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CHAPTER III.

RULES CONCERNING PLACING VESSELS ON PUBLIC GROUND. INJURIES CAUSED BY PEDESTRIANS TO EACH OTHER WITH THEIR LOADS. THE VICIOUS AND NON-VICIOUS OXEN--IF THEY HAVE DONE INJURY TO EACH OTHER OR TO HUMAN BEINGS, ETC.

MISHNA *I.*: If one places a jug on a public ground and another person stumbles over it and breaks it, the latter is not liable; if he is injured, the owner of the barrel is liable for the damage.

GEMARA: The Mishna starts out with "jug" and ends with "barrel," and it is the same way in several subsequent Mishnas. Said R. Papa: Jug and barrel are one and the same thing (as to the cases cited). (If so) for what purpose did the Mishna change the terms? For business transactions (*e.g.*, if one sells barrels he may deliver jugs, and *vice versa*). How is the case? Shall we assume in the case of a certain locality where these terms are decidedly distinct, then jug is one thing and barrel another? It is only in the case where most of the people use those terms distinctly and separately, but there is also a small portion who use them interchangeably, in which case I would say that the majority is to be followed; hence the statement that in money matters the majority is not to be followed (but the burden of proof is on the plaintiff).

"*And another person*," etc. Why is he not liable--must he then not look out? Said the disciples of Rabh in his name: The Mishna speaks of a case where he filled up the whole thoroughfare with barrels. Samuel said: When it is done in darkness. R. Johanan, however, said: The Mishna may be explained in that he placed the jug in a corner (where it could not be noticed). Said R. Papi: Our Mishna cannot be explained unless according to Samuel's or R. Johanan's interpretation, but not according to Rabh, because if it should be according to Rabh's interpretation he would not be liable if even he should break the barrel intentionally, as he had no passage way. (The Gemara, however, says that it can be explained also according

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to Rabh's interpretation, as R. Zbid in the name of Rabha explains it further on.) Said R. Aba to R. Ashi: In the West it was said in the name of Ula that the reason for the statement of the Mishna is that pedestrians are not in the habit of looking around.

Such a case happened in Nahardea, and Samuel held him liable. In Pumbeditha--and Rabba held him liable. It is correct of Samuel, for he follows his theory; but Rabba, shall we assume that he concurs with Samuel? Said R. Papa: It was in a corner of an oil-mill (and it was customary with those who came to the mill to place their vessels outside when waiting for their turn to enter the mill), and because it was customary to place there the vessels the pedestrian had to take care not to break them. R. Hisda sent the following message to R. Na'hman: "It was said (it is the custom of the judges to fine) one who kicks the other with his knees three (selas); one who kicks the

other with the foot, five; one who strikes the other with his fist, thirteen--what is the fine if one strikes his neighbor with the handle of a hoe or with the iron of the hoe?" He returned the following answer: "Hisda, Hisda, you are collecting fines in Babylon; state to me the facts in the case." He then sent him the following facts: There was a partnership water-basin out of which each of the partners irrigated his land every second day. Once one was irrigating his land from the basin when it was not his turn, and when the other one asked him why he did so and the former did not heed him, he struck him with the handle of the hoe. Said he (R. Na'hman) to him (R. Hisda): He would have been justified if he had even struck him a hundred blows, for even according to the one who holds that a man ought not to take the law into his own hands, in cases of loss one may do so, for when one is in the right he need not trouble himself (to go to court). And R. Na'hman says this, according to his theory which was taught elsewhere, that a man may take the law into his own hands even not in case of loss. According to R. Jehudah, however, this is permitted only in case of loss. R. Kahana objected: There is a Tosephtha: "Ben Bag Bag says: Do not enter the courtyard of thy neighbor secretly to take what belongs to you, for fear that he may look upon you as upon a thief, but do so publicly, and tell him that you take your own (in contradiction to R. Jehudah, who holds that one must not take the law into his own hands)." R. Jehudah rejoined: Your support, Ben Bag Bag, is an individual,

and the majority differ with him. R. Janai, however, explained that "take it publicly" means to do so with the *aid of the law*.

Come and hear: If an ox mount another to kill him, and the owner of the latter come along and pull out his own ox, and the former drop on the ground and is killed, he is not liable. Shall we not assume that this is in the case of a vicious ox, in which case there is no loss (for if he had not acted thus, and his ox should have been killed, he would have been paid in full; hence even where there is no loss one may take the law into his own hands)? Nay, it is in case of a non-vicious ox where there is loss (for if he should have waited to be paid by law, he would have received only one half). If so, how is the latter part of the Boraitha: "If, however, he pushed down the ox that mounted, and the ox was killed, he is liable." Now, if it is in case of a non-vicious ox, why should he be liable (there is loss, and he acted according to law)? Because he should have pulled out his own ox and not pushed the other so as to kill him.

Come and hear: "For one who obstructs the court of another by placing there jugs of wine and oil, the owner of the court may break the jugs while going in and out of the court." (Hence we see that one may do so although there is no loss?) Said R. Na'hman bar Itzhak: It means that he may break them while going out to go to court and also when coming in to get his documentary evidence (in case such is necessary; *e.g.*, when there is a dispute as to the ownership of the courtyard).

Come and hear the statement of our Mishna: "One who places a jug," etc., "he is not liable." The reason being that he stumbled over it, but if he broke it without stumbling over he is liable. (Hence we see that even when there is loss [for Rabh explained, above, this to be when the whole thoroughfare has been filled with jugs] no person is allowed to take the law into his own hand.) Said R. Zbid, in the name of Rabha: Nay, the same is the case even if he broke it intentionally, but the reason why he mentioned stumbling is because he had to state in the latter part that if he was injured the owner of the barrel is liable, in which case stumbling is essential, for if otherwise he himself caused his own injury; he mentioned that also in the first part.

Come and hear: "It is written [Deut. xxv. 12]: 'Then shalt thou cut off her hand'; this means that a fine of money shall be imposed upon her." May we not assume that this is only when she could not save herself otherwise? (Hence one may

take the law into his own hands?) Nay, that means when she could do otherwise. Then how is the case when she could not--is she free? If so, instead of the Boraitha stating in the latter part: It is written [ibid. 11]: "If she putteth forth *her* hand," this signifies to exclude the messenger of the court, if he has done a similar thing he is free (from paying for disgrace), let the Boraitha teach that there is a difference also in *her* own act; viz., the case is when she could save herself otherwise, but if she could not she is free? The Boraitha maintains thus: The case is when she could save herself otherwise, but if she could not, her hand is to be considered as a messenger of the court and she is free.

Come and hear: "One who set aside the due corner-tithe at one corner of his field and the poor came and took their due share at another corner, both are considered corner-tithe." Now if you should say that one may take the law into his own hands, let the owner prevent them from taking at another corner by force? Said Rabha: The expression that "both are corner-tithe" means only that both are free from tithe (given to the Levites), as we have learned in the following Boraitha: "One who renounced his ownership to his vineyard and then hastened in the morning and plucked the fruit himself, he must observe *peret* [Lev. xix. 10], *gleanings* [Deut. xxiv. 21], *peah* [Lev. xix. 9], and *forgotten heaves* [Deut. xxiv. 19], but he is free, however, from the Levites' tithe.

MISHNA *II.*: A jug (filled with water) that broke on public ground and its contents cause a person to slip and fall, or one is injured by its fragments, he (the carrier of the jug) is liable. R. Jehudah, however, says, if he break it intentionally he is, otherwise he is not.

GEMARA: Said R. Jehudah in the name of Rabh: It was taught only if he soil his clothes with the contents of the jug, but if he damage his person there is no liability, for the public ground (which has no particular owner) causes his damage. When I stated this before Samuel he said to me: Let us see; as to the liability for damage caused by one's stone, knife, or load (placed on public ground), we deduced it from the "pit" on, public ground, as explained *post*, page 111 (in which the Scripture reads "ox" and "ass"), and in all of them I read "an *ox*, but not a human being"; "an *ass*, but not vessels," and only as far as death is concerned (as the Scripture in this case speaks of death); as to damage, however, if to person there is, but if to

property there is no liability on the part of the one who placed them there. (Hence Samuel's theory is the reverse of that of Rabh.) What has Rabh to say to this? This (that we deduce all that from "pit") is only where he had renounced his ownership from them (as such is the case with the pit on public ground), but if he had not it is still his property (and we deduce his liability from the "ox"). R. Oshyiah objected: (There is a Boraitha:) It is written [Ex. xxi. 33]: "And an ox or an ass fall therein," and we say an *ox*, but not a human being; an *ass*, but not vessels; and from this it was said that if an ox or an ass laden with vessels fell into the pit and they were

broken, he is liable only for the injuries to the animal, but not for the damage to the vessels. Similar to this is his stone, knife, and load placed on public ground that cause damage. Therefore if one break his glass vessels by striking them against the stone so placed, he is liable. Now the first part of the Boraitha would be in contradiction to Rabh, who holds him liable for the vessels also, and the latter part (which treats of breaking glass vessels by striking them against the stone) would contradict Samuel? [Why would this be a contradiction only to those two? Do, then, those two parts of the Boraitha itself not contradict each other? Say, then, that Rabh would explain the Boraitha in accordance with his theory that he renounce ownership, and Samuel according to his theory stated above.]

Now, when we come to the conclusion that one's stone, knife, or load is equal to one's "pit," according to R. Jehudah, who holds that there is a liability for damages done to vessels by falling into a pit, if one strike his bottle against a stone he is liable. Said R. Elazar: Thou shouldst not think that he is liable only when both the stumbling and the breaking were caused by the stone, and not if only the breaking was caused by the stone, as in reality he is liable even in such case, as we concur with R. Nathan's theory (which is explained on page 120).

"*If intentionally*," etc. What means intentionally? Said Rabba, when he intended to lower them down from his shoulders (and while doing so they struck against the wall, he is liable, for his carelessness is considered a deliberate act). Said Abayi to him: Should we infer from this that R. Meir (who is very rigorous) holds that one is liable even if the jug dissolve of itself (although it is an accident)? He answered: Yea, R. Meir holds one liable if even only the handle remained in his hand. Why so? Is this not an accident, and being such, the Scripture frees

him from liability, as it is written [Deut. xxii. 26]: "But unto the damsel shalt thou not do anything"? And if you should say that this is only as regards capital punishment, but as regards damages one is liable, have we not learned in a Boraitha: "If his jug break and he fail to remove the fragments, or if his camel fall and he fail to raise it, R. Meir holds him liable for the damage they cause; the sages, however, hold that he is free from human justice and is liable only to heavenly justice; and the sages concede to R. Meir, where one places his stone, knife, or load on the top of a roof, and they are blown down by an ordinary wind and do damage, that he is liable; on the other hand, R. Meir concedes to the rabbis that, where one places jugs on the roof in order that they should dry, and they are blown down by an extraordinary wind and do damage, he is free" (because it is an accident; hence even according to R. Meir damages by an accidental act are excusable)? Therefore said Abayi: They differ (in our Mishna) in two cases: during the falling and after the vessels rested upon the ground; one holds that for stumbling while falling he is liable for carelessness, and the other one holds that it is an accident. And they also differ after the resting of the vessels, in case he renounce his ownership to the articles which caused the damage; one holds him liable even in such a case, and the other one holds him free. And wherefrom is such a theory? From the fact that the Mishna mentions two cases, viz.: "If he slipped on account of the water, *or* he was injured by the fragments," which is practically one and the same thing, we must say then that it means either when he slipped on account of the water while falling or that he stumbled over the fragments after they rested. But how is it with the above Boraitha, can you apply also to it the same interpretation? This would be correct regarding the jug containing water, but how can we find the above two cases in regard to the camel, as you cannot hold one liable for the stumbling of his animal, even in a case where one is held liable for his own stumbling; and if there should be a liability it should be only in one case,

namely, if he renounced his ownership to the carcass? Said R. A'ha: It can be explained that the camel stumbled by reason of the overflow of a river. How is the case? If there was another way, then he is surely liable; if there was no other way, is it not accident? Therefore it must be explained thus: that he himself stumble first and the camel stumble over him, in which case his stumbling is considered

carelessness. But (according to R. Jehudah, who requires intention in our Mishna in case one renounce ownership from his articles which caused damage) what intention can there be so that he should be held liable? Said R. Joseph, and so also said R. Ashi: If his intention was that he should regain ownership of the fragments. R. Elazar also holds that they differ even during the falling and concurs with Abayi's theory stated above.

R. Johanan, however, said that they differ only as to after they rested, and he comes to teach us that only in this particular case the rabbis freed him from liability if he renounced his ownership to the articles which caused the damage because it was accidental (but where there is no accident he is liable for renouncing his ownership).

It was taught: "One who renounces ownership to his articles that cause damage, R. Johanan and R. Elazar: one holds him liable and the other holds him free." Shall we assume that the one who holds him liable is in accordance with R. Meir and the other one is in accordance with the rabbis? Nay, as to R. Meir, all agree (that he is liable); they only differ as to the rabbis: the one who holds him free concurs with the rabbis, while the one who holds him liable may say: I say that even the rabbis who held him free do so only in the case of an accident, as stated above, but in other cases they also held him liable. There is ground for the supposition that it is R. Elazar who holds one liable. (See Pesachim, page 8, line 22, "Two things," etc.) Have we not heard from him concerning the following Mishna (above, page 30, end): "One who stirs up manure," etc., that it is so only in case he had an intention to claim it is his own, but otherwise he is not; hence we see that Elazar holds that if one renounce ownership to his articles which caused damage he is exempt. Said R. Adda bar Ahba: The case here is that he restored it to its original position. Said Rabbina: The case as explained by R. Adda bar Ahba is similar to one who finds an uncovered pit and he covers it and then again removes the cover (in which case he is not liable, for it is considered as if he never had anything to do with it). Said Mar Zutra, the son of R. Mari, to Rabbina: I fail to see any similarity. In the case of the pit the former act (the uncovered pit) is still as it was, while in the case of manure the act of the first one is no more in existence (because the place it first occupied is now vacant). If it has any similarity to a pit it is in case one find

an uncovered pit and stuff it up, and then again dig it out, in which case the former act disappears entirely and is wholly his work (and therefore he is liable). Therefore said R. Ashi that the case of manure was that he stirred it up less than three spans (and therefore it is considered no stirring up at all [because of *Lavud*; see Sabbath, page 12], and whereas he had no intention of exercising any act of ownership, it cannot be considered his property, and if we cannot hold him liable as being his property, we can also not hold him liable for digging a pit). And why does R. Elazar force himself to explain it where he stirred it up below three, and the reason is only because he intended it as an act of claiming ownership, but not otherwise; let him

explain it that it was above three, and although there was no intention of claiming ownership he is nevertheless liable? (Because he holds that one who renounces ownership to the articles which cause damage is liable.) Said Rabha: He did so because of the phraseology of the Mishna, viz.; Why "stirred" up--why not "lifted" up? Hence that "stirring" means below three spans.

Now when we come to the conclusion that it is R. Elazar who holds him liable, then it is R. Johanan who holds him free. Does then R. Johanan really hold so? Did he not say elsewhere that the Halakha prevails as an anonymous Mishna, and there is such a Mishna: "One who digs a pit on public ground and an ox or an ass falls into it and is killed, he is liable"? We must, therefore, say that R. Johanan holds that he is liable. Now, on the other hand, if R. Johanan holds that he is liable, then R. Elazar holds that he is not; but has not R. Elazar said in the name of R. Ishmael (Pesachim, page 8, "Two Things," etc., hence, that he holds that he is liable? These present no difficulty. What is stated here is his own, and that in Pesachim, is his teacher's opinion.

MISHNA *III*: One who empties water into public ground and causes injuries thereby, he is liable for the injuries. One who hides away a thorn or glass, or one who builds his fence of thorns, or a fence that falls in into public ground and some persons were injured thereby, he is liable for the damage.

GEMARA: Said Rabh: It was taught only if his vessels were soiled, etc. (see page 60). Said R. Huna to Rabh: If this should be considered even his mud (he ought to be liable)? Rejoined Rabh: Do you understand that the water was not absorbed? I mean when it *was* absorbed, and yet he injured himself

by the collected earth, and therefore there is no liability, for he should have been careful.

[Why did Rabh repeat his statement here? He said that already in connection with the preceding Mishna.] This was necessary: Once as to the sunny season and once as to the rainy season, and it is in accordance with the following Boraitha: "Although it is permitted during the rainy season to empty refuse-pipes and clean excavations, still it is not permitted to do so during the sunny season; and even in the rainy season, although they do it with permission, they are liable for the damage they cause."

"*One who hides away*," etc. Said R. Johanan: It was taught only in case it is jutting out, but if it is pressed in he is free. Why is he not liable even when it is pressed in? Said R. A'ha, the son of R. Ika: For the reason that it is not the custom of man to rub against the wall. The rabbis taught: One who hides away his thorns or glass in the wall of his neighbor, and the owner of the wall comes along and pulls down the wall and the thorns or glass falls into the public ground and does damage, the one who hid them away is responsible. Said R. Johanan: This is the case where the wall was in bad condition, but where the wall was in good condition the owner of the wall only is liable. Said Rabhina: It is to be inferred from this that if one covers his well with the pail of another, and the owner of the latter comes along and carries away his pail, the former is liable (if some accident occurs). Is this not self-evident? Lest one say that because the owner of the wall did not know who hid the thorns and could not inform him to remove them, therefore he is free; but in case of the well, as the owner of the pail knows him, he should have informed him that he took away the pail, and therefore the owner of the well should be free--he comes to teach

us that there is no difference.

The rabbis taught: The former pious men used to bury their thorns and broken glass in their fields three spans below the surface in order that they should not interfere with the plough. R. Shesheth used to burn them. Rabha used to throw them into the (river) Chiddekel. Said R. Jehudah: One who wishes to be pious should observe the laws of damages. Rabhina said: He should observe the teachings of the fathers (which were enumerated in the first tract of this section).

MISHNA *IV.*: One who places straw or hay on public ground in order to convert them into manure, and some pedestrian

sustains injury through them, he is liable; and the one who takes possession of them first is entitled to them. R. Simeon b. Gamaliel says: All those who obstruct a public thoroughfare by placing chattels therein and cause damage are liable; and the one who takes possession of them first is entitled to them. One who stirs up manure on public ground and a pedestrian sustains injury thereby is liable.

GEMARA: Shall we assume that our Mishna is not according to R. Jehudah of the following Boraitha: "R. Jehudah says: During the season of conveying manure one may remove his manure to the public highway and collect it there for thirty days in order that it should be trodden by man and animal, for on this condition did Joshua distribute the land"? It can be explained that R. Jehudah concedes that nevertheless he is liable for the damage.

(There is an objection.) Come and hear: "All those of whom it was said that they may obstruct the public highway, if they do damage they are liable; according to R. Jehudah, however, they are not." Said R. Na'hman: Our Mishna treats of the season when the manure is not conveyed, and it is according to R. Jehudah. R. Ashi, however, says: Our Mishna states "straw" and "hay" (which means before they were converted into manure, and the reason is) because they are slippery.

"*The one who takes possession of them*," etc. Rabh said: This applies to both the original substance as well as to its improvement. Zëira, however, holds that it applies to the improvement only. What is the point of their difference? Rabh holds that the original substance is also to be confiscated (as a fine) because of the improvement, and Zëira holds that only the improvement is to be confiscated. There is an objection from the clause of our Mishna: "One who stirs up manure," etc., and does not mention that the one who takes possession of it first is entitled to it. (Hence it contradicts Rabh.) Said R. Na'hman bar Itzhak: You quote a contradiction (to Rabh) from the subject of manure. In cases where there can be an improvement (*e.g.*, straw) the original substance was also subjected to the rule as a fine, but where there can be no improvement (*e.g.*, manure) there is no fine at all.

The Schoolmen propounded a question: According to the one who holds that the original substance is to be fined because of the improvement, is it to be fined at once or only after the improvement has taken place? This can be inferred from the fact

that it was attempted to contradict Rabh from "manure(which does not improve; hence that he is to be fined at once). What answer is this "Did not the Schoolmen propound their question after they heard of R. Na'hman's answer, and nevertheless they were doubtful? Shall we assume that in this case the Tanaim of the following Boraitha differ? "One who removes his straw and hay to a public highway to convert it into manure, and a pedestrian sustains injuries, he is liable, and the one who takes possession of them first acquires title to them, and if one takes them it is considered robbery. Rabban Simeon b. Gamaliel, however, holds that all those who obstruct a public highway and cause damage thereby are liable to pay the damage, and the one who lays his hand upon the articles of obstruction first acquires title to them, and it is not considered robbery." Let us see. How is this Boraitha to be understood? It reads that the one who lays his hand on the articles of obstruction first acquires title to them, and immediately thereafter it states that the one who takes them is guilty of robbery. It must, therefore, be explained thus: "One who lays," etc., acquires title to the improvement, but the original substance is prohibited as robbery, and R. Simeon b. Gamaliel, however, says the same is the case also with the original substance. According to Zëira surely the Tanaim differ in this case, but according to Rabh do they also differ? Rabh may say that all agree that the fine applies to the original substance on account of the improvement, but in what they differ here is, whether this Halakha should be put into practice or not. As it was taught: "R. Huna said in the name of Rabh: The Halakha is so, but it is not applied in actual practice. R. Adda bar Ahbah, however, holds that it is applied in practice." But this is not so, for R. Huna once declared peeled baley (placed by one on public ground to dry it) ownerless, R. Adda bar Ahbah did the same with date-husk. It was correct for R. Adda bar Ahbah, as he followed his theory (stated above), but shall we assume that R. Huna retracted from his statement above? Nay, in this case the owners were warned (several times).

MISHNA *V.*: Two potters (each carrying pottery) that walked, one following the other, and the first stumbled and fell, and the second stumbled over the first and also fell, the first one is liable for the damages of the second.

GEMARA: Said R. Johanan: It is not to be said that our Mishna is only according to R. Meir, who holds that stumbling

is considered wilful and therefore he is liable, but even according to the Rabbis who hold that it is an accident and he is free. Here, however, the case is different for he had to get up (at once) and he had not done so. R. Na'hman bar Itzhak, however, holds that if he even could not get up he is liable, because he had at least to give warning to the other, which he had not done. R. Johanan, however, denies this theory, for if he could not get up he could also not give warning (because of his excitement).

There is an objection from the following Mishna: "If one carrying a barrel followed one carrying a beam, and the barrel was broken by the beam, he is free, but if it broke because the carriers of the beam stopped, he *is* liable." Is it not to be assumed that he stopped in order to place the beam on the other shoulder, which is usually done, and still it is said that he is liable, because he should give warning? Nay, he stopped to rest. But how is it in the former case, is he free? Then the Boraitha should state that it is only when he stopped to rest, but if to place it on the other shoulder he is free. Why then does it state in the latter part that he is free only if he told him to

stop with the barrel? With this he comes to teach us that, although he stopped to rest, if he called to him to stop he is free.

Come and hear: "Potters and glaziers that walked, one following the other, and the first one stumbled and fell, and the second one stumbled over him and the third over the second one, then the first is liable for the damage of the second and the second is responsible to the third. If, however, they all fell on account of the first one, he is responsible for the damage of all; but if they warned each other they are not responsible." Is this not so even if they could not get up? Nay, they could get up, and it comes to teach us that even in such a case when they warned each other they are free.

Said Rabha (in explanation of the above Boraitha): "The first one is liable to the second one for both injuries to the person and to property. The second, however, is liable to the third one for personal injuries only." [How is this to be understood?] If stumbling is considered a wilful act, let the second one also be liable; if, on the other hand, stumbling is considered an accident, then let the first one also be free. The first one is considered wilful as it is equal to a "pit on public ground," in which case the digger is liable for both injuries to the person

and to property; the second, however, who is considered as if he himself has fallen into the pit (because of the stumbling of the first) can be liable only for personal injuries because he did not get up in time, but not for damages to property, as he can say that he did not dig the pit.

The Master said: If they all fell because of the first one, the first is liable for the damage of all of them. How was the case? R. Papa said: He obstructed the way (crosswise) like a carcass (which obstructs the whole way). R. Zbid, however, said: If such should be the case the first one would not be liable for the damages of the third, who should be careful, seeing that the second one stumbled over the obstruction of the whole thoroughfare; therefore he maintains that the first one fell diagonally and did not obstruct the whole thoroughfare, and the third one in his intention to walk on the unobstructed portion of the thoroughfare did not see the stumbling of the second and stumbled over him. [1]

MISHNA *VI.*: If one was coming from one side of the street carrying a barrel, and the other one was coming from the other side carrying a beam, and the barrel was broken by the beam, there is no liability, as both had the right to go each his way (and the carrier of the barrel should be careful not to collide with the beam). The same is the case when the carrier of the barrel followed the carrier of the beam. If, however, the carrier of the beam stopped (without any reason), and the carrier of the barrel while walking broke it by striking against the beam, he is liable; if the carrier of the barrel was told to stop by the carrier of the beam he is free. If the carrier of the barrel was preceding, and the carrier of the beam was behind him and broke his barrel by colliding with the beam (although unintentionally), he is liable (because of carelessness); if the barrel carrier stopped, he is free; but if he told him to stop and the beam carrier did not heed him, he is liable. The same is the case with one carrying fire and the other hemp.

GEMARA: Rabba bar Nathan questioned R. Huna: When one injures his wife by having intercourse with her, how is the law: is he free because he has done it with permission, or is he

nevertheless liable because he had to look out for her health? And he answered: This we have learned in our Mishna: "He is free, as both had the right to go each his way." Said Rabha to the latter: Is there not to be drawn an *a fortiori* conclusion from a wood [Deut. xix. 5] in which case both had permission to enter, and nevertheless when one was injured or killed, it is considered that the defendant entered the plaintiff's premises, and he is responsible or guilty; so much the more here it must be considered that he entered upon her premises and injured her? [But did not the Mishna state that each of them had permission to go his way? There is no similarity. In the case of the Mishna both had equal permission, and each of them did the same thing the other did, but here only he acted but she did nothing. Is that so? Did not the Scripture say plainly [Lev. xviii. 29]: "Even the souls that *commit* them shall be cut off"? Hence we see that the Scripture considers the female also as acting. There both of them derive pleasure and therefore are punished, but here the act is only his.] Resh Lakish said: If there were two cows on public ground, one of which was lying and the other one walking, and the latter kicked the former, she is not liable; if, however, the reverse was the case she is liable. (This was explained above, page 50.)

MISHNA *VII.*: Two that were on public ground, one running and the other one walking (ordinarily), or both of them running, and they injured each other, both are free.

GEMARA: Our Mishna is not according to Issi b. Jehudah of the following Boraitha: "Issi b. Jehudah says: The one who was running is liable, for it is uncommon. He, however, con. cedes that if it was on the eve of Sabbath in twilight, that he is not liable, for he is permitted at that time to run (and therefore it is considered common)." Said R. Johanan: So the Halakha prevails. But has not R. Johanan said elsewhere that the Halakha prevails according to an anonymous Mishna, and our Mishna (which is anonymous) states not so? The case in our Mishna is to be explained in that it speaks of the twilight on the eve of Sabbath, from the fact that it states, "or they were both running they are free." Then without the above explanation it would be superfluous after the statement that if even only one was running, etc., for it is self-evident that if both were running that so much the more they ought to be free; therefore the Mishna must be considered as incomplete, and should read thus: If one was running and the other one was walking, there is no

liability, when the case was in the twilight of the eve of Sabbath; on a week day, however, the one running is liable; if both were running they are free, even on a week day.

The Master said: "And Issi concedes that if it was in the twilight of the eve of Sabbath he is free, for he did so with permission." What is the permission? It is according to R. Hanina, who used to say: Come with us to meet the bridal queen. And according to others, "to meet the Sabbath bridal queen." R. Janai used to get up, enwrap himself and say: Come bride, come bride! (Hence it is a merit to run at twilight on the eve of Sabbath to meet the Sabbath.)

MISHNA *VIII.*: One who chopped wood on public ground and caused damage on private ground, or *vice versa*; or on his own private ground, and has done damage on another's private ground, he is in either of those cases liable.

GEMARA: And all the three cases were necessary to be mentioned, for if the Mishna should state the case of one who chopped wood on his own private ground, and did damage on public ground only, one might say that the liability is because on a public thoroughfare there are usually many passers-by; but if *vice versa* there is no liability because on private premises there are not many people. And if it should state the case of public to private ground only, one might say that the liability is because he had no right to chop wood there, and as he did that without permission he is liable, but from private to public ground, where he had a right to do so, there is no liability even if it caused damage on public ground. And if it should state these two cases only, still one might say that in one case he is liable, for he has done it without permission, and in the other case because there are many persons, but from one private ground to another, where usually not many people are, and each owner is permitted to do such a thing on his own premises, there is no liability, therefore it was necessary to mention all. The rabbis taught: "One who enters a carpenter's shop without permission, and was struck on his face by a flying splinter and died, there is no liability. But if he entered with permission the carpenter is guilty." Guilty of what? Said R. Jose b. Hanina: It means the liability to pay the four certain things, but he is free from banishment, for it is not equal to the case of a forest, which is considered the ground of every one who enters it, but in this case he entered his neighbor's estate. Said Rabha: Is not the following *a fortiori* conclusion to be drawn here: A

forest, where each one enters by his own will (without the permission of the other), still it is considered as if he entered by the request of the other, and he is to be banished in case he kills one unintentionally); in the case at bar, where he decidedly enters by the request of the other, shall he not so much the more be banished? Therefore we must explain the Boraitha thus: He is free from banishment means that this alone would not be sufficient, and the reason of R. Jose b. Hanina is that it is such an act of negligence that almost amounts to an intentional act (for he should look out).

An objection was raised from the following: "One who throws a stone into a public ground and kills some one, he is to be banished." Is *this* not such a negligent act as almost amounts to an intentional act, for he had to have in mind that on public ground people come and go, and still it says that he must be banished. Said R. Samuel bar Itzhak. The case is that he was tearing down his wall and threw the material into rubbish in the daytime. What was the nature of this rubbish? Was it such rubbish as people are likely to be about, then it is intentional? If not, then is it an accident? Said R. Papa: The case is that it was rubbish that people do their necessities thereon in the night-time, but not in the daytime, but still it may happen that some might do so in the daytime; it cannot be considered an intentional act, for it is uncommon to do so in the daytime, and, on the other hand, it is also not an accident, for it may happen.

R. Papa in the name of Rabha explained that R. Jose b. Hanina's statement has reference to the first part only, viz.: "One who enters a carpenter's shop without permission, and was struck in the face by a flying splinter and died, the carpenter is free." Said R. Jose b. Hanina: He is liable to pay the four things, but he is free from banishment (and the difference is thus): That he who explains that it refers to the latter part of the above Boraitha, so much the more as to the first part; but according to R. Papa, he who explains that it refers only to the first part, in the latter part where be entered by request he is to be banished. Is that so? Have we not learned in the following Boraitha: "One who enters a blacksmith's shop and was struck by an escaping spark

and died, there is no liability, even if he entered with permission"? The case here is that it was the blacksmith's apprentice. Assuming that it is so, may he be killed? It was that his employer insisted that he

should leave the shop, and he did not do so. Supposing it so, may he be killed? The employer thought that he did leave. If so, then any person would come under the same rule. In the former case the apprentice usually obeys his employer (and therefore the blacksmith assumed that he left when being told to do so), but in the case of a stranger the blacksmith should look around and see whether the stranger did leave or not.

R. Zbid in the name of Rabha supported the above statement by the expression of the verse, viz. [Deut. xix. 5]: "It (the iron) found," [1] but not when be *makes* himself found to the iron. From this R. Eliezer b. Jacob said: One who drops out of his hand a stone, and another one puts out his head and is injured by it, he is free. Said R. Jose b. Hanina: He is not to be banished, but he must pay the four things.

He who applies the explanation of R. Jose to the last case self-evidently holds that it also applies to the former case, and he who applies the explanation to the former case, in the last case may say that he is wholly free.

The Rabbis taught: Employees who came to demand their wages from their employer, and were gored by his ox or bitten by his dog, to death, he is free. Anonymous teachers, however, hold that employees have the right to demand their wages from their employer (and therefore he is guilty). How is the case? If the employer usually comes to town, what reason have the anonymous teachers for their assertion? If, on the other hand, he can be found only in the house, what is the reason of the first Tana? It is in a case where he is not certain, and the employee when knocking on the door or gate is told "In"; one holds that "in" means "come in" (and therefore they had the right to enter), and the other one holds that "in" means "stay where you are (and I will come out to you)." There is a support to the latter construction of "in" from the following Boraitha: "An employee that entered to demand his wages from his employer, and he was gored by his ox or was bitten by his dog, he is not guilty although he entered with permission." Why so? We must say that it means that when knocking on the door or gate he was told "in," and he meant that he had permission to enter, but in reality "in" meant only "stay where you are (and I will come out to you)."

MISHNA *IX*.: Two non-vicious oxen that wounded each

other: the one who is hurt the most is to be paid one-half of the amount of the value of difference of the injuries. If both are vicious the *full* amount of difference of the injuries is to be paid. If one is non-vicious and the other vicious: if the vicious one injured the non-vicious more than he himself was injured he pays the full amount of the difference, if the reverse is the case only one-half is paid. So also if two men wound each other, the one who hurt the most must pay the full amount of the difference.

A man who hurt a vicious ox and was also hurt by the ox, or when the reverse was the case, the full amount of difference is to be paid. If the case was with a non-vicious ox the man pays the full amount and the ox pays the half. R. Aqiba, however, says: Even if the ox was non-vicious, the full amount is to be paid.

GEMARA: The rabbis taught: It is written [Ex. xxi. 31]: "According to this judgment shall be done unto him." That means that as the judgment when two oxen gore each other, so also shall it be when an ox gores a man. As in the former case a non-vicious ox pays one-half and a vicious one the full amount; the same is the case if it gored a human being. R. Aqiba, however, says: "According to *this* judgment" means that the judgment just mentioned applies to man, but not to the preceding case. Shall we assume that it must be paid from the best estates? Therefore it is written [ibid., ibid.]: "Shall be done unto *him*," which means that he pays only from the body of the ox, but not from the best estates.

MISHNA *X*.: An ox of the value of one hundred selas that gored another one of the value of two hundred, and the carcass was worthless, the plaintiff takes the ox (*i.e.*, one-half of the damage).

GEMARA: Our Mishna is in accordance with R. Aqiba of the following Boraitha (which treats of the same case, and teaches): "The ox shall be appraised in court, and if he is worth one-half of the killed one the plaintiff may take him." Such is the dictum of R. Ishmael; R. Aqiba, however, holds that the plaintiff takes the ox without any appraisement. On what point do they differ? R. Ishmael holds that the plaintiff becomes a creditor, and his demand is money, and it must be assessed by the court, and R. Aqiba holds that the plaintiff becomes a partner to the defendant, and they differ as to the explanation of the following passage [Ex. xxi. 35]: "Then they shall sell the live ox and divide his money, and the dead ox also

they shall divide." R. Ishmael explains that it means that this shall be done by the court, and R. Aqiba maintains that the passage makes the parties partners, if both oxen were of equal value; if, however, the goring ox was worth half he belongs -it once to the plaintiff. What is still the difference? When the plaintiff has consecrated him (according to R. Aqiba he is sacred, and according to R. Ishmael he is not until awarded to the plaintiff by the court). Rabha questioned R. Na'hman: If the defendant sold the ox, how is it, according to R. Ishmael, who holds him to be a creditor, is the sale valid? Or perhaps because the ox becomes subject to the appraisement of the court it is not valid? He answered: The sale is not valid. But have we not learned in a Boraitha that it *is* valid? He may recover him. If it is so, what is the validity of the sale? In case the vendee used him in the meantime in ploughing he need not pay for it. Then infer from this that if a borrower sells his personal property the Beth Din can recover it for the benefit of the lender. Nay, from this case in which the Scripture made the ox hypothecary nothing can be inferred.

R. Ta'hlipha, of Palestine, taught in the presence of R. Abuhu: If he sold him it is invalid, but if he consecrated him it is valid. Who sold him? The defendant, and all agree that the sale is not valid, because even according to R. Ishmael be is still subject to the appraisement in court, and if he consecrated him all agree that he is sacred, because even according to R. Aqiba, who holds that he belongs to the plaintiff without any appraisement, a sacred thing is different by reason of the statement of R. Abuhu, who said that it was so decreed for fear that it might be said that consecrated things become ordinary without being redeemed.

The rabbis taught: "A non-vicious ox that has done damage, if he was sold, consecrated, slaughtered, or presented to somebody, the act is valid if it was done before the rendition of judgment; if, however, either of these things were done after rendition of judgment, it is null and void. If the creditors levied upon the ox, whether the damage was done before or after the recognition of the court of the debt the levy is void, for the damages in case of a non-vicious ox are paid from his body only. In case of a vicious ox all the above acts of his owner are valid without regard whether it was done before or after rendition of judgment, and even the levy of creditors is valid regardless of whether the damage was done before or after

recognition, for the reason that damages in case of a vicious ox are paid from the best estates only.

The Master said: "If sold it is valid, as far as the non-payment for the ploughing he has done; if it was consecrated it is valid for the reason stated by R. Abuhu; and if slaughtered or presented to somebody the act is valid." It would be correct as to presenting, because it means as far as the value of ploughing is concerned, but in case he was slaughtered, why should not the damage be collected from the value of his meat? Have we not learned in a Boraitha: "It is written: 'The *live*.'" Whence do we know that if even it was slaughtered? Therefore it is written: "And they shall sell the ox," which means in whatever state he is? Said R. Shizbi: This (that the act is valid) was necessary only as to the reduction in value on account of being slaughtered (*i.e.*, the owner of the ox need not pay the amount of such reduction).

The rabbis taught: "An ox of the value of two hundred zuz that gored another ox of the same value, and injured him to the extent of fifty, and the injured ox then improved and became of the value of four hundred, although it is possible that if not for the injury he would have improved still more, and would have become of the value of eight hundred, still he pays him only as at the time of the injury (one-half of fifty zuz); if, however, the injured ox became lean and decreased in value, he pays him according to the value at the time of the trial. If the ox who caused the injury improved, he pays him as at the time of the injury; if he decreased in value, as at the time of the trial. On account of what was that leanness of the plaintiff's ox? If it was on account of work done with him by the plaintiff, let the defendant say, Why should I suffer for the decrease in value caused by you? Said R. Ashi: The case is that the leanness was caused by the blow, in which case the plaintiff can say the horn of your ox is still impressed (in my ox) and this caused leanness.

MISHNA *XI.*: An ox of the value of two hundred that gored another ox of equal value and the carcass was of no value whatever. R. Meir holds that of such a case it is written [Ex. xxi. 35]: "Then shall they sell the live ox and divide his money." Said R. Jehudah to him: So the Halakha prevails in reference to the passage cited by you, but how is the last part of this passage [ibid., ibid.]: "And the dead one shall they also divide"? This can apply to a case where the carcass of the ox

(which ox was of the same value as the goring ox) is still worth fifty Zuz, in which case each

takes one-half of the live and one-half of the dead ox.

GEMARA: The rabbis taught: "An ox of the value of two hundred zuz that gored an ox of equal value and the carcass was worth fifty, each one takes one-half of the live and one-half of the dead ox, and this is the case of the ox intended by the Scripture." Such is the dictum of R. Jehudah. R. Meir, however, holds this is not the ox intended by the Scripture, but it is where it is as stated in the beginning of the Mishna, and the provision of the passage that "also the dead ox shall they divide" is carried out by appraising how much the carcass is worth less than when the ox was alive, and one-half of that difference (seventy-five zuz) is paid to the plaintiff from the live ox together with the carcass. If it is so, then, according to both, if the carcass is worth fifty each of them gets one hundred and twenty-five, as even according to R. Jehudah, who divides both oxen between them, the share is only one hundred and twenty-five, what is the difference between them? Said R. Johanan: The difference is as to the increase in value of the carcass (since the time of the injury). R. Meir holds that it belongs wholly to the plaintiff, and R. Jehudah holds that they are considered partners, and each takes one-half. And this was because there presented itself a difficulty to R. Jehudah: If you say that the Scripture sympathized with the defendant and meant that he should share in the improvement (of the carcass), would you say in case of an ox worth five selas (twenty zuz) that gored an ox worth one hundred and the carcass is worth fifty zuz, that they also must divide equally the live and the dead ox (and so the defendant will still profit in that, because the one-half carcass is worth twenty-five zuz, and half of the live is worth ten zuz, which makes thirty-five zuz, while the value of the defendant's ox was only twenty zuz), and where do we find such a case wherein the defendant should still profit? And furthermore, is it not written plainly [ibid. 36]: "He shall surely pay," which signifies that the defendant *pays*, but should not profit. [For what purpose is this additional passage adduced? Lest one say that he pays only where the plaintiff does actually suffer damages, but where he does not, as, for instance, an ox worth five selas that gored an ox of equal value, and the carcass was worth six selas (by increase in price, in which case the plaintiff profits), in such a case the defendant may profit, therefore this

passage is adduced to show that the defendant should always pay but never profit.] Said R. A'ha bar Ta'hlipha to Rabh: If it is so, then according to R. Jehudah, who insists upon the division of both, we find instances according to him that a non-vicious ox pays more than one-half, and the Scripture provides expressly [ibid. 351: "Then shall they sell the live ox and divide his money" (*e.g.*, when an ox worth fifty gored one worth forty, and the carcass was worth twenty, then the damage amounts to twenty, and if the plaintiff take one-half of the live ox which is twenty-five, and one-half of the carcass which is ten, he would receive altogether thirty-five, which is more than one-half of the damage). Nay, R. Jehudah also holds of the rule that the difference should be divided and deducted from the live one. Whence does he deduce it? From [ibid., ibid.]: "And the dead ox also they shall divide." But does not R. Jehudah deduce from this passage that each takes one-half of the dead and one-half of the live one? The passage could read: "And the dead ox they shall divide." Why "and the dead ox *also*"? To infer both.

MISHNA *XII.*: There are cases when one is liable for the acts of his ox and is free if they are his own acts, and *vice versa*. How so? If one's ox cause disgrace the owner is free, [1] but if he himself did so he is liable. If his ox blinded the eye of his slave or knocked out his teeth the owner is not liable (*i.e.*, the slave is not to be manumitted), but if he himself did it he is. If his ox wounded one of his parents he is liable, but if he himself had done so he is free; and the same is

the case when his ox set fire to a barn on Sabbath he is liable, while if he himself did so he is free, for in both last cases he is guilty of a capital crime.

GEMARA: R. Abbuhu taught in the presence of R. Johanan: All those whose acts are of a destructive nature are not liable (as regards the observation of the Sabbath), except those who wound and set fire. Said R. Johanan to him: Go and teach this outside of the college (*i.e.*, such a statement is not to be respected by the college), as those two mentioned are no exceptions (and are also of destructive nature); they can only constitute exceptions in case of the wounding (of an animal when he needed the blood) for his dog, [2] and in case of fire when he needed

the ashes (*i.e.*, when the act was done with an intention to derive benefit from the things acted upon).

There is an objection from our Mishna: "An ox that set fire to a barn," etc. And as the Mishna equals the owner to his ox, is it not to assume that as the ox had no need of the fire so also had the owner none, and still it is stated that he is free (civilly) because he is guilty of a capital crime (hence we see that setting fire on Sabbath is an exception)? Nay, the equality is in the reverse; that is, as the owner did it with some purpose, so also did the ox. How is this possible of an ox? Said R. Avia: It may be explained that it was an intelligent ox that had an itch on his back, and he started the fire in order to roll in the ashes. But whence do we know that this was his intention? From the fact that he really did roll in the ashes. Are there such intelligent oxen? Yea, there are, as there was an ox that belonged to R. Papa, who when he once suffered from toothache removed the cover from the beer barrel and drank from the beer to be cured.

Said the rabbis to R. Papa: How can you say that the equality is that the ox imitated the owner? Does not the Mishna state that if his ox cause disgrace he is free, but not if he himself: now can an ox have such intelligence as to intend to disgrace? Yea, for instance, when he intended to do damage (but caused only disgrace), in which case the Master said elsewhere, if he intended to do damage but caused only disgrace, he is liable.

MISHNA *XIII.*: An ox that ran after another ox, and the latter was injured, the plaintiff claims that the ox injured him while the defendant claims that it was not so, but that the injury was caused by rubbing against a stone: the rule is that the burden of proof is upon the plaintiff. If two oxen having different owners were running after a third, each of the defendants claiming that the other one's ox caused the injury, both of them are free; if the two oxen belonged to one person both are liable (as explained further on); if one ox was a big one and the other a small one, the plaintiff claims that the big one caused the injury while the defendant claims that the small one caused it (the difference being that the big one is of sufficient value to pay the half damage while the small one is not); or if one was non-vicious and the other vicious, the plaintiff claiming that the vicious one did the injury, and the defendant claiming that the non-vicious did it, the burden of proof is upon the

plaintiff. If the defendant's oxen were two, one a big one and the other a small one, and so also were the plaintiff's oxen, the plaintiff claims that the big one injured his big ox and the small one

injured the small ox, and the defendant claims that the reverse was the case (so as to reduce his payments); or when one was a non-vicious and the other one a vicious one, the plaintiff claims that the vicious one injured the big one and the non-vicious the small one, while the defendant claims that it was not so, but that the non-vicious injured the big one and the vicious the small one, the burden of proof is upon the plaintiff.

GEMARA: Said R. Hyya bar Abba: This statement (in the Mishna, that the plaintiff has the burden of proof) shows that Summachus' companions differ with him, for Summachus holds (*post*, page 106) that money, the ownership of which is doubtful, must be divided among its claimants. Said R. Abba bar Mamel to R. Hyya bar Abba: Does then Summachus hold so even if both of them claim to be positive in their statements? He answered: Yea. And whence do we know that our Mishna also speaks that both claim to be positive in their statements? Because it teaches plainly: One party says: *Your* ox; and the other party says (positively): *Not so*. R. Papa opposed: According to your explanation that both claim to be positive in their statements, the last part must naturally also treat of such a case; then how is it to be understood: If one was a big one and one was a small one, etc., the plaintiff has the burden of proof; how would be the law if he does not prove: he takes according to the statement of the defendant? Would this not be in contradiction to Rabba bar Nathan, who says that where one party claims to have sold another party wheat, and the other party admits to have bought of him barley, that the latter is free (and according to the above rule the seller would be entitled to recover for barley)? We must, therefore, say that the case is when one claims that he is positive, while the other one is not positive. Let us see who claims that he is positive. Shall we assume that the plaintiff claims that he is positive and the defendant does not, then there will still be a contradiction to Rabba bar Nathan. We must, therefore, say that the plaintiff does not claim that he is positive while the defendant does so (and therefore he claims his damages from both, and if he does not prove his assertion he recovers only according to the defendant's statement). Now as the latter part speaks of a case where the plaintiff was uncertain and the defendant was certain, the

same must be the case in the first part of the Mishna, and even Summachus holds to his theory, because if not it was not necessary for the Mishna to teach this case. Nay, in the latter part of the Mishna the plaintiff is not positive and the defendant is positive, and in the first part the reverse is the case.

But after this explanation the first part and last part treat of different cases; then could you not explain that the first part speaks where both were positive (and only then Summachus says that the money should be divided), and the last part treats where one is positive and the other is not (in which case Summachus does not oppose). It can be said: Certainty and uncertainty in the first part, and uncertainty and certainty in the other part is still one and the same case, but if both assert certainty in one case and certainty and uncertainty in the other case, there are two different things, and if the Mishna should mean so it would state so plainly.

"*Both are liable*." Said Rabha, of Pharsika, to R. Ashi: Infer from this that if non-vicious oxen cause damage the plaintiff may collect his damages from any one of them. Nay, the case in the Mishna is that both oxen were vicious. Said R. A'ha the elder to R. Ashi: If the case were that they were vicious, why is it stated that *both* are liable? It ought to be "*he*" (the man) is liable, meaning the owner (as the damage is paid from the best estates). We must, therefore, say that the case is that they were non-vicious, and it is according to R. Aqiba, who holds that they (the

parties) are considered partners, and the reason here is that both oxen are on hand, in which case he cannot shift the responsibility upon the missing ox, but where one of them is missing the defendant may say to the plaintiff: Prove that *this* ox has done the injury, and I will pay you.

Footnotes

69:1 The text reads, "as the cane of a blind one," and Rashi explains it, that when feeling the way with his cane, the blind man places it wherever it happens, longwise or crosswise. The above explanation, however, which is more lucid, is according to Tosphath.

73:1 The Hebrew term [Deutr. xix. 5] being ••••, literally "it found."

78:1 As explained above, p. 53, from the verse Levit. xxiv. 19.

78:2 According to the commentary of R. Hananel.

Next: Chapter IV.