

בגויל זה נותן ג' טפחים כולי -

By unfinished masonry, this one provides three טפחים, etc.

OVERVIEW

The משנה is very specific about the thickness of the walls to be built. Concerning the type of wall to be built, however, the משנה states מקום שנהגו לבנות. The type of the wall to be built depends on the מנהג.¹ The משנה concludes and adds that הכל כמנהג המדינה. The question arises what does the משנה intend to teach us by adding הכל כמנהג המדינה? Does this refer only to other types of walls; if other types of material are used which are not mentioned in the משנה, then we follow that מנהג. However if the walls in the משנה are used, we cannot change the thickness of the walls as prescribed by the משנה. Or does it also refer to the thickness of the abovementioned walls; if the מנהג is to make these walls thicker or thinner, we also follow the מנהג? Our תוספות will address this issue.

תוספות responds to an anticipated question:

והא דלא קאמר בגויל² ו' טפחים³ משום דלא נטעי למימר ו' לכל אחד -

And the reason that the משנה did not state, that by גויל a total of six טפחים must be provided by both parties? The משנה should have simply said 'בגויל ו' טפחים'. תוספות answers: **because we should not mistakenly assume**, that **each** of the parties must provide **six** טפחים. If the משנה would have simply stated 'וכו' בגזית ה' וכו' בגויל ו', one may have mistakenly assumed that this is the amount for each partner, thereby doubling the thickness of the wall.

תוספות has an additional question:

ואם תאמר אמאי אצטריך למיתני מדת גויל וגזית -

You may ask; why was it necessary for the תנא of the משנה to enumerate the measurements needed for גויל and גזית, etc. -

כיון דתנן הכל כמנהג המדינה כמו שנהגו כן יעשו -

¹ It is obvious that if the partners are in agreement, then any type of wall of any thickness (or no wall at all), may be built. The entire discussion involves situations where the partners disagree as to the type of wall, or thickness of the wall, to be built (or whether any wall at all is necessary). The laws here decide what each partner can coerce the other to build according to his preference.

² This question applies to all the measurements mentioned in the משנה; מנהג וכו'.

³ This would have been a more concise statement. We would assume that if the total is six טפחים, the partners would divide that amount amongst them. Why does the משנה need to state at length, that this partner must provide so many טפחים and the other partner must provide so many טפחים?

Since subsequently it was taught in our משנה that ‘everything should be done in accordance with the custom of the country’, whatever the custom is, they should build that way. If the מנהג המדינה was not to build a גזית wall of six טפחים, but rather more or less, we should follow the prevailing custom.⁴ Why therefore is it necessary to specify the thickness of these walls, since we will always follow the prevailing custom?

answers: תוספות

ויש לומר דאם נהגו יותר מו' בגויל לא יעשה וכן כולם אלא כשיעור המפורש –

And one can say; that if the custom was to build a גויל wall thicker than six טפחים he need not do it. And the same applies to all the walls mentioned in the משנה. He is obligated only for the amount specified in the משנה and no more. Either of the partners may refuse to bear the expense or to provide property for a גויל wall, thicker than six טפחים. His obligation is for three טפחים both in material and property but no more –

concludes: תוספות

ומיהו אם נהגו לעשות פחות מו' יעשה -

However if the custom is to build a גויל wall less than six טפחים thick, then either of the partners can decide that this is what he will do. He will participate only in a lesser wall, as is the prevailing custom. The other partner cannot coerce him to build a thicker wall, according to the measurement of our משנה. In this case, the מנהג overrides the שיעור of the משנה.

proves this point: תוספות

דאפילו אם נהגו בהוצא ודפנא⁵ יעשה כדמפרש בגמרא⁶ –

for even if the custom is to build a wall from הוצא ודפנא, which is inferior to any of the walls mentioned in the משנה he may do so, as the גמרא explicitly states. –

is of the opinion that the שיעורים in the משנה are the upper limits of the walls' thickness, however if the מנהג is to build it narrower we follow the מנהג.⁷ This is what the משנה is referring to when it states 'הכל כמנהג המדינה'. Based on the above, תוספות presents the following question:

ואם תאמר ומאי בעי בגמרא⁸ הכל כמנהג המדינה לאתויי מאי –

And if you will say; what is the question the גמרא poses, ‘what does the phrase

⁴ See ‘Thinking it over’ # 4.

⁵ הוצא and דפנא are the לולבים of the date palm. דפנא are the branches of the bay tree. See רש"י ד,א. The הוצא and דפנא are interwoven to make a fence.

⁶ א,ד. The opinion of תוספות is that just as the מנהג dictates the type of wall to be built (i.e. even הוצא ודפנא) it also dictates the thickness of the wall, (even by גזית וכו'). See ‘Thinking it over’ # 3.

⁷ See ‘Thinking it over’ # 2.

⁸ א,ד.

מקום שנהגו לבנות משנה states since the גמרא asks 'הכל כמנהג המדינה' come to include'. The גמרא asks since the משנה states מקום שנהגו לבנות משנה, we can surmise that we follow the local custom, why does the משנה add the phrase 'הכל כמנהג המדינה'? It seems redundant -

ומשני לאתויי אתרא דנהיגי בהוצא ודפנא⁹ –

And גמרא answers that the phrase הכל כמנהג המדינה comes to **include a place where the custom** is to build walls from **הוצא ודפנא**. This concludes the quote from the גמרא.

תוספות concludes his question: The גמרא could have offered a more obvious explanation why the משנה states 'הכל כמנהג המדינה'; not necessarily to include (only) הוצא ודפנא, but rather -

לימא לאתויי כמנהג כל המקומות כמו שנהגו¹⁰ —

Let the גמרא say that הכל כמנהג המדינה comes to include that one may build as is the custom in any place in the manner they conduct themselves. It includes (also) that we are permitted to build גויל גזית וכול' even narrower than the משנה states, if that is the מנהג המדינה.

תוספות answers:

ונראה לרבינו תם דדוקא בהוצא ודפנא אבל פחות מכאן אפילו נהגו מנהג הדיוט הוא –

And the ר"ת is of the opinion that הוצא ודפנא is specifically mentioned for it is the smallest wall allowed to be erected; however a wall which is inferior to הוצא ודפנא, even if that is customary in a locale to build walls inferior than הוצא ודפנא, it is considered an inappropriate custom and is not to be followed. Either of the partners can insist on building a superior wall (of at least הוצא ודפנא).¹¹ The גמרא could not have answered as תוספות proposed that 'הכל כמנהג המדינה' comes to include 'whatever the מנהג is', because that is simply not true. We do not follow a מנהג הדיוט.

concludes: תוספות

ומוכיח מכאן דיש מנהגים שאין לסמוך עליהם אפילו היכא דתנן הכל כמנהג המדינה:

And the ר"ת proves from here; from the fact that the משנה and גמרא limit the power of מנהג המקום to הוצא ודפנא but no less, **that there are customs that we do**

⁹ From מקום שנהגו לבנות גויל וכו' בוי"ן, I would think that the options are limited to these four types of walls (depending on the מנהג) and no others. By adding הכל כמנהג המדינה, the משנה is teaching us that there is no such limitation. Even הרצא ודפנא is sufficient if that is the מנהג.

¹⁰ The advantage of this answer is that it would include those customs that vary from the *משנה* of the *שיעורים*, as well as those places that build (even) with *הוצא ודפנא*. This answer would also bolster *תוספות* assumption that the *שיעורים* of the *משנה* are only an upper limit, not a lowest limit (as well). See ‘Thinking it over’ # 4.

¹¹ The meaning of the גמרא that כמנהג המדינה ודפנא is not (only) that even הוצא ודפנא is included, but rather the משנה insists that it be a valid מנהג of at least ודפנא, but not less. See 'Thinking it over' # 4.

not rely on them. We do not follow these customs; **even if the משנה instructs us to follow the מנהג המדינה**, nevertheless it is not the intent of the משנה that we follow a מנהג הדיוט.

SUMMARY

The משנה states 'וכו' וכו' בגויל זה נותן ג' וכו' for if it would have stated simply 'ו' we may have mistakenly assumed that each partner provides טפחים.

The measurements of the משנה are the upward limits. If the מנהג is to make it narrower we follow the מנהג (just as we see that we follow the מנהג of הוצא ודפנא).

When the גמרא states that כמנהג המדינה הכל comes to include הוצא ודפנא, the intent is to provide us (also) with a lowest limit to the sturdiness of the wall.

THINKING IT OVER

1. Is there a connection between תוספות opening remarks and the first 'וא"ת'?
2. תוספות understands¹² the שיעורים in our משנה to be an upper limit only and the מנהג allows for us to lower this שיעור. Why did not תוספות assume the opposite; that the שיעורים are the lower limit, and מנהג provides for adding to this שיעור?
3. תוספות maintains we may lower the שיעור of the משנה if that is the מנהג. Does he derive that from a קל וחומר or from הוצא ודפנא, or from הכל כמנהג המדינה?¹³
4. How did תוספות originally¹⁴ understand 'הכל כמנהג המדינה', and how is it understood in the מסקנא?¹⁵

¹² See footnote # 7.

¹³ See footnote # 6.

¹⁴ See footnote # 4 & 10.

¹⁵ See footnote # 11.