

ומי אמר רבי אלעזר הכי והאמר רבי אלעזר כולי –

And did א"ר say this; but א"ר said, etc.

OVERVIEW

The גמרא asks; how can א"ר rule that if he claims פתח פתוח מצאתי he is believed, and she becomes אסורה to him (if there is only one ספק), when א"ר ruled elsewhere that a woman cannot become לבעלה אסורה, only in restricted circumstances (of קנוי וסתירה), etc. תוספות discusses the viewpoint of this questioner (the מקשן).

תוספות asks:

תימה השתא דבעי למימר דלא מהימן אפילו לשוייה עליה חתיכה דאיסורא¹ -

It is astounding! Now that this מקשן wants to assert that the husband is not believed, even to 'make her a forbidden object to him', therefore -

תיקשי ליה מתניתין דהאומר לאשה קידשתיך אסור בקרובותיה² -

This משנה, which states that one who says to a woman, 'I betrothed you', is forbidden to her relatives; this משנה contradicts him.³

תוספות answers:

ויש לומר דסבירא ליה למקשן דאין דבר שבערוה⁴ פחות משנים⁵ -

And one can say; that the מקשן assumed that no שבערוה is effective with less than two witnesses -

ואפילו ראה אדם שזינתה אשתו רק שלא היה שם עדים לא היתה נאסרת עליו⁶

¹ The believability that א"ר grants to his claim of פתח פתוח is limited to the prohibition which he is placing on himself (but not that we actually believe him to deny her כתובה payments, for instance). It is generally accepted that if a person claims that (on account circumstances known to him) a certain item is prohibited to him, he is prohibited from it. This is called אפשיה חתיכה דאיסורא. A classic example is the משנה (mentioned in our גמרא) which תוספות cites immediately. He is forbidden to her relatives not because we know that he was מקדש this woman, but merely since he said he was מקדש her, so automatically he was אפשיה חתיכה דאיסורא to all her relatives.

² A man is forbidden from his wife's relatives; i.e. her mother, sister, or daughter, etc.

³ The question is that just as (according to the מקשן) his wife should not be אסורה to him since there were no עדים that she was מזונה (as there is by וסתירה), similarly (in the משנה) there were no עדים that he was מקדש this woman; why is he אסור בקרובותיה. It cannot be on account of his admission that he was מקדש her, for here too we are not accepting his admission that פתח פתוח מצאתי.

⁴ דבר שבערוה (literally of an immoral nature) refers to illicit relationships, marriages and divorces.

⁵ One cannot marry or divorce unless there are two witnesses present. Similarly one cannot be punished for illicit relationships unless two witnesses testify to that effect. [We derive this from the פסוקים of דבר בה ערות דבר (in כי מצא בה ערות דבר) and (דברים [שופטים] יט, טו) (in דברים [תצא] כד, א, על פי שני עדים וגו' יקום דבר) that דבר גזירה שוה of 'דבר דבר', teaches us that אין דבר שבערוה פחות מב']

⁶ There was no meaningful act (of זנות), with halachic consequences (according to the מקשן), since עדים did not observe it; just as there can be no meaningful act of גירושין וגירושין unless witnesses observe it. See 'Thinking it

So therefore (this מקשן assumed) even if a person saw that his wife was מזנה, however if there were no witnesses there to observe this זנות, she would not be prohibited to him (since 'אין דבר שבערוה פחות מב' ⁷ -

והלכך ממתניתין לא קשיא ליה מידי דקדשתיך בעדים קאמר ⁸ -

So therefore there is no difficulty at all from the משנה (which states that he is since when he said, 'I was מקדש you' he meant with witnesses; (אסור בקרובותיה) since when he said, 'I was מקדש you' he meant with witnesses; Tosfos proves that he meant with witnesses -

דמקדש אפילו בעד אחד אין חוששין לקדושין ⁹ -

For if one is מקדש even with one עד; his קדושין are inconsequential (and certainly if there were no עדים), so obviously when he said קדשתיך he meant with עדים -

אבל אהא דאמר רבי אלעזר דנאמן בלא עדים לומר דמצא פתח פתוח פריך שפיר:

However regarding that which ר"א said that he is believed to claim that he found a פתוח פתוח, even without עדים; the מקשן asks correctly (that a woman is not אין דבר שבערוה פחות, unless there is עדים בעתירה, נאסרה על בעלה, given his assumption that שווייה אנפשיה חתיכא דאיסורא משנים applies even to דאיסורא

SUMMARY

The מקשן assumed that דבר שבערוה פחות משנים applies even to cases where שווייה אנפשיה חתיכא דאיסורא.

THINKING IT OVER

answered that the מקשן assumed that since דבר שבערוה פחות מב' אין דבר שבערוה פחות מב' (עדים) without). ¹⁰ The גמרא answered that שווייה אנפשיה חתיכא דאיסורא (מקשן) that there can be דאיסורא without עדים. Why then does the גמרא ask מאי קמ"ל on ר"א, when he is teaching us and rejecting the המקשן ¹¹!?

over'.

⁷ The מקשן agrees to the concept of דאיסורא חתיכא אנפשיה שווייה generally, however when it comes to a דבר שבערוה, the שווייה אנפשיה חתיכא דאיסורא supersedes the concept of דבר שבערוה פחות משנים of גזירת הכתוב.

⁸ There were עדים by this קדושין (however they are not present now); therefore his admission of קדושין has its obvious consequence that he is אסור בקרובותיה.

⁹ He would not be אסור בקרובותיה.

¹⁰ See footnote # 6.

¹¹ See מהרש"א [הארוך].