

# III.

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## BAVLI BABA MESIA CHAPTER THREE

### FOLIOS 33B-44A

#### 3:1

- A. He who deposits with his fellow a beast or utensils,
- B. and they were stolen or lost,
- C. [if the bailee] made restitution and was unwilling to take an oath —
- D. (for they have said, “An unpaid bailee takes an oath and thereby carries out his obligation [without paying compensation for the loss of the bailment])” —
- E. [if then] the thief was found,
- F. [the thief] pays twofold restitution.
- G. [If] he had slaughtered or sold the beast, he pays fourfold or fivefold restitution.
- H. To whom does he pay restitution?
- I. To him with whom the bailment was left.
- J. [If the bailee] took an oath and did not want to pay compensation,
- K. [if] the thief was found,
- L. he pays twofold restitution.
- M. [If he slaughtered or sold the beast, he pays fourfold or fivefold restitution.
- N. To whom does he pay restitution?
- O. To the owner of the bailment.

**I.1** A. *Why specify in the Tannaite formulation both **beast** and **utensils**?*

- B. *It is necessary to do so, for if the Tannaite authority had referred only to beasts, I might have concluded that it is only in the case of a beast that the original owner [who is the one to whom the double payment is paid to begin with, the liability having been incurred on account of the theft, at which point the animal belonged not to the bailee but to the bailor=original owner] makes over the double payment of restitution to the bailee, since it required considerable trouble to take care of the beast. But as to utensils, which do not require all that much bother, I*

*might have supposed that the bailor does not have to hand over the twofold restitution to the bailee. [So that item had to be made explicit.]*

- C. *And if the Tannaite authority had referred only to utensils, I might have concluded that it is only in the case of utensils that the original owner hands over the double payment to the bailee, because, after all, in such a case the double payment is not so substantial, but in the case of a beast, in which instance, should the thief have slaughtered and sold the beast, he has to pay four or five times the value, I might have maintained that in that case the double payment need not be handed over. Accordingly, it was necessary to make both classifications of stolen possessions explicit.*
- D. *R. Ammi bar Hama objected, “And lo, it is an established principle that one may not transfer ownership of something which has not yet come into being [and does not exist]. [Freedman: How can the bailor make over the twofold repayment to the bailee?] And even in the view of R. Meir, who maintains that may transfer ownership of something which has not yet come into being, that position applies in a case such as the produce of a palm tree, which by nature is going to come into existence, but here, [34A], who can say for certain that the bailment is going to be stolen?*
- E. *“And if you choose to say that it is sure to be stolen, then who can say for sure that the thief is going to be found? And if the thief is found, who can say for certain that he will pay the restitution at all? Perhaps he will confess his guilt and be exempt from having to pay double [but merely makes restitution of the beast]!”*
- F. *Said Raba, “The bailor is treated as though he had said to him, ‘If it is stolen and you choose to pay me for the loss, lo, my cow is acquired by you as of this moment’ [and that solves the problem of R. Ammi].”*
- G. *R. Zira objected to this explanation, “If that is the case, then even the shearing and offspring of the beast [under these conditions] should also belong to the bailee! [Freedman: Since the ownership of the bailee is assumed to be retrospective, the shearings and offspring from the time of its delivery as a bailment should be his.] Why then has it been taught on Tannaite authority, ‘except for the shearing and the offspring’?”*
- H. *Rather said R. Zira, “The bailor is treated as though he had said to him, ‘except for the shearing and the offspring.’”*
- I. *[Freedman:] And why make this an absolute assumption?*
- J. *Because in general if there is an improvement in value that comes from other source, one gives that over, while one does not give over the improvement in value that derives from the beast itself.*
- K. *Some present the discussion in the following formulation:*
- L. *Said Raba, “The bailor is treated as though he had said to him, ‘If it is stolen and you choose to pay me for the loss, lo, my cow is acquired by you as of the moment just before the theft’ [and that solves the problem of R. Ammi].”*
- M. *What is at issue between the two formulations of Raba’s view?*
- N. *At issue is the problem raised by R. Ammi, or a case in which the beast was standing in the meadow [Freedman: just before the theft. Since this does not*

belong to the bailee, he cannot acquire it just then, for in order to acquire it, either he must perform an act of drawing of the beast or it must be standing within his domain; consequently the additional repayment that must be made by the thief over and above the principal will belong to the bailor.]

**II.1 A. ...[if the bailee] made restitution and was unwilling to take an oath [ — (for they have said, “An unpaid bailee takes an oath and thereby carries out his obligation without paying compensation for the loss of the bailment)” — [if then] the thief was found, [the thief] pays twofold restitution]:**

B. Said R. Hiyya bar Abba said R. Yohanan, “The sense is not that he actually has paid, but, since he has said, ‘I will pay,’ even though he has not actually paid, [the rule pertains.] *We have learned in the Mishnah: [if the bailee] made restitution and was unwilling to take an oath. It follows that if he has paid, the rule pertains, and if not, it does not pertain. Then, however, let me cite the concluding clause: [If the bailee] took an oath and did not want to pay compensation, [if the thief was found, he pays twofold restitution]. The reason then is that he did not want to do so. Lo, if he wanted to do so, even though he did not actually pay [the rule pertains]. It follows that from this formulation there are no inferences to be drawn.*”

C. *It has been taught on Tannaite authority in accord with the position of R. Yohanan: He who rented a cow from his fellow and it was stolen, and the other said, “Lo, I shall pay you compensation for it rather than taking an oath,” and afterward the thief was found, the thief pays twofold restitution or fourfold or fivefold restitution to the one who rented the beast [T. B.M. 3:3A-D: deposit rather than rent, otherwise verbatim].*

**II.2. A.** Said R. Pappa, “An unpaid bailee, once he has said, ‘I have acted negligently,’ — *[the original owner, the bailor] thereby assigns the double payment to him [forthwith, should the thief be found and fail to confess but be declared guilty and have to pay that sum], since had he wanted, he could have he could have freed himself by pleading that the beast had been stolen. As to a paid bailee, one he has claimed, ‘It was stolen,’ [the original or owner, the bailor] thereby assigns the double payment to him [forthwith, should the thief be found and fail to confess but be declared guilty and have to pay that sum], since had he wanted, he could have he could have freed himself by pleading that the beast had been hurt or had died. As to a borrower, even though he has said, ‘Lo, I shall pay restitution,’ [the original or owner, the bailor] in no way assigns the double payment to him, for in what manner could he otherwise have exempted himself? If it was by the plea that the beast had died on account of the work that it was doing [for which the borrower bears no responsibility, there having been a flaw in the beast, which should have been able to do that work], that is a very rare occurrence indeed.*”

B. *Some present the following version of R. Pappa’s statement: said R. Pappa, “Also as to a borrower, once he has said, ‘I shall pay restitution,’ [the original or owner, the bailor] thereby assigns the double payment to him [forthwith, should the thief be found and fail to confess but be declared guilty and have to pay that sum], since had he wanted, he could have he could have freed himself by pleading that the beast had died on account of the work that it was doing.”*

- C. *Said to him R. Zebid, "This is what Abbayye has said, 'As for a borrower, the twofold payment does not go to him unless he has actually paid for the beast up front.' Why so? Since the entire benefit of the loan of the beast went to him, the lender does not hand over the double payment to him merely because of the saying of a few words."*
- D. *It has been taught on Tannaite authority along the lines of the position of R. Zebid: He who borrowed a cow from his fellow, which was stolen, and the borrower went and paid for the beast and only afterward the thief was found, he pays the double payment in compensation to the borrower.*
- E. *Now as to the initial formulation of R. Pappa, this [Tannaite formulation] certainly does not constitute a refutation [because the present teaching is explicit that the payment actually was made,] but as to the second formulation, might one maintain that this constitutes a refutation?*
- F. *R. Pappa will reply to you, "Does this formulation bear greater authority than the one in our Mishnah-paragraph, which states explicitly, **he pays**, and which we nonetheless interpret to mean that he declares that he will pay? Here too, while the formulation is, and the borrower went and paid for the beast, the sense is, he said he would do so."*
- G. *But are the two cases comparable [so that we may impose the sense just now suggested on the second one]? In the formulation of the Mishnah, we do not find the language, went and paid, while here we find the language, went and paid!*
- H. *What is the sense of went and paid? He went and said [that he would pay].*
- I. *But since in the case of the one who rents the beast, it is stated, "and he says that he will pay," while in the case involving the borrower, it says, "he went and..." surely the inference is that it is stated with precision [and the parallel cannot be drawn as you propose].*
- J. *But were the two passages formulated together [that this precision in formulation should generate the distinction you propose between them]? [The two formulations are distinct, and the language used in the one cannot be asked to impart meaning to the other.]*
- K. *They asked the Tannaite authorities of the houses of R. Hiyya and R. Oshaia and they replied that they were indeed taught so as to be repeated together.*

**II.3.** A. *It is self-evident that, if the bailee declared, "I will not pay," but then said, "I will pay," then his situation is that he has said, "I will pay," [and we draw the correct conclusions, as just now spelled out].*

- B. But if he has said, "I will pay," [34B] and then he went and said, "I will not pay," *what is the law?*
- C. *Do we maintain that he has indeed retracted? Or perhaps he intended to stand by his original word, but was merely putting off the bailor [who wanted money he did not then have, though he intended ultimately to pay, in which case the double payment still is assigned to him]?*
- D. *And [here is another dilemma:] if he said, "I will pay," and then died, and his heirs say, "We are not going to pay," what is the law? Do we say that they have retracted, or perhaps they intended to stand by the father's original word, but were merely putting off the bailor [who wanted money they did not then have, though they intended ultimately to pay, in which case the double payment still is assigned to them]?*
- E. *And what if the sons [heirs] did pay? Can the bailor say to them, "When I handed over the possession of the double payment, it was to your father, who did me a favor. But it was not to you"? Or perhaps there is no difference?*
- F. *And what if the bailee paid to the heirs of the bailor? Can they say to him, "Our father gave you the double payment because you did him a favor, but as for us, you have done nothing for us"? Or perhaps there is no difference?*
- G. *And if the heirs of the bailee paid the heirs of the bailor? And what if he paid half [does he acquire half of the double payment that the thief later on makes]? What if he borrowed two cows but paid restitution for only one of them? What if he borrowed from partners and paid only one of them? What if partners borrowed and only one of them paid? What if one borrowed from a woman but paid her husband? What if a woman borrowed and her husband paid?*
- H. *These questions will have to stand unanswered.*

**II.4.** A. [With reference to the clause of the Mishnah, **[if the bailee] made restitution and was unwilling to take an oath**], said R. Huna, "We nonetheless impose upon the bailee the oath that the beast is not in his possession. *What is the reason? We take account of the possibility that he may have coveted the beast [and told the story that it was stolen so as to have the chance to buy it].*"

B. *The objection was raised on the basis of the following: He who lends money to his fellow on the strength of a pledge, and the pledge got lost, the creditor said to him, "I lent you a sela on the strength of it, but it was worth only a shekel," and the debtor says to him, "Not so, but you lent me a sela on the strength of it, and it was worth a sela," he is exempt. "A sela I lent you on the strength of it, and it was worth a shekel," and the other says, "Not so, but a sela you lent to me on the strength of it, and it was worth three denars," he is liable." A sela you lent to me on the strength of it, and it was worth two,"*

and the other says, “Not so, but I lent you a *sela* on the strength of it and it was worth a *sela*,” he is exempt. “A *sela* you lent me on the strength of it, but it was worth two,” and the other says, “Not so, but a *sela* I lent to you on the strength of it, and it was worth five *denars*,” he is liable. And upon whom is the oath imposed? Upon him with whom the bailment was left, lest this one take an oath, and then the other produce the bailment [M. [Shabuot 6:7A-P](#)]. Now to what does this final clause refer? Shall I see it is to the second clause? But the fact that the oath must be taken by the creditor is because he has conceded part of the claim [and has to take an oath for the rest of it]. [Why then give a different reason?]

- C. Rather, said Samuel, “It refers to the first clause [since there is no requirement of an oath there]!”
- D. How can it refer to the first clause? He means, the second subsection of the first clause: “A *sela* I lent you on the strength of it, and it was worth a *shekel*,” and the other says, “Not so, but a *sela* you lent to me on the strength of it, and it was worth three *denars*,” he is liable.” Now the debtor is the one who has to take the oath, but the rabbis have imposed the creditor to take the oath, lest this one take an oath, and then the other produce the bailment.
- E. Now if it were the case that [\[35A\]](#) R. Huna were right [that we nonetheless impose upon the bailee the oath that the beast is not in his possession, since we take account of the possibility that he may have coveted the beast and told the story that it was stolen so as to have the chance to buy it,] then once the lender has taken an oath that the bailment is not within his domain, how is he going to produce the bailment?
- F. Said Raba, “There are witnesses that the object was burned up [so there is no question of imposing an oath].”
- G. If so, then whence will he be able to produce the object?
- H. Rather, said R. Joseph, “There are witnesses that the object was stolen.”
- I. All the more so — whence will he be able to produce the object?
- J. He may make the effort to produce the object.
- K. So if the creditor takes the oath, the debtor too may make the effort to produce the object.
- L. Now there is no problem with the creditor, who knows who comes and goes from his house, so he may go to the trouble and produce the object. But as to the debtor, does he too know who goes into the creditor’s house and come out of it?
- M. Abbaye says, “It is a decree lest the he plea, saying to him, “After the oath I found the object.”
- N. R. Ashi said, “This one takes an oath and that one takes an oath. This one takes an oath that it is not within his domain, and that one takes an oath as to its value. And this is the sense of the statement: who takes the oath first? The creditor takes the oath first, lest the other take the oath and then this one produce the bailment.”
- O. R. Huna b. Tahalipa in the name of Raba said, “The initial clause of the final unit constitutes a refutation of the position of R. Huna [that we nonetheless impose upon the bailee the oath that the beast is not in his possession, since we



take account of the possibility that he may have coveted the beast and told the story that it was stolen so as to have the chance to buy it]. It is as follows: **A sela you lent to me on the strength of it, and it was worth two,” and the other says, “Not so, but I lent you a sela on the strength of it and it was worth a sela,” he is exempt.** Now if the view of R. Huna were correct, since [in accord with that view] in any event the creditor has to swear that the coin is not in his domain anyhow, let him also take an oath — through the extension of the original one — as to its value as well.”

- P. Said R. Ashi, “I reported the matter before R. Kahana, who said to me, ‘Let this apply to a case in which he believes him [that is, the debtor believes the creditor concerning the loss of the pledge and does not ask for an oath on that matter, so there is no secondary oath required in this context].’”
- Q. Then let the debtor accord credence to the creditor also in the matter of the value of the pledge!
- R. [He will reason as follows:] “The creditor did not really assess the value.”
- S. Then let the creditor accord credence to the debtor as to the value of the pledge!
- T. He does not do so.
- U. What’s the difference, that the debtor will believe the creditor but the creditor will not believe the debtor?
- V. The debtor cites in connection with the creditor, “The integrity of the upright shall guide them” (Pro. 11: 3), while the creditor cites in connection with the debtor, “But the perverseness of transgressors shall destroy them” (Pro. 11: 3).

- II.5.** A. Somebody deposited jewels with his neighbor. When he asked for them back, saying, “Give me my jewels,” the other replied, “I don’t know where I put them.”
- B. When the case came before R. Nahman, he ruled, “The claim, ‘I don’t know where I put them’ is one of negligence, so go and pay.”
  - C. The man did not pay, so R. Nahman ordered that the bailee’s house be seized.
  - D. Then the jewels were found. But by then they had gained in value.
  - E. Ruled R. Nahman, “Let the jewels go back to their original owner, and the house to its original owner.”
  - F. Said Raba, “I was in session before R. Nahman, and our chapter of study was **He who deposits with his fellow a beast or utensils.** So I cited the following, [if the bailee] made restitution and was unwilling to take an oath — [(for they have said, “An unpaid bailee takes an oath and thereby carries out his obligation without paying compensation for the loss of the bailment)” — [if then] the thief was found, [the thief] pays twofold restitution. If he had slaughtered or sold the beast, he pays fourfold or fivefold restitution. To whom does he pay restitution? To him with whom the bailment was left.] [The double repayment belongs to the bailee, so once he has paid, he is entitled to ownership. Here too since he had paid for the jewels, the increased value of the jewels should go to him.] But he did not answer me. And he did well not to answer me. How come? There the plaintiff did not impose upon the defendant the trouble of going to court, where as here he did have to go to that trouble.”

- G. *Shall we draw the inference that, in the view of R. Nahman, property assigned to a creditor in valuation returns to the debtor without limit of time. [Whenever the debtor pays, he can get his property back.]*
- H. *No, the case at hand is different, because it was a valuation made in error, for the jewels were in being to begin with. [But if an article is distrained because a debtor cannot repay, it may be that it is not returnable even if he subsequently acquires money [Freedman)].*
- I. *The Nehardeans have ruled, ‘Property assigned to a creditor in valuation returns to the debtor [if the debtor pays] over the next twelve months.’“*
- J. *And Amemar has said, “I come from Nehardea and take the view that property assigned to a creditor in valuation returns to the debtor without limit of time.” [Whenever the debtor pays, he can get his property back.]*
- K. *The decided law is that property assigned to a creditor in valuation returns to the debtor without limit of time, since it is said, “And you shall do that which is right and good” (Deu. 6:18).*

**II.6.** A. *It is self-evident that if an evaluation is made in behalf of the creditor, and he went and valued it for his own creditor, we say to the second creditor, “You are no better than the man into whose power you have come. [Freedman: Just as he would have had to return the goods if the debtor could repay the loan, so you must do so as well.]*

B. *If he sold, bequeathed, or gave it as a gift, the recipients have certainly taken over the distrained estates to begin with in order to possess the land, not the money. [Freedman: Therefore it is not returnable to the debtor. The creditor himself would have had to return it on account of the cited verse, for it is applicable to him, since in the first place he demanded money, not land. But that does not apply to these recipients, who were thinking about land, not money.]*

C. *If the property was evaluated in behalf of a woman creditor and she got married [and the seized estate has enter the husband’s domain as iron-flock property or remains the wife’s domain but the husband enjoys the usufruct], or if the property was made for the wife’s estate and she married and then died, the husband is in the status, vis à vis the wife’s estate, of a purchaser. He does not return the estate to the debtor nor is it returned to him [should he want to settle his wife’s debts].*

D. *For said R. Yosé bar Hanina, “In Usha they made the ordinance as follows: ‘A woman who during her husband’s lifetime sold off property of hers that is in the status of ‘usufruct property’ [that is, she has retained ownership but the husband has the usufruct through the life of the marriage], and then died — the husband may extract the property from the possession of the purchasers.’”*

**II.7.** A. **[35B]** *Where [without waiting for a court order of distraint] the debtor gave it to the creditor in settlement for his debt, there is a dispute between R. Aha and Rabina.*

B. *One party maintains, “It is to be returned.”*

C. *The other party said, “It need not be returned.”*



- D. *He who takes the view that it is not to be returned maintains that it is a valid act of sale, since he gave it in payment by an act of free will. The one who takes the position that it is returnable maintains that it is not a valid act of sale, and as for his giving it over voluntarily and not going to court, this he did merely out of shame.*

**II.8.** A. *And at one point may the creditor enjoy the usufruct of the property [under an order of distraint]?*

- B. *Rabbah said, "From the point at which he gets the court order."*  
C. *Abbaye said, "When the witnesses [to that document] sign their names, they impart ownership to him."*  
D. *Raba said, "When the days of publicly announcing [that the estate to be distrained is up for public sale to go to the highest bidder] are complete. [When that time has passed, if the estate is not sold, the creditor has a right to the usufruct]."*

We commence with the usual close analysis of the Mishnah-paragraph, at I.1 asking why two distinct classes of objects are specified, animate and inanimate. Then the different considerations that pertain to each are specified. At II.1 we ask a further question generated by a close reading of the document. II.2 proceeds to ask at what moment the ownership of the stolen article is transferred to the unpaid bailee. This generates a series of theoretical questions, none of them more than a further refinement of the issue at hand; none is answered. No. 4 then imputes to the Mishnah a consideration not made explicit but in principle important, namely, the specification that the one who makes restitution must not actually possess the object. This is a familiar condition. No. 5 deals with a concrete case in which the transfer of ownership of the object for which restitution is paid has to be specified. Nos. 6, 7, and 8 then complete the secondary expansion of the matter. Overall, II has taken us fairly far from the Mishnah's rule, but the progress outward is continuous and unbroken; there is nothing miscellaneous in the connections between one completed discourse and its sequel.

### 3:2

- A. **He who rents a cow from his fellow, and then lent it to someone else,**  
B. **and it died of natural causes —**  
C. **let the one who rented it take an oath that it died of natural causes,**  
D. **and the one who borrowed it then pays compensation to the one who rented it out.**  
E. **Said R. Yosé, "How should this one do business with his fellow's cow?"**  
F. **"But [the funds paid for] the cow are to return to the owner."**

**I.1** A. *Said R. Idi bar Abin to Abbaye, "Now in what way has the one who rented the cow acquired ownership of that cow [so that he is not responsible for it but is paid by the borrower]? Is it by the oath [that it has died a natural death]? Then let the one who hired the cow out say to the one who has rented it, 'Get out and take your oath with you, and I'll bring my suit against the one who has borrowed the cow!'"*

- B. *He said to him, "Do you think that the one who rented the cow acquires ownership of it by means of the oath that he takes? From the moment that the beast died, he has acquired ownership of it, and the purpose of the oath is only to placate the owner [as to the cause of death]."*
- I.2.** A. Said R. Zira, "There are times that the owner hands over many cows to the one who rents [a cow for a fee].
- B. *"How would that be the case? If Mr. X rented a cow from the owner for a hundred days and then Mr. Y went and borrowed it from him for ninety days [out of the hundred, so that when the ninety days were complete, Mr. X would have another ten days in which to use the cow], and then Mr. X went and rented it out from him for eighty days, then Mr. Y went and borrowed it from him for seventy days, and the cow died within the period of borrowing, for each span of borrowing the owner is liable to supply a cow."*
- C. *Said R. Abba of Difti to Rabina, "Now as a matter of fact, there is only one cow involved, the one that was brought in and taken out: taken out of the state of being borrowed and brought in to the state of being rented."*
- D. *He said to him, "But is the cow not at hand, that we may say such a thing to him? [Freedman: since the cow is dead, that argument cannot be used, and each act of borrowing and of renting forms a separate transaction]."*
- E. *Mar. son of R. Ashi said, "He has a claim only for two cows, one as to the act of borrowing, the other as to the act of renting, for there is one count of borrowing and one count of renting. [Freedman: Notwithstanding that there were two borrowings, they are regarded as one in the final analysis.] The one covered by the act of borrowing belongs entirely to the one who rented the beast out originally [and the borrower, here the actual owner, must pay for it], and as to the count of renting, he must work with the beast for the period of renting [and the owner has to provide an animal for the remaining period, ten days], and return it to the owner."*
- I.3.** A. Said R. Jeremiah, "There are circumstances in which both parties [the one who rents the cow and the one who borrows it from him] are obligated to a sin-offering **[36A]** and there are circumstances in which both parties [the one who rents the cow and the one who borrows it from him] are obligated to a sin-offering; there are occasions on which the one who rents out the beast is liable to a sin-offering and the one who borrows it to a guilt-offering, there are occasions on which the one who rents out the beast is liable to a guilt offering and the one who borrows it to a sin offering.
- B. "How so? For [falsely] denying, on oath, a monetary obligation, one is obligated for a guilt offering; for a false statement on oath, one is obligated to a sin-offering. [Freedman: if one swears falsely, profiting thereby, he is liable to a guilt-offering; if he does not profit thereby, thus taking an oath of utterance, he is obligated to a sin-offering.]
- C. "There are circumstances in which both parties [the one who rents the cow and the one who borrows it from him] are obligated to a sin-offering: for example, if the beast had died a natural death but they claimed that it had been in an accident, *the one who rented it, who is free of responsibility under both circumstances, is liable*

*to a sin offering, and the one who borrowed it, who is responsible in both cases, is also liable to a sin offering;*

- D. “and there are circumstances in which both parties [the one who rents the cow and the one who borrows it from him] are obligated to a sin-offering: for example, if it was stolen but they said that it had died on account of the work that it was doing, *in which case both of them have denied a monetary obligation, for they were responsible but have exempted themselves [by means of the oath];*
- E. “there are occasions on which the one who rents out the beast is liable to a sin-offering and the one who borrows it to a guilt-offering: for example if the beast died of natural causes but they said that it had died on account of the work that it was doing; *the one who rented it out one way or the other is exempt, so he is liable to a sin-offering, and the borrower, who is liable if it has died because of natural causes but has then exempted himself from obligation to pay through the claim that it has died on account of the work that it was doing is liable to a guilt offering;*
- F. “there are occasions on which the one who rents out the beast is liable to a guilt offering and the one who borrows it to a sin offering: for example, if the beast was stolen, but they said that it had died of natural causes; *the one who rented it out is the one who is liable in the case of a theft or a loss, and he has exempted himself from responsibility for repaying through the claim that it has died on account of natural causes, and so is liable to a guilt offering; the one who borrowed it one way or the other is liable to a sin offering.*”
- G. *So what’s his point?*
- H. *He proposes to dismiss the view of R. Ammi, who has said, “On account of no oath that is imposed by the judges does one bear responsibility by reason of the count of ‘an oath of utterance,’ because it is said, ‘or if a soul swear, uttering with his lips’ (Lev. 5:4, referring to an oath of utterance), referring then to an oath that one takes on his own initiative.”*
- I. *Thus [Jeremiah] demonstrates that the law does not accord with R. Ammi.*

**I.4.** A. *It has been stated:*

- B. A bailee who entrusted [the bailment] to another bailee —
- C. Rab said, “He is exempt. [He is not liable for anything for which he would not have been liable had he guarded the bailment himself.]”
- D. R. Yohanan said, “He is liable [even for accidents that were not to be prevented, for which he would not have been liable had he kept the bailment himself].”
  - E. *Said Abbaye, “In accord with the reasoning of Rab, one need not raise the question of an unpaid bailee who handed over the bailment to a paid bailee, for he has improved the conditions of the bailment. But even a paid bailee who handed the bailment over to an unpaid bailee, in which case he has diminished the standard of care of the bailment is exempt. Why so? Because in any event he has handed it over to a responsible person [who can give due care, whatever the circumstances of the bailment].*
  - F. *“In accord with the reasoning of R. Yohanan, there is no issue in respect to a paid bailee who handed the bailment over to an*

*unpaid bailee, in which case he has diminished the standard of care of the bailment. But even in the case of an unpaid bailee who handed the beast over to a paid bailee, in which case he has improved the conditions of the bailment, he remains liable. For [the bailor] can say to him, 'I don't want my bailment to be cared for by anybody else but only by you.'"*

- G. *Said R. Hisda, "This statement of Rab was not stated explicitly but derived by inference from the following case:*
- H. *"Certain gardeners would daily deposit their spades with a certain lady. One day they deposited them with one of themselves. When the man heard the sounds of a wedding, he went and deposited the spades with the same old lady. Between his leaving and his returning, the spades were stolen. When he came before Rab, the master declared him exempt [from having to make up the loss].*
- I. *"Now one who witnessed the trial drew the inference that it was on the count that a bailee who handed over a bailment to another bailee is exempt.*
- J. *"But that is not the operative consideration in this case. The case at hand was different, because every day they themselves had left their spades with that old lady [so he had no reason to suppose it was not a suitable bailee for that day as well]. [Hence Rab's opinion may not, after all, be that a bailee who entrusted the bailment to another bailee is exempt, that is, not liable for anything for which he would not have been liable had he guarded the bailment himself.]"*
- K. *R. Ammi was in session and going over this report [of Yohanan's view, D]. R. Abba bar Mammel objected to R. Ammi, "**He who rents a cow from his fellow, and then lent it to someone else, and it died of natural causes — let the one who rented it take an oath that it died of natural causes, and the one who borrowed it then pays compensation to the one who rented it** [because one who rents a cow is free from having to pay compensation in the case of natural death, but one who borrows without paying is obligated to compensate the owner even if the beast dies a natural death while in his possession].' Now [if Yohanan's position] is correct, then let the owner say to him, "I don't want my bailment to be cared for by anybody else but only by you."*
- L. *He said to him, "Here with what case do we deal? With one in which the owner gave permission to the one who rented it out to lend it to a third party."*
- M. *"If so, then the one who borrowed it should pay the owner!"*
- N. *"What he said to him is, 'at your discretion.'" [Freedman: He gave him general authorization, hence the one who rented the beast is regarded as the one who lent it and the payment is made to him.]*
- O. *R. Ammi bar Hama objected [by citing the following passage of the Mishnah], "**He who deposits coins with his fellow — [if the latter] (1) wrapped them up and threw them over his shoulder, (2) gave them over to his minor son or daughter, or (3) locked them up in an inadequate way, he is liable [to make them up if they are lost] , because he did not take care of them the way people usually take care [of things]. But if he did take care of them the way***

**people usually take care of things, he is exempt [M. 3:10].** *The reason then is that the son or daughter was a minor; lo, had they been adults, he would have been exempt from having to make restitution. But why? Let the bailor say to him, 'I don't want my bailment to be cared for by anybody else but only by you.'*

P. Said Raba, "Whoever leaves a deposit [with a third party] **[36B]** does so in the assumption that the bailee's wife and children [may take care of the bailment at some point or other]."

Q. *Said the Nehardeans, "You may deduce that position from the Mishnah-passage itself, for lo, it is explicit in saying, **gave them over to his minor son or daughter.** Lo, had he given them over to his adult son or daughter, he would have been exempt. It follows that had he given them over to outsiders, there would have been no difference whether they were adults or minors, he would have been minors. If the law were otherwise, the Tannaite authority should have said only 'minors.'*"

R. *That is decisive proof.*

S. *Said Raba, "The decided law is as follows: A bailee who entrusted [the bailment] to another bailee is liable.*

T. *"There is no issue in respect to a paid bailee who handed the bailment over to an unpaid bailee, in which case he has diminished the standard of care of the bailment. But even in the case of an unpaid bailee who handed the beast over to a paid bailee, in which case he has improved the conditions of the bailment, he remains liable. What is the reason? He may say to him, 'You are credible to me when you take an oath, but the other party is not credible to me when he takes an oath.'*"

**I.5.** A. *It has been stated:*

B. If the bailee was negligent in respect to the cow and it wandered off into a meadow where it died of natural causes,

C. Abbaye in the name of Rabbah said, "He is liable."

D. Raba in the name of Rabbah said, "He is exempt from liability [to pay restitution]."

E. Abbaye in the name of Rabbah said, "He is liable, *for any judge who does not give that judgment is no judge. He is liable not only in accord with the position of the one who maintains that if the beginning of an action takes place by reason of one's negligence and the end is merely by accident, he is liable. He is liable even in accord with the position of the one who says that in that case, one would be exempt. What is the reason? We invoke the principle that the very heat of the meadow is what killed the beast [so the death is because of negligence anyhow].*"

G. Raba in the name of Rabbah said, "He is exempt from liability [to pay restitution], *for any judge who does not give that judgment is no judge. He is not liable not only in accord with the position of the one who maintains that if the beginning of an action takes place by reason of one's negligence and the end is merely by accident, he is not liable. He is not liable even in accord with the position of the one who says that in that case, one would be liable. What is the reason? We invoke the principle, 'what difference does it make to the angel of death whether he carries out his mission here or in some other place?'*" [The initial negligence had nothing to do with the animal's death.]"

- H. *Now Abbayye concedes that if the beast had returned to the owner and then died, the bailee would have been exempt. Why so? Because lo, it has returned, so we cannot claim that the heat of the meadow has killed the beast.*
- I. *And Raba concedes that if the beast had been stolen from the meadow and then died of natural causes while in the thief's domain, the bailee would have been responsible. How come? Had the angel of death left the beast alone, it nonetheless would have been in the domain of the thief [and lost, so far as the owner was concerned, so the loss is a result of negligence on the part of the bailee, and he is responsible (Freedman)].*
- J. *Said Abbayye to Raba, "Now in accord with your view, that we admit the claim, 'what difference does it make to the angel of death whether he carries out his mission here or in some other place?' when R. Ammi was in session and going over this report [of Yohanan's view, and R. Abba bar Mammel objected to R. Ammi, "**He who rents a cow from his fellow, and then lent it to someone else, and it died of natural causes — let the one who rented it take an oath that it died of natural causes, and the one who borrowed it then pays compensation to the one who rented it** because one who rents a cow is free from having to pay compensation in the case of natural death, but one who borrows without paying is obligated to compensate the owner even if the beast dies a natural death while in his possession].' Now [f Yohanan's position is correct, then let the owner say to him, "I don't want my bailment to be cared for by anybody else but only by you"] and he said to him, 'Here with what case do we deal? With one in which the owner gave permission to the one who rented it out to lend it to a third party,' what he should have said to him is simply, 'what difference does it make to the angel of death whether he carries out his mission here or in some other place?'"*
- K. *He said to him, "Now in accord with your view, who invoke as the reason for Yohanan's ruling that the bailor can say, "I don't want my bailment to be cared for by anybody else but only by you,' the objection of R. Abba b. Mamel can be raised to begin with. But in accord with my view, which is that the owner can say, 'I believe you when you take an oath, but I do not believe the third party when he takes an oath,' the objection cannot be raised at all [Freedman: since in the Mishnah the one who rents out the beast is the one who takes the oath]."*
- L. *R. Ammi bar Hama raised this objection: "[**If a beast died of natural causes, lo, this counts as an unavoidable accident. If] one caused it distress and it died e.g., of cold or hunger, this does not count as an unavoidable accident. If it went up to the top of a crag and fell down, lo, this is an unavoidable accident. If] he brought it up to the top of a crag and it fell down and died, it is not an unavoidable accident [M. Baba Mesia 7:10A-E]. Lo, if it had died naturally, it would have been deemed an unavoidable accident, and he would not have been liable. Yet why should that be so? Let the bailor claim, 'The cold mountain air is what killed it, or the exhaustion of climbing the mountain is what killed it.'**"*
- M. *Here with what sort of case do we deal? With one in which he brought it up to a rich and good pasture land [in the mountains]. [That is quite*



*routine, and so the shepherd is not liable on the count of bringing the beast into cold air or tiring it out.]*

- N. *If that were the case, then the same rule should apply if it fell [since it was only right that he bring the beast up. Yet the rule is explicit: **If he brought it up to the top of a crag and it fell down and died, it is not an unavoidable accident.**]*
- O. *The liability is incurred because he should have supported it but did not do so.*
- P. *But then note the initial part of the same clause: **If it went up to the top of a crag and fell down, lo, this is an unavoidable accident.** Here too he should have supported it !*
- Q. *The case at hand deals with a situation in which he supported it when it went up and when it went down and fell [but the animal's weight was too much for him (Freedman), and that is why he is not liable to pay].*

**II.1 A. Said R. Yosé, “How should this one do business with his fellow’s cow? But [the funds paid for] the cow are to return to the owner:”**

- B. Said R. Judah said Samuel, “The decided law is in accord with R. Yosé.”
- C. *Said R. Samuel bar Judah to R. Judah, “You have said to us in Samuel’s name, ‘R. Yosé [37A] also differed in the first Mishnah-paragraph [since the same reasoning applies also to the following rule: **He who deposits with his fellow a beast or utensils, and they were stolen or lost, [if the bailee] made restitution and was unwilling to take an oath — (for they have said, “An unpaid bailee takes an oath and thereby carries out his obligation [without paying compensation for the loss of the bailment])” — [if then] the thief was found, [the thief] pays twofold restitution. [If] he had slaughtered or sold the beast, he pays fourfold or fivefold restitution. To whom does he pay restitution? To him with whom the bailment was left.**]* Here too does the law follow his opinion or is that not the case?”
- D. He said to him, “R. Yosé also differed in the first Mishnah-paragraph, and here too the decided law is in accord with R. Yosé.”
- E. *It also has been stated:*
- F. Said R. Eleazar, “R. Yosé also differed in the first Mishnah-paragraph, and here too the decided law is in accord with R. Yosé.”
- G. But R. Yohanan said, “R. Yosé concurred in the first case, for in that case, the bailee already has made restitution [and so acquired ownership of the stolen object].”
- H. *If he had already made restitution that would be the case, but if he had not made restitution, that would not be the case? But has not R. Hiyya bar Abba said R. Yohanan said, “**made restitution** bears the meaning not of actually having done so, but merely of having said, ‘I will pay’”?*
- I. *Then this is how to phrase matters: [But R. Yohanan said,] “R. Yosé concurred in the first case, for in that case, the bailee already has said, ‘Lo, I shall pay,’ [and so, in effect, has made restitution and acquired ownership of the stolen object].”*

The treatment of the present Mishnah-paragraph is considerably more satisfying than some that have gone before, because a rich theoretical interest generates abstract discussion of principles, rather than rather low-level exegesis of words and phrases. The first important inquiry is the theoretical problem at I.2, Zira's conception that, because of the rules before us, there are cases in which the one who gives over his cow as a rental incurs an almost limitless obligation. The real issue, however, is whether we classify each exchange, involving the same cow, as a distinct transaction, and this is raised at D, E. The next, and parallel, theoretical inquiry comes at I.3, with Jeremiah's composition, based on the given distinction between the sin-offering, compensating for a false oath from which one benefits, and a guilt-offering, compensation for one that yields no monetary gain. Joining that distinction with the rules governing bailments — none of the made explicit here — produces the rather intricate composition. But it yields a rather ordinary result, H. I do not see why No. 3 has to have been placed in the present passage, since it can have served as well in the discussion of types of oaths and the consequence of unwittingly taking one of them falsely. No. 4, by contrast, provides us with yet another theoretical problem, but one that does belong just where it is placed. For here we deal with a secondary expansion of our Mishnah-paragraph's case. We have had a renter lend out what he has rented; now we have a bailee entrust a bailment to another. At stake is a principle that has no bearing upon our Mishnah-paragraph, since what we want to know is whether the second bailee bears a liability that the first does not. No. 5 continues No. 4. So the treatment of the Mishnah-paragraph in the Talmud is entirely theoretical and essentially distinct from the problems and details of the Mishnah-paragraph. Here is a fine example of one discourse, that Talmud's, simply superimposed upon another, the Mishnah's, without clear and necessary connections at any point. If we wanted to see the Talmud as an essentially free-standing statement, merely tacked on to the Mishnah for appearance' sake, we could point to this marvelous composition as a fine example. The contrast between the whole of unit I and the rather minor contribution of II.1f. makes the same point still more clearly.

### 3:3

- A. [If] one said to two people, "I stole a maneh [a hundred zuz] from one of you and I do not know from which one of you it was."
- B. "The father of one of you deposited a maneh with me, and I do not know the father of which one of you it was,"
- C. [he] pays off a maneh to this one and a maneh to that one,
- D. for he has admitted it on his own.

### 3:4

- A. Two who deposited something with one person, this one leaving a maneh, and that one leaving two hundred [zuz] —
- B. this one says, "Mine is the deposit of two hundred [zuz ],"
- C. and that one says, "Mine is the deposit of two hundred [zuz ]" —
- D. he pays off a maneh to this one, and a maneh to that one,
- E. and the rest is left until Elijah comes.

- F Said R. Yosé, “If so, what has the deceiver actually lost?
- G. “But leave the whole sum until Elijah comes [and no one will be paid off].

### 3:5

- A. And so is the rule for two utensils, one worth a maneh, and one worth a thousand zuz —
- B. this one says, “The better one is mine,”
- C. and that one says, “The better one is mine” —
- D. he gives the smaller one to one of them.
- E. And from the [funds received from the sale of ] the larger one, he gives the cost of a smaller one to the other party.
- F. And the rest of the money [received for the sale of the larger one] is left until Elijah comes.

G. Said R. Yosé, “If so, what has the deceiver actually lost?

H. “But leave the whole [sum received for the sale of both utensils) until Elijah comes.”

- I.1 A. *[From the statement, [he pays off a maneh to this one and a maneh to that one] it follows that [since when one party lays claim and the confessed thief says, “I don’t know if it is yours or your fellow’s,” we do not rule that the money should be left in escrow,] we lay out money even on the basis of a doubt and do not rule, “Let the money stand with the one who is presumed to own it.”*
- B. *But that inference is contradicted by the following: Two who deposited something with one person, this one leaving a maneh, and that one leaving two hundred [zuz] — this one says, “Mine is the deposit of two hundred [zuz],” and that one says, “Mine is the deposit of two hundred [zuz]” — he pays off a maneh to this one, and a maneh to that one, and the rest is left until Elijah comes. [Why leave the money in escrow?]*
- C. *He said to him, “Are you proposing to compare a case of theft and a case of a bailment? In the matter of theft, in which case the man has violated a prohibition, rabbis have imposed an extra-judicial penalty; but in the case of a bailment, in which the bailee has not violated any extra-judicial penalty.”*
- D. *But the case of a bailment may be contrasted with another rule in a case of a bailment, and the case of a theft may be contrasted with another ruling in the case of a theft.*
- E. *The case of a bailment may be contrasted with another rule in a case of a bailment: “The father of one of you deposited a maneh with me, and I do not know the father of which one of you it was,” [he] pays off a maneh to this one and a maneh to that one, for he has admitted it on his own. And to this the following is to be brought in contrast: Two who deposited something with one person, this one leaving a maneh, and that one leaving two hundred [zuz] — this one says, “Mine is the deposit of two hundred [zuz ],” and that one says, “Mine is the deposit of two hundred [zuz ]” — he pays off a maneh to this one, and a maneh to that one, and the rest is left until Elijah comes.*
- F. *Said Raba, “In the first case [where only one person has deposited the money], he is treated as though the bailors had deposited their money with him in two*

*separate packages, in which case he should have paid close attention to which belonged to which; in the second, he is treated as though the two had made their deposits with him in a single package, so he was not expected to pay close attention, for example, if the two of them had made their deposits simultaneously, at the same moment. He may then lay claim as follows: 'You yourselves have not paid close attention to what you were doing, and am I supposed to pay close attention?''*

- G. *The case of a theft may be contrasted with another ruling in the case of a theft:*
- H. *Here we find [If] one said to two people, "I stole a **maneh** [a hundred zuz] from one of you and I do not know from which one of you it was," "The father of one of you deposited a **maneh** with me, and I do not know the father of which one of you it was," [he] pays off a **maneh** to this one and a **maneh** to that one, for he has admitted it on his own. And to this the following is to be brought in contrast: "If one has stolen something from one of five persons and does not know from whom he has stolen, this one says, 'From me has he stolen,' and that one says, 'From me has he stolen' — he leaves the stolen object among them and takes his leave," the words of R. Tarfon.*
- I. *It follows that [since when one party lays claim and the confessed thief says, "I don't know if it is yours or your fellow's," we do rule that the money should be left in escrow,] we do not lay out money even on the basis of a doubt and do rule, "Let the money stand with the one who is presumed to own it." [That the conflicts with the opening rule.]*
- J. *On what basis do you take for granted that the Mishnah-passage before us belongs to R. Tarfon [and not Aqiba, who rejects Tarfon's position]?*
- K. *It is because in this connection it has been taught on Tannaite authority: R. Tarfon concurs that [if] one said to two people, "I stole a **maneh** [a hundred zuz] from one of you and I do not know from which one of you it was," [he] pays off a **maneh** to this one and a **maneh** to that one. [So there really is a conflict between the two rules.]*
- L. *In that case, the victims were laying claim on him, while here, he proposes to carry out his obligations to Heaven. Note that the language is explicit: **for he has admitted it on his own.***
- M. *That proves it.*

**I.2** A. A master has said, "*In that case, the victims were laying claim on him.*"

B. *And what is the counterclaim?*

C. R. Judah said Rab said, "He remains silent."

D. R. Mattenah said Rab said, "That one **[37B]** protests [to each claimant, denying all knowledge of their allegations]."

E. *Now as to the view of him who says, he protests, silence is a confession.*

F. *But as to him who says, "He remains silent," silence in this case is not a confession, because he can claim, "The reason that I was silent before each party is that I was thinking, perhaps it was the other one."*

**I.3** A. A master has said, "...he leaves the stolen object among them and takes his leave."

- B. *But can all of them take it and go their way? Has not R. Abba bar Zabeda said Rab said, "In any case in which one is in doubt whether an article was left in a certain place, to begin with, he may not take it, but if he took it, he must not return it."*
- C. Said R. Safra, "It is left there. [The man has cleared himself, but the ownership of the object has to be proven by the claimants, and the court then decides.]"

**I.4.** A. Said Abbaye to Raba, "Did R. Aqiba not say [to Tarfon], 'This is not the way to remove the man from the transgression, unless he pays off the value of what was stolen to each one.' *It follows that we lay out money even on the basis of a doubt and do not rule, "Let the money stand with the one who is presumed to own it."*

B. *"Now note the contradiction in the following: If the house fell on him and on his mother [and we do not know who died first and hence who inherits], so that the heirs of the son say, 'The mother died first,' and the heirs of the mother say, 'The son died first,' these and those parties agree that they divide it. And said R. Aqiba, 'I concur in this case that the property remains in its former status'" [M. B.B. 9:10].* [Here, then, money does not change hands when there is doubt.]

C. *He said to him, "There you have two claims that rest on a perhaps, but in the case of the theft of one out of five persons, there is a case of a certainty as against a doubt, but as to the Mishnah-paragraph before us, [If] one said to two people, 'I stole a maneh [a hundred zuz] from one of you and I do not know from which one of you it was' — has a perhaps on both sides, and still, the rule is, [he] pays off a maneh to this one and a maneh to that one, for he has admitted it on his own."*

D. *How do you know that it represents the position of R. Aqiba? Because it has been taught in that connection on Tannaite authority: R. Tarfon concurs that [if] one said to two people, "I stole a maneh [a hundred zuz] from one of you and I do not know from which one of you it was," [he] pays off a maneh to this one and a maneh to that one. Now to whom does he make that concession? It is to R. Aqiba, who is commonly his debate-partner!*

E. *And how do you know that both sides have made a plea of "perhaps"?*

F. *First of all, because it is not stated, "They lay claim on him," and second, because R. Hiyya taught on Tannaite authority, "This one says, 'I do not know for sure,' and that one says, 'I do not know for sure.'"*

G. *But we have already established the context as that in which the guilty party wishes to carry out his duty to Heaven."*

**I.5** A. Said Rabina to R. Ashi, "And has Raba really said that in any case in which two distinct packages are deposited, one has to pay close attention? [Said Raba, "In the first case where only one person has deposited the money, he is treated as though the bailors had deposited their money with him in two separate packages, in which case he should have paid close attention to which belonged to which; in the second, he is treated as though the two had made their deposits with him in a single package, so he was not expected to pay close attention, for example, if the

*two of them had made their deposits simultaneously, at the same moment. He may then lay claim as follows: ‘You yourselves have not paid close attention to what you were doing, and am I supposed to pay close attention?’”]*

- B. *“But has not Raba — and some say, R. Pappa — said, ‘All concur in the case of two persons who left bailments [of lambs] with a shepherd that the shepherd leaves the bailment between them and takes his leave.’”*
- C. He said to him, “That is a case in which they left the lambs in the corral of the shepherd without his knowledge and consent.”

**II.1 A. And so is the rule for two utensils, one worth a *maneh*, and one worth a thousand *zuz* — [this one says, “The better one is mine,” and that one says, “The better one is mine” — he gives the smaller one to one of them. And from the funds received from the sale of the larger one, he gives the cost of a smaller one to the other party. And the rest of the money received for the sale of the larger one is left until Elijah comes. Said R. Yosé, “If so, what has the deceiver actually lost? But leave the whole sum received for the sale of both utensils until Elijah comes”:]**

- B. *It was necessary to present both [the instance of M. 3:4, the claim on the deposit of funds and the instance of M. 3:5, the claim on the deposit of objects]. For had we been given the first case, in that one rabbis will have taken the position that they did, because there is no loss, but in the latter case, where the loss involved [in the breakage of the larger utensil] is great, I might argue that they concur with R. Yosé.*
- C. *And if we had been given only the second case, involving the two utensils, I might have taken the view that in that case, R. Yosé takes the view that he does, but in the other, he concurs with sages. So it was necessary to present them both.*
- D. **[38A]** *Now lo, R. Yosé’s operative principle is that the deceiver should suffer a loss [and that applies to both cases in the same way]!*
- E. *Rather, both cases are necessary solely from the perspective of rabbis, and the intent of the Tannaite authority is to teach, not only this, but also that. [Freedman: Having first taught the instance of money, he proceeds to state, Not only do the rabbis rule thus where it involves no loss, but even in a dispute about utensils, where definite loss is caused.]*

This is a remarkably cogent discussion, and, even though the passage appears to do little more than clarify our Mishnah-paragraph, in fact a more ambitious agendum is underway. First of all, we deal with two distinct treatments of the same question, that is, to what degree must a self-confessed thief have to make exact restitution when the victim is not known with certainty. Second, we ask how to relate the dispute of Yosé and sages here and the dispute of Aqiba and Tarfon in a case that deals with the same principle but with different considerations of doubt altogether. We start with the most basic issue, which is, whether we transfer money in a case in which there is considerable doubt about the proper address of the money. That seems to be implicit in our Mishnah-passage and so the question is raised right away. Then we are able to compare the conflicting presuppositions on that matter of the laws at hand. Raba distinguishes the two cases, and, as we see, later on, even his premise is analyzed further, a fine mark of the cogent and single-minded composition of the whole. I.2 proceeds to



reconsider materials that at I.1 were tangential, and I.3 does the same. I.4, 5 then conclude the analysis of the materials that have served the purposes of the compositor of the whole, a mark, once more, of a thorough and satisfying analysis of all relevant cases, as well as of the principle to which the cases are meant to speak. II.1, by contrast, is a routine proof that the several cases set forth by the Mishnah are exemplary of distinct principles and therefore are required for some purpose.

### 3:6

- A. **He who deposits produce with his fellow**
- B. **even if it is going to go to waste —**
- C. **[the fellow] should not touch it.**
- D. **Rabban Simeon b. Gamaliel says, “He sells them in the presence of a court,**
- E. **“for he is in the position of one who thereby restores what is lost to its rightful owner.”**

**I.1** A. *What is the reasoning [behind the rule of A-C]?*

- B. Said R. Kahana, “A person prefers his own *qab* of produce over nine of his neighbor’s.”
- C. And R. Nahman bar Isaac said, “*We take account of the possibility that the bailor has declared the produce to be heave-offering and tithe in behalf of produce that he has in some other location. [If he had done so, then obviously the bailee should not touch the produce, which is in the status of priestly rations and not available for sale or use by common folk.]*”
- D. *An objection was raised from the following: **He who deposits produce with his fellow — lo, this one should not touch it. Therefore the householder [who retains ownership of the produce] may declare it to be heave-offering or tithes for produce located elsewhere [T. B.M. 3:7A-D].** Now with respect to the explanation of R. Kahana, we can understand the ruling and can make sense of the explanation beginning **therefore**. But with respect to the explanation of R. Nahman bar Isaac, what is the sense of the **therefore**? [The reason that the bailee may not touch the produce is precisely that the bailor may have declared it holy. It would then appear redundant.]*
- E. *This is the sense of the statement: now that rabbis have stated that the bailee may not sell the produce, for we take account of the possibility [of the owner’s having declared the produce holy], it is for that very reason — **therefore** — **the householder may declare it to be heave-offering or tithes for produce located elsewhere.***

**I.2** A. [With respect to the dispute, **the fellow should not touch it. Rabban Simeon b. Gamaliel says, “He sells them in the presence of a court, for he is in the position of one who thereby restores what is lost to its rightful owner”**], said Rabbah bar bar Hanah said R. Yohanan, “There is a dispute when the rate of wastage is normal, But when the rate of wastage is abnormal, all concur that the produce is to be sold by court order.” Now *vis à vis* the position of R. Nahman bar Isaac, that opinion assuredly presents a conflict [for he cannot concur, since

*he bailor may have declared it holy]. But is there a conflict with the position of R. Kahana?*

- B. *R. Kahana took the position [that a person prefers his own qab of produce over nine of his neighbor's] only where there is a normal rate of wastage. When he said, "person prefers his own qab of produce over nine of his neighbor's," it was only by way of an exaggeration.*
- C. *An objection was raised from the following statement: **Therefore the householder [who retains ownership of the produce] may declare it to be heave-offering or tithes for produce located elsewhere [T. B.M. 3:7A-D].** But should we not take account of the possibility that the rate of rotting was more than normal, and so the court has sold the produce, in which case the purchaser will be consuming produce that has not been properly tithed!*
- D. *Cases in which the rate of rotting is more than normal are not commonplace.*
- E. *But what if it does happen, shall we then sell the produce? And should one not take account of the possibility that the householder has declared this produce to be heave-offering or tithe for produce located elsewhere?*
- F. *When the produce is sold, it is sold only to priests [who have the right to eat this produce, which has been declared to be in the status of priestly rations], and it is sold only at the price that prevails for priestly rations [which, the demand being small, is substantially less than the price for produce that common folk can consume as well].*
- G. *Then from the viewpoint of R. Nahman bar Isaac also, why not simply sell the produce only to priests [who have the right to eat this produce, which has been declared to be in the status of priestly rations], and it is sold only at the price that prevails for priestly rations.*
- H. *The dispute concerns the following issue:*
- I. *Rabbah bar bar Hana takes the view that rotting at a more than normal rate is uncommon, and when it does take place, it exceeds the ordinary rate only after substantial time. Hence, if the owner had declared the produce to be heave offering or tithe for produce in some other location, he will have done so before the rate of loss has exceeded the normal, and when it does exceed the normal rate, we can sell it off to priests at the price prevailing for the same produce in the status of heave offering.*
- J. *But R. Nahman bar Isaac maintains that rotting at more than the ordinary rate is really quite commonplace, and when that sort of rotting takes place, it happens right away. Now if you maintain that we should sell the produce, there will be occasions on which one will go and sell the produce early on, and when the householder declares the produce to be heave offering or tithe for produce located elsewhere, he will not know that the bailee has already sold it off, in which case he will turn out to be consuming produce which is wholly untithed [that is, the produce he had in that other location].*
- K. *An objection was raised: **He who deposits produce with his fellow and the produce rotted, wine and it turned sour, oil and it stank, honey and it turns rancid, "even if they are going to waste, he should not touch the produce,"** the words of R. Meir. And sages say, "He finds a remedy for them*

and puts them up for sale in a court. He sells them to a third party. But he does not buy them for himself.” Along these same lines, charity supervisors who did not find poor folk among whom to distribute the beans that they have collected for the poor may sell the beans to others, but they do not sell it to themselves. Charity supervisors change money for others but they do not change money for themselves. [T. **B.M. 3:8A-H, 3:9A-D**]. Now, in this statement we see, it is taught on Tannaite authority, and the produce rotted. And does this not mean, even if the rate of wastage was more than average?

- L. *No, it means, only at the ordinary pace.*
- M. *But lo, it says, wine and it turned sour, oil and it stank, honey and it turns rancid — and this is always a case in which the rate of putrefaction is unusual!*
- N. *These fall into a different category, since once they reached that stage, they remain so [and do not deteriorate any further, so there is nothing to be gained by selling them, while produce rots more and more (Freedman)].*
- O. *But if oil stinks or honey turns rancid, [38B] for what good is it anyhow [so who would buy it]?*
- P. *The oil can be used by leather merchants, honey can be used to ease the sore spots on a camel's back.*

**I.3 A.** And sages say, “He finds a remedy for them and puts them up for sale in a court:”

- B. *What sort of a remedy does he find for them? [Freedman: since deterioration, in the case of oil and honey, does not go further, while the value has already dropped, so how is the matter remedied by the sale?]*
- C. *Said R. Ashi, “It is as to the gourds [in which the liquids are contained. These can be saved from further deterioration.].”*
- D. *In what matter then [do Meir and sages] differ [since Meir is supposed to agree that produce is to be sold if the wastage is above normal]?*
- E. *One authority maintains that sages take account of a great deal of wastage but not a small amount, while the other takes the view that sages take account even of a small amount of rotting.*

**II.1 A.** Rabban Simeon b. Gamaliel says, “He sells them in the presence of a court, for he is in the position of one who thereby restores what is lost to its rightful owner:”

- B. *It has been stated:*
- C. *R. Abba b. R. Jacob said R. Yohanan: “The decided law accords with the position of Rabban Simeon b. Gamaliel.”*
- D. *And Raba said R. Nahman: “It accords with sages.”*
- E. *Now lo, R. Yohanan has already made that statement [=C], for Rabbah bar R. Hana said R. Yohanan: “In any passage in our Mishnah that has been repeated by Rabban Simeon b. Gamaliel the law accords with his view, except for the three cases identified as Surety, Sidon, and the Second Ruling on Proof.”*

- F. *There is an Amoraic dispute concerning the opinions of R. Yohanan [Freedman: Rabbah b. Bar Hana held that he had stated a general rule, while Abba b. R. Jacob disputed it].*

### **Composite on Whether or Not a Relative May Dispose of the Property of a Captive**

- II.2** A. *From the position stated here in the view of Rabban Simeon b. Gamaliel we may infer that a relative may dispose of the property of a captive, while from the position of rabbis we may infer that a relative may dispose of the property of a captive. [If someone is taken captive leaving untended estates, may his next of kin take possession to save it from loss? Simeon b. Gamaliel says the bailee may sell the produce to save it, so the same reasoning would allow the next of kin to do the same.]*
- B. *Why should you reach such an inference? Perhaps the reason Rabban Simeon b. Gamaliel took the position that he did here is only because the stock itself [the rotting produce] is consumed, but in the case of the captive, he may also maintain that we do not permit the relative to take possession of the real estate [which may deteriorate but which will not be lost]. And, further, perhaps the reason rabbis took the position that they did in this case only to conform with the thinking of either R. Kahana [a man prefers his own qab of produce more than nine qabs of someone else] or R. Nahman b. Isaac [the owner may have declared the produce to be heave-offering or tithes]. But in that other case, they may concur that the relative does take over the property.*
- C. *Is that to suggest that the two form entirely independent considerations? But has not R. Judah said Samuel: "The law accords with the position of Rabban Simeon b. Gamaliel," and Samuel further said, "The relative does take over the estate of a captive." Now is this not because the form a single cogent case [so we cannot make the distinction proposed at B]?*
- D. *No, the two form entirely independent considerations. And reason sustains that judgment, for Raba said R. Nahman: "The decided law accords with the position of sages," and R. Nahman said, "The relative does take over the estate of a captive." Does that not prove that the two form entirely independent considerations?*
- E. *It proves that point.*

**II.3** A. *It has been stated:*

- B. *A captive that has been taken prisoner —*
- C. *Rab said, "A relative does not take over the management of his property."*
- D. *Samuel said, "A relative does take over the management of his property."*
- E. *If they have heard that he has died, all parties concur that a relative does not take over the management of his property. Where they differ is concerning a case in which they have not heard that he has died.*
- F. *Rab said, "A relative does not take over the management of his property," lest the relative allow the property to deteriorate.*
- G. *Samuel said, "A relative does take over the management of his property," for a master has said, "We value it as for a share-cropper, and he will not allow the*

*property to deteriorate.” [Should the owner return, the relative is given a share in the produce as a sharecropper (Freedman)].*

H. *An objection was raised from the following:*

I. R. Eliezer says, “The inference of the verse, ‘And my wrath shall wax hot and I will kill you with the sword’ (Exo. 22:23), tells me that their wives will be widows and their children orphans. Then what is the point of adding, ‘and your wives shall be widows and your children fatherless’ (Exo. 22:23)? It teaches that their wives will seek permission to remarry, and they will not be allowed to do so [since evidence that the husbands have died will not be available], and their children will want to take over their father’s estates, but they will not allow them to do so.”

J. Said Raba, “What we have derived is that they will not be permitted to take over the estates so as to sell them.”

K. *There was a case in Nehardea, and R. Sheshet ruled in the case in accord with this passage.*

L. *Said to him R. Amram, “Perhaps what we have derived is that they are permitted both to take over the estates and to sell them.”*

M. *He said to him, “Perhaps you come from Pumbedita, where they can pass an elephant through the eye of a needle. For these two cases are treated side by side, with the same law applying to the wives and the children. Just as in the one case, they are not allowed to remarry, so in the other, they are not allowed to take possession at all.”*

**II.4 A.** *Whether a captive that has been taken prisoner does or does not take over the management of his property is a dispute between Tannaite authorities as well, for it has been taught on Tannaite authority:*

B. **He who takes over the estate of a captive is not removed from it. Not only so, but if he heard a report that the ones assumed to have died and left the estate are coming back, if he went ahead and plucked up produce from the ground in any measure at all, lo, this one is rewarded for his promptness.**

C. **What is meant by such an estate of a captive? It is any one whose father or brothers or one of those who leave him an inheritance went overseas, and he heard that they had died, and he entered into his inheritance.**

D. **He who takes over a forsaken estate is removed from it. What is an abandoned estate? It is any one whose father or brothers or one of those who leave him an inheritance went overseas, and he has not heard that they had died, and he entered into his inheritance. [Tosefta: It is any estate, the death of the owner of which has not been reported, but into which one nevertheless has entered for purpose of inheritance.]**

E. **Rabban Simeon b. Gamaliel says, “I have heard that an abandoned estate is equivalent to a captive’s estate.”**

F. **He who takes over an abandoned estate — they retrieve it from his possession. What is an abandoned estate? It is any one whose father**

or brothers or one of those who leave him an inheritance is here, but we do not know where he has gone. [Tosefta: And in all of them, they estimate the value for restoring what is misappropriated as if the one who took over the estate had been in the status of a tenant farmer. What is abandoned property? Any of which the location of the owner is not known [T. Ketubot 8:3A-L].

- G. *What is the difference between the one kind, which is called “abandoned,” and the other, which is called [39A] “forsaken”?*
- H. “Abandoned” is against one’s will: “But the seventh year you shall let it rest and abandon it” Exo. 23:11), that is, by royal decree.
- I. ““Forsaken” is done voluntarily: “The mother shall be forsaken of her children” (Hos. 10:15).

**II.5** A. *It has been taught on Tannaite authority: And in all of them, they estimate the value for restoring what is misappropriated as if the one who took over the estate had been in the status of a tenant farmer.*

- B. *To which of the foregoing cases does it apply [property of captives, forsaken property, abandoned property]?*
- C. *If we say that it refers to the estate of a captive, lo, **this one is rewarded for his promptness so can there be any question about repayment for the improvements that the man has made to the property?** [Obviously not!]*
- D. *But should the statement refer, then, to forsaken property, lo, it has been taught, **He who takes over a forsaken estate is removed from it.***
- E. *Then it must refer to an abandoned estate.*
- F. *In accord with the view of whom [does the rule, **And in all of them, they estimate the value for restoring what is misappropriated as if the one who took over the estate had been in the status of a tenant farmer**] pertain?*
- G. *If we say that this accords with the position of rabbis, lo, it is stated explicitly, **He who takes over a forsaken estate is removed from it.** But if, then it is supposed to be the opinion of Rabban Simeon b. Gamaliel, lo, he has said, “**I have heard that an abandoned estate is equivalent to a captive’s estate.**”*
- H. *It is equivalent to a captive’s estate but also not wholly so. It is equivalent to a captive’s estate in that **he is not removed from it,** but it is not equivalent to a captive’s estate in that, while in the case of a captive’s state, **this one is rewarded for his promptness,** in the present case, **they estimate the value for restoring what is***



**misappropriated as if the one who took over the estate had been in the status of a tenant farmer.**

- I. *How does this matter differ from the following case, of which we have learned in the Mishnah: **He who lays out expenses for the upkeep of the property of his wife, whether he laid out a great deal of money and received little usufruct, or whether he laid out a small amount of money and received much by way of usufruct — what he has laid out, he has laid out, and the usufruct which he has enjoyed, he has enjoyed. [But if he laid out money for the upkeep of the estate and did not enjoy the usufruct at all, there being no return, he should take an oath to verify the amount which he has laid out as expenses, and he may then collect in recompense from her by deduction from her marriage contract what he has covered in the oath] [M. Ket. 8:5K-Q].** [The usufruct belongs to the husband, the principal remains the wife's. The husband cannot strike a balance between expenditure and revenue. Why not rule in the same way in the instance of abandoned property, instead of regarded the next of kin as a share cropper?]*
- J. *Lo, the matter is analogous only to the following, which R. Judah said R. Hisda said, "He who incurs expenditures to maintain the property of his wife, who is a minor [and a fatherless child; the mother or brothers have married her off, and she can annul the matter when she reaches maturity by refusing the husband at that time], is regarded as though he had done so for an outsider." Therefore, since the husband could not wholly rely upon the relationship [to produce a return on his investment, since the wife can simply annul the marriage], rabbis ordained that he could be repaid, so that the estates would not be allowed to deteriorate under his management. Here too, rabbis enacted a measure of relief on his behalf, so that the estates would not be allowed to deteriorate under his management.*

**II.6 A. And in all of them, they estimate the value...as if the one who took over the estate had been in the status of a tenant farmer:**

- B. *What does the language, **And in all of them** mean to encompass?*
- C. *It is meant to encompass the case that is covered by that which R. Nahman said Samuel said, "As to one who is taken captive, a relative is allowed to take over his estate. If he went forth with full*

knowledge and intention, a relative is not allowed to take over the management of his estate.

- D. *R. Nahman in his own account said, "One who flees is in the status of one who is taken captive."*
- E. *Fleeing on what account?*
- F. *If we say on account of the poll tax, then that is fully voluntary.*
- G. *Rather, it is one who flees on account of rebellion [against the state]?*

**II.7** A. Said R. Judah said Samuel, "A captive who was taken away leaving standing grain that was to be reaped, grapes that were to be vintaged, dates that were to be harvested, or olives that were to be gathered, the court takes over his estate and appoints a guardian to reap, vintage, harvest, and gather, and then the next of kin is permitted to take over the estate."

- B. *Why not appoint a permanent guardian of the estate?*
- C. *A permanent guardian is not appointed for fully-bearded men. [It is not fair to expect a guardian to work for nothing for an adult.]*

**II.8** A. Said R. Huna, "A minor is not permitted to take over the estate of a captive, nor a relative to take over the estate of a minor, nor a relative of a relative to take over the estate of a minor."

- B. *"A minor is not permitted to take over the estate of a captive:" he may permit the property to deteriorate.*
- C. *"nor a relative of a relative to take over the estate of a minor:" this refers to the relatives of the mother.*
- D. *"nor a relative to take over the estate of a minor:" since the minor cannot prevent it, the relative may simply misappropriate the property for his own use.*
- E. Said Raba, *"The statement of R. Huna yields the inference that one cannot acquire through mere usucaption the property of a minor [39B] even if the minor has come of age.*
  - F. *"But that pertains only to the brother on the father's side [who may claim that he has inherited the field from his father anyhow], but as to the brother on the mother's side, there is no objection.*
  - G. *"And the problem with the brother on the father's side forms a consideration only as to real estate, but as to houses, there is no concern.*
  - H. *"And as to real estate, that is not problem except in the case of a field that has no deed of partition drawn up, but if a deed of partition had been drawn up, it is generally known [so no false claim is likely]."*
  - I. *But that is not the case, for it makes no difference whether it is a brother on his father's side or a brother on his mother's side, whether involved is land or also houses,*

*whether a deed of partition has been drawn up or not — we in any case do not authorize such as these to acquire through mere usucaption the property of a minor.*

- II.9** A. *An old lady had three daughters. She and one daughter were taken captive, and one of the other two daughters died, leaving a child. Said Abbaye, “How shall we rule in this case? Should we temporarily assign the estates to the surviving sister? Perhaps the old woman is dead, and a relative is not permitted to take over the estates of a minor and administer them.*
- B. *“Should we assign the estates to the child? Perhaps the old lady is not dead, and a minor is not permitted to take over the estate of a captive.”*
- C. *Said Abbaye, “Therefore let the estate be divided. Half is to be given to the surviving sister, and for the other half we shall appoint an administrator to take care of the estate of the minor.”*
- D. *Said Raba, “Since we appoint an administrator for half, we appoint an administrator for the other half as well.”*
- E. *In the end they heard that the old lady had died. Said Abbaye, “A third goes to the sister, a third to the child, and as for the third third [which belongs to the surviving daughter, in captivity], a sixth goes to the sister and an administrator is appointed for the other sixth in behalf of the child.”*
- F. *Said Raba, “Since we appoint an administrator for one sixth we appoint an administrator for the other sixth as well.”*
- II.10** A. *To Mari bar Isaaq came his brother from Be Hozai [Khuzistan], saying, “Divide father’s estates with me. [Give me half of what you have inherited from our common father.]”*
- B. *He said to him, “I don’t know you.”*
- C. *The case came before R. Hisda, who ruled, “He [Mari] has spoken well to you, for it is written, ‘And Joseph knew his brothers, but they did not know him’ (Gen. 42: 8), meaning that he had gone forth without the mark of a beard but come back with the mark of a beard.*
- D. *He said to him [the brother], “Go and bring witnesses who can testify that you are his brother.”*
- E. *He said to him, “I do have such witnesses, but they are afraid of him, because he is a very powerful man.”*
- F. *He said to [Mari], “Then you go and bring witnesses that he is not your brother.”*
- G. *He said to him, “Is this not the law: he who lays claim on his fellow bears the burden of proof?”*
- H. *He said to him, “This is how I judge you and everybody who is powerful like you.”*

- I. *He said to him, "Then [if that is how things really are] one way or the other, witnesses will come but not give testimony [as to the truth, and you will dismiss anything they say for the same reason, namely, I am supposedly so powerful as to intimidate everybody with whom I deal]."*
- J. *He said to him, "They will not do two wrongs. [Freedman: Witnesses who can testify to your disadvantage may repress their evidence through fear of you, which is one wrong, but they will certainly not commit another by testifying falsely in your favor.]"*
- K. *So in the end witnesses came and testified that he really was his brother.*
- L. *The brother said to him, "Let him divide up with me the vineyards and gardens that he has planted."*
- M. *[Hisda] said to him, "His claim is entirely valid, for we have learned in the Mishnah: **If one has left both adult and minor sons, and the adults improve the property, the value of the increase is in the middle [and shared among all the heirs]** [M. Baba Batra 9:3A-C] [40A].*
- N. *"And so too did Rabbah say, 'The value of the increase is in the middle [and shared among all the heirs].'"*
- O. *Said Abbayye to him, "But are these cases truly parallel? In that case the adult sons are well aware that there are minors, and they forego [the value of their labor in their behalf], but here, did the man know that he had a brother, that he should forego the value of his labor in his behalf?"*
- P. *The matter rolled along until it reached the court of R. Ammi. He said to him, "More than this did sages rule: **they estimate the value for restoring what is misappropriated as if the one who took over the estate had been in the status of a tenant farmer.** [The one who is worked is paid for the improvements as a tenant farmer, getting half, third, or a fourth in accord with the local usage, though the land was not his.] *Should he then not be paid likewise on his own?* [Freedman: Even if the claimant is entitled to half of the improvement, Mari is entitled to a fraction of that half as though he were a tenant farmer, and Hisda had not allowed for this.]"*
- Q. *The matter came to the court of R. Hisda, who said to them, "Are they really comparable? In that other case, it was with permission of the court that the administrator entered the property, but here he entered the property without authority at all. [There was no court order that gave him the property when his father died.] Moreover, the plaintiff was a minor, and a relative is not allowed to administer a minor's estate."*
- R. *They brought this back to R. Ammi, who said to him, "They did not present me with a complete narrative of the suit by telling me that he was a minor."*

We deal with both components of the Mishnah-paragraph, at units I and II, respectively. The discussion is unusually thorough-going. I.1 commences with an account of the presumption that may be operative in not intervening in the bailment, Kahana's and Nahman's, "A person prefers his own qab of produce over nine of his neighbor's." or, "We take account of the possibility that the bailor has declared the produce to be heave-offering and tithe in behalf of produce that he has in some other location. These two explanations are then examined at some length, I.2. We proceed to a thorough analysis of the court's role in administering property of an absent proprietor. This is a free-standing composite, joined, in a rather clumsy way, only at the opening lines.

### 3:7

- A. He who deposits produce with his fellow —
- B. lo, this one [with whom the bailment is left, when returning it,] may exact [from the owner the following] deductions [due to natural depletion of the produce]:
- C. (1) for wheat and rice, nine qabs and a half for a kor;
- D. (2) for barley and durra, nine qabs to a kor;
- E. (3) for spelt and linseed, three seahs to a kor
- F. All is relative to the quantity, all is relative to the time [it is left].
- G. Said R. Yohanan b. Nuri, "But what difference does [quantity or time] make to mice? Will they not eat [plenty] whether it is from a large volume or a small volume of grain?
- H. "But he may not exact from the owner the stated reductions,
- I. "except from a single kor alone."
- J. R. Judah says, "If it was a large volume of produce, he may not exact from the owner the stated reductions,
- K. "for it increases [in bulk as it is stored away]."
- I.1** A. *But rice decreases by more than that!*
- B. Said Rabbah bar bar Hanah said R. Yohanan, "As to rice, they referred to peeled rice."
- II.1** A. (3) for spelt and linseed, three *seahs* to a *kor*:
- B. Said R. Yohanan said R. Hiyya, "This refers to [Freedman:] linseed in its calyxes."
- C. *So too we have learned on Tannaite authority:* For spelt and linseed in its calyxes and unpeeled rice, three *seahs* per *kor*.
- III.1** A. All is relative to the quantity, all is relative to the time [it is left]:
- B. *It was taught on Tannaite authority:* so it is per *kor* per year.
- IV.1** A. Said R. Yohanan b. Nuri, ["But what difference does [quantity or time] make to mice? Will they not eat [plenty] whether it is from a large volume or a small volume of grain? But he may not exact from the owner the stated reductions, except from a single *kor* alone]:"

- B. *It has been taught on Tannaite authority: They said to R. Yohanan b. Nuri, “Much of the grain deteriorates, and much is scattered [besides what the rats take, so it does depend on quantity (Freedman)].”*

**IV.2.** A. *It has been taught on Tannaite authority: Under what circumstances? When he has combined the bailment of grain with his own produce. But if the deposited produce was kept by itself, he may simply say to him, “Here is what is yours before you” [T. Baba Mesia 3:9G-I].*

- B. *But if he has combined the bailment of grain with his own produce, what difference does it make? Let us just see how much his was!*
- C. *The law speaks of a situation in which he does not know just how much his had been.*

**V.1** A. **R. Judah says, [“If it was a large volume of produce, he may not exact from the owner the stated reductions, for it increases in bulk as it is stored away:]”**

- B. *What constitutes “a large volume of produce”?*
- C. *Said Rabbah bar bar Hana said R. Yohanan, “Ten kors.”*
- D. *It has been taught likewise on Tannaite authority: A large volume of produce is ten kors.*

**V.2.** A. *A Tannaite authority taught before R. Nahman, “Under what circumstances [does Judah’s rule pertain]? If he measured out grain from him from his own granary and returned it to him out of the granary. But if he measured it for him out of his house and returned it to him out of his house, he may not make a deduction for decreases, because the quantity then increases [T. Baba Mesia 3:10H-I].”*

- B. *He said to him, “And are we dealing with dumb-bells, who give with a large measure and take back with a small one? Perhaps the reading should be, ‘the season of the granary’ [that is, the harvest]. And this is how to read the passage: Under what circumstances [does Judah’s rule pertain]? If he measured out grain from him in the harvest season and returned it to him in the harvest season. But if he measured it for him in the harvest season and returned it to him in the rainy season, he may not make a deduction for decreases, because the quantity then increases.”*
- C. *Said R. Pappa to Abbaye, “If so the barrel [that holds the produce] should burst!”*
- D. *It once happened that the barrel [that holds the produce] did burst.*
- E. *If you wish, I shall say that it is because of the tightness of the crops [Freedman: tightly pressed together in the barrel, they have no room to expand, so they caused it to burst].*

I see little more here than routine Mishnah-glossing; no large principles are adduced, nor does the subject-matter intersect with a principle that permits comparison and contrast with some other topic altogether.

### 3:8

- A. **He exacts [a reduction] of a sixth for wine.**
- B. **R. Judah says, “A fifth.”**
- C. **He exacts [reduction] of three logs of oil per hundred —**



- D. a log and a half for the sediment, and a log and a half for absorption [into the walls of the clay jars].
- E. If it was refined oil, he may not exact a reduction for the sediment.
- F. If the jars were old, he may not exact a reduction for absorption.
- G. R. Judah says, “Also: He who sells refined oil to his fellow through the year —
- H. “lo, [the latter] must accept upon himself [agree to] a reduction of a log and a half per hundred because of sediment.”

- I.1 A. *But there is no dispute [at M. 3:8A-B]. One authority refers to the conditions prevailing in his locale, and the other to the conditions that pertain in his.*
- B., *In the locale of the first authority, they would cover the inside of wine barrels with wax, which prevented the wood from absorbing much wine, while in the authority of the second, they covered the inside of the barrels with pitch, and the wood absorbed more wine.*
- C. *If you prefer, I may explain that it is because of the clay that was used for the barrel.*
- D. *In one locale the clay absorbed more wine, in the other less.*
- I.2 A. *In the locale of R. Judah they would put forty-eight jugfuls into the standard barrel, a barrel was sold at six zuz, and R. Judah retailed six jugfuls at a zuz.*
- B. **[40B]** *Deduct thirty-six from the forty-eight for six zuz, leaving twelve; deduct eight, which is a sixth allowed for absorption, leaving four.*
- C. *But Samuel has said, “He who makes a profit must not profit by more than a sixth”?*
- D. *There are the barrels and the lees.*
- E. *If so, it exceeds a sixth.*
- F. *But you have to take account of the trouble of going about business as well as the cost of advertising [the crier].*

- II.1 A. **If it was refined oil, he may not exact a reduction for the sediment. [If the jars were old, he may not exact a reduction for absorption]:**
- B. *But it is not possible that the barrel will not absorb any of the oil!*
- C. *Said R. Nahman, “The reference is to those that are lined with pitch.”*
- D. *Abbayye said, “You may even say that the reference is to those that are not lined with pitch. But once they are loaded, they are loaded [and cannot absorb any more than they have already absorbed].”*

- III.1 A. **R. Judah says, “Also: He who sells refined oil to his fellow through the year — lo, [the latter] must accept upon himself [agree to] a reduction of a log and a half per hundred because of sediment:”**
- B. *Said Abbayye, “When you look into the matter, you will note that, in the view of R. Judah, lees may be mixed with the oil, and in rabbis’ view, lees may not be mixed with the oil.*
- C. *“in the view of R. Judah, lees may be mixed with the oil: that is why the purchaser must accept the lees, for the seller can say to him, ‘If I had wanted to mix it up for you, could I not have done so? So now too, take it as is.’”*

- D. *But let him reply, "If you actually had mixed it up for me, I could have sold it off with the rest. But now what in the world can I do with it? I cannot sell it off separately."*
- E. *This refers to a householder, who wants the oil to be clear.*
- F. *Then let him say to him, "Since you have not mixed it up for me, you have given up in my favor your right to mingle the lees with the oil."*
- G. *R. Judah is consistent with his generally held opinion, which is not to accept a statement of renunciation. For we have learned in the Mishnah: **He who sells the yoke has not sold the oxen; if he sells the oxen, he has not sold the yoke. R. Judah says, "The price is what settles the issue. If one says to another, 'Sell me your yoke for two hundred zuz,' it is obvious that a yoke is not price at two hundred zuz, [so the oxen go with]. But sages say, "Price proves nothing" [M. Baba Batra 5:1E-N].***
- H. *"...and in rabbis' view, lees may not be mixed with the oil: that is why the purchaser does not have to accept the lees. He can say to the vender, 'If you had wanted to mix it up, would you have been allowed to do so? Now too I will not accept it.'"*
- I. *R. Pappa said to Abbaye, "Quite to the contrary, the opposite inference is more reasonable, namely, in the view of sages, lees may be mixed with the oil, and in R. Judah's view, lees may not be mixed with the oil.*
- J. *"in the view of sages, lees may be mixed with the oil: that is why the purchaser does not have to accept the lees. He can say to the vender, 'Since you did not mix it up for me, you have given up in my favor your right to mingle the lees with the oil.'"*
- K. *"and in R. Judah's view, lees may not be mixed with the oil: that is why the purchaser must accept the lees, for the seller can say to him, 'If I wanted to mix it up, I could not have done so, while you refuse to accept it separately; if one buys and sells at the same price, is such a person going to be a very successful merchant? [Obviously not, and such an arrangement is not contemplated.]"*

- III.2.** A. *A Tannaite authority taught: All the same are the purchaser and the depositor when it comes to the scum [of oil or wine].*
- B. *What is the meaning of "when it comes to the scum [of oil or wine]"?*
  - C. *If we say that just as the purchaser does not accept the scum, so the depositor is not required to accept it back, let the bailee say to him, "What in the world am I going to do with your scum?" To the contrary, just as the depositor must accept the scum, so must the purchaser accept it.*
  - D. *But does the purchaser have to accept the scum? And has it not been taught on Tannaite authority: R. Judah said, "The loss due to the muddle oil is assigned to the seller alone, since the purchaser accepts a log and a half of sediment without the scum [Freedman: since one and a half percent of the is sediment, he has a right that the rest should be clear and without scum].*
  - E. *There is no conflict, the one treats a person who pays his money in Tishri and receives the wine in Nisan at the prices of Tishri, the other speaks of one who pays his money in Nisan and takes the oil in Nisan at the prices of Nisan. [Freedman: In Tishri the oil is generally turbid with scum on top, so the price is*

low; he has to accept it. In Nisan the prices are high, the oil is clear and scum-free, so he can refuse it.]

The treatment is wholly focused upon the Mishnah's statements, which are clarified point by point. III.1 is the only component of more than routine interest.

### 3:9

- A. **He who deposits a jar with his fellow,**
- B. **and the owner did not specify a place for it,**
- C. **and [someone] moved it and it was broken —**
- D. **if in the midst of his handling it, it was broken,**
- E. **[and if he moved it to make use of it] for his own needs, he is liable.**
- F. **[If he moved it] for its needs, he is exempt.**
- G. **If after he had put it down, it was broken,**
- H. **whether he had moved it for his own needs or for its needs, he is exempt.**
- I. **[If] the owner specified a place for it,**
- J. **and [someone] moved it and it was broken —**
- K. **whether it was in the midst of his handling it or whether it was after he had put it down,**
- L. **[if he had moved it] for his own needs, he is liable.**
- M. **[But if he had moved it] for its needs, he is exempt.**

- I.1 A.** [He who deposits a jar with his fellow, and the owner did not specify a place for it, and [someone] moved it and it was broken — if in the midst of his handling it, it was broken, [and if he moved it to make use of it] for his own needs, he is liable:] *In accord with whose principle is the Mishnah's rule?*
- B. *It is R. Ishmael, who has said that we do not require the owner's knowledge and consent.* [It issue is whether, in returning an object to the owner, one is obligated to inform the owner that he has done so. Freedman: The first clause states that if one moved the jar for his own purpose, puts it down, and then the jar is broken, he is not responsible. Now when he moves it for his own purpose, he is regarded as having stolen it, since the bailee must not make any use of the bailment. When a person steals an object, he is responsible for it until he returns it *and* informs the owner that he has returned it. Ishmael holds, however, that the owner's knowledge is not necessary. When he puts the barrel down, the bailee thereby has returned it to the owner, and this is without the owner's knowledge. The Mishnah in the present passage likewise treats the bailee as not responsible, so the rule accords with Ishmael's principle.]
- C. *For lo, it has been taught on Tannaite authority:* "He who steals a lamb from the fold or a *sela* from a purse must return what he has stolen to the place from which he stole it [and then is no longer responsible for what happens to the lamb or the coin]," the words of R. Ishmael.
- D. R. Aqiba says, "[41A] The knowledge of the owner is required [for the transaction to be complete]."

- E. *But if the passage accords with the principle of R. Ishmael, why make explicit, **and the owner did not specify a place for it?** Even if the owner had not specified a place for it, he should also not be liable.*
- F. *The sense of the passage is, “it goes without saying,” in the following way: One need not say that if the owner had designated a place for it, the owner’s knowledge of return of the object is not required, since the object has been put in its designated place; but even if the owner did not designate a place for it, so that the place in which the bailee has placed the object is not its place, nonetheless even here, the owner’s knowledge is not required.*
- G. *Then let me point to the second part of the same passage: **[If] the owner specified a place for it, and [someone] moved it and it was broken — whether it was in the midst of his handling it or whether it was after he had put it down, [if he had moved it] for his own needs, he is liable. [But if he had moved it] for its needs, he is exempt.***
- H. *This accords with the position of R. Aqiba, who has said that [for the return of the object to the domain of the owner], we require the full knowledge and consent of the owner.*
- I. *But if the passage accords with his principle, why make explicit, **and the owner did specify a place for it?** Even if the owner had not specified a place for it, he should also be liable.*
- J. *The sense of the passage is, “it goes without saying,” in the following way: One need not say that if the owner had not designated a place for it, the owner’s knowledge of return of the object is not required, since the object has been put in a place that is not designated for it; but even if the owner did designate a place for it, so that the place in which the bailee has placed the object is its place, nonetheless even here, the owner’s knowledge is required.*
- K. *Then the opening clause represents the position of R. Ishmael, and the closing one, of R. Aqiba?*
- L. *That is quite correct, for, said R. Yohanan, “Whoever can explain for me the Mishnah-paragraph concerning the jar **[He who deposits a jar with his fellow]** will have me as his bath-attendant to bring his clothing after him to the bath.*
- I.2. A.** *Before Rab R. Jacob bar Abba explained the passage to speak of a case in which the bailee had taken the jar with the intention of stealing it [in which case the qualifications introduced earlier need not apply].*
- B. *Before Rab R. Nathan bar Abba explained the passage to speak of a case in which the bailee had taken the jar with the intention of using it. [Freedman: These two Amoraim explain the Mishnah so that the whole may agree with one Tannaite authority. R. Jacob b. Abba explains: the first clause means that he returned it to its place, since no particular place having been assigned to it, wherever he puts it is its place. Therefore, if it is broken, he is free from responsibility, the author being R. Ishmael, who maintains that the owner’s knowledge of the article’s return is unnecessary. But in the second clause the meaning is that it is not returned to its place; therefore he is liable. For though R. Ishmael holds that the owner’s knowledge is unnecessary, yet it must be put back into its place before the purloiner is freed of his responsibility. This, however,*

holds good only if he takes the barrel in the first place intending to steal it; if he merely desires to borrow it, we are not so strict, and wherever he put it back, even not in the place assigned to it, suffices to free him. R. Nathan b. Abba explains the passage likewise, but holds that even if the bailee takes it with the mere intention of using some of its contents, he forthwith becomes responsible, and remains so until he returns it to its own place. The assumption that the second clause means that he does not return it to its own place is implicit on both explanations.]

- C. *Then what is at issue between these two authorities [in their diverse explanations of the same passage in accord with the theory of the same Tannaite master]?*
- D. *It concerns whether [for liability to be incurred].unlawful use of an object* ["If a man hand over to his neighbor...any best to keep, and it die or be hurt, then shall an oath of the Lord be between them both that he has not put his hand unto his neighbor's goods" (Exo. 22:9-10), meaning, made unlawful use of them] *must involve actual damage.*
- E. *The authority who says that the bailee took the jar to steal it [R. Jacob bar Abba explained the passage before Rab to speak of a case in which the bailee had taken the jar with the intention of stealing it] takes the position that unlawful use of an object must involve actual damage [for liability to be incurred].*
- F. *The authority who says that the bailee took the jar merely to use it [R. Nathan bar Abba explained the passage before Rab to speak of a case in which the bailee had taken the jar with the intention of using it] holds that unlawful use of an object need not involve actual damage [for liability to be incurred].* [If the bailee misappropriates the bailment for his own use, he is responsible for what happens to it. In the case of the one who had the intention of stealing the object but did not use it, he is not liable, for there was no damage. In the case of the one who took the jar merely to use it, merely taking the object to use it is sufficient to impose liability for damages.]
- G. *To this R. Sheshet objected, "But has 'taken it' been specified? The exact language is, 'move it.'"*
- H. *Rather, said R. Sheshet, "In this case with what situation do we deal? A case in which one took the object in order to reach birds [while standing] on it. [The Tannaite authority of the Mishnah] takes the position that borrowing without the owner's knowledge and consent is an act of thievery, and the whole follows the position of R. Ishmael, with the latter clause dealing with a case in which the man put the object in a place that does not belong to the jar, while R. Yohanan [was puzzled because he took for granted that] the bailee had put the jar into its proper place."*

**I.3.** A. *It has been stated:*

- B. Rab and Levi — one said, "Unlawful use of an object must involve actual damage [for liability to be incurred]."
- C. And the other said, "Unlawful use of an object need not involve actual damage [for liability to be incurred]."
- D. *You may draw the conclusion that it is Rab who takes the position that unlawful use of an object need not involve actual damage [for liability to be incurred].*

- E. *For it has been taught on Tannaite authority: A shepherd who was guarding his flock, but left the flock and went to town, and a wolf came and tore a beast or a lion and trampled one — he is exempt from the obligation of having to make restitution. But if, prior to leaving the flock, he had placed his staff or wallet upon the best, he is liable. Now we may dwell upon this matter. It is because, prior to leaving the flock, he had placed his staff or wallet upon the best, that he is liable. But he had taken them away! Said R. Nahman said Rabbah bar Abbuha said Rab, “It means that the object is still on the beast.” But even though the object was still on the beast, what difference does it make? Lo, he had not drawn the beast and so taken possession of it! And R. Samuel bar R. Isaac said Rab said, “It is a case in which he had hit the beast with the staff and it ran before him [and that is tantamount to an act of drawing the beast. So there had been both unlawful use of the beast, in that the bailee had put his staff or wallet on it, and also an act of acquisition.] And yet there had been no damage to the beast. From that, is it not to be inferred, that he takes the position that unlawful use of an object need not involve actual damage [for liability to be incurred].” But I might say that he had weakened the beast with his staff [and so damaged it, hence there was actual damage]! You may derive that fact from a close reading of the passage, for it has been taught, he had hit the beast with the staff. That proves the point. Now since it is the fact that Rab takes the view that unlawful use of an object must involve actual damage [for liability to be incurred], it is Levi who takes the position that unlawful use of an object need not involve actual damage [for liability to be incurred].*
- F. *What is the reason for the position of Levi [that unlawful use of an object need not involve actual damage for liability to be incurred]?*
- G. *Said R. Yohanan in the name of R. Yosé b. Nehorai, “Unlawful use of an object in the hands of a paid bailee is different from that which pertains to an unpaid bailee. [41B] [Exo. 22: 9-10 refer to a paid bailee. Exo. 22: 6 speak of an unpaid bailee. He has only to take an oath that he has done nothing wrong and does not have to make restitution.] But I [Yohanan] say that it is not different.” Now how might it be different? For if unlawful use were not specified in connection with the case of a paid bailee, it would have been easy to infer the rule from the case of an unpaid bailee, through the following argument: if an unpaid bailee, who does not have to make up loss due to theft or loss of the object, still is liable should he make use of the bailment, then a paid bailee, who is responsible for theft or loss, surely should be liable if he makes unlawful use of it. Why then did Scripture introduce both cases? Scripture referred explicitly to them both in order to teach you that unlawful use need not involve damage for liability to be incurred. “But I say that it is not different in accord with the position of R. Eleazar, who says, ‘Both have the same purpose.’”*



- H. *“What is the meaning of the statement, ‘Both have the same purpose’?”*
- I. *“It is that one may raise the following problem in connection with the proposed argument a fortiori: the distinguishing trait of the unpaid bailee [which accounts for the fact that he will be responsible for theft or loss if he makes unlawful use of it,] is that he must pay restitution for double the value of the beast should he falsely claim that the beast has been stolen [and that penalty does not apply to the paid bailee, so the unpaid bailee in other ways will be subject to the more stringent rule, also, that he will be responsible for theft or loss if he makes unlawful use of the beast]. The one who does not raise that objection to the argument takes the view that the having to pay the principal without the possibility of taking an oath represents a greater responsibility than having to pay double compensation on account of taking a false oath.”*

**I.4. A.** Raba said, “If the consideration of unlawful use of a bailment had not been mentioned in the case either of the unpaid bailee or the paid bailee, *and the rule governing that matter can have been derived from the case of a borrower. [One who borrows a beast is responsible even for accidents, and when a bailee makes unauthorized use of the bailment, he becomes a borrower, one who has borrowed without permission.]* If a borrower, *who has the beast with the full knowledge and consent of the owner,* is responsible even for unpreventable accidents, then unpaid and paid bailees [who have utilized the beast not with the owner’s consent] surely should be responsible. And why was the law stated in connection with them both? It is to teach you the further stringent rule that even if there is no damage to the beast, unlawful use imposes liability.”

B. *And the contrary view?* It is so that you should not invoke the principle that what is deduced from an argument *a minori a fortiori* should be the same as that which is deduced: just as the borrower is exempt if the owner is in his service, so also unpaid and paid bailees are exempt if the owner is in their service. [Freedman: Therefore unlawful use is mentioned in their case to show that even they are responsible.]

C. *And as to the one who holds that unlawful use of an object must involve actual damage [for liability to be incurred], why do I need*

*these two distinct references [Exo. 22: 6-7, 9-10] to the matter of unlawful use of a bailment?*

- D. *One is to show that you should not invoke the principle that what is deduced from an argument *a minori a fortiori* should be the same as that which is deduced,*
- E. *and the other in line with the following teaching on Tannaite authority:*
- F. If a man shall deliver to his neighbor money or stuff to keep [without fee, that is, we deal with an unpaid bailee] and it be stolen...if the thief is not found, then the master of the house shall be brought to the judges” (Exo. 22: 6) — to take an oath.
- G. You say that it is to take an oath. But perhaps it is only for a trial [to enter the plea that the beast was stolen, and merely making that plea would suffice to impose upon the bailee the penalty of a twofold repayment]?
- H. Here we find a reference to unlawful use, and there we find the same matter [the paid bailee, Exo. 22:10, the unpaid bailee, Exo. 22: 7]. Just as in the latter passage, the purpose is for the bailee to take an oath [the paid bailee: “then an oath of the Lord shall be between them both”], so in the former passage, it is for the purpose of taking an oath.

The main point of interest is tangential to the Mishnah-paragraph at hand. The distinction important to the Mishnah — whether or not the owner had specified a place in which the bailment was to be deposited — is set aside in favor of the question of whether, if a bailee has utilized an object left in his keeping, he bears responsibility for what happens, whether or not he has caused damage to the object. Now that consideration is implicitly ignored by the contrast between moving the object for his own need or for the benefit of the object, a very different matter. So the Talmud precipitates its sustained and somewhat complex discourse by ignoring the Mishnah’s operative distinction and introducing one of its own instead — a fine example of amplifying the Mishnah’s law in a very original way indeed. We reach our goal — the analysis to which reference has just now been made — by asking whether we have to inform an owner that, having taken an object, we have now returned it. I.1 sets the stage by asking us to believe that the Mishnah-paragraph represents the views of two distinct, and conflicting positions, and that seems on the face of it implausible. It is only at No. 2 that the new consideration, upon which we plan to focus, is adumbrated. There, at 2.E-F, the issue is joined. Then No. 3 goes on to face the issue head-on. We analyze a

dispute and show which of the two parties to the dispute takes what position. No. 4 carries forward the discussion of No. 3, providing a mirror-image of what has been said. That the whole is a very carefully planned exposition, moving in logical stages from the exposition of the Mishnah-paragraph by reference to its authorities to the desired goal, which is the consideration of an entirely autonomous, but clearly pertinent question. I cannot imagine a better way of expanding the frame of reference of Mishnah-study, turning the exposition of laws into the analysis of law viewed in its broadest and most abstract terms. So far as — exemplified by this wonderful composition — the Talmud is a Mishnah-commentary, it is a commentary that aims at recasting not the text under study but the subject to which, *en passant*, the text itself points: the deepest and most encompassing considerations of principled law.

### 3:10

- A. [42A] He who deposits coins with his fellow —
- B. [if the latter] (1) wrapped them up and threw them over his shoulder,
- C. (2) gave them over to his minor son or daughter,
- D. or (3) locked them up in an inadequate way,
- E. he is liable [to make them up if they are lost] ,
- F. because he did not take care of them the way people usually take care [of things].
- G. But if he did take care of them the way people usually take care of things,
- H. he is exempt.

- I.1 A. *As for all the other instances, [for example, gave them over to his minor son or daughter, or locked them up in an inadequate way, he is liable to make them up if they are lost,] the operative consideration is because he did not take care of them the way people usually take care of things.*
- B. *But as to the matter of having wrapped them up and thrown them over his shoulder, what else was he supposed to have done?*
- C. Said Raba said R. Isaac, “Scripture has said, ‘and you shall bind up the money in your hand’ (Deu. 14:25) — even though the money is bound up, it still have to be kept in hand.”
- D. And said R. Isaac, “A person’s money should always be held in hand, as it is said, ‘and you shall bind up the money in your hand’ (Deu. 14:25).”
- E. And said R. Isaac, “A person should always divide his money up, a third in real estate, a third in stock in trade, and a third in liquid cash.”
- F. And said R. Isaac, “A blessing is located only in what is hidden away from sight, as it is said, ‘The Lord shall command the blessing upon you in your hidden things’ (Deu. 28: 8).”
- G. *A Tannaite authority of the household of R. Ishmael taught, “A blessing is located only in what the eye cannot reach [that is, in what is carefully hidden away], as it is said, ‘The Lord shall command the blessing upon you in your hidden things’ (Deu. 28: 8).”*

- I.2. A. *Our rabbis have taught on Tannaite authority:*

- B. He who goes to measure his grain in his granary should say the following: "May it please you, Lord our God, to send a blessing on the works of our hands."
- C. When he has begun to take the measure of the grain, he says, "Blessed is the One who sends a blessing on this crop."
- D. But if he took the measure and then said the blessing, lo, this is a vain prayer, since a blessing is common not in what is already weighed, measured, or counted out, but only in what is hidden from sight, as it is said, "The Lord shall command the blessing upon you in your hidden things" (Deu. 28: 8).

**I.3.** A. Said Samuel, "Safeguarding money can be done only by burying it in the ground."

- B. *Said Raba, "But Samuel concedes that on the Sabbath eve at twilight, rabbis did not put one to so much trouble [to conceal a bailment; on such an occasion, there are other acceptable means of safeguarding the bailment]. But if, at the end of the Sabbath, one tarried for enough time to have buried the money but did not bury it, he then becomes liable for what happens to it.*
- C. *"But if the depositor was a neophyte rabbi, the bailee might have been thinking, perhaps he needs the money for the rite of Separation [at the end of the Sabbath].*
- D. *"And nowadays, when there are money-diviners [who can find holes in the ground where money is hidden], the only proper way of safeguarding cash is by putting it under the roof beams.*
- E. *"And nowadays that house-breaks are commonplace, the only proper way of safeguarding cash is in holes between the bricks."*
- F. *Said Raba, "But Samuel concedes that cash may be secreted in the wall.*
- G. *"And nowadays that [Freedman: rappers are commonplace, the only proper way of safeguarding cash is to bury it in the handbreadth nearest to the earth or in the uppermost beams [of the house]."*

**I.4.** A. Said R. Aha b. R. Joseph to R. Ashi, "There we have learned: Leaven [which is supposed to be removed from sight on Passover] on which ruins collapsed is regarded as having been removed [since it is inaccessible].

- B. "Rabban Simeon b. Gamaliel says, "It is any that the dog cannot sniff out.""
- C. "And a Tannaite authority has taught in this connection: 'how far can a dog sniff out? Three handbreadths' depth into the ground.'
- D. "Now here what is the law [on placing money in the ground]? Do we require that the bailee bury the money to a depth of three handbreadths, or is that not so?"
- E. He said to him, "In that case, on account of the scent, we require a depth of three handbreadths, but here, since it is merely a matter of hiding the money from sight, we do not require three handbreadths' depth for a suitable concealment."
- F. Then how much is required?
- G. Said Rafram of Sikkara, "One handbreadth is enough."

**I.5.** A. There was a man who deposited money with his fellow. He put it in a cot of bulrushes, and the money was stolen.

- B. Ruled R. Joseph, "While the bailee gave it appropriate care so far as thieves are concerned, he did not give it appropriate care in respect to fire

*and was negligent in that regard. So to begin with, the bailment was treated with negligent, even though in the end, the loss of money was an accident. He therefore is liable.”*

- C. *Others say, “Even though so far as fire was concerned, it was negligent guardianship, so far as thieves were concerned, it is a suitable act of guardianship, so to begin with there was negligence, and while in the end, it was a mere accident, he is liable.”*

**I.6.** A. *Somebody left money with his fellow. He said to him, Give me my money back.” The bailee replied, “I don’t know where I put it.”*

- B. *The case came before Raba, who ruled, “Any claim of ‘I don’t know’ represents negligence. Go, pay.”*

**I.7.** A. *Somebody left money with his fellow, who entrusted it with his mother. She put it in her work basket, and the basket was stolen.*

- B. *Ruled Raba, How shall the judges deal with this case? Shall we say to him, ‘Go, pay’? Then he will reply, [42B], ‘Whoever leaves a bailment does so with full knowledge that the wife and children of the bailee will be entrusted with the bailment.’ Shall we say to his mother, ‘Go, pay’? Then she will reply, ‘My son never told me that the mother was not his own, so that I should go and bury it.’ Shall we say to him, ‘Why didn’t you tell her’” He will reply, ‘Had I told her that it was mine, it was because she was all the more likely to guard it well.’”*

- C. *Rather, said Raba, “Let him take an oath that these were the particular coins that he entrusted with his mother, and let his mother take an oath that these were the particular coins that she place in her work basket, and that the money was stolen. Then the bailee is exempt from further liability.”*

**I.8.** A. *A guardian of the estate of orphans bought an ox on their behalf and entrusted it to a herdsman. It had no molars or teeth with which to eat, so it died. [The alternative was to slaughter the beast properly and sell it for food.]*

- B. *Said R. Ammi bar Hama, “How shall we judge this case? Should we say to the guardian of the estate, ‘Go, pay,” he may reply, ‘I handed over the beast to the herdsman.’ Should we say to the herdsman, ‘Go, pay’? He can reply, ‘I pastured it with the other oxen and gave it food, how could I know that it wasn’t eating?’”*

- C. *Then why not take account of the fact that the herdsman was an employed guardian of property of orphans, so he should have watched over the matter carefully?*

- D. *If the orphans had suffered a loss, that would be true. But here the orphans suffered no loss, because the initial owner of the ox was turned up and they got their money back from him.*

- E. *Then who in the world is the plaintiff here?*

- F. *It is the owner of the ox, who has come now to claim that the steward should have informed him?*

- G. *What was he supposed to have told him? He himself was fully aware that it was a sale under false pretenses!*
- H. *The owner of the ox in fact was a middle man, who buys here and sells there. therefore the middleman must take an oath that he did not know of the animals condition, and the herdsman must pay compensation at the rate of the price for cheap meat.*
- I.9.** A. *Somebody deposited hops with his neighbor. The bailee also had a pile of hops. He told his brewer, "Take them from this pile of hops," but he took them from the other pile.*
- B. *Said R. Amram, "Now how in the world should the judges rule in this matter? Shall we say to the bailee, 'Go, pay'? He can plead, 'I explicitly instructed him to take them from this pile [of mine, not from the pile of the other].' Shall we then say to the brewer, 'Go, pay';? He can plead, 'He did not say to me, "Take from this pile and not that."'"*
- C. *But if the brewer had taken the time to bring his own hops yet did not do so [the bailment of hops was further away], that is a sign that he was pleased with how things had come out [Freedman: for he must have known that the brewer was taking the deposited hops and did not stop him from doing so]."*
- D. *That is not the case [there was no taking time to carry the hops a greater distance].*
- E. *So in the end, what loss was there? Did not the bailor benefit from the brewing of his hops?"*
- F. *Said R. Samma b. Raba, "The beer turned into vinegar [and there was no benefit ]."*
- G. *R. Ashi said, "The refers is to thorns [43A], and he has to pay them the value of thorns. [Freedman: Not hops were deposited but the thorns on which the hops hang, and this yielded an inferior brew]."*

The treatment of this Mishnah-paragraph is routine. No. 1 clarifies the language of the Mishnah, and that clarification, C, draws in its wake materials appended on the same general theme. No. 2 is tacked on because of the foregoing as well, a rather miscellaneous composite. The general notion that proper care of money involves burying it in the ground accounts for the inclusion of No. 3, with No. 4 in its wake. The sequence of cases that follow clearly was formed in its own terms — a set of case-reports, which show how somewhat odd claims were to be adjudicated—and here too, the entire composite was compiled before inclusion here, on account of the details of No. 5.

### 3:11

- A. **He who deposits coins with a money changer —**
- B. **if they are wrapped up, [the money changer] should not make use of them.**
- C. **Therefore if they got lost, he is not liable to make them up [as an unpaid bailee (M. 2: 7)].**
- D. **[If they were] loose, he may make use of them.**



- E. Therefore if they got lost, he is liable to make them up.
- F. [He who deposits coins] with a householder,
- G. whether they are wrapped up or whether they are loose —
- H. [the householder] should not make use of them.
- I. Therefore if they got lost, he is not liable to make them up.
- J. “The storekeeper is in the classification of [and so subject to the same rule as] the householder,” the words of R. Meir.
- K. R. Judah says, “The storekeeper is in the classification of [and so subject to the same rule as] the money changer.”

- I.1 A. Merely because the coins are wrapped up, the money changer is not to make use of them? [Could the binding not be only for safety, not to indicate the intention that the money changer not utilize the coins?]
- B. Said R. Assi said R. Judah, “The law deals with the case of coins that are bound up and sealed.”
- C. R. Mari said, “The bundle was tied with a distinctive knot.”
  - D. *Some say that R. Mari asked, “What is the law as to tying the bundle with a distinctive knot?”*
  - E. *The question stands.*

- II.1 A. **[If they were] loose, he may make use of them. [Therefore if they got lost, he is liable to make them up]:**
- B. Said R. Huna, “And that is the law even if they were subject to an unavoidable accident.”
- C. *But the Tannaite authority is explicit when he says, if they got lost!*
- D. *The rule accords the the position of Rabbah, for Rabbah said, “‘Stolen’ means by armed robbers, ‘lost’, his ship’s having sunk in the sea.”*
- E. But R. Nahman said, “If an unavoidable accident happened, he is not [responsible to make up the loss].”
- F. *Said Raba to R. Nahman, “By your reasoning, in taking the view that he is not responsible if an unavoidable accident caused the loss of the money, then in regard to this money, he is not deemed a borrower [who would bear such responsibility]. But if he is not a borrower, he is not deemed a paid bailee either.”*
- G. *He said to him, “In this I concur with you, but since he may derive benefit from the money, he has also to give benefit as well. In exchange for the benefit that if he should come across something to purchase from which he may make money, he is permitted to buy it with these coins, he is held in relationship to the money to be a paid bailee.”*
- H. *R. Nahman objected to R. Huna, “If the treasurer of the sanctuary deposits coins with a moneychanger, if they are bound up, the moneychanger should not make use of them. Therefore if he paid them out, the Temple treasurer has not committed an act of sacrilege. But if they are loose, he may make use of them. Therefore if the moneychanger spent the money, the Temple treasurer is responsible for sacrilege [T. Meilah 2:11A-F/M. Me. 6:5]. Now, if you take the position that even in the case of an unavoidable accident, [the money*

*changer is responsible to make up the loss,] what makes you specify **if the moneychanger spent the money?** Even if he had not spent the money, he should also be responsible for whatever happens to it!"*

- I. *He said to him, "That indeed is the law even if he did not make use of the money, but since in the opening clause the Tannaite authority refers to his having made use of them, the Tannaite authority in the closing clause follows the same pattern [even though the detail is not indicative].*

I.1 clarifies the details of the Mishnah's formulation, and II.1 investigates the proximate implications as well.

### 3:12A-D

- A. **He who makes improper use of a bailment —**
- B. **The House of Shammai say, "He suffers a disadvantage, whether the value rises or falls."**
- C. **The House of Hillel say, "[He restores the bailment] as it was at the moment at which he took it out [to use it for his own purposes] ."**
- D. **R. Aqiba says, "[He restores it as it was] at the moment at which it was claimed."**
- I.1** A. *Said Rabbah, "One who steals wine from his fellow, which to begin with was worth a zuz, and now is worth four zuz — if the jug broke or the man drank the wine, he pays four zuz. But if it breaks on its own [for some reason that the thief could not have stopped] he pays a zuz. What is the reason? Since if the jug were in hand, it would be returned to the owner just as is, it is only at the moment at which the thief drinks the wine or breaks the jug that he has robbed the owner of his wine, and we have learned, **All robbers pay compensation according to the value of the theft at the moment of robbery [M. Baba Qamma 9:1K].** But if it breaks on its own [for some reason that the thief could not have stopped] he pays a zuz. What is the reason? At this moment he has done nothing to it, so for what cause do you hold him liable? For we have learned, **at the moment of robbery. For the time of the robbery? But at that time it was worth a zuz!"***
- B. *We have learned, **The House of Hillel say, "[He restores the bailment] as it was at the moment at which he took it out [to use it for his own purposes]."** Now what is the sense of "at the moment at which he took it out"? If we say, "at the moment at which he took it out of the world" [when the object was destroyed or used up], in what case will the House of Hillel differ? And if we say, it means, in the case of depreciation, does anyone hold that view? And lo, we have learned, **All robbers pay compensation according to the value of the theft at the moment of robbery [M. Baba Qamma 9:1K].** And if the meaning of **as it was at the moment at which he took it out is, whether the value rises — that is the position of the House of Shammai! [43B]** Rather, the obvious sense must be, as when it is withdrawn from the owner's possession [household]. [Freedman: And they dispute the case if it subsequently appreciated. The House of Shammai maintains that he must pay its value as when he disposes thereof, while the House of Hillel hold that he must pay its value as at the time of the theft.] *Then does Rabbah [at I.1.A] take the position of the House of Shammai?!**

- C. *[That of course is manifestly impossible, so] Rabbah will reply to you, "In a case in which the article has appreciated in value, all parties concur [that the restitution is for the value of the stolen object at the time of its disposal, and 'when it is withdrawn' means when it is withdrawn from the world]. Where there is a dispute, it concerns the case in which the object at the time of the making of restitution is worth less than it was. The House of Shammai maintain that in paying back restitution for the unlawful use of an object, [we do not automatically impose a loss upon the thief, so] it is not necessary to make up the loss, for when the object depreciates, it is in the domain of the thief that it is deteriorating, and the House of Hillel take the view that in paying back restitution for the unlawful use of an object, it is necessary that the thief should suffer a loss, so when the object depreciates, we hold that the depreciation takes place in the domain of the owner [and the thief pays compensation according to the value of the object at the time of the sale]."*
- D. *Then when Raba said, "Unlawful use need not involve damage," did he take up the position of the House of Shammai? [At Mishnah Baba Mesia 3:9/I.4.A, Raba said, "If the consideration of unlawful use of a bailment had not been mentioned in the case either of the unpaid bailee or the paid bailee, the rule governing that matter can have been derived from the case of a borrower. One who borrows a beast is responsible even for accidents, and when a bailee makes unauthorized use of the bailment, he becomes a borrower, one who has borrowed without permission. If a borrower, who has the beast with the full knowledge and consent of the owner, is responsible even for unpreventable accidents, then unpaid and paid bailees who have utilized the beast not with the owner's consent surely should be responsible." So Raba is explicit that unlawful use must cause a loss.]*
- E. *Now here [in Raba's case] we deal with the case of one who has moved a jug in order to take down birds from a dovecot while standing on the jug, and they differ as to the unauthorized borrower's classification. The House of Shammai say, "An unauthorized borrower is in the classification of a robber, so when the object deteriorates, it does so in his domain." The House of Hillel say "An unauthorized borrower is not in the classification of a robber, so when the object depreciates, it does so in the domain of the owner." Now, when Raba said, "An unauthorized borrower, on the viewpoint of rabbis, is deemed in the classification of a robber, are we to say that Raba accords with the position of the House of Shammai?*
- F. *But here they differ as to the disposition of the return on an improvement in the stolen object. The House of Shammai hold that the improvement in the value of a stolen object is assigned to the victim of the robbery, and the House of Hillel take the view that the disposition of the improved value of the stolen object is to the thief, and at stake is what is at issue between the following Tannaite authorities:*
- G. *"He who steals a ewe and sheared it or it bears offspring must pay for the ewe, the shearings, and the offspring," the words of R. Meir.*
- H. *R. Judah says, "The object that is stolen returns as is."*
- I. *You may infer from the language that the difference is as stated, for lo, the exact language is, **The House of Shammai say, "He suffers a disadvantage, whether the value rises or falls."** The House of Hillel say, "[He restores the bailment]*

as it was at the moment at which he took it out [to use it for his own purposes].”

J. *That proves it.*

**II.1** A. R. Aqiba says, “[He restores it as it was] at the moment at which it was claimed:”

B. Said R. Judah said Samuel, “The decided law accords with the position of R. Aqiba.

C. “Still, R. Aqiba concedes that in a case in which there are witnesses [to the theft, he must pay the value of the object at the time of the theft]. *Why is that so? Scripture says, ‘He shall give it to him to whom it belongs in the day of his trespass offering’ (Lev. 5:24, meaning, he shall pay for it as on the day he incurs the obligation to bring a trespass offering,) and, since there are witnesses to the theft, the obligation to bring the trespass offering is incurred at that very moment.*”

D. Said R. Oshaiah to R. Judah, “My lord, you are the one who says so! But this is what R. Assi said R. Yohanan said, ‘R. Aqiba differed even in a case in which there are witnesses. What is the scriptural basis for that view? Scripture says, “He shall give it to him to whom it belongs in the day of his trespass offering” (Lev. 5:24), meaning, it is the court that declares him liable to bring a trespass offering [and not the adventitious presence of witnesses].’”

E. Said R. Zira to R. Abba bar Pappa, “When you go over there, take the round-about road, by the promontory of Tyre, and go on up to R. Jacob b. Idi and ask him whether he heard from R. Yohanan whether or not the decided law accords with the opinion of R. Aqiba.”

F. He said to him, “This is what R. Yohanan said, ‘The law accords with the view of R. Aqiba under all circumstances.’”

G. *What is the meaning of under all circumstances?*

H. Said R. Ashi, “The meaning is, you should not say that that is the case only where there are no witnesses, but in a case where there are witnesses, that is not the case.

I. “Or the statement of Yohanan may refer to a case in which the thief returned the stolen object to its place and the beast that had been stolen was injured, and the ‘under all circumstances’ is meant to exclude the position of R. Ishmael, who held the view that, in returning an object, it is not necessary to inform the owner in order to cease to be responsible for the object. In this way, we are told that the owner’s knowledge of the return of the stolen beast is required for the thief to cease to bear responsibility for the beast.”

J. Raba said, “The decided law accords with the position of the House of Hillel.”

The entire composition is unitary and, moreover, links itself up with prior passages, as indicated. Here is a mark of an extremely well-crafted discourse, in which many distinct threads are woven together into a single fabric. We start with Rabbah’s position, but our intent is to ask how each party relates to the Houses of Shammai and Hillel (the well-known premise being that the law ordinarily accords with the House of Hillel as against the House of Shammai), and, moreover, how

authorities who appear in other discussions altogether fit into the issues we treat here. I cannot imagine a passage that is less properly classified as “Mishnah-commentary.” What we have is other than exegesis of the Mishnah, even though the formal traits still appear to place the discussion into that classification. There is simply no understanding a single line of this composition without grasping its overall purpose.

### 3:12E-L

- E. **He who expresses [in the presence of witnesses] the intention of making use of a bailment —**
- F. **the House of Shammai say, “He is liable [for any damage done to the bailment, as if he had made use of it] .”**
- G. **And the House of Hillel say, “He is liable [for damages incurred] only when he will actually make use of the bailment,**
- H. **“since it is said, ‘If he has not put his hand to his neighbor’s property’ (Exo. 22: 7).”**
- I. **[If] he tipped over the jug and took a quarter-log of liquid from it, and it broke —**
- J. **he pays only the value of the quarter-log he has actually removed.**
- K. **But if he raised it up [so making acquisition of it], and took a quarter-log of liquid from it and it broke,**
- L. **he pays the value of the whole jug.**

- I.1 A. **[44A]** *What is the source of this ruling? It is as our rabbis have taught on Tannaite authority:*
- B. “Then the householder shall be brought to the judges...for all manner of trespass” (Exo. 22: 8) —
- C. the House of Shammai say, “This teaches that one is responsible for intentionality as much as for deed.”
- D. **And the House of Hillel say, “He is liable [for damages incurred] only when he will actually make use of the bailment, since it is said, ‘If he has not put his hand to his neighbor’s property’ (Exo. 22: 7).”**
- E. Said the House of Shammai to the House of Hillel, “But has it not been stated, ‘for all manner of trespass’?”
- F. Said the House of Hillel to the House of Shammai, “But has it not been stated, ‘If he has not put his hand to his neighbor’s property’?”
- G. “If so, what is the sense of, ‘for all manner of trespass’?”
- H. “One might have supposed that I know only that the thief himself is liable for what happens to the object that is stolen or the bailment. But if he said to his slave or his agent [to do the damage], how do we know that he bears responsibility? Scripture states, ‘for all manner of trespass.’”

- II.1 A. **[If] he tipped over the jug [and took a quarter-log of liquid from it, and it broke — he pays only the value of the quarter-log he has actually removed]:**
- B. Said Rabbah, “That is the law only in the case that the jug broke. But if the wine soured, he pays the entire value.

- C. *“What is the reason for that ruling? It was his arrows that affected the wine [so Freedman: by taking a small quantity, he helped it to sour, because a full barrel does not sour as quickly as one that is not full].”*

**III.1. A. But if he raised it up [so making acquisition of it], and took a quarter-log of liquid from it [and it broke, he pays the value of the whole jug]:**

- B. Said Samuel, “The sense of ‘took’ need not be literal at all. But once the thief has raised it up to take some of the wine, even though he has not actually taken it, he is liable.”
- C. *May we then conclude that Samuel takes the position that liability for unlawful use need not involve loss [there being no loss if the man merely lifts up the jug]?*
- D. *I will reply that that is not the case. For here the situation is different, since the man wants the whole barrel to depend upon this quarter-log. [Freedman: When he lifts the barrel up to take a quantity, he is regarded as having already taken it and put it back, because being in a full barrel it is less likely to sour; thus he makes the whole of the rest subservient to the quantity he desired and is using the rest in that capacity. This renders him responsible for the whole.]*

**III.2. A. Asked R. Ashi, “If one has lifted up a purse in order to take a denar from it, what is the law? Is it only in the case of wine that we rule that wine is guarded only by other wine, while a zuz can be guarded on its own, or perhaps the care that is taken for a purse is not the same as the care that is given to a single denar?”**

- B. *The question stands.*

The treatment at I.1 is simply to expand the dispute of the Mishnah-paragraph into a full-scale debate, in which the Houses are given proof-texts and the House of Hillel is allowed to dismiss the evidence of the House of Shammai. II.1 expands on the decided law of the Mishnah. I must admit I do not follow III.1.D, though read in light of III.2 the sense seems to be clear, as Freedman expounds it.