לאו קמודית דהא ארעא דידי 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 חזקת ג' שנים). 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.

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 – The רשב"ם explained[1]

דאם מוחזק זה שלש שנים – that if the מחזיק **is in possession** of the land for **three years –**

וטוען מפלניא זבנתיה – and the מחזיק **claims 'I bought it from an individual** who previously –

דזבנה מינך קמי דידי – bought it from you (the מערער) **in my presence;** had the מחזיק claimed this, the ruling would be –

דנאמן במיגו – that the מחזיק **would be believed for** he has a **מיגו**[2] **–**

דאי בעי אמר – for the מחזיק **could have claimed –**

מינך זבנתיה ואכלתיה שני חזקה – 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 – or also if the מחזיק **has witnesses** who will testify –

שהחזיק בה המוכר יום אחד – 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.

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[1] See רשב"ם ל,ב ד"ה אמר.

[2] Seemingly there should be no need for a מיגו; the claim of מפלניא זבינתה דזבנה מינך קמי דידי should be a valid טענה which is backed up by חזקת ג' שנים. Some commentaries claim that indeed no מיגו is required; it is merely an expression that the claim of קמי דידי is as good as if he would have claimed מינך זבינתה. Others however maintain that the טענה of קמי דידי זבנה מינך has a flaw. The מחזיק cannot provide proof that the מוכר lived there for even חד יומא (if there were עדים דדר בה חד 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 מינך זבינתה removes that flaw. See תוספות לב,ב ד"ה אמאי.

והביא ראיה - and the רשב"ם **brought proof** to these two rulings; of קמי דידי זבנה מינך and יומא דר ביה חד עדים יש לו –

מההיא דדר בקשתא בעיליתא דלקמן[3] – from the גמרא which we learn **later** 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 clamed the house as his. The מחזיק claimed (as in our גמרא) מפלניא זבינתה דזבנה מינך. רב חייא 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 רב חייא would have also given the field to the מחזיק if he had claimed קמאי דידי זבנה מינך.

תוספות comments on the רשב"ם:

וכדבריו כן הוא – and what he says (that [only] if the מחזיק has a חזקת ג' שנים that דר ביה חד or he has עדים קמי דידי זבנה מינך will he be believed if he claims יומא) **is correct** provided we are discussing a case –

היכא דיש עדים למערער – where the מערער has witnesses –

שהקרקע שלו היתה – that the land was once his; only then do we require that the מחזיק have a חזקת ג' שנים in order to be believed if he claims קמי דידי זבנה or דר ביה חד יומא –

אבל בעובדא דהכא – however in the case before us –

[ד[5]משמע שלא היה למערער עדים – [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 –

מדקאמר לאו קא מודית כולי – since the מערער **said: 'do you not admit, etc.** that this land was mine'. The fact that the מערער said לאו קא מודית, 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 – if the מחזיק **would claim –**

קמי דידי - in my presence –

זבנה מינך – he (the מוכר) **bought it from you** (the מערער)

או דר בה חד יומא – or if the מחזיק would claim that the seller **lived there for** (at least) **one day[6];** in these two instances, the מחזיק –

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

[4] The רשב"ם there, in ד"ה אפילו 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 אפילו 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] See הגהות הב"ח.

[6] תוספות seemingly means to say that the מחזיק claims that he is personally aware that דר בה חד יומא. The words 'קמי דידי' refer both to זבנה מינך and דר בה חד יומא. It seems that תוספות maintains that it is not necessary for the מחזיק to prove that the מוכר was דר בה חד יומא, it is sufficient if the מחזיק merely claims it (just as the

היה נאמן– would be believed
אף על פי שלא החזיק שלש שנים – even if the מחזיק **did not make a three year חזקה**; the reason he is believed is because the מחזיק has a –
מיגו – מיגו דאי בעי אמר, for he could have said to the מערער –
לא היתה שלך מעולם – 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 'מחזיק', even though he does not have a חזקת ג' שנים. Therefore when he claims מפלניא זבינתה דזבנה מינך קמי דידי or קמי דידי דר בה חד יומא, he is also believed, with the מיגו of להש"ם. If however the מחזיק merely claims מפלניא זבינתה דזבנה מינך and does not add קמי דידי or קמי דידי דר ביה חד יומא, then obviously he is admitting that the מערער is a מרא 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 מינך, the מחזיק is believed only if he has a חזקת ג' שנים and he (originally) claimed קמי דידי זבנה מינך or he has עדים that דר ביה חד יומא. If the מחזיק does not have a חזקת ג' שנים then he is not believed[7] (with the מיגו of להש"ם) even if the מערער has no עדים that it was originally his. B. In addition, even if the מחזיק has a חזקת ג' שנים (but does not claim קמי דידי זבנה מינך) he will believed only if he has עדים that the מוכר was דר בה חד יומא. However, if the מחזיק merely claims that דר בה חד יומא that would be insufficient, even though he has a [8]מיגו of [9]מינך זבינתה.
תוספות maintains (a) that if the מערער has no עדים then the מחזיק will be believed with a מיגו of להש"ם (even without חזקת ג' שנים) provided that the מחזיק claims initially either קמי דידי דר בה חד יומא or קמי דידי זבנה מינך. In addition (b), by all cases, תוספות maintains that

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מחזיק is believed when he claims קמי דידי זבנה מינך). The מחזיק is believed to claim דר בה חד יומא since he has a מיגו; either the מיגו of להש"ם or the מיגו of מינך זבינתה (if the מערער has עדים and the מחזיק was מחזיק ג' שנים) (if the מערער has no עדים). However by the case of בקשתא בעיליתא, the גמרא there states clearly that the מחזיק would be believed only if he brought עדים that the מוכר was דר בה חד יומא. The difference is that by בקשתא בעיליתא, the מחזיק already made his claim that מפלניא זבינתה דזבנה מינך. Therefore, if he would subsequently claim that דר בה חד יומא, that would be considered a מיגו למפרע, which is not a valid מיגו (as תוספות will shortly state). However if he originally claims 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 דר בה חד יומא (see the ר"י at the conclusion of our תוספות; footnote # 45). If however he claims קמי דידי זבנה מינך then the רשב"ם agrees that the מחזיק is נאמן even if there was no חזקת ג' שנים, provided that the מערער has no עדים that he was the מרא קמא. Others however disagree (see סוכ"ד ל,ב אות לה) and maintain that if there was no חזקת ג' שנים the מחזיק is never believed. Their reason is that there is a flaw in his claim of דזבנה מינך, since three years have not yet gone by and there is no שטר מכירה from the מערער to the מוכר. Others say that the מוכר would not want to claim להש"ם, 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 דר בה חד יומא, we still need the additional concept of טענינן ללוקח in order to award the property to the מחזיק. The power of a מיגו does not extend that far. Other 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 דר בה חד יומא, and the טענה of דר בה חד יומא is not the claim that can vindicate the מחזיק on its own merit; rather the טענינן (which does not take effect until we can verify that דר ביה חד יומא), as opposed to קמי דידי זבנה מינך which vindicates the מחזיק on its own merit.

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

קמי דידי is sufficient to substantiate the claim of דר בה חד יומא; עדים are not required (unless the מחזיק did not claim דר בה חד יומא initially[10]).

תוספות will now discuss the issue of a מיגו 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 מפלניא זבינתה כו' קמי דידי (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 דר בה חד יומא or קמי דידי זבנה מינך, since he has a מיגו that he could have stated להש"ם. An example of מיגו למפרע is in our case where initially he claimed מפלניא זבינתה כו' without קמי דידי (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 דידי זבנה וכו'. If we could substantiate this claim, then obviously he would be believed. However, we cannot substantiate this claim of קמי דידי, since now he has no מיגו; he cannot claim להש"ם (or any other vindicating argument) since he already admitted (by saying דזבנה מינך) that it originally belonged to the מערער. It is just that previously, before his original claim of מפלניא זבינתה that is when he had a מיגו. This type of מיגו is called מיגו למפרע; 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 דידי, since presently he has no valid מיגו to support his claim (only a מיגו למפרע).

אבל ודאי השתא דאמר – however, it is **certainly** true **that now, once** the מחזיק **stated –**

מפלניא זבינתה דזבנה מינך – I bought it from 'him' who bought it from you and by saying this, the מחזיק –

והודה שהיתה שלו – admitted that it originally **belonged to** the מערער, and since he did not originally claim either קמי דידי זבנה מינך or קמי דידי דר בה חד יומא, then the מחזיק –

תו לא מצי למיטען – cannot subsequently claim that the מוכר –

קמי דידי זבנה מינך – bought it from you in my presence –

או קמי דידי דר בה חד יומא – 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 –

מיגו דאי בעי אמר בתחלה[ב][11] – a מיגו that he could have stated originally –

לא היתה שלך מעולם – it was never yours[12]; This is not a valid argument. The מחזיק is not believed with this מיגו -

דמיגו למפרע לא אמרינן – 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 דידי, the מחזיק has no טענה and the property reverts back to the מערער.

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[10] See previous footnote # 6.

[11] See הגהות הב"ח.

[12] It would seem that the same will apply in a case where there was a חזקת ג' שנים and the מחזיק claimed מפלניא זבינתיה דזבנה מינך, but did not initially state קמי דידי. The מחזיק cannot subsequently claim (קמי דידי זבנה מינך or דר ביה חד יומא) and expect to be believed on the basis of the מיגו מינך זבינתה, since it too is a מיגו למפרע.

תוספות will first prove that מיגו למפרע לא אמרינן and then explain why it is not a valid מיגו.
כדמוכח לקמן (דף מא,ב) – as it is evident from the גמרא **later** (that מיגו למפרע לא אמרינן) –
גבי ההוא דדר בקשתא בעיליתא ארבע שנין – 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 זבינתה דזבנה מינך – and the מחזיק **claimed "I bought it from 'him' who bought it from you"** (as in our גמרא) –
אתא לקמיה דרבי חייא – the case **came before ר"ח –**
אמר ליה אייתי סהדי 'עדים bring' – he said to the מחזיק **–**
דדר ביה אפילו חד יומא – that the מוכר **lived there for even one day –**
ואוקמיה לה בידך – and I will place this property **in your possession'.** This concludes the quote from the גמרא. תוספות continues with his proof –
משמע דאי לית ליה סהדי – it seems from the response of ר"ח **that if** the מחזיק **has no עדים** that the מוכר was דר ביה חד יומא, then –
אינו נאמן לומר קמי דידי דר בה חד יומא – he is not believed to state that the מוכר **lived there one day in my presence –**
במיגו דאי בעי אמר מינך זבינתיה – since the מוכר has a **מיגו that he could have claimed 'I bought it** directly **from you** (the מערער). The reason this (למפרע) מיגו is invalid, is –
כיון שכבר הודה – since the מוכר **already admitted –**
דלאו מיניה זבנה – that he did not purchase the property **from** the מערער; the מחזיק claimed מפלניא זבינתה –
לית ליה תו מיגו – he no longer has the מיגו of מינך זבינתה that he originally had; the מחזיק already admitted that it was not מינך זבינתיה but מפלניא זבינתיה. This establishes that when he claims now קמי דידי he presently has no מיגו.[13]

תוספות 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 במה דקאמר השתא – and there is no basis **to believe what he is presently claiming** (that קמי דידי דר בה חד יומא) on account of the**–**
שהיה יכול לשקר בתחלה [מיגו[14]] (מתוך) – מיגו that he could have originally lied and said I bought it from you **–**
קודם שהודה – before he admitted that מפלניא זבינתיה. The reason for this is –
דלא הוה מסיק אדעתיה – for it never entered his mind –

[13] This proof is valid only according to תוספות who maintains that if the מחזיק originally claimed קמי דידי דר דר ביה חד יומא it is a valid claim. However according to the רשב"ם who maintains that the claim of 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 קמי דידי דר ביה חד יומא; then there is no proof at all from that גמרא.
[14] See הגהות הב"ח.

שהיה זקוק לטענה זו – that he needed this claim of קמי דידי. When the מחזיק claimed מפלניא זבינתה it is evident that he is saying the truth; since he has the מיגו of מינך זבינתיה. 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 ever say is true. The מחזיק told the truth that 'מפלניא זביתנה 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 מיגו למפרע is not a valid מיגו. Therefore once the מחזיק claimed that קמי דידי דר ביה חד יומא or מפלניא זבינה זבנה and did not originally claim קמי דידי זבנה מינך, and then if he subsequently claims קמי דידי he is not believed for this is a מיגו למפרע. The only way the מחזיק can retain the field once he admitted זבנה מינך is (if עדים testify that the מערער sold it to the מוכר or) if he brings עדים that the מוכר was דר ביה חד יומא. In that case since we substantiate that the מוכר was דר ביה חד יומא, then the rule of טוענין ללוקח applies, and בי"ד will argue that (perhaps) the מוכר bought it from the מערער[16]. תוספות proves that a מיגו למפרע is invalid from the story of בקשתא בעיליתא that רב חייא would only accept עדים that דר ביה חד יומא, but would not accept a טענה of דר ביה חד יומא after the מחזיק already admitted that זבנה מינך. A מיגו לפרע is invalid, because the fact that he was previously honest in his original claim cannot prove that he is equally honest in his subsequent claim.

In the coming section תוספות will cite גמרות which either support or (seemingly) contradict the ruling that מיגו למפרע לא אמרינן.
תוספות anticipates a question concerning מיגו למפרע לא אמרינן:
והא דקאמר התם רב – and that which רב said there[17] -
וחזיתיה לדעתיה דחביבי – 'and I saw that it was the opinion of my dear one[18] –
דאי הוה אמר ליה – that if the מחזיק **would have said to** the מערער, that the מוכר –

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[15] תוספות states that he was not originally aware that he needed the claim of קמי דידי; that makes it a מיגו למפרע. If he were originally aware that he needed the claim of קמי דידי to win the case; then we can argue that it (the מיגו of להש"ם) is not a מיגו למפרע, since he is presently merely interpreting his original statement of מפלניא זבינתיה to include also that ודר בה חד יומא. For if he was originally aware of the necessity of claiming קמי דידי, 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 חד יומא. We cannot say that he did not say it originally because it is not true (even though he knew it was necessary 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 חד יומא then it should be a valid מיגו. However, if we maintain as תוספות states, that originally the מחזיק was not aware that to win the case he must claim קמי דידי; he thought that מפלניא זבינתיה alone is sufficient; therefore it is a מיגו למפרע. See footnote # 27.

[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 (with a מיגו שלא הש"מ). See however the ר"י at the conclusion of our תוספות. See footnote # 45.

[17] On דף מא,ב in the case of בקשתא בעיליתא.

[18] רב referred to his uncle רב חייא as חביבי.

קמי דידי זבנה מינך – bought it from you in my presence, then ר"ח –
הוה מהימן ליה - would have believed the מחזיק –
במיגו דאי בעי אמר מינך זבינתה – 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"ח would have believed the מחזיק even if he would claim now[19] (after he already stated מפלניא זבינתיה דזבנה מינך) that קמי דידי זבנה מינך, he would be believed. This however would be a מיגו למפרע. If this is the understanding in that גמרא, then it contradicts that which תוספות maintains, namely, that מיגו למפרע לא אמרינן.

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

תוספות adds some clarification:
והוא הדין דאי הוה טעין מעיקרא – and the same rule will apply **if** the מחזיק **would have initially claimed,** that the מוכר –
קמי דידי דר בה חד יומא – lived there for one day in my presence; the ruling would be –
דהוה מהימן – that the מחזיק **would be believed.** The claim of קמי דידי is believed with a מיגו whether the מחזיק claims קמי דידי זבנה מינך or whether he claims קמי דידי דר בה חד יומא.[20]

תוספות offers an additional proof that מיגו למפרע לא אמרינן:
ועוד ראיה מסוף [פרק[21]] (ד)זה בורר (סנהדרין דף לא,א) – And there is an additional proof that מיגו למפרע לא אמרינן **from** the גמרא **in the end of זה בורר [פרק] –**
גבי ההיא אתתא– concerning that woman who was entrusted with a שטר חוב as a third party. The מלוה and the לוה agreed that she should hold the שט"ח.
דנפק שטרא מתותי ידה – 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) –

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[19] There is a slight indication there that this is what רב meant. The גמרא there states that after the מחזיק claimed that מפלניא זבינתיה דזבנה מינך, ר"ח told him that if you have witnesses that דר ביה חד יומא you will win the case. רב added that it appeared to him that if he would state קמי דידי זבנה מינך he would also be believed. רב seems to be saying that the מחזיק could be believed in two ways: either he has עדים that דר ביה חד יומא or he claims קמי דידי זבנה מינך. Therefore just as עדים דדר ביה חד יומא is valid even now, similarly the claim of קמי דידי זבנה מינך can also mean now. תוספות however will reject this reading.
[20] See 'Thinking it over" # 1.
[21] See הגהות הב"ח.

אמרה ידענא (ליה) [ביה[22]] בהאי שטרא – She said I know about this שטר –
דפריע הוא כולי – that it is a paid up שטר**, etc**. The לוה already paid the debt.
ולא הימניה רב נחמן – however ר"נ did not believe her[23]
רבא – אמר ליה רבא said to ר"נ why do you not believe her, she has a מיגו –
והא אי בעי קלתיה – 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 אי בעי קלתיה[24].
כיון דאיתחזק בבי דינא [אמר ליה[25]] – [ר"נ said to רבא**] since** the שטר **was established[26] in בי"ד -**
אי בעי קלתיה לא אמרינן – we do not say 'she could have burnt it'. This concludes the גמרא in פרק זה בורר.

תוספות continues with his proof:
אלמא – we may conclude from this גמרא, that –
אף על גב קודם שראינוהו בידה – even though that **before we saw** the שטר **in her possession –**
היתה נאמנת לומר דפרוע הוא – she would have been believed to claim that the שטר **is paid up –**
במיגו דאי בעי קלתיה – with the מיגו that she could have burnt the שטר, nevertheless –
השתא דאתחזק בבי דינא – now that it was 'established' in בי"ד –
פירוש שראינוהו בידה – the meaning of אתחזק is **that we saw the שטר in her possession –**
לא מהימנא – she is not believed to claim that it was paid up –
דאין כאן עוד מיגו – 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 אי בעי קלתיה; she can no longer burn it –
שעל כרחך צריכה עכשיו טענה זו – she presently absolutely requires this argument of פרוע -
שהיא אומרת – that she now claims –
אם רוצה לפטור את הלוה – if she wants to exempt the לוה from paying this debt. She has no other options. This means there is no מיגו.[27] Indeed she previously had the

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[22] See הגהות הב"ח אות ח'.
[23] There are actually two opposing לשונות in that גמרא as to whether ר"נ believed her. תוספות is citing the איכא 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 for a מיגו.
[25] See הגהות הב"ח אות ח'.
[26] תוספות will shortly explain that this means that בי"ד is presently aware of this שטר.
[27] This case is entirely different than בקשתא בעיליתא. There are no two separate claims here. The issue of whether אסיק אדעתיה שהיה זקוק לטענה זו or not, is relevant only where there are two claims (the original and the current) in which the בעל המיגו is arguing his case. If we were to maintain אסיק אדעתיה וכו', then the מיגו would apply retroactively to the first claim. If however at the time when there was the מיגו (before she

option of burning the שטר. If she would have come to בי"ד without (showing) the שטר and claimed פרוע הוא, then she would have been believed with the מיגו of אי בעי קלתיה. However once בי"ד sees the שטר, there is no longer a מיגו. It is merely a מיגו למפרע; she once had a מיגו. This proves that a מיגו למפרע לא אמרינן.

תוספות will now cite a different interpretation of the גמרא in זה בורר:
ובקונטרס פירש שם אתחזק – and רש"י there interprets the word **'אתחזק',** to mean -
שהיה השטר מקוים – 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 מיגו למפרע[28].

תוספות rejects רש"י's interpretation:
ואין נראה לרבינו יצחק – and the ר"י does not agree to this interpretation –
דמכל מקום אי בעיא קלתיה – that notwithstanding that it was a שטר מקויים, **nevertheless, she could have burnt it.** What difference does it make that it was a שטר מקויים if מיגו למפרע אמרינן, she has a valid מיגו.

תוספות will now bring yet another proof that מיגו למפרע לא אמרינן:
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 לוה -
מנה לי בידך – you owe me a (מנה) hundred זוז –
אמר לו הן – the לוה **responded** in the presence of עדים: **yes,** I owe you the מנה –
למחר אמר ליה תנהו לי – the next day the מלוה **says to** the לוה **give me** the מנה; if the לוה responds that –
נתתיו לך פטור – I gave it to you after my admission, the לוה is **exempt** from paying the מלוה. This concludes the משנה.
ופריך מינה (שם מא,א) – and the גמרא there **challenges from this** משנה
למאן דאמר המלוה את חבירו בעדים – to those that maintain that if one lends money in the presence of **witnesses**
צריך לפורעו בעדים – it is required of the לוה **to repay** the loan in the presence of **witnesses.** Otherwise the לוה is not believed to claim פרעתי. The גמרא continues with its question:
והא הכא – but here in the משנה –

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presented the שטר), nothing was claimed, then the מיגו is irrelevant. There is a מיגו but no claim which the מיגו can support. See footnote # 15.

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

כיון דתבעיה בעדים – since the מלוה originally **demanded** payment from the לוה **in** the presence of **עדים;** and the לוה admitted to owing the money, therefore –
כמאן דאוזפיה בעדים דמי – it is as if he lent the לוה the money **in** the presence of **witnesses –**
וקתני פטור – and nevertheless **the משנה states** that the לוה 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. [29] This concludes the quote from the גמרא (and the משנה).

תוספות continues with his proof:
ומאי קושיא – and what is the question! If we were to maintain that מיגו למפרע אמרינן, then there is no question -
דשאני הכא – for here in the משנה **it is different** that in the case of המלוה את חבירו בעדים –
דפטור – for in the משנה the לוה **is פטור** since he has –
מיגו דאי בעי אמר אתמול – a מיגו that he could have said yesterday, when the מלוה confronted him –
לא היו דברים מעולם – there was never such a thing; I never borrowed any money from you. If the לוה 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 מיגו למפרע אמרינן. The fact that the גמרא does not make this distinction between the case of the משנה (where there is a מיגו למפרע) and the ruling of המלוה את חבירו בעדים צריך לפורעו בעדים (where there is no מיגו at all) proves that the גמרא did not consider it to be a מיגו –
אלא ודאי כי האי גוונא – but rather it is certain than in such a manner; where the מיגו was applicable in the past, but not now in the present –
לא אמרינן מיגו – we do not allow such a **מיגו.**

תוספות cites another גמרא concerning מיגו למפרע, which requires explanation:
ומה שפירש הקונטרס בפרק בתרא דכתובות (דף קט,ב ושם) – and that which רש"י explains in the last פרק of כתובות –
גבי עשאה סימן לאחר – concerning the law of **'identifying it as a marker for another'. T**he [30]משנה 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 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

[29] For the s'גמרא answer on this question see previous תוספות ד"ה ובא on [ב]א,ה דף. See 'Thinking it over' # 2.
[30] א,קט דף.

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 – that if the מערער (witness) **claims and says –**
חזרתי ולקחתיה ממנו – I subsequently bought it from the מוכר – מחזיק -
לאחר שעשיתיה סימן בשמו – 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,[31] 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 –
נאמן – is believed; and he retrieves the field. This concludes the גמרא there.

רש"י interprets the גמרא there, that the reason the מערער is believed, is
דהפה שאסר - that the same mouth that prohibited him from claiming the field; i.e. his signature on the deed -
הוא הפה שהתיר – 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 – that since there are witnesses that the field **was once his** (the s'מערער)
ונגזלה ממנו – and the field **was stolen from** the מערער –
[ו]אין לו זכות [למחזיק][32] – and the מחזיק has no rights in this field –
אלא על פיו של זה [המערער] – only by the say so of this [מערער]
שעשאה סימן לו – that he signed **it away as a marker –**
והרי חזר ואמר לקחתיה הימנה – but the מערער **subsequently claimed that he repurchased it from him.** This concludes s'רש"י 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 הפה שאסר הוא הפה שהתיר.

תוספות rejects s'רש"י interpretation:
אין נראה לרבינו יצחק – it is not acceptable to the ר"י -
דבכי האי גוונא – for in such an instance –
לא אמרינן מיגו כדפרישית – a מיגו is not acceptable as I explained –
דעל ידי מה שהיה יכול לטעון תחילה – that on account of what he was originally able to claim –
אינו נאמן עכשיו – he is not to 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 מיגו למפרע.

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[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] See הגהות הב"ח.

תוספות will now offer his explanation for the גמרא in כתובות.
אלא נראה לרבינו יצחק – however it seems to the ר"י –
דהתם נמי [מיירי ד[33]חזר ואכלה שני חזקה – that there we are also discussing a situation **where** the מערער **returned** to this field **and consumed the** three **years of חזקה –**
אחר שעשאה סימן – 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.

תוספות anticipates a difficulty:
וכי תימא אי אכלה שני חזקה – and if you will say; if the מערער **made a חזקה**
פשיטא – it is obvious that he retains the field –
ומאי קא משמע לן רבי יוחנן דנאמן – and what is ר"י teaching us[34], that the מערער **is believed –**
מתניתין היא – it is an open **[35]משנה**
דחזקה שיש עמה טענה – that a חזקה which is accompanied by a claim –
הרי זו חזקה – this is a valid **חזקה.** In this case of עשאה 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?!

תוספות answers:
ויש לומר – and one can say –
דסלקא דעתך דלא מהימן – it may have entered our minds that the מערער **should not be believed –**
כיון שערער עליו – since the מערער **protested against** the מחזיק-seller, even -
קודם שאכלה שני חזקה – before the מערער **made the חזקה –**
לומר שהוא שלו – saying that this boundary field **is his** (the s'מערער), therefore he should not be believed when claims that he subsequently (re)bought the field from the מחזיק. The reason is because –
לא עביד איניש דלזיבנה בתר הכי – it is not customary for a person to purchase a field **after** he is מערער on the very 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 –
קא משמע לן – comes to teach us, that since the מערער has a חזקה we believe him when he claims חזרתי ולקחתיה הימנה.
וכן ההוא עובדא דמייתי בתר הכי – and similarly that story which the גמרא **relates afterwards[36] -**

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[33] See הגהות הב"ח.
[34] In the גמרא כתובות there, אביי said that the (אפוטרופוס for the) מערער is believed, since ר"י ruled this way.
[35] See further ב"ב דף מא,א.

איירי בשאכלה שני חזקה – is in a situation where a חזקה was made (presumably by either the מערער or the אפוטרופוס). This concludes the discussion concerning מיגו למפרע.

In summation: תוספות cites various גמרות in conjunction with מיגו למפרע. In the case of בקשתא בעיליתא where רב stated that קמי דידי זבנה מינך would be believed, it is to be understood that only if he would originally claim קמי דידי זבנה מינך he would be believed. However presently it is a מיגו למפרע. [That is why רב חייא required עדים that דר בה חד יומא.] The case of אי בעי קלתיה proves that מיגו למפרע לא אמרינן, since בי"ד sees the שטר, she loses her previous מיגו. [From here we can derive that even a הפה שאסר למפרע is not acceptable.] Similarly we can derive this from the case of מנה לי בידך that מיגו (הפה שאסר) למפרע לא אמרינן. Therefore[37] in the case of עשאה סימן לאחר we cannot say that the מערער is believed on account of הפה שאסר; but rather the מערער there made a proper חזקה.

תוספות returns now to our case of מפלניא זבינתה דזבנה מינך: In the case of בקשתא בעיליתא, where the מחזיק was there for four years and made a proper חזקה everyone agrees that if the מחזיק subsequently brought עדים that the מוכר was דר בה חד יומא, the property would remain by the מחזיק. He would retain the property on the basis of his חזקה and the טענינן of בי"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 מוכר and the מחזיק retain the right to the field on the basis of the חזקה (שיש עמה טענה של טענינן).
The question arises in the case where the מחזיק did not make a חזקה. According to תוספות if the מחזיק would have claimed קמי דידי זבנה מינך (or קמי דידי דר בה חד יומא), the מחזיק would be believed with a מיגו of לא היה שלך מעולם. However if the מחזיק merely claimed קמי דידי, and did not claim מפלניא זבינתה דזבנה מינך, can he subsequently bring עדים that דר בה חד יומא. On one hand since there are עדים that דר בה חד יומא then בי"ד is טוען on behalf of the מחזיק that the מוכר bought it from the מערער with a מיגו that להש"ם. On the other hand, this מיגו of להש"ם, while it may serve as a מיגו for the מוכר 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 the מוכר. For the מחזיק it is a מיגו למפרע. תוספות discusses this issue:

ובעובדא דידן – 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 –

אי הוה מייתי המחזיק סהדי – if the מחזיק would have subsequently **brought** **עדים –**

דדר ביה חד יומא – that the seller **lived there** (in the field) **for one day –**

נראה לרבי שמשון בן אברהם – it seems to the רשב"א –

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[36] This is the story of the אפוטרופוס 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 דמייתי בתר הכי, to דמייתי שם.

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

דהוה [ליה[38]] לאוקמי לארעא בידיה – that the land would be placed in the possession of the מחזיק.
אף על גב דליכא מיגו – even though the מחזיק **has no** longer the **מיגו** of להש"ם[39]; for as previously stated it is a מיגו למפרע –
מכל מקום טענינן ללוקח – 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 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 -
מאחר שהיה המוכר נאמן לומר – that since the seller is believed to claim – זבינתה מינך – I bought it from you (the מערער) and the מוכר would be believed (even though he has no חזקה) –
במיגו דאי בעי אמר לא היתה שלך מעולם – 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 (claims בי"ד) 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.

תוספות anticipates a (side[40]) difficulty with this reasoning:
ואף על גב דהאי לוקח ידע שהיתה שלו – and even though that this buyer (who is claiming מינך מפלניא זבינתה דזבנה) knows that it once was the s'מערער; for he himself says 'דזבנה מינך' –
והוה כחד סהדא – and this buyer-מחזיק **is like one עד** who testifies that the מערער was a מרא 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 contradicts him.

תוספות responds:
מכל מקום הוי מיגו – 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 דרבי 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

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[38] See הגהות הב"ח.
[39] It seems (according to the רשב"א) that if the מחזיק originally claimed that מפלניא זבינתה דדר בה חד יומא קמי דידי, דזבנא מינך, then he would surely be believed. In that situation both the מחזיק and the מוכר have the (same) מיגו of להש"ם 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 מיגו במקום עד אחד. The main issue is how the מיגו of the מוכר can grant the field to the מחזיק who does not possess this מיגו.

presence of one עד. When confronted, ראובן readily admitted that he grabbed the נסכא, however ראובן claimed that the נסכא was his and not s'שמעון. 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 –

(י)הו[ה][41][ד]אי לא [ד] – that were it not for the fact that ראובן was –

מחוייב שבועה ואינו יכול לישבע – obligated to swear but could not swear; if not for that fact, meaning if ראובן would not be obligated to swear –

היה נאמן במיגו לומר – he would have been believed to claim, that –

דידי חטפי – I grabbed my own piece of silver –

במיגו דאי בעי אמר לא חטפי – with a מיגו since he could have claimed I did not grab anything –

והיה מכחיש את העד – 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 ע"א 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 – and here in the case of מפלניא זבינתה וכו' the מוכר if he would claim להש"ם **would not be obligated to swear** against the admission of the מחזיק that זבנה מינך. The reason is –

דאין נשבעין על הקרקעות – 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 טענינן the מיגו can be applied to the מוכר on behalf of the מחזיק even if does not apply to the מחזיק.[42]

וכהאי גוונא מצינו בסוף המוכר [את הבית][43] (לקמן דף ע,א) – And we find something similar in the end of [את הבית] המוכר פרק

גבי מפקיד אצל חבירו בשטר – concerning the case when **someone deposits** something **by his friend with a note** of deposit. רב חסדא 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

[41] See הגהות הב"ח.
[42] See footnote # 39.
[43] See הגהות הב"ח.

accidently lost. A שומר is פטור from אונסים (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 טענינן), that their father (may have) returned it. This concludes the גמרא there.
תוספות continues with his proof.

דאף על גב דלא טענינן ליתמי נאנסו – 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 dos not want to appear frivolous in its actions. Nonetheless, even though בי"ד will not claim נאנסו –

אפילו הכי טענינן (ליה) [להו[44]] החזרתיו לך – 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 –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 –

במיגו דאי בעי אמר נאנסו –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 דר בה חד 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 – and the ר"י says –

דלא דמי להאיא דהמוכר את הבית – that our case **is not similar to that case in המוכר את הבית;** concerning the פקדון –

דהכא אם היה רוצה המוכר – for here in our case **if the מוכר would want –**

לזכות בטענה זו – to acquire the rights to the field **with this claim –**

דלא היתה שלך מעולם – that it was never yours (the מערער), **then –**

לא היה מעכבה הלוקח – the buyer would not be able to retain this field for himself –

שהרי יודע היה – for the buyer **had already known –**

[44] See הגהות הב"ח אות מ.

שהיתה שלו – 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]

תוספות discusses a related issue:

כתב רבינו חננאל ראינו לרבותינו הגאונים זכרונם לברכה – The ר"ח wrote: we have seen the view **of our Rabbis the גאונים ז"ל**

דהאי מחזיק – that this מחזיק who now lost this field –

לית ליה למיחת לדינא – cannot enter into a lawsuit –

בהדי מריה דארעא – with the original **owner of the land**[47] (the מערער) –

אלא האי דזבין ליה – but rather the מוכר **who sold it to** the מחזיק

מחית בהדיה – 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 the מחזיק can sue is the מוכר, who sold him this field.[48]

תוספות offers a dissenting view:

ואין נראה לרבי שמשון בן אברהם – the רשב"א does not agree with the ruling of the גאונים –

דהא – for we have a ruling, that –

כל זכות שתבא לידו – any rights that he may acquire –

מכר ראשון לשני – the first buyer (the מוכר) **sold to the second** buyer (the מחזיק) –

ולא יוכל לדחות ולומר לו – and the מערער **cannot push away** the מחזיק **and say to him –**

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[45] It would seem that the ר"י disagrees with the רשב"א only in the case where the מחזיק bought עדים דדר בה חד מפלניא זבינתה דזבנה מינך after he initially claimed יומא. However if he originally claims מפלניא זבינתה דדר בה חד יומא קמי דידי, דזבנה מינך, then both the לוקח and the מוכר would be acquitted with the מיגו of להש"ם. See however the מהרש"א בד"ה בא"ד אי. See footnotes # 16 & 39.

[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 טענה of the מיגו 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. [The difficulty with this explanation is that seemingly טענינן and בירור do not go hand in hand.] Another approach may be; what is the גדר of טענינן. The רשב"א could maintain that בי"ד claims that originally before the מוכר sold it to the לוקח, the מוכר could have acquired it from the מערער, and therefore the מחזיק did not contradict that original מיגו. However the ר"י will maintain that טענינן reflects בי"ד's claim now after the מוכר (allegedly) sold the field to the מערער; in which case the מחזיק contradicts the מיגו.

[47] This is perhaps what the גמרא means when it states: זיל לאו בעל דברים דידי את!

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

לאו בעל דברים דידי את – 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 – and later we find explicitly –
גבי ההוא דדר בקשתא בעיליתא – concerning the one who dwelt in an attic in קשתא –
דלא מצי למימר ליה – that the מערער **could not say to him –**
לאו בעל דברים דידי את – you are not my litigant –
אלא אי הוה משכח סהדי – but rather if the מחזיק **would have found עדים**
דדר ביה ההוא גברא חד יומא – that the מוכר **lived there for one day –**
ר"ח – הוה מוקי לה רבי חייא בידיה would have placed the property **in the possession** of the מחזיק.[49] We derive from there that the מחזיק is a בעל דבר with the מערער.

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 דר בה חד יומא and he will retain the field on the basis of טענינן. The ר"י argues that in this case the מחזיק cannot retain this field since he contradicts the potential מיגו of the מוכר.
We say מיגו במקום ע"א, when the ע"א is not מחייב a שבועה; e.g. by קרקע etc.
The גאונים maintain that the מחזיק is not a בע"ד of the מערער and the רשב"א disagrees.

<u>Summary</u>
תוספות maintains that if the מערער has no עדים then the מחזיק is believed (even without חזקת ג' שנים) to claim that מפלניא זבינתה דזבנה מינך קמי דידי or קמי דידי דר בה חד יומא.
We do not say מיגו למפרע. Nevertheless, according to the רשב"א, the מחזיק may bring עדים that דר בה חד יומא, and will retain the field on the basis of טענינן. The ר"י disagrees. The גאונים maintain that the מחזיק is not a בע"ד with the מערער.

<u>Thinking it over</u>
1. תוספות (argues with the רשב"ם and) maintains that if the מחזיק claims קמי דידי זבנה מינך he is believed just as if he would claim דידי דר בה חד יומא. Why then did רב say that וחזיתיה לדעתיה אי א"ל קמאי דידי זבנה מינך מהימן; when he could have said a greater חידוש that if א"ל קמאי דידי דר בה חד יומא מהימן?![50]

[49] Others question this proof. In the case of בקשתא בעיליתא, the מחזיק has a חזקת ג' שנים and the מערער wants to be מוציא from him; obviously the מחזיק is a בעל דבר. However, when there was no חזקת ג' שנים, the גאונים maintain that the מחזיק is not a בע"ד of the מערער.
[50] See footnote # 20.

2. תוספות proves from the סוגיא of מנה לי בידך that מיגו למפרע לא אמרינן.[51] Seemingly 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 מיגו למפרע לא אמרינן!?

בריך רחמנא דסייען!!!

Blessed be the Merciful one Who assisted us!!!

[51] See footnotes # 29 & 37.