ורב נחמן כרב הונא – And ר"נ follows the opinion of ר"ה

Overview

Our גמרא explains the opinion of רב נחמן who maintains that the עדות אבהתא is accepted, even though these עדים were contradicted concerning the עדות אכילה. The reason is because רב נחמן agrees with רב הונא that in a case of תרי ותרי, even though both groups of עדים are ספק פסול, nevertheless we disregard this ספק פסול and maintain the original חזקת כשרות of both groups of עדים. They are believed in any other testimony (besides the contradictory testimony, where we cannot believe either of them). According to רב נחמן this applies even to a (different) testimony (עדות אבהתא) in the very same case where they were contradicted (עדות אכילה) and considered a ספק פסול.[1]

תוספות asks a question:

ותימה דבפרק ב' דכתובות (דף יט,ב) תניא – And it is perplexing! For we have learnt in a ברייתא in the second פרק of כתובות –

שנים שהיו חתומין על השטר ומתו – Two witnesses **that were signatories on a document, and they died** subsequently before the document was authenticated –

ובאו שנים שאמרו – and two other people **came and stated –**

[ידענו] שכתב ידם הוא [זה][2] – we know that this is the handwriting of the deceased witnesses; they are authenticating the signatures –

אבל קטנים [היו][3] – however they were minors when the signed this שטר –

או פסולי עדות [היו] עדים – or they claimed that the deceased **were disqualified**

או אנוסים היו[4] – or they were coerced to sign this document. On one hand the second group authenticated the חתימות; however they maintain that the document is invalid for the reasons given. The ruling is as follows:

אם כתב ידם יוצא ממקום אחר – if the signatures of the deceased **can be authenticated from another source;** there are certified copies of their signatures available which compare favorably with the signatures on this document, then the second group of עדים –

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[1] The מהרש"א explains that the ruling of ר"ה ור"נ does not apply in a case where עדים are directly disqualifying other עדים by claiming that they are גזלנים. In this case all will agree that (we do not say it is תרי ותרי, but rather that) the second group is פסול for all עדות. The עדים that are being disqualified cannot be considered as תרי, for now they are the בעלי דבר, and not עדים. However in the case of ר"ה ור"נ the עדים are contradicting each other concerning something else. Neither group can be considered as בעלי דבר, but rather as עדים. It is only in these cases where the פסלות is merely implied, that we consider it תרי ותרי. (See footnotes # 4, 13-15)

[2] See הגהות הב"ח.

[3] See previous הגהות הב"ח.

[4] The עדים הפוסלים are claiming that the עדים החתומין were פסול at the time of the חתימת השטר, but not that they are פסול לעדות now (See footnote # 1).

אין נאמנין – are not believed to disqualify the שטר[5]. This concludes the quote from the ברייתא.

תוספות continues:
ופריך – and the גמרא there **challenges** this ברייתא, which states that the second group are not believed, this implies –
ומגבינן ביה בשטרא – and we collect with this contested **שטר!** How can this be?! It is -
תרי ותרי נינהו – two against **two!** The two latter עדים are disqualifying the two עדים on the שטר. Therefore even if we authenticate their signatures from elsewhere, nevertheless the two latter עדים are claiming that it is an invalid שטר. It is תרי ותרי![6] After some discussion in the גמרא –
רב נחמן – ומסיק התם (כ[7])רב נחמן concludes there –
דלא מגבינן בשטרא – that we cannot collect with this **שטר –**
ואוקי תרי להדי תרי – for we place two עדים who disqualify the שטר **against the two** עדים who validate the שטר[8] –
ואוקי ממונא בחזקת מריה – and we place the money in the possession of its owner[9]. Whoever has the money gets to keep it, regardless what it says in the שטר.

תוספות now presents the difficulty:
ואמאי לא מגבינן ביה – and why do we not collect with this שטר?!
והא סבירא ליה הכא כרב הונא – for the same ר"נ **maintains here as ר"ה** does -
דכשרים הם לעדות אחרת - that the עדים המוכחשים **are כשרים** עדים **for** any **other testimony** where there are not being contradicted. The reason for this is –
דמוקמינן להו אחזקת כשרות – for we place each group of these עדים המוכחשים **on their** original **presumption of כשרות[10].**

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[5] If, however אין כתב ידם יוצא ממקום אחר, and the only authentication is from these עדים who claim קטנים היו וכו', the שטר is invalid. These latter עדים are believed for it is considered הפה שאסר הוא הפה שהתיר. We can only validate the שטר is on account of their testimony, but they simultaneously claim that the עדים were פסול. It seems that even though מיגו בי תרי לא אמרינן (see previous תוספות ד"ה וזו), nevertheless הפה שאסר וכו' בי תרי, we do say.

[6] It is considered תרי ותרי even though no one is actually disputing the witnesses who claim קטנים היו וכו'. The reason is, because once we authenticate their חתימות it is presumed that they were עדים כשרים. This presumption is considered as if the עדים החתומין are testifying that they were עדים כשרים and what they signed is true. This is implicit in the very essence of a שטר.

[7] As corrected in the margin.

[8] See previous footnote # 6.

[9] If it would be a case where אין כתב ידם יוצא ממקום אחר, then בי"ד would tear up the שטר. In this case בי"ד does not tear up the שטר; nor does it validate the שטר.

[10] In the case of our גמרא, the עדים are contradicting each other concerning אכילה; each group implying that the other is testifying falsely, thus פסול for any other עדות. Nevertheless since it is only a ספק פסול (for there is contradictory testimony) we maintain (according to רב נחמן) the original חזקת כשרות of each group allowing them to testify (even in the very same case) if they are not contradicted in this testimony.

והתם [נמי][11] כעדות אחרת דמי – and there [also] the testimony concerning the loan **is similar to another testimony** from the testimony concerning their qualification as עדים**.**
דהא אין מכחישים אלו – for these עדים who claim קטנים היו וכו' **are not discrediting –**
את החתומים בזאת המלוה – those עדים **that signed on this loan –**
שהיו אומרים שאין חייב לו כלום – that the עדים הפוסלים **should be saying that the** לוה **owes nothing to** the מלוה. The עדים הפוסלים are not saying this.
אלא שאמרו – but rather the עדים הפוסלים **claimed** that **-**
אינכם נאמנים בדבר זה – you are not to be believed concerning this matter –
דפסולים הייתם – for you were disqualified; either by being קטנים or אנוסים וכו'. Therefore –
והוה לן למימר דנאמנים – we should have maintained that the עדי השטר **be believed** concerning the loan –
The עדי השטר since they were authenticated are (presumed to be) testifying that they were עדים כשרים[12]. In addition, they testify to the veracity of the loan. The עדים הפוסלים are only testifying concerning the כשרות of the עדי השטר. They are not testifying whether the loan is true or not. These two groups of עדים are מכחישים זה את זה concerning one thing only; whether or not the עדים were כשר when they signed the שטר. We cannot come to any conclusion since it is תרי ותרי. However concerning the loan there is no contention. The עדי השטר testify that there was a loan and no one is contradicting them. Therefore according to רב נחמן (and רב הונא) the עדות on the loan should be considered an עדות אחרת than קטנים היו וכו', and the עדי השטר should be believed concerning the loan.[13]

כמו הכא דכשרים – just like here in the מחלוקת between ר"נ and רבא, where ר"נ maintains that the עדי אבהתא **are כשר –**
אף על גב דאלו מכחישים אותם – even though that these other עדי חזקה **are contradicting them** concerning the חזקה, and by this contradictory testimony –
ופוסלים אותם – they disqualify the עדי אבהתא (וחזקה)
וחושבין אותן – and the עדי חזקה **consider the** עדי אבהתא (וחזקה)
כשאר פסולים – like all **other disqualified** עדים
לכל דבר עדות – for any matter of testifying. In the eyes of the עדי חזקה the עדי אבהתא (וחזקה) are liars and should be disqualified from ever testifying again. Nevertheless, we do not accept their implication; for the עדי אבהתא (וחזקה) have a חזקת כשרות, and are believed in all other testimony, even concerning אבהתא which is affecting

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[11] See הגהות הב"ח.
[12] See previous footnote # 6.
[13] This question is valid only because the עדים הפוסלים are not claiming that they are פסול now, but rather they were פסול at the time of the חתימת השטר. They were קטנים then, etc. The עדי השטר would not be considered בע"ד, since we are discussing a past testimony; not their current status. If however the עדים הפוסלים would claim that the עדי השטר are עדים פסולים now, then it would not even be תרי ותרי since the עדי השטר would be בע"ד, and not עדים. The עדי השטר would be disqualified and the שטר would be discarded. See footnote # 1.

the same case in which they were contradicted. The same should be true in the case of קטנים היו וכו', that the עדי השטר should be believed concerning the loan.

תוספות answers:

ואומר רבינו יצחק – and the ר"י says –

דכי אמרו קטנים היו – when the disqualifying עדים **said** that the signatories **were minors** when they signed the שטר; so even though it may be considered תרי ותרי, nevertheless –

ליכא לאוקמינהו אחזקייהו – we cannot establish them on their presumption of כשרות. The question here is whether or not these עדים were קטנים when they signed this שטר. There is no חזקה that they we not קטנים; on the contrary every person was previously a קטן! If there is a question if they liars or not (as in our גמרא), then they have a חזקת כשרות, but not concerning if they were קטנים or גדולים. Therefore the ספק remains.

תוספות continues to explain the next case:

וכן אנוסים – and similarly when the עדים claim that the חתומין were **אנוסים –**

נמי לא מפקי להו מחזקת כשרות – they also did not exclude the עדים החתומין **from** their **חזקת כשרות –**

דאמרינן אנוסין היו מחמת נפשות – for we assume that they meant that the עדים החתומין **were coerced** to sign **under the threat of death**. One is not permitted to sign falsely if threatened by monetary loss. If he does he becomes פסול לעדות. However if one is threatened with his life, he is permitted to sign falsely, and certainly does not become פסול לעדות. The עדים are claiming that the עדים החתומין were אנוסים מחמת נפשות; the עדי השטר (presumptuously) claim that they were not אנוסים. It is תרי ותרי. However there is no חזקה that can tell us that they were not אנוסים מחמת נפשות.[14]

תוספות now explains the last case: When the עדים הפוסלים stated that the עדים החתומין -

ופסולי עדות היו – were disqualified עדים which could seemingly mean that they are רשעים; in that case there would be a חזקת כשרות, that they are not רשעים. Nevertheless there is no difficulty –

דאיכא למימר – for we can say that פסולים means –

כגון שפוסלים אותם משנולדו – for instance that they disqualify the עדים החתומין **from when they were born;** meaning –

שאומרים קרובים היו – that the עדים הפוסלים **say** that the עדים החתומין **were relatives** (either to each other or to the מלוה or לוה) from birth –

ועכשיו נתרחקו – and now they became distanced; the relationship no longer exists[15]. It was a relationship due to a marriage for instance and the marriage dissolved

[14] If the עדים הפוסלים would claim that the עדות החתומין were אנוסים מחמת ממון, which is forbidden, then it would be similar as if they were פוסל them by גזלנותא. The עדי השטר become בע"ד and they and the שטר would be פסול. If, however, the עדים הפוסלים testify that the עדי השטר subsequently did תשובה, they are not בע"ד any more, but considered עדים. Therefore, on account of the תרי ותרי, we would utilize the חזקת כשרות to absolve them from this accusation and be מכשיר them (for other עדות) as well as the שטר.

[15] It is required that the עדים הפוסלים agree that now the עדי השטר are not relatives. If they claim that they are relatives (even) now, then the עדי השטר become בע"ד, and there is no תרי ותרי (see footnotes # 1, 4, 13 & 14).

and they are no longer relatives[16]. In this case also since the עדים claim that they were relatives from birth, there is no חזקת כשרות that tells us they were never relatives. Therefore even though it is תרי ותרי, it remains a ספק. That is why רב נחמן there concludes that אוקי ממונא בחזק מריה for there is no חזקת כשרות that can resolve the תרי ותרי.

Summary

The דין (of ר"ה ור"נ) that עדים המכחישים זא"ז are permitted to testify for other עדויות, is limited to situations where a חזקת כשרות can resolve the ספק פסול created by the תרי ותרי. If however there is no חזקה that can resolve the תרי ותרי, the ספק remains (and the עדים certainly cannot testify in the same case even for a different עדות).

Thinking it over

1. Is תוספות asking that the עדים should be believed concerning the loan, or that the שטר should be כשר? (What is the difference between these two options?)[17]

2. It would seem that if they claim אנוסים היו, they are also implying that there was no loan. Why does תוספות include this in his question and answer?

3. In the case of קטנים היו why do we not say there is a חזקה that אין העדים חותמין על השטר אא"כ נעשה בגדול?

4. What changed in תוספות understanding, from the קשיא to the תירוץ?

[16] For instance if a(n older) sister of an עד married the מלוה before the עד was born. That is a פסול קורבה משנולד. The עד cannot testify for his sister's husband. Once they are no longer married the עד may testify on behalf of the מלוה.

[17] See משכנות הרועים on מס' כתובות אות שצו-ז.