והא קיימא לן דאין עד נעשה דיין הני מילי בדאורייתא כולי –

But we have determined that a witness cannot become a judge?! This is valid only **concerning תורה** issues **etc.**

Overview

There are certain texts which add a question and answer on the מ"ד who maintains that עד נעשה דיין. Those texts read: והא קי"ל דאין עד נעשה דיין, ה"מ בדאורייתא אבל מדרבנן עד נעשה דיין. Then the גמרא resumes by asking (as is our גירסא) on the מ"ד אין עד נעשה דיין. However רש"י and תוספות do not include the question and answer on the מ"ד עד נעשה דיין in the text of the גמרא.

רש״י לא גריס ליה[1] והדין עמו -

רש"י does not include in his text the phrase: והא קי"ל דאין עד נעשה דיין וכו' **and he is correct** in deleting this phrase from the text -

כיון דפשיטא דבדרבנן עד נעשה דיין כדפריך לבסוף -

Since it is obvious that concerning **rabbinic** issues **a witness may act as a judge** in the same case in which he is testifying **as the** גמרא **subsequently asks.** The גמרא will soon ask; how can we maintain that concerning בפ"נ we say אין עד נעשה דיין?! This cannot be for בדרבנן the rule is עד נעשה דיין! It is evident that the גמרא takes it for granted that בדרבנן עד נעשה דיין. If this is true, then -

היכי פריך מעיקרא הא קיימא לן דאין עד נעשה דיין -

How can the גמרא **ask initially, that our presumption is that אין עד נעשה דיין?!** These are two contradictory presumptions![2]

תוספות anticipates a possible answer and rejects it. Perhaps when the גמרא stated originally והא קי"ל אין עד נעשה דיין', we thought that our case here, namely saying בפ"נ for a גט, is a דאורייתא situation. The גמרא then responded ה"מ מדאורייתא אבל מדרבנן עד נעשה דיין informing us that בפ"נ is a רבנן situation. Therefore the גמרא asks והא קי"ל בדרבנן דעד נעשה דיין, since the גמרא already realized that it is only a דרבנן. תוספות rejects such an answer out of hand.

דהא פשיטא דלא סלקא דעתין דהכא הוי דאורייתא -

For it is certain that the גמרא **did not entertain the thought that here** (saying בפ"נ in the presence of a בי"ד) it **is a דאורייתא.** Everyone is aware that saying בפ"נ is merely a תקנת חכמים, not a דין תורה at all. Therefore we cannot be גורס here והא קי"ל דאין עד נעשה דיין' for this is in direct contradiction to the conclusion of the גמרא

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[1] See רש"י ד"ה הכי גרסינן.

[2] See 'Thinking it over' # 1.

which states 'והא קי"ל בדרבנן דעד נעשה דיין'.

תוספות will attempt to justify somewhat the גירסא of 'והא קי"ל דאין עד נעשה דיין' even though it contradicts the subsequent 'קי"ל'.

ומיהו בפרק קמא דכתובות (דף יא,א) יש קצת[3] כענין זה -

However in the first פרק of כתובות there is something similar to this situation; where the גמרא first assumes a certain attitude, then immediately reverses its position and assumes the opposite to what it originally suggested. This is -

גבי גר קטן מטבילין אותו על דעת בית דין -

Regarding a minor (child in the process of becoming a) **גר.** His mother brought him to בי"ד to be מגייר. Since he is not a בר דעת yet, the דין is that **we are טובל** the child for גירות, relying **on the consent of בי"ד;** they are his surrogate father -

ופריך מאי קא משמע לן תנינא זכין לאדם שלא בפניו כולי -

And the גמרא asks on רב הונא the author of this statement; **what is he teaching us?! We have learnt this in a משנה; one may make a beneficial acquisition for a person** even **not in his presence etc.,** and without his knowledge. The acquisition is valid as long as it is beneficial to the recipient, even though he is not aware of it. Here too by גירות we are making an acquisition for the child שלא בפניו, since he is not a בר דעת to be aware of what is occurring. We are 'acquiring' for him a Jewish status which is beneficial to him. What can be more beneficial than being a Jew?!

It is obvious that at this point when asking this question the גמרא presumes with certainty that it is definitely beneficial to the child to be מגייר him.

והדר פריך והא קיימא לן דודאי עבד בהפקירא ניחא ליה:

And subsequently the גמרא **refutes** this (challenge to רב הונא)[4] by saying **that we have determined that a slave certainly prefers the free** life style of an עבד to the more restricted life style of a ישראל.[5] There is now an opposite assumption; that for a non- Jew, becoming Jewish is not considered beneficial from his perspective. We see that in the same גמרא there are two opposite assumptions as to whether becoming Jewish is to be considered beneficial from the perspective of the non – Jew. Therefore we can perhaps justify the גירסא of 'והא קי"ל דאין עד נעשה דיין' even though it is in contradiction to the conclusion of the גמרא that בדרבנן עד נעשה דיין. It is possible that the first והא קי"ל disagrees with the second והא קי"ל.

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[3] This indicates that it is not completely identical. See 'Thinking it over' # 2.

[4] See מהרש"א who claims that תוספות had a different גירסא in כתובות concerning this 'והא קי"ל דודאי וכו'.

[5] We would think therefore that by this גר קטן it is also considered a חוב rather than a זכות to be מגייר. Therefore רב הונא teaches us (there) that only by an עבד גדול that was טעים טעמא דאיסורא is it considered a חוב to be מתגייר. However by a גר קטן it is considered a זכות.

SUMMARY

We are not גורס the question and answer of והא קי"ל דאין עד נעשה דיין, ה"מ מדאורייתא וכו'. There can be no קי"ל that אין עד נעשה דיין by the saying of בפ"נ, since the entire requirement of saying בפ"נ is a דין מדרבנן. We have a קי"ל that בדרבנן עד נעשה דיין. It is not credible to have two opposite והא קי"ל.

There is however a similar situation in כתובות where we find two opposite presumptions in the same גמרא, concerning whether גירות is a זכות for a non-Jew or not.

THINKING IT OVER

1. We find many times that the הו"א and מסקנא of the גמרא disagree totally. Why does תוספות find it unusual[6] that the הו"א maintains אין עד נעשה דיין and the מסקנא maintains that עד נעשה דיין?

2. Can we differentiate[7] between our גמרא and the גמרא in כתובות which תוספות cites?[8]

[6] See footnote # 2.
[7] See footnote # 3.
[8] See אמרי בינה (לר"ש גרמיזאן).