

BUSINESS WEEKLY



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

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



CASE FILE

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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

WASP NEST

The Sorschers had rented a house for the year. One day, Mrs. Sorscher noticed a wasp in the house. She alerted her husband, who was able to kill it. The following day, Mrs. Sorscher noticed another two wasps. "This is very strange," she said to her husband.

"There must be a nest somewhere," Mr. Sorscher replied. "I'll look outside the house."

Mr. Sorscher walked around the house. Indeed, he found that the wasps had built a nest under an eave of the house.

"I found the nest," Mr. Sorscher told his wife. "We'll have to call the exterminator." "Please do," she replied. "I'm very worried about this; I don't want somebody stung by them!"

"I'll notify the landlord also," said Mr. Sorscher. "He has to know about this. Also, he may have an exterminator that he works with."

Mr. Sorscher called the landlord. "We discovered that a swarm of wasps made a nest on the outside of the house," he said. "Do you have the phone number of an exterminator?"

"That's strange; I've never had this before," said the landlord. "I do have an exterminator, though. You're welcome to call him, but at your expense."

"Why should we have to pay the exterminator?" replied Mr. Sorscher. "We can't go on living like this; it's potentially dangerous. The house is not usable as is."

"I understand that there is a problem; I'm not belittling it," said the landlord. "But the problem is not with the house itself; it's something external."

"I don't agree," argued Mr. Sorscher. "The nest is attached to the house and affects its usage."

The two approached Rabbi Dayan and asked:

"Who is responsible to pay the exterminator?"

"The *Mishnah* (B.B. 101b) addresses the respective responsibilities of the landlord and tenant for repairs to the rental property," replied Rabbi Dayan. "The rule of thumb stated is that the landlord is responsible for repairs that require professional service."

"The *Rishonim* further qualify that the landlord is only liable for professional repairs that are considered significant for proper dwelling (C.M. 314:1).

"Exterminating a wasp nest would seemingly fall under this category.

"However, the *poskim* limit the landlord's liability to repairs of the rental item itself, not when some external source limits the usage.

"For example, the *Mishnah* (B.M. 78a) teaches that if a person rented a donkey, but along the way the king conscripted it for his use - we consider this the misfortune of the renter, since the donkey itself is not defective or affected, only its usage. Therefore, the owner has no liability to compensate the renter for the loss of use (C.M. 310:1; *Sma* 310:2 *Nesivos* 310:1, 321:1).

"Similarly, here, if the need for extermination is due to external sources,

IS THE NULLIFICATION NULL?

Q. As Erev Rosh Hashanah approaches, can you please clarify who may serve as *Dayanim* when *hataras nedarim* is performed? Can two brothers serve on a panel of the same *beis din*?

Additionally, it is obvious that some people who serve as "*Dayanim*" for *hataras nedarim* do not know the relevant *halachos*. Does that affect its validity, and should I try to find *Dayanim* who are knowledgeable in this area?

A. Generally, two people who are closely related to one another may not serve as *Dayanim* on the same case (*Shulchan Aruch, Choshen Mishpat* 7:9).

Hataras nedarim (annulment of vows) must be performed by a panel of three individuals who would generally qualify as *Dayanim*. A woman may therefore not serve as a *Dayan* (*Chiddushei R' Akiva Eiger, Yoreh Dei'ah* 228:3). Children are also unqualified, because the Torah discusses the topic of *nedarim* in the context of *Roshei Hamattos* (the leaders of tribes; see *Bamidbar Perek* 30), conveying that the people engaged in the process of *hataras nedarim* must be worthy of serving in a leadership position (*Aruch Hashulchan* *ibid.* 10).

Nevertheless, since *hataras nedarim* is not a *din* (judicial matter), the *Dayanim* may be related to one another, and they may even be related to the person who is annulling his *nedarim* (*Yoreh Dei'ah* 228:1&3). The lone exception is that a husband may not be a *Dayan* for his wife's *hataras nedarim*, but that is because of the principle of *ishto k'gufo*, a person's wife is akin to himself. But a father may be among the *Dayanim* annulling his daughter's *nedarim* (*ibid.* 234:57).

The *poskim* debate whether someone who is disqualified from serving as a witness, and by extension as a judge due to his behavior, such as a *gazlan* (thief), may preside over *hataras nedarim*. Some rule that although such a person could theoretically repent, in his current state, he is not worthy of the title *Dayan*. In contrast, a relative who would be disqualified from adjudicating a financial matter only due to the familial bond is worthy of the title *Dayan*, and may therefore be part of the *hataras nedarim* panel (*Minchas Shlomo, Nedarim* 77a). Others rule that even those who are disqualified from bearing witness due to their poor behavior may serve as *Dayanim* for *hataras nedarim* (*Shu"t Shaagas Aryeh [Kol Shachal]* 1).

In regard to your second question, some *poskim* (*Ketzei Hamateh* 581:92) write that one should not do *hataras nedarim* on Erev Rosh Hashanah before absolute ignoramuses who don't know anything about *Hilchos Nedarim*, because the *Shulchan Aruch* (*ibid.* 228:1) states that *Dayanim* for *hataras nedarim* must be able to follow a logical argument they are being taught, and must also know how to find some reason why the person should not be required to fulfill the *neder* (i.e., creating a *pesach* for the nullification).

The *hataras nedarim* procedure is not merely a way of evading a promise.



CASE FILE

such as if the wasps attached their nest to the outside of the house, we cannot hold the landlord liable to pay for the extermination. Nonetheless, if the problem existed before the rental began, the landlord would be liable, since in that case he did not provide a house fit for living (*Emek Hamishpat, Sechirus* 54:2; *Hatov v'Hayashar*, vol. 21, pp. 129-131).

"However, if the nest was built in a hole in the wall, etc., so that the problem can be attributed to some defect in the building itself, the landlord would be liable.

"Regardless, if there was a clause in the contract or a common practice regarding extermination, we would follow it, but there does not seem to be a common practice about this.

"Based on this, the landlord cannot be made to pay for the extermination," concluded Rabbi Dayan, "unless the nest can be attributed to a defect in the house, such as hole or crack in the wall."

Verdict: The landlord is responsible for repairs that require professional service and are significant for proper dwelling, but if the problem is due to external sources, he is not liable. Thus, he is not liable for extermination unless the problem is attributable to a defect in the structure.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Yei'ush - Abandonment
#4
Retracting From Yei'ush

לע"נ ר' יחיאל מיכל ב"ר חיים חזקוני ח"י בת ר' שמואל חיים ע"ה

Q: I lost my wallet and abandoned hope of finding it. Afterwards, I spotted it and went to pick it up, but someone else took it first. Whose is it?

A: After *hefker*, the item leaves the person's ownership, and even he must make a *kinyan* to reacquire it (*C.M.* 273:4).

However, there is a dispute among the *Acharonim* whether a person can retract from *yei'ush* without making a new *kinyan*.

Some maintain that *yei'ush* differs from *hefker* in this regard, and that even after *yei'ush*, the item remains yours until taken by someone else, so that when you retract from *yei'ush*, nobody else can acquire it (*Nesivos* 262:3; *Mekor Chaim* 448:9; *Ketzos* 406:2).

However, others maintain that you cannot retract from *yei'ush*. Upon *yei'ush*, the Torah allows others to acquire the item and/or it leaves your possession completely, so that if someone else precedes you, he acquires it (*Terumas Hakeri* 262:1; *Chazon Ish B.K.* 18:1,3; see *Milu'ei Choshen* 406:35).

Our case depends on this dispute. The other person is now in possession, but there is a *middas chassidus* to return a lost item even after *yei'ush*.

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Rather, it relies on one of two reasons that are considered a valid basis for annulment of a vow: (1) The person regrets making the *neder* (*charatah*). This works only if the person regrets that he made the *neder* altogether, since he did so out of anger or lack of presence of mind. If he regrets it only *vis-à-vis* the future, and not for any past consequences of the *neder*, that is not a valid reason to nullify the *neder*. (2) The person is able to open a *pesach*, meaning that he states that had he been aware at the time he made the *neder* of a later consequence that would result from it, he would not have taken the vow, and it was therefore made in error.

We do not rely on *charatah* alone, since we suspect that a person might claim that his regret is retrospective, when really it is only regarding the future, which is not a valid basis for annulment. Therefore, a person may be *matir neder* only if he has a *pesach* (*Rema* *ibid.*).

On the other hand, a *pesach* alone is also not a blanket reason for nullification, because the concept of a *pesach* is complex, involving many criteria.

The common practice is, therefore, to turn *charatah* into a *pesach*. How? After the person says that he regrets making the *neder*, we ask, "Had you have known when you made the *neder* that you would come to regret it, would you have made this *neder*?" When the person answers, "No," we are *matir* the *neder* (*Shach* *ibid.* 15). Now, since this process is dependent on creating a *pesach*, the *Dayanim* must know how to create a *pesach* (see *Minchas Pittim* *ibid.*, who writes that some rule that the *Dayanim* must know the detailed *halachos* of *pis'chei nedarim*; see *Mibeis Levi, Yoreh Dei'ah* 1, p. 329).

Some *poskim* defend the practice of using *Dayanim* for *hataras nedarim* on Erev Rosh Hashanah despite their not knowing how to create a *pesach*, explaining that this knowledge is necessary only if there is a chance that a *neder* being annulled will actually require a *pesach*, and the text of *hataras nedarim* we recite on Erev Rosh Hashanah emphasizes that we are nullifying only vows that we have forgotten about. We obviously cannot need a *pesach* for a *neder* we don't remember. Furthermore, it is probable that the requirement to know how to create a *pesach* is not necessary *b'dieved* (see *Shu"t Vayaan David* 3:71). Therefore, it is customary that even if the *Dayanim* do not understand the mechanism of *hataras nedarim*, the procedure is still valid.

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