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Heter Mechirah

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Introduction

"*Heter mechirah*" is the name given for the idea that land in *Eretz Yisroel* can be sold to a non-Jew for the duration of *shemittah*, so that the original owner of the land, and those who want to buy its produce, can avoid many or all of the requirements of *shemittah*. This plan was first proposed in the late 1800s as a way of maintaining the new and struggling farmers in *Eretz Yisroel*. At the time, there were many *poskim* who were opposed to the *heter mechirah*, and others who supported it. With time, the economic and security situation in *Eretz Yisroel* improved, but the *heter mechirah* has continued to be used and debated.

As is well known, Rav Kook – in his roles as the Rav of Yafo and then as the

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Rav Ovadia Yosef's *Heter Mechirah* Responsum: Part 2

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Our first installment contained historical and bibliographical information about Rav Ovadia Yosef's position on the Heter Mechirah as reflected in the final iteration of his responsum on the matter that was published in Yabia Omer (Me'or Yisrael version), Volume 10 (Yoreh De'ah numbers 37-43) and the 5782 edition of Chazon Ovadia – Pruzbol/Shemitah (pages 213–312), as well as a synopsis of the first chapter in which he demonstrated that the majority of the authorities determine Shevi'it to be of Rabbinic origin nowadays. In this installment, we will endeavor to synopsize the next chapter of the responsum.

The Matter of the Apparent Deception of the Sale

Rav Yosef opens the chapter by noting that as we maintain that *shevi'it* nowadays is of Rabbinic origin, there is basis to rely upon the *heter mechirah* as instituted and accepted by numerous great *poskim* over the last 150 years. He acknowledges that the conditions of the past were considerably more perilous and threatening than they

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first רב הראשי – not only oversaw the *mechirah* for many years, but also defended its use. At the same time, he encouraged observance of *shemittah* and mourned that the Jewish community was in such dire straits that it had to rely on the *heter mechirah*. Rav Kook was primarily opposed by the *Chazon Ish*, who led the fight to overturn the *heter mechirah* and encourage *shemiras shemittah* in the traditional manner. As part of that effort, the *Chazon Ish* promoted the use of *Otzar Beis Din*, and – as we saw in the previous installment – promulgated lenient positions on many *shemittah* halachos.

First we will note three prerequisites for accepting the *heter mechirah*, and then we will turn to two *halachic* issues regarding the *heter*. [See Rabbi Raccah's article in this issue for an elaboration on the lenient position as elucidated by Rabbi Ovadia Yosef.]

1. *Yevul Nochri*

The *heter mechirah* is predicated on the assumption that once the land belongs to a non-Jew, the *halachos* of *shemittah* will not apply. As we will see in a future installment, all agree that the prohibition of *sefichin* does not apply to produce from a non-Jew's field, but there is significant difference of opinion as to whether the other *halachos* of *shemittah* are affected. The *Beis Yosef* is lenient, and this ruling is followed by the majority of Jews in *Eretz Yisroel*. In contrast, the *Mabit* takes a strict stance, and *Chazon Ish* accepts his position. According to the *Mabit*, the *heter mechirah* would provide little relief for people living in *Eretz Yisroel*, and therefore the *mechirah* assumes that one follows the position of *Beis Yosef* on this issue.

2. *Shemittah* is *D'rabannan*

Due to the many questions regarding the validity of the *heter mechirah* (as will be noted below), all who are lenient say that their position assumes that *shemittah* nowadays is only a *mitzvah d'rabannan*. That point was discussed in Issue 1 where we saw that, in fact, this is the generally accepted opinion.

3. Desperate Situation (*Dochak*)

When the *heter mechirah* was originally proposed, it was noted that if not for the *heter,* there was a chance that farmers and consumers would literally starve to death or have their lands stolen from them by Arabs, to the point that Rav Kook said במקום הדחק האיום שהישוב שרוי בו, one could rely on just about any opinion in the *poskim*. This raises significant questions about the *heter mechirah*, as follows:

The first question relates to the level of *dochak*. The level of desperation felt by the original Jewish farmers in the late 1800s no longer exists. At that time, the financial situation overall was very tenuous; there was no trade with surrounding countries, and the government was controlled by non-Jews. Of course, nowadays this is very different; Israel's economy is quite strong, the country can easily purchase food from the world market, and there is no concern that Arabs will grab the land of Jews if they are *shomer shevi'is*. Furthermore, in recent years, greenhouses and *Otzar Beis Din* have become viable methods for farmers to earn money during *shemittah*.

Thus, following the laws of *shemittah* nowadays does not present the same *dochak* which was felt by the original farmers who asked for the *heter mechirah*. In fact, Rav Kook himself wrote that:

בכל את אשר ימצא ב"ד יפה, שכבר היטב המצב ויש יכולת בלא סכנה לקיים את השביעית כמאמרה בלא שום הפקעה, חלילה וחלילה לשלח יד בקודש ולהפקיע קדושת הארץ.

In other words, the lenient position taken by *poskim* a century ago was based on a situation which is no longer true and therefore might not be a basis for being lenient today.

Two additional questions of using this justification:

- The *Beis HaLevi* suggests that the concept of relying on a rejected opinion in a *sha'as hadchak* might not apply to *shemittah* where the difficulty is inherent to the *mitzvah*.
- Is it appropriate to claim this is a *sha'as hadchak* when Hashem promises that no harm will come to those who fulfill this *mitzvah*?

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For the reasons outlined above, there are those who argue that the significant prerequisite that there be a *sha'as hadchak* to justify the *heter mechirah* does not apply nowadays and may never have applied.

In a similar manner, Rav Yosef Dov Soloveitchik said that those who farm and live in *Eretz Yisroel* have the pressure to consider relying on the *heter mechirah*, but there is no reason why Jews living in America should rely on the leniency.

Below we will discuss *halachic* issues raised regarding the sale itself.

Gemiras Da'as

Many *poskim* have discussed the validity of the *heter mechirah* based on the concern that it seems clear that both parties to the sale – the Jewish landowners as well as the non-Jewish "buyer" – have no intention of truly selling or buying the land. Despite the formality of the sale, there is no question that it is a הערמה (sham or legal fiction) of the first order. No one sells their land to an unknown person for an undetermined price, and then continues to work the land, until the buyer "surprisingly" chooses to sell it back at the end of *shemittah*. Is one permitted to perform this type of הערמה? If one did so, is the transaction valid? Does the apparent הערמה also indicate that the buyer and seller did not have the requisite גמירת דעת (intention to make a decision)?

At first glance, many would assume that this concern invalidates the sale, but there are three possible reasons to be lenient. The following is a brief summary of those reasons, followed by possible reasons to disagree:

1. *Ha'aramah* on a *D'rabannan*

The *Gemara* says that הערמה is permitted when the issur being discussed is an *issur d'rabannan*, and therefore since *shemittah* nowadays is *d'rabannan,* one may employ a הערמה to subvert the *halacha*.

THE ARGUMENT AGAINST: The *Chasam Sofer* reviews multiple cases where *Chazal* do or do not allow a הערמה. He attempts to use these examples to create "rules" as to when הערמה is appropriate and concludes that there is no clear indication when it is permitted. Therefore, he says that one should not say that הערמה is permitted in every situation of an *issur d'rabannan*.

2. *Mechiras Chametz*

The common practice is to allow *mechiras chametz* which includes a similar level of הערמה, both in selling the *chametz* and in selling the land through which the person accomplishes the *kinyanim*. If *mechiras chametz* is acceptable then *heter mechirah* should also be.

THE ARGUMENT AGAINST: There is a fundamental difference between those who perform *mechiras chametz* and those who participate in the *heter mechirah*. Jews who sell their *chametz* do so because they do not want to own *chametz* on Pesach. Their participation in the *mechirah* is an expression of this innate desire, and if the non-Jew chose to take the *chametz* and give them full market value, they would happily allow him to do so. Thus, agreeing to *mechiras chametz* includes גמירת דעת.

The same cannot be said of all of those who sign on for the *heter mechirah*, many of whom are using it to completely absolve themselves from the *mitzvah* of not working the land. In fact, if most of them were asked what would happen if there were no *heter mechirah*, they would respond that they would work the land anyway. In such cases, there is no "sincerity" to offset the obvious הערמה. Accordingly, the *heter mechirah* includes a much weaker גמירת דעת than *mechiras chametz*.

3. *Devarim Shebilev*

The general rule is that if someone performs all of the technical *kinyanim* required for a sale, the sale is

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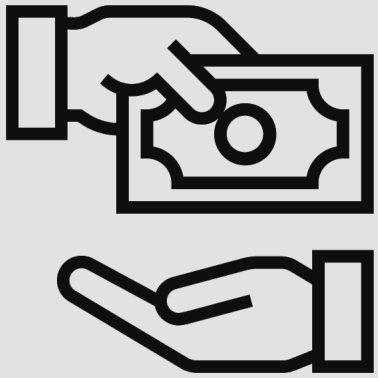
are today. Yet, he presents two reasons for the continued implementation of the *heter mechirah*. The first reason is that there are hundreds of farmers who support themselves solely from their agricultural pursuits and would be hard-pressed to provide for their families without their farming.[1] The second is the many non-observant farmers who sign up for the sale with the Chief Rabbinate, who would have sadly farmed as usual during the *shemittah* year if it weren't for the *heter mechirah*, and additionally their forbidden work product would have been sold on the open market.

One of the points raised against the *heter mechirah* is how it appears to be deceptive (*ha'arama*). Is it a true sale if the Jew knows that the gentile will likely never enter or touch the sold field? Rav Yosef cites the accepted practice of selling one's *chametz* to a gentile before Pesach and how this practice had been questioned as appearing deceptive.[2] However, Rav Moshe Schreiber, the *Chatam Sofer*,[3] had defended this practice, arguing that once the sale is actualized through the multiple forms of acquisition (*kinyanim*) that are legally binding with gentiles, and the parties are aware that this transaction is thereby a legal one, then even if the gentile does not desire to act upon his transaction, that would not invalidate the sale. Accordingly, since the *Rabbanut* effectuates the transaction with all of the appropriate and binding acts of acquisition, one cannot question the sale, particularly because *shvi'it* today is *d'rabbanan* (of rabbinic origin) and we rule that an apparently deceptive practice is binding for *d'rabbanan* situations.



Rav Yosef cites the objection of the Ridvaz,[4] Rabbi Yaakov David Wilovsky, to the *heter mechirah*, based upon a distinction between the sale of *chametz* and the *heter mechirah*. Rav Wilovsky argued that the sale of *chametz* essentially addresses a prohibition of Rabbinic origin since the Torah prohibition of *chametz* would be dealt with by the *bitul chametz* (annulment), while the *heter mechirah* endeavors to address a prohibition of Torah origin, and for that, this apparently deceptive practice does not suffice. Rav Yosef points out that this argument echoes a similar position taken by Rav Alexander Sender Shor in his *Tivu'ot Shor*[5] against the practice of selling animals and their feed to a gentile before Pesach. The *Tivu'ot Shor* distinguished between the standard sale of *chametz* and this sale of animals with their feed. When one sells his *chametz*, the *chametz* is annulled by *bitul chametz* and therefore prohibited only by a Rabbinic prohibition, for which *ha'arama* (apparently deceptive action) is effective. However, in the case of the animals, where there is no annulment (*bitul*), and the entire sale is to circumvent the Torah prohibition of feeding his animals *chametz* on Pesach, the apparently deceptive sale will not be effective and accordingly the practice would be forbidden. In this case, as in the case of the *heter mechirah* according to Rav Wilovsky, the apparently deceptive sale should be ineffective

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1 Note should be made of the enormous efforts made by some organizations to gather vast sums to help ameliorate the plight of those farmers who would opt to not work their land at all if they could afford to and are able to do so by virtue of the funds provided by these organizations. Similar efforts have existed since the first use of the *heter mechirah* at the end of the 19th century.
2 See for example *Machatzit HaShekel* (448:4)
3 *Chatam Sofer* (O"C 113 and Y"D 310)
4 Introduction to *Bet Ridbaz*
5 *Bichor Shor* (*Pisachim* 21a)

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because it relates to a Torah prohibition.

However, Rav Yosef demonstrates that the position of the *Tivu'ot Shor* was challenged by a long line of authorities who argued that the standard *chametz* sale does not relate to *chametz* only forbidden by Rabbinic prohibition, as the *Tivu'ot Shor* argued, because the *chametz* is sold prior to the *bitul chametz* being effectuated and as such when the *bitul chametz* is performed one's intent is certainly not on the *chametz* that was sold since it is already out of his possession. Furthermore, since the *chametz* is sold in an appropriate and binding fashion, there is no deception. Rav Yosef then presents numerous *poskim* who discuss the matter of an apparently deceptive sale related to matters of Torah-origin forbiddance, and these *poskim* muster examples wherein an apparently deceptive sale is effective.

Based upon these sources, Rav Yosef responds to the Ridvaz's challenge to the basis of the *heter mechirah*. First, to the essence of the challenge, as he had demonstrated, numerous *poskim* contest the view of the *Tivu'ot Shor* and argue that an apparently deceptive sale can be effective for a Torah-origin prohibition, and thus such a sale should be effective for the *heter mechirah* (and the *heter mechirah* sale takes place before the onset of the *shemittah* year). This is even more so, writes Rav Yosef, when we consider that according to most *poskim*, *shemittah* today is not a Torah prohibition but rather of Rabbinic origin. Furthermore, one can also take into consideration the position of some authorities who opine that *shemittah* does not apply today at all.

The next consideration that Rav Yosef addresses relates to the conditions of the sale by which the original owners of the field will continue to manage and operate the field as they see fit, even after the gentile has purchased it, serving much as officers of the new gentile owner. As it turns out, the gentile has no right to use or benefit directly from the fields he has acquired, and as such, how can we consider that the gentile owns the fields? Rav Yosef deduces a response to this from an interesting *halacha*[6] which states that in a case that a man who swears to withhold benefit from his son but says that he would transfer possession to his son's son if he will be a scholar, the ruling is that the son would be forbidden to benefit from them, but the son's son, if he be a scholar, would be permitted to benefit. This means that even though the son is barred from benefiting from his father's possessions, he still acquires them to be able to transfer them to his son the scholar, and he would be forbidden to give them to anyone else. Therefore, even though the son has no control over the possessions, he still has possession of them to be able to transfer them to his scholarly son. Similarly in our case, even if the gentile does not have control over the fields, that does not prevent him from being able to own the fields, and thereby remove *shemittah* prohibitions from working the land.

Rav Yosef next turns his attention to a different consideration. Among those farmers who sell their fields there may be those who do not observe Torah and *mitzvot,* and who are not selling their fields wholeheartedly. However, this is not a true concern because about such things we say that since they performed the necessary acquisitional actions for the sale, *Devarim SheBaLev Einam Devarim* (thoughts only entertained privately in one's heart are not considered meaningful). Therefore, if a non-observant grocer sells his *chametz* before Pesach because he does not want his observant shoppers to refrain from purchasing from him after Pesach, but doesn't perform the sale wholeheartedly, we still consider the sale to be binding and the sold *chametz* would be permitted after Pesach.[7]

Another concern Rav Yosef raises is based upon the opinion of Rav Yekutiel Yehuda Teitelbaum in his *Avnei Tzedek*[8] who opines that one may not sell

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6 See Rambam (*Hilchot Nidarim* 7:15)
7 See *Igrot Moshe* (*O"C* 4, 95)
8 *Avnei Tzedek* (*O"C* 21)

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his field to a gentile so that the gentile would build a house for him even on Shabbat. He explains that this deceptive sale cannot be compared to the selling of *chametz,* because *chametz* is a loose item intended to be bought and sold, and as such, the sale is without reservation, while when it comes to one's field or home, we know that he is not really selling it wholeheartedly, and the deception is evident. Accordingly, Rav Teitelbaum adds that when one sells his *chametz* to a gentile, he must not sell the room that the *chametz* is in; rather, he should only rent the room to the gentile. It follows that according to this view, the matter of selling one's field to a gentile for *shevi'it* would be questionable.

However, Rav Yosef shows that the *poskim* are not concerned with this consideration and permit selling the room in which the *chametz* is situated to the gentile. In fact, some say[9] that it is preferable to sell the room rather than to rent it. These authorities did not raise the issue that it is illogical that a person would sell their own house, and therefore selling one's field for *shevi'it* would be similarly permitted.

Rav Yosef considers another issue associated with apparent deception. He notes that the custom of the *Rabbanut* as part of the sale procedure to the gentile is to write a document of sale, in addition to effectuating all the necessary acts of acquisition. He explains that this is because there is an opinion[10] that holds that if one only speaks out the terms of an agreement, and does not write them down, this could indicate possible deception limiting the agreement. However, when one executes a document setting out the terms of the agreement, this concern is eliminated and there is no question as to the certainty of the agreement. Thus, in order to remove this possible concern, the *Rabbanut* executes a sale document with the gentile, in addition to the appropriate acts of acquisition, thereby confirming the validity of the sale.

We will I"YH review further sections of the responsum in the third installment of this series.

9 See *Kuntress Acharon* to *Mekor Chaim* (12, page 120c), *Chok Yaakov* (448:14), and *Mishna Brura* (448:19)
10 *Shita Mikubetzet* (*Kitubot* 56a *s.v. ViZeh Lashon HaRitva*) in the name of the Ritva

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valid and the individual's personal knowledge that he was insincere is considered דברים שבלב ("matters of the heart") which may *halachic*ally be ignored. Thus, the intentions of the parties are insignificant, and if they performed the *kinyanim* then the land is sold.

THE ARGUMENT AGAINST: There are times when the person's unspoken intent is so clear and obvious that the principle of דברים שבלב no longer applies. This is referred to as בלבו ובלב כל אדם (it is not only in his heart but in 'everyone's' heart) or אנן סהדי (we can all testify that this is his intention). The *Gemara*'s examples of that is of a man who gives away his entire fortune after being informed that his only child died. There is an אנן סהדי that he only gave the property away since he believes he has no heir, and if it turns out that his child is alive, then the property reverts to that child.

Is there an אנן סהדי that the farmer has no גמירת דעת to sell his fields (in which case the sale is invalid)? Or can we treat that as דברים שבלב and validate the sale since he went through the formal *kinyanim*?

The *poskim* have taken different stands on this issue, and it may be that it depends on whether one views the *heter mechirah* as one large unit or as multiple individual sales. If one looks at the aggregate sale of such a large percentage of the farmland of the State of Israel, there is a clear אנן סהדי that this is a sham. No one can believe that the government and *Rabbanut* who effectuate the sale want to sell all of that property to a non-Jew. Accordingly, there is an אנן סהדי that there is no גמירת דעת and the sale is invalid.

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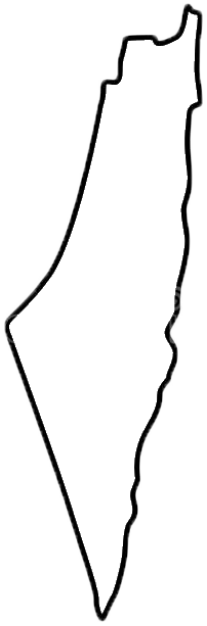
In contrast, others view the *heter mechirah* as an organized sale of thousands of individual parcels of land. When viewed this way, there is no אנן סהדי that any particular farmer does not have גמירת דעת. Instead, we will say that since he performed the appropriate *kinyanim* to sell his land, any lack of גמירת דעת is דברים שבלב and does not ruin the sale.

For some *poskim*, this issue – lack of גמירת דעת for the sale – is a decisive reason to reject the *heter mechirah*. Below, we will consider one other potential *halachic* issue with the sale.

Lo Sichanem

Above we discussed prerequisites of the *heter mechirah* and challenges to whether there is a גמירת דעת for that sale. In this section we will discuss the issue of לא תחנם and how that impacts the *heter mechirah*. This issue is based on a four-part line of reasoning:



1. In order for the *Rabbanut* to sell land which does not belong to them (i.e., for all the individual farmers), they must function as a *sheliach* (legal agent) of the landowners.
2. There is an *issur d'oraisa*, known as לא תחנם, to sell land in *Eretz Yisroel* to a non-Jew.
3. Accordingly, the *Rabbanut* is a שליח לדבר עבירה (agent to perform an *aveirah*) and we apply the principle that אין שליח לדבר עבירה (one cannot be an agent to perform an *aveirah*).
4. When the principle of אין שליח לדבר עבירה applies, it invalidates the *shelichus*, such that the *Rabbanut* cannot sell the people's lands (Step #1) and *shemittah* should apply.

If all of these are correct, the sale is invalid and the *heter mechirah* is ineffective, but if even one of them is incorrect then the issue of לא תחנם does not affect the *mechirah*. Accordingly, those who support the *heter mechirah* have suggested reasons to dispute each of these points, as will be noted below.

1. *Shelichus* is Required

This point is the one about which there is the least disagreement. Most suggestions of how the *mechirah* could be structured to avoid *shelichus* are quite novel or impractical. But in recent *shemittos* a method was actually implemented to address this point.

The vast majority of land in Israel belongs to the Israel Land Authority, which gives 99-year leases to individual farmers and "homeowners." Taking advantage of this nuance, instead of the farmers authorizing the *Rabbanut* to sell their lands for *shemittah*, they (effectively) returned their leases to the Israel Land Authority, and then the overseer of that body sold the entire land to the non-Jew. The return of the leases made one person in charge of all of the land, and he was able to sell it to the non-Jew without having to revert to *shelichus*! This was hailed as a clean way in which to avoid the concern of אין שליח לדבר עבירה since the sale could be accomplished without a *sheliach*.

While this provides advantages regarding לא תחנם, it is a downgrade from the perspective of גמירת דעת as was discussed in the previous installment. No longer can one claim that each individual farmer is sincere about his sale (such that any lack of sincerity qualifies as דברים שבלב). If the majority of farmland is sold in one transaction by the government itself, there is a clear אנן סהדי that there is no גמירת דעת to sell the land and the *mechirah* is invalid. Thus, the advantage of the new form of *mechirah* may be outweighed by its disadvantages.

2. *Lo Sichanem* to Sell Land

Assuming the *Rabbanut* must act as the *sheliach* for the landowner, we now move to Step #2 to consider if the prohibition of לא תחנם applies in this situation. The reasons to disagree with this are that לא תחנם might not apply if the sale is done to benefit Jews, if the sale is structured as a short-term sale, or if the buyer is not an idol-worshiper. There are significant *halachic* challenges to each of these

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reasons, and the standard assumption is that לא תחנם does apply.

3. *Sheliach L'dvar Aveirah*

Even if we assume the *Rabbanut* must be a *sheliach* of the landowner, it has been suggested that שליח לדבר עבירה only applies if the שליח accepts that what he is doing is an "עבירה" and the person sending him therefore has reason to believe he will not fulfill his assigned task. But since the *Rabbanut* (a) believes לא תחנם does not apply (as per #2 above), and/or (b) has a history of performing the sale each and every *shemittah*, the principle of אין שליח לדבר עבירה does not apply.

Once again, there are significant *halachic* and practical questions on these suggestions.

4. Invalidates the *Shelichus*

The last of the four points is one which has a long "history" in *Rishonim* and *Acharonim*. If we assume that (a) the *Rabbanut* is the *sheliach* of the farmer, and (b) that the sale of the land is an *aveirah*, so that we would apply the principle of אין שליח לדבר עבירה, would that invalidate the *shelichus*? In other words, does אין שליח לדבר עבירה merely mean that the agent takes full responsibility for the *aveirah* which he committed (instead of the one who sent him)? Or, alternatively, does it mean that by dint of the sale being an *aveirah*, the agent's appointment as a *sheliach* is null and void, such that he was never even authorized to perform the act for the one who sent him? If that is correct, the *Rabbanut* is not the *sheliach* of the farmer and therefore the land is never sold...and there is no (*heter*) *mechirah*!

This question was elaborated on in a series of *teshuvos* from the *Nodah B'yehudah,* in which he cites many *poskim* who had different opinions on the matter. The *Nodah B'yehudah* accepts the position of *Tosfos* that the *shelichus* is invalidated, and the *Chazon Ish* accepts this opinion as it relates to the *heter mechirah*. Accordingly, he rules that a *mechirah* carried out by a *sheliach* is not valid because the *aveirah* element undermines and destroys the required *shelichus*. Those who support the *heter mechirah* accept the ruling of the *Nesivos Hamishpat* that one may rely on the lenient opinion – at least as it relates to our issue – and therefore the *mechirah* is valid.

IN SUMMARY

We have seen several reasons why some challenge the *heter mechirah*, including what the *Chazon Ish* considered the most serious reason to reject the *heter mechirah* (לא תחנם). Contemporary *poskim* have written considerably on the merits of these challenges and why they might be incorrect, and these form the basis for why they do or do not accept the *heter mechirah.*

WE WOULD LIKE TO HEAR FROM YOU!

If you have any comments or questions, please send them to office@crcweb.org.
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