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Sanctified nest

If the mother was flying over the nest, and her wings touched the nest, one is obligated to send her away; if her wings do not touch the nest, one is not obligated to send her away.

If there was but one chick or one egg (*in the nest*), one is still obligated to let the mother go, for it is written: *a nest*, that is, any nest whatsoever. If there were there chicks able to fly or infertile eggs, one is not obligated to send the mother away, for it is written: and the mother is sitting on the chicks or upon the eggs - just as the chicks are viable, so too the eggs must be viable; hence, infertile eggs are excluded. And just as the eggs need the care of their mother, so too the chicks must be such as need the care of the mother; this excludes those that are able to fly.

The *Gemora* cites a *braisa*: It is written: *Sitting*, but not flying. I might then think that even when her wings touch the nest (*the law does not apply*), the verse therefore stated: *Sitting*.

The *Gemora* asks: How is this implied?

The *Gemora* answers: It is because it is not written *yosheves* – sitting.

Rav Yehudah said in the name of Rav: If she was perched upon two branches of a tree, we must consider the following: if when the branches slip away from each other she would fall upon them, one is obligated to send her away, but if not, one is not obligated to send her away.

The *Gemora* asks on this ruling from the following *braisa*: If she was sitting between them, one is not obligated to send her

away; if she was upon them, one is obligated to send her away; if she was flying over the nest, even though her wings touch the nest, one is not obligated to send her away (*the Gemora will ask shortly that this last ruling is contradicted by our Mishna*). Now, presumably the expression ‘upon them’ is analogous to the expression ‘between them’, and just as ‘between them’ means that she is actually touching them, so ‘upon them’ also means that she is actually touching them. It follows, however, that if she was upon the branches of a tree, one is not obligated to send her away!?

The *Gemora* answers: No, the expression ‘upon them’ is analogous to the expression ‘between them,’ and just as ‘between them’ clearly means that she is not touching them from above, so ‘upon them’ also means that she is not touching them from above, and that must be the case where she was upon the branches of a tree (*which would then, actually, support R’ Yochanan’s ruling*).

The *Gemora* attempts to demonstrate why this explanation of the *braisa* is more reasonable: It is indeed more logical to argue thus, for if you were to hold that when perched upon the branches of a tree one is not bound [to let her go], then the Tanna, in place of the case ‘If she was hovering over the nest, even though her wings touch the nest, one is not bound to let her go’, should rather have taught the case where she was perched upon the branches of a tree, and it would go without saying that where she was hovering [over the nest one is not

bound to let her go!¹ — [This argument is not conclusive for] he wished to state the case where she was hovering [over the nest] to teach that, even though her wings actually touch the nest, one is not bound to let her go.

The *Gemora* asks on the *braisa* from our *Mishna*, which states: If the mother was flying over the nest, and her wings touched the nest, one is obligated to send her away.

Rabbi Yirmiyah answered: The *braisa* is dealing with a case where her wings touch the side of the nest.

The *Gemora* cites another version of the above discussion: Shall we say that the following *braisa* is a support for Rav's view, for it was taught: If she was sitting between them, one is not obligated to send her away; if she was upon them, one is obligated to send her away; if she was flying over the nest, even though her wings touch the nest, one is not obligated to send her away. Now, presumably the expression 'upon them' is analogous to the expression 'between them,' and just as 'between them' clearly means that she is not touching them from above, so 'upon them' also means that she is not touching them from above, and that must be the case where she was upon the branches of a tree!

The *Gemora* rejects the proof: No, the expression 'upon them' is analogous to the expression 'between them,' and just as 'between them' means that she is actually touching them, so 'upon them' also means that she is actually touching them, but if she was perched upon the branches of a tree, one would not be obligated to send her away.

The *Gemora* asks: But if so, why did the *Tanna* of the *braisa* state the case where she was hovering over the nest, even though her wings were touching the nest, one is not obligated to send her

away; he should rather have taught the case where she was perched upon the branches of a tree, and it would go without saying that where she was hovering over the nest, one is not obligated to send her away!?

The *Gemora* answers: He wanted to state the case where she was hovering over the nest to teach that even though her wings actually were touching the nest, one is not obligated to send her away.

The *Gemora* asks on the *braisa* from our *Mishna*, which states: If the mother was flying over the nest, and her wings touched the nest, one is obligated to send her away.

Rabbi Yirmiyah answered: The *braisa* is dealing with a case where her wings touch the side of the nest.

The *Mishnah* had stated: If there was but one young bird or one egg etc. A certain Rabbi said to Rava: Perhaps it should be the reverse, thus if there was but one young bird or one egg (in the nest), one is not obligated to let the mother go, for according to the verse there must be young or eggs,² which is not the case here; and if there were there young birds able to fly or infertile eggs, one is obligated to let the mother go, for it is written, a nest, that is, any nest whatsoever! — (He replied,) If that were so, the verse should have stated: And the mother sitting upon them; why is it written: And the mother sitting upon the young or upon the eggs? To compare the young with the eggs³ and the eggs with the young.⁴

MISHNAH: If a man let (the mother) go and she returned, even four of five times, he is still obligated (to let her go again), for it is written: you shall surely let the mother go. If a man said, "I will take the mother and let the young go," he is still obligated (to let her go), for it is written: you shall surely let the mother

¹ If where she was perched the whole time directly over the nest the law of 'letting the mother go' does not apply, how much less where she was hovering over the nest!

² The verse states these nouns in the plural, i.e., several young or several eggs.

³ I.e., as eggs need the care of the mother so the young must be such as need the care of the mother, thus excluding such as can fly.

⁴ I.e., as the young are living beings so the eggs must be such as can produce living beings, thus infertile eggs are excluded. Consequently the expression 'a nest', signifying any nest whatsoever, includes a nest that has but one young or one egg in it.

go. If a man took the young⁵ and brought them back again to the nest, and afterwards the mother returned to them, he is not obligated to let her go.⁶

GEMARA: A certain Rabbi said to Rava: Perhaps 'shalleach' means once, and 'teshallach' twice? — He replied: 'Shalleach' implies even a hundred times; and as for 'teshallach', (it is required for the following teaching:) I only know (this law in the case where the mother is required) for matters of choice,⁷ from where do I know (that this law applies even when it is required) for the fulfilment of a mitzvah?⁸ The text therefore states: 'teshallach', (you shall let her go) under all circumstances.

Rabbi Abba the son of Rav Yosef bar Rava said to Rav Kahana: Then the only reason (for this) is that the Merciful One stated 'teshallach', but otherwise I should have said that (where one required the mother) for the fulfilment of a mitzvah, the law did not apply. But there is here, is there not, both a positive and a negative commandment?⁹ And (it is established law that) a positive commandment¹⁰ cannot override a positive and negative commandment! — It is necessary for the case where one had transgressed and had taken the mother. Now he has

⁵ Having already let the mother go.

⁶ For this man has acquired possession of the young ones, and they are now always at his disposal, consequently the law no longer applies.

⁷ I.e., for one's own purposes, either for food or for breeding.

⁸ E.g., for the metzora's sacrifice or for the sacrifice of a woman after childbirth). From where do I know that even for these religious purposes it is not permitted to take the mother?

⁹ The negative commandment: You shall not take the mother, and the positive commandment: You shall surely let the mother go.

¹⁰ For the fulfilment of which the bird is required.

¹¹ I.e., that the positive commandment of offering birds for the metzora's sacrifice should override the positive commandment of letting the mother go.

¹² In all prohibitions the transgression of which can be rectified by a subsequent act of the transgressor — e.g., the prohibition: You shall not steal, can after the transgression be rectified by the remedial commandment: He shall restore that which he took by robbery — the transgressor is not liable to forty lashes unless after the transgression he does not immediately fulfill the remedial commandment. In our case, therefore, if the man does not let the mother go at once he has transgressed the law and is liable to lashes. Accordingly there now remains

already transgressed the negative commandment, and there remains only the positive commandment; and one might suppose that now a positive commandment can override this (remaining) positive commandment,¹¹ (Scripture) therefore teaches us (that it is not so). This is in order, however, according to he who teaches that it depends upon whether he has fulfilled or not fulfilled (the positive commandment),¹² but according to he who teaches that it depends upon whether he has nullified or not nullified (the positive commandment),¹³ then so long as this man has not slaughtered the mother he has not transgressed the negative commandment.¹⁴ Moreover, according to Rabbi Yehudah who maintains that the commandment of letting (the mother) go was intended only in the first instance,¹⁵ there is now (after the transgression of the law) not even a positive commandment!¹⁶ — Rather, said Mar son of Rav Ashi, we suppose the case where a man took up the mother in order to let it go, in which case there is no infringement of the negative commandment; there is, however, a positive commandment and (it might be suggested that) the positive commandment (of the metzora's offering) should override this positive commandment.¹⁷ But in what way is this

only the positive commandment and this could be overridden by another positive commandment were it not for the expression 'teshallach.'

¹³ I.e., the transgressor does not incur the penalty of lashes for the infringement of the negative commandment unless he has also nullified his chances of performing the remedial commandment, e.g., here if he slaughtered the mother. But so long as he has not nullified the remedial commandment, even though he defers it to some later date, he is not liable to lashes.

¹⁴ It cannot therefore be suggested that the positive commandment of the metzora's sacrifice should override the law of letting the mother go for the latter still involves a positive and a negative commandment; accordingly the verse stated above to exclude this is now superfluous.

¹⁵ I.e., on finding a bird's nest a man should immediately let the mother go, for as soon as he takes up the mother he thereby transgresses the law for which he incurs forty lashes. Thereafter he is not obliged to let her go at all, but may use it for any purpose.

¹⁶ It, therefore, cannot be suggested that the man had transgressed the law and taken the mother, for then according to Rabbi Yehudah it may be used for all purposes.

¹⁷ By taking the mother he has not infringed the negative commandment, since he took it for the purpose of letting it go, and even if he does not let it go it cannot be said that he has transgressed this negative

positive commandment more potent than that?¹⁸ — Because one might argue: since a Master has said: Great is the peace between man and wife, for the Torah has permitted the Name of the Holy One, Blessed be He, which is to be written in all sanctity, to be washed away in the waters of bitterness, and since a metzora so long as he has not been cleansed is forbidden marital intercourse, (for it is written: And he shall dwell outside his tent seven days; 'his tent' signifies his wife,¹⁹ hence he is forbidden marital intercourse) — one might therefore argue, since he is forbidden marital intercourse, the positive commandment in his case²⁰ should override the positive commandment of letting the mother go, we are therefore taught (that it is not so).

MISHNAH: If a man took the mother with the young, Rabbi Yehudah says: he has incurred (forty) lashes, and he need not now let her go. But the Sages say: he must let her go, and he does not incur lashes. This is the general rule: (for the transgression of) any negative commandment which admits of a remedy by the subsequent fulfillment of a positive command, one does not incur lashes.²¹

GEMARA: Rabbi Abba bar Mamel raised the question: Is the reason for Rabbi Yehudah's view (in the Mishnah) that he is of the opinion that (for the transgression of) a negative commandment which can be remedied by a subsequent act (of the transgressor) one incurs lashes, or is it that elsewhere he is of the opinion that (for the transgression of) a negative commandment which can be remedied by a subsequent act one does not incur lashes, but here the reason is that he maintains

commandment retroactively. There now remains incumbent upon him the positive commandment of letting it go, but this would be overridden if he were to retain it for the fulfillment of the positive commandment of the metzora's offering. The verse is therefore necessary to exclude this possibility.

¹⁸ Why should the commandment of the metzora's offering be considered more important so as to override the commandment of letting the mother go?

¹⁹ Go say to them: Return to your tents, which was a permission to resume marital relations.

²⁰ I.e., the offering of birds which brings about the metzora's purification and also the restoration of conjugal relationships.

that the commandment of letting (the mother) go was intended only in the first instance?²² — Come and hear: A thief and a robber are subject to the penalty of lashes; these are the words of Rabbi Yehudah. Now is not this a case of a negative commandment which can be remedied by a subsequent act, for the Merciful One says: You shall not rob, and also: He shall restore that which he took by robbery?²³ You can therefore infer from this that the reason for Rabbi Yehudah's view (in our Mishnah) is that he is of the opinion that (for the transgression of) a negative commandment which can be remedied by a subsequent act (of the transgressor) one incurs lashes. Thereupon Rabbi Zeira said to them: Have I not told you that every Baraisa that was not taught in the school of Rabbi Chiya and Rabbi Oshaya is not authentic, and that you should not put it forward as a refutation in the Beis Hamidrash? Perhaps it was taught thus: (A thief and a robber) are not subject to the penalty of forty lashes.

Come and hear: Rabbi Oshaya and Rabbi Chiya taught: (It is written:) You shall not go back (to fetch it), but if a man went back (and gathered the forgotten sheaf) — (It is written:) You shall not finish off, but if a man did reap the whole field — he is subject to the penalty of forty lashes;²⁴ these are the words of Rabbi Yehudah. You may infer from this that the reason for Rabbi Yehudah's view is that he is of the opinion that (for the transgression of) a negative commandment which can be remedied by a subsequent act (of the transgressor) one incurs lashes! — Perhaps the reason here is that he maintains that the

²¹ Provided one fulfilled the, remedial positive act immediately according to one view above, or one did not nullify the chances of performing the remedial act according to the other view above.

²² And therefore once the mother has been taken both the negative and positive commandments have been infringed, and one is no longer obliged to send it away.

²³ This commandment obviously can only be taken as a remedial act for the preceding prohibition; nevertheless according to Rabbi Yehudah the robber incurs the penalty of lashes.

²⁴ Although in each case the Torah provides a remedial act, to leave the forgotten sheaf and the corner of the field for the poor and the stranger.

commandment of leaving (the gleanings etc. for the poor) was intended only in the first instance.²⁵

Ravina said to Rav Ashi: Come and hear: (It is written:) And you shall let nothing of it remain until the morning; (and that which remained of it until the morning) you shall burn with fire. Scripture here came and provided a positive commandment as a remedy for the (disregarded) prohibition, to indicate that the prohibition is not punishable by lashes; these are the words of Rabbi Yehudah. You may then infer from this that the reason for Rabbi Yehudah's view (in our Mishnah) is that he maintains that the commandment of letting (the mother) go was intended only in the first instance. This indeed proves it.²⁶

Rav Idi bar Avin said to Rav Ashi: Our Mishnah also proves it, for it states: If a man took the mother with the young, Rabbi Yehudah says: he has incurred (forty) lashes, and he need not now let her go. Now if you were to say that the reason for Rabbi Yehudah's view is that he is of the opinion that (for the transgression of) a negative commandment which can be remedied by a subsequent act (of the transgressor) one incurs guilt,²⁷ then it should have stated: He has incurred (forty) lashes and must also let her go! — Perhaps the Mishnah is to be interpreted thus: He has not cleared himself (by merely letting her go) until he has suffered lashes.²⁸

How far must he let it go? — Rav Yehudah said: until it is out of his reach.²⁹

How should he let it go? — Rav Huna said: With its feet.³⁰ Rav Yehudah said: With its wings.³¹

Rav Huna said: With its feet, for it is written: That let go freely the feet of the ox and the donkey. Rav Yehudah said: With its wings, for its wings are also (regarded as feet).

A man once clipped the wings (of the mother before letting it go), let it go and then caught it again. Rav Yehudah had him flogged and ordered him: Go, keep it until it grows its wing feathers again and then let it go. But whose view did he adopt? For according to Rabbi Yehudah he suffers lashes but need not let it go, and according to the Sages he must let it go but does not suffer lashes? — In truth he adopted the view of the Sages, but (the flogging) was chastisement of the Rabbis.³²

A man once came to Rava and asked: What is the law with regard to the timah?³³ Said (Rava to himself): Does not this man know that one is obligated to let go a kosher bird? He (Rava) then said to him: Perhaps (you enquire because) there was (in the nest) but one young bird or one egg? He replied: That is so. Then said (Rava) to him: This surely should not give rise to any doubt; it is expressly stated in our Mishnah: If there was but one young bird or one egg (in the nest), one is still obligated to let (the mother) go. The other then sent it away; whereupon Rava set snares for it and caught it. But is there not ground here for suspicion?³⁴ — He acted in an indirect manner (as did not give rise to suspicion).

²⁵ But once the law has been transgressed there is no longer a duty to leave them for the poor; hence the commandment 'to leave' is not a remedial act.

²⁶ It cannot be otherwise since here Rabbi Yehudah expressly states his view that for the transgression of a negative commandment which can be remedied by a subsequent act of the transgressor one does not incur lashes.

²⁷ And on this assumption the commandment of letting the mother go must be observed even after the transgression of the law.

²⁸ I.e., although he is bound even now to let her go he nevertheless suffers forty lashes.

²⁹ And then if this same person succeeds in catching it again he is permitted to use it.

³⁰ I.e., he must let it go so that it should be able to walk away on its feet. In this manner he has fulfilled his obligation even though he may have injured its wings so that it cannot fly away. Alternatively: he must get hold of it with its feet and set it free.

³¹ I.e., that it should be able to fly with its wings.

³² The punishment decreed by the Rabbis for disobedience as opposed to lashes ordained by Biblical law.

³³ A certain type of kosher bird.

³⁴ That Rava ordered the other to let the mother go only that he might gain possession of it himself.