

רבי אבא – A garden is different; as stated, etc.

Overview

The היזק ראייה לאו שמייה היזק teaches us that even if we maintain 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 that prohibits a person from looking at his neighbor's ripening crops¹. 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. תוספות will be discussing this question; Why is the obligation to build a wall limited to a גינה and not to a בקעה?

תוספות asks:

You may ask; from this very same reasoning that a גינה requires a fence; i.e. because one is forbidden to stand in a neighbor's field while the produce is ripening, for this very same reason –

one should be required to fence his adjoining property in a בקעה. Whether we maintain היזק ראייה לאו שמייה היזק, or it is assumed that in a בקעה there is no היזק 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?

תוספות answers:

one may say; that גינה is different from a בקעה, because in a גינה –

vegetables are grown for eating on a daily basis² – and a garden is continually bearing ripening produce. 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.

however a בקעה does not have ripening produce –

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

² Vegetables cannot be stored for long periods of time, like grain. There needs to be a continual fresh supply of vegetables from the garden.

אלא חדש אחד בשנה – only one month a year. The grain that usually is planted in a once a year crop. Its ripening season is only one month - **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. **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:

You may ask; 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 nothing usually 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 -

so why is it necessary for the תנא of our משנה to teach us 'וכן בגינה'. Obviously a גינה requires a wall even without their consent. According to the מ"ד who maintains that היזק ראייה לא שמיה היזק 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 (ה"ר שמיה היזק), will certainly require a dividing wall for a גינה. It need not be mentioned in the משנה!³

תוספות answers:

one can say; that we need to be taught the case of 'וכן בגינה' -

on account of גזיל וגזית; that he can be coerced to build the wall with גזיל 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.⁴

³ According to the מ"ד ה"ר לאו שמיה היזק it is understood why the משנה teaches us both דינים. In the case of the 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 שמיה היזק, 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 the חצר. See end of footnote # 4.

⁴ See the various commentaries who explain why we would have thought that by a גינה there is no requirement of המדינה. גזיל וגזית כמנהג המדינה. 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

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 the משנה teaches us the דין of 'וכן בגינה' to let us know that all the laws of גזיל 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.
2. Is there any connection between the first (קשיא and) תירוץ of תוספות and the second קשיא (and תירוץ)?

therefore is considered an actual מזיק. For this type of מזיק the משנה requires him to build a solid wall כמנהג 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 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 כמנהג 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 כמנהג המדינה ודו"ק רצע"ג. According to this suggestion it needs to be emphasized that the reason תוספות assumes וכן בגינה (in the question) is because we see that even the מ"ד of הר"ל agrees that a גינה requires a מחיצה; but not necessarily that a גינה inherently requires a מחיצה more than a חצר. וד"ל.