

גינה שאני כדרכי אבא וכולי – רבי אבא, etc. A garden is different; like

OVERVIEW

The גמרא teaches us that even if we maintain היזק לאו שמיא היזק, nevertheless under certain circumstances we are required to build a dividing wall. One such instance is the case of a גינה. The reason for building a wall in a גינה is to assure that we follow the injunction of ר' אבא, which prohibits a person from looking at his neighbor's ripening crops.¹ Seemingly this injunction applies to all crops, not only the crops of a גינה. In fact the injunction of ר' אבא specifically refers to a שדה and קמותיה which imply a wheat field that is usually found in a בקעה. Our משנה requires a wall by a גינה and not by a בקעה. Our תוספות will be discussing this question; why is the obligation to build a wall limited to a גינה and not to a בקעה?

asks: תוספות

ואם תאמר ומהאי טעמא² יתחייב נמי לגדור בבקעה³ –

And if you will say; from this very same reasoning, one should be required to fence his adjoining property in a בקעה.

answers: תוספות

ויש לומר דשאני גינה שמגדלין בה ירק לאכילה וכל שעה⁴ היא עומדת בקמותיה⁵ –

And one may say; that גינה is different from a בקעה, because in a גינה vegetables are grown for eating on a daily basis and a garden is continually bearing ripening produce -

אבל בקעה אינה עומדת בקמותיה אלא חדש אחד בשנה⁶ ולא מיחייב לגדור –

However, a בקעה does not have ripening produce only one month a year and therefore he is not obligated to fence it. The damage that may be caused in that one month does not warrant the expense of a wall.

אבל אסור לעמוד בשעה שעומדת בקמותיה –

¹ The reason, according to רש"י is that he should not do damage to him through an רעה.

² A גינה requires a fence because one is forbidden to stand in a neighbor's field while the produce is ripening.

³ Whether we maintain היזק לאו שמיא היזק, or it is assumed that in a בקעה there is no ראייה, nevertheless there should be an obligation to erect a dividing wall in a בקעה, in order to comply with the ruling of ר' אבא; just as we are required to comply with this ruling by a גינה. Why is there a difference between a גינה and a בקעה? In both places produce is growing. Why by a גינה we need to comply with ר' אבא's ruling, but not by a בקעה?

⁴ Vegetables cannot be stored for long periods of time, like grain. There needs to be a continual fresh supply of vegetables from the garden.

⁵ The different types of vegetables ripen at different times of the year. At any season there is usually a vegetable growing and ripening. Therefore if there would be no wall there may be a continual transgression of ר' אבא's ruling.

⁶ The grain that usually is planted in a בקעה is a once a year crop. Its ripening season is only one month

However, one is indeed prohibited from standing and watching his neighbor's field while the crops are ripening. The ruling of אבא ר' can be adhered to for such a limited time period. In the case of a גינה however, since there are crops on a continual basis, the injunction of אבא ר' will not be able to be followed unless there is a dividing wall.

תוספות has an additional question:

ואם תאמר ולמאן דאמר פלוגתא כיון דאשמועינן דאפילו בחצר שמיה היזק כל שכן בגינה –
And if you will say; according to the one who maintains that מחיצה refers to **dividing** the חצר, for he maintains that היזק ראייה שמיה היזק; **once the משנה taught us that even by a חצר** (where there does not exist the prohibition of אבא ר' for usually nothing grows in a חצר), **היזק ראייה is considered a היזק**, then **certainly by a גינה**, where the prohibition of אבא ר' applies; there is certainly a היזק if there is no wall –
ואמאי איצטריך תו למיתני וכן בגינה?⁷

So why is it necessary for the תנא of our משנה to teach us 'וכן בגינה'?⁸

תוספות answers:

ויש לומר דאיצטריך וכן בגינה למיתני משום גויל וגזית:
And one can say; that we need to be taught the case of 'וכן בגינה' on account of
גויל וגזית; that he can be coerced to build the wall with גויל וגזית according to the המדינה. If the משנה would not have taught us 'וכן בגינה', we may have mistakenly assumed that any wall is sufficient, even if it is not המדינה.⁹

⁷ Obviously a גינה requires a wall even without their consent. According to the מ"ד who maintains היזק ראייה לא שמיה it is understood why the משנה teaches us 'וכן בגינה'. A wall is not required in a חצר (unless they both agree to it) since ה"ר לאו ש"ה. However in a גינה, a wall is required (even without their consent) on account of אבא ר'. That proves that the requirement of a wall by a גינה is greater than by a חצר. The מ"ד who maintains that a wall is required by a חצר even without their consent (for היזק ראייה שמיה היזק), will certainly require a dividing wall for a גינה. It need not be mentioned in the משנה!

⁸ According to the מ"ד ה"ר לאו שמיה היזק it is understood why the משנה teaches us both דינים. In the case of חצר the משנה teaches us that they are required to build a wall המדינה, only if they originally agreed to build a מחיצה. The case of גינה teaches us that by a גינה סתם a wall is required even without an agreement. However, according to the מ"ד ה"ר, both cases are teaching us the same דין. The case of גינה is superfluous, since we can know it with a כל שכן from the דין of חצר. See end of footnote # 9.

⁹ See the various commentaries who explain why we would have thought that by a גינה there is no requirement of גויל וגזית. The following is merely a tentative suggestion. In a חצר the היזק ראייה is continuous and definitive. The use of the חצר is automatically diminished by the mere presence of a neighbor, whether he is looking at the חצר or not. It cannot be utilized to its fullest potential. Each neighbor therefore is considered an actual מזיק. For this type of מזיק the משנה requires him to build a solid wall המדינה. In the case of a גינה, however, the neighbor is not necessarily a מזיק per se. It is only when and if he looks specifically at the crops, that he is מזיק him with a עין הרע. We have no proof that there is a מזיק here; only a concern that he may be מזיק him. We require him to build a wall to prevent a possible היזק. Therefore, as soon as he builds any type of wall, even not המדינה there is no more היזק, since he cannot look at his neighbor's crops. I may think that any wall is sufficient. The משנה therefore teaches us 'וכן בגינה' that it must be המדינה. ודו"ק וצע"ג. According to this suggestion it needs to be emphasized

SUMMARY

A גינה requires a dividing wall (even if ה"ר לא ש"ה) because of the injunction of ר"א, since there is always produce growing in a גינה. However a בקעה does not require a wall since the crops are growing for only one month during the year. The person will be careful not to stare at his neighbor's ripening crops. According to the מ"ד that ה"ר ש"ה teaches us the דין of 'וכן בגינה' to let us know that all the laws of גויל וגזית apply there as well.

THINKING IT OVER

1. Is it possible to say that just as according to the מ"ד ה"ר לאו ש"ה nevertheless a גינה is different than חצר and requires a wall, similarly (but in a reverse manner) according to the מ"ד ה"ר ש"ה, a גינה is different than a חצר and does not require a wall (different than what תוספות assumes)? Explain.¹⁰
2. Is there any connection between the first (קשיא and) תירוץ of תוספות and the second קשיא (and תירוץ)?

that the reason תוספות assumes כ"ש בגינה (in the question) is because we see that even the מ"ד of הרלש"ה agrees that a גינה requires a מחיצה; but not necessarily that a גינה inherently requires a מחיצה more than a חצר. וד"ל.

¹⁰ See בל"י אות לב ד"ה ועיין.