

Shechainim

PART II

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

PRIVATE BACKYARDS:

In the previous *shiur*, we introduced some of the fundamental cases and principles concerning Hilchos Shecheinim. We also discussed that the *halacha* forbidding the construction of a window overlooking a neighbor's window or yard because of *hezek reiyah* may not apply today since most people have shades or blinds and can simply close them when they wish to engage in private activities opposite the window.

A similar situation exists regarding privacy fences between properties. Although in principle this should be mandatory due to *hezek reiyah*, there does not appear to be a binding *minhag* today to compel a neighbor to do so. This could be explained based upon the observation of some Achronim that today, most people do not engage in private activities in their backyards as they used to in Talmudic times. However, some poskim consider this inconclusive and assert that one may only be lenient together with other considerations. The same would apply when constructing a window opposite a neighbor's backyard. It should be noted, though, that according to the Gemara, if the public can see into the yard from the street or sidewalk, then there certainly would not be any issue in the above cases since in any case, others can see into the property.

WINDOWS OVERLOOKING A SWIMMING POOL:

What is the halacha concerning establishing a *chazaka* for *hezek reiyah* when constructing a swimming pool in one's backyard? This is a common question, and it is certainly a case of a private activity that would be included within the realm of *hezek reiyah*. Would such a person be able to compel his neighbors to obstruct the windows that face the pool? Even if he does not currently have a swimming pool, is it permitted for him to object to his neighbor constructing a window that faces his yard due to the possibility that he may eventually construct a pool? In order to understand the background to the issue and the practical halacha more fully, let's examine the subject of *chazaka* for *hezek reiyah* in more detail.

We mentioned previously that Rishonim disagree (in their discussion of Bava Basra 59b) as to whether one can attain a *chazaka* with respect to *hezek reiyah*, such as when one constructs a window opposite a neighbor's property and the neighbor does not protest. The halacha follows the opinion that one can attain a *chazaka* for *hezek reiyah*. There is an additional dispute in the Rishonim whether

such a *chazaka* can be attained only after a period of three years or even in less time than that. There too, the halacha follows the lenient view that one can achieve a *chazaka* in less than three years if the neighbor does not protest.

OBJECTING PREEMPTIVELY:

We also discussed that the Halacha allows one to place potentially harmful items next to his neighbor's property if the neighbor if there is no harm to the neighbor at present at all. This applies to *hezek reiyah* as well. If so, Reuven would be permitted to open a window opposite Shimon's yard if Shimon is not currently using the yard or engaging in private activities there. However, the Rosh claims that for the same reason, there is also no *chazaka* in such a case. Since Shimon is not currently being harmed by the window, he is not allowed to prevent Reuven from constructing the window even if it might pose difficulties for him in the future. Accordingly, Reuven cannot achieve a *chazaka* since Shimon does not have the right to issue a *macha'ah* (protest), and a *chazaka* can only be achieved if Shimon has the ability to issue a *macha'ah* and does not do so. If so, if Shimon later decides to use the yard to construct a pool and objects to the presence of the window, Reuven would have to remove the window.

The Shulchan Aruch (C.M. 154:16) cites this opinion of the Rosh, but follows it by citing the position of the Rashba who maintains that Shimon can protest initially when Reuven constructs the window. According to him, Shimon can protest now to ensure that if he later decides to use the yard, Reuven has not established a *chazaka* to have his window there. Consequently, if he does not protest, then a *chazaka* is in fact achieved by Reuven. The Shulchan Aruch seems to conclude in accordance with the Rashba.

Based on the ruling of the Shulchan Aruch, it would seem that Shimon may protest initially when Reuven constructs a window facing his yard, but if he does not protest, then he may not protest later when he decides to construct a pool since Reuven has already established a *chazaka*.

ALTERNATIVE REASONS TO OBJECT:

However, the halacha may still be that Reuven must close his window if Shimon later protests for three reasons that we will explain.

First, the Rema comments here that the halacha only follows

the Rashba if that is the common practice. Some Acharonim suggest that the common practice is no longer in accordance with the Rashba, but rather in accordance with the Rosh.

A second reason is based on the following difficulty. The Gemara (59a) says that one (Reuven) who constructs a window higher than four amos opposite a neighbor's courtyard cannot establish a *chazaka* [that would later prevent his neighbor from building upward and blocking the window], and the neighbor (Shimon) cannot issue a *macha'ah* against it. Some Rishonim explain that the Gemara is referring to a *chalon mitzri*, which is a type of temporary window, but concerning a *chalon tzuri*, a more permanent type of window, Shimon can issue a *macha'ah* and if not, one can attain a *chazaka* even above four amos. Other Rishonim explain that the Gemara is referring even to a *chalon tzuri*, which is permanent, and even in that context, *macha'ah* and *chazaka* are only possible if it is situated lower than four amos.

According to the second approach, one can explain that the issue at hand is that of *hezek reiyah*, and the reason for the potential *macha'ah* is to prevent a *chazaka* for the *hezek reiyah*. Since *hezek reiyah* does not apply above four amos, there is no reason for Shimon to protest the window, and therefore no *chazaka* can ever be attained above four amos. On the other hand, according to the first approach that a *chazaka* can be achieved for a permanent window above four amos despite the lack of *hezek reiyah*, one must explain that the issue at play does not relate to *hezek reiyah*. Rather, the issue in the Gemara is that Shimon is allowed to protest simply to ensure that Reuven, who is constructing the window, does not achieve a *chazaka*. If so, the reason must be that *macha'ah* is strictly to ensure that one does not lose his right to block the other's window.

A CONTRADICTION IN THE RAMBAN:

The Maharar Sasson points out a major difficulty here. The Ramban writes clearly like the first approach that *macha'ah* is allowed to prevent a *chazaka* in the case of the Gemara. However, the Ramban also holds that one may place hazardous materials adjacent to a neighbor's property so long as there isn't any damage at present. Why should this be permitted and Shimon not be allowed to protest if, according to the Ramban, Reuven can then establish a *chazaka* to keep the item there even when it is harmful?

The Nesivos suggests the following distinction between the cases. The only time that the Ramban allows a *macha'ah* so that Reuven does not get a *chazaka* is when Reuven is "using" Shimon's property. Thus, in the case of the window, Reuven wants the sunlight to enter through Shimon's property. In that case, the Ramban says that Shimon has the right to be *mocheh* to prevent Reuven from establishing a *chazaka*. This is because Shimon wishes to ensure that if at some later date he decides to construct his own wall next to the property line, Reuven cannot prevent him from doing so by claiming he had a *chazaka* to use the sunlight from his yard.

In contrast, explains the Nesivos, in the case of placing hazardous material next to the property line, Reuven is not using Shimon's property at all, and there is no damage to Shimon's property at this time. Therefore, the Ramban holds that Shimon may not protest Reuven's actions. If at some point Shimon decides to use the area next to the boundary, he can then demand that Reuven remove his hazardous material.

According to the Nesivos' explanation of the Ramban, *macha'ah* is only permitted prior to the presence of a situation of harm if a space of fewer than four amos exists between the two properties since the Gemara says that a space of four amos is sufficient for sunlight to enter. If so, in most cases, where there is a space of more than four amos between Reuven's window and Shimon's property, *macha'ah* would not be allowed simply to prevent a *chazaka*. Because Shimon does not yet suffer any damage from Reuven's window, it would be classified as a case of *kofin al midas Sedom* (we compel a person to allow a neighbor to benefit from his property when he suffers no loss whatsoever).

Based upon the approach of the Nesivos, it would seem that if Reuven constructs a window and then Shimon later wishes to construct a swimming pool, Shimon may insist that Reuven close the window. Because Shimon was never able to issue a *macha'ah* previously, no *chazaka* on the window was established.

IF THE USAGE ISN'T A COMMON ONE:

The third reason why Shimon may be allowed to protest Reuven's window is as follows. We mentioned in the previous shiur that the Gemara (17b) presents two versions of a machlokes between Abaye and Rava as to whether one may preemptively place a harmful object near a neighbor's property, if they are referring to a *sadeh asuyah l'boros* (field normally used for digging pits) or *eino asuyah l'boros* (not normally used for digging pits). We pasken that the machlokes applies only in the case of *sadeh asuyah l'boros*, which means that according to all opinions Reuven may place hazardous materials next to Shimon's property if it is not usually for something that will be damaged by it, and Shimon may only protest if he later chooses to do such a thing.

If so, in an area where backyards are not usually used for a swimming pool, Shimon would not be allowed to prevent Reuven from constructing a window opposite his yard due to the chance that perhaps Shimon will later build a pool. Accordingly, if Shimon does decide to build a pool, he would then have the right to insist that Reuven close the window he constructed previously.

Note, however, that although this should theoretically be the halacha, in the vast majority of situations we will pasken differently due to a number of other factors that we will see in the upcoming shiurim.

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