

**YESHIVAT HAR ETZION**  
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**TALMUDIC METHODOLOGY**  
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**KINYAN ON DAVAR SHE-LO BA LE'OLAM**

In the halakhic system transfer of ownership is accomplished through the process known as 'kinyan.' If the two parties (seller and buyer) agree to execute the sale, a ma'aseh kinyan (an act which demonstrates transfer of ownership) is performed which finalizes the kinyan. A question arises, however, as to the possibility of transferring non-existing items, objects which have yet to be created - davar she-lo ba le'olam. Examples include the fruit of a tree which has not yet grown, water which will ultimately fill a cistern, the potential 'kefel' payments of an animal which has not yet been stolen, and benefits from a field which the buyer does not presently own.

This question revolves around a machloket between R. Meir and Rabanan. The latter state absolutely that a kinyan on 'davar she-lo ba le'olam' is impossible. R. Meir however is more discriminating; he tolerates kinyan on 'davar she-lo ba le'olam' given one condition - the item must be 'avidi de'atu' something which generally materializes. For example, fruits of a tree which predictably grow on an annual basis are considered 'avidi de'atu' and can be sold even before they grow. Conversely, the rights to 'kefel,' on an animal that might be stolen, are not predictable or certain. There is no certainty that the animal will be stolen, nor that the thief will be caught, nor that he will be prosecuted and sentenced to pay 'kefel.' A transaction on these uncertain moneys such as this cannot be realized even according to R. Meir.

The fundamental issue centers on the apparent inability of a kinyan to operate upon a 'davar she-lo ba le'olam.' Why does kinyan fail? Of special significance to our analysis is R. Meir's position. Evidently, he also recognized that 'davar she-lo ba le'olam' presents a problem for kinyan; not all non-existent entities can be transferred. He merely qualified the scope of this failure: the kinyan only fails if the item remains uncertain even within the realm of probability. However, if the item is sure to emerge - avidi de'atu - it can be transferred through kinyan. What did R. Meir perceive as the principal shortcoming of attempting a kinyan on 'davar she-lo ba le'olam'?

One explanation of R. Meir's position suggests that the problem posed by 'davar she-lo ba le'olam' is a lack of 'da'at.' If I sell something which hasn't been created, chances are I haven't wholeheartedly decided to sell. Kinyan is based upon an unequivocal and complete decision by both parties to execute the transfer. When I cannot grasp the totality of the item being sold, my level of commitment remains questionable. In other words: one who sells a tangible item recognizes in a visceral manner that he is losing the item - he watches it exit his reshut. The fact that he completes the sale indicates his degree of serious-mindedness; despite the gravity of what he witnesses he still intends

and desires the finality of the sale. However, with regard to an item which is not material one may question how clearly the seller understands the consequences of his sale and how earnest he was in his pledge to sell it. If I offer to sell my Mercedes for \$100 it's only because I doubt I will ever own one; I don't seriously intend to sell if by chance I come to own one.

If this is true then we can comprehend R. Meir's distinction between an item which is predictable and one which is doubtful. In the case where the outcome is assured, the parties can arrive at a significant level of acquiescence (*gemirat da'at*) because the variables are certain. In the standard case of '*davar she-lo ba le'olam*,' where nothing is certain, we cannot assume that the parties arrived at this critical level of '*da'at*.' Hence R. Meir's *chiluk* reflects the central constraint which limits *kinyan* on '*davar she-lo ba le'olam*' - a lack of *da'at*.

Next, we must endeavor to understand the more unequivocal position of Rabanan. R. Meir's position is based upon two assumptions:

a) The general failure of *kinyan* of a '*davar she-lo ba le'olam*' is due to the absence of *da'at*,

b) Serious *da'at* can be experienced regarding something immaterial but predictable.

Rabanan could debate either assumption. They might contend that *kinyan* of '*davar she-lo ba le'olam*' is inhibited for reasons other than lack of *da'at*. Merely solving the *da'at* concern by selling something predictable does not correct all the problems of performing a *kinyan* on '*davar she-lo ba le'olam*.' Rabanan can argue with R. Meir regarding the root of the problem in making a *kinyan* upon *lo' ba l'olam*. Since the basis of the problem is dissimilar, the scope is also different.

Alternatively they might agree that the chief concern is *da'at*. However, mere predictability does not ensure complete *da'at*. As long as the item in question is intangible, no serious agreement or intention can be reached. Rabanan might agree that the core problem of *kinyan* on a non-existent entity is *da'at*. Mere predictability however does not solve this problem.

The question as to how to understand Rabanan vis-a-vis R. Meir is crucial not just for logical purposes but for halakhic reasons as well. If Rabanan agree in theory to R. Meir that the root of the problem is one of *da'at*, but argue about whether the factor of predictability effects *da'at*, then even Rabanan could draw a scenario where *da'at* about a non-existent item is clinched and the *kinyan* may be validated. What R. Meir accomplishes through predictability, the Rabanan might achieve through some other means. Take for example the statement of the Tur in his commentary on Chumash as to how Esav could have sold his birthright if it was '*she-lo ba le'olam*'; the double portion of inheritance wasn't owned by the children before their father died! He posits that this is the reason Esav SWORE to fortify the sale. The inference from the Tur is that even though we hold like Rabanan - that despite a high predictability we may not sell '*she-lo ba le'olam*' - if the parties swear, a sale may occur (the Rema in *siman 209* actually sides with this opinion). Evidently an oath convinces us that despite the imperceptible nature of the

item being sold, the parties in question have the proper conviction and commitment. According to this position even Rabanan view the absence of da'at as the debilitating factor in selling she-lo ba le'olam. According to R. Meir it can be surmounted if something is predictable. According to Rabanan, an actual oath is required to verify the presence of this acquiescence or will.

The Tashbatz in siman 398 presents a second scenario which has contemporary relevance. What happens in a market in which it has become accepted to sell items which are she-lo ba le'olam. [This relates to our market and the sale of futures and stocks.] He contends that once it has been accepted a kinyan on non-existent items is valid. Apparently, the general problem with she-lo ba le'olam was the assumption that parties aren't serious when it comes to transferring something which isn't yet real. This is a subjective assumption based upon normal human behavioral patterns. If this has been proven false through experience, if an entire community demonstrates da'at even for intangible items, kinyanim upon 'she-lo ba le'olam' become possible.

#### SUMMARY:

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One factor which might inhibit kinyan of 'she-lo ba le'olam' is the lack of da'at. R. Meir discriminates between predictable and doubtful items - in the case of the former there can be da'at. Alternatively, Rabanan might allow other factors such as shevua or social custom to dictate the presence of da'at and effect a kinyan.

There might exist, however, an additional problem concerning 'she-lo ba le'olam' (even according to R. Meir). Transfer of an item always requires the execution of a ma'aseh kinyan - a physical act which demonstrates transfer. These acts include: meshikha - pulling the animal into your house; hagbaha - grasping the watch in your hands and lifting it; chatzer - having the item placed in your courtyard where it is protected for your use. As is evident, most of these physical actions address a physical entity. In the case of she-lo ba le'olam there is no palpable object on which to perform the ma'aseh kinyan - hence there is no kinyan. (See afterward regarding the possibility of non-physical, abstract ma'aseh kinyan).

If this is true, one puzzle presents itself: Why does R. Meir validate a kinyan on she-lo ba le'olam in the case of avidi de'atu? Why should the factor of predictability be consequential if the prevailing constraint is the inability to perform a ma'aseh kinyan when there is no item? To answer this question we must glance at Tosafot in Gittin (42b) who asserts that according to R. Meir predictability alone might not suffice to allow kinyan to occur. In the case of fruits growing out of a tree not only are they predictable, they also grow directly from the tree which is physically present at the time of the kinyan. The potential 'kefel' payments of an animal - even if they can be predicted - do not spring directly from the animal but unfold and develop as a result of theft of the item. Since they don't emanate from the item itself they can't be sold. What is required according to R. Meir is not merely the ability to predict the

growth but an intrinsic relationship between the present item and its offspring. There is some ambiguity in Tosafot as to whether the term *avidi de'atu* refers to this characteristic - that the fruit grows directly from the tree (*de'atu* = that it emanates), or whether it refers as above to the notion of predictability. Still, according to this option, fruit which predictably grow from the tree are seen as the direct offshoot of the tree - hence an action performed upon the tree can relate to and access the fruit.

Though this relationship does not facilitate the state of *da'at*, it does provide for the prospect of performing a *ma'aseh kinyan*. True, the fruits themselves have yet to be formed and aren't objects upon which a physical act of *kinyan* can be performed. However, the representative of the fruits - their present physical representation (in this case the tree) is a suitable object for a *ma'aseh kinyan*. Since the fruits grow directly from the tree and/or are fairly predictable, one can envision executing the *ma'aseh kinyan* on the tree, with the intention of transferring ownership of the future fruits. This 'intimate' or integral relationship between tree and fruit is vital so that an action performed upon the tree can be taken as halakhically valid regarding the fruits. In case of an animal and *kefel* this relationship is lacking - *kefel* is extrinsic to the animal; therefore, an act of *kinyan* upon the animal in no way relates to the abstract *kefel* - even if that *kefel* is predictable.

This understanding is borne out by a fascinating Tosafot in Bava Batra (79b). Tosafot notes that R. Meir admits to *kinyan* on non-existent items even under circumstances in which the development or emergence of these items remain uncertain. For example, selling a field which isn't presently owned but hopefully will one day be yours is considered *she-lo ba le'olam*. Even though the field is extant, YOU don't yet own it. The SITUATION whereby you can sell it ( i.e. as an owner) has yet to develop. R. Meir permits such a sale - even though the prospect of your purchasing this field is certainly not '*avidi de'atu*' - certain or predictable. Similarly R. Meir allows a man to be *mekadesh* a woman who is presently a Gentile, looking toward her ultimate conversion as the moment when the validity of this marriage will begin. At this stage the woman isn't suitable for halakhic marriage - hence she is considered a '*she-lo ba le'olam* in terms of *kiddushin*. Clearly her conversion isn't certain to occur. Yet R. Meir justifies this *kiddushin*. What happened to the necessary condition of *avidi de'atu*?

Tosafot responds that in truth there are two categories of '*she-lo ba le'olam*'; in one category R. Meir requires the factor of certainty while in the other he doesn't. In the case of a bona fide *she-lo ba le'olam* such as the fruits of a tree or the *kefel* of an animal where the item in question is absolutely non-existent, one can only actualize a transaction if *avidi de'atu* is relevant. But in the case of items which are tangible, but at present are unsuitable for the particular halakhic process (a field which is not yours, a woman who isn't Jewish), we don't require the factor of *avidi de'atu*. Evidently *avidi de'atu* is not essential purely to secure full *da'at* for then it should be equally necessary in either case. Instead *avidi de'atu* is necessary to provide a fitting physical representative for the performance of *ma'aseh kinyan*. Only if the offshoot is predictable can we consider a *ma'aseh kinyan* performed upon the

representative as affecting its derivative. This requirement only applies in the case of genuine she-lo ba le'olam where the item is absolutely non-existent at the time of the kinyan. Hence we are forced to locate a stand-in - upon which we can execute the ma'aseh kinyan; only a predictable offshoot can serve as the stand-in. In the case of a field which is existent but at present cannot be fully transferred by the seller, we still have an item upon which to perform a ma'aseh kinyan - the field. Similarly in the case of a woman who is alive but not suitable for marriage, we can perform the act of kiddushin. In these two cases we can ignore avidi de'atu/predictability since we have an object upon which to execute the ma'aseh kinyan.

A question remains as to the position of Rabanan. Perhaps they agree to this stance but insist that a ma'aseh kinyan can never be projected to a derivative. If this is so, even in cases of avidi de'atu where there is a suitable physical representative, kinyan fails. On the other hand their disqualification of kinyan on 'she-lo ba le'olam' could have a different basis. They maintain that the kinyan fails not on technical grounds - lack of da'at or lack of ma'aseh kinyan (the standard ingredients of kinyan) - but on fundamental grounds, that there is no item of halakhic meaning to transfer - there can be no kinyan for there is nothing to be koneh. Ma'aseh and da'at are possible but there is nothing to sell.

[Certainly, there is much more to be said about this topic and as I peruse this shiur it seems to grossly oversimplify a complex issue. We might dedicate future cyberspace to this topic.]

Methodological Points:

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A. Often analysis of a machloket begins with the more conditional or qualified position. It is easier to begin thinking about R. Meir since he includes a factor which serves as the fulcrum for our topic. In cases of avidi de'atu the kinyan is valid, whereas in its absence the kinyan fails. It is easier to analyze his position and subsequently inquire as to the opposing logic of Rabanan.

B. Whenever something fails one asks: Does it fail because its key components or ingredients flunk or simply because of other factors (sometimes more fundamental than even a failure of its ingredients). In our case the ingredients of kinyan (that which is necessary to conduct a proper kinyan) include a ma'aseh kinyan, and full da'at. When this kinyan fails -she-lo ba le'olam - does it fail because a ma'aseh is unattainable or because the da'at is assumed to be inauthentic? Or, do we invalidate such a transaction, even though all the components are applicable, because the kinyan itself fails (possibly because there is nothing to transfer).

C. Use caution when the gemara establishes broad categories which contain disparate elements. The gemara readily compares all 'davar she-lo ba le'olam' even those which are presently real, but are unsuitable for kinyan. Tosafot, however, discriminated between them.

Further Research:

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A. What is the relationship between the inability of selling something which is she-lo ba le'olam to the inability to sell something actual to someone who isn't yet ba'olam? For example the inability to sell something to a baby prior to its birth. See Bava Batra 141b.

B. What is the relationship between kinyan on davar she-lo ba le'olam and creating a 'shi'abud' - a lien - on something which is she-lo ba le'olam - see Bava Batra 157a.

C. When someone swears to sell something which is she-lo ba le'olam - does the kinyan work, or must he simply deliver the item to fulfill his oath? (see aforementioned Rema and the Shakh).

D. In terms of the integral relationship between item and offspring, what would be the case of one who sells the profits from money which he plans to invest? In a similar vein would you compare fruits and trees to grain and the ground from which it grows? See Ketzot Hachoshen 209:4.

E. One stated problem with kinyan on she-lo ba le'olam might be the inability to execute a ma'aseh kinyan since there is nothing tangible. What about the prospects of utilizing an abstract ma'aseh kinyan which doesn't demand the presence of a physical item? Would kinyan 'agav' or kinyan 'chalipin' turn the trick ?

See the Shita Mekubezet to Bava Metzia (33b), in the name of the Tosafot Shantz, as well as the Chidushim Hameyuchasin Le'Ritva in the same location.