

HALOCHOSCOPE

This week's question:

Someone found a bird's nest with eggs in his yard. Previously, he formally announced that he does not want his property to acquire a bird's nest. To perform the *mitzvah* of *shiluach hakan*, sending away the mother bird, he picked up the eggs, after chasing away the mother. May he now make the nest and eggs *hefker*, owner-less, so that another person may also perform the *mitzvah*?

The issues:

- A) *Shiluach hakan*
- B) *Mezuman*, when the nest is not *hefker*
- C) Repeating the *mitzvah* with the same nest

A) *Shiluach Hakan*

When one chances upon a nest, before taking the eggs for himself, he must send the mother bird away. This positive *mitzvah* is accompanied by a negative *mitzvah*, forbidding taking them together. Taking only the mother is a violation of both *mitzvos*, according to many poskim. Others maintain that it violates only the positive *mitzvah*. Taking the eggs alone, in the presence of the mother, is a matter of debate. Some consider it part of the Scriptural violation. Others consider it a Rabbinical extension.

The procedure for the *mitzvah* is debated. Some require physically removing the mother by its wings. Others require chasing it away by banging the nest or making a frightening noise. There is some question on whether this *mitzvah* requires a *brocha*. This is due, in part, to the possibility that the eggs will be bad, exempting one from the *mitzvah*. Many poskim maintain that one must nonetheless recite a *brocha*. Some add that, due to the relative rarity of this opportunity, one should also recite *shehecheyanu*. According to others, one should recite these brochos omitting the Names of Hashem.

By wording the *mitzvah* in terms of '*ki yikarai*', if (or when) it shall happen [by chance]', the Torah clearly does not require one to go searching for a nest. There is no clear indication whether one is required to fulfill the *mitzvah* any time he comes upon a nest. What if one has no interest in taking the young? Must he still send away the mother? Must he still take the eggs? May he put them back right away? Is it ethically correct to cause the mother the pain of losing her nest? An additional question is raised: Suppose one finds a nest on *Shabbos*. Trapping a bird and handling eggs are forbidden. Must he scare the mother away? Assuming there is no obligation, does he get credit if he did it anyhow? This all leads to our own issue. Normally, when faced with a doubt about the fulfillment of a Scriptural *mitzvah*, one errs on the side of stringency. This would require one to fulfill it anyhow. If one is in doubt about the conditions for this *mitzvah*, should he perform it anyhow? Obviously, he will not be removing the eggs to eat them.

Should he remove them, then replace them, just so that the *mitzvah* is fulfilled? If he is not obligated, he will seem to be causing undue pain to the mother bird.

These issues are discussed by the poskim. One approach analyzes a situation posed by the Talmud. A nest has two layers of eggs. May one remove the lower layer without sending the mother away? She will be left sitting on the top layer. If the obligation applies regardless of whether one wishes to keep the eggs, this has not been accomplished. Since this is not raised, the implication is that this is not a major concern. However, the passage is not necessarily taken at face value. According to many interpretations, this case does not prove that there is no obligation. Some even suggest that this passage supports the idea of an obligation even when one does not want the eggs.

Another approach analyzes reasons for this *mitzvah*. A *Midrashic* passage seems to suggest the reason is to promote mercy on creatures. The Talmud seems to reject this reason as bordering on heresy. The *mitzvah* is a decree by Hashem. One reconciliation is that these are two sides in a debate. The Midrash holds of reasons for the *mitzvos*. The Talmud holds that we are incapable of knowing Hashem's reasons for *mitzvos*. There seem to be contradictory indications on which side we follow. Others suggest the two references do not argue. It is not the mercy of Hashem. Rather, it is to refine the mercy of the Jew, through performing the acts of this and other similar *mitzvos*. According to these explanations of the *mitzvah*, it only applies when one needs the eggs. Otherwise, it violates *bal tashchis*, the *mitzvah* forbidding waste and actually causes pain to the mother.

Another reason, or intended consequence, is found in the Zohar. When the mother returns to find her offspring missing, she will look for them and worry. When Hashem sees this concern, He will be aroused to His own pain at the absence of His children, the Jewish people, exiled from His presence. Thus, the *mitzvah* as intentionally arouses pain. It is assumed that *tzaar baalei chaim* is permitted to serve the needs of mankind. The creation is there to serve man's needs. Using it this way end does not constitute abuse of resources. According to this reason, one should fulfill the *mitzvah* even if he does not want the eggs. One must remove them, to cause the mother concern. It would not apply on *Shabbos*. The problem is, this reason would only apply in exile. This is certainly not the ideal situation for the Jews. It is hard to explain a *mitzvah* in the Torah based on such situations. Furthermore, this explanation would mean that one must go looking for nests.

Most tend in favor of an obligation even when one does not need the eggs. However, they do not hold one in violation for not sending the mother away unnecessarily. At worst, they consider it neglecting a positive *mitzvah*. If one does send the mother away, some poskim would give him credit from the *mitzvah*. Others would denounce it as cruelty. [See Ki Saitzai 22:7. Chulin 138b-142a, Poskim. Chinuch 544 545, Minchas Chinuch. Tur Sh Ar YD 292, commentaries (Birkei Yosef, Ar Hash 1-2 10, Mishmeres Shalom). Chacham Tzvi 83 Chavos Yair 67. Chasam Sofer OC 100. Chazon Ish YD 175:2.]

B) Mezuman

The *mitzvah* applies to a bird found by chance. This excludes a bird nesting inside a house, such as a pet or domesticated fowl. This is called *mezuman*. This seems to mean that the *mitzvah* would only apply to a nest found on wild, ownerless property. It can apply to private property, but certain conditions must be met. The ideal case is a nest found

on one's private property, but in an uninhabited section, such as an orchard. The Torah terminology includes three situations: wild birds that nested in private property; domesticated fowl that escaped to roost in an orchard; and birds found on public property.

Normally, acquisition requires *kinyan*, *halachic* demonstration of ownership through a formal act of transaction. When an article lands in one's yard, the yard can act as an agent of the owner to make a *kinyan*, known as *kinyan chatzer*. To be effective, the *chatzer* must be closed to the public and somewhat secure. As soon as a bird lands in one's yard, it becomes property of the owner – *mezuman*. However, a yard can only act as an agent if the owner is permitted to take possession. Until performing *shiluach hakan*, the owner may not take possession of the bird or the eggs. Therefore, the owner could still fulfill the *mitzvah* on the nest, unless there is reason to believe that the mother left the nest for any brief time. If she left, which is likely, the eggs are transferred to the possession of the owner before he can perform the *mitzvah*. To forestall this, one can proclaim that he does not wish his *chatzer* to make the *kinyan*.

If one finds a nest on the property of another, the eggs might already belong to the property owner (depending on whether the mother flew away at any point in time). If so, taking the eggs could be stealing, rather than fulfilling a *mitzvah*. [See Baba Metzia 10b-11a 102a Chulin 139a-b, Poskim. Tur, Sh Ar YD 292:2 3 7, CM 200:1 268 369 370:1 4, commentaries.]

C) Repeating the mitzvah with the same nest

The Torah uses a double expression when commanding the positive *mitzvah* to send away the mother bird. This is interpreted to mean that if the mother came back one would be required to send her away again and again. The poskim point out that this only applies if the eggs were not subsequently taken. If the eggs were picked up and replaced, and then the mother returned, one is exempt from further obligation. The reason given for this is that once they are picked up, they are considered *mezuman*. Thus, one may take them or the mother with them. Accordingly, the repeated *mitzvah* could only apply in the wild. There is a dissenting view that a *chatzer* requires conscious *kinyan*, at least verbally. In this view, one may always fulfill the *mitzvah* on a wild nest on his property unless he verbally acquired it. Therefore, he could repeat the *mitzvah* as well.

It is unclear whether one fulfilled the *mitzvah* the first times he sent away the mother. As mentioned, some poskim maintain that one does not fulfill the *mitzvah* unless he acquires the eggs. The language of the *mitzvah* mentions both sending away the mother and taking the eggs for oneself. [Some suggest that if there are two or more eggs, two people could fulfill the *mitzvah*, each of them chasing the mother and taking one egg.] Some say that there are two halves to the *mitzvah*, and that one can indeed fulfill it halfway by just sending away the mother. According to the others, what if the mother returns? At the time of the *mitzvah*, the person could not know this. Thus, it would appear that he fulfilled it at the time, but has more to do when the mother returns. However, it is also possible that one fulfills a new *mitzvah* every time he sends away the mother. This indicates that one could fulfill the *mitzvah* many times with the same nest. In our case, the owner of the yard would love to perform the *mitzvah* himself. Assuming that he proclaims before the mother leaves that he does not wish to take possession of the eggs

through *kinyan chatzer*, he may do so at any time. In the absence of such a proclamation, may he make the nest *hefker*, then fulfill the *mitzvah*? Furthermore, if his friends would like to have a chance at the *mitzvah*, may he make it *hefker* for them? In a public location, if the first person who picks up the eggs makes them *hefker* when he replaces them, would this allow the next person a chance for the *mitzvah*? Could the owner himself repeat the *mitzvah* by making the eggs *hefker*?

Some suggest that this depends on how one views *hefker*. Some consider it removing the item from one's possession. Others maintain that it permits anyone to take it without worrying about robbery. Yet others maintain that it is like an undertaking to surrender it to whoever takes it. According to the latter views, it would appear that it is still *mezuman*. The concept of ownership applies to many *mitzvos*. In some of the cases, the Torah is interpreted by the Talmud as exempting *hefker*, which is the opposite of our *mitzvah*. Based on some of these examples, the poskim debate our case.

In one view, once it is *mezuman*, *hefker* does not remove this quality. The Talmud suggests that one might be required to go searching for a nest, but that the Torah only obliges one who 'chances upon it'. Why bother searching, if one can simply disown his domestic fowl? Others maintain that *hefker* does work for this. The Talmud says that if chickens escape from their owner, the *mitzvah* of *shiluach hakan* applies to their eggs. Since the owner gave up hope, known as *yiush*, they are not considered *mezuman*. Indeed, this is the chosen example of *aino mezuman*. The escaped chickens or geese nested in an open property, such as an orchard. Evidently, *yiush* helps, even if the item has not officially left the ownership of the former owner. The fact that anyone else could take it means that it is not considered *mezuman*.

There is further debate whether *hefker* can always remove *mezuman* status. Some apply it to a wild nest, acquired in the process of *shiluach hakan* the first time. Others apply it to a nest made by a wild bird even on private property. Yet others apply it to domestic fowl. One could disown the bird before it lays the eggs. The others maintain that domestic fowl is considered *mezuman* by definition, even if one attempts to make it *hefker*. For this view, too, a proof is suggested from the Talmudic passage mentioned before. If one could disown his domestic fowl, why would there be any suggestion that the Torah obligates one to go searching for a wild nest? Just disown a domestic bird! [See Chulin 138b-139b 141a, Poskim. Mishnayos 12:1, Melech Shlomo, Lechem Shamayim etc. Tur Sh Ar YD 292:5, Shach, commentaries. Be'er Yitzchok YD:23:4. Imrei Yosher 158. Tokfo Kohain/Venasan Lakohain 19:3. Shaleach Teshalach, Dinim, 24, Harchev Davar.]

In conclusion, there is a view that it would work. Since no *brocha* is involved, many poskim suggest that one should fulfill this *mitzvah* in cases of *safeik* doubt. Accordingly, there is no harm in making the nest *hefker* to allow others to perform the *mitzvah*.

Sponsored By Martin Stein in memory of his mother, Tziporah bas Dovid Leib a"h, whose

yahrzeit is on the 4th of Iyyar. ☞

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