Shechainim

PART IV

Rav Shmuel Honigwachs, Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

RECAP OF THE PREVIOUS SHIUR:

In the last shiur about the laws of *hezek re'iyah*, we ended with a somewhat surprising position.

We discussed a case where Reuven has a house with a window overlooking Shimon's yard. If Shimon decides that he wants to install a swimming pool in his yard, there is a reasonable argument that he can force Reuven to either seal off his window or pay the cost of erecting a *mechitzah*, even though the window has existed for years. As we explained, our backyards typically are not used for very private matters; therefore, having a window with a line of view of someone's yard is not a *chazakah* for *hezek re'iyah*. Accordingly, if Shimon now wants to make a pool, which definitely requires privacy and the rules of *hezek re'iyah* would genuinely apply. Thus, the laws of *hezek re'iyah* could now be enforced for the first time and Reuven has no claim of *chazakah* to exempt himself from responsibility; consequently, it stands to reason that Reuven would have to block off his existing window.

Although this is a very surprising conclusion, it seems to be valid. However, as we shall explain, even if this assumption is correct, this halacha would not be applicable in most cases.

A HOME BOUGHT FROM A NON-JEW:

The Gemara in Bava Basra says that if a Jew purchases a property from a non-Jew, he assumes the halachic status of the non-Jewish seller. In the Gemara's case, this means that because a non-Jew does not have the ability to establish a *chazakah* against a Jewish neighbor, if a Jew buys his home, the buyer also does not have any prior *chazakos*. Had he bought from a Jew, any *chazakah* that the Jewish seller had established would carry over to the new owner.

There is a major *machlokes* in the Rishonim whether a Jew who buys a property from a non-Jew only receives the disadvantages of the seller, or acquires also the benefits and unique rights that he had. The Rosh writes that a Jewish buyer from a non-Jew also obtains his halachic advantages, even if these benefits would not have applied to a Jewish owner. The Tur, on the other hand, cites the opinion of "the Gaon" who says that a Jew only acquires the disadvantages of the non-Jew but not the advantages.

This dispute is made apparent in the following case: A Jewish homeowner installs a window overlooking the roof of the neighboring non-Jew's house. Sometime later, the non-Jew sells his home to a Jew. The new owner wants to add a new floor to his house, which would block the sunlight from his neighbor's window. The neighbor objects, saying that he has no right to block his sunlight. The new resident, however, claims that if his non-Jewish seller had decided to build the new floor, he would have had the right to do so. In this context, non-Jews are only subject to the rules of *dina d'malchusah*, which, unlike Choshen Mishpat, do not prohibit blocking the sunlight from a neighbor's window. He says that since he bought his house from a non-Jew, he should assume the same rights and should be allowed to make this extension. This dispute would hinge upon the *machlokes* between the Rosh and the Gaon.

The Shulchan Aruch rules like the Gaon, saying that the Jewish buyer cannot make this upwards extension because he only obtains the disadvantages of the non-Jewish seller and not the advantages. The Rema, however, rules like the Rosh and says that he obtains the advantages as well, and, therefore, he is permitted to make this extension if *dina d'malchusa* is on his side.

According to the Rema, we can assert that if a Jew buys his home from a non-Jew and has a window overlooking his neighbor's yard, he acquires the rights of the non-Jew, which means that he can follow the rules of *dina d'malchusah* and cannot be forced to close off his existing window to allow his neighbor to build a swimming pool. This means that Ashkenazim, who follow the rulings of the Rema, can avoid being forced to seal their pre-existing window. Sefardim, who follow the rulings of the Shulchan Aruch, would seemingly not be able to rely on this leniency.

IF BOTH NEIGHBORS BOUGHT FROM NON-JEWS:

However, even Sefardim can rely on Rema's ruling in a case where both neighbors bought their homes from non-Jews, as the Shulchan Aruch's ruling is specific to a case where one neighbor bought from a non-Jew and the other did not. The reasoning behind this is as follows: The Biur HaGra points out that the Gemara does, in fact, seem to say that as a rule, a Jewish buyer acquires the advantages of a non-Jew from whom he makes a purchase. It says that if a Jew buys *tevel* – i.e., produce that has not had *maasros* taken

from it – from a non-Jew, he does not have to separate *maaser* from these crops. The reason for this is that the non-Jew had no obligation to separate *maaser*, as this is only an obligation upon Jews; therefore, the Jew who buys it from him does not have this obligation either.

This Gemara seems to clearly be confirming the opinion of the Rosh and Rema that a Jew who makes a purchase from a non-Jew does assume his advantages. If so, how are we to understand the ruling of the Shulchan Aruch?

The Baal Ha'Itur answers by citing a Gemara in Bava Kama that if a Jew and non-Jew go before a *bais din* to settle a dispute, bais din will look at both the halachic ruling and the *dina d'malchusah* ruling, and then impose the more stringent of the two on the non-Jew. If the non-Jew would be on the losing side in either of these forums, *bais din* will rule against him. He can only win if both *Choshen Mishpat* and secular law are on his side.

In the case of the *tevel*, the non-Jew has no obligation to separate *maaser* according to any law. According to secular law, he obviously has no such obligation, and even according to Jewish law, only Jews are required to separate *maaser* and non-Jews are not. Thus, he clearly has no such obligation and a Jew who purchases these crops from him takes his place and also is not obligated to separate *maaser*.

Whereas, in the case of the Shulchan Aruch if it would somehow be possible to prevail upon the non-Jew to go to *bais din*, they would impose the laws of the Torah upon him – which in this instance are more stringent than the laws of secular courts – and they would restrict him from blocking his neighbor's sunlight. Consequently, it could be argued that the non-Jew does not actually have a right to block his Jewish neighbor's window and this non-existent right cannot be passed on to the Jewish buyer.

The same would be true in the case of a window overlooking a pool. If a Jew bought his house from a non-Jew, he does not inherit any right to keep his window open facing the pool, as the non-Jew did not have such a right according to Jewish law, and had he agreed to go to *bais din* they would have told him as much. That is why according to the Shulchan Aruch the Jew who bought his home from a non-Jew could be forced to seal off a window facing a pool due to the laws of *hezek re'iyah*.

This is all only true, however, in a case where only the owner of the house with the window bought his home from a non-Jew and the owner of the house with the pool did not. If both of them bought their homes from non-Jews, that would not be the case. In the unlikely event that both non-Jews had gone to *bais din* to determine if the window could be left open, the *bais din* would rule that they are to follow the *dina d'malchusah* which does allow it. Accordingly, when two Jews buy their homes from two non-Jews, they inherit the rules of the former owners, which is that the owner of the window cannot be forced to seal his window due to *hezek re'iyah*.

This is in fact the most common scenario when swimming pools are involved, as it is relatively rare for homes built for Jews to have pools in the yards. The standard situation where there are pools in the yard is when non-Jewish homes are sold to Jews. And, according to everything we have explained, we can now state that according to all opinions, in such a case the owner of the window cannot be forced to close it off to allow for a swimming pool to be installed.

NEW CONSTRUCTION:

The only exception to this would be if the neighbor wants to put in a new window after he purchased his home. The Maharsham says that since he only inherited the rights for any existing windows, he doesn't have the right to put in a new one that would present a problem of *hezek re'iyah*.

This leads us to return to the Rema's opinion and ask why he allows the Jewish buyer to create a new floor that would block his neighbor's window. If it is true that the Jewish buyer would only get the seller's rights on existing structures that he acquired from the non-Jew, why is he allowed to create a new structure that would block his neighbor's window?

The explanation would seem to be that although the new wall that the new neighbor wants to build did not exist yet when the non-Jew owned the home, the window in his neighbor's house did exist. When the non-Jew lived next door, that window did not have any "right" to have sunlight, as the non-Jew could have chosen to block it at any time. Thus, the Jewish buyer isn't considered to be creating anything new when he actually goes ahead and blocks the window. Rather, he is merely utilizing the advantages he assumed from the non-Jew. If the window did not yet exist when the home was purchased from the non-Jew and the neighbor only installed it afterward and

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PART IV *CONTINUED*

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established a *chazakah*, it would be forbidden to build a wall that blocked the new window.

WHEN BUYING FROM JEWS:

What would the *halacha* be if two Jews bought homes from two other Jews? The Gemara discusses a case where two brothers inherit property from their father, with one brother getting the house and the other getting the yard. In this story, the brother who inherited the yard wants to force the brother who inherited the house to close off a window that overlooks his yard because of *hezek re'iyah*. The Gemara says that the brother who owns the house does not have the right to keep his window.

There is a *machlokes Rishonim* whether that means that the one who owns the yard can force the one who owns the window to seal it off, or if it just means that he has the right to build a wall to block the window, even though he blocks his brother's sunlight by doing so. The Shulchan Aruch rules that he can build a wall that blocks the window, but he cannot force his brother to close off his window. The Rema, however, rules that he can even force the window to be sealed off.

The Shulchan Aruch adds that the same *halacha* would apply in a case where one man sells his property to two purchasers. This would seem to mean that if two Jews buy houses in a housing development from the same Jewish developer, with each of them having windows facing each other's yards; if one of them decides that he wants to build a pool, the Shulchan Aruch would rule that he cannot force his neighbor to close off his window, while the Rema would rule that he could.

However, this too may not be applicable in most cases. The Shulchan Aruch also discusses a case where one party sells his yard to someone else while keeping his house for himself. The Shulchan Aruch rules that the same halachos would apply in this case as in the aforementioned case of the two brothers who inherited a house and yard from their father. The Rema, however, says that if one person sells his yard while keeping the house for himself, the seller can be forced to close off any windows that overlook the yard.

Some Poskim say that the same would be true if one person sells his yard and subsequently sells his adjacent home to a second buyer. In such a case the buyer of the house inherits the same halachos as the seller. Since the seller could have been forced to close off his window after he sold his yard, the buyer of the house can also be forced to do the same. That is all true in an instance where the yard is sold first and the house is sold second. If, however, the house is sold first, the purchaser of the yard cannot force the owner of the house to seal off his window. According to this, if the developer sold the home to the one who wants to build a swimming pool first, he could force his neighbor to close off his window.

The *Prisha*, however, disagrees with those Poskim and says that even the Rema would agree that when the house and yard are sold to two Jews, one after the other, the owner of the house cannot be forced to close off his window. According to him, no matter which house is bought first, neither neighbor can force the other to seal a window. If both houses were bought from a Jew, the only time one could force the other to seal a window is if they were purchased simultaneously

FINAL CONCLUSION:

We can now conclude that the perplexing position we started this segment with only would apply in very specific cases. For example, when two people already owned their properties, and one of them wants to install a new window. In that case, if his neighbor wants to build a pool, he may have a right to force him not to construct the new window. Alternatively, the neighbor building the pool may have a right to force his neighbor to close off a window if he bought his house from a non-Jew or always owned his house and his neighbor bought his house from a Jew.

Whereas, if both of them bought their homes from non-Jews and the window already existed, or if both bought from a Jew - as long as they didn't purchase their homes at the exact same time, which is unlikely – the neighbor building the pool cannot force the neighbor to seal his window.

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