

**אף על פי שלא נתן<sup>1</sup> תקרה מגלגלין עליו את הכל – Even though he did not place the beam over the wall, we extend his liability for everything**

## **OVERVIEW**

The גמרא in ב"ק queries<sup>2</sup> what is the דין in a case where a person lives in another's courtyard unbeknownst to the owner; is he liable to pay rent or not. The גמרא refers to this as זה נהנה – the squatter is deriving a benefit (for otherwise he would have to pay rent elsewhere) – וזה לא חסר – and the owner is not suffering a loss (for he has no intention of renting out this vacant courtyard). The consensus of opinions in the גמרא is that זנוזל"ח is פטור. The case in our משנה seems to be a classic case of זנוזל"ח; the neighbor is deriving a benefit from the raised wall (above אמות ד'); that the other built, without causing any loss to the benefactor. תוספות offers two distinctions between our משנה and the rule that זנוזל"ח is פטור.

-----  
תוספות anticipates the following difficulty:

**אף על גב דזה נהנה וזה לא חסר פטור –**

**Even though that where one derives a benefit from another (נהנה), however the benefactor does not suffer a loss (לא חסר); the rule is that the beneficiary is exempt** from paying the benefactor. Seemingly, here too, the benefactor who raised the wall above אמות ד' (for his own benefit) is not suffering any loss from the fact that the beneficiary is intending<sup>3</sup> to place a beam on his wall. Why then should the beneficiary be obligated to pay the benefactor?!

תוספות responds:

**מכל מקום כיון דגלי דעתיה דניחא ליה בהגבהה<sup>4</sup> חייב –**

**Nevertheless since the beneficiary expressed his view, by building an adjacent wall that he is pleased with the raising of the common wall above אמות ד',**

<sup>1</sup> The הגהות הב"ח amends this to read נתן עליו את התקרה.

<sup>2</sup> דף כ,א.

<sup>3</sup> It would seem from תוספות heading 'אע"ג שלא נתן עליו את התקרה' that the question is why the beneficiary has to pay when he is only intending to use the wall. However once he placed his beam on the common wall, it is understood that he has to pay. It is not a case of זנוזל"ח anymore. The weight of the additional beam on the common wall is considered a loss to the benefactor. It will hasten the deterioration of the wall. The דין is that even if the חסר is minimal, the נהנה must pay for his entire הנאה, not just for the חסר. See המשנה על תוס' רע"א על המשנה. See 'Thinking it over' # 4.

<sup>4</sup> See טעמא where תוספות ב"ק דף כ,ב ד"ה טעמא states that תוספות states that ניחא ליה בהוצאה; i.e. he is pleased to the extent that he is willing to spend additional monies of his own in order to derive the benefit. This would distinguish this case from הדר בחצר חבירו שלא ברשות. There, even though the squatter is obviously דעת מגלה that he is pleased, nevertheless there was no outlay of his own monies. In our case however (as well as by מקיף וניקף) the גילוי דעת was accompanied by an outlay of money. It is in this case (only) that he is חייב.

therefore he is **obligated** to pay.

וכן משמע נמי בכיצד הרגל<sup>5</sup> (בבא קמא דף כ,ב ושם) דקאמר טעמא<sup>6</sup> דניקף הא מקיף פטור –

**And indeed this is also implied in כיצד הרגל** that **only** when there is no גילוי דעת on the part of the נהנה that he is pleased with the action of the benefactor. גמרא continues with quoting the גמרא: **for the גמרא says; the reason the ניקף is חייב is because the ניקף fenced the fourth wall however if the מקיף built the fourth wall (as well as the other three walls) the ניקף would be פטור**; even though the ניקף is deriving a benefit from the מקיף –

שמע מינה זה נהנה וזה לא חסר פטור<sup>7</sup> –

**We can derive from this ruling that where one derives a benefit, however the benefactor suffers no loss, the beneficiary is פטור.** This concludes the quote from the גמרא.

concludes his proof:

ואפילו הכי כשעמד ניקף חייב<sup>8</sup> כן נראה לי –

**And nevertheless when the ניקף arose and built the fourth wall he is obligated to pay** (his share in the previous three walls)! תוספות concludes: **This is how it appears to me.** That by זנוזל"ה if there is no גילוי דעת that he is pleased then he is פטור; however if there is a גילוי דעת that he is ליה, then he is חייב.

offers an alternate answer:

אי נמי הכא זה חסר הוא שגורם לו שהגביה הכותל למעלה מד' אמות –

**Or you may also say; here the benefactor is suffering a loss on account of the beneficiary for it is the beneficiary that caused him to raise the wall higher than four** אמות in the first place –

כדי שלא יהיה לו היזק ראייה בשום ענין ממנו:

**In order that he, the benefactor, should not have any היזק ראייה from the**

<sup>5</sup> The גמרא there in כיצד הרגל attempted to resolve the issue whether זנוזל"ה is חייב or פטור. The גמרא cites our (previous) משנה on ב,ד concerning a מקיף וניקף. The opinion of ר' יוסי is that (only) if the ניקף built the fourth wall מגלגלין עליו את הכל.

<sup>6</sup> The טעמא דגדר ניקף amends this to הגהות הב"ה.

<sup>7</sup> The גמרא there ultimately rejects this proof. תוספות however is deriving his interpretation from the ס"ד of the גמרא.

<sup>8</sup> Seemingly even when the ניקף built the fourth wall, it should still be considered לא חסר. Why is there a difference who built the fourth wall?! This indicates that the rule of זנוזל"ה is פטור only when the נהנה did not express his satisfaction with his benefit. However, when the נהנה expresses his satisfaction, even though the benefactor is לא חסר, nevertheless the נהנה is חייב. This explains the difference in the cases of ניקף וניקף as well as our משנה. When the מקיף built all four walls, even though the ניקף is נהנה he is still פטור, for he did not express his satisfaction in any manner. However if the ניקף built the fourth wall, or in our משנה where he built an adjacent wall, in these cases the ניקף is חייב for he is doing an action which expresses his satisfaction from the הנאה he is deriving from his benefactor.

beneficiary **in any manner** at all. The reason the benefactor raised his wall more than four אמות, was to protect himself from the beneficiary. The beneficiary should not be able to see him even if he stands on a high place and can look above a wall of (only) אמות ד'. Therefore since the benefactor had a loss on account of the beneficiary, it is no longer a case of זנוזל"ה;<sup>9</sup> the beneficiary has to pay his share.

### **SUMMARY**

is זה נהנה וזה לא חסר only if there is no גילו דעת on behalf of the beneficiary; however if the beneficiary is מגלה דעת that he is pleased with the הנאה, he is חייב. In our משנה the נהנה is ליה דניחא דעת through building an adjacent wall. Alternately our משנה is considered a חסר because the מהנה raised the wall on account of the נהנה, that the נהנה should not cause him any היזק ראייה.

### **THINKING IT OVER**

1. Why is there a difference whether the נהנה is מגלה דעת that he is נוחא ליה or not?<sup>10</sup>
2. What are the practical differences between the two תירוצים in תוספות?<sup>11</sup>
3. How much is the נהנה required to pay in our משנה; for his הנאה from the wall or for the entire (half of the) wall?<sup>12</sup>
4. Why is he considered a נהנה, if all he did was to build an adjacent wall!?<sup>13</sup>

---

<sup>9</sup> See מהר"ם who explains that זה חסר is not limited to a case where the benefactor loses on account of the הנאה of the נהנה, but even if the benefactor incurred the loss (from the beneficiary) not in conjunction with the beneficiary's הנאה (as in our case), it is still considered חסר. See בל"י אות קי.

<sup>10</sup> See בל"י אות קט בד"ה והנה עיקר.

<sup>11</sup> See נח"מ בד"ה א"נ.

<sup>12</sup> See בל"י אות קט בד"ה אולם.

<sup>13</sup> See footnote # 3. לז. עי' בסוכ"ד סי' לו.