

אנן אחתינן ליה אנן מסקינן ליה – We lowered him, we will elevate him

OVERVIEW

The גמרא details the case where ר"א ורשב"ג argue. There was a חזקה that the father was a כהן, and this was followed by a קול that the son is a גרושה (so his כהונה rights were forfeited), after which an ע"א testified that the son is כשר, whereupon he was (re)elevated to the status of כהונה. This was followed by two עדים claiming that he was a גרושה and another עד saying that he is a כשר. Initially the גמרא explained that רשב"ג maintains we are not דב"ד and we return him to his כהונה status. The question תוספות discusses is how can we give him a כהונה status when there are two עדים (who contradict the המכשירים) and maintain that he is a גרושה בן.

פירש בקונטרס¹ אף על גב דתרי ותרי נינהו אוקי תרי להדי תרי ואוקי גברא אחזקתיה² - **explained; even though there are two עדים against two עדים (so how can we elevate him to כהונה), nevertheless we place the two against the two to cancel them out and we place this person on his presumptive status of כהונה.**

questions this explanation:

וקשה לרבינו יצחק דבפרק האומר בקדושין (דף סו,א ושם) קאמר גבי ינאי³ היכי דמי - **And the גמרא מסכת קדושין in פרק האומר ר"י has a difficulty with פרש"י, for in פרק האומר ר"י states regarding ינאי; what is the case -**

אילימא דתרי אמרי אשתבאי ותרי אמרי לא אשתבאי -
If we say that two עדים said she was captured and two עדים said she was not captured (and that is why ינאי was vindicated), that is not a valid explanation, for -

מאי חזית דסמכת אהני פירוש אהני דאמרו לא אשתבאי סמוך אהני -
Why do you see to depend on these, meaning those that said she was not

¹ בד"ה ואנן.

² See there who writes עד הראשון שהוא נאמן דהא אכתי אין עוררין דקול לאו עוררין רש"י. (See footnote # 57.)

³ There was a controversy surrounding the (גדולה) כהונה of ינאי המלך. There were rumors that before his birth, his mother was in captivity among non-Jews; thereby making (her a (מדרבנן) זונה and making ינאי a חלל who is פסול. [A Jewish woman who had relationships with a non-Jew is considered a זונה. She is forbidden to marry a כהן. Any child she has from a כהן is considered a חלל, who is לכהונה פסול. A woman who was held captive among non-Jews is considered as a זונה, regardless whether it is known for sure if they had any relationship with her.] The חכמים 'suggested' that ינאי give up the כהונה on account of these rumors. The חכמים there continue to relate that the matter concerning her captivity was investigated and the rumor could not be substantiated. The גמרא there asks how is this that the rumor could not be substantiated, and ינאי was vindicated (as תוספות here continues).

captured, depend on the others who say she was captured; the question is -

ואמאי קאמר ויבוקש הדבר ולא נמצא -

So why did the חכמים say the matter was investigated and could not be substantiated, when seemingly it is substantiated that ינאי is the son of (at least a ספק) captive and should be פסול לכהונה (at least מספק). This concludes the citing of the גמרא. The question on אוקי תרי לבהדי is that even if there were תרי ותרי that would still vindicate ינאי because we say אוקי תרי לבהדי! What is the גמרא's question there?!

answer to this question: cites רש"י's תוספות

והתם⁴ פירש בקונטרס דלא אמרינן אוקי תרי בהדי תרי ואוקי גברא אחזקיה -

And אוקי תרי בהדי תרי we do not say ינאי in the case of רש"י explained there that - **ואוקי גברא אחזקיה**

דהא לא באו להעיד על אמו אלא על ינאי ולו לא היה חזקת כשרות -

Because the mother (who has a חזקת עדים) did not come to testify regarding ינאי's **but rather they were testifying regarding ינאי, and ינאי had no חזקת כשרות.**

In summation; רש"י is saying that even though the status of ינאי is completely intertwined with the status of his mother, nevertheless since we are not discussing the mother, only ינאי, therefore the חזקת כשרות of the mother is not effective for ינאי, the son.

disagrees: תוספות

ואין נראה לרבינו יצחק דחזקת האם מהניא גם לינאי כדמשמע הכא⁵ -

And the ר"י disagrees, for the חזקה of the mother is effective even for ינאי as it seems here⁶ -

ואמרינן נמי לעיל בפרק קמא (דף יג, א ושם) לדברי המכשיר בה מכשיר בבתה⁷ -

And the גמרא also said previously in the first פרק that the one, who validates her, validates her daughter as well. The same should apply to ינאי and his mother.

⁴ ואי אמרת אוקי תרי לבהדי תרי ואוקי איתתא אחזקתה הני מילי אי היא קמן והיתה באה לב"ד להתירה אבל, where he writes, בד"ה סמוך ⁴ There was no discussion regarding the permissibility of the mother to marry into כהונה, only the status of ינאי.

⁵ The suspected גרושה here also has no חזקה; the reason we are מעלה him to כהונה is because of the חזקה of the father who is מוחזק to be a כשר, כהן, the same should apply to ינאי that the חזקת האם should apply to him.

⁶ It will be necessary to say (according to תוספות) that the חזקת האב means (not merely that the father is a כשר, כהן, for how does that negate the possibility of the son being a גרושה, but rather) since the father is כשר, כהן, he is also בחזקת כהן כשר. [קובץ שיעורים ב"ב אות קלב (see רש"י).] [See also רש"י (פנ"י) that he will not marry a גרושה that he is also בחזקת כהן כשר.]

⁷ The case there is where a (unmarried) woman was pregnant and she claims נבעלתי; the view of ר"ג is that she is believed. There is an opinion in the גמרא that just as she is believed regarding herself (that she is not לכהונה) similarly the daughter that is born is also לכהונה. This is because the חזקת כשרות of the mother is transferred to the daughter, even though the daughter has no חזקת כשרות.

responds to an anticipated difficulty:

ואפילו מאן דפסל בבתה⁸ היינו משום דמעלה עשו גבי זנות⁹ -

And even the one who invalidates the daughter for כהונה, that is because the made an extra stringency for יוחסין regarding זנות.

mentions and negates another attempted resolution between our גמרא and the case of ינאי:

וגם אין לומר כמו שתירץ רבינו תם דליכא למימר התם אוקמינן אחזקה -

And we can also not say as the ר"ת answered, that there by ינאי we cannot say that we should place ינאי on the חזקה of the mother -

לפי שכל הנשים היו בחזקת שבויות¹⁰ -

Because all the women were presumed to be captives. This is the answer of the ר"ת -

rejects this answer:

דאם כן היכי מייתי מינה ראיה על אשתו שזינתה בעד אחד¹¹ -

For if indeed all the woman were בחזקת שבוייה, how can אביי bring proof from the story of ינאי regarding the case of a woman who an ע"א claimed she was מזונה -

דשאני התם דכל הנשים בחזקת שבוייה אבל אשתו זינתה היא בחזקת היתר -

For the case of ינאי is different (than the case of אביי), since (according to the ר"ת) all the women were בחזקת שבוייה, therefore the ע"א is believed (since he is supported by a חזקה), however by the case of שזינתה (the case of אביי) the alleged woman has a חזקת היתר, so what proof does אביי bring from ינאי. Therefore we must say that in the case of ינאי there was no חזקת שבוייה either, and אם ינאי had a חזקת היתר (just like the case of אביי).

In summation; the view of תוספות is that the חזקת האם (והאב) is (ולבן) לבת; we therefore need

⁸ We could therefore say that the גמרא in ינאי regarding קדושין maintains that the פוסל בבתה, therefore the חזקת האם, and the גמרא here maintains that the חזקת האם מהני לבת, therefore we are מעלה the son לכהונה. The חזקה here maintains that the חזקת האם מהני לבת, and the גמרא here maintains that the חזקת האם מהני לבת, therefore we are מעלה the son לכהונה.

⁹ The חכמים were stricter regarding a child who was born from זנות (like in the case of the unmarried woman) and decreed that in that case the חזקת האם לא מהני לבת (perhaps because since she is promiscuous, she is not that careful with whom she has relations with). However where the child was not born from זנות, like here or in the case of ינאי, all will maintain that חזקת האם מהני לבת.

¹⁰ According to the ר"ת it was presumed that all the women in מודיעים (the place where we suspect ינאי was captured) were captured during a war. In addition to this presumption there were עדים who testified that the mother was captured and עדים who testified that she was not captured. Even if we are to say ינאי תרי לבהדי תרי, אוקי תרי לבהדי תרי, nevertheless the חזקה is that they were all captured.

¹¹ There is an argument there between אביי ורבא in a case where an ע"א told the husband that his wife was מזונה, whether the wife becomes אסורה to the husband. אביי maintains that the עד is נאמן and she is אסורה לבעלה. To prove his point, אביי cited the case of ינאי and argued that it cannot be a case of תרי ותרי there, for we should follow the עדים who say אישתבאי, therefore we need to say that there was one עד who said אישתבאי and two עדים said אישתבאי, therefore ינאי was vindicated. If however there would not have been the two עדים that said אישתבאי, then ינאי would be פסול because we believe the ע"א.

כשר is בן גרושה where תרי ותרי because of the חזקת האב, and the case of ינאי where he would be פסול (if there would be תרי ותרי) even though there is a חזקת האם.

Tosfos offers his interpretation:

ונראה לרבינו יצחק דתרי ותרי ספיקא דרבנן הוא¹² ומדרבנן החמירו דלא מוקמינן לה אחזקה -
And it is the view of the ר"י that תו"ת is a ספק דרבנן and it is מדרבנן that we are
strict and we do not place her on her חזקת היתר; this explains why by ינאי he would be
פסול -

והכא בתרומה דרבנן הקילו -

And here regarding תרומה דרבנן the חכמים were lenient and permitted him to eat
(ספיקא דרבנן לקולא and) חזקת היתר since there is a תרומה דרבנן.

In summation; ר"י and רש"י both agree that by תו"ת we follow the חזקה. However according to ר"י that is only if the person in question has a חזקה (as in our case where he has a חזקת היתר [through the ע"א]) but not where the חזקת היתר comes from the parent (as by ינאי). The ר"י maintains that even where there is a חזקת היתר, if it is an איסור דאורייתא (like by ינאי) the רבנן consider it a ספק and we are מחמיר.

Tosfos will cite several sources which seem to contradict the ר"י and resolve them:

ובפרק בכל מערבין (עירובין דף לה,א) גבי תרומה ונטמאה כולי -

And in תרומה and עירובי תחומין regarding one who made an עירובי פרק בכל מערבין
the עירוב became טמא, etc. -

ספק¹³ הרי זה חמר גמל¹⁴ דברי רבי מאיר¹⁵ ומוקי לה רבה ורב יוסף בשתי כתי עדים -

¹² we follow the חזקה and if there is a חזקת היתר it is permitted; however the רבנן decreed that even though there is a חזקת היתר it should still be considered as a ספק. Therefore if the issue at hand is a תורה issue (like the case of ינאי, where a חלל is מדאורייתא), the חכמים said that ספיקא דאורייתא לחומרא, notwithstanding that there is a חזקת היתר (see 'Thinking it over' # 1); however if the issue at hand is a דרבנן (like in our case where we are debating whether he can eat תרומה דרבנן) then it is permitted since ספיקא דרבנן לקולא. The ר"י negates the view that תו"ת is a ספק דאורייתא and we do not take the חזקה status into consideration. Obviously if there was a חזקת איסור, then it would be אסור דאורייתא or an איסור דרבנן (whether it is an איסור דאורייתא or an איסור דרבנן).

¹³ There was a doubt as to when the עירוב became טמא; whether it was before שבת began in which case it is not a valid עירוב (since once the תרומה becomes טמא and has to be burnt it is no longer לאכילה when שבת begins), or it became טמא after the onset of שבת (in which case it is a valid עירוב since it was (לכהן) when שבת began).

¹⁴ Literally this means 'donkey camel'. It is as if a donkey is pulling him in one direction and the camel in the opposite direction so he can barely go anywhere.

¹⁵ A person may place his עירוב (up to) two thousand אמות from (his home in) the city. The עירוב entitles him to go an additional distance of אמה אלפיים in all directions from the place of the עירוב (his שביטה) only. In our case if the עירוב is valid, that is his מקום שביטה and he can go אלפיים אמה from the place of his עירוב only. If the עירוב is not valid he can go אלפיים אמה only from his home (and cannot go past the עירוב). ר"מ maintains that we place both stringencies on him and he can only go from his house to the place of the עירוב (two thousand אמה) but no further (because perhaps the עירוב is not valid), and he cannot go from his house in the opposite direction from his עירוב.

If there is a **doubt** as to when the עירוב became טמא, **this** person is like a ‘**donkey camel**’; **this is the view of ר"מ**. And ר"י established that this ספק was a result of **two groups of עדים** who offered contradictory testimony as to when the עירוב became טמא. This concludes the citation from the גמרא.

responds to the anticipated difficulty:¹⁶

הא דלא מוקמינן לה אחזקתה¹⁷ דלא נטמאת אף על גב דתרומה בזמן הזה דרבנן -
The reason we do not place the תרומה on its כשרות status and assume that it did not become טמא before שבת, since תרומה בזה"ז -
היינו משום דערובי תחומין דאורייתא לרבי מאיר¹⁸ -

That is because ר"מ maintains that עירובי תחומין is a דאורייתא, therefore we need to go לחומרא –

offers another distinction between the case of עירוב and our cases:

אי נמי שאני התם דאיכא ריעותא דהרי נטמאת לפניך ולא אמרינן השתא הוא דאיטמי¹⁹ -
Or you may also say; it is different there by עירוב, for there is a flaw in its חזקת חזקת, since presently it is טמא, so we do not say it became טמא now (during שבת), but rather it was טמא in the past up to the time we knew it was טהור –

anticipates a difficulty with this reasoning that we follow the השתא²⁰:

אף על גב דגבי מקוה אמרינן השתא הוא דחסר²¹ ואתאי (נדה דף ב,ב) –

(because perhaps the עירוב is valid).

¹⁶ Since תרומה is תרומה בזה"ז, and ספיקא דרבנן לקולא, therefore (since it is a case of תו"ת) we should place the תרומה on its חזקת חזקת that it became טמא (as late as possible) after שבת began (see following footnote # 17) and the עירוב should be valid. See ‘Thinking it over’ # 2.

¹⁷ This is not precisely the same case as here (or by ינאי) where one group of עדים say there was no פסול (or she was not captured), however in the case of עירוב both groups of עדים agree that the תרומה became טמא (and is presently טמא), nonetheless since both agree that initially it was not טמא and one כת maintains that it became טמא after שבת began, we should assume that its initial טהור status remains until we became sure that it is טמא (which is after שבת began). See second answer (footnote # 19).

¹⁸ This seemingly means that even though the concern whether it is טמא or not is only regarding דרבנן (where we would rule that דרבנן לקולא) since מדאורייתא it is not תרומה at all, nevertheless since this impinges on a דאורייתא issue (namely עירובי תחומין) therefore we do not say דרבנן לקולא. That is reserved exclusively for instances where the entire issue is דרבנן, like in our case; תרומה דרבנן. [Alternately, the תרומה now is certainly טמא, so as far as the תרומה is concerned it is irrelevant as to when it became טמא; the question is only whether the עירוב (which is a דין דאורייתא) is valid, so therefore we are מהמיר.]

¹⁹ See footnote # 17. Instead of following the חזקה דמעיקרא when it was טהור and assume that it remained טהור until we know for certain that it became טמא, we can follow the חזקה דהשתא that it is now טמא and assume that it was טמא all the time up to the point where we knew for certain that it was טהור.

²⁰ See previous footnote # 19.

²¹ The רש"י amends this to read: אי לא דאיכא למימר חסר ואתאי. The גמרא there is discussing a מקוה that had the שיעור (of סאה) and after a while it was found to be lacking the שיעור; the rule is that any טבילה that was done after

Even though that regarding a מקוה we [would be prone to] say it is now that it became deficient (and not that it was deficient earlier), and we do not follow the חזקה דהשתא, but rather the חזקה מעיקרא; why is it different by עירובי תחומין?

תוספות responds:

הכא דאיכא שתי כתי עדים לא אמרינן השתא הוא דאיטמי²² -

Here where there are two groups of עדים and one group said it became טמא before שבת, we do not say it became טמא now (after שבת began).

In summation: According to this last answer we say that by a ספיקא דרבנן [even if it is תרי ותרי] if there is a חזקה דהשתא לאיסורא, however if there is a חזקה דהשתא לאיסורא [just a regular ספק] (however if there is no תרי ותרי we rule לחומרא) we follow the חזקה דהשתא לאיסורא [except when there is a סברא even if there is a חזקה דהשתא לאיסורא] (as by מקוה)).

פר"י anticipates an additional difficulty on the תוספות:

ובשנים אומרים מת ושנים אומרים לא מת דאמרינן לעיל (דף כב, ב) לא תצא -

And in the case where two עדים said the husband died and two other עדים said he did not die; where the רבנן ruled that if she remarried she need not leave her new husband -

ולא מוקמינן לה אחזקת אשת איש²³ -

And we do not place her on her initial status as a married woman, which would prevent her from being together with her new husband. This contradicts the view of the ר"י that

the last measurement is invalid. The גמרא there explains that we follow the חזקה דהשתא (where it is חסר) and not the חזקה דמעיקרא, because the nature of a מקוה is that it loses water a little at a time and not all at once. Therefore since now it is a חסר we assume that it was losing water for a period of time. It is apparent from that גמרא that if not for this reasoning of חסר ואתאי we would follow the חזקה דמעיקרא and the past טבילות will be valid. Therefore it follows that by עירובי תחומין where there is no סברא and no logic to tell us when it became טמא. We should follow the חזקה דמעיקרא (that it was טהור) and not the חזקה דהשתא (that it was טמא).

²² In a case where there is a ספק (without contradictory עדים) as in the case of the מקוה we could say that we follow the חזקה דמעיקרא (if not for the סברא and rule לקולא); however in a case where two עדים testify לחומרא (as by עירובי תחומין where two עדים state that it was נטמא before שבת) we cannot follow the חזקה דמעיקרא and say that it became נטמא on שבת, since there are two עדים who testify that it was נטמא before שבת.

²³ This question does not seem to related to the view of the ר"י, for the ר"י maintains that by תו"ת we follow the חזקה (see footnote # 12). However by ספיקא דאורייתא, however מדאורייתא even if there is a חזקה דהשתא, nevertheless if it is a ספיקא דאורייתא it will be אסור (and we do not follow the חזקה דהשתא) so certainly when there is a חזקה דהשתא she should be לבעלה and be תצא. However, we can explain this as follows; if we maintain תו"ת is a ספיקא דאורייתא (and we do not follow the חזקה), then we can explain the ruling of לא תצא as the גמרא explained it previously that נשאת לאחד מעדיה ואמרת ברי לי, this removes the ספיקא דאורייתא; however if we follow the ruling of the ר"י that by תו"ת the דין תורה is that we follow the חזקה, so once she has a חזקה דהשתא even if נשאת לאחד מעדיה וכו', that cannot change her status as an א"א ודאי. [This scenario of נשאת לא' מעדיה ואמרת ברי לי will have to be utilized in (some of) the following cases.]

by every תו"ת we revert to the initial חזקה status. In this case her חזקה status is that she is an א"א; how can we allow her to remain married to the new husband?!

תוספות responds; the reason why it is לא תצא (despite the חזקת א"א) -

היינו משום דחזקה דאשה דייקא ומנסבא²⁴ מרעה לה לחזקת אשת איש -

That is because the presumption that a woman is meticulous in verifying her husband's death, **and only then does she marry, weakens her חזקת א"א**, and since she and the עד she married claim with a certainty that the husband died, therefore לא תצא -

תוספות anticipates a difficulty with the assertion that אשה דייקא ומנסבא in this case:

אף על גב דבשנים אומרים מת אמרין בהאשה רבה (יבמות פז,ב) דמותרת לחזור לו²⁵ -

Even though the גמרא states in פרק האשה רבה that if two witnesses testified that the husband died, she is permitted to return to her first husband -

וכיון דליכא חומרא בסוף לא דייקא²⁶ -

And since there is no stringency at the end, she is not that meticulous to prove that her husband died, therefore here too (by שנים אומרים מת וכו' where there are two עדים that say he died, she is seemingly not ומנסבא דייקא, and the חזקת א"א is not flawed, so why לא תצא?

תוספות responds:

מכל מקום הכא כיון דמכחישין זה את זה איכא חומרא²⁷ -

Nonetheless here by שנים אומרים מת וכו' אומרים לא מת since the two עדים כתי' עדים (תצא מזה ומזה וכו' she will be חומרא לבסוף) contradict each other there will be the חומרא לבסוף (she will be חומרא לבסוף) (תצא מזה ומזה וכו' she will be חומרא לבסוף), therefore she will be ומנסבא דייקא and that makes a ריעותא in the חזקת א"א.

תו"ת and דייקא ומנסבא continues the discussion regarding תוספות:

²⁴ The woman wants to be certain that her husband is dead before she remarries (in order to avoid the complications if he should return [that her children from the new husband will be ממזרים, and she will be מזה ומזה וכו' (תצא מזה ומזה וכו' (she will be חומרא לבסוף)], therefore this diminishes the power of her חזקת א"א and we consider her a ספק and since she is מעדיה וכו' we rule that לא תצא (see footnote # 23). See 'Thinking it over # 3.

²⁵ The rule is as follows; if there is only one witness that her husband died she is permitted to remarry; however there will be dire consequences for her if the husband returns (alive); she will not be able to remain with either of her husbands and she loses her כתובה from both husbands, etc. However if two עדים testify that her husband died and she remarries and her original husband returns she is permitted to return to her original husband (she is obviously prohibited from remaining with her current husband since she is the א"א of her original husband).

²⁶ The גמרא there explains the reason that we allow a woman to remarry based on the testimony of only one עד, is since we will be very strict with her if her husband returns, therefore we are sure that she will be ומנסבא דייקא, out of fear that if her husband returns she will have to face dire consequences. However when two עדים testify that her husband died, the consequences are not that severe, therefore there is no ומנסבא דייקא. In the case of שנים אומרים מת, there are two עדים who say he died and therefore there is (seemingly) no חומרא לבסוף, and she is not ומנסבא דייקא, therefore the חזקת א"א remains.

²⁷ See TIE previously on ד"ה הבא כב,ב footnote # 5.

ובשנים אומרים נתגרשה ושנים אומרים לא נתגרשה דאמרינן נמי לא תצא -

And in the case where two עדים say she was divorced and two other עדים say she was not divorced, where the ruling also was תצא -

אף על גב דלא דייקא²⁸ -

Even though that by גירושין she is not ומינסבא דייקא. The question is why is it תצא, since it is תו"ת and she has a חזקת א"א she should be מדאורייתא to remarry –

rejects a possible solution to this question:

ולכא נמי חזקה דאין האשה מעיזה פניה²⁹ -

And we cannot also say that there is presumption that a woman is not brazen to claim that she is divorced unless it is true -

דשלא בפני בעלה מעיזה³⁰ וכל שכן היכא דמסייעין לה עדים³¹ -

For a woman is מעיזה to say I'm divorced not in the presence of her husband, and she is certainly מעיזה where witnesses are supporting her; therefore her claim that she is divorced is meaningless. The question remains why תצא since it is תו"ת and she is א"א בחזקת א"א?

answers:

ויש לומר דמכל מקום דייקא³² לפי שיראה שיוזמו עדיה³³ או יפסלו אותם בגזלנותא³⁴ -

And one can say that notwithstanding that her permission is divorced based, nevertheless she is ומינסבא דייקא, for she is afraid that her witnesses may be impeached or they will be disqualified as robbers.

²⁸ When her permission to remarry is based on the death of the husband, the woman is ומינסבא דייקא, because if he returns she has no contradictory claim (he is her husband and alive), however if her permission to remarry is based on divorce, then (seemingly) she is not ומינסבא דייקא, for she thinks that even if the husband returns she can always claim that he divorced her.

²⁹ The rule is if a woman claims in her husband's presence; 'you divorced me', she is believed because חזקה אין אשה מעיזה פניה בפני בעלה. Therefore if it were not true that she is divorced she would not have to העזה to claim that she is divorced. Perhaps this חזקה applies to this case as well, that since she claims that she is divorced (see [end of] footnote # 23), she should be believed (even though she has a חזקת א"א), because of the חזקה אין אשה מעיזה וכו'.

³⁰ A woman does have to העזה to claim 'I'm divorced' even if it is not true, if she makes this statement not in the presence of her husband. There is no proof that the statement is true.

³¹ Here there are two עדים that support her claim that she is divorced, therefore she will have the העזה to say גרשתי even in the presence of her husband (even) if it is not true.

³² גירושין דייקא ומינסבא דייקא regarding תוספות is retracting his previous assumption that there is no ומינסבא דייקא.

³³ Other עדים may come and say that on the date in which you claim that her husband divorced her in this place, at that time you were with us in a different place and could not have witnesses the divorce you describe. This is called הזמה and the latter עדים are believed. She will then lose her גירושין עדי.

³⁴ Other עדים may come and claim that the עדי גירושין stole something (some time prior to their testimony). They will be disqualified as עדים. See 'Thinking it over' # 4.

In summation: the ה"א can be removed through the חזקה of ומינסבא (even by גירושין).

ר"י has an additional difficulty with the תוספות:

ובהאשה רבה (שם צג,ב ושם) גבי בעו מיניה מרב ששת עד אחד ביבמה מהו³⁵ כולי -

And in רב ששת, regarding that which they inquired from רב, 'what is the ruling of a single witness by a יבמה, etc.'

אמר להו תניתוה³⁶ אמרו לה מת בנך ואחר כך מת בעליך ונתייבמה³⁷ -

answered them we learnt this in a משנה: 'They (witnesses) said to her, 'your son died first and afterwards you husband died' so she was מתייבם -

ואחר כך אמרו לה חילוף הדברים³⁸ תצא והולד ראשון³⁹ והאחרון⁴⁰ ממזר -

And then they told her it was the opposite; your husband died before your son, the rule is she must leave her יבם and the first and last child is a ממזר for they were born from an איסור כרת relationship. This concludes the משנה which ר"ש cited. ר"ש continues -

היכי דמי אילימא תרי ותרי מאי חזית דסמכת אהני דאסרי ליבם סמוך אהני דשרו לה -

What are the circumstances of this case, where the ruling is ממזר; if you will say that it was two עדים (who said the child died first and she is מותר (אסורה ליבום), why do you see to depend on these latter witnesses who forbid her to יבום (and you rule תצא and declare her children to be ממזרים), depend on these former witnesses who permit her to יבום (and we should permit her to remain with the יבם and the children are כשרים). The תוספות however discusses this issue of מאי חזית וכו' -

וקשה דמאי פריך והא אית לן לאוקמי אחזקה⁴² דאסורה ליבם שמת בעלה תחלה⁴³ -

³⁵ The case there is where an עד testified that the husband, who was childless, died, which requires the husband's brother to be מייבם his deceased brother's wife. Can he be מייבם her if there is only one עד who testifies to his brother's death. The reason not to, is because perhaps she has a close relationship with her brother-in-law and would (gladly) marry him without the ומינסבא.

³⁶ יבמות צב,א.

³⁷ In this scenario if the child died first, the husband died childless and she is a proper יבמה and eligible for יבום.

³⁸ In this scenario where the husband died first he was not childless when he died therefore his wife is forbidden to the brother-in-law as אשת אחיו שלא במקום יבום, which is an איסור כרת. The children of a כרת relationship are ממזרים.

³⁹ This refers to the child that was born to her and her יבם before they heard the second testimony (that she is forbidden to the יבם).

⁴⁰ This refers to the child that was born to them after they heard the second testimony.

⁴¹ It cannot be discussing תו"ת (as ר"ש asked מאי חזית וכו') therefore we must say that initially only one עד came and said your child died first and she was מייבם on the basis of his testimony (thus resolving the query that an ע"א is believed by a יבמה) and then two עדים came and said חילוף הדברים therefore ממזר והולד ממזר.

⁴² Before any of the עדים came she was בחזקת איסור to the יבם because she was an א"א (and א"א) for she had a son. We do not know who died first, the חזקת איסור should determine that the husband died first and she remains אסורה ליבם as she always was.

And it is difficult to understand ר"ש question of מאי חזית, for it is proper to place her on her חזקה that she is forbidden to her יבם and that therefore we would assume that her husband died first leaving a child, which prohibits her from יבום. How can ר"ש suggest that we should be סמוך אהני and permit her to remain married when this runs contrary to her חזקה איסור ליבם.

proves that this is a valid חזקה איסור (even though currently she may be בחזקת היתר to the יבם, since both her husband and her child are dead):

כדאמרינן בפרק ארבעה אחין (שם דף לא,א ושם) גבי נפל הבית עליו ועל בת אחיו כולי⁴⁴ -

As the גמרא states in פרק ארבעה אחין regarding the case where the house collapsed on him and on his brother's daughter, etc.

continues to ask on the ruling of ר"ש (according to the s"l's explanation):

ועוד כיון דתרי ותרי ספיקא דרבנן הוא יש לאוסרה כדאמרינן גבי ינאי -

And additionally (even if we do not consider her ליבמה), since תו"ת (even where there is a חזקת היתר) is considered by the רבנן as a ספק (and if it is a ר"י as the יבם), we should prohibit her from the יבם (לחומרא issue we go דאורייתא explained by ינאי (that even though his mother had a חזקת היתר, nevertheless since it is a יבמה issue we go לחומרא, the same should apply by the יבמה).

rejects an anticipated answer to this question:

והתם לא דייקא כדאמרינן התם זימנין דרחמא ליה ליבם -

⁴³ This question seems to be both on רש"י and the ר"י who agree that by תו"ת we follow the חזקת איסור (but not on the later in this תוספות (see ('תוס' by) footnote # 51).

⁴⁴ ראוון has two wives רחל and לאה, where לאה is the daughter of his brother שמעון (whom he may marry). The rule is if ראוון dies childless, שמעון cannot be מייבם his daughter לאה and not even רחל (who is not related to him by blood, because she is a צרת ערוה. In this case the house collapsed on ראוון and לאה and they both died. If ראוון dies first, then at the moment of his death neither לאה nor רחל were eligible for יבום for they are ערוה and צרת ערוה respectively. However if לאה died first, רחל is no longer a צרת ערוה at the time of ראוון's death and she would be eligible for יבום to שמעון. The ruling is that רחל must receive חליצה from שמעון before she can marry anyone else (because perhaps לאה died first and she is ליבם but שמעון cannot be מייבם her, for perhaps ראוון died first and רחל is an אשת אב שלא אשת אב היא, but שמעון cannot be מייבם her, for perhaps ראוון died first and רחל is an אשת אב שלא אשת אב היא. On this אב"י asked why should she require חליצה, since רחל was always לשוק since she was a צרת ערוה. (חומרא answered that the חליצה היא is merely a חומרא). It is evident (from אב"י's question) that she is considered בחזקת היתר לשוק even though that currently she is בחזקת איסור לשוק (for she has no husband and no צרה), nevertheless we follow the חזקה דמעיקרא (not the דהשתא), similarly here too (by her husband and son) since she is בחזקת איסור מעיקרא (because of her son), we do not consider the דהשתא but rather the מעיקרא חזקה and she should be תצא, so what is רש"י's question?! סמוך אהני [Others explain תוספות to mean that just like by נפל הבית we rule לחומרא that she cannot be מייבם because of her ליבם (or that she must receive חליצה) even though it is תו"ת, so too by בעלה ובנה we should also rule לחומרא that she should be תצא. However, the difficulty with this explanation is how can we compare an איסור להתייבם לכתחלה or a חיוב לחלוץ לכתחלה to the ruling of תצא והולד ממזר. וצ"ע, בדיעבד.]

For there (by יבמה with her son) there is no דייקא,⁴⁵ as the גמרא states there;⁴⁶ 'sometimes she likes the יבם' and wants to marry him so she will not be דייקא.

answers: תוספות

ויש לומר דמכל מקום מהני דיוקא דידה לענין דמרעה ליה לחזקת איסור ליבם⁴⁷ -
And one can say; that nevertheless (even though there is the סברא of רחמא) her
דייקא is sufficient to be מרעה the ליבם איסור חזקת, for she is still somewhat out of concern that she may be ליבם אסורה.

תוספות responds to an additional anticipated difficulty:

והא דפריך נמי התם כולי ועוד ממזר ספק ממזר הוא -
And regarding this which ר"ש asks there by the יבמה and her son, etc.; 'and
furthermore, if we are discussing a case of תו"ת, how can the משנה state that the
children (from the יבם) are ממזרים, at most they are ספק ממזרים,' since there are two
תוספות who claim that she is אסורה ליבם. This concludes the גמרא; now תוספות continues with the difficulty -

אף על גב דבחזקת איסור ליבם היא -

Even though she is בחזקת איסור ליבם, so according to the ר"י that by תו"ת we follow the חזקה, she is אסורה ליבם and therefore the children are ממזרים; how can ר"ש argue that they are only ספק ממזרים -

תוספות responds -

מכל מקום לא הוי ממזר ודאי דמהני דיוקא דידה כדפרשינן⁴⁸ -
Nevertheless the child is not a ממזר ודאי for her (lesser) דיוק is effective to be
as the חזקה the מרעה explained previously -

תוספות offers an alternate (and opposite) explanation why the children are ספק ממזרים (only):

ועוד כיון דתרי ותרי ספיקא דרבנן⁴⁹ אין לנו להעמידה על חזקתה ולהתירו בממזרת -

⁴⁵ nevertheless, בחזקת א"א even though she is א"א, we say 'אומרים מת וכו' by תוספות stated previously that by יבמה since she is דייקא ומינסבא that makes a ריעותא in the חזקת א"א. However here by יבמה we cannot use this explanation of רחמא ליה ליבם since there is the concern of דייקא.

⁴⁶ See (the end of) footnote # 35. יבמות צג, ב.

⁴⁷ The query by ר"ש was whether this lesser דייקא (because of ליבם רחמא) is sufficient to allow her to be מתייבם based on the testimony of an ע"א; however, it is certainly sufficient to be מרעה the ליבם איסור חזקת by תו"ת.

⁴⁸ See footnote # 24 & 47. This [lesser] דייקא ומינסבא (by יבמה) is effective not only in regards to her (that תצא), but even regarding the children that they are not ממזרים (only ספק ממזרים [even if we would rule תצא]).

⁴⁹ The ruling of תו"ת is that even if there is a חזקת היתר or that as result of following the חזקה there will be a certain קולא (in a דאורייתא situation), the רבנן rule that it is מספק. If we would follow her חזקת איסור and declare the child a ממזר (since he is born from the איסור כרת), this would result in a leniency that he is permitted to marry a ממזרת; we do not allow this leniency because (notwithstanding the חזקה, which permits him to marry a

And furthermore since תו"ת is a ספק דרבנן we cannot place her on her חזקת – ממזרת in order to permit the child to marry a איסור ליבם

⁵⁰ר"י offers an alternate solution to the questions asked previously on the תוספות

ורבינו יצחק בר ברוך פירש דלא אמרינן בכל הני אוקמא אחזקה -

And the ריב"ב explained that the reason we do not say in all these cases, let us place it on the initial חזקה, is -

לפי שהשנים שמוציאים אותו מחזקתו של היתר הם מעידים תחלה⁵¹ -

Because the two עדים that remove him from the initial חזקה of permissiveness testified first -

ומיד כשהעידו יצא מחזקתו על ידי עדותו ותו לא אמרינן אוקמא אחזקה⁵² -

So as soon as they testified that it is forbidden, it left its initial חזקה status of היתר through their testimony (and it has the current איסור חזקה), and we will no longer say place it on its initial חזקה היתר.

ולחכי פריך לעיל⁵³ מאי שנא רישא ומאי שנא סיפא -

And therefore it is understood that which the גמרא asked previously, what is the difference between the רישא (by נתקדשה where we rule תצא) and the סיפא (by תצא where we rule נתגרשה), for the situation is -

דשנים שאומרים נתקדשה העידו תחלה -

That the שנים who said נתקדשה they testified first (and removed her from her חזקת – לא תצא א"א פנויה to a חזקת א"א), so why תצא -

ובשנים אומרים נתגרשה אף על פי שהם העידו תחלה⁵⁴ מכל מקום היתה בחזקת אשת איש -
And by even though the שנים אומרים נתגרשה testified first,

בממזרת and איסור בכשרה and therefore he is ספק ממזר (ממזרת) he remains a

⁵⁰ This refers to the cases of 'ב' אומרים נתגרשה and 'ב' אומרים מת וכו' etc.

⁵¹ For instance in the case of ינאי (whose mother had a חזקת היתר) the עדים who said אישתבאי (and negated her חזקת היתר) came before the עדים who said לא אישתבאי. This is not merely a conjecture but usually the עדים who appear first testify against the חזקה, for why should עדים come to substantiate a חזקה which is already in place?!

⁵² The חזקה by תו"ת is the status that the first עדים give; not the status that was before עדים came, for the first group of עדים nullified that initial חזקה and created a new חזקה.

⁵³ On כב,ב the גמרא cited a contradiction that by נתקדשה וב' אומרים לא נתקדשה and by נתגרשה וב' אומרים תצא. Seemingly there is no contradiction for by נתגרשה וב' אומרים תצא. What is the difficulty (according to the ר"י)? See תוס' ד"ה מאי!?! גמרא! This explains the difference (according to the ר"י).

⁵⁴ This would seemingly cause us to rule תצא לא since she is now בחזקת היתר. However according to this understanding the גמרא should not have asked סיפא ומ"ש רישא ומ"ש (that they should both have the same דין), but rather that the ruling should be the opposite in both cases (by קדושין it should be תצא and by גירושין it should be תצא); however the גמרא asks that the ruling should be the same in both cases. Therefore תוספות explains (according to the מהרש"א) that the מקשן there (mistakenly) assumed that the first set of עדים can only be מוציא from the חזקת היתר (by קדושין) but not from the חזקת איסור (by גירושין), so he asks סיפא ומ"ש רישא ומ"ש since in both cases there is a sort of חזקת איסור (by גירושין through her initial status) and by קדושין through the עדים.

מוציא nevertheless she was א"א בחזקת א"א (and that מקשן assumed that עדים המתירים cannot be מוציא מ"ש רישא ומ"ש סיפא מקשן asked (עדים האוסרים only מחזקה).

continues with the פ"ה הריב"ב תוספות:

וכן ההיא דהאשה רבה⁵⁵ ודינאי⁵⁶ שנים המוציאים אותו מחזקתו באו תחלה -

And similarly in the case of רבה and of ינאי in both these cases the two which remove him from the חזקה came first.

According to the תו"ת by ריב"ב we follow the חזקה; however not the initial חזקה, but rather the status which the first group of עדים bestow. It is not necessary to rely on תו"ת ספיקא דרבנן or אישה תו"ת ספיקא דרבנן in order to explain the contradictory גמרות.

The ר"י disagrees:

ואין נראה לרבינו יצחק דהא הכא בשמעתין מוקמינן ליה אחזקה -

And this is not the view of the ר"י (בן שמואל) (regarding the alleged חזקה (מוחזק באביו דכהן הוא) that חזקה (בן גרושה), we do place him on his initial חזקה (that חזקה באביו דכהן הוא) -
אף על גב דכבר פסלוהו השנים והוציאוהו מחזקתו -

Even though two עדים invalidated him and took him out of his חזקה כהונה by testifying that he is a גרושה, this testimony was before there were two עדים who testify that he is a גרושה; according to the ריב"ב he should be פסול -

rejects a possible answer:

ואין סברא⁵⁷ שיועיל מה שעד אחד המכשיר העיד קודם⁵⁸ -

And it is not logical to answer that the first testimony of the המכשיר should be effective to the extent that it places him בחזקת כהן -

offers another reason why the difficulty cannot be resolved:

ועוד דרב אשי משמע⁵⁹ דבעי למימר דאפילו אתו שניהם לבסוף דמסקינן ליה:

⁵⁵ This is the case where the first group said מת בנך ואח"כ מת בעלך (permitting her for יבום), so therefore the ruling will be תצא (even though initially she was ליבם) (בחזקת איסור ליבם) since the first עדים removed her חזקה.

⁵⁶ The two עדים that say his mother was captured testified first, therefore removing her חזקה היתר.

⁵⁷ This seems to be s"l opinion רש"י בד"ה ואנן רש"י (see footnote # 2).

⁵⁸ The ריב"ב (seemingly) maintains (according to the ר"י) that (only) עדים have the strength to remove him from the initial חזקה; however an ע"א cannot nullify a חזקה (for an ע"א is even weaker than a קול as תוספות pointed out previously on the והאמר ד"ה). And even if he does establish a חזקה when the עדים came later and testified that he is a גרושה they nullified that חזקה (like anytime two עדים come to nullify a חזקה).

⁵⁹ The גמרא originally established the מחלוקת between רשב"ג ור"א in a case where an ע"א came initially then two עדים and finally one עד, and the argument is whether there is a זילותא דב"ד. On this רב אשי asked why do we need that an ע"א came first and last, the same concern of זילותא will be if the two הפוסלים came first and then the עדים came and if we are not חושש לזילותא he will be a כשר. This indicates that even if the הפוסלים came first he still retains his כשרות; not like the ריב"ב.

And furthermore it seems that ר"א wanted to say⁶⁰ that even if both עדים came at the end (after the הפוסלים testified) we would still elevate him to כהונה, even though there were no עדים at all who sustained his כהונה, there were only הפוסלים, and according to the ריב"ב he should have a פסול חזקת and not be elevated to כהונה by this תו"ת.

SUMMARY

maintains that by תו"ת we follow the חזקה, but only regarding the person in question; the חזקה of the mother (father) does not apply to the child. agrees that we follow the חזקה (and the חזקת האם מהני לבת), however if it is בחזקת אסור מספק (if it is בחזקת אסור דאורייתא and it is a דאורייתא issue the חכמים ruled that it is אסור מספק); however if it is a דרבנן issue then it is מותר. The חזקה of גרושה and יבמה negates the חזקת אסור (even by גרושה and יבמה). maintains that the effective חזקה is the one established by the first עדים.

THINKING IT OVER

1. maintains that even though by תו"ת we follow the חזקה, nevertheless it is a ספק.⁶¹ The מהרש"ל asks that this contradicts what תוספות wrote previously (כב,א ד"ה תרי) that we are מכשיר by תו"ת since we place him on his כשרות, חזקת כשרות, and we do not say that he is מדרבנן פסול. How can we justify the question when the case there is regarding שטרות which is מדרבנן שטרות, לקולא,⁶² and how can we answer his question?⁶³

2. asks in the case of the עירוב with תרומה טמאה (ספק), that since תרומה בזה"ז is טמאה, we should place the תרומה on its טהרה.⁶⁴ It seems that if תרומה בזה"ז would

⁶⁰ The comments: ואומר רבינו יצחק בן אברהם דרב אשי נמי מוקי לה כשבא עד אחד המכשיר קודם שנים (על הגליון) הפוסלים אבל בבאו שנים הפוסלים תחלה ואחר כך באו שנים המכשירים בזה אחר זה לא בעי לאוקמי דהא לא הוי קרי במתניתין על פי עד אחד (ד)כיון דכי אתי עד אחד אין ממש בדבריו עד שבא האחר תו"ת understands that when ר"א asked נמי ר"א meant to say that we can explain the משנה (whether ע"א or ע"פ) in a case of תו"ת. We cannot say (says the תו"י) that it will be considered ע"פ since the two עדים המתירים did not come together but they came one after the other (after the המתיר came his testimony is meaningless (it contradicts two עדים), therefore when ר"א asked נמי ר"א meant that there was an בתחלה, however his question was, why do we say there was only one לבסוף, there could even be two לבסוף and the issue of זילותא will remain. The ר"י however can argue that ר"א says if the מחלוקת is regarding זילותא why (does the משנה) mention ע"א at all, let it be a regular תו"ת; proving that ר"א maintains by a regular תו"ת we place him on his initial חזקה even though the הפוסלים came first.

⁶¹ See footnote # 12.

⁶² See שבתורה.

⁶³ See מהרש"א.

⁶⁴ See footnote # 16.

be דאורייתא there would be no difficulty (for it would be a לחומרא). However the whole rule of עירובי תחומין is מדרבנן, so even if the תרומה is דאורייתא, the question is regarding the עירוב which is a דרבנן, so we should still be מתיר!

בחזקת א"א even though she is אומרים מת וב' אומרים וכו' explains that by 3. nevertheless תצא since the חזקה of מרעה is אשה דייקא ומינסבא חזקת א"א.⁶⁵ However, granted that there is no חזקת א"א, nevertheless even if there were a חזקת היתר, the ruling is that by a ספיקא דאורייתא we go (מדרבנן) לחומר;⁶⁶ why therefore is the ruling תצא?!⁶⁷

4. שמא יוזמו states that a woman is דייקא (even by גירושין) out of concern that שמת ב' עדים (alone) she is not וכו'.⁶⁸ Why then did תוספות previously state that by שמת ב' עדים (alone) she is not וכו',⁶⁹ when there is the same concern of דייקא?

המקרה - הדין	רש"י	ר"י	ריב"ב
אבוה כהן, קול הפוסל, עד המכשיר, ב' עדים הפוסלים, עד המכשיר – כשר	אוקמי אחזקת היתר של עד המכשיר	אוקמי אחזת היתר של אבוה לגבי תרומה דרבנן	אוקמי אחזקת היתר של עד המכשיר
ינאי – ב' אומרים אישתבאי וב' אומרים לא אשתבאי - פסול	אין לינאי חזקת היתר ולא דנים על האם	מדאורייתא אוקמי אחזקת היתר של האם ומדרבנן אסור מספק	אוקמי אחזקת איסור של ב' עדים הראשונים שפסלי
עירוב ספק (תו"ת) תרומה טמאה – אסור		א. ע"ת דאורייתא ופסול מדרבנן. ב. חזקה דהשתא דטמא ביחד עם ב' עדים הפוסלים.	עדי טומאה לפנה"ש באו תחלה
מקוה שנמצא חסר – פסול		סברא דחסר ואתאי אף שאין עדים פוסלים	
ב' אומרים מת וב' אומרים לא מת – לא תצא		דייקא ומינסבא מרעה לחזקת איסור, וגם בגרושה וגם ביבמה	אוקמי אחזקת היתר של ב' עדים הראשונים שמתירים
מת בנך ואח"כ מת בעלך והעידו להיפך – לא תצא		דייקא ומנסבא גם ביבמה אף דרחמא ליה.	

⁶⁵ See footnote # 24.

⁶⁶ See footnote # 12.

⁶⁷ See footnote # 23.

⁶⁸ See footnote # 34.

⁶⁹ See footnote # 26.