

Because of his sister's daughter

משום בת אחותו –

OVERVIEW

maintains that the reason the חכמים were by גיטין is because of 'his niece'; meaning that we are concerned for a cover up. תוספות explains how there can be a cover up (if there would be no זמן)

שלא יחפה עליה כשאלו בו זמן¹ –

So that he should not cover up for her, if there will be no זמן –

responds to an anticipated question:²

דלא אמרינן אוקמה אחזקת אשת איש והשתא הוא דאיגרשה³ -

For we do not say, place her on the presumptive status of an אשת איש and therefore presumably she became divorced just now (we do not make the presumption) כיון שהיא גרושה לפנינו⁴ –

Since she is presently divorced (as she stands) before us -

ועוד⁵ אדרבה אוקמה בחזקת כשרה⁶ שלא נבעלה כשהיא אשת איש:

And in addition (we cannot presume her to be א"א (בחזקת א"א) for on the contrary, place her in the presumptive status of an אשה כשרה (this חזקה asserts), that she was not נבעלה while she was married.

SUMMARY

We do not assume that she was מזנה while she was an א"א because she is a גרושה and has a חזקת כשרות בפנינו.

¹ רש"י ד"ה משום.

² We (presumably) know that this woman was מזנה with someone else. The question here is when the divorce became effective (since there is no זמן). Seemingly since the woman was an אשת איש, the burden of proof should be on her that she was divorced when she was מזנה. How can he be מחפה? תוספות addresses this issue.

³ Were we to make this presumption then there could not be any יחפה, for she will be presumed an אשת איש up until the present (or whenever there are עדים that saw her with the גט).

⁴ Since she is currently a גרושה, we will assume that this is her status retroactively until we can prove with certainty at some point that then she was married then. Since this is difficult to prove, the husband will be able to be מחפה.

⁵ See פנ"י (and others) that the two reasons of גרושה בפנינו and חזקת כשרות together outweigh the דמיעקרא חזקה; however either one of these reasons alone could not remove the חזקת א"א. See (however) # 120, that others disagree and maintain that they are two separate answers, עיי"ש.

⁶ Every person has a חזקת כשרות until we can determine with certainty, that they lost that חזקת כשרות. Regarding this woman her חזקת כשרות asserts that there was no זנות. Being with someone while she is a פנויה does not destroy her חזקת כשרות.

THINKING IT OVER

Generally what is stronger; a חזקה דהשתא or a חזקה דמעיקרא?⁷

⁷ See אג"ה # 127.