CHAPTER V.

RULES CONCERNING A GORING OX; EXCAVATIONS ON PUBLIC AND PRIVATE PREMISES; EXCAVATIONS MADE BY PARTNERS, ETC.

MISHNA *I*.: Should an ox gore a cow and the new-born calf be found dead at her side, and it be not known whether she gave birth to it before the goring or by reason of the goring, the owner of the ox pays half the damage for the cow and one-fourth for the calf. So also should a cow gore an ox and her new-born calf be found alive at her side, and it be not known whether she gave birth before the goring or by reason of the goring, the owner of the cow pays half the damage from the body of the cow and one-fourth from that of the calf.

GEMARA: Said R. Jehudah in the name of Samuel: This is the dictum of Summachus, who holds that money about which there is a doubt as to whom it rightly belongs, must be divided. But the sages said: There is a principal rule--the burden of proof is upon the plaintiff. [For what purpose is the statement that there is a principal rule? It was necessary that, even when the plaintiff claimed positively while the defendant only said that he was doubtful about it (in which case one might say that there need be no proof at all), this rule apply.] The same we have also learned in the following Boraitha (the exact statement of the Mishna with the addition): This is the dictum of Summachus, but the sages say that the burden of proof is upon the plaintiff.

Said R. Samuel b. Na'hmani: Whence is this rule deduced? From [Ex. xxiv. 14]: "Whoever may have any cause to be decided, let him come unto them." That means, he shall produce proof before them. R. Ashi opposed: Why is a verse necessary? Is it not common-sense that one who feels pain goes to a physician? We must therefore say that this verse applies to the saying of R. Na'hman in the name of Rabba b. Abbuhu: Whence is it deduced that in case of a claim and counterclaim the claim must first be passed upon and judgment awarded and executed, and then the counterclaim must be proved (as at this

stage the former defendant is now the plaintiff)? From the above-quoted passage, which means that the plaintiff who has the cause to be decided shall be heard first. The sages of Nahardea, however, said that in some cases it might happen that the counterclaim must be passed upon first, and that is in case the judgment, if awarded against the defendant, would have to be collected from the latter's real estate; for if the judgment were allowed to be collected before the counterclaim was proved, the estate would sell much cheaper than if he should prove his counterclaim and sell his estate at a proper price.

"*So also should a cow gore an ox*," etc. Half *and* a quarter of the damage! Why three-quarters--he has to pay only half? Said Rabha: The Mishna meant to say thus, If the cow is there, one-half of the damage is collected from the body of the cow; but if she cannot be found, one-quarter is

collected from the body of the calf, and the reason is because it is doubtful whether the calf was with its mother at the time of the goring or not; but if we should be certain that it was, half would be collected from the body of the calf.

This decision of Rabha is in accordance with his theory elsewhere as to a cow that has done damage--the same may be collected from its offspring, because the latter is considered a part of her own body. A hen that has done damage--the latter cannot be collected from her eggs, for the reason that they are completely separated from the hen and it does not care any more for them.

Rabha said again (in the first instance, when the ox gored the cow): The cow and her offspring are not separately appraised, but both of them together (*i.e.*, the value of the cow before giving birth and that after she gave birth, and not the value of the cow separately and that of the calf separately); for otherwise it would work too much harm to the defendant. The same is the case if one cut off the hand of his neighbor's slave or if one damage his neighbor's field (that is, in each of those cases the value prior to doing the damage and that after doing the damage is ascertained, and thus the damage is appraised, and not by appraising separately the damaged part and the main body). Said R. A'ha the son of Rabha to R. Ashi: If in reality the law is so, what do we care for the defendant? let him suffer. Why, then, did Rabha protect him? Because the defendant might say: "I caused injury to a gravid cow, and therefore the appraisement must also be made of such a cow."

it is certain, if the cow belonged to one person and the calf to another, that for the reduction of the fatness it must be paid to the owner of the cow; but for the depreciation on account of the reduction in fulness, to whom is this to be paid? (*I.e.*, if while the cow was gravid the owner of the cow sold the calf to be born to another person, and through the injury the cow miscarried, and by reason thereof the cow became reduced both in fatness and in fulness (figure), both of which are elements making up the value of a cow; now, for the reduction in fatness the owner of the cow must be paid, for the calf has not contributed to it; but for the depreciation on account of the decrease in the fulness, shall the owner of the calf be paid? for the calf gave her that fulness, or both the cow and the calf contributed to it, and the value of this damage must be divided.) R. Papa says it is paid to the owner of the cow only. R. A'ha the son of R. Iki says that it must be divided, and so the Halakha prevails.

MISHNA *II.*: A potter that placed his pottery in the court of another without his permission, and the court-owner's cattle broke them, there is no liability. If the cattle were injured thereby, the potter is liable. If, however, he placed them there with permission, the court-owner is liable. The same is the case with one who placed his fruit in another's courtyard and it was consumed by an animal of the court-owner. Should one lead his ox into the court of another without permission and it be gored by the ox of the court-owner, or be bitten by his dog, there is no liability. If, however, the ox in question gored the court-owner's ox, or it fell into the well and spoiled the water, he is liable. If the court-owner's father or son was in the well (at the time, and was killed), he must pay atonement money. If, however, he led it there with permission, the court-owner is liable. Rabbi, however, says that in all these cases the court-owner is not liable unless he expressly undertook to take care of the ox.

GEMARA: Is the reason for the statement in the first part of the Mishna only because he placed them without permission, but if with permission the potter would not be liable for injuries to the

animals of the court-owner, and we do not say that it is implied that the potter has assumed the care of the animals, and this can be only in accordance with Rabbi, who holds that wherever it is not expressly assumed there is no implied assumption to take care? Now, the latter part, which states: "If he placed them there with permission the court-owner is liable," is

certainly in accordance with the rabbis, who hold that there is an implied assumption even when nothing was expressly mentioned; and in the last part Rabbi declared that in all cases he is not liable unless the court-owner expressly assumed the care; hence the first and last parts will be in accordance with Rabbi, and the middle part in accordance with the rabbis? Said R. Zera: Separate the clauses, and say that the one who taught this part did not teach the other. Rabha, however, says: The whole Mishna can be explained to be in accordance with the rabbis, and that the case was that he entered with permission and the court-owner assured the safety of the pottery (and the potter assumed nothing), in which case he is responsible if even the wind should break them.

"*If he placed his fruit*," etc. Said Rabh: The case is only if she slipped on account of them; but if she consumed them (and by reason thereof died) there is no liability, for she was not compelled to eat them.

Come and hear: "One who led his ox into another's courtyard, and it consumed wheat which caused it diarrhœa and it died, there is no liability. If, however, he led it in with permission, the court-owner is liable." Why not argue here the same way, and say that it was not compelled to eat? Said Rabh: "You wish to contradict a case *with* permission by a case *without* permission? In the former event he assured the safety of the ox, and therefore he is liable if even the ox should choke himself."

The schoolmen propounded the following question: "When he assured the safety of the ox, did it only extend to himself (*i.e.*, to protect the ox against the injury by his own animals), or also to all cattle?" Come and hear: "R. Jehudah b. Simeon taught in Section Damages, of the school of Qarna: If one placed his fruit in the courtyard of another without permission and an ox came from some other place and consumed it, he is free; if, however, *with* permission, he is liable. Who is liable and who is free--is it not the court-owner?" (Hence we see that he must guard him also against injury by others?) Nay, it may be said that it has reference to the owner of the ox. If so, what difference is there whether it was with or without permission? There is: If with permission, it is to be considered the premises of the plaintiff, in which case the tooth is liable (for as soon as the court-owner allowed him to enter he thereby assigned him room in his court); but without permission,

it cannot be considered that he consumed it "in *another* man's field," which is required in the case of the tooth, and therefore there can be no liability.

Come and hear: "If one lead his ox into a courtyard without permission and an ox come from another place and gore it, he is free; if, however, *with* permission, he is liable." Who is free and who is liable--is it not the court-owner? Nay, it is the owner of the ox. If so, what difference is

there whether with or without permission? The Boraitha is in accordance with R. Tarphon, who says that there is an extra rule as to the horn if on the premises of the plaintiff, in which case he pays the whole. Now, if with permission, it is considered the premises of the plaintiff (for the reason stated above) and he pays the whole damage; but if without permission, it is equal to the case of the horn on public ground, in which case only half is paid.

It happened that a woman entered a house to bake, and the house-owner's goat having consumed the dough, became feverish and died. Rabha then made the woman pay for the goat. Shall we assume that he differs with Rabh, who said that it was not compelled to consume it? What comparison is this? There it was without permission, and therefore the safety was not assured; but here it was with permission, and therefore the safety of the goat was assured by the woman (for the reason stated further on, that in baking by a woman modesty is required, as she has to bare her arms and the owner of the house cannot stay in the room; it is therefore considered that he has assigned the whole room to the woman, and therefore she is responsible for the damage done to the house-owner). And why is this different from the following case: If a woman enter another's premises to grind her wheat without permission and the house-owner's animal consume the wheat, there is no liability. If, however, the animal was injured thereby, the woman is liable. The reason then is because it was without permission, but if with permission she would be free? There is a difference: In case of grinding wheat, where no modesty is required and the owner could be present, the care of the animal devolves upon him; but in case of baking modesty is required (as stated above).

"*If one lead his ox into a courtyard*," etc. Rabha said: One who leads his ox into a courtyard without permission, and the ox digs an excavation in the courtyard, the owner of the ox is liable for the damage caused to the court, and the court-owner

is liable for the damages caused by the excavation (if he renounced ownership), although the Master said elsewhere, on the strength of the passage [Ex. xxi. 33]: "If a *man* dig a pit," a *man*, and not an *ox*; for here in this case he had to fill up the pit (before renouncing ownership), and by not so doing it is considered as if he dug it.

Rabha said again: "One who leads his ox into a court without the permission of its owner, and it injures the owner, or the latter is injured through it, he is liable. If, however, it lie down (and by doing so breaks vessels, or while being in such a position the court-owner stumbles over it and is injured), there is none." Does, then, the lying down relieve him from liability? Said R. Papa: Rabha means, not that the ox itself lay down, but that it lay down (voided) excrement and thereby soiled the vessels of the court-owner, in which case the excrement is considered a pit; and we do not find that there is a liability for damage to vessels by a pit. This would be correct according to Samuel, who holds that any obstacle is considered a pit; but as to Rabh, who holds that it is not considered a pit, unless ownership is renounced, what can be said? Generally from dung ownership is renounced.

Rabha said again: If one enter a court without permission and injure the court-owner, or the latter be injured through him (by jostling against him), he is liable; if the court-owner injure him, he is free. Said R. Papa: "This was said only in case the court-owner has not noticed him; but if he has, he is liable." What is the reason? Because he can say to him: "You have the right only to drive him out, but not to injure him." And each follows his own theory, for Rabha, and

according to others R. Papa, said: If both of them were there with permission (*e.g.*, on a public highway), or both of them without permission, if one injure the other (by striking with the hand, although unintentionally), both are liable (for as to damages there is no difference whether with or without intention); but if one was injured through the other (as by jostling), they are free. The reason, then, is because both of them were either with or without permission; but if one was with and the other one without permission, the one who was with permission is free and the other is liable.

"If he fall into the pit and spoil the water," etc. Said Rabha: This was taught only when it was spoiled through the body (*e.g.*, when the body was soiled); but if it was so because

of the (putrefied) smell, he is free. And the reason is, because the carcass is only the *germon* (origin) of the smell, and for *germon* there is no liability.

"*If his father, his son*," etc. Why so? Is he not a non-vicious one? Said Ula: It is in accordance with R. Jose the Galilean, who holds, with R. Tarphon, that the horn on the premises of the plaintiff pays the whole damage, so also here he pays the whole sum of atonement money, and for that reason he teaches, "if his father," etc., to indicate that it was the premises of the plaintiff.

"*If he lead him in with permission*," etc. It was taught: "Rabh said: The Halakha prevails according to the first Tana, while Samuel holds that the Halakha prevails according to Rabbi."

The rabbis taught: "If he said: 'Lead in your ox and take care of him,' if he did damage, he is liable; if he was injured, there is no liability. If he, however, said: 'Lead in your ox and I will take care of him,' the reverse is the case." Is there not a difficulty in the explanation of the Boraitha? First it states, if he told him to lead in the ox and to take care of him he is liable if he did damage, etc.--then the reason is because he told him expressly to take care of him; but if nothing was said as to care, the reverse would be the case, for the reason that, when nothing is mentioned, the court-owner impliedly assumes the care. How, then, should the last part: "If he, however, told him: 'Lead in your ox and *I* will take care of him,' etc., be explained? Is it not to infer that the reason was because he expressly said that he would take care of him, but if nothing was said as to care, the owner of the ox is liable and the court-owner is free, for the reason that under such circumstances the court-owner does not assume the care, which is according to Rabbi, who holds that the court-owner is not liable unless he expressly assumes the care, and so the first part would be according to the rabbis and the last part according to Rabbi? Said Rabha: The whole Mishna can be explained to be in accordance with the rabbis, thus: Because it states in the first part "and *you* take care of him," it states also in the last part, "and *I* will take care of him." R. Papa said: The whole Mishna may be explained in accordance with Rabbi, but that he holds with R. Tarphon, who says that the horn on the premises of the plaintiff pays the whole, and therefore if he tell him, "*You* take care," the court-owner has not assigned him any room, and thus

it is to be considered as the horn on the premises of the plaintiff, which pays the whole; but if he keep silent, it is considered that he has assigned him room in the court, and thereby the court

becomes a partnership, and under such circumstances only half is paid.

MISHNA *III*.: If an ox intend to gore another ox, and injure a woman and cause her to miscarry, the owner of the ox is free from paying for the child. If, however, a man intend to hurt another man, and hurt a woman and cause her to miscarry, he must pay for the child. How is this payment made? The woman is appraised as to the difference in her value (as a slave) before and after she gave birth. Said R. Simeon b. Gamaliel: If so, then her value increases after giving birth. We must therefore say that the worth of the infant is appraised and its value is paid to her husband if she has one, or to his heirs if she has no husband. If she was a manumitted slave or a proselyte, there is no liability.

GEMARA: The reason is only because it intended to gore another ox, but if it originally intended to gore the woman he is liable for the infant. Shall we assume that this is a contradiction to R. Ada bar A'hba, who said elsewhere that even in such a case there is no liability? Nay, R. Ada b. A'hba may answer that, even according to our Mishna, there is no liability even if it intended to gore the woman. But why does the Mishna say that it intended to gore another ox? Because in the last part it states a case where a *man* intended to injure another one, in which it is essential, for so states the Scripture; therefore the same expression was used.

"*How is this payment to be made*," etc. The value of the infant? It ought to read "the increased valuation *caused* by the infant"? (for so does the Mishna state, that the woman is "appraised," etc.). It really means: "How does he pay the value of the infant and the increased valuation *caused by* the infant? The woman is appraised," etc.

"*Said R. Simeon b. Gamaliel*," etc. What does he mean? Said Rabha: He means thus: Is, then, the value of a woman during pregnancy higher than after she gives birth-is not the reverse the fact? We must therefore say "that the worth of the infant," etc., and so also we have learned in a Boraitha elsewhere. Rabha, however, says: He means thus: Does, then, the increase in value of the woman belong wholly to the husband, and she has no share in the increase of value caused even

by her infant? The infant is appraised and its value paid to the husband, and the money for the increase in valuation is divided between the husband and the wife. We have so also learned plainly in a Boraitha, with the addition that each item must be separately appraised: the pain, the damage; the value of the infant, however, must be paid to the husband only, but the increase in valuation caused by it must be divided. If so, then the two statements of R. Simeon b. Gamaliel contradict each other? This presents no difficulty. The one case is that of a first-birth, and the other is not.

And the rabbis, who hold that the increase in valuation also belongs to the husband, what is their reason? As we have learned in the following Boraitha: From the Scripture, which reads [Ex. xxi. 22]: "And her children depart from her," do I not know that she was with child? Why does it state, "a woman with child"? To tell thee that the increase in value caused by pregnancy belongs to the husband. R. Simeon b. Gamaliel, however, applies the passage quoted to the following Boraitha: R. Eliezer b. Jacob said: He is not liable unless he struck her over the womb. And R. Papa explained the above statement of R. Eliezer b. Jacob, that he does not mean the womb

only, but any part of the body except the arm or foot.

"*If she was a bondwoman*," etc., "*or a proselyte woman*," etc. Said Rabba: This is to be explained that he wounded her before her husband died, in which case the deceased acquired title to the money to be paid, and upon his death the same is inherited by the defendant, in whose possession the money still is (and so is the law as regards the property of a proselyte who died without leaving heirs); but if he wounded her after the death of her husband, the money is to be paid to her. Said R. Hisda: "Who is the author of this statement? Are, then, children as packages of money, that their ownership may pass from one to another? Where there is a husband alive the Scripture made an exception, in that the money to be paid should belong to him; but where there is none, no payment at all is to be made." Regarding this statement the Tanaim of the following Boraitha differ: "An Israelite's daughter that was married to a proselyte and she has conceived by him, and some one wounded her, if during the lifetime of the proselyte, the value of the infant goes to him; if after his decease, one Boraitha states that the defendant must pay to the mother and another Boraitha states that he is free."

According to Rabba's theory there is no doubt that the Tanaim differ, but according to R. Hisda's theory, in accordance with whom will be the Boraitha which states that he must pay? It is in accordance with Rabban Simeon b. Gamaliel, who said that the mother gets one-half of the money to be paid even when her husband is alive, and the whole if he is dead.

R. Iba the elder propounded the following question to R. Na'hman: One who took possession of the documents of a proselyte (which he held against the lands of an Israelite), what is the law? Shall we assume, of one who receives mortgages on estates, that his main intention is to take possession of the lands, and whereas of the latter the proselyte has as yet not taken possession, the one who took possession of the documents has acquired no title, because these documents are not considered property, or is it considered that the proselyte's intention was also as to the documents (and so they *are* his property)? He said to him: Answer me, my Master, could the intention of the proselyte be to wrap up a bottle in them? He answered: Yea, it may have been also for that very purpose.

Rabba said: "If an Israelite's pledge is in the hands of a proselyte and the latter dies, and another Israelite comes and takes possession of it, he may be deprived of the possession (by the owner of the pledged article). Why so? Because as soon as the proselyte died the lien on the pledge became null and void. If, however, a proselyte's pledge is held by an Israelite and the proselyte dies, and another Israelite takes possession of it, the pledgee has his lien on the pledge to the extent of his debt and the other one acquires title as to the balance. Why should not the pledgee's premises (on which the pledge is located) acquire the title for its owner? Did not R. Jose b. Hanima say that one's premises acquire title for their owner even without his knowledge? It may be explained that he was not there, and therefore when the owner is there, and he wishes he himself could acquire title, his premises can also do so for him; but where there is no owner to acquire title himself, his premises cannot do so for him. And so the Halakha prevails.

MISHNA IV.: One who digs a pit on private ground and opens it into public ground, or *vice versa*, or on private ground and opens it into the private ground of another person, is liable.

GEMARA: The rabbis taught: One who digs a pit on private premises and opens it into public premises is liable; and this is the kind of a pit that was meant by the Scripture. Such

is the dictum of R. Ishmael. R. Aqiba says: The pit mentioned in the Scripture is where one renounced ownership to his premises (on which there was a pit), but did not renounce it to the pit. Said Rabba: As to a pit on public ground, all agree that there is a liability, but as to one on one's own premises, R. Aqiba holds that even in such a case there is a liability, for it is written [Ex. xxi. 34]: "The owner of the pit"; that means that the Scripture meant a pit that has an owner, while R. Ishmael holds that it means the one to whom the cause of the injury previously belonged. But what does R. Aqiba mean by his saying, "That is the pit meant by the Scripture"? Thus: Why should this case be free from payment? Is this not the very case with which the Scripture began as regards payment? 1 R. Joseph, however, says, that as to a pit on private premises all agree that there is a liability, for the reason stated by R. Aqiba; they only differ as to a pit on public ground. R. Ishmael holds that one is also liable in such a case, thus: It is written [ibid., ibid. 33]: "And if a man open a pit, or if a man dig a pit"; now, if for the opening one is liable, so much the more is he for the digging? We must therefore say that the liability came to him because of the digging and opening only (*i.e.*, that neither the premises nor the pit is his, as being on public ground). R. Aqiba, however, may explain it thus: Both statements are necessary, for if the Scripture should state only as to the opening, one might say that only in case of opening it is sufficient to cover it, but in case of digging it is not, unless he stuff it up; and if the Scripture should state only the digging one might say that only in such a case it must be covered, for he has done some substantial act; but in case of opening only there is no need even to cover it, for no substantial act was done. Hence the necessity of both verses. And what does R. Ishmael mean by his statement, "This is the pit," etc.? He means that this is the pit with which the passage began as to damages.

There is an objection from the following: One who digs a pit on public ground and opens it into private ground is free, although it is not permitted to do so, for the reason that no excavation must be made under public ground. One who digs

a round, oval, or obtuse-angle-shaped pit on private ground and opens it into public ground is liable. And one who digs pits on private premises adjoining public ground, as, for instance, those who dig pits to lay foundations for buildings, is free. R. Jose b. Jehudah, however, makes him liable, unless he put up a partition ten spans high, or unless the pit was at least four spans distant from the pathway for man and beast. Now the first Tana holds him free, because it was for laying foundations; but otherwise he would also hold him liable? (Hence there is a liability for a pit on one's own premises?) According to whose theory is the statement of the first Tana? It would be correct according to Rabba, for it could be explained that the first part is according to R. Ishmael and the last part according to R. Aqiba; but according to R. Joseph, the last part is in accordance with all and the first part in accordance with none? R. Joseph may say that the whole Boraitha is in accordance with all, but the first part treats of a case where he renounced ownership neither to the premises nor to the pit (and although he must not do so, nevertheless there is no liability). Said R. Ashi: Now that we arrive at the conclusion that according to R. Joseph's theory the Boraitha is in accordance with all, the same may be explained also according to Rabba's theory that the whole Boraitha is in accordance with R. Ishmael; but the reason why,

according to your inference, there would be a liability, if it is not for laying a foundation, is because he extended the excavation under the public ground (and therefore, if not for laying foundations, it should be considered digging on public ground).

The rabbis taught: One who digs and opens a well and delivers it over to the community is free (if any accident happened). Otherwise he is liable. And so also was the custom of Nehunia the pit-digger, to dig and open wells and deliver them over to the community. And when the rabbis heard of it, they said: "He is acting in accordance with the Halakha."

The rabbis taught: It happened to the daughter of the very same Nehunia, that she fell into a large well. They came and informed R. Hanina b. Dosa of it. During the first hour he said to them: "Go in peace"; and so also during the second. At the third (when there was fear that she might have died), he said that she was out already and saved. When the girl was asked who saved her, she said that a ram passed by led by an old man (the ram of Isaac led by Abraham), who saved

her. When R. Hanina b. Dosa was asked whether he knew of her safety by prophecy, he said: I am no prophet, nor am I the son of a prophet, but I thought to myself, "Can it be that the children of that upright man (Nehunia, who was digging wells to enable the pilgrims to drink water from them) shall die by the very thing he was taking so much pains to prepare for the welfare of Israel?" Said R. A'ha: Notwithstanding this, his son died of thirst. The reason is, that the Holy One, blessed be He, is particular with the upright around Him, even on a hairbreadth, as it is written [Ps. l. 3]: "And round him there rageth a mighty storm" [1] (and there must have been some sin committed by Nehunia for which he was punished). R. Nehunia says: From the following passage [ibid. lxix. 8]: "God is *greatly* terrific in the secret council of the holy ones, and fear-inspiring overall that are about him." R. Hanina said: One who says that the Holy One, blessed be He, is liberal (to forgive every one his sins), his life may be disposed of liberally (for he encourages people to sin), as it is written [Deut. xxxiii. 4]: "He is the Rock, his work is *perfect*; for all his ways are just." R. Hana, and according to others R. Samuel b. Na'hmani, says: It is written [Ex. xxxiv. 6], "Long-suffering" in the plural, and not in the singular, to signify that He is long-suffering towards the upright and also towards the wicked.

The rabbis taught: One shall not remove stones from his own premises to public ground. It happened once that one did so, and a pious one passing by at the time and seeing him do that said to him: "Thou ignoramus, why dost thou remove stones from premises not belonging to thee to thy own premises?" He laughed at him. Some time later he was compelled to sell his lands, and while walking on the public highway in front of his former lands he stumbled over the stones he once piled up. He then exclaimed: "I see now that the pious one was right in his saying!"

MISHNA V.: One who digs a pit on public ground and an ox or an ass falls into it (and is killed), he is liable. It matters not as to the shape of the pit, whether round, oval, or a cavern, rectangular or acute-angular, in all cases he is liable. If this is so, then why is it written "pit" [•••]? To infer from this that as a round pit in order to be sufficient to cause death must

be no less than ten spans deep, so also all other forms must be at least ten spans deep. If they were of less depth, however, there is no liability for death; but for injuries there is.

GEMARA: Rabh said: The pit for which the Scripture made one liable is because of the vapors (therein contained), but not because of the shock (the animal receives). From this may be inferred that Rabh holds that the vapors kill the ox for which the digger of the pit is liable; if the ox should be killed not by the vapors, but by the shock received at the bottom of the pit, there should be no liability, because the ground is considered ownerless. Samuel, however, holds because of the vapors, and so much the more because of the shock; and if one might say that the Scripture meant only as to the shock and not as to the vapors, and therefore if it should be proved that the death was caused by the vapors and not by the shock there should be no liability, it would be incorrect, for the Scripture is testifying that the digger of a pit is liable, and even if the pit were filled with wool sponges, On what point do they differ (for according to both, if the ox was killed he must be paid for)? The difference is in case he formed a hill (ten spans high) on public ground (from which the ox fell down and was killed): according to Rabh he is not liable, while according to Samuel he is. What is the reason of Rabh's opinion? The passage states [Ex. xxi. 33], "*Fall* into it," which signifies that there must be the usual way of falling (into an excavation, and face downward), but according to Samuel "fall" means in any manner.

There is an objection from our Mishna: If so, then for what purpose is written "pit," etc.? Now, it would be correct according to Samuel, for the "so also," etc., would include also a hill on public ground; but according to Rabh, what does this include? It includes rectangular and acute-angular pits. But are these not expressly stated therein? They are first stated, and then it is explained whence they are deduced; and it was necessary to enumerate all the forms of a pit, to teach that in each of them there are sufficient vapors to kill, if they are ten spans deep. It happened that an ox fell into a lake from which the neighboring lands used to be irrigated, and its owner slaughtered it. R. Na'hman nevertheless declared him *trepha* (illegal, because, according to his theory, the limbs of the ox were broken by the fall). The same, however, declared that if the owner would spend only one kabh of flour in going around and asking the law in his case, he would learn that if the animal

under such circumstances should be alive twenty-four hours after the fall it could be held fit for eating, and he would not lose his ox, which is worth many kabhim of flour. From this we see that R. Na'hman holds that an animal may be killed from shock in a pit less than ten spans deep.

Rabha objected to R. Na'hman from our Mishna: "If they were less than ten spans deep and an ox or an ass fell into them and was killed, there is no liability." Is not the reason because there is no shock? Nay, because there are no vapors. If so, then why is it stated further: "If he be injured, he is liable." Why so--there are no vapors? He answered: "There are no vapors sufficient to kill, but sufficient to injure."

He again objected from the following Boraitha: It is written [Deut. xxii. 8]: "If any one were to fall *from* there"--this signifies that it means only *from* there, but not there*into*. How so? If the level of the public highway were ten spans higher than the roof of the house, so that some one might fall from the highway to the roof, there is no liability (because there was no obligation to make a battlement); if, however, the highway were ten spans lower than the roof, there is a

liability (for a battlement has to be made). Now then, if shock in an excavation less than ten spans deep also kills, why state *ten*? He answered: "This case is different, for it states 'house,' and less than ten cannot be called a 'house.'"

MISHNA *VI.*: When a pit belongs to two partners, and one of them passes by and does not cover it, and so also does the second, the latter only is liable.

GEMARA: Let us see. How can there be a pit of two partners on public ground? This case could be if we should say that the Halakha prevails in accordance with R. Aqiba, who holds one liable for a pit even if it be on his own premises, and partnership in the pit would be possible if both partners dig a pit on their premises and subsequently renounce their ownership to the premises but not to the pit; but if the Halakha prevails according to him who says that if one dig a pit on his own premises there is no liability, how is it possible on the one hand that there should be liability for the same pit on public ground, and on the other hand how can there be a partnership pit on the public ground? Shall we assume that both of them together hired an agent to dig the pit for them? Is there not a rule that there can be no agent to commit a transgression, for the agent ought not to commit any transgression if even he was hired to

do so? Consequently the partners could not be responsible for the acts of the agent. If we assume that the partnership consisted in that each of them dug five spans deep, then there can be no partnership, for the act of the first one can be taken into account according to Rabbi's theory only as to injuries; but even according to him as to death, and according to the rabbis' theory as to both injuries and death, it cannot be counted. How, then, can there be a partnership in a pit? Said R. Johanan: It is possible if both of them together removed a lump of earth from it which completed it to make it ten spans deep.

Where are the theories of Rabbi and his colleagues, mentioned above, stated? In the following Boraitha: "If one dig a pit nine spans deep and another one complete it to make it ten deep, the latter one is liable. Rabbi, however, says: The latter one only is liable in case of death, and both are liable in case of injuries."

What is the reason of the rabbis' theory? It is written [ibid., ibid. 33]: "And if a *man* dig a pit," which signifies that it must be by *one* only. Rabbi, however, explains this passage to mean that it must be dug by a *man* and not by an ox.

The rabbis taught: "If one dig a pit ten spans deep and another one complete it to make it twenty, and still another one make it thirty deep, all of them are liable." There is a contradiction from what we have learned in the following: "If one dig a pit ten spans deep and another one plaster and lime it (and thereby makes it narrow and increases its vapors), the last one is liable." Shall we not assume that the one case (where all are liable) is according to Rabbi and the other is according to his colleagues?

Said R. Zbid: "Both may be explained to be according to Rabbi only, thus: The case where all are liable is correct, as stated, and the case where only the last one is liable is where there were originally in it not sufficient vapors even to injure, and the other one by his acts produced so much vapors as to be sufficient both to injure and kill."

Rabha said: "If one place a stone at the edge of a pit which is less than ten spans deep and thereby complete its walls to measure ten spans, whether he is responsible or not would raise the same difference of opinion as between Rabbi and his colleagues stated above." Is this not self-evident? One might say that if one dig one span more in the *bottom*, and by doing so he increase the vapors to be sufficient to kill, he is liable,

because the vapors produced by him killed the animal; but if he raise the walls at the top (by placing the stone), by which he did not increase the vapors, as they were there already, one might say that he was not liable, because the animal was not killed by the vapors produced by him--he comes to teach us that there is no difference.

Rabba bar bar Hana in the name of Samuel bar Martha said: A pit eight spans deep, two of which are filled with water, there is a liability. Why so? Each span of water equals two of dry ground. The schoolmen propounded a question: If the pit was nine spans deep and only one span of them was filled with water, what is the law--shall we say that as there is only a little water there are no vapors in it, or shall we say that as it is nine spans deep the vapors of the water complete it to make it ten? Again, if the pit was seven spans deep, three of which were filled with water, what is the law--shall we say that as there is much water in it there are vapors, or because it is not sufficiently deep there are none? This remains unanswered.

R. Shizbi questioned Rabba: "If one dig a pit ten spans deep and another widen it (toward one direction only), what is the law?" He answered: "Then he diminished the vapors!" The former rejoined: "But he increased the possibility of being injured?" Rabba made no answer. Said R. Ashi: "A case of this kind must be examined. If he fell in through the side which was widened, then he surely increased the possibility of falling in, and he is responsible; if, however, he fell in through the other side, then he diminished the vapors, and he is not."

It was taught: "A pit the depth of which is of the same dimensions as its width, Rabba and R. Joseph, both in the name of Rabba bar bar Hana quoting R. Mani, differ as to the decision of those quoted: One holds that there are always vapors (sufficient to kill) therein unless the width exceeds its depth, and one holds that there are no vapors therein unless the depth exceeds its width."

"*If one passed by and did not cover it*." From what time on is he free? (That we say that the other one was charged with covering it, for the case undoubtedly is that the first one not only passed by but also used the pit; because if not so, then the first one ought to be liable as well, as it was negligence also on his part not to cover it.) As to this the following Tanaim differs: "One is drawing water from a well and another comes telling him to let him draw water, as soon as he lets him do so,

the liability of the first ceases. R. Eliezer b. Jacob, however, says that the liability ceases from the moment he delivered him the cover of the well. On what point do they differ? R. Eliezer b. Jacob holds that the theory of choice [1] applies to such a case, and each drew water from his own

part (and therefore the second is not considered to have borrowed from the first his share, so as to be charged with the care of the whole, and for that reason both are liable in case of damages; but if he accepted the cover, he thereby became charged with the care of the whole), and the rabbis hold that the theory of choice does not apply to such a case. R. Elazar said: One who sells his well, title passes with the delivery of the cover. How was the case? If he sold it for money, let the title pass by the payment of the money; if by occupancy, let the title pass by this act? The case was by occupancy, which requires that he should expressly tell him, "go and occupy and acquire title"; and if he delivered the cover to him, it is considered as if he told him so.

R. Jehoshua b. Levi said: One who sells his house, the title passes with the delivery of the keys (as it is the same as the delivery of the cover of the pit).

Resh Lakish in the name of, R. Janai said: "One who sells a flock of cattle, title passes with the delivery of the Mashkhukhith (the drawing-rope). How was the case? If he drew them (removed them from one place to another), let title pass by this act? If by delivery, let title pass by doing this? The case was that he drew them, which requires that the vendor shall tell the vendee expressly, "Draw them and acquire title," and as soon as he delivered the Mashkhukhith it is considered as if he told the vendee expressly, "Draw, and acquire title to them." What is meant by Mashkhukhith? It means the bell. R. Jacob said: "It means the forerunning goat kept at the head of the flock as leader, as a certain Galilean lectured in the presence of R. Hisda: When the shepherd gets angry at his flock, he blinds the leading-goat at the head of the flock (so that the leader falls and with him all the flock)."

MISHNA *VII.*: If the first one covered it, but when the second one passed by he found it uncovered and did not cover it, the latter is liable. If the owner of a pit properly cover it, and still an ox or an ass fall into it and is killed, there is no liability. If however, he do not properly cover it, he is liable.

[paragraph continues] If an ox fall forward, face downward, into a pit by reason of the noise caused by the digging, there is a liability; if, however, it fall backward, there is none. If an ox or an ass with its housings fall into it and the housings be damaged, there is a liability for the animal but not for the housings. If there fall therein an ox, deaf, raging, or young, there is a liability (explained further on). If a boy or a girl, a male or a female slave, fall in, there is none.

GEMARA: Until what time is the first one free? Said Rabh: Until he again knows of his own knowledge that the pit is uncovered. Samuel, however, says: Until he is informed, even if he has not seen it himself. R. Johanan says: Time must be allowed him until he could be informed and could hire workmen to cut wood and cover it.

"*If he cover it properly*," etc. If he covered it properly, how could the animal fall in? Said R. Itz'hak bar bar Hana: The case was, that the cover became rotten from the inside (and could not be noticed).

The schoolmen propounded the following question: "If he covered it sufficiently to withstand oxen but not camels, and camels came along and made the cover shaky and then oxen fell therein, what is the law? Let us see. How was the case? If camels are usual there, then certainly

the act is wilful; if they are not, then it is only an accident? The question is only where camels come there at times. Shall we say that, because camels do come there, it is considered wilful, for he should have had it in mind, or do we say that because at that time they were not there it might be considered an accident?" According to others the schoolmen did not question as to such a case; for there is no doubt that, as long as they came at times, he should have had it in mind, but what they did question was this: If he covered it sufficiently to withstand oxen but not camels, and the latter are usual there and the cover became rotten from within, what is the law? Do we say that *because* it is considered wilful as to camels it is so also as to allowing it to rot, or that the theory of *because* does not apply here? Come and hear: "An ox that was deaf, raging, young, or blind, or an ox that walked in the night-time, he is liable; if, however, the ox was sound and it was in the day-time, he is free." Now, why should it be so? Why not say *because* it is considered wilful as to an unsound ox it is also considered so as to a sound one? Infer from this that the theory of *because* does not apply to such cases,

"*If it fell in forward*," etc. Said Rabh: By "forward" is meant that it fell on his face, and by "backward" that it struck the back of its head against the bottom of the pit. And both of them have reference to the pit. [And this is in accordance with his theory that the Scripture made one liable in case of a pit only because of the vapors, but not because of the shock.] Samuel, however, says: "In case of a pit there is no difference whether it fall forward or backward, but he is liable." [For he follows his theory as to the vapors, and so much the more because of the shock.] But how is the case possible that when it fall backward from the sound of the digging he shall be free? As, for instance, when it stumbles over the pit and falls backward and strikes outside of the pit. Samuel objected to Rabh from the following Boraitha: "As regards a pit, whether it fall backward or forward, he is liable?" This objection remains.

R. Hisda said: Rabh admits in case of a pit on one's own premises that he is liable, because the owner of the ox may say, "You are liable either way; for whether he died from the vapors or from the shock, it was yours." Rabha, however, says: The case in the above Boraitha, which states that he is liable if even the ox fall backward, was that he turned over; that is, he first fell face downward, but before. he reached the ground he turned over and fell on his back, and therefore it is the vapors that he inhaled while falling face downward that kill him. R. Joseph says: The Boraitha in question does not mean to say that the owner of the pit is liable, but, on the contrary, that the owner of the ox is liable, and it treats of a case where the ox did damage to a well, namely, by (entering a courtyard without permission, the owner of which renounced ownership neither to the courtyard nor to the well, and) falling into the well, spoiling the water therein contained; in which case he is liable, no matter which way it fell. R. Hanina taught in support of Rabh: It is written: "And fall"--that means that the falling should be in the usual manner, face downward. From this it was said that if he fell face forward into a pit from the sound of the digging there is a liability; if backward from the same cause, there is none.

The Master said: "If he fall face downward from the sound of the digging, there is a liability." Why so? Was this not caused by the one who was doing the digging? (In this case it is assumed that the owner has hired another person to do the digging, and the latter is only the *germon* (medium), and there

is no liability for being the *germon*?) Said R. Simi b. Ashi: It is in accordance with R. Nathan, who said that the damage must be paid by the owner of the place where it was done, for the reason that the digger cannot be liable, because he is only the *germon* of the damage, as we have learned in the following Boraitha: "An ox that pushed another ox into a pit, the owner of the ox, and not the owner of the pit, is liable. R. Nathan, however, said that each one of them pays half (for both have their share in it)." But have we not learned in another Boraitha: "R. Nathan said: The pit-owner pays three-fourths and the owner of the ox one-fourth"? This presents no difficulty: One case treats of a vicious and the other of a non-vicious ox. But what does he hold in case of a non-vicious ox? If he holds that each one has done the *whole* damage, let each one pay half? And if, on the other hand, he holds that each one has done *half* the damage (and therefore the owner of the ox pays as for a non-vicious one one-fourth, which is half of the damage he did), only three-fourths are paid and one-fourth is suffered by the plaintiff? Said Rabha: R. Nathan was a judge, and he dived into the very depth of the Halakha. He holds that each has done only half the damage; but as to the objection raised that the owner of the ox should pay only one-fourth, it may be said that the owner of the killed ox may say to the owner of the pit: "I found my ox in your pit and you killed him; therefore, whatever I can realize from the owner of the ox who pushed mine in I will, and the balance you will have to pay."

Rabha said: "One who places a stone on the edge of the opening of a pit and an ox stumbles over the stone and falls into the pit," as to this question the difference of the rabbis and R. Nathan comes in (according to the rabbis the one who placed the stone is liable, for he caused the fall, and he cannot be considered as the *germon*, for the placing of a stone in itself is considered the same as a pit; and according to R. Nathan both are liable, for both contributed). Is this not self-evident? Lest one say: In that case the pit-owner may say to the owner of the ox, "Were it not for my pit your ox would have (instead of pushing him in) killed him"; but here, in this case, the one who placed the stone may say to the pit-owner, "Were it not for your pit, what harm would my stone have done him? Had he stumbled over, he would have gotten up at once?" It therefore teaches that he may, however, say to him, "Were it not for your stone, he would not have fallen into the pit."

Rabha said: An ox and a man who together push some other into a pit (so that the ox, the man, and the pit have all contributed), as regards damages all are liable; as regards the four things and the value of the infant (if it should be the case), the man is liable and the others are free; as to payment of atonement money and the thirty shekels for a slave, the ox is liable and the others are free; as regards damage to vessels and an ox that became desecrated and was redeemed, the man and the owner of the ox are liable, and the owner of the pit is free. Why is the owner of the pit free in this latter case of a redeemed ox? Because it is written [Ex. xxi. 36]: "And the dead shall belong to him," which means in a case where the dead can belong to him, excepting this case (for although it was redeemed the carcass cannot be sold but must be buried).

"*If an ox fall in*," etc. Our Mishna is not in accordance with R. Jehudah of the following Boraitha: "R. Jehudah makes one liable for damages to vessels caused by a pit." What is the reason for the rabbis' theory? It is written [ibid.]: "And an ox or an ass fall therein," which signifies an ox but not a man, an ass but not vessels. R. Jehudah, however, holds that the "or" means to add also vessels. Now, according to R. Jehudah, who admits that the word "ox" means to exclude man, what does the word "ass" mean to exclude? Therefore said Rabha: The necessity of stating "ass" as regards a pit according to R. Jehudah, and "lamb" as regards a lost

thing according to all, is really difficult to explain.

"*If an ox, deaf*," etc. What does this mean? Shall we assume that the ox *belongs* to a deaf person, etc., but if he belongs to a sound person there is no liability? How is that possible? Said R. Johanan: It means that the *ox* was deaf, etc. But if he was sound, there is no liability? Said Rabha: "Yea, an ox that is deaf, etc., but if he was sound there is no liability, because a sound ox is capable of taking care of himself. The following Boraitha is plainly in support of the above: If there fall therein a deaf, raging, young, or blind ox, or an ox walking in the night-time, there is a liability. If it was a sound one, however, and in the day-time, there is no liability.

MISHNA *VIII.*: There is no difference between an ox and another animal as regards falling into a pit; to have been kept distant from Mount Sinai [Ex. xiii.] as to payment of double, to restitution of lost property; as regards unloading; muzzling, kilayim [of species], and as regards Sabbath. Neither is there

any difference between the above-mentioned and a beast or bird. If so, why does the Scripture mention "ox or ass"? Because the verse speaks of what is usual.

GEMARA: Concerning falling into a pit, it reads [Ex. xxi. 34]: "In money unto the *owner* thereof," which signifies any animal that has an owner. Concerning Mount Sinai, it reads [ibid. xix. 13]: "Whether it be *animal* 1 or man, it shall not live," which includes also beasts; and the word "whether" includes also birds. Concerning payment of double, it reads [ibid. xxii. 8]: "For *all* manner of trespass," which signifies that every manner of trespass (wilfulness and even as regards inanimate subjects). Concerning restitution of a lost thing, it reads [Deut. xxii. 3]: "Every lost thing of thy brother's." Concerning unloading, we deduce it from the analogy of expression of "ass" used here, and in regard to Sabbath [Deut. v. 14] (as concerning the latter, other animals are also included, so also here). Concerning muzzling [Deut. xxv. 4], we deduce it from the analogy of the term "ox" used here, and concerning Sabbath [ibid.]. Concerning kilayim, if it relates to that of ploughing, we deduce it from the analogy of the term "ox" in the manner just stated; if it relates to that of coupling of animals, it is deduced from the analogy of the word "any of thy cattle" used here, and concerning Sabbath. And whence do we know that it is so as to Sabbath itself? From the following Boraitha: R. Jose says in the name of R. Ishmael: At the first commandments it is written [Ex. xx. 10]: "Thy man-servant, nor thy maid-servant, nor thy cattle"; and at the second commandments it is written [Deut. v. 14]: "Nor thy *ox*, nor thy *ass*, nor any of thy cattle." Why were they expressly stated? Are, then, the ox and the ass not included in it cattle"? To tell thee that, as the terms "ox" and "ass" mentioned here include beasts and birds, to put them on the same footing, so also, wherever these two terms are mentioned, they include beasts and birds. But perhaps the statement in the first commandments should be taken as *general* and that of the last commandments as *particular*, and as there is a rule that the *general* includes nothing but the *particular*, this means to say that only ox and ass are meant, and nothing else? Nay, it states, at the last commandments, also "*all* 2 of thy cattle," and the word

[paragraph continues] "all" adds all other beasts. Is it really so, that wherever "all" is written it adds

something? Is not the same word used at tithing, and still it is construed to be a case of *general* and *particular*? (See Erubim, p. 64.) We may say that "all" is sometimes also a *general*, but in this particular instance it must be explained only as to add; for it would have been sufficient to state only "and cattle," as it does in the first commandments, and still it states, "and *all* cattle," to infer that it plainly means to add.

Now, having come to the conclusion that this "all" means to add, why was it necessary to state "cattle" in the first and "ox" and "ass" in the last commandments? It can be explained that these particular expressions were mentioned for the purpose of deducing muzzling, unloading, and kilayim by the analogy of expression stated above. If also (that as regards kilayim it is deduced from Sabbath), let even a man be prohibited from drawing a wagon together with an animal, as he is also prohibited as regards Sabbath? Why, then, have we learned in the following Mishna: "A man is permitted with all of them to plough and draw"? Said R. Papa: One of the inhabitants of Papanai knew the reason for that, and that was R. A'ha bar Jacob, who explained it thus: It is written [ibid. 14]: "In order that thy man-servant and thy maid-servant may rest as well as thou"--that means that they are compared to them only as regards rest, but not as regards any other thing.

R. Hanina b. Egil asked R. Hyya b. Aba: Why in the first commandments is it not written "that it may be well with thee," and in the second commandments it is so written [Deut. v. 16]? He rejoined: "Instead of asking me for the reason, you had better ask me whether it is so written at all; for I did not notice it. You had better go to R. Tan'hum b. Hanilai, who used to frequent R. Joshua b. Levi, who was well versed in Agadah." He went there and got the answer from R. Tan'hum. From R. Joshua b. Levi I heard nothing about it, but so told me Samuel b. Na'hum the brother of R. Aha b. Hanina's mother [according to others, the father of the same]: The reason is because the first commandments (contained on the tables) were destined to be broken. And if so, what of it? Said R. Ashi: If this had been written thereon and subsequently (the tables) had been broken, Heaven save! "good" would have ceased from Israel.

R. Jehushua said: One who sees the letter "*Teth*" in his

dream, it is a good omen for him. Why so? Because the first time this letter is used in the Scripture is in the word "*Tobh*" (good) in the verse [Gen. i. 4]: "And God saw the light, that it was good (tobh)."

"*And so also a beast*," etc. Said Resh Lakish: In this Mishna Rabh teaches us that a cock and a peacock and a pheasant are considered kilayim with each other. Is this not self-evident? Said R. Habiba: Because they are usually raised together, one might say that they are one species. Hence this statement.

Samuel said: The ordinary goose and the wild goose are considered kilayim. Rabha b. R. Hanan opposed. Why so? If because the one has a long beak and the other a short one, then let a Persian and an Arabian camel also be kilayim, because the one has a thick and the other a thin neck? Therefore said Abayi: The reason is because the one has his testicles on the outside, while the other has them inside. R. Papa said: The one hatches one egg at a time, while the other hatches many at a time.

Footnotes

116:1 Rashi explains that of the pit mentioned as regards payment it is plainly written, "the *owner* of the pit shall pay"; of a pit, however, on public ground the Scripture begins with, "If one *open* a pit"--and the Mishna treats of one that *dug* a pit. Hence R. Aqiba's statement.

118:1 The Hebrew term is "Nisarah," and the Talmud explains it to mean a "hair," from the Hebrew word "saar" (a hair).

123:1 See Erubin, pages 80-82.

128:1 Leeser translates "beast."

128:2 The Talmud translates the Hebrew term literally, "all," while Leeser translates it "any."

Next: Chapter VI.