



# BUSINESS WEEKLY

Restoring the primacy of choshen mishpat

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



## STORY LINE

By Rabbi Meir Orlian

### ESROG ESCAPADE AT HAKHEL

Lev stood patiently at Hakhel on Succos morning, watching everyone fulfill the mitzvah of lulav and esrog. Unable to afford his own set, he planned to borrow someone else's.

When Mr. Freund finished waving his lulav, Lev asked him, "Can I borrow your lulav for the mitzvah?"

"You can't really borrow it, since the lulav and esrog must belong to you in the Beis Hamikdash the entire week, according to many authorities," replied Mr. Freund. "However, I'm happy to give them to you as a gift with the stipulation that you return them, matanah al menas l'hachzir."

"Great; I just have to make the brachah and do the mitzvah," Lev thanked him. "I'll be happy to return the lulav and esrog to you afterwards."

Mr. Freund handed his lulav and esrog to Lev, who made the brachos, turned the esrog right-side up, and began waving the lulav.

Suddenly the huge throngs congregating to hear the special Torah reading jostled Lev, knocking the esrog out of his hand! It fell to the ground and a piece broke off.

"I'm sorry about your esrog," Lev apologized to Mr. Freund. "I'll pay you whatever the esrog cost."

"That's not the point," Mr. Freund replied. "What am I going to do for the rest of the chag? I don't know whether I can still find a good esrog to buy."

"Maybe I can get you another esrog?" suggested Lev.

Meanwhile, Lev began to wonder: "Since the esrog was given to me as a gift with a stipulation that I can no longer honor, did I fulfill the mitzvah?"

Lev approached Rabbi Dayan. "Mr. Freund gave me his lulav and esrog as a matana al menas l'hachzir, but the esrog got damaged," he related. "Did I fulfill the mitzvah? What if I pay for it or give him another esrog?"

"If the esrog would be intact, you cannot return money instead," replied Rabbi Dayan. "Even when it is no longer intact, the Rosh (Succah 3:30) cites the Baal Haitur that the owner needs the esrog for the remaining days. Therefore — unlike other items, where replacing a ruined item with money

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## BHI HOTLINE

### STOLEN S'CHACH

**Q: I hired someone to build my sukkah, and I noticed that he used branches in addition**

**to the mats that I provided. When I inquired about their origin he told me that he had cut them off a neighbor's tree. Am I permitted to use those branches for s'chach?**

**A:** The Gemara (Sukkah 9a) teaches that a stolen sukkah is invalid, but a borrowed sukkah is valid. This has numerous applications.

1. A thief who removes someone from his sukkah and uses it for himself fulfills the mitzvah. Real estate cannot be stolen; even when the owner was removed from it, it remains his house and the thief is merely borrowing it.

2. If one stole a sukkah that was not attached to the ground, e.g., it is on a boat or wagon, the thief does not fulfill the mitzvah. Movable property can be stolen and thus may not be used to fulfill the mitzvah.

3. If one stole wooden planks and constructed a sukkah from them, mid'Oraisa the sukkah is invalid. Even if the thief is willing to pay for the wood he does not fulfill the mitzvah, since he must dismantle the sukkah and return the stolen planks. However, to facilitate repentance, Chazal enacted that a thief need not return stolen property that was incorporated into a building, and may instead pay the owner its value. Accordingly, if the thief pays for the stolen wood he may sit in the sukkah and even recite the brachah on the mitzvah. If he is not willing to pay for the wood, he does not fulfill the mitzvah (O.C. 637:3, Magen Avraham 637:5). In addition to being stolen property, there are authorities who maintain that it constitutes a mitzvah habaah b'aveirah — a mitzvah fulfilled through a transgression (Tosafos 9a



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is acceptable — if the recipient did not return the esrog as stipulated, the conditional gift is nullified, and the recipient did not fulfill the mitzvah!" (Rema, Ketzos and Nesivos C.M. 241:7.)

"The Shulchan Aruch (O.C. 658:4) rules in accordance with the Rosh," continued Rabbi Dayan. "He adds that even if the person cannot return the esrog because of oness (circumstances beyond his control) he did not fulfill the mitzvah."

"So I have to do the mitzvah again with another lulav and esrog if I can't return the esrog intact?" asked Lev.

"It seems so, but there are some exceptions," answered Rabbi Dayan. "The Bi'ur Halachah (s.v. "afilu...") writes that if the owner has another esrog with which to fulfill the mitzvah, the recipient may return the value of the borrowed esrog when the borrowed esrog itself is no longer intact."

"Then how about returning a different esrog?" asked Lev. "Would that be good enough?"

"Some authorities do not consider this sufficient," replied Rabbi Dayan. "However, the Bi'ur Halachah maintains that if you return a kosher esrog of equivalent quality, you fulfill your stipulation. He also takes into consideration the lenient position of some authorities — against the Rosh — that even regarding an esrog one can fulfill the stipulation by returning its value in money when the esrog is not intact. Additionally, if the item was ruined through oness some maintain that the recipient does not have to pay (see C.M. 241:8.) Thus, it is possible that you might fulfill the stipulation when returning a comparable esrog."



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d.h. "Ha'hu...").

Regarding your query — when someone else stole the s'chach — there is a debate whether it is categorized as a mitzvah habaah b'aveirah (O.C. 649:1 and Mishnah Berurah 8); but all authorities agree that it is categorized as stolen (Mishnah Berurah 637:18). Even though the s'chach was transferred (from the builder to you — shinuy reshus), nevertheless, since the owner does not know his branches were stolen, it constitutes yei'ush shelo midaas (abandonment without awareness), and it does not become yours (Biur Halachah 637:3 d.h. "Ela..."). If you intend to pay for the s'chach you can fulfill the mitzvah due to Chazal's enactment, even though you did not steal it (Hisorerus Teshuvah 3:2). Therefore, you should negotiate payment with your neighbor and then you may use the s'chach.

Interestingly, some write that there is a practical difference whether this s'chach is invalid because it was stolen or whether it is also invalid because of mitzvah habaah b'aveirah. Invalid s'chach that is adjacent to the wall invalidates the sukkah if it spans more than four amos (approx. 75.6 inches). If the invalid s'chach is more than four amos from the wall it invalidates the sukkah if it covers an area of more than four tefachim (12.6 inches) (O.C. 632: 1-2). These rules apply to invalid s'chach; but stolen s'chach that also carries the disqualification of mitzvah habaah b'aveirah is treated like a gap of airspace and invalidates the sukkah when the gap is at least three tefachim (9.4 inches). The reason is that stolen s'chach that carries the disqualification of mitzvah habaah b'aveirah may not contribute towards the validity of the sukkah whatsoever (Minchas Chinuch 325, see also Pri Megadim M.Z. 637:4 and Pischei Zuta 632:2).

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## MONEY MATTERS

Adapted from the writings of Harav Chaim Kohn, shlit

## BEIS DIN AND CIVIL COURT #27

### Majority Ruling

#### Q: How should a majority ruling of beis din be issued to the litigants?

**A:** The Torah teaches us that the ruling of beis din follows the majority. The ruling is the product of all three dayanim, even if one dissented from the majority opinion. Therefore, the ruling is made in the name of all three dayanim. If the ruling is issued in writing, all three are expected to sign it, even if one dayan dissented. It is permitted to indicate, though, that the ruling is based on the majority opinion (C.M. 19:1-2; Pischei Teshuvah 19:3).

A dayan who dissented should not express his personal opinion in contrast to the joint ruling. This is considered lashon hara about the other two dayanim towards the litigants. If the reasons for the ruling are written, and the dissenting dayan also writes his reasons, it is preferable to omit the names of the respective dayanim. However, in certain courts the practice is to indicate the name of each dayan.

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