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CONDOMINIA LAW IN THE TALMUD

AN ANALYSIS OF PARTNERSHIP BY PROXIMITY IN RABBINIC LAW

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Thesis submitted in partial
fulfillment of the requirements
for Ordination

Hebrew Union College-Jewish
Institute of Religion

1978

Referee, Prof. Ben Zion Wacholder

The thesis contains a study of the earliest form of rabbinic law involving partnership - joint ownership of residential property. The basic aim of the study is uncover the nature of partnership as it originated in rabbinic law. To this end all aspects of rabbinic condominia law have been studied and explained. The major issues involved are the rights on the part of each owner in the condominia to basic support and protection from various parts of the building, ability to compel the other owner to repair and maintain his part of the building, and damages resulting from failure on the part of either party to carry out his obligations.

In addition to study of the rabbinic law concerning condominia, a short presentation of English and American common law on the subject has been made. Material for this presentation was selected with a view toward its use in highlighting areas of rabbinic condominia law. Only those cases having a direct bearing on issues arising in the rabbinic common law were presented.

The thesis also contains an analysis of the nature of rabbinic partnership as it existed in joint ownership of residential buildings. Where there is no available material from the English and American common law, the analysis was made strictly on the basis of rabbinic law, but the former has been utilised wherever possible.

The main conclusions of the thesis are that within condominia law, partnership is created by the fact of two owners living in one building. The two owners are treated

equally except in such instances where this would not be fair, i.e. where there is a physical difference between their respective apartments, necessitating recognition of greater expense born by one party. In all other areas, rabbinic law operates to keep the footing of the respective partners on the same ground as when they entered into the partnership, allowing neither partner to gain an undue advantage over the other.

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INTRODUCTION

The law of partnership forms a major part of the rabbinic law of damages. Two of the five chapters of Sefer Kinyan in the Yad HaChazaka concern partnership and differing aspects of it. The earliest form of commercial partnership was partnership in property or joint ownership.[1] Any study of partnership in Jewish law must begin with the consideration of partnership in its simplest form. This is, in fact, an area of much concern in American law today, the law of condominia.

Perhaps the earliest and certainly one of the early areas of joint ownership was joint ownership of residential property. Following the principle that the oldest sections of law in a given area are found in the forward sections of the Mishna where they are located, the law of residential joint ownership, or condominia, is the origin of all partnership. Its study has merit, therefore, for two reasons. One is the comparative study of American condominia law; the other is as an initial step for treatment of all rabbinic laws concerning partnership.

The locus of the rabbinic law concerning partnership is the last chapter of Baba Mezia and the first few chapters of Baba Batra. These two tractates, along with Baba Kamma, originally formed one tractate before being split into three. The last chapter of Baba Mezia is immediately precedent to the Baba Batra material which should be understood in its

light. For the purposes of this study, the first three Mishnas of Baba Mezia Ien have formed the main source of material along with selected Mishnas from the third chapter of Baba Batra. In addition, selected Mishnas from the latter chapters of Baba Mezia and the early chapters of Baba Batra have been used to elucidate this material. In all cases the procedure has been to consider the Mishna as an independent document and then to add to it in individual steps the Gemara discussion relevant to it, the contributions of the major codifiers and finally the commentators upon those codes.[2]

The objective of the procedure outlined above is twofold. One is to reach original meanings of the Mishna (which is sometimes obscured by later interpretation of it) in order to see the development of rabbinic law and the starting point of the law of partnership. The second has been to explicate condominia law as it developed within the framework of rabbinic law which does not necessarily concern itself with the independent meaning of any one text. In particular, the rabbinic law relies upon the interpretations of the Gemara, or commentary to the Mishna, so that the Mishna may be subordinated to the understanding of it developed at a later time.

In addition to the study of the rabbinic literature, a presentation has been made of material pertinent to the law of condominia as found in the common law of both England and America. This should not be understood as a complete treatment of that subject.[3] While an attempt has been made to give

a full, although abridged, picture of that law, only those cases which have a direct bearing on the rabbinic common law have been presented. The examination of the common law has been for the express purpose of providing insight into the rabbinic law by the use of a focus not otherwise available. Rabbinic law and common law are separated by time and distance having developed in vastly different political and economic settings. Rabbinic condominia law resulted from an extension of Biblical concepts of fairness. Palestine was part of the Near East which was subsequently dominated by Hellenistic and Roman rulers. English law reflects an attempt to reconcile prerogatives of the king with the growing rights of the landowners within the feudal system. The documents containing the common law consist of case reports. Facts and concrete examples abound while authoritative comment is limited. The meaning and weight of a case can be known only by reference to subsequent cases which through their decisions determine the intentions of previous courts. Rabbinic condominia law is entirely the opposite. From the Mishna to the last rabbinic commentator, cases are few while rules and general statements abound. At the time of the creation of the Mishnaic material in this area, the law had developed to such a point that it was possible to record only general procedures without the necessity for reference to specific cases. The common law provides data which is useful in studying the rabbinic law because it reveals the roots of the principles incorporated in the Mishna.

The rabbinic condominia law divides itself into three main areas: division of building materials after destruction of a previously existing building owned by two owners, rebuilding of that building and maintenance and repair of the building while it stands. All of the material may be understood in reference to a simple model of two rooms, one directly over the other. Nothing in any of the main texts requires reference to a more complex structure. The procedures set out in these Mishnas would govern cases of joint ownership where multiple room buildings are involved, but it is not necessary to consider these situations for the study of these Mishnas. However, in order to have a more complete picture of the setting in which the laws were formed, it is necessary to consider briefly the entire range of structures covered by these laws in their actual operation.

The accepted meaning of "house" which is closest to the meaning of "Bait" is "the building or part of a building occupied by one family or tenant."[4] The house of our Mishna is less than the entire building in which it is found. Our Mishna makes it clear that house is limited to the ground floor, but it is not necessary for house to be equal to all of that ground floor.

In Baba Batra 4:1, house is defined as follows:

> "If a man sold a house, he has not thereby sold its side-chambers, even though they open into the house, nor the room that is behind, nor the roof if it has a parapet ten handbreaths high."

The house is limited in this Mishna (for purposes of sale) to rooms in the main building used for the same purpose, i.e. living space.[5] In applying this Mishna to our Mishnas,

we note that neither side-chambers nor inside rooms figure in any of the materials pertinent to the question of joint ownership. Our three Mishnas and the material connected to them only speak of the upper and lower floors with no vertical divisions considered. House is also the term used to designate a single apartment in a tenement.[6]

The meaning of the house which is established for purposes of sale where there has been an agreement to sell the house is not the same as the meaning of the house in our Mishnas. The house in our Mishnas would not be limited to the living space area but would include all inside rooms for the simple reason that when the house falls, the inside rooms, regardless of function, also fall. Side-chambers by virtue of their construction could not support attics and would not be included in the house for purposes of joint ownership.[7] The meaning of the house in our Mishna would be the main building exclusive of side-chambers (the materials of which could be identified and reclaimed) but including all that was within the walls which supported the tikra which served as the roof of the first story.[8] In other words, the house is that upon which an attic could be built although the attic would not necessarily have as great a floor area as the area of the tikra.[9] The most important features of the house (in determining the scope of the attic) are the roof and walls of the first floor. All of that roof which was flat and on the same level and thereby suitable for supporting a second floor would determine the boundaries of the house.

The attic which is on top of the house is one or more rooms occupied by one tenant or family entered by means of an external ladder. The crucial feature which distinguishes the attic as the property of a joint owner is the presence of this external ladder (with its feet in the courtyard). If the attic could only be entered through a trap door in the tikra of the house, it is called an "oufta."[10] Theoretically, an oufta could be sold to another creating a case of joint ownership, but the importance of privacy prevented this from occurring as the new owner could not erect an external ladder and open an outside entrance.[11]

There may be more than one attic on top of the house.[12] It is not clear whether the owner of the attic has the automatic right to build another attic on top of it. There are two conflicting rules which seem to apply. The Tosefta says that this is governed by local custom and was permissible in some areas.[13] This ruling conflicts with the statement made by Rav Ada bar Ada in the name of Ulla which prohibits the owner of the attic from increasing the weight of the attic.[14]

The first chapter, which covers Baba Mezia 10:2 is divided into two main areas. The first area is the consideration of the relationship between the owners of the building as it is understood in the Mishna and interpreted by the latter strata. There are three types of relationship involved. They are partnership (shutfut), inheritance (achim shechilku), and rent (socher u'mascir). The first two categories are virtually the same. Inheritance involves two brothers who inherit a house from their father and then divide it, one

living on each floor. Once the house has been divided, the relationship between the two brothers becomes one of partnership. This is important to our study because the laws governing the relationship between the owners differ in rent from the laws of partnership.

After the discussion of this problem, the substantive issues of maintenance and repair, the right to support and remedies are considered. Also included in this chapter is the question of damages resulting from failure of either party to carry out his obligations.

Chapter Two discusses Baba Mezia 10:1 which is concerned with the rules governing reclamation of building material after the building has been destroyed. This Mishna applies only to the area of partnership/inheritance. In rent the landlord owns the entire building and as a result of that ownership is the only person to reclaim building materials if the building is destroyed.

Chapter Three, which discusses Baba Mezia 10:3, covers rebuilding of the building after destruction. Two issues prior to rebuilding are considered. They are division of the land when the parties agree not to rebuild and possible remedies applicable to the problem which are not presented in the Mishna itself. The main thrust of the Mishna is to ensure that the building is rebuilt as it originally existed. The entire Mishna deals with one issue, the proper application of the remedy provided for the house owner's refusal to rebuild.

The fourth chapter contains a presentation of the English and American common law bearing on the subject of condominia. That material has been arranged to facilitate insight into the rabbinic law of condominia.

The final chapter contains an analysis of rabbinic law on the subject of joint ownership of residential property. It presents an understanding of this material as it bears on the important question of the nature of the early law of partnership within rabbinic law.

INTRODUCTION FOOTNOTES

1. Encyclopedia Judaica, Encyclopedia Judaica Jerusalem, The Macmillan Company, Jerusalem, 1971. "Partnership" The laws of partnership develop mainly from the law of joint ownership.
2. The major codifiers are 1)Maimonides, Yad HaChazakah, Yakov ben Asher, Arba'ah Turim, and Joseph Caro, Shulchan Aruch.
3. Material on the history of the common law may be found through reference to the appropriate articles in Corpus Juris Secundum and American Jurisprudence 2nd.
4. Websters New Twentieth Century Dictionary, Unabridged Second Edition. The World Publishing Company, Cleveland and New York, 1971.
5. See B.B. 61a. Though the side chambers and the house are used for the same purposes, the "side-chambers are not sold with the house. Both Rashi and Rabenu Gershom state that the "inside room" is used for storage of goods and has a different usage. Rashi, ad. loc. s.v. "room." Rabenu Gershom ad. loc. s.v. "room by itself.
6. B. B. 61 b. s.v. "where he drew the boundaries outside."
7. There are two interpretations of yazia given in the Gemara, and neither supports an attic. The first, apsa, is understood by Rashi and Mimuke Yosef to be a low building connected to the house, a sort of shed. The second, badka chalila, is explained by Rashi as like an apsa, and by Rabenu Gershom as a corrider in front of the house. Rabenu Gershom understands apsa as an attic entered from inside the first floor, in which case joint ownership would not be at issue.
8. Tikra is used within rabbinic literature to denote either the beams alone or the beams and plaster combination.
9. If the house had internal walls, the attic walls could extend upward from them, where otherwise they would be contiguous with the outside walls, equalizing the floor area.
10. Alfasi to Baba Batra 4:1.
11. Baba Batra 7:1.
12. B.M. 117a. "what of two attics, one on top of the other?"
13. Baba Mezia 11:2.
14. B.M. 117b. See also Yad, Hilchot Shechanim 4:5 and Tur Hoshen Mishpat 164:9.

CHAPTER I. MAINTENANCE AND REPAIR

הבית והעלייה של שנים נפחתה העלייה ואין בעל הבית רוצה לתקן הרי בעל העלייה יורד ודר למטה עד שיתקן לו את העל-ייה ר' יוסי אומר התחתון נותן את התקרה והעליון את המעזיבה

> "The house[1] and the attic[2] which belonged to two.[3] The attic[4] broke through, but the house owner did not wish to repair it. The attic owner may descend and live below until the house owner repairs the attic for him. Rabbi Yosi states: The lower one provides the beams; the upper one provides the flooring."[5]

Before entering into any discussion of this Mishna, it is necessary to define the precise case involved, i.e. what repairs are required. This depends on the meaning of the phrase "the attic broke through." There are three elements which make up the attic; floor (beams and flooring), walls and roof. Damage could occur to any of them, but the Mishna refers only to the beams and flooring. This conclusion is reachable both by process of elimination and by reasoning from the text.

The attic owner bears exclusive responsibility for maintenance and repair of both the walls and the roof of his apartment. A major part of repair is the provision of the necessary building materials which is why Rabbi Yosi uses the word "provide." Baba Mezia 10:1, which governs division of building materials, reveals that the house owner supplied the stones for the house walls and that the attic owner supplied the stones fo walls. Therefore, the attic owner maintains an

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the walls of the attic. He also maintains and repairs the roof because it (as well as the walls) is his property. The ROSH makes an explicit statement to this effect. (See p. and reference there.)

There are two passages in the Tannaitic strata which imply that "attic" means the beams and the flooring. One is the discussion between Rav and Shmuel which considers the loss of floor space on which a vessel might have rested. The other is the wording of the Tosefta, which substitutes ma'azeva - flooring - for attic. That passage has in mind the same situation as does our Mishna, for it gives the same statement by Rabbi Yosi. The Tosefta passage might be limited to only the flooring, but our Mishna, which has "attic," is wider in context. This is illustrated by Rabbi Yosi's statement, which identifies the area of concern - the beams and the flooring.

Having identified the area of damage, we are left with the determination of the nature of damage indicated by nifchata - broken through. This is easy to do by examination of the usage of this word as it occurs in the Talmud. The general meaning is, of course, to be lessened, diminished, or worn down. There are passages where the word is used to indicate walls which have been breached (Betza 4:3) or given way (Sukkot 18a). There are also passages where the word indicates a floor giving way beneath someone. (Keth. 62a) Taking these passages in conjunction with our Mishna and the structure being

discussed, we see that the meaning of nifchata is "worn down and consequently broken through." It is also possible that if the beams were weak, they could break without the flooring being worn at all, especially if they had been weakened by fire. The Mishnaic phrase, nifchata ha'aliya, refers to a situation where the flooring has worn through and additionally, although not always, the beams have broken.

This conclusion is bolstered by the Gemara passage which follows immediately upon our Mishna. This is a dispute between Rav and Shmuel concerning how extensive the damage is. If the space broken through is four handbreadths square then the remedy goes into effect, because a man does not live "half upstairs and half downstairs." Rashi explains that this is the space one vessel requires. According to Rav who has required that more than half the floor be broken through, where the damaged spot is only four handbreadths square the attic owner could be compensated by allowing him to place his vessel in the apartment below. The only part of the attic to which this discussion could refer is the floor upon which a vessel would be placed. Having identified the area involved, we may proceed to our consideration of the Mishna.

Our discussion of the second Mishna includes one textual problem and several legal issues. The textual problem concerns the understanding by the Gemara and subsequent authorities that this Mishna applies to rent. The legal issues, which may be resolved only after solving

the textual problem, include the following: 1) the right to support 2) responsibility for maintenance and repair and 3) damages resulting from failure of either (1) or (2).

The textual problem arises from the fact that rabbinic law is an evolving organism. As time progresses, its factual nexus changes creating new issues and new circumstances. The Mishna originated in a period where many residents owned parts of buildings in which they lived. The Gemara which interpreted it was created in Babylon where the housing patterns were different. Since rabbinic law is dependant on the Babylonian Talmud and not the Palestinian, the former is our prime concern. Rabbinic authorities and codifiers, relying on the Gemara's interpretation, misunderstood the Mishna's meaning and applied most of it to the area of rent for which it was not originally intended. Only a few opposed this trend.

The Babylonian Talmud which now reads only "the house and the attic," apparently preserved this reading until Rashi questioned it.[6] Rashi generally reflects the Gemara, and this case is no exception to that trend. The pattern of the Gemara to this Mishna is as follows.[7] It begins with a disagreement between Rav and Shmuel as to the amount which the attic floor must be opened to put the remedy into effect. This is followed by a discussion of three rent cases to which the Mishna might apply and some ancillary questions concerning the application of the remedy. Finally there is a discussion of the Rabbi Yosi statement and the question of responsibiliy

to repair. The response to this by rabbinic authorities has been to understand only the Rabbi Yosi statement as applying to partnership/inheritance with the rest of the Mishna applying to rent. This is indicated, for example, by the technique of three major codes which place only the Rabbi Yosi statement in their sections on partnership.[8] We will demonstrate that the entire Mishna referred originally only to partnership, but it will still be necessary to accept the subsequent interpretation of it in considering the rabbinic law in this area.

When we consider only Tannaitic material, the wording of the Mishna suggests partnership/inheritance. Its introductory phrase is the same as in the first and third Mishnas of the chapter.[9] Those two Mishnas are concerned with partnership/inheritance only, a fact which is not disputed. The two occupants are designated the same way, "ba'al," (בעל) house owner and attic owner, in all three Mishnas. This is noted by Tosephot who claims that this is one reason why the Mishna should be understood in terms of partnership/inheritance.[10] Lacking any reason in the Tannaitic strata to interpret this phrase differently in this Mishna, this reason by itself would be sufficient (the lemma by which this item is introduced, while obviously not itself Tannaitic, is an additional indication that this is the original reading). The phrase has the same meaning in this Mishna as it does in the other two. Use of the ownership language when rent is really meant cannot be due to lack of a suitable alternative because the Mishna had available to it the more specific

language of rentor and rentee, which is used elsewhere in Baba Mezia.[11]

There is a suggestion that this Mishna is found here although dealing with rent because of the similarity of the problems and remedy.[12] This illustrates the rabbinic legal process. The Gemara established that the Mishna dealt with rent creating the need for explanations of this anomaly and eliminating the possibility that the Mishna did not concern rent. It is more direct to first ask if it is true that the Mishna is intended for rent. It is simpler to reason that the Mishna originally meant partnership. The similarities of this Mishna to the other two is not an explanation of why a rent Mishna would be placed between two Mishnas dealing with partnership. It is a signal that this Mishna is also concerned with partnership and inheritance.

Only when we consider the Gemara's treatment of the Mishna does rent become a factor. The nature of the Gemara's discussion of rent cases provides further evidence that the Mishna originally intended partnership. After the discussion of constructive eviction, the subject of rent is introduced by Raba, a Babylonian Amora of the fourth century and continued by Rav Ashi, an Amora of the last generation of the Babylonian Talmud. There are three rent cases which are mentioned in this discussion. They all deal with the question of under what stipulation the apartment was initially rented. If the tenant had merely said that he wished to rent an attic (גגו), then the landlord must rent him another apartment if his apartment becomes uninhabitable. If the tenant had

specified the particular attic (עלייה פלונית), then the landlord has no further responsibility if the apartment becomes uninhabitable. The tenant, with that stipulation, takes the apartment as it is and will become; he assumes the risk. Only if the stipulation was to the particular attic upon the particular house (עלייה פלונית בבית פלוני) would the landlord be responsible to make repairs in the attic to keep it from becoming uninhabitable. In fact, the house itself would become subservient to an easement requiring the landlord to maintain it so that it would support the attic (שתהא קורה משעבדת לו). This last case is the only one which could fit our Mishna and is given in the name of Rav Ashi.[13] Where a commentator or codifier judges that the Mishna is concerned with rent, it is upon this last case which he relies. The remedy proposed in the Mishna exists for the purpose of compelling the landlord to make required repairs (or as a last resort allowing the tenant to do so), which he is responsible for only in the last case. Only in the last generation of the Talmud was a case found which would justify interpreting the Mishna to deal with rent.

Considering other Talmudic material which might bear on this question, we find four Mishnas which deal specifically with rental of houses.[14] One of them concerns itself with the division of responsibility between landlord and tenant. Three specific items are named to be provided by the landlord: the door, the bolt and the lock. The Mishna states the general principle that the landlord must provide all items or perform all tasks which are the work of a craftsman (מעשה אומן). The tenant is responsible for everything else. The Gemara's

discussion of this Mishna begins with a Baraita listing specific responsibilities of the landlord and the tenant. One of the tenant's responsibilities is to pave his roof (סיכול דף קיח ע"ב). This Baraita is taken as exemplary of the Mishnaic principle (there is nothing in the Gemara to indicate any challenge to that principle). We are therefore able to see the following two facts: 1) There is a general principle operative which could cover the repair question of our Mishna. 2) A specific example, paving the roof, is given as the responsibility of the tenant in line with this principle.

If the act of laying the ma'azeva is not craftman's work, then it would be the responsibility of the tenant in rent cases. If it is similar to the act of paving the roof, then it is probably not considered craftman's work. The ma'azeva is described by Rashi as a "plaster of mud," (טיט של סיכה) citing the one verse in the Bible where it occurs.[15] The word Rashi uses is the same verb as in the rent discussion leading to the inference that Rashi thought the two acts basically similar. Laying the ma'azeva is not craftman's work and therefore the responsibility of the tenant. There is no reason to create our Mishna in order to provide this answer.

Although a good case can be made that our Mishna did not originally deal with rent, the fact must be faced that it was so regarded by most rabbinic authorities. In considering the laws of partnership in residential housing, this becomes the law: only the Rabbi Yosi statement is directed at partnership/inheritance; the rest is considered to be rent.

Before proceeding into a treatment of the various rabbinic authorities on this matter, it would be helpful to consider those few sources which attempt to preserve the entire Mishna for the area of partnership/inheritance. The path that is followed by those preserving the idea of partnership/inheritance is to reason that both it and rent are included in the Mishna but only one is the subject of the disagreement between Rabbi Yosi and the rabbis. These authorities agree that the mishnaic dispute is in rent while there is no disagreement in reference to partnership/inheritance. This position with regard to the source of the Mishnaic argument is prompted by the structure of the Gemara. The Gemara prefaces its discussion of rent cases with a short item on the remedy which leads to the inference that the remedy applies in cases of rent. The Rabbi Yosi statement, which is taken to represent partnership by all authorities, is not related to the remedy. In applying this Mishna to both areas, this is the natural path to follow.

The application of the Mishna to both areas is effected in two steps. The first step, which is common to all authorities, is to say that the disagreement is in terms of rent, the anonymous Mishna assigning all responsibility to the house owner, Rabbi Yosi dividing it. Rabbi Yosi's ruling is the ruling that would be reached with regard to the flooring if this case were decided according to the procedures in Baba Mezia 8:7. The second step is to say that there is no disagreement in the case of partnership. This would mean either that Rabbi Yosi agrees with the rabbis and gives the house

owner the entire responsibility in this area or the reverse. In fact, both decisions are found in the literature.[16]

The difference between the above position and those of the codifiers themselves who divided the Mishna is that the remedy must be assigned to rent or to partnership/inheritance as we shall see. The three major codes include the remedy in rent.[17] The result of this interpretation of the Mishna has two effects: 1) It eliminates from the law the once accepted rule that the house owner had to repair not only the beams but the flooring and 2) It removes the Mishnaic remedy from the area of partnership requiring the finding of another way to enforce Rabbi Yosi's ruling.

There are two results which could have followed from this lack of a remedy in the area of partnership. The house owner could have been left without an effective remedy or another authority for the remedy must be found. This can be done either by applying the remedy from Mishna Three to repair cases as well as rebuilding (see below p. 20) or by suggesting another remedy.

The major commentators limit themselves to quoting Rabbi Yosi's ruling. They do not state how it is to be enforced, only that the attic owner may compel the house owner to make repairs where it is his responsibility to do so. An example of this is Maimonides:

> "the attic owner does not give him anything toward his expenses, but can compel him to rebuild it as it was."[18]

We know that Maimonides does not intend for this to be brought about by use of the Mishnaic remedy because he maintains the

distinction between rent and partnership. Kesef Mishna explains how Maimonides is able to say that the attic owner may compel the house owner to repair. According to him it is a transference of the remedy found in the third Mishna:

> "His reason is from what is taught in the last chapter of Baba Kezia - 'the house and the attic belonging to two which fell. The attic owner told the house owner to rebuild, but he didn't wish to. Behold, the attic owner may build the house and live in it until he (house owner) repays him his expenses.' which our rabbi (Maimonides)understood to mean that the house owner is required to rebuild all of the house without any assistance whatsoever from the attic owner . . ."[19]

This explanation applied to Maimonides' statement above leads to the conclusion that the attic owner compels the house owner to make repairs by moving into his house until they are made. This resurrects the remedy from our Mishna. However, Maimonides himself never states this explicitly.

This transference of authority is indicated by Maimonides himself in another work.[20] In discussing the Mishnaic dispute he says that the house owner is responsible for rebuilding the tikra:

> "and if he does not wish to, behold the attic owner builds the house and lives in it until he (the house owner) repays him all of his expenses."

This sounds like a discussion of rebuilding after destruction but is his comment on this Mishna. He is too cautious to explicitly say so but Maimonides clearly finds the authority to use this remedy in repair cases on the analogy of Mishna Three.

The same type of reasoning occurs in the Tur, who merely says that the house owner may compel[21] and Bet Yosef, who brings in Mishna Three as the source of that ability. This

interpretation is not accepted by Beit Hadash, who believes that the Mishna applies to both areas and is thereby able to apply the remedy not only to rent but to partnership.

> " . . . from there (the second Mishna) we learn that in cases of partnership the house owner bears the responsibility for repairs to damaged walls from the beams and below even though the Gemara understands the Mishna to concern itself with landlord and tenant."[22]

This is natural in terms of his position concerning the Mishnaic applications, but he oversteps himself in claiming that Maimonides himself followed this interpretation. As we have seen, Maimonides divides our Mishna and places the remedy in rent. If there is a dispute in the Mishna on an issue, Maimonides will give both positions which he does not do. From reading Maimonides on this issue in rent and in partnership, one would not know that the ruling in each is the subject of a Mishnaic dispute (there must be a dispute in the area of rent for the Mishna to apply to both. See above page 18. If this were the case, then Maimonides would also quote Rabbi Yosi in rent, but he does not). Furthermore, as much as he gives an explanation, Maimonides seems to be drawing his remedy from the third Mishna. Beit Hadash realizes that for Maimonides to draw the remedy from the second Mishna he should quote it in rent. He attempts to explain this omission by claiming that there was no disagreement over when the remedy could be applied in partnership. This disagrement, the first step of the Gemara discussion of the Mishna, was interpreted by Maimonides to concern the application of the remedy in rent. He does not list in partnership either the remedy itself or a statement of when

it goes into effect. Bait Hadash's explanation is ingenious and closer to the original intent of the Mishna (because it understands the entire Mishna to deal with partnership). It is not, however, Maimonides' view of the matter.

Given a situation of partnership where a building exists, with an attic owner and a house owner, the initial area which must be resolved is the right of each for the support of his apartment. Prior to the discussion of any affirmative action which can be required from either owner, there is the implicit assumption in rabbinic law that neither owner may decrease support in the building or damage the other's apartment.

One of the ways in which the responsibility to support can be determined is to see who benefits from the various component parts of the building. Secondly, the apartment must be delineated as completely as possible in order to see who owns what. The Mishna, in setting out the situation that it does, implies these questions.

Some have argued that the house owner derives no benefit from the attic; he would be better off without its presence and therefore should have no responsibility at all.

> "Why does he (house owner) need it (tikra) since the upper roof still exists? On the contrary, he should desire that it breaks open rather than remain in proper order so that the attic owner will not live on top of him. . . . If the attic owner wishes to remove the roof so that the house owner will be forced to repair the tikra, he (the house owner) can restrain him, for the roof is subject to an easement in favor of the house owner even when the tikra is there. For it is known that if rains fall on the tikra they will seep into the house. For this reason they (are

> considered to have) agreed beforehand, that the attic owner would maintain the roof so that the rain water should not damage the lower occupant, but the lower occupant is not required to give any assistance at all to the upper occupant."[23]

This interpretation bends all factors in favor of the house owner. He does not have any responsibility for the flooring because the roof provides any protection necessary. Against the argument that he derives some benefit from the roof (and therefore might have responsibility for its upkeep), he claims an implied agreement on the part of the attic owner to maintain it. Without this implied agreement, it seems, the house owner would have to share the upkeep of the roof. The attic owner, according to this reasoning, is responsible not only for the roof but for the tikra which in this quotation probably means flooring but could include the beams as well.[24]

The rationale that the house owner is required to maintain the beams and flooring is given by the Tur in the name of Rabbi Abraham ben David.

> " . . . since the upper occupant can say to the lower occupant 'I took the attic as against the house. Just as you stand on your ground which you took, similarly allow me to stand on my ground.' The ground of the upper occupant is the beams.[25]

Another source adds that assigning this responsibility to the house owner will equalize the expenses between the two owners.[26] He records the wording of the Tur and adds:

> "Just as I bear the upkeep of my roof, you have the responsibility for the upkeep of your roof; then the two of us will be equal in expenses."

This reasoning (to the conclusion of which the author of it

does not describe) requires that the house owner maintain not only the beams but the flooring as well. This is the position of the anonymous Mishna who originally formulated their ruling in connection with partnership and not rent. There are two ways of explaining how this equalizes the positions of the two owners which is the fundamental concern of the Mishna. One is the question of expenses; the owners will be equal only if the house owner bears the expense of beams and flooring which form the ceiling of the first floor and the floor of the second while the attic owner bears the expense of the beams and roof which form the actual roof of the house.[27] The other way involves focussing on the ground (קרקע) of each apartment. The house sits on actual ground while the attic is built upon the "ground" of the beams and flooring. For each owner to build with the same relationship to his ground, the house owner must complete (and maintain) the beams and flooring. The latter is the reason given by those who state that the house owner is responsible for beams and flooring.

The attic owner receives a benefit - support - from the lower apartment. The house owner bears a burden - the weight of the upper apartment - and receives a benefit - the protection of the roof - from the upper apartment. Unlike rent, where the landlord was the owner and hence the builder of the entire building and the tenant required to do only what the layman (בן בית) could do, the responsibility for support and repair comes from these benefits and burdens. They illustrate the mutual nature of the partnership. Although there are separate owners, there is only one building. The unity of

the building creates mutual responsibility; each apartment protects the other.

The three major codes all state without qualification that the attic owner may compel the house owner to maintain his building. This is also a formulation of the right to support.[28] There is a confusion in the rabbinic literature as to where exactly in the Gemara this right springs from. Since the codifiers do not themselves give sources, we must rely on the commentators, who are not in agreement. In a sense, this is tied in with the textual problem, but even without that factor, the source cannot be pinpointed.

The Mishna, even where taken to refer in its entirety to partnership, only speaks of beams and flooring. The Mishna could have been limited to those two areas and not be intended toward the walls. It is a much stronger argument to say that this right to support is also derived from two other sources. One is the third Mishna: rebuilding. That Mishna establishes the right of the attic to be supported by the house although it does not speak to the condition of the house. The other is the Baraita that deals with changes which establishes the general principle that the house may not be weakened. This Baraita is generally applied to rebuilding, but the principle extends to repair.[29] These three sources taken together establish the attic owner's right to support.

The Mishna does not contemplate any case where the house owner can compel the attic owner to make repairs in the attic. Several of the commentators have even pointed out that the

house owner does not want the attic owner to make repairs. There is only one set of circumstances where the house owner would want to compel repairs in the attic: where unrepaired damage was a danger to the house.

> "If there is a suspicion of danger in the beams of the house due to the weight of the attic structure, that it will fall on the beams, there is an opinion that the attic owner must make repairs."[30]

This statement is strengthened when quoted by a later authority. He rules that where there is danger of the attic walls falling on the house, the house owner may compel the attic owner to make repairs. This is the only case where the house owner may enter into the affairs of the attic.[31]

The application of the Mishnaic remedy creates an ancillary question. What happens to the original occupant of the house when the attic owner moves in? Either the occupant must relinquish the house or they live together. The Gemara gives a rationale for each alternative. The attic owner should be entitled to oust the house owner so that he would have sole possession as he had in the attic. On the other hand, the house owner would not have entered into any agreement which would result in his being evicted from his own house. The codifiers, relying on Alfasi, rule that the house owner is not evicted.[32] The Gemara takes an equivocal position limiting itself to putting the question forth and then proceeding to ask further questions based on a series of supposition, the first being that the two of them both occupy the house.[33]

The Mishna involves the upper occupant's ability to compel the lower occupant to make repairs in his apartment. The attic owner may also restrain the house owner from repairing his apartment where the repair requires tearing down and rebuilding the entire apartment. This situation arises when there is damage to the walls of the house resulting in the truncating of the lower apartment making it difficult to live there. One way in which this happens is that the house sinks into the ground while the level of the floor or of the bare ground if there is no flooring remains at the same height so that the effective height of the house is decreased.[34]

Unless the level of the attic sinks to within ten handbreaths of the ground, the house owner may not tear the building down and rebuild without the consent of the attic owner even at his own expense. As long as the attic is above the level, there is nothing he can do. The attic owner may even refuse to move to another apartment procured and paid for by the house owner.

The house cannot be said to exist once the attic sinks to a level of ten handbreaths.[35] As the attic owner's rights are not favored to the extent of eliminating the house, the house owner is allowed to rebuild. The attic owner must even contribute to the cost of rebuilding the bottom ten handbreaths. This distance is determinative when there is no stipulation in the original agreement between the two partners.

The possibility of sinkage seems to have been so great that it was common for partners to agree at what point they

would tear down and rebuild the building. They could stipulate to any reasonable height. If either partner had sufficient bargaining power to compel the other to agree to a height the court considered unreasonable, the stipulation could not be enforced. The Gemara reaches the conclusion that a reasonable height is that at which a man carrying a medium sized bundle could enter the apartment.[36]

A final question arising out of our Mishna concerns damage to the house when the floor of the attic is broken through. Does this affect the responsibility for repairs? The Talmudic example concerns water flowing into the house and causing damage there after having been used within the attic. The water either sat in a pool on the floor of the attic and gradually seeped through or else poured immediately through the flooring and beams. The assignment of repair responsibility and hence the avoidance of damage or the liability to pay for them may not be the same as in the Mishna where only repair of the building is at issue.

The solution to this problem involves a general rabbinic principle for damages. Normally, every person may do what he wishes within his own domain. If this results in damage in another domain, the person who is damaged must protect himself unless the damage is a direct consequence of the original act. The classic Talmudic example of this distinction is a person who, while within his own domain, shoots arrows which cause damage in another domain. He cannot protect himself from responsibility by claiming that he shot the arrows from within his own domain. Responsibility for damage

is often a question of "his arrows." When damage is ruled to be direct, the original actor is responsible.

Our case above turns on this distinction. Is the water falling into the house a case of direct damage? The rabbinic law is that where the water is delayed in seeping through, the repairs and responsibility for damage belong to the house owner. If the water falls through without delay, the attic owner is responsible. The Gemara, which is very economical with its words, does not explain what conditions are determinative.

In considering the particulars of this problem, two factors are introduced by other sources. They are the amount of water and whether or not there is flooring (or only beams). The absence of flooring is initially introduced as an explanation of the water falling immediately into the house. The lower must repair

> "Only where there is flooring, so that the waters are stopped and then fall, since this is not a case of 'his arrows.' If there is no flooring so that the waters fall immediately from the upper apartment to the lower, in this Rabbi Yosi agrees that the upper one must repair since this is a case of 'his arrows.'[37]

If there is no flooring, but the waters are stopped anyway falling through later, this is indirect. If there was flooring, but the waters fell straight through, this is still direct damage. The presence or absence of flooring was never considered determinative, only an indication of what the waters are more likely to do.[38]

The second way of looking at this problem is to focus on the amount of water coming through and the frequency with

which it occurs.

> "If there is a small amount of water, and it stops altogether even without flooring, he (the attic owner) does not have to remove his damage. If they (the waters) are great and damage him (the house owner) regularly even through the flooring, he (the attic owner) must remove his damage."[39]

This opinion does not even consider the flooring as an indication. The factor of immediacy is subordinated to the amount and frequency with which the water falls. This is an important difference. Even if the water does not come through immediately, the upper occupant is responsible when there is a lot of water which comes through regularly. The latter opinion abandons the mechanical decision process implicit in the test of immediacy and attempts to reach directly for the more substantial question of the amount and frequency of damage. If immediacy were the determining factor, the attic owner could spill huge amounts of water regularly and not be liable as long as the water took some time to seep through to the house. The second method measures the damage more accurately. As the possibility of damage increases (measured by the amount and frequency of water), the responsibility shifts to the attic owner.

These rules are limited to water used by the occupant of the attic.[40] If rain water is involved, the responsibilities are changed. First, if the water enters the attic through the roof, then the attic owner is exclusively responsible regardless of how the water goes through the tikra into the house. If the rain water enters the attic through the walls, windows or gutters and then falls through

the tikra, the house owner is exclusively responsible.[41] This distinction is unknown to the printed edition of the Gemara which speaks only of water without specifying its origination. The distinction is present in Alfasi whose text reads "When the upper occupant washes his hands and the water flows and damages the lower apartment."[42] His version may be based on the original version of the Gemara. It is possible that these distinctions were operative in Talmudic or even Mishnaic times. The principles for the distinctions are certainly present then.

Liability for damages is a direct factor of responsibility for repair. According to the rabbinic interpretation of the Mishna, the attic owner is responsible for the flooring. Damage is most likely to result when there is a hole in the flooring. In such a case it is direct which forces the responsibility on the attic owner. This is in accord with Rabbi Yosi's statement in the Mishna. The attic owner escapes liability when the flooring is in good repair since there is nothing else he can do to keep the water from seeping through.

There is one other source of information concerning responsibility for damage: discussions concerning implements whose regular use within the apartments is likely to cause damage.

> "None may set up an oven within a house unless there is a space of four cubits above it. If he sets it up in the attic, the flooring beneath it must be three handbreaths deep or for a stove one handbreath; and if it causes damage (to the floor), he must pay for the damage that is caused. R. Shimon says: They have prescribed these measurements only that if damage ensues, he shall not be liable to make restitution."[43]

There are two schools of thought concerning the interpretation of this passage. One set of authorities follows R. Shimon.[44] Another set of authorities follows the anonymous Mishna.[45] According to R. Shimon, if the distances are not observed, then the guilty party must pay for any damage resulting, but if he does observe them, he has no liability.

The anonymous Mishna offers more protection than Rabbi Shimon. According to it, any damage resulting from use of the implements in question must be paid for even if the distances are observed. The protection offered is that, where the proper distances are not observed, the neighbors may prevent the implements use out of fear that they will cause damage.[46] This latter position is preferable because it requires that the user of these implements exercise care in their use even when observing the distances because of his absolute liability.

CHAPTER ONE FOOTNOTES

1. The ground floor apartment.
2. The second story apartment.
3. This Mishna originally referred to two partners, but came to include a case of landlord and tenant.
4. The flooring of the attic and sometimes the beams.
5. This refers to the beams and flooring which are the ceiling of the house.
6. Rashi, B.M. 116a, s.v. "the house and the attic."
7. The Gemara to this Mishna is short, being only one side.
8. Yad, Hilchot Secherut 5:8; Tur, Hoshen Mishpat 312; Shulchan Aruch, Hoshen Mishpat 312:18.
9. Rashi suggested that the words "of two" be dropped but this is strictly a response to the Gemara, and illustrates that the words were included until that time.
10. B.M. 116a, Tosephot, s.v. "the house and the attic of two." The lemma by which this item is introduced, while not part of the Gemara, is an additional indication of the original meaning. Tosephot takes its lemmas from the text of the Talmud.
11. Baba Mezia 8:6-9. The word rentor (שוכר) is used there to refer to a landlord, in opposition to the word tenant (שוכר), so that the meaning is clear. Furthermore, this usage is preceded in the passage by the phrase "he who rents a house to his fellow." There is no such antecedent here. Note especially Mishna Seven.
12. Hidushei Ha Ran, D. Frankel, Jerusalem, 1963 p. 175.
13. Maimonides, Perush HaMishnayot B.M. 10:2. Alfasi on B.M. 116a, Bet HaBechirah on B.M. 10:2 quoting Mordecai.
14. Baba Mezia 8:6-9.
15. Nehemiah 3:8 describing the rebuilding of Jerusalem. See also Rashi, B.M. 116b, s.v. ma'azeva.
16. The rabbis agree with Rabbi Yosi according to Ma'id Mishna on Yad, Hilchot Shechanim 4:1 s.v. "the flooring which is on the beams" Rabenu Nisim holds that in partnership the house owner bears the entire burden - beams and flooring. He is quoted by Bet Yoseph who gives a listing of various authorities and their rulings on this issue. He points out correctly that there is even a third opinion, not according to either part of the Mishna, that the upper owner is completely responsible, according to the ROSH. Bet Yoseph, reasoning from the third Mishnam concludes that the correct law is according to Rabbi Yosi.
17. Yad, Hilchot Shechanim 5:8, Tur, Hoshen Mishpat 312:19, Shulchan Aruch 312:18.
18. Yad, ibid. 4:1.
19. Kesef Mishna to Yad, Hilchot Shechanim 4:1.
20. Maimonides, Perush HaMishnayot B.M. 10:2.
21. Tur, H.M. 164:1.
22. Bait Hadash on Tur, H.M. 164.

23. Rabenu Asher (ROSH) on Baba Mezia 10:2.
24. See also Bet Yosef on Tur, H.M. 164:1 s.v. "ma'azeva" Aruch HaShulchan 164:1. Sefer Meirat Enaim on Shulchan Aruch 164:1.
25. Tur, H.M. 164:1. This rationale is quoted in Aruch HaShulchan H.M. 164:1.
26. Aruch HaShulchan, ibid.
27. Sefer Meirat Enaim H.M. 164:3.
28. Yad, H.S. 4:1, Tur, H.M. 164, Shulchan Aruch, H.M. 164:1.
29. B.M. 117b.
30. Turei Zahav to Shulchan Aruch H.M. 164:1.
31. Aruch HaShulchan 164:1.
32. Yad, Tur, Shulchan Aruch loc. cit.
33. When he (the tenant) dwells there, (downstairs) does he dwell there alone, as formerly, or do both dwell there, because he (the landlord) can say to him, "I did not rent it to you so that you should evict men." Now should you say, both dwell therein, does he, when he makes use thereof, use it by way of the (lower) doors, or through the roof? The Gemara ends this series of questions by stating "these problems remain unsolved." Translation by Rebecca Bennet Publications Inc. Baba Mezia, vol. II, p. 662,663.
34. Rashi B.B. 6b, s.v. "the lower breaks " This is the explanation followed by most commentators who express themselves on this point. Another explanation is that part of the walls fall off, the attic coming to rest on the remainder of the house walls. Rabbenu Gershom B.B. 6b, s.v. "the lower house breaks." This explanation is motivated by the desire to explain the word "breaks" but shows little insight into what the actual process might have been. It is theoretically possible but highly unlikely that this would happen. Breakage to the lower walls would probably result in the destruction of the house.
35. Approximately two feet four inches.
36. B.B. 7a and codes at that location.
37. The general rabbinic law concerning damages stated above is the opinion of Rabbi Yosi. The rabbis hold that the general law is that one who causes damage must remove himself (take action to eliminate the damage.) Rabbi Yosi agrees only in cases of direct damage. See B.B. 25b. The quotation is from the ROSH B.M. 10:3.
38. Isserles to Shulchan Aruch H.M. 164:5.
39. ibid.
40. "Mei Tashmish" - water for personal use.
41. Bait Hadash to Tur, H.M. 155, Darke Moshe to Tur, H.M. 155, Hagahot Mi'iamunot to Yad, Hilchot Shechanim 10:6.

42. Alfasi to B.M. 117a, Also found in some manuscripts. See Dikduke Sofrim, Rabinovitz, M.P. Press Inc. New York, New York, 1976. Baba Mezia p. 70, note #6.
43. Baba Batra 2:2. Translation mostly Danby, The Mishna, Oxford University Press, London, 1933.
44. Rav Yosef said that Rav Yehuda said that Shmuel said "the law is according to R. Shimon. B.K. 61b.
45. Alfasi to B.M. 110a, Yad, Hilchot Shechanim 9:11. Tur, H.M. 155, Shulchan Aruch H.M. 155:1.
46. Rashi B.B. 20b, s.v. "if he damaged." Also B.K. 61b, Rashi s.v. "none should stand."

CHAPTER II. RECLAMATION OF BUILDING MATERIAL

הבית והעלייה של שנים שנפלו שניהם חולקין בעצים ובאבנים
ובעפר ורואין אלו אבנים העשויות להשתבר אם היה אחד
מהן מכיר מקצת אבניו נוטלן ועולות לו מן החשבון

> "The house and the attic which belonged to two which fell. 1) They divide the trees, the stones and the dirt. 2) They evaluate which stones were likely to break. 3) If one of them recognizes some of his stones, he takes them and they are credited against his account.[1]

This Mishna outlines the procedures followed in the event that a building belonging to two different people becomes uninhabitable and unrepairable (which is tantamount to destruction) as well as when it is actually destroyed. The building materials - wood, stones and dirt - are divided. The stones are especially valuable so all three steps concern them while the wood and dirt are only the subject of a single step. The steps are listed in the reverse of their actual operation. 1) Each owner has the opportunity to claim unbroken stones which he recognizes as having belonged to his part of the building. 2) An evaluation is made concerning whether the stones from the upper or lower part of the building were more likely to have broken in the destruction of the building. The stones are then apportioned on the basis of the evaluation. 3) The broken and unbroken stones are divided along with the rest of the building materials.

This Mishna does not specify the nature of the relationship between the two people involved. Unlike the second

Mishna, which was interpreted to mean rent althought it did not originally do so, this Mishna was not taken to mean rent. The consensus among the commentators is that this Mishna refers to both partnership and inheritance.[2] The procedures which it outlines operate identically in either case.

The wording "which fell" suggests destruction of sufficient magnitude to render both house and attic uninhabitable. Anything less would be a question of repair. This destruction should not be confused with the building sinking[3] where only the lower building becomes uninhabitable. No mention is made in the Mishna or any comment on it of part of the building remaining standing which the literature considers to be outside the definition of "falling." If one of the apartments remained intact, then in the unlikely event it was the upper one, this would be a case of sinking. If the lower apartment remained intact, the upper owner would simply have to rebuild.[4]

The procedures for dividing the building materials emphasize two of the underlying thrusts of Mishnaic society. One is the precious value of all materials. Waste is minimized as much as possible; everything is reused. The other is the importance of fair apportionment of economic loss. If it is possible to determine which owner actually sustained greater damage, this is done and the materials claimed on that basis. If not, they are divided.

The first two steps, which deal exclusively with recovery of stones, demonstrate their particular economic importance. Wood and dirt are always divided because they are not crucial.

Whole stones could be used in rebuilding and are worth more than an equivalent amount of broken stones. Whole stones had to bought at quarries and then hauled to the location of the building. This involved considerable expense. Every unbroken stone which could be reclaimed represented a significant saving.

After a building is destroyed, the first step is for each owner to claim stones which he recognizes as having been part of his building. Each owner has the opportunity to claim as many unbroken stones as he can. In addition to the savings of each stone, there is a second reason to claim as many as possible. The amount of stones an owner initially claims affects the determination made in the second step. The more stones an owner claims, the stronger his assertion that his part of the building provided the bulk of the unbroken stones.

The Mishna does not explain how the owners recognize particular stones. Possibly the owners, out of familiarity with their buildings having constructed them and lived in them, would remember what individual stones looked like. This would have been more likely in Mishnaic times than today because building materials were not uniform as they are today.

Although the Mishna says "if one of them," it clearly means that both owners may claim stones. The Mishna's phrasing is a peculiarity of rabbinic language. It outlines a procedure of which either owner may avail himself and describes it as it applies to either of them. For each stone

one owner claims, the other is allowed to take a whole stone to balance the division of materials.[5] After each owner claims the whole stones which he recognizes, the one who claimed less is credited with an amount of whole stones equal to the difference between the number of stones taken by each. In this manner they finish this step with an equal amount of whole stones. Because of this the possible advantage to one owner is minimized.

The Gemara's description of this advantage demonstrates that the Mishnaic "account" against which claimed stones are recognized refers to whole stones. Raba suggests that the difference between the two owners' accounts be equalized with broken stones. This suggestion is rejected in favor of Abaye who rules that each owner must receive an equal amount of whole stones. The Gemara then asks what significance this equalization would have. The answer is that either could secure bricks which were extra-wide or of well kneaded clay.

The explanation given above concerning claiming of unbroken stones is operable only where the apartments were the same height. If one apartment was of greater height than the other, the account should be proportional reflecting the difference in wall size. Then the two owners do not receive the same number of unbroken stones; the amounts are proportional to the size of those walls.

This first step does not depend simply on each owner claiming stones. Each owner must respond to the other's claim. The Gemara attempts to determine what responses are involved and to which the Mishna refers. It begins by

eliminating two possibilities for which it feels the procedure would be obvious. When one owner claims stones, if the other agrees, he takes them; if the other disagrees, he cannot.

To understand the Gemara's discussion of the remaining cases, it is necessary to consider the following facets of rabbinic law concerning the taking of oaths where pecuniary claims are involved. When one party claims that a second party owes him money, if the second party denies the claim, he (the second party) must take an oath that he does not owe anything. By doing so, he is absolved of responsibility to pay. If the second party says that he does not know according to one set of authorities he must pay. Another set of authorities holds that he is not required to pay or to take an oath. If the second party admits part of the claim and denies the rest, then he must take an oath concerning the part which he denies in order to be absolved of responsibility to pay that part. This is called "admission to a portion," (שבועת פיוס). If the second party admits to part of the claim and says he does not know about another part, then he would be required to take an oath about the second part under the doctrine of admission to a portion. As he has said that he does not know, he cannot take an oath and is thereby liable for that part as well.

The Gemara understands the Mishna to be concerned with a case like the last one outlined above. The likelihood in claiming is that when one owner claims stones, the other owner will agree to some, deny others and confess ignorance to the rest. What should be done? The second owner cannot

swear concerning the stones about which he has confessed ignorance, although he can swear about the stones he has denied. According to the Gemara's interpretation of the Mishna, the claiming party would take those stones as well.[6]

Crediting against account as a part of claiming is not totally independent from the next step, the evaluation of which part of the building provided the unbroken stones. If, for example, it is known that the upper attic provided the broken stones, then it would be unjust for the attic owner to receive as many unbroken stones as the house owner claimed. If the attic stones had broken, but the attic had been larger (entitling the attic owner to recover more material), the problem would be compounded. The house owner should be entitled to claim more unbroken stones; but as long as some unbroken stones had come from the attic, then its larger size might equalize their two accounts. These two factors would always be considered in balancing the two accounts.

After claiming of stones has been completed, an attempt is made to determine under what circumstances the building was destroyed and consequently which part of the building suffered the least damage. This part of the building is judged to have provided the unbroken stones. Where this can be done, the stones are distributed on this basis so that one owner receives a greater amount of unbroken stones from those remaining after claiming. The Mishna does not explain how this is done nor does it specify whether one owner receives all of the unbroken stones or only a greater portion of them.

When this determination can be made, it works as follows.[7] If the distribution of the building remains shows that the building fell from the pressure of the attic on the house, then the stones of the house broke under the weight of the attic; the attic owner claims the whole stones. If the building fell due to shock (such as due to an earthquake), then the attic stones had farther to fall and were more likely to break; the house owner claims the whole stones.

The manner in which the building fell can be determined in one of two ways; either by finding and questioning witnesses who saw the building fall or by examining the ruins.[8] If the ruins have been moved or cleared away, those who did so are questioned. The Gemara does not explain how the cause of destruction is determined from the ruins simply assuming that it is evident from looking at them.

The solution to this lack of explanation is suggested by a rabbinic authority.[9] To begin with, each owner is bound to recognize a certain number of stones from his walls. Where the building collapsed from shock, the stones which are further away from the building site will be from the attic; those close to the site will belong to the house. Where the building has collapsed due to the pressure from the weight of the upper apartment, the stones will be closer in and piled on top of one another. The more concentrated the stones, the greater the likelihood that the building collapsed due to attic pressure. According to this authority, neither owner ever receives all of the unclaimed whole stones. The owner of the unbroken apartment takes most of the whole stones.[10]

A more difficult problem exists when it cannot be conclusively determined how the building fell. At what point should division be fallen back upon? What legal devices are available to avoid resorting to this alternative? One possibility is to apply rules of evidence. If, for example, the stones fell into the domain of the house owner, then the burden of proof falls upon the attic owner. In order to reclaim whole stones, the attic owner must demonstrate that the house produced the broken stones. If he is unable to do so, then he cannot reclaim them and the matter is solved.

The Gemara offers several reasons why this solution is unacceptable.[11] The stones may have fallen into the public domain in which case neither owner is in the position of having to claim from another party.[12] The stones may have fallen into a domain common to both owners in which case they are not in the exclusive possession of either. The final reason given in the Gemara, and the most important, is that partners simply should not be allowed to claim chazakah against one another in this type of situation.[13]

This conclusion is established by the first Mishna of Baba Batra which provides that where a wall which divided a joint courtyard fell "the place and the stones belong to both." The Gemara makes the explicit comment that this phrase is included in the Mishna to cover the case where the stones have fallen into the domain of one partner or he removed them.[14] The burden of proof does not fall on the other; the stones are still regarded as belonging to both of them.[15]

The Tosefta presents another possible way to limit cases where the first clause of the Mishna must be resorted to. Instead of the Mishnaic wording, the Tosefta passage reads "the upper (stones) are regarded as if they are more likely to break.[16] Different interpretations of this passage are possible, but in determining its meaning we must bear in mind that it is governed by the presence (in the Tosefta as well as the Mishna) of the division clause. There must always be some cases in which division of materials occurs.

One interpretation of this passage is that it is an absolute rule that broken stones are from the upper apartment. Whenever both owners claim that their apartment provided the unbroken stones, it is ruled that the broken stones are from the upper apartment. This is the interpretation of Minchat Bikkurim who says that division is applied only where the rubble has been removed and it is therefore not known to whom the stones belonged.[17]

According to this interpretation, there is no apportionment when the stones remain on the premises. The attic owner takes the broken stones; the house owner takes the unbroken stones. There are two objections to this interpretation: 1) The Tosefta says that the stones of the attic are regarded as if they are more likely to break. The force of these words implies not an absolute rule but some sort of presumption. 2) This eliminates any case allowing the attic owner to recover whole stones. The Tosefta would be an alternate ruling according to this interpretation and not a modification of the Mishna. In light of the Gemara discussion which

emphasizes making this evaluation whenever possible, it is illogical to posit an absolute rule which would eliminate this process. A second interpretation is that this rule operates when it is impossible to determine from which story the broken stones came. Then it would be assumed that the broken stones are from the upper apartment. To apply this reading allows the attic owner to recover whole stones where he can prove that the building fell from pressure. This is one step forward from the first interpretation which did not allow that. There would be no cases where division could be applied, so this cannot be what the Tosefta means.

In order to preserve cases of division, the Tosefta formulation must affect the evaluation process itself. Within the evaluation, it is assumed initially that broken stones are from the upper apartment. This creates a prima facie case requiring the attic owner to bear a slightly greater burden of proof. He is allowed to demonstrate either that it is impossible to determine how the building fell or that the broken stones are from the house.

This kind of presumption is in accord with the wording of the passage which uses two hedge words suggesting that it is stating less than an absolute rule within the framework of this step in the Mishnaic process. The advantage is that it leaves open the possibility of resorting to division (where proof is inconclusive) but allows either owner to recover his stones depending on the proof.[18]

There is also a fourth interpretation of the Tosefta. It can be taken as a simple recognition that the upper stones

are more likely to break because they are farther from the ground. Having a greater distance to fall they will be more likely to break unless their fall is cushioned. This accords with the Gemara's treatment of the two causes of destruction and the understandings of them presented by various commentators. Where the building is destroyed due to shock and the stones are spread out, the stones of the upper apartment fall unimpeded to the ground and break more easily. Where the building crumbles, falling in on itself, the upper stones are cushioned by the house and slide to the ground, never reaching the velocity or force of contact present in the first case, and are less likely to break.

In order to determine the correct interpretation of the Tosefta passage, it is necessary to consider another rabbinic device which could have been applied to the problem at hand. This device is the principle of <u>רוב</u> or "majority." This principle operates where some element of the status of an item, animal or person is called into question. The uncertainty is eliminated by an appeal to probability. The operation of the principle is limited to situations where the minority, or lesser probability, can or should be ignored.

The classic case concerning <u>רוב</u> in the Talmud concerns a piece of meat whose status (kosher or unkosher) is not known. There are ten butcher stores in the town, nine selling kosher meat and one selling unkosher meat.

If the piece of meat was found (in the street) it is a question of Rov and the meat is considered kosher. If the piece of meat is in the possession of the person who originally bought it, but that person has forgotten where he bought it, then Rov cannot be applied. The meat is considered to be "half and half." This expression does not mean that the piece of meat is half kosher and half unkosher, but that the doubt concerning it is half and half.[19]

The difference between the two cases illustrates the distinction of when Rov may be used. Where the meat was found, the focus is upon the meat and the one store out of the ten which sells unkosher meat may be ignored. But where the meat is in the possession of the buyer, the stores are focused upon. In that case it cannot be ignored that there is a store in the town selling unkosher meat. The language of the Talmud expresses this as "all that is fixed (permanent) is considered half and half."[20] Where Rov cannot be applied, the Talmud says "all which can be decided according to majority should be so decided."[21]

Another factor which governs the operation of Rov is the principle of "closeness." (קרוב) If the piece of meat was closest to the store selling unkosher meat, that fact would still not defeat the principle of majority by providing a reason for not ignoring that store. But if the meat was found in that store, majority could not be applied.[22]

A third factor in Rov is the choice of majority to

be followed. The Talmud knows two kinds of majority: the majority which "is before us," and the majority which "is not before us."[23] The former is a case of known or determinable statistical majority as in the case of the piece of meat. The latter is a case where the statistical probabilities are unknown and cannot be determined, for example "most people buy animals for ploughing."[24] The known majority can be followed, but the unknown majority is not readily relied upon.

A final factor with Rov is the choice of majority to be followed. Often the status of the item in question can be resolved through the use of more than one majority. A Talmudic example which demonstrates this problem is the young girl who is raped near a spring which is outside of a city while a traveling caravan is camped nearby.[25] In determining the status of the offspring for the priesthood, a choice must be made between following the status of the majority of the men in the city or the majority of the men in the caravan.

With these considerations in mind we can examine how Rov would apply to our case. The closeness factor is not at issue. Proximity to the original site is suggested as part of actual apportionment, but it does not figure in the application of Rov here. There is only one majority which could be followed. This is the statement that the upper stones break in the majority of instances.[26] This seems to be a reasonable supposition, but we don't

know whether it would have been considered a case of known possibility. Possibly Rov could not be applied because of this factor. There is, however, a more compelling reason why Rov cannot be applied to our case.

Our case is not a situation where the minority could or should be ignored. The upper apartment was as much a permanent part of the building as the lower apartment. It would be committing an injustice to rule that each and every unbroken stone originated in the lower apartment because in some cases unbroken stones must have come from the upper apartment. This is a case of "all that is fixed is considered half and half." The upper apartment, and the stones in it, were fixed, so that the doubt in each stones is half and half. Rov cannot be applied to limit cases of division.

We are now in a position to understand the meaning of the Tosefta passage. It is a statement of Rov. It is found in the Tosefta but not in the Mishna because Rov could not be applied to this situation. The suggestion to use it is preserved, but it was not accepted into the operative law.

If the Mishna had followed this opinion and incorporated the Tosefta language, the first clause of the Mishna would have been functionally eliminated. Rov would have operated in one of two ways. It would have created an absolute rule resulting in the house owner reclaiming the unbroken stones in all cases. Secondly, it could have been a rule

applied when evaluation of breakage could not be made. Either version of Rov would have eliminated the need for division. The author of the Mishna felt that there were cases where the stones should be divided and decided not to adopt Rov.

After particular stones have been claimed and accounts balanced, the evaluation is attempted. If evaluation is inconclusive, then the first clause of the Mishna, division of the building materials, is resorted to. The Mishnaic formula appears to provide for equal division of the building materials irrespective of the size of the respective apartments. The Tosefta sets forth a different and more equitable rule. It records the introduction and first clause of the Mishna, to which it appends the following:

> "When does this apply? When they are equal, but if one is great and the other small, this one takes according to his share and that one takes according to his share."[27]

The procedure given in the Tosefta allows each owner to reclaim the materials which went into the construction of his part of the building, i.e. proportional division. The materials are evenly divided when the two apartments were exactly the same size. The materials are also evenly divided when both owners claim to have had the bigger apartment and a Bet Din is unable to determine which apartment was actually bigger. According to Nimuke Yosef, "the two divide" refers to the case where both claim to have had the bigger apartment; where the two apartments

were equal in size an equal division of building materials is the obvious solution.

The relative size of each apartment is a question of wall height, which determines the amount of stones and dirt used. The floor area of each apartment is the same as the nature of construction requires the walls of the attic to be contiguous with and extend upward from the walls of the house. The wood is the beams of the tikra. It is not divided as the stones and dirt are but returned to the house owner who originally provided it.

In discussing the wood, a problem arises concerning the construction of the building roof. It is clear from the literature that where an attic is built upon a house, the ceiling of the house is beams and "concrete" flooring. What is the construction of the attic ceiling which is the roof of the building? Nimuke Yosef assumes that the roof is made of the same beams-and-concrete-flooring combination. This assumption allows him to find an even division of materials which come from house ceiling and attic roof, as they are the same in nature. The house owner supplies his ceiling, and the attic owner supplies the roof. Each contributes the same amount of wood and retrieves a like amount. They are evenly divided because their square footage is the same, unaffected by wall height.[31]

1. The Mishna naturally divides itself into an introductory phrase and three clauses. The clauses have been numbered for purposes of convenient reference.
2. Rashi, Baba Mezia 116b s.v. "the house and the attic of two." Like brothers who inherit; not limiting it to that case, and thereby including partnership. Mizur Miskei Hamosh sets up inheritance and partnership, Baba Mezia 10:1 and 10:3, against rent which is found in Baba Mezia 10:2. See also Alfasi on B.M. 116b and ROSH on B.M. 10:1-3.
3. Baba Batra 6b-7a.
4. See Tur, Yoshen Mishpat 160:1.
5. B.M. 116b following Abaye.
6. This is the decision followed by both the ROSH and Alfasi.
7. According to the explanation given in the Gemara.
8. B.M. 116b.
9. Hidushei Ha Ran, L. Frankel, Jerusalem, 1963 p. 194.
10. ibid. p. 195. See also Yimuke Yosef on Alfasi B.M. 116b s.v. "let them look on the morrow."
11. B.M. 116b.
12. This is a rabbinic rule of evidence. He who wishes to recover from another bears the burden of proof. (
13. (
14. Baba Batra 4a.
15. This is followed by Alfasi to B.B. 4a and Maimonides, Yad, Hilchot Shechanim 2:18.
16. (
17. Minchat Bikkurim on Tosefta Baba Mezia 11:1.
18. In cases where the stones have been removed, the apportionment process would be inoperative and the loss would be split. Defaninhu may mean that the stones and materials have been moved (not taken away) and consequently do not offer evidence on the falling of the house, in which case the materials must be divided.
19. Ketuvot 15b, Chullin 95a, Pesachim 9b, Nidah 18a. This being the case, since matters of Kasrut stem from the Torah, the doubt is resolved in favor of the stricter interpretation, and the meat is considered unkosher and forbidden.
20. (
21. (
22. See B.B. 23b and Tosephot ad. loc. s.v. "majority and closeness, follow the majority." The decision follows from the Mishna there.
23. Majority which "is before us." (
    Majority which "is not before us." (

24. Baba Kamma 46b.
25. Ketuvot 15a.
26. Nimuke Yosef on Alfasi to B.M. 116b, s.v. "the two of them divide.
27. Tosefta Baba Mezia 11:1
28. See Hidushei Ha Ran, D. Frankel, Jerusalem, 1963 p. 163.
29. See B.M. 10:2. It seems reasonable to conclude that the house owner, who must repair the beams according to both the rabbis and Rabbi Yosi, originally provided them. In fact, the wording of Rabbi Yosi;s statement "the lower one provides the beams," suggests original construction.
30. Nimuke Yosef on Alfasi to B.M. 116b s.v. "of two."
31. See Rashi B.M. 116b s.v. "the two divide." Also see B.M. 101b.

CHAPTER III. REBUILDING OF CONDOMINIA

הבית והעלייה של שנים שנפלו אמר בעל העלייה לבעל הבית לבנות והוא אינו רוצה לבנות הרי בעל העלייה בונה את הבית ודר בתוכה עד שיתן לו את יציאותיו ר' יהודה אומר אף זה דר בחוך של חבירו צריך להעלות לו שכר אלא בעל העלייה בונה את הבית ואת העלייה מקרה את העליונה ויושב בבית עד שיתן לו את יציאותיו

> "The house and the attic which belonged to two which fell: The attic owner demanded that the house owner rebuild, but the house owner would not rebuild. The attic owner may build the house and live in it until the house owner reimburses him for his expenses. Rabbi Yehudah rules: Then he (the attic owner) would be living in another's property and be liable to pay rent, so the attic owner should rebuild the house and the attic and roof the attic and live in the house until reimbursed for his expenses."

Baba Mezia 10:3 formulates a remedy for the attic owner where the house owner is unable or unwilling to rebuild the building which was destroyed. He may himself rebuild the house and live in it. It is imperative to have some remedy because, obviously, if the house is not rebuilt, the attic cannot be rebuilt either. There are two issues prior to its application. They are a settlement whereby neither owner rebuilds and a way to compel the house owner to himself rebuild.

The division of the land where neither owner wants to rebuild is not mentioned in any of our Mishnas. The Gemara records two ratios of division, three fourths to one fourth and two thirds to one third. The latter is considered to be the law.[1] There is one statement that the attic owner has no share in the land but this is completely ignored.[2] This

statement could reflect a situation where one party owned land and a house and sold to a second the right to construct a second story. The problem with this reasoning is that an attic has an external ladder. If the courtyard is divided, the ladder claims a portion of it which demonstrates that the upper occupant has a share in the land while the building yet stands.[3] When one bought second story rights, he bought part of the land.[4]

The Tosefta version of this passage records only that the division is two thirds to one third.[5] The rabbinic law is that the attic owner takes one third of the land when the building is destroyed.[6] The rationale is that the attic adversely affects the duration of the building. The Gemara states that the probable life of the building is decreased by a third. The Gemara does not explain why this translates to a third of the land.[7] If the two owners agree to sell the site instead of dividing it for agriculture, they divide the proceeds according to the same ratio.[8]

If the two owners don't rebuild, they may disagree on whether to sell the land or divide it. The person wanting to sell could always sell his share, but this may decrease its value. There is an incentive to have the land sold as one plot. Should the house owner, having the larger share, be granted a controlling interest and be allowed to impose his will on the attic owner?

As long as the attic owner wants to rebuild, the land cannot be put to any use or sold whole. This is the by-product of the Mishna's rule. The land itself is subject to

an easement to support a house which will support the attic.[9]

When neither rebuilds, the attic owner claims a share of the land for agriculture. He possessed originally an easement on the house and land for, as it were, structural purposes; to hold up his attic. When he acquired the second story rights, did he acquire any other interest in the land? Does his share in a courtyard division signal that he holds an actual share of the land for any purpose or was it only for egress to his attic?

The Gemara states without reservation that each owner takes a share. This is prior to any usage (except rebuilding). Disposition of the land is subsequent and individual. If either wants to see the whole plot sold, it must be by the consent of both. The larger share does not represent a controlling interest.

There is in rabbinic law a device for the consolidation of plots into one unit.[10] Neither can make use of this device because each has an independent share. This device operates only where the legal entity is such that it cannot be divided. Since each owner can maintain his share, neither can compel the other to sell out.[11]

The second issue prior to the attic owner's rebuilding is whether he can compel the house owner to rebuild. The three authoritative codes do not consider the possibility of an alternative to the Mishnaic remedy.[12] Current rabbinic law would not allow any such remedy, but this does not mean that no other remedy was available at the time of the Mishna.

The alternative is to proceed against the house owner's other property. This requires that the house owner have other property in the region under the jurisdiction of the available court. Then there are two obstacles to obtaining a judgement. One is jurisdictional; the other involves the nature of the attic owner's rights.

The jurisdictional problem is that the court may not proceed against the house owner's property without his presence.[13] In certain kinds of cases, the court will ignore a party's absence. This tendency develops in cases of debts where people would borrow money and leave the region. This happened with enough frequency that lenders would have stopped lending unless allowed to collect from other property.[14] The extension of this tendency to our case is argued pro and con by various rabbinic authorities. Since this jurisdictional problem would not be as frequent in our area, it is likely that this jurisdictional problem is fatal to the attic owner's case.

If the court is willing to act, the attic owner may be unable to show that his claim extends to any of the house owner's other property. The relationship between the two owners is in part created by their proximity. It may not be a full and complete partnership extending to all assets of each. According to some rabbinic authorities, both problems are resolved in favor of the attic owner.

The advantage gained through this alternative is that the attic owner does not have to obtain the money necessary to rebuild and then extract it from the house owner. This is

important if he doesn't have and cannot get it. By obtaining judgement against other property, he does two things. He enables himself to rebuild and provides further incentive for the house owner to himself rebuild. The house owner will have greater control over the nature of his house if he rebuilds it himself and might save himself some money. The Gemara attempts to ensure that the house is rebuilt the same, so that the cost differential is limited, but there is bound to be a difference depending on who builds the house.[15]

Having disposed of prior questions, we now come to the actual operation of the remedy itself. If the house owner does not rebuild, the attic owner rebuilds in his place. He lives in the house until the house owner reimburses him for his expenses. He does not, at this point, rebuild the attic.

There are several reasons why the house owner might not rebuild. He may not have the money to rebuild the house as it was.[16] He may have other residences and decide he does not need the house. The Mishna could not have expected to compel a house owner to rebuild where he did not have the money to do so. The wording "and he does not wish to rebuild" could be an indication that there were a significant number of cases where the house owner was able but unwilling to rebuild.

The house owner's responsibility for reimbursement is limited to what he is required to rebuild i.e. the walls and first floor <u>tikra</u>.[17] Changes may be made in the building insofar as they strengthen the house or decrease the weight of the attic. This restriction insures that the life of the

building will not be shortened; where changes are made, they must increase the probable duration of the building.[18] If the attic owner makes changes in the house, they will increase the cost, but the house owner is only required to pay for expenses involved in rebuilding the house as it was.[19]

The question of a change in the structure also occurs when both owners agree to rebuild. The general principle, that the duration of the building must be preserved, is the same. One owner may wish to change the entire building to a heavier medium of construction and offer to bear the incremental expense in an effort to persuade the other owner to agree. The other owner does not have to consent to this change because it would result in a small loss of space, the heavier medium taking up more room.[20]

The point of contention in this Mishna is the argument between the anonymous Mishna and Rabbi Yehuda. The anonymous Mishna provides that where the house owner does not rebuild, the attic owner rebuilds the house and lives in it until reimbursed after which it is assumed he would rebuild the attic and move back into it.[21] Rabbi Yehuda believes that the attic owner, living in the property of another, is required to pay him rent. He provides that the attic owner should rebuild the entire building, then live in the house until reimbursed for the expenses stemming from building the house. Upon reimbursement, he would vacate the house and return to the attic. The rabbinic law on this question follows the anonymous Mishna. The attic owner rebuilds the house and lives in it until reimbursed.[22] He may rebuild the

attic at the same time and live in it instead, but he does not have to do so in order to avoid incurring liability for rent.

One interpretation of Rabbi Yehuda's rationale is that a question of interest is involved. According to this, if the attic owner did not build the house, then the ground would be divided. Rebuilding the house enables the attic owner to use more than the third of the land he takes at division. This has the effect of transferring a financial benefit from house owner to attic owner. This use of land is tantamount to interest or usury.[23] The attic owner must pay rent to the house owner in order to avoid collecting interest by use of land to which he would otherwise not be entitled.

This explanation is derived by an analogy to a similar case where payment of rent is required to avoid interest. In a section of the Mishna devoted to usury we find the following statement:

> "If a man lends (money) to another, he must not live rent-free in his courtyard, nor at a low rent, because that constitutes usury."[24]

The use of land to which the attic owner is not otherwise entitled is analogous to the borrowing of money. The attic owner, who gains the use of the land, is the debtor, the house owner is the creditor. According to the Mishna above, the creditor must not derive an undue benefit. For the analogy to hold, there must be a way of characterizing our case so that the attic owner becomes the creditor. Then he would be required to pay rent so that he does not derive a benefit from living in the house. This would be the case only

where the house owner benefits financially from having the attic owner build his house.

The following explanation illustrates that the attic owner cannot be considered the debtor. The entire plot of land is subject to a prescriptive easement on behalf of the attic owner requiring that the land be maintained for the purpose of erecting a residence. Nothing else may be done with the land unless the attic owner agrees. As the attic owner is entitled to the use of the entire plot (as opposed to title to one-third), he gains no benefit. He simply uses that to which he is entitled. Therefore, he is not the debtor.

When the attic owner rebuilds the house, the house owner excapes the bother of doing so. After it is built, the house owner owes the attic owner a sum equal to the expenses. Owing him money, he is in the position of a debtor. This is the situation in the Mishna set out above. The rule can easily be extended to our case.[25]

Another method of examining Rabbi Yehuda's dissent from the Mishna is to consider benefits and losses involved (exclusive of the previous issue). As we have said, a basic principle of rabbinic law is that no one should receive a benefit of any kind without paying appropriate compensation. This appears to have been a special concern of Rabbi Yehuda's.[26] Another reason the attic owner must pay rent is to avoid benefits arising out of depreciation of the building.[27]

There are three combinations of benefit and loss which might be involved. They are: 1) the attic owner benefits by

living in the house, while the house owner does not lose (if the attic owner did not build the house in order to live in it, there would be no house, and the house owner would have to build it himself); 2) the attic owner benefits and the house owner loses; and 3) the attic owner does not benefit.

If Rabbi Yehuda's ruling is based on (1), the attic owner, gaining a benefit, incurs a liability regardless of whether the house owner suffers a loss. This principle, that the benefiting party must pay where the other party does not lose, is discussed in the Talmud.[28] A number of cases appearing to support this principle are brought, but an actual loss is found in each case. From this discussion we learn two things: 1) if the attic owner does not have to pay rent (the anonymous Mishna), this is due not to benefit without loss, but because the nature of the easement gives the attic owner the right to live in the house in this case and 2) In fact, the house owner sustains an actual loss due to the blackening of the walls caused by use of fires in the house.

Rabbi Yehuda's position is based on (2). The attic owner benefits and the house owner loses due to depreciation. There are several possible benefits to the attic owner. First, he has a house to live in, but it hardly seems fair to consider this an unpaid for benefit. He has to advance the money to rebuild the house and suffer the bother of doing it. A more tangible benefit is that his attic escapes blackening of the walls or wear on the flooring while he is living in the house. He causes the house to depreciate, but he is reimbursed for the full amount of expenses so that he escapes

the cost of any depreciation prior to moving back into his attic. A second benefit is that while living in the house, he does not have to go up and down to and from the attic and saves the bother and energy.[29]

Rabbi Yehuda wants to avoid a situation in which the attic owner is required to pay rent for living in the house. Given that he thinks this is the outcome of the anonymous Mishna's ruling, it is easy to see why. Whatever the amount of rent, the attic owner is forced to spend additional money to rebuild his apartment after reimbursement because part of that reimbursement is used up, in effect, in paying the rent. In addition, the house owner could wait until the rent due was equal to the expenses of rebuilding the house, then move back into the house without having to pay anything at all. If the house owner did not need the house, either because he was absent from the region or because he had another place to live, there would be no reason for him not to follow this course of action. To avoid these difficulties, Rabbi Yehuda formulated a different remedy. The attic owner should rebuild the entire building, completing the roof of the upper story, and live in the house until reimbursed for his expenses.

There are several problems with this remedy. It is not clear exactly what it accomplishes. We said before that Rabbi Yehuda created this remedy in order to prevent a situation where the attic owner benefits as the house owner loses. Rashi interprets this remedy to solve the problem by eliminating the benefit. The attic is ready for the attic owner

to move into so he does not benefit by the house. The house owner gains a house which would not otherwise be built, but he suffers the depreciation of the walls.[30]

As we saw above, as long as the attic owner lives in the house, he benefits and the house owner loses. Tosephot, troubled by this, suggests a different version of the Gemara.[31] Rabbi Yehuda's remedy should be understood to mean that the attic owner rebuilds the entire building and lives in the attic. He does not let the house owner return to the house until reimbursed. This interpretation does eliminate all of the tangible benefits or losses and accomplishes Rabbi Yehuda's goal, eliminating the necessity for the attic owner to pay rent.

There is only one difficulty with the Tosephot solution. This is not the way that the Gemara reads and requires changing the text.[32] It would be preferable to find an interpretation which could explain how Rabbi Yehuda's solution avoids payment for rent without altering the Mishna.

The original source of this rule prohibited living rent free in the debtor's property even when this was not part of the borrowing agreement because that would be a freely gained benefit. When the whole building is rebuilt, the availability of the attic may enable us to say that the attic owner does not gain anything by living in the house. Why not have the attic owner live in his attic? The house owner might be tempted to move back into his house without repaying. As long as the attic owner possesses it, this would be less likely. There might be a loss due to wall blackening, but if

the attic owner does not benefit, he would not have to pay. Alternately this might not be considered a loss. The walls would blacken if the house owner was living there, and the law considers that he should be.

Regardless of Rabbi Yehuda's reasoning, the normative law is the anonymous Mishna. The attic owner rebuilds only the house and does not benefit by doing so; he still faces the rebuilding of the attic. This is determinative for the anonymous Mishna even if there is a loss sustained by the house owner. He is not viewed sympathetically. His unwillingness to rebuild even if due only to lack of funds does not put him in a good light. Having the attic owner rebuild the house is a simple, direct remedy. He might not have the money to rebuild the entire building so is properly entitled to rebuild only the house. The depreciation loss is an incentive for the house owner to rebuild if possible. The attic depreciation, which is postponed until the house owner makes reimbursement, cannot offset the bother of building an entire structure as well as the dislocation of resettlement.

CHAPTER THREE FOOTNOTES

1. One might think that in partnership when two owners obtain a piece of land and build on it, the land would be divided half and half. Any other division would seem unfair. This apparent injustice disappears, however, when one remembers that the ratio of division would have been known in advance and considered in the original agreement.
2. B.M. 117b. The statement "It is taught: If neither has anything, the attic owner has no share in the land," is not included by the ROSH and placed within parentheses in the printed edition. It is included by Alfasi.
3. For the effect of the ladder, see B.B. 11b. See also B.M. 117b Tosephot, s.v. "what if neither possesses" concerning the easement. Perhaps the easement upon the land which the attic owner has is only for the purpose of building an attic and does not obtain for agricultural purposes.
4. See Chapter Four, p.
5. Tosephta Baba Mezia 11:2.
6. Yad, Hilchot Shechanim 4:4; Tur, Hoshen Mishpat 164; Shulchan Aruch, Hoshen Mishpat 164:5.
7. Rashi, B.M. 117b s.v. "how much does it decrease?" One third. Nimuke Yosef to Alfasi on B.M. 117b s.v. "How much does it decrease it?" See also Aruch HaShulchan 164:5.
8. Tur, Hoshen Mishpat 164:7.
9. Tosephot B.M. 117b s.v. "What if neither possesses?"
10. This is a remedy applied where there are two partners in possession of one item which cannot be divided. Either may say to the other "sell me your share or buy mine" provided that he is able to buy out the other partner. The minimum amount of land which may be divided is a plot of eight amot. The minimum amount which will form a courtyard is four amot. (B.B. 1:6) Since this amount certainly exists where there was a house, the land may be divided. Aruch HaShulchan, Hoshen Mishpat 164:5, See also Tur, Hoshen Mishpat 171:1-3,5, and B.B. 13a-b.
11. Tosephot B.M. 117b s.v. "what if neither possesses?" The wording is "if he wants to sell for (the purpose of building) a house, he can only sell the share he has in it." Also see Bet Yosef to Tur, H.M. 164:6.
12. Yad, Hilchot Shechanim 4:3; Tur H.M. 164:6; Shulchan Aruch H.M. 164:5.
13. Yad, Hilchot Malveh u'Loveh 13:1.
14. Ketuvot 88a.
15. B.M. 117b "He who would change. . ."
16. The house must be rebuilt as it was or better, see below.
17. Rashi B.M. 117a s.v. "the attic owner told the house owner to rebuild." Also Bait Hadash to Tur H.M. 164:6. Nimuke Yosef to Alfasi on B.M. 117a. Shulchan Aruch; H.M. 164:5. We said before that tikra can mean either

the beams, or the beams and flooring. The discussions on the meaning of tikra in this case parallel the opinions concerning the division of responsibility for repair in B.M. 10:2. The authorities who say the house owner must repair both beams and flooring compel him to build both beams and flooring. Those who limit his responsibility to flooring in repair limit it here. Those who claim that the house owner is responsible for nothing say that here he must only build the walls to the tikra.

18. B.M. 117b and Yad, Tur, and Shulchan Aruch, ibid.
19. Shulchan Aruch, H.M. 164:5 "the attic owner rebuilds the house as it was."
20. See B. B. 2a on the question of materials and their sizes. For this ruling see Tur, H.M. 164:9.
21. See Rashi B.M. 117a "until he pays him his expenses."
22. Yad, Hilchot Shechanim 4:3, Tur, H.M. 164:5; Aruch HaShulchan 164:5.
23. The lending of money at interest, i.e. usury, between Jews, is forbidden in the Torah. See Leviticus 25:36-7. Rabbinic law has construed this prohibition as applying to any benefit gained without payment of appropriate compensation.
24. B.M. 5:2.
25. For this interpretation of Rabbi Yehuda's ruling see Bait Hadash to Tur, H.M. 164:6 s.v. "he should build himself the house.
26. B.M. 117b.
27. A "free" benefit is allowed only where it was conveyed knowingly and willingly. See Rashi B.M. 117b, s.v. "that he benefit from the property of another."
28. B.K. 20b.
29. Tosephot B.M. 117a s.v. "and live in the house until he pays him expenses."
30. Rashi B.M. 117a s.v. "and live in the house."
31. Tosephot B.M. 117a s.v. "and live in thehouse until he repays him his expenses.
32. The language with which Tosephot suggests this version is mistaekenly taken to suggest an actual different reading. See for example, the Soncino translation of Baba Mezia, p. 665, note #5, where it is claimed that this comment is based on a "slightly different reading." This seems to imply that Tosephot had a different manuscript of the misunderstanding of the word garas by which Tosephot introduces its version. This word cannot be translated literally. It is also used, for example, in the sense of "another understanding." See Rashi, B.M. 116b s.v. "azda." There are no manuscripts which record this supposedly different reading of the Mishna.

CHAPTER IV. ENGLISH AND AMERICAN COMMON LAW

The English common law began with the creation of writs after the Norman conquest of 1066. An injured party could seek relief in the king's courts. This was preferable to the communal and feudal courts then in existence because of the king's greater power of enforcement. As it became established that the king's courts would hear a particular kind of case, the complainant could obtain a writ from the king's chief minister, the chancellor, as a matter of course.[1] Each writ contained within it a form of action determining the manner in which the suit commenced, the substantive elements of the case, the manner of trial and the type of relief accompanying an eventual judgement.[2] There was a specific writ for each kind of case the king's courts would hear; if the plaintiff chose the wrong writ, his action would fail. If there was no writ which fit his case, the chancellor could draw up a new one, provided it was similar to cases for which a writ already existed.[3] If the chancellor could not create a new writ, the plaintiff could not obtain relief in the royal courts.

The prevalent methods of decision in England at this time were ordeal, combat and oath. Ordeal and combat went out of use during the twelfth and thirteenth centuries.[4] Oath, commonly called compurgation, or wager of law, required one party to swear his case. This was done in compliance with rigid formalities and the accompaniment of a number of "oath-helpers," who swore to the veracity of the oath. Any formal

error, such as use of the wrong word by the oath taker or his helpers, would defeat the case.[5]

As the common law developed over the next few centuries, it was influenced in part by a desire to avoid these methods of trial in favor of trial by jury. The jury, which developed originally as a kind of assessor's body, appraising property for taxes on its own knowledge without witnesses, was regarded as a more rational method of trial. To obtain a jury trial, plaintiffs sought to use forms of action which had developed late and did not provide a right to any of the older modes of decision.

Common law pleading consisted of three basic steps, the purpose of which was to frame a single issue[6] upon which the case could be decided. The plaintiff would set forth his claim in a declaration meeting certain formal requirements to which the defendant replied. This reply was made either by a demurrer or a plea. A demurrer denied the legal sufficiency of the case i.e. that even if the alleged facts were true, the plaintiff had no claim. Alternatively, the defendant could demur by arguing that the plaintiff had chosen the wrong writ for the case. Instead of demurring, the defendant could plead by denying a fact or facts set out in the declaration in which event the case would go to trial to determine the facts. If the defendant admitted the facts but claimed a defense to them, then the plaintiff would have to respond before an issue could be framed.[7] When a single issue had been framed, the pleading was ended and the case was tried.

During the course of the twelfth and thirteenth centuries, so many new writs were created that towards the fourteenth century, the system began to stiffen. Conservative judges quashed many of the newly created writs. This meant that many people were denied relief in the royal courts which had mostly supplanted their earlier competitors. In response to this development, another court system arose.[8]

Injured parties who could not obtain relief in the king's court could present a petition for special relief to him, which in practice was disposed of by the chancellor. That office developed independant judicial powers dealing with these requests. It used a writ of subpoena, which did not specifically state a claim like the royal court's writs, but only summoned the defendant to appear for examination. If the defendant did not appear, he forfeited a sum of money. The chancellor would interrogate all parties, then decide both questions of fact and law. The following is a description of the relationship between the two systems, law and equity, during the fourteenth century. The Chancellor, exercising his power of equity, did not

> "administer any body of substantive rules that differed from the ordinary law of the land. . . . The complaints that come before them are in general complaints of indubitable wrongs . . . of which the ordinary courts take cognizance, wrongs which they ought to redress. But then owing to one thing and another such wrongs are not always redressed by courts of law."[9]

The case which was usually heard in the law court concerned the existence (or lack thereof) of a legal relationship between plaintiff and defendant. When the former prevailed, he became entitled to a sum of money from the defendant. A

second type of remedy was available only through the chancellor's separate court: specific relief. This was directed not at the defendant's property, as in the law court, but at his person. The chancellor could direct him to perform, or refrain from performing, certain acts.

In English common law, and in American as well, property rights are rights springing from or descending into the land. Buildings, which are central to our study, were considered as improvements on the land and not separate independant entities. When one acquired a plot of land, he acquired not only the surface plot specified in the deed but all the airspace directly above it and all rights to what ever might be found in the ground below it. If there were improvements on the plot, one acquired them as well. Improvements were transferred as is with no warranties as to their condition or suitability for any type of usage. The fact that ownership of buildings came as a result of ownership of land created in the common law a disposition against the idea of condominia, where ownership of a part of a building is separate from ownership of land.

The condominium developed in connection with the living quarters of officers of the court. Lawyers held rooms for their exclusive use in the Inns of Court where cases were heard. A severe shortage of space in the late sixteenth century resulted in members building new chambers over existing buildings. Their construction of these rooms (at their own expense) earned them a life interest (lifetime control with the power to bequeath) with the right of assignment to any other member of the Inn.[10]

This development led the way to the increased use of condominia and their extension to the private sector, so that the right to have such a holding became established in the common law.

> "A man may have an inheritance in an upper chamber, though the lower buildings and the soil be in another, and seeing it is an inheritance corporeall it shall pass by livery."[11]

What followed in the common law is a process of determining the rights and obligations of the attic owner (using rabbinic terminology) and how his status modified that of the owner of the soil and house.

One of the earliest cases in English common law concerning condominia law occurred during the reign of Henry VIII (1509-1547). This case establishes that the lower owner may do nothing to destroy the attic above and records a dissenting opinion which carries further this train of thought.

> " . . . Fineaux and Brudenall, justices of the King's Bench, were of opinion that if a man have a house underneath, and another have a house over it, as is the case in London, the owner of the first house may compel the other to cover his house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of the house below; and this by action of the case. But some of the bar were of the opinion that the owner of the house might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above."[12]

This statement contains all of the issues involved in maintenance and repair. Neither owner may actively damage or destroy the building. This is fixed into the fabric of the law by the unanimous agreement of the court. Without this restraint, it would be impossible to have condominia. The

The house owner has the right to protection which would normally be provided by the attic, in particular, the roof. The dissenting justices, considering the attic owner by analogy from the last statement, are of the opinion that the attic owner is entitled to the same protection. This last area, the right of the attic owner to the support of the house and the right to compel maintenance thereof, has been the subject of much dispute as the common law, both English and American, developed.

The attic owner's right to support is divisible into two parts. The primary, and the more widely accepted, concerns his right, initially, to that support. This is agreed upon by the court, but is difficult to use in the analogy because the two partners are not really equal. The upper party is concerned with support, but he does not furnish the house owner with support. Instead, he furnishes protection. The two owners therefore are not concerned with the same thing. When the court says that the house owner may not tear down all or part of his house, it restrains him in a way that the attic owner is not restrained. The attic owner must provide a roof, but the court does not say he must maintain it. As long as the house owner cannot tear down his building, the attic owner has the support of the house. But what of the inevitable depreciation which must set in? Must the house owner maintain his house so that it will always support the attic? This is the fundamental and difficult question of repair. The court in Kielway did not really address itself to that issue. It merely provided the

basic starting point for the condominium. The building must be completed (the roof is a natural part of any residential building, which is the reason that the attic owner must complete it), and neither owner may actively damage it.

This restraint upon each owner stems from what the court sees as the fundamental unity of the building. This is illustrated by a decision in an Illinois case which explicitly accepts the idea of condominia.[13] In that case the house owner had title to the land and the first of a three story building. The attic owner held title to the top two floors which had been built as part of the original building. They also held the right to use hallways and stairways thereto together with a box office and the ground in the rear. There was no time stated in the deed as to the expiration of their rights. The court's decision there recognized the existence of real property which was not connected to the land.

> "The fee and the first story were charged with the support of the second and third stories, and we are of the opinion that said second and third stories were not personal property, but were real estate."[14]

There were in this case two factors present which influenced the court to make this decision. The first, and foremost, is that it is simply impossible to divide the building into separate parts. A grant of the top two floors having been made, these passed into separate ownership. As real estate, they were entitled to support as any building would be. The only difference is that the support was provided not only by the land as in most support cases, but also by a part of

the building. The second factor, which may have influenced the decision, was the ownership of land adjacent to the building although not the land on which the building actually stood.

This case did not define the nature of support or ask whether it was perpetual. This question was answered differently in America than in England where it leaned toward the attic owner. In English law "each (owner) may compel the other to repair his part in preservation of the others."[15] This right to compel stems not only from condominia but from a general principle that no man may suffer his house to injure another's.

> "But if two jointenants are of a house, and the one will not repair it, the other shall have a writ de reparatione facienda against him. So if a man have a house near to the house of another, and he suffer his house to be so ruinous, as it is like to fall upon the house of the other, he may have a writ de domo reparanda, and compel him to repair his house."[16]

This writ covered the situation where one owner had made repairs and needed to recover from the others. Compulsion to repair would have been a subject for the equity court. In England, the owners must maintain their apartments in good repair indefinitely.

In the United States the two owners have a more limited relationship. Although the building is one unit the two owners are considered to own adjoining, but legally separate dwellings. They are not joint tenants or tenants in common, but separate owners who

happen to own parts of the same building. In Loring v. Bacon[17] the attic owner repaired a leaky roof and brought an action in assumpsit (assumpsit meaning an implied obligation) to recover eighty dollars toward labor and materials. This was denied because the attic owner had a remedy in equity, being obliged by the principle mentioned above to bring an action on the case to compel the house owner to assist in making repairs. Recovery was disallowed because there was no legal relationship between the two owners.

American condominia common law has three basic problems, all stemming from the lack of a legal relationship between the two owners. Combined with this absence is the fact that the attic owner usually buys his rights with the expectation that they will last the natural life of the building. When the building ages beyond use, all his rights are terminated, absent clauses to the contrary. The problems caused by these two factors severly limit the worth of the attic owner's holdings.

> "Because a tenant-in-common could always require a partition of the jointly held property, any one tenant-in-common could, at his whim, bring his tenancy to an abrupt end and destroy the underlying structure. In addition, the common law was powerless to enforce any but the most minimal affirmative covenants providing for the maintenance and improvement of the commonly held elements. . . . The real difficulty facing the common law was to develop a mechanism which would provide for the contingency of partial or total destruction by fire or other natural disaster."[18]

The problem of partition could be overcome by a court which would refuse to order division on the theory that the attic was real property (as in Madison). This doctrine is not questioned, and one does not expect to find a court

ordering the separation of a building. Maintenance could be effected by stipulations in the original deed running with the land providing for upkeep. The first step in the solution to the problem of premature destruction is to provide a clause for rebuilding. The ultimate question is whether the attic owner may be said to have indestructible rights which cannot be terminated by the destruction of the building.

These two problems (inability to enforce maintenance and repair and termination of the attic owner's rights upon destruction of the building) are illustrated by the following four cases.

The first case involved damages to the house owner's goods through the defendant attic owner's failure to repair a leaky roof.[19] The plaintiff house owner suffered damage to the plaster walls and to goods which were present in his house. He sought to recover damages for both, but was denied. The court there found that the plaintiff should have sought his remedy in a court of equity to compel the defendant to repair his roof.

The court's instructions in Cheeseborough notwithstanding, that case did not guarantee that a plaintiff would be able to compel another owner to make any repairs. In a case in another jurisdiction involving two owners in a house divided vertically (the apartments were side by side), the plaintiff sued to compel defendant to repair his apartment, the decay of which was causing plaintiff's apartment to suffer.[20] He was denied recovery because there was no mutual easement to support past destruction of the building, so repairs could not be compelled unless expressly stated in the deed. Decay

was part of the natural destruction of the building which was expected so there was no call to repair.

If a plaintiff can neither compel repair nor recover damages resulting from failure to repair, his only alternative is to make the repairs himself. In an Iowa case the same year as Pierce, the plaintiff house owner requested the attic owner to repair his leaky roof, the deficiency of which was damaging the plaintiff's ceiling, carpet and furniture. The attic owner refused, so the plaintiff repaired it at his own expense and brought suit for reimbursement. He was unsuccessful because there was no legal relationship on which recovery could be based.[21]

We see from these cases that in the American common law, as opposed to the English, the two owners are regarded as separate in law (although joined in fact by their proximity). This disjunction makes it difficult to overcome any problem not considered in the original deed.

In Hahn v. Baker Lodge, a two story building was built, to be owned entirely by the house owner with the exception of a middle room on the second floor.[22] The grantee's deed had no reference to any land and no stipulations concerning either repair or eventual destruction of the building. The building did burn, and the attic owner wanted a middle room on the second floor of the new building. The court refused to grant this, stating that the attic owner had acquired and owned only the "room or space inclosed by that part of the building which was described and identified as the middle room or hall of the upper story."[23] The attic owner did not own any part of the actual structure; he only owned a cube of

air. When the building was destroyed by fire, there was nothing upon which the attic owner's deed could operate. His rights terminated because there was no way of determining where his cube of air was. The court claims that this is the intent of the parties.

> "As the instrument grants the defendant no estate in the land and contains no stipulation of the right to rebuild in case of destruction by fire, or other casualty, it would seem to be plain that it was the intention of the parties, collected from their agreement and its subject matter, that the agreement, and the relation created by it, should terminate with the destruction of the building."[24]

A case five years prior to Hahn had involved a deed of grant which contained a stipulation which seemed as if it might protect the attic owner's rights. The house owner there built a one story building and granted to the original attic owner the right to build a second story and "to have and to own said second story of the said building for the use of the parties of the second part perpetually."[25] This guarantee was reduced by the court to an easement for use as long as the structure stood. As there was no interest in the land, the attic owner's rights terminated with the destruction of the building.

The principle that the attic owner's rights terminate with the destruction of the building does more than limit the length of his ownership. It influences courts to limit his rights in the area of support and repair and to exclude the possibility of recovering damages occurring to or within the attic resulting from failure of support and/or repair. This linkage is illustrated by the following case where the issues

are tied together.

In Jackson v. Bruns, the walls in one corner of the lower apartment were crumbling and endangering the second floor.[26] The attic owner brought suit for damages resulting from the failure to make repairs and to compel the house owner to maintain his building in good repair. He was denied on both counts. Requiring the lower owner to make repairs would imply a perpetual easement to the right of support. Since the building is not considered perpetual,i.e. its destruction (and the termination of the attic owner's rights) is considered inevitable, there is no need to require repairs, because deficiencies which arise are part of the process of destruction (as in Pierce). This being the case, the upper owner cannot recover damages.

Examples of covenants attempting to provide both for maintenance and repair and for protection of the attic owner's rights after possible destruction of the structure are found in an Iowa case, Weaver v. Osborne. Both are located in a deed of sale which transferred to the grantee

> "All of the second story . . . commencing thirteen feet from the foundation. And it is further agreed that the first party agrees to maintain and keep in good repair the bottom of first story and the second party agrees to maintain and keep in good repair the top or second story and passageway and if either fails to maintain their part a notice of thirty days must be served on the party failing and then if not repaired can be done so by the other part at the expense of the party failing. In case of fire let it be optional with either party in case of building."[27]

The court there states that without this provision, the

house owner would have no responsibility to maintain the first floor and that the attic owner's rights would terminate upon destruction of the building. The first part, according to the court, is so within the rights of the grantor to make covenants running with the title that it is not necessary to dwell on it. After discussing the last sentence at some length the court concludes that without its presence, either party would compel the other to continuously repair and rebuild as a result of the first part of the provision concerning maintenance. The last sentence sets up a situation where the house owner may decide to rebuild or not at this option. If he rebuilds the first story, the attic owner may rebuild on top of it. However, if he decides not to rebuild, the attic owner is left helpless and all his rights terminate, not being in any way connected to the land.

Weaver demonstrates that the parties have the power to create in the original deed rights which will survive destruction of the original structure. The rule that (without stipulations) the attic owner's rights are terminated by the destruction of the building seems to stem from the simple fact that without a first floor to provide support, the attice owner cannot possibly build anything. Therefore, the property, even if thought to still rest in the attic owner, has no economic value. If it were possible to build a second story and hang it in the air by levitation or some other theoretical means, then the attic owner might have received more protection after destruction. Then the attic would

exist in reference to the soil and measurements above it and not be dependant on the first story.

Delineation of the attic without reference to the lower floor but in relation to the soil is found in Pearson v. Matheson.[28] The grantor conveyed a plot of land to the grantee who was to build a one story storeroom not to exceed fourteen feet in height. The grantor reserved the right to build over the storeroom. The conveyance was made before the building was built, and the division was made with reference to the soil and a line fourteen feet above it. The attic owner's rights were not defined in terms of the structure as in Hahn. Finally, there was a provision that in case of fire, the building was to be rebuilt within twelve months with the expenses pro-rated. In addition to the deed, there was a written contract which gave the attic owner the right to run steam pipes through the first floor. In return, the house owner was entitled to open skylights in the roof of his store. In a dispute that arose during the rebuilding after a fire, the court there found the intention of the parties to be clear.

> " . . . to confine Watson's tenure to the soil of the lot granted and the fourteen feet above it, and to reserve to Matheson the use of all that space which lay above the fourteen foot line parallel to and above the soil."[29]

The court held that the attic owner was "sovereign of the air" over the fourteen foot line. That sovereignty could not be defeated by transfer of rights to another party, destruction of the building or anything else. The provision for rebuilding without which the attic owner's rights would have terminated

continued all of his rights and obligations in force. The one clause served as a vehicle to preserve not only his ownership but to maintain it unmodified by the destruction of the original building.

CHAPTER FOUR FOOTNOTES

1. Maitland, F. W. Equity, also The Forms of Action at Common Law. Cambridge at the University Press, 1920. p.3.
2. Ibid. P. 296f. The writ is the actual document which the plaintiff must obtain in order to bring the defendant to court. The defendant is ordered to appear for the specific purpose of answering the particular claim set out in the writ.
3. Stephens, H.J. A Treatise on the Principles of Pleading in Civil Actions. Reprinted from the Fifth English Edition. Harvard Law Review Publication Association. Cambrdige, Mass. 1895, p. 6.
4. Thayer, J.B. A Preliminary Treatise on Evidence at the Common Law. Little, Brown and Company. Boston, Mass. 1898, p. 16.
5. ibid. pp. 24f, 38, 41.
6. Unlike modern pleading, where one could deny the sufficiency of the claim, argue that in addition it was the wrong from of action, and deny the particular facts. In the old common law, one had to choose one issue on which to base one's case, even if there was more than one valid way to win the case.
7. Stephens, op. cit. pp. 4-107.
8. Maitland, op. cit. p. 5.
9. ibid. p. 6.
10. Williamson, The History of the Temple London, p. 227-228.
11. 1 Coke, The First Part of the Institutes of the Laws of England, Section 59 (1) (b).
12. Kielway, 98b. pl. 4. quoted also in Loring v. Bacon, 4 Mass. 574. (1808)
13. Madison v. Madison. 206 Ill. 534, 69 N.E. 625. (1903)
14. ibid. p. 536. See also Rogers v. Cox. 98 Ind. 157.
15. Tenant v. Goldwin, 2 Lord Raymond 1091.
16. ibid. de reparatione facienda - of making repairs - an old seldom used writ whereby one jointenant in common could compel the others in the expenses of the necessary reparation of a house or mill owned by them. Law Dictionary with Pronunciations. Second edition. Lawyers Co-op Publishing Company, Rochester, New York, 1948.
17. 4 Mass. 574.(1808)
18. Stuart S. Ball, 123 U. of Pa. Law Review.
19. Cheeseborough v. Green, 10 Conn. 318, 26 Am. Dec. 396. (1834)
20. Pierce v. Dyer, 109 Mass. 374, 12 Am. Rep. 716, (1871)
21. Ottumwa Lodge v. Lewis 37 Iowa 67, 11 Am. Rep. 135 (1871)
22. 21 Ore. 30, 27 Pac. 166. (1891)
23. ibid. p. 167.
24. Thron v. Wilson, 110 Ind. 325, 11 N. E. 230. (1886)
25. 129 Iowa 616, 196 N.W. 1. (1906)
26. 154 Iowa 10, 134 N.W. 103. (1922)
27. ibid.
28. 102 S.C. 377, 86 S. E. 1063, (1915)
29. ibid. p. 1066.

CHAPTER V. ANALYSIS OF RESIDENTIAL PARTNERSHIP

The central issue of this study is the delineation of the relationship between the two owners of a residential building. The quality of this relationship determines their respective rights and obligations. There may be no legal relationship as in the American common law in which case there would be no enforceable rights or obligations. Alternatively, there may be a complete legal relationship, i.e. a full partnership as in the English common law in which case all the rights and obligations in question (support, repair, recovery of damages, rebuilding) would be enforceable.

The rabbinic literature, especially the Mishna and the Gemara passages to it, does not explicitly state the nature of this relationship. It must be deduced from the specific rights and remedies which are provided for the benefit of each party. We can state initially that this relationship is not like a partnership between tradesmen in that there is no formal act (kinyan) required to bring it into existence as there is in that area of the law. Any time there are two or more owners in the building, the relationship, de facto, exists. It remains only to see the legal consequences of it.

In the common law, the major areas of relief are two: recovery of sums of money (debt) and granting of specific performance. In the English condominia common law, both are present, but in America, relief is much more limited. We shall see that the rabbinic law falls between these two extremes.

In the American common law, no relief from maintenance failure may be had in the absence of specific covenants running with the title to provide it. Similarly, one may not recover for damages suffered through the failure of the other owner to maintain his part of the building. Furthermore, the destruction of the building terminates the rights of the upper party. The attic owner is afforded more protection in the rabbinic law. The nature of the attic owner's protection determines the quality of the relationship between the two owners.

There is one prevailing mode of relief running through the rabbinic material. It is the exercise of specific performance. If the house owner fails to make required repairs, the attic owner may do so himself and recover his expenses. If the house owner does not rebuild after destruction of the building, the attic owner may "stand in his shoes" and rebuild the house, living in it until reimbursed. What is lacking is the ability on the part of the injured party to simply recover a debt.

In the development of the common law in England, a distinction arose between those cases in which a legal relationship could be demonstrated and those where it could not. Without the existence of a legal relationship between two parties, one could not recover money from the other. We find in the rabbinic law a discussion of a possible remedy by which the attic owner might be satisfied. When the house owner refuses to rebuild after destruction, it is suggested that the attic owner seek a judgement against such other property of the

house owner as might be present under the jurisdiction of the appropriate court. This remedy is nowhere put into effect. This failure deomonstrates the absence of a full and complete partnership between the two owners. The partnership is not based on a contract between the two parties which would allow judgement against other holdings. Any recovery is limited to the property common to them both, that is, the building of which they each own part.

In England, the two owners are considered to be tenants-in-common seized of separate, identifiable parts. This legal relationship allows the enforcement of obligations and the recovery of damages where the obligations have not been met. In the rabbinic law there is no explicit legal relationship between the two parties, but this did not preclude the law from considering them as partners in the enforcement of their obligations and the protection of their rights. It could be said that the rabbinic law represents (in theory) the combination of some of the best features of both English and American common law.

The English common law, while affording the attic owner more protection than he might find in America, does not go as for as the rabbinic law, neither is it as realistic in its expectations for the life of the building from which it draws this protection. Under the English common law, it is expected that the building will remain standing forever. From this expectation is drawn the perpetual right of support and the consequent duty to repair. Pragmatically, this is sufficient to protect the attic owner's interests, but for the legal

theorist, it is untidy. One knows that a building will not stand forever even if maintained. It is bound to decay, and even if this is avoided, it could still fall victim to fire, earthquake or other premature distruction. In this case, the attic owner would be left without a remedy. The rabbinic law, on the other hand, has no such unrealistic expectation; it knows that buildings may be destroyed. In fact, it provides one Mishna of the three to govern what is done with the remains of the building and another to control the rebuilding. Therefore, it must be said that the attic owner's rights stem from some other theoretical base.

Unlike either common law, the rabbinic law considers the two owners to be equal with the same rights and obligations except in one case, the division of land where the building has been destroyed where the house owner takes two thirds to the attic owner's one third. It is this equality of right which provides the basis for the attic owner's rights. It is best demonstrated by Baba Mezia 10:1 (division of the rubble) for which there is no parallel in either common law.

Reclamation of stones demonstrates rabbinic concern for fairness and exactitude. The economic loss is minimized by each owner salvaging what he can from the remains of his part of the building. The law demonstrates a concern for detail in allowing each owner to claim particular stones from his building which may have been of a special character differing either in composition, size or color. If an owner had incorporated special features into his walls, this procedure affords him an opportunity to preserve them. After

stones have been claimed and the claims verified or denied, the amount of recovery is equalized. The law does not allow one owner to gain an unfair advantage over the other by claiming an undue amount of whole stones.

Only where it can be established that one part of the building was mainly responsible for providing the unbroken stones which remain may one owner claim a preponderant share. This is not unfair because it is based on an evidentiary conclusion. The economic loss is apportioned in this step according to actual damage. Where one apartment has survived relatively intact, it would be unfair not to recognize this fact. In this case, fairness may be served by an unequal division of the building materials.

In the process of determining what evidence would be sufficient to show that one apartment was responsible for determining broken stones, there was a conflict between fairness and exactitude on the one hand and judicial convenience on the other. This conflict concerned the use of a presumption that the unbroken stones came from the lower apartment. The acceptance of this idea as a presumption or as an absolute rule would have been a great convenience for the rabbinic courts. It would have eliminated any necessity to try the issue of breakage. In some cases, however, it would have resulted in an injustice excluding the attic owner from recovery of unbroken stones where he would have been entitled to them. Instead, it became necessary to fall back on division of the materials where breakage could not be shown.

The literature indicates a preference for avoiding division whereever possible; the acceptance of it shows a concern over fair apportionment of the economic loss. Due to the nature of the problem, there will always be a set of cases where the loss cannot be accurately assigned. There will be some cases where one owner's apartment did not break, but he is unable to prove it resulting in the loss of some unbroken stones to which he should be entitled but which go to the other owner under division. In other cases, the attic owner would be denied unbroken stones which are his if the presumption had been used. Neither method is inherently superior. The decision to use division was not made because it eliminates the cases of an owner receiving stones to which he is not entitled. It is used because it more fairly distributes the risk.

There are three possible situations resulting from destruction of the house. In two of them, division under step one is preferable to the use of the presumption to determine how reclamation should be made. There is also the case where division is unequal but can be proved; this case is properly resolved under step two. The cases are: 1) where breakage is equal 2) where the house broke 3) where the attic broke. In cases one and three, step one division is preferable to the use of presumption (or absolute rule) in step two which would assign the unbroken stones to the house owner. Only in case two does an injustice result in that the materials are divided when the house owner should takes the unbroken stones. There may be two factors involved in the decision to rely on

step one division in these cases. The crucial one (see Chapter Two, page) is that the law cannot ignore the upper apartment because it is fixed. This eliminates the use of the presumption. The other factor, which may be present, is the lack of statistical evidence to show the frequency with which the various cases occur. If the three cases are taken as likely to occur with equal frequency, then unfairness can best be avoided by falling back on step one in all three of the cases. This provides better treatment of the attic owner who would be the loser if all these cases were determined under step two. That would favor the house owner, a result which we see the Mishna is concerned to avoid.

The area of greatest consequence for the delineation of the relationship is the question of support and repair while the building stands. There is an assumption upon which the Mishna is based which is not explicitly stated. It is that neither owner may actively damage the building. We are able to see the necessity for this assumption as a starting point in the British case of Kielway which turns upon that point. It is the initial step. In that case, the rule is simply stated that neither owner may do any act which would damage the other's part of the building. It is given as symmetrical, but this is not the case in the rabbinic law where one partner may damage his apartment but the other may not.

According to the rules formulated by the Mishna Baba Kezia 10:2, the house owner may not suffer any damage to occur in his apartment lest this detract from the support which it furnishes to the benefit of the attic. The attic owner, on

the other hand, may leave his walls go unrepaired. Taking this ruling a step backward in an attempt to reach the rabbinic position on active damage comparable to the rule in Nielway, it would seem clear that the limitation on the house owner would remain the same; that is, the house owner could not tear down any of his walls or damage them in the slightest. The attic owner, on the other hand, may lessen his walls because this would be to the benefit of the house owner decreasing the burden on his apartment. The house owner may not take off his roof because this would be to the detriment of the house owner.

The second element is the right to support. The attic owner is entitled to support from the house which is constant in quality and quantity. This right is derived from the relationship of the two owners and not from any unrealistic expectation that the building will last forever if properly maintained. We have said that the attic decreases the probable life of the building by one third demonstrating its finite nature. During this period, the right to support is absolute. The building will at some time cease to exist, but until it does, the nature of the attic support must not be tampered with either by positive action or by negligence. In the American common law this right is unenforceable because there is no legal relationship. The rabbinic law, operating through a limited partnership, considers this right to flow naturally out of the setting involved. At the time the attic was added to the building (either when originally built or at a later date), the house furnished a certain

amount of support. It is this amount of support, that available to the attic at the beginning of the partnership, which must be maintained throughout the life of the building. This is different than the English common law.

The English common law derived the right of support and the consequent ability to enforce repair from the necessity to avoid damage. In Goldwin it was established that each owner could compel the other to repair "in preservation" of his own apartment. In addition it is derived from the general nuisance principal, but that only goes into effect when there is a danger of damage. The rabbinic law does not need any threshold level after which the right of support is activated and repairs compelled. Unlike the English law, which is conditional on danger, and the American, where there is no protection of the right, the rabbinic law sets out an absolute right to unqualified support. The level of support must be maintained as it existed at the formation of the partnership. Any damage must be repaired immediately.

In comparison with the American condominia law, the remedy provided in both Baba Mezia 10:2 (repair) and 10:3 (rebuilding) is very advanced. This remedy allows the injured party to take whatever steps are necessary to repair the injury and enforce recovery of expenses by refusing the failing party the right to occupy his dwelling until he has made reimbursement. This type of arrangement is not present in the American common law until Weaver, where it was included in the original agreement. It is effective there

because it was part of the intention of the parties, but in fact it is contrary to the dominant theories of American condominia law.

Rabbinic law protects both parties by seeking to preserve the situation as it existed when the partnership came into existence, that is, by maintaining the status quo. This may be altered only when it is of benefit to both parties. Any alteration will be to the benefit of the party seeking to perform it, the determining test is whether it benefits the other party or detracts from his apartment. Therefore, when changes in the building are made either during its lifetime or in rebuilding after destruction, the weight of the attic may only decrease and the strength of the house may only increase. Once these changes are made, they constitute a new status quo against which any furture changes must be judged. The original balance is forgotten so that these changes are irreversible.

All of the Mishnaic rules governing condominia are based on two objectives; equal protection for both parties and maintenance of the status quo. In fact, maintenance of the status quo is the means by which equal protection of both parties is accomplished. Reclamation of building materials returns the original contributions. Rebuilding after destruction requires the erection of a building the same as that which previously stood at the site. Maintenance and repair function to maintain the building in its original form. The remedies are limited to the building and may be performed by the injured party.

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