

He says to him; Fence it!

אומר לו גדר -

OVERVIEW

The **ברייתא** of **הכרם** is discussing a case where a dividing wall between a vineyard and a grain field (that had different owners) was breached. There is then sufficient cause to be concerned about **כלאים**, since the vines and grain are immediately adjacent to each other. The **ברייתא** states that he tells him to repair the breach, and if he repaired it and it was breached again, he should tell him again. If he showed no interest in repairing, then he is liable for any damage that is caused if there is an actual **כלאים**. It is not clear in the **ברייתא**, who is told to repair the fence. In addition it would seem that both the **בעל הכרם** and the **בעל השדה** should be jointly responsible to build the fence, since each one is contributing equally to the potential **כלאים**. Why is only one party required to repair the fence? Indeed if someone is required to repair the fence why the need to tell him; especially twice?! **תוספות** will be discussing these issues.

פירוש¹ לבעל הכרם והוא² המזיק –

The explanation of the phrase ‘He says to him’; the word ‘him’ refers **to the owner of the vineyard for he is the aggressor**. It is the responsibility of the **בעל הכרם** to repair the breach in the dividing wall. The reason the **בעל הכרם** is required to repair the wall and not the **בעל השדה**, even though seemingly each one is causing the other’s field to be come **כלאים**, is -

דארבע אמות שאמרו³ להרחיק הוא בשביל עבודת הכרם⁴ כדאמרינן בפרק שני לקמן (דף כו,א) –
Because the four cubits which the חכמים said that one is required to distance himself from the boundary of his neighbor’s property that is on account of the work required to cultivate the vineyard, as the גמרא states later in the second פרק.⁵

¹ negating רש"י's explanation that it is the **בעל הכרם** who is responsible to rebuild the wall on account of **כלאים** (since **עבודת הכרם** is **אמות ד'** it is as if the **כרם** extends an additional **אמות ד'** into the **שדה הלבן** and is causing the **כלאים**.)

² The הגהות הב"ח amends this to read **דהוא**.

³ The **משנה** there (כו,א) states that one who plants trees on his own property must distance himself from his neighbor’s property **אמות ד'** from the property line. Perhaps that is why it is referred to as **עבודת הכרם**; since it is the obligation of the **בעל הכרם** to erect this **מחיצה**.

⁴ The term **עבודת הכרם** is to be understood to include any type of tree that requires cultivation of **אמות ד'**.

⁵ It was customary to plow underneath the trees for a distance of four **אמות** radius, from the trunk of the tree, to cultivate the soil underneath the tree. If one were to plant his tree adjacent to the property line, there is concern that he may bring his plow into his neighbor’s property, which he has no right to do. Planting a tree

responds to an anticipated difficulty:

ואפילו רבי יוסי דקאמר לקמן (דף יח,ב כה,ב) על הניזק להרחיק את עצמו⁶ –

And even according to ר' יוסי who later states it is incumbent on the injured party to distance himself. על הניזק maintains however that even if we agree that

על הניזק (ד' אמות of משנה) and the ברייתא (and the ruling of the תוספות, nevertheless the ruling of the

האמר רב אשי לקמן (דף כה,ב) מודי ר' יוסי בגירי דיליה⁷ –

For רב אשי said later in the גמרא that ר' יוסי agrees that if the damage is done with his arrows, then it is על המזיק להרחיק. In our case of עבודת הכרם, it is considered גירי דיליה.

The בעל האילן will physically take the plow and bring it into his neighbor's field. In this case it is considered גירי דיליה and ר' יוסי will agree that you must either distance yourself or build a dividing wall. When that wall is breached the בעל האילן reverts to being the מזיק, and is required to repair the wall.

addresses now the issue of the requirement that the בעל הכרם be told (twice!) to rebuild the wall.

ואומר רבינו יצחק דלהכי קתני אומר לו גזור ולא קתני חייב לגזור⁸ –

near the property line is considered an act of aggression. He is a מזיק. However if there is a dividing wall between the properties, he may plant trees right up to the wall. There is no concern that he may take his plow into the other property since there is the dividing wall. If however the wall is breached, the concern of עבודת הכרם returns. It is the obligation of the בעל האילן to repair the wall; otherwise he is a מזיק, since his tree is within אמות of his neighbor's property, which is forbidden. In our ברייתא of עבודת הכרם, the בעל הכרם planted his vines up to the property line since there was a dividing wall between him and the בעל השדה. Once the wall was breached, it became the duty of the בעל הכרם to repair the wall as just explained. Therefore as long as he does not repair the wall he is considered the מזיק and any resultant damage caused by his negligence to repair the wall is his responsibility. [The responsibility of the בעל הכרם extends even into an area for which originally he was not solely responsible. The בעל הכרם had to build the wall on account of עבודת הכרם not for כלאים. Nevertheless he is responsible not only to limit the damage caused by עבודת הכרם, but even for the damage caused by the ensuing כלאים, since he is considered the מזיק. This liability for the איסור כלאים may be considered דינא דגרמי (as opposed to his responsibility to build the fence)]. The בעל הכרם, therefore, is also responsible for any damage of כלאים caused by his vines, since he is the מזיק.

⁶ ר' יוסי is discussing the following case: The משנה states that one must distance a tree twenty five אמות from his neighbors pit; so that the roots of the tree do not eventually weaken the pit. If the tree was planted after the pit was dug, the owner of the pit has the right to chop down the tree (provided he pays for the tree). ר' יוסי is of the opinion that even if the pit preceded the planting of the tree, he may not chop down the tree, for the owner of the tree has every right to plant a tree on his own property. ר' יוסי maintains that if the victim does not want to suffer let him dig his pit where no one will be able to weaken it. It would seem that ר"י would not agree to the משנה which states that a tree must be distanced from the property line four אמות. According to ר"י one should be able to bring his tree to the property line, since he is currently not doing any damage. The two cases seem very similar.

⁷ One may not shoot arrows from his own רשות and damage objects in his neighbor's רשות. ר' יוסי agrees that we do not say עצמו את עצמו להרחיק in any case which is considered גירי דיליה. The case of the tree and the pit is not considered גירי דיליה. When the tree is being planted there is no damage to the pit. The damage will be later, and will happen by itself without any involvement of the בעל האילן.

⁸ Seemingly it should have said he is obligated to build the fence. We rarely find this expression that the victim needs to remind the aggressor of his duties.

And the ר"י says that the reason the ברייתא uses the expression 'אומר לו גזור' – 'he says to him rebuild the fence', and the ברייתא does not say that 'he is obligated to repair the fence'. – מזיק will explain that here the מזיק is required to remind the

לפי שצריך להתרות בו ואם לא התרו בו לגזור אינו חייב באחריותו⁹ –

For here, it is required to warn the מזיק and if they did not warn him to repair the fence the מזיק is not liable for the damages incurred on account of the אסור כלאים.

ולהכי נקט נמי תרי זימני נפרצה אומר לו גזור אף פעם שניה כשנפרצה צריך להתרותו –

And that is also the reason that he mentions two times; 'if it was breached he says to him, 'fence it''! The reason the ברייתא mentions it twice is because if he repaired it once, and it was breached a second time, then **even the second time that it was breached he is required to warn** the מזיק. The initial warning the first time, when he subsequently repaired it, is not sufficient –

שאינו סבור להיות חייב לגזור כל שעה –

For the מזיק does not deem it appropriate that he is required to repair it every time. In order for him to be liable for אסור כלאים after he repaired it once and it broke, he must be warned a second time. Otherwise he is not liable.

ונפרצה פעם שלישית מספקא לרבינו יצחק אם צריך להתרותו כל שעה –

And if it was breached a third time; after he was twice warned and rebuilt twice the ר"י is doubtful, whether it is required to warn him every time; otherwise there is no liability on the part of the בעל הכרם –

או שמא סגי בתרי זימני ואין צריך להתרות בו יותר –

Or perhaps twice is sufficient; and there is no requirement to warn him further. He was warned already twice, He realizes that it is his continual obligation to have the wall repaired

נפרצה אומר לו גזור offers a different explanation for the redundancy of

ורבינו תם מפרש דלהכי נקט תרי זימני לאשמועינן –

And the ר"ת explains – that the reason he mentions twice the requirement to tell the בעל הכרם to repair the fence is to teach us –

שאם יש תוספת מאתים בין מה שהוסיף בנפרצה ראשונה ובין מה שהוסיף בנפרצה שניה –

That if there was an additional growth of a two hundredth amount between what was added during the first breach and between what was added during

⁹ It would seem from תוספות that if he did not warn the בעל הכרם to repair the fence, it would still become כלאים; however the בעל הכרם would not be liable to pay for the damage. The reason he is not חייב is because the damage inflicted by the בעל הכרם is considered only גרמי (see previous תוספות), [since he is not causing the damage directly]. One is liable for the damages of גרמי (according to some opinions) only if it is done במזיד. Therefore he has to be told to rebuild, otherwise the בעל הכרם assumes that it is not his responsibility to rebuild. He is considered a גרמי בשוגג.

the second breach. During each breach individually it did not grow a sufficient amount to equal a two hundredth, but if the growth during both breaches were to be added together it would equal to a growth amount of a two hundredth (or more) –

דאין מצטרפין לאסור ומראשונה ראשונה בטלי¹⁰ –

They cannot be combined to prohibit the produce, and from after the repair of first breach the additional growth of the first breach becomes nullified.

והארכת בהגזול קמא (בבא קמא דף ק,ב ושם) ובפרק במה אשה (שבת דף סה,א) :

And I have dealt with this at length in קמא and in אשה פרק הגזול.

SUMMARY

In the case of **הכרם** it is the obligation of the **בעל הכרם** to rebuild the wall. The **בעל הכרם** is considered the **מזיק**, since he is not permitted to plant within **ד' אמות** of the boundary line, unless there is a dividing wall.

גירי דיליה who normally maintains that **עצמו** את **ההרחיק** also agrees that the responsibility lies with the **בעל הכרם**, for since the concern is that the **בעל הכרם** will plow in his neighbors field to cultivate his **כרם**, that is considered **גירי דיליה**.

Nonetheless, unless the **בעל הכרם** is explicitly warned to rebuild the wall, he will not be **חייב** for the **כלאים**, since he does not realize that it is his obligation. Indeed he must be warned even a second time (after the original breach had been repaired and was broken again). We cannot assume that the **בעל הכרם** realizes that it is his ongoing responsibility. Concerning whether he must be warned a third time **תוספות** is unsure, perhaps twice is sufficient to have the **בעל הכרם** realize his responsibility.

Another explanation why the **ברייתא** mentions the warning twice, to inform us that the rule of **הוסף מאתיים** is **כלאים**, refers only to a **הוספה** of **מאתיים** during one breach period. We cannot combine the growths of two breach periods for the amount of **הוסף מאתיים**.

THINKING IT OVER

1. The **ברייתא** of **הכרם** can follow the view of **גירי דיליה** since it is considered **גירי דיליה**. We also derive from **הכרם** that **דאין דינא דגרמי** is **ר"מ**.¹¹ It seems contradictory that it should be both **גירי דיליה** and **דינא דגרמי**!

¹⁰ After each repair, if during that breach it did not grow **מאתיים**, then that growth of **כלאים** becomes **בטל**, as if it never happened. By the next breach we start estimating anew how much it grew during the present breach. If at this new breach, less than **מאתיים** grew, it is again disregarded after the current repair. It is only **אסור בכלאים** if it grew **מאתיים** during the period of a single breach.

¹¹ See previous ד"ה **כדתניא** and also footnotes # 5 [in brackets] & 9 in our **תוספות**

2. If we were to assume that one is required to warn the בעל הכרם on the third time also, what would be the דין concerning a fourth, fifth, etc. time?
3. How does the ת"ת derive from the ברייתא that we do not combine the הוספה of each נפרצה?
4. What would the ת"ת maintain is the דין when the בעל הכרם was warned only once, and it was נפרצה a second time; is the בעל הכרם חייב?