

## **האי קולא הוא חומרא הוא - Is this a leniency?! It is being severe!**

### **OVERVIEW**

Our גמרא states, that preferably, two witnesses should be required to testify that the גט is written לשמה; however רבנן בה אקילא עיגונא משום, and one witness is sufficient. To which the גמרא responds: 'האי קולא הוא חומרא הוא', that the repercussions of this קולא can be detrimental to the woman in the long run. Therefore it would be preferable (for the woman) that no leniency be made for her. Rather we should treat her according to the letter of the law, requiring two עדים.

Previously we learnt that an ע"א is not believed in a case of דבר שבערוה. There is an exception to this rule. If a husband is missing, and there is one עד who testifies that he is dead, we believe the עד, and the woman is permitted to remarry. This קולא is a דין דרבנן to alleviate the plight of עגונות. To insure that this leniency should not lead to frivolous testimony by an ע"א, the רבנן instituted harsh consequences for the woman, should the original husband return, after she remarries. They include that she will not be permitted to live with either husband, will lose her כתובות, etc. These penalties are not incurred if the woman remarries based on the testimony of two witnesses. In which case, if her original husband returns, she may return to him, etc. תוספות discusses the differences between these two cases.

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**בריש האשה רבה (יבמות פח,א) גבי חומר שהחמרת עליה בסופה -**

**In the beginning of the פרק האשה רבה, concerning (the logic of) 'the severity that you will eventually impose on her'<sup>1</sup>;** the גמרא continues this discussion -

**דפריך לא לחמיר ולא ליקל -**

**And asks: let us not be severe and not be lenient.** We will not have to be severe with her (in case her husband returns after she remarried on the basis of one witness), if we will initially not permit her to remarry based on the testimony of only one witness; let us require two עדים -

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<sup>1</sup> The גמרא there is discussing the case of a woman whose husband left. If one witness testifies that the husband is dead, she may remarry, based on his testimony. The גמרא asks how can an ע"א be believed against a חזקת אשת איש? The גמרא responds that since the woman is aware that in case she will remarry and her original husband will return, there will be serious repercussions, therefore she will be very careful to be sure that her husband is indeed dead before she remarries.

**ומשני משום עיגונא אקילו בה רבנן -**

**And the גמרא replied; out of concern** that she may remain an **עיגונה**, **the רבנן were lenient** and permitted her to get married on the basis of the testimony of an ע"א. This concludes the citation of that גמרא.

responds to an anticipated question:

**לא שייך למיפרך האי קולא הוא חומרא הוא<sup>2</sup> -**

**It is not appropriate to ask** there as we ask here, **'is this a leniency** that we let her remarry on the basis of an ע"א?! **It is being strict'** with her –

**דאי מצרכת לה תרי ובא בעלה מותרת לחזור כדאמרינן התם -**

**for if you will require two witnesses** to testify that her husband died, in order for her to remarry, **and then her husband will return** after she remarried on the basis of their testimony, then the דין will be that **she is permitted to return** to her former husband, **as the גמרא says there** in יבמות. Her 'marriage' to the second husband is invalid, since she was an איש the entire time and אין קידושין תופסין בה.

**והשתא בחד תצא מזה ומזה -**

**But now** when you permit her to remarry on the testimony of **one** witness, then if her husband returns, the דין is **she must leave both 'husbands'**. She is not permitted to live with either of them. We see therefore that by permitting her to marry on the testimony of one witness, which may seem a leniency, nevertheless it may turn out to be to her detriment; for she will lose both 'husbands'. The question is: why did not the גמרא in יבמות ask (like here): האי קולא הוא חומרא הוא?!

סוגיות answers by distinguishing between the two תוספות.

**דהתם זימנין דלא אפשר לתקן כשלא ראה אלא אחד שהיה מכיר שהוא בעלה -**

**for there** in יבמות מס', **oftentimes it is impossible to institute** that two witnesses must testify about her husband's death, for there are instances **where only one person, who recognized that he was her husband, saw him die -**

**ואפילו אם היו שם רבים מי יביאם בכאן להעיד -**

**And even if many people**, that recognized him, saw him die **there**, nevertheless **who will bring them here to testify?!** Therefore we cannot require two witnesses to testify, because there will be occurrences where we will not have two witnesses, and she will remain an עיגונה. Therefore we must be lenient and allow her to

<sup>2</sup> Our גמרא was not satisfied with the answer of רבנן בה רבנן and asked האי קולא הוא וכו' (and two should be required); why is the גמרא there satisfied with the answer of משעום עיגונא וכו' and does not also ask (to require two עדים)! See 'Thinking it over' # 3.

remarry based on the testimony of an ע"א.

**אבל כאן יכול לשלחו בשנים -**

**However here**, in the case of שליח הגט, **he can send** the גט **with two** שלוחים, who will testify that it is לשמה. There is no need to be lenient if this leniency will eventually turn out to be a חומרא.

### **SUMMARY**

The question הוא חומרא קולא האי is appropriate by שליח הגט. We should require that the husband send the גט with two שלוחים, who will testify that the גט was written לשמה, thereby avoiding any possible contention by the בעל, which may lead to severe consequences for the woman.

In the case of האשה שהלכה בעלה למדה"י, we cannot demand, for the sake of the woman, that two עדים testify that the בעל died, for many times two עדים will not be available to testify. Therefore, if we want to prevent עגונות, we have no choice, but to accept the testimony of an ע"א.

### **THINKING IT OVER**

1. How do we differentiate between the גמרא's question (in יבמות): 'לא לחמיר' 'האי קולא הוא חומרא' and proposed question for the גמרא there: 'ולא ליקל' 'הוא'?

2. How can we differentiate between the answer בה רבנן משום עיגונא אקילא, which is given in יבמות, and the same answer which is given here?

3. previously<sup>3</sup> explained that the concern of לשמה is only for the לעז which may result from ערעור הבעל (but there is no serious concern of שלא (לשמה)). What was the question on the גמרא of יבמות<sup>4</sup>? There the woman will make sure that her husband is dead before she remarries because of the consequences she will suffer if he returns. However here even if we know that the גט was written לשמה, nevertheless the husband may come just to be לעז, and she will not be protected from this לעז, therefore we require two עדים. How can we compare the two סוגיות?<sup>5</sup>

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<sup>3</sup> ב,ב ד"ה לפי (הב').

<sup>4</sup> See footnote # 2.

<sup>5</sup> See # 86 אמ"ה and גליון הש"ס להגרע"א.