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

Overview

ר"מ maintains that the עדים are not believed to claim קטנים היינו (even though they have a פה 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.

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**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 פה שאסר), that they did not have to come and testify that כת"י הוא 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 בגדול, 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]](#footnote-1)

תוספות has a difficulty:

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

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

**גבי תבע אחר זמנו ואמר ליה פרעתיך תוך זמני:**

**Regarding** when the מלוה **claimed** payment from the לוה **after the due date and** the לוה **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 לוה that פרעתיך תוך זמני. On the other hand the לוה 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 מגו במקום חזקה. The question is[[2]](#footnote-2) 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.

Summary

In our גמרא it seems that ר"מ ורבנן argue whether we say מגו במקום חזקה. However in ב"ב it is a בעיא דלא אפשיטא.

Thinking it over

Is תוספות question on the גמרא in ב"ב; why does the גמרא there ask whether we say מגו במקום חזקה 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 ר"מ maintains מגו במקום חזקה לא אמרינן and the רבנן maintain that מגו במקום חזקה אמרינן when the גמרא in ב"ב claims that we cannot resolve this issue?[[3]](#footnote-3)

1. See, however, previous תוספות (יח,ב) ד"ה מלוה footnote # 2. [↑](#footnote-ref-1)
2. See ‘Thinking it over’. [↑](#footnote-ref-2)
3. See ח"ב מ"ת אות רלג. [↑](#footnote-ref-3)