YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

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Dedicated with respect and love

In memory of Rabbi Abraham Halbfinger, z”l and

In memory of Bracha Halfbinger Tal, z”l

By Marcy and Tsvi Lieber

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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 #19: Is a *Macha'ah* an Attempt to Affect Social Perspective?**

In the previous three *shiurim*, we outlined different approaches toward understanding the function of *macha'ah*. Perhaps it is merely a manner of expressing opposition to the provocation of the squatter. If the *mara kama* is silent, we infer changed ownership; by lodging a *macha'ah*, he breaks his silence and there is no longer any indication of sale. Alternatively, we may assume that *chazaka* and squatting DIRECTLY impacts the ownership of the land, establishing a profile of ownership for the squatter. The *macha'ah* must in some way, repel that impact. One suggested method is that *macha'ah* impugns the integrity of the *machzik* or squatter by announcing that he is a *gazlan* and thereby undermining the profile he has worked to establish. A second view suggests that *macha'ah* intends to legally indict the squatter; by launching the litigation, the *macha'ah* halts the emerging status of the *machzik*.

In this *shiur*, we will explore a different understanding of *macha'ah*. Perhaps the *macha'ah* is directed at the broader community and attempts to REINFORCE the profile of the *mara kama* as owner. In this contest over ownership of the land, the *machzik* will triumph if the *mara kama* ALLOWS his status to erode. By REINFORCING his status in the public eye, the *mara kama* has reinforced his ownership and counteracted the impact of the *machzik*.

Ownership over land is heavily predicated upon public opinion. A primary method for transferring land through *kinyan* is a *shetar*, a contract that publicly announces the sale and changes public opinion. In a similar vein, public opinion can enable an otherwise futile attempt to steal land. The *gemara* claims that land cannot be stolen even if the owner is physically removed from his land. Portable items are stolen when they fall under the physical possession of the thief. Since physical possession is central to legal ownership of *metaltelin*, physical theft has impacted the status of the item and is considered a halakhic theft. Accordingly, land cannot be stolen, as no action truly changes its legal status. The original ownership is entrenched in more abstract realms, which are unaffected by physical realities. However, several *Rishonim* (*Tosafot*, *Sukka* 30b) claim that if the theft affects a long term change in the public perspective of the land, it is considered halakhic theft and subject to the standard laws of theft. This position indicates how crucial public opinion truly is regarding ownership of lands.

Perhaps the real battle between *machzik* and *mara kama* is over public opinion. The squatting does not merely provoke the *mara kama* or establish the presence of the *machzik*; rather, it attempts to alter public opinion about this land. After witnessing the *machzik* benefit from the land for three years, society begins to view the squatter as owner. The goal of *macha'ah* may be to broadcast a different message – that the *mara kama* continues to be the true owner of the land.

A complex case cited by the *gemara* (*Bava Batra* 32b-33a) may yield this perspective about *macha'ah*. A creditor was given land from which to collect fruit in the event that the loan would default. The borrower indeed defaulted and the creditor collected his loan by eating the fruits of this designated land. In the interim, the original borrower died, casting uncertainty over the proceedings. Believing that he was owed ADDITIONAL monies by the dead borrower, the *malveh* continued to enjoy the fruits of this land EVEN AFTER collecting the value of the original loan. He viewed this as an easier option than returning the land and litigating the additional loan with the inheritors of the land. He expected to be believed in his claims since he had a “*migu*” argument: Instead of asserting a second loan, he could have claimed that he PURCHASED the land from the estate. After all, he has already been present on the land for more than three years and he should enjoy the option of claiming that he purchased the land. Abbaye claims that this claim of purchase would fail, since society “views” this land as belonging to the estate. Even though a formal *macha'ah* has not been declared, the EFFECTS of *macha'ah* in blunting the *chazaka* already exist. The entire purpose of *macha'ah* is to proclaim ownership to a broader public. Since, independent of *macha’ah*, the public already views the land as belonging to the estate, the effects of *macha'ah* have already been accomplished even in the absence of a formal *macha'ah*.

A second *gemara* that may associate *macha'ah* with an attempt to alter public opinion about the land appears in *Bava Batra* 30b, which discusses the case of two litigants who each claim that they purchased land from the previous owner. One litigant offers his *chazaka* as proof of his purchase. The other possesses an actual *shetar* written to him by the original owner. Rava rules that the person who squatted is awarded the land provided he completed his three years of residency prior to the date on which the *shetar* was issued to the other litigant. If the *shetar* was issued PRIOR to the completion of the three years of *chazaka*, the *chazaka* would fail, since issuing this document is equivalent to *macha'ah*. By writing a *shetar* selling the land to a different party, the original (undisputed) owner has registered a *macha'ah* against the squatter.

This association between a classic *macha'ah* and a *shetar* written to a third party seems odd. If *macha'ah* were an attempt to undermine the current squatter by launching litigation or designating him as a *gazlan*, writing a *shetar* of sale to a third party would accomplish neither! Perhaps the *gemara* views *macha'ah* as an attempt to proclaim continued ownership to a public audience. By proclaiming to the public, the *mara kama* is reinforcing his own profile. Writing a contract of sale for this land to a third party would also constitute a public proclamation, which would be equivalent to classic *macha'ah*.

This view of *macha'ah* may explain an intriguing position asserted by the Ri Migash. The *gemara* in *Bava Batra* (39a) debates whether *macha’ah* should be lodged in the presence of two or three people. According to one version, the need for three listeners is to establish "*giluy milta*," dissemination of this information. This demand is perplexing, as the network of communication (*chavra chavra* *it lei*) should be sufficient to convey this information to the public. The Ri Migash claims that this position demands IMMEDIATE PUBLICITY, rather than relying upon ultimate dissemination “through the grapevine.” Since three people represent a mini-public, by declaring *macha'ah* to three people, the *mara kama* has personally disseminated the information to the public.

It seems that the Ri Migash (at least when explaining this position) maintains that *macha*'a*h* is an attempt to broadcast a profile of ownership to the public. He maintains that this broadcast must be PERSONALLY executed; thus, the *mara kama* must PERSONALLY broadcast to a minimum of three listeners.