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Trust and Fiduciary Duty in the Early Common Law

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**TRUST AND FIDUCIARY DUTY IN THE
EARLY COMMON LAW**

DAVID J. SEIPP*

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INTRODUCTION

Trust is an expectation that others will act in one’s own interest. Trust also has a specialized meaning in Anglo-American law, denoting an arrangement by which land or other property is managed by one party, a trustee, on behalf of another party, a beneficiary.¹ Fiduciary duties are duties enforced by law and imposed on persons in certain relationships requiring them to act entirely in the interest of another, a beneficiary, and not in their own interest.² This Essay is about the role that trust and fiduciary duty played in our legal system five centuries ago and more.

The legal system of England, as it developed between the twelfth century and the sixteenth century, set the structure and character of our modern law. Common law, the law applied in England’s central royal courts, was the dominant feature of this legal system. The long-understood story is that English common law in its formative centuries was unacquainted with trust as a legal device or as a human practice, and that fiduciary duties grew up outside the common law in a separate court of chancery with the law of trusts and trustees, only being incorporated a century and a half ago with the fusion of law and equity.

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¹ See TAMAR FRANKEL, *FIDUCIARY LAW* 5 (2011).

² See *id.* at 1-5.

Trusts were enforced by chancery, a court of equity, not by courts of common law. Fiduciary duties and the law of trusts thus seemed to have grown up outside the common law, in a different court that developed later than the common law courts and was sometimes regarded as their adversary or rival. Because the common law did not enforce the trusts nor their predecessors, called uses, it is sometimes thought that uses and trusts were invisible to the common law. In particular, an argument was made between 1526 and 1535 that uses did not exist at common law, but arose as instruments of fraud and collusion.³

Professor Tamar Frankel has challenged lawmakers, lawyers, and judges to put trust and fiduciary duty at the heart of modern law. In her honor, this Essay explores the extent to which trust and fiduciary duty can be found at the root of Anglo-American common law. While the common law did not enforce uses, it took account of uses in many ways, and recognized and enforced fiduciary duties in other relationships.⁴ Judges, lawyers, legislators, and treatise writers integrated these uses into the fabric of the common law. They wrote extensively about uses, and they identified trust as the essence of these arrangements. The impression that the common law ignored uses arose after uses had been familiar for two centuries. This impression arose from a political assault on this pervasive landholding arrangement, with the intent to collect more revenue for the king.

I. RIGOR OF THE COMMON LAW

Early English common law acquired a reputation for rigor – for uniform application of rules even in harsh circumstances that would seem to beg for exceptions.⁵ Those who knew the rules well could use them to their advantage, and those who lost out thereby were told by common law judges that it was their own folly that they had not protected themselves. In part, the chancellor's jurisdiction in equity developed in order to mitigate the harshness of common law rules. This is also why fiduciary duties, which became so closely linked to the chancellor's jurisdiction over trusts, can be thought to be contrary to the spirit of the early common law. Here are some examples of common law rules that seem to embody what might be called an anti-fiduciary impulse, a hostility to trusting and fiduciary relationships.

In early contract law, if I became your debtor by a written, signed, and sealed promise to pay (a bond), and then I fully repaid the debt to you, I would trust you to destroy the bond, cancel it, or give me a written release. If you instead did none of these things, you could then sue me in the king's court on

³ J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 254 (4th ed. 2002).

⁴ *Id.* at 251.

⁵ *See id.* at 102 (“The possibilities of technical failure were legion. And the growing strength of substantive law could also work injustice, because the judges preferred to suffer hardship in individual cases than to make exceptions to clear rules.”).

the original debt, and my evidence of full repayment would not be received.⁶ Only outside the common law, in the equity court of the chancellor, could I prove my repayment and enjoin my creditor from suing me at common law for a second repayment of my debt.⁷

If I dispensed with the formalities of a sealed writing and I became your debtor by a solemn oral promise to pay and a handshake, you would trust me to keep my oral promise. But if I then refused to pay, the common law would let me offer my sworn oath, called “wager of law,” as conclusive proof that I did not owe the money. Doing so indicated both that I was willing to damn my soul to eternal hell by lying under oath, and that I could pay eleven other people, called oathhelpers, to damn their souls by swearing they believed me.⁸ Only in the church courts could I be prosecuted for my breach of promise, and made to do penance by paying the sum that I owed as the price of getting back into communion with the church.

Rules like these gave the impression that the early common law was devised for shrewd, savvy schemers who knew the rules and knew how to exploit them. The fools who trusted their neighbors to keep their promises, to act in good faith, and to do what was expected of them had to look outside the common law – or wait a few centuries for the law to develop a new remedy, like trespass on the case for assumpsit, to rescue them. This impression of the early common law resembles the “bad man’s view” of the law put forward by Oliver Wendell Holmes, Jr. in his speech, *The Path of the Law*, delivered at Boston University School of Law in 1897.⁹ The bad man would not see contracts as

⁶ BAKER, *supra* note 3, at 324-25; *see, e.g.*, *Fishacre v. Kirkham*, Y.B. Mich. 17 Edw. 1, pl. 2, 112 S.S. 322 (Common Pleas 1289) (Seipp Number: 1289.008ss) (providing that one obligated in writing as a debtor could not allege payment without a specialty – a writing under seal).

Year Book references herein are to the Vulgate (London 1678-1680) edition unless otherwise indicated as:

–S.S.: Selden Society (1903-);

–Ames: Ames Foundation (1914-);

–Statham Abridgment: Nicholas Statham, *Epitome Annalium Librorum Tempore Henrici Sexti* (c. 1490), *available at* http://www.law.harvard.edu/programs/ames_foundation/digital/Statham/StathamMetadata.html;

–Fitzherbert Abridgment: Anthony Fitzherbert, *La Graunde Abridgment* (London 1577).

Where available, references to the Author’s database are provided following the citation.

⁷ *See, e.g.*, W.T. Barbour, *The History of Contract in Early English Equity*, reprinted in 4 OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 1, 25 (Paul Vinogradoff ed., 1914); Y.B. Pasch. 22 Edw. 4, pl. 18, fol. 6 (Chancery, Exch. Ch. 1482) (1482.086); J.L. Barton, *Equity in the Medieval Common Law*, in EQUITY IN THE WORLD’S LEGAL SYSTEMS 147 n.48 (Ralph A. Newman ed., 1973).

⁸ *See* BAKER, *supra* note 3, at 74 (commenting that court porters provided professional oathhelpers by the end of the sixteenth century).

⁹ OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167,

obligations to fulfill his promises, but only as options either to perform as promised or to pay the damages a court of law would award.¹⁰

Early English criminal law also seemed out of step with ordinary practices of trusting and fiduciary relationships. The common law felonies of robbery and burglary were crimes committed by strangers with force and violence.¹¹ It took several centuries for English law to extend felony liability to embezzlement, fraud, and forgery – acts in which wrongdoers were servants or agents of their victims or in transactions with their victims, and took advantage of the trust their victims reposed in them.¹²

Matters of substance in the early common law were heavily influenced by procedural, jurisdictional, and evidentiary rules, and these examples from early contract and criminal law are no exceptions. Common law judges applied rules of pleading and procedure in a sharply adversarial setting, a battle of wits between rival advocates. One who pleaded badly could expect no mercy from the other side, and none from the judge.¹³ But lack of trust inside the medieval courtroom did not necessarily extend outward to the world outside the courtroom, nor to the law applied outside the courtroom.

II. THE MEDIEVAL USE

The common law's inattention to notions of trust and fiduciary duty arose most prominently in the field of property law. The early common law had rigid rules of inheritance and feudal obligation. A dying landholder could not leave land by will to whomever he or she wanted (except in the city of London and some English boroughs by special local customs), but was forced to let it descend to the eldest male heir.¹⁴ If an heir to land at the high social level called knight service was under the age of twenty-one, the feudal lord of the heir took the heir and the land into wardship.¹⁵ Wardship permitted a lord who provided a reasonable maintenance for the heir to keep all the profits from the heir's land until the heir turned twenty-one.¹⁶ Wardship was thus a tremendous financial windfall to lords who otherwise were left to fixed feudal services or rents that over time had become hardly worth collecting.¹⁷ The lord could also sell the right to arrange the underage heir's marriage, another financial windfall to the lord.¹⁸ But the lord collected these valuable rights only if the land was inherited from the dying tenant, not given away during his life.

171 (1921); *see also* David J. Seipp, *Holmes's Path*, 77 B.U. L. REV. 515, 528 (1997).

¹⁰ Seipp, *supra* note 9, at 517.

¹¹ BAKER, *supra* note 3, at 534.

¹² *Id.* at 534-35.

¹³ *See id.* at 78.

¹⁴ *See id.* at 266-68.

¹⁵ *Id.* at 240.

¹⁶ *Id.*

¹⁷ *Id.* at 238, 241.

¹⁸ *Id.* at 240.

These feudal incidents, as they were called, of wardship and marriage can be viewed as a tax.¹⁹ They were broadly applicable, not subject to renegotiation, and profited particularly the king, who was always lord and never tenant.²⁰

Within this legal landscape, starting in the 1320s a social practice developed that enabled landholders to avoid – a later king’s lawyers would say “evade” – these feudal obligations.²¹ A landholder would transfer a bare legal title to a small group of persons who would hold that land (in subordination to the same feudal lord) for the benefit of the original landholder and then for whomever the landholder would designate by will, thus circumventing the rule against wills of land. This arrangement would delay transferring the land to an heir until he or she reached the age of twenty-one, thus circumventing the feudal incidents of wardship and marriage. A landholder could make provision for daughters and younger sons, and could make greater provision for a surviving spouse than the common law dower and curtesy afforded. He could also, by means of a use, deprive the surviving spouse of those common law entitlements. If a landholder wanted to give land at his or her death to the church, this device also circumvented a statute of mortmain enacted in 1279 that would have prohibited or required an expensive license from the king for such gifts of land.²²

The standard terminology for this social practice was feoffment to uses.²³ The landholder or feoffor granted or enfeoffed the land to feoffees to the use of the intended beneficiary, or *cestuy que use*.²⁴ The feoffees, nearly always at least three in number, would hold the land in joint tenancy with right of survivorship.²⁵ This arrangement made it very unlikely that the legal title would descend from a last surviving feoffee to that feoffee’s heir and give the lord a potential wardship. It was very common for the feoffor to be the *cestuy que use*. Similarly, in modern estate planning settlors set up trusts during their lifetimes and are themselves the initial beneficiaries of their trusts, keeping all of the income from the trust property until their deaths, and directing who next would receive the trust property after their deaths.

¹⁹ *Id.* at 238.

²⁰ *See Id.* at 241.

²¹ This account is based principally on Joseph Biancalana, *The Medieval Use, in* ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 111 (Richard Helmholz & Reinhard Zimmermann eds., 1998). Also useful are J.M.W. BEAN, *THE DECLINE OF ENGLISH FEUDALISM, 1215-1540*, at 24 (1968); ROBERT C. PALMER, *ENGLISH LAW IN THE AGE OF THE BLACK DEATH, 1348-1381*, at 116 (1993); J.L. Barton, *The Medieval Use*, 81 L.Q. REV. 562, 562 (1965).

²² *See* SANDRA RABIN, *MORTMAIN LEGISLATION AND THE ENGLISH CHURCH 1279-1500*, at 29-30 (1982).

²³ BAKER, *supra* note 3, at 249 n.4.

²⁴ *Id.* at 250.

²⁵ *See id.* (stating that multiple feoffees would help ensure against “individual unscrupulousness”).

Earlier legal historians supposed that uses were older than the 1320s. Roots of the use and the trust have been proposed in the *fideicommissum* of Roman law, the *salman* or *treuhand* of Germanic law,²⁶ and the *waqf* of Islamic law,²⁷ but the medieval use seems to have been an English invention.²⁸ Domesday Book, the survey of English landholding from 1086, noted lands said to have been held *ad usum* (to the use of) someone or other.²⁹ These were probably lands put temporarily in the custody of others, such as when a landholder went off on a pilgrimage. Landholders tried various custodial arrangements in the thirteenth century.³⁰ Uses were also preceded by conditional grants, in which the terms of the feoffee's intent, such as the obligation to convey the land to the feoffor's heir after the heir reached twenty-one, were spelled out as conditions of the feoffee's title. Such arrangements were caught by chapter six of the Statute of Marlborough, enacted in 1267, which provided that feoffments intended to deprive lords of their wardships were invalid, though feoffments made in good faith were valid.³¹

What set the use apart from these earlier arrangements was the separation of legal title from beneficial enjoyment of land. Feoffees to uses had the full legal title to land, the right to sell or grant it, and the ability to sue and be sued in relation to the land.³² The essential feature of uses, and what allowed them to override the prohibition on wills of land, was that the beneficiary or *cestuy que use* had no interest enforced by courts of common law and no remedy in courts of common law against feoffees who misbehaved.

III. ENFORCEMENT OF USES OUTSIDE THE COMMON LAW

Uses developed in England and spread for several decades probably without any regular enforcement by any courts. Feoffors set up such arrangements relying entirely on the good will of their feoffees, who were bound only by personal ties of friendship to carry out the wishes of the feoffor at the feoffor's death. But feoffees did not always do as they were told.

Because beneficiaries had no protection at common law, other courts stepped in to fill the gap. The first courts to do so were England's ecclesiastical courts.³³ Church courts maintained a jurisdiction separate from the royal courts of common law. For instance, church courts had jurisdiction over wills of personal property, which were permissible throughout England,

²⁶ See 4 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 410-11 (3d ed. 1945).

²⁷ See GILBERT PAUL VERBIT, THE ORIGINS OF THE TRUST 114 (2002).

²⁸ BAKER, *supra* note 3, at 248-49.

²⁹ See *id.* at 225.

³⁰ See Joseph Biancalana, *Thirteenth Century Custodia*, 22 J. LEGAL HIST. 14, 15-16 (2001).

³¹ Statute of Marlborough, 52 Hen. 3, ch. 6 (1267), in 1 Statutes of the Realm 19.

³² BAKER, *supra* note 3, at 252.

³³ *Id.* at 250.

even though nearly all the land in England could not be devised by will.³⁴ Church courts supervised executors of wills, appointed administrators for the personal property of intestates, and arranged for guardians of orphaned children. Church courts also dealt with a variety of trust-like arrangements in which land was held by one person for the benefit of another.

Scholars have not explored all surviving records of medieval ecclesiastical courts, but work by R.H. Helmholz, studying two courts with the best surviving records, both in the county of Kent in southeastern England, has shown that feoffees's obligations to uses were enforced in these church courts as early as 1375, and frequently in the first half of the fifteenth century.³⁵ By the 1460s, however, such cases were disappearing from the church courts, because the king's court of chancery was enforcing such uses.³⁶

In 1402 the House of Commons prayed for a remedy, presumably by legislation, against "disloyal" feoffees who sold or raised money on lands instead of performing the wills of their feoffors.³⁷ No statute was passed in response to this request, but the fact that it was made shows that the practice of feoffment to uses had become widespread and the problem of lack of enforcement had risen to the attention of the king and Parliament.

The response came instead from one of the king's principal officers, the chancellor. Nearly all chancellors before 1530 were bishops or archbishops.³⁸ They oversaw the royal writing office from which process issued for the common law courts. By the 1380s, chancellors were also receiving and acting upon petitions that complained of deficiencies and lack of remedies in the courts of common law.³⁹ By 1420, chancellors were receiving and acting upon complaints that feoffees to uses were not acting in accordance with their feoffors' instructions.⁴⁰ Petitioners complained that feoffees disregarded the commands of their consciences by failing to carry out the deathbed intentions of the feoffors who had given them title to their lands. It is not known how much of the chancery's business was taken up with enforcement of uses in the middle of the fifteenth century, but feoffees who betrayed their feoffor's trust could be ordered by one of the king's principal officers to act in accordance

³⁴ 1 R.H. HELMHOLZ, *THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 51 (2004) ("[T]he fundamental division between lands and chattels . . . would become the dividing line between the jurisdiction of courts of church and state.").

³⁵ HELMHOLZ, *supra* note 34, at 421; R.H. Helmholz, *The Early Enforcement of Uses*, 79 *COLUM. L. REV.* 1503, 1513 (1979); Richard Helmholz, *Trusts in English Ecclesiastical Courts 1300-1640*, in *ITINERA FIDUCIAE*, *supra* note 21, at 153, 157-60.

³⁶ HELMHOLZ, *supra* note 34, at 421.

³⁷ See 3 *Rotuli Parliamentorum* 511, 4 Hen. 4, no. 112 (1402) (The Parliament Rolls of Medieval England, Scholarly Digital Editions, CD-ROM, rel. 2005), *quoted in* 4 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 417 n.2 (3d ed. 1945).

³⁸ HELMHOLZ, *supra* note 34, at 224.

³⁹ BAKER, *supra* note 3, at 101-03.

⁴⁰ *Id.* at 251.

with their consciences. In the chancellor's court, which came to be known as equity, feoffees owed a fiduciary duty to carry out the feoffor's wishes to benefit the *cestuy que use*.

IV. ATTENTION TO USES IN THE COMMON LAW

The purpose of this Essay is to suggest that the medieval use was not invisible to the common law and its judges and lawyers, nor foreign to their learning and expertise. It is true that common law courts did not enforce uses, and they provided no remedies for the beneficiaries against feoffees who betrayed their feoffors' expectations. In the eyes of the common law, the feoffees had the full legal title, and the beneficiaries had nothing. A standard illustration of the point is that Thomas Littleton, a Justice of Common Pleas, wrote a book called *New Tenures*⁴¹ sometime between 1450 and 1460 in which he set forth every type of landholding known to English lawyers, but included no chapter on uses. According to a chief justice's estimate reported in a 1502 case, the greater part of England already was held by feoffments to uses by the time Littleton composed his treatise.⁴² The same chief justice also said that in relation to feoffees, "by the course of the common law" their feoffor "had nothing more to do with the land than the greatest strangers in the world."⁴³ This statement is an example of the extreme formalism of the early common law.

Littleton did in fact mention uses in passing, very late in his treatise, in a chapter on releases of future interests in land to the present possessors.⁴⁴ He called them feoffments "upon confidence to perform the will of the feoffor," and said that when such a feoffment was made, the law would presume "that the feoffor ought presently to occupy the land at the will of his feoffees."⁴⁵ Littleton went on to say that a beneficiary of a use for lands of the required value could even meet the property qualification for jury service. The chief justice who spoke in 1502 about how much of England was held to uses in Littleton's time was referring to this same jury qualification issue.⁴⁶

⁴¹ THOMAS LITTLETON, *NEW TENURES*, reprinted in *LITTLETON'S TENURES* (Eugene Wambaugh ed., John Byrne & Co. 1903).

⁴² *Dod v. Chyttynden*, Y.B. Mich. 15 Hen. 7, pl. 1, fol. 13a, 13b (C.P. 1502) (1499.025) (Frowyk, C.J.C.P.: "*al fesance de le Statut le grande part del' terre d' Angleterre fuit in feoffements sur confidence*") (referring to statutes setting property qualifications for jury service, the latest of which was enacted in 1429).

⁴³ *Dod v. Chyttynden*, Caryll's Reports 15 Hen. 7, pl. 258, 116 S.S. 392, 396 (C.P. 1502) (Serjeant Frowyk: "*per le course del common ley il nad plus a faire ovesque le terre que le plus estrange en le mounde*") (stating that a feoffor could not, of his own right, take a stranger's animals that had come onto and damaged enfeoffed land, but could only do so in a feoffee's name).

⁴⁴ LITTLETON, *supra* note 41, at §§ 462-64.

⁴⁵ *Id.* § 463.

⁴⁶ Edward Coke repeated Frowyk, C.J.C.P.'s point in his commentary on section 464 of

The common law took notice of uses in another rule regarding who could serve on juries. Parties could challenge prospective jurors who were related to or were tenants or lords of their adversaries. The common law allowed parties to challenge prospective jurors who were feoffees to uses when the opposing party was a beneficiary of uses, and vice versa.⁴⁷ Here the common law did not regard beneficiaries, in relation to their feoffees, as the greatest strangers in the world. The common law also took notice of uses in the law of maintenance, which prohibited interference in the lawsuits of others. Before he became a justice, Thomas Littleton said, and the Court of Common Pleas agreed, that a beneficiary who maintained a feoffee to his use in the feoffee's lawsuit was not guilty of maintenance.⁴⁸

Beginning in 1376, statutes were enacted in Parliament to fix problems that had arisen with feoffments to uses. The essence of the use, that feoffees held the title to land while a beneficiary derived profits from the land, had the potential to work much mischief. So Parliament sought to prevent debtors from concealing assets from creditors,⁴⁹ to allow claimants in land disputes to sue the real party in interest rather than the nominal titleholder,⁵⁰ to prevent the accumulation of wealth by the church,⁵¹ to permit purchasers from beneficiaries of uses to rely upon their apparent title,⁵² and to preserve the king's rights to wardships of infant heirs and their lands.⁵³ Applying and

Littleton's *Tenures*. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND OR A COMMENTARY UPON LITTLETON § 464 (15th ed. 1836).

⁴⁷ Y.B. Pasch. 3 Hen. 6, pl. 5, fol. 39a-39b (C.P. 1425) (1425.043) (forcing the withdrawal of challenged feoffee to uses); Hil. 9 Hen. 6, 7, Fitzherbert Abridgement, Challenge pl. 27, fol. 172r (C.P. 1431) (1431.183abr) (withdrawal of challenged beneficiary); Y.B. Hil. 21 Edw. 4, pl. 29, fol. 20b (Exch. Ch. 1482) (1482.029) (Huse C.J.K.B.: finding that a brother of a beneficiary could not be a juror in an action brought by the feoffee).

⁴⁸ Y.B. Pasch. 2 Edw. 4, pl. 6, fol. 2a (C.P. 1462) (1462.006) (Serjeant Littleton).

⁴⁹ 50 Edw. 3, ch. 6 (1376), *in* 1 Statutes of the Realm 398 (providing against feoffments by persons intending to put their lands beyond the reach of creditors while retaining the profits of their lands). The later statute of 19 Hen. 7, ch. 15 (1504), *in* 2 Statutes of the Realm 660, went well beyond this early statute in protecting creditors and lords from the effects of uses.

⁵⁰ 1 Ric. 2, ch. 9 (1377), *in* 2 Statutes of the Realm 3-4 (providing against feoffment of lords and great men of the realm by those who dispossess landholders where such feoffors take the profits); 4 Hen. 4, ch. 7 (1402), *in* 2 Statutes of the Realm 134 (giving an action against those who dispossess landholders and take the profits of the land after enfeoffing others).

⁵¹ 15 Ric. 2, ch. 7 (1391), *in* 2 Statutes of the Realm 80 (providing against feoffments to the use of ecclesiastical persons).

⁵² 1 Ric. 3, ch. 1 (1484), *in* 2 Statutes of the Realm 477 (providing that sales, grants, and leases by beneficiaries of uses convey title against feoffees).

⁵³ 4 Hen. 7, ch. 17 (1489), *in* 2 Statutes of the Realm 540-41 (titled "an Act Against Fraudulent Feoffments Tending to Defraud the King of His Wards").

interpreting these statutes, lawyers and judges of the common law courts showed their familiarity with uses and their enforcement. Common lawyers often referred to feoffors and other beneficiaries of uses, or *cestuys que use*, as purnors (takers) of profits in applying statutes of 1377 and 1402.⁵⁴ The statute of 1484 in favor of purchasers from beneficiaries drew the most attention from lawyers and judges of common law courts, measured by the number of cases reported dealing with that statute.⁵⁵

Littleton's *Tenures* had very little to say about uses, but two subsequent treatises on common law that proved almost as popular among lawyers and law students gave uses far more attention. Christopher St. German, a lawyer, wrote *Doctor and Student*, first published in two parts in 1528 and 1530, to demonstrate that while English law departed in some respects from the commands of conscience, in other ways it was congruent with divine law and reason.⁵⁶ Law students eagerly bought up copies of *Doctor and Student* for its legal content. St. German wrote in the form of a dialogue between a theologian and a lawyer, bringing out the rigor of the common law and its scope for sharp practice and manipulation. Given that his topic was the real or apparent divergence between conscience and law, St. German also discussed feoffment to uses.

In the voice of the lawyer, St. German wrote that generally every feoffment would be presumed to be a feoffment to the use of the feoffor unless there had been a bargain or recompense or other expression of the feoffor's intent to benefit the feoffee.⁵⁷ As a Justice of Common Pleas put it in a case of 1522, "common reason dictates that if I enfeoff someone without consideration or *causa* it shall be to my use"⁵⁸ St. German explained that the feoffor would have to sue in chancery for his remedy⁵⁹ and that in this respect the law applied by chancery accorded with conscience.⁶⁰

Next in the dialogue, St. German's theologian asked the lawyer "how uses began, and why so much land has been put in use in this realm"⁶¹ so that "few men be sole seised of their own lands."⁶² The lawyer answered that uses

⁵⁴ See Oliver W. Holmes, Jr., *Early English Equity*, 1 L.Q. REV. 162, 167 (1885).

⁵⁵ The Author's database of Year Book reports shows that the 1484 statute was cited or referenced in more cases than any of these other statutes.

⁵⁶ ST. GERMAN, DOCTOR AND STUDENT, at First Dialogue, prologue, fol. 1b (1528), reprinted in 91 S.S. 3 (1974).

⁵⁷ *Id.* at ch. 21, fol. 52a-52b (1528), 91 S.S. 220 (1974).

⁵⁸ *Gervys v. Cooke*, Y.B. Mich. 14 Hen. 8, pl. 5, 119 S.S. 108, 116-17 (C.P. 1522) (1522.014ss) (Broke, J.C.P.). The same point is made in a manuscript report probably written in 1533. Reports of John Caryll, Jr., pl. 13, 121 S.S. 366, 374 (Inner Temple, c. 1533).

⁵⁹ ST. GERMAN, *supra* note 56, at Second Dialogue, ch. 21, fol. 53a, 91 S.S. 221.

⁶⁰ *Id.* at Second Dialogue, ch. 21, fol. 53b, 91 S.S. 221.

⁶¹ *Id.* at Second Dialogue, ch. 21, fol. 54a, 91 S.S. 221.

⁶² *Id.* at Second Dialogue, ch. 22, fol. 56a, 91 S.S. 223.

derived from the law of reason, that land in England had two aspects, the freehold and the authority to take the profits of the land.⁶³ He explained that, in reason and conscience, one who had both could give only the possession and freehold to another and keep the profits to himself, “seeing there is no law made to prohibit” this.⁶⁴

As to why so much land had been put in use, St. German’s lawyer said that it would be long and perhaps “tedious” to list all the causes for the prevalence of uses.⁶⁵ He admitted that uses had been employed to mislead and intimidate rival claimants of land, to evade mortmain, to evade creditors, and to deprive lords of wardships, but said that statutes had remedied these abuses.⁶⁶ The two principal causes listed by the lawyer for the creation of uses were to make wills of land and to give effect to marriage settlements.⁶⁷

John Perkins, also a lawyer, wrote a work in 1528 that became known in later editions by the title *A Profitable Book*.⁶⁸ He intended the work to be a supplement to Littleton’s *Tenures*, focusing on aspects of conveyancing not dealt with by Littleton. Perkins mentioned uses in many chapters of *A Profitable Book*, but a chapter on devises particularly addressed the subject, setting forth a number of detailed rules about enforcement of uses. Perkins wrote, as had St. German, that every feoffment was presumed to be made to the feoffor’s use unless the feoffee gave consideration.⁶⁹ He added that this presumption had arisen very early, when the statute *Quia emptores* of 1290 permitted feoffment over a lord’s objection.⁷⁰

Another lawyer writing between 1522 and 1536 asserted that “there were trusts in the time of Edward I, as appears by the statute of Marlborough” of 1267, which prohibited feoffments depriving lords of their wardships.⁷¹ Both dates 1267 and 1290 were considerably earlier than the first trace modern historians can find of the employment of uses in England.⁷² A Justice of Common Pleas said in 1502 that chancery had begun enforcing uses against

⁶³ *Id.* at Second Dialogue, ch. 22, fol. 54a, 91 S.S. 222.

⁶⁴ *Id.* The theologian objected that this seemed to be a grant combined with a reservation that deprived the grant of nearly all of its practical effect, which was void in most circumstances. The lawyer’s effort to distinguish valid uses from such void grants was not very persuasive.

⁶⁵ *Id.* at Second Dialogue, ch. 22, fol. 55b, 91 S.S. 223.

⁶⁶ *Id.* at Second Dialogue, ch. 22, fol. 56a-57a, 91 S.S. 223-24.

⁶⁷ *Id.* at Second Dialogue, ch. 22, fol. 57a, 91 S.S. 224.

⁶⁸ JOHN PERKINS, *A PROFITABLE BOOK, TREATING THE LAWS OF ENGLAND*, at vii (photo. reprint 1978) (1827) (first published 1528 as *Perutilis tractatus*).

⁶⁹ *Id.* § 533, at 102-03.

⁷⁰ *Id.* §§ 528-29, at 101-02.

⁷¹ Uses pl. 141, Roger Yorke’s Notebook, 120 S.S. 141 (before 1536) (referring to the Statute of Marlborough, 52 Hen. 3, ch. 6 (1267), in 1 Statutes of the Realm 19).

⁷² See *supra* text accompanying note 21.

feoffees in the reign of Edward III (1327-1377),⁷³ again a considerably earlier period than modern historians assign to the first petitions for chancery to enforce uses.⁷⁴ These lawyers and judges of the early sixteenth century showed an awareness that there had been uses for about two hundred years, and that most of the land in England had come to be held in uses.

V. COMMON LAW JUDGES AND LAWYERS IN CHANCERY

Lawyers kept and copied reports of thousands of cases decided in the courts of common law, in a series known as the Year Books, and they excerpted manuscript reports of cases in compilations called abridgements. Among these Year Books are fourteen cases that report proceedings in chancery to enforce uses. In the first five of these cases, dating from 1452 to 1459, four of them from early abridgements, the chancellor's deputy, the master of the rolls, convened justices of the common law courts to get advice on how to enforce uses.⁷⁵ These reports show that common law judges and lawyers were familiar with this new interest, the use, and that they applied their learning and their craft, the detailed rules of the common law rules to the ways in which feoffees and beneficiaries would deal with the use.

A series of four short cases in chancery from 1465 reported proceedings to enforce uses, discussing issues of a half-sister relationship, commission of felony, and conflicting expressions of a feoffor's intent, without naming any lawyers or judges involved.⁷⁶ In a longer case before the chancellor in 1467, all the common law judges discussed the rights of a woman who had set up a

⁷³ *Dod v. Chyntynden*, Caryl's Reports 15 Hen. 7, pl. 258, 116 S.S. 395-96 (C.P. 1502) (Vavasour, J.C.P.: "*le subpena commence en temps Edward le tierce, mes ceo fuit tous foits envers le feoffee sur confidence mesme*").

⁷⁴ See *supra* text accompanying note 40.

⁷⁵ Trin. 30 Hen. 6, Statham Abridgement, Devise pl. 8, fol. 71v-72r (Chan. & Exch. Ch. 1452) (1452.032abr) (also reported in abridgements by Anthony Fitzherbert and Robert Brooke) (stating that one judge saw no difference between a feoffment and a devise); Mich. 31 Hen. 6, Statham Abridgement, Conscience pl. 1, fol. 51v (Chan. & Exch. Ch. 1452) (1452.043abr) (also reported in Fitzherbert's Abridgement) (discussing whether a feoffor who had already transferred land to a feoffee had the right to change his mind regarding to whom the land would be devised); 31 Hen. 6, Statham Abridgement, Sub pena pl. 1, fol. 169v (Chan. 1453) (1453.038abr) (also reported in Fitzherbert's Abridgement) (providing that if a feoffee created a feoffment himself, the original feoffor must recover from his feoffee and not the third party); Hil. 35 Hen. 6, 2 Fitzherbert Abridgement, Sub pena pl. 22, fol. 188r (Chan. & Exch. Ch. 1457) (1457.036abr) (collecting money for a daughter's marriage from defendant's enfeoffed lands); Y.B. Trin. 37 Hen. 6, pl. 23, fol. 35b-36a (Chan. & Exch. Ch. 1459) (1459.046) (also reported in Fitzherbert's and Brooke's Abridgements) (refusing to make enfeoffed land available to person with claims against the feoffor).

⁷⁶ Y.B. Mich. 5 Edw. 4, pl. 16, fol. 7b (Chan. 1465) (1465.119); Y.B. Mich. 5 Edw. 4, pl. 17, fol. 7b (Chan. 1465) (1465.120); Y.B. Mich. 5 Edw. 4, pl. 18, fol. 7b (Chan. 1465) (1465.121); Y.B. Mich. 5 Edw. 4, pl. 20, fol. 8a (Chan. 1465) (1465.123).

trust for herself and then had married.⁷⁷ In a 1474 case, Justice Littleton and another justice advised the chancery not to delay in enforcing a use against the underage heir of a feoffee.⁷⁸ And in a 1481 case, Littleton advised the chancellor whether to enforce a use set up by an infant feoffor.⁷⁹

Five more cases from 1492 to 1495 featured leading lawyers and justices from the common law courts debating questions of enforcement of uses in chancery.⁸⁰ In 1502, an odd case took place in the Court of King's Bench, a common law court, where lawyers and justices fully engaged in arguments about how feoffees would be held to the instructions of their feoffors.⁸¹ There was no suggestion in any of these cases that feoffments to uses and wills of land were illegitimate or fraudulent.

Finally, one of the last cases reported in the Year Book series, which can be called *Lord Dacre's Case*, was a pitched battle between lawyers and judges of the common law courts to determine once and for all the legitimacy and very existence of the use.⁸² This case was the culmination of a nine-year campaign by lawyers advancing the interests of Henry VIII to attack the two-century-old practice of uses at its core, and is discussed in Part VII below. This case too originated in chancery.⁸³

⁷⁷ Y.B. Trin. 7 Edw. 4, pl. 8, fol. 14b (Chan. & Exch. Ch. 1467) (1467.038), reprinted in 2 SELECT CASES IN THE EXCHEQUER CHAMBER, 64 S.S. 12-13 (M. Hemmant ed., 1948), and in J.H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY: PRIVATE LAW TO 1750, at 108-09 (Oxford Univ. Press 2d ed. 2010) (1986).

⁷⁸ Y.B. Mich. 14 Edw. 4, 2 Fitzherbert Abridgement, Sub pena pl. 14, fol. 1. Huse, C.J.K.B. disagreed with chancery's enforcement of uses against a feoffee's heir in Y.B. Pasch. 22 Edw. 4, pl. 18, fol. 6a-6b (Chan. & Exch. Ch. 1482) (1482.086).

⁷⁹ Y.B. Pasch. 21 Edw. 4, pl. 10, fol. 24a-24b (Chan. 1481) (1481.041).

⁸⁰ Y.B. Mich. 8 Hen. 7, pl. 4, fol. 7b-8b (Chan. 1492) (1492.012); Y.B. Pasch. 8 Hen. 7, pl. 3, fol. 11b-12a (Chan. 1493) (1493.006) (concerning profits feoffees took to pay annuities); Y.B. Mich. 10 Hen. 7, pl. 6, fol. 4b-5a (Chan. 1494) (1494.046) (penalizing a defendant 100 pounds for not returning an estate that was enfeoffed to the plaintiff's use); Y.B. Pasch. 10 Hen. 7, pl. 9, fol. 20a (Chan. 1495) (1495.027) (finding that a married woman as executrix could make a sale of land to her husband); Y.B. Pasch. 10 Hen. 7, pl. [13], fol. 20b-21a (Chan. 1495) (1495.031) (discussing whether a life tenant who attempted to convey a fee simple forfeited his life estate).

⁸¹ Y.B. Trin. 14 Hen. 7, pl. 10, fol. 1a (1499.024); Y.B. Trin. 15 Hen. 7, pl. 22, fol. 11b-12b (1500.030). This case is reported at much greater length in Caryl's Reports, pl. 262, 116 S.S. 401-404 (K.B. 1502) and Keilway 46, 72 Eng. Rep. 204 (K.B. 1502).

⁸² *Re Lord Dacre of the South (Lord Dacre's Case)*, Y.B. Pasch. 27 Hen. 8, pl. 22, fol. 7b-10a (Chan. & Exch. Ch. 1535) (1535.026). The remainder of this case is published in Spelman's Reports, Uses pl. 4, 94 S.S. 228-230. See also BAKER & MILSOM, *supra* note 77, at 127-32.

⁸³ *Re Lord Dacre of the South (Lord Dacre's Case)*, Y.B. Pasch. 27 Hen. 8, pl. 22, fol. 7b (Chan. & Exch. Ch. 1535) (1535.026).

VI. FINDING TRUST IN THE EARLY COMMON LAW

The word *trust* is usually thought to have replaced the word *use* as the name of this landholding arrangement after 1536, when the Statute of Uses was enacted. But lawyers and judges before 1500 used the word *trust* frequently to refer to feoffments to uses. The word entered Middle English from Old Norse and is frequently attested in religious and literary texts and correspondence after 1200.⁸⁴

Lawyers' texts were in Latin or in French. Use, a technical term, is our translation of the French *oepe* and Latin *usus*. Lawyers used the French *affiance* to express the notion of trust, as in a buyer's trust in a seller that a horse was sound (and action for deceit when the horse was not).⁸⁵ Two 1452 cases in an abridgement published about 1490 used the word *trust* in relation to uses.⁸⁶ Another abridgement of the same case published in 1514 used the word *confidence*, an English word of Latin derivation, instead of *trust*.⁸⁷ Petitions on the rolls of Parliament from 1442 and 1455 mentioned feoffment "upon trust" and those enfeoffed "of trust."⁸⁸ Two cases in a 1462 Year Book, first printed around 1510, quoted a judge as referring to a feoffee "on confidence"⁸⁹ and quoted Thomas Littleton, then a lawyer, speaking of certain persons enfeoffed "on confidence."⁹⁰ In 1464 another lawyer likewise spoke of a plaintiff enfeoffed to the use of the defendant "on confidence," then added that the defendant made the feoffment to the plaintiff "by trust and confidence."⁹¹ In

⁸⁴MIDDLE ENGLISH DICTIONARY 1139-40 (1997), available at <http://quod.lib.umich.edu/cgi/m/mec/med-idx?type=id&id=MED47299> (defining trust); 18 OXFORD ENGLISH DICTIONARY 623-24 (2d ed. 1989).

⁸⁵E.g., Y.B. Mich. 13 Hen. 4, pl. 4, fol. 1a-2a (C.P. 1411) (1411.053) (Thirning, C.J.C.P.: "*pur l' affiance que jay en vous*").

⁸⁶Trin. 30 Hen. 6, Devise pl. 8, in Statham Abridgement, fol. 71v-72r (Ch. & Exch. Ch. 1452) (1452.032abr) (Fortescue, C.J.K.B.: "*le dit devise fuit de trust &c.; il fuit de trust*"); Mich. 31 Hen. 6, Conscience pl. 1, in Statham Abridgement, fol. 51b (Chan. & Exch. Ch. 1452) (1452.043abr) (*une feoffement de trust*).

⁸⁷Trin. 30 Hen. 6, Devise pl. 22, in Fitzherbert Abridgement fol. 243r (1452.032abr) ("*le devise fuit de confidence; il fuit de confidence*"); Mich. 31 Hen. 6, Sub pena 23, in Fitzherbert Abridgement fol. 188r (1452.043abr) ("*feffement de confidence*").

⁸⁸5 Rotuli Parliamentorum 57, 20 Hen. 6, no. 1 (1442) (The Parliament Rolls of Medieval England, Scholarly Digital Editions, CD-ROM, rel. 2005) ("[T]he seid Feffees have no title ner interesse therynne, but only upon trust, and to his use, to execute his wille . . ."); 5 Rotuli Parliamentorum 295, 33 Hen. 6, no. 1 (1455) (The Parliament Rolls of Medieval England, Scholarly Digital Editions, CD-ROM, rel. 2005) ("[L]ondes or tenementes of which we were enfeoffed by them of trust, in which we had never title . . . but onely by the feoffement made by us in trust.").

⁸⁹Y.B. Pasch. 2 Edw. 4, pl. 6, fol. 2a, 2b (C.P. 1462) (1462.006) (Danvers, J.C.P.: "*mon feoffee sur confidence*").

⁹⁰Y.B. Pasch. 2 Edw. 4, pl. 11, fol. 5b (C.P. 1462) (1462.011) (Serjeant Littleton: "*un W. aiel le plaintiff enfeoffa certain persons sur confidence; le feoffees sur confidence*").

⁹¹Y.B. Pasch. 4 Edw. 4, pl. 9, fol. 8a-8b (C.P. 1464) (1464.012) (Serjeant Catesby: "*al*

1465 a feoffment “of trust” was reported.⁹² Then in 1468 the chancellor spoke of feoffment “in trust,”⁹³ and the Justices of Common Pleas described the duties of a “feoffee of a trust” to plead all pleas and to maintain an action for the land as the *cestuy que use* would want to plead, but this would be at the costs of the *cestuy que use*.⁹⁴ This lattermost example also provides a glimpse of what would now be called fiduciary duties of these predecessors of our trustees, as seen by judges of a common law court.

At the start of the 1470s, Year Books contain broader uses of the word trust. In 1471 justices held clearly that offices granted by the king were held “on trust and confidence”⁹⁵ and a chief justice said that “when I place trust and confidence in you and I am deceived, I will have an action for deceit.”⁹⁶ Then in 1477 a lawyer argued that “in every such bargain the law presumes (*entende*) that as the one puts his trust in the other to have the thing for which he bargains, that so ought the other” put his trust in the first one.⁹⁷ In 1478 perhaps the same lawyer said that each party to a bargain “ought to put the other in trust.”⁹⁸

Meanwhile, examples continued in a regular stream of Year Book cases from 1469 through 1482 calling uses feoffments “in trust” or more frequently, “of trust,” all in the reign of Edward IV.⁹⁹ For some reason, beginning in 1489

use le defendant &c. sur confidence; le defendant fist le feoffment al plaintiff per trust & confidence”).

⁹² Y.B. Mich. 5 Edw. 4, pl. 16, fol. 7b (Chan. 1465) (1465.119) (“*si home fait feoffement de trust de terre; fait feoffement de trust sans declarer de son volunt*”).

⁹³ Y.B. Pasch. 8 Edw. 4, pl. 11, fol. 4b (Chan. 1468) (1468.018) (Stillington, L.C.: “*si jeo enfeoffe un home en trust*”).

⁹⁴ Y.B. Hil. [8] Edw. 4, pl. 15, fol. 29b (C.P. 1469) (1469.015) (“*Nota que il fuit tenus per les Justices que un feoffe de trust est tenus de pleder tous plees*”).

⁹⁵ Y.B. Trin. 11 Edw. 4, pl. 1, fol. 1a-2a (Exch. Ch. 1471) (1471.001) (“*fuit clerement tenus que tiels offices queux sont grantes per le Roy a un home sur trust & confidence*”). Also, in Y.B. Hil. 21 Edw. 4, pl. [38], fol. 83b, 84a (C.P. 1482) (1482.067), Bryan, C.J.C.P. spoke of an “office of trust” which the office-holder could not grant over.

⁹⁶ Y.B. Trin. 11 Edw. 4, pl. 10, fol. 6a, 6a-6b (C.P. 1471) (1471.010) (Bryan, C.J.C.P.: “*quant jeo done trust & confidence a vous, si jeo fuy disceive, jeo avera action de Disceit*”).

⁹⁷ Y.B. Pasch. 17 Edw. 4, pl. 2, fol. 1a-2b (C.P. 1477) (1477.013) (Serjeant Catesby: “*en chescun tiel bargaine le ley entende que come l’ un mist son trust en l’ auter pur aver le chose pur que ils bargaynent, que issint duist l’ auter ‘e contra*”).

⁹⁸ Y.B. Hil. 18 Edw. 4, pl. 1, fol. 21b, 22a (C.P. 1479) (1479.001) (“*chescun d’ eux covient mist l’ auter en trust*”).

⁹⁹ Y.B. Mich. 9 Edw. 4, pl. 26, fol. 41a, 41b (Chan. 1469) (1469.115) (Serjeant Catesby: “*son pere luy enfeoff de trust*”); Y.B. Trin. 11 Edw. 4, pl. 13, fol. 8a (Chan. 1471) (1471.013) (“*si mon feoffee de trust*”); Y.B. Mich. 12 Edw. 4, pl. 5, fol. 12b (1472) (1472.043) (Serjeant Catesby: “*lou home fait foffement de trust*”); Y.B. Trin. 16 Edw. 4, pl. 1, fol. 4b (Chan. 1476) (1476.020) (“*il est enfeoffe en trust*”); Y.B. Mich. 16 Edw. 4, pl. 2, fol. 7b-8a (K.B. 1476) (1476.030) (“*plaintif ne fuist sinon que feoffee de trust*”); Y.B. Pasch. 21 Edw. 4, pl. 10, fol. 24a, 24b (Chan. 1481) (1481.041) (Apprentice Digas: “*feoffements de trust; si le pere fait feoffement de trust*”; Littleton, J.C.P.: “*ces feffees de trust*”); Y.B. Mich.

during the reign of Henry VII, the language of *trust* for uses is replaced by reporting of feoffments “on confidence,”¹⁰⁰ as Littleton had written in his *Tenures* and said in a case of 1462,¹⁰¹ and as Fitzherbert had printed in his abridgement of 1452 cases.¹⁰² Twelve more cases through to 1504 reported feoffments or feoffees *sur confidence*.¹⁰³ One notable variation in a 1502 case already noted above was mention of “the confidence” and “the confidence and the use” by a chief justice.¹⁰⁴

In the small number of Year Book reports for the early part of the reign of Henry VIII, the two terms came together and the reports show judges of common law courts viewing uses as established in common law and grounded on trust and confidence. A notable and lengthy 1522 case in Common Pleas prompted arguments about the nature of uses and their role in the common law.¹⁰⁵ The case was about a taking of cattle, a right to collect rent from a parcel of land, a release made by a beneficiary, and behind all of this, a feoffment to uses.¹⁰⁶ As the judges went through the arguments, they depicted uses as a form of landholding integrated with the common law and justified by reason because necessity required putting trust in others.¹⁰⁷

Justice Fitzherbert said that uses were at common law and that a use was nothing but trust and confidence that the feoffor put in the person of his feoffee according to his estate, and that this was at common law.¹⁰⁸ He went on to say

21 Edw. 4, pl. 1, fol. 37b, [38]a (C.P. 1481) (1481.069) (“*enfeoffa . . . auters de trust*”); Y.B. Hil. 21 Edw. 4, pl. 29, fol. 20b (Exch. Ch. 1482) (1482.029) (Huse, C.J.K.B.: “*issint est en feoffement en trust*”); Y.B. Pasch. 22 Edw. 4, pl. 18, fol. 6a, 6b (Chan. & Exch. Ch. 1482) (1482.086) (Rotherham, L.C.: “*sur feoffement de trust*”; Huse, C.J.K.B.: “*si home ust enfeoffe un auter de trust*”).

¹⁰⁰ E.g., Y.B. Mich. 5 Hen. 7, pl. 11, fol. 5b, 6a (C.P. 1489) (1489.042) (Serjeant Fyneux; the Court; Bryan, C.J.C.P.).

¹⁰¹ LITTLETON, *supra* note 41 § 462 (“[S]uch feoffment is made upon confidence”); Y.B. Pasch. 2 Edw. 4, pl. 6 fol. 2a-4a (C.P. 1462) (1462.006).

¹⁰² Trin. 30 Hen. 6, Devise pl. 22, in Fitzherbert Abridgement fol. 243r (1452.032abr); Mich. 31 Hen. 6, Sub pena 23, in 2 Fitzherbert Abridgement fol. 188r (1452.043abr).

¹⁰³ The last in the Year Books of Henry VII is Y.B. Mich. 20 Hen. 7, pl. 18, fol. 8b, 9b (C.P. 1504) (1504.018) (Kingsmill, J.C.P.). Exceptions to this pattern are Y.B. Mich. 18 Edw. 4, pl. 29, fol. 20a, 20b (C.P. 1478) (1478.100) (Serjeant Sulyard: “*un soit enfeoffe sur confidence en ma terre*”; Littleton, J.C.P.: “*en le case de feoffment sur confidence*”), and Y.B. Hil. 15 Hen. 7, pl. 3, fol. 2a (1500) (1500.003) (“*Issint est ou en feffee de trust*”).

¹⁰⁴ Dod v. Chyttynden, Y.B. Mich. 15 Hen. 7, pl. 1, fol. 13a, 13b (C.P. 1502) (1499.025) (Frowyk, C.J.C.P.: “*si on fait feffement sur confidence . . . or la confidence & le use est determine, pur ceo que le feoffor ne mist le confidence en le heir le feffee . . . le grande part del terre d’ Angleterre fuit in feoffements sur confidence*”).

¹⁰⁵ Gervys v. Cooke, Mich. 14 Hen. 8, pl. 5, 119 S.S. 108 (C.P. 1522) (1522.014ss).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 110.

¹⁰⁸ *Id.* at 114 (Fitzherbert, J.C.P.: “*lez usez sount al comen ley Et use nest forsque trust et confydens, que le feoffour mytte en le parson son feoffee accordant a son estate, fuit*

that when feoffees performed the will of the feoffor after his death, the trust in that case was by reason of necessity, because a dead man cannot perform his own will, and therefore must put his trust in someone else to perform his will.¹⁰⁹ When he enfeoffed someone, Fitzherbert said, “my trust and confidence is in him and in his heirs and assigns.”¹¹⁰ In the case at issue, the trust was in the land out of which the rent was granted.¹¹¹

The next judge to speak agreed that uses were “at common law, and by common reason,” and that when the feoffor put confidence and trust, the feoffee would be bound to his use.¹¹² It was not conscience that gave rise to uses, he said, but common reason, which was common law.¹¹³ The third judge also agreed that uses were at common law and were nothing other than confidence and trust, that every use was based on reason, and that the feoffees were bound to act according to the trust, because otherwise they would deceive their feoffor, which would be unreasonable.¹¹⁴ The Chief Justice of Common Pleas spoke last, and although he disagreed with many of the positions taken by his three colleagues, he said nothing one way or the other about the basic nature of uses or their relation to the common law or to reason.¹¹⁵ One of his colleagues joked to the Chief Justice that he had been arguing mainly for his own pleasure.¹¹⁶

The statements of these three judges would seem to reflect a consensus among common lawyers well attested from the cases and treatises. The consensus was about to come under a ferocious, sustained, and ultimately successful attack backed by no less important or opinionated a character than the king himself. Henry VIII would have his way. Henry’s heavy-handed intervention in this legal dispute has perpetuated the notion that the common law was fundamentally opposed to uses, and to the notions of trust and fiduciary duty that accompanied them.

al comen ley”). Fitzherbert recognized that at common law there was no remedy except by way of chancery. *Id.* at 115 (“*uncore al comen ley il navoit remedy mez par sub pena*”).

¹⁰⁹ *Id.* (“*cest trust est de necessity, quar un mort home ne poit performer son volounte demesne, et pur ceo covient de necessite de mytter son trust en un auter de performer son volounte*”).

¹¹⁰ *Id.* (“*si jeo enfeffe B. . . . ore mon trust et confydens est en luy et en sez heirez et assignez*”).

¹¹¹ *Id.* at 108.

¹¹² *Id.* at 116 (Brooke, J.C.P.: “*usez sount al comen ley, et par comen reason Et sir, come le feffor mist confydens et trust issint serra son use*”).

¹¹³ *Id.* (“*conscyens ne fait use, mez comen reason: que est comen ley*”).

¹¹⁴ *Id.* at 118 (Pollard, J.C.P.: “*usez fueront al comen ley et nest auter forsque confidens et trust. Et chescun use est par reson, et lez feffeez sount liez de fayre accordant al trust, auterment ilz disceveront lour feffour, que ne serra reason*”).

¹¹⁵ *Id.* at 120-21.

¹¹⁶ *Id.* at 122 (Brooke, J.C.P. to Brudenell, C.J.C.P.).

VII. THE ATTACK ON USES

The legal challenge to the legitimacy of uses was begun by Thomas Audley. A lawyer educated at Cambridge University, Audley was elected to Parliament in 1523 and there supported taxes proposed by Cardinal Wolsey, Henry VIII's chancellor. This brought him to the attention of Wolsey and the royal court, and Audley quickly climbed the ladder of royal preferment. One of Henry VIII's policies was to regain as much revenue as possible based on his rights as feudal overlord, and one practice standing in the way of that revenue was the use.

In 1526, the same year that Henry VIII began showing interest in Anne Boleyn, Audley gave a reading at his Inn of Court, Inner Temple.¹¹⁷ This was an educational exercise for the training of law students, supposed to be an exposition of a statute, but Audley's reading departed from the consensus of the legal profession and announced a new government policy. His exposition began in a conventional way. "I will show," he said, "what a use is, how it is made, and on what things a use may depend."¹¹⁸ A use "is a property or ownership of land . . . depending solely on confidence and trust between those . . . accounted owners by the common law" and "those who have a use" in the same land.¹¹⁹ This, Audley said, "is directly contrary to the learning of the common law," because if one made a feoffment on the proviso that the feoffee should not take any of the profits, but the feoffor would keep the profits, "this proviso is void."¹²⁰ Although uses were first contrived "for a good purpose," by which Audley probably meant the making of wills of land, "nevertheless to a great extent they have been pursued by collusion for the evil purpose of destroying the good laws of the realm."¹²¹ Instead of the ordinary and certain rules of common law, "now by reason of these trusts and confidences" inheritances were thrown upon "a law called 'conscience,' which is always uncertain" and depended on the chancellor's notion of conscience.¹²² "And by reason of this no man can know his title to any land with certainty."¹²³

Audley went on to recite the former mischiefs made possible by uses that had been remedied by statutes.¹²⁴ The main reason, he thought, why uses were contrived was "to make good last wills of land, because land was not devisable by the common law."¹²⁵ This showed that "at the beginning of the common law there were no uses, but only confidence between person and person, which

¹¹⁷ BAKER, *supra* note 3, at 254.

¹¹⁸ THOMAS AUDLEY, READING ON 4 HEN. 7, ch. 17 (Inner Temple, 1526), *reprinted in* BAKER & MILSOM, *supra* note 77, at 118.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*, *reprinted in* BAKER & MILSOM, *supra* note 77, at 119.

¹²⁵ *Id.*

was there from the beginning.”¹²⁶ He hinted at an argument that since nearly all the land in England was not devisable, wills of land carried out by feoffees to uses were void.¹²⁷

Audley’s reading seemed to incite something of a pamphlet war. An anonymous lawyer wrote an angry reply to Christopher St. German’s *Doctor and Student*.¹²⁸ St. German had written approvingly of uses and had derived them from the law of reason, but this lawyer said that uses “began of an untrue and crafty invention to put the king and his subjects from” what they ought to have by right, “the good, true common law of the realm.”¹²⁹ Concluding a list of the problems arising from uses that had already been corrected by statutes, he said again that “by such uses the good common law of this realm . . . is subverted and made as void.”¹³⁰ Uses “began upon an untruth and false purpose” because feoffors to uses gave the title and retained the profits, so “these uses began by an untrue and crafty invention and continued by an untruth and a deceit.”¹³¹ He denounced his fellow lawyers for maintaining “this untrue and crafty invention in the Chancery by the colour of conscience, contrary to the study and learning of the common law, and contrary to reason, and also to the law of God.”¹³²

In 1532 St. German replied that feoffments to uses deceived no one.¹³³ Feoffees did not think they were getting the profits of the land. Feoffments to uses and wills were drafted “by advice of learned counsel.”¹³⁴ St. German speculated that the angry lawyer himself “hath sometimes devised such uses as hath been necessary for his clients, or for himself or his friends, and no craft or falsehood.”¹³⁵

Another lawyer who took Audley’s side said in Inner Temple, probably in 1533, that “a use was invented in the beginning with the intention of making a fraud at common law, namely to make a declaration of a will and so to defraud the right heir and oust the wife of her dower or oust tenancy by the curtesy,” the corresponding right of a surviving husband to a life interest in his wife’s lands.¹³⁶

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ REPLICATION OF SERJEANT AT LAW (c. 1531), *reprinted in* BAKER & MILSOM, *supra* note 77, at 125.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*, *reprinted in* BAKER & MILSOM, *supra* note 77, at 126.

¹³³ CHRISTOPHER ST. GERMAN, LITTLE TREATISE ON THE SUBPOENA, *reprinted in* BAKER & MILSOM, *supra* note 77, at 126-27.

¹³⁴ *Id.*, *reprinted in* BAKER & MILSOM, *supra* note 77, at 127.

¹³⁵ *Id.*

¹³⁶ Reports of John Caryll, Jr., pl. 13, 121 S.S. 374-75 (Inner Temple, c. 1533) (Hare).

Bills put forward in Parliament in 1529 would have made invalid all uses of any land unless the use was recorded in the Court of Common Pleas, and would have given the king one-third of the value of the wardship of lands held by feoffees to the use of the king's tenants when the tenants left infant heirs at their deaths.¹³⁷ The House of Commons rejected Henry VIII's effort to regain one-third of his lost wardships.¹³⁸ Henry VIII threatened the House of Commons in March of 1531, "if you will not take some reasonable end now when it is offered, I will search out the extremity of the law, and then I will not offer you so much again."¹³⁹

Extremity of the law meant, in this case, a ruling that uses had always been fraudulent, all the feoffors' wills of land had been void, and the king and other lords were owed all the wardship revenue they had foregone. Henry's legal advisers framed a test case to challenge the validity of uses and wills of land before the courts of common law and get such a holding. *Lord Dacre's Case* arose this way. Whenever a tenant of the king died, officials of the king convened an inquest by a jury, as to what revenues might be owed to the king.¹⁴⁰ Henry's lawyers waited for the next peer of the realm to die with an infant heir.

Thomas Fiennes, Lord Dacre of the South, died in September 1533 a tenant of the king with lands held to uses and left a will paying his debts, raising money for the marriages of some of his kinswomen, devising some land to younger sons and arranging for the rest of the land to be held by his feoffees until his heir (eldest son of his deceased eldest son) came of age and could take it.¹⁴¹ It is hard to imagine a more typical example of the feoffments to uses that English landholders had employed since the 1320s.

The inquest jury found in January 1534 that Lord Dacre's will was made "by fraud and collusion" between Lord Dacre and lawyers to defraud the king of the wardship and marriage of his heir.¹⁴² Lord Dacre's feoffees challenged the inquest jury's finding in February 1535.¹⁴³ Such findings had to be challenged in a Chancery Court, and the chancellor before whom the feoffees came was Thomas Audley, who had started this assault on uses nine years before.¹⁴⁴

Audley and Thomas Cromwell, the king's secretary, convened all the judges of the common law courts in Paschal Term 1535 to hear arguments on behalf

¹³⁷ 4 HOLDSWORTH, *supra* note 26, at 450-51, app. III (1), (2).

¹³⁸ *Id.* at 453.

¹³⁹ HALL'S CHRONICLE 784 (1809), *reprinted in* BAKER & MILSOM, *supra* note 77, at 123-24.

¹⁴⁰ BEAN, *supra* note 21, at 273-74.

¹⁴¹ *Id.* at 275.

¹⁴² *Id.* at 275-76.

¹⁴³ *Id.* at 276.

¹⁴⁴ *Id.*

of the king in support of the jury's finding, and on behalf of the feoffees against it. A lawyer named Richard Pollard argued for the king's position:

[T]here are no such things as uses (*nest ascun use*). For if there should be any use it must necessarily have some foundation, either by common law or by statute. And it seems that there were no uses at common law, for it would be inconsistent for me to enfeoff you with my land (and thus part with it) and nevertheless to have it, contrary to my feoffment and gift. There is no mention of uses in our old year books (*auncient ans et livres*), and if there had been uses at common law it would have been mentioned in our old law books.¹⁴⁵

Pollard added a point made by Perkins in his *Profitable Book*, that no use (at least no implied use) could have been created before the statute *Quia emptores* of 1290.¹⁴⁶ This meant for Pollard that uses could not have been customs from time immemorial, since to be valid customs had to have been practiced since the accession of Richard I in 1189. "Therefore, since these uses had their beginning after that statute, they are not at common law. Neither are they by statute, for no statute has been passed by which uses are made. Thus there are no such thing as uses."¹⁴⁷ Pollard argued further that even if this extreme argument were rejected, the use of land could not be devised because devises of land were not allowed.¹⁴⁸ Pollard was rewarded in May 1535 with the office of King's Remembrancer of the Exchequer, an office he kept until his death.¹⁴⁹

Another lawyer for the king made less extreme arguments, and they were opposed by three lawyers arguing for the feoffees' side. The first of the feoffees's lawyers made the case that a will could not be said to be fraudulent or collusive, because the law presumed that when one was on the point of death he would not commit any deceit or fraud against another.¹⁵⁰ The second of the feoffees's lawyers met Pollard's argument head on:

¹⁴⁵ *Re Lord Dacre of the South (Lord Dacre's Case)*, Y.B. Pasch. 27 Hen. 8, pl. 22, fol. 7b, 9a (Chan. & Exch. Ch. 1535) (1535.026), translated in BAKER & MILSOM, *supra* note 77, at 129 (Apprentice Pollard). The start of the translation (by J.H. Baker) is of the law French "*n'est ascun use*."

¹⁴⁶ PERKINS, *supra* note 68, at 101.

¹⁴⁷ *Re Lord Dacre of the South (Lord Dacre's Case)*, Y.B. Pasch. 27 Hen. 8, pl. 22, fol. 7b, 9a (Chan. & Exch. Ch. 1535) (1535.026), translated in BAKER & MILSOM, *supra* note 77, at 129 (Apprentice Pollard).

¹⁴⁸ *Id.*

¹⁴⁹ J.H. Baker, *Pollard, Sir Richard (d. 1542)*, in NEW OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 757-58 (2004), available at <http://www.oxforddnb.com/view/article/69369> ("In May 1535 he was appointed king's remembrancer of the exchequer, an office that he held until his death.")

¹⁵⁰ *Re Lord Dacre of the South (Lord Dacre's Case)*, Y.B. Pasch. 27 Hen. 8, pl. 22, fol. 7b (Chan. & Exch. Ch. 1535) (1535.026), translated in BAKER & MILSOM, *supra* note 77, at 127-28 (Apprentice Onley).

[U]ses were at common law; for a use is nothing other than a trust which the feoffor puts in the feoffees upon the feoffment. If we were to say that there were no uses at common law, it would follow that there was no trust at common law; and that cannot be, for a trust or confidence is something very necessary between man and man, and at least no law prohibits or restrains a man from putting his confidence in another. . . . [A]nd moreover it has been held for many years that uses were at common law, by the common opinion of the whole realm. So it seems to me that it should no longer be disputed.¹⁵¹

If uses had always been void, this lawyer reasoned, then all the statutes specifically addressing uses would have been void as well.¹⁵²

The third of the feoffees's lawyers began by saying that when one made his last will at the point of death he could not carry it out himself "and for that reason he puts his trust in others and declares his will to be carried out by others."¹⁵³ He argued in the roundabout style of the time:

[U]ses were at common law. For the common law is nothing but common reason, and common reason wills that a man may put his trust in another; and a use is a trust between the feoffor and the feoffee, which trust is by common reason (as I have said) and common reason is common law: and therefore it follows that uses are by the common law.¹⁵⁴

The many statutes regulating uses, he argued, also showed that "uses were at common law."¹⁵⁵ Taking a more practical tack, he warned that "it would be a great mischief to change the law now, for many inheritances in the realm depend today on uses, so that there would be much confusion" if all wills carried out under uses were declared void.¹⁵⁶ Instead, the common law should follow the Latin maxim *communis error facit ius*,¹⁵⁷ which I might roughly translate: if everybody has been doing it wrong, let's just call it right and keep doing it.

I have repeated these arguments at length because they came at a climactic moment in the history of the use and because they represent the culmination of decades of cases, treatises, and statutes reflecting the incorporation of uses into the common law tradition. Not only the expectations and stability of English landholding but the independence of the English judiciary hung in the balance.

We have a judge's manuscript report, which circulated after his death, for what happened next.¹⁵⁸ After this argument, the judges of the common law

¹⁵¹ *Id.* at 128 (Serjeant Yorke).

¹⁵² *Id.*

¹⁵³ *Id.* at 130 (Serjeant Mountague).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Re Lord Dacre of the South (Lord Dacre's Case)*, 1 Spelman's Reports, Uses pl. 4, 93

courts gave their opinions, except for one judge who was away on the king's business in Wales.¹⁵⁹ Chancellor Audley, Secretary Cromwell (who was no judge of any court), and three of the judges agreed with Pollard and Henry VIII that Lord Dacre's will was ineffective and void because neither land nor the use of land could be devised by will.¹⁶⁰ Four of the judges were of the contrary opinion, that a will was "a declaration of trust" showing the feoffee the feoffor's intention as to how in conscience the feoffee should act.¹⁶¹ A fifth judge, John Port, was of the same opinion as the four against the king, but "spoke so softly" that the chancellor and the secretary thought he agreed with them and therefore thought they had a slim majority.¹⁶² Next all the justices were commanded to appear before the king.¹⁶³ Henry VIII commanded them to agree in their opinions, and told them that "those who were of the opinion that the will was void would have the king's good thanks."¹⁶⁴ One of the judges who opposed the king was conveniently ill, and the others, perceiving the number and influence of those arrayed against them, "conformed with" the king's opinion.¹⁶⁵ Audley and six of these same judges had presided a month earlier at the trial of Thomas More, a former chancellor, for high treason in denying the king's supremacy, leading to More's execution later the same year.¹⁶⁶

This story has come to an end. *Lord Dacre's Case*, as the feoffees' lawyer predicted, threw all inheritances by will into confusion. Henry VIII had gone to the extremity of the law. Parliament swiftly agreed to the Statute of Uses, enacted in 1536, which validated all uses and wills prior to Lord Dacre's death and henceforth, for all future uses, transferred title from the feoffees to the beneficiaries.¹⁶⁷ After this statute, another development, also demonstrating the importance of trust and fiduciary principles in the common law, converted the medieval use into the modern trust. As for Henry VIII, he declared victory more publicly in 1536: "[T]he grounds of all those uses were false, and never

S.S. 228 (Chan. & Exch. Ch. 1535) (1535.026). Another translation of this is available in BAKER & MILSOM, *supra* note 77, at 131-32.

¹⁵⁹ *Id.* at 230.

¹⁶⁰ *Id.* at 228-29 (Lyster, C.B.Ex., Baldwin, C.J.C.P., and Luke, J.K.B.).

¹⁶¹ *Id.* at 229-30 (Spelman, J.K.B., Shelley, J.C.P., Fitzherbert, J.C.P., and Fitzjames, C.J.K.B.).

¹⁶² *Id.* at 230 ("*mez il parla cy base*").

¹⁶³ *Id.*

¹⁶⁴ *Id.* ("*avoent de roy bon thanke*").

¹⁶⁵ *Id.*

¹⁶⁶ 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON, AND OTHER CRIMES AND MISDEMEANOURS: FROM THE REIGN OF KING RICHARD II TO THE REIGN OF KING GEORGE II, at 59 (3d ed. London 1742), available at World Trials Library on HeinOnline.

¹⁶⁷ BEAN, *supra* note 21, at 286-87 ("All devises of land by will made by those who died before I May 1536 were to remain valid. . . . [N]ow [the Statute of Uses] . . . declared that the *cestui que use* was the real owner of the land.")

admitted by any law, but usurped upon the prince, contrary to all equity and justice, as it hath been openly both disputed and declared by all the well learned men in the realm of England in Westminster Hall.”¹⁶⁸

VIII. FINDING FIDUCIARY DUTIES IN THE EARLY COMMON LAW

Long before the invention of uses, judges and lawyers of the common law courts developed remedies that we would now identify as recognition and enforcement of fiduciary duties. In the action of account, landholders sued their bailiffs and rent collectors, and the court forced them to account for the money they had received from third parties on the landholder’s behalf.¹⁶⁹ Defendants who refused to account or who were found in arrears could be committed to prison.¹⁷⁰ When courts extended the duty of accounting to agents who received money from their principals to trade on their behalf, judges determined that the proper measure of damages was not merely refunding the money initially invested, but rather, as one judge said in 1379, “you shall be charged in respect of reasonable profits.”¹⁷¹ As Joshua Getzler points out in his contribution to this Conference, this remedy in the common law action of account embodied fiduciary duties of loyalty, care, and prudence.¹⁷² It is no surprise that chancery took over the action of account in later centuries.¹⁷³

The action of waste also had a fiduciary character. It arose in the context of wardship, the right of a lord to take rents and profits from the land of an infant heir.¹⁷⁴ Some of England’s earliest statutes devised remedies against lords who abused their temporary guardianship over their tenants’ heirs. Four of the first five chapters of Magna Carta gave remedies for heirs against their guardians for withholding or wasting their inheritances.¹⁷⁵ The Provisions of Westminster in 1259, the Statute of Marlborough in 1267, the Statute of Westminster First in 1275, and the Statute of Gloucester in 1278 all confirmed

¹⁶⁸ Hall’s Chronicle 821, *reprinted in* BAKER & MILSOM, *supra* note 77, at 124 n.63.

¹⁶⁹ See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* at 221 (2d ed. 1898).

¹⁷⁰ Statute of Marlborough, 52 Hen. 3, ch. 23 (1267), *in* 1 *Statutes of the Realm* 24; Statute of Westminster Second, 13 Edw. 1, ch. 11 (1285), *in* 1 *Statutes of the Realm* 80-81.

¹⁷¹ *Hastynge v. Beverley*, Pasch. 2 Ric. 2, Ames 121, 122 (C.P. 1379) (1379.009am) (Belknap, C.J.C.P.).

¹⁷² Joshua Getzler, “As if.” *Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 978 (2011).

¹⁷³ See Morris S. Arnold, *Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 847 & n.95 (1980).

¹⁷⁴ See 1 POLLOCK & MAITLAND, *supra* note 169, at 319.

¹⁷⁵ Magna Carta, chs. 2-5 (1215), *reprinted in* J.C. HOLT, *MAGNA CARTA 451-52* (2d ed. 1992) (fixing the payment a lord could demand for admitting the heir to his inheritance, remitting this payment when the heir was underage, forbidding destruction or damage to the heir’s land, and requiring the guardian to maintain the land for the heir as it was before the wardship began).

or extended remedies against guardians who refused to turn over lands to the heirs when they reached the age of twenty-one, or who laid waste to the heirs' lands.¹⁷⁶ Heirs of land held by socage tenure, a bit below the status of knight service, could bring actions of account against their guardians.¹⁷⁷ In the Year Books, judges enforced the duties of guardians to heirs with rigor.¹⁷⁸

Executors distributed the personal property that a deceased testator left by will. They came under the jurisdiction and supervision of ecclesiastical courts.¹⁷⁹ Since executors also paid their testator's debts, they frequently sued and were sued in common law courts. Common law judges and lawyers worked out rules that executors would be forced to pay the testator's debts out of their own goods if they had wasted the testator's goods or converted them to their own use.¹⁸⁰ They said that executors acted improperly if they bought the testator's goods for themselves, what would now be called self-dealing.¹⁸¹

The full range of fiduciary duties in modern law far exceeds what early common law courts required in actions of account and waste and by penalties for executors' dealings with their testators' goods. Nevertheless, it is worthwhile to recognize that the early common law found ways to impose

¹⁷⁶ Provisions of Westminster, 43 Hen. 3, chs. 16-17 (1259), *in* 1 Statutes of the Realm 10 (heir's remedy for lands withheld after wardship, duty of guardian in socage to commit no waste); Statute of Marlborough, 52 Hen. 3, chs. 16-17 (1267), *in* 1 Statutes of the Realm 23, 24 (same); Statute of Westminster First, 3 Edw. 1, ch. 21 (1275), *in* 1 Statutes of the Realm 32 (requiring guardians to keep and sustain the lands of heirs); Statute of Gloucester, 6 Edw. 1, ch. 5 (1278), *in* 1 Statutes of the Realm 48 (providing remedies of forfeiture and damages for waste committed during wardship); Statute of 36 Edw. 3, ch. 13 (1362), *in* 1 Statutes of the Realm 374 (providing remedies of forfeiture and treble damages for waste committed during wardship); *see also* Sue Sheridan Walker, *The Action of Waste in the Early Common Law*, reprinted in *LEGAL RECORDS AND THE HISTORIAN* 185 (J.H. Baker ed., 1978).

¹⁷⁷ Statute of Marlborough, 52 Hen. 3, ch. 17 (1267), *in* 1 Statutes of the Realm 24; *see also* PAUL BRAND, *KINGS, BARONS AND JUSTICES: THE MAKING AND ENFORCEMENT OF LEGISLATION IN THIRTEENTH-CENTURY ENGLAND* 348-61 (2003) (discussing the accountability of socage guardians).

¹⁷⁸ *E.g.*, Y.B. 40 Edw. 3, Lib. Ass. pl. 22, fol. 243a (K.B. 1366) (1366.139ass) (Knyvet, C.J.K.B. said that the guardian was answerable to the heir and to the king for waste even though strangers had knocked down houses on the heir's land).

¹⁷⁹ *See* HELMHOLZ, *supra* note 34, at 376.

¹⁸⁰ *E.g.*, Y.B. Trin. 2 Hen. 6, pl. 4, fol. 12b, 13a (C.P. 1424) (1424.002) (explaining that an executor who sold or wasted the testator's goods would repay the testator's debts with the executor's own goods); Y.B. Hil. 19 Hen. 6, pl. 6, fol. 49b (C.P. 1441) (1441.033) (providing the same for an executor who sold the testator's goods and converted them to his own use).

¹⁸¹ *E.g.*, Y.B. Pasch. 21 Edw. 4, pl. 2, fol. 21b, 22a (C.P. 1481) (1481.033) (requiring executor to get ecclesiastical court permission for any self-dealing); *see also* Y.B. Mich. 20 Hen. 7, 64 S.S. 184 (Exch. Ch. 1504) (1504.012) (presenting an argument of three lawyers that executors' self-dealing was improper).

some of the same sort of duties that would later be called fiduciary when one person had temporary control of land, money, or goods on behalf of another.

CONCLUSION

“Without a doubt, the greatest threat to the common-law system [in the reign of Henry VIII] was the ‘use.’”¹⁸² This was the conclusion of two notable legal historians of the sixteenth century, E.W. Ives and J.A. Guy. It suggests that Thomas Audley’s and Richard Pollard’s arguments still hold sway. There was a battle over the use in the reign of Henry VIII, but this Essay suggests that the battle was between the king and vast majority of the legal profession. Most lawyers and judges of the common law did not view uses as a threat to their system. Starting in the 1320s, surely there were lawyers at the origin of the use. They seem to have secured in short order the absolutely necessary professional consensus that the common law would not enforce the use. Unless the use was incapable of passing any legally recognized right, title, or interest to the intended beneficiaries, it would have had no effectiveness to transfer the benefits of landholding in violation of the rules against wills of land and the feudal incidents of wardship and marriage.

Uses were thus in essence a legal fiction, with all sides in agreement that one state of affairs would appear on the legal record, full legal title to the feoffees, while a completely different state of affairs would be given effect in real life, effective wills of land without loss to the heirs by wardship or marriage.

Contrary to what lawyers seeking to curry favor from Henry VIII argued, the predominant motive for uses was neither fraud nor deception. The desire to direct the future course of landholding after one’s death by will seems to have been the overriding motive for this practice. Anglo-Saxons had the capacity to make wills of land, and after the Norman Conquest all property other than land could be left by will. Free alienation of land by a sale or grant during one’s lifetime was guaranteed by the statute *Quia emptores* in 1290 for all except tenants who held directly of the king. The rule that lands must not be devised by will appeared by 1200, but was never fully incorporated in the expectations of the people of England.¹⁸³ Every lawyer knew that in the city of London and some boroughs, land was devisable.

Only the king was the overall loser in this arrangement. Yet kings before Henry VIII and his father freely gave permission for their chief tenants to enfeoff others to their uses. Kings were thus complicit in waiving their wardships and other feudal incidents. Two statutes enacted in the first year of Richard III’s reign dealt with uses. One, already mentioned, enabled beneficiaries of uses to transfer title to purchasers.¹⁸⁴ The other directed who

¹⁸² E.W. IVES, *THE COMMON LAWYERS OF PRE-REFORMATION ENGLAND* 197 (1983); accord J.A. GUY, *CHRISTOPHER ST. GERMAN ON CHANCERY AND STATUTE 75* (1985); .

¹⁸³ MICHAEL M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* 268-69, 281 (1963).

¹⁸⁴ 1 Ric. 3 ch. 1, (1484), in 2 *Statutes of the Realm* 477-78.

should take over the fiduciary duties of the king himself, who was at his accession a feoffee to uses.¹⁸⁵

Those most involved in enforcing uses were likewise those most closely associated with the king's interests. The entire judiciary, the top of the legal profession, and of course the chancellor all owed their appointments to the king and were subject to removal at his whim. It is a measure of their early independence from the king's own fiscal interests that uses persisted for more than two centuries without any legal challenge to the fiction that allowed them to exist.

This Essay has shown that uses were by no means invisible to the common law. Yes, the common law would not enforce the fiduciary relationship at the heart of uses, because if it did the whole enterprise would collapse, but common lawyers talked about uses in the king's courts and in chancery as if creating uses, enforcing uses, and transacting about uses were an ordinary and essential part of their learning and craft, their common law.

The earliest evidence we have of judges and lawyers talking about uses in England speaks of trust as the linchpin of this landholding arrangement. The many case reports in which judges and lawyers spoke of uses and trust in the Year Books nearly all elaborated what now would be called fiduciary duties owed by feoffees to their beneficiaries. But trust and fiduciary duty can also be found beyond feoffments to uses, in the common law rules governing guardians, bailiffs, executors, and administrators, as well as in canon law.

This Essay has laid some blame for a long misunderstanding of the role of trust, trusting, and fiduciary duty in the common law at the feet of a handful of strident, ambitious, political lawyers seeking the favor of Henry VIII. But some of the blame also goes to legal historians, myself included, who have generalized the character or personality of the early common law as one that rewarded sharp practice and manipulation of the rules for self-interest. This impression ignored the common law doctrines that gave us some of our important fiduciary duties, such as the bailiffs' and receivers' duties to account for money collected on behalf of a landlord, and the guardians' duties to avoid waste of an heir's land.

The image of the scheming, self-interested, untrustworthy common law comes principally, I think, from the rules most often repeated and enforced in my sources, the Year Books. These were the medieval rules of pleading, civil procedure, in which adversarial battles of wits were carried out in front of a judge. It is too easy to take these vivid performances as a model for the rest of law, for substantive law. But the artificial arena of the medieval courtroom is not a model of all human relationships. I am grateful to Tamar Frankel for opening our eyes to the ways in which trust and fiduciary duty can be found at the root of our legal tradition centuries ago, as well as at its heart today.

¹⁸⁵ 1 Ric. 3 ch. 5, (1484), in 2 Statutes of the Realm 480.