אלא[1] אמר רב נחמן אוקי תרי להדי כולי

Rather, ר"נ said, we place the two against, etc.

Overview

The ברייתא taught that if two עדים testify on a שטר מקויים that the עדי השטר were קטנים, פסולי עדות or אנוסים (מחמת נפשות), the עדים הפוסלים are not believed (that we should destroy the שטר). ר"נ explained that the שטר has a דין of תרי ותרי and we cannot collect the debt with this שטר.

There is a dispute (elsewhere) in a case where two groups of עדים contradict each other, if each group may testify independently in other cases, or whether we say that since one of these two groups of עדים lied, they are disqualified from being עדים in other cases as well. We do not know which the lying group is, so both are disqualified. The opinion of ר"נ (and רב הונא) is that each group of עדים may subsequently testify in other cases. תוספות will initially compare and then differentiate between our case here and the case there.

תוספות asks:

ואם תאמר ולרב נחמן אמאי לא מגבינן ביה בשטרא -

And if you will ask; according to ר"נ, why do we not collect the debt **with this שטר?**

והא רב נחמן סבר כרב הונא (שבועות מז) [בבא בתרא דף לא,ב] -

For ר"נ maintains as ר"ה does –

בשני כתי עדים המכחישות זו את זו[2] דכל אחת באה בפני עצמה ומעידה -

Concerning two groups of witnesses who contradict each other; the ruling, according to ר"ה ור"נ, is **that each group may come independently** of the other **and testify**; we accept other testimonies (that are not related to their contradictory testimonies) from each group, as long as the witnesses of each group remain within their group and do not intermingle with each other[3] **-**

אף על גב דלפי עדות כל אחת חברתה פסולה לכל עדות -

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[1] Seemingly this תוספות should precede the previous תוס' ד"ה ואוקי.

[2] It is obvious, therefore, that the witnesses of one group are testifying falsely, and therefore are not suitable to be witnesses in the future as well. Nevertheless, since we do not know which group is the lying group, we place each group on their presumption of innocence (חזקת כשרות) and consider them to be עדים כשרים concerning other testimonies.

[3] If an עד of one group would combine with an עד of the contradicting group, then their testimony cannot be accepted. One of these עדים certainly lied in the contradictory testimony and is therefore פסול לעדות.

Even though that according to the testimony of each group **its companion** contradictory group is **disqualified for all** other **testimony;** each group it saying by implication that the other group is lying and therefore (besides that we should not accept their testimony in this case), they should be permanently disqualified from being עדים**.** Nonetheless the ruling is (according to ר"ה ור"נ) that even though we cannot resolve the contradictory case, we accept any other testimony where these two groups (or any other groups) do not contradict each other –

הכא נמי כיון דאין מכחישין אותם לומר שלא לוה כלום -

Here too, where one group claims that the עדים were קטנים ופסולים, and there is an אנן סהדי that contradicts them and claims that the עדי השטר are כשרים, we should follow the same ruling here as by שני כתי עדים המכחישות זו את זו, **since the** עדים הפוסלים **are not contradicting** the עדי השטר, and **saying that** the לוה **did not borrow anything;** the עדים הפוסלים are not testifying concerning the loan whether it took place (as the עדי השטר are indeed testifying), or not -

אלא אומרים אינכם נאמנים בדבר זה דפסולים הייתם ואמאי לא מגבינן ביה בשטר -

But rather the עדים הפוסלים **are testifying that you** (the עדי השטר) **are not to be believed concerning this** loan, **for you were disqualified** to testify; either because you were קטנים or פסולי עדות, etc. **So why do we not collect** the debt **with** this **שטר?!** The contradictory testimony is only concerning the status of the עדים. We cannot conclude whether or not the עדי השטר were כשרים, since this is a case of שני כתי עדים המכחישים זו את זו. However concerning whether or not there was a loan there is only one group of עדים that are testifying; namely the עדי השטר who claim that there was a loan. This is (seemingly) a 'new' case, where only one group of עדים is testifying unchallenged. There is no reason not to believe them (according to ר"ה ור"נ) that the loan took place.[4]

תוספות answers:

ויש לומר דהתם באה כל אחת בפני עצמה ומעידה -

And one can say that there by שני כתי עדים וכו', the reason **each group may come independently and testify,** is –

משום דמוקמינן כל אחת בחזקת כשרות -

Because we place each group **in a presumption of innocence;** we assume that each one individually has a חזקת כשרות. Before this case, each of the עדים was

[4] One cannot argue that since there is a doubt (on account of the תרי ותרי) whether the עדי השטר are כשרים, therefore we cannot accept their testimony; for in every case of שתי כתי עדות המכחישות וכו', each group claims that the other are פסולי עדות. There is in fact a ספק whether or not they are פסולי עדות, and nevertheless they are believed in other testimonies (on account of their חזקת כשרות). The same rule should apply here. They should be believed concerning the loan even if there is a ספק that they may be פסולי עדות.

presumed to be כשר. This חזקת כשרות supports them so we cannot disqualify them מספק. Therefore they can testify in other cases.

אבל הכא שאומרים קטנים היו או קרובים משנולדו עד עתה שנתרחקו -

However here, that the עדים הפוסלים **claim** that **the** עדי השטר **were minors** when they signed the שטר, **or** the עדים הפוסלים claim that the עדי השטר **were relatives** to one of the parties **from birth until now, when they became distanced**, they are no longer related,[5] therefore -

ליכא למימר אוקמינהו אחזקתייהו דפסלינן אותן משנולדו -

We cannot say: 'place them on their presumption of כשרות', **for** the עדים הפוסלים **are disqualifying them from birth.** In the case of שתי כתי עדים וכו' each כת is פוסל the other כת from this testimony onwards. However since it is תרי ותרי, and we are not sure which כת is פסול, therefore there is a ספק. We say that each כת has a חזקת כשרות from before this case, where even according to the opposing כת, at that point they were עדים כשרים. Therefore we accept their future testimony on account of this חזקת כשרות. In our case, however, the עדים הפוסלים are testifying that the עדי השטר were either קטנים, in which case there is no prior חזקת כשרות;[6] or that they were קרובים from birth, in which case there is also no חזקת כשרות. There never was a time when we know for certain that the עדי השטר were כשר to testify on this שטר. When the opposing testimony does not allow for a חזקת כשרות, they cannot be believed to claim that there was a loan. They have no חזקת כשרות for the time when the loan took place, since the עדים הפוסלים are claiming that they were פסול then, from the time of birth onwards.

תוספות anticipates the following question; that by the claim of אנוסים מחמת נפשות, the עדי השטר do have a חזקת כשרות. Before they signed on this שטר מחמת אונס they were עדים כשרים. The עדי השטר should be believed that there was a loan.[7] תוספות explains:

ואנוסים היו נמי מחמת נפשות לא שייך לאוקמי אחזקה דהא לא פסלי להו כלל -

And also in the case where the עדים הפוסלים claim that the עדי השטר **were אנוסים מחמת נפשות,** we also cannot believe the עדי השטר that there was a loan; **it is not possible** to **place them on their חזקת** כשרות and therefore believe them, **for the** עדים הפוסלים **do not disqualify at all** the עדי השטר. The reason the עדים המוכחשין are believed to testify in other cases, even though they are contradicted and considered עדים פסולים by the opposing כת is because since there is a ספק if they are פסולים

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[5] See תוספות יט,ב ד"ה ואם, that we must be discussing a case where they say that עתה נתרחקו. It seems from תוספות that if the עדים הפוסלים stated that the עדי השטר were פסול for they were רשעים or that they became related to each other some time before the שטר was signed (but not from birth), in which case the עדי השטר do have a חזקת כשרות (from before they became רשעים, or from before they were related), then we would collect with this שטר as in a regular תרי ותרי. See footnote # 8 and 'Thinking it over # 2.

[6] Even though there is a חזקה that אין עדים חותמין אא"כ נעשה בגדול, nevertheless that is not a חזקת כשרות in these עדים, rather it is a חזקה regarding the הנהגה of writing a שטר (see מהר"ם שי"ף).

[7] See 'Thinking it over # 3.

or not. The חזקת כשרות resolves the ספק in their favor. However here the עדים הפוסלים claim that the עדי השטר were אנוסים מחמת נפשות and the אנן סהדי claims that it is a valid שטר; there is therefore a ספק whether or not they were אנוסים מחמת נפשות. There is no חזקת כשרות that can resolve this ספק. The עדים הפסולים are not impinging on the integrity of the עדי השטר.[8] Since there is no חזקת כשרות that can resolve the issue; therefore the ספק remains a ספק. We cannot accept testimony when there is a ספק if this testimony is true or not.

תוספות offers another explanation why we do not say here אוקמי אחזקתייהו:

ורבי שמשון בן אברהם אומר דהכא לא מוקמינן להו אחזקה[9] -

And the רשב"א explained that here we do not place them in a חזקת כשרות because –

כדאמר לעיל משום דאילו הוו קמן דלמא הוו מודה:[10]

As the גמרא just **stated previously, 'because if** the עדי השטר **would be before us perhaps they would have admitted'** that they were אנוסים, קטנים or פסולי עדות. Therefore it may not be considered as תרי ותרי; but rather there is only one group of עדים that is clearly stating that the עדי השטר are פסולים. It is possible that the עדי השטר would agree with them.

Summary

The rule, that by שני כתי עדים המכחישות זו את זו they can each באה בפני עצמה ומעידה, is limited to situations where the contradictory testimonies allow for a חזקת כשרות. However if the testimony does not allow for a חזקת כשרות (or does not impinge on the חזקת כשרות) then they cannot testify.

Alternately they can only testify if they openly contradict the opposing עדים, not if their contradiction is merely assumed (by a אנן סהדי, etc.)

Thinking it over

1. There seem to be differences between the case here (שנים החתומים על השטר) and the case there (by תרי ותרי):

A. Here, the עדים הפוסלים are testifying directly that the עדי השטר are פסולים (and their intent is to be פוסל the שטר); there, the עדים are merely

[8] It would seem that if the עדים הפוסלים would claim that the עדי השטר were אנוסים מחמת ממון, then we would be able to collect with this שטר on the basis of the חזקת כשרות of these עדים that they would not sign if it was 'merely' אנוסים מחמת ממון. See footnote # 5 and 'Thinking it over' # 2.

[9] According to the answer of the רשב"א, there would not be a חזקה even if they testified that they were רשעים or *became* קרובים (and not necessarily that they were קרובים משנולדו). See footnote # 5.

[10] See 'Thinking it over' # 5.

contradicting each other concerning the case; the פסלות (for other cases) is merely implied.[11] The עדים המכחישין זא"ז have no known intent to be פוסל the opposing עדים (for all future cases).

B. There, the opposing עדים are explicitly contradicting each other (and therefore implicitly stating that the opposing עדים are פסולים and cannot be פוסל others); however here, no one is directly opposing the עדים הפוסלים and claiming that the עדי השטר are כשרים; it is 'merely' a אנן סהדי that the שטר was done בכשרות.[12]

C. There, the עדות which will be accepted lies in the future; here, the עדות which תוספות wants us to accept is in the past.

D. There, the conflicting testimonies cancel out each other and the חזקת כשרות (which was never invoked) remains. Here, the אנן סהדי and the claim of the עדים הפוסלים seemingly cancel out each other. However the אנן סהדי is seemingly based 'merely' on a presumption of כשרות. Once the אנן סהדי and the עדים הפוסלים cancel out each other there no longer remains a חזקת כשרות! The חזקת כשרות was 'used up' in cancelling the עדים הפוסלים.

Are these differences sufficient to make a distinction להלכה between the two cases, and if they are, why does תוספות not consider them?

2. תוספות explained that when the עדים הפוסלים claim משנולדו or קרובים אנוסים there is no חזקת כשרות to support the עדי השטר. This implies that if they claimed פסולי עדות היו because of גזלנות, or קרובים היו but not משנולדו, and similarly אנוסים היו מחמת ממון, then there is a חזקת כשרות and we can collect with the שטר as in תו"ת.[13] Why then does the גמרא ask ומגבינן ביה כבשטרא מעליא והא תו"ת נינהו; perhaps the ברייתא is discussing these types of cases where the עדי השטר have a חזקת כשרות and we can collect even in a case of תו"ת?!

3. תוספות explains that by אנוסים היו there is no impingement on their חזקת כשרות and therefore we cannot accept the testimony of the עדי השטר.[14]

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[11] See הפלאה כב,א תוד"ה תרי.

[12] Is there a סברא that, according to רב חסדא who maintains that תו"ת are פסולים להעיד, then the עדים הפוסלים should be פסול להעיד since there is a תו"ת against them on account of the אנן סהדי?! (מפי מו"ח ז"ל).

[13] See footnotes # 5 & 8. See מהר"ם שי"ף.

[14] See footnote # 7.

Seemingly in the case of אנוסים היו, there never was a question initially that the עדי השטר should be believed. The עדים הפוסלים are not merely claiming that the עדי השטר are פסולים להעיד, but rather they are claiming that there was no loan. This is the simple meaning of אנוסים היו; they were coerced to sign on the שטר (by the מלוה, etc.) even though there was no loan. Otherwise why was there a need for coercion?! How can there even be a הו"א that the עדי השטר should be believed when the עדים הפוסלים claim there was no loan?!![15]

4. תוספות initial question is that we should believe the עדי השטר that there was a הלואה. Does תוספות mean to ask that it should be considered as a מלוה על פה or a מלוה בשטר?[16]

5. The רשב"א explains that there is no חזקת כשרות since it is possible that אילו הוו קמן דלמא הוו מודו.[17] However, their הודאה cannot (seemingly) destroy their חזקת כשרות, for it will be considered as חוזרים ומגידים, which is ineffective! We will not consider them as קטנים וכו'![18]

[15] See בית יעקב.
[16] עיין משכנות הרועים אותיות שצו ושצז.
[17] See footnote # 10.
[18] See מהר"ם שי"ף and (חו"מ סי' כט ס"ק ב) שער המשפט.