

BUSINESS WEEKLY



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

Issue #725 | Sukkos | Oct 16, 2024 | 14 Tishrei 5785

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



CASE FILE

Rabbi Meir Orlian
Writer for the Business Halacha Institute



BHI HOTLINE

לע"נ הרב אהרן בן הרב גדליהו ע"ה

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

DAMAGED ESROG

Mr. Hadari was browsing the stands at the large, outdoor *arba minim* center.

At one stand, he found an esrog that he liked, but there was a miniscule dot about a third of the way from the top.

"What do you think of that esrog?" the seller asked Mr. Hadari. "...It's beautiful! Clean, a nice shape, rich color... \$100."

"Indeed," replied Mr. Hadari. "I'm seriously considering buying it. I'm just concerned about this dot..."

"Let me have a look," said the seller.

The seller examined the esrog. "That dot is an issue at all," he said. "It's so tiny, barely noticeable. It's not even clear that it's on the critical part of the esrog. There's no question that it's considered a mehudar esrog."

"I'm glad that you say so," said Mr. Hadari, "but I'd like to ask my Rov. He's over there, at the other end of the center."

"You're welcome to ask him," said the seller. "I'm sure that he'll say it's fine."

Mr. Hadari took the esrog and headed over to his Rov. On the way, a stray animal raced through, knocking Mr. Hadari off balance. The esrog fell to the floor, breaking the pitam and causing a gouge.

Mr. Hadari returned to the seller apologetically. "That animal caught me completely by surprise from behind," he said. "I'm sorry that the esrog got ruined. It's not my fault, though; it was complete oness, circumstances beyond control."

"That makes no difference," said the seller. "You took the esrog to check with your Rov, so if you are not able to return it - for whatever reason, you need to pay the \$100 that it was worth!"

"I'm willing to be reasonable and pay partially," replied Mr. Hadari, "but I don't see why I should be liable. I didn't buy the esrog yet, and even if I'm like a shomer - guardian - on it, I'm not liable for oness."

The two came before Rabbi Dayan and asked:

"Is Mr. Hadari liable for the esrog?"

"The Gemara (Nedarim 31a; B.B. 88a) teaches that

SUCCAH BED DAMAGED

Q. I lent a folding bed to my friend to use in his *succah*. In the middle of *yom tov*, he realized there was a tear in the mattress, but he did not know whether it happened while he was using it or beforehand. I am almost certain that the mattress was intact when I gave it to him. Is he obligated to pay to repair the damage?

A. In general, a *shomer* (guardian) who does not know how a *pikadon* (item he was guarding) got damaged and whether it happened in a way that would absolve him of payment (e.g., if someone borrowed a cow that died in course of doing ordinary work — *meisah machmas melachah*), is obligated to pay (see *Shach, Choshen Mishpat* 271:44 and 340:7). This is irrelevant to your case, however, because you don't know for certain that the bed was intact when the borrower received it, and if it wasn't, he clearly wasn't responsible for the damage (see *Shu"t Tiferes Yosef, Choshen Mishpat* 6).

Nevertheless, we must consider a different angle: Since the damage was first noticed when the bed was in his possession, we should apply a principle called *kan nimitza, kan hayah* — since it was found in this location, this is where it is presumed to have happened.

The Gemara (*Kesubos* 76a) discusses the case of two people who bartered a cow for a donkey, formalizing the transaction through a *kinyan chalipin* (acquisition by exchange). This means that the owner of the donkey, whom we'll call Reuven, led the cow (*kinyan meshichah*), thereby acquiring it, and in exchange, its owner, Shimon, became the owner of the donkey, which was still in Reuven's property. When they reached Reuven's property, however, the donkey was dead, and it was unclear whether it had died before or after the *kinyan* took place.

In order to reduce confusion, let us take the barter out of this case and discuss a scenario in which Shimon acquired the donkey through a *kinyan suddar* (lifting an object to formalize the transaction), which renders him the buyer and Reuven the seller. (The *kinyan* can be made either before or after payment is rendered.)

The halachah in this case is *kol mi shenolad hasafeik b'reshuso, alav lehavi haraayah* — the burden of proof lies with the person in whose property the uncertainty arose, regardless of whether money already exchanged hands.

The Rishonim and *poskim* debate what the word *b'reshuso* means, however.

The *Mechaber* (R' Yosef Karo) follows the opinion of the Rishonim who write that it refers to the property in which the item being bought is stored; we assume that since the issue arose in the seller's property, it happened while in his possession (*kan nimitza, kan hayah*). Therefore, since the donkey was in Reuven's property, he must either prove that it was alive at the time of the *kinyan* or return Shimon's money.

BHI HALACHIC WILL EVENT

The Business Halacha Institute, along with Zahav Senior Resources & Referrals, a division of Agudath Israel of America, proudly presents two Halachic Will Events.

At the event, Seniors will have the opportunity to consult with Rabbonim and Professionals in the Estate Planning field and receive their Halachic Will and Medical Directive documents.

The events will take place in Great Neck, New York on Sunday, November 10, and in Lakewood, New Jersey on Wednesday, November 20.

This is a component of the BHI estate planning series, with additional developments in this series forthcoming.

For RSVP and information, please call Zahav at 732 540-1898 or The BHI at 718 233-3845





CASE FILE

if someone takes an item with intent to buy it if it proves acceptable, he is liable for all damage to it, even oness,” replied Rabbi Dayan, “provided that the price is set” (C.M. 200:11).

Most Rishonim explain that the person is considered a buyer meanwhile, while others consider him a borrower, since he has the option of keeping the item and buying it (Tosfos B.B. 87b; Ran Nedarim 31a).

Rambam writes that the person must take the item with intent to acquire it, whereas other Rishonim do not require explicit intent, and suffice with presumption of this intent (Sma 200:29).

“Moreover, once the buyer takes the item with intent to check it, the seller cannot retract, whereas the buyer can, since he took it on this condition (ibid.).

Some suggest that a person who takes several esrogim to ask his Rov with intent to buy only one, should not be considered a buyer for them all. However, he could still be considered a borrower for them all, since he has the benefit of choosing any one of them (Pischei Choshen, Pikadon 1:[73]).

If the person decides not to buy the item, some consider him henceforth a shomer sachar, like a borrower after the time, while others consider him a shomer chinam, since it turned out that he had no benefit (Sma 200:31).

“Thus, since the oness occurred on the way to the Rov and the price was set, Mr. Hadari is liable for the esrog,” concluded Rabbi Dayan. “Had he decided not to buy it, and the accident had occurred on the way back to the seller, he would not be liable for oness.”

Verdict: A person who takes an item to check is liable even for oness, either as a buyer on condition or as a borrower. If he decided not to buy and an accident occurred on the way back, he is not liable for oness, but only as a shomer sachar or shomer chinam.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Ye'ush - Abandonment

#7

Expression of Ye'ush

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

Q: I found an identifiable item lying the corner of the shul parking lot. Can I presume the owner's ye'ush and take it for myself?

A: An item that has identifying features – simanim – and was found in a predominantly Jewish area, we presume that the owner did not have ye'ush, so that there is a mitzvah to return it (C.M. 259:1-2)

Only if it is known that the owner already expressed ye'ush, e.g., if he said: “Woe to the financial loss” or something similar, before the person found the item, can the finder keep it (C.M. 262:5).

Similarly, if it is clear that the item has sat there a very long time, such as if it became rusty, so that presumably the owner forgot it there and already had ye'ush – even if the item has identifying features the finder can keep it (ibid.).

However, if the person found the item and took it into his custody before ye'ush, he remains responsible to return it even after the owner's ye'ush (C.M. 262:3; see Pischei Choshen, Avedah 2:6).

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



BHI HOTLINE

If the donkey was not in Reuven's property, the burden of proof would lie with Shimon, and if he is unable to prove that the animal was already dead before he bought it, Reuven may keep the payment. Moreover, even if Shimon had not paid yet, he would be required to pay (*Choshen Mishpat* 224:1 with *Sma* 2).

The Rema rules according to the Rishonim who maintain that *b'reshuso* refers to the person who is presumably owner of the object at the time the uncertainty arose. Since this happened after Shimon made a *kinyan*, thereby becoming the assumed owner of the donkey, he is required to prove that the donkey died before he made the *kinyan*. If he cannot provide proof, he forfeits the money he paid Reuven, and if he has not paid yet, he is required to pay now (Rema ibid.).

Applying these principles to your case, since the uncertainty arose when the bed was in your friend's possession, it would appear that the rule of *kan nimtza, kan hayah* would apply, and we would assume that the damage occurred while it was in his possession.

The Gemara (*Niddah* 58a) teaches, however, that if someone borrowed a garment, and after wearing it he found a stain and it is unclear when it got dirty, the halachah is *hamotzi meichaveiro alav haraayah*, the burden of proof lies with the party who is seeking to extract money from the other party. Therefore, the owner of the garment would have to prove that it got stained while in the borrower's possession.

Tosafos asks (ibid. s.v. *Vela'inyan*; *Chullin* 51a s.v. *Hamotzi*) why we don't apply the halachah discussed above and assume that the person who currently possesses it (i.e., it's *b'reshuso*) — the borrower, in this case — is responsible for the damage. *Tosafos* answers (according to the first approach) that since the current holder only borrowed the item, it is not considered to be *b'reshuso*; rather, it remains the property of the lender.

In conclusion, your friend is not responsible for the damage, since we don't know whether the mattress was torn before he borrowed it (*Sho'el Umeishiv Mahadura Kama*, 1:243; *Chochmas Shlomo* 224; cf. *Shaar Mishpat* 72:25; *Shu"t Maharsham* 6:237).

Obviously, if your friend believes you that the mattress was intact, or if there is reason to believe that the damage occurred in his possession, then he would be obligated to pay.



BEIS HORA'AH

Ask the Rav, Email correspondence / Arbitration and Mediation / Small Claims / Wills and Estate Planning / Halacha Hotline



BUSINESS SERVICE DIVISION

Rabbinical Consultation / Banking and Iska / Contract Drafting / Shabbos Initiative / Industry-specific Seminars



AWARENESS & EDUCATION

Business Weekly / Hebrew Masa Umatan / Shiurim and Chaburis / Kollel I'Dayanis Choshen Mishpat Curriculum / Seforim & Publications / Self-learning Program / Halacha on the Daf