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Bava Basra Daf 41

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Mishna

Any *chazakah* (a status of having been present on a property for three years) that is not accompanied by a claim is not a valid *chazakah*. What is an example of such a case? If the owner asked, “What are you doing in my property?” And the person replies, “Nobody ever objected to my presence,” this is not a valid *chazakah*.

However, if he claims that the person sold it to him, gave it to him as a gift, or that his father either sold it to him or gave it to him as a gift, his *chazakah* is valid. If someone claims that he inherited it, his *chazakah* is valid, even if he does not know how his father acquired the land. (41a)

Why Isn’t This Obvious?

The *Gemora* asks: Isn’t this obvious?

The *Gemora* answers: One might say that the squatter actually bought the land, and had a sale document to this effect that got lost. The reason he is merely saying that nobody objected is because he is scared that if he claims he bought the property, he will be asked to show his sale document. One might therefore think that we (*i.e. Beis Din*) should proactively ask such a person, “Did you perhaps (*buy it and*) lose your sale document?” This is as stated by the verse, “*Open your mouth for a mute.*” The *Mishna* therefore teaches us that we do not ask him this question. (41a)

Cases of Chazakah and Protests

A flood swept away the wall that separated the property of Rav Anan and his neighbor. He put the wall up again in the property of his friend. Rav Anan went to Rav Nachman, who told him to return the wall to its original place.

Rav Anan asked: “Don’t I have a *chazakah*?” [*The Rashbam, explains that the neighbor instructed and helped Rav Anan to build the wall there.*]

Rav Nachman replied: “Who do you hold like? Do you hold like Rabbi Yehudah and Rabbi Yishmael who say that if it is in front of him, it is a *chazakah* right away? The law is not like them.”

Rav Anan asked: “Don’t I have a *chazakah*, as he helped me put up the wall (*and I have witnesses to this effect - Rashbam*)?”

Rav Nachman answered: He only gave you this land mistakenly, under a mistaken pretense (*that it was being put back in the right place*). You yourself would clearly not have put it back in the wrong place on purpose. Just like you did not realize, he also did not realize (*and did not mean to give you part of his land*).

A flood swept away the wall that separated the property of Rav Kahana and his neighbor. He put the wall up again in someone else’s property. Rav Kahana went before Rav Yehudah. Two witnesses came and testified regarding this case. One said that Rav Kahana had moved the border two rows into the neighboring property, while one said he had moved it three rows into the property. Rav Yehudah ruled that Rav Kahana should move the wall back two out of the three rows.

Rav Kahana says: Who does this ruling follow? [*The two witnesses contradict each other, and therefore their testimony should be thrown out!*]



Rav Yehudah answered: This is like Rabbi Shimon ben Elazar. This is as the *braisa* states: Rabbi Shimon ben Elozar says that Beis Shammai and Beis Hillel only argue regarding a case where there are two sets of witnesses, and one says that an amount of money involved (*in any case*) is one hundred and one says it is two hundred. In such a case, they agree that included in two hundred is one hundred. What is their argument? Their argument is regarding one set of witnesses, and one says that an amount of money involved is one hundred and one says it is two hundred. Beis Shammai says: Their testimony is contradictory. Beis Hillel says: Included in two hundred is one hundred. [*Beis Hillel therefore would rule in your case, as well, that included in three rows is two rows.*]

Rav Kahana asked: Wasn't a letter brought from *Eretz Yisroel* stating that the law does not follow Rabbi Shimon ben Elozar? [*It does not follow his understanding of the argument between Beis Shamai and Beis Hillel.*]

Rav Yehudah answered: When the letter is brought before me, I will retract my ruling.

There was a person who was living in an attic in Kashta for four years. The owner of the house came and found him there. He asked the person: What are you doing in this house? He answers: I bought it from someone who bought it from you.

The person living there went before Rabbi Chiya. He said: If you have witnesses that the person you claim to have bought the house from lived there for even one day, I will give you the house. Otherwise, I will not give you the house.

Rav says: I was sitting before my uncle (*Rabbi Chiya*). I asked him: Does a person not buy a house and sell it that very night (*i.e. if he gets a good offer right after he buys it*)?

Rav continues: I understood that he held the following. If the person living in the attic says that he saw the person he bought it from buy it from the person claiming it is his now, he is believed. This is because he has a *migu* that he could

have stated he bought directly from this person (*and won, as he has a chazakah*).

Rava says: It is logical that Rabbi Chiya is correct. This is as the *Mishna* states: If someone claims that he inherited, his *chazakah* is valid. This implies that he does not need a claim, but he does need a proof.

The *Gemora* asks: Perhaps the *Mishna* means to say that he does need a claim or a proof? Alternatively, a buyer does not spend money for no reason. [*The Rashbam explains this means that even if you will say that an inheritor does need a proof, a buyer does not need proof or a claim, as he would not have spent his money if it was not clear that he bought it from the owner.*]

They (*students of the yeshiva*) asked: If the seller had appeared in the apartment to measure it, is that proof that he lived there? [*Is it enough in the case where Rabbi Chiya ruled above that he had to have been there for one day for the claim to be valid?*]

Abaye says: This is what he is saying (*that this is enough*).

Rava says: A person will measure a property even though he never bought it. (41a – 41b)

INSIGHTS TO THE DAF

The Testimony of a Shtar

The Mefarshim are bothered how does a *shtar* (*document*) work? Chazal have a rule that testimony must be said orally and not written. If this is the case, how can we rely upon the testimony of a *shtar*?

There are a number of different answers to this question. Rabeinu Tam says the prohibition of writing testimony only refers to someone who is mute. Anyone who can say testimony may also write testimony. This follows a principle taught by *karbonos*. We are commanded in the Torah to mix the meal offering with oil. Chazal tell us that if there is

enough oil that it can be mixed, the mixing is not necessary. The same is true here; as long as a person can speak, speaking is not necessary.

The Rambam is of the opinion that testimony in a *shtar* is only Rabbinic. According to Biblical law, a *shtar* is invalid. Since, however, they are necessary for the functioning of society, the Rabbis decreed that this form of testimony should be considered valid.

Rashi and the Baal HaMaor have a different explanation. They explain that a *shtar* is written by the person obligating himself in some fashion (*i.e. a borrower or a seller*). The witnesses here are not regular witnesses in a court case, rather, they are agent of an obligated party who which to obligate themselves by means of a *shtar*. This form of testimony is not what the Torah was referring to when it disqualified written testimony.

The *Gemora* Chagigah (10b) cites Shmuel who states that one who resolves to make a vow must express the vow with his lips; otherwise, it is meaningless.

The Noda b'Yehudah (Y"D I: 66) inquires if an oath that was written down but not expressed would be valid as an oath. His underlying question is: Do we regard his written word as an expression of his lips?

This should be dependent on the dispute mentioned above regarding the validity of testimony from a written document. The Rambam maintains that testimony must be from the mouth of the witnesses and a document will not be Biblically acceptable for testimony. Rabbeinu Tam disagrees and holds that one who is physically capable of testifying may testify through the means of a document.

He concludes, however, that even the Rambam would agree that writing is considered testimony and yet, a written document cannot be accepted by *Beis Din*. The logic for this is as follows: An act of writing can constitute speech, but only during the time that it is being written. *Beis Din* will only

accept an oral testimony when they hear it directly; hearsay is disqualified. Witnesses who signed a document are testifying, but *Beis Din* is not present at that time. If they would sign in front of *Beis Din*, that would be considered valid testimony.

With this principle, you can answer what would seemingly be a contradiction in the Rambam. He rules in Hilchos Eidus (3:7) that testimony must be from the mouth of the witnesses and a document will not be Biblically acceptable for testimony; yet later in Perek 9:11, he writes that one is required to testify with his mouth or at least that he is fitting to testify with his mouth. This would imply that if he is fitting to testify with his mouth, he would be permitted to testify through the means of a document. According to the Noda b'Yehudah's explanation, it can be said that the Rambam allows witnesses to testify through the means of a document, but only if they sign the document when *Beis Din* is present. Accordingly, we can say that an oath taken through writing will be binding.

DAILY MASHAL

He Who Makes the Dumb Talk

An expensive scarf was stolen from the home of HaGaon Rav Tzvi Broide zt"l, the mentor of Rav Yisrael Salanter zt"l, and his distressed wife eventually suspected their poor maid, tormenting her with accusations. Rav Broide told her to desist and said that if she had a claim against the maid, she should summon her to a din Torah. As the rebbetzin prepared herself to go to the beis din, her husband donned his coat to accompany her. "You don't have to come with me," she said, "I know how to present my case."

"I'm sure you do", he replied, "but the poor maid will get all tongue-tied when she hears an important lady like you declaiming in front of the rabbi of the town. I'm therefore going along to speak on her behalf, as we are taught in Mishlei: Speak for a dumb person."