מהדורת משפחת ברייטמן
BRAITMAN FAMILY EDITION

תמצית ערוך השולחן

TAMTZIS ARUCH HASHULCHAN

A Concise Summary of the Dinim of the Aruch HaShulchan

CHOSHEN MISHPAT · VOLUME II · SIMANIM 189–427

Mekach uMemkar ◆ Ona'ah ◆ Matanah ◆ Aveidah ◆ Nachalos
Pikadon ◆ Sechirus ◆ Po'alim ◆ Geneivah ◆ Gezeilah ◆ Nezikin
Chovel uMazik

Concise practical rulings, with source references and explanatory notes from the Pischei Teshuva and the Pischei Choshen

Kesser Shem Tov
PUBLISHING

Tamtzis Aruch HaShulchan — A Concise Summary of the Dinim of the Aruch HaShulchan
Choshen Mishpat, Volume II — Commerce, Acquisitions, Theft & Damages

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ISBN: 979-8-1871315-5-6

First edition
Version 1.3

Kesser Shem Tov Publishing
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הורינו היקרים



דבורה בת זוסיע ז״ל
דוב צבי בן יעקב הלוי ז״ל



משה אהרן ורעיתו פייגל ברייטמן

In everlasting memory of our dear parents
Devorah bas Zusya · Dov Tzvi ben Yaakov HaLevi

Dedicated by Moshe Aharon and Faigie Braitman



a defect while the seller says he already drew and saw and agreed, or one claims there was an unfulfilled condition and the other denies it — in all these, the one who seeks to extract bears the burden of proof. (AH §10)

If the claimant brings no proof, the one in possession swears a *heses* oath and is exempt; on a claim with partial admission or with one witness contradicting him, he swears a *Torah* oath. (AH §10)

The *beis din* must determine who is currently the possessor and who is the extractor, for the oath belongs to the possessor to swear and be exempt; he may reverse a *heses* oath onto his opponent, but a *Torah* oath he cannot reverse (*Siman* 87). (AH §10; Siman 87)

"I Sold a Field but Do Not Know to Whom"

One who says "I sold a field but do not know to whom," and one comes and says "I am the buyer" — he is believed. (AH §11; Rema)[156]

- Some hold the seller may impose an oath upon him; though one does not ordinarily swear on a *shema* claim, when he comes to extract, the possessor may impose an oath even on a *shema* claim. (AH §11; Sma)
- Some hold there is no place for such an oath, since the seller admits it is not his and there is now no one to contradict the claimant — for who would compel an oath? (AH §11; Taz)
- Many dispute this ruling entirely, holding he is not believed without proof, as in the *Yerushalmi* (*Kiddushin* ch. 3). (AH §11; Shach and Gra; Yerushalmi *Kiddushin*, ch. 3 halacha 7)
- If he has one witness, he is certainly believed. (AH §11; Even HaEzer, Siman 37)

223: Disputed Offspring and Disputed Fields in a Sale

Disputed Timing of an Animal's or Maidservant's Birth

If one exchanged a cow for a donkey — the donkey's owner acquiring the cow through *chalipin* (which requires no *meshichah*), while the cow remained in the seller's house — and the cow gave birth before it is known when: the seller claiming it was born before the buyer drew the donkey, and the buyer claiming it was born afterward — the burden of proof is on the buyer. (AH §1)

- The same applies to one who sold his maidservant for money, received the payment, said "I am selling you this maidservant," and she then gave birth, with a dispute over whether the birth preceded or followed receipt of payment. (AH §1)

This holds not only where the seller physically holds the animal and offspring, but even where they stand in a meadow, in a public domain, or in the possession of others, since the seller has the presumption of prior ownership (*chezkas mara kama*) and the buyer has no presumption at all — so the one seeking to extract must bring proof. (AH §1; Shach)[157]

Even if the buyer claims with certainty (*bari*) and the seller merely says "perhaps" (*shema*), we do not say *bari* prevails over *shema*, for the presumption of prior ownership prevails over a certain claim. (AH §1; *Bava Kamma* 46a)

If the buyer physically seized the cow with its offspring, or the maidservant with her offspring, then the seller must bring proof, since actual possession prevails over the presumption of prior ownership. (AH §1)

- This is so where both claim *bari* or both claim *shema*, and all the more so where the buyer claims *bari* and the seller *shema*. (AH §1)
- **But if the buyer claims *shema* and the seller claims *bari***, the buyer's possession does not avail him — even actual possession — for the seller's presumption is a strong one, whereas the buyer, uncertain even whether his possession is valid, cannot be awarded by it. (AH §1)
- Some of the great authorities hold that even the buyer's *shema* is aided by his actual possession, since he is at least in possession. (AH §1; *Tosafos*, *Bava Metzia* 100a)

The Rambam's View and the Oath

According to the Rambam, in this dispute — even with the cow standing in a meadow and the maidservant in an alleyway, and even where the seller says "I do not know" — they remain in the seller's presumption until the buyer brings proof. (AH §2; Rambam, Hilchos Mechirah, ch. 20)

If the buyer brings no proof, the seller swears while holding a sacred object regarding the cow's offspring; but for the maidservant's offspring he swears only a *heses* oath, since one does not swear a formal oath over slaves. (AH §2; Rambam, Hilchos Mechirah, ch. 20)

Where each says "I do not know" and the item is in neither one's possession, they divide it. (AH §2; Rambam, Hilchos Mechirah, ch. 20)

Our teachers, the authors of the *Shulchan Aruch*, cited both views and did not decide between them. (AH §2)

Where One Party Is Silent

If one says "it was born in my possession" and the other is silent, the claimant acquires the offspring, for silence is treated as admission — and this holds even where

Notes

156. see *Pischei Choshen*, *Kinyanim* 13:49, that the self-declared buyer is believed where the seller pleads ignorance.

157. see *Pischei Teshuva* 223, citing *Rabbi Akiva Eiger* (responsum §136), that even where there are conflicting sets of witnesses (*tarei u'trei*) on when the animal in the meadow gave birth, in a monetary matter we still leave it in the seller's *chezkas mara kama*.

the silent party is in possession, since he admitted to the other. (AH §3)

Silence is treated as admission only where the party ought to have known [the facts]; where he had no way of knowing, his silence is not deemed an admission. (AH §3; Yoreh De'ah, Siman 127)

- If he was silent and only later cried out, the law may follow that of *Siman* 138. (AH §3; Siman 138)

Dispute Over Which of Two Slaves or Fields Was Sold

Where one had two slaves, a large and a small one, or two fields, a large and a small one, and the buyer says "I bought the large one" while the seller says "you bought the small one" — the burden of proof is on the buyer. (AH §4)

If the buyer brings no proof, the seller swears a *heses* oath that he sold only the small one; there is no *Torah* oath here, even though he admits part. (AH §4; Siman 88)

If, however, there is an admission of part regarding movables that carries a *Torah* oath, he swears by extension (*gilgul*) also concerning the fields and the slaves. (AH §4)

- For example, the buyer claims a large field together with its sheaves, and the seller admits to a small field with fewer sheaves than claimed; or the buyer claims a large slave with a garment of twenty *amos*, and the seller admits to a small slave with an unsewn garment of ten *amos* — for otherwise they are two kinds and are not subordinate to the field or slave. (AH §4)

Where the Seller Is Silent or Uncertain in the Two-Item Case

If the buyer says "I bought the large one" and the seller is silent, the buyer acquires the large one — even where the seller is in possession — for silence is treated as admission. (AH §5)

If the seller says "I do not know," the buyer must bring proof, for we do not say *bari* prevails over *shema* to extract money. (AH §5)

If the buyer brings no proof, the seller swears a *heses* oath that he does not know, and gives him the small one. (AH §5)

- The seller may turn the oath back onto the buyer, who then swears and takes the large one, since any *heses* oath can be reversed. (AH §5)

Where there is a matter of a Torah oath between them — such as where the buyer claims two slaves with their garments, the seller admits to one and says of the second "I do not know" — since he cannot swear, he pays. (AH §5; Tur)

224: Doubt Arising in One's Domain

The Principle: Doubt Arising in One's Domain

Whenever a doubt [to one's detriment] arises while the item is in a person's domain, the burden of proof is on him — whether he is coming to collect or to retain money already in his hand. (AH §1; Kesuvos 76b)

This differs from the case where a buyer seized a cow that then gave birth [and the burden fell on the seller]: there the buyer's possession works to his benefit, so he retains it; here the possession is to his detriment, so his advantage lies in showing the defect did not occur in his domain — hence he must bring proof. (AH §1)

Exchanging a Cow for a Donkey

Where one exchanges a cow for a donkey and the donkey's owner drew the cow, but the cow's owner had not yet drawn the donkey when the donkey died, was stolen, or was lost, and it is unknown whether it died before or after the drawing of the cow — the burden of proof is on the cow's owner, since the donkey was acquired to him wherever it stands upon the donkey-owner's *meshichah* of the cow, and it is thus regarded as in his domain. (AH §1; Siman 195)

If he brings no proof, the seller [the donkey's owner] swears that he did not know of the donkey's death at the time the cow was drawn and that it was not [already] ill — such that there was no fraud — and is exempt; so ruled the Rema. (AH §1; Rema)

According to Rambam and the Rif, "domain" means the place where the donkey actually stands when the defect arises, and the owner of that place must bring proof, on the principle "where it is found, there it was." (AH §2; Rambam, Hilchos Mechirah, ch. 20)

- Accordingly, some say that if it died in a meadow or in another's domain, the cow's owner must bring proof. (AH §2; Sma)[158]

A Cow Found to Be a *Tereifah*

Where a needle is found in the thick wall of the second stomach having pierced a perforating hole, if a drop of blood is found on it, it is established that the animal became a *tereifah* before slaughter. (AH §3)

If the mouth of the wound had scarred over with a thin skin, it is established that it became a *tereifah* three days before slaughter; so if he slaughtered it within three days of purchase, it is known the defect arose in the seller's hands. (AH §3)

Notes

158. see *Pischei Teshuva* 224, citing the *Avodas HaGershuni* (*siman* 87), who applies this rule to a real-world grain-delivery dispute and holds that where the merchandise never had an established *chazakah* of the full amount, the buyer's *shema* claim cannot extract money from the seller.

If the wound had not scarred over, or he slaughtered after three days from purchase, it is a doubt as to when it became a *tereifah*, and the butcher [buyer] must bring proof that it became a *tereifah* before his purchase, since the doubt arose in his domain, on the principle "where it is found, there it was." (AH §3)[159]

If he brings no proof, he pays the price to the seller — even if he had not yet paid — and it is exacted from him and given to the seller. (AH §3)

It is a great rule regarding a found defect through which the buyer wishes to void the sale: in whatever domain it is found, he must bring proof, whether to collect or to retain. (AH §3)

If the drawing and slaughter were not in the butcher's domain but in another's domain or in a *simta*: according to the Rosh the butcher must bring proof, while according to Rambam, since the defect is not in his domain, he need not. (AH §3; Taz)

One must determine who is the one coming to collect: **if the buyer had not yet paid**, the animal's owner [seller] is the one seeking to collect, and the burden is on him. (AH §3; Siman 232:24)[160]

A Horse Seized by an Extortioner After Exchange

Where Reuven exchanged his horse for Shimon's wine — the wine was acquired to Reuven by the act of *chalipin* once Shimon drew the horse — and an extortioner then seized the horse from Shimon claiming it was stolen from him, bringing no proof: **if Reuven admits** the horse was stolen from the extortioner, it is a mistaken sale and the wine remains with Shimon. (AH §4)

But if Reuven does not admit it, we assume the extortioner is lying, and the wine must be given to Reuven, for his misfortune caused it. Reuven need not even swear, since one does not swear on a claim of uncertainty where there is no supporting indication. (AH §4; Gra)

- The extortioner's words, without any proof, are not considered a supporting indication, since he presumably lies. (AH §4)

225: Warranty and Liability for Mishap

The Seller's Warranty

A seller is liable under warranty (*achrayus*) when the property is seized from the buyer through the seller's own doing — for example, where the seller's creditor seized it for the debt. (AH §1)

This holds even where the warranty was not written into the deed, since warranty is [treated as] a scribal error — a person does not throw away his money for nothing. (AH §1)

One who sells land, a slave, or movables is liable under warranty. (AH §2) If someone extracts the purchase from the buyer on account of the seller, the buyer recovers his money from the seller, (AH §2) and also collects half the enhancement. (AH §2; Siman 115)

This applies even though the buyer did not stipulate it at the time of the sale, and even where the land was sold by deed with no mention of warranty, since warranty is [treated as] a scribal error. (AH §2)

This principle that warranty is [treated as] a scribal error applies to a *chalipin* [barter] transaction as well. (AH §2; *Ketzos* Siman 116)[161]

The Three Levels of Warranty

There are three grades of warranty in a sale, each higher than the last. (AH §1)

The lowest is warranty against himself — that the seller himself will not take the property back from the buyer. (AH §1; Siman 226)

Higher than that is warranty for what comes on his account — that the seller's creditor came and seized it for the debt. (AH §1)

Highest is general warranty — that a victim of theft came and seized it. (AH §1)

For all grades of warranty the seller is liable even in an unspecified [*stam*] sale. (AH §1)

When Warranty Is Specified

If he specified in the deed warranty only against himself, he is not liable for the higher grades, since by specifying this grade he showed he did not obligate himself further. (AH §1)

If he specified warranty for his creditor, he is all the more liable for warranty against himself, but he is not liable for general warranty. (AH §1)

If he specified general warranty, he is liable for all of them. (AH §1)

Some say that where he obligated himself for the creditor's warranty, he is all the more liable for warranty against theft where he himself stole it — but where he bought from a *ganav* he is not liable under that warranty. (AH §1; *Nesivos*)

Which Warranties Apply to Which Property

With land, all the grades of warranty we mentioned apply. (AH §2)

Notes

159. see *Pischei Teshuva* 224, who distinguishes the *tereifah*-needle case — where the animal has a verified *chazakah* so "where found there it was" applies — from goods lacking any such presumption.

160. see *Pischei Choshen*, *Mechirah* (*Kinyanim*) 13:15, on whether one who bought but left the item in the seller's domain is a *shomer chinam*, becoming a *shomer sachar* once he holds it back for his money.

161. see *Pischei Teshuva* 225:1, citing the *Tzemach Tzedek*, *Even HaEzras Ge'onim*, *Shevus Yaakov*, *Ketzos*, and *Bais Meir*, who dispute at length whether "*achrayus* is a scribal error" applies where two parties barter their houses with each other.

With movables, only warranty against theft applies, for a creditor does not seize movables from those who purchased from the debtor — even if he pledged movables together with land, and even if he made them an *apotiki*. (AH §2; Siman 60)

With slaves, the creditor collects only where they were made an *apotiki*. (AH §2; Siman 117)

Extraction by Legal Process Versus by Force

The seller is liable under warranty only where the claimant extracted the purchase from the buyer through a court — for example, the movables were stolen or robbed goods, or the land was robbed land, or the seller's creditor seized it, all established and carried out through *beis din*. (AH §3)

But if a coercer (*anas*) extracted the purchase from the buyer — even under a non-Jewish ruler's law or in non-Jewish courts — the seller is not liable under warranty. (AH §3)[162]

Even if the coercer claims this purchase was stolen from him, so long as he does not verify it through valid witnesses he is not believed; the presumption is that he is lying, and the buyer's luck [*mazal*] is what caused [the loss]. (AH §3)

Even if he does not take the whole purchase but leaves part of it — so that it appears he is not taking what is not his — he is still not believed, for we say he is being cunning so that they will believe that what he takes is his. (AH §3)

Payment Made Without a Court

Where the buyer paid the creditor without a court order, the seller need not repay him. (AH §3; Sma)

But a buyer who gave [the property] to the robbery victim may collect from the seller, since he could have gone to court and verified [the claim]. (AH §3; *Nesivos*)[163]

As for the creditor, *beis din* will not afterward issue a writ of seizure, since he already collected without their authorization. (AH §3)

Stipulating to Assume Liability for Mishap

If the buyer stipulated that the seller is liable for any mishap that befalls this land, then even a coercer robbing it on the seller's account — claiming the seller robbed it from him — obligates the seller to pay even where it is known to be false, since any monetary condition is binding. (AH §4)

For a mishap not on the seller's account, he is not liable unless he expressly specified that he obligates himself for every kind of mishap, even one not on his account. (AH §4)

Even where he specified "any mishap," he is liable only for a common [*shakhiach*] mishap, not for an uncommon [*lo shakhiach*] one. (AH §4)

Uncommon mishaps — such as the river that irrigated the field being cut off, or the river shifting to run through the field and turning it into a water-filled pond unfit for planting, or an earthquake destroying it — leave him exempt, since such mishaps did not enter the seller's mind when he stipulated liability. (AH §4)

So too for every monetary condition, we assess the intent of the one who stipulated as to what he stipulated. (AH §4)

- Sailors hired to bring sesame to a certain place, who stipulated liability for any mishap until arrival, were not liable when the river they were transporting it on was cut off, for the Sages ruled this an uncommon mishap, and they need not transport the sesame there by beast. (AH §4; *Gittin* 73a)

Only if he expressly specified that he obligates himself even for an uncommon mishap is he liable for whatever occurs. (AH §4)

Stipulating That There Be No Warranty

If the seller expressly stipulated that there be no warranty upon him, then even if it becomes known the property was robbed and the victim extracted it from the buyer, the seller is not liable — and all the more so if a creditor came and seized it, he returns nothing — since any monetary condition is binding, for he tells him, "You understood and accepted." (AH §5; Rambam)[164]

A Divided Warranty — Wine Cellar Case

One who sold a wine cellar and they stipulated that the seller bears warranty only if the barrel breaks or spills, while the buyer bears warranty only as to the taste — such as if it turns to vinegar — and then a mishap of libation [*nisukh*] befell it: the loss falls on the seller. (AH §6)

This is deduced from the particulars: since the seller accepted external warranty not stemming from the wine itself, and the buyer accepted warranty for spoilage of the wine itself, any mishap not intrinsic to the wine — such as libation — counts as an external mishap for which the seller is liable. (AH §6)[165]

But if before the mishap it was foreseeable — such as where they knew coercers were coming and the seller warned him to hide his wine and he did not — the seller is not liable, for the buyer brought the loss upon himself. (AH §6)

Notes

162. see *Pischei Teshuva* 225:3, citing the *Bais Efraim*, who distinguishes a governmental claim that predated the sale (a *mekach ta'us* for which the seller answers) from one that arose only afterward (a genuine *oness* for which he does not).

163. see *Pischei Teshuva* 225:2, citing *Mayim Chaim*, that where the buyer's out-of-court settlement in fact benefited the seller (by averting a total loss in court) the seller may owe him to the extent of that benefit.

164. see *Pischei Teshuva* 225:4, citing the *Panim Me'iros*, that where the parties earlier stipulated "no governmental warranty" and then rewrote the deed *stam*, we follow the original condition and the witnesses' stated intent.

165. see *Pischei Teshuva* 225:6, citing the *Panim Me'iros*, that the Rosh's primary rationale is *oki mamona bechezkas mara*, so if the buyer already paid the money is not extracted from the seller; and *Bais David* on modern shipping-contract warranty for theft and loss.

In such a case the buyer may only tell the seller to exert himself and save the money from the coercer, since the seller did obligate himself at least for this mishap. (AH §6; Taz)

This applies specifically where the mishap of libation is common in that place, as with breakage; if it is uncommon he is exempt in any event. (AH §6; Levush)

226: Selling Land Without Warranty; Claims Against It

Seller Litigating Over Land He Sold Without Warranty

Where Reuven sold a field to Shimon even without warranty (*achrayus*), and Levi, a creditor of Reuven, comes to seize it from Shimon — if Reuven wishes to litigate with Levi, he may do so, and Levi cannot object that Reuven has no stake since he sold without warranty. (AH §1)[166]

- There can be practical significance to Reuven litigating: sometimes Shimon is not skilled in argument and it benefits him for Reuven to argue; sometimes it affects the very law, such as where Reuven made the field an *apotiki* which Shimon cannot redeem with money but Reuven himself can. (AH §1; Siman 115)
- Other significance: Reuven may offset one debt against another, or may demand that Levi swear he was not repaid; and although Shimon too can impose that oath, Shimon may have waived it. (AH §1; Rashi, Kesuvos 92b)
- Likewise if Shimon stated he has no witnesses or proof and then found them but can no longer bring them, while Reuven can bring them. (AH §1; *Tosafos*, Kesuvos 92b)

Shimon cannot, however, compel Reuven to litigate on his behalf. (AH §1; Nimukei Yosef, *Bava Metzia*, ch. 1)

If Reuven gave Shimon the field as a gift and did not stipulate warranty in the gift document, Reuven cannot argue on his behalf, since Shimon lost no money through him. (AH §1)

- Nevertheless Shimon may appoint Reuven as his agent (*morsheh*) to argue for him, as even a defendant may appoint an agent nowadays. (AH §1; Siman 124)

The Seller's Own Warranty When He Reacquires the Land

Where Reuven sold a field to Shimon explicitly without warranty and then himself bought it back from Shimon with warranty, and Reuven's creditor comes to seize it — Reuven cannot recover from Shimon, for although Reuven never accepted *achrayus* on the sale, he is presumed to have accepted *achrayus* upon himself, that he as the seller should not be the one to cause it to be taken from the buyer. (AH §2)[167]

But if a creditor of Yaakov seized it from Reuven — such as where the field originally belonged to Yaakov and Reuven inherited it from him, and now Yaakov's creditor seizes it — Reuven recovers the full price from Shimon, since Yaakov is like a stranger. (AH §2)

A Right That Arises After the Sale

The seller's own *achrayus* obligation applies only to a right the buyer had at the time of sale; but **if the right came to Reuven afterward**, Reuven may seize the field from Shimon. (AH §3)

- For example, Shimon owed a debt to Yaakov, Reuven's father, and after Reuven sold the field to Shimon, Yaakov died and Reuven inherited the debt — Reuven may seize this very field, since it is as though he lent to Shimon after the sale. (AH §3; Sma)[168]

Guardians Who Sold Orphans' Land

Where guardians (*apotropsin*) sold land of orphans, with the *achrayus* resting on the orphans' property, the guardians may afterward seize that same field for a debt owed to them personally, for they are like a court, and a court can certainly collect its own debt from land it sold on another's behalf. (AH §4; Siman 108)

A Genuine Claim Emerging After Acquisition

Where one bought land and, after completing acquisition but before using it, claimants (*me'ar'erin*) emerged against it, the buyer may retract, void the sale, and take back his money from the seller, and the seller litigates with the claimants — there being no greater defect than this. (AH §5)

- Even if it is later revealed that the claim was baseless, the sale remains void once it was voided, and both parties may retract. (AH §5)

If the buyer used the field even slightly after the acquisition — even merely treading its boundary and joining it with his adjacent field — he can no longer retract, and litigates with the claimant. (AH §5)

- This applies only where the treading was after the acquisition; if it was before the acquisition, then even though treading the boundary itself effects acquisi-

Notes

166. see *Pischei Teshuva*, citing the *Chasam Sofer* (siman 46), who adds a further practical significance to the seller's litigating, based on the two-document scenario of siman 31.

167. see *Pischei Teshuva*, citing Rabbi Akiva Eiger (siman 148), who leaves unresolved whether the seller's presumed self-warranty applies where the field was stolen and the original victim seized it, since the victim does not collect through the seller's lien.

168. see *Pischei Teshuva*, citing the *Shevus Yaakov* (1:165), who challenges the Sma and holds the seller could seize even if the father died before the sale.

tion, the buyer is not bound to keep it against a claim unless he used it slightly after the acquisition. (AH §5; Taz)

- Some say this applies only where he has not yet paid; but once he has paid and taken possession, nothing further avails him. (AH §5; *Tosafos*, *Bava Kamma* 9a and Rosh)
- And even without payment, if after taking possession he walked in the field or its boundary to inspect what it needs, he can no longer void the sale and must pay the money. (AH §5; *Tosafos*, *Bava Kamma* 9a and Rosh)

There is no distinction in all this between land sold with warranty or without warranty. (AH §5)

Even with warranty, once the buyer has trodden the boundary he cannot say "since the *achrayus* is on you I will void the sale now," for the seller can respond that he will pay him when it is seized and he holds a court's seizure document. (AH §5)

- This applies only where the seller is a man of means from whom the buyer could collect if needed; but if he is not of means, the buyer may retract now and take back his money, lest the seller consume the money and leave nothing to collect. (AH §5; Kesef Mishneh, ch. 19)

As long as he has not trodden the boundary, even if bought without warranty, the buyer may void the sale even though it was a full acquisition; and according to the second view, as long as he has not yet gone to inspect what it needs, he may retract upon finding a claimant. (AH §5; Siman 195)

The same law applies to movables when a claim of theft emerges against them. (AH §5)

It is forbidden to sell land or movables that carry litigation or a legal dispute without informing the buyer, even if one accepts *achrayus*, for no one wants to pay money and then be dragged into litigation. (AH §5)

A Mere Rumor Versus a Genuine Claim

All the above applies only to a genuine claim — one where, though not yet fully verified, the court sees there is a sound basis to it. (AH §6)

But if only a mere rumor emerged, even before the sale was fully finalized, the buyer cannot void the sale over baseless talk, for otherwise no sale would ever hold. (AH §6)

- Nevertheless, before he has taken possession, if he wishes to retract, the court restrains the seller, since he has not yet taken possession. (AH §6)

Once a sale is voided due to a claim, even if it emerges that the claim is baseless, the sale does not revert, and both parties may retract. (AH §6)

The Rema wrote: **if a claim arises against the field because the seller owed others**, and the seller says he holds receipts (*shovarim*) for the debts, this is deemed a valid claim and the buyer may retract, for one need not purchase and safeguard a receipt forever. (AH §6; Rema)

- Even if he paid part of the money, the seller must return it, for it is evident he did not advance partial payment to uphold part of the sale and void part. (AH §6; Sma)

According to the second view above, where he has not yet paid: **if the claim is such that it can be verified over time** — the claimant saying "I have a document and will ratify it" — the buyer is not ordered to pay until the matter is clarified, and the court sets a time as it sees fit. (AH §6; Taz)

227: The Laws of Ona'ah (Overcharge)

The Prohibition of *Ona'ah*

It is forbidden to overreach one's fellow — whether as seller or as buyer — and one who does so transgresses a *Torah* prohibition, (AH §1; *Leviticus* 25:14) though there are no lashes for it since restitution can be made. (AH §1; Tur)

- There are two types of *ona'ah*: deception in the substance of the merchandise itself (e.g. passing off inferior or old goods as superior or new), and deception in the price (charging more, or paying less, than the established market rate to one who is unaware of it). (AH §1)

Where the goods themselves are misrepresented, there is *ona'ah* even if the price is fair, and no distinction is made between a storekeeper and a private homeowner selling. (AH §1)

Where one party knows the true value and the other does not, he must inform him; if not, he transgresses — even a buyer who knows he is being sold below the fixed price must tell the seller. (AH §1; *Bava Metzia* 51a)

It is forbidden to overcharge even by a *perutah*'s worth, and one who knowingly overreaches transgresses. (AH §2)

The Three Categories: Less Than, Exactly, and More Than a Sixth

When there was no intent to defraud and *ona'ah* is later found, there are three laws: less than a sixth is forgiven and the sale stands; exactly a sixth — the sale stands but the overcharge is returned; more than a sixth — the sale is void. (AH §2; *Bava Metzia* 50b)

For goods with a fixed uniform price sold by all shopkeepers alike — such as flour, bread, and salt — even less than a sixth is not forgiven and the overcharge must be returned. (AH §2; *Bava Basra* 95a)

A sixth counts whether it is a sixth of the value of the goods or a sixth of the money paid; even if by one reckoning it is more than a sixth and by the other less, so long as one side reaches a sixth it is treated as *ona'ah* of a sixth — the sale is binding and the full overcharge is returned. (AH §3)

- When it is void [more than a sixth], one need not merely return down to a sixth; once it enters the category of reversal, the whole amount is refunded. (AH §3; Siman 218)

If less than a sixth by any amount (e.g. selling something worth seventy for sixty and a *perutah*), it is forgiven and nothing is returned. (AH §3)

If more than a sixth by any amount (e.g. selling something worth sixty for fifty less a *perutah*), the sale is void and the wronged party may return the item. (AH §3)

In a case of reversal [more than a sixth], the wronged party cannot force the overreacher to refund the overcharge and keep the sale; the overreacher may say 'either reverse the sale or forgo your claim.' (AH §3)

If the wronged party wishes to uphold the sale, the overreacher cannot void it — even if the goods later rose sharply in price. (AH §3)

- Some hold that even the overreacher may void the sale unless the wronged party consented to uphold it or remained silent past the time limit; the primary view is the first. (AH §3; Yerushalmi *Bava Metzia*, ch. 4)

Where One Side Is More Than a Sixth and the Other Less

When one side reaches more than a sixth and the other is less than a sixth (and neither is exactly a sixth), we follow the value of the goods, for both voiding and forgiveness, since the error lies in the goods and not in the money. (AH §4)

The Minimum Amount Subject to *Ona'ah*

The overreacher need not refund unless the overcharge exceeds a *perutah*; on a mere *perutah*'s worth there is no claim, for it is customary to forgive that much. (AH §5; *Bava Metzia* 55a)

- Some say nothing is refunded until the amount reaches a *ma'ah* of silver. (AH §5; Tur (per Rif))
- Some say even a *perutah* must be refunded, and so ruled the Rema. (AH §5; Rema)[169]

Overcharging Below a Sixth — Whether Permitted

The Rosh's first side holds that where the seller is expert in the value and the buyer is not, or the buyer is a dealer more expert than the seller, they may not overreach one another even below a sixth if there is a *perutah*'s worth of *ona'ah*; a God-fearing person avoids this in all cases. (AH §6; Rosh)

- The Rosh leaves it doubtful whether overreaching below a sixth is permitted when there is a *perutah*'s worth of *ona'ah*. (AH §6; Beis Yosef)
- The doubt applies only where the seller has grounds to assume the buyer knows the price yet wants this particular item; but where the seller understands the price is hidden from the buyer and knows there is a *perutah* of *ona'ah*, it is forbidden unless he discloses it. (AH §7)

With a coin, so long as it has not reached the *ona'ah* threshold, it is permitted *lechatchilah* to pass it on at full value. (AH §6; Rosh)

For goods that some sell at a large profit and some at a small profit, there is no *ona'ah* against one who profits greatly, since some sell at such prices; but one should not look to those who undercut and spoil the market. (AH §7; *Bava Basra* 91a)

The Time Limit for Claiming *Ona'ah*

A buyer may claim his overcharge (a sixth) or void the sale (more than a sixth) only until he has time to show the item to a dealer or relative; after that he may not, and even a purchase worth a *maneh* for two hundred stands. (AH §8; *Bava Metzia* 49a)

If he was unable to claim because the overreacher was away, and he used the item: with *ona'ah* of a sixth, use is not deemed forgiveness, for the item is his and he need only receive the overcharge; even with more than a sixth, if he notified the seller, use is not forgiveness, but he pays a usage fee. (AH §8; Shitah Mekubetzes citing Ritva)

If a valid excuse (*ones*) prevented him from investigating within the time, he may still reverse. (AH §8)

- Some say that even after the *ones* passed, he may claim it did not occur to him to investigate; others dispute this. (AH §8; Sma)
- If he shows that after the *ones* passed he investigated and found *ona'ah*, and delayed only because he thought the seller would not believe his excuse, his claim is accepted. (AH §8; Sma)
- If he shows he consulted a dealer who wrongly told him the price was fair, he may reverse — provided many dealers now contradict that valuation. (AH §8; *Nesivos*)

If the buyer knew at the time of purchase that he was overcharged and remained silent, then claimed his overcharge immediately after the sale, before the time to show a dealer, we do not say he forgave. (AH §9; Rema)

- This applies only to *ona'ah* of a sixth; with more than a sixth, silence within the time is forgiveness, since one cannot claim he stayed silent to uphold a sale that is in any event void. (AH §9; *Nesivos*)
- The *Aruch HaShulchan* rules as the primary law that if both knew of the *ona'ah* at the time of acquisition, it is as though they stipulated no claim of *ona'ah* would be raised, and it is forgiven, without need of an explicit condition. (AH §9; *Ketzos*)

If purchased on credit and not yet paid, many hold it is not forgiveness even after a long time, for he can say

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169. see *Pischei Choshen*, *Geneivah* 11:2 (n. 7), for the later formulations of the dispute whether refund is owed only above a *perutah*.

he did not bother to investigate while holding the money. (AH §10)[170]

- Yet if he used the item a long time, it is certainly forgiveness, for there would be no end to the matter. (AH §10)
- Where credit prevents forgiveness, even partial payment leaving a balance is not forgiveness. (AH §10)

The Seller's Time Limit

A seller claiming *ona'ah* has no fixed time limit — and certainly not for voiding — since he does not know his item's worth until he sees a like item sold in the market. (AH §11)

- If the item is of uniform value with no variation (e.g. pepper), he reverses only until he can inquire about the market rate. (AH §11)
- If it is known that a like item came into the seller's hands and he knew he erred yet did not claim, he clearly forgave and can no longer claim; but if the buyer merely alleges this and the seller denies it, the seller need not bring proof, since forgiveness is a weak claim. (AH §11; Sma)
- When it is unknown whether there was *ona'ah* at all, the buyer is believed to say a like item reached the seller who forgave, by a *migo* that he could have said there was no *ona'ah*. (AH §11; *Nesivos*)

If the acquisition was by *kinyan sudar* and the item remains with the seller, the roles reverse: the seller may reverse only until he could show a dealer, while the buyer may reverse until the item reaches him and he can show a dealer. (AH §11; *Nesivos*)[171]

With *ona'ah* of land, neither party may reverse after this time, since land is not hidden and can be shown to anyone. (AH §11; Shach)

When the Price Later Changed

If the party wishes to reverse only because the market price has now changed (and there was no *ona'ah* at the time of sale), he may not, since there was no *ona'ah* at the time of the acquisition. (AH §12)

If the overreacher claims the price changed and the wronged party denies it, the wronged party must bring proof; we do not rely on the current presumption to void a clear acquisition. (AH §12)[172]

If one sold under duress, undercutting more than the range where the mind errs, he cannot reverse, since he knew he was undercutting and was compelled — it is full forgiveness. (AH §12)

- Some say that when the price later changed, even if there was originally *ona'ah*, he cannot reverse, presuming he forgave earlier; but the primary view is that while still within his time to reverse we do not close the door on the wronged party. (AH §12)

Where the Price Rose or Fell Before Claim

Sold worth four for five (sale void) and, before showing a dealer, it rose to seven: the buyer may reverse but not the seller, for the buyer says 'had you not overreached me you could not have reversed.' (AH §13; Sma)

Sold worth five for four (sale void) and it fell to three: the seller may reverse but not the buyer. (AH §13)

Sold worth five for six (a sixth — sale binding, overcharge refunded) and before showing it rose to eight: the seller must still refund the one of overcharge, for it rose in the buyer's possession. (AH §14)

Sold worth six for five and it fell to four: the buyer must refund the one of overcharge, for the same reason. (AH §14)

Ona'ah for a Dealer and Various Movables

A dealer, though expert, is subject to *ona'ah* just like a layman; we do not presume he knew and forgave. (AH §15)

- When the seller is a dealer and the buyer claims the seller knew and forgave (having been forced to sell), and the seller now reverses, an oath may be imposed on him. (AH §15; *Bava Metzia* 51a)

All movables are subject to *ona'ah*, even books, precious stones, and pearls, and the buyer may reverse until he shows them to expert dealers of such goods, wherever they may be. (AH §16)

- If no expert dealer was in the town and he took it elsewhere, or a dealer came after a long time and informed him he erred, he reverses. (AH §16)
- If dealers contradict one another — one saying he erred, one saying not — the one holding the property has the upper hand; if a majority say he erred, or the reverse, we follow the majority of opinions. (AH §16; *Tosafos Bava Kamma* 27b)

Ona'ah in Coinage

There is *ona'ah* in coins; per the Rambam its threshold is a sixth, like all merchandise — e.g. a gold *dinar* worth 24 silver *dinars* exchanged for 20 or 28 requires refund; more than that voids the exchange, less is forgiven. (AH §17; Rambam, Hilchos Mechirah, ch. 12)

- A worn coin passed by count (not weight) that is short by a sixth requires refund; if passed by weight, even the

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170. see *Pischei Choshen*, *Genevah* 11:14, and *Pischei Teshuva* 227, citing the *Sha'ar Mishpat*, *Bais Meir*, and R' Akiva Eiger, who hold that so long as the buyer still holds the money he may claim even after the time-limit — and dispute whether the reason is a *migo* or that a *mochzik* need not investigate.

171. see *Pischei Teshuva* 227, questioning whether, when the item stays with the seller after *kinyan sudar*, the seller too may reverse past the time-limit since he is *mochzik* in the object.

172. see *Pischei Teshuva* 227, citing the *Chasam Sofer* (*Choshen Mishpat* §37), who challenges the Rema's placing the burden of proof on the wronged party regarding a later price change.

slightest shortfall is reversed. (AH §17)

- Some hold the threshold for coin *ona'ah* is one part in twelve (half of all other *ona'ah*); the Rema ruled like this dissenting view. (AH §17; Sma)

Where the coinage of gold on silver has no government-fixed rate and money-changers exchange it by its worth, the law of *ona'ah* (a sixth) applies; but where the government fixes the rate, it is like a matter of count, and even the slightest error is reversed unless he knew and forgave. (AH §17; *Nesivos*)

A worn coin subject to the shortfall of *ona'ah* requires refund only where there is a place it circulates at that discount; otherwise there is no reversal of *ona'ah* and it is forbidden to keep it. (AH §17)

Time Limit and Standards for Coins

In cities, one may return the *dinar* or *sela* until he can show a money-changer, since ordinary people are not expert; **in villages** where no changer is available, until Friday when he brings it out for *Shabbat* and shows it to an expert. (AH §18)

- After that time the overreacher need not exchange it, though it is a measure of piety to exchange it later when he recognizes it as his. (AH §18)
- This applies only where the coin circulates even with difficulty; but if it does not circulate at all, he must exchange it by law even after a long time. (AH §18; Levush and Taz)
- Likewise in other merchandise, it is a measure of piety to refund even after the time to show a dealer, unless the seller knows the buyer knew and forgave; and if it is established the buyer did not show a dealer because he never suspected *ona'ah*, the seller must refund even later by law. (AH §18)

A Worn Coin — Keeping and Disposing of It

A coin worn short by the amount of *ona'ah* may not be kept, since one can easily defraud with it; he may not sell it except to one who explicitly will break it. (AH §19)

- Even then, he may not sell to a violent man, one suspected of fraud, or a dealer, for they are suspected of defrauding others with it. (AH §19)
- He may not make it into a weight, nor throw it among silver scraps lest it be passed as coin, but should melt it or pierce its center to make it an ornament — not pierce it at the side, lest the pierced spot be cut off. (AH §19)
- If worn down to half its value, it may be kept, since the shortfall is evident to all. (AH §19)
- So long as it is not worn to the *ona'ah* threshold, it may be passed on at full value, since it circulates as such. (AH §19)
- Where coins are taken only by weight, it may be kept in any case, since every buyer weighs it. (AH §19)

Buying with an Indefinite Sum (*Achsara*)

One who buys with money by the handful — without measure, weight, or count (e.g. 'sell me your cow for this money in my hand') — acquires and refunds *ona'ah*; the same for buying produce by lump sum, for since the term 'sale' was used there is *ona'ah*. (AH §20; Siman 209)

- The default of 'sale' is that they care to know the value; the default of 'exchange' is that they do not; so if he said 'sale' there is *ona'ah* by the market rate, even where the item's rate is not fixed. (AH §20; Shach)
- Some say a lump-sum sale is a legal doubt whether *ona'ah* applies, and we do not extract from the one in possession; the primary view is the first. (AH §20; Taz)
- If he did not say 'sale' but 'exchange this for these,' there is no *ona'ah* — where the money too was pulled. (AH §20; Kesef Mishneh, Hilchos Mechirah, ch. 13)

Exchange (*Chalifin*) and *Ona'ah*

One who exchanges vessels for vessels or an animal for an animal — even a needle for a coat of mail or a lamb for a horse — has no *ona'ah*, for this one wants the needle more than the mail. (AH §21; Rambam, Hilchos Mechirah, ch. 13)

One who exchanges produce for produce — whether valued before or after the sale — is subject to *ona'ah*. (AH §21; Rambam, Hilchos Mechirah, ch. 13)[173]

- Some explain vessels for vessels have no *ona'ah* even if valued, and produce for produce without valuation likewise none; the reason there is no *ona'ah* in exchange is that ordinarily one does not care about the item's value. (AH §21; Maggid Mishneh, Hilchos Mechirah, ch. 13)
- Many hold that wherever there is a valuation, *ona'ah* applies to any item, with no essential distinction between vessels and produce. (AH §21)
- In exchange without valuation there is no *ona'ah* even beyond half, whether acquired for household use or for trade. (AH §21)
- If the exchange was unspecified and the overreacher says it was without valuation while the wronged party says with valuation: for household use the overreacher is believed, for trade the wronged party. (AH §21)
- Even though there is no *ona'ah* in exchange, voiding for a defect applies to exchange as well. (AH §21; *Nesivos*)
- Where produce is exchanged for produce without valuation and both parties pulled (a valid *kinyan* on both), there is no *ona'ah*, since the term 'exchange' was used. (AH §21; Kesef Mishneh)

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173. see *Pischei Choshen*, *Geneivah* 10:26 (n. 51), and *Pischei Teshuva* 227, citing the *Radvaz* and *Shevus Yaakov*, that goods held for resale are subject to *ona'ah* even in barter.

Stipulating Against *Ona'ah*

One who says 'on condition that you have no claim of *ona'ah* against me' — the other still has a claim, for he does not know how much *ona'ah* there is that he should forgo it, and thinks it mere words. (AH §22)

- This is only where he does not know the amount; certainly if he said 'on condition there is no *ona'ah* in it' and there is, some say the whole sale is void. (AH §22)

But one who specifies — 'this item I sell you for two hundred, I know it is worth only a *maneh*, on condition you have no claim of *ona'ah*' — the other has no claim; likewise a buyer who specifies. (AH §22)

- Some say this works only when he specified the exact amount of *ona'ah*; but 'I know it is worth more/less' does not help, for the wronged party can say he did not know it was so much. (AH §22; Sma)
- If he said 'I know it is worth much more/less,' there is no *ona'ah*. (AH §22)
- A stipulation to another's benefit does not help unless made at the outset of the sale. (AH §22; Siman 207)

One who sells for a *maneh* saying 'this is worth only a zuz, on condition you have no claim of *ona'ah*' — the other has a claim, for it sounds like mere exaggeration to raise his spirits, unless he specified the amount of *ona'ah* or close to it, within the range where the mind errs. (AH §23)

- Some say that so long as he knows there is *ona'ah* but not its amount, saying 'it is worth only a *zuz*' suffices without specifying the value. (AH §23; Taz)
- If they forgave *ona'ah* of a sixth and more than a sixth was found, the sale is void; likewise if they forgave up to a quarter or third and more was found. (AH §23; Radvaz)
- When calculating *ona'ah*, one reckons against the true value of the goods, and the excess given willingly counts as a gift; when *ona'ah* claims arise, the goods are appraised. (AH §23)

A Homeowner Selling His Household Vessels

A homeowner who sells his own household vessels and overcharges the buyer — there is no *ona'ah*, since he would not have sold unless paid more, and it is as though he stipulated no *ona'ah*. (AH §24; Rashi *Bava Metzia* 51a)

- Even if he sold under duress there is no *ona'ah*, for he can say selling his household vessels is a disgrace and he would not have sold for less. (AH §24)[174]
- But if a defect is found in the item, he reverses, with no distinction between homeowner and shopkeeper. (AH §24)
- Some say this applies only where the buyer knew the seller was a homeowner selling his vessels; if he did not know, there is *ona'ah*. (AH §24)
- If the homeowner gave the item to a broker to sell, there is *ona'ah* even if the buyer knew it was the homeowner's, since giving it to a broker presumably means he despaired of a high price. (AH §24; Sma)
- Some say even then there is no *ona'ah*, since perhaps the owner told the broker not to sell below a set price. (AH §24; Taz)
- If the buyer bought through a broker who did not know the seller was a homeowner, there is *ona'ah* even if the buyer knew — unless the buyer or principal told the broker, 'you are my agent whether to benefit me or harm me,' or did not disclose he was an agent. (AH §24; *Nesivos*)

The Homeowner as the Wronged Party

The rule that a homeowner selling his vessels has no *ona'ah* when he overcharges: some say this applies only to a sixth, but more than a sixth he is like anyone else, for no one would forgive that much. (AH §25)

- Others hold there is no distinction. (AH §25)
- Some hold that just as there is no *ona'ah* against the buyer when the homeowner overcharges, so too there is none when the homeowner himself is overcharged, and none when a person buys household vessels and is overcharged; but all the poskim dispute this. (AH §25)

Sale Based on a Third Party's Appraisal

Where buyer and seller agreed to close the sale by Levi's appraisal at a set sum, and it turns out he erred to the extent of *ona'ah*, the law of *ona'ah* applies, for the intent was to rely on his expertise, not on whatever he says. (AH §26)

- If the overcharge cannot be recovered because the overreacher went far away: if Levi is a dealer expert in appraisal and took no fee, he is exempt; if he took a fee, he is liable, like an expert butcher who erred; if not expert, he is liable even acting gratis, under *dina d'garmi*. (AH §26; Siman 306)
- Some say that when they said 'by Levi's appraisal' because he is expert, the sale is void even below a sixth, treating him like an agent; but this does not follow from the Tur, *Shulchan Aruch*, or reason. (AH §26)

An Oppressor (*Anas*) and *Ona'ah*

An oppressor (*anas*) has no *ona'ah*, for 'do not overreach one another' excludes him from 'brothers'; but if he overreaches another, he refunds *ona'ah* by the ordinary law. (AH §27)

- Where a Jew and an *anas* jointly sold an item with *ona'ah*, and the courts will not hold the *anas* liable for

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174. see *Pischei Teshuva* 227, discussing a wife who sold her husband's garment under her own duress, where the homeowner exemption may not apply.