YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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**Shiur #16: The Role of *Macha'ah***

**A Protest Lodged Against a Land Squatter**

Unlike disputes over portable items, land disputes are not resolved based on possession. Physical possession of land is meaningless; the ownership is proven by producing witnesses of purchase or a contract of purchase. However, since contracts are often misplaced, Halakha develops an intricate apparatus for proving ownership in their absence. If a person has resided upon land while benefitting from it in an uninterrupted fashion for three years, he is assumed to be its owner. If the last known prior owner (the *mara kama*) lodges a protest, however, the years of residence are rendered meaningless and the *mara kama* retains his prior ownership. How does the registering of protest, *macha’ah*, override the squatting of three years?

A basic and popular explanation shifts the entire weight of this mechanism to the response or, lack thereof, of the *mara kama* during the squatter’s three years of residence. If the three year residence truly created a new status or assumption about the disputed land, perhaps a verbal protest would be insignificant to override it. In reality, however, the mechanism by which three-year residence alters the dispute is by provoking silence of the *mara kama*. Since he did not protest the invasion of his land during that time, we can assume that he is no longer the rightful owner. A REAL owner would not countenance such infiltration and the silence of the *mara kama* indicates that he has already sold the land to the current resident. Of course, if he lodges a protest within three years, there is no indication of sale and the land reverts back to the last known owner.

Accordingly, the *macha'ah* of the *mara kama* does not defeat the *chazaka* of the current resident by nullifying its achievements. Rather, the *chazaka* only works in the first place because it establishes silence of the *mara kama* and we interpret that silence as evidence of sale. If the *mara kama* protests, however, there is no evidence of sale.

Viewing *macha'ah* in this fashion effectively disconnects the *macha'ah* from the squatter. *Macha'ah* is not meant to be a COMMUNICATION to the squatter (the *machzik*), but is rather the natural response of a provoked owner. This response does not suggest any change in the land's status. In fact, it is the owner’s silence that is surprising, and it is explained in the most logical fashion – that he is no longer an owner.

One ramification of this interpretation of *macha’ah* relates to whether it needs to be issued publically. Throughout the third *perek* of *Bava Batra*, the *gemara* asserts the validity of *macha'ah shelo be-fanav*, a *macha'ah* registered in the absence of the squatter. This is often explained based upon the premise that word of the protest will ultimately reach the squatter; the network of friendships and acquaintances (*chavra chavra* *it lei*) assures delivery of this information. Effectively, even if the squatter is absent, *macha'ah* is considered indirect communication between him and the *mara kama*.

However, some *Amora’im* seem to deny this network of communication and still allow absentee *macha'ah*. For example, the *gemara* (39a) discusses the case of a person who qualifies his protest by requesting that the listeners not repeat this report to the squatter. R. Pappa validates this protest because of the aforementioned network of communication; even if the listener does not report firsthand to the squatter, the protest will eventually be communicated to him by word of mouth. Just as a protest can be lodged in the absence of the squatter, it can be lodged with a request not to pass the information directly to the squatter. Yet for some reason, R. Zevid invalidates this protest. If R. Zevid were to accept the role of the communication network, he should in theory validate this *macha’ah.* It should make little difference whether an open-ended *macha’ah* were issued or one accompanied by a request not to share it with the squatter.

Evidently, R. Zevid does not rely upon the communication network of *chavra chavra it lei*. Yet he nevertheless validates a standard unqualified protest lodged in the squatter’s absence. In his view, how does *macha’ah* operate? It seems that the *mara kama*’ssilence indicates lack of ownership. Any protest – even one that is not ultimately communicated to the squatter – eliminates any proof of altered ownership. The protest *per se* obstructs the land squatting, even without assurance that the protest will be relayed to the land squatter. Although R. Zevid does not require communication of the *macha'ah* and does not rely on the communication network to relay that information, he DOES require a DEFIANT protest against the squatting, rather than a TIMID statement. He therefore invalidates a protest lodged with a request for non-disclosure.

An additional position which may validate *macha'ah* even without the network of assured communication is asserted by Shmuel (*Bava Batra* 38b), who discusses the case of a *macha'ah* registered in the presence of two witnesses who are physically incapable of conveying the report to the *machzik*. Once again, logic dictates that the communication network should assure conveyance of this message to the *machzik* through secondary parties, rendering the personal capabilities of the actual first party listeners irrelevant. Indeed, Rav explicitly claims that this *macha'ah* is sufficient, since word of the protest will inevitably travel back to the *machzik*. Rav even specifically invokes the *chavra chavra* *it lei* principle.

However, Shmuel disagrees, invalidating a *macha'ah* presented to physically handicapped witnesses. If Shmuel endorses the principle of *chavra* *chavra* *it lei*, the actual listeners should be irrelevant, as an entire NETWORK of people will convey the *macha'ah* message. It is possible that Shmuel does not require the communication network, nor does he accept its existence. *Macha'ah* is merely necessary to indicate enduring ownership and opposition to unfair squatting. Whether it is factually communicated to the *machzik* is unimportant. However, choosing handicapped witnesses as the immediate audience of the protest weakens that *macha'ah*, as it appears as though the *mara kama* is trying to actively conceal his comments/protest from the *machzik*. Just as R. Zevid maintains that requesting non-disclosure flaws a *macha'ah*, Shmuel similarly maintains that choosing handicapped listeners can subvert the integrity of a *macha'ah*. Neither Shmuel nor R. Zevid REQUIRE communication nor RELY upon the communication network. Acknowledging that network would render the caliber of the listeners or even the instructions given to those listeners irrelevant. Yet even without acknowledging the communication network they each validate an absentee *macha'ah*.

In summary, the *gemara* validates an absentee *macha'ah* and appears to justify its validity based upon the principle of *chavra chavra it lei*, that word will ultimately be communicated back to the *machzik*. However, two positions (R. Zevid and Shmuel) seem to ignore this principle and still validate a classic absentee *macha'ah*. This may indicate that *macha'ah she-lo be-fanov* is valid EVEN WITHOUT ASSURANCES OF COMMUNICATION, reflecting the fact that the function of *macha'ah* is to indicate enduring ownership and it accomplishes this even if the *machzik* never hears the protest.

The primary *nafka mina* of this view of *macha'ah* would be a situation in which the listeners of the *macha'ah* testify that they did not relay news of the *macha'ah* to anyone, thus short-circuiting the communication network. The Rosh (*Bava Batra* 3:1) addresses this situation (although he addresses it from the perspective of his unique position on the role of *macha'ah*). Clearly, if the efficacy of *macha'ah* is unrelated to its conveyance to the *machzik*, this type of *macha'ah* would be valid. As long as the *mara kama* did not handicap his *macha'ah* by choosing physically infirm people or by requesting non-disclosure, his protest indicates enduring ownership and is valid, even if no reports were delivered to the *machzik*. Rabbenu Yona (*Bava Batra* 29) explicitly approves *macha'ah* even if we have factual evidence that no reports were conveyed to the *machzik*. In contrast, the Rambam (*Hilkhot To’en Ve-Nitan*) disagrees and invalidates a *macha'ah* that clearly did not reach the *machzik*.

This approach to *macha'ah* – that the provoked 'silence' of the *mara* *kama* indicates a sale - would yield another interesting application as well. Since the status of the land is based on the response or silence of the previous owner, if his silence can be explained based on alternate reasons, no *chazaka* would entail. Typical *chazaka* is based on interpreting the silence of the *mara* *kama*; if he were really still the owner, he certainly would have responded to the provocation of land squatting, and his silence proves that he no longer owns the land. If the silent *mara kama* can offer an explanation for his silence, the interpretation fails and the *chazaka* fails with it.

This scenario – known as *amatla* (offering alternate reasons for behavior) – is possibly apparent is several *sugyot* regarding failed *chazakot*. The *gemara* (29a) discusses a discontinuous *chazaka*. For example, a person squatted for a year, was absent the next, squatted the third year, was absent for the fourth year, and squatted his third a final year during the fifth year of this period. Although several different reasons may explain the disqualification of this *chazaka*, the Rashbam claims that the *mara kama* has an *amatla*: "I didn’t protest because I didn’t see you behaving like a standard owner” – that is, I wasn’t sufficiently provoked. A second example is provided by a *gemara* (36a) which appears to disqualify *chazaka* if the squatter ate prohibited fruits (*orla*). Again, the *mara kama* can explain his silence through an *amatla*: “I didn’t protest since I saw you eating forbidden fruits.”

The ability of *amatla* to derail the *chazaka* may indicate that the entire *chazaka* is based upon interpretation of the first owner's silence. Typically, his silence is interpreted to mean that he is no longer the owner. However, if he suggests a different manner of interpreting his silence, we have no basis to suggest he sold the land and no *chazaka* emerges. If *chazaka* were based on a MORE OBJECTIVE phenomenon, whereby the squatting ITSELF creates a status change, perhaps *amatla* would not be able to subvert the empirical reality that the land was squatted upon for three uninterrupted years.