

The Jewish Roots of English Property Law

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ABSTRACT

In "The Jewish Roots of English Property Law," we examine the common misperception that English property law evolved from Greco-Roman roots. The authorities from Plucknett, Jolowicz, Sir Vinogradoff, Jenks, Pollock, and Maitland to Auerbach, Rabinowitz, and Broyde are reviewed with assertions that Jewish law had no role in the origins of the British legal system to assertions that Jewish law is a root metaphor for much of modern, Western law. After reviewing specific examples in transfer of real property; mortgages, servitudes, and uses; adverse possession; bailment; and lost, mislaid, and abandoned property, we reach conclusions that Jewish law had similar structures but no causal connection to English real property law and a causal connection but dissimilar motives and patterns with mortgage law, but that Jewish law can be connected by motive, opportunity, and pattern with subsequent English personal property law as those areas of law became more central to international commerce during the Crusades.

INTRODUCTION

A common misperception in the instruction of legal history includes the claims that the fundamental principles of law that comprise modern society are of

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Roman origin. One commentator has gone so far as to suggest that Jewish law has had no substantial effect on Western law. He wrote:

While a direct influence of Jewish law on Western law cannot be identified, Jewish thought did contribute to the general intellectual climate of the times. This came about in two ways. First, there was the influence of Jewish thought directly — in particular, the allegorical tradition of reasoning present in the Midrash

The second form of influence was more subtle. As Christian scholars sought contacts with Jewish intellectuals in order to clarify their understanding of the Old Testament, they found that the Jews frequently had translated words and phrases differently and had interpreted passages in a wholly different way. This forced the Christians to reexamine their sources and their arguments, and often to devise new explanations to counter Jewish knowledge and criticism. . . .

Nevertheless, neither Jewish thought nor Jewish law seems to have had any substantial influence on the legal systems of the West, at least so far as the surviving literature shows.²

Berman was not alone in his views, for the introduction to the leading modern summary of English law sees the rise of English law as a natural outgrowth of the decline of Roman law, which itself derived from “others still more ancient — Greek, Semitic, Assyrian, Egyptian — all with long histories of absorbing interest.”³

² Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 588 (1983).

³ Theodore F.T. Plucknett, *CONCISE HISTORY OF THE COMMON LAW* (5th ed., Little, Brown & Co. 1956). Plucknett’s history was first published in 1929 and has since been re-published multiple times as recently as 2001. It has been considered by multiple generations of law students and historians as the seminal textbook and ultimate authority on the historical roots of English law.

Any contribution of Jewish law is scantily found in Plucknett's treatise,⁴ and reasonably limited to the Jewish *gage*.⁵ Quite recently, Professor Broyde critiqued Berman's conclusions, focusing on "one lost example" — the nature of bailment created by finding a lost object.⁶

Berman and his more recent critic see the Jewish influence as insignificant or exceptional, but the seasoned debate is significantly beyond the identification of occasional exceptions. It has already been strongly asserted that notions of contracts and debts enforceable in secured transactions are derived from Jewish sources.⁷ Broad brushes have introduced the Jewish influence on common-law development of contractual issues of consideration, detriment, past consideration, and quasi contracts; statutes of repose and limitations; transfers of land; torts including negligence and contributory negligence; burden of proof and due process; as well as the law of bailment.⁸ The similarities between Biblical self-incrimination

⁴ *Ibid*, at 3. *See also*, note 28, below, and accompanying text. A contemporary with equally sterling credentials, Professor Jolowicz, finds other roots of English law in Germanic, French, and Greek systems.

⁵ *Ibid*, at 605.

⁶ Michael J. Broyde, *The Hidden Influence Of Jewish Law On The Common Law: One Lost Example*, 57 *EMORY LAW JOURNAL* no. 6, at 1403 (2008).

⁷ Judith A. Shapiro, Note, *The Shetar's Effect on English Law-A Law of the Jews Becomes the Law of the Land*, 71 *GEO. LJ.* 1179 (1983). [Much of the subsequent historical analysis leading to the *shetar* is provided thanks to Ms. Shapiro's seminal Note].

⁸ Auerbach, Charles, "The Talmud — A Gateway to the Common Law," *WESTERN RESERVE LAW REVIEW* 5, at 26 (1951).

and Fifth Amendment law have been explored.⁹ Long before the *shetar*¹⁰ was examined in 1983, the historical interrelationship between the Jewish *starr* and the English common law concept of a *gage*, which grew into our modern mortgage, were explored by Rabinowitz along with the relationship of Jewish law to other credit devices, like the confession of judgment, as well as the general warranty deed, the right of dower, penal bonds, and, even, trial by jury.¹¹

While Berman, Plucknett, and Maitland may understate the role of Jewish law in British legal concepts, some of the claims of Jewish roots of English and American law are unduly ambitious. Consistent throughout these assertions of the Jewish parentage of modern law is a methodology that we believe is flawed. In each, the scholar examines the law as it existed in an occasionally relevant time period and compares that law with Jewish law from an occasionally relevant time period. Upon finding similarities or a correlation between Jewish presence when changes in law were developed, the writer concludes that Jewish law had a causal effect on modern law.

⁹ Isaac Braz, The Privilege Against Self-Incrimination in AngloAmerican Law, JEWISH LAW AND CURRENT LEGAL PROBLEMS 161-68 (Nahum Rakover ed., 1984).

¹⁰ Transliterated variously as *shetar*, *shtar*, *starra*, and *starr* in the literature. In Jewish law, “Any document of legal significance, in particular a promissory note.” THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 264 (Random House, NY, 1989).

¹¹ Jacob J. Rabinowitz, The Influence of Jewish Law on the Development of the Common Law, in 1 THE JEWS: THEIR HISTORY, CULTURE, AND RELIGION 497 (Louis Finkelstein ed., 1st ed. 1949).

This can lead to false positive results. For example, not long after the world had concluded an insanity of injustice against Jews, one professor claimed that the American jury system derived from Jewish roots¹² The analysis fails to mention that the antecedent English independent petit jury system in which trial jurors are independent from the grand jurors who charged the defendant wasn't mandated by statute until over half a century after the Edwardian Jewish expulsion.¹³ The pre-existing Jewish trial system had no concept of jurors or lawyers, and justice was rendered by 3, 5, 7, 23, or 71 expert judges.¹⁴

A standard-free, single axis comparison of Jewish law from any time period with English or American law from another period can lead to other types of historical errors. For example, we ought reasonably ask whether Jewish, English, and Roman law might be similar because they all derive from Greek, Persian, Sumerian, or Egyptian law. Legal systems may also reach similar results because groups of educated people seeking to solve the same sociological problems may independently arrive at similar solutions. Examining mere similarities in legal results cannot be a reliable methodology for determining historical causation.

¹² *Ibid*, at 514-19.

¹³ The Jews were expelled from England by Edward I in 1290, *see*, below, at 6-7, but the first recorded claim to have a jury composed of people who were not the indicting parties was around 1305, and the plea for an independent jury acting as judges of fact was not allowed by statute until 1351. Theodore F.T. Plucknett, *CONCISE HISTORY OF THE COMMON LAW*, at 126-27 (5th ed., Little, Brown & Co. 1956).

¹⁴ Sanhedrin, Chapter 1, Mishnoth 1-6; *See*, Pinhas Kehati, *MISHNAH, SEDER NEZIKIN*. Vol. 2, *SANHEDRIN*, at 1-15 (1994).

Objective

Our objective is to find a methodology to test historical notions of influence and inter-cultural borrowing from Jewish sources of law to the modern common law more precisely. Whether or not that notion is one of causation, in a strictly historical sense, the tools used by lawyers in examining the connection between cause and effect may shed light on the task. Even where evidence of a prior criminal activity is inadmissible to show guilt in a present matter, “[i]t may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁵ As we recognize that evidence of commonality in motives, opportunity, and pattern can shed light on criminal guilt, even where we would bar that same testimony to show direct causation, we might find in an historical context that we should draw positive and negative inferences about whether one culture caused changes in another where motive, opportunity, and patterns are common between them.

Once we offer a standard, we will begin by applying it to an exploration of property law. Property law is a particularly relevant field on which to perform our archeological dig. How society holds property tells much about the sociology and legal mores of that society. Which character traits are favored by society, such as loyalty, fealty, intelligence, or fairness may be inferred from the rules society uses to reward individuals and families with property. This is why Property is usually a first year law course, and it is why Talmudic study often starts with tractates

¹⁵ Fed.R.Evid. 404(b) [U.S. federal, as well as widely accepted state law].

discussing the ownership of property. It is convenient that the motives of Roman, English, and Jewish societies in creating property law may be different.

We will challenge the notion that our modern definition of property ownership derives exclusively from Roman classical traditions, but, using our new tools for a critical re-examination of transfer by deed and feudal enfeoffment, we will challenge mere parallelism between Jewish law and British law as a basis for causation. In the process, we will learn that pre-modern English law has fundamental similarities with the Roman model in areas of real property and security interests in land, but fundamental differences regarding personal property and bailments of property. Where English law is most dissimilar with Roman law, we will notice distinct similarities with Jewish law. This will lead to the conclusion that Jewish law might have been merely a concurrent model for estates in land, but it was central to the creation of the legal structure needed for a mercantile society based on the free transferability of personal property.

Standard of Review

In measuring the validity of historical causation, we are inevitably on shaky ground. Obviously, the best evidence would be a contemporaneous writing containing a citation to Jewish authority. As a preliminary matter, we must first define what we will consider to be Jewish authority. There are many direct references to Biblical law in the early American colonies from dissident sects of Roundheads, Puritans, Pilgrims, Calvinists, and other Protestants who came to America seeking religious freedom from the hostility between the Roman Catholic

and Anglican Churches.¹⁶ Multiple sects of Protestant Christians have lived by strict religious codes derived from the Old Testament as a means of rebelling against the Roman Catholic sacraments and the dispensation system controlled by the Papacy. They sought strict construction of the Old Testament as one of the founding principles of the Protestant Reformation, particularly in England. Puritans looked to the ultimate Jewish source, the first five books of the Bible, known to Jews as the Five Books of Moses, the Torah, and other names, for literal rules of behavior as well as definitions of sin.

While some scholars treat such citations to the Bible as direct evidence of Jewish influence on modern law, we limit our evidence to non-Christian Jewish sources and do not define these uses of the Bible as Jewish sources of English law. The literal meanings adopted by the early Colonials and believed by many Evangelical groups today are derived from a literal reading of the first five books of the Bible, but they are not Jewish. From the time of the first redaction of the Oral Law starting around 200 C.E., which, by Jewish tradition, derives from the law handed to Moses at Mt. Sinai, such literalism is not the Law. To be considered Jewish law for the purposes of our analysis, the usage must have derived from Jewish sources as interpreted by the then contemporaneous Jewish legal authorities, which, from Roman times to the present, would be the literal words of the Five Books of Moses as interpreted by Talmud or reinterpreted by later

¹⁶ *See, e.g.*, The Capitall Lawes of New England (1641, 1642) [listing 15 capital offenses, 13 of which are followed by Biblical citations]; Capital Lawes of Massachusetts (1648) [same].

redactors, codifiers, and interpreters. Three of the largest world religions have laid reasonable claims to ownership of the Old Testament, and, indeed, each has renamed it and re-interpreted it. We cite Biblical law as evidence only where it is interpreted as Jewish law would apply it.

With that definition preventing us from relying solely on citations to the Bible, we are left to circumstantial evidence of a causal connection between Jewish and English law. Absent a direct witness highly placed in the Christian infrastructure of the great medieval courts who could explain his work sources, there are no surviving sources of direct evidence admitting the transmission of Jewish values as source material for British law. Certainly, with the perennial waves of persecution, expulsions, and pogroms, it would have been politically inconvenient to credit the damned race with the foundation of the fundamental legal system. Even in our modern, egalitarian times, the subtle bias against recognizing Talmudic roots in modern law can occasionally be seen. The author, an American litigator, recalls hearing a judge reject an advocate's argument as "Talmudic." Presumably, the reference was to an argument that was too technical or detailed, too well-reasoned, or merely, as writer, actor, producer, director Mel Brooks once wrote, "Too Jewish."¹⁷

Absent direct citation, we might apply the legal standards of circumstantial evidence by looking for opportunity, motive, and pattern. While most of the evidence has surely been destroyed by the millennia, including 2,000 years of conscious

¹⁷ *Blazing Saddles*, (1974).

persecution, we can seek causal evidence in the patterns of parallel phraseology and the similarity of philosophical approach, so long as we, at the same time, identify an opportunity for the cross-pollination of Jewish ideas into early English law. In examining those sources, we will avoid citations to modern law, since our objective is to find patterns of language, philosophy, or policy in early English law that are similar to some antecedent root. For the British-American side of that, we will use a secondary source law encyclopedia published in 1778.¹⁸

THE LEGAL HISTORY OF THE JEWS IN ENGLAND: OPPORTUNITY

We can quickly reach the conclusion that there was ample opportunity for the cross-pollination of Jewish law into British law, even though the Jewish tenure in Great Britain before modernity lasted only from the reign of William the Conqueror through Edward I. The Destruction of the Temple in 70 C.E. began a Diaspora of the Jews that spread the cultural contact of Jewish law northward into Iraq, Syria, and Persia, eastward to the Far East and India, and across the Mediterranean to establish the great Sephardic communities in Tunisia, Iberia, Greece, and Gaul. A

¹⁸ BACON'S ABRIDGMENT (1778). Matthew Bacon of the 18th century edited a five-volume encyclopedia of English law in the middle and late 18th century. This edition, which ought not be confused with the later New Abridgment edited a century later and published in Philadelphia, was reported to be prominent in the libraries of George Wythe, the College of William & Mary's first Professor of Law and Police, http://web.wm.edu/law/lawlibrary/about/about_history.shtml?svr=law, and was recommended to a generation of the first lawyers of the United States, including Wythe's student, Thomas Jefferson, as an essential element of their libraries. http://library.uvic.ca/site/spcoll/digit/slavery_opinion/commentary/bio_bacon.htm. American common law remained tied to English precedent as it existed before the Revolution. Lawrence M. Friedman, A HISTORY OF AMERICAN LAW, 3rd ed. (New York: Touchstone, 2005), 4-5. The historical placement of Bacon's Abridgment makes it a fine indicator of, at least, the American perception of the state of the common law at the foundation of the United States.

major migration moved northwest via the Black Sea to found the great Ashkenazi communities of Eastern Europe focused in Warsaw, Krakow, and across the north of Germany through the Ukraine and as far West as Lithuania.¹⁹ Concurrent with the Norman Conquest in 1066 C.E. in Britain, on December 31st of that year, a Muslim mob attacked the Jewish quarter of Granada in the first of many Muslim persecutions of Spanish Jews, leading to a mass exodus of the established Jewish community, which included poet and philosopher Moses ibn Ezra, Judah Halevi, and Maimonides.²⁰ While these Jewish leaders left for safer locations along the Mediterranean Sea,²¹ the welcome bid by William the Conqueror resulted in a significant Jewish immigration to Britain.²²

By the end of the House of Normandy, there was a small but coherent Jewish community of approximately 4,000 that had developed a close association with the monarchy by supplying funds for the royal establishments of Scotland and

¹⁹ Abba Eban, *Heritage, Civilization, and the Jews* (Summit, 1984).

²⁰ *Ibid*, at 145-46.

²¹ *Ibid*, at 146.

²² 1 F. Pollock 4 F.W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 468 (reissued 2d ed. 1968). Whether the Jews entered by invitation or tolerance is the matter of some argument. 4 S. BARON, *A SOCIAL AND RELIGIOUS HISTORY OF THE JEWS* 77 (1957). Whether the Jews were Sephardim from Spain or Ashkenazim from Rouen is also disputed. *See*, JEWISH ENCYCLOPEDIA, England, <http://www.jewishencyclopedia.com/view_friendly.jsp?artid=375&letter=E> (1905), *citing*, William of Malmesbury, *GESTA REGUM ANGLORUM*, ed. Duffy, p. 500. The distinctions do not matter for our purposes.

England.²³ It was during that period of British legal history from 1066 C.E. to 1290 C.E., predominantly during the reigns of Henry I Beauclerc and his grandson, Henry III, that most of the writs were established and matured,²⁴ including the writ of trover, which will become central to the recovery of the value of lost property at time of conversion and the resolution of bailments.²⁵ The Jews were subsequently expelled by Edward I Longshanks in 1290 C.E., before the invention and use of the writ of Case to collect additional damages from a bailee. We can supportably conclude, as others have before, that there was an opportunity for early English law to be influenced by Jewish law during the period from 1066 to 1290 C.E., and we will look for influences that show that historical imprint.

A PERIOD OF GREAT CHANGES: MOTIVE

The next question to ask is “why?” What motive could exist for Jewish legal principles to leak into early English law? Shapiro suggests a motive as to debt, mortgages, and security devices in that the law had to adjust in order to use Jewish liquidity in support of the Crusades and other contemporaneous military adventures.²⁶ We do know that the period of the Jewish presence in England from 1066 to 1290 C.E. was a period in which international contact from England across Europe to Jerusalem greatly increased as a result of at least nine Crusades from

²³ Abba Eban, *HERITAGE, CIVILIZATION, AND THE JEWS*, at 163 (Summit, 1984).

²⁴ Theodore F.T. Plucknett, *CONCISE HISTORY OF THE COMMON LAW*, at 354-76 (5th ed., Little, Brown & Co. 1956).

²⁵ *Ibid*, at 374-75.

²⁶ *See*, notes 10-13, above, and accompanying text.

1095 to 1272 C.E. During that increase in international contact, we can imagine that international trade and commerce grew in importance. As we will see, there was a useful Roman model for only some of the property problems encountered in the early centuries of the second millennium. Where no Roman model was available, there was an available Jewish model.

COMPARATIVE TREATMENT OF LIVERY OF SEISIN

The predominant form for the transfer of real property in English law from the present back to the Norman Conquest was by deed transferred in a formalistic ceremony which has evolved to our modern closing. It is in this respect that there are the greatest similarities between Roman, Jewish, and English law.

The Roman concept of *dominium* was direct and based solely on absolute right of ownership. “A right in *re* was a real right, valid against all the world; a right *ad rem* was an obligation or personal right against a particular person or persons.”²⁷ Ownership of property was an absolute state called *dominium*, as contrasted with early English law in which the right to use and possession of property is relative to the rights of other, prior possessors.²⁸

The Roman law of classical times is dominated by the *absolute* conception of ownership[,] which it has evolved and by the action through which this right is asserted, the *vindicatio*. Ownership, in the developed law, may be defined as the unrestricted right of control over a physical thing, and whoever has this right can claim the thing he

²⁷ NEW ADVENT CATHOLIC ENCYCLOPEDIA, Roman Law, <http://www.newadvent.org/cathen/09079a.htm>.

²⁸ ENCYCLOPEDIA BRITANNICA, “Categories of Roman law » The law of property and possession,” <http://www.britannica.com/EBchecked/topic/507759/Roman-law/41327/The-law-of-property-and-possession>.

owns wherever it is and no matter who possesses it. If I possess a thing and you own it, then all you have to do is prove your ownership[,] and I must give it up; it is not necessary for you to allege that I have done you any wrong. I, on the other hand, the possessor, have nothing to do but sit tight and wait for you to prove your right; if you do not succeed in proving that you are owner, I remain in possession. Now[,] this very clear-cut conception is not to be found at in all, or even most systems of law. English law, for instance, has never known an action corresponding to the *vindicatio*, at any rate with respect to movables. The actions by which an owner recovers his thing which has got[ten] out of his possession all allege that the defendant has done some wrong to the plaintiff, that, for instance, the defendant “unjustly detains” the thing [referencing detinue] or that the plaintiff lost it, that it came into the hands of the defendant and that the defendant has converted it to his own use [referencing conversion]; to use technical language, the actions for the recovery of movables all “sound in tort”. Further, the wrong alleged is, strictly, not one to ownership, but to possession, for, if the thing be “bailed”, e.g., lent, by the owner to another, it is the bailee who can bring the action against the third party in whose hands the thing is found, the bailor being originally confined to his rights against the bailee.²⁹

Professor Jolowicz, a barrister and professor of law writing in post-War England attributes “relative rights of possession” to the other “Germanic systems,” to the Greeks, and to the French, *citing*, Paul Vinogradoff.³⁰ Sir Vinogradoff wrote nothing at that citation about Germanic or French origins, and the Greek law cited is sufficiently immaterial that we quote it at length:

As to the problem under discussion, Rome developed the conception of absolute property for the citizen ... while Athens worked out a conception of *relative* property rights. It is significant enough that there is no Greek term corresponding to the *dominium* of the Romans. It has been conjectured that this is to be explained by the insufficient development in Greece of the rules as to occupation and usucapion. Under these circumstances, it is said, a Greek attempting

²⁹ H.F. Jolowicz, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 142 (1952) [Emphasis in original].

³⁰ *Ibid*, at note 1, at 143, and accompanying text.

to assert absolute ownership “against the whole world” would have had to run the gauntlet of an endless string of references to one [potential defendant] after another, truly a *probatio diabolica*. I must own that I fail to understand this line of reasoning: the Greek world traced property in a multitude of cases to definite acts of State [. . .] and nothing could have been easier than to assert absolute *dominium* at least in such cases — provided that absolute *dominium* had been recognized.³¹

Transfers of private property, whether real, personal, or chattel real, could be conveyed and enforced permanently, but Roman law provided clear definitions for ownership and formal ceremonies for alienation of property. As mandated by the seminal Roman Twelve Tables of Law, around 450 B.C.E., “When one makes a bond and a conveyance of property, as he has made formal declaration so let it be binding.”³² The ceremony for formal transfer must have been memorable in an era in which the manipulation of metals was the key to empire:

‘*Mancipatio*’, says Gaius [I., at 119], ‘is a sort of symbolical sale’ (*imaginaria venditio*). For its accomplishment are needed the two parties to the transaction (the transferor and the transferee), at least five witnesses, who must be Roman citizens above the age of puberty, a pair of scales and another citizen of full age to hold them (*libripens*), and a piece of copper (*aes*, also called *raudusculum*). The ceremony consists in the transferee’s grasping the thing to be transferred, if it is moveable, and saying, e.g. if it is a slave that is being transferred, ‘I assert that this man is mine according to Quiritarian [Roman] right, and he bought by me with this piece of copper and these copper scales.’ ... Then, he strikes the scales with the piece of copper, and

³¹ Paul Vinogradoff, *OUTLINES OF HISTORICAL JURISPRUDENCE*, <http://books.google.com/books?id=7psDG1D21-AC> , at vol. II, at 198. We will suggest that this influence may have been Jewish. *See*, below, at 21, *et seq.*

³² The Roman Twelve Tables of Law, Table VI, ¶1, circa 450 B.C.E.

gives it to the transferor which he handed to the transferor 'by way of price (*quasi pretii loco*).'³³

Early English law similarly relied on a memorable ceremony on the land in which physical delivery occurred.³⁴

A *feud* or fee was created or transferred by a deed of *feoffment* with 'livery of *seizin*.' The ceremony of 'livery of *seizin*' consisted in the *feoffor* and *feoffee* going on the land to be conveyed and the delivery to the *feoffee* of a glove, knife, rod or other object on the land as a symbolical delivery of the land itself.³⁵

As Plucknett notes, "Although the theory of possession and ownership was no part of the English law of land, yet the canonical idea was easily adapted and a recent disseisin was protected by Henry II's Assize in the same way as a recent dispossession in canon law."³⁶

³³ H.F. Jolowicz, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 145 (1952); *see also*, ENCYCLOPEDIA BRITANNICA, "Categories of Roman law » The law of property and possession," <http://www.britannica.com/EBchecked/topic/507759/Roman-law/41327/The-law-of-property-and-possession>.

³⁴ The ceremony of yore has been replaced in modern times, at least in American residential closings, by an equally memorable event in which hundreds of pages of unread and indecipherable documents arrive not long before a well dressed master of ceremonies leads the laity through a series of signatures, copying, and handshaking universally accomplished in under an hour. The ceremony is conducted in private, unlike livery of seisin, *imaginaria venditio*, or *kinyon*, but it is followed by a public recordation. It is only through our modern prism that we imagine this to be a contract rather than a ceremony.

³⁵ 1 WALSH, PROPERTY 134 (2d ed. 1947).

³⁶ Theodore F.T. Plucknett, CONCISE HISTORY OF THE COMMON LAW, at 304 (5th ed., Little, Brown & Co. 1956).

Professor Auerbach suggested that Jewish law provides a similar ceremony based on witnesses and a deed:³⁷ “Man shall buy fields for money and subscribe the deeds and sell them and procure evidence of witnesses.”³⁸ It is clear that, by Roman times in the time of the compilation of the Mishnah,³⁹ the transfer of real property, referred to in Jewish law as *me’karka*, could be accomplished by paying all or part of the purchase price, called *keseph*, by contract signed and delivered before to witnesses, called *schetar*, or by adverse possession, called *hazakah*, as we will discuss later.⁴⁰ What is less clear is whether a procedure recited in the Books of Prophets would have been treated by the Sages as legally binding or otherwise prescriptive.⁴¹ While books outside the Five Books of Moses, also called the *Chumash* or the Torah, are used to elucidate epistemological issues,⁴² “[m]atters of

³⁷ Auerbach, Charles, “The Talmud — A Gateway to the Common Law,” WESTERN RESERVE LAW REVIEW 5, at 26 (1951).

³⁸ Jeremiah 32:44.

³⁹ The Talmud is a compilation of the Oral Law posited to have derived from Mt. Sinai. The first compilation, the Mishnah, led by Rabbi Judah HaNasi, was completed around 170-200 C.E. in Palestine during Roman rule. The first level of glosses, called the Gemorra, was redacted and finalized from 200-500 C.E. THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 30-34 (Random House, NY, 1989).

⁴⁰ Kiddishin 26a, Bava Bathra 52b.

⁴¹ Bava Kamma 3a.

⁴² At Bava Kamma 2b, the Sages willingly used a citation to Isaiah 32:20 to prove that the word *v’shilach* meant “sends forth” in Biblical times, and they relied upon an earlier teaching to apply that definition to the word in concluding that the same word referred to a foot rather than a tooth. TALMUD BAVLI, Tractate Bava Kamma, Vol. I, n. 39, at 2b4, (Schottenstein ed. 2001). Again, at Bava Kamma 3a, the Sages willingly used a citation to I Kings 14:10 to understand the meaning of an

Torah law [*halakhah*] are not derived from the Books of the Prophets or the Writings, because it is assumed that all Torah laws have sources in the *Chumash* (*i.e.*, the Five Books of Moses) itself (*see Megillah 2b-3a*).⁴³ In the very next sentence after the Talmudic citation to Jeremiah 32:44, the famed Rabbi Abaye⁴⁴ asks: “perhaps he was merely giving a piece of good advice,”⁴⁵ rather than binding law.⁴⁶ The law follows Rabbi Abaye.⁴⁷ Even there, the notion that feudal enfeoffment derived from a system in which, initially, all land returned to its tribal owners on the 50-year jubilee ⁴⁸— may be overly eager.

unfamiliar word. TALMUD BAVLI, Tractate Bava Kamma, Vol. I, n. 1, at 3a1, (Schottenstein ed. 2001).

⁴³ In the same discussion, the Sages balk at the notion that material outside the *Chumash* can be cited for use as precedent or to establish a rule of law. TALMUD BAVLI, Tractate Bava Kamma, Vol. I, note 10, at 2b2, (Schottenstein ed. 2001).

⁴⁴ R. Abaye is noted as one of the greatest Sages of the Talmud, particularly in matters of civil law. He was a member of the fourth generation of Babylonia Amoraim. While raised an orphan in poverty, he rose to become the head of the most eminent yeshiva of its time at Pumbedita. Debates between him and Rabbah, Rav Yosef, and Rava are found throughout the Talmud, and Abaye can usually be counted on to present the formalistic, logical approach. While subsequent Jewish law most often follows Abaye’s successor at Pumbedita, Rava, Abaye’s rationale is inevitably essential to understanding the legal principles involved. *See*, Margin Note, Bava Metzia 21b, Steinsaltz Edition translation, Volume II, Part II, at 9 (Random House, NY, 1990).

⁴⁵ Baba Bathra [also transliterated *Bava Bathra*] 28b, COMPLETE SONCINO ENGLISH TRANSLATION OF THE BABYLONIAN TALMUD (Judaica Press, 2005 [on-line], c.1996).

⁴⁶ *Ibid*, at note 2, at 29a.

⁴⁷ *Ibid*.

⁴⁸ LEVITICUS 25:10. The notions of *shmittah karka’ot*, the 50-year return of all lands, was excluded from the Shulchan Aruch, and was ignored during the Second Temple and after the Diaspora began, but the notions of release and return of property to

There is a similar formalistic transfer component in Jewish law called *kinyon*, a formal procedure to render an agreement legally binding. The time of *kinyon* defines when a transaction is complete, and there are specific formalisms required, such as pulling the property, transferring it, performing an act of taking possession, lifting the article, or conducting an exchange.⁴⁹ One of these ceremonies, *kinyon agav sudar*, is the exchange of a symbolic item, such as a handkerchief, for property of significant value.⁵⁰ The ceremonies contain symbolic elements, but there is no sign of the public display of banging copper into scales or grasping a symbolic object on the land and passing it to the purchaser.

Before concluding that the roots of English law can be traced to a Jewish root, we might note that there are also similar ceremonies in other contemporary legal systems. Pollock & Maitland find a similarity in the transfer of book-land in Anglo-Saxon law:

As regards the Anglo-Saxon law, our evidence is but very slight. We know nothing about the conveyance of any land that was not book-land, and book-land we take to be an alien, ecclesiastical institution, from which few inferences can be drawn. Even as to this book-land some questions might be raised which could not be easily answered. On the whole, though the books may speak of the gift in the perfect or in the future as well as in the present tense, it seems probable that the

its original owner every seven years to ameliorate poverty and return property to its original tribal owners, the *schmittah kesafim*, appears at SHULCHAN ARUCH, HOSHEN MISHPAT, § 67, and is discussed by Maimonides in a Responsa in 1196 C.E. JEWISH ENCYCLOPEDIA, Sabbatical Year & Jubilee. <http://www.jewishencyclopedia.com/view.jsp?artid=18&letter=S&search=jubilee> (1905).

⁴⁹ THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 254 (Random House, NY, 1989).

⁵⁰ Ibid.

signing or the delivery of the original deed was sufficient to transfer proprietary rights from one man to another. [*citing* Brunner, 149-206.] Occasionally, though but rarely, we hear of a turf being placed upon the altar. [Citing Pollock, LAND LAWS, 3d ed., at 199].⁵¹

Indeed, it is suggested in the same source that the Normans came to England with a tradition of land conveyance “without any transfer of possession, by a symbolical investiture, by the delivery of a written charter, by a surrender in court . . .”⁵² Why, then, would we satisfy ourselves that the ceremonial, symbolic transfer of land derived from the also contemporaneous Jewish symbolic transfer ceremony?

The similarity of modern and medieval English real property law to Roman law, and the dissimilarity to equivalent Jewish law for the conveyance of real property continues in quiet title actions. Roman law provided for a cause of action for formal transfer of property in the form of a phony lawsuit, called *in jure cessio*, which is functionally similar to modern quiet title actions.⁵³ Jewish law preferred a default to a false oath in a legal proceeding,⁵⁴ even though Jewish law had no problem accepting other legal fictions, particularly as to ritual observance.⁵⁵

⁵¹ Frederick Pollock & Frederic William Maitland, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 2d Ed. (University Press, 1898) [Original from Harvard University, Digitized Aug 18, 2005] <http://books.google.com/books?id=A7b7eCAzzBEC>, at ch. IV § 3, at 87.

⁵² Ibid.

⁵³ A.M. Prichard, ROMAN PRIVATE LAW 194-95 (3^d Ed. MacMillan, 1961); ENCYCLOPEDIA BRITANNICA, “Categories of Roman law » The law of property and possession,” <http://www.britannica.com/EBchecked/topic/507759/Roman-law/41327/The-law-of-property-and-possession>.

⁵⁴ See, e.g., Bava Metzia 2a [Ben Nannas argues that it is better for the parties to pay damages twice than to allow any party to take a false oath]; see also, Shavuot

When applying our self-imposed standards for historical causation, we can note that there was opportunity for cross-pollination of Jewish law into the development of early English real property law. The outgrowth of Henry II's Assize occurred during the Jewish presence in England, and there was therefore an opportunity for cross-pollination.

It is more problematic to identify similarities in motives for the development of land law. More than any other feature, what a feudal system of fealty and knightly service requires is certainty of title.⁵⁶ Upon completing the Conquest, the unifying administrative act of the Normans was to create a single index of all the land, crops, people, and, even, cattle within the domain as well as the title owner of

45. Oaths are avoided if they might be “the vain oath,” or *shebuah shaveh*, whether it is a false oath because the witness is lying or merely an unnecessary oath imposed as a result of a false claim by the litigants. Both oaths are to be avoided as vain oaths. Bava Metzia 2b, Steinsaltz Edition translation, Volume I, Part I, note, at 15 (Random House, NY, 1989). *citing*, Bezalel Ashkenazi, SHITTAH MEKUBBETZET. Medieval English law gave greater credence to Jewish oaths than Christian oaths, but this may have been motivated by the royal prerogative in collecting Jewish debt. SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS xiii (J.M. Rigg ed. & trans. 1902); *cf.* David J. Ibbetson, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS, at 32 (Oxford, 1999) <<http://books.google.com/books?id=UiKIfoy-xe8C>> [suggesting evidence that oaths taken at wager at law were not taken cavalierly, though acknowledging that the availability of debt relief by swearing that the debt was not owed altered the substantive law of early causes of action].

⁵⁵ As one example, we can look to Bava Bathra 54b-55a; SHULCHAN ARUCH, ORACH CHAVIM 246, in which it is held that a loaned animal must be declared ownerless rather than permit it to work on Sabbath, *but see*, MISHNAH BERURAH, in which it is clarified that the owner may reclaim after Sabbath and no Jew could interfere with the owner re-taking his former property. *See*, note 85, at 29, below.

⁵⁶ T.F. Bergin & P.G. Haskell, Preface To Estates In Land And Future Interests 8 (1966).

them.⁵⁷ Service tied by title to land was central to the social obligations of feudalism:

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....⁵⁸

Jewish law initially had its own system of title certainty. Jewish title to land reverted to its assigned initial, tribal owners once every fifty years at the Jubilee.⁵⁹ The *shmittah karka'ot*, the 50-year return of all lands, while providing certainty of title ownership, is inconsistent with the notions of feudal duty running with land, creating no conditional duty of fealty in return for land. The land returns to its tribal tenants unconditionally and regardless of their servitude to the king.

The notion of the *shmittah karka'ot* was excluded from the Shulchan Aruch, and was ignored both during the Second Temple and after the Diaspora began,⁶⁰ and it was replaced in Mishnaic times no later than during the Roman Empire by a system including ceremonies such as *kinyon* and written *schetar* that created a freedom to make private contracts for land. The *schetar* was non-exclusive to the

⁵⁷ The Domesday Book(s). See, Theodore F.T. Plucknett, CONCISE HISTORY OF THE COMMON LAW, at 13 (5th ed., Little, Brown & Co. 1956).

⁵⁸ BLACK'S LAW DICTIONARY 560 (rev. 5th ed. 1979) (emphasis in original).

⁵⁹ See, note 47, above.

⁶⁰ JEWISH ENCYCLOPEDIA, Sabbatical Year & Jubilee.
<http://www.jewishencyclopedia.com/view.jsp?artid=18&letter=S&search=jubilee>
(1905).

point of egalitarian. Anyone could enter a contract. Even a person deemed sufficiently untrustworthy that he could not take an oath or sign a contract was not excluded, for the *schetar* was not signed by the interested parties, but was usually signed by two disinterested witnesses.⁶¹ The rules governing contracts to land were no different than contracts to goods, and they were infused with a Torah policy of egalitarianism, at least as to control by the king or his vassals. Jewish law insisted upon treating the stranger equal to the other parties in a transaction. “And a stranger shall you not wrong, neither shall you oppress him, for you were strangers in the land of Egypt.”⁶² “[A] stranger . . . you shall not do him wrong. The stranger that sojourns with you shall be as the home-born among you, and you shall love him as yourself, for you were strangers in the land of Egypt.”⁶³ “He . . . loves the stranger in giving him food and raiment. Love the stranger, for you were strangers

⁶¹ “*Ay-day cha-tee’mah* [are] witnesses whose signatures appear on a legal document. With regard to many legal documents, the authenticated signatures of two qualified witnesses are all that is needed to establish the legal validity of the document. All other forms of verification are of secondary importance. . . . *Ay-deem* [are] witnesses. The Torah states: ‘According to the testimony of two witnesses . . . shall a matter be established.’ (Deut. 19:15). Thus, the authenticated testimony of two witnesses is generally needed in order to establish the truth about an event or the validity of a claim. . . . Testimony authenticated by a court is the highest form of proof and is almost impossible to refute. Even a subsequent retraction by the witnesses or a confession of perjury is insufficient to contradict it. There is no difference between the legal force of the testimony of two witnesses and that of 100 witnesses. Generally, only male adult Jews, who are not related to the litigants or to each other, and who have no personal interest in the case, are acceptable as witnesses. . . .” THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 237 (Random House, NY, 1989).

⁶² EXODUS 22:20.

⁶³ LEVITICUS 19:33-34.

in the land of Egypt.”⁶⁴ “You shall not pervert justice due to the stranger . . . but you shall remember that you were a slave in Egypt and the Lord your God redeemed you from there; therefore, I command you to do this thing.”⁶⁵ The Sages read the Torah law as requiring non-discrimination in charity and some contractual matters “on account of the ways of peace”.⁶⁶ While early rabbinic commentary arguably confines this to Jewish converts, thereby discriminating on the basis of religion,⁶⁷ feudal class distinctions and fealty have no application to Jewish legal social policy. The notion that feudal enfeoffment derived from a system of *schetar* contracts seems as unlikely as the notion that it derived from the *shmittah karka’ot*, for Jewish legal principles related to property are and were fundamentally inapposite to the public policy needs of a pre-mercantile, feudal society.

As we weigh our factors of opportunity, motive, and pattern, it seems problematic to declare a causal nexus between Jewish *kinyan* and Anglo-American siesen for transfer of real property by deed, as once proposed by Professor Rabinowitz.⁶⁸ While the opportunity for cross-pollination of Jewish law was plainly present, the Romans and the Normans had similar policy interests of certainty of title. Jewish law consistently advanced notions of egalitarianism, first in a pre-

⁶⁴ DEUT. 10:18-19.

⁶⁵ DEUT. 24:17.

⁶⁶ *See*, GITTEN 59a-b.

⁶⁷ George Horowitz, THE SPIRIT OF JEWISH LAW, at § 75, at 129, §§ 129-32, *passim*.

⁶⁸ *See*, footnote 11, at 4, above, and accompanying text.

commercial context of returning land to its tribal grantees every fifty years, and later by preserving an equality of contractual rights. Finally, the forms and pattern of the law do not look particularly similar to Jewish patterns. Though deeds before witnesses were common in early Talmudic law, they were common in Roman law, as well. In Jewish law, the deeds were generally ascribed to paper or parchment and signed by a nearly universally literate population. In both Roman and English practice, *livery of seisin* or *mancipatio* were impressive enough demonstrations that they were likely to be remembered even after the less plentiful parchment was long gone. It seems reasonable to wonder whether the development of feudal estates and transfer of those estates did not coincidentally develop the useful habit of making the transfers before witnesses.

SERVITUDES, USUSFRUCTUS, USEFRUCT, AND THE ROAD TO SECURITY INTERESTS AND LEASEHOLDS

A security interest that could be exercised to defeat the carefully constructed feudal relationship while transferring title to Jews, who were barred from owning land, could not be acceptable — and it wasn't.⁶⁹ At first, only chattels and fruits of

⁶⁹ Jews during the period barely had the right to possess a burial plot that would comply with Jewish law. “[I]n 1177, Henry II. granted to the provincial Jews an important concession— the right of burying their dead outside the walls of the towns in which they resided [in accordance with Jewish law], instead of bringing the bodies, as had previously been the law, to the London cemetery at Cripplegate for interment.” SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS xi (J.M. Rigg ed. & trans. 1902), *citing* Pet. Bles., Cont. ad Hist. Ingulf. (pseudo.) an. 1100; Eadmer (Rolls Ser.), pp. 99-101; Will. Malmesh., Gesta Reg. (Rolls Ser.) ii. 371; Gesta Reg. Hen. II. (Rolls Ser.) i. 182; Stow, SURVEY OF LONDON, ed. Strype, Book iii. 54, 88.

the land could be seized in satisfaction of a debt.⁷⁰ The Crusades during the reign of the Normans and Plantagenets created devastation for Christians, Jews, and Moslems across Europe to Asia, but, in England, the campaigns created a need for credit. In a world in which wealth is represented by land, the Crusaders offered their land as collateral.⁷¹ Since Jews were barred from holding title in land,⁷² the law needed to sever the notion of title from the right to possess and enjoy the land.⁷³ Roman property law of *dominium* did not recognize possessory rights, as such, but there were enforceable servitudes recognized for leasehold rights to the fruits, or income, from the land. The Romans developed a mechanism for enforcement of a servitude to take profits or fruits of land called *ususfructus*.⁷⁴ Our modern system of enforcement of liens on land has many parallels to the Roman model of *ususfructus*.

⁷⁰ Frederick Pollock & Frederic William Maitland, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 2d Ed. (University Press, 1898) [Original from Harvard University, Digitized Aug 18, 2005] <http://books.google.com/books?id=A7b7eCAzzBEC>, at ch. IX § 3, at 596.

⁷¹ E. Jenks, *Edward Plantagenet, The English Justinian* 40-41 (1923).

⁷² *See* F. Lincoln, *THE STARRA* 114-15 (1939); *SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS ix-x* (J.M. Rigg ed. & trans. 1902) [Jews prevented by Jewish law from swearing Christian oaths of fealty and were therefore barred from holding feudal estates].

⁷³ E. Jenks, *above*, note 12, at 40-41; *Cf.* 1 F. Pollock A F.W. MAITLAND, *above*, note 3, at 469 (alien to English law for creditor not in possession of land to have rights in it).

⁷⁴ Latin, “use of the fruits.” *ENCYCLOPEDIA BRITANNICA*, “Categories of Roman law » The law of property and possession,” <http://www.britannica.com/EBchecked/topic/507759/Roman-law/41327/The-law-of-property-and-possession>

Ususfructus was the right to use and take the fruits (such as crops) of a thing and corresponded to the modern notion of life interest. A more restricted right, likewise not extending beyond the life of the holder, *usus* permitted merely the use of a thing; thus, a person could live in a house but could not let it, as that would be equivalent to ‘taking the fruits.’⁷⁵

Similar law appears in Jewish sources. Jewish law recognizes and addresses possessory interests in property. Parallel phraseology is found in an example of this in the Talmudic treatment of a Biblical duty to offer “first fruits” as sacrifice. The Torah commands: “Wherefore I now bring the first fruits of the soil, which God has given me.”⁷⁶ As Elon has recited, the Biblical command implies that it applies to owners of land.⁷⁷ Thus, when the Talmud asks whether the duty to pay and recite the ceremonial blessing incumbent to the sacrifice applies to the title owner of the land or to the possessor in interest of the crops grown on the land, the question being posed is who owns land, and how the responsibilities and privileges of ownership are defined. The debate is instructive:

It has said: As to one who sells his field for its fruit [*i.e.*, the land itself remains under the ownership of the seller and the purchaser acquires only the fruit], R. Johanan said: ‘He brings and recites’ [He has the full bundle of rights and responsibilities regarding first fruits]. Resh Lakish said: ‘He brings but does not recite.’ R. Johanan [justified his position on the basis that] with the acquisition of the fruit, one also acquires the property for purposes of cultivating the fruit, and he may therefore recite [quite literally] ‘I now bring the first fruits ... given me.’ Resh Lakish [responded, equally literally], ‘Acquisition of the fruit

⁷⁵ *Ibid.* A.M. Prichard, ROMAN PRIVATE LAW 213-14 (3^d Ed. MacMillan, 1961).

⁷⁶ Deuteronomy 26:10.

⁷⁷ Menachem Elon, JEWISH LAW (MISHPAT IVRI), Cases and Materials, at ch. 2, at 41 (1999).

is not acquisition of the underlying property, and he therefore cannot say' ... 'I now bring ... of the soil ... given me.'⁷⁸

The significance of the debate is not whether one or the other Sage is correct about who is responsible for bringing first fruits for sacrifice.⁷⁹ The significance of the debate between scholars who had never seen and would never expect to see first fruits sacrificed is that it defines possessory rights in property in which the owner of goods is, according to one of the Sages, the superior possessor of right.

Shapiro suggests that it is the Jewish tradition which is followed in enforcing non-title, security interests in land: "By 1250, scutage had completely replaced feudal services: tenant obligations had been reduced to money payments. 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."⁸⁰ Thus, Richard I could enforce Jewish rights to attachments for the use of the land.⁸¹ But, the same result is available by *usufruct*, and there is little evidence that Jews were granted title to land.⁸²

⁷⁸ Gittin 47B.

⁷⁹ The last sacrifice in Jewish practice was around the time of the destruction of the Second Temple in 70 C.E., about 180-220 years before the lives of Resh Lakish and Johanan.

⁸⁰ Judith A. Shapiro, Note, The Shetar's Effect on English Law-A Law of the Jews Becomes the Law of the Land, 71 GEO. LJ. 1180-81 (1983)

⁸¹ *Ibid.*

⁸² "[I]t was not until 1275 [15 years before the Edwardian expulsion] that [a Jew] was legally capable of holding so much as a ten years' agricultural lease, and the license then granted was subject to the express reservation that he received no

The similarities between *usufruct* and enforcement of security on land are apparent in some early law.

In the law set forth by Littleton and Coke it is sometimes possible for the one entitled to rent to satisfy his claim out of the profits of the land: thus, where a feoffment is made reserving a certain rent, upon the condition that, if the rent be in arrear, the feoffor or his heir may enter and hold the land until he be satisfied or paid the arrears. In this case, says Coke, "when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall or partly by the one and partly by the other, the feoffee may re-enter into the land." [*citing*] Lit. §327; Co. Lit. 202b, 203a. See Co. Lit. 205a, and marginal note (d).⁸³

This proves too little, because, as shown above, both Roman and Jewish law include a servitude on land for the use of the fruits. But, Professor Hazeltine finds strong evidence in the proceedings of the newly formed Exchequer of the Jews that English law innovated an inalienable right to possession that was superior to enfeoffment of seisen for which the Jews were ineligible. We see a direct causal linkage between the Jewish presence in London and the concurrently developing law of security in land.

The history of gages to secure loans,⁸⁴ where the debtor remains in possession of the gaged land until default, begins with the coming in

homage or fealty from Christians. It was only land tenable by rent in money or kind that he was entitled to hold at common law, and the '*mortua vadia*' which are rarely and barely mentioned in the rolls, were probably rent charges." SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS xiii (J.M. Rigg ed. & trans. 1902).

⁸³ Harold Dexter Hazeltine, "The Gage of Land in Medieval England and the United States," 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 646, 664 (Little, Brown & Co., 1909).

⁸⁴ The etymology of the word mortgage is not Jewish, but it probably came from France with the Normans. "Mortgage (n.) 1390, from O.Fr. *morgage* (13c.), *mort gaigne*, lit. 'dead pledge' (replaced in modern Fr. by *hypothèque*), from *mort* 'dead' +

of the Jews and of foreign merchants from Italy and other countries. In the centuries that immediately follow the Norman Conquest it is English policy to foster industry and commerce. Foreigners are induced to visit the realm, and it is sought to make up for deficiencies in English production by bringing in the goods of other countries. Systems of banking and insurance take root. In the interest of creditors new and more efficient processes of judicial execution are established. The Exchequer of the Jews is set up as a branch of the Great Exchequer. A system of registering debts owing to Jewish creditors and the gages that secure them is perfected, this system allowing a free buying and selling of Jewish obligations and efficient execution on default.⁸⁵ The needs of other creditors are supplied by giving them, on judgments or enrolled recognizances of debt, new writs of execution in addition to the old common law writs of *feri facias* and *levari facias*; these new writs enabling the creditor to reach the lands and chattels and body of the debtor. The writ of *elegit* is introduced by the Statute of Westminster the Second for creditors generally. Merchant creditors, if they get their debtors to make recognizances of debt before courts of record or certain public officials, may obtain, on the default of their debtors, even more effective remedy. Merchant creditors may reach, among other things, not only half the land, as under the Statute of Westminster the Second, but all the land of the debtor. These merchant securities are known as "statutes merchant" and "statutes staple," the former being introduced by the Statute of Acton Burnel and the Statute of Merchants in the reign of Edward I., the latter by the Statute of the Staple under Edward III. The advantages of the merchant securities are given to all creditors by the

gage 'pledge;' so called because the deal dies either when the debt is paid or when payment fails. O.Fr. *mort* is from V.L. '*mortus* "dead,' from L. *mortuus*, pp. of *mori* 'to die' (see mortal). The verb is first attested 1467." Douglas Harper, ONLINE ETYMOLOGY DICTIONARY, Mortgage (2001)
<http://www.etymonline.com/index.php?l=m&p=22>.

⁸⁵ "See, further, 3 Hoveden 266, 267; Bracton, f. 13, 386b; 2 Blackstone, c. 20; Plowden, Usury 95-98; Horwood, Y. B. 32-33 Ed. I., pp. xii, xlii; Jacobs, Jews of Angevin Enorland; Gross, Exch. of the Jews (printed in 1 Publications of Anglo-Jewish Hist. Exhibition) ; 1 Pollock and Maitland, Hist. Eng. Law 468-475, 2 idem 123, 124; Rigg. Jewish Exch. (Seld. Soc.) ix-lxii; Hazeltine, Exch. of the Jews, 18 L. Quart. Rev. 305-309." *Ibid.*, note 2 and accompanying text, at 664.

Statute 23 Henry VIII., introducing the security known as a "recognizance *in the nature of a statute staple*."⁸⁶

The ineligibility of Jews to hold land in fee and the need for Jewish credit to finance the Crusades and the new international economics mothers invention, as Hazeltine notes:

“A gage of land with possession of the debtor to secure money obligations is therefore rendered necessary and possible . . . The publicity essential to this form of gage is thereby obtained; but it should be well observed that the new security breaks in upon the old law with its restraints on alienation and its requirement that livery of seisin is necessary to the conveyance of rights in land. The old feudal polity is attacked and attacked successfully by commercialism.”⁸⁷

After the appearance of the Jews in England, and for the specific motive of creating a form of secured credit in an enforceable manner, but faced with the disability of Jews who were forbidden to take feudal oaths of fealty to any earthly

⁸⁶ “See, further, preambles to Stat. Act. Burnel, 11 Ed. I., and Stat. Merchant, 13 Ed. I.; Coke, 2 Inst. 677-680, 4 Inst. 237, 238; Bac. Abr. tit. Execution; Comyn, Digest, tit . Obligation (K); Wright, Tenures 170-171; 2 Blaekstone, c. 10, § V, c. 20, §2, 3 idem c. 26, §5, 4 idem c. 33, § III; 2 Reeves, Hist. Eng. Law 71, 72, 276-279, 3 idem 289; Coote, Mortgage, 2 ed., 66; Rogers, Indus. and Com. Hist. Eng. (1892) 71, 72; Cunningham, Eng. Indus. and Com. during Early and Middle Ages, (1896) 222, n. 3, 281-283, 290, 316, 317; Cunningham and McArthur, Eng. Indus. Hist.; 2 Pollock and Maitland, Hist. Eng. Law 203, 204, 596, 597; Brodhurst, Merchants of the Staple, 17 L. Quart . Rev. 62-74; - Carter, Eng. Legal Institutions (1902) 250-270.”

“The forms of gage described by Glanvill and Bracton seem to be, as we have already explained, securities with immediate possession of the creditor. For the view that the gage with possession of the debtor may be found in these writers, see, however, 2 Phillips, Eng. Reichs- und Rechtsgeschichte 239, 240; 2 Glasson, Histoire dn droit et des institutions de l'Angleterre 313-316; Chaplin, Story of Mortgage Law, 4 Harv. I.. Rev. 6 *et seq.*” *Ibid*, at note 1 and accompanying text, at 665.

⁸⁷ *Ibid*, at 665.

being, the concept of seisin had to become inferior to the right of possession. “The gage of lands and tenements to Jewish creditors who do not take possession arises, then, on the registration of a written contract under seal before public officials at the Jewish Exchequer or in certain towns.”⁸⁸

The remedies available for enforcement could not include title, so the remedy had to develop a very unromantic superior right of possession.

Sometimes indeed the debtor says that, should he make default, all his goods, movable and immovable, may be distrained.⁸⁹ Apparently all such recognizances or bonds create, as regards movable property, merely a right to distrain the chattels that are in the hands of the debtor, not an hypothecation or right *in rem* that enables the creditor to follow the chattels into the hands of third persons.⁹⁰ We have evidence, however, that the gaging of land to Jews by registered contract gives rise to a right *in rem* for purposes of security.⁹¹ If the alienee of land bound by the debt refuse to pay the debt with interest, the *seisina* of the land in his hands will be given to the Jew.⁹²

⁸⁸ “See on this system of *archae* and *rotuli* the authorities cited in n. 2, p. 664, supra. Compare Rigg, Jewish Exch. (Seld. Soc.), pp. xiii, xxxvii, 136 (. v. stallare). On the enrolment of documents in the Great Exchequer see 1 Hall, Red Book of Exchequer, pp. xix-xxxv.” *Ibid*, at note 1 and accompanying text, at 666.

⁸⁹ “See Jewish Exch. (Seld. Soc.) p. xix. n. 1, 33, 34. 92-94, 102; Webb, Question, App. Nos. 19, 30, 31. See further Jewish Exch. (Seld. Soc.) 67, 68, 91, 93.” *Ibid*, at note 4 and accompanying text.

⁹⁰ *Ibid*. Hazeltine notes that: “The Jewish gage of chattels seems to be a gage with immediate possession of creditor,” *ibid*, at note 5 and accompanying text, at 666, citing Hazeltine, The Exchequer of the Jews, 18 L.QUART.REV. 308, and signaling as a comparison, Rigg, Jewish Exch. (Seld. Soc.) p. xiii. As we will review below, this becomes a form of bailment protected by trover.

⁹¹ Hazeltine cites no authority for this sentence other than the next. *Ibid*.

⁹² *Ibid*, citing, see the cases in Jewish Exch. (Seld. Soc.) 18, 63; *Les E statutes de la Jeuerie*, I Stats. of Realm 221; 1 Madox, Hist. Exch. 233. n. (y). Compare the case of *De flawston v. De Seulis*, Jewish Exch. (Seld. .Soc.) 53. *Ibid*.

Hazeltine notes that “[t]he alienee may, however, vouch his warrantor”,⁹³ which might be quite enough of a disability in light of the problems with wager of law,⁹⁴ but the better question is to inquire as to the nature of *seisina*. What Güterbock describes as a possessory right perfected by actual use but inferior to *seisin*,⁹⁵ and Stroud associates with the enforcement of *gages*,⁹⁶ Maitland assigns to the seisin of chattels, all the while acknowledging that there can be no such thing in the orthodox theory of early English real property law.⁹⁷ Nevertheless, Maitland recites Glanville:

Glanvill twice has occasion to mention possession of goods; each time he calls it *seisina*. The pledgee of movables may have seisin of

⁹³ *Ibid*, citing, see the case in Jewish Exch. (Seld. Soc.) 63. *Ibid*.

⁹⁴ See, note 190, below, and accompanying text.

⁹⁵ Karl Güterbock, trans. Brinton Coxe, BRACON AND HIS RELATION TO THE ROMAN LAW, at 99 (1866)
<http://books.google.com/books?id=3KZ0bx6n4ugC&pg=PA98&lpg=PA98&dq=seisina&source=bl&ots=dtNCeU_oXY&sig=t8XhBaKd5JyCHQmbiYRBEcBZedk&hl=en&ei=nHQASTjpLJS0MbqKzdwH&sa=X&oi=book_result&ct=result&resnum=3#PPA99,M1>.

⁹⁶ Stroud Francis Charles Milsom, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM: THE MAITLAND LECTURES GIVEN IN 1972, at note 3, at 169 (Cambridge, 1976)
<http://books.google.com/books?id=9Q09AAAAIAAJ&printsec=frontcover#PPA169,M1>.

⁹⁷ “There is no such thing known to our law as the seisin of chattels; one may be seised of land, but of a chattel, real or personal, one shall be possessed, not seised. Of course, one may seize chattels, and between seizure and seisin the etymologist may see a close connection, but he that would commit a really bad blunder let him speak of the seisin of chattels.” Frederic William Maitland, ed. H.A.L. Fisher, The Seisin of Chattels, 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 1 (Cambridge University Press, 1911)
<http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=871&chapter=70237&layout=html&Itemid=27>.

them—*cum itaque res mobiles ponuntur in vadium ita quod creditori inde fiat seisina* (lib. 10, cap. 6). The plaintiff in an assize of novel disseisin recovers seisin of the land and seisin of his chattels also, *seisinam omnium catallorum* (lib. 13, cap. 9).⁹⁸

Maitland recites Bracton:

In Bracton there is very much to be read of *seisina* and *possessio*, and to me it seems that he uses the two words as precisely equivalent, though, perhaps, for him *seisina* is the vulgar word, *possessio* the technical and correct Latin term to be found in the Roman law books. We shall return to this hereafter, when we speak of chattels real. Bracton has hardly ever occasion to mention the possession of movables, but with him, as with the writer of the *Leges Henrici*, the hand-having back-bearing thief is *seisitus de latrocinio*, and is *in seisina* (fol. 150 b, 154 b). Fleta (fol. 54, 62) copies, Britton (vol. I., p. 56) translates these phrases. There can be no prosecution in the court of a lord having franchise of infangthief, unless the accused *de rebus insecutis fuerint seisiti*; in other words it is only over *mesfesours trovez seisiz* that such a lord has jurisdiction. Clearly, to say that a thief was taken *seisitus de furto*, or *seisitus de latrocinio*, was to use a technical phrase about an important point. It is used in the Assize of Clarendon—“*si aliquis fuerit captus qui fuerit seisitatus de roberia vel latrocinio.*” Bracton again (fol. 122) says that if the coroner hears of treasure trove he must inquire *si aliquis inde inventus sit seisitus*. Elsewhere (fol. 440 b) he discusses what is to be done if the defendant in an action of debt will not appear; his suggestion is, *bonum esset adjudicare querenti ab initio seisinam catallorum secundum quantitatem debiti petiti*.⁹⁹

Maitland concludes with a significant argument that, from the time of Bracton and through the reign of Richard I – which precisely targets the historical period for maximal exposure of Jewish commercial law to English law – the concept of seisin applies to chattels.¹⁰⁰ That is not our question, however. We recognize that

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

the term *seisina*, which Maitland notes to be the vulgar form for *possessio*, is applied exclusively to personal property and, except in our example involving some undefined possessory right to a pledge in land, impinges on no feudal duties.

The clarification may be Hazeltine's analysis:

On default in payment the creditor may bring his action of Debt; and execution will be by summary processes.¹⁰¹ If his security on the land be enforced, the creditor will be given *seisina* by the court.¹⁰² He may either sell the lands after possession for a year and day, in which time the debtor has a chance to redeem;¹⁰³ or, he may hold the lands until he has satisfied himself out of the rents and profits.¹⁰⁴

¹⁰¹ "Our sources are full of actions of Debt. *See, e. g.*, Tovey, *Anglia Judaica* 42, 43, 50; Prynne, *Demurrer*, part 2, p. 11; Cole, *Documents of 13th and 14th Centuries* 285-332; *Jewish Exch. (Seld. Soc.)*, *s. v.* Debt. The process of execution laid down by *Lea Estatutes de la Jeuerie*, 1 *Stats. of Realm* 221, 221a, is very much like that under the Stat. West. II, c. 18." Hazeltine, "The Gage of Land in Medieval England and the United States," 3 *SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY* note 1, at 667, and accompanying text.

¹⁰² *Citing*, "See Jacobs, *Jews* 57, 90, 231 (and compare 233), 234; Webb, *Question*, App. No. 4; Bracton's *Note Book*, pi. 301; *Plac. Abb. (Rec. Com.)* p. 58; "Exchequer Receipt Roll, 1185" (with preface by Hubert Hall) 31; *Les Estatutes de la Jeuerie*, 1 *Stats. of Realm* 221a; Goldschmidt, *Geschichte der Juden in England* 69, n. 37; *Jewish Exch. (Seld. Soc.)* pp. xiii, xxxviii, n. 1, 63, and Index *. *v.* Seisin. Compare Rigg, *Jewish Exch. (Seld. Soc.)* p. xxxv. Similarly, the assignee of the Jewish creditor may obtain *seisina* of the gaged land *per praeceptum Domini Regis*. See Webb, *Question*, App. No. 6." *Ibid*, at note 2, at 667, and accompanying text.

¹⁰³ *Citing*, "1 *Foedera* 51 (see Jacobs, *Jews* 134-138); 1 *Rotuli Chartarum*, ed. Hardy, 93 (see also Tovey, *Ang. Jud.* 62-64, and Jacobs, *Jews* 212-214); Goldschmidt, *Juden in England* 21, 22; Rigg, *Jewish Exch. (Seld. Soc.)* xiii. See Webb, *Question*, App. No. 14. Richard I.'s *Carta qua plurimae libertates Judeis conceduntur & confirmantur* (1190), 1 *Foedera* 51: Et liceat predictis Judeis quiete vendere vadia sua, postquam certum erit illos ipsa per unum annum integrum & unum diem tenuisse." *Ibid*, at note 3.

¹⁰⁴ *Citing*, "See *Jewish Exch. (Seld. Soc.)* xiii, xxxviii, n. 1, lvii, 19-27, 43-45, 89-91: *Chapitles Tuchaunz La Gyuerie*, *Jewish Exch. (Seld. Soc.)* lvi; *Les Estatutes de la Jeuerie*, 1 *Stats. of Realm* 221a; Jacobs, *Jews* 233." *Ibid*, at note 4.

While the land is in his hands the creditor has not feudal seisin, not the *seisina* of one in the scale of lords and tenants, but *seisina ut de vadio*, seisin as a gagee;¹⁰⁵ and this seisin of the Jew or of his assignee is protected by the courts.¹⁰⁶

From the sources that have come under our notice, it is not clear whether the right of sale given by the charters of Richard I and John indicates that the land is at the end of the year and day completely forfeited to the creditor, his title to the land being perfected by the acquiring of this right of sale, or whether the creditor is obliged to account to the debtor for the proceeds of the sale over and above the amount of the debt and interest. The answer may lurk in records of the Jewish Exchequer that are still unprinted. In the thirteenth century one would certainly expect to find an accounting in cases of sale, quite as much as in cases where the creditor is reducing his claim by taking the profits of the land.¹⁰⁷

Hazeltine suggests that the inability to locate a record of account may lead to the conclusion that the Jewish creditor could take title, but we have already seen from other sources that such a result was quite impossible.¹⁰⁸ Rather, the end result looks significantly like a modern foreclosure in which the creditor may not exercise the deed of trust by entering and becoming seised, but may call upon the sheriff or

¹⁰⁵ *Citing*, “See Jacobs, Jews 231; Webb, Question, App. Nos. 4, 6; Rigg, Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1.” *Ibid.*, at note 5.

¹⁰⁶ *Citing*, “See Plac. Abb. (Rec. Com.) 64, 82, 175; Bracton's Note Book, pl. 301, 1825; Jacobs, Jews 191, 234; Webb, Question, App. No. 6.” *Ibid.*, at note 6.

¹⁰⁷ *Ibid.*, at 667-68.

¹⁰⁸ *See* note 80, above, at 27; note 67, above, at 24. If modern foreclosure practice provides any guidance, the bidders would tend to bid the minimum amount needed to obtain title, which, in most cases, is the “upset price” at which the creditor will be fully repaid and will therefore allow the sale to proceed without upsetting the auction by buying the property itself or reserving the sale from the auction. *See*, Upset Price, WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 2nd Edition (2005).

private auctioneer to sell to the highest qualified bidder.¹⁰⁹ Quite similar to modern law, the mortgagee may not enter and take as would seem to be a natural result of his deed of trust or mortgage; the mortgagee must sell to another qualified buyer at public sale or may hold and satisfy himself out of the fruits of the land subject to redemption. In a modern context, a mortgagee would not be disqualified from bidding at the sale because of religion, but other incompetent buyers, such as minors or persons ruled mentally incompetent, are not permitted to bid without their guardian. As Hazeltine notes, “Sometimes, by collusion with powerful personages, it was contrived to defer the redemption indefinitely, ‘thus compassing by sharp practice what we now call foreclosure.’”¹¹⁰

We have therefore established quite firmly that English law of gages derived from the circumstance of a Jewish presence in England during a critical historical period. But, that was not our question. We asked, rather, whether Jewish law, rather than the presence of early Jewish merchants, was a root source of English real property law involving servitudes and security. Roman law would seem to give the *usafuctus* rights for the life of the mortgagee. That was insufficient to secure the loans needed in Norman and Plantagenet times. Jewish law would also permit

¹⁰⁹ *See, e.g.*, Maryland Code Ann., Real Property, § 7–105.1, *et seq.* American jurisdictions vary widely in modern foreclosure proceedings both because of modern concepts of consumer protection, *see, e.g.*, 42 D.C. Code ch. 8A (repealed), and because many states have long had non-judicial rather than judicial foreclosure mechanisms, Virginia Code Ann. § 55-59, *et seq.*

¹¹⁰ *Citing*, Rigg, Jewish Exch. (Seld. Soc.) xxxvii. Hazeltine, “The Gage of Land in Medieval England and the United States,” 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY note 7, at 667-68.

the pledge of the fruits of land as security for a loan, and Jewish law also allows enforcement of the security specified in the *shetar* including full title to the land. English law follows neither rule, but fashions its own answer.

Using our standards of motive and pattern, we see a causal linkage in motive and opportunity between the Jewish presence in London and the development of the modern mortgage. Indeed, there is clear and direct evidence that the Jewish presence caused the development of a device that could secure their loans while depriving them of seisin in real property. We lack evidence, however, of a pattern in Jewish law that gets picked up in British law. We conclude that the Norman English law derived from the Roman servitude of *ususfructus*,¹¹¹ which may have, itself, derived from Biblical use of fruits or may have been concurrently developed with Jewish use of fruits. That right, however, becomes a useful tool when Richard I is seeking to enforce Jewish security interests without conveying title to land to Jews.¹¹² The enforcement of the *shetar* was a clever melding of the Jewish contract and bond with an enforcement mechanism pre-existing in Roman and early English law within the constraints of the religious discrimination of the times.

¹¹¹ *But see*, MERRIAM-WEBSTER ONLINE, <<http://www.merriam-webster.com/dictionary/usufruct>>, usufruct [which traces the etymology of the word to the Latin *usus et fructus*, but traces the origin to c. 1630].

¹¹² Judith A. Shapiro, Note, The Shetar's Effect on English Law-A Law of the Jews Becomes the Law of the Land, 71 GEO. LJ. 1179 (1983) [explaining how the *shetar* could be enforced from the land by royal prerogative without transferring the land, but not connecting this to the pre-existing Roman writ].

COMPARATIVE TREATMENT OF ADVERSE POSSESSION

It has been suggested that early English law of adverse possession borrows from Jewish law, because early English law of prescription is similar to Jewish law. Early English law bears at least as much similarity to Roman law. Roman causes of action for the acquisition of land were limited.

The modes of acquiring ownership were of two genera, arising from natural law and from civil law. One acquired, by natural law, in occupation, accession, perception of fruits, and by tradition (delivery). Occupation occurred in acquisition by hunting, fishing, capture in war, etc. The right of post-limium was the recovery of rights lost through capture in war, and in proper cases applied to immovables, moveables, and to the status of persons. Finding was also a means of occupation, since a thing completely lost or abandoned was *res nullius*, and therefore belonged to the first taker.¹¹³

In both cases, the property is treated as ownerless and subject to conquest and dominion by the finder.

Acquisition by occupation in Roman law required that the property be lost or abandoned completely. Such property could be acquired by *occupatio* by the first person to take possession of it as ownerless.¹¹⁴ Roman title ownership was definitive and certain,¹¹⁵ and possessory interests were distinctly secondary. One could,

¹¹³ NEW ADVENT CATHOLIC ENCYCLOPEDIA, Roman Law, <http://www.newadvent.org/cathen/09079a.htm>.

¹¹⁴ ENCYCLOPEDIA BRITANNICA, "Categories of Roman law » The law of property and possession," <http://www.britannica.com/EBchecked/topic/507759/Roman-law/41327/The-law-of-property-and-possession>

¹¹⁵ As discussed above, at notes 55-57, and accompanying text, certainty was, of course, a major objective of the Normans after the conquest in 1066 C.E. It was the reason for the creation of the Domesday Books and the basis upon which feudal taxation was assessed. In its public policy objectives, the certainty of title to land was so essential to the feudal system of right and duties that it might be thought of

however, obtain ownership by possession under a cause of action called *usucapio*.¹¹⁶ After two years of continuous, good faith possession, in the case of land, or one year in the case of movables,¹¹⁷ a claimant could establish title. Title transferred only if there was no theft or violence in the acquisition.¹¹⁸ Thus, the elements of Roman adverse possession were: 1) possession; 2) passage of continuous time; and 3) lack of hostility.

Jewish law has a similar concept of ownerless property called *hefker*, which applies to property that has been expressly and intentionally abandoned by its owner,¹¹⁹ or lost to natural forces.¹²⁰ Jewish law also develops a claim to adverse possession called *hazakah*,¹²¹ which evolves based on Rabbinic regulation.

as parallel in policy to the Roman law controlling public lands. Theodore F.T. Plucknett, *CONCISE HISTORY OF THE COMMON LAW*, at 13 (5th ed., Little, Brown & Co. 1956). Jewish law was relatively unconcerned about uncertainty of title to the point of creating fictions treating property as ownerless when it was subject to a shifting interest of being reclaimed after the Sabbath. Bava Bathra 54b-55a; SHULCHAN ARUCH, ORACH CHAVIM 246 [loaned animal must be declared ownerless rather than permit it to work on Sabbath], *but see*, MISHNAH BERURAH [clarifying that the owner may reclaim after Sabbath and no Jew should interfere].

¹¹⁶ A.M. Prichard, *ROMAN PRIVATE LAW* 201-06 (3^d Ed. MacMillan, 1961).

¹¹⁷ *But see, ibid*, at 203 [“Gaius tells us it is not often that *usucapio* operates in the case of movables, for in Roman law everybody who, knowing a thing is not his own, sells or gives it to another, commits a theft.”].

¹¹⁸ “Under the Twelve Tables and the *lex Atinia*, *res furtive* (stolen property), and under the *legels Iulia et Plautia*, *res vi possessa* (property taken by violence)” may not be taken by *usucapio*. *Ibid*, at 202.

¹¹⁹ The term is generally applied to chattels. *THE TALMUD* (Steinsaltz Ed.) *REFERENCE GUIDE*, at 184 (Random House, NY, 1989).

¹²⁰ Bava Metzia 21b. The rationale applied by the Gemorra is that the owner abandons hope for recovering the object as soon as it is caught in a tidal flow, rising

While it is true that, in a dispute regarding real estate, physical possession alone is not sufficient to create a presumption of ownership, in practice the Rabbis modified this law with a regulation called ‘years of *hazakah*. Under this regulation, if a person holds uncontested possession of a piece of real estate for three full years (making full use of it and consuming its crops), and the original owner could have contested the possession but said nothing, and after three years the original owner tries to repossess the property, claiming that the person in possession is there illegally, his suit is rejected. If the person in possession claims that he bought the field and has lost the deed of sale, he is believed without proof, because it is unreasonable to expect a buyer to keep a deed of sale for more than three years.¹²²

We might read that, as Professor Auerbach did,¹²³ to conclude that Jewish law of adverse possession contains familiar elements: 1) open; 2) notorious; 3) possession; for 4) a continuous term.¹²⁴ But, the categories are not dissimilar from the Roman law of *occupatio*, except that Jewish law required open and notorious action rather than the mere lack of hostility and required three instead of two years to establish

sea, or violent waters. Bava Metzia 21b, Steinsaltz Edition translation, Volume II, Part II, notes, at 9 (Random House, NY, 1990).

¹²¹ Steinsaltz defines *hazakah* to apply to moveables, *me-tal’-te-leen*, as well as land, *karka*, and states that the three-year statute of limitations applies to land claims. THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 189-90 (Random House, NY, 1989).

¹²² Ketubot 17b, Steinsaltz Edition translation, Volume VIII, Part II, at 39 (Random House, NY, 1992).

¹²³ “Suffice it to say that the requirement in the Talmud is that the possession by the squatter of a cornfield be open, notorious and adverse for a period of three years if he is to acquire title by adverse possession.” Auerbach, Charles, “The Talmud — A Gateway to the Common Law,” WESTERN RESERVE LAW REVIEW 5, at 27 (1951), *citing*, Bava Bathra 28a-b.

¹²⁴ Rabbi Akiba argued to limit continuity to one year placed in between two partial years, BAVA BATHRA 28a, and another argument is presented that the continuous possession can be for as little as one year if it is sufficiently open and hostile. *Id.*

the claim.¹²⁵ Unlike English and American law in which a squatter becomes the possessor of right by the passage of a significantly longer period of 15 or more years,¹²⁶ along with the other elements, a claimant under Jewish law must allege that they are the rightful, title possessor under a principle called *hazaka sheayl emah ta'ahnah*.¹²⁷ In both the case of Roman *usucapio*,¹²⁸ and in the case of Jewish *hazakah*,¹²⁹ the cause was more a rule of evidence than an entitlement to an

¹²⁵ Roman *occupatio* and Jewish *hazakah* are also different in that *occupatio* applies principally to land, *see* note 87, above, and *hazakah* applies principally to chattels, *see* notes 89-91, above, which seems to establish a pattern that might be the precursor to the English legal distinctions between the two types of property.

¹²⁶ *See, e.g.*, D.C. Code § 12–301(1) (2001 ed.) [15 years]; Virginia Code Ann. § 8.01-236 [15 years]; Maryland Code Ann. §5-103(a) [20 years]. In modern Britain, the result are affected by the Limitation Act of 1980 and the Registration Act of 2002. In each version of Anglo-American law, even though the right of adverse possession is characterized as a limitation of the rights of the prior possessor to defend, there is no requirement that the squatter claim any right of title.

¹²⁷ THE TALMUD (Steinsaltz Ed.) REFERENCE GUIDE, at 190 (Random House, NY, 1989);

¹²⁸ *See*, BLACK'S LAW DICTIONARY, at 1542 (7th Ed. 1999); “There is no principle in all law which the moderns, in spite of its beneficial character, have been so loathe to adopt and to carry to its legitimate consequences as that which was known to the Romans as Usucapion, which has descended to modern jurisprudence under the name of Prescription.” Henry S. Maine, ANCIENT LAW (17th Ed. 1901).

¹²⁹ Baba Bathra [also transliterated *Bava Bathra*] 29a, at note 1, COMPLETE SONCINO ENGLISH TRANSLATION OF THE BABYLONIAN TALMUD (Judaica Press, 2005 [on-line], c.1996) [“Heb. *hazakah*, which combines the meanings of ‘holding’ or ‘occupation’, and ‘presumed ownership’. What is meant is a title not supported by documents or witnesses, but based on the mere fact of possession. The English legal term [i]s *usucaption*”].

estate,¹³⁰ but, unlike Roman law, Jewish and English law distinguish between adverse possession, which applies to land, and bailment, lost, mislaid, and abandoned goods.

COMPARATIVE TREATMENT OF BAILMENT

The availability and applicability of Roman law roots for English law become less available as the analysis turns from immovable property to moveable property¹³¹ and from title owners to rightful possessors. The Roman model of *dominium* provided almost no enforceable rights a mere possessor could exercise, other than *ususfructus*, and that had limited applicability to moveable property.¹³²

¹³⁰ According to Professor Prichard, Roman law also contained acquisitive, extinctive, and adjectival prescriptive acquisitions. A.M. Prichard, *ROMAN PRIVATE LAW* 200-01 (3^d Ed. MacMillan, 1961). Only the adjectival prescriptions are mere limitations of actions, while the former two causes of action change title based on possession, precisely like modern law. There is also some indication that early Talmudic law recognized an acquisitive prescription in which no plea of title was required to acquire title. *See*, Baba Bathra [also transliterated *Bava Bathra*] 41a, 52b, *COMPLETE SONCINO ENGLISH TRANSLATION OF THE BABYLONIAN TALMUD* (Judaica Press, 2005 [on-line], c.1996) [gifts, divisions of estates between brothers, and estates of a childless proselyte]. These cases are most consistent with acquisitions of abandoned or ownerless property. *Ibid*, at note 17, at 42a.

¹³¹ Moveable property is, as the name implies, property that can be picked up and moved without changing its nature or value. It includes livestock and produce that have been severed from the land, but it becomes more significant when it also includes chattels, goods, and, later, in the mercantile and later ages to modernity, chattels real such as stocks, bonds, contracts traded for their own value, and all of the forms of property which, today, account for almost all significant wealth. In the time of the Normans, and even in the antebellum times fictionally portrayed of the American South in the film *Gone with the Wind*, the wealth is the land. In modern times, it is the value of the bearer bonds destroyed and distributed in the explosive movie *Die Hard* that encompass real, as well as fictional, wealth.

¹³² *See*, note 87, above.

English law begins to look more like Jewish law and less like Roman law in the area of bailment, and we begin to see evidence of Judaic roots.

Categories of Bailment

Roman law had some categories and causes of action defining the relationship between the rightful possessor of property and the owner of that property, but it had no model by which a mere possessor could enforce rights against any third party. Roman law provided, in a theory akin to contract, for *mutuum*, the loan of money or consumable property in which the borrower would return the equivalent value of the property lent; *commodatum*, a loan of property for its use as a borrower; *depositum*, a loan for safekeeping; and a *pignus*, the handing over of property as a pledge for security,¹³³ each with its own rules.¹³⁴ This does not, however, read like the precursor of bailment. The rules recited in Justinian create four categories including contract, quasi-contract, wrongs, and apparent quasi-wrongs.¹³⁵ An action might be taken by a bailor against his bailee on a contractual theory of an undertaking, but there is no provision for the bailee to exercise rights for the protection or enjoyment of goods he did not own.

English common law around the time of the American Revolution had 3-6 categories of bailment, some of which had Latin names from Roman categories of

¹³³ Ibbetson, above, at 9.

¹³⁴ *Ibid*, citing Justinian 3.14.2.

¹³⁵ Kenneth D. Cooper-Stephenson & Elaine Gibson, TORT THEORY (Captus, 1993), at 344 < <http://books.google.com/books?id=2OyI7KuMBvcC>>.

law.¹³⁶ In a leading case in 1703, the Court identified six levels of bailment aligned along the same criterion of who benefited from the bailment.

There are six several Sorts of Bailment, which lay a Care and Obligation upon the Party to whom the Goods are bailed. 1. The first is a bare and naked Bailment to another, to keep for the Use of the Bailor, which is called a *Depositum*. 2. A Delivery of Goods to another which are in themselves useful to keep, and these are to be restored again in Specie, which is called *Accommodatum*. 3. A Delivery of Goods for Hire, which is called *Locatio* or *Conductio*. 4. A Delivery by way of Pledge, which is called *Vadium*. 5. A Delivery of Goods to be carried for a Reward. 6. Such a Delivery as here in the Case at Bar, where Goods are delivered to do some Act about them, such as Carrying, and without a Reward, which is called a *Mandatum*, by *Bracton, lib. 3.100.* in *English*, an Acting by Commission.¹³⁷

In seeking patterns, we notice that all of the English categories in this fairly early source are named in Latin. The Latin named for a loan for safekeeping for the benefit of the depositor is, in both Roman and English law, called *depositum*; and the loan of property for its use by a borrower and return in specie is a *commodatum* in Roman law and an *accommodatum* in early English and American law. Further, both Roman and English systems contain a category for pledges, called variously in Latin, *pignus* and *vadium*, but any system with secured loans would need to invent

¹³⁶ State statutory law has significantly changed the common law in modern times as a result of local lobbying and changing commercial circumstances. For example, in Washington, D.C., liability in a paid parking lot is controlled by the possessor of the keys rather than the commercial status of the transaction. This modern result, while anomalous with the law in most American states, has deep historical roots. “If A. leaves a Chest lock’d with B. to be kept, and take away the Key, without acquainting B. with the Particulars, the Goods in the Chest are in the Possession of A., for since A. keeps the Key, the Goods are locked out of the Possession of B.” 1 BACON’S ABRIDGMENT, Bailment, 237, at ¶ A (1778), *citing* Co. Lit89.a, 4 Co 83 b. Doc. & Stud. 129.

¹³⁷ *Coggs v. Barnard*, 2 Ld. Ray 909, &c (B.R. Trin Term. Anno z Ann. Regina, 1703) (Holt, C.J., with Powell, Parvis, & Gould).

some system for retaining the security, and Ms. Shapiro has argued that the English mortgage is more like Jewish *gage*,¹³⁸ and even Plucknett notes the similarities in naming with the modern mortgage.¹³⁹

Bailment categories in Jewish law have entirely dissimilar names from their English counterparts, but the categories themselves and the applicable law is remarkably Jewish. Jewish law recognizes four categories of bailment situations: (1) *shomar chinam* (gratuitous or simple bailee); (2) *shomar shachar* (bailee for hire); (3) *shochar* (renter); and (4) *shoale* (borrower). English law devolves to the same three categories: When the bailment is for the benefit of the lender; when the bailment is for the benefit of the borrower; and where the bailment is for mutual benefit of the parties in the form of either a rental or a bailment for hire.¹⁴⁰

Standard of Care for Simple Bailments

The gratuitous bailee in early English and the *shomar chinam* in Jewish law are held only to a negligence standard and is not responsible for stolen or lost property. As provided in the Bible,¹⁴¹ a gratuitous bailee takes an oath that he has

¹³⁸ Judith A. Shapiro, Note, The Shetar's Effect on English Law-A Law of the Jews Becomes the Law of the Land, 71 GEO. LJ. 1179 (1983).

¹³⁹ Theodore F.T. Plucknett, CONCISE HISTORY OF THE COMMON LAW, AT 605 (5th ed., Little, Brown & Co. 1956).

¹⁴⁰ See, BLACK'S LAW DICTIONARY, AT 136-37 (7th Ed. 1999) [definitions of bailment, bailment for mutual benefit, gratuitous bailment].

¹⁴¹ Exodus 22:6-7.

not taken or been negligent with the property; he is then immune from payment.¹⁴² He may not use the deposited property for his own benefit.¹⁴³ Since the law presumes that the bailment is solely for the benefit of the bailor, the bailee is held to protect the property from his own damage, but his duty of care as to the actions of others is quite limited, and he is not responsible for stolen or lost property.¹⁴⁴

English laws follows the Jewish model as to what is variously called the “simple bailment” or a gratuitous bailment:

If a Man delivers Goods to another to be kept, or, which is all one, to be safely kept, the Bailee undertakes to keep them only from all Damage that arises from his own Negligence; and the Undertaking being only to keep them, he ought not to use them as though he had an Interest in them.¹⁴⁵

Standard of Care for Bailees for Hire

Almost as curious, the debate between categories is the same in early English law as it is in the Talmud. In addition to being responsible not to use the property and to protect it from his own negligence, a *shomar shachar*, or bailee for hire, in Jewish law has additional responsibilities for protecting the property from theft or

¹⁴² It should be noted that the power and persuasiveness of an oath was different than in present culture. The penalties for perjury were significant and permanent, including the fear of Divine retribution, and scholars and sages were sufficiently fearful of taking a false oath inadvertently that it was not uncommon for a scholar to pay the penalty rather than take the oath. Bava Metzia 2a [Ben Nannas argues that it is better for the parties to pay damages twice than to allow any party to take a false oath]; *see also*, Shavuot 45.

¹⁴³ Bava Metzia 29b.

¹⁴⁴ Exodus 22:6-7.

¹⁴⁵ 1 BACON’S ABRIDGMENT, Bailment, 237, at ¶ A (1778), *citing*, *Coggs v. Barnard*, 2 Ld. Ray. 909 & c. [Vide Holt’s Argument].

loss by third parties. The *shomar shachar* is not responsible for the natural death, broken limb, or breakage of the property, and his responsibility for theft excludes armed robbery and supervening criminal activity beyond his control.¹⁴⁶ The result is the same for the *shochar*, the renter.¹⁴⁷ The quotation above from Bacon's Abridgment about gratuitous bailees continues to note a different result breaking along the same policy lines for general bailment, also referred to as a bailee for hire:

But it was formerly held, that where Goods were bailed generally, that if those Goods, with others of the Bailee's, were stolen, though without his Default, that the Bailee should be responsible for them, there being a Warranty in Law annexed to all such Bailments.¹⁴⁸

Bacon's Abridgment distinguishes the results based on consideration paid for the bailment for hire:

It is held by some, that if A. commits Goods to B. to be kept, or, which is all one, to be safely kept, and they are stolen, that B. must answer the Value of them to A. Others have made a Distinction, that if B. had undertaken for a Price to keep them, that then he should have been bound to answer for them if they have been stolen, because there is a Consideration to found the Promise; but where no Reward is agreed on, there they say there can be no Consideration on which the Promise is built, and therefore a naked Promise which affords no Action . . .¹⁴⁹

¹⁴⁶ Exodus 22:10.

¹⁴⁷ Exodus 22:14.

¹⁴⁸ 1 BACON'S ABRIDGMENT, Bailment, 237, at ¶ A (1778), *citing* 4 Co. 83. *Southcote's Case*, But for this *vide* Co. Lit. 89.a. Cro. Eliz. 815. Kelw. 77. Sav. 74. Sid. 36. Rol. Abr. 3. Pl. 2. Bro. Tit. Bailment 7. Tit.; Detinue 35.

¹⁴⁹ *Ibid*, 241-42, at (D).

Borrowers:

The borrower, or *shoale*, in Jewish law is presumed to act for his own benefit, and his duties as a bailee are the highest. He becomes an insurer for most purposes, being responsible for the costs of replacement in the case of his own negligence, loss, theft, natural death, broken limbs, breakage, and even robbery. The borrower is excused only if the animal dies as a result of the purpose for which it was leased.¹⁵⁰

Early English law asks the same policy questions:

If a Man lends another his Sheep, Oxen, or his Cart, the Borrower hath a qualified property in them, according to the purposes for which they were borrowed; and by force of this loan they may be used reasonably for these Purposes and for the Time agreed on; and if they Perish in such Occupation, it is at the Peril of the Lender; but if they Perish in any other Manner, the Borrower must answer for them. . . . As to the borrowing of Things perishable, as Corn, Wine, Honey, or the like, a Man must from the Nature of the Thing have an absolute property in them, otherwise it would not supply the Uses for which it was lent, and therefore he is obliged to return something of the same Sort, the same in Quantity and Quality with what was borrowed.¹⁵¹

¹⁵⁰ Exodus 22:13-14. The rule is the same for borrowers and renters.

¹⁵¹ 1 BACON'S ABRIDGMENT, Bailment, 241, at ¶ C (1778), *citing* Doct. & Stud. 129. While reciting the same basic pattern of policy concerns, early Elizabethan English law may have moved the responsibility for natural death and accidents from the borrower to the lender: "The reason of these Several Cases is this, That when any Man borrows or hires a Thing, and only uses it in accordance with the Purposes of the Loan, that Contract bears him out from all Accidents that are consequent upon such Usage; for there is no Reason why the Borrower should no[t] have the Use of it according as the Owner had licensed and empowered him; and if any unavoidable Accident happen upon such a License, the Lender must impute it to the Folly of his own Permission; but if it happen through the Negligence of the Borrower, then it is fit he should answer for that whereby he becomes injurious to the Lender." *Ibid*, at (D), at 243. Our point is that the pattern of policy questions in the early English law matches its Jewish roots and does not match any Roman pattern.

Of almost equal interest is the pattern found in the quotation from Bacon's Abridgment referring to "Sheep, Oxen, or his Cart."¹⁵² In the quotation above, the words seem to be surplus. There is no explanation for why the case or the note about the case would refer to those particular property categories. But the same pattern of language is in Biblical and Talmudic analysis of bailment.¹⁵³ The Sages attributed special significance to each of the four categories named in the Torah.¹⁵⁴ Much of that significance seems to be lost to early English law, but the pattern of the terminology seems to carry through. Talmudic scholars will recognize the familiar formulation of the list including a small animal, a large animal, and a utensil, cloth, or other moveable, non-living chattel. While such a formulation sounds like mere poetic license to our modern ears, the Sages found great meaning in the words. Since the phrasing of the Mishnah and Torah were both considered perfectly parsed, extra words in the text required explanation. The explanation for this language, which seems to lose the fourth term during the analysis, is that the rule encompasses small animals used for food, large animals re-used for work, and goods that have an identifying mark on them. We note the unusual formulation here, because it appears to provide evidence that the writer(s) of the English case adopted the pattern of language from a similar source in Jewish law on the same topic of law even though they do not appear to be aware of the reasoning behind the

¹⁵² Ibid.

¹⁵³ *Cf.* Deuteronomy 22:1-3 [referring to oxen, ass, lamb, and garment].

¹⁵⁴ Bava Metzia 27a.

categories they recite. In the English formation, the three named chattels are equal examples of borrowed property that must be protected by the borrower.

LOST, MISLAID, AND ABANDONED PROPERTY

The distinctions between Roman and early English law, and the concomitant similarity to Jewish law, become more pronounced when we turn to lost, mislaid, and abandoned chattels. The available Roman model is limited to *usucapio*,¹⁵⁵

¹⁵⁵ Roman law also provided for treasure trove, but the results were different than either English law or Talmudic law. In Roman *thesauri inventio*, or treasure trove, “[a]t first, not the finder but the owner of the land was probably entitled. Hadrian gave it to the finder if it was on his own land, or if he found it by chance *in sacro aut in religioso loco*. But the finder who found treasure on another’s land by chance shared it with the owner of the land, even where the land belonged to the Emperor, or to the *Fiscus*, or to some city. If the finder found it when searching for it, the owner of the land took all. Later, the *Fiscus* shared with the finder what was found on lands belonging to the Emperor or the State or *in religioso loco*...” A.M. Prichard, *ROMAN PRIVATE LAW* 192 (3^d Ed. MacMillan, 1961). In English law, ownerless property in the ground is a royal prerogative: “The King hath a Prerogative in Treasure Trove, that is, Treasures of Gold and Silver which must be hid(den) in the Earth, and in which no Man hath a Property; but Treasures of Gold and Silver found on the Surface of the Earth, or found in the Sea, belong to the Finder.” 4 *BACON’S ABRIDGMENT*, Prerogative, 164, at ¶ 8 (1778), *citing*, 3 Inst. 133. Kitch. 80. Jewish law seems to follow Roman law when the Sages note that it is obvious that a wall filled with lost objects are divided equally between the finder and the landowner. Bava Metzia 26a. Using our rubric of seeking common patterns and motives, we might conclude that English treasure trove law started from a pre-existing Roman legal category, which was similar to the Jewish law on the point, and, in recognition of the fiscal needs of the Norman and Plantagenet monarchs, asserted royal prerogative. For reasons and with roots that we have not located, the English law of treasure trove seems to have applied to Jews in England in a biting manner. Under the Statute of Jewry, dating to Edward the Confessor (1042-1066), the possessions of all Jews in England were the prerogative of the king, following the English law of treasure trove. *SELECT PLEAS, STARRS, AND OTHER RECORDS FROM THE ROLLS OF THE EXCHEQUER OF THE JEWS* x (J.M. Rigg ed. & trans. 1902), *citing* *HOVEDEN* (Rolls Ser.) ii. 137, 231; *ANCIENT LAS OF ENGLAND*, ed. Thorpe, 1810, p. 195; Liebermann, *Uber die Leges Edward Confessoris* (1896), p. 66. Since this predated the growth of Jewish immigration to England after the Norman Conquest, it seems unlikely to have been rooted in Jewish law, but the Jewish arrival seems to

which could be asserted for moveable property after the passage of a year,¹⁵⁶ but did not generally apply.¹⁵⁷ Concurrent Jewish law¹⁵⁸ recognized distinctions in lost property between found chattels that belong to the finder immediately upon being found;¹⁵⁹ property that may be held by the finder while an effort is made to locate the true owner;¹⁶⁰ and property that the finder may not take.¹⁶¹ In both the Jewish

have in some way inspired the exclusively English royal prerogative of treasure trove.

¹⁵⁶ Of course, an owner of a thing could demand its return from a defendant who was somehow impeding plaintiff's possession by making a claim *vindicatio*, Jolowicz, above, at 142, and might even file a personal action to punish the recalcitrant thief, *ibid*, at 215. But, only a plaintiff with title ownership could claim relief, for there was no concept of possessory rights to protect the bailee or finder, *ibid*, at 142-43.

¹⁵⁷ "If the valuables had been lost, not secreted, and the owner were intraceable, the rules of treasure trove would not apply. Probably, the finder just kept a possession that was better than anyone else's: *usucapio* should not have been possible for him because of the absence of *justus titulus*." A.M. Prichard, ROMAN PRIVATE LAW 192 (3^d Ed. MacMillan, 1961). The possessor could not establish facts from which one could infer an intention to transfer ownership. *See*, William A. Hunter, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE, 138 (1876) http://books.google.com/books?id=bcEoAAAAYAAJ&pg=RA1-PA138&lpg=RA1-PA138&dq=justus+titulus&source=bl&ots=zg8dvZU2eb&sig=GDHxoizrtCicGrzh4riOMw-GP9g&hl=en&ei=eZShSfmQGp6Dtwfmhcn6DA&sa=X&oi=book_result&resnum=5&ct=result

¹⁵⁸ Rules set forth in the Mishnah are at least as old as Roman times. *See*, note 38, above.

¹⁵⁹ Bava Metzia 21a; Shulchan Arukh, Hoshen Mishpat 262:7.

¹⁶⁰ Bava Metzia 24a.

¹⁶¹ Bava Metzia 25b.

and the early English law, bailment and lost property are related concepts.¹⁶² The finder of lost goods that contain an identifying mark, like a gratuitous bailee, may not benefit from the found goods, unless the benefit is a benefit to the lost item, itself. Thus, a found textile may be spread out on display to air it out or unfold it, but it may not be put out when guests are expected.¹⁶³ But a finder of a perishable chattel that does not support itself by its work is instructed to sell the chattel and restore the money instead of the chattel to the true owner if they appear.¹⁶⁴

It is in this area, with no parallel areas of Roman law, that we find similarities to English and American law of lost, abandoned, mislaid, and intentionally stored property.

Lost and Mislaid Property

English law parallels Jewish law in the distinction between lost and mislaid property, and there is no Roman corollary. Mislaid property cannot be kept by the finder. Where the property is exclusively private, any guests or employees who come upon the property have no right to items found there,¹⁶⁵ unless the owner of the property does not exercise dominion over the property, and/or leases it to

¹⁶² Bava Metziah 29a, Steinsaltz Edition translation, Volume II, Part II, notes, at 131 (Random House, NY, 1990).

¹⁶³ Pesachim 26b.

¹⁶⁴ Bava Metziah 28b.

¹⁶⁵ *South Staffordshire Water Co. v. Sharman*, 2 QB 44 (1896) [pool cleaners who find a ring].

strangers.¹⁶⁶ The same distinction appears in the Mishnah: “If one found objects [in various settings in the inside half of the wall of a house], they belong to the owner of the house; if he was in the habit of renting the house to others, even if the objects are found inside the house, these belong to the finder.”¹⁶⁷ Jewish law also makes a distinction between objects that are found in a circumstance that implies that the loser was dealing with a shopkeeper when he mislaid the property and might look to the shopkeeper for its return.¹⁶⁸ The rule is illustrated in a ruling that:

. . . small sheaves in the public domain belong to the finder; in a private domain, if they are found lying in a manner indicating that they fell accidentally, they belong to the finder; in a private domain, if they were found lying in a manner indicating that they were placed down, the finder takes them and announces them.¹⁶⁹

Another Mishnah defines right to possession of lost property based on whether the objects are found in an old wall, where they were likely lost and abandoned by the owner, or a new wall, and, if in the new wall, whether they were found on the outer half in a more publicly accessible domain or in the inside half, where they become the property of the landowner.¹⁷⁰

¹⁶⁶ *Hannah v. Peel* [1945] KB 509 [soldier finds some jewelry in house never occupied by owner]; *McAvoy v. Medina*, 93 Mass. (11 Allen) 548, 87 Am.Dec. 733 (1866) [person mislaid billfold on counter of barber shop and would probably have realized this]; distinguished from *Bridges v. Hawkesworth*, 21 LJQB 75 (1851), in that this was not lost but mislaid.

¹⁶⁷ Bava Metzia 25b.

¹⁶⁸ Bava Metzia 26b-27a.

¹⁶⁹ Bava Metzia 23a.

¹⁷⁰ Bava Metzia 25b.

Ye'ush and Objective Abandonment replaced by Trover

The Mishnah seeks to define lost property from the equally Roman notion that lost property cannot be acquired unless it is utterly abandoned and thereby ownerless. That abandonment in Jewish law is called *ye'ush*. The Mishnah determines *ye'ush* based on whether the goods are presumed to be abandoned based on whether the goods appear to have been placed intentionally or fallen accidentally,¹⁷¹ and whether they have an identifying mark on them, a *siman*.¹⁷² Jewish law creates a “reasonable person,” objective definition for when property is to be considered abandoned by its prior owner even if the owner is standing and shouting that he wants his money back.¹⁷³ Scattered coins belong to the finder at once,¹⁷⁴ even if they are found in assembly halls, study halls, or marketplaces,¹⁷⁵ but coins in a bag must be announced and returned to the owner.¹⁷⁶ A parallel example is found in ancient English law: “It is in one Case said, that an Action of Trover does

¹⁷¹ Bava Metzia 21a;

¹⁷² Bava Metzia 21b.

¹⁷³ Bava Metzia 24b; TALMUD BAVLI, Tractate Bava Metzia, Vol. I, notes 20-21, at 24b2, (Schottenstein ed. 2001).

¹⁷⁴ Bava Metzia 21a [*ma'ot miphozahroth*].

¹⁷⁵ *Ibid*, at 21b, even where they might be presumed to be charity for the poor or the property of the shopkeepers, who might not yet be aware that the coins are lost. *See also, ibid*, at 24a.

¹⁷⁶ Bava Metzia 24b [*ma'ot bech'eat*].

not lie for Money, unless it were in a Bag at the Time of the Conversion.”¹⁷⁷ In early British law, the title to property is determined by the objective circumstances of its arrival in the possession of the finder, rather than on the subjective state of title.¹⁷⁸

In the Jewish search for an objective definition of *ye'ush*, Rava¹⁷⁹ and Abaye¹⁸⁰ engage in a famous debate running through multiple factual settings to determine the subjective intent of the owner to abandon.¹⁸¹ The Sages argue about whether the loser knew that the object was lost at the time it was found, or whether

¹⁷⁷ 5 BACON'S ABRIDGMENT, Trover, 264, at ¶ (D)(17) (1778), *citing*, Cro.Eliz.661. *Holiday v. Hicks*.

¹⁷⁸ “It is laid down that if *J.S.* take Goods of *J.N.* in order to prevent their being stolen or damaged, an Action of Trover lies; because the Loss would not, if either of these Things had happened, have been irreparable. But if *J.S.* take Goods of *J.N.* which are in Danger of being destroyed by fire or otherwise, in order to preserve them, this Action does not lie, because the loss would in such Case have been irreparable.” 5 BACON'S ABRIDGMENT, Trover, 265, at ¶ (D)(30) (1778), *citing* Bro. Tresp. Pl. 213.

¹⁷⁹ Rava was one of the greatest sages of the Babylonian Talmud from the Fourth Generation of the Amorim. He lived around 313 C.E. and was the founder of an academy at Mechoza. A contemporary of Rabbi Abaye, whom he succeeded at the competing academy at Pumbedita, they are often locked in academic debate about commercial legal issues. Rava, who made his living as an expert, kosher butcher in an era during which scholars were not paid for their religious or community leadership duties, often takes a position that is more pragmatic commercially, while Abaye often seems to use his training in formal logic to promote a formal, logically derived approach. Subsequent Jewish law follows Rava in his debates with Abaye in all but six cases.

¹⁸⁰ Abaye was a contemporary of Rava and the leader of the academy at Pumbedita before Rava was appointed to succeed him posthumously. *See*, note 43, above.

¹⁸¹ Bava Metzia 21b.

the owner intentionally placed the objects where they were found,¹⁸² and can thereby be presumed to have abandoned them. Using the concept of presumptive *ye'ush*, Jewish law identifies circumstances of abandonment when the owner may be unaware that the property has been lost. Where a flood has washed away beams, wood, or stones, and deposited them in someone else's field, they belong to the finder,¹⁸³ unless they are salvageable.¹⁸⁴ If the property is abandoned, it is taken by the finder at once; if it is not presumed abandoned, it must be preserved and protected while it is announced.

Early English law does not track Jewish law in the complex distinctions made between *ye'ush* and property that must be announced. All lost property passes to the finder, and there is no duty to seek the prior owner or announce. But, early British law created a cause of action named trover that developed in the royal courts to recognize and define the rights of non-title-holding possessors, including scattered coins, washed away beams, and other property that Jewish law would transfer unconditionally. In Bracton's time, the relevant cause of action might have been trespass, but trespass in the king's court derived from claims *vi et armis* (force

¹⁸² Thus, figs that had been cut and set out along the road or a field so they could dry and cure are not abandoned, but carobs or olives found in the same place are lost and presumed abandoned. Bava Metzia 21b.

¹⁸³ Bava Metzia 22a.

¹⁸⁴ Bava Metzia 22a; TALMUD BAVLI, Tractate Bava Metzia, Vol. I, note 7, at 22a1, (Schottenstein ed. 2001).

of arms) or *contra pacem* (breach of the peace).¹⁸⁵ Finders, bailees, and borrowers did not present situations in which the claimant owned the property and the possessor had come into possession wrongly. Such claims had been addressed in manorial courts by pleading a larceny but leaving out the words of felony in an action *de re adirata*.¹⁸⁶ Even then, the claim is proprietary in nature; that is, the plaintiff *clamat proprietatum*, — is the owner of the object sought — and he may claim against an innocent purchaser.¹⁸⁷ By 1294, we have clear evidence of the use of detinue in the king's courts to bring an action against a presumably innocent finder.¹⁸⁸ Detinue is initially limited to owner-claimants, but broadens enough to include claims for the non-delivery of purchased goods and includes no defense that the plaintiff is not the owner.¹⁸⁹ Professor Ibbetson suggests this branch of detinue is based on the *assumpsit* of a duty by the defendant,¹⁹⁰ and it occurred in the mid-14th to mid-15th century.¹⁹¹ Regardless, the cause remained ineffective, because

¹⁸⁵ *See*, Plucknett, above, at 372.

¹⁸⁶ *Ibid*, at 374.

¹⁸⁷ David J. Ibbetson, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS, at note 43, at 18, and accompanying text (Oxford, 1999) <<http://books.google.com/books?id=UiKIfof-xe8C>>.

¹⁸⁸ Plucknett, above, at 374.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Assumpsit* is an early English cause of action that, in many cases can be equated with the assumption of a duty between private parties, as in our modern concept of contracts.

¹⁹¹ Ibbetson, above, note 68, at 107, *citing* YBT.29 Edw III f.38, YBT.33 Hen VI f.26 pl. 12.

either side could win its claim by an even-then anachronistic process called wager of law, in which teams of character witnesses, called compurgators, could swear to the honesty of the party as a substitute for a factual trial.¹⁹² Further, detinue remained less desirable because it was unavailable or useless if the property had depreciated or appreciated in value.¹⁹³ Another branch of detinue remained for proprietary claims, as when an owner claimed from an innocent finder.¹⁹⁴

Around this time, an alternative cause named trover and based on the notion of assumpsit developed.¹⁹⁵ Assumpsit may be relevant to a voluntary bailee, but it should be of little help against a finder, who, at least overtly, has assumed no duty. Jewish law discusses this problem explicitly., defining finding as a presumptive employment and creating a mechanism by which a finder could demand higher wages from the owner for returning a lost object in advance of his undertaking to pick it up.¹⁹⁶ If a finder has no duty to undertake to return lost property to its owner, then the act of taking the property might be imbued with the characteristics of an undertaking. Similarly, this new kind of detinue, in which the assumpsit is presumed from the finding of the property and the proprietary rights of the

¹⁹² Plucknett, above, at 374.

¹⁹³ Ibbetson, above, at note 73, at 108, *citing* Simpson, Action on the Case for Conversion, 75 LQR 364, 375 (1959).

¹⁹⁴ Ibbetson, above, at 107.

¹⁹⁵ Plucknett, above, 372-75.

¹⁹⁶ Bava Metzia 31b; Shulchan Arukh, Choshen Mishpat 265:1.

claimant are irrelevant, takes form as trover.¹⁹⁷ Ibbetson suggests that trover reaches its final form, in which the plaintiff was not required to plead how the goods had arrived in the defendant's possession, but only that defendant had found it and plaintiff had lost it, sometime in the mid-14th to mid-15th centuries.¹⁹⁸ The derivation of the cause looks like Jewish law, but that would place it between 60 and 160 years after the expulsion of the Jews in 1290.¹⁹⁹

Early English law requires no effort by the finder to locate the prior possessor, but it takes the responsibility to protect the prior owner to an additional level by ranking the rights of possession into superior and inferior title and passing title immediately, subject to later disseisin. At English common law, the finder stands in the shoes of the prior possessor as to the subsequent possessor:

The Finder of a Jewel, although he do(es) not acquire by the Finding a general Property therein, may maintain an Action of Trover against a Stranger who converts it;²⁰⁰ because, as a Finder is answerable for the Jewel to the Person in whom the general Property

¹⁹⁷ Ibbetson, above, at 107-08.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ An action in Trover, from the French word trouver "to find," see, 5 BACON'S ABRIDGMENT, Trover, 256 (1778), would be for the value of the item, as distinguished from an action for the return of the actual item, which would be undertaken by Replevin, or for the more liberally computed damages for having taken or retained the property of another, which would be by Conversion or Trespass to Chattels.

is, he has a special Property therein. He has moreover a Right to the Jewel as against every Person, except the Person who lost it.²⁰¹

In both the case of Jewish law with property that must be announced and British lost property, the finder becomes a bailee. In Jewish law, he must announce the find for three festivals, which is the same as one year,²⁰² and, until the year has passed, the finder stands in the role of a bailee.²⁰³

The distinction between bailment for hire and gratuitous bailment in Jewish law is illustrated by an ancient debate in the Talmud. There is an argument between Rabbah, Rav Yosef, and Rabbi Tarfon that continues through the ages as to whether the finder of perishable and replaceable goods (compared to working animals) is a gratuitous bailee (*shomer chinam*), a bailee for hire (*shomer sachar*), or, even, a borrower (*shoayl*). At stake is the determination of when a finder can use the proceeds from selling the found object and how long he must protect those funds without using them. Parallel with those rights are the responsibilities of the finder when and if the loser re-appears and makes a claim. If Rav Yosef's position, which is followed much during the Middle Ages by Rif,²⁰⁴ and the Rambam,²⁰⁵ prevails,

²⁰¹ 5 BACON'S ABRIDGMENT, Trover, 262, at ¶ (C)(29) (1778), *citing* the seminal case, *Armory v. Delamire*.

²⁰² Bava Metziah 28a.

²⁰³ Bava Metziah 29a.

²⁰⁴ Isaac Ben Jacob al-Fasi, (1013-1103 C.E.). "The chief work of Alfasi [s.i.c.] is his 'Halakot,' often referred to as the 'Rif' (R. Isaac Fasi) from the initials of Alfasi's name. Rabad described it as 'the little Talmud,' because it contains the essence of the Talmud in an abridged form. In the first place, Alfasi eliminated from the Talmud all haggadic comments; that is, the second of its two constituent elements

then, as a bailment for hire, the found item may be used by the finder. The finder, like a paid bailee, is not responsible for the natural death, broken limb, breakage, ordinary wear and tear, or loss of the item in an armed robbery, but the finder is responsible for guarding the property, and is liable for the value of the item if it is stolen, lost, or broken by his negligence or malfeasance. The influential Shulchan

(Halakah and Haggadah, or Law and Homily); in accordance with the title of the book, he retains only the Halakah. He gives the halakic discussions of the Gemara in a condensed form, adding occasionally criticisms on the interpretations and decisions given by post-Talmudic authorities." *See*, JEWISH ENCYCLOPEDIA, Alfasi, Isaac Ben Jacob, <<http://www.jewishencyclopedia.com/view.jsp?artid=1191&letter=A>> (1905)

²⁰⁵ Moses ben Maimon, Maimonides (1135-1204 C.E.). "[K]nown in Arabic literature as Abu 'Imran Musa ben Maimun ibn 'Abd Allah. The history of the "second Moses," as Maimonides came to be called, is overlaid with fable. According to some of his biographers, he evinced in boyhood a marked disinclination for study. This, however, is highly improbable, for the works produced by him in his early manhood show that their author had not passed his youth in idleness. Moses ben Maimon, or Maimonides, received his rabbinical instruction at the hands of his father, Maimon, himself a scholar of high merit, and was placed at an early age under the guidance of the most distinguished Arabic masters, who initiated him in all the branches of the learning of that time. Moses was only thirteen years old when Cordova fell into the hands of the fanatical Almohades, and Maimon and all his coreligionists there were compelled to choose between Islam and exile. Maimon and his family chose the latter course, and for twelve years led a nomadic life, wandering hither and thither in Spain. In 1160 they settled at Fez, where, unknown to the authorities, they hoped to pass as Moslems. This dual life, however, became increasingly dangerous. Maimonides' reputation was steadily growing, and the authorities began to inquire into the religious disposition of this highlygifted young man. He was even charged by an informer with the crime of having relapsed from Islam, and, but for the intercession of a Moslem friend, the poet and theologian Abu al-'Arab alMu'ishah, he would have shared the fate of his friend Judah ibn Shoshan, who had shortly before been executed on a similar charge. These circumstances caused the members of Maimonides' family to leave Fez. In 1165 they embarked, went to Acre, to Jerusalem, and then to Fostat (Cairo), where they settled." *See*, JEWISH ENCYCLOPEDIA, Moses ben Maimon, <<http://www.jewishencyclopedia.com/view.jsp?artid=905&letter=M&search=Rambam>>

Aruch, compiled by Joseph Caro in the Sixteenth Century, follows this position.²⁰⁶ If the sage, Rabbah, as well as Rema,²⁰⁷ the Tosafot,²⁰⁸ and Rosh²⁰⁹ from the Middle

²⁰⁶ SHULCHAN ARUCKH, HOSHEN Mishpat 267:16.

²⁰⁷ Moses ben Israel Isserles, (1520-1572 C.E.). "Isserles' writings may be divided into two classes of works: (1) halakic, and (2) philosophical, cabalistic, exegetical, and scientific. It is on the former that his great reputation rests. His zeal for the Law and his vindication of Ashkenazic customs spread his fame far and wide. Indeed, he may with justice be called the Ashkenazic codifier; for he was to the Ashkenazim what Caro was to the Sephardim. Like Caro, he wrote a commentary to the Arba' Turim, entitled 'Darke Mosheh,' of which two parts were printed (i., Fürth, 1760; ii., Sulzbach, 1692). An abridgment of this work, entitled 'Kizzur Darke Mosheh,' was published with the text in Venice, 1593. This commentary contains a severe criticism of the 'Bet Yosef.' It is also the source of Isserles' other work, 'Mappah,' which is both a criticism of and a supplement to Caro's Shulhan 'Aruk. Isserles saw that Caro's 'table' was not sufficiently 'prepared'; for Caro as a Sephardi had neglected the Ashkenazic minhagim. He therefore provided the Shulhan 'Aruk (= 'Prepared Table') with a 'Mappah' (= 'Table-Cloth'), consisting of notes ('haggahot') inserted in Caro's text. These notes first appeared in the Cracow edition of the Shulhan 'Aruk (1571), in Rashi type to distinguish them from the text of Caro." See, JEWISH ENCYCLOPEDIA, Isserles, Moses ben Israel (ReMA) <<http://www.jewishencyclopedia.com/view.jsp?artid=366&letter=I&search=Rema>> (1905).

²⁰⁸ "Critical and explanatory glosses on the Talmud, printed, in almost all editions, on the outer margin and opposite Rashi's notes. The authors of the Tosafot are known as Tosafists (*ba'ale ha-tosafot*). For what reason these glosses are called 'tosafot' is a matter of dispute among modern scholars. Many of them, including Graetz, think the glosses are so called as additions to Rashi's commentary on the Talmud. In fact, the period of the Tosafot began immediately after Rashi had written his commentary; the first tosafists were Rashi's sons-in-law and grandsons, and the Tosafot consist mainly of strictures on Rashi's commentary. Others, especially Weiss, object that many tosafot, particularly those of Isaiah di Trani, have no reference to Rashi. Weiss, followed by other scholars, asserts that 'tosafot' means 'additions' to the Talmud, that is to say, they are an extension and development of the Talmud. For just as the Gemara is a critical and analytical commentary on the Mishnah, so are the Tosafot critical and analytical glosses on those two parts of the Talmud." See, JEWISH ENCYCLOPEDIA, Tosafot <<http://www.jewishencyclopedia.com/view.jsp?artid=276&letter=T&search=Tosafot>> (1905).

Ages, are followed, then the finder is treated as a gratuitous bailee (*shomer chinam*), and may not use the property for their own use, but they are only responsible for taking an oath that they did not take it themselves or destroy it by negligence. Rabbi Tarfon would treat the found property as property borrowed from the loser, making the finder responsible for unavoidable accidents.²¹⁰

Even though the model of prior and subsequent possessors does not appear in Jewish law, the separation of possessory rights from title rights is found in Jewish law and not in Roman law. Many of the British hornbook cases sound like fact settings found in the Talmud, and, reflecting the Talmudic dispute, the rule allowing the finder to use found items as against all but the prior possessor is similarly contested. Like both Jewish and Roman law, English law is concerned whether a finder may use a found object if, by using the object, it will be devalued.

If a Man, who found Apparel, wear it, this is a Conversion; the wearing of the Apparel being an unlawful Intermeddling therewith. But if, by Reason of Negligence in keeping such Apparel, it be eaten by Moths, this is not a Conversion; because the Injury does not arise from a Malfeasance. And there is some Doubt whether an Action upon the Case does in such Case lie; for it is laid down in divers(e) Books, that the Person, who came to the Possession of the Goods of another by Finding, is not obliged to take to(o) much Care of them, as if he had come to the Possession thereof by Delivery. But it is in one Book laid down, that an Action upon the Case lies for Negligence in keeping

²⁰⁹ Asher ben Jehiel. “Eminent Talmudist; born in western Germany about 1250; died in Toledo, Spain, 1328.” See, JEWISH ENCYCLOPEDIA, Asher ben Jehiel < <http://www.jewishencyclopedia.com/view.jsp?artid=1930&letter=A> > (1905).

²¹⁰ Bava Metzia 29a, Steinsaltz Edition translation, Volume II, Part II, notes, at 131-34 (Random House, NY, 1990).

Goods which were found; inasmuch as, it is the Duty of the Finder of Goods to keep them safely for the Owner.²¹¹

This example shows the kind of linguistic pattern that we might cite in suggesting a causal connection. While there are many examples of different types of goods that would have the same rule of law as “apparel,” the word commonly translated as “garment” appears 192 times in Bava Metzia,²¹² and, regardless of the general rule of finders in *Armory v. Delamire*, the rule as to apparel requires that the garment not be used. In the Talmud, the use of “garment” is attributed to the need for the law to treat goods with an identifying mark, a *siman*, differently.²¹³

English law also follows the Talmudic result for a working beast:

If *J.S.* who lawfully distrained a Beast, work it, this is a Conversion; because the working of the Beast is an unlawful Intermeddling therewith. But if *J.S.* after having lawfully distrained a Milch Cow belonging to *J.N.* milk it, this is not a Conversion; for as milking the Cow, which prevents its being spoiled, is for the Benefit of *J.N.* it is lawful to milk it. If *J.S.* who lawfully distrained a Beast, impound it in a proper Pound, this is not Conversion; because he does nothing more than put the Beast into the Custody of the Law.²¹⁴

The result tracks the Talmudic debate, in which a beast which eats but doesn't work

²¹¹ 5 BACON'S ABRIDGMENT, Trover, 258-59, at ¶¶ (B)(21-24) (1778). Citing, 1 Leon. 224. *Waldgrave v. Ogden*. Cro.Eliz 219. 2 Bulstr. 312; Bro. Detin. Pl.40. 1 Leon. 223, 224. Owen 141. Cro.Eliz.219. Cf., notes 98-100, and accompanying text [regardless of the “finder's keepers” rule of *Armory v. Delamire*, Jewish law seems to apply to a lost garment].

²¹² As counted by computer from Bava Metzia, COMPLETE SONCINO ENGLISH TRANSLATION OF THE BABYLONIAN TALMUD (Judaica Press, 2005 [on-line], c.1996).

²¹³ Bava Metzia 27a.

²¹⁴ 5 BACON'S ABRIDGMENT, Trover, 258, at ¶¶ (B)(14-16) (1778), citing, Cro. Ja. 148. *Bagshaw v. Goward*. Brownl. 5; 2 Mod. 244.

may be sold, but a beast that produces to cover its costs may be used by the finder.²¹⁵ Even though English law seems to pass title to lost property immediately subject to a subsequent disseisin if the prior possessor makes a claim, in specific cases matching Talmudic cases, the finder is permitted to keep, but is limited in use, of the found property.

Similarities in Liabilities

A comparison of liabilities is equally interesting. Again, Roman law provides no guidance. In Roman law, the finder has neither rights nor responsibilities towards found property. As in Jewish law, the finder in English law is responsible to the owner, but the duties are limited to that of a gratuitous bailee or a bailee for hire.

If Goods, in order to prevent the sinking of a Ship, are thrown by the Master of the Ship into the Sea, this is not a Conversion; because, so far from disposing of the Goods as if they were his own, the Master only does what is necessary for the Preservation of the Ship and the Lives of the Persons on Board.”²¹⁶ “An Action of Trover does not lie against the Saver of Goods thrown on Shore, which were Part of the Cargo of a Ship that had been wrecked, unless a Satisfaction have been made or tendered for the Trouble or Expense of saving them; it being highly reasonable, that the Party who has saved Goods, and has perhaps done it at the Peril of his Life, should have a Lien upon the Goods for his Trouble or Expense.”²¹⁷

²¹⁵ Bava Metzia 28b.

²¹⁶ 5 BACON’S ABRIDGMENT, Trover, 258, at ¶ (B)(9) (1778), *citing*, *Bird v. Astcock*.

²¹⁷ 5 BACON’S ABRIDGMENT, Trover, 270, at ¶ (E)(39) (1778), *citing*, Ld. Raym. 393, *Hartford v. Jones*.

As in Jewish law,²¹⁸ the finder in English law is generally not responsible for damages beyond the value of the property. “If *J.S.* who came to the Possession of the Goods of *J.N.* by Finding, lose them, or they be taken from him, *J.S.* is not guilty of a Conversion; because he does not in either Case dispose of the Goods as if they were his own.”²¹⁹ But, the intentional refusal to deliver to his prior possessor, the loser of the item, creates a cause of action for more than trover.²²⁰ “If *J.S.* who came to the Possession of Goods the Property of *J.N.* by Finding, do(es) not absolutely refuse to deliver the Goods to *J.N.* and do(es) only say; that he does not know whether *J.N.* be the Owner of them, this is not a Conversion.”²²¹ A comparison between Jewish and English law provides evidence of the causal linkage between the remainder of personal property law and the presence of the Jews in England from 1066-1290, for the English legal theory that would permit such damages would

²¹⁸ Jewish law provides for four and five times damages only if a thief steals an ox or sheep and slaughters it. Exodus 21:37. One who robs his neighbor pays the value stolen plus a fine of one-fifth. Leviticus 5:21-24. Otherwise, damages at Jewish law, other than personal injury damages, are limited to the value of the property at the time of the taking.

²¹⁹ 5 BACON’S ABRIDGMENT, Trover, 257, at ¶ (B)(8) (1778), *citing* 1 Leon. 223. *Vandrink v. Archer*, 1 Roll. Abr. 6. L. pl. 4. Bro. Detin. Pl. 40.

²²⁰ An action for trover or for detinue seeks return of the item or its value, and implies no malfeasance. Conversion is equivalent to a civil allegation of theft, and implies malfeasance. Conversion may have little role in English law, because the cause was not created until after the Edwardian expulsion.

²²¹ 5 BACON’S ABRIDGMENT, Trover, 259, at ¶ (B)(28) (1778), *citing*, Bulst. 310. *Isaac v. Clark*, 2 Mod. 245..

not be developed until 1348,²²² after the departure of the Jews. In the area of lost and found property, as well as bailment, there was no useful Roman model, and English law was both exposed to and seems to track Jewish law.

CONCLUSION

We have compiled and reviewed prior writings attributing the roots of English property law to Jewish influences. Attributing modern property law exclusively to antecedents in Roman law, as was common a generation ago, is not supportable. There were no antecedents in Roman law for bailment, lost, or mislaid property, and the devices of uses and servitudes were inadequate for dealing with mercantile transactions in crops or other goods severed from the land. Jewish law provided a rich source for making the transition from feudal society to commercial society. There was a period of approximately 224 years in which a Jewish presence was active in England, and it was during that same time period when medieval English law developed causes of action central to the transition to mercantile society. The absence of a viable Roman law antecedent probably motivated the selection of Jewish legal principles to appear in the modern definitions of personal property and the duties of citizens to care for the property interests of others. For whatever motivation, we can trace clear similarities in the language and policy patterns found in English law from their likely Jewish roots in areas involving chattels. The linkages suggested in the literature to real property, where the policy motives were quite different during the medieval Jewish presence in England, seem

²²² Theodore F.T. Plucknett, *CONCISE HISTORY OF THE COMMON LAW*, at 469-70.

more attenuated. Indeed, we find ample antecedent patterns in Roman law for the formation of post-Norman English law regarding transfers of property, servitudes and pledges, and prescriptions on land. In these areas, there may be some question about a blending of Jewish practices with the Roman antecedents, but it seems more problematic to suggest plenary Jewish roots. Early Jewish law was developing during the same time as Roman law, and it is natural to expect some similarities between them, as we have seen.

The contribution of Jewish law to the root definitions of early English personal property law is not to be understated in its significance. One of the most fundamental indicators of the social interactions within society is the way leading citizens hold, use, and alienate property. In modern parlance, the possession and alienation of property defines the difference between communism, socialism, and capitalism. In historical terms, the transfer of property defines the difference between feudal enfeoffment and modern brokerage and permits the notion of universal equality of opportunity. How we treat the rights and duties of possessors of property defines the social bonds of society, which is why Property is usually a first year law course, and it is why Talmudic study often starts with Bava Metzia chapters II and III.