

חזקה אין כולי - There is a presumption that witnesses do not, etc.

OVERVIEW

maintains that the עדים are not believed to claim (even though they have a שאסר), since there is a חזקה against their claim. The חכמים who argue and believe the עדים, seemingly maintain that the מגו overpowers the חזקה. Our תוספות finds it difficult to accept that this is the interpretation of their מחלוקת.

הכא משמע דלא אמרינן מגו במקום חזקה ולרבנן אמרינן -

It seems from here that (according to ר"מ) we do not apply the power of a מגו, when the claim contradicts a חזקה and according to the רבנן we do apply a מגו even if the claim contradicts a חזקה. The עדים are claiming that they were קטנים when they signed the שטר. They have a מגו (really a שאסר), that they did not have to come and testify that כתיב זה. Nevertheless ר"מ maintains that we do not believe them (even though they have a מגו), on account of this חזקה, that אין העדים וכו' אא"כ נעשה, which contradicts their claim. This proves that the power of חזקה is stronger than a מגו (according to ר"מ). Conversely according to the חכמים who maintain that we believe the עדים in spite of the חזקה, this proves that the מגו is more effective than the חזקה.¹

תוספות has a difficulty:

וצריך עיון דבעיא היא בפרק קמא דבבא בתרא (דף ה, ב ושם) ולא אפשר -

And this requires contemplation for this is a query in the first פרק of פרק ב"ב; whether a מגו is more effective than an opposing חזקה or not and this was not resolved. The query there was –

גבי תבע אחר זמנו ואמר ליה פרעתך תוך זמני:

Regarding when the מלוה claimed payment from the לווה after the due date and the לווה replied that I paid you already before the due date. In this case there is a חזקה that a person does not pay his debts before they are due. This contradicts the claim of the לווה that פרעתך תוך זמני. On the other hand the לווה has a מגו; he could have claimed that I paid you after the due date; in which case he would have been believed. It is a חזקה. The question is² how we can reconcile our גמרא that the issue is resolved (albeit in a מחלוקת) and the גמרא in ב"ב, which maintain that the issue is not resolvable. תוספות does not answer this question.

¹ See, however, previous מלוה footnote # 2. (ד"ה מלוה)

² See 'Thinking it over'.

SUMMARY

In our גמרא it seems that מ"ר and רבנן argue whether we say חזקה במקום מגו or not. However in ב"ב it is a אפשיטא.

THINKING IT OVER

Is the question on the גמרא in ב"ב; why does the גמרא there ask whether we say חזקה במקום מגו or not, when we see here that it is a מחלוקת? Or is the question on our גמרא here; how can our גמרא assume that מ"ר maintains מגו when the גמרא in ב"ב claims that we cannot resolve this issue?³

³ See ח"ב מ"ת אות רלג.