בס"ד

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Clarifications in the Laws of Choshen Mishpat and Ribbis | #29 Tishrei 5785

Halacha Insights

Halachos Regarding the Arba Minim

Bnei Torah **have recently raised the issue of** Arba Minim **suppliers who haven't paid their wholesaler for the produce, if this is** meakev **the buyer's acquisition**

The *bnei Torah* explain: Even if a person does all the necessary *kinyanim* in the best possible way, if the supplier hasn't yet paid the wholesaler for the produce, the supplier has only acquired the *arba minim* with a *kinyan meshichah* which is a *kinyan derabanan*. If so, even if the buyer pays before yom tov for his *arba minim*, he only acquired them *miderabanan*, while there are *poskim* who hold that in order to fulfill a *mitzvah min haTorah* the *kinyan* must also be a *kinyan min haTorah*, and a *kinyan derabanan* is not sufficient.

However, in the following lines we will explain why there is no reason for concern, and that a person fulfills the mitzvah according all views, even if the *kinyan* is only *miderabanan*.

1. According to the Machaneh Efraim (*hilchos meshichah* 2), even one who acquires an item with a *kinyan derabanan* of *meshichah*, can be *makneh* to others *min haTorah* with the *kinyan* of *shinui reshus*. That being, the buyers are *koneh min haTorah* even though the supplier was only *koneh* with a *kinyan derabanan* of *meshichah*. However, some *acharonim* (see Divrei Chaim Choshen Mishpat 51) disagree, arguing that the *kinyan* of *shinui reshus* is only *koneh* in the case of theft, and we don't find a *kinyan shinui reshus* in regular buying and selling.

If the supplier signs a document to the wholesaler obligating him to pay for the produce, it is considered a *kinyan min haTorah*, similar to the *din* of זקפן במלוה – if the debt is converted into a loan, which is considered *kinyan kesef* as cited by Rav Akiva Eiger beginning of *siman* 190. (But the conversion into a loan must be written by the suppliers who are selling the *arba minim*, and not by the wholesaler.)

2. Even according to those who hold that *kinyanim derabanan* are not valid *min haTorah*, that is only regarding

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Editorial

With thanks and praise to Hashem, we present before you some of the chidushim and halachos that were raised in our beis medrash on Choshen Mishpat issues.

The present issue clarifies halachos regarding the arba minim and sukkah, as the Gemara writes in Sanhedrin (101), Rebbi Shimon ben Elazar testified in the name of Rebbi Shimon ben Chanania, whoever recites a passuk in its time brings goodness to the world, as it says "how good is a word on time." Similarly, the Gemara in Eruvin (54) writes, Rebbi Zeira cites the passuk "happiness to a man by the answer of his mouth, and how good is a word on time," explaining, when does a person rejoice? When he answers with his mouth. Rashi explains "a good word on time" as "one who expounds on the halachos of the yom tov on the yom tov," and "when is a person happy with his studies? When he can answer those who ask him halachos."

The mitzvah of arba minim is connected to the halachos of Choshen Mishpat, as the passuk writes ולקחתם לכם ביום הראשון פרי עץ הדר – "you must take lachem, for yourselves, on the first day, a beautiful fruit, etc." The arba minim must be lachem, yours, and not stolen. How applicable this halachah is after Yom Kippur, after confessing financial transgressions at Nei'lah, למען נחדל מעושק ידינו –

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the fulfillment of the mitzvah, that it is not regarded "*lachem*," but they have the right to sell the produce, even *min haTorah*, since *Chazal* rule that this is an accepted method of buying and selling, and it is valid even *min haTorah*. This is similar to the view of the *poskim* that a *muchzak* who acquires an item via *tefisah* (seizing), the item is not his regarding the requirement of "*lachem*." Although *Chazal* permit him to seize the object, it doesn't belong to him regarding the requirement of "*lachem*." Likewise, the Magen Avraham (636) cites the Yereim that although an item stolen from a non-Jew is permitted, it isn't "*lachem*." Although he obtains an item, it is not necessarily his regarding a mitzvah that requires "*lachem*," but this lack of *lachem* only regards that person who acquired it, not one who buys from him, who is *koneh* with a *kinyan kesef* which is valid even *min haTorah*.

3. The Mekor Chaim explains, the *machlokes rishonim* if a *kinyan derabanan* is valid *min haTorah* is based on the understanding of the *din hefker beis din hefker*, that beis din has the right to be *mafkir* a person's items. Does this mean the *Chachamim* are merely *mafkir* but are not actually *makneh* the item to the other person, or are they also *makneh* the item to the other person? According to the view that a *kinyan derabanan* is not valid *min haTorah*, the *Chachamim* are merely *mafkir* the item, but it doesn't become the other person's property and therefore it is not regarded *lachem*, while according to the opinion that a *kinyan derabanan* is valid *min haTorah*, the *Chachamim* are actually *makneh* the item to the buyer, and it is regarded his for all intent and purposes.

   But in our case, even if *Chazal* are merely *mafkir* the item and aren't *makneh* it, once the *lulav* is *hefker* and is recognized as so *min haTorah*, it can now be sold with the regular *kinyanim* that are *koneh min haTorah*, and it will be recognized as a *kinyan min haTorah*.

4. The Noda BiYehudah explains that a *kinyan derabanan* is not valid regarding a *kinyan min haTorah*, but it is valid regarding a *kinyan derabanan*, and it is totally his regarding a *din derabanan*. And once it is valid for a *din derabanan*, it would be absurd to say that it can't now be bought with *kinyanim de'oraisa* regarding a *din de'oraisa*. Therefore, if the wholesalers are *makneh* to the suppliers, even if it is only a *kinyan derabanan*, the suppliers can then sell it to another person *min haTorah*.

   There are those who want to take the Noda BiYehudah's *chidush* a step further, that since the *arba minim* are bought before *yom tov* when there is no issue of *lachem*, the *kinyan* done then is a complete *kinyan min haTorah*, and will be valid *min haTorah* even once *yom tov* enters. But this seems farfetched, because he only buys the *arba minim* in order to fulfill the mitzvah, which is why he pays so much for them. Therefore, although he buys them on *erev Yom Tov*, it is in order to fulfill the mitzvah of *ulekachtem* **lachem** *bayom harishon*.

   But in our case, the suppliers buy the *arba minim* from the wholesalers in order to sell them further, and regarding such a *kinyan* we can certainly say that it belongs to them, and those buying from them will then be able to fulfill the mitzvah of *lachem min haTorah*.

(All of the above-mentioned is only effective if the suppliers pay the wholesalers after *Yom Tov*. But if there are disputes between them and the suppliers end up without paying for the *arba minim*, this is a far more serious matter and it could be considered theft retroactively.)

Question: Is there halachic concern in the status of the *kinyan* if the seller is forced to lower the price?

Some note that one should not haggle the price of the *arba minim* lower than the average price (we are not discussing a seller who charges an exuberant price), since this would be a *din* of *talyuhu vezavin* – lit. they hanged him and he sold, meaning a seller intended to sell it at a higher price, but was forced to sell it for a lower price due to the buyer's pleas and undue influence. Verbal imposition is also considered "forcing," as regarding the *issur* of *lo sachmod*, where the *rishonim* state that verbal imposition is also forbidden, and likewise, verbal imposition is also considered *talyuhu vezavin*.

And although *talyuhu vezavin* is considered a *halachic* sale, that is only if the seller receives the full price. But if the buyer pays less than the average price and the seller loses from this sale, it is possible that this is not considered a *halachic* sale. And if it isn't

considered a *halachic* sale, his *arba minim* are not *lachem* and he is not *yotze*.

However, we could argue that this *din* is only applicable with items that have an average worth, but *esrogim's* price fluctuate by the hour, so it can actually never be sold "less than the average price," since there is no average price, as the Teshuvos Beis Yitzchak writes (*Orach Chaim* 107), an esrog doesn't have a price, and it all depends on how much the person is prepared to pay for it. But this is hard to fathom: The *din* of *talyuhu vezavin* also applies to land, yet *ein ona'ah lekarkaos* – the *din* of undercharging or overcharging doesn't apply to real estate, meaning that land doesn't have a fixed price, just like *esrogim*, and nevertheless the *din* of *talyuhu vezavin* applies to land. So why doesn't it apply to *esrogim*?

However, we can differentiate between land and *esrogim*. Although there is no *din ona'ah* regarding land, it does have an average price, depending on the market (as Rashbam explains in Bava Basra 61b), while *esrogim* don't have a stable price at all.

Some compare the *din* of *esrogim* to the ruling of the Shulchan Aruch (Choshen Mishpat 205:4), if an item is sold at lower than its price, the sale is annulled. But they are mistaken: The Shulchan Aruch is discussing a case where the seller initially didn't intend to sell the item but was forced to do so, and the buyer also paid a low price. In such a case, the sale is annulled. But in our case, the seller intended to sell the *esrog*, and since he accepted the money paid, he agreed to the price even though it was far lower than the given price for such an *esrog*.

In short: We could argue that a low price paid is only an annulment of the sale if the actual sale was forced, and the seller initially didn't intend to sell the item at all. But if he intended to sell the item, the sale is valid even if he received a lower price than expected, since the seller accepted the money and this is considered an agreement to the sale.

This is our view on the subject, but nevertheless one should ask a Rav.

ע"י הרה"ג ר' **ברוך אברהם עסטרייכער** שליט"א
ראה"כ ומרבני היכל הוראה 'דבר המשפט'

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" so that we may refrain from the injustice in our hands," and the first mitzvah afterwards is the mitzvah of arba minim, which must be lachem and not stolen.

In these days of Sukkos we read Sefer Koheles, whose main theme is to show how the whole world is futile. All money transgressions come from valuing money and coveting other's items, but if a person realizes that all is futile, he will be protected from theft and other monetary prohibitions, and will enjoy the best of this world and the World to Come.

It should be noted that one may not derive practical halachah from this pamphlet, since every case has different elements that effect the final halachah.

In the name of the Kollel's Rabbanim, we wish to bless all our readers, and all our Jewish brethren, with a gemar chasimah tovah, a year of geulah, yeshuah and a shanah tovah umesukah.

Aseres yemei teshuvah 5785

The editors

Halachic Issues

The Din of Lachem Regarding Arba Minim

1) The *Mechaber* rules in *Orach Chaim* 568:3: A person is not *yotze* the mitzvah on the first day with a borrowed *lulav*, since it needs to be *lachem*, belonging to you. And the Mishnah Berurah adds: Therefore one must be careful to pay the *arba minim* suppliers before *Yom Tov* and to acquire the *arba minim* with a *kinyan min haTorah* of money, since some are of the opinion that *meshichah* (the *kinyan* of taking hold of an object) is not *koneh min haTorah*.

   Therefore, one should pay with cash, which is a *kinyan* of money according to all opinions.

   This is better than paying with a credit card or a bank transfer, since it isn't clear if such payments are regarded money in order to make a *kinyan*.

   It is important to note that even this year, 5784, although the first day of Sukkos is Shabbos, all the *dinim* of *lachem* are applicable on the second day of *Yom Tov* since we are *machmir* on the second day as if it was the first day.

   In addition to that reason, it is advisable to pay with cash so that a person doesn't forget to pay for the *arba minim*, and stolen *arba minim* are *passul* all seven days, being a *mitzvah haba'ah b'aveirah* (Shevet Halevi 7:83). Also, so that the seller will not have to chase after his payment, lest he regrets the sale and it will be a *mekach taus* – a mistaken sale (as ruled in *Choshen Mishpat* 200:7), in which case the *arba minim* will be stolen and *passul*.

2) **If *Hefker* is Considered *Lachem***

If a *lulav* is *hefker* but the person didn't intend to be *koneh* it, is he *yotze* the mitzvah? The Aruch La'ner (Sukkah 27a) discusses this, saying it depends how we understand the *din* of *lachem* which excludes the use of stolen or borrowed *arba minim*. Does the Torah want the person to actually own the *arba minim*, in which case *hefker* will be *passul*, or is the Torah's intention that it doesn't belong to somebody else, in which case a *hefker arba minim* would be kosher.

He writes, this depends on the *machlokes rishonim* if one is *yotze* with a *lulav* of *issur hana'ah*. If *issur hana'ah* is not considered *lachem* (so holds the Raavad), *hefker* is also not considered *lachem*; if *issur hana'ah* is considered *lachem* (so holds the Ritva), *hefker* is also considered *lachem*.

The Pri Megadim (649 *Mishbetzos Zahav* 3) cites the Kapos Temarim (Sukkah 31) that one is not *yotze* with a *hefker lulav*.

This discussion leads us to other *halachos*:

3) **A Gentiles *Lulav*, According to Those Who Hold *Gezel Akum* is Permitted**

There is another *nafka mina* in the *chakirah* of the Aruch La'ner, if *lachem* must belong to the person, or it is enough that it doesn't belong to somebody else: **According to the view that an item stolen from a gentile is permitted, is it considered *lachem*?**

The Magen Avraham (637) cites Sefer Yereim that if one stole a *lulav* from a gentile, it is not considered *lachem*. But the *poskim* ask, if he can keep it and isn't limited how to use it, why isn't the *lulav* considered *lachem* [see Avnei Milu'im 28:3]? But following our above explanation, we can say the Yereim is of the opinion that for an item to be considered *lachem*, it isn't sufficient that it doesn't belong to anybody else, but it must actually belong to him. Therefore, the fact that he may use the stolen item doesn't yet make him the owner of the *lulav*, and since he isn't the real owner because he stole it from the gentile, it isn't considered *lachem*.

With this we can explain the *machlokes haposkim* if a *kinyan derabanan* is valid for a mitzvah *min haTorah* like the mitzvah of *arba minim*. We could say that *hefker beis din hefker* transforms the gentile's item into *hefker*, but *Chachamim* cannot make it a *kinyan*, as explained in Mekor Chaim (448:9). Therefore, a *lulav* stolen from a gentile doesn't belong to him, only that it doesn't have any other owner and is regarded *hefker*, and the *din* therefore depends on the *halachah* if one is *yotze* with a *hefker lulav*.

The *poskim* also discuss a *kinyan* that is only for

a certain amount of time, as explained in Ketzos Hashulchan beginning of 241. This also depends on the above-mentioned *chakirah*, because in a *kinyan* for a certain time the person is the owner at the time of the mitzvah and there are no other owners at that moment, and therefore he should be *yotze*. But we could say that the ownership must be an ownership forever, otherwise it is regarded as one who only has *kinyan peiros* in the item, meaning he is able to eat the fruit but isn't an actual owner of the tree, and similarly here he may use the *lulav* but isn't an actual owner of the *lulav*, meaning it isn't *lachem*, וצ"ע.

4) ***Ona'ah* in *Arba Minim***

According to the views that the *din* of *ona'ah* is applicable to *arba minim*, is it considered *lachem*?

If the difference in price was only a sixth, in which case the item is acquired and the cheater must return the difference, then if he returns the difference it is certainly considered *lachem*. But what if he doesn't pay the difference? Seemingly, this depends on the *machlokes* between the *poskim* regarding the *issur* of *ona'ah*: If *ona'ah* is a subdivision of the *issur* of theft, and the obligation to return the difference is derived from the *passuk* והשיב את הגזלה – "he must return the theft," it is possible to argue that the "theft" is the money that has to be returned, but doesn't relate to the actual item that was sold legally. If so, the *arba minim* are kosher and are not considered stolen items that would be *passul*. But if we say that the actual item is stolen, it could be that it is no longer *lachem* and one cannot be *yotze* the mitzvah with it.

[We can answer this query from the *halachah* (Sukkah 637) regarding a stolen plank that was fixed into a building. Although the stealer must pay for the plank, it is considered his due to the *takanah* of *Chazal* (*takanas meirish*), that a stealer need only pay money and isn't required to return the plank. If so we can say the same regarding the *ona'ah*, that although he has to return the money, the item is still his. But this is not so, because some *rishonim* hold regarding *takanas meirish*, if the stealer doesn't want to return the money, it isn't *lachem* and he isn't *yotze* (Magen Avraham ibid), and the same could be said regarding the *din* of *ona'ah*, that if he doesn't want to return the difference in price, the actual *arba minim* are considered stolen. However, we could differentiate between the *din* of *ona'ah* and *takanas meirish*, since the *din* of *ona'ah* that one must return the difference, is *min haTorah* (according to many views), unlike *takanas meirish* which is *derabanan*. That so, we could say that only regarding *takanas meirish* it isn't considered *lachem* if he doesn't want to return the money, because the *Chachamim* retract their *takanah* and the item returns to being a regular stolen item, which is *passul*. But the *ona'ah din* of paying the difference and not returning the actual item is *min haTorah*, and there is no *takanah* of *Chazal* saying that if he doesn't return the money, it isn't considered *lachem*. If so, we can return to our initial proof, and just as we see that *takanas meirish* is considered *lachem*, similarly an item that was subject to *ona'ah* is considered *lachem*.]

This is regarding a case of *ona'ah* that was a sixth of the price, but if the person was cheated over a sixth of the correct price, in which case the sale is annulled if the cheated person retracts from the sale, what would be the *din* if the person cheated hasn't yet retracted the sale, is it still considered *lachem*?

Regarding *kiddushin*, the Nesivos (beginning of 227) writes that as long as the cheated person hasn't retracted the sale, he is the item's owner and is able to be *mekadesh* a woman with it. If so, the same *din* should be applied regarding *arba minim*. But we could differentiate between *kiddushin* and *arba minim*: Regarding *kiddushin*, there is no *din* of *lachem*, which is why a person can be *mekadesh* a woman even with intangible *hana'ah*. Therefore, since the item now belongs to him, it is valid to be *mekadesh* with it. But this doesn't make the item *lachem*, and since the cheated person can always retract the sale, it isn't *lachem*. [And even if the cheated person later retracts the sale, one could say that it is only retracted from when he did so, and not retroactively, meaning it was *lachem* when he performed the mitzvah. Or perhaps it is retracted retroactively, in which case he isn't *yotze* even if it was retracted after he performed the mitzvah.]

Besides these arguments, *ona'ah* may be *passul* due to *mitzvah haba'ah be'aveirah*. The question is, is *mitzvah haba'ah be'aveirah* is applicable here? One could argue that the

item was not acquired with an *aveirah*, and had he paid the correct amount he would be *yotze* the mitzvah, meaning that it didn't become his because he paid less, and if so, it isn't a *mitzvah haba'ah be'aveirah* .

Lachem Regarding Sukkah

The Gemara states (Sukkah 27b), although one isn't yotze the mitzvah with a borrowed lulav, one is yotze the mitzvah of sukkah with a borrowed sukkah, as derived from the words כל האזרח, but one isn't yotze with a stolen sukkah, since the Torah writes חג הסוכות תעשה לך, the sukkah must be lecha, yours.

The poskim write, there are two ways to understand this gemara: A borrowed sukkah is kosher because a sukkah doesn't need to be yours, yet nevertheless there is a special limud to teach that a stolen sukkah is passul. Or, we could say that the sukkah must be *lecha*, which is why a stolen sukkah is *passul*, and we have a special *limmud* that a borrowed sukkah is kosher, since he nonetheless has a *kinyan peiros*.

And there is a *nafka mina* between these two explanations, regarding a disputed sukkah where the *din* would be *hamotzi mechavero alav hara'ayah* – the liability of proof is on the one who wants to take from another, and he then seized the sukkah, in which case the *din* is that we cannot reseize it from him. If the sukkah needs an actual *kinyan*, in this case it is only his because beis din has no power to reseize the sukkah, and since an actual *kinyan* is required, he isn't *yotze*. On the other hand, if we say that only an actual stolen sukkah is *passul*, but anything else is kosher, this sukkah will also be kosher since it isn't stolen, and this is the view of the Chasam Sofer (beginning of *perek lulav hagazul*), that one is *yotze* with such a sukkah. [This is also the *machlokes* between the Mishnah Berurah and Machatzis Hashekel (see Biur Halachah 637:2 s.v. *lo yatza*), if a person stole a sukkah and other people sat in it. The Machatzis Hashekel, explaining the view of the Magen Avraham, says they aren't *yotze*. But the Mishnah Berurah holds that one could argue that they are *yotze*, explaining that although a person may not use a *lulav* that another person stole, that is because it is no better than a borrowed *lulav* and one isn't *yotze* with a borrowed *lulav*, but since a borrowed sukkah is kosher, others can be *yotze* with a sukkah that another person stole. This *machlokes* between the Mishnah Berurah and Machatzis Hashekel depends on how to understand the *issur* of a stolen sukkah and the *heter* of a borrowed sukkah: if the *chidush* of the Torah is that one is *yotze* with a borrowed sukkah because he at least has *kinyan peiros*, then other people may not sit in a stolen sukkah. But if the Torah's *chidush* is that only a stolen sukkah is forbidden to be used, we could say that this applies to the one who stole it, but not to others, since for them the sukkah isn't stolen, and it is only borrowed.]

The Shulchan Aruch Harav writes (637:2): "One may fulfill his obligation with a borrowed sukkah, because, since he enters it with permission, it is considered as his own. The phrase *'lecha'* implying that the sukkah must be one's own, was stated only to exclude a stolen sukkah." He then continues, writing that one is *yotze* with a stolen sukkah, since land cannot be stolen and it is therefore a borrowed sukkah and not a stolen one.

We must understand these two rulings, since they seem to contradict each other: One can derive from the beginning of his words that the sukkah must belong to the person, as he writes that a borrowed sukkah is permitted because "since he enters it with permission, it is considered as his own." Yet he also writes that since land cannot be stolen, a stolen sukkah is kosher since it is considered a borrowed sukkah "and one can fulfill the obligation with a borrowed sukkah." But in that case he didn't have permission since it is stolen, so how can this be compared to a borrowed sukkah?

We could answer: The Rav holds that the Torah only limits a stolen sukkah, and as long as it isn't stolen, the sukkah is kosher. But if so, how do we understand the Torah's ruling that a sukkah must be yours? If it must be yours, a borrowed sukkah should also be *passul*! Therefore, he explains (in *se'if* 11) that *lechatchila* the sukkah

should belong to the person, and if one steals the sukkah *lechatchila* he shouldn't sit in it, unlike a borrowed sukkah where the owner gives him permission and it is considered his sukkah. [According to this, the Gemara's ruling that one may sit in a stolen sukkah since it is considered a borrowed sukkah and one may sit in a borrowed sukkah, is only *bedieved*.]

There are therefore three categories of sukkos:

1) A stolen sukkah, which is *passul* even *bedieved*;

2) a sukkah that isn't stolen but also isn't borrowed, for example a sukkah built in the public domain or if he shoved the owner out of his sukkah, in which case the sukkah is kosher *bedieved* but not *lechatchila*;

3) a borrowed sukkah, which is considered *lecha* because the owner gives permission.

Stolen Bread

The Mateh Efraim (625:55) is mechadesh that on the first night of Sukkos one isn't yotze the mitzvah of sukkah by eating stolen bread. He derives this from the Gemara's gezeira shava of matzah on the first night of Pesach to sukkah on the first night of Sukkos, and just as one isn't yotze on the first night of Pesach with stolen matzah, similarly one isn't yotze with stolen bread on the first night of Sukkos.

Consequently, according to the poskim (Imrei Binah Pesach 25; Sefas Emes Sukkah 35) that guests on Seder night must acquire the matzah so that it is lachem, one can ask if the same din applies on the first night of Sukkos.

◆ מודעה משמחת ◆

לאור הריבוי השואלים בעניני ממונות ורבית
בשבועות הבאות מתכונן בעזהי"ת
'היכל הוראה דבר המשפט'

לשכור מקום רחבת ידים להורות את דבר המשפט

פרטים יבואו

ונזכה להגדיל תורה ולהאדירה

◆ פרנס החודש ◆

ידידינו הרבני הנגיד רוצו"ח
ר' **אברהם שטירמאן** שליט"א

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נידב ידידינו החשוב
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ר' **דוד בענדיקט** שליט"א

◆ **פרנס השבוע** ◆
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ר' **יוסף דויטש** שליט"א