p. 308

CHAPTER X.

RULES CONCERNING HOUSES, GARDENS, AND OTHER REAL ESTATE OWNED IN PARTNERSHIP, AND WHAT MAY OR MAY NOT BE DONE IN PUBLIC THOROUGHFARES.

MISHNA *I.*: If one owns a house, the upper chamber of which belongs to another, and it falls, the wood, stones, and all other materials are to be divided accordingly (*i.e.*, he who has had a greater share in this building takes more). If some stones or bricks are still saved, an investigation is to be made, from which part of the building the stones were most liable to break; then the saved ones belong to that part which was not liable to break. If, however, one of them recognizes some of his stones, he may take them, provided he reckons them to his account.

GEMARA: From this statement it is to be investigated which part was more liable to break. We may infer that the cause of the ruin was known; then let us see if it was ruined because of the lower, which could not hold the upper part any longer; then the materials which lie in that place where the lower part was placed belong to its owner, and the materials beside it belong to the upper part; and if it was ruined by a storm or a stroke so that the upper part fell first, then there can be no doubt that the upper bricks are the broken ones. Why then the above statement? The Mishna treats in case the material was removed immediately after the falling occurred by the street cleaner, who paid no attention to the cause and the manner of its falling. If so, let us see under whose control they are now, and for the other party who is the plaintiff it is to bring evidence? Partners usually are not particular in such a case where the materials are placed.

Provided he reckons them to his account. Rabha was about to say that it must be divided according to the value, *i.e.*, that he must get broken ones for the amount of his partner's saved ones. Hence he is benefited by his claim that he recognizes the stones belonging to him. Said Abye to him: On the contrary,

p. 309

this will not benefit him, but damage, as according to his claim he recognized all that belongs to him; consequently all other stones do not belong to him, but to his partner. Therefore he said the Mishna meant that his partner shall take other saved stones according to the number he took by recognizing, and the benefit of such a claim is that if his bricks were of more value than the others his partner has nothing to say against the quality.

MISHNA *II.*: If the attic was ruined and the owner of the house declined to repair it, the tenant has a right to take his residence down in the house until his attic be repaired. R. Jose, however, said the owner has to repair the roof, and the tenant the rain leaders.

GEMARA: Does the Mishna mean entirely ruined, so that it is impossible to live in, or even if it was ruined in part, *e.g.*, four ells? According to Rabh, as he may use the lower part instead of

the ruined, the greater part is meant, and according to Samuel, even a small part; it is disagreeable for one to live in two places. But let us see how the case was. If he hired *this* chamber, he may claim that so is his fate; if any chamber, let him hire another one for his tenant. Said R. Ashi: The case was that the owner said: "This upper chamber of *this* house is rented to you," and with such an expression he subjects the house to the chamber. This is as Rabin b. R. Ada reported in the name of R. Itzhak: It happened that one said to his neighbor, "I sell you this vine which is placed upon the persicum." Finally the latter was thrown out, and the case came before R. Hiye, who decided that the owner must furnish him with another persicum as long as the vine exists.

R. Abba b. Manuel questioned: When the tenant goes to, dwell in the lower apartment, must the owner vacate it for the tenant, or should they dwell together; as the owner may say, "I have not rented it to you, that I should be put out"? Should you decide that it is so, there would be another question: If there were two upper chambers, one above the other, and the lower became spoiled, should we say the tenant shall go to dwell in the upper one? Or he may claim: "I have rented to ascend one story, and am obliged to ascend two"? This question remains.

There were two who used to live in two upper chambers, one above the other, and the topmost became spoilt, and when the rain came through it did damage. Who is to make the repairs?

p. 310

[paragraph continues] R. Hiye b. Abba said the occupant of the upper chamber, and R. Ilai, in the name of Hya b. Jose, said the occupant of the lower one. Shall we assume that the above differ the same as R. Jose and the rabbis of our Mishna differ (*i.e.*, R. Jose holds that the party doing the damage must remove the cause of it; and therefore he maintains that the tenant has to repair the rain leaders, and the rabbis hold that the injured party has to remove the cause of damage, and therefore they say that the owner has to repair even this). How could it be borne in mind that the sages of our Mishna differ in the case cited above? Are they not contrary to this opinion in the case of removing a tree (Baba Batra, p. 256)? It can only be said that the above Amoraim differ the same as the above Tanaim differ in the place cited. However, the point on which the Tanaim of our Mishna differ is this: Who must strengthen the roof? The rabbis hold, the smearing with clay of the roof and the rain leaders strengthens, hence, it is the obligation of the owner, and R. Jose holds that the above is only for straightening the roof? There shall not be any holes, and therefore it is the duty of the tenant to make the walking upon it more convenient.

But did not R. Ashi declare, when he was at the place of R. Kahana, that we all have decided that R. Jose admits that one is responsible for damage done to his fellow by things which come directly from him (though it is the obligation of every one to keep aloof from damaging things, so that the owner of it is not responsible for the carelessness of the injured one)? This is only as, *e.g.*, if one has planted a tree that did no harm when planted, but thereafter when the roots spread; but, *e.g.*, if one pours water, and while going downward it injures, he is responsible. Hence R. Hya's statement above that in such a case the lower one has to repair is not in accordance with R. Jose's, theory. The case mentioned above was not direct, as he washed his hands at another place on the roof and the water rested there, and afterwards it flowed down from another place.

MISHNA *III.*: A house with an attic belonging to two persons which becomes ruined: the owner of the upper one requires the rebuilding and the owner of the house refuses; the former may

rebuild the house and dwell in it until the latter returns him the expenses. R. Jehudah, however, maintains that even in such a case he is considered a tenant who must pay his rent (as

he has not his own house); therefore the owner of the attic rebuilds the house and attic, roofs it, and then he may make his dwelling down in the house until the expenses are paid.

GEMARA: Said R. Johanan: At three different places R. Jehudah teaches us that it is forbidden for one to derive benefit from the property of his neighbor, although the latter loses nothing; namely, in the case of our Mishna, also in case of changing the color by dyeing (First Gate, p. 216), and finally in case of the payment of a part of his debt, that R. Jehudah decrees that the note for collection loses its former force even if so stipulated. (Baba Batra.)

(Says the Gemara:) After all these statements we are not sure of such a decree by R. Jehudah, as all the three have their reasons; here because of spoiling the house while used, hence the owner loses by paying as for a new one; in the case of dyeing, because of changing of the agreement, and there is a Mishna above, p. 188, that he who does so must suffer; and also concerning the payment of a part of his debt, because it is only an asmakhta, which according to his theory above, p. 160, gives no title; but in cases where one does not suffer at all, and the other derived some benefit, may be that he (Jehudah) does not object.

R. A'ha b. Ada in the name of Ula said: If the owner of the lower part wants to rebuild his house with unhewn stones instead of hewn ones, his partner cannot protest (because the building with them is stronger than of the hewn ones), but if *vice versa*, he may prevent him. The same is the case with half bricks instead of whole ones (Rashi explains that between two half bricks, little stones and cork were laid, so that the wall became thicker by a span), and so it is with cedars instead of sycamores. To diminish the number of windows, and also the height of the building, his partner has no right to protest; if, however, the owner wanted to rebuild him the attic, just the reverse is the case, as the lower part may protest against a heavier attic which may damage his house. But how should the law be decided if both of them have no money to rebuild it? As R. Nathan of the following Boraitha: The owner of the lower part takes two shares and the upper one a third, and according to anonymous teachers the lower one takes three-quarters and the upper one one-quarter. And Rabba said: Practise as R. Nathan said, as he was a judge and always went into the deepness of the law. He reasoned that the upper building damages a third of the

lower (*i.e.*, that if the upper one were not upon it, it would hold a third more), therefore a third he must take.

MISHNA *IV.*: The same is the case with an olive-press which was placed under a garden. (Rashi explains that it means of two brothers who inherited them, one took the olive-press, the other the garden), and the roof of the press-house became ruined, the owner of the garden may descend and work up the bottom of the press-house for seed, until the roof of it will be repaired.

A wall or a tree which falls suddenly on a public thoroughfare, and causes damage, the owner is

not responsible. If, however, time was given to him for cutting off the tree or the wall, and it fell after the time elapsed, he is responsible. If one's wall is placed at a neighbor's garden, and it falls (into his neighbor's garden), and he insists that the stones should be removed, the owner of them, however, says: "They are yours (as I renounce my ownership of them)," he is not to be listened to. If, however, the owner of the garden accepted his offer, and after a reconsideration he offers him his expenses for the removing, and repairs his stones, he is also not to be listened to.

The same is the case with a laborer who was hired to work with straw and hay, and when he demanded his pay, if the employer said to him: Take the articles in which you were engaged, for your payment, he must not be listened to. If, however, the laborer accepted, and after reconsideration the employer told him: Take cash for your hire and leave the articles to me, he must not be listened to.

GEMARA: Rabh said that the Mishna meant that the greater part of the roof was spoilt, but if only a small part, *e.g.*, four ells, he may work up his garden, and for the space spoilt he should use the bottom of the press-house. But Samuel said: It means even four ells, as it is disagreeable for one to sow in two places; and both cases of their differing were necessary to state; as if the former only, one might say that only concerning a dwelling Samuel disagreed with Rabh, and concerning sowing he agrees; and if the latter, one might say concerning sowing Rabh agrees with Samuel; therefore both were taught.

If time was given. What time is fixed for such a case by the court? Said R. Johanan: "Thirty days."

If one's wall was placed, etc. From the expression, "he offered him his expenses," it is to be understood that after the gardener has already removed; but if the reconsideration had

been before the removal, the owner of the wall has still the right to them, even if it was accepted by the gardener; why, then, let his estate give him title as R. Jose said above (p. 195). R. Jose's statement holds good when the former owner of that article agrees to give him title; here, however, he does not, as his former proposition was made only to win time for removing.

The same is the case with a laborer, etc. It was necessary for the Mishna to teach both cases, as in the former case only, one might say: It is because the gardener has nothing to demand from the owner of the wall; but in the latter case, where the laborer has to demand his money from the employer, he may be listened to, as people say: From a debtor of thine accept even bran in payment; and of this case only, one might say, as soon as he accepted, he acquires title, because he had money at his employer's, but in the former case the gardener does not acquire title, even if he accepted, as he has nothing to claim from the wall man; therefore both were necessary.

He must not be listened to. But have we not learned in a Boraitha that he may be listened to? Said R. Na'hman: This presents no difficulty. The Boraitha speaks of an ownerless article (which some one hired a laborer to remove without notifying him that it is such; and after he was through, he said, "Take this for your labor"), he may be listened to; and our Mishna treat of his own work. Rabha objected to R. Na'hman from the Boraitha above (p. 20), which states that

if a laborer who was hired for the whole day finds an article, it belongs to his employer, from which it is easily understood that in our case, when he was hired to remove an ownerless article, the one who hired him acquired title to it, hence the drawing of the labor gives no title to him. Why then should the employer be listened to if he tells him to take it for his work? Therefore said R. Na'hman, both the Mishna and the Boraitha speak of ownerless articles; however, the cases are different, as the Mishna speaks of lifting (*i.e.*, that the laborer has removed the article), and the Boraitha speaks of looking (*i.e.*, that the laborer was hired to guard it by looking), so that there was no act on the part of the laborer which could give him title, and so neither of them has as yet acquired title; therefore the employer is listened to.

Said Rabba: If looking gives title to an ownerless article or not, the Tanaim of the following Mishna differ: The watchmen appointed to watch aftergrowth (of barley for omer) in the sabbatical

year, receive their wages from the treasure of the sanctuary. R. Jose, however, maintains, if one likes to do this for nothing he is allowed. Said the sages to him: According to your theory the omer would be brought from the donation of an individual. Is it not to assume that the point of their differing is whether looking gives title? According to the first Tana it does, and therefore if the watchman did it for nothing, he acquires title to it (as growth is ownerless in a sabbatical year); and R. Jose holds that looking does not give title, and the congregation acquires title on them when delivered to them The saying of the sages is to be explained thus: According to your decision, that one can watch without any payment, in accordance with our theory that looking gives title, the omer could be brought by an individual?

Said Rabha: All agree that looking gives no title, and the point of differing is whether it is to be feared for mighty men, who would take possession of the aftergrowth, being ignorant that it belongs to a sanctuary. The first Tana holds that such is to be feared, and therefore the sages enacted that the watchmen shall get four zuz, so that it shall come to the ears of the above that the sanctuary laid its hand on it, and they will keep aloof from it. R. Jose, however, holds that such an enactment was not made, and the sages said to him: According to your decision the watchman remits his four zuz to the congregation (as we are sure that four zuz were enacted), and so his four zuz in which they had no share will always be considered his, and if the congregation buys daily offerings for it or other things, it is considered from an individual (which is not allowed), and so said Rabin when coming from Palestine, that R. Johanan is also of the opinion that the above is the point of their differing.

MISHNA *V.*: One must not place his manure upon a public ground, unless it is immediately taken away by those who want to use it. Clay must not be soaked or bricks made upon a public thoroughfare; however, one may knead clay if needed for building, but not for bricks. For a building at a public place they must use the material as soon as it is brought, that it shall not be left there a long time, and even then, if they cause damage, the owner is responsible. R. Simeon b. Gamaliel maintains that one may prepare material for his building during thirty days.

GEMARA: Our Mishna is not in accordance with R. Jehudah, who said (First Gate, p. 66) that one may do so in the season.

[paragraph continues] Abye said: R. Jehudah with his decision just quoted, R. Simeon b. Gamaliel with his decision in our Mishna, and R. Simeon with his decision (First Gate, p. 145), that if damage was done there is no responsibility, are teaching that as soon as one placed his property with the permission of the court, he is not responsible for damage done by it.

The rabbis taught: If a hewer of stones has transferred them to the polisher, and they cause damage while under his control, the latter is responsible; the polisher to the drier, the latter to the carrier, and the latter to the builder, the builder to the architect; all of them are responsible if damage was done through the stones while under their control only, but as soon as one transfers them to the other, his responsibility ceases. If, however, the stones fall from the line they were placed upon, all of them are responsible. But have we not learned in another Boraitha that the very last one is responsible, while all others are free? This presents no difficulty. The first one speaks of a case where all of them undertook to build this building in partnership, and the second of a case where they were hired day laborers.

MISHNA *VI*.: When two gardens were placed one above the other, and some herbs were grown between them, according to R. Mair the herbs belong to the higher garden, and according to R. Jehudah to the lower one. Said R. Mair: (My decree is correct;) if the higher would remove his earth, there would be no herbs. Answered R. Jehudah: If the lower one would care to fill up his garden with earth to make it alike with the higher one, the same would be the case. Rejoined R. Mair: As either of them can prevent the other, we have to investigate from what sources the herbs exist. R. Simeon, however, maintains that the upper one may use that which he can reach with his hand, and the remainder belongs to the lower one.

GEMARA: Said Rabha: The sages of our Mishna do not differ concerning the rest of the herbs, that they belong to the upper one; they, however, do differ concerning the branches. R. Mair holds that the branches must go with the roots, and R. Jehudah does not agree with his theory, as we have learned in the following Boraitha, that that which comes out of the roots and the branches belongs to the owner of the estate. So is the decree of R. Mair. R. Jehudah, however, says that the branches belong to the owner of the tree. This is concerning business, and the same we have learned concerning Arla (the third year

of planting, of which the fruit is forbidden for use), and both cases were necessary to teach, as if only one case, one might say that they differ only concerning business, but not concerning prohibited things, and *vice versa*.

R. Simeon maintains, etc. Said the school of R. Janai: Provided he does not exert himself to reach them. Ephraim the scribe, the disciple of Resh Lakish, said in the name of his master, that the Halakha prevails in accordance with R. Simeon. This was reported to the King Sabura, [1] and he said: We are grateful to R. Simeon for his decision.

END OF BABA METZIA AND VOLUME XII.

Footnotes

316:1 Rashi explains that the King Sabura was acquainted with the Jewish law, as well as with the Persian, and Thosphoth agree with him.