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THE ORIGIN OF THE COMMON-LAW WARRANTY OF REAL PROPERTY AND OF THE INCHOATE RIGHT OF DOWER

JACOB J. RABINOWITZ

I. ORIGIN AND PURPOSE OF THE ENGLISH WARRANTY CLAUSE

In his article *The Gage of Land in Medieval England*,¹ Hazeltine includes warranty of real property among the obligations which, in medieval England, gave the obligee an in rem charge upon the obligor's property. When a parcel of real property was conveyed with warranty, all other real property remaining in the hands of the grantor became bound for the "acquittance defence and warranty" of the grantee, and this charge was not affected by a transfer of the property to a third party. How this came about, that is, how the grantor's personal obligation to "warrant defend and acquit" the grantee became a charge upon his property, even in the hands of an alinee, is not quite clear.

Nor is this the only feature of the early law of warranty which remains unexplained. In fact, the origin of the English warranty clause itself has never been satisfactorily explained. Pollock and Maitland are in accord with the opinion expressed by Blackstone that warranty was introduced for the purpose of barring the heir of the grantor from denying the validity of his ancestor's grant, made without his, the heir's, consent. They believe that this occurred about the year 1200 when we find that the heir's consent was no longer considered necessary to a valid transfer. To quote from their *History of English Law*:² "Blackstone, Comment. ii, 301 says that express warranties were introduced 'in order to evade the strictness of the feodal doctrine of non-alienation without the consent of the heir.' This, though the word feodal is out of place, we believe to be true. The clause of warranty becomes a normal part of the charter of feoffment about the year 1200."

There are, however, several difficulties in this explanation. In the first place, an examination of a large number of twelfth century charters will reveal that, more often than not, these charters, too, contain warranty clauses.³

³See e. g., 9 British Academy, Records of Social and Economic History, Records of the Templars in England in the 12th Century 168-9, 245, 257, 259, 275; Ramsey Cartulary, Public Records Office, Chronicles and Memorials; no. 79, pp. 30, 150; 17 Pipe Roll Society Publ. (1195) 26, 47, 59, 62. Furthermore, in 17 Pipe Roll Society Publ. 157-8 reference is made to the action of *warrantia cartae*, which was an action for the enforcement of a warranty, in connection with the levying of fines in
Secondly, a warranty clause is contained in numerous twelfth-century conveyances by religious houses in which there could be no objection raised by an heir. Finally, if the purpose of the warranty clause had been to bar the heir, it would not have taken the form it took. It would have followed the old clauses in the deeds of the Frankish period on the continent and of the Anglo-Saxon period in England. These clauses would have been most fitting for the purpose of barring the heir from contesting the validity of a transfer by his ancestor. They attack the problem directly and say, in so many words, that the heir shall not impugn the transfer, whereas the English warranty clause of the thirteenth century accomplishes this purpose by indirection, by imposing upon the heir the positive duty of warranting his ancestor's grant, from which the negative duty of refraining from attack upon it flows.

The writer proposes to show that the classical English warranty clause was copied by the English from the Jews, and that it answered a pressing need which arose when the Jews introduced new security devices into England.

_Necessity for the Warranty Device._

The form of security which was most frequently used by the Jews in England was known as the "Jewish gage." This form of security was, as Pollock and Maitland point out, a completely novel institution in England, in that it gave rights in land to a creditor who was not in possession of the land. It was a general lien in favor of the creditor upon all the real property owned by the debtor at the time the debt was incurred. By virtue of this lien the creditor could follow the property into the hands of an alienee who acquired the property after the lien attached to it. Land in England thus

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4See _e.g._, _Ramsey Cartulary_ 150 (a conveyance by the Abbot of Ramsey, made between the years 1133 and 1160); _Records of the Templars_ 245 (an exchange of land between the Templars and Kirkstead Abbey, made in 1161).

5See _Cozzi CONTRIBUZIONI_ 71f. The following is a typical clause: "Et si quis vero, aut ego ipsi, aut aliquid de propinquibus meis, vel qualibet extranea persona, qui contra hanc vindicionem quem ego bona voluntate fieri rogavi, agere conaverit, inferit inter tibi et fisco soledus tanta causas atque exsolvat, et quod repetit vindicare non valeat et haec vindicio atque voluntas mea perenni tempore firma permaniat."

6See _Kemble, Codex Diplomaticus_, Introd. 1xiii ff.

7_1_ _Pollock & Maitland, loc. cit. supra note 2, at 473; _2_ id at 123; Hazeltine, _loc. cit._ supra note 1.

8_1_ _Pollock & Maitland, op. cit. supra note 2, at 115.

9See _Selden Society Publ., Select Pleas Charters and Other Records from the Exchequer of the Jews_ (1901) 18, 53, 63.
became burdened with invisible liens and charges. This situation called for some such device as a warranty when property was transferred by one party to another. For, if the land may be burdened with invisible charges while it remains in the grantor's possession, the grantee will inevitably demand some sort of protection against the risk of being evicted by one of the grantor's creditors. The Jews, who brought about this situation, had a remedy ready for it in the form of an all-embracing warranty clause which, as we shall see later, had been known to them for many centuries prior to their settlement in England, and was used by them in England as elsewhere in every transaction involving a sale of real property.

So much by way of circumstantial evidence. Fortunately, however, we need not rely upon this type of evidence alone. The English warranty clause, in form as well as in substance, bears unmistakable signs of its Jewish origin, and, through the Jews, some of its elements may be traced to remote antiquity.

**Development of the Jewish Warranty Formula**

The standard formula of the medieval English warranty clause reads: "Ego et heredes et assignati mei warrantizabimus acquietabimus et defendemus predicto . . . et heredibus et assignatis suis contra omnes homines." Sometimes the words "et foeminas" are added, and at other times the words "Christianos et Judeos" are further added, so that the last phrase in the clause reads: . . . "Contra omnes homines et foeminas, Christianos et Judeos."

In order to trace the origin and ascertain the significance of each of the words and phrases in the above formula it will be necessary to review briefly the history of warranty of real property, beginning with the Assyro-Babylonian tablets, through the Aramaic and Demotic papyri found in Egypt, through the Talmud, and through medieval Jewish sources down to the thirteenth-century Hebrew deeds from England.

Generally speaking, the warranty formula underwent two distinct stages of development. The first stage is represented by the Assyro-Babylonian...
deeds, and is continued with some modifications and additions in the Aramaic papyri of the fifth century B.C. The typical Assyrian warranty clause reads:

Any return or plea or suit shall not be admitted. Whoever in future or at any time shall set up a claim or dispute, whether it be $D$ or his sons or his brothers or any one belonging to him, who from $S$ or his sons shall seek to obtain a legal decision or lawsuit shall deposit five minas of pure silver and so much precious gold in the treasury of the God... The money he shall return to its owners... In his suit that he brings he shall not prosper.\textsuperscript{14}

This clause obviously imposes upon the grantor, his heirs and representatives, the negative duty of refraining from attack upon the validity of the transfer, providing for a penalty in case of breach of this duty, but it does not impose upon him the positive duty of defending the grantee's title against strangers.

A typical clause in the Aramaic papyri reads: "I shall have no power, I $Y$, or any sons or female or male dependent of mine shall have no power to set in motion suit or process against you, nor shall we have power to sue son or daughter of yours, brother or sister, female or male dependent of, yours, or any man to whom you may sell this house or to whom you may give it as a gift."\textsuperscript{15} The rest of this clause contains a provision for a penalty in case a claim is asserted against the grantee, or his representatives, by the grantor, or his representatives, and also a provision that the property is to remain to the grantee, notwithstanding the payment of the penalty by the grantor.

The most important addition made in this clause, as compared with its Assyrian predecessor, is that it includes within its scope the grantee's assigns by way of gift or sale. But the essential nature of the Assyrian warranty clause, imposing a negative duty upon the grantor and his representatives, still remains unchanged in the Aramaic papyri, although the enumeration of possible contestants is more exhaustive in the latter than in the former.

The second stage of the development of the warranty clause is found in Demotic papyri, beginning with the seventh century B.C., in Neo-Babylonian tablets of the Persian period, and in the Talmud. In a conveyance dated between 645 and 640 B.C. the warranty clause reads as follows: "The man who shall come unto thee on account of these shares above

\textsuperscript{14} Johns, Assyrian Deeds and Documents 10. See also Peiser, Texte Juristischen und Geschäftslichen Inhalts, Keilinschriftliche Bibliothek, Band 14, p. 71f.  
\textsuperscript{15} Cowley, Aramaic Papyri No. 25. Italics added.
written, I will cause him to be cleared [?] for thee from any patent in
the land." In another deed of conveyance, dated 562 B.C. and represent-
ing the sale of a cow, the warranty clause reads: "He that shall come to
thee on account of her to take her from thee, saying, she is not thy cow,
I am he that will clear her for thee." In a tablet dated in the 37th year
of Artaxerxes I (427 B.C.) and representing a lease for 60 years in which
the rent was paid in advance, there is a clause which is rendered by Clay,
the editor and translator, as follows: "In case a claim should arise against
the property, X [the lessor] shall settle the claim brought against the
property." In another place the same editor and translator renders this
clause somewhat differently: "If a claim should arise against that field,
X [the lessor] shall satisfy the claim against [clear the encumbrance of]
that field." By way of comment the editor adds: "In Aramaic הנני means to
'Cleanse, purify, clear'. In legal parlance in Babylonian 'to clear of encum-
brances'." Finally, a fragment of a warranty clause quoted in the Talmud
reads as follows: "I will acquit, clear, purify and confirm . . .

One might add parenthetically that there can be little doubt that all of
these three versions of the warranty clause, the Demotic, the Neo-Baby-
lonian and the Talmudic are traceable to one common source, and that
they are not just the result of parallel development. It is sufficient to

163 CATALOGUE OF THE DEMOTIC PAPYRI IN THE JOHN RYLANDS LIBRARY 44-47.
17 Id. at 59-60. See also Papyrus Strassburg 1, translated in CATALOGUE OF THE
DEMOTIC PAPYRI IN THE BRITISH MUSEUM, pp. XXVII-XXXI. In the Demotic papyri
of the later Ptolemaic period the warranty clause is more elaborate and contains
what we might call a covenant of further assurance. It reads as follows: "He that
shall come unto thee on account of it in my name or in the name of any person what-
soever I will cause him to discharge thee. And I will purge them for thee from every
writing, every title, every right, every word whatsoever at any time. Thine are their
writings, its titles in every place in which they are. Every writing that has been made
concerning it, and every writing in the name of which I am justified [in my claim]
on it thine are they with the right conferred by them; thine is that to which my
claim is justified in its name. The oath [or] the proof that shall be imposed on thee
in the court of justice in the name of the right conferred by the above writing which
I have made unto thee to cause me to make it, I will make it without alleging any
title or anything whatsoever against thee." PAPYRUS ADLER DEM. 2 (123 B.C.).
189 UNIVERSITY OF PENNSYLVANIA BABYLONIAN EXPEDITION, SERIES A, 36-38.
198 id at 22. See also PEISER, BABYLONISCHE VERTRÄGE DES BERLINER MUSEUMS 73.

The warranty clause in this document, which represents a deed of conveyance of a
slave, is rendered by Peiser as follows: "Am Tage, da man Zurückforderungsklage
betreffs jenes Slaven erhebt, soll Sum-iddina sein Recht an den Slaven nachweisen [?]
und an Iddina-Nabu geben." Clay is of the opinion that the word 'umarraq,' which Peiser
translates by the phrase "sein Recht nachweisen," is to be rendered rather as "clear
of encumbrances." KOSCHAKER, BABYLONISCH-ASSYRISCHES BÜRGERSCHAFTSRECHT 192-
193, states that he is inclined to agree with Clay. In the light of the Egyptian papyri
cited in the two preceding notes, and of the fragment of the warranty clause from the
Talmud there can be no doubt that Clay's translation is the correct one.

20 BABYLONIAN TALMUD, Baba Metzia fol. 16a.
point to the word denoting the grantor's duty to clear the property of encumbrances or adverse claims. In both the tablets and the Talmud the same Aramaic word 표현, meaning to purge or cleanse of impurities, is used, and in the Demotic papyri a word is used which is similarly rendered by the translator by the English words "clear" or "purge." The use of this term in all of these versions in the same derivative sense of freeing property from encumbrances could not possibly have occurred by accident.

The warranty clause in the Hebrew documents of the Middle Ages reads, with some minor variations, as follows: "And whoever shall come from the four winds of the world, man or woman, Jew or Gentile, son or daughter, heir or legatee, near or far, who shall arise and contrive and make any claim or requisition whatsoever on the said William, or his heirs or representatives, regarding the said house with the court and appurtenances, it will be obligatory upon me, my heirs and representatives, to free them and protect them against those claimants, and to maintain their possession of the house, court and appurtenances aforesaid, in peace and comfort [peaceably and quietly], on the surety of all my property, landed or movable, which I now possess or may in future acquire."21

It is fairly obvious that this formula combines all the elements of the Assyrian, Aramaic and Demotic-Talmudic warranty clauses with some additions and modifications. The detailed enumeration of the possible contestants is, except for the characteristically Jewish "Jew or Gentile," still substantially the same as that in the Assyrian and Aramaic deeds. The inclusion of the grantee's assigns within the scope of the warranty is the same as in the Aramaic papyri. Finally, the assumption by the grantor of the positive duty of defending the grantee's title is the same as in the Neo-Babylonian-Demotic-Talmudic formula. The new element in this formula is the opening phrase, "And whoever shall come from the four winds of the world." This is explainable in the light of a certain analysis of warranty found in the Talmud.22 According to the Talmud there are three

21ABRAHAMS, Stokes and Loewe, Starks and Jewish Charters in the British Museum (1280) 109. For similar clauses see DAVIS, Hebrew Deeds (Shtaroth) Nos. 3, 11, 26, 29, 33, 35, 39, 44, 45, 46 (a conveyance by a Jew to a non-Jew), 48. Substantially the same formula is found in the Formulary of Rabbi Judah Barzillai (11th century, Spain) No. 26, pp. 45-46. In a deed of conveyance made at Léon in the year 1053 and published in 4 Revue des Études Juives, 227-229, the warranty clause, in French translation, reads as follows: 'Et vienne, d'un des quatre coins du monde, fils, fille, frère, soeur, parent, étranger, successeur ou héritier, Juif ou non-Juif, verbalement ou par écrit et soulevé au sujet de cette vente une contestation quelconque, ses paroles seront nulles et considérés comme un tesson brisé, qui n'a point de valeur, à charge pour moi de repousser et rendre vaine toute contestation et réclamation de façon à la maintenir dans son droit d'un maintien complet et d'une conservation complète.'

22BABYLONIAN TALMUD, Ketubot fol. 91b-92a.
kinds of warranty: (1) Warranty against the acts of the grantor himself; (2) warranty against those claiming through the grantor, such as his heirs or creditors; (3) warranty against "the whole world." A famous tenth-century Hebrew authority\(^\text{23}\) arranges these types of warranty in an ascending order, the lowest on the scale being warranty against the acts of the grantor and the highest being warranty against the whole world. He adds that each type of warranty includes the one or the ones below it on the scale and excludes the one or the ones above it. Thus where a deed contains an express warranty against the acts of the grantor, the other two types of warranty are excluded. Where it contains a warranty against those claiming through the grantor, warranty against the grantor's own acts is included and warranty against the whole world is excluded. Where it contains warranty against the whole world, the other two types are included. The phrase "If anyone should come from the four winds of the world" was apparently intended to convey the idea of a warranty against the whole world. Although this all-inclusive phrase made the specific enumeration of possible contestants superfluous, if not confusing and ambiguous, draftsmen, with the conservatism characteristic of the legal profession, continued to include the enumeration in their formulas.

**Influence of the Jewish Formula upon the Structure of the English Warranty Clause.**

In the light of the above discussion, the phrase "Contra omnes homines et foeminas, Christianos et Judeos" in the medieval English warranty clause becomes intelligible. It was borrowed verbatim from the Jewish warranty clause, and the "omnes homines et foeminas" part of it is, as we have seen above, traceable as far back as the Aramaic papyri of the fifth century B.C. This is what the writer had in mind when he said that the English warranty clause bears unmistakable signs of its Jewish origin. For, while it may be difficult to prove that the idea of warranty and the rules flowing out of the warranty clause were borrowed by one system of law from another, since in such matters it is almost impossible to eliminate the possibility of parallel development, the use of such quaint phrases as the one referred to above falls into a different classification. Here this possibility is so remote that it may safely be disregarded.

Having thus shown that at least part of the medieval English warranty clause was borrowed from the Jews, we shall now consider the three operative words of the medieval English warranty clause, "warrantizare, defendere et acquietare," which are to this day found in our deeds in their English.

\(^{23}\)Rav Hai Gaon, Mekar Umikra, c. 28.
form "warrant, defend and acquit." Of these the first one was probably borrowed from the procedure in the action of theft, the actio furti, where the common defence was the voucher of a warrantor.24 "Defendere" and "acquietare," on the other hand, are translations of equivalent Hebrew terms. The term נפש which corresponds to "acquietare" is found in almost every one of the available Hebrew deeds from Angevin England,25 and was certainly not borrowed by the Jews from the English, since it is also found in the fragment of the warranty clause quoted in the Talmud and referred to above. The equivalent of the term "defendere," 浞, occurs in several Hebrew deeds from England26 and in the Formulary of Rabbi Judah Barzillai.27 Here again, as in the case of the phrase "Contra omnes homines" etc., it is fairly obvious that the English adopted these terms from the Jews.

It should be borne in mind that the warranty clause was not the only legal form which the English adopted from the Jews. The writer has shown elsewhere28 that the classical English mortgage in the form of an absolute conveyance and a condition subsequent, and the conditional bond in the form of an absolute obligation with an avoidance clause, were borrowed by the English from the Jews. The position of the Jews in England during the twelfth and a good part of the thirteenth century was such that it was almost inevitable that they should have exercised an important influence upon the development of English legal forms and devices, which were then in their formative stage. The Jews were the principal financiers and money-lenders in England during that period, and their financial transactions were numerous and involved large amounts of money.29 They brought with them to England a highly developed system of law and a large number of legal forms and devices. The idea of warranty was particularly well developed among them. The analysis of warranty quoted above from the Talmud is as valid today as it was in the fourth century. In England there was hardly a transaction among the Jews to which there was not attached some kind of warranty. To what point of refinement the Jews of medieval England carried the idea of warranty is illustrated by the following example. Long before the common law laboriously worked out an adequate method of dealing with an assignment of a chose in action,

24See 2 POLLOCK & MAITLAND, op. cit. supra note 2, at 663.
25See note 21 supra.
26DAVIS, op. cit. supra note 21, Nos. 3, 5, 11, 26, 29, 33, 35, 39, 52.
29See 1 POLLOCK & MAITLAND, op. cit. supra note 2, at 469; 2 id at 118-119.
the Jews of England were dealing in bonds and recognizances pretty much in the same way in which banks today deal in commercial paper. Among the available Hebrew documents from England there are quite a few assignments of debts. Since the Jewish bond carried with it a general lien on the real property of the debtor, and therein lay its main value, the assignor would warrant that there were no other bonds outstanding against the debtor. This is, of course, an exact counterpart of a warranty against prior encumbrances in our modern mortgage.

An interesting bit of evidence of the Jewish origin of the medieval English warranty clause is found in Y.B. 30 Edw. I where there is almost contemporary testimony to that effect. At page 190 Brumpton, J. says: "The word 'defend' was used when the Jews were in the land, and was first provided to meet their case." What is true of "defend" is also true of "acquit" and of warranty in general, although at the end of the thirteenth century warranty had become so much a part of English law that its origin had been entirely forgotten. What Brumpton, J. says about "defend" having been first provided to meet the case of the Jews, that is, of Jewish debts outstanding against the property being conveyed, is, of course, entirely in line with what the writer has said at the beginning of this article about the Jews having created a situation which called for some such device as a warranty.

**Jewish Derivation of the Rules Governing Warranty**

Together with the warranty clause some of the important rules governing warranty of real property were borrowed by the English from the Jews. One of these is the rule giving the remote grantee a right to enforce the warranty against the original grantor. Mr. Justice Holmes in his book *The Common Law* devotes a whole chapter of profound learning to the origin of this rule. He traces it to the identification of the heir with his ancestor, which is found in early Roman law as well as in Germanic law, and to the notion that the assign is a quasi-heir. However, the solution of this problem seems to be much simpler than that. The right is traceable to the inclusion of the assign within the scope of the warranty which, as we have seen above, is found in the standard Hebrew warranty clause and goes as far back as the Aramaic papyri of the fifth century B.C. English conveyancers simply borrowed this feature of the warranty clause together with the rest of the clause.

30 See e.g., 3 Calendar of the Plea Rolls of the Exchequer of the Jews (published by The Jewish Historical Society of England) 206, 207-208.
Furthermore, the inclusion of assigns within the scope of the warranty was rendered necessary by the introduction of the "Jewish gage" which, as we have seen above, constituted a general lien upon the debtor's real property. If an owner of real property could be divested of his property through the enforcement of a lien created by a party other than his immediate grantor, it was natural to provide him with a remedy over against that party.

It is true, as Mr. Justice Holmes has pointed out, that Bracton speaks in several places of the assign as "quasi-heres," and explains his right to enforce the warranty on this ground. But this is probably a bit of medieval scholasticism attempting to find a formal ground for a rule dictated by practical considerations.32

It seems to the writer that the assign's right to sue the original grantor on his warranty was, at least in Hebrew law, based upon the same principle as that of the remote holder of negotiable paper to sue the maker. Warranty of real property is a perfectly natural intermediate step between the strictly personal nonassignable obligation and the impersonal freely transferable negotiable instrument. When negotiable instruments came into vogue among the Jews, the difficulty which Jewish jurists saw in their enforcement was that the obligation seemingly ran to an unknown person. It was argued that the instrument should be invalid for lack of definiteness, which is a necessary requisite of every enforceable obligation. However, a great thirteenth century Jewish jurist held that where the obligee is ascertainable in the future, although he is unknown at the time the instrument is drawn, the requirement of definiteness is fully satisfied.33 In support of his opinion, interestingly enough, the learned Rabbi cited the biblical case of Saul offering a reward to whomsoever will defeat Goliath. In the case of a warranty running to the grantee and his assigns, Jewish jurists apparently saw no

32Id. at 373-374. Holmes quotes Bracton, fol. 176, to the effect that assigns had the right to sue the original grantor on the warranty only where they were named in the warranty clause, that is, where the warranty ran to the grantee, his heirs and assigns. This would seem to indicate that the practice of including assigns within the scope of the warranty preceded the rule giving them a right to sue the original grantor, and that the courts only recognized the validity of a device which had been introduced by conveyancers.

It seems that at the time when warranty of real property was introduced in England in the twelfth century, the civil law maxim of Nem no alteri stipulari potest had not yet been adopted in England. Conveyancers therefore saw no difficulty in making the warranty run to assigns who were not parties to the transaction between the grantor and the grantee. Bracton's theory of the assign being a quasi-heir may have been prompted by a desire on his part to reconcile the assign's right to sue on the warranty with the above maxim of the Roman law.

33Responsa of Rabbi Asher ben Yehiel, c. 68, § 9.
difficulty because the warranty could be enforced only by one who was the owner of the property, and this was considered a sufficient description of the obligee to satisfy the requirement of definiteness.

That some such notion also prevailed among Englishmen may be seen from the warranty clause in a certain charter dated 1202. This warranty clause reads: "I, the aforesaid Roger and my heirs, will finally warrant to the aforesaid Peter and his heirs, or to whomever they give, sell or assign them, against all men and women; and this my charter becomes for them a warranty even as to the aforesaid Peter." The assigns are thus put on a par with the grantee with regard to the warranty. Their right, like his, is based upon the charter, that is, upon the promise running to them directly, and not upon the promise to the grantee by representation.

We shall now return to a consideration of the rule that the obligation of the warranty constitutes an in rem charge upon the property of the warrantor. This rule is easily explainable if we assume the Hebrew origin of the English warranty. It is a cardinal principle of the Hebrew law of obligations that every obligation, whether originating in a loan of money or in a warranty incidental to the conveyance of real property or in the endowment of the wife by the husband, when embodied in a writing executed in the presence of at least two witnesses, carries with it a general lien upon all of the obligor's property. This principle is known in Hebrew law as "ahrayut," a word which denotes what is probably the most fertile concept in Hebrew law. Freely rendered it means that all of the obligor's property stands surety for the discharge of the obligation assumed by him.

Originally, the creditor's lien attached only to the debtor's immovable property. At a later period it was held that by inserting a special provision to that effect in the bond the lien could be extended to the debtor's movable property. At a somewhat earlier period the question was raised by the

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34See Adler, Jews in Medieval England 263-266, where the original is copied in full and translated from a manuscript preserved in the Library of St. Paul's Cathedral.

The writer's attention has been called to the English practice whereby the grantee of land received the accumulation of deeds which his grantor had received from his predecessors; and it has been suggested that this practice strengthens the analogy between the right of the holder of a negotiable instrument to sue on the instrument and that of the assign to sue on the warranty.

The writer wishes to add that the language of the warranty clause quoted in the text seems to bear out the above suggestion. It was apparently contemplated by the parties that if the grantee should transfer the property to another, the assign would receive the original deed, and that his right to sue the original grantor on the warranty would be predicated upon his holding of that deed.

35Mishna, Baba Bathra, 10, 8.
36Babylonian Talmud, Baba Metzia, fol. 15b.
37Mishna, Ketubot, 8, 8.
38Babylonian Talmud, Baba Bathra, fol. 44b.
Babylonian Master Samuel as to whether or not the debtor could validly subject his future acquisitions to the lien of the creditor. By analogy with conveyance of property, it was argued by some, that a lien on property to be acquired in the future by the debtor should be ineffective just as a sale of such property would be ineffective. The conclusion of the Talmud, however, is that a lien is not to be likened to a conveyance. In the post-Talmudic period the practice became universal to incorporate in every writing of an obligatory nature a provision for a lien on the obligor’s property, movable and immovable, present and future.

It is to be noted here that the idea of “ahrayut,” that is, of subjecting all of the obligor’s property to the lien of the creditor, may not have been altogether original with the Jews. In a Neo-Babylonian debenture of the early part of the seventh century B.C. we find it stated: “. . . all his property, in town and country, all that there is shall be a pledge for . . . another creditor has no right of disposal over it until . . . gets his money, fully repaid.” This was apparently a general charge upon the obligor’s property in favor of the obligee, without delivery of possession, exactly as in the Jewish bonds.

A still closer approximation to the formula of the Hebrew bond with “ahrayut” is found in the Demotic bond of the Ptolemaic era in Egypt. The lien formula in the Demotic papyri usually reads as follows: “All of everything that belongeth to me and those things that I shall gain are in pledge for every word that is above, until we do according to them, of necessity without delay.” This, it will readily be seen, is an almost exact

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39Id. at fol. 157a-157b; SHULHAN ARUK, HOSHEN MISHPAT (the standard code of Hebrew law) c. 112, § 1:
40See, e.g., FORMULARY OF RABBI JUDAH BARZILLAI, no. 34; DAVIS, op. cit. supra note 21, Nos. 23, 47, 54. This standardized formula was used by the Jews of medieval England in the bonds which they took from their non-Jewish debtors, and it gave rise to what came to be known as the “Jewish gage.” See SELECT PLEAS FROM THE EXCHEQUER OF THE JEWS, op. cit. supra note 9 at 33, 93, 94. From the Jewish bonds this formula apparently passed into general use so that thirteenth century English bonds commonly contain a provision binding the obligor’s property, movable and immovable. See 2 POLLOCK & MAITLAND, op. cit. supra note 2, at 2. The provision for binding the obligor’s future acquisitions, although it does not occur in English bonds with that regularity with which we find it in Hebrew writings of an obligatory nature, is also found in numerous thirteenth century transactions between non-Jews, where the formula reads “Obligo omnia bona mea, mobilia et immobilia, presentia et futura,” or, sometimes, “habita et habenda.” See e.g., CALENDAR OF THE CLOSE ROLLS (1268-1272) 243, 258, 300, 410-411.
41Henry F. Lutz, A NEO-BABYLONIAN DEBENTURE, 10 UNIV. OF CAL. PUBL. IN SEMITIC PHILOLOGY, No. 9, 251-256.
42See e.g., P. ADLER, DEM. 4, 5, 6, 11. The Demotic bond is strikingly similar to the Hebrew bond in still another respect. The former contains a provision to the effect that the obligor shall not be able to plead payment as long as the bond remains in the hands of the obligee. “We shall not be able to say ‘we have given thee silver, corn or
counterpart of the Hebrew formula, the only difference being that the Hebrew bonds, in accordance with the Talmudic principle referred to above, specify movable and immovable property, while the Demotic bond speaks of "all of everything that belongeth to me."

It thus appears that the idea of "ahrayut" is a very old one and that it developed in the cultural and economic sphere of which the Jews of Talmudic times were a part. The question of who originated this idea is not important for our purposes. It is certain, however, that this idea took firm root in Hebrew law and became the central core of the Hebrew law of obligations. As indicated above, there is not a single Hebrew writing of an obligatory nature which does not have "ahrayut" attached to it. What is more, "ahrayut" is implied in law even when it is omitted from the writing. In the language of the Talmud the omission is presumed to be an error of the scrivener. In all of the available Hebrew deeds of conveyance from England there is not a single one which does not carry a warranty, and there is not a single warranty which does not carry with it a charge on the warranty whatsoever without proved receipt; we shall not be able to say 'we have performed for thee the right of the contract' while the above contract is in my hand."

A similar provision is found in the medieval Hebrew bond. See e.g., Davis, op. cit. supra note 21, No. 24, 31, 83. In No. 24 the provision in question reads: "And as long as this bond is in the hands of R. Abraham R. Elijah shall not be believed, if he should say 'I have paid,' save by a receipt signed by his [R. Abraham's] own hand."

As far as the writer was able to ascertain, none of the commentators on the legal papyri correctly understood the significance of the above provision in the Demotic bond. Nor were they aware of the existence of a similar provision in the medieval Hebrew bond. In the writer's opinion this is one of the many instances in which the answer to a perplexing question with regard to the Egyptian papyri may be found in the Talmud and in medieval Hebrew legal forms. As far as the Hebrew bonds are concerned there is no difficulty in ascertaining its significance. There is in the Talmud, Shebu'oth, fol. 41b. a rule to the effect that where one borrows money from another in the presence of witnesses he is not required to pay in the presence of witnesses, so that a plea of payment by the borrower is sufficient, even when not supported by the testimony of witnesses. However, where the loan is evidenced by a writing this rule does not apply, and the borrower cannot plead payment if the lender produces the writing. The above provision was therefore intended to state in specific terms the effect that the writing was to have upon a plea of payment by the borrower.

The presence of a similar provision in the Demotic bond at once suggested to the writer that a rule similar to the one just cited from the Talmud must have prevailed in Egypt. Indeed, such a rule is ascribed by Diodorus to King Bocchoris (eighth century B.C.). As translated in 3 Catalogue of the Demotic Papyri in the John Rylands Library, introd. p. 10, this rule reads: "Persons who have contracted a debt without a written agreement, and deny that they owe it, after taking an oath, are freed from the debt."

It should also be noted here that a similar provision is found in Cowley, Aramaic Papyri, No. 10 (456 B.C.) where it reads: "And I shall have no power to say to you that I have paid you your money and the interest on it while this deed is in your hand." Diodorus' statement about the law that prevailed in Egypt thus receives indirect confirmation from legal forms used there as early as the fifth century B.C.

43Babylonian Talmud, Baba Metzia, fol. 15b.
rantor's property, movable and immovable, present and future. It was this idea of "ahrayut," borrowed by the English from the Jews together with the warranty clause, which was responsible for the rule that a warranty creates an in rem charge upon the property of the warrantor.44

II. ORIGIN OF THE INCHOATE RIGHT OF DOWER

This brings us to a consideration of the inchoate right of dower. Briefly stated, it is the contingent right which a woman has, during her husband's lifetime, to have a life estate in one-third of the real property which her husband owned during coverture set off to her, if she should survive him. Hazeltine, with a great deal of insight, puts this right of the married woman in the same class with the right of the grantee to enforce a warranty, as constituting an in rem charge upon land in medieval England. But he was unaware of the fact that these apparently disconnected rules of law are traceable to one common source and spring from one root-idea, namely, that of "ahrayut."

A comparison of English medieval law and practice with Hebrew law and practice, ancient and medieval, on the same subject will, the writer believes, make this abundantly clear. Pollock and Maitland have this to say about the wife's rights during marriage in the twelfth and thirteenth centuries:

The unspecified dower is therefore treated as a charge on all the husband's lands, a charge that ought to be satisfied primarily out of those lands which descend to the heir, but yet one that can be enforced, if need be, against the husband's feoffees. If, however, we go back to Glanvill, we shall apparently find him doubting whether, even in the case of a specified dower, a widow ought ever to attack her husband's feoffees, at all events if the heir has land out of which her claim can be satisfied.

Some hesitation about this matter was not unnatural, for our law was but slowly coming to a decision of the question whether and how the land burdened with dower can be effectually alienated during the marriage. The abundant charters of the twelfth century seem to show that, according to common opinion, the husband could not as a general rule bar the wife's right without her consent, that he could bar it

44 An interesting document, showing the close relationship between the English warranty clause and its Hebrew equivalent, is found in MADOX, op. cit. supra note 11, at No. 119 (1287). The grantor, after stating that he is bound to warrant, defend and acquit the grantee, proceeds to state that in case of failure on his part to do so, all his property, movable and immovable, present and future, shall be bound for the payment of the damages the grantee may sustain by reason of such failure. This, it will readily be seen, is an almost perfect specimen of a Hebrew warranty clause with 'ahrayut.' Cf. documents cited in note 21 supra.
with her consent, and that (though this may be less certain) her consent might be valid though not given in court. 45

It appears from the above quotation that the rule giving the wife a charge upon her husband's property for the enforcement of her dower developed slowly in England, and that the common opinion in the twelfth century was in advance of that of the judges in this respect. While Glanvill was still hesitating about the widow's right to claim dower in lands conveyed by her husband during his lifetime, the practice of obtaining the wife's consent to a grant by her husband, for the purpose of barring her right of dower, had become general.

As for the Jews, this practice prevailed among them for at least a thousand years prior to their settlement in England. A rule ascribed by the Talmud 46 to Simeon B. Shatech (second century B.C.) subjects all of the husband's property to a charge in favor of the wife for the enforcement of her dower rights. As a result of this rule the practice developed to have the wife release her dower rights in the property which the husband was about to convey. Such a release is mentioned already in the Mishna. 47

It is to be noted here that this practice of obtaining the married woman's release before a conveyance was made by her husband is also found in Demotic papyri of the third century B.C. and later. The following is an example:

Whereas a woman of alimony, owner of money-payment . . . his wife saith. Take a writing from . . . my husband to make him do according to every word above. My heart agrèeth with it, whereas I have claim on him by the right conferred by the writing of alimony and the writing of money-payment which he made unto me to perform for me the right conferred by it at any time, and I am without claim on thee in the above [mentioned] dry vacant plot which makes 1 1/2 cubits of land of necessity, without delay, without any compulsion. 48

Among the Jews of medieval England the practice continued in pretty

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452 Pollock & Maitland, op. cit. supra note 2, at 423-424.
46Babylonian Talmud, Ketubot, fol. 82b.
47Mishna, Ketubot, 10, 6.
48P. Adler Dem. 2, and P. Ryl. 17. See also 1 Catalogue of the Demotic Papyri in the British Museum 34-36 (284 B.C.). It seems that neither the editor of the Rylands papyri nor the editor of the British Museum papyri fully understood the legal significance of these releases. They thought that in these cases the property conveyed had been mortgaged by the husband to the wife. However, the language of these releases, together with the release of dower mentioned in Mishna, Ketubot, 10, 6, clearly indicates that there had been no mortgage to the wife in the usual sense, but that the property conveyed, as well as all other property which the husband may have owned, was charged with the wife's dower, and that the wife released the property from this charge.
much the same way as in Talmudic times. Among the available Hebrew deeds of conveyance in England, from Jew to Jew and from Jew to non-Jew, there are hardly any which are not accompanied by a release by the grantor's wife. The adoption by the English of the above practice would have been sufficient to give rise to the rule that where there was no release by the wife the property conveyed by the husband during his lifetime remained subject to dower. There is also strong evidence to the effect that the formula of the Jewish "Kethuba," or endowment document, binding all of the husband's property for the payment of the dower, was similarly adopted by the English. In Blackstone, v. II, p. 134, note p, we read: "When the wife was endowed generally ... the husband seems to have said, 'with all my lands and tenements I thee endow,' and then they all became liable to her dower. When he endowed her with personalty only, he used to say, 'with all my worldly goods' (or, as the Salisbury ritual has it, 'with all my worldly chattel') 'I thee endow.' These formulae, which were used for the purpose of creating a charge upon the husband's property in favor of the woman, are strikingly similar to that part of the Hebrew "Kethuba," which was used for the same purpose and which reads as follows: "I take upon myself and my heirs the responsibility of this marriage contract, ... so that all this shall be paid from the best part of my property, real and personal, that I now possess or may hereafter acquire."

It is true that while this similarity is very suggestive, it is not conclusive of the Hebrew origin of the English formulae. There is, however, one bit of evidence, again in the form of a quaint phrase no one has hitherto thought necessary to explain, which tells the story most eloquently. In his chapter on Dower, sections 48 and 49, Littleton describes a certain kind of dower, which he calls "Doument de la plus beale" and which, he says, would arise under the following circumstances: A man died seised of certain land, part of which he held of one lord by knight's service and the other part of another in socage. He left a widow and a son under age. The lord under whom the deceased held by knight's service entered upon the land, held under him, as guardian in chivalry, and the widow entered upon the other land as guardian in socage. If the widow brought a writ of dower against the guardian in chivalry he could plead the above matter, "and pray that it may be adjudged by the court that the wife may endow her selfe de

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49 See e.g. Davis, op. cit. supra note 21, No. 29, 44, 50, 100.
507 Jewish Encyclopedia 472. See also, Maimonides, Yad Ha-Chazaka, Yibbum Ve-Chaliza, c. 4, § 33, for the full text of the Jewish "Kethuba," and 5 McClintock & Strong, Cyclopedia of Biblical, Theological and Ecclesiastical Literature 776, for an English translation.
la pluis beale, i.e. of the most faire of the tenements which she hath as guardian in socage."

Why, it may be asked, was the widow to endow herself of the fairest part of the land? Was this an act of chivalry toward the lady on the part of the guardian in chivalry? This might have been so had he offered her part of what he himself held in guardianship, but not when he insisted that she obtain her dower from the land which was held by her husband in socage, and of which she herself was the guardian.

The writer believes that only a reference to the Hebrew "Kethuba" formula quoted above will furnish the answer. It will be recalled that this formula states that the woman is to be paid from "the best part" of her husband's property, a phrase which is almost identical with Littleton's "de la pluis beale." Littleton's phrase is apparently a relic of the old English endowment formula which was copied from the Jewish "Kethuba." It did not come into existence by accident, just as the equivalent Hebrew phrase did not find its way into the "Kethuba" by accident. The Hebrew phrase has a long history behind it, and the reason for its insertion in the "Kethuba" is to be found in a certain rule of the Hebrew law of execution going back to the time of the Mishna, that is, at least to the second century. In Mishna Gittin, 5, 1 we read: "Compensation for damage is paid out of property of the best quality, a creditor out of land of medium quality, and a woman's kethubah out of land of the poorest quality."

It should be added by way of explanation that the term "n'zikin" in the original, which the translator renders by the English term "damage," means damage resulting from a tortious act. The rule of the above Mishna, therefore, is that a judgment creditor of a tortfeasor is to collect from property of the best quality; a lender, who became a creditor voluntarily, is to collect from property of medium quality; and the woman is to collect her dower from the poorest quality, since, in the words of the Talmud, she is more anxious to get married than the husband is.

In order to overcome this rule of the Mishna, placing the woman in an inferior position, it became customary among the Jews to insert in the "Kethuba" a definite provision to the effect that the woman is to collect her dower from the best part of her husband's property. The English apparently copied this provision from the Jews together with other provisions of the Hebrew "Kethuba."

III Conclusion

The warranty clause in the conveyance of real property was introduced
in England by the Jews in substantially the same form in which it had been used by them for many centuries prior to their settlement in England. Some of the elements of this clause are of great antiquity, going as far back as the Assyro-Babylonian tablet deeds.

The rule of Anglo-American law giving the remote grantee a remedy against the original grantor for the enforcement of the warranty is traceable to the inclusion of assigns within the scope of the warranty, a feature which is characteristic of the Hebrew warranty clause as well as of the warranty clause in the Aramaic papyri of the fifth century B.C. Similarly, the rule that gave the grantee an *in rem* charge upon the property of the grantor for the enforcement of the warranty is traceable to a rule of the Hebrew law of obligations which provides for such a charge in favor of the obligee, as an incident of every obligation embodied in a written document and executed with certain required formalities.

The inchoate right of dower, which gives the widow a charge upon all the real property owned by her husband during coverture, is of similar origin. The endowment document was treated in Hebrew law, as well as in Egyptian law of the Ptolemaic period, like any other obligation, so that it gave rise to a charge upon the husband's property in favor of the wife, and the Hebrew "Kethuba" states so specifically. The English adopted this feature of the Hebrew "Kethuba" together with some of its other provisions. The most definite trace of Hebrew influence upon the development of the English endowment document is found in the medieval English dower *de la plus belle*, which originated in a provision in the Hebrew "Kethuba" giving the wife the right to collect her dower from the best part of her husband's property.

Though questioned by the author (see *supra* page 86 et seq.), the explanation offered by Mr. Justice Holmes for the ability of the grantee of a covenantee to sue upon the covenant seems to be accepted by a prominent worker in the field of running covenants. See Sims, *The Future of Real Covenants: Objection to Restatement of Property Treatment of Covenants, supra* this issue at page 5.—Ed.