

## 2.

---

# Bavli Baba Qamma

## Chapter Two

### Folios 17A-27A

#### 2:1

- A. How is the leg deemed an attested danger in regard to breaking something as it walks along [M. 1:4D]?
- B. A domesticated beast is an attested danger to go along in the normal way and to break [something].
- C. [But if] it was kicking,
- D. or if pebbles were scattered from under its feet and it [thereby] broke utensils —
- E. [the owner] pays half of the value of the damages [caused by his ox].
- F. [If] it stepped on a utensil and broke it,
- G. and [the utensil] fell on another utensil and broke it,
- H. for the first [the owner] pays the full value of the damage.
- I. But for the second he pays half of the value of the damage.
- J. Fowl are an attested danger to go along in the normal way and to break [something].
- K. [If] a fowl had its feet entangled,
- L. or if it was scratching and thereby broke utensils,
- M. [the owner] pays only half of the value of the damage [his fowl has caused].

**I.1** A. [17B] Said Rabina to Raba, “Is not **foot** the same as **beast**?”

- B. *He said to him, "The Tannaite framer of the passage begins with generative classifications of damages and then proceeds to derivatives thereof."*
- C. *"Well according to that reasoning, what about what follows [at M. 2:2]: **How is the tooth deemed an attested danger in regard to eating what is suitable for [eating]? An ox is an attested danger to eat fruit and vegetables....What generative classifications and derivatives are under discussion here?!**"* [Kirzner: Both clauses deal with actual eating, hence tooth.]
- D. *He answered him as a joke, "Well, buddy, I repeated one rule, so you now make sense of the next!"*
- E. *So anyhow, what is the real explanation?*
- F. *Said R. Ashi, "In the first clause the Mishnah addresses the classification of tooth as it pertains to a wild beast, in the second, tooth as it pertains to domesticated cattle. It might have entered your mind to say that since the verse states, 'He shall put in his cattle' (Exo. 22: 4) [using a word that means a grazing animal (Kirzner)], the rule on tooth pertains only to domesticated cattle but not to wild beasts; so we are informed that the wild beast is covered in the classification of cattle."*
- G. *"If so, then the framer of the passage should have treated domesticated cattle first."*
- H. *"The category of wild beast, which is derived through exegesis, is the more important of the two."*
- I. *"Then in the opening part of the Mishnah tractate, addressing the issue of foot, why not put first what Scripture does not explicitly present [Kirzner: damage done by other parts of the body of the animal]?"*
- J. *"So how are these cases comparable anyhow? There, when we deal with tooth, both wild beasts and cattle fall into the classification of generative sources of damages, so what is gained through exegesis is given precedence; but here, in the case of foot, how can the principal give way and the secondary derivative take precedence?"*
- K. *"And if you prefer, I shall say: since the chapter before has concluded with the treatment of foot, it starts here with foot."*

## I.2

- A. *Our rabbis have taught on Tannaite authority:*
- B. **A domesticated beast is an attested danger to go along in the normal way and to break [something]: how so?**

- C. A domesticated beast that entered the courtyard of the injured party and did damage with its body as it went along, or with its hair as it went along, or with the saddle that was on it, or with the burden that was on it, or with the bit in its mouth, or with the bell on its neck,
- D. or an ass that did damage with its burden —
- E. the owner pays full damages.
- F. Sumekhosh says, “In the case of pebbles that it may kick, or in the case of a pig that burrows in a dunghill and does damage, payment is for full damages.”

**I.3** A. *If the pig did damage, that’s obvious! Rather, I should say, if it caused something from the dunghill to pop up and do damage, payment is for full damages.*

B. *So who in the world mentioned pebbles anyhow?*

C. *In fact the formulation bears a lacuna, and this is how it should be read: In the matter of pebbles, though it is routine [for them to be tossed about], the owner still has to be pay only half-damages; but in the case of a pig digging in a dunghill, if it caused something from the dunghill to pop up and do damage, payment is for full damages.*

D. Sumekhosh says, “In the case of pebbles that it may kick, or in the case of a pig that burrows in a dunghill and does damage, payment is for full damages.”

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

- B. **In the case of chickens that were flying about from place to place and breaking utensils with their wings, the owner pays full damages; but if wind was stirred up under their wings and it broke utensils, [the damage came about by vibration from their wings,] he pays only half-damages.**
- C. **Sumekhosh says, “Full damages” [T. B.Q. 2:1I-L].**
- D. *A further Tannaite formulation of the rule:*
- E. **Chickens that were hopping on dough or produce, which they dirtied or picked at — the owner pays full damages. If the damage came about because they raised dust or pebbles, the owner pays half-damages.**
- F. **Sumekhosh says, “Full damages” [T. B.Q. 2:1A-C].**
- G. *A further Tannaite formulation of the rule:*
- H. **In the case of chickens that were flying about from place to place and breaking utensils with their wings, the owner pays full damages; but if wind was stirred**

up under their wings and it broke utensils, [the damage came about by vibration from their wings,] he pays only half-damages.

- I. *The anonymous formulation accords with rabbis [above].*

**I.5** A. *Said Raba, “Now from the perspective of Sumekhosh, there is no problem, since he takes the view that damage resulting from the action of the beast is equivalent to damage done by its body [Kirzner: and is subject to the law of foot]. But as to the view of rabbis, if they hold that damage resulting from the action of the beast is equivalent to damage done by its body, then why not pay full damages? And if damage resulting from the action of the beast is not equivalent to damage done by its body, why make the owner pay even half-damages?”*

B. *Retracting, Raba said, “In point of fact damage resulting from the action of the beast is equivalent to damage done by its body, but the fact that one has to pay half-damage on account of secondary damage, of the kind caused by pebbles flying, in fact is a law that has derived from tradition.”*

- I.6** A. Said Raba, “Any action that done on the part of a person afflicted with flux uncleanness (Lev. 15) would result in his conveying uncleanness to something [e.g., by pressure or contact or movement of the object] in the case of damages would involve compensation of full damages [the action being a direct cause], while any action that done on the part of a person afflicted with flux uncleanness would not result in his conveying uncleanness to something in the case of damages would involve compensation of only half-damages [the action being an indirect cause].”
- B. *Has Raba’s statement the purpose of merely telling us the law of pebbles [that is, what is caused directly results in full damages, but what is caused only indirectly, in only half? If so, we already know that, why set forth such a thing in so convoluted a way?]*
- C. *No, Raba’s intent was to inform us of the rule governing cattle drawing a wagon [over utensils, which were broken]. [Kirzner: In such a case full payment is required, because if a person afflicted with flux uncleanness were to sit on the wagon that passed over clean objects, the objects would have been made unclean; the reason is that the damage, or the uncleanness, is caused by the body and not by its secondary force.]*

D. *There is a Tannaite formulation that presents the same principle as Raba: A domesticated beast is deemed an attested danger to break things as it goes along.*

E. *How so? A domesticated beast that entered the courtyard of the injured party and did damage with its body as it went along, or with its hair as it went along, or with the saddle that was on it, or with the burden that was on it, or with the bit in its mouth, or with the bell on its neck,*

F. *or an ass that did damage with its burden —*

G. *or a cow that was drawing a wagon [over utensils that were broken] —*

H. *the owner pays full damages.*

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

B. **Chickens that were pecking at the rope of a well bucket, and in consequence it was weakened and fell and broke, the owner pays full damages. [If it fell and broke and furthermore broke another utensil alongside, for the first the owner pays full damages, and for the second, half-damages] [T. B.Q. 2:1E-G].**

**I.8** A. *Raba raised this question: “If a beast tread on a utensil and did not break it, but it rolled off to some other place and then broke, what is the law? The operative criterion is what happened at the outset, in which case the damage has been done by the body of the beast [and the case is subject to the classification of foot]? Or is the operative consideration the breaking of the utensil, in which case we classify the damage under the rubric of pebbles?”*

B. *Why not solve the problem in line with Rabbah’s view, for said Rabbah, “If someone threw a utensil from the roof, and someone else came along and while it was coming down, batted it with a stick and broke it, the latter is exempt from having to pay, for we say, the man broke a broken pot”?* [Kirzner: Is not this the best proof that it is the cause of the damage that is the determining factor; the latter party is not obligated to compensate, but the whole liability to pay is upon the one who threw the utensil from the top of the roof.]

C. *What was obvious to Rabbah was dubious to Raba.*

D. *Come and take note:* In the case of chickens, hopping is not an action that is deemed an attested danger. [Half-damages are paid, not full.] Some say, “Hopping is an activity on the part of chickens for which they are an attested danger [and full damages are to be paid].” *Now could you suppose that hopping is at issue? [Surely not, that’s what chickens do.] Rather, what the passage must mean is, Hopping that produces flying debris, which break things..., and this is what is subject to debate: One authority [some say...] takes as the operative criterion the original cause of the damage [which is why payment is in full], and the other authority invokes as the operative criterion only the result, so that the breaking of the utensil is the decisive criterion?*

E. No, [18A] *the hopping has only caused the debris to fly, and the point under debate is the same as that of Sumekhoh and rabbis.*

F. *Come and take note: **Chickens that were pecking at the rope of a well bucket, and in consequence the rope was weakened and fell and broke, the owner pays full damages.** [T. B.Q. 2:1E-G]. That implies that the operative criterion the original cause of the damage [which is why payment is in full].*

G. *Explain the full payment to refer to damages done by the rope [Kirkner: whereas for the bucket only half-damages will be paid].*

H. Lo, damage done to the rope is extraordinary, so only half-damages should accrue!

I. *We deal with a case in which the rope was smeared with dough.*

J. *But the language used is, **and in consequence the rope was weakened and fell and broke!** [Kirkner: This clearly indicates that the payment is in respect to the damage done to the bucket.]*

K. *Well, in fact what we have is the position of Sumekhoh, who has said, “In the case of damage done by pebbles, full damages are paid in compensation.”*

L. *So if it’s Sumekhoh, what about what follows: **If it fell and broke and furthermore broke another utensil along side, for the first the owner pays full damages, and for the second, half-damages** [T. B.Q. 2:1E-G]? *Now if this were the view of Sumekhoh, would he concur in the payment of only half-damages [in the case of pebbles]? And should you claim that there is a distinction made by Sumekhoh between damage produced by the force of the causative factor and the**

*damage made by indirect force, then what about the question raised by R. Ashi: "In Sumekhosh's opinion, is indirect force treated as analogous to direct force or is that not the case"? You could have solved that problem from the case at hand, showing that it is not treated as analogous to direct force. So in point of fact the cited passage cannot represent the view of Sumekhosh but only of rabbis. It must then follow that the operative criterion is the original cause of the damage, and that serves as the determining factor [Kirzner: though the bucket rolled to some other place, where it broke, the case is still subject to the law of foot].*

*M. Said R. Bibi bar Abbayye, "The bucket that was broken was [Kirzner:] continuously pushed by the poultry [from one place to another, so that it was broken by actual bodily touch, and falls under the category of foot]."*

## **I.9**

*A. Raba raised this question: "Is the half-damage to be paid for damage caused by pebbles to be paid only from the body of the beast itself or from the best property of the owner of the beast? Will it be paid only from the body of the beast itself since we do not find a case in which half-damages are collected from the best property of the responsible party? Or perhaps it will be paid from the best property of the responsible party, since we do not find a case in which damages done in an ordinary way will be compensated only out of the body of the beast that has done the damage?"*

*B. Come and take note: In the case of chickens, hopping is not an action that is deemed an attested danger. [Half-damages are paid, not full.] Some say, "Hopping is an activity on the part of chickens for which they are an attested danger [and full damages are to be paid]." Now could you suppose that hopping is at issue? [Surely not, that's what chickens do.] Rather, what the passage must mean is, Hopping that produces flying debris, which break things..., and this is what is subject to debate: one authority [some say...] takes as the operative criterion the original cause of the damage [which is why payment is in full], and the other authority invokes as the operative criterion only the result, so that the breaking of the utensil is the decisive criterion?*

*C. No, the hopping has only caused the debris to fly, and the point under debate is the same as that of Sumekhosh and rabbis.*

D. *Come and take note: The dog which took a cake [to which a cinder adhered] and went to standing grain, ate the cake, and set the stack on fire — for the cake the owner pays full damages, but for the standing grain he pays only for half of the damages [his dog has caused]. Now what is the operative consideration here? Is it not that [half-damages are paid for the standing grain] because it is classified as damage done in the category of pebbles* [Kirzner: because the damage to the stack was not done by the actual body of the dog but was occasioned by the dog through the instrumentality of the coal, which, after having been put on a certain spot, spread the damage near and far]? *And in that connection the Tannaite formulation is: The owner pays half-damages from the body of the dog.* [Kirzner: Does this ruling not offer a solution to the problem raised by Raba?]

E. *But do you suppose that at issue here is pebbles? From the perspective of R. Eleazar, [Kirzner: who maintains that the payment even for the stack will be in full and out of the body of the dog that has done the damage], will there ever be a case in which full damages would be paid out of the body of the animal that has done the damage? So therefore the passage must refer to a case in which the dog handled the coal in an extraordinary manner* [Kirzner: by taking it in its mouth and applying it to the stack, in which case it is subject to the law of horn]. *R. Eleazar, therefore, treats the matter along the lines of the principle espoused by R. Tarfon, who has said, “Damage varying from the norm that is done by horn in the premises of the injured party will be compensated in full.”*

F. *Not at all. What is the consideration that has led you to explain the view of R. Eleazar in line with the position of R. Tarfon? It is only that he requires payment of full damages. Well, R. Eleazar takes the view of Sumekhosh, who has said that in the case of damage done by pebbles, the responsible party pays full damages; and he further takes the view of R. Judah, who has said, “[Where a beast that is an attested danger does damages, so that payment is required,] the part of the payment that would be paid even if the beast were not an attested danger remains in place” [that is, is always subject to the law covering the beast that is deemed harmless (Kirzner)], with the result that when one says that payment is made out of the body of the beast, it can refer*



*only to half of the part for which even the beast that was deemed harmless would be liable.*

G. Said R. Sama b. R. Ashi to Rabina, “Well, I can concede that the position assigned to R. Judah pertains to cases of a beast that was deemed harmless but was then declared an attested danger [that is, cases classified under horn]. But have you heard that [18B] he takes that view in cases in which the damage done by the beast to begin with is classified as a perpetually-attested danger [e.g., damage classified as foot, thus pebbles in this context]? Rather, when R. Eleazar stated the view that full payment is required, that was in a case in which the beast was in fact an attested danger [to set fire to a stack of grain in an extraordinary manner], and what is at issue? R. Eleazar takes the view that it is possible for a beast to become an attested danger in acts that are classified as pebbles, and rabbis maintain that a beast cannot be declared an attested danger in acts that are classified as pebbles.”

[Kirzner: In spite of however many times the damage is done, the payment will never exceed half-damages, on account of the consideration that in the case of pebbles in the usual way, even though the beast is an attested danger to begin with, still no more than half-damages are involved.]

H. *Then what about what Raba asked, “Does the law of declaring a beast an attested danger pertain to damages done in the category of pebbles or does the law of declaring a beast an attested danger not pertain to damages done in the category of pebbles?”* [Kirzner: In the former case, if an animal makes pebbles fly by means of an unusual act on more than three occasions, the payment will be in full, on the analogy of horn; in the latter case, payment will never exceed half-damages, since if it happens three times, the act is usual, and it is then classified under pebbles, requiring half-damages in the case of any usual act of an animal in making pebbles fly.] *Why not now solve that problem, either from the angle of view of rabbis, in which case there is no such thing as declaring a beast an attested danger with regard to damages done in the category of pebbles, or from the perspective of R. Eleazar, maintaining that there is such a thing as declaring a beast an attested danger with regard to damages done in the category of pebbles?*

I. *Raba may say to you, “When I raise the question, it is within the position of rabbis who differ from Sumekhos. But here, whether from the position of rabbis or from that of R. Eleazar, in the case of the dog, both parties stand by the principle of Sumekhos, who has said, ‘In the case of damage that falls into the classification of pebbles, one has to pay full damages.’ And what is the operative consideration for rabbis, who have half-damages paid here? It is because of the fact that the dog handled the coal in an extraordinary manner but was not yet an attested danger to do so. At issue, then, is the dispute between R. Tarfon and rabbis.”*

J. *Well, I can concede that R. Tarfon took the view that payment in full is required, but have you heard him say that payment in full is exacted from the body of the beast that did the damage* [Kirzner: for since payment is in full, why should it not be out of the best of the defendant’s estate]?

K. *Yes, indeed! For he derives his view from the law of damages that fall into the classification of horn that are done in the public domain. And it is sufficient for the inferred law to be as strict as that from which it is inferred. [That from which it was inferred is horn on public domain, where payment in the case of a beast deemed harmless is made out of the body of the beast that did the injury.]*

L. *But R. Tarfon explicitly rejects the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred!*

M. *Where R. Tarfon rejects the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred, that is in a case in which an argument a fortiori would thereby be annulled; but where the argument a fortiori would not thereby be annulled, he accepts the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred.*

**I.10** A. *Reverting to the body of the prior composition:*

B. *Raba asked, “Does the law of declaring a beast an attested danger pertain to damages done in the category*

of pebbles or does the law of declaring a beast an attested danger not pertain to damages done in the category of pebbles? *Do we draw an analogy from pebbles to horn [to which the consideration of attested danger pertains], or do we not draw such an analogy, on grounds that the law of pebbles is a derivative of the generative classification of foot [and the food is not subject to the consideration of being declared an attested danger]?"*

C. *Come and take note:* In the case of chickens, hopping is not an action that is deemed an attested danger. [Half-damages are paid, not full.] Some say, "Hopping is an activity on the part of chickens for which they are an attested danger [and full damages are to be paid]." *Now could you suppose that hopping is at issue? [Surely not, that's what chickens do.] Rather, what the passage must mean is, Hopping that produces flying debris, which break things.... Do we not deal with a case in which the poultry did it three times, so that at issue between the two authorities is that one takes the view that the law of declaring a beast an attested danger does pertain to damages done in the category of pebbles, and the other authority maintains that the law of declaring a beast an attested danger does not pertain to damages done in the category of pebbles?*

D. *No, it happened only one time, and at issue between them is the same principle that is subject to dispute between Sumekhosh and rabbis.*

E. *Come and take note:* A domesticated beast that crapped on dough —

F. R. Judah says, "The owner pays full damages."

G. And R. Eleazar says, "He pays half-damages."

H. *Do we not deal with a case in which the ox had done it three times, so that at issue between the two authorities is that one takes the view that the law of declaring a beast an attested danger does pertain to*

damages done in the category of pebbles, *and the other authority maintains that the law of declaring a beast an attested danger does not pertain to damages done in the category of pebbles?*

I. *No, it happened only one time, and at issue between them is the same principle that is subject to dispute between Sumekhosh and rabbis.*

J. *But lo, is this not an extraordinary event [so it should come under the category of horn, and only half-damages should be paid on the first of the three shits]?*

K. *It happened where the animal didn't have enough space [to do it some other way, so it was quite ordinary].*

L. *Well, why didn't R. Judah simply say, "The decided law is in accord with Sumekhosh," and R. Eleazar, "The decided law is in accord with rabbis"?*

M. *It was important to them to make a ruling with reference to shit in particular, for you might have thought that, since the shit was part of the animal, and they came out of its body, they should be classified as part of its body [Kirzner: damage should be compensated in full, like any other derivative of food]; so we are informed that that is not the case [and the shit is deemed in the classification of pebbles (Kirzner)].*

N. *Come and take note of what Rammi bar Ezekiel repeated as a Tannaite statement: "A chicken that put its head into an empty glass jar and crowed and broke the jar — the owner pays full damages."*

O. *But said R. Joseph, "They say in the household of the master: A horse that neighed or an ass that brayed and broke utensils — the owner pays half-damages."*

P. *Do we not deal with a case in which the ox had done it three times, [19A] so that at issue between the two authorities is that one takes the view that the law of declaring a beast an attested danger does pertain to*

damages done in the category of pebbles, *and the other authority maintains that the law of declaring a beast an attested danger does not pertain to damages done in the category of pebbles?*

*Q. No, it happened only one time, and at issue between them is the same principle that is subject to dispute between Sumekhosh and rabbis.*

*R. But lo, is this not an extraordinary event!*

*S. It happened where there were some seeds in the jar [which the hen went for].*

- I.11** A. *R. Ashi raised this question: “Would an act that was extraordinary reduce the payment, in the case of damage that fell into the classification of pebbles, to the payment of a quarter-damages in compensation, or would an act that was extraordinary not reduce the payment, in the case of damage that fell into the classification of pebbles, to the payment of a quarter-damages in compensation?”*
- B. *Why not solve the problem in line with what Raba asked, for Raba asked, “Does the law of declaring a beast an attested danger pertain to damages done in the category of pebbles or does the law of declaring a beast an attested danger not pertain to damages done in the category of pebbles?” Now this would bear the implication that we would not take account of the exceptional character of the act. [Kirzner: For if otherwise, and quarter-damages will be paid in the first instance of an unusual act in the case of pebbles, how could the compensation rise above half-damages?]*
- C. *Maybe the force of Raba’s question was simply, “Well, if you want to take that position, then..., thus: if you might wish to propose that we do not take account of the extraordinary character of an action when it comes to applying the law of pebbles, then does or does not the law of declaring a beast an attested danger pertain to damages done in the category of pebbles?”*
- D. *Anyhow, the question stands.*
- I.12** A. *R. Ashi raised this question: From the viewpoint of Sumekhosh, do we take account of damages that are caused by indirect force or do we not? Has he received a tradition on the matter, the effect of which he limits to damage done by indirect force, or has he no such tradition anyhow?”*
- B. *The question stands.*

- II.1** A. **[But if] it was kicking, or if pebbles were scattered from under its feet and it [thereby] broke utensils — [the owner] pays half of the value of the damages [caused by his ox]:**
- B. *The question was raised: What is the sense of the statement, If it was kicking and damage resulted from the kicking or in the case of pebbles flying in the usual way, half-damages are paid, that is, in accord with the view of rabbis [vs. Sumekhoh], or is the sense of the statement, if it was kicking and it did damage through its kicking, or when pebbles went flying as a result of the kicking, then only half-damages are assessed, bearing the implication that if pebbles fly in the ordinary way, damages are paid in full, following the view of Sumekhoh?*
- C. *Come and take note of what comes at the end: **[If] it stepped on a utensil and broke it, and [the utensil] fell on another utensil and broke it, for the first [the owner] pays the full value of the damage. But for the second he pays half of the value of the damage.** Now if this represented the view of Sumekhoh, does he concur that half-damages would ever be paid in the case of pebbles? And if you want to propose that the sense of **the first is the utensil broken off by a fragment that flew from the first broken utensil, and then the second** refers to the utensil broken by a fragment that flew off from the second utensil, and if you wish further to take for granted that in Sumekhoh's view, we distinguish between damage done by direct force and damage done by indirect force [with half-damages in the latter case], then what about R. Ashi's question raised above: R. Ashi raised this question: From the viewpoint of Sumekhoh, do we take account of damages that are caused by indirect force or do we not? Has he received a tradition on the matter, the effect of which he limits to damage done by indirect force, or has he no such tradition anyhow? You could solve that problem easily by maintaining that we do not take account of damages that are caused by indirect force.*
- D. *R. Ashi raised his question within the frame of reference of rabbis, and this is his question: "If it was kicking and damage resulted from the kicking or in the case of pebbles flying in the usual way, half-damages are paid, thus implying that in the case of pebbles flying as a result of kicking, only quarter-damages would be paid, since the exceptional character of the act reduces payment in the case of pebbles? Or is the sense as follows: If it was kicking and it did damage through its kicking, or when pebbles went flying as a result of the*

kicking, then only half-damages are assessed, *since the exceptional character of the act does not reduce the payment when it comes to pebbles?*”

E. *The question stands.*

**II.2** A. R. Abba bar Mamel asked R. Ammi, and some say, R. Hiyya bar Abba, “If the cow was walking along in a place in which it was not possible not for her to make pebbles fly off, but in any event it was kicking and so made pebbles fly and do damage, what is the law? *Since it was not possible for the cow to produce any other effect, we have to classify this as the normal course or events? Or should we say that, well, anyhow, in this case in any event, the pebbles are scattered on account of the cow’s own kicking?*”

B. *The question stands.*

**II.3** A. R. Jeremiah asked R. Zira, “If a cow was going along in the public road and kicked a pebble, which did damage, what is the law? *Do we compare the case to one in which damage results from horn, [liability applying even in public domain], so that the owner is liable? Or do we compare it to a derivative of foot, in which case the owner is exempt?*”

B. *He said to him, “It stands to reason that it is a derivative of foot.”*

C. “If it kicked a pebble in public domain and it did damage in private domain, what is the law?”

D. He said to him, “If the disembedding of a pebble is not there [Kirzner: to institute liability, since it took place on public ground], what sort of descent can there be [on the strength of which liability would be incurred for the owner]?”

E. *An objection was raised:* If the cow was walking along the way and kicked a pebble, whether in private domain or in public domain, the owner is liable. *Does this not mean that it kicked the pebble in public domain and it did damage in public domain?*

F. *No, what it means is that it kicked the pebble in public domain and it did damage in private domain.*

G. *Yeah, well you just said,* “If the disembedding of a pebble is not there [Kirzner: to institute liability, since it took place on public ground], what sort of descent can there be [on the strength of which liability would be incurred for the owner]?”!

H. *He said to him, “I take it back.”*

- I. *An objection was raised: [If] it stepped on a utensil and broke it, and [the utensil] fell on another utensil and broke it, for the first [the owner] pays the full value of the damage. But for the second he pays half of the value of the damage. And in this regard it was taught as a Tannaite statement: Under what circumstances? In the domain of the injured party. But if it was in public domain, then for the first he is exempt, and for the second he is liable. Does this not mean that it kicked the pebble in public domain and it did damage in the public domain?*
- J. *Not at all. It kicked a pebble in the public domain but it did damage in private domain.*
- K. *Yeah, well you just said, "If the disembedding of a pebble is not there [Kirzner: to institute liability, since it took place on public ground], what sort of descent can there be [on the strength of which liability would be incurred for the owner]"!*
- L. *He said to him, "I take it back."*
- M. *Now is that so? [19B] And did not R. Yohanan say, "There is no distinction, so far as payment of half-damages is concerned, between private and public domain." Does this statement also address a situation in which the cow kicked the pebble in public domain and it did damage in public domain?*
- N. *No, what it means is that it the cow kicked the pebbles in public domain but they did the damage in private domain.*
- O. *Hey, you just said, "If the disembedding of a pebble is not there [Kirzner: to institute liability, since it took place on public ground], what sort of descent can there be [on the strength of which liability would be incurred for the owner]"!*
- P. *He said to him, "I take it back."*
- Q. *If you prefer, I shall say that R. Yohanan spoke only of liability in the category of horn [where there is no distinction between public and private domain (Kirzner)].*

- II.4** A. *R. Judah Nesiah and R. Oshaia happened to be at the gate of R. Judah. The following matter came up between them: "If an animal knocked about with the till [and caused damage in public domain, what is the law?"]*
- B. *One of them said, "So is the owner supposed to walk along holding the animal's tail?"*



- C. *“So in the case of horn, why not say the same: Is the owner supposed to walk along holding the horn of his animal wherever it goes?”*
- D. *What’s the parallel? In the one case, namely, horn, damage is exceptional, while in the case of the tail, it’s quite common for an animal to swish its tail.*
- E. *But if in the case of the tail, it’s quite common for an animal to swish its tail, then what’s the question? [It’s a secondary case of foot.]*
- F. *The problem arises when the beast swishes about violently.*

- II.5** A. *R. Ina raised this question: “If the animal knocked around with its prick and did damage, what’s the law? Do we say that it is comparable to horn? But in the case of horn, desire does not take over, while here it does? Or perhaps in the case of horn, the animal wants to do damage, but here the animal doesn’t want to do damage [but only have sex]?” [Kirzner: It should therefore come under the category of tooth and foot, for which there is no liability on public domain.]*
- B. *The question stands.*

- III.1** A. **Fowl are an attested danger to go along in the normal way and to break [something]. [If] a fowl had its feet entangled, or if it was scratching and thereby broke utensils, [the owner] pays only half of the value of the damage [his fowl have caused]:**
- B. Said R. Huna, “This rule applies only in a case in which the string became attached on its own, but if somebody had attached it, then liability would be for full damages.”
  - C. *If it became entangled on its own, who is supposed to be liable? Not the owner of the string, for how would he ever be liable? If the string was properly put away by him, so it was an accident, and if it was not kept in a safe place, he is negligent [and should pay full damages]! So the owner of the chicken must be responsible.*
  - D. *But on what basis then do you differentiate [so he is not liable for full damages under all circumstances]? If the exemption is on account of the verse, “If a man shall open a pit” (Exo. 21:33), meaning, there would be no liability if cattle opened a pit, then there should be no liability even to half-damages, since liability is when man makes the pit but not when cattle do it!*
  - E. *So the Mishnah must address a case in which the chicken made the string fly from place to place [and it is in the rubric of pebbles], and when R. Huna made his statement, it was with reference to a case dealt with elsewhere:*

String that is ownerless — said R. Huna, “If it became entangled on its own, doing damage thereby, the owner of the chicken exempt, [and the string has no owner]. [Kirzner: Since there was no owner to the string, the owner of the chicken is not liable for damage resulted from a nuisance created by his poultry on the principle that cattle, creating a nuisance, would in no way involve the owner in any obligation.] If a human being had attached the string, he would be liable to pay full damages.”

F. *On what count is he liable?*

G. Said R. Huna bar Manoah, “On the count of pit, rolled about by feet of man or feet of an animal.”

**I.1** opens with examination of the language of the Mishnah. No. 2, bearing its own talmud at No. 3, then provides a Tannaite complement to the Mishnah’s rule. No. 4 turns to another Tannaite complement to the rule of the Mishnah, with a talmud at Nos. 5, 6, and Nos. 7, 8-12 follow the same pattern. **II.1** goes forward with the hermeneutical problem to which most of **I.1** was devoted, a fine example of sustained reading of diverse statements in accord with an underlying problem that units the whole. Nos. 2, 3-5 ask further questions of refinement in the framework of the Mishnah’s rule. **III.1** provides a qualification to the Mishnah’s rule’s application.

## 2:2

- A. How is the tooth deemed an attested danger in regard to eating what is suitable for [eating] [M. 1:4C]?
- B. An ox is an attested danger to eat fruit and vegetables.
- C. [If, however,] it ate [a piece of] clothing or utensils, [the owner] pays half of the value of the damage it has caused.
- D. Under what circumstances?
- E. [When this takes place] in the domain of the injured party.
- F. But [if it takes place] in the public domain, he is exempt.
- G. But if it [the ox] derived benefit [from damage done in public domain], [the owner] pays for the value of what [his ox] has enjoyed.
- H. How does he pay for the benefit of what [his ox] has enjoyed?
- I. [If] it ate something in the midst of the marketplace, he pays for the value of what it has enjoyed.
- J. [If it ate] from the sides of the marketplace, he pays for the value of the damage that [the ox] has caused.

- K. [If he ate] from [what is located at] the doorway of a store, the owner pays for the value of what it has enjoyed.
- L. [If it ate] from [what is located] inside the store, the owner pays for the value of the damages that it has caused.

### I.1

- A. *Our rabbis have taught on Tannaite authority:*
- B. **How is the tooth deemed an attested danger in regard to eating what is suitable for [eating]:**
- C. **How so? A beast that entered the courtyard of the injured party and ate food that was suitable for it, or drank liquid that was suitable for it — the owner pays full damages.**
- D. **So, too, a wild beast that went into the injured party's domain and tore an animal to pieces and ate its meat — the owner pays full damages.**
- E. **And a cow that ate barley, an ass that ate horse beans, a dog that licked oil, or a pig that ate a piece of meat — the owner pays full damages [T. B.Q. 1:8A-I].**

### I.2

- A. *Said R. Pappa, "Now that you have specified all these items which, under ordinary circumstances, would not serve as food for beasts but which in an emergency will be eaten by them as food, if a cat ate dates or an ass ate fish, — the owner pays full damages."*

### I.3

- A. *There was the case of an ass that ate bread and chewed the basket. R. Judah declared the owner liable to pay full damages for the bread and half-damages for the basket.*
- B. *Now why should this be the case? Since it is quite routine for the beast to eat the bread, it was quite routine for it to chew the basket too?*
- C. *It was a case in which only after it had eaten the bread did the ass chew the basket.*
- D. *Yeah, but who says bread is food that a beast routinely eats? The following contradicts that view: If an animal ate bread, meat or soup, the owner pays half-damages. Is this not a domesticated beast?*
- E. *No, it was a wild beast.*
- F. *A wild beast? But it routinely eats meat!*
- G. *The meat was roasted.*
- H. *If you prefer, I shall say, it was a deer.*

I. *If you prefer, I shall say, it was a domestic beast, but the bread was eaten upon a table [which is odd].*

**I.4** A. **[20A]** *There was the case of a goat that saw turnips on top of a cask, climbed up and consumed the turnips and broke the cask. Raba declared the owner liable for the turnip and the jar, for, since it was routine to eat turnips, it was also routine for the animal to climb up to get them.*

**I.5** A. Said Ilfa, "If a beast was in public domain and stretched out its neck and ate food on the back of another beast, the owner is liable. *How come? The food that is on the back of the other beast is as though it were in the courtyard of the injured party.*"

B. *May one say that the following supports his ruling: If the injured party had had a bundle of grain hanging over his shoulder, and someone's animal stretched out its neck and ate the grain, the owner would be liable?*

C. *No, in line with what Raba said, "It would be comparable to an act of an animal that was jumping [that is rather odd and so would fall into the classification of horn], and here, too, it is an act that is comparable to the animal's jumping."*

**I.6** A. *Where did Raba's statement get made? It concerns the statement that R. Oshaia made, "If a beast is in public domain and went and ate as it went along, the owner is exempt from having to pay compensation, but if it stood still and ate food, he is liable. What differentiates the case when it was going along? It is its standard practice."*

B. *Well, standing still and eating is also standard practice!*

C. *It is in this context that Raba said, "It is a case in which the animal jumped to get the food [and that is not routine]."*

**I.7** A. *R. Zira raised this question: "If a sheaf was rolling around, what is the law?"*

B. *Well, what sort of case is in mind?*

C. *It would be in a case, for instance, in which the grain was situated to begin with in the domain of the injured party but rolled into public domain through the action of the animal, which then ate the grain in public domain. What is the law?*

- D. *Come and take note of what R. Hiyya repeated as a Tannaite statement: “If there is a bag of food lying partly inside and partly outside the domain of the injured party, if the beast ate it inside, the owner is liable; if it ate it outside, he is exempt.” Now would this not be a case in which the animal rolled the sheaf along?*
- E. *No, read as follows: If there is a bag of food lying partly inside and partly outside the domain of the injured party, if the beast ate it, for the grain that was inside, the owner is liable; and for the grain that was outside, he is exempt.*
- F. *If you prefer I shall say, when R. Hiyya made that statement, it concerned a bag that had long stalks of grass [partly inside, partly outside].*

**II.1 A. An ox is an attested danger to eat fruit and vegetables. [If, however,] it ate [a piece of] clothing or utensils, [the owner] pays half of the value of the damage it has caused. Under what circumstances? [When this takes place] in the domain of the injured party. But [if it takes place] in the public domain, he is exempt:**

- B. *To what does the final ruling [Under what circumstances? [When this takes place] in the domain of the injured party. But [if it takes place] in the public domain, he is exempt] refer?*
- C. *Said Rab, “To all of the prior rulings, that is, even to clothing and utensils. How come? Whoever himself diverges from the usual practice, and then someone else diverges as well from the usual practice, the latter party is exempt.” [Kirzner: The injured party had no business leaving his clothes or utensils in public domain.]*
- D. Samuel said, “This refers only to fruit and vegetables. But as to clothing and utensils, the owner is liable.”
- E. *And so with R. Yohanan and R. Simeon b. Laqish:*
- F. Said R. Simeon b. Laqish, “*To all of the prior rulings, that is, even to clothing and utensils.*”

G. [Supply:] And R. Yohanan said, “It refers only to fruit and vegetables.”]

H. *And R. Simeon b. Laqish is consistent with rulings announced in another context, for* 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. But R. Yohanan said, “The ruling in the cited Mishnah paragraph relevant to

this case pertains only to fruits and vegetables, but as to clothing and utensils, the owner is liable [even when damage is done in the public domain].”

I. *Might one then suppose that R. Yohanan also rejected the position of R. Simeon b. Laqish even in the case of the two cows?*

J. *No, in point of fact he takes the view that as to the case of clothing and the like, it would be usual for people to put them in public domain while taking a rest nearby, but it is certainly unusual for cows to lie down in the public domain.*

**III.1 A. But if it [the ox] derived benefit [from damage done in public domain], [the owner] pays for the value of what [his ox] has enjoyed:**

B. And how much might that be?

C. Rabbah said, “The cost of straw [of a very coarse and cheap kind].”

D. Raba said, “The cost of barley of a cheap grade [Kirzner: two-thirds of the usual price].”

E. *It has been taught on Tannaite authority in accord with the position of Rabbah, and it has been taught on Tannaite authority in accord with the position of Raba:*

F. *It has been taught on Tannaite authority in accord with the position of Rabbah:* R. Simeon b. Yohai said, “The owner of the cow pays only the cost of straw alone.”

G. *And it has been taught on Tannaite authority in accord with the position of Raba:* **But if it [the ox] derived benefit [from damage done in public domain], [the owner] pays for the value of what [his ox] has enjoyed. How so? If the cow ate a qab or two of barley [in public domain], the court does not say, “Pay the value.” But they make an estimate of how much someone would be willing to pay to feed his cow what is appropriate for it, even though the cow does not usually eat such food. Therefore if it ate wheat or something bad for it, the owner does not have to pay a thing [T. B.Q. 1:7C-F].**

**III.2 A. Said R. Hisda to Rammi bar Hama, “You weren’t with us yesterday in our neighborhood, when we raised some really interesting questions.”**

B. *He said to him, “What were these really interesting questions?”*

- C. He said to him, “He who without the owner’s knowledge or consent lives in the upper room of someone else — does he have to pay him rent or does he not have to pay him rent? *Now what sort of case would be involved? If we say that it is a courtyard that was not up for rent, and the man who lived there did not anyhow usually pay rent, then the one party gained nothing and the other party lost nothing! So it must have been a courtyard that was up for rent and a man who was used to paying rent, in which case the one party benefited and the other lost out [so obviously, he has to pay the rent]! So the issue is to be addressed to a case in which the courtyard was not up for rent, but the man usually paid rent. What then is the rule? Can the party say to the owner, ‘What did I cost you anyhow?’ Or perhaps he may say to him, [20B] ‘Lo, you have gained benefit from my property, so you have to pay me rent’?*”
- D. He said to him, “The solution is found in a commonplace Mishnah ruling.”
- E. He said to him, “What Mishnah ruling?”
- F. He said to him, “I’ll tell you after you’ve done some sort of favor for me [to show your subservience].” [Hisda] took his scarf and folded it up for him.
- G. Then [Rammi] said to him, “**But if it [the ox] derived benefit [from damage done in public domain], [the owner] pays for the value of what [his ox] has enjoyed.**”
- H. Said Raba, “How much anguish and trouble is a person spared whose Master helps him out. For even though the problem is not in fact analogous to the case of our Mishnah paragraph, R. Hisda accepted the solution that he proposed. [But here is the difference:] in the case of the Mishnah, the defendant benefited, but the plaintiff lost out; in the problem at hand, while the defendant benefited, the plaintiff suffered no loss.”
- I. But Rammi bar Hamma took the view that [there was no loss to the defendant anyhow, since] produce left in public domain without further indication of its status has been declared ownerless. [So the defendant here, too, suffers no loss.]
- J. We have learned in the Mishnah: **He whose [land] surrounds that of his fellow on three sides, and who made a fence on the first, second, and third sides — they do not require [the other party to share in the expense of building the walls] [M. B.B. 1:3].** Now lo, if he made one on the fourth side, they would impose upon him a share of the cost of the whole expenditure on the fences. Would that not

*prove that if the defendant has gotten a benefit, even though the injured party has suffered no loss, the defendant has to pay for what he has benefited?*

K. *That case is different, for the plaintiff may argue against the other, “You are the one who gave me the expense of building additional fences [since your land was in the middle of mine.]”*

L. *Come and take note: R. Yosé says, “If he built a fence on the fourth side, they assign to him his share in the case of all three other fences” [M. B.B. 1:3]. So the liability pertains when the defendant shuts in the fourth side, but if the plaintiff had shut in the fourth side, the defendant would not have had to pay. Would that not yield the point that where the defendant derives a benefit, the plaintiff suffering no loss, the defendant would not have to pay?*

M. *That case is different, for the defendant may argue, “For my purposes a fence of cheap thorns worth a zuz would have been enough.”*

N. *Come and take note: A house and an upper story belonging to two people which fell down — [if] the resident of the upper story told the householder [of the lower story] to rebuild, but he does not want to rebuild, lo, the resident of the upper story rebuilds the lower story and lives there, until the other party compensates him for what he has spent [M. B.M. 10:3]. So it’s his expenditures that he has to pay back, lo, the rent is not at issue. That proves that if the one party derived benefit while the other party suffered no loss, the defendant is exempt from having to pay.*

O. *That case is exceptional, for the lower story is indentured to the upper story.*

P. *Come and take note: R. Judah says, “Also: [if so,] this one is [then] living in his fellow’s [housing]. [So in the end] he will have to pay him rent. But the resident of the upper story builds both the house and the upper room, and he puts a roof on the upper story, and he lives in the lower story, until the other party compensates him for what he has spent” [M. B.M. 10:3]. Does this not prove that if one party gains a benefit and the other party does not lose, the former still is liable to pay?*



Q. *That case is different since at issue there is the blackening of the walls [so the plaintiff has had a real loss].*

R. *They said to the household of R. Ammi. He said, "So what did the defendant do to him? What loss did he cause for him? What damage did he do to him?"*

S. R. Hiyya bar Abba said, "Let's examine the matter carefully."

T. *They then went and sent it to R. Hiyya bar Abba. He said, "What's all this communicating? If I had an answer, wouldn't I have sent it to you?"*

### III.3 A. *It has been stated:*

B. R. Kahana said R. Yohanan [said], "He does not have to pay him rent."

C. R. Abbahu said R. Yohanan [said], "He does have to pay him rent."

D. *Said R. Pappa, "The statement made by R. Abbahu was not explicitly stated by R. Yohanan but was derived by R. Abbahu on the basis of something that R. Yohanan did say. For we have learned in the Mishnah: [If] one took a stone or a beam from what is consecrated, lo, this one has not committed an act of sacrilege. [If] he gave it to his fellow, he has committed an act of sacrilege. But his fellow has not committed an act of sacrilege. If he built it into the structure of his house, lo, this one has not committed an act of sacrilege — until he actually will live under it [and enjoys its use] to the extent of a perutah's worth [M. Me. 5:4].* In that connection said Samuel, 'But that is so only if he left the stone or beam loose on the roof' [Kirzner: as otherwise the mere conversion involved would render him liable to the law of sacrilege]. *And in session before R. Yohanan, R. Abbahu cited this statement of Samuel to indicate that he who without the owner's knowledge or consent lives in the upper room of someone else does have to pay him rent. Now the other party remained silent, so he thought since he kept silent, he concurred. But that is not the case. [Yohanan] just didn't pay any attention to him, in line with what Rabbah had already stated, for said Rabbah, 'Consecrated property that is utilized without the knowledge and consent of the Temple steward is in the status of property of an*

ordinary person [21A] that is used with the knowledge and consent of the owner [and the two types of ownership are not equivalent].”

**III.4** A. *R. Abba bar Zabeda sent word to Mari bar Mar, “Ask R. Huna the following question: ‘He who without the owner’s knowledge or consent lives in the upper room of someone else — does he have to pay him rent or does he not have to pay him rent?’” In the interim, however, R. Huna died.*

B. *Said Rabbah bar R. Huna, “This is what my lord, my father, stated in the name of Rab: ‘He does not have to pay him rent. And he who rents an apartment from Reuben has to pay rent to Simeon.’”*

C. *What in the world is Simeon doing here?*

D. *This is the sense of the statement:* If it turns out to be a house belonging to Simeon, he has to pay rent to him.

E. *Two statements [and contradictory ones at that]!*

F. *The latter speaks of an apartment that was for rent, the former with one that was not for rent.*

G. *So, too, it has been stated:*

H. *Said R. Hiyya bar Abin said Rab, and some say, said R. Hiyya bar Abin said R. Huna, “He who without the owner’s knowledge or consent lives in the upper room of someone else does not have to pay him rent. And he who rents a house through the medium of the townsfolk nonetheless has to pay rent to the owner of the house.”*

I. *The owner of the house? What is he doing here?*

J. *This is the sense of the statement:* If the house turns out to belong to a particular owner, then the rent has to be paid to him.

K. *Well, then, how can you harmonize these obviously conflicting laws?*

L. *The latter speaks of an apartment that was for rent, the former with one that was not for rent.*

**III.5** A. *Said R. Sehorah said R. Huna said Rab, “He who without the owner’s knowledge or consent lives in the upper room of someone else*

does not have to pay him rent. The pertinent scriptural verse is this: 'Through emptiness even the gate gets smitten' (Isa. 24:12)."

- III.6** A. *Said Mar b. R. Ashi, "I myself have seen such a thing, and it was as though an ox had gored it."*  
B. *R. Joseph said, "A house is better off occupied."*  
C. *What's at issue between them?*  
D. *At issue between them is a house where the owner was using the space for storing wood and straw.*

- III.7** A. *There was a man who built a villa on ruins that belonged to an estate. R. Nahman confiscated the house [for the estate]. May we then say that R. Nahman takes the position, "He who without the owner's knowledge or consent lives in the upper room of someone else does have to pay him rent"?*  
B. *In that case to begin with people from Kerman had been living in the property and paying some small rent to the estate. He had ruled, "Go, make a settlement with the estate," but the builder paid no attention to him, so R. Nahman confiscated the house [for the estate].*

- IV.1** A. **How does he pay for the benefit of what [his ox] has enjoyed? [If] it ate something in the midst of the marketplace, he pays for the value of what it has enjoyed. [If it ate] from the sides of the marketplace, he pays for the value of the damage that [the ox] has caused. [If he ate] from [what is located at] the doorway of a store, the owner pays for the value of what it has enjoyed. [If it ate] from [what is located] inside the store, the owner pays for the value of the damages that it has caused:**
- B. **[If it ate from what is located inside the store, the owner pays for the value of the damages that it has caused:]** Said Rab, "That is so even if the animal had stood in the market but turned its head to the side and ate the food."
- C. Samuel said, "Even if the animal had stood in the market but turned its head to the side and ate the food, the owner is exempt."
- D. *Now in Samuel's view, then, how should we ever find a case in which the owner would be liable?*
- E. *It would involve a case in which, for instance, a case in which the animal had left the marketplace and walked right into the side areas of the marketplace.*
- F. *There are those who repeat this formulation on its own:*

G. If the animal had stood in the market but turned its head to the side and ate food —

H. Rab said, “The owner is liable.”

I. Samuel said, “The owner is exempt.”

J. *Now in Samuel’s view, then, how should we ever find a case in which the owner would be liable?*

K. *It would involve a case in which, for instance, a case in which the animal had left the marketplace and walked right into the side areas of the marketplace.*

L. *Objected R. Nahman bar Isaac, “[If he ate] from [what is located at] the doorway of a store, the owner pays for the value of what it has enjoyed — how should we find such a case? That would obviously be only in an incident in which the animal turned its head toward the entrance of the shop. And yet, it says, **The owner pays for the value of what it has enjoyed. Thus: what it has enjoyed is compensated, but the damage that it has done is not compensated!**”*

M. *He raised this objection but he himself settled it: “It would be in an incident in which the entrance of the store was at a corner.” [Kirzner: The animal had access to the food placed there without having to turn its head.]*

N. *There are those who say, “In the case in which the animal turned its head, there is no dispute at all. The owner of the beast is liable for the damage done. What is subject to dispute concerns a situation in which part of the location is in the domain of the injured party and part is in the public domain. And this is what is said:*

O. *“Rab said, ‘The rule applies to such a case in which there is liability for actual damages only where the animal turned its head. But if the injured party left part of his site on public domain unfenced and put food there, there would be no liability to pay for the loss [but only for what the beast benefited in being fed].’*

P. *“Samuel said, ‘Even if the injured party left part of his site on public domain unfenced and put food there, there would be liability to pay for the loss.’”*

**IV.2** A. *May we say that what is at issue between them is the case of a pit that is dug on the property of the defendant [Kirzner: and while abandoning the site, retains ownership of the pit]? Rab says that the owner of the cow is exempt for the loss of the produce holds that a pit dug on one’s own site is subject to the law of pit [Kirzner: so that fruits left on an unfenced site adjoining public*

ground constitute a nuisance that may be abated by all and everybody], *and Samuel, who holds the owner of the cow liable for the loss sustained by the owner of the produce*] takes the view that a pit dug on one's own site is never classified under the law of pit [the pit being on private property (Kirzner)].

- B. Rab may say to you, "In point of fact, I shall tell you, **[21B]** in general a pit that is in one's own domain is exempt from damages that may be caused by it under the law of pit. But here, the defendant may say, 'You don't have the right to spread out all your produce so near to the public domain as to get me involved in liability by my cow's eating them.'"
- C. And Samuel may say, "In general a pit that is in one's own domain is subject to the law of a pit, for in the case of damage done by a pit, the plaintiff can plead that the pit may have been completely unmarked. But in the case of fruit spread on private property, can one plead that the produce can have been overlooked? Obviously they were quite visible." [Kirzner: And since they were kept on private property they could not be considered a nuisance; the animal consuming them there has indeed committed trespass.]

**IV.3** A. May we say that the issue of the animal's turning its head to the sideways is subject to dispute in the following Tannaite formulation, as has been taught on Tannaite authority:

- B. "If a beast ate produce in the marketplace, the owner pays only to the extent of the benefit it has enjoyed; but if the produce was on the sides of the market, payment is assessed in terms of the actual damages done by the animal," the words of R. Meir and R. Judah.
- C. R. Yosé and R. Eleazar say, "It is not routine for the animal to eat, but only to walk there."
- D. Now does R. Yosé not go over the ground of the initial authority [Meir and Judah], unless in fact the animal had turned its head is at issue between them, in which case the initial authorities hold that, if the animal turned its head, the payment is still going to be the benefit it has enjoyed, and R. Yosé then would hold that the payment will be in accord with the damage done?
- E. No, not really. All parties concur, if the animal turned its head, whether with the position of Rab or the position of Samuel. But here what is at issue is the interpretation of the language, "...and it shall feed in another man's field" (Exo. 22: 4). [Meir and Judah] take the view that, "...and it shall feed in another man's field" (Exo. 22: 4) means to exclude liability for damage done in the public domain, while [Yosé and Eleazar] maintain that the phrase,

“...and it shall feed in another man’s field” (Exo. 22: 4), *serves only to exempt liability for produce in the defendant’s domain.*

- F. *In the defendant’s domain?! But he can well plead, “What right did your produce have to be on my ground”!*
- G. *Rather, at issue are the cases addressed by Ilfa [the animal stretched out its head and ate produce on the back of the animal of the injured party] and R. Oshaia [an animal jumped and ate produce kept in baskets].*

**I.1**, bearing its talmud at Nos. 2-4, begins with a familiar sort of Toseftan complement to the Mishnah. Nos. 5+6, 7 begins a set of secondary refinements of the law. **II.1** clarifies the language of the Mishnah. **III.1** explains a detail of the Mishnah’s rule. No. 2, continued at Nos. 3-6, calls upon our Mishnah’s rule to solve a problem of its own. **IV.1**, continued at Nos. 2-3, clarifies the circumstances in which the Mishnah’s rule pertains, succeeding in showing what is at stake in the rule.

## 2:3

- A. **The dog or the goat that jumped from the top of the roof and broke utensils —**
- B. **[the owner] pays the full value of the damage [they have caused],**
- C. **because they are attested dangers.**
- D. **The dog which took a cake [to which a cinder adhered] and went to standing grain, ate the cake, and set the stack on fire —**
- E. **for the cake the owner pays full damages,**
- F. **but for the standing grain he pays only for half of the damages [his dog has caused].**

**I.1** A. *The operative consideration is that they jumped off the roof, but if they had only fallen down and broken the utensils en route in their fall, they would be exempt. It must follow then that the authority at hand takes the view that if the beginning of an action that results in damage is by reason of negligence but the end is an accident, then the defendant does not have to pay damages.*

B. *So, too, it has been taught on Tannaite authority:*

C. *The dog or the goat which jumped from the top of the roof and broke utensils — [the owner] pays the full value of the damage [they have caused]. If the animal had merely fallen down and broken the utensils, the owner is exempt.*

D. *That poses no problem for him who maintains the view that if the beginning of an action that results in damage is by reason*

of negligence but the end is an accident, then the defendant does not have to pay damages. *But from the perspective of him who says, If the beginning of an action that results in damage is by reason of negligence but the end is an accident, then the defendant does have to pay damages, what is to be said?*

E. *The ruling speaks of a case in which utensils were set near the wall, so that if the animal had jumped, it would have missed them completely; in that case, even to begin with, there is no negligence to be taken into consideration.*

F. *Said R. Zebid in the name of Raba, "There would be a case in which even if the animal had fallen, the owner would be liable. For example, it would apply to the case of a dilapidated wall [in which case the defendant is negligent]."*

G. *What negligence [on the part of the goat owner] is involved here? We can't say that the goat owner should have kept in mind that the bricks might fall down and do damage, since not the bricks but the beast is what fell down, so why not invoke the law that applies to a case in which the beginning of an action that results in damage is by reason of negligence but the end is an accident?*

H. *Here the wall of the roof rail was very narrow [Kirzner: or sloping, so it was natural that the animal would not be able to stay there very long but would slide down and do damage].*

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

B. A dog or a goat that jumped — if it was from below to above, the owner is exempt. If it was from above to below, the owner is liable. [In the former case, this would be unusual, and the owner does not have to pay full damages, but only half-damages in the classification of horn (Kirzner).] In the case of men or chickens, whether they jumped from below to above or above to below, they are liable [since men and chickens jump a lot].

C. **[22A]** *But has it not been taught on Tannaite authority: A dog or a goat that jumped, whether from above to below or below to above are exempt?*

D. *R. Pappa explained this: "This speaks of cases where they did the opposite of what was natural, the dog leapt and the goat climbed."*

E. *So why the exemption? [Surely half-damages are still to be collected?]*

F. No, what it means is that they are exempt from having to pay full damages but still liable to pay half-damages.

**II.1 A. The dog that took a cake [to which a cinder adhered] and went to standing grain, ate the cake, and set the stack on fire — for the cake the owner pays full damages, but for the standing grain he pays only for half of the damages [his dog has caused]:**

B. *It has been stated:*

C. R. Yohanan said, “One is liable [in the case described by the Mishnah’s rule] for the damage done by fire one has set on account of one’s arrows [that is to say, the human agency that causes the fire].”

D. R. Simeon b. Laqish said, “One is responsible [in the case described by the Mishnah’s rule] for the fire on account of the damage that has been done by one’s property.”

E. *How come R. Simeon b. Laqish did not take the view of R. Yohanan?*

F. *R. Simeon b. Laqish will say to you, “Well, liability for fire on account of one’s arrows is because the arrows travel through the force of what the man has done, and that is not the case here.”*

G. *How come R. Yohanan did not take the view of R. Simeon b. Laqish?*

H. *R. Yohanan will say to you, “Well, there is substance to one’s property, but in this case, where’s the substance [Kirzner: tangible properties]?”*

I. *We have learned in the Mishnah: The dog that took a cake [to which a cinder adhered] and went to standing grain, ate the cake, and set the stack on fire — for the cake the owner pays full damages, but for the standing grain he pays only for half of the damages [his dog has caused]. Now from the perspective of him who says, “One is liable for the damage done by fire one has set on account of one’s arrows [that is to say, the human agency that causes the fire],” this poses no problem, for the dog functions as his arrow. But from the perspective of the one who said, “One is responsible for the fire on account of the damage that has been done by one’s property,” the fire here is not the property of the owner of the dog!*



- J. *R. Simeon b. Laqish may say to you, "Here with what situation do we deal? It is one in which the burning coal was thrown by the dog on the barn, so full damages must be paid for the cake, but only half for the damage done to the spot on which the coal was thrown; for the barn as a whole there is no compensation at all."*
- K. *And R. Yohanan?*
- L. *It is a case in which the dog actually put the coal on the barn. For the cake and the damage done to the spot on which the coal was placed, the owner pays full damages; for the barn, half-damages [since this is not a direct but only an indirect result].*
- M. *Come and take note: A camel that was carrying flax and passed by in the public way, and the flax it was carrying got poked into a store and caught fire from the lamp of the storekeeper and set fire to the building — the owner of the camel is liable. [If] the storekeeper had left his lamp outside, the storekeeper is liable. R. Judah says, "In the case of a candle lit for Hanukkah, the shopkeeper is exempt under all circumstances" [M. 6:6C-E]. Now from the perspective of him who says, "One is liable for the damage done by fire one has set on account of one's arrows [that is to say, the human agency that causes the fire]," this poses no problem, for the camel functions as his arrow. But from the perspective of the one who said, "One is responsible for the fire on account of the damage that has been done by means of one's property," the fire here is not the property of the owner of the camel!*
- N. *R. Simeon b. Laqish may say to you, "Here with what situation do we deal? It is one in which the camel passed across the front of the building and set the whole of it on fire." [The entire incident was the work of the camel; there is no issue of proprietorship of the fire.]*
- O. *If so, then look at what follows: [If] the storekeeper had left his lamp outside, the storekeeper is liable. But if the camel passed across the front of the building and set the whole of it on fire, why should he be liable?*
- P. *The camel stood all of a sudden.*
- Q. *If the camel stood all of a sudden, and set fire to the whole front of the building, all the more so should the shopkeeper not have to pay a penny and the owner have to pay the whole cost of the damages!*
- R. *Said R. Huna bar Manoah in the name of R. Iqa, "Here with what sort of a case do we deal? It is one in which the animal stopped to piss. [22B] In the first clause, the reason that the owner is liable is that he should not have*

*overloaded the animal [to such an extent that the flax would get into the shop]; in the concluding clause the shopkeeper is liable because the shopkeeper left the candle outside the shop."*

- S. **Come and take note: [If] a kid was tied up to [a barn], and a slave boy was nearby, and [they] got burned up along with [the barn], he is liable [for the kid]. [If] a slave boy was tied up to it, and a kid was near by, and [these] got burned along with it, he is exempt [for the slave boy] [M. 6:5D-E].** *Now from the perspective of him who says, "One is liable for the damage done by fire one has set on account of one's arrows [that is to say, the human agency that causes the fire]," this poses no problem; that is why he is exempt [Kirzner: since capital punishment is attached to that agency]. But from the perspective of him who says, "One is responsible for the fire on account of the damage that has been done by means of one's property," why should he be exempt? If his cattle had killed a slave, would he be exempt? [in line with Exo. 21:32, obviously not].*
- T. *R. Simeon b. Laqish will say to you, "Here with what sort of a case do we deal? With one in which the fire was actually kindled on the body of the slave [by the man's own action], in which case we impose upon the guilty party the more stringent of the two penalties."*
- U. *Then why bother to say such an obvious thing?*
- V. *It is necessary to set forth the law to deal with a case in which the goat belonged to one party, the slave to someone else. [Kirzner: No charge can be made for the goat, since the defendant has in the same act committed murder and is liable to the graver penalty.]*
- W. **Come and take note: He who causes a fire to break out through the action of a deaf-mute, idiot, or minor, is exempt from punishment under the laws of man, but liable to punishment under the laws of heaven [M. 6:4A].** *Now from the perspective of him who says, "One is liable for the damage done by fire one has set on account of one's arrows [that is to say, the human agency that causes the fire]," this poses no problem; that is why he is exempt, since the arrow [the fire] is assigned to the ownership of the deaf-mute, so the man is not liable. But from the perspective of him who says, "One is responsible for the fire on account of the damage that has been done by means of one's property," why should he be exempt? Had he given his ox to a deaf-mute, an idiot, or a minor, would he not have been liable?*

- X. *Lo, it has been stated in this regard:* said R. Simeon b. Laqish in the name of Hezekiah, “They have declared one is exempt from having to pay compensation only if he handed over to a deaf-mute, insane person, or minor, a coal, which he has then blown upon [making it a flame, which then kindled other things]. But if he handed over what was an already-glowing flame, there is full liability. *What is the operative consideration? It is that since the danger was clear and present.*”
- Y. And R. Yohanan said, “Even when a flaming fire has been handed over to him, one is still exempt.” *He takes the view that it is how the deaf-mute handles the fire that causes the damage. One would be liable only if he gave chopped woods, chips, and fire to him.*”

**II.2** A. *Said Raba, “Both Scripture and a Tannaite teaching sustain the position of R. Yohanan:*

B. “Scripture: ‘If fire break out’ (Exo. 22: 5), meaning, on its own; and yet, ‘he who kindled the fire shall surely make restitution.’ This means that the responsibility for the fire is because of one’s arrows [that is, human agency].

C. *“A Tannaite teaching, as has been taught on Tannaite authority: Scripture has opened [with discussion of] [23A] damages that are done by one’s property and concluded with damages that are done by one’s own person, so as to say to you, responsibility for the fire is because of one’s arrows [that is, human agency].”*

- II.3** A. *Said Raba, “Abbaye found a problem in the following: in the view of one who maintains that the responsibility for the fire is because of one’s arrows [that is, human agency], how would we ever come up with an example of a case for which the All-Merciful has granted an exemption involving damage done by fire to what is hidden? [If a human being did such damage, there would not be an exemption (Kirzner).]”*
- B. *But he solved the problem: “For example, a fire broke out in that courtyard, [and it would not have spread beyond a certain point, but] a fence fell down, not on account of the fire, and the fire then spread and did damage in another courtyard. In such a case the effect of the man’s arrow has come to an end [but the fire continued to do damage].”*
- C. *Well then, even with respect to hidden goods that are burned up, can’t we say that the effects of the man’s arrow have come to an end too? [Kirzner: And there should be exemption for damage done to all kinds of property.]*

- D. *It must follow that someone who holds that one is responsible for damage done by fire because it represents the man's own arrows has also to concede that the operative consideration in any event is that it is because it is his property. [Liability for hidden goods in the case of the fence that fell down, then] would be because the man should have built a fence up to stop the fire but he did not do so; this would then classify the fire as property that the owner had not guarded properly.*
- E. *Well, if in the end, someone who holds that one is responsible for damage done by fire because it represents the man's own arrows has also to concede that the operative consideration in any event is that it is because it is his property, what can possibly be at issue between the two masters who have debated that now-fruitless issue anyhow?*
- F. *At issue between them is whether damage done by fire is compensated also on four other counts [pain, healing, loss of time, and humiliation, which are compensation in the case of man but not property.] [Kirzner: Yohanan considers fire a human agency, so one is liable on the other counts; Simeon b. Laqish does not impose liability on those counts.]*

**III.1 A. For the cake the owner pays full damages, but for the standing grain he pays only for half of the damages [his dog has caused]:**

- B. *Who is liable for the damages to the barn?*
- C. *The owner of the dog.*
- D. *Well, why shouldn't the owner of the dog be liable?*
- E. *It is a case in which he did not take care of his dog.*
- F. *If he took care of the dog properly, how in the world did the dog get it?*
- G. *He broke in.*
- H. *Said R. Mari b. R. Kahana, "That is to say that doors under ordinary circumstances are accessible to a dog."*

**III.2 A. Where did the dog eat the cookie? If we say he ate it in someone else's barn, don't we require "and shall feed in the field of another" (Exo. 22: 4), [that other person being the plaintiff]? And that condition has not been met here!**

- B. *The rule is required to cover a case in which he ate the cookie in the barn of the one who owned the cookie.*
- C. *Then you may draw the conclusion that food carried in the mouth of the defendant's cow is equivalent to [23B] food kept in the courtyard of the plaintiff himself. [Kirzner: And liability for eating the*

food is not denied.] *For if it is equivalent to the courtyard of the defendant, why can't the defendant say to the plaintiff, "What in the world is your bread doing in my dog's mouth?"* [Kirzner: Why should I be liable for bread eaten in my premises?]

D. *For this question had been raised: "Is food carried in the mouth of a cow classified as though it were located in the courtyard of the injured party or as though it were located in the courtyard of the defendant in the case? And if you maintain that it is classified as though it were in the courtyard of the defendant to the case, then how in the world will you ever find an example in which one is liable for damages that fall in the classification of tooth, even though Scripture has imposed liability for such damages?"*

E. Said R. Mari b. R. Kahana, "It could be, for instance, a case in which the cattle scratched its back against a wall for the sheer pleasure of it, and pushed it down, or where it ruined produce by rolling over on it, for sheer pleasure."

F. *Objected Mar Zutra, "Then don't we require 'and shall feed in the field of another' (Exo. 22: 4), [that other person being the plaintiff]? And that condition has not been met here!"*

G. *Rabina said, "It is a case in which the cattle rubbed paintings off [the wall]."*

H. *R. Ashi said, "It is a case in which the cow trampled on produce"* [Kirzner: in which case there is total destruction of the corpus].

I. *Come and take note: If one sicked a dog at him or sicked a serpent against him, he is exempt [M. San. 9:1]. Who is exempt? The one who sicked the dog is exempt, but the owner of the dog is liable. And if you maintain that food carried in the mouth of the defendant's cow is equivalent to food kept in the courtyard of the defendant, why can't the defendant say to the plaintiff, "What in the world is your hand doing in my dog's mouth?" You have, therefore to conclude, there is exemption also for the one who sicked the dog.*

J. *Or, if you prefer: The damage was done by the dog when it bared its teeth and injured the plaintiff that way [but the plaintiff's hand was never in the dog's mouth].*

K. *Come and take note: If one sicked a dog at him or sicked a serpent against him, R. Judah declares him liable, and sages*

**declare him exempt [M. San. 9:1].** In this connection observed R. Aha bar Jacob, “When you look into the matter, you will find that, in R. Judah’s opinion [who holds one liable who makes a snake bite a man], the poison of a snake is between its teeth. Therefore the one who makes the snake bite a man is put to death through decapitation, while the snake itself is exempt. In the opinion of sages, the poison of the snake is vomited up out of its midst [on its own], and therefore the snake is put to death through stoning, and the one who made the snake bite the man is exempt.” [Freedman, *Sanhedrin*, p. 526, n. 8: On Judah’s view the fangs themselves are poisonous. Consequently the snake does nothing, the murder being committed by the person. But the sages maintain that even when its fangs are embedded in the flesh, they are not poisonous, unless it voluntarily emits poison. Consequently the murder is committed by the snake, not the man.] *Now, if you take the position that food carried in the mouth of the defendant’s cow is equivalent to food kept in the courtyard of the defendant, why can’t the defendant say to the plaintiff, “What is the world is your hand doing in my snake’s mouth?”*

L. *As to the death penalty for the snake, that is not the position we take.*

M. *On what basis?*

N. *It is in line with that which has been taught on Tannaite authority:*

O. He who enters someone else’s domain without permission and was gored by the householder’s cow and died, while the ox is put to death by stoning, the owner is exempt from having to pay a ransom. *How come the owner is exempt from having to pay a ransom? Isn’t it because he can say, “What were you doing on my property?” In the case of the ox can’t one say the same thing to the injured party: “What were you doing on my property?” It must follow that, in the case of killing dangerous beasts, we do not invoke that argument.*

**III.3** A. *The household of Tarbu had some goats that did damage to R. Joseph’s fields. He instructed Abbaye, “Go tell the owner to keep them in.”*

B. *He said to him, "Why should I go? If I do, they'll say to me, 'Let the master put up a fence on his own land.'"*

C. *Now if you have to put up a fence, then were are we ever going to find cases in which the All-Merciful is going to impose liability for damages in the classification of tooth?*

D. *When the cattle pulled down the fence and broke in, or when it collapsed at night.*

E. *R. Joseph proclaimed the rule, and some say it was Rabbah, "Those who go up to the Land of Israel and those who come down from there to Babylonia are to be informed, in the case of goats that are kept for market and in the interim do damage, the owners are to be warned two and three times. If they obey, well and good, but if not, we command them: 'Kill your beasts right away and sit at the butcher's stall to get whatever you can.'"*

**I.1** asks about the implications of our Mishnah's rule for an intersecting principle. **II.1+2-3** explains what principle stands behind the Mishnah's rule. This permits us to survey a variety of intersecting items. **III.1, 2-3** provide minor glosses to the rule of the Mishnah.

## 2:4

- A. What is [the definition of] a harmless [animal], and what is [the definition of] one which is an attested danger?
- B. "An attested danger is any one about which people have given testimony for three days.
- C. "And a harmless one is that which has refrained [from doing damage] on three days," the words of R. Judah.
- D. R. Meir says, "An attested danger is one against which people have given testimony for three times.
- E. "And a harmless one is any which children can touch without its goring them."

**I.1** A. ["An attested danger is any one about which people have given testimony for three days. And a harmless one is that which has refrained [from



**doing damage] on three days,” the words of R. Judah:] *What is the scriptural basis behind the position of R. Judah?***

- B. Said Abbaye, “Said Scripture, ‘Or if it be known from yesterday and the day before yesterday that he is a goring ox, and yet his owner does not keep him in’ (Exo. 21:36) — ‘...yesterday’ is one day; ‘from yesterday,’ two; ‘the day before yesterday,’ three; ‘and yet his owner does not keep him in’ — this speaks of the fourth goring [which is the first that is going to involve full damages, the animal now being deemed an attested danger].”
- C. Raba said, “‘Yesterday’ and ‘the day before yesterday’ are one day; ‘the day before yesterday’ are two; ‘and he does not keep him in,’ at which point [Kirkner: to prevent a third goring] he is liable to full damages.”
- D. *What is the scriptural basis behind the position of R. Meir?*
- E. *It is in line with that which has been taught on Tannaite authority:*
- F. Said R. Meir, **[24A]** “If there was a span of time between the gorings, the owner is liable, how much the more so if they are consecutive and simultaneous!” [So at issue is not the number of days at all.]
- G. They said to him, “The case of the woman afflicted with flux (Lev. 15) will prove to the contrary, for if the occasions on which a flux makes its appearance are spread over long intervals, that is, three days, she is entirely unclean, but if they come at short intervals, e.g., on the same day, she is not entirely unclean.”
- H. He said to them, “Lo, Scripture itself says, ‘And this shall be his uncleanness in his issue’ (Lev. 1: 3) — Scripture has made the matter depend in the case of the male afflicted with flux on the number of cases in which the flux makes its appearance, and in the female on the number of days in which the flux makes its appearance.”
  - I. *How so? Maybe the intent of “and this” is not to eliminate the female afflicted with flux from being affected by the number of times on which the flux makes its appearance but to eliminate the requirement of the male afflicted with flux from being affected by the number of days on which the flux makes its appearance?*
  - J. Scripture has said, “And of him who has an issue, of man and of woman” (Lev. 15:33). In this language Scripture treats as comparable the male and the female. Just as the uncleanness of the female depends on the number of days on which the flux makes its appearance, so the uncleanness of males depends on the number of days that the flux makes its appearance. And moreover, Scripture treats the female as



comparable to the male. Just as in the case of the male, the matter depends on the number of times that the flux makes its appearance, so in the case of the female the matter depends on the number of times the flux makes its appearance.

K. But through using the language, “and this,” Scripture has excluded that proposition.

L. *What makes you maintain that it eliminates the one and not the other?*

M. *When cases involving the appearance of flux are concerned, it has the effect of excluding them, when cases of appearance of flux are concerned, the consideration of the number of days should not be taken into account.*

## I.2

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

B. **“What is the definition of a beast that is an attested danger? It is any the owner of which has been warned on three days. And a beast deemed innocent? It is one between the horns of which children can play and he will not gore them,”** the words of R. Yosé.

C. R. Simeon says, **“One that is an attested danger is any against which testimony has been given three times. The language ‘three days’ was used only in connection with having the beast return to the status of one deemed harmless”** [cf. T. B.Q. 2:2].

## I.3

A. Said R. Adda bar Ahba, “The decided law conforms to the position of R. Judah in the case of the ox declared an attested danger, for lo, R. Yosé concurs with him, and the decided law is in accord with R. Meir in the matter of the ox deemed harmless, for lo, R. Yosé concurs with him.”

B. *Said Raba to R. Nahman, “Why should the master not simply say, the decided law accords with R. Meir in the matter of the ox declared in attested danger, since, lo, R. Simeon concurs with him, and the decided law conforms to the view of R. Judah in the case of the animal held to be harmless, for lo, R. Simeon agrees with him?”*

C. *He said to him, “Well, as a matter of fact, I take the position of R. Yosé, for R. Yosé’s opinion is accompanied by solid argumentation.”*

- I.4** A. *The question was raised, “When we speak of three days, does this pertain to the goring of cattle, so that if the ox gores more than one cow on one day, it still counts as one, or is the reference to the owner, who has to be warned on three different days [regarding three acts of goring committed by his ox, even though all were on one day (Kirzner)]?”*
- B. *So what difference does it make?*
- C. *If three sets of witnesses testify on a single day [Kirzner: and testify to three cases of goring that occurred previously on three different days], then, if you take the view that the warnings pertain to the ox, then there has been a valid admonition. But if you say that the warnings pertain to the man, then there has not been a valid admonition. The owner may well respond, after all, “This is the first time that you have given me warning.” So what is the rule?*
- D. *Come and take note: An ox is not declared an attested danger unless the witnesses give testimony against him before the owner and before the court. If they gave their testimony against the ox before the court but not before the owner, or before the owner but not before the court, the ox is not declared an attested danger. That can only be if the testimony is given against the ox both before the court and before the owner. If testimony was given against it by two on the first day, two on the second, and two on the third, lo, there are in hand three acts of testimony, which form a single act of testimony for the purposes of declaring the witnesses a conspiracy [should that be the fact]. If, therefore, the first of the three pairs of witnesses is found to form a conspiracy, lo, only two acts of testimony that are valid remain, with the result that the ox is exempt from the status of an attested danger, and the witnesses are exempt from penalty. If the second group is likewise found to be a conspiracy, lo, only a single act of testimony is in hand [of the required three], with the result that the ox is exempt from the defined status and they are exempt from penalty. If the third of the three sets is found a conspiracy, then all three sets of witnesses are liable to the penalty, and in this case Scripture declares, “Then you shall to do him as he had thought to have done to his brother” (Deu. 19:19). Now, if you take the view that the testimony concerns the ox, there is no problem here. [24B] But if you maintain that the three days concern the master, then the first set surely should be able to enter the claim, “So how could we have known that three days afterward, another set would come and give testimony against him?”*

E. *Said R. Ashi, "I stated this report before R. Kahana, and he said to me, 'And even if you take the view that the testimony concerns the ox, is there no problem? Why can't the final set claim, "How in the world are we to have known that all those who came to court came and testified against the same ox? We had the intention of imposing on the owner only half-damages?"'"*

F. *Well, maybe we have a case in which with a case in which the witnesses made surreptitious gestures to one another [Kirzner: thus conspiring to act concurrently]?*

G. *R. Ashi said, "Maybe it's a case in which the sets of witnesses appeared in close order?"*

H. *Rabina said, "Maybe it's a case in which the witnesses know the owner but not the ox?" [Kirzner: In such a case the sole intention of all the sets of witnesses was to have the beast declared an attested danger, but not to make the owner pay half-damages.]*

I. *Well, in that case, how could such testimony impart the status of an attested danger to the ox?*

J. *What they would have said is, "In your herd you have a goring ox, so you should undertake responsibility to control the entire herd."*

- I.5** A. *The question was raised: He who sicked the dog of a second party on a third party — what is the law? Obviously, the one who has sicked the dog is exempt from having to pay damages, but what is the status of the owner of the dog? Do we say he can say to him, "What in the world did I do to the victim?" Or perhaps we say to him, "Since you knew that your dog could be sicked and do injury, should should not have let it be"?*
- B. *Said R. Zira, "Come and take note: **And a harmless one is any which children can touch without its goring them.** Lo, if the ox had gored [having been incited by the children], the owner is going to be liable."*
- C. *Said Abbaye, "Well, is the language used, if the beast gored, the owner is liable? Maybe the meaning is, if it gored, it will not be assumed harmless anymore, though in respect to that particular act of goring, the owner will also not be liable?"*
- D. *Come and take note: **If one sicked a dog at him or sicked a serpent against him, he is exempt [M. San. 9:1].** Does this not mean that the one who sicked the dog or snake is exempt, but the owner is liable?*
- E. *Read it as: The one who sicked also is exempt.*

- I.6** A. *Said Raba, “If you should reach the conclusion that he who sickens the dog of a second party on a third party is exempt from having to pay damages, if one sickened the dog against himself, the owner is liable. How come? Whoever himself diverges from the usual practice, and then someone else diverges as well from the usual practice, the latter party is exempt.”*
- B. *Said R. Pappa to Raba, “This position has been set forth in accord with your view in the name of R. Simeon b. Laqish, for 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.’”*
- C. *He said to him, “In a case such as that, involving two cows, I would always impose liability, for [Kirzner: in behalf of the plaintiff] we may argue: ‘Your cow may be entitled to tread on my cow but has no right to kick it.’”*

**I.1** provides a scriptural basis for the Mishnah’s rule. No. 2 complements the Mishnah with a Tannaite formulation, which carries its own talmud at No. 3. As is often the case, there follow secondary questions of refinement and expansion, at Nos. 4-6.

## 2:5

- A. An ox which causes damage in the domain of the one who is injured [M. 1:4F] — how so?
- B. [If] it gored, pushed, bit, lay down, or kicked [M. 1:4B],
- C. in the public domain,
- D. [the owner] pays half of the value of the damages [the ox has caused].
- E. [If it did so] in the domain of the injured party,
- F. R. Tarfon says, “[The owner pays] the full value [of the damages the ox has caused].”
- G. And sages say, “Half of the value.”
- H. Said to them R. Tarfon, “Now in a case in which [the law] deals leniently, namely, with damage caused by tooth or foot in the public domain, in which case [the owner] is exempt [M. 2:2F], [the law nonetheless] has dealt strictly with them in the domain of the injured party, so that [the owner] has to pay the full value of the damages [caused by his ox] [M. 2:2E];

- I. “in a place in which, to begin with, the law has dealt strictly, namely, in the case of damage done by the horn [goring] in the public domain, so that [the owner] has to pay half-damages, is it not logical that we should now impose a strict rule on that same matter when the damage takes place in the domain of the injured party, so that he should have to pay full damages?”
- J. They said to him, “It is sufficient for the inferred law to be as strict as that from which it is inferred.
- K. “Now just as when the damage done by the horn takes place in the public domain, the owner pays half-damages, so [if it takes place] in the domain of the injured party, the owner pays half-damages.”
- L. He said to them, “I shall not derive [25A] the law for the damage caused by the horn [by analogy to] another case of damages caused by the horn. I shall derive the law covering damage caused by the horn from the law of damage caused by the foot.
- M. “Now if in a situation in which [the law] ruled leniently, namely, in respect to the damage caused by tooth and foot in the public domain, the law has nonetheless imposed a stringent rule in the case of damage caused by the horn;
- N. “in a situation in which the law has imposed a stringent rule, namely, in the case of damage caused by the tooth and the foot, when the injury takes place in the domain of the injured party, is it not reasonable that we should impose a strict rule in the case of damage caused by the horn?”
- O. They said to him, “It is sufficient for the inferred law to be as strict as that from which it is inferred.
- P. “Just as when the damage takes place in the public domain, the owner pays half-damages, so when the damage takes place in the domain of the injured party, the owner pays half-damages.”

- I.1** A. *But is it possible that R. Tarfon declines to recognize the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred? But lo, the principle that is sufficient for the inferred law to be as strict as that from which it is inferred derives from the Torah! For it has been taught on Tannaite authority:*
- B. What case in Scripture illustrates the validity of the argument a fortiori? “And the Lord said to Moses, ‘If her father had only spit in her face, should she not hide in shame seven days?’ (Num. 12:14). How much more should a divine

reproof deriving from the Omnipresent impose shame for fourteen days — but it suffices for what is inferred by an argument to conform to the traits of the premise of that same argument! [Freedman: Since you argue from her father's reproof, even a divine reproof does not necessitate a longer period of shame. Scripture proceeds, 'Let her be shut up without the camp for seven days,' so the principle of sufficiency is scriptural.]”

- C. *Where R. Tarfon rejects the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred, that is in a case in which an argument a fortiori would thereby be annulled; but where the argument a fortiori would not thereby be annulled, he accepts the principle that it is sufficient for the inferred law to be as strict as that from which it is inferred. In that case in the case of reproof by the Presence of God, there is no explicit reference to seven days; but by the argument a fortiori, a spell of fourteen days of reproof may be derived. But then the principle of sufficiency is invoked, so as to exclude the additional seven days. That leaves the seven days to which Miriam was subjected to divine reproof. In the present case, by contrast, Scripture itself is what specifies the payment of half-damages, and the power of the argument a fortiori is to introduce the payment of the other half of the same damages, so that full damages are required as compensation. If, however, you invoke the argument of sufficiency, you then nullify the sole purpose of the argument a fortiori.*
- D. *And rabbis?*
- E. *In the case of the reproof set forth in Scripture in behalf of God's presence, the minimum of seven days is defined in the phrase, "Let her be shut out of the camp for seven days" (Num. 12:14).*
- F. *And R. Tarfon?*
- G. *The ruling "And let her be shut" itself derives from the principle of sufficiency [Kirzner: decreasing the number of days to seven].*
- H. *And rabbis?*
- I. *Another verse is stated, "And Miriam was shut out of the camp" (Num. 12:15).*
- J. *And R. Tarfon?*
- K. *That is to indicate that even in general the principle of sufficiency pertains, so that you would not limit that principle only to a case in which the honor owing to Moses was involved, so that one might have supposed that that principle of*

*sufficiency does not pertain in general; so we are informed that that is not the case.*

**I.2** A. *Said R. Pappa to Abbaye, “But lo, here in what follows we have a Tannaite authority who does not invoke the principle of sufficiency, and that is the case even though it is a case in which an argument a fortiori would thereby be annulled, for it has been taught on Tannaite authority:*

B. *“How on the basis of Scripture do we know that a seminal emission produced by a man suffering flux uncleanness [in Lev. 15] is a source of uncleanness [to the purpose who touches or carries it]?”*

C. *“It is a matter of logic, namely: if a discharge that is clean in the case of a clean person [e.g., saliva] is unclean in the case of a person afflicted with flux, then a discharge that is unclean in the case of a clean person [seminal emission of a cultically clean man makes the man unclean] surely should be unclean in the case of a person afflicted with flux!”*

D. *“Now this proof serves with respect to both touching and carrying the substance. But why should that be the case? Why not say that while the argument a fortiori is effective for the matter of touching the substance, we may invoke the principle of sufficiency to exclude the matter of merely carrying the substance from being a source of uncleanness? [That is, the argument a fortiori serves to prove only that if one touches the substance it is a source of uncleanness, but not if one carries it without touching it.] And if you should maintain that there is no need to invoke an argument a fortiori with respect to the category of touching the substance, since the person afflicted with flux uncleanness certainly should not be less unclean than a clean person [whose semen causes uncleanness to someone who touches it], it is still necessary to produce an argument a fortiori. For I might argue as follows: ‘By reason of uncleanness that takes place by night’ (Deu. 23;11) is written with reference to someone whose seminal emission is what causes him to be unclean, excluding the person afflicted with flux uncleanness, who has been made unclean not alone by his seminal emission but by another source of uncleanness. So, in the end, may not the argument a fortiori serve to inform us that the person afflicted with flux is not excluded?” [Kirkner: And since the a*

fortiori would still serve a useful purpose regarding defilement by touching, why should not the principle of sufficiency be employed to exclude defilement by mere carrying? Hence this Tannaite authority does not resort to the principle of sufficiency even where the employment thereof would not render the a fortiori ineffective].

E. [Kirzner translates:] But where in the verse is it stated that the uncleanness must not have resulted also from any other cause? [Kirzner: The law applicable to semen to cause defilement by touching is thus per se common to all kinds of persons; the inference by means of the a fortiori would therefore indeed be rendered useless if the principle of sufficiency, excluding as a result defilement by carrying, were admitted.]

**I.3** A. *And who is the Tannaite authority who would take the view that the semen of a person afflicted by flux uncleanness causes uncleanness merely by carrying? It is neither R. Eliezer nor R. Joshua, for we have learned on Tannaite authority: "The semen of a man afflicted with flux uncleanness imparts uncleanness if it is touched, but it does not impart uncleanness if it is merely carried [but not touched],"* the words of R. Eliezer.

B. R. Joshua says, "It also imparts uncleanness if it is carried, since it is not possible for it not to contain particles of flux uncleanness [that have adhered to the otherwise healthy semen]."

C. *Now R. Joshua takes the position that he does only because it is not possible for it not to contain particles of flux uncleanness [that have adhered to the otherwise healthy semen]. But if it were not for that consideration, it would not be a source of uncleanness.*

D. *The Tannaite authority who would take the view that the semen of a person afflicted by flux uncleanness causes uncleanness merely by carrying is the one responsible for that which we have learned in the Mishnah as follows: [Above them: (8) he who has intercourse with a menstruating woman, for he conveys uncleanness to what lies [far] beneath him [in like degree as he conveys uncleanness to what lies] above.] Above them: [25B] (9) the flux of the*



**Zab, and (10) his spittle and (11) his semen and (12) his urine, and (13) the blood of the menstruating woman, for they render unclean through contact and carrying [M. Kel. 1:3].**

E. *Maybe here, too, the operative consideration is that it is not possible for it not to contain particles of flux uncleanness [that have adhered to the otherwise healthy semen]. But if it were not for that consideration, it would not be a source of uncleanness?*

F. *If that were the case, then the framer of the passage should have repeated the category of semen alongside with flux. Why place it in relationship to saliva, if it were not for the fact that the reason that it is a source of uncleanness derives from the analogy to the saliva [and it is therefore subject to the rule governing saliva]. [Kirzner: It is thus proved that semen of a person afflicted with flux causes defilement by carrying on its own account, not on account of the particles of flux that it is supposed to contain.]*

- I.4** A. *Said R. Aha of Difti to Rabina, “Lo, the following Tannaite authority does not invoke the principle of sufficiency even when the upshot of the argument a fortiori would not be nullified thereby. For it has been taught on Tannaite authority:*
- B. *“How that we know that mats are unclean by reason of overshadowing in a tent in which a corpse is located [Kirzner: even though they are not included among the articles referred to in Num. 31:20]?*
- C. *“It is a matter of logic: if little clay jugs, which are not made unclean if a person afflicted by flux touches them, are made unclean in the tent of a corpse, a mat, which is made unclean by the touch of a person afflicted by flux, surely should contract uncleanness in a tent of a corpse!*
- D. *“Now that demonstration pertains to uncleanness not only for a single day until sunset [as at Lev. 15:5-11] but also to the uncleanness for seven days that a corpse causes. But why should this be the case? Why not say that the argument a fortiori serves to impose uncleanness*

*only until evening on that same day, but the argument of sufficiency serves to exclude the consideration of uncleanness for seven days?”*

E. *He said to him, “R. Nahman bar Zechariah already raised that problem to Abbayye, and Abbayye said to him, ‘The Tannaite authority invoked the argument a fortiori to prove in the case of mats that they contract uncleanness from a dead creeping thing [Kirzner: as mats are not included among articles referred to in Lev. 11:32], and this is how the passage should read:*

F. *““How that we know that mats are unclean by reason of a dead creeping things?*

G. *““It is a matter of logic: if little clay jugs, which are not made unclean if a person afflicted by flux touches them, are made unclean a dead creeping thing, a mat, which is made unclean by the touch of a person afflicted by flux, surely should contract uncleanness from a dead creeping thing!””*

H. *Then what is the source of the rule that mats are made unclean when located in the tent of a corpse?*

I. *It is stated, “raiment or skin” in the context of dead creeping things (Lev. 11:32) and the same words occur in the case of the tent of a corpse (Num. 31:20). Just as in the case of raiment or skin stated in the context of dead creeping things, [as we have now proven] mats are subject to uncleanness, so when we find “raiment...or skin” in connection with a corpse, mats are covered by the uncleanness.*

J. *And, as a matter of fact, the words used for establishing this analogy based on verbal correspondence should be available for this particular purpose and no other, for if these words were not available, one could challenge the analogy in this way: If when dead creeping things cause uncleanness to mats, the minimum volume of the source of uncleanness must be the size of a lentil, what basis is there for an analogy to corpses, where the minimum volume to convey uncleanness is not the amount of a lentil but the volume of an olive? It follows that the words used for establishing this analogy based on verbal correspondence should be available for this particular purpose and no other, for if these words were not available, one could challenge the analogy.*

K. *Well, since the law regarding dead creeping things is treated in the context of the unclean of semen, “Or a man whose seed goes forth from him” (Lev. 22: 4) in the setting of, “Or whoever touches any creeping thing.” In the case of semen it is stated, “And even garment and every skin on which is the seed of copulation” (Lev. 15:17). Why did Scripture have to mention “raiment or skin” in the case of dead creeping things? It has to be included that it was stated only to make these words available and free for the defined purpose.*

L. *And still — thus far what we have in hand is a phrase left open for establishing a verbal analogy only in one aspect. And that would pose no problem from the perspective of him who says that when there is a formula that is available for purposes of establishing a verbal analogy in only one of its texts, we may then draw an inference therefrom, and there is no possibility of refutation. But if you maintain the view that though in that case one may draw an inference, still, in such an instance one may propose a refutation, then on what basis is there an analogy between the uncleanness of dead creeping things and that of corpses?*

M. *Well, the point of verbal intersection in the text that address the matter of corpse uncleanness also is left available for its present purpose. For the law on corpse uncleanness, too, is placed in juxtaposition with the uncleanness of semen: “And whoever touches any thing that is unclean by the dead man or one whose seed goes forth” (Lev. 22: 4). In the case of semen it is stated, “And every garment and every skin on which is the seed of copulation.” So why again mention “raiment...skin...” in the context of corpse uncleanness [at Num. 31:20]? It was so stated to make the phrase available for the stated exegetical purpose. And, it follows the words that are required to establish the verbal analogy are available in both texts.*

N. *Well, all that works quite nicely, to be sure, from the perspective of him who maintains that when we draw an inference on the basis of analogy, the subject of the inference [Kirzner translates:] is placed back on its own basis [Kirzner: being subject to specific laws applicable to its own category; so here mats in the tent of a corpse, though derived by analogy from reptiles, are subject to the laws of defilement by corpses, a defilement of seven days]. But from the perspective of him who says that, when an inference is drawn by such an analogy, the*

*subject of the inference [Kirzner translates:] must be on a par with the other in all aspects, how can you establish the law that mats kept in the tent of a corpse become uncleanness for seven days, since you infer it from dead reptiles, where the uncleanness is only for one day]?*

O. Said Raba, “Said Scripture, ‘And you shall wash your clothes on the seventh day’ (Num. 31:24) — all uncleanness contracted from a corpse must last for seven days.”

- I.5**
- A. Why not have tooth and foot be liable for damage done in public domain on the basis of the following argument a fortiori:
  - B. If when damage is done by the horn in the domain of the injured party, the owner of the beast pays only half-damage, but if the damage is done in public domain, one is liable nonetheless, then, in the case of tooth or foot, where, if damage is done in the domain of the injured party, one pays full damages, surely one should bear liability if the damage is done in public domain!
  - C. Scripture states, “And it shall feed in another man’s field” (Exo. 22: 4) — and not in public domain.
  - D. **[26A]** *So have we ever spoken of full payment? It was only half-payment for which we argued* [Kirzner: on the analogy to horn, where the liability is only for half-damages in the case of a beast deemed harmless; the scriptural text may have been intended to exclude only full compensation].
  - E. Scripture said, “And they shall divide the money of it” (Exo. 21:35) — the money of it, meaning, the ox that has gored, but this does not include compensation for damage caused by another ox.
  - F. Well, then, on the strength of the following argument a fortiori drawn from the case of the horn, let the damages in the classification of tooth and foot not be liable for compensation to more than half-damages when the injury takes place in the domain of the injured party:
  - G. If for damage done in the category of horn that takes place in public domain, one is liable, and yet, if the damage was done in the domain of the injured party, one pays only half-damage, then, in the case of tooth and foot, where one is exempt from having to pay damages when the injury takes place in public domain, the liability regarding damage done on the premises of the injured party should be kept to half-damages!
  - H. Scripture states, “He shall make restitution” (Exo. 22: 4) — in full.
  - I. Well, why not then say that damage done in the public domain that falls into the classification of horn should not be liable at all, on the strength of the

following argument a fortiori: if in the case of damages in the classification of tooth or foot, which, if it takes place in the domain of the injured party, must be paid in full, but if done in public domain, does not involve compensation at all, while damages in the classification of horn done in the domain of the injured party have to be compensation only in half, then is it not reasonable to suppose that if the damage is done in the public domain, one should be entirely exempt from having to pay compensation?

- J. Said R. Yohanan, “Scripture said, ‘And they shall divide the money of it’ (Exo. 21:35) — in regard to half-damages, there is no distinction to be drawn between public and private domain.”
- K. And why not take the view in the case of man that ransom for manslaughter should be paid, on the basis of the following argument a fortiori:
- L. if an ox, the owner of which is not liable to pay damages on four counts [pain, medical expenses, loss of work time, humiliation, in addition to depreciation of value], imposes upon its own liability for ransom should it kill a man, then a man, who is liable on four counts, surely should be liable to pay a ransom.
- M. Scripture to the contrary states, “Whatsoever is laid upon him” (Exo. 21:30), and the language, “upon him [the owner of the ox]” excludes “upon man [in other circumstances, who then does not have to pay ransom].”
- N. And why not take the view that for damages done by the ox, there should be liable for the additional four items, on the basis of the argument a fortiori as follows:
- O. if a man, who is not liable to pay a ransom [in the case of manslaughter] is liable to pay on the four counts, an ox, who is liable to pay a ransom, surely should be liable on the four counts!
- P. Scripture has said, “If a man cause a blemish in his neighbor” (Exo. 21:30) — excluding an ox who injures a neighbor of its owner.

- I.6** A. *The question was raised: “In the case of damages done in the classification of foot, when an ox stepped on a child in the courtyard of the injured party, what is the law as to payment of the ransom by the ox’s owner? Do we say that the case is comparable to damages classified under horn, since just as with horn, if the animal should commit manslaughter two or three times, it becomes the animal’s normal way so the owner must pay ransom, and here, too, there is no difference? Or perhaps in the case of damages in the category of horn, the intent of the beast is to do damage, while here it is not the intent of the beast to do damage?”*

- B. *Come and take note: "If one brought his ox into the courtyard of a household without permission, and the ox gored the householder, who died — the ox is put to death through stoning, and its owner, whether the beast was deemed harmless or an attested danger, pays a complete ransom," the words of R. Tarfon. Now how does R. Tarfon know that the beast that was deemed innocent nonetheless pays the entirety of the sum required for a ransom [and not half-damages]? Is it not because he concurs with the view of R. Yosé the Galilean, who takes the view that the owner of the beast deemed harmless does pay half-liability as a ransom? And he derives that position on the basis of an argument a fortiori from the case of foot. Therefore, he takes the view, a ransom is exacted in the case of damages done in the category of foot [as in the case before us].*
- C. *Said R. Shimi of Nehardea, "The Tannaite authority at hand [Tarfon] can have derived the rule from the law pertaining to damage done by foot."* [Kirzner: And not from the law applicable to manslaughter committed by foot, in which case there may be no ransom at all; thus, if in the case of foot, which involves no liability for damage on public ground, there is liability to pay in full in the plaintiff's premises, does it not follow that, in the case of horn, involving as it does payment of half-ransom on public ground, there should be payment of full ransom in plaintiff's premises?]
- D. *Then overturn that argument on the following basis: The distinguishing trait involving damage in the classification of foot is that liability is common also with fire [where ransom is not a penalty].*
- E. *But it might be damage done to what is hidden away [and here there is liability for foot but not for fire].*
- F. *The distinguishing trait of damage done to hidden goods is that it is comparable to pit [and there is no ransom in the case of damages in the classification of pit].*
- G. *One might have drawn an inference from damage done to utensils [inanimate objects, for which there is no liability in the case of pit].*
- H. *But there really is no analogy to inanimate objects, which are liability in the way in which fire is.*
- I. *The inference is then to be drawn from the case of damage done to inanimate objects that were hidden [Kirzner: for which neither fire nor pit involve liability].*

- J. *But what liability is involved there, since liability for inanimate objects is common with man [while ransom does not pertain to man who commits manslaughter]?*
- K. *So does it not follow that the Tannaite authority must have drawn his inference from the case of paying ransom for manslaughter in the case of foot, yielding the conclusion that ransom has to be paid for manslaughter committed by foot?*
- L. *Yup.*

**I.7** A. *Said R. Aha of Difti to Rabina, "It really does stand to reason that ransom is required in the case of manslaughter committed in the category of foot, for if you should image that ransom is not required in the case of manslaughter committed in the category of foot, and the Tannaite authority has derived his ruling from the law pertaining merely to damage done in the category of foot, it would have been pretty easy to refute his argument. For what analogy is to be drawn to damage in the category of foot for which there is liability in the case of foot, while that is not the case with ransom? Doesn't this on its own show that he can have drawn his inference only from ransom in the case of foot, and that would prove that ransom has to be paid for manslaughter committed by foot?"*

B. *Yup.*

**I.1** takes up the analysis of the Mishnah paragraph. Nos. 2-4 then carry forward in other terms the issue introduced in No. 1. No. 5 then reopens the logical argument of the Mishnah and examines a variety of further, possible propositions. Nos. 6-7 then asks a theoretical question that flows from the foregoing.

## 2:6

- A. **Man is perpetually an attested danger —**
- B. **whether [what is done is done] inadvertently or deliberately,**
- C. **whether man is awake or asleep.**
- D. **[If] he blinded the eye of his fellow or broke his utensils, he pays the full value of the damage he has caused.**

**I.1** A. *The Tannaite formulation treats the clauses, **[If] he blinded the eye of his fellow, and, or broke his utensils**, as comparable, so that, just as in the latter case, there is payment of compensation for damage but not for the other four*

*counts, so if he blinded his fellow's eye, he pays compensation for damage but not for the other four counts.*

- I.2** A. **[Man is perpetually an attested danger...he pays the full value of the damage he has caused:]** *What is the scriptural basis for this ruling?*
- B. Said Hezekiah, and so, too, it was presented as a Tannaite formulation of the household of Hezekiah, “Said Scripture, ‘Wound in place of wound’ (Exo. 21:25) — this serves to impose liability for actions done inadvertently as much as for those done intentionally, for those done under constraint as for those done willingly.” [Liability is the same under all circumstances when man is involved.]
- C. *But are the cited words not required to make the point that one pays compensation for pain even where depreciation has been paid?*
- D. *If that were the point that Scripture wanted to make, Scripture could as well have said, “wound for wound.” Why: “wound in place of wound”? It is to yield two points.*

- I.3** A. Said Rabbah, “If there was a stone lying in someone’s bosom and he did not know about it, and when he got up, it fell down — as to the matter of paying damages, he is liable; as to the matter of paying the other four counts, he is exempt; as to the Sabbath, it is work done intentionally that the Torah has prohibited [so he is not liable]; as to manslaughter, he is exempt from having to flee to a city of refuge; as to the matter of the release of a slave [if the stone put out its eye or tooth, Exo. 21:26-27], there is a dispute between Rabban Simeon b. Gamaliel and rabbis.”
- B. *And that dispute has been taught on Tannaite authority as follows:* If the master of the slave was a physician, and the slave said to him, ‘But blue on my eye,’ and the physician blinded him, or ‘scrape my tooth,’ and he knocked it out by accident, the slave may now laugh at the master and walk off into freedom. Rabban Simeon b. Gamaliel says, “‘...and he destroy it’ (Exo. 21:26) — the slave goes forth to freedom only if the master deliberately intends to destroy it.”
- C. [Continuing Rabbah’s statement:] “But if the man did know that the stone was there, and then he forgot about it, but when he got up, the stone fell down — as to the matter of paying damages, he is liable; as to the matter of paying the other four counts, he is exempt; as to manslaughter, he is liable to having to flee to a city of refuge, for Scripture has said, ‘at unawares’ (Num. 35:11), meaning, some prior knowledge, and here there was some prior knowledge; as



to the Sabbath, he is not liable; as to the matter of the release of a slave [if the stone put out its eye or tooth, Exo. 21:26-27], *the dispute between Rabban Simeon b. Gamaliel and rabbis still applies.*

- D. “If the man intended to throw the stone two cubits and it fell four cubits away, as to the matter of paying damages, he is liable; as to the matter of paying the other four counts, he is exempt; as to the Sabbath, he is not liable, since we require work that is done deliberately, and that is not the case here; as to manslaughter, Scripture has said, ‘And if a man not lie in wait’ (Exo. 21:13), thus excluding this case, where the man intended to throw a stone two cubits but it went four; as to the matter of the release of a slave [if the stone put out its eye or tooth, Exo. 21:26-27], *the dispute between Rabban Simeon b. Gamaliel and rabbis still applies.*
- E. “If the man intended to throw the stone four cubits and it fell eight cubits away, as to the matter of paying damages, he is liable; as to the matter of paying the other four counts, he is exempt; as to the Sabbath, if the man had said that the stone should fall anywhere, he is liable, but if he did not make such a statement, he is exempt; as to manslaughter, Scripture has said, ‘And if a man not lie in wait’ (Exo. 21:13), thus excluding this case, where the man intended to throw a stone four cubits but it went eight; as to the matter of the release of a slave [if the stone put out its eye or tooth, Exo. 21:26-27], *the dispute between Rabban Simeon b. Gamaliel and rabbis still applies.*”
- F. And said Rabbah, “If someone threw a utensil from the roof, and someone else came along and while it was coming down, batted it with a stick and broke it, the latter is exempt from having to pay.” *What is the operative consideration? The man broke a broken pot?* [Kirzner: Is not this the best proof that it is the cause of the damage that is the determining factor; the latter party is not obligated to compensate, but the whole liability to pay is upon the one who threw the utensil from the top of the roof.]
- G. And said Rabbah, “If someone threw a utensil from the roof, and underneath were pillows or cushions, which someone else in the interim removed, or even if the one who threw the object removed them, he is exempt.” *What is the operative consideration? At the time the man threw the utensil, all he was doing was sending off his arrows.* [Kirzner: His agency had been void of any harmful effect; the arrow had spent its force, when the act of throwing took place it was not calculated to do any damage.]

H. And said Rabbah, “If someone threw a child from the roof, and someone else came along and caught it on a sword [and killed it], *there is a dispute between R. Judah b. Betera and rabbis. For it has been taught on Tannaite authority:* If ten people hit someone with ten sticks, whether simultaneously or sequentially, and the man died, all of them are exempt. [27A] R. Judah b. Betera says, ‘If they did it sequentially, then the last one is liable, since he [Kirzner translates:] was the immediate cause of the death.’

I. “If an ox came along and caught the child on its horns, *we deal with the dispute of R. Ishmael b. Yohanan b. Beroqa and rabbis, for it has been taught on Tannaite authority:* ‘Then he shall give for the redemption of his life whatever is laid upon him’ (Exo. 21:30) — compensation for the life of the one who has been injured. R. Ishmael son of R. Yohanan b. Beroqa says, ‘It is compensation for the life of the one who did the injury.’”

J. And said Rabbah, “If someone fell from the roof and hit a woman, he is liable on four counts; if it was his deceased childless brother’s widow [and in falling, he had sexual relations with her], he has not acquired her as his levirate wife; he is liable for the compensation to injury done her, pain, medical expenses, and time lost from work, but not for humiliation, for we have learned in the Mishnah: **One is liable on the count of indignity only if he intended [to inflict indignity] [M. B.Q 8:1Z].**”

K. And said Rabbah, “If one fell from the roof by reason of an unusually strong wind and hit someone and damaged the person and also humiliated him, one is liable for compensation for the damage but exempt from the additional four counts. If he fell by reason of a window that was commonplace and damage and humiliation were caused, he is still liable for compensation for the damage but exempt from the additional four counts. If while falling he turned over [to mitigate the fall in some way and thus intentionally fell on someone], he is liable also for humiliation. For it has been taught on Tannaite authority: on the basis of Scripture’s statement, ‘and she puts forth her hand’ (Deu. 25:11), don’t I know that ‘she grabs him’? So why should Scripture continue and state, ‘And she grabs him’? It is to tell you that, since there was an intentionality to do injury, even though there was no intentionality to cause humiliation [compensation is to be paid].”

L. And said Rabbah, “If one put a live coal on someone’s heart and he died, he is exempt. [The victim should have removed the coal and did not do so.] If he put it on his garment and it burned up, he is liable. [The victim may have left the coal on the garment thinking he would be compensated for the damages.]”

M. Said Raba, “Both of these cases are set forth in Mishnah passages. As to the one involving putting the coal on the neighbor’s heart: **If one pushed him under the water or into the fire, and [the other party] cannot get out of there and so perished — he is liable. [If] he pushed him into the water or into the fire, and he can get out of there but [nonetheless] he died, he is exempt [M. San. 9:1G-I].** As to his garment: “Tear my cloak,” “Break my jar,” [the one who does so] is liable. [If he added,] “...on condition of being exempt,” [the one who does so] is exempt [M. B.Q. 8:7J-M].”

N. Rabbah raised this question: “If one left a live coal on the heart of a slave, what is the law? *Is in the category of doing so on the heart of the master? Or is the slave categorized only as the master’s chattel? if you say it is as though he put it on the heart of the master, when what is the law if one put a live coal on an ox?*”

O. Then he went and solved the problem: “The slave is in the classification of the master’s own body [and one is exempt], while the ox is in the category of the master’s chattels [and he is liable].”

I.1 presents a close reading of the language of the Mishnah, and No. 2 the scriptural foundation for the Mishnah’s ruling. No. 3 then pursues the issue raised at No. 1, shading over into a collection of thematically-cogent statements attributed to Rabbah.