

# HALOCHOSCOPE

This question will be dealt with over the course of the next few weeks as a series. The issue is much more complex than meets the eye, and though it will be discussed in some detail, this should not be used as a personal *halachic* guide.

**(i) What arrangement, if any, should be made by a Jewish landlord, for the use of coin-operated machines by his tenants on *Shabbos*? (ii) In the same vein, if someone owns a vending machine, what, if anything, should he do about its use by gentiles on *Shabbos*? [We will use 'landlord' and 'vendor' interchangeably.]**

The issues:

- A) *Mekach Umemkar*, commercial activity on *Shabbos*
- B) *Sechar Shabbos*, earning money from activities done on *Shabbos*
- C) *Shvisas kailim*, requiring utensils to 'rest' from *melacha* on *Shabbos*
- D) *Sechar kailim*, profiting from use of one's utensils
- E) *Hashma'as kol*, intrusive, non-*Shabbos* sounds

## A) *Mekach Umemkar*

*Mekach umemkar*, literally, buying and selling, is forbidden on *Shabbos*. All commercial activity is included in this prohibition, including anything to do with one's business. This is not limited to situations where actual *melacha* will necessarily be violated by a party or his agents. In addition to the issues raised by the act of the violation, we need to address the issue of benefiting from profits of such violations, i.e., the profits of the forbidden commercial activity, whether they are a direct result of a transaction made on *Shabbos*, or of a process or part thereof that took place on *Shabbos*. This is grouped loosely under the categories of *maaseh Shabbos*, or acts done on *Shabbos*, and *sechar Shabbos*, profits of *Shabbos*.

In the view of most poskim, *mekach umemkar* is not forbidden Scripturally. In one view it is considered a prophetically instituted ordinance. It is alluded to in a passage in *Yeshayahu* [58] and in a passage in *Nechemia* [13]. In *Yeshayahu* the verse says [... if you honor *Shabbos* by refraining] *mimtzo cheftzecha vedaber davar*, from seeking your affairs and speaking mundane words. The prophet clearly assumes this to be conduct worthy of a reward. The opposite was condemned. It was institutionalized practice at that time. Prophetic institutions have more stringency than regular Rabbinic institutions. They are somewhere in between Scriptural *mitzvos* and Rabbinical institutions.

[The words of the Prophets are considered the Word of Hashem, relayed through His emissaries. As such, they have specific force to determine *halacha*, but not as additions to the Torah. The Prophets never added to the body of the Torah and *mitzvos*. They explained and were responsible for adding institutions, in their capacity as the rabbinic leaders. If Hashem then mentioned these institutions in the Prophecies He sent to the Jews, there is an inherent endorsement of the institutions. Thus, the institutions

mentioned by the 'Sofrim', writers of the Prophecies, have quasi-Scriptural significance.]

Another view maintains that the entire prohibition is Rabbinical. It was introduced as a precautionary measure to prevent writing. Records are written at the time of a transaction. *Kosaiv*, writing or making permanent impressions, is a *melacha* on *Shabbos*. In this view, the prohibition might have been instituted in the times of the Prophets, but does not have the power of a Prophetic institution. A prophet conveys the words of Hashem Himself, making it the equivalent of a *mitzvah* commanded directly by Hashem. A Rabbinic institution is created entirely by the Rabbis, for the reasons they see fit, with authority granted to them by Hashem in the Torah. [See Yeshaya 58:13-14, Nechemiah 13:15-22, Shabbos 19a 113a-b 116b 148a-151a 126b etc., Poskim. Tur Sh Ar OC 246 306 307, commentaries.]

### **Shaboson**

There is a view that it is forbidden Scripturally, as a positive *mitzvah* of *Shaboson*, to rest or desist. In this view, even things that do not involve *melacha* are forbidden. One should not be spending all day doing business. In a town with walls and an *eruv* one could load up his wares, buy and sell, and the entire day would pass no differently than a regular workday. For this reason the Torah gave the *mitzvah* of *Shaboson*. Some add that the terminology used by *Nechemiah* implies that the commercial activity would be considered Scriptural *chilul Shabbos*. References to a Rabbinic ordinance forbidding business on *Shabbos*, refer to occasional buying and selling. A fixed business open on *Shabbos* involves a violation of *Shaboson*. [See Emor 23:24, Ramban.]

### **Vedaber davar**

In addition to actual commercial activity, checking up on one's business and discussing a transaction, business or work, is forbidden. This is included in the words cited earlier from the passage in *Yeshaya*, *vedaber davar*. [See references above]

### **Maris Ayin**

Giving the appearance of *mekach umemkar* is also forbidden. Generally, *maris ayin*, the appearance of impropriety, is forbidden for one of two possible reasons. Either one may simply not bring suspicion upon himself, or there is concern that if this activity is allowed people might confuse it with the forbidden activity, thinking it is really permissible. One is forbidden to do something that might teach others a wrong lesson.

Usually, there is some discussion on whether this could apply to a Rabbinically ordained prohibition. It involves a precaution against a precaution. However, the Talmud forbids leading animals in a way that they are usually led to the market, even though one is not leading them there. Some commentaries explain, the usual distinction within *maris ayin* applies to cases where the appearance is of a Rabbinical ordinance independent of any other Scriptural prohibition. *Mekach umemkar* is forbidden on *Shabbos* due to a Scriptural *melacha* of *kosaiv*. Therefore, it is necessary to forbid *maris ayin* in order to protect the original cause. [See e.g. Shabbos 54a-b, Poskim. Tur Sh Ar OC 305:15, etc.]

### **[Chilul Hashem**

Due to the nature of business, the poskim enacted a kind of ban on relying on certain measures to circumvent the prohibition. For example, there is a way to make a partnership with a gentile and to keep a business open. In recent generations this threatened to become so prevalent that all the stores on the main high street were open. This created a *chilul Hashem*, desecration of Hashem's Name. Therefore, a ban of sorts was made by many Rabbanim on this kind of partnership. [See Halochoscope XII:10.]

### **Uvdin Dechol**

In addition to all the above reasons to forbid commerce specifically, there is another quasi-Scriptural dictum of a more general nature that should come into effect here. The Torah commands us to remember the *Shabbos* day to make it holy. The Talmud explains this in the simplest terms to mean that one should not do things on *Shabbos* the way he does them on every other day of the week. Running his business in the way it runs the rest of the week is certainly included in this. Some maintain that running a business in any form is considered non-*Shabbos* activity, even if it is done differently.

### **Kinyan, effectuating a transaction**

For a transaction to take effect in Jewish law, a proper *kinyan*, formal act of acquisition, must be made. It is likely that no proper transaction takes place in our case. The transaction involved is the payment made for the use of the machine, a form of rental, or *sechirus*. A *kinyan* involves the *maase*, formal act, and the *chalos*, effectuation. It is possible that in our case any such *kinyan* will lack one or the other of these, on the part of the landlord. For example, the landlord could state that he does not wish to gain possession of the money until after *Shabbos*. Nonetheless, for the prohibition of *mekach umemkar* on *Shabbos* to apply, the effectiveness of *kinyanim* is not necessary. Especially according to those who consider it a decree to prevent writing, there is no difference between actually processing the transaction and simply verbalizing the agreement. There is always the concern for writing. Therefore, even speaking about the sale is forbidden. In our case, the 'vendor' is not actually speaking about this 'sale'. Maybe this does not constitute the verbal side of *mekach umemkar*. Assuming that he has indeed thus avoided the basic personal violation, the issue is whether he is automatically violating the practical side by having a transaction process itself. Perhaps the restriction applies to transactions *per se* as well. In addition, even if the prohibition does not take on a life of its own but must pertain to its original reasons, maybe there is always such concern with writing etc. when using any automatic means to make the *kinyan*.

One issue that we can resolve is whether the transaction done in violation of *Shabbos* takes effect. If something is forbidden, we know that the activity is not considered a nonentity. Otherwise, how could one ever be held liable for doing it? Thus, the *maaseh* of doing a transaction on *Shabbos* definitely happens. This is what is forbidden to do. The question is whether the *chalos* also happens. The Talmud debates the issue of whether an activity forbidden by the Torah but done in violation is able to take effect. The poskim debate how to conclude based on the Talmudic discussion.

In our case, the issue would be whether one can later effectuate a *kinyan* that took place on *Shabbos*. Furthermore, are the parties bound by their acts? Assuming that the landlord arranged not to participate in the act of *kinyan* himself, by refusing to take possession of the money until after *Shabbos*, he still allows the tenant to use the machine. Thus, he is allowing part of the *maase kinyan* take place. In Torah law, both parties are needed to enact the *kinyan*. In our case, the landlord will be the *makneh*, consenting and causing the tenant to make his *kinyan*. Thus, both are participating in an act of *kinyan*. Assuming the landlord does not wish to cause the *chalos* at this point, the issues are: (i) whether he is liable for forbidden *Shabbos* activity where he did nothing himself, but his consent was needed for the *kinyan*, and (ii) whether their *kinyan* is binding. The seller can retract his consent until the buyer takes possession. Thus, when the gentile buyer or user goes through with his part, the vendor is finalizing his own part to it, albeit

automatically. Some reject this concern. The vendor gave his consent before *Shabbos*. All he 'does' on *Shabbos* is to refrain from retracting his consent. He needs no new positive intent. The poskim debate this second issue and some conclude that the *kinyan* is binding. Thus, we still have a serious issue here. The transaction is basically going through, either on or after *Shabbos*, based on activities done on *Shabbos*.

Furthermore, money is transferred. The buyer places coins into the machine, which belongs to the vendor. The buyer removes the item from the possession of the vendor, or uses the washer or dryer. This must be considered a straightforward transaction. As such it would clearly involve active *mekach umemkar*. If the buyer were a Jew it would also involve aiding another in sinning. In the case of a vending machine, there need not be any Scriptural *melacha* involved. Yet some actions of commerce do seem to be present.

To avoid violating the prohibition of *mekach umemkar*, the poskim consider suggesting certain conditions and provisions. In order to make the acquisition valid, the vendor must receive the money in his possession. One cannot be forced to make an acquisition. One need only stipulate before the item comes into his possession that he does not wish to make the acquisition. The manner of *kinyan* in this case is *chatzeir*, where one's domain acts in his behalf to effect the *kinyan*. One is allowed to stipulate that the *chatzeir* should not take possession for him. Therefore, the vendor could stipulate that he should not gain the money until after *Shabbos*.

There are a few problems with this method. First, the buyer did take possession of the item, unless one wishes to consider him stealing. Second, this really only resolves one aspect of *mekach umemkar*, profiting from *Shabbos* activity. The transaction did take place, and the vendor has done nothing to stop it. In fact, he is perfectly happy to let it happen, inasmuch as it gave the buyer what he wanted when he wanted it.

To avoid this, one could stipulate that the *chalos* of the transaction will be effective retroactive to *Erev Shabbos*, requiring only the *maaseh* of taking possession on *Shabbos*. As we have mentioned there is a question whether this is permitted, or even effective. Nonetheless, there is a way to avoid this problem as well. Rather than separating the *maaseh* from the *chalos*, one could stipulate that he wishes to do his entire part on *Erev Shabbos*. As we mentioned, a *kinyan* requires the active participation of the vendor. The vendor makes the *hakna'ah* on *Erev Shabbos*. [See e.g. Tesh. R.A.E. I:159.]

In the next issue we will explain this issue. ... to be continued

*On the Parsha ... Yosef said give me your livestock ... [he] gave them bread for horses ... Why should we die before your eyes, we and also our land? Acquire us and our land for bread. We and our land will be slaves to Par'oh ... [47:16-19] Why did they volunteer both themselves and the land at one time? Besides, if they would be slaves, they would be provided bread by their master anyhow! Actually, this is exactly what they had in mind. They simply asked that Par'oh acquire them as slaves, automatically acquiring their land, and then provide for them. However, to effect the *kinyan*, Yosef would need to give them something in return, as an exchange. With their acquisition of bread, they would be *makneh* themselves as slaves. Therefore they asked for bread, that would immediately revert to the possession of their new master.*

♠ In honor and in memory of my mother, Yitele bas R. Shimon a'h, Henriette Silver. ♣

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