YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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In memory of our beloved father and grandfather
Mr. Berel Weiner (Dov Ber ben Aharon z"l).
May the learning of these shiurim provide an aliya for his neshama.

Steven Weiner, Lisa Wise, Michael & Joshua

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**Shiur #18: Is *Macha'ah* a Manner of Launching the Litigation Process?**

In previous *shiurim*, we explored different methods toward understanding the function of *macha’ah*, the protest registered by the *mara kama* (or last known owner) to preserve his title in the face of the squatter who has been residing on the disputed land for the past three years. One intriguing option suggests that the *mara kama* must personally assail the INTEGRITY of the *machzik*, rendering him a *GAZLAN* and not a legal owner. The *macha’ah* is targeted toward the *machzik* and quite possibly must be lodged either in his presence, or at least in a manner which approximates that experience.

A different possible function for *macha’ah* emerges from an interesting *gemara* in *Bava Batra* (38b-39a), which cites the syntax of a *macha’ah*. The simple reading of the *gemara* implies that the *mara kama* must announce his intention to initiate LEGAL PROCEEDINGS against the current squatter. He must declare that “tomorrow” (in the future), I plan to litigate in court. Could the purpose of *macha’ah* be to symbolically start legal proceedings so that the title of the land is “frozen” and remains in possession of the last known owner until further hard evidence can be produced? Interestingly, the Rashbam cites a debate as to whether this language including plans to start litigation is actually necessary. This debate may indeed revolve around the question of how to understand *macha'ah*. Assuming *macha'ah* overrides the impact of the *chazaka* by symbolically starting the litigation process, this language would be crucial.

An interesting halakha cited by the *gemara* (39b) may reinforce this sense that *macha'ah* launches litigation. The *gemara* assumes that *macha'ah* must be reinforced every three years. If the *macha'ah* is disregarded, the *chazaka* of the squatter triumphs. What would happen if the BASIS for the *macha'ah* were changed? For example, the first protest claimed that the land was stolen, while the subsequent one suggested that the land was willfully delivered to the current squatter to consume the fruits. Either way, the squatter does not own the land and his *chazaka* should be ineffective. Yet the *gemara* claims that in a case of "*ireir* *ve*-*chazar ve-ireir*" – in which the basis for the *macha'ah* is altered – the *macha'ah* fails. On the surface, this halakha appears odd. By repeatedly opposing the *chazaka* of the squatter, the *mara kama* should defeat his *chazaka* regardless of the altered basis of the *macha'ah*.

Some (for example, the Rashba) claim that the *macha'ah* fails since the changing *macha'ah* raises suspicions. The entire *chazaka/macha'a* process is speculative to begin with. A concrete *shetar* would unambiguously prove ownership. In the absence of a *shetar*, the *chazaka* can IMPLY ownership and *macha'ah* can prevent that implication. If the *macha'ah* ITSELF proceeds suspiciously, however, the ownership is awarded to the LEAST suspicious litigant. By altering the basis of his *macha’ah* the *mara kama* raises suspicions and weakens his legal position.

However, a different explanation of this disqualification of altered *macha'ah* may be that a *macha'ah* launches litigation. All litigation requires providing a basis for the legal claim. If the original litigation were asserted based on alleged THEFT of the land and the subsequent *macha'ah* were based upon a different claim, these two would represent entirely DIFFERENT *macha'ot*. As stated earlier, a *macha'ah* must be reinforced or reasserted within a three year expiry period. If *macha'ah* operates by the *mara kama* merely expressing his ownership over the land, the ACTUAL PROTEST would be significant and the LEGAL BASIS as to WHY the land does not belong to the squatter would be irrelevant. Common protests with dissimilar legal basis would still be regarded as identical *mach'aot*, which, if repeated within three years, should defeat the squatter. By viewing *macha'ah* as a launch to the legal proceeding, however, the legal basis of the *macha'ah* becomes crucial. If the basis for the *macha'ah* is different, each *macha’ah* is considered independent and the original *macha'ah* expires.

If indeed the *macha'ah*'s function is to launch litigation against the squatter, a second question emerges – how must this launch occur? Is it sufficient to merely state intention to indict the squatter? After all, ownership of land is more abstract than ownership of portable items. By registering intent to litigate, the last known owner is reinforcing HIS OWNERSHIP in the legal arena. Merely announcing intent may not be sufficient to assert ownership. Perhaps in addition to announcing intent, the *mara kama* must actually BEGIN proceedings and BEGIN to generate evidence for any future litigation. This second approach may explain the appearance of an interesting phrase regarding the mechanics of *macha'ah*: the word *EIDUT*, or TESTIMONY. Thus far, we have speculated that *macha'ah* declares opposition (as opposed to silence, which may indicate a prior sale), designates the squatter as a *gazlan* (see *shiur* [www.vbm-torah.org/archive/metho73/17metho.htm](http://www.vbm-torah.org/archive/metho73/17metho.htm)), or announces intent to litigate. The term “*eidut*,” the concept of testimony, would be unsuitable for a standard *macha'ah*. Yet the *gemara* in *Bava Batra* (39b) cites a *machloket* as to whether *macha'ah* should be declared in front of two or three people. At one stage, the *gemara* claims that the need for two listeners of the *macha'ah* is because they are considered "*sahaduta*,” the Aramaic word for “*eidim*,” witnesses. If we take this term seriously, it appears that the *macha’ah* doesn’t merely announce realities about the land; it designates ACTUAL WITNESSES for future litigation. Even though these witnesses/listeners may not attend litigation, the very act of designating potential witnesses constitutes the start of litigation, which repels the impact of *chazaka*.

In fact, when the Rashbam (39a) explains the need to include the phrase, "I plan on indicting the squatter" in the base *macha'ah*, he employs the term of *eidut*. He quotes Rabbenu Chananel, who states that if the *macha'ah* is lodged without this conclusion, the *macha'ah* fails, since it is not considered “conveying testimony.” Evidently, Rabbenu Chananel viewed *macha'ah* as generating ACTUAL testimony, and not just symbolically beginning the litigation process.

This understanding of *“sahaduta”* and the explanation of *macha'ah* as designating potential witnesses may help us to better appreciate the position of Shmuel (*Bava Batra* 38b), who argued that if the *macha*'*ah* were registered in front of people who are physically incapable of travel to the location of the land, the *macha'ah* fails. As discussed in previous *shiurim*, this position seems odd, since the network communication should assure conveyance of the *macha'ah,* despite the handicap of the listeners. Perhaps a *macha'ah* must designate listeners as potential *eidim*. As long as they are capable of traveling, the designation is considered *eidim-*labeling and the litigation has begun. If they are incapable of travel, the *macha’ah* cannot be viewed as an act of designating *eidim* and the legal process hasn’t been launched.