

## **On what are you relying, on this שטר; this שטר is merely a potsherd**

### Overview

In the case at hand, the מוחזק initially claimed that he has a שטר (which could have been מקויים). The מערער argued that it is a שטר מזוייף. In response the שטר admitted that it is a שטר מזוייף; however he lost his original valid שטר. רבה ruled that the מוחזק has a מיגו for he need not have admitted that it is a שטר מזוייף. However רב יוסף disagreed and argued that the שטר which you are relying on is a שטר מזוייף. Seemingly רב יוסף is not responding to s'רבה argument that the בעל השטר has a מיגו. This תוספות will offer three explanations why the מיגו is not effective.

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(רב יוסף has a question (on the response of תוספות):

**It is perplexing! For the בעל השטר should be believed -**  
**– with a מיגו; for he could have claimed –**

**שטר is a valid שטר.** If the bearer of the שטר would not have admitted that it is indeed a false שטר, but would have rather maintained that it is a valid שטר, he would have been awarded the property. Therefore on account of this מיגו we should believe his claim that 'I bought it from you (and I lost the original valid שטר)'.<sup>1</sup>

answers: תוספות

**– answered ריב"ם and the –** ותירץ רבי יצחק ברבי מרדכי

**– מיגו a the rulings of we do not apply –** דלא אמרינן מיגו

**to extract monies [from its presumptive owner]<sup>3</sup>; –** להוציא ממון [מחזקתו]<sup>2</sup>

**– is in possession of the property –** and the fact that the בעל השטר is in possession of the property –

**– is meaningless; the בעל השטר is not the מוחזק –** אינו כלום

**– for land is presumed to be in the possession of its original owner –** דקרקע בחזקת בעליה קיימא

**– since he has neither a valid שטר nor a חזקה –** כיון שאין לו שטר ולא חזקה

**– but rather merely words that support his contention –** אלא בדברים בעלמא

**– for he says I had a valid שטר –** שאומר שטרא מעליא הוה לי

**and it was lost.** Words alone without a חזקה or a שטר do not entitle anyone to be considered a מוחזק in property. Therefore since the בעל השטר is not the מוחזק; but

<sup>1</sup> is (seemingly) merely repeating s'רבה argument; indicating that רב יוסף did not properly address the מיגו argument. תוספות however, does not explicitly state that רב יוסף is not responding to רב"ב.

<sup>2</sup> See הגהות הב"ח.

<sup>3</sup> The reason is that in order to extract money from the owner it is necessary to be certain that the monies are due. A מיגו cannot offer this degree of certainty; only two עדים can.

rather the מערער is the מוחזק in this case, for he is certainly the קמא, we cannot apply the מיגו principle here<sup>4</sup>.

anticipates the possible question that in any monetary argument someone is losing money; every מיגו should be considered a להוציא. מיגו will clarify when a מיגו is effective.

**– מיגו and we do not apply a – ולא אמרינן מיגו**

**– only to maintain money that is in one's possession – אלא להחזיק ממון**

**– that he can exempt himself from paying out monies to creditors – שיכול לפטור עצמו**

**מיגו through a – על ידי מיגו.** This example is discussing a case where one claims that the בעל המיגו owes him money. The בעל המיגו can be exempt from paying this claim through the מיגו; since the money claimed is in his unequivocal possession.

**– or if you will, a מיגו is also<sup>5</sup> effective – אי נמי**

**– if one has a שטר or a חזקה concerning property – אם יש לו שטר או חזקה**

**– and this מערער comes to invalidate his proof; by claiming, for instance, that the third party seller never owned this property – וזה בא לפסול ראיתו**

**– then this מוחזק can substantiate his claim through a מיגו – אז זה יכול לקיימו על ידי מיגו**

**– as in the case where the מחזיק claims concerning his seller that 'he bought it from you in my presence' he is believed with a – כמו קמי ידי זבנה מינך**

**– מיגו for he could have claimed – מיגו דאי בעי אמר**

**– 'I bought it from you and I consumed its produce for the three חזקה years'.<sup>6</sup>** In this case the ownership of the field is being contested<sup>7</sup>; nevertheless since he has a חזקה, the מיגו allows him to retain the field on the basis of the חזקה. However a מיגו does not have the power to enable someone to extract money or property that is in someone else's possession.

ריב"ם is not satisfied with this explanation of the תוספות.

**however the ר"י is not satisfied** with this explanation that מיגו להוציא since it is a מיגו – ואין נראה לרבינו יצחק

**– since רב יוסף does not explicitly<sup>8</sup> express this reason** of מיגו להוציא; but rather רב יוסף claims that הא שטרא חספא בעלמא, this –

<sup>4</sup> and מיגו may be of the opinion that since this is a שתיק בעי דאי, it is more effective than a regular מיגו and can be utilized even להוציא ממון. See תוספות ב"ב, ד"ה וזה. See footnote # 8.

<sup>5</sup> תוספות will offer another example where מיגו is effective even in a case where his presumptive ownership is not as verifiable as in the aforementioned case concerning his money

<sup>6</sup> It seems evident from this תוספות that the claim of קמי ידי זבנה מינך is not believed on its own merits; only on account of the מיגו זבנתא. See תוס' ל"ה לאו.

<sup>7</sup> It is not that clear who is the מוחזק in this case; whether it is the מחזיק (who lived there for three years) or the מערער (who is the קמא). Nonetheless since the מערער is not a definite מוחזק, the מיגו is effective.

<sup>8</sup> Some commentaries maintain that according to the ריב"ם, the dispute between רב יוסף and רב רבה is whether this is considered a מיגו להוציא or not. רב רבה maintains that it is not a מיגו להוציא since the מחזיק initially presented a שטר which would have given him possession of the property. רב יוסף replied that we cannot consider him a מוחזק on account of a שטר מזויף. This would seemingly answer the ר"י objection. However the ר"י argues

**indicates that it is not because of this** explanation of מיגו להוציא, that רב יוסף dismisses the מיגו. –

offers a different explanation –

**and the ר"י is of the opinion –**

**that the reason רב יוסף maintains that we do not invoke here the rules of מיגו, is that –**

**– מיגו would have no מחזיק since here the כיון דלית ליה הכא מיגו –**

**unless he initially lied;**

**– for it was necessary for him to initially lie –**

**and to claim ‘and here is the שטר’.** The only way the מחזיק has a מיגו is because he clearly lied initially when he said 'והא שטרא'. The מיגו is that he could have kept up this lie. We cannot base a מיגו on a lie<sup>9</sup>. In a regular case of מיגו (for instance החזרתי במיגו דנאנסו) the original claim (החזרתי) is not known to be either a truth or a lie. Its truthfulness is established through the power of a מיגו. In our case however, we begin initially with a blatant self confessed lie on behalf of the המיגו. בעל המיגו. A מיגו is not effective under these circumstances<sup>10</sup>.

offers another explanation why there is no effective מיגו here:

**– or if you will we may also state –**

**that the reason we do not employ here a מיגו, is –**

**because he is retracting his original claim**

**‘and here is the שטר’.** He based his proof of ownership on the (false) שטר

**– and now he is retracting this claim –**

**and he admits that the שטר is a חספא בעלמא הוא**

**but rather his new claim is that I had a valid שטר.**

A person may not change his arguments in בי"ד, when the latter argument contradicts the former, as in this case<sup>11</sup>. Previously he stated ‘this is the שטר’; subsequently he admits that it is not a valid שטר; but rather I had another שטר.

## Summary

offers three interpretations why a מיגו is ineffective here:

1. It is a מיגו להוציא. 2. It is a מיגו that is prefaced by a lie. 3. He is a חוזר וטוען.

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that if the basis of רב יוסף's objection is that it is a מיגו להוציא, he should have stated that ‘explicitly’ (in addition to perhaps also explaining why it is considered a מיגו להוציא on account of the שטר מזויף).

<sup>9</sup> According to the ר"י this is what רב יוסף meant when he said שטרא אהאי שטרא; the basis of the מיגו is the (false) שטר that the מחזיק introduced originally. However this שטר is a חספא בעלמא, and we cannot base a מיגו on a lie.

<sup>10</sup> A popular explanation is that the purported purpose of a מיגו is to prove the honesty of this individual. However, here the בעל המיגו is showing that he is not honest.

<sup>11</sup> רב יוסף is saying that originally you depended on this שטר (אמאי סמכת אהאי שטרא); however now you can no longer depend on this שטר (since it is a חספא בעלמא). You can therefore not accept any conflicting claims (even with a מיגו), since it is considered to be a חוזר וטוען. See שיטה מקובצת בשם הרא"ש.

Thinking it over

According to the ר"י, what are the reasons that רבה disagrees with רב יוסף?