

ואפקעינהו רבנן לקידושין מיניה –

And the רבנן retracted the קידושין from him.

OVERVIEW

Our גמרא teaches us that every קידושין is contingent on the consent of the חכמים. When a person is מבטל a בפני בי"ד the חכמים utilize this contingency and retract the entire marriage. It is as if the woman was never married. תוספות will discuss that this may cause some rather severe difficulties.

תוספות asks a question:

והקשה הרב רבי שמואל אם כן יחפה על בת אחותו -

And ר"ש asked if this is so, that when a person is מבטל a בפני בי"ד, the חכמים revoke his original קידושין; it is considered as if he never formally married this woman, then there is a concern that **he will conspire to cover up for his sister's daughter¹**. If a person marries his niece for whom he has a special fondness he will be able to (deviously) protect her in a case where she was unfaithful –

וכשיבואו עדים שזינתה ישלח לה גט ויבטל שלא בפני השליח -

And when the witnesses will come to testify that she was an adulteress and therefore liable for the death penalty; the husband who may desire to protect her from such a fate **will send this wife a גט** after the infidelity and subsequently **will be מבטל** this גט **not in the presence of the שליח** or the wife, but rather בפני בי"ד -

ופקעי קידושין ונמצא שהיא פנויה -

And therefore the קידושין will be cancelled retroactively as if they were never married **and it will emerge that she is an unmarried** woman at the time of the alleged adultery. She will be spared the death penalty in a deceptive manner².

תוספות answers:

ואומר רבינו יצחק דלא קשה דאין לחוש אלא כשמחפה עליה שלא כדין³ -

¹ It does not necessarily mean only his niece; however there is usually a special fondness for one's niece.

² We find that in order to prevent a (seemingly) similar fraud that the חכמים instituted זמן in גיטין. Otherwise after an adulterous affair the husband could give her an undated גט, with which she can claim that she was divorced at the time of the alleged infidelity. Why are we not concerned about this issue in this case?

³ In the aforementioned case of זמן, the woman was מזונה while she was an איש. The גט was given to her after the זנות. It is only that on account that there is no זמן, that she can claim that she was divorced at the time. The truth is that she was not divorced then; only later. Therefore there is a valid concern that she is illegally and wrongfully being spared the death penalty.

The ר"י says that this presents no difficulty for there is no concern unless he conspires on her behalf illegally -

אבל הכא כדין מחפה ומן התורה פטורה -

However, here the protection is legal and she is exempt מן התורה from the death penalty since the חכמים retroactively invalidated the marriage.

תוספות poses an additional question:

ועוד הקשה רבי שמואל דהיכי מחייבין לעולם מיתה אשת איש שזינתה -

And the ר"ש posed an additional difficulty how can we ever mete out the death penalty by an אשת איש who was מזונה. Even if there were witnesses who warned her in advance that if she commits adultery she will be liable for the death penalty, nevertheless she should be exempt from it –

והא התראת ספק היא⁴ דשמא ישלח לה גט ויבטלנו -

for this is a doubtful warning. The case of (any) woman שזינתה it is always a **for he may**, subsequently after the adultery, **send her a גט and then be מבטל the בי"ד**. This will cause that אפקעינהו רבנן לקידושין מיניה, which in turn will retroactively make his wife a פנויה. The עדים cannot warn her that if she proceeds with her intentions that she will be מחוייב מיתה, because it is possible that even after this זנות she will not be מחוייב מיתה, if her husband sends her a גט and is subsequently מבטל it בי"ד. The question is how can there ever be חיוב מיתה by an שזינתה אשת איש שזינתה.

תוספות adds an additional question:

ועוד יכולים ממזרים ליטהר -

And furthermore ממזרים can be purified and reinstated into the Jewish community. The husband of the שזינתה אשת איש (the mother of the ממזרים), will send her a גט and be מבטל it בי"ד which renders her a פנויה retroactively. The children she bore from the illegal relationship will no longer be ממזרים since למפרע she is not an אשת איש. These two scenarios seem unacceptable to ר"ש.

תוספות answers the first question concerning חיוב מיתה:

ואומר רבינו תם דכי האי גוונא לא הוי התראת ספק -

And the ר"ת says that in such a situation it is not called a התראת ספק, that perhaps the בעל will send her a גט and be מבטל it בי"ד. The reason is –

דאזלינן בתר רובא ורוב אין מגרשין נשותיהן וכששולחין גט אין מבטלין -

⁴ A person is not liable for the death penalty unless the witnesses warn him in advance that if he commits this act he will receive the death penalty. If however even if he does the act there is a possibility that he will not be liable for the death penalty, for whatever reason, then this warning is considered a **התראת ספק** a doubtful warning, and consequently the person is not liable for the death penalty regardless of the situation.

For we follow the majority and most people do not divorce their wives, and when they sent a גט they are not מבטל it. A התראת ספק is when there is a reasonable probability that the offender will not be מחוייב מיתה. In this case it is highly unlikely that she will be spared the death penalty, for the probability of her receiving a גט and the husband also subsequently nullifying it, go against the majority rule.

התראת ספק offers another explanation why it is not a תוספות:

ועוד דאוקמינן אחזקתה שהיא עכשיו נשואה -

And furthermore we assume her to be in her present status that she is presently married. A married woman who is מזונה מיתה; the possibility that she may retroactively become a פנויה is merely a ספק. The חזקת נשואה presently, resolves that ספק. Therefore she is considered a נשואה and there is no התראת ספק.

תוספות offers a proof that a חזקה דהשתא can resolve the ספק status into a ודאי.

דאם לא כן נזיר⁵ שהיה שותה יין או מטמא למתים אמאי לוקה -

For if what was said previously **is not so**; but rather a חזקה cannot resolve a ספק, then **a נזיר who was drinking wine**, which he is forbidden to do, **or he was defiling himself** by coming in contact with **dead** bodies; which he is prohibited from doing **why does he receive מלקות**, even if he transgressed despite the warning of witnesses; as we have learnt –

דאם אמרו לו אל תשתה אל תשתה חייב על כל אחת ואחת (נזיר דף מב, א) -

That if the witnesses **warned him: ‘do not drink wine, do not drink wine,** and he drank, the דין is that **he is liable for מלקות for each time⁶** that he drank⁷. The question is: why is he חייב מלקות –

והא התראת ספק היא שמא ישאל על נזירותו -

For it is a התראת ספק, because **perhaps he may recant on his vow** of נזירות. The דין by all vows is, that one may recant his vow by going to a ת"ח and finding a reason why he cannot keep this vow. Once the חכם accepts the reason and nullifies the vow it is as if he never made the vow in the first place. נזיר is a special case of a vow, wherein this loophole is also available that he may be מתיר his נזירות. When the עדים are warning him not to drink wine, for if he does he will be מחוייב מלקות that is a התראת ספק. The עדים cannot be sure that he will receive מלקות for he always has the option of being מתיר נדר. Nevertheless the משנה tells us that he is חייב מלקות (על כאו"א). The reason must be as follows: whether he will be מתיר נדר is a ספק, presently he is בחזקת נזיר, the חזקה of נזיר

⁵ See 'Thinking it over' # 1.

⁶ The idea that he is חייב על כאו"א, is really irrelevant to our discussion here. Tosfos quotes this משנה because it states clearly that a נזיר is חייב מלקות. See מהרש"א הארוך.

⁷ If they told him אל תשתה before each time that he drank.

resolves the ספק that we consider him a נזיר and it is not a ספק. We will say the same thing concerning אזהרת זנות by an איש אשת. The חזקה דהשתא resolves the ספק. now returns to the very first question of שמא יחפה and the last question concerning ממזרים יכולים ליטרה:

ומה שהקשה אם כן יחפה על בת אחותו ויכולין ממזרים ליטרה -

And concerning that which ר"ש asked that if so (that אפקעינהו רבנן לקידושין (מינה) then he will be מחפה על בת אחותו and also that ממזרים will be able to become טהור and be admitted to the קהל ישראל, which according to ר"ש is inappropriate. The answer is:

אי ידעינן שלכך מתכוין⁸ לא מפקעינן קדושין מיניה -

If we know that this is the husband's intent for being מבטל a גט, we will not retract the קידושין from him. The קידושין will remain valid and the גט will be בטל.

דלתקנה עשו חכמים ולא לתקלה שמתוך כך יהיו בנות ישראל פרוצות בעריות -

For the חכמים instituted this אפקעינהו for constructive purposes but not to be destructive for on account of this; if we will follow this rule of אפקעינהו even in the abovementioned situations it will certainly be destructive, **the daughters of Israel will be promiscuous with the illicit relationships.** They will not be concerned. They will depend on their husbands to bail them out by giving them a גט and being מבטל it בפני בי"ד. Now however that we will not allow this אפקעינהו in these situations they will retain the modesty of בנות ישראל.

concludes:

אבל אם ברור לנו⁹ שלא לכך נתכוין¹⁰ לא חיישינן אם יכולים ליטרה:

However, if בי"ד is certain that this was not his intention; neither to be מחפה ממזרים **can become טהור** and admitted to ישראל; since it will not lead to any פריצות.

SUMMARY

ביטול הגט by אפקעינהו רבנן לקידושין מיניה has three concerns if we say יכולים ממזרים (3) מיתת בי"ד concerning התראת ספק (2) שמא יחפה (1) בפני בי"ד ליטרה.

Concerning the חשש of שמא יחפה the ר"י maintains that we are not concerned since it is ע"פ דין.

⁸ For instance his wife is being accused in בי"ד of זנות or a ממזר was born on account of an illicit relationship and he sends her a גט and is מבטל it בפני בי"ד.

⁹ See 'Thinking it over' # 2.

¹⁰ For instance he had no idea that his wife had an affair, etc.

The ר"ת argues with the ר"י and maintains that אפקעינהו applies only when we are certain that his intent is not for יחפה על בת אחרת or to be ממזרים. Concerning התראת ספק the ר"י offers two reasons why it is not ספק; either a) that the רוב tells us that he will not send her a גט and be מבטל it, or b) the חזקת נישואה of now resolves the ספק of the future. We find the same idea by שמא ישאל על נזרו that the חזקת נזיר resolves the ספק of נזרו.

THINKING IT OVER

1. Is proof from תוספות¹¹ regarding חזקה or רוב¹² (or both) Why, also, is proof required that חזקה or רוב can resolve a ספק?
2. What is the דין if we are not sure what the intention of the בעל is when he is מבטל the גט בבי"ד¹³; do we say אפקעינהו or not?
3. What would seem to be stronger (based on this תוספות) רוב or חזקה?

¹¹ See footnote # 5.

¹² Seemingly רוב נזירים שואל on their נזירות.

¹³ See footnote # 9.