

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

SHEDDING TREE

Mr. Green and Mr. Brown were neighbors. Years ago, Mr. Green had planted a small tree in his yard. However, this small tree had grown significantly over the years, and now had large branches that extended well over Mr. Brown's

property.

The tree had beautiful leaves and flowers, when in bloom. However, it shed heavily, dropping its leaves and flowers onto the ground below, including onto the Browns' property. In addition, birds would come and sit on the branches, adding their droppings, as well.

Every fall and spring, Mr. Brown would clean his property, several times each season, from the leaves and flowers that Mr. Green's tree shed.

One year, Mr. Brown finally had it, and decided to confront Mr. Green on the issue.

"Why should I have to clean up the shedding from your tree?" Mr. Brown complained. "Clean up after your own mess!"

"It's not my mess," replied Mr. Green. "It's nature. Trees grow. They produce oxygen. They provide shade. They are pretty when in bloom. And they shed..."

"Still, you planted the tree and it is yours, so it's your responsibility!" insisted Mr. Brown. "When you clean away the shedding from your property, you should come and clean my property, as well."

"When I planted the tree, it was a young sapling," argued Mr. Green. "At the time, the tree was well within my property, and I tended to it completely. If over the years it grew, that's not my problem."

"Then hire someone to cut the branches that extend over my airspace!" demanded Mr. Brown.

"If you want to cut the branches that jut into your property, I can't stop you," said Mr. Green. "However, you pay for it! I'm not interested in cutting them."

The two came before Rabbi Dayan and asked: **"Is Mr. Green responsible for the shedding of his tree?"**

"The third *perek* of Bava Basra addresses a person's requirement to distance potential damage from his neighbor," replied Rabbi Dayan.

"The *Mishnah* (B.B. 25b) writes that a person must distance a tree significantly from his neighbor's well. If he didn't, and the roots expand into the well, he has to cut down the tree. However, Rabi Yosi maintains that he is not required to cut down the tree, since he planted it within his own property and the damage is not direct. The *Gemara* (ibid.) rules like Rabi Yosi.

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לע"נ ר' שלמה ב"ר ברוך ז'וג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

MOVING THE BOUNDARY

Q: My neighbor in the bungalow colony extended his porch over the property line into my territory. I don't want to get into an argument with him now, when we are about to live next-door to each other for the summer, but I'm concerned that if I wait until after the summer to address the issue, he might claim that he already made a *chazakah* on it.

Is my concern valid? And if it is, can you advise me how to deal with it without broaching the subject now?

A: We begin with the obvious: It is forbidden to infringe upon another person's property unless he has clearly granted permission to do so. A person who uses someone's property against the owner's will is a *sho'el shelo midaas* (borrower without permission), and he is considered a thief (see *Rashbam B.B. 57b, s.v. L'kulah*). According to some *poskim*, a person who subsumes someone else's property into his own transgresses *lo sigzol* (Rambam, *Geneivah* 7:11, *Shulchan Aruch, C.M. 376:1. Cf. Sma ibid. 2*). In Eretz Yisrael he would also transgress the *lav of hasagas gvul* (*Devarim* 19:14). He is also subject to a curse in the Torah of *arur masig gvul rei'eihu*, which, some *poskim* say, applies even outside of Eretz Yisrael (*Aruch Hashulchan* 376:1).

Turning to your question, there are two types of *chazakos* that could apply to this scenario, with differing *halachos*: *chezkas karka'os* and *chezkas tashmishin*.

Chezkas karka'os means that a person makes a *chazakah* on the land itself, in a way that prevents its owner from using that portion of his land.

The *halachah* is that a person does not acquire land merely by making a *chazakah*; it must be transferred to him by the owner, either by sale or as a gift. If the owner gave him permission to use it or decided to forgo payment for its use, the person using it does not take ownership of it even if he has used it for many years.

If he did use it for many years, and he claims that the owner transferred ownership to him, he must



CASE FILE

"Elsewhere, the *Gemara* (B.B. 18b) indicates that Rabi Yosi maintains, moreover, that even initially the person is not required to distance his tree. *Shulchan Aruch* rules this way" (C.M. 155:32; *Sma* 155:73).

"Although even indirect damage (*grama*) is prohibited and a person must refrain from such acts (B.B. 22b; *Tur*, C.M. 378:2; *Gra* 378:1), the *Acharonim* explain, based on the Ramban, that here we do not associate the tree's damage, even indirectly, to the person's own actions, since it grew on its own" (*Chiddushei Rav Boruch Ber*, B.B. #3).

"Thus, although the tree grew and now sheds onto Mr. Brown's property, he cannot require Mr. Green to clean up or cut it down.

"However, Mr. Brown can cut any branches that extend into his property and disturb him, at his own expense (C.M. 155:26-30).

Nonetheless, many locales have ordinances regarding trees that extend into a neighbor's airspace. Some locales hold the owner of the tree liable for its upkeep and that it not disturb the neighbors; others require this only if the damage is significant. However, many *Acharonim* rule that regarding laws of neighbors, *dina d'malchusa dina* – the law of the land, does not apply, unless for public safety or need, or if the widespread common practice is in accordance with such" (see *Shach* 356:10; *Beis Yitzchak*, C.M. #77; *Igros Moshe*, C.M. 2:62; *Emek Hamishpat*, *Shecheinim* p. 409).

"Thus," concluded Rabbi Dayan, "Mr. Brown can cut whatever branches jut over his property and disturb him, but cannot require Mr. Green to remove his tree or clean up, barring local ordinances otherwise."

Verdict: A neighbor cannot restrain someone from planting a tree that will grow and ultimately disturb him nor require the owner to clean up any mess it causes. Many authorities maintain that *dina d'malchusa dina* – the law of the land, would not apply here, unless the widespread common practice is in accordance with such.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Dayanim (Judges) #6

Adjudication Nowadays
(continued)

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח'י בת ר' שמואל חיים ע"ה

Q: What cases can non-Semuchim Dayanim adjudicate nowadays?

A: We previously mentioned that the Sages authorized non-*Semuchim Dayanim* to adjudicate nowadays only cases that are common and entail monetary loss, including theft.

Some authorities maintain, though, that robbery through force or mugging with physical injury is not considered common, when the stolen item is no longer intact. However, many *Rishonim* write that all robbery is considered common and can be adjudicated. *Acharonim* rule this way, since otherwise the world would be filled with robbery (C.M. 1:3; *Sma* 1:14; *Shach* 1:9; *Aruch Hashulchan* 1:4).

Damage caused by animals through *shen* (eating) and *regel* (trampling) is considered common and can be adjudicated (C.M. 1:3).

Some write that damage caused by fire (*eish*) and obstacles (*bor*) is considered uncommon and cannot be judged. However, the Mechaber and many *Acharonim* rule that it can be (*Shach* 1:2; *Pischei Teshuvah* 1:2).

Next week, b'e"H, we will address what *beis din* can do when not halachically authorized to adjudicate.



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validate his claim by producing a contract, bringing witnesses who testify that the sale occurred, or proving that he used the field in the presence of the owner for three years, and the owner never protested (C.M. 140-142).

A *chezkas tashmishin* is when a person has been using someone's property for a certain use that does not hinder the owner from using his property — e.g., by hanging a clothesline above a neighbor's yard.

There is a dispute among the *poskim* if this *chazakah* works the same way as *chezkas karka'os*. Some rule that in this case as well, it would take three years *and* a claim for the use to make this *chazakah*. Others argue that since the person's use of the property does not prevent the owner from using it, we assume that since the owner let him use it without protest, he must have forgone any claim against him and agreed to let him use it, in which case he cannot change his mind (*Rema* 153:2, 16 and 155:35). In addition, in a *chezkas tashmishin*, a claim that the owner granted permission (ibid. 155:43) or was *mochel* (154:7 and *Mishkan Shalom* 4, fn. 16-17) is enough of a claim to the land, and he does not have to claim that it was sold or gifted to him.

Extending a porch into a neighbor's property obviously does prevent the owner from using that space, and the only type of *chazakah* that can be made is a *chezkas karka'os*, which requires both a valid claim *and* a three-year *chazakah*.

In order to prevent your neighbor from claiming, after three years, that you transferred ownership of that section of your property to him, you must make a *macha'ah* (protest). Even if you don't suspect that he would lie and claim that you transferred ownership, you must take into account that if he passes away after using the porch for three years, *beis din* will claim, on behalf of his heirs, that you may have transferred ownership to their father, and the *chazakah* makes it theirs. You should therefore make a *macha'ah*.

If you are not so concerned that it will ruin your relationship with your neighbor, you can contact him and tell him that you are not insisting that he remove his porch, but you also don't want to lose the rights to your property. You should request that he give you a document — preferably signed by witnesses — in which he acknowledges that part of his porch is built on your property, and that it will be returned to you if and when you decide to reclaim it, and he will not be believed if he claims that you transferred ownership unless he can prove it with a contract.

Another benefit of this document is that he won't be able to claim that the land belonged to him all along, which may be hard to disprove without his acknowledgment, in writing, that it is yours.

In next week's column, iy"H, we will discuss how to make a *macha'ah*.

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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