

THE YESHIVA PIRCHEI SHOSHANIM SHULCHAN ARUCH PROJECT

Damages between Neighbors Shiur One

Mareh Makomos for this Shiur

Bava Basra 59a

Bava Basra 41a

Nemukey Yosef (Bava Basra 31b, dibbur hamas'chil masnisin)

Rosh (Bava Basra, Perek Chezkas Habatim, Siman 74)

Rif (Bava Basra 32a)

Rambam (Laws of neighbors 8:1)

Rif (Bava Basra 31b)

Rambam (Laws of neighbors, 8:3)

The Hebrew Version of this Lesson was written by

© Yeshiva Pirchei Shoshanim 2007

This shiur may not be reproduced in any form without permission of the copyright holder.

Table of Contents:

1. Sources
2. Seifim of the Shulchan Aruch and Rama
3. Attaching a ziz to a wall
4. A chazaka for usage in three years
5. The ruling of the Tur
6. Chazaka for visual trespass
7. Use of a small ziz
8. To extend the area of the ziz
9. A chazaka of four amos underneath the ziz
10. The measure for a chazaka for usage (and if a claim is needed)
11. The ruling for a ziz that is less than a tefach
12. Review questions and answers

Placing a ziz and making a chazaka on it



Siman 153: The law of building a ziz and a gutter and placing a ladder or wall. In this Siman, there are 20 Seifim.

Siman 153 Seif One

1 1(1) One who wishes to construct a ziz (*meaning a beam or stake that protrudes from the attic outwards*) of any length from his wall into the air of the yard of his neighbor, the yard owner can prevent this because this is a visual trespass when he hangs items from this and uses it.

Rama: 2 and as long as he does not remove it and the yard owner leaves it there of his own volition, the owner of the ziz may not use this because it is a visual trespass to the yard owner, and the yard owner uses it (Tur).

Siman 153 Seif Two

2 One builds a ziz 3 and the yard owner did not protest, the owner of the ziz immediately makes a 4 chazaka. 5 (*and uses it and prevents the yard owner from using it*) (Tur).

Rama: And there are those that say that all of these chazakos [4] 6) require three years, and as long as there were not three years of chazaka he can protest. So, too, concerning a daim as in chazakos of land (Tur in the name of Rabbeinu Tam and the Rosh), and as was explained above in siman 146, Seif 9. And there are those that say that for a ziz that is less than one tefach, no chazaka can be made, and the yard owner can protest whenever he wants; 2 [5] 7) and if he did not protest and left it there of his own volition, the yard owner can use it but not the ziz owner (Tur in the name of the Ramah and the Ri of Barcelona and the Rosh).

Siman 153 Seif Three

3 If the ziz was a tefach long, he is machzik into the air of the adjacent yard. In addition, if the yard owner wants 6 to build under the ziz and make its usage impossible, the ziz owner can prevent him. 7 And if the ziz is not a tefach long, he does not have a chazaka in the air of the yard and whenever the yard owner wants to, he can build under it and make use of the ziz impossible, and the owner of the ziz cannot prevent him.

Attaching a ziz to a wall

S I M A N 1 5 3 : 1

The source of this *Halacha* is the *Mishnah* in *Bava Basra* 59a. It is important to note that in *Bava Basra*, instead of the commentary of **Rashi**, there is the commentary of the **Rashbam**, which we will be following for these *sugyos*.

The *Siman* begins with the subject of a *chazaka* for usage,

We are familiar with the concept of a *chazaka* (possession) concerning ownership of land.

A *chazaka* on land is achieved when a person lives on a property for three years and has a valid claim (for example, he claims he purchased the land or was given it as a gift) and no one protests his presence during this period.

This is a *chazaka* and the land belongs to him,

The *chazaka* for usage is similar, but instead of the possession in question being a certain item, it is a certain usage. Once a *chazaka* is made, no one can prevent the *machzik* from the usage that he now possesses, and he can prevent others from impinging on this usage.

The *Mishnah* speaks of a *ziz*, a metal or wooden rod (or the like) that is attached to a wall under a window or roof (or the like) in order to hang objects on it, and the *ziz* protrudes into the yard of a neighbor.

The *Mishna* states that

“ONE WHO PLACES A *ZIZ* UP TO 1 *TEFACH* IN LENGTH, THERE IS A *CHAZAKA*.”

The **Rashbam** explains that if the owner of the adjacent yard does not demand that the *ziz* be removed, the owner of the *ziz* makes a *chazaka*, and the owner of the yard is not allowed to build underneath this *ziz*.

The Mishna adds:

“AND HE CAN PROTEST,” WHICH THE RASHBAM EXPLAINS AS FOLLOWS:

The owner of the yard can protest against the one who builds the *ziz* before he makes his *chazaka* and insist that it be removed because it disturbs him, because when the owner of the roof uses the *ziz* he sees into his neighbor's yard, and this is called *hezeik re'iya* — visual trespass.

The Mishnah continues (based on the Rashbam's explanation),

If the *ziz* is less than a *tefach* there is no *chazaka*, and the owner of the yard underneath cannot protest its presence, because it is so small that it causes no disturbance.

A chazaka for usage in three years

The **Beis Yosef** adds that according to the **Rashbam**, the *chazaka* requires 3 years and a claim of either purchase or receipt of the usage as a gift,

However, not a claim of *mechila*. *Mechila* means that the *machzik* claims that since the owner of the adjacent yard never voiced a complaint, this means he was *mocheil*, was willing to forgo use of the space under the *ziz*. This is based on the *Gemara* in *Bava Basra* 41a, which states that any *chazaka* that does not have a claim with it is not a *chazaka*.

The **Rashbam** holds that a *chazaka* requires 3 years and a valid claim. The **Tur** as well writes explicitly

“AND THE OWNER OF THE ZIZ CLAIMS THAT HE ERECTED IT WITH PERMISSION THAT HE BOUGHT IT FROM HIM OR IT WAS GIVEN TO HIM.”

The Tur does not accept a claim,

That the owner of the yard gave his tacit permission to the *ziz's* being there, rather he requires a solid claim for a *chazaka*.

The ruling of the Tur

The Tur rules as follows:

First, the Tur brings a brief introduction about usage-based *chazakos*.

“THERE IS A *CHAZAKA* WHICH IS NOT FOR THE LAND ITSELF BUT RATHER TO USE IN A MANNER OF *CHAZAKA* FOR USAGE, AND WHEN THE USAGE IS REMOVED, THE PLACE REMAINS CLEAR FOR ITS OWNERS.”

Then, the Tur brings our case:

When does this apply?

Reuven’s house was adjacent to Shimon’s yard and he placed a *ziz* from his house into Shimon’s yard and possessed this for 3 years and claims that he did this with permission that he has acquired from him or was given it as a gift

THIS IS A *CHAZAKA* AND REUVEN MAY USE THIS WHENEVER HE WANTS AND MAY PREVENT SHIMON FROM USING IT.

We see as we did above that the Tur requires both 3 years of possession and a valid claim for a usage based *chazaka*.

The Tur adds:

Initially, when Reuven came to build this, or after he built it but had not yet possessed it for 3 years, Shimon may protest, and Reuven must remove it immediately (this is, because he has not yet made a *chazaka* on this *ziz*).

This is as long as Reuven does not remove it and Shimon leaves it there of his own volition, the owner of the *ziz* is not allowed to use it (before making a *chazaka*), because he damages the owner of the yard with his looking (the fact that he looks into his yard infringes on his privacy), but the owner of the yard may use the *ziz* for as long as it remains there and the owner of the *ziz* cannot stop him.”

The Tur concludes with the ruling of the *Mishnah*:

“When does this apply (that Reuven has a *chazaka* on the *ziz*)? When the *ziz* protrudes 1 *tefach*. If it does not protrude 1 *tefach*, there is no *chazaka* because the owner of the yard did not feel a need to protest, since it is less than a *tefach*.”

A chazaka for visual trespass

The Nemukey Yosef (*Bava Basra* 31b, *dibbur hamas'chil masnisin*) asks:

The *Halacha* is that visual trespass has no *chazaka*. Meaning, if a person causes damage to his neighbor by his looking into his yard, there is no *chazaka* for this. Even after three or many more years he cannot claim that he has possession of this right, because this is a great damage to a person. This is the ruling of the Rif and other *poskim*. If so, how can one who erects a *ziz* have a *chazaka* on its usage, despite the visual trespass he commits against his neighbor?

The Nemukey Yosef replies,

The above rule is said only concerning visual trespass from a window into a neighbor's yard. This is because such usage takes place on a regular basis. Therefore, this is a sufficient disturbance to prevent a *chazaka*. However, the case at hand is where the *ziz* comes from the roof and hangs over the yard. A roof is not considered a place used regularly. Therefore, the damage or disturbance is not so great as to prevent a *chazaka*.

Use of a small ziz

When a *ziz* is smaller than a *tefach* does its owner have the right to use it?

There is a *Machlokes* on this question in the *Genara*:

1. **Rav Huna** holds that the intent of the *Mishnah* is that the owner of the roof (i.e. owner of the *ziz*) cannot protest against the use of the *ziz* (because even if the owner of the yard uses the *ziz* he cannot see who is above him on the roof. Therefore, he commits no visual trespass, as explained by the **Rashbam**). The owner of the yard, however, can surely protest against the roof owner's use of the *ziz* (the **Rashbam** explains that the yard owner can protest that the *ziz* owner not build it at all).
2. **Rav Yehuda** holds that even the owner of the yard cannot protest against the owner of the roof's using this *ziz*.

The *Genara* explains that both hold that visual trespass is a bona fide form of damage. The *Machlokes* between Rav Huna and Rav Yehuda is as follows:

Rav Yehuda holds,

While visual trespass is indeed a form of damage, the yard owner cannot protest against the roof owner's use of the *ziz* because the roof owner can claim that the *ziz* is only usable for hanging items. Therefore, when he hangs items he will be careful to turn his head away and not look into his neighbor's yard.

Rav Huna counters that this is not a reason to allow this,

As the yard owner can claim that the roof owner will still look into his yard, because he will be afraid to hang items on the *ziz* without looking. The **Rambam** explains that the claim is that the roof owner will use his fear of falling to justify his looking while hanging objects onto the *ziz*.

What is the *Halacha* concerning this *Machlokes*?

The **Tur** writes that the **Ramah**¹ and **Rav Yehuda** of Barcelona rule like **Rav Huna** and notes that the **Rosh** (*Bava Basra*, *Perek Chezkas Habatim*, *Siman 74*) also rules this way.

The **Beis Yosef** notes that the **Rif** (*Bava Basra 32a*) also rules this way, and apparently, the **Rambam** does as well (Laws of neighbors 8:1).

To extend the area of the *ziz*

The *Genara* brings the ruling of **Rav Assi** in the name of **Rav Mani**, who holds,

If one makes a *chazaka* on a *ziz* that is one *tefach* wide (one *tefach* in width as measured along the wall it protrudes from) and is four *tefachim* long. This means it protrudes four *tefachim* from the wall – based on the **Rashbam's**

¹ *Ramah* – *R' Meir Ben Todros HaLevi Abulafia* - Born: Spain, c. 1170. Died: Spain, c. 1244. Talmudist. Av Bet Din in Toledo, he was regarded as one of the foremost halachic authorities of his time being consulted by the Ramban among others. He was one of the first rabbis to attack the Rambam on his views on resurrection etc and he was opposed to the study of philosophy. Author of *Peratei Peratim/Minute Details*, compendium of *chidushim* on the whole Talmud written in Aramaic, of which only *Bava Basra* and *Sanhedrin* are extant and are known as *Yad Ramah*.

explanation of a one-by-four *tefachim ziz*), the owner of the *ziz* makes a *chazaka* on the width of four *tefachim* as well. Meaning he can now place a board that is four by four *tefachim* in this space.

The Tur writes that the *Halacha* is the same in the opposite case,

In which a *chazaka* is made on a *ziz* that protrudes only one *tefach* but is four *tefachim* wide. In this case, again, the owner of the *ziz* acquires four by four *tefachim*.

The Rashbam explains,

This ruling: because the yard owner allowed him to make a *chazaka* on the area considered a *makom chashuv*, this means that he agreed to the entire four by four *tefachim*.

The Rashbam adds

If one makes a *chazaka* on a space that is one *tefach* wide and ten *tefachim* long, his *chazaka* is on the same four by four *tefachim*, but not ten *tefachim*. The **Rashbam** concludes that one who is *machzik* a *ziz* that is one *tefach* wide and *three tefachim* long, he has not made a *chazaka* on three by three *tefachim*, but only the space of the *ziz* and not more. Because three *tefachim* is not considered a *makom chashuv*, we say that the yard owner did not agree to his using the area of a *makom chashuv* here.

A chazaka of four amos underneath the ziz

We learned that if a person is *machzik* a *ziz* that is one by four *tefachim*, he is in fact *machzik* an area of four by four *tefachim*, a *makom chashuv*. The question is, does the *ziz* owner receive permission to use the four *tefachim* that are *underneath* the *ziz* as well? Can he prevent the owner of the yard from using that area?

The *Rishonim* differ on this point:

1. The **Rif** (*Bava Basra* 31b) writes that if one is *machzik* a *ziz* that is one by four *tefachim*, he has use of four by four *tefachim* in length and width *and in depth*, meaning he does have use of the four *tefachim* underneath the *ziz*. Therefore, when the owner of the yard wishes to build under the *ziz*, he must leave four *tefachim* of space underneath it clear as this belongs to the owner of the *ziz* above.

2. The **Rosh** however writes on the above quote of the **Rif** that this is illogical to him, because a broad *ziz* is made to be used as a shelf, i.e. for use *on* the *ziz* and not *below* it.

The **Rambam** (Laws of neighbors, 8:3) writes similarly to the **Rif**,

However, with a slight difference. The **Rambam** writes that the owner of the yard must leave ten *tefachim* of space clear under the *ziz* as opposed to the **Rif** who placed this *Shiur* at four *tefachim*.

From where did the Rambam get the measure of ten *tefachim*?

The **Maggid Mishnah** writes,

While ten *tefachim* are not mentioned in the *Genara*, the **Rambam** understood that ten *tefachim* are sufficient as a distance because this is the minimal *Shiur* of a dwelling. If so, ten *tefachim* are certainly sufficient space for use of the *ziz*.

The measure for a chazaka for usage (and if a claim is needed)

It was stated above that according to the Rashbam,

A usage-based *chazaka* requires three years as well as a claim, such as the *madzik* purchased the area or was given it as a gift. This *shitah* differs from that of the **Rambam**.

The **Maggid Mishnah** notes,

The **Rambam** holds that *mehilas shibudim*, forgoing a lien for a usage-based *chazaka* is effective immediately.

Meaning, the moment that the roof owner put the *ziz* in place and the yard owner did not protest, the roof owner made a *chazaka* on the *ziz*. The **Rambam** rejects the other point as well, and holds that a usage-based *chazaka* goes into effect even without a claim of purchase or receiving as a gift. Rather, the claim of *mehila* alone is sufficient according to the **Rambam**.

The ruling for a ziz that is less than a tefach

The **Tur** brings the ruling of **Rav Yehuda of Barcelona** (referred to as “**the Ri of Barcelona**”), who writes that a *ziz* that is less than one *tefach* in length has no *chazaka* (as was learned in the *Mishna*), whether it was placed there by the roof owner or the yard owner.

As for protesting against this *ziz*, he writes,

The owner of the yard cannot protest against the roof owner’s placing the *ziz*, because the roof owner can use the *ziz* within the space of his roof alone.

Meaning,

He can attach a rope to it and use it within the space of the roof only, thus preventing any visual trespass against the yard owner. Only when there is visual trespass can the yard owner protest.

However, the rule of “internal usage” mentioned by **the Ri of Barcelona** is explained by the **Beis Yosef** as follows:

If the roof owner wishes to place a beam or stake into the wall so that it goes through the wall entirely, but his intention is only to use the part of the beam or stake that extends into his property and not the yard (and his intent in putting the beam or stake all the way through the wall was only so that it should be stronger), the yard owner may not protest and claim that the roof owner might begin using the part of the *ziz* that extends outside as well.

The Ri of Barcelona mentioned in the **Tur** adds,

If the yard owner comes to put a *ziz* into the wall that belongs to the roof owner, since it is less than one *tefach*, the roof owner may not protest, and in such a case, we apply the principle of “*kofin al middas Sedom*” – we do not allow people to behave toward each other as they did in Sedom. The yard owner may hang items from this *ziz* and the roof owner may not protest.

The reason the yard owner may do this is because there is no suspicion of harm in this. There is no claim of visual trespass, as this *ziz* does not help the yard owner look onto his neighbor’s roof.

There is also no fear of the yard owner's making a *chazaka* on this *ziz*, as there is no *chazaka* for a *ziz* that is less than one *tefach* long. If the fear is that the *ziz* will damage the wall, a *ziz* that is less than one *tefach* long cannot support items heavy enough to pose any structural danger to the wall.

And if the *ziz* is a *tefach* or more long?

The Ri of Barcelona,

Adds that if the *ziz* is a *tefach* long, either the roof owner or yard owner can make a *chazaka*. If the yard owner is *machzik*, he can use the *ziz* and hang things on it. If the roof owner is *machzik*, he makes a *chazaka* on the part of the yard that is under the *ziz* and can prevent the yard owner from any construction underneath the *ziz*.

However,

The Tur asks on the first ruling concerning the *ziz* that is less than one *tefach*, writing that it is illogical that the yard owner can place a *ziz* that is less than a *tefach* into a wall that belongs to the roof owner.

When the *Mishnah* states,

There is no protest against a *ziz* that is less than one *tefach*, the intent is specifically for the use of the *ziz*. Meaning, as long as the yard owner allows the roof owner to leave a *ziz* in the wall, the yard owner may use this. However, the yard owner is certainly not allowed to place a *ziz* into the outside wall that belongs to the roof owner, as this wall does not belong to him.

In this *Shiur*, we have learned the sources for *Seifim* 1-4. In the coming *Shiur*, we will bring the rulings of the **Shulchan Aruch** and **Rama** in these *Seifim*, based on the sources learned in this lesson.

Questions and Answers

1. What is a “usage-based *chazaka*?”

This is similar to a *chazaka* on land, which is achieved after a person lives on a property for three years and has a claim (for example, he claims he purchased the land) and no one protests his presence during this period. The *chazaka* for usage involves possession not of a certain item, but of a certain *usage*. Once such a *chazaka* is made, no one can prevent the *madzik* from this usage, and he in turn can prevent others from impinging on this usage.

2. What is the law concerning a large *ziz*, as brought in the *Mishna*?

The *Mishna* states that “one who places such a *ziz* up to 1 *tefach* in length, there is a *chazaka*.” The **Rashbam** explains that if the owner of the adjacent yard does not demand that the *ziz* be removed, the owner of the *ziz* makes a *chazaka*, and the owner of the yard is not allowed to build underneath this *ziz*.

The *Mishna* adds: “and he can protest,” which the **Rashbam** explains as follows: The owner of the yard can protest against the one who builds the *ziz* before he makes his *chazaka* and insist that it be removed because it disturbs him, because when the owner of the roof uses the *ziz* he sees into his neighbor’s yard, and this is called *hezeik re’iya*, visual trespass.

3. What is the *Mishna*’s ruling if the *ziz* is less than one *tefach* in length?

The *Mishnah* continues (based on the **Rashbam**’s explanation) that if the *ziz* is less than a *tefach* there is no *chazaka*, and the owner of the yard underneath cannot protest its presence, because it is so small that it causes no disturbance.

4. Is there a *chazaka* for visual trespass?

No, the *halacha* is that visual trespass has no *chazaka*. Meaning, if a person causes damage to his neighbor by his looking into his yard, even after three or many more years he cannot claim that he possesses this right, because this is a great damage to a person. This is the ruling of the **Rif** and other *poskim*.

5. If so, how can one who erects a *ziz* have a *chazaka* on its usage, despite the visual trespass he commits against his neighbor?

The **Nemukei Yosef** replies that the above rule is said only concerning visual trespass from a window into a neighbor's yard. This is because such usage takes place on a regular basis. Therefore, this is a sufficient disturbance to prevent a *chazaka*. When the *ziz* comes from the roof and hangs over the yard, however, this is not considered as a place that is used regularly. Therefore, the damage or disturbance is not so great as to prevent a *chazaka*.

6. When a *ziz* is smaller than one *tefach* (and, as we learned, its owner cannot make a *chazaka* and there is no protest against it) does its owner have the right to use it?

There is a *Machlokes* on this question in the *Gemara*. **Rav Huna** holds that the intent of the *Mishnah* is that the owner of the roof (i.e. owner of the *ziz*) does not protest against the use of the *ziz* (because even if the owner of the yard uses the *ziz* he cannot see who is above him on the roof. Therefore, he commits no visual trespass, as explained by the **Rashbam**). The owner of the yard, however, can surely protest against the roof owner's use of the *ziz* (the **Rashbam** explains that the yard owner can protest that the *ziz* owner not build it at all. **Rav Yehuda** holds that even the owner of the yard cannot protest against the owner of the roofs using this *ziz*).

7. What is the *Halacha* concerning this *Machlokes*?

The **Tur** writes that the **Ramah** and **Rav Yehuda** of Barcelona rule like **Rav Huna** and notes that the **Rosh** also rules this way. The **Beis Yosef** notes that the **Rif** also rules this way, and apparently, the **Rambam** does as well.

8. One is *machzik* a *ziz* that is one by four *tefachim*, and is therefore *machzik* an area of four by four *tefachim*. Does this entitle him to use of the four *tefachim* that are underneath the *ziz* as well?

The *Rishonim* differ on this point: The **Rif** writes that if one is *machzik* a *ziz* that is one by four *tefachim*, he does have use of the four *tefachim* underneath the *ziz*. Therefore, when the owner of the yard wishes to build under the *ziz*, he must leave four *tefachim* of space underneath it clear as this belongs to the owner of the *ziz* above. The **Rosh** however writes on the above quote of the **Rif** that this is illogical to him, because a broad *ziz* is made to be used as a shelf, i.e. for use *on* the *ziz* and not *below* it. The **Rambam** writes similarly to the **Rif** but with a slight difference. The **Rambam** writes that the owner of the

yard must leave ten *tefachim* of space clear under the *ziz* as opposed to the **Rif** who placed this *Shiur* at four *tefachim*.

9. What is the measure for a *chazaka* for usage, and is a claim needed?

According to the **Rashbam**, a usage-based *chazaka* requires three years as well as a claim, such as the *machzik* purchased the area or was given it as a gift.

The **Maggid Mishnah** notes that the **Rambam** holds that a usage-based *chazaka* is effective immediately. Meaning, the moment that the owner of the *ziz* put the *ziz* in place and the yard owner did not protest, the roof owner made a *chazaka* on the *ziz*. The **Rambam** rejects the other point as well, and holds that a usage-based *chazaka* goes into effect even without a claim of purchase or receiving as a gift. Rather, the other's tacit consent is sufficient according to the **Rambam**.

10. Does the yard owner have the right to place a *ziz* into the wall that belongs to the roof owner?

The **Ri of Barcelona** holds that the yard owner may put a *ziz* is less than one *tefach* into the wall that belongs to the roof owner. The roof owner may not protest, as we apply here the principle of “*kofin al middas Sedom*” – we do not allow people to behave toward each other as people did in Sedom. The **Tur** holds that it is illogical that the yard owner should have the right to do this.