

Two courtyards one above the other

שתי חצרות זו למעלה מזו -

OVERVIEW

The גמרא discusses the case of two adjoining חצרות, where the ground level of one is higher than the other. There is a dispute whether the owner of the upper חצר must contribute to that part of the wall which is below his ground level. However there is no dispute as to the responsibility of the lower חצר's owner. He is required to assist in building the dividing wall for the full אמות ד' above the ground level of the upper חצר.¹ תוספות will be discussing the reason for this ruling.

תוספות asks:

ואם תאמר ותחתון למה יסייע לעליון -

And if you will say; and why should the owner of the lower חצר assist the owner of the upper חצר to build up to four אמות above the ground level of the upper חצר?!

דמכא מיטי לארבע אמות ולא יוכל התחתון לראות בחצר העליון יבנה העליון -

For when the wall reaches four אמות from the ground level of the lower חצר, at which point the owner of the lower חצר cannot see into the upper חצר; that should be sufficient for the בעל התחתון, since he can no longer cause היזק ראייה to the חצר העליון. In order to prevent היזק ראייה from the חצר העליון to the תחתון, that upper part of the wall should be built by the owner of the upper חצר; who alone is causing the היזק ראייה.

תוספות answers:

ואומר רבינו תם כגון שחצר התחתון אינו נמוך אלא² אצל חצרו של עליון (אלא מצד א')³ -

And the ר"ת says that we are discussing a situation where for instance that the lower חצר is not lower than the upper חצר in its entirety, but rather it is lower only where it is close to the חצר of his higher neighbor (only on one side) -

ומצד א' הוא גבוה כחצר העליון שיוכל לראות שם -

However from the other side of the lower חצר where it is not close to the חצר (חצר העליון) is as high as his neighbor's חצר, there the חצר התחתון is as high as his neighbor's חצר. The חצר התחתון slopes. It is low adjacent to the חצר העליון and it rises when it is at a distance from the boundary of the חצר העליון, in such a manner that it is possible to see from the rise in the חצר התחתון into the חצר העליון, even after the wall, of אמות ד' high from

¹ See 'Thinking it over' # 1.

² The מהרש"ל keeps the word אלא, while the מהרש"א deletes it.

³ See מסורת הש"ס that others delete this phrase (in parenthesis).

הצר העליון can see into the הצר התחתון has been built. Therefore since the קרקע הצר התחתון he must contribute to the entire wall, until it is ד' אמות high from the ground of the (and the rise in הצר התחתון).

תוספות offers an alternate solution:

ורבינו יצחק מפרש דהתחתון מזיק לעליון כי קאי עליון⁴ –

And the ר"י explains that it is not necessary to assume that we are discussing a sloping הצר; but rather a regular הצר, that in its entirety is lower than the upper הצר. The reason the תחתון must assist the עליון up to ד' אמות from the ground of the עליון, **is for the תחתון damages the עליון when the עליון is standing [at the edge of his own הצר]**; next to the dividing wall, which is ד' אמות higher than the ground of the תחתון. It is however less than ד' אמות higher than the ground of the עליון. Therefore when the עליון stands next to the (original [shortened] wall) he can be seen by the תחתון, if the תחתון is not immediately next to the wall, but at some distance from it.

תוספות proves his contention that even though the wall is ד' אמות high from the ground of the תחתון, the עליון can be seen when he stands.⁵

כדאמרינן לעיל כי קאימנא חזו לי' –

As the גמרא previously stated, 'when I stand up the people of the רה"ר can see me'.

תוספות concludes

ולכך צריך לסייע עד ד' אמות בחצר העליון:

And therefore; since the תחתון can see the עליון standing **he is required to assist up to four אמות above the ground level of the upper הצר**; to prevent the התחתון בעל התחתון from seeing the העליון even when he stands.

SUMMARY

There are two ways to understand why the תחתון must build up to ד' אמות above the ground level of the העליון. A. The הצר of the תחתון slopes upwards as it recedes from the dividing wall enabling the תחתון to see over the lower wall. B. The תחתון can (usually) see the עליון above the lower wall when the עליון stands up [close to the wall].

⁴ The הגהות הב"ח amends this to read **כדאמרינן בשפת הציור** עליון.

⁵ See 'Thinking it over' # 3.

⁶ Concerning two roofs on opposite sides of a רה"ר.

⁷ It is assumable that a roof is more than ד' אמות higher than the רה"ר; nevertheless, the people of the רה"ר can see the הגג בעל הגג when he stands.

THINKING IT OVER

1. תוספות assumes that the גמרא maintains that the תחתון must assist in building the wall above the ground level of the עליין.⁸ How does תוספות deduce this?⁹
2. According to the פירוש ר"י, would there be any difference depending on how wide the חצר התחתון is (from the wall to the opposite boundary)?¹⁰
3. Why was it necessary for תוספות to prove that it is possible to see someone over a high wall, from the previous גמרא?¹¹ It seems quite factual.¹²
4. What are the relative advantages and disadvantages of both פירושים in תוספות? What are the practical differences להלכה?

⁸ See footnote # 1.

⁹ See מטה יוסף אות קנו.

¹⁰ See נח"מ.

¹¹ See footnote # 5.

¹² See סוכ"ד אות מב ד"ה אבל דעת (in עד"ז).