

Hafqa'ah, Kefiyyah, Tena'im

Section A: *Hafqa'at Qiddushin Bazman Hazeh*

I The usual stance of the contemporary *posqim* is that we cannot apply retroactive annulment of marriage except in cases corresponding exactly with those mentioned in the Talmud. The impression is often given that there is a 100% consensus in this matter and therefore there is no point in employing annulment even as one element of a double- or treble-barrelled solution for the problem of *get*-refusal.

II Thus in the debate between Rabbi Shelomoh Riskin and Rabbi Zalman Neḥemyah Goldberg¹ the latter repeatedly insists, in opposition to Rabbi Riskin, that retroactive annulment **without a *get*** is nowadays out of the question. Only where there was an [externally] invalid *get* – as in the cases in the Talmud – can such annulment apply. Rabbi Riskin's arguments from the Rosh's interpretation of the *taqqanat haGe'onim* (i.e. that the *taqqanah* was based on post-talmudic *hafqa'ah* demonstrating that retroactive *hafqa'ah* is possible even after the *ḥatimat haTalmud*) are rejected by Rabbi Goldberg because the enactment of the Ge'onim also operates only together with a *get* (again externally flawed as in the cases of the Talmud but this time due to talmudically unsanctioned coercion).

III Rabbi Goldberg agrees that even nowadays one could introduce annulment enactments which would operate by invalidating the act of the *qiddushin* (and hence there would be no requirement of a *get*) but he points out that the Rema rules that **in practice** even this is not to be allowed.

IV Admittedly, there are cases such as the missing husband whose death is attested by only one witness – even if the 'one witness' be a pagan's innocent talk – where the Sages allowed remarriage on the basis of annulment (without a *get*) but that is because there is convincing evidence (albeit not proof) that the husband is dead and there is also the assumption that a woman enquires carefully before remarrying due to the fact that she is aware of the severe repercussions that would ensue were her husband to return. For permitting nowadays the practice of annulment in the case of *get* refusal however, we have no precedent whatsoever in the *Halakhah*. Rabbi Goldberg is at pains to point out that it is not his own opinion that he is putting forward but that of the Rashba in his *Responsa* - I:1162.

V The lengthy article by Rabbi David Lau *Hafqa'at Qiddushin leMafrea' beYamenu*² comes to a similarly pessimistic conclusion.

VI However, Rabbi Ovadyah Yosef sounds a more positive note. In an article titled “*Kol Hameqaddesh ada'ta' deRabbanan Meqaddesh we'Afge'inho Rabbanan leQiddushin Mineh*”,³ he writes that from the rationale suggested by the Ramban and the Rosh for the Ge'onim's *taqqanat hamoredet*, namely that it is based on the power of annulment, we can infer that even nowadays the sages of each generation are empowered to enact the annulment of marriage (even after a properly conducted *qiddushin*); such power is not limited to the talmudic sages alone.

VII He adds that the author of *Responsa 'Ezrat Yisrael* argues that the Rambam agrees that coercion in the case of *me'is 'alai* is an enactment of the Geonim and not talmudic law. This would mean that the

¹ This debate was conducted in *Teḥumin*. Rabbi Riskin wrote the first item in XXII 191-209. Rabbi Goldberg followed with a critique in XXIII 158-160. Riskin responded to the critique in XXIII 161-164 and Goldberg replied again in XXIII 165-168. There is also a summary article of Riskin's position in 'Amudim XIV 17-22.

² *Teḥumin* XVII 251-271.

³ *Torah Shebe'al Peh* (Jerusalem 5721) 96-103.

Rambam also maintains that retroactive annulment can be introduced by the post-talmudic sages in cases not included in the rubric of annulment by the Talmud.

VIII This contradicts the view of the Rashba (*Responsa* I:1185) who maintains that we can only apply annulment in those cases where it is explicitly permitted in the Talmud. Perhaps, writes Rabbi Yosef, Rashba was following his opinion expressed elsewhere (*Responsa* VI:72) that the *taqqanat heGe'onim* was an emergency measure only, in response to the circumstances prevailing in Babylon at the time. It follows therefore that even according to Rashba, adds Rabbi Yosef, one could introduce retroactive *hafqa'ah* nowadays for the emergency needs of our time.

IX He backs this up with the statement of the Rema in *Darkey Mosheh* ('*Even Ha'Ezer* 7) that the reason the Great Rabbis of Austria permitted captured women to return to their husbands even if the latter were *kohanim* was not in accordance with the regular *Halakhah* but was an emergency ruling. "Though this meant permitting a possible Pentateuchal prohibition I think," writes the Rema, "that they relied on that which we say – *Kol dimeqaddesh 'ada'ta' derabbanan meqaddaesh* and there was [therefore] power in the hands of the *bet din* to annul the women's marriages so that they were considered unmarried so that even if they had had relations they are permitted to their *kohen*-husbands".

X Rabbi Yosef notes the obvious difficulty with the Rema's suggested interpretation of the ruling of the *Gedoley Ostreich* – that even if a woman was unmarried at the time of her captivity a relationship with a gentile would forbid her to her *kohen*-husband – and suggests possible solutions. In the course of his discussion he says that even after '*afqe'inho* there remains a rabbinic marriage. This will explain why the Rashba insists that annulment by itself is not enough; a[n externally flawed] *get*, or some other additional reason for permission to remarry, must be present to overcome the problem of the residual rabbinic state of marriage.

XI He furthermore notes that however one understands the Rema, it is clear that at a time of great need one can apply annulment⁴ even nowadays. He then informs us that he discovered amongst the enactments of the Rabbis of Jerusalem from 5269 (= 1509) which were printed at the end of the book *Hayyim waH'esed Mussafia* (letter ט"ז) that in their opinion it is possible to annul marriage even after the *hatimat haTalmud*. He concludes that although a number of *posqim* disagree – Rivash (*Responsa*, 399) *Peney Yehoshua* in the name of Rabbi Betsalel Ashkenazi (*Quntress 'Aḥaron to Ketubbot* 3a) and the *Peraḥ* (*siman* 125 sub-section 39) – nevertheless at a time of great need it would seem that there is a possibility to take a lenient stance in accordance with the aforementioned *posqim*.⁵

XII The final section of this article deals with post-talmudic enactments to annul *qiddushin* given in defiance of communal agreements. Here, says Rabbi Yosef, very many *Rishonim* agree to the contemporary effectiveness of such enactments. Even the Rashba, who explicitly limits the application of annulment to those cases explicitly described in the Talmud, wrote in a *responsum* cited in *Bet Yosef* (end of *EH* 28) that such initial annulments can be made by means of judicial confiscation of the marriage ring. The Rivash (*Responsa*, 399) rules similarly and so the Rashbets (*Responsa*, II 5). Maharam Alashqar (*Responsa*, 48) cites the Rosh as holding the same opinion and as adding that even if the *qiddushin* performed against the communal enactment were executed by means of intercourse they would be rendered by the enactment as promiscuous and therefore ineffective. Many of the great *Aḥaronim* agreed to this and they are enumerated in *Keneset HaGedolah* (*EH* 28, *Hagehot Bet Yosef* 37).

XIII In the final paragraph, Rabbi Yosef notes that the Rashba agreed to such annulments only in theory but in practice he would not rely on them. Similarly, the Rivash requires the agreement of all the local

⁴ Even in cases not mentioned in the Talmud, even where there is no *get*, and even where there was no preceding enactment of annulment in the given circumstances.

⁵ At this point it sounds as if Rabbi Yosef is proposing reliance on annulment alone in an emergency situation of '*iggun*. See, however, below.

Sages before he would agree to the practical application of such enactments. Nevertheless, he adds that Mahara ben Shimon in *Responsa Umitsur Devash* (EH no. 6) maintains, along with many supporters, that one can rely in practice on enactments of annulment and the *bet din* that succeeded him did rely on annulment in actual cases.

XIV Although we cannot adopt this practice because of our custom to demand consensus in matters of marriage/divorce, we can apply it in cases where *qiddushin* have been made at the time of the *shiddukh* – against the will of the Sages and in defiance of a communal enactment (where even the Rashba and the Rivash etc. agreed in principle to the annulment of the marriage without any *get* and expressed concern only for practice) – and the wife claims afterwards *me'is 'alai* and he refuses to divorce her in the hope of making some easy money. In such a case we can enforce a *get*. Although, as a rule, we cannot enforce a *get* in cases of *me'is 'alai* when we are dealing with a definitely married woman, in this case we can rely on that which the Meiri (*Qiddushin* 65a), amongst others, wrote that in a case of doubtful *qiddushin* if the wife does not want to go ahead with the *nissu'in* (= *me'is 'alai*), we can coerce a divorce. Although one can infer the opposite from some *posqim* a doubt remains so that we have a *sefeq sefeqa*⁶ to be lenient.

XV How much more so if the *qiddushin* were in defiance of a communal enactment **explicitly threatening annulment** one could certainly enforce a *get* in practice where the bride claimed *me'is 'alai*.

XVI Shemuel Atlas's excellent – and very lengthy⁷ – article on *hafqa'ah* concludes that annulment is never really retroactive. Either it means that the husband divorces wholeheartedly because of his fear that otherwise the Sages will annul his marriage retroactively – something he does not want, or it means that the Sages used their power to uproot biblical law and bring the marriage to an end without a *get*. Either way, the marriage ends now and not retroactively. One advantage of this understanding of *hafqa'ah* is that it would obviate the problem of *bi'at zenut*. A disadvantage would be that it would not be possible to use *hafqa'ah* to undo cases of bastardy as was proposed (theoretically) by the Maharsham (*Responsa Maharsham* I:9) and by Rabbi Herzog.

Section B: Kefiyyah in cases of *me'is 'alai*

I In an article in *Diney Yisrael*⁸ M. Shapiro notes that, Maharam MeRothenberg, in his younger years, disallowed coercion in cases of *me'is 'alai* but later he reversed his position and permitted it. This is exactly the opposite of what happened with Rabbenu Tam who initially allowed coercion in cases of revulsion and later in life forbade it.⁹

II Yuval Sinai in his research proposal on the subject of coercion¹⁰ suggests that extensive research would show that a majority of the *Rishonim* support the Rambam's opinion regarding coercion of a *get* in cases of *me'is 'alai*.

III R. David Bass in “‘Al Gerushin wa'Aginut lefi Nuqdat Mabat 'Ortodoqsi'”¹¹ notes that most *posqim* do not allow *kefiyyah* in cases of *meis 'alai*. Indeed, R. Shemuel Amar of Morocco (d. 5649/1889) ruled¹²

⁶ Maybe the *halakhah* is like the Rif and the Rambam etc. that one can coerce in cases of *me'is 'alai* even where there are definite *qiddushin* and, even if the *Halakhah* is not so, maybe in a case of *qiddushin* given in defiance of a communal enactment there is no marriage at all.

⁷ “Kol diMeqaddesh ‘ada‘ta’ deRabbanan Meqaddesh”, *Netivim beMishpat Ha'Ivry*, New York 1978, 206-264.

⁸ “Gerushin Begin Me'isah”, *Diney Yisrael*, II (5731), 117-153. The citation above is taken from pages 140-42.

⁹ *Yabia' 'Omer*, III EH 19:15.

¹⁰ “Submission of Application and Research Proposal on the Subject of Coercion as a Solution for the Problem of Agonnot”, 2.7

¹¹ Internet article – <http://www.snunit.k12.il/seder/agunot/view.html>

¹² *Responsa Devar Shemuel* 23.

(against a number of the Rabbis and Sages of Fez) that a *get* cannot be coerced even if the husband attempted to murder his wife because the talmudic list of circumstances justifying *kefiyyah* is closed. R. Shemuel directs his readers to an earlier *poseq* who wrote that even if he pursues her with a knife in order to stab her we still do not force him to divorce and we cannot even say that he is obliged to divorce her. This approach is found in the Rosh¹³ who forbade the application of coercion in a case where the wife claimed:

“...that her husband is crazy and his stupidity increases day by day so she requests that he divorce her before he becomes totally mad and she would then be an *‘agunah* for ever....he is utterly crazy and she is afraid that he might kill her in his anger because when people anger him he strikes and kills and hurls and kicks and bites....Re’uven counters that ‘You knew him beforehand and you considered and accepted. Also, he is not crazy but merely not well-versed in wordly conduct and he will not divorce you unless you return the books or their value and then he will divorce you.’ [Reply] I do not see from their claims anything for which it would be fitting to coerce him to divorce because **one cannot add to that which the Sages enumerated in Chapter *HaMaddir* (77)**....Therefore, she should persuade him to divorce her or she should accept him and be sustained from his properties.”

IV In this vein, we find the *posqim* persistently refusing to apply *kefiyyah* wherever there exists dispute as to whether the case under discussion merits it. R. Bass cites R. Shabbetai Kats, the *Shakh*, who, in *Gevurat ‘Anashim*, says as follows.

“In any case where there is a possibility to explain a halakhic source leniently or stringently one must adopt the strict interpretation which would exclude compelled divorce so as to avoid the danger of a coerced *get* which would make the woman’s children from another man who is not her husband into *mamzerim*.”

V Even if the stringent camp opposing *kefiyyah* is a small minority many *posqim* will rule against applying it and R. Bass quotes an explanation of this expounded by R. Mosheh Sofer as follows.¹⁴

VI The logic behind the acceptance of a coerced *get* is that the husband does indeed want in his heart of hearts to obey the words of the Sages as the Rambam explained. Now that is all very well when all the *Posqim* agree that the situation warrants *kefiyyah*. However, in the case with which the *Hatam Sofer* was dealing (one in which the husband had become epileptic) there was a dispute amongst the *Posqim* as to whether coercion could be applied, the Rosh saying that it could and the Mordekhai that it could not. The *Hatam Sofer* reasons as follows.

“Even if it is clear in Heaven that the *Halakhah* is like the Rosh, since there is the opposing opinion of the *Mordekhai*, and we do not have anyone who can decide between them, if one forced him to divorce she is still a definitely married woman in Biblical Law and not a questionable one. The reason I say this is that a coerced *get*, even when it is enforced according to the Law, and he says ‘I agree’ the *get* is nevertheless only fit for the reason that the sages gave....it is presumably agreeable to him to fulfil the words of the Sages who said one should compel him to divorce as the Rambam beautifully explained....[but] this is only when it is clear to the husband that the coercion is in accordance with the Law according to every authority [for] if so it is a *mitsvah* [in his situation] to heed the words of the Sages. However, in here the husband will say ‘who says it is a *mitsvah* to heed the

¹³ *Responsa, Kelal* 43:3.

¹⁴ *Responsa Hatam Sofer*, III EH I No. 116.

words of the Rosh? Perhaps it is a *mitsvah* to heed the words of the *Mordekai*! So if that which he said, 'I agree', was coerced and did not issue from his heart¹⁵ there does not seem to be even a potential position¹⁶ to coerce a divorce.

VII However, he also cites from a *responsum* of the *Tsemah Tsedeq* the following:

In this matter (of *me'is 'alai*) right is on his (the Rambam's) side for she is indeed not as a captive that she should be made to have relations with someone who is repulsive to her as it is written¹⁷ 'Her ways are ways of peace etc.'¹⁸

VIII He also quotes the famous words of the *Tashbets*¹⁹ who, in a *responsum* concerning a case where a woman's life was made a misery by a cantankerous and miserly husband (who would quarrel with her endlessly and starve her)²⁰ who was widely known as such,²¹ ruled that the husband could be compelled to divorce. *Tashbets* argues that this may be derived by *qol waḥomer* from the *ba'al polypus* in the Mishnah (*Ketubbot* 77a)²² especially as we find a *qol waḥomer* similar to this in the *Yerushalmi* (*Ketubbot* 5:7). Then, presumably addressing the Rosh, he writes:

"Now although we find in a *responsum* of the leading 'Aḥaronim *zal*²³ that we do not coerce at all in a case such as this we ourselves are not reed-cutters in the marsh²⁴ and [when dealing with] something dependent upon logic a judge has only what his eyes see.²⁵ It is possible that they²⁶ did not say that²⁷ about cases [involving] great suffering like this and how very much more so if he starves her.²⁸ **If she had been their [daughter] they would not have spoken so.** The Rashba *zal* wrote in a *responsum*²⁹ like us....and it is proper for the *bet din* to rebuke him and to apply to him this [biblical] verse: "Have you murdered and also taken possession?"³⁰ for this [marriage situation] is worse than death, for he is 'like a lion that treads and eats'³¹....and the *dayyan* who forces her to return to her husband when she rebels, like the law of the Arabs,³² is to be excommunicated...."³³

¹⁵ Because according to the *Mordekhai* he was right.

¹⁶ Lit. an 'I would have said' (*hawa' 'amena'*).

¹⁷ Proverbs 3:17.

¹⁸ *Responsa Tsemah Tsedeq* (Lubavitch) 135.

¹⁹ II:8.

²⁰ So it was a case of *me'is 'alai* with an '*amla*'.

²¹ Hence the *amla*' was *mevoreret*.

²² This seems to contradict the Rosh and his school who argue that no additions can be made to the justifications for *kefiyyah* mentioned in the Talmud.

²³ The reference is almost certainly to the Rosh who would have been referred to as an '*Aḥaron* by the *Tashbets*.

²⁴ A talmudic expression for ignoramuses – *Shabbat* 95a, *Sanhedrin* 33a.

²⁵ *Bava' Batra* 131a, *Sanhedrin* 6b, *Niddah* 20b.

²⁶ The Rosh and his school.

²⁷ It is impossible to coerce a divorce even in cases of severe suffering.

²⁸ Where there is an opinion in the Talmud (Rav, *Ketubbot* 77a) that we coerce a divorce and *Tosafot* (ibid. 70a, s.v. *Yotsi' weyiten ketubbah*) and a number of *Rishonim* decide accordingly – cf. *ET* VI col. 417, footnote 901.

²⁹ *Responsa Rashba* I 693.

³⁰ I Kings 21:19.

³¹ *Ta'anit* 8a.

³² = Islamic law (*Shariyah*). See *Ketubbot* 63b for the dispute of Amemar and Mar Zutra. The *halakhah* follows Amemar – see *EH* 77:2,3.

³³ For even those who say we cannot coerce the husband to divorce his wife who claims *me'is 'alai* agree that we cannot coerce her into compliance. .

IX Finally, R. Bass cites a *responsum* of R. Feinstein³⁴ in which it is stated explicitly that it is possible to apply coercion in a case of insanity **even though this is not mentioned explicitly in the Talmud** [as a cause for coerced divorce].³⁵ In the course of this *responsum*, R. Feinstein writes that where a husband became afflicted with periods of insanity after the wedding it would be permitted to coerce divorce³⁶ because ‘one cannot dwell with a snake in one cage’³⁷ and the Talmud accepts the inability of ‘dwelling with a snake in one cage’ as grounds for coercing a divorce.³⁸ He then cites, from *Tur EH* 154, the above-mentioned *responsum* of the Rosh which, he says, seems to contradict his position.³⁹ However, he argues, in the Rosh’s case there was no actual insanity rather, he says,

“the husband was sane but bad tempered due to his evil nature and the language ‘becoming madder day by day’⁴⁰ which they⁴¹ wrote means only that due to his anger he acted like an idiot and a madman and therefore one cannot say of him that ‘it is impossible to dwell with a snake in one cage’ because since he was mentally competent it would have been possible for her to see that he does not come to a situation that [will] anger [him] although it would have been very difficult for her to be so careful. So, since we do not find that we coerce in such a case where it is no more than very troublesome, the Rosh maintains that we do not coerce a divorce....but if he is [really] mad – where we apply the rule that ‘a person cannot dwell with a snake in one cage’ because it is not possible to beware....as he acts irrationally - they would certainly agree that we compel him so long as he is capable of divorcing that is if [and when] he has periods of sanity.”

X Rabbi Yosef in the above-mentioned article records that an illegally coerced *get* when enforced by the *Bet Din* is only rabbinically invalid according to the Rambam and he adds that so rule the Maharashdam, the Maharanaḥ and the Radbaz.⁴² Hence, if she remarried on the basis of such a coerced *get* she need not leave her new husband. We also find in the *responsa* of the Rosh that if a *bet din* coerced a divorce in the case of *me’is alai* and she remarried on the basis of this *get* she need not leave her new husband.

Section C: Conditional marriage

(i) *Responsa Mishpetey Uzziel* 45.

I In this *responsum*, Rabbi Benzion Meir Ḥai Uzziel proposed a condition which would make the continuation of the marriage dependent on the approbation of the *Bet Din*. The concept of *kol hameqaddesh* is based on the fact that when a Jew marries he does so with the desire that his betrothal be in accordance with the approbation of the Sages of Israel. This is comparable to one who takes a wife ‘on

³⁴ *Responsa Igrot Mosheh EH* I:80.

³⁵ R. Bass implies that R. Feinstein is disagreeing with the Rosh. However, that cannot be, because in this *responsum* R. Feinstein says that the Rosh would agree with him! It seems to me that the *IM* proves unequivocally from the Talmud that in a case of madness coerced divorce is sanctioned, so coercion in this case is not ‘adding to the talmudic list’ at all. Hence, the Rosh would have no difficulty agreeing with R. Feinstein’s ruling; indeed, he would have to agree.

³⁶ At periods of the husband’s remission.

³⁷ I.e. one cannot expect a husband and wife to remain together if one has to be constantly on guard – for whatever reason - against the other. Cf. *ET* I pp. 249-50.

³⁸ *Ketubbot* 77a and *Tosafot* ibid. 70a s.v. *Yotsi’ weyiten ketubbah*.

³⁹ The Rosh’s case seems to be one of insanity in the husband yet he ruled that divorce cannot be coerced.

⁴⁰ This is the wording of the *Tur*; in the Rosh the reading is ‘and his stupidity increases day by day’.

⁴¹ The Rosh and the *Tur*.

⁴² It is noteworthy that Rabbenu Tam writes in *Sefer HaYashar* (beginning of *siman* 24 = p. 40 lines 4-7 in the Jerusalem 5732 ed.) that no-one can prove whether a divorce illegally coerced by a *bet din* is biblically or only rabbinically invalid.

condition that his father approve' where, if the father disapproves, the marriage is annulled *ab initio*. This comparison of *kol hameqaddesh* to 'on condition that my father approves' is made by Ramban, Re'ah, Don Qresqas Vidal, and Ritva (*Shittah Mequbetsset, Ketubbot* 3).

II Accordingly, writes R. Uzziel, there would be no need in case of such a condition for repetition at the time of seclusion etc. nor would there be any need for an oath. If, in every case of *qiddushin*, we apply *kol hameqaddesh* even after *huppah*, *yi'ud* and *bi'ah* and even to cases of *qiddushey bi'ah* although no actual condition was made and no oath taken, then how much more so can we accept an **explicit** condition which makes the marriage dependent on the contemporary sages not objecting thereunto although the condition is not repeated and no oath is taken. The Sages only said that one who betroths on a condition and made *nissu'in* etc. without repetition of the condition might have foregone the condition, because his fear of promiscuous intercourse may have led him to do so. That promiscuity is only possible if **he** cancels the condition and brings about the retrospective status of concubinage but in a case where the annulment of the marriage is out of his hands ('on condition that **father** never objects', 'on condition that **bet din** never objects') he cannot be considered the cause of the annulment and the concomitant concubinage, so his acts of intercourse remain, as they were up till now, totally legitimate.

III One can add to this the consideration that even if he were to forego his condition the condition would remain effective (i) because he made the condition dependent on others (*bet din*) so it cannot be cancelled without their agreement, and (ii) because he made the condition in gratitude for a favour he received from others (his wife, who agreed to marry him) so it cannot be cancelled without her consent. This parallels the laws of vows where we find that one who based his vow on the will of another and even one who vowed because of a favour that someone else had done for him, even without mention of the will of another, cannot obtain annulment without that other person's consent.⁴³

IV R. Uzziel furthermore distinguishes between his proposed condition and the case of *meqaddesh lizman*. If a man marries with the declaration 'You are betrothed to me with this ring according to the Law of Moses and Israel for the next thirty days' she becomes married to him forever (*Nedarim* 29) because once the sanctity of marriage takes hold **unconditionally** it cannot dissipate without a *get* – see the gloss of the Rema to *EH* 40:1. However, where one betroths **on condition** that some future event will or will not occur (eg. the *bet din* will not object) the marriage becomes *conditionally* valid and, should the condition be breached, is retroactively annulled.

V However, R. Uzziel suggests that a condition which simply allows the local *bet din* to annul on the basis of the husband's misbehaviour is not acceptable for three reasons:

1. We need a condition whose abrogation is due to outsiders only and not to the husband so that the annulment will not be his fault and the relationship will not be rendered retroactively promiscuous. If, however, the *bet din* can annul only on the basis of the husband's misconduct, it works out that the annulment is his fault and, therefore, that the relationship was promiscuous.
2. Such a condition plays straight into the hands of unscrupulous husbands who will be able to rid themselves of their wives without needing to bother with, and pay for, a *get* and without the expense of paying the *ketubbah*. They need only conduct themselves in the required (obstreperous) manner and *bet din* will declare their dissatisfaction with the marriage thereby annulling it retroactively so that there will be need for neither a *get* nor payment of the *ketubbah*.
3. The wording employed in the condition referring to the husband not having behaved 'according to the law and as is proper' (*kadin wekhashurah*) is extremely elastic and may be explained quite differently in different *batey din*.

VI Due to these considerations, R. Uzziel proposes that the condition should state that the *bet din* should declare their opposition to the marriage only if they see that the continuation of the marriage would cause 'iggun to the wife or the husband. The claim of the aggrieved party should first be brought to the local *bet*

⁴³ Cf. *Yoreh De'ah* 228:2 and *Shakh* *ibid.* 39; *YD* *ibid.* 21

din who, if they are satisfied that there is a case, would publicise the claim in the local press and wait three months for the opposing side to bring their counter-claims. If no such claims arrive, or if they do but the *bet din* is not convinced by them, so that they decide to annul the marriage, they should then make their decision known to the district *bet din* who should first publish the local *bet din*'s decision in the press giving three more months to the couple and, should the district *bet din* also conclude in favour of annulment, they should take the case to the *Bet Din* of the Chief Rabbinate who should give six more months for plaintiffs' arguments and for discussion before acquiescing to annulment. Accordingly, R. Uzziel proposes the following wording for a marriage condition [NOT FOR PRACTICAL USE]:

"הרי את מקודשת לי בטבעת זו כדת משה וישראל עד שלא ימחו בחיי ואחרי⁴⁴ מותי בית דין שבעיר
זו בהסכמת בית דין המחוז או המדינה ובהחלטת מועצת ונשיאי הרבנות הראשית של כנסת ישראל
בירושלים, ומסבה מוכרחת של עגון"

VII He adds that the conditional *qiddushin* should be recorded in the *ketubbah* where it should be added that the groom accepts responsibility to pay his wife in accordance with all the *ketubbah* regulations even if the marriage is ultimately retroactively dissolved. It should also be recorded that the groom swore a severe oath for his wife's benefit, and dependent upon her will, and upon the will of the local *bet din* and upon the will of the *Bet Din* of the Chief Rabbinate, to fulfil all the details of the *ketubbah* [even if the marriage is retroactively annulled] and not to cancel the condition upon which the marriage was based.

VIII R. Uzziel concludes *responsum* 45 by emphasising that all that he has written should be understood as no more than a proposed basis for halakhic discussion. No change could actually be made in the area of *gittin* and *qiddushin* without the agreement of the leading orthodox communities of the people of Israel.

(ii) *Responsa Mishpetey Uzziel* 46.

I In *responsum* 46, we are told that R. Uzziel published number 45 in *HaMaor* (Iyyar 5695) and received three responses – from Rabbi S.Y. Zevin, from Rabbi Yisrael Kark and from Rabbi E.Y. Waldenberg. Before embarking on the discussion, R. Uzziel sets out three questions:

1. Is such an enactment really essential?
2. Would such an enactment be detrimental to Jewish family life?
3. Is it possible to put the proposed enactment into practice?

1. Is such an enactment really essential?

II Regarding this first question, he cites many examples from the Talmud and the *Posqim* demonstrating the concern which the Sages of many generations espoused for the '*agunah*. Enactments of this nature are traced back by the Talmud to the days of King Shaul! From all these precedents it is clear that R. Uzziel's proposal of a new enactment in the interest of avoiding '*iggun* is not – as R. Zevin suggested – indicative of a desire to up-date Judaism but of a desire to use the *Halakhah* wherever the moment calls for a remedy. Nowadays, there are **very, very many** '*agunot* and it is our duty to do whatever can be done to help them.

III Now, he adds, **although our recent teachers ruled that no condition in *nissu'in* can be made,⁴⁵ other permitted avenues (of which we can say that such an approach they did not rule forbidden) are not closed to us – as I explained in my previous *responsum*.**

⁴⁴ Surely מותי או אחריי is preferable in modern usage.

⁴⁵ A reference to the pamphlet '*En Tenai BeNissu'in*'. See Abel: "Review of '*Eyn Tenai BeNissu'in*'" and "The Plight of the '*Agunah* and Conditional Marriage".

IV [R. Zevin argues that R. Uzziel's proposal is no more than tinkering with the French and Constantinople conditions and the recent '*aḥaronim* forbade both. R. Uzziel's condition may differ from theirs but it is only in minor detail that it does so and it will therefore make no difference, because all conditions in *nissu'in* have been forbidden. To this Rabbi Uzziel replies that, as is well known in the world of Torah, the smallest variation can change the ruling from exemption to obligation and from prohibition to permit.]

2. Would such an enactment be detrimental to Jewish family life?

V Rabbi Zevin wonders whether such an enactment would, indeed, be beneficial to '*agunot*. He argues as follows. Anyone who wanted to abandon his wife would, in the past, have had to bother himself with the writing and signing of a *get*. Then came Rabbenu Gershom and banned divorce without the wife's consent. Now if this enactment of R. Uzziel were to be accepted, any husband who wanted to be rid of his wife could simply abandon her for 12 months and know that *bet din* would declare his marriage annulled - without a *get* and without her consent. In the prevailing situation she is forbidden to remarry without a *get* so at least he will experience guilt pangs about leaving her an '*agunah* (!) but with R. Uzziel's enactment he will feel no guilt at all.

VI R. Uzziel cannot see the validity of this argument. Surely anyone with a spark of decency in him would not abandon his wife to '*iggun* with or without the enactment. The husband would find no relief in the annulment because, on the contrary, the publication of the situation would make matters much worse for him. However, the enactment is intended for base people of the lowest calibre who could not care less about their wives and children. It will not give them free rein to do as they please; that they will do anyhow, but it may shame them because they will be shown up as the causes of their marriages' dissolution. Besides, the enactment will retain all their financial marriage obligations upon them because even with retroactive annulment of the marriage these obligations will stand, by means of the law of 'self-obligation with a *qinyan*' – see *Hoshen Mishpat* 40.

VII The author then argues that whenever there is a need for an enactment in the interest of one section of the public - even if it be a minority – we are commanded to act and we are not to be deterred by the possibility that the enactment may cause trouble for the rest of society. He supports this argument with two citations, one from the Talmud⁴⁶ and one from the *Rishonim*.⁴⁷

VIII He writes:

“Therefore I say that we are commanded to seek and to find a solution for '*agunot* since this problem has become practical in our time and there is heard on every side a cry 'Seek counsel for a solution for the many '*agunot* due to various causes'. In a situation where utter corruption is before us in all its dreadfulness we are not permitted to hide ourselves from the facts because of far-fetched concerns in which there is no substance. As I see it, the measure for all our actions and enactments is – The *Halakhah* and wherever there is no opposition from the *Halakhah* we can say nothing but: 'For the ways of the L-rd are upright and righteous men progress in them and wicked men stumble in them'”.⁴⁸

3. Is it possible to put the proposed enactment into practice?

IX R. Zevin argues that the enactment could not be put into practice because of the uncertainty of interpretation of an expression like עגון מוכרחת של עגון. How can human beings, mere flesh and blood, know that the situation is indeed a definite case of '*iggun*?

⁴⁶ אין אדם בגטין See *Ketubbot* 2b-3a.

⁴⁷ *Responsa Mabit* II 222.

⁴⁸ *Hoshea* 14:10.

X To this, R. Uzziel replies that one does not need to be a prophet to recognise a situation that is creating 'iggun. If *bet din* have made every effort within their power to find the husband and have failed; or they have failed to reunite him with his wife; or to obtain a *get* from him; or if they find that the husband is mentally incapable of divorce and the doctors say that there is no hope of a cure; or if he has gone and taken another wife and they cannot separate him from her. If the wife, in any of these cases, has lost all hope and seeks her freedom we have clear cases of 'iggun and 'the judge has only that which his eyes see'.

XI Furthermore, the husband made his will dependent on the will of the *bet din* therefore so long as the *bet din* regard the situation as one of 'iggun the condition has been breached.

XII R. Zevin asked also how the condition which refers to the local and district rabbinic courts will work in places that do not have such facilities.

XIII R. Uzziel agrees that this is a problem but tells us that he was aware of it from the start. The main point is that the condition should refer to the Court of the Chief Rabbinate in Israel which, he says, he believes will endure for ever. The mention of other rabbinical courts was made out of respect for the many great *batey din* across the world and also to express the need to publicise the recalcitrance of the husband in the area in which he lived but clearly the matter would need consideration before the implementation of the enactment and this anyhow would have to await much debate before its worldwide acceptance in practice as R. Uzziel emphasized at the end of the *responsum*.

XIV Indeed, R. Uzziel notes that R. Zevin himself writes that it would be possible to produce a formula that would match the reality of today's situation and concerning such matters it has been said: "...and salvation is through a multitude of counsellors".⁴⁹

XV R. Uzziel then cites an objection of R. Kark who notes that whereas a marriage dependent on the will of the father is based upon a clear-cut condition one dependent on the will of the *bet din* is not. What will happen if one *bet din* regards the situation as 'iggun and another does not? Upon whose opinion did the groom make his marriage dependent, the first, second or third *bet din*? Even within one *bet din* there may be disagreement. Although we apply the majority rule to the rulings of the judges of *bet din* in this case where the condition mentioned that the three *batey din* agree that the situation is 'iggun one cannot apply the majority rule and even if within one of the *batey din* there was one judge who disagreed the condition would not be breached because the condition implies total consensus as the Talmud says in 'Avodah Zarah (72[a]) 'as three estimate the value' means the majority of three but 'as three decide' means all three.

XVI To this R. Uzziel replies that his enactment states expressly that all three *batey din* must agree. As to the possibility that there may be only a majority decision within any one of the *batey din* and that would not be sufficient to breach the condition which, according to its wording, requires 100% consensus within each *bet din*, the answer is that the condition's reference to the decision of *bet din* rather than to the decision of three must be understood as a decision of *bet din* in its normal halakhic functioning which is decision by majority. Indeed, this is even better than 'as three estimate the value' which though it mentions three means a majority of three whereas *bet din* which does not even mention three most certainly means, as wherever *bet din* is referred to, a majority of *bet din*.

4. 'Eyn tenai benissu'in

XVII R. Zevin raises the obvious problem of the condition being cancelled due to the fear of promiscuity as *Tosafot* explain that for this reason "...it is not common for *nissu'in* to be annulled by a condition".

⁴⁹ Mishley 11:14, 24:6.

XVIII R. Uzziel responds that these very words of *Tosafot* are a refutation of R. Zevin's argument because with these words *Tosafot* make clear that a *tenai benissu'in* is **unusual** which means that it is possible.

XIX Similarly, the Rambam says that we may presume that no halakhically fit Jew would make his intercourse promiscuous when he could make it an act of *mitsvah (qiddushin)*. Clearly, such an assumption is only possible in the absence of proof to the contrary. Therefore, if he had explicitly stipulated the possibility of retroactive annulment with its concomitant promiscuity then no such assumption can be made.

XX Thus, according to both *Tosafot* and Rambam, a condition in *nissu'in* will be valid when it is clear that the condition was intended not just for *qiddushin* but for *nissu'in* also.

XXI How much more so is this the case if he swore an oath never to forego the condition so that it would be **impossible** for him to perform an unconditional act of *bi'at mitsvah (qiddushin)* since by the very act he would transgress the prohibition of breaking an oath so that he would be rendered halakhically unfit and the assumption could therefore no longer be made of him that 'he would not make his intercourse promiscuous when he could make it an act of *mitsvah (qiddushin)*'.

XXII This may also be proven from *Tosafot* in *Bava' Qamma'* 110, s.v. 'Ada'ta' who say that when the Gemara suggests that a woman who found herself bound to a leprous levir should be exempt from *halitsah* on the grounds that she would never have married her former husband unconditionally had she realised she would finish up in such a situation the Gemara means that she was widowed from 'erusin. If she had had *nissu'in* we would assume that she would have accepted her former husband unconditionally because for what might happen after her husband's death she would not risk her *nissu'in* being retroactively dissolved (whereas from *qiddushin* alone she gains nothing).

XXIII This proves that *Tosafot* agree that if she made an explicit condition at *nissu'in* so that we know that she wanted conditional *nissu'in* (because the condition was more important to her than guaranteed unblemished *nissu'in*) the condition would be valid. Note also that the *Terumat HaDeshen* has written (*Responsa*, 222) that since nowadays we arrange *qiddushin* and *nissu'in* together a condition made at *qiddushin* refers also to *nissu'in*. See also *Helqat Meḥoqeq*⁵⁰ who writes that a *qiddushin* condition repeated before *bi'ah* is valid.

XXIV Similarly, the *Hatam Sofer* also writes that when a condition (to avoid a levirate bond with an apostate brother) is made at *qiddushin*, which nowadays is followed by *nissu'in* and *bi'ah* within a matter of hours, it is impossible to argue that the condition was made only until *nissu'in* with the wife's intention being that the facts about the missing brother would be discovered before *nissu'in* and accordingly either the *qiddushin* would be annulled or the *nissu'in* would proceed unconditionally. From R. Sofer's words, says R. Uzziel, we can see that wherever it is impossible to clarify between 'erusin and *nissu'in* whether or not the condition has been breached we cannot say that the condition has been foregone at *nissu'in* or *bi'ah*.⁵¹

XXV Nevertheless, R. Uzziel agrees that R. Zevin has a point. Allowing that a condition in *nissu'in* is halakhically **possible**, we must still ask ourselves whether it is halakhically **permitted** seeing that the breaching of such a condition will bring in its wake a retrospective liaison of promiscuity.

⁵⁰ *Helqat Meḥoqeq*, 'Even Ha'Ezer 38, sub-paras. 48&49. The *HM* says there that if the condition was repeated at *yihud* it would survive the intercourse also. See below, note 88.

⁵¹ Because if it were assumed that the condition was cancelled at *nissu'in* or *bi'ah* there would be no point in making the condition in the first place – as the *Hatam Sofer* states explicitly (*Responsa -atam Sofer EH II 68, s.v. Wa'ani hisbarti*).

XXVI The response to this, says R. Uzziel, lies in the words of the *Me'il Tsedaqah* who maintains that *bi'at zenut*, in the a case of a couple living together as man and wife, is a non-issue. When the Talmud explains that the concern for cancellation at *nissu'in* of a *qiddushin* condition is due to the groom's fear of *bi'at zenut* it means not that the relationship with his wife will have been promiscuous and illicit – for it is not illicit at all in such circumstances when they have been living as man and wife – but that he fears the scenario (i) of this woman being lost to him and **living with another during his life-time** (when this is due to retroactive annulment of his marriage) and (ii) of his **children being born** from an unmarried woman. That is why in the case of Mahari Bruna's condition there is no need to fear cancellation because the marriage will only be annulled if she becomes bound for levirate marriage which can only happen **after he dies** and if he died **childless** (See *Responsa Hatam Sofer EH II 68*).

XXVII R. Uzziel supports this opinion (that there is no prohibition of *bi'at zenut* when the relationship was conducted on the basis of *qiddushin* and *nissu'in* – even if later annulled) from the Gemara itself as follows. In *Yevamot* the Mishnah discusses the case of a minor girl married off by her mother or brothers to an adult male. The girl has the right of *me'un* which she can exercise until her adulthood (12) and, if exercised, the *me'un* would retroactively annul her marriage. *Bet Shammai* rule that *me'un* can only operate during *'erusin* but *Bet Hillel* allow it even after *nissui'in*. In the Gemara, Rabbah and Rav Yosef explain that *Bet Shammai*'s reason for disallowing post-*nissu'in me'un* is because no-one would make his intercourse promiscuous and *Bet Hillel* allow it because since there is *ketubbah* and *qiddushin* people will not come to say that the intercourse was promiscuous. Now what is the meaning of 'people will not come to say' that the relationship was promiscuous? Surely, the ruling of *BS* and *BH* should depend on whether the relationship was **in fact** promiscuous (and therefore forbidden) or not, and not on whether or not people so perceive it. This would suggest that in fact there is, in a marriage such as this, which was based upon *qiddushin*, *ketubbah* and *nissu'in*, no prohibition of promiscuity at all. Only because in the public's perception it is seen as *zenut* and he would not agree to 'make his relationship *zenut*' in the eyes of the public, do *Bet Shammai* forbid *me'un* by the wife after *nissu'in*. *Bet Hillel*, however, maintain that even the public do not perceive such a relationship as promiscuous and they therefore see nothing wrong with *me'un* of the husband by the wife even after *nissu'in*. This is also the opinion of *Tosafot* in *Gittin* (81).⁵²

XXVIII Rabbi Uzziel adds that wherever the Talmud says that the Sages made his intercourse promiscuous it speaks only of cases where he betrothed by intercourse and they decreed that **that single act** be considered one of promiscuity⁵³ so that it should not effect betrothal. However, if one marries a minor girl who later declares *refusal* or if one marries on a condition that is later breached so that, in both these cases, the marriage disintegrates retroactively, there is no retrospective promiscuity since the relationship was formed, and the marriage was lived, on the basis of *qiddushin* and *nissu'in*. It may be embarrassing for the couple because others may look on it, retrospectively, as 'living in sin' but the truth is that there is no actual promiscuity as Rashi states explicitly in his commentary to tractate *Berakhot* 27⁵⁴ – 'We encourage the minor to refuse her husband and to uproot her *qiddushin* retroactively and to make all his acts of intercourse **as if** they were acts of promiscuity'. We must explain similarly every place where there is mention of the Sages having made [all] his acts of intercourse [during his retroactively dissolved marriage] promiscuous: it means that the acts [only] **appear** to be promiscuous. Even the Rambam, he adds, who maintains that concubinage is biblically forbidden [for a layman] and that one who enters into such a relationship is liable to flogging for transgressing "There shall not be a harlot...", agrees that this negative prohibition does not apply where she was uniquely associated with him.⁵⁵

⁵² 81b s.v. *Bet Shammai*.

⁵³ As R. Uzziel will demonstrate later (see at footnote 58), even this decree of the Sages does not make the intercourse promiscuous vis-à-vis the husband (or wife), only vis-à-vis the marriage.

⁵⁴ 27a s.v. *shemema'ananim 'et haqetannah*.

⁵⁵ Nevertheless, Rambam might still forbid even this type of concubinage for other reasons. Rabbi Uzziel could have added the following considerations:

XXIX This being the case, Rabbi Uzziel proposes that marriage could be performed on the condition that the certain contemporary Sages never object to the union. As soon as they voice an objection the marriage would be retroactively dissolved.

XXX R. Uzziel adds that in cases where the husband unjustifiably refuses his wife a *get* it is clear that he cannot be classified as 'one of the decent in Israel' (*hakesherim beYisrael*) for on the contrary he belongs to the class of the evil and the wanton (*resha'im ufrutsim*) and one cannot assume of such a person that he would not make his intercourse promiscuous for that assumption is made only of decent Jews (*beney Yisrael hakesherim*) as the Rambam writes.

XXXI Nevertheless, R. Uzziel points out that he does not approve at all of marriages based on conditions of the usual sort such as those employed by the French rabbinate and (later) the Constantinople rabbinate, conditions which did not involve extra-mural decisions. Such conditional marriage is too close to a business partnership where the dissolution of the agreement is determined by either one of the parties being dissatisfied with the continuation of the partnership – the husband or the wife. Such conditional marriage R. Uzziel considers worse than concubinage which, as long as it lasts, is, after all, a marriage-type arrangement. Conditional marriage, however, which can become annulled at any moment because circumstances have arisen that one side does not like, cannot be considered even a marriage-type situation and is really a type of *zenut*.

XXXII On the other hand, marriage conditioned on the will of a father or a *bet din*, which cannot be annulled by husband or wife no matter what circumstances arise, but only by decision of a father or *bet din* who want the marriage to be as all Jewish marriages should be – such conditional marriage is not promiscuous at all; neither does it become so retrospectively after annulment. Hence, the couple would

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1. Most *Posqim* permit *pilagshut* (cf. R. Naftali Schwartz, *Bet Naftali*, no. 45, part 1, s.v. *Wa'afilu*. This particular *responsum* was written by Rabbi Yosef David Sinzheim author of *Yad David* and head of Napoleon's "Sanhedrin" in Paris).
 2. Radbaz (*Responsa* IV 225) says that even the Rambam considers *pilagshut* only rabbinically forbidden.
 3. The *Noda' biHudah* (II EH 27, approaching the end of the final paragraph) says that the Rambam prohibits a layman to have a concubine only when her liaison with him is one of concubinage **only** but if the couple enter into conditional *qiddushin* then even if the condition is broken and the *qiddushin* retroactively annulled, the Rambam agrees that there is no prohibition whatsoever.
 4. A similar conclusion is arrived at in a *responsum* of Rabbi David Sinzheim published in *Responsa Bet Naftali* (R. Naftali Schwartz, *ibid.*) though he says that, to avoid the problem of *biat zenut*, it must be agreed at the time of the conditional *qiddushin* that if the condition is unfulfilled and the *qiddushin* accordingly retroactively annulled, the liaison being entered into shall be one of concubinage. He also adds that it could well be that the Rambam would still prohibit concubinage even in such circumstances but says that **we** can permit such conditional marriage, **even when taking the Rambam's opinion into consideration**, for the following reason. Even if we accept that the Rambam's position is that concubinage for a layman is prohibited by biblical law nevertheless, when a marriage is entered into on a condition, so that it will be retroactively annulled on the breaking of the condition and converted to concubinage, there is, at the time of the marriage, no certainty that the couple are entering concubinage because it may well be that the condition will never be broken and the liaison will prove to be *qiddushin* and not *pilagshut*. The situation is thus one of doubt – is this arrangement *qiddushin* (which is, of course, permitted) or *pilagshut* (which is, according to the current understanding of the Rambam's position, forbidden by biblical law)? Rabbi Sinzheim continues: The Rambam considers any doubtful biblical prohibition as only rabbinically proscribed so that to enter into such a matrimonial partnership would be, even according to the Rambam, only a rabbinical prohibition. Hence, from our point of view, even if the *Rishonim* were evenly split on the question of the permissibility of *pilagshut* for a layman, we would be dealing, in the case of conditional marriage, with a **doubt** (the 50-50 split of the *Posqim* concerning definite *pilagshut*) of a rabbinic prohibition (the **possible** biblical prohibition of conditional marriage that might prove to be *pilagshut*) and *safeq derabbanan lequla'*! How much more so is it possible to rule leniently considering that a majority of the *Posqim* permit *pilagshut*.

He also mentions that Mahardakh (*Morenu HaRav David Kohen*) suggests in a *responsum* that the Rambam would permit retroactive concubinage created as a by-product of a marriage annulled due to a broken condition – as argued above by the *Noda' BiNudah*. There are also other reasons to say that a conditional marriage, as proposed by R. Uzziel, would not, on annulment, lead to retrospective promiscuity – see "The Plight of the 'Agunah and Conditional Marriage'" XIX.25-32.

not have reason to cancel their condition but on the contrary they would want the condition to be permanent so that the marriage should continue with the approbation of *bet din* - which is *da'at Torah* - and whenever *bet din* see that the marriage is not existing in accordance with the *Torah* the marriage will be annulled.

XXXIII R. Uzziel then cites an interpretation of Rashi in *Shittah Mequbetsset* to *Ketubbot* 3a⁵⁶ to prove his point. Rashi is said to explain that *kol hameqqadesh* does not mean that he is marrying on an understood condition for then there would be no problem with *qiddushey bi'ah* because they would be automatically cancelled by the condition just as would *qiddushey kesef*.⁵⁷ Rather, Rashi is said to explain, the groom wants a marriage that can only be undone by a *get* but **he agrees to any *get* that the Sages declare valid** even if it is biblically void. Now if he had married her with *qiddushey kesef* we can say that he accepts the *get* as valid by means of retroactive annulment because that will only change his *kesef* from *qiddushin* into *matanah*. His intention in all his *bi'ot* was that they be *bi'ot nissu'in* and the Sages do not contradict that. However, if he made *qiddushey bi'ah* what can one say about the status of that *bi'ah* if the Sages annul the marriage? Surely it will change from *qiddushin* to *zenut* and this he never agreed to so perhaps, in cases of *qiddushey bi'ah*, he made his marriage totally independent of the Sages so that they cannot annul and his *bi'ah* will thus remain *kasher*. To this the Talmud replies that the Sages made his *bi'at qiddushin* into *bi'at zenut* **but he did not intend it as such**. Having had no improper intentions at the time of the *bi'ah*, **he is free of any taint of sin**⁵⁸ and therefore he can accept the validity of the *get* by means of annulment in this case also. According to this understanding of Rashi, when the Talmud says that all is well if he married with *kesef* but how can one explain it if he married with *bi'ah* the question is not really what power did the Sages have to do it but what was the groom thinking. *Shittah Mequbetsset* concludes: "I have already explained fully the approach of Rashi of blessed memory, enlightener of the eyes of the Diaspora. **His is the best of all the explanations**".⁵⁹

XXXIV R. Uzziel proceeds to demonstrate that both *Tosafot* and the Rambam agree to this.

In *SM* to *Ketubbot* 3a towards the end of the second section beginning '*Od katav*, *Tosafot* are cited as follows:

"...but if he betrothed with *bi'ah* what can they do since they do not have the authority to uproot such a thing? The Talmud replies that the Sages made his *bi'ah* into a *bi'at zenut* meaning there is no sin because there is no *qiddushin* so she can certainly marry someone else and at the start also no sin was done because it was the Sages who made his *bi'ah* into a *bi'at zenut* but he had no such intention it's just that he made his will dependent on the will of the Sages; **it was a *mitsvah* and not an '*averah*.'**"

So did the Rambam also write in his *responsa*:⁶⁰

"Question: Concerning *אין אדם עושה את בעילתו בעילת זנות* The true meaning of the matter is as follows. When we see that he has relations with a woman and treats her as his wife we do not say that maybe he intended [the relationship] as promiscuity because there is an assumption that a person would not make his intercourse promiscuous. According to this assumption we say that [if] one

⁵⁶ The second piece beginning '*Od katav*.

⁵⁷ A problem noted by Ramban – see *Shittah Mequbetsset* there, s.v. *Hatina*.

⁵⁸ See above, footnote 53.

⁵⁹ See end of the next paragraph in *SM* (s.v. *We'od*).

⁶⁰ *Responsa Rambam*, ed. *Meqitsey Nirdamim* (Freimann), Jerusalem 5694 no. 167. The *responsum* appears also in Blau's edition of *Meqitsey Nirdamim*, Jerusalem 5746, no. 356. This is one of the *responsa* to the Sages of Lunel all of which were written in Hebrew (though some were dictated by the Rambam to his pupils). There is thus no question of inaccurate translation.

betrothed with an item worth less than a *perutah* and we afterwards saw that he had relations [with the woman he had married] we do not say that this was in reliance on the original *qiddushin* (which were invalid) but we say that anyone who has intercourse does so for the purpose of licit relations (and therefore she would need a *get*). Regarding 'the Sages made his intercourse promiscuous' there is no problem because it is the Sages who made it [so] **but he did not commit a promiscuous act and intended only licit relations with his wife."**

XXXV This powerful and well-based logic is agreed to by all. Even Rav - who said that when one betroths on a condition [and conducts *nissu'in* without repetition of the condition] he intends his intercourse as an act of [unconditional] *qiddushin* because he does not want his relations to become promiscuous [with the future breach of his condition] - even Rav will agree in the case of this type of condition which is made dependent on the will of the *bet din*, that no one would cancel it but on the contrary he would want its continuance [as it is for a good purpose and it would not render his relationship illicit]. Thus by this enactment we are not saying to all Israel that they should not care about making their intercourse promiscuous as the Rav, the Gaon, Rabbi S. Y. Zevin, *yetzav*, understood.

XXXVI We can now describe three categories of conditions in marriage.

1. A condition of personal desire for example "on condition that you will give me 200 *zuz*". If such a condition were made at *qiddushin* and repeated at *bi'ah* [so that it would be effective according to almost all opinions], the marriage would be considered retrospectively promiscuous with the retroactive annulment brought about by the breaching of the condition. Such a condition, though effective, would be forbidden of use as the Rashba states explicitly.⁶¹
2. A condition like that of vows and blemishes which is not for the [material] benefit of the husband but is necessary for the satisfactory functioning of the marriage. It is in the case of such conditions that Rav and Shemuel disagreed. The *Halakhah* is like Rav that when *qiddushin* are based upon such a condition and followed by *nissu'in* without the repetition of the condition a *get* is required for the annulment of the marriage even if the condition was breached because the groom may have foregone his condition at *nissu'in* for fear that a subsequent retroactive annulment would render his relationship promiscuous i.e. in the eyes of the public and that his children would be called born out of wedlock. It follows that if such a condition were repeated at *bi'ah* it would be both effective and permitted. It is of this type of condition that *Tosafot*⁶² wrote that it is unusual for a person to make it but it would be effective if made.
3. A condition making the marriage dependent upon the will of the *bet din* in the interest of the spiritual well-being of the marriage. In the case of this type of condition not only do all agree that there is no question of retrospective promiscuity but, on the contrary, making *qiddushin* and *nissu'in* on such a condition is not only not a sin it is a *mitsvah* as stated in *Shittah Mequbetsset* and to this everyone agrees.

XXXVII Rabbi Uzziel then lists the *Rishonim* from whose words it may be inferred that they agree with this: Rambam, Ramban, Re'ah, Don Qresqas (pupil of the Re'ah), Ritba – all of them say that the power invested in the Sages to annul marriages is vouchsafed them by the groom's declaration being taken as the equivalent of 'on condition that the Sages never protest' which parallels the case in the Mishnah 'on condition that my father never protests'. The question arises – how could the Sages allow such a condition to be used to annul the marriage even after the *nissu'in* and to make his relationship promiscuous. As the Ritba writes:⁶³

"...although [in the case of] 'I am intimate with you on condition that my father agrees [with the marriage thereby brought about]' where if the father disapproved they are not married, one can suggest that the father does not care about promiscuity but the Sages – how can they not care about it [when they annul

⁶¹ See *Shittah Mequbetsset*, *Ketubbot* 73a, s.v. *Hiqshu betosafot*.

⁶² *Yevamot* 107a, s.v. *Bet Shammai*; *Ketubbot* 73a, s.v. *Lo Tema*'.

⁶³ *Hiddushey Ritba*, *Ketubbot* 3a, s.v. *we'afqeh inho*.

retroactively a marriage based upon their consent – as every marriage is]? The Talmud answers: that the Sages also made his intercourse promiscuous.”

Rabbi Uzziel is astonished:

“I see the question but I do not see the answer”. The question was why the Sages would not care about making his intercourse promiscuous and the answer is that they made his intercourse promiscuous!? We must therefore say that what the Talmud means is that the Sages made his intercourse promiscuous **insofar as it will not effect *qiddushin*** so that the marriage is retroactively annulled but the intercourse in and of itself was not promiscuous at all since it was the Sages (and not the groom himself) who annulled his marriage, he having made the marriage dependent on their will.⁶⁴ This logic is agreed to by all.”

XXXVIII R. Zevin claims that R. Uzziel has grafted differing opinions cited in *Shittah* into one. R. Uzziel denies this, arguing that all he has done is to explain the listed opinions by means of one piece of logic. A careful examination of Rashi, he adds, will show that he too agrees that *kol hameqaddesh* works on the principle of ‘on the condition that the Sages do not protest the marriage’.⁶⁵

⁶⁴ According to this, the question was how could the Sages not care about making his intercourse promiscuous and the answer is that they did **not** make it so as regards his act but only as regards the act’s effectiveness. However, the wording of the Ritba implies otherwise. He wrote that whereas in the case where the father disapproved so that they are not married ‘one can suggest that the father does not care about promiscuity but the Sages – how can they not care about it [when they annul retroactively a marriage based upon their consent – as every marriage is]? The Talmud answers: that the Sages **also** made his intercourse promiscuous.” The ‘also’ compares the action of the Sages to that of the father seemingly meaning that the answer to the question “How could the Sages not care about promiscuity?” is that in this case they had no alternative and chose the lesser of two evils.

⁶⁵ In *SM* Ramban, Re’ah and Ritva explain ‘*ada’ta’ derabbanan*’ as being parallel to ‘*al menat sheyirtseh ’abba’*’. Therefore, there is no danger of *zenut* when the marriage is made conditional on the mind of others because the couple want a **matrimonial** relationship and it is only an outside factor – the Sages – which annulled the marriage - which they can do since he made it dependent upon them. From this Rabbi Uzziel deduced that whenever a marriage is made dependent on an outside will (the Sages, the father, the *bet din*) retroactive annulment will not bring about promiscuity.

R. Zevin observes on this that these *Rishonim* who compared ‘*ada’ta’ derabbanan*’ to ‘*al menat sheyirtseh ’abba’*’ never explained the Talmud’s question (as Rashi did, as we shall see) ‘If he betrothed with intercourse how can one explain it?’ and the answer ‘They made his intercourse promiscuous’, as pertaining to the groom and meaning: If he betrothed with *bi’ah* how can we read his mind? How can he have intended it purely as a matrimonial liaison when he contemplates the possibility of retroactive annulment? The answer accordingly being: The **Sages** made his intercourse promiscuous – **he** did not! And therefore his intercourse remains licit even after annulment and he, being aware of that, feels no need to forego his condition making his marriage dependent on the Sages. On the contrary, these *Rishonim* explain the Talmud’s question as being aimed at the Sages: What authority do they have to annul a marriage if the betrothal was made by intercourse? the answer being that even this is within their power. According to this, it would seem that his intercourse does indeed become retrospectively illicit but he will still marry in accordance with their conditions and it is considered as if he also repeated the condition at the time of intercourse. Therefore, when a person wants to make conditions of his own, in addition to those understood to accompany every marriage as stated in the Talmud, he would have to make an explicit condition, valid according to all the laws of conditions, and repeat it at *bi’ah* for otherwise we would fear cancellation due to his abhorrence of promiscuous intercourse.

True, according to Rashi’s understanding (as explained above) – that the intercourse of betrothal becomes promiscuous (and the marriage annulled) only from the outside point of view of the Sages but from the inside view of the matter the act of the groom remains absolutely innocent - there would be no illicit intercourse, no fear of cancellation and therefore no need to repeat the *qiddushin*-condition at *bi’ah*. However, Rashi never said that ‘*ada’ta’ derabbanan*’ is parallel to ‘*al menat sheyirtseh ’abba’*’! We can thus deduce according to Rashi only that the **talmudic Sages** have this power and even then only in the case of a flawed *get*. (The groom is assumed to accept only the **talmudic Sages’** conditions and only where there is an externally flawed *get*.)

In summary: According to Ramban etc., we could apply the Talmud’s ruling to cases of other ‘outside minds’ – that of the father or the *bet din* (even a *bet din* of our time) but that would not help us because according to this school of thought the acts of intercourse do become illicit so that if we were to introduce R. Uzziel’s condition we would have to insist on repetition of the condition before intercourse. On the other hand, according to Rashi though there is no retrospective promiscuity in the case of talmudic annulment that will not help us because we have no indication that the Sages’

XXXIX He is especially surprised that R. Zevin claims that all the *Rishonim* agree that the discussion in the Talmud refers to the Sages (what right do they have to do such a thing?) and not to the groom (what intention did he have at the *bi'ah*?). “I am astonished,” writes R. Uzziel, “Are all the authorities whom we mentioned not *Rishonim*?”⁶⁶

5. *'Afqe'inho Rabbanan leqiddushin mineh*

XXXX All three critics⁶⁷ raised the following problem. We know that in the case of *mayim she-en lahem sof* the Sages did not release the woman even though the chance of her husband having survived was infinitesimal. We see from here that the Sages would not use *hafqa'ah* save where there was a flawed *get* or where the original *qiddushin* were improper and so we find explicitly in a *responsum* of the Rashba cited in *Shittah Mequbetset* *ibid.*⁶⁸

XXXXI R. Uzziel cannot see the problem. He did not say that the *qiddushin* should dissolve by means of the application of *'afqe'inho* but by means of the additional explicit condition made at the time of the marriage. Even according to the Re'ah etc. who understand every dissolution in the Talmud as being based on an understood condition parallel to ‘if my father agrees’ we can say that the Sages did not expend the power granted them by that condition in every circumstance but only in the case of a *get* or improper betrothal but in the rare case of *mayim she'en lahem sof* they required something additional such as *ittha' doiqa' uminasva'* or *'ed 'ehad* etc. However, where there is an explicit condition at the time of betrothal stating that if the *bet din* express dissatisfaction with the marriage at any point in the future then the couple do not want now to enter into betrothal, such a condition can certainly undo the marriage bond retroactively even though there was no flaw in the *qiddushin* and without any need for a *get* or any other additional justification. As stated above, the breach of such a condition does not bring about *zenut* thus it is not sinful. Indeed, the application of such a condition to marriage is a *mitzvah* in that it makes the marriage dependent on the [contemporary] sages so that the husband will never be tempted to rebel against his wife and to leave her in chains in ‘living widowhood’.⁶⁹

6. *Meqaddesh 'al da'at urtson 'a'herim 'o bet din*

XXXXII R. Kark made a most important point. Accepting that it is true that when *'afqe'inho* was applied by the talmudic Sages no actual *zenut* was created, that is because he is not permitted to betroth using any formula other than that which the Sages authored and it is this formula that carries with it the implication that he is betrothing in accordance with their will. Thus it was entirely the doing of the Sages that made his marriage conditional on their approval and he had no choice in the matter as a result of which we say that the annulment imposed by the Sages in any given case does not render the relationship promiscuous because he had no part in the annulment – neither in the condition that made it possible nor in the choice of circumstances in which to apply it. However, when he adds his own condition to the betrothal, such as in the enactment that R. Uzziel is proposing, since it is **he** who causes the annulment⁷⁰ by making this condition and he could cancel it if he wished,⁷¹ we have no reason to say that retroactive annulment would not render the relationship retrospectively promiscuous so that we must, as with any other condition, fear that perhaps he did cancel it.

annulment is parallel to that of the father and so we cannot assume licit intercourse after annulment by the father or the *bet din* so, again, it would be necessary to repeat the condition before intercourse.

⁶⁶ See above XXXIII & XXXVII.

⁶⁷ Rabbis Zevin, Waldenberg and Kark see above, I.

⁶⁸ *Ketubbot* 3a, s.v. *WehaRashba zal.* This *responsum* (I:1185) is cited by Rabbi Yosef in “*Hafqa'at Qiddushin Bazman Haze*h” - see above, section A VIII.

⁶⁹ II Shemuel 20:3.

⁷⁰ I.e. who makes annulment possible.

⁷¹ However, R. Waldenberg and R. Uzziel maintain that he cannot cancel a condition that he has handed over to others - see below, paragraph L.

XXXXIII R. Kark supported his argument with the following citation. In *Gittin* 84⁷² there is quoted a *tosefta* - “This is your *get* on the condition that you eat pig etc.if the condition was fulfilled [it is a *get* and if not]⁷³ it is not a *get*. Upon this the Talmud asks that it may be derived [that the *get* is unconditionally valid from the fact] that it is a condition against the Torah etc. and Rav [Ada breh deRav Iqa]⁷⁴ answers that we apply the rule of a condition against the Torah in cases like *she’er kesut we’onah* where **he**⁷⁵ uproots the Law but here **she**⁷⁶ uproots it. On this Ravina asked that since she uproots the Law only in order to accommodate his condition it is his [condition that] ultimately does the uprooting.

XXXXIV We see from here that the responsibility is, in the final analysis, that of the one who made the condition and not that of those who acted according to the condition. The same applies in the case of the proposed enactment – since he made the condition which made it possible for others to annul his marriage it is he, not the *bet din*, who is considered responsible for the annulment so there is no difference between this and other types of condition - all will result in retrospective *zenut*⁷⁷ and thus there would still be concern in R. Uzziel’s enactment scenario for cancellation of the condition.

XXXXV R. Uzziel responds by pointing out that R. Kark did not cite the conclusion of the talmudic discussion which reads as follows.

“Therefore Ravina said that we apply the rule of a condition against the Torah in cases like *she’er kesut we’onah* where the condition certainly uproots the Law but here who says that she is bound to uproot the Law? Let her not eat and not be divorced!”⁷⁸

This is accepted as normative by the *Shulḥan ‘Arukh* (*‘Even Ha’Ezer* 143:12).

Similarly in the case of the Uzziel proposal, the husband’s condition, though making possible the *bet din*’s annulment, does not force the *bet din* to annul. Therefore, he is not considered the author of the annulment and his relationship is thus not promiscuous.

XXXXVI Rabbi Waldenberg raised the fact that the Rashba on *Ketubbot*⁷⁹ says that the meaning of *shavyuho Rabbanan liv’ilato be’ilat zenut* is that since no-one wants that [to happen to him] he will really make up his mind and give the *get* from now [even if his condition to return by a certain date is not met due to unavoidable mishap] in order that they should not annul his marriage. From here it is clear that although it is the Sages who annul his marriage his relationship is considered to have been promiscuous since he is the cause of the annulment by having made the *qiddushin* dependent on their will.⁸⁰

⁷² B, near the top.

⁷³ The bracketed words are missing from the text of R. Uzziel’s *responsum*.

⁷⁴ The bracketed words are missing from the text of R. Uzziel’s *responsum*.

⁷⁵ The husband, who made the condition.

⁷⁶ The wife, who did not make the condition.

⁷⁷ Whether real or perceived – see above, XXVIII & XXXIX.

⁷⁸ The meaning seems to be that if a person makes a condition which would **force** another party’s transgression of the Law, that also would be included in the ‘condition against the Torah’ concept but there cannot be such a case because since the condition refers to another person’s conduct the other party always has the option not to fulfil the condition as Ravina concludes – let her not eat and not be divorced.

⁷⁹ *Hiddushet Rashba* on *Ketubbot* 3a, first paragraph.

⁸⁰ Even where the condition was not made explicitly and is only inferred from the assumption of *kol hameqaddesh* or from *kedat Mosheh weYisrael*. How much more so will this be the case when he stipulates an explicit condition making his marriage dependent on the will of his father or the *bet din*.

XXXXVII R. Uzziel says that he could simply answer with the talmudic rejoinder – ‘*gavra agavra koramit?*’⁸¹ It has already been demonstrated that many *Rishonim* understand that the Sages indeed did undo his marriage due to the [understood] condition and there is no [actual] promiscuity caused by this although he is the [ultimate] cause of the annulment. The truth, however, is that the Rashba may agree that there is no actual promiscuity in the case of ‘*en 'oness begittin*, and that the husband would prefer to agree to give the *get* even in cases of ‘*oness* to avoid the mere **perception** of *bi'at zenut*’.⁸²

XXXXVIII R. Waldenberg points to a comment of R. Aqiva Eiger to *Gittin* 33:⁸³ “One must say that perhaps he would not want to render his relationship promiscuous”.⁸⁴ Thus we see, says R. Waldenberg, that even due to annulment by the Sages his relationship is rendered promiscuous.

XXXXIX This, again, can be solved by understanding the promiscuity that the husband wishes to avoid as being the **perceived** promiscuity in the eyes of others. This, indeed, is implied in R. Eiger’s wording ‘**perhaps** he would not want’ and if *bi'at zenut* were a prohibition why only perhaps, is it not virtually certain that he would not accept that his relationship be classified as *bi'at zenut*?

L R. Waldenberg asked further that once a condition making the marriage dependent on the will of others has been stipulated the couple cannot forego it⁸⁵ because the continuation of the marriage is out of their hands. Accordingly, why did R. Uzziel need to exclude the possibility of the husband’s cancellation of the condition by appealing to the fact that it was made for the wife’s benefit so the husband cannot forego it unless she agrees?

LI R. Uzziel responds that there is an important difference between these two things. If the condition cannot be cancelled because its fulfilment or breach is dependent on the will of others then though he could not forego it so that the original *qiddushin* would become unconditionally valid there is nothing stopping him from making new unconditional *qiddushin* by means of *bi'ah*. Where, however, the condition is for her safety, even a new unconditional *qiddushin* by *bi'ah* would not be effective unless she explicitly agreed to it.⁸⁶

LII To summarise, we have seen that many *Rishonim* have explained that the concept of retroactive annulment by the Sages is based on ‘on condition that father accepts’ (*Qiddushin* 43). Now, if this latter ruling applies only to ‘*erusin*’ how could the law allowing the Sages to annul a valid marriage even long after *nissu'in* have been based on the law of ‘on condition that father accepts’? It must therefore be that all these *Rishonim* understood that the Mishnah which says that if the son died we tell the father to protest the marriage (to avoid her needing *halitasah*) means even if the son died after *nissu'in* and from this I

⁸¹ Cf. *Ta'anit* 4b et al. I.e. even if the Rashba is to be understood as R. Waldenberg understands him the Rashba is but one of the *Rishonim*, many of whom disagree with him.

⁸² See above, XXVII.

⁸³ The comment is found in *Derush weHddush Rabbi Aqiva Eiger*, part 2, *Gittin* 33a, on *Tosafot* s.v. *Afke'inho*.

⁸⁴ R. Eiger refers to the question raised by Rashbam, quoted there in *Tosafot*. Rashbam refers to the *halakhah* that a *get* sent to a wife through an agent and then cancelled by the husband without the wife or the agent having been informed, is biblically void yet effects divorce by rabbinic decree by means of retroactive annulment. Rashbam asked that according to this rule a person could protect his adulterous wife from penalty and rescue children born of the adultery from bastardy by cancelling a *get* being delivered to his wife and making sure not to inform his wife or the delivery agent. *Tosafot* cites R. Yitshaq (Ri) as answering that so long as the protection and rescue are legal there is no problem. (Re'ah, quoting his teacher Ramban, is cited in *Shittah Mequbetset* to *Ketubbot* 3a as answering this question in the same way and as adding “would that they (the *mamzerim*) be purified!”). R. Eiger asks that according to this answer there remains the following difficulty. The enactment that requires that a divorce be dated was introduced so that it would not be possible to argue that the *get* was given at an earlier date and that it preceded an act of adultery committed by the wife. Why should we fear that he would protect his wife in an illegal manner (by lying about the date of the divorce) when he could save her in a perfectly legal way – by cancellation of the *get* (as above). R. Eiger answers that we must say that perhaps he would not want to render his relationship promiscuous – which he would do if he were to use the retroactive annulment method.

⁸⁵ See above, note 71.

⁸⁶ The condition’s being dependent on the will of others is still necessary to remove the problem of *bi'at zenut*.

derived in my previous *responsum* that a condition based upon the will of others does not engender promiscuity and for this reason we are not concerned that he might have used his *bi'ah* as a form of (unconditional) *qiddushin*. From the fact that the condition of the father's acceptance is effective even after *nissu'in* whereas the other types of condition are subject to the rule of '*en tenai benissu'in*' it is clear that the former type does not engender promiscuity and so there is no fear that he might have made a new unconditional marriage by *bi'ah*.⁸⁷

LIII On this claim R. Zevin asked many questions.

Q.1. The Talmud states regarding conditional marriage "...but as to *nissu'in*, can one say that he had a condition in *nissu'in*?" Now if when one makes a condition dependent on the will of others the condition survives *nissu'in* why can the Talmud not respond that there could have been such a condition in the marriage in question?

A.1. *Tosafot* have made clear that the Talmud means only that it is not common for people to make a condition in *nissu'in* and that is true also of a condition dependent on the father's will because surely in the vast majority of cases the father's agreement or disagreement would be sought before *qiddushin* or would at least become clear before *nissu'in*. Furthermore, in such a case people could ask the father and if he was unaware of such a condition the presumption would certainly be that no such condition (at least in *nissu'in*) was ever made.

Q.2. In *Ketubbot* 73[b] the Talmud cites Rabbah as maintaining that where the conditional *qiddushin* followed by *nissu'in/bi'ah* without repetition of the condition occurred with one and the same woman all (i.e. Rav and Shemuel) agree that the *nissu'in* too are conditional. The Talmud questions this from the following *baraita*'. "[If someone stipulates] 'Behold, I make *qiddushin* with you by *bi'ah* on condition that my father will agree', even though the father did not agree she is betrothed, Rabbi Shim'on ben Yehudah says in the name of Rabbi Shim'on [bar Yoḥai], "If the father agrees she is betrothed [if the father did not agree she is not betrothed]."" Now here, asks the Talmud, it is a case of an error involving one woman yet they argue?!⁸⁸

R. Zevin argues from this that due to the concern for *bi'at zenut* even a condition dependent on the father cannot survive sexual relations. So write *Tosafot* there s.v. '*Ela*' that according to Rav even if he betrothed her on a condition and married her on the condition, once he consummated the marriage she would need a *get* (even if the condition were breached). This is proven by *Tosafot* from the fact that the Talmud later on asks against Rabbah from the case of "...Behold, I make *qiddushin* with you..."

Therefore, since the accepted understanding is that Rav and Shemuel argue even in the case involving only one woman,⁸⁹ the case of 'intercourse on the condition of the father's agreement' would also be included in the debate of Rav and Shemuel and, as Rashi says (*Gittin* 25), "Even if the father did not want the marriage she is married because the groom wants to avoid promiscuity". We see from here that the condition dependent on the father differs not at all from any other condition. Retroactive annulment due to its breach would engender retrospective promiscuity as would be the case with any other condition.

A.2. R. Uzziel responds that in the original assumption⁹⁰ of the Talmud the *Tanna' Qamma'* of the *Baraita'* rules that even in the case of the father's consent the condition will not survive *bi'ah* because of

⁸⁷ We are similarly not concerned that he might forego his condition and render the original *qiddushey kesef* unconditionally valid but R. Uzziel did not need to mention that because, as has already been explained, he **could not** forego the condition, even if he wanted to, since it is dependent upon the will of others.

⁸⁸ This contradicts Rabbah's assertion that in cases involving only one woman **all agree** that the condition at *qiddushin* survives past *nissu'in* and *bi'ah*. Here, we see that even a condition at *bi'ah* does not survive the act itself according to at least one opinion.

⁸⁹ I.e. not as Rabbah argued.

⁹⁰ The *hawwah 'amina'*.

the fear of promiscuity but according to Rabbi Shim'on if the condition was breached she is not married. It makes sense to say that the latter assumes that this type of condition cannot lead to promiscuity.

Now the *Halakhah* is in accordance with Rabbi Shim'on⁹¹ yet we also rule according to Rav who says that if one betroths on a condition and failed to repeat the condition before intercourse the marriage is valid even if the condition was breached! Hence, we must say that Rav agrees that the condition 'if father agrees' survives *bi'ah*.⁹²

This is why the debate between the *Tanna' Qamma'* and R. Shim'on is presented as regards a condition of the father's will rather than as regards **any** condition not repeated at *bi'ah*.⁹³ Surely the reason is that it is only in the case of this type of condition that Rabbi Shim'on maintains that if the condition was breached – even after *bi'ah* – the marriage would be annulled and the *Tanna' Qamma'* argues that even in such a case the condition will not survive *bi'ah*. In the case of all other types of conditions, however, Rabbi Shim'on agrees with the *Tanna' Qamma'* that the condition will not survive *bi'ah* as Rav said. This is the Gemara's initial understanding of the *baraita'*.

The conclusion of the Gemara, however, is that the argument in the *baraita'* is about the meaning of 'on condition that my father agrees'. Does it mean 'on condition that my father remains silent' (does not disagree) or does it mean 'on condition that my father says yes'. The meaning of the *baraita'* now is:

[If someone stipulates] "Behold, I make *qiddushin* with you by *bi'ah* on condition that my father will agree", even though the father did not [actively] agree she is betrothed [because he passively agreed by remaining silent], Rabbi Shim'on ben Yehudah says in the name of Rabbi Shim'on [bar Yoḥai], "If the father [actively] agrees she is betrothed, if the father did not [actively] agree [but simply remained silent] she is not betrothed."

According to this, if the condition was not⁹⁴ fulfilled **all** agree that the marriage is annulled and in fact this second interpretation of the *baraita'* remains valid at the conclusion of the Talmud's debate as is apparent from the following. "Ulla said in the name of R. El'azar: If one betrothed by forgiving a debt and then consummated the marriage or if he betrothed on a condition and then consummated the marriage or betrothed with less than the value of a *perutah* and then consummated the marriage – **all agree** that [even if the condition was breached] she needs a *get* [to be released from the marriage]".⁹⁵

Now if this *baraita'* is understood as recording a dispute as to whether a condition of marriage can survive *bi'ah* (as the Talmud thought initially) how can Ulla in the name of R. El'azar say that if one makes a conditional *qiddushin* and then *bi'ah* **all agree** that she needs a *get* to remarry when Rabbi Shim'on says explicitly that the condition of the father's consent is effective even after *bi'ah*?⁹⁶ One

⁹¹ 'Even Ha'Ezer 38:8.

⁹² And if made at *qiddushin* would survive *ḥuppah*, *yiḥud* and *bi'ah*.

⁹³ The debate of Rav and Shemuel was described as applying to any condition. If the debate between the *Tanna' Qamma'* and R. Shim'on also applies to any condition why was it described as referring to the particular condition of the father's will?

⁹⁴ The word 'not' is missing from the talmudic text quoted in the *responsum*.

⁹⁵ *Ketubbot* 74a.

⁹⁶ One could answer that in Ulla's case, as in the Mishnah and in the argument of Rav and Shemuel, the condition was made **only** at *qiddushin* and there is therefore reason to suspect that it was withdrawn at *nissu'in* or *bi'ah* but in the *baraita'* the condition was made immediately before *qiddushey bi'ah* so it is highly likely that it was not withdrawn before or during the *bi'ah*. (The argument in the *baraita'* would then mirror the later argument between *Shiltey HaGibborim* in the name of Riaz – that even a condition immediately preceding *bi'ah* would be cancelled - and the rest of the *Posqim* who say that it would survive!) I could not understand why Rabbi Uzziel does not deal with this. I later discovered that the *Hasdey David* to *Tosefta' Qiddushin* 3:8 explains that this *tosefta'* means that there was some interval between the pronouncement of the condition and the act of *bi'ah* and the condition was not repeated immediately before *bi'ah* so that the case is analogous to that of Rav and Shemuel etc.

might attempt to answer that the Gemara's statement "If one betroths on a condition and then consummates the marriage all agree that she is⁹⁷ (unconditionally) married" refers to Rav and Shemuel (rather than to literally all *Tanna'im* and *Amora'im*) i.e. that the two of them follow the *Tanna' Qamma'* of the *baraita'* who maintains that after *bi'ah* the condition of betrothal is cancelled and she is unconditionally married as we find in *Tosafot*⁹⁸ s.v. *Divrey hakol* with regard to the case of betrothal on less than the value of a *perutah*.⁹⁹ However, this answer is unacceptable because if it were so, why did the *Tosafot* not ask this very question from the *baraita'* of the father's consent?¹⁰⁰ The truth thus is that the only argument in the *baraita'* is regarding the meaning of the father agreeing to the marriage but there is a consensus that the condition survives the *bi'ah* and that is because the condition is dependent on others¹⁰¹ so he definitely did not make *bi'ah* for the purpose of [unconditional] *qiddushin* because even if he makes *bi'ah* depending on the condition, his intercourse could not be rendered promiscuous [by subsequent retroactive annulment] because he would not be responsible for the annulment but his father.¹⁰²

Q.3. R. Zevin cites a Rashba who quotes a *tosefta'* in *Qiddushin* where we learn:

"[I shall have intercourse with you] on condition that my father agrees, even if the father did not agree she is married. Rashba¹⁰³ says [in the name of R. Meir¹⁰⁴] that if he agrees she is married, if he does not agree she is not married, because the intercourse was only in accordance with the initial condition".

This *tosefta'*, which records that the argument is whether the initial condition survives *bi'ah*, parallels exactly the argument of Rav and Shemuel, the *Tanna' Qamma'* = Rav and Rashba = Shemuel. This shows that even when the condition is the father's acquiescence there is disagreement between Rav and Shemuel and the *Halakhah* is like Rav that the condition is cancelled.

A.3. R. Uzziel points out that the distinction between other conditions and that of the father's will is not his own invention but that of the *Rishonim* cited in *SM* and can we say that they were unaware of this *tosefta'*? Furthermore, why did R. Zevin not look at the end of the words of the Rashba where he wrote that that *tosefta'* definitely disagrees [with the conclusion of the Talmud] but [that is not a problem because] it was not taught in the *Bet HaMidrash* and we [therefore] cannot ask any question from it

⁹⁷ The text of the *responsum* reads 'is not' and seems therefore to refer to the statement of R. Aha bar Ya'akov near the top of the page but that is impossible as is clear from the continuation of the *responsum* wherein R. Uzziel explains that this would mean that Rav and Shemuel follow the *Tanna' Qamma'* of the *baraita'* who says she is unconditionally married. This would make the *responsum* read: One might attempt to answer that the Gemara's statement "If one betroths on a condition and then consummates the marriage all agree that she is **not married** (if the condition is breached)" refers to Rav and Shemuel (rather than to literally all *Tanna'im* and *Amora'im*) i.e. that the two of them follow the *Tanna' Qamma'* of the *baraita'* who maintains that after *bi'ah* the condition of betrothal is cancelled and **she is unconditionally married!**

⁹⁸ *Ketubbot* ibid.

⁹⁹ *Tosafot* suggest that in that case *divrey hakol* refers only to Rav and Shemuel.

¹⁰⁰ I.e. if the Talmud's initial interpretation of the *baraita'* is ultimately accepted, why did *Tosafot* not ask against Ulla/R. El'azar's statement - **everyone agrees** that if one betroths on a condition and then consummates the marriage the condition is cancelled - from the *baraita'* - "[If someone stipulates] 'Behold, I make *qiddushin* with you by *bi'ah* on condition that my father will agree', even though the father did not agree she is betrothed, Rabbi Shim'on ben Yehudah says in the name of Rabbi Shim'on [bar Yoḥai], 'If the father agrees she is betrothed [if the father did not agree she is not betrothed] - which demonstrates that even after *bi'ah* there is a dispute? This implies that the Talmud's second interpretation is accepted as the final word so that both opinions in the *baraita'* agree that a condition of the father's consent does survive *bi'ah* and that presents no challenge to the statement of Ulla/R. El'azar because they spoke of most types of conditions which do not depend on the will of outsiders and which do not normally survive *bi'ah* whereas the *baraita'* speaks of a condition dependent on the will of outsiders which does survive *bi'ah*. That is why *Tosafot* did not raise any problem from the *baraita'* against Ulla/R. El'azar.

¹⁰¹ According to what I wrote in footnote 96 this may not follow.

¹⁰² And where the annulment is not due to him but to the decision of others there is no question of retrospective promiscuity as has been explained at length above.

¹⁰³ Rabbi Shim'on ben El'azar?

¹⁰⁴ The MS reading is R. Shim'on ben Yehudah in the name of R. Shim'on - as in *Ketubbot* 73b.

because if any *baraita* was not taught in the school of Rabbi Hiyya and Rabbi Oshaya one cannot ask any question based on it.

So, on the contrary, it is clear that the Rashba supports R. Uzziel in that the Rashba concludes that the Talmud's final decision is that the two opinions in the *baraita* argue about the meaning of 'on condition that my father will consent' but both opinions agree that if he does not consent she is not married – as I have explained.

Thus, there is no contradiction to the logic of the *Shittah Mequbetset*¹⁰⁵ who differentiates between a condition dependent on the will of the couple and one dependent on the will of others and, on the contrary, one can support his view from the talmudic debate. This proves the correctness of the words of our rabbis the Re'ah and the Ritva and their school that the doctrine of *kol hameqaddesh*..., which we know remains in force after *nissu'in*,¹⁰⁶ stems conceptually from the condition '*al menat sheyirtseh 'abba*'.¹⁰⁷ Heaven forbid that we should entertain the thought, even for a moment, that all of them¹⁰⁸ made an error in basic talmudic texts and forgot entire talmudic subjects.¹⁰⁹ It is furthermore impossible to say that this opinion is subject to controversy for we have learnt in the Mishnah:¹¹⁰ "If the son died we exhort the father to say 'I do not want' ". The indefinite form of the mishnah implies that even if the son died after his *nissu'in* we exhort the father to say 'I do not want' in order to release his daughter-in-law from the levirate bond.

Q.4. R. Zevin is astonished: Is this the only case that we have in the *mishnayot* of Tractate *Qiddushin*? Are not all the conditions of *qiddushin* set out there? Nevertheless, we rule that all the conditions refer to *qiddushin* and not *nissu'in* so why should this mishnah be different?

A.4. R. Uzziel responds that his inference from the mishnah was not from the report of the condition itself but from the additional ruling that if the son died we exhort the father to say 'I do not want' which implies even after *nissu'in* for if not so the Tanna of the mishnah would not have failed to say 'if the son died **during the 'erusin** [period]'. This also suffices to answer R. Zevin's next point namely that in the code of the Rambam and in the *Shulḥan 'Arukh* no difference is made between them.¹¹¹

Q.5. In Rambam chapter 7 of 'Ishut and in *Shulḥan 'Arukh 'Even Ha'Ezer* 38 all the conditions are set out and amongst them is '*al menat sheyirtseh 'abba*' and after that they¹¹² explain that if he made conditional *qiddushin* and then *nissu'in* without repetition of the condition she would need a *get* to be released from the marriage with no difference being made.

A.5. However, according to what R. Uzziel wrote above the matter is explicit in their words because that which they wrote 'If the son died we exhort the father....'¹¹³ means even if the son died **after his *nissu'in*** we exhort the father to say 'I do not want' and with that the *nissu'in* are retroactively annulled, from which it is clear that this condition survives the *nissu'in*.

¹⁰⁵ See above, XXXIII.

¹⁰⁶ This is obvious from the three cases in the Talmud where this doctrine is invoked as the rationale for the rabbinic annulment of *qiddushin* after *huppah*, *yiḥud* and *bi'ah* – 'en 'oness begittin, bittul haget hasheliḥut, get shekhiv mera'.

¹⁰⁷ The act of *qiddushin* being conditioned by the understood rider 'on condition that the Sages never object' which functions exactly as 'on condition my father never objects'.

¹⁰⁸ Of the *Rishonim* collated in *Shittah Mequbetset* as sharing this understanding of *kol hameqaddesh*.

¹⁰⁹ As we would have to say according to R. Zevin.

¹¹⁰ *Qiddushin* 3:6, 63a.

¹¹¹ Between 'on condition my father agrees/does not protest' and all the other conditions.

¹¹² Rambam and R. Yosef Caro.

¹¹³ To express disapproval of the marriage.

Q.6. R. Zevin argues that from the very wording of the mishnah one can infer that it means [that the son died] before *nissu'in* for if not so it should have been explicit: 'if the son died without children'.¹¹⁴

A.6. R. Uzziel responds that the fact that *yibbum* applies only where the deceased husband leaves no children is common knowledge so there is no need for the Tanna to add that information into the mishnah. Why did R. Zevin not ask himself why the Mishnah did not add the information that the son died during the '*erusin* period as this it needed to do because the unqualified 'If the son died we exhort the father....' implies even if he died after *nissu'in*.

Q.7. R. Zevin supports his argument further by appealing to the explanation of this mishnah in the Gemara namely that it means '...if father will not object within 30 days'. Now we know that they were accustomed to wait 12 months from the '*erusin* to the *nissu'in* and therefore the Gemara chose a length of time within the '*erusin* period.¹¹⁵

A.7. R. Uzziel is surprised – every student knows that it is the way of the Gemara to choose 30 days or 12 months as examples of a period of time and the period has no significance whatsoever.¹¹⁶

Q.8. R. Uzziel now confronts the one open contradiction to his thesis - that of the ruling by *Shiltey HaGibborim* in *Ketubbot* chapter *HaMaddir*¹¹⁷ who writes:

“Even if he made *qiddushin* on a condition and repeated the condition before intercourse saying ‘Behold I shall now have intercourse with you on condition that you have no blemishes or vows’ or on another condition for example ‘....on condition that father will agree’, even if the father did not consent she is unconditionally married because no-one would make his intercourse promiscuous so this groom meant his act of intercourse as one of [unconditional] matrimony¹¹⁸ and the fact that he repeated his condition¹¹⁹ means only that he was convinced that she (lit. they) would not transgress his condition¹²⁰ and therefore even if the condition was breached this cannot annul the [unconditional] matrimonial intercourse so she is [unconditionally] betrothed.”

A.8. This, writes R. Uzziel, constitutes a clear and explicit contradiction to his thesis but it is not a major problem because it is a unique opinion.¹²¹ Indeed, R. Uzziel has collated the opinions of many authorities

¹¹⁴ If the mishnah refers even to after *nissu'in*, as R. Uzziel maintains, so that there could have been children born in the marriage, then it should have been pointed out in the mishnah that the voicing of the father's disapproval is requested only if the husband died **without issue** because only then would there be a levirate bond from which to save the widow. According to R. Zevin, however, the mishnah speaks only when the husband died during the period of '*erusin* so it is understood that he would have had no children and this fact therefore did not need to be noted in the mishnah.

¹¹⁵ I. e. the Talmud chose a period well within the usual extent of '*erusin* so as to avoid the less straightforward situation that would be created by a stipulation like 'on condition that my father does not object within two years', which would normally include a period of *nissu'in*, because it would then have been necessary to explain that the condition was effective up to, but not including, the period of *nissu'in*.

¹¹⁶ In the original: ושלשים יום לא דוקא

¹¹⁷ S.v. *Ba'al harey zo mequddeshet*.

¹¹⁸ I.e. We must assume that he used his initial act of intercourse as a method of unconditional betrothal.

¹¹⁹ Even if this was done immediately before *huppah*, *yihud* and *bi'ah*.

¹²⁰ He did not take seriously the possibility that his partner would go ahead with the consummation if she were not in compliance with his condition.

¹²¹ There are two issues here. One is whether a condition made even immediately before *bi'ah* would be foregone during intimacy and the other is whether the condition dependent on the father would, like conditions not dependent on others, give rise to promiscuity in its being breached. R. Uzziel is right in saying that no other authority supports the view of Riaz as regards the first issue but can the same be said for certain regarding the second – which is the point at issue here? On this, see below s.v. **8. Tenai beqiddushin shehu letovat ha'ishah** (beginning at paragraph LVI).

who are accepted as normative that even if he repeated the condition at *nissu'in* that would be enough to perpetuate the condition [even beyond intercourse].¹²²

Q.9. R. Zevin argues that it is more likely that a person would cancel his condition due to fear of promiscuity when the condition is dependent on his father than when it is dependent on himself. When the condition depends on himself he can rely upon his not breaching the condition so he need feel no necessity of cancellation. Nevertheless we say that even in the case of a condition dependent on himself he is concerned that he might not be able or willing to abide by the condition and that he might breach it rendering his relationship promiscuous and that as a result of this concern he will forego the condition. In the case of a condition dependent on others, where the power to avoid annulment has been removed from the hands of the groom, is it not even more likely that he will fear that the father might annul the marriage and that he will find a state of promiscuity thrust upon him and that he will therefore cancel the condition?¹²³

A.9. R. Uzziel says that here R. Zevin has missed the point. The difference between one who makes his condition dependent upon his own will and one who makes his condition dependent on the will of the Sages or his father is that the latter wants his marriage to continue and wants his father to perpetuate his consent and as a result all his acts of intercourse are marital but others annul his marriage¹²⁴ whereas the former, by breaching his condition, makes his intercourse retroactively promiscuous, since he brought about the retroactive annulment of his own free will.

7. *Tenai de'al menat shelo' yimleh 'abba' lizman yadua'*

LIV R. Uzziel now turns to the observations of Dayyan Waldenberg. R. Uzziel has previously written that the rationale underlying *kol hameqaddesh* is that every marriage is considered as if it were made on a condition that the Sages will give their consent.

Q.1. R. Waldenberg poses against this a question based on the statement of the Ran who rules that in a case of the father's will the meaning is on condition that the father say yes, and once he has said yes he cannot retract. Even if he later regrets his consent and protests his opposition, the marriage will be valid because when any condition requires a positive occurrence once that occurrence takes place that is sufficient for the fulfilment of the condition. According to the Rambam, even if the condition were to be expressed negatively – on condition that my father does not object – if the father simply remains silent after hearing of the marriage, the marriage becomes unconditionally valid and the father's subsequent objection can no longer annul it (see *'Ishut* 7 and *Tur & Bet Yosef EH* 38). So wherein lies the advantage enjoyed by the Sages to annul marriages due to the groom's understood condition, surely once the marriage has taken place and the Sages have not objected – and how much more so if they have positively consented – it is too late for them to annul.¹²⁵

¹²² R. Uzziel here directs us to *Helqat Mehokeq*, *'Even Ha'Ezer* 38, sub-paragraphs 48&49. The *HM* says there that if the condition was repeated at *yihud* it would survive the intercourse also. For the evidence that *Shiltey HaGibborim*'s stringency is not applicable to the type of condition being discussed by R. Uzziel and for further discussion of the opinion of the *Shiltey Gibborim* (and the Riaz whom *SHG* is citing), see Abel, "The Plight of the 'Agunah and Conditional Marriage", IX:25-49. For the problem of ignoring a unique stringent opinion in the area of *gittin* and *qiddushin* see Abel, "Halakhah – Majority, Seniority, Finality and Consensus", section IV. On the other hand, see Abel, "Rabbi Morgenstern's Agunah Solution" #15 for reliance on even a unique lenient opinion in an emergency even in matters of Pentateuchal law.

¹²³ In light of the fact that we have learned (above, L, LI) that a condition dependent on others cannot be cancelled perhaps this should rather read 'he will therefore create an unconditional marriage by *bi'ah*'.

¹²⁴ I. e. even if the father did annul the marriage there would be no retroactive promiscuity since this would not have been his doing. There is, therefore, no reason for the groom to feel any need for cancellation.

¹²⁵ Accordingly, we would have to say that the rabbinic power of annulment is based on some other rationale.

A.1. At first, R. Uzziel was going to propose that the condition is that the Sages do not object **when they see the flaw in the marriage**. If they do, the marriage will be retroactively annulled.¹²⁶ However, according to this, the condition cannot undo the marriage until the marriage becomes flawed – then the Sages have the possibility of annulment – but until then the marriage is **unconditionally valid** and such cannot be because once a marriage has come into being unconditionally it remains like that forever as the Talmud declares: If one says to a woman, ‘You are betrothed to me for today but tomorrow you are no longer my wife’ she cannot ever be released from that marriage without a *get* because bodily sanctity does not dissipate with nothing [more than the mere passage of time] (*Nedarim* 29). Therefore, R. Uzziel says that *kol hameqaddesh* should be understood as the equivalent of ‘on condition that they **never** object’ and such a condition remains in force throughout the marriage [and even after the husband’s death!] and to this the Ran agrees (Ran, *Qiddushin*, chapter *Ha’Omer*: ‘...and if he fixed a time, it is all in accordance with whatever he fixed’).

Q.2. R. Waldenberg argues that for *kol hameqaddesh* we do not need all the above because his making the marriage dependent on the will of the Sages means that so long as he lives with her on the basis of these *qiddushin*, when any cause for annulment arises the Sages will be empowered to annul, and as soon as the matter becomes dependent on them they object.¹²⁷

A.2. There is no condition in the world that can, on its breach, undo a marriage which has already been unconditionally sanctified. Only a condition which makes the marriage conditional from the beginning and, when breached, annuls the marriage retroactively, is valid. In the case of *sheyirtseh ‘abba’* the condition can endure throughout, and even beyond, the marriage only if it is expressed as ‘on condition that my father never - at any time during or after the marriage – expresses his disapproval’ or in words to that effect.

LV Hence, the proposal to employ the condition that the *bet din* never object – during my life or even after my death – is exactly the same as the condition lying behind *kol hameqaddesh* and is effective even after his death as is apparent from the mishnah concerning ‘*al menat sheyirtseh ‘abba’*’. Although in the case of breach the Sages declare his *bi’ah* promiscuous – i.e. not a *bi’ah* of *qiddushin* – [that is only as regards their legal effect] but intrinsically since [both the initial and all subsequent] acts of intercourse were on the basis of the original *qiddushin* and were marital acts, they are not promiscuous but [on the contrary] they are acts of *mitsvah* as stated in *Shittah Mequbetset* and accordingly his children are born within a halakhic marriage bond and are the products of *be’ilat mitsvah*.

8. *Tenai beqiddushin shehu letovat ha’ishah*

LVI R. Uzziel now wishes to take account of the aforementioned opinion of *Shiltey Hagibborim* citing Riaz that even a condition made immediately before *bi’ah* would be cancelled at the *bi’ah* itself.¹²⁸ He

¹²⁶ This means that the silence, or even the consent, of the Sages at the beginning of the marriage would not render it unconditionally valid because the time of the conditional part of the marriage has not yet arrived. Only when a situation requiring annulment has arisen does the period of the condition set in and that moment the Sages declare immediately their dissatisfaction with the marriage and it is thereby annulled.

¹²⁷ This seems to be exactly what R. Uzziel first suggested above and then rejected because of *Nedarim* 29! Indeed, he proceeds to reject these words of R. Waldenberg for precisely that reason! Furthermore, even if R. Waldenberg was right on this point we could apply the same reasoning to the father also – again as R. Uzziel wanted to do. It may be that R. Waldenberg meant to say that in the cases of the Sages’ annulment the *modus operandi* is really that of abrogation of the Pentateuchal Law (*‘aqirah*) – by non-retroactive, rather than retroactive, annulment. This, of course, could not fit with the Ritva, Re’ah etc. who explicitly base *kol hameqaddesh* on *sheyirtseh ‘abba’*. Additionally, one could argue that the rabbinic power of abrogation does not need the ‘help’ of the groom’s condition but this is not so certain – see *Tosafot Bava’ Batra*’ 48a s.v. *Tinah* at the end.

¹²⁸ The view of Riaz is that even a condition dependent on others, even if recited immediately preceding *qiddushin*, *huppah*, *yihud* and *bi’ah*, will be cancelled at *bi’ah* by the groom because of his concern for the promiscuous effects of retroactive annulment.

does this by pointing to the fact that *EH* 38:38 rules that a condition made in the interests of the wife cannot be cancelled by the husband.

LVII R. Zevin wonders at this: Does not the assumption that one would not commit promiscuous intercourse apply equally to men and women so that it is just as likely that she would forego a condition before *bi'ah* as it is that he would?

LVIII R. Uzziel responds: That which seems as obvious to Sir as 'an egg in *kutah*'¹²⁹ to me is highly questionable. The Gemara asks in *Bava' Qamma'* (110[b]) that a sister-in-law who found herself in a levirate bond with a leper should be released without *halitsah* because on that understanding she did not agree to be married. There, answers the Gemara, we attest that she is satisfied with any husband (even one with a leprous brother) etc. R. Uzziel argues: If it is true that a woman also is concerned about *bi'at zenut*, there would have been no question from the start because although she would not have agreed to *qiddushin* which brought her to such circumstances, once she reaches *nissu'in*¹³⁰ she would forego her "condition" so that her relationship with her husband be not promiscuous and we would not need the Gemara's answer that a woman is satisfied with anything. Thus it is clear that this assumption was not made regarding women. This is stated explicitly by the *Mishneh LaMelekh* in the name of the Radbaz (*Yad, Gerushin*, 10:18). The *Sedey Hemed* (*Ma'arekhet 'Ishut* 30) cites an assembly of *posqim* who differentiate between men and women in this regard.¹³¹

LIX The *Sedey Hemed* notes, however, that the *Noda' BiHudah* applies this assumption also to women. Nevertheless, continues R. Uzziel, we find that the *NB* rules that '*en tenai benissu'in*' does not apply to a condition to protect him or her against a loss in spite of the possibility of *be'ilat zenut* (*NB I EH* 54).¹³²

LX The *Hatam Sofer* (*EH* II 68) asks against this *NB* from the Gemara (*Yevamot* 107) where *Bet Shammai* express the opinion that *me'un* is possible only for '*arusot*' and not for *nesu'ot* so that people, not realising that this *nesu'ah* is still a minor, should not think that the release of this *nesu'ah* without a *get* from her marriage was made possible by the fact that she had been married on a condition that was subsequently breached and they will say *yesh tenai benissu'in* (and rely in other marriages on conditions even if breached after *nissu'in*) whereas in truth says the Gemara '*en tenai benissu'in*' - there is no condition that can survive *nissu'in*. According to the *NB*, asks the *HS*, why would people not presume that there had been a condition to protect her from a loss; if they should then deduce that such conditions can be successfully employed to survive *nissu'in* that would do no harm for, according to the *NB*, that would be true!

LXI R. Uzziel cannot see the problem because the *Tosafot* explain that *yesh tenai benissu'in* should be read as a question. Will people say *yesh tenai benissu'in* - that there was a condition in this *nesu'ah*'s marriage? - no, because they know that '*en tenai benissu'in*' - conditions surviving *nissu'in* are unusual - so they will think (not realising that this *nesu'ah* was a minor) that a married woman can leave her husband without a *get* and the *NB* himself explained like this! The *NB*¹³³ supports his view with the *Bet Shemuel* who says that if a condition explicitly referring to the *get* were made at *bi'ah* and the condition was breached she would not need a *get* which can only be reconciled with the statement in *Yevamot* 94

¹²⁹ The reference is to the obvious permissibility of eating an egg together with *kutah* - a dip having milk as one of its ingredients. The egg, though the produce of a hen - a meaty food - is definitely not considered meaty and may obviously be consumed together with milk. The Talmud often uses this as an analogy for something which is obviously permitted or obviously correct - see, *inter alia*, '*Eruvin* 62b.

¹³⁰ See *Tosafot* there s.v. *De'da'ta'* who maintain that the Gemara refers only to a woman widowed from '*erusin*! R. Uzziel himself is clearly aware of this *Tosafot* - see above, XXII!

¹³¹ See the discussion in '*Igrot Mosheh EH* I 79, section 3.

¹³² Near the end, s.v. *Uvifrat*. The wording of the *Mishpetey Uzziel* here appears confused (perhaps due to printing errors) and I have summarised according to what I found in the *NB*.

¹³³ *NB I EH* 56.

(‘*en tenai benissu’in*’) if we understand the Talmud to mean it is unusual for there to be a condition in *nissu’in* (‘*en regilut sheyihyeh tenai benissu’in*’) as Rabbenu Ḥayyim, cited in *Tosafot*, explains.

LXII R. Uzziel notes that he later found that the *Pitḥey Teshuvah* (EH 38 sub-para. 18) quotes the above NB and comments “However, from the words of the *Bet Shemuel* (sub-para. 47) it does not seem so - research is required”. R. Uzziel, however, points out that that statement in BS refers to a case where she knew before the *nissu’in* that the condition for her benefit had not yet been fulfilled. For example, if the condition was that he would give her 200 *zuz* but he had not set a time limit [for the condition’s fulfilment] which is exactly what the relevant paragraph of EH is talking about. Concerning such a case the BS says that if the *nissu’in* went ahead [without repetition of the condition] we would say that she has certainly foregone the condition since she knows that he has not [yet] fulfilled it. However, if she did not know [at the time of *nissu’in* that the condition was not yet fulfilled] we would not fear [that her entering *nissu’in* without repetition of the condition implied] that she had foregone the condition that was for her benefit. Indeed, the NB himself (ibid.) writes this: ‘That which is stated in paragraph 46 concerning her condition namely that if he took her into *nissu’in* without repetition she has foregone the condition – that means only when the husband promises to eventually fulfil his obligation towards her.’¹³⁴

LXIII R. Uzziel then adds that in addition to all the above it would seem that the fear of cancellation is relevant in cases of financial conditions but not in the case of a condition to save her from everlasting ‘*iggun*. A proof to this is the statement of the Gemara that if a widow found herself bound to a levirate leper she should, it would seem, be released without *ḥalitsah* since she did not marry on that understanding and the Gemara responds that a woman is satisfied with a minimal marital situation¹³⁵ as Resh Laqish says “It is better to live with a partner [than as a widow]” (*Bava’ Qamma’* 111). From here it seems that in any case where she stands to be a life-long ‘*agunah* so that she cannot ‘live with a partner’ we **do** say that she would not have married on that understanding.¹³⁶ From this it is clear, writes R. Uzziel, that that which is obvious to R. Zevin that a condition in her favour is not different from any other condition is not only not obvious but on the contrary it is refuted and groundless and all the words of the *posqim* that we have mentioned escaped him.

LXIV However, R. Uzziel was still not satisfied and therefore added a further support to his argument in the shape of an oath not to cancel the condition. Once he has sworn on her will and for her benefit and on the will of the *bet din* he cannot cancel the condition¹³⁷ according to the law of ‘one who swears on the will of another and on the will of the public’.

LXV Again, R. Zevin is astonished. Why the oath – is it not explicit in EH (38:38) that a condition in *qiddushin* in her interest cannot be foregone without her agreement?

LXVI R. Uzziel answers that even in the case of a condition in her interest, if she went ahead with the *nissu’in* without repeating the condition we say that she definitely has foregone the condition since she knew that the husband had not – up till that point – fulfilled the condition (cf. *Helqat Mehoheq* 38:56 and

¹³⁴ I.e. When, at the *nissu’in*, he has not yet fulfilled the condition that he made at *qiddushin* (eg. to give her 200 *zuz*) but he promises to do so in the future, if she then goes ahead with the *nissu’in* without the condition being repeated we can assume that she has foregone the condition accepting that he will certainly abide by his word. The fact that she has reason to be suspicious of his good intentions since he has already been somewhat remiss in carrying out his promise yet she goes ahead without repeating the condition implies that she is willing to take her chances that he will ultimately come up with the money. If she still felt any doubt about his reliability she would certainly have made certain by repeating the condition. However, if the time for the fulfilment of the condition (for her benefit) has not yet arrived – as when the condition refers to future possible contingencies – her proceeding with the *nissu’in* without repetition of the condition certainly does not imply her having foregone it for she has no reason to feel the need to repeat it since there is no evidence – and at present there can be no evidence – that her husband would fail to abide by the condition.

¹³⁵ I.e. even one that leads to being bound to a leprous levir.

¹³⁶ We accept the ‘*umdena* that she married on an unspoken condition that such a situation would not arise.

¹³⁷ Surely this should read ‘he cannot have the oath annulled’.

Bet Shemuel 38:67).¹³⁸ Therefore, I wrote that they should swear on the will of the *bet din* etc. not to cancel the condition as such an oath cannot be undone without the consent of all those upon whose will the oath was made. In such circumstances we would not say that since a person would not make his intercourse promiscuous there is a danger of cancellation of the condition, because, on the contrary, we would say that a person would not transgress his oath - a far more serious matter than the possibility of promiscuity. Indeed, according to many *posqim*, there is no promiscuity in situations as this where the couple are living as man and wife.¹³⁹

LXVII R. Zevin argued that the stipulation 'so long as the *bet din* do not object' constitutes '*qiddushin lizman*' and R. Uzziel responded (near the end of *responsum* 46, 157a, s.v. *Tu haziteh*) that he has already dealt with this in *responsum* 45, section 3 (on p. 142). However, in 45 he started with *עד שלא ימחה האב* and then changed to *על מנת שלא ימחה* which is what he stays with and with that there is no problem of *qiddushin lizman*.

LXVIII R. Zevin argues that any condition must be doubled – and R. Uzziel's is not. Rav Uzziel replies that this is no problem because the basis of his proposal is the explanation of the *Rishonim* that *kol hameqaddesh ada'ta' derabbanan meqaddesh* functions as an extension of '*al menat sheyirtseh 'abba*'. Just as *kol hameqaddesh* does not require *tenai kaful* etc. so it must be in the case of '*al menat shelo yimleh 'abba*'. The condition is no more than 'a revelation of intent' so we do not require a double condition – cf. *Noda' BiHudah* I EH 56 s.v. *Wenimtsa*'.¹⁴⁰

Appendix

R. Zevin asks one question that R. Uzziel does not deal with. The *Hafla'ah* to *Ketubot* 3a quotes his brother's explanation of the Talmud's well known question 'All very well if he betrothed with money but if he betrothed with intercourse what can one say?' The explanation runs as follows. The declaration of the Talmud that everyone who betroths does so only in accordance with the will of the Sages means that the betrothal is governed by the same rules as 'on condition that my father agrees' (and so is it explained in *Shittah Mequbetset* in the name of the *Rishonim*). On this the Talmud asks that we rule that if one

¹³⁸ This seems to totally contradict what was said earlier in the *responsum* – see above LXII and note 134. R. Uzziel could have better described the oath simply as an additional safeguard.

¹³⁹ See above, XXVI-XXIX & XXXII – XXXIX.

¹⁴⁰ This is problematic. In the case of conditions imposed by **the Sages on all marriages** one can say that, in the absence of evidence to the contrary, *kedat Mosheh veYisrael* is sufficient (and even that addition to the marriage formula may not be necessary) to make the marriage conditional upon the Sages' wishes. However, it does not follow, even in the case of '*al menat sheyirtseh* (or *shelo yimleh*) *'abba*', that the condition will operate on the basis of *umdena/giluy da'at*. There is disagreement amongst the *Rishonim* as to whether an '*umdena* requiring *giluy da'at* can ever operate in the area of *gittin* and *qiddushin*. The Rema rules (EH 42:1) that even an '*umdena mukhatat* (which does not require *giluy da'at*) does not operate as regards the execution of *qiddushin*. The '*Arokh HaShulhan* (EH 42:8,9) says that the same applies to the delivery of the *get*. The Wilna Gaon (SAEH *ibid.* sub-sec. 4) says that this is a *humra* due to the gravity of matters of marriage and divorce but the '*Arokh HaShulhan* (*Ibid.* 42:10,11) argues (though in the end he is uncertain – *Ibid.* 42:12,13) that it may well be purely halakhic because, unlike monetary matters, both the delivery of the *qiddushin* and the delivery of the *get* are ineffectual without two witnesses. This is because the witnesses of marriage and divorce are intrinsic to the legal act and without them no marriage or divorce will have taken place whereas those witnessing monetary dealings are required only for proof that the transaction did indeed take place but the transaction itself is fully valid without them. Therefore, as an '*umdena*' cannot be seen or heard by the witnesses it cannot have any effect on the marriage or divorce. Only an explicit condition could do this. [According to this, an '*umdena mukhatat* could still operate in cases of divorce at a stage preliminary to the delivery of the *get* (for example when the husband was dangerously ill and told witnesses to write a *get* for his wife but did not add that they should deliver it to her where we apply the '*umdena*' that he did mean that the *get* should be given to her). This must be so according to all opinions because such '*umdenot* in the case of *gittin* are accepted in the *Halakhah* without question.]

In consideration of all this, it would surely have been better to construct an explicit double condition with '*im* and '*im lo*'.

betroths on a condition and then consummates the marriage she [is married unconditionally and] needs a *get* [to be released from this marriage] because there is no condition that survives intercourse, so we should also say that the condition that the Sages agree should not be valid if he betrothed with *bi'ah*. To this the Talmud replies that the Sages rendered his intercourse promiscuous.

It is clear from here that at least one great authority maintains that the condition that my father agrees does not survive *bi'ah* exactly like all other conditions and only when the condition is dependent on the consent of the Sages can it extend beyond *bi'ah* due to the power of the Sages to render a legitimate and marital act of intercourse illicit – something which the father (or a contemporary *bet din*) cannot do.

I would respond to this by saying that the Ritva cited in *SM* who takes this approach in explaining *kol dimeqaddesh* quotes the exact wording of the *baraita* 'Behold I shall betroth you **by intercourse** on condition that my father consents' as the basis for the Sages' annulment of *qiddushey bi'ah*. The *Hafla'ah* does not mention this at all.