

And let us be concerned that perhaps she – וניחוש שמא תחתיו זינתה – was מזונה while she was betrothed to him

OVERVIEW

After the גמרא cites the dispute between רבא ורב אשי, the גמרא asks, וניחוש שמא תחתיו. There is a dispute between רש"י and תוספות, as to what the גמרא is asking.

¹ וניחוש negates a purported explanation of the question תוספות

אין לומר דפריך² אמאי אינו יכול לטעון טענת בתולים לאוסרה עליו -

We cannot say that the גמרא is asking, why should he not be allowed to claim טענת בתולים in order to (possibly) prohibit her to him -

ניחוש באשת כהן³ שמא תחתיו זינתה דליכא אלא חדא ספיקא ספק תחתיו ספק אין תחתיו -

Let us be concerned in the case of a s'כהן wife (where he is a כהן), that perhaps she was מזונה תחתיו, in which case there is only one doubt, namely whether she was מזונה תחתיו (and she is לו), or whether it was not תחתיו (and she is permitted to him).

תוספות explains why this cannot be the גמרא's question:

דהא מצי לשנויי דהא דאינו יכול לטעון היינו להפסידה מכתובתה⁴ -

For the גמרא could have answered that the meaning of טענת בתולים אינו יכול לטעון טענת בתולים is regarding making her lose her כתובה; this he cannot do -

דאיכא ספק ספיקא דאפילו תחתיו אימור באונס הוה⁵ -

For there is a ספק ספיקא; firstly it may have been תחתיו (where she retains her כתובה) and even if it were תחתיו perhaps it was באונס (and even an אשת כהן does not lose her כתובה if it was באונס (even though she is לבעלה) –

תוספות stands by his refutation of אין לומר despite an anticipated difficulty:

¹ See וליחוש (רשב"א וכו') (and רש"י ד"ה וליחוש). However רש"י does not limit the question to an אשת כהן (see footnote # 3).

² The גמרא's question (according to this לומר) is that the ברייתא by saying that he has no טענת בתולים, will dissuade him from going to בי"ד if נמצאת בעולה. This in turn may cause him to live with his wife באיסור if זינתה תחתיו. The גמרא should have indicated that he can claim טענת בתולים to verify whether he may continue being with his wife.

³ By an אשת ישראל there is no such concern, for even if she is a בעולה she is still permitted to him, since there is a ספק ספיקא; perhaps it was not תחתיו (and she is מותרת לו) and even if it was תחתיו, perhaps it was באונס (and she is still מותרת לו). However by an אשת כהן who is לבעלה even if באונס. See 'Thinking it over'.

⁴ He cannot be מפסיד her כתובה even if he claims that זינתה תחתיו. If this claim were substantiated she would lose her כתובה (if זינתה ברצון). However since he cannot prove it she retains her כתובה.

⁵ The answer to the purported question (according to the אין לומר/פרש"י) is that even if there is a concern of זינתה תחתיו, the ברייתא still states that he has no monetary טענת בתולים (as תוספות just explained), however he certainly can come to בי"ד regarding the איסור והיתר status of his wife. The ברייתא was only discussing the monetary issue.

ואין זה דוחק⁶ דלעיל⁷ נמי מפרש אינו יכול לטעון טענת בתולים הכי -

And this is not an awkward answer, for previously the גמרא also explained the phrase אינו יכול לטעון טענת בתולים in this manner (that it is discussing only a monetary issue not an איסור והיתר issue) -

דקאמר⁸ למאי אי לאוסרה עליו⁹ ביהודה אמאי לא כולי -

Where the גמרא asks, regarding what does the משנה say that there is no טענת in יהודה, if the טענת בתולים is to forbid her to him, why is there no טענת בתולים in יהודה, etc. The גמרא there concludes that we must say that אין לו טענת בתולים is (only) in reference להפסידה כתובתה. It is evident from that גמרא that the phrase אין לה טענת בתולים can refer only to monetary issues and not to איסורים; therefore we can also say here the same. There can be no question of why is he not לאוסרה עליו, for he definitely is (at least by כהן) -

אלא אכתובה פריך אמאי אינו מפסיד לה -

But rather we must say that the גמרא is asking (only) **regarding the כתובה, why he cannot make her lose her כתובה**, since she may have been מזונה תחתיו; however the difficulty with interpreting the question in this matter, is that he cannot make her lose the כתובה, since it is a ספק ספיקא, perhaps it was not תחתיו (so she retains her כתובה), and even if it was תחתיו perhaps it was באונס, where she also retains her כתובה (even by an אשת כהן [even though she is [אסורה עליו]).

תוספות answers:

ונראה לרבינו יצחק דלרב אשי פריך¹⁰ -

And it is the view of the ר"י that the גמרא asks on רב אשי that we should be concerned שמא תחתיו זנתה (and she may be אסורה to him [if he is a כהן]) and allow him to dispute her entire כתובה –

כיוון דבעלמא אית ליה דאין לה כלום והכא יש לה לפי שכנסה ראשון -

For since generally רב אשי maintains that בתולה ונמצאת בעולה she receives nothing, and here in the case of the ברייתא she receives a מנה because - (כנסה ראשון) (so she is presumed to be a בעולה)

אם כן יבא לידי איסור שזה האיש סבור כיון שזו יש לה אף על גב דבעלמא לית לה -

Therefore there is the concern **that the** second husband **will come to** transgress **an** **איסור**, **for this** second husband **assumes that since this** woman (whom I married

⁶ Seemingly one may argue that it is a דוחק to say that אין לו טענת בתולים refers only to monetary issues and not to issues, since the expression אין לו טענת בתולים would indicate that there is no טענת בתולים at all even for issues of איסור והיתר. תוספות proves that it is not a דוחק to say so.

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⁸ The האוכל אצל חמיו ביהודה שלא בעדים אינו יכול לטעון טענת בתולים וכו' which states גמרא there cited the משנה here on יב,א which states

⁹ The husband claims that he was not בועל her while she was an ארוסה and he suspects her of being (ברצון), which would forbid her to him.

¹⁰ According to (ד"ה וליחוש) פרש"י the question is directed to the ברייתא (whether according to רבה or אשי).

receives a partial כתובה, even though generally a woman who was married receives nothing (according to רב אשי -

אם כן מחזקינן אותה ודאי בעולה מבעל ראשון ואדעת כן רוצים לומר שנשאתי¹¹ -

Therefore (thinks the second husband) it is obvious that the חכמים presume her to be a בעולה from the first husband, and the חכמים want to say that I married her with this in mind that she is a בעולה, so thinks the second husband -

ובחנם אטרח לבית דין שודאי לא יאסרוה עלי -

And so it is in vain that I should trouble myself to go to בי"ד and inform them that she is a בעולה (to ascertain whether she is אסור for me), for the בי"ד will certainly not prohibit her from me, since the בי"ד assumes with certainty that she is a בעולה from her first husband,¹² and there was no זנות at all. However in truth it is possible that she was not a בעולה from the first husband (as the עדים testify), and she was מזונה תחתיו and should be - אסורה (if he is a כהן) לו -

ולכך היה לנו להפסיד כתובתה שיבא לבית דין ולא יטעה¹³ לומר שמותרת לו -

And therefore (in order to remedy this mistaken assumption by the husband) we should make her lose the כתובה entirely, if he has a טענת בתולים, so he will come to בי"ד (for the monetary claim) and will not mistakenly assume that she is מותרת לו (for he sees that בי"ד does not assume that she was a בעולה by the first husband, and therefore בי"ד is granting him טענת בתולים to deny her the כתובה entirely, since כנסה בחזקת בתולה - (ונמצאת בעולה ולא כלום) -

takes his argument a step further:

ואפילו באשת ישראל יש לנו להפסידה¹⁴ -

And we should make her lose her כתובה entirely even if she is an אשת ישראל (where there is no concern of איסור since it is a ספק ספיקא, nevertheless) she should lose her כתובה -

גזירה שיראה כהן שזו לא תאבד כתובתה ויסבור אף בשלו כן ולא יבא לבית דין -

On account of a גזירה that if a כהן will see that this woman (the אשת ישראל) does not lose her כתובה (that proves they consider her a בעולה from the first husband) and he will assume that the same applies also in his case, so he will not come to בי"ד, but really it is possible that she was מזונה תחתיו (even באונס) and she is אסורה לו -

¹¹ Otherwise (if they do not assume that I too realize that she is a בעולה) why are they giving her a מנה for her כתובה since כנסה ראשון?!! That proves that the חכמים presume that I too assume her to be a בעולה since כנסה ראשון.

¹² In fact not only did בי"ד assume it but they presumed that I too realized that she is a בעולה from the first husband and that it why they deny me the monetary טענת בתולים and award her a מנה.

¹³ His mistake is that he does not realize that there is a difference between ממון and איסור. As far as ממון is concerned she receives a מנה because there is a ספק ספיקא (even by a כהן; see footnote # 5); however concerning איסור there is no ספק ספיקא regarding an אשת כהן since she is אסורה even if it was באונס (see footnote # 3).

¹⁴ This is an additional advantage of פי' תוס' אין לומר. For according to the אין לומר the question of וניחוש is only regarding an אשת כהן (see footnote # 3), however according to תוספות the question of וניחוש is even by אשת ישראל.

אבל לרבה לא פריך מידי כיון דבעלמא נמי יש לה ליכא למיטעי:

However according to רבה there is no question at all,¹⁵ for since generally a נמצאת בעולה also receives a מנה, there can be no mistake that the בי"ד is certain that she was a בעולה by the first husband (and therefore she was not מזונה תחתיו), because the reason she receives now a מנה is (regardless whether she was a בעולה by the first husband, but rather) because by every נמצאת בעולה and נמצאת בעולה she (still) receives a מנה.¹⁶

SUMMARY

The question of זינתה וניחוש שמא תחתיו is that since רב אשי maintains ולא נמצאת בעולה ולא טענת בתולים (to pay nothing) in order not to dissuade him from coming to בי"ד to verify whether עליו אסורה.

THINKING IT OVER

¹⁷ (אינו תחתיו or תחתיו) ספק (whether אשת כהן or כהן) writes that by an אשת כהן there is only one ספק; firstly there is the possibility that there is also a ספק ספיקא; seemingly by אשת כהן there is also a ספק ספיקא; firstly there is the possibility that she was never מזונה (and she is a בעולה from her first husband), and even if she was מזונה perhaps it was not תחתיו (it was between the two marriages)!¹⁸

¹⁵ When the ברייתא stated אין לו טענת בתולים that was referring to monetary issues, but obviously he can go to בי"ד regarding his permission to remain with his wife (if he is a כהן). There is no reason why he will be hesitant to go regarding אסור, for no negative assumption about her בתולה status prior to his marrying her was made. She receives a מנה, because in all cases where she is a בעולה (whether בתולה בחזקת or not) she receives a מנה.

¹⁶ Therefore he will come to בי"ד and claim שמא תחתיו זינתה and if it is verifiable she will lose her entire כתובה and be אסורה לו.

¹⁷ See footnote # 3.

¹⁸ מהר"ם שי"ף (בתוד"ה כגון).