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Otzar Beis Din

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As we are well aware, it is difficult for farmers to keep the *mitzvos* of *shemittah* and in recent decades there has been a revival and repurposing of a traditional method of somewhat easing the burden of *shemittah* on farmers. This method – known as *Otzar Beis Din* – has been embraced by those who do not accept the *heter mechirah*, or only want to rely on it in cases of great need.

The source of *Otzar Beis Din* is a *Tosefta* which describes how communal representatives (שלוחי בית) would harvest the *hefker* produce and process it to the point that it would be usable for consumers, and then distribute the finished goods to the local community. In this way, *Beis Din* was serving the community

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Rav Ovadia Yosef's Heter Mechira Responsum: Part 3

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In the previous installment, we explored a chapter of Rav Ovadia Yosef's lengthy responsum regarding the validity of the heter mechira. In this installment, we will explore another chapter, namely the chapter dealing with the prohibition of Lo Tichoneam (thou shall not deal with them graciously). This is a lengthy and complicated chapter,¹ as this subject is one of the primary challenges to the foundation of the heter mechira. Considering the length and intricacy of this chapter, we will only present elements of it, as this is not the format for a truly thorough and broad exposition of this important section.

Introduction

The Torah (*Devarim* 7:2) states regarding the gentiles: לא תחנם (you shall not deal with them graciously). The Rabbis derive a group of very important and relevant laws from this verse. Among these laws is the law of לא תתן להם חניה לא תתן להם חניה (you shall not give them an encampment in the land);² meaning that it is

1 *Chazon Ovadia – Pruzbol/Shemittah* (pages 258-278). It should be noted that even after having published the final iteration of the *heter mechira* responsum, Rav Yosef returned to further discuss aspects of the *heter mechira* related to our subject in a responsum published posthumously in *Yechave Da'at*, volume 7 (number 171).

2 *Avodah Zara* 19b and 20b. This is codified by Rambam (*Hilchot Akum* 10:3,4).

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by bringing the *shemittah* fruit from the fields to the people living in the towns and cities.

For hundreds of years after the *Tosefta* was written, we have no record of *Otzar Beis Din* ever being used during *shemittah*. Rav Kook proposed that if the farmers themselves would be hired as the communal representatives, *Otzar Beis Din* would not only be a way to distribute *shemittah* produce but also provide the destitute farmers with a source of income during *shemittah*. *Beis Din* would hire them to harvest, process, package, and deliver the *shemittah* fruit to everyone else, and the end-consumers would pay for all that labor – but not for the *hefker* fruit itself. This “cost” for the fruit would be passed on to the farmers as a source of *shemittah* income! In this way, not only would consumers have fruit to eat, but the *shemittah*-observant farmers could have some minimal form of support.

The idea remained dormant until *Chazon Ish* further encouraged it during *shemittah* 5705 (1944-1945) and 5712 (1951-1952). Things have not always worked out well with the *Otzar Beis Din* system, as there were some *shemittah* years in which consumers were apprehensive to purchase the produce (leading to large financial losses for those involved) or where distributors demanded changes that were [*halachic*] downgrades to the system.

Among the more controversial elements are those relating to pricing. There is technically no charge to consumers for

the actual fruit – since it is *hefker* – but rather they are asked to pay an amount which covers the expense of harvesting, processing, packaging, and delivering the fruit to them. If so, the price should be less than the same fruit costs during other years. But in fact, due to *shemittah* restrictions the fields may produce less fruit than usual, and the price per pound is higher. Somehow that seems inappropriate.

From a different angle, all fruit from a given field should cost the same per pound regardless of how large or desirable it is. If that happens, people will only choose the finest fruit – whose *Otzar Beis Din* price is cheaper than would be expected for similar produce – and never buy the less desirable fruit (for which this price per pound is more than the market can tolerate). Can different prices be charged for different fruit, if the *Otzar Beis Din* put an equal amount of effort into all the fruit? These are examples of the questions that *Poskim* for an *Otzar Beis Din* must grapple with.

Aside from the points noted above, *Otzar Beis Din* fruit follows the standard *halachos* of *shemittah*. Namely, (a) there generally cannot be *Otzar Beis Din* for vegetables, since vegetables are invariably forbidden as *sefichin* (for exceptions see installment 7), and (b) fruit marketed by *Otzar Beis Din* has *kedushas shevi'is* and must be treated accordingly (e.g., not wasted, not exported). [The application of the *mitzvah* of *biur* to *Otzar Beis Din* produce was discussed in installment 10.]

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prohibited to sell land in *Eretz Yisrael* to gentiles. *Rishonim*³ explain that this prohibition applies to all gentiles, not just to members of the seven Canaanite nations. Since the essential mechanism of the *heter mechira*, as its very name implies, relies upon the sale of land to a gentile to thereby permit a Jew to work the land during the *shemittah* year, understandably, a prohibition to sell the land of *Eretz Yisrael* to a non-Jew would challenge the very core of the heter.

Gentiles who are not Idol Worshipers

Rav Yosef cites the *Rishon LiTzion*, Rav Miyuchas⁴ who, while referring to the ruling in the *Shulchan Aruch* (YD 151:8) that it is forbidden to sell homes or fields in *Eretz*

Yisrael to gentiles, notes that many great rabbis did indeed sell homes and yards to non-Jews in apparent contravention of this law. Rav Miyuchas explains that it is obvious that this prohibition is limited to selling the land to idol worshippers, but not to Muslims, who are not idol worshippers. Rav Miyuchas finds support in this distinction from the Rambam⁵ who presents this prohibition as being a prohibition to sell land to idol worshippers so that the Jews would not learn from their idolatrous ways. The clear implication is that the prohibition would not apply to gentiles who are not idol worshippers, such as Muslims. Rav Yosef further adduces support to this approach from the *Meiri*⁶ who states that this prohibition would not apply

³ *Tosafot* (*Avoda Zara* 20a and *Yivamot* 23a) and according to Rav Chaim Benveniste (*Dina Dichaye, Lavin* 48, 58c) the Rambam as well. See also *Sefer HaEshkol* Vol. 3 (page 123).

⁴ *Mizbach Adama* (Salonika 5537, page 12b)

⁵ *Sefer HaMitzvot, Lo Ta'aseh* #51

⁶ *Meiri, Avoda Zara* 20a. [Writer's note: This particular position of Rav Menachem Meiri is part of a larger *weltanschauung* expressed by him in numerous places in regard to a broad array of laws. This fascinating perspective has been the source of considerable

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to a non-Jew who is "from the nations bound by religious life-paths and who are accepting of Divinity."

Rav Yosef presents a potential challenge to the position espoused above. He quotes Rav Yosef Karo in his *Bait Yosef* (CM 249) regarding the related prohibition of presenting gifts to non-Jews. The Rabbis⁷ derive that one may not present a gift to a non-Jew from the same passage that they derive the prohibition to provide them encampment in *Eretz Yisrael*. The *Bait Yosef* writes that this prohibition of gifting applies to all non-Jews, even those who do not worship idols, with the only exception being a *ger toshav*. Rav Karo then codifies this view in the *Shulchan Aruch* (CM 249:2). However, Rav Yoel Sirkes in his *Bayit Chadash* (CM 249) seems to disagree with this view, and would appear to permit presenting a gift to non-idol worshipping non-Jews, such as Muslims.⁸ Rav Yosef finds support for this position in the *Meiri* (*Avodah Zara* 20a) and Rashba (*Tshuvot HaRashba* 1:8) who permit giving a gift to a non-Jew who does not worship idols. Yet, the authoritative *Shulchan Aruch* renders a strict view in the associated *halacha* relating to this issue. Rav Yosef notes that Rav Miyuchas was aware of this apparent inconsistency, namely that with respect to selling land to non-idol worshipping non-Jews he is lenient, while with respect to presenting them with gifts, he is strict, in accordance with the *Shulchan Aruch*. However, as Rav Eliyahu Mani⁹ points out, since both laws are derived from the same verse, the contradictory rulings require an explanation.

One resolution offered is that the prohibition of selling land in *Eretz Yisrael* to a non-Jew is associated with the verse (*Shemot* 23:33) that warns of their inhabitation in the land potentially drawing us to idol worship, as is written by the Rambam in the previously cited *Sefer HaMitzvot*, and therefore it would be permitted to sell land to a non-idol worshipping gentile, while when it comes to gifting, all gentiles would be equal since they do not observe the seven Noahide laws. Rav Yosef then adds an additional point: it would be reasonable to assume that if Rav Yosef

Karo had known about the *Meiri* and Rashba who permit providing a gift to non-idol worshipping gentiles, he would have adjusted his thinking to be in line with theirs.

A Sale for the Benefit of the Jewish Settlement

Rav Yosef cites Rabbi Yisrael Yehoshua Trunk¹⁰ who advances a different resolution. Rabbi Trunk explains that in the case of the *heter mechira*, the sale serves to ease the difficulty of the Jewish farmers and as such the sale is for the betterment of the Jewish settlement in *Eretz Yisrael*. In such a case, he argues, there is no prohibition of sale, even if there would normally be a prohibition to sell the land to a non-idolator. This is more compellingly the case, he adds, if the sale is temporary and the land will be sold back at the close of the *shemittah* year. In a different responsum¹¹ he adds that in the case of the *heter mechirah*, the Jew actually benefits from the sale because the land is sold back to him in a better condition so he can continue to work it easily.

Rav Yosef draws support for this view from the opinion of the Ramban¹² regarding the unique circumstance where one could free a slave in order to complete a *minyan*. The Ramban explains that although the prohibition to free a slave is to avoid giving him a gift, in the case where the slave's freedom would enable the performance of a *mitzvah*, one really is not giving the slave a gift but rather benefitting oneself. Accordingly, says Rav Yosef, in our case, where the prohibition to sell land in *Eretz Yisrael* to a gentile is derived from the same verse of *לא תחנם*, one may apply the same reasoning that so long as it is being done for his own benefit the prohibition doesn't apply. Rav Yosef writes that he found a similar reasoning in the writings of Rav Yosef Shaul Natanzon of Lvov (Lemberg).¹³

However, Rav Yosef notes that one may wish to differentiate between the sale of land to a gentile and presenting a gift to a gentile, although they are both derived from the same verse source. As it relates to presenting a gift, one could argue that whenever the Jew provides the gift to the gentile in order to benefit from it, he isn't really "gifting" anything,

discussion in rabbinic writings, but even more so in academic circles. A proper treatment of this remarkable view is obviously beyond the scope of this article, but its importance requires mention. For further information in English, see Rabbi J. David Bleich in his *The Philosophical Quest* (Chapter 3, page 40 ff) and *Contemporary Halakhic Problems Volume VII* (Chapter 6, page 170 ff). For an extensive list of primarily academic citations, see Prof. Pinchas Roth, *In This Land, Jewish Life and Legal Culture in Late Medieval Provence* (Chapter 3 note 56, pages 62-63). ~ DJR]

7 *Avodah Zara* 20a

8 The term "appears" applies here because, as Rav Yosef points out based upon an article printed in the *Moriah* journal (5780 page 74), the version of *Bayit Chadash* being quoted was censored and the actual original words of the *Bayit Chadash* do not support this lenient view.

9 *Zichronot Eliyahu YD Ma'arechet Gimel* #4

10 *Yeshu'ot Malko* YD 55

11 *Yeshu'ot Malko* YD 59

12 Ramban, *Gitin* 38a. This view is also found in the Ran there.

13 *Sho'el U'Mashiv* 2:2:77 (end)

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but rather is exchanging a gift for some benefit. However, when it comes to our case, the Torah forbade the sale of the land under all conditions, even if the Jewish seller intends to benefit from the sale, as the Torah doesn't permit providing an opportunity for the gentile to have encampment in *Eretz Yisrael*. The *Chazon Ish* (*Sheve'it* 24:4) records this distinction.

Rav Yosef responds that this would be true if the sale was permanent, because then the gentile would be granted actual encampment in the land. However, in the case of the *heter mechira*, the land is sold only temporarily, with the sale intended only to release the *shemittah* prohibition. In that case, where the sale is to benefit the Jewish settlement of the land, and it is intended to provide encampment in the land to the Jew, the prohibition of sale would not apply. Rav Yosef cites Rav Mordechai Rubio¹⁴ who argues that the process of the *heter mechira* actually provides the Jews with encampment in the land because it provides them with the ability to maintain their fields, instead of abandoning interest in settlement due to the difficulty of maintaining the fields during a *shemittah* year.

Rav Yosef states that the combination of this argument, namely that a sale to a gentile intended to benefit the Jewish encampment is permitted, and the previously mentioned argument, that sale to a non-idol worshipping Muslim is permitted, creates a *sefek sefaka* (a double doubt) in a disagreement of post-Talmudic authorities, where even with Torah origin laws we would be lenient. Accordingly, he finds a basis to be lenient in this regard.

When a gentile already owns land in *Eretz Yisrael*

Rav Yosef cites Rav Kook¹⁵ who, in the name of Rav Zalman Shach, presents another possible exception to

the prohibition of selling land in *Eretz Yisrael* to a gentile. One could say that if a gentile already owns land in *Eretz Yisrael*, such that he already has an encampment in *Eretz Yisrael*, then it would not be forbidden to sell him additional land, because it does not increase his resident status. Of course, it could be argued that the additional land helps him because if he sold his previously owned land, he will maintain an encampment due to the newly purchased land. The response to this objection is that while that may be true, we follow his present situation, which is that he already has resident status. In his responsa,¹⁶ Rav Kook adduces this exception from the Rambam (*Hilchot Akum* 10:4). [Rav Shneur Zalman Fradkin¹⁷ advanced a similar view in a different context. Rav Fradkin opined that it would be permitted to exchange houses in *Eretz Yisrael* with a gentile, as he reasons that the prohibition is to allow him initial encampment in *Eretz Yisrael*, because that would allow him to go from being a temporary resident to a permanent resident. However when he already has encampment, what difference does it make if it be this house or another, when he is already settled in the land? This view aligns with that quoted by Rav Kook.] Ultimately, Rav Kook did not rely on this view. Yet, argues Rav Yosef, it certainly further buttresses the lenient position when it is combined with the previously presented opinions that formed the double doubt.

With these arguments serving as the foundation, Rav Yosef proceeds to tackle other challenges to the *heter mechira* associated with the לא תהנם prohibition.

This is the final installment of this topic in the series, and we have covered only a minuscule portion of Rav Yosef's *heter mechira* responsum. Those who wish to further their understanding of this seminal responsum are directed to the original.

14 *Shemen HaMor* YD 4 (page 35a end)

15 *Shabat Ha'Aretz* (introduction chapter 12, page 52)

16 *Mishpat Cohen* (number 68 end)

17 While Rav Yosef quotes this important responsum from other sources, it has recently been published in the new compilation volume of Rav Fradkin's *Torat Chesed* (Machon Yerushalayim 5780, number 9 – see there section 7, page 70).



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