

## What if he sanctified it without seizing it – מהו – הקדישה בלא תקפה

### OVERVIEW

זירא queried (according to the s' explanation); what would the ruling be if one of the litigants holding the טלית grabbed it away from his opponent in the presence of בי"ד, where initially he remained silent, and subsequently he protested the seizing of his share of the garment. This issue was not resolved. The גמרא continues if we would assume that in this case the ruling would be that the seizer retains the garment (since initially his opponent did not protest), what would the ruling be if one of the litigants (instead of grabbing it away) was מקדיש the entire טלית; does the entire טלית become הקדש or not (as the גמרא explains both sides of the query). תוספות clarifies the case of הקדישה בלא תקפה and elaborates on the explanation of this query.

ומיירי נמי כגון ששתק בשעה שהקדיש ולבסוף כששאלה הגזבר צווח –

And this query is also discussing a case where he was silent when his adversary was מקדיש the טלית and subsequently when the treasurer of the הקדש demanded the טלית he protested, similar<sup>1</sup> to the case of תקפה אחד בפנינו, where the issue was in a case of שתק ולבסוף צווח.

ומבעיא ליה כיון דאמירתו לגבוה כולי הוה הקדש כתקפה<sup>2</sup> –

And his query is that since the rule is that promising to הקדש, etc. (is the equivalent of transferring an object to a lay person), therefore the act of הקדש is like תקפה, and therefore since הקדש is like תקפה, we assume –

דכיון ששתק אודיי אודי ליה והוה הקדש<sup>3</sup> –

that since he was silent after the הקדש, he admitted to him that it belongs to his adversary and the טלית will become הקדש.

<sup>1</sup> Presumably the case of תקפה א' בפנינו by שתק ולבסוף צווח is that after a (small) interval, the aggrieved party was צווח (but not that he was שתק the entire time when they were in בי"ד, and he was צווח only when the grabber was leaving בי"ד, for that would seem to be the case of ליה אודי אודי, for obviously at some point he protested [otherwise there is no claim at all]). However here by הקדישה the צווח does not mean after a (small) interval, but rather he was שתק completely until the גזבר came to collect (his share of) the טלית. The difference is that when the article is physically taken away, then the protest must be in close proximity in time from when it was taken away; otherwise it is certainly ליה אודי אודי. However by הקדש since the item is still in his possession, it is not [as] necessary for him to protest (as long as he is in possession); only when the גזבר wants to take it for הקדש. See # 243 אמ"ה.

<sup>2</sup> אמירתו לגבוה should accomplish that the aggrieved party should realize that the item has been taken away from him (figuratively), and if it is indeed his, he should respond appropriately by protesting immediately (even before the גזבר comes to take it away physically). See 'Thinking it over' # 1.

<sup>3</sup> We are now assuming that by תקפה if it was שתק ולבסוף צווח we rule that אותו מידו.

mentions an anticipated question:

**ולא דמי לגזל ולא נתייאשו הבעלים דשניהם אין יכולין להקדיש –**

**And our case in this איבעיא is not similar to the case where a גזלן stole an item and the owners did not give up their chance to retrieve it, the rule is that both of them (the גזלן and the owner) cannot be מקדיש this item -**

**זה לפי שאינו שלו וזה לפי שאינו ברשותו –**

**This one (the גזלן) cannot be מקדיש it because it is not his, and this one (the owner) cannot be מקדיש it because it is not in his possession.** Seemingly here too, how can one person be מקדיש the whole טלית (even if are to assume that since he was silent he admitted that it is not his, nevertheless), since half the טלית is not in his possession; it is being held by his adversary?!

replies that our case of גזלן וחסדף צוה is different from גזלן נתייאשו וכו':

**דכיון דאודי ליה הוי כפקדון שיש לו ביד אחרים דיכול להקדיש<sup>4</sup> –**

**Because here since he admitted (by his silence) to his adversary, it is considered (for the מקדיש) as a deposit which another party is holding for him, where the owner can be מקדיש this deposit, even though it is not in his possession, similarly here too if שתיקה is כהודאה then the one who is שותק is (merely) holding the טלית as a פקדון for the one who is מקדיש it.**

proves that one may be מקדיש a אחרים לו ביד אחרים;

**כדמוכח בהמוכר את הספינה (בבא בתרא דף פח,א) גבי ההוא דאייתי קרי כולי<sup>5</sup> –**

**as is evident in הספינה את המוכר פרק regarding the case of the one who brought pumpkins to sell, etc. The גמרא there concludes -**

**דאי לא קייצי דמייהו הוי קדושות –**

**That if their price (of the pumpkins) are not fixed, they become הקדש.** It is evident that even though the pumpkins were not in the possession of the מקדיש, but rather they were in the hands of the customers, nevertheless the הקדש is חל for it is considered only as a פקדון by the customers.

explains the other side of the איבעיא:

<sup>4</sup> The owner cannot be מקדיש the item when it is in the possession of the גזלן because the גזלן is retaining it for himself and has no intention of returning it to the owner, therefore it is considered אינו ברשותו. However where the litigant (by his שתיקה) is admitting that it belongs to the owner and is therefore willing (and obligated) to return it, in that case it is considered ביד אחרים.

<sup>5</sup> The story there is that someone brought pumpkins to the market for sale. The people were grabbing the pumpkins, and the owner, afraid that he would not get paid announced that he is מקדיש the קרי. The גמרא concludes that if there is a set price for the pumpkins then they are not הקדש, since the people who took them intend to (pay for them and) buy them, so they are not in the רשות of the מקדיש. However if there is no set price for the pumpkins then we are not certain that the people will want to buy them when they realize the price; therefore it is considered as if the קרי is in their possession merely as a פקדון and the הקדש is חל.

או דלמא הקדש לא הוי כתיקיפה דלמה יצווה בשביל דבריו<sup>6</sup> –

**Or perhaps the הקדש is not the same as seizing, for why should he protest because of his words;** in his mind, words (as opposed to seizing) are meaningless. Therefore the fact the he did not protest is no indication at all that he is conceding ownership but rather he is not upset at all by this הקדש since it belongs to him and not to the מקדיש.

גמרא continues with the conclusion of the תוספות:

ומייתי מההיא מסותא דהקדיש חד ושתק אידך<sup>7</sup> –

**And the גמרא cited from that case of the מסותא where one of the partners was מקדיש the מסותא and the other partner was silent** and did not protest -

**ומסקנא דלא הוי הקדש אלמא שתיקתו אינו כהודאה:**

**And the conclusion in the case of מסותא is that it is not הקדש; it is therefore evident that his silence cannot be interpreted as an admission.**

### SUMMARY

The query of בלא תקפה is where he was ולבסוף צווה. The question is whether he should be צווה (since כמסירותו להדיוט), or whether there is no need for צווה since it is merely words and no physical removal.

### THINKING IT OVER

1. Seemingly the admitting (through שתיקה) was after the הקדש,<sup>8</sup> how can the הקדש be חל, when at the time of the הקדש there was no admittance, and he was like a גזול?<sup>9</sup>

2. It seems that the reason תוספות gives why הקדישה is not the same as תקפה (because there is no reason to protest)<sup>10</sup> is not the same as the גמרא's reason (that it is not ברשותו); in fact according to תוספות it is not הקדש because it is not שלו (since he did not admit) and not (only) because it is not ברשותו?<sup>11</sup>

<sup>6</sup> See 'Thinking it over' # 2.

<sup>7</sup> For a comprehensive explanation of מסותא see following והא. The question regarding מסותא is not the same as the query regarding תקפה בלא הקדישה, nonetheless since by מסותא the ruling is that it is not הקדש (because it is יכול להוציאה בדיינים) regardless that it was a case of שתק, this proves that by הקדש we do not say שאתה יכול להוציאה בדיינים, for if שתיקה כהודאה דמיא it would be שתיקה כהודאה דמיא.

<sup>8</sup> See footnote # 2.

<sup>9</sup> See שמועה בשם הריטב"א.

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

<sup>11</sup> See אמ"ה # 256 that the גמרא is teaching us that it is not even a ספק הקדש (even though there is a possibility that the תלית belongs entirely to the מקדיש, nevertheless), since it is not ברשותו, therefore there is no הקדש at all. See נח"מ and קע בסוף אות קע for a different approach.