**The exemption of *shen* and *regel* in a ‘*r’shus harabim*’ (public thoroughfare)**

1. **Introduction**

The purpose of this article is to attempt to provide an understanding of the nature of the exemption in the public thoroughfare of damage in the category of *shen[[1]](#footnote-2)* and *regel[[2]](#footnote-3)* according to different *rishonim*. To do this, we will be examining several cases in the second *perek* ofBava Kamma. These involve cases which could be understood in different ways. Seeing the different ways the *rishonim* deal with these should give some insight to their varying understandings of the exemption in general[[3]](#footnote-4). Due to the breadth of this *sugya*, this article will not be a comprehensive study of all the necessary texts, nor will it contain many definite conclusions. Rather, the aim is to provide a preliminary analysis of several of the relevant *gemoros* and *rishonim* and thereby form a basis for further study and a more thorough understanding.

1. **Scriptural source**

We shall start with the *passuk* that creates this exemption.

כִּ֤י יַבְעֶר־אִישׁ֙ שָׂדֶ֣ה אוֹ־כֶ֔רֶם וְשִׁלַּח֙ אֶת־ בְּעִיר֔וֹ וּבִעֵ֖ר בִּשְׂדֵ֣ה אַחֵ֑ר מֵיטַ֥ב שָׂדֵ֛הוּ וּמֵיטַ֥ב כַּרְמ֖וֹ יְשַׁלֵּֽם[[4]](#footnote-5)

"When a man shall destroy a field or vineyard and sends his animal through it and it destroys in the field of another, he shall pay from the best of his field and vineyard"

The *gemara* in the first *perek of Bava Kamma* uses this *passuk* to teach us the obligation to pay for damage categorised as *shen[[5]](#footnote-6)*. As the *passuk* states, this obligation applies when the damage is done in the field of another. As we shall see in one of the later sources, the *gemara* takes this to be the source of an exemption when the damage occurs in the public domain[[6]](#footnote-7).

Based on the wording of the *passuk* from which the *gemara* learns this *p’tur* (exemption) , we can suggest a few possible reasons[[7]](#footnote-8) for such an exemption. One option is that the public thoroughfare is, in some regard, considered the domain of the damager (*mazik*) and therefore he is not required to guard his animal and a person would only be expected to pay for a damage he was obligated to guard against. Alternatively, the damaged party (*nizak)* is considered at fault for leaving his objects where he should not have. This can be seen as an extension of the *gemara's* *s’vara* of 'what is your produce doing in my area'[[8]](#footnote-9). A third option is that the only case in which the Torah obligates one to pay is when the *mazik* trespasses into the domain of another. Entering the public thoroughfare is not considered trespass as everyone has a right to walk his animal down the street, so an act of damage there would not obligate the animal's owner to pay. Finally, the *gemara* could be deriving from the *passuk* an area in which one is exempt*,* i.e. in the *r’shus harabim,* while the reason for such a *p’tur* may not be directly because it is not ‘in the field of another’[[9]](#footnote-10).

1. **Talmud Bavli**

To begin with, we will quote some of the *gemaros* upon which we will base our discussion, along with some rudimentary analyses. For the time being, the *gemara* will be examined without the different interpretations of the *rishonim*, except where these are necessary to understand the simple meaning of the text.

**3.1) *Kishkasha b’znava* (hit it with its tail)**

The first *gemara* I would like to bring can be found on 19b:

יתיב רבי יהודה נשיאה ורבי אושעיא אקילעא דרבי יהודה נפק מילתא מבינייהו כשכשה בזנבה מהו א"ל אידך וכי יאחזנה בזנבה וילך אי הכי קרן נמי נימא וכי יאחזנה בקרן וילך הכי השתא קרן לאו אורחיה הא אורחיה וכי מאחר דאורחיה מאי מבעיא ליה כשכוש יתירא מבעיא ליה

"R’ Yehuda the prince and R’ Oshiya were sitting and the following discussion occured.

'If an animal breaks something with the swishing of its tail, what is the law? (As regards damage done in the public thoroughfare, is it *regel* which is exempt in such an area, or *keren* - violent, unusual, damage - for which there is no such exemption)'.

To which came the reply,

'obviously it is is exempt. Must one keep hold of his animal's tail as it walks through the street?'.

'But that would apply equally to violent damage (which we know one is obligated for)'.

'The difference is that the swishing of its tail is normal behaviour while *keren* is not'.

'In that case what was the original question? (If the swishing of its tail is normal behaviour then the usual exemption should apply!)'.

'The question was in a case of unusually vigorous swishing. (Is this regular behaviour or unusual violent behaviour?)."

This piece is interesting as one may have assumed that the reason it gave for exemption, 'must one keep hold of his animal's tail as it walks through the street?' is the reason for the general exemption of *shen* and *regel* in the public thoroughfare. It is the practical concern of how people will be able to use the road. Based on the way the *rishonim* read this *gemara,* one could come out with it being either a proof or disproof to this understanding. The Rosh in his commentary explains the entire *gemara* as a back and forth discussion as to whether this is *regel* or *keren*. He interprets the line 'must one keep hold of his animal’s tail as it walks through the street' as meaning obviously it is *regel*[[10]](#footnote-11). This kind of interpretation[[11]](#footnote-12) seems to point out that this is the very reason for the exemption. However, the Rosh could be explaining that the *gemara* means there must be an exemption here due to the practical problem of ‘how else could people use the road’, without giving the reason behind such a *p’tur*. He then supplies the source of the exemption (that it is *regel bir’shus harabim*), without telling us how such an exemption operates, rather just that it is what the *gemara* is referring to here. If this is the case, then we can’t derive the reason for the *p’tur* from the wording of the gemara.

The Rashba interprets this *gemara* somewhat more clearly[[12]](#footnote-13). He writes that the answer of the *gemara* is a *s’vara* (logical reason)[[13]](#footnote-14) which has not been seen until now, (i.e. not a reference *regel b’reshus harabim*) and the *gemara* doesn't mention the classical exemption due to the public thoroughfare until the end when it asks, 'if you knew that this was a case of regular behaviour, what was your original question?' This would mean that whatever the reason for such an exemption it is not due to practical considerations, as this was an alternative answer the *gemara* tried to give before coming to the normal exemption.

**3.2) *Mishna* 19b**

The next source we must consider is in the *mishna* on 19b. The context is the obligation to pay for *shen*:

במה דברים אמורים ברשות הניזק אבל ברשות הרבים פטור ואם נהנית משלמת מה שנהנית כיצד משלמת מה שנהנית אכלה מתוך הרחבה משלמת מה שנהנית מצדי הרחבה משלמת מה שהזיקה

“when does this (the *chiyuv* of *shen*) apply?, when the damage is done in the property of the damaged party. In the public thoroughfare, however, he (the owner of the damaging animal) is exempt.

If benefit is gained (by the damager), he pays for the benefit derived from the damage done. (The nature of this other obligation will not be dealt with and for our purposes it means that he is exempt from *shen*.) What is such an example of when one would pay for the benefit had rather than paying *shen*? When the animal eats from the middle of the street, the owner pays for the benefit (and is exempt from *shen*). When the animal eats from the sides of the street, the owner is obligated in *shen*.”[[14]](#footnote-15)

Rashi's explanation of the *chiyuv* when the damage is done on the sides of the street is unusual and will be dealt with later. For now, let us suggest that the reason for the *chiyuv* is that the sides of the street are considered the domain of the damaged party and therefore no exemption applies. This would mean that the *mishna* stays on its previous topic of the distinction between public and private areas. We can see from here that the definition of a public area is not based on monetary ownership. The sides of the street were used by individuals to display their wares but they had no ownership of the area. Any explanation of the exemption we are looking at should take such a law into account, according to this understanding of the *mishna*.

**3.3) *Kofetzes* (jumping)**

The next *gemara* to consider can be found on 20a.

אמר אילפא בהמה ברשות הרבים ופשטה צוארה ואכלה מעל גבי חברתה חייבת מאי טעמא גבי חברתה כחצר הניזק דמי לימא מסייע ליה היתה קופתו מופשלת לאחוריו ופשטה צוארה ואכלה ממנו חייבת כדאמר רבא בקופצת הכא נמי בקופצת והיכא איתמר דרבא אהא דאמר רבי אושעיא בהמה ברשות הרבים הלכה ואכלה פטורה עמדה ואכלה חייבת מאי שנא הלכה דאורחיה הוא עמדה נמי אורחיה הוא אמר רבא בקופצת

“Ilfa said that if an animal in the public thoroughfare stretches out its neck to eat off the back of another animal, its owner is *chayav* (even though both animals are in the public domain) as it is comparable to the property of the damaged.

Let us support this from a *b’raisa* which says that if an animal eats from a box on someone's back, its owner is obligated to pay.

No, that is not necessarily true, perhaps this *b’raisa* is like Rava explains (about another case), that it is a case where the animal jumps on the person’s back.

What case did Rava explain this way? The case that R' Oshiya said, ‘for an animal in the *reshus harabim*, walking and eating is *patur,* standing and eating is *chayev*’. What is the difference between standing and walking? Both are usual behaviour. Rava says (standing) refers to a case where the animal jumped.”

At face value, the *chiddush* of Ilfa is that since a person has rights to transport his goods through the public thoroughfare, whether on his or his animal’s back, that area is treated as a private area. Rav Oshiya (with Rava’s interpretation) seems to say this would only apply if the offending animal had to jump to reach it. Only then would it be considered far enough out of the public domain that it would be given the laws of a private area. It is also possible that Rav Oshiyah is not arguing with Ilfa. Rather he is giving a different case in which one would be *chayav*, possibly for a different reason[[15]](#footnote-16). If this is the case, the *gemara* does not present an opposing view to Ilfa, rather just shows that there is no proof to his opinion as the *b’raisa* could be talking about a different case.

**3.4) *Misgalgel* (rolling)**

The very next *gemara* is the *sugya* of *misgalgel,* also on 20a.

בעי ר' זירא מתגלגל מהו היכי דמי כגון דקיימא עמיר ברשות היחיד וקא מתגלגל ואתי מרשות היחיד לרה''ר מאי ת''ש דתני רבי חייא משוי מקצתו בפנים ומקצתו בחוץ אכלה בפנים חייבת אכלה בחוץ פטורה מאי לאו מתגלגל ואתי לא אימא אכלה על מה שבפנים חייבת על מה שבחוץ פטורה איבעית אימא כי קאמר רבי חייא בפתילה דאספסתא

“R' Zeira asks what is the law by rolling?

What is the case in question? For example, a bundle was in a *reshus hayachid* (private area) and rolled to the *reshus harabim*.

A proof – R’ Chiya taught: regarding an object which is partly inside and partly outside, if it is eaten inside he is *chayav,* if it is eaten outside he is *patur.* Is this not referring to a case of rolling?

No! Teach the *b’raisa* the following way: for that which is eaten inside he is *chayav* and for that which is eaten outside he is *patur.*

Alternatively, this is referring to a bundle of flax.”

According to Rashi, the *gemara* here poses a question about when an animal finds food in a private domain and then eats it in the public domain. Is the *chiyuv* of *shen* dependent on the place where the object was eaten (and the owner of the animal would be *patur* in this case) or where it was taken from (and the owner would be *chayav*)?[[16]](#footnote-17) Whether the *p’tur* of *shen* in a public domain is to do with the damage being the fault of the damaged party or if it is because no trespass occurred in doing the damage, it is strange that there should be an option that the deciding factor in the *chiyuv* of *shen* is the location of the eating. To make matters worse, many *rishonim* question Rashi from another *gemara* which seems to say that the *chiyuv* is dependent on where the object was eaten.

Other *rishonim*, Tosfos[[17]](#footnote-18) included, explain the question in this *gemara* to be about a case in which some food is rolling towards the public domain and it is eaten whilst still in the private domain. Do we consider it as if it was there already (and the owner of the animal would be *patur*) or not (and the owner would be *chayav*)? The exemption being applied to such a case implies that the *p’tur* of *shen* in the public domain is to do with the owner not being careful with his object by allowing it to end up in a public area rather than a lack of trespass. Trespass occurred in this case , yet the *gemara* gives a possibility that the owner of the animal is exempt [[18]](#footnote-19).

**3.5) *Machazeres***

On 21a, the *gemara* about *machazeres* (when an animal turns its head to the side of the street to eat) can be found:

 כיצד משלמת מה שנהנית וכו': אמר רב ובמחזרת ושמואל אמר אפילו מחזרת נמי פטור ולשמואל היכי משכחת לה דמחייב כגון דשבקתה לרחבה ואזלה וקמה בצידי רחבה

“Rav says ‘it (the *chiyuv* of the *mishna[[19]](#footnote-20)* on the side of the street) applies even when the animal just sticks its head into the sides of the street.’ Shmuel (argues and) says ‘that is also *patur*.’

According to Shmuel, what case would you be *chayav* for? When the animal leaves the street completely and stands on the side of the street.”

From the *mishna* we know that the side of the street has the status of a private area. This discussion of the *gemara* is considering a case in which the animal was able to reach objects in this quasi-private area whilst standing in a public area where it had every right to be.

**3.6) *Gemara* 21b**

One last *gemara* to consider is on the following *amud*:

לימא מחזרת תנאי היא דתניא אכלה מתוך הרחבה משלמת מה שנהנית מצידי הרחבה משלמת מה שהזיקה דברי ר"מ ורבי יהודה רבי יוסי ור"א אומרים אין דרכה לאכול אלא להלך ר' יוסי היינו תנא קמא אלא מחזרת איכא בינייהו ת"ק סבר מחזרת נמי משלם מה שנהנית ורבי יוסי סבר משלמת מה שהזיקה לא דכולי עלמא מחזרת אי כרב אי כשמואל והכא בביער בשדה אחר קא מיפלגי מר סבר (שמות כב-ד) "ובער בשדה אחר" ולא ברה"ר ומר סבר ובער בשדה אחר ולא ברשות המזיק ברשות המזיק לימא פירך ברשותי מאי בעי אלא דאילפא ורבי אושעיא איכא בינייהו

“Let us say that whether *machazeres* is *chayav* or *patur* is a *machlokes* between *tanaim* (R’ Meir and R’ Yehuda against R’ Yossi and R’ Eliezer). As we learnt in a *b’raisa:* ‘if it ate from the street, he pays (only) for the benefit derived; if it was from the edges of the street, he pays for the damage caused. These were the words of R’ Meir and R’ Yehuda. R’ Yossi and R’ Eliezer say the way of an animal is not to eat, only to walk.’ [The *gemara* asks:] isn’t R’ Yossi the same as the first opinion? Rather *machazeres* is the difference between the two. The first opinion holds *machazeres* pays for benefit (only) and R’ Yossi holds he has to pay for the damage. [The *gemara* rejects this suggestion:[[20]](#footnote-21)] No! these *tannaim* could hold either way in the case of *machazeres*. Rather, they argue about the *passuk* of *'bier bisdeh acher*', whether it only exempts from payment for damage in the property of the *mazik* or also for damage done in the public domain. (The *gemara* rejects this, damage in the property of the *mazik* is obviously exempt because) he can say to the *nizak* 'why is your produce in my property?!' (Therefore the *passuk* must be teaching us the *chiddush* of a *p’tur* in the public thoroughfare.) (The *gemara* concludes) that this is actually[[21]](#footnote-22) a *machlokes* about the *din* of Ilfa and Rav Oshiya (and not about *machazeres*).”

From this *gemara* we see our exemption is from the *passuk* we mentioned above. It has to be noted that the *gemara* is not clear if the *din* of Ilfa is a *machlokes* between him and Rav Oshiya or they both hold the same thing. The *gemara* also clearly shows that *machazeres* and the *din* of Ilfa are not connected and both opinions could hold either way in the other *machlokes*. This means that, for example, one must be able to explain why you would be *chayav* if your animal ate from the back of another animal but *patur* if it turned off to the side of the street and ate there. Using our earlier explanation of the *din* of Ilfa, we would be saying that the *chachamim* afforded the right to transport wares through the public thoroughfare. They protected this by making it as if a person passing through creates his own small private area into which others are forbidden to enter. They did not give the same protection to the sides of the street, an area typically used to display one’s wares. This could be because transport was a more necessary use of the main road. Another option is that the nature of transport means that the owner can't take care of his property to the same extent as he is able to when displaying his wares whilst stationary. Therefore, Halacha gives him extra protection.

1. **Rishonim**

We will now have a look at the way some different *rishonim* understand the aforementioned *gemaras* and try to gain some understanding of the way they view the exemption.

**4.1) Rashba**

The Rashba writes that the reason for the *chiyuv* in the case of Ilfa is that since you have every right to transport your things through the public domain, it becomes like your own private area into which others cannot enter[[22]](#footnote-23). Since he writes that this is due to the *nizak* having the right to have his property here, it could be taken to mean that he understands the *p’tur* in a *reshus harabim* is due to a carelessness on the side of the damaged party, leaving his property where he should not have done, which doesn’t apply in this case. However, the Rashba complicates this by saying, regarding *machazeres*, that if the animal doesn’t need to turn out of the road to get to the food, for example if they are small goats being carried on the back of a donkey, then it is still considered as damage in the public area and *patur*[[23]](#footnote-24) [[24]](#footnote-25). The fact that he allows for an area’s definition to change based on the behaviour of the animal would seem to suggest that the exemption is based on the animal doing what it is supposed to be doing, i.e. walking straight down the street, nothing to do with how the *nizak* left his property. To understand this, we will have to explain that you are only *chayav* when your animal enters an area where it is not permitted to be, i.e. trespasses. Ilfa adds that permission to use part of the public area for transport of your goods makes it like your area. In a similar vein, Ravholds that the sides of the public area where you can display your wares, even if accessible from the main street, is also like your area. However, if an animal enters your area in a way that iss completely expected and usual, it does not count as trespass. Hence, the *rabanan* did not treat it as your area with regards to this damage.

The Rashba also writes that the *chiddush* of Ilfa would also apply to items left on a pillar in the public thoroughfare[[25]](#footnote-26). Either the ability to place items down on raised areas constitutes part of transport, or the statement of Ilfameans that any place raised out of the public area was meant to be used by individuals; possibly more so than the sides of the street, to fit with the *gemara* on 21b, quoted above[[26]](#footnote-27).

**4.2) Rif, Ramban, Ba’al Ham’or**

The Rifmelds the opinions of Ilfaand Rav Oshiyato say that, *l’maskana,* one is only *chayav* if the animal had to jump to reach the back of the other[[27]](#footnote-28). The Rambanexplains[[28]](#footnote-29) that the Rif decides to *pasken* (halachically conclude) like this because the opinions of Rav Oshiya andIlfa[[29]](#footnote-30) are linked to the opinions of Ravand Shmuel about *machazeres* in which the *halacha* is like Shmuel. He writes that the reason to be *m’chayev* in both *machazeres* and *kofetzes* (i.e. according to Rav and Ilfa) is that the *Torah* only exempted a case where the animal behaves normally and eats from the middle of the road. According to the opinions who say one is only *chayav* once the animal has jumped, or left completely to the side of the road (i.e. Shmuel and Rav Oshiya), normal behaviour would include being *machazeres* or eating off the back of another animal. This means that he thinks that the two arguments are the same and whatever you hold in one you must hold in the other. The way in which he links the two arguments is very problematic due to the *gemara* on 21b which seems to write clearly that it is possible to hold either like Ravor Shmueland still hold of the *din* of Ilfa.

The Ba’alHam’oron the page argues on the Rif and says the statements of Ilfaand Rav Oshiyaare unconnected. He explains that Ilfa’s law is an extension of what is considered a private area and that of Rav Oshiyais a case of *keren,* which is *chayav* in the public domain[[30]](#footnote-31). If this is the case, when the *gemara* said the *b’raisa* brought as a proof to Ilfa is actually the case of *kofetzes*, it was saying that the reason for obligation in the *b’raisa* is fundamentally different to what was suggested. This contrasts with the view mainly taken until now, that the *gemara* interpreted the *b’raisa* as consistent with the view which opposed Ilfa; that one is only *chayav* if the animal jumped. Such an explanation of the law of *kofetzes* (Rav Oshiya’s law of jumping being *chayav*) is difficult as this would incur an obligation of half *nezek* as with all cases of *keren*. This goes against the simple understanding the *gemara[[31]](#footnote-32)*, as pointed out by several *rishonim*. It also seems to go against a *gemara* which says:

ההוא ברחא דחזא ליפתא אפומא דדנא סריך סליק אכלה לליפתא ותבריה לדנא חייביה רבא אליפתא ואדנא נזק שלם מאי טעמא כיון דאורחיה למיכל ליפתא אורחיה נמי לסרוכי ולמסלק

“A certain goat which saw a turnip on top of a barrel, climbed up and ate it, breaking the barrel, Rava was m’*chayev* the owner full *nezek.*

What is the reason? Since it is normal to eat the food, it is normal to climb up to get it.”

This means that any action required to eat food in a normal way would also be considered normal. Therefore, jumping on the back of an animal to eat should not be considered *keren.*

The Rashba quotes the Ra’avad, who writes that one who holds that the *chiyuv* of *kofetzes* is because of *keren* has no brain in his skull, to point out the difficulty of such an opinion[[32]](#footnote-33).

**4.3) Rosh**

The Rosh writes that *p’shat* in the *gemara* is like the Rif[[33]](#footnote-34). What is interesting is that throughout this piece, he constantly mentions that the final reason to be obligated or exempt is whether or not the *nizak* had permission to put his objects in that place. An example of where he refers to this is:

אלא הך דאילפא ודר' אושעיא וברייתא דהיתה קופתו מופשלת טעם אחד להם דכל היכא דיכולה בהמה לאכול כדרכה דרך הילוכה בלא קפיצה אין לו לאדם רשות להניח שם פירותיו והוי רשות הרבים ופטורה אבל היכא דאין יכולה לאכול אלא בקפיצה יש לו רשות להניח פירותיו ומיקרי חצר הניזק

“Rather, the laws of Ilfa, Rav Oshiya and the *b’raisa* all have the same reason, that wherever the animal can reach in a normal manner a person has no right to leave his produce there and it is therefore the public area and exempt but where the animal has to jump to reach it, he has permission to leave his produce there and it is called the area of the *nizak.*

This clearly implies that the Roshholds the reason for our exemption of *shen* in a public domain is that the *nizak* was not allowed to keep his objects here. This contrasts with the Rashba who we explained above bases the exemption on a lack of trespass.

**4.4) Rashi**

Finally, we come to Rashi. On the *mishna* on 19b, Rashiwrites that the reason you are *chayav* when the animal takes from the edge of the public thoroughfare is that it is like *keren* and the owner is only obligated to pay half damage[[34]](#footnote-35). On 21a he writes that according to Shmuel, one is obligated to pay when his animal leaves the road entirely because it is unusual to leave the road. Therefore, it is not considered to be like a *r’shus harabim*[[35]](#footnote-36). Either this is a change and Rashiexplains the *gemara* differently to the *mishna* for unclear reasons;or when he explained the *mishna* he was doing so according to Rav only. Rashi, when commentating on the *gemara*, does not tell us the reason Ravsays that *machazeres* is *chayav.* He may be remaining with the original explanation he wrote on the Mishna.*.* If this is true, then there is a bigger *machlokes* between Ravand Shmuelthan we originally thought. Ravthinks that wandering off the road is unusual and therefore considered *keren*,whilst Shmuelholds any such behaviour is normal. Therefore, he must come to a case where the animal has completely left the road for it to qualify as being out of the public area.

On 20a, Rashitells us that the reason *kofetzes* is obligated is because it is *keren,* like the Ba’alHam’or[[36]](#footnote-37). On 21b, when the *gemara* suggests that the argument is a *machlokes* about the law of Ilfaand Rav Oshiya,Rashi says the following[[37]](#footnote-38):

ואתא ר' יוסי למימר אין דרכה לפשוט צווארה על חבירתה ואין דרכה לקפוץ מדרך ולאכול אלא להלך ואית ליה דאילפא ודר' אושעיא

“and R’ Yossi comes to tell us that it is *ein darka* (not normal behaviour) to stretch its neck to eat from another animal and *ein darka* to jump from the road to eat; it is only normal to walk in the road, i.e. he holds of Ilfaand Rav Oshiya*.*”

This sounds like he thinks both Ilfa and Rav Oshiya are *m’chayev* for the same reason. We know that Rashi wrote earlier that the reason *kofetzes* is obligated is because it is *keren*. This would result in the *din* of Ilfaalso being due to *keren*. However, the *gemara* writes that it is because the back of an animal is like the courtyard of the *nizak.* This will have to be resolved in one of several ways, none of which are very satisfactory.

One option is that the phrase ‘*ein darka*’in Rashion 21b means ‘and therefore it’s considered a private area’. Then Rashi would be saying that R’ Yossi holds the reason for *chiyuv* in both cases is that it is unusual behaviour and not covered by the *p’tur* of *reshus harabim,*  like the Roshand other *rishonim*.This would seem to be a particularly unclear way of expressing that. Also, it would mean that Rav Yossiholds of the *din* of Rav Oshiyabut for a different reason to the one given by Rashion 20a and we would have to explain what prompted this change.

Another possibility is that ’*ein darka*’in Rashimeans it’s *keren.* This is difficult because the *gemara* on 20asaid the reason for Ilfa’s opinion is that the back of the other animal is considered like the courtyard of the *nizak*. One possibility to explain this is that Rabbi Yossiholds of the *din* of Ilfabut for a different reason to the one given by the *gemara*. An alternative explanation is that Rashiunderstands thewords ‘like the courtyard of the *nizak’* on 20a in a very loose sense to mean that you are *chayav* just like in the courtyard of the *nizak,* (but only half and it is due *keren*),and thathe does thiswithout telling us. This would even give us room to say that the Rashi on *machazeres* in Shmuelbrought above[[38]](#footnote-39) which says leaving the road completely is like damage done out of the *r’shus harabim* the same way. This would mean that Rashithinks the only reason to be *chayav* in an area which is technically public is to consider it *keren.*this explanation is verydifficult to say as it requires us to assume that that the words of the *gemara* and Rashiare imprecise.

Whichever way we resolve this issue, we can see that Rashi is very willing to say cases in the *gemara* are *chayav* due to *keren*, even though this enters him into all the problems pointed out above when it came to the *Ba’al Ham’or.* We could explain such an opinion as being driven by an understanding that the *p’tur* of *shen* in a *r’shus harabim* is a *g’zeiras hakasuv* and we have no *s’varos* to use to limit or extrapolate this *p’tur*. Therefore, any anomalies would have to be explained, where possible, with *keren.*

1. **Conclusion**

We have seen how different understandings of the exemption of *shen* in the *r’shus harabim* can be taken from various *sugyos* in the second *perek* of Bava Kamma. We have looked at the ways in which these have been interpreted in different commentaries and tried to gain an insight from their words into the way they have understood the matter. As promised, no definite conclusions have been reached and a complete thorough analysis is missing, but hopefully we have scratched the surface and started going in the right direction.

Mikey Kahan

1. damage done when the animal has intent to benefit, the most primary example being eating [↑](#footnote-ref-2)
2. damage done when the animal goes about its normal activities, for example walking [↑](#footnote-ref-3)
3. For example, if they understand a *p’tur* (exemption) in the *gemara* to be due to *r’shus* *harabim* or give a different explanation informs us as to when they hold the exemption of *r’shus harabim* applies. [↑](#footnote-ref-4)
4. Sh’mos 22,4 [↑](#footnote-ref-5)
5. Bava Kamma 3a [↑](#footnote-ref-6)
6. Bava Kamma 21b [↑](#footnote-ref-7)
7. Some may ask are we trying to find *ta’ama d’kra* (the reason behind a *passuk*), which is the subject of a dispute of *taanaim* in Bava Metzia, 115a and we *pasken* against the opinion that says we do (R’ Shimon). Generally, it is accepted to look into the way laws in the *torah* work (a ‘*geder’* in *yeshivish*) – do we like this, Moshe? Your derech generally seems to be to delete leitzonusdike zachen as a means of deciding when they can apply and how to extrapolate from them to cases the *gemara* did not explicitly discuss. The opinion of R’Shimon which we don’t hold like is that we will do so to limit the application of the *din* (law) even within the boundaries in which it was originally placed in the Torah (for example saying the prohibition of taking collateral from a widow is due to widows being poor, so it would not apply to a rich widow, while the *passuk* made no such distinction and seemingly stated the prohibition across the board). [↑](#footnote-ref-8)
8. Bava Kamma 21b [↑](#footnote-ref-9)
9. But due to secondary considerations. For example, the practical issue of people not being to use the road without fear of prosecution without such an exemption. [↑](#footnote-ref-10)
10. Rosh, Bava Kamma *perek* 1 *siman* 2. s.v. *kishk’sha biznava*. [↑](#footnote-ref-11)
11. Although it is difficult with the text of the *gemara*, which now is using very unclear language to express such a point. [↑](#footnote-ref-12)
12. Rashba, Bava Kamma 19b s.v. *ve’chi yochzena b’znava v’yelech* [↑](#footnote-ref-13)
13. Namely, if this was *chayav* then no animals could enter public areas without constantly being held which is obviously not required. [↑](#footnote-ref-14)
14. The *gemara* later discusses the exact parameters of this case, as will be seen in a later source.  [↑](#footnote-ref-15)
15. For example, this could be considered unusual behaviour and fall in the category of *keren*. [↑](#footnote-ref-16)
16. s.v. *mai* [↑](#footnote-ref-17)
17. s.v. *misgalgel mahu* [↑](#footnote-ref-18)
18. It should be pointed out that there is always the possibility that the understanding of the *p’tur* of *shen* depends on this question of the *gemara*. [↑](#footnote-ref-19)
19. See 3.2 [↑](#footnote-ref-20)
20. This is probably because we always prefer a disagreement of *amoraim* to be a new discussion, rather than repeating previously held opinions without telling us. [↑](#footnote-ref-21)
21. As the *gemara* has no proof that this is not about *machazeres* it could be that this is just an acceptable alternative and therefore there is room for Rav and Shmuel to argue, rather than a definite conclusion. This would especially be the case if Ilfa and R’ Oshiya are arguing since then what we have done is changed one *machlokes amoraim* for another and all we have gained is that this is not definitely about *machazeres*. [↑](#footnote-ref-22)
22. Rashba Bava Kamma 20a s.v. *ve’ta’am chiyuvan* [↑](#footnote-ref-23)
23. Rashba Bava Kamma 21a s.v. *ve’chein lo asu* [↑](#footnote-ref-24)
24. Although this case is an explicit piece of Palestinian Talmud, and therefore must be dealt with according to all opinions, there are other ways to explain it. See *tosafos* 21a s.v. *de’kayma b’keren zavis* where he explains that since the goats can reach that area, it is considered a *reshus harabim* even for other animals. This can be understood to mean that since an area can be reached by some animals behaving normally, the area is one in which the *nizak* should not leave his produce. [↑](#footnote-ref-25)
25. Rashba Bava Kamma 20a s.v. *ve’kofetses d’ke’amar*  [↑](#footnote-ref-26)
26. In 3.6 [↑](#footnote-ref-27)
27. Bava Kamma, Page 20 in the *oiz ve’hadar* Rif. [↑](#footnote-ref-28)
28. MilchemesHashem,Page 20 in the *oiz ve’hadar* Rif [↑](#footnote-ref-29)
29. The Ramban explains that Ilfa agrees to Rav Oshiya according to the conclusion of the *gemara*, i.e. one is only chayav if the animal had to jump. Here I refer to the gemara’s original understanding of Ilfa. [↑](#footnote-ref-30)
30. As explained by the *Shiltei hagiborim* [↑](#footnote-ref-31)
31. The *gemara* just says *chayav*, implies obligated full *nezek*. Also, the *gemara* on 21b which explain the *machlokes* tanaaim as about *kofetzes* uses a language of ‘*m’shalemes mah shenehenis*’ (he pays what he damaged) which also implies full payment. [↑](#footnote-ref-32)
32. Rashba, Bava Kamma 20a s.v. *v’garsinan b’yerushalmy* [↑](#footnote-ref-33)
33. Rosh, Bava Kamma, *perek* 2 *siman* 4 [↑](#footnote-ref-34)
34. s.v. *m’tzidey ha’rechava meshalemes mah shehizika* [↑](#footnote-ref-35)
35. s.v. *v’kama b’tzidey rechava* [↑](#footnote-ref-36)
36. s.v. *b’kofetzes* [↑](#footnote-ref-37)
37. s.v. *ika b’neihu* [↑](#footnote-ref-38)
38. In this section [↑](#footnote-ref-39)