

HALOCHOSCOPE

Addition to last issue: First, it should be noted that while we mentioned various sources (section B) that exempt a roof from the Mitzvah of Maakeh if it is not used frequently, there are other opinions. The Talmud suggests a low Maakeh for an infrequently used roof. Some Poskim require a regular Maakeh on this type of roof. Others do not require any Maakeh. It is also clear that some Poskim only use the idea of exempting an infrequently used roof to justify a questionable practice. Others, in condemning the practice, question the basis for the exemption. Finally, one of the very sources that this exemption is based on is actually discussing building a Maakeh on such a roof. It refers to building a Maakeh on Chol Hamoed, normally a forbidden activity. The Halacha is that one may do this activity as an amateur job. The question is, if this refers to the regular Mitzvah of Maakeh, it should be a permissible activity on Chol Hamoed. The answer given is that it refers to a roof that is not used frequently, which is exempted from the obligation. However, one should anyhow build a Maakeh there to prevent risk of a hazard. This is not an obligation and is not permitted to do professionally on Chol Hamoed. Accordingly, we see that there is basis for building a Maakeh on such a roof. Second, the Poskim mention that a roof with shingles or tiles does not require a Maakeh, because people do not use it. There is some debate on the reason for this exemption. The simple meaning is that they are not actually used, which would mean that this is another source for the exemption on any roof that is not used. However, others point out that it refers to a roof that is not possible to be used because the shingles would break. Accordingly, only a roof that is not possible to use is exempt. A roof that could be used but is not actually used, would not be exempt. Nonetheless, many Poskim maintain that one need not build a Maakeh on a roof that is not normally used. If one wishes to build it anyhow, he should not recite the customary Brocha, since many Poskim exempt the roof from the Mitzvah. [See Sma C.M. 427:1 Ar. Hash. C.M. 314:5, references, section B last issue.]

The following questions were raised:

- i. Two Jews share a garage, but one owns the roof (the rights to build on top). Is there any obligation on the other one to build the Maakeh? Is there any difference whether the two are partners or whether they own one side each?**
- ii. A landlord lives downstairs and rents the upstairs to a tenant, including use of the garage roof. Whose responsibility is the Maakeh?**

The issues:

- (A) Partners' responsibility to build a Maakeh**
- (B) Responsibility of a landlord or tenant to build it**

(A) Partners

The Talmud debates the applicability of this Mitzvah to partners. The basis for the debate is the terminology used by the Torah when commanding this Mitz-

vah. The Torah says *Veasisa Maakeh Legagecha*, make a fence for *your* roof. This implies a roof owned by one person, since the pronoun is in the singular form. The Torah seems to exclude partners from the obligation. However, the Talmud goes on to say that the Torah requalifies its statement by giving the reason for this Mitzvah. "Lest the faller shall fall off it" implies that the reason for the roof is to prevent accidents. Accordingly, there is no logical reason that partners should be exempt. This passage in the Talmud discusses many Mitzvos that apply to possessions or property, and the apparent implicit exclusion for partners. After each inference from the language to exempt partners from a Mitzvah, the Talmud then includes them again by inferring another term used. After the list is finished the Talmud cites evidence that these second inferences were never accepted, and that partners are indeed exempted. Thus we are left with a disagreement on whether partners are indeed exempt. To further complicate matters, the sources cited to disprove the inclusions do not apply to all of them, but to two of them. They are also cited singly, one Talmudic authority citing one single case, and then another citing a second case. In addition, the whole debate is only according to the view of one earlier talmudic view, that of Rebi Ilai. The other view is that of the Rabanan, usually assumed to be the majority view, or at least the view that is accepted as the Halachic deciding view. Their debate applies to a totally different Mitzvah. The Talmud had extrapolated on the view of Rebi Ilai, who had exempted partners in the one case, on the assumption that it would be he would also exempt partners from other Mitzvos given the same type of terminology. It is possible that the other view might agree to inferences regarding the other Mitzvos. On the other hand, they might never have excluded partners from the obligations in the first place.

The Poskim are faced with three possibilities. Maybe the majority view never excludes partners, and we follow this view. Maybe they only disagree in the one case but agree in all other cases to Rebi Ilai. Then two results are possible. Maybe the inference is upheld, and partners are exempt. Or, maybe the inference is rejected and partners are indeed obliged. As a result there are differing views on how to rule. The opinion of the main Poskim is to include all partners in the obligation.

Accordingly, had the roof itself belonged to both partners, there would definitely be an obligation on them to build a Maakeh. Since the roof actually belongs to one partner, it is his obligation to build it. The fact that the garages underneath belong to both does not seem to bear on the matter. There is a clear provision in the Mitzvah that only a roof over a house is included in the obligation. However, it is not clear that the house must belong to the same person as the roof. The Poskim

refer to a case where a neighbor had the exclusive use of his neighbor's roof. The question was, who is the one obliged to build the Maakeh? One factor is whether the owner of the roof must also own the dwelling underneath. If the user does not own or rent (see next section) the roof, the owner of the house is obliged. If the user is the owner of the roof, some say that this roof is exempt, while others say that only the roof owner is obliged. The house owner is definitely exempt. However, in our case, the owner of the roof does own a part of the building underneath. Therefore, he should be obliged in the Mitzvah. Since the other owner definitely does not own any part of the roof, he is exempt. The only other possibility is that the owner of the roof is also exempt, since he might be considered a partner in some form or another. Accordingly, he should definitely build the Maakeh, but might want to refrain from reciting the Brocha. [See Chulin 135a-136a, Poskim. Tur Shulchan Aruch Choshen Mishpat 427:2 (Gro etc.) Sdei Chemed Klalim Mem 195 piece begin. Ukvar. Chazon Ish, C.M. Likutim 18:7.]

(B) Tenants

The issue of obligation is raised again with regard to landlords and their tenants. Is the obligation placed on the dweller of the house, and user of the roof, or is it placed on the owner of the hazard? Furthermore, the tenant could also be considered an owner since he buys the use with his rent. In one Talmudic passage an outright obligation is placed upon the tenant. However, this is debated by the Poskim. The issue is, firstly, whether this passage is the unanimous opinion, and if it is not, whether it is followed in Halacha. Secondly, is this obligation on the tenant a Scriptural one or a Rabbinical one?

The discussion regarding this issue is also based on the above mentioned Talmudic passage. There is also another passage that comes into play. The Torah specifies the obligation to apply to one who builds a new house. The Sifri uses the reason of hazard to infer that the obligation also applies to one who buys inherits or is gifted a house. If a tenant is also obliged, would it be necessary to include these others? Accordingly, there are three views held by different Poskim. There is a minority view that just as the word *Gagecha* comes to exclude partners, in the final analysis (i.e., in accordance with those who follow this view, cited in the earlier section) so, too, a tenant is excluded based on this word. A second minority view maintains that a tenant is Scripturally obliged to build it. The majority view maintains that the tenant is Rabbinically obliged to build it.

Assuming it is a Rabbinical obligation on the tenant, the explanation for this is

further debated. One view is that it is really the landlord's obligation but that he might neglect his obligation. Therefore, the Rabbis placed an obligation on the tenant, due to the hazard. According to this view the landlord is still obliged, but the tenant's obligation is added. In fact, the landlord is really the ideal candidate for this Mitzvah, and should not really neglect it. The other view is that due to this consideration the Rabbis removed the obligation from the landlord, which they are allowed to do by passively suspending the obligation. They then placed it wholly on the tenant. According to this view, the landlord is not obliged at all.

Some point out that the Rabbis suspend a positive obligation by suggesting passive refrain from the Mitzvah, but do not suspend negative Mitzvos. The landlord is still obliged to prevent loss of blood on his property. Others maintain that the Rabbis suspend active obligations. As the negative Mitzvah in this case requires an action to prevent its violation, the Rabbis suspend this requirement. [See Chulin 136a Baba Metzia 101b Sifri Ki Seitzei 22:8 (65) Poskim. Tur Sh. Ar. C.M. 314:2, commentaries. Sdei Chemed, Chazon Ish as above.]

What results from this discussion is that if the landlord also lives in the lower dwelling, he might be exempt if he does not reserve any rights to use the roof. Or, he could be obliged to share the obligation, since he lives there as well. He might even be obliged to build it before he rents it to a tenant. He might be obliged to shoulder the entire cost, since the tenant might not be obliged in this case. If the tenant neglects his obligation the landlord might be obliged anyhow. Finally, it is possible that neither is obliged to fulfill it as a Mitzvah of Maakeh, but that at least the landlord, and possibly both, are obliged to prevent the hazard, and must build it anyhow, albeit without a Brocha.

In conclusion, it is suggested that the two of them build it together, but that they should not recite a Brocha. They may make the following stipulation. If the one is obliged he appoints the other as his agent to build it. In this case the one who does build it may recite the Brocha. If it is his own obligation it is his right to recite the Brocha. As an agent, he may also recite the Brocha. (see Halocho-scope V:6, section C). If one of them sees that the other is negligent in fulfilling the Mitzvah, he should go ahead and do it himself, without the Brocha.

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This issue of Halocho-scope is dedicated to the memory of Gershon Avraham ben Yosef Hakeen Cohen z"l, by his friends and admirers. His Shloshim falls on this Shabbos, the eighteenth of Kislev.

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