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PART II—INCOMPLETE PASS: WHO IS LIABLE WHEN A DELIVERED PACKAGE ISN'T RECEIVED?

Adapted from the writings of Dayan Yitzhak Grossman

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

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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.

לע"נ הרב יוסף ישראל
ב"ר משה גרוסמן זצ"ל

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PARSHAS SHMOS

POLICE REPORT

Excerpted and adapted from a shiur by
Dayan Yitzhak Grossman

Do you propose to murder me, as you murdered the Mitzri?...Par'o heard about this matter and sought to kill Moshe...

Shmos 2:14-15

Rashi explains that Par'o was notified about Moshe's killing of the Egyptian by Dasan and Aviram, which constituted *mesirah* (informing on a Jew to a non-Jewish government). Although *mesirah* is generally considered a severe transgression, it may be permitted to report a crime: The Gemara (Bava Metzia 83b) relates that R' Elazar be'R' Shimon agreed to serve as a government agent to catch thieves, including Jewish ones, and turn them over to the government for punishment, which was often death. R' Shimon ben Korah was unhappy with R' Elazar's actions, but many *Rishonim* and *poskim* assume that this is permitted *me'ikar hadin*. The Ritva explains that even where evidence of the crime was less than dispositive, R' Elazar permitted *mesirah* because the *malchus* need not follow the regular rules of *eidus*, and if the *malchus* is reasonably certain of the suspect's guilt, he may be turned over to it.

The Rashba writes that it is permitted to serve as a government agent to catch criminals, but great Torah sages should avoid

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Q&A from the
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Debt Relief

Q My friend is still awaiting his 2022 tax refund of \$10,000. In desperate need of the funds, he asked me to lend him the money. He says that when the refund arrives, he will hand it over to me—including the interest the IRS tacks onto late refunds. Is this a *ribbis* violation?

A Yes, that arrangement would be *ribbis*. Even though your friend will only pass along what the IRS gives him, he is considered your *loveh* (borrower), because he personally commits to repaying you, so any extra money he pays you is *ribbis*.

Instead of lending your friend money, you might wish to consider purchasing the debt from him.

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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-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 KESSEF 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

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He won't owe you money, but he will be responsible to deliver to you what the IRS sends him, including the interest it pays (Y.D. 168:18).



RAV ARYEH
FINKEL

But know that if the IRS defaults, you'll be out the money, because the buyer of a loan assumes the risk of default (Y.D. 173:4).

Usually, a loan is sold halachically by transferring the promissory note to the buyer. But in this case that's not possible, because there is no signed note that documents the IRS's debt. The *Shulehan Aruch* (Y.D. 168:18) provides a mechanism that can be employed here: Your friend should declare that he forgives the IRS its debt. In this way, the funds he receives from the IRS will not be his but ownerless, and you may then claim them. (See also *Shach* 173:8.) There is no obligation to notify the IRS of its windfall, and the money it pays is yours (*Shach* *ibid.*). With this solution, you don't acquire the debt; rather, your friend is hired to make the debt ownerless and the recovered funds available to you.

If the IRS determines that the refund due is less than the \$10,000 your friend expects, you may claim the difference from him, because purchasing the debt or paying someone to make it ownerless only subjects you to the risk of the debtor defaulting, not the risk that the debt is less than you were told (Y.D. 173:4). But you may not charge him interest on the difference.

constitute a *kinyan*, either as *kinyan kessef* (acquisition via payment) or as *kinyan situmta* (acquisition via an act generally accepted as conveying ownership in a particular industry or market, 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.

⁶ Sefer Hamiknah, Kuntres Acharon 303.

⁷ *Nesivos Hamishpat, siman 200 bliurim s.k. 3 and chidushim s.k. 1*. This view is accepted by Shu"t Be'er Yitzchok D.C. end of siman 5 sv. *Ach gam zeh and Aruch Hashulchan* (*ibid. se'if 2*), as well as various contemporary authors (*Business Weekly* [BHW] 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, *Ksofim Shenimtz'u Bevaiv Holkneseis*, n. 3, and here.

⁸ *Minchas Shlomo Bava Metzia* p. 126. Cf. R' Shachar Imber, *Hagdaras Chatzeir Hamishtameres*, *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 tinanya siman 96 sv. Umeihai ta'am*.

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.

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such positions. Following the *Rashba*, the *Maharam Schick* permitted a private citizen to report a wife for poisoning her husband, accepting the local justice system as fair.

More recently, R' Moshe Feinstein ruled that a private citizen may not report a thief to the authorities, because the punishment they would mete out is more severe than that of the Torah. (He says R' Elazar's *heter* pertains only to government agents.) But R'

Yosef Shalom Elyashiv permitted a private citizen to report a thief to the police. Rav Elyashiv and R' Asher Weiss also permit reporting a sexual abuser to the police if there is sufficient evidence of his guilt. R' Shmuel Vosner permits serving as a tax auditor, but he says

one should preferably avoid it.

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