

# BUSINESS WEEKLY



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

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



## CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

## BOTHERSOME SMOKE

Mr. Simon had made a bonfire on Lag Ba'Omer in his backyard for many years. As Lag Ba'Omer drew near again, Mr. Simon piled wood in his yard for this year's bonfire. His neighbor, Mr. Wasser, who had moved in a year ago,

approached Mr. Simon

"I remember that you made a bonfire on Lag Ba'Omer last year," Mr. Wasser said. "It seems that you're planning on making a bonfire again."

"Of course I'm planning to!" said Mr. Simon. "I've made one for years, long before you moved in. Many people from the neighborhood join. We have songs and inspirational *divrei Torah* – and also some food. You're welcome to join!"

"That wasn't exactly where I was heading..." said Mr. Wasser.

"What do you mean?" asked Mr. Simon.

"Last year, when you made the bonfire, the smoke wafted heavily toward us," said Mr. Wasser.

"I found it quite intolerable!"

"I'm sorry about that," said Mr. Simon. "It's a yearly event, though. If the smoke bothers you, please shut your windows for the night."

"Shutting the windows helped somewhat, but not enough," said Mr. Wasser. "I understand that you want to honor Rabi Shimon bar Yochai – but it should not be at other people's expense! I was hoping that you would move the bonfire somewhere else!"

"Where would you like me to move it?!" asked Mr. Simon. "I've been making the bonfire in this spot year after year! I don't think that it's any fairer to the other neighbors to move the bonfire near them!"

"I believe that it's in my rights to protest bothersome smoke," said Mr. Wasser, "even if you've been doing this for years. If need be, I'll take this up with *beis din*!"

"I don't see how you can protest now," said Mr. Simon.

The two came before Rabbi Dayan and asked:

**"Can Mr. Wasser protest the bonfire because of the smoke?"**

"The *Gemara* (B.B. 23a) teaches that there is no *chazakah* – established right – for smoke, because it is considered intolerable to most people," replied Rabbi Dayan. "Therefore, even



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

## A VALID DECEPTION?

**Q:** Reuven agreed to sell Shimon a valuable diamond but only on condition that he would pay him up front.

When Shimon paid in full for the diamond, Reuven told him that he had not actually sold him the diamond; rather, he was seizing the money Shimon had given him to settle debts from previous transactions.

Does Shimon own the diamond?

**A:** The *poskim* write that if someone is owed money, and he decides to deceive the debtor into paying him by offering to sell him a property for cash (in instances in which cash would serve as a *kinyan* — see C.M. 190), and then claiming, once the debtor gives him the money, that he never intended to sell the property, the *halachah* is that since *devarim shebalev einam devarim* (thoughts that are not expressed verbally do not have halachic validity), the sale is binding and the property is transferred to the buyer. The debtor/buyer is entitled to reclaim his money, and if the creditor/seller no longer has the money, the debtor may collect from the property (ibid. 190:6, with *Sma* 7).

The *halachah* is similar if the debtor is deceived into giving his creditor money for *metaltelin* (objects). In transactions involving objects, money changing hands is *not* a final *kinyan*, but if one of the parties wants to renege, he must accept a *mi shepara* curse in *beis din* (ibid. 204:1). If he does not want to accept that curse upon himself, he must follow through on the transaction.

But although the *kinyan* is binding only in terms of obligating a party who wants to renege to accept a curse upon himself, the creditor is still entitled to hold onto the object he "sold" as collateral for the previous loan so that the borrower cannot continue avoiding payment (ibid. 204:11, with *Sma* loc. cit.).

Some *poskim* write that if the creditor informs two witnesses that he is about to engage his debtor in a transaction, but only for the purpose of forcing him to repay his debt, he is then halachically entitled to void the transaction after it takes place, and keep the money (see *Shach* 205:4 with *Chiddushei Rabbi Akiva Eiger*;

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if someone has been producing smoke for years, the neighbor can still protest" (C.M. 155:36).

"However, Tosafos (s.v. *Bekutra*) and other *Rishonim* qualify that this applies only to smoke such as from a furnace, which is consistent, but there is a *chazakah* for occasional smoke" (C.M. 155:37).

"Regarding occasional smoke that is *not yet* established, the *Rishonim* dispute whether the neighbor can protest. *Tur* cites from *Ramah* that the neighbor can protest and prevent initially even occasional smoke; *Shulchan Aruch* rules accordingly.

"However, *Trumas Hadeshen* (#137) rules that the neighbor cannot protest occasional smoke, even if it is not yet established; *Rema* adopts this position. Some explain that although neighbors can protest other kinds of occasional damage, smoke does not entail actual monetary damage, only unpleasantness" (*Mishkan Shalom* 2:36:[116], citing *Even Hamishpat* 5752, 24:8).

"*Shach* (155:19) and many Sephardic *Acharonim* reject the position of the *Trumas Hadeshen* and *Rema*, while other Ashkenazic *Acharonim* accept the *Rema's* ruling" (*Shemesh Tzedakah*, C.M. #2; *Maharsham* 1:17).

"Thus, in this case, because Mr. Simon has been making a bonfire for years and has a *chazakah*, Mr. Wasser cannot protest now, since the smoke is only occasional. Without a *chazakah*, if Mr. Simon were first coming to make a bonfire, the issue would be subject to the dispute between the *Shulchan Aruch* and *Rema*. Sephardim would obviously follow the *Shulchan Aruch*, and Mr. Wasser could protest, whereas among Ashkenazim the issue is questionable.

"Even so," concluded Rabbi Dayan, "some suggest that the *Rema* was only lenient when the person makes the fire in his own property for living usage, but not in public property, even if for purposes of a *minhag*" (*Pischei Choshen, Nezikin* 13:19[45]).

**Verdict: Neighbors cannot protest occasional smoke that is already established. Shulchan Aruch, followed by Shach and Sephardic Acharonim, rules that they can protest before it is established, whereas Rema and other Ashkenazic Acharonim rule that they cannot.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

## MONEY MATTERS

Dayanim (Judges) #44

Enforcing the Ruling

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

### Q: Is beis din's ruling legally enforceable?

A: Typically, *beis din* will grant 30 days to make a payment, due according to its ruling. However, *beis din* can extend or shorten the time as it deems appropriate (C.M. 100:1).

From a halachic perspective, *beis din* can enforce its ruling with whatever power it has. In the past, when *beis din* had full legal power, this included issuing documents that empowered the plaintiff to possess or collect assets due him, or imposing *cherem* or *nidui* – communal isolation or excommunication – on a person who refused to pay (C.M. 19:3; 100:3).

Nowadays in most countries, *beis din* does not have the legal power to enforce its ruling. Its formal legal power is that of arbitration, based on the arbitration agreement signed by the litigants at the beginning of the process. To grant the arbitration award legal enforceability, it is necessary to present the award to the court to convert it into a legally enforceable ruling. Afterward, the award can be legally enforced in the normal legal manner.



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*Shaar Mishpat* 85:4; *Shu"t Beis Shlomo*, C.M. 60).

In addition, the *Acharonim* write that there are two instances in which a creditor is entitled to hold onto money a debtor paid him for a purchase to cover a previous debt, without actually giving the item that was supposed to be purchased.

Some *poskim* write that it is problematic for a creditor/seller to keep the money paid for an item without giving the item to the debtor/buyer only if the creditor offered to sell it. If, however, the debtor asked to buy it and the creditor accepted payment without uttering a word, he may then claim that he accepted the payment for the previous debt (*Ketzos* 190:5; see *Pischei Choshen, Kinyanim* ch. 3, fn. 68). Even if the creditor did offer to sell something, but he also mentioned the outstanding debt, he may claim that he accepted the payment for the debt, not for the sale (*Ketzos* *ibid.*).

Others write that if immediately (*toch kedei dibbur*) after accepting money from the debtor, he informed the debtor that he doesn't want to sell the item, he may void the sale and keep the money to settle the previous debt (*Nesivos Chiddushim* 190:9; and *Nesivos* 85:3) — either because a person may always invalidate a sale *toch kedei dibbur* (*Shulchan Aruch* 190:7 with *Ketzos* 7; cf. 6), or because reneging *toch kedei dibbur* proves that his intention all along was to extract payment for the previous debt, not to make a sale (*Aruch Hashulchan* 190:21).

Accordingly, since Reuven didn't inform witnesses that he intended to fake a sale in order to retrieve the money owed to him, his cancellation of the sale is generally not valid unless he mentioned the outstanding debt or canceled the sale immediately after accepting the money.

[Some write that although one generally cannot void a transaction based on *devarim shebalev*, if the transaction is valid only in terms of the reneging party having to accept a *mi shepara* curse, *devarim shebalev* are valid, and the creditor may keep the money to settle the outstanding debt without giving the debtor the object, and he does not have to accept a *mi shepara* (*Mishpat Shalom* 190:6; *Shu"t Shoel Umeishiv Revia'ah* 2:10, quoting his father). According to this opinion, if no other *kinyan* was made, Reuven may void the sale of the diamond and keep the money to settle the previous debt (see *Shu"t Imrei Yosher* 2:178). But other *poskim* (see *Mishpat Shalom* 201:2 and *Shu"t Maharash Engel* 7:111) write that nowadays, money does acquire objects under the rule of *situmta*. Therefore, it would be subject to the previous ruling.]

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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