YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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Refuah Shleima to Aaron Meir Ben Silah

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Dedicated by Rabbi Barry and Shoshana Hartman in memory of
Sarah and Gustave (Sarah and Gedalya) Hartman z”l,
Cipora and Rabbi Moshe Turner z”l

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**Shiur #03: Three Years of *Chazaka* on Land**

**and the *Shor Ha-Mu'ad***

Since land cannot be physically “held,” the concept of “*Ha-motzi mei-chaveiro alav ha-raya*” is irrelevant. Obviously, testimony of *eidim* or presentation of a *shetar* will unequivocally prove ownership, but in the absence of these elements, how can a disputed land case be decided? The *mishna* Bava Batra (28a) asserts that if a squatter has been benefitting for three continuous years without protest, he is awarded the land. The *mishna* DOES NOT, however, articulate the mechanism by which *chazaka* secures the land for the squatter. This chore is left for the *gemara*.

The *gemara* initially cites “Holkhei Usha” (later clarified to be R. Yochanan), who claim that a *chazaka* of three years can be inferred from the precedent of *shor ha-mu’ad*. Just as three gorings transform an animal from a *tam*, which pays only *chatzi* *nezek*, into a *mu’ad*, which pays *nezek shalem*, three years of residence upon or benefit from land similarly transforms the assumed ownership over land from the last known previous owner (“*mara kama*”) to the current squatter (“*machzik*”). This association between three years of *chazaka* and *shor hamu’ad* is unexpected and certainly not obvious. What common denominator exists between *shor ha-mu’ad* and a *chazaka* upon land?

Tosafot develop an interesting concept to explain this association. Three gorings prove that the true nature of the animal is violent. We can no longer assume that these events were incidental and avoidable. Since we can EXPECT the animal to continue damaging, the owner is held fully culpable if he is derelict in guarding against future damages. Just as three gorings demonstrate the NATURE of the ANIMAL (*huchzak nagchan*), three years demonstrate the NATURE of the previous owner as “passive” or unresponsive to the squatting (*huchzak* *shatkan*). Since he is proven to be unresponsive, he has effectively YIELDED the lands to the *machzik*.

Tosafot is asserting an extremely audacious claim about the ownership of land. Typically, items that are owned cannot be yielded to others through *mechila*. *Mechila* is simply a forfeiture of “rights;” it can dissolve the RIGHT to collect a debt or (as discussed in the previous *shiur*) or dissolve the RIGHT to prevent people from using one’s lands. Once RIGHTS have been dissolved through *mechila*, debts cannot be collected and an item’s non-consumptive utility cannot be denied to others. However, actual items that are owned must be transferred through a *kinyan*. Tosafot (to the opposition of all *Rishonim*) claim that land is different and evidently isn’t really owned – even by the legally recognized owner. Since land isn’t portable and endures beyond human life spans, a person who ACQUIRES it does not really OWN it ESSENTIALLY; he merely acquires RIGHTS of use and RIGHTS of preventing non-owner usage. If he is unresponsive while others squat, he has waived those rights and the land rights transfer to the squatter.

Essentially, Holkhei Usha asserted a major paradigm shift in the understanding of *chazaka*. We would have presumed that three years of unopposed squatting would be PROOF of purchase; if the original owner had not sold the land to the *machzik* at some earlier point, he would have presumably vocalized his opposition. The silence INDICATES an earlier sale (which probably included some classic form of *ma’aseh kinyan*). According to the present model, however, three years do not PROVE changed ownership, but rather TRIGGER it. After three years of silence, the land has been yielded (*mechila*) to the squatter.

Ultimately the *gemara* questions Holkhei Usha’s comparison with the *shor* *ha-mu’ad*. If *chazaka* functions in the classic manner as evidence to an earlier sale, it would only be valid if there was an accompanying *ta’ana*, a claim of sale. However, if three years generate an ACTUAL CHANGE of ownership, the *chazaka* should be independently effective even without an accompanying claim. Why, then, does the *mishna* (41a) unilaterally demand a claim accompanying every *chazaka*? If Holkhei Usha’s logic is based on *mechila*, the *gemara*’s question regarding the necessity of a *ta’ana* is quite valid. Indeed, the *gemara*’s relatively SIMPLE solution to explain the *ta’ana* requirement according to Usha may imply that this *mechila* logic was NOT their basis.

Based upon this concern, the Ramban asserts a very different logic to explain the efficacy of *chazaka* of three years according to Holkhei Usha. This logic assumes a very distinct premise about the process of an animal becoming a *shor mu’ad*. In previous *shiurim* (Bava Kama [22](http://www.vbm-torah.org/archive/metho71/16metho.htm), [23](http://www.vbm-torah.org/archive/metho71/17metho.htm), [23](http://www.vbm-torah.org/archive/metho71/18metho.htm)), we noted that three events of goring do not merely demonstrate the aggressive tendencies of the animal, thereby requiring the owner to be more careful and obligating him toward full payments in situations in which he was not. Rather, the formal and procedural requirements of becoming a *shor* *m’uad* indicate that the animal must undergo a status change vital toward the increased payment scale. Without actually changing the halakhic STATUS of the animal (a process that necessitates *beit din* and several other procedural factors), full payments cannot be collected. Hence, *shor ha-mu’ad* serves as paradigm for items whose status changes after three iterative events. Holkhei Usha reasoned that after three years of enjoyed and unprotected utility, the status of the land would ALSO change. The land was “known” to belong to the *mara* *kama*, the last known owner, but the squatter resided there and benefitted for three years. Perhaps this process empowers him as the new *muchzak*, who will triumph in litigation in the absence of hard evidence. Perhaps the three year process alters the *MUCHZAK* STATUS of the land.

Unlike portable items, whose *muchzak* status is determined solely by physical possession, *muchzak* status of land cannot be so easy determined. One approach would be to deny the existence of such a status and to claim that *mara kama* will also triumph unless and until hard evidence can be supplied. However, Holkhei Usha may have developed a new theory: eating the “fruits of land” for three uncontested years converts the squatter into the new possessor of the land, the new *muchzak*. In litigation, he will be leveraged as the (new) default victor in cases without hard proof – based upon the principle of *ha-motzi mei-chaveiro alav ha-raya*! This new paradigm was derived by comparing the STATUS CHANGE rendered by three gorings to the STATUS CHANGE rendered by three years of *chazaka*.

This logic would naturally prompt the gemara’s question to Holkhei Usha. If the actual three years of benefit alter the status of the land and establish the *machzik* as the new default *muchzak*, why is a *ta’ana* required in the case of *chazaka* on land? The squatter triumphs not because we believe that he ACTUALLY purchased the land, but rather because he enjoys the leveraged status of *muchzak.* He therefore should not have to lodge any claim.

However, unlike Tosafot’s logic, the Ramban’s logic for Holkhei Usha is flexible enough to explain the need for a *ta’ana* in this case. The Ramban’s logic for Holkei Usha can both explain the question of the gemara but also explain the need for a ta’ana. Perhaps Holkehi Usha maintained that mere utility and benefit ALONE does not alter the status of land and establish a new *muchzak*. Instead, they demand TWO factors in establishing the *machzik* as the new *muchzak* – three years of utility AS WELL AS a legal claim to defend that status. Since the status of land is abstract, the title of *muchzak* cannot be assigned based purely on “presence;” the combination of presence and a legal assertion create the status of *muchzak*. Lack of a *ta’ana* would cripple the *chazaka*, since the squatter would never attain the status of *muchzak.* This seems to be the Ramban’s actual explanation of Holkhei Usha’s reply to the *gemara*’s question.

Alternatively, the lack of a claim may represent a DEFECT in the legal position of the *machzik*, known as “*re’uta*.” Since he is not BELEIVED to have purchased the land but wins the case based on his newfound STATUS as *muchzak*, he must present a robust posture in court. If he cannot explain how he arrived at the land (that is, he cannot lodge a claim of purchase), his overall profile is downgraded and he cannot triumph based purely on his established *muchzak* status. At that stage, he would require actual evidence, which he does not possess. This approach is adopted by the Chiddushei Ha-Ran, who more or less resembles the Ramban in his explanation of Holkhei Usha.

The differences between the Ramban and the Ran are significant, but they are less important than their commonality. According to the Ramban, the absence of a claim erodes the *muchzak* status that three years of utility achieved. In contrast, according to the Ran, the squatter is still considered a *muchzak*, but he cannot triumph through his *muchzak* status alone since his overall legal profile is flawed. The common denominator is that the *muchzak* status attained through three years of *chazaka* may, at some level, require a *ta’ana*. Holkhei Usha’s reply defending the need for a *ta’ana* makes sense according to the logic attributed to them by the Ramban. It is harder to justify the need for a *ta’ana* according to the logic attributed to them by Tosafot.