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Bavli Baba Qamma Chapter Three

Folios 27A-36A

3:1A-D

- A. He who leaves a jug in the public domain,
- B. and someone else came along and stumbled on it and broke it —
- C. [the one who broke it] is exempt.
- D. And if [the one who broke it] was injured by it, the owner of the barrel is liable [to pay damages for] his injury.

- I.1** A. *How come the framer of the passage refers to begin with to a **jug** but then concludes with reference to a **barrel**? And so, too, we have learned in another passage in the Mishnah: **This one comes along with his barrel, and that one comes along with his beam — [if] the jar of this one was broken by the beam of that one, [the owner of the beam] is exempt.** How come the framer of the passage refers to begin with to a **barrel** but then concludes with reference to a **jug**? And so, too, we have learned in the Mishnah: **This one is coming along with his barrel of wine, and that one is coming along with his jug of honey — the jug of honey cracked, and this one poured out his wine and saved the honey in his jar — he has a claim only for his wages [M. B.Q. 10:4A-E].** How come the framer of the passage refers to begin with to a **barrel** but then concludes with reference to a **jug**?*
- B. Said R. Hisda, “Well, as a matter of fact, there really is no difference between a jar and a barrel.”

- C. *So what is the practical difference between the usages?*
- D. *It has to do with buying and selling.*
- E. *How can we imagine such a case? If it is in a place in which a jug is not called a barrel, nor a barrel a jug, for in such a case, the two terms are kept distinct!*
- F. *The distinction is required for a place in which most of the people call a jug a jug and a barrel a barrel, but some call a barrel and jug and some call a jug a barrel. What might you then have supposed? That we follow the majority usage? [27B] So we are informed that that is not the case, for in disputes over monetary transactions, we do not follow the majority usage.*

- II.1** A. **And someone else came along and stumbled on it and broke it — [the one who broke it] is exempt:**
- B. *Why should he be exempt? He should have opened his eyes as he walked along!*
 - C. *They said in the household of Rab in the name of Rab, “We deal with a case in which the whole of the public domain was filled with barrels.”*
 - D. *Samuel said, “We deal with a case in which the jugs were in a dark place.”*
 - E. *R. Yohanan said, “We deal with a case in which the jug was at a corner.”*
[Kirzner: The defendant therefore is not to blame.]

F. *Said R. Pappa, “A close reading of our Mishnah rule can accord only with the view of Samuel or R. Yohanan. For if it were in accord with the position of Rab, then what difference does it make that exemption is accorded only if the man stumbled over the pitcher? Why not rule in the same way even if he deliberately broke the pitcher?”*

G. *Said R. Zebid in the name of Raba, “In point of fact, the same rule really does apply even if the defendant deliberately broke the jug. And the reason that the language, **and stumbled on it**, is used, is that the later clause goes on to say, **And if [the one who broke it] was injured by it, the owner of the barrel is liable [to pay damages for] his injury.** But that would be the case only if he stumbled on it, but not if he deliberately broke the jug. How come? The man has deliberately injured himself. So that is why, to begin with, the word choice was **and stumbled on it**.*

II.2 A. Said R. Abba to R. Ashi, “This is what they say in the West in the name of R. Ulla: ‘The reason is that people do not ordinarily look out when they walk along the way.’”

II.3 A. *There was a case in Nehardea, and Samuel imposed liability [for the broken utensil]. In Pumbedita, and Rabbah imposed liability as well.*

B. *Now there is no problem in understanding Samuel’s ruling, since he acted in accord with his own tradition [if the pitcher was visible, there would be liability]. But shall we then say that Rabbah concurred with Samuel?*

C. *Said R. Pappa, “The damage was done at the corner of an oil factory, and, since it is entirely permitted to store barrels there, the defendant should have walked along with his eyes wide open.”*

**A man has got the right to take the law into his own hands
where there will be a loss.**

The following theoretical problem on whether or not a has got the right to take the law into his own hands where there will be a loss is inserted here because our Mishnah-paragraph makes a contribution to the formulation of one of the stages in the argument. This is a free-standing composition, not formulated around a problem of Mishnah-exegesis.

II.4 A. R. Hisda sent word to R. Nahman, “Lo, they have said, ‘For kicking with the knee, three selas; for kicking with the foot, five; for a blow with the saddle of an ass, thirteen.’ *What is the penalty for wounding with the blade of a hoe or the handle of a hoe?*”

B. *He sent word, “Hisda! Hisda! Are you really imposing in Babylonia such extrajudicial fines as these [which you have no right to do over there]? Tell me the details of the case as it happened.”*

C. *He sent word, “There was a well that belonged to two people, who used it on alternate days. One of them then went and drew water on a day that was not assigned to him. The other said, ‘This is my day.’ The latter ignored him. So the other took the blade of a hoe and struck him with it.”*

D. *R. Nahman sent word, “Even if he hit him a hundred times with the blade of the hoe [it would not have mattered]. For even in the opinion of one who says, ‘Someone may not take the law into his own hands,’ where there will be a loss, he has every right to do so.”*

E. *For it has been stated:*

F. R. Judah said, “A man has not got the right to take the law into his own hands.”

G. R. Nahman said, “A man has got the right to take the law into his own hands where there will be a loss.”

H. *Now all parties concur that where there will be a loss, someone may take the law into his own hands. Where there is an argument, it concerns a case in which there will be no loss. R. Judah said, “A man has not got the right to take the law into his own hands.” Since there will be no loss, he can go to court. But R. Nahman said, “A man has got the right to take the law into his own hands where there will be a loss.” Since he is acting in accord with the law anyhow, why take the trouble to go to court?*

I. *Objected R. Kahana [to R. Judah’s view], “Ben Bag Bag says, ‘A person should not go and retrieve his own property from the household of someone else, lest he appear to be a thief. But he should be ready in public to break his teeth and you may say to him, “I am seizing what is my own from the thief’s possession”’ [T. B.Q. 10:38].”* [This then would contradict Judah’s position.]

J. *[Judah] said to him, [28A] “True enough, Ben Bag Bag is on your side. But he is a dissenting view, differing from rabbis.”*

K. R. Yannai said, “What is the meaning, anyhow, of **break his teeth?** *It is, in court.*”

L. *If so, the language, you may say to him, is inappropriate. Rather it should be, they [the court] may say to him! So too, the language, I am seizing what is my own, is inappropriate. Rather, it should be, he is seizing what is his own!*

M. *So that’s a problem.*

N. *Come and take note: In the case of an ox that climbed up on another one to kill it, and the owner of the one on the bottom came along and pulled out his ox, so that the one on the top fell and was killed — the owner of the bottom ox is exempt from having to pay compensation. Does this ruling not pertain to an ox that was an attested danger, in which case there is no loss to be expected?*

O. *No, it speaks of an ox that was deemed innocent, and there is a considerable loss to be expected.*

P. *If so, then look what's coming:* If he pulled off the ox on top and it died, he is liable to pay compensation. *But if the ox was deemed innocent, why should he have to pay compensation?*

Q. Because he should have pulled his ox out from underneath, and he did not do that. [Kirzner: He had no right to push the ox on top.]

R. *Come and take note:* He who filled the courtyard of his fellow with jugs of wine and jugs of oil — the owner of the courtyard has every right to break the jugs in order to get out or break the jugs in order to get in.

S. Said R. Nahman bar Isaac, “He breaks the jugs to get out only if a court says he may do so, he may break the jugs to get in only to get whatever documents he needs to prove his case in court.”

T. *Come and take note:* How on the basis of Scripture do we know that in the case of a slave whose ear had been bored [as an indication that he was in perpetual service, to the Jubilee year], the term of service of which has come to an end [with the Jubilee], the owner of which has been urging him to leave, and, in the process, injured him and done him damage, the owner is exempt from having to pay compensation? Scripture states, “You shall not take satisfaction for him who is...come again...” (Num. 35:12), meaning, for one who is determined to come again [as a slave, continuing his service], you will not take a ransom.

U. *Here with what sort of a case do we deal? It is a slave who was a thief*[Kirzner: so the owner is protecting himself from a genuine loss].

V. *Well, up to now he hasn't stolen anything, but now he's expected to go and steal?*

W. *Yes, that's quite plausible, since up to now he was afraid of his master, but now that he is about to go free, he isn't afraid of his master anymore.*

X. R. Nahman bar Isaac said, “At issue is a slave to whom his master gave a Canaanite serving girl as a wife. *Up to this time it was a legitimate relationship, but once he is freed, it is not legitimate*” [Kirzner: so the master may use force to eject him].

Y. *Come and take note: He who leaves a jug in the public domain, and someone else came along and stumbled on it and broke it — [the one who broke it] is exempt. So the operative consideration is*

that he stumbled on it. Lo, if he had deliberately broken it, he would have been liable. [This is contrary to Nahman's view.]

*Z. Said R. Zebid in the name of Raba, "In point of fact, the same rule really does apply even if the defendant deliberately broke the jug. And the reason that the language, **and stumbled on it**, is used, is that the later clause goes on to say, **And if [the one who broke it] was injured by it, the owner of the barrel is liable [to pay damages for] his injury.** But that would be the case only if he stumbled on it, but not if he deliberately broke the jug. How come? The man has deliberately injured himself. So that is why, to begin with, the word choice was **and stumbled on it.***

AA. Come and take note: "Then you shall cut off her hand" (Deu. 25:12) — that refers to a monetary fine equivalent in value to the hand. Does this not speak of a case in which the woman has no other way of saving her husband but doing what she did [proving one may not take the law into one's own hands]?

BB. No, it involves a case in which she can save her husband in some other way.

CC. Well, if she cannot save her husband in some other way, would she be free of all liability? Then why go on to say, "And puts forth her hand" (Deu. 25:11) — excluding an officer of the court [from liability for humiliation that he may cause when acting in behalf of the court]? Rather, why not recast matters by dealing with the case at hand, thus: Under what circumstances? When she can save her husband by some other means. But if she cannot save him by some other means, then she is exempt.

DD. This is the sense of the passage: Under what circumstances? When she can save her husband by some other means. But if she cannot save him by some other means, then her hand serves as the agency of the court and she is indeed exempt.

*EE. Come and take note: **He who had a public way passing through his field, and who took it away and gave [the public another path] along the side, what he has given he has given. But what is his does not pass to him [M. B.B. 6:7A-D].** Now if you maintain that someone may take the law into his own hands, then let*

the man just take a whip and sit there [and keep people out of his property]!

FF. Said R. Zebid in the name of Raba, "It is a precautionary decree, lest he assign to the public a crooked path."

GG. R. Mesharshayya said, "It is a case in which he gives them a crooked path."

HH. R. Ashi said, "Any path that is over off to the side is classified as a crooked path to begin with, since what is nearer for one party will be farther for another."

II. *If that's so, then why specify, But what is his does not pass to him? Why can't he just say to the public, "Take what is yours and give me what is mine?"*

JJ. *That is because of what R. Judah said, for* said R. Judah, "A path that the public has taken over is not to be disrupted."

KK. *Come and take note: A householder who designated peah at one corner of the field, and the poor come along and take the peah from another side of the field — both this and that are classified as peah. Now if you maintain that a person may take the law into his own hands, why should it be the fact that both this and that are so classified? Just let the man take a whip and sit there [and keep people out of his property]!*

LL. *Said Raba, "What is the meaning of the phrase, both this and that are so classified? It is for the purpose of exempting the designated produce from the requirement of separating tithes. For so it has been taught on Tannaite authority: He who declares his vineyard to be ownerless and then gets up early in the morning and harvests the grapes is liable to leave for the poor the grapes the fall to the ground, the puny bunches, the forgotten ones, and the corner of the field, but is exempt from having to designate tithes."*

We commence, **I.1**, with analysis of the Mishnah paragraph's language. **II.1, 2+3** then spell out the operative consideration behind the Mishnah's rule. No. 4 introduces a theoretical problem. The rather ambitious, free-standing composition is inserted only because the framer has drawn upon our Mishnah's rule as part of his repertoire of cases and evidence.

3:1E-I

- E. [If] his jug was broken in the public domain,
- F. and someone slipped on the water,
- G. or was hurt by the sherds,
- H. he is liable.
- I. R. Judah says, “In [a case in which he did so] deliberately, he is liable, and in [a case in which he did] not [do so] deliberately, he is exempt.”

- I.1** A. Said R. Judah said Rab, “The rule applies only to a case in which the clothing of the injured party was soiled in the water. **[28B]** But as to the injury to the person himself, the responsible party is exempt, since it was the public domain that did the injury. *When I repeated this statement before Samuel, he said to me, ‘Well, are not liabilities for damages brought about by a stone, knife, or a burden, derived by analogy to pit? In that case, I invoke for all of them the following: “an ox” (Exo. 21:33) — excluding a man; “an ass” (Exo. 21:33) — excluding inanimate objects. But that exclusion pertains, in particular, an accident resulting in death, but when it comes to damages that may be caused, man is always liable, and inanimate objects are always exempt.’*” [Kirzner: 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 him from damages on account of injury to the person?]
- B. And Rab?
- C. *That rule applies to a case in which the owner has abandoned the property, but in cases where the nuisance has not been abandoned by the owner, the property remains the owner’s chattel [and are subject to the law applicable to ox (Kirzner)].*
- D. *Objected R. Oshaia, ““And an ox or an ass fall therein’ (Exo. 21:33) — ‘an ox’ — excluding a man; ‘an ass’ — excluding inanimate objects. On this basis, they have said: **[If] an ox carrying its trappings fell into it and they were broken, an ass and its trappings and they were split, the owner of the pit is liable for the beast but exempt for the trappings [M. B.Q. 5:7].** To what may this ruling be compared? To the ruling in the case of a stone, knife, or baggage left on public ground, which did damage....”*
- E. *Should the passage not read, “What case may be compared to this ruling? Thus: What may be similar to this ruling? The case of a stone, knife, or baggage left on public ground that did damage.”*

F. [Continuing D:] “‘...So if a bottle broke against a stone, there is liability.’ *Now the opening clause contradicts the position of Rab* [Kirzner: who maintains that unless they have been declared ownerless, they are subject to the law of ox], *and the closing one* [so if a bottle broke against a stone, there is liability], *contradicts the position of Samuel* [Kirzner: he thinks it should be subject to the law applicability to pit, imposing no liability for damages done to inanimate objects].”

G. *Well, within your reasoning, anyhow, the passage itself contains a contradiction, since it commences by speaking of an exemption [with the stone, knife, and luggage classified as pit] and concluding then with liability [the bottle smashed against the stone]! So Rab works matters out within his theory, and Samuel works matters out within his theory. Rab works matters out within his theory: Under what circumstances? In a case in which he declared the property ownerless. But if he did not declare it ownerless and abandoned, he would be liable. So if a bottle broke against a stone, there is liability. Samuel works matters out within his theory: since you have said that a stone, knife, or luggage are equivalent to one's pit, then from the perspective of R. Judah, who imposes liability for damages done to utensils damaged by a pit, if a bottle broke against a stone, there is liability.*

H. Said R. Eleazar, “[With regard to the ruling, if a bottle broke against a stone, there is liability,] that pertains only in an instance in which someone stumbled over the stone and the bottle broke against it. But if the person stumbled because of the condition of the public domain, though the bottle broke against the stone, there would have been an exemption [in line with the position that it was the public domain that caused the accident].”

I. *In accord with what authority is that interpretation? It is not in accord with R. Nathan* [Kirzner: who holds that where no payment can be exacted from one defendant, the co-defendant, if any, will himself bear the whole liability].

J. *There are those who report matters as follows:*

K. Said R. Eleazar, “[With regard to the ruling, if a bottle broke against a stone, there is liability,] you may not say that that pertains only in an instance in which someone stumbled over the stone and the bottle broke against it. But if the person stumbled because of the condition of the public domain, though the bottle broke against the stone, there would have been an exemption [in line with the position

that it was the public domain that caused the accident]. But to the contrary, even if the person stumbled against the ground, if the bottle broke against the stone, there is liability.”

L. *In accord with what authority is that interpretation? It is obviously in accord with R. Nathan.*

- II.1** A. **R. Judah says, “In [a case in which he did so] deliberately, he is liable, and in [a case in which he did] not [do so] deliberately, he is exempt”:**
- B. *What is the sense of deliberately?*
- C. Said Rabbah, “If someone deliberately brought the pitcher down from his shoulder” [Kirzner: even if he did not intend to break it].
- D. *Said to him Abbaye, “Does it then follow that R. Meir would impose liability even when the pitcher just slipped down by accident?”*
- E. *He said to him, “Yes, indeed, R. Meir does impose liability even when the handle remained in the hand of the carrier.”*
- F. *But why should this be the case? It is nothing other than an accident, and the All-Merciful has exempted someone from having to pay damages in the case of an accident. For it is written, “But to the girl you shall do nothing” (Deu. 22:26) [Kirzner: for so far as she is concerned, it was against her will and a sheer mishap].*
- G. *And should you say that that means she is not to be put to death, but, as to damages, there should be liability, has it not been taught on Tannaite authority: If one’s pitcher broke and he did not clean up the mess, or his camel fall down and he did not raise it up, R. Meir declares him liable for any damage that may result, and sages say, [29A] “He is exempt from action in earthly courts though liable in heavenly courts,” while sages concur with R. Meir in the case of one’s stone, knife, or luggage that one left on the roof, which fell down in a quite normal wind and did damage, that he is liable, and R. Meir concurs with rabbis in the case of one who brought up his cans to the roof so as to dry them off, and they fell in an extraordinary wind and did damage, that he is exempt, [Kirzner: does this not prove that even regarding damages, all concur that there is exemption in cases of sheer accident?]*
- H. *Rather, said Abbaye, “Two issues are subject to dispute. Subject to dispute is damage done when the pitcher is falling, and subject to dispute is damage done by the sherds after the pitcher fell. Subject to dispute is damage done when the pitcher is falling: is stumbling a sign of negligence? One authority [Meir] maintains that stumbling is a sign of negligence, and the other*

authority [Judah] takes the view that stumbling is not a sign of negligence. Furthermore, subject to dispute is damage done by the sherds after the pitcher fell: is one liable for damage done by what he has abandoned [and no longer owns]. One authority [Meir] takes the position that one is liable for damage done by what he has abandoned, and the other authority [Judah] maintains that one is not liable for damage done by what he has abandoned.”

- I. *How do you know?*
- J. *Since there are two clauses in the formulation, namely, **and someone slipped on the water, or was hurt by the sherds.** Now aren't these the same thing? That would be the case, unless this is the sense: If someone slipped in the water when the pitcher was falling, or someone was injured in the sherds after the pitcher fell.*
- K. *Now once you have interpreted the Mishnah to address two distinct issues, should we not suppose that the additional Tannaite rule [if one's pitcher broke and he did not clean up the mess, or his camel fall down and he did not raise it up, R. Meir declares him liable for any damage that may result, and sages say, "He is exempt from action in earthly courts though liable in heavenly courts"] also deals with the same two issues? And, indeed, that would pose no problem with respect to the rule concerning the pitcher would come up, for example, either when the pitcher was falling or after it had fallen. But as to the camel, while I can well imagine damages done after the camel fell down, for instance, the owner has declared the carcass ownerless, but how could such a case come up when it was falling down?!*
- L. *Said R. Aha, "Well, it could be a case in which the camel passed through in water along the slippery shore of a river." [Kirzner: The stumbling of the camel is thus imputed to the driver.]*
- M. *Well, what would be the circumstances here? If there was another way of making the trip, then the driver is negligent. And if there is no other way of making the trip, then he is subject to mere accident. Rather, you would find such a case, for instance, if the driver stumbled and the camel stumbled with him.*

- II.2** A. *If someone abandoned his nuisance, declaring it ownerless, then where would the question of intentionality enter in anyhow [as Judah says it does]?*
- B. *Said R. Joseph, "It would involve the intentionality of maintaining ownership of the sherds."*

- C. And so said R. Ashi, "It would involve the intentionality of maintaining ownership of the sherds."

II.3

- A. R. Eleazar said, "There is a dispute concerning the rule covering damages done when the pitcher was falling."
- B. *But as to damage done afterward, what is the rule? Do all parties concur that one is exempt?*
- C. *But lo, there is R. Meir, who declares liability!*
- D. *Rather, as to damage done afterward, what is the rule? All parties concur that one is liable.*
- E. *But lo, there are rabbis, who declare the owner exempt from liability.*
- F. *So what is the sense of the cited statement? What is the meaning of "damage done at the time of the fall"? It is, "also damage done at the time of the fall," and he so informs us of the rule in accord with the position set forth by Abbaye.*
- G. [29B] And R. Yohanan said, "The dispute pertains to damage that took place after the pitcher fell."
- H. *But as to damage done during the fall, what is the rule? All parties concur that one is exempt." But, as a matter of fact, since R. Yohanan said further on, "Do not take the view that the Mishnah paragraph on the case of the two potters represents the view of R. Meir, who takes the position that the act of stumbling is classified as negligence, it must follow that R. Meir would impose liability [Kirzner: for damage done at the time of the fall].*
- I. *Then what? All parties would concur in imposing liability? Surely the statement later on by R. Yohanan that we should not take the view that the Mishnah passage on the two potters accords with the position of R. Meir would imply that rabbis would declare the man exempt [for damage done at the time of the fall]!*
- J. *So what it is that R. Yohanan wishes to tell us is that if one has declared a property of his that has become a nuisance to be ownerless, the property is exempted by rabbis from liability since at the moment that the pitcher or camel fell, it was an accident, but nuisances that are declared ownerless in any other condition would be liable even from the viewpoint of rabbis. [Kirzner: The statement made by Yohanan 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 Meir and rabbis was only where the inception of the nuisance was with a fall, an accident, but where*

the nuisance had originally been willfully exposed to the public, there would be liability according to all opinions.]

II.4 A. *It has been stated:*

- B. He who declares ownerless a property of his that has become a nuisance —
- C. R. Yohanan and R. Eleazar —
- D. One said, “He remains liable for damage that may result from the nuisance.”
- E. And the other said, “He is exempt from having to pay damages that may result from the nuisance.”

F. *May we then say that the one who imposes liability accords with the position of R. Meir, and the one who declares the former owner exempt takes the position of rabbis?*

G. *As to the view of R. Meir, there is no dispute* [Kirzner: for Meir imposes liability for abandoned nuisances even where their very inception was by accident]. *Where there is a dispute before us, it is within the framework of the position of rabbis. The authority who declares the former owner exempt accords with the position of rabbis, pure and simple, and the one who declares him liable will say to you, “I maintain that, even within the framework of rabbis, he is liable. For rabbis declare the man exempt only where he has declared ownerless property of his that has become a nuisance in a case in which it was by an accident that the nuisance was created, but in general, nuisances that are declared ownerless nonetheless involve liability.”*

H. *May it be concluded, in any event, that it is R. Eleazar who takes the position that one is liable?* For said R. Eleazar in the name of R. Ishmael, “There are two things that do not fall within the domain of a person but that are regarded by Scripture as though they were within his domain: a pit dug in public domain, and leaven after the midday of the eve of Passover.”

I. *You may indeed draw that conclusion.*

J. *Yeah, well, did R. Eleazar say any such thing? He said the exact opposite! Have we not learned in the Mishnah: **He who brings out his straw and stubble into the public domain to turn them into manure, and someone else was injured on them — he is liable [to pay compensation for] his injury?** And in*

connection with that rule, said R. Eleazar, “That rule applies only in a case in which the one who brought out the manure intended to acquire title to it. But if he had not intended to acquire title to it, he would have been exempt from having to pay damages.” Does this not prove, therefore, that, in his view, one is exempt from paying damages caused by a nuisance that one has created and then abandoned?

K. Said R. Adda bar Ahva, “His statement pertains to a case in which one brought the dung back to its prior position” [Kirzner: in which case the defendant did not aggravate the position].

L. Said Rabina, “What would be a case comparable to the one proposed by R. Adda bar Ahva? It would be like someone who came along and found a pit open, so he covered it and then opened it again.”

M. *Said Mar Zutra b. R. Mari to Rabina, “Are the cases really comparable? In the latter case, what the original party did in digging the pit has not been undone, while in the case at hand, [when the man put the dung back where it belonged], he has undone the deed he originally did. Rather, the only correct comparison would be to a case in which someone found a pit that was uncovered, filled it up, and then dug it out again. Here, the nuisance created by the original party has been completely removed, and the new party is solely and fully responsible for damages.”*

N. Rather, said R. Ashi, “[Eleazar referred to a case in which] someone turned over the dung within the first three handbreadths of the ground [Kirzner: and one substance is not regarded as removed from another unless a space of not less than three handbreadths separates them].” [Kirzner: In this case the nuisance created by the

original offender is not yet considered in law as abated.]

O. And what forced R. Eleazar to interpret the stated rule of the Mishnah to speak of a case in which someone turned over the dung within the first three handbreadths of the ground and so to limit the rule to one who intended to acquire title to the dung, so that if he did not intend to acquire title to it, he would have been excluded from the rule? Rather, make it refer to one who turned over the dung above the first three handbreadths, so that, even if one did not intend to acquire title to it, one should still be liable?

*P. Said Raba, "He found a problem in the formulation of the Mishnah text itself, namely: why refer explicitly to **turn**? You could just as well have used the language of **pile up**! So the intent of **turn** must be to indicate that it is within the first three handbreadths above the ground."*

Q. Now, since we have established that it is R. Eleazar who maintains that one is liable, it must follow that it is R. Yohanan who has said one is exempt.

*R. But is it the fact that R. Yohanan takes that position? And lo, we have learned in the Mishnah: **He who put away thorns or glass, and he who makes his fence out of thorns, and a fence which fell into the public way — and others were injured by them — he is liable [to pay compensation for] their injury.** And in this connection said R. Yohanan, "That ruling applies only where the thorns were projecting into the public way. But if they had been kept in private domain [but only later on the owner abandoned his ownership*

and declared them public property], he would not have been liable to damages they might subsequently do.” *Now on what basis will R. Yohanan have declared someone to be exempt from having to pay damages if the thorns were on private property? Is it not because they would have been a nuisance on private property? Does this not then bear the implication that only if a nuisance is created on public property is one liable, but abandoned nuisances do involve liability?*

S. *No, in point of fact I may well say to you that one who declares ownerless nuisances that he has created still is exempt. And why is one exempt in the case of thorns in private property? It is because it has been stated in this connection: Said R. Aha b. R. Iqa, “It is because people do not usually go along and scratch their backs on walls.”*

T. *Anyhow, does R. Yohanan really maintain such a view [that abandoned nuisances do involve liability]? Lo, R. Yohanan has said, “The decided law is in accord with Mishnah rulings that do not bear attributions.” And we have learned in the Mishnah: **He who digs a pit in public domain, and an ox or an ass fell into it and died, is liable [M. B.Q. 5:5E].** [Kirzner: Does this not prove that there is liability for a pit dug in public ground?] *So, in point of fact, R. Yohanan has to be the one who has said that one is liable, and since it was R. Yohanan who said one is liable, it must follow that R. Eleazar is the one who said one is exempt.**

U. But did not R. Eleazar say **[30A]** in the name of R. Ishmael, “There are two things that do not fall within the domain of a person but that are regarded by Scripture as though they were within his domain: a pit dug in public domain,

and leaven after the midday of the eve of Passover”?

V. *That is no problem. Here he speaks in his own name, there he was speaking in the name of his master.*

I.1 clarifies the case to which the Mishnah’s rule applies. **II.1** clarifies the terms of the Mishnah paragraph. Nos. 2, 3-4 carry forward the discussion of No. 1.

3:2

- A. He who pours water out into the public domain,**
- B. and someone else was injured on it,**
- C. is liable [to pay compensation for] his injury.**
- D. He who put away thorns or glass,**
- E. and he who makes his fence out of thorns,**
- F. and a fence which fell into the public way —**
- G. and others were injured by them —**
- H. he is liable [to pay compensation for] their injury.**

- I.1**
- A. Said Rab, “The rule applies only to a case in which the clothing of the injured party were soiled in the water. But as to the injury to the person himself, the responsible party is exempt, since it was the public domain that did the injury.”
 - B. Said R. Huna to Rab, “Why not regard the ground that is mixed with the water belonging to him to be clay belonging to the man himself?”
 - C. *Well, do you suppose that I am speaking of water that has not dried up? I am speaking of water that has dried up.*
 - D. *So why do I need two statements of the same point?*
 - E. *One refers to the dry season, the other to the rainy season, as has been stated on Tannaite authority: All those of whom they have spoken, who open up their gutters or sweep out the dust of their cellars into the public domain, in the dry season have no right to do so, but in the rainy season, have every right to do so. But even though they do so with every right, nonetheless, if what they have done causes damage, they are liable to pay compensation.”*

- II.1**
- A. He who put away thorns or glass, and he who makes his fence out of thorns, and a fence which fell into the public way — and others were injured by them — he is liable [to pay compensation for] their injury:**

- B. Said R. Yohanan, “This ruling pertains only to a case in which the thorns project into public domain. But if they were within private domain, he would not be liable.”

C. *How come one is exempt from liability?*

D. Said R. Aha b. R. Iqa, “Because people do not ordinarily walk along and scratch their backs on the walls.”

II.2 A. *Our rabbis have taught on Tannaite authority:*

- B. **He who stored away thorns and glass in the wall of his fellow, and the owner of the wall came along and tore it down, and someone else came along and was injured by them, lo, this one nonetheless is liable [T. B.Q. 2:6A-D].**

- C. Said R. Yohanan, “This rule pertains only in the case of a decrepit wall. But if it were a strong wall, the one who hid the thorns would be exempt, the owner of the wall liable.”

II.3 A. Said Rabina, “That is to say, he who covers his pit with a cover belong to his fellow, and the owner of the cover came along and took away his cover — the owner of the pit is liable.”

B. *So what else is new?*

C. *What might you otherwise have supposed? In a case in which the owner of the wall had no knowledge of who hid the thorns in the wall and could not tell him he planned to pull down the wall, the rule is what it is, while in the case of the pit, where the owner of the lid knew the owner of the pit, you might have argued that he had the obligation to tell him he planned to remove the lid. So we are informed that that is not a valid view.*

II.4 A. *Our rabbis have taught on Tannaite authority:*

- B. **The pious men of old would put away thorns in fields that they themselves owned and dig them a hole three handbreadths deep, so that the plough would not catch on them [T. B.Q. 2:6E].**

C. *R. Sheshet would throw them into a fire.*

D. *Raba would throw them into the Tigris.*

II.5 A. *Said R. Judah, “Someone who wants to be truly pious will fulfill the teachings concerning damages.”*

B. *Raba said, “The teachings of tractate Abot.”*

C. *And some say, “The teachings of tractate Berakhot.”*

I.1, II.1 once again define the cases to which the Mishnah’s rule applies. No. 2, bearing its own gloss at No. 3, and No. 4, supplemented at No. 5, add a Tannaite complement to the Mishnah.

3:3

- A. He who brings out his straw and stubble into the public domain to turn them into manure,
- B. and someone else was injured on them —
- C. is liable [to pay compensation for] his injury.
- D. But whoever grabs them first effects possession of them.
- E. Rabban Simeon b. Gamaliel says, “All those who disrupt the public domain and thereby caused injury are liable to pay compensation.
- F. “And whoever grabs [what they left out in the public domain] first effects possession of them.”
- G. He who heaps up cattle dung in the public domain
- H. and someone else was injured by it —
- I. he is liable [to pay compensation for] his injury.

- I.1**
- A. *May we say that our Mishnah paragraph does not accord with the view of R. Judah? For it has been taught on Tannaite authority:*
 - B. **R. Judah says, “At the time of fertilizing the fields, a man may take out his manure and pile it up at the door of his house in the public way so that it will be pulverized by the feet of man and beast, for a period of thirty days. For it was on that very stipulation that Joshua caused the Israelites to inherit the land” [T. B.M. 11:8E-H].**
 - C. *You may even maintain that he concurs with the Mishnah’s rule. R. Judah concedes that if one has caused damage, he is liable to pay compensation.*
 - D. *But has it not been taught in the Mishnah: If the storekeeper had left his lamp outside the storekeeper is liable [if the flame caused a fire]. R. Judah said, “In the case of a lamp for Hanukkah, he is exempt” [M. B.Q. 6:6E-F], because he has acted under authority. Now surely that must mean, under the authority of the court [and that shows that one is not responsible for damage caused by his property in the public domain if it was there under the authority of the court]!*

- E. *No, what it means is, on the authority of carrying out one's religious obligations.*
- F. *But has it not been taught on Tannaite authority:*
- G. In the case of all those concerning whom they have said, "They are permitted to obstruct the public way," if there was damage done, one is liable to pay compensation. But R. Judah declares one exempt from having to pay compensation.
- H. *Come and take note:* In all those cases in which sages have said that it is permitted to create a nuisance in the public domain, if one has done damage thereby, he is liable to pay compensation, but R. Judah exempts him.
- I. Said R. Nahman, "The Mishnah speaks of the season in which it is not the normal time to fertilize the fields and it does represent the view, also, of R. Judah."
- J. R. Ashi said, **[30B]** *"The Mishnah speaks of his straw and stubble and these are slippery [and may never be put into public domain]."*

II.1 A. But whoever grabs them first effects possession of them:

- B. Said Rab, "He acquires both the corpus and also the right to the increase in value that has accrued while they were in the public domain."
- C. Zeiri said, "He acquires the right to the increase in value that has accrued while they were in the public domain but not to the corpus themselves."
 - D. *What's at stake?*
 - E. *Rab takes the view that rabbis imposed the sanction of assigning ownership to the corpus on account of right to the increase in value that has accrued while they were in the public domain.*
 - F. *Zeiri takes the view that rabbis did not impose the sanction of assigning ownership to the corpus on account of right to the increase in value that has accrued while they were in the public domain.*
- G. *We have learned in the Mishnah: He who brings out his straw and stubble into the public domain to turn them into manure, and someone else was injured on them — he is liable [to pay compensation for] his injury. Now here it is not stated, But whoever grabs them first effects possession of them!* [Kirzner: Omitting this clause would 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, because here there is neither increase in quantity nor improvement in quality while lying on public ground.

This would not be in accord with the view of Rab, who maintains that the penalty extends not only to the increase but also to the corpus of the object of the nuisance.]

- H. *The Tannaite authority has stated the operative language in the opening clause, and that language applies also to the concluding one.*
- I. *But lo, in regard to the latter clause, it has been taught on Tannaite authority: They are forbidden on grounds of thievery [Kirzner: which shows that the penalty does not extend to the corpus].*
- J. *When the language, They are forbidden on grounds of thievery, is used, it is with reference to all the cases covered here [inclusive of straw and stubble], pertaining to the one who has come along and seized possession of them first, assigning title to him alone.*
- K. *But that is not exactly what the formulation contains, for we have learned in the Mishnah: **He who brings out his straw and stubble into the public domain to turn them into manure, and someone else was injured on them — he is liable [to pay compensation for] his injury. But whoever grabs them first effects possession of them,** and it is permitted to do so despite the law of thievery. If, however, someone turned up dung in the public domain and someone else was injured thereby, he must pay compensation, and no one may take possession of the dung, on account of the law of thievery. [Kirzner: This shows that the penalty does not extend to the corpus.]*
- L. *Said R. Nahman bar Isaac, “Are you really proposing to raise the case of dung? But it is only where something may be increased in value that the sages have imposed the sanction affecting the corpus on account of the gain resulting from the utilization of public domain. But in the case of something that will not increase in value is not subject to such a sanction.”*

II.2 A. *The question was raised: In the opinion of him who maintains that rabbis imposed the sanction of assigning ownership to the corpus on account of right to the increase in value that has accrued while they were in the public domain, is the sanction imposed on the spot? Or is it only when the profit is produced that we impose the sanction on the corpus too?*

B. *Come and take note: The case of dung was raised as an objection to the position of Rab [and that is not going to increase, so from Rab’s view the penalty is imposed even before there is any gain (Kirzner)].*

C. *Well, do you really think that answers the question? When we raised the question of dung, it was before R. Nahman had set forth his explanation [Kirzner: that there is no penalty at all with regard to an object that yields no increase, while the query is based on the principle laid down by Nahman]. But after R. Nahman set forth that explanation, what objection would be plausible in the case of dung anyhow?*

II.3 A. *May we say that the same issue is worked out between the following Tannaite authorities:*

B. **“A bond in which is inscribed provision of interest — they penalize the holder, who may collect on the strength of that bond neither principal nor interest,”** the words of R. Meir.

C. **And sages say, “He may collect the principal but he may not collect the interest”** [cf. T. **B.M. 5:22D-E**].

D. *May one then propose that Rab accords with R. Meir, and Zeiri with rabbis?*

E. *Rab may say to you, “I take the position that I do even in accord with rabbis. Rabbis take the position that they do in that case only with regard to the principal, which is entirely subject to the law, while here, in the case of public nuisances, even the corpus itself will do damage.”*

F. *And Zeiri may say to you, “I may take the position that I do even within the premise of R. Meir. For R. Meir took the position that he did there only at the moment that the document was drawn up, since at that very point, there has been a stipulation of usury, but here, in the case of nuisances, who will say that there really will be damage anyhow?”*

II.4 A. *May we say that the same issue is worked out between the following Tannaite authorities:*

B. **He who brings out his straw and stubble into the public domain to turn them into manure, and someone else was injured on them — he is liable [to pay compensation for] his injury. But whoever grabs them first effects possession of them, and it is permitted to do so despite the law of thievery. If, however, someone turned up dung in the public domain and someone else was injured**

thereby, he must pay compensation, and no one may take possession of the dung, on account of the law of thievery.

C. Rabban Simeon b. Gamaliel says, "Anyone who causes a nuisance in the public domain so that others are injured thereby are liable to pay damages, and whoever takes possession first of what they have left there acquires title, and that is permitted without regard to the law of robbery."

D. *Well, first of all, there is a contradiction in the body of the formulation! First of all you say, **Whoever grabs them first effects possession of them**, and then you go on, and that is permitted without regard to the law of robbery! So the clear intent of the passage is this: **Whoever grabs them first effects possession** of the increase in them that has taken place in the public domain, and the language, and no one may take possession of the dung, on account of the law of thievery refers to the corpus itself. Then Rabban Simeon b. Gamaliel comes along and takes the position that even in the case of the corpus itself, **whoever grabs them first effects possession**. Now from the perspective of Zeiri, there can be no doubt that there is a Tannaite dispute on precisely what is of interest to him. But from Rab's perspective, shall we say that there is a Tannaite dispute on his point?*

E. *Rab may reply to that question, "All parties take the view that rabbis imposed the sanction of assigning ownership to the corpus on account of right to the increase in value that has accrued while they were in the public domain. But here what is at issue is whether or not this is a theoretical law that is in point of fact not to be enforced. For it has been stated: Rab Huna said Rab [said], 'It is a theoretical law that is in point of fact not to be enforced.'" R. Adda bar Ahba said, "It is a theoretical law but in point of fact is to be enforced."*

F. *Is that so? And lo, R. Huna declared ownerless barley that had been spread out on public domain. R. Adda bar Ahba declared ownerless [31A] the refuse of boiled dates left there. Now there is no problem understanding the action of R. Adda bar Ahba, since he followed his own stated view. But can we say that R. Huna has retracted his position?*

G. *The owners in that case had been repeatedly warned [and continued their disruptive practice].*

I.1 finds the authority behind our Mishnah passage. II.1-4 clarify a secondary issue of the Mishnah's rule, but the acute relevance of our Mishnah passage is shown at No. 4.

3:4

- A. Two pot sellers who were going along, one after another,
- B. and the first of them stumbled and fell down,
- C. and the second stumbled over the first —
- D. the first one is liable [to pay compensation for] the injuries of the second.

- I.1
- A. *Said R. Yohanan, "Do not say that the Mishnah paragraph represents [the schismatic view of] R. Meir, who [eccentrically] maintains that one who stumbles is deemed negligent and so is liable. But even from the perspective of rabbis, who say that such a person is excused on grounds of a mere accident, so that one would be exempt from having to pay compensation, he is here liable, since he should have stood up, and he did not do so."*
 - B. *R. Nahman bar Isaac said, "You may even say he did not have to get up. But he should have taken precautions, and he did not take precautions."*
 - C. *R. Yohanan said, "Since he did not have to get up, he also did not have to take precautions, since he was discombobulated."*
 - D. *We have learned in the Mishnah: [If] the one carrying the beam was coming first, and the one carrying the jar was following behind, [if] the jar was broken on the beam, the one carrying the beam is exempt. But if the one carrying the beam stopped short, he is liable. Does this not mean that he stood still so as to put the beam on his shoulder, as carriers ordinarily do, and yet he is liable, so it must be because he did not take precautions?*
 - E. *No, it speaks of a case in which he suddenly stopped to rest [and that is not common, hence is an unusual action]. And what should the law be [from Yohanan's view] if he did stop to shoulder the beam? Would he be exempt from having to pay compensation? Then why go on and say, And if he said to the one carrying the jar, "Wait up!" he is exempt? Rather, why not formulate matters so that both cases are covered at once: Under what circumstances [if the one carrying the beam was coming first, and the one carrying the jar was following behind, [if] the jar was broken on the beam, the one carrying the beam is exempt]? If he stopped to rest. But if he stopped to shoulder the beam, he is exempt?*

- F. *In formulating matters as he has, the framer of the Mishnah indicates to us that even if he stopped to rest, if he told the carrier of the barrel to hold up, he is exempt.*
- G. *Come and take note: Potters or glass carriers who were walking Indian file, the first of them stumbled and fell, and the second stumbled on the first, the third on the second — the first is liable for the damages suffered by the second, the second is liable for the damages suffered by the third, but if it was on account only of the first one that they fell down, then the first one is liable for the damages suffered by all of them. But if each of them gave a warning to the others, then all of them are exempt from having to pay compensation. Now does this not address a case in which none of them had a chance to get up?*
- H. No, it speaks of a case in which they did have a chance to get up, but they did not get up.
- I. *Then what would be the law in a case in which they did not have a chance to get up? Would they be exempt from having to pay compensation? Then if so, look at the concluding clause: But if each of them gave a warning to the others, then all of them are exempt from having to pay compensation. Now in the light of the contrary position, why not restate the matter in the following, inclusive formulation: Under what circumstances? If they had a chance to get up. But if they did not have a chance to get up, then they are exempt from having to pay compensation.*
- J. *In stating matters as he has, the framer of the Mishnah thereby tells us the following: Even though they had a chance to get up, if they merely warned one another instead, they still are exempt.*

I.2

- A. Said Raba, "...The first is liable for the damages suffered by the second' — both the damages done by his person [Kirkner: being subject to the law applicable to damage done by man] and the damages done by his property [which are subject to the law applicable to damage done by pit]; 'the second is liable for the damages suffered by the third' — for damages done by his person but not for damages done by his property."
- B. *Well, how do you want it? If stumbling is classified as negligence, then the second party should also be liable for every kind of damage, and if stumbling is not classified as negligence, then why should the first party not be exempt from having to pay damages anyhow?*
- C. **[31B]** The first party is certainly classified as negligent. *The second party is liable for damage done by his body, for he should have gotten up and he*

didn't. But as to damage done by his property, he is exempt, for he may say to him [the third party], "So I'm not the one who dug this pit anyhow!"

- D. *An objection was raised: All of them are liable for damage done by their persons but exempt for damages done by their property. Now does this not speak even of the first party in line?*
- E. *No, it speaks of all but the first.*
- F. *Well, it uses the language "all of them"!*
- G. *Except the first.*
- H. *So what's the sense of "all of them"?*
- I. *Said R. Adda bar Ahba, "All of them speaks to all of the injured parties."*
- J. *Well, how have you solved the problem? If you maintain, as a matter of fact, that even the first in line is subject to the law, then we can understand why the language, "all of them," is used. But if you hold that it is "all of them" except for the first, what can be the meaning of the language "all of them"? Rather, frame matters as, all of the injured parties!*
- K. *Rather, said Raba, "...The first is liable for the damages suffered by the second' — both the damages done to his person and the damages done to his property; 'the second is liable for the damages suffered by the third' — for damages done to his person but not for damages done to his property. What is the operative consideration? The person of the second party is subject to the law that pertains to damages in the classification of pit, and there is no case in which damages done in the classification of pit are to be compensated in the case of inanimate objects."*
- L. *That poses no problems for Samuel, who has said, "Any damages done by reason of stumbling fall into the category of pit." But according to Rab, who has said, "Only where a nuisance has been declared ownerless is that the case, but if it has not been abandoned, that is not the rule" [but the operative classification is damage done by an ox, and there, damage done to inanimate objects is also compensated (Kirzner)], what is to be said?*
- M. *Rather, we have in fact to go along with the initial formulation of Raba's position, and as to your objection, it uses the language "all of them" [so that all of them are liable for damage done by their person, but exempt for damage done by chattels, covering also the first party], that has been explained by R. Adda bar Minyumi before Rabina as follows: "It speaks of a case in which the inanimate chattels have been damaged by the chattels of the other party."*

- I.3** A. The master has stated: "...But if it was on account only of the first one that they fell down, then the first one is liable for the damages suffered by all of them":
- B. *How in the world can he have fallen down?*
- C. *R. Pappa said, "He blocked up the whole road like a carcass."*
- D. *R. Zebid said, "Like the staff of a blind man."*

I.1 investigates the authorities behind our Mishnah paragraph's rule. No. 2, bearing a gloss at No. 3, complements a detail of the foregoing.

3:5

- A. This one comes along with his jar, and that one comes along with his beam —
- B. [if] the jar of this one was broken by the beam of that one,
- C. [the owner of the beam] is exempt,
- D. for this one has every right to walk along [in the street], and that one has every right to walk along [in the same street] —
- E. [If] the one carrying the beam was coming first, and the one carrying the jar was following behind,
- F. [if] the jar was broken on the beam,
- G. (1) the one carrying the beam is exempt.
- H. [32A] (2) But if the one carrying the beam stopped short, he is liable.
- I. (3) And if he said to the one carrying the jar, "Wait up!" he is exempt.
- J. [If] the one carrying the jar was first, and the one carrying the beam was following behind,
- K. [if] the jar was broken on the beam,
- L. (1) [the one carrying the beam] is liable.
- M. (2) But if the one carrying the jar stopped short, [the one carrying the beam] is exempt.
- N. (3) And if he said to the one carrying the beam, "Wait up!" he is liable.
- O. And so is the rule in the case of this one coming along carrying his flame, and that one coming along carrying his flax.

- I.1** A. *Rabbah bar Nathan addressed this question to R. Huna: "He who during sexual relations does injury to his wife — what is the law? Since he acts well within the realm of what is permitted, he is exempt from paying damages, or perhaps he ought to have taken care?"*

- B. *He said to him, “You have learned the following in the Mishnah: **For this one has every right to walk along [in the street], and that one has every right to walk along [in the same street].**”*
- C. Said Raba, “All the more so to the contrary! If in the case of wood [Deu. 19:5: ‘as when a man goes into the wood with his neighbor to cut wood, and his hand takes a stroke with the axe to cut down the tree and the head slips from the heft and hits his neighbor’], in which instance this one entered as if into his own domain and that entered as if into his own domain, still, it is treated as though the one had entered the domain of the other so that he is liable, in this case, in which, after all, the defendant has actually entered the domain of the injured party, all the more so should damages be paid under the same rubric! And as to the language, **for this one has every right to walk along [in the street], and that one has every right to walk along [in the same street]**, in that case, both of them were both active, while in this case, only the husband did anything.”
- D. *Yeah, well, didn’t she do anything? And isn’t it written, “The souls that commit them shall be cut off from their people” (Lev. 18:29)?*
- E. *Well, both of them had a good time, but he’s the one who actually did something!*

- II.1**
- A. **[If] the one carrying the beam was coming first, and the one carrying the jar was following behind, [if] the jar was broken on the beam, (1) the one carrying the beam is exempt:**
 - B. Said R. Simeon b. Laqish, “Two cows in public domain, one lying down, one walking along — the one walking along butted the one lying down — the owner is exempt. The one lying down butted the one walking along — the owner is liable.” *May we then say that the following supports his position: [If] the one carrying the beam was coming first, and the one carrying the jar was following behind, [if] the jar was broken on the beam, the one carrying the beam is exempt. But if the one carrying the beam stopped short, he is liable. Now here it is parallel to the case of the cow that was lying down kicking the cow that was walking, and the owner is liable.*
 - C. *But do you really think that there is support from this case [showing that misconduct involves liability for damage that may result (Kirzner)]? Not only does the present case not support the other, but it in fact raises a problem for the position of R. Simeon b. Laqish! For the operative consideration in his view is that the lying cow has kicked the walking one. But if the latter one had*

sustained damage only because of an accident, and not affirmative action, the owner would be exempt. But the case of the Mishnah at hand deals with accidental damage, and still the owner is liable!

- D. *The Mishnah deals with a case where the beam blocked the whole passage, as a carcass would, while R. Simeon b. Laqish deals with a case in which the cow was lying off to the side, so the other cow could just as well have passed on the other side.*
- E. *But the concluding part of the Mishnah paragraph before us sustains the claim of R. Simeon b. Laqish: **[If] the one carrying the jar was first, and the one carrying the beam was following behind, [if] the jar was broken on the beam, [the one carrying the beam] is liable. But if the one carrying the jar stopped short, [the one carrying the beam] is exempt!** Now here is a perfectly clear case in which we have a walking cow kicking a lying one, and the rule exempts the owner from having to pay compensation!*
- F. *Not at all! The Mishnah addresses a case in which the damage was done in an ordinary way, as the carrier of the beam was passing by in the usual way, while R. Simeon b. Laqish deals with a case in which the owner of the cow lying down can have said, “Even if you are entitled to walk on me, you don’t have the right to kick me!”*

I.1 presents a case that calls on the principle of the Mishnah paragraph. II.1 appeals to the present Mishnah-rule to analyze a position taken elsewhere.

3:6

- A. **Two who were going along in the public domain,**
- B. **one was running, the other ambling,**
- C. **or both of them running,**
- D. **and they injured one another —**
- E. **both of them are exempt.**

- I.1** A. *The Mishnah-passage before us does not accord with the position of Issi b. Judah, for it has been taught on Tannaite authority: Issi b. Judah says, “If someone was running, he is liable for damages he may do, since he is behaving in an unusual way.” Issi concedes that if it was on the eve of the Sabbath toward dusk, he is exempt, because he is running under a prevailing, blanket permission to do so [T. B.Q. 2:11G-H].*

B. Said R. Yohanan, “The decided law is in accord with Issi b. Judah.”

C. *But did R. Yohanan make any such statement? And has not R. Yohanan said, “The decided law is in accord with the unattributed Mishnah,” and we have learned in the Mishnah: **One was running, the other ambling, or both of them running, and they injured one another — both of them are exempt.***

D. The rule addresses a case in which it was on the eve of the Sabbath toward dusk.

E. *Yeah, and how would you know?*

F. *Since it says, **or both of them running...both of them are exempt.** Now why bother to say this? If in a case in which **one was running, the other ambling** damages done by the one that was running are not subject to compensation, if both of them were running, can there be any question of the rule? So this must be the sense of the matter: **One was running, the other ambling — both of them are exempt.** Under what circumstances? At dusk on the eve of the Sabbath. But on an ordinary day, if one was running and the other was walking, the one who was running is liable. If both of them are running, even on an ordinary day, both are exempt.*

I.2 A. The master has said: “Issi concedes that if it was on the eve of the Sabbath toward dusk, he is exempt, because he is running under a prevailing, blanket permission to do so”:

B. *Whence the blanket permission?*

C. *It is in accord with R. Hanina, for said R. Hanina, [32B] “Come, let us go out to greet the bride, the queen.”*

D. Some say, “To meet the Sabbath, the bride, the queen.”

E. *R. Yannai would cloak himself and stand and say, “Come, bride, come bride.”*

I.1 identifies the authority behind our rule. No. 2 provides a footnote to the foregoing.

3:7

- A. **He who chops wood in private property, and [the chips] injured someone in public domain,**
- B. **in public domain, and [the chips] injured someone in private property,**
- C. **in private property, and [the chips] injured someone in someone else’s private property —**

D. he is liable.

- I.1** A. *All of the several cases before us [A, B, C] are absolutely required. For had the framer of the Mishnah given us the rule alone that pertains to chopping wood in private domain and doing damage in public domain [He who chops wood in private property, and the chips injured someone in public domain], I might have supposed that that is the law because the damage has been done where the public is located, while if he split wood on public domain and did damage in private domain, since the damage took place where not many people are found, I might have supposed that the opposite ruling would pertain.*
- B. *And if the Mishnah dealt only with the case of chopping wood in public domain and doing damage in private domain [in public domain, and the chips injured someone in private property], I might have imagined that the act of cutting wood was to begin with against the law, while cutting wood in private domain and doing damage in public domain, where to begin with the act was perfectly legal, would be subject to a different rule.*
- C. *And if the Mishnah had treated only those two cases, I might have supposed that the rule in the one case was because a lot of people are in public domain, and the rule in the other case was because the act was unlawful, while in case of cutting wood on one's own domain and doing damage in someone else's domain [in private property, and [the chips] injured someone in someone else's private property], where the damage took place where not many people are found and where the act was lawful to begin with, the contrary might have been the rule.*
- D. *So all three cases had to be set forth.*

- I.2** A. *Our rabbis have taught on Tannaite authority:*
- B. *He who enters a carpenter's shop without permission, and a chip of wood flew and hit him in the face and killed him — the carpenter is exempt [from having to go into exile]. But if the man had entered with permission, the carpenter is liable.*

C. *Why liable?*

D. *Said R. Yosé bar Hanina, "He is liable to pay on the four counts, but he is in point of fact exempt from having to go into exile, since this is not comparable to the rule governing the wood. In the case of wood [Deu. 19: 5: 'as when a man goes into the wood with his neighbor to cut wood, and his hand takes a stroke with the axe to cut down the tree*

and the head slips from the heft and hits his neighbor’], this one entered as if into his own domain and that entered as if into his own domain. But in this case, this one has entered into the domain of another party.”

E. Said Raba, “It is a matter of an argument a fortiori, namely, if in the case of the wood, this one entered on his own intentionality that one entered on his own intentionality, it is as though he had entered in accord with the intentionality of the other, so the other party has to go into exile in the case of manslaughter, in our case, in which the deceased has entered the workshop in full accord with the intentionality of the other, should the other not all the more so be subject to the liability of exile?”

F. Rather, said Raba, *“What is the meaning of ‘exempt’? He is exempt from exile, because exile is insufficient to expiate the sin. And this is the operative consideration in the mind of R. Yosé bar Hanina: It is because you have a case of an action done inadvertently that, in point of fact, is nigh unto an action that was done deliberately.”*

I.3 A. *[But on his own account, not explaining someone else’s position,] objected Raba, “[But if] he added even a single stripe and the victim died, lo, this one goes into exile on his account [M. Mak. 3:14C]. Now here you have a case of an action done inadvertently that, in point of fact, is nigh unto an action that was done deliberately, since the court officer should have kept in mind that people can die from one additional stroke, and yet, it is taught, lo, this one goes into exile on his account!”*

B. *Said R. Shimi of Nehardea, “It would be a case in which the court officer erred in his count.”*

C. *Raba tapped on his foot, and said to him, “Is it his job to count? Is it not taught on Tannaite authority: The most important of the judges makes the recitation, the second does the counting, the third says, ‘Smite him.’”*

D. *Rather, said R. Shimi of Nehardea, “It would be a case in which the judge himself made the mistake in counting.”*

I.4 A. *Another objection was raised: He who throws a stone into the public domain and so committed manslaughter — lo, this one goes into exile [M. Mak. 2:2A]. Now here you have*

a case of an action done inadvertently that, in point of fact, is nigh unto an action that was done deliberately, since the should have kept in mind that people congregate in the public domain, and yet, it is taught, lo, this one goes into exile on his account!’”

B. Said R. Samuel bar Isaac, “The Mishnah’s rule refers to a case in which one was tearing down his shaky wall” [Lazarus: removing such possible danger to the public is commendable].

C. *But then he should have looked into the matter carefully [to see that no damage would result]!*

D. We deal with a case in which he was dismantling his wall at night.

E. *So if he was doing it at night, he still should have looked into the matter carefully [to see that no damage would result]!*

F. We deal with a case in which he was clearing away the debris of his wall into the rubbish.

G. *So what was the rubbish like? If the dump heap was located in a place in which passersby were frequent, then the man is negligent, and if it was not a place in which passersby were frequent, then he has acted inadvertently!*

H. Said R. Pappa, “The rule was required only to deal with the case of a rubbish heap that was commonly used for dumping by night, but not commonly used for dumping by day. Still, some people pass by and set there by day. In that case, the man who tossed the stone is not held to be negligent, because the place is not ordinarily used for convenience by day, but he also is not merely inadvertent in his action, because from time to time people pass by and set there by day.”

I.5 A. R. Pappa in the name of Raba assigned the remark of R. Yosé bar Hanina to the opening clause, namely: He who enters a carpenter’s shop without permission, and a chip of wood flew and hit him in the face and killed him — the carpenter is exempt [from having to go into exile]. Said R. Yosé bar Hanina, “He is liable to pay on the four counts, but he is in point of fact exempt from having to go into exile.”

B. Now one who assigns this statement to the concluding clause [where the carpenter knew the man was coming in] all the more so will refer it to the beginning clause [where the carpenter did not know the man came in], but he who refers to the opening clause will take the view that, in the case dealt with in the concluding clause, where the man came in with the carpenter's permission, he would have to take refuge.

C. Well, would he really have to take refuge in such a case at all [if the carpenter knew the man come in]? And has it not been taught on Tannaite authority: He who enters the shop of a smith and sparks fly and hit him in the face and kill him — the smith is exempt [from going into exile], even where the entrance was made with the permission of the smith!

D. Here with what sort of a case do we deal? It is with an apprentice of the smith.

E. Is the apprentice of the smith there for the killing?

F. It's a case in which the master was asking the kid to get out but he didn't get out.

G. So even if he master was asking the kid to get out but he didn't get out, is the apprentice of the smith there for the killing?

H. It's a case in which the master supposed that the apprentice had already left.

I. If so, then even if it were a third party, the same rule should apply!

J. **[33A]** Not at all, a third party would not be afraid of the master, while the apprentice would [so the master would not have assumed the apprentice stuck around].

I.6

A. R. Zebid in the name of Raba assigned the remark of R. Yosé bar Hanina to the following:

B. "And if it found the neighbor...he shall flee" (Deu. 19: 5) — excluding one who made himself available.

C. On the strength of that reading, said **R. Eliezer b. Jacob**, “**If after the stone left the man’s hand, the other party stuck out his head and took [the stone on the head], lo, this one is exempt.**”

D. Said R. Yosé bar Hanina, “He exempt from having to go into exile, but he is liable to pay on the four counts.”

E. *One who refers his statement to the present matter all the more so will refer it to the ones that have been given up to now, but he who refers it to the earlier ones would hold that in this case, the man is exempt from all sources of liability.*

I.7 A. *Our rabbis have taught on Tannaite authority:*

B. A worker who has come to collect his wages from the household, and the ox of the householder gored him, or the dog of the householder bit him, and he died — the householder is exempt [from having to pay ransom].

C. Others say, “Workers have every right to come and lay claim on their wages before the householder.”

I.8 A. *How shall we imagine the case before us? If the employer were readily available, then how can we explain the view of “others say,” and if the employer were not readily available except at home, then what can possibly stand behind the position of the initial Tannaite statement?*

B. *The rule was necessary to cover the case of someone who was sometimes available but not other times. So the workers came to his door, and were told, “Yes.” One party maintains that the meaning of “yes” is, “Come on in,” and the other party takes the view that the meaning of “yes” is “stay where you are.”*

C. *So, too, it has been taught on Tannaite authority in accord with the opinion of him who said that the meaning of “yes” is “stay where you are,” for it has been taught on Tannaite authority:*

D. A worker who has come to collect his wages from the household, and the ox of the householder gored him, or the dog of the householder bit him, and he died — the householder is exempt [from having to pay ransom] even though he came in with permission.

E. *How come? Is it not because he called from the door, and the other said to him, "Yes," and that proves that the meaning of "yes" is "stay where you are."*

F. *That proves it.*

I.1 explains why the Mishnah paragraph has to give a variety of cases to make its point. No. 2 gives us a Tannaite complement to the Mishnah. It bears its own sizable talmud, and Nos. 3-6. No. 7 gives us another Tannaite complement to the Mishnah, with its talmud at No. 8.

3:8

- A. Two oxen [generally deemed] harmless which injured one another —
- B. [the owner] pays half-damages for the excess [of the value of the injury done by the less injured to the more injured ox].
- C. [If] both of them were attested dangers, [the owner] pays full damages for the excess [of the injury done by the less injured to the more injured ox].
- D. [If] one was deemed harmless and one an attested danger, [if] it was an ox which was an attested danger [which injured] an ox deemed harmless, [the owner] pays full damages for the excess.
- E. [If] it was the ox deemed harmless [which injured] the one which was an attested danger, [the owner] pays half-damages for the excess.
- F. And so is the rule for two men who injured one another: they pay full damages for the excess [of the injury done by the less injured to the more injured man].
- G. [If it was a case of] a man who injured an ox which was an attested danger, or an ox which was an attested danger which injured a man, one pays full damages for the excess [of the injury done by the one to the other].
- H. [If it was] a man [who injured] an ox deemed harmless, or an ox deemed harmless [which injured] a man —
- I. [if it was] the man [who injured] the ox deemed harmless, he pays full damages for the excess.
- J. [If it was] the ox deemed harmless [which injured] the man, one pays half-damages for the excess.
- K. R. Aqiba says, "Also: An ox deemed harmless [which injured] a man — [the owner] pays full damages for the excess."

I.1 A. *Our rabbis have taught on Tannaite authority:*

- B. “According to this judgment shall be done to it” (Exo. 21:31) — as is the judgment of an ox that has injured an ox, so is the judgment of the ox that has injured a man. Just as when an ox injures an ox, an ox that is deemed harmless pays only half-damages, but one that is an attested danger pays full damages, so when an ox injures a man, the ox that is deemed harmless pays only half-damages, but one that is an attested danger pays full damages.
- C. R. Aqiba says, “According to this judgment shall be done to it’ (Exo. 21:31) — this speaks of the ruling that pertains in the latter verse [Exo. 21:29, dealing with the ox that is an attested danger] and now in accord with the former verse [Exo. 21:28, dealing with an ox that was deemed harmless]. Might one then suppose that the owner must pay from real estate of the highest quality? Scripture says, ‘...shall be done to it’ (Exo. 21:31), meaning, the owner pays through the carcass of the ox, and he does not pay by handing over his real estate of the highest quality.”
- D. *And from the perspective of rabbis, what is the meaning of ‘...this...’ (Exo. 21:31)?*
- E. It serves to exempt the owner from having to pay compensation of the other four classes.
- F. *And how does R. Aqiba provide evidence of the exemption of the owner from having to pay compensation of the other four classes?*
- G. *He derives it from the following:* “And if a man cause a blemish in his neighbor” (Lev. 24:19) — a human being against his neighbor, not an ox against its neighbor [is liable on the specified counts].
- H. *And rabbis?*
- I. *If the proposition were to derive from the specified passage, one might have thought that one is obligated to compensate only for pain on its own. But as to compensation for medical expenses and time lost from work, I might say that the owner might have to pay [when his ox did such injuries]. So we are informed that that is not the case.*

I.1 provides a Tannaite complement to the Mishnah.

3:9A-C

- A. An ox [deemed harmless] worth a maneh [a hundred zuz] which gored an ox worth two hundred [zuz],
- B. and the carcass [of the latter] is worth nothing —
- C. [the owner of the ox which is gored and worthless] takes the ox [worth a maneh, which did the goring].

I.1

- A. *In accord with what Tannaite authority is the rule before us?*
- B. *It is R. Aqiba, as has been taught on Tannaite authority:*
- C. “The ox has to be assessed in a court,” the words of R. Ishmael.
- D. R. Aqiba says, “The corpus of the ox is assigned to the plaintiff.”
 - E. *What is at stake in the dispute?*
 - F. *R. Ishmael takes the view that the injured party is in the status merely of a creditor, and he has a claim merely of money against the defendant. But R. Aqiba says that both parties become joint owners of the ox responsible for the damage.*
 - G. *They differ also as to the interpretation of the following: “Then they shall sell the live ox and divide the money of it” (Exo. 21:35) — R. Ishmael takes the view that it is the court that is thus admonished by the All-Merciful, and R. Aqiba maintains that it is the injured party and the party responsible for the injury that the All-Merciful here admonishes.*
 - H. *What is at stake between them?*
 - I. *The case in which the injured party has declared the beast to be sanctified to the Temple is at issue between them. [Aqiba would regard it as a valid act, Ishmael would not, since one cannot consecrated property he does not own.]*

I.2

- A. *Raba addressed this question to R. Nahman, “If the party responsible for the injury sold the carcass, from the perspective of R. Ishmael, what is the law? Since in the judgment of R. Ishmael, the injured party is in the status of a creditor, and he has a claim merely of money against the defendant, the beast is held to be sold. Or perhaps, [33B] since the ox is subject to the lien of the injured party, the party responsible for the injury has not got the power to sell it?”*
- B. *He said to him, “It is not validly sold.”*

C. *But has it not been taught on Tannaite authority:* If the defendant had sold the ox, it is a valid sale?

D. The injured party may go and recover the beast from the one who bought it.

E. Well, if it is the fact that the injured party may go and recover the beast from the one who bought it, for what purpose is the beast deemed to have been sold?

F. For the value of the ploughing the beast has done for the purchaser.

I.3

A. May one then infer that if one has taken out a loan and then sold his movables, the court may collect the debt in behalf of a creditor? [But it is usually only real estate that may be distrained in such a case!]

B. *The case at hand is exceptional, for the ox is deemed as though it had been mortgaged for the half-damages that are owing.*

C. But has not Raba stated, "If one mortgaged one's slave and then sold him, the creditor can collect by attaching the slave. If he mortgaged his ox and sold it, the creditor cannot collect from it"?

D. *But what's the operative consideration? In the case of the slave, the matter is publicly known? Well, in the case of the ox, since it has gored, it is widely known.*

I.4

A. *R. Tahalipa, the Westerner, repeated as a Tannaite formulation before R. Abbahu, "While if the party responsible for the injury sold the carcass, it is not validly sold, if he sanctified it to the altar, it is properly sanctified.' Who sold it? If we say that it is the party responsible for the damages, then the clause, 'the sale is not valid' accords with the position of R. Aqiba that the ox is transferred to the injured party, while the concluding clause of this same passage, 'if he sanctified it, it is a valid action' would concur only with the position of R. Ishmael, who maintains that the ox has to be assessed by the court. If we maintain that it is the injured party has sold it, then would not the opening clause, 'where he sold the ox, it is not valid,' accord only with the position of R. Ishmael and the concluding clause would accord with the view of R. Aqiba!"*

B. *In point of fact, the party responsible is the one who sold it, but the opinion of all parties is that, if he sold it it is not sold, even from the perspective of R. Ishmael, for lo, the ox is mortgaged to the injured party. But if he sanctified it to the altar, it is properly sanctified, accords even with the position of R. Aqiba, in line with the consideration stated by R. Abbahu, namely, “It is a precautionary decree, lest people imagine that something that has been sanctified is released from that status without an act of redemption [and hence it is deemed sold and must be redeemed].”*

I.5

- A. *Our rabbis have taught on Tannaite authority:*
- B. **An ox that had been deemed harmless that inflicted injury, if before it came to court the owner declared it consecrated, it is consecrated. If he slaughtered it, sold it, or gave it away as a gift, what he has done is valid. If after it came to court the owner declared it consecrated, it is not deemed consecrated. If he slaughtered it or sold it or gave it away as a gift, what he has done is not valid. For he has to pay compensation from the corpus of the animal itself [which must be kept available, once the court has made its determination, for use in compensation] [T. B.Q.5:1A-I].**
- C. If other creditors came in first and seized the ox, whether the debt was contracted before the ox gored or the goring took place before the debt was incurred, the distraint is null, since he has to pay compensation from the corpus of the animal itself.
- D. **An ox that had been deemed an attested danger that inflicted injury, whether before or after it has come to court — if the owner declared it consecrated, it is deemed consecrated. If the owner slaughtered it, sold it, or gave it away, what he has done is valid, for the owner pays damages from the choicest real estate [no matter the condition of the corpus of the beast] [T. B.Q. 5:2A-F].**
- E. If other creditors came in first and seized the ox, whether the debt was contracted before the ox gored or the goring took place before the debt was incurred, the distraint is valid, since the owner pays damages from the choicest real estate.

I.6

- A. The master has said: “If the owner sold it, it is deemed sold,” for the purposes of the ploughing that the beast has done.
- B. If the owner declared it consecrated, it is deemed consecrated:

C. That is in line with what R. Abbahu said.

I.7

A. If he slaughtered it, sold it, or gave it away as a gift, what he has done is valid:

B. *Now there is no problem understanding why, if he gave it away as a gift, what he has done is valid, since that would pertain to its ploughing. But if he slaughtered it, why not come and get payment out of the meat of the beast? Has it not been taught on Tannaite authority: "...The live ox..." (Exo. 21:35) — I know that the rule applies only to the living ox. What is the source of the rule if the ox has been slaughtered? Scripture says, "And they shall sell the ox" (Exo. 21:35) — under all circumstances?*

C. *Said R. Shizbi, "The reference is to the decrease in the value of the beast on account of its having been slaughtered"* [Kirzner: for which the defendant is thus not made responsible].

D. *Said R. Huna b. R. Joshua, "That is to say: he who impairs the value of securities that are mortgaged to his creditor, he is exempt from having to pay compensation."*

E. *That is obvious.*

F. *What might you have maintained? In such a case that is the rule only where the defendant could argue, "I haven't deprived you of anything at all," and could even claim, "It is only the [Kirzner translates:] mere breath of life that I have taken away from your security." [That is why he doesn't have to pay the damages there.] But in general, there would be liability. Therefore we are told that that is not so.*

G. *But Rabbah in point of fact has said this, for has not Rabbah said, "He who burns the deeds that belong to someone else is exempt from liability"?*

H. *That is obvious.*

I. *What might you have maintained? It is in the case in which the ox had been slaughtered that the defendant could claim, "It's merely a piece of paper of yours that was burned," so he can be exempt, but in spoiling a field held as security, for example, by digging pits, ditches, or caves, someone should be liable. So we are informed that that is not the case. For here*

the damage is like that caused by digging pits, ditches, and caves, and yet: what he has done is valid.

I.8 A. “If other creditors came in first and seized the ox, whether the debt was contracted before the ox gored or the goring took place before the debt was incurred, the distraint is null, since he has to pay compensation from the corpus of the animal itself”:

B. *Now there is no problem understanding the rule covering the case in which the goring took place prior to the debt, so the plaintiff for damages has the prior claim. But why should that be the case when the debt was contracted before the ox did the goring? [34A] And even if the goring took place before the debt was contracted, is not the creditor first in line [to claim the ox]? Does this not prove that if a creditor of a later debt went ahead and collected what was owing to him what he has collected is null and has to be returned?*

C. *Not at all. I may well say to you, what he has collected is validly in hand, but the case [where a creditor was a plaintiff for damages] is exceptional, for the plaintiff for damages may argue, “Had the ox already been in your possession before it gored, would I not have been within my rights to distraint it while it was in your hands? For it is out of the corpus of the ox that did the damage that I am to be compensated.”*

I.9 A. *Our rabbis have taught on Tannaite authority:*

- B. An ox worth two hundred zuz that gored an ox worth two hundred zuz, and did to the beast damages worth fifty zuz, but then the injured ox increased in value and was worth for hundred zuz, since one may claim that, if it had not been injured, it would have been worth eight hundred zuz, the responsible party has to pay damages in accord with the state of affairs at the time of the injury. [Kirzner: The defendant cannot put up the increase of the value of the injured ox as a defense.]
- C. If the value of the injured beast depreciated, the assessment is made in accord with the state of affairs at the time of the valuation in court.
- D. If the ox that did the damage gained in value, compensation is still assessed in accord with the state of affairs at the time of the injury.
- E. If it lost in value, the assessment is made in accord with the state of affairs at the time of the valuation in court.

- I.10** A. The master has said: “If the ox that did the damage gained in value, compensation is still assessed in accord with the state of affairs at the time of the injury”:
- B. *Who is the authority for this ruling?*
- C. *It is R. Ishmael, who has said that the injured party is in the status merely of a creditor, and he has a claim merely of money against the defendant.*
- D. *Then look at what follows: If it lost in value, the assessment is made in accord with the state of affairs at the time of the valuation in court!*
- E. *This surely accords with the opinion of R. Aqiba, who says that both parties become joint owners of the ox responsible for the damage.*
- F. *So does the opening clause accord with the position of R. Ishmael and the concluding one of R. Aqiba?*
- G. *No, the whole accords with the position of R. Aqiba, but here, with what sort of case do we deal? It is one in which the defendant fattened the ox.*
- H. *Now if it is one in which the defendant fattened the ox, then note the opening clause: ...But then the injured ox increased in value and was worth for hundred zuz, since one may claim that, if it had not been injured, it would have been worth eight hundred zuz, the responsible party has to pay damages in accord with the state of affairs at the time of the injury. But if he fattened it up, why is it necessary to state [that the compensation for the original damage has still to be paid (Kirzner)]?*
- I. *Said R. Pappa, “The opening clause [the injured ox increased in value] makes no differentiation between whether the responsible party fattened it up or whether the beast increased in value on its own. And it was necessary to state such a rule, to deal with the latter case, that, even if the ox improved in value on its own, still compensation is paid as at the time of damage. But the situation covered by the concluding clause [the ox that did the damage improved in value] speaks only of a case in which the beast was fattened up.”*

- I.11** A. “If it lost in value, the assessment is made in accord with the state of affairs at the time of the valuation in court”:

B. If it lost in value: *On what account? If we say that it lost in value because of the work that it did, then the defendant can say, "You made it lose value? Am I supposed to pay?"*

C. *Said R. Ashi, "It's a case in which it lost in value because of the blow to it, in which case he may say to him, 'It is the horn of your ox that is buried in it.'"*

I.1 commences with the interest in identifying the authority of our Mishnah paragraph. No. 2 then provides the foregoing with a secondary, theoretical expansion. No. 3 then develops a point deemed implied by No. 2. The talmud of No. 2 is continued at No. 4. No. 5 then augments the Mishnah's rule with a Toseftan complement, and Nos. 6-8 add their talmud to the Tosefta's statements. No. 9 proceeds to yet another Tannaite complement, with its talmud at Nos. 10, 11.

3:9D-I

- D. **An ox worth two hundred [zuz] which gored an ox worth two hundred,**
- E. **and the carcass [of the latter] is worth nothing —**
- F. **said R. Meir, "Concerning such a case it is said [in Scripture], 'Then they shall sell the live ox and divide the proceeds of it' (Exo. 21:35)."**
- G. **Said to him R. Judah, "True, this is the law. Surely you have carried out the verse which says, 'Then they shall sell the live ox and divide its proceeds.' But you have not yet carried out the verse which says, 'And the dead one also they shall divide'!**
- H. **"Now what is [an example of] that [rule]? This is an ox worth two hundred which gored an ox worth two hundred, and the carcass [of the dead ox] is worth fifty zuz —**
- I. **"For in this case, this party takes half the value of the living ox and half the value of the corpse, and that one takes half the value of the living ox and half the value of the corpse."**

I.1 A. *Our rabbis have taught on Tannaite authority:*

- B. "An ox worth two hundred zuz that gored an ox of two hundred zuz, and the carcass was worth fifty — this one takes half of the value of the living animal and half of the value of the corpse, and that one takes half of the value of the living animal and half of the value of the corpse, and this is that ox of which the Torah has spoken," the words of R. Judah.
- C. R. Meir says, "This is not the ox of which the Torah has spoken, but rather: an ox worth two hundred zuz that gored an ox worth two hundred, and the

carcass is worth nothing — it is that case concerning which it is said, ‘And they shall sell the live ox and divide the money of it’ (Exo. 21:35).

- D. “Then how do I set forth a case to which pertains the statement, ‘And the dead one also they shall divide’? This refers to the loss in value brought about by death, which has to be compensated to the extent of one half out of the body of the living ox.”

I.2 A. *Now, since in the case specified by R. Judah, in which the carcass is worth fifty zuz, both R. Meir and R. Judah concur that this party gets one hundred twenty-five zuz and that party gets one hundred twenty-five zuz, what’s at stake in the dispute anyhow?*

B. *Said Raba, “At issue between them is a case in which the carcass has increased in value. R. Meir takes the view that it is the plaintiff who has to sustain the entire loss in the value of the carcass, and R. Judah maintains that the loss in the value of the carcass is shared by the defendant up to half [since he holds both the plaintiff and the defendant divide the value of the carcass].”*

C. *Said to him Abbaye, “If so, then we have found for R. Judah [34B] that an injury done by a beast that was deemed harmless may impose a more severe penalty than an injury done by a beast that is an attested danger? And should you say, ‘Yes indeed!’ as we have learned in the Mishnah, R. Judah says, ‘[The owner of an animal deemed] harmless is liable, but one regarded as an attested danger is exempt, [since it is said, “And it has been testified to its owner, but he did not keep him in” (Exo. 21:29) — but this one has been kept in]’ [M. B.Q. 4:9L-N], while in this case there is no liability, I may say, granted that you have heard that R. Judah takes that view in regard to the requirement of taking precautions, which, after all, is specified in Scripture, but have you heard that he takes such a position with respect to paying reparations? And has it not been taught on Tannaite authority: R. Judah says, ‘Might one suppose that if an ox worth a hundred zuz gored an ox worth five selas [twenty zuz], with the carcass worth a sela [four zuz], one party should get half the living ox together with half of the dead ox [fifty-two zuz] and the other party should get half the living ox together with half of the dead ox [fifty-two zuz]? You must say [that that is not the case,] for why has the definition of the ox declared an attested danger been specified? Is it to*

impose upon the owner a more stringent or a less stringent rule? You must of course say that it was to impose upon the owner a more stringent rule. No, if in the case of an ox that is deemed an attested danger, the owner must pay only to the extent of the damages, then surely in the case of an ox deemed harmless, which is subjected to the less stringent ruling, all the more so, the owner must pay only to the extent of the damages!” [Kirzner: Why then should the defendant in the case of the ox that is deemed harmless share the loss occasioned by a decrease in the value of the carcass, which he would not have to do in the case of *an ox that was an attested danger*?]

D. *Rather, said R. Yohanan, “At issue between them is a case in which the value of the increase goes up. One authority [Meir, who allows the party responsible for the damages no interest in the carcass (Kirzner)] maintains that it is assigned to the injured party, and the other party has it divided in half.”*

I.3 A. *And this is what was troubling R. Judah [and that led him to take the position that he took]: Now that you have maintained that the All-Merciful has favored the party responsible for the injury, giving him a share in the increase in the value of the carcass, then, might one suppose that if an ox that was worth five selas [twenty zuz] gored an ox that was worth a maneh [a hundred zuz], with the corpse worth fifty zuz, that this party would take half of the living beast and half of the corpse, and that one would take half of the living beast and half of the corpse? Now would you really say so? And where have we found a case in which the party responsible for the damages makes a profit? And furthermore Scripture says, “He shall surely make restitution” (Exo. 21:36), meaning, the owner of the goring ox make restitution but they do not collect restitution!*

I.4 A. *So what’s the point of* And furthermore Scripture says, “He shall surely make restitution” (Exo. 21:36), meaning, the owner of the goring ox make restitution but they do not collect restitution?

B. *Should you say that that is the case when there would be a loss to the injured party, but in a case in*

which there would be no loss to the injured party, for instance, a case in which if an ox that was worth five selas [twenty zuz] gored an ox that was worth a five selas, with the corpse worth thirty zuz, that here, too, the defendant would take a share in the profit? And furthermore Scripture says, “He shall surely make restitution” (Exo. 21:36), meaning, the owner of the goring ox make restitution but they do not collect restitution.

I.5

A. Said R. Aha bar Tahalipa to Raba, “If so [Kirzner: that the principle to compensate by half for the decrease in value brought about by the death is maintained only by Meir but not by Judah], we find a case in which, from the perspective of R. Judah, the owner of a beast deemed harmless will pay more than half-damages! But the Torah has stated, ‘And they shall sell the live ox and divide the money of it’!”

B. R. Judah does maintain that that the principle to compensate by half for the decrease in value brought about by the death of the ox will be compensated by half of the value of the living ox.

C. *How on the basis of Scripture does he know this?*

D. “And the dead ox also they shall divide” (Exo. 21:35).

E. But lo, R. Judah utilizes this verse to indicate that **this party takes half the value of the living ox and half the value of the corpse, and that one takes half the value of the living ox and half the value of the corpse.**

F. *If that were all the cited words can prove, Scripture should have said only, “And the dead ox...” Why add, “also?” It is to show that two lessons may be derived from the clause.*

I.1, with its thorough and interesting talmud at Nos. 2-5, amplifies the dispute of the Mishnah paragraph by restating it in other terms.

3:10

- A. There is he who is liable for the deed of his ox and exempt on account of his own deed, exempt for the deed of his ox and liable on account of his own deed.
- B. His ox which inflicted embarrassment — [the owner] is exempt.
- C. But he who inflicted embarrassment is liable.
- D. His ox which blinded the eye of his slave or knocked out his tooth — [the owner] is exempt.
- E. But he who blinded the eye of his slave or knocked out his tooth is liable.
- F. (1) His ox which injured his father or his mother — [the owner] is liable.
- G. But he who injured his father and his mother is exempt.
- H. His ox which set fire to a shock of grain on the Sabbath — [the owner] is liable.
- I. But he who set fire to a shock of grain on the Sabbath is exempt
- J. because he is subject to liability for his life.

I.1

- A. *R. Abbahu repeated as a Tannaite formulation before R. Yohanan: “All actions that serve destructive purposes done on the Sabbath are exempt from liability on account of violating the Sabbath, except for someone who does injury to another and one who sets a fire for a destructive purpose.”*
- B. *He said to him, “Go and repeat the Tannaite version as follows: The exceptions for who does injury to another and one who sets a fire for a destructive purpose form no part of the Mishnah teaching. And should you propose that these do form part of the formulation, then the reference to causing a bodily injury would speak of a case in which one needed blood to feed a dog [and hence the action is not purely destructive] or one needs the ashes for some purpose [with the same result].”*
- C. *We have learned in the Mishnah: **His ox which set fire to a shock of grain on the Sabbath — [the owner] is liable. But he who set fire to a shock of grain on the Sabbath is exempt because he is subject to liability for his life.** Now the formulation of the Tannaite rule compares the man to the ox, showing that, just as what the ox the action was taken without any constructive purpose, [35A] so in the case of the owner, the action would have been taken without any constructive purpose. And it is then taught, ...is exempt because he is subject to liability for his life. [Kirzner: This would show that setting*

fire on the Sabbath even for a purely destructive purpose is a violation of the Sabbath, supporting the view of Abbahu and contradicting that of Yohanan.]

- D. *No, to the contrary, the formulation of the Tannaite rule compares the ox to the man, showing that, just as in the case of the owner, there was an intention to accomplish some constructive purpose, so in the case of the act of the ox, there must have been some constructive purpose.*
 - E. *So in the case of an ox, what might such a constructive purpose be!?*
 - F. *Said to him R. Abbayya, “Here with what sort of a case do we deal? It is a an intelligent ox, which got an itch on its back, and wants to burn down the barn to roll around in the ashes.”*
 - G. *So how in the world would we know that?*
 - H. *After the barn burned down, the ox really did roll around in the ashes.*
 - I. *Yeah, and when did it ever happen?*
 - J. *Sure did — there was an ox in the household of R. Pappa, which had a toothache. It went into the brewery, took off the lid, and drank the beer until the pain stopped.*
 - K. *Said rabbis before R. Pappa, “But can you really say, the formulation of the Tannaite rule compares the ox to the man? Lo, it specifically says, **His ox which inflicted embarrassment — [the owner] is exempt. But he who inflicted embarrassment is liable.** Now if the formulation of the Tannaite rule compares the ox to the man, then where in the case of cattle would there be intentionality to inflict humiliation?”*
 - L. *For example, if the ox formed the intention to do damage, for a master has stated, “If one formed the intention of doing damage, even if he did not form the intention of humiliating, [he is liable on the latter count in any event].”*
2. A. *Raba said, “The Mishnah’s rule [**But he who set fire to a shock of grain on the Sabbath is exempt because he is subject to liability for his life**] deals with an act that was inadvertent, in line with the Tannaite formulation of the household of Hezekiah, for the Tannaite formulation of the household of Hezekiah maintains: ““And he who kills a beast [shall pay for it] and he who kills a man [shall be put to death]” (Lev. 24:21). [Freedman, *Sanhedrin*, p. 532, n. 4: This verse, by coupling the two, likens them to each other; it also implies that where monetary compensation has to be made for an animal, it is not so for a man, since “shall pay for it” is only prescribed for the former.] Just as in the instance of one who hits a beast, you make no distinction between doing so inadvertently and deliberately, doing so intentionally and*

unintentionally, doing so with a downward blow or an upward blow, in no instance declaring one exempt from having to make monetary compensation but imposing liability in all cases to monetary compensation, so in the case of one who hits [and kills] a man, you should make no distinction between doing so inadvertently and deliberately, doing so intentionally and unintentionally, doing so with a downward blow or an upward blow, in no instance declaring one liable to make monetary compensation but in all cases declaring one exempt from monetary compensation [since the death penalty may be involved].” [Kirzner: The man setting fire though inadvertently is exempt from all civil liability, so you cannot infer therefrom that the death penalty is attached to setting fire on the Sabbath even if one did so for destructive purposes.]

- B. *Said rabbis to Raba, “Can you define the context of the Mishnah rule as an act that was done inadvertently? Does the Mishnah not state that if the owner had set fire to a barn on the Sabbath, he would be exempt from civil damages, specifically, **because he is subject to liability for his life?**”*
- C. *“This is the sense of the statement: It is because, if he did the action deliberately, **he is subject to liability for his life.**”*
- D. *For instance?*
- E. *For instance, if he wanted the ashes, he would be exempt from civil liability, even if he had done the action inadvertently.*

I.1 investigates a principle operative in the Mishnah paragraph before us. No. 2 then addresses the Mishnah passage before us.

3:11

- A. **An ox which was running after another ox, and [that latter ox] was injured —**
- B. **this one claims, “Your ox did the injury,”**
- C. **and that one claims, “Not so, but it was hit by a stone” —**
- D. **he who wants to exact [compensation] from his fellow bears the burden of proof.**
- E. **If two [oxen] were running after one [ox] —**
- F. **this one says, “Your ox did the damage,”**
- G. **and that one says, “Your ox did the damage” —**
- H. **[35B] both of them are exempt.**

- I. [But] if both of them belonged to the same man, both of them [oxen] are liable [to pay compensation].
- J. [If] one of them was big and one little —
- K. the one whose ox has suffered an injury says, “The big one did the damage,” but the one who is responsible for the damage says, “Not so, but the little one did the damage” —
- L. one of them was deemed harmless, and one was an attested danger —
- M. the one whose ox has suffered an injury says, “The one which was the attested danger has done the damage,” but the one who is responsible for the damage says, “Not so, but the one which had been deemed harmless did the damage” —
- N. he who wants to exact [compensation] from his fellow bears the burden of proof.
- O. [If] those [oxen] that were injured were two, one big and one small,
- P. and those [oxen] responsible for the injuries were two, one big and one small —
- Q. the one whose ox was injured says, “The big one did the damage to the big one, and the little one to the little one,”
- R. and the one responsible for the damage says, “Not so, but the big one injured the little one, and the little one injured the big one” —
- S. one of them was deemed harmless and one was an attested danger —
- T. the one whose ox has suffered an injury says, “The one which was the attested danger did the damage to the big ox, and the one which had been deemed harmless did the damage to the little ox,”
- U. and the one responsible for the damage says, “Not so, but the one which had been deemed harmless injured the big ox, and the one which had been an attested danger injured the little one” —
- V. he who wants to exact [compensation] from his fellow bears the burden of proof.

- I.1** A. Said R. Hiyya bar Abba, “That **[he who wants to exact [compensation] from his fellow bears the burden of proof]** is to say, the colleagues of Sumekhosh differed from him, who has said, ‘Where there is doubt about the disposition of property, it is divided in half.’”
- B. Said R. Abba bar Mamel to R. Hiyya bar Abba, “Did Sumekhosh take that position even where there was a conflict of two absolutely certain claims?”

- C. He said to him, “Yes, Sumekhosh did take that position even where there was a conflict of two absolutely certain claims.”

I.2 A. *And how do you know that in our Mishnah paragraph, we deal with a conflict of two absolutely certain claims?*

B. *It is because the Mishnah paragraph states, **this one claims, “Your ox did the injury,” and that one claims, “Not so, but it was hit by a stone....”***

C. *Objected to that proposition R. Pappa, “Well, if in the opening clause, we deal with a conflict of two absolutely certain claims, then in the concluding one, we also should deal with a conflict of two absolutely certain claims. But look what it says: [If] those [oxen] that were injured were two, one big and one small, and those [oxen] responsible for the injuries were two, one big and one small — the one whose ox was injured says, “The big one did the damage to the big one, and the little one to the little one,” and the one responsible for the damage says, “Not so, but the big one injured the little one, and the little one injured the big one” — one of them was deemed harmless and one was an attested danger — the one whose ox has suffered an injury says, “The one which was the attested danger did the damage to the big ox, and the one which had been deemed harmless did the damage to the little ox,” and the one responsible for the damage says, “Not so, but the one which had been deemed harmless injured the big ox, and the one which had been an attested danger injured the little one” — he who wants to exact [compensation] from his fellow bears the burden of proof. So then, if the other party did not bring proof, then he collects in accord with the claim of the party responsible for the injury. May we then not maintain that this contradicts the position of Rabbah bar Nathan, who has said, ‘If one party claimed that he had left as a bailment grain, and the other party admitted that he had left as a bailment barley, the latter is exempt from having to take an oath.’”* [Kirzner: 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 ox that was deemed an attested danger, and the

defense admitted the little one or the ox deemed harmless, respectively.]

D. *So it must follow that our Mishnah's rule deals with a case in which one party was certain of his claim and the other subject to doubt.* [In that case, the argument presented at C is no longer viable (Kirzner).]

E. *Now which of the two parties was subject to doubt about the validity of his claim? If we should propose that it was the injured party who was certainly of his claim, and the party accused of responsibility for the injury the one who was subject to doubt, this would still contradict the position of Rabbah bar Nathan!* [Kirzner: For surely the plaintiff by his definite claim in respect of the big one has tacitly waived his claim in respect of the little one.] *Rather, it must be that the party that has suffered the injury is not certain about his claim, while the party accused of the injury is certain of his claim. And since in the latter clause of the Mishnah, the party that has suffered the injury is not certain about his claim, while the party accused of the injury is certain of his claim, then the opening clause likewise should deal with a case in which the party that has suffered the injury is not certain about his claim, while the party accused of the injury is certain of his claim.*

F. *And is it the fact that Sumekhohs made his ruling even in a case in which the party that has suffered the injury is not certain about his claim, while the party accused of the injury is certain of his claim, so that the framer of the Mishnah thought it necessary to tell us that this view is not the right one?* [Kirzner: This is 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.]

G. *Not at all, the concluding clause deals with a case in which the party that responsible for the injury is not certain about his claim, while the party that has suffered the injury is certain of his claim.* [Kirzner: How then can Hiyya maintain that our Mishnah deals with a case in which both were certain in their pleas?] *In any case the opening clause is not comparable to the concluding one.*

H. *A case in which the injured party is certain of his claim, and the defendant subject to doubt, and one in which the injured party is*

subject to doubt and the defendant certain of his claim, are comparable, while one in which the injured party is certain and the defendant certain is not comparable to a case in which the injured party is doubtful and the defendant certain. [Kirzner: Pappa was therefore loathe to explain the commencing clause as dealing with a case where the defense 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 defense was urged tentatively.]

- I.3** A. *Reverting to the body of the preceding:* Said Rabbah bar Nathan, “If one party claimed that he had left as a bailment grain, and the other party admitted that he had left as a bailment barley, the latter is exempt from having to take an oath.”
- B. *What’s the point! We have in fact learned precisely that fact in the Mishnah: [If] he claimed wheat and the other admitted to having barley, he is exempt [M. Sheb. 6:3/O]!*
- C. *If we had to derive the rule only from that formulation, I might have thought that, while he is exempt from having to pay compensation for the value of wheat, he is liable to pay compensation for the value of barley at the very least. So we are informed that he is entirely exempt.*
- D. *We have learned in the Mishnah: [If] those [oxen] that were injured were two, one big and one small, and those [oxen] responsible for the injuries were two, one big and one small — the one whose ox was injured says, “The big one did the damage to the big one, and the little one to the little one,” and the one responsible for the damage says, “Not so, but the big one injured the little one, and the little one injured the big one” — ...he who wants to exact [compensation] from his fellow bears the burden of proof. So then, if the other party did not bring proof, then he collects in accord with the claim of the party responsible for the injury. But why not invoke the principle that he is entirely exempt as in the case of wheat and barley?*

E. *The owner of the injured ox is entitled to get paid only where he can produce evidence, but he gets nothing if he has no evidence.*

F. *But has it not been taught on Tannaite authority: Lo, this one is paid compensation for injury done to the little ox out of the corpus of the big ox, and for injury done to the big ox out of the corpus of the little one?*

G. *That would be the rule if the injured party had already seized them.*

H. *We have learned in the Mishnah: One of them was deemed harmless and one was an attested danger — the one whose ox has suffered an injury says, “The one which was the attested danger did the damage to the big ox, and the one which had been deemed harmless did the damage to the little ox,” and the one responsible for the damage says, “Not so, but the one which had been deemed harmless injured the big ox, and the one which had been an attested danger injured the little one” — he who wants to exact [compensation] from his fellow bears the burden of proof. So then, if the other party did not bring proof, then he collects in accord with the claim of the party that has suffered the injury. But why not invoke the principle that he is entirely exempt as in the case of wheat and barley?*

I. *The owner of the injured ox is entitled to get paid only where he can produce evidence, [36A] but he gets nothing if he has no evidence.*

J. *But has it not been taught on Tannaite authority: Lo, this one is paid compensation for injury done to the little ox out of the corpus of the ox deemed an attested danger, and for injury done to the big ox out of the corpus of the little one held to have been harmless?*

K. *That would be the rule if the injured party had already seized them.*

II.1 A. **But] if both of them belonged to the same man, both of them [oxen] are liable [to pay compensation]:**

- B. *Said Raba of Paraziqa to R. Ashi, "That yields the inference that if two oxen that were held to be harmless and belonged to the same owner did damage, if the injured party wanted to collect from this one, he may do so, and if the injured party wanted to collect from this one, he may do so."*
- C. *Not at all, for with what situation do we deal here? It is one in which both were deemed attested dangers.* [Kirzner: In this case the whole estate of the defendant can be distrained upon for the payment of damages.]
- D. *Well, look at what's coming: [If] those [oxen] that were injured were two, one big and one small, and those [oxen] responsible for the injuries were two, one big and one small — the one whose ox was injured says, "The big one did the damage to the big one, and the little one to the little one," and the one responsible for the damage says, "Not so, but the big one injured the little one, and the little one injured the big one" — he who wants to exact [compensation] from his fellow bears the burden of proof! Now if both were attested dangers, then what difference would it make whether the larger or the smaller did the damage, since in any event the responsible party has to pay the full value of the ox!*
- E. *He said to him, "Well, the latter clause speaks of oxen that were deemed harmless, and the former clause deals with oxen that were declared attested dangers."*
- F. *Said R. Aha the Elder to R. Ashi, "If both of them in the opening clause were deemed attested danger, then what's the point of, [But] if both of them belonged to the same man, both of them [oxen] are liable [to pay compensation]? What the passage should say is, the owner of the oxen is liable! Furthermore, what's the point of both of them? Rather, in point of fact, we deal with oxen that are deemed harmless, and the rule derives from the principle of R. Aqiba, who has said that both parties become joint owners of the ox responsible for the damage. The operative consideration is that both of the oxen are with the owner, in which case he cannot assign the blame for the disaster from the one to the other. But if both of the oxen are not with him, he may plead, 'Go, bring evidence that this is the ox that did the damage, and I'll pay you.'"*

I.1, continued at No. 2, addresses the issue of how our Mishnah's rule intersects with another, closely pertinent issue. No. 3 footnotes the foregoing. **II.1** presents another sort of standard Mishnah-exegesis.