

ומי אמר רבי אלעזר הכי והאמר רבי אלעזר כולי –

And did א"ר say this; but א"ר said, etc.

OVERVIEW

The גמרא asks; how can ר"א rule that if he claims פתח פתוח מצאתי he is believed, and she becomes אסורה to him (if there is only one ספק), when ר"א ruled elsewhere that a woman cannot become אסורה לבעלה, only in restricted circumstances (of קנאי, etc. (וסתירה), etc. תוספות discusses the viewpoint of this questioner (the מקשן).

תוספות asks:

תימה השתא דבעי למימר דלא מהימן אפילו לשוייה עליה חתיכה דאיסורא¹ -

It is astounding! Now that this מקשן wants to assert that the husband is not believed, even to ‘make her a forbidden object to him’, therefore -

תיקשי ליה מתניתין דהאומר לאשה קידשתיך אסור בקרובותיה² –

This משנה, which states that one who says to a woman, ‘I betrothed you’, is forbidden to her relatives; this משנה contradicts him.³

תוספות answers:

ויש לומר דסבירא ליה למקשן דאין דבר שבערוה⁴ פחות משנים⁵ -

And one can say; that the מקשן assumed that no דבר שבערוה is effective with less than two witnesses -

ואפילו ראה אדם שזינתה אשתו רק שלא היה שם עדים לא היתה נאסרת עליו⁶

¹ The believability that ר"א grants to his claim of פתה פתה is limited to the prohibition which he is placing on himself (but not that we actually believe him to deny her כתובה payments, for instance). It is generally accepted that if a person claims that (on account of circumstances known to him) a certain item is prohibited to him, he is prohibited from it. This is called אנפשיה חתיכא דאיסורא. A classic example is the משנה (mentioned in our גמרא) which תוספות cites immediately. He is forbidden to her relatives not because we know that he was מקדש this woman, but merely since he said he was מקדש her, so automatically he was דאיסורא חתיכא אנפשיה to all her relatives.

² A man is forbidden from his wife's relatives; i.e. her mother, sister, or daughter, etc.

³ The question is that just as (according to the מקשן) his wife should not be אסורה to him since there were no עדים that she was מזנה (as there is by קנני וסתירה), similarly (in the משנה) there were no עדים that he was מקדש this woman; why is he אסור בקרובותיה. It cannot be on account of his admission that he was מקדש her, for here too we are not accepting his admission that פתח פתוח מצאתי.

⁴ A דבר שבעררה (literally of an immoral nature) refers to illicit relationships, marriages and divorces.

⁵ One cannot marry or divorce unless there are two witnesses present. Similarly one cannot be punished for illicit relationships unless two witnesses testify to that effect. [We derive this from the פסוקים of דבר בה ערות כי מצא בה עדות דבר (in א, כד, [תצא] דברים) and (in יט, טו [שופטים] דברים) that דבר יקום וגו' על פי שני עדים וגו'; this גזירה שוה of 'דבר דבר', teaches us that א"י דבר שבערו פחות מ'.

⁶ There was no meaningful act (of זנות), with halachic consequences (according to the מקשן), since עדים did not observe it; just as there can be no meaningful act of קדושין וגירושין unless witnesses observe it. See 'Thinking it over'.

So therefore (this מקשן assumed) **even if a person saw that his wife was מזנה, however if there were no witnesses there to observe this זנות, she would not be prohibited to him** (since 'אין דבר שבערוה פחות מב' ⁷ -

והלכך ממתניתין לא קשיא ליה מידי דקדשתין בעדים קאמר ⁸ -

So therefore there is no difficulty at all from the משנה (which states that he is since when he said, 'I was מקדש you' he meant with witnesses -

תוספות proves that he meant with witnesses -

דמקדש אפילו בעד אחד אין חוששין לקדושין ⁹ -

For if one is מקדש even with one עד; his קדושין are inconsequential (and certainly if there were no עדים), so obviously when he said קדשתין he meant with עדים -

אבל אהא דאמר רבי אלעזר דנאמן בלא עדים לומר דמצא פתח פתוח פריך שפיר:

However regarding that which ר"א said that he is believed to claim that he found a פתח פתוח, even without עדים; the מקשן asks correctly (that a woman is not אין דבר שבערוה פחות, unless there is קנוי וסתירה בעדים), given his assumption that שווייה אנפשיה חתיכא דאיסורא applies even to משנים.

SUMMARY

The מקשן assumed that שווייה applies even to cases where שווייה אנפשיה חתיכא דאיסורא.

THINKING IT OVER

therefore, אין דבר שבערוה פחות מב' since מקשן assumed that, answered that תוספות there can be no דאיסורא (עדים without). ¹⁰ The גמרא answered that שווייה אנפשיה חתיכא דאיסורא (מקשן) that there can be דאיסורא ר"א maintains (not like the עדים without. Why then does the גמרא ask ר"א on מאי קמ"ל, when he is teaching us and rejecting the המקשן ¹¹!?

⁷ The מקשן agrees to the concept of שווייה אנפשיה חתיכא דאיסורא generally, however when it comes to a שבערוה, the חתיכא דאיסורא denies this זנות (עדים without), מעשה זנות אין דבר שבערוה פחות משנים of גזירת הכתוב.

⁸ There were עדים by this קדושין (however they are not present now); therefore his admission of קדושין has its inevitable consequence that he is בקרובותיה אסור.

⁹ He would not be בקרובותיה אסור.

¹⁰ See footnote # 6.

¹¹ See מהרש"א [הארוך].