



Bava Basra Daf 32

“MIGU L’HOTZI”

בבבא בתרא דף ל"ב: ההוא דאמר לחבריה, מאי בעית בהאי ארעא. אמר ליה, מינך זבינתה, והא שטרא. אמר ליה, שטרא זייפא הוא. גחין לחיש ליה לרבה, אין שטרא זייפא הוא, מיהו שטרא מעליא הוה לי ואירכס, ואמינא אינקיט האי בידאי כל דהו. אמר רבה מה לו לשקר, אי בעי אמר ליה שטרא מעליא הוא. אמר ליה רב יוסף, אמאי סמכת אהאי שטרא, האי שטרא חספא בעלמא הוא ההוא דאמר לחבריה, הב לי מאה זוזי דמסיקנא בך, והא שטרא. אמר ליה שטרא זייפא הוא. גחין לחיש ליה לרבה, אין שטרא זייפא, מיהו שטרא מעליא הוה לי ואירכס, ואמינא אינקיט האי בידאי כל דהו. אמר רבה מה לו לשקר, אי בעי אמר ליה שטרא מעליא הוא. אמר ליה רב יוסף אמאי קא סמכת אהאי שטרא, האי שטרא חספא בעלמא הוא אמר רב אידי בר אבין, הלכתא כוותיה דרבה בארעא, והלכתא כוותיה דרב יוסף בזוזי. הלכתא כרבה בארעא דקיימא ארעא תיקום, והלכתא כוותיה דרב יוסף בזוזי, דהיכא דקיימי זוזי לוקמי.

-א-

Whether *migu* can keep the land by the *machzik*, thereby removing it from the original owner

When Rav Yosef says a migu fails to work, it is because we don't say migu l'hotzi/Rabbah holds that saying "I could have been quiet" is a stronger migu, thereby working even l'hotzi/The Halacha follows Rabbah by land because chazaka there isn't viewed as a migu l'hotzi/Migu works to be machzik by land specifically after making a claim that could have been used to keep the land

-תוס', תומים, רא"ש, שו"ת בית אפרים-

א. *Tosafos*¹ cite the *Rivam* that when *Rav Yosef* says we cannot keep the land by the *machzik*, and we don't believe him that he has another document with a *migu*

that he could have said this document is valid, the reasoning is that a *migu* cannot be used to remove money. As such, the fact that he currently is using the land is meaningless, for land is always considered to be in the possession of the owner. A *migu* will only help for a person to hold onto something assumed to be his, where if someone tries to take it away from him, he can use a *migu* to exempt himself. Conversely, a *migu* fails to remove something from another person's possession. [1]

The *Rosh*² writes that while it may be true the *Rivam*

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[1] On the other hand, the *Ramban* disagrees with the *Rivam*, for he uses the *Gemara* in *Bava Metzia*¹¹ to prove that a *migu* can be used even *l'hotzi*. It is also the opinion of many other *Rishonim*, but this isn't the place to elaborate.

As such, the *Ramban* explains that when the *Gemara* relates "Why are you relying on this document, this document is a mere

pottery shard", thereby causing us not to believe the *migu*, the intention is that since the document is unverified, which gives it the status of a random pottery shard, coupled with the fact that he admits to this, it causes that *Beis Din* has no responsibility to verify it because of the *migu*. As such, by jumping in and admitting to the document being useless, it is a foolish move which causes him to lose out.

holds that a *migu* cannot be used to remove money, there is what to consider if this *din* can be fitted into the words of the *Gemara*.

Now, as to the reason why *Rabbah* holds one is believed with a *migu* (that he could have said his original document was valid) when he admits to his document being a fake but claims to have a valid one elsewhere, *Tosafos* in *Bava Metzia*³ cite the *Rivam* that although a *migu* cannot be used to remove money (as we have just seen is his opinion), nevertheless this *migu* is stronger than the average *migu*. Here, the reason to believe him doesn't lie in the fact that he could have used another claim. Instead, the *migu* works by means of the fact that he could have been silent, not admitting to the document being a fake. If he would have been silent, he would have been believed to use the document, for the signatures were recognized by those present.

The *Beis Efraim*⁴ elaborates further, asserting that *Rabbah* certainly admits a *migu* cannot be used to remove money. In this case though, being that he already said he has a document, and it would have been a sufficient proof in *Beis Din*, and he could have refrained from revealing that it was a fake, this causes the case to be different from a *migu l'hotzi*. Instead, it is viewed as a *migu l'hachzik* (to hold onto something), for he is holding onto his initial ability to win the case with his original document, which isn't called a *migu l'hotzi*. It is to this point that *Rav Yosef* disagrees, asserting that although it is true he could have stuck with his initial claim and original document, this doesn't give him the status of a *muchzak*, for the document is akin to a mere pottery shard.

Now, according to the *Gemara's* conclusion, the *Halacha* follows *Rabbah* by land, causing for the land to stay with whoever had it until now. Conversely, the *Halacha* follows *Rav Yosef* by money, with money staying wherever it has been. *Tosafos*⁵ comment that when we say the *Halacha* follows *Rabbah* for land, it is because a *migu* works to hold onto something. As such, when it comes to land, we can keep it by whoever has the *chazaka* to be using it until now.

Bearing this in mind, the *Tumim*⁶ cites *Tosafos* and the *Rosh l'Halacha*, asserting that a *migu* to keep land by the *machzik* (thereby removing it from the original owner) isn't a *migu l'hotzi*. Practically speaking, this is a *chiddush*

in the *din* of *migu l'hotzi*, whereby we are allowed to use *migu* to keep something with whoever is currently holding onto it, even though doing so removes it from the original owner. Being that we aren't removing anything from the owner right now, it isn't viewed as a *migu l'hotzi*. Instead, we are keeping the land with whoever has been holding it until now.

On the other hand, while the *Rosh*⁷ writes like *Tosafos*, he adds to their words. He relates that the *Halacha* follows *Rabbah* by land for it to remain with whoever has possession of it. Being that he initially came with a claim of having a proper document, this causes us to view the land as if it belongs to him. As such, although he later admits to his document being a fake, nevertheless, he still can use a *migu* to retain his hold on the land. At the same time, the *Halacha* follows *Rav Yosef* by money for it to stay where it is, with the reasoning that although it is true he initially came with a proper document, which would have allowed him to win the case, nevertheless, he still needed to collect the money. As such, when he later admits to the document being a fake, his whole *migu* is classified as *migu l'hotzi*.

On these words of the *Rosh*, the *Beis Efraim* (there) comments that regarding how to understand why it isn't a *migu l'hotzi* for one to keep land he has a *chazaka* on, it is clear the *Rosh* doesn't hold it has anything to do with his current hold on the land (meaning it isn't a *migu l'hotzi* because he isn't trying to remove money that someone else currently has possession of), unlike the implication of *Tosafos*. Instead, the *Rosh* holds that when he initially come to *Beis Din* with a claim of having a valid document, the claim gives him possession of the land. As such, although he later admits to the document being a fake, it isn't considered a *migu l'hotzi* when he uses the *migu* argument, for when he initially presented the document as valid, it caused him to gain an ownership hold on the land. The *migu* is being used to hold onto land he already gained ownership over, so it doesn't matter that the document was revealed to be a fake. Although it is true his initial claim was indeed found to be false, nevertheless, it is sufficient to allow the second claim and *migu* reasoning to be viewed as an act of holding onto to something that is already within his grasp.

Conversely, when a lender makes a claim against a borrower using a document, where he originally brings a

document that he presents as valid, only later admitting to it being a fake but claiming he has a different valid document, in this case the *Halacha* doesn't follow *Rabbah*. We cannot believe him with his *migu*, for although it is the true the first document gave him an initial right to take money from the borrower, it was in the world of *l'hotzi*, and he failed to collect the money. Therefore, when he later admits to it being a fake but wants to still collect using his *migu*, the argument is given the status of *migu l'hotzi*.

Practically speaking, the *Beis Efraim* holds there is a disagreement between *Tosafos* and the *Rosh* regarding the *Gemara's* conclusion that the *Halacha* follows *Rabbah* by land for it to stay where it is. To *Tosafos*, this conclusion means that whenever one has a hold on land, and a claim with the logic of *migu*, he is believed, for his

hold on the land negates the issue of *migu l'hotzi*, as his argument is instead viewed as a *migu l'hachzik*.

Conversely, the *Rosh* holds that this is true specifically where the initial claim is that he has a valid document, which causes him to gain an ownership right over the land. As such, although he later ruins his claim and needs to rely on the reasoning of *migu*, we say that the land is already considered to be in his possession, thereby causing us to view his argument as a *migu l'hachzik*, not a *migu l'hotzi*. However, for cases where the initial claim doesn't yet put the land in his possession, a *migu* argument later will be viewed as a *migu l'hotzi*, and he won't be believed. [This is unlike the *Tumim* who writes that both *Tosafos* and the *Rosh* are of the opinion that any *migu* to hold onto land isn't viewed as a *migu l'hotzi*.] [2]

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When *migu l'hotzi* fails to work, whether it is because of the *chezkas mammon*

Migu isn't a complete clarification, which is why it works to be machzik, but not l'hotzi/A migu doesn't work against one who has a chezkas mammon/Where one has a migu to exempt himself, but the accuser grabs the item, if the migu helps to get it back

-קהלות יעקב, קצות החושן, תומים-

ב. The *Kehillos Yaakov*⁸ comes to explain why a *migu* can work *l'hachzik*, but not *l'hotzi*. He writes that a *migu* isn't a complete clarification, and although it serves as an indication one is telling the truth, nevertheless it isn't

foolproof. As such, only when it comes to one trying to hold onto something already in his possession, there a *migu* works, for when it comes to being *machzik*, this level of clarification is sufficient, as even a *safek* is sufficient to retain the status quo. Conversely, when one is trying to take something from his friend, *migu* fails to work, for a complete clarification is necessary when trying to remove something from another person's possession. He then later writes that a *migu* is like the concept of a majority, which is why it works by *issurin*

NOTES

[2] The *Knesses HaGedolah*¹² writes that *Tosafos* and the *Rivam* (previously mentioned) disagree as to whether *migu* works to keep the land by the *machzik*. *Tosafos* hold that this isn't viewed as a *migu l'hotzi*, while the *Rivam* disagrees, arguing that even such a scenario is viewed as a *migu l'hotzi*.

The *Tumim*¹³ though is bothered by this assertion of the *Knesses HaGedolah* (concerning how he says there is a disagreement), for when it comes to the *Halacha*, there is no difference between them. The *Rivam* is merely coming to explain the opinion of *Rav Yosef*, asserting that he holds such a case falls into the category of a *migu l'hotzi*. Conversely, *Tosafos* are writing on the *Gemara's* conclusion that the *Halacha* follows *Rabbah* when it comes to land, concerning which they explain that this is because one holding onto the land isn't viewed as using his *migu l'hotzi*. As such, when it comes

to the *Halacha*, where we follow *Rabbah*, there is no indication the *Rivam* would argue that the *migu* fails to work.

On the other hand, the *Beis Efraim* (there) writes that the *Knesses HaGedolah* was correct in asserting that the *Rivam* holds *migu* doesn't work by land, with even such a case being viewed as a *migu l'hotzi*. According to the *Rosh*, it comes out that when we conclude there is a difference between land and collecting a loan, it is true specifically where the initial claim was sufficient to gain a *chazaka* on the land. Conversely, when it comes to the belief of a *migu*, it is always viewed as *l'hotzi*, even by land. *Tosafos* are merely *mechadesh* that any *migu* works by land, but there is no proof the *Rivam* agrees to this. [It is possible this is what he had in mind, for the words are written quite briefly.]

the same way a majority works by *issurin*. Conversely, it is insufficient to remove money, the same way a majority is insufficient to achieve such a goal.

Within the subject, the *Ketzos Hachoshen*⁹ relates that when *migu l’hotzi* fails to work, it is because the *chezkas mammon* is stronger than the clarification of *migu*. As such, it cannot undo the *chazaka*.

Based on this, he asserts that when we say *migu l’hotzi* fails to work, it is specifically where the other person has a *chezkas mammon*. Conversely, if he doesn’t have a *chezkas mammon*, and is merely holding onto the item in question, a *migu* will be sufficient to remove it from him.

Interestingly, the *Tumim*¹⁰ writes that if *Reuvein* makes a monetary claim against *Shimon*, and *Shimon* has a *migu* to exempt himself, if *Reuvein* jumps in and grabs the money from *Shimon*, *Shimon* loses his right to exempt himself by means of the *migu*, for it is now considered a *migu l’hotzi*. Although it is true he could have used the *migu* prior to *Reuvein* seizing the money from him, nevertheless, being that *Reuvein* now has the money in his possession, *Shimon’s migu* would function *l’hotzi*, and *migu* doesn’t have the power to remove money.

On the other hand, the *Ketzos* disagrees, arguing that when we say a *migu l’hotzi* fails to work, that is the case only where the person with the item has a *chazaka*, for

chazaka is stronger than *migu*. Conversely, where the person merely seizes the item in question, and the other party can exempt himself by means of a *migu*, there is no *chazaka* on what he grabbed, and the *migu* can still be used.

However, if we use the explanation of the *Kehillos Yaakov*, it is possible to gain an understanding of the *Tumim*. According to him, the reasoning isn’t merely that *chazaka* is stronger than *migu*. Instead, the main factor is that a *migu* isn’t a complete clarification. As such, when it comes to holding onto money, a *migu* is sufficient, for it works to create a *safek*, and a *safek* is enough to exempt oneself. Conversely, when it comes to removing money, a full clarification is necessary. Therefore, when dealing with a situation where one was able to exempt himself with a *migu*, but the accuser came and grabbed the item, we can say the *migu* should lose its ability to help him. Although it is true the *migu* would have worked to exempt him from paying (by creating a *safek*), nevertheless, regarding getting the item back from the accuser who grabbed it, *migu* is insufficient, for it fails to provide a sufficient clarification. As such, this is why the *Tumim* holds that *migu* fails to work even where one doesn’t have a *chezkas mammon*, for it isn’t a complete clarification of the matter.

מראי מקומות

1. (ד"ה אמאי) 2. ס' י"ג 3. דף ב': (ד"ה וזה) 4. שו"ת אהע"ז ס' כ"ה (אמנם) 5. (ד"ה והלכתא) 6. ס' פ"ב בכללי מגו (אות ט') 7. ס' י"ג 8. בב"ב ס' כ"ד (אות ג') 9. ס' פ"ב סק"א 10. ס' פ"ב בכללי מגו (אות ג') 11. דף ק"י 12. חו"מ ס' פ"ב בכללי מגו אות ג"ח 13. שם סק"ט