

# BUSINESS WEEKLY



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

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## CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

### PAID FOR

Rafi planned on taking a summer course. He needed to purchase a required textbook.

Abie, who had taken that same course during the year, posted that he was selling the textbook secondhand.

"I'm interested in buying the textbook," Rafi said.

"I'm selling it for \$60," replied Abie.

"That's fine," Rafi said. "How can I pay you?"

"Just transfer me the money," said Abie.

"I'm away for two weeks," said Rafi, "so please hold the book for me."

The summer wore on, but Rafi never bothered to pick up the book. Most of the course was online, and when he needed the text, he borrowed it from another friend.

Toward the end of the summer, Abie called Rafi about the book.

"I'm sorry," Rafi apologized, "it never worked out for me to stop by and pick up the book."

"No problem," said Abie. "It's been sitting happily on the shelf."

"The truth is," said Rafi, "at this point I don't need the book so much. I'd rather just cancel the sale; return my money and keep the book. You can sell it to someone else who will take the course in the fall."

"What do you mean, cancel the sale?!" asked Abie. "You already paid for the book. I have no more use for it, either. If you want to sell it to someone else for the fall, that's your prerogative."

"Till I receive the book it's not mine," argued Rafi. "Although I already paid, it's still yours meanwhile, so I can ask for my money back. I'm strapped for cash, and while it may sound funny, the extra \$60 will make a big difference for me."

"I also need the money," replied Abie. "The \$60 was spent long ago and I see no reason to pull from elsewhere just because you were negligent in picking up the book."

The two turned to Rabbi Dayan and asked:

**"Can Rafi retract from purchasing the book and ask for his money back?"**

"There is a dispute in the *Gemara* (B.M. 47b) whether payment of money acquires movable items according to the Torah," replied Rabbi Dayan. "We rule that although it does, the Sages instituted that money does *not* finalize the transaction, but only a physical *kinyan* (act of acquisition), such as raising the book (*hagbahah*). This is to encourage the seller, even after receiving payment, to properly protect

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Ask your Rav or email  
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## BHI HOTLINE

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

### BOTTLE OF INTEREST

**Q:** One Friday night, Reuven suddenly realized that he didn't have wine for *Kiddush*. He knocked on his neighbor's door and asked to borrow a bottle of wine.

Is Reuven required to return a bottle of wine, or may he repay Shimon in cash for the bottle of wine?

What if the price has risen since the bottle was purchased – may Reuven return the same type of wine, or would that be a *ribbis* issue, since he is paying back something that is more valuable than what he borrowed? And what if he wants to pay with money and the price has changed – does he pay the price Shimon actually paid, or the current price?

Finally, if Shimon bought the bottle on sale, is Reuven obligated to pay him only the sale price, and if he would pay more it would be *ribbis*, or is he required to pay the normal market price for this bottle?

**A.** We will begin with the last question. The amount Shimon paid for a bottle is irrelevant; its value is determined by the average market price at the time it was borrowed, and that is the amount Reuven must pay.

Similarly, if someone damages someone else's object, there's no difference whether the item was purchased at a discount or received as a gift; the *mazik* (person who inflicted the damage) is required to pay whatever the object was worth at the time it was damaged (see issue #346, where we determine that a *mazik* is liable only for the object's value before the damage, not for a replacement).

In terms of the form of repayment, there is a significant difference between buying and borrowing items.

If someone buys something, he must pay for it with money (*Shulchan Aruch*, C.M. 101:6). Even if the seller agreed to accept an object as payment, it is not certain that the buyer must follow through and give him that object (see *Chavos Daas* 161:1 and *Nesivos* 203:7).



## CASE FILE

the item while in his hands, lest the buyer retract" (C.M. 198:1,5).

"However, *Chazal* censured one who retracted unilaterally after the item was paid for and pronounced upon him *Mi shepara*...: "The One Who punished the people of the generation of the Flood and of the generation of the *Pelaga* (Dispersion of Bavel), those of Sodom and Amora, and the Egyptians at the [Red] Sea, will punish one who does not uphold his word" (C.M. 204:1, 4).

"Moreover, even before payment, *Chazal* considered one who backed out after a firm verbal commitment as *mechusar amana* (untrustworthy). *Beis din* should dissuade the parties from retracting, and certainly if money was already paid" (*Pischei Choshen, Kinyanim* 2:[34]).

"Nonetheless, some *Acharonim* maintain that if the price changed significantly meanwhile, one who retracted after a verbal commitment alone would not be considered *mechusar amana*. If he already paid, though, he would still be subject to *Mi shepara*. Therefore, Rafi should not retract and demand his money back and would be subject to *Mi shepara* if he did" (Rama 204:11; *Erech Shai* 204:11).

"However, in a different case, where circumstances changed and made the transaction superfluous, such as if the buyer inherited a similar item, or if the clear, intended purpose of the purchase never materialized some maintain that there is no *Mi shepara*," concluded Rabbi Dayan. "Thus, if Rafi had received another textbook for free, or the course was canceled, he could retract without being subject to *Mi shepara*" (see Chasam Sofer, C.M. #102; *Shevet Halevi* 4:206, 7:236; *Pischei Choshen, Kinyanim* 1:[5], 2:[35]).

**Verdict: A person who paid for an item should not retract and is subject to *Mi shepara* if does retract, unless there was a clear, justifying change in circumstances that made the purchase superfluous.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #23  
(Bordering Property)  
Building and Planting

לע"נ ר' יחיאל מיכל ב"ר חיים זוג' חי' בת ר' שמואל חיים ע"ה

**Q: A developer bought a plot of land to build a house. Can the neighboring farmer claim *bar-metzra* rights?**

A: Although *Chazal* awarded the *bar-metzra* rights, in accordance with what is "fair and good," if the buyer wants to build on the land, whereas the *bar-metzra* wants to plant seeds, the *bar-metzra* cannot take the property from the buyer, since building is more durable and "good" for society. However, if the *bar-metzra* wants to plant fruit trees, which are also durable, he is granted rights (C.M. 175:26; *Sma* 175:43; *Aruch Hashulchan* 175:55).

Some write that trees, which are rooted in the ground, are considered more durable than houses (this is questionable nowadays), so that if the buyer wants to plant trees and *bar-metzra* wants to build, he cannot take the property. Others maintain that since both are durable, the *bar-metzra* retains his rights (*Sma* 175:44; *Taz* 175:26).

Similarly, some write that a stone house has preference over a wooden one, while others do not differentiate (*Pischei Choshen, Shutfim* 11:46[106]).



## BHI HOTLINE

When someone borrows something, on the other hand, he must pay back whatever he borrowed. If he borrowed money, he must return money (*Shulchan Aruch* 101:1 with *Sma* 1). In our case, since he borrowed a bottle of wine, he must return a bottle of wine, if that's what his neighbor wants (*Rivash* 396; *Machaneh Efraim, Ribbis* 25; *Chavos Daas*, loc. cit.; *Nesivos* 107:4. Cf. *Chazon Ish, Yoreh De'ah* 72:3). His obligation is to return the bottle of wine, not the monetary value of the wine at the time he borrowed it.

Therefore, if the bottle of wine now costs less, the borrower is required to return either a bottle of wine, or the current price of the wine, if his neighbor agrees to accept money. Paying the original price would be a problem of *ribbis* (*Bris Yehudah*, ch. 17, fn. 25).

If the price of the wine has increased, the borrower should really be required to pay back a bottle of wine, since that is what he borrowed. But there is a form of *ribbis d'Rabbanan* that we must address in this context.

*Chazal* ordained that we are not allowed to borrow *peros* (literally, fruit, but this prohibition includes any object other than money), even if the borrower pledges to return the same number or volume of fruit that he borrowed. The reason for this prohibition is that *Chazal* were concerned that the price of the commodity would rise between the time of the loan and the time of repayment, in which case the borrower would return something of greater value than what he borrowed.

Although this is not a true prohibition of *ribbis*, since he is obligated to return the item he borrowed, not its value, *Chazal* enacted this prohibition because this type of transaction looks like *ribbis* (*mechezi k'ribbis*). This prohibition is called *se'ah b'se'ah*, meaning that the person borrowed a *se'ah* (a measure used in the time of *Chazal*, similar to the "bushel" used nowadays) and pledged to return a *se'ah* (*Yoreh De'ah* 162:1).

In certain cases, *Chazal* were lenient with their prohibition. The leniency that applies to our discussion is that *Chazal* allowed loans of *se'ah b'sa'ah* once the market price has been set (*ibid.* 162:3). Since the fruit were readily available for purchase before the rise in the market price, we view it as though the borrower already bought the fruit for the lender at the lower price, and the increase in value occurred in the lender's possession, so there is no problem of *ribbis*.

Assuming that the bottle of wine borrowed is not of a rare variety, but is readily available in stores and its price doesn't fluctuate much, its price is considered as though it was set, and there is no issue of *ribbis*.

Therefore, not only may the borrower return a bottle of wine even though he paid more than his neighbor did, but even if the neighbor agrees to accept money as payment, the borrower may pay the current price even though it's more than his neighbor paid (*Shulchan Aruch Harav, Dinei Ribbis* 30; *Chavos Daas* 163:5).

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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