



## CUT-THROAT COMPETITION

### SOURCE SHEET AND DISCUSSION QUESTIONS

We live in a world of finite resources. When one person acquires an item, it is not free to be taken by someone else. The Torah and the Rabbis set in place rules to govern the behavior of buyers and sellers to allow competition in a way that is fair for all parties involved. One of these rules is known as “ani hamehapech bechararah” (literally, the pauper who is involved in acquiring a pancake). This means that a person should not acquire the items that his friend has been attempting to secure for himself. It applies to cases where the purchaser has put effort into obtaining a resource, but has not yet actually acquired it. At this point, the item is in somewhat of a grey area. It doesn’t yet belong to the buyer, but efforts have already been made to secure it. What obligation does another potential buyer have in such circumstances? What about the seller?

Briefly look at the following cases where the principle may apply:

- A** Bob was stopped at a red light when a man knocked on his window. “Want a cold Coke? Only two dollars. Last one!” the fellow said, pointing to a cooler on the side of the road. “Let me think for a second,” Bob replied. “Two dollars is a bit much for one can.” As Bob was trying to decide if he should buy the drink, Earl called out, “Here’s your money. Give it to me instead.”
- B** Roy walks into a small store right off of Main Avenue. A sign near the register says, “Air conditioner sale! 70% off! Limited Supplies!” He asks the cashier, “Do you still have the air conditioners on sale?” “One left,” says the man. “It’s that box in the corner.” Roy, realizing that he left his wallet in the car, tells the cashier that he wants it and will be back in a moment. Five minutes later, he comes back in, only to see Michael walking out with the box that he had his eye on. “What are you doing?” Roy demands. “I was buying that!” Michael shrugs. “I heard that this was the last one, so when you went outside, I grabbed it. You snooze, you lose.” What about the same case, except on sale for 20% off not 70%?
- C** Keith is walking along the beach when he notices that there is something buried in the sand. He starts to dig around the item, but before he can uncover it, hears a loud squawk behind him. Turning around, he sees a seagull is swooping down to grab his lunchbox which was left a few feet behind him. Keith quickly chases away the bird and returns to his hole in the sand. To his surprise, Alex is standing there with a plastic bag stuffed with cash. “Look what I found here!” he exclaims. “It’s all mine!”

**D** Scott stands on his porch and looks at his front steps. They are in bad shape after the winter, so he pulls out his phone and calls Joe the handyman. They agree on a price, and Scott says he will call back shortly to arrange a time for the work to be done. As he hangs up, Stu walks up to him and says, "I just heard you on the phone with Joe. I can do the job for the same price. When do you need me to start?" Scott shrugs and says, "I don't care who does it, I just want it done. You can start tomorrow."

**E** Thompkins International, an antiques and manuscripts dealer, agreed to sell a one-of-a-kind handwritten copy of Shakespeare's King Lear to Paul Grable for 3.2 million dollars. When he came to give them a check for it, they informed him that Jason Malbern, who had heard about the deal from a friend in the business, had come in the day before and paid them the full amount in cash and was now the proud owner of the manuscript.

Let's start by looking at the section of Talmud which discusses this rule.

### A. Sources:

#### **SOURCE 1:** *Talmud Bavli (Kiddushin 59a)*

Rav Giddel was involved in purchasing a certain piece of land. Rebbe Abba came and bought it. Rav Giddel went and complained to Rebbe Zeira. Rebbe Zeira complained to Rav Yitzchok Naphcha. He (Rav Yitzchok) said to him, wait until he (Rebbe Abba) comes up to us, on the holiday. When Rebbe Abba came, he (Rav Yitzchok) found him and said, "**A pauper who is involved in acquiring a cake**, and another person takes it from him, what is the halacha?" (Rebbe Abba) said, "**He is called a wicked person.**" "If so, (seeing as you agree that it is wrong to take the item in that case) why did you do this (buy the land)?" He replied, "I did not know (that Rav Giddel was in the process of purchasing it)"

תלמוד בבלי קידושין נט א  
רב גידל הוה מהפיק בההיא ארעא.  
אזל רבי אבא זבנה. אזל רב גידל  
קבליה לרבי זירא. אזל רבי זירא  
וקבליה לרב יצחק נפחא. אמר ליה,  
"המתן עד שיעלה אצלנו לרגל." כי  
סליק אשכחיה. אמר ליה, "עני מהפך  
בחררה ובא אחר ונטלה הימנו, מאי?"  
אמר ליה, "נקרא רשע!" "ואלא מר  
מאי טעמא עבד הכי?" א"ל, "לא הוה  
י'דענא."

The Talmud introduces us to the concept of ani hamehapech (one involved with acquiring something) and tells us that one who violates the directive (jumps in front of his friend to make the acquisition) is a wicked person.

**Q: What does it mean when we say the person is "wicked"? If he took property inappropriately, he is a thief; if not, what is the problem?**

**Q: Also, why do you think Rebbe Abba calls the person a rasha (evil)? Why doesn't he just say to return it to his friend? What does the language imply about the status of the acquisition?**

It must be that there is a time period between agreement and complete acquisition that allows for an action that “may” be binding, even though it’s wrong. (See discussion later in module over whether the object actually needs to be returned)

**Q: Since both parties seem to have a right to pursue acquisition in this grey area, why do the Rabbis step in and take the side of the first party in such a forceful way?**

Let’s take a look at the perspectives of two early authorities, Rashi and Tosafos, who argue about the scope of this rule:

**SOURCE 2:** *Tosafos on Talmud Bavli ibid.*

Rabbeinu Tam (Tosafos) says that the prohibition is only relevant when the pauper wants to enrich himself **through paid work or he wants to buy something, and his friend jumps ahead and completes the deal first, like in the case of Rav Giddel**. This is why he is called a wicked person; why is he chasing after the item that his friend has worked for? **He should go and do business elsewhere!** However, if the **cake was ownerless, there is no prohibition involved**, because if he does not get this item, he will not necessarily find another one.

תוספות לעיל  
עני המהפך בחררה ובא אחר ונטלה. ואומר  
ר"ת, דאיסור דמהפך דנקט הכא לא שייך  
אלא דוקא כשרוצה העני להרויח בשכירות,  
או כשרוצה לקנות דבר אחד, וחבירו מקדים  
וקונה, והוי דומיא דרב גידל. ומש"ה קאמר  
”דנקרא רשע” כי למה מחזר על זאת שטרח  
בה חבירו? ילך וישתכר במקום אחר! אבל  
אם היתה החררה דהפקר, ליכא איסור,  
שאם לא זכה בזאת לא ימצא אחרת.

Tosafos says that this rule only applies to a **purchase or for paid work**, but not to **finding** an item.

**Q: Is his view supported by the case in the Talmud? How?**

**Q: Also, what is the logic behind the difference between a purchase and an ownerless item? What does that tell you about the reasoning behind the rule?**

Before answering this question, let’s take a look at how Rashi sees the case.

**SOURCE 3:** *Rashi on Talmud Bavli ibid.*

**A pauper who is involved in acquiring a cake:** He is attempting to acquire it, either in a case where it is **ownerless property** or he is trying to get the **owner to give it to him**.  
**Called a wicked person:** Because he has ruined the livelihood of his friend.

רש"י לעיל  
עני המהפך בחררה. מחזר  
אחריה לזכות בה מן ההפקר, או  
שיתננה לו בעל הבית  
נקרא רשע. שיורד לחיי חבירו

**Q: Rashi’s view of the case seems totally different from that of Tosafos. How so?**

**Q: If, as Rashi claims, the phrase “a poor person who is involved with acquiring a cake” is the case of an ownerless item or a gift, why does Rebbe Abba agree he transgressed this rule? He was acquiring a piece of land owned by Rav Giddel, not ownerless property!**

It must be that Rashi understands that “ani hamehapech” (pauper acquiring a cake) **EVEN** applies to business transactions in addition to lost and gifted items, while Tosafos says that it applies **ONLY** to business dealings, like the actual case of Rav Giddel.

Let’s take a look at the commentary of Nachmanidies (Ramban) to get a deeper insight into the positions of Rashi and Tosafos:

## B. Analysis:

### SOURCE 4: *Nachmanidies (Ramban) on Talmud Bavli (Bava Basra 54b)*

**Rabbeinu Tam (Tosafos)** says that the Talmud in Kiddushin says that a person is wicked when one person is attempting to buy an item and another comes and purchases it first, **because if he does not make this purchase, he can find the same thing to buy elsewhere**. Even if he does not find the item (elsewhere), **it is not a big loss**. However, in the case of an ownerless item, he is not called wicked even if he takes the item for himself, because **he may not be able to find another one, and his own livelihood is more important**. This is different than a purchase, even if it is an item on sale, because we do not differentiate between different cases of purchased items. **Rashi** disagrees and says we are talking about **ownerless items** and that Rabbeinu Tam’s reasoning does not make sense.

רמב"ן בבא בתרא נד ב  
ופריק ר"ת ז"ל, כולהו לא קשיאן. דכי  
אמרינן במס' קידושין "נקרא רשע", במהפך  
בה ללוקחה ובא אחר ולקחה, שאם לא  
לקח זו, ימצא אחרת ליקח. ואם לא מצא,  
אין הפסדו מרובה. אבל בדבר של הפקר,  
דקא זכי לנפשיה, לא מיקרי רשע דלא  
משכת אחרינא, וחיי קודמין. כלומר, רווחא  
דידיה עדיפא, מה שאין כן במכר, ואפילו  
לקח בפחות מכדי דמיו, הואיל ומכר הוא  
אין לחלוק וכו' אבל רש"י ז"ל פ"י שם, "עני  
המהפך בחררה לזכות בה מן ההפקר"  
וכו', ועוד, שאין בדברי רבינו תם ז"ל טעם  
כעיקר.

**Q: According to Ramban, what would Tosafos say to a person who cuts in front of his friend to purchase an item, besides calling him a rasha - evil person!?**

That’s right. Go buy another piece of land! A person should not undermine his friend’s efforts to acquire an item when there is no significant loss for himself.

**Q: According to Ramban, why is an ownerless object or a gift different?**

An ownerless item is considered to be a case of loss (for the second person) because there is no reason to assume that a similar item will be found again. It is a question of balancing competing priorities, the right of acquisition (of the second person) against the squandering of another’s efforts (the first person). **In a business case Tosafos rules you have to forego a potential gain, while in a case of a found or gifted object you have a right to that gain.**

According to Rashi, there is no reason for this distinction. **Ani hamehapech prohibits one person from ruining his friend's efforts period**, even if he will **miss out on a potential gain** by not interfering. They agree as to the nature of the ruling but not in its applicability in all cases.

**Q: Why does Rashi expect the second guy to "take a loss" just because his friend was first to the party, even though the acquisition was never finalized?**

One answer is that you shouldn't hurt your friend (squander his efforts) just to enrich yourself. This seems to be the simple understanding of Rashi's position. However, there is another somewhat novel approach to explain Rashi as well:

**SOURCE 5:** *Rabbi Yehoshua Falk (S'ma) Sefer Meiras Einayim on Shulchan Aruch: Choshen Mishpat (237:1)*

**There is no ani hamehapech by ownerless or gifted items**, because they are not commonly found items. This is unlike cases involving the purchase of an item which can be bought elsewhere, even if it involves some effort to do so. **Those who disagree (Rashi) say that even by a gift or ownerless items he would be called a wicked person.** The reason for this is because once the first person has **made efforts to acquire the item** it is considered as if the second fellow is actually taking away what the 1st person has, **on some level, already acquired.**

סמ"ע שלחן ערוך חושן משפט רלז:א  
כיון שאינו (ההפקר והמתנה) דבר המצוי.  
משא"כ כשבא לקנות דבר דיכול להשתדל  
לקנותו גם במקום אחר, אף שיהיה לו  
טירחא בזה. והחולקים סבירא להו דאף  
במתנה והפקר נקרא רשע, דכיון דזה כבר  
בא לקחנו ולקבלה, ה"ז השני כנוטל במה  
שכבר זכה בו הראשון.

**Q: How does the S'ma explain why Rashi would prohibit a second person from interfering with the acquisition of an ownerless object?**

S'ma answers that the real reason this rule applies across the board is because it is "as if the second person is actually taking away something away from the 1st person that he has, on some level already acquired". He is suggesting that, even though he didn't even pick up the object, on a Rabbinical level there is, nonetheless, a partial acquisition, which certainly should not be interfered with by the second person.

So, we really come out with two explanations for Rashi. Either, that ani hamehapech is so we do not ruin someone else's efforts, even if that causes a loss to the second party (Ramban), or that a person is considered to already own the item he is seeking to acquire on a Rabbinic level, even before he actually picks it up.

**Q: What would be the biggest practical difference between the Ramban's understanding of Rashi vs. the S'ma? Think about what would happen after the fact.**

According to Ramban, ani hamehapech is poor ethical behavior, but that does not make it actionable in court. According to S'ma, the Rabbis consider it to be a form of theft. It is very possible that they would require the item to be given to the first person, in the same way that a stolen item has to be returned to its rightful owner.

**Q: Even if the second buyer does not have to give the item back, he is still called a wicked person. What does this really mean in terms of consequences for his wrongdoing?**

Primarily, it is an indication that his actions have crossed the line from being aggressive and not particularly nice to being actions which are wrong and prohibited by the rabbis; he has damaged his relationship to Hashem and needs to do teshuva (rectify the sin). There are also sometimes consequences in regards to his relationship with the community.

How do we rule, like Rashi or Tosafos or some combination of the two? Let's go to the next section and see.

### C. How We Rule:

**SOURCES 6 AND 6A:** *Rabbi Yosef Cairo(Shulchan Aruch)/Rabbi Moshe Isserlis (Rama) on Chosen Mishpat (237:1)*

#### Source #6. Shulchan Aruch

**1 If a person is attempting to rent or buy something,** such as land or moveable property, **and someone else buys it instead, the second fellow is called a wicked person.** The same thing is true if he is trying to hire himself out. Some say that if **he is trying to get an ownerless item**, or a gift, and someone else takes it first, the second fellow is not called a wicked person because he would not necessarily be able to find it elsewhere. Some say that there is **no difference between the cases.**

#### Source #6a. Rama

**The first opinion is the halacha.**

שלחן ערוך שם  
א המחזיר אחר דבר לקנותו או  
לשכרו, בין קרקע בין מטלטלים,  
ובא אחר וקנאו, נקרא רשע.  
והוא הדין לרוצה להשכיר עצמו  
אצל אחר. וי"א שאם בא לזכות  
בהפקר, או לקבל מתנה מאחר,  
ובא אחר וקדמו, אינו נקרא רשע,  
כיון שאינו דבר המצוי לו במקום  
'אחר וכו' וי"א דלא שנא וכו'  
רמ"א שם  
וסברה הראשונה נראה עיקר

Shulchan Aruch and Rama bring the two opinions and provide a ruling. The halacha follows Tosafos, that ani hamehapech only applies to business-like cases.

Based on what we have seen, let's think about some implications.

**Q: Based on Tosafos, this halacha does not apply to objects that are not commonly available, like lost objects. Can you think of other cases that might be similar?**

Here are a few cases discussed in the halacha.

- Unique items
- Contractors and craftsmen
- Sale items

**Q: Explain how each of these items might be excluded from the prohibition and actually be allowed to the second person? Can you think of other common cases that might be considered similar to lost objects?**

**Unique items** - these are considered to be the same as lost objects. Remember, the logic of Tosafos is that if the item cannot be purchased elsewhere, it causes a loss to the second purchaser, and he is not obligated to accept that. The same would be true for a unique item.

**Contractors and craftsmen** - the same principle applies here. If the craftsman has a unique talent or specialty, which cannot be found elsewhere, then it would be permissible to hire him away from the first person. If not, ani hamehapech would apply.

**Sale items** - this is a debate in halacha. Some say that unusually good sales are like unique items, so ani hamehapech would not apply. Others say that we do not differentiate between types of purchases, and that inasmuch as the item is not unique, we do not change the halacha based on the price and ani hamehapech will apply.

### **Case Analysis**

Based on the sources we have discussed above, what do you think the halacha should be in the cases discussed at the beginning of the module? What factors could be changed in the cases to cause a shift in the halacha?

### **EXTRA CREDIT**

Two more things to consider.

**Q: At what point in the sale process do we enforce this halacha? Before there is any discussion between the buyer and seller, there is no reason for it to apply, and after the purchase has been completed it would be an issue of theft. When does ani hamehapech apply?**

The halacha of ani hamehapech takes effect after the purchase price has been agreed upon by the buyer and seller. Before that, it is not advanced enough for the halacha to apply. Remember, we are balancing out the right of the two buyers and the seller. It would not be fair to cancel the right of another buyer to buy from the seller when the first one has not even settled on the purchase price and might not even end up agreeing to buy the item at all. It would also cause an unfair loss to the seller, who may not end up finding any buyer at all.

**Q: Can the second buyer offer a higher price?**

Yes, the second buyer can outbid the first one. Ani hamehapech does not cancel the right of the seller to take advantage of a better offer. Note that depending on where they are in the sale process, there may be other restrictions imposed by Jewish law upon the seller if he wants to cancel his agreement with the first buyer.