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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #02: *Chazaka* Upon *Tashmishin***

Regarding portable items (*metaltalin*), possession is 9/10 of the law. Disputed ownership is typically awarded to the one possessing the item; the principle of “*ha-motzi mei-chavero alav ha-ra’aya*” establishes the possessor as the leveraged party in all disputes. Unless the plaintiff (*tovei'a*) can muster actual evidence, the case is awarded almost by default to the *Nitva*, the one who maintains physical possession over the disputed item.

Litigations involving land are not solved as simply. Land cannot be HELD or physically possessed. Even if one of the litigants is physically standing on the land under dispute, that presence has no halakhic import. Obviously, producing witnesses or a contract of sale (*shetar*) will yield victory, but in the absence of this evidence, who should be awarded disputed land?

The third *perek* of *Bava Batra* describes a mechanism known as “*chezkat gimmel shanim,*” whereby a person who has benefitted for three straight years from land without legal protest can be assumed to have purchased or otherwise legally acquired the land. The three-year period of “owner-like” usage without any complaint INDICATES that his claim to have purchased the land is indeed accurate.

Presumably, a *chazaka* for utility of land (*tashmishin*) works in a similar fashion. If someone enjoys utility for an uninterrupted period, he is assumed to have purchased that utility.

 According to this approach, a *chazaka* for utility of land is based on the fact that his utility PROVES PURCHASE and is fundamentally similar to a *chazaka* on land; but the sources indicate that a *chazaka* of *tashmishin* actually operates differently. The *mishna* (*Bava Batra* 41a) asserts that ANY *chazaka* that is not accompanied by an assertive claim (*ta’ana*) is not operational. *Chazaka* PROVES acquisition only if a CLAIM for acquisition has been lodged. Accordingly, we would anticipate that even a *chazaka* for *tashmishim* requires the lodging of a *ta'ana*. However, most of the *mishnayot* in the end of the third *perek* of *Bava Batra*, which address *chazaka* of *tashmishin*, do not stipulate the need for a *ta'ana*. In addition, the *gemara* in *Bava* *Batra* 23a, discussing a potential *chazaka* of *tashmishin* (which is ultimately disqualified) depicts a scenario without a *ta’ana*, as does the *gemara* in *Bava Batra* 6a (a case that IS ratified). These *gemarot* indicate that unlike a *chazaka* that PROVES purchase of land and must be accompanied by a *ta’ana*, *chazaka* about utility of land does not require a *ta’ana* and presumably does not merely provide PROOF of purchase. In fact, the Ramban cites the position of the Geonim, who explicitly claim that *chazaka* upon *tashmishin* does not require a claim. How, then, does a *chazaka* upon *tashmishin* of land operate?

The Ramban (in his *Milchamot* comments to *Bava Batra* 6a) asserts that land-based utilities can be “acquired” through the process of *mechila*. If the owner of the land witnessed the utilities being enjoyed (for a duration of time) and did not protest, he has effectively YIELDED them to the recipient. This is a novel concept because typically, an item which is legally owned must be transferred through an act of *kinyan*; it cannot simply be “waived” to another. The classic scenario of “waiving” occurs when something tangible is not OWNED but a person merely POSSESSES RIGHTS that can be employed against another. Those RIGHTS can be waived, even if significant value will be affected. For example, a creditor can waive his rights to collect a loan because he really doesn’t own anything. We would have assumed that the owner of land actually OWNS the utilities of that item as well, and must therefore transfer them through an appropriate *kinyan*. The Ramban’s theory asserts otherwise. Although the actual land or wall is tangible, owned, and transferable only through *kinyan*, the ABSTRACT (and recyclable) utilities are not really owned. Instead, the owner of the land or wall possesses rights to use it and prevent others from doing so. Through direct *mechila* – or even assumed *mechila* (inferred from sustained silence in the face of provocation) – the utilities can be enjoyed by another. Tosafot (23a) assert a similar logic of *mechila* to explain the mechanism of *chazaka* upon *tashmishin*.

This logic would obviate the need for an accompanying *ta’ana*. Actual land must be transferred through classic *kinyan*. Sustained *chazaka* of land merely proves the past occurrence of an act of *kinyan*, and it can only verify that claim if ACCOMPANIED by a claim. *Chazaka* upon *tashmishin*, however, is not merely evidence of a professed sale; it actually generates a “transfer” of ability to the “user.” His sustained and unopposed use constitutes *mechila* on the part of the owner, which dynamically empowers the beneficiary with rights of utility. Of course, under such circumstances, no claim is necessary.

The *Ketzot* (153:3) develops a different logic to explain *chazaka* upon *tashmishin*, assuming, as the Geonim did, that it does not require an accompanying claim. Land can be acquired through three different methods – money (*kesef*), contracts (*shetar*), and *chazaka* (symbolically remodeling the land). How would one ACQUIRE utilities of lands or walls? The scenario of *chazaka* upon *tashmishin* concerns a person who unilaterally began using land and did not meet with opposition. The *chazaka* helps to determine whether the beneficiary actually purchased these rights (or according to the Ramban had them “waived” to him)? Presumably, the act of *kinyan* by which these rights can acquired would be a standard *ma’aseh* *chazaka* (*kesef, shetar* or *chazaka*) performed upon the land but stipulating that only utilities are being transferred and not the actual land.

The *Ketzot* claims that utilities can be transferred by a different means of *kinyan* (which is not suitable in actual land transfers) – by beginning to USE the utilities, an act of *kinyan* has been performed. If two parties choose to enact a *kinyan* upon utilities, the purchaser (instead of *kesef* or *shetar*) may commence utility as a symbolic trigger/*kinyan* to transfer the “legal ownership” of those utilities. By extension, *chazaka* or continued and unopposed use of utilities does not PROVE a prior purchase, BUT ITSELF ENTAILS a *ma’aseh kinyan* upon those utilities. Even though the previous owner of the land did not explicitly authorize a *kinyan*, by remaining silent during the unilateral use, he has effectively authorized the transfer. The benefit from utilities entails a *kinyan* upon those utilities.

It is then obvious that a *chazaka* upon *tashmishin* – meant not to prove prior purchase but to constitute an ACTUAL purchase – does not require an accompanying claim. The reason that classic *chazaka* upon land requires a claim is that it (presumably) entails a proof of prior purchase, which by its very definition is useless unless a claim of purchase is launched. By contrast, according to the *Ketzot*, sustained *tashmishin* is a NEW *kinyan* upon those very utilities, which actually transfers ownership upon the utilities.