

ארבעה שומרין פרק שמיני

(fol. 38b) **משנה א:** ארבעה שומרין הן שומר הנזק והשואל נושא שכר והשוכר. שומר הנזק נשבע על הכל והשואל משלם את הכל. נושא שכר והשוכר נשבעים על השכר ועל השבייה ועל המיתה ומשלמין את האבידה ואת הנגיבה:

Mishnah 1: ¹There are four kinds of keepers: The unpaid trustee and the borrower, the paid keeper, and the renter. The unpaid trustee swears about everything²; the borrower pays for everything; the paid keeper and the renter swear about breakage, abduction, and death, but pay for the lost and the stolen³.

1 The same Mishnah already was part of it was not his fault.

Bava meši'a 7:9.

3 They do not pay for what happened

2 He has to swear that he did not take beyond their control.

anything and that in case anything was lost

(38b line 37) **הלכה א:** ארבעה שומרין הן כול'. אמר רבי יוחנן. ארבעה שומרין הן ואין חיובין אלא דרף קניין. רבי יעקב בר אחא בשם רבי לעזר. אף לענין גזילה אין חיובין אלא דרף קניין. אמר רבי יוסי בירבי בון. ומתניתא אמרה כן. המקביל שדה מחברו כול'. רבי חנניה אמר רבי בון. אף בגניבה אין חיובין אלא דרף קניין. רבי חנניה בשם רבי פינחס. ומתניתא אמרה כן. היה מושכו ויוצא ומת ברשות הבעלים פטור. הגביהו או שהוציאו מרשות הבעלים ומת חיוב. הגביהו ברשות הבעלים כמי שניצא כל רשות הבעלים. היה מושכו ויוצא עד שניצא כל רשות הבעלים. רבי אבהו בשם רבי יוחנן. בעומדת באבוסו. רבי בון בר חייה בעי. אם בעומדת באבוסו אפילו לא משך. אלא כי נן קיימין בעומדת ברשות הרבים. מה. רבי בון בר חייה כבית שמי. דבית שמי אומרים. ילקה בחסר וביתר. מה נן קיימין. אם בעומדת ברשות הרבים וחשב לגזילה ומתה באותה המחשבה דברי הכל חיוב. אם עד שלא משך דברי הכל פטור. אלא כי נן קיימין בעומדת באבוסו. כדאמר רבי בון בר חייה כבית שמי. אמר רבי בון. תמן בקונה שלא מדעת הבעלים. ברם הקא בקונה מדעת הבעלים.

Halakhah 1: “There are four kinds of keepers,” etc. Rabbi Johanan said, there are four kinds of keepers and they become liable only through acquisition⁴. Rabbi Jacob bar Aha in the name of Rabbi Eleazar: Also in matters of robbery they become liable only through acquisition. Rabbi Yose ben Rabbi Bun said, a *baraita* said so: “one who contracts with another for a field,”⁵ etc. Rabbi Hananiah said, Rabbi Abun, also in theft cases they become liable only through acquisition⁶. Rabbi Hananiah in the name of Rabbi Phineas, our Mishnah said so: “If he was pulling it to lead it out but it died on the owner’s property, he is not liable. If he lifted it or had it led outside the owner’s property when it died, he is liable.”⁷ If he lifted it inside the owner’s property it is as if he had taken it out of the entire property of the owner. If he was pulling it and it left, only after it left the entire property of the owner. Rabbi Abbahu in the name of Rabbi Johanan: If it was standing at his feeding trough⁸. Rabbi Abun bar Hiyya asked: If it was standing at his feeding trough then even if he did not pull it⁹! But we must deal with the case that it was standing in the public domain¹⁰. Does Rabbi Abun bar Hiyya follow the House of Shammai, since the House of Shammai say, “he shall be hit by less or more”¹¹? How do we hold? If it was standing in the public domain and he intended to rustle it when it died, according to everybody he became liable by that intention. If he did not start to pull it, according to everybody he is not liable¹². But we must hold that it was standing at a feeding trough on his property¹³. As Rabbi Abun bar Hiyya said, following the House of Shammai. Rabbi Abun said, there he acquired without the knowledge of its owner; but here when he acquires with the knowledge of its owner¹⁴.

4 In the Babli, *Bava qamma* 79a, this is treated as an old (tannaitic or pre-tannaitic) rabbinic institution. Since keepers incur financial responsibilities, the moment in time when responsibility is transferred from owner to keeper must be well defined. The rules of this transfer are borrowed from the rules of buying and selling. Any act which would transfer property from the seller also

transfers responsibility from owner to keeper; absent such an act no responsibility is transferred.

5 Tosephta *Bava meṣi’a* 9:12. If somebody contracts to care for a field and then neglects his duty so that there is no yield, he can be sued for damages only if there was an act of acquisition.

6 The act of stealing is completed and

the thief responsible for double restitution only after an act of acquisition, such as putting the stolen object in his pocket. If the thief is discovered while he is dragging away some object in the owner's house, he is not liable for double restitution since as long as the object was not lifted it was not acquired by the thief as long as he did not reach the public domain.

7 Mishnah *Bava qamma* 7:8, Notes 83-84, describing rustling of animals.

8 Babli *Ketubot* 31b, an opinion ascribed to Rabinna II. An animal pulled or pushed into the public domain is not thereby acquired by the thief; it becomes acquired only when it is brought into the thief's private property.

9 Since we hold that the property of a person acquires abandoned property found on it (cf. *Gittin* 6:2, Note 71). Since the owners do not know where their lost object is, they cannot make a mental reservation which would annul the acquisition.

10 In the Babli, *loc. cit.*, opinion ascribed to Rav Aḥa (bar Rava), of the last generation of Babylonian Amoraim.

11 Mishnah *Bava meṣi'a* 3:13. The dishonest keeper in the opinion of the House of Shammai has to pay the larger of the values of the object either at the time it was given to him or when it should have been returned. The House of Hillel makes him

pay the value at the time he took possession, R. Aqiba the value at the time of the claim. This has nothing to do with the problem here. The Mishnah there continues: "If somebody intends to take the deposit, the House of Shammai hold him liable, but the House of Hillel say, he is liable only from the moment he takes it." Since in the public domain acquisition is effected only by lifting the object, not by dragging it, liability for cattle rustling in the public domain exists only for the House of Shammai.

12 The statement is elliptic. If he intended to rustle an animal but did not do it, even the House of Shammai agree that thought without action is without legal consequences. If he pulled the animal along, and declared before witnesses that he intended to rustle this animal, even the House of Hillel will agree that he accepted liability for his act.

13 The Mishnah in *Bava meṣi'a* notes that for the House of Shammai full liability starts when the animal enters the robber's property while the House of Hillel require an act or at least a declared intent of acquisition.

14 While an act of acquisition may be required for liability both of the keeper and of the thief, the details of what is considered as such an act are different in the two cases since acquisition by the will of the owner is less restrictive than that against his will.

38b line 53) כְּתִיב כִּי־יִתֵּן אִישׁ אֶל־רֵעֵהוּ וְגו'. לְשֹׁמֵר. וְלֹא לְקָרוֹעַ. לְשֹׁמֵר. וְלֹא לְהַשְׁלִיךְ.
לְשֹׁמֵר. וְלֹא לִיתֵּן בְּמִתְּנָה. אָמַר רַבִּי יוֹסִי. וְהוּא שֶׁאִמַּר לִיתֵּן מִתְּנָה לְכָל־מִי שֶׁיִּצְרָח. אֲבָל אָמַר
לְפָנָי. מִכֵּן שֶׁשְׁמִירָתוֹ עָלָיו כְּמִי שֶׁהוּא עָלָיו.

¹⁵It is written: *If a man give to another, etc'*, *to keep*¹⁶. *To keep*, not to tear it up. *To keep*, not to throw it away. *To keep*, not to give it away as a gift.

Rebbi Yose said, only if he said to give it to anyone he likes. But if he said, to X, since he is obligated to keep it is as if he kept it for him¹⁷.

15 Babli *Bava qamma* 93a.

16 *Ex.* 22:6.

17 The paragraph gives the rules of the unpaid keeper who in case of loss has to swear that he did not appropriate the article for himself and that it was not lost by his negligence. But if he received the article in order to dispose of it, or to distribute it to the poor, even if it was lost there cannot be

any oath. R. Yose points out that this applies only if the charge was to distribute to the poor, not if it was to be delivered to a designated person. Rashi explains in *Bava qamma* that the depositor cannot sue because he renounced ownership and the poor cannot sue since the keeper was free to give to any poor person of his choice.

וְגוֹנֵב מִבֵּית הָאִישׁ. לֹא מִרֹאשׁ גָּגוֹ. אָמַר רַבִּי לְעֶזְרָה. הִדָּא דְּתִימָר בְּגַג שְׂאִינִי מְבוּצָר. אֲבָל בְּגַג מְבוּצָר כְּבֵית הוּא.

It was stated: *If it was stolen from the man's house*¹⁶. Not from his roof. Rebbi Eleazar said, that means, from an unprotected roof. But a fortified roof is like a house¹⁸.

18 Taking anything from a flat roof visible from the outside is not theft but robbery since it was in the open. There can be no double restitution in this case. But if the roof was surrounded by a wall so that

nothing deposited there could be seen from the street it is theft and subject to its laws. Keeping a deposit on an open roof is gross negligence on the part of the keeper.

וְגוֹנֵב מִבֵּית הָאִישׁ. לֹא מִבֵּית הַשּׂוֹאֵל. וְכֵן וְגוֹנֵב מִבֵּית הָאִישׁ. לֹא מִבֵּית נוֹשֵׂא שְׂכָר וְהַשּׂוֹכֵר. מִכֵּינֵן שֶׁשְׂמִירְתּוֹ עָלָיו כְּמִי שֶׁהוּא עָלָיו. שְׂתִימָצָא אוֹמֵר. שְׁלֹשׁ פְּרָשִׁיּוֹת הֵן. הַתְּחִלּוֹתָהּ בְּשׂוֹאֵל. וְהַאֲמָצְעִית בְּנוֹשֵׂא שְׂכָר וְהַשּׂוֹכֵר. וְהַעֲלִיזָהּ בְּשׂוֹמֵר חֲנָם. שׂוֹאֵל לִפִּי שְׁנֵהֲנָה אֶת הַכֹּל מִשְׁלָם אֶת הַכֹּל. נוֹשֵׂא שְׂכָר וְהַשּׂוֹכֵר לִפִּי שְׁנֵהֲנָה מִקְצֵת וּמֵהֲנָה מִקְצֵת נִשְׁבָּע מִקְצֵת וּמִשְׁלָם מִקְצֵת. שׂוֹמֵר חֲנָם שְׂאִין לוֹ הִנִּיחָה נִשְׁבָּע וְיוֹצֵא. מֵהוּ נִשְׁבָּע. לֹא פִשְׁעֵתִי. הֵיוּ אֲחֵרִים יוֹדְעִין שֶׁלֹּא פִשַׁע מֵאִי. נִישְׁמָעִינָה מִהֶדָּא. הָרִי שְׂנִמְצָא הִגְבֵּה וְאִין לוֹ לְשֹׁלֵם. מֵהוּ שְׂאִימֵר לוֹ. בּוֹא וְהִשְׁבַּע לִי שֶׁלֹּא נָתַתְּ עֵינֶיךָ בָּהּ לְגוֹזְלָהּ. נִישְׁמָעִינָה מִהֶדָּא. וְאִם לֹא יִמְצָא הִגְבֵּה. הָא אִם נִמְצָא פְטוֹר.

It was stated, *if it was stolen from the man's house*¹⁶; not from the borrower's house. *If it was stolen from the man's house*; not from the house of the paid keeper or the renter¹⁹? Since he is obligated to watch it, it is as if it

referred to him²⁰; for you may say that there are three paragraphs²¹. The last one about the borrower, the middle one about the paid keeper and the renter, the first one about the unpaid keeper. The borrower who profits from all pays everything. The paid keeper or the renter, because he profits partially and gives partial profit, swears about part and pays part. The unpaid keeper who does not profit at all swears and leaves. What does he swear? I did not commit anything²². What is the situation if others know that he did not commit anything? Let us hear from the following: If the thief was found but has nothing with which to pay, may he say to him²³, swear to me that you were not thinking to take it? Let us hear from the following: *If the thief was not found*²⁴. Therefore, if he was found he is not liable.

19 The verse speaks of the unpaid keeper, who swears that he did not take it and that he was not negligent but does not pay. The corresponding cases for the paid keeper and the borrower are not mentioned in the verses. The definite article is interpreted to mean that the verse insists that *it was stolen from this man's house*; the rule does not apply to others. By the reason explained later it is clear that the borrower cannot swear; he must pay. There is no intrinsic reason in the verse to exempt the paid keeper and the renter. Why are they exempt? In the Babli *Bekhorot* 11a, the verse is read to exclude institutions; cf. *Bava gamma* 7:1 (5d 46), Notes 10 ff.

20 There is a reason to extend the rule of the unpaid keeper to the paid one.

21 Ex. 22:6-8, 9-11, 13-14. A similar statement in the Babli, *Bava meši'a* 94b.

22 He did not take anything for his personal use and was not criminally negligent.

23 The owner of an object stolen from an unpaid keeper. If he cannot recoup his loss he might be tempted to let the keeper swear in the hope that he might prefer to pay rather than swear.

24 Ex. 22:7. If the thief was found, the unpaid keeper is absolved from any oath. *Mekhilta dR. Ismael Neziqin* 15.

(38b line) כְּתִיב כִּי־יִתֵּן אִישׁ אֶל־רֵעֵהוּ חֲמוֹר אוֹ־שׂוֹר אוֹ־שֶׁה וּגְו'. שְׂבוּעַת יֵי תְהִיָּה בֵּין שְׁנֵיהֶם. גְּנוֹבָה. אִם גְּנוֹב וְגַב מַעֲמֹו. אֲבִידָה. וְאִם. לְרִבּוֹת הָאֲבִידָה. עַד כְּדוֹן כְּרָבִי עֲקִיבָה. כְּרָבִי יִשְׁמַעְמַל. תִּגֵּי רַבִּי יִשְׁמַעְמַל. מָה אִם גְּנִיבָה שְׁקֻרֻבָה לְאוֹנְסִין אֶת אֹמֶר מִשְׁלֵם. אֲבִידָה שְׁאִינָה קְרוּבָה לְאוֹנְסִין לֹא כָל־שֶׁכֶן.

אֵין כְּתוּב בְּשׂוֹאֵל אֶלָּא שְׂבוּרָה. אֲבִידָה וְגִנְיָבָה מְנִיין. וְדִין הוּא. מָה אִם נוֹשֵׂא שֶׁכֶר וְהַשׂוֹכֵר שְׁאֵין מְשַׁלְמִין שְׂבוּרָה וּמִתָּה מְשַׁלְמִין גְּנִיבָה וְאֲבִידָה. שׂוֹאֵל שְׁמִשְׁלֵם שְׂבוּרָה וּמִתָּה אֵינוֹ דִּין שְׁמִשְׁלֵם אֲבִידָה וְגִנְיָבָה. וְתִגֵּי עָלֶיהָ. הֲרִי זֶה קָל וְחוֹמֶר שְׁאֵין עָלָיו תְּשׁוּבָה. שְׂבוּיָה

מִנִּיין. נֶאֱמַר כֹּאן וְנִשְׁבַּר אוֹרֶמֶת וְנֶאֱמַר לֵהֶן וּמֵת אוֹרֶשְׁבַּר. מֵה לֵהֶן שְׁבוּיָה עֲמִהֶן אִף כֹּאן שְׁבוּיָה עֲמִהֶן. עַד כְּדוֹן כְּרָבִי עֲקִיבָה. כְּרָבִי יִשְׁמַעֲלָל. רָבִי יִשְׁמַעֲלָל כְּרָבִי נֶתֶן. רָבִי נֶתֶן אוֹמֵר. אוֹ. לְרִבּוֹת אֶת הַשְּׁבוּיָה. וְכָרָבִי מֵאִיר דָּאֵמֵר. גִּזְרָה שְׁנֵה בְּמִקּוֹם שְׁבָאָת. מֵה לֵהֶן נִשְׁבָּעִין עַל הַאֲוֶנְסִין. אִף כֹּאן נִשְׁבָּעִין עַל הַאֲוֶנְסִין. עוֹד דְּרָבִי נֶתֶן. דְּרָבִי נֶתֶן אוֹמֵר. אוֹרֶמֶת. לְרִבּוֹת אֶת הַשְּׁבוּיָה.

It is written, *if a man give to his neighbor a donkey, or an ox, or a sheep*²⁵ etc. *An oath before the Eternal shall be between the two of them*²⁶. *Stolen, if it was stolen stealing from him*²⁷. *Lost, and if, to include the lost one*²⁸. So far following Rabbi Aqiba. Following Rabbi Ismael? Rabbi Ismael stated: Since you say that he pays for theft which is close to duress, for loss which is not close to duress not so much more²⁹?

For the borrower only the broken is written. From where loss and theft? It is logical. Since the paid keeper and the renter who do not pay for the broken or the dead have to pay for theft and loss, the borrower who pays for the broken or the dead certainly has to pay for theft and loss³⁰. It was stated about this: This is an argument *de minore ad majus* which cannot be challenged.

From where the abducted? It is said here, *it was broken or died*³¹; and it is said there, *it dies or was broken*²⁵. Since there the abducted was included, here also the abducted was included. So far following Rabbi Aqiba³². Following Rabbi Ismael? Rabbi Ismael follows Rabbi Nathan. Rabbi Nathan says, *or, to include the abducted*. Or following Rabbi Meïr who said, an equal cut at the place it comes from³³. Since there one swears for duress, also here one swears for duress. Still following Rabbi Nathan, for Rabbi Nathan said, *or it died*³¹, to include the abducted one³⁴.

25 Ex. 22:9.

26 Ex. 22:10.

27 Ex. 22:11. The verse is intentionally misquoted; it is written וְאִם “and if”, not אִם “if”, as noted in the sequel.

28 This is Rabbi Aqiba’s signature argument that all conjunctions which are not absolutely necessary imply an addition which can only be determined by tradition.

29 In the Babli, *Bava meši’a* 94b, this is characterized not as a statement of R. Ismael but as a Galilean Amoraic statement in the spirit of R. Ismael. A different argument is in *Mekhilta dR. Ismael Neziqin* 16, (ed. Horovitz-Rabin p. 305).

30 This is an argument of R. Ismael; *Mekhilta dR. Ismael Neziqin* 16, (ed. Horovitz-Rabin p. 306).

31 Ex. 22:13.

32 This is *not* an argument of R. Aqiba but of R. Ismael [*Mekhilta dR. Ismael Neziqin* 16, (ed. Horovitz-Rabin p. 306)]. R. Aqiba's argument is attributed here to R. Ismael.

33 Chapter 4, Note 33. If *broken or died*

and *died or was broken* defines an equal cut, since the abducted is mentioned in v. 9 it also is implied in v. 13.

34 A follower of R. Aqiba has the choice of arguing either following R. Meir or R. Nathan.

מהו (38c line 8) רבי יודן בעי. טענו טענת גנב שלאונסין. אמר לו. בא ליסטיס מזויין ונטלה. מהו שמשלם תשלומי כפל שלאונסין. אמר רבי יוסי. אין ביני נתיני. שומר שכן והשוכר. דתני. לא מצינו בשומר שכן והשוכר שמשלם תשלומי כפל שלאונסין. ותני עלה. זהו קל וחומר שיש עליו תשובה. אמר רבי חנינה. אם אומר אתה כן נמצאת אומר. הרי זה קל וחומר שיש עליו תשובה. דו זכיל מימר ליה. מצינו בשומר שכן והשוכר שאינו משלם תשלומי כפל. תאמר בשואל שמשלם תשלומי כפל מכל-מקום. ותני עלה. הרי זה קל וחומר שאין עליו תשובה.

Rebbi Yudan asked: ³⁵If he claimed the claim of a thief and duress? He told him, an armed robber came and took it; does he have to pay double restitution of duress? Rebbi Yose said, if it were so one should state "the paid keeper and the renter;" but we have stated: We do not find that the paid keeper and the renter pay double restitution of duress. On this we have stated, "this is an argument *de minore ad majus* which is questionable"³⁶. Rebbi Hanina said, if you say so, should you say, this is an argument *de minore ad majus* which is questionable³⁶, for he can tell him, let us say that the borrower pays double restitution. On this it was stated, this is an argument *de minore ad majus* which cannot be challenged³⁷.

35 The proviso that the keeper may have to pay double restitution is mentioned only for the unpaid keeper, where Ex. 22:8 is interpreted to mean that the keeper claimed the deposit was stolen but it was proven in court that he himself took it. The paid keeper or the renter must pay for stolen items (22:11); in general, a claim that the item was stolen by such a keeper is an agreement that he has to pay; even if the claim is false there is no reason for double restitution. But if the keeper claims that the

item was abducted by force, he may swear to this fact to free himself from paying (v. 22:9). An argument is missing here, which is supplied in the Babli, *Bava meši'a* 57b, viz., that in an orderly commonwealth an armed robber will hide his weapons in public and only show them to his intended victim. This makes armed robbery an instance of theft (*Sanhedrin* 8:3, Notes 44ff.). Therefore the question arises whether a false claim of armed robbery makes the paid keeper or the renter liable for

double restitution.

36 The text is incorrect. The scribe first wrote correctly שאין עליו תשובה “which cannot be challenged” and then corrected it wrongly to the text given. The reference is to the argument *de minore ad majus* presented in the preceding paragraph where it was stated that the argument is unquestionable. But if there are instances of theft where the paid keeper and the renter

follow the rules of the unpaid keeper, the argument becomes invalid; it is more than questionable, it is shown to be false.

37 Therefore the claim of armed robbery is not a claim of theft; there never can be double restitution by the paid keeper or the renter. The Babli (*Bava meši'a* 57a/b) disagrees and holds that in this case the paid keeper has to pay double restitution (Maimonides *Hilkhot Genevah* 4:4).

(38c line 16) את מר. אם-בעליו עמו לא ישלם. מהו שישבע. רבי זירא אומר. נשבע. רבי חנינה ורבי לא תגריהון אמרין. אינו נשבע. מתניתא מסייעה לרבי חנינה ולרבי לא. שבר שביה ומתה שהו פטורין בנושא שר והשוכר. והשואל בבעליו פטור שלא בבעלים חייב. אבידה וגניבה שהו חייבין בנושא שר והשוכר. לא כל-שכן בשואל בבעליו פטור שלא בבעלים חייב. מאן דמר. פשיטא שהוא נשבע צריכה ליה שישלם. רבי חנינה בשם רבי יודן. מתניתא מסייעה לרבי זירא. שואל שהחמירה התורה עליו בבעליו פטור שלא בבעליו חייב. נושא שר שהיקלה התורה עליו לא כל-שכן בבעלים פטור שלא בבעלים חייב. אין תימר לשבועה איצטריכת ליה. ניתני בנושא שר והשוכר. הווי לא צורכה דלא לתשלומין. וקשיא על הדא דרבי זירא. שואל אם בעליו עמו נשבע. אין בעליו עמו ישלם. נושא שר אם בעליו עמו נשבע. אין בעליו עמו לא ישלם. שומר חנם בין שהבעליו עמו בין שאין הבעלים עמו נשבע. אמרת. דברים שהשואל משלם נושא שר נשבע. דברים שנושא שר נשבע שומר חנם והא פטור. דברים שנושא שר משלם שומר חנם נשבע. מה את מתני בשומר חנם. בשבועה נשבע עמו. ואית דבעי. מה את מתני בשומר חנם ונושא שר. בין שהבעלים עמו בין שאין הבעלים עמו. אמר רבי אבין. על-כל-דבר-פשיע. אומר רבי מנא. לא מצינו שהשנות התורה בגניבה ואבידה בשואל. לכן נשוא שומר חנם ונושא שר שבר שביה ומתה.

It was said, *if its owners were with him, he does not have to pay*³⁸. Does he have to swear? Rabbi Ze'ira said, he swears. Rabbi Hanina and Rabbi La both are saying, he does not swear³⁹. A *baraita* supports Rabbi Hanina and Rabbi La: “Breakage, abduction, and death for which he is not liable in the cases of the paid keeper and the renter⁴⁰, and the borrower with the owner is not liable, without the owner is liable⁴¹; loss and theft where the paid keeper and the renter are liable, is it not that *a fortiori* the borrower be not liable with the owner but liable without the owner⁴¹?” For him who says it is obvious that he swears, should he not have to pay⁴²?

Rebbi Ḥanina⁴³ in the name of Rebbi Yudan: A *baraita* supports Rebbi Ze'ira. "The borrower, for whom the Torah was restrictive, with the owner is not liable, without the owner is liable; the paid keeper, for whom the Torah was lenient, *a fortiori* with the owner should not be liable, without the owner should be liable.⁴⁴" If you are saying, his problem was swearing, he should have stated "the paid keeper and the renter⁴⁵." That means he only needs it for payment. It is difficult for Rebbi Ze'ira: the borrower swears if the owner was with him; if the owner was not with him he must pay. The unpaid keeper swears, whether the owner was with him or was not with him⁴⁶. You are saying that where the borrower pays the paid keeper swears⁴⁷. Where the paid keeper swears, the unpaid keeper should not be liable. Where the paid keeper pays, the unpaid keeper swears⁴⁸. What do you state about an unpaid keeper when the owner be with him⁴⁹? But some are asking, what do you state about an unpaid and a paid keeper, whether or not the owner be with him⁵⁰? Rebbi Abin said, *any word of criminality*^{46,51}. Rebbi Mana said, do we not find that the Torah treated loss and theft equally for the borrower? Therefore, we shall treat breakage, abduction, and death equally both for the unpaid and the paid keepers⁴².

38 Ex. 22:14. If the borrower had asked not only for the use of an animal and/or agricultural or mechanical implements but also had asked their owner to help him in his work, then the disposition over animals or tools never was transferred to the borrower; in case the animal died or it and the tools broke or were taken by force the borrower does not have to pay. But if the authority over animal and/or tools was transferred, the borrower has to pay if anything happens to them.

39 The Babli does not treat the question, which seems to be that even though the owner retains the power of disposition over his property, the borrower might have to swear that he was not in any way the cause

of the accident.

40 Since Ex. 22:9 excuses the paid keeper in the case of an unobserved accident but requires an oath that the keeper did never use the animal or object for himself (or the renter that he never overstepped the conditions of his lease).

41 There is no verse referring to the responsibility of the borrower for cases of loss and theft but it cannot be less than that of breakage, etc. It cannot be more since the conclusion of a logical argument cannot be stronger than the premise.

42 Since the oath would absolve from payment, it is clear that R. Ze'ira holds that the borrower has to pay if he cannot swear. But this contradicts the argument of the

baraita since it also applies to the case where the owner works with the borrower.

43 This is the late Amora R. Hinnena, not the early R. Hanina mentioned earlier.

44 In fact his responsibility depends on whether there was a formal act of transfer of responsibility, Note 4.

45 Since in general the paid keeper and the renter follow the same rules. But since the renter pays the owner for the use, in matters of payment there is reason to differentiate between the two.

46 *Ex. 22:8*.

47 If the loss was because of the unlawful actions of third persons.

48 If the loss was because of the

negligence of the keeper, when the object was lost, or probable negligence, when it was stolen.

49 As stated before, if there was no formal transfer of responsibility, the unpaid keeper does not even swear.

50 Since the distinction is made only for the borrower, we do not even know whether such a distinction is of any relevance for the other kinds of keepers.

51 This explicitly excludes the distinction about the participation of the owner for paid and unpaid keeper; the previously quoted *baraitot* are contradicted.

52 This is a different argument but supporting R. Abin's conclusion.

(38c line 37) ומה טעמון דבית שמי. על-כּל-דבר-פֿשע. ומה מקיימין דבית הלל טעמון דבית שמי. פֿשע. על-כּל-דבר-פֿשע. תיפתר ששלח בו ד על ידי שליח.

רבי יוסי בר חנינה בעי. מה אמר. יטול. נטל. והתני רבי הושעיה. נשברה החמיצה נותן לו דמי כולה. כלום החמיצה לא מחמת קילקולה. רבי שמואל רבי אבהו בשם רבי לעזר. שליחות שנאמר בשומר חנם אינו חייב עד שיחסר. רבי שמואל בעי קומי רבי אבהו. מה איתאמרת יסב. חיסר או אפילו לא חיסר. אמר ליה. לית הדא שאילתא דרבי יוסי בר חנינה יטול נטל. אין תימר ליטול. אפילו לא חיסר. אין תימר. עד שעה שיחסור. אין תימר ליטול. החזירה בין למקומו בין למקום אחר פטור. אין תימר נטל. החזירה למקומה פטור. למקום אחר חייב.

רבי אבהו בשם רבי יוחנן. נאמרה שמירה בשומר חנם ונאמרה שמירה בשומר שָׂכָר. ולא דמיא שמירה שנאמרה בשומר חנם לשמירה שנאמרה בנושא שָׂכָר. שמירה שנאמרה בשומר חנם פֿינן ששימר כל-צורכו פטור. שמירה שנאמרה בנושא שָׂכָר אין משערין אותו אלא בגופו. לפיכך רואין אותו אם היה ראוי לשמירה פטור. ואילא חייב. אין אומרין. אלו היה אחר שם יכול להציל הציל פטור. שלא הציל חייב.

רבי לעזר בשם רבי הושעיה. נאמרה שליחות ד בשומר חנם ונאמרה שליחות ד בשומר שָׂכָר. ולא דמיא שליחות ד שנאמרה בשומר חנם לשליחות ד שנאמרה בשומר שָׂכָר. שליחות ד שנאמרה בשומר חנם אינו חייב עד שימשוד. שליחות ד שנאמרה בשומר שָׂכָר פֿינן שהניח מקלו ותִּרְמִילוּ עֲלֵיהּ חייב. שמע רבי יוסי בר נהוראי ומר. אני אני מקבל עלי את הדבר הזה אלא אחד זה ואחד זה אינו חייב עד שימשוד. רבי אמי בשם רבי לעזר ותני רבי

הושעיה כן. אילו נאמרה שלוחות יד בשומר חנם שאינו צריך הייתי למד מנושא שכן. מה אם נושא שכן שהחמירה התורה עליו אינו חייב עד שימשוך. שומר חנם שהיקלה בו התורה אינו דין שלא יהא חייב אלא דעד שימשוך. לאי זה דבר נאמרה שלוחות יד בשומר חנם שאינו צריך. להחמיר על נושא שכן. כיון שהניח מקלו ותרמילו עליה חייב. רבי יוסי אומר. אם אומר את כן נמצאת למד על המלמד להחמיר עליו. דו יכיל מימר ליה. מה אם נושא שכן שהחמירה בו התורה אינו חייב עד שימשוך. שומר חנם שהיקלה בו התורה אפילו משך יהא פטור. אלא כיני. לא נאמר שלוחות יד שנאמרה בשומר שכן שאינו צריך. הייתי למד משומר חנם. מה אם שומר חנם שהיקלה בו התורה אינו חייב עד שימשוך. נושא שכן שהחמירה בו התורה כיון שמשך חייב. לאי זה דבר נאמרה שלוחות יד בנושא שכן שאינו צריך. להחמיר עליה. כיון שהניח מקלו ותרמילו עליה חייב.

Text of the Escorial ms. of *Bava meši'a* 3:13

מה טעמון דבית שמאי. פשע. על-כל-דבר-פשע. מה מקיימין בית הלל. פשע. על-כל-דבר-פשע. תיפתר ששלח בו יד על ידי שליח.

רבי יוסה בן חנינה בעי. מה את אמרת. ליטול נטל. והא תני רבי הושעיה. נשברה או שהחמיצה נותן לו דמי בלה. כלום החמיצה אלא מחמת טילטול. רבי שמואל רבי אבהו בשם רבי לעזר. שלוחות יד שנאמרה בשומר חנם אינו אלא עד שעה שיחסר. רבי שמעון בצה קומי רבי אבהו. מה את אמרת. חסר או אפילו לא חסר. אמר ליה. ולא דא היא שאילתיה דרבי יוסה בן חנינה. ליטול נטל. אין תימר. ליטול. אפילו לא חסר. אין תימר. נטל. עד שעה שיחסר. אין תימר. ליטול. החזירה בין למקומה בין למקום אחר פטור. ואין תימר. נטל. החזירה למקומה פטור. למקום אחר חייב. רבי אבהו בשם רבי יוחנן. נאמרה שמירה בשומר חנם ונאמרה שמירה בשומר שכן. ולא דמיינה שמירה בשומר חנם לשמירה שנאמרה בשומר שכן. שמירה שנאמרה בשומר חנם כיון ששימר לו כל-צורכו פטור. שמירה שנאמרה בשומר שכן אפילו הקיפו חומה של ברזל אין רואין אותו באילו שומר. היה יכול להציל חייב. לא היה יכול להציל פטור. אין אומרין. אלו היה אחר שם היה יכול להציל.

רבי לעזר בשם רבי הושעיה. נאמרה שלוחות יד בשומר חנם ונאמרה שלוחות יד בשומר שכן. ולא דמיינה שלוחות יד שנאמרה בשומר חנם לשלוחות יד שנאמרה בשומר שכן. שלוחות יד שנאמרה בשומר חנם אינו חייב עד שעה שימשוך. שלוחות יד שנאמרה בשומר שכן כיון שהניח מקלו ותרמילו עליו חייב. שמע רבי יוסה בן נהורי ואמר. אני איני מקבל עלי את הדבר הזה. אלא אחת זו ואחת זו אינו חייב עד שימשוך. רבי אימי בשם רבי לעזר. ותני רבי הושעיה כן. לא נאמר שלוחות יד שנאמר בנושא שכן שאינו צריך. הייתי למד משומר חנם. מה אם נושא שכן שהחמירה עליו תורה אינו חייב עד שעה שימשוך. שומר חנם שהיקלה בו תורה אינו דין שלא יהא חייב עד שעה שימשוך. לאי זה דבר נאמרה שלוחות יד בנושא שכן. שאינו צריך להחמיר עליו. כיון שהניח מקלו ותרמילו עליו חייב. אמר לו רבי יוסה. אם אומר את כן נמצאת למד קיל מחמור להחמיר עליו. דו יכיל מימור ליה. מה אם נושא שכן שהחמירה התורה בו אינו חייב עד שעה שימשוך. שומר חנם שהיקלה בו התורה אפילו משך יהא פטור. אלא לא נאמר שלוחות יד שנאמרה בשומר חנם שאינו צריך הייתי למד מנושא שכן. מה אם שומר חנם שהיקלה התורה בו אינו חייב עד שעה שימשוך. נושא שכן שהחמירה בו התורה

כִּינּוּ שְׁמִשְׁדָּה יְהֵא חֵיב. לֹאִי זֶה דְּבַר נְאֻמָּה שֶׁלִּיחוֹת יָד בְּשׁוּמֵר חֲנֻם שְׂאִינוּ צְרִיךְ לְהַחֲמִיר עַל נוֹשֵׂא שְׂכָר.
כִּינּוּ שְׁהֵנִיחַ מִקְלּוֹ וְתַרְמִילוֹ עָלָיו חֵיב.

⁵³What is the reason of the House of Shammai? *Any word of criminality*^{46,54}. How do the House of Hillel explain the reason of the House of Shammai? “Criminality,” *any word of criminality*. Explain it if he appropriated it through an agent⁵⁵.

Rebbi Yose bar Ḥanina asked, what was said, to take? Took⁵⁶? Did not Rebbi Hoshia state, “it broke”; if it turned into vinegar he pays for everything⁵⁷? It turned into vinegar only because of its spoilage⁵⁸. Rebbi Samuel, Rebbi Abbahu in the name of Rebbi Eleazar. “Grabbing”⁵⁹ which was mentioned for the unpaid keeper makes him liable only if he diminished⁶⁰. Rebbi Samuel asked before Rebbi Abbahu: What has been said about taking? That he diminished or even if he did not diminish? He said to him, is that not Rebbi Yose bar Ḥanina’s question, to take, took? If you say “to take”, even if he did not diminish⁶¹. If you say “took,” only when he diminished. If you say “to take”, if he returned it either to its former place or to another place he is not liable. If you say “took,” if he returned it to its former place he is not liable, to another place he is liable.

Rebbi Abbahu in the name of Rebbi Joḥanan: “Guarding” is mentioned for the unpaid keeper and “guarding” is mentioned for the paid keeper, but “guarding” mentioned for the unpaid keeper is not similar to “guarding” mentioned for the recipient of a fee. “Guarding” mentioned for the unpaid keeper; if he guarded it sufficiently he is not liable. For a paid keeper one estimates it only relative to his body. Therefore one judges him; if the guarding was appropriate he is not liable, otherwise he is liable⁶². One does not say, if another had been there, he could have saved⁶³. If he saved, he is not liable; if he did not save, he is liable⁶⁴.

Rebbi Eleazar in the name of Rebbi Hoshia: “Grabbing” is mentioned for the unpaid keeper and “grabbing” is mentioned for the paid keeper, but “grabbing” mentioned for the unpaid keeper is not comparable to “grabbing” mentioned for the paid keeper. “Grabbing” mentioned for the unpaid keeper does not make him liable unless he move it⁶⁵. “Grabbing” mentioned for the paid keeper, he is liable from the moment he puts his staff and his bag on it⁶⁶.

Rebbi Yose ben Nehorai heard this and said, I am not accepting this, but in any case he is not liable unless he move it⁶⁷. Rebbi Immi in the name of Rebbi Eleazar: But did not Rebbi Hoshiaia state it in this way? If “grabbing” had not been mentioned for the unpaid keeper as unnecessary⁶⁸, I would have inferred from the recipient of a fee. Since the recipient of a fee, with whom the Torah was strict, does not become liable unless he move it, it is only logical that an unpaid keeper, with whom the Torah was lenient, not be liable unless he move it. For which purpose was “grabbing” mentioned for the unpaid keeper since it was unnecessary? To be strict with the recipient of a fee; from the moment he puts his staff or his bag on it he is liable. Rebbi Yose said, if you say so, you infer about the premise to restrict it. For one could say to him, since the recipient of a fee, with whom the Torah was strict, does not become liable unless he move it, the unpaid keeper, with whom the Torah was lenient, should not be liable even if he move it. But it must be the following: “Grabbing” should not have been mentioned for the paid keeper as unnecessary, for I would have inferred from the unpaid keeper⁶⁸. Since the unpaid keeper, with whom the Torah was lenient, is not liable unless he move it, the recipient of a fee, with whom the Torah was strict, becomes liable when he moves it. For which purpose was “grabbing” mentioned for the recipient of a fee since it was unnecessary? To be strict; from the moment he puts his staff or his bag on it he is liable⁶⁹.

53 The remainder of the Halakhah does not refer to Mishnah 8:1 but to *Bava meṣi'a* 3:13. There exists a full parallel in the Escorial ms. of *Neziḡin* (E), reproduced above, and a not quite complete version published by R. H.Y.D. Azulai almost 200 years before the discovery of E; cf. *Bava meṣi'a* 3:13, Note 89. The Leiden ms. there quotes only the first line followed by “etc.” This justifies considering the text of E as second source for the text here.

A short parallel to the discussion here is in the Babli, *Bava meṣi'a* 44a.

54 Mishnah *Bava meṣi'a* 3:13 states that

according to the House of Shammai, a keeper becomes unfaithful and liable for any and all damages to the deposit if he thinks of appropriating it for his own use; according to the House of Hillel only the actual taking triggers liability. The House of Shammai include in “word of criminality” also unspoken words which would prevent the keeper from swearing to his innocence.

55 Giving orders certainly involves words. If the order was criminal, the person giving the order can no longer swear truthfully that he did not take the deposit even if he himself never touched it.

56 This refers to the second part of Mishnah *Bava meši'a* 3:13: "If he tilted the [wine] amphora and took a *quartarius*, and then it broke, [the unpaid keeper] pays only for a *quartarius*. If he lifted it and took a *quartarius*, and then it broke, he pays for all." It is assumed that the amphora did not break because of any action of the keeper's; then the unpaid keeper does not have to pay for the loss. But if he lifted the amphora with the intent of stealing from it, it becomes his property and he is liable for the entire value of amphora and contents. The question now is whether "took" means that he actually removed anything from the amphora's contents or whether just moving the amphora with the intent of taking triggers full liability. Since in a sale of movables it is not the payment which transfers property rights and liabilities from seller to buyer but the buyer's moving the item, it is not unreasonable to read "took" as "intent to take" since action of moving is decisive.

57 R. Hoshia qualifies the first statement. If he only tilted the amphora but did not move it from its place and it broke he only pays for what he took, to apply only to the case of breakage. If he tilted the amphora, took some wine, and then the wine turned into vinegar, he is liable to pay for all the wine since we say that tilting the wine and pouring from it caused the rest to turn into vinegar.

58 Read with E: "the motion".

59 The biblical expression שָׁלַח יָדוֹ "sent his hand", mentioned both in *Ex. 22:7* and 10.

60 Only if he actually took from it, not if the volume diminished by his handling the

amphora for his own purposes.

61 But it lost volume after he handled it not for its own sake.

62 Text of E: "Guarding mentioned for the paid keeper, even if he enclosed it in an iron wall one is not satisfied that he guarded. If it was in his power to save, he is liable. If it was not in his power to save, he is not liable." This refers to the rule that the paid keeper is liable for theft and loss.

63 Since the keeper is paid, it would have been the responsibility of the owner to hire a sufficient number of guards to watch over his property.

64 This belongs before the preceding sentence; cf. Note 62.

65 As made clear in Mishnah *Bava meši'a* 3:13.

66 Since the paragraph about the paid keeper (*Ex. 22:9-11*) refers to animals, the example given refers to animals. If the keeper has to shepherd an animal, he cannot use it as his beast of burden even for the most minute load to his own benefit.

67 He requires an act of acquisition; he is liable only if he makes the animal move from the place where he put his bag on it.

68 Since earlier we had established a strict order of liabilities, the unpaid keeper being liable less than the paid keeper or renter who in turn are liable less than the borrower, a mention of liability after "grabbing", appropriating the deposit, for the unpaid keeper would automatically imply the same for the paid keeper and the renter. In the first version, the argument is upside down as R. Yose points out.

69 Since the mention of "grabbing" in v. 10 is unnecessary if it meant the same as in v. 7, it follows that the rules of liability for

the paid keeper are more strict than those for the unpaid keeper. The detail, in what these rules are more strict, is not mentioned in the

biblical text; it must be left to the traditional understanding of these rules.

משנה ב: אמר לשומר הנם איכן שורי אמר לו מות והוא שנשבר או נשבה או נגנב או אבד. נשבר והוא שמות או נשבה או נגנב או אבד. נשבה והוא שמות או נשבר או נגנב או אבד. נגנב והוא שמות או נשבר או נגנב או אבד. אבד והוא שמות או נשבר או נשבה או נגנב. משביעך אני ואמר אמן פטור:

Mishnah 2: He said to the unpaid keeper, “where is my ox?” He told him, “it died,” but it broke, or was abducted, or stolen, or lost⁷⁰. “It broke,” but it died, or was abducted, or stolen, or lost. “It was abducted,” but it died, or broke, or was stolen, or lost. “It was stolen,” but it died, or broke, or was abducted, or lost. “It was lost,” but it died, or broke, or was abducted, or stolen. “I want you to swear,” he answered “Amen”. He is not liable⁷¹.

משנה ג: איכן שורי אמר לו איני יודע. מה אפה שח והוא שמות או נשבר או נשבה או נגנב או אבד. משביעך אני ואמר אמן פטור.

Mishnah 3: “Where is my ox?” He told him, “I do not know.” “What are you telling?” But if had died, or broke, or was abducted, or stolen, or lost. “I want you to swear,” he answered “Amen”. He is not liable⁷¹.

משנה ד: איכן שורי אמר לו אבד. משביעך אני ואמר אמן והעדים מעידין אותו שאכלו משלם את הקרן. הודה מעצמו משלם קרן וחומש ואשם.

Mishnah 4: “Where is my ox?” He told him, “it was lost.” “I want you to swear,” he answered “Amen”. Witnesses testify that he ate it: he has to pay its value⁷². If he confessed himself he pays the value, and a fifth, and a reparation sacrifice⁷³.

משנה ה: איכן שורי אמר לו נגנב. משביעך אני ואמר אמן והעדים מעידין אותו שנגנב משלם תשלומי כפל. הודה מעצמו משלם קרן וחומש ואשם:

Mishnah 5: “Where is my ox?” He told him, “it was stolen.” “I want you to swear,” he answered “Amen”. Witnesses testify that he stole it: he has to pay double restitution⁷⁴. If he confessed himself he pays the value, and a fifth, and a reparation sacrifice⁷³.

משנה ו: אָמַר לְאֶחָד בִּשְׁוֶק אֵיכָן שׁוֹרִי שֶׁגָּנַבְתָּ וְהוּא אָמַר לֹא גָנַבְתִּי וְהָעֵדִים מַעֲיִדִין אוֹתוֹ שֶׁגָּנַב מִשְׁלָם תְּשַׁלְּמוּ כָפָל. טַבַּח וּמִכָּר מִשְׁלָם תְּשַׁלְּמוּ אַרְבָּעָה וְחִמְשָׁה. רָאָה גְדִים שֶׁמִּמֶּשְׁמֵשִׁין וּבֵאִין אָמַר גָּנַבְתִּי אָבֵל לֹא טַבַּחְתִּי וְלֹא מִכַּרְתִּי אֵינוֹ מִשְׁלָם אֵלָּא קָרֵן:

Mishnah 6: He said to a person on the market, “where is my ox which you stole?” This one says, “I did not steal,” but witnesses testify that he stole it: he has to pay double restitution⁷⁴. If he slaughtered or sold it, he pays quadruple or quintuple restitution⁷⁵. If he saw that witnesses appeared and said, “I stole but did neither slaughter nor sell,” he only pays its value⁷⁶.

70 These are the cases enumerated in *Ex.* 22:6,9, where the unpaid keeper swears but does not have to pay. Breakage refers to vessels, not to animals; it is included since it appears in the verse.

71 Even though he swore under a false category, since he swore correctly to the fact that he does not have to pay he is not liable for the sacrifice required for a false oath.

72 He has to pay restitution. But since he did not claim falsely that it was stolen, there is no fine. In general there is no fine imposed if the culprit confesses before

witnesses testify against him.

73 Following *Lev.* 5:20-25.

74 This is not the double restitution of the common thief (since the owner himself handed the animal or vessel over to him) but the double restitution required by *Ex.* 22:8.

75 *Ex.* 21:37.

76 He did not swear; there is no additional fifth and sacrifice. There is no fine for the confessed thief; therefore he pays only the value even though he falsely claimed not to have slaughtered or sold the animal.

(38d line 1) **הלכה ב:** אָמַר לְשׁוֹמֵר חֵטֶם כּוֹל. רַב אָמַר. פְּטוֹר מִשְׁבּוּעַת פִּיקְדוֹן וְחֵיִיב מִשּׁוּם שְׁבּוּעַת בִּיטוּי. אָמַר רַבִּי יוֹחָנָן. מֵאַחַר שֶׁמִּצְוָה לְהַפִּיסוֹ אֵינוֹ חֵיִיב מִשּׁוּם שְׁבּוּעַת בִּיטוּי. עַל דַּעֲתִיָּה דְרַב אֵינוֹ מִצְוָה לְהַפִּיסוֹ. מִפִּיִּסוֹ עַל הָאֶמֶת וְאֵינוֹ מִפִּיִּסוֹ עַל הַשֶּׁקֶר.

Halakhah 2: “He said to the unpaid keeper,” etc. ⁷⁷Rav said, he is not liable for a keeper’s oath but is liable because of a blurted oath. Rabbi Johanan said, since it is a religious duty to appease him, he is not liable because of a blurted oath. In Rav’s opinion, is there no religious duty to appease him? One appeases with truthful statements, not with lies.

77 This paragraph is from *Sanhedrin* 3:10, Notes 190-192.

(38d line 5) רַבִּי יוֹחָנָן בְּעֵי. שְׁבּוּעַת סוּטָה מֵהוּ שִׁיְהוּ חֵיִיבִין מִשּׁוּם שְׁבּוּעַת בִּיטוּי. מָה נֵּן קִיּוּמִין. אִם בְּשׁוּגָתָהּ בְּעֵבֶרָה וּבְשׁוּבָהּ אֵין כָּאֵן סוּטָה. אִם בְּמִזְדָּה בְּעֵבֶרָה וּבְשׁוּבָהּ אֵין כָּאֵן קוֹרְבָן.

אֲתִיבָא דְרַב קָרְבִי עֲקִיבָה. וְאִין יִסְבּוֹר רַבִּי יִשְׁמָעֵאל כְּרַבִּי מֵאִיר אֲתִיבָא הִיא דְרַבִּי מֵאִיר אָמַר.
אָמֵן שְׁלֵא נִטְמָאתִי. אָמֵן שְׁלֵא אֶטְמָא. וְאֵת מִשְׁכַּח מִקְשִׁיא.

Rebbi Johanan asked: May the oath of a deviant woman⁷⁸ be liable for a blurted oath? Where do we hold? If she is in error in sin and oath she is not deviant⁷⁹. If she is intentional in sin and error there is no sacrifice⁸⁰. Rav follows Rebbi Aqiba⁸¹. If Rebbi Ismael⁸² would argue like Rebbi Meïr it would follow, since Rebbi Meïr said⁸³: “Amen that I was not defiled, Amen that I shall not be defiled.” But you may question this⁸⁴.

78 The suspected adulteress who is put under oath by the Cohen, *Num.* 5:22.

79 If she slept with a man thinking it was her husband and swears while in this belief, she is not forbidden to her husband and not deviant.

80 There is no sacrifice for an intentional false oath.

81 This refers to Halakhah 3:1. R. Aqiba admits the possibility of sacrifices for inadvertent blurted oaths (*Lev.* 5:4) referring to past events as well as future ones but R. Ismael allows only future- directed blurted oaths. Rav (Chapter 3 Note 7) admits only past-directed blurted oaths; as just shown this is not possible in the case of the deviant woman.

82 R. Meïr explains the repetition “Amen, Amen” in *Num.* 5:22 that the first one is past directed, the second future directed. R. Ismael might agree that this is a special case where a biblical verse also requires the inclusion of references to past events. Then the question of R. Johanan might make sense since the possibility of an oath by a deviant woman depends on past events but the designation as blurted oath must depend on future happenings, not covered by the previous argument.

83 Mishnah *Soṭah* 3:1.

84 Since practice would follow neither R. Ismael nor R. Meïr there seems to be no point for R. Johanan’s question.

משנה ז: אָמַר לְשׂוֹאֵל אֵיכָן שׂוֹרִי אָמַר לוֹ מַתּ וְהוּא שְׁנִשְׁבַּר אוֹ נִשְׁבַּח אוֹ נִגְנַב אוֹ אָבַד. נִשְׁבַּר וְהוּא שְׁמַת אוֹ נִשְׁבַּח אוֹ נִגְנַב אוֹ אָבַד. נִשְׁבַּח וְהוּא שְׁמַת אוֹ נִגְנַב אוֹ אָבַד. נִגְנַב וְהוּא שְׁמַת אוֹ נִשְׁבַּר אוֹ נִשְׁבַּח אוֹ אָבַד. אָבַד וְהוּא שְׁמַת אוֹ נִשְׁבַּר אוֹ נִשְׁבַּח אוֹ אָבַד. נִגְנַב. מִשְׁבִּיעֵהוּ אֲנִי וְאָמַר אָמֵן פְּטוּר:

Mishnah 7: He said to the borrower, “where is my ox?” He told him, “it died,” but it broke, or was abducted, or stolen, or lost⁷⁰. “It broke,” but it died, or was abducted, or stolen, or lost. “It was abducted,” but it died, or broke,

or was stolen, or lost. “It was stolen,” but it died, or broke, or was abducted, or lost. “It was lost,” but it died, or broke, or was abducted, or stolen. “I want you to swear,” he answered “Amen”. He is not liable⁸⁵.

משנה ח: איכן שוּרִי אָמַר לוֹ אֵינִי יוֹדֵעַ כֹּה אֶתָּה שָׁח וְהוּא שְׂמִית אוֹ נִשְׁבַּר אוֹ נִשְׁבָּה אוֹ נִגְנַב אוֹ אָבָד. מִשְׁבִּיעוֹ אֲנִי וְאָמַר אָמֵן חַיִּיב.

“Where is my ox?” He told him, “I do not know.” “What are you telling?” But if had died, or broke, or was abducted, or stolen, or lost. “I want you to swear,” he answered “Amen”. He is liable⁸⁶.

85 Since the borrower pays for any of the reasons mentioned, by his oath he does not deprive the owner of any money. Therefore no sacrifice is due.

86 He denies ever having borrowed an ox. His oath is to the detriment of the owner; a sacrifice is due in addition to the restitution of 125% of the value.

(38d line) **הלכה ז:** אָמַר לְשׂוֹאֵל. אֵיכָן שׂוֹרִי כו'. אָמַר רַבִּי יוֹחָנָן. וְתִיב כֵּן. טַעֲנוּ טַעֲנַת אֲבוֹד וְנִשְׁבַּע לוֹ וְהוֹדָה. בֵּין עַד שֶׁלֹּא בָּאוּ הָעֵדִים בֵּין מִשְׁבָּאוּ הָעֵדִים מִשְׁלֵם קָרָן וְחֹמֶשׁ וְאֶשֶׁם. טַעֲנוּ טַעֲנַת גִּנְבָּה וְנִשְׁבַּע לוֹ וְהוֹדָה. עַד שֶׁלֹּא בָּאוּ הָעֵדִים מִשְׁלֵם קָרָן וְחֹמֶשׁ וְאֶשֶׁם. וְאִם מִשְׁבָּאוּ הָעֵדִים מִשְׁלֵם תְּשַׁלְּמִי כָּפֹל וְאֶשֶׁם וְחֹמֶשׁ עוֹלָה לוֹ מִתּוֹךְ כְּפִילוֹ. דְּבָרֵי רַבִּי יַעֲקֹב. אָמְרוּ לוֹ לְרַבִּי יַעֲקֹב. אֵיכָן מְצִינוּ אֶשֶׁם בְּלֹא חֹמֶשׁ. אָמַר לָהֶן. אִם נִשְׁבַּע וְנִשְׁבַּע וְנִשְׁבַּע הָרִי מְצִינוּ אֶשֶׁם בְּלֹא חֹמֶשׁ. וְרַבִּנּוּ אָמְרוּ. לְקָרָן חֹמֶשֶׁשׁ אֵין לְשִׁבְעוֹת חֹמֶשֶׁשׁ.

דְּבַר אַחֵר. וְשֵׁלֵם אוֹתוֹ בְּרֹאשׁוֹ וְחִמִּישְׁתּוֹ יוֹסֵף עָלָיו. אָמַר רַבִּי זִירָא. וְתִיב כֵּן. טַעֲנוּ טַעֲנַת אֲבוֹד וְנִשְׁבַּע לוֹ וְהִפְרִישׁ קָרְבָּן. מֵאִילוֹ שְׁאִילוֹ הוֹדָה מִשְׁבָּאוּ הָעֵדִים קִידֵּשׁ אֶף כָּאֵן קִידֵּשׁ. טַעֲנוּ טַעֲנַת גִּנְבָּה וְנִשְׁבַּע לוֹ וְהִפְרִישׁ קָרְבָּן. מֵאֲחֵר שְׁאִילוֹ הוֹדָה מִשְׁבָּאוּ הָעֵדִים לֹא קִידֵּשׁ אֶף כָּאֵן לֹא קִידֵּשׁ. וְכַרְבִּי יַעֲקֹב קִידֵּשׁ.

Halakhah 7: “He said to the borrower, “where is my ox,” etc. Rabbi Johanan said, it was stated thus⁸⁷: “He⁸⁸ claimed a claim of loss, swore, and confessed. Whether before witnesses came or after witnesses came he pays the value, a fifth, and a reparation sacrifice⁷³. If he claimed a claim of thief, swore, and confessed before witnesses came he pays the value, a fifth, and a reparation sacrifice. When after witnesses came he pays double restitution⁷⁴ and a reparation sacrifice; the fifth is counted for him in the double payment, the words of Rabbi Jacob. They said to Rabbi Jacob, where do we find a reparation sacrifice without fifth? He said to them, if he swore, and swore,

and swore, we find a reparation sacrifice without fifth. But the rabbis say, there is a fifth for the capital; there is no fifth for oaths⁸⁹.”

Another explanation: *He shall pay the whole worth and add its fifths to it*⁹⁰. Rabbi Ze'ira said, it was stated thus: “He claimed a claim of loss, swore, and dedicated a sacrifice. Since if he confessed after witnesses came it would be sanctified, it is sanctified here. He claimed a claim of thief, swore, and dedicated a sacrifice. Since if he confessed after witnesses came it would not be sanctified⁹¹, it is not sanctified here, but following Rabbi Jacob it would be sanctified.”

87 *Bava qamma* 65a/b, Tosephta *Bava qamma* 8:8.

88 A paid keeper or renter who pays for stolen and lost deposits but pays no double restitution if he in fact stole it but claims that it was lost.

89 Rabbi Jacob holds that if he swore falsely he has to pay the fifth of the value of the deposit but if he then repeats the false oath there is no underlying money involved and therefore no money due. The rabbis hold that double restitution is only due from the thief after conviction by the court. For payment after confession neither fifth nor a sacrifice are due.

90 *Lev.* 5:24. The plural “fifths” implies that for repeated false oaths about the same subject additional fifths are due (*Sifra Hovah, Wayyiqra II, Parašah* 13:12; *Babli Bava qamma* 103b, *Bava meši'a* 54b). This disproves R. Jacob's statement.

91 A reparation offering is obligatory; it cannot be voluntary. Since the rabbis hold that double restitution excludes oath and confession, no sacrifice is possible even in the case where the verse demands double restitution in any case, as for the paid keeper who falsely claimed that a thief had stolen the item (Note 74).

38d line 23) אָמַר רַבִּי יוֹחָנָן. הַטּוֹעֵן אֶת חֲבִירוֹ טַעֲנַת גָּנֵב מְשַׁלֵּם תְּשֻׁלוּמֵי כָּפֹל. טִבַּח וּמְכַר מְשַׁלֵּם תְּשֻׁלוּמֵי אַרְבָּעָה וְחֲמִשָּׁה. תָּמון אָמַר. מְשַׁלֵּם תְּשֻׁלוּמֵי אַרְבָּעָה וְחֲמִשָּׁה. רַבִּי פִּדְתָּ בִּשְׁם רַבִּי הוֹשַׁעְיָה. תִּנְיִי תָמוֹן וּמִסִּיעִין לְרַבִּי יוֹחָנָן. אֵיכָן שׁוֹרִי. אָמַר לוֹ. אֲבָד. מִשְׁבִּיעֶדָּ אֲנִי. וְאָמַר אָמֵן. וְהַעֲדִים מַעֲדִין אוֹתוֹ שְׁאֵלָו. מְשַׁלֵּם אֶת הַקֶּרֶן. הוֹדָה מַעֲצָמוֹ. מְשַׁלֵּם קֶרֶן וְחוֹמֶשׁ וְאֶשֶׁם. וְיֵשׁ אֲכִילָה בְּלֹא טִבִּיחָה. אָמַר רַבִּי חֲגִי. תִּפְתֵּר בְּשִׁשְׁחֻטּוֹ אַחֵר. וְיֵי דָא אָמְרָה דָּא. אָמַר לְאַחַד בְּשׁוֹק. אֵיכָן שׁוֹרִי שְׁגִבְתָּ. וְהוּא אוֹמַר. לֹא גִבְתָּ. מִשְׁבִּיעֶדָּ אֲנִי. וְאָמַר אָמֵן. פָּטוּר. מִפְּנֵי שְׁאֵמַר לְאַחַד מִן הַשּׁוֹק. אֲבָל אִם אָמַר לְאַחַד מִן הַשּׁוֹמְרִין חֵיב. מִתְּנִיתָא בְּשִׁאֲכָלוֹ וְאַחֵר כֶּדֶּן נִשְׁבַּע לוֹ. מִן מַה דְּמַר רַבִּי יוֹחָנָן בְּשִׁנְשַׁבַּע לוֹ וְאַחֵר כֶּדֶּן אֲכָלוֹ.

Rebbi Johanan said, if somebody claims against another a claim of thief he pays double restitution. If he slaughtered or sold, he pays⁹² quadruple or

quintuple restitution. There, they say, he pays quadruple or quintuple restitution⁹³. Rabbi Pedat in the name of Rabbi Hoshai: There⁹⁴ we state and it supports Rabbi Johanan: “‘Where is my ox?’ He told him, ‘it was lost.’ ‘I want you to swear,’ he answered ‘Amen’. Witnesses testify that he ate it; he has to pay its value⁷². If he confessed himself he pays the value, and a fifth, and a reparation sacrifice⁷³.’” Is there eating without slaughtering⁹⁵? Rabbi Haggai said, explain it if another slaughtered⁹⁶. And the following said so: He said to one in the market place, “where is my ox which you stole?” He says, “I did not steal.” “I want you to swear,” and he says “Amen.” He is (not)⁹⁷ liable. Because he is one in the market place. But if he said it to one of the keepers, that one would be liable⁹⁸. The *baraita* when he ate it and then swore. What Rabbi Johanan said, if he swore and after that ate it⁹⁹.

92 The following implies that one has to read “does not pay.”

93 In Babylonia they transmit R. Johanan’s saying as requiring multiple restitution; Babli *Bava qamma* 106b.

94 Mishnah 4.

95 The Mishnah does not require multiple restitution for eating the animal entrusted to him. This proves that there is no quadruple or quintuple restitution and double restitution only if the keeper claims that it was stolen from him.

96 The Babli, *Bava qamma* 71a,

emphatically disagrees, in the name of R. Johanan. Since the verse brackets slaughter and sale together and a sale is impossible without a third party, so slaughter by a third party acting on his orders also triggers the liability of the thief.

97 This has to read “is liable.”

98 This has to read “would not be liable (for quadruple or quintuple restitution).”

99 If the unpaid keeper had sworn or the paid keeper had paid, the animal became his and if he slaughtered afterwards there can be no additional restitution.

משנה ט: אמר לנזשא שקר והשוקר איכן שורי אמר לו מות והוא שנשפר או נשבת. נשפר והוא שמות או נשבת. נשבת והוא שמות או נשפר. נגנב והוא שאבד. אבד והוא שנגנב. משביעך אני ואמר אמן פטור. (fol. 38c)

Mishnah 9: He said to the recipient of a fee or to a renter, “where is my ox?” He told him, “it died,” but it broke or was abducted; “it broke,” but it died or was abducted; “it was abducted,” but it died or broke; “it was stolen,”

but it was lost; "it was lost," but it was stolen. "I want you to swear;" if he said "Amen", he is not liable.

משנה י: מת או נשבר או נשבה והוא שנגנב או אבד. משביעך אני ואמר אמן חייב. אבד או נגנב והוא שמת או נשבר או נשבה פטור. זה הכלל כל הנשבע להקל על עצמו חייב. להחמיר על עצמו פטור.

Mishnah 10: "It died, or it broke, or it was abducted," when it was stolen or lost. "I want you to swear;" if he said "Amen", he is liable. "It was lost, or stolen," when it died, or broke, or was abducted; he is not liable. This is the principle: Anybody who swears to his benefit is liable, to his detriment is not liable.

(38d line 33) **הלכה ט:** אומר לנושא שְׁכָר כול'. אומר רבי יוחנן. הטוען לחבירו טענת גנב באבדירה חייב. איכן אבדית. אומר לו. נגנבה. אומר רבי יוחנן. הטוען לחבירו טענת גנב אינו חייב אלא לאחר שבועה. ומאי טעמא. נאמר פאן שליחות יד. ונאמר להקל שליחות יד. מה שליחות יד שפאמרה להקל אינו אלא לאחר השבועה. אף שליחות יד שפאמרה פאן אינו חייב אלא לאחר שבועה. אומר רבי יוחנן. טענו טענת אבוד ונשבע לו ואחר כך טענו טענת גנב. פטור. רבי יוחנן בעי. שבועת טענת גנב מהו שיהו חייבין בה משום שבועת ביטוי. מחלפה שיטתיה דרבי יוחנן. תמן אומר. טענו טענת אבוד ונשבע לו ואחר כך טענו טענת גנב פטור. וכן אומר אבין. תמן פשיטה ליה וכן צריכה ליה. מה איצטריכת ליה חזי ופשיטה. רבי חייה בר יוסף אומר. הטוען לחבירו טענת גנב אינו חייב עד שיכפור בבית דין. מה נן קיימין. אם כהוא דקאים וחיוב לחבריה שבועה אפילו נשבע חוץ לבית דין חייב. אלא כי נן קיימין כהוא דחמי לון אזלין. בעון מישבעוניה והוא קפץ ומשתבע. רבי חייה בשם רבי יוחנן. בעומדת על אבוסו. רבי זירא בעי. מה איתאמרת. בעומדת או אפילו עומדת. ואין תימר אפילו עומדת. היא הך היא הך. אין תימר בעומדת. מחלפה שיטתיה דרבי יוחנן. תמן אומר. טענו טענת אבוד ונשבע לו והפריש קרבן ואחר כך טענו טענת אונס פטור. והכא את מר הכין. אומר רבי לא. שנייא היא שהיא ביוצא וידויי בשבועה. מקשינא על דעתיה דרבי זירא. אומר לו. איכן שורי. אומר לו. נגנב. משביעך אני. ואמר אמן. והעדים מעידין אותו שנגנב. משלם תשלומי כפל. הודה מעצמו. משלם קרן וחומש ואשם: והכא כיון שמשך בטוענו טענת אבוד. מיכן ואילך בטוענו טענת גנב ופטור. תיפתר בשנשבע לו ואחר כך טבח. תלמידיו דרבי חייה בר לולייני אמרי. תפתר בששחטו רבוי. ויש טביחה בלא מכירה. כסומכוס דאמר. אף על פי שאין גניבה לש טביחה ומכירה. שמואל אמר. בשלא באו עידי גניבה. אבל אם באו עידי טביחה חייב.

Halakhah 9: “He said to the recipient of a fee,” etc. Rabbi Johanan said, one who claims before his neighbor a claim of thief in a case of loss is liable¹⁰⁰. “Where is my lost object?” He told him, “it was stolen.”

Rabbi Johanan said, one who claims before his neighbor a claim of thief is liable only after an oath. What is the reason? It is said here “grabbing” and it says there “grabbing.” Since “grabbing” mentioned there only applies after an oath, so also “grabbing” mentioned here only applies after an oath¹⁰¹.

Rabbi Johanan said, one who claims a claim of loss, swore to him, and afterwards claimed a claim of thief is not liable¹⁰². Rabbi Johanan asked: May one be liable for a blurted oath in case of an oath regarding a claim of thief¹⁰³? The argument of Rabbi Johanan seems to be inverted. There he said, if he claimed a claim of loss, swore to him, and afterwards claimed a claim of thief is not liable. And here he says so¹⁰⁴? There it is obvious to him, here it is problematic for him¹⁰⁵. What is problematic for him? He saw and found it simple¹⁰⁶.

Rabbi Hiyya bar Joseph said¹⁰⁷, one who claims before his neighbor a claim of thief is liable only after he denied in court. Where do we hold? If about him who already owes an oath¹⁰⁸ to his neighbor, even if he was swearing out of court he is liable. But we must hold about him who saw them coming. They wanted to make him swear but he jumped in and swore¹⁰⁹.

Rabbi Hiyya in the name of Rabbi Johanan: When it was standing at his feeding trough¹¹⁰. Rabbi Ze'ira asked: how was it said? “If it was standing” or “even if it was standing”¹¹¹? If you say “even if it was standing,” it makes no difference¹¹². If you say “if it was standing,” then the argument of Rabbi Johanan is inverted. There, he said, if he claimed before him a claim of loss, had been swearing to him, selected a sacrifice¹¹³, and then claimed a claim of duress, he is not liable¹¹⁴. But here you are saying so? Rabbi La said, there is a difference since he absolved himself of confession by the oath¹⁰². They objected to the opinion of Rabbi Ze'ira: “‘Where is my ox?’ He told him, ‘it was stolen.’ ‘I want you to swear,’ he answered ‘Amen’. Witnesses testify that he stole it: he has to pay double restitution⁷⁴. If he confessed himself he pays the value, and a fifth, and a reparation sacrifice⁷³.” But here when he moved it¹¹⁵ by claiming that it was lost. Afterwards he claimed a claim of

thief and is not liable¹⁰². Explain it that he swore to him but slaughtered it afterwards¹¹⁶. The students of Rabbi Hiyya bar Julianus say, explain it that he slaughtered it when it was lying down¹¹⁷. Is there slaughter without sale¹¹⁸? Following Symmachos who said, there can be slaughter and sale without theft¹¹⁹. Samuel said, if there came no witnesses of the theft, but there came witnesses of the slaughter; he is liable¹²⁰.

100 A person who finds a lost object with distinguishing marks by which the owner can convincingly describe it is obligated to return it to its owner (*Deut.* 22:1-3); by picking it up he automatically becomes an unpaid keeper. If the owner hears that the object was found by that person and comes to reclaim it, if the finder had honestly told him that he lost it again he would not be liable since he was an unpaid keeper. But if he falsely claimed that it was stolen, he is liable for double restitution required for any false claim of theft (*Ex.* 22:8).

101 "Grabbing" is mentioned in *Ex.* 22:7 regarding court procedures involving an oath for an unpaid keeper who falsely claims that the object was stolen and has to pay double restitution. It also is mentioned in v. 10 regarding the paid keeper who for an actually stolen object has to pay its value (v. 11) but double restitution for a false claim of theft for which he swore falsely.

102 Babli *Bava qamma* 107b. Since he discharged his obligations towards the owner by his oath, the second claim is irrelevant.

103 If he swears for the second claim (truly or falsely), is this a blurted oath in the meaning of *Lev.* 5:4?

104 How can he say he is not liable and then make him liable for a blurted oath?

105 He is not liable for an oath about a

deposit; this implies nothing for the rules of blurted oaths.

106 The previous answer is incorrect. He saw that the answer is simple: since the second oath is not required it would be a blurted oath if true and a false oath if false, sinful in any case.

107 Babli *Bava qamma* 106b/107a. He notes that *Ex.* 22:8 in general is read as applying to court proceedings (6:1 Note 1, *Bava mesi'a* 1:1 Note 9) expressing the general conditions when an oath can be imposed. Therefore the double restitution imposed at the end of the verse has to be in such a proceeding, and double restitution imposed on the paid keeper or renter is imposed on the same basis by the argument of Note 101.

108 By court order.

109 Before there was any court proceeding. This oath does not protect him from having to swear another oath imposed by the court; therefore it does not trigger double restitution.

110 Babli *Bava qamma* 107b.

111 What kind of testimony will make him pay double restitution? Since he is a keeper and the animal was delivered to him, it needs an act of acquisition to be stolen and then this has to be classified as robbery, rather than as theft. If the animal was standing at a feeding trough on his property,

there it belongs. If he claims that it was stolen, he is liable for double restitution. If he took it as his property, he is a robber, the animal is his property, he has to pay for it, but any oath will be irrelevant since it would not be about the other's property. But if the formulation was "even if it was standing at his feeding trough" then it would apply even if he took it by robbery. (Rashi in *Bava qamma*.)

112 Whether he took the animal before he swore or after.

113 For his false oath.

114 For double restitution, since by the oath and payment he acquired the animal and the second claim is baseless; cf. Note 102.

115 He did not move it but acquired it by the oath as if he had moved it after buying.

116 When he already had acquired the animal by his oath.

117 He was an honest keeper beforehand; the animal was still its owner's property. He did not move the animal with the intent of appropriating it; the animal was acquired by

slaughter. This argument presupposes that quadruple or quintuple restitution applies only for slaughter or sale after theft.

118 It should read: "Is there restitution for slaughter without prior theft?"

119 He holds that quadruple or quintuple restitution is independent of restitution for theft; theft has not to be proven, only illegal slaughter. In the Babli (*Bava qamma* 75b) he states that if there were witnesses for the theft whose testimony stood up and witnesses for slaughter or sale which were found perjured, the accused has to pay double restitution for theft and the perjurers double or triple restitution for the false accusation, showing that slaughter or sale can be separated from theft. (The thief of cattle who sells his booty has to pay five times, not seven.)

120 He holds that while quadruple or quintuple restitution applies only to stolen animals, the theft has not to be proven in court if there are witnesses for illegal slaughter.

רִישׁ לְקִישׁ אָמַר. רָאָה עֵינַי גְּנִיבָה בְּאֵין וְאָמַר. גְּנֵבְתִּי. מֵאַחַר שֶׁאֵין בְּהוֹדֵייתוֹ מִמֶּשׁ פְּטוֹר. רָאָה עֵינַי טְבִיחָה בְּאֵין וְאָמַר. טְבַחְתִּי. מֵאַחַר שֶׁאֵין (ס"א שְׁלֹשׁ) בְּהוֹדֵייתוֹ מִמֶּשׁ פְּטוֹר (ס"א חֵיב). רַבִּי זִרְאָ בָּעִי. רָאָה עֵינַי אוֹנְסִין בְּאֵין וְאָמַר. אֲנֹסְתִי. אָמַר רַבִּי חֲנִינָה. מִתְּנִיתָה כְּרַבִּי שֶׁמָּעוֹן דָּאָמַר. עֵיקָר תְּבִיעָה קִנְס. כְּמִי שֶׁאֵין בְּהוֹדֵייתוֹ מִמֶּשׁ וּפְטוֹר. וְרַבִּנּוּן אָמְרִין. אֵין עֵיקָר תְּבִיעָה קִנְס. כְּמִי שֶׁלֹּשׁ בְּהוֹדֵייתוֹ מִמֶּשׁ וְחֵיב.

Rebbi Simeon ben Laqish said, if he saw that witnesses to the theft were approaching and he said "I stole," since his confession is inoperative he is not liable¹²¹. If he saw that witnesses to the slaughter were approaching and he said "I slaughtered," since his confession is (another opinion: not)¹²² operative¹²³ he is not liable (another opinion: is liable). Rebbi Ze'ira asked: that witnesses to rape were approaching and he said "I raped"? Rebbi

Ḥanina⁴³ said, the Mishnah follows Rabbi Simeon who said the main claim is for the fine¹²⁴. Therefore his confession is inoperative and he is not liable¹²¹. But the rabbis say, the main claim is not for the fine. Therefore his confession is operative¹²⁵ and he is liable¹²¹.

121 In this entire paragraph, “liable” has to be replaced by “not liable” and vice versa.

The principle that a confession frees a person from a fine is valid only if the confession preceded the appearance of witnesses since witnesses make his confession unnecessary. If the thief waits until the injured party has found witnesses he has to pay double restitution: the value of the object which he took as a debt and the double as a fine.

122 Copyist’s notes; the copyist’s correction of the incorrect text from which he copied.

123 It is assumed that the witnesses have no knowledge about how he acquired the animal which he slaughtered; he could have

bought it from the owner or from a thief. The person who bought from the thief cannot be sued for multiple restitution. Therefore his confession is as irrelevant as is the witnesses’ testimony; there is no place for any liability. If he also admits to having stolen the animal he liquidates his debt by paying its value.

124 Mishnah 5:6, Note 79.

125 For the rabbis the main claim of the father of an underage rape victim is for the diminution of his daughter’s chances on the marriage market; this is a claim for damages, not a fine, and in this respect “the admission of the debtor is worth 100 witnesses.”

לא להקל ולא להחמיר חייב. אומר רבי. מתניתא אמרה כן. אומר לשואל
אמר לשומר חנם אומר לנושא שקר והשוכר. איכן שורי. אומר לו. מות. מהו שלאמר לו. בוא
והשבע לי שלא נתתה עיניך בה לגוזלה. מכל-מקום אינו משלם. מהו דיימר ליה. אפילו דאף
יהב לי כמה ידי אנה בעי גבד.

It was stated: If it was neither to his benefit nor to his detriment, he is liable¹²⁶. Rabbi said, a *baraita* says so: “If he said to the borrower, the unpaid trustee, the recipient of a fee, or the renter, ‘where is my ox?’ This one said, ‘it died.’”¹²⁷

May he tell him, “come and swear to me that you never thought of rustling it”^{128,23}? In any case he would not pay; what could he say? “Even if you would pay me a lot, I want from you what is mine.”

126 There is a *baraita* which disagrees with the Mishnah and holds that a false oath

is a false oath even if the false formulation does no harm to the other party.

127 Tosephta 6:7 starts in this way; but the *baraita* must have the person who swore falsely not to the detriment of the depositor as liable to the penalties of a false oath.

128 Could the depositor ask that the paid trustee or renter, or even the borrower, who paid for the lost or stolen object, nevertheless swear that they do not hold the object in their possession? The first

argument is against, for the oath will not change the monetary situation. The second argument is in favor; there is a value to one's own possession which cannot be expressed in monetary terms. The answer is not given, nor is the question raised in the Babli. In the absence of guidance, a court cannot act.