

**והא<sup>1</sup> הכא דכי תקפה כהן כולי – And here, if the כהן seized it, etc.**

## **OVERVIEW**

The הקדישה בלא cites the case of מסותא (in order to resolve the query of בלא), where one of the litigants was מקדיש whose ownership was in dispute. מסותא רב המנונא maintained that the issue of מסותא can be resolved based on the case of ספק בכור. By a ספק בכור the ruling is הראיה (which according to המנונא meant that if the כהן took possession of this ספק בכור, we will not make him return it), and that (even if it is ישראל) it is הקדישה בלא. This proves (as תוספות will explain) that הקדישה בלא is הקדש. However רבה rejected this proof, saying that the כהן cannot grab it, and the reason it is אסור בגיזה ועבודה is because it is a קדושה הבאה מאליה. Our תוספות will explain the two sides of the issue concerning מסותא, the proof of המנונא and the rejection by רבה.

נראה דהכי מיבעי ליה במסותא<sup>2</sup> כיון דמקרקעי היא והוה דינא כל דאלימ גבר<sup>3</sup> –  
**It appears (to תוספות) that this is the issue concerning the מסותא; since the מסותא is like land (it is not a movable object) and therefore the ruling concerning the disputed ownership of this מסותא is כל דאלימ גבר –**  
 וכיון דאם תקפה האחד והקדישה כשהיא בידו מסתמא תו לא פקע<sup>4</sup> –  
**And therefore since presumably if one of the litigants seized possession of the מסותא and was מקדיש it while it is in his possession, the הקדש could not be undone; it would remain הקדש –**

<sup>1</sup> This תוספות references the גמרא on ב,ו.

<sup>2</sup> תוספות does not interpret the query by מסותא to be similar to the query of בלא תקפה (where the question is whether we say כהודאה); for if that was the issue by מסותא, then how did המנונא want to resolve it from ספק בכור (where no one knows if this animal is a בכור, and), where the concept of שתיקה is not applicable (for the ישראל does not know whether this is a בכור or not). [We must assume nonetheless that in the case of מסותא the other partner was שותק ולבסוף צווח; otherwise how can we resolve (from מסותא) the query regarding בלא תקפה (see previous הקדישה footnote # 7).]

<sup>3</sup> See ויחלוקו ד"ה ויחלוקו, who cites the גמרא in ב,לד,ב, that when there is a dispute over an item and neither of the litigants are in possession of this item (for instance a boat, or קרקע where neither is in possession) the rule is כל דאלימ גבר; **whoever is stronger can overpower** his opponent and take possession. It is apparent from תוספות that כל דאלימ גבר is a continuous process; whoever grabs it last is in possession (unless one can bring proof that it belongs to him).

<sup>4</sup> This is a presumption of תוספות according to either side of איבעיא גבר. In a case of כל דאלימ גבר when one person is in possession, then (even though the other party can take it away from him, nevertheless as long as it is in his possession) he can be מקדיש it. This הקדש will remain even if the other party grabs it away from him. See 'Thinking it over' # 1. [This concept of הקדישה is כתקפה, etc. is not applicable to the query of בלא תקפה by תלית. There by תלית since they were both holding it, there is no דין of כד"א, only ויחלוקו. שתיקה כהודאה דמיא. Therefore the query there is only concerning whether דמיא.]

**אפילו חזר חבירו ותקפה ממנו –**

**Even if his adversary would seize it away from him,** nevertheless the הקדש would remain as is, therefore it can be understood that -

**כי הקדישה בלא תקפה נמי הוי הקדש<sup>5</sup> –**

**If he was מקדיש the מסותא without תקפה it would also be הקדש.** This is one side of the query.

**או דלמא כיון דאפילו גבר האחד אם יכול השני לחזור ולתקפה ממנו זוכה –**

**Or perhaps, since that if even one of the litigants overpowered the other and took possession of the מסותא, nevertheless if the other can seize it back to his possession, the second one will acquire it, therefore -**

**הוא הדין הקדיש בלא תקפה לא יחול הקדש כלל –**

**The same rule will apply by הקדש ולא תקפה that the הקדש will not be חל at all, for -**

**כיון דחבירו אם תקפה היה זוכה דלא אלים הקדש מתקיפה<sup>6</sup> –**

**Since if his friend would grab it back, the friend will acquire it, therefore his הקדש is invalid, for הקדש is not stronger than seizing;** if seizing is not final (for it can be retaken back [showing that it is not really ברשותו]) then the הקדש too is not final (meaning it is no הקדש)<sup>7</sup>. These are the two sides of the query concerning מסותא.

Tosfos continues with the s' attempt to resolve this query:

**והשתא<sup>8</sup> אייתי והא הכא אם תקפה כהן אין מוציאין<sup>9</sup> –**

**And now the גמרא cites the case of ספק בכור and brings the proof; for here by ספק בכור if the כהן grabbed it we do not take it away from the כהן -**

**ולכך אפילו לא תקפה אסורין בגיזה ועבודה<sup>10</sup> מספק –**

**And therefore we see that the ruling is that even if לא תקפה the בכור is forbidden בגיזה ועבודה on account of the ספק -**

<sup>5</sup> Each party has the potential right to grab it; if we assume that הקדישה is an act which is similar to תקפה; then if הקדישה, it is like he was תקפה, meaning that it is in 'his' possession. This תקפה (of הקדישה) was not merely a physical תקיפה which can be reversed, but rather it is a תקיפה of הקדש which is irreversible (see previous footnote # 4), therefore it will remain הקדש. [According to this side of the query, הקדישה would be the equivalent of תקפה והקדישה; meaning that הקדישה is 'stronger' than תקפה alone.]

<sup>6</sup> According to this side of the query, תקיפה and הקדש are equal; neither of them is final.

<sup>7</sup> There is no concept that an article is first הקדש and then when someone else takes possession the הקדש vanishes (without פדיון). If the הקדש can exist only temporarily then it is no הקדש at all.

<sup>8</sup> This means; that now that we explained the reason why it should be הקדש by מסותא is because each person has the power to grab it (for דאלימ גבר), and being מקדיש is a form of grabbing, and the grabbing of הקדש is considered as if תקפה והקדישה, we will prove that this is indeed so (that הקדישה is as if תקפה והקדישה) based on the ruling by ספק בכור that it is בגיזה ועבודה.

<sup>9</sup> understood that when the משנה rules concerning ספק בכור that הראיה עליו הראה, this refers to either the כהן or the ישראל, that בי"ד cannot remove it from whoever possesses it (meaning גבר).

<sup>10</sup> One is forbidden to shear the wool of a בכור or to work with a בכור for the תורה writes (טו, יט) (דברים [ראה]). לא תעבד בבכור שורך ולא תגוז בכור צאנך.

משום דשמא יש לכהן חלק בו ולכך יכול לתקפה<sup>11</sup> –

Because perhaps the כהן has a share in this בכור and that is why he can grab it -

אלמא<sup>12</sup> אפילו לא תקפה חשיב כאילו תקפה כבר והקדישה בעודה בידו –

It is therefore evident that even where לא תקפה it is considered as if he was already and he was מקדיש it while it was still in his possession. This concludes the proof of רב המנונא.

continues with the s' רבה rejection of this proof.

ודחי רבה דהתם אם תקפה כהן מוציאין מידו<sup>13</sup> –

And רבה rejected this proof, for there by בכור ספק, if the כהן grabbed it from the ישראל the rule is that we take it away from the כהן and give it back to the initial owner, the ישראל -

ואף על פי שאין לכהן בו כלום דאפילו כבר תקפה מוציאין מידו –

And even though the כהן has no rights at all in the בכור, for we see that even if the כהן already grabbed it we are מוציאין מידו; proving that he has no rights in this בכור -

ואפילו הכי אסורין בגיזה ועבודה ועל כרחך<sup>14</sup> משום דקדושה הבאה מאליה שאני –

And nevertheless the בכור is עבודה, so perforce we must say that a קדושה which comes by itself (without human intervention; such as a בכור) is different than a קדושה which is caused by the act of a person. Therefore there can be no proof from בכור concerning the case of מסותא which is a קדושה that is caused by man.

asks (a seemingly unrelated question<sup>15</sup>):

ואם תאמר אמאי אין מוציאין מידו והלא הבעלים יאמרו ליתן לכהן אחר –

<sup>11</sup> Otherwise it should be מותר בגיזה ועבודה if it is in the possession of the ישראל. He is not required to give it to the כהן, since the ישראל is the מוחזק; indicating that we do not consider it a בכור (even מספק). It should therefore also be מותר בגיזה ועבודה. The reason why it is אסור בגיזה ועבודה (according to רב המנונא) is because the כהן has a right of תקיפה, and whenever there is the right of תקיפה, the הקדש will be חל (except that by בכור there is no need for the כהן to be מקדיש it בפה for it became הקדש by birth).

<sup>12</sup> This is the conclusion concerning מסותא, that just as by בכור the right to תקיפה allows the הקדש to be חל, similarly by מסותא the right of גבר כל דאלים allows his הקדש to be חל.

<sup>13</sup> The משנה which states that by בכור ספק the rule is הראיה עליו, means that the כהן cannot claim it from the ישראל (unless he can somehow prove that it is a בכור), but not that the כהן may keep it if he grabs it. In fact the כהן will be required to return it to the ישראל if he grabbed it. The reason we do not say כ"א by בכור is because the ישראל was the original מוחזק in this animal (when it was a fetus).

<sup>14</sup> The קדושה of a בכור ספק that it is אסור בגיזה ועבודה is not all connected to any rights which the כהן may have (which is none). It is a ruling in ספק קדושה הבאה מאליה (and it is like any דאורייתא) and can prove nothing concerning מסותא which is a קדושה פה through a person.

<sup>15</sup> See נח"מ and פנ"י.

**And if you will say; why is the rule that אין מוציאין מידו (as רב המנונא originally thought); cannot the owner say give this בכור to another כהן?!<sup>16</sup>**

answers: תוספות

**ויש לומר במכירי כהונה<sup>17</sup> –**

**And one can say;** that we are discussing a case where this כהן is a 'befriended כהן'; the owner always gives his מתנות כהונה to this כהן. The owner cannot argue that he wants to give it another כהן. The question is only if it is a בכור or not.

תוספות offers an alternate solution:

**אי נמי<sup>18</sup> אינו יכול לתובעו רק טובת הנאה<sup>19</sup> שיש לו בו למאן דאמר טובת הנאה ממון –**  
**Or you may also say; the owner can only demand the טובת הנאה which the owner possesses in this בכור according to the one who maintains that is considered something which has monetary value.**

תוספות rejects an anticipated proof to this last statement that the כהן is obligated at most only for the טובת הנאה:

**ומפרק הזרוע (חולין דף קלג,א) דאמר<sup>20</sup> בן לוי דחטף מתנתא פריצותא הוא –**  
**And from the פרק הזרוע in גמרא where it states a בן לוי who grabbed a מתנת כהונה; it is considered outlandish -**

**משמע דאינו חייב לשלם אין ראיה –**

**This indicates** that it is 'merely' a פריצותא, **but** the בן לוי is not obligated to pay. This would seemingly support the contention of תוספות that at most the מתנת כהונה כהן is liable for the טובת הנאה but is not required to return the מתנת כהונה.

However תוספות says that from that גמרא **there is no proof -**

**דשמא מיירי כשאכלו כדאמרינן התם (דף קלב) המזיק מתנות כהונה או אכלן פטור:**  
**Because perhaps that גמרא is discussing a case where the בן לוי ate already**

<sup>16</sup> The owner has the right to give the בכור to whichever כהן he pleases; how can רב המנונא have thought that the owner may seize the בכור as his own.

<sup>17</sup> All the other כהנים, knowing that this ישראל give his מתנות כהונה to this כהן, are מתייאש from receiving these מתנות כהונה, and therefore this כהן receives it.

<sup>18</sup> This answer argues with the previous answer and maintains that if the כהן grabs the מתנות כהונה the ישראל cannot force him to return it. At most he can claim from the כהן the טובת הנאה according to the מ"ד that טובת הנאה is considered ממון. However if we maintain אינה ממון, he cannot claim anything from the כהן.

<sup>19</sup> טובת הנאה refers to the right the owner has to give his מתנות to whomever he pleases. We can attach a monetary value to this; for someone may come to the ישראל and tell him if you give the מתנות to this כהן, I will pay you something for it, and other similar types of benefits. There is a dispute whether this טובת הנאה is considered something of material benefit, which, if taken away, can be claimed in court.

<sup>20</sup> In our גמרות it states: הא כיצד דחטף מתנתא וכו' ולזולי קא מזלזל במצוה. The גמרא states: חולין קלא,א in גמרא. The גמרא states: חולין קלא,א in גמרא. The גמרא states: חולין קלא,א in גמרא. The גמרא states: חולין קלא,א in גמרא.

the מתנת כהונה, in which case he is surely פטור **as the states there, 'one who damages or eats מתנות כהונה is exempt** from paying for it'. However, here where the בכור is present, perhaps the owner can force him to return it to him.

### **SUMMARY**

The query regarding מסותא is whether the right of כד"א allows the הקדש to be חל as if he was מקדיש it after the תקיפה. According to ר"ה the איסור גיזה ועבודה by בכור תופס the right of the כהן to be ספק בכור. This is rejected by רבה who maintains that despite that the כהן has no rights in the ספק בכור, nevertheless it is אסור בגיזה וכו' because it is a קדושה הבאה מאליה. The (even according to ר"ה) בכור תופס the כהן if he was מכירי כהונה (רב המנונא) or alternately he can only claim the טובת הנאה according to the מ"ד that טובת הנאה is ממון.

### **THINKING IT OVER**

1. assumes that when one is תוקף (קרקע) and is מקדיש it, it becomes הקדש (even though the other party could have grabbed it back [before the הקדש]).<sup>21</sup> Is this הקדש a ודאי הקדש or is it a ספק הקדש, because even though it is ברשותו, can we however say that it is ודאי שלו (since the other party can grab it back)?<sup>22</sup>

2. רבה rejects רב המנונא's proof and maintains that תקפה כהן מוציאין אותו מידו and the reason it is אסור בגיזה ועבודה is because קדושה הבאה מאליה שאני רבה. Is רבה ruling that תקפה כהן מוציאין אותו מידו, or is רבה saying that in order to explain the איסור גיזה ועבודה it is not necessary to maintain that מוציאין אותו מידו, but ת"כ אין מוציאין אותו and nevertheless אסורין בגיזה ועבודה because of קדושה הבאה מאליה?<sup>23</sup>

<sup>21</sup> See footnote # 4.

<sup>22</sup> See בל"י אות קעב.

<sup>23</sup> See בל"י אות קעה.