

# BUSINESS WEEKLY

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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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THIS EDITION OF THE BUSINESS WEEKLY IS DEDICATED  
BY R' SHLOME WERDIGER IN MEMORY  
OF HIS FATHER  
הרה"ח ר' נחמיה  
ב"ר שלמה אלימלך ז"ל

## STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

## Borrowed Blowtorch

Rabbi Brand was a kashrus mashgiach (supervisor). He had once purchased blowtorch equipment for kashering ovens, but later accepted an administrative position and hadn't used the equipment since. A colleague, Rabbi Brenner, asked to buy the blowtorch. "I don't want to sell the equipment at this point," Rabbi Brand replied. "However, I'm happy to let you use it until I need it again."

Rabbi Brenner agreed. They signed an agreement allowing him use of the equipment until the owner wanted it back. Three years later, Rabbi Brand needed a kashering job done. He arranged verbally with Rabbi Brenner to do the job without charge in lieu of using the equipment. The following year, Rabbi Brand notified Rabbi Brenner that he wanted the blowtorch back.

"It's mine now," said Rabbi Brenner with surprise. "I did a job for you last year as payment for the equipment."

"I never sold it to you," said Rabbi Brand. "You agreed to do the job in return for having used the blowtorch during the past few years, but I never intended to sell it."

"I was clear that the job was payment for buying the equipment," replied Rabbi Brenner.

"Absolutely not," insisted Rabbi Brand. "I was clear that the job was in lieu of the use, but I never relinquished ownership."

"It's your word against mine," said Rabbi Brenner. "I'm in possession of the equipment, so the burden of the proof is now on you!"

"I have proof," said Rabbi Brand. "There is a signed contract that you borrowed the equipment and would return it."

"That's irrelevant," said Rabbi Brenner. "Of course you lent it to me initially, but later you sold it to me. There's no proof to negate that. I suggest that we consult Rabbi Dayan and let him decide."

The two came before Rabbi Dayan. Rabbi Brand explained the circumstances and asked: "Does Rabbi Brenner have to return the blowtorch equipment?"

"When there are witnesses or clear evidence that 1) Rabbi Brenner received the equipment as a loan and 2) the equipment is still in his hands – he must return it," ruled Rabbi Dayan. "He is not believed without proof to say that he subsequently bought it."

"Why is that?" asked Rabbi Brenner. "What happened to the rule of hamotzi meichavero alav hare'ayah (the burden of proof is on the plaintiff)?"

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## Sale of Chametz

Reuven became ill before Pesach and was unconscious for a number of days. On Erev Pesach Reuven's son sold his father's chametz.

**Q: Was it necessary for him to sell his father's chametz? Was the sale effective?**

**A:** While a person is unconscious he is categorized as a shoteh – someone lacking daas — and is exempt from the prohibition of possessing chametz. Nevertheless, there are two approaches to explain the me-

chanics of this halachah. One approach is that a person lacking daas is obligated in mitzvos but is exempt from liability for lack of compliance since he is an oness (incapable of fulfilling his obligation). Accordingly, since the chametz is owned by a Jew who is obligated in mitzvos it is prohibited for benefit after Pesach (O.C. 448:3), the same as any other chametz owned by a Jew on Pesach, and the fact that he was an oness is irrelevant (Chelkas Yoav, O.C. 1).

The second approach is that someone lacking daas is not obligated to perform mitzvos nor is he responsible for transgressing them. Although it is clear that when he performs a mitzvah it has a spiritual effect on him, nevertheless he is not obligated to perform mitzvos nor is he accountable for his transgressions (Machaneh Chaim, E.H. 2:34). Consequently, the prohibition against possessing chametz does not apply to an unconscious person, nor does the penalty

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"The Gemara (B.M. 116a; B.B. 46a, 52b) teaches that although the person currently in possession of an item usually has the upper hand, this does not apply to items that are lent or rented," replied Rabbi Dayan. "In that case, the original owner is still considered the muchzak (in possession)."

"Why do we need evidence about these two factors – initially a loan and still holding?" asked Rabbi Brand.

"Otherwise, Rabbi Brenner has a migo (lit., 'since')," replied Rabbi Dayan. "As you know, when a person can make a winning claim, but instead claims something else that is questionable, he retains much of the rights of the winning claim. Simply stated, if the person wanted to lie, he could have made the other, winning claim and won the case. Since he didn't make that claim – this lends credence to his version." "How does that apply here?"

asked Rabbi Brenner.

"Without evidence that the blowtorch was loaned, Rabbi Brenner could claim that he bought it from the outset and would be believed," explained Rabbi Dayan. "Alternatively, without evidence that the equipment was still in his hands, he could claim that he returned it already and would be believed. Therefore, with this migo, he is also believed to claim that he received it as a loan and later purchased it.

"However, when there is evidence that he received the equipment as a loan, and people see it still in his hands – he has no alternative, winning claim," concluded Rabbi Dayan. "We know that the blowtorch was initially loaned, and, without the migo, he is not believed that he later bought the item. Rabbi Brand is considered the known owner of the equipment, so Rabbi Brenner must return it" (C.M. 72:18; 90:13; 133:5).

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for possessing chametz (See Achiezer 3:81; M.B. 434:16; Pri Megadim Pesichah 2:2).

However, according to all opinions if the owner regains consciousness during Pesach, it would be impossible for him to sell his chametz and he would be obligated to destroy it. To avoid this outcome it is essential to determine whether one may sell another's chametz without his awareness.

At first glance it seems that we could apply the principle zachin l'adam shelo b'fanav – one could perform a beneficial act of acquisition (kinyan) for someone else even without his consent. Since it is in the owner's interest for his chametz to be sold, it may be sold to a gentile, even when the owner is incapable of appointing someone as his agent. However, Ketzos (243:8) argues that the principle of zachin applies when one intends to convey ownership for the recipient to take something from him. In

this case, the intent is to sell his chametz to a gentile and as such the principle of zachin does not apply, even though it would be beneficial for him.

However, there is precedent for selling someone else's property without prior authorization. A custodian for a friend's chametz must sell that chametz when Pesach approaches to prevent the owner from undergoing the total loss that would occur if the chametz remained in his possession (O.C. 443:2, C.M. 292:17. See Magen Avraham 436:11: even someone who is not a custodian may sell a friend's chametz). This halachah seems to prove that one may sell some chametz without prior authorization (Chasam Sofer, E.H. 11). Since the prohibition against benefiting from chametz that was owned by a Jew on Pesach is only Rabbinic, one may rely on those authorities who permit selling someone's chametz without authorization (Divrei Malkiel 4:18).

## Completing the Transaction #1

We learned previously that a transaction is not finalized, i.e., either party still has the legal ability to retract until a kinyan, an act of acquisition, is performed.

**Q: What are the classic forms of kinyan for various items?**

**A:** Different kinds of items have different forms of kinyan, as described in masechtos Kiddushin and Bava Metzia.

Real estate transactions are finalized either through cash payment (kesef), document

of sale (shtar), or act of possession (chazakah). Small movable items are acquired through picking up (hagboho), and large movable items through dragging them (meshichah). Small animals are similarly acquired through leading (meshichah) and large animals through grasping the reigns (mesirah).

Many items can also be acquired by placing them in the buyer's property (chatzer), or as an "add-on" to a real-estate transaction

(agav). Most transactions can also be completed through a symbolic exchange (chalipin), by having the seller grasp the handkerchief or other item of the buyer.

Customary business practices of the time are often recognized by Halachah (situmta). Finally, admission of the "seller" can sometimes serve to grant ownership (odisa).

Details of these various kinyanim will be discussed in the coming weeks, iy"H.

## MONEY MATTERS

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