MISHNAH. IF A MAN PLACES A [KAD] PITCHER ON PUBLIC GROUND AND ANOTHER ONE COMES AND STUMBLES OVER IT AND BREAKS IT, HE IS EXEMPT. IF THE OTHER ONE WAS INJURED BY IT, THE OWNER OF THE [HABITH] BARREL IS LIABLE TO COMPENSATE FOR THE DAMAGE.

GEMARA. To commence with PITCHER[24] and conclude with BARREL![25] And we have likewise learnt also elsewhere:[26] If one man comes with his [habith] barrel and another comes with his beam and [it so happened that] the [kad] pitcher of this one breaks by [collision with] the beam of that one, he is exempt.[26] Here [on the other hand] the commencement is with barrel[25] and the conclusion with pitcher![24] We have again likewise learnt elsewhere: In the case of this man coming with a [habith] barrel of wine and that one proceeding with a [kad] pitcher of honey, and as the [habith] barrel of honey cracked, the owner of the wine poured out his wine and saved the honey into his barrel, he is entitled to no more than his service.[27] Here again the commencement is with pitcher[25] and the conclusion with barrel![25] R. Papa thereupon said: Both kad and habith may denote one and the same receptacle. But what is the purpose in this observation?[28] — Regarding buying and selling.[29] But under what circumstances? It could hardly be thought to refer to a locality where neither kad is termed habith nor habith designated kad, for are not these two terms then kept there distinct? — No, it may have application in a locality where, though the majority of people refer to kad by the term kad and to habith by the term habith, yet there are some who refer to habith by the term kad and to kad by the term habith. You might perhaps have thought that the law[30] follows the majority.[31]

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(1) Cf. supra p. 41.

(2) Infra pp. 224-5. According to R. Ishmael compensation for manslaughter will have to be made by the owner of the ox, but according to the Rabbis there will be no payment, as the child at the time of the fatal fall was devoid of any value.

(3) Ex. XXI, 30.

(4) For since the falling down was caused by a wind of usual occurrence, it is considered wilful.

(5) V. Deut. XXV, 5, and Yeb. VI, 1.

(6) Cf. Kid. I, 1, and Yeb. 56a.

(7) Infra, 86b.

(8) For Man is Mu'ad to pay Depreciation even for damage done while asleep.

(9) On account of the absence of a will to do damage.

(10) Intending thus to fall upon a human being standing below so as to escape the worst effects of his falling, but without intention to degrade.

(11) Deut. XXV, 11.

(12) Ibid.

(13) Since the person upon whose heart the live coal had been placed was able to remove it.

(14) Lit., ‘garment’.

(15) [In this case, the failure of the owner to remove the coal could be explained as due to his belief that he could claim compensation.]

(16) Sanh. 76b.

(17) Infra p. 531.

(18) This does not imply release from liability, as he might have meant, ‘You may tear, if you wish it,’ with all the consequences it involves.

(19) In the presence of his master; cf. Tosaf. a.l.

(20) Not death.

(21) Regarding compensation, as he could have removed it.

(22) In which case there is exemption.

(23) Where there is liability.

(24) Heb. Kad.

(25) Heb. Habith.
(26) Infra p. 169.
(27) V. infra p. 685.
(28) How can it affect law.
(29) The two terms may be interchanged in contracts as they are synonyms.
(30) Regulating technical terms in contracts of sale.
(31) Who keep the two terms distinct.

Talmud - Mas. Baba Kama 27b

It is therefore made known to us that we do not follow the majority[1] in [disputes on] matters of money.[2]

AND ANOTHER ONE COMES AND STUMBLES OVER IT AND BREAKS IT, HE IS EXEMPT. Why exempt? Has not one to keep one's eyes open when walking? — They said at the school of Rab, even in the name of Rab: The whole of the public ground was filled with barrels.[3] Samuel said: It is with reference to a dark place that we have learnt [the law in the Mishnah]. R. Johanan said: The pitcher was placed at the corner of a turning.[4] R. Papa said: Our Mishnah is not consistent unless in accordance with Samuel or R. Johanan, for according to Rab why exemption only in the case of stumbling [over the pitcher]? Why not the same ruling even when one directly broke it? — R. Zebid thereupon said in the name of Raba: The same law applies even when the defendant directly broke it; for AND STUMBLES was inserted merely because of the subsequent clause which reads, IF THE OTHER ONE WAS INJURED BY IT, THE OWNER OF THE BARREL IS LIABLE TO COMPENSATE FOR THE DAMAGE; and which of course applies only to ‘stumbling’ but not to direct breaking, in which case it only stands to reason that it is the plaintiff who is to blame for the damage he caused to himself. It was therefore on this account that ‘stumbling’ was inserted in the commencing clause.

R.Abba said to R. Ashi: In the West[5] the following [explanation] is stated in the name of R. ‘Ulla: [The exemption[6] is] because it is not the habit of men to look round while walking on the road.[7] Such a case occurred in Nehardea[8] where Samuel ordered compensation [for the broken utensil] and so also in Pumbeditha[8] where Raba similarly ordered compensation to he paid. We understand this in the case of Samuel who abided by the dictum he himself propounded,[9] but regarding Raba are we to say that he [also] embraced the view of Samuel? — R. Papa thereupon said: [In the case of Raba] the damage was done at the corner of an oil factory; and since it was usual to keep there barrels, he[10] ought to have kept his eyes open while walking there.[11]

R.Hisda dispatched [the following query] to R. Nahman: As there has already been fixed a fine[12] of three sela's[13] for kicking with the knee; five for kicking with the foot; thirteen for a blow with the saddle of an ass — what is the fine for wounding with the blade of the hoe or with the handle of the hoe? — The reply was forwarded [as follows]: ‘Hisda, Hisda! Is it your practice in Babylon to impose fines?[14] Tell me the actual circumstances of the case as it occurred.’ He[15] thereupon dispatched him thus: There was a well belonging to two persons. It was used by them on alternate days.[16] One of them, however, came and used it on a day not his. The other party said to him: ‘This day is mine!’ But as the latter paid no heed to that, he took a blade of a hoe and struck him with it. R. Nahman thereupon replied: No harm if he would have struck him a hundred times with the blade of the hoe. For even according to the view that a man may not take the law in his own hands[17] for the protection of his interests, in a case where an irreparable loss is pending[18] he is certainly entitled to do so.

It has indeed been stated: Rab Judah said: No man may take the law into his own hands for the protection of his interests, whereas R. Nahman said: A man may take the law into his own hands for

the protection of his interests. In a case where an irreparable loss is pending, no two opinions exist that he may take the law into his own hands for the protection of his interests: the difference of opinion is only where no irreparable loss is pending. Rab Judah maintains that no man may take the law into his own hands for the [alleged] protection of his interests, for since no irreparable loss is pending let him resort to the Judge; whereas R. Nahman says that a man may take the law into his own hands for the protection of his interests, for since he acts in accordance with [the prescriptions of the] law, why [need he] take the trouble [to go to Court]?

R. Kahana [however] raised an objection; Ben Bag Bag said;[19] Do not enter [stealthily] into thy neighbour's premises for the purpose of appropriating without his knowledge anything that even belongs to thee, lest thou wilt appear to him as a thief. Thou mayest, however, break his teeth and tell him, 'I am taking possession of what is mine.'[20] [Does not this prove that a man may take the law into his own hands[21] for the protection of his rights?[22]] — He[23] thereupon said

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(1) Cf. infra p. 263 and B.B. 92b.

(2) As the defendant is entitled to plead that he belongs to the minority.

(3) Such a public nuisance may thus be abated.

(4) The defendant is thus not to blame.

(5) I.e., in Eretz Yisrael, which is West of Babylon.

(6) For breaking the pitcher.

(7) Probably because the roads in Eretz Yisrael were in better condition than in Babylon; v. Shab. 33b; A. Z. 3a.

(8) A town in Babylon.

(9) That were the pitcher to have been in a visible place there would be liability.

(10) The defendant.

(11) And was thus to blame for the damage he had done.

(12) Cf. infra 90a, dealing with some other fixed fines.

(13) Sela' is a coin equal to one sacred or two common shekels; v. Glos.

(14) For the judicial right to impose fines is confined to Palestinian judges; cf. supra p. 67 and infra 84b.

(15) R. Hisda.

(16) Cf. B.B. 13a.

(17) I.e., resort to force.

(18) As where there is apprehension that the Court will be unable to redress the wrong done, e.g., in case all the water in the well will be used up.

(19) V. Ab. (Sonc. ed.) p. 76. n.7.

(20) Cf. Tosef. B.K. X.

(21) Since it is definitely stated that he may break his teeth . . . [The case dealt with here is where the loss is not irreparable, otherwise, as stated above, he would be allowed to enter even without permission.]

(22) Thus contradicting the view of Rab Judah.

(23) Rab Judah.

Talmud - Mas. Baba Kama 28a

: It is true that Ben Bag Bag supports thy view; but he is only one against the Rabbis[1] who differ from him. R. Jannai [even] suggested that 'Break his teeth' may also mean to bring him before a court of justice. But if so, why 'and thou mayest tell him?' Should it not read 'and they[2] will tell him'? Again, 'I am taking possession of what is mine'; should it not be 'he is taking possession of what is his'? — This is indeed a difficulty.

Come and hear: In the case of an ox throwing itself upon the back of another's ox so as to kill it, if the owner of the ox that was beneath arrived and extricated his ox so that the ox that was above dropped down and was killed, there is exemption. Now, does not this ruling apply to Mu'ad[3] where no irreparable loss is pending? — No, it only applies to Tam[4] where an irreparable loss is indeed

pending. But if so, read the subsequent clause: If [the owner of the ox that was beneath] pushed the ox from above, which was thus killed, there would be liability to compensate. Now if the case dealt with is of Tam,[5] why liability? — Since he was able to extricate his ox from beneath, which in fact he did not do,[he had no right to push and directly kill the assailing ox].[6]

Come and hear: In the case of a trespasser having filled his neighbour's premises with pitchers of wine and pitchers of oil, the owner of the premises is entitled to break them when going out and break them when coming in. [Does not this prove that a man may take the law into his own hands for the protection of his rights?][7] — R. Nahman b. Isaac explained: He is entitled to break them [and make a way][8] when going out [to complain] to the Court of Justice, as well as break them when coming back to fetch some necessary documents.

Come and hear: Whence is derived the ruling that in the case of a [Hebrew] bondman whose term of service, that had been extended by the boring of his ear,[9] has been terminated by the arrival of the Jubilee year[10] if it so happened that his master, while insisting upon him to leave, injured him by inflicting a wound upon him, there is yet exemption? We learn it from the words, And ye shall take no satisfaction for him that is . . . come again . . .[11] implying that we should not adjudicate compensation for him that is determined to 'come again' [as a servant].[12] [Does not this prove that a man may take the law into his own hands for the protection of his interests?][7] — We are dealing here with a case where the servant became suspected of intending to commit theft.[13] But how is it that up to that time he did not commit any theft and just at that time[14] he became suspected of intending to commit theft? — Up to that time he had the fear of his master upon him, whereas from that time[14] he is no more subject to his master's control.[10] R. Nahman b. Isaac said: We are dealing with a bondman to whom his master assigned a Canaanite maidservant as wife:[15] up to the expiration of the term this arrangement was lawful[15] whereas from that time this becomes unlawful.[16]

Come and hear:IF A MAN PLACES A PITCHER ON PUBLIC GROUND AND ANOTHER ONE COMES AND STUMBLES OVER IT AND BREAKS IT, HE IS EXEMPT. Now, is not this so only when the other one stumbled over it, whereas in the case of directly breaking it there is liability?[17] — R. Zebid thereupon said in the name of Raba: The same law applies even in the case of directly breaking it; for 'AND STUMBLES' was inserted merely because of the subsequent clause which reads, IF THE OTHER ONE WAS INJURED BY IT, THE OWNER OF THE BARREL IS LIABLE TO COMPENSATE FOR THE DAMAGE, and which, of course, applies only to stumbling but not to direct breaking, as then it is of course the plaintiff who is to blame for the damage he caused to himself. It was therefore on this account that 'stumbling' was inserted in the commencing clause.

Come and hear: Then thou shalt cut off her hand,[18] means only a monetary fine. Does not this ruling apply even in a case where there was no other possibility for her to save [her husband]?[19] — No, it applies only where she was able to save [him] by some other means.[20] Would indeed no fine be imposed upon her in a case where there was no other possibility for her to save [her husband]? But if so, why state in the subsequent clause: 'And putteth forth her hand,[21] excludes an officer of the Court of Justice [from any liability for degradation caused by him while carrying out the orders of the Court]'? Could not the distinction be made by continuing the very case[22] [in the following manner]: 'Provided that there were some other means at her disposal to save [him],[20] whereas if she was unable to save [him] by any other means there would be exemption'? — This very same thing was indeed meant to be conveyed [in the subsequent clause:] 'Provided that there were some other means at her disposal to save [him],[23] for were she unable to save [him] by any other means, the resort to force in her case should be considered as if exercised by an officer of the Court[24] [in the discharge of his duties] and there would be exemption.'

Come and hear:[25] In the case of a public road passing through the middle of a field of an

individual, who appropriates the road but gives the public another at the side of his field, the gift of the new road holds good, whereas the old one will not thereby revert to the owner of the field. Now, if you maintain that a man may take the law into his own hands for the protection of his interests, why should he not arm himself with a whip and sit there?[26] — R. Zebid thereupon said in the name of Raba: This is a precaution lest an owner [on further occasions] might substitute a round- about way[27] [for an old established road]. R. Mesharsheya even suggested that the ruling applies to an owner who actually replaced [the old existing road by] a roundabout way.[27] R. Ashi said: To turn a road [from the middle] to the side [of a field] must inevitably render the road roundabout, for if for those who reside at that side it becomes more direct, for those who reside at the other side it is made far [and roundabout]. But if so, why does the gift of the new road hold good? Why can the owner not say to the public authorities: 'Take ye yours [the old path] and return me mine [the new one]'? — [That could not be done] because of Rab Judah, for Rab Judah said:[28] A path [once] taken possession of by the public may not be obstructed.

Come and hear: If an owner leaves Pe'ah[29] on one side of the field, whereas the poor arrive at another side and glean there, both sides are subject to the law of Pe'ah. Now, if you really maintain that a man may take the law into his own hands for the protection of his interests why should both sides be subject to the law of Pe'ah?[30] Why should the owner not arm himself with a whip and sit?[31] — Raba thereupon said: The meaning of 'both sides are subject to the law of Pe'ah' is that they are both exempt from tithing,[32] as taught:[33] If a man, after having renounced the ownership of his vineyard, rises early on the following morning and cuts off the grapes,[34] there applies to them the laws of Peret,[35] 'Oleloth,[36] 'Forgetting'[37] and Pe'ah[38] whereas there is exemption from tithing.[39]

MISHNAH. IF HIS PITCHER BROKE ON PUBLIC GROUND AND SOMEONE SLIPPED IN THE WATER OR WAS INJURED BY THE POTSHERD HE IS LIABLE [TO COMPENSATE]. R. JUDAH SAYS: IF IT WAS DONE INTENTIONALLY HE IS LIABLE, BUT IF UNINTENTIONALLY HE IS EXEMPT.

GEMARA. Rab Judah said on behalf of Rab: The Mishnaic ruling refers only to garments soiled in the water.[40]

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(1) I.e., the majority of Rabbis.

(2) I.e., the Judges.

(3) In which case the Court would order compensation in full.

(4) Where compensation is only for a half, the plaintiff losing the other half.

(5) V. p. 145, n. 9.

(6) [Although there was the danger of his losing the full value of his ox.]

(7) Thus contradicting the view of Rab Judah.

(8) But no more.

(9) Ex. XXI, 6.

(10) Lev. XXV, 10, and Kid. 14b, 15a.

(11) Num. XXXV, 32.

(12) According to another rendering quoted by Rashi, it means 'that has to return' to his family, as prescribed in Lev. XXV, 10.

(13) In which case an irreparable loss is pending.

(14) I.e., the arrival of the Jubilee year.

(15) Ex. XXI, 4; Kid. 15a.

(16) Cf. Onkelos on Deut. XXIII, 18; hence the Master may use force to eject him.

(17) Thus opposing the view of R. Nahman.

(18) Deut. XXV, 12.

(19) Thus proving that even where irreparable loss is pending, as in this case, it is not permitted to take the law into one's own hands.

(20) In which case she acted ultra vires, i.e beyond the permission granted by law.
(21) Deut. XXV, 11.
(22) Dealing with a woman coming to rescue her husband.
(23) V. p. 147. n. 6.
(24) Lit. 'her hand is like the hand of the officer'.
(25) B. B. 99b.
(26) To keep away intruders; v. p. 147 n. 5.
(27) Which is of course not an equitable exchange in accordance with the law.
(28) B.B. 12a; 26b; 60b and 100a.
(29) I.e., the portion of the harvest left at a corner of the field for the poor in accordance with Lev. XIX. 9; XXIII, 22; v. Glos.
(30) Thus proving that even where irreparable loss is pending, as in this case, it is not permitted to take the law into his own hands.
(31) I.e., keeping the poor away from the Pe'ah on the former side.
(32) But they will by no means belong to the poor, for the portion left on the former side remains the owner's property.
(33) Infra 94a; Ned. 44b.
(34) So that ownership has been re-established.
(35) I.e.. grapes fallen off during cutting which are the share of the poor as prescribed in Lev. XIX, 10.
(36) Small single bunches reserved for the poor in accordance with Lev. XIX, 10, and Deut. XXIV, 21.
(37) I.e., produce forgotten in the field, belonging to the poor in accordance with Deut. XXIV, 19.
(38) I.e the portion of the harvest left at a corner of the field for the poor in accordance with Lev. XIX, 9; XXIII, 22; v. Glos.
(39) V. infra 94a. For the law of tithing applies only to produce that has never been abandoned even for the smallest space of time; v. Rashi and Tosaf. a.l.
(40) Rab maintains that the Mishnah deals with a case where the water of the broken pitcher has not been abandoned, so that it still remains the chattel of the original owner who is liable for any damage caused by it

Talmud - Mas. Baba Kama 28b

For regarding injury to the person there is exemption, since it was public ground[1] that hurt him.[2] When repeating this statement in the presence of Samuel he said to me: 'Well, is not [the liability for damage occasioned by] a stone, a knife or luggage[3] derived from Pit?[4] So that I adopt regarding them all [the interpretation]: An ox[4] excluding man, An ass[4] excluding inanimate objects! This qualification[5] however applies only to cases of killing, whereas as regards [mere] injury, in the case of man there is liability, though with respect to inanimate objects there is [always] exemption?'[6] — Rab [however, maintains[7] that] these statements apply only to nuisances abandoned [by their owners],[8] whereas in cases where they are not abandoned they still remain [their owner's] chattel.[9]

R. Oshaia however raised an objection: 'And an ox or an ass fall therein'.[4] 'An ox' excluding man; 'an ass' excluding inanimate objects. Hence the Rabbis stated: If there fell into it an ox together with its tools and they thereby broke, [or] an ass together with its equipment which rent, there is liability for the beast but exemption as regards the inanimate objects.[10] To what may the ruling in this case be compared? To that applicable in the case of a stone, a knife and luggage[11] that had been left on public ground and did damage. (Should it not on the contrary read, 'What case may be compared to this ruling?'[12] — It must therefore indeed mean thus: 'What may [be said to] be similar to this ruling? The case of a stone, a knife and luggage that had been left on public ground and did damage'.) 'It thus follows that where a bottle broke against the stone there is liability.' Now, does not the commencing clause[13] contradict the view of Rab,[14] whereas the concluding clause[15] opposes that of Samuel?[16] — But [even] on your view, does not the text contradict itself, stating exemption in the commencing clause[13] and liability in the concluding clause![15] Rab therefore interprets it so as to accord with his reasoning, whereas Samuel [on the other hand] expounds it so as to reconcile it with his view. Rab in accordance with his reasoning interprets it thus: The [above]

statement[13] was made only regarding nuisances that have been abandoned, whereas where they have not been abandoned there is liability.[17] It therefore follows that where a bottle broke against the stone there is liability. Samuel [on the other hand] in reconciling it with his view expounds it thus: Since you have now decided that a stone, a knife and luggage [constitute nuisances that] are equivalent [in law] to Pit, it follows that, according to R. Judah who orders compensation for inanimate objects damaged by Pit,[18] where a bottle smashed against the stone there is liability.

R. Eleazar said: This ruling[15] refers only to a case where the person stumbled over the stone and the bottle broke against the stone. For if the person stumbled because of the public ground, though the bottle broke against the stone, there is exemption.[19] Whose view is here followed? — Of course not that of R. Nathan[20] . There are, however, some who [on the other hand] read: R. Eleazar said: Do not suggest that it is only where the person stumbled upon the stone and the bottle broke against the stone that there is liability, so that where the person stumbled because of the public ground, though the bottle broke against the stone, there would be exemption. For even in the case where the person stumbled because of the public ground, provided the bottle broke against the stone there is liability. Whose view is here followed? — Of course that of Nathan.[20]

R. JUDAH SAYS: IF IT WAS DONE INTENTIONALLY HE IS LIABLE, BUT IF UNINTENTIONALLY HE IS EXEMPT. What does INTENTIONALLY denote? — Rabbah said: [It is sufficient[21] if there was] an intention to bring the pitcher below the shoulder.[22] Said Abaye to him: Does this imply that R. Meir[23] imposes liability even when the pitcher slipped down [by sheer accident]? — He answered him:[24] 'Yes, R. Meir imposes liability even where the handle remained in the carrier's hand.' But why? Is it not sheer accident, and has not the Divine Law prescribed exemption in cases of accident as recorded,[25] But unto the damsel thou shalt do nothing?[26] You can hardly suggest this ruling to apply only to capital punishment, whereas regarding damages there should [always] be liability, for it was taught:[27] If his pitcher broke and he did not remove the potsherds, [or] his camel fell down and he did not raise it, R. Meir orders payment for any damage resulting therefrom, whereas the Sages maintain

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(1) Lit 'ground of the world'.

(2) Whereas the water was only the remote cause of it.

(3) Even when not abandoned; cf. supra p. 7.

(4) Ex. XXI, 33.

(5) Excluding man.

(6) For killing and injury could not be distinguished in the case of inanimate objects. How then could Rab make him liable for soiled garments (and exempt for injury to the person)?

(7) The difference in principle between Samuel and Rab is that the former maintains that nuisances of all kinds, whether abandoned by their owners or not, are subject to the law applicable to Pit, in which case there is no liability either for damage done to inanimate objects or death caused to human beings, whereas the view of Rab is that only abandoned nuisances are subject to these laws of Pit, but nuisances that have not been abandoned by their owners are still his chattels, and as such have to be subject to the law applicable to ox doing damage, in which case no discrimination is made as to the nature of the damaged objects, be they men, beasts or inanimate articles; cf. also supra p. 38.

(8) In which case they are equal (in law) to Pits dug on public ground.

(9) They are thus subject to the law applicable to ox; v. supra p. 18.

(10) V. infra 52a.

(11) Even when not abandoned; cf. supra p. 7.

(12) Since the case of stone, knife and luggage is far less obvious than this case which is explicitly dealt with in Scripture.

(13) Making a stone, a knife and luggage subject to the law applicable to Pit.

(14) Who maintains that unless they have been abandoned they are subject to the law of Ox.

(15) Imposing liability in the case of a bottle having been smashed against the stone.

(16) According to whom it should be subject to the law applicable to Pit imposing no liability for damage done to

inanimate objects.

(17) Even for damage done to inanimate objects, as they are subject not to the law of Pit but to that applicable to Ox.

(18) Supra p. 18.

(19) Since it was ownerless ground that was the primary cause of the accident.

(20) Who holds that where no payment can be exacted from one defendant, the co-defendant, if any, will himself bear the whole liability; cf supra p. 54 and infra 53a

(21) To constitute liability.

(22) Though there was no intention whatever to break it.

(23) Who is usually taken to have been the author of anonymous Mishnaic statements, especially when contradicting those of R. Judah b. Il'ai, his colleague.

(24) I.e., Rabbah to Abaye.

(25) Deut. XXII, 26.

(26) For so far as she is concerned it was a mishap.

(27) Infra 55a.

Talmud - Mas. Baba Kama 29a

that no action can be instituted against him in civil courts though there is liability[1] according to divine justice. The Sages agree however, with R. Meir that, in the case of a stone, a knife and luggage which were left on the top of the roof and fell down because of a wind of usual occurrence[2] and did damage, there will be liability.[3] R. Meir [on the other hand] agrees with the Sages that, regarding bottles that were placed upon the top of the roof for the purpose of getting dry and fell down because of a wind of unusual occurrence[4] and did damage, there is exemption.[5] [Does not this prove that even regarding damages all agree that there is exemption in cases of sheer accident?] — Abaye therefore said: It is on two points that they[6] differ [in the Mishnah]; they differ regarding damage done at the time of the fall [of the pitcher] and they again differ regarding damage occasioned [by the potsherds] subsequently to the fall. The difference of opinion regarding damage done at the time of the fall of the pitcher arises on the question whether stumbling implies negligence [or not];[7] one Master[8] maintaining that stumbling does imply negligence, whereas the other Master[9] is of the opinion that stumbling does not [necessarily] imply negligence.[10] The point at issue in the case of damage occasioned [by the potsherds] subsequently to the fall, is the law as applicable to abandoned nuisances;[11] one Master[8] maintaining that for damage occasioned by abandoned nuisances there is liability,[12] whereas the other Master[9] maintains exemption.[13] But how can you prove this?[14] — From the text which presents two [independent] cases [as follows]; SOMEONE SLIPPED IN THE WATER OR WAS INJURED BY THE POTSHERD; for indeed is not one case the same as the other,[15] unless it was intended to convey, 'Someone slipped in the water while the pitcher had been falling[16] or was injured by the potsherd subsequently to the fall.'

Now that the Mishnah presents two independent cases, it is only reasonable to assume that the Baraitha[17] similarly deals with the same two problems. That is all very well as regards the 'pitcher' where the two [problems] have application [in the case of damage done] at the time of the fall or subsequently to the fall [respectively]. But how in the case of the 'camel'? For though concerning damage occasioned subsequently to the fall, it may well have application where the carcass has been abandoned,[18] yet in the case of damage done at the time of the fall, what point of difference can be found?[19] — R. Aha thereupon said: [It deals with a case] where the camel was led in water along the slippery shore of a river.[20] But under what circumstances? If where there was another [better] way, is it not a case of culpa lata?[21] If on the other hand there was no other way [to pass through], is it not a case of no alternative? — The point at issue can therefore only be where the driver stumbled and together with him the camel also stumbled.

But in the case of abandoning nuisances,[22] where could [the condition of] intention [laid down by R. Judah] come in? — Said R. Joseph: The intention [in this case] refers to the retaining of the

ownership of the potsherd.[23] So also said R. Ashi, that the intention [in this case] refers to the retaining of the ownership of the potsherd.

R. Eleazar said: 'It is regarding damage done at the time of the fall that there is a difference of opinion.' But how in the case of damage done subsequently to the fall? Would there be unanimity that there is exemption? Surely there is R. Meir who expressed [his opinion][24] that there is liability! What else [would you suggest? That in this case] there is unanimity [imposing] liability? Surely there are the Rabbis who stated [their view] that there is exemption! — Hence, what he means [to convey by his statement] 'damage done at the time of the fall', is that there is difference of opinion 'even regarding damage done at the time of the fall', making thus known to us [the conclusions arrived at] by Abaye.[25]

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(1) For not having removed the potsherds or the camel that fell down.

(2) Which the defendant should have anticipated.

(3) For carelessness.

(4) Which could hardly have been anticipated.

(5) For in this case the defendant is not to blame for carelessness.

(6) I.e., R. Judah and the anonymous view which is that of R. Meir.

(7) As it was owing to the defendant having stumbled that his pitcher gave way.

(8) I.e., R. Meir.

(9) I.e., R. Judah.

(10) 'INTENTIONALLY' stated in the Mishnah would thus mean where there was intention actually to break the pitcher, for if the intention was merely to bring the pitcher below the shoulder it would come under the term 'UNINTENTIONALLY', the ground advanced by R. Judah is that in the case of stumbling and breaking a pitcher and doing thereby damage, no negligence was necessarily involved.

(11) Of which the defendant is no longer the owner.

(12) For the liability in the case of Pit is also where it has been dug in public ground and is thus ownerless.

(13) For he holds that the liability in the case of Pit is only where the defendant had dug it in his own ground and though he subsequently abandoned it he retained the ownership of the pit itself; cf. supra p. 107; and infra 50a.

(14) That the points at issue are twofold.

(15) Why then would one case not have sufficed?

(16) And the water was still in the process of being poured out.

(17) Supra p. 152.

(18) The point at issue thus consisting in the law applicable to abandoned nuisances.

(19) For the problem whether 'stumbling' implies negligence or not has surely no application where it was not the driver but the camel that stumbled.

(20) The stumbling of the camel is thus imputed to the driver.

(21) I.e., grave fault, which has nothing to do with the problem of stumbling.

(22) Which is the second point at issue between R. Judah and R. Meir.

(23) [R. Judah therefore means this: If he had the intention of retaining the shards he is liable; if he had no intention to do so but abandoned them, he is exempt.]

(24) Supra p. 152.

(25) Supra p. 153.

Talmud - Mas. Baba Kama 29b

R. Johanan, however, said: 'It is regarding damage occasioned after the fall [of the pitcher] that there is a difference of opinion.' But how in the case of damage done at the time of the fall? Would there be unanimity [granting] exemption? Surely R. Johanan's statement further on[1] that we should not think that the Mishnah[2] [there] follows the view of R. Meir who maintains that stumbling constitutes carelessness, implies that R. Meir imposes liability.[3] What else [would you suggest? That there] be unanimity [imposing] liability? Surely the very statement made further on[1] by R. Johanan

[himself] that we should not think that the Mishnah[2] [there] follows the view of R. Meir, implies that the Rabbis would exempt![3] — Hence what he [R. Johanan] intends to convey to us is that abandoned nuisances have only in this connection been exempted from liability by the Rabbis since the very inception [of the nuisances][4] was by accident, whereas abandoned nuisances in other circumstances involve liability [even according to the Rabbis].[5]

It was stated: In the case of abandoned nuisances [causing damage], R. Johanan and R. Eleazar [differ]. One imposes liability and the other maintains exemption. May we not say that the one imposing liability follows the view of R. Meir,[6] whereas the other, who maintains exemption follows that of the Rabbis?[6] — As to R. Meir's view no one could dispute [that there should be liability].[7] Where they differ is as to the view of the Rabbis. The one who exempts does so because of the Rabbis,[8] while the other who imposes liability can say to you, 'It is I who follow the view even of the Rabbis, for the Rabbis who declare abandoned nuisances exempt do so only in one particular connection, where the very inception [of the nuisances][9] had been by accident, whereas abandoned nuisances in other connections involve liability.' May it not be concluded that it was R. Eleazar who imposed liability? For R. Eleazar said in the name of R. Ishmael:[10] There are two [laws dealing with] matters that are really not within the ownership of man but which are regarded by Scripture as if they were under his ownership. They are [the following]: Pit in public ground,[11] and Leaven after midday [on Passover eve].[12] It may indeed be concluded thus.[13]

But did R. Eleazar really say so? Did not R. Eleazar express himself to the contrary? For we have learnt;[14] 'If a man turns up dung that had been lying on public ground and another person is [subsequently] injured thereby, there is liability for the damage.' And R. Eleazar thereupon said: This Mishnaic ruling applies only to one who [by turning over the dung] intended to acquire title to it. For if he had not intended to acquire title to it there would be exemption. Now, does not this prove that abandoned nuisances are exempt? — R. Adda b. Ahabah suggested [that the amendment made by R. Eleazar] referred to one who has restored the dung to its previous position.[15] Rabina [thus] said: The instance given by R. Adda b. Ahabah may have its equivalent in the case of one who, on coming across an open pit, covered it, but opened it up again. But Mar Zutra the son of R. Mari said to Rabina: What a comparison! In the latter case, [by merely covering the pit] the [evil] deed of the original [offender] has not yet been undone, whereas in the case before us [by removing the dung from its place] the [evil] deed of the original [offender] has been undone! May it not therefore [on the other hand] have its equivalent only in the case of one who, on coming across an open pit, filled it up [with earth] but dug it out again, where, since the nuisance created by the original [offender] had already been completely removed [by filling in the pit], it stands altogether under the responsibility of the new offender? — R. Ashi therefore suggested [that the amendment made by R. Eleazar] referred to one who turned over the dung within the first three [handbreadths][16] of the ground [in which case the nuisance created by the original offender is not yet considered in law as abated]. But what influenced R. Eleazar to make the [Mishnaic] ruling[17] refer to one who turned over the dung within the first three [handbreadths of the ground], and thus to confine its application only to one who intended to acquire title to the dung,[18] excluding thereby one who did not intend to acquire title to it? Why not indeed make the ruling refer to one who turned over the dung above the first three handbreadths, so that even where one did not intend to acquire title to it the liability should hold good? — Raba [thereupon] said: Because of a difficulty in the Mishnaic text[17] [which occurred to him]: Why indeed have 'turning up' in the Mishnaic text and not simply 'raising,'[19] if not to indicate that 'turning up' implies within the first three handbreadths [of the ground].

Now [then] that R. Eleazar was the one who maintained liability,[20] R. Johanan would [of course] be the one who maintained exemption. But could R. Johanan really maintain this? Surely we have learnt: If a man hides thorns and broken glass [in public ground], or makes a fence of thorns, or if a man's fence falls upon public ground and damage results therefrom to another person, there is liability for the damage.[21] And R. Johanan thereupon said: This Mishnaic ruling refers to a case

where the thorns were projecting into the public thoroughfare. For if they were confined within private premises[22] there would be exemption. Now, why should there be exemption in the case where they were confined within private premises if not because they would only constitute a nuisance on private premises? Does this then not imply that it is only a nuisance created upon public ground that involves liability, proving thus that abandoned nuisances do involve liability? — No, it may still be suggested that abandoned nuisances are exempt. The reason for the exemption in the case of thorns confined to private premises is, as it has already been stated in this connection,[21] that R. Aha the son of R. Ika said: Because it is not the habit of men to rub themselves against walls.[23]

But again, could R. Johanan [really] maintain this?[24] Surely R. Johanan stated:[25] The halachah is in accordance with anonymous Mishnaic rulings. And we have learnt: If a man digs a pit in public ground, and an ox or ass falls in and dies, there is liability.[26] [Does this not prove that there is liability for a pit dug in public ground?] — [It must] therefore [be concluded that] R. Johanan was indeed the one who maintained liability. Now then that R. Johanan was the one who maintained liability, R. Eleazar would [of course] be the one who maintained exemption. But did not R. Eleazar say

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(1) Infra p. 166.

(2) Dealing with the case of the two potters, infra p. 166.

(3) For damage done at the time of the fall.

(4) I.e., when the pitcher gave way or the camel fell down.

(5) The statement made by R. Johanan that it was regarding damage occasioned after the fall (of the pitcher) that there was a difference of opinion would thus mean that the difference of opinion between R. Meir and the other Rabbis was only where the inception of the nuisance was with a fall, i.e. with an accident, as where the nuisance had originally been wilfully exposed to the public there would be liability according to all opinions.

(6) V. p. 155, n. 1.

(7) For R. Meir imposes liability for abandoned nuisances even where their very inception was by accident; v. Rashi, but also Tosaf. 29a.

(8) Supra p. 153.

(9) As when the pitcher gave way or the camel fell down.

(10) Pes. 6b.

(11) Which is not the property of the defendant, but for which he is nevertheless responsible on account of his having dug it.

(12) Lit., ‘from the sixth hour upwards’, when in accordance with Pes. I. 4, it becomes prohibited for any use and is thus rendered ownerless, but for its destruction the original owner is still held responsible.

(13) That according to R. Eleazar abandoning nuisances does not release from responsibility.

(14) Infra p. 161.

(15) In which case the defendant did not aggravate the position.

(16) According to the principle of Labud, which is the legal consideration of separated parts as united, one substance is not regarded as removed from another unless a space of not less than three handbreadths separates them.

(17) Infra p. 161.

(18) Lit., ‘and the reason is because he intended’, etc.

(19) Which would necessarily mean above the first three handbreadths of the ground level.

(20) In the case of abandoned nuisances that have caused damage.

(21) Infra p. 159.

(22) Although he subsequently abandoned it to the public.

(23) It is therefore the plaintiff himself who is to blame.

(24) That abandoning nuisances releases from responsibility.

(25) Shab. 46a.

(26) Infra 50b.

in the name of R. Ishmael etc.[1] [which proves that abandoned nuisances do involve liability]? — This presents no difficulty. One view[2] is his own whereas the other[3] is that of his master.

MISHNAH. IF A MAN POURS OUT WATER INTO PUBLIC GROUND AND SOME OTHER PERSON IS INJURED BY IT, THERE IS LIABILITY FOR THE DAMAGE. IF HE HIDES THORNS AND BROKEN GLASS, OR MAKES A FENCE OF THORNS, OR, IF A FENCE FALLS INTO THE PUBLIC GROUND AND DAMAGE RESULTS THEREFROM TO SOME OTHER PERSONS, THERE IS [SIMILARLY] LIABILITY FOR THE DAMAGE.[4]

GEMARA. Rab said: This Mishnaic ruling[5] refers only to a case where his garments[6] were soiled in the water. For regarding injury to himself there should be exemption, since it was ownerless ground that hurt him.[7] [But] R. Huna said to Rab: Why should not [the topmost layer of the ground mixed up with private water] be considered as private clay?[8] — Do you suggest [the ruling to refer to] water that has not dried up? [No.] It deals with a case where the water has already dried up. But why [at all] two [texts[9] for one and the same ruling]?[10] — One [text] refers to the summer season whereas the other deals with winter, as indeed [explicitly] taught [elsewhere]: All those who open their gutters or sweep out the dust of their cellars [into public thoroughfares] are, in the summer period, acting unlawfully, but lawfully in winter; [in all cases] even though when acting lawfully, if special damage resulted, they are liable to compensate.[11]

IF HE HIDES THORNS etc., R. Johanan said:[4] This Mishnaic ruling refers only to a case where the thorns were projecting into the public ground. For if they were confined within private premises there would be no liability. On what account is there exemption [in the latter case]? — R. Aha the son of R. Ika [thereupon] answered:[12] Because it is not the habit of men to rub themselves against walls.

Our Rabbis taught: If one hid thorns and broken glasses in a neighbour's wall and the owner of the wall came and pulled his wall down, so that they fell into the public ground and did damage, the one who hid them is liable. R. Johanan [thereupon] said: This ruling refers only to an impaired wall.[13] For in the case of a strong wall the one who hid [the thorns] should be exempt while the owner of the wall would be liable.[14] Rabina commented: This ruling[15] proves that where a man covers his pit with a neighbour's lid and the owner of the lid comes and removes his lid, the owner of the pit would be liable [for any damage that may subsequently be caused by his pit]. Is not this inference quite obvious?[16] — You might perhaps have suggested this ruling[15] [to be confined to the case] there, where the owner of the wall had no knowledge of the identity of the person who hid the thorns in the wall, and was accordingly unable to inform him of the intended pulling down of the wall, whereas in the case of the pit, where the owner of the lid very well knew the identity of the owner of the pit, [you might have argued] that it was his duty to inform him [of the intended removal of the lid].[17] It is therefore made known to us [that this is not the case].[18]

Our Rabbis taught: The pious men of former generations used to hide their thorns and broken glasses in the midst of their fields at a depth of three handbreadths below the surface so that [even] the plough might not be hindered by them. R Shesheth[19] used to throw them into the fire.[20] Raba threw them into the Tigris. Rab Judah said: He who wishes to be pious must [in the first instance particularly] fulfil the laws of [Seder] Nezikin.[21] But Raba said: The matters [dealt with in the Tractate] Aboth;[22] still others said: Matters [dealt with in] Berakoth.[23]

MISHNAH. IF A MAN REMOVES HIS STRAW AND STUBBLE INTO THE PUBLIC GROUND TO BE FORMED INTO MANURE, AND DAMAGE RESULTS TO SOME OTHER PERSON, THERE IS LIABILITY FOR THE DAMAGE, AND WHOEVER SEIZES THEM FIRST ACQUIRES TITLE TO THEM. R. SIMEON B. GAMALIEL SAYS: WHOEVER CREATES ANY

NUISANCES ON PUBLIC GROUND CAUSING [SPECIAL] DAMAGE IS LIABLE TO COMPENSATE, THOUGH WHOEVER SEIZES OF THEM FIRST ACQUIRES TITLE TO THEM. IF HE TURNS UP DUNG THAT HAD BEEN LYING ON PUBLIC GROUND, AND DAMAGE [SUBSEQUENTLY] RESULTS TO ANOTHER PERSON, HE IS LIABLE FOR THE DAMAGE.

GEMARA. May we say that the Mishnaic ruling[24] is not in accordance with R. Judah? For it was taught: R. Judah says: When it is the season of taking out foliage everybody is entitled to take out his foliage into the public ground and heap it up there for the whole period of thirty days so that it may be trodden upon by the feet of men and by the feet of animals; for upon this understanding did Joshua make [Israel][25] inherit the Land. — You may suggest it to be even in accordance with R. Judah, for R. Judah [nevertheless] agrees that where [special] damage resulted, compensation should be made for the damage done. But did we not learn that R. Judah maintains that in the case of a Chanukah candle[26] there is exemption on account of it having been placed there with authorization?[27] Now, does not this authorization mean the permission of the Beth din?[28] — No, it means the sanction of [the performance of] a religious duty[29] as [indeed explicitly] taught: R. Judah says: In the case of a Chanukah candle there is exemption on account of the sanction of [the performance of] a religious duty.

Come and hear: In all those cases where the authorities permitted nuisances to be created on public ground, if [special] damage results there will be liability to compensate. But R. Judah maintains exemption![30] — R. Nahman said: The Mishnah[31] refers to the time when it is not the season to take out foliage and thus it may be in accordance with R. Judah. — R. Ashi further [said]:

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(1) That there is liability for a pit dug in public ground, though it is ownerless.

(2) That abandoning nuisances releases from responsibility.

(3) That abandoning nuisances does not release from responsibility.

(4) Supra p. 158.

(5) Which, according to Rab, deals with a case where the water has not been abandoned, but remained still the chattel of the original owner.

(6) Those of the person who was injured.

(7) Whereas the water was but the remote cause of it.

(8) Lit., ‘his clay’. i.e., of the owner of the water.

(9) The one here and the other supra p. 149.

(10) Expounded by Rab here as well as supra pp. 149-150.

(11) Supra pp. 19-20.

(12) V. p. 159, n. 3.

(13) Which was likely to be pulled down.

(14) For not having taken proper care to safeguard the public.

(15) As stated in the Baraitha quoted.

(16) Why then had Rabina to make it explicit?

(17) Failing that, the sole responsibility should then fall upon him.

(18) But that the responsibility lies upon the owner of the pit.

(19) Who was stricken with blindness; cf. Ber. 58a.

(20) V. Nid. 17a.

(21) [By being careful in matters that may cause damage.]

(22) [Matters affecting ethics and right conduct. Var. lec., ‘Rabina’.]

(23) [The Tractate wherein the benedictions are set forth and discussed.]

(24) Imposing liability in the commencing clause.

(25) B.M. 118b. Why then liability for the damage caused thereby during the specified period permitted by law?

(26) Placed outside a shop and setting aflame flax that has been passing along the public road.

(27) Infra p. 361.

(28) A permission which has similarly been extended in the case of the dung during the specified period and should accordingly effect exemption.
(29) Which is of course absent in the case of removing dung to the public ground, where liability must accordingly be imposed for special damage.
(30) Does not this prove that mere authorization suffices to confer exemption? Cf. n. 2.
(31) V. p. 161, n. 5.

Talmud - Mas. Baba Kama 30b

The Mishnah states, HIS STRAW AND STUBBLE which are slippery [and may never be removed into public ground even according to R. Judah].

WHOEVER SEIZES THEM FIRST ACQUIRES TITLE TO THEM. Rab said: Both to their corpus and to their increase [in value],[1] whereas Ze'ire said: Only to their increase but not to their corpus.[2] Wherein is the point at issue?[3] — Rab maintains that they [the Rabbis] extended the penalty to the corpus on account of the increase thereof, but Ze'ire is of the opinion that they did not extend the penalty to the corpus on account of the increase thereof.

We have learnt: IF HE TURNS UP DUNG THAT HAD BEEN LYING ON PUBLIC GROUND AND DAMAGE [SUBSEQUENTLY] RESULTS TO ANOTHER PERSON, HE IS LIABLE FOR THE DAMAGE. Now, [in this case] it is not stated that 'Whoever seizes it first acquires title to it.'[4] — [This ruling has been] inserted in the commencing clause, and applies as well to the concluding clause. But has it not in this connection[5] been taught [in a Baraitha]: They are prohibited [to be taken possession of] on account of [the law of] robbery?[6] — When [the Baraitha] states 'They are prohibited on account of robbery' the reference is to all the cases [presented] in the Mishnaic text[7] and [is intended] to [protect] the one who had seized [of them] first, having thereby acquired title [to them]. But surely it was not meant thus, seeing that it was taught:[8] 'If a man removes straw and stubble into the public ground to be formed into manure and damage results to another person, he is liable for the damage, and whoever seizes them first acquires title to them, as this may be done irrespective of [the law of] robbery. [However] where he turns up dung on public ground and damage [subsequently] results to another person, he is liable [to compensate] but no possession may be taken of the dung on account of [the law of] robbery'?[6] — R. Nahman b. Isaac [thereupon] exclaimed: What an objection to adduce from the case of dung! [It is only in the case of] an object that is susceptible to increase [in value] that the penalty is extended to the corpus[9] for the purpose of [discouraging any idea of] gain, whereas with regard to an object that yields no increase there is no penalty [at all].[10]

The question was asked: According to the view that the penalty extends also to the corpus for the purpose of [discouraging the idea of] gain,[9] is this penalty imposed at once[11] or is it only after some gain has been produced that the penalty will be imposed? — Come and hear: An objection was raised [against Rab] from the case of dung![12] But do you really think this [solves the problem]? The objection from the case of dung was raised only before R. Nahman expounded the underlying principle;[13] for after the explanation given by R. Nahman what objection indeed could there be raised from the case of dung?[14]

Might not one suggest [the argument between Rab and Ze'ire to have been] the point at issue between [the following] Tannaim? For it was taught: If a bill contains a stipulation of interest,[15] a penalty is imposed so that neither the principal nor the interest is enforced; these are the words of R. Meir, whereas the Sages maintain that the principal is enforced though not the interest.[16] Now, can we not say that Rab adopts the view of R. Meir[17] whereas Ze'ire follows that of the Rabbis?[18] — Rab may explain [himself] to you [as follows]: 'I made my statement even according to the Rabbis: for the Rabbis maintain their view only there, where the principal as such is quite lawful, whereas here

in the case of nuisances the corpus itself is liable to do damage.' Ze'ire [on the other hand] may explain [himself] to you [thus]: 'I made my statement even in accordance with R. Meir; for R. Meir expressed his view only there, where immediately, at the time of the bill having been drawn up, [the evil had been committed] by stipulating the usury, whereas here in the case of nuisances, who can assert that [special] damage will result?'

Might not one suggest [the argument between Rab and Ze'ire to have been] the point at issue between these Tannaim? For it was taught: If a man removes straw and stubble into the public ground to be formed into manure and damage results to another person, he is liable for the damage, and whoever seizes them first acquires title to them. They are prohibited [to be taken possession of] on account of [the law of] robbery. R. Simeon b. Gamaliel says: Whoever creates any nuisances on public ground and causes [special] damage is liable to compensate, though whoever takes possession of them first acquires title to them, and this may be done irrespective of [the law of] robbery. Now, is not the text a contradiction in itself? You read, 'Whoever seizes them first acquires title to them,' then you state [in the same breath], 'They are prohibited [to be taken possession of] on account of [the law of] robbery'! It must therefore mean thus: 'Whoever seizes them first acquires title to them,' viz., to their increase, whereas, 'they are prohibited to be taken possession of on account of [the law of] robbery,' refers to their corpus. R. Simeon b. Gamaliel thereupon proceeded to state that even concerning their corpus, 'whoever seizes them first, acquires title to them.' Now, according to Ze'ire, his view must unquestionably have been the point at issue between these Tannaim,[19] but according to Rab, are we similarly to say that [his view] was the point at issue between these Tannaim? — Rab may say to you: 'It is [indeed] unanimously held that the penalty must extend to the corpus for the purpose [of discouraging the idea] of gain; the point at issue [between the Tannaim] here is whether this halachah[20] should be made the practical rule of the law'.[21] For it was stated: R. Huna on behalf of Rab said: This halachah[20] should not be made the practical rule of the law,[22] whereas R. Adda b. Ahabah said: This halachah[20] should be made the practical rule of the law. But is this really so? Did not R. Huna declare barley [that had been spread out on public ground] ownerless, [just as] R. Adda b. Ahabah declared

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(1) While on public ground.

(2) Which thus still remains the property of the original owner.

(3) I.e., what is the principle underlying it?

(4) This clause, if omitted purposely, would thus tend to prove that the penalty attaches only to straw and stubble and their like, which improve while lying on public ground, but not to dung placed on public ground, apparently on account of the fact that in this case there is neither increase in quantity nor improvement in quality while lying on public ground. This distinction appears therefore to be not in accordance with the view of Rab, maintaining that the penalty extend not only to the increase but also to the corpus of the object of the nuisance.

(5) I.e. in connection with the latter clause.

(6) Which shows that the penalty does not extend to the corpus.

(7) Even to straw and stubble.

(8) [V. D.S. a.l.]

(9) According to the view of Rab.

(10) For, since there is no gain, nobody is likely to be tempted to place dung on public ground.

(11) Even before any gain accrued.

(12) Although no increase will ever accrue there, thus proving that according to Rab the penalty is imposed on the corpus even before it had yielded any gain.

(13) That there is no penalty at all with regard to an object that yields no increase; whereas the query is based on the principle laid down by R. Nahman.

(14) Where no increase will ever accrue.

(15) Which is against the biblical prohibition of Ex. XXII, 24.

(16) Cf. B.M. 72a.

(17) Extending the penalty also to the corpus.

(18) I.e., the Sages who maintain that the penalty attaches only to the increase.

(19) For R. Simeon b. Gamaliel is certainly against his view.

(20) To extend the penalty to the corpus.

(21) As to whether people should be encouraged to avail themselves of it, or not.

(22) For the sake of not disturbing public peace.

Talmud - Mas. Baba Kama 31a

the refuse of boiled dates [that had been placed on public ground] ownerless? We can well understand this in the case of R. Adda b. Ahabah who acted in accordance with his own dictum, but in the case of R. Huna, are we to say that he changed his view? — These owners [in that case] had been warned [several times not to repeat the nuisance].[1]

MISHNAH. IF TWO POTTERS WERE FOLLOWING ONE ANOTHER AND THE FIRST STUMBLED AND FELL DOWN AND THE SECOND STUMBLED BECAUSE OF THE FIRST, THE FIRST IS LIABLE FOR THE DAMAGE DONE TO THE SECOND.

GEMARA. R. Johanan said: Do not think [that the Tanna of] this Mishnah is R. Meir who considers stumbling as implying carelessness that involves liability.[2] For even according to the Rabbis who maintain [that stumbling is] mere accident for which there is exemption,[2] there should be liability here where he[3] had [meanwhile had every possibility] to rise and nevertheless did not rise. [But] R. Nahman b. Isaac said: You may even say that [the Mishnah speaks also of a case] where he[3] did not yet have [any opportunity] to rise, for he[3] was [surely able] to caution[4] and nevertheless did not caution. R. Johanan, however, considers that where he[3] did not yet have [any opportunity] to rise, he[3] could hardly be expected to caution as he was [surely] somewhat distracted.

We have learnt: If the carrier of the beam was in front, the carrier of the barrel behind, and the barrel broke by [colliding with] the beam, he[5] is exempt. But if the carrier of the beam stopped suddenly, he is liable.[6] Now, does this not mean that he stopped for the purpose of shouldering the beam as is usual with carriers, and it yet says that he is liable, [presumably] because [he failed] to caution?[7] — No, he suddenly stopped to rest [which is rather unusual in the course of carrying]. But what should be the law[8] in the case where he stopped to shoulder the beam? Would there then be exemption? Why then state in the subsequent clause,[9] 'Where he, however, warned the carrier of the barrel to stop, he is exempt'? Could the distinction not be made in the statement of the same case [in the following manner]: 'Provided that he stopped to rest; but if he halted to shift the burden on his shoulder, he is exempt'? — It was, however, intended to let us know that even where he stopped to rest, if he warned the carrier of the barrel to stop, he is exempt.

Come and hear: If a number of potters or glass-carriers were walking in line and the first stumbled and fell and the second stumbled because of the first and the third because of the second, the first is liable for the damage [occasioned] to the second, and the second is liable for the damage [occasioned] to the third. Where, however, they all fell because of the first, the first is liable for the damage [sustained] by them all. If [on the other hand] they cautioned one another, there is exemption. Now, does this teaching not deal with a case where there has not yet been [any opportunity] to rise?[10] — No, [on the contrary] they [have already] had [every opportunity] to rise. But what should be the law[8] in the case where they [have not yet] had [any opportunity] to rise? Would there then be exemption? If so, why state in the concluding clause, 'If [on the other hand] they cautioned one another, there is exemption'? Could the distinction not be made in the statement of the same case [in the following manner]: 'Provided that they have already had every opportunity to rise; but if they have not yet had any opportunity to rise, there is exemption'? — This is what it intended to let us know: That even where they [have already] had [every opportunity] to rise, if they cautioned one another, there is exemption.

Raba said: The first is liable for damage [done] to the second whether directly by his person[11] or by means of his chattels,[12] whereas the second is liable for damage to the third only if done by his person[13] but not if caused by his chattels. [Now,] in any case [how could these rulings be made consistent]? [For] if stumbling implies carelessness, why should not also the second be liable [for all kinds of damage]?[14] If [on the other hand] stumbling does not amount to carelessness, why should even the first not enjoy immunity?

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(1) It was therefore a specially aggravated offence.

(2) Supra pp. 153 and 155.

(3) The first potter.

(4) The second potter to stop.

(5) The carrier of the beam.

(6) Infra p. 169.

(7) Which would thus support the interpretation given by R. Nahman and contradict the view expounded by R. Johanan.

(8) According to the view of R. Johanan.

(9) Infra p. 170.

(10) V. p. 166, n. 7.

(11) Being subject to the law applicable to damage done by Man.

(12) Which are subject to the law applicable to Pit.

(13) V. p. 167, n. 4

(14) Even if caused by his chattels.

Talmud - Mas. Baba Kama 31b

— The first was certainly [considered] careless,[1] whilst, as to the second, he is liable for damage done by his person, [that is,] only where he [has already] had [the opportunity] to rise and did [nevertheless] not rise; for damage caused by his chattels he is [however] exempt, as he may say to him:[2] It is not I who dug this pit.[3]

An objection was raised [from the following Baraitha]: All of them are liable for damage [done] by their person,[4] but exempt for damage [caused] by their chattels.[4] Does [this Baraitha] not refer even to the first?[5] — No, with the exception of the first. But is it not stated, 'All of them ...'? — R. Adda b. Ahabah said: 'All of them' refers to [all] the plaintiffs.[6] [But] how is this? If you maintain that the first [is] also [included], we understand why the Baraitha says 'All of them'. But if you contend that the first is excepted, what [meaning could there be in] 'All of them'? Why [indeed] not say 'The plaintiffs'? — Raba [therefore] said: The first[7] is liable for both injuries inflicted upon the person of the second and damage caused to the chattels of the second, whereas the second[8] is liable to compensate the third only for injuries inflicted upon his person but not for damage[9] to his chattels; the reason being that the [person of the] second is subject to the law applicable to Pit, and no case can be found where Pit would involve liability for inanimate objects.[10] This accords well with the view of Samuel, who holds that all nuisances are [subject to the law applicable to] Pit.[11] But according to Rab who maintains that it is only where the nuisance has been abandoned that this is so, whereas if not [abandoned] it is not so,[12] what reason could be advanced?[13] — We must therefore accept the first version,[14] and as to the objection raised by you [from the Baraitha], 'All of them are liable',[15] it has already been interpreted by R. Adda b. Minyomi in the presence of Rabina to refer to a case where inanimate objects have been damaged by the chattels [of the defendant].[16]

The Master stated: 'Where, however, they all fell because of the first, the first is liable for the damage [sustained] by them all.' How [indeed can they all] fall [because of the first]? — R. Papa said: Where he blocked the road like a carcass, [closing the whole width of the road]. R. Zebid said: Like a blind man's staff.[17]

MISHNAH. IF ONE COMES WITH HIS BARREL AND AN OTHER COMES WITH HIS BEAM AND THE PITCHER[18] OF THIS ONE BREAKS BY [COLLISION WITH] THE BEAM OF THIS ONE, HE[19] IS EXEMPT, FOR THE ONE IS ENTITLED TO WALK [THERE AND CARRY BEAMS] AND THE OTHER IS ENTITLED TO WALK [THERE AND CARRY BARRELS]. WHERE THE CARRIER OF THE BEAM WAS IN FRONT, AND THE CARRIER OF THE BARREL BEHIND, AND THE BARREL BROKE BY [COLLISION WITH] THE BEAM, THE CARRIER OF THE BEAM IS EXEMPT.[20]

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(1) [Since stumbling implies carelessness.]

(2) To the third.

(3) I.e., the nuisance was created not by the second, but caused by the first who fell.

(4) Whether to the person or to the chattels of the plaintiff.

(5) Who, according to Raba, is liable for damage caused even by his chattels to the person of the second as being subject to the law applicable to Pit. This Baraitha thus refutes Raba.

(6) The first is thus, as a matter of course, not included.

(7) Being subject to the law applicable to damage done by Man.

(8) Should be subject to the law applicable in Pit.

(9) Though done by the person of the second.

(10) Supra p. 18.

(11) Supra p. 150. [The person of the second may therefore be treated as Pit.]

(12) But is subject to the law applicable to Ox where damage to inanimate objects is also compensated.

(13) For the person of the second, though lying on the ground, has surely never been abandoned by him. Why then exemption for damage done by him to inanimate objects?

(14) Of the statement of Raba, according to which the first is liable for damage done whether by his person or by his chattels, whereas the second is liable for damage done only by his person but not if done by his chattels.

(15) For damage done by their person, but exempt for damage done by their chattels, including thus also the first.

(16) Which are subject to the laws of Pit involving no liability for inanimate objects. Were, however, the person of the plaintiff to have been injured, there would be no exemption even if the injury were caused by the chattels of the first, as expounded by Raba.

(17) [With which the blind gropes his way on either side of the road.]

(18) Cf. supra p. 142.

(19) The owner of the beam.

(20) For the carrier of the barrel who was behind should not have proceeded so fast.

BUT IF THE CARRIER OF THE BEAM [SUDDENLY] STOPPED, HE IS LIABLE.[1] IF, HOWEVER, HE CRIED TO THE CARRIER OF THE BARREL, HALT!' HE IS EXEMPT. WHERE, HOWEVER, THE CARRIER OF THE BARREL WAS IN FRONT, AND THE CARRIER OF THE BEAM BEHIND AND THE BARREL BROKE BY [COLLISION WITH] THE BEAM, HE IS LIABLE.[2] IF, HOWEVER, THE CARRIER OF THE BARREL [SUDDENLY] STOPPED, HE IS EXEMPT. BUT WHERE HE CRIED TO THE CARRIER OF THE BEAM, 'HALT!' HE IS LIABLE. THE SAME APPLIES TO ONE CARRYING A [BURNING] CANDLE WHILE ANOTHER WAS PROCEEDING WITH FLAX.

GEMARA. Rabbah b. Nathan questioned R. Huna: If a man injures his wife through conjugal intercourse, what is [the legal position]? Since he performed this act with full permission is he to be exempt [for damage resulting therefrom], or should perhaps greater care have been taken by him? — He said to him. We have learnt it: ... FOR THE ONE IS ENTITLED TO WALK [THERE AND CARRY BEAMS] AND THE OTHER IS ENTITLED TO WALK [THERE AND CARRY BARRELS].[3] Raba [however] said: There is an a fortiori [to the contrary]: If in the case of the Wood,[4] where this one [the defendant] was entering [as if] into his own domain, and the other [the plaintiff] was [similarly] entering [as if] into his own domain, it is nevertheless considered [in the eye of the law][4] that he entered his fellow's [the plaintiff's] domain, and he is made liable, should this case[5] where this one [the defendant][6] was actually entering the domain of his fellow [the plaintiff][7] not be all the more [subject to the same law]?[8] But surely [the Mishnah] states, . . . FOR THE ONE IS ENTITLED TO WALK THERE [AND CARRY BEAMS] AND THE OTHER IS ENTITLED TO WALK [THERE AND CARRY BARRELS, indicating exemption where the entry was sanctioned]! — There, both of the parties were simultaneously [active against each other], whereas here[9] it was only he[10] that committed the deed. Is she[11] [considered] not [to have participated in the act at all]? Is it not written, The souls that commit them shall be cut off from among their people?[12] — [It is true that] enjoyment is derived by both of them, but it is only he to whom the active part can be ascribed.

WHERE THE CARRIER OF THE BEAM WAS IN FRONT etc. Resh Lakish stated:[13] In the case of two cows on public ground, one lying down [maliciously] and the other walking about, if the one that was walking kicked the one that was lying, there is exemption [since the latter too misconducted itself by laying itself down on public ground], whereas if the one that was lying kicked the one that was walking, there is liability to pay. May not [the following be cited in] support of this:[14] WHERE THE CARRIER OF THE BEAM WAS IN FRONT AND THE CARRIER OF THE BARREL BEHIND, AND THE BARREL BROKE BY [COLLISION WITH] THE BEAM, HE IS EXEMPT. BUT IF THE CARRIER OF THE BEAM [SUDDENLY] STOPPED HE IS LIABLE. For surely [this latter case] here is similar to that of the lying cow kicking the walking cow,[15] and liability is stated! — But do you really think that this [liability] need be proved?[14] [The Mishnaic text however] not only fails to be of any support [in this respect], but affords a contradiction to Resh Lakish, [in whose view] the reason [even for the liability] is that the lying cow kicked the walking cow, thus [implying] that [the latter] sustained damage [because of the former cow] through sheer accident, and there would be exemption. Now, [the case of] the Mishnah surely deals with accidental damage, and still states liability? — The Mishnah [deals with a case] where the beam blocked the [whole] passage as if by a carcass,[16] whereas here [in the case dealt with by Resh Lakish] the cow was lying on one side of the road so that the other cow should have passed on the other side.[17]

But the concluding clause may [be taken to] support Resh Lakish. For it is stated, BUT IF THE CARRIER OF THE BARREL WAS IN FRONT AND THE CARRIER OF THE BEAM BEHIND, AND THE BARREL BROKE BY [COLLISION WITH] THE BEAM, HE IS LIABLE. IF, HOWEVER, THE CARRIER OF THE BARREL [SUDDENLY] STOPPED, HE IS EXEMPT.

Now, surely this case resembles that of the walking cow kicking the lying cow,[18] and the text states exemption? — No! The Mishnah [deals with the case where the damage was done in a usual manner as] he[19] was passing in the ordinary way, whereas here [in the case dealt with by Resh Lakish] it may be argued for the lying cow,[20] 'Even if you are entitled to tread upon me, you have still no right to kick me.'[21]

MISHNAH. IF TWO [PERSONS] WERE PASSING ONE ANOTHER ON PUBLIC GROUND, ONE [OF THEM] RUNNING AND THE OTHER WALKING OR BOTH OF THEM RUNNING, AND THEY WERE INJURED BY EACH OTHER, BOTH OF THEM ARE EXEMPT.[22]

GEMARA. Our Mishnah is not in accordance with Issi b. Judah. For it has been taught: Issi b. Judah maintains that the man who had been running is liable, since his conduct was unusual. Issi, however, agrees [that if it were] on a Sabbath eve before sunset there would be exemption, for running at that time is permissible. R. Johanan stated that the halachah is in accordance with Issi b. Judah. But did R. Johanan [really] maintain this? Has R. Johanan not laid down the rule that the halachah is in accordance with [the ruling of] an anonymous Mishnah?[23] Now, did we not learn . . . ONE [OF THEM] RUNNING AND THE OTHER WALKING OR BOTH OF THEM RUNNING . . . BOTH OF THEM ARE EXEMPT? — Our Mishnah [deals with a case] of a Sabbath eve before sunset. What proof have you of that? — From the text, OR BOTH OF THEM RUNNING . . . BOTH OF THEM ARE EXEMPT; [for indeed] what need was there for this to be inserted? If in the case where one was running and the other walking there is exemption, could there be any doubt[24] where both of them were running?[25] It must accordingly mean thus: ' Where one was running and the other walking there is exemption; provided, however, it was on a Sabbath eve before sunset. For if on a weekday, [in the case of] one running and the other walking there would be liability, [whereas where] both of them were running even though on a weekday they would be exempt.'

The Master stated: 'Issi, however, agrees [that if it were] on a Sabbath eve before sunset there would be exemption, for running at that time is permissible.' On Sabbath eve, why is it permissible? — As [shown by] R. Hanina: for R. Hanina used to say:[26]

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(1) For he is to blame.

(2) For the carrier of the beam, who was in this case second, should have taken care to keep at a reasonable distance.

(3) This proves that where the act is sanctioned no liability is involved.

(4) Referring to Deut. XIX,5: As when a man goeth into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree and the head slippeth from the helve and lighteth upon his neighbour ... cf. also infra p. 175

(5) I.e., the problem in hand.

(6) The husband.

(7) The wife.

(8) Of liability.

(9) V. p. 170 n. 6.

(10) I.e the husband.

(11) I.e the wife.

(12) Lev. XVIII, 29. [The plural indicates that both are regarded as having participated in the act.]

(13) Supra pp. 98 and 124.

(14) I.e., that misconduct involves liability for damage that may result.

(15) As here, too, the offender is to blame for misconduct.

(16) Consequently the liability extends even to accidental damage.

(17) [There could therefore be no liability attached except where the lying cow maliciously kicked her, but not for accidental damage.]

(18) In that there was contributory misconduct on the part of the plaintiff and his cow respectively.

(19) The carrier of the beam.

(20) Lit ‘she can say to her’.
(21) It was therefore requisite that Resh Lakish should express his rejection of this plausible argument.
(22) So long as they had no intention of injuring each other.
(23) Cf. supra p. 158.
(24) That there should be exemption.
(25) Where there was contributory negligence.
(26) Cf. Shab. 119a.

Talmud - Mas. Baba Kama 32b

‘Come, let us go forth to meet the bride, the queen!’ Some [explicitly] read:’. . . to meet Sabbath, the bride, the queen.’ R. Jannai, [however,] while dressed in his Sabbath attire used to remain standing and say: ‘Come thou, O queen, come thou, O queen!’

MISHNAH. IF A MAN SPLITS WOOD ON PRIVATE PREMISES[1] AND DOES DAMAGE ON PUBLIC GROUND, OR ON PUBLIC GROUND AND DOES DAMAGE ON PRIVATE PREMISES,[2] OR ON PRIVATE PREMISES[3] AND DOES DAMAGE ON ANOTHER'S PRIVATE PREMISES, HE IS LIABLE.

GEMARA. And [all the cases enumerated] are necessary [as serving respective purposes]. For if the Mishnah had stated only the case of splitting wood on private premises and doing damage on public ground, [the ruling could have been ascribed to the fact] that the damage occurred at a place where many people were to be found, whereas in the case of splitting wood on public ground and doing damage on private premises, since the damage occurred in a place where many people were not to be found, the opposite ruling might have been suggested.[4] Again, if the Mishnah had dealt only with the case of splitting wood on public ground and doing damage on private premises,[5] [the ruling could have been explained] on the ground that the act[6] was even at the very outset unlawful, whereas in the case of splitting wood on private premises[3] and doing damage on public ground, [in view of the fact] that the act[6] [as such] was quite lawful, the opposite view might have been suggested.[4] Again, if the Mishnah had dealt only with these two cases [the ruling could have been explained in] the one case on account of the damage having occurred at a place where many people were to be found, and [in] the other on account of the unlawfulness of the act,[6] whereas in the case of splitting wood on private premises[3] and doing damage on another's private premises, since the damage occurred in a place where many people were not to be found and the act[6] was quite lawful even at the very outset, the opposite view might have been suggested.[4] It was [hence] essential [to state explicitly all these cases].

Our Rabbis taught: ‘If a man entered the workshop of a joiner without permission and a chip of wood flew off and struck him in the face and killed him, he [the joiner] is exempt.[7] But if he entered with [the] permission [of the joiner], he is liable.’ Liable for what? — R. Jose b. Hanina said: He is liable for the four [additional] items,[8] whereas regarding the law of refuge[9] he is [still] exempt on account of the fact that the [circumstances of this] case do not [exactly] resemble those of the Wood.[10] For in the case of the Wood the one [the plaintiff] was entering [as if] into his own domain and the other [the defendant] was [similarly] entering [as if] into his own domain, whereas in this case the one [the plaintiff] had [definitely] been entering into his fellow's [the defendant's] workshop. Raba [however,] said: There is an a fortiori [to the contrary]: If in the case of the Wood where the one [the plaintiff] was entering to his own [exclusive] knowledge and that one [the defendant] was similarly entering of his own accord, it is nevertheless considered [in the eye of the law][10] as if he had entered with the consent of his fellow [the defendant] who thus becomes liable to take refuge, should the case before us, where the one [the plaintiff] entered the workshop with the knowledge of his fellow [the joiner], be not all the more subject to the same liability? Raba therefore said: What is meant by being exempt from [being subject to the law of] refuge is that the sin could not be expiated

by mere refuge; the real reason of the statement of R. Jose b. Hanina being this: that his offence,[11] though committed inadvertently, approaches wilful carelessness.[12] Raba [on his own part] raised [however] an objection: If an officer of the Court inflicted on him[13] an additional [unauthorized] stroke, from which he died, he [the officer] is liable to take refuge on his account.[14] Now, does not [the offence] here committed inadvertently approach wilful carelessness?[12] For surely he had to bear in mind that a person might sometimes die just through one [additional] stroke. Why then state, 'he is liable to take refuge on his account'? — R. Shimi of Nehardea there upon said: [The officer committed the offence as he] made a mistake in [counting] the number [of strokes]. [But] Naba tapped R. Shimi's shoe[15] and said to him: Is it he who is responsible for the counting [of the strokes]? Was it not taught: The senior judge recites [the prescribed verses],[16] the second [to him] conducts the counting [of the strokes], and the third directs each stroke to be administered?[17] — No, said R. Shimi of Nehardea; it was the judge himself who made the mistake in counting.

A [further] objection was raised: If a man throws a stone into a public thoroughfare and kills [thereby a human being], he is liable to take refuge.[18] Now, does not [the offence] here committed inadvertently approach wilful carelessness?[19] For surely he had to bear in mind that on a public thoroughfare many people were to be found, yet it states, 'he is liable to take refuge'? — R. Samuel b. Isaac said: The offender [threw the stone while he] was pulling down his wall.[20] But should he not have kept his eyes open? — He was pulling it down at night . But even at night time, should he not have kept his eyes open? — He was [in fact] pulling his wall down in the day time, [but was throwing it] towards a dunghill. [But] how are we to picture this dunghill? If many people were to be found there, is it not a case of wilful carelessness?[19] If [on the other hand] many were not to be found there, is it not sheer accident?[21] — R. Papa [thereupon] said: It could [indeed] have no application unless in the case of a dunghill where it was customary for people to resort at night time, but not customary to resort during the day, though it occasionally occurred that some might come to sit there [even in the day time]. [It is therefore] not a case of wilful carelessness since it was not customary for people to resort there during the day. Nor is it sheer accident since it occasionally occurred that some people did come to sit there [even in the day time].

R. Papa in the name of Raba referred [the remark of R. Jose b. Hanina] to the commencing clause: 'If a man entered the workshop of a joiner without permission and a chip of wood flew off and struck him in the face and killed him, he is exempt.' And R. Jose b. Hanina [thereupon] remarked; He would be liable for the four [additional] items,[22] though he is exempt from [having to take] refuge.[23] He who refers this remark to the concluding clause[24] will, with more reason, refer it to the commencing clause,[25] whereas he who refers it to the commencing clause[25] maintains that, in the [case dealt with] in the concluding clause where the entrance had been made with [the] permission [of the joiner], he would be liable to take refuge.[23] But would he be liable to take refuge [in that case]?[24] Was it not taught: If a man enters the workshop of a smith and sparks fly off and strike him in the face causing his death, he [the smith] is exempt[26] even where the entrance had been made by permission of the smith? — [In this Baraitha] here, we are dealing with an apprentice of the smith. Is an apprentice of a smith to be killed [with impunity]? — Where his master had been urging him to leave but he did not leave. But even where his master had been urging him to leave, [which he did not do,] may he be killed [with impunity]? — Where the master believed that he had already left. If so, why should not the same apply also to a stranger?

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(1) I.e., his own premises.

(2) Of a neighbour.

(3) V. p. 173, n. 5.

(4) Lit., 'I might have said no'.

(5) V. p. 173. n. 6.

(6) Of splitting wood.

(7) From fleeing to the city of refuge. Cf. Num. XXXV, 11-28,Deut. XIX, 4-6; and supra p. 137.

(8) In the case of mere injury; cf. supra p. 133.
(9) Laid down in the case of manslaughter.
(10) Referred to in the verse, As when a man goes into the wood with his neighbour to hew wood, and his hand fetcheth a stroke with the axe to cut down the tree, and the head slippeth from the helve and lighteth upon his neighbour, that he die, he shall flee unto one of those cities, and live; Deut. XIX, 5. Cf. also supra p. 170.
(11) I.e., that of the joiner.
(12) In which case the taking of refuge is insufficient; cf. e.g. Num. XXXV, 16-21, and Deut. XIX, 11-13.
(13) On an offender sentenced to lashes.
(14) The victim's. Mak. III, 14.
(15) To draw his attention.
(16) Deut. XXVIII, 58 etc.; Ps LXXVIII, 38.
(17) Lit., says, "Smite him". Mak. 23a.
(18) Ibid. II. 2.
(19) In which case the taking of refuge is insufficient; cf. e.g. Num XXXV, 16-21 and Deut. XIX, 11-13.
(20) Cf. Mak. 8a.
(21) Why then be subject to the law of refuge?
(22) In the case of mere injury; cf. supra p. 133.
(23) In the case of manslaughter.
(24) Where the entrance had been made with the knowledge of the joiner.
(25) Where the entrance had been made without any imitation.
(26) From having to take refuge.

Talmud - Mas. Baba Kama 33a

— A stranger need not fear the master-smith[1] whereas the apprentice is in fear of his master.[2] R. Zebid in the name of Raba referred [the remark of R Jose b. Hanina] to the following: [The verse,] And [it] lighteth [upon his neighbour],[3] excludes [a case] where the neighbour brings himself [within the range of the missile]. Hence the statement made by R. Eliezer b. Jacob: If a man lets [fly] a stone out of his hand and another [at that moment] puts out his head [through a window] and receives the blow [and is killed], he is exempt.[4] [Now, it was with reference to this case that] R. Jose b. Hanina said: He is exempt from having to take refuge,[5] but he would be liable for the four [additional] items.[6] He who refers this remark to this [last] case will with more reason refer it to the cases dealt with previously,[7] whereas he who refers it to those dealt with previously[7] would maintain that in this [last] case[8] the exemption is from all [kinds of liability].

Our Rabbis taught: If employees come to [the private residence of] their employer to demand their wages from him and [it so happens that] their employer's ox gores them or their employer's dog bites them, with fatal results, he [the employer] is exempt [from ransom].[9] Others,[10] however, maintain that employees have the right to [come and] demand their wages from their employer. Now, what were the circumstances [of the case]? If the employer could be found in [his] city [offices], what reason [could be adduced] for [the view maintained by] the 'Others'.[10] If [on the other hand] he could be found only at home, what reason [could be given] for [the anonymous view expressed by] the first Tanna? — No, the application [of the case] is where the employer could [sometimes] be found [in his city offices] but could not [always] be found [there]. The employees therefore called at his [private] door, when the reply was 'Yes'. One view[11] maintains that 'Yes' implies: 'Enter and come in.' But the other view[12] maintains that 'Yes' may signify: 'Remain standing in the place where you are.' It has indeed been taught in accordance with the view[12] maintaining that 'Yes' may [in this case] signify: 'Remain standing in the place where you are.' For it has been taught: 'If an employee enters the [private] residence of his employer to demand his wages from him and the employer's ox gores him or the employer's dog bites him, he [the employer] is exempt even where the entrance had been made by permission.' Why should there indeed be exemption[13] unless in the case where he called at the door and the employer said: 'Yes'? This thus proves that 'Yes' [in such a

case] signifies: ‘Remain standing in the place where you are.

MISHNAH. IN THE CASE OF TWO TAM OXEN INJURING EACH OTHER, THE PAYMENT OF THE DIFFERENCE WILL BE IN ACCORDANCE WITH THE LAW OF HALF-DAMAGES.[14] WHERE BOTH WERE MU'AD THE PAYMENT OF THE DIFFERENCE WILL BE IN FULL.[14] WHERE ONE WAS TAM AND THE OTHER MU'AD THE PAYMENT OF THE DIFFERENCE FOR DAMAGE DONE BY MU'AD TO TAM WILL BE ON THE BASIS OF FULL COMPENSATION, WHEREAS THE PAYMENT OF THE DIFFERENCE FOR DAMAGE DONE BY TAM TO MU'AD WILL BE IN ACCORDANCE WITH THE LAW OF HALF-DAMAGES. SIMILARLY IN THE CASE OF TWO PERSONS INJURING EACH OTHER, THE PAYMENT OF THE DIFFERENCE WILL BE IN FULL. WHERE MAN HAS DAMAGED MU'AD AND MU'AD HAS INJURED MAN, THE PAYMENT OF THE DIFFERENCE WILL BE IN FULL. BUT WHERE MAN DAMAGED TAM AND TAM INJURED MAN, THE PAYMENT OF THE DIFFERENCE FOR DAMAGE DONE BY MAN TO TAM WILL BE ON THE BASIS OF FULL COMPENSATION, WHEREAS THE PAYMENT OF THE DIFFERENCE FOR DAMAGE DONE BY TAM TO MU'AD WILL BE IN ACCORDANCE WITH THE LAW OF HALF-DAMAGES. R. AKIBA, HOWEVER, SAYS: EVEN IN THE CASE OF TAM INJURING MAN THE PAYMENT OF THE DIFFERENCE WILL BE IN FULL.[15]

GEMARA. Our Rabbis taught: [The words of the Torah] According to this judgement shall be done unto it[16] [imply that] the judgement in the case of Ox damaging ox applies also in the case of Ox injuring man. Just as where Ox has damaged ox half-damages are paid in the case of Tam and full compensation in the case of Mu'ad, so also where Ox has injured man only half damages will be paid in the case of Tam and full compensation in the case of Mu'ad. R. Akiba, however, says: [The words,] ‘According to this judgement’ refer to [the ruling that would apply to the circumstances described in] the latter verse[17] and not in the former verse.[18] Could this then mean that the [full] payment is to be made out of the best [of the estate]?[19] [Not so; for] it is stated ‘Shall it be done unto it [self],’ to emphasise that payment will be made out of the body of Tam, but no payment is to be made out of any other source whatsoever.[20] According to the Rabbis then, what purpose is served by the word ‘this’? — To exempt from liability for the four [additional] items.[21] Whence then does R. Akiba derive the exemption [in this case] from liability for the four [additional] items? — He derives it from the text, And if a man cause a blemish in his neighbour[22] [which indicates that there is liability only where] Man injures his neighbour but not where Ox injures the neighbour [of the owner]. And the Rabbis?[23] — Had the deduction been from that text we might have referred it exclusively to Pain,[24] but as to Medical Expenses and Loss of Time[25] we might have held there is still a liability to pay. We are therefore told[26] [that this is not the case].

MISHNAH. IF AN OX [TAM] OF THE VALUE OF ONE HUNDRED ZUZ HAS GORED AN OX OF THE VALUE OF TWO HUNDRED ZUZ AND THE CARCASS HAD NO VALUE AT ALL, THE PLAINTIFF WILL TAKE POSSESSION OF THE [DEFENDANT'S] OX [THAT DID THE DAMAGE].[27]

GEMARA. Who is the author of our Mishnah? — It is R. Akiba, as it has been taught: The ox [that did the damage] has to be assessed by the Court of law;[28] this is the view of R. Ishmael. R. Akiba, however, says: The [body of the] ox becomes transferred [to the plaintiff]. What is the point at issue? — R. Ishmael maintains that he [the plaintiff] is but a creditor and that he has only a claim of money against him [the defendant], whereas R. Akiba is of the opinion that they both [the plaintiff and defendant] become the owners in common of the ox[29] [that did the damage]. They [thus also] differ as to the interpretation of the verse, Then they shall sell the live ox and divide the money of it.[30] R. Ishmael maintains that it is the Court on which this injunction is laid by Divine Law,[31] whereas R. Akiba is of the opinion that it is the plaintiff and defendant on which it is laid.[32] What is the practical difference between R. Ishmael and R. Akiba? — There is a practical difference between

them where the plaintiff consecrated the ox [that did the damage].[33]

Raba put the following question to R. Nahman: Should the defendant meanwhile dispose of the ox, what would be the law according to R. Ishmael? [Shall we say that] since R. Ishmael considers the plaintiff to be a creditor whose claim [against the defendant] is only regarding money, the sale is valid, or that

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(1) Who should thus have borne in mind that the stranger might not yet have left the place. The smith should therefore not yet have allowed the the sparks to fly off.
(2) Who should not resonably have expected him to have still been there.
(3) Deut. XIX, 5; v. supra, p. 175, n. 3.
(4) Cf. Mak. 8a.
(5) In the case of manslaughter.
(6) Since it was an act of negligence to throw a stone where people are to be found.
(7) In the case of the joiner, who at least knew that a newcomer had entered his workshop.
(8) Dealt with by R. Eliezer b. Jacob, where the defendant is to blame as he put out his head after the stone had already been in motion.
(9) For which cf. Ex. XXI, 30. The vicious beast is, however, stoned; v. supra p. 118.
(10) According to Hor. 13b, the views of R. Meir were sometimes quoted thus; cf. however Ber. 9b; Sot. 12a; A.Z. 64b.
(11) I.e., that of 'Others'.
(12) Put forward by the first Tanna.
(13) Where the entrance had been made by permission.
(14) Cf. supra p. 73.
(15) Cf supra p. 15.
(16) Ex. XXI, 31.
(17) Ibid. XXI, 29 dealing with Mu'ad.
(18) Ibid. XXI, 28 dealing with Tam.
(19) As in the case of an injury done by Mu'ad. Cf. supra, p. 73.
(20) Cf. supra p. 15.
(21) V. supra p. 133.
(22) Lev. XXIV, 19.
(23) [Wherefore apply 'this' to deduce exemption from the four items, since that is already derived from this latter verse?]
(24) The liability for which is not in respect of an actual loss of value.
(25) The liability for which is in respect of an actual loss of money sustained.
(26) By the expression 'this'.
(27) As the full value of it corresponds in this case to the amount of half-damages.
(28) And if its value is not less than the amount of the half-damages, the defendant will have to pay that amount in full, whereas where the value of the ox that did the damage is less than the amount of the half-damages, the defendant will have to pay no more than the actual value of the ox that did the damage.
(29) Where its value is more than the amount of the half-damages.
(30) Ex. XXI, 35.
(31) I.e., to sell the live ox which is still the property of the defendant.
(32) As the live ox became their property in common where its value had been more than the amount of the half-damages.
(33) [According to R. Ishmael the consecration is of no legal effect, whereas R. Akiba would declare it valid.]

Talmud - Mas. Baba Kama 33b

since the ox is mortgaged to the plaintiff,[1] the defendant has no right [to dispose of it]? — He replied: The sale is not valid. But has it not been taught: In the case of [the defendant] having disposed of the ox, the sale is valid? — The plaintiff will still be entitled to come forward and

distrain on it [from the purchaser].[2] But if he is entitled to come forward and distrain on it, to what purpose is the sale valid? — For the ploughing [the ox did with the purchaser].[3] Can we infer from this that in the case of a debtor having sold his chattels, a Court of law will distrain on them for a creditor?[4] — The case there [of the ox][5] is altogether different, since the ox is regarded as if [the owner] had mortgaged it [for half-damages]. But did Raba not say[6] that where a debtor has mortgaged his slave and then sold him [to a third person] the creditor is entitled to distrain on him, whereas where an ox has been mortgaged and then sold [to a third party] the creditor cannot distrain on it?[7] — Is not the reason in the case of the slave that the transaction has been widely talked about?[8] So also in the case of this ox; since it gored it has been talked about, and the name 'The ox that gored' given it.

R. Tahlifa the Western[9] recited in the presence of R. Abbahu: 'Where he sold the ox, the sale is not valid, but where he consecrated it [to the altar], the consecration holds good.' Who sold it? Shall I say the defendant? [In that case the opening clause,] 'Where he sold the ox, the sale is not valid', would be in accordance with the view of R. Akiba that the ox becomes transferred [to the plaintiff], while [the concluding clause.] 'Where he consecrated it, the consecration holds good' could follow only the view of R. Ishmael who said that the ox has to be assessed by the Court. If [on the other hand, it has been disposed of by] the plaintiff, would not [the opening clause.] 'Where he sold the ox, the sale is not valid', be in accordance with the view of R. Ishmael, while [the concluding clause.,] 'Where he consecrated it, the consecration holds good' could follow only the view of R. Akiba? — We may still say that it was the defendant [who disposed of it], and yet [both rulings] will be in agreement with all. 'Where he sold the ox, the sale is valid' [may be explained] even in accordance with R. Ishmael, for the ox is mortgaged to the plaintiff. 'Where he consecrated it, the consecration holds good,' [may again be interpreted] even in accordance with R. Akiba, on account of [the reason given] by R. Abbahu; for R. Abbahu [elsewhere] stated:[10] An extra precaution was taken[11] lest people should say that consecrated objects could lose their status even without any act of redemption.[12]

Our Rabbis taught: If an ox does damage while still Tam, then, as long as its case has not been brought up in Court, if it is sold the sale is valid; if it is consecrated, the consecration holds good; if slaughtered and given away as a gift, what has been done is legally effective. But after the case has come into Court,[13] if it is sold the sale is not valid; if consecrated, the consecration does not hold good; if slaughtered and given away as a gift, the acts have no legal effect; so also where [other] creditors stepped in first and distrained on the ox [while in the hands of the defendant], no matter whether the debt had been incurred before the goring took place or whether the goring had occurred before the debt was incurred, the distraint is not legally effective, since the compensation [for the damage][14] must be made out of the body of the ox [that did it].[15] But in the case of Mu'ad doing damage there is no difference whether the case had already been brought into Court or whether it had not yet come into Court; if it has been sold, the sale is valid; if consecrated, the consecration holds good; if slaughtered and given away as a gift, what has been done is legally effective, where [other] creditors have stepped in and distrained on the ox, no matter whether the debt had been contracted before the goring took place or whether the goring had taken place before the debt was incurred, the distraint is legally effective, since the compensation is paid out of the best of the general estate [of the defendant].[16]

The Master stated: 'If it is sold, the sale is valid'. [This can refer] to ploughing [done by the ox while with the vendee]. 'If consecrated, the consecration holds good'; on account of the reason given by R. Abbahu. 'If slaughtered and given away as a gift, what has been done is legally effective'. We can quite understand that where it has been given away as a gift the act should be legally effective, in respect of the ploughing [meanwhile done by the ox]. But in the case of it having been slaughtered, why should [the claimant] not come and obtain payment out of the flesh? Was it not taught: '[The] live [ox]:[17] this states the rule for when it was alive; whence do we know that the same holds good

even after it has been slaughtered? Because it says further: And they shall sell the ox,[17] i.e., in all circumstances'? — R. Shizbe therefore said: What is referred to must be the diminution in value occasioned by its having been slaughtered.[18] R. Huna the son of Joshua thereupon said: This proves that if a man impairs securities mortgaged to his creditor, he incurs no liability. Is this not obvious?[19] — It might perhaps have been suggested that it was only there[20] where the defendant could argue, ' I have not deprived you of anything at all [of the quantity]', and could even say, 'it is only the mere breath [of life] that I have taken away from your security' [that there should be exemption], whereas in the case of impairing securities in general there should be liability; we are therefore told [that this is not the case]. But has not this been pointed out by Rabbah? For has not Rabbah stated: 'If a man destroys by fire the documents of a neighbour, he incurs no liability'?[21] — It might perhaps have been suggested that it was only there where the defendant could contend 'It was only a mere piece of paper of yours that has actually been burnt' [that there should be exemption], whereas in the case [of spoiling a field held as security] by digging there pits, ditches and caves there should be liability; we are therefore told that [this is not so, for] in the case here the damage resembles that occasioned by digging pits, ditches and caves,[22] and yet it is laid down that 'what has been done is legally effective'.

'Where [other] creditors stepped in first and distrained on the ox [in the hands of the defendant] no matter whether the debt had been incurred before the goring took place or whether the goring had taken place before the debt was incurred, the distraint is not legally effective, since the compensation must be made out of the body of the ox [that did the damage].' We understand this where the goring has taken place before the debt was incurred, in which case the plaintiff for damages has priority. But [why should it be so] where the debt has been contracted before the goring took place, [seeing that in that case] the creditor for the debt has priority?

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(1) For if payment were not forthcoming the plaintiff would be entitled to distrain on the ox to the extent of the amount of the half-damages.

(2) V. p. 181, n. 8.

(3) Who will thus not have to pay for the use of the animal, [or, who will be permitted to put the ox to such service, v. Wilna Gaon, Glosses.]

(4) Whereas according to established law this is usually the case only with immovable property, cf. supra p. 62 but also B.B. 44b.

(5) That did damage by goring while still in the state of Tam.

(6) Supra p. 47. Cf. also B.B. 44b.

(7) Why then distrain on the ox in the case of goring when it had already been sold?

(8) V. B.B. loc. cit.

(9) The Palestinian.

(10) 'Ar. 33a.

(11) In the case of one who consecrates property on which there is a lien of a kethubah or a debt.

(12) It is therefore a better policy to declare the consecration valid and prescribe a nominal sum for redemption.

(13) Since when the ox is legally transferred to the plaintiff.

(14) Which will be only half of the actual amount of the loss sustained.

(15) Cf. supra p. 73.

(16) Cf. Tosef. B.K. V.

(17) Ex. XXI. 35.

(18) For which the defendant is thus not made responsible.

(19) That such an inference could be made; why then the special statement made by R. Huna?

(20) In the case of the ox that had been slaughtered.

(21) Infra p. 570.

(22) Since the damage is visible.

Moreover, even where the goring had taken place before the debt was contracted, was not the creditor actually first [in taking possession of the ox]?[1] Can it be concluded from this that where a creditor of a subsequent date has preceded a creditor of an earlier date in distraining on [the property of the debtor], the distraint is of no legal avail?[2] — No; I may still maintain that [in this case][3] the distraint holds good, whereas in the case there,[4] it is altogether different; as the plaintiff [for damages] may argue,[5] 'Had the ox already been with you [before it gored], would I not have been entitled to distrain on it while in your hands? For surely out of the ox that did the damage I am to be compensated.'

Our Rabbis taught: Where an ox[6] of the value of two hundred [zuz] gored an ox of the same value of two hundred [zuz] and injured it to the amount of fifty zuz, but it so happened that the injured ox [subsequently] improved and reached the value of four hundred zuz, since it can be contended that but for the injury it would have reached the value of eight hundred zuz, compensation will be [still] paid as at the time of the damage.[7] Where it has depreciated, the compensation will be paid in accordance with the value at the time of the case being brought into Court.[8] Where it was the ox which did the damage that [subsequently] improved, the compensation will still be made in accordance with the value at the time of the damage.[9] Where it has [on the other hand] depreciated, the compensation will be made in accordance with the value at the time of the case being brought into Court.[10]

The Master has said: 'Where it was the ox which did the damage that [subsequently] improved, the compensation will still be made as at the time of the damage.' This ruling is in accordance with R. Ishmael, who maintains that the plaintiff is a creditor and he has a pecuniary claim against him [the defendant]. Read now the concluding clause: 'Where it [on the other hand] depreciated, the compensation will be made in accordance with the value at the time of the case being brought into Court'. This ruling, on the other hand, follows the view of R. Akiba, that they both [plaintiff and defendant] become the owners in common [of the ox that did the damage]. [Is it possible that] the first clause should follow the view of R. Ishmael and the second clause follow that of R. Akiba? — No; the whole teaching follows the view of R. Akiba, for we deal here with a case where the improvement was due to the defendant having fattened the ox.[11] If the improvement was due to fattening, how could you explain the opening clause, 'where . . . the injured ox [subsequently] improved and reached the value of four hundred zuz . . . compensation will be paid as at the time of the damage'? For where the improvement was due to the act of fattening [by the owner], what need could there have been to state [that compensation for the original damage has still to be paid]? — R. Papa thereupon said: The ruling in the opening clause[12] applies to all cases, whether where the ox improved by special fattening or where it improved by itself: the statement of the rule was required for the case where the ox improved by itself — even then compensation will be paid as at time of the damage. The ruling in the concluding clause,[13] however, could apply only to a case where the improvement was due to special fattening.

'Where it[14] has depreciated, the compensation will be made in accordance with the value at the time of the case being brought into Court.' Through what can it have depreciated? Shall I say that it has depreciated through hard work? In that case [surely] the defendant can say, 'You cause it to depreciate![15] Could you expect me to pay for it?' — R. Ashi thereupon said: The depreciation [referred to] is due to the injury, in which case the plaintiff is entitled to contend, '[The evil effect of] the horn of your ox is still buried within the suffering animal.'[16]

MISHNAH. WHERE AN OX[17] OF THE VALUE OF TWO HUNDRED [ZUZ] GORED AN OX OF THE SAME VALUE OF TWO HUNDRED [ZUZ] AND THE CARCASS HAD NO VALUE AT ALL, R. MEIR SAID THAT IT WAS WITH REFERENCE TO THIS CASE THAT IT IS WRITTEN, AND THEY SHALL SELL THE LIVE OX AND DIVIDE THE MONEY OF IT.[18] R.

JUDAH, HOWEVER, SAID: THIS IS CERTAINLY THE HALACHAH,[19] BUT WHILE YOU FULFIL [BY THIS RULING THE INJUNCTION], 'AND THEY SHALL SELL THE LIVE OX AND DIVIDE THE MONEY OF IT,' YOU DO NOT FULFIL [THE NEXT INJUNCTION], 'AND THE DEAD OX ALSO THEY SHALL DIVIDE.'[20] THE CASE DEALT WITH BY SCRIPTURE IS THEREFORE WHERE AN OX OF THE VALUE OF TWO HUNDRED [ZUZ] GORED AN OX OF THE SAME VALUE OF TWO HUNDRED [ZUZ] AND THE CARCASS WAS WORTH FIFTY ZUZ: ONE PARTY WOULD HERE GET HALF OF THE LIVING OX TOGETHER WITH HALF OF THE DEAD OX[21] AND THE OTHER PARTY WOULD SIMILARLY GET HALF OF THE LIVING OX TOGETHER WITH HALF OF THE DEAD OX.

GEMARA. Our Rabbis taught: Where an ox of the value of two hundred [zuz] gored an ox of the same value of two hundred [zuz] and the carcass was worth fifty zuz, one party would get half of the living ox together with half of the dead ox and the other party would similarly get half of the living ox together with half of the dead ox. This is the [case of the goring] ox dealt with in the Torah, according to the view of R. Judah. R. Meir, however, says; This is not the [case of the goring] ox dealt with in the Torah, but where an ox of the value of two hundred [zuz] gored an ox of the same value of two hundred [zuz] and the carcass was of no value at all — this is the case regarding which it is laid down, 'And they shall sell the live ox and divide the money of it.' But how could I [in this case] carry out [the other direction],'And the dead ox also they shall divide'? [This only means that] the diminution [in value] brought about by the death[22] has to be [compensated] to the extent of one-half out of the body of the living ox. Now, since [in the former case][23] according to both R. Meir and R. Judah one party will get a hundred and twenty-five [zuz][24] and the other party will similarly get a hundred and twenty-five [zuz], what is the [practical] difference between them? — Raba thereupon said: The difference arises where[25] there has been a decrease in the value of the carcass,[26] R. Meir maintains that the loss in the value of the carcass has to be [wholly] sustained by the plaintiff,[27] whereas R. Judah is of the opinion that the loss in the value of the carcass will be borne by the defendant to the extent of a half.[28] Said Abaye to him:[29] If this be the case, will it not turn out that according to R. Judah

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(1) Why should then the plaintiff for damages override the right of another creditor who had already taken possession of the ox?

(2) Whereas this is a point on which opinions differ; cf. Keth. 94a.

(3) Dealing with two creditors for loans.

(4) Where one of the creditors was a plaintiff for damages.

(5) Against the other creditor.

(6) In the state of Tam.

(7) And the defendant cannot put up the increase in the value of the injured ox as a defence, for but for the injury the ox might have reached the value of even eight hundred zuz.

(8) To the detriment of the defendant.

(9) This view apparently maintains that the plaintiff does not become an owner of a definite portion in the ox that did the damage, but becomes entitled merely to a certain sum of money to be collected out of the body of that ox.

(10) Seemingly because the plaintiff is according to this ruling regarded as having become at the time the goring took place an owner of a definite portion in the ox which has subsequently depreciated. For if he became entitled to a certain sum of money in the body of that ox, why should he suffer on account of depreciation?

(11) In which case it is only reasonable that the plaintiff should not be entitled to any share in the improvement that resulted from the fattening carried out by the defendant.

(12) Dealing with the case where it was the injured ox that improved and increased in value.

(13) Giving the law where the ox that had done the damage improved.

(14) I.e., the ox that had been injured, dealt with in the opening clause.

(15) By hard work.

(16) The depreciation is thus a direct result of the injury for which the defendant is responsible.

(17) In the state of Tam.

(18) Ex. XXI, 35.
(19) That half-damages should be paid in the case of Tam.
(20) As in the case specified by R. Meir the carcass had no value at all.
(21) Amounting altogether to one hundred and twenty-five zuz. The plaintiff would thus get seventy-five zuz in respect of the damage that amounted to one hundred and fifty zuz. Together with the fifty of the carcass of his ox the sum total will be one hundred and twenty-five zuz.
(22) Of the animal attacked resulting from the injuries inflicted upon it.
(23) Specified by R. Judah, where the carcass was worth fifty zuz.
(24) I.e., half of the value of the living ox and half of the value of the carcass.
(25) Since the death of the attacked ox.
(26) Before it has been sold.
(27) As according to R. Meir, the defendant has no interest whatsoever in the carcass.
(28) Since according to R. Judah, both the defendant and the plaintiff have to divide the value of the carcass.
(29) Raba.

Talmud - Mas. Baba Kama 34b

[injury by] Tam would involve a more severe penalty than [injury by] Mu'ad?[1] And should you maintain that this indeed is so,[2] as we have learned: R. Judah says: In the case of Tam there is liability [where the precaution taken to control the ox has not been adequate] whereas in the case of Mu'ad there is no liability,[3] it may be contended that you only heard R. Judah maintaining this with reference to precaution, which is specified in Scripture,[4] but did you ever hear him say this regarding compensation? Moreover, it has been taught: R. Judah says: One might say that where an ox of the value of a maneh [a hundred zuz] gored an ox of the value of five sela' [i.e., twenty zuz] and the carcass was worth a sela' [i.e., four zuz], one party should get half of the living ox[5] together with half of the dead ox[6] and the other party should similarly get half of the living ox and half of the dead ox?[7] [This cannot be so]; for we reason thus: Has Mu'ad been singled out[8] to entail a more severe penalty or a more lenient one? You must surely say: [to entail] a more severe penalty. Now, if in the case of Mu'ad no payment is made but for the amount of the damage, should this not the more so be true in the case of Tam the [penalty in respect of which is] less severe?[9] — R. Johanan therefore said: The practical difference between them[10] arises where there has been an increase in the value of the carcass, one Master[11] maintaining that it will accrue to the plaintiff whereas the other Master holds that it will be shared equally [by the two parties].[12]

And it is just on account of this view that a difficulty was felt by R. Judah: Now that you say that the Divine Law is lenient to the defendant, allowing him to share in the increase [of the value of the carcass] , you might then presume that where an ox of the value of five sela' [i.e. twenty zuz] gored an ox of the value of a maneh [a hundred zuz] and the carcass was valued at fifty zuz, one party would take half of the living ox[13] together with half of the dead ox[14] and the other party would similarly take half of the living ox and half of the dead ox?[15] Say [this cannot be so, for] where could it elsewhere be found that an offender should [by order of the Court] be made to benefit as you would have the offender here in this case to benefit? It is moreover stated, He shall surely make restitution,[16] [emphasising that] the offender could only have to pay but never to receive payment. Why that additional quotation?[17] — [Otherwise] you might have thought this principle to be confined only to a case where the plaintiff was the loser,[18] and that where no loss would be incurred to the plaintiff — as e.g. where an ox of the value of five sela' gored an ox similarly of the value of five sela' [i.e. twenty zuz] and it so happened that the carcass [increased in value and] reached the amount of thirty zuz — the defendant should indeed be entitled to share in the profit;[18] hence the verse, He shall surely make full restitution, is adduced [to emphasise that in all cases] an offender could only have to pay but never to receive payment.

But R. Aha b. Tahlifa said to Raba: If so [that the principle to compensate by half for the decrease

in value brought about by the death is maintained only by R. Meir], will it not be found that according to R. Judah Tam will involve the payment of more than half damages,[19] whereas the Torah [emphatically] stated, And they shall sell the live ox and divide the money of it? — [No;] R. Judah also holds that the decrease in value brought about by the death will be [compensated] by half in the body of the living ox.[20] Whence could he derive this?[21] — From [the verse], And the dead ox also they shall divide.[22] But did not R. Judah derive from this verse that one party will take half of the living ox together with half of the dead ox and the other party will similarly take half of the living ox and half of the dead ox?[23] — If that were all, the text could have run, 'And the dead ox [they shall divide].' Why insert 'also'? It shows that two lessons are to be derived from the verse.[24] MISHNAH. THERE ARE CASES WHERE THERE IS LIABILITY FOR OFFENCES COMMITTED BY ONE'S CATTLE[25] THOUGH THERE WOULD BE NO LIABILITY SHOULD THESE OFFENCES BE COMMITTED BY ONESELF. THERE ARE, AGAIN, CASES WHERE THERE IS NO LIABILITY FOR OFFENCES COMMITTED BY ONE'S CATTLE[25] THOUGH THERE WOULD BE LIABILITY WERE THESE OFFENCES COMMITTED BY ONESELF. FOR INSTANCE, IF CATTLE HAS BROUGHT INDIGNITY [UPON A HUMAN BEING] THERE IS NO LIABILITY,[26] WHEREAS IF THE OWNER CAUSES THE INDIGNITY THERE WOULD BE LIABILITY.[27] SO ALSO IF AN OX PUTS OUT THE EYE OF THE OWNER'S SLAVE OR KNOCKS OUT HIS TOOTH THERE IS NO LIABILITY,[28] WHEREAS IF THE OWNER HIMSELF HAS PUT OUT THE EYE OF HIS SLAVE OR KNOCKED OUT HIS TOOTH HE WOULD BE LIABLE [TO LET HIM GO FREE].[29] AGAIN, IF AN OX HAS INJURED THE FATHER OR MOTHER OF THE OWNER THERE IS LIABILITY,[30] THOUGH WERE THE OWNER HIMSELF TO INJURE HIS FATHER OR HIS MOTHER[31] THERE WOULD BE NO [CIVIL] LIABILITY.[32] SO ALSO WHERE CATTLE HAS CAUSED FIRE TO BE SET TO A BARN ON THE DAY OF SABBATH THERE IS LIABILITY,[30] WHEREAS WERE THE OWNER TO SET FIRE TO A BARN ON SABBATH[33] THERE WOULD BE NO [CIVIL] LIABILITY, AS HE WOULD BE SUBJECT TO A CAPITAL CHARGE.[32]

GEMARA. R. Abbahu recited in the presence of R. Johanan:[34] Any work [on the Sabbath] that has a destructive purpose entails no penalty [for the violation of the Sabbath], with the exception, however, of the act of inflicting a bodily injury, as also of the act of setting on fire. Said R. Johanan to him: Go and recite this outside[35] [for the exception made of] the act of inflicting a bodily injury and of setting on fire is not part of the teaching; and should you find grounds for maintaining that it is,[36] [you may say that] the infliction of a bodily injury refers to where the blood was required to feed a dog;[37] and in the case of setting on fire, where there was some need of the ashes.[37]

We have learnt: WHERE CATTLE HAS CAUSED FIRE TO BE SET TO A BARN ON THE DAY OF SABBATH THERE IS LIABILITY, WHEREAS WERE THE OWNER TO HAVE SET FIRE TO A BARN ON SABBATH THERE WOULD BE NO [CIVIL] LIABILITY. Now, the act of the owner is here placed on a level with that of Cattle; which would show, would it not, that just as in the act of Cattle there was certainly no intention to satisfy any need,

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(1) For in the case of Mu'ad it is certainly the plaintiff who has to bear the whole loss occasioned by a decrease in the value of the carcass; cf. supra p. 65.

(2) And Tam will indeed involve a penalty more severe than that involved by Mu'ad.

(3) B.K. IV, 9.

(4) For which cf. infra, p. 259.

(5) Amounting to fifty zuz.

(6) That would amount to another ten zuz.

(7) The result would be that the plaintiff whose injured ox had altogether been worth twenty zuz would get damages amounting to sixty zuz.

(8) In Scripture; cf. Ex. XXI, 36.

(9) Why should then the defendant in the case of Tam share the loss occasioned by a decrease in the value of the carcass

which he would not have to do in the case of Mu'ad?
(10) R. Meir and R. Judah.
(11) R. Meir, according to whom the defendant has no interest in the carcass.
(12) V. supra p. 189, n. 7.
(13) Amounting to ten zuz.
(14) That would amount to another twenty-five zuz.
(15) The result would be that the defendant instead of paying compensation would make a profit out of the offence, as in lieu of his ox which did the damage and which was worth twenty zuz he would get a total of thirty-five zuz.
(16) Ex. XXI, 36.
(17) I.e., why is not the first objection sufficient?
(18) Of the ten zuz that make the carcass worth more than the ox while alive.
(19) As e.g.. where an ox of the value of fifty zuz gored another's ox of the value of forty zuz and the carcass was worth twenty zuz, in which case the actual damage amounted to twenty zuz, half of which would be ten zuz, whereas if the plaintiff will get half of the living ox and half of the dead ox he shall be in receipt for damages, in addition to the value of the carcass, not of ten but of fifteen zuz.
(20) The sum total received by the plaintiff will therefore never be more than half of the actual loss sustained by him after allowing him, of course, the full value of the carcass of his ox.
(21) Since he is in disagreement with R. Meir as to the implication of the last clause of Ex. XXI, 35.
(22) Ex. XXI, 35.
(23) I.e., that the decrease in value brought about by the death will be compensated for by half in the body of the living ox. V. Supra p. 189.
(24) Viz., the principle laid down in the preceding note and the principle maintained by R. Judah, that the defendant as well as the plaintiff has an interest in the carcass and will share the profits of any increase in its value.
(25) Lit., 'ox'.
(26) As explained supra p. 134.
(27) Cf. B. K. VIII 1-2.
(28) To the law laid down in Ex. XXI, 26-27.
(29) In accordance with ibid, cf. also supra p. 137.
(30) For damages.
(31) Involving thus a capital charge, for which cf Ex. XXI, 15.
(32) As wherever a capital charge is involved by an offence, all civil liabilities that may otherwise have resulted from that offence merge in the capital charge; cf. supra p. 113.
(33) For which cf. Ex. XXXI, 14-15; but v. also ibid. XXXV, 2-3, Mekilta a.l. and Yeb. 7b, 33b and Shab. 70a.
(34) Cf. Shab. 106a.
(35) [I.e., your teaching is fit only for outside and not to be admitted within the Beth Hamidrash; v. Sanh. (Sonc. ed.) p. 425.]
(36) Cf. Shab. 75a; v. also B.K. VIII, 5.
(37) Which case involves the violation of the Sabbath because the purpose has not been altogether destructive.

Talmud - Mas. Baba Kama 35a

so also the owner similarly had no intention to satisfy thereby any need, and yet it is stated THERE WOULD BE NO [CIVIL] LIABILITY AS HE WOULD BE SUBJECT TO A CAPITAL CHARGE?[1] No; it is the act of Cattle, which is placed on the same level as that of the owner himself, to show that just as in the act of the owner there had surely been the intention to satisfy some need, so also in the act of Cattle there must have been the intention to satisfy some need.[2] But how is this possible in the case of Cattle? — R. Iwiya replied: The case here supposed is one of an intelligent animal which, owing to an itching in the back, was anxious to burn the barn so that it might roll in the [hot] ashes. But how could we know [of such an intention]? [By seeing that] after the barn had been burnt, the animal actually rolled in the ashes. But could such a thing ever happen? — Yes, as in the case of the ox which had been in the house of R. Papa, and which, having a severe toothache, went into the brewery, where it removed the lid [that covered the beer] and drank beer

until it became relieved [of the pain]. The Rabbis, however, argued in the presence of R. Papa: How can you say that [the Mishnah places the act of] Cattle on a level with [the act of] the owner himself? For is it not stated: IF CATTLE HAS BROUGHT INDIGNITY [UPON A HUMAN BEING] THERE IS NO LIABILITY,[3] WHEREAS IF THE OWNER CAUSES THE INDIGNITY THERE IS LIABILITY? Now, if we are to put the act of Cattle on a level with that of the owner himself, how are we to find intention [in the case of Cattle]?[4] — Where, for instance, there was intention to do damage, as stated by the Master[5] that where there was intention to do damage though no intention to insult, [liability for insult will attach]. Raba, however, suggested that the Mishnah here[6] deals with a case of inadvertence, [resembling thus Cattle which acts as a rule without any specific purpose] and [the law[7] was laid down] in accordance with the teaching at the School of Hezekiah. For it was taught at the School of Hezekiah:[8] [Scripture places in juxtaposition] He that killeth a man . . . and he that killeth a beast[9] .....[to imply that] just as in the case of killing a beast you can make no distinction whether it was inadvertent or malicious, whether intentional or unintentional, whether by way of coming down or by way of coming up,[10] so as to exempt from pecuniary obligation, but [in all cases] there is pecuniary liability,[11] so also in the case of killing man you should make no distinction whether it was inadvertent or malicious, whether intentional or unintentional, whether by way of coming down or by way of coming up so as to impose a pecuniary liability, but [in all cases] there should be exemption from pecuniary obligation.[12] Said the Rabbis to Raba: How can you assume that the ruling in the Mishnah refers to an inadvertent act?[13] Is it not stated there [that were the owner to have set fire to a barn on Sabbath there would be no civil liability] AS HE WOULD BE SUBJECT TO A CAPITAL CHARGE?[14] — It only means to say this: Since if he would have committed it maliciously he would have been liable to a capital charge, as, e.g., where he had need of the ashes, there should be exemption [from civil liability] even in such a case as this where he did it inadvertently.[15]

MISHNAH. IF AN OX WAS PURSUING AN OTHER'S OX WHICH WAS [AFTERWARDS FOUND TO BE] INJURED, AND THE ONE [PLAINTIFF] SAYS, 'IT WAS YOUR OX THAT DID THE DAMAGE, WHILE THE OTHER PLEADS, 'NOT SO, BUT IT WAS INJURED BY A ROCK [AGAINST WHICH IT HAD BEEN RUBBING ITSELF]',[16] THE BURDEN OF PROOF LIES ON THE CLAIMANT. [SO ALSO] WHERE TWO [OXEN] PURSUED ONE AND THE ONE DEFENDANT ASSERTS, 'IT WAS YOUR OX THAT DID THE DAMAGE', WHILE THE OTHER DEFENDANT ASSERTS, 'IT WAS YOUR OX THAT DID THE DAMAGE',

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(1) Which would show that setting fire on Sabbath even for purely destructive purposes is a violation of the Sabbath, supporting thus the view of R. Abbahu and contradicting that of R. Johanan.

(2) Though with cattle there would really be no legal difference whatsoever whether this was the case or not.

(3) V. p. 192, n. 2.

(4) Being as it is altogether devoid of the whole conception of insult.

(5) Supra p. 141.

(6) Which exempts man setting fire on Sabbath from any civil liability involved.

(7) Exempting from civil liability in the case of Man.

(8) Keth. 35a, 38a; Sanh. 79b and 84b.

(9) Lev. XXIV, 21.

(10) Which, however, forms a distinction in the case of unintentional manslaughter with reference to the liability to take refuge, for which cf. Mak. 7b.

(11) As indeed stated supra p. 136.

(12) Even when there is no actual death penalty involved, and likewise in the Mishnah the man setting fire though inadvertently is exempt from all civil liability, so that you cannot infer therefrom that death penalty is attached to setting fire on Sabbath even for destructive purposes. V. supra p. 192. n. 8.

(13) In which case the capital punishment could never be applied.

(14) V. p. 192, n. 8.

(15) On the basis of the teaching of Hezekiah.

(16) Denying thus any liability.

Talmud - Mas. Baba Kama 35b

NEITHER OF THE DEFENDANTS WILL BE LIABLE. BUT WHERE BOTH OF THE [PURSUING] OXEN BELONGED TO THE SAME OWNER,[1] LIABILITY WILL ATTACH TO BOTH OF THEM. WHERE, HOWEVER, ONE [OF THE OXEN] WAS BIG AND THE OTHER LITTLE[1] AND THE CLAIMANT MAINTAINS THAT THE BIG ONE DID THE DAMAGE,[2] WHILE THE DEFENDANT PLEADS, 'NOT SO, FOR IT WAS THE LITTLE ONE THAT DID THE DAMAGE', OR AGAIN WHERE ONE [OX] WAS TAM AND THE OTHER MU'AD AND THE CLAIMANT MAINTAINS THAT THE MU'AD DID THE DAMAGE[3] WHILE THE DEFENDANT ASSERTS, 'NOT SO, FOR IT WAS THE TAM THAT DID THE DAMAGE,' THE BURDEN OF PROOF LIES ON THE CLAIMANT. [SO ALSO] WHERE THERE WERE TWO INJURED OXEN, ONE BIG AND ONE LITTLE, SIMILARLY TWO PURSUERS, ONE BIG AND ONE LITTLE, AND THE PLAINTIFF ASSERTS THAT THE BIG ONE INJURED THE BIG ONE AND THE LITTLE ONE THE LITTLE ONE, WHILE THE DEFENDANT CONTENDS, 'NOT SO, FOR [IT WAS] THE LITTLE ONE [THAT INJURED] THE BIG ONE AND THE BIG ONE [THAT INJURED] THE LITTLE ONE'; OR AGAIN WHERE ONE WAS TAM AND THE OTHER MU'AD, AND THE PLAINTIFF MAINTAINS THAT THE MU'AD INJURED THE BIG ONE AND THE TAM THE LITTLE ONE, WHILE THE DEFENDANT PLEADS, 'NOT SO, FOR [IT WAS THE] TAM [THAT INJURED] THE BIG ONE AND THE MU'AD [THAT INJURED] THE LITTLE ONE,' THE BURDEN OF PROOF FALLS ON THE CLAIMANT.

GEMARA. R. Hiyya b. Abba stated: This [Mishnaic ruling][4] shows that [in this respect] the colleagues differed from Symmachus who maintained[5] that money of which the ownership cannot be decided has to be equally divided [between the two parties]. Said R. Abba b. Memel to R. Hiyya b. Abba: Did Symmachus maintain his view even where the defendant was as positive as the claimant?[6] — He replied: Yes, Symmachus maintained his view even where the defendant was as positive as the claimant. But [even if you assume otherwise],[7] how do you know that the Mishnah is here dealing with a case where the defendant was as positive as the claimant?[8] — Because it says, THE PLAINTIFF STATES 'IT WAS YOUR OX THAT DID THE DAMAGE', WHILE THE DEFENDANT PLEADS 'NOT SO. . . '[9] R. Papa, however, demurred to this, saying: If in the case presented in the opening clause the defendant was as positive as the claimant, we must suppose that in the case presented in the concluding clause the defendant was similarly as positive as the claimant. [Now,] read the concluding clause; WHERE, HOWEVER, ONE OX WAS BIG AND THE OTHER LITTLE, AND THE PLAINTIFF ASSERTS THAT THE BIG ONE DID THE DAMAGE WHILE THE DEFENDANT PLEADS 'NOT SO, FOR IT WAS THE LITTLE ONE THAT DID THE DAMAGE'; OR AGAIN WHERE ONE OX WAS TAM AND THE OTHER MU'AD, AND THE CLAIMANT MAINTAINS THAT THE MU'AD DID THE DAMAGE, WHILE THE DEFENDANT PLEADS, 'NOT SO, FOR IT WAS THE TAM THAT DID THE DAMAGE', THE BURDEN OF PROOF IS ON THE CLAIMANT. [Now this implies, does it not, that] where he does not produce evidence he will get paid in accordance with the pleading of the defendant. May it now not be argued that this [ruling] is contrary to the view of Rabbah b. Nathan, who said that where the plaintiff claims wheat and the defendant admits barley, he is not liable [for either of them]?[10] — You conclude then that the Mishnah deals with a case where one party was certain and the other doubtful.[11] Which then was certain and which doubtful? It could hardly be suggested that it was the plaintiff who was certain, and the defendant who was doubtful, for would this still not be contrary to the view of Rabbah b. Nathan?[12] It would therefore seem that it was the plaintiff who was doubtful[11] and the defendant certain. And if the concluding clause deals with a case where the plaintiff was doubtful and the defendant certain, we should suppose that the opening clause[13] likewise deals with a case where the plaintiff was doubtful and the defendant certain. But could Symmachus indeed have

applied his principle even to such a case,[14] that the Mishnah thought fit to let us know that this view ought not to be accepted? — [Hence it must be said:] No; but that the concluding clause [deals with a case where] the plaintiff was doubtful and the defendant certain, and the opening clause[13] [presents a case where it was] the plaintiff who was certain and the defendant doubtful.[15] But [even in that case] the opening clause is not co-ordinate with the concluding clause?[16] — I can reply that [a case where the plaintiff is] certain and [the defendant] doubtful[17] and [a case where the claimant is] doubtful and [the defendant] certain[18] are co-ordinate[19] whereas [a case where the claimant is] certain and [the defendant also] certain is not co-ordinate with [a case where the claimant is] doubtful and [the defendant] certain.[20]

The above text states: 'Rabbah b. Nathan said: Where the plaintiff claimed wheat and the defendant admitted barley, he is not liable [for either of them].'[21] What does this tell us? Have we not already learnt [in a Mishnah]: where the plaintiff claimed wheat and the defendant admitted barley he is not liable?[22] If we had only [the Mishnah] there[22] to go by, I might have argued that the exemption was only from the value of the wheat,[23] while there would still be liability for the value of barley;[24] we are therefore told by Rabbah b. Nathan that the exemption is complete.

We have learnt: WHERE THERE WERE TWO INJURED OXEN, ONE BIG AND THE OTHER LITTLE etc. [Now this implies that] where he does not produce evidence he will get paid in accordance with the pleading of the defendant. But why not apply here [the principle of complete exemption laid down in the case of] wheat and barley? — The plaintiff[25] is entitled to get paid [only where he produces evidence to substantiate the claim], but will have nothing at all [where he fails to do so]. But has it not been taught; He will be paid for [the injury done to] the little one out of the body of the big and for [the injury done to] the big one out of the body of the little one? — Only where he had already seized them.[26] We have learnt: IF ONE WAS TAM AND THE OTHER MU'AD, AND THE PLAINTIFF CLAIMS THAT THE MU'AD INJURED THE BIG ONE[27] AND THE TAM THE LITTLE ONE WHILE THE DEFENDANT PLEADS, 'NOT SO, FOR [IT WAS THE] TAM [THAT INJURED] THE BIG ONE AND THE MU'AD [THAT INJURED] THE LITTLE ONE', THE BURDEN OF PROOF FALLS ON THE CLAIMANT. [Now this implies that] where he does not produce evidence he will get paid in accordance with the pleading of the plaintiff. But why should [the principle of complete exemption laid down in the case of] wheat and barley not be applied here? —

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(1) And were in the state of Tam, in which case the half-damages are paid only out of the body of the ox that did the damage, as supra p. 73.

(2) And the body of the big one should secure the payment of the half damages.

(3) And the compensation should thus be made in full.

(4) That it is the claimant on whom falls the onus probandi.

(5) Infra p. 262 and B.M. 2b, 6a, 98b, 100a; B.B. 141a.

(6) In which case not the defendant but only the Court is in doubt.

(7) And suggest that where the defendant has been positive even Symmachus admits that the claimant will get nothing unless by proving his case.

(8) For in the cases dealt with in the Mishnah the defendant is usually unable to speak positively, as in most cases he was not present at the place when the alleged damage was done; cf. also Tosaf. a.l.

(9) Which is apparently a definite defence.

(10) For the claim of wheat has been repudiated by the defendant while the claim for barley admitted by him has tacitly been dispensed with by the plaintiff. The very same thing could be argued in the case of the Mishnah quoted above, where the claim was made in respect of the big one or the Mu'ad, and the defence admitted the little one or the Tam respectively.

(11) In which case the argument contained in the preceding note could no more be maintained.

(12) For surely the plaintiff, by his definite claim in respect of the big one or the Mu'ad, has tacitly waived his claim in respect of the little one or the Tam respectively.

(13) Where the defendant pleads that 'the pursued ox was injured by a rock...' .
(14) Which is really an absurdity, to maintain that a plaintiff pleading mere supposition against a defendant submitting a definite denial should in the absence of any evidence be entitled to any payment whatsoever.
(15) [How then could R. Hiyya maintain that our Mishnah deals with a case where both were certain in their pleas.]
(16) [If so, what is the objection of R. Papa to R. Hiyya's statement, since even on his view there is a lack of co-ordination between these two clauses in the Mishnah.]
(17) As in the case dealt with in the commencing clause.
(18) Which is the case in the concluding clause.
(19) Lit 'are one thing'.
(20) R. Papa was therefore loth to explain the commencing clause as dealing with a case where the defence as well as the claim was put forward on a certainty, but preferred to explain it as presenting a law-suit where, though the claim had been put forward positively, the defence was urged tentatively.
(21) V. p. 197. n. 2.
(22) Shebu. 38b.
(23) Which was denied by the defendant.
(24) Admitted by the defendant.
(25) In the case of the oxen.
(26) In which case the principle of complete exemption maintained by Rabbah b. Nathan apparently does not apply.
(27) V. p. 196. n. 1.

Talmud - Mas. Baba Kama 36a

The plaintiff is entitled to get paid [only where he produces evidence to substantiate the claim] but [failing that he] will have nothing at all. But has it not been taught: He will be paid for [the injury done to] the little one in accordance with the regulations applying to Mu'ad and for [the injury done to] the big one out of the body of the Tam? — Only where he had already seized them.

BUT WHERE BOTH OF THE [PURSUING] OXEN BELONGED TO THE SAME OWNER, LIABILITY WILL ATTACH TO BOTH OF THEM. Raba of Parazika[1] said to R. Ashi: It can be concluded from this that where oxen in the state of Tam [belonging to the same owner] did damage, the plaintiff has the option to distrain either on the one or the other! — [No, replied R. Ashi, for] we are dealing here [in the Mishnah] with a case where they were Mu'ad.[2] If where they were Mu'ad how do you explain the concluding clause: WHERE, HOWEVER, ONE [OF THE OXEN] WAS BIG AND THE OTHER LITTLE AND THE CLAIMANT MAINTAINS THAT THE BIG ONE DID THE DAMAGE WHILE THE DEFENDANT PLEADS 'NOT SO, FOR IT WAS THE LITTLE ONE THAT DID THE DAMAGE' THE BURDEN OF PROOF FALLS ON THE CLAIMANT. For indeed where they were Mu'ad what difference could there be [whether the big one or the little one did the damage] since at all events he has to pay the full value of the ox? — He thereupon said to him: The concluding clause presents a case where they were Tam, though the opening clause deals with a case where the oxen were Mu'ad. Said R. Aha the Elder to R. Ashi: If the commencing clause deals with a case where the oxen were Mu'ad,[2] what is the meaning of 'LIABILITY WILL ATTACH TO BOTH OF THEM'? Should not the text run, 'The owner will be liable'? Again, what is the meaning of 'BOTH OF THEM'? — [The commencing clause also] must therefore deal with a case where the oxen were Tam, and the ruling stated follows the view of R. Akiba, that plaintiff and defendant become the owners in common [of the attacking ox].[3] Now this is so where 'BOTH OF THEM' [the oxen] are with the owner, in which case he cannot possibly shift the claim [from one to the other].[4] But if 'BOTH OF THEM' are not with him he may plead,[5] 'Go and produce evidence that it was this ox [which is still with me][6] that did the damage, and then I will pay you.'

CHAPTER I V

MISHNAH. IF A [TAM] OX HAS GORED FOUR OR FIVE OXEN ONE AFTER THE OTHER,