

Competition in Halacha: Part IV

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DUELING FISHERMEN:

The Gemara in Bava Basra (21B) discusses a case where someone has set up nets to catch fish and a second fisherman wants to lay his nets in the same area. The Gemara says that the second fisherman is not allowed to encroach on the first man's territory by putting down his own nets in the same area. Instead, he must go a bit further away so that he doesn't take away any of the fish that the first fisherman was going to catch in his nets. It seems from this Gemara that the first fisherman already has the rights to these fish, which is why the second fisherman may not infringe on his territory.

The Gemara is bothered by the fact that we know that a local resident is allowed to compete with an existing business. Accordingly, the Gemara asks why the second fisherman is not allowed to put down his nets in the same area and compete with the first fisherman.

The Gemara answers that, in this case, the first fisherman has already set his sights on these fish. Rashi explains that the fisherman has his eyes on these particular fish and has exerted effort to obtain them. Once he has done so, it is forbidden for someone else to grab them away from him.

As mentioned in the previous segment, Rashi's opinion is that the law of *ani mehapech becharara* applies even to ownerless items; therefore, although the fish are ownerless, since the first man exerted effort to try to acquire them, it would be forbidden for someone else to interfere. Rashi is thus very understandable. Tosfos, however, states that *ani mehapech becharara* does not apply to ownerless items. If so, why can't the second man compete to take possession of these fish?

Tosfos offers two answers to explain this halacha. His first answer is that the reason *ani mehapech becharara* applies by a purchase and not by an ownerless item is because an item that is for sale can be acquired elsewhere, while an ownerless item cannot be obtained for free anywhere else; therefore, we can tell people not to interfere in a sale that someone else has exerted effort to obtain, as they should simply purchase the item elsewhere, but we can't tell someone not to try to obtain an ownerless item, as he cannot find a duplicate anywhere else. The case of the fish can be compared to a sale in this regard, as we can tell the second fisherman to fish elsewhere and leave the first man's territory alone; therefore, *ani mehapech becharara* would apply even according to Tosfos.

Tosfos then offers a second answer that has many practical applications. He says that a fisherman is different than someone trying to grab an ownerless item because "*u'mnaso b'kach*", this is his source of livelihood. If someone would try to take away the fish that he has set his sights on, he would be taking away his livelihood. Tosfos opines that this is forbidden to do, even though the fisherman has not yet acquired the fish in a halachically valid way and does not own them yet. Since he exerted efforts to gain control of these fish, we forbid anyone else from ruining his source of livelihood.

MARUFIAH:

The Rama describes a very practical application of Tosfos's second answer. He says that in some places they practiced a rule known as "*marufia*", which translates as "steady customer". In these places, it was ruled that

if someone has a steady customer who always does business with him, a competitor would not be allowed to lure this customer away by undercutting him and offering the customer a better deal.

In olden times, many Jews made a living as money lenders. They would lend non-Jews money with interest, and often had steady customers who consistently used their service. In places where the law of *marufiah* was practiced, once someone has an ongoing relationship with a non-Jewish money borrower, a second money lender would not be allowed to offer a better rate in order to steal away this customer. This is because the first money lender has already “set his sights” on this customer, and he is comparable to the fish in the Gemara’s case.

As the Rama notes, this sort of *marufiah* was practiced in some areas, but not everywhere. Some places learned the Gemara differently than Tosfos’s second answer, and did not consider such actions to be prohibited. Therefore, whether *marufiah* is practiced or not is dependent on the *minhag hamakom*, accepted local practice. The Shulchan Aruch Harav speaks very strongly in favor of following the rule of *marufiah* and says that anyone who fears Heaven should never steal a steady customer in such a way.

WHAT QUALIFIES AS A STEADY CUSTOMER?

The classic case of *marufiah* would be if a customer has a past business relationship with one man, and is expected to purchase from him in the future. Whether a second person may steal away this customer depends on whether or not the rule of *marufiah* is practiced in that particular location. Everyone agrees, however, that if a deal has already been agreed upon between two parties, that an interloper would be forbidden from trying to persuade the customer to back out and purchase from him instead.

To illustrate, the Shulchan Aruch speaks of a case where one money lender entered an agreement with a non-Jew to borrow money from him for 5 years at 5% interest, and the contract stipulates that the money must be paid over the 5-year period and cannot be paid upfront so that all the interest can be collected. In such a case, a second money lender would be prohibited from approaching the borrower and offering to lend him the entire amount so that he

can pay back the loan upfront - ignoring the clause in the contract against this - and then pay him back over the next 5 years at 4% interest. Everyone agrees that one who interferes with a deal in this manner is called a *rasha*, with the Shulchan Aruch describing his action as being worse than *ani mehapech becharara* and typical *marufiah*.

We can thus break down cases of steady customers into three categories: If a customer patronized one money lender in the past and is expected to do so again, whether or not a second money lender can approach him and offer better terms is subject to whether or not *marufiah* is practiced in that location. If money has already been lent with a contract that forbids the borrower from backing out of the deal, it would be forbidden in all places for a competitor to encourage the borrower to breach the contract and utilize his services instead.

If money was already lent but there was no clause in the contract that forbids the borrower from paying upfront and ending the relationship, the Poskim rule that it would be forbidden for a competitor to approach the non-Jew and suggest that he back out of the loan and borrow from him instead; however, if the non-Jew comes up with this idea and he is the one who initiates contact with the second money lender, since he has no contractual requirement to remain tied to the first money lender, the second man would be permitted to go along with his idea and lend him the money on better terms.

CUSTOMERS ALREADY IN A STORE:

If customers are already shopping inside a specific store, it would be forbidden for a proprietor of a competing store to approach them and try to lure them to him by offering a better deal to shop in his store. This is forbidden even in places where the rule of *marufiah* is not usually enforced. The halacha is that one is allowed to compete with another local business, even if he is adversely affecting his bottom line, but the Gemara says that the reason for this is because “*zeh osek b’soch shelo v’zeh osek b’soch shelo*.” He will operate in his store and he will operate in his store. One is only permitted to compete with an existing business if he operates in his own store, but not if he operates inside the competing store.

In Israel, it is common for van drivers to canvass a

neighborhood looking for customers. They may be tempted to stop by a bus stop and offer the people waiting for a bus to take them to their destination for a fee. According to what we just explained, this may be forbidden because the customers are already at the bus stop, which may be considered the property of the bus company, and it is forbidden to poach customers from inside someone else's business.

PERMISSIBLE LURING OF CUSTOMERS:

It is always permitted to advertise one's wares or services, even if this may lure away someone else's steady customers. If one sells cars, for example, he may advertise in a newspaper. It is true that someone who always buys his cars from another dealer may see that the advertiser is offering a better deal, and this may lure him away from his steady supplier; however, since the advertiser is not approaching him directly and trying to woo him away from his competitor, this will not fall under the category of *marufiah*.

Furthermore, if a store has non-Jewish competitors who are actively trying to entice his steady customers to leave him, a Jewish competitor would be permitted to do the same. The reason why some places banned one from trying to lure away a steady customer is because the seller has already "set his sights" on this customer and is relying on his business. If he knows that non-Jews may entice the customer to leave him, he is not assured of the business and cannot be said to have this customer fully in his sights; therefore, *marufiah* would not apply.

GRABBING CHOMETZ AFTER PESACH:

There is a fascinating story discussed in a teshuva in Sefer Ma'asos Binyomin. An owner of a liquor store sold his chometz to a non-Jew before Pesach. When Pesach was over, a competitor hastened to the non-Jew and offered him more money to sell the liquor to him, rather than to the Jew who had sold it to him. By gaining possession of all of the first storeowner's liquor, he would effectively be putting him out of business.

The Ma'asos Binyomin says that this would be forbidden because of a *marufiah*. Since the first owner certainly had his sights on purchasing the chometz back from the non-Jew, he has the rights to this chometz and another buyer may not grab it away.

We see from this teshuva that the Ma'asos Binyomin held that *marufiah* does not only apply to a merchant trying to steal a customer; it also applies to a purchaser exerting effort to buy a specific item.

The Ma'asos Binyomin adds that if the second store owner purchased the chometz from the non-Jew, *bais din* can take it away from him. This is very puzzling, as the Poskim say that while *marufiah* may be forbidden, *bais din* does not get involved and demand compensation when one transgresses. The Sharei Tzion suggests that he is saying that *bais din* may demand a penalty as such actions are a danger to the accepted rules of commerce, and if there would be no penalty it would be impossible to sustain the economic structure.

FRUITS KNOCKED OFF A TREE:

Another Gemara discusses a case where a poor man is knocking fruits of *peah* off a tree with a stick. He has already knocked the fruits to the ground, but has not yet picked them up to obtain ownership. The Gemara says that it is *gezel d'rabbanan*, Rabbinically decreed theft, for anyone else to pick up the fruit from the ground and take them for himself. Since the first man exerted efforts to knock down the fruits from the branches, they are already considered to be "in his sights", and anyone who grabs them away from him is considered a thief.

This becomes the basis for basic copyright and patent rights in halacha. If someone exerts much effort to create a product, he is akin to a fisherman who has already laid his nets or a poor man who has already knocked fruits off a tree. Once someone has put forth this level of effort, Chazal forbid someone else from coming along and taking his business away from him and one who does so is labeled a *rasha*.

PARNASSAH IS DECREED BY HASHEM:

The bottom line of all of these halachos is that the amount of money one will earn is decreed by Hashem on Rosh Hashanah. One has an obligation of *hishtadlus*, but he is only permitted to try to earn money in ways that are permitted by halacha. One who has strong *emunah* will recognize the fact that engaging in business tactics forbidden by halacha will not bring him any extra profits, and he will only do *hishtadlus* in a permitted manner.