

Do we say in the face of a מי אמרינן במקום חזקה מה לי לשקר או לא 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 מיגו פרעתיך בזמני, however he could have claimed תו"ז פרעתיך, is this מיגו strong enough to offset the חזקה of תו"ז א"א פורע. א"א attempts to resolve this query, however these attempts (but one) are refuted.

תוספות asks:

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

for if the מלוה possesses a שטר he cannot collect from the יתומים (or שלא בפניו) **unless** he takes **an oath** that the money is owed; however –

with this חזקה of תו"ז א"א פורע תו"ז, the מלוה **collects** from the יתומים **without an oath**;¹ if their father died תו"ז, as the גמרא previously stated.

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. 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.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 שטר במקום שטר, then –

certainly we cannot believe a מגו when it defies this חזקה – **כל שכן במקום חזקה** of תו"ז א"א פורע תו"ז –

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

² 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 מיגו במקום חזקה, שטר, we cannot say חזקה is stronger than שטר.

which is preferable more 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 עדים (or במקום שטר); therefore we should certainly not say מיגו במקום חזקה which is stronger than the שטר. Why is the גמרא inquiring whether מיגו במקום חזקה or not.

answers:

and the ר"י says that there is no difficulty at all – ואומר רבינו יצחק דלא קשה כלל

חזקה – for it is certain that עדים are preferable to מחזקה – מלוה ליה **paid** the עדים **testify that** – דאי אמרי שפרעו **even within the allotted time;** before the due date, the ליה 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.

and³ if the עדים testify even after the time – ואי אמרי אפילו לאחר זמן **we know that** the ליה **did not pay** the מלוה **לא פרעו**

he would collect from the יתומים without a שבועה. 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 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 ליה). Therefore from the fact that we do not say מיגו במקום עדים we cannot derive that we do not say מיגו במקום חזקה; עדים are stronger than חזקה.

continues:

and the reason why the מלוה is required to swear when he attempts to collect from the יתומים **when he has a שטר;** 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); the answer is –

that is because it is not totally evident from the שטר itself – זהו לפי שאינו מוכיח מתוך השטר

if the ליה 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 ליה still owes the money –

for occasionally the מלוה will retain the שטר even if it was paid up, on account of the coins that are due the scribe

³ See 'Thinking it over' # 1.

for writing up the שטר. 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 פשיטי דספרי.

of פרק גמרא states in the first – כדאמרינן בפרק קמא דבבא מציעא (דף יז,א) מסכת ב"מ.

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 שטר במקום שטר.

asks a different question: תוספות

however there is a difficulty, that notwithstanding – אך קשה דמכל מקום what was previously said concerning עדים and a שטר

the גמרא should resolve this query – תפשוט

that we do not believe a מיגו against a חזקה; – דלא אמרינן מיגו במקום חזקה; we can derive this –

from רב"ה, who says – מדרמי בר חמא דאמר בפרק כל הנשבעין (שבועות דף מה,ב ושם) **in פרק כל הנשבעין the following:**

one who deposits something by his friend with a note stating that he deposited a specific item; the דין is –

he is required to return the deposited item – צריך להחזיר לו (בשטר) [בעדים]⁴ **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 –

is not believed to say I returned the פקדון to you, even though he has a –

that he could have claimed they were – במיגו דאי בעי אמר דנאנסו **accidentally** lost or stolen, etc. Had he claimed נאנסו he would be פטור from paying, provided that he swears the שבועת השומרים. Nevertheless now that he claims נאנסו he is not believed (even with a שבועה); rather he must pay for the פקדון⁵. The reason the מיגו is not effective, is –

because the depositor can say to the recipient; if you had returned it to me I would have returned the שטר פקדון to you, so –

what is your שטר doing in my hand; – שטרך בידי מאי בעי **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 גמרא that a מיגו is not effective against the claim of מאי בעי שטרך. This claim of מאי בעי שטרך is conclusive evidence that the בעל השטר is owed (money). If the מיגו is not effective against the שטר –

⁴ See מסורת הש"ס.

⁵ See רב"ה's ruling. This תוספות seems to follow for different interpretations of שבועות מה,ב ד"ה בשטר. See נחלת משה וכו' רשב"ם (לקמן עא,א ד"ה אמר רבא) the view of the

then certainly a מיגו cannot be effective against the חזקה of תו"ז – א"א פורע תו"ז

for the חזקה of 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 מאי בעי – **שטרך בידי מאי בעי** –

is not sufficient to exempt the מלוה from a שבועה if he wishes to collect from the יתומים.

The חזקה of תו"ז is stronger than a מיגו. The חזקה of תו"ז is stronger than a מיגו as evidenced by the fact that חזקה exempts from a שבועה and the שטר does not. If there is no מיגו במקום שטר then there is certainly no מיגו במקום חזקה.⁶ What is the איבעיא of the גמרא (according to רב"ח)?⁷

offers a possible response:

perhaps the גמרא here that inquires whether מיגו במקום חזקה or not –

does not agree with רב"ח; it may maintain that a מיגו may be valid. If the חזקתי במיגו דנאנסו שומר claims שומר is by a חזקה (שבועה). Therefore the גמרא inquires as to what the דין is by a חזקה.

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

and our גמרא is not at all comparable –

to that in גמרא [מסכת קידושין] פרק [קדושין] פרק האומר (דף סז,ב ושם) –

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 –

and he claimed before he died that 'I have children'. His wife will be פטור from יבום וחליצה 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 פטור מיבום וחליצה. The reason why he is believed against the חזקה that she requires יבום וחליצה, is –

for he has a מיגו, that he could have exempted her from the יבום obligation by giving her a גט. That גמרא seems to maintain that

⁶ See 'Thinking it over' # 2.

⁷ 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 לא אמרינן מיגו במקום עדים. If we equate מיגו במקום חזקה then מיגו במקום עדים (שטר) לא אמרינן, therefore if חזקה is stronger than שטר, then מיגו במקום חזקה is stronger than שטר. This question was negated that a שטר is not עדים. However רב"ח says distinctly that מיגו במקום שטר, then for sure לא אמרינן מיגו במקום חזקה, since חזקה is definitely stronger than שטר.

a מיגו is effective against a חזקה.⁸ We are forced to say that the חזקה there is not at all similar to our חזקה. מיגו במקום חזקה. The reason we must say that they are not comparable is because in our גמרא it is questionable whether we say מיגו במקום חזקה and in פרק האומר we believe him with a חזקה במקום חזקה. However תוספות does not explain how the two cases are different.⁹

פרק האשה in גמרא and similarly that – וכן ההיא דהאשה שלום (יבמות דף קטו,א ושם) שלום

דבעי – 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.¹⁰ The גמרא there explains the two sides of the query.

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.

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.

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 why they are not similar¹¹.

⁸ Up to this point she was בחזקת איסור יבמה לשוק. This חזקה contradicts his claim that he has children and therefore she should be בחזקת היתר לשוק.

⁹ 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 חזקה contradicts completely his claim of תו"ז פרעתי תו"ז, therefore there is a possibility that such a מיגו is not effective (See מהר"ם).

¹⁰ 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.

¹¹ 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 חזקה here the איבעיא there in יבמות would remain. If we were to resolve that מיגו במקום חזקה אמרינן,

תוספות has a different question:

however there is a difficulty from what we learnt in a משנה in מסכת יבמות – **ומיהו קשה מדתנן ביבמות בפרק בית שמאי (דף קיא,ב) פרק ב"ש**

a sister-in-law, who went through the יבום process and was subsequently divorced. If she claimed –

within the first thirty days after the יבום; she was divorced within thirty days and she claims –

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 ¹² זקוקה ¹² – ליבום

יבמה חליצה. However if she complained to **forces** the יבם to give the חליצה. **כופין אותו** – **בי"ד**, when she was divorced -

after thirty days have passed from the original יבום date, then -

requests from him that he should give the חליצה, **מבקשין הימנו** – **בי"ד** merely **requests from him** that he should give the חליצה, **מבקשין הימנו** – **בי"ד** does not coerce him. This is the משנה.

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.

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 **לא מוקי** A person cannot contain himself for more than thirty days. This ends the quote from the גמרא there.

במקום חזקה concludes his question; the woman is not believed

even though she has a מיגו – **אף על גב דאית לה 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 –

nevertheless in יבמות we still may not believe the woman since she may be saying a claim of בדדמי; not a מיגו במקום חזקה לא אמרינן as in תו"ז. If we were to resolve that **אף על גב דאית לה מיגו**, we still may believe the אשה that her husband died; since the fact that there is a war does not preclude his death.

¹² 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.

that a woman is believed to claim אינו יכול לבוא עלי. The question is that there in יבמות there is a claim of נבעלתי. On the other hand she should be believed that לא נבעלתי since she has אינו יכול לבוא עלי. The משנה there rules that she is not believed. That proves that מיגו in our גמרא if איבעיא here is where the חזקה and טענה directly contradict each other; otherwise we may say מיגו במקום חזקה. By a יבמה we do not believe a מיגו against a חזקה, which seems to conflict with the query here.¹³

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 איבעיא here is where the חזקה and טענה directly contradict each other; otherwise we may say מיגו 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?¹⁴

2. How does תוספות compare the שטר פקדון of רב"ח to a שטר מלוה of our גמרא?¹⁵ By a שטר מלוה a שבועה 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 מלוה); however by a שטר פקדון the מפקיד pays for the שטר; there is no פשיטי דספרי, therefore the טענה of מאי שטרך בידי מאי is sufficiently strong to negate the מיגו?!

3. If we were to assume in our גמרא that we do say מיגו במקום חזקה, would that necessarily mean that מיגו is stronger than חזקה? How can this possibly answer תוספות last question from יבמה?¹⁶

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

¹³ See 'Thinking it over' # 3.

¹⁴ See footnote # 3.

¹⁵ See footnote # 6.

¹⁶ See footnote # 13.