YESHIVAT HAR ETZION

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**TALMUDIC METHODOLOGY**

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**Shiur #17: Is *Macha'ah* an Attempt to Impugn the *Machzik*?**

In the previous *shiur*, we addressed an interesting model toward understanding *macha'ah*, the protest lodged by the *mara kama* that can scuttle the attempts of a land squatter to claim ownership. If the *mara kama* is silent, we can assume that he already sold the land; if he protests, we have no indication of sale and the last previous owner retains ownership. Accordingly, the use of land by the squatter does not ACCOMPLISH any halakhic change; it merely serves as provocation to gauge the potential response of the *mara kama*. If he protests in the face of this provocation, we can assume that he is the current owner of the land. If he is silent, we can assume he has already sold it to the squatter.

However, many *gemarot* indicate that the use of land by the squatter actually changes the halakhic status of the land and renders the squatter a new “possessor” of the land. His use is not intended merely to provoke a response from the *mara kama*, but rather to establish himself as a *muchzak* upon the land. In this view, the protest of the *mara kama* is not merely intended to shatter the silence and subvert any possible proof of sale based on silence. Instead, the protest must - in some way - reverse the impact of the three years of use on the part of the *machzik*. How does *macha'ah* reverse the halakhic effects of the *machzik's* presence upon the land?

One approach suggests that the *macha'ah* attempts to render the *machzik* into a *gazlan* - a thief. The *machzik* attempts to define himself as the new owner of the land because of his utility of it. The *macha'ah* assails his personality by announcing that he is in fact squatting upon “owned land” and is a considered a *gazlan*. Once he is defined as a *gazlan*, his efforts to establish ownership through utility have been rendered worthless and the original *mara kama* retains ownership.

This approach is reflected by the *gemara* in *Bava Batra* (38b) that provides the suggested syntax of *macha'ah*. R. Zevid claims that the language should announce that the squatter "is a *gazlan* who is stealing the fruits of the land…" This suggests that the primary purpose of *macha'ah* is to classify the squatter as a thief. Interestingly, both the Rosh and Rabbenu Yona claim that this harsh personal assault is not necessary and the assertion that the person is a *gazlan* is not needed to validate the *macha'ah*.

A second possible proof that *macha'ah* is not intended merely to shatter silence and lodge a protest, but rather to personally assail the character of the *machzik* by accusing him of theft, can be gleaned from a *gemara* in *Bava Batra* (39a) that draws an interesting analogy between *macha'ah* and *lashon hara*. Most *Rishonim* assume that the analogy is very indirect – just as the spread of *macha'ah* is based on a communication network, in a similar manner, gossip that has already spread through THAT communication network is no longer considered *lashon* *hara*, since it is already public knowledge. However, Rabbenu Gershom claims that the *gemara* is not merely creating an analogy between *macha'ah* and *lashon hara*. Lodging *macha'ah* is considered *lashon hara* and therefore must be lodged in the presence of three people. If fewer than three hear the *macha'ah*, others will be hesitant to spread the news of it, as it is forbidden *lashon* *hara*, and the communication network will break down. By assailing the personality of the *machzik* in front of three listeners, the *mara kama* has converted this information into public knowledge that should be freely disseminated without worry of violating the prohibition of *lashon hara*. By defining a *macha'ah* as halakhic *lashon hara* and engineering the *halakhot* to accommodate the rules of *lashon hara*, Rabbenu Gershom is clearly viewing *macha'ah* as a PERSONAL ASSAULT against the *machzik*. If it were merely a statement pronounced about the land and the rightful owner, it should not be considered *lashon hara*. Evidently, the *macha’ah* attacks the integrity of the *machzik* himself.

This approach to *macha'ah* may also explain an interesting *gemara* (*Bava* *Batra* 40a) that requires two attendant witnesses for every *macha'ah*. Under most circumstances, witnesses are forensic; they provide the highest form of evidence and it is therefore highly encouraged to secure their presence. However, there are certain activities, such as the execution of *gittin* and *kiddushin*, that require attending witnesses – *eidei kiyum –* and are invalid without these witnesses, even if all parties agree to the facts. Typically, monetary matters do not require *eidei kiyum*, even though the status of an object or land's ownership is shifting; *eidei kiyum* are required when personal status is affected (marriage and divorce). Yet the *gemara* in *Bava Batra* (40a) suggests that *macha'ah* must be performed in front of at least two witnesses, and without their attendance the *macha'ah* is invalid. Some *Rishonim* take this *gemara* non-literally, but others read it quite literally –a *macha’ah* must be performed in the presence of two *eidei* *kiyum*. Presumably, these *Rishonim* would equate *macha’ah* to other halakhic actions that change personal status. Accordingly, the *macha’ah* does not address the ownership status of the land, but rather the status of the PERSON squatting on the land. The *macha’ah* alters his identity from potential owner to *GAZLAN*. Since the *macha’ah* affects his identity, two attendant witnesses are necessary.

This approach to *macha’ah* may explain the need to pronounce *macha’ah* in the LITERAL presence of the squatter. As stated in previous *shiurim*, the *gemara* is quite comfortable validating a *macha’ah she-lo be-fanav*, a protest lodged in the absence of the squatter, since the communication network of friends (*chavra chavra* *it lei*) assures conveyance of this information to the *machzik*. At one initial stage, the *gemara* does require DIRECT protest IN THE PRESENCE of the *machzik* (see *Bava Batra* 28b) but this position was rejected; the communication network is reliable enough to account for an absentee *macha’ah*. How and in what capacity does this network function? If *macha’ah* merely provides information about the alleged sale, the network is required to convey this information indirectly to the *machzik*, in part to afford him an opportunity to retain whatever documents and evidence he possesses. If the *macha’ah* ACTUALLY TARGETS THE IDENTITY OF THE *MACHZIK*, the communication network may have to transfer the information “person to person” through the mechanism of *shelichut* so that the final people who communicate directly with the *machzik* can PRONOUNCE HIM A *GAZLAN* IN HIS PRESENCE. Actual contact between the *mara kama* who lodges the protest and the *machzik* is not necessary simply because each “link” in the communication network is effectively a *shaliach* to pronounce him a *GAZLAN*. If the *macha’ah* were lodged in a fashion that would not accommodate *shlichut*, however, perhaps the absentee *macha’ah* would be invalid. This may help explain an unusual position of R. Zevid (*Bava Batra* 39a). As noted in the previous *shiur*,R. Zevid does not permit *macha’ah* qualified by a request not to convey the information to the *machzik*. In that *shiur*, we questioned why this qualification is flawed; after all, the communication network assures the information flow! Perhaps R. Zevid DOES accept this communication network, but he considers its participants to be a series of agents transferring this “personal accusation” so that the ultimate listeners who approach the *machzik* can designate him a *gazlan*. If the *mara kama* SPECIFICALLY REQUESTS that the information NOT be spoken to the *machzik*, this process of pronouncing him a *gazlan* through *shaliach* “designates” cannot function.