

תרויהו בפנויה קמסהדי -

They are both testifying concerning an unmarried woman

OVERVIEW

and קדושין עדים in cases of ברייתא concerning contradictory עדים interprets the גירושין, to being taking place in a situation where two individual עדים are contradicting each other. Therefore, in the case of ע"א אומר נתקדשה וע"א אומר (לא תנשא) ואם נשאת לא תצא the ruling is לא נתקדשה, since they both agree that she was a פנויה before this controversial קדושין, and only one says that it took place. It follows that one עד cannot contradict the assumption of both עדים that she was initially a פנויה; therefore תצא אם נשאת לא תצא. This תוספות questions firstly, the need for an עד to say לא נתקדשה (to permit her to remain married) and secondly, why she cannot (re)marry לכתחלה since she is פנויה בחזקת פנויה.

comments: תוספות

לא הוה צריך להא' דאפילו ליכא אלא ההוא דאמר נתקדשה לא תצא -

It was not necessary to mention this fact that they were both testifying that she was unmarried (before this controversial קדושין), **for even if there were not** two who testified, **but rather only the one who maintains that she was betrothed** previously to someone else (and no one contradicted him); nevertheless **she would not** be required to leave her new husband. The reason is –

דאין דבר שבערוה פחות משנים -

For a matter concerning illicit relations cannot be established with **less than two** witnesses. There are no two witnesses here who testify that the woman was married (only the ע"א), therefore she remains פנויה בחזקת פנויה. תוספות does not resolve this difficulty.²

asks: תוספות

אבל תימה³ אמאי לא תנשא לכתחלה דהוה לן לאוקמה אחזקה -

¹ It would seem more appropriate that תוספות is referring to the phrase 'ואין דבריו של אחד במקום שנים'. The עד who testifies לא נתקדשה is merely stating that she was not נתקדשה at the time when the other עד claims that נתקדשה. He is not (necessary) claiming that she was never נתקדשה.

² See תרומה בא"א קא מסהדי it was necessary to state סיפא since in the תוספות הרא"ש answers that therefore in the רישא he also mentions קא מסהדי בפנויה קא מסהדי.

³ Even if we are to ignore the previous difficulty, for it is 'merely' a 'technical' difficulty, not a difficulty in the actual ruling (or answer it somewhat; see previous footnote # 2); nevertheless there is the following difficulty which questions the ruling itself.

However it is astonishing; why can she not initially be permitted to remarry?! For בי"ד should place her on her presumptive פנויה status,⁴ since the עד that claims נתקדשה is contradicted by the עד who claims לא נתקדשה. We should therefore fall back on her פנויה חזקה!⁵

answers: תוספות

ויש לומר כגון שאנו יודעים שזרק לה קדושין ומספקא לן אי קרוב לו או קרוב לה⁶ -

And one can say, that we are discussing a case where for instance we know that the 'husband' threw קדושין money towards her, and we are in doubt whether the קדושין money landed closer to him (and she is not מקודשת); or whether it landed closer to her (in which case she is מקודשת). This was known for a fact (without the two contradictory עדים)⁷ -

והני ב' סהדי חד אמר קרוב לו וחד אמר קרוב לה -

And these two contradictory עדים, one claimed that it landed closer to him, and one claimed it was closer to her. Therefore -

דכיון דודאי זרק לה הקדושין לית לן למימר אוקמה אחזקה להתירה לכתחילה -

Since it is certain that he threw קדושין money to her, we cannot rule that we should place her on her חזקה to permit her to marry לכתחילה. Her חזקה (ספק קדושין) has been severely flawed by the knowledge that an act of קדושין (albeit a ספק קדושין) has been performed. Once there is no חזקה פנויה, ודאי חזקה פנויה, she may not marry לכתחילה.⁸

offers another possibility: תוספות

אי נמי כגון שהיו נרות דולקות ומטות מוצעות -

Or you may also say, that we are discussing a case where for instance the candles were lit and the beds were spread with linens, which indicates -

⁴ See מהרש"א that the ע"א is testifying that she was נתקדשה בפני שנים. The חזקה פנויה should resolve the contradictory testimony of the two עדים. See (following footnote # 5 and) 'Thinking it over' # 1.

⁵ This is different than if נתקדשה ושנים אומרים לא נתקדשה; it is therefore a situation of תרי ותרי, and by תו"ת (even if there is a חזקה היתר, nevertheless) it remains a ספק מדרבנן. However here it is a case of בהכחשה ע"א and therefore we should certainly follow the חזקה דמעיקרא (even מדרבנן). See (also) previous מ"ש. [Alternately since here there is only an ע"א, therefore he cannot be believed since אין דבר שבערוה פחות משנים.]

⁶ See גיטין עח, א, where the משנה states that if a man throws a גט to his wife, if it landed closer to him she is not מגורשת, and if it landed closer to her she is מגורשת. There are differing opinions there as to the exact meaning of קרוב לו and קרוב לה. The same rule will apply by קדושין.

⁷ See 'Thinking it over' # 2.

⁸ This ספק is different than if נתקדשה וע"א אומר לא נתקדשה. There we are not sure that any קדושין took place at all, and she retains her חזקה פנויה. We only have the word of an ע"א and אין דבר שבערוה פחות. However in this case we know that there is a ספק קדושין, this denies her, the חזקה פנויה status.

שהיה עומד לקדש כדאמר בסוף המגרש⁹ (גיטין פט, א) -

That the husband was preparing to marry her, as the גמרא states in the end of המגרש -

ועד אחד אומר נתקדשה ועד אחד אומר לא נתקדשה באותה שעה:

And one עד claims she married and the other עד claimed she did not marry at this very time that the first עד claimed that she married. In this case as well, the חזקת פנויה is seriously flawed by the indications that a wedding was about to take place. Therefore the ruling is לכתחלה.

SUMMARY

If there are indications that place a serious doubt on her status חזקת פנויה (such as קרוב לו וקרוב לה, or גירות דולקות, etc.), this prevents her from marrying (but she may remain married).

THINKING IT OVER

1. What is the דין if an א"א claims that a woman was נתקדשה בפני שנים; is he believed against her חזקת פנויה?¹⁰
2. What would be the דין: a) if there were only two עדים, one said he threw it to her and the other קרוב לה? b) If we know that he threw the קדושין to her ספק קרוב לו ספק קרוב לה; and there were no עדים at all to testify positively that it was either קרוב לה or קרוב לו?¹¹
3. In our case of גירות דולקות was there a קול (ע"א) that she was נתקדשה?¹²
4. Why did תוספות choose to give the example of קרוב לו וכו' before the example of גירות דולקות וכו'? Seemingly, the case of גירות דולקות is where the גמרא (גיטין) specifically states that she loses her חזקת פנויה!
5. Is there any value in a flawed חזקה?

⁹ The משנה there (פח, ב) states that מקודשת הרי זו מקודשת. The גמרא there explains that there was a קול that she was נתקדשה היום when it was known that מוצעת. Otherwise, a קול is meaningless.

¹⁰ See footnote # 4.

¹¹ See (footnote # 7 and) (קרוב לסופו ובהערה מ).

¹² See אילת השחר (for # 4 as well).