בס"ד

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Notes on Rav Bednarsh's Gemara B'Iyun Shiur (Kiddushin, 5777)

שיעור #1 – 9/8/16

שיעור פתיחה

Is קדושין a מצוה?

A) יראים, בה"ג – no, regulation (this is the way to create the status of marriage)

B) חינוך, רמב"ם – yes, a מצוה (if one wants to get married, then it a מצוה to be done in this way)

C) סמ"ק – yes, a מצוה (but with being married and living with a wife as the real goal, similar to a בן נח)

Question on בה"ג — גמרא in קדושין on .מא

Q: Uses principle of "מצוה בו יותר מבשלוחו" by קדושין; implies it is a מצוה!

A: ר"ן – refers to פרו ורבו (a more expansive read of the term "מצוה בו יותר מבשלוחו").

Question on רמב"ם — גמרא in מ"ק on :יח

Q: Explicitly says קדושין on חול המועד is not a מצוה — "לאו מצוה קעביד"!

A1: רבי אברהם בן הרמב"ם – קדושין is only beginning of the מצוה; נשואין is the completion of the מצוה

Weakness: רמב"ם's wording in הל' אישות indicates the מצוה is really the קדושין itself

A2: Rav Rosensweig (whole article about it — very creative, עיין שם)

A3: Rav Lichtenstein –

Background: גמרא in ביצה uses the term "מצוה" there as something pressing enough to do now and violate יו"ט. רמב"ם (in פה"מ there) says the מצוה of פרו ורבו. Why not say the מצוה of קדושין? Because doing קדושין earlier is no better than doing it later; unlike פרו ורבו, where it is better as soon as possible.

Therefore, the same can be said for the גמרא in מ"ק: talking about an issue of mixing שמחה with שמחה, and to be דוחה that issue, it must be pressing. Thus, קדושין, which can be done as well later as it can be done now, is not considered pressing, and thus is "לאו מצוה קעביד."

Potential נ"מ

1) scope of the idea of מצוה בו יותר מבשלוחו: to יראים/בה"ג, applies even to a הכשר מצוה [as ר"ן holds]; but to רמב"ם and סמ"ק, it might need to be the מצוה itself [as מקנה holds].

2) the היתר of taking a פילגש: to רמב"ם, it should be אסור [1] (as indeed it is; he permits a מלך alone to have a פילגש) [as ריב"ש holds]; but to יראים/בה"ג, may be מותר [as ר' יוסף בן דוד holds]. To סמ"ק, if one already has a wife — there's room to say either option.

3) the ברכה of אירוסין: a very strange ברכה [2], which compelled רא"ש to say it's a ברכת השבח, like קידוש, not a ברכת המצוה [יראים/בה"ג would have to say this]; but רמב"ם holds it is a ברכת המצוה [fits nicely with his own שיטה]

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[1] At least because of the עשה of doing קדושין — you can't live with a woman as a wife without קדושין. And possibly even because of the ל"ת of קדשה.

[2] ר"ת added the second לנו, so that way people wouldn't wrongly be מדייק to say you can't sleep with other people's ארוסות, but you *can* with their נשואות.

Though not necessarily. Technically, one could say it's a ברכת השבח, and nonetheless a מצוה (thereby still holding like רמב"ם's שיטה regarding if קדושין is a מצוה)

For example: ריטב"א quoting רמב"ן – can't say a ברכת המצוה for technical reasons (not a גמר מצוה); thus, they were מתקן a ברכת השבח instead [but might be a מצוה still]

Another example: ריטב"א quoting רבינו יחיאל – a ברכת השבח, but say a ברכת המצוה on קדושין afterwards [thereby clearly holding it's a מצוה still]

Regardless, רמב"ם himself is consistent.

As for רא"ש – ambiguous. Repeatedly refers to it as a מצוה; yet says a פילגש is מותר and one can do פרו ורבו with her; thus, don't need קדושין as one needs שחיטה. Moreover, by קדושין, תורה merely says "if," whereas by שחיטה, it says to do. Thus, sounds more like יראים/בה"ג.

More on the explicit חקירה between רמב"ם (ברכת המצוה) and רא"ש (ברכת השבח)

Other נ"מ which come out:

1) when to say the ברכה: generally, ברכת המצוות are עובר לעשייתן, and ברכות השבח are after.

רמב"ם is consistent (he says to do it עובר לעשייתן). רא"ש brings both sides — but ends with תוספות saying to do it after, so consistent as well.[3]

2) who says the ברכה: if ברכת המצוה, ideally should be the מצוה-doer; if not, doesn't matter.

רמב"ם is consistent (he says ideally the חתן does it). תוספות says someone else does.[4]

Though not necessarily. Technically, one could say simply that the one involved in the מצוה is the one who should say the ברכת השבח.

3) if the חתן is deaf: if a ברכת המצוה, then can't be יוצא with the rabbi's ברכה; if a ברכת השבח, he can.

[נודע ביהודה said can't be יוצא, since a ברכת המצוה; but תבואות שור argued on this]

4) need for a מנין: if a ברכת המצוה, why need a מנין? But if a ברכת השבח, perhaps necessary.

רמב"ם is consistent (never says need a מנין). רא"ש quotes רב שמואל בר חפני who says no need. But רא"ש sides with רב אחאי גאון, who requires a מנין, so is consistent. (תוספות in כתובות too).

Though not necessarily. Technically, just being a ברכת השבח doesn't mean it needs a מנין. This just makes more sense to that side.

5) need for a כוס: if a ברכת המצוה, why need a כוס? But if a ברכת השבח, perhaps necessary.

רמב"ם is consistent (says just a מנהג, do as you want). But the מנהיג may've held it's needed.[5]

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[3] Could've been like ראב"ד, that you do it afterwards for technical reasons (she might say no). But רא"ש is saying like תוספות in פסחים by מילה ברית, that you say it afterwards because it is a ברכת השבח. (Also why the rabbi says it, not the one doing the מצוה). Therefore, רא"ש/תוספות are saying it for fundamental reasons.

[4] Could've said this is for technical reasons, even if a ברכת המצוה (for example, so as not to embarrass him if he doesn't know how to say it, or maybe since he'll be so nervous). But תוספות says a fundamental reason: because it is about all of כלל ישראל's קדושה. Thus, sounds like it's a ברכת השבח, not a ברכת המצוה.

[5] Basis for the famous חומרה of Rav Chaim. How can you have the rabbi make a הגפן and have the חתן drink? You can't do that normally — only allowed by קידוש and הבדלה, which are each a חובה! Therefore, if a real חיוב here, then it makes sense. But if like רמב"ם (i.e. not a real חיוב), then shouldn't work. Thus, to be מחמיר for the רמב"ם, the rabbi pours a drop onto his hand, and then licks it off.

ערוה"ש [in אה"ע לב:ט] (and others who don't say this חומרה) answer that the מנהג took on the status of a חובה.

6) נוסח used in the ברכה: doesn't focus on what it should (קדושין), but instead on קדושת ישראל in general; this was the starting point for ראי"ש saying it's a ברכת השבח. But to רמב"ם, it's pretty strange.

Two ways to address this strangeness for the רמב"ם:

a) [technical] ideally, we'd say it normally, but we must say other things to avoid עבירות (such as people misunderstanding to think they can marry עריות, or to think it's מותר to be with one's ארוסה before נשואין).

Weakness: just explain afterwards clearly, instead of incorporating it into the ברכה!

b) [fundamental] Rav Rosensweig – to רמב"ם, the מצוה isn't just the קדושין. It is to transform the אישות which comes afterwards by doing קדושין first.

This is why רמב"ם gives the historical background first; supposed to do something more than the natural, we make it spiritual as well.

That is why we want עדים (we want it to be a formal act of commitment, a קנין).

This explains רבי אברהם בן הרמב"ם as well. נשואין is part of it, because the נשואין becomes a committed one and a changed one because of the קדושין.

That is what "לישא אשה בכתובה ובקידושין" in the כותרת refers to.

This is why רמב"ם mentions כתובה in the כותרת, even though he holds כתובה is דרבנן. That is his part of the commitment; she commits herself not to marry anyone else, and he commits to her with the כתובה.

Finally, this explains why the ברכה has extra things in it, including the איסור דרבנן of not sleeping with one's ארוסה. Makes the commitment into something more real.

שיעור #2 – 9/12/16

שוה כסף ככסף – ב.

Source for שוה כסף = כסף by קדושין

Q: תוספות – what's the source that a woman can be נקנית even with a שוה כסף? The פסוק says כסף, which should be understood as being דווקא!

וכ"ת – maybe it's just obvious that שוה כסף = כסף,

ליתא – since we needed a פסוק to teach it by עבד עברי later on!

(תוספות wonders about the same thing by ערכין. By פדיון הבן and הקדש, he suggests from כלל ופרט וכלל).

Three main streams of answers in the ראשונים:

A) תוספות – without דרשות, *never* would've known שוה כסף = כסף. **Learn from דרשה**, and extrapolate everywhere.

תוספות addresses why we need a פסוק both by עבד עברי and by נזיקין:

1) Couldn't have learned נזיקין from עבד עברי, nor could נזיקין have properly taught everything.

2) Couldn't have learned עבד עברי from נזיקין, nor could עבד עברי have taught everything.

(To תוספות's first answer, learned from עבד עברי; to his second, learned from נזיקין).[6]

Other ways of learning from a פסוק to קדושין

(Different than תוספות since not using a בנין אב; yet similar, since שוה כסף = כסף from פסוק, not סברא)

a) רמב"ן – learn to קדושין from עבד עברי through "אין כסף"

b) ריטב"א – learn to קדושין from אמה העבריה from שפחה כנענית through גזירה שוה of "לה" "לה"

(Both are pretty weak, and rejected even by the ראשונים who brought them up).

B) תוספות טוך in ר"י מדנפיר"א – *always* knew that שוה כסף = כסף, **from סברא** (the opposite of תוספות).

Q: If so, why need the דרשות? כלל ופרט וכלל are for other laws; but what about ישיב by עבד עברי and נזיקין?

A: by עבד עברי, need a דרשה because פסוק says כסף twice (as it says in the ירושלמי); and by נזיקין, since it says מיטב, we might have thought even if paying with כסף, we'd need to give money specifically too.

C) ר"ן, ריטב"א, רשב"א, רמב"ן – sometimes need a דרשה, but sometimes don't and it's from סברא (a middle ground).

When *from both* of their דעות, then no need for a פסוק. That's why there's no need for a source by קדושין.

When *against* one party's דעת, then it needs a special דרשה:

By עבד עברי, since redeemed against the אדון's will, needs a special פסוק to force him to accept it.

By נזיקין:

a) רמב"ן – (same thing) since repaid with שוה כסף against the ניזק's will, need special פסוק

b) רשב"א – (a little different) without פסוק, wouldn't have known you can give non-מיטב

Potential נ"מ

מהרי"ט – to the extreme opinions, A) and B), context doesn't matter; to C), it does.

Thus, if one says "this is קדושין, on condition I'll give you 100 dollars later," can he give שוה כסף instead?

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[6] רש"י (in קדושין on .ח) doesn't clarify how, but indicates we know שוה כסף = כסף by קדושין from עבד עברי. Yet elsewhere (in ערכין on .כז), רש"י sounds like the source to other things is from נזיקין. Which one does רש"י really think is the source?

מהרי"ט – to רמב"ן, there is no דרשה here, and you can't give it to her against her will. But to ר"י, then it doesn't matter if she agrees or not — it's a סברא that they are the same. And to תוספות too, it shouldn't matter — now that there's a דרשה teaching כסף = שוה כסף, they are the same thing.

אבני מלואים – argues. Cannot apply halachic categories to something which depends on what the average person thinks or wants.

To מהרי"ט, the מחלקת boils down to the scope of כסף = שוה כסף: to תוספות and ר"י, it applies to all of תורה; but to רמב"ן, it only applies when with her דעת (with two exceptions, נזיקין and עבד עברי).[7]

To C), what's a סברא to distinguish between with her דעת and without? Either כסף = שוה כסף, or it doesn't!

a) When she accepts it, she's מחשיב the שוה כסף to be like כסף.

Rav Soloveitchik – comparable to גמרא on ח. — רב כהנא took a סודר as ה' סלעים of פדיון הבן, despite objectively not being worth that much. Apparently, some subjectivity is involved.

Based off this, we have a potential נ"מ:

פנ"י – if a woman says to accept קדושין from someone through a שליח, and then only שוה כסף is given — doesn't work, since she didn't actually specify that she wanted it.

Not necessarily though. Maybe once the שליח is made a שליח, his דעת is as good.[8]

b) אבני מלואים – you have the right to refuse שוה כסף, if you so choose, when it is forced upon you.

נ"מ between the two סברות: what is the default status of שוה כסף?

To Rav Soloveitchik, you must make the שוה כסף into כסף; but אבני מלואים thinks it is always like כסף, until you say that you don't want it.

Perhaps why there's the distinction above between the רמב"ן and רשב"א regarding why נזיקין needed a פסוק: to רמב"ן, need a special acceptance; whereas to רשב"א, can give it without a special acceptance.

By saying כסף is שוה כסף — does גמרא mean it's *exactly* the same as כסף; or else, comparable, but still different?

Similarly, does the term "כסף" include all value; or, more broadly, that value is always a valid substitute?

A) ריטב"א – only a גילוי מילתא[9] that שוה כסף is בכלל כסף

(naturally exactly the same thing; the term "כסף" just means value, not actual money. Also, a local idea)

B) שו"ת הרא"ש – a real דרשה teaching value is an acceptable substitute for an item (since can turn into the item)

(naturally two distinct categories [but דרשה may change that]. Also, a global idea, applying everywhere)

Potential נ"מ

1) "איצטלית" case: where someone wanted to bother his wife and said "I'll divorce you if you give me a robe."

רא"ש – because כסף = שוה כסף, she can even give him money instead of the robe to fulfill the תנאי.

Isn't that backwards? Yes, שוה כסף is like "כסף," but is כסף like a "robe?"

ריטב"א would surely disagree with this, since he thinks we only have a גילוי מילתא that the term "כסף" really means שוה כסף — but who ever said that the term "robe" means "value of a robe?"

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[7] Likewise, to the other opinions within A) — since it is only a unique דרשה by קדושין too, it would come out like רמב"ן here.

[8] אבני מלואים rejects like this, though his real reason for rejecting the נ"מ is what's about to be brought below.

[9] Meaning, it reveals what the simplest explanation was; as opposed to real דרשות, which actually teach something new.

But ראש obviously felt differently. He may think that the דרשה of שוה כסף taught one can give acceptable substitutes.[10] Thus, even though "robe" meant literally "robe," but one is allowed to substitute money, based on this דרשה about acceptable substitutes.

2) technicalities of the דרשה: for example, can one ask a פירכה on it? (only can on a real לימוד, not a גילוי מילתא)

מהרש"א – true בנין אב (and thus can ask a פירכה on it); but פנ"י – only a גילוי מילתא [11] (and thus cannot)

3) are all items like כסף or not: for example, the גמרא on ז: - ח., in the second version of רב יוסף and רבה — it's possible they are arguing over how real a דרשה it is [12]

4) מחלקת between רמב"ם and תוספות over if one can לכתחילה even use שוה כסף, or must one ideally use real כסף

They argue about this in two contexts:

a) paying a debt: גמרא seems clear that one must give money if one has; only if not can one give שוה כסף.

תוספות indeed says like this. But רמב"ם (in הל' מו"ל יא:ז) says must first give מטלטלין; only if no מטלטלין, can give land. But never says must first give כסף more than other מטלטלין.[13]

b) paying up נזיקין: ר"ת says one must first give כסף, and only if one doesn't have can one give מטלטלין. But רמב"ם (in הל' נ"מ ח:י) says one must first give מטלטלין, and only if one doesn't have can one give קרקעות. Again, only divides מטלטלין and קרקעות, but not כסף and other מטלטלין.

Thus, רמב"ם understands the דרשה of ישיב this way,[14] as saying that שוה כסף and כסף are exactly the same. But תוספות thinks that שוה כסף is still בדיעבד in some cases (and thus, they are still two separate categories).[15]

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[10] See דברי יחזקאל for the same idea.

[11] Perhaps one could even tie this into the two answers of תוספות (though not necessarily).

[12] רבה, who doesn't require full alignment with כסף, may say only a גילוי מילתא; but רב יוסף, who does, may say a real דרשה.

[13] In terms of this divide between מטלטלין and קרקעות, the רמב"ם may have been coming off the גמרא in ב"ק on יד: (עיין שם).

[14] See in הל' ערכין ז:א. See also הל' גניבה ואבידה ג:יא and הל' עבדים ב:ח.

[15] This 4th potential נ"מ only addresses the first raised question above (namely, the nature of the לימוד of שוה כסף = כסף, is it a גילוי מילתא or a real דרשה, and are they the exact same thing or not), but not the second (namely, is it a local or global idea). To clarify, רמב"ם clearly holds שוה כסף (or at least מטלטלין) are exactly the same as כסף, closer to the גילוי מילתא side; but we have no indication as to whether he'd agree with the ראש or not by the "איצטלית" case.

שיעור #3 – 9/15/16

ב. – Comparison between קנין כסף and קדושי כסף

(*A few quick addendums to* שיעור #2 *about* שוה כסף ככסף):

רשב"א vs. בעל העיטור over whether קרקע can be used for קדושי כסף

A) בעל העיטור (as quoted by רשב"א)[16] – cannot do קדושין with קרקע at all

רשב"א assumes סברא is because קדושין is הוקש to גט, and since גט can't be done with מחובר, neither can קדושין.

However, when read inside, not so clear. בעל העיטור may only have meant by קידושי שטר, not קידושי כסף.

Nonetheless, רשב"א understood the בעל העיטור this way.

B) רשב"א himself – *can* do קדושי כסף with קרקע; only קדושי שטר, which is הוקש to גט, cannot be done with מחובר

What might be the underlying מחלקת?

1) the source for why a גט cannot be done with מחובר: the גמרא isn't so clear why this is true.

One option could be that the פסוק requires "ונתן בידה," and קרקע cannot be given from hand to hand.

Another option could be that the פסוק requires a "ספר," and thus must be something used for writing. (Even though we hold it can even be abnormal — still, maybe "ספר" is at least able to exclude קרקע).

Thus, if about a need for a מעשה נתינה, may extend to כסף too; if about a need for a ספר, it may not.

2) what קדושין is modeled after:

To the בעל העיטור, the model would be גט; to the רשב"א, it would be normal ממונות transactions.

If similar to גט, there may be ritual requirements in the נתינה; if just transference of value, then maybe can even use קרקע. (This may be a very fundamental question, which we'll delve into later).

However, there may be another סברא for the questioner of the שו"ת רשב"א, unrelated to the בעל העיטור:

רשב"א assumed the questioner was based on the היקש between קדושין and גט extending even to קדושי כסף.

But the questioner's reason had nothing to do with גט; question was based on "אין קיחה אלא בכסף," that the term "כסף" only refers to מטלטלין, not to קרקעות. One therefore cannot do קדושי כסף or buy a field with קרקע, since not a קנין כסף. In short, קרקע doesn't count as שוה כסף.

This sounds very much like the רמב"ם mentioned in the last שיעור, who thought כסף and all מטלטלין are the same — as opposed to קרקע which is neither כסף nor שוה כסף. This may have been the questioner's basis.[17]

Three main שיטות were listed in the last שיעור for the source for שוה כסף = כסף. תוספות alone held it wasn't a סברא.

Why would תוספות think שוה כסף = כסף isn't a סברא?

1) המיוחס לרא"ה – textual reason – תוספות asked earlier why the משנה said דינר ושוה דינר (and not merely שוה דינר, as in ב"מ). תוספות was thus מדייק in the משנה's wording, and derived from the extra words "דינר" and "פרוטה" that the תורה was saying specifically כסף as a גזירת הכתוב.

2) פנ"י – fundamental reason – קדושין itself is a חידוש, a גזירת הכתוב

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[16] רשב"א here. When asked about this twice in his שו"ת, refers to this שיטה and the questioner's assumption without name.

[17] It's also quite feasible to think the רמב"ם would therefore agree with this questioner over the רשב"א; although unfortunately, we don't have anything firm from the רמב"ם himself to say this with certainty.

(He seems to mean that had we only been talking about buying fields, of course there is a סברא to give value to acquire it. But to get married, which isn't the same as buying something — it's a ritual, determined by the תורה — is beyond the limits of what our logic might dictate. It's a "חידוש," and thus unbound).

The גמרא learns קדושי כסף through the גזירה שוה of "קיחה" "קיחה" from שדי עפרון.

Is קדושי כסף really being learned from the קנין of a field, or is it just a גילוי מילתא (that this is what קיחה is with)?

- The דרשה itself strange, since the קיחה is on the item used for the transaction there, versus the item itself.

תוספות deflects this as not being a big deal. But ריטב"א uses this oddity to prove it was only a גילוי מילתא.

- The גמרא on ג. (in its simplest read)[18] implies there really is a general comparison between אשה with a שדה, and only for a technical reason do we not learn חליפין through the comparison.

תוספות and others reject that read though — should've used as a source for שטר then; and also, חזקה should work by an אשה too then, as it does by a שדה!

תוספות therefore explains that גמרא didn't say that קדושין in general is learned from there, but rather specifically קידושי כסף. (As for the ה"א to learn חליפין, תוספות explains that כסף might have included חליפין).

Within תוספות, one could take this in two directions; namely, that:

a) קדושי כסף is actually learned and comparable to the קנין of a שדה; or that

b) קדושין also has כסף as a means to do it, though not comparable to שדה at all (as ריטב"א sounded)?

The ט"ז (to be mentioned shortly) sounds like קדושי כסף is really comparable to a קנין כסף by שדה; while the פנ"י (mentioned above) sounds like there's no comparison at all (as ריטב"א implies).

When buying a שדה, if one gives over a פרוטה *aside* from the total amount he intends to pay for it, has nothing happened, since you haven't started paying yet; or no, has it been purchased, and that פרוטה was the קנין כסף?

There is a famous מחלקת between the סמ"ע and ט"ז over this case:

כסף פרעון – סמ"ע – the כסף works when it is a פרעון, part of the price. The principle underlying the deal is an exchange of value; thus, before that value has begun to be paid, they can still back out.

Basis for the סמ"ע: the exchange of אברהם אבינו buying the שדה עפרון — he paid the full price.

(To deflect — he *happened* to have paid the full price, but *could have* used separate כסף קנין too).

כסף קנין – ט"ז – the handing over of the כסף is a ritual act which enacts the קנין. The price of the שדה is a debt he owes, but the כסף given over doesn't need to be part of the price — it's a formal act which commits him.

Basis for the ט"ז: the idea of כסף קידושין, which is linked to the buying of a field. And by קדושין, it isn't about how much she is worth — it's obviously a symbolic act, not that an exchange of a ring for a wife. Therefore, it must be that the כסף given over for a שדה isn't an exchange either.

How can one deflect the ט"ז's source and defend the סמ"ע?

1) אבני מלואים – no, a woman also has a certain price (thus, even קדושין is about כסף פרעון)

Proof: the ראש brought a proof that one pays the value the שטר was sold for (and not the face value) by מחילת שטר חוב from a case of קדושין, and said the value owed there would be a פרוטה. Thus, we see that קדושין is also about an exchange of the value of a פרוטה.

(However, what precisely the value is remains a little unclear. Definitely not acquiring her, as the אבני מלואים makes very clear elsewhere. Nonetheless, somehow, one gains the value of something).

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[18] And maybe from רש"י's words there; or at least, how many of the ראשונים understood him.

2) אבן האזל (and many others) – no real comparison between קדושי כסף and קנין כסף of a שדה; just a גילוי מילתא

Apparently though, the ט"ז (and אבני מלואים, by answering differently) understood the connection more seriously.

Hashkafically, how are we to understand the comparison between buying a שדה and taking a wife? [19]

A) non-modern way: acquisition of valuable item, upon which things can be planted and grown for you

B) based on specific field אברהם bought, the מערת המכפלה: he demonstrated his desire to not be a mere guest in the land; rather, it will be the land where our nation's ancestors are buried, our homeland. Not a regular real estate purchase. The connection between the בני ישראל and א"י is profound and everlasting, and this was the true beginning of that bond. In this context, קדושין— a deep, eternal spiritual bond — makes perfect sense.

C) based on the manner through which אברהם bought the field: Rav Hirsch – initially, it was offered for free; but אברהם wanted to sacrifice for it, showing it wasn't just real estate, but representative of an eternal spiritual bond between himself and his deceased wife. It was both an opportunity for him to offer her great honor, as well as demonstrate that their bond lasted beyond their physical lives — she was worth all the money in the world to him. Therefore, this is the best קנין in תנ"ך to learn קדושין from: while every קנין is a sacrifice (each side gives something up to get something valuable), this one teaches us certain fundamentals about marriage.

[19] If just a גילוי מילתא, then not much of a question. This is really only going within the side that there's a real the comparison.

שיעור #4 – 9/19/16

ב. – Is קדושין more like קנין or הקדש?

(**Note:** some ראשונים, such as רמב"ן and his school, thought all this text was added into the גמרא at a later date.
Nonetheless, it's still important for us to understand and learn from, even if not from רבינא and רב אשי per se).

The process of the first step of marriage is called both "קנין" and "קדושין." There are models for both terms:

- קנין – the קנינים found elsewhere (as the rest of the פרק goes on to explain), and implies a real acquisition
- קדושין – like הקדש, and implies an איסור restricting the use of others

Which language is more specific? Really a קנין, with one result being the איסור; or really about the איסור, though the process of creating it may look like a קנין in other regards? [20]

These two sides can perhaps be gleaned from תוספות on ב. תוספות asks the following question:

Q: Why not ask "ותנא תרתי אטו חדא" here by the term "קנין" based on כסף (as done later by "דרך" from ביאה)?

תוספות offers two answers to this question:

A1: all three avenues of doing קדושין can accurately be called a קנין

A2: ביאה cannot be called a קנין; nonetheless, שטר can, so the term is being used for two of the three avenues

A1 seems to think that the process of קדושין itself *is* fundamentally a קנין.[21]

A2 seems to think that the קנין component actually *isn't* an inherent aspect of the whole process of doing קדושין.

Potential נ"מ

1) טענינן by גט: case of a שטר חוב brought against a person who he isn't around, ב"ד won't accept the שטר without first being מקיים it. This process is referred to as "טענינן" (they make the claim on his behalf to protect him from losing). However, by the same case by a גט, the גט is accepted without טענינן, even though he "loses" his wife.

Why? What's the difference between the two cases? Four basic answers given in the ראשונים:

A) תוספות (in גיטין on ב.) – indeed, fundamentally should've said טענינן; nonetheless, חז"ל were מיקל by עגונה

B) ריטב"א, רמב"ן – by ממונות, can't take his money; but a woman isn't husband's money to take,[22] so no טענינן

[C) תוספות (brought by רמב"ן, others) – a שטר חוב *is* accepted without קיום in such a case; no טענינן there either**]**[23]

[D) רמב"ן (technical answer) – by ממונות, no extra evidence to trust it; by גט, we trust she'll check seriously**]**

תוספות and ריטב"א/רמב"ן may argue over the above point:

תוספות may hold a husband fundamentally has a real קנין in his wife, whereas ריטב"א/רמב"ן may hold not; and the נ"מ is whether that would enable us to say טענינן.

2) whose מזל is she considered under: in beginning of כתובות, whole discussion about whether husband must pay for wife's מזונות if they cannot proceed with חופה at the scheduled time for various reasons.

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[20] Already, this touches upon the serious question of whether we really think one "purchases" a wife.

[21] (And the only thing the גמרא is coming to answer is why one פרק picked one term over the other).

[22] As for her potential איסור — if she is satisfied with the "proof," it's up to her (even if it will indirectly impact the husband).

[23] It should be noted that this is a clear minority opinion.

In addressing why husband can't claim it was her מזל which caused this, not his, תוספות says (in one answer) it is because she is like his "field." תוספות הרא"ש is even clearer — she is "קנין כספו" like other items.

You see these ראשונים really are considering the קדושין to be some sort of real קנין.

3) why קדושין isn't תופסין in an ארוסה: because there's a קנין in her already; or simply because it's a כרת חייבי מיתות?

פנ"י – because of husband's ownership in her; אבני מלואים – only because of the איסור of כרת

They argue by a strange case: if two people try to do קדושין to a שפחה חרופה; there is only an איסור לאו there. That would be an actual נ"מ of this מחלקת.

Proof for אבני מלואים: גמרא in קדושין on :סז – asks for a source that אשת איש doesn't have קדושין תופסין in her, and ends up relying on the fact that there's an איסור involved!

חזו"א – defends פנ"י – פנ"י agrees there's an איסור; however, there's *also* the קנין הבעל. Either would be reason enough for קדושין not to be תופסין. However, based on the גמרא's context —seeking a source that the child will be a ממזר — it needed to focus on the איסור component's lack of תפיסת קדושין, since that is what really determines if the child will be a ממזר or not.

4) why an ארוסה is allowed to eat תרומה: is it because she is the property of the כהן, just as an עבד is; or is it somehow because of his marriage to her?

גמרא seemingly says because an ארוסה is also called "קנין כספו," just like an עבד, and thus she can eat תרומה.

This seems to be a proof to the קנין side.

However, תוספות הרא"ש quotes ר"ת who says that "קנין כספו" by her is really just an אסמכתא; the real source is "ביתו." This would avoid the proof; he doesn't really have a real קנין in her.[24]

אבני מלואים gives a different answer (which fits nicely; he's been on the non-קנין side so far):

רמב"ן distinguishes between קנין ממון and קנין איסור by an עבד כנעני and an עבד עברי.[25] The אבני מלואים claims that it is the קנין איסור which enables a כהן's עבד to eat תרומה.[26] Proof? Since it is also true by a כהן's wife, who he only has קנין איסור in.

Based off this, the אבני מלואים avoids the same proof for the קנין side of looking at קדושין. When the גמרא was talking about her being קנין כספו, it only meant with regard to eating תרומה, and meant the קנין איסור.

Within the side that it truly is a קנין, what does that mean? An איסור was put on her, but what was he קונה? [27]

A) נצי"ב (and most poskim) – no financial benefit. מעשה ידיה לבעלה is only דרבנן, and clearly didn't mean because it's an essential part of the marriage, since they gave her the choice to determine if she wants this deal or not.

B) רשב"א (in כתובות on :מז) – her being "קנין כספו" means she is a "שפחה לשמושיה." From context, he is clearly talking on a דאורייתא level; thus, seems like he is saying that קנין כספו truly means a חיוב on her to serve him.

C) פנ"י – based off a ר"ן – though מעשה ידיה לבעלה is only דרבנן — the מלאכת הבית, the upkeep of the home, is something she is responsible for on a דאורייתא level.[28]

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[24] To highlight, תוספות הרא"ש himself doesn't say this. That makes sense — thus far, he's been heavily on the קנין side, so it would be strange for him to avoid this straightforward proof for his שיטה.

[25] רמב"ן first says this regarding an עבד כנעני: when מפקיר the עבד, only מפקיר the ממונות component of ownership, but he still needs a שטר שחרור (since owned him in terms of affecting his איסורים: he couldn't sleep with a Jewish girl and is פטור on some מצוות; and he can sleep with a שפחה כנענית). רמב"ן then also extends the same idea to an עבד עברי as well.

[26] This is as opposed to from the קנין ממון (which is an issue by the קנין of the כהן's animal, but he attempts to deal with it).

[27] It's clear from many sources that he isn't really קונה her גוף (despite תוספות הרא"ש's exaggerated language).

[28] This could be what the רשב"א meant too. "למיקים לקמיה" means she is like his personal assistant.

However, the mainstream opinion is like A). No work on a דאורייתא level. If so, what's the קנין?

Clearly, it must be that there is a קנין for the relationship, for the אישות. But what does that actually mean?

1) נצי"ב – for marital intimacy. As the פסוק states, "כי יקח איש אשה ובעלה" — he has the right to sleep with her, and she can't refuse. That is what he is קונה.

Doesn't she have that right on him too? Does that mean she has a קנין in him too?

No. His is a right over her explicitly found in the פסוק; her right from him is found as a מצוה he must do for her, but not written as a right per se.

(Proof: רמב"ם – כתב סופר in הל' נדרים says that husband can't swear off wife due to his שעבוד to her; but as for her being unable to swear off him, רמב"ם says it is because her intimacy is owned by him).

2) תוספות (in קדושין on :ל) – explained in what sense a wife is in the husband's רשות and thereby cannot fulfill כיבוד אב ואם to the same degree as before: she lives with him, and might be far away from her parents.

Based off this, one could might say that this is his קנין in her — this is a real חיוב, she must live in his home. (Rav Moshe Feinstein in fact explained that this is why the wife take on the husband's מנהגים).

3) ר"ן, מאירי (in beginning of קדושין) – he owns the right to the marital relationship itself, the right for her to not be with anyone else. He owns the right to exclusivity.

(By saying this though, we're forced to make the two sides — קנין and הקדש — very close to one another).

שיעור #5 – 9/22/16

ב: – Clarifying the גמרא's questions and ה"אs

(*A quick addendum to* שיעור #4 *about whether* קדושין *is more like* קנין *or* הקדש*)*:

To clarify, the contrast between the two options might not be so sharp. It might not be that there is קנין *or* הקדש, but rather *both*, and sometimes one part will exist without the other.

Never will have קנין without איסור, but maybe איסור without קנין. The נצי"ב gives three examples:[29]

A) By חייבי לאוין: there's איסור, since קדושין is תופסין; but no קנין, since no right to sleep with her.

B) By being מקדש an עובר, a fetus: רמב"ם has a funny formulation — the קדושין worked, but do it again so it isn't a קדושין של דופי. נצי"ב explains that it isn't a ספק, but rather that only the איסור part of the קדושין was חל.[30]

C) By doing יבום against her will: full איסור of אשת איש, but no right to continue to forcefully live with her

(All three of these are debatable, but this is what the נצי"ב thought).

נצי"ב explained the גמרא's ה"א of thinking that maybe קדושין could be חל against her will this way: if one of these cases, not such a ludicrous ה"א (after all, he already has the איסור part in her; and still, קמ"ל not).

Q: If "נקנית" implies not בעל כרחה, then how can the משנה say "היבמה נקנית" — she *can* be acquired בעל כרחה!

1) תוספות – language was used in the רישא to prevent thinking קדושין can be done against her will, so the סיפא used the same language (and נקנית itself doesn't imply either way, it is ambiguous).

2) רמב"ן, others – has to do with the word איש and אשה as well. Had it said האיש קונה, that would have implied it is all up to him. But by saying האשה נקנית, it implies she is *equally* as in control. As for יבמה נקנית, that means *neither* of their wills are important; thus, both are *equally* unimportant.

3) נצי"ב – (in line with what he said above) – a יבמה too must, indeed, agree to the קנין; it *can't* be חל without her permission (only the איסור part can be against her will). Thus, the משנה is precise when it says היבמה נקנית.

Q: How could the משנה later on say האיש מקדש — doesn't that sound like he can do the קדושין against her will?

1) תוספות – indeed, it's misleading. But relying on the fact that it was already clarified in the first פרק that this isn't true, and that he can only do קדושין with her permission.

2) רמב"ן – the language over there was מקדש, and it's clear that one can only be מקדיש something one owns, and thus one needs the owner's permission; as opposed to קנין, where one doesn't need the item's permission.

רמב"ן seems nonsensical — *both* need owner's permission, and *neither* needs object's permission!

שו"ת תשב"ץ – explains רמב"ן – though one can be קונה something without its permission — to be מקדיש it, one must own it first. Therefore, while the language of "נקנית" could potentially mean that one can do it against her will — the language of "מקדש" could not (one would obviously need to acquire her first, and that would be with her will; and only then, once she's "owned" by him, could he be מקדש her)

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[29] These build off his perspective on the nature of the קנין (see the end of last שיעור), that it means the right to sleep with her.

[30] Reb Chaim explains this strange formulation of the רמב"ם's in a different manner.

(This is apparently assuming that the קנין and the קדושין are two different components, and they happen at separate times.[31] Two stages: first, he's קונה her, and that requires her דעת; then, he's מקדש her, which doesn't require her דעת).[32]

תשב"ץ is clearly taking the comparison to הקדש very seriously — doesn't just mean that it is also an איסור, but that קדושין really functions similarly in some ways to הקדש. We'll deal with this חקירה more later.

By explaining **רמב"ן** this way, we see that there are indeed *two* separate components to every קדושין.

Rav Gustman – the **ירושלמי** has a **ה"א** that all three avenues are necessary in every instance to create קדושין; it rejects this **ה"א** with a **ברייתא** proving otherwise. However, from the fact that the **ירושלמי** took the **ה"א** seriously enough to need a **ברייתא** to disprove it, this **ה"א** is legitimized, and perhaps one sees that there are actually three components of קדושין: the קנין, the איסור, and the relationship[33] (**כסף** = קנין, **שטר** = איסור, **ביאה** = relationship). The conclusion is still that any one still creates all three, but the basis of the **ה"א**, that all three exist, is still true.

To Rav Gustman, we see that there are really *three* separate components to every קדושין.

How serious was the ה"א that one can do קדושין without her דעת? Could we have really thought that'd be true?[34]

A) נצי"ב – (the explanation mentioned above — in a case where there was already the איסור component)

B) מאירי – simple read – literally meant he could take her against her will. Accordingly, either indeed, not a very good **ה"א**; or else, perhaps there would be a **גזירת הכתוב** enabling this (when the **תורה** said "**כי יקח**").

C) רשב"א – **ה"א** was to allow the קדושין to be without full דעת, i.e. when forced in the manner of תלויה וקדש, which technically counts. In fact, there's a **מחלקת** in **ב"ב** whether ultimately this works: it does on a **דאורייתא** level, but they argue whether the **רבנן** undid the קדושין. Thus, the **ה"א** was it working on a **דאורייתא** level, and the **קמ"ל** was that it doesn't work, like the opinion which held the **רבנן** overturned the קדושין.

D) ר"י מלוניל – **ה"א** was specifically about קדושי שטר. On **ט:**, though it is clear that the **שטר** needs to be written **לשמה**, there's a **מחלקת** over whether it must be initially written with her knowledge as well. Thus, the **ה"א** here was that it works when it wasn't written **מדעתה**, and the **קמ"ל** was that no, it must be **מדעתה**.[35]

If the ה"א was truly suggesting one can be מקדש her forcefully — why isn't that true in the end, in the קמ"ל?

A) רש"י (on **מד.**) and **מאירי** – a **סברא** — there needs to be דעת המקנה

(**מאירי** also adds that society could not function in such a manner)

B) רש"י (in **יבמות** on **יט:**) and **סמ"ג** – a **פסוק** — "**והלכה והיתה**" implies she goes to get married by her own will

Why would they think one needs a **דרשה**? Isn't the **סברא** the first opinion uses pretty obvious?

1) No. Perhaps they think that from **סברא**, one actually doesn't need דעת המקנה.

(Accordingly, the **ה"א** was truly a very solid **ה"א**, because from **סברא** there'd be no need for her **דעת**).

(This might indicate that קדושין is more about איסור and not really a קנין).

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[31] At least conceptually, even if it isn't really perceptible.

[32] Hypothetically, this might mean that if she were to say "I want to become your wife, but I don't want all the religious components, that I need to be אסור to the whole world, etc.", and he were to respond "I want you to be my wife, and I do want the איסור things" — then it would work, since he was קונה her with her דעת, and then can be מקדש her against her will.

[33] These latter two are based on **תוספות**'s (on **ב:**) two understandings as to what the term "קדושין" signifies.

[34] **מאירי** refers to two major reasons why this'd be troubling: a) there'd be a קנין without דעת המקנה, and b) societal breakdown.

[35] Presumably, the opinion which held it can be written **שלא מדעתה** would hold like the first answer of our **גמרא**.

2) Yes. But they may be saying that there's a need for *more* than just plain דעת המקנה, which isn't obvious from סברא. The פסוק would teach that there's a need for *real will*.

סמ"ג may imply this. He quotes רש"י in יבמות, and then interprets the גמרא in ב"ב about תליוהו וקדש in a unique way — that it is talking about the man being forced to marry the woman.[36]

Most ראשונים read that גמרא as saying that if one forces *a woman* to *accept* קדושין — technically, it should work, but חז"ל uprooted the קדושין.[37]

But סמ"ג reads it as saying that if one forces *a man* to *do* קדושין — technically, it should work, but חז"ל uprooted the קדושין. As for a case where a *woman* was forced to *accept* קדושין — that won't work even on a דאורייתא level, because there is a need for her to have *real, absolute will*.

Why would one think this? What would be the logic for this higher requirement?

a) psychological perspective: he can leave the marriage unilaterally with a גט; additionally, he can marry other women. Thus, he may agree in the back of his mind. But she, who has neither, may not.

b) not from psychology; rather, the פסוק said "והלכה והיתה" which implied this (that she must do something more willfully and actively; unlike what it says by the man, "כי יקח").

According to this understanding in his interpretation of ב"ב, it fits neatly for why he'd use the פסוק — from סברא alone, we'd know the need for her consent, but not this will.

However, to the standard interpretation of the גמרא in ב"ב, a woman goes by the same rules as a man; thus, when forced to accept, then technically would be a valid קדושין — but חז"ל undid it so she wouldn't be stuck.

What if the man is the one forced into the קדושין?

1) בעל העיטור – not even a valid קדושין on a דאורייתא level

2) רמב"ם – a valid קדושין on a דאורייתא level, and חז"ל never made a תקנה here[38]

3) רמ"ה and **חלקת מחוקק** – a valid קדושין on a דאורייתא level, but חז"ל uprooted the קדושין, as they did by a woman

Are the בעל העיטור and רמב"ם arguing over a unique קדושין idea, or a broader idea which applies elsewhere too?

A) רשב"א – בעל העיטור: general rule. Thus, if forced to *buy* – invalid sale, but if forced to *sell* – valid sale

רמב"ם: general rule. Assumes a כ"ש — if valid if forced to sell, then surely valid if forced to buy.

B) מאירי – רמב"ם: unique to קדושין.[39]

Generally, forced to buy won't work (a person won't really agree in his heart to lose money to gain something one doesn't want), though being forced to sell does (money can easily be used to reacquire the old item; but the item is more difficult to turn into money).

However, by קדושין, one isn't really losing anything (the פרוטה is negligible) to acquire the wife; therefore, assumed agreement.[40]

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[36] None of the other ראשונים read it this way, and it is less than simple to read it into the text of גמרא (but it can be done).

[37] As for forcing the man — unclear. We'll deal with that soon.

[38] Likely because, as mentioned before, a man is less stuck than a woman: he can unilaterally escape with a גט, and can marry women even now. Thus, they didn't feel the need to institute a תקנה on his behalf.

[39] More accurately, it all just depends if one is really losing something in return for the item one is forced to buy or not.

[40] To the מאירי's interpretation of the רמב"ם then, one forced to acquire something for free would indeed truly acquire it.

C) אבני מלואים – רמב"ם: unique to קדושין.

> Generally, forced to acquire something is invalid, because to it requires a lot of דעת to acquire something. But one isn't really acquiring anything in קדושין, and thus requires less דעת.[41]

The assumption of the אבני מלואים's (that קדושין requires less דעת), is not so simple.

Rav Soloveitchik – quoting Reb Chaim – ממונות and איסור function differently. For example, ממונות doesn't need עדות for קיום הדבר, while איסור does. The reason for that is because איסור requires a *higher* level of דעת (the עדות makes things more serious).

Thus, Reb Chaim seemed to have the opposite assumption of the אבני מלואים.[42]

[Options in how to understand the בעל העיטור:

1) רשב"א – (quoted above) – general rule. Cannot force one to acquire, either by קדושין or sales.

2) מאירי – unique to קדושין.

> When forced to give a מתנה for free, then doesn't work, since not receiving anything in exchange. Comparable to קדושין, where the man isn't really receiving anything for what he gives.
>
> However, by a regular sale, where he *does* receive an item in exchange for the money he is forced to expend, it *is* valid.
>
> > (This interpretation makes the בעל העיטור against the אבני מלואים defending the סמ"ע above, who understood that one *does* receive some value in exchange for the money one gives over in קדושין).

3) אבני מלואים (מב:א) – siding with חלקת מחוקק over בית שמואל – unique to קדושין.

> Ultimately invalid because חז"ל uprooted the קדושין (but did not do so by a sale).
>
> > (Reading the בעל העיטור inside, this seems rather implausible in terms of interpreting him).

4) ריטב"א (in ב"ב there) – reaches same conclusion as the בעל העיטור against the רמב"ם (that one cannot force the קדושין), albeit for a different reason: it is much harder (i.e. it requires more דעת) to acquire something than to relinquish ownership, and thus cannot be forced even though a sale can be.

> (Similar to אבני מלואים's explanation of the רמב"ם; however, ריטב"א applies it to קדושין, so comes out with the same halachic conclusion as the בעל העיטור over the רמב"ם).
>
> Adds a caveat though — if paid off for it, like by a קונה receiving additional money as well, then can assume he is גומר ומקנה despite looking like he is being forced. But again, in essence — one cannot be forced to acquire, neither by קדושין or a regular sale. **]**

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[41] This אבני מלואים fits well with all that we've seen him saying so far, that the focus is on the איסור and not the קנין at all.

[42] There may or may not also be a מחלקת between the רמב"ם and ראב"ד here about "רוצה אני," but it is very hard to concretely know what is going on. Nonetheless, what might come out is that רמב"ם may be saying that one needs a lower level of דעת here than by ממונות (which would work nicely for the אבני מלואים), whereas the ראב"ד might be saying (for example, as the מ"מ understands him) that one needs a higher level of דעת here than by ממונות (which would work nicely for Rav Chaim).

שיעור #6 – 9/26/16

ב: – More points in the reading of the גמרא; and also, ערלה in חו"ל:

Why does the גמרא assume we should prefer the masculine form?

רש"י – the משנה and גמרא always use the masculine form

תוספות – the תורה always uses the masculine form

רדב"ז and others note that the גמרא seemingly indicates that men go to war, but not women. Many other sources do as well, let alone the פסוקים everywhere which strongly imply this.

But the משנה in סוטה implies that for a מלחמת מצוה the women *do* go to war.

Indeed, מנחת חינוך in many places holds that women *do* go to war in a מלחמת מצוה.

However, mainstream opinion is not that way. How else might one explain the משנה in סוטה?

רדב"ז offers two alternative explanations:

a) once the man leaves the חופה, then she will obviously leave as well

b) women assist in other regards, to support the war effort

This latter explanation seems to be the mainstream understanding.

Why does the גמרא assume it should have said דבר instead of דרך?

רש"י, others – since we wanted to stick with the masculine language

רשב"א, others – since it's the more normal word to use, more normal than דרך

What was the גמרא's question of "תלקח" (or "תקח")?

1) תוספות ישנים – we knew the הלכה that the man does it; the גמרא was merely asking why the תורה formulated this in an unclear way, which sounded like he could take her by force, instead of in a clearer fashion

2) רשב"א quoting ראב"ד – actually asking why the הלכה is the way it is: "why is it that the woman can't do the action, instead of the man?"

What are the ways in which an אתרוג is comparable to an אילן?

Regarding ערלה and רבעי:

רש"י (here) – that it has the דינים of ערלה and רבעי

תוספות (here) and רש"י (in ר"ה there) – not just that it has these דינים, but that we go after חנטה for ערלה and רבעי

Regarding שביעית:

Everyone agrees that it is that we go after חנטה for שביעית.

(Couldn't say it merely means that it has the דינים of שביעית — anything that grows from the ground does!)

Q: How does this גמרא fit with the מ"ד in ברכות who says that we only teach כרם, not נטע?

A1: תוספות – that מ"ד admits *some* תנאים may hold רבעי applies to other trees, but he thinks that's not להלכה

A2: תוספות – that מ״ד would say this גמרא is talking about on a דרבנן level; he was talking on a דאורייתא level

תוספות highlights the נ״מ between these two answers:

Because we pasken like the מיקל opinion in חו״ל, is there נטע רבעי on a דרבנן level or not?

To A1 – no, there is not; but to A2 – yes, there is

להלכה, there are three opinions about רבעי in חו״ל:

1) רבינו יונה – (doesn't hold of the rule that we go after the מיקל opinion in חו״ל) – applies to all trees

2) רמב״ם quoted by the גאונים, תוספות, שאילתות, and others – only applies to כרם

3) רמב״ם himself, רמב״ן, others – it doesn't apply at all in חו״ל, not even to כרם

תוספות clearly seemed to assume that רבעי fundamentally could apply in חו״ל. Yet רמב״ם obviously felt not.

What might the underlying basis for this distinction?

A) Reb Chaim – we pasken that ערלה in חו״ל is a הלכה למשה מסיני. What is the nature of this הלכה למשה מסיני though: is it a an entirely new דין, or is it an expansion of a preexisting דין?

רמב״ם would say that it is an entirely new דין of ערלה, whereas the גאונים and תוספות would say that in truth, the הלכה למשה מסיני simply teaches us that the regular דין of ערלה applies to חו״ל as well.[43]

Accordingly, רמב״ם would think there is no reason to assume רבעי exists by this ערלה, whereas the others would think there is no reason to say it would not.

Potential נ״מ:

1) applicability of רבעי to ערלה of חו״ל: (the aforementioned distinction)

2) status of נשרפין: regular ערלה is one of the נשרפין; however, מנחת חינוך says that this דין doesn't apply to ערלה of חו״ל (all נשרפין need a special פסוק to include them). But פנ״י says that they are considered amongst the נשרפין.

This would fit well with the רמב״ם vs. תוספות: the רמב״ם would be like the מנחת חינוך, and תוספות like the פנ״י.

3) the שומר לפרי (fruit peel): does ערלה apply to the שומר לפרי (which generally is only known through a special inclusion) of חו״ל as well? צל״ח – no (since new דין, separate from ערלה). But תוספות would likely hold yes.

4) מלקות: one only gets מלקות if the sin is actually written in the תורה, but not if just based on a הלכה למשה מסיני. Therefore, to the רמב״ם, don't get מלקות for ערלה in חו״ל;[44] to the other side though, probably would get מלקות.

Reb Chaim is all based on one specific גרסה. However, he mentions another גרסה:

טור's (and maybe ראב״ד's) גרסה in רמב״ם: בכור *does not* apply in חו״ל.

If so, simply a rule that all things which require הבאת מקום (being brought to ירושלים) don't apply in חו״ל. This is true for בכור, which teaches to מעשר שני, which teaches to רבעי; none apply in חו״ל.

Reb Chaim's גרסה in רמב״ם:[45] בכור *does* apply in חו״ל.

If so, then merely a special exclusion to say no הבאת מקום by בכור of חו״ל. מעשר שני, however, does *not* exist in חו״ל on a דאורייתא level. As for the comparison to בכור — that is merely saying that since there would be no חיוב of הבאת מקום for the מעשר שני of חו״ל anyhow even if it *did* exist (just as no חיוב by בכור), the רבנן were not מתקן any קדושת מעשר שני on produce from חו״ל. Taken to רבעי now — really saying no רבעי in חו״ל on a

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[43] This impacts how each would read the פסוק of "כי תבואו אל הארץ" — רמב״ם would say that only applies to ערלה, and this is a new דין; but תוספות would say it's talking chronologically, not geographically (when it starts to apply, not where it applies).

[44] Not just a hypothesis — רמב״ם says this explicitly.

[45] This seems to be the correct גרסה; the פרנקל edition proven this, as it is better with the גמרא and with רמב״ם elsewhere.

דאורייתא level, and the comparison to מעשר שני is saying that just as the רבנן were not מתקן any קדושה in that respect, so too they were not מתקן with regard to רבעי.

To this גרסה, the comparison is only between מעשר שני and רבעי, and their respective פטורים in חו"ל are not learned from בכור. This enables the מחלקת to be over something more fundamental, as Reb Chaim explained.

However, there is an alternative way to explain the מחלקת in a fundamental manner using this גרסה:

B) תורת הזרעים – the גמרא says that ערלה is a "דבר שיש לו מתירין." ר"ת explains[46] this as referring to רבעי.

One might have understood that רבעי is a totally separate מצוה from ערלה. In fact, if one isn't פודה one's רבעי, it isn't treated as ערלה — it's brought to ירושלים to be eaten! However, ר"ת clearly understood them as connected.

This might fit well with the מחלקת between רמב"ם and תוספות regarding רבעי in חו"ל. Because תוספות views רבעי as a continuation of ערלה (in the fourth year the איסור begins to "wear off," and in the fifth it is entirely gone), תוספות also assumes it can apply in חו"ל. But רמב"ם might view רבעי as a totally independent מצוה (all cases of רבעי start out as ערלה, but it is an entirely separate concept nonetheless), and therefore won't apply in חו"ל.

[46] It should be noted that there are other explanations of this גמרא in the ראשונים.

שיעור #7 – 9/26/16

חליפין beginning of ;גמרא points in the reading of the ;ירק of a קדושת שביעית – ב: - ג.

ירק of a קדושת שביעית:

1) רש"י – goes after the **לקיטה**

(Would make a lot of sense, if not for the upcoming reason; after all, goes after לקיטה with regard to מעשר).

תוספות is compelled to disagree.

Background: is one allowed to eat ספיחים (items which get planted each year, and generally won't grow on their own) which grew during שביעית? This is a מחלקת תנאים: ר"ע – אסור מדאורייתא; חכמים – אסור מדרבנן (due to a fear that people will claim these grew on their own when they really planted them). We pasken like the חכמים.

Contradiction:

משנה in שביעית (ט:א) – ר"ש – all types of ספיחים are **מותר**, except for כרוב which is אסור.

Yet in פסחים (on :נא) – ר"ש – all types of ספיחים are **אסור** except for כרוב which is מותר!

In order to address this contradiction, רב נסים גאון explained that the משנה in שביעית was talking about ones from the 6th into the 7th year, and the גמרא in פסחים about the 7th into the 8th year:

What's the logic of the משנה in שביעית? This משנה is about קדושת שביעית. **All other ספיחים,** if grown in the 6th, will be big; and if in the 7th, small. **But כרוב** will be big whether grown in the 6th or the 7th, and can be passed off as 6th year ones when really 7th year ones; thus, people may sell them and violate the קדושת שביעית.

What's the logic of the גמרא in פסחים? About the איסור of ספיחים (according to ר"ע, who says it is an actual איסור דאורייתא). **All other ספיחים:** if picked during שביעית, are אסור מדאורייתא because of the איסור of ספיחים; but if picked in the beginning of the 8th year (before the point of כדי שיעשו), then are אסור מדרבנן, since can be confused with ones picked in the 7th. **However, by כרוב:** if picked during שביעית, then אסור מדאורייתא due to the איסור of ספיחים; but if picked in the 8th, then מותר (רבנן weren't גוזר here, because people won't make a mistake and think you can eat the ones picked during שביעית, since they will assume they are from the 8th year — which they really were — since they grow so fast).

(The second half of רב נסים גאון is irrelevant for the point תוספות is trying to make. It is the first half which matters).

In the משנה in שביעית, what's the case of a כרוב they were גוזר on?

Wouldn't make sense to say that they were גוזר on ones which had grown during the 6th and were also picked during the 6th — how could it have no קדושת שביעית it was picked, yet suddenly get it when ר"ה comes along?

Rather, must be a case when it grew during the 6th year, and was picked during the 7th year.

Therefore, we see from here that קדושת שביעית מדאורייתא goes based off of when it grows, not when it's picked.

2) תוספות – goes after growth [**רוב גידוליהם**, as will be clarified momentarily]

However, תוספות must now distinguish between trees and vegetables (since both go after "growth" to this).

Therefore, תוספות distinguishes between חנטה, which is the beginning of the growth, for trees, and רוב גידוליהם, the majority of the growth, for vegetables (unlike by מעשר, which goes after לקיטה, the picking).

3) תוספות (in ר"ה) – goes after **גמר גידוליהם**

a) unwilling to distinguish between שביעית and מעשר by ירק, but b) also unwilling to leave רב נסים גאון. Thus, says ירק goes after גמר גידוליהם (which is like מעשר now, which goes after לקיטה; the לקיטה *ipso facto* is also the גמר גידול, so the terms can easily be interchanged. This also still explains the משנה in שביעית like רב נסים גאון).

(ר"ש משאנץ in שביעית isn't convinced by this explanation, but it's clear why one would want to say this).

Overall, רש"י and תוספות in ר"ה fundamentally attach the דינים of שביעית and מעשר of a ירק still; however, תוספות here is forced to make a break between them.

What might be the סברא for such a distinction?

Well, **no דינים of מעשר can possibly apply** before the produce is picked.

However, **certain דינים of שביעית *do* apply** beforehand (for example, one cannot do עבודה to them; they have קדושת שביעית in that one cannot poison a tree with growing fruits on it, due to הפסיד פירות שביעית; etc.).

Therefore, it makes sense to have this type of distinction between picking by מעשר and growth by שביעית.

Because רש"י is apparently unlike רב נסים גאון, how might he explain the משנה in שביעית?

A) ריטב"א – משנה in שביעית is also about איסור ספיחים, not קדושת שביעית.

All other ספיחים: if big, must've been planted in 6th and picked in 7th; thus, קדוש and מותר. If small, must've been planted in 7th and picked in 7th; thus אסור because of ספיחים. **However, by כרוב**: if big, and planted in 6th and picked in 7th — technically, should be קדוש and מותר; but the רבנן were גוזר on it, because could also have been big even if planted in 7th and picked in 7th (which would really be אסור because of ספיחים).

This can work within רש"י's explanation that ירק follows לקיטה for שביעית: anything picked during the 7th has קדושת שביעית and is מותר — unless also planted during שביעית, at which point it's אסור due to the איסור of ספיחים.[47]

B) רע"ב – working off רמב"ם in פה"מ – משנה in שביעית is about an issue with organized agriculture.

All other items, when picked during שביעית, we can assume they came from הפקר; thus, are קדוש, but מותר. **However, כרוב,** which are very valuable, we must worry may have come from שמור fields (and thus, would be קדוש and אסור). Therefore, the רבנן were גוזר to treat all כרוב as such.

This too can work within רש"י's explanation, since it too assumes that ירק goes after לקיטה with regard to שביעית.[48]

How is a כוי unlike both a בהמה and a חיה?

רש"י – it is אסור to mate a כוי with either a בהמה or חיה

Q: Permissibility to mate goes after the species, not whether it counts as a בהמה or חיה! Why's this relevant?

A1: תוספות – going according to the opinion which thinks that a כוי is definitely one of two possible animals; we just don't know which one. What is unknown is whether we are חוששין לזרע האב or not. Thus, if knew to follow the mother (and thereby whether it was a בהמה or חיה), could've mated it with mother's type.

A2: רשב"א – it looks like some of the other species; thus, if knew it had the status of בהמה or חיה, would've grouped it under one of those species it looked like, and would've been מותר to mate with that species

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What does "פלוגתא" mean?

1) ר"ח – "**מחלקת**". When there's a מחלקת, then it says "דרך." If not, then it says "דבר."

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[47] (Worth noting: fits well with the ירושלמי, as did רב נסים גאון's explanation. But the next option won't fit as well).

[48] As an aside, there are two other explanations in the גמרא in פסחים as well, aside for רב נסים גאון's: A) רש"י there explains that כרוב is different in that it grows in the field all year round. B) ר"ת explains that כרוב is different in that it grows like a tree. For our purposes here though, these don't affect things.

How would this be true in our משנה?

ר״ח is forced to say that the מחלקת between ב״ה and ב״ש counts (even though not actually in the total number, but rather in how one of the ways works).

To this, the גמרא's proof from ר״א was merely from the fact that he argues; that's why "דרך" fit in the רישא.

2) רש״י, all the other ראשונים – "**distinction**." When there is another option — this way, *as opposed to* that way — then it says "דרך." If not, then it says "דבר."

How would this be true in our משנה?

A) רש״י – excluding חופה, as the גמרא segues into (even though only implicit — nonetheless, still a "חילוק")

But there are many places in ש״ס where there are implicit distinctions, yet we say דבר still!

There are a number of ways to answer this in the ראשונים, but we'll just mention one:

B) רמב״ן – it's not; only going on אתרוג and the last two. Our משנה and זב were already answered beforehand.

This gets around the issue רש״י's explanation has — there's no need for to include any implicit חילוקים.

To this, גמרא's proof from ר״א was that because his opinion had no חילוק, used the word "דבר," unlike the רישא.

"למעוטי חליפין"

What's the גמרא's ה״א that חליפין would work for קדושין, and what's its answer for why it doesn't?

What's the גמרא's ה״א?

1) רש״י (how the ראשונים understand him; or at least, the simple pshat in the גמרא) – because we learn from שדה to אשה through "קיחה" "קיחה", then we assume the other קנינים which work by a שדה should work by קדושין.

(To this, an אשה really ***is*** compared to a שדה).

The relationship between חליפין and כסף: **no relationship**.

2) ר״ת, many other ראשונים – "קיחה" "קיחה" is only for כסף; however, חליפין should count as כסף

(To this, an אשה really ***is not*** compared to a שדה)

The relationship between חליפין and כסף: the **ה״א** – they're **related**; but **קמ״ל** – they're **not**.[49]

3) רשב״א – "קיחה" "קיחה" is only for כסף; however, extrapolate from כסף to other קנינים (like חליפין or חזקה or שטר)

(To this, the ה״א was that an אשה really *is* compared to a שדה, and the conclusion is that she *is not*).

The relationship between חליפין and כסף: **no relationship**.

What's the גמרא's conclusion?

(Two points which must be addressed by each explanation:

A) why פשטה ידה וקבלה won't work by חליפין

B) why חליפין which *is* worth a פרוטה won't work)

1) תוספות (changes the גרסה), **רמב״ן** (with תוספות's גרסה), **ריטב״א** (both גרסאות) – because חליפין can be done with less than a פרוטה — which is not true by כסף — that reveals it is a different mechanism than כסף is

(To this, neither פשטה ידה ומקבלה nor חליפין worth more than a פרוטה are questions. Doesn't work even if either of these are true, simply because there's no source teaching us that חליפין ever works by קדושין).

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[49] To תוספות, they are actually fundamentally unrelated. To the מרדכי and others who say it was uprooted due to a תקנה דרבנן, then they are only technically unrelated.

שיעור #8 – 10/6/16

אין אשה נקנית בחליפין – ג.

(continuing off the end of last שיעור)

2) מרדכי – less than a פרוטה is not considered כסף; and when it *is* שוה פרוטה (which *would* be כסף), then it doesn't work due to a גזירה דרבנן אטו פחות משוה פרוטה.

This is similar to the first option, in that it is also a formal understanding (i.e. when less than a פרוטה, there's no קדושין because there is simply no valid קדושין mechanism — there's no כסף).

(To this, פשטה ידה ומקבלה obviously wouldn't work, just as this was clear according to ר"ת's explanation. As for the why חליפין of a שוה פרוטה won't work —it *would* fundamentally, but a תקנה דרבנן uprooted it).

3) רש"י – חליפין doesn't work for less than a פרוטה because it is a גנאי for the woman

This is different than the previous two options; those were formal, whereas this is psychological.

To this, both the questions of A) פשטה ידה וקבלה and of B) חליפין worth more than a פרוטה seemingly apply.

How could this approach be defended from either point?

To defend from A), from the פשטה ידה וקבלה question:

a) תוספות הרא"ש – applies the rule of בטלה דעתה אצל כל אדם

Why can't she do what she wants? Because not about her saying she is personally מקפיד; rather, an external reason, about the שיעור of what is considered חשוב by קדושין, based on most people. Thus, not up to any particular woman.[50]

To defend from B), from the חליפין of a שוה פרוטה question:

a) תוספות ר"ד מהדורה קמא, תלמיד הרשב"א, ר"י הזקן – the reason this doesn't work is because the קדושין were uprooted due to a תקנה דרבנן (like the מרדכי above explained within תוספות's general perspective)

b) רשב"א – because the item is returned, the relevant value to determine here is what the principle employed requires, not the specific item's value itself; and the principle here (namely, חליפין) allows for less than a פרוטה, so this doesn't work

c) רמב"ן – because the item is returned, the value לבסוף is less than a פרוטה, even if the item used was worth more than a פרוטה; and קדושין depends on הנאה לבסוף, so this doesn't work

רמב"ן (here and on :ו) connects this to why מתנה על מנת להחזיר doesn't work as well.

רמב"ם seemingly agrees with רמב"ן. He explains why מתנה על מנת להחזיר doesn't work as being because there's no הנאה לבסוף, though he never explicitly says why חליפין doesn't work.

Why would קדושין uniquely depend on getting הנאה לבסוף, unlike other קנינים?

1) קדושין – גנאי has this added aspect, unlike other things; only if הנאה לבסוף is there no גנאי

2) philosophy of the קדושין – the כסף of קדושין is about creating a relationship. If not really giving to her, then doesn't count as קדושין, since lacks that aspect of giving, of commitment.

("גנאי" not as "insulting" here; rather, as unable to create relationships by its very nature).[51]

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[50] This is apparent from the תוספות הרא"ש himself, when he asks about בנתיה דרב ינאי. The גנאי isn't that she objects; that would be up to any individual then. Rather, it is that women in general don't consider this an appropriate means to do קדושין.

[51] קנין here is along the lines of "קנה לך חבר."

d) ר"ן – the תורה either meant כסף only, or also with the sub-track of חליפין (he thinks חליפין is under כסף; it's just a question of what the תורה meant); those were our two choices.[52] The conclusion of the גמרא was that since we know some types of חליפין cannot work, since a woman wouldn't give herself over for less than a פרוטה; therefore, the תורה must not have meant to include this sub-track. By process of elimination then, the תורה must have meant the other option: only regular כסף works.[53]

e) perhaps the fact that חליפין *could* be less than a פרוטה taints all of חליפין with the idea of גנאי. כסף is fundamentally about valuing something; חליפין is about trading something. Thus, inherently a גנאי, because he isn't showing her that he appreciates her when he does it with this type of exchange.

[These last three options can also be used to answer the other question, why פשטה ידה וקבלה won't work].

According to many of the ראשונים, whether or not חליפין works under the קנין of כסף was under discussion.

To most ראשונים, in the ה"א, חליפין was under the קנין of כסף; but what was the conclusion?

A) תוספות (here), **רמב"ן, ריטב"א** (within תוספות's גרסה) – חליפין *does not* work through the same reason as כסף

B) ר"ת in ספר הישר, תוספות (in גיטין on :לט), **תלמיד הרשב"א** – חליפין *is* included in כסף

Potential נ"מ

1) the need to return the סודר used: is this return actually mandated, or was it just a social convention to do?

Based off the גמרא in נדרים with רב נחמן and רב אשי: the opinion of רב אשי is vague. He might mean that technically keeps the סודר, but convention is to give it back; this would fit better with the side that it is included in כסף. To the other way to read רב אשי, and to רב נחמן, it might only be קני על מנת להקנות.[54]

2) Each instantiation of a מחלקת between the רמב"ם and ראב"ד throughout the תורה:

A) One example (in הל' עבדים ה:ג): **can חליפין be used to free an עבד כנעני?**

רמב"ם says that doing חליפין can't work to free an עבד, since must either be כסף, שטר, or ראשי אברים (implying חליפין isn't כסף); but ראב"ד argues (as does תוספות in גיטין), because חליפין is כסף too.[55]

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[52] This supplies a fourth option for how to understand the גמרא's ה"א above, as a subtle variant of תוספות's approach.

[53] תוספות רי"ד's conclusion sounds like the ר"ן as well.

ר"ת in ספר הישר is hard to understand. He makes it sound like one cannot distinguish within the קנין itself, so similar to ר"ן; but working with תוספות's גרסה, not ר"ן's.

[54] Which either means it was a מתנה על מנת להחזיר; or else, קצוה"ח – not giving him ownership of it itself, but rather that you are just giving it to him for the sole purpose of letting the transaction go through (but without giving the סודר for itself).

[55] ריטב"א (in קדושין on :כב) brings this מחלקת, and explains that they're arguing over how to read the line in the משנה that an עבד כנעני is קונה himself through כסף: the משנה itself says כסף, not חליפין, like רמב"ם; but ראב"ד held it was included in that term.

שיעור #9 – 10/10/16

אין אשה נקנית בחליפין – ג.

(continuing off the end of last שיעור)

B) Another example (in הל' מכירה כט:ט): **is the קנין חליפין of a קטן who has reached the age of פעוטות binding?**

If a קטן who reached the age of פעוטות did a קנין סודר and then retracted before he handed over the money or the item, רמב"ם says he can retract. ראב"ד argues, and says that he cannot, because it's a קנין כסף.

רמב"ם states his rationale: since a שטר is written by a קנין סודר, and one doesn't sign on a שטר for a קטן.

Why should that matter? רמב"ם seemingly is based off one interpretation of a גמרא in ב"ב (on .מ), which says that one can write a שטר even without the person's דעת by a קנין סודר. But why should that impact whether the קנין סודר itself was a valid קנין?

Reb Chaim – קנין סודר is a "קנין דעת" — a קנין on the other's seriousness. (That's the "קנין אחר" תוספות alludes to). The מעשה hasn't made the קנין in of itself, as it does by other types of קנינים; rather, it's just a way of showing that one is serious about doing what he said he is doing.

Additional basis for this idea:

a) רמב"ם also writes that in many places they do a קנין סודר along with other things, though רמב"ם adds that the קנין סודר doesn't do anything at all. It's just a way of showing they're serious, but not truly needed to impact the קנין in those cases.

b) דבר אברהם – quotes מקור חיים – סיטומתא is only a קנין on a דרבנן level; but חתם סופר – even a קנין on a דאורייתא level. On this, the דבר אברהם asks: how can this work on a דאורייתא level — where's the מעשה קנין? He answers based on the פסוק in רות by קנין סודר which says "this was the custom." Thus, קנין סודר is the basis for סיטומתא working on a דאורייתא level. This דבר אברהם fits very well with Reb Chaim: about demonstrating seriousness.[56]

How does this explain the רמב"ם about the חליפין of a קטן?

Why is a שטר valid testimony in general — isn't it an issue of "מפיהם ולא מפי כתבם?"

Many ראשונים answer that when there is דעת המתחייב, then one *can* use writing. It's concretized דעת. But if עדים just chose to testify about something on their own in writing instead of with spoken words — that's where the issue of "מפיהם ולא מפי כתבם" arises.

Rav Soloveitchik – most ראשונים interpret the גמרא in ב"ב as saying that one doesn't need to ask the person before writing the שטר, since he'd probably agree to it. But רמב"ם understood that when one does a קנין סודר, where the דעת itself effectuates the קנין all on its own, then clearly there's a high enough level of דעת to establish the דעת המתחייב required for a שטר.

If so, then a קטן — even if he has reached the age of פעוטות — doesn't have enough דעת for that to work. He has enough דעת to agree when it is truly the מעשה effectuating the קנין, but he cannot reach the level of דעת necessary to do a קנין without a מעשה, with just pure דעת.

C) Another example (in הל' מכירה ה:י): **ability to retract on a קנין while still on the topic only by קנין סודר?**

רמב"ם says this is a unique דין by קנין סודר. But ספר התרומות quotes ר"ת as arguing: this is true by all קנינים.

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[56] Perhaps it can also be used to get around the question about using חליפין which is worth a פרוטה on the explanation of רש"י: if most people wouldn't use standard חליפין in קדושין, then it isn't the מנהג and loses its power.

(רמב"ם fits particularly well with Reb Chaim's idea: קנין סודר is uniquely about the דעת and not the מעשה, and thus, as long as still discussing the קנין, one doesn't have that higher level of דעת.

3) "כלתא קנינו": does the giving of a קנין סודר count as the קנין having ended at that moment or not?

שו"ת רשב"א – if one says that a קנין should happen after 30 days: if the קנין has "ended" by then, then invalid.

When one does a קנין כסף, that money is still working towards your credit after 30 days; thus, it is still valid.

When one does a קנין משיכה, that action has ceased to exist in any way upon its completion; thus, invalid.

What about when one does a קנין סודר? רשב"א says it depends on whether קנין סודר works under כסף or not:

If קנין סודר is under כסף, then valid; but if working for some other reason, then invalid, since not extant.

4) useful כלי: does a כלי which is useful count as a שוה פרוטה in all of תורה or not? It works for קנין סודר.

רשב"א (in שבועות) – seems to say it depends on this same חקירה: if under כסף, yes; if not, no[57]

5) applicability to גוים: (doesn't have to be true) if כסף works for גוים, then maybe חליפין should work for גוים too (as תוספות here holds); but if not קנין כסף, then maybe can't work by גוים (as רשב"א here holds).[58]

6) עדי קיום: the פסוק says "תעודה בישראל," a language of עדות; additionally, the גמרא in ב"ב says קנין סודר is done with two people. Most ראשונים interpret that merely as smart advice; but ראב"ד and רשב"א both mention an opinion which understands this as a need for עדי קיום.

If קנין סודר was under כסף, then wouldn't need עדי קיום; but if all about דעת, perhaps requires עדי קיום.

However, רמב"ם explicitly says there is no need for עדי קיום by קנין סודר, while ראב"ד brings the opposite! Aren't their opinions reversed?

To defend the ראב"ד: he may have just been quoting the גאון, but he himself doesn't hold that way. Alternatively, it can be that he still agrees קנין סודר sometimes needs more דעת, even if under כסף.

To defend the רמב"ם: even if קנין סודר is about a higher level of דעת, עדי קיום might be just by דבר שבערוה.

7) אונאה: is there אונאה by חליפין? If כסף, yes; if not, no.

שו"ת רי"ף – no אונאה by חליפין, since not truly about an exchange, but rather about their דעת.[59] But ראב"ד in הל' מכירה argues – there *is* אונאה by חליפין.

8) whose סודר is given: לוי – the סודר of the מקנה; רב – the סודר of the קונה. The גמרא explains לוי's side as saying the happiness gained in the acceptance of the סודר caused the מקנה to give the actual item as well.

מאירי, ריטב"א – the simple explanation of this גמרא proves that קנין סודר is not about an exchange, but rather concretized דעת (even רב would likely agree; their argument is over a different point).

To defend ראב"ד: perhaps this is the very מחלקת between רב and לוי. Alternatively, perhaps one could say the מקנה is trading his item for the pleasure of having the סודר accepted by the קונה.

In truth, there may be two types of קנין חליפין: a קנין סודר, and plain חליפין (item for item, without a middle item).

To this, a regular חליפין is about exchange — what ר"ת calls "שוה בשוה" — whereas a קנין סודר is not.

What might be basis for saying these are two separate types of קנינים?

The גמרא in ב"מ (on .מז) seemingly learns out two separate things from two parts of the פסוק in רות.

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[57] This רשב"א is rather difficult though, for he seems to say that it should work for קדושין if חליפין works under כסף — that's explicitly against our גמרא! Regardless, he hangs this general idea on whether קנין סודר works through כסף or not.

[58] After all, the פסוק in רות which is the source for קנין סודר says this was the custom "בישראל."

[59] This already sounds like Reb Chaim. And of course, it would make sense that the רמב"ם would fit with the רי"ף.

Potential נ"מ

1) using פירות: can using a פרי work to effectuate the קנין? ר"ת – yes for regular חליפין, but no for קנין סודר.

2) מחלקת between רב and לוי: (mentioned above) only argue by קנין סודר, not by regular חליפין.

3) included in the משנה on כב: was it included under כסף or not? ר"ת – regular חליפין was, but קנין סודר was not

If so, when our גמרא excluded חליפין by קדושין — did it mean to exclude just קנין סודר, or also regular חליפין?

תוספות ר"ד – if he gives the actual agreed price through חליפין, then it *does* work as קדושין; our גמרא meant to exclude when you don't, such as using a קנין סודר to agree to the price — that doesn't work

Two ways to understand תוספות ר"ד:

a) חליפין doesn't work, but if he actually gave money, that counts as כסף, despite his saying חליפין

b) the above "two דינים" idea — קנין סודר is not able to work, but regular חליפין can

שיעור #10 – 10/31/16

ג: – Clarifying the גמרא's questions and תוס'

Why's it obvious a father can't be the one who accepts קדושין for a daughter, yet must give her the money?[60]

1) ריטב"א and רמב"ן – "**בעלות**" – the father is the בעלים over the daughter; that's why he can give her over. Thus, it is obvious that the בעלים should be the one to keep the money

Problem: the גמרא in גיטין (on .כא) says the father is sort of a "שליח" to receive a daughter's גט; and the גמרא in כתובות (on .מז) connects the two ideas of גיטין and קדושין through the היקש of "ויצאה והיתה." If so, then we see the daughter is really the בעלים, and the father is just acting as her שליח!

To address this issue:

a) ריטב"א and רמב"ן themselves – addressing a different issue between the גמרא in גיטין and a גמרא in כתובות (on .ה) – despite the היקש, there are still differences between גיטין and קדושין. This is one good example — the father acts as her שליח for גט, but he is the בעלים by קדושין.

Additional basis for this: on .מד, ריש לקיש was ignored when he tried carrying "ויצאה והיתה" too far; thus, even if they are connected, not equated fully — sort of like a "דון מינה ואוקי באתרה" type of idea.

b) תוספות רי"ד (on the ירושלים [an אחרון]) – we don't pasken like the גמרא in גיטין; brings the גמרא in קדושין on .מד with ריש לקיש — that "ויצאה והיתה" was disregarded — as proof.

רש"י – explained this line as "could it be that the תורה gave him this right for no reason?" Not clear what he meant.

Rav Gustman – read רש"י as saying the same thing as רמב"ן and ריטב"א.

2) "Special privilege" – however, רש"י might be saying that it isn't that the תורה was saying the father is the בעלים over his daughter; rather, it was the תורה giving the father a right here. The סברא is that the תורה was trying to benefit him; if so, logical to say he keeps the money too.

This would be a little more moderate. Nothing to do with being the בעלים over her, and neater with גמרא in גיטין. The תורה gave a specific זכות of קדושין to the father for his benefit, so it follows that he keeps the כסף.

3) "שליחות" – take גמרא in גיטין very seriously, and assume father is truly working as a שליח here too. The תורה appointed him as the שליח here (for example, to take care of her). Still, not standard שליחות, since a) she can't even appoint a שליח in the first place as a קטנה; furthermore, b) this is something she herself cannot do. Thus, more like an אפוטרופוס; he's given the power to act on her behalf. This is as a responsibility though, not a right.

This approach seems problematic for two reasons:

a) גמרא on .ט – the way to write a שטר קידושין when a father marries off a daughter is "הרי בתך מקודשת לי"

(That sounds more like he is the בעלים than a שליח).

b) The original question — what does the גמרא here on :ג and its סברא that he gets the money mean then?

To defend: a father is more than a regular שליח; like an אפוטרופוס. Thus, in charge, not just a representative.

Regarding a) – in the שטר, must address the person in charge of decision making, even if not the בעלים.

Regarding b) – may depend on how one views the כסף in the first place. If כסף פרעון [see שיעור #3] – then indeed, hard to understand. But if כסף קנין, which may be there just to demonstrate seriousness or the like, then it *would* make sense that he must give the money over to the one actually making the decision.

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[60] As we'll see shortly, another way to breakdown these upcoming opinions might be "is the father acting as a שליח or as the בעלים in this קדושין transaction?"

Q: How can the גמרא try to learn קדושין from בושת ופגם; the גמרא in כתובות (on :מ) learned בושת ופגם from קדושין!

A1) תוספות – גמרא in כתובות – learn from his keeping the כסף קידושין of a קטנה (known from "את בתי נתתי" and then סברא) that he gets her בושת ופגם even as a נערה (since he could've married her to a מוכת שחין and pained her for money; and this pain would've lasted even beyond the point when she'd be a קטנה, so he gets a נערה's בושת ופגם too).[61] And the גמרא here tried to learn from בושת ופגם of a נערה to the כסף קידושין of a נערה.

A2) תוספות – גמרא in כתובות – learn from his keeping the כסף קידושין when he's מקדש a נערה (known itself from[62] "את בתי נתתי" and then סברא) that he gets בושת ופגם of a נערה (since he could've married her to a מוכת שחין for money). And the גמרא here tried to learn from a נערה's בושת ופגם to the כסף קידושין of a נערה who's מקדש herself.

A3) תוספות הרא"ש, others — it actually *is* circular logic; however, weren't addressing the source.[63] Thus, truly *did* try to learn from בושת ופגם to קדושין; and אה"נ, could've responded with this, but just responded differently.

(שיטה לא נודע למי – reads this point — that the attempted לימוד was circular — into part of the גמרא's answer).

A4) כתובות in תוספות (on :מ, in the second explanation) **and רמב"ן** – (similar to first answer) – גמרא in כתובות – learn from his keeping כסף קידושין of קטנה (known itself from "את בתי נתתי") that he gets the בושת ופגם of a קטנה. And the גמרא here was trying to learn from בושת ופגם of קטנה, which she *does* have enough of a יד to receive (she collects נזק; see ב"ק on :פז), and yet the בושת ופגם still goes to the father, so too the כסף קדושין of a נערה.

A5) תוספות טוך – גמרא here – learn from the בושת ופגם of a נערה מפותה to the קדושין of a נערה. And then the גמרא in כתובות was trying to learn from the קדושין of a נערה to the בושת ופגם of a נערה אנוסה.

This clearly assumes that by some logic, it would have been known that the בושת ופגם of a נערה מפותה is the father's. What might that logic be?

Perhaps because we knew it'd either be hers or her father's — and she was מוחל, so must be her father's.

Other ראשונים reject this explanation because it isn't simple at all that נערה מפותה actually has בושת ופגם still, (we may just say she loses it completely, since she was מוחל).

A6) ר"ת (brought in the ראשונים), **others** – גמרא in כתובות – learn from קדושין to בושת ופגם. But the גמרא here was actually trying to learn from בושת ופגם to מעשה ידיה (which we were led onto after bringing in רב הונא).

What was the גמרא's ה"א after it said "אבל נערה ... תקדיש איהי נפשה ותשקול כספא", and what was its conclusion?

What's the גמרא's ה"א?

1) תוספות (first explanation) – *only* she can be מקדש herself, and she gets the money; father doesn't have either

2) תוספות (second explanation) **and רמב"ן** – *either* she can be מקדש and she keeps the money, *or* father can be מקדש and he keeps the money

3) תוספות רי"ד – *either one* can be מקדש; *but* she keeps the money either way [64]

4) המיוחס לרא"ה (in explaining **ר"ח**) – *only* father is able to be מקדש her, *but only* she gets to keep the money [65]

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[61] תוספות then asks: following that logic, why doesn't he get בושת ופגם of a בוגרת then? תוספות is forced to answer that the פסוק of "בנעוריה בית אביה" by הפרת נדרים taught us that he has no domain over a בוגרת at all. However, תוספות doesn't like this answer, which is really why the next answer is suggested.

[62] Or else, as תלמיד הרשב"א puts it, from הפרת נדרים (which is can be learned from in this context, since it is איסור from איסור).

[63] Or else, in case there was someone out there who held of a different source for whatever reason.

[64] From this, it seems clear that תוספות רי"ד is saying that as a קטנה, the father is the בעלים; but as a נערה, the father is a שליח. See the discussion earlier, in the beginning of this שיעור; to slice this distinction between קטנה and נערה is novel idea.

[65] He seems to have had a different גרסה in the גמרא; there's seemingly no way to read this into our גמרא's words.

What's the גמרא's conclusion?

1) תוספות הרא"ש – *either one* can be מקדש, *but* father keeps the money either way

(This is even going according to ריש לקיש on מג:, who we don't pasken like)

2) תוספות and most ראשונים – *only* father can be מקדש her, and only he gets the money; she doesn't have either

(This is only going according to רבי יוחנן there, who we do pasken like)

Problem: the דרשה of יציאה דכוותה only teaches us that the father gets the money. But how do we know that only he can do the קדושין and not her?

To address this issue:

a) כתובות in תוספות (on מו:) – it is a סברא that whoever does the קדושין keeps the money

(This is the converse of the סברא which appeared earlier in the גמרא here)

b) ר' עקיבא איגר – that's not a סברא; after all, she does many things,[66] yet gives the money to the father!

Rather, learn from הפרת נדרים, which is pure איסור, to the איסור of קדושין.[67]

From ר' עקיבא איגר,[68] it appears one can separate the איסור and the ממונות components of the קדושין. The קדושין itself is pure איסור, and the monetary component is simply about who keeps the money.

This fits with the side [see שיעור #4 above] that קדושין is fundamentally about איסור and not קנין.

By תוספות assuming otherwise, it may be that תוספות holds the איסור and ממונות components are inherently linked, and that's why whoever does the קדושין must keep the money.[69]

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[66] Creates her מעשה ידים, acquires אבידות, etc.

[67] In a different תוספות there in כתובות, תוספות assumes this can't be done, because it's still considered "איסורא דאית ביה ממונא."

[68] See also תלמיד הרשב"א mentioned above too, in note 62.

[69] Alternatively, other אחרונים suggest instead that this may relate to the כסף הנאה idea of the רמב"ם [see שיעור #8 above]. The problem with that is that it is more likely that תוספות doesn't hold of that idea.

שיעור #11 – 11/3/16

ג: - ד. – Clarifying the גמרא's questions and ה"אs

(continuing off the end of last שיעור)

To how the תוספות רי"ד and המיוחס לרא"ה understood the גמרא's ה"א (namely, by a קטנה, father both accepts the קדושין and keeps the money; and by a נערה, father accepts the קדושין, but the money goes to the daughter), it would appear that the father acts as the בעלים by a קטנה, and acts as a sort of אפוטרופוס by a נערה.

However, according to these opinions, what part of this (if any part) remains true in the conclusion?

a) In the conclusion that the father keeps the money even by a נערה, it may still be keeping the idea that he was only acting as a שליח for her then, and it is really her money initially — but nonetheless, he has the right to receive certain things she should've fundamentally gotten, and that's why it still goes to him here.

b) Alternatively, it could be that the conclusion of the גמרא rejects this idea, and says that even by a נערה he is the בעלים, and that's why he gets the money.

(This approach might fit better with the words of the גמרא; after all, it does call him an "אדון אחר").

The opinion of the רמב"ם isn't so clear.

In הל' אישות, by dividing between a קטנה and נערה, he indicates that there is some difference between the two.

However, not at all clear what that difference might be.

a) Perhaps it's an echo of the גמרא's ה"א here. Different categories with different sources and rationales.

b) Perhaps even saying more than that; he might be alluding to the aforementioned potential alignment, respectively, of קטנה and בעלות on one hand,[70] and נערה and שליחות on the other.

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What does the גמרא mean by "יציאה דכוותה קא ממעט?"

A) רש"י, תוספות, others – the ה"א was that the דרשה can be made as saying there is money given over from the בעל to the father or to the daughter; the conclusion was that it's given to the person whose רשות she was in.

B) ר"ח and opinion brought by רש"י in כתובות (on מו:) – the ה"א was that the father can be מקדש his קטנה daughter and the money is his, and the גמרא's conclusion is that he can do so by a נערה daughter too and also keeps the money there. "יציאה דכוותה" means that just as in the פסוק by her going free with סימנים, it is talking about a נערה, so too in our case of קדושין.

Problem: תוספות – already knew it was about a נערה; only thing missing was that he keeps the money! In other words, to ר"ח, the question of "ואימא לדידה" still applies; what's the source the father keeps the money?

To address this issue:

a) מאירי – ר"ח may have meant both explanations; agrees with רש"י and תוספות, and is just adding that this is also how we know the פסוק is dealing with a נערה. At which point, he isn't missing anything.

The issue with this is that this really doesn't sound like what ר"ח was saying.[71]

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[70] Rav Miller noted that in הל' תשובה, רמב"ם writes that קטנים are "like his possessions." Though that is in regards to divine punishment — nonetheless, one sees that קטנים children count as his קנינים to some degree.

[71] Neither as quoted by רש"י and תוספות, nor in the אוצר גאונים where we have him brought.

b) המיוחס לרא"ה – "ואימא לדידה" was already answered: we knew that the father could do the קדושין, from "את בתי נתתי." If so, "ויצאה חנם" was only necessary to teach that the father gets the money. The final question which remained was how to prove that "ויצאה חנם" was dealing with a נערה and not a קטנה, and *that* was what "יציאה דכוותה" was coming to prove.

The גמרא's conclusion was that the כסף קידושין of a נערה going to the father couldn't be learned from הפרת נדרים.

However, the ה"א was that the father gets the monetary שבח נעורים. Is this at all true in the end?

גמרא in ב"ק (on פז.) – מחלקת between רב, ריש לקיש against רבי יוחנן over if the father keeps the תשלומי חבלה of a נערה:

רבי יוחנן says he does, using the term "שבח נעורים."

A) תוספות (there) – just using this as a phrase, since גמרא concluded that we can't learn this from הפרת נדרים

B) רש"י (there) – cites the פסוק of "בנעוריה בית אביה"

This sounds like רש"י really thinks the פסוק brought in our גמרא and rejected is actually a source!

רש"י does the same thing in ב"מ (on יב.) – explains that גמרא as only talking about a קטן's מציאה, but that a קטנה's מציאה goes to her father was already known from the דרשה of "שבח נעורים."

This is doubly problematic: the גמרא in כתובות (on מז.) – gets her מציאה because of איבה (only דרבנן)!

רמב"ם too seemingly repeatedly runs into a similar issue.

רמב"ם (in הל' נערה בתולה ב:יד) – father gets בושת ופגם of a נערה says since all שבח נעורים goes to the father.

Maybe could deflect this רמב"ם as just using a phrase (as תוספות did to the גמרא).

But aside from that deflection being weak, רמב"ם seemingly does this again:

רמב"ם (in הל' אישות ג:יא) – when saying father keeps כסף קידושין of daughter, also lists all the other things he gets of hers (like מציאה and מעשה ידיה). It seems like he's hinting to this general idea of שבח נעורים; otherwise, why list all these random things in that context?

Strongest proof: in פה"מ (in both ב"מ and כתובות), explicitly says from the פסוק of "בנעוריה בית אביה"!

How can we understand why both רש"י and the רמב"ם seemingly maintain the גמרא's ה"א of שבח נעורים?

a) Once "יציאה דכוותה" taught he keeps the כסף, then we can use "בנעוריה בית אביה" to teach שבח נעורים.

Problem: this still doesn't address the problem with the גמרא in כתובות (on מז.) about איבה.

b) Most אחרונים – it's actually a מחלקת אמוראים – רב and ריש לקיש say that the money goes to the daughter, and רבי יוחנן says to the father. The first opinion holds that שבח נעורים is *not* a general idea (that פסוק is for הפרת נדרים only); and the second opinion, רבי יוחנן, holds that it *is* a general idea.

The גמרא in both קדושין and כתובות is only quoting **אמר רב** הונא רב throughout; רבי יוחנן would argue.

Additionally, רש"י in ב"ק brings the שבח נעורים idea only in the side which will eventually become רבי יוחנן; and he also only brings the איבה idea in the side which will eventually become רב.

Thus, רמב"ם and רש"י would pasken like רבי יוחנן over רב in regards to this דרשה as well.

The גמרא here says "בני בנים הרי הם כבנים" is a סברא.

Yet the גמרא in ב"ב (on קטו.) and in סנהדרין (on סד:) learn this idea from a פסוק!

Which one is it — is "בני בנים הרי הם כבנים" a סברא, or does it need a דרשה?

A) Many ראשונים (תוספות there, רמב"ן, רשב"א, ריטב"א) – there's a difference between the word "זרע" and "בן": while זרע includes both from סברא (like in the גמרא here) — בן does not, and thus needs a דרשה.[72]

Two problems with this explanation:

a) Slightly weak, in that the גמרא sounds like the point is **בני בנים כבנים**; it should've said **כזרע**.

Can deflect this, if need be, by saying indeed, this is just לאו דווקא.

b) The גמרא in יבמות (on כב:) has a דרשה for a ממזר, but doesn't give a דרשה for בני בנים; yet there, only says the word "בן," and it's also known that the הלכה is that בני בנים make her פטור from יבום!

The ראשונים are forced to find ways to answer this, such as inventing a דרשה in יבמות.

B) Perhaps one could say that when it is understood that "בן" means "child" in general, then there's a סברא that "בני בנים הרי הם כבנים."[73]

(This is true in the גמרא here and in יבמות there).

But when it is understood that "בן" means specifically a son or daughter, then there's no סברא that this specific word represents descendants generally, and therefore a דרשה is needed to teach so.

(This is true in the גמרא in ב"ב and in סנהדרין).

What is the principle which the גמרא teaches is available to use by its דרשה from the word "מאין?"

A) תוספות הרא"ש, רש"י and others – the prefix "מ" (which means "because"), followed by the word "אין," — and the principle which comes out is that the word אין doesn't need a "י" (so if it has one, it's open for a דרשה).

B) רמ"ה – the word "מאן" — and the principle is that any letter with a צירי under it without being followed by a "י" is open to make a דרשה.

What does the גמרא mean by "מתזנא מיניה" versus "מעלמא קאתי?"

A) רש"י – psychological – מתזנא מיניה means he expected it when he gave her the food, since it's common; unlike כסף קידושין, which is מעלמא קאתי — less common — and he didn't give her food on condition to get it

B) רשב"א – biological – מתזנא מיניה means that the very food he gave her is what enabled her to do work, so of course it is owed to him; unlike כסף קידושין, which is מעלמא קאתי, and his giving the food was unrelated to it

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[72] This fits particularly well with the גמרא in סנהדרין there, which implies this point about the word זרע.

[73] This approach seems to make a lot of sense, but isn't found in the ראשונים for some reason.

שיעור #12 – 11/7/16

"כי יקח" without ה"א ;ק"ו in רמב"ן vs. תוספות ;אילונית – ד. - ד:

What is the case of an אילונית going free at בגרות?

(**To שמואל**, who holds that she is only considered an אילונית from the time we discover she is one and onwards, then this is simple: she was sold at any point from the normal age until 19).

But to רב, who holds she is considered an אילונית even למפרע, then she was an אילונית all along, and it shouldn't have been a valid sale!

[As an aside: within רב, at what point in time does that למפרע status really go back to?

A) רמב"ן – 12 1/2

B) רש"י (in יבמות) – 12

C) ראב"ד – from the time that the סימני איילונות appeared]

1) ראב"ד – she was sold at some age, such as 15, without any סימנים; nonetheless, the sale was valid, and the גמרא is saying that she just goes free before the six years are up

2) רמב"ן – sold at 11, went free at 17 after six years, and then at 20 it was revealed that she should really get back the salary for those years after 12 ½ till 17

3) גרנ"ט explaining טור [74] – even to רב, it won't go לפמרע for *all* things; it will depend on the case:

For things relating to her דעת, then it goes למפרע back to 12.

But for things relating to her social status of being a בוגרת, then it goes מכאן ולהבא, from 20 onwards.

Using this to answer our question: even רב agrees that she isn't classified as a בוגרת from then למפרע; rather, she is merely considered a גדולה intellectually from then. Thus, the sale was valid all along.

תוספות vs. רמב"ן about each potential ק"ו: תוספות – technical לימודים; but רמב"ן – revealing underlying ideas

"ביאה with נקנית is not אמה העבריה"

תוספות – valid basis for a ק"ו

רמב"ן – לאו דווקא, not a basis for a ק"ו, because אמה העבריה is not about אישות

"שטר with נקנית that isn't מה ליבמה"

רמב"ן – doesn't prove anything, because needs נשואין, which is accomplished via ביאה

"כסף that she goes out with מה לאמה העבריה"

תוספות – just a קולא; could have said any other example, such as that she goes free with 6 years, יובל, and סימנים

רמב"ן, רש"י – reveals that אמה העבריה is uniquely linked to money, unlike אשה

The גמרא concludes that both פסוקים are necessary, in context of the תנא's source. Does רב also need both פסוקים?

A) תוספות and most other ראשונים — yes; there is no מחלקת between the תנא and רב

B) שיטה לא נודע למי, and one side in **תוספות** (on יג.) [75] – though the תנא is דורש both פסוקים, רב doesn't use "כי יקח"

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[74] He's coming to explain a contradiction in the טור: seems to pasken like רב in one place, and like שמואל in another.

[75] Based off how תוספות explained the גמרא on :ג, that there was a ה"א she'd keep the money if we are דורש the "כי יקח" source.

Does רב think a woman can give the כסף קדושין to the man then, if he doesn't use the דרשה from "כי יקח?"

No, רב would say that from the "יציאה דכוותה" point, we saw that it's the husband who gives the father the money; therefore, similarly, when the father is out of the equation and it is her herself, we would still say that the husband is the one giving the money to her.

Problem: if so, how will this fit with the end of the גמרא here? The תנא needed the פסוק of "כי יקח" to show that the girl can't give the money; but can't the דרשה of "יציאה דכוותה" teach that as well?

To address this issue, we must explain what the ה"א would have been, even with having "יציאה דכוותה":

a) תוספות – there was never a ה"א that she could give the money; rather, the ה"א is for a case where he gives the money and she says the words.

(This is a still pretty weak in the words of the גמרא though).

b) הג"ה in the תוספות הרא"ש – would've thought it could go either way; either the man or the woman can give the כסף. "יציאה דכוותה" would show that it also works when the man gives it.

c) מאירי and ריטב"א – if not for "כי יקח," would've said been דורש it as "יש כסף לאדון זה" referring to the husband. The master loses his servant, and loses the money; but the husband gains a servant, and gains the money. That would be the contrast.

(And the גמרא earlier already knew "כי יקח," and that's why it was דורש it the way it did).

d) ראב"ד – if not for "כי יקח," would've said the daughter gives the husband money, and then he in turn gives it to the father.

Now, the שיטה לא נודע למי technically could've just answered that רב didn't have any of these ה"אs.

However, he had a slightly different גרסה in the גמרא, and thus supplies an answer:

e) שיטה לא נודע למי – if not for "כי יקח," would've said "ויצאה חנם" teaches that the girl gives her father money and then is free to marry herself off, and may not have taught קדושי כסף at all.

Practically, the ה"א comes out differently to these answers:

To **c)** and **d)**, קדושי כסף would mean the woman gives כסף to the man

To **b)**, קדושי כסף would mean either one can give the כסף to the other one

To **e)**, wouldn't have known קדושי כסף works as a valid avenue at all

To **a)**, the woman would be allowed to say the formula

שיעור #13 – 11/10/16

ד: – רמב"ם and כסף קידושין being "מדברי סופרים"

רמב"ם says in two places (in הל' אישות א:ב and הל' אישות ג:כ) that כסף is מדברי סופרים.

ראב"ד attacks this, and says that a mistaken פירוש in a גמרא fooled him.

What source might רמב"ם have been coming off of?

a) גמרא in ב"ב (on :מז) and elsewhere – more understandable that ב"ד can uproot כסף קידושין than קדושי ביאה

Why?[76]

1) the teachers of רבינו גרשום, רש"י – קדושי כסף is דרבנן; thus, "הם אמרו והם אמרו." But קידושי ביאה is דאורייתא

2) תוספות and others – by קדושי כסף, there can be הפקר ב"ד הפקר, and by קדושי ביאה, that power isn't relevant

3) ריטב"א and others – by קדושי כסף, it doesn't turn the קדושין into an עבירה, but by קדושי ביאה it does

רמב"ם may have understood like רבינו גרשום here, and thus concluded that קדושי כסף is only דרבנן.

b) Additionally, רמב"ם may also have just been saying this based on his own rules of classification.

In ספר המצוות, רמב"ם had said that קידושי שטר is also considered מדברי סופרים. Clearly though, with regards to this, he changed his mind when he wrote the משנה תורה.

It is also possible that later in his life he also retracted on saying this about קדושי כסף. Already in the days of רמב"ם's son, we see it wasn't clear if he had or hadn't.

However, כ"מ and others think this isn't true.

ראב"ד and רמב"ן both interpret the רמב"ם very radically, as saying that she's only married on a דרבנן level.

But they were just setting up a strawman; no one who actually tries to defend the רמב"ם thinks that way. And the simple reading of the רמב"ם definitely sounds like she'd still be a full אשת איש for all regards, since he doesn't make any further distinctions between them.

If not though, then what *did* he mean?

רמב"ם labels anything learned from the י"ג מידות as being "מדברי סופרים."

One sees this clearly in הל' ממרים by a זקן ממרא. Additionally, he even considers תקנות and גזירות to be מדברי סופרים.

Accordingly, it seems that anything we were reliant on חז"ל to have known it earns this label.

Furthermore, in a תשובה, רמב"ם even considers a הלכה למשה מסיני to be מדברי סופרים.

(This one is less clear; only needed חז"ל to *transmit* them, but not to *interpret* or *derive* them, etc.).[77]

Therefore, קדושי כסף isn't anything unique; rather, part of a general שיטה. But is there a נ"מ?

תשב"ץ (both in זוהר הרקיע and in his שו"ת), **ש"ך**[78] – no נ"מ other than that it doesn't count in the מנין המצוות

(To this then, the גמרא in ב"ב wouldn't have really been רמב"ם's source for this).

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[76] There are more explanations and additional nuances, but here are some basic, mainstream approaches.

[77] See in הל' טומאת מת ב:י for an example demonstrating how this might be more complex.

[78] Perhaps the מ"מ and כ"מ too.

Potential נ"מ

1) consent of the rabbis: כ"מ – whether it's necessary to have the consent of the rabbis (as גמרא indicates).

2) a conceptual distinction: Rav Rosensweig – שטר and ביאה capture the conceptual nature of קדושין, but כסף does not. It works, but that is because people take it seriously and they often buy things this way (plus, it's convenient). However, by its nature, it wouldn't have related to קדושין as the other two do.

3) more מיקל by דרשות learned from the י"ג מידות: this might illustrate itself in a variety of ways:

A) Perhaps חז"ל can **actively uproot them**; unlike פסוקים, which can only be uprooted בשב ואל תעשה.

B) ר"ן in נדרים (on .ח) – a **חל is שבועה** on something learned from a דרשה, but not on something explicit.[79]

C) תוספות – why is it better to have a **מצורע stick his thumb into the עזרה**, and not just walk in, when he must get the blood applied to his thumb? Both should be אסור, since he is טמא, and both should be נדחה because of the מצוה! One answer: because the entry of a טמא body part is learned from a דרשה.

D) תוספות יר"ט – something written in the תורה is **more "מקודש"**[80] than something learned from a דרשה.

E) פרי מגדים – if one must be **מחלל שבת**, better to violate a דרשה than something explicit in the פסוקים.

F) פרי מגדים – while a regular דאורייתא דין's ספק goes לחומרה, a דרשה's **ספק goes לקולא**

G) Perhaps unable to receive certain types of **עונשים** for something learned from a דרשה

This general approach of the רמב"ם's aligns neatly with another general approach of his: that all דרבנן laws carry the weight of the מצוה דאורייתא of "לא תסור."[81] The obligation's דאורייתא, but the legislation is from the rabbis.

Accordingly, makes sense why he'd feel comfortable using the same term for those and also explanations of normal תורה laws. Both required human intervention to bring about, and both have תורה authority backing them. In terms of punishments and certain other aspects, they're different — but not fundamentally different.

Rav Elchanan[82] – none of this means that דברי סופרים are either unauthoritative or untrue.

Nonetheless, perhaps ה' cares more about things He chose to say explicitly and discussed at length in the תורה.

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[79] Though that may not be a real distinction, since it may just be based on what was actually sworn on by הר סיני.

[80] (See זבחים on .פט).

[81] The רמב"ן and others disagree, for example.

[82] Many of the potential נ"מ above were from him.

שיעור #14 – 11/14/16

"מה ליבמה שכן זקוקה ועומדת" – ד:

Initially, the גמרא seems to think[83] it *is* significant that אמה העבריה isn't נקנית through ביאה.

Yet in the end, it seems to think[84] it *isn't* significant.

Which one is it really?

1) רמב"ן – the גמרא above was לאו דווקא; and it really meant a מה מצינו, not a ק"ו

2) Maybe one can only use it to set the background for a ק"ו, but not to break a ק"ו [85]

3) Maybe because the part about כסף was trying to talk about כסף, not relationships [similar to the idea of Rav Rosensweig at the end of the last שיעור]; unlike by ביאה, where it is about the relationship, and thus relevant to object and say that אמה העבריה isn't about that sort of relationship

4) Maybe different parts of the גמרא were assuming different things: first part thought יעוד is the main goal of the sale of an אמה העבריה; while the later part assumed differently, that the main point is the slave work.[86]

By the ק"ו to teach that קדושי ביאה works from יבמה, the גמרא says it breaks down, because a יבמה is "זקוקה ועומדת."

Q: תוספות – include this very point in the ק"ו as well! [87]

Technical answers:

1) תוספות הרא"ש – can only include facts into the ק"ו, but not a דין which is only created by the תורה.

2) רמב"ן (second answer) [88] – *can* include this point in the ק"ו from כסף to ביאה, *but not* from יבמה to אשה.[89]

Fundamental answers:

3) ר"י – ביאה is uniquely linked to יבמה and being זקוקה ועומדת. The מצוה is to build up the dead brother's home and have children; thus, makes sense that ביאה should be a קנין more easily here than elsewhere

(In terms of the יבום logic here, it sounds like the קנין flows from the fulfillment of the מצוה.

This is **similar** to what the **ישי"ש** says by יבום in general — that the ביאה isn't a ביאה of קדושין, but rather just a מצוה, and "אשה הקנה לו מן השמים."

This is **against** the **ריטב"א** in יבמות, who says you are קונה her with תחילת ביאה, with הראה, but the מצוה is only when he completes the ביאה).

4) רמב"ן (first answer) **in תוספות, and ר"א, רש"י** – ביאה is גומרת, and does נשואין, not קדושין. Thus, the whole לימוד doesn't work anymore — the קדושין came from the dead brother, not the ביאה.

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[83] When it tries to learn a ק"ו from אמה העבריה to קדושין working with כסף.

[84] When it objects to the breaking of the ק"ו by קדושין working with ביאה from יבמה by saying ביאה isn't שייך to אמה העבריה.

[85] Even if, intuitively, it seems like it should be the other way around.

[86] This will be a big discussion later on.

[87] "If כסף, which doesn't work by a יבמה (even though she is זקוקה ועומדת) works by קדושין (even though she isn't זקוקה ועומדת), then surely ביאה, which does work by יבמה, should work by קדושין."

[88] This is against the תוספות in ב"ק; one would need to give a different one of these answers for that approach.

[89] Not exactly clear what רמב"ן means here.

The novelty with regard to יבום here is that the יבם isn't מקדש the יבמה; rather, the יבם inherits the קדושין of his dead brother. He does נשואין, and then naturally gets the קדושין.[90]

This is a big חקירה in יבום:

A) are there still extant קדושין of the dead brother; or no,

B) no extant קדושין, and she just has a moral obligation to marry the brother and not a stranger?

Potential נ"מ [91]

1) nature of relationship between יבם and יבמה: with the respective sides of "אין זיקה" and "יש זיקה" falling in place on either side here –

If the קדושין of the dead brother, then "יש זיקה"; if not, then "אין זיקה."

2) nature of the איסור of a יבמה לשוק: is it a lower level of אשת איש, or just some other איסור?

If the קדושין of the dead brother, then lower level of אשת איש; if not, not.

3) תפיסת קידושין לאחר: can the קדושין of someone else be חל on a יבמה?

If the קדושין of the dead brother, then קדושין cannot be חל; if not, it can.

4) דבר שבערוה: is חליצה called a דבר שבערוה?

If the קדושין of the dead brother, then yes; if not, not.[92]

In the גמרא's conclusion, is it that doing יבום is also a regular קדושין of ביאה; or no, its own unique mechanism?

Seemingly, must be that it's still its own mechanism, since ביאה by a יבמה has unique components to it! [93]

A) מהרי"ק (unlike his questioner in his שו"ת) – nonetheless, it still is a קדושין

B) ר"ת (brought in תוספות in יבמות on :מט) – there's no ממזרות by a יבמה לשוק; and no תפיסת קידושין by the יבם even, since he has the זיקה.

This sounds like he argues on מהרי"ק.

אור שמח – in the רמב"ם (in הל' יבום א:א) – רמב"ם uses the words "אשה הקנה לו מן השמים." While the גמרא only used this term very sparingly, and could've been understood as a local point — but the רמב"ם holds it is a major idea, and that's why there is no need for the יבם to do קדושין.

Potential נ"מ

עדי קיום: is there a need for עדי קיום by the יחוד here? [94]

a) ריטב"א, תוספות הרא"ש, מאירי, and שלטי הגיבורים – need עדי קיום by יבום

b) ש"ש and שו"ת רשב"א – no need for עדי קיום, since "אשה הקנה לו מן השמים"

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[90] Alternatively, it might be that he inherits the partial קדושין — since, after all, there is no חיוב מיתה on other people who sleep with her now, just a לאו — and then he completes it and does נשואין. But רמב"ן says נשואין, and רש"י and ר"א probably meant this too, since that is what גומרת means in the גמרא later on.

[91] Oversimplified, since this is really a סוגיא for יבמות.

[92] See the נודע ביהודה, who brings this to argue on the מרדכי. Brings in a lot of other follow-up נ"מ as well, such as whether the kid be a ממזר; does the idea of אסור לבעל לבועל apply; יהרג ואל יעבור; חומרה דאשת איש, etc.

[93] It works even against her will, and בשוגג, etc.

[94] It could be that this isn't really a נ"מ though; one could say that even if not קדושין, you still need עדי קיום, since they don't depend on the process, but rather on the result, and here, ultimately there is a conclusion of ערוה.

Or one could deflect it the other way, as Reb Chaim does — since יבום doesn't need דעת, then no need עדי קיום, even if קדושין.

שיעור #15 – 11/17/16

בע"כ contradiction; beginning of "ביתך"; "אין קטיגור נעשה סניגור"; הקדש by שטר – ה.

Why does the גמרא say "אף בשטר" — how is שטר a bigger חידוש than the others?

A) תלמיד הרשב"א – because there is no mention of it in the פסוק, it is the least explicit

B) שיטה לא נודע למי – because there is no הנאה, unlike by כסף and ביאה, so would have thought it might not work

C) ריטב"א – because that is the order of the פסוקים

[**D)** coming off the ברייתא in the ספרי, which was going on this פסוק, and שטר isn't learned from this פסוק at all]

What is the שטר which the גמרא is saying doesn't work by redeeming הקדש?

A) רש"י – where one writes a שטר to the גזבור that he owes money to הקדש

There a few questions on רש"י:

1) רשב"א – a שטר חוב doesn't work for קדושין either, so how is this a valid question on the ק"ו?

To defend רש"י:

a) Most אחרונים – that is only true according to how רשב"א reads the גמרא on ח.;[95] but if רש"י held like how רא"ש reads the גמרא there, then there's no problem at all — a שטר חוב is a real debt

b) Reb Chaim – a complicated explanation; עיין שם.

2) Rav Elchanan Wasserman [96] – how is this type of שטר relevant — just because it is on a שטר doesn't mean it is a קנין שטר! If anything, that should be a קנין כסף!

To defend רש"י:

a) ספר המקנה – רש"י really agrees with the רשב"א. Really, he meant that you write a שטר which says "הרי זה פדוי," and you *also* write a חוב on it, so that way you aren't just stealing from הקדש.

b) Other אחרונים – apparently, "שם שטר אחד הוא" — even though not the same, still able to ask a question on a ק"ו like this.

B) רשב"א – parallel to שטר קדושין — where the גזבור just writes "הרי זה פדוי," comparable to "הרי את מקודשת לי"

Q: Why is "אין קטיגור נעשה סניגור" an issue by כסף causing divorce — the opposite was true on ד: by אמה העבריה, when the גמרא explained that she is more able to be נקנית with כסף because she is sent away with כסף?

A) תוספות – depends on the direction. By אמה העבריה, going from the party that received the money initially back to the one that had given it; that makes sense. By כסף, it'd be going from him to her in both instances.

תוספות was clearly assuming the גמרא's ה"א was that the man would be giving the money to the woman when he divorces her. It could have hypothetically been the other way around.

(Perhaps that's how רשב"א understood, and that's why he gave a different answer).[97]

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[95] The גמרא there says a משכון doesn't work for קדושין. The רשב"א assumes the weakness of collateral is that it is merely a debt, and not the final payment; but others argue, such as the רא"ש, and say that the reason it doesn't work is because you don't really owe the money in that case. But if you did truly owe the money, then it would work, even if you didn't pay now.

[96] He also quotes a תוספות who explains the type of שטרות which are excluded from redeeming הקדש as רש"י had understood.

[97] The advantage of reading it תוספות's way is that the man is the one doing it in both scenarios. The advantage of reading it the other way is that it is the "קונה" who would be giving the כסף in both scenarios.

B) רשב"א – there's no issue of "אין קטיגור נעשה סניגור" by business dealings (like אמה העבריה); there is by קדושה [98]

From this, רשב"א may be setting up קדושין as more about קדושה than about קנין [see שיעור #4 above].

תוספות הרא"ש and תוספות טוך are both unclear. They may be like תוספות, but they also may be like רשב"א.

The גמרא in נדרים on מו. says that "ביתך" in a נדר only applies as long as the person is alive.

Yet the גמרא here sounds like this תנאי invalidates a גט for lack of כריתות is because it extends indefinitely!

Which one is correct?

Technical answers:

1) תוספות – in נדרים, it's talking about an individual; here, "בית אביך," is referring to his lineage in general [99]

2) ריטב"א and others – in נדרים, only meant when he was alive; here, it's לאו דווקא, and really meant a case where he said "בית זה של אביך," [100] or "קרקע זה של אביך." But had he only said "בית אביך," that *would* be כריתות.

(The weakness of these answers is that the ברייתא's purpose was to distinguish between words he used).

3) שיטה לא נודע למי (second answer) – in נדרים, only said "ביתך"; here, added the word "לעולם." But had he only said "בית אביך," that *would* be כריתות.

Fundamental answers:

4) שיטה לא נודע למי (in his first answer), **מאירי** – there's a difference between making נדרים and making a תנאי. In נדרים, we go after לשון בני אדם; thus, go after if he is alive or not. But by תנאי, we follow after…

They don't spell out the alternative. What is the other option?

Perhaps they mean that we go after the objective meaning, or the language of the תורה. Just because people happen to use slang terminology, that doesn't mean we'll follow it. [101]

This would be strange. Most poskim assume we follow לשון בני אדם by people talking everywhere; only don't in making דרשות off פסוקים. Why follow objective language, and not what people mean?

The ב"ח seems to follow this strange opinion as well — makes the same distinction להלכה.

5) רמב"ם (in הל' גירושין ג:יא-יב) – if he says "all the days of פלוני," then it works, it is a good גט. But if he says "don't marry פלוני", then that תנאי never expires (even if it becomes practically inconsequential; she can't marry him when he's dead anyhow). Thus, even if both are *practically temporary* — one is *formally temporary*, while the other is *formally everlasting*.

This would align nicely with the רמב"ם's approach in another context (הל' גירושין ט:יא):

If a husband says he is divorcing his wife on condition that he doesn't come back within 12 months, and then dies within that span (for example, after 4 months) without children and with brothers, then is she allowed to remarry someone else during those following 8 months?

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[98] We also seem to find it only by the holiest things, such as the קדש הקדשים; speaks volumes about the sanctity of marriage.

[99] Some אחרונים point out that his descendants can all be wiped out too, and thus it could qualify as כריתות after all! To this, they respond that if it's something so uncommon, then it doesn't count to enable something to qualify as כריתות.

[100] Since it could still maybe get knocked down, he offers another answer; but since this is unlikely, it is still a good answer.

[101] Alternatively, I thought the contrast could be that by גיטין, we'll go after broader definitions of words, to include more possible meanings (and not limit our interpretation to just the normal meaning) of לשון בני אדם. This might be based off of a need for כריתות by גיטין — which would provide an actual source for this idea, unlike the answer suggested by Rebbi. Additionally, it would provide a סברא for why we might ever follow after the language of something other than לשון בני אדם by something people say: we *still do* follow what people mean, but include other possible, legitimate meanings. כנלע"ד.

The הלכה is that she must wait. But why?

a) תוספות – really, she could remarry right then and there; however, people would get confused, so חז"ל made a תקנה that she should not.

תוספות obviously did not give any credence to the still existing but only theoretical תנאי.

b) רמב"ם – fundamentally cannot remarry, since the תנאי isn't fulfilled until after the 12 months.

Again, רמב"ם understands that we must recognize the theoretical תנאי.

Of all the answers listed here, רמב"ם's is the only one that would enable her to go home after the father dies.

By אמה העבריה, the גמרא says there is a case of בע"כ כסף, but there isn't by כסף by אישות.

What does that mean?

A) תוספות רי"ד, רש"י – by אמה העבריה, that means that she can be sold by the father against her will.

One weakness in this explanation is that we *do* have אישות against her will then, when father is מקדש her.

Another weakness in this explanation is that we *do* find it by אישות by רב הונא and חופה on ה:.

B) ר"ת – by אמה העבריה, that means יעוד by her father against her will

One weakness in this explanation is that whether יעוד can be done without her permission is not so simple: while תוספות, רמב"ן, רשב"א and ריטב"א say that it means you just have to let her know — others, such as רש"י himself, רמב"ם, מאירי, and שיטה לא נודע למי all say that it means you actually need her permission. And this latter opinion reads more simply in the גמרא later on.

Another weakness in this explanation is that maybe that still counts as consent: because the father gave her over initially and he knew all along that this was a possibility, maybe he gave his consent then.

Another weakness in this explanation is that יעוד really does seem to count as "באישות."

c) רש"ש – by אמה העבריה, the בע"כ is the גרעון כסף against the אדון.

Unclear why none of the ראשונים say this explanation. It avoids all the issues the other explanations had.[102]

[102] I thought perhaps because the אדון is still receiving compensation in return for what he was forced to give up (he gets the money), unlike in the other cases (by גט and by יבום, there's no compensation); thus, could not properly be called "בע"כ."

שיעור #16 – 11/21/16

פירכא irrelevant; "קנין כספו"; רב הונא; בע"כ – ה.

(continuing off the end of last שיעור)

רש"י – בע"כ by an אמה העבריה means selling one's daughter against her will.

ר"ת – that's not considered בע"כ, because his דעת is considered as her דעת; that's why קדושין and חופה are also not considered בע"כ when done by the father!

To defend רש"י:

a) תוספות – מכירה is called בע"כ, since she wouldn't agree to that; but by the marriage cases, she would have

(This glosses over the fact that she might have wanted someone better than who he chooses).

Though the גמרא may be purely grammatical (i.e. what counts as בע"כ), it may show something deeper:

To this defense of רש"י, it seems like the father represents his daughter as a שליח or an אפוטרופוס in the case of marriage — not that he is the בעלים [see שיעור #10 above].

b) רש"י seems to have been defending himself by adding the word "בעלמא" into the text.

He'd therefore be explaining that there is no other non-קדושין types of כסף by אישות which happens בע"כ.

ריצב"א (brought in תוספות הרא"ש) – similar to this – in the case of קדושין and חופה, that is the sole type of בע"כ there; unlike by שטר and ביאה, where there is a second case of בע"כ.

c) תוספות רי"ד – all these cases *are* called בע"כ. (His גרסה in the גמרא's conclusion says that indeed, חופה *is* called בע"כ [and the גמרא never said that "כסף באישות בע"כ לא אשכחן" here apparently]).

d) שיטה לא נודע למי – מכירה, she couldn't do herself; whereas by קדושין and חופה, she could one day do.

Similar to the way the first answer above: the basic point is acting as a בעלים counts as against her will, like by מכירה; as opposed to when he acts as a שליח (even if against her will), like by קדושין and חופה.

Do we pasken like רב הונא? He was seemingly left without having been disproven.

1) ר"ח (in a כתב יד) – we pasken like רב הונא

2) ר"ח (as quoted in **רמב"ן and other ראשונים**) – had "ספיקא היא" instead of "פסיקא היא" — so it is a ספק

(להלכה, in שו"ע it is paskened this way, to be חושש for it לחומרה).

3) תוספות and most ראשונים — we pasken against רב הונא

Why can a כהן's wife eat תרומה if she isn't actually acquired through כסף, but rather through שטר or ביאה?

1) תוספות הרא"ש – [see שיעור #4 above; fits nicely] – because she's still his item, she can however he got her

2) כתובות in רש"י, שיטה לא נודע למי – technically, only means קנין כסף; however, all הוויות are הוקש to one another

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Can one bring a פירכא on a ק"ו from something which isn't שייך?

1) תוספות הרא"ש – yes

(This סוגיא proves it)

מהרש"ל – no

What about this סוגיא?

a) it's a weaker ק"ו because of דיו

b) just a סברא that only a very special act can make קדושין, based on the assumption that the whole idea of קדושין is a חידוש [103]

Therefore, based off of these, two more possibilities arise:

2) מהרש"ל (first explanation) – yes, but only on a weak ק"ו

3) מהרש"ל (second explanation) – no; here, wasn't really a פירכא at all, but rather just a סברא against it

[103] Unclear what he means by the חידוש here. Perhaps that she is stuck with him forever and can't divorce herself.

שיעור #17 – 11/24/16

חופה – ה.

What is חופה?

1) מאירי, תוספות ר"י הזקן, others – יחוד

רמב"ם adds – יחוד which is ראוי לביאה

(**דרישה** thinks רמב"ם holds הכנסה לביתו and יחוד)

2) ר"ן – הכנסה לביתו

3) תוספות רי"ד – פריסת טליתו עליה

4) בעל העיטור – בית שיש בו חידוש

5) תוספות (in יומא) – יצאה בהינומא

(This is where the custom of doing the "bedekin" comes from [not תוספות רי"ד, as many think]).

Where does the custom of having a canopy come from?

One might have thought from the בעל העיטור's opinion.

גר"א – often held the wedding in the חצר בית הכנסת, and that was הכנסה לביתו, because the חתן often didn't have his own home (lived with in-laws), and would use the shul, which is everyone's property. Having a canopy designated that he was using the חצר now, and marks it as his רשות.

To this, actually based on the ר"ן's opinion.

Is חופה more about the relationship or the קנין?

Potential נ"מ

1) חופה to a girl less than three: a big מחלקת whether this works.

Perhaps depends on this question: if about intimacy, then no; if about their hierarchy, yes.

2) According to רב הונא, if one did חופה as קדושין, then what would be the נשואין?

A) תוספות הרא"ש (first answer) – included together in the קדושין

B) תוספות הרא"ש (second answer) – ביאה

(Avoided saying doing a second חופה because of the סברא of "מאי אולמיה האי חופה מהאי חופה").

C) תוספות טוך – doing a second חופה

What about the "...מאי אולמיה" issue?

תוספות טוך might respond that unlike additional כסף, one can always enhance קירוב, intimacy.

Thus, these might also align with whether about intimacy (תוספות טוך), or קנין (תוספות הרא"ש).

3) definition of the word חופה: if it means יחוד or פריסת טליתו, then sounds like it's more about intimacy; but if הכנסה לרשותו, then about קנין (although granted, this can be disputed, not מוכרח).

4) need for עדי קיום: for example, **תוספות ר"י הזקן** – need עדי קיום by חופה; but **others** – don't need.

Why wouldn't there be a need for עדי קיום?

a) אבני נזר, others – because חופה is not a דבר שבערוה (she was an אשת איש already).

b) Reb Chaim – the conceptual nature of the process is a חלות ממילא; just need to be in a situation of נשואין, and then it happens on its own. Therefore, don't need דעת, just כוונה.[104]

As opposed to the first possibility, which is that it is a formal act which creates the marriage, created by their דעת, just like by regular מקח וממכר.

Thus, these might also align with whether about intimacy (Reb Chaim), or קנין (others).

By setting up the question this way — as formal קנין action versus חלות ממילא, there are more נ"מ:

Potential נ"מ

1) חופה for a קטנה on a דאורייתא level: discussion in the אור שמח about whether there is or isn't.

To Reb Chaim, there would be; but to the others, there would not.

2) עדות לקיום הדבר: (see above)

To Reb Chaim, no need; to תוספות ר"י הזקן,[105] do need; אבני נזר, no need (but on that same side).

3) efficacy of a תנאי in the חופה: for example, **ר"ן, רמ"ה, and אור שמח** – no; but **חזו"א and שאגת אריה** – yes

Reb Chaim would align with the first opinion;[106] the others with the second.

4) חופה done through שליחות: will this work? **אור שמח** – doesn't work; **חזו"א** – does work

If about intimacy, can't have intimacy without the actual people involved; but if really the same as any other קנין, then can even work through שליחות.

5) נשואין in the טעות: would it still be binding? **אבני נזר and ספר המקנה** – invalid; **חזו"א** – still valid

Reb Chaim would align with the first opinion;[107] the others with the second.[108]

However, אור שמח says it is invalid. But he was on the other side above!

Even though he says a תנאי doesn't work — apparently here, there was never any דעת in the first place. apparently. But Reb Chaim would respond that that since in actuality they have been made close now, then there was נשואין and it can't be undone.

6) חופה before the קדושין: would this work? A big מחלקת.

To Reb Chaim, certainly would not work; but to the others, perhaps it would.

7) חופה on שבת: is this permitted to be done? Why or why not?

ר"ן (based on ירושלמי) – אסור, it's a קנין; **רמב"ם** – אסור, since there's a concern the caterer will sin[109]

ר"ן aligns with the קנין side,[110] רמב"ם with the intimacy side (since didn't say about the קנין).

(Also, this explanation fits with why רמב"ם left חופה out of the list of what is אסור on שבת).

Q: To רמב"ם (חופה is יחוד and ביאה) — the גמרא in כתובות (on יא:) implies חופה happens even if עדים say no יחוד!

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[104] Rav Soloveitchik – that this is why we say that all Jews have אירוסין with the תורה. That's the formal commitment, and an unbreakable connection and obligation. But Rav Chaim had נשואין with the תורה, a more intimate relationship.

[105] The אבני מלואים holds this way as well.

[106] Because it is a חלות ממילא, one can either do it or not, but don't control it על תנאי. Same as why one can't do a תנאי on חליצה.

[107] If about intimacy, then it still happened ממילא, despite their mistaken דעת.

[108] Since it is a regular קנין, and a קנין requires דעת.

[109] Others explain him differently, but this seems to be the simplest read in the רמב"ם.

[110] Which fits well with his opinion of הכנסה לביתו above, which also aligns nicely with the קנין side.

To defend רמב"ם: many אחרונים say that was a case of מסרה האב לשלוחי הבעל, like we find in כתובות on מח:.

Q: How can that itself accomplish חופה; clearly about קנין, and nothing about the relationship?[111]

A) בית יעקב – has a fundamental idea. There are two tracks of חופה: when a גדולה does it herself, then it needs יחוד; but when it is the father giving her over, then מסירה works.

Why? As a גדולה, she has a mind of her own, and thus must give herself over; but when a child, she is given over, and then the giving over is the significant point, since she doesn't object either way.

Proof: ירושלמי – אסור to marry an אלמנה on שבת.

Why specifically an אלמנה?

a) מאירי – technical answer — לאו דווקא; but בתולות are always married on Wednesdays anyhow.

b) תוספות – fundamental answer – because an אלמנה has a different way of marrying her.

What does תוספות mean? Why would that be?

1) Perhaps because for a בתולה, this is the first time she's getting married, and thus, even a small action can bring her to that high level of feelings of closeness; but someone who has "been there and done that," it requires a bigger action to create that, like ביאה.

2) בית יעקב – same difference as giving herself over (like an אלמנה) and her father giving her over. Since that is מסירה, no concern of them traveling on שבת and doing this.

Now, one could look at it in this manner, as being a technical divide between them about the דעת.

But using the בחת יעקב's split, could also say that it is truly two different types of חופה: one is about intimacy and the relationship, which exists by a גדולה; and the other type, by a קטנה, is about the קנין.

Therefore, to answer: חופה done by woman herself is about intimacy; but not done by her father.

Thus, the two sides that have been presented until now — to this, *both* exist, but as two different tracks for two different people.

This can answer why רש"י made the case of רב הונא on ג. be when the father gave her over:

Many technical answers are given in the אחרונים; but maybe there's a fundamental answer, that it's because חופה acting as a קנין (i.e. for קדושין) only makes sense if doing the type of חופה which *is* a קנין, the one of a קטנה; the other type of חופה, by a בוגרת, which *isn't* a קנין, wouldn't work.

However, can't work for the רמב"ם, since רמב"ם explains the מסרה לשלוחי הבעל idea in פרק כ"ב of הל' אישות, and there he sounds like he is saying that there's no difference between how old she might be.

Additionally, it sounds like רמב"ם has his own answer for this question. He defines נשואין as חופה in פרק י', and only gets around to this idea in of מסרה לשלוחי הבעל in פרק כ"ב. It would seem clear that he doesn't think that is doing נשואין, but rather talking about attaining certain rights then.

Moreover, רמב"ם also says there even without a חופה, and never says נשואין.

Therefore, in truth, רמב"ם sounds like he is saying that besides for נשואין, there is something else called "רשות בעלה" and "רשות אביה," which has to do with certain rights.

Therefore,

B) two levels (as opposed to two tracks). She can enter his רשות, the formal קנין part — with that comes ירושה and the like — or you can have the real closeness of נשואין, the חופה, which is about intimacy.[112]

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[111] And until now, the assumption had been that רמב"ם had understood like the intimacy side (ביאה and יחוד strongly sound that way, as well as some of the other נ"מ mentioned.

[112] The דרישה referenced above can be another twist: need to go through the first level in order to get to the second one.

Additional proofs to this:

a) By a **חופת נדה**, רמב"ם says the נשואין are not "completed," and she is like an ארוסה.

Now, could've said that she's actually an ארוסה still, and he calls it not "completed" because a real נשואין is always called "גומרת" (it completes the process of marriage).

However, can now instead explain that this achieves the קנין part, but not the relationship part.

b) רמב"ם also says that the ברכת אירוסין works on a חופת נדה, at least בדיעבד.

Therefore, to answer: indeed, מסרה לשלוחי הבעל does *not* accomplish the full חופה; however, it is enough to make her considered having entered the husband's רשות for certain rights, and that is what the גמרא in כתובות was talking about.

שיעור #18 – 11/28/16

"נתן הוא ואמרה היא" – ה:

What is the problem of אמרה היא?

1) רש"י – according to **מהרש"ל**'s change – "כי תקח" (she takes)

Why did מהרש"ל change רש"י?

He obviously felt that there would be a problem in רש"י saying "כי תלקח."

On :ב, the גמרא asked why the תורה hadn't said "כי תלקח." What was that question about though?[113]

A) תוספות and רשב"א – technically, nothing wrong with the תורה saying "כי תלקח." However, the תורה wanted to teach this idea, of why the man looks to find a wife and not the other way around.

B) ראב"ד (brought in the רשב"א) – "כי תלקח" means that the woman does the קדושין. The גמרא was asking why the תורה specifically said that a man must do the קדושין, and not the woman.

מהרש"ל must have thought there was only תוספות's explanation on :ב, and thus "fixed" רש"י — after all, "כי תלקח" wouldn't be a problematic קדושין, since he thought it meant she gets taken by him.

But רש"י (as actually found in the גרסה of the ראשונים, which is probably correct) said "כי תלקח" on :ה; thus, he probably held like the ראב"ד on :ב, that "כי תלקח" would mean she takes him, and that doesn't work.

2) רש"י – according to the other ראשונים – "כי תלקח"

(The ראשונים understood this to mean "she is taken," and asked in רש"י. But רש"י probably understood it to mean "she takes," just as "כי תקח" does).

3) תוספות הרא"ש and רשב"א – "כי תקיח" (she causes him to take)

Why didn't the גמרא discuss the fourth possible case, of נתנה היא ואמר הוא?

1) תוספות – wouldn't be simply divided, since depends on the case — if an אדם חשוב, then it *would* work

2) ריטב"א – it was obvious that it wouldn't work in that case

רמב"ן is similar, but makes it into a כ"ש that it wouldn't work — if even her אמירה doesn't work, then כ"ש her נתינה won't work.

(He seems to be assuming that the נתינה is the primary component, not the אמירה).

3) בה"ג – the גמרא *did* discuss it — נתן הוא ואמרה היא and נתנה היא ואמר והוא are the same issue.

(He seems to be assuming that the אמירה and the נתינה are two equal components).

What is the דין in that case of נתנה היא ואמר הוא?

1) בה"ג – it's a ספק, just like the גמרא's conclusion by נתן הוא ואמר היא

2) תוספות – not קדושין (but by an אדם חשוב, it *is* קדושין)

3) רמב"ם, and others, רי"ף – not קדושין [and אדם חשוב is called נתן הוא]

What's the מחלקת between תוספות and רמב"ם?

A) No מחלקת in terms of the הלכה; they are just arguing on semantics.

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[113] [See שיעור #6 above].

B) גר"א – תוספות – it is a valid קדושין by an אדם חשוב, even if he just says "הרי את מקודשת לי בכסף זה," but רמב"ם – must specify that it's the הנאה which she is getting in that case that's the קדושין; if not, invalid.

(They may be arguing over whether one needs to specify the object or הנאה that one's using for the קדושין, or is it just enough that one had such an object there and intended to do קדושין).

C) גר"א [114] – generally, in a case where he said it and she was silent, her silence counts as הודאה, since she could've given it back to him demonstrating rejection; however, in this case, where she gave it to him and he is the one holding it (i.e. she can't give it back — he has it, not her), then is her silence a הודאה?

תוספות – yes, that's a הודאה, since she could've objected; but רמב"ם – no, that case is different — if she doesn't give it back when she could've and is silent, that's הודאה; but just silence alone is not a הודאה.

The גמרא, in its second answer, concludes that the case of אמרה היא ונתן הוא is "ספיקא היא וחיישינן מדרבנן."

What does this mean?

1) רמב"ם only brings the ספק part.

What did he mean? And what about the גמרא's wording of "חיישינן מדרבנן?"

A) ר"ן – it is a real ספק; but on a דאורייתא level, should've paskened that it's not קדושין, by resolving the ספק based on her being a חזקת פנויה. However, חז"ל were מחמיר by a ספק ערוה.

B) מאירי – it is a real ספק; but on a דאורייתא level, all ספיקות are resolved לקולא. However, רמב"ם held [115] that the whole idea of ספק דאורייתא לחומרה is only a דרבנן construct.

2) רי"ף only quotes the דרבנן part.

What did he mean? And what about the גמרא's wording of "ספיקא היא?"

A) ר"ן and ריטב"א – it really is *not* קדושין on a דאורייתא level; but חז"ל were גוזר to treat her as a ספק אשת איש due to the חומרה of the איסור

B) אבני מלואים – (how ר"ן above explained רמב"ם)

3) שיטה לא נודע למי – it really *is* קדושין on a דאורייתא level; but the ספק is over whether the רבנן were מפקיע the קדושין, from a fear that it would lead others to do קדושין by her giving it, which actually wouldn't work.[116]

Ultimately, why is אמרה היא a problem with "כי יקח" at all; just ignore her, and it should work as נתן הוא!

(To the **שיטה לא נודע למי**, this is correct: it *is* קדושין on a דאורייתא level; however, חז"ל just uprooted it)

A) נתן הוא alone would be fine; however, her אמירה ruins it here. The technical מעשה קידושין must be done in a way which demonstrates his activity and her passivity; "כי יקח" also teaches this demonstrative component.

B) Even נתן הוא would not work alone, because the מעשה קידושין itself requires both a valid אמירה and נתינה.

What would be the conceptual underpinnings of the difference between קדושין and קנין שדה?[117]

To the first option: by a קנין ממון, no rule about who is active or passive; but by קדושין, there is.

To the second option: by a קנין ממון, there is only the component of נתינה; but by קדושין, there is actually a need for the אמירה too as part of the מעשה.

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[114] גר"א said this option as well, though he seemingly didn't need to.

[115] See in הל' טומאת מת ט:יב.

[116] As for the first answer of the גמרא — it knew for sure that they did this אפקעינהו.

[117] Except according to the one radical opinion brought in the מאירי in the name of the תוספות, but which no one else says and he rejects too, that a קנין שדה also requires an אמירה to be valid.

(This sounds like the בה"ג brought above: the אמירה and the נתינה are two equal parts).

Why might be the basis of either option?

To the first option: a philosophical principle which is taught from "כי יקח," like "...איש חוזר אחר אבידתו."

To the second option: two possibilities:

a) קיחה normally means with words (as רש"י says across the תורה), and that is truly what it means by קדושין, unlike by a שדה.[118]

b) תורת גיטין – הקדש is חל with אמירה.[119] Use both the language of the תורה and the רבנן: need the קנין, and that requires the נתינה component, and need the קדושה, and that requires the אמירה component.

Proof: the גמרא in נדרים on ו: about a יד by קידושין. Most ראשונים explain that it is clear what the person means, but the גמרא's question is whether an improper vocalization counts or not. Accordingly, because קדושין is in that סוגיא (along with נדרים, נזירות, הקדש, etc.), it seems clear that the אמירה is part of the actual מעשה קידושין.

[118] This represents a philosophical principle too: not acquiring an object, but rather, creating a relationship.

[119] This is actually a complicated סוגיא in מעילה; without getting into it now — ultimately, the ראשונים hold that it still requires some sort of אמירה.

שיעור #19 – 12/1/16

"נתן הוא ואמרה היא" – ה:

(continuing off the end of last שיעור)

[Let's rephrase the question the last שיעור ended with in a slightly different but overall similar manner].

Generally, would've required two things: **a)** a valid מעשה קידושין, and **b)** a גילוי דעת that they want to do קדושין.

But both aspects are there is the case of נתן הוא ואמר היא, and yet, the גמרא thinks it may not be a valid קדושין.

Why should it matter who brought about the גילוי דעת?

Technical answers:

A) שיטה לא נודע למי – indeed, it *is* a valid קדושין on a דאורייתא level; however, חז"ל uprooted the קדושין as a גזירה

B) רמ"ה (brought in the **טור**) – indeed, if he says "הן," then it *is* valid; the גמרא's case is without him saying "הן"

What did the רמ"ה mean?

a) משנה למלך – the issue in this case is when the order was first נתן הוא, and then אמרה היא, because in such a case it really is unknown what he meant when he gave it.[120] In short, really do just need a good גילוי דעת; however, in this case, there wasn't a good one.

b) Other אחרונים – "הן" is the equivalent of him saying "הרי את מקודשת לי."[121]

Fundamental answers:

C) תורת גיטין – no, the אמירה is not just for גילוי דעת; there is a formal הלכה that the מעשה קידושין includes an אמירה. When the תורה said "כי יקח," it meant a נתינה and אמירה.

(Why might this be true? Maybe because the word "קיחה" simply means "take with words." Or maybe because it really is a special type of הקדש, as the name קדושין suggests, and הקדש requires an אמירה always).[122]

D) רמ"א and תוספות רי"ד – indeed, the אמירה is just a formal גילוי דעת; but if one does use אמירה as the way to reveal that דעת, then there is a special rule that the man must be more active and the woman more passive; it must look like the final touch is the responsibility of the man, not the woman.[123]

What are some נ"מ between these two general sides — the technical answers, and the fundamental ones?

Potential נ"מ

1) עסוקין באותו ענין if נתן הוא ואמרה היא: to the technical answers, since there was גילוי דעת, then her אמירה doesn't hurt and it works; but to the fundamental ones, she has ruined the קדושין there, despite having a גילוי דעת.

מאירי, רשב"א, תוספות ר"י הזקן, others – valid קדושין; but **תוספות רי"ד** – her אמירה ruins the קדושין

2) if both were silent, but afterwards claim they intended for קדושין:

רמ"א – valid קדושין (her talking is worse); but **חלקת מחוקק** – not a valid קדושין (silence is worse)

Why might it not be a valid קדושין?

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[120] When a woman is silent, we *do* assume she is accepting — but that is because she should have objected, since it greatly impacts her life if she is married; but a man, who it matters less to, one can't assume he'd object if it wasn't meant as קדושין.

[121] This option enables the רמ"ה to potentially hold that there is actually a requirement for an אמירה. See more below.

[122] [See שיעור #18 above]

[123] [Again, see שיעור #18 above. This introduction has mostly summarized that which was said at the end of that שיעור and set things up in a slightly different manner; the following נ"מ really begin the new material].

a) Like the תורת גיטין: need an אמירה, and there is no אמירה here.

b) Even without a need for אמירה, this won't work still, since there are no עדי קיום (the עדים can't testify that they saw a קדושין, since at the time they didn't know what they meant).[124]

3) ר"ן's proof to his approach to the mechanics of the קדושין process: ר"ן in נדרים explains the way קדושין works as the woman removes all objections, and then the man is just sort of "זוכה from הפקר." He references the גמרא here as proof to this idea.

The ר"ן's proof is rather unclear. However, it would seem that the only option where there might be a proof for his idea from this גמרא would be the option which held it must appear that the woman is totally passive.

To clarify further נ"מ, let's rephrase this question again:

Is the אמירה בקידושין: A) a formal part of "כי יקח," or B) is it just a גילוי מילתא of their דעת?

Potential נ"מ

4) פסק of the בה"ג: the בה"ג had held the הלכה in a case of נתנה היא ואמר הוא is a ספק if the קדושין was valid.

If the אמירה is a formal part of "כי יקח," then this is logically possible;[125] but if just a גילוי דעת, then not[126]

5) ידים מוכיחות: the גמרא in נדרים on ו: about יד by קדושין – what was the גמרא's question?

a) תוספות – these are ידים מוכיחות, it is known what he meant; the question was if this counts as a valid אמירה.

(**תורת גיטין** – this proves that there is a formal requirement of אמירה as part of "כי יקח").

b) רבינו אברהם מן ההר – these were not clear enough ידים; the question was what he meant

(**קהלת יעקב** – uses this to deflect the proof of the תורת גיטין).

6) שידוכין plus ידים שאינן מוכיחות: if he only said "הרי את מקודשת," but there were also שידוכין — is that a יד מוכיח?

מהר"י בן לב – valid קדושין, called הוכחה; but **מהרי"ט** – invalid קדושין, not called הוכחה

If valid קדושין, must hold no need for a formal אמירה; but if invalid, maybe because no proper אמירה.

A third side in the question: or C) is it a גילוי דעת, but necessary for עדות to work; thus, a formal requirement?

7) הריני נותנו בתורת קידושין: if he says "הריני נותנו בתורת קידושין," is that a valid קדושין?

a) ריב"ש – there is a difference between this and just "הרי את מקודשת" — this is just as אינו מוכיח as saying "הרי את מקודשת," but it *is* a full sentence. Therefore, this works; figure out what he meant if a full sentence.

Why would this be true?

Apparently, the problem of ידים שאינו מוכיחות would be the failure of a proper אמירה, not a lack of דעת.

Other אחרונים – argue — this is invalid; still unclear what he meant

They might be assuming that אמירה is merely about גילוי דעת.

8) לשון בני אדם: perhaps whether the language of קדושין is based on לשון בני אדם, or else based on what's considered objective language of the תורה:[127] objective language only fits if formal requirement for אמירה.

9) עסוקין באתו ענין in general: understood simply, רבי יהודה sounds like formal דין, but רבי יוסי sounds like not. Though even within רבי יוסי, both options could come up, within the מחלקת between רבי and רשב"א.[128]

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[124] This approach seems to be the understanding of more ראשונים (for example, see the end of the רשב"א).

[125] Two actions, both of equal importance: if he does both, קדושין; she does both, no קדושין; he does one, she does one, ספק.

[126] She did the מעשה קדושין, so irrelevant that he revealed his דעת — this violated "כי יקח," so it isn't a ספק, it's nothing!

[127] [See שיעור #15 above].

[128] See the two גרסאות in the מרדכי as well. This last נ"מ will be discussed at length in the upcoming שיעורים.

שיעור #20 – 12/5/16

ידים שאינן מוכיחות; ביאה, שטר in Need for אמירה – ה:

Is there a need for אמירה in שטר קדושי?

A) רש"י (on the משנה on our דף), **רמב"ם, מאירי quoting the חכמי ההר** – no

B) רש"י (on the ר"ף), **רבותיו quoting מאירי** – yes

What are they really arguing over?

1) They might be arguing over **whether or not** there is a formal need of אמירה by קדושין [see last שיעור].

2) Alternatively, **within the side** that there *is* a formal need of אמירה:

They might be arguing over the formal status of כתיבה, whether it is a valid substitute for אמירה.

3) Alternatively, **within the side** that there *is no* formal need for אמירה, and it is all about גילוי דעת:

(First, would need to make an אוקימתא and say that she didn't read it or understand it).

They might be arguing over whether we assume she knows what it is: the first option would assume she understood it was a שטר קדושין,[129] and the second option would argue that she might not know.

4) Alternatively, **within the side** that there is a formal need for אמירה, since necessary for the עדי קיום:

To the second option, they must know that they both knew that it was a שטר of קדושין at the time.

But what about to the first option?

a) אבני מלואים – don't need עדי קיום for *her* דעת, only on *his* דעת; and that, there automatically was.

Why? Because the husband is the one really doing the קדושין; she just allows it to happen.

b) based on אבני נזר – need עדי קיום for the מעשה, not for the דעת. However, by כסף — without דעת, not a מעשה of קדושין (since it could just be a present or whatever). But by ביאה, which fundamentally is related to קדושין and is thus a valid מעשה of קדושין — there, no need for עדי קיום on their דעת, so not a problem when there's no אמירה.

Though discussing ביאה, one can extend אבני נזר's idea to שטר to address this question.[130]

Is there a need for אמירה in ביאה קדושי?

A) רש"י and רמב"ם – yes

However, the תוספתא only says that כסף needs אמירה, while ביאה just needs to be לשם קידושין.

One could read that as saying yes, need אמירה there too.[131]

B) But the **תוספתא** might mean to say no — while ביאה requires דעת for קדושין, there's no need for an אמירה.

At the very least, the אבני נזר (see above) says that one definitely doesn't need עדי קיום on the אמירה by ביאה, based on the case where a divorced couple went to a hotel room together (we assume they are remarried).

What might they be arguing over in this potential מחלקת?

1) Within the side that there *is no* formal need for אמירה, and it is all about גילוי דעת:

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[129] Maybe because she authorized the writing (if we need her דעת, which is a מחלקת ראשונים), or else, maybe from the context.

[130] In fact, this may be a little better even: he gets a little stuck with ביאה, but שטר is certainly an objective מעשה קידושין.

[131] For example, the מנחת יצחק on the תוספתא there says like this, and ignores the potential דיוק.

They might be arguing over whether we assume they don't want to do זנות, and therefore don't need a גילוי דעת: the first option wouldn't assume this, while the second option would.

2) Alternatively, **within the side** that there is a formal need for אמירה, since necessary for the עדי קיום:

They might be arguing over the אבני נזר, if עדי קיום are required on the דעת too, or just the מעשה.

The simple reading of the גמרא is that אהא = ידים שאינו מוכיחות, and אהא + נזיר עובר לפניו = ידים מוכיחות.

Q: אהא is seemingly no more likely to mean נזיר than תענית; thus, shouldn't even be considered ידים at all!

A) no, אהא really *does* imply נזיר more than תענית

1) תוספות – אהא implies he can start it right now, which is always true for נזיר, but not for a תענית [132]

2) רמב"ן (second answer) – אהא implies on himself, his status is changing; תענית is just something he does

B) indeed, אהא really *doesn't* imply נזיר more than תענית

Rather, the דיוק is not in what שמואל *said*; it is in what he *didn't say*. שמואל chose to say a case of ידים מוכיחות, of נזיר עובר לפניו, when he *could've* said a case of אינן מוכיחות if he held of them.

What אוקימתא might שמואל have made that would've been ידים שאינן מוכיחות?

3) ריטב"א, רמב"ן – where he had been talking about נזירות beforehand

4) ריטב"א (second answer), **תוספות רי"ד** – where asked him afterwards and he said he meant to be a נזיר

5) רשב"א quoting the ראב"ד, שיטה לא נודע למי [133] – where he was holding his hair

מאירי gives a few other cases which can be used to add on to this:

6) where he was holding a cup of wine

7) where a נזיר had already passed by him

The answer of the תוספות רי"ד is different than the other ones:

Most ראשונים had been assuming the reason why אהא would be less than ידים is because it was a problem with the דיבור itself. Only called a יד if it leans towards one interpretation, at least a little bit.

But the תוספות רי"ד seems to be saying that it really is a יד, despite being so unclear; just unknown what he meant when he said it. If that is clarified after, then it *can* be a יד (albeit maybe אינן מוכיחות only), even though the words themselves didn't imply anything at all.

C) indeed, אהא really *doesn't* imply נזיר more than תענית

Rather, the phrase of ידים שאינו מוכיחות is לאו דווקא; and אהא + נזיר עובר לפניו is really called ידים שאינן מוכיחות.

8) תוספות – (seems to say this; and thus, seems to retract from what was addressed in the previous תוספות).

To A), proving from אהא that ידים שאינן מוכיחות are *not* ידים and *don't* work.

To B), proving from the דיוק that ידים שאינן מוכיחות are *not* ידים and *don't* work.

To C), proving from אהא that phrases *less than* ידים are not good, but ידים שאינן מוכיחות *are* ידים and *do* work.

תוספות was based on one of two גרסאות in the גמרא in נזיר:

גרסה #1 – אהא = ידים שיאנו מוכיחות, and אהא + נזיר עובר לפניו = ידים מוכיחות

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[132] Such as if he already ate that day.

[133] They even make a דיוק from the גמרא in נזיר to provide support for this.

גרסה #2 – אהא = not even ידים at all, and נזיר עובר לפניו + אהא = ידים שאינן מוכיחות

The first גרסה fits better with approaches **A)** and **B)**, and **the second גרסה** fits better with approach **C)**.

To A) and B), "הרי את מקודשת" probably means "לי," but it is ידים שאינן מוכיחות.

To C), "הרי את מקודשת" really doesn't imply either way over the other one, and thus isn't ידים at all.

The גמרא here seemingly concludes within שמואל that ידים שאינן מוכיחות are *not* ידים.

Yet the גמרא in נדרים (on ה:), from a דיוק, concludes within שמואל that ידים שאינן מוכיחות *are* ידים.

Which one did שמואל really hold?

1) תוספות – no contradiction, since this גמרא is really talking about things which aren't really ידים at all.

Therefore, שמואל really holds as the גמרא in נדרים implies — ידים שאינן מוכיחות *are* ידים.

רמב"ם – may be like this as well:[134] he seemingly says ידים שאינן מוכיחות are good, yet he establishes the case as specifically being with a נזיר עובר לפניו.

2) ריטב"א, רמב"ן – שמואל himself is vague. Either סוגיא was going according to either side in the מחלקת.[135]

Therefore, שמואל really holds as the גמרא in קדושין implies — ידים שאינן מוכיחות are *not* ידים.

3) מאירי – denies the דיוק the question is based on — no, שמואל actually himself holds like רבי יהודה.[136]

Therefore, שמואל really holds as the גמרא in קדושין implies — ידים שאינן מוכיחות are *not* ידים.

If they were discussing קדושין, and then he uses the wrong language (like "הריני אישך"), is that a valid קדושין?

A) שיטה לא נודע למי, מאירי, ראש, תוספות ר"י הזקן – no, invalid קדושין

Seemingly assuming that he must preserve the impression that he is changing her stature and not her changing his [see שיעור #18 and שיעור #19 above].[137]

B) תלמיד הרשב"א, תוספות ר"י הזקן in יש אומרים – yes, valid קדושין

Seemingly assuming there's a requirement of saying she is מקודשת, and he is fulfilling that requirement.

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[134] (Even though the חזו"א had a different explanation in the רמב"ם).

[135] For example, this גמרא here was רב פפא, who held that they are not ידים.

[136] Against תוספות, for example, who made the דיוק that שמואל is against רבי יהודה.

[137] Interestingly, ר"י הזקן was on the other side of the מחלקת earlier, when it was when they were discussing קדושין and they used her אמירה — there, he thought her wording did *not* ruin it. Nonetheless, that one was purely procedural, but this one is substantive.

שיעור #21 – 12/8/16

ו. – Strange קדושין phrases; עסוקין באותו ענין

Are all these languages found in פסוקים?

Most of them seem to be, but some are controversial:

עצורתי –

1) רש"י – quotes his rabbeim – from פסוק in שמואל about דוד המלך's soldiers, about women

רש"י attacks this though, since that means that they hadn't been with women!

2) רש"י – means "gathered with me in the home."

To this, it ends up that they aren't all פסוקים.

However, ר"י – defends the rabbeim of רש"י – they were saying they hadn't had relations with a woman for the past few days — but it means marital relations!

To this, תוספות defends so that they are all פסוקים again.

3) רמב"ם – had the word אסורתי instead (that must've been his גרסה).

To this, it ends up that they aren't all פסוקים.

תפושתי –

1) תוספות ר"י הזקן (first explanation) – from פסוק about the case of an אונס

(This one is strange though, since the פסוק is about rape, not a marriage!)[138]

To this, they are all פסוקים.

2) תוספות ר"י הזקן (second explanation) – means "held inside my home"

To this, it ends up that they aren't all פסוקים.

Why would it matter if these phrases are all based on פסוקים?

Might depend on whether one held **A)** that there is a need for an objective, formal meaning of the word (thus, would all need to be פסוקים), or whether **B)** a subjective meaning is sufficient.[139]

Potential נ"מ

1) אהובתי: based off a מרדכי (in the end of the second פרק), **ב"י** – works, valid קדושין (even though there is no פסוק); whereas **משנה למלך** – doesn't work, invalid קדושין.

2) ר"ף's omission: strangely, the ר"ף leaves out this whole סוגיא.[140]

Why might he have left it out?

Perhaps because this is totally subjective, he therefore didn't bother recording languages which might lose their effectivity in our day and age.

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[138] This question is likely what prompted the second explanation.

[139] This could potentially neatly align with the חקירה mentioned above [see שיעור #19] — whether there is a formal דין of אמירה, or is there just a need for גילוי דעת — in that an objective language would fit nicely with the formal דין of אמירה side, and the subjective meaning would fit with the גילוי דעת side [as was discussed above]. However, although this would fit nicely — not necessarily true, because either side could be explained within either side still.

[140] Interestingly, the ראשונים don't mention this omission at all.

As opposed to the רמב"ם, who *does* quote this גמרא, thus may think there is a need for an objective language somehow.[141]

Within the objective language side, what might be underlying the גמרא's unanswered ספק?

A) Six of the phrases are from מעשה בראשית.

a) For those ones, it may be what is the relationship between natural אישות and halachic אישות.

b) Or else, which words there are essential to the nature of marriage, and which are just side details.

B) מיועדת is also interesting:

c) The ספק could be about the relationship between יעוד and קדושין.

C) תפושתי is also interesting:

d) The ספק could be about the relationship between sexual relations and marriage.

e) Or else, whether "לו תהיה לאשה" has roots in the actual act.

Why is חרופתי its own question, apart from the others? Don't say because it had an answer — so did לקוחתי![142]

(What does it literally mean?

a) Most ראשונים on the תורה – designated for

b) רמב"ן – youth [inferior level of אישות]

c) ראב"ע – degradation

d) חזקוני – language of הפקר)

1) No reason; happened to have been the way the גמרא was taught.

2) ר"ן – this one is stronger.

It is the only one which cannot be used in any other way, and specifically refers to אישות.

(For example, יעוד could be used in other contexts as well).

3) שיטה לא נודע למי – this one is weaker.

It is the only one which specifically means not קדושין.

(This would fit better with ראב"ע's or חזקוני's explanation of the literal meaning).

Potential נ"מ

What is the הלכה with regard to חרפתי is the end?

a) ר"ן – it is a ספק, same as all the other phrases brought here.

b) רמב"ם – works everywhere in the world.

He might be based on understanding חרופתי as the ר"ן above said.

(Though see more analysis on this opinion shortly).

c) שיטה לא נודע למי – not even a ספק outside of יהודה

This is because it is a weaker language to use than the other ספק ones.

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[141] Though I personally doubt it — he couches this whole discussion in saying whatever is relevant in their day and age.

[142] I thought that the simplest answer could be because לקוחתי was the last one in the list, so the גמרא interjected with an answer for that one; and then continued on with חרופתי, and then attempted to solve that one as well.

רמב"ם says that חרופתי works everywhere. Isn't it clear from our גמרא that it is an unanswered ספק?

1) כ"מ – he had a different גרסה which concluded it *is* מקודשת

(This was the גרסה of the ר"ח as well).

2) כ"מ – the גמרא is לאו דווקא, and we really *do* learn the whole world from יהודה

3) רש"י, תוספות, and others – what happened to the גמרא's question of "יהודה ועוד לקרא?" At first, the גמרא assumed the פסוק proved it's a good קדושין; then, seemingly changed, and said only in יהודה, but nowhere else!

These ראשונים answer[143] that the גמרא changed between two opinions within in a מחלקת תנאים:

At first, working within ר"ע's opinion, which held that she is a חצי שפחה חצי בת חורין.

Afterwards, switched to רבי ישמעאל's opinion, which held that she is a full שפחה כנענית.

If רמב"ם was like רש"י and תוספות then, he was paskening off the opinion of ר"ע, who we also pasken like.

According to the **first two answers**, it is based off יהודה. To the **third answer**, it is based off the פסוק.

(There are other ways to understand the switch in the גמרא's ה"א:

a) maybe initially assumed it was a word which was commonly used; and in the end, backtracked

b) maybe initially assumed objective meaning works; and in the end, held subjective)

In the גמרא's conclusion, with regard to the unclear phrases (עצורתי, נגדתי, etc.):

If discussing קדושין – ספק קדושין

If not discussing קדושין – not קדושין

What if they both claim afterwards that they meant it as קדושין?

A) מאירי quoting ראב"ד – not קדושין, since there were no עידי קיום

B) רשב"א and ר"ן – ספק קדושין

[**C)** Perhaps it is קדושין – and you just need עידי קיום on the מעשה, not the דעת]

What might they be arguing over?

ראב"ד is easy to understand — there were no עידי קיום on the דעת. But what do רשב"א and ר"ן hold?

They must think don't need עידי קיום on the דעת; but if so, then why isn't it a good קדושין?

Perhaps they hold the אמירה is actually part of the מעשה.[144] If so, then we have דעת — we believe them afterwards — but we have a ספק as to whether this now counts as good עידי קיום on the מעשה.

What was the מחלקת between רבי יהודה and רבי יוסי, and also the ensuing מחלקת תנאים?

A) Almost all ראשונים – רבי יהודה held it wasn't valid, even if discussing; and רבי יוסי held it was valid if discussing, and then there was a מחלקת within רבי יוסי as to what counts as discussing (and is therefore valid).

B) רשב"א – the מחלקת was within שמואל. Thus, רבי יהודה and רבי align (רבי יהודה says valid if עסוקין באותו ענין), and רבי יוסי and רשב"א align (רבי יוסי says valid even מענין לענין).

The גמרא says we pasken like רבי יוסי.

To all the other ראשונים, that means we pasken באותו ענין; but to the רשב"א, it means מענין לענין.

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[143] רשב"א says similarly, though slightly differently: switching between אמוראים who argued within what ר"ע meant.

[144] [See שיעור #19 above].

One can plug רבי יהודה vs. רבי יוסי into the formal need of אמירה versus גילוי דעת question[145] in one of three ways:

1) רבי יהודה held there is a need for a formal אמירה; but רבי יוסי held only need a גילוי דעת

2) רבי יהודה also held only need a גילוי דעת; however, they argue over the אומדנה of how to determine that דעת

3) רבי יוסי also held there is a need for a formal אמירה; however, they argue over if there can be connectivity between the valid אמירה and a delay of time if there is something binding them still

Once discussing that old distinction:

What does אותו ענין and מענין לענין mean?

A) רש"י and others – אותו ענין = קדושין itself, and מענין לענין = things related to their marriage

This seems to align with the formal need for אמירה side.

B) מאירי in יש אומרים and תלמיד הרשב"א – אותו ענין = their household, and מענין לענין = קדושין of others

This seems to align with the גילוי דעת side.

A variety of other relevant מחלוקות:

What if he talks and she doesn't?

A) רמב"ם, תוספות ר"י הזקן – not good; she needs to say yes

B) מרדכי – still works

What if neither of them talk (but others talked on their behalf)?

A) גרסה of "עם" in מרדכי – no good; he needs to talk

B) גרסה of "שם" in מרדכי – still works; as long as there was context, others talking before them

What if there was just a context, but no talking?

A) רש"י (on נ:) - works

משנה למלך agrees with רש"י.

B) תוספות (there) – doesn't work

מהרי"ק agrees with תוספות.

[145] [See שיעור #19 above].

שיעור #22 – 12/29/16

phrases שחרור and גט; גט by אמירה – ו. - ו:

Is אמירה necessary for גט?

A) תלמיד הרשב"א in רב אב ב"ד, מאירי in יש אומרים – no

(To this, "גיטה" in our סוגיא is לאו דווקא)

B) תוספות ר"י הזקן, רמב"ם – yes, but only מדרבנן [since already clear from the written גט]

C) תוספות, בעל המאור, רמב"ן, רשב"א – yes, מדאורייתא

If yes [i.e. to B) and C)], why? What's the reason?

a) תלמיד הרשב"א in רב אב ב"ד, מאירי in יש אומרים – (isn't necessary)

b) רמב"ם – so it will be a **נתינה בתורת כריתות**

(To this, the main point is that **he must be clear**).

[בעל המאור seems to require אמירה as part of the act, similar to רמב"ם, but even מדאורייתא].

c) תלמיד הרשב"א in ראב"ד, תוספות – so she will be **משלחת ואינה חוזרת**, so she won't return

(To this, the main point is for **her to know**).

Potential evidence:

1) גמרא in קדושין on ו. – "מנא ידעה" implies she needs to know [**proof to תוספות, to c**)]

To רמב"ם, to b) – this line of "מנא ידעה" must only apply to קדושין; a little לאו דווקא

To רב אב ב"ד, to a) – even worse, for every "גיטה" in the גמרא is לאו דווקא

2) גמרא in גיטין on נה. – can inform עדים that it's a גט, and give to her under the guise of a שטר חוב **[proof to רב אב ב"ד, to a), and to רמב"ם, to b)]**

To תוספות, to c) –

A) תלמיד הרשב"א – quoting ראב"ד – case of עסוקין באותו ענין (as for a חרשת, done with רמיזה)

B) תוספות – *by implication,* told the עדים to tell her

Potential נ"מ [between רמב"ם, b), and תוספות, c)]

If he says "הרי זה גיטך" later on: תוספות might think it works, but רמב"ם would say it wouldn't.

What does "לא יהא לו עסק עמהם" mean?

A) רש"י, most ראשונים – for a דיין to pasken

(Many אחרונים say this is the source for a מסדר קידושין at a wedding)

B) רבינו עזריאל – for a regular person to talk to women about קדושין and גיטין

קובץ שעורים – one weakness: how can a person create קדושין without meaning to?

Apparently, something like דברים שבלב אינם דברים, despite the fact that here there wasn't even basic דעת for the חלות (unlike elsewhere where we apply this rule, where there was basic דעת but also a תנאי).

How can the גמרא say that someone who doesn't know רב הונא can't pasken — if he knows רב הונא, then he knows it; and if he doesn't, then indeed, he doesn't know it — but nor does he know this rule!

A) תוספות – not a rule for the דיין; a rule for those appointing him, to ensure they inform him when appointed

(To this, a דיין needn't know every last detail to be a דיין for קדושין and גיטין; nonetheless, he does need to know the common things, as רש"י implies, and the גמרא is saying that this is considered common enough).

B) תלמיד הרשב"א – it *is* a rule for the דיין himself: by other areas of הלכה, knowledge of one part of certain הלכות enables one to pasken within the realm of that which one knows; however, by קדושין and גיטין, which are more חמור, one shouldn't pasken anything until one knows everything. That's the added חידוש of the גמרא.

(This approach would read the גמרא as saying that even though one knows the מחלקת between the תנאים, but just doesn't know how to pasken — not good enough. The גזירה is so far-reaching that even if one knows there is one tricky issue somewhere, one still cannot pasken anything at all about these topics).

Thus, to A) – don't really need to know every last detail to pasken in these areas; **to B) –** one must.

Why doesn't saying "מותרת לכל אדם" work for freeing a שפחה כנענית?

A) רש"י – since still made אסור to others with this action (for example, can no longer be with an עבד)

Why does it work by one's wife then — she's made אסור to כהנים upon the divorce!

a) Nonetheless, still permitted her to most people

b) Didn't make her אסור with this to anyone new (she was already אסור to a כהן as a married woman)[146]

B) תוספות הרא"ש – since real חלות of שחרור is giving up the קנין ממון; the היתר to others only comes about ממילא

C) תוספות ר"י הזקן – since she *isn't* yet מותר to everyone — must first do טבילה!

This is based on the רמב"ם (though other ראשונים argue), who holds that the reason for why there is no תפיסת קידושין on an עבד כנעני is that though he has left the category of a גוי, he has not yet become a full Jew. The רמב"ם thus believes that the second טבילה is a חיוב דאורייתא, and this turns him into a full Jew.

What does "כשתברח ממנו" mean? When the slave runs away from who?

A) רש"י, others – from the גוי

B) ריטב"א – from the Jewish owner (גרסה of "תברח ממני")

Does "אין לי עסק בך" work for גיטין? The גמרא only discusses this with regards to an עבד כנעני.

A) תוספות ר"י הזקן – yes, works for גיטין as well

B) רמב"ם – (leaves this out)

The simple read of רמב"ם is that it doesn't work for גיטין.[147] Why not?

a) מאירי, רשב"א – like "איני אישך" — can't speak about *him*, must be about *her* status

b) מאירי, תלמיד הרשב"א – this is a financial language, and doesn't make sense by a wife

c) ר"ת (as quoted in תוספות) – it only works when ה' wants there to be more קדושה

(What's the logic here? Perhaps that the words themselves mean "I have no competition with someone else who wants you." Thus, by an עבד, the competition — ה' — "takes" him; but by a wife, where no additional קדושה is gained by the divorce, there is no competition to fill in and "take" her.

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[146] I suggested c) – the איסור of a גרושה to a כהן isn't generated because he ceases to be a part of her life (proof — upon his death, she's מותר to a כהן), as opposed to freeing his שפחה, where it *is* due to his removal that her new status is gained.

[147] תוספות ר"י הזקן claims רמב"ם left it out because he had it included already, it was obvious.

שיעור #23 – 1/2/17

מקדש במלוה – ו:

Why doesn't מקדש במלוה work?

A) Mainstream opinion – because he didn't give her anything

Even though being מוחל the loan, in an economic sense, makes her just as much richer as if one actually gave her that same amount of money — nonetheless, in terms of this, he didn't give her something new (just avoiding her having to give him money).

B) ר"ן (on .מז) – because a חוב is not a חפצא of כסף

Potential נ"מ

Giving her a debt which someone else owed to him: to A) – this works, since she receives a new debt she didn't have before; to B) – doesn't work, since not a חפצא of כסף

But the גמרא in קדושין on .מז says that this does work for קדושין!

To defend, ר"ן explains that is only where he specified "for the הנאה of the חוב of others."

What does ארווח לה זימנא mean?

1) רש"י, רי"ף, רי"י מיגש, רמ"ה, רמב"ן, others – it depends on what he calls it –

(Thus, the scenario is one where he said he'll extend the loan she owes him as a way of doing קדושין)

If he says to be מקדש her **with the money** — doesn't work

If he says to be מקדש her **with the הנאה** he caused her — then, it does work

This is because he's giving her a new הנאה, even if not giving new money

What if he uses an in between language?

To restate the above: if he says "הנאת מחילת מלוה," that works; if "מלוה" or "מעות מלוה", that doesn't.

But what if he says **"מחילת מלוה"** — which does that count as?

a) רש"י (in כתובות) – doesn't work [understands as going on the הלואה]

b) תוספות (there) – works [understands as going on the הנאה]

Why does the גמרא use a case of הנאת הרווחת זמן then, and not simply הנאת מלוה?

A) רמב"ן (in one answer) – it is דווקא

This is specifically true by הרווחת זמן, where she will focus on the הנאה; however, if one is מוחל the loan, then she will focus on the money.

B) Most ראשונים (and even רמב"ן in his other answer) – no, לאו דווקא

Technical reasons for why the גמרא said this then:

a) רמב"ן – to teach us about the איסור of הערמת ריבית

b) מאירי, רמ"ה – to teach us a bigger חידוש, that not only is being מוחל a loan considered a הנאה, but even just extending the loan counts as הנאה

2) ר"ת – gives a פרוטה to a בעל חוב of hers to extend her loan, and is מקדש her with that פרוטה

Why say a case of ארווח לה זימנא then, instead of just paying someone to lend her money in the first place?

תוספות – because the language of מקדש במלוה sounded like there was already a debt in existence

3) ראב"ד, ר"ח, רמב"ם – actually gives her money

A) רמב"ם – actually lends her money [148]

(Weakness: doesn't fit neatly with the גמרא's wording of ארווח לה זימנא)

B) ר"ח – she hands him back the money, and then he gives it to her again as a new loan

(Trying to have his cake and eat it too — essentially like רמב"ם, but tries to fit better with the words)[149]

C) ראב"ד – she is about to hand him back the money — she actually has it there before him — and then he tells her she can hold onto it for longer

(Same idea as ר"ח, but employing the idea of הילך, and thereby fitting even better with the גמרא's words)

(רמב"ן, for example, thinks these are all problematic — רמב"ם, since not an old loan; ר"ח, since not really an old loan; and ראב"ד, for this חידוש that money ready to be repaid is considered returned when she says הילך).

The fundamental מחלקת between 1) and 3): whether the pleasure of being allowed to keep something one already has counts as receiving a new הנאה or not.

(Everyone agrees "רקוד לפני" or the like counts as הנאה — but that is because she is gaining something now. The question here is whether the removal of potential pain count as receiving a הנאה now?).

What about buying קרקעות or מטלטלין for an owed debt?

גמרא in קדושין on מז. – seemingly says that it doesn't work for a sale

Yet גמרא in קדושין on כח: – seemingly says one *can* buy a פרה for the value owed for buying a שור, i.e. for a debt! [See also in ב"מ on מו:, on מח., and on סג.]

Does it work or does it not?

1) תוספות, ראש, רמב"ן, רשב"א, others – using a debt *does not* work for a sale; as for the other sources which imply it can —make an אוקימתא of a case where he said "for the הנאה of being מוחל the debt."

This approach cannot work for the רמב"ם, ר"ח, or ראב"ד though. How might they explain this then?

2) ראב"ד (possibly) – in קדושין on מז., it *does not* work, since using a real הלואה, a real loan; however, in the other sources (where it *does* work), those were cases where it was really a מכירה initially, and he can use the debt as he would use חליפין — it's really a *trade* for the item he sold him for the item given now. Thus, considered like a delayed חליפין, not a standard debt.

However, it is worth clarifying that to this, the קנין is really still a קנין כסף, not חליפין; just *similar* to חליפין.[150]

3) רמב"ם – using a debt *does* work for a sale; as for the גמרא in קדושין on מז. –

a) מ"מ – we don't pasken like that גמרא; the other sources argue on this one

b) תוספות ר"י הזקן – we pasken like רבי יוחנן over ריש לקיש (רבי יוחנן holds that מעות are really קונה on a דאורייתא level). With that in mind, all the sources where it worked were uncommon cases, and חז"ל weren't מתקן the idea of משיכה in uncommon cases; therefore, the מעות of the loan was able to be קונה. However, the סוגיא on מז. was going like ריש לקיש.

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[148] רמב"ם alludes to his teachers (referring to ר"יף and ר"י מיגש) here, but says that their explanation isn't worth repeating.

[149] ר"י הזקן likes the רמב"ם, but not ר"ח. Why? Did he think to make this אוקימתא in the case is more דוחק than the רמב"ם? וצ"ע.

[150] [What does this really mean? I think ראב"ד is saying there is a fundamental divide between a debt owed from a real loan, and a debt owed in place of a real object. The debt in the place of a real object counts as replacing the object that was there, whereas a real loan is truly about money. According to this, some other types of owed amounts, such as for נזק, would seemingly align with the מכירה type more than the true הלואה type, and then להלכה, one could acquire items through using that type of debt too; as opposed to שכר שכירות, for example, where the opposite might be said].

שיעור #24 – 1/5/17

מקדש במלוה – ו:

(continuing off the end of last שיעור)

Let's provide a bit more clarity on the מחלקת between the רמב"ם and ראב"ד:

The גמרא in קדושין on כח: has two steps:

Step 1) מדאורייתא, מעות are קונות. However, מדרבנן, one needs to do משיכה to be קונה. If one were to use מעות and then back out before משיכה, then one gets a מי שפרע.

Step 2) דמי שור בפרה דמי חמור בשור — this is an uncommon case, and therefore חז"ל weren't מתקן anything in such a case; thus, מעות are קונה here even מדרבנן.

What is the essential difference between the cases in the first and second steps?

A) רמב"ם, most ראשונים – the first step is discussing a חוב which *is not* מחמת מכר, and the second step is about a חוב which *is* מחמת מכר

The principle here is that מדאורייתא, one is קונה in all situations of מלוה.

B) ראב"ד – the first step is discussing a חוב which *is* מחמת מכר (but one which is not מחמת מכר isn't קונה on any level), and the second step is about a חוב which is מחמת מכר, but where the דמים were unknown

The principle here is that מדאורייתא, one is קונה with a חוב which is מחמת מכר, but not a regular חוב.

What might be the סברא behind such a principle?[151]

נתיבות המשפט – as long as the money is still owed, then the original owner still has rights in his item, and therefore it can be seen as giving that item in exchange for the other one now

In terms of how the רמב"ם dealt with the apparent contradiction between the גמרא in קדושין on כח: and the other sources, we saw two approaches last time:

a) מ"מ – it is a מחלקת between the two סוגיות, and the רמב"ם paskened like one over the other

b) תוספות ר"י הזקן – there is a מחלקת between רבי יוחנן and ריש לקיש, and we pasken like רבי יוחנן that מעות are really קונה on a דאורייתא level. The סוגיא on כח: was going like ריש לקיש,[152] so it need not concern us.

However, there is another approach as well:

c) Rav Shimon Shkop, other אחרונים – in our גמרא on ו:, אביי taught that being מקדש במלוה does not work; however, in the גמרא on מז., רב had seemingly already taught the same thing![153] Therefore, it must be that they were talking about different cases:

On מז., רב was talking about being מקדש with the actual coins that he had lent and she hadn't yet spent — and that didn't work because the כסף wasn't his to use, it is her חפצא.

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[151] [See note 150 above as well].

[152] Because ריש לקיש holds מעות are not קונה מטלטלין on a דאורייתא level, one needs actual נתינת כסף regarding קרקע (which it is truly קונה); but רבי יוחנן thinks any sort of מעות are קונה — no different than the מעות by מטלטלין — and that even includes a הלואה. Rav Soloveitchik showed how this was מדוייק from the רמב"ם's words themselves.

[153] One could potentially deflect this by saying אביי was coming off of רב, and just adding a חידוש about הנאת מלוה.

But on אביי, ו: was talking about being מקדש with the שעבוד of the חוב, and that doesn't work because releasing a שעבוד is not a proper "מעשה נתינת כסף." Accordingly, while this can work for a מכר, which only needs מעות, it cannot for קדושין, which requires real נתינת כסף (hence, the רמב"ם's differentiation as well).

אבני מלואים offers two explanations for how to understand this distinction:

I) אבני מלואים's second explanation – קדושין requires a formal נתינה, whereas a מכר really only requires a practical, bottom-line transfer of net value (in business, that's what we care about).

Don't we learn קדושי כסף from קנין קרקע though?

This works better with the idea that the לימוד was only a גילוי מילתא, not a true comparison.[154]

(The problem with this is that this really doesn't sound like what the רמב"ם was saying; he focuses on the הנאה, which is why the next answer is more likely correct).

II) אבני מלואים's first explanation, most אחרונים – by קדושין, there must be הנאה, and there is no new positive הנאה by being מוחל a הלואה; but by מכר, only a transfer of net value is needed.

(This might be because fundamentally, קדושין is really about the relationship; or else psychologically, that it requires her to feel good about it).

This fits much better with the רמב"ם's words, and also with the רמב"ם in general (מתנה על מנת להחזיר, חליפין, etc.). In fact, the רמב"ם may have even gotten this distinction from those other instances — those things work by מכר (and really most things), but not קדושין.

Though no ראשונים say this, there might be a fourth way to resolve the apparent contradiction:

4) On מז., the case was about קרקע, which requires a formal נתינה, just as קדושין does (and they are even connected through "קיחה" "קיחה") and therefore using a חוב doesn't work; but on כח:, it was about מטלטלין, and since we hold like רבי יוחנן that מעות are קונה on a דאורייתא level, that doesn't require a formal נתינה.[155]

Potential basis: the ירושלמי, as understood by the קרבן העדה,[156] says that while a הלואה doesn't work to be קונה for קרקע, it does work (fully, not even just for a מי שפרע) for מטלטלין.

Why is the גמרא's case of הערמת ריבית (offering a time extension in exchange for her marriage) not real ריבית?

A) ר"ת – because a third party is involved [to his explanation, in the previous שיעור, that it is not the מלוה being מקדש her, the לוה; rather, the מקדש is a third party helping her], and ריבית is only when from the לוה to the מלוה

(Yet still called הערמת ריבית, since she easily might have asked him to do this, in exchange for marrying her, and that would truly be problematic with ריבית).

B) ר"י מיגש – ריבית קצוצה is only when done at the time of the giving of the loan, not at the time of an extension[157]

Nonetheless, why isn't this case at least אבק ריבית? [assuming that is a higher level, a true איסור דרבנן]

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[154] See שיעור #3 above, for example.

[155] To clarify: this is not the same as תוספות ר"י הזקן as explained by Rav Soloveitchik in note 152 above. There, the resolution was that the גמרא on מז. was like ריש לקיש, who we don't hold like; and רבי יוחנן, who we do, thinks that there is no need for a true formal נתינה by קרקע either (the same קנין of מעות is at play by both קרקעות and מטלטלין on a דאורייתא level). Here, however, the resolution is that the גמרא on מז. is like רבי יוחנן (and thus להלכה) as well, and just that the קנין of קרקע is like קדושין and requires a formal נתינה too (and without that, even להלכה, the קנין will not work). ודו"ק.

[156] Though the רשב"א has one interpretation, and the פני משה has another, both of which are different than the קרבן העדה's.

[157] The רמב"ם agrees with this general idea, though the ראב"ד argues.

a) No, אבק ריבית = הערמת ריבית. Accordingly, though one wasn't supposed to do this — because אבק ריבית isn't יוצאת בדיינין, then this still counts for קדושין after the fact.

b) Because חז"ל were only מתקן the איסור of אבק ריבית on common cases, not on cases where normal money isn't taken (like receiving a wife), this case is only הערמת ריבית.

C) רש"י – the woman is not a חפצא to be considered ריבית when "received"

Why not?

a) רשב"א – "אין גופה קנוי" — she is not "owned" by him; there is just a relationship

[Assumption about ריבית: no איסור if no actual קנין (and maybe he holds that ריבית דברים is only דרבנן)]

b) תוספות ר"י הזקן – both of them benefit (he has obligations to her through this)

[Assumption about ריבית: no איסור if both sides benefit, regardless of who benefits more]

(He might be holding like the רמב"ן and רא"ש quoted by the מחנה אפרים, that תרבית בלי נשך, gaining without the other losing, is not considered ריבית).

c) ריטב"א – "קונה עבד קונה אדון לעצמו" – she benefits more than him

[Assumption about ריבית: no איסור if the לוה gains more than the מלוה]

Would there be a valid קדושין it was actually somehow a case of ריבית קצוצה?

For example, if the קדושין were stipulated at the time of the loan, according to the ר"י מיגש above.[158]

ר"י מיגש – invalid קדושין

Another example: what if he lent 4 for 5, and then collected the 5th, and then gave it back to her as קדושין?

A) ריטב"א – valid קדושין

B) מאירי – invalid קדושין

Without going too in-depth, there is a fundamental חקירה about רבית which may be relevant; is רבית:

a) really some form of גזל, or

b) mainly an איסור, even though fairly his money?

אבני מלואים – ריטב"א may hold like גזל, and thus invalid; but מאירי may hold really his (and returning it is more like צדקה or something), and thus valid.

Other potential נ"מ:

1) Is it a לאו הניתק לעשה? רמב"ם – yes; רמב"ן – no (it is like צדקה when given back)

2) Is it the same עשה of השבה, or a new עשה of השבה? רמב"ם – same one; רמב"ן – a new one

3) Is there a חיוב to give the same object back? If גזל – yes; if not – no

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[158] Another example:

אבני מלואים (based off a דיוק in רש"י) – if lend 4 for 5, and then are מקדש with the 5th one (ignoring the מקדש במלוה issue)

אבני מלואים in רש"י (only asked why it's called הערמת ריבית, but not why it doesn't work) – valid קדושין

(The other אחרונים don't think this is a sound דיוק).

שיעור #25 – 1/9/17

מתנה על מנת להחזיר – ו:

The גמרא rejects the first version of רבא's statement; apparently, it was mistaken.

However, unclear why the גמרא couldn't just say that there is a fundamental difference between תרומה and the others: by תרומה, there's a מצוה in the actual giving, whereas by the others, one must make a payment.

When the גמרא said מתנה על מנת להחזיר works by מכר, did it mean when used as a קנין חליפין or as a קנין כסף?

The **רמב"ם** states that מתנה על מנת להחזיר works by a מכר because of חליפין

a) Most אחרונים – this is לאו דווקא; a מתנה על מנת להחזיר can also work for a קנין כסף

b) אבן האזל – no, only through חליפין (thus, if specifically trying to do קנין כסף by a שדה, this won't work)

Why might this be? If it works for everything else, why shouldn't it work as a קנין כסף?

Apparently, while it is a proper נתינה, it does not enrich the other person, which is what קנין כסף is about. This is not giving הנאה; it's a formal נתינה. Thus, it fails as a קנין כסף; unlike by other things (such as תרומה, or פדיון הבן, or אתרוג), where it's enough to just give the חפצא without increasing his worth, and works.

אבן האזל adds that this is the רמב"ם working לשיטתו, in that he holds a חליפין is just a symbolic נתינה.

However, while this is a nice suggestion, it is hard to see here. The גמרא uses a "מנה" in its example, and that is a type of coin; חליפין cannot work through a coin, a מטבע. Thus, when the גמרא said מכר, it *must* have meant קנין כסף, not חליפין, and then the אבן האזל would be wrong.

The mainstream approach is that מתנה על מנת להחזיר works for everything except for קדושין.

Why doesn't it work by קדושין?

A) ריטב"א, רשב"א, תוספות, רב האי גאון – it is a גזירה מדרבנן, since it looks so much like חליפין

רב האי גאון had a גרסה which said this explicitly; רמב"ן agreed to this explanation within that גרסה.

However, תוספות and ריטב"א even read it into our גרסה.

How strong was this גזירה?

a) Most ראשונים – the רבנן uprooted the קדושין

b) שלטי גיבורים – quoting ריא"ז – מקודשת ואינה מקודשת

B) רמב"ן, מאירי, רמב"ם (within our גרסה) – doesn't work even on a דאורייתא level; it is a נתינה, but there is no הנאה

Q: But there is the positive הנאה of her using it during the time while she had it!

A1: ר"ן, רמב"ן – אה"נ, if said about the right הנאה, that works; but if said wrongly, about the item itself, then it doesn't work

A2: Since the case was where the item was a דינר; there is no הנאה of "just having" a coin, since it can't really be used for anything useful. But if there had been הנאה from its use, then that would work.[159]

Why would קדושין need הנאה, unlike everything else?

a) אבן האזל – no, everything else that is done through קנין כסף *does* need הנאה [see above]

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[159] Rav Bednarsh couldn't find anyone who suggested this option, but he considered it a legitimate possibility.

b) קדושין is unique, as seen on ג. — about a relationship, not a formal exchange (either fundamentally, that real הנאה is needed to cement a relationship; or else, psychologically, she won't be convinced to commit without this הנאה).

Potential נ"מ

אבני מלואים, גר"א – if he said to do the קדושין through the הנאה of the usage — to B), the רמב"ן, it would be a valid קדושין; but to A), תוספות, it would not be, since could still be confused with חליפין.

(This isn't really absolute — the continuation of רב אביגדור כהן צדק in the שו"ת רא"ש shows that he holds like תוספות, that it is a גזירה, but he also thinks saying it like this works)

גמרא in נדרים on מח. – a מתנה which cannot be made הקדש by the receiver is not called a מתנה.

גמרא in ב"ב on קלז. – one is not allowed to be מקדיש a מתנה על מנת להחזיר, since won't satisfy the תנאי of "תחזירהו לי."

However, these are in apparent contradiction to our גמרא:

Those sources indicate that a מתנה על מנת להחזיר *is not* a real מתנה, since the receiver cannot be מקדיש it.

Yet our גמרא says it *is* a real מתנה (despite the fact that one cannot be מקדיש it)!

Possible resolutions:

A) ירושלמי in נדרים, רמב"ן, רשב"א, ריטב"א, תוספות הרא"ש (in one answer) – the גמרא in נדרים is לאו דווקא; really, one cannot be מקדיש a מתנה על מנת להחזיר — yet it still counts as a מתנה, despite that inability.

What did that גמרא in נדרים mean then?

a) It was just saying that any מתנה which is not a serious מתנה — in the ירושלמי's words, a "הערמה" — is not a real מתנה [here, however, it was a real מתנה].

b) That was with regard to a special חומרה found by נדרים [here, however, that isn't relevant].

B) Many ראשונים – no, the גמרא in נדרים *is* דווקא; one actually *can* be מקדיש a מתנה על מנת להחזיר.

What about the גמרא in ב"ב which indicated one could not, since the return won't satisfy "תחזירהו לי"?

a) מהר"ם, תוספות רי"ד – he can be מקדיש it, it is just undone at the time of the return (as for ב"ב — that case was specifically by a שור, and thus קדושת המזבח, which is קדושת הגוף and cannot just disappear)

b) מאירי – quoting גדולי הדורות – he can be מקדיש it, but must then redeem it before he gives it back

c) תוספות, תוספות הרא"ש – it is only a temporary status of הקדש

(This might mean either like a), or else like b), or else a third option, where he explicitly stated when he was מקדיש it that it was only for a certain amount of time)

d) תלמיד הרשב"א – he has the ability to rent it out to someone else, and can be מקדיש that money

e) ראב"ד (brought in רשב"א and מאירי) – he can be מקדיש his זכות in the object

How does that הקדש ever leave?

רשב"א (in understanding this ראב"ד) – it doesn't — the owner is stuck with it, and must redeem it himself if he wants to use it

(The big חידוש here is that this would satisfy the תנאי of "תחזירהו לי," even though the owner would end up losing out on a little bit of money).

C) ריב"ב (quoted in the שו"ת in שלטי גיבורים in יומא) – it is a מחלקת הסוגיות. While the גמרא in נדרים understood the story and its conclusion as being literal, our גמרא argued and did not.

(Clearly, this is not the mainstream approach).

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Is a מתנה על מנת להחזיר a real מתנה?

A) ריטב״א, רא״ש – yes; a permanent מתנה, except with a תנאי that it must be given back

Accordingly, one must do a full קנין in order to return the item.

(This is the mainstream understanding).

B) קצוה״ח – no; rather, just a מתנה for a certain amount of time, and then that ownership naturally expires

Isn't that called a קנין פירות?

No, this is a קנין גוף לזמן, which is something different than a קנין פירות.

(קצוה״ח also agrees there is a תנאי — if not given back, then it was never a מתנה — but that is a side point).

Potential proofs:

a) The גמרא in ב״ב said that one cannot be מקדיש it, due to a violation of the תנאי of "תחזירהו לי." What if he didn't say "לי" though, and just said "תחזירהו"? Seemingly, one *could* be מקדיש it (the owner didn't limit it to still be able to be used upon the return, just that it be given back). If so, how could the receiver still fulfill the תנאי of "תחזירהו" — he can't give something which belongs to הקדש! Thus, it must be that a מתנה על מנת להחזיר is really something which expires, and naturally — without a full קנין — goes back.

b) The רשב״א says that the reason a communal אתרוג works for everyone is because each of them owns it partially, each for their own time.

(**נתיבות המשפט, others –** deflect this by saying that each fully owns it, but as a מתנה על מנת להחזיר).

(**Rav Shimon Shkop –** deflected this by saying that maybe שותפין are real owners and thus different).

c) In very similar terms, רבינו אביגדור כהן צדק (brought in the שו״ת רא״ש) seems to say this.

(**חזו״א, others –** deflect this by saying that his continuance shows he really just meant that it is a full מתנה, and that one just has to give it back in the end).

Potential נ״מ:

1) Is there a need for full קנין to give it back?

ריטב״א, רא״ש – yes; קצוה״ח – no

(This is very relevant with regards to giving a קטן a מתנה על מנת להחזיר — the קצוה״ח thinks that works; and the גמרא seemingly saying it doesn't work by אתרוג really means if given to him as a real מתנה).

2) Is one able to be קונה something על מנת להחזיר via a קנין סודר?

To the ריטב״א, רא״ש – yes, why not? But תוספות in ערכין says no, which fits nicely with the קצוה״ח (like a שאילה, which cannot be acquired through קנין סודר).

3) What happens if one is מקדיש a מתנה על מנת להחזיר? [see above]

The גדולי הדורות in the מאירי had said one has to redeem it before returning it (this would fit with the רא״ש and ריטב״א), but the מהר״ם and תוספות רי״ד say that the הקדש disappears at the end of the time (and this really sounds like the קצוה״ח).

4) What if one is מקדש a woman with a complete נתינה with something that he had himself been given only as a מתנה על מנת להחזיר?

To the ריטב״א, רא״ש – it should work, and he just will have to figure out how to fulfill his תנאי; but to the קצוה״ח, maybe it won't work, because he can't give her more than he himself owns, and he thus only gave her something which is a מתנה על מנת להחזיר.

שיעור #26 – 1/12/17

דין ערב ;כהן המסייע ;מתנה על מנת להחזיר – ו: - ז.

Even though מתנה על מנת להחזיר works by תרומה, the גמרא says it's אסור to do, since looks like כהן המסייע בבית הגרנות.

Why is this like כהן המסייע בבית הגרנות though? He isn't doing any work here for the giver!

A) רש"י – by him doing this, he's expecting to receive other תרומה in the future

To this, the problem with כהן המסייע here is that it is quid pro quo; it isn't supposed to be a trade at all.

B) תוספות ר"י הזקן ,תוספות ר"ד – the problem is not with tomorrow — it's with today, this giving itself

To this, the problem with כהן המסייע here is the פגם in the נתינה; the כהן is not receiving all the benefit.[160]

This leads us into a broader question:

What is the underlying issue of כהן המסייע בבית הגרנות in general?

In the גמרא in בכורות, our גרסה [based on רש"י ,רבינו גרשום] says that it is אסור for כהנים, לויים, *and* עניים to be מסייע.

However, רמב"ם – notably leaves עניים off of this list.[161]

With this omission, רמב"ם makes it seem like the issue of כהן המסייע is an impingement of the כבוד and קדושה of the כהנים and לויים.

Additionally, רמב"ם's very formulation strongly indicates this as well.

Moreover, the context רמב"ם places this in — how the כהנים and לויים aren't supposed to ask for these gifts, or grab them, since they are eating from the שלחן ה' — strongly indicates this as well.

But what might be the problem of כהן המסייע to our גרסה, to רש"י's גרסה, then?

It would seem to be that though it is still technically a valid נתינה, it is against the spirit of the law, since he didn't receive all the benefit; namely, it is a פגם in the נתינה.

Thus, regarding the underlying issue of כהן המסייע בבית הגרנות:

A) Our גרסה – a פגם in the נתינה

B) רמב"ם – impinging on the כבוד and קדושה of the כהנים and לויים

Potential נ"מ:

1) The inclusion of עניים in this איסור [see above]:

To רש"י's גרסה – yes; to רמב"ם's גרסה – no

2) Who does the איסור primarily devolve on?

To A) – the בעלים; to B) – the כהנים and לויים

(The language of the גמרא in בכורות seems to fit better with A) — it says "not to give." Fittingly, רמב"ם changes this: he begins with saying that it is אסור for the כהנים and לויים to do this, and only later adds that the בעלים are not allowed to let them do it. Moreover, even with regard to the issue from the side of the בעלים — while our גמרא had the action of the sin in the בעלים's giving, the רמב"ם's formulation is only for them to passively allow the כהנים to help).

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[160] [See גר"א below for a potential נ"מ between these two opinions].

[161] It is likely רמב"ם had the גרסה of the רמב"ן in that גמרא, which did not have the word "עניים." As a matter of fact, this גרסה has an advantage over רש"י's, in that the פסוקים quoted (for example, "שחתם ברית הלוי"), seemingly don't include עניים.

3) The application to מתנה על מנת להחזיר:

רמב"ם could go either way; but תוספות ר"י הזקן, תוספות ר"ד – because of this giving itself [like A)][162]

4) Whether כהן המסייע applies to פדיון הבן:

שו"ת רשב"א, simple read of רמב"ם,[163] גר"א in רש"י – no, it is מותר to use a מתנה על מנת להחזיר for פדיון הבן; but תוספות, ראש, מרדכי – yes, it is also אסור to use for פדיון הבן (just as by תרומה, since also מתנת כהונה)[164]

According to B), what might be the סברא behind this distinction between תרומה and פדיון הבן?

a) פרי חדש – no, the רמב"ם really agrees it is אסור

(This is דוחק, since רמב"ם doesn't sound like that; also, שו"ת רשב"א clearly implies מותר).

b) גר"א (perhaps) in רש"י – the issue is only when there is a next time, that he'll get to keep; but by פדיון הבן, there is no expected next time, and thus no חשש that he is doing it for that one

To this, a נ"מ between the opinions of רש"י and תוספות ר"י הזקן, תוספות ר"ד also emerges:

To רש"י – no issue by פדיון הבן; but to תוספות ר"י הזקן, תוספות ר"ד – אסור by פדיון הבן as well, since he is not receiving all of the benefit.

c) דרך אמונה – there is no קדושה in the חפצא

This is weak for a couple of reasons: רמב"ם sounds like the איסור is on the כהן, and is about an impingement of *his* קדושה; also, why would פדיון הבן have any less קדושה than other מתנות, such as זרוע וקיבה and מעשר ראשון, which also don't formally have קדושה![165]

[**צפנת פענח** (similar) **–** there is no חפצא at all by פדיון הבן (seems to avoid these issues)].

d) Ponevezher Rav – if the real מתנת כהונה is the son [see שיעור #34 below], then the פדיון is just to redeem the son, or a symbolic act to show that he was a מתנה; the פדיון is not the מתנה itself.

This works very well for A) too, and solves for B) — the פדיון is just a technicality, not the מתנה itself, and thus, no איסור of כהן המסייע.

By the case of דין ערב, must the man actually go back and say "הרי את מקודשת לי" to the woman?

A) Most ראשונים – yes

B) One opinion brought in ר"ן – no

What is the reason why an ערב must pay back the מלוה — with what was he מחייב himself?

A) Simple read of the גמרא, רשב"א, others – the receiving of הנאה

(The גמרא in ב"ב says that because of the הנאה that the מלוה relied on him, the ערב was משעבד himself).

B) רמב"ם – the אמירה alone was מחייב him (as long as he was serious about it)

In fact, רמב"ם learns from ערב that one can truly owe money just through with words.

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[162] רש"י is a little tricky here — he was different than תוספות ר"ד there, but he had the word עניים in his גרסה, against רמב"ם.

[163] רמב"ם says only that it works, but not that it is אסור, and therefore sounds like he thinks it is really מותר.

[164] (There is a story in the גמרא which supports this side as well).

Although this opinion is more intuitive, why didn't our גמרא also say explicitly that it is אסור by פדיון הבן?

It could be because at that stage in our גמרא, since פדיון הבן didn't even work בדיעבד, it didn't need to mention this.

[165] To address this point, one could try to distinguish based on the fact that they must still be eaten בדרך כבוד.

To this, why did the גמרא mention anything about הנאה?

Apparently, the גמרא was just using that merely to remove the אסמכתא issue which should apply.

C) רשב"ם – because it is as if he himself received the money

In a sense, the מלוה gave the ערב's own money therefore, acting as his שליח.

To this too, the הנאה mentioned is just to deal with the side problem of אסמכתא.

Potential נ"מ:

1) If a Jew lends money to a גוי with ריבית, and another Jew is an ערב:[166]

To A) and B) – מותר מדאורייתא (the ערב is not a לוה); but to C) – אסור מדאורייתא (the ערב *is* a לוה)

2) Our סוגיא, of דין ערב [not plain ערב] – what is he doing the קדושין with?

To A) – רשב"א, ריטב"א – she is מקודשת because she receives הנאה

But to B) – רמב"ם – he also says הנאה here; yet doesn't ערב work through the אמירה alone?

a) מחנה אפרים – not literally דין ערב; rather, just learn from the side point of the הנאה, which solved the אסמכתא issue by ערב, to קדושין (namely, we learn from there that this is called הנאה).

b) Rav Gustman – in the end, don't really learn anything from ערב to קדושין;[167] קדושין is about הנאה

c) Based on קובץ שיעורים, גרי"ז – he lent her friend, and she owes him money back; then, he is מקדש her with that loan. And מקדש במלוה is a valid קדושין if there is a real הנאה.[168]

To C) – one opinion in the ירושלמי, תלמיד הרשב"א – she is מקודשת because as if she received the money

This leads to a נ"מ of what the language of the קדושין is:

To A), B) – "האמ"ל בהנאת מתנה זו;" but to C) [תלמיד הרשב"א, רא"ש] – "האמ"ל במנה זו"

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[166] Both sides of this question are brought as a מחלקת ראשונים in the ראב"ד on the ספרא.

[167] Once the גמרא introduced the idea of אדם חשוב, this was revealed. (Obviously, this is a radical explanation).

[168] This approach ends up reading a lot into her statement. It's based on a דיוק in the language of "משעבדא ומקניא" though.

שיעור #27 – 1/16/17

דין עבד כנעני ;דין ערב – ז.

In the case of דין ערב, what did she receive? What is she מקודשת with? [see last שיעור]

A) ריטב"א ,רשב"א ,רמב"ם – הנאה

What do we learn from ערב?

a) Maybe that הנאה counts as כסף

b) Maybe that this type of הנאה counts as הנאה

To this, the language used would be "הרי את מקודשת לי בהנאה..."

B) ר"ש ,תלמיד הרשב"א – as if she received the money

(This is based on the ירושלמי).

To this, the language used would be "הרי את מקודשת לי במנה..."

C) פנ"י ,קובץ שיעורים – she owes the money through ערב, and then the קדושין is with the מחילת מלוה

(They have to deal with the fact that מקדש במלוה doesn't work; they try to get around it).

Potential נ"מ [between the major opinions above — A) and B) — about what she is receiving]

1) The language used [see above]

2) If the case weren't about a דינר, but rather about a פרוטה: to A), the רמב"ם, then it probably wouldn't be a valid קדושין (the הנאה in such a case is likely less than a פרוטה's worth); but to B), the ר"ש, it would be valid

3) If מוחל the loan of someone else: ר' עקיבא איגר in his שו"ת — to A), the רמב"ם, maybe it would be a valid קדושין; to B), the ר"ש, it wouldn't be a valid קדושין

4) Is it ריבית קצוצה to lend money on condition that the לוה pay a גוי or pay הקדש more than he borrowed?[169] ריבית דאורייתא – ב"מ in תוספות, since as if one were given the ריבית oneself [this sounds like B)]; but מחנה אפרים – might not be ריבית קצוצה to A); and even if it were, would only be for the הנאה gotten, not the full amount.

5) Is the item an אתנן if a woman says to give someone else a sheep for her to sleep with the giver? To A), the רמב"ם, it likely would not be an אתנן (since she didn't receive that item from him, even if she got הנאה); but to B), the ר"ש, it likely would be an אתנן (since it is as if he gave it to her)

6) The case on :ח of placing the money on a rock: ריטב"א ,רמב"ן – if she were to say to destroy the money, and she also indicates that she really wants to marry him, then a valid קדושין through דין ערב (she got הנאה from him destroying it on her say so); but ר"ש argues, since a בן דעת didn't accept it. (This fits neatly לשיטתם).

However, the רשב"א is like the ר"ש in the גמרא there on :ח, even though like the ריטב"א by דין ערב here!

Thus, might not be a good נ"מ.

Additionally, one could also say for B) that as long as he spends it, it is as if he gave it to her (in fact, this is like one side in the ירושלמי, that the giver is the שליח of the sender).

Additionally, to swing it the other way and defend the רשב"א, it could be that the only time it is considered a significant enough הנאה is when someone else benefits from it, not just by him listening to her words; thus, in a case where he destroys it, no one benefits from it, and there isn't enough הנאה.

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[169] Everyone would agree that this is obviously not a good thing to do either way, and probably constitutes אבק ריבית.

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How does דין עבד כנעני work?

A) רש"י, רשב"א – the giver is a שליח of the man doing the קדושין

(**ר"ח, בעל העיטור –** similar to this, with the addition of the idea of זכייה).

The חידוש is that this works even though the money being given belongs to the שליח.

B) רמב"ם, תוספות ר"י הזקן, ריטב"א – the man doing the קדושין comes afterwards and says "הרי את מקודשת לי"

(To this, the giver was not a שליח at all).

Slightly different formulations though:

1) רמב"ם, תוספות ר"י הזקן – "בהנאה הבאה לך בגללי"

2) ריטב"א – "בכסף שנתן לך פלוני"

C) מאירי, רא"ש – (either of the above options work)

(Based on this, the פנ"י thought that even the others don't really argue. However, the אבני נזר [see below] clearly understood that the first two sides did argue).

The fact that they both parties have דעת here is straightforward to any of the above options.

However, where is the מעשה נתינה?

To A), to רש"י, that is simple: the שליח acted on his behalf

(And the חידוש was just that it was with the שליח's own money, not מקדש's).

To B) though, to ריטב"א, it is more difficult; where is the מעשה נתינה?

a) תוספות ר"י הזקן – the הנאה he is giving her now by enabling her to be allowed to keep the money (since otherwise she would have to give it back).

(To this, the money must still be בעין; if not, it wouldn't work).

b) ריטב"א – because this is learned from עבד כנעני, and by an עבד כנעני there is no need for there to be a נתינה by him (based on רבא on כג.), just a קבלה — so too here, maybe there is only no need for a נתינה by him, just a קבלה (of course, the קבלה must still be לשם קדושין — but still, no need for an actual נתינה by him).

[This would fit neatly with the distinction above between the ways that the תוספות ר"י הזקן and the ריטב"א respectively formulated their שיטות].

אבני נזר – notes that רש"י and ריטב"א seem to match up nicely לשיטתם on כג. –

How does the כסף of אחרים work to set an עבד כנעני free according to the חכמים?

A) רש"י – through זכין לאדם שלא בפניו

(Though רש"י doesn't say explicitly, he'd likely hold that if the עבד doesn't want to go free, he isn't freed. This is the opinion of the רי"ף and רמב"ם).

Clearly, we require a נתינה by the עבד כנעני then, but it is just assumed that he wants this.

B) ריטב"א – not through זכין (even if he stands there and screams, he is still freed)

This aligns neatly: just as there is no need for the נתינה of the עבד כנעני, there is also no need for a נתינה by the man.

The question of whether a נתינה is needed from the one being מקדש or not will have other possible implications:

Other potential נ"מ:

1) Can an עבד כנעני be freed against his will? [see above]

2) Cases brought in משנה למלך (הל' אישות ה:א)[170] –

To the ריטב"א, that no נתינה is required, there seemingly would be a valid קדושין in these cases; but to רש"י, that a נתינה *is* required, it is less clear: is it that we require a חסרון of a פרוטה, but that the שליח's חסרון counts as his (and thus, there wouldn't be a valid קדושין); or is it that there is no need for a חסרון at all, as long as there is still some מעשה נתינה (and there still would be a valid קדושין, and not a נ"מ)?

3) If there is דין עבד כנעני when a גוי gives the money –

Reb Chaim – no, invalid קדושין, since a גוי doesn't have שליחות (this would fit with רש"י); but קצוה"ח – yes, valid קדושין, since the דין of עבד כנעני doesn't work through שליחות (this would fit with the ריטב"א).

(Context: there is no שליחות by a גוי. Thus, when doing a קנין סודר with a גוי, one cannot write in the שטר that the עדים did the קנין סודר for the גוי,[171] for that would be akin to acting as his שליח. However, even if they don't write it — does it work if they actually do it for him still? סמ"ע – no, because it would use שליחות; but ט"ז – yes (קצוה"ח explains – since working through דין עבד כנעני, not שליחות).

[170] Some examples: the רדב"ז's case of him throwing something worth half a פרוטה when thrown, but worth a פרוטה upon landing; or him giving a stolen item and her being קונה it through a שינוי רשות; or giving an item which is אסור בהנאה when she is a חולה שיש בה סכנה, and to her it is therefore very valuable; etc.

[171] The normal practice in the days of these אחרונים was to have the קנין occur by using the סודר of the עדים.

שיעור #28 – 1/16/17

שיטת הרמב"ם ;דין עבד כנעני – ז.

(continuing off the end of last שיעור)

To clarify, in terms of whether רש"י and ריטב"א actually disagree:

Does the ריטב"א disagree with רש"י?

A) מאירי ,רא"ש – no (both דינים are true, and working under the rubric of דין עבד כנעני)

B) ריטב"א himself – yes — רש"י's case is so obvious that one doesn't even need דין עבד כנעני

(Thus, not really much of a מחלקת at all — just about what's obvious and counts as דין עבד כנעני).

Does רש"י disagree with the ריטב"א?

A) פנ"י – no (like רא"ש and מאירי)

B) אבני נזר – yes — רש"י holds that the ריטב"א's case lacks the necessary נתינה from the מקדש himself

If one assumes like the אבני נזר, that there is this מחלקת about the necessity of a נתינה, many potential נ"מ arise:

Other potential נ"מ: [aside from by קדושין and the other three mentioned at the end of the last שיעור]

4) שליח לדבר עבירה (for example, doing a קנין on שבת) –

To רש"י, it shouldn't work (since working through שליחות, to which a דבר עבירה is an exception); קצוה"ח – but to the ריטב"א, it should work (since דין עבד כנעני doesn't work through שליחות).

5) ריבית (a third party is allowed to pay ריבית, but does this count as a third party?) –

Oversimplifying: to רש"י, this might be a problem, since through שליחות; but to ריטב"א, perhaps allowed.

To highlight and clarify a point within this, whose כסף/סודר was it truly before it went to the אדון/אשה/מקנה?

To רש"י, either –

a) goes from the third party to the נותן, and then goes to the מקבל through שליחות of the נותן; or

b) alternatively, might just go from the third party to the מקבל (and no need for a חסרון of the נותן's)

To ריטב"א –

c) It goes directly from the third party to the מקבל (with no need for a נתינה at all)

Based on this, another potential נ"מ arises:

6) קנין סודר to acquire from הקדש –

שו"ת רשב"א, תומים – no, that's מעילה; but קצוה"ח – yes, no issue

תומים might fit with רש"י — because דין עבד כנעני works through שליחות, and therefore the third party first gives it to הקדש, and only then gives it to the מקבל on behalf of הקדש —that constitutes מעילה.

[This is working within a) above in רש"י, not the alternative option, b)]

But קצוה"ח understands דין עבד כנעני like c) above, without שליחות, and thus it works even by הקדש.

The opinion of the רמב"ם:

In explaining these cases, the רמב"ם has numerous strange formulations:

1) Regarding דין ערב – in הל' מכירה יא:טו, it seems like ערב works through אמירה alone; yet in הל' אישות ה:כא, he makes it sounds like it works through הנאה. Which one is it?

2) Regarding דין עבד כנעני – in הל' אישות ה:כב (assuming תוספות ר"י הזקן had the correct explanation in the רמב"ם), דין עבד כנעני works through her receiving הנאה; but by actual עבד כנעני, nothing to do with him receiving הנאה!

3) Regarding דין שניהם – aside from the fact that the רמב"ם puts דין שניהם before דין עבד כנעני (unlike the גמרא's logical order, of it following the other two), it is also not really parallel to the other two (here, he discusses the הנאה about of the receiving, not the giving), even though it is ostensibly based upon them!

Before returning to these, let's clarify something about the case of דין שניהם:

In דין שניהם, what does the מקדש actually say? What is the הנאה being received?

A) רמב"ם – "הרי את מקודשת לי בהנאת מתנה זו שקבלתי ברצונך" (in short, הנאת קבלת המתנה)

רשב"א – asks two questions on this:

Q1) not parallel to דין ערב and דין עבד כנעני which it us based off, where it is the הנאת נתינה [see above]

Q2) הנאת קבלת מתנה is only by an אדם חשוב; and moreover, only according to רב פפא, not רבא (who was unsure about that case, yet himself said דין שניהם).

מ"מ – defends from this second question – when *she* actually gives it to him, like by an אדם חשוב, then the הנאה must override the loss she suffers — and that is only by an אדם חשוב, and only according to רב פפא; but when she doesn't personally lose anything, like in the דין שניהם case, then she would get הנאה (even to רבא) from the קבלה of anyone she likes (whether an אדם חשוב or not).

B) רשב"א – the third party gave כסף on behalf of the מקדש to the מקדש (which counts as giving to the אשה)

(That this works is very interesting, and some אחרונים say that is why רמב"ם avoided it).

Potential נ"מ

An apparently simpler case of דין שניהם, yet not in the גמרא:

The גמרא's case: M1 to M2, on behalf of W being married to M2

Simpler alternative: M1 to M2, on behalf of W being married to M3

Why did the גמרא leave out this case?

a) תוספות רי"ד – the גמרא wanted to teach us a bigger חידוש, where the very person receiving the money could also be the מקדש

(But this simpler case certainly would work as well).

b) Perhaps רמב"ם – the גמרא specifically chose its case, because this case wouldn't work

Why not? Because the מקדש [M3] didn't do anything to give her [W] הנאה (at least very directly, even if his agreement to do קדושין enabled the other person to keep the money).

To the רשב"א, however, this would work, since not about הנאת קבלה.

Moving on in the גמרא, before returning to the רמב"ם:

What does "וכן לענין לממונא" refer to? [1 – דין ערב; 2 – דין עבד כנעני; 3 – דין שניהם; 4 – אדם חשוב]

A) רש"י – 1 , 2 , 3 [but seemingly not 4]

Why wouldn't the case of אדם חשוב work by ממונות?

a) רמב"ן, others – אדם חשוב only works when there is an additional הנאה (i.e. that he is also marrying her)

b) ר"ן – להלכה, רש"י would agree 4 works by ממונות; however, since it was רבא who said "וכך לענין ממונא," and רבא personally was מסופק about 4, then רבא obviously couldn't have meant to include אדם חשוב

(To this, רש"י is the same as the next opinion) –

B) גאונים, ר"ח (quoted by ריטב"א), ר"ן – 1 , 2 , 3 , 4

C) רמב"ם – 1 [seemingly not 2 , 3 , 4]

The רמב"ם never clearly brings "וכן לענין ממונא" at all; only sort of does by 1, by דין ערב.

Q1: Textually, what basis might רמב"ם have had to not apply this line of the גמרא to the other cases?

Regarding 4, אדם חשוב – he may have understood like רמב"ן for רש"י [needs more to be real הנאה]

But what about regarding 2, דין עבד כנעני, and 3, דין שניהם?

a) Maybe אה"נ, he really *did* apply this to 2 and 3 as well. רמב"ם does say by קנין סודר that the עדים are allowed to give their סודר, so maybe he really did apply דין עבד כנעני to ממונות, even if somewhat unspoken. As for דין שניהם, maybe once he wrote ערב and עבד כנעני, he felt it was included as well.

(This approach would then make רמב"ם exactly like רש"י overall).

But the simple read is that רמב"ם thought it only applied to 1, דין ערב.

b) רמב"ם may not have had "וכן לענין ממונא" in his גרסה at all — the ר"ף seemingly didn't either;[172] and he brought דין ערב because there is a separate גמרא in עבודה זרה which uses דין ערב by ממונות (which happened to be רבא too)

What if the רמב"ם *did* have our גרסה though?

c) Maybe he thought that the גמרא in עבודה זרה was what our גמרא was actually referring to, since there it is רבא there too; if so, because that גמרא was only about דין ערב, then this line must have been as well.

Q2: Conceptually, why might 1, דין ערב, apply to ממונות, but not the other דינים?

We'll try to address this question now, along with the previous issues in the רמב"ם.

Overall, four difficult points in the רמב"ם:

P1) the inconsistency in how דין ערב works

P2) the inconsistency in how דין עבד כנעני works

P3) the lack of parallel (קבלה in lieu of נתינה) to דין ערב and דין עבד כנעני by דין שניהם (as well as the strange order)

P4) his פסק that "וכן לענין ממונא" applies only to ערב

How might we address these issues?

Approach #1: everything is לאו דווקא

(This is *very weak* — how could he possibly have all these לאו דווקא formulations in the same context?!)

How would each be solved?

Regarding P1) – like מחנה אפרים, that it was learned from a side problem of אסמכתא by ערב

Regarding P2) – a) really meant like the ריטב"א,[173] or else b) learned a side point from עבד כנעני [that this doesn't need a חסרון] (and the הנאה is obvious — she receives money by agreeing to his קדושין)

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[172] At least, the ר"ף didn't as the ראשונים quote him; though in our text, they insert it in parentheses.

[173] This is highly unlikely, since רמב"ם says it works through שליחות.

Regarding P3) – לאו דווקא regarding the language (make it parallel to the others) and regarding the order

Regarding P4) – really meant like רמב"ן's explanation of רש"י regarding אדם חשוב, and relied on other places to cover the others

But obviously, this is not very satisfactory.

Approach #2: Based on אור שמח – קדושין has a unique דין of הנאה (based on מתנה על מנת להחזיר)

How would each be solved?

Regarding P1) – actual ערב works through אמירה; but דין ערב by קדושין is through הנאה

Regarding P2) – actual עבד כנעני works through שליחות; but דין עבד כנעני by קדושין is through הנאה

Regarding P3) – actual דין שניהם is not through הנאה; but by קדושין, it is through הנאה

Regarding P4) – ממונות depends on כסף, while קדושין depends on הנאה; thus, *none* of these special דינים (which work through הנאה) can apply by ממונות. [As for why דין ערב uniquely *does* apply to ממונות — that is based on the גמרא in עבודה זרה (perhaps because the מחילה of a הלואה counts as כסף for ממונות)].

Approach #3: גרי"ז – קדושין needs both כסף and הנאה

How would each be solved?

Regarding P1), P2), and P3) – the כסף component is learned from דין ערב, דין עבד כנעני, and דין שניהם; but the רמב"ם fills in where there is also the requisite הנאה in each case.

Regarding P4) – רמב"ם is like רמב"ן for רש"י; as for the other two, he didn't bother speaking them out — fundamentally, these ideas are all ממונות ideas, and רמב"ם didn't have to fill in anything for us there.

To summarize, between the אור שמח and the גרי"ז, there are two totally different ways of looking at the רמב"ם:

A) אור שמח, questioner to the גרי"ז – קדושין is totally different than ממונות, and doesn't need a formal נתינת כסף

B) גרי"ז – קדושין needs כסף of הנאה (in other words, a regular קנין כסף plus הנאה)

Potential נ"מ

דיני ממונות by אדם חשוב and דין שניהם: אור שמח – doesn't work (not considered נתינת כסף); but גרי"ז – works (those count as נתינת כסף [and there also happens to be הנאה, which is not important by קדושין])

The אור שמח seems to be the better explanation in the רמב"ם himself.

But the גרי"ז seems to be the better in the גמרא itself (since it actually learned קדושין from these דינים).

How would אור שמח deal with the גמרא?

a) the גמרא isn't being so exact, to actually learn from these דינים; rather, just drawing a parallel.

b) Rav Gustman – רבא himself hadn't known this, since he didn't know the דין of אדם חשוב; but once we had אדם חשוב teach that it is all about the הנאה and the relationship, then didn't need ערב or עבד כנעני per se.

שיעור #29 – 1/23/17

טב למיתיב טן דו מלמיתיב ארמלו – ז.

What does "טב למיתיב טן דו מלמיתיב ארמלו" really mean?

Here, רש"י explains it locally — she needs only a small קנין, like ערב (that's the "כל דהו").

However, this term comes up four other times in ש"ס:

1) מא. on קדושין – a woman who sent a שליח without having seen her future husband before — no issue of ואהבת לרעך כמוך (while a man might reject a wife he marries blindly — a woman will not, due to טב למיתיב)

2) קיח: on יבמות – giving a woman a גט when she isn't around, using the principle of זכין לאדם שלא בפניו, when there is fighting in the marriage — doesn't work (since not a זכות for her, due to טב למיתיב)

3) עה. on כתובות – if someone made a תנאי about the other person in the marriage not having מומין or נדרים, and then they have, but they can be removed — if the מום is on a woman, then invalid קדושין; but if the מום was on the man, then still a valid קדושין (due to טב למיתיב)

4) קיא. on ב"ק – if a man dies and leaves his wife as a יבמה to his brother who is a מוכת שכין — still a valid זיקה (since she would still have wanted this situation, due to טב למיתיב)

Again though — what does this really mean? Is a woman really happy to marry anyone? Perhaps if he was the last person around — but generally, that isn't the case!

In short — do these sources really suggest that she is satisfied with any husband?

A) שבות יעקב – yes [174]

B) בית הלוי – no

If not, then how would each source be interpreted?

Regarding 1) – תוספות there (discussing the איסור to marry off your daughter as a קטנה) says that even though there is the idea of טב למיתיב, that is only true by an adult woman who sent a messenger; by doing so, she has shown she isn't מקפיד. But a קטנה might not want the husband you marry her off to.

(To this, one might say that טב למיתיב applies only once a woman has in some shown herself not to care; however, that isn't the default).

However, the רשב"א answers why it is אסור to marry off a קטנה despite טב למיתיב differently: the reason why a קטנה is different than a גדולה is because a קטנה might hear something bad about the husband, and be swayed by that לשון הרע, and won't be happy to marry him any longer.

(To this, fundamentally, even a קטנה has טב למיתיב — she'd want to be married to anyone, but she can be fooled by someone else into thinking that she doesn't want it).

This fits well with the רשב"א on ה. as well:

תוספות – not called בע"כ of the girl when her father marries her off, since she probably wants it

Q: ריטב"א, רמב"ן – but he can even marry her to a מוכת שכין, who she certainly doesn't want!

A: רשב"א – she even wants a מוכת שכין (even if kicking and screaming), due to טב למיתיב

Thus, רשב"א sounds like it really is something fundamental to all woman, that (at least initially) they'd be willing to marry anyone. [תוספות works for the בית הלוי, but רשב"א aligns with שבות יעקב]

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[174] His case was where it turned out that the husband was impotent, and then ran away, and the woman was left with being an עגונה. The שבות יעקב said that unfortunately nothing could be done, due to טב למיתיב.

Regarding 2) – perhaps קטטה isn't the biggest deal — a fight doesn't mean that they don't want to be married. Moreover, if they are already married, then maybe it is worthwhile for her to continue to stay married to him. But that doesn't mean that even from the outset she would've wanted to marry anyone.

Regarding 3) – in the end, the מום can be removed; if so, it doesn't really matter that he once had them (though apparently, it bothers men when in the reverse case). Thus, not a proof she'd marry anybody.

Regarding 4) – what is the "כל דהו" here? רש"י (as understood by the תרומת הדשן) – since the first husband was good, it was worth the chance that she might fall to the יבם, to the מוכת שחין.

(To this, there is no proof that she would initially be willing to marry anyone).

However, מהר"ם – referring to the יבם, the מוכת שכין (he himself is a "כל דהו").

[Nonetheless, מהר"ם himself still says that a מומר does count as less than a "כל דהו." If so, he personally would agree with the בית הלוי that she isn't initially willing to marry *any* husband; his standard of who ranks as less than a "כל דהו" is just different than what רש"י's ostensibly is].[175]

בית הלוי goes further, and draws a distinction between this case and the שבות יעקב's:

In the שבות יעקב's case, because the פגם was in the husband himself, it was a מקח טעות, which automatically is not binding. But this case in ב"ק, where the פגם was not in the husband himself, was merely about a תנאי; and a תנאי can't be binding if left unspoken (unless exceedingly obvious), as we say "דברים שבלב אינם דברים" (for ex: by someone who sells his house with intent to go to א"י).

How do we pasken?

להלכה, the mainstream opinion of modern-day poskim (Rav Moshe Feinstein, and others) is that if there was a serious מום present at the time of the קדושין (*not* one which only came later), and it was known to the man and was left undisclosed — that is a מקח טעות, and the קדושין is invalid.

Thus, fundamentally, we pasken like the בית הלוי over the שבות יעקב.

Overall, this might depend on what טן דו itself refers to:

If about enabling her to have זנות covertly – any husband is good, even if he has other issues.

If about company – then must be a normal husband (even if ugly or other small issues — still qualifies, since all people have deficiencies); but if serious problems (such as with having relations), invalid קדושין.

Anyhow, this all is still working with the basic premise of טב למיתיב.

However, some people [176] tried arguing that טב למיתיב doesn't apply nowadays.[177]

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[175] In this particular מחלקת, to highlight one potential נ"מ: if the יבם were a מומר — to רש"י, it might be a valid קדושין still, since the first husband was still good [however, בית הלוי – based on רד"ך —no, if he is worse than a מוכת שחין and not even worth anything, then even רש"י would agree that it is not a valid קדושין now]; but to מהר"ם, he says that this is worse than a מוכת שכין — it is אסור to even live with him — and therefore not a valid קדושין.

Another potential נ"מ: if the first husband himself turns out to be a מוכת שכין, and she was unaware of it — to רש"י, she may not have agreed to marry him, and the קדושין would be invalid; but to מהר"ם – it would still be a valid קדושין.

(Regardless, either explanation can work with the בית הלוי fundamentally, with רש"י's generally being easier).

[176] (For example, Rabbi Rackman).

[177] Different reasons were generated; some examples: a) only true in the old days, when women were less self-sufficient in society; or b) when woman had no way of doing proper birth control. Eventually, more radical סברות were suggested, such as c) stating that any husband who doesn't give a גט is "abusive" [far from simple], and also that he must have always been this way, even at the time of the קדושין [which seems to deny that he had free will and might have become this way later].

Rav Soloveitchik attacked this vehemently. He argued back that the חזקות which חז"ל said about nature were intrinsic and ontological — טב למיתיב included — and that this was כפירה.

Was Rav Soloveitchik serious about this?

a) Perhaps. After all, it seems to fit with his approach generally, that everything in ש"ס is fundamental and philosophical, and certainly not tied to specific times. Thus, he may have meant it as he said it.

b) But many of his תלמידים — Rav Schachter, Rav Lichtenstein — said they didn't understand how this could be true about *all* חזקות, when some indeed change (from the גמרא itself, here is one clear example: "חזקה שאין אדם מיעז פניו בפני בעל חובו," yet חז"ל instituted שבועת היסת).

Therefore, they instead thought he was partially exaggerating, mainly because he didn't appreciate the flippant attitude held by these people towards the מסורה, and also because it was a question related to אשת איש.

שיעור #30 – 1/26/17

ז. – Link between הקדש and קדושין

In the גמרא's conclusion, is there a פסול of חצי איש?

A) ראב"ד – yes, and comes to exclude a חצי עבד חצי בן חורין

(This question was posed by the גמרא itself; ראב"ד assumes it answered one way [namely, doesn't work]).

(רשב"א argued on ראב"ד though; he thinks that case *does* work in the end, based off of different גמראs)

B) רשב"א – yes, to exclude if he explicitly said, "half of me is marrying you;" this is not a valid קדושין

אבני מלואים – but if half of a person owns something, then all of him owns it!

(He brings proof from the ריטב"א later on, by an עבד כנעני's property going to the אדון, since his property).

Therefore, אבני מלואים concludes that רשב"א must hold that קדושין isn't a regular קנין, but rather, it is more about the איסור (which fits well with אבני מלואים everywhere [see שיעור #4, for example]).[178]

C) רמב"ם (to the אבני מלואים) – no, no such דרשה at all

(To this, it would be a valid קדושין in both of the above two cases).

Rav Gustman – (based off the אבני מלואים above) – perhaps רמב"ם argued because he thinks קדושין *is* more similar to other קנינים.

The גמרא seems to assume that there is a connection between הקדש and קדושין.

(As **תוספות** points out, there was a special פסוק by הקדש teaching this idea of קדושה spreading; how else could we extend it to קדושין?)

This ties in to how seriously we take the fact that the לשון דרבנן for this stage of marriage is קדושין. It is more than just a regular איסור; rather, it is some sort of consecration for a higher purpose of עבודת ה'.[179]

(However, תוספות limits this somewhat, restricting it to which language one actually uses. The פנ"י, for example, assumes the fundamental link to הקדש, but disregards the limitation of any specific לשון of קדושין).

However, ריטב"א has a different approach to תוספות's question about why קדושה might've spread by קדושין too:

On this מחלקת between רבי יוסי ורבי שמעון and רבי מאיר ורבי יהודה, the שיטה מקובצת has two explanations for the basis of the opinion of רבי מאיר ורבי יהודה (i.e. קדושה only spreads when one is מקדיש a דבר שהנשמה תלויה בו):

a) a דרשה; or else

b) a סברא

ריטב"א here first assumes it is a סברא, and one which extends to קדושין as well [and this extension stems from the fact that it too is an איסור, even if not uniquely like הקדש].

Alternatively, ריטב"א says the extension was with a בנין אב [again, without a unique link from הקדש to קדושין].

Regardless, it is clear that the ריטב"א avoided this idea of רש"י and תוספות that קדושין is really a type of הקדש.

Overall then, this seems to be a legitimate חקירה: how serious is the comparison between קדושין and הקדש?

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[178] However, it should be noted that the קובץ שיעורים disagrees, and thinks the רשב"א can be defended in another way.

[179] To be clear, this is obviously not the same thing as giving an item to הקדש; rather, it would be a different type of הקדש. Additionally, the metaphor of a marriage regarding the בני ישראל and ה''s relationship (in particular via the בית המקדש) is revelatory as well.

Other potential נ"מ:

1) The גמרא in נדרים on :ו, and its question of whether or not there is a יד to קדושין:

One would seemingly assume not; after all, there is a special פסוק by נדרים.

Thus, תוספות explains this side as stemming from קדושין being like הקדש.

However, ר"ן says it'd merely be learned through a מה מצינו.

2) The גמרא in נדרים on :כט, and its discussion of whether or not קדושה can be פקעה בכדי:

Simply read, it would seem קדושין is a type of הקדש (it says קדושה can't be פקעה בכדי, just as קדושין can't).

However, ר"ן notes that it is a מחלקת; and according to אביי, who thinks קדושה *can* be פקעה בכדי, then the reason why קדושין cannot just disappear is because of the power of the קנין in it.

(If so, one can say the whole comparison is only between the קנין components of הקדש and קדושין).

3) The גמרא in קדושין on .נב, and why the קדושין is invalid if he is מקדש her with a stolen item:

Q: תוספות הרא"ש – what's the חידוש of the גמרא? Obviously the קדושין isn't valid; he doesn't own the item!

A: תוספות הרא"ש – one might have wondered why חז"ל didn't say that there should a קדושין מדרבנן here, when there was no ownership of the גנב, as a גזירה to a case when he had actually been קונה it; thus, the גמרא answers that just as they weren't גוזר for this by הקדש, they weren't גוזר by קדושין either.

(This seems to be assuming that הקדש and קדושין are strongly linked)

(One could have read the גמרא simply though, without a significant חידוש, as saying that there is just no קדושין here because the גנב did not own the item).

4) If a שליח for someone else's קדושין mistakenly says "לי" and marries the woman:

גר"א, רא"ש – just as הקדש cannot work through a טעות, neither does this (fits with the strong link side); the other side might argue

Even if there is a strong link between קדושין and הקדש, does it matter which language he uses in the קדושין?

A) תוספות – yes; it is restricted to the language of "מקודשת"

B) פנ"י – no; once the whole concept of קדושין is related to הקדש, then the wording used should be irrelevant

(There are two גרסאות in רש"י — the one תוספות had, which implies as תוספות held [as תוספות notes], and one which had "לשון קדושין היא," which might imply like the פנ"י).

תוספות uses this to explain why the קדושין doesn't spread in the upcoming case of "...חצייך בפרוטה," even though she has דעת in that case.

What would be the סברא for תוספות's limitation?

a) קובץ שיעורים – there are two separate tracks for קדושין: a) הקדש and b) קנין. Either process leads to the same result (both generate both components) — but nonetheless, there are two distinct ways to reach that result, and there are נ"מ. This is one: if doing a process of הקדש, then it comes with the ability to spread; if קנין, it doesn't. Thus, of course there is this restriction based on the language used.

b) שער המלך – not willing to go that far, or even to say that קדושין is a type of הקדש. Rather, תוספות merely meant that by having chosen to use this language of הקדש, that is his way of saying that he wants the קדושין to externally resemble הקדש, and that it should spread (he really meant all of her).

(To this, it is all really just a technical distinction about what a person's intention was).

(However, the weakness with this approach is that it assumes people actually mean this).

Despite everyone agreeing the קדושה spreads by an עולה if a דבר שהנשמה תלויה בו, it doesn't spread by קדושין.

Why not?

From the גמרא itself, it seems to be because she didn't give her דעת. "דעת אחרת" can prevent this spread.

But why is this problematic here? She agreed to get married! She *does* have her דעת then, and it should spread! Just as when the owner is מקדיש half his animal, and no one stops it, the קדושה spreads to all of it; so too here, once she does the קדושין on half of herself, why doesn't the קדושין spread to all of her?

A) קובץ שיעורים – no — half of her objects to the other half

(This is very strange).

B) אבני מלואים – no — she isn't the subject, she is the object; thus, unlike the owner of the animal, and accordingly, it can't spread. She can only protest, but she doesn't *do* anything, so it doesn't spread.

(He references the ר"ן in נדרים, who explains the mechanics of קדושין as her enabling him to do it to her).

C) רשב"א – אה"נ, really it should spread; nonetheless, it doesn't work for a separate reason: by her having it spread, that would be an issue of "כי תלקח," and accordingly the קדושין is invalid

(Interestingly, this is the opposite of the אבני מלואים — she is *too* involved, and thus she ruins the קדושין).

D1) ר"ח – while he wants it to spread, she does not want the קדושין

(Psychological – when she heard half, she didn't agree to *any* of it; she didn't take him seriously)

D2) ריטב"א, תוספות ר"י הזקן – while he wants it to spread, she only wanted half

(Psychological – when she heard half, she only heard that much, and that was all she agreed to)

E) תוספות ר"ד – whenever there are two opinions, then the idea of פשטה doesn't apply

Why not?

Maybe similar to D2: both parties must understand what the other is saying; a communication issue.

Within the רשב"א's approach, why is it considered that she did it? After all, the woman always needs to give her דעת, but it is still the man who is doing it!

Here's a new חקירה: is the idea of פשטה –

A) a function of the מעשה, the action (in other words, he really *was* מקדש all of her); or

B) a function of the תוצאה, the result (in other words, he really was מקדש only half of her, but then it spread)?

With this in mind, the רשב"א appears to only fit within B), the תוצאה. The first step is history; now, he is doing nothing (no new נתינה or אמירה), and she is apparently taking the more active role.

However, the אבני מלואים seems to be assuming the opposite: there is no פשטה on her side since she isn't involved in the מעשה at all; she's an object here, not a subject, and thus unlike the owner of the עולה case

Other potential נ"מ:

1) If a partner is מקדיש one half, does it naturally spread to the other half when he acquires it later on?

Our גרסה in the גמרא implies it doesn't, since it said that he needs to be מקדיש the other half as well.

Why?

a) פנ"י – the קדושה cannot spread at a later point

b) אבני מלואים, תלמיד הרשב"א – since it was קדושת דמים, it doesn't spread; only קדושת הגוף can spread

But מאירי has one גרסה that implies it spreads anyhow, even without him being מקדיש it again.

Within our גרסה, according to the פנ"י, it sounds more like A); after acquiring the other half, the קדושה does not spread on its own. To the תלמיד הרשב"א and אבני מלואים though, as well as to the other גרסה brought in the מאירי, it seems more like B) — קדושה spreads on its own, if it's the right sort of קדושה.[180]

[180] To this, isn't the אבני מלואים on the other side of this חקירה than he was just above? See note 182 below.

שיעור #31 – 1/30/17

דיחוי; קדושין Questions about segmented; פשטה קדושתה – ז. - ז:

(continuing off the end of last שיעור)

To clarify the חקירה mentioned last time, before exploring additional נ"מ:

Is the idea of the קדושה spreading:

A) a function of the מעשה itself (practically, it is part of his initial action itself; it doesn't spread on its own)

This can itself be understood in one of two ways:

a) as a סברא (he really meant all, even though he only said half); or

b) as a גזירת הכתוב (stating that being מקדיש half of it counts as being מקדיש all of it]); or is it

B) a function of the תוצאה (practically, that once the קדושה is there, it spreads on its own)

More potential נ"מ:

2) How to understand the מ"ד which holds "גמרו" by a שפחה חרופה:[181]

אבני מלואים – this is exactly the דין of פשטה (fits well again with the תוצאה side); but גרי"ז – גמרו is a totally different principle than פשטה (this fits well with the מעשה side).

3) The restriction of תוספות that only the language of מקודשת might spread:

(This fits well with the מעשה side, but not if about a תוצאה).

4) The problem of דעת אחרת [see last שיעור]:

רשב"א said it would really spread, but is an issue for a different reason, of "כי תקח" (this fits well with the תוצאה side); but others (ריטב"א, ר"י הזקן) explained that she really only meant half, or they both only meant half (תוספות רי"ד), and therefore it couldn't spread (this fits well with the מעשה side within the סברא side. However, אבני מלואים [see note][182] could fit with the מעשה side too, yet within the גזירת הכתוב side — it only spreads if there is a חלות).[183]

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Is there a difference between if he were to say today and tomorrow and this morning and tonight?

A) ר"ן, מאירי, תלמיד הרשב"א (quoting "רש"י") – quoting one opinion – same thing [both left as a ספק]

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[181] The גמרא in גיטין on מג: has a מחלקת about what happens to the קדושין of a חצי שפחה חצי בת חורין after she is freed; do they become full-fledged קדושין ("גמרו"), or do they dissipate entirely?

[182] It should be noted that the אבני מלואים seems like he is on both sides of this חקירה:

1) By "גמרו" (the גמרא in גיטין on מג:), he seems to be on the תוצאה side.

2) By an animal of partners (the גמרא here), he seems to be on the תוצאה side.

3) Yet by being מקדש half a woman (the גמרא here), he seems to be on the מעשה side.

The resolution to this apparent problem is that he holds there are two types of פשטה: if there is already a חלות, then that קדושה will spread natural (i.e. the תוצאה side); but if there is not (like by the woman here) then we can only talk about פשטה in terms of the מעשה.

[183] [Or else, this could be phrased differently, off of רש"י saying "במאמרו" — there is only פשטה based off of an אמירה].

B) Most ראשונים – there is a difference [this morning and tonight count as if said at the same time, and will work if that works; while today and tomorrow is the question asked in the גמרא as the third question]

If she agreed to all (half for a פרוטה, half for a פרוטה), why doesn't it work through פשטה, even if not מונה והולך?

A) תוספות – אה"נ, it would, if he used the right language of מקודשת; here, he used a different language

B) Based on רשב"א above – even if it were to spread, it still wouldn't be a good קדושין, due to "כי תקח"

C) Perhaps since she said that she only wanted half each time, she wanted to do half and then half, and that doesn't work [even if she doesn't mind being fully married]

How do we pasken each of these four questions?

A) רמב"ם – the first two work result in a valid קדושין, and the last two are in ספק

(This is because he paskens like an אם תמצא לומר).

B) רא"ש, רשב"א, ראב"ד – no, all four are in ספק

What about the rule that most ראשונים have of paskening like an את"ל?

Here, the fourth question undermined the first two as well — the last question had the two halves being the closest together, and the גמרא still said that one was a תיקו; therefore, all must still be in ספק.

How might the רמב"ם respond to this point?

ר"י הזקן, ר"ן – no, the first two are more likely to result in a valid קדושין than the fourth because he is counting in those cases, he is מונה והולך — he was more likely trying to do all of her in one קדושין then, as opposed to in the fourth case, where he was trying to do her in two halves in one קדושין.

Thus, to the רמב"ם – two separate questions in the גמרא, broken into two groups (1 – 3, and then 4). The question in the first group is in his psychology (what did he mean); and the question in the fourth question is in the הלכה itself (can one marry a woman in segments).[184]

But to the ראב"ד – one group/question for all, in the הלכה itself (can one marry a woman in segments).

[*Note:* there is קדושת מזבח and קדושת בדק הבית; these are not the same things as קדושת הגוף and קדושת דמים. For example, one can say that an item has קדושת דמים, and then it must be sold and the money used for a קרבן].

What does the גמרא mean by "יש דיחוי בדמים"?

1) ריטב"א, רמב"ן, תוספות, רש"י – there is דיחוי even though it only has קדושת דמים

2) ראב"ד (in רשב"א), רבינו חיים (in תוספות זבחים) – the דיחוי in the קדושת דמים even makes the תמורה be נדחה

(Their גרסה had the word "מדחה" instead).

3) ר"ח – the money from this animal can't be used for a קרבן, even if sold (i.e. even the דמים are פסול)

(This is probably just for the person himself; the money would probably be used as a קרבן for the קץ המזבח).

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[184] In other words, we know that חצי אשה is a פסול — but is it in the מעשה קידושין (which is fractured here), or the חלות קידושין (and here, he wants it to be on all of her, so should work)?

This חקירה of the גמרא's might play into the מ"ד who holds "פקעו" by the קדושין of a שפחה חרופה — תוספות הרא"ש says that the reason for that is because of חצי אשה (fits with an issue with the חלות קידושין side — right now, the partial קדושה breaks down); but רש"י says it is because she is כקטן שנולד דמי (fits with an issue with the מעשה קידושין side — the initial מעשה is unaffected, and thus needs a different reason for why the קדושין are פקעו)].

שיעור #32 – 2/2/17

דיחוי – ז. - ז:

(continuing off the end of last שיעור)

In the last שיעור, we saw that perhaps the mainstream opinion of how to understand "דיחוי בדמים" was:

1) ריטב"א, רמב"ן, תוספות, רש"י – there is דיחוי even though it only has קדושת דמים

However, to this, why also say "דיחוי מעיקרא הוי דיחוי" — aren't דיחוי בדמים and דיחוי מעיקרא the same thing?[185]

Numerous examples to try to prove the two don't automatically overlap are suggested:

[קדושת הגוף but דיחוי מעיקרא]

a) תוספות – a מומר who was מפריש a חטאת from his flock

The חידוש here is that since the problem is not in the חפצא, it is still called קדושת הגוף.

(As opposed to the case of half an animal in our גמרא, where it was a problem in the חפצא).

b) רשב"א, רמב"ן – if someone is מקדיש an animal, half as an עולה and half as a שלמים

The חידוש here is that this is called קדושת הגוף, since it can make a תמורה.[186]

(As opposed to the case of half an animal in our גמרא, where doesn't make a תמורה before the other half was bought and made הקדש).[187]

c) רמב"ן, ריטב"א – דיחוי מעיקרא by מצוות

The חידוש here is to assume that this is the same as קדושת הגוף by קדשים.

(As opposed to the case of half an animal in our גמרא, where there is a concept of דמים).

[דיחוי בדמים but נראה ונדחה]

d) תוספות – if someone is מפריש a female for his קרבן פסח, and then it gives birth to a male

The חידוש here is that this is called נראה ונדחה, since the פסול only comes from the mother, even though this is not literally נראה ונדחה (the same as we find it elsewhere).

e) רשב"א, רמב"ן – if someone is מפריש a חטאת, and then it gets a מום, and then he becomes a מומר; or else, designates money for a חטאת, and then becomes a מומר

The חידוש here is that the פסול is considered דיחוי בדמים, and prevents the money from being used for a קרבן now.[188]

Other ways to explain "יש דיחוי בדמים" avoid this redundancy altogether though [see last שיעור]:

2) רבינו חיים – the דיחוי in the קדושת דמים even makes the תמורה be נדחה [has גרסה of "מדחה" instead]

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[185] Some basic background information about these topics:

If the מום precedes the קדושה, then it is called קדושת דמים; but if the קדושה precedes the מום, then it is called קדושת הגוף.

A couple of נ"מ: if קדושת דמים, the animal can't make a תמורה, and is מותר in גיזה ועבודה after פדיון; but if קדושת הגוף, then it *can* make a תמורה and is אסור in גיזה ועבודה after פדיון.

[186] רמב"ן assumes "יש דיחוי בדמים" means the same as קדושת דמים in מסכת תמורה; thus, the litmus test is if it makes a תמורה.

[187] Apparently, before the other half was bought, they really considered it to have קדושת דמים (to the point where it could be redeemed even without a מום) [see אחיעזר versus גרי"ז below].

[188] [Similar to the opinion of the ר"ח below, just not using it to explain our גמרא].

3) ר"ש משאנץ, ר"ח – the money from this animal can't be used for a קרבן, even if sold (i.e. even the דמים are פסול)

This opinion is based on a דיוק: the גמרא usually says "יראה עד שיסטאב," yet here it says "קדושה ואינה קריבה" (which implies it can never be used for a קרבן, not even its money).

[The big חידוש which emerges from this (and from רשב"א, רמב"ן above), is that דיחוי can transfer to money].

4) יש אומרים in רמב"ן here, and in רש"י זבחים on יב. – even though only with a small problem, still דיחוי

(The "small problem" is that it's only missing a purchase, it's only money).

רמב"ן and רש"י both reject this — it doesn't fit well with the פסח source; and also, this isn't just a "small problem" — there is another owner who isn't interested in selling it!

Overall, what is the reason that דיחוי is a problem?

There isn't any explicit פסוק saying that it is an issue.[189] What might be the problem then?

1) תלמיד הרשב"א – a problem of בזיון

(The סברא is probably that it is inappropriate to bring this animal with bad associations to ה').

To this, the issue is a פסול in the animal.

[If this is the reason, then it'd be harder to understand the חידוש that comes out of the ר"ח's opinion].

2) Perhaps it is a problem of a פגם in the קדושה

(The סברא would be that "קדושה" means "designation" for something; accordingly, if there is a break in its designation, then perhaps the very קדושה becomes ruined).

To this, the פסול would be in the קדושה, not in the animal.

If this is the reason, it would work well with the חידוש of the ר"ח and רמב"ן, רשב"א above.

What is the status of the animal in our case after he is מקדיש the first half but before he buys the second half?

A) אחיעזר – real קדושת דמים (after all, it *is* called "יש דיחוי בדמים")

To this, it can be redeemed without a מום.

(And it is worse than רגלה של זו עולה [where that isn't true] because he doesn't own the rest of the animal.

B) גרי"ז – no, it is קדושת הגוף which is standing to be redeemed for money (like קדם הקדשו למומו); and when the גמרא called it "יש דיחוי בדמים," it just meant that it is destined to be redeemed for the money

To this, it cannot be redeemed without a מום (just like the case of רגלה של זו עולה).

There's a strange רמב"ם which was pushing the גרי"ז.

In הלכות מעשה קרבנות ט:ד, the רמב"ם writes:

I) דיחוי מעיקרא אינו דיחוי

II) ואע"פ שהוא קדושת דמים

III) אין בעלי חיים נדחים

Regarding I) — he's paskening against רבי יוחנן, and דיחוי מעיקרא is a reason not to have דיחוי

Regarding III) — he's paskening against רבי יוחנן, and דיחוי בבעלי חיים is a reason not to have דיחוי

But regarding II) — strangely, he sounds like קדושת דמים is a reason to say that it *does* have דיחוי!

To address this:

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[189] Some ראשונים find רמזים in the פסוק, but really not anything explicit.

a) לח"מ (הלכות שגגות) – רמב"ם just meant it's not a reason not to have דיחוי; really, קדושת דמים is neutral

b) לח"מ (הלכות מעשה קרבנות), גרי"ז – as it sounds — קדושת הדמים is a reason to have דיחוי even if it was דיחוי מעיקרא (which generally is not דיחוי)

Why? The גרי"ז explains as follows:

In this רמב"ם, קדושת דמים means קדושת הגוף שמיועד לפדיון והקרבת דמיו.

Essentially, there are two types of דיחוי:

D1) פסול בקרבן

D2) פגם בקדושה (lowers the קדושה to קדושת הגוף שמיועד לפדיון והקרבת דמיו)

Potential נ"מ between these two types of דיחוי:

1) If D1, then the way רמב"ם paskens, it is only an issue if נראה ונדחה, but not מעיקרא; but if D2, then it is only an issue if מעיקרא

2) If D1, then its תמורה is still a good קרבן; if D2, then its תמורה is not good

Accordingly, the גרי"ז reads the רמב"ם as saying the following three-staged progression:

I) דיחוי מעיקרא is not דיחוי by the type of דיחוי which is a פסול בקרבן [D1].

II) However, this is the other type of דיחוי [D2]; at which point, *specifically because* it is מעיקרא, that is why it should be נדחה here!

III) But no, since בעלי חיים aren't נדחים, there is no דיחוי here either.

If a father acts as a שליח for his sons, and each son only gave half a פרוטה, then there is no נתינת פרוטה at all!

A) תוספות – נותן is לאו דווקא; don't care at all about the פרוטה from the נותן's side, only from the מקבל's side

B) תוספות רי"ד, תלמיד הרשב"א – the נותן *is* giving a פרוטה, since father gave his own money through דין עבד כנעני

Potential נ"מ:

What if the father had given a חצי פרוטה of each son's money?

To תוספות – that is the גמרא's unresolved ספק; but to תלמיד הרשב"א – would certainly not be a קדושין

The מחלקת seems to be if we a need נתינת פרוטה (תלמיד הרשב"א, תוספות רי"ד), or just a קבלת פרוטה (תוספות).[190]

[190] [This would seemingly be connected to שיעור #27 in general and note 170 in particular as well].

שיעור #33 – 2/6/17

פסק – ח. by רבה and רב יוסף; רב יוסף's first proof from תבואה וכלים

What do רבה and רב יוסף argue about in the לישנא קמא and לישנא בתרא respectively?

A) Most ראשונים – in the ל"ק, they argue over סמיכת דעת; in the ל"ב, they argue over a formal requirement

B) ריטב"א – even in the ל"ב, they really argue about סמיכת דעת

Between רבה and רב יוסף, how do we pasken in the end? Do we need a שומא for קדושי כסף?

It would seem to be rather clear — on ט., the גמרא seemingly paskens like רבה. Therefore,

A) ריטב"א, רמב"ן, תוספות in יש אומרים – never need שומא

However, ר"ת – we always pasken like רבה over רב יוסף — why would the גמרא need to pasken this מחלקת?[191] Moreover, why didn't the גמרא just say his name — why did it say that שיראי don't need a שומא? Therefore,

B) ר"ת in תוספות – it depends [192] –

If something which everyone has a sense of the price, like שיראי — no need for a שומא.

If something which they don't (such as a diamond) — needs a שומא.

C) רמב"ם – it depends [193] –

If something which a woman specifically desires, like שיראי – no need for a שומא.[194]

If something she isn't excited about (then if she doesn't know its exact worth, no סמיכת דעת) – need a שומא.

To B) and C), to avoid any issues –

To רמב"ם, simply don't use something she doesn't specifically desire, and then state its worth.

To ר"ת, there'd be a big issue if he uses a diamond ring, even without stating much it is worth.

Accordingly, the מנהג developed not to use a diamond ring, and instead to use a plain ring.

ר"אש, however, says that one *can* use a diamond ring (as long as one doesn't state how much it is worth).

[These two are brought as two opinions in the שו"ע].

Why would ר"ת say that diamonds are an issue even if he doesn't say how much they're worth?

a) ר"ן – diamonds are *so* confusing that even if he said "כל דהו" has no סמיכת דעת

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[191] (Unless one thinks that rule is only true when their מחלקת is in ב"ב; this requires a certain גרסה).

Other ראשונים offer different explanations to deflect this question — for example, ר"י said the גמרא needed to pasken like רבה outright here because רב יוסף had brought numerous proofs to his words; others suggest it was just אגב the other rulings.

[192] Both questions are resolved with this explanation: we don't fully pasken like רבה — something the גמרא needed to tell us, and also had to clarify that it is specifically שיראי-like items which need a שומא.

[193] Apparently based on the same דיוקים as ר"ת.

[194] The סמיכת דעת isn't just intellectual, it is also emotional.

b) Based off the עצמות יוסף – holds that the default is like when he said חמשין, and needs to actually say "כל דהו" for it to not be an issue of סמיכת דעת

Potential נ"מ between these two explanations:

What if he did say "כל דהו" explicitly and used a diamond ring?

To a) – not a valid קדושין; but to b) – a valid קדושין

(This is why the מסדר קידושין asks the עדים if this ring is worth a פרוטה; this is the equivalent of saying "כל דהו," that her דעת is only on a פרוטה).

(Nonetheless, despite that, we are still מחמיר not to use a diamond ring at all).

When does one need to do the שומא (according to רב יוסף, and also to ר"ת and רמב"ם when not שיראי-like)?

A) תוספות, רש"י – must be before the קדושין

B) רמב"ם – even after the קדושין

רש"י and תוספות were based off the fact that if a שומא afterwards worked, why would רב יוסף say it doesn't?[195]

But רמב"ם seems to have understood that the difference between רבה and רב יוסף was over whether the שומא afterwards works למפרע (like רבה) or only מכאן ולהבא (like רב יוסף).

What might be the סברא behind each of these opinions?

To רש"י and תוספות, it's easy: once the קדושין was פסול, it's over. What good will a שומא afterwards do?

But to the רמב"ם, what might be the סברא for why it will help?

a) תוספות ר"י הזקן – when he did קדושין and it was incomplete, we assume that what he really meant was that she should be מקודשת to him when it will be complete (i.e. after the שומא here).

b) לח"מ – רמב"ם only said this to the לישנא קמא, where it was just about סמיכת דעת, but not to the לישנא בתרא, where it was about the item itself.

What does he mean by this?

Perhaps that to the לישנא בתרא, there was an invalid מעשה קדושין; but to the לישנא קמא, it would be that since she had the basic דעת to do the קדושין, that is called a valid מעשה קדושין, and the last nagging doubt she has will be dealt with later, when they do the evaluation.

The difference between them — whether like both לשונות (ר"י הזקן), or only the לישנא קמא (לח"מ).

Is this level of סמיכת דעת needed by other things as well, or is it unique to קדושין?

It might be unique to קדושין (certainly to Reb Chaim, who holds that קדושין needs a higher level of דעת).

In the first proof brought by רב יוסף, there were a few potential interpretations of the ברייתא:

0) (rejected immediately) – to exclude שוה כסף worth a פרוטה

1) רב יוסף – to exclude שוה כסף without a שומא

[195] (When he says that "אמר חמשין ושוו חמשין" is invalid, he indicates that even with a שומא afterwards, it is still invalid).

2) רבה (in the ה"א) – to exclude חליפין

3) רבה (in the מסקנא) – to exclude קנין כסף with תבואה וכלים that are less than a פרוטה

Strangely enough, first ה"א is actually paskened somewhat by the רמב"ם:

רמב"ם – an עבד עברי sold to a גוי can only be redeemed with actual כסף, and not תבואה וכלים.

The רמב"ם seems to be working off the ירושלמי's interpretation of this ברייתא.

Nonetheless, isn't this against our גמרא and its דרשה of "ישיב" still?

(And our גמרא uses פסוקים from when sold to a גוי, so can't say it's only talking about sold to a Jew).

A) אור שמח – בבלי is using the פסוק of "מכסף מקנתו," whereas רמב"ם and ירושלמי are using "כסף ממכרו."

Even so, both of these פסוקים are still about when he is sold to a גוי!

אור שמח – בבלי's פסוק is about the מכירה, and the ירושלמי's is about the גאולה.

(This is somewhat difficult, since "ישיב" sounds like it is about the גאולה).

(אור שמח – the בבלי was talking about doing it with both of their agreement [teaching that this successfully redeems him], while the ירושלמי was talking about against the גוי's will).

B) פנ"י – בבלי is about when the original מכירה was with שוה כסף, and then the גאולה can be with שוה כסף; but ירושלמי is about when the original מכירה was with actual כסף, so the גאולה must be with כסף

(The weakness of this explanation is that the רמב"ם is not מחלק between these)

C) פנ"י – בבלי is about when נמכר לשנים, and the ירושלמי is about when נמכר ליובל

[D) I thought — the גוי is not bound by the rules of our דרשה, of שוה כסף]

What might be the סברא underlying this distinction of the רמב"ם's?

1) אור שמח – חילול ה' (when he is forced to accept random objects in return for losing his bought slave)

2) Rav Gustman – when sold to a Jew, then it was a קנין הגוף; but when sold to a גוי, it is like a חוב. When buying something — one can use שוה כסף, but when paying a debt — one must use כסף itself ideally

3) דגל ראובן – on רמב"ן, רשב"א – don't have to accept שוה כסף against one's will; however, a Jew must go the extra mile to help free his fellow Jew, to fulfill והפדה, and therefore must accept it in this circumstance. A גוי, on the other hand, has no such obligation, and thus doesn't need to accept שוה כסף.

שיעור #34 – 2/9/17

פדיון הבן and רב יוסף's second proof that עבד עברי by חליפין – ח.

The גמרא has a ה"א to make a דרשה to say that חליפין is excluded from the word "כסף" by an עבד עברי.

The גמרא rejected this because it couldn't fit with the words of the ברייתא; however, is this הלכה still true?

A) תוספות – yes, we still hold that חליפין does not work to acquire an עבד עברי

(**משנה למלך – רמב"ם** is silent, and this silence strongly indicates that he also thinks it doesn't work)

B) שיטה לא נודע למי – no, now that there is no דרשה, חליפין *does* work to acquire an עבד עברי

(ב"מ in תוספות holds like the קיב. on שיטה לא נודע למי, unlike תוספות here)

תלמיד הרשב"א – brings three opinions; the first is like the שיטה לא נודע למי, the third is like תוספות here.

It's easy to see why the שיטה לא נודע למי says what he says — in the conclusion, there is no פסוק excluding it.

But what about תוספות — if there is no פסוק excluding חליפין, why shouldn't it work to acquire an עבד עברי?

1) תלמיד הרשב"א – second opinion – חליפין does not work where there is no קנין הגוף

This is difficult, since the גמרא on טז. rules one cannot be מוחל the work of an עבד עברי since his גוף is owned!

(Though תלמיד הרשב"א hints that he'll address this later on — unfortunately, that part is not extant).

a) קצת מפרשים in מאירי on טז. – we don't pasken like that גמרא (issue with רבא there from another גמרא).

(מאירי himself rejects this, since the גמרא needs רבא's answer there, no one else seems to argue!)

b) Perhaps גופו קנוי there really means indebtedness, like a משכון (see תוספות ר"י הזקן, others). If that's the case, then maybe חליפין cannot work to acquire this.

How would the שיטה לא נודע למי respond to this defense for תוספות?

I) Perhaps that חליפין *does* work for something which is not a קנין הגוף

II) Or else, maybe that עבד עברי is really a קנין הגוף (as the גמרא really sounds like, after all)

2) קצוה"ח – the גמרא says that טובת הנאה is not acquired with חליפין. תוספות extends that to שכירות and then to מתנה על מנת להחזיר too. Accordingly, קצוה"ח suggests that things which have an expiration date, that are a temporary קנין, are not able to be acquired with חליפין; and since this קנין is also only temporary (until six years or יובל), חליפין doesn't work.[196]

How would the שיטה לא נודע למי respond to this defense for תוספות?

I) Perhaps that חליפין *does* work for a קנין זמן

II) Or else, maybe that עבד עברי is really a permanent קנין — and the idea of six years and יובל are just "decrees of the king" to uproot this permanent sale

3) Based on רמב"ן, others there – there is a קנין אסור on the עבד עברי (as evidenced by his permissibility to be with a שפחה כנענית); thus, perhaps תלמיד הרשב"א meant that the גמרא merely referred to a קנין הגוף of קנין איסור, but not a קנין הגוף regarding ממונות. And חליפין doesn't work to accomplish a קנין איסור.

Why might this be true?

a) Maybe because "לקיים כל דבר" only refers to ממונות

b) Maybe based on Reb Chaim – חליפין is a special קנין of דעת, and that may not be enough for a קנין איסור

[196] However, קצוה"ח himself sides against this in the end.

c) Maybe because this is ritualistic, and requires actual כסף for this [197]

How would the שיטה לא נודע למי respond to this defense for תוספות?

I) Perhaps that חליפין *does* work for a קנין איסור

II) Or else, similarly, maybe that חליפין counts as כסף, and thus does work for this קנין איסור

III) Or else, maybe that there is no קנין איסור by an עבד עברי [198]

רב יוסף's next proof: is it for the לישנא קמא (and thus is a problem of סמיכת דעת), or the לישנא בתרא (and thus is a problem with the חפצא — it requires certain features to work)?

The simple read would seemingly be that it was a proof for the לישנא בתרא;[199] indeed, some ראשונים say this way:

A) תלמיד הרשב"א, תוספות ר"י הזקן quoting רש"י – a proof for the לישנא בתרא

However, תוספות has a different understanding:

B) תוספות – a proof for the לישנא קמא

There are a bunch of חידושים which come out of this:

1) Even a man is not a בקי in שומא [200]

2) There is an issue of סמיכת דעת even though he didn't say the value, since the rule of ה' סלעים is known

3) There is a need for סמיכת דעת of the כהן by פדיון הבן

This third חידוש is particularly notable; some אחרונים clearly held against this:

פרי חדש, דרישה – no need for סמיכת דעת of the כהן by פדיון הבן [201]

Additionally, that seems to be more intuitive. Firstly, it's free money; how much דעת does one really need to accept that? Moreover, one would have thought the חיוב of the father is just to give the money to the כהן; he doesn't need to accept it or keep it, based on פרעון בע"כ שמיה פרעון (under normal circumstances, one cannot refuse to let another person pay up his debt).

Be that as it may, what might be the סברא for תוספות?

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[197] (If one understood unlike the ראב"ד, and thought that חליפין is not a track of כסף).

[198] How could that be? Isn't that why he is allowed to be with a שפחה כנענית?

It's actually not so simple — it's a big מחלקת how that works:

Why is an עבד עברי allowed to be with a שפחה כנענית?

1) קנין איסור **– רמב"ן, ריטב"א, רשב"א, רמב"ן**

2) רמב"ם – on a דאורייתא level, all Jews are allowed to be with a שפחה כנענית; however, חז"ל were גוזר that we cannot. However, they didn't make this גזירה on an עבד עברי.

3) תוספות in יבמות – a special היתר as part of his עבודה

One of many potential נ"מ brought in the אחרונים:

Is he permitted to a שפחה כנענית not owned by his master? To רמב"ן and רמב"ם – מותר; but to תוספות – it is a limited היתר for עבודה, and thus אסור here.

Accordingly, שיטה לא נודע למי might hold like רמב"ם or תוספות to solve this issue, and deny the principle of a קנין איסור here.

[199] This would fit well with the גמרא 's usage of the language of "קייצי" here.

[200] Some ראשונים earlier held that the language of "a woman doesn't know שומא" is specific, due to "כל כבודה בת מלך פנימה."

[201] פרי חדש had even said that one can give it to a חרש or קטן, or to a כהן who refuses to accept it.

a) עצמות יוסף – פדיון הבן is not only the father doing a פרעון; rather, it is a transaction between the two of them, like a מכירה. The father gives money, and the כהן gives the son.

קצוה"ח argues — is the כהן really selling the son? In what manner does he own him?[202]

b) קצוה"ח – there is a special requirement of "דרך מתנה" by פדיון הבן which demands דעת

(This is still a חידוש — firstly, that there is such a requirement at all; and moreover, that this doesn't just mean not בע"כ, but rather that he needs a high level of סמיכת דעת. Is this really likely to be true, that a מקבל מתנה needs so much סמיכת דעת?)

Overall, this brings up a big חקירה about פדיון הבן:

On one hand, the term itself sounds like it's a real פדייה, one of removing קדושה and receiving an item.

On the other hand, is the son really imbued with קדושה, and is the father really taking him from the כהן?

Therefore, is פדיון הבן really:

A) a חוב ממון, and not a real פדיון (no change in the bay's status)

(And the terminology of פדייה helps explain why ה' created this חוב, why it is a מצוה to give this money)

To this, only the father is active, by doing the פרעון.

B) a real פדיון (change in the baby's status)

To this, one could either say:

a) it is still the father doing the פדיון alone (like by מעשר שני); or else

b) it is really the כהן who sells the son to the father (like by פדיון הקדש, where the גזבור's consent is needed).

This latter possibility, b), would have seemed more intuitive within the real פדיון side.

However, מהרי"ט אלגזי and Rav Shimon Shkop opt for a) instead.

Potential נ"מ:

1) Need the כהן's דעת [see above]:

פרי חדש and דרישה – no (fits with חוב side); but תוספות (to עצמות יוסף) – yes (fits with real פדיון side)

2) Need to add on a חומש:

בה"ג, הלכות פסוקות – add a חומש (fits with real פדיון side);[203] but רמב"ן – no need (fits with חוב side)

(However, one could still maybe be on the real פדיון side, and still argue on the דין of the בה"ג, since it is seemingly source-less. Maybe just a גזירת הכתוב that there is no need for a חומש here).

3) The ritual performed between the father and the כהן brought by the גאונים:

This fits well with the real פדיון side; as for the חוב side, some אחרונים say that this is just חיבוב המצוה.

4) Does the כהן make a ברכה?

The גאונים had a ברכה (fits with the real פדיון sided);[204] but the רא"ש rejected this, both because one can't make up ברכות not in ש"ס, and also because the כהן isn't doing anything (fits with the חוב side).

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[202] At first, קצוה"ח entertains the idea that even by paying a debt one would need סמיכת דעת, but ultimately rejects this.

[203] [Some of those who held this way (רב האי גאון, for example), might have understood this idea of adding a חומש as being closer to the חומש paid by מעילה, as a קנס and not as a standard פדיון. This is reflected by their opinion that the חומש is only added when the ה' סלעים are given beyond the first 30 days].

[204] More precisely, it fits within the latter option, b), within the real פדיון side — the כהן makes a ברכה as an active party here.

5) Giving the כוהנת to a ה' סלעים: [205]

תוספות's latter approach – yes, even to her; but רמב"ם, maybe תוספות's first side – no, only a male כהן

Some אחרונים suggest this depends on this חקירה as well:

If a just a חוב, a מתנה like זרוע וקיבה — then maybe she can take it;[206] if a real פדיון, then might need the direct involvement of a male כהן, who is in charge of the בית המקדש.

6) If a ספק of a חיוב of פדיון הבן:

To the חוב side – פטור (due to המוציא מחבירו עליו הראיה); to the real פדיון side – חייב (must redeem son)

Within the real פדיון side, what קדושה does the baby possess?

a) ספר המצוות in רמב"ם – no real קדושה; the פדיון is "as if" he were owned by the כהן. ה' wanted us to act in this way, to remember how He redeemed our firstborn (obviously, impractical to say to bring him as a קרבן or actually make the כהן keep him).

b) ערוה"ש, ספורנו – real קדושה, like by הקדש and מעילה (until פדיון, it's אסור for him to do דברי חול, even for himself)

c) Perhaps real קדושה, but not as a קרבן — rather, that he is designated for the עבודה, similar to a כהן

To this, he'd be allowed to do דברי חול, and just must remove this חיוב to work in the בית המקדש (which is אסור for him to do anyhow) by having this פדיון done.

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[205] Both an actual בת כהן, and even a בת כהן who is married to a ישראל (and perhaps even to her husband on her behalf).

[206] The כתב סופר says not in the case of giving it to her husband on her behalf though [see previous note], since he holds the כהן is not able to appoint a שליח.

שיעור #35 – 2/13/17

"וישלים" ;"לדידי שוה לי" – ח.

What does the גמרא mean that it was worth it to רב כהנא, since he was a גברא רבה?

1) ר"ן, ריטב"א, רשב"א, רש"י – "objective subjective" value,[207] and it looks to us that רב כהנא would indeed have this value for this item, since he is a גברא רבה

2) שיטה לא נודע למי (גרסה different) – רב כהנא was a גברא רבה, and therefore wouldn't lie

But what does it mean that he wouldn't lie? What sort of valuation system are we using?

Similar to the above, this גרסה must assume an "objective subjective" value, and that he would tell us what is unknown (i.e. his personal subjective value, but which must still be true and set, not arbitrary).

3) רמב"ם – leaves out the concept of a גברא רבה; merely says "לדידי שוה לי" works

Accordingly, it would seem the רמב"ם is saying that the idea of "לדידי שוה לי" is purely subjective and arbitrary; one can decide that the object carries whatever value he wants.

However, what does the רמב"ם do with our גמרא, which seemed to say this was true only by a גברא רבה?

a) רדב"ז – not at all bothered by this

Perhaps he thought the רמב"ם just didn't have this whole part in his גרסה.[208] But it is pretty weak still, without any clear explication of this and also without any evidence that there was such a גרסה.

b) כ"מ – not totally arbitrary; it must objectively be worth this amount to someone in the world, even if not to the particular individual saying this (it works for anyone if it is actually worth ה' סלעים to רב כהנא).

To this, it is a sort of compromise — an arbitrary value connected to someone's objective reality.

(The weakness here is that the רמב"ם didn't say this; additionally, it reads poorly in the גמרא).

c) מאירי, תוספות ר"י הזקן, רשב"א – a סודר is only useful for a גברא רבה; but other things, like an עגל or a טלית, are useful for everyone, and anyone can say "לדידי שוה לי"

To this, also a sort of compromise — arbitrary value based on an objective usefulness.

(The weakness here too is that the רמב"ם doesn't make any distinction. And even if a סודר was valued by all people in his day, the רמב"ם still should've said an item useful only to certain people).

d) גר"א (based on גרסה of בה"ג)[209] – can assume a גברא רבה will be מוחל the loss; someone else might not

To this, it can be totally arbitrary, even if left unspoken (and separately, there might be אונאה).

Why would רמב"ם allow anyone to do it this then, if only a גברא רבה can be assumed to be מוחל?

גר"א – while an assumed מחילה avoids an אונאה issue, and indeed, that is only by a גברא רבה — nonetheless, the context here is הלכות פדיון הבן, not אונאה, so רמב"ם didn't bother to clarify this.

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[207] In basic economics, the way the supply curve and the demand curve reach their equilibrium is based on the place where the quantity and the price converge on those curves. Accordingly, that demonstrates that every person really has their own price that they would be willing to pay for this item (for example, if it goes up in price, while some people will indeed stop buying it, others will still continue to buy it). Hence, an "objective subjective price" for every person: every individual believes the item has a certain price which they'd be willing to pay for it (not that they would pay more than the market price for no reason — they aren't stupid — but that they'd still pay this price for this item if that became the market price).

[208] A third potential גרסה, after ours and the one brought in the שיטה לא נודע למי.

[209] To clarify, this would be a fourth potential גרסה [see previous note].

e) גרסה of בה"ג, and שיטה לא נודע למי, מאירי (second explanation), רמב"ם (to ט"ז, מחנה אפרים) – the difference between a גברא רבה and a regular person is that a גברא רבה doesn't need to speak out this point (but if a regular person speaks this out, it works for him too).[210] Accordingly, רמב"ם just brought the הלכה of a regular person, and left out this minor distinction.

To this, it can be a purely arbitrary value, as long as it is clear that he is doing this.

What about if a woman were to say that something less than a שוה פרוטה is worth a פרוטה to her?

A) ר"ן – קידושי ספק

מאירי brings two opinions about this:

B) First side in מאירי – a valid קדושין

C) Second side in מאירי – an invalid קדושין

What might be the basis for this ספק?

a) Maybe whether a פרוטה is a quantitative שיעור or also a qualitative שיעור (less than a פרוטה isn't כסף)

b) Maybe whether "לדידי שוה לי" is strong enough to make the item count as a qualitative כסף

Within the explanations which employ some degree of an objective value, can that objective value be used by a seller to evade an issue of אונאה? [211]

A) ריטב"א – yes, avoids the issue of אונאה

If so, how is there ever אונאה? Doesn't his willingness to pay the price reveal this is worth it to him?

ריטב"א – no, there are two types of "לדידי שוה לי." If it is only said in a time of desperation, and the only reason it is worth it to him now is because of that desperation — that is אונאה. However, if he would've bought this at this price regardless, and it happens to be more than the market price — not אונאה.

B) קצוה"ח – no, not relevant to אונאה — of course that would be אונאה

מחנה אפרים – by פדיון הבן, "לדידי שוה לי" worked because both agreed; without one knowing — that's אונאה

(Whereas ריטב"א doesn't think that matters — if it is objectively worth it to him, it's binding).

When the גמרא says "וישלים" — *must* he fulfill the תנאי, or is it his choice? [212]

A) תוספות ר"י הזקן, שיטה לא נודע למי – it is his choice [it was a real תנאי, a true condition]

This approach fits well with the language of "על מנת," which generally means a condition.

B) אבני מלואים, תוספות ר"י הזקן in יש אומרים – valid קדושין, and must pay the rest [not a condition; it's a stipulation]

This approach fits well with the language of "מקודשת וישלים."

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[210] This happens to fit very well in the wording of the בה"ג himself, since he concludes with a regular כהן even after the distinction between a גברא רבה and a regular person.

[211] For example, if someone's "objective subjective value" is above the current market price, and a seller knows this, can the seller take advantage of this and charge that individual the higher price without violating the איסור of אונאה?

[212] In other words, if he wants the קדושין, then he must give the money, but if he decides he doesn't, then he doesn't have to.

(רמב"ם might mean this. There are two גרסאות in the רמב"ם: a) "והוא שישלים," and b) "והוא ישלים." While the latter גרסה sounds like this approach, the first גרסה seems like the other one).[213]

Why is this a stipulation and not a condition?

a) Maybe because it wasn't a תנאי כפול [214]

But the רמב"ם explicitly holds that an "על מנת" is like a תנאי כפול!

Maybe the difference is that here "על מנת" wasn't actually said; rather, it was merely *like* "על מנת." Therefore, maybe it is not fully like "על מנת" (at least not like an "על מנת" in this regard).

[213] The שו"ע brought it as "ישלים," and therefore אבני מלואים thought both רמב"ם and שו"ע agreed with him.

[214] If not a תנאי כפול, though most ראשונים say that only the תנאי is בטל, but the מעשה is still קיים — the קצוה"ח holds in numerous places that the תנאי is binding, but as a stipulation, not as a condition.

שיעור #36 – 2/16/17

תנאי כפול; "ויחליף" ;מונה והולך; "וישלים" – ח.

(continuing off the end of last שיעור)

C) ריטב"א – regular condition, but force him to either pay to make it a קדושין, or give a גט [215] and avoid עיגון [216]

This may have been influenced by both languages — it's a real condition, but we aim for his fulfilling it.

(This approach is worried about her being an עגונה, unlike the שיטה לא נודע למי's approach).[217]

D) מאירי (first approach), פה"מ in רמב"ם [218] **–** regular condition, but force him to pay to make it a קדושין

This certainly was trying to accommodate both parts of the גמרא's languages.

Why must he pay, if it was truly a condition?

a) Maybe really only meant like the ריטב"א (either pay, or else release her fully)

However, this would be very דחוק read in their languages.

b) Maybe because of an עגונה concern, since there is no good option of לפטור [219]

This too is a bit דחוק, for it requires the assumption of a couple of חידושים [see the above note].

c) Maybe this was both a condition *and* a stipulation of obligation. He meant a condition, but also promised her a מנה — thus, we force him to fulfill that condition by fulfilling his moral obligation.[220]

Why isn't this true in all cases when someone says "על מנת" then?

To the מאירי (actually discussing this גמרא), it might be because of the unique formulation here.

To the רמב"ם ("על מנת" was actually said in his case), maybe because this is only true by conditions which are left without a clear way to resolve them.

The simple read of the גמרא is that רב אשי is a second answer to the question on ר"א from the ברייתא.

How do we pasken?

A) מאירי, רא"ש, רשב"א – like רב אשי (who both has the last word in the גמרא, and is also the בתראי chronologically): the הלכה a מנה סתם is a valid קדושין; but if both מנה סתם and מונה והולך, then only קדושין once the last דינר is given.

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[215] This is probably what he means by "לפטור." It is a big מחלקת ראשונים over whether one can just be מבטל a תנאי, and if the ריטב"א is on the side that one could, then he might mean to just cancel the תנאי.

[216] In other words, we don't allow him to leave her in limbo indefinitely.

[217] Some אחרונים explain why her being an עגונה here is not a concern: it was her fault, she accepted this open-ended קדושין.

[218] (In the third פרק, by a similar case).

[219] This would assume one cannot just cancel a תנאי; and as for a גט, maybe they hold one cannot give a גט until the קדושין are completed, even if they will be retroactively (perhaps a חסרון of לשמה or something).

[220] [To me, this answer also seems very weak. חז"ל didn't decide to force the fulfillment of his word in a "מי שפרע" case on the basis of his moral obligation, even though he really went back on his word there and חז"ל were clearly bothered by that (hence, the existence of a "מי שפרע") — yet they did force him here, where he clearly made a condition (and the degree of his reversal is thereby greatly mitigated)?! This, as well as the fact that this is not found anywhere else, and it really should apply to many other תנאים].

B) ר"ח, רמב"ם, ר"ף – (seemingly leave out רב אשי entirely) – if מנה זו and מונה והולך, then only קדושין once the last דינר is given; but if מנה סתם and מונה והולך, then קדושין from that first דינר.

How can they just go against רב אשי?

1) מאירי – must have been a טעות סופר in the ר"ף

(This seems דחוק, once we see these other ראשונים saying it too; also, most גרסאות have this).

2) מ"מ, ר"ן – (based off a ר"ף in פסחים) – we pasken like the סתם גמרא against רב אשי, and the first answer was the סתמא דגמרא

How could the סתם גמרא come after רב אשי if רב אשי himself wrote the גמרא?

Maybe "רב אשי ורבינא סוף הוראה" doesn't mean they wrote the גמרא; rather, it means that they were the last ones quoted authoritatively in the גמרא by name (and thus, the סתם גמרא is still after them).

3) תוספות ר"י הזקן – ר"א himself argued on רב אשי; and after all, the גמרא paskened like ר"א later on

(Most ראשונים there understood that no one argued on ר"א, and just brought אגב אורחיה of paskening).

4) גר"א – interprets the גמרא differently – they read רב אשי not as a second answer to the question, but as a second way to knock away the "הכי נמי מסתברא." Accordingly, רב אשי was just saying that one *could have* said מונה והולך is different; in truth though, it is not.

What if he merely said מנה זו and just gave her a דינר (i.e. not מונה והולך) — could he still back out?

a) גר"א – based on a דיוק in the ר"ף – he cannot retract in that case

b) But the ר"ף might have just been working with the assumption that such a case (saying "מנה זו" and then handing her a single דינר) would never happen — they aren't crazy.[221]

When the גמרא says "מקודשת ויחליף" in the case of a coin that is only יוצא על ידי הדחק, what does it mean?

A) מאירי, ר"ן (first approach) – if מחליף, then קדושין; if not, then not

(The סברא for this would be that there was an implicit תנאי that her דעת was on this).

B) ר"ן, ראב"ד (second approach) – unconditionally קדושין, and he owes her to switch it

(The סברא for this would be that there was a valid קדושין; however, there might be a moral obligation here for him to replace the bad דינר [similar to מאירי above in the "וישלים" case]).

The רמב"ם's language is a bit ambiguous:

ראב"ד understood him as saying like A), and therefore argued.

However, most understood him as saying that if the coin isn't even able to be used על ידי הדחק, then it isn't a valid קדושין; accordingly, he wasn't discussing this מחלקת (by a coin that *is* יוצא על ידי הדחק) at all.

Why does the תנאי work in the case of "מקודשת וישלים" even though it wasn't a תנאי כפול?

A) אבני מלואים [see above] **–** אה"נ, *it doesn't*; not a תנאי, but rather a stipulation [the result when not a תנאי כפול]

B) רשב"א in יש מדקדקין – derives from here that על מנת works without a תנאי כפול, while אם requires a תנאי כפול

(Indeed, this is the opinion of the ר"ף and the רמב"ם).

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[221] [As for if he gave her 99 of the 100 in that case — תלמיד הרשב"א thinks the ר"ף might be מדויק to say it works there, since he just meant "this, for whatever it is," and thus a valid קדושין (and he wouldn't even have to be משלים it); but if he was also מונה והולך, then he was showing that he actually plans to give 100. לענ"ד, this is the better דיוק to make in the ר"ף].

C) שיטה לא נודע למי, ראי"ש – in this case, as if he had said a תנאי כפול (since his language was very clear; the מנה was specified as the main point of the קדושין)

Earlier (on :ו), a similar מחלקת — **why did a תנאי work by an אתרוג of מתנה על מנת להחזיר, even though not כפול?**[222]

1) תוספות (on :ו and on :מט) – some cases have an אומדנה that you meant an absolute תנאי (thus, serves the same purpose as a תנאי כפול). Not every case is as obvious (such as the case of משה רבינו and the בני גד ובני ראובן).[223]

(This seems to align well with the ראי"ש and שיטה לא נודע למי, approach C), in our גמרא).

[222] (This same question can be asked in many cases, where the גמרא has a תנאי, but doesn't specify that it was כפול).

[223] To illustrate this point: one might really intend to do something anyhow, but will just try to spur the other party to do something with this action by seemingly making it contingent upon that desired other thing. For example, though a father might plan on letting his kids enjoy dessert whether or not they head straight to bed afterwards, he might try to incentivize them to do so by saying prior to dessert that, by his allowing them to eat dessert, he wants them to head nicely to bed after. In truth though, he was going to allow them to have dessert anyhow, and thus, not a real תנאי.

שיעור #37 – 2/20/17

תנאי כפול – ח.

(continuing off the end of last שיעור)

2) רמב"ם, רי"ף – על מנת doesn't need תנאי כפול; only אם needs תנאי כפול

(This aligns well with the יש מדקדקין in the רשב"א, approach B), in our גמרא).

3) סוכה in תוספות – אה"נ, it actually *was* a תנאי כפול in all those cases; however, since that wasn't the point in each of those sources, the גמרא didn't bother to explain that clearly

4) ראב"ד, רשב"ם (משנה תורה on) – ממונות doesn't need תנאי כפול; only גיטין and קדושין need תנאי כפול [224]

According to the רי"ף and רמב"ם, what might be the סברא to differentiate between על מנת and אם?

a) One might've said that the language is just different — somehow, על מנת implies "if and only if," while אם implies just "if."

But the problem with this is that רי"ף and רמב"ם somehow relate it to the apparent fact that it is "like מעכשיו," so this doesn't seem to be where they are coming from. [Also, it is hard to see how this is true anyhow].

b) The רמב"ם seems to have a unique שיטה by גט as well:

If a person were to give a גט now, and 30 days from now she buys him a house based on what he had said:

I) If he had said על מנת she buys him a house — it was גירושין למפרע

II) If he had said after 30 days [or any other "...לאחר"] if she buys him a house — it is גירושין מכאן ולהבא

III) If he had said אם she buys him a house:

Most ראשונים — it is גירושין מכאן ולהבא

רמב"ם – "he divorced her now [at the giving], but she is only divorced when she buys the house"

The רמב"ם proceeds to outline various נ"מ between לאחר ל' and אם, cases II) and III) respectively:

1) תנאי כפול – אם requires תנאי כפול, while לאחר ל' does not

2) גט in רשות הרבים at the time of fulfillment – אם is גירושין, but לאחר ל' is not

3) if she remarried before fulfillment – by אם, she mustn't leave him, but by לאחר ל' she must

Clearly then, רמב"ם distinguishes between אם and לאחר ל' in some very radical way. All the ראשונים did not.

Apparently, רמב"ם thinks that by אם, something unique happens — the action, in a sense, happened now, and then it must be undone later on. אם is a special kind of תנאי.[225]

Accordingly, the difference between על מנת and אם is that by על מנת, if the תנאי is unfulfilled, *truly nothing* happened at the earlier point (later on, when left unfulfilled, it was revealed למפרע that nothing ever happened). But by אם, it *did* happen now, and then it must be uprooted after (when left unfulfilled).

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[224] [More precisely, some ראשונים make it more broadly about איסור versus ממונות (see בעל המאור in גיטין there). However, others (such as רשב"ם in ב"ב and רמב"ן in מלחמות ה' there in גיטין) explain that we generally *don't* need a תנאי כפול, against ר"מ; that being said, as a special חומרה by גיטין and קדושין, a תנאי כפול is required nonetheless לכתחילה. (As for our גמרא, which is about קדושין — it was not discussing what to say לכתחילה, but rather a בדיעבד case, and thus left out the תנאי כפול)].

[225] (This is presumably what the אבני מלואים meant as well in his piece discussing this רמב"ם).

Therefore, אם is a very big חידוש (that this type of תנאי can uproot the מעשה); as opposed to על מנת, which, as the גרי"ז put it, isn't a חידוש at all, just like a מקח טעות — there was no דעת in the beginning. The חידוש of תנאי, of אם, therefore also requires certain special rules [foremost among them being תנאי כפול].

This also neatly explains why the תנאי is בטל and the מעשה is קיים when no תנאי כפול was made:

At first glance, this is absurd: why should the מעשה be קיים if he never intended it?

a) מאירי, ראב"ד (משנה תורה on) – if truly serious about the תנאי, then he would've made it a תנאי כפול; since he didn't, he was just trying to encourage the person to do what he wanted

(This works best within תוספות's approach [in the last שיעור] about גילוי דעת by תנאים).

b) כתובות in תוספות – since the whole idea of a תנאי is a חידוש, then must stick to its unique rules. Either do it right, or don't: if he wants to use the special חידוש of תנאי, then he must do it correctly; if not, it falls away, and he is left with the חלות of his action.[226]

While a) is psychological, b) is formal.[227]

Accordingly, the רמב"ם would probably view אם and תנאי like b).

To the רשב"ם and ראב"ד, approach 4) above — תנאי was learned from בני גד ובני ראובן, itself a case of ממונות!

A) רשב"א, רמב"ן (brought in מ"מ) – we don't pasken like ר"מ; there is really no need for a תנאי כפול; however, by גיטין and קדושין, which are so important, we are מחמיר to לכתחילה be חושש for the other opinion, for ר"מ

B) ראב"ד (משנה תורה on), בעל המאור – no, there is a real difference between גיטין/קדושין and ממונות

Different approaches of how to explain this:

a) גרי"ז – when the two sides of the תנאי are ממונות, we believe he really wants it on only תנאי; but by marriage and divorce, he isn't altering his life so significantly just for the point being thrown in. As for the specific case of בני גד ובני ראובן — because they didn't own it yet, it wasn't merely trading property (plus, this was their נחלה in א"י); it was far more significant, and that's why משה רבינו needed a תנאי כפול.

b) Rav Soloveitchik – there is a fundamental difference between ממונות and איסור. ממונות depends solely on the person's desires; thus, whatever he says goes. But by איסור (including אישות), it is a חלות with a life of its own; it has objective significance. To affect this, one needs the חידוש of the mechanism of תנאי.[228]

(This idea of Rav Soloveitchik's to distinguish here can also be applied to explain the רמב"ם's separate distinction, to distinguish between languages used: על מנת is about טעות, while אם is about תנאי).

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[226] Still though — he didn't want to do it! Why should this be true?

1) גרי"ז – maybe this is part of the גזירת הכתוב of תנאי

2) He really meant the חלות fully; and then, he really meant the תנאי to prevent the חלות. But that second ability is unable to destroy the first unless done right. "תנאי מילתא אחריתי" — tough luck — he thought he was getting two things, and turns out that the second one got messed up — but once he committed to the first one, it happens anyhow.

[227] [There is technically another option found in the ראשונים: **c) רשב"א in גיטין –** sort of combines these two – once there is a גזירת הכתוב, then he really didn't mean it].

[228] [לענ"ד, the גרי"ז fits better for the ראב"ד, while Rav Soloveitchik fits for the בעל המאור].

שיעור #38 – 2/23/17

מנה אין כאן משכון אין כאן – ח. - ח:

What is the דין if one is מקדש a woman with a מנה and gave her a משכון immediately?

A) בעל העיטור – valid קדושין

Why might this be true?

Perhaps comparable to the גמרא on מז:, about transferring a שטר חוב as the קדושין. Fundamentally, that גמרא indicates that one *can* be מקדש her without actual money and merely with a debt; only for technical reasons does it not work (that he can be מוחל it and she won't rely on it). Additionally, מעמד שלשתן works for קדושין. Thus, we see that transferring a debt is a valid form of קדושין, as long as the technicalities are worked out (like in the next case in our גמרא as well, by a משכון דאחרים).

B) Most ראשונים – not a valid קדושין

Why not?

1) ריטב"א, ראב"ד, ר"ש – no debt was created here; thus, no valid transfer, and no valid קדושין either

To this, one cannot give a משכון unless there is a debt.[229] The משכון builds on the debt.

(רש"י is not clear, but many אחרונים [see קרבן נתנאל, for example] understood רש"י this way too).

2) רשב"א, רמב"ן – this *is* a valid creation of debt; thus, it is a valid משכון. However, the reason why this still isn't a valid קדושין is because there is a difference between his משכון and a משכון דאחרים: by his משכון, he's still connected to it; but by giving her a משכון of others, he is totally disconnected from it now.[230]

Why does it make a difference whether or not he is still connected to it?

a) Perhaps related to the חקירה above about whether there is a need for a full נתינה [see שיעור #28] or not (if he is still connected to it, then maybe there is an issue with the נתינה [the מנה is not yet given, and the משכון was only given temporarily, since it will be going back to the husband]).

b) ר"ן uses a phrase of "אגיד גביה," a term borrowed from גיטין. He can no longer be attached to her at all — no strings attached. This could mean to refer to the idea of כריתות, that the giving must be a complete separation between the item-giver and the item; and that somehow, this transfers over to the realm of קדושין-item-giving as well.

(However, more likely, he just means to say that it is a חסרון with the נתינה, like the first option).

[One potential נ"מ between these two options might be whether it applies to buying קרקע — if a), then not a נתינה; but if b), no connection to כריתות, so it would work].

Potential נ"מ [between 1), ר"ש, and 2), רמב"ן]:

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[229] [There is a ר"ן in שבועות (on יז: in the דפי הרי"ף) which interprets the ר"י מיגש as holding that one cannot truly give a real משכון in this instance; even if a real debt *were* created (for example, if money was given the day before), a real משכון is only able to be given at the time when the money was handed over. However, this is not a mainstream understanding].

[230] Other ראשונים whose opinions could have potentially been added to either side:

As stated above, רש"י's opinion isn't clear. רמב"ם also is not clear.

As for תוספות — though תוספות begins by sounding like the רמב"ן, in the end he seems like the רא"ש. Which one is תוספות?

תוספות הרא"ש made it into two separate opinions (first רמב"ן's, then his own); but תוספות doesn't sound like that.

פנ"י, קרבן נתנאל – read רמב"ן into תוספות (though since תוספות really sounds like the רא"ש, the פנ"י says תוספות holds of both)

1) Can one create indebtedness via giving over a משכון [see above]?

To ראש – no; to רמב"ן – yes

If not, what about the גמרא in ב"מ about using a פועל's work tools to hire other workers if it was a situation where one isn't able to get other workers now, it is a דבר האבד?

a) They initially were מקנה him the item for this purpose

b) There is a הזיק involved

Why does that matter?

I) Maybe because of תפיסה by גרמא (this would be a huge extension to בושת דברים)

II) Maybe because of some sort of תקנה דרבנן

If not, are there any exceptions where this *would* work still?

a) תוספות – if he is מקנה him the item itself

b) ריטב"א quoting the ראב"ד – if he is מקנה him a שיעור of a מנה in the משכון

c) ר"ן quoting the ראב"ד – if he is מקנה him a שעבוד of a מנה in the משכון

Isn't this exactly against the שיטה of the ראב"ד overall, that one cannot create a שעבוד on the משכון without a real debt?

I) אבני מלואים – it's a טעות סופר

II) One *can* create a שעבוד on a משכון, as long as one explicitly says it; not on its own.

(If this is correct, then this turns the ראב"ד into a strange new, third שיטה).

If yes, what is the סברא for why this works?

a) אבני מלואים – can create an ערב without a לוה (based on a strange case in the שו"ת רשב"א), or a שעבוד משכון without a שעבוד הגוף

b) קונטרסי שיעורים – the giving of the משכון creates a שעבוד הגוף

What might be some נ"מ to these different explanations of the סברא of the רמב"ן?

I) An $100 משכון for an $1000 debt – if a), then $100; if b), then $1000

II) If the משכון is lost באונס – if a), then פטור; if b), then חייב

2) Doing קדושין by giving her a שטר which says he owes her money:

To 1), ריטב"א (and perhaps a דיוק in רש"י on ה.) – valid קדושין; but to 2), רשב"א – not a נתינה still (since he is still holding onto the money)

In the case of משכון דאחרים, which *does* work, what is the חפצא being used to do the קדושין?

A) רמב"ם – the משכון

B) רמב"ן – the חוב

(רש"י is a bit unclear. At first, he sounds like it is the חוב; but then he says since she is owning the משכון).

[מאירי – brings two opinions – a) can say either חוב or משכון (this would fit with the רמב"ם; he says חוב works by מעמד שלשתן, for example); but b) "גדולי הדורות" (perhaps רמב"ן) – cannot (presumably, must say חוב)]

To A), why would it work to say with the משכון?

1) תוספות ר"ד – the בעל חוב is קונה the משכון with a קנין גמור

2) רמב"ם – he is מקדש her with the portion of ownership he has in the משכון

3) ריטב"א, רשב"א – even if he says משכון, he really means the חוב, since the משכון is really called the חוב

יונת אילם – there is a מסורה from Reb Chaim that the משכון is the embodiment of the חוב, it really is the עיקר of the חוב — "in the משכון lays the חוב." The שעבוד המשכון is the main point, not the שעבוד הגוף.

This potentially could help to explain numerous things:

a) This opinion of the רשב"א and ריטב"א

b) The strange language of רש"י above (how he mentions both the משכון and חוב)

c) The קונטרסי שיעורים above (how the משכון creates the שעבוד הגוף)

d) How most poskim assume that the transference of the משכון transfers the שעבוד הגוף also.

שיעור #39 – 2/27/17

רבי יצחק – ח:

רבי יצחק said that a בעל חוב is קונה the משכון.

This statement of רבי יצחק appears in the גמרא five times in total:

[1 , 2] The גמרא in both ב"מ and שבועות (it is the same גמרא) seemingly says that his rule is only שלא בשעת הלואתו.

[3 , 4] Yet the גמרא in גיטין sounds like רבי יצחק's דין applies (שביעית won't be משמט the חוב) even when בשעת הלואתו, as does the גמרא in פסחים (will count as one's חמץ if one takes חמץ as a משכון from a גוי)!

[5] Then there is our גמרא in קדושין, which could seemingly be understood either way.

There are many different approaches for how to address this apparent contradiction:

A) רמב"ן, רמב"ם, others – רבי יצחק applies even בשעת הלואתו

To this, the גמרא in גיטין and פסחים makes sense. [3 , 4]

What about the גמרא in ב"מ and שבועות? [1 , 2]

1) רמב"ן – that was just a ה"א, that רבי יצחק was only שלא בשעת הלואתו (asked as a rhetorical question)

2) ר"י מיגש – in those cases, it was not the סתם גמרא speaking; רבי יצחק himself said that his דין was both בשעת הלואתו and also שלא בשעת הלואתו. But the גמרא was saying that some תנאים don't agree with this, and they argue with רבי יצחק when בשעת הלואתו; that being said, רבי יצחק himself said it in all cases.

(This requires one to read the גמרא's formulation of "did רבי יצחק say" in a לאו דווקא fashion).

B) ר"ת – רבי יצחק applies only שלא בשעת הלואתו

To this, the גמרא in ב"מ and שבועות makes sense. [1 , 2]

What about the גמרא in גיטין and פסחים? [3 , 4]

ר"ת – distinction between formulations: "הלואהו" means בשעת הלואתו, but "המלוה" can mean either

This only works to explain the גמרא in גיטין [3]; but what about the גמרא in פסחים [4] (says המלוה)?

ר"ת – distinction between a גוי and a Jew: by a גוי, בשעת הלואתו is the same as שלא בשעת הלואתו

Why might this be true?

By a משכון of בשעת הלואתו of a Jew, he really trusts him, and is counting on him returning it; by שלא בשעת הלואתו, he is taking it as collection. But by a גוי, one might not be as certain he'll pay up, so even when בשעת הלואתו, one intends to take it as a collection.

C) ספר המכריע (תוספות ר"ד) – (subtly different than ר"ת) – רבי יצחק himself says it by both בשעת הלואתו and שלא בשעת הלואתו, but we only pasken like him שלא בשעת הלואתו.

(Almost the same as ר"י מיגש, except ר"י מיגש paskened one way, while תוספות ר"ד paskened the other).

To this, the גמרא in ב"מ and שבועות [1 , 2] meant we only pasken like רבי יצחק by שלא בשעת הלואתו.

However, the גמרא in גיטין and פסחים [3 , 4] was going according to רבי יצחק himself, and we don't pasken like those סוגיות (we agree to the דין, but for different reasons).

D) Based on בה"ג – depends on whether there was a שטר or not — with a שטר – only שלא בשעת הלואתו; without a שטר – even בשעת הלואתו

To this, the גמרא in ב"מ and שבועות [1 , 2] is with a שטר.

If so, בשעת הלואתו, the מלוה wasn't intending the משכון as a collection. He was still expecting to get cash, that's why he had the לוה write him the שטר; really relying on the שטר, not the משכון. But when שלא בשעת הלואתו, the מלוה was clearly taking the משכון to rely on it, as collection.

However, the גמרא in גיטין and פסחים [3 , 4] are without a שטר.

If so, then the person is really using the משכון to rely on it, and therefore it is more like a collection; thus, רבי יצחק's דין applies even when בשעת הלואתו.

E) תוספות, רא"ש – רבי יצחק's דין has two levels

To this, the גמרא in ב"מ and שבועות [1 , 2] is only שלא בשעת הלואתו, where there is a full קנין on the משכון.

However, the גמרא in גיטין and פסחים [3 , 4] are even בשעת הלואתו (echo of the full קנין by שלא בשעת הלואתו); he is קונה a strong שעבוד, enough to prevent השמטת החוב and to be מחייב for בל יראה ובל ימצא.

How does this work? Why does שלא בשעת הלואתו show anything about בשעת הלואתו?

Perhaps because every משכון which was בשעת הלואתו has the potential to eventually turn into a משכון which will have the status of a שלא בשעת הלואתו [i.e. if the time of the loan expires].

How does רבי יצחק being applied to our גמרא in קדושין [5] fit in?

To A) – even בשעת הלואתו

To B) – only שלא בשעת הלואתו

To C) – only שלא בשעת הלואתו

To D) – depends if there is a שטר

To E) – could go either way — which of these two levels does קדושין require?

a) תוספות – even בשעת הלואתו

To this, even a strong שעבוד is enough for doing a valid קדושין.

b) רא"ש – only שלא בשעת הלואתו

To this, one needs a full קנין to accomplish a valid קדושין.

To what degree does the בעל חוב acquire the משכון (to what degree will he be חייב on it according to רבי יצחק)?

A) תוספות רי"ד) ספר המכריע, ראב"ד, רש"י – חייב on אונסין

a) ספר מכריע, ראב"ד – specifically שלא בשעת הלואתו

b) רש"י – unclear, might even be בשעת הלואתו

B) רב האי גאון, ר"ח, ריטב"א, רמב"ן, ר"י מיגש, רמב"ם, רא"ש, תוספות – חייב on גניבה ואבידה (like a ש"ש)

Proof: the גמרא in ב"מ on פב. equated רבי יצחק with ר"מ (who held the בעל חוב who is like a ש"ש on a משכון)

Defenses for the other side:

a) רא"ש – that was only a ה"א (and could've rejected it for this reason, but had other questions to ask)

b) רש"י – saying that ר"ע (in a מחלקת of ר"א and ר"ע) aligns with רבי יצחק, not ר"מ (from ר"מ and רבי יהודה)

(רמב"ן attacked this for other reasons; but רש"י apparently held ר"מ was never equated to רבי יצחק)

What might be the סברא for either opinion?

For A) –

It can't be that he is חייב on אונסין because he is like a שואל; as the רמב"ן argues, a שואל is only חייב on אונסין because of the notion of "כל הנאה שלו," which isn't true here (can't use the משכון). What is the סברא then?

1) חייב as an owner: an owner obviously loses out when his property gets damaged, even if only through **אונסין**. Thus, because he is **קונה** the **משכון**, the **מלוה** is like an owner on it (he received a full **קנין** on the **משכון** as payment), and is **חייב** on **אונסין**. (The **לוה**'s right to redeem the item doesn't prove ownership).

2) יונת אלים quoting Reb Chaim – a **משכון** is not **פרעון**; rather, it *is* the **חוב** itself. "In the **משכון** lies the **חוב**." When the item gets lost, therefore, the **חוב** is lost as well.[231] [See previous **שיעור** as well]

To highlight the difference between these two options:

Why doesn't the **לוה** still have to pay the **מלוה** back if the **משכון** gets destroyed through **אונסין**?

To 1) – because he already repaid the loan; but to 2) – because the **חוב** was destroyed and lost.

For B) –

What is the "**שכר**" which makes him like a **ש"ש**? It can't merely be the **מלוה**'s holding onto the **משכון** and thereby being more secure on his money, since that was true even without getting onto **רבי יצחק**!

1) ראש (first answer) – can use it for **קדושין** now, or to buy **קרקעות** or **עבדים** (which he couldn't as a **הלואה**)

The **קנין** gives you the right to do the **קדושין**, and the ability to do **קדושין** is the **שכר**.

This is weak, because he could've done this with the money before the loan, so not really a net gain.

It must be that nonetheless, since he doesn't have the money right now, it's called a "**שכר**."

This works by a **משכון** that was **בשעת הלואתו**.

However, **שלא בשעת הלואתו** would seemingly have made sense even without **רבי יצחק** (the **שכר** that he's secure that he'll get paid back now). Why do we need to get onto this here as well?

Apparently, we'll have to say that this is inherent **שכר**, not an entirely new **שכר**, which is what is necessary for the **חיוב** (like **פרוטה דרב יוסף**, which works since he didn't have it before).

Overall, this answer gets pretty complicated.

2) ראש (second answer) – can use it for a **חליפין** now (which he couldn't as a **הלואה**, or even as money)

This is weak, because it is hard to see why this is significant "**שכר**" — can just use any small item…

3) ר"י מיגש – he was **קונה** the **שעבוד** (and that very **קנין** itself is the "**שכר**")

(This answer too will run into the same problems the first answer of the **ראש** did above)

4) רמב"ן – now **שמיטה** will not be **משמט** it; also, now it won't be lost if the **לוה** dies (can collect from **יורשים**)

(This answer too will run into the same problems the first answer of the **ראש** did above)

5) Rav Rosensweig – why is a **שוכר** held accountable for **גניבה ואבידה** like a **ש"ש**? Not because he is hired to guard it, as a **שומר חנם** and a **שומר שכר** are — rather, because he is allowed to use it, which constitutes a **קנין** of sorts; he's more like a **שואל**. Thus, while a **שוכר** and a **ש"ש** look similar, their **חיובים** come from different angles: a **ש"ש** is a beefed-up **ש"ח**, but a **שוכר** is a watered-down **שואל**.[232]

Plugging this idea in here: the point isn't "**שכר**" here; rather, it is ownership, and that is why he's **חייב** like a **ש"ש**. "With **קנין** comes responsibility." This can itself be formulated in one of two ways:

a) when one owns something, one is expected to take care of it; upon destruction, he is blamed

b) not about blame; rather, he's made himself lose out on it by not watching what he himself owns

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[231] The best proof for Reb Chaim might be the opinion of **שמואל** in **שבועות**. Though we don't pasken like him, **שמואל** says that even if the **מלוה** took a very small **משכון** — if that small **משכון** gets destroyed, the entire **חוב** is lost. And it's possible that we don't pasken like **שמואל** only for technical reasons, but his basic understanding might be true still.

[232] This might have been what **רב האי גאון** meant in the quote brought in the **ספר המכריע**.

שיעור #40 – 3/2/17

"תנם על גבי סלע"; "תנם לאבא"; "נטלתו וזרקתו לים"; רבי יצחק – ח:

Is the קנין of the משכון a full קנין in the item itself, or is it merely a קנין on the שעבוד?

A) תוספות,[233] ב"מ in רש"י[234] תוספות ר"ד[235] – an actual קנין

B) ריטב"א, ר"י מיגש, (and תוספות's second level) – a קנין with regard to שעבוד

Potential נ"מ:

1) If a גר lends money on a משכון and then dies –

ר"ת (quoted in שו"ת מהר"ם) – the משכון is הפקר (which fits with the actual קנין side); but תוספות and רשב"א in ב"ק – reverts back to owner (which fits with the שעבוד side)

2) If one lends money on a משכון, and then is מוחל the loan –

ר"ן, ריטב"א,[236] בעל העיטור – מחילה doesn't work (which fits with the actual קנין side); but שו"ת מהר"ם – מחילה does work (which fits with the שעבוד side)

3) חיוב אחריות [see previous שיעור] –

רש"י, תוספות ר"ד, ראב"ד – even for אונסין (which fits with the actual קנין side), but תוספות, רמב"ם, רמב"ן, ריטב"א, רשב"א, etc. – only like a ש"ש (which fits with the שעבוד side)[237]

4) Even בשעת הלואתו or only שלא בשעת הלואתו? [see previous שיעור]

If it was only שלא בשעת הלואתו, it could fit to either side here, seemingly; but if even בשעת הלואתו, then it would seemingly fit better with the שעבוד side

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If she takes the money and throws it into the sea, the גמרא says she is not מקודשת. Why not?

Seemingly, it can't be because she retracted on the קדושין (which she accepted) within תוך כדי דיבור — after all, קדושין is one of the exceptions to that power of תוך כדי דיבור!

Two general approaches to this question:

A) No retraction at all here –

a) מאירי – there was never an agreement for קדושין in the first place, since she took it in anger

(To this, even if she throws it after תוך כדי דיבור then, she is not מקודשת)

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[233] "קנין גמור"

[234] "לכל מילי"

[235] "לגוביינא"

[236] Though the ריטב"א really says that it is not a full קנין, but that it is a strong enough partial קנין to prevent מחילה.

[237] Of all the ראשונים, only תוספות calls the קנין a "קנין גמור" and also says he is only חייב like a ש"ש. To explain this apparent difficulty, one must either say a) the formulation was לאו דווקא, or else b) in addition to him owing the money, he also gave the מלוה a קנין גמור (but not as payment). Thus, if destroyed through no fault of the מלוה's, then he doesn't need to pay for the משכון and is still owed the loan. (That being said, this is rather unintuitive — why would the לוה need to pay twice?)

b) חכם צבי – even if she took it calmly — nonetheless, since she revealed within תוך כדי דיבור that she only took it in order to throw it into the sea, it was never an acceptance. While indeed, there is no ability to retract within תוך כדי דיבור by קדושין, but there *is* the ability to reveal one's דעת within תוך כדי דיבור.[238]

(תוספות ר"י הזקן – quoting רב נסים גאון – clearly along the same lines as these two, in that there is no retraction; however, not clear which of these two options he really means).

B) There is retraction here –

ספר המקנה – really, one *can* retract within תוך כדי דיבור even by קדושין; when the גמרא said it was an exception, it just meant that לא אתי דיבור ומבטל מעשה.[239] However, with another מעשה, one *can* retract, even by קדושין — אתי מעשה ומבטל מעשה.

(This is a big חידוש, for it goes against the standard explanations given as to why these four things are exceptions to תוך כדי דיבור).[240]

How does the case of "על מנת שיקבלם לי" work for קדושין?

A) אבני מלואים (and silence of most ראשונים) – שליחות

תוספות ר"ד – but there was no appointment; could there be שליחות here?! Therefore,[241]

B) תוספות ר"ד – not שליחות; rather, doesn't need to give her the כסף קידושין — enough to put it where she says

(We'll analyze what he might mean by this soon).

How might the other ראשונים respond to this issue of there not being מינוי?

1) There is an implicit מינוי שליחות

How?

a) Via the חתן (and not an issue of אמרו אימרו, for maybe these ראשונים don't think that is an issue)

b) Directly to her father (and מינוי שלא בפניו works)

These are both knotty, but could work for some ראשונים.

2) Working through זכין לאדם שלא בפניו

Is it really so obvious that קדושין is a זכות for her?

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[238] (These "two דינים" in תוך כדי דיבור can be useful in defending ר"ת's שיטה that תוך כדי דיבור is דרבנן only, despite the fact that we find the idea of תוך כדי דיבור even by דיני דאורייתא: perhaps ר"ת just meant that there was a תקנת השוק which permitted retraction, but with regard to תוך כדי דיבור as a concept of connecting moments — that is a דאורייתא concept he too agrees to).

[239] By קדושין, the עיקר is the מעשה (i.e. the חלות which comes about because of the ritual act); unlike by דיני ממונות, where the עיקר is the דעת (i.e. and not the action which symbolized that one had דעת).

[240] Namely, either because they are unable to be overturned by a mere תקנה, since they are דאורייתא and הפקר ב"ד הפקר cannot help [this is how Rav Bednarsh formulated it; however, I thought the way this option was generally presented was because these things are so destructive that חז"ל left these out of their תקנה to prevent certain severe problems; see רשב"ם in ב"ב on the very bottom of קכט: and the top of קל., for example]; or else, because these things are so serious that people won't say them unless they are absolutely certain, and thus there is no unspoken room left for them to take it back if they so choose].

[241] (He is also based on the upcoming גמרא).

a) אבני מלואים – can split the דעת for the קדושין and the דעת of acquiring the money. The דעת of the קדושין — that, she does on her own; as for the דעת to accept the money on her behalf — that, the father does using זכין לאדם שלא בפניו.

b) Perhaps קדושין is a זכות in this case, if זכין applies to anything she says she wants and consents to

(This isn't so simple for a couple of reasons: many ראשונים say that זכין only works if it gives her something new; and also, many say that it only works if it is an objective זכות [just because she once said she wants it doesn't mean that it is actually a זכות for her now when she isn't there]).

In the ספק case of "תנם על גבי סלע," when it was a סלע של שניהם, the simple understanding of the גמרא's ספק is whether she meant to say "yes" to him when she said to put it on a rock of both of theirs.

If so, where is the קנין of the קדושין? It can't be קנין חצר — the גמרא in ב"ב says this doesn't work to acquire things!

A) Works through regular rules of קנין –

[Assumption about his דעת]

a) רשב"א, רמב"ן – he was משאיל לה מקום בסלע

(Not only does this require an assumption in his דעת, there's another problem here — where is the מעשה קנין on the rock? To that, some distinction would need to be made, perhaps about שותפין).

[אוקימתא in the case]

b) ספר המקנה, תוספות טוך (defending רש"י) – she owned a specific half

(To this, the question could either be: a) which half did she mean for him to put it in, his or hers; or else, b) does she mean to accept the קדושין when she tells him to put it on her half of a rock which he owns the other half of?)

c) רא"ש – he actually placed it in her hands (he didn't really put it in the rock)

B) ריטב"א – though דין ערב [242]

This is because he is spending the money on her behalf.

Why didn't the other ראשונים say this?

1) רא"ש, רשב"א – not relevant at all — דין ערב only applies when he gives it to a person!

2) רמב"ן – fundamentally relevant; however, דין ערב applies only when one actually spends one's money — here, by putting it on a rock, he isn't losing his money

Why does the ריטב"א think this *does* count as איבוד ממון?

Perhaps ריטב"א thinks that even though it is still guarded when he is still here —when he leaves, it is no longer guarded and counts as מאבד ממונו על פיה; however, רמב"ן argues, and says that since it wasn't destroyed when he actually placed it down, it isn't really איבוד ממון.

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[242] [Rav Bednarsh said the ריא"ז is like the ריטב"א לענ"ד, while I think the ריא"ז (who argues on his grandfather, the תוספות רי"ד below), is *similar* to the ריטב"א, in that it also works through ערב according to him, I also think that there is a significant difference: while the ריטב"א still required איבוד ממונו, the ריא"ז holds it works simply because he gives her הנאה by placing it where she wanted it (closer to the "יש מתרצים" in the רשב"א and רא"ש, who has it working with ערב yet needing איבוד ממוניו)].

Obvious נ"מ: if she explicitly says that she wants it as קדושין, and that he should place it on the rock — to רמב"ן, ריטב"א – a valid קדושין; but to רשב"א, רא"ש – not a valid קדושין

C) תוספות רי"ד – any place where he puts it at her request counts as giving it to her

This is a big חידוש. If this were true, then why would we need דין ערב at all?

a) Perhaps תוספות רי"ד thinks this *is* דין ערב.

(This would be a new interpretation in דין ערב, and would seemingly also apply to ממונות then).

b) Perhaps דין ערב is when she wants someone else to have the money; the תוספות רי"ד is talking about where she wants to have it, she just wants it in a certain location (which is not in her יד or חצר)

(To this, it seems that this would only apply to גיטין and קדושין, not דיני ממונות).

Why?

מאירי – quoting רוב גאונים – while in מקח וממכר, one needs to have a regular קנין to acquire the item — for קדושין, she doesn't need a *real* קנין on the כסף; rather, it is good enough that she is "מחזקת עצמה כמקובלת בכך." This is because he isn't actually buying anything here (it's not a real קנין, not a real קנין הגוף); thus, an experience of נתינה is enough, even if not a legal transfer.

שיטה לא נודע למי – putting it in her שמירה counts as enough for קדושין

Why is this good enough?

Here too, the same two types of possibilities as within the תוספות רי"ד:

a) This is called "איבוד ממונו על פיה" too, and thus working through דין ערב

b) Like the מאירי's "רוב גאונים," but he quantifies it to something more substantive (דיני שמירה)

שיעור #41 – 3/6/17

איסורי הנאה ;"תנם על גבי סלע" – ח:

(continuing off the end of last שיעור)

As a potential basis for the opinion of the תוספות רי"ד, let's look at a גמרא in גיטין on :עח –

Three strange points emerge from it:

a) There seems to be a קנין ד' אמות in a רה"ר (generally, it doesn't work there)

b) According to רבי יוחנן (how we pasken), if she can guard it, then it's a valid גט even beyond her ד' אמות

c) רבי יוחנן says that this is uniquely true for גירושין, but not for other things

Are these a pattern? Is there some underlying reason which connects all of these?

1) תוספות – no חידוש at all here

What about these three strange things?

Regarding a) – לאו דווקא in a רה"ר; really meant in a סימטא (where קנין ד' אמות does work)

Regarding b) – the regular rule is that יכול לשמור counts as ד' אמות

Regarding c) – by גט, she needs to accept it on the floor (it works בע"כ); but by ממונות, the person doesn't need to accept it there if they don't want to

2) רמב"ן – a חידוש based on a תקנה

This was a special קולא by גיטין because of a תקנה מדרבנן to prevent עגונות.

Thus, even in a רה"ר, even if beyond ד' אמות (as long as she can guard it), and only by גט.

3) פסקי הרי"ד – a חידוש based on a fundamental difference between גיטין and מקח וממכר

By גיטין, he doesn't have to be מקנה the גט to the wife; rather, there must just be a מעשה נתינה.[243]

Thus, even in a רה"ר, even if beyond ד' אמות (as long as she can guard it), and only by גט.

Why might this be true?

I) Perhaps only by גט, since בע"כ (and thus, unlike a normal קנין, which requires both sides' דעת)

II) Perhaps only by שטרות, which are not intrinsically valuable.

III) Perhaps only by אישות, which only requires a מעשה נתינה, not a true קנין.

If this last option were true, then this might provide basis for the תוספות רי"ד in our סוגיא.

Indeed, **פנ"י –** connects this פסקי רי"ד to our תוספות רי"ד here; it fits perfectly לשיטתו.

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[243] קצוה"ח [see below] and others say this too (based off the גמרא in גיטין on .כ, about using איסורי הנאה despite not owning it). However, Reb Chaim and many others argued on this whole idea, and thought there is a need for a true קנין by גט as well.

Strangely, the רמב"ם seemingly brings our גמרא about the סלע של שניהם twice. Why?

Numerous answers are given by the אחרונים; one example:

אור שמח – maybe both ways to understand this סוגיא was legitimate — a ספק in her דעת, or a ספק in the קנין.

Accordingly, the רמב"ם paskened like both legitimate options.

However, maybe the רמב"ם was joining the גמרא here and the גמרא in גיטין because he held like קצוה"ח and פנ"י, that only a מעשה נתינה is required by both.

Can קדושי שטר be done with איסורי הנאה?

In the בבלי, this is never discussed. A similar idea, of using איסורי הנאה, is found by גיטין (in גיטין on כ.).

But what about קדושי שטר, or some other form of שטר קנין (like for קרקע or עבדים) [as opposed to שטר ראיה]?

ירושלמי here – equates this to גיטין, and says it depends on the level of the איסור:

If אסור בהנאה מדאורייתא – the שטר is not valid; but if only אסור בהנאה מדרבנן – the שטר is valid.[244]

What is the reason for this distinction?

a) Maybe both technically would work, but חז"ל were גוזר to be מפקיע the קדושין by an איסור דאורייתא.

b) However, perhaps this distinction is more fundamental: maybe something אסור בהנאה מדאורייתא is not defined as a חפצא of ממון; but if it is only אסור בהנאה מדרבנן, then it *is*, but we just *act* as if it wasn't (a classic גברא/חפצא distinction). And a נ"מ would be whether they can work as קדושי שטר.

An apparent contradiction between the בבלי and ירושלמי by גט emerges though:

The בבלי says that all איסורי הנאה work for גט, but the ירושלמי says that it depends on the level of the איסור.

1) Mainstream approach – indeed, a מחלקת between them, and we pasken like the בבלי over the ירושלמי

2) מאירי – suggests a way to make the ירושלמי like the בבלי, by reading it בתמיה

3) שו"ת רשב"א (only a ה"א; he rejects this is the end) **–** maybe the בבלי agrees to the ירושלמי, and the בבלי was only talking about using something which was אסור בהנאה מדרבנן

להלכה, we assume like this first approach, and pasken like the בבלי by גיטין (works with all types of איסורי הנאה).

Given that, is there a difference between different שטרות?

A) שו"ת רשב"א – yes — by קדושי שטר, if done with איסורי הנאה מדאורייתא, it is invalid

What would be the סברא for this?

By גט, only need a מעשה נתינה, since can do it against her will; but by everything else, that isn't true.

B) קצוה"ח – yes — still works by קדושין (since קדושין is just like גיטין) [see פנ"י and note 243 above]; but by מקח וממכר, by regular שטרי קנין, then it doesn't work if done with איסורי הנאה מדאורייתא

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[244] As an aside, both the בבלי and the ירושלמי say that by קדושי כסף, even something only אסור בהנאה מדרבנן won't work.

What might there be a difference (at least to the ירושלמי) between כסף and שטר? כסף requires some value or הנאה to be gotten, and all types of איסורי הנאה are worthless and no הנאה will be gotten from them; but שטר does not require any value or הנאה.

What would be the סברא for this?

אישות only requires a מעשה נתינה, which can be done with איסורי הנאה; מקח וממכר needs a real transfer.

c) אמרי בינה – no — all types of איסורי הנאה can be used for all types of שטרות

What would be the סברא for this?

Paskening like the בבלי over the ירושלמי, and extending that to all שטרות [perhaps because they are not intrinsically worth anything, then that is clearly not what the קנין is about].

In the case of "כלב רץ אחריה," to what degree is there a חיוב הצלה?

A) מאירי[245] **–** must spend money to save the person, but also will be reimbursed

B) יש אומרים quoted by מאירי – must spend money to save the person, but will not be reimbursed

C) ריטב"א – depends whether she says something:

If she says to save her – must save her, but will be reimbursed (since she told him to do so)

If she doesn't say anything – doesn't need to save her, but won't be reimbursed if he does (like מבריח ארי)

ריטב"א seems to be assuming that she isn't in mortal danger (otherwise, there would be a חיוב to save her from "לא תעמוד על דם רעך"); moreover, he seems to be assuming that it isn't even a case of clear danger, since if she was already being damaged, then not considered מבריח ארי, and he would get reimbursed.

מאירי, on the other hand, seems to be assuming it was a case of mortal danger.[246]

Accordingly, ריטב"א thinks the חיוב to save her depends on her אמירה; to the others, it does not.

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[245] Most ראשונים in סנהדרין on עג. say like this as well.

[246] [See also תוספות ר"י הזקן].

שיעור #42 – 3/9/17

ט. – שטר קדושי שטר on a חרס; Man gives the שטר

If one writes a שטר קדושין on a חרס, that is a valid form of קדושין, even if it isn't worth a פרוטה.

The גמרא's explicit חידוש is that this works even though it isn't worth a פרוטה.

(This is coming to contrast the נתינה of כסף with that of שטר — by שטר, called a נתינה, even though worthless).

The גמרא's implicit חידוש is that a שטר on חרס works, even though it can be forged.

However, this generally is not true. The גמרא in כתובות advises writing a sample of one's signature on חרס, since there is nothing to worry about there (no one will write something above the signature, since such a שטר wouldn't be accepted anyhow, since able to be forged when on חרס).

If so, how can our גמרא imply that a שטר קדושין can be written on חרס; it should be invalid, since יכול להזדייף!

[Technical answers]

A) ר"ת[247] **–** denies the premise — our גמרא meant to engrave into the חרס (which isn't able to be forged)

(But indeed, if written with ink, such a שטר קדושין would have been invalid).

B) רבינו יחיאל[248] **–** their חרס was different than ours; theirs could not be forged, even though ours can

If so, why then does the גמרא in כתובות say it is safe to write one's signature on חרס as a sample?

רבינו יחיאל – shards of חרס were often thrown out; thus, no one would ever think to look through the garbage for this shard. Even though it *would* be accepted if brought into court (since not forgeable) — it isn't dangerous to do this still, since no one will think to look for it to hurt you.

[Fundamental answers]

C) תוספות – this ברייתא is like ר"א (who holds עדי מסירה כרתי; the גמרא in גיטין on כב: says he allows חרס)

Why does ר"א permit the usage of something forgeable for a גט (and apparently a שטר קדושין)?

a) Rav Soloveitchik – there is a distinction between different types of שטרות: while a שטר ראיה (used as a proof) cannot be forgeable — according to ר"א, a שטר קנין (used to create a חלות) *can* be**.** Though ר"מ thinks the way a שטר קנין works is by giving over a valid שטר ראיה — ר"א thinks that is not relevant, and even a non-ראיה type of שטר can work as a שטר קנין.

To this, the מחלקת between ר"מ and ר"א is over how a שטר קנין works fundamentally — is it because a valid שטר ראיה was handed over (ר"מ), or does it work even without a ראיה (ר"א)?

b) Other אחרונים – even ר"א agrees that a שטר קנין needs to be a valid ראיה; however, ר"א believes that the bringing of a שטר קנין into ב"ד with the עדי מסירה will cause the שטר to serve as a valid ראיה. ר"מ argues, and thinks the ראיה must be contained in the שטר itself. Thus, here, even valid on חרס (which is forgeable), since still a ראיה to ר"א, because of the עדי מסירה.

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[247] (As quoted in רשב"א here and ריטב"א there).

[248] (Sometimes quoted as ר"ת too).

To this, the מחלקת between ר״מ and ר״א is over whether the עדי מסירה potentially coming is considered a ראיה — must the ראיה be in the שטר itself (ר״מ), or does the chance that עדי מסירה will come forward count (ר״א)?

Potential נ״מ between these two sides within תוספות:

According to ר״א, can a שטר חוב without עדים signed on it collect from נכסים משועבדים?

To Rav Soloveitchik, it seemingly cannot — even ר״א agrees that an actual שטר ראיה needs to be a real ראיה (he only argues about a שטר קנין); but to the other אחרונים, it can (this *is* viewed as a real ראיה, since using the שטר will prompt the עדי מסירה to come forward).

D) תוספות רי״ד – no, this ברייתא is even according to ר״מ (who holds עדי חתימה כרתי)

Even ר״מ allows forgeable שטרות for גט; both תנאים agree that it doesn't need to be a valid ראיה per se, (and even though גירושין needs עדות לקיום הדבר, there are עדי מסירה). Rather, the difference between these תנאים is the definition of the form of a שטר — to ר״מ, a שטר must contain both the story *and* that עדים signed on it; but to ר״א, it only needs to contain the story to be called a שטר.

[Ultimately, this is similar to the approach of Rav Soloveitchik above: it addresses the apparent contradiction by drawing a distinction between a שטר קנין and a שטר ראיה (namely, by saying that a שטר קנין doesn't require a valid ראיה within the שטר itself, while a שטר ראיה does). However, while Rav Soloveitchik was only going within ר״א, תוספות רי״ד is even within ר״מ].

This ties into a general מחלקת between רש״י and תוספות throughout גיטין: does ר״מ need the גט to be considered מוכח מתוכו (that it be a valid ראיה in and of itself)?

a) רש״י – no, doesn't need to be מוכח מתוכו

b) תוספות – yes, must be מוכח מתוכו

(And תוספות רי״ד sounds like he understood ר״מ as רש״י had).

Potential נ״מ between these two sides:

1) If the גט is written on a דבר שיכול להזדייף:

To רש״י – a valid גירושין; but to תוספות – not a valid גירושין

2) If there are two people with the same name in that place:

To רש״י – a valid גירושין; but to תוספות – not a valid גירושין

3) If there are two שטרות about the sale of a field are on the same day:

The גמרא says this depends on ר״מ and ר״א. ר״מ holds the two sides split the field. Why?

רש״י – because there is a psychological אומדנה that the seller had probably intended to give half to both; but תוספות – because the שטר is only חל at the end of the day (that's when it becomes מוכח מתוכו, the point when it is able to serve as a ראיה from)

E) תוספות שאנ״ץ [249] – no, this ברייתא is even according to ר״מ (who holds עדי חתימה כרתי)

[249] (He too claims to be quoting ר״ת).

Even though ר"מ requires that a גט be מוכח מתוכו, that is not necessary by קדושין. Though we have the היקש of "ויצאה והיתה" — that only transfers the form, the basic idea, but not all of the details.

[This is the only approach which actually distinguishes between גיטין and קדושין].

Within the opinion of ר"א (עדי מסירה כרתי), do עדי חתימה also work, or is it specifically עדי מסירה which do?

A) רבינו אפרים, בעל המאור, תוספות – specifically עדי מסירה כרתי

B) ראשוני ספרד, רמב"ם, רי"ף – either עדי מסירה or עדי חתימה

But let's look a little deeper into the opinion of the רמב"ם:

In הל' גירושין, רמב"ם says that either one works for a גט.

Yet in הל' אישות, the רמב"ם leaves out that a שטר קדושין is also valid with עדי חתימה.

1) לח"מ – רמב"ם just left it out, since he had spoken this out elsewhere.

(And this is a stronger answer than usual, since ultimately, using just עדי חתימה is only בדיעבד).

But why would he write it in הל' גירושין then?

By גט, they would commonly do both, for תיקון עולם; by קדושין, they wouldn't need to do both, so less common.

2) ספר קובץ – no, רמב"ם specifically left it out — עדי חתימה don't work by קדושי שטר

Why not?

a) ספר קובץ – because עדי חתימה cannot be used by קדושי כסף and קדושי ביאה, חז"ל didn't want to distinguish between קדושי שטר and the avenues of doing קדושין

(This seems like a pretty funny סברא. Why equate them in this manner?)

b) Other אחרונים – קדושי שטר is a unique שטר, in that it must be the man who gives it (due to "כי יקח"), even though normally it is the מקנה who gives the שטר. By גט, there is no tension — the man is the מקנה, and he is also the one who needs to give it; but by קדושין, the גמרא says that "כי יקח" overrides the need for the מקנה to give it.

Additionally, the ר"ן writes that עדי חתימה only work when they prove the עדי מסירה too (the fact that they signed on the שטר, and the שטר is now in the hands of the receiver, is proof that the מקנה gave the שטר over to the receiver).[250]

With these two points in mind, we can explain why עדי חתימה work by גט but not קדושי שטר:

Where the שטר is in the hands of the קונה, then the עדי חתימה inherently prove the עדי מסירה, and work as עידי קיום; but by קדושי שטר, because the שטר is given to the קונה, the עדי חתימה don't prove anything about the עדי מסירה — the person who doesn't need to prove anything has the שטר, not the one who does![251] Therefore,

I) אור שמח – there is no גמירת דעת there

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[250] (We don't suspect maybe it fell out of his hands and the other picked it up).

[251] [Namely, the husband, who wants to prove she's married to him. However, the ריטב"א is like the לח"מ though, and thinks that עדי חתימה *would* work here, since she can use it to prove that he owes her things like the כתובה and שאר, כסות, and עונה].

II) חזו"א – the עדי חתימה aren't valid עידי קיום

Thus, by גט, either the עדי מסירה *or* the עדי חתימה (by proving the עדי מסירה) commit the man; but by קדושין, only עדי מסירה commit her — עדי חתימה won't (they don't prove the עדי מסירה).

This approach in the רמב"ם can offer a different approach to explain the תוספות שאנ"ץ above:

Once we already see that קדושי שטר are a unique type of שטר, then instead of saying that we just transfer the form but not the details through the היקש of "ויצאה והיתה" — no, we can say that even the details *would* transfer through the היקש; it is just that here, the עדי חתימה don't work as valid עידי קיום in this case, since the קונה has the שטר.

By קדושי שטר, how did the גמרא prove it is the man who gives the שטר? Wasn't it even still — one versus one?

A) שיטה לא נודע למי – "את בתי נתתי" could mean חופה, but "כי יקח" must refer to קדושין

B) ראב"ד (quoted by שיטה לא נודע למי) – no, two פסוקים to one ("כי יקח" and "אם אחרת יקח," versus "את בתי נתתי")

C) עצמות יוסף – "כי יקח" is specific, while "את בתי נתתי" is general

שיעור #43 – 3/16/17

ט. – Daughter accepting קדושי שטר; Language written in שטר

At what age is a daughter still in her father's רשות able to accept a שטר קידושין on behalf of the father?

A) תוספות רי"ד, תוספות הרא"ש, רשב"א, רמב"ן – whether a קטנה or a נערה

B) שיטה לא נודע למי, מאירי, ריטב"א, ר"ן – no, only a נערה (and working through שליחות)

How could the first side hold that a קטנה can accept קדושין? Obviously can't be working through שליחות…

1) תוספות רי"ד – not connected to the גמרא on יט.

As for our גמרא, make an אוקימתא — the father was there at the time of the handing over the קדושין, and told the husband to put the שטר in his daughter's hand. This is enough to create a valid קדושין [according to the תוספות רי"ד; see above, in שיעור #40 and שיעור #41].

To this, the daughter isn't doing anything over here.

2) רמב"ן, others – this *is* connected to the גמרא on יט.

Based on the idea in that גמרא, that a father saying "צאי וקבלי קדושיך" to his קטנה daughter works.

In general, how does that idea work? Where's the קבלת הקידושין?

a) ריטב"א – similar to ערב — the father receives הנאה when the daughter takes the money, since the husband is losing money based on his say-so, and that counts as קדושי כסף

(However, can't explain our גמרא, since that was unique to קדושי כסף, since כסף is about הנאה).

b) ר"ן – the father receives הנאה when the daughter takes the money, since the כסף goes to the father, and that counts as קדושי כסף

(However, can't explain our גמרא, since that was unique to קדושי כסף, since כסף is about הנאה).

Because neither of these approaches can be applied to our גמרא, other explanations are needed:

c) צפנת פנעח, מהרי"ט (based on beginning ראי"ש, רשב"א) – a קטנה is capable of doing קדושין as long as she had a father and he gave her over the rights (he removes himself from her, and allows her to act on her own behalf)

This is a big חידוש; there are a couple of assumptions here: firstly, that she is really the בעלים on herself; and also, that she doesn't need full דעת for קדושין (she's just a קטנה, and incapable of that), since not really a קנין anyhow.

What about a יתומה then? Why can't she do קדושין then?

צפנת פנעח – (based on a ירושלמי) – nothing to do with her lack of דעת; rather, simply a גזירת הכתוב that a יתומה is not a בת קידושין

However, neither of these ראשונים really sounds like they meant the father just removes his superimposed power over her.[252] Nonetheless, it's hard to disprove this radical opinion.

[252] (The ראי"ש adds in שליחות in the end, and the רשב"א mixes in that it goes to her father).

d) ראש – as if he gave her over the זכות (since it's her choice to make), working through שליחות.

To this, the father is really accepting the קדושין (through a mechanism of שליחות).

Also, to this, it can work by both קדושי כסף and קדושי שטר.

The obvious חידוש here is that a קטנה is acting as a שליח. Indeed, the ראש clarifies that a קטנה can be a שליח when it is for her own זכות.

What does he mean by this, by "her own זכות"?

I) אבני מלואים – it ends up benefitting her (she is married)

To this, "her זכות" means the marriage.

[This should apply elsewhere then, and seems to run into problems in ב"מ].

II) קהלות יעקב – to keep the money for herself, but count the קבלה as someone else's

To this, "her זכות" means the money itself.

e) רשב"א, רמב"ן – (one of the following options) –

I) (Based on the ending of the רשב"א) – maybe the father really does the קדושין, and the קטנה is just a way for the husband to be מקנה the item to the אב, sort of like by a חצר

To this, the חידוש is that as long as the שטר ends up belonging to the father, don't need the father to do a מעשה of receiving it.

The hardest point here is רמב"ן's comparison to the case of giving it to the dog.

Seemingly, have to say that רמב"ן is just using that as a way to show that sometimes קדושין can be viewed as having been received even without the person actually having received it.

II) Reb Chaim – not שליחות of the father's, but also not him doing everything — rather, she does the מעשה, and the father supplies the דעת

To this, the חידוש is that a קטנה can do a מעשה קדושין even without the דעת.

To summarize, the מחלקת between A) and B) here:

To the מהרי"ט and צפנת פנעח, it is over whether a קטנה can do קדושין or not.

To the ראש, it is over whether a קטנה can ever have שליחות or not.

To רמב"ן, רשב"א, it is over whether, if the שטר ends up belonging to the father, the daughter can accept the שטר.

To Reb Chaim, it is over whether a קטנה can do the מעשה קדושין and the father provides the דעת.

Based on Reb Chaim, Rav Soloveitchik connected the respective שיטות of רמב"ן and ר"ן to another מחלקת:

What language must be written in the שטר in each case? [*left to right — least stringent to most*]

ריטב"א	רמב"ן #1	רשב"א, רמב"ן #2	ר"ן
Pre-בוגרת –	**Pre-בוגרת –**	**Pre-בוגרת –**	**Pre-בוגרת –**
Given to father – **either**	Given to father – בתך	Given to father – בתך	Given to father – בתך
Given to daughter – **either**	Given to daughter – **either**	Given to daughter – **either**	Given to daughter – בתך
בוגרת –	**בוגרת –**	**בוגרת –**	בוגרת –
Given to daughter – את	Given to daughter – את	Given to daughter – את	Given to daughter – את
Given to father – **either**	Given to father – **either**	Given to father – את	Given to father – את

In terms of the case of a pre-בוגרת daughter, giving it to the father –

They all agree that one write it to the בעל דבר when giving it to the בעל דבר; however, the difference between the ריטב"א and everyone else seems to be over whether the father is merely an אפוטרופוס acting on behalf of the daughter, but she is really the בעלת דבר (ריטב"א), or whether the father is the בעל דבר (the others).

[See שיעור #10 above as well].

In terms of the case of a pre-בוגרת daughter, giving it to the daughter –

Within the other opinions aside for the ריטב"א, she is not the בעלת דבר; rather, the father is. Accordingly –

The מחלקת between רמב"ן #1 and ר"ן seems to be over whether the language written in the שטר is there to help make things clear (רמב"ן), or whether it needs to be something formal and absolutely correct (ר"ן).

However, רמב"ן #2, רשב"א and ר"ן, seem to agree that there's a need for a correct, formal language written in the שטר (as seen from the case of a בוגרת daughter, giving to the father). What do they argue over then?

Based on Reb Chaim, Rav Soloveitchik – their מחלקת seems to be over whether the קטנה can ever do the קדושין on her own (רמב"ן), or whether she cannot (ר"ן). To רמב"ן, therefore, she isn't a mere שליח — she too is partially the בעלת דבר — and therefore, the שטר can be addressed to her.

שיעור #44 – 3/21/17

רב פפא ורב שרביא and רבא ורבינא – ט:

How did the גמרא answer why we should compare שטר גיטין to and not קדושין?

A) רש"י – since קדושי שטר itself is learned in the first place from גיטין, this too should be learned from there

B) שיטה לא נודע למי – the general rule is that whenever you have a היקש, the process is to do דון מינה ומינה

(This is in contrast to a גזירה שוה, where it is a מחלקת תנאים which process to employ).

C) קובץ שיעורים – the היקש of הויות להדדי couldn't teach this is the end, because the היקש is only about the חלות of the קדושין, not about the מעשה קדושין (they are all different processes, after all)

What might be the underlying basis for the מחלקת between רבא ורבינא and רב פפא ורב שרביא?

A) קדושין

רבא ורבינא – the woman is נקנית, but not מקנה [along the lines of the ר"ן in נדרים, how she allows him to do it]

רב פפא ורב שרביא – the woman is מקנה herself

B) שטרות [and the only נ"מ would be by שטר קדושין]

רבא ורבינא – the שטר must be written with the דעת of the giver

רב פפא ורב שרביא – the שטר must be written with the דעת of the מתחייב (the מקנה)

C) לשמה

רבא ורבינא – the דעת of the owner of the שטר is enough to be considered לשמה

רב פפא ורב שרביא – the דעת of everyone obligating themselves is necessary for לשמה

(The simple explanation of לשמה is that this item is going to be used for that purpose; thus, if not everyone is on board with the process, then it might not be considered לשמה).

If a שליח of the man tells the סופר to write a גט, the גט is בטל; the סופר must hear it from the husband's own mouth.

What about in קדושין though? What if a שליח of the woman tells the סופר to write the שטר קדושין — is that מדעתה?

A) ריטב"א, רמב"ן – not a valid קדושין

This seems to be the simple explanation — after all, there is a היקש of "הויה ליציאה."

B) רמב"ם – valid קדושין

What about the היקש of "הויה ליציאה"? Shouldn't that invalidate this?

This may depend on a separate חקירה:

Why does the writing of a גט require the husband's direct command?

a) From "וכתב" – the husband needs to write it (or directly cause it to be written)

To this, his writing of the גט is part of the גירושין.[253]

b) From לשמה – without the husband's command, it is not considered לשמה

To this, it is a תנאי in the סופר writing לשמה, that the סופר must hear that the husband intends to divorce; he must be one hundred percent sure that the husband wants it.[254]

To explain the רמב"ם now, many אחרונים (אור שמח, Reb Chaim) say that both sides of this חקירה are correct:

By גט, we need the command of the husband, so that he writes the גט; and we also need his דעת, as a תנאי in לשמה (which is redundant, once we already have his command).

However, by שטר קדושין, need the command of the husband, since need it to be coming from him to be considered "כי יקח איש אשה" [or to create the שטר, according to Reb Chaim]; but also need her דעת along with his, for her to agree, so that the סופר can properly do it לשמה. Regarding the man's command — that cannot work through a שליח; but regarding the woman's agreement — that *can* work when a שליח tells the סופר that she wants it, since it doesn't need a formal שליחות of the סופר acting on her behalf, we merely need her agreement to make it לשמה.[255]

Tying this back into the previous discussion — the רמב"ם would likely then say that the מחלקת between רבא ורבינא and רב פפא ורב שרביא is over whether this is an issue of לשמה — רבא ורבינא hold that the שטר is just written by the husband, but רב פפא ורב שרביא hold that while the שטר is written by the husband, there is also a תנאי that she must agree as a side problem in לשמה.

According to the ה"א that the שטרי אירוסין really were שטרי נשואין, what did שטרי נשואין mean?

A) ריטב"א ,תוספות הרא"ש ,מאירי (first option) – really just שטרי אירוסין, and called שטרי אירוסין ונשואין

B) רשב"ם in ב"ב ,ריטב"א ,מאירי (second option) – the כתובה

Why would a כתובה need the דעת of both of them? He commits himself in the כתובה, but why need her דעת?

[Side problems]

a) ריטב"א – she agrees to take it that day (to avoid an issue of a קנוניא, to avoid it being a שטר מוקדם)

b) מאירי – in case he wrote that she was bringing in less than she actually did in her נדוניא, it requires her דעת before he writes it [256]

[Fundamental problem]

c) רמב"ן (maybe) – to commit herself to pay a sum of money they might write at the time of the נשואין

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[253] (Reb Chaim adds that this is actually a general rule of שליחות).

[254] Rav Moshe and the שלחן ערוך הרב held this way להלכה; though they took the side of לשמה even further, and said it requires more than just a גילוי דעת — must be one hundred percent certain. Nonetheless, even with this expanded version of לשמה, they gave different נ"מ where it would still work according to this side of the חקירה — Rav Moshe, if there was a handwritten letter; שלחן ערוך הרב, if he happened to overhear the husband say he wanted this.

[255] To them, the side of לשמה is not as expanded as Rav Moshe and the שלחן ערוך הרב had made it [see previous note]. Just needs a standard גילוי דעת that she wants it.

[256] And even though she can always sue him afterwards that she had really brought in more — that would be awkward for her to try to get him to write another כתובה later.

שיעור #45 – 3/23/17

"הן הן דברים הנקנין באמירה" ;רב פפא ורב שרביא and רבא ורבינא – ט:

How do we pasken between רב פפא ורב שרביא and רבא ורבינא?

A) רמב"ן ,ר"ח ,רמב"ם ,רי"ף – like רב פפא ורב שרביא

B) רב יוסף טוב עלם ,רב נוטראי גאון ,בה"ג – like רבא ורבינא

Many ראשונים say to treat it as a ספק still, since there are so many people on either side.

What's the basis of this מחלקת?

There are a few factors which the ראשונים mention, but the main discussion seems to be focused around how to understand רב אשי in the גמרא in כתובות on :קב. Most ראשונים think רב אשי is the most authoritative [257] (he's the בתראי, and with regard to רבינא — he's the רבי). But does רב אשי have an opinion about our סוגיא?

Let's examine the different interpretations of that גמרא first, and then tie it back to our סוגיא:

The גמרא in כתובות on :קב has רב אשי saying in response to רבינא that שטרי פסיקתא are "לא ניתנו ליכתב." The גמרא then tries to bring either a proof or disproof to רב אשי from the משנה in ב"ב which says they need "דעת שניהם," and then the גמרא deflects that by saying the משנה is about, or can be about, שטרי אירוסין.

To be addressed: a) What does ניתנו ליכתב mean, **b)** what did רב אשי mean when he said "לא ניתנו ליכתב," **c)** what was the גמרא trying to show from the משנה in ב"ב, **d)** what was its deflection, and then ultimately, **e)** what does רב אשי hold about our סוגיא?

1.1) רמב"ם ,רש"י (to טור) –

a) ניתנו ליכתב –
Can write a שטר with דעת שניהם

b) רב אשי's "לא ניתנו ליכתב" meant –
Can't write a שטר, even when דעת שניהם, because no שעבוד נכסים on פסיקתא, and שטר will be misleading

c) The משנה in ב"ב was a –
Disproof of רב אשי
(By allowing it to be written as long as they agree, clearly don't worry about it being misleading)

d) The גמרא's deflection was that –
No disproof, since the משנה is about שטרי אירוסין

e) The משנה is about –
קדושי שטר, and therefore רב אשי is like רב פפא ורב שרביא

1.2) רמב"ם ,ריטב"א ,רשב"א רמב"ן (to מ"מ) – based off רי"ף

a) ניתנו ליכתב –
Can write a שטר with דעת שניהם, and there will be שעבוד נכסים

b) רב אשי's "לא ניתנו ליכתב" meant –
Even if you write a שטר, there still will not be a שעבוד נכסים

c) The משנה in ב"ב was a –
Disproof of רב אשי
(By needing דעת שניהם, you see that it is something significant)

d) The גמרא's deflection was that –
No disproof, since the משנה is about שטרי אירוסין

e) The משנה is about –
קדושי שטר, and therefore רב אשי is like רב פפא ורב שרביא

2) רי"י ,בעל המאור (in תוספות in כתובות) –

a) ניתנו ליכתב –
Can write a שטר without asking permission

b) רב אשי's "לא ניתנו ליכתב" meant –
Can only write a שטר if permission is granted

c) The משנה in ב"ב was a –
Proof for רב אשי
(By needing דעת שניהם, you see that it can only be written if they both grant permission)

d) The גמרא's deflection was that –
No proof, since the משנה is about שטרי אירוסין

e) The משנה is about –
Either one, and therefore רב אשי could be like either רבא ורבינא or רב פפא ורב שרביא

3) ר"ת –

a) ניתנו ליכתב –

[257] [Except for רב יוסף טוב עלם, who thinks רבינא beats out רב אשי]

The קנין is only חל if they write a שטר

b) רב אשי's "לא ניתנו ליכתב" meant –
The קנין is חל even if they don't write a שטר

c) The משנה in ב"ב was a –
Disproof of רב אשי
(By needing דעת שניהם, see that writing it will create a חוב, and thus needs permission from both)

d) The גמרא's deflection was that –
No disproof, since the משנה is about שטרי אירוסין

e) The משנה is about –
קדושי שטר, and therefore רב אשי is like רב פפא ורב שרביא

4) מאירי in the יש מפרשים –

a) ניתנו ליכתב –
Can write a שטר without asking permission, since it won't create a שעבוד נכסים either way

b) רב אשי's "לא ניתנו ליכתב" meant –
Can only write a שטר if permission is granted, since it will create a שעבוד נכסים

c) The משנה in ב"ב was a –
Proof for רב אשי
(By needing דעת שניהם, you see that it can only be written if they both grant permission)

d) The גמרא's deflection was that –
No proof, since the משנה is about שטרי אירוסין

e) The משנה is about –
Either one, and therefore רב אשי could be like either רבא ורבינא or רב פפא ורב שרביא

5) ראב"ד (as quoted by the מאירי) –

a) ניתנו ליכתב –
The חלות is a חלות התחייבות, which you write a שטר about

b) רב אשי's "לא ניתנו ליכתב" meant –
The חלות is a חלות הקנאה, which you don't write a שטר about

c) The משנה in ב"ב was a –
Disproof of רב אשי
(By allowing the שטר to be written, you see that it must be a התחייבות)

d) The גמרא's deflection was that –
No proof, since the משנה is about שטרי אירוסין

e) The משנה is about –
קדושי שטר, and therefore רב אשי is like רב פפא ורב שרביא

Therefore –

Reasons to pasken like רב פפא ורב שרביא:

a) According to 1), 3), and 5) — רב אשי is like them

b) The simple read of the משנה was like them, according to the גמרא in קדושין

(Q: But the גמרא in כתובות assumed the other way!)

c) רב נחמן earlier was like them

(Q: He just meant that it must be given with her דעת, not that it must be written with her דעת!)

Reasons to pasken like רבא ורבינא:

a) If one thought רבינא still beats out רב אשי

(Most ראשונים don't)

b) רבא over רב פפא

c) Should go after the more מחמיר opinion

d) רב אשי might be like them

How does this קנין of "הן הן דברים הנקנין באמירה" work? Generally, a קנין can't work through אמירה alone!

A) Because it gives הנאה, just like a קנין כסף

How can it work by מטלטלין then?

ר"ן – it works like a קנין סודר

How can it work by מטבע then?

ספר המקנה – it is better than a קנין סודר

(But he doesn't explain how or why).

(If one were to say that this is only a חלות התחייבות, and not a חלות הקנאה, then this makes sense — not actually transferring the coins themselves).

(But, as we'll see below, this is not so simple; after all, the simple read of the גמרא is that it is a real קנין — the גמרא calls it a קנין, not just a התחייבות).

B) The הנאה makes them more serious, and then the קנין works through אמירה alone

But how can it work through אמירה alone?!

1) מאירי, ריטב"א, נודע ביהודה – it's a special תקנה דרבנן

Why would חז"ל make such a תקנה?

a) מאירי – someone might be confused and think this was a תנאי, that the קדושין was only being done on condition that the money be given (even though in realty they were just promising to give it, and the קדושין was working regardless) — and therefore, to avoid this misconception (and potential serious איסורים), חז"ל said that they have to give the money whether they like it or not

b) נודע ביהודה – because it is good for people to marry off their kids — everyone is happier if this is a real commitment to make sure that the shidduch goes through

(This takes the גמרא's reference to the הנאה they are getting more seriously).

2) No, this really works on a דאורייתא level

How?

a) If merely a התחייבות and not a קנין, then can work along the lines of what the רמב"ם says about התחייבות elsewhere (that it is חל with just אמירה).

b) But sticking with the simple read of the גמרא (that it is a real קנין), then maybe like the opinion of תוספות,[258] who says that certain things (this being one example of those) can have a קנין work by them even just through אמירה, if they are really serious about it.

(**חזו"א –** the מעשה in a קנין is just there for דעת, not intrinsically necessary. Generally, need a מעשה to establish that דעת; but there are some exceptions to this, when clearly known there is דעת).

Does "הן הן דברים הנקנין באמירה" even work on something the person doesn't have?

A) רמב"ם – doesn't work

B) ריטב"א, בעל העיטור – does work

What are they arguing over?

1) ריטב"א – whether this is a הקנאה (רמב"ם), or a התחייבות (בעל העיטור)

2) extra serious, so able to be מקנה a דבר שלא בא לעולם (בעל העיטור)

[258] [See, for example, in כתובות on .קב, in בכורות on :יח, and in ב"ב on .נג].

(The assumption here would be that the חסרון of דבר שלא בא לעולם is about גמירת דעת).[259]

And the רמב"ם would either say:

a) there is no extra seriousness here; or else (more likely)

b) extra seriousness doesn't help for a דבר שלא בא לעולם. There is no חפצא; seriousness is irrelevant.

[259] This fits with the ראב"ש (on the תורה) by the sale of עשו's בכורה — the swear helped add seriousness, and then it was קונה even by something which was a דבר שלא בא לעולם. (The שו"ת ריב"ש denied this could even exist, he thought it was so wrong).

שיעור #46 – 3/27/17

ט: – Source and nature of קדושי ביאה

Why do רבי and רבי יוחנן read the פסוק differently?[260]

A) This is the מחלקת between רבי יונתן and רבי יאשיה, over whether the "ו" is there to mean "and" or "or"

B) שיטה לא נודע למי – they are arguing over how strong a לימוד the "גזירה שוה" to שדה עפרון was

What is the פסוק which רבי יוחנן brought?

A) רש"י – "עם אשה בעולת בעל"

B) תוספות ר"י הזקן – "והיא בעולת בעל"

(This is written by בני נח).

What might they be arguing over?

1) Maybe about the מחלקת between רש"י and ר"ן in סנהדרין whether there is קדושין for a גוי or not –

a) רש"י – no קדושין

b) ר"ן – there is קדושין, but the פסוק excludes one from a חיוב מיתה for adultery with her

(רש"י here would be going לשיטתו, that there is not, and תוספות ר"י הזקן might say there is)

2) Maybe about the nature of the קדושי ביאה —

To begin, let's introduce a few sources which indicate something unique about קדושי ביאה:

I) יבמות in ירושלמי – if a חרש does קדושי ביאה, it has a חלות on a דאורייתא level (unlike the other two avenues of קדושין, which are only מדרבנן by a חרש)

II) רש"י מהדורא קמא [261] – a 9-year-old קטן can do קדושי ביאה, even though he doesn't have דעת

From these sources, we see that the standards of דעת by קדושי ביאה may be more relaxed.

The question is, might קדושי ביאה even work without דעת at all?

III) קדושין in ירושלמי – שמואל – a בן נח is קונה a wife by ביאה, even without דעת [even if דעת for זנות!]

(It's hard to see how society could function if we paskened like this).

IV) מרכבת המשנה – based on a דיוק in the רמב"ם [262] – if he fixes his conduct afterwards, by marrying her, he doesn't need another קדושין — the ביאה (even though דעת for זנות) works למפרע as a קדושין

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[260] The גמרא never explains why רבי doesn't have the ה"א of רבי יוחנן (of needing first כסף and then ביאה).

[261] (Brought in the שיטה מקובצת in כתובות).

[262] The רמב"ם repeatedly says that an אונס ומפתה must do נשואין, but he doesn't mention קדושין.

However, this דיוק doesn't seem particularly strong. The רמב"ם might simply be saying that he *also* needs to do נשואין as part of the process of correcting what he did wrong — it isn't enough, and he can't just get away with, doing only קדושין.

(This source would indicate that such an idea exists even for Jews!)

V) יבמות on :ח – ביאה can be קונה a **יבמה** without **דעת**

(This would depend why that is true by **יבום** — is it because of **הקמת שם**? Or might it be somehow related to the unique process of **קדושי ביאה**?)

There are other sources which also imply something unique about **קדושי ביאה**:

VI) Against **ב"ש**, the opinion of **ב"ה** is that if a divorced couple shares a hotel room, we assume they are married. Why? Firstly, "**הן הן עדי יחוד הן הן עדי ביאה**" — we assume there was **ביאה**; and then additionally, we also assume that "**אין אדם עושה בעילתו זנות**," and thus the **ביאה** was for **קדושין**.

This is rather strange; why allow such a low standard of **עדות** uniquely here?

a) מרדכי, מהר"ם – no, we would use the same logic by **קדושי כסף** — if the **עדים** miss the actual giving of the **כסף**, if there is a strong **אומדנה**, then that suffices as **עדות**

b) Indeed, this is an exception [263] — because it would be inappropriate for the **עדים** to see this, and because the **תורה** gave the **רבנן** the latitude of deciding what the standards of the **עדות** should be, the **רבנן** set it at a lower point here.[264]

c) Perhaps **קדושי ביאה** itself is an exception; maybe only need **עידי קיום** of such a high standard when we need to make their **דעת** as high as possible (as Reb Chaim said); but by **קדושי ביאה**, if the **דעת** is not so crucial, then maybe it suffices to just have a lower standard of **עדות**.

This discussion leads us onto another point, which also might be revelatory about **קדושי ביאה**:

VII) What does the idea of "**אין אדם עושה בעילתו זנות**" actually mean?[265]

a) Regular, full **דעת** for **קדושין** (a real **אומדנה** of **דעת קדושין**)

b) By the other avenues of **קדושין**, a higher level of **דעת** is required, which these acts facilitate; but by **קדושי ביאה**, perhaps one only needs it to be **לשמה**, he only needs to have **כוונה** for the act. This would be because **ביאה** *is* **אישות**, and therefore he must simply know what he's doing to allow it to naturally happen (again, as opposed to **כסף** and **שטר**, which are just ways of showing seriousness). Naturally **אישות**, unless specifically made into **זנות** (the very phrase employed of "**אין אדם עושה בעילתו זנות**" indicates that this is true).

This same idea of **ביאה** as **אישות** itself might be the underlying point in all these sources. And even if we don't hold of any of them, it still might be what the **תוספות ר"י הזקן** was working off of too.

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[263] (One line in the **מהר"ם** might imply this).

[264] This is similar to what we find in the discussion by **שתי שערות**, and by a **ב"ד** looking at a **גיורת**'s **טבילה**.

[265] The **שלטי גיבורים** says this is true even if he makes a **תנאי** before the **ביאה**!

שיעור #47 – 3/30/17

ט: – The nature of קדושי ביאה; חיוב קנס בביאה שלא כדרכה; Relationship between "לו תהיה לאשה" and קנס

(continuing off the end of last שיעור)

In the last שיעור, we were discussing a חקירה about קדושי ביאה; is it really:

A) a formal קנין the same as קדושי כסף or קדושי שטר; or else,

B) a מציאות of אישות (which works to facilitate קדושין as well), which in some ways is more effectual?

Potential נ"מ:

1) The source of רבי יוחנן's opinion [see last שיעור]:

רש"י – "עם אשה בעולת בעל" [fits with A)]; but תוספות ר"י הזקן – "והיא בעולת בעל" [fits with B)]

2) Need for full דעת [see last שיעור]:

To A) – need full דעת; but to B) – maybe only need a lower level [ירושלמי by חרש; רש"י מהדו"ק by קטן]

3) Always need דעת [see last שיעור]:

To A) – always need דעת; but to B) – maybe don't always need דעת [בני נח according to שמואל; מהרי"ק by יבום; maybe why lower standard of עדות in some cases]

4) Meaning of "אין אדם עושה בעילתו בעילת זנות" [see last שיעור]:

To A) – it is a real אומדנה of דעת קנין; but to B) – not דעת קנין (rather, merely need דרך אישות, and then it works as קדושי ביאה)

Working off the last נ"מ mentioned, of "אין אדם עושה בעילתו בעילת זנות," we have a new חקירה:

Is the idea of "אין אדם עושה בעילתו בעילת זנות":

A) a real אומדנה of דעת קנין; or else,

B) any ביאה which is דרך אישות is קונה

(This latter option might be based in the תוספתא).

(Additionally, it fits well with the actual language of this term — it is אישות, until he makes it into זנות).

Potential נ"מ:

1) Secular Jews, or sinners:

רמב"ם, Rav Moshe – only applies to כשרים (who want a halachic קנין; others don't) [fits with A)]; but Rav Henkin – even applies to secular people who want to live as a married couple [fits with B)]

What is the underlying basis of this מחלקת?

a) About the nature of marriage in general (is Jewish marriage the same as universal, humanistic marriage): Rav Moshe – they don't want a Jewish marriage; but Rav Henkin – a humanistic marriage is enough — our קדושין is merely our version of the desire for marriage

b) Both agree כסף and שטר require דעת for halachic marriage, they argue about the standards of דעת in קדושי ביאה: Rav Moshe – they aren't having דעת for this specific action (even if they

want to get married in general); Rav Henkin – by קדושי ביאה, there's no need for דעת for a specific action (unlike by קדושי כסף, for example, where there's no worry that any random gifts were קדושין), as long as they want to be married in general

2) If they honestly think they are already married:

Simple read of the גמרא in כתובות – only applies knew the קדושין was פסול [fits with A)]; but רא"ה – (doesn't literally interpret that גמרא) – still applies even if they think they are married [fits with B)]

3) If they don't even know קדושי ביאה exists:

שאגת אריה – doesn't apply [fits with A)]; but דבר אברהם, Rav Henkin – still applies (as long as for marriage, and not just זנות) [fits with B)]

4) קדושי ביאה done על תנאי:

To A) – the תנאי should work; שלטי גיבורים – can't prevent ביאת אישות from being קונה with a תנאי (as long as wasn't intending for זנות) [fits with B)]

5) Why it was easier for the רבנן to undo קדושי כסף than קדושי ביאה:

To A) – must explain some other way (for example: רמב"ם, רבותיו של רש"י – דרבנן versus דאורייתא); but to B) – fits nicely — harder to מבטל something which itself was אישות, and doesn't need the same דעת

In the ה"א, by considering ביאה as a קנין for an אמה העבריה, the גמרא seems to have assumed אמה העבריה is more about potential אישות (in the eventuality of יעוד) than the עבודה.

This is a big חקירה later on, by אמה העבריה. Does this stand in the גמרא's conclusion? Worth thinking about.

If a woman was נבעלה שלא כדרכה על ידי הבעל – everyone agrees she is a בעולה

But if a woman was נבעלה שלא כדרכה על ידי אחר, there is a מחלקת תנאים:

חכמים – she is still considered a בתולה

רבי – Regarding סקילה – she is considered a בעולה

Regarding קנס – she is still considered a בתולה

This leads us into an important מחלקת about whether a חיוב קנס exists when the אונס or מפתה was done שלא כדרכה:

Is there a חיוב קנס באונס ומפתה שלא כדרכה?

A) רמב"ם, רש"י, רבינו אליקים (in שיטה מקובצת on כתובות in :מ) – פטור

The סברא here seems to be that since he didn't break the בתולים, he is therefore פטור.

B) ראב"ד, תוספות, most ראשונים – חייב

The סברא here is that once there is the דרשה from "משכבי אשה," this counts as a ביאה for all הלכות.

There are four main sources in the גמרא which deal with this:

I) גמרא in סנהדרין on :עג – [support for A)] –

In a discussion addressing how one might pay the קנס for raping one's sister (he should be חייב as a רודף, and thereby פטור from the קנס due to קים ליה בדרבה מיניה), the גמרא determines "ממונא לא משלם עד גמר ביאה,"

which רש"י explains as being because one is only חייב to pay the קנס for breaking her בתולים. Accordingly, one seemingly shouldn't be חייב if שלא כדרכה either.

To defend B):

No, one is really חייב to pay the קנס from the beginning; however, in the particular case of a רודף, he is פטור because of קים ליה בדרבה מיניה. However, even without breaking the בתולים, he is חייב the קנס.

II) גמרא in קדושין on .י – [support for B)] –

The גמרא says that all the rapists pay the קנס; this seemingly includes those that had raped her שלא כדרכה.

To defend A):

תוספות ר"י הזקן – offers two suggestions –

a) Suggests an alternative גרסה without the word "כולהו" (thereby making the "משלמי" refer only to the one who had ביאה with her after people who had done so שלא כדרכה)

b) Or else, one can even read this into our גרסה — not the בועל שלא כדרכה who pays, but rather, anyone who is בועל כדרכה after the שלא כדרכה ones will pay.

III) גמרא in כתובות on :מ, and in ערכין on .טו – [support for B)] –

The גמרא says that if two men rape her (one שלא כדרכה, then one כדרכה), both pay the קנס.

To defend A):

רש"י in ערכין – refers to a different man who would rape a שלימה, not this one who had שלא כדרכה

IV) גמרא in יבמות on .נט – [strong support for B)] –

In discussing a case where a כהן גדול is חייב for אונס ומפתה, and yet she wasn't a בעולה (so he can marry her), the גמרא suggests a case of a כהן גדול that had raped her שלא כדרכה.

To defend A):

a) מאירי in סנהדרין – the גמרא could've deflected this for this reason, but had other ways to do so

(Obviously, this is a pretty weak defense).

b) תוספות ר"י הזקן – אה"נ, he is חייב to marry her, but he is not חייב to pay the קנס in such a case

This is a very big חידוש. תוספות ר"י הזקן splits the חיוב to marry her from the חיוב to pay the קנס.

This leads into an important חקירה:

A) Are the חיובים to pay the קנס and marry the woman one חיוב; or else,

B) Are they two entirely separate חיובים?

Potential נ"מ:

1) Defense of רמב"ם, רש"י side from the גמרא in יבמות on .נט [see above]:

מאירי – could've objected [fits with A)]; but תוספות ר"י הזקן – divide the two [fits with B)]

2) If the man is מודה בקנס:

ריפ"פ (on רס"ג) – פטור from קנס and נשואין [fits with A)]; but רדב"ז – חייב in נשואין still [fits with B)]

3) Nowadays, when there is no סמיכה (and thus no ability to administer קנסות):

ריפ"פ – not חייב in נשואין [fits with A)]; but ספר החינוך – no קנס, but חייב in נשואין [fits with B)]

4) מנין המצוות:

רס"ג, בה"ג – only one מצוה [fits with A)]; but רדב"ז (based on רמב"ם) – two מצוות [fits with B)]

5) Application of "לו תהיה לאשה" to a בוגרת, בעולה, etc.:

To A) – certainly not, since no קנס; but to B) – גר"א in explaining רמ"א – yes, a מצוה to marry her

To provide the background for this גר"א:

יבמות in רא"ש – if there are rumors about someone and a certain girl — generally, not supposed to marry her, to avoid these rumors; **however, רמ"א –** if one indeed had ביאה with her (i.e. the rumors are true), it is a מצוה to marry her.

רמ"א is strange for two reasons:

a) Never mentions that she must be a נערה, implying she doesn't need to be!

רמ"א also added that even if rumors about two people, and both were true, and one is married and one is single — she should marry the single one, due to תקנה רבינו גרשום's.

b) Doesn't mention, implying that even if she was with the single man second (and thus already wasn't a בתולה when they were together), this still applies!

These two points demonstrate the רמ"א really applies "לו תהיה לאשה" even where there is no קנס whatsoever. The סברא would seem to be that he should still "do right" by the girl — not as a punishment, but as a positive way to make amends. The תורה wants ביאה to be within the context of a relationship, not just a free-for-all; and if there was no relationship beforehand, at least create one afterwards.

שיעור #48 – 4/24/17

י. – "שווין כאחד"; תחילת ביאה or סוף ביאה?

According to רבי יאשיה, he is only חייב if they are "שווין כאחד." What does that mean?

A) רש"י – the man is only חייב if the girl is חייב

תוספות asks — isn't that against the משנה in נדה (brought in our גמרא below)?

רש"י could say that משנה is only going according to רבי יונתן; but תוספות thinks that is דוחק.

B) תוספות, most ראשונים – the man is only חייב if the girl would get the same מיתה as him if she were an adult

The גמרא in סנהדרין on :סו has a מחלקת between ר"מ and the חכמים over what a man is חייב for a קטנה מאורסה:

חייב סקילה – חכמים

ר"מ – not חייב סקילה

Within ר"מ, it sounds like there is a מחלקת אמוראים:

רב – but חייב חנק

רב יעקב בר אדא – totally פטור

According to רש"י – from this גמרא, it seems like the חכמים = רבי יונתן; and ר"מ — if like רב = רבי יונתן, and if like רב יעקב בר אדא = רבי יאשיה (namely, that he is פטור since she is פטור)

According to תוספות – from this גמרא, it seems like ר"מ — if like רב = רבי יונתן, and if like רב יעקב בר אדא = רבי יאשיה (namely, that he is fully פטור since she theoretically gets סקילה and he theoretically gets חנק). As for the חכמים — תוספות doesn't say, but רשב"א says = רבי יאשיה (he is חייב since both theoretically get סקילה).

C) ריטב"א – not whether or not he gets killed — rather, if he is חייב to get סקילה if she is fully פטור

According to ריטב"א – the מחלקת between the חכמים and ר"מ is the same מחלקת between רבי יונתן and רבי יאשיה (as opposed to either רש"י or תוספות, where it was within ר"מ, and the חכמים were sort of a side point).

[ריטב"א seems to think רב יעקב בר אדא was just questioning רב, but wasn't a serious opinion (perhaps his גרסה there in סנהדרין was different than ours too].

(ריטב"א had a different גרסה here though, which said "את שניהם" [to make the פסוק not about חנק, but סקילה]).

The גמרא asks whether תחילת ביאה or סוף ביאה is קונה?

(The גמרא then gives a couple of נ"מ, but leaves out the most obvious one, of just not finishing the ביאה).

However, there is an apparent contradiction:

The גמרא here concludes סוף ביאה קונה.

Yet the גמרא in יבמות on :נה assumes that הראה is קונה!

A) ר"ח quoting אור זרוע – it's a מחלקת הסוגיות; and we pasken like יבמות over קדושין (since that is the main סוגיא about הראה)

This is not mainstream at all. To this, even by קדושי ביאה, we would say תחילת ביאה קונה.

תוספות brings four answers:

B) ר"ש משאנץ – theoretically הראה is קונה, but סתם דעת is on גמר ביאה

Therefore, here it was a סתם case, and in יבמות, it was where he didn't finish the ביאה, and it therefore looks like his דעת was on the הראה.

C) בה"ג, ריב"ם – [essentially the same, but adds that] he must explicitly state it if wants to be קונה with הראה

Therefore, here it was a סתם case, and in יבמות, it was where he spoke out that his דעת was on the הראה.

Are these two opinions just two illustrations of one principle? Would they argue on each other?

It seems obvious that ר"ש משאנץ would agree to ריב"ם; but would ריב"ם agree to ר"ש משאנץ?

a) ר"ן, ריטב"א, רא"ש – yes, it's all one שיטה

b) משנה למלך – no, because maybe he had דעת for גמר ביאה, and then changed his mind and didn't do it; thus, ריב"ם would argue on ר"ש משאנץ's case

D) ר"ת – both are talking about הראה; our גמרא is discussing whether it is תחילת הראה or סוף הראה.

Therefore, here it was about the specifics of הראה, and in יבמות was more generally saying it is הראה.

What is the question of תחילת הראה or סוף הראה?

a) משנה למלך – the גמרא is trying to define the one moment which counts as ביאה; the עטרה has a length, and the question is which moment of that entry is considered the ביאה

(This must be assuming that הראה is הכנסת עטרה and not נשיקת האבר, since נשיקת האבר is by definition only momentary, and cannot have a תחילה or סוף).

But this is problematic, as the משנה למלך himself notes — why wouldn't the גמרא ever discuss this in other contexts (such as by ערירות)? And why mention דעת here?

b) ר"ת himself in ספר הישר – the question was whether we say "ישנה לביאה מתחילה ועד סוף" — is ביאה a process, going from the נשיקת האבר until הכנסת העטרה (but all of it is considered one process of ביאה),[266] or is it merely momentary, and that final moment of הכנסת העטרה is the moment of ביאה?

Accordingly, since we pasken סוף ביאה קונה, the moment of הכנסת העטרה is the moment of ביאה, and everything beforehand is just preparation.

If so, then why is the נ"מ of קדושי ביאה being אסור for a כהן גדול true — she wasn't a בעולה from the תחילת ביאה, that was just preparation!

ר"ת – for a כהן גדול there is a higher standard of בתולה, and even that preparation (נשיקת האבר) counts to make her a בעולה in this context.[267]

(This is a very big חידוש, since nowhere else do we find this stage as being significant).

E) רי"ף, רב ניסם גאון – difference between קדושין and נשואין

Therefore, here it was talking about קדושין, and in יבמות it was talking about נשואין.

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[266] (This side still requires הכנסת העטרה; still saying that if and only if he does הכנסת העטרה does the נשיקת האבר count as ביאה).

[267] Others (such as קובץ שיעורים) give different, perhaps less radical, answers.

The רי"ף explains that we knew הראה works for נשואין because the פסוק says קיחה by נשואין, and that gets connected to the קיחה by ערוות.

A few points worth noting here:

1) Apparently, they are assuming that ביאה works to do נשואין (if done for נשואין, not זנות).

2) Where does it say that קיחה is referring to נשואין?

a) רמב"ן – "כי יקח ... ובעלה" – refers to both קדושין and נשואין (and therefore, the דרשה from קיחה was on the ביאה after the קדושין, the נשואין, even though the קיחה here was the קדושין)

b) יבמות in תוספות ישנים – "כי יקח" = קדושי כסף, and "ובעלה" = קדושי ביאה, and then the דרשה was that הראה works by קדושי כסף, and there is no הראה by קדושי כסף, so must mean הראה works by the נשואין which comes after that קדושי כסף

Those suggestions both used the פסוק of "כי יקח איש אשה ובעלה." But there is another approach:

מאירי, most אחרונים on our סוגיא – use a different פסוק; either

c) by מוציא שם רע, which is talking about נשואין, and says "כי יקח איש אשה," or else

d) by עורכי מלחמה getting sent home, where it says "אשר ארש אשה ולא לקחה" (clearly saying קיחה is something which comes after קדושין)

3) What would be the סברא to differentiate like this between קדושין and נשואין?

a) just a גזירת הכתוב [from one of the three פסוקים just referenced] — by נשואין, there is a special קיחה קיחה of דרשה; but by קדושין, we stick with the סתם understanding of ביאה, which is גמר ביאה

(This isn't to say that there is no logic behind this; it is certainly understandable that by קדושין, where it is taking two halachic strangers and turning them into having a relationship, more is required; unlike by נשואין, which is just finishing the process, and thus requires less).

b) רמב"ן – (seems like a different approach) – it depends on the person's דעת.

To clarify, let's start with a confusing רמב"ם. According to the גרסה of the מ"מ and the תוספות ר"י הזקן, in which he has the word "מסתמא," the רמב"ם incorporates both the answers of the ריב"ם and of רב ניסם גאון. Why use both?

One answer might be that רב ניסם גאון himself is based on the ריב"ם. One can do either קדושין or נשואין with הראה; however, a סתם person has in mind to only do קדושין with גמר ביאה.

If so, why does a סתם person have דעת to do נשואין with הראה? Why's there this distinction?

I) [psychological] – (same idea as above, that the קדושין is a bigger commitment or transition, from no relationship to a relationship, instead of by נשואין, which just completes the relationship, and thus needs less to achieve that level of דעת, to commit)

II) Rav Soloveitchik [fundamental] – קדושין itself is דעת to create a חלות; however, נשואין is a חלות ממילא, it is a מציאות, it is a relationship. Thus, by נשואין, only need כוונה, to know what you are doing — but not that you have a desire to commit. Thus, no ability to decide when it is חל; unlike קדושין, where you do have that power.

Potential נ"מ between these two approaches:

If he stated that the נשואין should only happen at the stage of גמר ביאה: to I) – only נשואין at the stage of גמר ביאה; but to II), to Rav Soloveitchik – still happens at הראה

שיעור #49 – 4/27/17

בועל נדה; קטנה נשואה a גט for Accepting; ביאה נשואין עושה או אירוסין עושה – י.

How do we pasken — ביאה נשואין עושה או אירוסין עושה?

Most ראשונים – assume that we pasken אירוסין עושה, even though the גמרא itself doesn't really reach a clear conclusion. This is because רבא and אביי wanted to defend this side, and they are the בתראי.

What is the underlying basis of the גמרא's ספק?

1) Well, why might one say that since ביאה can do אירוסין, and if one assumes that ביאה can also do נשואין, then both are being accomplished at the same time. That would be why נשואין עושה might be true.

However, ביאה – גר"א cannot do נשואין;[268] it is an עבירה to be בועל ארוסתו, after all.[269]

And he thinks that is what our גמרא is itself asking about, and therefore concludes that it doesn't work for נשואין at all, since our גמרא's conclusion appeared to be אירוסין עושה. Therefore,

2) גר"א – the ספק is whether ביאה can accomplish נשואין at all (even after קדושין).

That being said, this גר"א is not mainstream. He goes against many ראשונים and how we pasken להלכה (that ביאה with the proper intention *can* accomplish נשואין).

Therefore, [**within approach 1) above**], the ספק seems to be one of two things:[270]

A) Generally, can one מעשה perform two functions? Or else,

B) Perhaps generally it can; however, specifically here, maybe there must be a break between the קדושין and the נשואין? Maybe they cannot be simultaneous.

Why might this be true?

Perhaps similar to the רמב"ם in the beginning of הל' אישות — the whole point of קדושין is to make there be an earlier stage of marriage before the נשואין. Therefore, maybe that would be lost if there was no space at all between the two stages.

What does the side of נשואין עושה hold?

A) כ"מ – she is מותר in ביאה [i.e. she is fully a נשואה]

B) מ"מ – (based off of a דיוק in the גמרא [it only said יורשה, מיטמא לה, and מיפר נדריה]) – he gets those rights, but is still אסור to have ביאה with her

What might be the סברא for this?

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[268] Unlike the ראשונים from the previous סוגיא who implied this does indeed work.

[269] The other ראשונים, like the רמב"ם, felt that it depends on one's כוונה — only if no כוונה for נשואין is it an עבירה.

[270] [Personally, I thought there might be a third way to view the ספק, even within this side:

C) if נשואין is just a חלות ממילא (like Reb Chaim), for נשואין to occur, it requires that the act be done with an ארוסה. By necessity, it requires that context to for it to establish this relationship in מציאות, and here, there'd be no such context].

Reb Chaim – two דינים in חופה:

1) On a דאורייתא level, it is a קנין for all the דינים of נשואין

2) But on a דרבנן level, it is also a מתיר for ביאה.

The נ"מ between them is that ביאה only does this first דין, not the second; that specifically needs חופה.

(Reb Chaim infers this from the רמב"ם's language itself — ביאה creates נשואין, but not a היתר ביאה).

What emerges from this is a מחלקת in how to understand the איסור דרבנן of בועל ארוסתו בבית חמיו:

The standard understanding is that there is an איסור to do ביאה without נשואין.

But the מ"מ seems to understand that you specifically need חופה to permit the ביאה, not just נשואין.[271]

Can a father accept a גט for his קטנה daughter?

תוספות brings this topic up, at first as a ספק.

Why did תוספות mention this here?

a) It might just be because the גמרא had mentioned a father's rights in his קטנה daughter.

b) However, it could be deeper — תוספות may have been bothered by a question of the שיטה לא נודע למי:

Why didn't the גמרא make a דיוק that it must be אירוסין עושה from an earlier part of the ברייתא, when it said that the father is מקבל her גט, seemingly after any one of the avenues of קדושין (including ביאה)?

If one assumes that a father can only accept the גט of his daughter as an ארוסה, but not as a נשואה, the גמרא should have made this דיוק; by the fact that it didn't, does that imply that a father *can* still accept the גט of his נשואה daughter while she is still a קטנה? This might have prompted תוספות's discussion.

Anyhow, the following is all known with certainty:

A father *can* accept the גט of his ארוסה daughter, whether she is a קטנה or נערה.

However, a father *cannot* accept the גט of his נשואה daughter when she is a נערה.

But can a father accept the גט of his נשואה daughter when she is a קטנה?

A) תוספות – he cannot

This is תוספות's conclusion, and also what would seem to be intuitive. After all, we generally think of her as being totally disconnected from her father after the נשואין (in fact, she is even called a "יתומה בחיי האב" after the divorce or husband's death).

B) רש"י[272] **–** he can

What might be the סברא for רש"י?

He apparently agrees that the father cannot be מקדש her again, or do any of the other things, even while she is still a קטנה, once she has gone through נשואין; why should only קבלת גיטה be different?

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[271] [רש"י might have understood like the מ"מ too; it depends on how one interprets his wording of "כאירוסין"].

[272] In most places [see in קדושין on :מג, in יבמות on :קט, and in סנהדרין on .סט, for example]. As for in כתובות on :מו, where he sounds like he is against this — one might say that he was only talking about a נערה there (i.e. if a נערה is בגרה or ניסת).

Maybe because it is a "continuation" of the קדושין which he had the זכות to create; it hearkens back to the time while she was still in his רשות. He sees that process "to its end."[273]

Still, even if that were so — why would this only apply to a קטנה he married off, and not a נערה?

First, let's bring up a different מחלקת between רש"י and תוספות. In קדושין on :מג, both רש"י and תוספות say that for a נערה מאורסה, either she or her father can accept her גט. But they argue over a קטנה מאורסה:

רש"י – only the father can accept her גט

תוספות – same as a נערה מאורסה — either she can or he can

Thus, we see another instance where רש"י believes a קטנה is different than a נערה, though this time by an ארוסה instead of a נשואה. Is there a pattern here, one which can explain both דינים?

This might tie back into an earlier issue [see שיעור #10 in specific][274] — does the father act as a בעלים on his daughter, or rather as some sort of שליח?

As mentioned there, perhaps there is a difference between a קטנה and a נערה: by a קטנה, he is the בעלים, but by a נערה, he is a שליח. Accordingly, with נשואין, his זכות in his נערה daughter disappears; but his ownership by his קטנה daughter does not. This discrepancy explains why though he might lose some זכותים, he still retains others.[275] Similarly, this might explain why רש"י believes only the father can accept the גט of his קטנה מאורסה daughter and not her.

There are the unique דינים of משכב, מושב, and מדרס by a נדה, a זב, a זבה, or a יולדת.

When a נדה, a זב, a זבה, or a יולדת touches something regularly, they make it a ראשון לטומאה.

But these דינים of משכב, מושב, and מדרס have extra strength, in two particular ways:

I) The טומאה penetrates all the way through the layers, hitting anything stacked beneath with טומאה

II) Moreover, each of these layers becomes an אב לטומאה itself, not just a ראשון לטומאה.

When our גמרא says "תחתון כעליון" by a בועל נדה, it means that while a בועל נדה has I), he does not have II).[276]

How is this unique status of a בועל נדה supposed to be understood?

A) רש"י – he is like a נדה with one leniency (his משכב is only like עליונו של זב)

B) תוספות הרא"ש – he is like a generic אב הטומאה with one חומרה (namely, מטמא משכב תחתון כעליון)

Some potential נ"מ (there are many more):[277]

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[273] (There might be other answers as well. See Rav Dovid Povarsky, for example).

[274] [See also שיעור #11 and שיעור #16].

[275] This can also solve the issue with the רש"י in כתובות (see note 272). תוספות on :מג in קדושין said רש"י changed his mind about an ארוסה; but now that we see they are dependent on one another, we can say he changed his mind about a נשואה as well, and then it would make sense that he contradicts himself in different places in ש"ס — they are before and after the retraction.

[276] When he sits on layers, he only makes each become a ראשון, just like something which a real זב had carried (not sat on).

[277] [משא, מעיינות, תרומת חו"ל, etc. — for any of these: רש"י – like a נדה; but תוספות הרא"ש – like a טמא מת (i.e. a generic אב הטומאה)].

1) Is he מטמא בהיסט?

רש"י – yes; but תוספות הרא"ש – no

2) בגדי אדם הנוגע בו?

רש"י – מטמא; but תוספות הרא"ש – not מטמא

Rav Lichtenstein – ties this into another מחלקת between רש"י and תוספות in ב"ק:

What is the דרשה of "משכבו ולא הגזול" teaching?

a) רש"י – he cannot be מטמא it to make it an אב הטומאה if it is stolen; lacks the owner's permission

תוספות attacks this – why should טומאה be based on permission?!

b) תוספות – he cannot define someone else's thing as something which is made for sitting on if it wasn't designated for that

Even רש"י would agree with this point. How would רש"י respond to תוספות's attack though?

Rav Lichtenstein – while תוספות felt that טומאת משכב is the transmission of טומאה from the זב, רש"י instead felt that it is a new חלות שם טומאה in משכב, called משכב הזב, which is an אב.

Accordingly, this won't work on a stolen object — one can transfer טומאה to it, to make it a ראשון,[278] but one cannot redefine someone else's item to make it into an אב הטומאה.

This same idea can be said regarding a בועל נדה then as well, to explain why רש"י thinks a בועל נדה is exactly like a נדה with this one exception — he possesses the טומאה of a נדה, but he is still not a נדה. Thus, while indeed, טומאה is transferred from a בועל נדה, to make an item into a ראשון, since טומאה can always transfer — nonetheless, a בועל נדה cannot define something else as an אב הטומאה. That is a different process, which only an actual נדה can do.

[278] As the דיוק in רש"י indicates.

שיעור #50 – 5/1/17

תרומה eating אשת כהן ;קדושין before חופה – י:

Can חופה take place before the קדושין and still work to create נשואין once the קדושין occurs?

Potential evidence that it can:

I) רש"י – says "ביאה דלאחר חופה"

II) מרדכי quoted in תשובת רש"י (in beginning of כתובות) – explicitly says that חופה before קדושין works

III) ריטב"א, רמב"ן – how a כהן גדול can be מקדש with ביאה (to the מ"ד who says תחילת ביאה קונה) and be permitted to fully marry her, to do נשואין — if he had already brought her into the חופה, and then did קדושי ביאה

a) משנה למלך – proved from here that חופה can come before קדושין

b) משאת בנימין – argued, and said it cannot

(משאת בנימין would just say the case is when she was in the חופה until קדושין, and really חל afterwards)

What might be a סברא for why it could work?

1) Perhaps, based on Reb Chaim, because חופה and נשואין are really just a מציאות of closeness — if it is in the context of getting ready to do קדושין, that is serious enough to enable that relationship to be established, even if it came out of order, when both are done.

2) Perhaps, based on a comment of Rav Soloveitchik, חופה doesn't really create נשואין; rather, it removes an obstacle (called "בית אביה") which prevents קדושין from becoming נשואין on its own. One cannot *create* נשואין before קדושין, but one can *remove the obstacle* preventing the קדושין from becoming נשואין before the קדושין.

Why did רש"י think it was it necessary to put חופה before the קדושי ביאה? What in the גמרא prompted this?

A) [practical] – one will enter יחוד anyhow before doing ביאה, so it makes sense that חופה was before ביאה

(This would make sense only if רש"י held that חופה means יחוד).

In short, it was simply easier to describe a scenario of ביאה after חופה (after יחוד), instead of the reverse.

B) [fundamental] – if ביאה came after חופה, then it counts as one thing, because the single action of ביאה caused the transition from פנויה to נשואה; thus, it can teach to כסף, which is also one thing. However, if the חופה was after the ביאה, then there are two steps, and one can't learn the one step of כסף from a two-step process.

(This doesn't require saying רש"י holds like the תוספות ר"י הזקן, that יחוד is חופה, unlike the first approach).

What's the source that an אשת כהן can eat תרומה?

I) בבלי – "קנין כספו"

II) ספרי – "כל טהור בביתך"[279]

[279] If this were the source, and the simple meaning is only for a נשואה, then what would be the source for an ארוסה eating? To this, we would either have to use the ק"ו of רבי יהודה בן בתירא, or else the ריבוי of the ספרי (it says "ביתך" an extra time).

Which is the real source?

A) ר"ת (quoted in תוספות הרא"ש) – real source is "כל טהור בביתך," and "קנין כספו" is just an אסמכתא

("קנין כספו" really just refers to an עבד כנעני).

B) תוספות הרא"ש – real source is "קנין כספו," and "כל טהור בביתך" is just an אסמכתא

The ירושלמי may sound like this.

Additionally, the רמב"ם sounds like this as well (only brings the פסוק of "קנין כספו").

רש"י is more complicated. Sometimes he says one, sometimes the other.[280] Why?

a) Perhaps רש"י thinks it is a מחלקת אמוראים (the two different versions in our גמרא); namely:

לישנא קמא – the תנאים argued over the דין דאורייתא, and hold "כל טהור בביתך" is only the source for a נשואה, but not an ארוסה [they don't hold of "קנין כספו," and therefore needed to get onto a fancy ק"ו]

לישנא בתרא – the תנאים both agreed that an ארוסה eats on a דאורייתא level [and therefore might think the source is from "קנין כספו," and not "כל טהור בביתך"].

(To this, the לישנא קמא uses "כל טהור בביתך," and the לישנא בתרא uses "קנין כספו").

רש"י on חומש brings both דרשות though, which indicates that someone holds of both of them.

b) Perhaps the לישנא קמא uses only "כל טהור בביתך," and not "קנין כספו," but the לישנא בתרא uses both of them — "כל טהור בביתך" for a נשואה, and "קנין כספו" for an ארוסה.

It would make sense then why רש"י sometimes bring one דרשה or the other: it depends on the context. Additionally, רש"י on חומש would be saying like the לישנא בתרא.

To this, it might mean that there are two separate דינים for eating תרומה (this could be what the ירושלמי meant — "they kept the פסוק by a נשואה, but not by an ארוסה").

Rav Lichtenstein – the ריטב"א in כתובות – interprets רש"י as saying that a יבמה cannot eat because of the living brother, but she can eat because of the dead brother if she had been a נשואה (but not if she was only an ארוסה).[281] This fits nicely with the above distinction: "פקע קניניו" when he died — thus, if only an ארוסה and eating from "קנין כספו," that falls away. But since she is still "in his house" if she was a נשואה, because of יבום — then she can still eat from "כל טהור בביתך."

One could speculate to potentially apply this split to other ideas as well:

An ארוסה might be comparable to an עבד כנעני or a שפחה כנענית, who have no כהונה on their own; but a נשואה might eat as part of the family — she might have some status of כהונה herself. While "קנין כספו" might only be אכילה לטובת הבעל, "כל טהור בביתך" means she has her own ability to eat.

This could lead to other נ"מ: for example, whether one fulfills a מצוה by giving תרומה to an אשת כהן herself [282] — this might depend on if she's an ארוסה or a נשואה; or else, whether she makes a ברכה on the תרומה — perhaps she does as a נשואה, but not as an ארוסה (not a מצוה for her).[283]

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[280] For example: here, רש"י says "כל טהור בביתך;" yet in יבמות on .נו, he says "קנין כספו."

[281] רש"י can be read in a different manner. This is just the ריטב"א's interpretation.

[282] This was a מחלקת between Rav Kook and the ישועות מלכו.

[283] The צפנת פענח – הל' ע"ז ד:יד – makes this same distinction, and offers another נ"מ: if after she is מזנה, if she eats תרומה, does she pay the חומש — as a נשואה — she might not, just as a חלל does not; but as an ארוסה — she might, only from the קנין.

שיעור #51 – 5/4/17

"הנהו קלא אית להו" "קבל מסר והלך"; תרומה eating ארוסת כהן – י: - יא.

According to רבינא, both רבי יהודה בן בתירא and בן בג בג think that קדושין enables her to eat תרומה on a דאורייתא level.

Within רבינא, רבי יהודה בן בתירא holds that ביאה (without חופה, according to the מ"ד that אירוסין עושה, who the גמרא is defending) is מאכילתה even מדרבנן. How does he know that?

A) רש"י – there's no חשש סמפון because "אין אדם שותה בכוס אלא אם כן בודקו"

What about the חשש שמא תשקה of עולא?

a) מאירי – no חשש שמא תשקה, since after ביאה he is מייחד לה מקום in his home now

b) שיטה לא נודע למי – אה"נ, that's a concern; rather, just means that if not for the חשש שמא תשקה, then would be allowed to eat, since there is no חשש סמפון here

B) ר"מ quoting תוספות – doesn't actually mean מאכילתה; rather, just מאכילתה on a דאורייתא level

To begin, some background regarding an ארוסת כהן eating תרומה:

I. מדאורייתא – an ארוסה eats

II. משנה ראשונה – it's אסור for her to eat until חופה or הגעת זמן

III. משנה אחרונה – it's אסור for her to eat until חופה

What was the reason for the משנה ראשונה?

חשש שמא תשקה – עולא

(But if הגיע זמן, then מייחד לה מקום)

חשש סמפון – רב שמואל בר יהודה

(But if הגיע זמן, then he'll check her out with בדיקת חוץ, before he starts paying for her food)

What was the reason for the change between משנה ראשונה and משנה אחרונה?

חשש סמפון – עולא

חשש סמפון – רב שמואל בר יהודה, but they realized that בדיקת חוץ wasn't good enough

With that in mind, there seems to be an inconsistency in the words of רבי יהודה בן בתירא:

He says עד שתכנס לחופה (which implies משנה אחרונה).

Yet the גמרא says his concern was עולא's concern and not חשש סמפון (which implies משנה ראשונה)!

A) ריטב"א, תוספות – within the משנה ראשונה (and either with our גרסה [גרסה #1] of "עד שתכנס לחופה משום דעולא" and לאו דווקא; or else, with a different גרסה [גרסה #2, brought by the ריטב"א] of just "משום דעולא")

B) רשב"א, רבינו משה מנרבונא – משנה אחרונה according to עולא

Not concerned for the חשש סמפון in and of itself, but once חז"ל were גוזר because of חשש שמא תשקה, then they added to continue the איסור because of חשש סמפון

(To this, either with גרסה #1, or else a new גרסה [גרסה #3] of "עד שתכנס לחופה משום דעולא ומשום סמפון").

C) רשב"א – no, even משנה אחרונה according to עולא is not because of חשש סמפון, but rather חשש שמא תשקה

(רש"י in כתובות sounds like this as well).

(רמב"ם also seems like this; never says חשש סמפון, only חשש שמא תשקה [see more below]).

Isn't this against the גמרא in כתובות?

רשב"א thinks that גמרא was only a ה"א, and therefore shouldn't be taken seriously.

How do these opinions each fit in with the נ"מ of מסר והלך?

To A) and C) – works out smoothly — according to משנה ראשונה, רבי יהודה בן בתירא would say מותר for her to eat תרומה (since no relatives), and בן בג בג would say אסור (because not checked out)

Isn't the father there — what does it mean, that there are no relatives?

a) רש"י – not the father, just his שלוחים

b) תוספות רי"ד – only worried about קטנים (siblings), won't know better; but father will know better

c) ראב"ד quoting שיטה לא נודע למי – only for a short while, so no concern

To B) – more difficult — to בן בג בג, it is אסור, since חשש סמפון; and to רבי יהודה בן בתירא, it is also אסור now because of חשש סמפון! How is this case a נ"מ?

a) תוספות – אה"נ, not really a נ"מ; just saying that it would have been a נ"מ within the משנה ראשונה

b) רשב"א – all one case (קבל, מסר, והלך): the father *immediately accepted* the קדושין, and then they *immediately* all went home; and because it was immediate, there was no time in between for the חשש שמא תשקה to be relevant, and when no גזירה for the חשש שמא תשקה first, then there is no גזירה of חשש סמפון.

Thus, to רבי יהודה בן בתירא, it is מותר (the basis for the גזירה of the חשש סמפון was never there, since not a continuation of any גזירה of חשש שמא תשקה); and to בן בג בג, it is אסור (due to the חשש סמפון).

Overall then, how many נ"מ is קבל מסר והלך really?

A) רש"י – three

#1 – קבל מומין, accepted her "as is" — there is a חשש שמא תשקה, but not חשש סמפון

#2 – מסר האב לשלוחי הבעל — no חשש שמא תשקה, but there is a חשש סמפון

#3 – הלך האב with the שלוחי הבעל — no חשש שמא תשקה, but there is חשש סמפון

Why aren't we concerned she might give to her father here?

a) מהרש"ל – change גרסה to שלוחי האב

b) Not concerned that an adult will drink

c) only a short while

B) תוספות – two (according to רב אסי)

#1 – קבל מומין, accepted her "as is" — there is a חשש שמא תשקה, but not חשש סמפון

#2 – מסר והלך האב עם שלוחי הבעל – no חשש שמא תשקה, but there is חשש סמפון (but if אב hadn't gone with them, then the שלוחים would have checked her and all would agree מותר for her to eat)

(And no concern that she might give to her father here for the same reasons as above)

C) ראב"ד, רשב"א (brought in שיטה לא נודע למי) – one

#1 – קבל קידושין ומיד מסר והלך — no חשש שמא תשקה (since no גזירה for the חשש סמפון made when there was no חשש שמא תשקה one first), but there is חשש סמפון (since no time to check)

What about according to the רמב"ם?

רמב"ם – only mentions the reason of the חשש שמא תשקה

Thus, would have expected him to say קבל מומין is אסור (because of חשש שמא תשקה), but מסר והלך is מותר.

Yet רמב"ם indicates that they are *all* אסור until she is נכנס לחופה. Why need to wait until חופה if only the חשש שמא תשקה?

a) מהר"י קורקוס – רמב"ם really holds of חשש סמפון too [and like רבינו משה מנרבונא above]

(This is very דוחק, since רמב"ם never mentions it at all).

b) אבני מלואים – maybe רמב"ם understood the נ"מ of מסר like ר"י in תוספות in כתובות (the reverse of most ראשונים) — there *is* a חשש שמא תשקה, since maybe she'll share the food with the שלוחי הבעל, but there is no חשש סמפון, because they'll do their job well and check before they take her back

c) אבני מלואים (preferred) – based on תוספות in קדושין on :מה — they made a גזירה that was a לא פלוג (and even though that is against our גמרא, that is either because our גמרא is only according to some אמוראים who we don't pasken like; or else, our גמרא is only going according to the משנה ראשונה).

Rav Soloveitchik – indeed, makes more sense to make a לא פלוג for עולא than for רב שמואל בר יהודה. To רב שמואל בר יהודה, they were merely concerned that perhaps she'd be a פנויה after all; thus, never really said "an ארוסה is אסור." But to עולא, the גזירה was really on an ארוסה, and a לא פלוג thus makes more sense.

What does "הנהו קלא אית להו" mean practically?

A) רש"י, others – and he therefore knew about them and accepted them, and thus can't claim מקח טעות

Isn't this against the גמרא in ב"ב on :צב which says that one *can* say "הרי שלך לפניך," i.e. seemingly for the לוקח to claim מקח טעות to the מוכר?

a) רבינו אליהו – here, after gave the money; there, before gave the money

b) רמב"ן – here, according to בן בג בג; there, according to other תנאים

c) מאירי – here, from in-town (there is a קול); there, from out of town (no קול)

d) ראב"ד – here, no מקח טעות; there, no מקח טעות (the מוכר says to the לוקח "הרי שלך לפניך")

B) ר"ת, others – he can claim מקח טעות; however, there was no גזירה because of חשש סמפון because the claim of מקח טעות is not common (unlikely that someone would end up buying such an עבד)

To summarize: can one claim מקח טעות if one should have noticed the מום?

1) רמב"ם, ר"ת – yes

(**רמב"ן –** מחלוקת תנאים, but agrees in the conclusion).

2) מאירי, רש"י, ראב"ד – no

3) רבינו אליהו – before he pays – yes; after he pays – no

שיעור #52 – 5/8/17

מקח טעות – יא. - יא:; first answer for בית שמאי; second answer for בית שמאי

(continuing off the end of last שיעור)

What might they be arguing over?

A) It may just be a judgement call, as to what is considered something one should've known about.

B) However, it might also be about something more fundamental, about the nature of מקח טעות:

How does the claim of מקח טעות work?

a) ר' עקיבא איגר – there's an implicit תנאי made in every sale, that if there is a מום then the sale is undone

(To this, there fundamentally was a sale, and there was just a תנאי in it which undid it).

b) בית הלוי [see שיעור #29] **–** distinction between a problem with the marriage and an issue in the husband himself. A מקח טעות isn't a תנאי, but rather that it is a חסרון in the מעשה itself — never made the transaction in the first place, because there was no דעת.

(To this, there was never a sale in the first place).

Potential נ"מ:

1) Who can retract?

ריטב"א – either party can retract — there was no sale at all (this fits with the בית הלוי; however, to ר' עקיבא איגר, maybe only the buyer can back out)

2) Can the buyer retract if he is negligent and should've checked out beforehand? [see above]

To the בית הלוי – fits better with רמב"ן, ר"ת — no transaction unless the buyer explicitly accepts the מום; but to ר' עקיבא איגר – fits better with ראב"ד, רש"י — only has this תנאי if he did his part

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There are four answers given in the גמרא for the source of בית שמאי's opinion. We'll go through them one by one.

[Answer #1 for בית שמאי's source]

The ה"א of the גמרא within the first answer,[284] **was that even if she explicitly accepts a פרוטה, she is not מקודשת.**

Why not?

A) שיטה לא נודע למי, others – "בטלה דעתה אצל כל אדם"

(This could fit well if כסף is not just a sale, but rather a statement of valuing her [see שיעור #8]).

(Or else, it could be just about מציאות, that she really didn't mean to accept it).

B) תוספות – not called כסף in this context

(This fits well if כסף is not just a sale, but rather a statement of valuing her).

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[284] And, according to the שיטה לא נודע למי, even its conclusion.

Who was this רבי ינאי who was so rich?

A) Our גרסה – actually רבי ינאי

(The גמרא in ב"ב on יד. mentions a רבי ינאי who planted 400 vineyards).

B) תוספות רי"ד – couldn't have been this rich; must mean ינאי המלך

Why is the גמרא's question specifically from בנתיה דרבי ינאי?

[To clarify: if the גמרא was just questioning the idea of her not being able to accept a פרוטה ("why shouldn't it be valid if they both agreed?") then why not just ask that without mentioning the בנתיה דרבי ינאי?]

A) Rav Dovid Povarsky – אה"נ, really לאו דווקא; the question is really without the בנתיה דרבי ינאי.

(The question really was that it doesn't make sense to invalidate the קדושין if they both agreed).

B) תוספות – "נתת דבריך לשיעורין"

If there's no rule, that's fine (like by בושת ופגם or the like); but if there's a rule, then there can't be exceptions.

C) Perhaps this shows that not everyone feels a דינר is significant, and thus there's nothing special about a דינר

What's the גמרא's conclusion in this first explanation for בית שמאי?

A) רש"י –	**B) תוספות –**	**C) שיטה לא נודע למי –**
Regular woman:	**Regular woman:**	**Regular woman:**
פרוטה – פשטה ידה וקבלה	פרוטה – פשטה ידה וקבלה	דינר – פשטה ידה וקבלה
דינר – לילה/שליח	דינר – לילה/שליח	דינר – לילה/שליח
בנתיה דרבי ינאי:	**בנתיה דרבי ינאי:**	**בנתיה דרבי ינאי:**
פרוטה – פשטה ידה וקבלה	פרוטה – פשטה ידה וקבלה	דינר – פשטה ידה וקבלה
תרקבא דדינרי – לילה/שליח	דינר – לילה/שליח	תרקבא דדינרי – לילה/שליח

What's the סברא for each of these opinions?

A) The סברא for רש"י seems straightforward: if she agrees, then the minimum is a פרוטה; if left unspecified, then the default is based on her usual degree of קפידא.

B) The סברא for תוספות seems to be the following: if she agrees, then the minimum is a פרוטה; if left unspecified, then the default is based on the average woman's קפידא. If she had wanted otherwise, then she should have specified, and she therefore expected this.

The מחלקת between רש"י and תוספות seems to merely be a מחלקת in אומדנה — if she doesn't specify, does she expect the world to relate to her based on her specialty preferences (רש"י), or on the average person's feelings (תוספות)?

To רש"י, what about the issue of "נתת דבריך לשיעורין?"

Possible defenses for רש"י:

a) תוספות הרא"ש – since there's a minimum, then not considered "נתת דבריך לשיעורין"

(Unclear why this should be true — we'd still need to figure out each case!)

b) Based on שיטה לא נודע למי – since only in cases of where she told a שליח to accept it without specifying, or when done at night where she couldn't see — these cases are uncommon, and therefore not a problem of "נתת דבריך לשיעורין"

This approach assumes that "נתת דבריך לשיעורין" is only a problem when it will actually cause confusion; therefore here, no confusion will ensue from these rules, since it won't happen often.

תוספות may have argued on this (though doesn't have to), and held that there is a fundamental property of הלכה that there is an issue of "נתת דבריך לשיעורין," even in uncommon cases.

C) The שיטה לא נודע למי for the סברא is that he really keeps the סברא of the ה"א: fundamentally, need a דינר for קדושין; when unspecified, rely on your specific קפידא; but when less than a דינר, apply the idea of בטלה דעתה.

The מחלקת between רש"י and תוספות on one hand, and שיטה לא נודע למי on the other, is over the גמרא's conclusion.

From the wording of our גמרא, it sounds like רש"י and תוספות — "I never said פשטה ידה…".

But the שיטה לא נודע למי also has evidence supporting him — the משנה sounded like it was a דינר normally, not only in this specific, weird case.[285]

[Answer #2 for בית שמאי's source]

To quickly provide some background about coins:

דינר 4 – שקל/Biblical סלע

דינר 2 – שקל Talmudic

דינר 1 – זוז/דינר

דינר 1/5 (but they added to it, and became דינר 1/6) – originally גרע/Biblical מעה

What was the smallest coin they minted in צור?

A) ריטב"א, מאירי, רש"י – a מעה

B) רש"י – most **ראשונים, תוספות, רבותיו של רש"י** a דינר

To תוספות, the גמרא reads simply.

But to רש"י, the גמרא is strange — how is it explaining why בית שמאי requires a דינר for קדושין then?

רש"י – since the תורה said more than a פרוטה, we need חשיבות, and therefore was placed on a דינר.

(רש"י borrowed this idea from the גמרא on the top of יב. He apparently understood that it is taken for granted by everyone that less than a דינר is not respected for קדושין).

[285] [I thought this wasn't strong textual backing: רש"י and תוספות can say our משנה is referring to the default דעת of people, which is a perfectly normal thing for the משנה to do; one doesn't have to frame it as "only referring to one weird case"].

שיעור #53 – 5/11/17

"פרוטה כל דהו" s'רב יוסף; בית שמאי – Second, third, and fourth answers for יא: - יב.

(continuing off the end of last שיעור)

What was the גמרא's question from שתי כסף?

To תוספות, the question is clear — why based on מעה and not דינר?

To רש"י though, the question is instead — why two מעה, and not only one מעה?

As for the גמרא's answer –

To רש"י, it's simple — two is learned from כלים (which is plural) [and מעה since that's כסף צורי].

["מה כלים שנים, אף כסף שנים, מה כסף דבר חשוב, אף כלים דבר חשוב" — גרסה s'רש"י]

To תוספות, our גרסה will be difficult — sure, now we know two, but what about מעה instead of דינר?

Thus, תוספות has a different גרסה, which ends the opposite way, learning from כלים to כסף again (teaching that one only needs something חשוב [i.e. lowering the standard], a מעה, something useful, and not a דינר).

["מה כלים שנים, אף כסף שנים, מה כלים דבר חשוב, אף כסף דבר חשוב" — גרסה s'תוספות]

Part of the weakness of תוספות's explanation is that a מעה is discussed in the תורה (the גרע), while a דינר is not; and, seemingly, the whole reason צור and its mint are relevant is because they make the same coins as the ones in the תורה — if so, shouldn't the smallest coin be a מעה?

A) תוספות – there was no מעה coin in the time of the תורה, just a מעה weight

B) רשב"א – there *was* a מעה in the time of the תורה, but nonetheless, it still was not minted in צור

They argue fundamentally over what רב אסי's rule really meant, that סתם כסף in the תורה refers to כסף צורי:

To תוספות, it really means that סתם כסף is the coinage at the time of the תורה (and צור just happens to be the same as those earlier times; they kept up the ancient traditions).

For תוספות, it is not such a big חידוש. This is pretty intuitive.

To רשב"א, it really means the coins produced in צור.

For רשב"א, it is odd. Obviously can't mean a גזירת הכתוב about a mint in צור; what does it mean, then?

a) Maybe that סתם כסף means valuable coins, and in צור they made valuable coins like this.

b) Maybe that סתם כסף means valuable coin in your days, and might change in each generation.

(This latter approach would obviously be quite radical).

From what to what, and which law, does the היקש of דבר חשוב teach?

A) תוספות – from כלים to כסף

Teaches that the שיעור of the כסף is a מעה

B) רש"י – from כסף to כלים

a) רש"י here – teaches כלים have to be worth שתי כסף

But תוספות asks on רש"י — this doesn't work for שמואל, who makes this דרשה, yet holds that כלים can be even less than שתי כסף ("יצאו כלים למה שהן")!

b) תוספות – teaches כלים have to be worth a שוה פרוטה

(This works for שמואל now — but only according to תוספות, who says "למה שהן" means a פרוטה)

c) רש"י in שבועות – teaches non-כלים have to be worth שתי כסף (but not talking about כלים)

(This works for שמואל now, but only after changing the גרסה to "מה כסף... אף כל דבר חשוב").

d) מאירי, ר"י מיגש – teaches כלים don't have to be worth any fixed amount, for כלים are always חשוב

(This works for שמואל, but now the comparison isn't really so powerful — non-כלים must be worth a certain quantitative amount to be considered חשוב, while כלים are fundamentally חשוב, even without that quantitative property).

How could רב יוסף even think רב אסי was like בית שמאי?

A) רמב"ן (first answer) – he didn't hold of רב אסי, and thus didn't care that he held like בית שמאי

B) רמב"ן (second answer) – he thought רב אסי was ambiguous, and could fit with either בית שמאי or בית הלל

להלכה, in שבועת הדיינין, the טענה is שתי מעות. How do we know that?

A) רמב"ם – because it is מדבריהם, it is כסף מדינה, and the smallest silver coin in מדינה was the מעה

But our גמרא sounded like the reason we knew כסף was a מעה here was based on the היקש!

a) Maybe רמב"ם read the היקש like רש"י did (it was just teaching two instead of one, not why the מעה)

b) Maybe רמב"ם thought that in the conclusion, against this part of the גמרא, we don't use the היקש to teach this [286]

How is this מדבריהם? It's learned from a פסוק, and the רמב"ם said just above that this is true on a תורה level!

קרית ספר – offers two suggestions:

a) On a דאורייתא level, one would swear on a כפירה of a פרוטה and a הודאה of a פרוטה, and then afterwards the רבנן instituted that one only swears on a כפירה of שתי כסף (the פסוקים were אסמכתות)

b) The שיעור of שתי כסף isn't explicit in the פסוק — only known through a דרשה — and thus, the רמב"ם considers it "מדבריהם."

B) מ"מ – because it is מדאורייתא, and though it should have been in דינר — the היקש lowered it to מעה

To this, even in the conclusion of the גמרא here, רב אסי applies, because this is כסף קצוב after the היקש of שנים.

C) תוספות in שבועות, תוספות הרא"ש here – (this only works for תוספות's גרסה) – סתם כסף is a פרוטה, but the דרשה of "מה כלים דבר חשוב, אף כלים דבר חשוב" raises it to מעה

To this, though רב אסי doesn't apply here in the conclusion (not כסף קצוב), the היקש of דבר חשוב does apply.

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[286] (Both of these approaches remain with some issues that aren't clearly resolvable).

(The רמב"ם likely had the גרסה of the ר"י מיגש, which was רש"י's גרסה, so it makes sense why he didn't say this. As for why he didn't like the מ"מ — well, he might not think this is called כסף קצוב).

How much is "שתי כסף" actually?

A) Most ראשונים – שתי מעה (1/3rd of a דינר)

B) ר"י מיגש – שתי דינר מדינה (1/4th of a דינר)

A few strange points in this ר"י מיגש:

I) The גמרא never refers to a דינר מדינה (though רש"י mentions it as well)

II) The grammar is incorrect — should be שני, not שתי!

To this, we'll have to say there had been some other word for this דינר מדינה which was feminine and we lost that word.

III) He assumes there are 156 פרוטות in a דינר; but our גמרא says 192 (and only has another ה"א of 144).

Accordingly, it isn't surprising that the רמב"ם rejects him in no uncertain terms.

[Answer #3 for בית שמאי's source]

Why don't we hold of the דרשה which ריש לקיש suggests for בית שמאי?

First, there are two ways to understand the process of ריש לקיש's derivation:

A) רש"י –

Step #1: need possibility of גרעון כסף (at least two פרוטות)

Step #2: for the מכירה, not just two פרוטות, but rather a דינר

Step #3: learn קדושין from the מכירה to require a דינר

B) משנה למלך – (coming to defend the רמב"ם, who says the sale of an אמה העבריה needs two פטורות) –

Step #1: need possibility of גרעון כסף (at least two פרוטות)

Step #2: learn קדושין from the מכירה (at least two פרוטות)

Step #3: since קדושין needs more than a פרוטה, קדושין needs a דינר

The נ"מ which comes out:

How much is the minimum for the מכירה of an אמה העבריה according to ריש לקיש in בית שמאי?

To רש"י – a דינר; to the משנה למלך – two פרוטות [or more than a פרוטה].

Why does בית הלל argue then? Within רש"י's read of our גמרא's steps:

a) שיטה לא נודע למי (first approach) – (on Step #1) – don't need the possibility of גרעון כסף (or יעוד)

b) ר' עקיבא איגר – (on Step #2) – don't bump it up to a דינר; just two פרוטות

c) שיטה לא נודע למי (second approach) – (on Step #3) – don't learn קדושין from אמה העבריה

The נ"מ of these is what the שיעור of the מכירה of an אמה העבריה to בית הלל (and to us להלכה):

To a), it would be a פרוטה; to b), it would be two פרוטות; to c), it would be a דינר.

(By using עקיבא איגר ר׳s explanation, we can explain and defend the רמב״ם without having to get onto the משנה למלך׳s problematic new read in our גמרא).

[Answer #4 for בית שמאי׳s source]

Is this idea of "שלא יהו בנות ישראל כהפקר" a דאורייתא or דרבנן concept?

A) Most ראשונים – דרבנן

(The רבנן uprooted the קדושין when less than a דינר).

B) ריטב״א – דאורייתא

What was the opinion of רב יוסף?

A) ריטב״א, simple explanation – your smallest coin

B) תוספות הרא״ש – your 1/192nd of a דינר coin

What is an איסור coin made of?

A) רש״י on the משנה – made from silver

Would have to be tiny (only 8 פרוטות), and also — not true historically.

B) ב״מ in תוספתא – made from copper

Also, the ירושלמי says the smallest silver coin was a מעה.

We pasken like אביי, that the שיעור of a פרוטה is an objective שיעור (a set ratio to the amount of silver in the דינר).

And a halachic פרוטה is fixed at 192 for the דינר. The ratio of פרוטות in an actual איסור is able to fluctuate though. Sometimes it is 6, sometimes 8 (since sometimes there are 32 איסור in a דינר, and sometimes 24).

Why would the ratio of an איסור to a דינר fluctuate?

To the תוספתא and the ירושלמי, it makes sense — one is copper, the other is silver.

But to רש״י, why would it sometimes be more expensive, and sometimes less?

One would have to say that they sometimes changed the size or the purity of the איסור.

A פרוטה (based on a מסורה from the גאונים) is ½ a barely seed, which would come out to 1/40th of a gram of silver.

This became a problem though, when the סמ״ע discovered that, in his days, nothing could be bought with that.

If so, how could this measurement still be used as a שוה פרוטה?

A) סמ״ע – indeed, nowadays a פרוטה must be more — it must be able to buy something

(While the ש״ך argued about changing the שיעור by פדיון הבן, he seemed to agree in terms of the פרוטה)

נחלת שבעה objected — while רב יוסף thought it was subjective, אביי said it an is objective amount of silver!

B) נחלת שבעה – no, an objective amount of silver (1/40th gram), regardless of what it can buy

להלכה, we pasken like the נחלת שבעה.

What were the סמ"ע and ש"ך thinking; aren't they clearly against our גמרא?

They might have thought רב יוסף was saying that even the smallest coins in one's days are able to be used; and אביי argued, and said that there is an objective minimum to the coins called a פרוטה, that they must be of a certain, fixed ratio to a דינר (and thus, at least a certain amount of silver). But it was a given that they must also have buying power. The standard can be raised, not lowered.

What does כסף mean? It could seemingly mean either:

I) Silver

II) Currency

III) Value (buying power)

אבני מלואים – discussed this at length:

In the language of the תורה — from רש"י's words, it seems to be the מחלקת in our סוגיא — in the רב יוסף part of our סוגיא, בית שמאי would say silver, and the other opinion (we can call it בית הלל) would say value.

In the language of the משנה — this seems to be a מחלקת between the ריטב"א and תוספות on ב.:

Why did בית הלל have to say פרוטה?

a) תוספות – to define the word כסף

(To תוספות, it means currency).

b) ריטב"א – to parallel בית שמאי (but a פרוטה isn't כסף; a פרוטה is only שוה כסף)

(To ריטב"א, it means silver).

[To clarify though — this is only in the wording of the משנה. The ריטב"א in our סוגיא thinks that how we pasken, כסף means value, like בית הלל in the language of the תורה above].

Potential נ"מ:

1) Is there a need for a דרשה for שוה כסף:

If value – don't need a פסוק to teach שוה כסף = כסף; but if silver or currency – do need a דרשה

2) אבני מלואים – what the שיעור of a פרוטה is:

If silver – based on silver; if currency – based on smallest coin; if value – based on buying power

(This could be the difference between סמ"ע and ש"ך [value], and רב יוסף [currency], and us [silver])

חזו"א argues – whichever one כסף means, the שיעור will still be defined as a 1/40th gram of silver

שיעור #54 – 6/5/17

"מטיבין לו ומאריכין לו ימיו" – לט:

The גמרא here says that uniquely these מצוות tilt the scale when towards good when equal.

Yet the גמרא in ר"ה on יז. says that out of mercy, ה' tilts the scale towards good when equal!

A) תוספות – in ר"ה, still just a בינוני who ה' is merciful with; as opposed to these, which make him a צדיק

[What this precisely means is hard to say].

B) פני יהושע – in ר"ה, about the judgment in the word to come; as opposed to these, which are in this world

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Based on our גמרא, what does the רמב"ם pasken about these מצוות?

A) עין משפט נר מצוה, perhaps מאירי – by saying that ה' knows and calculates everything in a manner beyond our comprehension, רמב"ם was alluding to this גמרא

Not exactly like this גמרא though:

a) The גמרא indicates that these מצוות have special power, yet רמב"ם doesn't specify that at all!

b) Additionally, in the פה"מ to פאה, רמב"ם writes these מצוות are unique because they are בין אדם לחבירו, and thus both good for ה', so to speak, and other people,[287] thereby ensuring people will be nice in turn (that's the benefit in this world).

B) Many אחרונים – the גמרא's conclusion [see more below] can be read as saying that the משנה was really only dealing with עולם הבא (while רב שמעיה was in the ה"א, thinking it was both עולם הזה and עולם הבא).[288]

Accordingly, our משנה is about עולם הבא, while in פאה it is about both worlds (since they are בין אדם לחבירו).

The גמרא moves on to a more fundamental question, whether there is really שכר in this world for מצוות.

Reality, as stated in a ברייתא, seems to contradict the משנה's statement that one *does* get שכר for מצוות in this world!

To address this, אביי says something unclear about יום טב and יום ביש.

Was he referring to the משנה or ברייתא [the גרסה isn't clearly one way], and what did he mean by this phrase?

A) רש"י – יום טב – the world to come; ה' saves a צדיק from eternal loss with bad in this world for his few sins

To this, יום טב really means "תיקון יו"ט," as physical suffering (the reverse for a רשע with "תיקון יום ביש")

(This fits well with the upcoming גמרא, about the comparison to cutting off one branch of a tree).

Also, to this, refers to the משנה: יום טב – the מטיבין of the משנה; יום ביש – the אין מטיבין of the משנה

(To this, it isn't so clear why the term "יום" in specific was used, instead of "years" or "life").

B) ריטב"א – (different version of רש"י) – (same סברא as the above)

But to this, יום טב means physical pleasure, and it is the רשע who receives the יום טב (for the same reason)

To this, refers to the ברייתא: יום טב – pleasure of רשעים in this world; יום ביש – pain of צדיקים in this world

Why called יום? Since עולם הזה is just a short time, a mere "day," of good or bad respectively

C) מהר"ל, תוספות רי"ד – both יום טב and יום ביש refer to a צדיק — gets both physical pleasure and physical pain

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[287] (As for תלמוד תורה, he explains that it teaches one how to be good to other people).

[288] This is explicit in Rav Kapach's translation of the text of the פה"מ here in קדושין.

To this, for a צדיק, refers to the משנה with יום טב, but to the ברייתא with יום ביש (opposite for a רשע)

Why called יום? Because one day this, one day that — even in this world, it switches off by days

D) ר"ת – a צדיק really gets reward in עולם הבא, and even in this world he receives mostly good[289]

To this, refers to the ברייתא: יום טב – fleeting pleasure of רשעים in this world; יום ביש – fleeting pain of צדיקים in this world

Why called יום? Since the fleeting reward or pain to each is only a small part of this world, a mere "day."

Three overall philosophies then [for a צדיק; the reverse is true for a רשע] within אביי:

1) רש"י (either version) – reward for מצוות — עולם הבא; punishment for עבירות — עולם הזה

2) תוספות רי"ד – reward for מצוות — some of both worlds; punishment for עבירות — some of עולם הזה

3) ר"ת – reward for מצוות — both worlds; punishment for עבירות — short periods in עולם הזה

While אביי tried to resolve the משנה and the ברייתא, רבא appears to have thought it was a מחלקת תנאים.[290]

Seemingly, according to רבא, the משנה is the חכמים, and referring to עולם הזה too.

Yet in פה"מ [see note 288], רמב"ם seems to say the משנה is refers only to עולם הבא; isn't that against רבא?

a) Maybe רמב"ם paskened like אביי according to רש"י [see note 290]: everyone agrees the משנה refers to עולם הבא

b) פנ"י – explains רבא as saying that the משנה is really רבי יעקב (i.e. טוב means עולם הבא, as does אריכות ימים); and the ברייתא agrees, but uses words differently (טוב and רע occurring in this world).

To this explanation, the משנה and ברייתא really agree; the ברייתא just uses the words in their plain sense, and the משנה uses them like רבי יעקב uses them.

This can explain how the רמב"ם understood the משנה as referring to עולם הבא then, even within רבא.

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[289] This approach was likely influenced by the story of איוב.

[290] תוספות had rejected רש"י's interpretation of אביי (that there is no שכר for מצוות in this world), since that was what רבא was coming to introduce, by bringing in the שיטה of רבי יעקב.

But שיטה לא נודע למי defends רש"י – within אביי, everyone agreed to this; רבא came to argue that only רבי יעקב held this way

שיעור #55 – 6/8/17

יהרג ואל יעבור; צדיק ורע לו against רבי יעקב's promises; Explanations for – לט: - מ.

(continuing off the end of last שיעור)

To summarize the different opinions of what happens to a צדיק in this world:

[The רשע would get the flipside of all of these]

A) Simple meaning of the משנה, משנה according to רבא [except to the פנ"י] – good

B) אביי according to ר"ת – mostly good, brief periods of bad

C) אביי according to מאירי, תוספות ר"ד – complex; some good, some bad (proportion is inscrutable)

D) אביי according to רבי יעקב, רש"י according to תוספות, מהר"ל – no שכר מצות [i.e. bad]

E) Radical read of רבי יעקב[291] **–** no שכר ועונש in this world at all, totally random

Reward and punishment certainly still exist; however, only in עולם הבא.

And of course, השגחה still exists, but simply to fulfill the Divine plan, not as reward and punishment.

The תורה promises worldly rewards many times — how could רבי יעקב deny שכר for צדיקים in this world?[292]

A) מהרש"א – difference between the nation [those פסוקים] and individuals [רבי יעקב]

B) רמב"ם – those promises aren't שכר מצוה — they are factors which enable doing more מצוות (and vice versa)

(Still pretty difficult — good physical things will still occur to צדיקים, which seems against רבי יעקב's point)

(רמב"ם might therefore also mean specifically for the public and not individuals; somewhat unclear)

C) אור החיים – גמרא in ברכות on ז. משה רבינו asked ה' to explain צדיק ורע לו; while ר"מ thought ה' didn't answer him, but רבי יוסי taught that ה' responded that צדיק ורע לו exists only when the צדיק is not a צדיק גמור

(This fits well with רש"י, who explained that bad things occur to a צדיק in this world to cleanse his sins).

Accordingly, the תורה was talking about a צדיק גמור, while רבי יעקב meant a normal case, a צדיק שאינו גמור.

D) תולדות יצחק (uncle of the שו"ע) – רבי יעקב's statement was לאו דווקא; rather, he just meant that the main שכר for מצוות is in עולם הבא. Nonetheless, there might be some שכר still in this world (but can't depend on it)

From our גמרא, one might have thought that the only explanation for צדיק ורע לו would be as punishment for sins.

However, there seems to be a מחלקת throughout ש"ס whether there is some other explanation:[293]

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[291] Rav Bednarsh didn't find anyone who said this, but it seems like a legitimate conceptual possibility.

[292] Because of this question, מאירי simply said "אה"נ, we don't pasken like רבי יעקב."

However, this response isn't fully sufficient, since one must still address how רבי יעקב understood these פסוקים.

[293] The following possible explanations are all in the realm of נגלה; regarding נסתר, the concept of גלגולים might be important.

1) ברכות on .ז [see אור החיים above] – while רבי יוסי said צדיק שאינו גמור, ר"מ thought ה' remained silent, which implies that there is some other, unknown reason for צדיק ורע לו

2) שבת on .נה – רבי אמי said there is no death or suffering without sin; but the conclusion of that גמרא sounds like even without sin, there is still death and suffering

That being said, תוספות points out that the גמרא doesn't have valid basis for concluding that about suffering, and מאירי says that indeed, רבי אמי is the correct explanation.

[Both מאירי and רמב"ן consistently לאו דווקא any גמרא which implies suffering doesn't stem from sins].

3) ברכות on .ה – רבא said if one cannot find any sins to blame one's suffering on, attribute it to יסורין של אהבה

What does that mean?

Many different explanations exist, which imply different reasons exist for suffering other than sins:

a) a test, the concept of a נסיון

b) physical suffering makes one become more spiritually focused

c) atonement for all of the בני ישראל as a whole

d) to show scoffers and cynics that a צדיק serves ה' even through bad times

However, רמב"ן, מאירי – still say that this is לאו דווקא

רמב"ן – makes a strong דיוק – the גמרא doesn't say he *doesn't* have sins, just that he can't *find* any sins. Thus, such pain is ה's way of helping him, from אהבה, cleansing sins he doesn't even realize he has.

4) מועד קטן on .כח – רבא said significant this-worldly-things are not dependent on זכות, but rather on מזל

How should this be understood?

A) מאירי – rejects this גמרא, claiming it was based on weak points

[Obviously, this is a very difficult thing to say about a statement of רבא…]

B) ר"ן – don't pasken like this גמרא

C) תוספות – some מזל is too weighty to be changed, but not always

D) עקידת יצחק, others – while מזל affects things as a default, זכות can nonetheless change them

Interesting to note how it was often רבא addressing this issue of צדיק ורע לו.

It was actually based on his experiences with his teachers, who he saw suffer more than seemed appropriate.

Rav Soloveitchik – practically, in terms of how to live in real life, we pasken like ר"מ; we are finite and cannot understand the infinite reasons for why reward and punishment is perfectly logical and just. Ideally, the question should be altered — ask not why the צדיק suffers, but instead, how should a צדיק respond to suffering.

Does רבי יעקב agree to the concept of שלוחי מצוה אינו ניזוקין?

A) שיטה לא נודע למי (first explanation), simple read of the גמרא – yes, even רבי יעקב agrees שלוחי מצוה אינו ניזוקין.

B) שיטה לא נודע למי (second explanation) – no, רבי יעקב doesn't think שלוחי מצוה אינו ניזוקין

(Instead, it was רבי יעקב asking if רבנן held of this rule; they responded only when not an expected danger).

Why didn't the various צדיקים merely turn down the advances of these noblewomen?

A) מאירי – they were actually tempted (no external pressures) at first, but succeeded in overcoming the desire

B) רש"י – denying the noblewomen would have caused them to be killed [294]

To this, initially, this would seem to be a classic case of יהרג ואל יעבור then.

However, since the women were non-Jews, then not גילוי עריות; if so, why'd they try to kill themselves then?

1) רמב"ן, ריטב"א, others – it *was* יהרג ואל יעבור, because of the issue of בועל ארמית

Even though not one of the עריות (and maybe not even an איסור in the תורה), still is קנאין פוגעין בו [295]

But the גמרא in עבודה זרה says that קנאין פוגעין בו is only בפרהסיא, and these cases were בצינעא!

a) ריטב"א – makes an אוקימתא, it *was* בפרהסיא

Pretty weak though, since the story really doesn't sound like this at all.

Perhaps ריטב"א meant everyone would find out about it (just as the גמרא says by אסתר).

Still weak though, since unlikely either they or the noblewomen would spread it.

b) רמב"ן (in מלחמות ה') – no, even בצינעא, to be בועל ארמית is a situation of יהרג ואל יעבור

Why?

I) נמוקי יוסף – because it is אבזרייהו of עריות

Not so simple: firstly, it won't lead to בפרהסיא [how אבזרייהו may be understood]; also, the גמרא says it was it is only אסור מדרבנן when בצינעא (from the ב"ד of the חשמונאים).

II) Even without קנאין פוגעין בו itself, the גמרא also implies there might be a חיוב כרת (which would also make it יהרג ואל יעבור, and even בצינעא).

(In fact, רמב"ן indicates like this, and רמב"ם says a "חיוב כרת מדברי סופרים").

(To this, the ב"ד of the חשמונאים were just adding on the four sets of מלקות).

Between the two options, רמב"ן is likely like the latter one. רמב"ן says that specifically a Jewish man and a non-Jewish woman is עריות, while the other way around is not, since in such a situation he turns his זרע into a גוי. Does that relate to בפרהסיא at all? No, it sounds like the issue is even specifically for the sake of בצינעא, it is actually עריות.

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[294] (Most ראשונים seem to assume this way, like רש"י, because they all ask the upcoming question on the סוגיא).

[295] This gets into a big חקירה whether קנאין פוגעין בו is a real חיוב מיתה, or else just a היתר do so something extra-judicial to restore the spiritual order of the בני ישראל.

מרדכי – (in order to free a woman whose יבם had become a מומר) – extended the idea that a situation of בועל ארמית is יהרג ואל יעבור by saying she was פטור from חליצה, since it's גילוי עריות for her to do יבום with the מומר

On two levels, this is a big חידוש:

a) מרדכי assumes he loses his status as a Jew

b) מרדכי applies בועל ארמית even to a Jewish girl with a non-Jewish man; most ראשונים [see רמב"ן above] only apply it when a Jewish man, since then מוליד a child for עבודה זרה.

Overall, within this general perspective:

Where does the punishment of קנאין פוגעין בו apply?

Everyone agrees only בפרהסיא.

Where does the punishment of כרת apply?

A) נמוקי יוסף, ריטב"א – only בפרהסיא

To this, the fundamental issue is only his being a negative model for the public.

B) רמב"ן, probably רמב"ם – even בצינעא

To this, the fundamental issue is really to be מוליד a child for עבודה זרה.

That being said, קנאות is only relevant for pubic matters.

שיעור #56 – 6/12/17

יהרג ואל יעבור – לט: - מ.

(continuing off the end of last שיעור)

2) מאירי, שלטי גיבורים (first explanation) – wasn't יהרג ואל יעבור;[296] nonetheless, it was a מידת חסידות

This leads into a big מחלקת over if one can voluntarily be מוסר נפש in a case of יהרג ואל יעבור:

A) תוספות, רא"ש, others – yes, and a מידת חסידות

[Based on part of the ירושלמי]

B) רמב"ן, רמב"ם, others – no, מתחייב בנפשו

רמב"ן – proof from the fact that there's no option to die instead of being מחלל שבת for פיקוח נפש

How do the other ראשונים get around this?

a) Rav Yaakov Emden – only for a regular person; a צדיק really should give up his life[297]

b) (The real answer) – fundamental difference between פיקוח נפש from natural means and being forced by a coercer; when forced, there is also a component of קידוש ה'

This approach also solves two otherwise apparent contradictions:

I) In the אגרת השמד, though רמב"ם says that to accept certain foreign beliefs is not יהרג ואל יעבור (due to a technicality — it's only עבודה זרה with words), he also speaks highly of those that gave up their lives to reject them; yet in משנה תורה, רמב"ם says that one who gives up one's life when not יהרג ואל יעבור is מתחייב בנפשו!

With this, can explain that when dealing with עבודה זרה, if only not יהרג ואל יעבור for a technical reason, then permitted to give up one's life (even if not חייב to).

II) תוספות (in עבודה זרה) says that it is a מצוה to give up one's life even when not חייב; yet תוספות (in סנהדרין), by assuming a man who gave up his life when not חייב must not have known the הלכה, implies one cannot just volunteer to do so!

With this, can explain that there is a difference between when the intent of the coercer is to distance him from his religion (where it's a מצוה of קידוש ה' to give up one's life) and when merely for the coercer's benefit (where it's not allowed).

3) מאירי, ריב"ש (second explanation) – גדולי ישראל are unique, because of the unique חילול ה' entailed

4) רבינו יונה, שלטי גיבורים (second explanation) – they didn't think they would die

רבינו יונה – suggests two ways to understand this:

a) They relied on the miracle

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[296] מאירי went even further, saying it was where they weren't threatening them at all.

[297] (It isn't totally clear how far to take this based on his examples. But he might actually be saying that if one is a צדיק, then one is supposed to give up one's life for any מצוה, even like by eating on יו"כ or being מחלל שבת).

[After all, the גמרא makes it seem like it's really expected if one is ניצול מדבר עבירה].

b) They knew they wouldn't die, even relying on nature

(In the first story, maybe somehow knew he'd be protected from שדים; in the second, maybe he was just trying to make an impression on her [as he clearly did]; in the third, maybe reasonably thought he could jump to the next roof, but fell)

These cases are distinct from normal situations of יהרג ואל יעבור; here, they proactively tried to kill themselves.

Is that permitted?

A) רבינו יונה – no

(And thus, he assumes it wasn't where they were really trying to kill themselves [see above]).

B) תוספות, many other ראשונים[298] **–** yes

This סוגיא might be one proof.

There are a few other proofs from midrashic sources too (captives leaping overboard, שאול המלך, etc.).

Rabbi Dr. Haym Soloveitchik – אשכנזים tried to defend this ex post facto; really based on intuition

Avraham Chaim Grossman, others – no, this was really based on the simple read of the הלכה

This גמרא (and the ראשונים who comment on it) seems to be a strong proof to this.

What is the underlying מחלקת?

a) Rav Elchonon Wasserman – to תוספות, three cardinal sins are דוחה פיקוח נפש; but to רבינו יונה, it's a tie

This might explain תוספות and רמב"ן, but not ריטב"א (who said "מותר לחבול עצמו," not חייב), and also definitely not מאירי, שלטי גיבורים (who said מידת חסידות to volunteer one's life). Nor does it explain why שאול was allowed to kill himself for fear of torture, or the captives case (wasn't really ערות).

b) Maybe to תוספות's side, מותר because of the component of קידוש ה'; to רבינו יונה, that isn't true.

[This neatly avoids all the apparent issues in Rav Elchonon's explanation].[299]

Additionally, this may provide some basis for the practice of killing others (as was sometimes done during the Crusades) — שאול first asked someone else to kill him; for קידוש ה', maybe it's permitted.

How is תלמוד תורה good for others, that it fits into this list of מצוות which naturally benefit him in this world?

A) רמב"ם – teaches one how to treat other people, who will in turn be nice to him

B) שיטה לא נודע למי – once one knows much תורה, one is able to assist others by answering questions

C) מהר"ל – תורה gives the world its existence, and brings good into the world, which one benefits from as well

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[298] By the other ראשונים dealing with these cases as normal scenarios of יהרג ואל יעבור, they clearly assumed it was permitted.

[299] Explains why one can volunteer; explains those stories (Jewish slaves sold for prostitution and a Jewish king in captivity are obvious cases of חילול ה').

שיעור #57 – 6/15/17

מעשה versus תלמוד ;עבירה in private ;מצטרף מחשבה רע למעשה – מ. - מ:

ה׳ does not punish someone for thoughts of doing an עבירה (only if leads to actions), while He does reward for מצוות. The one עבירה which is an exception is עבודה זרה.

Why is עבודה זרה an exception?

A) it is more חמור; this whole perspective is only חסד from ה׳ anyhow, and this breaks those bounds

B) מאירי – more fundamental – since עבודה זרה is all about belief, the action is not as important — it is the blasphemous thoughts which are the core issue

ירושלמי – quotes תוספות – the reverse system with גוים (punished for עבירה thoughts, not rewarded for מצוה ones)

Why?

A) Could just be a justified prejudice

B) משך חכמה – when someone wants to do something, and doesn't — it could either be because he really didn't want to, or it could be because it just didn't work out, even though he really did want to

By a Jew, the assumption is that his real desire is to do the מצוות and avoid עבירות.

(This aligns neatly with the opinion of the רמב״ם by beating a man until he says "רוצה אני" by גט).

But by a גוי, the assumption is that his real desire is to do עבירות and not מצוות.

This also explains the one other exception the גמרא gives for this system of reward and punishment:

After a Jew does an עבירה once, then it becomes like היתר for him, and he is held accountable even for thoughts of that עבירה, even if he doesn't do it. The חזקה is now that his inner will is for the עבירה.

This also be used to go back and explain why עבודה זרה is an exception as well:

For someone who possess heretical beliefs, his true desire is to act upon those beliefs.

The גמרא first teaches that it is better to do an עבירה secretly, because that way a חילול ה׳ is avoided.

The גמרא then says something odd: if someone feels an overpowering urge [which they cannot overcome, as the גמרא clarifies] to do an עבירה, he should dress in black and go far away, and then do the עבירה.

It's one thing to say to do a small עבירה over a big one; but to say doing so is permitted seems nonsensical!

A) תוספות – quoting ר״ח – doesn't really mean permitted; rather, it's just advice to conquer the יצר הרע

רב האי גאון [300] – "מה שלבו חפץ" doesn't mean the sin; it means what his *new* heart desires (not doing it)

ירושלמי – quoting the ריטב״א [301]– even suggests that the words mean to crush the "שאור שבעיסה"

רב האי גאון assumed this would certainly work (uses the word ודאי).

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[300] Brought in רש״י in חגיגה.

[301] [We don't have this ירושלמי].

B) ר"ח, מאירי [302] **–** not an actual עבירה; rather, something inappropriate, which in public is a חילול ה', but in private, though inappropriate, is not an actual sin

ר"ח suggests that this might *also* cause him to not do it [but not that it is certain, as רב האי גאון said).

C) ר"ף – we don't pasken like רב אלעאי

On what basis?

ר"ף might mean we reject רב אלעאי because we believe in ultimate free will, that he can conquer his יצר הרע. While רב אלעאי thought there are cases where he really cannot overcome his urge, we do not.

D) רש"י, תוספות, תוספות הרא"ש, חגיגה in others – doesn't really mean permitted; rather, it's just advice saying that it is less bad this way than if he were to do it in public

Perhaps the other ראשונים opted for other answers because they consider advice to do a smaller עבירה as tantamount to permitting the עבירה.

ספר חסידים [303]– better that a person violate the sin of being מוציא זרע לבטלה rather than sleeping with one of the עריות. [Still required the person to do intense תשובה; thus, it wasn't a היתר, but rather advice].

Rav Ovadiah – paskened like this simple פשט of רב אלעאי, and brought many ראשונים who held this way. Obviously though, it depends on every situation, and many factors must be weighed in each example.

What's so bad about staring at a rainbow?

A) ריטב"א – because it is like the form of ה', as the פסוק in יחזקאל by the מעשה מרכבה states

ריטב"א says there is a סוד behind this. More simply though:

a) תוספות רי"ד – just as a rainbow isn't really as it appears, it isn't exactly as we perceive it — so too is ה'; thus, one should not stare at it and think he fully understands

b) Perhaps just as a rainbow looks like it is comprised of so many different beautiful colors, but really all stems from one pure light — perceived multiplicity which is truly a pure unity — so too is ה'

B) כלי יקר – the גמרא says that in the generation of certain צדיקים, there were no rainbows. How is that possible — isn't it just light being refracted through water droplets? Therefore, he says there *were* rainbows, but they didn't stare at it, thinking that "we can just sin, because ה' won't destroy us anyhow for it," as the רשעים do

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What is "דרך ארץ" in the משנה?

A) רמב"ם, most commentators – good character traits

B) רש"ש – work

What does "אינו מן הישוב" mean?

A) רמב"ם – doesn't contribute to society

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[302] In his main explanation in מועד קטן.

[303] See this quoted in the beginning of שו"ע אבן העזר סימן כ"ג, by the נושאי כלים there.

B) ר"ן, others – doesn't have self-respect

The גמרא later on says he is also פסול לעדות.

To the ר"ן, this follows from the "אינו מן הישוב" — because he has no self-image of being a respectable person, to do the right thing, then he cannot be trusted not to testify falsely.

To the רמב"ם [though he too has a פסול of מבוזה], the פסול stems from the רישא of the משנה — if he doesn't have these three things, then he is assumed to be a רשע, and is therefore פסול לעדות.

From our גמרא, it would have seemed that תלמוד is greater than מעשה.

However, there is a confusing גמרא in ב"ק which might imply differently:

A) רש"י (in ב"ק) – מעשה is greater

The question in the גמרא in ב"ק was that רבי יוחנן's statement implied לימוד was greater, and that contradicted our גמרא in קדושין, which implied מעשה was greater.

The answer in the גמרא in ב"ק was that there are three levels:

1) teaching others

2) מעשה

3) own learning

Thus, overall, מעשה is greater than one's own לימוד.

Why does our גמרא say תלמוד is greater?

תוספות in יש מפרשים – when someone is young, תלמוד is greater, because it leads to מעשה; but when one is old, it is more important to do מעשה

B) ר"ת[304] **–** תלמוד is greater

(ר"ת is working off our גמרא in קדושין, which really sounds like it explicitly said תלמוד is greater).

The question in the גמרא in ב"ק was that רבי יוחנן's statement implied it was possible to do מעשה without לימוד, and that isn't true.

The answer in the גמרא in ב"ק was that he meant teaching others, and that is greater than מעשה.

To this, there are also three levels:

1) teaching others

2) own learning

3) מעשה

C) שאילתות – תלמוד is greater

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[304] The first explanation in תוספות in קדושין is complex. It seems similar to ר"ת, but ends off by saying that מעשה is better; see מהרש"א there. It might be saying like ר"ת in the גמרא's ה"א, but like רש"י in the גמרא's answer.

The question in the גמרא in ב"ק was based on רבי יוחנן's conduct, that he put on his תפילין before teaching his תלמידים; the contradiction was in his conduct (which implied מעשה was greater) against our גמרא in קדושין (which implied תלמוד was greater).

The answer in the גמרא in ב"ק was that teaching others is less than מעשה.

To this, there are also three levels:

1) own learning

2) מעשה

3) teaching others

תוספות רי"ד – how can this be, that teaching others is less than one's own learning?!

To defend, perhaps the topic being discussed is chronological order, not philosophical importance.

Overall, seems to be an important philosophical מחלקת between רש"י and ר"ת:

רש"י – מעשה is greater

ר"ת – תלמוד is greater

רש"י seems to have a good point — by מעשה being the end goal, isn't תלמוד just the means to reach it?

While that is certainly one approach (many ראשונים [תוספות הרא"ש, שאילתות, רס"ג, מאירי, etc.] agree with this ranking of רש"י's), there are other ways to understand "מביא לידי מעשה" which work to defend ר"ת:

בית הלוי – no, not just a means; rather, an end goal in and of itself [305]

This can be used to explain our גמרא for ר"ת in different ways:

a) ריטב"א – it is indeed a means, but it is *also* an end

b) של"ה, מהר"ל – this is a סימן, not a סיבה — that תלמוד brings one to מעשה *proves* that תלמוד is greater, but that isn't the *reason* why it is greater

מביא לידי מעשה itself could be understood in different ways:

1) שאילתות – now you know how to do the מצוה

2) מאירי in ב"ק – makes the מצוה more meaningful

3) של"ה, תוספות רי"ו הזקן – because you become more spiritual and a better, nicer person, and closer to ה'

To rephrase this a little differently, there are many different purposes which are accomplished with תלמוד תורה:

I) brings one to do מצוות — technically, practically [like שאילתות]

II) brings one to do מצוות — transformative [like תוספות ר"י הזקן]

III) Rav Soloveitchik – a form of עבודה to ה', submitting to the רצון ה'

[305] He explains נעשה ונשמע this way — even aside from the practical מצוות, we keep learning even theoretical הלכות. He also explains "שלא ברכו ברכת התורה בתחילה" this way — just viewed it as a הכשר מצוה, and thus didn't make a ברכה on it.

[Based on רמב"ם in ספר המצוות, מצות עשה ה']

IV) נפש החיים, תניא – the internalization of רצון ה'

(The level of unity with ה' is heightened when one thinks about what ה' "thinks" about)