

In the coming section תוספות will cite גמרות which either support or (seemingly) contradict the ruling that לא אמרינן מיגו למפרע.

מיגו למפרע לא אמרינן anticipates a question concerning תוספות:

and that which רב said there¹ – והא דקאמר התם רב

and I saw that it was the opinion of my dear one² – וחזיתיה לדעתיה דחביבי

–

– מוכר the מערער, that the מחזיק **that if the would have said to** דאי הוה אמר ליה

– ר"ח **bought it from you in my presence,** קמי ידי זבנה מינך –

– מחזיק the **would have believed** הוה מהימן ליה –

with a מיגו for the could have claimed במיגו דאי בעי אמר מינך זבינתה

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 now³ (after he already stated זבנה מינך (מפלגא 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 תוספות maintains, namely, that מיגו למפרע לא אמרינן.

corrects this mistaken assumption: תוספות

will still מחזיק **did not mean that** רב – לא קאמר שהיה עדיין נאמן בטענה זו

be believed with this argument of קמי ידי (even after he initially claims מפלגא

(זבינתיה דזבנה מינך). This cannot be, for it is a למפרע. מיגו למפרע.

– **but rather** רב meant to say as follows –

– קמי ידי זבנה **would have initially claimed** מחזיק **if the** אי הוה טעין מעיקרא

before he admitted that מפלגא זבינתיה דזבנה מינך – **קודם שהודה** the מערער giving

the status of a קמא. It is only in this case where he originally claims מפלגא זבינתיה דזבנה מינך that the מחזיק would be believed.⁴

that the מחזיק would be believed.

adds some clarification: תוספות

and the same rule will apply if the מחזיק **is believed** דאי הוה טעין מעיקרא

– מוכר the **would have initially claimed,**

lived there for one day in my presence; קמי ידי דר בה חד יומא – the ruling

would be –

that the would be believed. The claim of קמי ידי is believed

with a מיגו whether the מחזיק claims מינך זבנה מינך or whether he claims קמי ידי דר בה חד יומא.

יומא.

¹ On בקשתא בעליתא דף מא,ב.

² חביבי as רב חייא referred to his uncle רב.

³ There is a slight indication there that this is what רב meant. The גמרא there states that after the מחזיק claimed that מפלגא זבינתיה דזבנה מינך, ר"ח told him that if you have witnesses that יומא דר ביה חד יומא you will win the case. רב added that it appeared to him that if he would state קמי ידי 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 יומא דר ביה חד יומא or he claims קמי ידי זבנה מינך. Therefore just as יומא דר ביה חד יומא is valid even now, similarly the claim of קמי ידי זבנה מינך can also mean now. תוספות however will reject this reading.

⁴ See question at end of section.

מיגו למפרע לא אמרינן offers an additional proof that תוספות

And there is an additional proof that from the גמרא in the end of בורר (ד) זה בורר (סנהדרין דף לא,א) – [פרק] זה בורר in the end of גמרא from the מיגו למפרע לא אמרינן

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.

The שטר was released by her from her possession to דנפק שטרא מתותי ידה – (presumably upon the request of the מלוה who wanted to collect his debt) –

She said I know about this שטר – אמרה ידענא (ליה) [ביה]⁶ בהאי שטרא

that it is a paid up שטר, etc. The לוה already paid the debt.

however ר"נ did not believe her⁷ – ולא הימניה רב נחמן

why do you not believe her, she has a מיגו – אמר ליה רבא – said to ר"נ

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 בעי קלתיה⁸.

since the שטר was established¹⁰ in בי"ד – [רבא said to ר"נ] – [אמר ליה]⁹ כיון דאיתחזק בבי דינא

we do not say 'she could have burnt it'. This concludes the גמרא in בורר.

continues with his proof:

we may conclude from this גמרא, that –

even though that before we saw the שטר in her possession – אף על גב קודם שראינוהו בידה

she would have been believed to claim that the שטר is paid up – היתה נאמנת לומר דפרוע הוא

with the מיגו that she could have burnt the שטר, nevertheless – במיגו דאי בעי קלתיה

now that it was 'established' in בי"ד – השתא דאתחזק בבי דינא

the meaning of אתחזק is that we saw the שטר in her possession – פירוש שראינוהו בידה

she is not believed to claim that it was paid up – לא מהימנא

for there is no longer any מיגו. Once the woman bought the שטר, she lost the מיגו of בעי קלתיה; she can no longer burn it –

⁵ See הגהות הב"ה.

⁶ See הגהות הב"ה אות ח'.

⁷ There are actually two opposing לשונות in that גמרא as to whether ר"נ believed her. תוספות is citing the איכא דאמרי.

⁸ 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.

⁹ See הגהות הב"ה אות ח'.

¹⁰ שטר will shortly explain that this means that בי"ד is presently aware of this שטר.

she presently absolutely requires this argument of פרוע –

– that she now claims –

– if she wants to exempt the ליה from paying this debt. She has no other options. This means there is no מיגו.¹¹ 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 קלתיה אי בעי. 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 למפרע.

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

and 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.¹²

תוספות rejects רש"י's interpretation:

– and the ר"י does not agree to this interpretation –

– 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 אמרינן לא למפרע, she has a valid מיגו.

תוספות will now bring yet another proof that אמרינן לא למפרע:

– and an additional proof, for we have learnt in a משנה in פרק שבועת הדיינין (שבועות דף לח,ב) - ליה אלוהא דתנן בפרק שבועת הדיינין (שבועות דף לח,ב) -

– you owe me a (מנה) hundred – **מנה לי בידך** –

– the responded in the presence of עדים: yes, I owe you the מנה – **אמר לו הן** –

the next day the מלוה says to the מנה **give me** the מנה; if the מנה responds that –

I gave it to you after my admission, the ליה is **exempt** from paying the מלוה. This concludes the משנה.

– and the גמרא there challenges from this משנה **– ופריך מינה (שם מא,א)**

¹¹ This case is entirely different than בקשתא 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 בעל המיגו is arguing his case. If we were to maintain וכו' אסיק אדעתיה, then the מיגו would apply retroactively to the first 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.

¹² 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 ליה 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 ליה cannot claim פרוע unless he has valid proof. [However if the שטר is not מקויים, the ליה may be believed that דמזוייף, since it has not yet been established that there is a valid שטר.]

to those that maintain that if one 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:

– משנה **but here** – **והא הכא**

since the מלווה originally **demanding** 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.¹³ This concludes the quote from the גמרא (and the משנה).

continues with his proof:

and what is the question! If we were to maintain that מיגו למפרע אמרינן, then there is no question –

for here in the משנה **it is different** that in the case of המלווה את חבירו – **דשאני הכא** – בעדים –

– **פטור** since he has – **for** in the משנה the לווה **is פטור** – **דפטור**

a מיגו that he could have said yesterday, when the מלווה 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 מלווה nothing. 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 למפרע) and the ruling of המלווה את חבירו (where there is no מיגו at all) proves that the גמרא did not consider it to be a מיגו –

but rather it is certain than in such a manner; **אלא ודאי כי האי גוונא** – where the מיגו was applicable in the past, but not now in the present –

מיגו – **we do not allow** such a מיגו.

concerning גמרא, which requires explanation:

and that which רש"י explains in the last פרק of כתובות – **ומה שפירש הקונטרס בפרק בתרא דכתובות (דף קטב, ושם)**

concerning the law of 'identifying it as a marker for another'. The משנה¹⁴ 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

¹³ For the גמרא's answer on this question see previous ובא on תוספות ד"ה ובה.

¹⁴ דף קטא, א.

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 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:

that if the מערער (witness) claims and says – דאם טען ואמר – מחזיק – מוכר – I subsequently bought it from the מחזיק – חזרתי ולקחתי ממנו – לאחר שעשיתי סמך בשמו as a marker in his name; in the deed it was clearly stated that the boundary field belongs to the seller-מחזיק,¹⁵ 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.

רש"י interprets the גמרא there, that the reason the מערער is believed, is

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:

that since there are witnesses that the field was once his (the מערער's)

and the field was stolen from the מערער –

and the מחזיק has no rights in this field – [אין לו זכות [למחזיק]¹⁶

only by the say so of this [המערער]

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

הפה שאסר הוא הפה שהתיר 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.

rejects רש"י's interpretation:

it is not acceptable to the ר"י – אין נראה לרבינו יצחק

for in such an instance – דבכי האי גוונא

a מיגו is not acceptable as I explained – לא אמרינן מיגו כדפרישית

¹⁵ 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.

¹⁶ See הגהות הב"ח.

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 in גמרא will now offer his explanation for the תוספות.

– ר"י seems to the however – אלא נראה לרבינו יצחק

– 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: תוספות

חזקה made a מערער – and if you will say; וכי תימא אי אכלה שני חזקה

– it is obvious that he retains the field – **פשיטא**

– and what is ר"י teaching us¹⁸, that the מערער is believed –

משנה¹⁹ – it is an open מתניתין היא

– that a חזקה which is accompanied by a claim – דחזקה שיש עמה טענה

– this is a valid חזקה. In this case of עשאה סימן לאחר (according to the חזרתי ולקחתיה הימנה טענה of the s"l interpretation) there is a valid חזקה of three years and a טענה. Why does ר' יוחנן teach us this דין when it is seemingly obvious?!

answers: תוספות

– and one can say – ויש לומר

– it may have entered our minds that the מערער should not be believed –

– since the מערער protested against the מחזיק-seller, even – כיון שערער עליו

– before the מערער made the חזקה – קודם שאכלה שני חזקה

– saying that this boundary field is his (the מערער's), therefore he should not be believed when claims that he subsequently (re)bought the field from the מחזיק. The reason is because –

– 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 –

¹⁷ See הגהות הב"ח.

¹⁸ In the גמרא כתובות there, אביי said that the מערער is believed, since ר"י ruled this way.

¹⁹ See further ב"ב דף מא,א.

comes to teach us, that since the מערער has a חזקה we believe him when he claims חזרתו ולקחתיה הימנה.

and similarly that story which the גמרא relates afterwards²⁰ -

is in a situation where a חזקה was made (presumably by either the מערער or the אפוסטרופוס). This concludes the discussion concerning למפרע מיגו.

In summation: תוספות cites various גמרות in conjunction with למפרע מיגו. In the case of where רב stated that קמי דידי זבנה מינך would be believed, it is to be understood that only if he would originally claim מינך זבנה רב חייא required עדים that יומא חד בה דר he is believed. However presently it is a למפרע מיגו. [That is why רב חייא required עדים that יומא חד בה דר he is believed.] The case of אי בעי קלתיה proves that למפרע לא אמרינן, since בי"ד sees the שטר, she loses her previous מיגו. [From here we can derive that even a למפרע שאסר הפה is not acceptable.] Similarly we can derive this from the case of לי בידך מנה that למפרע לא (הפה שאסר) מיגו (הפה שאסר) למפרע לא. Therefore²¹ in the case of עשאה סימן לאחר we cannot say that the מערער is believed on account of חזקה; but rather the מערער there made a proper חזקה.

קמי דידי claims מחזיק (and רשב"ם argues with the תוספות) maintains that if the קמי דידי זבנה מינך claim he is believed just as if he would claim יומא חד בה דר he is believed. Why then did רב say that קמאי דידי זבנה מינך מהימן; when he could have said a greater חידוש קמאי דידי זבנה מינך מהימן? ²²

²⁰ This is the story of the אפוסטרופוס 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. See רש"י here, who changes the גירסא from דמייתי שם, to דמייתי שם.

²¹ The alternative is that תוספות is citing the גמרות in a manner: We do not say למפרע מיגו 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 למפרע מיגו when there was never an original claim which the מיגו could have supported (אי בעי קלתיה); and it goes without saying that למפרע לא אמרינן when in the original claim the מיגו testified to his own detriment (מנה לי בידך).

²² See footnote # 4.