

אין אדם מקנה דבר שלא בא לעולם - בבא בתרא קמב.
Getting ahead of ourselves: Can I sell fruit that WILL grow in my orchard, or only fruit that has ALREADY grown?

Bava Batra 142a discusses an expectant father's decision to transfer ownership over some of his possessions to his unborn child. This opens up a question that shows up throughout Shas, namely whether one can actually transfer ownership over items that do not yet exist (e.g., the fruit that WILL grow from a tree that haven't grown yet) or transfer ownership to people who do not yet fully exist (e.g., a baby in utero)!

Comments? Questions? Email dinanddaf@gmail.com

1. בבא בתרא קמב. The acquirer does not fully exist.

דאמר רב נחמן: המזכה לעובר – לא קנה. לקשתלד – קנה. ורב הונא אמר: אף לקשתלד – לא קנה. ורב ששת אמר: אחד זה ואחד זה קנה.

The Gemara clarifies: As Rav Nahman says: With regard to one who transfers ownership of an item to a fetus, the fetus does not acquire it. But if he says that the transfer of ownership of the item should take effect when she gives birth, the fetus acquires it. And Rav Huna says: Even if he says that the transfer of ownership of the item should take effect when she gives birth, the fetus does not acquire it, because the fetus did not exist in the world when he transferred ownership. And Rav Sheshet says: In both this case and that case, the fetus acquires the item.

2. יבמות צג. The items do not yet exist.

דאיתמר: המוכר פירות דקל לחברו, אמר רב הונא: עד שלא באו לעולם – יכול לחזור בו. משבאו לעולם – אין יכול לחזור בו.

As it was stated: With regard to one who sells the fruit of a palm tree to another before the fruit has grown, Rav Huna said: Until the fruit has come into the world, he can retract the sale, as it has yet to take effect. However, after the fruit has come into the world, he can no longer retract, despite the fact the fruit had not yet sprouted when he made the acquisition.

ורב נחמן אמר: אף משבאו לעולם – יכול לחזור בו. אמר רב נחמן: מדינא דאי שמיט ואכיל – לא מפקינן מיניה. And Rav Nahman said: Even after they have come into the world he can retract, as the acquisition was defective from the outset. He maintains that one cannot transfer ownership of an entity that does not yet exist. Rav Nahman said: Even so, I concede that if the buyer seizes the fruit and consumes it, the court does not remove them from him, because despite the faulty acquisition he was promised a sale of fruit.

3. משנה קידושין ג: The situation does not yet exist.

...האומר לאשה: "הרי את מקודשת לי לאחר שאתגיר", או "לאחר שתתגירי", "לאחר שאשתחרר", או "לאחר שתשתחררי", "לאחר שימות בעליך", או "לאחר שתמות אחותיך", "לאחר שיחלוץ לך יבמיה" – אינה מקודשת...
מקודשת...

With regard to one who says to a woman: You are hereby betrothed to me after I convert, or: After you convert, or if he was a Canaanite slave and says: After I am emancipated, or if she was a Canaanite maidservant and he says: After you are emancipated, or if he says to a married woman: After your husband dies, or to his wife's sister: After your sister dies, or if he says to a woman awaiting levirate marriage or *ḥalitza* from a brother-in-law [*yavam*], who in the opinion of this *tanna* cannot be betrothed by another man: After your *yavam* performs *ḥalitza* for you, in all these cases she is not betrothed. Since he cannot betroth her at the present time, his attempt at betrothal is ineffective.

And similarly, with regard to one who says to another: If your wife gives birth to a female the child is hereby betrothed to me, even if she becomes pregnant, or is pregnant but her pregnancy is not known, if she gives birth to a girl, that child is not betrothed to him. But if he said this when the wife of the other man was pregnant and her fetus was discernible at the time, i.e., her pregnancy was known, his statement is upheld, and therefore if she gives birth to a girl, the child is betrothed to him.

4. קידושין סב:-סג.

אמר אביי: רבי אליעזר בן יעקב, ורבי, ורבי מאיר כוליהו סבירא להו – אדם מקנה דבר שלא בא לעולם... Abaye says: Rabbi Eliezer ben Ya'akov, and Rabbi Yehuda HaNasi, and Rabbi Meir all hold the following principle: A person can transfer an entity that has not yet come into the world. That is, one can perform an act of acquisition for an item that is not yet in existence...

רבי מאיר, דתניא: האומר לאשה: "הרי את מקודשת לי לאחר שאתגייר", "לאחר שתתגיירי", "לאחר שאשתחרר", "לאחר שתשתחררי", "לאחר שימות בעלך", "לאחר שתמות אחותך", "לאחר שיחלוץ לך יבמך" – אינה מקודשת. רבי מאיר אומר: מקודשת...

Rabbi Meir also holds that one can transfer an entity that has not yet come into the world, as it is taught in a *baraita*: With regard to one who says to a woman: You are hereby betrothed to me after I convert, or: After you convert, or: After I am emancipated, or: After you are emancipated, or: After your husband dies, or: After your sister dies, or: After your *yavam* performs *ḥalitza* for you, she is not betrothed. Rabbi Meir disagrees and says: She is betrothed...

5. רמב"ם הלכות מכירה כב:א

אין אדם מקנה דבר שלא בא לעולם. בין במקר בין במתנה בין במתנת שכ"ב מרע. כיצד. מה שתוציא שדה זו מכור לך. מה שתוציא אילן זה נתון לך. תנו מה שתלד בהמה זו לפלוני. לא קנה כלום. וכן כל כיוצא בזה: A person cannot transfer ownership over an article that has not yet come into existence. This applies with regard to a sale, with regard to a present or with regard to the disposition of an oral will.

What is implied? If a person states: "What my field will produce is sold to you," "What this tree will grow is given to you," "Give so and so the offspring that this animal bears," the recipient does not acquire anything. Similar principles apply in all analogous situations.

Why?

אין סמיכות דעת

6. נמוקי יוסף (רב יוסף חביבא) בבא מציעא סו:

לא מהני משום דלא סמכא דעתיה

This is ineffective because the (recipient) does not rely on this transaction actually happening

7. בראשית כה:לג

וַיֹּאמֶר יַעֲקֹב הַשְׁבַּע לִי כִּי־אֶתְּבָרְכְּ וַיִּשָּׁבַע לוֹ וַיִּמְכֹּר אֶת־בְּכֹרְתּוֹ לְיַעֲקֹב:

But Jacob said, "Swear to me first." So he swore to him, and sold his birthright to Jacob.

8. נציב (רב נפתלי צבי יהודה ברלין) העמק דבר בראשית כה:לג

השבעה לי כיום. באשר בכורה הוא באמת דבר שלא בא לעולם. וא"א למכור ע"כ הוסיף לו שישבע שלא יחזור במכירה :

Swear to me today: given that the firstborn right is something that does not yet exist and therefore cannot be sold, hence he added that Esav should take an oath not to renege on the sale.

אין בעלות ...It isn't mine yet

9. רמב"ם הלכות מכירה כב:ה

דְּבַר שֶׁאֵין בְּרִשְׁתּוֹ שֶׁל מַקְנֶה אֵינוֹ נִקְנָה. וְהָרִי הוּא כְּדֶבֶר שֶׁלֹּא בָּא לְעוֹלָם. כִּי־צִד. מֶה שֶׁאֵירֶשׁ מֵאֲבָא מְכֹר לָךְ. מֶה שֶׁתַּעֲלֶה מִצּוּדְתִּי מִן הַיָּם נִתֵּן לָךְ. שְׂדֵה זֶה לְכַשְׁאֲקָתָהּ קִנְיָהּ לָךְ. לֹא קֵנָה קְלוּם. וְכֵן כָּל כִּיּוֹצֵא בְּזֶה:

An entity that is not in the possession of the seller cannot be acquired; it is like an entity that has not come into existence.

What is implied? When a seller says: "What I will inherit from my father is sold to you," "What my net will bring up from the sea is sold to you," or "When I purchase this field, it is sold to you," the purchaser does not acquire anything. Similar principles apply in all analogous situations.

אין על מה שיחול הקנין

10. ספר עיר שושן מאת הלבוש (ר' מרדכי יפה) חושן משפט רט:ד

שאין כאן דבר שיחול עליו קנין...

ובפירות נמי דוקא כשקנה אותם קודם שחנטו אבל לאחר שחנטו מיקרו בא' לעולם וקנה... אבל אם מכר האילן לפירותיו...קנה מיד גוף האילן לפירותיו...ואין אחד מהם יכול לחזור בו

11. ר"ן נדרים כט. (ד"ה וכתב הרשב"א - מתחיל בנדרים כח:)

ואף הרשב"א ז"ל היה חוכך בדינו לומר דאין דין זה אלא במקדיש בלבד משום דהקדש חל בקדושת פה ובאמירה בלחוד וה"ה לאומר יהא קרקע זה לעניים עד שאעלה לירושלים דאמירה כמסירה אבל במקנה לחבירו בעלמא לא דבמאי קני הא אפילו א"ל מעכשיו אי אפשר לו לקנות אלא בכסף בשטר ובחזקה וכסף או שטר או חזקה שנעשה על מכר זה או מתנה זו ראשונה כשחזר זה וקנה כבר כלתה קנייתן של אלו ולבסוף במה יקנה:

And though the Rashba disagreed saying that this ruling only applies to one who is consecrating an item only because hekdesh (=consecration) takes effect via speech only; the same would be the case if one said: "This land should belong to the poor until I ascend to Jerusalem," because in that case speech is like an actual handoff. But one who transfers ownership to another person generally, this (=i.e., saying, this is yours until I ascend to Jerusalem) does not work, because with what does the second party actually acquire the land? After all, even if the owner said "from now," the second party must acquire it through money, a contractor use of the land. And when money, contact, or use was done on this sale or on this gift originally, when someone went back and bought the land (from the second party), the original acquisition of the land through money, contract or use is gone. So with what will this second party (re-)acquire the land?