

The Crown Jewels

**Part 1: Who is responsible for stolen collateral?**

**By: R' Yosef Greenwald**

I was recently walking in Midtown Manhattan and I passed by a famous bank. Outside of the bank was a glass display case with a beautiful collection of jewelry, including necklaces, watches and earrings that were obviously worth millions of dollars. I discovered that the jewelry was actually the crown jewels of a European royal family. The country was suffering from financial difficulties and they had given their crown jewels to the bank as collateral against a loan. The bank was promoting this prestigious transaction by showcasing the crown jewels. While it may not be as common nowadays, in previous generations when people were very poor, they would go to the pawn shop to obtain money. It was common practice to give the pawn shop a valuable object as collateral, the *mashken*, in exchange for a loan. The customer then had a set time to pay back that loan and get back the object.

**Who has ownership of the collateral?**

What is the halachic status of a *mashken* that is stolen? If there is a blackout and the collateral is taken, must it be paid back?

The pawnbroker may be considered a *shomer sachar*, a paid guard of the item. If he is a paid *shomer*, then he would be obligated for *geneiva* or *aveida* if the item was stolen or lost.

But this extreme case of a blackout is considered an *ones*, beyond the regular confines of *geneiva* and *aveida*. There is nothing you can do to prevent a blackout. In the case of an *ones*, an accident, the pawnbroker is *patur*, and he can collect payment for the debt. The loss of the collateral item is incurred by the original owner, and not the one who was holding on to the *mashken*.

The Gemara in *Shevuos*, *Daf* 44, brings a famous *memreh* which is found in five places in *Shas*.

*"Minayin*

*L'Baal Chov Shekoneh Mashkon Shene'emar L'cha T'heyeh Tzedakah."*

R' Yitzchok says that a person who returns collateral in a timely fashion, is considered as if he has given him the gift of *tzedaka*.

The Gemora raises the question, as to what is the halachic status of the collateral, to whom does it belong? If it is not the property of the *malveh*,

why is it considered as giving *tzedaka*, when he returns it to the *loveh*? Apparently, concludes the Gemora, the *malveh* has some rights to the object, that he should not have to return it and thus it is considered an act of charity when he does return it.

It is important to understand the parameters of *Kinyon Mashkon*. What right does the lender have over a collateral object? The Gemara discusses a *mashkon*, a collateral object, in terms of a *Shomer Sachar* and in comparison to the *Shomer Aveida*.

### **Timing it Right**

The timing of giving the *mashkon* can make an essential difference in the areas of responsibility.

A *mashkon*

at the time of the loan is not being taken as a form of payment. The collateral

is meant to ensure that the borrower has an incentive to pay back the money in

time. When the borrower gives up an important object, he'll make sure to pay

back his debt. And if he does not pay back the loan, at least the lender will have something to show for the money which he loaned out.

A *mashkon* which is given later on, *shelo b'shaas halvaah*, has a different status. In this case, the debt has existed for a while and the lender sees that he's not getting his money back. So he asks the debtor for an object of value. It may not be worth as much as the debt, but at least it's something the lender can have in hand. Then, when the debt is repaid, the lender will return the *mashkon*.

In the *Halacha*

*L'maaseh* of ownership of collateral, there is a *machlokes* between the Rambam and Ra'avad.

### **The Rambam's designation as a *Shomer Sachar***

The Rambam in *Hilchos Schiros, Perek 10, paskens* like the Rif. He says that the *din* of *Baal Chov Koneh Mashkon* is accepted *L'halacha*, but nevertheless, the collateral is considered owned by the debtor. According to the Rambam, the collateral is owned by the debtor in both cases, "*bein b'shaas halvaah, bein shelo b'shaas halvaah*," whether the object was given during the time of the lending or not.

Both of these types of *mashkon* have the *halacha* of a lender who acquires a *mashkon*

to be a *shomer*

*sachar*. Therefore, the

Rambam *paskens*

that if the collateral is taken away in an *ones*, in a situation where he has no control, the loss

is absorbed by the borrower, the actual owner of the collateral. The lender is

no more than a *shomer*

*sachar*. If the item were stolen, the lender would bear some responsibility. But in the case of an *ones*, the responsibility lies solely with the debtor.

### **The Ra'avad distinguishes based on timing**

The Ra'avad disagrees. He differentiates between the two types of collateral, depending on when they were given.

According to the Ra'avad, only a *mashken b'shaas halvaah*, collateral given at the time

of the loan, is compared to a *shomer sachar*.

But if the debtor gives collateral later on, the Ra'avad views the *mashkon shelo b'shaas halvaah* as a partial payment. The lender sees that the debt is not being paid, so he takes an object. He is seizing payment for the debt. It may not be the whole amount that he is owed, it could be partial payment. Of course, the lender would prefer cash, but for now he takes what he can get.

Taking the *mashkon* after the debt is due is really a form of *govineh*, which will be a partial or full payment depending on the worth of the *mashkon*.

The borrower has the ability to redeem the object with money or property.

But for now, it is considered that the lender has collected his debt.

Once the lender has collected his debt, then the *mashkon* belongs to him. The collateral is considered a *kinyon*, and the lender is *chayiv b'onsim*. If the object is

lost *b'ones*,

the loss is incurred by the lender, because he has acquired the item by collecting against the debt.

### **Stolen Jewels**

Let us revisit the example of a bank holding the crown jewels as collateral. If those jewels are stolen, is the bank responsible? The jewels were taken during an *ones*, a circumstance beyond their control.

According to the Rambam, regardless of what type of *mashkon* it was, the bank is not responsible to bear the loss. The bank is considered a *shomer sachar*,

and the loss is incurred by the royal family.

However, according to the Ra'avad, the *halacha* depends on what type of *mashkon*

it was. If the crown jewels were taken after the loan was made, then they are

considered like a form of payment. In this case, the loss is incurred by the bank.