

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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לז"נ האישה החשובה מרת מינדל בת ר' משולם זאב הארטשטיין ע"ה



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה



BHI HOTLINE

לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

BORROW AGAIN Yoni had borrowed a drill from Pesach, an acquaintance. After using it for about two weeks, he wanted to return it.

Yoni knocked on Pesach's door, but no one was home. He considered leaving the drill at the door but decided against that in case something should happen to it.

Yoni was about to head back home with the drill when he saw Yitz, Pesach's next-door neighbor, outside the house.

"Good afternoon, Yitz," Yoni said.

"Good afternoon to you," replied Yitz. "What brings you here?"

"I borrowed a drill from Pesach and came to return it," explained Yoni. "It seems that no one's home, though."

"Yes, I know," said Yitz. "Pesach told me that they would be away for the week. Can I help?"

"Could I leave you the drill to give to Pesach when he comes home?" asked Yoni.

"Certainly," replied Yitz. "We often accept packages for each other!"

Yoni gave the drill to Yitz. "Thanks a lot," he said. "Please let me know when you give it to Pesach."

The following day Yoni called Yitz. "It turns out that I need the drill for another few days. Can I come by and pick it up?"

"Did you ask Pesach whether you could borrow it again?" asked Yitz.

"I tried calling him but couldn't reach him," said Yoni. "What's the difference, though? He didn't limit how long I could use the drill."

"That's true," replied Yitz. "But once I have it, I don't know that I can give it away without his permission."

"What's the logic?" argued Yoni. "I could have kept the drill with me for another week, and Pesach wouldn't have been any the wiser!"

"I would like to check with Rabbi Dayan," insisted Yitz. He called Rabbi Dayan and asked:

Can I give the drill back to Yoni without explicit permission from Pesach?

"A person who borrows an item for an unspecified time may continue using it until the owner requests it back," explained Rabbi Dayan. "Therefore, had Yoni not given the drill to Yitz, he could have continued using it" (C.M. and Nesivos 341:1).

However, once Yitz received the drill he

DID YOU KNOW?

Non-competite agreements can be halachically non-binding if not set up properly.

Ask your Rav or email
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guidance.

THE LOST SEASON

Q: I bought, on credit, a shipment of suits for the summer season. My store had to remain closed during the coronavirus shutdown, and I barely sold any suits. Since sales on such merchandise are seasonal, the suits that are left will not sell once the next season's styles come in. I probably will not be able to sell many of these suits next summer, which means that I suffered a huge loss on this merchandise.

My supplier is insisting that I pay on the date we originally set for payment. I told him that he should either give me a discount on the merchandise, or I will return the merchandise as payment, since the Torah considers *shaveh kesef k'kesef* (items that have monetary value are equal to actual money).

He countered that our transaction was completed when he shipped the suits, and I can't return the merchandise to him for a full refund or demand a discount as payment.

Am I allowed to return the merchandise against his will?

A: Your supplier is correct in his assertion that your transaction was final when you acquired the merchandise and you cannot cancel or change it (see *Nesivos* 230:1). The question is whether your assumption that you can return the merchandise, in accordance with the principle of *shaveh kesef k'kesef*, is valid.

Halachah differentiates between various cases in which a person owes another person money, regarding whether he can pay with *shaveh kesef*.

A *mazik* (person who caused damage) is allowed to pay for damages with *shaveh kesef* (*Shulchan Aruch*, C.M. 419:1). An employer, on the other hand, may not pay his workers with *shaveh kesef*. Rather, he must sell his objects and pay the workers with money (*ibid.* 336:2). Rashi (*Bava Metzia* 118a, s.v. *Ein Shom'in Lo*) explains that since there is a prohibition of *lo salin s'charo* (not delaying payment), which connotes that the employer must



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repossessed it on behalf of Pesach, based on the concept of *zachin l'adam shelo b'fanav*.

In truth, when a guardian (*shomer*) gives an entrusted item to someone to bring to the owner, the guardian is not yet relieved of his responsibility and therefore can request that the person return the item to him. We do not necessarily apply *zachin l'adam*, since there is no clear benefit to the owner whether the item be in this one's hands or the other's. However, if the owner does not rely on the guardian, or if he is known to regularly trust the other person who received the item, it is a benefit for the owner to have the item in the trusted recipient's hands.

However, if a borrower gives money to a person to return to the lender, it is beneficial that it be in that person's hands, since then the money returns to the owner's possession and the person cannot return it to the borrower (C.M. 125:1-2; 293:4).

Similarly, presumably it is to the owner's benefit that a borrowed item be returned and no longer used, certainly if it is in the hand of a close neighbor.

"Thus, Yitz repossessed the drill for Pesach," concluded Rabbi Dayan. "For Yoni to retake it, would essentially be borrowing it again without explicit permission. Although Pesach already lent the drill to Yoni without a time limit, lending once does not automatically mean that he wants to lend it again. A person can only borrow from someone without permission if he is certain that the owner would allow borrowing it" (*Rama* 381:1; *Shach* 358:1; *Shulchan Aruch Harav, Hil. She'eilah* #8; *Pischei Choshen, Geneivah* 1:15[36], 7:2[4]).

Verdict: Once the drill was returned to a close neighbor, Yoni may retake it only if it is certain that Pesach would allow him to borrow it again.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

APOTROPUS #4
(FINANCIAL GUARDIAN)
Designating Terumah and Maaser

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח'י בת ר' שמואל חיים ע"ה

Q: Is a financial guardian (apotropus) authorized to designate terumah and maaser from the produce of minor orphans?

A: The *Mishnah* (*Gittin* 52a) teaches that an *apotropus* can tithe the orphans' produce.

However, the *Gemara* derives from the verse that an *apotropus* cannot tithe. It explains that an *apotropus* can tithe in order to feed the orphans, but not to store away for when they mature or to sell to others (C.M. 290:14).

In explaining this distinction, there is a dispute whether the *apotropus*'s authority is from the Torah (but the Sages restricted it when not for immediate use), or is only Rabbinic and relies on *hefker beis din hefker* to award the produce to the *apotropus* in order to allow tithing for the orphans' immediate use (*Ramban, Gittin* 52a; *Ketzos* 243:7).

Some differentiate between the authority of the *apotropus* to handle the orphans' financial matters, which is from the Torah (derived from the *apotropus* of the Tribes in dividing the Land), and his authority to tithe their fruit, which is only Rabbinic (*Ritva Gittin* 52a).



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render payment according to the original agreement, he must pay with actual money (see *Rashba* *ibid.* and *Pischei Teshuvah* 336:1 for additional reasons).

A borrower, too, must repay a loan with money (*Shulchan Aruch* 101:1), because he is required to return what he received, which was money.

Unlike an employer, however, if a borrower does not have money, he is not required to sell his possessions in order to pay the lender money (*ibid.* 101:2), because the lender realized at the time of the loan that there was a chance that the borrower might not have money to repay and he would have to repossess one of the borrower's belongings as payment (*Sma* 101:1).

The *poskim* debate whether this is true only for a loan, or whether it also applies to a debt incurred when a person purchased merchandise on credit.

The *Shulchan Aruch* (101:6) rules that in the case of a purchase, the buyer must sell his possessions in order to pay the supplier with money. A lender is primarily engaging in a *mitzvah* of *chesed* when he issues the loan, and he was therefore willing, from when he lent the money, to accept *shaveh kesef* as payment, whereas a seller sells his merchandise in order to earn monetary profit, so he is considered to have stipulated clearly that he is willing to accept only money in exchange for the goods.

Others argue that a loan and a sale are the same in this regard, and a buyer is permitted to pay with *shaveh kesef* if he doesn't have money, unless the seller specifically stipulated otherwise when they made the deal (*Tumim* *ibid.* 5. See *Beis Yosef; Paamonei Zahav*, and *Igros Moshe Yoreh De'ah* 1:77, which discusses a case in which the amount owed to the supplier was turned into a loan, and whether that makes it possible for payment to be made with *shaveh kesef*).

Returning to your question: If you have money, then you must definitely pay with money, and you may not return the merchandise to the supplier as *shaveh kesef*. If you don't have money, then according to the *Shulchan Aruch*, you are required to try to sell your belongings to pay your supplier with money (*Shu"t Beis Shlomo*, C.M. 59 in a comment, and *Shu"t Igros Moshe*, loc. cit., disagreeing with *Ketzos Hachoshen* 101:5, who rules that even according to the *Shulchan Aruch* you are allowed to return the exact merchandise purchased). The *Tumim* rules that you may pay the seller with any *shaveh kesef* according to its current market value.

We should point out, however, that you generally won't gain much by returning the merchandise, because it will only be valued at the price it can be sold for now (see commentators to *Shulchan Aruch* 109:3), which is far less than the originally agreed upon purchase price (see *Tosafos, B.K.* 9a, s.v. *Mishehechzik*).

In any case, a supplier (or lender) can always tell the buyer (or borrower) that he does not want *shaveh kesef* and would rather wait for payment in order to receive actual money (*Shulchan Aruch* 74:6 and 101:4).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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