There are no claims regarding – **החרשת והשוטה כולי אין להן טענת בתולים the virginity of a deaf-mute and an imbecile, etc.**

Overview

The general rule is if someone marries a woman with the assumption that she is a בתולה (a virgin), whose כתובה is two-hundred זוז, and it turns out that she is a בעולה (whose כתובה is one hundred זוז), she (partially) loses her כתובה.[1] Our ברייתא teaches that regarding certain women, the husband cannot claim this טענת בתולים. There is a dispute between רש"י and תוספות why, regarding these women, אין להן טענת בתולים.

פירוש בקונטרס[2] דאי הוה פקחת לטעון הוה טענה משאירסתני נאנסתי[3] -

רש"י explained the reason there is no טענת בתולים here, **for if she was clever** enough **to claim, she would have claimed, 'I was forced after the אירוסין';** therefore we claim it on her behalf –

תוספות asks:

וקשה לרבינו יצחק דהיכי טענינן לה הכי מספק לאפוקי ממונא כיון דאיהי לא טענה -

And the ר"י has a difficulty; since she is not claiming anything; **how can we make this doubtful claim** (משנתארסה נאנסה) **for her, to take away money** from her husband. תוספות clarifies his question -

דחזקת גופה איתרעי[4] דהוי שור שחוט לפניך[5] אבל חזקת ממון לא איתרע[6] -

For the presumptive status of her body (that she is still a בתולה as she was since

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[1] See footnote # 34, and the very end of this תוספות.

[2] בד"ה הא ר"ג.

[3] See previously יב,ב and here as well that according to רבן גמליאל where she claims that the reason she is not a בתולה, is because she was forced after the אירוסין, and so it is his loss, she is believed, and he is required to pay her the entire כתובה. In this case even though the חרשת וכו' is not (capable of) claiming anything, we claim on her behalf that (perhaps) משנתארסה נאנסה and she receives the entire כתובה.

[4] Every woman has a חזקה דמעיקרא that she is a בתולה (she was born that way), and until we know otherwise, we assume that she is still a בתולה. However here she is a בעולה, as no one is contesting this, therefore it is not that obvious to assume that she was a בתולה until after the אירוסין (as we would otherwise say, if she claimed it), but here since she is a בעולה there is sufficient reason to assume that perhaps she was a בעולה even before the אירוסין and does not deserve the (entire) כתובה.

[5] See previously on טז,א (and in תוס' ורש"י there). שור שחוט לפניך is an expression indicating that we know something is certainly not in order. The ox is dead; the owner has a claim on somebody for killing the ox. Here too there is no question that she is a בעולה. It is up to her to prove when it happened, otherwise we may assume that it happened before the אירוסין.

[6] The husband is in the possession of the כתובה money. In order to award it to her we need strong proof that משנתארסה נאנסה, and since we have no claim from her; what gives us the right to claim it against his חזקת ממון?! It would seem that this question is on our גמרא proper, which states כגון זו פתח פיך לאלם הוא that we claim it on her behalf.

she was born), **has been weakened; for** it is like '**an ox is slaughtered before you', however the status of the money is not weakened;** the husband is in the possession of the money that she wants to take away from him –

תוספות, however, finds support for פרש"י:

ומיהו מביא רבינו יצחק ראיה לפירוש הקונטרס דאמר בפרק המדיר[7] (לקמן עו,ב ושם) -

However, the ר"י brings a proof to פרש"י, for the גמרא **states in פרק המדיר**

לא הוגלד פי המכה המוציא מחבירו עליו הראיה[8] -

If **no scab formed on the wound** the rule is **המוציא מחבירו עליו הראיה -**

ומפרש דאפילו לא יהיב טבח דמי על הטבח להביא ראיה שברשות המוכר נטרפה[9] -

And the גמרא there **explains that even if the butcher** (the buyer) **did not yet pay** for the cow, nevertheless **it is incumbent on the butcher to bring a proof that it became a טריפה** while it was **in the possession of the seller;** otherwise, the buyer must pay the seller for the animal.

תוספות responds to an anticipated difficulty:

והא דמפרש רב אשי[10] למתניתין דהמדיר[11] -

And this which רב אשי explained the משנה in פרק **המדיר -**

דהיו בה מומין ועודה בבית אביה על האב להביא ראיה -

That if she had blemishes and was still in her father's house, the father must

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[7] The case there is where one bought a cow and slaughtered it, and a needle was found in the stomach which was perforated through and through, which rendered the animal a טריפה. If the perforation occurred before the sale, the seller is obligated to reimburse the buyer. The rule is if the wound formed a scab, it is certain that it took place (at least) three days prior, so if the sale was within three days of the שחיטה, we know that it became a טריפה while in the possession of the seller and he is required to reimburse the buyer.

[8] The seller need not reimburse the buyer unless he can somehow prove that the perforation of the needle took place before the sale.

[9] We see here that even though it is a 'שור שחוט לפניך', the animal is certainly a טריפה (like the woman is certainly a בעולה) and the buyer (who did not pay yet) has the חזקת ממון (like the husband); the only question is when did this happen, which no one knows (same as here), and we see there that the חזקת ממון is not sufficient and we make him pay, similarly here too the חזקת ממון is not sufficient and he has to pay her the full כתובה. The reasoning is the same in both cases; one who buys an ox must pay for it (unless he can prove he bought a טריפה), one who marries a woman, we assume she is a בתולה and he owes her a כתובת בתולה, unless he can prove she was a בעולה before the אירוסין.

[10] עו,א.

[11] עה,א. The משנה there reads; (רישא) היו בה מומין ועודה בבית אביה האב צריך להביא ראיה שמשנתארסה היו בה מומין הללו (סיפא) נכנסה לרשות הבעל הבעל צריך להביא ראיה שעד שלא נתארסה היו בה מומין אלו והיה מקחו מקח טעות ונסתחפה שדהו. The case there is where man married a woman and he found blemishes (מומין) on her and he does not want to have נישואין with her. If we know that she had the blemishes while she was in her father's house (after the אירוסין) and we are not sure whether they were there before or after the אירוסין, (and the father wants that the husband, who does not want to have נישואין with her, pay the כתובה), the father must prove that the blemishes happened after the אירוסין, however once she entered her husband's domain (and he wants to divorce her), he has to prove that it happened before the אירוסין, if he does not want to pay the כתובה.

prove that the blemishes occurred after the אירוסין; so רב אשי explained -

רישא מנה לאבא בידך[12] סיפא מנה לי בידך -

The first case in the משנה is comparable to where one says, '**you owe my father a מנה'; the סיפא** is comparable to a case where one says, '**you owe me a מנה'.** This concludes the citation from the גמרא. תוספות continues -

לא[13] מטעם דברי ושמא ברי עדיף כדמשמע לפום ריהטא[14] -

It is not on account of the reasoning, **as would seem superficially, that** by **ברי ושמא, the ברי is stronger -**

דאם כן הוה קשה דהיכי טענינן לה הכי[15] -

For if indeed that is the reasoning (on account of ברי ושמא), there is **a difficulty, for how can we claim** it **on her behalf [here] -**

אלא כדפירש התם[16] בקונטרס רישא מנה לאבא בידך -

Rather the difference between the רישא and the סיפא there, is **as רש"י explained there, the רישא** is like a case where one claims, '**you owe my father a מנה' -**

דלגבי האב לא מהני חזקת הגוף דבתו[17] דהכתובה היא באירוסין של אב[18] -

For regarding the father, the חזקת הגוף of his daughter is not effective, for by אירוסין the כתובה goes to the father -

סיפא מנה לי בידך דלגבי דידה מהני חזקת הגוף דידה[19] -

However, **the סיפא** is like '**you owe me a מנה'; so, regarding the** wife, **her חזקת הגוף is effective** to collect her כתובה -

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[12] When she is still בבית אביה as an ארוסה, the כתובה belongs to the father (if she is a נערה). Therefore, it is like one who is claiming, 'you owe my father a מנה'.

[13] Seemingly the answer of ר"א is still not clear; what difference is there between מנה לאבא בידך or מנה לי בידך. One may have assumed that the difference is in ברי ושמא, as תוספות continues to explain and negate.

[14] In the סיפא, where she is the claimant (the כתובה payment goes to her), she is a ברי, for she knows for sure that the מומין happened after the אירוסין, and the husband is a שמא, all he can claim is perhaps it happened before the אירוסין, therefore we rule that עליו להביא ראיה, otherwise she receives the כתובה, since ברי ושמא ברי עדיף. However, when she is בבית אביה, the claimant for the כתובת אירוסין is the father, who also does not know for sure when the מומין happened, only she knows, and her ברי is irrelevant since she is not the claimant, therefore it is a שמא ושמא, and since the father is the מוציא, therefore על האב להביא ראיה. [This is similar to מנה לאבא בידך, where the claimant is not sure that the לוה (still) owes money to his (deceased) father.] However, תוספות negates this explanation.

[15] The רש"ש amends this to read הכא (instead of הכי). There by the מומין, we say if the claimant is not a ברי, he cannot collect (even though the חזקת הגוף tells us that the מומין happened later [after the אירוסין]), so why is it that here there is no טענת בתולים (and she collects the כתובה), since there is no טענת ברי (only חזקת הגוף). This proves that ברי ושמא does not play a role in determining her status.

[16] בד"ה רב.

[17] She was born without blemishes, this חזקה normally remains in effect until the time we know for sure that it changed, therefore we postpone the appearance of the מומין as long as possible.

[18] The claimant is the father, the חזקה is by the daughter (see footnote # 17), we cannot apply the חזקה of the daughter to the claim of the father.

[19] The same is here that her חזקת הגוף that she was born a בתולה is effective that we postpone the time of her becoming a בעולה as much as possible and we claim משנתארסה נאנסה.

וכן צריך לפרש דאי מטעם ברי קאמר התם[20] -

And indeed, it is necessary to explain it in this manner that the difference between the רישא and the סיפא is not on account of ברי ושמא ברי עדיף), **for if the reason what he is saying there** (that she is believed בבית בעלה) **is on account of ברי -**

אמאי קאמר דעודה בבית אביה על האב להביא ראיה דמשנתארסה נולדו בה מומין -

Why does the משנה **rule that when she is still בבית אביה, the father must bring proof that the מומין came after the אירוסין -**

אמאי צריך להביא ראיה כיון דאמר ברי לי -

Why does he need to bring proof, since the father **claims, I am sure** the מומין came later -

דבכל ענין משמע דצריך להביא ראיה אפילו אב אמר ברי[21] לי[22] -

For it seems that the father must always **bring proof in any event, even if the father claims ברי לי.** This concludes פרש"י.

תוספות offers his explanation why אין להן טענת בתולים:

ולרבינו יצחק נראה לפרש הכא דאין להן טענת בתולים לפי שבחזקת מוכת עץ[23] היא -

And the ר"י prefers to explain what it states here **that אין להן טענת בתולים,** that is **because she is presumed to be a מוכת עץ –**

תוספות responds to an anticipated difficulty:

ואף על גב דכולהו נמי חבוטי מחבטן[24] -

And even though that all other women **are also** prone **to be struck,** so why is there טענת בתולים by them and not by החרשת וכו'. תוספות responds -

מכל מקום שאר נשים יש להן טענת בתולים מדלא קאמרי[25] שהן מוכת עץ -

Nevertheless, regarding **other women there is טענת בתולים** against them, **since they do not claim that they are מוכת עץ -**

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[20] Previously, תוספות negated this explanation (of ברי ושמא), since it is in contradiction with our גמרא here (see footnote # 15). Now תוספות is explaining that it cannot be the explanation there, for it is negated by the גמרא there.

[21] The משנה states without qualification, that בבית אביה the father must bring proof. It is possible and just as likely that the father knows when she received the blemishes, and even in that case, he still needs to bring proof. If the reason is ברי עדיף, why should he need to bring proof when he claims ברי?!

[22] If, however, the reason the father needs to bring proof is because the חזקת הבת is ineffective for the father, it is understood that it makes no difference whether he claims ברי or not. The deciding factor is the חזקת הבת.

[23] A מוכת עץ (hit by wood) refers to a woman who lost her בתולים due to being struck in that area but not because of intimate relations. We claim on her behalf that the reason she has no בתולים is because she is a מוכת עץ, but not because she was נבעלה (either before or after the אירוסין). [There is a dispute what is the כתובה of a מוכת עץ. According to ר"מ it is מאתיים (like a בתולה), and according to the רבנן it is a מנה (like an אלמנה).] See 'Thinking it over' # 1.

[24] See ב,לו.

[25] See 'Thinking it over' # 2.

אבל הנך חרשת ושוטה דלא מצי אמרי בחזקת מוכת עץ נשאות -

However, these חרשת ושוטה, who cannot claim anything, we assume that **they are married with the presumptive status** that they are **מוכת עץ.**

תוספות supports his view based on a (different) גירסא:

וכן נראה דברוב ספרים לא גרסינן לעיל[26] בברייתא -

And so too it is apparent that the reason why אין להם טענת בתולים is as תוספות explained it that they are בחזקת מוכת עץ (but not like רש"י that we claim[27] on their behalf משנתארסה נאנסה), **since in most texts, the previous ברייתא does not state** (as it does state in our text) ויש להן טענת בתולים -

אלא החרשת והשוטה והאילונית יש להן קנס ותו לא -

Rather that ברייתא reads, '**the חרשת and the שוטה and the אילונית have קנס',** but no more, meaning -

ואין כתוב ברוב ספרים ויש להן טענת בתולים –

That in most texts it is not written 'ויש להן טענת בתולים', as it is written in our text -

ולפירוש רבינו יצחק פריך שפיר דמדקאמר יש להן קנס -

So, if we assume this גירסא, **according to the פר"י the contradiction** between the ברייתות **is properly understood, for since** the first ברייתא **states, 'they** (the חרשת ושוטה וכו') **receive קנס,** therefore -

אלמא לא חשבינן להו בחזקת מוכת עץ[28] -

It is evident that we do not consider them as presumably מוכת עץ, but the second ברייתא which states אין להן טענת בתולים assumes that they are בחזקת מוכת עץ (as the ר"י explained above[29]) -

אבל לפירוש הקונטרס מאי קפריך הכא נמי בחזקת בתולות חשבינן להו -

However, according to פרש"י (if we assume this גירסא) **what is the contradiction** between the two ברייתות, the first ברייתא assumes them to be בתולות (therefore they receive קנס), and the second ברייתא **here also considers them בחזקת בתולות -**

דהא אמרינן השתא דמשנתארסה נאנסה -

For since we say אין להן טענת בתולים that means they receive the entire כתובה, for **we now say that משנתארסה נאנסה** that she is בחזקת בתולה, just like the first ברייתא; so, what is the contradiction?![30]

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[26] On this עמוד, where it states ורמינהו החרשת וכו'.

[27] See footnote # 19.

[28] תוספות apparently maintains that a מוכת עץ does not receive קנס.

[29] See (the text by) footnote # 23.

[30] However, according to the גירסא in our text (which is גירסת רש"י), the contradiction is obvious; the first ברייתא stated יש להן טענת בתולים and the second ברייתא stated אין להן טענת בתולים.

תוספות asks:

ורבינו שמשון בן אברהם הקשה לפירוש רבינו יצחק דאמאי לא משני -

And the רשב"א asked, according to the פר"י, why the גמרא **did not answer** the contradiction between the two ברייתות as follows -

הא דקתני אין להן טענת בתולים כרבי מאיר דאמר בפרק קמא (לעיל יג,א) -

This ברייתא which states, אין להן טענת בתולים (for she is מוכת עץ בחזקת), **is according to ר"מ, who maintains in the first פרק** that by -

מוכת עץ בין הכיר בה בין לא הכיר בה מאתים[31] -

מוכת עץ, whether he was aware of it or whether he was not aware, her כתובה is **two hundred** זוז (like a בתולה) -

והא דקתני יש להן טענת בתולים[32] כרבנן דאמרי כתובתן מנה[33] -

And the ברייתא, which states, **יש להן טענת בתולים, is according to the רבנן,** who maintain that the **כתובה** of a מוכת עץ **is one hundred** מנה (like an אלמנה) –

תוספות anticipates a possible solution to this question:

וכי תימא משום דקתני חרשת דומיא דאיילונית[34] -

And if you will say, the reason the גמרא does not offer this answer, is **because** the ברייתא **teaches, 'a חרשת** and a שוטה and an אילונית receive קנס and יש להן טענת בתולים'. We assume that the rule by חרשת is **similar** to the ruling **of an איילונית –**

תוספות rejects this solution:

הא על כרחך איילונית גופה לא הפסידה כתובתה לגמרי -

Since perforce even the איילונית does not lose her כתובה entirely -

דהא רב ששת דמשני הא רבן גמליאל הא רבי יהושע -

Since רב ששת who answered here, '**this** ברייתא is according to **ר"ג,** and **this** ברייתא is according to **ר"י,** so this very same ר"ש -

סבירא ליה בפרק קמא (דף יא,ב) כנסה בחזקת בתולה ונמצאת בעולה יש לה כתובה מנה:

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[31] The ר"י maintains that the חרשת וכו' is בחזקת מוכת עץ. A מוכת עץ, according to ר"מ receives the entire כתובה, therefore the husband has no claim, for we assume she is a מוכת עץ and receives מאתיים.

[32] It is seemingly apparent that the רשב"א is asking on the ר"י, according to our גירסא (but not according to the גירסת רוב הספרים (גירסת הר"י). See (however) מהרש"א.

[33] When the husband claims that she is not a בתולה, so even if we will assume that she is a מוכת עץ, she will not receive the entire כתובה, for a מוכת עץ receives only a מנה.

[34] The טענת בתולים by an איילונית (that husband thought she was a בתולה and it turns out that she is a בעולה), will cause her to lose the entire כתובה (the accepted ruling is כנסה בחזקת בתולה ונמצאת בעולה אין לה כתובה כלל). We will not assume that she is a מוכת עץ, for she is intelligent and would have said that she is a מוכת עץ (unlike a חרשת ושוטה). Therefore, since by איילונית, she has no כתובה, we could not have answered that the ברייתא which stated החרשת וכו' יש להן טענת בתולים means that she will only lose a מנה (and receive a מנה), because since an איילונית receives nothing, the same should apply to a חרשת.

Maintains in the first פרק that if **he took her in, presuming she is a בתולה and it turned out she is a בעולה, she has a כתובה מנה.**[35]

Summary

According to רש"י the reason a חרשת וכו' has no טענת בתולים, is because we claim on their behalf משנתארסה נאנסה, while according to תוספות the reason is that she is presumed to be a מוכת עץ.

Thinking it over

1. Why is it that after the ר"י brings proof to פרש"י, the ר"י disagrees[36] and offers a different explanation?!

2. תוספות writes that 'regular' woman have טענת בתולים (and we do not assume that they are מוכת עץ), since they did not say מוכת עץ אני.[37] Does תוספות mean that they should have said it (to their husbands) before the נישואין, or that they should have said it when the husband realized that she is not a בתולה?[38]

[35] Therefore, רב ששת could have given the רשב"א's suggested answer, since according to ר"ש, both a חרשת and an איילונית, have a כתובה מנה by טענת בתולים. תוספות does not offer an answer to the רשב"א's question on the ר"י.

[36] See [text by] footnote # 23.

[37] See footnote # 25.

[38] See משנה למלך הל' אישות פי"א ה"ח.