

הבא עליה באשם תלוי קאי –

Whoever comes upon her is liable for an אשם תלוי

OVERVIEW

The גמרא is discussing a case of a married woman, where two contradictory sets of עדים came, and one group claims that her husband died (or divorced her) while the other set denies that this took place; the rule is that if she remarries (illegally) she may remain married. The גמרא challenges this ruling; how can she remain married since there are contradictory witnesses (one set of which claims that she is still a married woman), whoever lives with her may be transgressing a תורה prohibition, and is liable to bring a קרבן ספק¹! The issue in this תוספות is whether this woman is considered a אשם תלוי, on account of the תרי ותרי; or perhaps she should be considered a אשת איש, on account of her חזקה דמעיקרא that she was an איש.

asks: תוספות

תימה דבחטאת קאי דהא מסקינן בפרק ד' אחים (יבמות דף לא, א ושם) -

It is astounding to maintain that whoever is בועל this woman is obligated (only) for an אשם תלוי, when in fact he should be **obligated for a חטאת**, **for the גמרא concludes in אחים** - פרק ד' -

דתרי ותרי ספיקא דרבנן ומדאורייתא אוקמה אחזקה² -

For a case of two עדים against two עדים, is deemed to be a ספק only³; **however** **we place** this woman on **her original presumptive status** that she is married. If she is בחזקת אשת איש, then whoever is בועל her, is liable for a חטאת, and not for an אשם תלוי!

has an additional question: תוספות

ומאי משני נמי כשניסת לאחד מעדיה הא עד נמי בחנק קאי דאוקמה אחזקה -

¹ An אשם תלוי (a 'hung' [doubtful] guilt offering) is brought when there is an (evenhanded) doubt that a תורה prohibition has been violated. A classical case is when there are two pieces of meat, one of which is not כשר, and someone ate one of the pieces and is unsure which one. In our case on account of the contradictory testimonies she seems to be a ספק אשת איש. Whoever lives with her is חייב an אשם תלוי. See following תוספות ד"ה באשם.

² If תרי ותרי would be a ספיקא דאורייתא, then it would be understood that קאי תלוי באשם, for it is a ספק; however מדאורייתא in a case of תרי ותרי we follow the חזקה דמעיקרא (in this case she is אשת איש). She is therefore אסורה.

³ When the חזקה דמעיקרא is a חזקה היתר, the חכמים rule that (even though מדאורייתא it is מותר, nevertheless) it is ספיקא דאורייתא לחומרא, for the חכמים deem it to be a ספק.

And in addition, what does the גמרא answer, that she married one of her witnesses (who testified that her husband died or divorced her); the answer is insufficient, for that witness too, is liable for the חנק death penalty⁴ (for there is no ספק), since we place her on her איש חזקת אשת איש.

answers: תוספות

ואומר רבינו תם דחזקה דאשה דייקא ומנסבא מרעה לה להך חזקה -

And the ר"ת answers that the (opposing) חזקה, which is that a woman is meticulous and marries only after a scrutinizing investigation,⁵ diminishes the strength of this חזקת אשת איש.⁶ These two חזקות cancel out each other. It is therefore considered as if there is no חזקה דמעיקרא and the תרי ותרי is ruled as a ספיקא. ⁷ Therefore נשאת לאחד since it is a ספיקא דאורייתא באשם תלוי קאי, and if לאחד there is no problem (for the עד), for he maintains that there is no ספק; he observed the מיתת הבעל.

now proves that the חזקה of ומנסבא דייקא cancels the חזקת אשת איש:

דמהאי טעמא נמי שרינן לה כי ליכא עדים כלל אף על פי שהיא בחזקת אשת איש:

For it is also for this very same reason that we permit her to remarry even if there are no witnesses at all,⁸ even though she is איש בחזקת אשת איש;

⁴ See (וכו') מהרש"א who comments that תוספות differentiates between הבא עליה that he should be (merely) מחויב חטאת (for he is a שוגג and may have thought the she was פנויה (בחזקת פנויה); and אחד מעדיה who should be [מת בעליך] (בחזקת א"א [for he is testifying] and seemingly aware that there is a תר"ת situation, which places her א"א (בחזקת א"א). See also רבה אליהו רבה.

⁵ The חזקה of ומנסבא דייקא אשה is (usually) associated with the severity she will encounter if her original husband returns after she remarries on the basis of the testimony of an אחד עד; but not if two עדים testified that her husband died (as in our case). See תוספות הרא"ש (here and אנן ד"ה אנן [TIE footnote # 27]) who maintains that since here it is תרי ותרי, she will suffer the severe consequences if her husband returns, therefore she is ומנסבא דייקא. See there and in תו"י in the margin (brought in footnote # 7) why the חזקה of ומנסבא דייקא applies (even) to the case of נגדרשה (where seemingly it can never be disproven that her husband divorced her, since two עדים testify to that on her behalf).

⁶ The commentaries explain that even though at this point in the גמרא we have not as yet established that we are discussing a case where she claims לי שמת, nevertheless there is the חזקה of ומנסבא דייקא אשה; either because the woman even though she is not ברי, nevertheless she ascertains that the היתר will not be contradicted; or that the חזקה of ומנסבא דייקא affects the (המתירים) עדים, they will not lie, for she may be דייקא and prove them wrong. See משכנות הרועים אות תרמז-ח.

⁷ See (mentioned in footnote # 5) who writes; ובשנים אומרים נתגרשה נמי דייקא כי יראה שלא יוזמו עידיה אבל חזקה דאין אשה מעיזה ליכא כיון דאיכא עדים דקא מסייעי לה. And when two say she was divorced, etc., she is also meticulous, for she is afraid that her witnesses may be impeached; she does not, however, have the חזקה that a woman is not brazen (to claim she is divorced, and therefore believed when she does claim so), since she has witnesses who support her claim of divorce.

⁸ תוספות is referring to the הלכה that if one עד (even a לעדות, or even the wife) testifies that the husband died; the woman is permitted to remarry (with precautionary consequences which insures us that דייקא (ומנסבא).

for the abovementioned reason that the חזקה of וּמִנְסָבָא דִּיִּקָּא cancels the חזקת אשת איש,⁹ and we permit her to remarry.

SUMMARY

חזקת א"א דמעיקרא we follow the מדאורייתא; ספק מדרבנן is only a תרי ותרי; however the חזקה of וּמִנְסָבָא דִּיִּקָּא cancels out the חזקת א"א and it remains a ספיקא דאורייתא.

THINKING IT OVER

If a person is aware that there is a ספק דאורייתא in the act that he is performing, is he required to bring an אשם תלוי?¹⁰

⁹ Even though that the reason we allow her to remarry is because משום עיגונא אקילו בה רבנן; nevertheless if the חזקת א"א would remain (despite the וּמִנְסָבָא דִּיִּקָּא), the reason of עיגונא would not be sufficient to overrule a חזקת איסור. Therefore we must say that the דִּיִּקָּא removes the חזקת איסור, and משום עיגונא provides that she is not considered (מדרבנן) as a דבר שבערוה, and any עד is sufficient. See תרמט.

¹⁰ See also following תוספות and תרנב הרועים אות תרנב.