IN THEIR HISTORY OF ENGLISH LAW, POLLOCK AND MAITLAND SPEAK OF THE "GLANVILLIAN AND BRACTONIAN MORTGAGES" AS REPRESENTING TWO DISTINCT STAGES IN THE DEVELOPMENT OF THE ENGLISH LAW OF MORTGAGES.\(^1\) ON THE BASIS OF AN OBSOLETE PASSAGE IN GLANVILL THEY CONCLUDED THAT, AT THE TIME WHEN GLANVILL'S TREATISE WAS WRITTEN, A FORFEITURE OF GAGED LAND BY THE GAGOR, IN CASE OF FAILURE ON HIS PART TO PAY THE MORTGAGE DEBT ON THE DUE DATE, COULD BE VALIDLY EFFECTED BY AN APPROPRIATE PROVISION TO THAT EFFECT IN THE MORTGAGE AGREEMENT, AND THAT IN THE ABSENCE OF SUCH A PROVISION THE GAGEE COULD ENFORCE A FORFEITURE BY A PROCEEDING IN COURT. THE GLANVILLIAN MORTGAGE WAS, ACCORDING TO POLLOCK AND MAITLAND, ONE IN WHICH A FORFEITURE WAS EITHER EXPRESSED OR IMPLIED, AND IN THE LATTER CASE THE GAGEE HAD TO HAVE RESOURSES TO WHAT WE MIGHT CALL A FORECLOSURE PROCEEDING IN ORDER TO ENFORCE A FORFEITURE. THE "BRACTONIAN MORTGAGE," THEY ASSERT, TOOK THE FORM OF A LEASE FOR A DEFINITE PERIOD OF TIME, WITH A PROVISION THAT UPON FAILURE ON THE PART OF THE GAGOR TO PAY THE DEBT AT THE END OF THE PERIOD FIXED IN THE MORTGAGE INSTRUMENT THE LAND WAS TO BECOME THE PROPERTY OF THE GAGEE ABSOLUTELY.

AS TO THE "CLASSICAL ENGLISH MORTGAGE" IN THE FORM OF AN ABSOLUTE CONVEYANCE WITH A CONDITION SUBSEQUENT, POLLOCK AND MAITLAND ARE APPARENTLY OF THE OPINION THAT IT CAME TO THE FORE IN THE FOURTEENTH CENTURY ONLY, BY REASON OF THE FACT THAT THE LAWYERS OF THAT TIME FOUND IT DIFFICULT TO SQUARE THE NOTION OF A TERM OF YEARS SWELLING INTO A Fee WITH THEIR IDEAS OF SEISIN.\(^2\)

THE WRITER PROPOSES TO SHOW THAT NEITHER IN THE TWELFTH NOR IN THE THIRTEENTH CENTURY COULD A FORFEITURE BE EFFECTED EITHER BY AGREEMENT BETWEEN THE PARTIES OR BY A PROCEEDING IN COURT, AS IN THE SO-CALLED "GLANVILLIAN MORTGAGE;" THAT A TERM OF YEARS COULD NOT BE CONVERTED INTO A Fee BY NONPAYMENT OF THE MORTGAGE DEBT, AS IN THE SO-CALLED "BRACTONIAN MORTGAGE;" THAT POLLOCK AND MAITLAND FAILED TO TAKE FULLY INTO ACCOUNT A VERY POTENT INFLUENCE UPON THE DEVELOPMENT OF ENGLISH LAW DURING THE PERIOD UNDER DISCUSSION, NAMELY THE INFLUENCE OF HEbrew LAW AND LEGAL

\(^1\) POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 119-122.
\(^2\) ID. AT 122-3.
forms; and that English mortgages of the twelfth and thirteenth centuries were patterned after similar Jewish forms and devices.

These great historians of English law were apparently aware of the possible influence of the Jews upon the development of English law, but, lacking a knowledge of Hebrew law, they were unable to undertake an investigation of this influence. In a significant passage they say:

"Whether the sojourn of the Jews in England left any permanent mark upon the body of our law is a question that we dare not debate, though we may raise it. We can hardly suppose that from the Lex Judaica the Hebrew law which the Jews administered among themselves, anything passed into the code of the contemptuous Christian. But that the international Lex Judaismi perished in 1290 without leaving a trace of itself is by no means so certain." 3

Whether or not English judges and lawyers of the twelfth and thirteenth centuries deliberately adopted rules and doctrines from Hebrew law is a question we need not discuss here. But the position of the Jews in England during this period was such that it was almost inevitable that they should have exercised an important influence upon the development of English security devices and, through these devices, upon the body of law which grew out of them.

The business of money-lending on a large scale, and with it the means by which this business was carried on, was introduced into England by the Jews. There is hardly a phase of English medieval law, connected with the creditor-debtor relationship, which has not been influenced by Jewish practices and legal forms. The writer has shown elsewhere 4 that the English recognizance is a Hebrew form, going back to Talmudic times, which was adopted by Englishmen from the Jews when the former learned the business of money-lending from the latter. It has also been pointed out that the medieval English bond, in its essential features, is Jewish in origin. Furthermore, it has been demonstrated that the provision, almost universally found in medieval English suretyship contracts, that the surety be bound as a principal debtor is of Jewish origin. 5 And finally, the writer has shown that the "classical English mortgage" and the "penal bond" are much older than is commonly believed, that they were developed by the Jews and adopted by their English imitators in the business of money-lending. 6 With all

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3. I id. at 473.
5. Ibid.
this in mind the writer has examined the various forms of mortgages which prevailed in England during the twelfth and thirteenth centuries, on the one hand, and the corresponding Hebrew forms, on the other, and has found a remarkable similarity between them. But before discussing this similarity it may be well to consider the Pollock and Maitland classification of the medieval English mortgages.

The passages in which Glanvill speaks about the forfeiture of gaged property occur in Chapters 6, 7, and 8 of Book 10 of his treatise. In Chapter 6, he says:

"Praeterea cum ad certum terminum res aliqua ponitur in vadium aut ita convenit inter creditorem et debitorem quod si ad terminum illum vadium suum non acquietaverit debitor ipse, tunc vadium ipsum remaneat ipsi creditoris, ita quod negotium suum sicut de suo inde faciat aut nihil tale convenit inter eos. In primo casu stabitur conventioni. In secundo, existente termino si fuerit debitor in mora solvendi debitum, poterit se inde conqueri et insti-

tiabitur quod ad curiam veniat et inde respondeat, et per hoc breve."

"In addition—when a thing is pledged for a definite period, it is either agreed between the Creditor and Debtor, that if, at the time appointed, the Debtor should not redeem his pledge, it should then belong to the Creditor so that he might dispose of it as his own; or no such agreement is entered into between them. In the former case, the agreement must be adhered to; in the latter, the term being unexpired, without the Debtor’s discharging the Debt, the Creditor may complain of him, and the Debtor shall be comp-

elled to appear in Court, and answer by the following Writ."

In Chapter 7 he gives the form of a writ by which the debtor is called upon to acquit the gage, and in Chapter 8 he states that if the debtor comes to court and acknowledges the gage, he is given a reason-

able time within which he is to acquit the gage, and upon his failure to do so “dabitur licentia ipsi creditori de cetero negotium suum de vadio ipso sicut de re propria facere quo modo voluerit.” That is, “Liberty shall be given to the Creditor, from that time, to treat the pledge as his own property and do whatever he chuses with it.”

The above passages occur in Glanvill’s discussion of gages of per-

sonal property. The sentence introducing the subject begins: “Cum itaque res mobilis ponitur in vadium.” But Pollock and Maitland apparently base their conclusion as to the applicability of the same rules to gages of land upon another passage in which Glanvill, after defining

7. "Existente termino. This is palpably false reading—it should be elapso termino, the term being expired.” Note ad locum in Beames’ translation of GLANVILL, DE LEGIBUS (1812).
8. GLANVILL, DE LEGIBUS, bk. 10, ch. 8.
9. Id., ch. 6.
a "mortuum vadium" as a gage of land in which the profits from the land are not applied by the gagee to the reduction of the debt, states: "Cetera serventur ut prius de vadiis in rebus mobilibus consistentibus dictum est." 10

While on its face the sentence last quoted seems to support the Pollock and Maitland conclusion, a close examination of the entire Glanvillian text dealing with gages 11 will reveal that the above sentence is not to be taken at its face value. There are in this text several rules which are obviously not applicable to gages of land. The rule that the gagee is to keep the gage safely is one, that he is not to use it is another, and that in case it is necessary to incur expenses the agreement of the parties is to govern is still another. The general statement that the rules applicable to gages of chattels are also applicable to gages of land is therefore obviously inaccurate, and one cannot draw from it any conclusions as to whether or not the rules with regard to the forfeiture of gaged property were applicable to gages of land.

If the passages in Glanvill dealing directly with the subject do not give us any definite indication as to the applicability of the forfeiture rules to gages of land, there are other passages which, though not dealing directly with the subject, seem to point to the conclusion that these rules were not applicable to gages of land. 12 The mortgagee's seisin was, according to Glanvill, a seisin "ut de vadio" and not a seisin "ut de feodo." 13 In the case of a disseisin of the mortgagee by a stranger, the former could not have a writ of novel disseisin. The mortgagor was the only one to whom this writ was available in such a case. Similarly, in the case of a disseisin of the mortgagee by the mortgagor, the former could not have this writ, but was relegated to his remedy in an action of debt. Now, if a forfeiture of gaged land was possible either by agreement or by the order of the court, as Pollock and Maitland would have us believe, a whole series of questions arises: Was the nature of the seisin changed upon forfeiture from one "ut de vadio" to one "ut de feodo"? Where a forfeiture was provided for by express agreement was the gagee entitled to a writ of novel disseisin in case he was disseised, either by the gagee or by a stranger, after the term of payment of the mortgage debt had expired? And where a forfeiture was effected by judgment of the court, did the court order an enfeoffment of the gagee by the gagor? On what terms? How were the services to be performed by the feoffee to the feoffor to be determined? Glanvill would hardly have remained silent on these matters, if he meant

10. Id., ch. 8.
11. Id., ch. 6.
13. Ibid.
to include land in his statement of the rule about a forfeiture of gaged property. 14

Furthermore, if the gagee of land had a right to a forfeiture, it must have depended upon his continuing in possession of the gaged land, for if he was disseised, either by the gagee or by a stranger, he was, as we have seen above, relegated to his remedy in an action of debt. It follows,

14. At this point the writer wishes to call attention to another misunderstanding which arose from the vagueness of the Glanvillian text dealing with the mortgage. Pollock and Maitland are of the opinion that under the "Glanvillian mortgage," when the gagee was disseised of his gage either by the gagor himself or by a stranger, he had no remedy whereby he could repossess himself of the gaged land, the writ of novel disseisin not being available to him. All he could do was to bring an action of debt against the gagor, in which action he could only recover a money judgment. This anomalous position of the "Glanvillian gagee" was, according to Pollock and Maitland, the reason for the disappearance of the "Glanvillian gage." To quote from their History of English Law (2d ed. 1898) 120-1:

"But of the practice described by Glanvill we know exceedingly little; it is not the root of our classical law of mortgage, which starts from the conditional feoffment. It seems to have soon become antiquated and the cause of its obsolescence is not far to seek. The gagee of Glanvill's day is put into possession of the land. Unless the gagor has put the gagee into possession, the king's court will pay no heed to the would-be gage. It will be one of those 'private conventions' which that court does not enforce. So the gage must be put in possession. If he possession is called a seisin, a seisina ut de vadio. For all, this, however, it is unprotected. If a stranger casts the gagee out, it is the gagor who has the assize. But more; if the gagor casts the gagee out, the gagee cannot recover the land. The reason given for this is very strange:-What the creditor is really entitled to is the debt, not the land. If he comes into court he must come to ask for that to which he is entitled. If he obtains a judgment for his debt, he has obtained the only judgment to which he has any right.

"Now, if a court of law could always compel a debtor to pay his debt, there would be sound sense in this argument. Why should a court give a man security for money when it could give him the money? But a court cannot always compel a debtor to pay his debt, and the only means of compulsion that a court of the twelfth century could use for such a purpose were feeble and defective. Thus the debtor of Glanvill's day could to all appearance reduce his gagee from the position of a secured to that of an unsecured creditor by the simple process of ejecting him from the gaged land. Such a state of things can have been but temporary."

The writer believes that the assumption that in his action of debt the gagee could only recover a money judgment is unwarranted. There are several entries in the Pipe Rolls which clearly indicate that about Glanvill's time, that is at the beginning of the reign of Richard I, the gagee was given a remedy for the recovery of his gage. To quote some of these entries: "Herueus de Weston debet iii m. pro habendo recto de ix m. vel de vadio suo." Pipe Roll Society Publ. v. 1 (N. s.), p. 116. Hugo f. Lefvin et Willelmus de Buggeden r. c. de x m. pro habenda villa de Cornenburg usque ad terminum cruistatorum sicut vadium suum. Pipe Roll Society Publ. v. 2 (N. s.), p. 76. Liulfus homo ducis Saxonic debet Lx m. ut habeat vadium suum de terra de Stebbinge." Pipe Roll Society Publ. v. 1 (N. s.), p. 108. Some ten years later we find the following entry on the Pipe Rolls: "Willelmus de Keutil et Nicolaus frater eius debent x. li. pro habenda saisina maneriiorum de Camel et H三菱spil et Willelmus de Mariscis eis invadiavit, que eis adjudicata fuerunt esse vadia eorum." Pipe Roll Society Publ. v. 12 (N. s.), p. 99.

In these cases the gagees obtained possession of the gaged land by judicial process, and in one case at least the gagee demanded that either the debt be paid or that possession of the gaged property be delivered to him. This being so, the rule stated by Glanvill that the gagor cannot have a writ of novel disseisin is not at all unreasonable and technical. The writ of novel disseisin was available only to a party who claimed the land absolutely, and claimed nothing else, while a gagor's claim was primarily for money, and not for possession of the land. He claimed the land only as an alternative to the claim for money, and not absolutely at that, but only for as long as the debt remained unpaid. It was only reasonable therefore that the disseised mortgagee should be given his remedy in an action of debt, and not by a writ of novel disseisin. We still say to this day that a mortgage is incidental to the debt which it secures.
therefore, that in every case where a gagee of land sought to enforce a forfeiture the preliminary question of who was in possession of the land at the time the writ issued would have had to be decided before the court could have given a judgment of forfeiture. Yet when Glanvill speaks in detail about the possible issues that may arise between the gagor and gagee when both appear in court, he says nothing about the case in which the gagor acknowledges the gage, but denies that the gagee remains in possession.¹⁵

So much for the internal evidence from the Glanvillian text itself. Let us now turn to the evidence outside of the text. Pollock and Maitland state that they could not find the writ calling upon the debtor to acquit the debt—that is the writ by which a forfeiture was enforced—even in the earliest Registers.¹⁶ Now if the writ was applicable to land, its absence from the Registers would be rather peculiar. But if we should assume that it was applicable to chattels only, this absence could be easily accounted for inasmuch as recourse to this writ must have been very rare, since a loan on the security of chattels did not ordinarily involve a large amount of money, and a royal writ was quite an expensive commodity in those days.

Another indication that a provision for a forfeiture was not valid may be seen in the fact that Pollock and Maitland were apparently unable to find a single document of the twelfth century, or of a later date for that matter, in which there is a provision for a forfeiture. On the contrary, some of the available twelfth century mortgages would seem to indicate that a provision for a forfeiture was not considered valid in the twelfth century. No. 509 in Madox' Formulare, for example, is an agreement between mortgagor and mortgagee that within a period of two and one-half years from the date of the instrument the mortgagor or his brothers or nephew may redeem the property, and that if they do not redeem within that period, the property is to remain to the mortgagee in accordance with his charter. Obviously, we have here a case of the "classical English mortgage" in which an absolute charter of feoffment was delivered by the mortgagor to the mortgagee, and an instrument of defeasance or of the right of repurchase was executed by the latter and delivered to the former. Again, in Pipe Roll 3 Ri. 1 we find the following entry: "Prior de Kenilwurda debet c.s. pro habendo judicio de Flechamstedt secundum cartas suas quas Templarii tenent."¹⁷ Apparently, what happened here was that the owner of Flechamsteda had mortgaged his property to the Prior and delivered a charter of feoffment to the Templars, to be returned to him upon payment of the

¹⁵ Glanvill, De Legibus, bk. 10, ch. 8.
¹⁶ 1 Pollock and Maitland, History of English Law (2d ed. 1898) 120 n. 2.
¹⁷ Pipe Roll Society Publ. v. 2 (N. S.), p. 128 (1191).
mortgage debt, or turned over to the Prior upon default in payment. The writer has shown elsewhere that such a delivery of the instrument of conveyance to a third party was the regular procedure employed in what Pollock and Maitland call "the classical English mortgage" during the early stage of its development, and that the treasury of the Templars was often used by the parties as the depositary in such conditional conveyances. If a provision for a forfeiture was valid in the twelfth century, it is difficult to see why the parties should have gone to the trouble of executing two instruments and, at least in one case, delivering it to a third party, when they could have provided for a forfeiture in a single instrument.

Further evidence to the effect that a provision for a forfeiture was considered invalid in England at a very early time is found in a document, dated 1127, and contained in the Cartulary of the Monastery of Ramsey. This document, if the writer's interpretation of it is correct, represents a mortgage in which a most ingenious method was used for the purpose of effecting a forfeiture—a method which would do honor to the most astute corporation lawyer in our own time. The instrument recites that as a dispute had arisen with regard to certain land between one William Wilard and the Abbot of Ramsey, the latter gave to the former 100 s. upon condition that if Wilard will repay the 100 s. at the end of three years his claim to the land shall be as good as, "and better not worse," as on the day when suit was commenced. If at the end of the three years Wilard failed to repay the money, the Abbot was to hold the land for another three years, and if at the end of the second three-year period Wilard again failed to repay the money, he was to lose his claim to the land.

In all probability this was just an ordinary mortgage, and the dispute was nothing but a fiction intended to cover up a provision for a forfeiture which would otherwise have been invalid. The circumstances of the transaction definitely point in this direction. The sum of 100 s., which was paid by the Abbot to Wilard, was quite a substantial amount in the early part of the twelfth century. Money was scarce, and he who had it could dictate terms pretty much his own way to the one who needed it. If, then, this had been a settlement of a real controversy, it is hardly likely that the Abbot would have given Wilard the option of repaying the money and reasserting his claim after the lapse of three years, and a further option at the end of a second three-year period. Furthermore, parties to a settlement, especially the one that has to part

19. Ramsey Cartulary, Chronicles and Memorials, No. 79, p. 144, No. LXXI.
with money, usually wish to make the settlement final, and do not wish to leave the issue of the controversy in doubt.

The most amazing thing, however, about this transaction is that it conforms with a certain rule of Hebrew law concerning forfeitures, as stated in an early Talmudic text of the second century. This text reads as follows:

"Where two individuals were involved in litigation, and one said to the other: 'If I do not come within 30 days you shall have in my hands so much', and the other demanded that much, R. Jose says: 'the condition shall stand', and R. Judah says: 'how does he become entitled to that which has not come into his hands, the condition is not valid.' Where one delivered his house or his field to another in pledge for a loan of money, and said to him: 'If I do not repay you from now until such a day, I shall have nothing in your hands', and the time arrived and he did not pay, R. Jose says: The condition shall stand'. R. Judah says: 'How does he become entitled to that which is not his, the condition is not valid'. R. Judah admits, however, that in the case where two individuals were contending over a house or over a field, and one of them said to the other: 'If I do not come from now until such a day, I shall have nothing in your hands,' and the time arrived and he did not come, he has lost his claim."20

It thus appears from the above text that according to R. Judah a provision for a forfeiture is not valid, unless the ownership of the property to be forfeited is in dispute, and one of the parties to the dispute stipulates for a forfeiture in favor of the other. It should be added here that R. Judah's opinion is the one that prevails according to the Talmudists.

It will readily be seen that the method of providing for a forfeiture, which was used in the English mortgage discussed above, corresponds exactly to the hypothetical case put by R. Judah, in which, he admits, a provision for a forfeiture is valid. Indeed, there is a very close, and to the writer's mind very significant, similarity between the phraseology of the condition as stated by R. Judah, and that of the English mortgage. Nowhere is a word denoting payment, such as "solvere" or "persolvere" mentioned in the English instrument. "Si non venerit, afferens quae supradicta sunt, sciat se perdidisse omnem calumniam," reads the forfeiture clause in that instrument. Wilard is to "come and bring" the money, exactly as in the Talmudic text, "If I do not come." Furthermore, the entire form of the instrument is rather peculiar. It does not speak in the first person, as English documents of the Middle Ages usually do. It is not a grant or demise by Wilard, but is rather

an attestation by the court of a stipulation entered into before it by the parties to a suit. It speaks in the third person, "in hoc breviculo osten-dit . . . sciat se perdidisse." This feature of the instrument, too, is in remarkable agreement with Hebrew law on the subject of forfeitures. There is an important body of opinion among post-Talmudic authorities holding that R. Judah's statement about the validity of a forfeiture provision where the property to be forfeited is in dispute has reference to a case in which the provision was embodied in a stipulation made before a prominent court in connection with the conduct of a trial.21

The writer believes that the parallelism between the above English mortgage and the rules of Hebrew law with regard to forfeitures is so close that it is hardly possible to explain it away as a mere coincidence. We seem to be dealing here with a pattern shaped on the basis of a whole series of rules, exceptions to the rules, and modifications of these exceptions. Such patterns do not come into existence by accident. It is quite likely that the Abbot followed an example set by the Jews, or that he obtained the advice of a Jewish expert in the money-lending business before he advanced the money. Be that as it may, the fact that the parties had to resort to an elaborate fiction in order to provide for a forfeiture in a legally valid manner shows that ordinarily a provision for a forfeiture was not considered valid.

What has been said above about the invalidity of a forfeiture provision in Glanvill's time applies with equal force to what Pollock and Maitland call the "Bractonian mortgage." The law was not changed in this respect between the time of Glanvill and that of Bracton. But a few words must be added about the documents which Pollock and Maitland cite as examples of the "Bractonian mortgage." An examination of these documents will reveal that they do not quite represent what these great historians of English law claim they represent. No. 509 in Madox has already been discussed by the writer. It is an example of the "classical English mortgage" in its earlier stage of development, in which two documents, a charter of feeoiment and an instrument of defeasance, were used. No. 230 in Madox is a lease by the mortgagor to the mortgagee for a period of fifteen years at a rental of sixpence a year. The instrument provides that if at the end of the fifteen-year period the mortgagor fails to pay the debt, the mortgagee is to hold the property from year to year at the original rental. The land was not to become the property of the mortgagee absolutely upon default by the mortgagor. He was only to hold it from year to year until the debt was paid. The mortgagor's right to redeem the property at the end of any year continued indefinitely. This, if anything, tends to show

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21. See Rabbi Isaac Alfasi on Baba Bathra, ch. 10.
that a forfeiture clause was not considered valid, and that a term of years
could not be changed into a fee by the mortgagor's default. The same
is true of the document cited by Pollock and Maitland from Chron. de
Melsa I. Upon default by the mortgagor at the end of a period of
thirty years the mortgagee was to hold the property from year to year
at a fixed rental.

The Yearbook case cited by them may have been one of a "classi-
cal English mortgage," with an absolute charter of feoffment and an
instrument setting forth the exact terms of the mortgage. The defend-
ant in his answer in that case probably referred to the latter instrument,
which usually recited that if the debt was not paid at the end of the
term fixed by the parties, the property was to remain to the mortgagee,
but that if it was paid, the property was to revert back to the mortgagor.

The same is true of the document cited by them from Guisborough
Cartulary. This document was probably accompanied by a charter
of feoffment. At any rate, the document does not represent a "Brac-
tonian mortgage" in the form of a lease for a term of years, with a pro-
vision that upon failure on the part of the mortgagor to pay the mort-
gage debt at the end of the term the property is to belong to the mort-
gagee absolutely. For, in the first place, it appears that the property
was not demised to the mortgagee for a term of years. There are no
words of demise anywhere in the document. The operative words used
are "obligavi et impignoravi." Also, there is a provision in the docu-
ment that the mortgagor should not sell the property to anyone, except
the mortgagee, in case he should not wish "to hold it in his hand," which
seems to indicate that the mortgagor remained in possession. Again,
the fact that there is no provision for a deduction from the principal
amount of the loan for the use of the property indicates that the mort-
gagee was not in possession, for if he had been, the transaction would
have been a "mortuum vadium," a species of usury according to Glanvill.

It is true that the texts dealing with the subject in Bracton's trea-
tise do seem to support the Pollock and Maitland conclusion. But it is
likely that Bracton left out of account the absolute charter of feoffment,
which was part of every mortgage in which the mortgagee was to
become the owner of the mortgaged property in case of default by the
mortgagor. He had in mind only the document setting forth the terms
of the mortgage, and this document, standing alone, does seem to have
the effect of turning a term of years into a fee. He may have been

23. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (2d ed. 1898) 122. The
case is found in Y. B. 21-2 Edw. I, p. 125 (1294).
24. Page 144.
prompted to overlook the charter of feoffment by a desire for logical symmetry, for in the same passage in which he speaks of a term of years being turned into a fee by a condition he also speaks of a fee being turned into a term of years by a condition.

A very strong indication that Bracton's text is not to be taken at its face value may be found in the fact that in all of the entries in the printed Close Rolls, recording mortgages during the latter part of the reign of Henry III, the transaction takes the form of two separate instruments: an absolute charter of feoffment, and a document setting forth the terms of the mortgage. A diligent search of these rolls by the writer has failed to uncover a single case in which a term of years was to be turned into a fee without the aid of an absolute charter of feoffment, executed by the mortgagor simultaneously with the execution of the document setting forth the terms of the mortgage.

We now come to a consideration of the various types of mortgages found in the Talmud and other Hebrew sources, and their English counterparts. The outstanding feature of the Talmudic law of mortgages is that a provision for a forfeiture of the mortgaged property upon default by the mortgagor is not valid. There were, however, ways of evading this rule against forfeitures. The usual method by which what amounts to a forfeiture was effected under Hebrew law was as follows: the mortgagor would convey the property to the mortgagee absolutely, and the mortgagee, on his part, would undertake to return the property to the mortgagor upon repayment, within a specified period, of the money advanced by him to the mortgagor. The mortgagor's conveyance and the mortgagee's undertaking would be embodied in two separate instruments, and both instruments would be delivered to a third party, to be turned over to the mortgagee or returned to the mortgagor, as the case may be, at the end of the period specified in the agreement between them.

The writer has shown elsewhere that this type of mortgage, in all of its essential features, such as the use of two separate instruments and the delivery of these instruments to a third party, was adopted by the English from the Jews, and that it gave rise to what Pollock and Maitland call the "classical English mortgage," which is still in use throughout England and the United States. In this paper the writer will discuss several types of mortgages, other than the one just mentioned.

27. For a full discussion of the subject and citation of authorities see Rabinowitz, The Common Law Mortgage and the Conditional Bond (1943) 92 U. of PA. L. Rev. 179.
28. Ibid.
The pledge of land with delivery of possession to the creditor was in common use among the Jews at a very early time. A wide variety of gages of land with delivery of possession to the gagee is discussed in the Talmud, tractate Baba Metzia in the chapter dealing with the laws of usury. The connection between these gages and the usury laws is to be found in the fact that in many cases the gaging device was used for the purpose of evading these laws. The principal types of gage mentioned in the Talmud are:

(1) A gage for a specified term, during which the gagor is precluded from paying the debt and redeeming the property.

(2) A gage of indefinite duration, under the terms of which the gagor may at any time pay the debt and redeem the property.

(3) A gage with deduction, under the terms of which the gagee deducts from the principal a certain amount, usually smaller than the normal rental or income from the property, for the use of the property.

(4) A gage without deduction, in which no deduction is made from the principal for the use of the property.

(5) "Kitzutha," a gage in which for a specified period of time the gagee is to deduct a certain amount from the principal, after which period the entire income from the property is to be deducted from the property.

(6) "Mashkantha of Sura," a gage under the terms of which the entire debt is to be extinguished at the end of a specified period of time in exchange for the gagee's use of the land.

From the point of view of the usury laws there is a difference of opinion among post-Talmudic authorities as to the effect of these various types of gage. According to the French school represented by Rashi and Rabbenu Tam, types (3), (5), and (6) are wholly free from the taint of usury, while (4) is only quasi-usury—"abak ribbith," literally the dust of usury and is prohibited only by Rabbinical law, and not by Pentateuchal law. Others hold that type (3) is also usurious, and that only (5) and (6) are not; and still others are of the opinion that the only type of gage which is wholly free from usury is (6), under which the debt is entirely extinguished at the end of a specified period.

With regard to quasi-usury, the rule is that although the lender commits a moral transgression, the temporal courts will, nevertheless, not intervene to invalidate the transaction and compel the lender to return to the borrower what he has received from him by way of usury.

29. Fol. 67a-68a.
30. Baba Metzia, fol. 67b, s. v. Beathra.
31. Tosaphoth on Baba Metzia, 67b, s. v. Rvina.
32. See Rabbi Asher b. Yechiel on Baba Metzia, fol. 67a-68a.
A comparison of these Talmudic gages with the Glanvillian "vadium" will reveal a close correspondence between them. Glanvill speaks of the "vadium ad terminum," the gage of land for a term, and the "vadium sine termino," the gage without a term. Pollock and Maitland apparently interpret the text in Glanvill to mean that under the "vadium ad terminum" the lender may not demand the repayment of the loan before the expiration of the term, while under the "vadium sine termino" he may do so at any time. However, the plain meaning of the text is that the term has reference to the mortgage and not to the loan. The difference between a mortgage with a term and one without a term, therefore, consists in the fact that under the former the mortgagor may not redeem the land by paying the mortgage debt before the expiration of the term, while under the latter he may do so at any time. It may readily be seen, by a reference to the Talmudic gages enumerated above, that Glanvill's "vadium ad terminum" and "vadium sine termino" are the exact counterparts of types (1) and (2), respectively, of these gages.

Again, in the same book, Glanvill speaks of the "mortuum vadium," and explains the same as a gage under the terms of which no deduction from the principal is made by the lender in favor of the borrower for the use of the land by the former during the term of the gage. This is obviously type (4) of the Talmudic gage. Type (3) is not specifically mentioned by Glanvill, but is clearly implied in his definition of the "mortuum vadium." "Mortuum vadium dicitur illud cujus fructus vel redditus interim percepit in nullo se acquietant." From this it follows that where a deduction is made, even though it is less than the full value of the income from the land, the transaction is not a "mortuum vadium."

Pollock and Maitland apparently did not give the proper weight to the words "in nullo" in Glanvill's definition of the "mortuum vadium." They are therefore of the opinion that, according to Glanvill, the only type of gage which was wholly free from the taint of usury was the one in which the entire income from the property was deducted from the principal of the loan. Having failed to find instances of such gages in the twelfth and thirteenth centuries they concluded that the sin of usury involved in the "mortuum vadium" was disregarded by money-lenders. To quote from their History of English Law:

"The specific mark of the mortgage is that the profits of the land received by the creditor are not to reduce the debt. Such a bargain is a kind of usury; but apparently it is a valid bargain, even

33. GLANVILL, De Legibus, bk. 10, ch. 6.
34. 2 Pollock and Maitland, History of English Law (2d ed. 1898) 120.
35. GLANVILL, De Legibus, bk. 10, ch. 8.
though the creditor be a Christian. He sins by making it, and, if he dies in his sin, his chattels will be forfeited to the king; but to all seeming the debtor is bound by his contract. . . . Even the Christian, if we are not much mistaken, was very willing to run such risk of sin and punishment as was involved in the covert usury of the mortgage. The plea rolls of the 13th century often show us a Christian gagee in possession of the gaged land, but we have come upon no instance in which he was called upon to account for the profits that he had received.” 36

However, a close examination of some of the available thirteenth century mortgage instruments will reveal that in form at least money-lenders did not disregard the sin and risk involved in the “mortuum vadium.” There is a provision in these instruments for some deduction, however small and normal, for the use of the property. In No. 230, Madox, Formulare Anglicanum, which has already been mentioned, the gagee was to deduct sixpence per year, and in Chronicles de Melsa, the deduction was one of one shilling per year. 37 These mortgages were therefore similar to type (4) above of the Talmudic gage.

A comparison between No. 230 in Madox and the standard Hebrew gage with deduction, given in the formbook of Rabbi Jehudah Barzillai 38 (11th century, Spain) is particularly illuminating in this respect. There is an almost complete identity of pattern between the two. In the Madox instrument the land was delivered to the gagee for a period of fifteen years at a rental of sixpence per year, with a provision that upon failure on the part of the gager to pay the debt at the end of that period the gagee was to hold the property from year to year at the same rental until he was paid in full. In the Barzillai form the gage is similarly given for a definite period of time, with a fixed annual deduction by way of rent, and with a provision that in case of default the gagee is to hold the property from year to year at the original rental until he is fully paid.

A truly remarkable parallelism between the Talmudic law of mortgages and the English law on the same subject, as laid down by Glanvill, is to be found in the passage in which the latter speaks of the usurious character of the “mortuum vadium,” where he says that although the “mortuum vadium” is a species of usury it is not prohibited by the king’s court. 39 This is obviously in complete agreement with the view of the Talmud, as interpreted by the French school of commentators, on a mortgage without deduction. The transaction according to the,

36. 2 Pollock and Maitland, History of English Law (2d ed. 1898) 119.
38. Form No. 42.
Talmud, is quasi-usurious and involves a sin, but does not involve a legal wrong which would warrant the intervention of a temporal court.

An interesting variation of type (5) of the Talmudic gage is found in an English mortgage, dated 1190. According to the terms of this mortgage a certain sum was to be deducted from the principal annually until the twenty-fifth year, that is, during the first half of the term of the mortgage, which was made for a period of fifty years. After the twenty-fifth year the mortgagor was to get the benefit of one-half the income from the land, together with one-half the original rental. The similarity between this elaborate scheme and the gage known in the Talmud as "Kitzutha," type (5) above, is more than suggestive. It will be recalled that according to most authorities this type of gage is wholly free from the taint of usury and does not even involve moral sanctions. The term of fifty years may have been suggested to the parties by the Biblical law of the Jubilee year. Indeed, the Talmud likens a mortgage with deduction to the sale of land under the laws of the Jubilee year.

Type (6) of the Talmudic gage, the so-called "mashkantha of Sura" under which the debt was entirely extinguished at the end of a specified term was similarly used in England at a very early period. Pollock and Maitland, in discussing the gage for years, remarked:

"Now in our records it is not always easy to mark off the gage for years from those beneficial leases of which we have spoken above. Both of them will serve much the same purpose, that of restoring to a man a sum of money which he has placed at the disposal of another, though in the case of the beneficial lease there is nothing that could be called a debt. As already said the beneficial lease was common. It was particularly useful because it avoided the scandal of usury."

It will readily be seen from the above that the gage for years was the exact counterpart of the "mashkantha of Sura," and that both were used for the same purpose, namely, that of evading the prohibition of usury.

Finally, an interesting reflection of Talmudic law is found in a mortgage cited by Madox in his introduction to the Formulare Anglicanum. A Jewish mortgagee leased the mortgaged property to the mortgagor's wife. Madox calls this transaction singular, and singular it certainly is to anyone not familiar with Hebrew law. But a reference to the chapter in the Talmud dealing with usury will at once reveal the reason for this peculiar, and apparently fictitious set-up.

41. 2 Pollock and Maitland, History of English Law (2d ed. 1898) 121-2.
42. P. XXII.
In this chapter mention is made of a certain method of evading the usury laws which the Talmudists condemn. This method consisted in the mortgagee's leasing the property to the mortgagor at a fixed annual rental. The instrument would recite that the borrower mortgaged the property to the lender, and that the latter leased it to the former. When the objection was raised to this form of instrument that the lender could not at the same time and by the same instrument become mortgagee and lessor, the formula was changed to read: The borrower mortgaged the property to the lender and, after the lender had remained in possession for some time, he leased it to the borrower. Still the Talmudists condemned this type of transaction as savoring of usury, because payments were made directly by the borrower to the lender. In the Madox mortgage the mortgagor's wife was brought into the picture in order to avoid direct payments by the borrower to the lender.

The writer has attempted to show that every type of gage which was used by the Jews since the days of the Talmud was known and used in medieval England. This complete parallelism, together with the fact that there is hardly a phase of English medieval law, connected with the creditor-debtor relationship, which has not been influenced by the Jews, inescapably leads to the conclusion that the English copied these devices from the Jews.

43. Baba Metzia, fol. 68a.
44. See id. fol. 69b, where it is said that usury laws apply only to direct payments by the borrower to the lender.