

Heter Mechira

Rabbi Ezra Schwartz

Rosh Yeshiva and Bochen, RIETS · Rabbi, Mount Sinai Jewish Center, NYC

Perhaps the area of halacha that has expanded the most in the past 125 years is *mitzvot hateluyot baaretz*, agricultural mitzvot that apply in the Land of Israel. The *aliya* of millions of Jews and the establishment of agricultural communities forced poskim to research areas of halacha that had not been researched for hundreds of years. A fascinating literature developed to confront the challenges of a reality where Jews work the land and must deal with *mitzvot hateluyot baaretz*. Within this broad area, perhaps the aspect that has merited the most discussion is shemitta, with its consequent challenge of not farming for an entire year and the potential significant loss that may ensue. Perhaps the aspect of shemitta that has generated the most Torah literature is the *heter mechira*.

The first shemitta after the *Aliya Rishona* (the First *Aliya*) was in 1882. The few Jewish farmers in Petach Tikva and Motza were able to observe shemitta properly. They left their fields fallow in accordance with the Torah's directive. However, by the time the shemitta of 1889 arrived, the situation had become more complicated; in addition to the original two *moshavot*, there were Jewish farmers in six other communities.¹ A good number of these farmers were not religious and therefore not inclined to follow the Torah's directive of leaving the fields fallow for a complete year. This generated a wide-ranging and fertile halachic discussion about the permissibility of circumventing the shemitta prohibitions by selling the land to non-Jews. This sale is known as the *heter mechira*. Many *gedolei Yisrael* including Rav Yehoshua of Kutna and Rabbi Shmuel Mohliver permitted the sale. Others including the Beit HaLevi and the Netziv forbade it. A decision was made to send the question to Rav Yitzchok Elchanan Spector. Rav Yitzchok Elchonon permitted the sale. However, he stipulated that his permission was only granted if the *rabbanim* in Yerushalayim would concur. The Yerushalayim rabbanim led by Rav Yehoshua Leib Diskin however, did not permit the sale. Consequently the rabbi of Yafo and surrounding agricultural communities at that time, Rav Naftali Hertz Halevi, did not implement the *heter mechira*. The sale was left to local Sefardic rabbis who drafted the documents and implemented the *heter mechira*.²

When shemitta of 1896 arrived, there was great fear that failure to sell the land to non-Jews for shemitta may undermine the entire *yishuv*. R Naftali Hertz Halevi consulted once again with R Yehoshua Leib Diskin and the Aderet, the two most prominent rabbis of Yerushalayim. Although these same rabbanim had forbidden the *heter mechira* in 1889, in 1896 they permitted it with a few minor improvements. They did stipulate, however, that this *heter* is only a temporary accommodation and must be revisited each shemitta. In the shemitta of 1903, R

¹ Rishon Letzion, Mazkeret Batya, Nes Tziyona, Rosh Pina, Gedera and Yesod Hamaala.

² See Rav Yechezkel Michel Tukachinsky, *Sefer HaShmitta* pages 59-62 and Rav Shlomo Yosef Zevin, *L'Or HaHalacha* pg. 117, for a brief history of the *heter mechira*.

Yehoshua Leib had already passed away, but the Aderet nonetheless signed on to the *heter mechira*. This far-reaching conversation surrounding the *heter mechira* was debated by *gedolei Yisrael* and only picked up steam after the publication of Rav A.Y. HaKohen Kook's *Shabbat Haaretz* in 1910. In that classic work, Rav Kook explores every halachic and philosophical dimension of the *heter mechira*, and set the table for the *heter* as it is known today. Although the Ridbaz, then of Safed, argued vociferously against the *heter*, it was put into effect nonetheless. Since that time, the Chief Rabbinate has supported the *heter mechira* for each shemitta. However, large segments of Klal Yisrael, based largely on R Avraham Yeshaya Karelitz's arguments in *Sefer Chazon Ish* on *Shviit*, do not support the *heter*.

Our goal is to outline some of the issues that have been and continue to be hotly debated, and to analyze the positions of major poskim. It stands to reason that a topic of this scope cannot be completely covered in a single article. We will therefore limit ourselves to an overview of this rich and important halachic topic.

Yesh Kinyan

The basis of the *heter mechira* is the Gemara in Gittin:

Raba said: Even though an acquisition of land by a non-Jew in Israel does not remove the obligation of tithing . . . it is effective to permit the non-Jew to dig pits, shrubbery and caves . . . R Elazar says: Even though an acquisition of land by a non-Jew in Israel is effective in removing the obligation of tithing . . . it is not effective to permit the non-Jew to dig pits, shrubbery and caves. . .

Gittin 47a

אמר רבה: אע"פ שאין קנין לעובד כוכבים בארץ ישראל להפקיע מידי מעשר, שנאמר: כי לי הארץ, לי קדושת הארץ, אבל יש קנין לעובד כוכבים בא"י לחפור בה בורות שיחין ומערות, שנאמר: השמים שמים לה' והארץ נתן לבני אדם; ור"א אומר: אע"פ שיש קנין לעובד כוכבים בא"י להפקיע מידי מעשר, שנאמר: דגנך, ולא דגן עובד כוכבים, אבל אין קנין לעובד כוכבים בא"י לחפור בה בורות שיחין ומערות, שנאמר: לה' הארץ.
גיטין מז.

Raba believes that the acquisition of land in Eretz Yisrael by a non-Jew does not serve to exempt the produce from an obligation to tithe. However R Elazar disagrees. He maintains that acquisition of land by a non-Jew does exempt the produce from the obligations of *maasrot*. Although at first glance, this Gemara supports the possibility of sale of the land to circumvent the shemitta laws, upon further reflection, this source presents difficulties for the *heter mechira*. The Gemara discusses only tithing and does not address other *mitzvot hateluyot baaretz* such as *orlah* (the prohibition against eating fruit of a tree in its first three years), *kilaei hakerem* (the prohibition against planting grapes and other produce together), and most important for us, shemitta. This has led some to suggest that *yesh kinyan* (the sale is effective) only exempts one from those *mitzvot hateluyot baaretz* that are primarily positive commands. *Orlah* and *kilaei hakerem* are fundamentally *lavin* (negative commandments), and non-Jewish ownership will not affect the obligation. If this analysis is correct, the question as to whether shemitta is fundamentally a *mitzvah* or fundamentally an *issur* (prohibition) reigns supreme. The Chazon Ish raised this objection to *heter mechira*. However, as we will see, this was far from his strongest objection.³

³ See *Chazon Ish, Shemitta* 1:3.

There are a number of other reasons to question the application of *yesh kinyan l'Akum* to shemitta. The most basic question stems from the fact that halacha sides with the opinion that *ain kinyan* (a sale is not effective); in fact the acquisition of land by a non-Jew does not remove produce from obligations that inhere in the Land of Israel. The Rambam (*Hilchot Terumot* 1:10) follows the position of Raba that sale of the land to a non-Jew does not remove the obligation to tithe. Although at first glance this question seems insurmountable, upon careful review of the *sugya* and the halachot of shemitta we can understand why *heter mechira* has a firm basis in halacha.

Kesef Mishne (*Shemitta V'yovel* 4:29) understands that when Rambam decided *ain kinyan*, he was referring to a case where the land was repurchased by a Jew. However, so long as the land remains in the possession of a non-Jew, all would agree that *yesh kinyan*. Although *Kesef Mishne's* approach justifies reliance on the *heter mechira*, it must be noted that there are many who disagree with the *Kesef Mishne*.⁴

The most commonly accepted view to support *heter mechira*, emerges from the Gemara itself. The Gemara notes that only in Eretz Yisrael do we assume that *ain kinyan*. In Surya (the area roughly equivalent to modern Syria, that was not conquered by the totality of the Jewish people but rather only by David HaMelech for his personal purposes – see *Gittin* 8a, and the comments of Rashi and Maharam Schiff there) however, the Gemara notes that all agree *yesh kinyan*. Since the sanctity of Surya is rabbinic in nature, even those who ordinarily maintain that *ain kinyan* agree that in Surya *yesh kinyan*. If we can argue either that the sanctity of Eretz Yisrael in our times is completely rabbinic, or that for purposes of shemitta the sanctity of the land is rabbinic, then there would be grounds to justify the *heter mechira*. Both of these positions can be found in Rishonim. Rabbeinu Baruch, (*Sefer Hateruma, Hilchot Eretz Yisrael*), assumes that the sanctity of the land is completely rabbinic in our times. He follows those opinions in the Gemara that *kedusha shenia*, the sanctity of the land subsequent to the settlement of Ezra and Nechemiah, is nullified.⁵ This also seems to be the approach of the GRA (*Yore Deah* 331:6,28). It must be mentioned however that this seems to be a minority approach among Rishonim. Most Rishonim, including Rambam (*Terumot* 1:5), maintain that even after the destruction of the Second Temple the sanctity of the land is biblical in nature.

What has stronger medieval support is the notion that although the sanctity of Eretz Yisrael in its entirety is biblically mandated, nonetheless shemitta in our times is rabbinic. This approach has support from the Gemara.⁶ According to Rabbi Yehuda HaNasi, we compare shemitta to yovel. Since yovel is no longer observed in our times, shemitta is similarly no longer observed as a matter of Torah law.

⁴ Rav Moshe of Tirani (*Mabit*, volume 1:11) famously disputed the *Kesef Mishne's* understanding. This disagreement is particularly relevant for the shemitta status of foods grown on gentile land. *Kesef Mishne* declares that they do not possess *kedushat sheviit* (the sanctity of shemittah) but *Mabit* and *Maharit* contend that they do. See the summary of this issue in Rav Zevin, *L'Or HaHalacha* page 114 and Rav Yosef Zvi Rimon, *Shemitta* pages 288-291. It should be noted that the practice was traditionally in line with the view of *Kesef Mishne* that produce from a non-Jew's land was not treated with the sanctity of *sheviit*.

⁵ See among others *Chagiga* 3b. See also Rav Zevin's excellent summary of this issue in *L'or HaHalacha* pages 105-112.

⁶ *Gittin* 36b and *Moed Kattan* 2b.

This approach is subject to much criticism. There is a great deal of literature regarding the final halachic outcome of the Gemara that compares shemitta to yovel.⁷ In particular, the position of Rambam in this respect is subject to much debate.⁸ Moreover, if we follow the approach that the sanctity of the land is in full effect according to Torah law, but with respect to shemitta it is rabbinic, we have reason to question the entire comparison to Surya. Unlike Surya, where the sanctity of the land itself is rabbinic, Eretz Yisrael maintains its kedusha according to Torah law.⁹ Nevertheless the comparison of shemitta in our times after the destruction of the Second Temple with Surya, as mentioned in the Gemara, remains the strongest basis for *heter mechira*. This is the approach favored by Rav Kook in *Shabbat Haartzet, Mavo* chapter 11.¹⁰

Lo Techaneim

The major opposition to *heter mechira*, however, does not stem from the sugya of *yesh kinyan*, but from another sugya. The Gemara in *Avoda Zara* 20a teaches:

The verse states: do not show mercy to them (lo techaneim), do not allow them to settle (from the word chanaya) the land. Don't we require lo techaneim for a different law, since the Torah means don't show them favor (chen)? If so, the verse should have stated lo techunam. Why does it say lo techaneim? We see that it is teaching two laws. However, we still require this verse for a different law, since the Torah means don't give them a gratuitous gift (chinam). If so, the verse should have stated lo tachinam. Why does it say lo techaneim? We see that it is teaching all of the laws.

דאמר קרא: לא תחנם, לא תתן להם חנייה בקרקע. האי לא תחנם מיבעי ליה דהכי קאמר רחמנא: לא תתן להם חן! א"כ, לימא קרא לא תחונם, מאי לא תחנם? שמע מינה תרתין. ואכתי מיבעי ליה דהכי אמר רחמנא: לא תתן להם מתנת של חנם! אם כן, לימא קרא לא תחינם, מאי לא תחנם? שמע מינה כולהו.

We derive three distinct prohibitions relating to *akum* from *lo techaneim*: it is forbidden to sell them land in Eretz Yisrael; it is forbidden to bestow upon them additional favor; and it is forbidden to give them a gratuitous gift.

Based on the first of these prohibitions, the Netziv (*Meishiv Davar* volume 2 number 56) writes in a memorable formulation that those who want to circumvent shemitta with use of the *heter mechira* are: "ברח מהזאב ופגע בו ארי" —fleeing from a wolf only to encounter a lion"—they are

⁷ Ramban and Rosh posit that we follow Chachamim who disagree with Rebbi and maintain that *sheviit* in our times is biblical, however the majority of Rishonim follow Rebbi that shemitta is rabbinic.

⁸ *Kesef Mishne* 4:25 assumes that *sheviit* is biblical according to Rambam, but his position cannot be squared with the text of Rambam found in the Frankel edition, see Rav Rimon page 284.

⁹ This was the argument of *Beit HaLevi* (volume 3 number 1). See the explanation of Rav Soloveitchik in *Shiurei HaRav* to Sanhedrin 26, and in Rabbi Menachem Genack, *Gan Shoshanim* number 57. Rav Kook rejects the analysis of *Beit HaLevi* in *Shabbat Haartzet, Mavo* chapter 11. Rav Soloveitchik (*Nefesh Harav* page 82) himself offered a different innovative reason to question the *heter mechira*. In his understanding, the Land of Israel is owned by all Jews. The individual owners therefore are not licensed to sell the land, which is not exclusively theirs. Hence any sale entered by an individual farmer would be invalid. See Rav Herschel Schachter, *Eretz HaTzvi* chapter 30 section three for a question on this analysis.

¹⁰ There are other suggestions made by Rav Kook as well. Perhaps in cases of great need such as this we can rely on the position of Raavad and *Baal HaMaor* that shemitta after the destruction of the Beit HaMikdash is a matter of stringency- *middat chasidut*. See *Shabbat Haartzet, Mavo* chapter 10 and *Chazon Ish Sheviit* 23:4.

striving to circumvent shemitta, which according to the majority of poskim is rabbinic, but end up encountering a Torah prohibition of *lo techaneim*, not selling land in Eretz Yisrael to non-Jews.

The *Chazon Ish* (*Sheviit* 24:4 s.v. *Ulefikach*) took this argument a step further. He maintains that because of the prohibition of *lo techaneim*, the very sale of the land, as it was traditionally put into practice, is not valid. The Gemara¹¹ teaches that *ain shaliach l'dvar aveira*—the halachic institution of agency was not established for the performance of a prohibited activity. Since the farmers appoint the Israeli Chief Rabbinate as their agents to sell land to a non-Jew—an activity that is prohibited according to Jewish law—it should follow that any ensuing sale is invalid based on the principle of *ain shaliach l'dvar aveira*.

However, there is ample ground to question both the Chazon Ish's application of *ain shaliach l'dvar aveira* and the very understanding of the Netziv, that contemporary selling of the land to a non-Jew would be a violation of *lo techaneim*.

The principle of *ain shaliach ledevar aveira* is based on the notion of *divrei harav vedivrei hatalmid divrei mi shom'im*—we assume a lack of sincerity in the appointment of an agent to carry out a prohibited act, since the agent should listen to the directive of G-d rather than the specific instructions he was given. It follows therefore that in a situation where the agent believes that there is no prohibition involved—as he relies on the opinions we will discuss below that *lo techaneim* does not apply in the case of *heter mechira*—then the one who appoints the agent has a right to assume that the agent will carry out his directive and the *shelichut* is in effect.¹² Moreover, the language of the power of attorney delegating the Chief Rabbinate as agents to sell the land does not explicitly mention that they are to sell the land to non-Jews. As such, one can argue that the agency is not invalidated.¹³ Additionally, there are large schools of poskim who maintain that even in a case of *ain shaliach ledevar aveira*, the agency itself is not invalidated.¹⁴ This position is famously attributed to the *Netivot Hamishpat* (182:1), and the Chazon Ish's own brother in law, the Steipler Gaon, maintains in his work on *Bava Metzia* (16:8) that the simple explanation of the Gemara is that the agency is not invalidated. Moreover and perhaps most important, in shemitta of 2008 the land was sold by the farmers directly to the non-Jew, thus circumventing the problem of *ain shaliach ledevar aveira*.¹⁵

With respect to the Netziv's question, there are ample grounds to maintain that the sale as currently constituted does not run afoul of the prohibition of *lo techaneim*. Many maintain that in this case, where the sale is intended to benefit the yishuv, there is no prohibition.¹⁶ Rav Kook in his *teshuvot* (especially *Mishpat Kohen* number 58) offers many explanations why the sale does not present a problem of *lo techaneim*. He argues that the prohibition of *lo techaneim* only

¹¹ *Bava Metzia* 10b.

¹² See *Sema Choshen Mishpat* 182:2. See also Rav Avraham Sherman's article in *Torah She'beal Peh* volume 35 page 92.

¹³ See *Mishne Lemelech Geneiva* chapter 3 number 6.

¹⁴ See *Tosafot Bava Metzia* 10b sv *D'amar*.

¹⁵ See Rav Yosef Zvi Rimon, *Shemitta* page 299.

¹⁶ This explanation was put forward by R' Yehoshua of Kutna in his *Yeshuot Molcho YD*, number 55. See also Rav Yechiel Mechel Tukachinsky, in his *Sefer Hashemitta* page 108 who questions this approach.

extends to those nations who are idolatrous, not to today's Moslems. He further argues that a temporary sale, such as the way it is currently done, does not present a problem. Rav Zevin (*L'Or Ha'Halacha* 124) notes that it was this mechanism that was invoked in the *Teshuvot Shemen HaMaor*, as the basis for the pre-modern *heter mechira*. Finally, Rav Kook (*Shabbat Haaretz, Mavo* chapter 12) cites a member of his bet din, R Zalman Shach, who inferred from the Rambam (*Avoda Zara* 10:4) that the prohibition of *lo techaneim* only applies to giving a non-Jew his or her original foothold in the Land of Israel. Once the non-Jew already owns land there is no prohibition against giving him additional land.¹⁷

Gemirat Daat

There is one final obstacle that the *Chazon Ish* (*Bava Kamma* 10:9) raised against the *heter mechira*. The entire sale seems to be a sham. The sale is not registered in the land registry and as such runs afoul of the *dina demalchuta* (the law of the land). Moreover, there is a lack of the requisite *gemirat daat*, seriousness, needed for the sale to take effect. The farmers do not intend for the sale to be genuine and as such one can argue that the entire *heter mechira* is invalid.

It is worth noting that in 1979 the Knesset passed legislation that sale of land to circumvent the shemita prohibitions need not be registered with the land registry.¹⁸ With respect to the lack of seriousness needed for the sale to take place, this issue was already hotly debated with respect to the other *heter mechira*, sale of chametz to a non-Jew to circumvent the prohibition of Jewish-owned chametz after Pesach. In that context many poskim maintain that although the seller may lack the requisite seriousness, since the sale is binding and enforceable as a matter of law, it is valid. In our case, there are additional reasons to assume that the sale has the requisite *gemirat daat*. The contracts drawn up are fully binding legal documents. One may not sign a valid document and subsequently contend that he or she lacked the requisite *daat* to do so.¹⁹

As we have seen, all the questions and challenges to *heter mechira* can be addressed. Nevertheless Rav Soloveitchik cautioned those who reside outside of Israel not to rely on it. In fact, the policy of the OU has been not to rely on the *heter*. Those who reside in Israel have firm basis to rely on the *heter* as we mentioned. Certainly when not relying on the *heter* involves the purchase of fruit from avowed enemies of the Jewish people and State, there is strong reason to prefer reliance on the *heter*.²⁰ However Rav Soloveitchik cautioned that those who reside outside of Israel and do not confront the same pressing needs should not get involved in what remains a debated halachic enterprise.²¹

¹⁷ It is worth noting that the *Chazon Ish* (*Sheviit* 24:1) deemed this interpretation as acting frivolously with a Torah prohibition.

¹⁸ See Rav Rimmon page 302.

¹⁹ See Rav Rimmon page 303 for sources and discussion of this.

²⁰ See Rav Rimmon pages 380-382.

²¹ See Rav Herschel Schachter, *Divrei Harav* 240-241.