

returns now to our case of מינך: מפלגיא 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 יומא חד בה דר, 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 (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 ידי דר בה חד יומא (or קמי ידי זבנה מינך), the מחזיק would be believed with a מיגו of מעולם שלך. However if the מחזיק merely claimed מפלגיא זבינתה, דר בה חד יומא 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 למפרע מיגו.

and in our case where the מחזיק claims וכו' מפלגיא זבינתה וכו' and he had no עדים that it was originally his – **ובעובדא דידך** – חזקה, and the מערער had no עדים that it was originally his –

if the מחזיק would have subsequently brought עדים – אי הוה מייתי המחזיק סהדי – דדר ביה חד יומא – that the seller lived there (in the field) for one day –

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

– דהוה [ליה]¹ לאוקמי לארעא בידה – that the land would be placed in the possession of the מחזיק.

even though the מחזיק has no longer the מיגו of להש"ם²; for as אף על גב דליכא מיגו – previously stated it is a למפרע מיגו –

nevertheless the מחזיק will get the field since there is a rule that argues on behalf of the buyer. The buyer has עדים that the מוכר was דר, 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 –

I bought it from you (מערער) and the מוכר would be believed (even though he has no חזקה) – זבינתה מינך –

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.

¹ See הגהות הב"ח.

² It seems (according to the רשב"א) that if the מחזיק originally claimed that יומא קמי ידי דר בה חד יומא, then he would surely be believed. In that situation both the מחזיק and the מוכר have the (same) מיגו of מעולם. 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 # 5 & 8.

anticipates a (side³) difficulty with this reasoning:

and even though that this buyer (who is claiming מִינֵךְ דִּזְבְּנָה מִינֵךְ) **זָכַרְתָּ דִּזְבְּנָה** knows that it once was the s'מִעֲרַעֵר; for he himself says מִינֵךְ –

and this buyer-מִחְזִיק is like one עַד who testifies that the מִעֲרַעֵר was a מִרָא קָמָא. The question is; how can we believe the מוֹכֵר that he bought it from the מִעֲרַעֵר with the מִיגו of מִלֵּשׁ"ם; when the מִחְזִיק is testifying that it did belong to the מִעֲרַעֵר contrary to the מִיגו of the מוֹכֵר. The מִחְזִיק is an עַד אֶחָד who contradicts the מִיגו of the מוֹכֵר! The מוֹכֵר has no מִיגו of מִלֵּשׁ"ם. The מוֹכֵר would not readily claim מִלֵּשׁ"ם since there would be an עַד אֶחָד who contradicts him.

responds:

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

proves his point:

as is indicated in the later גמרא – **כְּדִמְשַׁמַּע לְקַמֵּן (דף לגב) גְּבִי נִסְכָּא דְרַבִּי אַבָּא** **concerning the 'piece of silver on which רַבִּי אַבָּא ruled.** In the (famous) case of נִסְכָּא אַבָּא (שמעון) grabbed away a piece of silver from his friend (ראובן) in the presence of one עַד. When confronted, ראובן readily admitted that he grabbed the נִסְכָּא, however ראובן claimed that the נִסְכָּא was his and not שמעון's. If there would have been no עַד, then ראובן would have been believed that it is his נִסְכָּא with a מִיגו that he never grabbed it away from שמעון – לא – שמעון would have been believed that it is his נִסְכָּא with a מִיגו that he never grabbed it away from ראובן. This מִיגו of מִלֵּשׁ"ם is however compromised by the ע"א; for had ראובן claimed לא – שמעון he would have had to swear against the ע"א. The גמרא considers ראובן to be obligated to swear (מִחְוִיב לִישָׁבַע), since the power of his מִיגו is weakened by an ע"א that requires him to swear. However he is considered not able to swear (וְאִינוּ יָכוֹל לִישָׁבַע), since presently he is not contradicting the עַד. Therefore since he is a מִחְוִיב לִישָׁבַע וְאִינוּ יָכוֹל לִישָׁבַע the ruling by אבא ר' is that ראובן must return the נִסְכָּא to שמעון. It seems from that גמרא –

– **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 –

he would have been believed to claim, that –

I grabbed my own piece of silver –

with a מִיגו since he could have claimed I did not grab anything –

and even though that he would be contradicting the עַד; ראובן would still have been believed. אבא ר' does not say that the מִיגו of מִלֵּשׁ"ם is not a valid מִיגו on the basis that it contradicts an ע"א. Rather the מִיגו is compromised on account of the שְׁבוּעָה which the ע"א generates. However the ע"א by himself does not weaken the מִיגו. Therefore in cases where an ע"א would not generate a שְׁבוּעָה, a מִיגו which contradicts an ע"א would be a valid מִיגו. תוספות now concludes –

³ This is a side issue whether we say a מִיגו במקום עַד אֶחָד. The main issue is how the מוֹכֵר of the מִיגו can grant the field to the מִחְזִיק who does not possess this מִיגו.

⁴ See הגהות הב"ח.

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 –

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 ע"א.

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 מחזיק⁵.

And we find something similar in the end of [את הבית] פרק המוכר – וכהאי גוונא מצינו בסוף המוכר [את הבית]⁶ (לקמן דף ע,א)

concerning the case when someone deposits something by his friend with a note of deposit. נפקד 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 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 טענינן), that their father (may have) returned it. This concludes the גמרא there.

continues with his proof.

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 –

–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 דר. בה חד יומא. The מוכר still has a מיגו of להש"ם, since

⁵ See footnote # 2.

⁶ See הגהות הב"ח.

⁷ See הגהות הב"ח אות מ.

the מיגו 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.

offers a dissenting opinion:

and the ר"י says – ואומר רבינו יצחק

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

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 –

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

for the buyer had already known – שהרי יודע היה

that it did belong to the מערער.⁸ 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 מינך דזבנה, 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.⁹

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 יומא חד and he will retain the field on the basis of טענין. 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 יומא חד, when the ע"א is not מחייב a שבועה; e.g. by קרקע etc.

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

⁸ It would seem that the ר"י disagrees with the רשב"א only in the case where the מחזיק bought יומא חד after he initially claimed מינך דזבנה. However if he originally claims יומא קמי' מפלניא זבינתה דדר בה חד יומא קמי' 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 footnote # 2.

⁹ 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 מוכר 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 טענין and בירור do not go hand in hand.] Another approach may be; what is the טענה of גדר. 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 טענין reflects בי"ד claim now after the מוכר (allegedly) sold the field to the מערער; in which case the מחזיק contradicts the מיגו.