For if he had a claim of, etc. – שאם היה לו טענת וכולי

Overview

The משנה explains the reason for the תקנת חכמים that a בתולה should be married ליום הרביעי is because in case the husband claims that she is not a בתולה (and was perhaps מזנה while she was betrothed [which would make them אסור to each other]), he will be able to immediately go to בי"ד (on Thursday) and state his claim. There is a dispute between רש"י and תוספות as to what is accomplished by stating the claim in בי"ד.

תוספות asks:

ואם תאמר הא תינח אשת כהן[1] או פחותה מבת שלש[2] -

And if you will say; granted, there is a point in טענת בתולים by **the wife of a כהן, or** if he was מקדש his wife when she was **less than three** years **old -**

דליכא אלא חד ספיקא[3] כדאמרינן בגמרא (לקמן ט,א)[4] -

For in those cases she will be אסורה to him (by his טענת בתולים) since **there is only one doubt, as the גמרא states -**

אבל בשאר נשים דאיכא ספק ספיקא[5] אמאי תנשא ליום ד'[6] -

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[1] If the wife of a ישראל was forced into זנות against her will (באונס), she is permitted to remain with her husband. However if the wife of a כהן was נאנסה (she is considered a זונה and she) is forbidden to be with her husband. He is required to divorce her.

[2] A girl who is less than three years old; even if she had ביאה, her בתולים will return and she will retain her בתולה status. If she became מקודשת before she was three, and her husband finds her not to be a בתולה, it must be that she was נבעלה sometime (after she was three, which is sometime) after she was מקודשת and an אשת איש.

[3] Regarding the אשת כהן (if the husband claims she is a בעולה) it can be she was נבעלה before the קדושין (when she was still a פנויה and is not considered a זונה) and she is מותרת לבעלה כהן, or it is possible she was נבעלה after the קדושין in which case she is a זונה (even if it was באונס [see footnote # 1]) and is אסורה לבעלה. Since there is only one ספק, she is אסורה לבעלה מספק as in every ספיקא דאורייתא. Similarly by a קטנה who was נתקדשה (to a ישראל) when she was less than three years old, there is also only one ספק whether she was נבעלה באונס (where she is מותרת לבעלה ישראל [see footnote # 1]) or whether she was נבעלה ברצון (where she is definitely אסורה לבעלה ישראל since she was certainly נבעלה תחתיו [after the קדושין (see footnote # 2)] for otherwise she would still be a בתולה). Therefore she is אסורה מספק.

[4] In these cases it is understood why the חכמים were מתקן that he marry ליום ד', because if he finds out that she was already נבעלה she is אסורה עליו, and by going to בי"ד he will be told to divorce her.

[5] By an אשת ישראל (who was נתקדשה when she was more than three) there is a doubt within a doubt, which should permit them to be together. There is the doubt that perhaps she was נבעלה באונס (in which case she is מותר לבעלה ישראל [see footnote # 1]), and even if she was נבעלה ברצון (which would seemingly forbid her to her husband); nevertheless there is the additional doubt that perhaps she was נבעלה before the קדושין (and she is permitted to him). Even if he tells בי"ד that she is a בעולה, nonetheless בי"ד will permit them to be together since there is a ספק ספיקא להיתרא.

[6] We cannot say that the תקנה was made so that he can claim she is a בעולה and he does not owe her the (entire) כתובה, because for this we do not need a תקנה; if he does not want to pay her (full) כתובה, he can always claim that.

However by the rest of the women (who are not אשת כהן or were not נתקדש פחותה מבת ג') **where there is a ספק ספיקא** and therefore she is not אסורה to him, so **why should** those women **get married ליום ד',** since the טענת בתולים will not accomplish anything.

תוספות answers:

ואומר רבינו תם דלא פלוג רבנן בתקנתא -

And the ר"ת answers that the רבנן did not differentiate in their enactment for a בתולה to marry ליום ד' -

ומשום אשת כהן ופחותה מג' תקנו בכל הנשים שינשאו ביום ד' -

And they enacted that every woman should marry ביום ד' (even though the טענת בתולים will not prohibit them from being together) **because of an אשת כהן and a פחותה מבת ג'** (where the טענת בתולים creates an איסור).

תוספות cites s'רש"י opinion on this matter:

ובקונטרס פירש שמתוך כך יתברר הדבר ויבואו עדים שזינתה ברצון[7] -

And רש"י explained; the purpose of טענת בתולים by שאר נשים is **that by** his complaining in בי"ד, **the situation will be verified and witnesses will come** forth **that she was מזנה willingly** and therefore אסורה לבעלה.

In summation: according to תוס' the תקנה (initially) was only for an אשת כהן and a פחותה מבת ג', and on account of לא פלוג it was extended to שאר נשים also.[8] However according to רש"י the תקנה was initially for all נשים, for we may find out that נבעלה ברצון.[9]

תוספות asks on פירש"י:

וקשה לפירושו דאמרינן בגמרא (שם,ב) אמר אביי אף אנן נמי תנינא -

And there is a difficulty with פירש"י for the גמרא states, 'אביי said we also learnt in a משנה this rule of ר' אלעזר -

דהאומר פתח פתוח מצאתי נאמן[10] לאוסרה עליו[11] -

However regarding איסור we are concerned that if he does not go immediately to בי"ד, he may calm down and convince himself that it does not matter (since it is only a ספק, etc.)

[7] The words שזינתה ברצון do not appear in our רש"י text. See 'Thinking it over' # 1.

[8] If he makes the claim by אשת כהן ופחותה מבת ג', she will be אסורה on him; however by שאר נשים they will not be אסורה עליו.

[9] However, it is possible that even by אשת כהן or פחותה מבת ג' she will not be אסורה (by טענת פ"פ) unless עדים testify.

[10] The novelty of this ruling is that for טענת בתולים it is not necessary to prove that there was no דם בתולים, but even if there is no proof from the דם (for they lost the cloth, etc.), nevertheless if he claims there was an opening (instead of being closed) that is sufficient to render it a valid claim and we do not suspect that perhaps he is mistaken whether it was a פ"פ or not. See 'Thinking it over' # 2.

[11] See the גמרא there on the עמוד א' that he is believed לאוסרה עליו only by an אשת כהן or פחותה מבת ג'.

That one who says, 'I found an open doorway', he is believed to have her forbidden to him; this rule is indicated in our משנה, for the משנה states -

בתולה נשאת כולי מאי לאו דקטעין פתח פתוח[12] -

'A בתולה is married, etc. because if he has טענת בתולים he will be אביי ;'משכים לבי"ד continues, **is it not so that** his טענת בתולים is **that he claims** מצאתי **פתח פתוח**' (indicating, according to אביי, that האומר פ"פ מצאתי נאמן לאוסרה עליו). This concludes the citation from the גמרא. תוספות continues with his question on פרש"י -

והשתא היכי מייתי ראיה לפירוש הקונטרס הא אף על גב דאינו נאמן -

But now, according to רש"י, what proof is אביי **bringing** to the ruling of פ"פ מצאתי נאמן, from our משנה; **for even if he is not נאמן -**

מכל מקום ישכים לבית דין שמתוך כך יצא הקול ויבואו עדים ויתברר הדבר[13] -

Nevertheless he should still **be משכים לבי"ד, for on account of** his claim, **there will be publicity and witnesses will come and the matter will be clarified** that she was מזנה ברצון; however his claim alone of פ"פ is not believed.

תוספות answers (his question on רש"י):

ויש לומר דלא מייתי אביי ראיה לרבי אלעזר אלא שהוא בקי ומכיר אם הוא פתח פתוח[14] -

And one can say; that אביי is not bringing a proof to the ruling of **ר"א** that האומר פ"פ מצאתי נאמן לאוסרה עליו (for indeed according to פירש"י there is no proof), **but rather** אביי is proving **that** a person **is acquainted and recognizes whether it is a פ"פ** or not; he proves it in the following manner -

דאם אינו בקי לא יצא הקול ולא יבא לידי בירור -

For if a 'regular' person **is not a בקי, there will be no publicity** to his claim **and nothing will be verified -**

כי יאמרו שהוא טעה וסבור שמצא פתח פתוח ואינו כן ולא יחושו לדבריו -

For people **will say (**when they hear his טענת בתולים), **that he is mistaken, for he thinks that he found a פ"פ, but** really **it is not so, and they will not pay attention to his claim,** so there will be no בירור. However, since the משנה states that there will be a בירור, this proves that his claim of פ"פ is valid.

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[12] See תוס' there (ד"ה מאי (הא', why אביי assumed that the משנה is discussing טענת פ"פ. The גמרא refutes the proof of אביי for the משנה may be discussing טענת דמים (see footnote # 10).

[13] It is possible that we do not rule like ר"א and (by טענת פ"פ) he is not נאמן לאוסרה עליו (even by an אשת כהן and פחותה מבת ג' [see footnote # 9]), however he is משכים לבי"ד so that עדים will come. However according to תוספות that the reason for the תקנה (initially) was for אשת כהן and פחותה מבת ג', for they will be אסורה to him if he claims טענת בתולים (and because of לא פלוג the תקנה was extended to שאר נשים), therefore there is a proper proof from our משנה that by פ"פ he is נאמן לאוסרה עליו (by אשת כהן and פחותה מבת ג').

[14] See footnote # 10.

תוספות offers another explanation of פירש"י:

ועוד יש לומר[15] דגם לפירוש הקונטרס לא היו מתקנים שתהא ניסת ליום ד' -

And additionally one can say, that even according to פרש"י (that the purpose of טענת בתולים is that יתברר הדבר), the חכמים **would not have instituted that** every woman **should be married ליום ד',** solely -

משום שמא יתברר על ידי עדים -

Because that **perhaps there will be verification through עדים,** for that is too far a stretch (there may not be a קול, the עדים may not come, etc.) -

אבל כיון דבאשת כהן ובפחותה מבת שלש דנאמן לאוסרה עליו תקנו שתהא ניסת ברביעי -

But rather since by אשת כהן and פחותה מבת ג', where he is נאמן לאוסרה עליו, the חכמים **instituted that she should marry on Wednesday,** therefore the חכמים -

גם בשאר נשים תקנו משום שמתוך כך יצא הקול ויתברר הדבר על ידי עדים -

Also instituted by שאר נשים that they should marry ביום ד' (but not because of לא פלוג as תוספות said, but rather) **because through this** claim **there will be publicity and the incident will be verified by witnesses -**

והשתא מייתי אביי שפיר ממתניתין דבאשת כהן ובפחותה מבת שלש נאמן לאוסרה עליו.

And now (that all [even רש"י] agree that the תקנה was [initially] made for an אשת כהן ופחותה מבת ג' since he is נאמן לאוסרה עליו), **אביי brings a proper** proof to ר"א **from our משנה that by אשת כהן and פחותה מבת ג' he is believed לאוסרה עליו.**

In summation; according to this last explanation (of רש"י) the תקנה was made initially because of פחותה מבת ג' [as תוספות maintains] where he is נאמן לאוסרה עליו and אשת כהן. The חכמים then extended this תקנה to שאר נשים (not because of לא פלוג [as תוספות explained], but rather) because there is a purpose for שאר נשים as well, for through his טענת בתולים there will be a קול and יתברר הדבר בעדים.

תוספות asks:

ותימה[16] דהכא משמע דמשום חששא דזנות תקנו שתהא ניסת ברביעי -

And it is astounding; for it seems from the משנה **here that** the חכמים **instituted that she should marry Wednesday because of the concern of promiscuity זנות -**

ובפרק ב' דגטין (דף יז,א ושם) איכא מאן דאמר דתקנו זמן בגטין משום פירי[17] -

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[15] This explanation disagrees with the assumption mentioned in footnote # 9.

[16] See 'Thinking it over' # 3.

[17] When a woman brings property into a marriage (נכסי מלוג) the rule is that (even though she retains the ownership of the property, nevertheless) the husband receives the fruits of the property. This arrangement continues as long as they are married. If however the husband divorces her he loses the rights to the פירות (from the time of the divorce). If there would be no זמן in the גט, it is conceivable that the husband, even after the divorce, will continue consuming the פירות (without the woman realizing it), and when she will claim that he illegally ate the פירות, the burden of proof

However in the second פרק of גיטין מסכת **there is one** (ריש לקיש) **who maintains that** the חכמים **instituted** to write **a date in a גט because of פירי -**

אבל משום שמא יחפה על בת אחותו[18] לא חיישינן משום דזנות לא שכיח –

However this מ"ד maintains **that** we cannot say that the reason the חכמים were מתקן זמן בגיטין is **because perhaps he will cover up for his niece,** he negates this view and maintains that **we are not concerned** for שמא יחפה **since זנות is not prevalent.** The question is why there by זמן there is no תקנה because of זנות, however here by the wedding we make a תקנה because of our concern for זנות?!

תוספות answers:

ויש לומר דהתם קאמר זנות דאתי לידי מיתה דהיינו בהתראה[19] ובעדים לא שכיח -

And one can say that ר"ל **says there that a זנות which will carry a death penalty, meaning** that it was done **with a warning and witnesses, is not common** therefore there is no need to be מתקן זמן because of שמא יחפה; however זנות without עדים והתראה (for which we are concerned here) is indeed common, and therefore there is a need for the תקנה of יום ד'.

תוספות offers an alternate answer:

אי נמי הכא שלא תשב עמו באיסור כל ימיו חשו אפילו לזנות אף על גב דלא שכיח:

Or you may **also** answer; **that here they were concerned for זנות even though it is not common, in order that she should not be with him illegally all his life,** however there, since there is no lifelong איסור to be concerned about (merely her wheedling herself out of the death penalty), they were not concerned for זנות.

Summary

The תקנה of בתולה נשאת ליום ד' was made initially for אשת כהן or פחותה מבת ג', however it was extended to שאר נשים either because of לא פלוג (the view of תוס'), or because there is the possibility that יתברר הדבר בעדים (the view of רש"י).

Thinking it over

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will be on her as to when the divorce took place (since there is no date in the גט). Therefore the חכמים instituted to write the date, protecting the woman's rights to her פירות, beginning from the date on the גט.

[18] The view of ר' יוחנן there is that they were מתקן זמן בגיטין because it is possible that someone will marry his niece ([not necessarily a niece but rather anyone] of whom he is very fond, regardless of their marital status), and she may be מזנה תחתיו and will be מחויב מיתה, so in order to spare her the death penalty her husband (dear uncle) will write her a גט and she will claim that she received the גט before the זנות, so she was not an אשת איש and not liable for the death penalty. Therefore they instituted זמן בגיטין to avoid this miscarriage of justice.

[19] תוספות mentions התראה so the answer will be applicable even according to רש"י that עדים (without התראה) will come and testify that זינתה ברצון (for by זמן there needs to be התראה as well, to have a חיוב מיתה).

1. תוספות writes (in פרש"י) that עדים will testify that זינתה ברצון.[20] Why is it necessary that they testify that זינתה ברצון, even if the testify that she was מזנה and do not know whether it was ברצון on not, she will still be אסורה לבעלה, for the עדים will know whether she was זינתה תחתיו, and once we establish that she was זינתה תחתיו, she is אסורה לבעלה (because now there is only one ספק whether it was באונס or ברצון); why mention זינתה ברצון?![21]

2. If it is assumed that a person is בקי in פ"פ,[22] is there any חידוש in the ruling of ר"א that האומר פ"פ מצאתי נאמן לאוסרה עליו in a case of אשת כהן or פחותה מבת ג'?[23]

3. Is there any connection between תוספות last question[24] regarding זנות, with that which תוספות mentioned previously?[25]

[20] See footnote # 7.
[21] See פרדס יצחק אות צט.
[22] See footnote # 10.
[23] See ח"ב מ"ת אות ו.
[24] See footnote # 16.
[25] See פנ"י and סוכ"ד אות כו.