NOTE

The Shetar's Effect on English Law—A Law of the Jews Becomes the Law of the Land

The rational study of law is still to a large extent the study of history.
Holmes, *The Path of the Law*[1]

I. INTRODUCTION

English law, like the English language, is an amalgam of diverse cultural influences. The legal system may fairly be seen as a composite of discrete elements from disparate sources. After the conquest of 1066, the Normans imposed on the English an efficiently organized social system that crowded out many Anglo-Saxon traditions.[2] The Jews, whom the Normans brought to England,[3] in their turn contributed to the changing English society. The Jews brought a refined system of commercial law: their own form of commerce and a system of rules to facilitate and govern it. These rules made their way into the developing structure of English law.

Several elements of historical Jewish legal practice have been integrated into the English legal system.[4] Notable among these is the written credit agreement—shetar, or starr, as it appears in English documents. The basis of the shetar, or "Jewish Gage," was a lien on all property (including realty)[5] that has been traced as a source of the modern mortgage.[6] Under Jewish law, the shetar

1. 10 HARV. L. REV. 457. 469 (1897).

2. I CM. TREVELYAN, HISTORY OF ENGLAND 142-48 (1953).

3. 1 F. POLLOCK 4 F.W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 468 (reissued 2d ed. 1968). There is some dispute whether the Jews arrived by William the Conqueror's invitation or merely with his permission. 4 S. BARON, A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS 77 (1957).

4. *See generally* J. RABINOWITZ, JEWISH LAW 250-72 (1956) (discussing Jewish Gage, Odaita. Starr of Acquittance, and Representation by Attorney).

5. *See infra* text accompanying notes 34-36 (describing shetar and accompanying lien).

6. Rabinowitz, *The Common Lav Mortgage and the Conditional Bond,* 92 U. PA. L. REV. 179-94 (1943). The author traces the two-instrument (debt and release) mortgage to its origin as a device to avoid asmakhta. a Jewish principle invalidating penalty clauses. Under that doctrine. Jewish money lenders were forbidden to exact a penalty conditioned on the future failure of the debtor's obligation. *Id.* at 184-85. If a conveyance involved asmakhta, it was void. *Id* at 182. Invalidation as asmakhta could be avoided if all obligations were incurred at the time of the original transaction. *Id.* at 184. 185-86. Land was seizable as security only if the creditor went into possession at the time of the loan: "Meakhshav"—"from now". *Id* at 185. For this reason, the debt instrument included an immediate conveyance of the land that was to serve as security against default. A second instrument, the acquittal, would release the security and reconvey the land to its original owner if the debt were paid on or before its due date. *Id.* at 185. The entire written obligation (shetar) remained in the hands of a third party for the duration of the debt. *Id* at 192. The document proved that the debt existed and clarified the rights and duties of the parties in case of default. *See also* 2 C HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 71-92 (2d ed. 1967) (chapter on asmakhta).

Rabinowitz finds in these and other early Jewish devices for avoiding asmakhta both the structural and substantive roots of the English mortgage and the later developed equitable right of redemption. J. RABINOWITZ. *supra* note 4, at 250-72. *See also* F. LINCOLN, THE STARRA 47-50 (1939) (outlining the same derivation); *see generally* F. LINCOLN, THE LEGAL BACKGROUND TO THE STARRA (1932) (same). Compare the historical period of equitable right of redemption with the same term of protected re-

permitted a creditor to proceed against all the goods and land of the defaulting debtor.[7] Both "movable and immovable" property were subject to distraint.[8]

In contrast, the obligation of klight service under Anglo-Norman law barred a land transfer that would have imposed a new tenant (and therefore a different knight owing service) upon the lord.[9] The dominance of personal feudal loyalties equally forbade the attachment of land in satisfaction of a debt; only the debtor's chattels could be seized.[10] These rules kept feudal obligations intact, assuring that the lord would continue to be served by his own knights. When incorporated into English practice, the notion from Jewish law that debts could be recovered against a loan secured by "all property, movable and immovable" was a weapon of socio-economic change that tore the fabric of feudal society and established the power of liquid wealth in place of land holding."

The Crusades of the twelfth century opened an era of change in feudal England. To obtain funds from Jews, nobles offered their land as collateral.[12] Although the Jews, as aliens, could not hold land in fee simple,[13] they could take security interests of substantial money value.[14] That Jews were permitted to hold security interests in land they did not occupy expanded interests in land beyond the traditional tenancies.[15] The separation of possessory interest from interest in fee contributed to the decline of the rigid feudal land tenure structure.[16]

At the same time, the strength of the feudal system's inherent resistance to this widespread innovation abated. By 1250, scutage[17] had completely replaced feudal services: tenant obligations had been reduced to money pay-

demption in *Leviticus* 25:29: "And if a man sell a dwelling house in a walled city; then he may redeem it within a whole year after it is sold; for a full year shall he have the right of redemption." *Id*

7. J. RABINOWITZ, *supra* note 4, at 253. *See infra* text accompanying notes 33-47 (describing shetar in Jewish law).

8. *Set infra* text accompanying note 35 (extent of lien imposed by shetar).

9. T.F. BERGIN A P.G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 8 (1966). Land tenure was central to social organization within the feudal system:

> The feudal system originated in the relations of a military chieftain and his followers, or king and nobles, or lord and vassals, and especially their relations as determined by the bond established by a grant of *land* from the former to the latter. From this it grew into a complete and intricate complex of rules for the tenure and transmission of real estate, and of correlated duties and services . . . .

BLACK'S LAW DICTIONARY 560 (rev. 5th ed. 1979) (emphasis in original).

10. 2 F. POLLOCK A F.W. MAITLAND. *supra* note 3. at 596.

11. *See* H.G. RICHARDSON, THE ENGLISH JEWRY UNDER ANGEVIN KINGS 94 (I960) (Jews' liquidation of land obligations broke down rigidity of structure of feudal land tenure and facilitated transfer of land to new capitalist class).

12. E. JENKS, EDWARD PLANTAGENET, THE ENGLISH JUSTINIAN 40-41 (1923).

13. *See* F. LINCOLN, THE STARRA 114-15 (1939) (Jews could possess lands, but not hold by fee); SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS ix-x (J.M. Rigg ed. & trans. 1902) [hereinafter J.M. RIGG] (Jews religiously barred from swearing Christian oath of fealty, and therefore disabled from holding feudal estate).

14. E. JENKS, *supra* note 12, at 40-41.

15. *Cf.* 1 F. Pollock A F.W. MAITLAND, *supra* note 3, at 469 (alien to English law for creditor not in possession of land to have rights in it).

16. E. JENKS, *supra* note 12, at 41.

17. Scutage, in medieval feudal law, was a payment by the tenant in lieu of military service. D. WALKER. THE OXFORD COMPANION TO LAW 1121 (1980). *See Infra* note 18.

ments.[18] And as the identity of the principals in the landlord-tenant relationship became less critical, a change in the feudal rules restricting alienability of interests in land became possible.

One catalyst for this change may have been the litigation surrounding debt obligations to Jews secured by debtors' property. The Jews in Norman England had a specified legal status. They alone could lend money at interest.[19] They were owned by the King, and their property was his property.[20] The King suffered their presence only so long as they served his interests[21]—primarily as a source of liquid capital.[22]

Because moneylending by Christians was infrequent, English law had not established its own forms of security.[23] The Jews operated within the framework of their own legal practice,[24] which was based on Talmudic law developed over centuries of study. But the peculiar status of the Jews as the Crown's de facto investment bankers encouraged the King to direct his courts to enforce the credit agreements made by Jews under their alien practice. This nourished the growth of Jewish law in a way that blurred the absolutes of feudal land tenure.[25] Previously inalienable rights in land gave way to economic necessities, and the English ultimately adopted the Jewish practices.[26]

This note examines a moment of contact between two peoples, when necessity, proximity, and social upheaval prompted a cultural exchange between the Jewish merchants and moneylenders and those they served. The note describes the effect on English law brought about by the King's Jews as they

18. In feudal land holding, the tenant's possessory right in land was limited to usufruct, as granted by the King, who retained absolute dominion over the land. The denotation of the tenant's interest as *fee (*or *fief, feud, or feodum)* reflected the tenant's obligation to render service to the sovereign in return for the privilege of using the land. 2 W. BLACK STONE, COMMENTARIES 104-05.

During the first century of the Norman Conquest land was held by military tenure, in which the tenants owed a specified number of days per year in knight service. 1 F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 252. Either the tenants or their servants owed personal service in the King's army. Later, the King came to require a standing army to pursue extended campaigns on the Continent. *Id.* In place of short-term combat service, the King accepted "scutage" (literal derivation: "shieldage"), whereby his tenants-in-chief sent money in lieu of themselves or their knights. *Id.* at 266. The scutage fees enabled the King to employ professional troops and permitted the gentlemen to remain at home. *Id. Set generally id* at 252-82 (section on knight's service). By the reign of Edward I in 1272, both personal service and scutage failed to provide adequate military resources; additional taxes were instituted in their stead. E. JENKS, *supra* note 12. at 102.

19. 1 F. Pollock A F.W. MAITLAND, *supra* note 3, at 468.

20. *Id* at 468. 471.

21. *See* Mandatum Regis Justiciariis Ad Custodiam Judeorum Assignatis de Quibusdam Statutis per Judeos in Anglia Firmiter Observandis. Anno Regni Regis Henrici Tricesimo Septimo (Mandate of the King to the Justices Assigned to the Custody of the Jews Touching Certain Statutes Relating to the Jews in England Which are to Be RIGorously Observed. The Thirty-Seventh Year of King Henry) [A.D. 1253) (Mandate of Henry III ordaining "(t)hat no Jew remain in England unless he do the King service, and that from the hour of birth every Jew, whether male or female, serve Us in some way"), *printed in* J.M. RIGG, *supra* note 13, at xlviii-xlix.

22. 1 G.M. TREVELYAN, *supra* note 2, at 250-51.

23. J. RABINOWITZ, *supra* note 4, at 262.

24. *Set* J.M. RIGG, *supra* note 13, at xix (Jews made loan arrangements according to traditional law of the shetar).

25. *See 2* F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 123-24 (Jewish creditors' rights in land enforced by King; same rights not available originally to Christian creditors).

26. *See 1* F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 475 (Second Statutes of Westminster of 1285 gave Christian creditor the remedy of *elegit,* similar to the choice of remedies afforded Jewish creditors). *See also Infra* text accompanying notes 168-78 (Statute of Merchants adopted enrollment procedures and eventual award of land to unpaid creditor).

executed and registered debt instruments, assigned and enforced the underlying obligations, and generally survived by moneylending, the only profitable occupation open to them.[27] It first reviews the Jewish credit agreement and its function in Anglo-Norman feudal society. It then suggests a rational explanation for a development in medieval English law heretofore perceived only as an anomaly: that the early writs of debt, which were for recovery of money, used terminology more appropriate to an action for recovery of land. This confusion now appears to be merely the linguistic expression of an innovation in the law due to the development of an action to recover alternative relief: repayment of money lent or award of collateralized land.

Finally, the note focuses on the incorporation of Jewish law into English practice through a series of thirteenth century cases involving the same Jewish litigant. Jewish debt procedure had by then become part of everyday business in England. Even as the Jews began to be excluded from moneylending, their procedures were adopted into the general English law governing debt registration and collection. In 1275, the statute "De Judeismo"[28] forbade the Jews' usurious practices.[29] In 1285, the Statute of Merchants[30] formalized creditor remedies that paralleled the provisions of the Jewish shetar.[31] In 1290, the Jews were expelled,[32] but their credit practices remained.

II. JEWISH CREDIT AGREEMENTS IN FEUDAL ENGLAND

A. THE SHETAR IN JEWISH LAW

The law of the shetar, developed and elaborated by 500 A.D. in the Babylonian Talmud, antedates the Norman Conquest by six centuries.[33] Historically, the "shetar hov" (or generally just "shetar") was an instrument that established formal obligation, either in contract or in debt.[34] At the moment that a debtor acknowledged his indebtedness through a shetar, a general lien was established, encumbering *all* the debtor's property as security for ultimate repayment.[35] In case of default, the creditor could proceed not only against movable

27. 1 F. POLLOCK A F.W. MAITLAND, *supra* note 3. at 471 (English Jews could profitably engage only in moneylending). Although the Talmud prohibited charging interest on loans, even to Gentiles, authorities including Rabbenu Tam (a 12th-century Talmud scholar whose opinions are still cited with respect) permitted Jews to lend Gentiles money at interest "because no other avenues of trade or commerce (were) open to Jews, and the lending of money (was) the only means of livelihood left to them." D.M. SHOHET, THE JEWISH COURT IN THE MIDDLE AGES 89-90 (1931).

28. 1 STATUTES OF THE REALM 221 (London 1810 A photo, reprint 1963). This statute, which is undated, is generally thought to date from 1275. *See* 10 S. BARON, *supra* note 3, at 111 (attributing statute to 1275); J.M. RIGG, *supra* note 13, at xxxviii (attributing statute to 1274-75). STATUTES OF THE REALM attributes the statute to either 4 Edw. (1275-76) or 18 Edw. (1289-90). 1 STATUTES OF THE REALM 221 n.[l).

29. *See* Les Estatutz de la Jeuerie (The Statutes of Jewry) <pgrph> 1 STATUTES OF THE REALM 221, 221 (providing that henceforth no Jew lend at usury upon land, rent, or other thing; that interest accruing after previous Feast of St. Edward not be collectible; that debts to Jews secured by chattels be paid by Easter or be forfeited; and that the King will no longer enforce the Jews' usurious contracts, but will punish the lender).

30. Statute of Merchants, 1285, 13 Edw., Stat. 3.

31. *See infra* text accompanying notes 168-78.

32. 10 S. BARON, *supra* note 3, at 113.

33. G. HOROWITZ, THE SPIRIT OF JEWISH LAW 16 (1953).

34. Fuss, *Shetar,* in PRINCIPLES OF JEWISH LAW 186 (M. Eton ed. 1975).

35. *Id* The shetar imposed a lien on all the real property Out the debtor owned at the time of the

and immovable property held by the debtor, but also against encumbered land that the debtor had transferred to a third party.[36] The debt attached to the land, and the creditor's Lien had priority over subsequent alienations.-[17]

Because of the severe obligations imposed by the shetar, the contents of the instrument followed a standard form designed to ensure authenticity and precision. Each shetar recited standard clauses of obligation, the creditor's right to customary modes of execution, and a final phrase stating that the document was not merely a form but a statement of an express contract.[38] Inserted into the form language were the names of the parties, the sum and the currency of the debt, and the date of the obligation, thereby indicating the creation of the lien.[39] To prevent fraud, the document was signed by two witnesses who knew the parties.[40]

A nation of wanderers, in adapting to a variety of cultures, determined that the language in which the shetar was written should be irrelevant to its legal validity.[41] Thus, in dealings with a surrounding Gentile populace, Jews were content that loan agreements be formalized in Latin or in the Norman French of early England.[42] Generally, the Jewish parties and witnesses would attest in

instrument's formation, regardless of whether the lien was expressly written into the shetar. Jewish law originally did not attach debt obligation to chattels. During the amoraic period. Jewish law extended the lien to the movable property of the debtor if specifically noted in the shetar. But the rabbinic courts would not enforce a lien against movable property that had been sold by the debtor to a third party. *Id.*

36. *Id* at 186. During the post-Talmudic period, it became customary to insert in the shetar a provision imposing a lien on the debtor's after-acquired property. J. RABINOWITZ. *supra* note 4, at 254.

37. Eton, *Lien,* in PRINCIPLES OF JEWISH LAW 288 (M. Eton ed 1975).

38. Fuss, *supra* note 34, at 184-85; G. HOROWITZ, *supra* note 33, at 509-11.

39. G. HOROWITZ, *supra* note 33, at 511.

40. *Id* at 511. In contrast to the documentary procedure of the written shetar, credit agreements also could be made orally under Jewish law. Milveh be-al peh—literally "loan by mouth" was distinguished from milveh bi shetar—"loan by writing." Shiloh, *Loans,* in PRINCIPLES OF JEWISH LAW 262 (M. Eton ed. 1975). The oral creditor, however, had no right to levy on the debtor's alienated and encumbered property to obtain satisfaction of the debt *Id*

41. 1 C. HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 152 (2d ed. 1965).

From the time of the Jewish exile in Babylonia, 586 B.C., the Jews had lived as outsiders in foreign lands. In order to live within their own law, they developed a doctrine to minimize conflicts between Jewish law and the law of the surrounding community. G. HOROWITZ, *supra* note 33. at 79. In dealings with the Christian populace, the Jewish community followed the principle that "the law of the Kingdom is the Law" (dina de-malkhuta dina). They accepted and obeyed any law that did not conflict with Jewish laws governing specific religious obligations. *Dina De-Malkhuta Dina.* in 6 ENCYCLOPEDIA JUDAICA 51, 54 (1972). Respect for the rale of the Gentile sovereign raised the problem of determining the applicable law:

> The decrees of the king are law to us; but the national law is not our law. Among all nations there are certain fundamental rights and privileges which belong to the sovereign. Within this scope, the commands of the king are law. But this does not bold true of the judgments rendered in their courts. For the laws which the courts apply are not the essence of royalty. They are based on the precedents to be found in their writings. You cannot dispute this distinction, for otherwise you would annul, God forbid, the laws of the Jews.

0. HOROWITZ, *supra,* at 79-80 (quoting Rashba, Rabbi Solomon ibn Adret of Barcelona (1235-1310)).

Jewish courts would enforce external civil laws and formalities, *id* at 80, but did not permit such civil law to sanction behavior otherwise forbidden to Jews. *Id* Thus, a transaction enforceable in Gentile courts might still be invalidated (as applied to Jews) by a Jewish tribunal. *Id* at 80-81.

42. J.M. RIGG, *supra* note 13, at xix. *See* HEBREW DEEDS OF ENGLISH JEWS (M.D. Davis ed. A trans. 1888) [hereinafter M.D. DAVIS] (reproducing the Hebrew portion of shetars in Hebrew and Latin); STARRS AND JEWISH CHARTERS PRESERVED IN THE BRITISH MUSEUM (1. Abrahams, H.P. Stokes A H. Loewe eds. A trans. 1930-32) (hereinafter STARRS AND CHARTERS| (reproducing Hebrew and Latin portions of shetars).

Hebrew and the Christians in French or Latin.[43] Although neither party may have understood the other's language, the document had the full force of law in both communities.[44]

The crucial limitation on debt collection under Jewish law was that a creditor had a lien against the debtor's land, but not against the debtor's person.[43] Personal freedom was not to be diminished by a debt obligation, and a creditor could not enslave one who was unable to repay him.[4]* The origin of this practice was the Biblical protection of the dignity of debtors, as embodied in the injunction not to enter the debtor's home to receive a pledge, but rather to wait outside for the debtor to bring it out.[47] This was the structure of the law of obligation that the Jews brought with them to England.

B. NORMANS IN ENGLAND—A CENTRALIZING MONARCHY

Unique among its feudal neighbors, the Norman Duchy was governed as a centralized unit, with no baron strong enough to challenge the Duke's authority.[48] Although the Norman Duke owed fealty to the King of France, that King lacked effective power over his vassals, who independently governed their own territories.[49] In Normandy, however, feudalism was strictly territorial: a pyramid of land tenure embodied a system of military obligations ascending from knight through baron to Duke, from whom all land and authority derived.[50] On the continent, and later in England, William the Conqueror set out to maintain and strengthen this Norman system of centralized governance.[51] With the Conquest, the Normans introduced to England a well-organized central authority.[32]

The early governance of conquered England concentrated power in the King. As William the Conqueror imposed the rigorous order of the feudal

43. *See, eg.,* J.M. Rigg. *supra* note 13, at xix (Hebrew creditor signed in Hebrew); *id* at 46 (record of Exchequer documenting shetar written in Hebrew with Latin duplicate). In England the terms of the acquittance took the Jewish form of the release: "from the beginning of the world" to the present. J. RABINOWITZ, *supra* note 4, 265-69.

44. Both Jewish and English courts recognized the force of a shetar offered as evidence of a debt. J.M. Rigg, *supra* note 13. at xix-xx. Rigg describes the elaborate recording and witnessing procedures, including both Jewish and Gentile participants, designed to avoid fraudulent documents. *Id* The King's courts enforced a duly enrolled shetar. *See infra* text accompanying notes 132-48 (discussing mechanism by which Exchequer enforced debt obligations). The courts within the Jewish community routinely enforced shetars.

45. Elon, *Imprisonment for Debt,* in PRINCIPLES OF JEWISH LAW 634 (M. Elon ed. 1975).

46. *id.* at 634. *See also* M. ELON, RESTRAINTS OF THE PERSON AS A MEANS IN THE COLLECTION OF DEBTS IN JEWISH LAW (1961) (precis of doctoral dissertation) (Jewish tradition had no personal imprisonment for debt, reasoning that if a debtor's home could not be entered, even less could the debtor be taken; in the 13th century, Jewish scholars began to debate and approve imprisonment for evasive debtors, but only in carefully prescribed conditions).

Unlike Jewish law, English law specifically envisioned such imprisonment. *See* Statute of Merchants, 1285, 13 Edw., Stat. 3 (establishing imprisonment of the body of a defaulting debtor); Statute of Acton Burnell 1283, 11 Edw. (if debtor's goods insufficient to satisfy debt, debtor imprisoned pending repayment, but creditor responsible for assuring bread and water sufficient to sustain life of imprisoned debtor, who must further reimburse creditor upon release).

47. *Deuteronomy* 24:10-11 (to preserve debtor's dignity in bis own home).

48. 1 G.M. TREVELYAN, *supra* note 2, at 144.

49. *Id* at 144-45.

50. *Id* at 143.

51. W. STUBBS, THE CONSTITUTIONAL HISTORY OF ENGLAND 74-75 (abr. ed. 1979).

52. G.M. TREVELYAN, *supra* note 2, at 142.

system, he avoided the system's tendency toward decentralization and disintegration that had sapped the power of the French kings.[53] He limited the power of his tenants-in-chief by granting each of them landholdings scattered over the realm, instead of large, contiguous tracts.[54] He governed the counties through sheriffs who depended on him for their power.[55] He maintained a national militia, thereby shunning total reliance on the loyalty of his tenants-in-chief.[56] And he had all significant landholders swear an oath of primary allegiance to him.[57] This concentration of power in the monarch grew during the successive reigns of a series of strong kings who increasingly assumed more power—military, legislative, and judicial—over the nation.[58]

C. THE JEWS UNDER THE NORMAN KINGS

Outsiders in feudal society, both Anglo-Norman and continental, the Jews were not part of the network of land-based obligations. They could not own land. On the Continent, they were owned as chattels by the local lords, who protected the Jews' possessions on the understanding that what a Jew owned, he held for the ultimate use of his lord.[59] The Jews in Norman England, however, were within the exclusive domain of the King's personal control, living at his sufferance and according to his wishes.[60]

The first settlement of Jews in England came in the wake of William the Conqueror.[61] William determined that he should be the sole owner of Jews in England. Others could own Jews only with the King's permission as expressed by royal grant.[62] The *Leges Edwardi Confessoris,* a twelfth-century compilation and translation into Latin of laws attributed to Edward the Confessor,[63]

53. W. STUBBS, *supra* note 51, at 85-91.

54. *Id* at 90-91.

55. *Id* at 88.

56. *Id* at 86.

57. *Id* at 84.

58. *Id.* at 117-18. The dates of the Norman and Angevin Kings from the Conquest to the expulsion of the Jews in 1290 are:

William I	1066-1087
William II	1087-1100
Henry I	1100-1135
Stephen	1135-1154
Henry II	1154-1189
Richard I	1189-1199
John	1199-1216
Henry III	1216-1272
Edward 1	1272-1307

D. WALKER, *supra* note 17, at 1317.

59. F. LINCOLN, *supra* note 13, at 8-9. As "Administrator of the Realm," the continental King had interstitial power in the areas where no vassal could substantiate a rival claim; upon (his theory, the King had asserted special authority over widows and orphans, aliens, Jews, lunatics, etc. E. JENKS, *supra* note 12, at 90-91.

60. F. LINCOLN, *supra* note 13, at 10.

61. H.G. RICHARDSON, *supra* note 11, at 1.

62. F. LINCOLN, *supra* note 13, at 10.

63. 1 F. POLLOCK & F.w. MAITLAND. *supra* note 3, at 103. Pollock and Maitland believe that the laws of Edward the Confessor are of dubious authority as descriptions of historical fact perhaps reflecting some unknown 12th-century author's hopeful imagination.

the least vassal to the King. The underlying reality was that the Jews were no more than the embodiment of the King's accounts receivable. Jews were subject to periodic tallage and tithing when the King required them to turn over money that was held, ultimately, on his behalf.[82] The King preserved the Jews and their investments as representing his own financial future.

The royal charters, in effect, permitted the Jews usufruct of money[83] much as their Christian neighbors were permitted use of the land. At the King's pleasure, they would derive a livelihood by lending money at interest. Because Jews could lend money at interest, they were available to finance excursions to continental Europe and on Crusade.[84] In addition to the extraordinary fiscal demands of the Crusades, the nobles still owed knight service. Taxpaying began to replace personal service in the practice of "scutage"—money assessed from landowners in lieu of knight fees.[85] For this too, the Jews' assets were liquid, and available for a fee.

It was convenient to the realm to have a source of credit. It was further convenient that the profits from the loan arrangements, forbidden to Christians, be available to the King via his Jews. And it was to the King's advantage to enforce the contracts of credit made by the Jews.

III. THE JEWISH PRESENCE IN THE DEVELOPING LAW OF COMMERCE

A. IN THE KING'S COURT

The most striking development in English law during the twelfth century was the expansion of the royal courts. Under Henry II, the King's court assumed an increasing share of litigation that previously had been heard only by local courts.[86] This was done through the issuance of royal writs, originally executory commands to the sheriff, but, with time, increasingly representing a formal summons initiating action in the royal courts.[87] Glanvill's treatise, written at the close of the reign of Henry II,[88] is in part a form book of writs instructing the proper method of litigation and procedure. The categories of

Becket pointed to the Jews' internal juridical independence as an argument for a separate autonomous clergy. 4 S. BARON, *supra* note 3, at 277.

82. 10 S. BARON, *supra* note 3, at 96-99. The Saladin Tithe of 1188, to finance the Third Crusade, demanded that the Jews turn over 60,000 pounds, one-fourth of the value of their entire property in the country. 4 S. BARON, *supra* note 3, at 81.

83. The King forbore from his absolute rights in the Jews' possessions, permitting continued investment to accrue profits for his later use. G.M. TREVELYAN, *supra* note 2, at 251.

84. E. JENKS, *supra* note 12, at 40.

85. 1 F. POLLOCK A F.w. MAITLAND, *supra* note 3, at 271-74.

86. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 349-51 (1959).

87. *Id* at 195-97.

88. Glanvill's treatise is believed to have been written between November 29, 1187 and July 6, 1189. GLANVILL. *supra* note 68. at *xxx-xxxi.* The man whose name the treatise bean, Ranulf Glanvill, was appointed Henry II's chief justiciar in 1180. 1 F. POLLOCK & F.W. MAITLAND, *supra* note 3, at 163. After Henry's death in 1189, Glanvill accompanied the new King, Richard I, on Crusade and died in Acre in 1190. *Id* The authorship of the treatise is unknown but has been attributed to at least three men: Glanvill; Hubert Walter, who became chief justiciar in 1193; and, Geoffrey fitz Peter, the sheriff of Northampton. GLANVILL. *supra* note 68, at xxxi-xxxiii. It is equally likely that the book is the work of an unknown clerk of the King's court. *Id* at xxxiii.

writs reflect the precise boundaries of the then recognized forms of action.[89]

Among the writs developed during this formative period was the writ of debt.[90] Initially, litigants most commonly used the writ to collect loans of money." Because the Jews were the predominant moneylenders,[92] they would have been the predominant users of the early writ. But the Jews were not merely the unintended beneficiaries of a fortuitous royal innovation. Taken together, the coincident circumstances of the Jews' relation to the King, the then unique form of relief afforded them by their shetars, and certain peculiarities in the wording of the early writs all suggest that the Jews contributed in heretofore unexplained ways to the development of the early writ of debt.

In accord with their traditional practice, when the Jews lent money, they did so under written credit agreements documented in the traditional form of the shetars.[93] Because of his relation to the Jews, the King had manifold interests in enforcing these shetars. And, because "what the Jews held, they held for the King,"[94] what the Jews lost through litigation or to an evasive debtor was lost to the King. Nor were these losses small: the Jews accumulated immense wealth through their moneylending and the King's Exchequer relied heavily on the Jews as an important source of tax revenues.[95] And the King had an even more immediate stake in the revenues from court costs. When the debtor refused to pay, the King enforced the Jewish contracts through his royal court, at a cost of one-tenth to one-sixth of the sum at issue.[96] Yet, despite the royal interest, the questions posed by litigation of the shetar were not questions that English practice was designed to solve.

When a Jew sought to enforce a shetar, he asked alternative forms of relief: payment of the money owed or award of the land and chattels securing the debt.[97] But this request apparently was an aberration from English practice of the early twelfth century.[98] A Jew's request tracked the terms of his unique contract: only a Jewish creditor of a defaulting debtor would be forced to seek either money or security, because only his alien procedure left the debtor in possession of the land pledged to secure the debt.[99]

89. *See* GLANVILL, *supra* note 68, Book X, ch. 7, at 122 (writ of gage); *id.* Book XII, chs. 3-5, at 150-51 (writs of mort d'ancestor).

90. R.C. VAN CAENEGEM, *supra* note 86, at 254-56.

91. 2 F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 207.

92. *See* 1 F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 473 (Jews had monopoly in lending money at interest).

93. *See generally* M.D. DAVIS, *supra* note 42 (reproducing portions of credit agreements between English debtors and Jewish creditors); STARRS A CHARTERS, *supra* note 42 (reproducing Hebrew and Latin portions of credit agreements between English debtors and Jewish creditors).

94. *See supra* text accompanying note 65 (quoting Bracton).

95. *See* H.G. RICHARDSON, *supra* note 11, at 161-75 (discussing heavy taxation of Jews under Kings Henry II, Richard I, and John).

96. *See* 10 S. BARON, *supra* note 3, at 94 (court fee during King John's reign one tenth of debt); R.C. VAN CAENEGAM, *supra* note 86, at 258 (court fees at end of Henry II's reign average one-sixth of debt; during 10th year of John's reign, one-seventh).

97. *See supra* text accompanying notes 36-37 (describing creditor's remedies under shetar).

98. The explicit categorization of actions as real or personal did not arise in English law until Bracton's time. *See* Williams. *The Terms Real and Personal In English Law, 4* L.Q.R. 394, 398-400 (1888) (Bracton classifies actions; Glanvill does not). *See also* 2 H. DE BRACTON. DE LEGIBUS ET CONSUBTUDINISUS ANGLIAE 290-91 (G.E. Woodbine ed. A S.E. Thorne trans. 1968) (first division of actions).

99. *Set* 2 F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 123 (Jewish creditor frequently not in

It appears likely that, at that time, a Christian litigant asked for only a single remedy, either a thing or money. A Christian creditor took and kept possession of the land until the debt was satisfied.[100] In case of default, therefore, his suit would be for money only.[101] If the debtor wrongfully put him out of possession of the land securing the debt, English practice barred the Christian creditor from bringing an assize of novel disseisin to recover the land: the English system relegated him to a suit only for the underlying debt.[102] Conversely, the debtor regained the possessory rights to his property once the underlying debt was satisfied. If the creditor refused to return the security, the debtor's suit would be limited to return of the pledged property.[103] A Jewish creditor was apparently the only person in the realm who would seek execution on a significant personal obligation by either transfer of a thing or payment of a sum.

A Jewish creditor's ability to ask two forms of relief gave him more than the obvious advantage over a Christian creditor. Important procedural privileges inhered in the option of getting real relief for a personal obligation. The conventional litigant, suing on a personal obligation and seeking only money, could not get judgment if the defendant did not appear in court.[104] In contrast, any litigant seeking an award of land would be awarded judgment if the defendant had been absent, without excuse, after three successive summonses.[105] After the defendant's third unexcused absence, the land was "seized into the King's hand" for fifteen days and then adjudged to the plaintiff.[106] Consequently, only a litigant demanding land was assured complete relief regardless of a defendant's attempts to evade the court's power. Other litigants could gain access to defendants' property only through successful attempts to secure defendants' presence through distraint of chattels and lands.[107] This disparate justice dissatisfied Bracton, who proposed that the courts grant relief to claimants of personal obligations who were faced with a defaulting defendant by the distraint and award of the defendant's property.[108] But because this solution

possession of land securing debt); 1 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3. at 469 (Jewish credit arrangement novel and alien institution to English because Jewish creditor did not take possession of land securing debt).

100. GLANVILL *supra* note 68, Book X, ch. 8. at 122-24; 2 F. POLLOCK 4 F.W. MAITLAND. *supra* note 3, at 120.

101. *See* GLANVILL *supra* note 68. Book X, ch. 7, at 122 (writ for summoning debtor to redeem gage).

102. *Id* Book X. ch. 11, at 126; *see* 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 121 ("the creditor is really entitled to . . . the debt, not the land. If he comes into court he must come to ask judgment for that to which he is entitled").

The assize of novel disseisin was a possessory action for land. Through summary process in the King's court, a freeholder recently ousted from land could recover possession by showing prior occupation without the formality of testing legal title. *See* 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 47-52 (describing assize).

103. GLANVILL *supra* note 68, Book X, ch. 9, 10, at 125 (writ for summoning creditor to restore gage, and different replies of creditor in court).

104. 2 F. POLLOCK & F.W. MAITLAND, *supra* note 3, at 594; Williams, *supra* note 98, at 401.

105. GLANVILL *supra* note 68, Book I, ch. 7, at 5-6; 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 592-93; Williams, *supra* note 98, at 400-01.

106. GLANVILL *supra* note 68, Book I, ch. 7, at 5-6. This was the procedure under a writ of right for land. *See id* Book I. ch. 6, at 5 (exemplar of writ initiating action). The procedure for novel disseisin was similar. Williams, *supra* note 98, at 401.

107. Williams, *supra* note 98, at 401.

108. 2 F. POLLOCK A F.W. MAITLAND, *supra* note 3, at 594-95.

was not generally adopted until 1832,[109] a Jewish creditor's avenues of enforcement remained unique in medieval England, enabling him to pursue his claim to judgment even though the defendant did not appear to answer the writ.

The Jews asked for a remedy that the English system was unaccustomed to offering. This challenge was met by the King, who himself commanded enforcement of the terms of the shetar. The King first manifested his interest in a command to pay in the form of a writ *praecipe*,[110] which if disregarded, conferred jurisdiction on the King's court.[111] By the shetar's terms, the debtor had the choice of paying the debt or relinquishing the property which secured the obligation. To enforce this choice, the King's command would have had to reflect the divergent remedies: money or property.[112] Eventually, this form of writ *praecipe* evolved into the writ of debt."[3]

The King's intervention on behalf of his Jewish moneylenders may explain and in turn have produced some anomalous terminology in the early development of the writ of debt. The wording of the writ evidences the intrusion of land interests into personal litigation. In the writ, as exemplified in Glanvill, the King ordered the Sheriff to "[o]rder N. to give back justly and without delay to R. a hundred marks which he owes . . . and of which . . . he *deforces him* unjustly.""[4] Professor van Caenegem observes that this wording closely

109. *Id.* at 595.

110. *See* R.C. VAN CAENEGEM. *supra* note 86, at 254 (writ *praecipe* for money originated in Henry I's with commands to Jews' debtors to pay). The writ *praecipe* was a summary order from the King to his sheriff to command someone to do something (here, to pay money owed) prior to judicial determination of the rights of the parties. *Id* at 234-35. From a purely executive order, the writ developed into a form which initiated judicial process in the King's court. *Id See generally id.* at 234-35 (discussing development of writs *praecipe).*

Evidence of the issuance of these writs is in the Pipe Roll for the 31st year of the reign of Henry I (1130-31). The Pipe Rolls were the annual balance sheets of the Exchequer, recording the accounts rendered by those responsible for royal revenues, principally the sheriffs. J. JACOBS, *supra* note 70. at 303-04. Because a Jew had to pay the King for the privilege of a writ *praecipe,* a record of the transaction was entered on the Pipe Rolls. Among the entries involving Jews for 1130-31 are the following:

> Rubi Gotsce and other Jews to whom earl Ranulf was indebted, owe 10 Marks of gold for that the king might help them to recover their debts against the earl.
> Abraham and Deuslesalt, Jews, render account of one mark of gold that they might recover their debts against Osbert de Leicester.

Id at 14-15 (translated from the abbreviated Latin in which the Pipe Rolls were written). Twelfth-century Pipe Rolls also survive for the years 1155 to 1200. *Id* at 305. Joseph Jacobs has collected and translated many of the entries involving Jews in these Pipe Rolls. *See generally id.* at 44-221 (interspersing select entries from Pipe Rolls from 1155 to 1206).

111. *Id* at 234.

112. *Cf.* H.G. RICHARDSON, *supra* note 11, at 112-13 (Pipe Rolls indicate most actions in which Jews were plaintiffs were for recovery of money lent or mortgaged land).

113. R.C. VAN CAENEGEM, *supra* note 86, at 254.

114. GLANVILL *supra* note 68, Book X ch. 2, at 116-17 (emphasis added). The writ of debt in Glanvill's original Latin read:

> Rex uicecomiti salutem. Precipe N. quod iuste et sine dilatione reddat R. centum marcas quas ei debet ut dicit, et unde quentur quod ipse ei iniuste deforciat. Et nis1 Fecerit, sumone eum per bonos sumonitores quod sit coram me uel iusticiis meis apud Westmonasterium a clauso Pascha in quindecim dies, ostensurus quare non fecerit. Et habeas ibi summonitores et hoc breue. Teste etc.

Id This translated in English:

> The king to the sheriff, greeting. Order N. to give back justly and without delay to R. a hundred marks which he owes him, so he says, and of which he complains that he deforces

resembles that of the classic *praecipe* for land.[115] Specifically, the writ of debt adopted the words "unjustly deforces" *(unde . . . ei iniuste deforciat)*[116] from the *praecipe.*[117] To "deforce" is to wrongfully withhold possession of land from one who is lawfully entitled to it.[118] The impropriety of the transplanted terminology, therefore, lies in the sense of the wrong conveyed by the words, "unjustly deforces," which calls for an immediate remedy for an egregious interference with land tenure. But the underlying complaint was default on a debt. Thus the terms of the writ appear to ask for inappropriate relief. Noting the apparent confusion,"[9] van Caenegem indicates that Jews were the principal beneficiaries of the early writ.[120]

The "misuse" of the words "unjustly deforces" in the early writs conveys more than just the verbal conservatism of the early common law. Use of the term implies an underlying land obligation securing a certain sum, which strongly suggests the existence of an arrangement like the Jewish shetar. Here, however, the King himself compelled payment in money or in land to be made by the debtor found in breach of a private agreement. The term "deforce," then, communicates the Jew's ability to circumvent the procedural limitations of personal actions.

R.L. Henry has suggested, alternatively, that the writ used "deforce" to connote a breach of the King's peace: as an empty incantation with the single purpose of lending substance to a claim of the King's jurisdiction.[121] The King did not customarily intervene in private disputes.[122] The purported fiction was

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him unjustly. And if he does not do it, summon him by good summoners that he be before me or my justices at Westminster a fortnight after the octave of Easter to show why he has not done it. And have there with you the summoners and this writ. Witness: N. At M.

R.C. VAN CAENEGEM. *supra* note 86, at 437.

115. R.C. VAN CAENEGEM, *supra* note 86, at 254; *see also* 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 173 (writ of debt as given by Glanvill closely similar to writ of right for land known as the *Praecipe in capite).*

116. Approximately: "of which (he| unjustly deforces him." *See supra* note 114 for complete text of writ.

117. R.C. VAN CAENEGEM, *supra* note 86, at 254; 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 204.

118. *See* D. WALKER, *supra* note 17, at 347 (defining deforcement).

119. *See* R.C. VAN CAENEGEM, *supra* note 86, at 254 ("unjustly deforces" was "inappropriate in a personal action for debt, although appropriate enough in a real action for tenure"). Others have also noted the peculiar wording of the writ. *See* R.L. HENRY, CONTRACTS IN THE LOCAL COURTS OF MEDIEVAL ENGLAND 15 (1926) ("[a] person who does not pay his debt may be said to detain something which does not belong to him, but he can hardly be said to 'deforce'"); *1* F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 204-05 (noting peculiarity and explaining it: 'The bold crudity of archaic thought equates the repayment of an equivalent sum of money to the restitution of specific land or goods"); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT, THE RISE OF THE ACTION OF ASSUMPSIT 55-56 (1975) (noting peculiarity and concluding: "The use of the word *deforciat* may" look slightly curious in a debt writ, but again its use in all probability is not significant").

120. R.C. VAN CAENEGEM, *supra* note 86, at 437.

121. R.L. HENRY, *supra* note 119, at 16. Henry first notes the anomaly posed by the formal declaration in debt litigation in the seignorial courts. There, the plaintiff's claim that the defendant "detains and deforces" the amount of the debt sometimes was supplemented by "against the peace of the lord." *Id* at 15. Henry theorizes that the local formula mimicked those used in the King's court, because the local lords, like the King, wanted to usurp the traditional jurisdiction of the hundred and county courts. *Id* at 16.

122. *See* GLANVILL. *supra* note 68, Book X. ch. 8. at 124 ("[i]t is not the custom for the court of the lord king to protect or warrant private agreements of this kind concerning the giving or receiving of things as a gage, or other such agreements, whether made out of court or in courts other than that of the lord king; it follows that, if such agreements are not kept, the court of the lord king will not concern

that withholding payment on a debt breached the King's peace. Henry argues that the formalism was dropped once the action was well-established and the fiction no longer necessary.[123]

But the invocation of the King's peace has another explanation, derived from the unique relationship between the King and his Jews. Because the early actions at debt were principally on behalf of Jews, and because Jews claimed their rights in the King's name, all obligations owed to them were ultimately owed to him.[124] Withholding a debt owed, even indirectly, to the King is a breach of the King's peace that requires no legal fiction. If the price of the writ was paid, the King's courts were ready to stand behind a Jewish creditor's complaint in debt. To enforce the debt was to restore peace to a small part of the realm.

Use of the term "deforce" symbolizes the courts' interference with rights in land. Used to imply "breach of the peace," it invokes the image of the King's wrath. The otherwise puzzling formalism signaled an institutional conflict: in the courts of feudal England, land tenure had been distinct from personal rights in law. Jews were asking the courts to award land—to compel transfer of property to satisfy a personal obligation—before final judgment.[125] Because the King was, in effect, the real party in interest, the interference with land tenure was done with his consent and support. Lacking the King's hand, the action would have been impossible. Only the King's interest in enforcing Jewish creditors' remedies could make possible this invasion of land beyond the limits of relief in personal actions.

The traditional Jewish procedure governing lien-accompanied debt was an innovation in feudal society. The embryonic legal system lacked the terminology to describe a private judicial proceeding for money that jeopardized possession of land. From this came the hybrid use of the term "deforce." "Deforce" disappeared from the King's court shortly after the time of Glanvill,[126] approximately the time when Jewish litigation had been removed to the newly established Exchequer of the Jews.[127] In the seignorial courts, the term fell into disuse by 1291,[128] one year after the expulsion of the Jews from England. Though this may be adventitious, the decline of the phrase and its underlying Royal obligation coincides with the decline of the Jews in England. When the King's Jew was no longer the creditor, default on a debt no longer implicated the interest of the Royal treasury.

B. THE EXCHEQUER OF THE JEWS

At no time during their two-century presence in England were the Jews perceived as more than a necessary evil: a source of capital. The Jews, welcomed

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itself with them, and is therefore not bound to pronounce upon the rights or privileges of the several prior or subsequent creditors").

123. R.L. HENRY, *supra* note 119, at 16.

124. *See supra* text accompanying notes 64-65 (Jews held property ultimately for King).

125. *See* H.G. RICHARDSON, *supra* note 11, at 84-98 (explaining method by which Jews who had been awarded land liquidated their interest in it).

126. 2 F. POLLOCK 4 F.W. MAITLAND, *supra* note 3, at 173.

127. *See infra* notes 129-48 and accompanying text (discussing Exchequer of the Jews).

128. R.L. HENRY, *supra* note 119, at 15.

as moneylenders, were despised as creditors. So long as the King enforced the Jews' debt instruments, the best way to avoid obligation was to attack the Jewish community, destroying people and records. Sporadic incidents culminated in riots against the Jews during the Coronation of Richard I in 1189 and in the Massacre at York in 1190.[129] Beseiged by the mob, hundreds of the York Jews chose death over baptism. The warriors, joining religious hatred to their economic motivation, were quick to destroy the deposits of shetars held within the Jewish community. At York, the riot was instigated by Richard Malebysse, a nobleman deeply indebted to the Jews. After 500 Jews died in the Citadel, Malebysse led the mob to the Cathedral, where they destroyed the debt records, which had been held for safety in the Chapter House. When the smoke cleared, both creditor and debt had been eradicated.[130]

Following his return from the Crusades and release from captivity,[131] Richard I was displeased by the attacks on his Jewish moneylenders. Because duplicates did not exist for many of the documents destroyed, the King was unable to collect debts that would otherwise have escheated to him. He was concerned with preserving a record of debts owed to ensure their payment. By 1200, this concern prompted the establishment of Archae (Registry of Bonds) and of the Exchequer of the Jews.[132]

Archae were established in all towns with sizeable Jewish populations. The registries consisted of Chirograph Chests and four Chirographers—two Christians and two Jews—and their clerks.[133] The Chirograph procedures were strongly reminiscent of traditional Jewish practice.[134] All bonds were to be formalized in the presence of the official witnesses, and immediately duplicated.[135] The original and duplicate were usually written on the same skin and were divided by an irregular cut, producing corresponding tallies.[136] The Archa retained the duplicate, which was called the *pes* or "foot" of the bond, while the creditor retained the original, with the debtor's seal affixed.[137] When the debtor satisfied the debt, the creditor gave the debtor a deed of acquittance.[138] The debtor could then prove satisfaction of the debt only by delivering the acquittance to the Archa, for which he obtained the *pes,* which cancelled the debt.[139] No debt, acquittance, or assignment of debt was valid unless filed in the Chirograph Chest, which could be opened only by order of the Exchequer or in the presence of a majority of the Chirographers.[140]

The King's Exchequer oversaw the King's accounts. A contemporary treatise described its organization and duties: the "Dialogue of the Exchequer."[141] Litigation of Jewish debt instruments comprised a substantial portion of the Exchequer's business, so much so that a separate branch was created to try Jewish causes.[142] Beginning in 1198, "Custodes Judaeorum," or "Wardens of the Jews," were appointed,[143] subordinate to the Exchequer.[144] The Custodes Judaeorum were the first Justices of the Jews. They exercised exclusive jurisdiction over all matters involving Jews and Christians, except those in which the Jew was criminally accused.[145] During the thirteenth century they were charged with enforcing the shetars of the Jews.[146] This special branch of the Exchequer could effectively ascertain the amounts due the King's treasury via the King's Jews.[147]

The Chirograph Chests preserved the bonds of debt and the deeds of acquittance, and the Archae preserved the Chirograph Chests.[148] Many of the pleas brought before the Exchequer of the Jews still survive, and a substantial body of legal paper memorializes the interaction of the thirteenth-century British legal system with the Jewish law of the shetar. Surviving records indicate that the Exchequer of the Jews presided over matters arising from the full range of interactions between Christians and Jews. The primary document offered to prove the transfer of interest in land and the establishment, transfer, or satisfaction of a debt was the shetar.

C IN THE MATTERS OF COK HAGIN

The records of the Exchequer reveal the tensions between several elements: the King's thinly disguised economic interest, the court's struggle between formalism and alien law, inter-religious suspicions, and everyday venality. Within the pleas of the Exchequer of the Jews, the appearances of one recur-

129. J.M. Rigg, *supra* note 13, at xvii-xviii.

130. *Id;* H. MARGOLIS & G. MARX, A HISTORY OF THE JEWISH PEOPLE 384-88 (1965 reprint). M.D. Davis' collection of shetars includes one recording substantial debts owed by Richard Malebysse. ("out of the great debt which he owes to my master Aaron, and for which I gave him this writing.") In the Hebrew versions of the documents, his name is translated into the Hebrew for "evil beast" (khayah raah), the literal translation of the Norman surname. M.D. DAVIS, *supra* note 42, at 288. This translation was a playful though prophetic pun by the creditor. The Hebrew phrase is used in the Book of Genesis by Jacob's sons to describe the animal they falsely claim has devoured their brother Joseph. *Genesis* 37:33. This biblical passage would have been read in synagogues the same week this shetar was written. M.D. DAVIS, *supra* note 42, at 288.

131. The government assessed the Jews 5,000 marks of the 100,000 mark ransom for the release of Richard I. 4 S. BARON, *supra* note 3, at 81-82.

132. J.M. Rigg, *supra* note 13, at xviii-xix; 1 W. HOLDSWORTH, *supra* note 80, at 45-46.

133. J.M. Rigg, *supra* note 13, at xviii-xix. Chirograph, literally "handwriting," was the term used for the written documents.

134. *See supra* notes 34-40 and accompanying text (describing documentary procedure of shetar).

135. J.M. Rigg, *supra* note 13, at xix.

136. *See generally* STARRS AND CHARTERS, *supra* note 42 (photographic plates of bonds, showing irregular cut).

137. J.M. RIGG, *supra* note 13, at xix.

138. *Id* The acquittance frequently was written on the back of the original bond of debt. 1 STARRS AND CHARTERS, *supra* note 42, at xiv-xv.

139. J.M. Rigg, *supra* note 13, at xix.

140. 1 W. Holdsworth, *supra* note 80, at 45. By 1240, the system had changed: the sealed bond was kept in the Archa. and copies were given to both the creditor and the debtor. 1 Starrs AND CHARTERS, *supra* note 42. at xv.

141. DIALOGUS DE SCACCARIO, *supra* note 68. The unknown author of the 12th century (ca. 1176) "dialogue" describes the exchequer board, a table covered with a checkered cloth, from which the court derived its name. The members of the court sat around an oblong table, ruled off into squares to facilitate a system of accounting (described in detail in the "Dialogus") used to determine debts owed to the King. *Id* at xxxv-xxxix. 6-7; *see also* 1 F. Pollock & F.W. MAITLAND. *supra* note 3, at 191-92 (describing Exchequer as compound institution: judicial tribunal and financial bureau).

142. J.M. Rigg, *supra* note 13, at xx.

143. *Id* Of the original four "wardens," Simon de Patesbull, Henry de Wichenton, Benedict de Talemunt, and Joseph Aaron, the latter two were Jews. *Id*

144. 1 W. HOLDSWORTH. *supra* note 80, at 45-46. The Barons of the Exchequer could annul the judgments of the Custodes Judaeorum. *Id*

145. *See Id* at 46 (cases in which Jews accused of crimes found among Crown Pleas).

146. *See generally* J.M. Rigg, *supra* note 13, at 3-134 (a collection of pleas before the Exchequer of the Jews from 1220 to 1285).

147. *See id* at xx (King could order scrutiny of Archae to determine financial position of Jews; when done, Archae closed under triple lock and seal and all business suspended).

148. *Id* at xix.

rent litigant, Cok Hagin,[149] sometime Chief Rabbi,[150] serve as an exemplar of the cultural contact between Jew and Christian. Cok's changing fortunes illustrate not only the limits of the Jews' personal freedom in English society, but also the extensive reliance on Jewish legal practice in the King's court.

Cok's first appearance was in 1272, when the Queen, through her clerk, claimed from him 100 pounds "in ready money." Instead of paying immediately, Cok acknowledged debts to the Crown amounting to 100 pounds, but not in ready money, and asked that the King's Council render judgment. To support the Queen's claim, the Queen's agent appealed to the King's Council, the Queen's Council, and the eyewitnesses to the making of the agreement. Cok agreed to pay the debt in two installments and named four Jews as sureties. If he defaulted, they, equally with him, would be subject to distraint of their lands, debts owing, chattels, and their bodies.[151]

In 1273, Cok appeared with several others to pay a partial sum to delay the tallage assessed in the Easter Term of the first year of Edward I's reign. They asked respite for the greater part owed, and agreed on a penalty that each would owe in default.[152] Later that year, the court noted that the appointed date had passed without payment of tallage or penalty. The penalty was assessed and paid.[153]

One year later, Cok Hagin appeared as co-surety to receive custody of Joce Bundy, a Jew who was charged with lending "money to Christians by blank tallies,[154]—leaving blank the amount due until after the debtor had signed.[155] Additionally, Bundy was charged with having lived, for some time, in Rayleigh without the King's license. For this offense all Bundy's goods and chattels were forfeit to the Crown. When Bundy failed to appear for his appointed court date, the court found Cok Hagin and his co-surety "in mercy."[156]

In 1275, the King notified his Justices that he had granted all of Cok Hagin's possessions as gifts to his "dearest Consort, Eleanor, Queen of England." She was to receive all of the Jew's debts owing and all his goods and chattels. These were forfeit because Cok Hagin was excommunicate for refusing to submit to trial "according to the Law and Custom of the Jewry."[157] Edward conditioned this gift to Eleanor upon her making good to the King, before Christmas, "the arrears of the last tallage assessed upon him, the Jew."[158]

By 1282, in the tenth year of Edward's reign, Cok was again doing business.[159] In that term, Cok summoned Roger de Ling to answer for the principal and interest owed on a debt represented by one Chirograph, sworn to be duplicated in the London Chirograph Chest.[160] In the same year, Cok's real estate deals apparently proliferated. In return for a fee interest in a plot of land and a house in London, he exchanged a nine-year term on a farm in Essex in which he had a liveried interest.[161] The farm had been obtained "on account of divers debts" of the former owner, a knight.[162] The prior agreement, transferring the farm, was duly enrolled at the Exchequer. For his new property, Cok Hagin agreed to pay yearly, at Easter, "one gillyflower" to the former tenant and also to render "to the capital lords of the fee the services due and wonted therefor, in discharge of all secular services, customs, and all things exacted and demanded."[163] The two charters, granting respectively the properties to their new owners, contain the warranties, witness attestations, seals, and signatures required by the law of the shetar. The court received these elements as proof of the agreement's validity. The court also recorded that the Queen's attorney was present to give her consent and acknowledgement to Cok Hagin's document.[164]

Cok Hagin's last appearance is as one of a group of the descendants of Master Elias joining together to acknowledge, by their shetar, the acquittance of an ancient debt to their father. As his heir they released the debtor "from the creation to the end of the world." "By spontaneous and unanimous consent," they discharged the debt as fully paid.[165]

The surviving records of the Exchequer of the Jews cover a limited period (1220-1284). Cok Hagin's experience is representative insofar as it illustrates personal and religious disputes, shetars of property transfer, debt registration

149. "Cok Hagin" is an English corruption of the Hebrew name Yitzhak Hayim. C. ROTH, ESSAYS AND PORTRAITS IN ANGLO-JEWISH HISTORY 24 (1962); C. ROTH, HISTORY OF THE JEWS IN ENGLAND 93-94(1941).

150. J.M. RIGG, *supra* note 13, at 119 n.1.

151. *Id* at 67-68. Here, not only the principal, but also his sureties are subject to real actions arising out of a personal obligation.

152. *Id* at 77.

153. *Id* at 77.

154. *Id* at 82.

155. *Id* at 82 n.1.

156. *Id at* 82-83. "In mercy" means subject to fine or punishment at the discretion of the court. BLACK'S LAW DICTIONARY 708 (rev. 5th ed. 1979).

157. *Id* at 87-88. The offense, apparently, is one "against his Law," indicating that the Jew had transgressed against Jewish doctrine rather than against a secular command. *Id* Other sources report that Cok Hagin was, at the time, on the losing side of a power struggle within the Jewish Community. C. ROTH, ESSAYS AND PORTRAITS IN ANGLO-JEWISH HISTORY, *supra* note 149, at 25.

In their own religious courts, Jews were subject to penalties of excommunication for violation of Jewish law. Religious courts operated independently of the Crown, whose control began only when the defendant was ejected from the protection of his community and formal social position. The excommunicate Jew or the Jew who converted forfeited his goods to the King. *See* J.M. Rigg, *supra* note 13, at 87-88, 96 (excommunicated Jew); *Id* at 99-100 (converted Jew). On leaving his community, a Jew abandoned the role of holding goods for the ultimate use of the King. *See id* at 61 (goods forfeited by Jew living without King's license, outside Jewish community). The King would have been eager to encourage enforcement of Jewish law, at least to the extent of seizing the goods of those excommunicated.

158. J.M. RIGG, *supra* note 13, at 87.

159. The Queen had encouraged the King to confirm Cok Hagin's election as Chief Rabbi in 1281. *Id* at 119 n.l. His excommunication apparently had been temporary.

160. *Id* at 117.

161. *Id* at 118-20. By a royal edict of 1271, Jews were forbidden to own land. *See* Mandatum Regis Super Terris et Feodis Judaeorum in Anglia. Anno Regni Regis Henrici Quinquagesimo Quinto)Mandate of the King Touching Land and Fees of Jews in England. The Fifty-fifth Year of the Reign of King Henry) [A.D. 1271]*printed in* J.M. RIGG, *supra* note 13, at l-lv (mandate of Henry III prohibiting Jews to have "freehold in manors, lands, tenements, fees, rents or tenures of any kind whatsoever by charter, grant, feoffment, confirmation, or any kind of obligation, or in any other manner," but permitting Jews to dwell in houses in the city). Despite this prohibition, the exchequer record clearly states that Cok Hagin had taken the land "by livery—i.e., by livery of seisin, a form of land tenure denied the Jews by the preceding edict. Perhaps this was possible through some direct intervention of the Queen or because he held in her name only.

162. J.M. Rigg. *supra* note 13, at 118.

163. *Id* at 120. It IS doubtful that Cok here submitted to knight service, per se, but he likely assumed all taxes (including scutage fees) assessed on the property. *Cf. id* at xiii (Jew could not swear homage or fealty, which were necessary duties of freeholder in feudal system).

164. J.M. RIGG. *supra* note 13, at 118-20. Cok Hagin was apparently the Queen's chattel. She, not the King, would have power to affirm or deny his actions.

165. *Id* at 133-34.

and acquittance, and a royal conveyance whereby his goods and, arguably, he himself were granted to the Queen. The Exchequer enforced the law "according to the customs of the Jewry" for nearly a century until the expulsion in 1290. Over time, the alien ways of the Jews had become the subject of everyday litigation in the King's courts.

IV. CONCLUSION: THE EXODUS AND WHAT THE JEWS LEFT BEHIND

Interdicta est iudeis licentia usurandi - Illustration of Jew wearing badge required by 1275 Statute forbidding Jews the practice of usury. (MS British Museum)

Ruling during an era of socio-economic change (1272-1307), Edward was wont to legislate accordingly. And Edward was weary of the Jews.[166] Thus he issued laws forbidding the Jews from holding real property, denying them usurious practice, and ordering them to wear distinctive dress and identifying badges.[167]

Even as he restricted Jewish moneylenders, Edward expanded the universe of non-Jewish moneylending. He had before him a model of secured debt contracts, enforced for centuries by the royal courts for the royal usurers. In the Statute of Merchants of 1285,[168] Edward extended to creditors the forms of registry, remedy, and enforcement that had previously been the substance of the Exchequer of the Jews.[169] Under the Statute, a debtor acknowledged the existence of his debt before the Mayor and one of the recording clerks. The clerks recorded the debt in two rolls, one to remain with the Mayor, one with the clerks. In his own recognizable handwriting, the clerk prepared a debt instrument, to which the debtor affixed his seal and the officials affixed the King's seal. This instrument was given to the creditor, who would present it to the Mayor and the clerks to prove his rights if the debtor defaulted.[170]

More than the enrollment procedures paralleled the structures of the Exchequer of the Jews. The remedies also extended to Christian creditors the relief formerly available only to Jews.[171] No longer was a Christian creditor's

166. *See* T. TOUT. EDWARD THE FIRST 161 (1909) ("Edward disliked the Jews both on religious and economical grounds").

167. *Id.* at 160-62. Edward was following Henry Ill's precedent, issuing special restrictions for Jews. *See* J.M. Rigg. *supra* note 13 at xlvtii-lxi (provisions of Henry III and Edward I). Additionally, Edward's Statutes of Jewry of 1275, *see supra* note 28 (dating statute), denied legal process for the recovery of interest and limited execution on the principal due to one-half of the debtor's land and chattels. J.M. RIGG. *supra,* at xxxviii. English practice no longer required Jewish jurors in cases involving Christians and Jews. Articles Touching the Jewry (undated statute of Edward I, which internal evidence indicates was issued after 1284) *printed in* J.M. RIGG, *supra,* at liv, xli.

168. Statute of Merchants, 1285, 13 Edw., Stat. 3. The Statute of Acton Burnel, 1283, 11 Edw., which was enacted two yean before the Statute of Merchants, had been intended to establish a speedy remedy for merchant creditors. Because the sheriffs had failed to apply the statute correctly, the Statute of Merchants of 1285 re-enacted and expanded its provisions. 1 A.W. RENTON, ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 116 (1897).

169. Statute of Merchants. 1285, 13 Edw., Stat. 3.

170. *Id.*

171. *See supra* text accompanying notes 97-109 (comparing remedy available to Jewish creditor under shetar with remedy available to Christian creditor under early common law). In the same year that the Statute of Merchants was enacted, a Christian creditor, for the first tune in English law, was

relief before judgment limited by the debtor's absence. If the Christian creditor presented to the Mayor a matured, acknowledged debt instrument corresponding to an enrolled debt, he had established full right to relief.[172] If the debtor did not pay, the creditor eventually obtained access to the debtor's lands,[173] even as the Jews had done for years. And if the creditor were ejected from the debtor's lands, he could bring an assize of novel disseisin to be put back in possession.[174] The Statute of Merchants expressly allowed merchants "damages, and all necessary and reasonable costs in their labors, suits, delays, and expenses,"[175] the same label that disguised otherwise usurious interest in Jewish contracts.[176] Finally, the King assumed the duty of maintaining the Roll of Debts, affixing his seal next to the debtor's and charging one penny for each pound of obligation.[177] The new law expressly excluded Jews.[178]

Five years after the Statute of Merchants, Edward I expelled the Jews from England. Religious hostility was rife. Repeated tallages had depleted the Jews' resources and lessened their value to the King's purse.[179] No longer were the Jews the unique source of credit in England.[180] By the Statute of Merchants, Edward had granted to all non-Jewish creditors the same remedies and procedural rights previously available to Jews. Debts were secured by land, and the security interest survived the death of the creditor and the alienation of the property.

In addition to the property that escheated to the King on their departure,[181] the Jews left behind a law of debtors and creditors developed in the Talmud,

permitted to elect his remedy. Pollock and Maitland trace the writ of *elegit* (election of remedies) to the adoption by the Second Statutes of Westminster, 1285, 13 Edw., Stat. 1, ch. 18, of the remedy formerly available only to Jewish creditors. 1 F. POLLOCK A F.W. MAITLAND, *supra* note 3. at 475. The election was between a writ *of fieri facias* and transfer of the debtor's property to the creditor. Second Statutes of Westminster, 1285, 13 Edw., Stat. 1, ch. 18.

The Statutes of Westminster introduced another innovation: where before, judgment in debt could be executed only from the debtor's chattels and the fruits of his lands. A.W.B. SIMPSON, *supra* note 119, at 87, now only one half of the debtor's land and his "Oxen and Beasts of the Plough" were immune from execution. Second Statutes of Westminster, 1285, 13 Edw., Stat. 1, ch. 18.

172. Statute of Merchants, 1285, 13 Edw., Stat 3. *See also* A.W.B. SIMPSON, *supra* note 119, at 127-28 (describing creditor's procedure for relief under Statute of Merchants).

173. *See* Statute of Merchants, 1285, 13 Edw., Stat. 3 (upon creditor's presentation of debt instrument to Mayor, debtor arrested and imprisoned; if he has not paid within three months, he is enabled to sell his lands or chattels to satisfy the debt; if he still has not paid in another three months, a reasonable portion of his lands and chattels are delivered to the creditor to hold as security against ultimate repayment or until the debt is satisfied out of their proceeds). *See also* A.W.B. SIMPSON, *supra* note 119, at 127-28 (same).

174. Statute of Merchants, 1285, 13 Edw., Stat 3; *cf.* text accompanying note 102 (same remedy had been denied ejected creditor who had held by gage).

175. Statute of Merchants, 1285,13 Edw., Stat. 3 (translation from 1 STATUTES OF THE REALM, *supra* note 28, at 100 n.4)

176. *See* J.M. Rigg, *supra* note 13, at xxxviii-xxxix (although Statutes of Jewry prohibited their usurious practices, Jewish creditors concealed interest charges as expenses of recovery or penalties for defaults on installments).

177. Statute of Merchants, 1285, 13 Edw., Stat 3. At fairs, the cost was one and one-half pennies per pound. *Id*

178. *Id*

179. *See* 10 S. BARON, *supra* note 3, at 109 (in 1271, the Jews were unable to raise a 6.000 mark tallage imposed for Prince Edward's Crusade).

180. *Id* at 109-13. As Jewish revenues dropped, Edward borrowed from Italian and Cahorsin merchants. *Id* at 113.

181. *Id* at 114. Edward allowed the Jews to take their movable property. T. TOUT, *supra* note 166, at 162.

introduced in the Exchequer, and preserved in the laws of England. Traces of the shetar procedure survived for centuries in English law. A sealed debt continued to be dischargeable only by a deed of release or by cancellation or destruction of the debt instrument.[182] The practice of debt cancellation by requiring return of the *pes* of the chirograph continued from 1194 until its abolition by statute in 1833.[183]

Most important, the encumbrance of real property permitted by the Jewish Law of the shetar had been adopted by English law. Bonds contained the traditional Hebrew formula pledging "all my goods, movable and immovable."[184] Creditors had the statutory right to execute against the debtor's land. No longer were personal obligations and rights in land rigidly separate. Even while Edward was divesting himself of his Jewish moneylenders, he made their legacy permanent. A small but significant principle of Jewish Law, wherein personal debt superseded rights in real property, had become the law of the land.

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182. A. KIRALFY, THE ENGLISH LEGAL SYSTEM 53 (6th ed. 1978); C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 231-33 (reprint 1970).

183. F. LINCOLN, *supra* note 13, at 136-38. *See supra* text accompanying notes 137-39 (describing documentary procedure of Archa, under which *pes* was returned to debtor by Archa when debt was

184. J. RABINOWTTZ, *supra* note 4, at 254-55. Some bonds further mimicked the shetar, extending the lien to all goods "present and future." *Id*