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CHAPTER II.

RULES REGULATING THE PRINCIPLE OF VICIOUSNESS AND NON-VICIOUSNESS IN THE FOUR PRINCIPAL TORT-FEASORS ENUMERATED IN THE FIRST MISHNA.

MISHNA *I.*: What tendency makes the foot to be considered vicious? 1 That of breaking (everything in its way) while walking. An animal has a tendency to cause breakage while walking in her 2 usual way. If, however, she were kicking (which is not her habit to do, and therefore considered a derivative of the horn), or there were gravel being kicked up from under her feet (which is sometimes her habit to do) and vessels were broken, one-half of the damage is paid. (In the case of gravel it is so by tradition; and the case is that it was done on the premises of the plaintiff.) If she stepped on a vessel and broke it, and the fragments thereof fell on another vessel and broke it, for the first vessel the full amount of the damage is paid (for it is the damage of the foot), but for the second vessel only one-half is paid (for it is the same as that of "gravel"). Cocks have a tendency to walk in their usual way and cause breakage. If, however, something was attached to their feet, or they were

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hopping and they broke vessels, only one-half is paid (the reason is explained further on in the Gemara).

GEMARA: Said Rabhina to Rabha: (Let us see.) Does not the term "foot" in the Mishna mean the foot of the animal; and does not the term "animal" mean its foot? Why, then, the change of the terms in the Mishna? He answered: Our Mishna begins with "foot," because the same term was used in a previous Mishna (page 27), (but the proper term is "animal").

The rabbis taught: An animal has a tendency to walk in her usual way and cause breakage. How so? An animal that entered upon the premises of the plaintiff and caused damage with her body, or with her hair while walking, or with the saddle which she had on, or with the freight she was loaded with, or with the halter placed in her mouth, or with the bell suspended from her neck; and an ass with his load the whole must be paid. Summachus says: In the case of gravel and in that of a swine raking in rubbish, if damage was done the whole must be paid. "Damage was done?" Is this not self-evident? Read therefore: If he *hurled it* and thereby did damage, the whole must be paid. "Gravel?" Where is this here mentioned? The Boraitha is not complete, and ought to read thus: In case of gravel, although it is in their nature to kick up, still half only is paid; and the same is the case if damage was done by a swine that was raking in rubbish and *hurled* some of it. Summachus, however, says: Gravel and swine pay the whole damage.

The rabbis taught: Cocks that were flying from one place to another, and broke vessels with their wings, pay the whole; if, however, the damage was caused by the wind produced by the wings, only half is paid (for whatever is not done directly by the body, but only by the force

produced by the body, is considered to be on the same level with "gravel," and pays half). Summachus, however, holds that the whole must be paid.

Another Boraitha states: Cocks that were hopping on dough, or on fruit, and made the same dirty or punctured them, the whole damage must be paid. If they throw on them dust or gravel, half is paid. Summachus, however, holds that the whole must be paid.

Still another Boraitha teaches: If a cock were flying from one place to another, and the wind produced by the wings damaged vessels, only half must be paid. So we see that the above anonymous Boraitha is according to the Rabbis. Said Rabha: On the contrary, the last Boraitha is correct according to Summachus

[paragraph continues] (who opposes that it was a tradition that "gravel" pays only half) and says that the whole must be paid, because he holds that one's force is on the same level with one's body (and therefore damage done by the wind, caused by the wings, is equivalent to damages-done by the wings themselves), but according to the rabbis, if it is considered as done by the body, then the whole must be paid; if it is not considered as done by the body, nothing is to be paid. Subsequently Rabha himself explained: It is undisputed that one's force is equivalent to one's body, but the force (wind) being unusual, it is considered as "gravel," for which there is a tradition that only half is paid.

Rabha said again: All that which in case of one having a running issue is considered a sufficient contact to make the article unclean, in case of damages pays the whole; and all that which in case of one having a running issue is not sufficient contact to make unclean, pays in case of damages half; and he means to teach us the case of the wagon carrying one having a running issue (*i.e.*, as in case of a wagon carrying one having a running issue which passes over vessels the latter become unclean, but if only "gravel" is kicked up from under the wagon and falls upon vessels the latter do not become unclean; so also in case of damages, in the first instance the whole, and in the latter instance only half is paid). There is a Boraitha supporting Rabha: "An animal has a tendency," etc. (as stated above, page 31), with the addition that a wagon carrying a person pays the whole damage.

The rabbis taught: "Cocks that were nibbling at a rope from which a water-pail was suspended, and severing the rope broke the water-pail, pay the whole." Rabha propounded a question: If an animal stepped on a vessel which did not break at once, but only rolled away for some distance and then broke, what is the law? Do we follow the origin and consider it to have been broken by the body (and the whole is paid), or do we follow the place where the breakage took place, and it is the same as in the case of "gravel" (and only half should be paid)? Come and hear: Hopping is not to be considered vicious; according to others, however, it may. Is it possible that damage done by hopping shall not be considered vicious (is it not in the nature of the cocks to do so)? Must it not be assumed that while hopping the vessel rolled away and then broke, and they differ on the following: One holds we trace the damage to the origin, and one holds that we consider only the place where the

damage occurred? (Hence we see that in this case there exists a difference of opinion.) Perhaps (all agree that we consider only the place where the damage occurred, but) this is in accordance with Summachus, who holds that even "gravel" pays the whole. If so, how would you explain the latter part: "If a fragment flew off and fell on another vessel and the latter broke, for the first vessel the whole, but for the second only half must be paid?" Now if it be according to Summachus, does he then hold to the theory of half damage? And if you should say that he distinguishes between primary and secondary force (in case of the rolling of the water-pail it was primary force, but in that of the vessel damaged by the fragments of the pail it was secondary force), let the question of R. Ashi as to whether or not Summachus distinguishes between primary and secondary force be solved from this, that it is not on the same level with primary force? We must, therefore, say that the above Boraitha is according to the rabbis. Infer from this that we trace the damage to its origin.

R. Bibi bar Abayi, however, said: In the case of the above water-pail the latter was rolling by the continuous original action of the cock (even in the moment of breaking).

Rabha questioned: The one-half damage paid in case of "gravel," is it paid out of the body of the tort-feasor, for we do not find anywhere that half damage is paid from the best estate; or is it paid from the best estate, for we find nowhere that damage done by usual means shall be paid out of the body of the tort-feasor? Come and hear: "A dog that snatched and carried off a cake from the burning coals on which it was being baked to a barn, and there consumed the cake, and with the burning coal that stuck in the cake set fire to the barn, must pay for the cake the whole, and for the barn only one-half." Is the reason for that not because the damage of consuming the cake is that (directly) of the tooth, and the damage to the barn is only indirectly (remote), as in "gravel," and we have (nevertheless) learned in a Tosephtha in regard to this latter that the half damage is paid out of the body? (Hence that it is paid out of the body?) But, on the other hand, can it enter the mind that the reason for the liability in this case is because it is the usual case of "gravel," according to R. Elazar of the Boraitha, even if he concurs with Summachus that "gravel" pays the whole damage? Do we find anywhere that such is paid out of the body? We must, therefore, say that in the usual case of

[paragraph continues] "gravel" the damage is paid out of the body, but the case in the above Mishna is that the coal was handled not in the usual way, and R. Elazar holds in this respect with R. Tarphon, who said (page 50) that where damage was done by the horn in an unusual way on the premises of the plaintiff, the whole damage must be paid. In reality, however, it is not so. For what is the reason of the assertion that it is, according to R. Tarphon, because of the whole damage? We can say that R. Elazar holds, according to Summachus, that "gravel" pays the whole, and he agrees also with R. Jehudah, who says further on that the non-vicious element (even in case of viciousness) remains intact, and therefore when it is stated here that it is to be paid out of the body, it refers to that element (and in case of non-viciousness it is always paid out of the body).

Said R. Sama, the son of R. Ashi, to Rabhina 1: (Even according to this theory) you can explain R. Jehudah's statement only in case of a non-vicious animal that became vicious, but how can you explain his statement when the animal is considered vicious from the beginning, as in the case of "gravel in the unusual way"?

We must, therefore, say (if you wish to explain that it is "gravel in the usual way") that R. Elazar held that the whole damage must be paid, according to him, only when it became vicious by doing so thrice, and they differ in the following: One, holds that the theory of viciousness does not apply to gravel, and one holds that it does. If it should be so, then why did Rabha question whether there can be viciousness in case of "gravel in the usual way" (*i.e.*, as when we say that the first time one-half damage is paid, as in the case of the horn, so also it becomes vicious by being done thrice, as the horn), or viciousness cannot apply here, (for as it is a derivative of the foot (because it is natural) it is considered vicious from the beginning, and still pays only one-half damages); according to the rabbis, it certainly is not, and according to R. Elazar it is? Rabha might answer: My doubt whether the theory of viciousness applies to gravel is according to the rabbis, who differ with Summachus; in our case, however, both the rabbis and R. Elazar

agree with Summachus, and the reason why the rabbis hold that only half is paid, is because the cause was in the unusual way (in which case it is a derivative of the horn), and it does not become vicious, and the point of their difference is the same as that of the rabbis and R. Tarphon. We have heard R. Tarphon say only as to the whole damage, but have we ever heard him say that it must be paid out of the body? Yea, it is sufficient that the result derived from an inference be equivalent to the law from which it is drawn, and as this is a derivative of the horn, it cannot pay more than the principal or in another manner. But we know that R. Tarphon does not hold to the rule just stated? (There is no difficulty.) He does not hold to that rule only in cases where the rule of *a fortiori* is applicable (as explained further on, page 51), but where this rule is not applicable he *does* hold to the former rule.

R. Ashi questioned: According to the rabbis, who differ from Summachus and hold that in "gravel in the usual way" only one-half is paid, does the "unusual way" in gravel (as, for instance, if done by kicking up gravel) change it to the payment of one-fourth of the damage (*i. e.*, as the "usual way" is considered vicious, does the "unusual" way make it non-vicious to pay one-half of the amount paid in case of viciousness)? Can this not be solved from Rabha's question, whether there is or there is not viciousness in the case of gravel, from which it is to be inferred that it does *not* change it (for if it *does* change it to one-fourth, then in case of viciousness it would pay only half, how can Rabha doubt whether viciousness in this case pays the whole--does viciousness, then, pay more than double the amount of non-viciousness)? We can explain that Rabha was doubtful in both rules (both as to change and viciousness). If you will assert that in case of gravel the rule of change does not apply, can we apply to this case the rule of viciousness? This question remains unanswered.

"*If she were kicking*," etc. R. Abba bar Mamal questioned R. Ami, and according to others R. Hyya bar Abba: If she (the animal) were walking in a place where it was impossible for her not to kick up gravel, and she kicked, and by so doing kicked up gravel and caused damage, what is the law? Shall we say that because it was impossible for her not to do it, it is, although done by kicking, considered the usual way (and pays half), or we do not consider it so, because still it was done by kicking? This question remains unanswered.

R. Jeremiah questioned R. Zera: If she were walking on public ground and gravel being kicked up from under her feet caused damage, what is the law? Is this a derivative of "horn" (because

gravel pays half), and she must pay even if it was on public ground, or gravel is the derivative of "foot" (because it is done with the foot), and there is no liability if done on public ground? He answered him: Common-sense dictates that it is a derivative of the "foot." (He asked again:) If she were walking on public ground and kicked up gravel which fell on private ground causing damage, what is the law? He answered: If there is no starting, shall there be a resting (*i.e.*, the starting being on public ground, where there is no liability, shall the resting-place of the gravel be taken into consideration)? The questioner objected: Have we not learned elsewhere: If she were walking on the road and kicked up gravel, whether on public or on private ground, there is a liability. Shall we not assume that it means that both the kicking up of the gravel and the damage were done on public ground? (Now if kicking up gravel is compared with the "horn," therefore there is a liability, as in the latter case; but if it is a derivative of the "foot," why should there be a liability?) (He answered:) Nay, it means that the kicking was on public, but the damage was done on private ground. But did you not argue, "If there is no starting, shall there be a resting?" He answered: I retract my argument.

R. Jehudah the second and R. Oshiyah were sitting on the porch of R. Jehudah's house, and a question was asked: If she has done damage by shaking her tail, what is the law? (Is it considered to be in her habit to do so, and there is no liability, or not?) Said the other: Is there any duty on the owner to hold her by the tail when leading her? If so, why not apply the same argument to the horn, shall the owner hold him (the, ox) by the horn when leading him? What comparison is this? In the latter it is not in his nature to do so, but in the former it is (and therefore it is a derivative of the "foot"). If it is in her? nature to do so, then what is the question for? The question was only in case it was extraordinary shaking. (This question remains.)

"*Cocks have a tendency*," etc. Said R. Huna: The statement that he pays only half and no more relates only to a case where the article got attached of itself; but if a human being attached it, the one who did so is liable to the whole damage,

[paragraph continues] (for it is considered a "pit"). "If it got attached of itself," who is liable? If we assume that the owner of the article attached is liable, how was the case? If he kept the article with good care, then it was only an accident; if he did not, then it was wilful, and the full damage must be paid. We must, therefore, say that the owner of the *cock* is liable.

Why does he not pay the whole damage? Because it is written [Ex. xxi. 33]: "If a man dig a pit," which means to limit it to a human being only, and exclude the case of an ox digging a pit (in this case the article attached is considered "a pit" which the cock created), let the same argument apply even to the half damage, and let us say: "If a *man* dig a pit, but not if an *ox* dig a pit" (and let there be no liability at all). We must, therefore, say that our Mishna treats of a case where the cock has done the damage by hurling the article for some distance (in which case it is "kicking up gravel," and only half damage is paid), and the statement of R. Huna applies to the following case: "Of an ownerless article, R. Huna says if it got attached of itself there is no liability at all; but if it was attached by a human being, the one who attached it is liable." On what principle is he liable (for, after all, it does not resemble a "pit" in all respects, because a "pit" is stationary, while here it was removed from the place where it was tied on)? Said R. Huna bar Munoa'h: He is liable on the principle of a "movable pit," which is made so either by human beings or by animals (*e.g.*, if one places a stone in the public highway which, while lying in that place, did not cause any damage; and another person or an animal removed it from that to another place

and damage was caused there, the latter is liable).

MISHNA *II*.: What tendency makes the tooth to be considered vicious? That of eating what is fit for it. An animal has a tendency to consume fruit and vegetables; if she, however, chewed up a garment or vessels, only half damage is paid. This is said only if on the premises of the plaintiff, but on public ground there is no liability. But if she derived any benefit therefrom, the value of such benefit is paid. How so? If she consumed from the middle of the public highway, the value of the benefit is paid; if from the sideways of the highway only, the amount of the damage is paid; if from the *front* of a store, the value of the benefit; if from *within* the store, only the value of damage is paid. (This Mishna is explained further on.)

GEMARA: The rabbis taught: The tooth has a tendency

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to consume what is fit for it. How so? For an animal that entered the court of the plaintiff and consumed food that is fit for her or drank liquids that are fit for her, the whole damage must be paid. The same is when a beast entered the court of the plaintiff and killed an animal, or consumed meat, the whole damage must be paid.

For a cow, however, that consumed barley and an ass that consumed beets, or a dog that was licking oil or a swine that devoured meat, the whole damage must be paid (although it is not their usual food). Said R. Papa: Now that you lay down the rule that an article consumed which constitutes the food of the consumer only in case of unusual necessity is considered food; for a cat that devoured dates and an ass that consumed fish, the whole must be paid. It happened that an ass consumed a loaf of bread contained in a basket and chewed up the basket, and R. Jehudah decreed that the whole be paid for the bread and half for the basket (because the former is in his habit to eat and the latter not). Why so? Is it not in his habit to chew also the basket while eating the bread? The case was that he first consumed the bread and then chewed up the basket. Is then bread the usual food of cattle? Have we not learned: "If she consumed bread, meat, or cooked food, half is paid"? Shall we not assume that it treats of cattle? Nay, it means a beast. If so, then it is in its habit to eat meat? The case is that the meat was roasted. It can be explained also that the meat was raw, but that the animal was a deer. And if you wish to explain it that it treats of cattle, then the case was that the food was placed on the table (which is unusual for cattle to eat from). It happened that a goat, noticing beets on the top of a barrel, climbed up and consumed the beets and broke the barrel, and Rabha ordered to pay the whole for both. Why so? Because: as it is in her habit to consume beets, so it is also her habit to climb up the barrel. Ilpha said: An animal being on public, ground, that extended her neck and consumed some article from the back of another animal, is liable. Why so? Because the back of the other animal is considered as the plaintiff's premises. Shall we assume that he shall be supported by the following Boraitha: "When his basket was placed on his back and an animal extending her neck reached the food therein and consumed it, it is to be paid for"? Nay, the case is as Rabha said, that! it was reached by the animal jumping at it, so also was the case here, viz., by jumping. Where was Rabha's explanation taught?

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[paragraph continues] On the following statement of R. Oshiyah: An animal on public ground, if she has consumed while walking there is no liability, but if she has done so while standing in one

place there is a liability. (And it was questioned): Why is this so? Is it not usual for an animal also to stand in the public highway? Said Rabha: R. Oshiyah meant to say if the animal jumped. R. Zera propounded a question: If it was rolling, what is the law? To what case has R. Zera reference? If the animal was standing on private ground and the article was rolling toward the private ground. [1] (Do we follow the place where it was consumed, and there is no liability, or do we follow the place wherefrom it was removed, and there *is* a liability?)

Come and hear: "R. Hyya taught: A bundle of food being placed partly within and partly without (private premises), if the animal consumed that portion placed within, there is, and if that portion placed without, there is no liability." Shall we not assume that it was rolled in (*i.e.*, that the whole was consumed, and it was rolled wholly in or wholly out, respectively; hence, that we follow the place of consumption)? Nay, R. Hyya taught so only in long-leafed grass (in which case every leaf is partly within and partly without the premises, and as soon as one end is touched the other goes after it, and therefore we follow the place of consumption, but not so in case of grain).

"*If she chewed up a garment*," etc. To what part in the Mishna has this reference? Said Rabh: To all parts. Why so? If one does an unusual thing (as in this case the placing of a garment in public ground), and another does an unusual act to that thing (as in this case the chewing up of the garment by the animal), there is no liability. Samuel, however, says this was taught only of fruit and vegetables, but for garments and vessels there is a liability. Resh Lakish, however, concurs with Rabh (because he adheres to his theory further on, Chap. III., Mishna 6.)

"*If she derived benefit*," etc. How much? Rabba said the value of hay. Rabha said the value of cheap barley. There is a Boraitha in accordance with Rabba, namely: "R. Simeon b. Jo'hi says: Only the value of hay or straw is paid, and no more." There is another Boraitha in accordance with Rabha, namely: "If she derived benefit, she pays as much as the value of the benefit. How so? If she consumed a kabh or two, not the

full value is paid, but only so much as one requires to feed his animal on food fit for her, although he is not in the habit of using such food. Therefore (as the fitness of the food is taken into consideration) if she consumed wheat or other food injurious to her, there is no liability (if on public ground)."

R. Hisda said to Rami bar Hama: I regret that you were not in our neighborhood the other evening when very acute questions were asked of us. What were they? Thus: One who takes up his dwelling in the court of his neighbor without the latter's knowledge, must he, or must he not, pay rent? How was the case? If the court was not to be let, and the dweller was such that he did not need to rent any (*e.g.*, if he had a dwelling of his own, or could get one without paying rent), then the one derives no benefit and the other suffers no loss? And if the court was to be let and the dweller needed a dwelling-place, then one does derive benefit and the other suffers loss (and why should no rent be paid)? The case was where the court was not to be let, but the dweller needed one. How is it? Can the dweller say to the court-owner: "What loss have I caused you?" Or can the court-owner say to the dweller: "It does not matter, for you derived benefit at any rate"? And he answered him: For this there is a Mishna. Where is that Mishna? He said to him: If you will render me some services, I will tell you where it is. He took off his coat and rolled it together for him. He then said: It is the above Mishna which states that if any benefit was

derived the value thereof must be paid. Said Rabha: How secure and careless does the man feel that knows that the Lord helps him. (See Yomah, page 31, a similar saying in the name of R. Huna.) He accepted the Mishna as a case similar to the one above, when in reality the facts of the Mishna are different from those of the case above, as in the case stated in the Mishna one derives benefit and the other suffers damage, while in his case one derives benefit and the other does not suffer any loss.

[What could Rami bar Hama say to that? Generally, one who places fruit on public ground renounces ownership of it (and therefore there is no loss).]

Come and hear: R. Jehudah said also that one who occupies his neighbor's court without the latter's knowledge must pay rent. Infer from this that in case one derives benefit, although the other suffers no loss, there is a liability? Nay, there it is different; it treats of a new house, the walls of which become soiled

from use (and this is considered a loss to the owner). (Finally) this question was sent to the school of R. Ami, and he answered: What has he done, what loss has he suffered, or what damage has he caused? Said R. Hyya bar Abba: Nay, we have still to consider this matter (as the soiling may be considered a damage). Afterward they sent to him (to R. Hyya b. Abba) for his decision in this matter, and he said: They continue sending me this question; if I could find any reason to decide this, would I not have answered?

(In reference to above question) it was taught: R. Kahana said in the name of R. Johanan: He need not pay any rent. R. Abbubu said in the name of the said authority that he need pay rent.

R. Abba bar Zabda sent a message to Mari bar Mar to ask R. Huna for his decision in the above matter. In the meantime R. Huna departed life. Said Rabba, his son: So said my father and teacher in the name of Rabh: He need not pay. (He also said): One who rents a house from Reuben must pay the rent to Simeon. How does Simeon come in here? He meant thus: If the house, in which he was living there at the time, was sold to Simeon, the rent must be paid to Simeon (although Simeon had no knowledge that he was occupying the house). Could, then, R. Huna say two things which contradict each other? There is no contradiction, because in the latter case the occupant intended to pay for its use. The very same case was taught by R. Hyya bar Abin in the name of Rabh, and according to others in the name of R. Huna. R. S'horah said in the name of R. Huna, quoting Rabh: One who dwells in the house of his neighbor (which was unoccupied and located in an unsettled district) without the owner's knowledge need not pay any rent, because the non-occupation causes damage, as it is written [Is. x xiv. 12]: "And in ruins is beaten the gate" (*i.e.*, if unoccupied the gate becomes ruined, and therefore the owner of the house derives benefit from the occupation). Said Mar bar R. Ashi: I once saw such a house which was damaged and looked as if gored by an ox. R. Joseph assigned another reason, viz., a house which is inhabited lasts longer (for the inhabitants make all the repairs necessary). What is the difference between these two reasons? There is a difference when the house is used for storing wood and straw. [1]

A certain person erected a palace on the ruins belonging to orphans, and R. Na'hman collected the rent (for the use of the ruins) from the palace. Should we assume that R. Na'hman holds that one who dwells in the house of his neighbor without the knowledge of the owner must pay rent? In this case the ruins were previously occupied by ancients who used to pay a nominal rent to the orphans, and R. Na'hman ordered Carmines to go and compensate the orphans, which order was disregarded by him, and therefore R. Na'hman collected it from the palace.

"*How does she pay for the benefit*," etc. Said Rabh: This was taught only when she turned around her head (from the public highway to the sideway), but in a case where one leaves a portion of his own ground open to the public highway (and an animal enters upon it while walking on the public ground and consumes fruit stored there) there is no liability. Samuel, however, says: Even in the latter case there is a liability. Shall we assume that they differ as (to the liability of a) pit located on one's own ground (where the owner renounced his ownership of the ground, but not of the pit)? Rabh holds that (the owner of the pit) is liable (and in this case in question the fruit is considered a "pit," and the ground being ownerless, it is considered public ground, and therefore he ought not to have done so, and for that reason there is no responsibility for consuming it). Samuel holds that for the pit in question there is no liability (consequently he was allowed to place his fruit there, and therefore the consumer is liable). Nay, Rabh may answer, I hold in case of a "pit on one's own ground" that there is no liability; but why is here the consumer liable? Because the owner of the animal can say: You cannot have so much privilege as to place your fruit in the immediate neighborhood of public ground and hold my ox to liability. And the same is the case with Samuel, who may say: In case of a "pit on one's own ground," I hold that there is a liability, but here, if even it would be right (for the owner of the animal) to say that the ox could not be aware of the pit (and therefore if he should be damaged the owner of the pit would be liable), the case is different, because

the fruit was exposed to view and the ox could not escape noticing it (and therefore if the ox should be injured the owner of the fruit would not be liable; the owner of the ox, however, is liable for the fruit consumed by his ox, because he derived benefit from another's property). Shall we assume that in the above case (turning the head) the Tanaim of the following Boraitha differ: "If an animal consumed from the middle of the highway, the value of the benefit derived is to be paid; if from the sideways, the value of the damage is to be paid. Such is the dictum of R. Meir and R. Jehudah; R. Jose and R. Elazar, however, hold that it is not her usual habit to consume, but only to walk (on the sideway, and therefore there is a liability). Now, shall we assume that R. Jose concurs with the first Tana, but they differ only as to "turning the head," viz.: The first Tana holds that in that case she also pays only the value of the benefit, and R. Jose holds that she pays the value of the damage done (and hence that the Tanaim differ)? Nay, it may be said that all agree, that in case of "turning the head" it is either according to Rabh or according to Samuel, but they differ here as to feeding in *another* man's field [Ex. xxii. 4]: "And he lets his beasts enter, and they feed in *another* man's field."

One holds that it means to exclude *public* ground (and therefore if she consumed from the middle of the street there is no liability), and one holds it means to exclude the ground of the defendant. "The ground of the defendant?" (Why should there be any liability?) Let the defendant say to the plaintiff: What right had you to place your fruit upon my ground? We must therefore say that they differ in cases stated by Ilpha and R. Oshiyah (see *supra*, page 38) (R. Meir holds, if in the middle of the highway only the value of the benefit is to be paid in both the

case stated by Ilpha and that stated by R. Oshiyah. And R. Joseph maintains that it is not her usual habit, etc.,

and holds to Ilpha and R. Oshiyah.)

MISHNA *III*.: A dog or a goat that jump down from the top of a roof and break vessels pay the whole damage; for they are vicious (as to jumping, and it speaks of a case on the premises of the plaintiff). A dog that snatched a cake (from the coal on which it was baked) and carried it to a barn and there consumed the cake and (with the burning coal stuck in the cake) set fire to the barn, the whole for the cake, but only one-half damage for the barn is to be paid (as explained further on in the Gemara).

GEMARA: The Mishna states a case of jumping, because in case of *falling* down there is no liability; we see then that the Tana holds that where the beginning of an act is wilful (in this case, allowing the goat or dog to be on the top of the roof), but the end is only by accident (the falling down, which he could not anticipate), there is no liability. We have so also learned in a Boraitha: "A dog or goat that jump down from a roof and break vessels pay the whole damage; if, however, they *fell* down there is no liability." The rabbis taught: "A dog or a goat that jump up from below, there is no liability; if, however, they jump down from above there is. A human being or a cock, however, that jump are liable in either case."

"*A dog that snatched*," etc. It was taught: R. Johanan said: One's fire is considered one's arrow (*i. e.*, one who allows a fire started by him to spread and do damage is liable on the same principle as one who shoots from a bow when the arrow does damage). Resh Lakish, however, said: The liability is because the fire is considered one's property. There is a contradiction from our Mishna: "A dog that snatched a cake," etc. It would be right according to the one who holds that one's fire is considered one's arrow, for in this case it is the dog's arrow (and the dog is the person's property); but according to the one who holds that it is because the fire is considered one's property, in this case it is the property of the owner of the dog. Resh Lakish may say: The case was that he flung it, in which case he is liable for the cake to the full amount; for the place on which the coal fell to one-half (for it is unusual); and for the barn he is not liable at all (for the liability for one's fire is because it is his property, and in this case it is not). And R. Johanan may explain that he placed (the cake and the burning coal) in the usual way, and therefore for the cake and the place where the coal lay he is liable to the full amount, but for the barn he is liable only to one-half. Said Rabha: There are both a biblical passage and a Boraitha in support of R. Johanan, viz., a biblical passage, for it is written [Ex. xxii. 5]: "If a fire *break* out"; "break" means if it does so of itself, and still "he that kindled the fire shall surely make restitution" [ibid.]. Hence we see that one's fire is considered one's arrow. A Boraitha: As we have learned: "The passage starts out with damages done by one's *property* (the above-quoted passage, which means 'break' out of *itself*) without the aid of some person, and ends with the damages done by one's *own person*: 'He that kindled,' etc. [ibid., ibid.],

to teach that the liability for one's fire is because it is considered his arrow."

Rabha said again: It was first a difficulty to Abayi: It is known that there is no liability for damages done by fire to concealed articles; how can such a case be found in the biblical law, according to those who hold that fire is considered one's arrow? Afterward he himself tried to explain it thus, that the case is where a fire started in one court and the fence of the court fell in, not by reason of the fire (but by some other reason), and on account of this the fire spread to another court and caused damage, in which case the "arrow" ceased to be such at the boundary of the first court (for at the time the fire was started it was unable to spread outside of the court, before the falling in of the fence).

If so, then the same thing may be said also in case of unconcealed articles? We must, therefore, say that the one who holds that the liability is because it is his arrow, holds that it is so because the same is also his property, and that in this case he had sufficient time to repair the fence (before the fire spread) but did not do so; and although not liable for starting the fire he is liable for allowing it to spread, in which case it is the same as if he had kept his ox in a stall without locking the door. If it should be so, that the one who holds that the liability for one's fire is because it is his arrow holds also of the other theory, that it is considered his property (and if not liable for one reason is liable for the other reason), then what is the difference between R. Johanan and Resh Lakish? The difference is as to the liability for the four things (see above, page 6). (According to the one who holds that it is because it is his arrow also, there is a liability; and according to the one who holds that it is because it is his property, there is none.)

"*For the cake*," etc., "*pays*," etc. Who is liable--the owner of the dog? Why should also the owner of the coal not be liable? (For according to both R. Johanan and Resh Lakish the liability is because it is his property, and according to R. Johanan, who holds that half must be paid for the barn, the owner of the coal pays the other half; and according to Resh Lakish, who holds that there is no liability at all for the barn, let the owner of the coal be liable for the whole?) The case is that the owner of the coal took good care of it. If so, how could the dog get hold of it? The case is that the dog dug under the door and in such a way gained access. Said Mari, the son of

R. Kahana: From the fact that the owner of the dog must pay the whole damages is to be inferred that ordinary doors are considered unsecured in regard to dogs (and it must not be considered unusual so as to pay only half).

Let us see: The Mishna states that the dog has consumed the cake, etc. Consumed where? If not on the premises of the owner of the cake, why must it be paid? This is not "in *another* man's field" [Ex. xxii. 4] (which means on the premises of the plaintiff). We must, therefore, say that it was at the barn of the cake-owner. (From the fact that he must pay for the cake) then infer that the mouth of an animal (consuming something on the premises of the plaintiff) is considered as it is yet in the court of the plaintiff. (As the case stated in the Mishna was that the dog kept it in his mouth from the time he picked it up until he reached the barn, and it was not considered that it was on the premises of the defendant, although the dog was his property,) for if it would be considered as the premises of the defendant, he could say to the plaintiff: Your bread was all the time in the mouth of my dog, which is my property, and there it was consumed; why, then, shall I pay? We say infer, because a question was actually raised as to this. And there could no such question arise if it were certain that the mouth of the animal is considered the premises of the defendant; and besides, there could arise no case in which there would be a liability for damage by the tooth, as in order to consume it it must necessarily be taken into the mouth. Said Mari, the

son of R. Kahana: If there could be no direct case of "tooth," there could arise a case which is its derivative, as, for instance, when the animal was rubbing against the wall for her own benefit and thereby did damage, or she rolled over fruits for her own benefit, and made them dirty (which cases are derivatives of the "tooth"). Mar Zutra opposed: But is it then not written in the Bible that there must be complete destruction [I Kings xiv. 10]: "Sweeps away the dung till there be *nothing* left"? Which is not the case here (as the wall or the fruit is still in existence). Said Rabhina: It can be explained that by rubbing against the wall she obliterated *completely* the engravings thereon; (and in case of the fruit), said R. Ashi, that by rolling over the fruits she sank them into the mud (so that they could not be removed).

There were certain goats belonging to the family of Tarbu that were doing damage to the property of R. Joseph, and he said to

[paragraph continues] Abayi: Go and tell their owners to keep them in safety. The latter answered him: If I do so they will tell me that you should put up a fence on your ground. [If one must put up a fence upon his premises in order to prevent consumption of, or otherwise damaging, his fruit, how can there: be a case of liability for damage by the "tooth," for which the Scripture makes it plainly liable? That may be in case she dug under the fence or the fence fell in in the night-time (if there was no opportunity of repairing it).] Announced R. Joseph, and according to others Rabba: It shall be known to all those who are ascending to Palestine and to all those who are descending to Babylon that if those goats that are kept for slaughter during the market days do damage, their owners shall be warned twice or three times. If they listen well and good, if not the goats are to be brought to the slaughter-house, even before the arrival of the market days, and the owners are to be paid their market value of that day.

MISHNA *IV*.: What is considered a non-vicious and what is considered a vicious one? A vicious ox is one that has been warned three days. A non-vicious one is one that abstains (from goring) for three days. Such is the dictum of R. Jehudah. R. Meir, however, said a vicious ox is one that had been warned thrice, and a non-vicious one is one that, when children pat him on the back, does not gore them.

GEMARA: What is R. Jehudah's reason? Said Abayi: It is written [Ex. xxi. 36]: "In time past" (in the original: "*Mi*-tmol, Shilshom"). It could have been written "tmol" (yesterday), and then would have counted only once, but it is written "*Mi*-tmol" (since yesterday), therefore it signifies twice; when "shilshom" is added it signifies thrice, and then follows, "and his owner hath not kept him in" [ibid.], which means that viciousness begins upon goring the *fourth* time (for the third time, however, only half is paid). Rabha, however, is not so particular about the addition of "mi" to "tmol," and therefore this word signifies only once, and the word "shilshom" signifies twice, hence "and his owner," etc., means the *third* time, when the ox becomes vicious, and he pays the whole damage.

And what is the reason of R. Meir's theory? This is explained in the following Boraitha.: R.. Meir said: (Draw an *a fortiori* conclusion): If he gored at "long intervals (only once a day), he is considered vicious on the third time; so much the more if he had gored thrice in one day he must be considered

vicious. They rejoined: There is no conclusion *a fortiori* to be drawn here, as there is a similarity in the case of a woman who has a running issue, who is unclean for seven days only when she notices the disease three days in succession once a day, but if she notices it three times or more in one day she has to wait only one day. He said again. (From this nothing can be inferred) as the verse made this case an exceptional one by the words "*And this*," etc. [Lev. xv. 3], which signify that it is so only in this case, and no others can be compared to it, for we see that in this case the verse made it, in case of a man, depend upon the number of times of noticing of the issue, while in the case of a woman, it made it dependent upon the number of days.

The rabbis taught: What ox is considered vicious? One that has been warned for three days; and a non-vicious one is one that is patted by children and does not gore; such is the dictum of R. Jose. R. Simeon, however, holds that a vicious ox is such as has been warned thrice (even in one day), and the statement as to the three days is only as to abstaining (that is, if after having been warned three times he abstains for three days from goring, then he is again considered non-vicious). Said R. Na'hman in the name of R. Ada bar Ahba: The Halakha prevails as stated by R. Jehudah in regard to a vicious ox, and according to R. Meir in regard to a non-vicious ox, for the reason that R. Jose agrees with them. Said Rabha to R. Na'hman: Let the master say that the Halakha prevails according to R. Meir in regard to a vicious ox, and according to R. Jehudah in regard to a non-vicious ox, for the reason that R. Simeon agrees with them in both. He rejoined: I concur with R. Jose, for he has always his valid reasons.

The schoolmen propounded a question: The three days in question, are they as to make the ox vicious; but the owner may be liable for a vicious one in one day; or are those three days also as to the owner? In what case can there be a difference? If there appear three different sets of witnesses in one day (and testify as to three gorings in three days), if those three days are as to the ox, then he becomes vicious; but if they are as to the liability of the owner, then the latter can say all the three sets appear only now (and the Scripture requires that they shall appear in three days).

Come and hear: "An ox does not become vicious until testimony is given in the presence of both his owner and the court. If in the presence of only one of them, he does not become

vicious until it is in the presence of both. If two witnesses testified as to the first goring, two as to the second goring, and two as to the third (each goring being at a different place, time, and man), we have then three sets of witnesses, but still all the three sets are considered one as to be proved in collusion. If one set is found collusive there is still the testimony of the other two sets, and neither the owner is liable to pay for a vicious one nor are his witnesses liable (to pay the other half for viciousness). The same is if also the second set proved collusive. If, however, all the three sets prove collusive, they are all considered as one set, and all of them are to pay the one-half for viciousness, and that is meant by the passage [Deut. xix. 19]: Then shall ye do unto him, as he had purposed to do unto his brother," etc. Now let us see. If the three days are as to the ox (but the owner may become liable if testimony be given to him thrice in one day), it is correct that the witnesses are liable only when all the three sets proved collusive (for it may be that the one who was injured brought all the witnesses to testify to the three gorings, and each set knew of the other and to what they were to testify, and therefore they cannot say that they intended to make him pay only one-half); but if you should say that the three days are as to the

owner also, why should the first set of witnesses (if proved collusive) be liable? Let them say that they did not know that others would come in two or three days later to testify as to make him vicious. Said R. Ashi: When I read this Halakha before R. Kahana, he said to me: Even if the three days are explained to be in regard to the ox only, would it then be correct, for (if even the first set cannot argue that they had no knowledge of the testimony to be given by the others, for they knew that on their own testimony he could not be made vicious) the last set can say: How should we have known that all these witnesses before the court were going to testify as to this case; we intended to testify so as to make him pay only one-half? We must, therefore, say (that if the three days refer to the ox) one set of witnesses gave the other a hint as to what they were going to testify. R. Ashi said: The case is that they all come together and therefore are supposed to know of the testimony of one another. Rabhina said: It may be that the witnesses knew the owner, but did not know the ox (and therefore by coming to testify they meant to make the ox vicious and must have known that there was already testimony given). If they do not know the ox,

how can they make him vicious? They testify and warn the owner that there is a "goring" ox among his cattle, and therefore that he should take care of *all* his cattle.

The schoolmen propounded the following question: For one who sets his neighbor's dog on a third person, what is the law? The first one is surely not liable (for he was only instrumental in the injury), but the owner of the dog, is he or is he not liable? Can he say: What did I do in this matter? Or can we tell him: Having known that your dog is capable of being set on, you should not keep him? Said R. Zera: Come and hear. It is stated in our Mishna: What is considered a non-vicious ox? One who when patted by children does not gore them, but if he does gore he is liable (although it was caused by the patting of the children). Said Abayi: Is this, then, so stated in the Mishna? Perhaps the Mishna meant that if he did gore he is no more considered entirely non-vicious, but that he is not liable for *that* goring. This question remains undecided. Rabha said: If you should say that one who sets on his neighbor's dog is liable, it would follow that, if in such a case the dog turned on the one who sets him on and bit him, the owner is not liable. Why so? As stated above, page 39, that one who does an unusual thing, etc., which is the same in this case. The man was wrong in setting on the dog, and the dog should not bite him. Said R. Papa to Rabha: It was taught in the name of Resh Lakish in accordance with your theory in the case of two cows (see *post*, page 70). Rejoined Rabha: I in such a case hold him to liability, for the reason that we can say to him: You had permission to step upon me, but had you then also permission to kick me?

MISHNA *V.*: "An ox that did damage on the premises belonging to the plaintiff," stated in Chapter I., Mishna IV.; how so? If he gored, pushed, bit, lay down on, or kicked while on public ground, he pays half; if while on the premises of the plaintiff, R. Tarphon holds the whole; the rabbis, however, say one-half. Said R. Tarphon to them: (Are we then not to draw an *a fortiori* conclusion.) In a case in which the law is lenient with the "tooth" and "foot" on public ground, making them not liable, it decrees rigorously if the same happened on the premises of the plaintiff, namely, that the whole must be paid; in a case where it decrees rigorously that the "horn" on public ground must pay half, is it not a logical inference that we ought to strictly adjudge the same, if on the premises of the plaintiff,

liable for the whole? They said to him: It is sufficient that the result derived from the inference be equivalent to the law from which it is drawn, viz., as if on public ground only half, so also if on the premises of the plaintiff. He rejoined: I also do not infer "horn" from "horn," but I infer horn from "foot," and I reason thus: if in cases in which the "tooth" and "foot" were dealt with leniently if on public ground, the "horn" was dealt with rigorously, is it not a logical conclusion that the latter shall be rigorously dealt with in cases where the former were also so dealt with? They rejoined again: It is nevertheless sufficient that the result derived from the inference be equivalent to the law from which it is drawn.

GEMARA: Did R. Tarphon ignore the theory of "It is sufficient," etc.? Is, then, this rule not a biblical one? As we have learned in the following Boraitha: "An *a fortiori* conclusion must be considered biblical. Where is it to be found in the Bible? It is written [Numb. xii. 14]: 'And the Lord said unto Moses, if her father had spit in her face would she not be ashamed seven days?' So much the more if it is toward the Shekhina, it must be fourteen days? But there is a rule that it is sufficient that the result derived from the inference be equivalent to the law from which it is drawn." (Hence we see that the rule of "It is sufficient" is also biblical.) R. Tarphon does not hold to that rule only where an *a fortiori* argument can refute that inference, but where there is no such refutation he does, viz., in the Bible the seven days of the Shekhina are NOT written; only by an *a fortiori* argument we set it to be fourteen days, and therefore, by the rule above stated, we equal it to the father's case, but in our case the half damage is written in the Bible and applies also to the premises of the plaintiff, and by an *a fortiori* argument we only add another half to it. Now if you should apply the rule above stated, then the *a fortiori* argument would be refuted entirely by it. The rabbis, however, maintain that the seven days in case of the Shekhina ARE written in the Bible, viz. [ibid., ibid.]: "Let her be shut up seven days." R. Tarphon, however, may say that that is the very verse which indicates the application of the rule of "It is sufficient," etc. And whence do the rabbis deduce the application of this rule? There is another passage for that, viz. [ibid. 15]: "And Miriam was shut up." R. Tarphon, however, may say that that other verse is necessary to indicate that the rule of "it is sufficient," etc., is applicable in ordinary cases

also, as one might say that it is applicable to this case only because of the honor of Moses; hence the passage.

Let the "tooth" and "foot" be liable (if they do damage) on public ground by the following *a fortiori* argument: The horn (doing damage) on the premises of the plaintiff pays only half, still the same is the case even on public ground; the "tooth" and "foot," which pay the whole if on the premises of the plaintiff, is it not logical that they should be liable on public ground? Therefore the Scripture reads plainly [Ex. xxii. 4]: "And they feed in another man's field," which signifies private, but not public ground. Do we then say that the whole must be paid (as the tooth, to which this passage has reference), we say that one-half should be paid? There is another passage [Ex. xxi. 35]: "And divide *his* money," which signifies *his* money (of the horn), but not the money in other cases (*i.e.*, in other cases the whole must be paid).

Let the "tooth" and "foot" be liable only to one-half if on the premises of the plaintiff by the following *a fortiori* argument: The horn which is liable on public ground pays only half on the premises of the plaintiff; the "tooth" and "foot," which have no liability at all on public ground,

should they not so much the more pay only half on the premises of the plaintiff? To this the Scripture reads [ibid. xxii. 4], "make restitution," which means a *satisfactory* payment (the whole).

Now let the horn on public ground not be liable at all by the following *a fortiori* argument: The "tooth" and "foot," which pay the whole on the premises of the plaintiff are not liable on public ground; the horn, which pays only half on the premises of the plaintiff, should it not so much the more be entirely free on public ground? Said R. Johanan: The Scripture added [ibid. xxi, 35]: "They shall divide" (which is superfluous, as it was already stated before that his money shall be divided), to signify that it is also liable on public ground.

Let a man (that kills another wilfully, but without warning, in which case he is neither to suffer the death penalty nor to be banished) pay a sum of money in atonement by the following *a fortiori* argument: An ox which is not liable to the payment of the four certain things (mentioned above, page 6) must nevertheless pay a sum of money in atonement; for a man who is liable to the payment of the above four things, is it not logical that he should be liable to the payment of a sum of money in atonement? To this the Scripture reads [ibid. 30], "whatever

may be laid upon *him*," which means upon *him only* (the ox), but not upon a man.

Now let the ox be liable to the payment of the four things by the following *a fortiori* argument: A man who is not liable to the payment of money in atonement is nevertheless liable to the payment of the four things; for an ox, which is liable to the payment of atonement money, is it not logical that he should pay the four things? To this the Scripture reads [Lev. xxiv. 19]: "And if a *man*, etc., in his neighbor," which does not mean an *ox*, etc.

The schoolmen propounded the following question: An ox that steps with his foot on a child lying on the premises of the plaintiff, what is the law in regard to the payment of the atonement money? Shall we say that it should be equal to the case of the horn, as when the horn gores twice or thrice it is considered its habit and pays atonement money, the same shall be applied to the foot, as it is always its habit to step? On the other hand, can it be said that there is no similarity to the horn because the horn gores with the intention to do damage, which cannot be said of a foot which steps without such intention? Come and hear: One who leads his ox into one's court without the owner's permission and the ox gore the owner to death, the ox is to be stoned and his owner, whether in case of viciousness or non-viciousness, must pay the full sum of atonement. Such is the dictum of R. Tarphon. Now let us see: Whence does R. Tarphon infer that in case of non-viciousness the full sum of atonement money must be paid? Is it not because he holds with R. Jose the Galilean, who says (Text, 486) that a non-vicious ox pays half atonement money on public ground, and he (R. Tarphon) draws an *a fortiori* conclusion from the "foot" (viz., the tooth and foot, which are not liable at all on public ground, "pay the full amount of atonement money on premises belonging to the plaintiff, and the horn, which pays, according to R. Jose the Galilean, half atonement money on public ground, so much the more should be paid the full atonement money on premises belonging to the plaintiff). Hence we see that the case of atonement money applies also to the foot. Said R. A'ha of Diphthi to Rabhina: Common-sense also dictates so. For if one should think that it does not apply to the foot, and the Tana (R. Tarphon) deduces it only from the *injuries* caused by the foot (but not from the killing) (viz., if the foot, which on public ground is not liable for damages, pays the

full damage if on premises of the plaintiff, the horn, which pays on public ground half atonement money, according to R. Jose the Galilean, is it not logical that on premises belonging to the plaintiff it should pay the full sum of atonement money?) It could be refuted and said: As far as the damage of the foot is concerned, it is its habit (to damage all things lying in its way when walking), but it is not so as to killing. Infer from this that the case of atonement money applies to the case of the foot also, and R. Tarphon has drawn his *a fortiori* conclusion from this case. And so it is.

MISHNA *VI.*: A human being is considered always vicious, whether he acts intentionally or unintentionally, when awake and also when asleep. If one blind the eye of his neighbor, or break his vessels, he pays the whole damage.

GEMARA: The Mishna teaches if one blind the eye of his neighbor that, as in the case of breaking one's vessels, only damage is paid for, but not the four things; so also in the former case only for the damage, but not the four things, is to be paid (when done unintentionally). Whence is that deduced (that the damage is paid for even when unintentionally)? Said Hyzkiah, and so also was it taught by his disciples: The passage says [Ex. xxi. 25] "wound for wound" (which is superfluous, for it is stated [Lev. xxiv. 19]: "And if a man cause a bodily defect"), to make one liable for unintentional as for intentional damage, and for an accidental as for a deliberate act. But do we not need this passage to make one liable for the pain (which is one of the four things explained above) where damages are paid? If so, let the passage say "wound for wound," why then "wound *instead* [1] of a wound"? Infer from this both.

Rabba said: One who carries a stone in his lap without being aware of it, and while getting up from his seat drops it, as regards damages he is liable (for there is no difference whether it was intentional or not), but as regards the four things he is not; regarding the Sabbath the Scripture prohibits only intentional work; as to banishment (if a human being was killed thereby), he is not liable; as to his liability to a slave (if it fell on a slave and blinded him), R. Simeon b. Gamaliel and the rabbis differ (as to whether he must manumit him or not [Ex. xxi. 26]). If in the above case he was at first aware of the presence of the stone,

but subsequently forgot it, as to damages he is liable, as to the four things he is not (for the fact that he forgot it cannot be considered wilfulness); as to banishment he is liable, as regards Sabbath he is not; as regards a slave, R. Simeon b. Gamaliel and the rabbis differ. If he intended to throw the stone two (ells) distant and threw it four, as to damages he is liable; as to the four things he is not; as regards Sabbath, intention is necessary; as to banishment, the Scripture said [ibid. xxi. 13]: "And if he *did not lie in wait*," excepting this case under discussion; as regards a slave, R. Simeon b. Gamaliel and the rabbis differ. If he intended to throw four (ells) and threw it eight (ells) distant, as to damages he is, as to the four things he is not liable; as regards Sabbath he is free unless he said: Let it fall wherever it may; as regards banishment the above-quoted passage means to except such a case as to his liability to a slave. R. Simeon b. Gamaliel and the rabbis also differ. [1]

Rabba said again of one who drops his own vessel from the top of a roof, and before it reaches the ground another person strikes it with his cane and breaks it, the latter person is not liable, for it is considered that he broke a broken vessel.

The same said again: One who drops a vessel from the top of a roof upon the ground which has been covered with pillows, and another person removes them before the dropping of the vessel (without the knowledge of the person who drops it) and the vessel was broken, there is no liability on the part of the person who drops it, for at the time he dropped it he thought it could not break, nor was the person who removed the pillows liable, because he was only the remote and not the proximate cause of the damage.

The same said again: If one drop a child from the top of a roof, and before it reaches the ground another person cut it with his sword, this is similar to the case of the following Boraitha, in which R. Jehudah b. Bathyra and the rabbis differ: If one was assaulted by ten different persons, no matter whether at once or at different times, and was killed, none of them has to suffer capital punishment, as according to the Scripture it must be known who was the cause of the death. R. Jehudah b.

Bathyra, however, holds, in case the assault was made by one after the other, that the last one is guilty, for he hastened his death (and this rule can be applied to the above case of the child).

If (in the case of the child) a vicious ox killed it with his horns before it reached the ground, this is similar to the case of the Boraitha (post, pages 90 and 91) in which R. Ishmael, the son of R. Johanan b. Broka, and the rabbis differ.

The same also said: One who falls from the top of a roof by an extraordinary wind and does damage, or falls on a woman and causes her shame, is liable for the damage, but not to the four things. If, however, it happen by an ordinary wind and causes damage or disgrace to a woman by falling on her, he is liable for all the four things except for the disgrace.

Lastly Rabba said: One who causes the death of another by placing live coals upon his (bare) breast has no liability (for the deceased could remove them); if he placed the coals upon another one's clothes and they were burned he is liable (because the moment the live coal was placed on the clothes the latter were at once damaged).

[Said Rabha: Both these cases are explained in Mishnayoth. The first one in Tract Sanhedrin, Mishna II., and the second in this tract, Chapter VIII., Mishna 5.] He, however, propounded the following question: If one placed a live coal upon the breast of his neighbor's slave, is the slave considered in such case as his own body (and there is no liability, for the slave should remove it), or is he considered only his property (and he is liable)? And if one should say that a slave is considered the body of his master, what is an ox under such circumstances considered? He subsequently solved it himself. A slave is considered one's body, and an ox is considered one's property (and there is liability in the latter case, for the ox cannot remove it).

Footnotes

30:1 See Gemara.

30:2 We are compelled to use in our translation of this section for male and female animals the same terms used when speaking of human beings, for the following reasons: (*a*) The Bible translators use the same terms when speaking of animals, either of common or distinct gender, *e. g.*, see Leeser's translation (which we follow in the translation of the Talmud), Numb. xxii. 25, Exod. xxii. 5, as regards, "ass," which is of common gender, also ibid., Exod. xxi. 29, Numb. xix. 3, as regards a distinct gender; and so in many, many other places. Now, as the Mishna and the Gemara following use the word "animal" here in the feminine (probably for the reason that in those times of domestic animals the female was usually permitted to walk the highway without one directing her, which was not so with an ox, which was usually hitched to a wagon and in charge of a driver whose duty it was to take care that the ox did not step on articles lying in the way), and as "it" is usually used for the neutre gender, we could not very well use this term. (We follow strictly this rule as regards gender in all other places, to correspond with the original.)

(*b*) If we used "it" and "its" instead of the above terms, it would be very hard for the reader to comprehend the true sense of the discussions.

34:1 The Rabhina mentioned here is Rabhina Zuta, a nephew of the first Rabhina, who is mentioned in Kethuboth 100*b*; for Rabhina, who was a disciple of Rabha and colleague of R. Ashi, died long before in the time of R. Sama, the son of R. Ashi. See Doroth Harishonim, Presburg, 1897.

39:1 According to Maimonides and others.

41:1 Rashi explains this that the owner of the house used it for storing wood and straw, and the tenant lived in the same place used for such storage; and then as to "ruin," there is none, for it is being used; but as to repairs, the owner would not see p. 42 what repairs are necessary, as he does not live there; consequently, in such a case, according to R. Joseph, he need not pay, and according to R. S'horah he need pay. We, however, would say, that the Gemara means that it was used for storing wood and straw by the stranger, and, on the contrary, according to Rabh, he need not pay, for the house is no more vacant; and according to R. Joseph he need pay, because he will not care to make repairs. We leave the choice to the reader.

54:1 The literal translation of the text reads "a wound *instead* (ta'hath) a wound."

55:1 In the last two cases there is only a difference as regards Sabbath. In the first case, even if he said, "Let it fall wherever it may," there is also no liability, for the Scripture requires that it should be intentional work, and in the first case the distance is so small that there can be no question as to his intention to do work.--Rashi.

Next: Chapter III.