CHAPTER VIII.

RULES AND REGULATIONS CONCERNING THE SALE AND HIRING OF ANIMALS, THE EXCHANGE OF THEM, THE SALE AND LEASING OF REAL ESTATE.

MISHNA *I.*: If one borrows a cow, and at the same time hires or borrows its owner, or if he does so before borrowing the cow, and the cow dies while they were laboring, the borrower is free from payment, as it is written [Ex. xxii. 13]: "And if one borrow aught of his neighbor, and it be hurt or die," etc. If, however, he has borrowed a cow, and has borrowed or hired its owner afterwards, and it dies, he is responsible; as it is written [*ibid*., *ibid*. 13]: "The owner thereof not being with it, he shall surely make it good."

GEMARA: As in the latter part the Mishna states, "if he borrowed the cow afterwards," we may infer that in the first part it means that he has borrowed or hired its owner at the very time that he borrowed the cow. How, then, can there be a case in which the cow is borrowed by being led only, and its owner by words? And if the owner of the cow says to the borrower: "I and my cow are borrowed for your service," *he* is already considered borrowed, but the cow is not considered so until it is led off by the borrower. And so the owner was borrowed *before* the cow? If you wish, we may say that the stipulation was made that the owner shall not be considered borrowed until the leading of the cow takes place; and if you like, it may be said that the cow was already placed in the yard of the borrower, and in such a case leading it off is not necessary. We have learned in the Mishna that "there are four kinds of bailees," etc. Whence do we deduce all this? From what the rabbis taught. The first paragraph [*ibid*., *ibid*. 6] treats of a gratuitous bailee; the second [*ibid*., *ibid*. 9] treats of a bailee for hire; the third [13] treats of a borrower.

Says the Gemara: This is correct concerning a borrower, as it is so plainly written [verse 13]. But how do we know that the first and the second paragraph mentioned above are not the reverse? Common sense shows that the second paragraph

means a bailee for hire, as he is responsible for loss and theft. But perhaps the contrary may be said. The first paragraph may mean a bailee for hire, since he is responsible for the double amount if he claims theft. (This is no question.) It is more rigorous to pay the principal amount without an oath than the double amount with an oath. The evidence for this can be inferred from the case of a borrower who has all the benefit without any expense, and nevertheless he pays only the principal amount. But has not the borrower to feed it and also to guard it consequently he has some expenses? It can be said that the borrower keeps it in a grazing place, which is also secured from thieves; or that he borrows vessels for which he has no expenses at all. It is stated in the same Mishna "that a bailee for hire and a hirer take an oath in case the borrowed thing breaks, is confiscated, or dies, but they pay for loss and theft." This is correct in case of theft, as it is written plainly [*ibid*., *ibid*. 12]: "But if it be stolen he shall make restitution unto the owner

thereof." But whence do we know that the same is the case with loss? Therefore the word "stolen" is repeated [1] to include loss.

But this would be correct according to him who holds that the Torah does not talk as men talk. (Therefore, as there is a repetition, loss may be deduced.) But according to him who holds that the Torah talks like men, what can be said? It was said in the west that an *a fortiori* conclusion is to be drawn thus: For theft which is almost an accident one must pay; for loss which is almost a neglect, so much the more he must pay. Whence do we deduce that a borrower is responsible for any kind of loss? It is plainly written that he is responsible for anything broken or for death. But how do we know that he is responsible in case of confiscation also? And lest one say that this can be inferred from the case of broken or death, it may be objected that cases could be borne in mind which are not so in case of confiscation. It is from what R. Na'hman said in the following Boraitha: Since it is written in verse 13 [*ibid*., *ibid*.], "hurt or dies," confiscation may be included. But is not the word "or" needed for itself? Because if it were not, one might say that the restitution must be made only if the article be both hurt and dead, but not if it were broken only.

Nay, there could be no error, in either case, because common sense dictates that there is no difference to the owner if it were entirely or only half killed. Whence do we deduce that a borrower is responsible for theft or loss? And lest one say that this is to be inferred from the cases of damage or death, then it may be objected that the above cases are different, as they cannot be returned. But in case of theft or loss it can sometimes be returned if he troubles himself. Therefore it must be said that this is deduced from the word "and" in verse 6, which means that what is written above also belongs to this, and also that this corresponds with the above.

It was taught: In case of neglect in the presence of the owner, R. A'ha and Rabuna differ. One makes the borrower responsible, because he holds that a verse can be used only with that matter which was written previously in conjunction with it; and as verse 14 frees the one who has neglected his duty in the presence of its owner, it is not written concerning a gratuitous bailee, which begins with *ibid*., verse 6 (although the law about neglect is mentioned there, and it is not mentioned concerning a bailee for hire and a borrower); therefore the responsibility of a neglect, just mentioned by the two, is to be deduced by drawing an *a fortiori* conclusion from a gratuitous bailee. However, to free one from the consequences of neglect done in the presence of the owner cannot be deduced, because verse 14, which freed them, does it only on the responsibility mentioned there. And the one who frees him holds that the law of a verse can be used in conjunction with that preceding it and that written before. Consequently, verse 14 refers also to a gratuitous bailee in verse 6.

An objection was raised from our Mishna, which states: "He who has borrowed the cow and the owner at the same time," etc.; but a gratuitous bailee is not mentioned there? (Hence there is an objection to him who says that a gratuitous bailee is free in case of neglect committed in the presence of the owner?)

But even according to your theory is there mentioned in the Mishna a bailee for hire? Therefore we must say that the Mishna teaches only things which are plainly written, but not things which are deduced.

R. Hamnuna said: There is no responsibility when the owner works together with the borrowed article--*e.g.*, when the owner of the borrowed ass works with it, and also when he is present

from the time the article is borrowed until it is broken; but not otherwise. (Says the Gemara:) From this statement it is to be inferred that he interprets verse 14, "that the owner must be with it the whole time." Rabha then objected from the following: "If one has borrowed or hired a cow and its owner at the same time, or borrowed the cow and hired the owner, although the owner did his work at some other place, the borrower is free from payment in case the cow dies." May we not assume that the same is the case even if the owner was engaged with another kind of work? Nay; it means the same work. What, then, is the meaning of "at another place"? *E.g.*, he digs after it the earth which it ploughs to make it ready for seed. But as the latter part of this Boraitha states plainly: "If one hired or borrowed a cow, and thereafter he borrowed or hired its owner, although the latter were engaged with his cow *in the very same work and at the same time*, the borrower is not responsible in case the cow dies." Consequently, the first part must speak of a separate kind of work he was engaged in? It can be explained that both parts of the Boraitha speak of one and the same labor, and by the change of expressions it was intended to add something unexpectedly new in the first part as well as in the last; namely, in the first part, that although he was engaged at another work, the borrower is free in case of the cow's death; and in the latter part, that even if he were working together with his cow there is a responsibility. But can such an explanation hold good? To be unexpectedly new it must be only if the cow were laboring at a separate work, and its owner at another kind of work; but if both are at the same work, it is very easy to be seen that he is free. Aside from this there is another Boraitha which states as follows: Because it is written [Ex. xxii. 14]: "But the owner thereof be with it," etc. Why, then, was there need to state, "the owner not being with it," etc.? Is the first not sufficient? It is only written to teach that if the owner were with it at the time of borrowing, there is no necessity for him to be also with it at the time it dies; however, if he were with it at the time it was dying or breaking, but not at the time it was borrowed, the responsibility remains. And there is also another Boraitha, similar to this, which objects to R. Hamnuna's statement, and so it remains. However Tanaim differ in the interpretation of the Scripture, in the following Boraitha it is written [Lev. xx. 9]: "For every man . . . that curses his father and mother shall be put to death,

that his father and his mother hath he cursed," etc. Now, from this it is known that when he curses both father and mother he is guilty; whence do we know that the same is the case when he cursed only one of them? Therefore the repetition, "his father and his mother," to teach that one of them is sufficient to put him to death. So is the decree of R. Jashia. R. Jonathan, however, maintains that from the repetition one cannot understand more than from the first sentence, as for both it could be explained that the two are meant or only one is meant. However, the law is correct as R. Jashia said, for if the verse would mean both *only*, it would state so plainly.

Abye, who agrees with the theory of R. Jashia, interprets the verses in question in this manner. From the verse [13] it is to be understood that when the owner was not present at both times mentioned above, but if he was present at one of the times only, he (the borrower) is free; and from verse 14 it is understood that when he was present on *both* occasions he is free, but if on

one occasion only he is responsible. Therefore it must be concluded that if the owner was present at the time the animal was borrowed, there is no necessity for him to be present at the time of its death. But if *vice versa*, there is a responsibility. Rabha, however, agrees with the theory of R. Jonathan, and interprets the verses in question thusly: From verse 13 it may be understood that if he were present at both times, and also if he were only present at one of them, and the same may be understood from verse 14, and therefore we conclude that the law remains as Abye said (although I do not agree with his reasons).

However, whence do we know that the owner's presence at the time of borrowing is the main thing--perhaps the occasion of the accident is the main thing? Common sense shows that the former is the main thing, as this act only brings the article under the control of the borrower. On the contrary, common sense shows that death is the main thing, as a borrower is responsible for an accident? Nay; after all, the first is the main thing, as this act obliges him to feed it. Said R. Ashi: From the expression, "And if a man borrow aught of his neighbor" [*ibid.*, *ibid.*], it is to be inferred that he is responsible only when he borrowed *from* his neighbor, but not if his neighbor is with him. Then the continuation of the above-cited verse and what follows would be all superfluous? Nay; if not the following,

one may say that such expressions are customary in the Scripture.

Rabina questioned R. Ashi: If one tells his messenger that he shall substitute him in service to his neighbor together with his cow, how is the law if the cow breaks or dies while laboring? Is the word "owner" in the Scripture to be taken so particularly that no one can stand in his stead; or in such a case is the messenger of one considered as if it were himself? Said R. Aha b. R. Iwia to R. Ashi: "Concerning a husband who used the cow of his wife." R. Jonathan and Resh Lakish differ in regard to his responsibility, and concerning a messenger R. Jonathan and R. Ashi differ.

Said R. Eylish to Rabha: If one borrows another's slave and cow, how is the law? This question is to be considered according to the theory of both the Tanaim who differ in the case of the law regarding a messenger, whether he is considered a substitute or not. To the one who holds that he is considered a substitute, the question is the same as is the case with a slave, for the reason that the slave is free from the obligations of the law, and therefore he cannot substitute; on the other hand, according to him who holds that a messenger is not considered a substitute, it may also be questioned if the same is the case with a slave or if the latter is different, as he may be considered as the hand of his master (consequently he may stand for him?). And Rabha answered: "Common sense dictates that the hands of a slave are considered as his master's."

Rami b. Hama questioned: "A husband who uses the estate of his wife, what should he be considered, a borrower or a hirer?" Said Rabha: "Only a man of such genius is fit to make such an ingenious error. What difference is there if he is considered a borrower or a hirer? In both cases it must be considered that the owner of the property is with him; consequently there is no responsibility." The question, however by Rami bar Hama could be raised in case one has hired a cow of a woman and thereafter married her. If the husband is considered a borrower, then he is not responsible, as the owner of the article borrowed is with him; or if he is considered a hirer, the law of a hirer consequently remains. But what is the difference? Is it not a fact that now the owner of the hired article is with him, and this should supersede the previous act which was

without the hirer; as we say the same in case he is considered a borrower?

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Therefore, if Rami raised a question it must be thus: If a woman has hired a cow from any one, and afterwards she married, then, in accordance with the rabbis, who hold that the borrower has to pay to the hirer, there is no question, as the owner of the borrowed article is considered to be with him. However, according to R. Jose, who holds that in such a case the cow must be returned to its first owner--now, if after the woman has married, her husband uses the cow and it breaks, what is he considered, a hirer who must pay, or a borrower who is not responsible for an accident in the presence of its owner? Said Rabha: The husband is considered neither a borrower nor a hirer, but (a buyer of the estate of his wife), as said in the First Gate, p. 197.

The schoolmen propounded a question: If the body of the animal becomes lean because of the labor, how is the law? Said one of the rabbis, named R. Hylqia b. R. Ovia: As the schoolmen questioned in case of leanness and not in case of death, they must be sure that in the latter case one is surely responsible. Why, then, has he borrowed it, to put it under a canopy? Said R. Rabha: Not only if it become lean, but even if it dies while laboring, there is no responsibility, for the reasons said above by R. Hylqia.

There was a man who borrowed an axe from his neighbor and it broke, and he came before Rabh, who told him to bring witnesses that he used it as an axe is usually used, and then he would acquit him. (Questioned the Gemara.) But how is it when there are no witnesses? Come and hear! There was one who borrowed an axe and it broke, and Rabh had decided that he must buy him another one. Said R. Kahana and R. Assi to Rabh: "Does the law prescribe so?" Is it not stated that the defendant has only to pay the damage, but not to buy another? And Rabh kept silence. The Halakha, therefore, prevails in accordance with R. Kahana and R. Assi, that he must return the broken one and must give the difference in money.

There was one who borrowed a pitcher and it broke, and R. Papa told him to bring witnesses that he used it as a pitcher is usually used, and he would acquit him. There was a man who borrowed a cat, which had overeaten itself with mice and died, and R. Ashi, before whom the case was brought, was deliberating (whether this is considered a case in which it dies while laboring or not). Said R. Mordecai to him: "So said Abimi

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of Hagrunia, that a man whom a woman has killed must not be taken into consideration." [1]

Rabha said: "If one wants to borrow something from his neighbor, and so that he shall not be held responsible if it be damaged, he may say to the borrower: You may give me water to drink (*i.e.*, that the giving of water will be considered a labor, so that he borrowed the article with its owner). However, if the lender is clever, he may say to him: First borrow what you need, and afterwards I will give you the water."

Said Rabha: A teacher who teaches infants, a planter, a butcher, a barber, and the scribe of the city--all these, when they do their work, are considered, in case one borrows an article from them, as if he has borrowed also the owner of it.

Said the rabbis of Rabha's college to Rabha: "According to your theory you, master, are borrowed to us" (*i.e.*, that if we were to borrow something from you and should spoil it we should be free from payment). And Rabha became angry, saying: "You want to benefit yourselves with my money? On the contrary, you, as my disciples, are borrowed to me, since I have the right to engage you in any tract of the Talmud I like, and you have no right to prevent me or refuse to study what I explain to you." (Says the Gemara: In reality it is not so.) In the days before the festivals he is borrowed to them, as then he must teach the laws of the coming festivals; they (the disciples), however, are borrowed to him on all other days.

It happened that Maraimar b. Hanina hired mules from Huzai, and the former overworked them and they died; Rabha made him responsible. Said the rabbis to Rabha: "Was it not a neglect in the presence of the owner, and Huzai used to support them in their work? Rabha was embarrassed; finally it was learned that Huzai was not supporting them in their labor, but, on the contrary, was there to see that they were not overloaded. (Consequently Rabha was right in his decision.) This is correct in accordance with him who holds that a neglect in the presence of the owner is to be freed, but there is one who holds that in such a case the borrower is not free. Why, then, the embarrassment? (He may have agreed with the latter.) The case was that the mules were stolen, and died in the house of the thief; and when Rabha made him responsible the rabbis

questioned him: "Was it not stolen in the presence of the owner? Why, then, should Maraimar be responsible for the theft?" And therefore Rabha was embarrassed. Finally, it was learned that Huzai came only to see that they should not be overloaded.

MISHNA *II*. If one borrowed a cow for a half a day, and for the other half a day he hires it, or he borrows it for to-day and hires it for to-morrow, or there were two of them, one of which he borrowed and the other he hired, and it dies, the lender claims that it dies in the time for which it was borrowed, and the borrower says, "I don't know," then the latter is responsible. If the reverse, the hirer says: "It dies while laboring when it was hired," and the owner says, "I don't know," then the former is free. If, however, they contradict each other, and one says that it died while borrowed, and the other says it died while hired, then the hirer has to take an oath that it is as he said, and he is acquitted. But if both say they don't know how the case was, then the damage is divided.

GEMARA: From this statement it is to be understood that if one claims a mana, and the defendant says, "I don't know," he must pay. Shall we assume this should be an objection, as it was taught that R. Na'hman and R. Johanan hold the defendant free in such a case? R. Huna and R. Jehudah hold him responsible (the reason of R. Na'hman's statement is, as R. Ashi explains, because the plaintiff cannot collect any money without evidence; and therefore the money remains with the defendant, in accordance with the law of hazakah). Nay; as R. Na'hman said elsewhere that this is only in case the defendant has to take an oath (the illustration will follow further on). The same can be explained in the case in our Mishna. How was the case? Rabha illustrates it thus: If one claims a mana, and the defendant says, "I am sure of fifty zuz, but not of a hundred," then as he cannot take an oath he must pay. However, in the cases brought in our Mishna, such a case can be found in the first part, when there were two cows. The plaintiff claims, "I have forwarded to you two cows for one day, a half of it as a loan and the other half as

a hire, or for two days, one day as a loan and the other as a hire," and both die in the time for which they were borrowed. The defendant claims, "I am sure that one of them died in the time of borrowing, but I am not sure of the other one," and as he cannot swear, he must pay. The second part is to be explained that there were three cows, and the

plaintiff claims that two of them died in the time for which they were borrowed. The defendant claims that he is sure only of one of them, and as to the others, he does not know whether that which was borrowed died, and that which is still alive is the one which was hired, or *vice versa*. As he cannot swear, he must pay. And according to Rami bar Hama, who holds that all the four kinds of bailees are liable only when they admit a part and deny a part, the first part of the Mishna is to be explained that the claim was for three cows for half a day, or a day as a loan and the other as a hire; and the plaintiff claims that all the three died at the time when they were borrowed. The defendant, however, denies one of them altogether, and for the remainder he claims that only one of them died in the time for which it was borrowed, and concerning the other, he is doubtful; and in the second part the plaintiff claims that he has given him four cows: three of them as a loan and the one as a hire, and the three which were borrowed died. The defendant denies one altogether, and admits that one died in the time for which it was borrowed, and as to the remainder he is doubtful. As he cannot take an oath, he must pay.

One says it died while borrowed, etc. But why? In the claim of the defendant we do not see any admission, even in part, as to the claim of the plaintiff (since the plaintiff claims that that which was borrowed died, and the defendant says that it is still alive, but that the other which was hired is dead; consequently he is not obliged to take an oath at all. Said Ula: As the defendant must take an oath that the cow in question died a natural death, the plaintiff may desire that in that oath shall be included a statement that the hired cow, and not the borrowed one, died (such a desire must be listened to, as it is explained elsewhere that this is a biblical law).

But if both say they don't know, etc. This statement is in accordance with Symachos, who holds that doubtful money must always be divided.

MISHNA *III*: If one has borrowed a cow, and the owner sends it to him by his son, slave, or messenger, or even by the same persons of the borrower, and it dies while on the road, the borrower is free. If, however, the borrower orders him to send it through his son, slave, or messenger, or even through the same persons of the owner, or even if the owner says to him, "I will send it through the persons mentioned above, of my own or of yours," and the borrower says, "Do so," then the

borrower is responsible for the death while on the road, and the same is the case with the return.

GEMARA: Was it not said above that the hand of a slave is considered as the owner's? Why, then, should the borrower be responsible if it was sent with the slave of the owner? Said Samuel: It treats of a Jewish bondman, whose body does not belong to the owner. Rabh, however, said: The Mishna can be explained that it treats even of a heathen bondman; but the order of the borrower is to be considered, as if he would say: Strike it with a stick and it will come to me. [1]

As the borrower told him to send it in that manner, his intention was that as soon as he shall forward it to the above-mentioned persons, the control of the owner ceases.

An objection was raised from the following: If one borrows a cow and it was sent to him with the son of the owner, or with his messenger (with the consent of the borrower), the borrower is responsible for an accident on the road. If, however, it was sent by his slave, he is free. Now this would be correct in accordance with Samuel's theory, as the Boraitha may treat of a heathen slave, and our Mishna of a Jewish one; but according to Rabh's theory it contradicts? Say, then, Rabh explained the case of the Mishna, that the borrower is not as explained above, "it is considered," but Rabh says that the Mishna treats of which it was said plainly, "Strike it with a stick and it will come to me." As it was taught: "Lend me your cow. Through whom shall I send it to you? Strike it with a stick and it will come." Said R. Na'hman in the name of Rabba bar Abuhu, quoting Rabh: As soon as it was out of the control of the owner the borrower is responsible for an accident.

There is a Boraitha which states plainly, as it is above, in the name of Rabh. Shall we assume that it shall be a support to him? Said R. Ashi: Nay; as the Boraitha may treat in case that the courtyard of the borrower was behind that of the owner, so that the borrower was sure that if the owner would strike the animal with a stick, while turning it to the yard of the borrower, it will come to it (but not otherwise). But is not such a case self-evident? The case was that there was another corner in

the yard of the owner, and the animal could turn there while running. Lest one say that in such a case the borrower was not sure, it is necessary to teach us that he was.

R. Huna said: "If one borrows a hatchet, if he has done some work with it he acquires title to it for the time borrowed, but not otherwise." (According to his theory drawing does not give title to a bailee.) To what purpose was this stated? Did he mean to say that he is not responsible for an accident? Why should this case be different from the case of the cow mentioned above? He meant to say that the owner has the right to retract as long as the borrower has not used it, but not after he has. And he differs with R. Elazar, who said that at the same time the enactment of drawing was made concerning buyers, it was also enacted concerning bailees, and so also we have learned in a Boraitha, with the addition that as real estate may be bought with money, with a note, and with hazakah, the same is the case with hiring. With hiring! What has a note and a hazakah to do with hiring? Said R. Hisda: When real estate is hired (*e.g.*, if one hires a house, if he has paid the rent, or has given a note, or taken possession, hazakah, of it) the owner has no right to retract.

Samuel said: If one steals a bunch of pressed dates, which contains fifty dates--and usually when they are sold together a bunch contains only forty-nine, but if single he sells out the whole fifty--then, when the robber repents and wants to make amends, if the dates belong to a common man he has to repay only for forty-nine, but if they belong to the sanctuary, he must repay fifty, with the addition of a fifth part. However, if one spoils the same, he is free from the additional fifth part; as the master said elsewhere: It is written [Lev. xxii. 14]: "If a man *eat* a holy thing unwittingly," etc.; it excludes if he spoiled it.

R. Bibi bar Abye opposed: Why shall he pay to a common man only forty-nine? Let the owner say: I would sell them singly. Said R. Huna bar Jehoshua: There is a Mishna (in the First Gate, p. 131): "It is appraised at how much the measure of the land required for planting a saah was worth before, and how much it is worth after."

Hence we do not appraise the value of that which was consumed, but of that which was diminished. Shall we assume that Samuel holds that the law concerning an ordinary man is not equal to that of the sanctuary? Are we not aware that elsewhere R. Abuhu, in the name of Samuel, declares that there

is no difference? Samuel had retracted that statement. But how do you know that Samuel retracted from *that* statement? Perhaps he had retracted from *this* statement. We are aware of this from Rabha's following statement: "That if some one took something from the sanctuary unintentionally or by an error, he transgresses, as if he did the same from an ordinary man intentionally." (Hence we see that there is a difference between a sanctuary and ordinary goods, and Rabha would not teach such a law if it were against Samuel.) Rabha said: Carriers who break a barrel of wine, the price of which on a market day is five zuz and on an ordinary one four, on the market day they have to return another barrel of wine, but on another they have to pay in cash four zuz. This, however, is said if the wine dealer has no other wine for sale. But if he has other wine, and he does not sell it, they may return him a barrel of wine, as we see that he intends to keep the wine for the season; and also in case they pay him, he has to deduct the money for their labor, and also what he has to pay for making a hole in the barrel (which was of clay).

MISHNA *IV*.: If one exchanged an ass for a cow, and it brought forth young ones, or one has sold one's female slave and she gives birth, and the seller claims that this happened before the sale, and the buyer thereafter, the value of it is to be divided. If one possesses two male slaves, a large one and a small one, or two fields, one large and one small, and the buyer claims, I bought the large one, and the seller, I doubt it, the buyer's is to be considered. If the seller claims: I sold the small one, and the buyer doubts it, the claim of the seller must be considered. If, however, they contradict each other, the seller must take an oath that he has sold the smaller one; if both doubt it, the difference is to be divided.

GEMARA: Why should it be divided? Let us see who possesses it. It should be the obligation of the plaintiff to bring evidence. Said R. Hyya bar Abba in the name of Samuel: The Mishna says: When the articles in question are still in the *semita* (a corner near a public thoroughfare where articles for sale are placed). But why should it not be considered still under the control of the owner, and the buyer the plaintiff who should have to bring evidence? The Mishna is in accordance with Symachos, who said that doubtful money ought to be divided without a note. But was Symachos's decision in a case where both claim that they are certain? Symachos's decision was

only in cases where both doubted. Said Rabba b. R. Huna: Yea, Symachos made his decision, even in a case where both claim certainty. Rabh, however, said: Symachos's decision was only when both claimed that they are doubtful, but not when both claimed certainty. But the Mishna

is to be corrected, that both of them claimed that they were doubtful; and therefore the article in question must be divided. However, the Mishna is correct only with Rabh's correction, because part of it speaks plainly in case both are in doubt. Therefore the first part must also be interpreted in the same way. But according to Rabba bar R. Huna's theory, who says that Symachos's decision was even when both claim certainty, the last part would be entirely superfluous, since even when they claim certainty it is to be divided. Is it so much the more when both claim doubt? Nay; this cannot affect, as it may be said that the last part was taught only to make clear the meaning of the first part; lest one say that it speaks only when they both claim doubt. Therefore it teaches plainly the claims of doubt in the last part to signify that the first part speaks when both claims were of certainty, and nevertheless it must be divided. An objection was raised from the decision in our Mishna that the seller must take an oath that he has sold the smaller one, and this is correct only in accordance with Rabha, who says that Symachos's decision does not apply to a case of certainty. But, according to Rabba bar R. Huna's theory, it does. Why, then, should he take an oath; let them divide?

Symachos admits that in such a case where the oath is to be taken biblically, the law that it should be divided does not exist, as will be explained further on.

If one possesses two slaves, etc. What has an oath to do here? In the claim of the defendant we do not see any admission at all, as the plaintiff claims that he sold another person, which the defendant does not contradict; and, secondly, the seller says: "Here is your bought article; take it." Such a case is not considered a part admission, as said above; and aside from this there is no rule that no oath must be given concerning slaves. Said Rabh: It treats when he demands the value of the articles sold, but not themselves, as, *e.g.*, the value of the slave or the field in question. Samuel, however, says: The Mishna treats concerning the garments of a slave and the sheaves of a field; the seller claims: I sold you the smaller ones; the buyer says: The larger ones. But then the claims are

not of one and the same article, and the axiom, There is no admission by the defendant, mentioned above, applies also to this. As Rabh Papa declares elsewhere that it speaks not of a ready-made garment, but of the stuff to a garment, which is still attached, and one claims: You have sold me measure for a large garment, and the other says: For a small one, the same is to be explained here.

It was difficult for R. Hoshea to accept this explanation, as the Mishna states a slave, and not a garment. Therefore he tried to explain thus--that the Mishna treats that the plaintiff claims that he sold him a slave with his garments or a field with its sheaves. And to the objection that there is no admission at all to the claim of the plaintiff that he has sold him a garment with the slave, the explanation of R. Papa mentioned above may be used here also, that the dress was attached to the slave (*i.e.*, that he was dressed in it); and as an oath has to be given to him for the dress, the oath about the slave may also be included.

It was difficult for R. Shesheth to accept this explanation, as according to it the main thing the Mishna teaches is that the oath for encumbered estate, for which an oath is not given when the claim is only about it, is nevertheless to be included in the oath given for unencumbered estate; and this is plainly stated in several places elsewhere. This, however, presents no difficulty, since, lest one say that the garment which the slave wears is equal to himself, or the sheaves of

the field which are still attached to it are equal to the field, it comes to teach us that it is not so.

If both doubt it, etc. This is certainly in accordance with Symachos's theory, who says that doubtful money is to be divided. How, then, is the second part to be explained, which states that if the seller claims that it was born under his control, the seller must swear that so it was? Did not Rabba bar R. Huna declare above that Symachos's theory applies also to the claims of a certainty? Why, then, an oath? Let them divide in this case also. Symachos admits that in such a case, where the oath is to be taken biblically, the law that it should be divided does not exist. As Rabha explained that it treats of a case in which he has cut off a woman's hand, and of a field in which he has digged pits, excavations, and caves, to which the theory, "Here they are," does not apply, as it is not acceptable. Concerning the admission in

part, it may be considered that her hand is considered a part of her. [1]

MISHNA *V*.: If one sold out his olive trees for fuel, and there were still bad olives on them, the oil of which was less than a quarter of a lug from the measure of a saah, they belong to the buyer. If, however, there was such a quantity or more, the buyer claims it is produced from his trees, and the seller claims it was produced from his estate, the products are too be divided.

Olive trees which were overflooded (by a stream), taken out by the owner, and planted in another's field, and the two quarrel about the fruit borne: one claims, My trees, and the other, My ground brought it. It is to be divided.

GEMARA: Let us see how the case was. If the seller told the buyer to cut it off immediately, and he didn't, then even if there was less than that quantity, it belongs to the seller. If he told him: You can cut it off whenever you like, then, even if it was more, it belongs to the buyer. The case was that he sold it without any stipulation; then less than a quarter of a lug people do not care about. But when more than this, they do. Said R. Simeon b. Paze: The quarter in question must be measured after what is lost in pressing it.

Olive trees which were overflooded, etc. Said Ula, in the name of Resh Lakish: The law holds good only when they were torn out with lumps of earth in which they were planted. (In such a case the trees in question are free from the law Arlah; that is, the first three years) and even then only when three years have elapsed from the time he had planted them in the other field. Otherwise the fruit belongs to the owner of the trees; as be may say to the owner of the estate: If you, *e.g.*, would plant new trees you could not use them in the first three years, as they would be Arlah. But why should not the owner of the estate claim: "If I should do as you say, I would use all of them after the lapse of three years, and now you take half of it." Therefore we must accept, as Rabin has reported that Resh Lakish said, thus: The law holds good when they were torn out with the lumps of earth and during the first three years, but after the lapse of three years all of them belong to the owner of the

estate, because of the reason stated above. But why should not the owner of the trees claim: If you should plant it you would not use it for three years, and now you consume half of it every

year? Because the owner of the estate may answer: If I were to plant it, they would be small and would not afford much, so that I could use the ground near them for vegetables (which need sunshine), which is not the case now, as you planted your trees in that place.

There is a Boraitha: If the owner of the trees says, "I will take back my plant from your field," he must not be listened to (although after three years it will all belong to the other one), but the owner of the estate has to pay the value of trees for planting, and not the value for fuel. Why so? Said R. Johanan: Because of the occupancy of the land of Israel. Said R. Jeremiah: To such an explanation we need such an authority as R. Johanan.

It was taught: If one has planted trees in a field belonging to another, without the consent of the owner. Said Rabh: His word must be appraised, but not to his benefit (*i.e.*, if the expenses were more than the improvement, he gets nothing, and if the improvement was worth more, then he gets paid for the improvement). Samuel, however, maintains that the appraisement should be as much as one has to pay for planting such a field. And R. Papa said.. They (*i.e.*, Rabh and Samuel) do not differ, as one speaks of a field which is better for trees and the other of that which is better for vegetables. And the statement of Rabh was not heard from him plainly, but was so inferred from the following: There was a man who came to Rabh with such a complaint, and he told him to appraise his work. He objected, saying, I do not want my field to be planted at all, and Rabh said: Go and appraise his work, not to his benefit. And the man said: I don't want to do even that, as he spoilt my field. Thereafter it was learned that the owner of the field had fenced it, and Rabh said: From this we see that his work satisfies you; go and appraise his work so that he may be benefited.

It was taught: "If one has rebuilt a ruin of one's neighbor without his consent, and to the owner's claim has said: I will take back my wood and stones," R. Na'hman is of the opinion that he must be listened to, and R. Shesheth maintains that he must not. An objection was raised. R. Simeon b. Gamaliel said that in such a case the Beth Shamai hold that he should

be listened to, and the Beth Hillel say not. Shall we assume that R. Na'hman holds in accordance with the Beth Shamai? R. Na'hman holds with the Tana of the following Boraitha: In such a case his claim should be taken into consideration; so is the decree of R. Simeon b. Eliezar. But R. Simeon b. Gamaliel said that so was the decree of the Beth Shamai. The Beth Hillel's verdict, however, is contrary. How, then, should the law be decided? Said R. Jacob in the name of R. Johanan: If this happened with a house, his claim may be considered, but not with a field--for the reason the earth became deficient.

MISHNA *VI.*: If one rents a house (without appointing the time) in the rain season, he has no right to make the tenant move from the Feast of Tabernacles until Passover; and in the summer season for a period of thirty days. In the large cities, however, there is no difference at what time; he must keep him twelve months; and the same is the case with stores or shops at any place. R. Simeon b. Gamaliel maintains that the term of the shops of bakers and dyers is three years.

GEMARA (Let us see): In the rain season why must he keep him for the whole season? Because usually when a man rents a house it is for the whole season. Why should not the same be said of

the summer season? And if you should say that the reason is that because during the rain season it is not easy to find a house to rent, then how is it that in the large cities the term is fixed for twelve months? Now if the twelve months terminate in the rain season, and the owner makes the tenant move, why it is not easy to find a house for rent? Said R. Jehudah: All the terms are fixed only for giving notice; *i.e.*, thus: If one lends a house to some one anonymously, one cannot make the tenant move from the Feast of Tabernacles until Passover, unless one had given him notice thirty days before, And so, also, we have learned in the following Boraitha: The terms thirty days and twelve months are for giving notice; and this notice is to be given by the owner of the house as well as by the tenant, as the owner may say, If you had given me notice, I should have troubled myself to find a man who would have taken it for the whole season. Said R. Assi: If he has dwelt even only one day in the rain season, the owner loses the right to make him move until Passover. But was not thirty days the term? He means to say if one day of the thirty days in question had passed without any protest of the owner. Said R. Huna: The owner, however, has the right to increase the

rent. Said R. Na'hman to him: This would be if he would hold him (χεβιοις 1) (in his pocket) until the tenant would lose his last garment. (Rejoined R. Huna:) I mean if the rent in general becomes dearer. It is certain, if the house of the owner where he dwells falls, he may make the tenant remove from that house (if the term is at an end) even without a notice before, as he may say, You are not better than myself, as I also cannot so easily find a house, and I was not aware that my house will fall. If the tenant sold out his lease, loaned, or made it a present, the same may be done, as the owner may say, You are not better than the man from whom you took it. If, however, the tenant has given it for the wedding of his son, then it must be investigated; if it was possible for the owner to notify him, he should do so; and if not, he may say, You are not better than myself.

There was a man who bought a lot of wine and couldn't find a place to keep it in, and he asked a certain woman if she had a place for hire; and she said no. Then he betrothed her and she gave him a place. He went home, wrote a divorce, and sent it to her. She then took carriers, paid them with the same wine for taking it out, and put it in the street. When the case was brought before R. Huna b. R. Jehoshua, he said: As he has done, so it was done to him; he was rightly rewarded, and not only from a yard which was not for rent she had the right to do so, but even if it was for rent, as she may say I would like to let it to some one, but not to you, as you are in my estimation equal to a spy.

R. Simeon b. Gamaliel maintains, etc. A Boraitha states that the reason is because they usually give very much of their goods in debt to the people in the neighborhood.

MISHNA *VIII*.: The owner of the house is obliged to give to the tenant a door bolt, a lock, and all other things belonging to the house which is to be done by a specialist. However, the things which can be done by any one the tenant has to furnish himself. The manure of the house belongs to the owner; the tenant has a right only to the ashes which he takes out from the ovens.

GEMARA: The rabbis taught: The owner of the house is obliged to put in doors, to open windows, to repair the ceiling,

and to support it with a beam; and the tenant is obliged to make for himself a ladder, a battlement, a gutter, and to plaster the roof with clay.

R. Shesheth was questioned: Whose duty is it to furnish a Mezuzah? 1 But did not R. Mesharshia say that the obligation is the tenant's? The question was that if the door-post was of stone, whose is it to furnish a place for the Mezuzah? And R. Shesheth answered thus: We have learned in our Mishna, which states that things which need not a specialist the tenant must prepare; and this is also to be considered among these things as he can fix it himself.

The rabbis taught: The tenant has to buy a Mezuzah, but when he removes he must not take it with him, unless he is aware that a Gentile will occupy the house after him. And it happened that one took it out while removing, and buried his wife and two children.

The manure belongs to the owner, etc. How is the case if the cattle were the tenant's? Why, then, should the manure belong to the owner of the house? And if the yard was not rented to him, and the cattle belong to the owner, then it is self-evident that it belongs to him? The court was not rented, and the manure was not of the owner's cattle, but of cattle which were in the court to load or unload things belonging to the tenant. And this statement may be a support to R. Jose bar Hanina, who said that a courtyard acquires title for its owner even without his knowledge. An objection was raised from the following: If one said all articles found in my courtyard to-day, it shall give title to me. He said nothing. Now if the theory of R. Jose is correct, why should his words be disregarded? It speaks of an open court where the articles are not secure. If so, how is to be understood the latter part of the same Boraitha, which states: If, however, there was heard a voice in the city that in the yard of so and so is found an article (Rashi explains this as, *e.g.*, that it was heard in the city that a lame ram happened to come to his field, or that the river overflowed and left some fish in his yard) his word is to be considered. Now, if it speaks of a court where the things are not secure, why should his word be considered, even in this case? If such a thing was heard in the city, one would not dare to take it, and therefore it is considered as if the yard were secured

[paragraph continues] Another objection was raised from the following: Ashes of the ovens and dust from the air belong to the tenant, but that from the stable and in the yard belongs to the owner. Now if the theory said above by R. Jose is correct, why should dust of the air belong to the tenant? Is it not the air of the owner's court? Said Rabha: Air which cannot reach the ground because of some obstacle must not be considered as if it were on the ground. But was the decision certain to him? Did not he himself question as follows: If one has renounced his ownership of a purse of money, and has thrown it into one open door, and it passes out through another open door, and falls outside of the house, did the contact of the purse with the air of the house in its passage through give title to the purse to the owner of the house, or, because it has not rested in the house, has the house-owner no title? (Now if he were certain in his above decision, he would not ask such a question?) In the case questioned by him there was no obstacle, as in the case mentioned above.

That which is in the stable and in the yard, etc. Why both? Is not one sufficient, as it speaks of a

yard which was not rented to the tenant? Said Abye: It means to say that even if the courtyard was rented. still that which is in the stable belongs to the owner. And R. Ashi said: From this it may be inferred that if the yard was rented without any stipulation, the stable in it is not to be considered included.

MISHNA *VIII.*: If the year was made a leap-year, the tenant reaps the benefit of the intercalation. However, if he rented him the house monthly, the intercalation belongs to the owner. It happened in Ciphorius, that one rented a bath-house for twelve golden dinars a year. The payment should be one dinar monthly, and thereafter the year was made leap intercalary. When the case came before R. Simeon b. Gamaliel and R. Jose they decided that the payment of intercalation shall be divided.

GEMARA: Does the Mishna bring a fact to contradict its previous statement? (As there is no mention of a division, but belongs either to one or to the other.) The Mishna is not completed, and should read thus: If he has rented it to him for twelve months to be paid monthly, then the payment for the added month is to be divided, and it happened also in Ciphorius, etc.

Said Rabh: If I were there I would decide that this month belongs altogether to the owner. What was the intention of Rabh to teach us? That the last expression must be considered.

[paragraph continues] Has he not taught the same elsewhere; namely, R. Huna said that in the school of Rabh it was taught that if one says I sell you this article for an istera (hundred mahas), then he has to pay him a hundred mahas in good money, and if *vice versa* he may give him an istera? (The difference between an istera and a hundred mahas is that an istera contains also a hundred mahas, but not in current money.) From that statement we can infer nothing, as one may say that the last expression was only an explanation to the preceding one. (In our case, however, there is no explanation. The owner rented the tenant the house for a year for twelve golden dinars. The payment should be a dinar monthly; consequently it was two conditions, and not an explanation.) Samuel, however, said: The decision was so made because they came to the court in the middle of the month, but if they had appeared in the beginning it would be entirely the owner's; and if they would come in the end of the month, it would be the renter's (because they doubted as to which expression should be considered, the first or the last; and if they came in the beginning of the month, and he required payment or removal, then his claim is to be considered, since the house is his. And if they came at the end of the month, there is no claim for removal, but for the past month. Such a debt cannot be collected by the court, and therefore the money remains with the renter. But if they came in the middle of the month, and the owner demands payment or removal, he is to be paid for the future, but not for the time past.

But did not Samuel also hold that the last expression must be considered? Is it not stated elsewhere: If one said, I sell you a kur of wheat for thirty salahs, the seller may retract even at the last saah, because the buyer does not acquire title until he has taken the last one (and he had sold him the whole kur and not every saah separately). If, however, the seller said, I sell you a kur for thirty salahs, each saah for a salah, then he cannot retract from that which was already measured (as the last expression, one saah for a salah, is the one taken into consideration). So said both Rabh and Samuel. (Hence we see that Samuel also agrees to the theory of the last expression.) Nay, the reason in that case was, because he took possession of it already, and in our case also for the same reason that it is doubtful, whether the first or the last expression is to

be considered. He does not pay for the time occupied, but for the future. R. Na'hman, however, maintains that the estate is

always considered in the occupancy of the owner, and therefore there is no difference at what time in the month they came to the court. His rent must be paid; and not only when the last expression was a salah a month, but even if it was the reverse, a "salah a month, twelve for a year."

R. Janai was questioned: If the renter says I have paid, and the owner claims I have not received it, who of them must bring evidence? (Let us see.) The following Mishna in (Tract B'khorad) answers this question: Either it was for time past or for the present, namely: If the father dies within thirty days of his first-born son's birth, he must be considered unredeemed as yet (*i.e.*, when he is grown up, then the obligation of redeeming would remain to him all his life). If, however, his father dies after thirty days, he is to be considered redeemed, unless neighbors assure him that he was not. (From which it is inferred that within the time the renter must bring evidence, and after the time the owner must bring evidence, as according to the Jewish law rent is paid at the end of the month.) The question was, at the very same day when the term is ended, the renter says I paid you in the morning, and the owner says you did not. Said R. Johanan to them: This we have learned in the following Mishna: A laborer who claims in the last day of his employment, that he did not receive as yet his salary has to take an oath and collect the money. And that the laborer must take an oath and not the employer is enacted by the rabbis only there; as the employer has to deal with many laborers, it may happen that he has given to another one instead, and then he will swear falsely; but in your case the renter is trusted, if he takes an oath that he has paid.

Rabha, in the name of R. Na'hman said: If one has rented out a house for ten years, and has signed a lease without a date, and thereafter he claimed that the tenant has already had the house for five years, he is to be trusted. Said R. A'ha of Difti to Rabina: According to this theory, if one has loaned a hundred zuz and has taken a note, should the debtor also be trusted if he says, I have paid you the half? And he answered: What a comparison is this? A note is written for collection; and if he would pay, he would insist that it should be written on the note or he would take receipt. In this case, however, the owner may claim that he has made the lease, so that the tenant shall not be able afterwards to claim hazaka (occupancy).

R. Na'hman said: If one borrows at his neighbor's an article

for the time it may be fit for work, he may take it as often as he requires it as long as it exists. Said R. Mari, the son of Samuel's daughter: This holds good only if it was done with the ceremony of a sudarium. And R. Mari b. R. Ashi said: That in case it breaks, he is obliged to return him the pieces, as it was only borrowed, but not sold.

Rabha said: If one borrows a hoe to dig this vineyard, he may dig with it the whole vineyard. If he says *a* vineyard, it may be any vineyard he likes, and if he says *vineyards*, then he may dig as many as he possesses, and if it breaks he must return the pieces.

R. Papa said: If one says lend me this well, and it becomes ruined, the borrower has no right to rebuild it. If, however, he said a well, if it becomes spoilt, the borrower may rebuild it. If, however, he said to him, Allow me your estate to dig a well, he may dig at any place in it until he finds water. However, all this holds good only with the ceremony of a sudarium.

MISHNA *IX*.: If a man rents out a house and it falls he must build another house in the same condition as the first was; if it was a small one, he must not build it larger, and *vice versa*. If it was two houses he must not make one, and *vice versa*; he must not increase or decrease the number of windows, unless the renter agrees.

GEMARA (How was the case): If the owner rented him *this house*, then why should he build another one when it falls; and if he rented him anonymously a house, then why can he not make any change in the building, *e.g.*, two or one, or a large instead of a small? When Rabin came from Palestine he said, in the name of Resh Lakish, that the Mishna treats: When the owner said to the tenant, I rent out to you a house like this. If so, what does the Mishna teach us? Is this not self-evident? The case was if the house was standing on a shore of a river, and lest one say, that it means a house which is placed in the same position, therefore the Statement of the Mishna.

Footnotes

250:1 The term in the Scripture is *Ganub yganubh*; literally, stolen, to be stolen. Hence the repetition of the word theft. Leeser, however, translates according to the sense.

256:1 This is an ancient parable, and it means that such carelessness must not be considered.

259:1 His reason is that the slave who was appointed for this message is to be considered hired, as his master has a right to hire him out, and therefore it is as if he hired out two cows. And the statement above, that the band of the slave is considered as that of his master's, holds good only when the master himself lends or hires, Then the slave may substitute for him, but not otherwise.

264:1 The text is so complicated that it is very difficult to understand the real meaning of it. The Achri has omitted this from his compendium: the commentaries also have tried to explain this, but did not succeed. However, according to our method we could not omit this, so we did the best we could to translate it.

267:1 We have translated according to Schoenhack's Dictionary. Rashi, however, explains it differently, which is not translatable; the meaning, however, is the same.

268:1 The "amulet" for the door-post (Deuteronomy, vi. 9).

Next: Chapter IX