

Even – אף על פי שלא נתן [עליו את ה¹] תקרה מגלגלין עליו את הכל though he did not place the beam over the wall, nevertheless we extend his liability for the entire wall.

Overview

The גמרא in ב"ק² queries 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 זנוול"ח is פטור. The case in our משנה seems to be a classical case of זנוול"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 זנוול"ח is פטור.

asks: תוספות

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 intending³ to place a beam on his wall. Why then should the beneficiary be obligated to pay the benefactor?!

answers: תוספות

nevertheless since the beneficiary expressed his view, by building an adjacent wall - **דגלי דעתיה** - **מכל מקום כיון** **that he is pleased with the raising⁴** of the common wall above אמות ד', therefore he is - **obligated to pay.**

¹ The הגהות הב"ה emends it so.

² דף כ,א.

³ 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 זנוול"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. ועי' בתוס' חסר. רע"א על המשנה. See 'Thinking it over' # 4.

⁴ See ד"ה טעמא where תוספות states that ניהא 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 מגלה דעת that he is pleased, nevertheless there was no outlay of his own monies. In our case however (as well as by מיקף וניקף) the גילוי דעת was accompanied by an outlay of money. It is in this case (only) that he is חייב.

פרק and indeed this is also implied in - וכן משמע נמי בכיצד הרגל (ב"ק דף כב, ושם)
that **כיצד הרגל** is only when there is no דעת on the part of the
that he is pleased with the action of the benefactor.

goes on to prove his point. The גמרא there in כיצד הרגל attempted to resolve the
issue whether זנוזל"ח is חייב or פטור. The גמרא cites the (previous) משנה in גב, דף כב, ב"ב
concerning a מקיף וניקף. The opinion of ר' יוסי is that (only) if the ניקף built the fourth wall
מגלגלין עליו את הכל. 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 wall) the ניקף would be פטור; even though the ניקף is deriving a benefit from
the מקיף -

we can derive from this ruling that - **שמע מינה**

where one derives a benefit, however the benefactor suffers no loss, the beneficiary is **פטור**.⁶ This concludes the quote
from the גמרא.

concludes his proof:

and nevertheless - ואפילו הכי

when the ניקף arose and built the fourth wall he is obligated to pay (his share in the previous three walls)! Seemingly even when the ניקף
built the fourth wall, it should still be considered לא חסר וזה נהנה וזה לא חסר. Why is there a
difference who built the fourth wall?! This indicates that the rule of זנוזל"ח 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 מקיף 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 נהנה is חייב for he is doing an action
which expresses his satisfaction from the הנאה he is deriving from his benefactor.

concludes:

This is how it appears to me. That by זנוזל"ח if there is no דעת that he is pleased then he is פטור; however if there is a דעת that he is ליה, then he
is חייב.

offers an alternate answer:

it can also be said that - אי נמי

⁵ See footnote # 1.

⁶ The גמרא there ultimately rejects this proof. however is deriving his interpretation from the הוה
גמרא of the אמינא.

הכא זה חסר הוא - here the benefactor is suffering a loss on account of the beneficiary -

שגורם לו שהגביה הכותל למעלה מד' אמות - for it is the beneficiary that caused him to raise the wall higher than four אמות in the first place -

כדי שלא יהיה לו - in order that he, the benefactor, should not have -

היזק ראייה - any **from the 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) ד' אמות. Therefore since the benefactor had a loss on account of the beneficiary, it is no longer a case of ⁷זנוז"ח, the beneficiary has to pay his share.

Summary

is 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 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 ראייה.

Thinking it over

1. Why is there a difference whether the נהנה is מגלה דעת that he is נוחא ליה or not?
2. What are the practical differences between the two תירוצים in תוספות?
3. How much is the נהנה required to pay in our משנה; for his הנאה from the wall or for entire (half of the) wall?
4. Why is he considered a נהנה, if all he did was to build an adjacent wall!?⁸

⁷ See מהר"ם who explains that זה חסר is not limited to 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 הנאה (as in our case), it is still considered חסר. עי' בבלי"י סי' ק"י. זה חסר.

⁸ See footnote # 3. עי' בסוכ"ד סי' לו, לז.