



Good Fences...

Masechet Bava Batra opens by discussing a case where people want to divide a shared courtyard. The *Mishnah* teaches that they must build a fence to divide between the two properties according to the local standard.

The *Bartenura* explains that the case in the *Mishnah* is where the courtyard is smaller than the minimum size for which each party can force the other to divide it. This explains why the *Mishnah* begins that the parties “wanted” to divide the courtyard. However once the agreed to do so, they must build a fence, with each party equally contributed land on which to build it. Despite the fact the *Mishnah* explains that its thickness must be according to the local standard, the *Bartenura* adds that it must be a least four *amot* high and thick enough that one cannot see through the fence. This is because of *hezek re'iya*. How does we understand *hezek re'iya*.

The *Even HaAzel* (*Shchenim* 2:16) presents two ways to understand the issue. At first it would appear to be that the obligation to build the fence is much like other laws (of which we will learn) where one has to prevent damage being caused to his neighbours property. It would seem then the peering into another property causes direct damage and the wall prevents that. Without a fence, it is impossible for one not to gaze at his friend property and cause that damage.

The *Even HaAzel* present another way of understanding the issue. It not that that gazing does any damage per se. Rather that with the lack of privacy, the neighbour will be inhibited from using it for private matters. Even though the “damage” is indirect, we learn that one is still accountable – *gerama be'nezikin chayav*. He notes that even if one party simply stood on his side without looking into the other side, his presence would cause that damage. Importantly, he adds that according to this understanding, *hezek re'iya* would only apply if the damaged party had a *chazaka* – full rights to use that land. Otherwise, the other party could equally counter that his own movement should not be restricted.

The *Even HaAzel* cite the following debate as stemming from these two different understanding. If brothers divide an estate, then “*ein lahem chalonot ze al ze*”. In other words, one heir cannot prevent the other from building a wall in front of the neighbouring heir’s window. The *Raavad* maintains, that while this might be true, the other heir equally cannot demand that his brother close up his windows that overlook his property. The *Rosh* however argues that this would a classic case of *hezek re'iya* so that demand can be made; a position shared by the *Rambam*.

The *Even HaAzel* explains that the *Rosh* maintains the first understanding that *hezek re'iya* is direct damage. Since the owner with the windows does not have a *chazaka* (the property was only now divided) he must prevent that damage from occurring and block up the window. The *Raavad* however maintains the second understanding that the damage is simply the restricted use of his property. In this case however, just as the heir with the window does not have a *chazaka*, the other heir does not have a *chazaka* on unrestricted use. Consequently, *hezek re'iya* would not apply in this case.

Based on this analysis, it is difficult to understand how the *Raavad* would understand our *Mishnah*. Neither party has a *chazaka* of unrestricted usage so how is *hezek re'iya* motivating the obligation to build a wall. The *Even HaAzel* explains that the obligation is not from direct damage, but rather stems out of the law of *shutfim* – joint ownership. Just as they can compel on other, when they shared the courtyard, to build a door, a guardhouse, etc, this obligation when dividing the *chatzer* is part of those laws. To be clear, it is certainly dependant one whether *hezek re'iya* has a basis in *halacha* (which is debated in the *Gemara*). If it did not, then this law would have not found its way into the laws of *shutfim*. Once it is however, they must be build the wall when they divide the courtyard.

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Revision Questions

בבא מציעא י"א-י"ג

- What is done with the rubble from a collapsed building with two owners, one of which lived on the second floor? (י"א: א')
- Regarding the dwelling arrangement described in the previous question what is the law if the second floor collapses? (י"ב: ב')
- What is the law if the building collapses and the ground floor owner does not want to rebuild? (Include both opinions.) (י"ג: ג')
- What other case is similar to the one just described? (י"ד: ד')
- If a tree in a private property collapses in to the public domain, when is the owner liable for the damage it causes? (י"ד: ד')
- If someone's fence collapses into another's property, can he tell his neighbour to keep the stones instead of removing them? (י"ה: ה')
- If the neighbour accepts, can the original owner pay him the removal costs and demand the stones? (י"ה: ה')
- What other case brought has the same ruling as the previous two questions? (י"ה: ה')
- Can one use the public domain when engaged in construction? (י"ה: ה')
- What are the three opinions regarding the ownership of vegetables that grow out of a steep incline in between two properties? (י"ו: ו')

בבא בתרא א' א' – ב' ב'

- Explain how a fence is to be constructed when dividing a property that had joint ownership. (א' א')
- How do they determine which material should be used for the fence work? (א' א')
- Regarding which property is one not able to force his partner to construct a fence? (א' ב')
- According to *R' Yosi*, if one neighbour constructed a fence, what would the other neighbour have done such that we can now obligate him to share in the construction cost? (א' ג')
- What is the maximum height of the fence that members of a shared-courtyard are obligated to contribute to the construction cost? (א' ד')
- What other feature of a courtyard is debated as to whether the cost can be placed on all members? (א' ה')
- What qualifies a person to be a citizen of a city? (א' ה')
- How large must a shared courtyard be before it can be subdivided? (א' ו')
- How large must a shared field be before it can be subdivided? (א' ו')
- How large must a shared garden be before it can be subdivided? (א' ו')
- What item can never be divided? (א' ו')
- What must one do if he wishes to dig a hole near the hole of his neighbour? (א' ז')
- What other three things must be distanced from the fence at that same distance? (א' ז')
- What are the restrictions placed on the installation of an oven? (א' ז')

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Next Week's Mishnayot...

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	שבת קודש
10 November ט' חשוון	11 November י' חשוון	12 November י"א חשוון	13 November י"ב חשוון	14 November י"ג חשוון	15 November י"ד חשוון	16 November ט"ו חשוון
Bava Batra 2:3-4	Bava Batra 2:5-6	Bava Batra 2:7-8	Bava Batra 2:9-10	Bava Batra 2:11-12	Bava Batra 2:13-14	Bava Batra 3:1-2

