

**מאי לאו דקא טעין טענת פתח פתוח –**

**פתח פתוח Is it not so; that he alleged the claim of**

**OVERVIEW**

attempted to show that the משנה of וכו' teaches us that the husband is believed כתובתה with טענת פ"פ. Our תוספות discusses why he is not believed in יהודה as well.

וביהודה אף על גב דאיכא חזקה<sup>1</sup> לא מהימן כדפירש בקונטרס -

**And regarding יהודה, he is not believed even though there too there is the חזקה of ומפסידה as<sup>2</sup> explained<sup>3</sup> רש"י -**

offers an alternate explanation:

אי נמי כיון דמתייחד עמה ודאי בא עליה דלא מוקי איניש אנפשיה<sup>4</sup> -

**Or you may also say; since he is secluded with her, he certainly had relations since a person cannot contain himself in such a situation.**

anticipates a difficulty:

ואף על גב דגבי יבמה אמרינן (יבמות דף קיא,ב) דעד ל' יום מוקי אנפשיה<sup>5</sup> -

**And even though that regarding a יבמה, the גמרא states one can control himself up to thirty days, and here we assume that he cannot control himself at all –**

responds that nevertheless -

**רוב פעמים לא מוקי אנפשיה אפילו שעה אחת דעל דעת כן מתייחד [עמה] ואיתרע חזקה:**

<sup>1</sup> The reason why a person is believed with כתובתה is because (as the גמרא explains on יא,א) אין (י,א) טענת בתולים להפסידה בכתובתה – a person does not toil to have meal and then destroy it. See ד"ה חזקה רש"י there that he must be telling the truth, for if we assume that he is lying because he does not like his wife, why go to the bother of making a wedding feast and then losing your wife; it would be easier for him to divorce her while she is still an ארוסה (where she does not receive a כתובה).

<sup>2</sup> Why therefore is he not believed even in יהודה, since the same חזקה applies there?!

<sup>3</sup> עיי"ש. who states he is not believed for perhaps he was בועל while she was an ארוסה and he forgot. רש"י. According to this explanation (as opposed to the א"נ of תוספות) there is [merely] a concern that he was עליה.

<sup>4</sup> According to this explanation it is certain that בא עליה and not merely a concern as it is according to פרש"י (see footnote # 3). See 'Thinking it over' # 1.

<sup>5</sup> The משנה there states that if a יבמה claims within thirty days of יבום that the יבם was not עליה (and he gave her a גט), we force him to give חליצה (we believe her that he was not עליה and therefore she is still ליבום and requires חליצה). However if she claimed after thirty days that he was (still) not עליה (and he claims he was עליה and he gave her a גט) then we ask him (but we do not force him) to give חליצה (since according to her claim she still requires חליצה), because we believe him and not her. The גמרא explains that we believe him that בא עליה because עד ל' יום, but no longer, so the יבם was certainly עליה.

**Most times he cannot control himself even for one hour,<sup>6</sup> for it is with this intent that he secludes himself [with her], and therefore the חזקה of אין אדם טורח is flawed.<sup>7</sup>**

### **SUMMARY**

The חזקה of אין אדם טורח בסעודה ומפסידה is weakened in יהודה either because we suspect that he was בא עליה or we are certain that he was בא עליה.

### **THINKING IT OVER**

1. Is there any difference whether we assume פרש"י that perhaps he was בועל and forgot,<sup>8</sup> or whether we assume פ'י התוס' that he was ודאי בעל?<sup>9</sup>

2. רוב פעמים לא מוקי יהודה writes when differentiating between יבמה and תוספות. <sup>10</sup> Is offering two differences (a. אנפשיה אפילו שעה אחת דעל דעת כן מתייחד [עמה] <sup>11</sup> or merely one <sup>12</sup> difference?<sup>13</sup>

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<sup>6</sup> It is possible that מוקי אנפשיה up to thirty days, but not probable; especially in this case that ע"ד כן מתייחד עמה. See 'Thinking it over' # 2.

<sup>7</sup> The חזקה tells us that he is telling the truth regarding his טענת בתולים; in this case that he was not בא עליה during חזקה; however the fact that he was מתייחד עמה tells us that it is most likely that he was בא עליה and contradicts the חזקה.

<sup>8</sup> See footnote # 4.

<sup>9</sup> See חדושי בתרא אות צ"ה.

<sup>10</sup> See footnote # 6.

<sup>11</sup> If it is two differences what is the meaning that by יהודה it is מתייחד עמה, seemingly by a יבמה when he is ע"ד כן מתייחד עמה?!

<sup>12</sup> If there is only one difference why the need to write both the רוב and the ע"ד כן?

<sup>13</sup> See אילת אהבים.