

Part II—Incomplete Pass: Who Is Liable When a Delivered Package Isn't Received?

Adapted from the writings of Dayan Yitzhak Grossman

January 4, 2024

In the previous article, we discussed whether a customer is liable for shipped merchandise that is lost or stolen en route. We considered whether the customer is responsible for the merchandise as soon as the vendor releases it to the shipper, either under the doctrine of agency (*shlichus*) or under that of guaranteeing (*arvus*). Here we consider whether he is responsible for the merchandise once it is delivered to his premises, before he personally receives it.

Kinyan chatzeir

As we recently noted,[1] the Gemara says that in general, “a person’s courtyard acquires property for him even without his knowledge (*chatzeiro shel adam koneh lo shelo midato*).”[2] It would seem to follow that a customer automatically acquires ownership of merchandise delivered to his premises, which would make him responsible for its subsequent loss or theft.

Secured vs. unsecured courtyards

There is, however, a major qualification of the above rule: It applies only to a secured courtyard (*chatzeir hamishtameres*), not an unsecured one.[3] Some maintain that this qualification applies only to the acquisition of ownerless property, whereas gifts and purchased items can be acquired even via an unsecured courtyard;[4] others strongly reject this view.[5] Accordingly, if merchandise is delivered to a secure location within the customer’s premises, as occurs with programs such as Amazon Key In-Garage Delivery or Walmart InHome Delivery, the customer would automatically acquire the merchandise upon delivery. But where the merchandise is simply left on his doorstep or porch, it must be determined whether such locations are considered secured or unsecured.

R’ Pinchas Halevi Horowitz (author of the *Hafla’ah*) characterizes a secured courtyard as one that is locked, with the key in the owner’s possession.[6] R’ Yaakov Lorberbaum (author of *Nesivos Hamishpat*), however, rejects this view and maintains that a courtyard is considered secured as long as it is surrounded by partitions (*mechitzos*), even if it is not locked and lacks a roof.[7]

While these earlier *Acharonim* give concrete criteria for the definition of “secured,” some more recent ones offer less technical and more subjective definitions. R’ Shlomo Zalman Auerbach is reported to have explained:

The rule regarding a secured courtyard is apparently that a high level of security (*shemirah me’ulah*) is not required...it is sufficient that one routinely leaves his items there. According to this, it is possible that diamonds and other valuable items, which are customarily stored only in locked cabinets and not just inside the house, cannot be acquired via a courtyard.[8]

It is similarly reported that R’ Chaim Kanievsky asserted that a secured

courtyard is one in which “it is the custom of people to place their possessions there without fear of theft.”[9] To a follow-up question about whether this means that “it is the custom to leave even a valuable item there, without fear that it will be stolen from him when he goes to sleep at night,” R’ Chaim replied: “it is possible (*yitachein*).”[10] When presented with the dispute between the Hafla’ah and the Nesivos, R’ Chaim is reported to have responded: “This does not depend on a lock; it depends on whether everyone enters and exits, in which case it is not a secured courtyard.”[11]

In light of the above, a yard enclosed by a fence would always be considered secured according to the Nesivos, but according to the Hafla’ah it would be so only if the fence gates are locked. According to R’ Shlomo Zalman Auerbach and R’ Chaim Kanievsky, it is possible that even a yard with a locked fence would not be considered secured if the fence is easily climbed by thieves and people do not consider the yard to be a secure location. R’ Tzvi Yehudah Ben-Yaakov (a prominent contemporary *dayan* in Eretz Yisrael, author of *Mishpatecha LeYaakov*), however, has ruled that a yard with a fence that deters “decent people (*anashim mehuganim*)” from taking items from within the yard is indeed considered a secured courtyard even if the fence is ineffective against thieves.[12]

Willingness to acquire the merchandise

We have heretofore discussed the technical conditions for the applicability of *kinyan chatzeir*. It is possible, however, that even where these conditions are met, the customer will still not acquire merchandise delivered to his premises until he personally takes possession of it: R’ Akiva Eiger declares it obvious that if someone does not wish to acquire a particular item, his *chatzeir* does not acquire it for him against his will.[13] It may be argued that a customer has no interest in acquiring merchandise delivered to him before he takes physical possession of it, because he gains no practical benefit from doing so and he exposes himself to responsibility for its loss or theft. (Acquiring property from a seller is often assumed in halacha to be beneficial to the buyer, because it prevents the seller from changing his mind about the sale. But since there is virtually no chance of this occurring in the typical retail context, denying the seller the ability to renege would presumably not be considered a practical benefit.)

This argument, however, is subject to a *reductio-ad-absurdum* objection, because it would seem to extend to a customer who does personally take possession of purchased merchandise and stores it securely on his premises for future use, and it is then stolen. According to the above argument, the customer should be able to claim that he did not intend to acquire the merchandise until he was ready to use it, so he should not bear responsibility for its loss (putting aside the question of custodial liability). But this seems patently absurd, and it is not entirely clear to this author whether and how to distinguish between this case and our case of merchandise left on a customer’s porch.

Kinyan kesef *and* kinyan situmta

In the case of a customer who has already paid for the merchandise, there

is a further consideration that the payment itself may constitute a *kinyan*, either as *kinyan kessef* (acquisition via payment) or as *kinyan situmta* (acquisition via an act generally accepted in a particular industry or market as conveying ownership, e.g., a handshake); a detailed discussion of these *kinyanim* and their applicability to our case is beyond the scope of this article.[14]

We reiterate our introductory disclaimer from the previous article that our analysis is of the basic halacha governing such cases, absent any controlling agreement, law, or custom.

[1]What's Mine Is Mine: Does a Sale Include the Unknown? Bais HaVaad Halacha Journal. Nov. 30, 2023.

[2]Bava Metzia 11a and elsewhere. The Gemara is referring to ownerless items, but the principle would seem to apply to gifts and items being purchased as well; see Pis'chei Choshen, Hilchos *Kinyanim*, *perek 1 se'if 15* and n. 24 for discussion of this point.

[3]Bava Metzia *ibid.*

[4]See Ketzos Hachoshen *siman 200 s.k. 2.*

[5]Aruch Hashulchan *ibid. se'if 9.* Cf. Pis'chei Choshen *ibid. perek 8 n. 3.*

[6]Sefer Hamiknah, *Kuntres Acharon 30:9.*

[7]Nesivos Hamishpat, *siman 200 biurim s.k. 3* and *chidushim s.k. 1.* This view is accepted by Shu"t Be'er Yitzchok O.C. end of *siman 5 s.v. Ach gam zeh* and Aruch Hashulchan (*ibid. se'if 2*), as well as various contemporary authors (Business Weekly (BHI) Issue 523, "The Missing Mitzvah"; R' Chaim Weg, Backyard Bounty, Q&A From the Bais HaVaad Halacha Hotline, May 20, 2021; R' Yeshayahu Feldman, *Bedinei Kinyan Chatzeir*, Birurei Torah *gilyon 59*). Cf. Shu"t Lehoros Nasan *cheilek 8 simanim 116-121* (the positions of the Sefer Hamiknah and the Nesivos Hamishpat are introduced in *siman 116 os 2*); R' Yeshuah Ratabi, *Ksafim Shenimtze'u Bevais Haknessess*, n. 3; and here.

[8]Minchas Shlomo Bava Metzia p. 126. Cf. R' Shachar Imber, *Hagdaras Chatzeir Hamishtameress*, Yotzros 4, pp. 48-57.

[9]Shaleiach Teshalach (Weinberger) p. 165 *she'eilah 45.*

[10]*Ibid.* p. 188 *she'eilah 147.*

[11]*Ibid.* p. 166 *she'eilah 46.* R' Naftali Yechiel Weinberger, who published these responses of R' Chaim, reports that R' Chaim reviewed them and authorized their publication but recommended the inclusion of a disclaimer that one should not rely on his responses *lema'aseh* (*ibid.* p. 157).

[12]Mishpatecha LeYaakov *cheilek 6 siman 16 pp. 313-26* (also here).

[13]Shu"t R' Akiva Eiger, *mahadura tinyana siman 96 s.v. Umeihai ta'ama.*

[14]For a brief discussion relevant to our case, see R' Chaim Weg, Packaged Pachyderm, Q&A From the Bais HaVaad Halacha Hotline, Dec. 3, 2020.