

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

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The rational study of law is still to a large extent the study of History.

Holmes, *The Path of the Law*.

1. 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. The Jews, whom the Normans brought to England, 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. 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) that has been traced as a source of the modern mortgage. Under Jewish law, the shetar permitted a creditor to proceed against all the goods and land of the defaulting debtor. Both “movable and immovable” property were subject to distraint.**

In contrast, the **obligation of knight service under Anglo-Saxon law barred a land transfer that would have imposed a new tenant** (and therefore a different knight owing service) upon the lord. The **dominance of personal feudal loyalties equally forbade the attachment of land in satisfaction of debt**; only the debtor's chattels could be seized. **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.** Although the Jews, as aliens, could not hold land in fee simple, they could take security interests of substantial money value. **That Jews were permitted to hold security interests in lands they did not occupy expanded interests in land beyond traditional tenancies.** The separation of possessory interest from interest in fee contributed to the decline of the rigid feudal land tenure structure.

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

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introduced in the Exchequer, and preserved as 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. The practice of debt cancellation by requiring return of *pes* of the chirograph continued from 1194 until its abolition in 1833.

Most important, **the encumbrance of real property permitted by the Jewish Law of shetar** had been adopted by English law. Bonds contained the traditional Hebrew formula pledging “all my goods, movable and immovable.” 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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Footnotes:

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#3: 1 F. Pollock & F.W. Maitland, *The History of English Law Before the Time of Edward 1* 468 (reissued 2d ed. 1968): There is some dispute as to whether the Jews arrived by William the Conqueror’s Invitation or merely with his permission. ...

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#6: Rabinowitz. *The Common Law Mortgage and the Conditional Bond*. 92 U. Pa. L. Rev 179-94 (1943) The author traces the two instrument (debt & 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. If a conveyance involved *asmakhta*, it was void. Invalidation as *asmakhta* could be avoided if all obligations were incurred at the time of the original transaction. **Land was seizable as security only in the creditor went into possession at the time of the loan:** 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 The entire **written obligation (shetar) remained in the hands of a third party** for the duration of the debt The document proved that the debt existed and clarified the rights and duties of the parties in case of default.

Rabinowitz finds in these and other early Jewish **devices** for avoiding a both the structural and substantive **roots of the English mortgage**, and later developed equitable right of redemption. Compare ... *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.

9 TF Bergin & 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 ...”

11: H.C. Richardson, *The English Jewry Under Angevin Kings* 94 (1960) (**Jews liquidation of land obligations broke down rigidity of feudal land tenure and facilitated transfer of land to new capitalist class.**)

13 Lincoln ... (**Jews religiously barred from swearing Christian oath of fealty**, and therefore disabled from holding feudal estates.)

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

17 **Scutage**, in medieval feudal law, was **a payment by the tenant in lieu of military service**, Walker *The Oxford Companion to Law*. 1121 (1980).