**תרוייהו** **בפנויה קמסהדי -**

**They are both testifying** concerning **an unmarried** woman

Overview

אביי interprets the ברייתא concerning contradictory עדים in cases of קדושין and 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 נתקדשה the ruling is (לא תנשא) ואם נשאת לא תצא, 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 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 בחזקת פנויה.

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תוספות comments:

**לא הוה צריך להא[[1]](#footnote-1) 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 בחזקת פנויה. תוספות does not resolve this difficulty.[[2]](#footnote-2)

תוספות asks:

**אבל תימה[[3]](#footnote-3) אמאי לא תנשא לכתחלה דהוה לן לאוקמה אחזקה -**

**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]](#footnote-4) since the עד that claims נתקדשה is contradicted by the עד who claims לא נתקדשה. We should therefore fall back on her חזקת פנויה![[5]](#footnote-5)

תוספות answers:

**ויש לומר כגון שאנו יודעים שזרק לה קדושין ומספקא לן אי קרוב לו או קרוב לה[[6]](#footnote-6) -**

**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]](#footnote-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 לכתחלה.** Her חזקת פנויה has been severely flawed by the knowledge that an act of קדושין (albeit a ספק קדושין) has been performed. Once there is no ודאי חזקת פנויה, she may not marry לכתחלה.[[8]](#footnote-8)

תוספות offers another possibility:

**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 -

**שהיה עומד לקדש כדאמר בסוף המגרש[[9]](#footnote-9) (גיטין פט,א) -**

**That** the husband **was preparing to marry her, as** the גמרא **states in the end of** פרק **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 לא תנשא לכתחלה.

Summary

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

Thinking it over

1. What is the דין if an ע"א claims that a woman was נתקדשה בפני שנים; is he believed against her חזקת פנויה?[[10]](#footnote-10)

2. What would be the דין: a) if there were only two עדים, one said he threw it קרוב לו 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 לו or קרוב לה?[[11]](#footnote-11)

3. In our case of נרות דולקות was there a קול (beside the ע"א) that she was נתקדשה?[[12]](#footnote-12)

4. Why did תוספות choose to give the example of קרוב לו וכו' before the example of נרות דולקות וכו'? Seemingly, the case of נרות דולקות is where the גמרא (in גיטין) specifically states that she loses her חזקת פנויה!

5. Is there any value in a flawed חזקה?

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. [↑](#footnote-ref-1)
2. See תוספות הרא"ש who answers that since in the סיפא it was necessary to state תרווייהו בא"א קא מסהדי, therefore in the רישא he also mentions תרווייהו בפנויה קא מסהדי. [↑](#footnote-ref-2)
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. [↑](#footnote-ref-3)
4. See מהרש"א that the ע"א is testifying that she was נתקדשה בפני שנים. The חזקת פנויה should resolve the contradictory testimony of the two עדים. See (following footnote # 5 and) ‘Thinking it over # 1. [↑](#footnote-ref-4)
5. This is different than if שנים אומרים נתקדשה ושנים אומרים לא נתקדשה where the ruling is לא תנשא (לכתחלה). For there, there are two עדים who maintain נתקדשה; it is therefore a situation of תרי ותרי, and by תו"ת (even if there is a חזקת היתר, nevertheless) it remains a ספק מדרבנן. However here it is a case of ע"א בהכחשה and therefore we should certainly follow the חזקה דמעיקרא (even מדרבנן). See (also) previous תוספות ד"ה מ"ש. [Alternately since here there is only an ע"א, therefore he cannot be believed since אין דבר שבערוה פחות משנים.] [↑](#footnote-ref-5)
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. [↑](#footnote-ref-6)
7. See ‘Thinking it over’ # 2. [↑](#footnote-ref-7)
8. This ספק is different than if ע"א אומר נתקדשה וע"א אומר לא נתקדשה. There we are not sure that any קדושין took place at all, and she retains her חזקת פנויה. We only have the word of an ע"א and אין דבר שבערוה פחות משנים. However in this case we know that there is a ספק קדושין, this denies her, the חזקת פנויה status. [↑](#footnote-ref-8)
9. The משנה there (פח,ב) states that יצא שמה בעיר מקודשת הרי זו מקודשת. The גמרא there explains that there was a קול that she was נתקדשה היום when it was known that נרות דולקין ומטה מוצעת. Otherwise, a קול is meaningless. [↑](#footnote-ref-9)
10. See footnote # 4. [↑](#footnote-ref-10)
11. See (footnote # 7 and) משכנות הרועים אות תרצז (קרוב לסופו ובהערה מ). [↑](#footnote-ref-11)
12. See אילת השחר (for # 4 as well). [↑](#footnote-ref-12)