

על פי התורה אשר יורוך

# Yorucha

## weekly overview

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY OVERVIEW VIDEO

## Kinyanim Part II

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### THE SEVERITY OF MI SHEPARA:

As we mentioned in Part 1 of this series, the reason Chazal decreed that payment does not constitute a *kinyan* is because they were worried that a seller would lose interest in an item once he received money for it, and he would no longer protect it and take care of it. This leads to a concern that if a fire would break out on his property, he would not attempt to save the merchandise that he had already received payment for, and he would let it burn. For this reason, Chazal stated that merchandise remains in the seller's ownership and responsibility until the buyer actually takes possession of it through a physical *kinyan*.

Although the buyer does not own the merchandise until he makes an actual *kinyan*, Chazal put a deterrent in place to ensure that he doesn't retract from the deal after having committed to the extent of giving payment. This deterrent is known as *mi shepara* and is a grave curse that applies to people who don't keep their word after making such a serious commitment.

According to one opinion, Bais Din will direct this curse specifically upon the person who transgresses in this way by saying, "May he who punished the dor hamabul, punish YOU if you do not keep your word (Remah 204, 4)."

The Aruch Hashulchan explains the reason why such a terrible curse is invoked. People are generally influenced by the culture in which they live and operate, and normal business culture is, unfortunately, dominated by the mindset that profits and the quest for money override all other concerns. This culture glorifies making money at all costs, even if it means not remaining true to one's promises and commitments. To counteract this mindset, Chazal instituted a curse that affirms that one who doesn't stick to his word after making such a firm commitment will not benefit at all from it; rather, he will only stand to lose in every way. A businessman who hears this curse will understand that it is not worth it for him to break his word.

### FLUCTUATIONS IN THE MARKET:

Regarding verbal commitments, we said in Part 1 that if there is a significant change in the market, one may back out of their commitment. For example, if someone verbally agreed to purchase merchandise at a certain price, and the value then drops considerably, he is allowed to retract his offer. This ruling does not apply after one has made a payment. Once one does so, even if the market changes significantly, he is not permitted to renege on his commitment.

Basically, once someone makes a cash payment, he is locked into the deal. If he backs out, he is liable for the *mi shepara*, even if there are mitigating circumstances. The deal is only not yet final in one way – that the seller still is officially the owner and bears the responsibility to protect the merchandise.

### PAYING BY CHECK:

There is a disagreement between the Machaneh Efraim and the Nesivos Hamishpat regarding an instance where a buyer purchases an item with an IOU – or, in today's society- with a check.

The Machaneh Efraim says that in such a case, ownership does transfer to the buyer even before he makes a *kinyan*. His reasoning is that although we are worried that the seller will not protect the merchandise after he receives a cash payment, this concern does not apply if he only received an IOU or check. When he only has an IOU or a check, he doesn't have the security of having cash in his hands, and he still will naturally be careful to make sure nothing bad happens until he actually receives his money; therefore, there is no reason to take extra measures to ensure that he protects the merchandise, and we can say that the buyer takes ownership of it while it is still on the seller's property.

The Nesivos disagrees and says that when Chazal decreed that an item does not transfer to the ownership of the buyer after he makes a payment, they enacted this decree across the

board. They did not differentiate between payments made with cash and those made with an IOU; therefore, no matter what form of payment was given, the merchandise does not leave the seller's ownership until the buyer actually makes a *kinyan*.

## DAMAGE TO THE MERCHANDISE:

While a buyer usually is not permitted to back out of a deal after making a cash payment, there may be an exception in a case where the merchandise becomes damaged before he takes possession of it. The Shulchan Aruch rules that if the merchandise becomes damaged – for example, if a hurricane strikes and floods the area of the merchandise – the buyer may back out because he would suffer a loss if he was forced to take the damaged goods. This would apply both to a large loss and to a small loss.

The Aruch Hashulchan adds that a buyer who sees the damage coming can back out even before the loss occurs. For example, if he sees the hurricane approaching, he is allowed to renege on the deal even before it actually hits. He adds, however, that if the loss hasn't happened yet, one can only back out if the merchandise is going to be completely damaged. One cannot back out for a small amount of potential damage.

A practical example of a case of damage to merchandise would be if an esrog merchant ordered a shipment from Israel and paid cash in advance. If the esrogim would be shipped by boat, and the boat were to sink, causing all the merchandise to be lost, who would have to bear the cost? According to the above, it would seem that the buyer should be allowed to back out of the deal in the case of such a loss.

However, there is another Gemara that if someone purchases meat for yomtov, he would gain ownership of the meat as

soon as he hands over the cash. The reason for this is because transactions move more quickly in the hectic pre-yomtov season, and one can assume the sides agree to finalize the deal right away. Accordingly, one could argue that the same would apply in the story of the esrogim. Because the items are to be used for the sake of a mitzvah on Yom Tov, cash payment would constitute a full *kinyan*.

The Pischei Choshen, however, says that a person can only take advantage of this exception to the rule for a sale made on erev yomtov itself. According to this, it would seem that the dealer would not automatically take possession of the esrogim with his cash payment, and he may be able to retract because of the loss.

## IF THERE WAS INSURANCE:

What if the merchandise was insured on behalf of the buyer? It could be argued that Chazal's decree would not apply when the merchandise is insured, as it would not matter if the seller protects the items or not because the buyer would receive compensation if anything would happen to them in any case. If so, it would mean that when there is insurance, a transaction would be completed with a cash payment and ownership would transfer to the buyer. It would then be his responsibility to deal with the insurance company and whatever other hassle is involved in the process of claiming the settlement.

The Pischei Teshuva, however, says that it would make no difference in terms of halacha whether the merchandise was insured or not. He says that Chazal made their decree across the board, and external factors such as this would not change the halacha.



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