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TALMUDIC METHODOLOGY
By: Rav Moshe Taragin

KINYAN AGAV

One of the more intriguing ways to transfer ownership of an item is through the process known as kinyan agav. The source of agav appears in a mishna in Kiddushin (26a) and the ensuing gemara, which bases this device upon a verse from the Divrei Hayamim. Agav is a solution to a predicament in which the object being transferred is not physically accessible and a classic act of kinyan is impossible. Generally acts of kinyan (ma'ase kinyan) performed upon portable items (metaltelin) are physically demonstrative in nature. For example, meshicha demands pulling the animal into the area of the purchaser, while hagba'ah requires physically lifting the item. In cases in which the metaltelin are not physically accessible the shortcut of agav is extremely useful. By performing a ma'ase kinyan solely upon a piece of land, halakha allows me to acquire metaltelin as well. Being that a ma'ase kinyan upon land does not have to be direct and physical, agav provides an extremely important alternative for the transfer of metaltelin. As land may be sold through kesef (a down payment of money) or shetar (the drafting and delivery of the deed) the ability to effect transfer of metaltelin through these acts as well is highly useful. Basically agav allows the ma'ase kinyan performed upon the land to effect the transfer of the metaltelin as well.

Several gemarot, though, suggest a more powerful definition of agav. For example, the gemara in Bava Batra (77-78) describes the difficulty we encounter attempting to sell a debt. According to many Rishonim, a debt cannot be transferred at all at a Biblical level. Debt transfer is only a rabbinic allowance to encourage a smooth and fluid economy. Even when transferring, the gemara suggests that a protracted, two stage process must be performed, including the drafting of an entirely new contract to represent the debt. Yet despite these impediments, the gemara allows the transfer of a debt through agav. A structurally parallel gemara appears in Bava Batra 44b, which addresses the difficulty of creating a "shibud" upon metaltelin. Generally, land may be appropriated as payment for a debt, even if that land were subsequently sold by the borrower to another. The original "shibud," lien

upon the land, "follows" the land. The gemara clearly asserts that metaltelin do not act in this manner and hence cannot be taken from a person who has purchased them from the borrower. Yet here, too, the gemara recommends agav as a tool to create shibud upon metaltelin and allow their collection in lieu of a debt.

These two gemarot might be suggesting something more dramatic about agav. To be sure, we might explain each gemara along local lines. Namely, we might claim that debts per se are in theory transferable but are hindered by the difficulty in performing a ma'ase kinyan upon something so abstract. Hence agav provides a natural solution – the ability to transfer ownership by relying upon the ma'ase kinyan of the accompanying land instead of devising a ma'ase kinyan on an abstract item. A similar "local" solution might be posed for the gemara in Bava Batra 44b about utilizing agav to create shibud upon metaltelin. Possibly, metaltelin can be rendered as shibud and ultimately appropriated only if the potential purchasers can investigate the presence of a lien before their purchase. Absent this ability, it is not fair to allow collection since the buyer had no recourse and innocently purchased these items. In general, metaltelin are not traceable to the degree that land is, and hence the inability to collect is purely to protect purchasers and create a dynamic economic situation in which people are not afraid to buy and sell. In the situation of agav, as the metaltelin have been associated with the land, they too become traceable and collectable.

Indeed, each gemara may be explained in a parochial manner but the combination of the two gemarot suggests something more striking about agav as a device for property transfer. Possibly, agav allows monetary entities (objects, debts) to be transferred automatically along with the land. Being that in an agrarian culture land entails the basis of transactions, halakha allows the concept of "throw ins" to sweeten the deal. Once the kinyan is performed upon the land, the metaltelin are automatically transferred along with the land. This might account for the ability to employ agav for entities which exhibit difficulty in being transferred (debts or shibud upon metaltelin). By bundling them along with land, they transfer automatically.

An interesting gemara in Kiddushin seems to revolve around this issue. The gemara (27a) considers a situation in which the land was sold while the metaltelin were given as a gift. Would agav operate under these conditions, where there is a slight discrepancy between the transfer of land and the deal

regarding the metaltelin? If we view the land merely as the item upon which we might perform a ma'ase kinyan that can also serve as a ma'ase kinyan for the metaltelin, this discrepancy would certainly not be an issue. If, however, we view agav as a bundling of land and metaltelin, we might require that they share the same sort of transaction. Even though the gemara ultimately allows this discrepancy, its basic issue still remains uncertain. By allowing this scenario, the gemara might be concluding that since in essence sales and gifts are basically similar, parity between the land and the metaltelin exists. We could then ask what would happen if the discrepancy between the land deal and the metaltelin transaction were much greater? What if the land were only temporarily transferred or were only loaned to the metaltelin purchaser? Would we require some degree of correspondence between the two transactions?

A second question which might surround our issue concerns the need for actual land to be transferred. The Geonim (eighth to tenth century halakhists) established a custom to perform agav even when the seller did not own any land. They relied upon every person's right to land in Eretz Yisrael (see especially a responsa of the Rashba 7:438 quoting Rashi, who cites this prevalent practice among the Geonim). Alternatively, some relied upon every person's ultimate burial plot as land upon which to structure agav. The opposition to this strategy took two forms. Some questioned the legality of these rights. Even though the Jewish nation maintains its hold upon Eretz Yisrael even in our absence from the land, such title may not percolate to the individual level. A person's rights for a burial plot, on the other hand, may not be legally meaningful during his lifetime (unless he has purchased a specific plot). The Ittur, however, opposed this practice because even though such rights exist, they are an insufficient basis for agav. This device requires actually definable or discernable land. Even if every Jew possesses a legally recognized right to Eretz Yisrael, no PARTICULAR segment of land belongs exclusively to him, and no particular segment will actually transfer as a result of agav.

This debate about performing agav upon land which is not determined might also be impacted by our original question. If agav were merely an attempt to execute a ma'ase kinyan upon land to trigger the independent transfer of metaltelin, we might embrace agav even upon abstract land which does not actually transfer. As long as halakha recognizes the rights to this land the ma'ase kinyan can be performed. Even though ultimately no land is

actually transferred, the independent transfer of metaltelin is not inhibited. However, if we view agav as a bundling of two components, with the metaltelin only transferring along with the land, we obviously would disqualify such a procedure if the land, meant to serve as the basis of the "bundled deal," would not actually transfer.