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Mishnah

If partners wish to make a partition in a courtyard (*in which they jointly own; the wall will provide privacy for each of them*), they build the wall in the middle (*where they each provide half the land for the wall*). Where the local custom is to build of rough-edged stones, smooth stones, half-size bricks, or (*whole*) bricks - they build; all in keeping with the local custom.

With rough-edged stones - one gives three *tefachim* (*handbreadths*) and the other gives three *tefachim*. With smooth stones - one gives two and a half *tefachim*, and the other gives two and a half *tefachim*. With half-size bricks - one gives two *tefachim*, and the other gives two *tefachim*. With (*whole*) bricks - one gives one and a half *tefachim*, and the other gives one and a half *tefachim*. Therefore, if the wall fell down, its place and the stones belong to both.

So too with a vegetable garden: Where the custom is to put up a fence, they obligate him to do so; but in the valley (*by a field of grain*), where the custom is not to put up a fence, they do not obligate him to do so. If, however, one wishes to, he enters into his own field and builds it (*the partition is built using his own resources, and it is located entirely on his portion of the field*), and he makes a sign on the outside (*of the fence to show that it was built by him*). Therefore, if the wall fell down, its place and the stones belong to him. If they built it by consent, they build the wall in the middle and they make a sign on each side. Therefore, if the wall fell down, its place and the stones belong to both of them. (2a1 – 2a2)

Mechitzah

The *Gemara* presumes that the word “*mechitzah*” used in the *Mishnah* means a wall. This can be proven from that

which we learned in a *Baraisa*: [*One is not allowed to plant vines within four amos of someone’s grain unless there is a wall separating them.*] If a wall of a vineyard (*which is adjacent to a field of grain belonging to his fellow*) falls down, he (*the owner of the grain*) may tell him (*the owner of the vineyard*) to build the wall (*for otherwise, the new grain that grows will be prohibited as kilayim of the vineyard, and if the new growth reaches a point where it is more than one part to two-hundred parts of the permitted produce, the entire grain will become prohibited, for the new part is too large to be nullified*). If the wall fell down again, he may tell him to rebuild it again. If the owner of the vineyard abandoned the wall and did not rebuild it, he has caused his fellow’s grain to become unfit (*kilayim*) and he will be liable for the damages. [*Thus we see that the word “mechitzah” means a wall.*]

The reason why either of them can be compelled (*by Beis Din*) to erect a wall (*in a case of a jointly owned courtyard*) is because they both agreed (*originally*); however, if they did not agree to this, he (*the partner who has no desire to build a wall*) cannot be compelled (*to erect a wall*). From this we may infer that ‘visual trespass’ is not regarded as a substantial damage (*for if it would be, one partner can tell the other, “I do not want you to see my activities”*).

The *Gemara* asks: Perhaps the word “*mechitzah*” means division, as it is written: *And the division of the congregation was etc.*? Accordingly, the following would be the meaning of the *Mishnah*: Once they agreed to divide the courtyard, they are required to build a wall between them (*even if one of the partners is reluctant to do so*). From this we may infer that ‘visual trespass’ is regarded as a substantial damage.

If so, the *Gemara* asks, why does the *Mishnah* say, “partners wish to make a division”? It should have said, “partners wish to divide”?

The *Gemara* responds: And if “*mechitzah*” means a wall, why then does the *Mishnah* say, “they build the wall”? It should have simply stated: “they must build it”?

The *Gemara* answers: If the *Mishnah* had said ‘it,’ I might have understood that a mere boundary marker is sufficient (and the *Mishnah* would be teaching us that a small indivisible courtyard may also be divided, if they agree; it would not be telling us anything about the halachos of ‘visual trespassing’). It therefore tells us that the partition must be a wall (in order to ensure privacy). (2a2 – 2b1)

It is stated in the *Mishnah*: They build the wall in the middle.

The *Gemara* asks: Is this not obvious (if “*mechitzah*” means a wall – if they agreed to build it together, it is obvious that it should be built in the center of the courtyard)!?

The *Gemara* answers: It had to be stated with respect to the case where one of the partners persuaded the other to agree. You might have thought that in that case, the second partner can say to the first, “When I consented to your request, it was only with respect of my view (by allowing a thin partition of boards which would prevent my looking over into your part, or a thick wall, but only a small part would be built on my land), but I never agreed to use my ground space.” The *Mishnah* teaches us that he cannot say like that. (2b1 – 2b2)

Visual Trespass

The *Gemara* asks: And is a ‘visual trespass’ not regarded as a substantial damage? (A sign to remember the six proofs that the *Gemara* is about to give: Garden, wall, force, divide, windows and Rav Nachman): Our *Mishnah* had stated: So too with a vegetable garden (and the only reason to build a wall is to prevent visual trespassing)!

The *Gemara* answers that this is not a proof, for a garden is different on account of Rabbi Abba’s teaching. Rabbi Abba said in the name of Rav Huna who said in the name of Rav: A person is forbidden from standing near his friend’s field when its stalks are grown (because people in the city will tend to admire it, and therefore cause it to be damaged by their evil eye). – but the *Mishnah* stated: And similarly (indicating that there is one reason for both)? – That is referring to the rough-edged stones or the smooth stones.

The *Gemara* attempts to prove this from another *Mishnah*: If the wall of a courtyard collapses, the joint owner can be compelled to help in rebuilding it to a height of four *amos* (cubits). [This is obviously because of ‘visual trespassing’!]

The *Gemara* rejects the proof, for if it falls, the case is different (since they had previously agreed to build the wall).

The *Gemara* asks: What then was the point of bringing this proof (for the cases are obviously different)?

The *Gemara* answers: Because it could be said that this statement was required only as an introduction to the next clause of the *Mishnah*, which states: He is not compelled to help in rebuilding above four *amos*.

Come and hear from the following *Mishnah*: All residents of a courtyard are compelled to assist in building a gatehouse (to prevent the public from peering inside) and a door to the courtyard. This indicates that ‘visual trespass’ is a substantial damage!

The *Gemara* deflects this proof, for damages inflicted by the viewing of the public is different.

The *Gemara* asks: Is then ‘visual trespass’ by a private individual not a substantial damage? Come and hear from the following *Mishnah*: A courtyard is not required to be divided (on the demand of one of its owners) unless it is large enough to allow four *amos* for each partner, which shows that if enough space will be left to each, a division can be



demanded. Seemingly, this means that a partner can be compelled to build a wall!

The *Gemara* answers: No! A mere fence of sticks, serving as a boundary marker, is sufficient.

The *Gemara* attempts once again to cite a proof that we are concerned for 'visual trespass.' Come and hear from the following *Mishnah*: If one built a wall built in his courtyard facing windows from another courtyard, whether above, below, or opposite them, the wall must be kept four *amos* away. In explanation of this, it was taught that if the wall is higher, it must be four *amos* higher so that one should not be able to lower himself and look in. If the wall is lower, it must be four *amos* lower so that one should not be able to stand on it and look in. And it must be four *amos* away so as not to darken his neighbor's house.

The *Gemara* rejects this proof as well, for damage caused by looking into a house (*where a person routinely performs intimate activities there*) is different (*than a courtyard*).

The *Gemara* attempts to cite a proof for a final time: Rav Nachman said in the name of Shmuel: If a person's roof adjoins his neighbor's courtyard, he must build a fence four *amos* high (*in order to prevent the fellow who is working on his roof to see into his neighbor's courtyard*).

The *Gemara* deflects this proof as well, for there it is different, because the owner of the courtyard can say to the owner of the roof, "I routinely make use of my courtyard, but you have no set times for using your roof, and I do not know when you may be going up there, so that I may hide from you" (*and this is why a wall is required*). (2b2 – 3a1)

INSIGHTS TO THE DAF

Liability for an Evil Eye

Rabbi Abba said in the name of Rav Huna who said in the name of Rav: A person is forbidden from standing near his friend's field when its stalks are grown.

Shulchan Aruch cites this *halachah*; however, the Rambam omits it.

The Maggid Mishnah explains that the Rambam maintains that this is not actually a prohibition; rather, it is a *midas chassidus* - one who wishes to act piously should avoid standing near his fellow's field when there is standing grain. This is why we do not force neighbors, whose roofs are adjacent to each other, to build a fence so one should be prevented from looking into the other's area.

The Raavad disagrees, and holds that a wall of four *amos* is required by a garden.

The Steipler Gaon quotes from a wise man that one who damages by casting an evil eye on another will not be liable to pay. It is for this reason that the *Gemara* utilizes the term "it is forbidden," and not that "one is liable." The Steipler disagrees, and explains that the reason the term "liable" is not used is because we have no way of determining without a doubt that the damage occurred on account of this person's evil eye. However, if we would know for certain that it was due to him, he would be liable (*except according to the Rambam*).

Armored glass in the era of the *Beis Yosef*

Our *sugya* explains that amongst the many forms of damage a person must avoid causing another is included *hezek re'iyah* – visual damage such as invasion of privacy by peering into your neighbor's premises. *Chazal* regarded such damage as so severe that they demanded precautions to avoid any possibility of its occurrence. Our *mishnah* therefore rules that if neighbors share a yard (which used to be a utility area of the home for cooking, washing etc), one of them can force the other to share the costs of building a dividing wall high enough to prevent *hezek re'iyah*. For the same reason, you must not make a new doorway or window facing a neighbor if you thereby see into his property. *Nimukei Yosef* stresses that *Chazal* define no specific distance for this *halachah* and even if houses are far apart,



neighbors must not make any structural change causing *hezek re'iyah*.

Three sorts of visual damage: In his *Kehilos Ya'akov* (Bava Basra, #5), the Steipler ztl lists three sorts of damage from *hezek re'iyah*:

- a) Personal damage: People engaging in personal affairs feel discomfort and embarrassment when observed.
- b) Damage to property: *Hezek re'iyah* limits a person's use of his property.
- c) Parapsychological damage: Just looking at something or someone may cause harm.

Our *sugya*, for example, forbids looking at another's crop to prevent damage from *'ayin ra'ah* (see Vol. 145). *Chazal* also state that it is improper to have your door face your neighbor's (Bava Basra 60a) as Bil'am praised our forefathers for scrupulously behaving otherwise, saying "How good are your tents, Yaakov" (Bemidbar 24:5).

Anyone wanting to break a wall for a new window or enlarge an existing one must first ask his facing neighbor's permission. *Pischei Teshuvah* (C.M. 157, S.K. 9), even forbids someone with an unopenable window to install an openable one instead without his neighbor's consent because he could open the window and get a better angle of view to his neighbor's property!

Opaque glass: Poskim disagree as to if one may break a wall and install an opaque window to let light into one's house without being able to see outside. The Rashach (cited in Kenesses HaGedolah, 154) forbade it without the neighbors' consent as the glass may eventually break with a resultant aperture causing *hezek re'iyah*.

Armored glass in the era of Rav Yosef Karo (the Beis Yosef): However, in his Responsa Avkas Rochel (121), Rav Yosef Karo remarks that we shouldn't worry about the glass breaking as the homeowner sees to prevent such accidents for his own sake. He recommends using armored glass for the neighbors' peace of mind: "I've often seen them installing

iron lattices in front of such windows to protect from rocks sometimes thrown by children."

Invasion of privacy in the modern era: Contemporary urban construction features closely-built houses or flats and those wanting to live in a home completely free from *hezek re'iyah* have to choose rural or suburban settings. Indeed, Rav Yom Tov Tzahalon, a leading rabbi in Tsefas about 400 years ago, remarked: "We've already clarified that if a town practices a certain custom, it prevails. In Tsefas, in fact, we've never heard a claim of *hezek re'iyah* between houses far apart." Still, he emphasizes that the prohibition to cause damage by looking into a neighbor's property also applies in towns where buildings are close and their windows face each other (Responsa Maharitatz, I, 253). HaGaon Rav Y.S. Elyashiv, cited in Tziyon BeMishpat (p. 139), rules that as lack of available land precludes the required distance between buildings to avoid *hezek re'iyah*, neighbors can no longer present such claims. However, *hezek re'iyah* is still so frequent in shared yards that Rosh on our *sugya* and Remo (Shulchan 'Aruch, C.M. 157:1) rule that partners in a yard may force one another to share the costs of building a fence or wall between their premises even if local custom is different. (Minchas Tzvi, Hilchos Shechenim §3: see also Responsa Teshuvos veHanhagos, III, 453)

Unrecognizable Damage

The *Gemara* quotes from a *Baraisa* that if one fails to fence his vineyard, thereby causing the adjacent produce owned by someone else to become forbidden as *kilayim*, the owner of the vineyard is responsible to pay for the damage.

Tosfos asks: Why is the owner of the vineyard liable to pay? It should qualify as a *hezek sh'eino nikar* - an unrecognizable damage, which is not considered a damage?

Tosfos answers that even if the damage isn't recognizable in the object, so long as the context of the situation looks like a damage, i.e. the vines growing near the produce without a fence separating, it is considered a damage that is recognizable and the owner is liable.

Tosfos asks: If this is considered “recognizable,” why do we consider it to be an unrecognizable damage when one takes a *sheretz* (creepy insect) and places it on his friend's *taharos*? There too, the context of the situation should qualify as a damage recognizable?

Tosfos answers that since *tumah* requires not only contact between the *sheretz* and the *taharos*, but also requires *hechsher* (the food must become moist willingly to be susceptible to *tumah*), that aspect is still not recognizable and therefore qualifies as a damage which is not recognizable.

The question is, however, that Tosfos just got finished saying that *kilayim* is not merely a situational prohibition of mixing produce and grape vines. *Kilayim* is only created if the owner “wants it.” Based on this, Tosfos explains that so long as the owner is doing whatever possible to build a fence, even though the *kilayim* grew .5% prior to the fence being erected, it is not considered a *kilayim* violation. Since *kilayim* also has its own set of prerequisites to become forbidden - only if the owner fails to put in the effort of building the fence, which is not necessarily recognizable, we should consider *kilayim* a damage which is not recognizable, just as we consider *tumah* a damage which is not recognizable (due to the lack of recognition that it became *huchshar l'kabel tumah*)?

Tosfos apparently holds that by *kilayim* the prohibition is a *metzius* of growth. We don't require the consent of the owner to create the prohibition; just that if the owner makes an effort to build a fence and demonstrates that he doesn't want the *kilayim*, the prohibition can be avoided. *Tumah* requires a positive act of *hechsher* to create the status of *tumah*, therefore it is considered “not recognizable,” but *kilayim* doesn't require a positive act to become forbidden (rather, a positive act to repair the fence will prevent the prohibition).

DAILY MASHAL

The Partnership of the Body and Soul

The Mishnah had stated: If partners wish to make a partition in a courtyard, they build the wall in the middle.

Reb Yonasan Eibshitz explains the Mishnah homiletically: Partners wish to build a wall – this is referring to the body and the soul of a person who have a partnership between them. They must build a fence, so the yetzer hara does not enter between them.

Evil Eye

The *Gemara* (Bava Metzia 30a) states that one is forbidden to spread out a lost article that he is watching when he has guests because when the guests see the article being displayed, they may be envious and they will cast an evil eye on the article.

One must wonder why one should be concerned of someone else's jealousy, especially if it is said: *and the rotting of the bones is jealousy*. Why should one be concerned that someone else's envy will harm his belongings and property?

We find that the gentile prophet Balaam, when blessing the Jewish people, declared, *how good are your tents, Yaakov, your dwelling places, O Israel*. The *Gemara* states that Balaam saw that every Jewish tent was aligned in a way that no one could see inside his neighbors' tent. Besides for the issue of privacy, there was another dimension to this blessing. Balaam had an evil eye, and Balaam wished to curse the Jewish People with his influence. By casting an evil eye on a neighbor, one is essentially influencing his Jewish friend with the character of Balaam, and this is detrimental to one's well-being. For this reason one should avoid casting an evil eye on someone else, and one must also be careful to avoid allowing others to cast an evil eye on himself or on his possessions.