

Arkaos

PART 1

By Rav Shmuel Honigwachs - Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

THE SEVERITY OF GOING TO SECULAR COURT:

Unfortunately, many otherwise respectable Jews are not as stringent as they should be regarding the prohibition against taking their disputes to be heard in secular courts. The Shulchan Aruch [C.M. 26] writes very strongly about this matter. He states that it is forbidden to have disputes brought before non-Jewish judges, even if their rulings are the same as Jewish law and even if both parties are willing to go to this secular court. He adds that one who does go to non-Jewish courts is a *rasha*, and is akin to one who blasphemes and lifts his hand against the Torah of Moshe.

Regrettably, many people who find themselves in litigation over significant amounts of money choose to have their cases heard in secular courts. It is important to stress that although there may be specific times when a *bais din* will permit a case to go to a non-Jewish court, this decision is far from simple and is considered with the utmost gravity. It is definitely not a step that may be taken lightly without the consent of a *Bais Din*.

WHEN DOES BAIS DIN PERMIT IT?

Standard *Bais Din* procedure is that when a plaintiff wants to call a defendant to a *din Torah*, he requests the *bais din* to send a *hazmanah* to summon him. If he doesn't respond to the first summons, a second one is issued, and then a third. If after three *hazmanos* the defendant still does not respond, *bais din* will give the plaintiff a *heter* that permits him to pursue the case in secular court. There is a discussion in the *Poskim* regarding instances where it is obvious that the defendant will never agree to go to *bais din* even before the three *hazmanos* are issued. For example, if the plaintiff sends one *hazmanah*, and the defendant responds by saying, "I will never go to *bais din*", it is possible that the plaintiff will be given permission to bring the case to court. [As a practical matter, it is still usually not advisable to pursue the claim in court before the three *hazmanos* are sent. This is because the plaintiff probably does not have proof that the defendant made this statement. Since it is not documented, the other party can deny it, which could

cause the plaintiff a lot of trouble, and could cost him time and money. He can avoid this hassle and expense by following the accepted procedure, even if it may not seem necessary.]

The source for the practice of sending three *hazmanos* and then allowing the plaintiff to go to secular court is a *Gemara* in *Bava Kama*. The *Gemara* there cites a source in *Chazal* to a then-common expression: "If you call your friend and he doesn't answer, take a heavy wall and throw it at him." Rav Paltai Gaon, cited by the *Rosh*, explains this *Gemara* to be referring to the *bais din* process. He says that it means that if you call your friend to a *din Torah* and he doesn't come, you can strike him with the "heavy wall" of a secular court.

Rav Paltai Gaon seems to be saying that one doesn't need an explicit *heter* from *bais din* to go to court; rather, if one sends the summonses to *bais din* and his friend ignores them, he is permitted to take him to court without any official permission from *bais din*. However, the *Rambam*, followed by the *Teshuvos Rema*, say that a *bais din* must give the plaintiff explicit approval to take his defendant to secular court. Many *Acharonim* add that the same *bais din* that sent the *hazmanos* must be the one to provide this *heter* to go to court. It cannot be obtained from another *bais din*. Other *Poskim* disagree and say that any *bais din* can issue the *heter*.

WHO IS RESPONSIBLE FOR THE COURT FEES?

The *halacha* is that if someone summons his friend to a secular court without following the proper *halachic* procedure before doing so, the defendant can call the plaintiff to a *din Torah* and force him to pay for any court fees he incurred as a result of having to defend himself in court. On the flip side, if the plaintiff did follow the proper protocol and received a *heter* from *bais din* to go to court, he would be allowed to go back to *bais din* and force the defendant to pay for his court fees because he only had to pay those expenses as a result of the defendant's refusal to go to *bais din*.

As we said above, Rav Paltai Gaon's opinion is that one may pursue claims in secular court even without obtaining official permission from *bais din*, as long as he first attempted to

summon the other side to a *din Torah*. If this is done, and one goes to court without obtaining a *heter* from *bais din*, can the plaintiff demand that the defendant pay his court fees?

The Divrei Chaim relates a story where a plaintiff asked a defendant to come to *bais din* with him in front of witnesses, and the defendant refused and said he would not go. He then took him to court, without sending any official *hazmanos* to *bais din*. The defendant subsequently went to *bais din* and demanded that he be reimbursed for his legal fees. The Divrei Chaim ruled that the plaintiff is not obligated to pay those fees since he verbally expressed his willingness to go to *bais din* and the defendant refused, and he can prove this by bringing forth the witnesses. Apparently, he holds that this is true even though the standard procedure of summoning a defendant to *bais din* was not followed. The *sefer Ne'os Desheh* disagrees and infers from the language of several Acharonim that the exemption from paying the litigant's legal fees only applies if three *hazmanos* were sent; however, he does agree that it would apply even if *bais din* did not issue a specific *heter* to go to secular court.

ZONING BOARDS:

A common question that comes up in contemporary times is whether one is permitted to pursue a claim with a local Zoning Board. To give an example: A resident wants to build an extension onto his home and needs to obtain a variance from the local Zoning Board to do so. For whatever reason, his neighbors oppose the idea and feel it will be harmful to them. Are they permitted to present their claims against the variance at a Zoning Board meeting or would this be akin to pursuing a claim in a secular court?

Back in the days when Jews were confined to ghettos, there was a very limited amount of living space. The Maharik speaks about a case where a newcomer wants to take up residence in a ghetto but the old residents oppose his presence because he will occupy space that they cannot afford to give away. He says that the residents would be permitted to petition the local squire to prevent this Jew from moving in, and this would not be forbidden as is going to secular court.

He compares this to a case in the Mishnah of a man who notices an ownerless object and falls on it. The Gemara says that since the man did not make a valid *kinyan* on the object, others may grab it away from him. It seems from the Mishnah that although others may grab the item, the original man who fell on it can also do whatever he can to keep them away and retain it for himself. The Maharik argues that the space in the ghetto can be compared to the ownerless object in the Mishnah, since the land the man intends to occupy is currently available, he has the right to try to grab it for himself. However, the current residents, who have already “fallen” on the spot, also may do whatever it takes to prevent him from acquiring it, including petitioning the local authorities to keep him away.

The Bais Yosef disagrees with this comparison and does not permit petitioning the authorities in this manner; however, many Acharonim rule like the Maharik.

It is noteworthy that the case of the Zoning Board is not exactly like the Maharik's case because the land in the ghetto that the Maharik was discussing was ownerless, while the property the person wants to build an extension on belongs to him. However, the Divrei Chaim does compare the two cases and says that a person would be permitted to stop someone from building onto his house, or even from building a shul on his property, by petitioning the local authorities, and he bases his ruling on the Maharik.

It should be noted that the Divrei Chaim even uses this reasoning to prevent a shul from being built. Although the halacha is clear that one cannot use the rule of *hasagas gevul* to fight the building of a shul in *bais din*, he says that one can do so in a local board that is similar to a contemporary Zoning Board. The *Yad Shalom* and *Pischei Teshuva*, however, say that even according to the Maharik, one would only be able to use the authorities to prevent the building of a private home but not to prevent the building of a shul.

To watch the video or listen to the shiur given by the Dayan, visit: www.baishavaad.org/yorucha-topics
Or signup to receive them via whatsapp: [📞 732.232.1412](https://www.whatsapp.com/channel/002997322321412)