

He says to him; Fence it! – אומר לו גדור

Overview

The **ברייתא** of **מחיצת 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 **איסור 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 **איסור 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.

The explanation¹ of the phrase ‘He says to him’; the word ‘him’ refers **to the owner of the vineyard**. 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 -

for he (the **בעל הכרם**) is considered **the aggressor**. The reason the **בעל הכרם** is considered the **מזיק** as opposed to the **בעל השדה** is because –

The four cubits which the **חכמים** **said** that one is required to **distance himself** from the boundary of his neighbors property – [the **משנה** there states that one who plants trees on his own property must distance himself from his neighbor’s property four **אמות** from the property line³] -

that is on account of the work required to cultivate the vineyard⁴.

As the גמרא states later in the second פרק. 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 near the property line is

¹ explanation that it is the **בעל הכרם** who is responsible to rebuild the wall on account of **כלאים**. (Since **עבודת הכרם** is as if my **כרם** extends an additional **אמות** into the **שדה** and is causing the **כלאים**.)

² The **דעה** emends this to read: **דהוא**.

³ Perhaps that is why it is referred to as **מחיצת 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**.

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 ד' of his neighbor's property, which is forbidden. In our case of ברייתא, 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 responsibility⁵. The בעל הכרם, therefore, is also responsible for any damage of כלאים caused by his vines, since he is the מזיק.

anticipates a possible difficulty:

who ר' יוסי – and even according to יוסי דקאמר לקמן (דף יח,ב, כה,ב) later states concerning 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 –

it is incumbent on the injured party to distance himself. – על הניזק להרחיק את עצמו. 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. תוספות maintains however that even if we agree that על הניזק להרחיק, nevertheless the ruling of the ברייתא (and the משנה of ד' אמות) is still valid. The reason is –

– גמרא in the אמר רב אשי **for אמר רב אשי לקמן (דף כה,ב)**

that ר' יוסי agrees that if the damage is done with his arrows, then it is על המזיק להרחיק. One may not shoot arrows from his own רשות and damage objects in his neighbor's רשות. Any case which is considered גירי דיליה ר' יוסי agrees that we do not say על הניזק להרחיק את עצמו. 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. In our case of עבודת הכרם, however, 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 אמות ד' or build a

⁵ 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 איסור, since he is considered the מזיק. This liability for the כלאים איסור may be considered דינא דגרמי (as opposed to his responsibility to build the fence).

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 הכרם be told (twice!) to rebuild the wall.

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'. 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. תוספות will explain that here the מזיק is required to remind the תוספות –

לפי שצריך להתרות בו – **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 איסור כלאים⁶.

and that is also the reason that he mentions – ולהכי נקט נמי

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 –

it is required to warn the מזיק. The initial warning the first time, when he subsequently repaired it, is not sufficient –

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 the איסור כלאים after he repaired it once and it broke, he must be warned a second time. Otherwise he is not liable.

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.

or perhaps twice is sufficient; He was warned already twice, He realizes that it is his continual obligation to have the wall repaired

⁶ 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.

and there is no requirement to warn him further. – ואין צריך להתרות בו יותר

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

and the ר"ת explains – ורבינו תם מפרש

that the reason he mentions twice the requirement to tell the fence to repair the fence – דלהכי נקט תרי זימני

to teach us that if there was an additional growth of a two hundredth amount –

between what was added during the first breach – בין מה שהוסיף בנפרצה ראשונה

and between what was added during 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) –

they cannot be combined to prohibit the produce. – דאין מצטרפין לאסור

and from after the repair of first breach the additional growth of the first breach becomes nullified. 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.

And I have dealt with this at length in פרק במה אשה (בבא קמא דף ק,ב ושם) **ובפרק במה אשה** (שבת דף סה,א) **פרק במה אשה** **and in פרק הגזול קמא**

Summary

In the case of שנופרצה it is the obligation of the בעל הכרם to rebuild the wall. The בעל הכרם is considered מזיק, since he is not permitted to plant within אמות ד' of the boundary line, unless there is a dividing wall. ר' who normally maintains that עצמו את עצמו 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 איסור 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 הוסיף 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 מאתיים.

Thinking it over

1. The ברייתא of מחיצת הכרם can follow the view of ר' יוסי, since it is considered גירי דיליה. We also derive from מחיצת הכרם that ר"מ is ⁷ דאין דינא דגרמי. It seems contradictory that it should be both גירי דיליה and דגרמי!
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 ר"ת derive from the ברייתא that we do not combine the הוספה of each נפרצה?
4. What would the ר"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?

⁷ See previous דתניא ד"ה תוספות and also footnotes # 5&6 in our תוספות.