

מי אמרינן במקום חזקה מה לי לשקר או לא –

Do we say in the face of a חזקה; ‘why would I lie’, or not.

OVERVIEW

The גמרא queries: in a case where there is a חזקה that contradicts a claim, and a מיגו that supports the claim, which is stronger; the מיגו that supports the claim or the חזקה that denies it. Specifically the case involves where the לווה claims תו"ז, however he could have claimed בזמני פרעתיך, is this מיגו strong enough to offset the חזקה of תו"ז. Our תוספות attempts to resolve this query, however these attempts (but one) are refuted.

תוספות asks:

הקשה הרב יצחק בר מרדכי והא הך חזקה עדיפא משטר –

The א"א פורע תו"ז of חזקה presented a difficulty with this query. For this is stronger than a note; the חזקה enables the מלוה to collect better than a שטר can. תוספות explains how this is so -

דבשטר אינו גובה אלא בשבועה ובהך חזקה גובה בלא שבועה¹ –

For if the מלוה possesses a שטר **he cannot collect** from the יתומים (or בפניו) **unless** he takes an **oath** that the money is owed; however **with this חזקה of א"א פורע תו"ז**, the מלוה **collects** from the יתומים **without an oath**; if their father died תו"ז, as the גמרא previously stated -

ואם כן מאי קא מיבעיא ליה הא פשיטא דמיגו במקום עדים לא אמרינן –

And since this is so (that this חזקה is stronger than a שטר), **what is his query** if a מיגו of לשקר מה לי is stronger than this חזקה? It certainly cannot be stronger than this חזקה. **For this is obvious that we do not say that a מיגו can be believed in the face of witnesses** who testify against the litigant who has the מיגו.² We have just surmised that שטר is weaker than the חזקה, for with the שטר he cannot collect מיתמי without a שבועה. Therefore if we cannot say a מיגו במקום שטר, then -

כל שכן במקום חזקה דעדיפא טפי³ –

¹ It would seem that we may (even) be discussing a חזקה without a שטר; there are עדים that it is תו"ז of the loan. See תוס' ה,א ד"ה ובא.

² If one of the litigants presents a claim for which he has a מיגו that supports it; however the other litigant presents witnesses that contradict his claim; he is certainly not believed; despite that he has a מיגו. עדים are the strongest validation and proof. The strength of a שטר is the עדים that sign on it. A שטר can therefore be considered as עדים. It follows therefore that if there is a מיגו against a שטר it will not be believed since it is a מיגו במקום עדים.

³ It cannot be presumed at all that the ריב"ם maintained that חזקה is stronger than עדים! Therefore it is likely that the ריב"ם presumes that מיגו במקום שטר לא אמרינן, since עדים are backing the שטר. It follows then that if חזקה is stronger

certainly we cannot believe a **מגו** **when it defies** this **חזקה** of תו"ז **which is more preferable** than the **שטר**, for it enables one to collect from יתומים without a שבועה.

To summarize: The **חזקה** is stronger than the **שטר**. The strength of the **שטר** is the **עדים**. We do not say **מיגו** במקום **חזקה** (or במקום **שטר**); therefore we should certainly not say **חזקה** is stronger than the **שטר**. Why is the **גמרא** inquiring whether **חזקה** or not.

answers: תוספות

ואומר רבינו יצחק דלא קשה כלל דודאי עדים עדיפי מחזקה –

And the ר"י says that there is no difficulty at all, for it is certain that עדים are preferable to חזקה –

דאי אמרי שפרעו אפילו בתוך הזמן פטור –

for if עדים testify that the מלוה paid the loan even within the allotted time; before the due date, the מלוה will be **exempt** from paying the loan, even though there is a **חזקה** that he did not pay, nevertheless the **עדים** that testify that he paid are stronger than the **חזקה** –

ואי' אמרי אפילו אחר זמן ידענו שלא פרעו היה גובה מן היתומים בלא שבועה –

And if the עדים testify even after the time; we know that the מלוה did not pay the loan, the מלוה would collect from the יתומים without a שבועה.⁵

continues: תוספות

ומה שצריך שבועה ביש לו שטר זהו לפי שאינו מוכיח מתוך השטר אם פרע ואם לאו –

And the reason why the מלוה is required to swear when he attempts to collect from the יתומים **when he has a שטר;⁶ that is because it is not totally evident from the שטר itself if the מלוה paid or not.** The **עדים** on the **שטר** testify that there was a loan. They do not testify whether it was paid or not. Therefore there are no **עדים** that testify that this loan is still owed. That is why a שבועה is required. The fact that the מלוה is holding the **שטר** is not conclusive evidence that the מלוה still owes the money –

דזימנן דזייר ליה אפשר דספרא כדאמרין בפרק קמא דבבא מציעא (דף יז,א.) –

For occasionally the מלוה will retain the שטר even if it was paid up, on account

than **שטר**, we cannot say **חזקה** במקום **שטר**.

⁴ See 'Thinking it over' # 1.

⁵ The assumption that **חזקה** is stronger than the **עדים** (of the **שטר**) is incorrect. **עדים** are stronger than **חזקה**. Whatever **חזקה** can accomplish (such as collecting from יתומים תו"ז without a שבועה), the **עדים** can accomplish more. They enable the מלוה to collect from the יתומים even without a שבועה. Whenever the **חזקה** and **עדים** conflict we follow the testimony of the **עדים** against the **חזקה**. When **עדים** testify that he paid תו"ז, the מלוה cannot collect (even from the מלוה). Therefore from the fact that we do not say **מיגו** במקום **עדים** we cannot derive that we do not say **מיגו** במקום **חזקה**, for **עדים** are stronger than **חזקה**.

⁶ Seemingly if when there is a **חזקה** he collects without a שבועה, so by a **שטר** which has the power of **עדים** he should certainly be able to collect without a שבועה (since תוספות concluded that **עדים** are stronger than **חזקה**).

of the coins that are due the scribe for writing up the שטר as the גמרא states in the first פרק of מ"ב.⁷

תוספות asks a different question:

אך קשה דמכל מקום תפשוט דלא אמרינן מיגו במקום חזקה מדרמי בר חמא –

However, there is a difficulty, that notwithstanding what was previously said concerning עדים and a שטר the גמרא should resolve this query that we do not believe a מיגו against a חזקה; we can derive this from רב"ה –

דאמר בפרק כל הנשבעין (שבועות דף מה,ב ושם) המפקיד אצל חבירו בשטר –

Who ruled in פרק כל הנשבעין, one who deposits something by his friend with a note stating that he deposited a specific item; the דין is –

צריך להחזיר לו (בשטר)⁸ –

The נפקד is required to return the deposited item to its original owner in the presence of witnesses. If he has no witnesses that he returned the item; and the depositor shows the שטר פקדון, the recipient of the deposit –

ולא מהימן לומר החזרתי לך במיגו דאי בעי אמר דנאנסו –

is not believed to say, 'I returned the פקדון to you', even though he has a מיגו that he could have claimed they were accidentally lost or stolen, etc. Had he claimed he would be פטור from paying, provided that he swears the השומרים. Nevertheless now that he claims החזרתי לך, he is not believed (even with a שבועה); rather he must pay for the פקדון.⁹ The reason the מיגו is not effective, is –

משום דמצי אמר ליה שטרך בידי מאי בעי –

Because the depositor can say to the recipient; what is your שטר doing in my hand; if you had returned it to me I would have returned the שטר פקדון to you, so how come I still have the שטר. The fact that the שטר is in the possession of the בעל הפקדון proves that the שומר did not return the פקדון. This concludes the citation from the גמרא in שבועות. We see from that שטרך בידי מאי is not effective against the claim of בעי מאי. This claim of שטרך בידי מאי is conclusive evidence that the בעל השטר is owed (money). If the מיגו is not effective against the שטר –

וכל שכן דלא אמר מיגו במקום חזקה –

⁷ It is the responsibility of the לווה to pay for the scribe's work. Occasionally the לווה is even lacking the few coins necessary to pay the סופר. The מלוה agrees to lay out these monies, but will not return the paid up שטר to the לווה, until the לווה repays the דספרי. When the מלוה holds the שטר it is not comparable to עדים testifying that he owes money. There is always the concern that the loan was paid. Therefore he cannot collect from the יתומים without a שבועה. It is not a weakness in the דין of עדים; rather it is a weakness in the proof of holding the שטר. It is possible that we do say במקום שטר.

⁸ This is amended to read 'בעדים'.

⁹ See רב"ה ח"ה for different interpretations of תוספות שבועות מה,ב ד"ה בשטר. נחלת משה וכו'. רשב"ם (לקמן עא,א ד"ה אמר רבא).

- א"א פורע תו"ז of חזקה **Then certainly a מיגו cannot be effective against the**

דחזקה עדיפא דאין צריך שבועה וטעמא דשטרך בידי מאי בעי לא מהני לפוטרו משבועה –

For the חזקה of א"א פורע תו"ז is more effective than a שטר; since with the חזקה, the מלוה is not required to swear to collect from the יתומים however the claim of מיגו is not sufficient to exempt the מלוה from a שבועה if he wishes to collect from the יתומים.¹⁰

תוספות offers a possible response:

ושמא סוגיא דהכא לא סברה כרמי בר חמא –

And perhaps the גמרא here that inquires whether חזקה במקום מיגו or not, does not agree with רב"ה; it may maintain that a מיגו במקום שטר may be valid. If the שומר claims דנאנסו he may be believed (with a שבועה). Therefore the גמרא inquires as to what the דין is by חזקה במקום מיגו.

however; מיגו במקום חזקה will offer other places where there is a discussion concerning חזקה; however they are not relevant to our discussion here:

ולא דמי כלל להווא דפרק¹¹ האומר (דף סד,ב ושם) דאמר היכא דמוחזק לן דאית ליה אחים –

And our גמרא is not at all comparable to that גמרא in פרק האומר [מסכת קדושין], **where the גמרא states that in a case where it is known that a married person has brothers,** however we are unaware that he has children; which would require his wife to receive either יבום or חליצה upon his death -

ואמר יש לי בנים דנאמן במיגו דאי בעי פטר לה בגיטא –

And he claimed before he died that **'I have children'**. His wife will be פטור from חליצה if we accept his testimony. However this claim of exempting his wife from יבום goes contrary to the חזקה; until now it was presumed that he had brothers and was childless, which obligates her for יבום, nevertheless the דין is **that** the husband **is believed**; upon his death she is חליצה מיבום. The reason why he is believed against the חזקה that she requires חליצה is **for** he has a מיגו, **that he could have exempted her** from the יבום obligation **by** giving her a גט. That גמרא

¹⁰ חמא רמי בר חמא taught us that the טענה of מיגו is stronger than a שטרך בידי מאי בעי. The חזקה of א"א פורע תו"ז is stronger than a שטרך בידי מאי בעי as evidenced by the fact that חזקה exempts from a שבועה and the שטר does not. If there is no מיגו במקום חזקה then there is certainly no חזקה במקום מיגו. What is the איבעיא of the גמרא (according to רב"ה)?! See 'Thinking it over' # 2. In the קשיא of the ריב"ם it was assumed that a שטר is equivalent to עדים. We know that the חזקה is stronger than a שטר alone, regarding the שבועה for יתומים. It is also known that חזקה is stronger than a שטר alone, regarding the שבועה for יתומים. If we equate חזקה with עדים, and חזקה is stronger than שטר, therefore if חזקה is stronger than שטר, then מיגו במקום חזקה is stronger than שטר. This question was negated that a שטר is not חזקה. However רב"ה says distinctly that מיגו במקום שטר לא חזקה, then for sure חזקה is stronger than שטר, since חזקה is definitely stronger than שטר.

¹¹ This is amended to read דקדושין פרק האומר

seems to maintain that a מיגו is effective against a חזקה.¹² However תוספות does not explain how the two cases are different.¹³

וכן ההיא דהאשה שלום (יבמות דף קטו,א ושם) דבעי החזיקה היא מלחמה בעולם –

And similarly that גמרא in פרק האשה שלום where the גמרא queries: she established that there is a war elsewhere in the world; and she claimed that her husband died there. Is she permitted to remarry or not.¹⁴ The גמרא there explains the two sides of the query -

מי אמר מיגו דאי בעי אמרה שלום בעולם –

Do we say that we should believe her that he died for she has a מיגו, for if she wanted to lie she could have said there is peace in that part of the world where my husband died. If she would have said that, since we are unaware of any war there, she would have been believed, therefore we should believe her now with this מיגו -

או דלמא כיון דהחזיקה היא ואמרה בדדמי לא אתי מה לי לשקר ומרע לחזקה –

Or perhaps we do not believe her, for once she established that there is war where she claims her husband died and we know that in the time of war she says he died even if in reality she only assumes that he died, therefore this מיגו cannot come and be effective and to weaken the חזקה that in the time of war a woman's claim is merely a בדדמי – an assumption not an actual testimony.

ומייתי התם מעין ההיא בעיא לא דמי כלל להך דהכא –

And the גמרא there discusses a similar query as ours; this compels us to say that the query there it is not at all comparable to this query here. If they are similar why mention the query twice; in our גמרא and in יבמות. Again תוספות does not explain (here) why they are not similar.¹⁵

¹² Up to this point she was לשוק יבמה איסור בחזקת חזקה. This חזקה contradicts his claim that he has children and therefore she should be לשוק. We are forced to say that the חזקה במקום חזקה there, is not at all similar to our חזקה במקום. The reason we must say that they are not comparable is because in our גמרא it is questionable whether we say חזקה. מיגו במקום חזקה and in פרק האומר we believe him with a חזקה. מיגו במקום חזקה.

¹³ One explanation given is as follows: In פרק האומר the fact that he has brothers does not preclude his claim that he has sons, the two are not contradictory, and therefore the מיגו is effective. In our case the חזקה of א"א פורע תו"ז contradicts completely his claim of פרעתי תו"ז, therefore there is a possibility that such a מיגו is not effective (See מהר"ם).

¹⁴ The דין is that if a woman comes from overseas and claims that her husband died, she is permitted to remarry. If however there was a war there, she is not permitted to remarry even though she claims that her husband died. The reason she is not believed in the latter case is because we are concerned that in wartime since so many people died and she cannot find her husband she 'assumes' that he died without actually knowing for sure that he died.

¹⁵ See תוספות in (קט"ו,א ד"ה או) who explains that there the חזקה and the claim do not contradict each other. It is possible that there is a war (and even if she is claiming בדדמי) and yet the husband died. However, here the חזקה and the claim conflict with each other. Therefore no matter how we would resolve the איבעיא here, the איבעיא there in יבמות would remain. If we were to resolve here that במקום חזקה אמרינן מיגו, nevertheless in יבמות we still may not believe the woman since she may be saying a claim of בדדמי; not as טענת ברי in תו"ז. If we were to resolve that מיגו

ומיהו קשה מדתנן ביבמות בפרק בית שמאי (דף קיא,ב) –

However there is a difficulty from what we learnt in a משנה in מסכת יבמות – פרק ב"ש

יבמה שאמרה תוך שלשים יום לא נבעלתי כופין אותו אחר שלשים מבקשים הימנו –
A sister-in-law, who went through the יבום process and was subsequently divorced within thirty days, if she **claimed within** the first **thirty days** after the יבום; **there was no relationship with me**, the יבם did not perform ביאה with me during our marriage and therefore I still require חליצה, since I am still ליבום ¹⁶, so בית דין forces the יבם to give the חליצה. However if she complained to בי"ד, when she was divorced **after thirty days** have passed from the original יבום date, then בי"ד merely **requests from him** that he should give the חליצה, יבמה; however בי"ד does not coerce him. This is the משנה.

ומפרש התם דעד שלשים יום מוקי איניש אנפשיה טפי לא מוקי –

And the גמרא explains there; why is there a difference whether the divorce took place within thirty days or after thirty days; **for up to thirty days** when a man is together with a woman **a person can control himself**, and withhold his temptation to have ביאה. However **more than thirty days he cannot control himself**, and by that time he will certainly have had ביאה with the יבמה.

ולכך לאחר שלשים יום אין כופין דלא מהימנא –

And therefore after thirty days have passed since the יבום, before she was divorced, and then she comes to complain **we do not coerce him** to give חליצה for it is assumed that he already had ביאה with his יבמה **for the יבמה is not believed**. It goes against the חזקה of מוקי לא מוקי. A person cannot contain himself for more than thirty days. This ends the quote from the גמרא there.

במקום חזקה the woman is not believed concludes his question; the woman is not believed

אף על גב דאית לה מיגו דאי בעיא אמרה אינו יכול לבא עלי דנאמנת –

Even though she has a מיגו **for if she wanted she could have said he is incapable of having ביאה with me**; he is physically dysfunctional. If she would have made such a claim then she would have been believed –

כדמוכח בסוף נדרים (דף צא,א) :

As it is evident in the end of נדרים מסכת נדרים that a woman is believed to claim אינו יכול לבוא

we still may believe the אשה that her husband died; since the fact that there is a war does not preclude his death.

¹⁶ A יבמה has an איסור to marry anyone but her brother's –in-law, until she had ביאה or received חליצה from one of her יבמים. Marriage without ביאה is insufficient to remove this איסור.

עלי.¹⁷ does not answer this question.¹⁸

SUMMARY

The חזקה of א"א פורע תו"ז is stronger than שטר (because a שטר cannot prove conclusively that the loan was not paid); however it is not stronger than עדים. Our גמרא seemingly maintains that a מיגו may be valid against a שטר (in opposition to רב"ה) The חזקה and טענה directly contradict each other; otherwise we may say במקום חזקה. By a יבמה we do not believe a מיגו against a חזקה, which seems to conflict with the query here.

THINKING IT OVER

1. חזקה offers two proofs that עדים are stronger than חזקה. Why are both proofs required?¹⁹

2. By a גמרא of שטר מלוה to רב"ה of שטר פקדון compare תוספות How does? ²⁰ By a שטר מלוה is required by יתומים since we are concerned that the מלוה retained the שטר because of the פשיטי דספרי (it is possible that a מיגו would be believed against a שטר מלוה); however by a שטר פקדון, the מפקיד pays for the שטר; there is no פשיטי דספרי, therefore the טענה of מאי בידי שטרך is sufficiently strong to negate the מיגו?²¹

3. If we were to assume in our גמרא that we do say במקום חזקה, would that necessarily mean that מיגו is stronger than חזקה? How can this possibly answer last question from יבמה?²²

4. Differentiate between the various חזקות and מגו that תוספות discusses.

¹⁷ The question is that there in יבמות there is a חזקה; the חזקה is that a person will be בועל by thirty days which contradicts her claim of לא נבעלתי. On the other hand she should be believed that לא נבעלתי since she has a מיגו of אינו יכול לבוא עלי. The משנה there rules that she is not believed. That proves that מיגו is stronger than חזקה. Why therefore is there an איבעיא in our גמרא if חזקה או לא?

¹⁸ See גמרא בד"ה ומיהו. See 'Thinking it over' # 3.

¹⁹ See footnote # 4.

²⁰ See footnote # 10.

²¹ See גמרא בד"ה מדרמי.

²² See footnote # 18.