p. 1

TRACT BABA KAMA (THE FIRST GATE).

CHAPTER I.

THE FOUR PRINCIPAL TORT-FEASORS; THE DIFFERENT MODES OF RESTITUTION; THE VICIOUS AND NON-VICIOUS ANIMALS; THE APPRAISEMENT BEFORE THE COURT.

MISHNA *I*: There are four principal causes of tort (expressly mentioned in the Scripture): the ox; the (uncovered) excavation; the mabeh (the pasture of one's cattle in another's field); and the fire. The measure of the damages done by the ox is different from that of the damages done by the mabeh, and *vice versa*; and that of both, which are animated beings, is not like that of the damages caused by the fire, which is not animated. And the measure of damages caused by the three last mentioned, which are movable, is different from that of the damages caused by the (uncovered) excavation, which is stationary. One thing, however, is common to all, and that is, that they are all likely to do damage, which must be guarded against, and if damage is done, the one responsible for it must make good from his best estates.

GEMARA: If the Mishna states that there are "principals there must be derivatives. Are those derivatives as their principals or not? Said R. Papa: "Some of them are and some of them are not?" (as explained further on). The rabbis taught: "It was said of the ox that he has three principals, the horn, the tooth, and the foot. Of the horn the rabbis taught: It is written [Ex. xxi. 28]: "If an ox *gore*," and goring is only with the horn, as it is written [Deut. xxxiii. 17]: "And his horns are like the horns of reem; with them shall he push (gore)," etc. What is the derivative of the horn? Hurting, biting,

p. 2

lying upon, [1] and kicking; (because they are usually done intentionally, as goring). Why is "goring" called a principal? Because it is written [Ex. xxi. 28]: "If an ox gore?" Let also hurting be a principal, because it is written [ibid., ibid. 35]. "And if a man's ox *hurt*." That hurting means goring, as we have learned in the following Boraitha: "It starts out with hurting, and it ends with goring, to teach thee that the hurting mentioned here means goring." Why does the Scripture in case of a man use the term "gore," while in the case of an animal it uses the term "hurt"? For a man, who is fortunate, [2] (who is guarded by his planet) "gore" is used (because it is certain that the ox gored him intentionally with all his might to harm him), but of an animal, which is not fortunate, "hurt" is used, and by the way it teaches us that an ox which is vicious toward a human being is considered vicious toward an animal, which case is not so in the reverse. But is then "biting" not the derivative of the "tooth"? Nay, the tooth usually derives benefit by doing the damage (consuming), which is not the case with biting. Are not lying upon and kicking the derivatives of the foot (because it cannot be done without bending of the feet)? Nay, damage by the foot is of frequent occurrence (because whenever the animal walks and

there is something in the way it damages it), which is not the case with the above. But to what does R. Papa refer in stating that the derivatives are not like their principals? Shall we assume that he refers to those just stated? This cannot be, for they are all of the same nature, as stated above, and the owner must guard against it, and he must pay the damage. We must therefore say that there is no difference between the principal and derivatives of the horn, and R. Papa's statement refers to the derivative of the foot, in case of doing damage by digging up gravel with the foot, in which case only one-half of the amount of the damage must be paid, and which is Sinaic (*i.e.*, the restitution is for actual damage and not as a fine, which is always the case whenever one-half damage is paid). But why is this case called a derivative of the foot? (only one-half of the damage is paid, while in the case Of the principal the whole must be paid). It is a derivative in respect that (by the same tradition that if the damage-doing animal

is not of sufficient value to pay the amount of the damage) the balance must be paid from the best of one's estates, which is only so in case of damage by the foot. Is the latter part of this then certain? Did not Rabha further on (page 33) propound a question wherefrom the damages shall be collected? (This does not matter.) Rabha was not certain about it, but R. Papa was. Why, then, is it called a derivative of the foot, even according to Rabha's theory, who was not certain about it? To equal it to the foot in that respect, that it is not liable if the damage was done on public ground (as damages done by the foot are not paid unless done on the ground belonging to the party damaged).

"*And, mabeh*," etc., "*and fire*," etc. What is meant by mabeh [1]"? Said Rabh: "It means a man"; Samuel, however, said it means the tooth (of the ox). Why does Rabh not explain it as Samuel? Because when the Mishna states "ox," it means everything with which an ox can do damage (consequently "mabeh" must be something else). And what is the reason of Samuel? Is Rabh's opinion, then, not correct? The Mishna states ox. Said Rabh: "It states 'ox' for the damage done by the foot, and 'mabeh' for that done by the tooth, and it must be explained as follows: The law of damages done by the foot, which is of frequent occurrence, cannot be applied to that of the tooth, which is not of frequent occurrence; on the other hand, the law of damage done by the tooth, which usually benefits thereby, cannot be applied to that of the foot, which derives no benefit."

But what is the matter with the horn? Why is it left out? This is included in the statement, "And if they do damage, the one responsible," etc. Why is it not mentioned expressly?

[paragraph continues] The Mishna states only cases of those which are considered vicious from the very beginning (and must pay the full amount of damage, as tooth and foot, etc.), but not cases of those which are not considered vicious from the beginning (as the horn, which pays the full amount of damages only on the third time of doing damage). Why does Samuel not concur with Rabh? He maintains that it cannot mean a "man," because this latter is enumerated in a subsequent Mishna: "A vicious ox, and an ox doing damage on the estate of the party suffering the damage, and the man." Why is "man" not mentioned in the first part of the Mishna? Our Mishna treats only of injuries done by one's property, but not of injuries done by one's person. Now as to Rabh, is then the "man" not enumerated in the subsequent Mishna? (Why, then, state it also in our Mishna?) Rabh may say: "It is mentioned in the later Mishna only because other

vicious ones are mentioned therein, and according to him (who says that 'mabeh' means a man) the statement in the Mishna, 'the law of damages,' etc., must be explained thus: "The law of damages of an ox differs from that of a man in that the former pays 'atoning money,' while the latter does not (if a vicious ox kill a man by goring he pays atoning money, therefore if only the law of the ox would be stated, that of the man could not be deduced therefrom, because if a man kill another man unintentionally he is banished; if intentionally he suffers the death penalty, and pays no atoning money); and the law of a man differs from that of an ox in that the former is liable (in case of personal injuries caused to another man, in addition to the payment of actual damages) to four things (explained further on), which is not the case with the ox; the one thing common to both is that they are likely to do damage, and one is charged with taking care of them." [Is it then usual for an ox to do harm? It means a vicious one. But is it then usual for a man to do harm? Yea, when asleep. How is it to be understood? It is usual for a man when asleep to contract and stretch out his limbs, and all that is then in his way he damages.] But is not the man charged with his own care of himself? This can be explained as R. Abbuhu said elsewhere to one Tana: "Read, 'The man is charged with his own care of himself'"; so also is it to be read in our Mishna (and the statement in the Mishna that one is charged with taking care of them refers to the others mentioned).

R. Oshiyah taught: There are thirteen principal tort-feasors:

the depositary; the one loaning for use; the bailee for hire; the bailor for hire; the actual damage sustained through the personal injury; the expense incurred in curing the injury; the earnings lost through such injury and the shame suffered (this will be explained in Chapter VIII.), and those four principals mentioned in our Mishna, which make thirteen. (The depositary is liable for arbitrary damage; the one loaning for use is liable even for an accident; and the bailee for hire and the bailor for hire are responsible even for theft and loss, and, manifestly, for arbitrary damage; actual damage means that if one inflicts an injury on another person he must pay the difference in value of the person injured; the pain suffered, *i.e.*, so much as one whose arm, for instance, was to be amputated by an instrument would pay to be relieved by a drug from such pain as amputation would cause; all the others are explained further on in this volume.) Why did the Tana of our Mishna not state those nine? It is correct according to Samuel, because the Mishna treats only of injuries done by one's property, and not of injuries by one's person, but according to Rabh (who says that "mabeh" means a man, and so injuries by one's person are treated of) why does he not state them? The Mishna treating of "a man" means to include all damages done by a man. And according to R. Oshiyah, are they not included in the "man" stated in the Mishna? There are two kinds of damages done by man, viz., those done by him to another man (which constitute a crime), and those done by him to an ox (in which case the liability is restricted to civil damages only). If so, why not state the same thing in regard to an ox? Let him state a case where an ox injured a man, and a case where he injured another ox. What question is this? As to a man there is a difference between the injury done to a man and that done to an ox, for in the former he is liable for the four things, and in the latter case he pays only actual damages (and therefore both are stated); but in the case of an ox, what difference is there between the injury done by him to a man and that done by him to an ox? In both cases he pays only actual damages.

R. Hyya taught: "There are twenty-four principal tort-feasors, viz., those who pay double [see Ex. xxii. 4]; those who pay four or five [ibid. xxi. 37]; the thief (who confesses his guilt, in

which case he pays only the actual value) and the robber (who is also a principal because he is mentioned in the Scripture [Lev. V. 23]; the collusive witness; the one who commits rape (is a

principal because mentioned in Deut. xxii. 29); the seducer [mentioned in Ex. xxii. 16]; the slanderer [Deut. xxii. 19]; the one who defiles heave-offering; the mingler (one who mingles together heave-offering with ordinary food); the one who brings a drink-offering (to the idols); (the three latter are not mentioned in the Scripture, but still they are principals for they pay pecuniary damage, and the latter is stated in the Scripture); and these with those thirteen mentioned above make twenty-four.

But why does R. Oshiyah not enumerate these mentioned here? He enumerates only those who pay actual damages, but not those who pay in form of a fine. If so, why does he not enumerate the thief and the robber who pay actual damages (as explained above)? He does so, for he states the depositary and the one loaning for use (in the case of the depositary it very often occurs that he sets up as a defence that it was stolen from him, and we have learned elsewhere that if one sets up a defence of theft or robbery he is responsible as a thief and robber). And as to R. Hyya, does it not state the depositary and the one loaning for use? He states separately property which came *lawfully* into his possession (as in the case of the depositary, etc.), and property which came *unlawfully* into his possession (as the thief).

It is correct according to the Tana of our Mishna, who states "principals" because there are also derivatives (which were enumerated above), but according to R. Hyya and R. Oshiyah if they state "principals" there must be derivatives; what are they? Said R. Abbuhu: They are all as principals in that respect that the damage must be paid from the best estates. What is the reason? It is deduced by an analogy of expression; in all those cases either the word "for" or "give" or "pay" or "money" is written. (Where it is written "for" we deduce it by analogy from the "for" stated as to the vicious ox, as there it is from the best estates (which in turn is deduced from the tooth and foot); so also it is here, if "give" or "pay" is written we deduce it from the ox that gored a slave where these words are written; if "money" is written we deduce it from the pit where the same word is written; and in all those cases it is paid from the best estates.)

"*The law of the damage done by an ox is not like that*," etc. For what purpose does he mention this here at all? Said R. Zbid in the name of Rabha: "He means to say with that, that no question should be raised why the Scripture does not state

one of the tort-feasors and leave the others to be deduced (by way of analogy) therefrom, for one cannot be deduced from the other (as it is stated above; Rabh according to his theory and Samuel according to his).

"*And that of both which are animated*," etc. For what purpose does the Tana mention this? Said R. Mesharshia in the name of Rabha: "He means to say that it should not be questioned why the Scripture does not state two of the tort-feasors (the ox and the mabeh), and fire would be deduced from these two; for this one cannot be deduced from those two (for the one is not like the others, etc., as stated in the Mishna). Said Rabha: "If any one of these should be mentioned

with the 'pit,' all others could be deduced from those two by reason of having something common to all (as *e.g.*, if he would state the pit and the horn, the tooth could be deduced thus: the pit, the nature of which is not to move and do damage, must pay; the more so the tooth, the nature of which is to do so; and if you should say the pit is made from the very beginning to do damage, which is not so with the tooth, I will cite you the horn (which is not made so); and if you will say that the horn does the damage intentionally, I will cite you the pit and the conclusion will return (the former argument will be reinstated); the one thing common to all is that it is their nature to do damage, and one is charged with taking care of them, etc. I will also bring in the tooth. In such a way I would also deduce the foot, if the pit and the horn should be stated; and if it should be objected that the pit is from the beginning made to do damage, which is not so with the foot, the horn would be cited; and if it should be objected to on the ground that the horn does damage intentionally, the pit would be cited. And so forth as to all, with the exception of the horn, for the objection might be raised that they are all considered vicious from the beginning (which is not so with the horn). For what purpose, then, did the Scripture enumerate all of them? To teach their different peculiarities; viz., the horn--to distinguish between a vicious and a non-vicious one; the tooth and foot--to exempt them from liability if the damage was done on public ground (for it is written, Ex. xxii. 4, "and they feed in *another* man's field," but not on public ground); the pit--to exempt it from liability if vessels fell into it (and were damaged); the man--to make him liable to pay for the four things (which is not so in the case of the others); fire--to exempt it from liability if it consumed concealed articles (as

[paragraph continues] *e.g.*, if articles were concealed in a stack of grain, in which case the liability is only for the grain, but not for the articles).

"*The one thing, common to them all*," etc. What does this mean to include? (As from the statement it seems to include all other things the nature of which is to do damage, and one is charged with taking care of them, what other such things can there be?) Said Rabhina: "It means to include that which we have learned in the following Mishna: 'If notice be given to one to remove (within a certain time usually given by a Beth Din) a wall, or to cut a certain tree, (and he failing so to do within such time) they fall, he is liable.'" How is the case? If he renounced his ownership of them, then according to both Rabh and Samuel it is like the case of the pit; as a pit because it does often damage one must take care of it, so also is the case here. [1] If he has not renounced ownership, then, according to Samuel who says that they are all deduced from the pit, are they the same as the pit? Nay, the case is that he has renounced ownership, but lest one say that they are not like the pit which is originally made to do damage, which is not the case with the above things (the building of a wall or the planting of a tree), then the case of the ox proves that; and lest one say that the ox is different because of its usual way of doing damage with its feet, then again the case of the pit may prove and so the conclusion will return (and the original argument is reinstated).

"*To pay the damages*." The rabbis taught: It is written [Ex. xxii. 4]: "With the best of his own field, and with the best of his own vineyard shall he make restitution." That means the best field and the best vineyard of the plaintiff (*e.g.*, if A's ox grazed upon a parcel of land belonging to B, the best land of B is taken as a standard, and A must pay an amount of damages equal to the difference in value of such a parcel of land before and after having been grazed upon). Such is the dictum of R. Ishmael; R. Aqiba, however, said: "The passage intends to state only that damages are collected from the best estates of the defendant (*i.e.*, the parcel of land of the

plaintiff is appraised, and if the defendant wishes to pay in land he must do so with land of his own best estates), and so much the more in case of damages to consecrated articles. Is it possible that according

to R. Ishmael restitution must be made with the best land even if land of an inferior quality be damaged? Said R. A'ha bar Jacob: "The case treated of here is that the best land of the plaintiff was of the same quality as the worst land of the defendant, and they differ on this point. R. Ishmael holds that the land of the plaintiff is taken as a standard, and the passage stating that he shall pay from the best estates, means from the best estates of the plaintiff, and R. Aqiba holds that that of the defendant is taken as a standard for best."

What is the reason of R. Ishmael's statement? The word "field" is written below (with the best of his own *field*) and also above (and they feed in another man's *field*) (ibid., ibid.); as above it has reference to the land of the plaintiff, so also in the statement below (and the passage is to be expounded thus: When the defendant has land which equals the best of the plaintiff's, he must pay out of such land the amount of the damage). And R. Aqiba? He may say, it is written: "With the best of his own fields, etc., he shall make restitution." That means not that of the plaintiff (and no deduction by analogy is admissible when the statement is so plain). R. Ishmael, however, may say: In this case we must derive the benefit of both the analogy of expression and the passages; the analogy of expression as I have explained, and the benefit from the passage I derive for explaining that it refers to a case where the defendant has both best and worst land, and the plaintiff has only best land, and the worst land of the defendant is inferior to the best of the plaintiff, in which case he cannot say to the plaintiff, collect your damages from my worst (because the passage gives the benefit to the plaintiff to be paid from the best), and therefore. he must make restitution from his own *best* estates.

Abayi propounded the contradiction of the following passages to Rabha: It is written [ibid., ibid.]: "With the *best* of his own fields," etc., which means from the best estates only and with nothing else, and we have learned in another Boraitha: "It is written [Ex. xxi. 34]: 'And to return money (make restitution)'; means this to include *equivalents of money, even bran?*" (Rabha answered): This presents no difficulty. When he returns of his own will he may give even bran, but if through the court he pays from the best estates. Said Ula, the son of R. Ilai: "The wording of the passage seems to lead to the same

conclusion, for it is written 'shall he make restitution,' which signifies *involuntarily*." Said Abayi to him: "Is it then written 'restitution shall be made'?" (which would mean involuntarily). It is written "*he shall* make," etc., which can also mean voluntarily. When R. Papa and R. Huna, the son of R. Jehoshua, returned from the college they explained the above passage as follows: "Anything (of personal property) is considered as the best of estates, for if he cannot sell it (at a reasonable price) at one place, he can take it to another place (and therefore if he makes restitution with personal property he may do so even with bran); except (if he makes restitution with) land, he must do so only with the best estates in order to enable him to procure a buyer."

R. Samuel bar Abba of Akkrunia propounded the following question to R. Abba: When the standard (as to which are the best and which are the worst lands) is taken, is it taken of those

lands of his own, or of those of the public in general? (*i.e.*, has the defendant to make restitution out of his *own* best estates, and if his worst lands are as good as the best of the public in general, must he nevertheless pay out of his *own* best, or if his worst lands are as good as those of the public in general, may he make restitution out of his worst lands?--for they are as good as those of the public in general). According to R. Ishmael this is no question, for he says that those of the defendant are taken as a standard (and therefore if his worst are as good as those of the plaintiff he pays out of his worst estates), but the question is only according to R. Aqiba, who holds that those of the defendant are to be taken as a standard. How is it? Shall we assume that the passage "the best of his own fields" means to exclude the lands of the plaintiff, or it means to exclude the lands of the public in general? And he answered him: The Scripture states expressly "of his *own* land," and you ask whether the land of the public in general is taken as a standard? R. Samuel objected: We have learned (in case there are to be collected a woman's claim under her marriage contract [Kethubah], damages, and other debts): If one has only good lands, all the claims are collected from the good lands; if he has only medium lands, all are collected from those lands; if only poor-quality lands, all are collected from those lands; if he has all the three, damages are collected from the good; ordinary creditors collect from the medium; the Kethubah is collected from the poor-quality lands; if he has good and medium land only,

damages are collected from the good; ordinary debts and the claim of his wife are collected from the medium lands; if he has medium and poor-quality lands only, damages and ordinary debts from the medium and the wife's claim from the poor-quality lands; if he has only good and poor land, damages from the good and the other two from the poor-quality land. Now, we see that the middle part of this Boraitha states "that if he had medium and poor land, damages and ordinary debts are collected from the medium and the other two from the poor land," and if it is as you say, that his own lands are taken as a standard, let the medium he has be considered the best (as they are *his* best), and the creditors shall be referred to the poor lands? Therefore said Rabhina: They differ as to the statement of Ula. For Ula said: "According to the Scripture the creditors are paid out of the poorest, for it is written [Deut. xxiv. 11]: 'In the street shalt thou stand, and the man to whom thou dost lend shall bring out unto thee the pledge into the street.' Now if it depends on the will of the debtor, he usually brings out the poorest article he possesses as a pledge; but why have the sages enacted that creditors shall be paid out of the medium? In order not to close the door to the borrowers." The one master holds of Ula's enactment, the other one does not (but adheres strictly to the meaning of the passage).

The rabbis taught: "(One who had to pay damages, ordinary debts, and the wife's claim), if he convey all his estates (the good, medium, and poor) to one person, or to three different persons at the same time, they pass to the grantees subject to the same liabilities as if in the hands of the grantors (*i.e.*, the one who bought the good pays off the damages, the one who bought the medium pays off the creditors, etc.). If at different times, all are paid from the estate sold last (for the buyers of the prior estates may each say: When I bought my land there were other lands from which to pay). If this estate is not sufficient, the last but one is resorted to; if still insufficient, the last but two is resorted to." How is the case, if he conveyed to one person? Shall we assume that he conveyed them by one deed, then surely they pass subject to the original liability, for even if he sold them to three persons, in which case one must have priority, you say that they pass subject to such liabilities, still more so if he sold to one? (what was the necessity of stating it?) Therefore we must say that it means that they were conveyed one after another (on three different days), and

why does he state three? To teach that although each one of them may say: "I left room enough for payment," the same thing may be said even if sold to one. He will say on each parcel of land: When I bought this parcel of land there were other parcels out of which to pay. The case here is that the good lands were the last to be sold (in which case it is more advantageous for him to let them collect according to their rights than to advance the argument that he left room for payment). So also said R. Shesheth. If so, shall they all collect of the good lands? (for at the time the first two estates were sold all the liability shifted over to the best lands). The grantee may tell them: "If you will be quiet and collect according to your original rights well and good, but if not I will return the deed for the sale of the poor land to the grantor (and then the liability will shift over to those lands, for no claims are collected from conveyed lands when there are free lands), and all of you will have to collect your claims from the poor land."

It is certain that when the grantee conveyed the medium and the poor lands, and left the best for himself, that they all collected their claims from the best lands, for those were the only ones which remained, and the others were no more in his possession so that he could refer to them saying, "I do not care for the enactment of the sages (for my benefit)" but in case he conveyed the good land and left for himself the medium and the poor, how is it? (shall the claims be collected from the second grantee because he took his lands subject to the liability? and from the first grantee they cannot collect, for he can say he accepts the enactment of the sages, and the good estates which were at the time of the first conveyance free were subject to the liability for payment of the claims?). Abayi intended to decide that all collect from the best estates. Said Rabha to him: "Did not the first grantee convey to the second grantee all his rights and interests he may have in them? And now, if they would come to the first grantee, they could collect from the medium lands only, and although at the time the medium and poor lands were conveyed the good ones were still free, he could say, "I do not want to avail myself of the enactment of the sages"; so also the second grantee can tell them: "Collect your claims from the medium and poor lands," for when the second grantee bought the estates he did so with the intention to acquire all the rights and interest the first grantee had at the time. R. Huna, however, said: (The above passages, one mentioning "money" and the other "the

best estates," do not contradict each other), it means either money or best estates. [1]

R. Assi, however, said: "Money is as good as land." For what purpose is this statement? If for the purpose that it is considered the "best" (*i.e.*, although he has good land he may pay in money), then it is the same that R. Huna stated, and it would be sufficient to say "and so also said R. Assi" Shall we assume that it is for the purpose of teaching as in the case of two brothers who have divided up land between themselves, and subsequently a creditor (of their father) comes and levies upon the share of one of them (that the other may pay his share of contribution either in land or in money)? Did not R. Assi already state this case? For it was taught: "Two brothers partitioned their estates and subsequently a creditor came and levied upon the share of one of them; Rabh said the partition is thereby annulled (and a new partition must take place of the lands which remained), because he holds that brothers in such a case are as heirs. Samuel, however, said that it is valid, because he holds it is as an ordinary sale and as one who buys without a responsibility. R. Assi says he (the other brother) must pay his share of one-fourth in land and one-fourth in money, for he was in doubt whether they are considered as heirs, and he

must contribute his share in land and not in money, or as an ordinary sale with responsibility, and he must pay to him what he lost, but in money, and therefore he must pay one-fourth in money and one-fourth in land), therefore he must pay one-fourth in land and one-fourth in money. But what is meant by the statement "it is as good as land"? that it is considered "best"? then it is again the same statement made by R. Huna? Say: "And so also said R. Assi."

R. Zera in the name of R. Huna said: In case one does a meritorious thing he shall do it up to one-third. What does this mean? Shall we assume that it means up to one-third of his own property? If so, then if he has occasion to perform three meritorious things he must spend his whole property? Said R. Zera: It means up to one-third in endeavoring to adorn the meritorious thing (*e.g.*, if there are two scrolls of Law, and one is more expensive than the other, he shall spend one-third more to buy the more expensive one). R. Assi questioned:

[paragraph continues] Does it mean one-third of the cheaper one, or does it mean one-third should be added? This question remains unanswered. In the West it was said in the name of R. Zera: Up to one-third he shall spend from his own (without expectation to be rewarded in this world), thenceforward from the Holy One's, blessed be He (*i.e.*, that part will be repaid to him in this world).

MISHNA *II.*: (The following is the rule:) In all that which I am charged with taking care of I have prepared the damage (*i.e.*, if damage was done it is considered that I was instrumental in doing it). If I prepare only a part of the damage I am responsible nevertheless for the whole, as if I prepared the whole. And only as to property which cannot be desecrated (but for that which is desecrated there is no responsibility), or property of persons governed by laws adopted by their community, [1] or such that has an owner, and at any place (the damage was done), except if done on the ground exclusively belonging to the defendant, or on that belonging to both together, the defendant and the plaintiff. If damage was done, the defendant must complete the payment of the damages with the best of his estates.

GEMARA: The rabbis taught: "In all that which I am charged with taking care of," etc. How so? If one intrusts a deaf man, a fool, or a minor with the charge over a pit, or an ox, and they cause damage he must pay for such damage, which is not so in case of fire (explained further on). What case is treated of here? when the ox was kept on a rope, or the pit was covered, equivalent to which in case of fire is as if it were live coals; and if you should ask why there should be a difference (between the former and the latter), (it may be said) in the case of the ox he is likely to get loosened, and in the case of a pit the cover is likely to slip off (and therefore the owner should have that in mind and bestow better care), but in the case of coal it is the reverse, for it is likely to get more and more extinguished. But according to R. Johanan, who said (elsewhere) that if one intrusts even a flame (to those stated above) he is also free (and consequently the statement above, "which is not so in case of fire," must be explained as meaning a flame), and in such a case the equivalent thereof here would be a loosened ox and an uncovered pit. Why should there be a

difference? There (in case of fire) the deaf man has so closely connected himself with the fire (*i.*

e., if he would not move it, it would remain stationary), that it is considered that he himself has done the damage (this is according to Rashi's second explanation, and it is stated elsewhere that if a deaf man, etc., do damage there is no liability), but here it is not so (for the ox or the pit did the damage without the aid of those mentioned).

The rabbis taught: There is a more rigorous rule in the case of the ox than in the cases of the pit and the fire, and *vice versa*. (How so?) The rigorousness of the rule in case of the ox is that he (the owner) pays the atoning money (when the ox kills a free man, and 30 shekels if a slave) which is not so in the case of the pit and fire. The rigorousness of the rule in the cases of the pit and the fire is that the pit is originally made to do damage, and the fire is considered "noxious from the beginning," which is not so in case of the ox. There is a more rigorous rule in the case of fire than in the case of the pit, and *vice versa*. The rigorousness of the rule in case of the pit, which is made originally to do damage, lies in that one is responsible if he intrusted it to a deaf man, minor, or fool, which is not so in case of fire, and the more rigorousness is in the case of fire, which has in its nature to move and to do damage, and is considered noxious in that it consumes everything whether fit or unfit for it, which is not so in the case of the pit. Let him also teach that the case of the ox is more rigorous because he is liable for damages to vessels (by breaking them intentionally either with the horn or with the foot), which is not so with the pit. The Tana enumerates some and leaves out others. Is then anything else left out that also *this* is left out? Yea, the case of concealed articles (*e.g.*, if an ox has kicked upon a sack containing vessels, or an ox carrying a sack containing vessels fell into a pit and the vessels broke, the owner is responsible for the vessels, which is not so in case of fire).

"*If I have prepared a part of the damage*," etc. The rabbis taught: "How so? If one dug a pit nine spans deep and another one came and completed it to be ten spans deep, the latter is responsible (whether the ox falling into it was killed or only injured). Shall we assume that this is not according to Rabbi (who said further on that for damages both are liable)? Said R. Papa: The case is that the ox that fell in was killed (in which case Rabbi also agrees that the one who dug the last span must pay). R. Zera opposed: Is this the only case--is it not

the same if one left his ox in charge of five persons, and one of them left intentionally and the ox caused damage--is the, one who left responsible? And R. Shesheth also opposed, saying that there is another case when one added fuel to a burning fire, and the latter caused damage; the last one is responsible, and R. Papa himself opposed, saying there is also another case of the following Boraitha when five persons sit on a bench, and it does not break, and another one comes and sits down and it breaks, the last one is responsible (for the whole damage); and he himself explained it as it had been, Papa bar Abba (who was a heavy-weight man). Now, let us then see; in all those three cases how is it to be understood? If without the last one no damage would have been caused, then is it self-evident that he is responsible? And if even without him damage would have been caused, then what has he done that makes him liable? (and therefore these illustrations cannot be cited, because in the, case of the pit the one who dug it nine spans can say to the other: If you had not dug the tenth span the animal would not have been killed (as there is a tradition that a pit less than ten spans deep cannot kill), but only injured, and I would have had to pay only for the injury, but not for the whole animal). But finally how is this Boraitha, after all, to be explained? (for the former two cases which are not Boraithas we do not care). It can be said that if he would not have sat down it would have not broken before the lapse of two hours, and he hastened it to break in one hour, in which case the first five can say to the

last one: "If not for you, we would have remained sitting a little longer, and would have left (and the bench would not have broken)." But why should he not reverse the argument and say: "If you were not with me on the bench, it would not have broken at all?" The case is that it broke while he was leaning on them. What is the difference? Lest one should say that, as he caused the damage only by his strength (leaning) and not by sitting down, he should not be liable, he comes to teach us that one's strength is equivalent to one's weight of body.

"*I am responsible to pay the whole damage*." It does not state "I am responsible for the damage," but "I am responsible to complete the compensation for the damage"; this is a support to what was taught by the rabbis: "The completion of the compensation for the damage." This is to teach that the plaintiff must trouble himself with the disposal of the carcass.

p. 17

[paragraph continues] Whence do we deduce it? Said R. Ami: It is written [Lev. xxiv. 21]: "And he that killeth a beast shall make restitution for it" (yeshalmenah). Do not read "yeshalmenah," but read "yashlimenah," he shall complete her (*i.e.*, the plaintiff shall take the final trouble of disposing of it by sale and the defendant shall pay the balance of the damage). Hezkyah says, it can be deduced from the following passage [Ex. xxi. 34]: "And the dead beast shall be his," which signifies it shall be that of the plaintiff. So it was explained by the disciples of Hezkyah. "Thou sayest it belongs to the plaintiff perhaps the passage means that it belongs to the defendant? It was said: "It was not so." What does that mean? Said Abayi: If thou shouldst think that the carcass belongs to the defendant, it should have been written "an ox for an ox" [ibid., ibid.], and no more (and I would know that the defendant can have the carcass); why the addition of the above passage? Infer here from that the passage means that it shall remain the plaintiff's. Said R. Kahana to Rabh: Is that so, that without the addition of that passage it could be thought that it belongs to the defendant? Where is the common sense? Since if he (the defendant) has a number of carcasses he may give them to the other party (in payment of the damages), for the master said above: It is written [ibid.] "He shall '*return*'; that includes equivalents of money, and even bran." The more so the carcass in question, which is his own? This statement (as to who has to trouble himself with the disposal of the carcass) was necessary as to the loss in value of the carcass (*i.e.*, that from the time the animal was killed its owner is charged with its disposal, and if through his negligence it was not disposed of, and there resulted a loss in value, that loss is charged to the plaintiff).

Shall we assume that the Tanaim of the following Boraitha differ as to this case? It is written [ibid. xxii. 12]: "If it be torn in pieces let him bring it in evidence that it happened so by accident, and he will not be liable" (for a bailee for hire is not responsible for accident). Abba Saul, however, says it means he shall bring the carcass into court (to be appraised). May we not suppose that they differ thus (for we cannot suppose that they differ in case it was done by accident, for even Abba Saul must concede that a bailee for hire is not responsible in such a case, but they probably differ in a case where the bailee *is* liable): One holds that the loss in value is chargeable to the plaintiff, and the other holds that it is chargeable to the defendant?

p. 18

Nay, both agree that it is chargeable to the plaintiff, but they differ as to the trouble of transportation of the carcass.

As we have learned in the following Boraitha: The anonymous teachers say: Whence do we deduce that the owner of the pit has to bring up the killed ox from the pit (at his expense)? It is written [ibid. xxi. 34]: "He shall make restitution in money unto the owner thereof; and the dead" (*i.e.*, he must give also the carcass, which cannot be done unless brought up from the pit). Said Abayi to Rabha: "How is this case of transportation of the carcass? Shall we assume that when in the pit it is worth one Zuz and when on the brink thereof it is worth four? Then this trouble is for his own benefit? Why the passages?" He answered him: "The case is that it is in either case not worth more than one Zuz" (and even then he must bring it up). But can there ever happen such a case? Yea, as people usually say: "A beam in the forest is worth one Zuz, and the same, although, in the city, is also only of same value."

Samuel said: "(It is the custom of the courts that) no appraisement is made for a thief or robber (*i.e.*, if one stole an article, etc., and the same was broken, he does not return the broken parts and pay the difference in value, but must return good articles), but only in case of damages. And I, however, add also the borrower, and Aba (Rabh) agrees with me."

It was taught: Ula said in the name of R. Elazar: An appraisement is made for a thief and a robber. R. Papi, however, said: No appraisement is made. And the Halakha prevails that no appraisement is made for a thief and robber; but for a borrower, however, it may be made, according to R. Kahana and R. Assi. Ula said again in the name of R. Elazar: "A firstborn (of a man) which was killed by an animal within the thirty days need not be redeemed." So also has Rami bar Hama taught: Because it is written [Numb. xviii. 15] "thou shalt redeem" one might think that this were so even if it were killed within the thirty days; therefore it is written [ibid., ibid.] "nevertheless" [1] to distinguish (that in case it was killed it need not).

The same said again in the name of the same authority: "Of brothers who have divided up (their estates of inheritance), that wearing apparel which they have on is appraised, but that which their sons and daughters have on is not appraised, because

they have no case in court, and therefore we do not trouble them to come." Said R. Papa: "Sometimes, however, even what they have on is also not appraised; this may be the case if the eldest brother was the manager of the estates, and he was dressed in better clothes for business purposes."

The same said again in the name of the same authority: The Halakha prevails that debts are collected from slaves (because they are considered as real property). Said R. Na'hman to Ula: Did R. Elazar say so even when the slaves fall inheritance to orphans? Nay, only from him. From him? Would you say even from the only garment he has on? The case here is that he has hypothecated the slave, as Rabha said: "If one hypothecates his slave and thereafter sells him, the creditors nevertheless replevy the slave. If he has, however, hypothecated his ox, and thereafter sold him, the creditor cannot replevy him. Why so? Because when a slave is hypothecated people talk about it, and therefore the vendee is charged with notice, which is not the case with an ox." After R. Na'hman left, Ula said to those present: "So said R. Elazar: 'Even from the orphans (for a slave is as real estate).'" Said R. Na'hman (when he heard of this): "Ula avoided me (to state that in my presence, for fear I would cut him off with numerous objections)." Such a case happened in Nahardea and her judges collected a debt (from the slaves which fell an inheritance to orphans). In Pumbeditha such a case happened, and R. Hana bar

Bizna collected it. Said R. Na'hman to them: "Go and return it, and if not I will collect it from your property." Said Rabha to R. Na'hman: "Ula, R. Elazar, the judges of Nahardea, and R. Hana bar Bizna are all your opponents; according to whom then is your decision?" He answered: "I know a Boraitha, which was taught by Abimi: "A premonition (πρεοβολη) is effective as to land, but not as to slaves; personal property passes with land (if personal property is sold with land, and only the land is taken possession of, the personal property also passes), but not with slaves." (Hence we see that slaves are considered personal property.) Shall we assume that the Tanaim of the following Boraithas differ as to this case: If one sold slaves and land, and the vendee took possession of the slaves, the land does not pass. The same is the case if *vice versa*. Land and personal property, if the vendee took possession of the land, the personal property passes, but not *vice versa*. Slaves and personal property do not pass, unless the vendee takes possession

of both of them, as one does not pass with the other. In another Boraitha it was taught that if one takes possession of the slaves the personal property sold therewith passes. Shall we not assume that they differ in this: One holds that slaves are considered real, and the other holds that they are personal property? Said R. Ika, the son of R. Ami: "Nay, all agree that a slave is personal property, and that Boraitha which states that it does not pass is correct, and that Boraitha that states that it does pass, treats of a case where the clothes which are on the body of the slave were sold." [And even when so, what of it? Is this then not considered a moving court, and with a moving court (personal property) does not pass? And if you should say that he was then not moving, did not Rabha say (Baba Metzia, Chap. I.) that if it does not pass when moving, it does not do so also when standing or sitting?] The Halakha prevails that it passes only when the slave is tied and cannot move.

But have we not learned in another Boraitha that if he takes possession of the land the slaves also pass? There is the case that the slaves are standing upon it. Would you say that the Boraitha which states that they do not pass means that they do not stand upon it? This would be correct according to the one who says that slaves are considered personal property, and therefore if they stand upon it they do, and if not they do not pass; but according to the one who says that slaves are as real property, why is it necessary that they should stand upon it? Did not Samuel say that if one convey to another ten different parcels of land located in as many different states, the taking possession of one of them acquires title to all? (Says the Gemara: What a question is this?) Even according to the opinion of him who says that slaves are considered personal estates, why is it needed that they should stand upon it? Have we not the tradition that if personal property be sold with real property, the former need not be upon the latter when possession is taken of the latter? What answer can you give to this, that there is a difference between personal estates that *are* movable and those that *are not*? Say the same thing here: There is a difference between movable and immovable real estate. Slaves are considered movable real estate, the body of the earth is one wherever it is (consequently all his lands are attached to each other).

"*Property which cannot be desecrated*," etc. R. Abba said: "An ox intended to be sacrificed as a peace-offering, which has

done damage, the (half) damage is paid out of his meat, but not out of those pieces prepared for

the altar." Is that not self-evident, for those pieces are for the Lord? It means to teach that the value of the half of these pieces is not collected from the other half of the flesh (*e.g.*, a non-vicious ox consecrated for a peace-offering, of the value of two hundred Zuz when slaughtered, that has killed another ox of the same value when alive, in which case according to law he must pay the damage out of half of his body. Now the pieces being burnt the value of the half body is diminished, nevertheless the amount diminished cannot be collected from the other half of the body). According to whom is this? According to the rabbis, (who hold in case one ox has pushed another ox into a pit) that only the owner of the ox has to pay, but not the owner of the pit (although it is not sufficient); then this is self-evident. If it is according to R. Nathan, who in the above case holds that the owner of the pit must complete it, why should in this case the parts sacrificed be exempt? This can be according to both R. Nathan and the rabbis; according to the rabbis, because we might say that the rabbis held so only where there are two distinct elements (the ox and the pit), but in this case where there is only one body, the plaintiff may say: I will collect my damage from any part I wish. And according to R. Nathan: In that case the owner of the ox may say to the owner of the pit: I found the ox in thy pit; whatever I cannot collect from that party, I will collect from thee. But in the case herein can he then say the flesh has done the damage, but not those pieces in question? (Hence the statement.)

"*And that property that has owners*." What does this mean to exclude? We have learned in a Boraitha, this means to exclude ownerless property. How is the case? If our ox gore an ownerless ox, who claims damages? If the reverse is the case, let him go and take the ox? The case is that (after he has done the damage) he was appropriated by some one. Rabhina said: "This means to exclude the case where he first did the damage, and then was consecrated by his owner, or declared ownerless (by driving him out)." So also we have learned in a Boraitha: "Further than that said R. Jehudah: Even if he damaged and then was consecrated, or his owner declared him ownerless he is exempt, as it is written [Ex. xxi. 29], 'and warning have been given to his owner, and he killeth a man or a woman,' etc., which signifies that during the killing, the bringing

of the suit and the making of the award there shall be one and the same owner."

"*Except on the property of the defendant*." For he can say to him: What has your ox to do on my premises?

"*And on the property of both the defendant and the plaintiff*." Said R. Hisda in the name of Abimi: In a partnership court one partner is liable to the other partner for damages done by the tooth and foot, and our Mishna is to be explained thus: "Except on property exclusively belonging to the defendant, where he is free, but on premises belonging to both the defendant and the plaintiff, if damage is done, the one doing it is liable." R. Elazar, however, makes them free and explains the Mishna that there is no liability for foot and tooth when it belongs to the plaintiff or to both the defendant and the plaintiff, and what is stated further on of one's liability refers to damage done by the horn, because partnership property is for that purpose considered a public ground. It is right according to Samuel (*ante*, p. 5), but according to Rabh, who says that the expression "ox" in the Mishna includes everything in relation thereto, what does this mean to include? It means to include that which the rabbis taught: "If damage is done the defendant is responsible." This means to include the depositary, the loan for use, the loan for hire, and the bailor for hire; if an animal has done damage on their ground, a non-vicious ox pays half and a

vicious ox pays the full amount of damages. If the enclosure wall in good condition broke in in the night time, or it was broken in by burglars and (the animal) went out and has done damage, there is no liability." How was the case? Shall we assume that the ox of the bailor for hire has injured the ox of the bailee, let the bailor say to the bailee: If he should damage some stranger's property you would have to pay (because you are charged with taking care of him); why should I pay you when he has injured your ox? And if the reverse were the case (and still it is said that only one-half is paid), let the owner say to the bailee: If he were injured by an ox of a third person would you not have to pay me the full amount of damage? (because in the case of a loan for use he is liable for damages occurring by accident), now when *your own* ox has caused the injury you want to pay me only one-half? The case is that the ox of the bailor has injured the ox of the bailee, and the objection just stated can be explained that the bailee has agreed to take care that the ox shall not *be injured*, but not that he shall *do no injury to others*.

If so, how will be explained the later part which states that if the wall was broken in in the night-time, or the same was broken in by burglars, and the animal went out and did damage, he is free, from which is to be inferred that if in the daytime there is liability. Why should it be so? Did he then warrant against his injury to others? The Boraitha meant thus: If he has warranted against his injury to others he is liable only in the daytime, but not if in the night-time or by accident. Is that so? Has not R. Joseph taught: "In a partnership court and an inn, one is liable for damages done by the tooth and the foot?" Is this not contrary to the statement of R. Elazar? R. Elazar might answer: Do not the Boraithas themselves contradict each other? Have we not learned in another Boraitha: R. Simeon b. Elazar laid down four rules in regard to damages: "If done on ground exclusively belonging to the plaintiff and not to the defendant, the liability is for the whole (even if done by the horn and in case of a non-vicious animal); if *vice versa* there is no liability at all; if on ground belonging to both, as *e.g.* a partnership courtyard or valley, there is no liability for the foot and tooth, but for goring, pushing, biting, lying upon, and kicking, a non-vicious pays one-half and a vicious pays the whole. If on ground belonging to neither of them, as, for instance, a courtyard belonging to neither of them, there is a liability for the tooth and foot; for goring and biting, pushing and lying upon and kicking, a non-vicious ox pays one-half and a vicious pays the whole damage." Hence, we see that it is stated that in a partnership courtyard or a valley there is no liability for the tooth and the foot, and hence do the two Boraithas contradict each other. That one (which says there is no liability) treats of a courtyard which is held in partnership for both storing fruit and keeping oxen (in which case it is considered a partnership courtyard as to both the foot and the horn), and therefore in case of the tooth he is free, and in case of the horn he pays half, as it is equal to public ground; and that Boraitha taught by R. Joseph treats of a court held in partnership only as to fruit, but not as to oxen, in which case as to the tooth it is considered the exclusive ground of the plaintiff. It seems to be so also from the difference used in the wording of the Boraithas. In one case things similar to an inn (which is not used for oxen), and in the other-those similar to a valley (where generally oxen are pastured) are stated. Infer herefrom. R. Zera opposed: If there was a partnership for fruit, can it be called *another man's* field,

as required by Ex. xxii. 4? Said Abayi to him: "So long as it is not partnership as to oxen *it is* considered *another man's* field."

MISHNA *III*.: Damages are assessed in money, and are collected from what has a value of money; and it must be done before the court, and only on testimony of witnesses who are freemen, and they must be members of a community who have adopted a set of laws for their government; and women are on the same footing with men as to damages; both the defendant and the plaintiff must contribute (sometimes) toward the payment of the damages. (The whole Mishna will be explained further on in the Gemara.)

GEMARA: What is the meaning of "assessing in money"? Said R. Jehudah: It means the assessment shall be made by the Beth Din in money only, and this is explained in the following Tosephtha which the rabbis taught: "If a cow has damaged a garment (on the ground belonging to the owner thereof), and subsequently the garment of same owner lying on public ground was trod upon by the cow, and was damaged, it is not said, because each party is entitled to damage from the other, that both shall be relieved from paying each other at all, but the damages in each case are separately assessed, and the excess paid to the party due."

"*They are collected only from what is valued in money*." The rabbis taught: The expression in the Mishna "what is valued in money" teaches that the Beth Din is not obliged to collect damages unless from real estates, but if the party entitled to be paid, however, has anticipated and has seized upon personal property the Beth Din may collect his claim from that property. How is it so inferred from the Mishna? Said R. Ashi: The expression "which is valued in money" means to say but real money itself, and all those things (personal property, slaves, evidences of debt, etc.) are considered money itself. R. Jehudah bar Hinna propounded the following contradiction to R. Huna, the son of R. Jehoshua: It states "what is valued in money"; this teaches that the Beth Din is not obliged to collect unless from real estates; and another Boraitha states: It is written [Ex. xxi. 34]: "(he shall give) unto the owner," which includes even equivalents of money, and even bran? (Hence a contradiction?) The case treated of here is that if they are to be collected from orphans' estates, for damages due from their deceased father, in which case they are to be collected from realty

only. If it is from orphans, what does the last part state-that if the party has seized personal property the Beth Din may collect therefrom? The case is as Rabha said in the name of R. Na'hman elsewhere, that he made the seizure during the lifetime of the father, so also is the case here.

"*On testimony of witnesses*." This is to exclude the case when one admits his guilt, and thereafter witnesses appear, so that he is no more liable to pay a fine. This is correct according to the one who holds that if one admits his guilt and thereafter witnesses appear that he is no more liable to fine, but according to the one who says that in such a case he is, what does the statement in the Mishna mean to exclude? It is needed in regard to the latter part, which states that the witnesses must be freemen, to exclude slaves.

"*And the women are on the same footing*," etc. Wherefrom is this deduced? In the schools of Hezkiah and R. Jose the Galilean it was taught: It is written [ibid. xxi. 28]: "If an ox gore a man *or a woman*"; this signifies that the Scripture made equal a woman and a man in respect to all crimes which are mentioned in the Scripture.

It was taught: The one-half damage paid (in case of a non-vicious ox); R. Papa said damages, because he is of the opinion that usually oxen require particular care and according to the law he would have to pay the whole damage, but as that happened only once the Scripture had pity with him and remitted one-half, and R. Huna the son of R. Jehoshua holds that it is a fine, because he is of the opinion that oxen usually are considered guarded and according to the law he would have to pay nothing at all, but the Scripture nevertheless fined him in order that he should take particular care. An objection was raised, based upon the Mishna. Both the plaintiff and the defendant sometimes contribute toward the payment of the damage. It is right according to the one who says that the half damages paid is considered damage; therefore sometimes the plaintiff must also contribute (*i.e.*, he takes less than he suffered), but if according to the one who holds that it is a fine, then he takes what he is not entitled to, how can you say that he is contributing? This statement is only in regard to loss in value of the carcass. But this was already stated in the first Mishna, as explained above, "to complete the damage." Infer that the owners are charged with the disposal of the corpse? This need be stated twice, once in case of a vicious and once in case of a

non-vicious animal; and it would not suffice to state it only once; for if it should be stated only in case of a non-vicious animal it would be argued that it is so because of that fact that he was not vicious, but in case of a vicious animal I would say it is not so; and if it would be stated only in case of a vicious animal, it could be said that it is so because the full amount of damage is paid, but in the case of a non-vicious animal it is not so, hence the necessity of stating it twice.

(An objection was made.) Come and hear: "The following is the rule: All those who pay more than actual (punitive) damage (*e.g.*, in case of killing a slave where thirty shekels are to be paid) do not pay so on their own admission (but it must be proved by other evidence). Is it not to be inferred herefrom that in case of paying less (than actual damages), one does pay so on his own admission? Nay, this means in case where the whole damage is paid. But how is it in case of paying less--is the same the case? Then why should it state, the rule is that all those who pay *more*," etc.; why not state, the rule is that all those who pay damages not according to the actual amount of damage done," which would make it clear as to those who pay more as well as to those who pay less? This objection remains, and the Halakha, however, prevails that the half damage is a fine. Can there be a settled Halakha in spite of an objection? Yea, for what is the reason of raising the objection, because it does not teach, "as much as they have damaged"? It could not state so because there is the half damage in case of raking up gravel, which is Mosaic that it is damage and not fine. Now, when the conclusion arrived at is that the half damage is a fine, when a dog consumes a sheep or a cat consumes a hen, it is unusual (and therefore considered the derivative of the horn and pays only one-half damage); such a damage is not collected in Babylon, where fines are not collected. But this is so only where those killed were big ones, but in case they were small ones it is usual, and it is to be collected in Babylon also; but if the plaintiff has seized upon the property belonging to the defendant (even in the former case), we do not compel him to surrender it, and also if he says: "Fix me a time to go to Palestine," his request maybe granted. And if he does not go he is put under the ban. In either case we place him under the ban until the tort-feasors are removed, as stated further on (end Chapter IV.), in the name of R. Nathan.

MISHNA *IV.*: There are five cases which are considered

non-vicious and five which are considered vicious. A domestic animal is considered non-vicious to gore, to push, to bite, to lie upon, or to kick; the tooth (of an animal) is considered vicious to consume that which is fit for it; the foot is considered vicious to break everything on its way while walking; the vicious ox; the ox doing damage on the estates belonging to the plaintiff exclusively; and a man. The wolf, the lion, the bear, the leopard, and the *bardalis* and the serpent are considered vicious. R. Elazar says: When they are domesticated they are not, with the exception of the serpent, which is under all circumstances vicious.

GEMARA: From the teaching of the Mishna that "the tooth is considered vicious to consume," it must be inferred that the case is when the damage was done on the ground belonging to the plaintiff, and it is nevertheless taught "the animal is not vicious," which means not to pay the whole, but to pay half, and this is according to the rabbis, who say that the horn doing damage on the estate of the plaintiff is considered unusual, and pays only one-half of the damage; then according to whom would be the latter part? "The vicious ox and the ox doing damage on the estate of the plaintiff and the man," which means that they pay the whole damage, according to R. Tarphon, who says that the horn, although it is unusual for it to do damage on the premises of the plaintiff, still pays the whole. Then the first part of the Mishna will be according to the rabbis, and the latter part according to R. Tarphon? Yea, so it is, as Samuel said to R. Jehudah: Genius, do not trouble yourself about the explanation of our Mishna, and follow my theory that the first part is in accordance with the rabbis and the latter part is in accordance with R. Tarphon. R. Elazar in the name of Rabh, however, said that both parts are according to R. Tarphon, but the first part treats of a court that was separated for fruit only to one of the parties, and for oxen for both of them, and in such a case concerning "tooth" it is considered the premises of the plaintiff only, and concerning "horn" it is considered public ground.

Said R. Kahana: I have explained this Halakha to R. Zbid of Nahardea, and he rejoined: How can both parts of the Mishna be in accordance with R. Tarphon? Did not the Mishna state, "the tooth is vicious to consume what is *fit* for it," which signifies that it is vicious only as to what is fit for it, but not as to what is *unfit* (as then it is like the horn and pays only half), and R. Tarphon says plainly that even the horn pays the whole on the premises of the plaintiff?

Therefore said Rabhina: "The Mishna is not completed, and ought to read as follows: There are five cases which are considered non-vicious until they are declared to be vicious; the tooth, the foot, however, are considered vicious from the very beginning, and this is called the vicious ox; as to the ox doing damage on the estate of the plaintiff, the rabbis and R. Tarphon differ; and there are other vicious animals similar to those: the wolf, the lion, the bear, the bardalis, the leopard, and the serpent." So also we have learned plainly in a Boraitha.

"*And not to lie upon*." Said R. Eliezer: "It is so only when it lies on large vessels, but if on small ones it is usual, and it comes under the law applying to the foot."

"*The wolf, the lion, etc., and the bardalis*." What is a bardalis? Said R. Jehudah: It is a Nephrasa. What is a Nephrasa? Said R. Joseph: It is an Apa (Hyena). [1] Samuel said if a lion on public ground had caught an animal and ate it up alive there is no liability, for it is his usual way to do

so, and therefore it is as if an ox had consumed fruit or herbs in public ground; but if he had first killed it and then ate it up he is liable, for it is not usual, and it comes under the law applying to the horn.

MISHNA *V.*: There is no difference between a vicious and a non-vicious animal, only that a non-vicious pays one-half of the damage, and only from the (money realized from the sale of the) body of the animal having done the damage; and a vicious animal pays the whole damage and from the best estates.

GEMARA: What is meant by "best estates"? said R. Elazar: It means, the highest of his own estates; and so it is said [II Chron. xxxii. 33]: "And Hezekiah slept with his fathers, and they buried him in the *best place* of the sepulchres," etc., and R. Elazar said, "best" means among the "highest of his own family"--that is, David and Solomon."

It is written [ibid. xvi. 14]: "And they buried him in his sepulchres, which he had dug for himself in the city of David, and they laid him in the couch which was filled with sweet odors and divers kinds of spices," etc. "And all Jehudah and the inhabitants of Jerusalem showed him honor at his death" [ibid. xxxii. 33]. Infer from this that his disciples were placed on his

grave to study the law. R. Nathan and the sages differ as to how long it continued; one says it lasted three, the others say seven, and still others say it lasted thirty days.

The rabbis taught (referring to the passage just quoted) that it means the thirty-six thousand people who preceded the coffin of Hezekiah, the king of Judah, all their shoulders bared. So said R. Jehudah. Said R. Ne'hemiah to him: "Was not the same thing done upon the death of Ahab?" The great honor consisted in that the Holy Scrolls were placed on his coffin, and it was announced, "*That* one resting in the coffin has performed all that is written in *these* Scrolls." But do we not do the same thing at present? At present we only take the Scrolls out, but we do not place them on the bier, and if you wish you may say that at present we even place them on the bier, but do not say "that he performed," etc. Said Rabba bar bar Hana: I was once walking along with R. Johanan, and he said that at present we say even "he performed," etc., but we do not say "he taught" (that which is written in the Scrolls, which was said at the funeral of Hezekiah). But did not the master say: "The study of the Law is great because it causes action"? Hence we see that action has preference over study, and why was it said of Hezekiah that he "taught"? This presents no difficulty. Over learning, action has a preference; teaching, however, has preference over action.

R. Johanan in the name of R. Simeon b. Johai said: "It is written [Isa. xxxii. 20]: 'Happy are ye that sow beside all waters, freely sending forth the feet of the ox and the ass.'" It means that those who occupy themselves with the study of the Law and those bestowing favors on others will be rewarded with the inheritance of two tribes, as it is written [ibid., ibid.]: "Happy are ye that sow," and "sowing" means nothing else than charity, as it is written [Hosea x. 12]: "Sow then for yourselves after righteousness, that you may reap (the fruit) of kindness"; and by "water" is meant the Law, as it is written [Isa. Iv. 1]: "Ho, every one of ye that thirsteth, come ye to the water" (*i.e.*, the Torah); "is rewarded with the inheritance," etc., means he overcomes his enemies as the tribe of Joseph, as it is written [Deut. xxxiii. 17]: "With them shall he push

nations together to the ends of the earth," and he acquires understanding as the tribe of Issachar, as it is written [I Chron. xii. 32]: "And of the children of Issachar, those who had *understanding* of the times to know what Israel ought to do."

Footnotes

2:1 Spoiling vessels thereby.

2:2 According to the other explanation of Rashi it is because a human being is provident, *i.e.* careful, and it is not easy to kill him unless by penetrating his body with the horns with great force.

3:1 Modern scholars come to the conclusion that originally the Mishna read •••••• which means one who started a fire, instead of ••••• which latter word cannot be found either in the Scripture or in the Mishna elsewhere, and that this latter word originates from an error on the part of the transcriber in writing an • instead of ••. And it seems to us that this view of the scholars is correct, for we find in one Tosephtha plainly the word "Hamabir" instead of "Hamabeh." We may add to this that Rabh's explanation, "It means a man," shows also that "Hamabir" is the correct word. We have therefore omitted all the citations of the passages to explain the meaning of the word "Hamabeh," as they are too far-fetched and were probably added by the expounders of Rabh's statement. Abraham Krochmal, however, maintains that in the first Mishnayoth it was used "Hamabir," but Rabbi, the editor of his Mishnayoth, wrote "Hamabeh," for the reason that this word has two meanings which can be applied to foot and tooth. (See his Notes on the Talmud, Lemberg, 1831, page 260.)

8:1 This is no contradiction of what was stated above, that a pit does not do damage often, for it means that it does not do so as often as the foot, which treads on everything in its way.

13:1 The reason why this was not stated till now is that there should be no interruption in the discussion of R. Ishmael and R. Aqiba.

14:1 This seems to be the true meaning of the expression "Bene Brith," and not, as some thought, that it means Israelites. See our introduction to this edition in our "History of the Talmud."

18:1 According to Leeser's translation.

28:1 There is a long discussion in the Talmudical dictionaries as to the correct meaning of bardalis, which is mentioned in several places in the Talmud and seems to have different meanings; we translate it "hyena" according to Mr. Sheinhack in his "Hamashbir."

Next: Chapter II.