

## *This week.....*

- **How Does One Lose the Land, Heaven Forbid?- A Glimpse from the Parasha**
- **A Fence on the Roof of an Organization's Building - Ask the Rabbi**
- **Jewish Ownership of Eretz Yisrael\_ part V - from the works of Rav Yisraeli zt"l**
- **Removing a Distributor of Tzedaka Funds - from the world of Jewish Jurisprudence**

## How Does One Lose the Land, Heaven Forbid?

Harav Yosef Carmel

The spies' path through *Eretz Yisrael* is outlined in our *parasha*: "They went up and traveled the Land, from the Zin Desert to Rechov to L'vo Chamat" (Bamidbar 13:21). In all of the several mentions of L'vo Chamat in *Tanach*, it has an implication of referring to the whole Land or all of its inhabitants. This is so because it is a place in the periphery of the country, on its northern border (see Bamidbar 34:8; Yechezkel 47:20). David is described as assembling all of the people to escort the *aron* to Yerushalayim, from the Shichor River in Egypt to L'vo Chamat (Divrei Hayamim I, 13:5). We find this in the time of Shlomo as well (Melachim I, 8:65), as people gathered to inaugurate the *Beit Hamikdash*. Let us take a look at citations in the prophets that include this location in a prominent manner.

The *navi* tells that Yeravam ben Yoash was victorious and extended the borders of the Kingdom of Israel to their maximum, reaching until L'vo Chamat (Melachim II, 14:25). The *midrash* says that when one shows respect to prophets, he receives more land than Yehoshua and David did (Eliyahu Zuta 7). These victories brought on great riches for the kingdom and its capital, Shomron. One of the materials that is the greatest sign of riches is ivory (see Melachim I, 10:21; *ibid.* 22:39). In his words of rebuke to the people of that time, Amos refers to houses and beds of ivory that existed (Amos 3:15; Amos 6:4). However, these riches caused terrible corruption, which was the target of most of Amos' prophecies. In warning of the impending doom that would befall the people if they continued these ways, he spoke of affliction that would come from L'vo Chamat to the stream of the Arava (*ibid.* 6:12-14).

Amos speaks of three issues. 1) One who abuses justice and harms the vulnerable is like one who has his horse run through fields before the rocks have been removed. 2) The conquests of the dynasty of Yehu (of which Yoash was a member) will be returned. 3) The Assyrians will oppress the nation militarily until their control will be lost.

There are apparently two main ways for us to lose control over *Eretz Yisrael*. One, which is found in our *parasha*, is the despising of *eretz hemdah* (the coveted land). The other is by displaying corrupt behavior instead of maintaining a moral existence.

This week we will commemorate the 13<sup>th</sup> *yahrtzeit* of our teacher, Harav Shaul Yisraeli *z.t.l.* He taught, among other things, the love of the Land and the importance of an effective, upstanding judicial system and society. May we follow in his footsteps in those areas and in others.

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**Question:** We are building a new building for a Jewish organization. The question has arisen whether we require a fence for the roof (*ma'akeh*) and, if so, what are its requirements?

**Answer:** In general, one who builds a home is required to build a sturdy fence that is ten *tefachim* (approximately two and a half feet) high for its roof (Shulchan Aruch, Choshen Mishpat 427:5). However, there are several cases where there are exemptions.

The *gemara* (Chulin 136a) says that while the word "*gagecha*" (your [singular] roof) (Devarim 22:8) does not exclude the *mitzva* of *ma'akeh* in the case of a home owned by partners, it does exclude a *shul* or a *beit midrash* (study hall) from requiring a fence. Rashi (ad loc.) provides two reasons for this exemption: 1) No one has ownership of these places, as people from around the world have rights to them. 2) These places are not used to live in (*beit dira*). The Rambam (Rotzchim 11:2) and Shulchan Aruch (ibid.:3) state the second reason. This is along the line of their rulings that storage houses and other such places that are not lived in are exempt, an opinion that is not universally accepted (see S'ma ad loc.:2, 5). One other reason is provided to exempt a *shul*, namely, that it has sanctity that precludes this type of obligation. However, that position is difficult to support (see Binyan Tzvi II, 17).

We must thus compare your case to that of a *shul* and *beit midrash*. We do not know and even you may have difficulty determining whether your organization is more similar in structure and purpose to a partnership or to a *shul* that serves an undefined broad public body (see Minchat Yitzchak V, 122). This may anyway not be the main point, as the more accepted distinction of a *shul* is that it is not a *beit dira*. However, here we also have trouble comparing cases. If one has a building that is inhabited during much of the day but it is not a home that is classically lived in, does it require a *ma'akeh*? In many ways, the requirements of a building regarding *ma'akeh* and regarding *mezuzah* are compared (Kesef Mishneh, Rotzeiach 11:1). There is much discussion about whether office buildings require *mezuzas* (see Living the Halachic Process G-4). The most accepted opinion is to affix a *mezuzah* without a *beracha*, and one might expect that likewise an organizational building, even if no one sleeps there, would be the same. However, the S'ma (427:2) points out that regarding certain types of storage rooms, the Shulchan Aruch is stringent regarding *mezuzah* (Yoreh Deah 286:1) and lenient regarding *ma'akeh* (Choshen Mishpat 427:1).

Let's put things in perspective. In cases where people rarely use the roof, e.g., when access requires a ladder or a key and only workmen venture there, there are ample halachic opinions that do not require a *ma'akeh* for any type of house (see Minchat Yitzchak V, 122; Yeshuat Moshe II, 79). This is the reason that *poskim* point out that in the classic, slanted roof-top, the *minhag* is not to build a fence (Aruch Hashulchan, Choshen Mishpat 227:5). When people use the roof regularly and without some type of fence there is a real danger, halacha requires one to take necessary steps to remove the danger (see Living the Halachic Process H-8), even if the formal *mitzva* of *ma'akeh* does not apply. This is because beyond the specific *mitzva* of *ma'akeh*, there is a general prohibition against being responsible for dangerous situations (ibid.). Certainly then, in this case where the formal obligation is likely not to apply, if you take the normal steps that any construction company takes to avoid danger (and possible law suits if tragedy occurs, Heaven forbid), you probably have fulfilled your obligation. It would then just be worthwhile, if the planned use of the roof warrants some precautions, that the fence you erect will be just over two and a half feet high.

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## **M**oreshet Shaul

(from the works of Hagaon Harav Shaul Yisraeli zt"l)

### Non-Jewish Ownership of Eretz Yisrael – part V

(from Eretz Hemdah I, 5. 4,5)

[We will now take a closer look at how halacha views the opinion of *ein kinyan*, whereby the Land's kedusha in regard to terumot and ma'asrot remains even after a field was sold to a non-Jew. We will also look into the opinions of Rishonim regarding the opinions that *yesh kinyan*.]

Rishonim dispute the explanation of *ein kinyan*.

Rashi (Gittin 47b) says that as a result of there not being a *kinyan*, it is considered, in regard to matters of sanctity, as if the field was not sold and remains in the possession of the previous owner. It follows that the seller would be required by the Torah to buy fruit to serve as *bikurim* from the field and bring them to Yerushalayim on a yearly basis because it is considered to still be his land and fruit.

According to the Rivam, with regard to the *kedusha*, it is considered, as a result of the sale, as if the field entered the domain of *Klal Yisrael* as a whole. This has the following logical advantage. The halacha is that if a Jew buys produce from a non-Jew and does *miruach* (smoothing the pile of produce, which is the action that makes produce *chayav* in *ma'asrot*), the buyer is obligated in *ma'aser*. Yet we must consider that if one Jew buys produce from another Jew before *miruach* and the buyer does the *miruach*, the buyer is exempt on the Torah level from *ma'asrot* because it is not called "the produce of your seed." We must say that it is considered as if the field was owned by every single Jew so that when he later does *miruach*, it is like *miruach* of fruit from his own field.

Rabbeinu Tam says that from the perspective of Torah law, whenever one would be exempt from *ma'aser* when buying from a Jew, he is likewise exempt when he buys from a non-Jew. He must hold that the *kedusha* of the Land is unrelated to who owns the specific tract of land.

All agree that the non-Jew has a monetary *kinyan*.

According to the opinions that *yesh kinyan* and the *kedusha* is removed, still, ostensibly, if a Jew buys back the field, it will revert back to its *kedusha*. For example, the *mishna* (Gittin 47) says that because of a special rabbinic institution, one who buys back a field from a non-Jew has to bring *bikurim*. The Ritva explains that this is talking about *bikurim* on that which grew before the sale, for that which grew after the sale certainly has a full-fledged obligation.

The Rambam (Bikurim 2:15) says that one who buys from a non-Jew brings *bikurim* on a Torah level because the non-Jew does not have the power to undo the *kedusha*. The Ra'avad says that he was referring even to a case where the produce grew in the non-Jew's possession. The Ra'avad understands that the *machloket* of whether there is *kinyan* is where the field is in the non-Jew's possession.

However, the Kesef Mishneh's (ad loc.) understanding of the Rambam's opinion is that the obligation is in regard to that which grew after the Jew bought the field, for that which grew when under the non-Jew's possession would not have full *bikurim* even if *ein kinyan*. According to this, the *machloket* is when the field is bought back and according to the opinion that *yesh kinyan*, even at that point it lacks *kedusha*. This is implied by the Rambam's language in Hilchot Terumot (1:6): "A non-Jew who bought ... he did not uproot the *mitzvot*... therefore if a Jew went back and bought it, it is not like a personal acquisition...." The Gra agrees with the Kesef Mishneh's explanation of the Rambam, whereas the Chazon Ish and Rav Chaim Halevi demonstrate why they think the Ra'avad is correct. According to them, that which the field, upon reacquisition, is not like a personal conquest is true even according to the opinion that *yesh kinyan*. We believe that the Kesef Mishneh is correct. [Further analysis of the specific sources is beyond our present scope.]

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# P'ninat Mishpat

## Removing a Distributor of Tzedaka Funds

(based on Halacha Psuka, vol. 44 - a condensation of Piskei Din Rabbaniim vol. I, pp. 353-361)

**Case:** A man died, leaving significant funds to charity. He placed an institution (the defendant = *def*) in charge of distributing the funds and a committee (the plaintiff = *pl*) in charge of overseeing its function. *Pl* claims that *def* is not handling the money in the manner that the deceased instructed in writing. *Def* denies the charges.

**Ruling:** Throughout the course of the hearings period, *def* acted in a manner that demonstrated that it was not interested in cooperating with the proceedings, including by pushing off hearings based on bizarre excuses. Its behavior raised questions about its reliability and was one of several indications of the veracity of *pl*'s claims of mismanagement of the funds.

The Shulchan Aruch (Choshen Mishpat 290:5) says that if *beit din* appointed a guardian and heard, based on circumstantial evidence, that he was taking for himself from the property, they are to replace him. However, if he was appointed by the father of the orphans, then they are not to remove him without real proof. The Rama adds that even if *beit din* appointed him, he is not to be removed without real evidence. *Beit din*, though, determined that *def*'s behavior was such that it went beyond simple circumstantial evidence and since it was of a similar level to that of testimony, everyone should agree that they be removed.

In this case, *beit din* also received testimony that *def* was not following the instructions that the deceased left. The Rashba (Shut VII, 449) dealt with a parallel case, of a community that was in charge of *tzedaka* funds left by an individual and wanted to change the purpose of the funds without permission from the donor. The Rashba acknowledged the halacha that if those in charge of distributing *tzedaka* decide that its recipients should be changed from that which was announced, they may do so. However, one has to distinguish between different circumstances. The above is true if they determine that the original need has been taken care of and they want to give to a different type of need. We say that the community donates with the intention that those who are in charge will make decisions of this type. However, when a single individual gives money for a certain cause, says the Rashba, the people in charge may not change the recipient without authorization, as this would be considered stealing from the poor person.

Therefore, it is clear that *def* was required to follow the deceased's instructions and that since it failed to do so, it lost the trustworthiness necessary to continue, and it must be removed.

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