

לאו קמודית דהא ארעא ידידי הוא –

Do you not admit that this field is mine

OVERVIEW

The גמרא presents the following case. The מערער claims that the field of the מחזיק belongs to the מערער. The מערער, however, did not produce any עדים that the field was ever his. The מחזיק responded that he bought the field from a מוכר who originally bought it from the מערער (the מחזיק did not have a ג"ש). The ruling is that since the מחזיק could not verify any connection between the מוכר and this field (and the מערער); the field reverts to the מערער. Our תוספות will be discussing the efficacy of various different claims of the מחזיק, in this setting.

The תוספות will now discuss, under what circumstances the מחזיק will be believed. First תוספות will cite the opinion of the רשב"ם and then תוספות will offer his view.

פירש רבינו שמואל דאם מוחזק זה שלש שנים וטוען מפלניא זבנתיה דזבנה מינך קמי ידידי –
The רשב"ם explained¹ that if the מחזיק is in possession of the land for three years and the מחזיק claims ‘I bought it from an individual who previously bought it from you (the מערער) in my presence’; had the מחזיק claimed this, the ruling would be –
דנאמן במיגו² דאי בעי אמר מינך זבנתיה ואכלתיה שני חזקה –
that the מחזיק would be believed, for he has a מיגו, since the מחזיק could have claimed, ‘I bought it from you (the מערער) and I have consumed the produce of this field for the three חזקה years’.

The רשב"ם offered another situation in which the מחזיק would be believed:

אי נמי אם יש לו עדים שהחזיק בה המוכר יום אחד –
Or also if the מחזיק has witnesses who will testify that the alleged seller (from whom the מחזיק bought the field) was in possession of the land for at least one day; then the מחזיק will be believed, and be allowed to keep the land.
והביא ראיה מההיא דדר בקשתא בעיליתא דלקמן –

¹ רשב"ם ל,ב ד"ה אמר.

² Seemingly there should be no need for a מיגו; the claim of קמי ידידי should be a valid טענה which is backed up by ג' שנים. Some commentaries claim that indeed no מיגו is required; it is merely an expression that the claim of קמי ידידי is as good as if he would have claimed זבנתיה. Others however maintain that the claim of קמי ידידי זבנה מינך has a flaw. The מחזיק cannot provide proof that the מוכר lived there for even יומא (if there were even יומא he would be believed regardless). It is highly unusual that a person buys and sells property without being there for even a short while between the buying and selling. The מחזיק would not be believed. The מיגו of זבנתיה removes that flaw. See ד"ה אמאי.

יש לו and קמי ידידי זבנה מינך brought proof to these two rulings; of גמרא which we learn **later**³ concerning a person **who dwelt in an attic in the city of קשתא**. The גמרא there relates that there was a person who dwelt in an attic for four years and had witnesses to prove it. The מערער came and claimed the house as his. The מחזיק claimed (as in our גמרא מינך) מפלניא זבינתה דזבנה מינך ruled that if the מחזיק can provide עדים that the person who sold him the house (four years ago) lived in the house (prior to selling it to the מחזיק) for even one day, then the מחזיק will keep the house.⁴ רב remarked that קמאי ידידי זבנה מינך would have also given the field to the מחזיק if he had claimed מינך.

רשב"ם comments on the תוספות:

וכדבריו כן הוא היכא דיש עדים למערער שהקרקע שלו היתה –

And what the רשב"ם says (that [only] if the מחזיק has a שנים ג' will he be believed if he claims קמי ידידי זבנה מינך or he has עדים that יומא חד ביה חד יומא) **is correct**, provided we are discussing a case **where the מערער has witnesses that the land was once his**; only then do we require that the מחזיק have a שנים ג' in order to be believed if he claims קמי ידידי זבנה מינך or יומא חד ביה חד יומא –

אבל בעובדא דהכא משמע⁵ שלא היה למערער עדים מדקאמר לאו קא מודית כולי –

However in the case before us [where] it seems that the מערער had no עדים that the land was once his; we can infer that the מערער had no עדים at all, **since** the מערער **said: 'do you not admit, etc. that this land was mine'**. The fact that the מערער said instead of producing witnesses that he once owned the land, proves that the מערער had no witnesses that the land was once his. He is basing his claim on the testimony of the מחזיק, who stated מפלניא זבינתה דזבנה מינך admitting in essence that the מערער was a previous owner. Therefore, since the מערער has no עדים that he was a previous owner –

אי הוה טעין קמי ידידי זבנה מינך או דר בה חד יומא היה נאמן –

if the מחזיק would claim he (the מוכר) bought it from you (the מערער) in my presence, or if the מחזיק would claim that the seller lived there for (at least) one day;⁶ in these two instances, the מחזיק would be believed -

³ מא, ב. Our תוספות will shortly cite this incident.

⁴ The רשב"ם there, in אפילו ד"ה explains that if we know that the seller lived there for even one day, בי"ד will not require the מחזיק to prove that the seller bought it from the מערער, but rather בי"ד will argue on behalf of the buyer-מחזיק, that the seller bought it from the מערער. This claim of בי"ד that the מוכר bought the field from the מערער, is supported by the חזקה. If however the מחזיק cannot prove that the מוכר lived there יומא חד ביה חד יומא, then we do not have a bona fide buyer. People do not buy properties from people in the street. A bona fide buyer will seek for some proof that the seller is indeed the owner of the property. בי"ד will argue on behalf of a bona fide buyer (in order to bolster trade and protect the consumers), however בי"ד will not argue on behalf of what may be a bogus buyer and seller.

⁵ The דהכא דמשמע amends this to read דמשמע.

⁶ קמי' The words דר בה חד יומא seem to say that the מחזיק claims that he is personally aware that יומא חד ביה חד יומא. It seems that תוספות maintains that it is not necessary for the מחזיק to prove that the מוכר was יומא חד ביה חד יומא, it is sufficient if the מחזיק merely claims it (just as the מחזיק is believed when he

אף על פי שלא החזיק שלש שנים מיגו דאי בעי אמר לא היתה שלך מעולם –

Even if the מחזיק did not make a three year חזקה; the reason he is believed is because the מחזיק has a מיגו, for he could have said to the מערער it was never your field; the מערער has no עדים that it was ever his land. When the מערער came to claim the land, the מחזיק could have simply stated it was never your field, and the field would remain by the מפלניא זבינתה דזבנה. Therefore when he claims חזקה ג' שנים, he is also believed, with the מיגו of להש"ם. If however the מחזיק merely claims מיגו and does not add חזקה ג' שנים, then obviously he is admitting that the מערער is a קמא and that he (the מחזיק) has no valid claim to the property. He may have a מיגו but he has no טענה.

In summation there is a dual מחלוקת between the רשב"ם and תוספות.

A. The רשב"ם maintains that in the case of מפלניא זבינתה דזבנה מיגו, the מחזיק is believed only if he has a שנים ג' חזקה and he (originally) claimed מיגו or he has עדים that he has זבנה מיגו. If the מחזיק does not have a שנים ג' חזקה then he is not believed (with the מיגו of להש"ם)⁷ even if the מערער has no עדים that it was originally his.

B. In addition, even if the מחזיק has a שנים ג' חזקה (but does not claim מיגו) he will be believed only if he has עדים that the מוכר was יומא דר בה חד יומא. However, if the מחזיק merely claims that מיגו זבינתה מיגו⁸, even though he has a שנים ג' חזקה, that would be insufficient, even though he has a מיגו זבינתה מיגו⁹.

תוספות maintains (a) that if the מערער has no עדים then the מחזיק will be believed with a מיגו of להש"ם (even without שנים ג' חזקה) provided that the מחזיק claims initially either מיגו זבינתה מיגו or

מיגו זבינתה מיגו. The מחזיק is believed to claim יומא דר בה חד יומא since he has a מיגו; either the מיגו of זבינתה מיגו (if the מערער has עדים and the מחזיק was שנים ג' חזקה) or the מיגו of להש"ם (if the מערער has no עדים). However by the case of בקשתא בעיליתא, the גמרא states clearly that the מחזיק would be believed only if he brought עדים that the מוכר was יומא דר בה חד יומא. The difference is that by בקשתא בעיליתא, the מחזיק already made his claim that זבינתה מיגו. Therefore, if he would subsequently claim that יומא דר בה חד יומא, that would be considered a למפרע מיגו, which is not a valid מיגו (as תוספות will shortly state). However if he originally claims יומא דר בה חד יומא then he has a valid מיגו and is believed.

⁷ According to some commentaries (see בל"י אות צה) he is not believed if he claims (or even if he brings עדים) that יומא דר בה חד יומא (see the ר"י at the conclusion of our תוספות; footnote # 45). If however he claims מיגו זבינתה מיגו then the רשב"ם agrees that the מחזיק is נאמן even if there was no שנים ג' חזקה, provided that the מערער has no עדים that he was the קמא. Others however disagree (see ל"ב אות לה) and maintain that if there was no שנים ג' חזקה the מחזיק is never believed. Their reason is that there is a flaw in his claim of מיגו זבינתה מיגו, since three years have not yet gone by and there is no שטר מכירה from the מערער to the מוכר. Others say that the מחזיק would not want to claim יומא דר בה חד יומא, for perhaps the מערער will eventually produce עדים that it was once his.

⁸ The commentaries explain (שיטת הרשב"ם) that even after we verify that the מוכר was יומא דר בה חד יומא, we still need the additional concept of טענין ללוקח in order to award the property to the מחזיק. The power of a מיגו does not extend that far. Others (see סוכ"ד אות כט) explain that if we assume that מיגו is a זכות הטענה (not a proof), then even with the מיגו, we still are not aware that the מוכר was יומא דר בה חד יומא (we merely grant him the same monetary rights for his current claim as if he claimed the מיגו claim). The current טענה of יומא דר בה חד יומא is not the claim that can vindicate the מחזיק on its own merit; rather the טענין (which does not take effect until we can verify that יומא דר בה חד יומא [which we are not verifying]), as opposed to מיגו זבינתה מיגו which vindicates the מחזיק on its own merit. See footnote # 46.

⁹ The מהרש"א maintains, however, that (even) according to the רשב"ם it is not necessary to have עדים that יומא דר בה חד יומא but even if the מחזיק claims יומא דר בה חד יומא, the מחזיק is נאמן when he has a שנים ג' חזקה.

קמי ידידי דר בה חד יומא. In addition (b), by all cases, תוספות maintains that קמי ידידי is sufficient to substantiate the claim of יומא חד בה חד יומא; עדים are not required (unless the מחזיק did not claim דר בה initially)¹⁰.

will now discuss the issue of a למפרע; a retroactive מיגו. The power of a מיגו is to substantiate an effective claim. An acceptable מיגו is in a case when the litigant could have stated a better argument instead of stating the present argument; as in the case where the מחזיק initially claimed קמי ידידי זכינה כו' (which is an effective claim); however it needs to be substantiated that it is indeed true. The מיגו substantiates the claim. The מחזיק will be נאמן that it indeed was להש"ם קמי ידידי זכינה כו' or דר בה חד יומא, since he has a מיגו that he could have stated להש"ם. An example of למפרע מיגו is in our case where initially he claimed קמי ידידי זכינה כו' without זכינה כו' (which is an ineffective claim). At this point he is not believed (even though he has the מיגו of להש"ם) since he has no טענה. Afterwards he makes a second claim that it was קמי ידידי זכינה וכו'. If we could substantiate this claim, then obviously he would be believed. However, we cannot substantiate this claim of קמי ידידי, since now he has no מיגו; he cannot claim להש"ם or any other vindicating argument since he already admitted (by saying מינך דזכינה) that it originally belonged to the מערער. It is just that previously, before his original claim of זכינה כו' that is when he had a מיגו. This type of מיגו is called למפרע מיגו; there was a מיגו by his first claim, but not by his second claim. תוספות maintains that such a מיגו is not valid, as תוספות will shortly explain. We will not believe his second claim of קמי ידידי, since presently he has no valid מיגו to support his claim (only a למפרע מיגו).

אבל ודאי השתא דאמר מפלניא זכינה דזכינה מינך והודה שהיתה שלו –

However, it is certainly true that now, once the מחזיק stated ‘I bought it from ‘him’ who bought it from you’, and by saying this, the מחזיק admitted that it originally belonged to the מערער, and since he did not originally claim either קמי ידידי זכינה מינך or יומא חד בה חד יומא, then the מחזיק –

תו לא מצי למיטען קמי ידידי זכינה מינך או קמי ידידי דר בה חד יומא –

cannot subsequently claim that the מוכר bought it from you in my presence or that the מוכר lived there one day in my presence. We cannot argue that even in such a case the מחזיק should be believed, since he had –

מיגו¹¹ דאי בעי אמר בתחלה לא היתה שלך מעולם¹² –

a מיגו that he could have stated originally it was never yours; This is not a valid argument. The מחזיק is not believed with this מיגו –

דמיגו למפרע לא אמרינן –

¹⁰ See previous footnote # 6.

¹¹ The הגהות הב"ח amends this to read במיגו.

¹² It would seem that the same will apply in a case where there was a חזקת ג' שנים and the מחזיק claimed מפלניא זכינה כו'. קמי ידידי זכינה מינך but did not initially state קמי ידידי זכינה מינך. The מחזיק cannot subsequently claim קמי ידידי זכינה מינך or יומא חד בה חד יומא, since this too is a למפרע מיגו.

for we do not allow a retroactive מיגו. A מיגו can substantiate a claim only if it could have been claimed at the moment of the actual claim. If it could only have been claimed in the past, but not presently; it is not an acceptable מיגו. Therefore, since we cannot substantiate his claim of קמי ידידי, the מחזיק has no טענה and the property reverts back to the מערער.

מיגו will first prove that מיגו למפרע לא אמרינן and then explain why it is not a valid מיגו.

כדמוכח לקמן (דף מא,ב) גבי ההוא דדר בקשתא בעיליתא ארבע שנים –

As it is evident from the גמרא **later** (that מיגו למפרע לא אמרינן), **concerning an individual who lived in an attic in the city of קשתא for four years** (and had עדים to that effect). A מערער claimed the property as his –

ואמר מפלניא זבינתיה דזבנה מינך –

And the מחזיק claimed **“I bought it from ‘him’ who bought it from you”** (as in our גמרא) –

אתא לקמיה דר’ חייא אמר ליה אייתי סהדי דדר ביה אפילו חד יומא ואוקמיה לה בידך –

The case came before ר”ה; he said to the מחזיק ‘bring עדים that the מוכר lived there for even one day and I will place this property in your possession’. This concludes the quote from the גמרא. continues with his proof –

משמע דאי לית ליה סהדי אין נאמן לומר קמי ידידי דר בה חד יומא –

It seems from the response of ר”ה that if the מחזיק has no עדים that the מוכר was דר there one day in my presence –

במיגו דאי בעי אמר מינך זבינתיה כיון שכבר הודה דלאו מיניה זבנה לית ליה תו מיגו –
with a מיגו that the מחזיק has that he could have claimed ‘I bought it directly from you’ (the מערער). The reason this מיגו is invalid, is **since** the מחזיק **already admitted that he did not purchase the property from the מערער**; the מחזיק claimed זבינתיה, **he no longer has the מיגו** of זבינתיה that he originally had; the מחזיק already admitted that it was not זבינתיה but מינך זבינתיה. This establishes that when he claims now קמי ידידי he presently has no מיגו.¹³

will now address the issue, why indeed is a מיגו למפרע not effective. Seemingly he is telling the truth, for if he is lying he could have lied originally! תוספות explains:

ואין לו להאמינו במאי דקאמר השתא מתוך¹⁴ שהיה יכול לשקר בתחילה קודם שהודה –

And there is no basis to believe what he is presently claiming (that קמי ידידי דר בה)

¹³ This proof is valid only according to תוספות who maintains that if the מחזיק originally claimed קמיה ידידי דר ביה חד יומא it is a valid claim. However according to the רשב"ם who maintains that the claim of קמיה ידידי דר ביה חד יומא is valid only if there are עדים to that effect, but the מחזיק is never believed even if he initially claimed קמיה ידידי דר ביה חד יומא; then there is no proof at all from that גמרא.

¹⁴ The השתא מיגו שהיה אמends this to read שהיה יכול לשקר בתחילה קודם שהודה.

on account of the **מיינו** that he could have originally lied and said I bought it from you, **before he admitted** **מפלגת זרינחיה**. The reason for this is –

דלא הוה מסיק אדעתיה שהיה זקוק לטענה זו –

for it never entered his mind that he needed this claim of קמי דידי. When the מחזיק claimed זבינתיה מיןן it is evident that he is saying the truth; since he has the מיגו of זבינתיה מיןן. This truth however, is an insufficient טענה; it does not establish that the מערער ever sold the property. The מחזיק needs now to make a claim that is an effective טענה; the claim of קמי דידי. There is no מיגו now however, to substantiate his new claim of קמי דידי. The fact that he was honest by the first claim, cannot prove that he is also honest in his second claim.¹⁵ A מיגו merely substantiates the immediate claim; it cannot indicate to us that everything this person will say in the future is true. The מחזיק told the truth that מפלניא זבינתה וכו' , being under the impression that this claim is sufficient to win the case. When he now realizes that it is insufficient, it is possible that he resorts to lying.

In summation: A מפלגניא זבינתה that מציגו למפרע is not a valid claim. Therefore once the מחזיק claimed that מציגו למפרע, קמי ידידי דר ביה חד יומא or קמי ידידי זבנה and did not originally claim דזבנה מינך, and then he subsequently claims קמי ידידי he is not believed for this is a מציגו למפרע. The only way the מחזיק can retain the field once he admitted מינך דזבנה is (if מרעיר testify that the מוכר sold it to the מוכר or) if he brings עדים that the מוכר was יומא חד ביה חד יומא. In that case since we substantiate that the מוכר was יומא חד ביה חד יומא, the rule of טוענין ללוקח applies, and בי"ד will argue that (perhaps) the מוכר bought it from the מרעיר.¹⁶ מרעיר proves that a מציגו למפרע is invalid from the story of רב בקשתא בעיליתא that רב would only accept עדים that יומא חד ביה חד יומא, but would not accept a טענה of יומא חד ביה חד יומא after the מחזיק already admitted that דזבנה מינך. A מציגו למפרע is invalid, because the fact that he was previously honest in his original claim cannot prove that he is equally honest in his subsequent (unanticipated) claim.

In the coming section תוספות will cite גמרות which either support or (seemingly) contradict the

15. מייגו למפרע states that since he was not originally aware that he needed the claim of קמי ידיי; that makes it a מייגו למפרע. If he was originally aware that he needed the claim of קמי ידיי to win the case; then we can argue that it (the מייגו למפרע) is not a מייגו למפרע, since he is presently merely interpreting his original statement of מפלניא זבינתיה to include (but not מפלניא זבינתה דזבנה מייגו) תוספות according to גירסא that בל"י אות צו [See דר בה חז יומא or קמי ידיי זבנה מייגו (דאמר לי דזבנה מייגו), which allows for the קמי ידיי as an interpretation of the previous claim.] For if he was originally aware of the necessity of claiming קמי ידיי, then why did he not initially say it?! Obviously, we are forced to say that this is what he meant when he originally said מפלניא זבינתיה; that the מוכר was דר ביה חז יומא. We cannot say that he did not say it originally because it is not true (even though he knew it was necessary to claim it in order to win the case), for if so, then why is he saying it now! What changed?! Therefore since he originally meant that דר ביה חז יומא then it should be a valid מייגו. However, if we maintain as תוספות states, that originally מחזיק was not aware that to win the case he must claim קמי ידיי; he thought that מפלניא זבינתיה alone is sufficient; therefore it is a מייגו למפרע. See footnote # 27. See 'Thinking it over' # 3.

¹⁶ If the מוכר would have claimed that מינך זבינתה then he would be believed if either the מחזיק was there for three years, or if the מערער had no עדים that he was the מרא קמא (מיגו שלא הש"מ). See however the ר"י at the conclusion of our תוספות. See footnote # 45.

מיגו למפרע לא אמרינן ruling that

והא דקאמר התם¹⁷ רב וחזיתיה לדעתיה דחביבי¹⁸ דאי הוה אמר ליה קמי ידי זבנה מינך –
And that which רב said there ‘and I saw that it was the opinion of my dear one that if the מחזיק would have said to the מערער, that the מוכר bought it from you in my presence, then ר"ה –

הוה מהימן ליה במיגו דאי בעי אמר מינך זבינתה –
would have believed the מחזיק with a מיגו, for the מחזיק could have claimed, ‘I bought it from you’ – the מערער. This concludes the quote from that גמרא. A cursory reading might indicate that ר"ה would have believed the מחזיק even if he would claim now (after he already stated זבנה מינך¹⁹ (מפלניא זבינתיה דזבנה מינך) that קמי ידי זבנה מינך, he would be believed. This however would be a למפרע. If this is the understanding in that גמרא, then it contradicts that which למפרע לא אמרינן maintains, namely, that

corrects this mistaken assumption:

לא קאמר שהיה עדיין נאמן בטענה זו אלא כלומר אי הוה טעין מעיקרא קודם שהודה –
קמי did not mean that the מחזיק will still be believed with this argument of (even after he initially claims זבנה מינך). This cannot be, for it is a למפרע, **but rather רב meant to say as follows; if the מחזיק would have initially claimed זבנה קמי ידי before he admitted** that זבנה מינך; giving the מערער the status of a קמא. It is only in this case where he originally claims זבינתיה דזבנה מינך that the מחזיק would be believed.

adds some clarification:

והוא הדין דאי הוה טעין מעיקרא קמי ידי דר בה חד יומא דהוה מהימן²⁰ –
And the same rule will apply if the מחזיק would have initially claimed that the מחזיק lived there for one day in my presence; the ruling would be that the מחזיק would be believed. The claim of קמי ידי is believed with a מיגו whether the מחזיק claims קמי ידי דר בה חד יומא or whether he claims זבנה מינך.

offers an additional proof that לא אמרינן מיגו למפרע:

¹⁷ On דף מא,ב in the case of בעיליתא.

¹⁸ רב referred to his uncle חביבי as רב חייא (similar to our use of דודי [which can also mean my dear one]).

¹⁹ There is a slight indication there that this is what רב meant. The גמרא there states that after the מחזיק claimed that ר"ה told him that if you have witnesses that זבנה מינך, מפלניא זבינתיה דזבנה מינך רב added that it appeared to him that if he would state זבנה מינך קמי ידי he would also be believed. רב seems to be saying that the מחזיק could be believed in two ways: either he has עדים that זבנה מינך דר בה חד יומא or he claims זבנה מינך קמי ידי. Therefore just as זבנה מינך דר בה חד יומא is valid even now, similarly the claim of זבנה מינך קמי ידי can also mean now. תוספות however will reject this understanding.

²⁰ See “Thinking it over” # 1.

ועוד ראיה מסוף²¹ דזה בורר (סנהדרין דף לא, א) –

And there is an additional proof that from the גמרא in the end of בורר זה [פרק] –

גבי ההיא איתתא דנפק שטרא מתותי ידה אמרה ידענא ליה²² בהאי שטרא דפריע הוא כולי – מלוה regarding that woman who was entrusted with a שטר as a third party. The מלוה and the לוה agreed that she should hold the שט"ה. The שטר was released by her from her possession to בי"ד (presumably upon the request of the מלוה who wanted to collect his debt). She said I know about this שטר that it is a paid up שטר, etc. The לוה already paid the debt.

ולא הימנה רב נחמן²³ אמר ליה רבא והא אי בעיא קלתיה²⁴ –

However ר"נ did not believe her. רבא said to ר"נ why do you not believe her, she has a מיגו for she could have burnt it; it was in her possession all the time. If the woman would have burnt the שטר, the מלוה would not have been able to collect with it. Therefore now that she claims that the לוה paid, she should be believed with the מיגו of קלתיה.

כיון²⁵ דאתחזק בבי דינא²⁶ אי בעיא קלתיה לא אמרינן –

[רבא said to ר"נ] since the שטר was established in בי"ד we do not say 'she could have burnt it'. This concludes the גמרא in בורר זה פרק.

תוספות continues with his proof:

אלמא אף על גב דקודם שראינוהו בידה היתה נאמנת לומר דפרוע הוא –

We may conclude from this גמרא, that even though that before we saw the שטר in her possession she would have been believed to claim that the שטר is paid up – במיגו דאי בעיא קלתיה –

with the מיגו that she could have burnt the שטר, nevertheless –

השתא דאתחזק בבי דינא פירוש שראינוהו בידה לא מהימנה דאין כאן עוד מיגו –

Now that it was 'established' in בי"ד [the meaning of אתחזק is that we saw the שטר in her possession]; she is not believed to claim that it was paid up, for there is no longer any מיגו. Once the woman bought the שטר to בי"ד and בי"ד saw it, she lost the מיגו of קלתיה; אי בעיא קלתיה; she can no longer burn it –

שעל כרחק צריכה עכשיו טענה זו שהיא אומרת אם רוצה לפטור את הלוח –

She presently absolutely requires this argument of פרוע that she now claims if

²¹ מסוף פרק זה הגהות הב"ה amends this to read.

²² The הגהות הב"ה amends this to read ביה (instead of ליה).

²³ There are actually two opposing לשונות in that גמרא as to whether ר"נ believed her. תוספות is citing the דאמרי.

²⁴ We derive from this, that a מיגו is not limited to merely a better argument. Rather, any course of action that would insure victory in a case can be considered as a מיגו.

²⁵ The הגהות הב"ה amends this to read כיין ליה.

²⁶ תוספות will shortly explain that this means that בי"ד is presently aware of this שטר.

she wants to exempt the לווה from paying this debt. She has no other options. This means there is no מיגו.²⁷ Indeed she previously had the option of burning the שטר. If she would have come to בי"ד without (showing) the שטר and claimed הוא פרוע, then she would have been believed with the מיגו of בעי קלתיה אי. However once בי"ד sees the שטר, there is no longer a מיגו. It is merely a למפרע; she once had a מיגו. This proves that a אמרינן לא.

זה בורר in גמרא will now cite a different interpretation of the תוספות:

ובקונטרס פירש שם אתחזק שהיה השטר מקוים –

And רש"י there interprets the word אתחזק to mean **that the שטר was authenticated** by בי"ד. It was a שטר that was notarized by בי"ד. Therefore the מיגו is not valid against such a שטר; but not because it is a למפרע.²⁸

rejection of רש"י's interpretation:

ואין נראה לרבינו יצחק דמה מועיל דמכל מקום אי בעיא קלתיה –

And the ר"י does not agree to this interpretation, **for notwithstanding** that it was a שטר מקוים; **nevertheless, she could have burnt it.** What difference does it make that it was a שטר מקוים; if מיגו she has a valid מיגו.

will now bring yet another proof that אמרינן לא למפרע:

ועוד ראיה דתנן בפרק שבועת הדיינין (שבועות דף לח,ב) –

And an additional proof, for we have learnt in a משנה in פרק שבועת הדיינין, that if a מלוה says to a לווה –

מנה לי בידך אמר לו הן למחר אמר ליה תנהו לי נתתיו לך פטור –

‘You owe me a (מנה) hundred זוז’; the לווה responded in the presence of עדים: **yes, ‘I owe you the מנה’.** **The next day the מלוה says to the לווה, ‘give me the מנה’;** if the לווה responds that **I gave it to you** after my admission, the לווה is **exempt** from paying the מלוה. This concludes the משנה.

ופריך מינה (שם מא,א) למאן דאמר המלוה את חבירו בעדים צריך לפורעו בעדים –

And the גמרא there challenges from this משנה to those that maintain that if one

²⁷ See footnote # 15. This case is entirely different than בעיליתא. There are no two separate claims here. The issue of whether זקוק לטענה זו is relevant only where there are two claims (the original and the current) in which the מיגו is arguing his case. If we were to maintain אסיק אדעתיה וכו', then the מיגו would apply retroactively to the first claim (that originally he meant what he is claiming now) and support the second claim. If however at the time when there was the מיגו (before she presented the שטר), nothing was claimed, then the מיגו is irrelevant. There is a מיגו but no claim which the מיגו can support.

²⁸ It seems that רש"י disagrees with תוספות and maintains that אמרינן לא למפרע. According to רש"י, even if the woman came to בי"ד without the שטר and claimed that the לווה paid, and then the שטר מקוים was presented, she will not be believed, even though she has the בעי קלתיה אי. Others explain (רש"י) that implicit in a (שטר מקוים) is the understanding that the לווה cannot claim פרוע unless he has valid proof (not just a מיגו). [However if the שטר is not a שטר מקוים, the לווה may be believed that פרוע במיגו דמזויף, since it has not yet been established that there is a valid שטר.]

lends money in the presence of witnesses, it is required of the לווה to repay the loan in the presence of witnesses. Otherwise the לווה is not believed to claim פרעתי. The גמרא continues with its question:

והא הכא כיון דתבעיה בעדים כמאן דאזפיה בעדים דמי וקתני פטור²⁹ –

But here in the משנה since the מלוה originally demanded payment from the לווה in the presence of עדים; and the לווה admitted to owing the money, therefore it is as if he lent the לווה the money in the presence of witnesses and nevertheless the משנה states that the לווה is פטור. We derive from the משנה that even though he admitted to owing the money in front of witnesses he is not required to repay the loan in the presence of witnesses. This concludes the quote from the גמרא (and the משנה).

ומאי קושיא שאני הכא דפטור מיגו דאי בעי אמר אתמול לא היו דברים מעולם –

And what is the question! If we were to maintain that למפרע מיגו, then there is no question, **for here in the משנה it is different** than in the case of המלוה את חבירו **for** in the משנה the לווה **is** פטור since he has a מיגו **that he could have said yesterday**, when the מלוה confronted him **there was never such a thing**; I never borrowed any money from you. If the לווה would have said it then, he would owe the מלוה nothing. תוספות claims that this מיגו from yesterday (which would have acquitted him) should carry over to the present, if we maintain that למפרע אמרין. The fact that the גמרא does not make this distinction between the case of the משנה (where there is a למפרע) and the ruling of המלוה את חבירו (where there is no מיגו at all) proves that the גמרא did not consider it to be a מיגו –

אלא ודאי כי האי גוונא לא אמרין מיגו –

But rather it is certain than in such a manner; where the מיגו was applicable in the past, but not now in the present, **we do not allow** such a מיגו.

ומה שפירש הקונטרס בפרק בתרא דכתובות (דף קט,ב ושם) גבי עשאה סימן לאחר –

And that which רש"י explained in the last פרק of מסכת כתובות concerning the law of ‘identifying it as a marker for another’. The משנה there³⁰ states that if a person sold a field, and in the deed of sale the seller indicated the various boundaries of the field being sold. One of the boundaries of the field being sold was identified in the deed as being adjacent to another field of this seller (the boundary field). The deed of sale was signed by two witnesses. Eventually one of these witnesses was מערער on this boundary field. The מערער brought עדים that

²⁹ For the s'gמרא answer on this question see previous ובא on [ב]ה,א. See ‘Thinking it over’ # 2.

³⁰ דף קט,א.

this boundary field was once his, and he never sold it; it was stolen from him. The מחזיק brings proof that it is indeed his field since the מערער himself signed on the deed which proclaimed that the boundary field belongs to the מחזיק – seller. This is the only proof the מחזיק has to support his claim. The דין in the משנה is that the מערער lost his rights in the boundary field, since he signed on this deed of sale. This concludes the משנה.

The גמרא there continues:

דאם טען ואמר חזרתי ולקחתיה ממנו לאחר שעשיתיה סימן בשמו נאמן³¹ – **that if the מערער (witness) claims and says, ‘I subsequently bought it from the מוכר after I signed on the deed whereby I identified it as a marker in his name’; in the deed it was clearly stated that the boundary field belongs to the seller-מחזיק, but if the מערער claims that subsequent to the signing of the deed, the מערער (re)purchased the field; the דין is that the מערער is believed;** and he retrieves the field. This concludes the גמרא there.

– דהפה שאסר הוא הפה שהתיר interprets the גמרא there, that the reason the מערער is believed, is –

דהפה שאסר הוא הפה שהתיר – that the same mouth that prohibited him from claiming the field; i.e. his signature on the deed is the same mouth that permits him to reclaim the field with the argument that חזרתי ולקחתי ממנו. רש"י elaborates:

דמאחר שיש עדים שהיתה שלו ונגזלה ממנו – that since there are witnesses that the field was once his (the מערער's) and the field was stolen from the מערער –

אין לו זכות אלא על פיו של זה שעשאה סימן לו והרי חזר ואמר לקחתיה ממך – אין [מערער] [מחזיק] has no rights in this field only by the say so of this [מערער] that he signed it away as a marker, but the מערער subsequently claimed that he repurchased it from him. This concludes רש"י's interpretation of the גמרא. The מערער is believed that חזרתי ולקחתיה הימנה since the only strength of the מחזיק is based on the admission of the מערער in the שטר. רש"י considers this a valid שהתיר הוא הפה שאסר.

רש"י's interpretation rejects תוספות:

אין נראה לרבינו יצחק דבכי האי גוונא לא אמרינן מיגו כדפרישית – This explanation of רש"י is not acceptable to the ר"י, for in such an instance a

³¹ The מערער actually claimed that the entire boundary field was originally his; however he conceded a narrow strip of land, adjacent to the sold field, to the מחזיק – seller. It was on account of this narrow strip that he signed the deed which stated that the sold field was adjacent to the boundary field. However, claims the מערער, the entire field including this strip is now mine; I repurchased the strip from him as well.

³² The הגהות הב"ח amends this to read המערער שעשאה למחזיק אלא על פיו של זה.

– **is not acceptable as I explained – מיגו**

דעל ידי מה שהיה יכול לטעון תחילה אינו נאמן עכשיו –

that on account of what he was originally able to claim he is not to be believed

now. In the way רש"י explained the case, the מערער cannot be believed now that חזרתי ולקחתיה הימנה, just because he originally did not have to sign the שטר. This is considered a למפרע.

כתובות will now offer his explanation for the גמרא תוספות.

אלא נראה לרבינו יצחק דהתם נמי³³ חזר ואכלה שני חזקה אחר שעשה סימן –

However, it seems to the ר"י that there we are also discussing a situation where the מערער returned to this field and consumed the three years of חזקה after he designated this boundary field as a marker. The field belongs to the 'מערער', since he has a חזקה and he claims חזרתי ולקחתיה הימנה; but not on account of any מיגו.

anticipates a difficulty:

וכי תימא אי אכלה שני חזקה פשיטא ומאי קא משמע לן ר' יוחנן דנאמן³⁴ –

And if you will say; if the מערער made a חזקה it is obvious that he retains the field, so what is ר"י teaching us that the מערער is believed –

מתניתין היא³⁵ דחזקה שיש עמה טענה הרי זו חזקה –

it is an explicit משנה that a חזקה which is accompanied by a claim this is a valid חזקה. In this case of עשה סימן לאחר (according to the ר"י's interpretation) there is a valid חזקה of three years and a טענה of חזרתי ולקחתיה הימנה. Why does ר' יוחנן teach us this דין when it is seemingly obvious?!

responds:

ויש לומר דסלקא דעתין דלא מהימן –

And one can say it may have entered our minds that the מערער should not be believed –

כיון שערער עליו קודם שאכלה שני חזקה לומר שהיא שלו –

since the מערער protested against the מחזיק (the case of the משנה), even before the מערער made the חזקה saying that this boundary field is his (the מערער's), therefore he should not be believed (in the case of the גמרא) when he claims that he subsequently (re)bought the field from the מחזיק. The reason is because –

לא עביד איניש דליזבנה בתר הכי קא משמע לן –

It is not customary for a person to purchase a field after he is מערער on the very

³³ The הגהות הב"ח amends this to read מיירי דחזר ואכלה.

³⁴ In the כתובות there, גמרא אב"י said that the מערער is believed, since ר"י ruled this way.

³⁵ See further ב"ב דף מא,א.

same field. Therefore even though the מערער has a חזקה, I might have thought that his טענה, that he bought this field, is unbelievable, therefore ר' יוחנן **comes to teach us**, that since the מערער has a חזקה we believe him when he claims חזרתה הימנה.

וכן הוא עובדא דמייתי בתר הכי³⁶ איירי בשאכלה שני חזקה –

And similarly that story which the גמרא relates afterwards, **is in a situation where a חזקה was made** (presumably by either the מערער or the אפוסטרופוס). This concludes the discussion concerning מיגו למפרע.

In summation: בקשתא מיגו למפרע in conjunction with גמרות various cites תוספות In the case of where רב stated that קמי דידי זבנה מיןך would be believed, it is to be understood that only if he would originally claim קמי דידי זבנה מיןך he would be believed. However presently it is a מיגו [That is why רב חייא required עדים that יומא דר בה חד יומא] The case of בעי קלתיה אי proves that מיגו למפרע לא אמרינן since בי"ד sees the שטר, she loses her previous מיגו. [From here we can derive that even אסור למפרע הפה is not acceptable.] Similarly we can derive this from the case of לי מנה [עשה סימן לאחר] Therefore³⁷ in the case of עשה סימן לאחר we cannot say that the מערער is believed on account of הפה שאסר; but rather the מערער there made a proper הזקה.

In the case of בקשתא בעילייתא, where the מחזיק was there for four years and made a proper חזקה everyone agrees that if the מוכר subsequently brought עדים that the מוכר was יומא חד בה דר, the property would remain by the מחזיק. He would retain the property on the basis of his חזקה and the טענין of ב"ד that the מוכר bought it from the מערער (at least) four years ago and the מערער was not מוחה until after the חזקה. Both the מחזיק and the מוכר retain the right to the field on the basis of the (שיש עמה טענה של טענין).

The question arises in the case where the מחזיק did not make a חזקה. According to תוספות if the מחזיק would have claimed קמי ידידי זבנה מינך (or קמי ידידי דר בה חד יומא), the מחזיק would be believed with a מיגו of מעולם שלך. However if the מחזיק merely claimed דובנה מינך and did not claim קמי ידידי, can he subsequently bring עדים that חד יומא דר בה חד יומא? On one hand since there are עדים that חד יומא דר בה חד יומא then טוען on behalf of the מחזיק that the מוכר bought it from the מערער with a מיגו of להש"ם. On the other hand, this מיגו of להש"ם, while it may serve as a מיגו for the מחזיק against the מערער, however from the perspective of the מחזיק, we cannot use this מיגו, since the מחזיק already admitted that it belonged to the מערער. The מחזיק no longer has the מיגו of להש"ם. For the מחזיק it is a מיגו למפרע. תוספות discusses this issue:

³⁶ This is the story of the אפטרופוס who argued before אביי, and to whom אביי agreed; based on the ruling of ר' יוחנן. Actually the story is related there before the ruling of ר' יוחנן was mentioned. See רש"ש here, who changes the גירסא from דמייטי שם, to דמייטי בתר הכי.

³⁷ The explanation of the order in תוספות is that תוספות is citing the גמרות in a manner: We do not say מִיגו even when there were two claims, and by the first claim there was a מִיגו (by בקשתא בעיליתא) [albeit with an ineffective טענה], since לא אסיק אדעתיה; we certainly do not say מִיגו למפרע when there was never an original claim which the מִיגו could have supported (אי בעי קלתיה); and it goes without saying that מִיגו למפרע לא אמרינן when in the original claim the בעל המִיגו testified to his own detriment (מנה לי בידך). See 'Thinking it over' # 2.

ובעובדא דידן אי הוה מיייתי המחזיק סהדי דדר ביה חד יומא –

And in our case, where the מחזיק claims ‘מפלניא זבינתה וכו’ and he had no חזקה, and the מערער had no עדים that it was originally his, **if the מחזיק would have subsequently brought עדים that the seller lived there (in the field) for one day –**

נראה לרבינו שמשון בן אברהם דהוה³⁸ לאוקומי לארעא בידיה –

It seems to the רשב"א that the land would be placed in the possession of the מחזיק; for –

אף על גב דליכא מיגו³⁹ מכל מקום טענינן ללוקח –

Even though the מחזיק **has no** longer the מיגו of להש"ם; for as previously stated it is a למפרע מיגו, **nevertheless** the מחזיק will get the field since there is a rule that **בי"ד argues on behalf of the buyer**. The buyer has עדים that the מוכר was יומא דר בה חד יומא, this makes him a legitimate buyer; therefore בי"ד will argue on his behalf. תוספות goes on to explain that בי"ד will argue that –

מאחר שהיה המוכר נאמן לומר זבינתה מינך במיגו דאי בעי אמר לא היתה שלך מעולם –

Since the seller is believed to claim I bought it from you (the מערער) and the מוכר would be believed (even though he has no חזקה) **with the מיגו that the מוכר could have said** to the מערער, **‘it was never yours’**; we are discussing the case where the מערער has no עדים that it was ever his. Therefore (בי"ד claims) since if the מוכר were here and claimed that he bought it from the מערער he would have been believed, therefore the מחזיק who bought it from the מוכר gets to keep the field.

anticipates a (side)⁴⁰ difficulty with this reasoning:

ואף על גב דהאי לוקח ידע שהיתה שלו והוי כחד סהדא מכל מקום הוי מיגו –

And even though that this buyer (who is claiming מינך זבינתה דזבנה) **knows** that it once was the מערער's; for he himself says **‘דזבנה מינך’ and this buyer-מחזיק is like one עד** who testifies that the מערער was a קמא. The question is; how can we believe the מוכר that he bought it from the מערער with the מיגו of להש"ם; when the מחזיק is testifying that it did belong to the מערער contrary to the מיגו of the מוכר. The מחזיק is an עד אחד who contradicts the מיגו of the מוכר! The מוכר has no מיגו of להש"ם. The מוכר would not readily claim להש"ם since there would be an עד אחד who

³⁸ The דהוה ליה לאוקמי amends this to read הגהות הב"ה.

³⁹ It seems (according to the רשב"א) that if the מחזיק originally claimed that מיגו קמי מפלניא זבינתה דזבנה מינך ודר בה חד יומא קמי להש"ם of מיגו the מוכר and the מחזיק have (the same) מיגו simultaneously. However in this case where the מחזיק lost the מיגו; how can the מחזיק retain the field on the basis of a מיגו which only the מוכר has but the מחזיק does not! See footnotes # 42 & 45.

⁴⁰ This is a side issue whether we say a אחד מיגו במקום עד אחד. The main issue is how the מוכר of the מיגו can grant the field to the מחזיק who does not possess this מיגו. See that explanation later in this תוספות (by footnote # 43).

contradicts him. תוספות responds: **nevertheless it is a valid מיגו**; notwithstanding that there is an ע"א who contradicts him. An ע"א is not sufficiently strong (in some cases) to compromise the מיגו.

תוספות proves his point:

כדמשמע לקמן (דף לג,ב) גבי נסכא דר' אבא –

As is indicated in the גמרא later concerning the ‘piece of silver on which רבי
אבא’ ruled. In the (famous) case of נסכא דר' אבא, a person (ראובן) grabbed away a piece of silver from his friend (שמעון) in the presence of one עד. When confronted, ראובן readily admitted that he grabbed the נסכא, however ראובן claimed that the נסכא was his and not שמעון's. If there would have been no עד, then ראובן would have been believed that it is his נסכא with a מיגו that he never grabbed it away from שמעון – לא חטפתי. This מיגו of לא חטפתי is however compromised by the ע"א; for had ראובן claimed לא חטפתי he would have had to swear against the ע"א. The גמרא considers ראובן to be obligated to swear (מחוייב לישבע), since the power of his מיגו is weakened by an ע"א that requires him to swear. However he is considered not able to swear (ואינו יכול לישבע) since presently he is not contradicting the עד. Therefore since he is a מחוייב שבועה ואינו יכול לישבע, the ruling by ר' אבא is that ראובן must return the נסכא to שמעון. It seems from that גמרא –

אי⁴¹ לא הוי מחוייב שבועה ואינו יכול לישבע –

that were it not for the fact that ראובן was obligated to swear but could not swear; if not for that fact, meaning if ראובן would not be obligated to swear –

היה נאמן לומר ידי חטפי במיגו דאי בעי אמר לא חטפתי והיה מכחיש את העד –

He would have been believed to claim, that I grabbed my own piece of silver with a מיגו since he could have claimed I did not grab anything, and even though that he would be contradicting the עד; ראובן would still have been believed. ר' אבא does not say that the מיגו of לא חטפתי is not a valid מיגו on the basis that it contradicts an ע"א. Rather the מיגו is compromised on account of the שבועה which the עד אחד generates. However the ע"א by himself does not weaken the מיגו. Therefore in cases where an ע"א would not generate a שבועה, a מיגו which contradicts an ע"א would be a valid מיגו. תוספות now concludes –

והכא לא הוי מחוייב שבועה דאין נשבעין על הקרקעות –

And here in the case of מוכר if the מוכר would claim להש"ם, he would not be obligated to swear against the admission/testimony of the מחזיק that מינך זבנה. The reason is **for one does not swear on claims concerning land**. Therefore even if we consider the מחזיק as an ע"א that the field belonged to the מערער in the past, it does not diminish to strength of the מיגו which the מוכר can claim להש"ם. A שבועה weakens a מיגו, not an ע"א. This concludes the issue whether we say a מיגו במקום ע"א.

תוספות now offers a proof that in the case of טענין the מיגו can be applied to the מוכר on behalf of

⁴¹ The הגהות הב"ח amends this to read דאי לא יזהר מחוייב

the מחזיק even if does not apply to the מחזיק.⁴²

וכהאי גוונא מצינו בסוף המוכר⁴³ (לקמן דף ע,א) גבי מפקיד אצל חבירו בשטר –

And we find something similar in the end of [את הבית] concerning the case when someone deposits something by his friend with a note of deposit. רב גמרא ruled that if the bailee (נפקד) claims that he returned it to the מפקיד he is believed (with a שבועה) even against the שטר. The reason is because the נפקד has a מיגו; he could have claimed נאנסו; they were accidentally lost. A שומר is פטור (if he swears). This claim of returning is valid only if there is a מיגו of נאנסו; otherwise the claim that it was returned, is not a valid argument, since the מפקיד has a שטר which indicates that the פקדון was not returned. The גמרא there discusses also the case where this note was presented by the depositor, to the orphans of the שומר. The ruling is that the יתומים are פטור, because בי"ד claims on behalf of the יתומים (the rule of טענין), that their father (may have) returned it. This concludes the גמרא there. תוספות continues with his proof.

דאף על גב דלא טענינן ליתמי נאנסו אפילו הכי טענינן⁴⁴ ליה החזרתיו לך –

that even though בי"ד will not claim on behalf of the יתומים that there was an אונס. Seemingly that would have been the simplest solution to protect the יתומים, by claiming נאנסו. Nonetheless בי"ד will not claim נאנסו on behalf of the יתומים since an אונס is not a usual occurrence. בי"ד does not want to appear frivolous in its actions. Nonetheless, even though בי"ד will not claim נאנסו, **nevertheless בי"ד will claim on behalf of the יתומים that the father returned it to the מפקיד and the יתומים will be exempt from paying for the object –**

כיון שאביהם היה נאמן בטענה זו במיגו דאי בעי אמר נאנסו –

since their father would have been believed with this claim; had the father himself claimed that he returned the object he would have been believed **with a מיגו that he could have claimed נאנסו.** We derive from that גמרא that even though the persons whom we are trying to protect (in this case – the יתומים) do not have a מיגו, nevertheless since the original party (in this case – the father) had a מיגו; it is irrelevant whether the יתומים have a מיגו. The same holds true in our case where the מחזיק brought עדים later that the מוכר was יומא. The מוכר still has a מיגו of להש"ם, since the מוכר never admitted that it ever belonged to the מערער. It is only the מחזיק that lost the מיגו of להש"ם. The previous case of פקדון teaches us that as long as the original party (in our case – the מוכר) has a מיגו that is sufficient, even though that the party whom we are protecting (in our case – the מחזיק) has no מיגו.

תוספות offers a dissenting opinion:

ואומר רבינו יצחק דלא דמי לההיא דהמוכר את הבית –

⁴² See footnote # 39.

⁴³ The המוכר את הבית גבי amends this to read הגהות הב"ה.

⁴⁴ The טענין להו החזרתיו amends this to read הגהות הב"ה.

And the ר"י says that our case is not similar to that case in המוכר את הבית; concerning the פקדון –

דחא אם היה רוצה המוכר לזכות בטענה זו דלא היתה שלך מעולם –

for here in our case if the מוכר would want to acquire the rights to the field with this claim that it was never yours (the מערער), then –

לא היה מעכבה הלוקח שהרי יודע היה שהיתה שלו –

The buyer would not be able to retain this field for himself, for the buyer had already known that it did belong to the מערער.⁴⁵ In the case of פקדון if the father had claimed נאנסו then the יתומים would be פטור. Therefore even though we do not claim נאנסו for the יתומים, nevertheless the claim of נאנסו acquits them; the יתומים do not contradict the מיגו of נאנסו. Here however had the מוכר come after the מחזיק said מפלניא זבינתה דזבנה מינך, and said to the מערער that the field was never yours; then ultimately the לוקח would lose the field. The מערער would claim that the alleged מוכר never bought it from me, since he claims להש"ם; and you the מחזיק admit that it was once mine. Therefore we cannot use the מיגו of להש"ם for the benefit of the מחזיק, since the מחזיק contradicts this very same מיגו.⁴⁶

In summation: There is a מחלוקת between the רשב"א and the ר"י. The רשב"א maintains that even if there was no חזקת ג' שנים the מחזיק can subsequently bring עדים that חד יומא and he will retain the field on the basis of טענין (since the מוכר [still] has the מיגו of להש"ם). The ר"י argues that in this case the מחזיק cannot retain this field since he contradicts the potential מיגו of the מוכר (for the מחזיק admits that it belonged to the מערער).

We say שבועה מחייב ע"א, when the ע"א is not במקום ע"א etc. e.g. by קרקע etc.

Tosfos discusses a related issue:

כתב רבינו חננאל ראינו לרבותינו הגאונים זכרונם לברכה –

The ר"י wrote: we have seen the view of our Rabbis the גאונים ז"ל –

⁴⁵ It would seem that the ר"י disagrees with the רשב"א only in the case where the מחזיק brought עדים דדר בה חד יומא after he initially claimed מפלניא זבינתה דזבנה מינך. However if he originally claims קמי בה חד יומא, then both the לוקח and the מוכר would be vindicated with the מיגו of להש"ם. See however the מהרש"א בד"ה. See footnotes # 7, 16 & 39. See 'Thinking it over' # 4.

⁴⁶ One possible way of explaining the מחלוקת between the רשב"א and the ר"י is that they differ in the explanation of a מיגו. The ר"י maintains that a מיגו functions as a זכות הטענה, therefore since the מחזיק contradicts the מיגו of the רשב"א (the מיגו is להש"ם and the מחזיק claims מינך דזבנה) he cannot derive any benefit from it. The רשב"א however may maintain that a מיגו is a בירור that the מוכר is telling the truth. Once we establish that בירור, then automatically the מחזיק is זוכה in the field (on account of טענין). [The difficulty with this explanation is that it is not the מוכר who is claiming זבינתה מינך and has a מיגו of להש"ם; it is merely that טענין that perhaps the מוכר bought it, and by טענין there is (seemingly) no בירור (only הטענה), so there is no functioning מיגו of בירור (see footnote # 8).] Another approach may be; what is the טענין גדר. The רשב"א could maintain that בי"ד claims on behalf of the מוכר (only, disregarding the לוקח) that originally before the מוכר sold it to the לוקח, the מוכר could have acquired it from the מערער, and therefore the lack of a מיגו by the מחזיק is irrelevant. However the ר"י will maintain that טענין reflects בי"ד claim now (on behalf of the לוקח) after the מוכר (allegedly) sold the field to the מערער; in which case the מחזיק contradicts the מיגו (see סוכ"ד אות מט).

דהאי מחזיק לית ליה למיחת לדינא בהדי מריה דארעא⁴⁷ אלא האי דזבין ליה מחית בהדיה⁴⁸.
That this מחזיק who now lost this field cannot enter into a lawsuit with the original owner of the land (the מערער) but rather the מוכר who sold it to the מחזיק enters in a lawsuit with the מערער. The reason is that the מערער can say to the מחזיק you and I have no business with each other. I did not sell you anything, so you can have no complaints against me. The only one that can sue the מערער is the מוכר, who sold this field to the מחזיק.

Tosfos offers a dissenting view:

ואין נראה לרבינו שמשון בן אברהם דהא כל זכות שתבא ליזו מכר ראשון לשני –
The רשב"א does not agree with the ruling of the גאונים, for we have a ruling, that any rights that the first buyer (the מוכר) may acquire, is sold to the second buyer (the מחזיק) –

ולא יוכל לדחות ולומר לו לאו בעל דברים ידי את⁴⁹ –
And the מערער cannot push away the מחזיק and say to him you are not my litigant; we have no common interest. Whatever right the original מוכר has to contest the מערער concerning this property that he claims he bought from him; all these rights are transferred to the subsequent buyer; the מחזיק.

The רשב"א proves his point:

ולקמן אשכחן בהדיא גבי ההוא דדר בקשתא בעליתא –
– קשתא And later we find explicitly concerning the one who dwelt in an attic in דלא מצי למימר ליה לאו בעל דברים ידי את –
that the מערער could not say to him you are not my litigant –
אלא אי הוה משכח סהדי דדר ביה ההוא גברא חד יומא הוה מוקי לה ר' חייא בידיה⁵⁰:
But rather if the מחזיק would have found witnesses that the מוכר lived there for one day, ר"ה would have placed the property in the possession of the מחזיק. We derive from there that the מחזיק is a בעל דבר with the מערער.

In summation:

The גאונים maintain that the מחזיק is not a בע"ד of the מערער (where there was no ג' שנים), and the רשב"א disagrees.

⁴⁷ This is perhaps what the גמרא means when it states: זיל לאו בעל דברים ידי את! There is no דין תורה!

⁴⁸ It would seem that according to the גאונים even if the מחזיק has a יומא בה חד יומא, it is only the מוכר that can take the מערער, not the מחזיק. This would conflict with the previous רשב"א.

⁴⁹ The meaning of לאו בעל דברים ידי את in the גמרא is that you lose the די"ת since you have no valid claim, but not that there is no די"ת.

⁵⁰ Others (see נח"מ) question this proof. In the case of בקשתא בעליתא, the מחזיק has a ג' שנים and the מערער wants to be מוציא from him; obviously the מחזיק is a בעל דבר. However, when there was no ג' שנים, the גאונים maintain that the מחזיק is not a בע"ד of the מערער.

SUMMARY

maintains that if the מערער has no עדים then the מחזיק is believed (even without שנים ג' (חזקת ג' to claim that קמי ידידי מינך דזבנה or מפלניא זבינתה דזבנה מינך קמי ידידי (חזקת ג' שנים יומא.

We do not say למפרע מיגו. Nevertheless, according to the רשב"א the מחזיק may bring טענינן. The ר"י disagrees. The גאונים maintain that the מחזיק is not a בע"ד with the מערער.

THINKING IT OVER

1. קמי ידידי דר מחזיק claims that if the רשב"ם (argues with the תוספות. ⁵¹ Why then did קמי ידידי זבנה מינך he is believed just as if he would claim דר יומא. וחזיתיה לדעתיה אי א"ל קמאי ידידי זבנה מינך מהימן רב say that א"ל קמאי ידידי דר בה חד יומא מהימן (even) if חידוש that ⁵²!

2. ⁵³ Seemingly מיגו למפרע לא אמרינן that מנה לי בידך of סוגיא תוספות. ⁵⁴! מיגו למפרע לא אמרינן that case is entirely different, since originally when he had the מיגו he did not attempt to acquit himself, but rather to obligate himself, by saying 'I owe the money'. How can we possibly derive from there that ⁵⁴!

3. ⁵⁵ Seemingly, מיגו למפרע and a מיגו regular? Why is there a difference between a מיגו, we can argue that once the person presented his claim he lost the מיגו! ⁵⁶

4. ⁵⁷? חזקת ג' שנים if there was a רשב"א with the ר"י argue Would the

ברוך רחמנא דסייען

⁵¹ See footnote # 20.

⁵² נח"מ. See

⁵³ See footnotes # 29 & 37.

⁵⁴ See בל"י אות צט.

⁵⁵ See footnote # 15.

⁵⁶ See בל"י אות צז and נח"מ ד"ה ואין (עד"ז) in.

⁵⁷ See footnote # 45.