

SELECTIONS OF RABBINIC LITERATURE

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SCRIPTURE

Exodus 26: 6-14

(6) If a man gives money or utensils to his fellow to watch, and they are stolen from the house of the man, if the thief is found he shall pay double. (7) If the thief is not found, the householder approaches God [swearing] that he did not put out his hand (*shalah yad*) to the property of his fellow.

(8) For every case of contestation--for an ox, for an ass, for a sheep, for a garment, for every case in which he says "lo, this is it"--the case of the two of them shall come to God; he whom God finds (Heb. plural) wicked shall pay double to his fellow.

(9) If a man gives an ass, or an ox, or a sheep, or any animal to his fellow to watch, and it died, or was broken, or was taken captive with no one seeing, (10) An oath of the Lord shall be between them that he did not put out his hand to the property of his fellow, and its owner will accept [it] and he [the watchman] will not pay. (11) And if it should be stolen from him he shall pay to its owner. (12) And if it should be torn he shall [the watchman] bring him [the owner] to the torn carcass, he shall not pay.

(13) And if a man borrows from his fellow and it is broken or it dies, if its owners are not with him (or: it) he shall surely pay; (14) if its owners are with it he shall not pay.

If he is a hired laborer it is reckoned (lit. comes) against his hire.

MISHNAH

Mishnah, Tractate Baba' Mesi'a', Chapter 3

M3:1

- [A] One who deposits with his friend and animal or vessels--
- [B] and they were stolen or lost:
- [C] if he paid and did not want to swear--
- [D] for lo they have said: "An unpaid depositary swears and is exempt"--
- [E] if the thief was found he pays the double payment;
- [F] and if he slaughtered it or sold it he pays the four- or fivefold payment.
- [G] To whom does he pay it?
- [H] To the one who had the deposit.
- [I] If he swore and did not want to pay:
- [J] if the thief was found he pays the double payment;
- [K] and if he slaughtered it or sold it he pays the four- or fivefold payment.
- [L] To whom does he pay it?
- [M] To the owner of the deposit.

M3:2

- [A] One who rents a cow from his friend--
- [B] and has lent it to another and it died naturally:
- [C] let the lessee swear that it has died naturally and the borrower pays to the lessee.

- [D] Said R. Yose (fl. ca. 140-70): “How [can this be]?”
 [E] “That one is doing business with the cow of this one!”
 [F] “Rather let the cow [i.e. its value] return to its owners.”

M3:3

- [A] If he said to two people: “I robbed a *maneh* (=100 *zuz*) from one of you, but I do not know which one of you,”
 [B] [or:] “The father of one of you deposited a *maneh* with me, but I do not know which he is,”
 [C] He gives a *maneh* to this one and a *maneh* to this one,
 [D] because he has admitted it by his own mouth.

M3:4

- [A] If two deposited with one person--the one [depositing] a *maneh*, the other two hundred [*denarii*]
 [B] This one says “The two hundred are mine,” and this one says “The two hundred are mine.”
 [C] He gives a *maneh* to this one and a *maneh* to this one, and let the remainder be set aside until Elijah comes.
 [D] Said R. Yose: “If so what has the cheater lost?”
 [E] “Rather, let all of it be set aside until Elijah comes.”

M3:5

- [A] And likewise two vessels one worth a *maneh*, and one worth one thousand *zuz*,
 [B] this one says “The valuable one is mine,” and this one says “The valuable one is mine.”
 [C] He gives the small one to one of them, and from the [proceeds of] the bigger one he gives the value of the smaller one to the second, and let the remainder be set aside until Elijah comes.
 [D] Said R. Yose: If so what has the cheater lost?
 [E] “Rather, let it all be set aside until Elijah comes.”

M3:6

- [A] If one deposits produce with his friend--
 [B] even if it is perishing, lo let him not touch it.
 [C] R. Simeon b. Gamaliel (fl. ca. 140-70) says: “Let him sell [them] before the court,
 [D] “because of [the principle of] returning a lost object to its owners.”

M3:7

- [A] If one deposits produce with his friend--
 [B] lo, let this one [the depositary] deduct losses:
 [C] for wheat and rice nine half *qabs* to the *kôr*;
 [D] for barley and millet nine *qabs* to the *kôr*;
 [E] for spelt and linseed, three *se'âs* to the *kôr*.
 [F] All is [assessed] according to the measurement and all is [assessed] according to the amount of time.

- [G] Said R. Yohanan b. Nuri (fl. ca. 100-30): “What does it matter to them? Mice eat [as much as they eat] whether there is much or little.
 [H] “He only exacts losses for one single *kôr*.”
 [I] R. Judah says (fl. ca. 140-70): “If the measure was large, he does not deduct
 [J] “because they increase.”

M3:8

- [A] Let him deduct one sixth for wine.
 [B] R. Judah says, “One fifth.”
 [C] Let him deduct three *lôgs* of oil per hundred:
 [D] One and one half *lôgs* for sediment; one and one half *lôgs* for absorption [by the casks].
 [E] If it was clarified oil, let him not deduct for sediment;
 [F] if old casks, let him not deduct for absorption.
 [G] R. Judah says: “One who sells clarified oil all year round, lo this one accepts upon himself one and one half *lôgs* to the one hundred.”

M3:9

- [A] If one deposits a jar with his friend--
 [B] if the owners did not single out a place for it, and he [the depositary] moved it and it broke:
 [C] if it broke while in his hands [if moved] for his needs he is liable; for its needs he is exempt;
 [D] if it broke after he put it down, whether for his needs or for its needs he is exempt.
 [E] If the owners did single out a place, and he moved it and it broke:
 [F] Whether it broke while in his hands or after he put it down for his needs he is liable, for its he is exempt.

M3:10

- [A] If one deposits money with his friend--
 [B] If he bound it and cast behind him,
 [C] [or] gave it to his minor son or daughter,
 [D] and he locked [the door] before them in an inappropriate manner
 [E] he is liable,
 [F] for he did not watch [over it] in the manner of watchmen.
 [G] If he did watch in the manner of watchmen he is exempt.

M3:11

- [A] If someone deposits money with a banker--
 [B] if it is bound let him not make use of it;
 [C] if it is loose, let him use it.
 [D] [If he deposits with a householder] in any case let him not use it.
 [E] “The shopkeeper is like a householder”
 [F] The words of R. Meir (fl. ca. 140-70).
 [G] R. Judah says: “Like a banker.”

M3:12

- [A] If someone appropriates (*shalah yad*) a deposit--
- [B] the House of Shammai (fl. 1st cent. CE) says: "He is punished with depreciation and appreciation,"
- [C] and the House of Hillel (fl. 1st cent. CE) says: "[He is liable for the price] at the time of taking it out,"
- [D] and R. Aqiba says (fl. ca. 100-30): "According to [the value at] the time it is demanded."
- [E] If someone intends to appropriate a deposit--
- [F] the House of Shammai hold liable;
- [G] and the House of Hillel says: "He is not liable until such time as he appropriates it."
- [H] How?
- [I] If he tipped the jar and took a *rebî'ît* from it and it broke, he pays only a *rebî'ît*.
- [J] If he picked it up and took a *rebî'ît* from it and it broke, he pays for the whole.

TOSEPTA

Tosepta, Tractate Baba' Mesi'a', Chapter 3

T3:1

- [A] The borrower is not permitted to lend,
- [B] and the renter is not permitted to rent,
- [C] and the renter is not permitted to lend,
- [D] and the lender is not permitted to rent
- [E] and he with whom one has deposited are not permitted to deposit with another
- [F] unless the owner householder gave him permission.

T3:2

- [A] One who borrowed a cow from his friend--
- [B] and it was stolen,
- [C] and the borrower preempted and paid,
- [D] and afterwards the thief was found,
- [E] he pays double or four- or five-fold payment to the second
- [F] One who rented a cow from his friend,
- [G] and it was stolen or lost,
- [H] and he said "I am hereby paying and I am not swearing,"
- [I] he paid,
- [J] and afterwards the thief was found,
- [K] he pays double or four- or five-fold payment to the second

T3:3

- [A] One who deposited a cow with his friend,
- [B] and it was stolen or lost,
- [C] and he said "I am hereby paying without an oath,"
- [D] and afterwards the thief was found,
- [E] he pays double or four- or five-fold payment to the second

T3:4

- [A] One who sells a cow to his friend,
- [B] and it was stolen:
- [C] this one says it was stolen in your possession,
- [D] and this one says it was stolen in your possession,
- [E] let them split it.
- [F] The thief was found,
- [G] this one says it was stolen in my possession,
- [H] and this one says it was stolen in my possession
- [I] let them split it.

T3:5

- [A] One who says: "I owe a *maneh*,
- [B] but I do not know if [I owe it] to so and so or to so and so,"
- [C] he gives a *maneh* to this one and a *maneh* to this one,
- [D] for he has admitted by his own mouth.
- [E] He said to two people:
- [F] "I robbed a *maneh* from one of you and two hundred from one of you,
- [G] and I do not know which of you,"
- [H] he gives this one two hundred, and this one two hundred,
- [I] or else he should have kept quiet.
- [J] This one says, "The two hundred are mine," and this one says "The two hundred are mine,"
- [K] he gives them [each] a *maneh*,
- [L] and let him not give them the rest
- [M] until they come to an agreement between them.

T3:6

- [A] Two who deposited with one person--the one [depositing] a *maneh*, the other two hundred [*denarii*],
- [B] At the time that they claim [their deposits],
- [C] this one says "The two hundred are mine," and this one says "The two hundred are mine."
- [D] He gives a *maneh* to this one and a *maneh* to this one, and let the remainder be set aside until Elijah comes.
- [E] Said R. Yose: "If so what has the cheater lost?"
- [F] "Rather, let all of it be set aside until Elijah comes."
- [G] And likewise two vessels one worth a *maneh*, and one worth one thousand *zuz*.

T3:7

- [A] If one deposits produce with his friend--
- [B] even if it is perishing, lo let him not touch it.
- [C] therefore the householder may make it into the priestly gift or tithes for [produce in] another place.

- [D] R. Simeon b. Gamaliel says: “In the case of perishing [produce], let him sell [it] before the court,
 [E] “because he is like one returning a lost object to the owners.”

T3:8

- [A] “One who deposits produce with his friend,
 [B] “and it rotted,
 [C] “[deposited] wine and it became sour,
 [D] “oil and it became rancid,
 [E] “even though it is perishing, let him not touch it,”
 [F] the words of R. Meir
 [G] And the Sages say, “He makes a cash assessment before the court,
 [H] “he sells them to others, and does not sell them to himself.”

T3:9

- [A] Similarly, the treasurers for charity who have not found paupers to whom to distribute bread sell to others and do not sell to themselves.
 [B] Treasurers for charity make change (i.e. buy silver coin with copper coin) for others but not for themselves.
 [C] One who deposits produce with his friend--
 [D] lo, let this one deduct his losses.
 [E] With regard to what were the [above] words stated?
 [F] When he mixed it with his own produce,
 [G] but if it was left by itself
 [H] let him say: “Lo, yours is before you.”
 [I] The rule is the same for one who mixes and for one who declares tithes.

T3:10

- [A] For sweets and the various types of pulse the sages did not give a fixed measure.
 [B] Said ben Azzai (fl. ca. 100-30): the power of R. Aqiba is strengthened (perhaps a euphemism for weakened?) because he gave fixed measure for these and not for those.
 [C] Said R. Yohanan b. Nuri: “What does it matter to the mice? They eat [as much as they eat] whether there is much or little.
 [D] “He only deducts his loss for a single *kôr*.”
 [E] Said R. Judah: “With regard to what were the [above] words stated?
 [F] “When he measured [produce] from his house,
 [G] “but if he measured from his threshing floor (where one uses oversized measures) he does not deduct his loss,
 [H] “because they increase.”
 [I] They said to him [R. Yohanan b. Nuri?]: “Rather, because produce is scattered; rather because produce perishes (and not merely because of mice; therefore deductions depend on volume).”
 [J] And so did R. Judah state (in accord with his view in M3:8!): “They only said [the rule of] sediments in the case of oil,
 [K] “for sometimes a person buys from his friend clarified oil without sediments.”

T3:11

- [A] R. Yose asked the Sages: “Lo [in a case] that he has separated [by proclamation] ten *kôr* per hundred [for tithes],
 [B] “and he measured his tithe,
 [C] “and it was reduced (so that he really had less than a tenth left),
 [D] “what [is the rule]?”
 [E] They said to him: “Just as the tithe was reduced so too the regular produce was reduced (i.e. we presume that the regular produce was eaten by vermin etc. at the same rate as the tithe produce),
 [F] “and even though [the regular produce] was not reduced, it is permitted (since we presume that it could have been).”
 [G] [He asked:] He measured the regular produce and it had increased (so the tithe he separated was too small),
 [H] “what is the rule?”
 [I] They said to him: Just as the regular produce was increased, so too the tithe was increased,
 [J] “and even though the tithe was not reduced, it is permitted.”
 [K] “He had regular produce and second tithe and he wants to sell them (because they are going bad),
 [L] “which does he sell first?”
 [M] They said to him: “He sells the regular produce first and afterwards the second tithe.”

T3:12

- [A] Someone who appropriates (*shalah yad*) a deposit--
 [B] the House of Shammai says: “He is punished with depreciation and appreciation.”
 [C] How?
 [D] He deposited it with him [when it was selling] at two [measures per unit of money (e.g. two pounds for a dollar)], and [later] stood at four,
 [E] at four and it [later] stood at two,
 [F] he gives it [the repayment for the deposit] at two (i.e. at the higher price).

MIDRASH

Mekilta' of R. Ishmael

Mishpatim 15 (p. 301)

The verses in Exodus 22:6-14 do not distinguish between what the Mishnah calls watchmen (depositories) in the same way as the Mishnah does. The Mishnah classes “watchmen” by the type of contract (do they get paid? which party derives benefit? etc.), but the Exodus passage implies that the important distinction is what kind of object is being watched. Thus if it was money that was deposited the depository is not liable for theft (Ex. 22:6-7), but if it was an animal the depository is liable (22:9, 11). Yet the Mishnah based its rules--at least in part--on an understanding of the passage from Exodus. How did it get there? The Mekilta', an ancient commentary to Exodus, may offer us an intermediate step. While recognizing that verses 6-12 seem to contrast animate with inanimate objects, the Mekilta' also notes that verse 8 includes both an inanimate object and an animate objects, and concludes that like verse 8 the whole passage,

makes no distinction between animate and inanimate objects. The language of the Mekilta', as you can see, is quite dense.

- [A] *For every case of contestation* (Ex. 22:8)
- [B] Scripture is talking about [the distinction] between one [kind of] watchman and another [kind of] watchman.
- [C] You say that Scripture is talking about [the distinction] between one watchman and another watchman?
- [D] Perhaps Scripture only came to distinguish between [liability for watching] money or utensils (Ex. 22:6) and [that for] animals (Ex. 22:9)!
- [E] Therefore the verse states (*talmud lomar*): *a garment* (Ex. 22:8):
- [F] *a garment* was subsumed under the general rule; why did it become an exception to the rule (it is the only non animal in the list in Ex. 22:8)?
- [G] Just as a garment is special (in that Ex. 22:8 cannot be about a distinction between inanimate and animate deposits and therefore) Scripture is talking about [the distinction] between one watchman and another watchman,
- [H] so too [in the case of] *every* Scripture is talking about [the distinction] between one watchman and another watchman.
- [I] Thus, Scripture did not come to distinguish between money or utensils and animals.

Mishpatim 16 (pp. 304-5)

If Exodus 22:6-12 really distinguishes between the kinds of contracts that owners make with their depositaries, how are we to know from Scripture which kind of depositary has which kind of liability? Read on!

- [A] *And if it should be stolen from him* (Ex. 22:11).
- [B] This one is a paid depositary, and the one above (verses 6-7) was an unpaid depositary.
- [C] Do you say so?
- [D] Perhaps it is only this one who is the unpaid depositary and the one above is the paid depositary!
- [E] Reason as follows:
- [F] inasmuch as the borrower is liable [if the deposit gets stolen] (Ex. 22:13-14), and the watchman (in Ex. 22:11) is liable,
- [G] just as the borrower derives benefit, so [the watchman who is liable is one] who derives benefit.
- [H] An unpaid depositary is excluded, since he derives no benefit.
- [I] Thus you should not interpret (lit. say) in accordance with the second interpretation [D], but in accordance with the first interpretation [B]:
- [J] this one is a paid depositary, and the one above is the unpaid depositary.

TALMUD

Yerushalmi Baba' Mesi'a' 3:1 (9a)

Mishnah: One who deposits with a friend...

- [A] Where do we get [the rule that if the depositary pays he receives the double payment when the thief is found]?

- [B] [A baraita':] *If the stolen object should be found in his hands [...double shall he pay]* (Ex. 22: 3).
- [C] Don't we know that *if the thief is found he shall pay double* (Ex. 22:6)?
- [D] Why then does the verse state *double shall he pay* ?
- [E] If it has no bearing on it (i.e. on its own context), give it over to the passage which precedes it
The previous passage is somewhat difficult to understand as it stands. It would make more sense if the verses in B-D were reversed, and the problem in those clauses were that the rule about double payment in Ex. 22:6 is redundant since we already know it from 22:3. Then E would say: if it has no bearing on the question of the thief who is found, give the rule about double payment in 22:6 to the topic that precedes it: a depositary whose deposit has been stolen.
- [F] Rabbi [Judah the Patriarch (one text reads Rab Nahman)] went to the study house of R. Judah.
- [G] He (R. Judah) said before him this [tradition (clauses B-E above)].
- [H] He (Rabbi) said: "Say what follows [in the Mishnah]:
- [I] If he swore and did not want to pay:
- [J] if the thief was found he pays the double payment;
- [K] and if he slaughtered it or sold it he pays the four- or fivefold payment.
- [L] To whom does he pay it?
- [M] To the owner of the deposit (M3:1 I-M).
- [N] [But according to your tradition that the rule about double payment in Ex 22:6 refers to the depositary] "let him pay the one who holds the deposit [in this case as well]!"
- [O] R. Nasa in the name of R. Jonah [answered]: "To the place where the principal goes there goes the double payment" (i.e. if the depositary has to be reimbursed because he paid rather than swear he gets the penalty payment too).
- [P] R. Yohanan and R. Lezer [say]: "R. Nasa adds (i.e. supplements the Mishnah) in the name of R. Yose b. Hanina: 'The final word is not [that the rule of the Mishnah applies only] if he paid,
- [Q] "Rather, since he has taken it upon himself to pay he is like one who paid (i.e. if the thief was found before he actually paid)."
- [R] If he said "I am paying" we suspect that he has appropriated it (*shalah yad*).
- [S] If he said: "I am swearing," and he saw that they were adding other oaths [for other matters] upon him and he said: "I am paying," we suspect.
- [T] Said R. Yose [in rebuttal of clause S]: "The Torah did not require him to swear to make it harder for him, but to make it easy for him, that if he wanted to pay let him pay, and if he wanted to swear let him swear."

Babli, Baba' Mesi'a' 33b-34a

- [A] Mishnah: One who deposits ... an animal or utensils....
- [B] Why did the Mishnah need to teach "animal," and why did the Mishnah need to teach "utensils?"
- [C] They are both necessary:
- [D] For if the Mishnah had taught [only] "animal" I would have said:

- [E] [In the case of an] animal [that the owner] transfers [the rights to] the double payment to him, for the bother [in connection with an animal] is great in bringing it in and taking it out.
- [F] But [in the case of] utensils where the bother is not great I would say that he does not transfer [the rights to] the double payment to him.
- [G] And if the Mishnah had taught [only] “utensils” I would have said:
- [H] [In the case of] utensils he transfers [the rights to] the double payment, because the amount of its added payment (lit. double payment) is small.
- [I] But [in the case of] animals, when if he [the thief] slaughtered it and sold it he pays four- and five-fold payments, I would say that he does not transfer [the rights to] the double payment.
- [J] [Therefore, it is all] necessary.
- [K] Rami b. Hama objected: “One may not transfer something that has not yet come into existence! (i.e. how can the Mishnah grant the rights to the penalty payment?)
- [L] “and even according to R. Meir who said: “One may transfer something that has not yet come into existence”--
- [M] “that (i.e. R. Meir’s ruling) pertains, e.g., to fruits of the tree which typically come,
- [N] “but here: who knows if [the deposit] will be stolen,
- [O] “and if you could say that it would be stolen, who knows if the thief will be found,
- [P] “and if you could say that the thief would be found, who knows if he would pay,
- [Q] “perhaps he will confess and be exempt [from any payment above the principal.”
- [R] Said Raba: “He becomes like one to whom [the owner] says: ‘When it is stolen, and you are willing, and you pay me, lo my cow is sold to you from this moment.’”
- [S] R. Zera objected: “If so even [the appreciation of the animal in the form of] wool and offspring [should belong to the depository (since he sold him the animal retroactively)],
- [T] “Why does a baraita teach ‘except for wool and offspring’?”
- [U] Rather R. Zera said: “He becomes like one to whom [the owner] says: ‘... Except for wool and offspring.’”
- [V] How can you interpret so restrictively?
- [W] [It is not restricting the meaning of the Mishnah, but makes sense:] In the general case people typically sell [the rights to] appreciation that comes of itself (i.e. a windfall, such as double payment by the thief), but people do not typically sell appreciation that comes from the body [of the deposit] (such as wool or offspring).
- [X] There are those who say : “Said Raba: ‘He becomes like one to whom [the owner] says: “When it is stolen, and you are willing, and you pay me, it is sold to you [from] immediately before its theft.’””
- [Y] What is [the difference] between them (i.e. between the two versions of Raba’s statement, R and X)?

- [Z] The difference is the question of R. Zera (Raba's tradition in X is not open to R. Zera's objection in S, since Raba does not grant retroactive ownership for the entire time of the deposit).
- [A'] Alternatively, the animal was in a valley [(which was not the depositary's private property) when stolen]. (The Talmud here assumes that in order for the depositary to have acquired the animal at the time of the theft it had to be in his property. So, according to the second version of Raba's statement, X, if it was stolen from someplace not owned by the depositary the depositary would never have acquired the animal, and would have no right to the double payment.)