CHAPTER III.

LAWS RELATING TO BAILMENTS, HIRERS, LOSSES ON DEPOSITED ARTICLE AS TO THEIR QUANTITY AND THEIR QUALITY, AS TO THE CARE TO BE BESTOWED ON DEPOSITED ARTICLES BY THE DEPOSITARY, AND OF MONEY WHETHER IT MAY BE USED.

MISHNA *I*.: If one has deposited an animal or vessel with his neighbor, and they were stolen or lost, and he paid, because he refused to take an oath [according to the law that a gratuitous bailee must swear and is acquitted], and thereafter the thief was found, who must pay the double amount, or in case he has slaughtered or sold, four and five fold, to whom shall he pay? To him who has kept the bailment. If, however, the bailee took an oath, because he refuses to pay, and the thief was found, he must pay the above-mentioned amount to the owner.

GEMARA: "*He has paid, because he refused*," etc. Said R. Hyya bar Abba in the name of R. Johanan: "The expression 'paid' is not to be understood that he has done so already, but if he said, 'I will pay,' it is to be considered paid." And there is a Boraitha in accordance with his statement, viz.: "If one has hired a cow of his neighbor, and it was stolen, and the hirer said, I will pay rather than take an oath (that it was not an accident), and thereafter the thief was found, the double amount belongs to the hirer."

R. Papa said: "A gratuitous bailee, when he said, 'I have neglected my duty' (which makes liable for payment), acquires title of the double amount because he could be acquitted if he should claim it was stolen. The same is the case with a bailee for hire, when he claims 'stolen,' because he could be acquitted by claiming it was crippled or died (in which case he is not responsible); and also a borrower, if he said, I am ready to pay, he acquires title for the double amount, as he could acquit himself by claiming the animal had died while laboring." Said R. Zbid to him: "So said Abayi: A borrower does not acquire title of the double amount, unless he has already paid. Why so? for all the benefit he has derived was only upon his word, without any

actual payment. It is not sufficient his saying, I am ready to pay." And there is a Boraitha supporting him: "If one borrowed a cow of his neighbor, and it was stolen, and the borrower hastened and paid, and thereafter the thief was found, the double amount belongs to the borrower." Shall we assume that the Boraitha is an objection to R. Papa's statement? He may say, has, then, the Boraitha more strength than our Mishna--does not the Mishna state, "and he paid," and nevertheless it was interpreted that the same is the case if he says, "I will pay"? Why should not this same explanation apply to the Boraitha? But what comparison is it? The Boraitha states, "he hastened and paid," which is not the case in the Mishna. But why should it not be explained he hastened to *say*, "I will pay"? Nay, the same Boraitha expresses in the case of a hirer, "he *said*," and in the case of a borrower, "hastened," hence the Boraitha was particular as to its word. But whence do we know that the Boraitha's statements were taught together--

perhaps each statement was taught separately, consequently no special attention must be paid to the wording? The disciples of R. Hyya and R. Oshia were questioned, and the answer was, that all the statements of the above Boraitha were delivered at one time.

It is certain that if he previously said, "I will not pay," and afterwards he declared, "I will," it is a reconsideration and must be counted; but how is it if it is *vice versa*? Shall we assume this also a reconsideration, or perhaps he intended to pay, but as he had no cash, he only postponed payment? Also how is it if he promised to pay, and dies, and his heirs refuse, or he dies without saying anything, and his heirs pay, does the double amount belong to them, or can he say to them, "If your father would promise to pay I would be pleased to transfer the double amount to him, but with you I have nothing to do, as probably you were aware of the double amount, and, therefore, you paid"? These questions are not decided. R. Huna said: "In all cases an oath is given to the bailee that at that time the article is not in his possession, for fear, perhaps, he would prefer to keep the article for himself, and, therefore, he paid for it." 1

There was a man who deposited a nose jewel with his friend, and when being required to return, he said, "I do not know where I put it," and when the case came before R. Na'hman, he

said: "Such an answer shows a neglect of duty, and you must pay." The man did not submit to R. Na'hman's decision, unless R. Na'hman made him pay by force. Finally, the article was found, and was increased in value. Said R. Na'hman: "Return it to its owner and have your money refunded." Said Rabha: "I was sitting before R. Na'hman when he decided the above case, and our study was in this chapter, and I questioned him, Is not this case equal to the statement of our Mishna: If he paid and refused to swear, etc., and R. Na'hman did not answer, (and thus deliberating this matter I came to the conclusion that) it was right in him not to answer, because the case in our Mishna does not treat of a case where he was troubled by the court, as in this case." (Says the Gemara:) "Shall we assume that R. Na'hman holds that property appraised by the court, for the sake of the creditor, and delivered to him, should be returned to the defendant when he brings cash? Nay! The above case of the nose jewel is different; as the article was in his possession, no appraisement could be made; hence the appraisement itself was an error. (However, when the court appraises by examining the article, no change is to be made.) The sages of Nahardea, however, hold that even a correct appraisement by the court is to be returned in twelve months (when the defendant brings cash). Said Amemor: "I myself am a Nahardean, and I hold that an appraisement is always to be returned." (Said the Gemara:) "So the Halakha prevails, because it is written [Deut. vi. 18]: "And thou shalt do that which is right and good," etc. 1

It is certain, when it was appraised for the sake of a creditor, and the latter appraised it for his own creditor, the returning may take place, because it may be said to the latter creditor, You cannot be entitled to any more privilege than this defendant. The reverse is the case when the creditor sold it, or gave it as a present, because the intention of the people was given to the estate but not to the value of it. The same is the case if it was appraised for a widow (according to her marriage contract) and she remarried, and the same is also when the estate was appraised for the sake of a creditor of a widow, and after she remarried and died her husband cannot require for returning, as he is considered a buyer (and not an heir), to whom the law prescribes no returning

shall take place, neither by nor to him. As R. Jose said: "It was enacted in the city of Usha that if a woman sold her estate, called mulgeo 1 (*i.e.*, an estate in which her husband has the usufruct, the use of the products and the principal estate remain hers) while her husband is yet alive and she dies, the husband may take it away from the hands of the buyer." If, however, the creditor took the estate for his debt without appraisement, but with the admission of his creditors, it may be returned or not. R. A'ha and Rabbina differ; according to one it may not, because it was a correct sale, as the debtor had given it with his good will; and according to the other it may, because the sale is not to be considered a good one, as the debtor did it only because he was ashamed to go to court, but not with his good will.

From what time may the creditor use the products of an appraised estate? According to Rabba, as soon as the warrant reaches him; and according to Abayi, from the time the warrant was signed by the court. Rabha, however, says: "The warrant that the estate shall be sold for his debt does not suffice even when it is in the hands of the creditor, provided the time of heraldry had elapsed." (The previous products, however, belong to the debtor.)

MISHNA *II*.: If one has hired a cow and he loaned it to some one else, and it died a natural death, the hirer takes an oath that the death was natural, and the borrower must pay to the hirer. Said R. Jose: "How could the hirer do business with the cow, which did not belong to him? Therefore the cow, or the value of it, must be returned to the owner."

GEMARA: Said R. Idi b. Abin to Abayi: "Is not the oath the only reason for acquiring title? Let then the owner say: Keep aloof from this case with your oath, and I will summon your borrower (as it did not die while in your possession). It will be better for me to summon the borrower (who is responsible even for an accident)." And Abayi answered: "Do you think that the oath is the only reason for the title? It is not so. The title is acquired with the death of the animal, the title of its value is acquired to the hirer, and the oath is only to please the owner."

R. Zera said: "It can happen that the hirer has a right to require several cows from the owner for one cow. How so? (As the explanation of this queer proposition is so clearly illustrated

by Rashi, we omit the explanation given in the Gemara, and we append it in a foot-note. 1) Said R. A'ha of Difta to Rabbina: "Let us see. It was only one animal which was going from borrowing to hiring, and *vice versa*. Why then should he furnish him with four--is it not sufficient he should furnish him with two, one of them to remain the property of A and the other for the remaining labor days"? And Rabbina answered: "Is then the animal yet alive, that it could be said so? The animal is dead, and there were two cases of hiring and two cases of borrowing, and he has a right to receive compensation for each case, also for each hiring of the labor days." Mar bar R. Ashi, however, maintains: "A is entitled to two cows only, one for both cases of hiring, and one for both cases of borrowing; as the cases under one name cannot be considered two, because all this occurred with only one animal (as explained above)."

It was taught: "A bailee who has transferred the bailment to another bailee, according to Rabh the first bailee has the same responsibility as if he would take care of it himself, (*i.e.* he is free from accident). According to R. Johanan, the first one is responsible even for an accident." Said

Abayi: "According to Rabh's theory, not only a gratuitous bailee who transferred to a bailee for hire, who has increased the responsibility of it, is not responsible any more than the prescribed law of such a bailee, but even if he was a bailee for hire and he transferred it to a gratuitous bailee, that the responsibility was decreased; the same is the case, because he transferred it to one who was able to take care of it (consequently he did not neglect his duty); and according to R. Johanan's theory, not only a bailee for hire who transferred it to a gratuitous bailee, in which the responsibility was decreased, but

even a gratuitous bailee who transferred it to a bailee for hire, in which the responsibility was increased, he is nevertheless responsible for all that occurs, because the owner may say, "I have trusted the bailment to you, not to any one else, as I did not want the bailment to be under the control of some one else." Said R. Hisda: "Rabh's statement was not made by him directly, but it was inferred from an act which happened, namely: There were gardeners who had deposited their spades at a certain old woman's; one day, however, one of them gave it for safekeeping to his comrade, and when the latter heard voices from a wedding procession and wanted to accompany it, he transferred the spade of the above to the old woman, and when he returned, he found it was stolen. When the case came before Rabh, he acquitted him. Those who have heard this decision thought that it was because of the law that a bailee who transfers the bailment to another bailee is free; in reality, however, Rabh acquitted him because the depositor himself used to deposit his articles with the same old woman; consequently he could not claim that he would not trust her with his bailment. R. Ami was sitting and declaring the just stated Halakha, and R. Abba bar Mammal objected to his statement from our Mishna: "One hired a cow," etc. Now if the above statement is correct, why could not the owner of the animal claim, "I did not want that my bailment should be under the control of another one"? And he answered: The Mishna treats of a case where the owner gave him permission to loan it to some one. If so, the owner has a right to the value of the cow? The owner told him, You can do so to whomever you like (and so he cannot claim any more that he does not want his bailment to be under another's control).

Rami bar Hama objected to this from Mishna VII., in this chapter, which states that if he transferred them to his little children, etc., of which it is to be inferred that if he would transfer them to his big children, he would be free. Why so? The owner could claim, "I do not want my bailment to be under another's control." Said Rabha: "Usually, when one deposits an article for safekeeping with any one, he intends that he may ask his wife and children to take care of it, and the sages of Nahardea said: "That it seems the cited Mishna is rightly explained so, as it states, 'his little children,' of which it is to be inferred that if he would give it to the care of the big ones, he would be free."

However, the case is only with his children, not with strangers, for if he would transfer them to strangers, he would be responsible

at any rate, for the reason that the bailee can claim that he did not want it in the control of another, as stated above." Rabha said: "The Halakha prevails, that a bailee who has transferred the bailment to another bailee of any kind is responsible. Why so? Because the owner may say, that you alone are trusted by me with an oath, but not the man to whom you have transferred it."

It was taught: "If the bailee has neglected his duty, and the animal was going out to the rushes and dies a natural death, Abayi in the name of Rabba makes him liable, and said: That any judge who would decide to the contrary is not worthy to be a judge, as not only according to him who holds that if an accident follows a neglect, there is a liability, he is responsible, but even according to him who holds that in such a case there is no liability, in this case he would admit that he is responsible. Why so? Because it may be said that the air of the rushes killed it (hence it is not the accident, but the neglect, which caused the death)." Rabha, however, in the name of Rabba said: "He is free, and every judge who decides to the contrary is not worthy to be a judge, as not only according to him who holds that if an accident follows a neglect there is no liability, but even according to him who holds to the contrary, would admit that in this case he is free. Why so? Because there was a natural death, and there is no difference to the Angel of Death where his subject is placed." Rabha, however, admits that if it was stolen from the rushes, although it dies a natural death in the house of the thief, the bailee is nevertheless responsible. Why so? Because if it were alive, not he, but the thief, would possess it (consequently, before he dies the liability came simultaneously with the theft).

Said Abayi to Rabha According to your theory, that there is no difference to Angel of Death where it is placed, the answer of R. Ami to R. Aba stated above, p. 86, that it treats of a case where the owner has permitted the hirer to borrow it, etc., would not be satisfactory, as also in their case a natural death occurred and he could claim that it is no difference to Angel of Death where it was placed." Rejoined Rabha: "According to you the objection was: That the owner could claim, 'I do not want that my bailment should be under the control of another,' your objection could be sustained; but I said that the claim of the owner was that the first bailee only is trusted by him with an oath, but not any one else; hence your objection cannot be sustained."

Rami bar Hama objected from the following Boraitha: "If he brought the animal to a steep hill, and it falls and dies, it is not to be considered an accident, and he is liable." Of which it is to be inferred that if a natural death would occur while yet on the steep hill, it would be considered an accident. Why? Let him say that the mountain air or the labor of ascending such a high altitude has killed it? The Boraitha treats when it was brought to a good fat pasture.

"*Said R. Jose*," etc.: Said R. Jehudah in the name of Samuel: "The Halakha prevails in accordance with R. Jose." Said R. Samuel b. Jehudah to R. Jehudah: "You declared to us in the name of Samuel that Jose differs also with the first Mishna (in case of double payment); does the Halakha prevail according to him against the first Mishna also or not"? And he answered: "Yea, so it is!" The same was taught in the name of R. Elazar. R. Johanan, however, said: "R. Jose agrees with the first Mishna, in case he has already paid." Already paid! Did not R. Hyya b. R'Aba declare in his name (above, p. 81) that even if he said, "I am ready to pay," suffices? Say then, R. Jose agrees with the first Mishna in case the defendant declared already, "He is ready to pay."

MISHNA *III*.: If one said to two persons, I have robbed one of you the value of a manna (100 zuz) but I do not know which of you, or the father of one of you deposited with me a manna, but I do not know whose father, he must pay a manna to each of them, as he himself admitted his debt.

If two persons have deposited with one person one hundred zuz and the other two hundred, and each of them claims that the two hundred are his, the depository must pay to each of them one hundred, and the remaining hundred should be deposited until Elijah will come. Said R. Jose: If so, what does the swindler lose? Therefore, the whole sum should be deposited. The same is the case with two utensils: one of them was worth hundred zuz and the other thousand, and each of them claimed that the better one was his; then one of them must get the hundred one, and the other get hundred zuz in cash from the value of the utensils, and the remainder is deposited until Elijah will come. R. Jose, however, objected as said above, and maintained that both utensils should be deposited until Elijah will come.

GEMARA: We see then, from the beginning of the Mishna, that doubtful money is to be collected, and we do not say leave the money with its present possessor, in accordance with the law

of occupancy (Hasaka). Is there not a contradiction in the second part, in case of a deposit, where the doubtful hundred zuz must be deposited? The answer was: "Do you want to contradict a case of a deposit with a case of robbery?" A robber must be punished, but not a depositor.

There is, however, contradiction of both robbery and deposit. In case of a deposit it is stated in the first part: The father of one of you has deposited, etc. He must pay a manna to each of them. And in the second part, in case of the deposits of one and two hundred, it states that the doubtful hundred shall remain, etc. Said Rabha: "The first part is to be compared to two men who have deposited separately, one in the absence of the other, two bundles, where it is the duty of the depository to be very particular with the bundles and to mark on each of them to whom it belongs (so he ought to know whose father deposited with him). And the second part treats of a case where both persons deposited together the above sum, and it is to be compared as if they would put their moneys in one bundle, in which case the depository may say: You yourself were not particular in separating the sum to whom it belongs; then shall I be more particular than you? The contradiction of a case of robbery to the other case of the same is as follows: There is a Mishna (First Gate, p. 233): "If one robbed one of five persons and does not know the one, and each of them claims, 'He was robbed,' the robber may place the sum among them, etc., and depart, so is the decree of R. Tarphon."

We see, then, that we do not collect money in case of doubt because of the law of occupancy, and our Mishna, however, states that the robber must pay a manna to each of them (hence doubtful money is to be collected?). Are you then certain that our Mishna is in accordance with R. Tarphon? Yea! As in addition to the cited Mishna it is said that R. Tarphon admitted that if one said to two persons, "I have robbed one of you of a manna and I do not know who is the one," he must pay a manna to each of them. (Hence the contradiction is clear.) Nay! There is no contradiction. R. Tarphon speaks of a case when both persons summoned him; and our Mishna treats of a case when the robber repents and would like to satisfy the heavenly will, and it seems that our Mishna must be so explained, as A closes with the expression that he himself admitted his debt. Infer from this that so it is.

The master says: "When both parties summon him." But

what does the defendant claim?" R. Jehudah in the name of Rabh said: "He kept silence." And R. Mathnah said in the name of the same: "He denies knowing either of them. According to him who says he denies, if he keeps silent it would be counted as an admission, and according to him who says he kept silent, this silence is not counted as an admission, as he may declare, 'I kept silent before each of them because I thought, perhaps he is the one who deposited the greater sum.'"

The master said: "The robber may place the sum thus robbed and depart." And what shall be then? Shall the five take the sum? Did not R. Aba b. Zabda declare in the name of Rabh "Every doubt," etc.

Said R. Saphra: "The expression 'departed' means this: He is to place the sum *before the court* in presence of the five men, saying, 'Who of you is robbed shall bring evidence'; and as they could not do so, he may depart with the money, [1] and it shall remain with him until evidence is brought." Said Abayi to Rabha: "Did not R. Aqiba say that such a way would not keep him from transgression, but he must pay the sum robbed to each of them? Hence we see that on account of doubt money is to be collected, and not to leave the money with the possessor in accordance with the law of occupancy (and in Tract Baba Bassra, 155*b*, we heard him saying that the law of occupancy has the preference)? And he answered: There was an uncertainty of both the plaintiff and the defendant, and here it is only an uncertainty of the plaintiff, but the defendant is certain that he has robbed one of them. But is not the case in our Mishna also, an uncertainty of both the plaintiff and the defendant, as the latter says to each of them, "I do not know whether *you* were robbed"? It is already explained above that our Mishna treats of a case where he repents and would satisfy the heavenly will. Said Rabbina to R. Ashi: "How could Rabha say, if there were two bundles he ought to be particular to know to whom each bundle belongs. Did not Rabha or R. Papa say elsewhere: That all agree in case where two men have deposited with a shepherd, one two sheep, and one one sheep, in the presence of both, and thereafter each claims the two sheep are his, the shepherd must place three sheep before them and depart? And he answered, There the case was where they deposited in his flock in his absence."

The same is the case with two utensils, etc. Why the repetition? Is this case not the same as the previous? To teach us that even in the case of utensils, which may involve a loss by selling the better one, the rabbis are nevertheless of the same opinion.

MISHNA *IV*.: If one deposits fruit at his neighbor, he must not touch it, even when should they be lost (destroyed by mice or by decay). R. Simeon b. Gamaliel, however, maintains, that he must sell it by order of the court, as this is similar to returning a lost thing.

GEMARA: What is the reason of the first Tana of our Mishna? Said R. Kahana: "Usually one is pleased with his own goods, be it a ninth part, as with the goods of a stranger, be it multifold." R. Na'hman b. Itzhak, however, said: "Because it is to be feared, [1] perhaps the owner of it has separated it for heave-offering or tithe." Said Rabba b. b. Hana in the name of R. Johanan: "The Tanaim of the Mishna differ only when the fruit becomes diminished as usual (further on is explained the measure of usual loss of each kind of grain and fruit); but if the loss would be

more than usual, all agree that he may sell it by order of the court." An objection was raised from the following: If one has deposited fruit at his neighbor's, and it decays; or wine, and it becomes sour; or oil, and it creates a stench; or honey, fermenting, one must not touch it; such is the decree of R. Meier. The sages, however, say: "He may try to prevent the loss and sell it by order of the court, provided he does not buy it for himself. Similarly, holders of charity funds, when there is no poor to whom to distribute, may change the money to any one, but not to themselves. Officers who are appointed to distribute food to the poor, if there is none, they may sell it, provided they do not buy it for themselves." Now the Boraitha states: "Fruit, and became rotten"; does it not mean even more rotten than usual? Nay, it means as usual. It states: "If wine becomes sour," etc., which certainly means that it is entirely spoiled for consumption? With beverages it is different, as there is no remedy (this would be correct with wine that becomes sour, and then has yet a value as vinegar, but oil and honey) when spoiled, what use can be had of them? Oil to smear the heels of footwear, and honey to use as salve for the camel wounds. The Boraitha states: "According to the sages he may try to

prevent the loss." What should he do? Said R. Ashi: "He can save the pitchers which contained the spoiled articles; for if anything remains within, the pitchers may also become spoiled. What is the point of their difference? According to one, care should be taken only for a great loss, but not for a trivial loss; and according to the other, care must be taken even for a trivial loss.

"*R. Simeon b. Gamaliel said*," etc. It was taught, R. A'ba b. Jacob in the name of R. Johanan said: "The Halakha prevails in accordance with R. Simeon." And Rabha in the name of R. Na'haman said: "The Halakha prevails in accordance with the sages." But did not R. Johanan declare conclusively that when R. Simeon b. Gamaliel is mentioned in the Mishna the Halakha prevails in accordance with him--why then the repetition? There are Amoraim who differ concerning R. Johanan's decision; according to some of them the decision was conclusive, and according to others the decision was rendered not for all time (*i.e.*, in some instance the Halakha does not prevail according to Raban Simeon).

It was taught: "If one becomes a prisoner, according to Rabh his property must not be transferred to the nearest relative; and according to Samuel, it may." If there was a rumor that the man was dead, all agree it may be done; but if there is no rumor about his death, Rabh maintains: "It may not, because the relative may spoil his property"; and Samuel maintains it may, because the master decided that when the owner of the. property returns, the man who kept his property for him may be rewarded, as usually gardeners take a share for tilling the ground (*i. e.*, that from each property he receives his share), he would not spoil it. An objection was raised from the following Boraitha: R. Elazar said: "It is written [Ex. xxii. 23]: 'My wrath shall wax hot, and I will slay you with the sword,' etc. From this it is understood that their wives remained widows and their children orphans. For what purpose, then, does the verse add, 'and your wives shall be widows and your children fatherless'? To indicate that their wives would wish to remarry, but would not be allowed, and their children would beg that the property of their father should be transferred to them, and it will not be granted (*i.e.*, they will be prisoners, hence the property of a prisoner is not to be transferred to his relatives)." Said Rabha: "It was taught that it may be transferred to them, but they may not sell it. Such a case happened in Nahardea, and R. Shesheth

did not allow the transfer of the property to his relative to be made, basing his decision upon the just quoted Boraitha." Said R. Amram. to him: "Perhaps the Boraitha is taught as Rabha amended it." And he rejoined: "Are you not a Pumbadithan, who tries to pass an elephant through the eye of a needle? Does not the Boraitha make the wives equal to their children? As the wives are entirely forbidden to marry, so are the children entirely from their father's property."

Says the Gemara: However, in the case in question the Tanaim of the following Boraitha differ. If one took possession of the estate of a prisoner, he must not be compelled to give it up; furthermore, if he was informed that the prisoner was about to be liberated, and he hastened to use the products of the estate, he is considered diligent, and rewarded. And the following are considered property of prisoners. If his father, brother, or one of his grantors went to the sea-countries, and there was a rumor that they were dead, whoever takes possession of their abandoned property, he must be compelled to give it up. And the following is considered abandoned property. "If the owners went to the sea-country, and no rumor of their death was heard." [R. Simeon b. Gamaliel, however, said: "I have heard that the latter's property is equalled to the prisoner's.] The same is the case with him who takes possession of forsaken property. And what is called forsaken property? If its owners are somewhere in the neighborhood, but cannot be found. Why, then, is the former called abandoned and the latter forsaken? Abandoned means, he was compelled to leave it; as it is written [Ex. xxiii. 11]: "But the seventh year shalt thou let it rest and lie still," 1 which is a decree of the Lord, and the latter means that he has forsaken it willingly, as it is written [Hosea, x. 14]: "The mother was dashed in pieces upon her children." The Boraitha adds, it was declared that all those who take possession of such land, their compensation must be appraised as if they were hired as gardeners.

Now let us see in which case this addition applies? It cannot be applicable to the case of prisoners, as it was stated above that

he is considered diligent; and also not in the case of forsaken property, as it is stated that he must be compelled to give it up; consequently it applies only to the case of abandoned property. But according to whom? Shall we assume that it is in accordance with the rabbis? Did they not declare that also in such a case the possession must be given up; and if in accordance with R. Simeon b. Gamaliel, did he not declare that he heard that this case must be decided as the case of prisoners? Yea! As in the case of prisoners, but not in all respects. It is equal only in case the possessor need not give it up, but not in case that he should be considered diligent, as his compensation is to be appraised as that of a gardener.

But why is this case different from that in the Mishna (Kethuboth, Chap. VIII., Mishna 3), which states that all he has done must be recognized? Nay! It is similar to the following case only, in which case it was said by R. Jacob in the name of R. Hisda, that if one incurred expense for the estate of his wife who is not yet of age, it is to be considered as if he incurred the expense for the estate of a stranger, which does not belong to him (*i.e.*, for which he may never be reimbursed). Why so? The rabbis enacted in such a case a rule to prevent the possessor from spoiling the estate, and the same is made here in our case for the same purpose.

But did not the Boraitha state "all of them, their compensations must be appraised," etc.? What

does the expression mean? "All of them"? To add to what R. Na'hman said in the name of Samuel, that if one became a prisoner, his estate may be transferred to his relatives, and if he left his estate willingly, this is not to be done. R. Na'hman, however, declares his own opinion to be that if he was compelled to run away, he should be considered as a prisoner. Because of what does he run away? If for the reason that he has not paid his duty, is it not the same as if he abandoned his estate willingly; therefore, it must be explained that R. Na'hman means that he ran away because of some crime. Said R. Jehudah in the name of Samuel: "A prisoner who left ripe stalks for cutting, or grapes, dates, or olives for pressing, the court should appoint a guardian who shall do all work necessary, and then transfer it to his relative. But why should the garden not remain until his return? For adults, full-grown men, no guardians are appointed."

R. Huna said The estate of a prisoner must not be transferred to a minor relative, and not the estate of a minor to any relative, and also not to a relative of his relative (*e.g.*, a minor

who has a brother of his father, and this brother has a brother of his mother, who is a perfect stranger to the minor). It must not be transferred to a minor relative, because he may damage the estate; and also not to a relative, and a relative of relatives, because in the course of time they may possess it without any protest; they would keep it for themselves permanently, basing their pos. session upon the law of Occupancy."

Said Rabha: "It is to be inferred from R. Huna's statement above, that possession is not taken of the estate of a minor, no matter whether he is an uncle on his father's or mother's side; no matter whether it was land or houses, and also no matter whether the division among the brothers took place or not."

There was an old woman who had three daughters. Together with one of them she was taken to prison, and of the remaining two, one died and left a child. Said Abayi: "What shall we do? Should we transfer the estate to the remaining living daughter, who is here, then perhaps the old woman will die, and the minor will become an heir; and there is a rule that the estate of a minor must not be transferred to a relative in trust. Should we transfer the estate to the child, then perhaps the old woman will not die; and there is a rule that no minor can be appointed as guardian to the estate of a prisoner. Therefore, the half of the estate should be given to the sister, who is here; and a guardian shall be appointed for the other half for the sake of the child." Said Rabha: "When there is no other way but the appointment of a guardian for the half, then he shall be appointed rather for the whole estate." Finally, it was heard that the old woman was dead. Said Abayi: "Now, one-third of the estate should be given to the sister, and one-third transferred to the child, and the remaining third should be divided one-half to the sister, for safekeeping, and for the other half a guardian shall be appointed for the sake of the child." (Rashi explains thus: One-third certainly belongs to her, as she is an heir; the same is the case with the other third of the minor; the remaining third, however, belongs to the sister who is a prisoner, whose existence is doubtful. Now, the half of her inheritance must surely be transferred in trust to her sister, as the law allows a relative to be a guardian; and, at any rate, her sister may take possession of it, if she is dead, as she is the heir; and if she is still alive, she is to be considered a guardian. The other half, however, if she is dead, the minor is an heir; but if she is alive, she cannot be a guardian, because of age; and, therefore, a guardian must be appointed.) Said

Rabha: "If a guardian, then he must be appointed for the whole third."

A brother of Mari b. Isk, who was born in Hoozai, came to him and demanded a share of the inheritance of his father, and he said: I do not know you. The case came before R. Hisda, and he said: Mari is right: as it is written [Gen. xlii. 8]: "And Joseph recognized his brothers, but they recognized not him." And the reason was, because Joseph had departed when he was not yet bearded, and when they saw him he was; therefore it is for you to bring evidence that you are his brother. And he answered: I have witnesses, but they are afraid to testify, because Mari is a powerful man (and they are afraid of being injured by him). Said R. Hisda to Mari: "Then you must go and bring witnesses that he is not your brother." Rejoined Mari: "Is this the law? Is it not a rule that the plaintiff must bring evidence?" And R. Hisda answered: "So is my decision to you and to all powerful men like you." And he rejoined: "What is the use of my bringing wit. nesses, they will certainly testify for my sake, as they will be afraid to testify against me." Rejoined R. Hisda: "I do not suspect that the witnesses will do two wrong things for fear of you; what they may do is, not to appear before the court, but they are not suspected that they should come and testify falsely." Finally, witnesses appeared, and testified that *he* is his brother. And the brother claimed Mari should give him a share from the vineyards and gardens cultivated by Mari, and R. Hisda said that his claim was right, as there was a Mishna, Chap. ix., in the Third Gate, which stated so. Said Abayi to him: "What comparison is this? The Mishna there treats of a case where were brothers of age and minors, and those of age cultivated the estate; the Mishna states, therefore, the improvement must be divided (*i.e.*, as they know of the existence of their minor brothers, they relinquish the forth. coming share of their labor for the sake of the minors). But here, did Mari know that a brother existed, that he should relinquish his labor for him?" The case was not decided in this court, and came before R. Ami, and he said: "Was it not decided in a case of greater importance, namely, of a relative who took possession of the estate of a prisoner, and improved it, his compensation must be appraised as a gardener; and in this case, as R. Hisda decided, he should take an equal share of the improvement made by Mari, without any compensation even as a gardener, and the case was returned to R. Hisda, and he said: How can it be compared? The case cited by R. Ami was, that the court appointed the relative

to take care of the estate, and certainly a compensation must be given him; but here, did Mari do so with the permission of the court? and, moreover, the court could not appoint him as a guardian, because his brother was a minor then, and, as said above, no relative can be appointed guardian of the estate of a minor." The case was referred again to R. Ami, and he said: "I was not aware that his brother at that time was a minor."

MISHNA *V.*: If one deposits fruit, the depository may account to him losses as follow: To wheat and rice, nine half *cabs* to one *coor*; to barley and millet, nine whole cabs; to spelt and flax, three *saahs* to one *coor*; however, all must be appraised according to the measures and circumstances of the time. Said R. Johanan b. Nuri: What do the mice care? they consume all the same, whether more or less; therefore he must account the loss to him for one *coor* only. R. Jehudah, however, says: If there was a large quantity, he may account for no loss at all, because it increases.

GEMARA: Is it not a fact that with rice there is more loss? Said R. bar bar Hana in the name of R. Johanan: "The Mishna treats of shelled rice."

To spelt and flax, etc. Said R. Johanan in the name of R. Hyya: "The Mishna treats of flax which is yet in the stalk, and so we have also learned in the following Boraitha: To spelt and to flax in the stalk, and to rice not shelled, three *saahs* to one *coor*."

All must be appraised, etc. In a Boraitha it was taught so accordingly to each *coor* and circumstance of the season.

R. Johanan, etc. There is a Boraitha which adds as follows: It was said to R. Johanan, Is it not a fact that much of it undergoes a loss, and much of it is scattered?"

Another Boraitha, concerning our Mishna, states: All this is said in case he has mixed it with his own, but if he has assigned a corner, for him to put his grain, then he may say: "Yours is before you, take it as it is."

But why should it not be the same, even if he has mixed it with his own? He may take his own, and for the remainder he shall say: Yours is before you? The case was, when he used this grain. But even then let him take the remainder of his own? The case was when he did not know how much he had used of it.

R. Jehudah said, etc. What is to be considered a large quantity? Said Rabba bar bar Hana in the name of R. Johanan: Ten *coors*; and so we also learned in a Boraitha.

A disciple taught before R. Na'hman that all this was said in

case the depositor measured the grain of his barn, and the depository returned the grain also from his barn; but if he returned the grain from his house he needs not to account to him any loss at all, because it usually increases. Said R. Na'hman to him: "Does the Mishna treat of fools who give a large measure and take in return a small one? Perhaps your Boraitha teaches as follows: All this is said when the depositor has given it to him at harvest time, and it was returned to him at the same season; but if he deposited it in the harvest, and it was returned to him in the rain season, he needs not to account any loss, as it increases." Said R. Papa to Abayi: "If it is so, why should not the pitcher full of grain crack in the rain season? It happened that such a pitcher cracked. According to others, the grain which was in a closed pitcher does not increase, for lack of space."

MISHNA *VI*.: The loss of wine counts one-sixth--R. Jehudah, however, says one-fifth--of oil, three *lugs* of each hundred, namely, one and a half for yeast, and one and a half for the absorption of the vessel. [1] If, however, the oil was already purified, there is no loss for yeast, and if the vessels were old ones, then nothing is to be accounted for the vessels. R. Jehudah, however, says that even if one sells purified oil the buyer bears the loss of one and a half to each hundred *lugs*, for waste [2] yearly.

GEMARA: And they do not differ. The one of them treats of waxed barrels, as the custom was in his place, which do not absorb much; and the other treats when they were smeared with pitch,

as the custom was in his place, and absorbed more. Some say that in some places barrels were made of such kind of clay that did not -absorb much. In the place where R. Jehudah used to live, there was usually put forty-eight pitchers into one barrel, and they were sold for six *zuz*. R. Jehudah, however, when he became a storekeeper, sold every six pitchers for one *zuz*, so that for thirty-six pitchers he obtained six *zuz*, and twelve remained for him; counting the loss of eight pitchers for absorption by the vessels, he nevertheless had for his profit four pitchers. But did not Samuel say that one must manage that his profit should not exceed a sixth of the amount? Hence a sixth is allowed? Why, then, did not R. Jehudah manage to have a sixth profit? Because of the barrels and the yeast, which, aside from the four

[paragraph continues] *lugs*, remained for him. If so, then R. Jehudah profited by more than a sixth? He took this for his trouble, and for the commission which he had to give to the barrel sellers.

"*If it was purified oil*," etc. But even if there were old ones, it is impossible that they should not absorb some? Said R. Na'hman: The case was when they were waxed. Abayi, however, says, even when they were not waxed, if they were old ones they had already absorbed all they could, and nothing more from the new stuff.

R. Jehudah says, etc. Said Abayi: "In accordance with R. Jehudah's theory, one may mix yeast with the oil he is selling; and that is the reason that the buyer must accept a *lug* and a half for yeast, as the seller may say, If I would like to mix yeast with it you would have to accept; do the same even when I give it to you pure. But why should not the buyer say, If you would put yeast in it, I would sell it with the oil; but now, even if you would furnish me with the yeast separately, what should I do with it, as I cannot sell it separately? The Mishna treats of a private person who prefers clear oil.

And, according to the theory of the rabbis, one must not mix yeast with oil, and therefore one may not accept any loss for yeast, as the buyer may say, As it is not allowable for you to mix the yeast with the oil, I need not accept any loss for yeast. Said R. Papa to Abayi: It seems to be the contrary. According to the sages, he is allowed to mix yeast, and therefore the buyer need not accept any loss for it, as he may say, Because you have not mixed it, you have relinquished it for my sake. And, in accordance to R. Jehudah's theory, the mixing is not allowed, and therefore he must accept the loss of a *lug* and a half, and the seller may say, To mix any yeast with the oil by one is not permitted, and if you were not to accept any loss, where is my profit? Shall I be a business man for buying and selling without deriving any profit from it? There is a Boraitha which states that a buyer or a depository, concerning the offscouring, is equal in law. How is this to be understood? Shall we assume as the buyer does not accept the offscouring, the same is the case with the depositor? Why? The depository may say: What have I to do with your offscourings? Therefore it must be explained in the reverse. As the depositor must accept the offscouring, the same is the case with the buyer. Is that so? Have we not learned in a Boraitha, R. Johanan said that the loss of unpurified oil is to be accounted to the seller only, but not to the

buyer, because he accepts a *lug* and a half for yeast, without offscouring? This presents no difficulty. It treats of a case when the money for the oil was paid in Tishri, and he delivered it in Nissan, with the same measure as at the time it was bought (then the buyer must accept the loss,

as the oil in Nissan is usually already purified), and R. Johanan speaks of a case when it was paid and delivered in Nissan with the usual measure of the season.

MISHNA *VII.*: If a barrel is deposited for safe-keeping with some one without the owner assigning a separate place for it, if the depository has handled it and it broke while yet under his hand, if his act was for his own advantage he is responsible. If for the sake of the article, he is not. If, however, it broke after it was replaced, there is no responsibility at any rate. If a separate place was assigned by the owner, and the depository handled it and it broke, he is responsible for it at any rate, provided he has replaced it for the sake of the article.

GEMARA: This Mishna, which states that there is no responsibility if it broke after he replaced it, even if it was for his own advantage, is in accordance with R. Ismael, who said elsewhere that no knowledge of the owner is necessary for the return of a lost article; but if so, why then only when a separate place was not assigned to it? The same should be the case even when it was assigned? Yea! but it is to be explained thus: Not only when a place was assigned by the depositor, and the depository put it into the same, he is free;. but even if no place was assigned, if only the depository returned it to the place where it was before, he is also free; but if so, how is to be understood the latter part of our Mishna in case a place was assigned by the depositor? This is in accordance with R. Aqiba, who said that the knowledge of the owner is needed. And the same interpretation of the first part is to be used here also; that is, not only if a place was not assigned, but even if it were assigned, he is nevertheless responsible. But is it right that the first part should be in accordance with R. Ismael and the latter part with R. Aqiba? Yea! as R. Johanan said: "He who will interpret to me our Mishna in accordance with one of the two above Tanaim, I will carry his clothes for him to the bath-house." R. Jacob b. Abba, however, explained it before Rabh that he took the same with the intention of robbery, and R. Nathan b. Abba, before the same, that he took it with the intention of using a part of it, (and although he has not used it as yet) it is nevertheless

considered already his property and he is responsible for it. 1 In which point do Jacob and Nathan differ? In the law of "stretching his hand" (Ex. xxii. 10): If using a part of it is needed, or the intention alone makes him liable, although he has not touched it as yet. According to Jacob he is not liable unless he has used some, and according to Nathan the intention only suffices. R. Shesheth opposed (both statements). "Does then the Mishna state he took it? It states he handled it only." Therefore he explained it that the handling was for the purpose of reaching pigeons, which were on a higher place, by standing upon the barrel, and he holds that borrowing an article without permission of the owner is considered robbery; hence he acquired title to it. And by such an interpretation the whole Mishna can be explained in accordance with R. Ismael, and the latter part, in case the place was assigned by the depositor, treats when the depository has replaced it not in its assigned place. R. Johanan, however, maintains that, from the expression of the Mishna, replaced is to be understood that he put it at the very same place (and therefore his above statement). It was taught: "Rabh and Levi, one of them holds that stretching his hands means that he used a part of it already, and the other one holds that the intention only suffices, and from the explanation of Rabh in a Boraitha, further on, it may be understood that Rabh is the one who holds that the intention only suffices. The Boraitha states as follows: "A shepherd, who left his flock, and in the meantime a wolf or a lion damaged it, he is free (provided it was not a neglect of duty). If, however, he placed his cane or his bag upon the animal, which was damaged by the above wild beast he is responsible; and in the discussion, why such a law? It

was explained in the name of Rabh that he struck it with his cane and it ran away." Now, did he take anything away from the animal? Hence it is to be inferred that he holds that the liability of stretching his hands needs not any using or diminution of the article. But perhaps Rabh means that he struck it so hard with his cane that it becomes lean (hence it is considered a diminution), and it seems so from the expression, he struck it with his cane; hence Rabh holds that to the above liability using is needed, and Levi is the one who holds it needs not. Said R. Johanan in the name

of R. Jose b. Nehoraï: Peculiar is the stretching of hands, which reads in regard to a bailee for hire in connection from the same expression, which reads in regard to a gratuitous bailee. But I say that it is not peculiar. (Says the Gamara:) According to R. Jose, What is the peculiarity? He maintains this expression should not be written in the case of a bailee for hire, and it should be deduced from the case of a gratuitous bailee thus: A gratuitous bailee, who is not responsible for theft and loss, is responsible for stretching of hands. A bailee for hire who is responsible for the former also, so much the more should he be responsible for the latter act. Why then is it written separately? The peculiarity is that he is responsible, even for the intention. And R. Johanan, who said: I say it is not peculiar, bases his theory on the ground that the above *a fortiori* conclusion is to be controverted thus: A gratuitous bailee is in some respects more rigorously held in a case where he claims stolen, and must pay the double amount if thereafter it was found that it was not so, which is not the case with the bailee for hire. He, however, who does not use the objection, maintains that the principal amount without an oath (which the law prescribes to a bailee for hire) is more rigorously held than the double amount with an oath.

Rabha says: "If the expression of stretching hands would not be written in the both above-mentioned cases, it could be deduced from the case of a borrower. A borrower who has stretched his hands on the article with the permission of its owner is, nevertheless, responsible, even for an accident; both the above-mentioned cases, which treat of those who have stretched their hands without the permission of the owner, so much the more should they be responsible. Why, then, is it written, one of them, to teach that the intention of stretching hands without using suffices; and the other one, that one shall not say that the rule: it is sufficient for a deduction, to apply the law of the case from which it is deduced, in the very same manner, but not more rigorously? And as a borrower is not responsible when it happened in the presence of the owner, so also should be with both mentioned bailees, that if they have done so in the presence of the owner, they should be free (therefore the repetition, to teach that in this case it is not so).

MISHNA *VIII.*: If one has deposited money for safe-keeping, and the depository tied it and carried it on his shoulder, or he gave it to his son or daughter, who were not as yet of age, or he

did not lock it safely, he is responsible for carelessness. If, however, he was careful with it, as it is required of a bailee (and nevertheless an accident happened), he is free.

GEMARA: It is correct in all cases mentioned in the Mishna, that he is responsible for carelessness, but in the case that he tied it and carried it on his shoulder, why is this considered careless? What better could he do? Said Rabha in the name of R. Itshak: It is written [Deut. xiv. 25], "and bind up the money in thy hand," which means, although it is "bound up," it shall

nevertheless be in his hands. R. Itshak said again: That the above cited verse intimates that one shall manage so that his money shall always be in his hands. And he said again: It is advisable for one that he shall divide his money in three parts, one of which he shall invest in real estate, one of which in business, and the third part to remain always in his hands (as it may happen that he will need cash for a profitable transaction). The same said again: Usually blessing does not occur but in things which are not before the eyes, as it is written [Deut. xxviii. 8]: "The Lord will command upon thee the blessing in thy storehouses" (which are not continually before the eye). Similar to this, it was taught by the disciples of R. Ismael. The rabbis taught: "He who is going to measure the grain in his barn, he may say, It shall be thy will, O Lord our God, Thou shalt send blessing to the labor of our hands. When he begins to measure, he may say: Blessed may be He Who sendeth blessings upon this heap. If, however, he prayed after measuring, his praying was in vain, because blessing does not occur on things which are weighed, measured, or counted, but on things which are not before the eyes, as it is written (as the above cited verse)."

Samuel said: "Nothing is considered safety with money, unless it is hidden in the ground." Said Rabha: "Samuel admits that if it was in the twilight of the eve of Sabbath, that the rabbis would not trouble him to do so. If, however, after the Sabbath departed, and he had time to hide it, and he did not do so (and in the meantime something occurred), he is responsible, unless he was a young scholar who thought, probably, I will need money for the benediction of the Habhdala. It happened that one deposited money with his neighbor, who hid it in a hut made of branches, and it was stolen. When the case came before R. Joseph, he said: "Although concerning fire, it is a wilful carelessness; concerning thieves, it is considered safe; and there is a rule that if, finally, it was an accident, although it was started in

neglect, there is no responsibility. The Halakha, however, prevails, that in such a case there is responsibility."

It happened that one deposited money with his neighbor, and when he demanded the money, the depository said: I do not know where I put it; and Rabha made him pay, declaring that such an answer is considered wilfulness. It happened also that one deposited money with his neighbor, and he gave it to his mother for safe-keeping. She put it in a χαρταλος (a kind of box), and it was stolen. When the case came before Rabha, he was considering how to decide: Should we make him pay, he may say, he who gives an article for safe-keeping does so with the condition that the depository may save it by means of his family. Shall we make his mother pay, she may say, my son did not inform me that the money was not his. If I were aware of it, I would have buried it; and shall we make him pay because he did not tell his mother? He may say, on the contrary, I have done so, because I thought if she would think it is my money, she would take more care of it; therefore, he decided that he shall swear that he gave it to his mother; and she shall swear that she put it in the above-named box, and it was stolen, and then both shall be free. There was a guardian of orphans, who bought an ox for the orphans and transferred it to the shepherd. The ox had no teeth and could not eat, and finally it died. And Rami b. Hama considered how to decide: Shall we make the guardian pay, he may say, I transferred it to the shepherd, what could I do more? And shall we say the shepherd shall pay, he may say, I did my duty. I have put it between the oxen, and food was given to it; how could I know that it could not eat? [Let us see: the shepherd is considered a bailee for hire of the orphans, was it not his duty to investigate? If there would be a damage to the orphans, it would indeed be decided so; but the case was, that the orphans did not suffer any damage, as they found the owner of the ox

and collected the money which was paid to him for it. Who, then, is now the plaintiff? The owner of the ox, who claims that he was not informed of the case. Of what should he be informed (did he not know that his ox had no teeth and the act of selling was a fraud)? It speaks of a speculator whose business is to buy and sell oxen.] The decision of Rami b. Hama was, that the speculator should swear that he was not aware of it, and then the shepherd must pay the value of cheap meat. 1

It happened one deposited a bundle of hops with his neighbor, who owned a similar bundle of the same, and told his employee to put the hops in the beer, from his own bundle, but the employee took them from the other one. When the case came before R. Amram, he was considering how to decide this case. Shall the depository be made to pay? He may claim, I told my employee to take from my own. Then should the employee be made to pay? He may claim, my employer did not tell me not to touch the other bundle, and I thought that he only showed me that he owned hops, and it was no difference from which bundle I would take. [But what damage did the depository sustain? Even if he paid for the hops used, he has in exchange his own. Said R. Sama b. Rabha: "The case was, that the beer was spoiled by the bad hops." And R. Ashi said: "The hops were good, but mixed with thorns, and the beer was not improved as it should be." And the employer claimed the damage was caused by the bad quality of the hops, and wanted the difference of the value for not improving, and it was decided he should get it.]

MISHNA *IX.*: Money deposited for safe-keeping with a money-changer, if it was tied up, he must not use it, and therefore, if lost, he is not responsible. If open, he may use it, and is responsible if lost. With a private person, however, he may not use it under any circumstances, and is therefore not responsible for loss. A storekeeper is considered in this respect a private person, according to R. Meier. According to R. Jehudh, however, he is considered a money-changer.

GEMARA: If the depositor names the sum contained in each bundle, why then shall the money-changer not use it? (Every one knows that a money-changer needs always money for his business, and one who deposits money with him does so usually with the intention that it shall be used.) Said R. Assi in the name of R. Jehudh: "Read in the Mishna that it was both tied up and scaled." R. Mari questioned: "How is the law, when it was tied up with an unusual knot? (Should it be considered as a seal or not?)" This question remains undecided.

"*If open, he may use it*," etc. Said R. Huna: "Even if it was robbed." [But did not the Mishna state *for loss*? as Rabha explained that loss means such an accident as, *e.g.*, his ship was lost at sea.] R. Na'hman, however, maintains that in such case he is not responsible. Said Rabha to him: "According to your theory we see that the money-changer is not considered a borrower (who is responsible even for an accident); then must he not be considered also as a bailee for hire (hence he should not be responsible for theft) And he answered: "I agree with you, that because he has a right to use the money for business, to derive benefit from it, this makes him a bailee for hire." R. Na'hman objected to R. Huna's statement from the following Tosephta: "'Money deposited with a money-changer, if tied up, must not be used, and in case the money was from the sanctuary and the money-changer used it, the transgression is not imputed to the treasurer of the sanctuary. If, however, open, it maybe used, and if the money-changer used it, the transgression

falls upon the above-named treasurer.' Now, according to your theory that the money-changer is responsible, even if it was robbed by force (consequently, with the act of depositing, it goes from under the control of the treasurer, and is from now on under the control of the money-changer, hence the transgression was already done by depositing). Why then does the Tosephta state that only when the money-changer used it, the transgression falls upon the treasurer?" And R. Huna answered: "Indeed, the same is the case even when the money-changer has not used it, and the expression used in the latter part is not to be taken in particularity, but it is mentioned because of the same expression in the first part?"

MISHNA *X*.: A depository who stretches his hand for the bailment, the school of Shamai makes him liable from the time he touched it for increase and decrease, so that if, thereafter, it becomes lower in price the depository must suffer; and the same if it increases, he must transfer the increase to the owner. The

school of Hillel makes him liable from the time he used it. R. Aqiba, however, maintains that he must pay the value at the time he is summoned.

GEMARA: Rabba said: "If one robbed a barrel of wine, the value of which was one zuz at that time, and thereafter it increases to four zuz; if he breaks it or drank its contents, he must pay four zuz. If, however, it breaks accidentally, he must pay one zuz only. Why so? Because, if it would still be in existence, he would be obliged to return it; consequently, the guilt came with the drinking or breaking, when the value was already increased; and there is a Mishna that all robberies must be counted from the time they were perpetrated; but if it was broken without his fault, so that after its increase he had done nothing, he pays one zuz only, as his liability begins from the time he took it, and then it was worth only one zuz. An objection was raised from our Mishna: The school of Hillel makes him liable, etc. What is meant by the expression, *from the time he used it*? Shall we assume that by the word *used* is meant that he had given it away, and at that time the value of it was decreased? Is there one Tana in the whole college that holds so? Is it not stated in the Mishna that all robberies must be paid at the time they were perpetrated, and if increased at the time, then Beth Hillel's decision would be the same as Beth Shamai? Hence the expression, "at the time it was used," means when it was taken from the owner. And the above schools differ in case of an increase. According to Beth Shamai, if it increased at the time he had given it away, he must pay the increase also; and according to Beth Hillel, it must be appraised only at the time it was robbed; and if so, then Rabba's decision is in accordance with that of Beth Shamai? Rabba may say that the schools do not differ with an increase, but with decrease. And the point of difference is this: The Beth Shamai holds that the liability comes with the stretching out of his hands, although he has not used it as yet; consequently, the decrease occurs while under his control. And the Beth Hillel holds that using is necessary; consequently, it is considered under the control of the owner until the depository makes use of it, and if a decrease occurs while it was not as yet used by him, it is counted under the control of the owner.

Then Rabha's decision above (page 101), that stretching out the hands needs not the *using*, would be in accordance with the Beth Shamai; therefore this point of their difference must be explained thus: The Beth Shamai holds that the increase of a

robbed article belongs to the owner, and according to Beth Hillel, it belongs to the robber. (And the Mishna treats of a case, *e.g.*, a gravid cow or a sheep unshorn, according to Beth Shamai, it belongs to the owner; and according to Beth Hillel, it belongs to the depository.) R. Meier and R. Jehudah differ in the same case (Baba Kama,), and it seems to be so, as the Mishna states that the school of Shamai holds that he must suffer increase and decrease; and the school of Hillel, at the time it was used. (From the expression increase and decrease, and not dearer and cheaper, it is to be inferred that it treats of a case similar to the above-mentioned explanation--Rashi.) Infer from this that so it is.

R. Aqiba, however, maintains, etc. Said R. Jehudah in the name of Samuel: The Halakha prevails according to R. Aqiba. He, however, agrees that in case there were witnesses at the time of robbery it must be paid. Why so? Because it is written [Lev. v. 24]: "To whom it appertaineth shall he give it, on the day when he confesseth his trespass." And as there were witnesses, the trespass is counted from the time it was done. Said R. Oshia to R. Jehudah: "Rabbi, thou sayest so! So said R. Assi in the name of R. Johanan: R. Aqiba insists in his decree even if there are witnesses, and his reason is taken from the same verse cited, as only the court made him know of his trespass." Said R. Zeira to R. Abba b. Papa: "When you will ascend to Palestine, make thy way around the steps of Zur and visit R. Jacob b. I'di and question him whether he heard from R. Johanan about R. Aqiba's decision above, and if so, the Halakha prevails." (He did so) and the answer was: "So said R. Johanan, the Halakha prevails in accordance with R. Aqiba always."

What is meant always? Said R. Ashi: "It means even when there were witnesses. It can also be said that it means the Halakha prevails in accordance with him, even when the depository returned it to its former place and then it broke: against R. Ismael's theory that the knowledge of the owner is not necessary (*i.e.*, that R. Aqiba makes him responsible if it breaks, while the owner was not as yet aware that the article was returned), and so the Halakha prevails. Rabha, however, said: "The Halakha prevails in accordance with Beth Hillel."

MISHNA *XI.*: If one intends to use a bailment deposited in his control and said so in presence of witnesses, the liability follows immediately; so according to Beth Shamai. Beth Hillel, however, maintains he is not liable unless he has acted so, as it

is written [Ex. xxii. 10]: "That he has not stretched out his hands against his neighbor's goods." If he has bent the (deposited) barrel, and took of it a quarter of a *lug*, and in the meantime it broke by accident, he must pay only for the quarter of a *lug*. If, however, he picked up the barrel and took the above-mentioned measure, and in the meantime it broke, he must pay for the whole barrel.

GEMARA: Whence is all this deduced? From the following, as the rabbis taught: "It is written [ibid., ibid. 8]: 'For all manner of trespass.'" From this the Beth Shamai deduces that he is liable for the intent as well as for the act itself. The Beth Hillel, however, maintains that there is no liability unless he stretches out his hands, as the above-cited verse (10) reads. Said the Beth Shamai to the Beth Hillel: Is it not written, "for all trespasses"? And they answered: But is it not written, "if he had not stretched out his hands"? The verse, however, cited by you is to be explained thus: Let one say that he is liable only when he himself committed this act, but not if

he did so through his slave or messenger; therefore it is written, of all trespasses.

If one bent the barrel, etc. Said Rabha: "It is so in case it breaks. If, however, the wine became sour, he must pay for the whole. Why so? Because his act causes the damage (for if it were full, no air could enter to spoil it)."

If, however, he picks it up, etc. Said Samuel: "The expression, and he took of it, is not to be taken literally, for it means with the intention of taking out, and he is liable even if it broke before he did take." Shall we assume that Samuel holds that "using" is not needed for the liability of stretching hands? It may be said this case is different, as one-quarter of a *lug* may cause the spoiling of the whole wine, as explained above.

R. Ashi questioned: "If one picked up a deposited packet with the intention of taking out of it one *dinar*, what is the law? Shall we assume that wine only is saved when it is full, but money can be saved at any rate, or a full packet of money is safer than one which is not filled up (as from a packet full of money a coin cannot easily drop)? This question remains unsettled.

Footnotes

82:1 There are objections and answers concerning oaths, which are repeated in Tract Shebuoth (Oaths), therefore omitted here.

83:1 Of which it is to be deduced that if it is possible to moderate the strict law without any trouble it must be done.

84:1 *Mulgeo* means milking, and it is used in a case where the milk is always drawn away, and the cow, the principal, loses nothing by the operation.

85:1 A hired an animal of B that he should labor with it one hundred days, and then B asked A, as a favor, he should loan it to him for ninety days of the hundred, and subsequently he should return it to A for the remaining ten days, and if death occurred during the time it was yet borrowed, B, although he is the owner, is now considered a borrower only, who is responsible. But if A after he had loaned the hired cow to B, the owner, hired the same again for eighty days, B is considered a borrower of the animal, who hired it to another one for labor. Now if the animal dies while under the control of A he has only to take an oath that the death was natural and B must furnish him with another cow instead. If, however, B has borrowed it again for seventy days out of the eighty of the second hiring, and death occurs while under B's control, then A has only to take an oath for the natural death, and B, the borrower, has to furnish A with four cows--two for the two times he has borrowed from him, *i.e.*, as the time of his borrowing is not yet elapsed it is considered as if he had loaned him *two animals* and two deaths occurred, and the other two he must furnish him for the remaining labor days he hired from him.

90:1 In the text only one word, *Veyonêach*, was Saphra's answer, and the explanation is translated by us from Rashi.

91:1 It means to state that this law was an old one, in time when heave-offering and tithes were observed.

93:1 The Hebrew word for it is *Nietooshim*, which means literally "abandoned"; and the second, *Retooshim*, which means split, and thus according to the meaning of the verse. It is translated by Leeser as in the text, which certainly also means unwillingly. Rashi, however, explains from the beginning of the verse, which is literally a tumult, that for fear enemies will rob the land the inhabitants ran away and left the land desolate; and the Gemara considers it as if it were done willingly.

98:1 Rashi explained above that all vessels at that time were of clay, and therefore a new one absorbed.

98:2 The text uses the word "schmarim," which means literally yeast. Here, however, it refers to waste material.

101:1 This complicated paragraph is explained by Rashi at length, but notwithstanding his interpretation it remains complicated and seems to us of no importance. We, therefore, have translated almost literally without any explanation, as every student should be able to interpret it according to his own understanding.

104:1 Rashi says: I wonder where Rami's decision is taken from. The shepherd was surely not the bailee of the speculator. It seems, however, to him, that p. 105 [paragraph continues] Rami based his decision upon the Mishna II. in this chapter, where R. Jose declared that the cow must be returned to its owner, although the owner has not any business with the borrower, and so was the Halakha decided. Now, as in that case the hirer suffered nothing, as the law makes him free of an accident, nevertheless, because he has a claim against the borrower, it is decided that the owner of the cow may substitute the hirer and collect the money for his claim from the borrower. The same is the case here; for if the orphans would suffer any damage, they would surely collect it from the shepherd, who was their bailee. Now, when they did not suffer any damage, the speculator substitutes them. However, such moderation could not be made if the orphans would suffer any damage, as the orphans, who are not yet of age, could not relinquish what is due to them; but now when the speculator substitutes them, and the claim of wilful carelessness could not be made by the speculator directly, because the shepherd claims that he had done all his duty, etc. (see text); hence the moderation, he shall pay the value of cheap meat and the skin shall be returned to him. Tosphat, however, maintains in the name of R. Tam, that this decision was not a moderation at all, but a strict law, for if the speculator would be informed, he would have slaughtered the ox immediately, as he could not wait with it for the market-day and sell the meat at a low price.

Next: Chapter IV