For movables which he denied – אמטלטלין דכפריה

Overview

The גמרא cites two versions of the ruling of the נהרדעי regarding writing a הרשאה (אורכתא).[1] The first version is that we do not write a הרשאה for מטלטלין (because it is not in his possession), and the second version is that we do not write a הרשאה for מטלטלין if the litigant (who is in possession of these מטלטלין) denies that it belongs to the original owner (who wishes to write the הרשאה in order to retrieve them). תוספות discusses the practical ruling that is relevant nowadays.

כתב רבינו חננאל דהאידנא נהגו לכתוב אורכתא אפילו אמטלטלי דכפריה וטעמא לא ידענא -

The ר"ח wrote that nowadays the custom is to write a הרשאה even for מטלטלין דכפריה, but I (the בעל התוספות) **do not know the reason** why we do so –

תוספות offers an explanation for the ruling of the ר"ח:

ורבינו תם מפרש דטעמא דהלכתא כלישנא בתרא[2] דסוגיא דגמרא כוותיה -

And the ר"ת explains that the reason we write a הרשאה even on מטלטלי דכפריה is **because the ruling is like that latter version** of the נהרדעי, **for the סוגיא of the גמרא** elsewhere **agrees with this** latter version. תוספות cites his proof -

דבשבועות[3] (דף לג,ב ושם) דייק טעמא דמשביע[4] עליכם דאיש פלוני כהן הוא -

For in שבועות מסכת the גמרא **infers; 'the reason** he is exempt from a קרבן העדות is because he said to a potential witness, **'I adjure you to testify that a certain person** (a third party) **is a כהן'**, which is not a monetary issue -

הא מנה לפלוני ביד פלוני חייבין והא קתני סיפא[5] עד שישמעו מפי התובע[6] -

However if one said to a potential witness, 'I adjure you to testify that a **certain person owes another person a מנה',** and they refuse to testify (and they could have testified), the rule is **they are obligated** to bring a קרבן העדות, **but** how could this be

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[1] See previous תוס' ד"ה לא.

[2] The apparent difference between the two versions is that according to the first version we do not write a הרשאה for מטלטלין at all (even if the litigant does not deny the ownership of the claimant), because it is not ברשותו. However the איכא דאמרי reject this ruling (there is no problem of אינו ברשותו in order to write a הרשאה), they only disallow writing a הרשאה on מטלטלי דכפריה, but not on other מטלטלין.

[3] The תורה writes in (ויקרא ה,א) והוא עד וגו' אם לא יגיד ונשא עונו. That one who withholds testimony and swears falsely that he does not know testimony, transgresses a sin and is required to being a קרבן עולה וירד. The משנה there excludes testimony which are not of a monetary nature, like testifying that someone (else) is a כהן.

[4] The הגהות הב"ח amends this to read, דמשביע **אני** עליכם (instead of דמשביע עליכם).

[5] לה,א.

[6] In the inferred case mentioned above, it was a third party that adjured them to testify that מנה לפלוני ביד פלוני, and nevertheless the inference from the משנה was that the עדים are חייב the קרבן העדות.

since the משנה taught in the סיפא that the עדים are not liable for the קרבן העדות **unless they hear** the request to testify **from the mouth of the claimant'.** The גמרא there answered -

אמר שמואל בבא בהרשאה והא אמרי נהרדעי לא כתבינן אורכתא אמטלטלי -

'שמואל said that the case is where the third party who adjured the עדות **came with a הרשאה** from the claimant (so he is considered as if he is the claimant). The גמרא there asked, how could he have a valid הרשאה, **but the נהרדעי said we do not write a הרשאה on מטלטלין'.** The גמרא there answered -

הני מילי[7] דכפריה אבל לא כפריה כתבינן וכן בפרק יש בכור[8] (בכורות דף מט,א) -

'When did the נהרדעי say that we do not write a הרשאה on מטלטלין **that** is only if the litigant **denies** owing the מטלטלין, **however if he is not denying it, we do write** a הרשאה on מטלטלין', **and this is also found in פרק יש בכור.** We see that the גמרא accepts the ל"ב of the נהרדעי (not like the ל"ק) -

וכיון דהלכתא כלישנא בתרא[9] אם כן אפילו כפריה כתבינן -

So since we see from the גמרא **that the הלכה is like the latter version** (that we can write a הרשאה on מטלטלין), **therefore we can write** a הרשאה **even on דכפריה** מטלטלין -

דהא לישנא בתרא מפרש טעמא דלא כתבינן אמטלטלין דכפריה משום דמיחזי כשיקרא[10] -

For the latter version explains its reason why we do not write a הרשאה **on מטלטלין דכפריה, because it appears like a falsehood -**

ולמיחזא כשיקרא לא חיישינן[11] כדמסיק בהכותב (כתובות דף פה,א) ובפרק כל הגט (גיטין דף כו,ב) -

However we are not concerned for מיחזי כשיקרא, as the גמרא concludes in פרק **הכותב and in פרק כל הגט,** where the גמרא states -

דליתא לדרב פפי דאמר האי אשרתא דדייני דמיכתבא מקמי דלסהדו סהדי אחתימות ידייהו[12] –

That the ruling of ר"פ [is rejected], who stated, 'this authentication of the judges which was written before the witnesses came to testify on their signatures -

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[7] The הגהות הב"ח amends this to read מילי **היכא** דכפריה (instead of מילי דכפריה).

[8] See footnote # 24.

[9] This means that we do not accept the ruling of the לישנא קמא that a הרשאה cannot be written on something which is not in his possession, rather this is of no concern.

[10] He writes in the הרשאה that he is transferring the ownership of the disputed מטלטלין to his agent (the מורשה). However we do not know that the מרשה has any rights in these מטלטלין, perhaps the litigant is correct and it does not belong to the מרשה, so how can he transfer it to the מורשה if it does not belong to him?! This seems like a lie!

[11] We accept the ruling of the לישנא בתרא that a הרשאה can be written even for something which is not in his רשות. We, however reject the concern of the ל"ב that we are concerned for מיחזי כשיקרא, rather we are not concerned for מיחזי כשיקרא, as תוספות continues to prove that מיחזי כשיקרא is of no concern..

[12] ר"פ maintains that if the דיינים wrote up the text of their authentication of the signatures on a document, before the witnesses came to authenticate their signatures, that document is invalid, even if the דיינים signed it after the עדים authenticated their signatures. The reason is that the document, which states, 'we have seen and authenticated the signatures' is a false statement, since when it was written the signatures were not authenticated. We however do not accept the ruling of ר"פ, and we maintain למיחזי כשיקרא לא חיישינן!

פסולה משום דמיחזי כשיקרא -

Is invalid, since it is מיחזי כשיקרא'; we do not accept s'רב פפי ruling, rather we are not concerned for מיחזי כשיקרא.

תוספות asks:

ואם תאמר כיון דלא חיישינן למיחזי כשיקרא אם כן בשבועות (דף לג,ב) **ובבכורות** (דף מט,א) **-**

And if you will say, since we are not concerned for מיחזי כשיקרא, so therefore in בכורות and שבועות מסכתות **-**

כי פריך[13] מנהרדעי דאמרי לא כתבינן הוה ליה למימר דליתא -

When the גמרא asked, based on the ruling of נהרדעי **who say, 'we do not write a רשאה** on (דכפריה) מטלטלין, the גמרא should have answered **that** this ruling **is rejected,** as we just stated that למיחזי כשיקרא לא חיישינן –

תוספות answers:

ויש לומר דאורחא דגמרא למיפרך ממילתא אף על גב דליתא[14] -

And one can say that it is the manner of the גמרא to ask a question **from a ruling even though it was rejected.** תוספות proves this -

דבפרק ב' דכתובות (דף כא,ב) **נמי פריך מדרב פפי אמילתיה דרב הונא[15] וחוזר בה מחמת זה[16] -**

For in the second פרק of כתובות מסכת**, the גמרא also challenges the ruling of ר"ה from** the ruling of **ר"פ, and on account** of **this** question **the** גמרא **retracts -**

ומגיה דברים אף על גב דאמר בהכותב (כתובות דף פה,א) **דליתיה[17] -**

And edits the statement of ר"ה, **even though** the גמרא in **הכותב** פרק **states** that the ruling of ר"פ **is rejected.** We see that we ask questions and even revise statements on account of a rejected ruling –

תוספות qualifies this previous proof:

ומיהו לפי המפרש התם[18] דהא דקאמר ליתא לא קאי ארב פפי אלא כלומר ליתא לקושיא -

However according to the one who explained there, that this which the גמרא

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[13] See previously in this תוספות that the גמרא asked on שמואל who said בבא בהרשאה, 'but the נהרדעי ruled לא כתבינן אורכתא אמטלטלי'.

[14] תוספות means that the גמרא wants to justify the ruling even according to the rejected ruling of the נהרדעי, who agree with רב פפי that we are concerned for מיחזי כשיקרא.

[15] רב הונא ruled there that if two of the three דיינים recognize the signatures they may testify before the third דיין, and then they can all sign the authentication, provided that they testify before the two sign. This indicates that the authentication was already written (for all we require that they testify before they sign), but how can this be, since according to ר"פ this authentication is invalid, for since it was written prior to the authentication, it is מיחזי כשיקרא.

[16] On account of this question (see footnote # 15) the גמרא revised the ruling of ר"ה that instead of saying the דיינים can testify to the third דיין before they sign, it is revised that they can testify provided the authentication was not written yet.

[17] We see for this גמרא that it is customary for the גמרא to ask (and answer) question based on rulings that are rejected.

[18] In כתובות and גיטין.

stated, 'it is not so',[19] the גמרא **was not referring to** the ruling of ר"פ regarding מיחזי כשיקרא, **but rather it meant that there is no question -**

דאין קושיא דבקיום שטרות דוקא חיישינן למיחזי כשיקרא דבית דין[20] **-**

There is no difficulty from the ruling of ר"פ, **for it is only by authentication of notes that we are concerned for the appearance of falsehood by a בי"ד -**

אבל בשאר מילי לא מדרב נחמן אז אין זה ראיה[21] **משום דפריך מדרב פפי -**

However regarding other issues (not a בי"ד) there is **no** concern for מיחזי כשיקרא as we see from the ruling of **ר"נ.** If this is the correct interpretation of 'וליתא', **there is no proof from** the fact that the גמרא **challenged** ר"ה **from** the ruling of **ר"פ,** since ר"ה was also discussing קיום שטרות.

תוספות asks:

ואם תאמר ולישנא קמא דנהרדעי מאי הוה משני אמתניתין דשבועות ודבכורות -

An if you will say; but according to the first version of the נהרדעי that we do not write a הרשאה for מטלטלין at all, **what will they answer** to explain the **משניות of** מסכתות **שבועות and בכורות,** from where it appears that we do write a הרשאה (at least on מטלטלין דלא כפריה), not like the לישנא קמא –

תוספות (first) offers a partial resolution to his question:

ומיהו אמתניתין דשבועות מצי לאוקמי בקרקעות וכמאן דאמר נשבעין[22] **-**

However, regarding the משנה in שבועות we can establish the inferred case (of מנה לפלוני ביד פלוני חייבין)[23] **that it was regarding real estate** (where the נהרדעי of ל"ק agree that we can write a הרשאה on קרקע since קרקע is always ברשות בעלים) **and according to the מ"ד that we swear** even on קרקע -

אבל בההיא דבכורות דאייתי בפדיון בכור ליכא לאוקמי כמאן דאמר פודין בקרקעות -

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[19] In both מסכתות the גמרא challenged a ruling which indicated that לא חיישינן למיחזי כשיקרא from the ruling of ר"פ that חיישינן למיחזי כשיקרא. After asking the question the גמרא answers וליתא מדרב נחמן וכו'. We have (thus far) understood this 'וליתא' to mean that the ruling of ר"פ is rejected in face of the ruling of ר"נ, who is not חושש למיחזי כשיקרא. [The ruling of ר"נ is that according to ר"מ even if one finds a written גט in the garbage, he may give it to witnesses to sign and it is valid. Obviously there is no concern for מיחזי כשיקרא.] According to this interpretation, the ruling of ר"פ that חיישינן למיחזי כשיקרא was rejected, and תוספות proof is valid. However there is another interpretation of the word 'וליתא'.

[20] We must be very meticulous when dealing with a בי"ד that there should be no sign of מיחזי כשיקרא.

[21] תוספות wanted to bring proof from the discussion regarding ר"ה that the גמרא asks and revises statements based on a rejected view (the view of ר"פ), which would explain the s'גמרא question based on the rejected view of the נהרדעי (see [text by] footnote # 14). However according to the מפרש, there was no rejection of ר"פ regarding קיום שטרות, therefore the גמרא rightfully challenged ר"ה who was also discussing קיום שטרות. We have no support for תוספות answer.

[22] See footnote # 6. The claim was that שמעון owed ראובן real estate. The עדים have to swear that they do not know any testimony before they are חייב קרבן עדות and generally the accepted opinion is that there is no שבועה on קרקע. However we can say that the inferred case is according to the מ"ד that נשבעין על הקרקעות. See 'Thinking it over' # 1.

[23] See footnote # 6.

However regarding that משנה in בכורות,[24] which is discussing פדה"ב, we cannot establish it according to the מ"ד that one can be פודה his בכור **with[25] קרקע -**
דהא קתני בההיא משנה[26] דאין פודין -

For that משנה states explicitly that we are not פודה a בכור with קרקע.

תוספות answers:

ויש לומר דאיכא לאוקמינה שהאחד חייב לחבירו[27] ושואל מדרבי נתן[28] -

And one can say that it is possible (for the ל"ק דנהרדעי) **to establish** the case **where one owes his friend money and he is asking** that he should be paid **on account** of the ruling of **ר"נ** –

An alternate explanation according to the ל"ק:

אי נמי שנתן לו במעמד שלשתן[29] -

Or you may **also** say **that he transferred it to him in the presence of** all **three[30] -**

תוספות inserts a caveat:

ומיהו בההיא דבכורות צריך לדקדק אם יכול ליתן במעמד שלשתן -

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[24] The משנה there on ב,מח states that if two women (who are married to two people) gave birth to two בכורים and both fathers paid ten סלעים (five each) for the פדה"ב of both בכורים, and then one of the babies died before he was thirty days old and we do not know whose baby died. The rule is if they paid the money (10 סלעים) to one כהן, the כהן must refund ה' סלעים since one baby died prematurely, (and the two fathers will divide it), however if they gave it to two כהנים neither כהן is obligated to return the ה' סלעים for he could argue, 'the baby which I redeemed is alive'. The גמרא asked that even if they gave it to one כהן he can tell each father who wants a refund that your baby is alive. The גמרא answered that one father gave the other father a הרשאה to collect the refund. Therefore he approaches the כהן and demands payment for one בכור, for in any event the כהן owes either him or the other father ה' סלעים, and since he is a מורשה, the כהן must refund the ה' סלעים. The גמרא continues to ask that the נהרדעי say that 'אין כותבין אורכתא וכו and answered like the לישנא בתרא. How will the ל"ק explain that משנה.

[25] This means that they each gave the כהן five סלעים worth of קרקע.

[26] נא,א.

[27] In the case of the בכור שמת let us say that ראובן ושמעון are the two fathers, and שמעון happens to owe ראובן five סלעים. ראובן comes to the כהן and says pay me five סלעים ממה נפשך; if my baby died, you owe me ה' סלעים and if s'שמעון baby died, you owe him ה' סלעים and since you owe him ה' סלעים and he owes me ה' סלעים, according to ר' נתן (see footnote # 28), the כהן must pay ראובן the ה' סלעים ממ"נ. In the case of שבועת העדות. the one who is משביע the עדים that they should testify that שמעון owes ראובן money, he is also the creditor of ראובן, so therefore it is as if שמעון owes him money and therefore the claim is made מפי התובע. See text by footnote # 6.

[28] The ruling of ר"נ is that if לוי owes שמעון, and שמעון owes ראובן, the law is that ראובן can go directly to לוי and collect the amount he is owed (provided that לוי owes that amount [or more] to שמעון).

[29] In the case of בכור שמת (see footnote # 27) it is not necessary to say that שמעון owes ראובן the ה' סלעים, but rather that שמעון told ראובן in the presence of the כהן (all three – מעמד שלשתן) that שמעון is instructing the כהן that the money he may owe to שמעון should be given to ראובן. Similarly by שבועת העדות, ראובן is instructing שמעון in the presence of all three (שמעון ,ראובן and the משביע) that the money should be given to the one who is משביע the עדים,.

[30] מעמד שלשתן is a means of transferring assets from one to another without making a traditional קנין. If שמעון has something of ראובן (either a פקדון or a loan), ראובן can instruct שמעון to transfer this asset to לוי (in the presence of all three ראובן שמעון לוי), and לוי becomes the new owner of this asset.

However regarding the case of **בכורות, it is necessary to question whether he can transfer** the סלעים ה' from the כהן **through מעמד שלשתן -**

כיון דהוא עצמו לא היה יכול להוציא מידו[31] -

Since שמעון **himself would not be able to extract** the סלעים ה' **from the possession** of the כהן -

כמו שבכתובה אין יכולה ליתן במעמד שלשתן[32] -

Just like by a כתובה, where she cannot give it through מעמד שלשתן -

כיון דלא ניתנה לגבות מחיים כמו שמפורש בהחובל (לקמן דף פט,א) **-**

Since a כתובה **is not given over** to the woman **that she can collect it while** her husband is still **alive, as it is stated explicitly in החובל** פרק**.**

תוספות discuses an anticipated difficulty:

ואין לתמוה על מה שאנו נוהגין לכתוב הרשאה אפילו במלוה -

And one should not be astounded regarding our custom to write a הרשאה even for a loan -

אף על פי שאין אדם יכול להקנות הלואתו לחבירו[33] -

Even though that a person cannot transfer his (oral)[34] **loan to his friend -**

כדמוכח במי שמת (בבא בתרא דף קמח,א) **שדוחק למצוא דהלואתו לפלוני איתא בבריא[35] -**

As is evident in מי שמת פרק**, where the** גמרא **struggles to find a** case **that by a healthy** person he can transfer **his loan to another -**

ולא מצי לאשכוחי אלא הואיל ויורש יורשה[36] אי נמי במעמד שלשתן[37] -

And the גמרא **could not find** a case where it is transferred, **rather** the reason it is

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[31] תוספות is suggesting that מעמד שלשתן is effective only if the bestower (ראובן in footnote # 30), can collect the asset from the one who owes it to him, however if the bestower cannot collect it, as in our case where neither father can collect from the כהן, in that case מעמד שלשתן may not be effective.

[32] The wife cannot instruct her husband to transfer the כתובה obligation to a designated recipient even במעמד שלשתן, since right now the woman cannot collect her כתובה (she is still married). The same applies elsewhere that perhaps מעמד שלשתן is effective only when it can be collected from the debtor now. See 'Thinking it over' # 2.

[33] The idea why a הרשאה is effective is because we consider it that the מרשה transfers the ownership of the assets in question to the מורשה. However since one cannot transfer a loan (even with a valid קנין), how can he write a הרשאה, since the מרשה cannot transfer the loan.

[34] One can transfer a מלוה בשטר to his friend by writing another שטר, stating that he is transferring the debt to the new recipient, and in addition by handing over the original שטר to the new recipient. This does not apply to a מלוה ע"פ.

[35] The גמרא there states that if a שכיב מרע says הלואתי לפלוני (the loan which someone owes be should be paid to פלוני), the rule is that the לוה must pay פלוני. The גמרא asks where do find that by a בריא such a transfer works (even) with a קנין, so that we can say that by a שכיב מרע it works by saying (without a קנין). The תקנה by a שכ"מ is that where otherwise a קנין is required, by a שכ"מ it is sufficient that he says it and it is considered as if he made a קנין. However if something cannot be transferred with a קנין (like הלואתי לפלוני), how can it be transferred by the saying of a שכ"מ. The saying of a שכ"מ is not better than a קנין!

[36] If a מלוה (even a בריא) dies, the debtor owes the money to the heirs of the מלוה.

[37] See footnote # 30.

effective by a שכ"מ **is since his heir inherits** this loan, therefore he can transfer it with a מתנת שכ"מ, for it too is considered an inheritance, **or** you can **also** say that this מלוה ע"פ can be transferred **במעמד שלשתן,** therefore it is also effective by מתנת שכ"מ even if it was not given במעמד שלשתן -

משמע דבשום ענין לא מצי מקני ליה -

It seems from that גמרא **that there is no way** in which a מלוה ע"פ **can be transferred,** so how is it that we write a הרשאה on a מלוה ע"פ since it cannot be transferred to the מורשה –

תוספות explains how we can write a הרשאה (even) on a מלוה ע"פ:

דכיון דקיימא לן כאיכא דאמרי[38] -

For since we have established the ruling **like the א"ד** of the נהרדעי -

ולהך לישנא אמטלטלין דגזילה נמי כתבינן אורכתא[39] -

And according to this version we can write a הרשאה even on stolen movables -

אף על פי שאין יכול להקנותו כמו שאין יכול להקדיש -

Even though the owner of the stolen goods **cannot transfer** ownership of these goods to another, **just as** the owner **cannot be מקדיש** these מטלטלין דגזילה -

דקיימא לן כרבי יוחנן דגזל ולא נתייאשו הבעלים שניהם אין יכולין להקדיש -

For we have established the ruling like ר"י that in a case where **he stole** an item **and the owners were not מתייאש, neither of them** (the thief or the owner) **can be מקדיש** this item, and the same applies that they cannot be מקנה this item -

כדמשמע בפרק קמא דבבא מציעא (דף ז,א עיין שם) דפריך מיניה לרב[40] -

As it seems in the first פרק of ב"מ מסכת **where** the גמרא **asks from the** ruling of ר"י **on רב -**

ומשמע נמי התם דסבר סתמא דגמרא דאם המסותא[41] מטלטלין לא היה נגזל יכול להקדיש -

And it also appears from the גמרא **there that the גמרא assumes that if the מסותא was movable, the נגזל would not be able to be מקדיש it,** and nevertheless according to the א"ד we write a הרשאה on מטלטלי דגזילה -

הוא הדין הלואה[42] אף על פי שאין יכול להקנותה כתבינן הרשאה -

The same rule applies to a loan that even though the creditor **cannot transfer it,**

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[38] See footnote # 2 & 9.

[39] See previous תוס' ד"ה לא that the dispute between the ר"ק and the א"ד is by מטלטלי דגזילה..

[40] In our text there it is רב נחמן from whose ruling it was inferred that if the aggrieved party can retrieve his loss in court, he can be מקדיש it. The גמרא challenged this ruling from ר"י who maintains שניהם אין יכולין להקדיש. This proves that the גמרא accepts the ruling of ר"י.

[41] A מסותא is a bath(house).

[42] תוספות is comparing הלואה to גזילה; if הרשאה works by גזילה it should work by הלואה. In both cases the item is not in the רשות of the מרשה. By גזילה the item exists, but it was taken from the owners unwillingly – גזילה. By הלואה the item does not really exist, it is money owed to him (even if it was given voluntarily).

nevertheless **we can write a הרשאה** on this loan, just like we can write on מטלטלי דגזילה -
וטעמא דלהאי לישנא מסקינן דשליח שויה[43] -

And the reason why we can write it is because **according to this version** of the א"ד the גמרא **concludes that** the מרשה **made** the מורשה **into a שליח -**
ועשו תקנה לענין שליחות כאילו היה קונה קנין גמור -

And the חכמים **made an enactment regarding this שליחות as if** the שליח/מורשה **would acquire** the item in question **with a complete קנין** –

תוספות offers support for this custom of writing a הרשאה for a loan:
ויש סמך למנהג בהגוזל (בתרא) (לקמן דף קד,ב) דרב פפא הוה <u>מסיק</u> זוזי בי חוזאי -

And there is support for this custom in הגוזל (בתרא) פרק, where the גמרא relates: **the רב פפא was owed money by** the people of **חוזאי -**
אקנינהו לרב שמואל בר יהודה אגב אסיפא דביתיה[44] כי אתא נפק לאפיה עד תווך –

He transferred the ownership of this money **to רשב"י through the אגב** קנין using **the threshold of his house, and when** רשב"י **came back** with the money, **רב פפא went out to greet him until תווך**; he was so happy that he retrieved his money -
ו<u>מסיק</u> משמע לשון הלואה –

And the word **מסיק indicates a loan.** We see from there that ר"פ was מרשה this loan to רשב"י –

תוספות rejects this proof:
ויש לדחוק דמסיק בעיסקא מיירי שלא ניתן להוצאה[45] –

And one can deflect this proof **for** the term **מסיק** can be **discussing an investment that cannot be spent** for his own interest (and not [necessarily] a loan) –

An additional refutation of this proof:
ועוד דבהזהב (בבא מציעא דף מו,א) ובהמוכר את הספינה (בבא בתרא דף עז,ב) לא גרסינן ומסיק -

And additionally in הזהב פרק **and in המוכר את הספינה** פרק where this story is cited, **the text does not read, ומסיק** זוזי בי חוזאי -
אלא הוה ליה זוזי בי חוזאי בכל הספרים –

But rather in all the texts it reads**, 'he had money by חוזאי'** which indicates more of a פקדון than a loan -

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[43] The הקנאה of a הרשאה is a legal fiction. The item always belongs to the מרשה, not the מורשה. It is only in order that the opposing litigant should not be able to claim לאו בעל דברים דידי את that we consider the מורשה as the owner. Therefore it is understood that the מרשה cannot really be מקנה the item in question since it is not ברשותו, so really the מורשה is merely a שליח of the בעלים. Regarding this שליחות the חכמים instituted that we consider the שליח as the owner, for the limited purpose that other litigant cannot claim לאו בעל דברים דידי את.

[44] This was the mode of קנין that made the הרשאה effective.

[45] Either the initial invested money exists or the goods which were purchased with the money exists.

ואין לדקדק מההיא דבכורות[46] (דף מט,א) גבי פדיון הבן שיכול להרשות -

And we cannot infer from that גמרא **in בכורות** מסכת **regarding פדה"ב that one may be מרשה** even for a loan, for there we say that one was מרשה the other to retrieve the money from the כהן -

אף על פי שניתן לכהן על מנת להוציא[47] דלא מסקי אדעתייהו שימות תוך שלשים -

Even though the פדה"ב money was **given to the כהן with the intent that he can spend it, for they did not assume that the child would die within thirty days** (and they will want a refund) -

אלמא יכול להרשות במלוה -

It is therefore seemingly **evident that on can be מרשה** even **for a loan** –

תוספות rejects this proof:

דהתם על כרחך לאו על מנת להוציא נתנו לו[48] –

For there, perforce we must assume **that they did not give** the כהן the פדה"ב money **with the intent that he spend it -**

דקיימא לן כשמואל דאמר התם בסמוך להההיא שמעתא (שם) -

For we have established the ruling like שמואל, who stated there, nearby to that סוגיא -

דפודה בנו בתוך שלשים ונתאכלו המעות דאין בנו פדוי:

That one who redeems his son within thirty days of his birth **and the money was consumed** before the child reached thirty days, **that his son is not redeemed,** so the כהן must have been instructed to hold on to the money, therefore it was a פקדון and not a loan, that is why a הרשאה could be written.

Summary

We can write a הרשאה even on מטלטלי דכפריה since the ruling is like the א"ד and we are not concerned for מיחזי כשיקרא. We may even write a הרשאה on a loan since he is a שליח, for whom the חכמים instituted as if he acquired it בקנין גמור.

Thinking it over

1. תוספות writes that we can establish the case of שבועות (according to the ל"ק of the נהרדעי) by קרקע.[49] Why did not תוספות answer that we can establish it by a פקדון

[46] See footnote # 24.

[47] The difference between a loan and a פקדון (deposit) is that the borrower may spend the money of the loan, while the custodian of a פקדון may not use the money at all. A הלואה cannot be transferred (unless במעמד שלשתן), however a פקדון can be transferred.

[48] Rather it was given to the כהן as a פקדון.

[49] See footnote # 22.

(where he can be מקדיש it[50])?![51]

2. תוספות seem to be (somewhat) unsure whether מעמד שלשתן would be effective by בכור, since the bestower cannot collect it from the כהן, just as מעמ"ש is ineffective by a כתובה.[52] Is the case of בכור any different from כתובה that it is possible to distinguish between them, and maintain that by בכור the מעמ"ש would be effective?

[50] See footnote # 39.
[51] See מהרש"א.
[52] See footnote 32.