concept found in every age: but the emphasis on trusts and moral obligation in Nottingham's jurisprudence must surely have contributed to its prominence around 1700. The sovereign which emerged from the Glorious Revolution was Parliament, conceived still as a supreme court. The theoretical importance of Parliament's judicial functions led to the conflicts between the Commons and the Lords over their respective roles, and to a dangerous arrogance in the Commons which caused Defoe and others to remind them of their trusteeship and of the fundamental law which bound even them. In the Aylesbury election case of 1704 the Lords joined with Lord Chief Justice Holt to tell the Commons that the vote was the absolute right of a freeholder, and that 'the security of our English constitution' was that 'neither House of Parliament has a power separately to dispose of the liberty or property of the people'.

Law could be seen to be changing all the time, and the immemorial antiquity of English law was no longer a plausible political argument. 'Junius' appealed to Magna Carta against the innovations of the lawyer, Mansfield, but politicians generally were arguing from abstract legal concepts—contract and trust—rather than from the history of the law. Burke, framing the philosophy of conservatism, appealed once more to the past, but to the virtues of England's political tradition, not the sacred antiquity of her laws; while in the hands of the utilitarians, Helvetius and Bentham, law-making came to seem an exercise neither in moral philosophy nor in history, but in psychology, a problem of how to give the greatest happiness to the greatest number.

The main impression left by eighteenth-century law is, however, one of practical, unexciting worth, the reflected worth of the gentry who arranged the affairs of England in their county meetings, often assembled at the Assizes. Gone were the heroic attitudes of the law in the seventeenth century, when in a fit of 'legal antinomianism' Milton could argue that it was 'legal' to kill the king. The purpose of English law was not even to put down violence, but—as all the world knew—to defend the Englishman's property. Amongst that property, according to Blackstone, personal possessions, once regarded contemptuously by the law, had begun to achieve an importance equal to land and office, by reason of 'the introduction and extension of trade and commerce, which are entirely occupied in this species of property and have greatly augmented its quantity . . .'

E. USES, THE STATUTE, AND THE DUKE OF NORFOLK

AN EARLY CASE CONCERNING USES

Baker and Milsom, *Sources* p. 94

DE ST EDMUNDS v. ANON. (1371)

Y.B. Trin. 45 Edw. III, fol. 22, pl. 25.

T. de St Edmunds, knight, brought a writ of wardship against one J. and claimed the wardship of the body and the lands of John son and heir of L. de W.; and he claimed the manor of C. which was held of him for homage. And J. put forward to the court a deed by which that same L. in his lifetime had enfeoffed himself and others of that manor in fee simple; and he asked judgment whether the action lay.

Cavendish said that he did not admit the deed, but he said that the livery was made upon condition that [J. and the others] would enfeoff the infant when he came of age, and so by collusion to oust us from our wardship etc.

Belknap said that [T.] should not be received to this averment contrary to the deed which was in fee simple. But the opinion of the court was that he would be received, because if the case were so the infant when he came of age could enter.

Belknap was willing to take issue that the feoffment was not made upon condition as [T.] had alleged, ready.

And the others said the opposite, that it was by collusion.

Belknap then asked in accordance with the statute[1] for process against the witnesses to the deed; and he had it.

STATUTE OF 15 RICHARD II: RESTRICTION OF USES[2] (1391)

S&M, pp. 245–6 (No. 64E)

Item, whereas it is contained in the statute *De Religiosis*[3] that no man of religion or other man whatsoever shall buy or sell, or under colour of gift or lease or other title of any sort shall receive from any one or in any way, by artifice or strategem, cause lands or tenements to be appropriated to himself from any one . . . , so that the said lands and tenements come into mortmain: . . . it is granted and agreed that all those who are possessed of lands, tenements, fiefs, advowsons, or other possessions by enfeoffment or in other fashion for the use of men of religion or of other spiritual persons . . . shall, between now and the feast of St. Michael next, have them amortized by license of the king and the lords [of the lands]; or, otherwise, [the holders] shall sell them and alienate them for another use between now and the said feast, on pain of their being forfeit to the king and the lords as tenements purchased by men of religion, according to the form of the statute *De Religiosis*. And from this time on, under the same penalty, no such purchase shall be made, so that such men of religion or other spiritual persons shall thereof enjoy the profits as aforesaid. And this same statute shall extend to and hold for all lands, tenements, fiefs, advowsons, and other possessions purchased or to be purchased for the use of gilds or fraternities.[4] . . .

(French) *Statutes of the Realm*, II, 70 f.

THE DEVELOPMENT OF USES

Baker and Milsom, *Sources* 94–118

MESSYNDEN v. PIERSON (c. 1420)

Bill in Chancery: C1/5/11; printed in Selden Soc. vol. 10, p. 114 (in French).

To the most reverend and most gracious father in God the bishop of Durham,[5] chancellor of England humbly beseecheth your continual orator, Thomas Messynden the younger [as follows]:—

Whereas Thomas Messynden his father enfeoffed Richard Pierson, parson of Hatcliffe church, John West, parson of Bradley church, John Barneby the younger of Barton, and John See of Little Coates, in certain lands and tenements in the vill of Healing, in the county of Lincoln, to the value of £10 a year, on condition that the said feoffees should enfeoff the said suppliant in the aforesaid lands and tenements when he reached the age of 18 years; and now the said suppliant is aged 18 years and more, and has often requested the said fooffees to enfeoff him in the said lands and tenements according to his father's wish (*volunte*) and condition, and they utterly refuse and say that they will hold the said lands and tenements to their own use: may it please your most gracious lordship to grant certain writs to send for the said feoffees upon certain pains by you to be limited, to answer before you in the Chancery, and to declare why they will not enfeoff the said suppliant according to the aforesaid wish and condition; for God and as a work of charity, considering (most gracious lord) that the said suppliant can have no recovery at common law.

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[1] Statute of Marlborough, 52 Hen. III, c. 6; see [*Sources*, p. 9].

[2] On the law of uses, see Holdsworth, *History of English Law*, IV, 407 f.

[3] The Statute of Mortmain, no. 52B.

[4] The prohibition also extended to municipalities.

[5] Thomas Langley, lord chancellor 1417–24.

CARDINAL BEAUFORT'S CASE (1453)

31 Hen. VI, Statham Abr., Subpena, pl. [1].[6]

If I enfeoff a man in order to perform my last will, and he enfeoffs someone else, I may not have a *subpoena* against the second feoffee because he is a stranger. But, by the opinion of YELVETON [J.K.B.] and KYRKBY M.R.,[7] I shall have a *subpoena* against my feoffee and recover damages for the value of the land. And on the same occasion KYRKBY said that if my feoffee in trust enfeoffs someone else of the same land upon trust, and dies, I shall in this case have a *subpoena* against the second feoffee; but it is otherwise where he enfeoffs him in good faith, for there I am remediless. And so it was adjudged in the case of the cardinal of Winchester,[8] in a *subpoena* in the Chancery.

ANON. (1464)

Y.B. Pas. 4 Edw. IV, fol. 8, pl. 9.

In a writ of trespass '. . . [to show] why with force and arms he broke the plaintiff's close and cut the trees and trod down and consumed the grass', *Catesby* [pleaded in bar]: you ought not to have an action, for we say that long before the supposed trespass one J. B. was seised of certain land (and he showed what it was) whereof the place where the trespass is supposed was part, in his [demesne] as of fee; and, being seised of the same in fee, he enfeoffed the plaintiff in fee to the use of the defendant upon trust (confidence); and later the defendant, by the plaintiff's sufferance and at his will, occupied the land, and cut the trees on the same land, and spoiled the grass; which is the same trespass for which the plaintiff has conceived this action.

Jenney. That is no plea, for the sufferance of the plaintiff is not a certain fact, nor is the occupation by the defendant at the plaintiff's will. Such sufferance and will cannot be tried..for a man's intention is uncertain; and one must plead facts which are or can be known to the jury if issue is taken upon them. That is not so of this sufferance or will of the plaintiff by which the defendant occupied, and therefore in such a case in order to make a good issue on traversable facts one must plead the plaintiff's lease to the defendant to hold at will, which is traversable and may be tried.

Catesby. Why should he not have these facts, when it follows from reason that the defendant enfeoffed the plaintiff to the defendant's use, and thus that the plaintiff is rightfully in this land only to the defendant's use? The defendant made the feoffment to the plaintiff upon trust and confidence, and the plaintiff suffered the defendant to occupy the land, and so in reason the defendant occupied at his will. This proves that the defendant shall now take advantage of pleading this feoffment in trust to justify the occupation of the land for that cause.

MOYLE, JCB. These would be good facts in the Chancery, for there the defendant shall aver the intention and purpose of such a feoffment; for in the Chancery, by conscience, one shall have a remedy according to the intention of such a feoffment. But here, by the course of the common law in the Common Pleas or King's Bench, it is otherwise; for the feoffee shall have the land. and the feoffor shall not plead a justification against his own feoffment whether it was on trust or otherwise.

Catesby. The law of the Chancery is the common law of the land; and there the defendant shall have advantage of such facts and [shall set out the] feoffment. Why, then, should it not be the same here?

MOYLE. It cannot be, here in this court, as I have told you: for the common law of the land in this case differs from the law of the Chancery on this point.

Catesby moved on, and, as to the trees, he pleaded the feoffment of the land to the plaintiff on trust (as before), and that the defendant occupied by the sufferance and will of the plaintiff. Sir, we have no other facts with respect to that. As to the grass, however, we say that the plaintiff was seised in fee, and leased the

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[6] Inaccurately abridged in Fitz. Abr. *Subpena*, pl. 19.

[7] Misprinted in Fitz. Abr. as 'Wylby clerkez des rolles'.

[8] Henry Beaufort, bishop of Winchester 1404–47.

land to the defendant to hold at will, as a result of which the defendant entered and did the trespass in the way supposed, and it is for this the! his action is brought here.

Jenney. As to the plea with respect to cutting the trees, [no law compels us to answer] the plea pleaded in the manner [and form aforesaid] etc.[9] And as to the spoiling of the grass, the plaintiff traverses the lease: and the other side contra.

NOTES (?1465)

Y.B. Mich. 5 Edw. IV

(a) Fol. 7v, pl. 16.>

If J. enfeoffs A. to [J's] use and A. enfeoffs R., even though [A.] sells to [R.], if A. gives notice to R. of the intent of the first feoffment, [R.] is bound by writ of *subpoena* to carry out [I.'s] will. [Again] if a tenant in borough English enfeoffs one to the use of himself and his heirs, the youngest son will have the *subpoena* and not the heir general. Again if a man makes a feoffment upon trust [for himself of land which descended to him through his mother, and dies without issue, the heir on his mother's side will have the *subpoena*. [Again] if the tenant of a special estate tail makes a feoffment to his own use, without declaring his will, and dies, the reversioner will have the *subpoena*. But if there is a tenant in tail with remainder over in fee, and the tenant in tail makes a feoffment in fee to his own use without declaring his will and dies, the remainderman will have the *subpoena*—but query this. [Again] if a husband and wife are seised in right of the wife, and the husband makes a feoffment without declaring his will, the wife will never have the *subpoena*.

(b) Fol. 7v, pl. 18.

There are lord and tenant and the tenant enfeoffs one [to his own use] without expressing his will, and commits felony and is convicted: query who will have the *subpoena*, because the lord will not.

(c) Fol. 8, pl. 20.

If a man enfeoffs another [to his own use] without specifying his intention, and he later makes his will, the last will shall be observed. But if the feoffment is made with some certain intention that shall be observed without any variation: unless the intention was that [the land] should be [held] to the use of the feoffor and his heirs, [in which case] he can change and make a new will, because no third party has acquired an interest. It is otherwise if [the feoffment] is made with the intention that [the feoffor] should take an estate tail: then he cannot make any change, because it is not like an estate general [in himself].

ANON. (1467)

Y.B. Trin. 7 Edw. IV, fol. 14, pl 8.[10]

There was a case in the Chancery, as follows: a man was enfeoffed to the use of a woman, who took a husband, and they sold this land to a stranger for a certain sum of money, and the wife received the money; and the husband and wife asked the person who was enfeoffed to the wife's use to make an estate of this land to the stranger, and he enfeoffed the stranger; and afterwards the husband died, and the woman brought a *subpoena* against the person who was enfeoffed to her use; and he showed all these facts, and she demurred in judgment. And the case was stated in the Exchequer Chamber before the chancellor and the justices of both benches.

Starkey, for the plaintiff. This plea is not sufficient, for what the wife did was void. If she had been seised of the land, and the husband and wife had made a feoffment, she would have had a *cui in vita* after the husband's death because the feoffment made by the wife during the marriage is void. Likewise here, in conscience, this sale by the husband and wife was entirely the husband's act and not the wife's.

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[9] This denotes a demurrer.

[10] Also reported, in the Exchequer Chamber, in Selden Society, vol. 64, p. 12.

The whole court agreed.

And THE CHANCELLOR[11] said that the wife could not consent during the marriage. If something was done out of dread or coercion, it could not be called consent: and whatever a married woman does may be said to be done for dread of her husband.[12] And they should take no notice of the fact that the wife received the [purchase] money, because she could not have had the benefit of it, but only the husband.

THE CHANCELLOR said to *Starkey*: what are you asking for?

Starkey. We pray that the defendant be committed to prison until he satisfies us for the same land.

THE CHANCELLOR. You could have a *subpoena* against the vendee, who is in possession of the land, and recover the land against him.

YELVERTON [J.K.B.] The *subpoena* lies against him if he was aware of the deceit and wrong done to the wife, but not otherwise.[13]

THE CHANCELLOR. He knew the woman had a husband.

Starkey. We pray that the defendant be committed to prison; and as to the *subpoena* against the other person, we will be advised. . . .

For the judgment in this case, see fn. 12 p. [89], below. The variant Y. B. says it was agreed by Danby C.J., Choke and Yelverton JJ., in the Exchequer Chamber, that the widow should have a *subpoena*.

ANON. (1478)

Y.B Mich. 18 Edw. IV, fol. 11, pl. 4.

In the Chancery there was a case as follows: a woman made a feoffment on trust when she was single, and then she took a husband, and during the marriage she made her will that her feoffees should make an estate to her husband, unto him and his heirs for ever; and she died; and after her death her husband sued a *subpoena*. The case is, whether or not this will was good.

Tremayle. It seems the will was good, and that the feoffees shall be compelled to make an estate according to the will; for, just as a wife may appoint executors with her husband's agreement, so by her husband's agreement she may make her will that the feoffees should make an estate to the husband: and conscience requires well enough that this be done.

Vavasour. There is a great difference between your case and this case. There are various cases where a wife, with her husband's agreement, may appoint executors. For instance, if a bond is made to the wife when she is single, she may appoint executors during the marriage by her husband's agreement, and in this case the executors shall have the action of debt on the bond, because the husband may in no way have an action on it after the wife's death, for his interest is determined by the death. She may also make a testament, with her husband's agreement, for her clothing—which in our law is called *paraphernalia*—and this shall be good even though they are the husband's goods. In the present case, however, the law is otherwise; for the law will not allow anything done by her during the marriage to be good. If she makes a feoffment of her land during the marriage, it is void: and this well proves that nothing done by her during the marriage concerning any inheritance is good. For the writ of *cui in vita* says, 'whom in her lifetime she could not gainsay', and this proves well that her act and will is void during the marriage.

Jay to the same effect. If this will were good, a wife's inheritance would not be safe from her husband's alienation during the marriage; for the feoffment made before the marriage was made with the intention that

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[11] Robert Stillington, bishop of Bath and Wells, appointed on 20 June.

[12] Cf. Exchequer Chamber report: 'ubi non est libertas, ibi non est consensus'.

[13] Cf. Exchequer Chamber report: '. . . It was also said by them that if I enfeoff a man to my use and then he enfeoffs someone else in return for a certain sum [of money], if this stranger knows that he was enfeoffed to my use I shall clearly (*bien*) have a *subpoena* against the stranger'.

the husband's alienation should be of no effect. Moreover, if the will were to be effective, it would prejudice the heir.

Sulyard conceded this.

THE CHANCELLOR.[14] The will cannot be good, for she may not gain or lose the land during the marriage without her husband; and since she may not do it at common law, and since any act done by her is absolutely void, the law of conscience likewise says that her will shall be void and of no effect.

Tremayle. A fine levied by a husband and wife is good.

Vavasour. The reason is because the wife shall be examined openly in court by the justices, and her purpose is proved by matter of record.

But at this time the opinion of them all, except *Tremayle*, was that the will was void. . . .[15]

STATUTE CONCERNING FEOFFMENTS BY CESTUY QUE USE (1484)

1 Ric. III, c. 1; *Statutes of the Realm*, vol. II, p. 477 (untr.).

Because, by secret and unknown feoffments, great uncertainty, trouble, costs and grievous vexations do daily grow among the king's subjects, inasmuch as no one who buys lands, tenements or other hereditaments, nor women who have jointures or dowers in any lands, tenements or other hereditaments, nor men's last wills to be performed, nor leases for term of life or of years, nor annuities granted to any person or persons for their services for term of their lives or otherwise, are in perfect surety nor without great trouble and doubt of the same: for the remedy thereof it is ordained, established and enacted, by the advice of the lords spiritual and temporal and the commons in this present parliament assembled, and by authority of the same, that every estate, feoffment, gift, release, grant, lease and confirmation of lands, tenements, rents, services, or other hereditaments, made or had (or hereafter to be made or had) by any person or persons being of full age, of sound mind, at large and not in duress, to any person or persons, and all recoveries and executions had or made, shall be good and effectual to him to whom it is so made, had or given, and to all others to his use, against the seller, feoffor, donor or grantor thereof, and against the sellers, feoffors, donors or grantors and his and their heirs, claiming the same only as heir or heirs to the same sellers, feoffors, donors or grantors, and every of them, and against all others having or claiming any title or interest in the same only to the use of the same seller, feoffor, donor or grantor, or sellers, donors or grantors and his or their said heirs, at the time of the bargain, sale, covenant, gift or grant made; saving to every person or persons such right, title, action and interest by reason of any gift in tail made thereof, as they ought to have had if this act had not been made.

STATUTE CONCERNING WARDSHIP OF THE HEIR OF CESTUY QUE USE (1490)

4 Hen. VII, c. 17,[16] *Statutes of the Realm*, vol. II, p. 540 (untr.).

Where, by a statute made at Marlborough[17] it was ordained that, when tenants made feoffments in fraud to make the lords of the fee to lose their wards, the lords should have writs to recover their wards against such feoffees, as in the said statute (among other things) appears more plainly at large; since the making of which statute many imaginations have been had and yet been used, as well by feoffments, fines and recoveries as otherwise, to put lords from their wards of lands holden of them by knight's service: it is therefore ordained, established and enacted by authority of the said present parliament, that the said statute of Marlborough be observed and kept in all manner of things after the form and effect thereof.

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[14] Thomas Rotherham, bishop of Lincoln.

[15] The reporter notes that Vavasour cited the case of 1467 (see p. [15], above), and said that the *subpoena* was maintainable and that the woman in that case had judgment.

[16] Though cited as of 4 Hen. VII, this chapter was passed at the prorogued session which began on 25 January 1490, in the year 5 Hen. VII.

[17] 52 Hen. III, c.6; see [*Sources*, p. 9].

And over that it is ordained and enacted by the said authority that if any person or persons of what estate, degree or condition he or they be of, be or hereafter shall be seised in demesne or in reversion of estate of inheritance, being tenant immediate to the lord of any castles, manors, lands and tenements or other hereditaments holden by knight's service, in his or their demesne as of fee to the use of any other person or persons and of his heirs only [and] he to whose use he or they be so seised dieth, his heir being within age, [and] no will by him declared or made in his life touching the premises or any of them: the lord of whom such castles, manors, lands, tenements and hereditaments been holden immediately shall have a writ of right of ward, as well for the body as for the land, as the lord should have had if the same ancestor had been in possession of that estate so being in use at the time of his death, and no such estate to his use [had been] made or had . . . .

The statute further provides that if the heir of cestuy que use is of full age he shall pay relief; and that when cestuy que use in ward comes of age he shall have the like action of waste against the lord as if his ancestor had died seised. The act was to take effect in respect of persons dying after Easter 1490.

GREGORY ADGORE'S READING ON USES (*c.* 1490)

Reading on 1 Ric. III, c. 1, in the Inner Temple: CUL MS. Hh. 3. 10, fol. 22v; UCO MS. 162, fol. 107: LI MS. Maynard 3, fol. 197. There is a fourth text in KU MS. D 127.

. . . If a husband and,wife make a feoffment, it shall be presumed to the use of the husband. If an abbot makes a feoffment, it shall be presumed to the use of the feoffee; and the law is the same if the feoffment is with the conventual seal. If several persons make a feoffment, it shall be presumed to the use of them all; but if one of them was the owner,[18] then it shall be to his use according to the facts. If my feoffees make a feoffment over, these second feoffees shall be to my use; but it is otherwise if the feoffment is made by express words to the use of the first feoffees, in which case I am put to my remedy in the Chancery. Matter to prove a use is sometimes in writing: as where the habendum says, 'to such and such a use', then is the use sufficiently proved. The law is the same if the habendum says, 'for £100 which he has paid': this is sufficient proof. So likewise concerning an estate for life, with remainder over in fee, it seems the use is changed. Sometimes the use shall be changed and proved by words: as where the owner says upon the livery that the fooffees shall be seised to his use and to [the use of] his heirs of his body begotten, or his heirs male, or his heirs female. So it is if he declares upon the livery that they shall find a chaplain to sing for him. If a use is to someone for life, and after his decease to another in fee, it seems that this cannot be changed because of the prejudice to the third person; but where the lease is only to himself, as for finding a chaplain and such like, it seems that he may change it well enough. Moreover, if a man has feoffees and they make a feoffment and the owner declares (*monstra*) the use, it is now changed and caused to be in the other feoffees. Also, where my feoffees make an estate, and I declare the use and make the estate, the livery is void-as where I enter upon my termor, or upon the king's possession, and make a feoffment-and yet it seems that the use is changed by such an estate. Also, the use may be changed upon matter of fact, that is, matter of substance, but not bare words—unless it is upon the livery, and then it may be, as above. Also, if a man discusses a marriage, and says that his son shall have such land (and says what) after his decease, or at once, the use is changed when the marriage is performed; but not before the marriage occurs, for before then he has an election, and so it is uncertain. . . . .

THOMAS AUDLEY'S READING ON USES (1526)

Reading on 4 Hen. VII, c. 17, in the Inner Temple: BL MS. Hargrave 87, fol. 438; CUL MS. Ee. 5. 19, fol. 7.

. . . The words of this statute[19] are, 'If any person etc. be seised in demesne or in reversion of estate of inheritance . . . to the use of any other etc. . . .': now, since by these words the lords cannot have wardship of their tenants' heirs by reason of this statute except in cases where their tenants had an estate in use at the time of their death, I will show what a use is, how it is made, and on what things a use may depend.

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[18] In this reading the English word 'owner' is used repeatedly for the cestuy que use.

[19] See p. [15], above.

First, a use is a property or ownership of land or something else, real or personal, depending solely on confidence and trust between those who are in actual possession and are accounted owners by the common law of such lands and things whereon the use depends, and those who have a use in the same thing whereon the use depends. By reason of a use, those to whom the use of such lands or things belongs shall take the profits of such lands and things. whereon the use depends, through the confidence and sufferance of them in whom the possession exists at common law. And this is directly contrary to the learning of the common law; for if a man makes a feoffment, proviso that the feoffee shall, not take the profits, but the feoffor, this proviso is void: for the common law adjudges the feoffee to be the true owner. Therefore it is agreed in 7 Edw. IV[20] that the feoffee in trust shall have an action of trespass against cestuy que use, and there is no remedy to defend the plea by the common law.

Next, although these uses were at first contrived for a good purpose, namely for power to make wills of land[21] in this realm, whereas inheritances in old times were ruled and governed by the common law (which for the most part consists of ordinary and certain rules): nevertheless to a great extent they have been pursued by collusion for the evil purpose of destroying the good laws of the realm, which now by reason of these trusts and confidences is turned into a law called ‘conscience’, which is always uncertain and depends for the greater part on the whim (*arbitrement*) of the judge in conscience. And by reason of this no man can know his title to any land with certainty; for now land passes by words and bare proofs in the Chancery, whereas by the common law it could only pass by solemn livery on the land or something equivalent, or by matter of record or in writing. Also, the trial of title to land in this realm was never by proofs but by verdict, whereas now it is contrary.

By reason of uses and confidences men who had rights of action were defrauded of their lands, until provision was made by various statutes . . . . By reason of these uses, lords were defrauded of lands alienated in mortmain, until the statute of 15 Ric. 11.[22] And by reason of uses lords lost their heriots, wards and reliefs until this statute and the statute of 19 Hen. VII.[23] At the present day by reason of uses a man shall not be tenant by the curtesy, and the lord shall not have his escheat, and a widow shall not be endowed; nor can any land be made secure. Thus, so great have been (and still are) the mischiefs by reason of these uses that it follows that these uses were contrived to a great extent to defraud the good laws of this land. I think the main reason why uses were contrived [was] to make good last wills of land, because land was not devisable by the common law. Therefore at the beginning of the common law there were no uses, but only confidence between person and person, which was there from the beginning. However, no notice was taken of uses, for cestuy que use could not have an action, and an action did not lie against him, until various statutes were made for that purpose. . . . And by the statute of 1 Ric. III[24] it is provided that every feoffment, gift, and so on, made by cestuy que use. should be good: and by this statute . . . a possession passes by reason of a use.

Again, these uses may depend on every kind of possession purely real, such as land, rent, common, and the like; and on a chattel real such as a wardship and a lease for years; and on a chattel purely personal, such as plate, a horse, and other goods. But a man may not give his goods to uses in order to defraud creditors, which is void by the statute of 3 Hen. VII.[25]

Audley concludes this part of the reading by explaining the methods of creating uses. There are, he says, two ways: (1) upon an alteration of possession, such as a recovery, fine, feoffment or release; (2) by bargain, covenant, gift or

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[20] Probably a slip for 4 Edw. IV; see p. [15], above.

[21] The text is obscure in both MSS., and appears to read: ‘s. pur power de terre en cest royalme . . . s. darrein soll’ bon’. The word ‘soll’’ has been read as ‘vol[unte]’, since a later passage says the original purpose of uses was ‘pur faire darreyn voluntes bon de terr’.

[22] 15 Ric. II, c. 5.

[23] 19 Hen. VII, c. 15.

[24] See p. 15, above.

[25] 3 Hen. VII c. 4.

will. There is then a detailed exposition of the law relating to wills, and Audley argues that if a will is void it is 'no will by him declared' for the purpose of the statute of 1490.

Re Lord Dacre of the South (1535)

Y.B. Pas. 27 Hen. VIII, fol. 7, pl. 22; LC MS. Acc. LL 52960, 27 Hen. VIII, fol. 21 (=I)
Trin. 1535: Spelman, *Reports*, p. 228, pl. 4 (=II)

Record summarised in J.M.W. Bean, *The Decline of English Feudalism* (1968), pp. 275–283. Thomas Fiennes, Lord Dacre of the South, died on 9 September 1533. Most of his lands were vested in feoffees to uses, and by his last will he left several manors to his younger sons in tail male and the bulk of his lands to be retained by the feoffees until the heir came of age and then conveyed to the heir. Inquisitions post mortem were held in Kent and Sussex, and the jurors found that the will had been made by fraud and collusion between Lord Dacre and his counsel to defraud the king of the wardship of the body and lands of the heir. The Kent inquisition was traversed in Chancery by the feoffees in February 1535, and the case was argued in the presence of the judges in Easter term following.

I

In the Chancery, before the chancellor[26] and all the justices of England, *Oneley* apprentice recited that it was found by virtue of an office before the escheator of Kent that certain persons were seised to the use of the Lord Dacre and his heirs, and while they were seised the said lord (by covin and collusion with Polsted[27] and others, with the intention of defrauding our lord the king of the wardship and marriage of his son) declared his will—the terms of which were found by the jury and entered verbatim—which provided inter alia that the feoffees should pay a woman, [one of his kinswomen, £5][28] for her marriage, and another woman £100; and he recited in his will that his goods were not sufficient to pay his debts and funeral expenses, and so he willed his feoffees to take the profits for that purpose in tail, with remainder in tail, remainder in fee; and he devised the manor of B. to his youngest son in tail. And it was found that the land was held of the king, and that [Lord Dacre's] son and heir was 18 years old; and [the inquisition] was returned. The aforesaid feoffees came into the Chancery and complained that by virtue of this office they had been wrongfully expelled from the possession of the same land, and (while denying by protestation that [the testator] made his will by covin and collusion) said that they demurred in law. It seems to me that this office is not sufficient. First, I do not think any will can be declared by collusion; for the law presumes when a man is on the point of death that he will not commit any deceit or covin against another. His will is made under such necessity, because he has no time [left to carry out his wishes himself]; and the law construes every will favourably and according to the testator's intention: . . . as, for the payment of his debts and marriage of his daughters, which the testator cannot do when he is dead. Therefore, because of the necessity of it, it cannot be thought to have been done by collusion. If then, a will cannot be made by collusion, this finding by the jurors is irrelevant; for, notwithstanding that the jurors find a thing which in law cannot be, that shall be determined by the judges, and their finding is void . . . . Then again, the statute of 4 Hen. VII[29] provides that lords should have the wardship of the heir of cestuy que use where no will is declared; and this implies in itself (*en luy*)[30] that if cestuy que use declares any will the heir shall not be in ward. . . . Likewise here.

Whorwood to the contrary. . .[31]

Yorke to the contrary. It seems to me that uses 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

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[26] Sir Thomas Audley.

[27] Thomas Polsted (d. 1533), of the Inner Temple, who practiced as an attorney in Surrey and Sussex and was also counsel to the earl of Arundel and the borough of Guildford.

[28] MS. Reads 'for her costs' in print, misreading 'cosin' as 'costes'.

[29] See p. 15, above.

[30] Misprinted as 'en un lieu'.

[31] His argument is substantially repeated by Richard Pollard, below.

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. That there were uses at common law is proved by statutes . . . and 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, for it cannot be said that all the statutes of uses hitherto made are utterly void . . .[32]

Pollard apprentice to the contrary. First, with respect to the point that a will cannot be declared by collusion because of the presumption which was mentioned: it would be an amazing presumption, for the law to presume something plainly against the truth [and] which appears from an office to be otherwise. For it is evident (*appiert*) that the Lord Dacre declared his will by collusion, which is clean contrary to the presumption. Next, it seems that there 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 any 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. Also, it seems to me that if a man made a feoffment in fee before the statute *Quia emptores terrarum*,[33] the law created a tenure between the feoffor and the feoffee, and that tenure was a consideration whereby the feoffee was seised to his own use; and therefore before that statute there were no uses, because of the aforesaid consideration. And if uses did not exist before that statute, it follows that uses had their beginning after the statute was passed, and so the use was not created by the law. For I think nothing can be maintained to be law except such things as have continued since time immemorial: that is, before the time of King Richard I. . . . 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 things as uses. But admit that there are: it [nevertheless] seems that they are not testamentary. For the use shall follow the nature of the land, and is like a rent issuing out of the land; and a rent shall be of the same nature as the land. For a use of land in gavelkind shall be partible in the same way as the land (that is, as between daughters in respect of land at common law), and in borough English the use shall descend to the youngest son:[34] and this proves that a use shall follow the nature of the land from which it issues. It follows that it may not be devised, and therefore descends to the heir of the Lord Dacre, and therefore the king shall have the wardship. [It has been argued that the king shall not have the wardship here because the statute of 1490 says 'no will by him declared', whereas][35] here a will has been declared. But, sir the aforesaid statute shall be taken and understood to mean 'where a good and lawful will has been declared', and not a collusive will made to defraud the lord of his right. It appears from the office that this will was made for that purpose and therefore in law it is no will for the purpose of ousting the king from his wardship.[36] Moreover, it seems to me that collusion by declaring a will to oust the lord of his wardship shall be remedied by the equity of the Statute of Marlborough. . . .

Mountague to the contrary. First, it seems to me that it cannot be said that this will was made by collusion; for the making of a testament is the last act a man performs, and when a man sees that he is on the point of dying it is hardly likely that he would do anything which would prejudice or wrong his neighbour,[37] but rather that he wishes to make his testament and last will solely [for necessity, because he cannot][38] do

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[32] He then argues that uses are testamentary, since they may pass by word and therefore do not have to be conveyed in the same way as land; and that the statute of 1490 does not apply because Lord Dacre had declared a will.

[33] (1290); see p. 9, above.

[34] *Note* (1465); see p. 97, above.

[35] The text is garbled in MS. and in print.

[36] Cf. Audley's argument in 1526: see p. 105, above.

[37] MS Reads 'lord' in print.

[38] MS Reads 'in order that others may do what he cannot' in print.

and perform it himself, and for that reason he puts his trust in others and declares his will to be carried out by others . . . . But even if it is the law that a will may be made by collusion, nevertheless there cannot be said to be collusion in this will. The Lord Dacre willed that his feoffees should be seised to the use of one A., his son, in tail, the remainder over in fee; and that cannot be called collusion, for collusion cannot be averred upon an estate tail, any more than a use can be upon an estate tail. And it was recently adjudged by advice of all the justices that a tenant in tail cannot be seised to another's use.[39] Also, he has given the manor to his youngest son, and declared that certain moneys must be raised for the marriage of one of his kinswomen and for the payment of his debts, which things.prove that the will was not made by collusion to defraud the lord of his wardship. Moreover, it seems that uses 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. And to prove that uses were at common law, there is a writ in the register called *causa matrimonii praelocuti*, which lies where a woman enfeoffs a man with a view to marrying him, and later he will not marry her, and she demands the land back: this writ is based entirely on a trust which the woman put in the feoffee and it clearly proves that a trust (and, by consequence, a use; was at common law. Also, as has been said, it is proved by many statutes that uses were at common law . . . And the length of time for which the law has been so held, and continuance thereof, makes it law even if there was no reason to prove it: in the civil law it is said that *communis error facit jus*, and 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 this were done. [Moreover],[40] it seems that a use is devisable. For the statute of 1 Ric. III[41] says that all feoffments, gifts and grants made or to be made by cestuy que use shall be good, and a devise is in effect like a gift or grant. If a man devises devisable land in tail, and the tenant in tail enters after the devisor's death and enfeoffs a stranger, and dies, his issue shall have formedon and shall count on a 'gift': for a devise is a gift, and even though it is not within the words it is taken to be within the equity of the statute, because it is in equal mischief.

II

Remember that the following matter came into question in Chancery before Sir THOMAS AUDLEY, knight (previously a serjeant at law), and THOMAS CROMWELL, the king's secretary. An office was found *virtute officii* before the escheator after the death of the Lord Dacre of the South, and it was thereby found that A. and B. were seised in fee of the manors of F. and G. to the use of the said lord and that he made his last will in respect of these and all his other lands that his youngest son should have the manor of F. in tail remainder to Thomas the said lord's kinsman and heir (namely son of the lord's son William), to have unto him and his heirs male of his body, remainder to someone in tail, remainder in fee to one R.; and that the said Thomas was under age, and that the said manor of F. was held of the crown in chief, and that another son should have the manor of G. in tail, remainder over in the same way; and that, with respect to the rest of his lands, he willed that his executors should take the profits in order to pay his debts and funeral expenses, and to pay for the marriage of various kinswomen of the said lord, and then remainder to Thomas as above; and that the said lord at the time of his death had goods and chattels to the value of 500 marks; and that the will was made by collusion to defraud the said king of the wardship of the said Thomas and of the lands. Thereupon the said feoffees came and demurred in law upon the office. And it was argued for a long time by the apprentices and serjeants, the justices of both benches being present by the said chancellor's command. Afterwards, in the Exchequer Chamber, by appointment of the aforesaid chancellor and secretary, all the justices and the chief baron were assembled in order to give their opinions privately in this case. (ENGLEFIELD J. was not there, however, because he was on the king's business in Wales.) The points were these:

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[39] *Anon*. (1532) in Brooke Abr., *Feffements al uses*, pl. 40.

[40] 'Ouster' in MS., misread in print as '*Oneley*', though it is clearly a continuation of Mountague's argument.

[41] See p. 101, above.

1. Were there uses upon feoffments at common law, before any statute was made? Many of the justices were of opinion that this word ‘use’ was in old times called ‘trust’ or ‘confidence’, and is now called ‘use’ by various statutes of Richard II, Richard III and Henry VII, and incorporated into the law. For cestuy que use may have an action of waste against his guardian, and vouch in formedon, and have aid.

2. Can cestuy que use make a will of his lands? As to this question, the said chancellor, the said secretary, LYSTER C.B., BALDWIN C.J.C.P. and LUKE J.K.B. were of the opinion that such a will was ineffective and void. For no land is devisable by will, except by custom, since it is against the nature of land to pass in such a way. Another argument put forward was that the land was in the feoffee for all purposes, and therefore it would be against reason for cestuy que use (who in effect has nothing) to make a will and thereby give another’s land to whom he pleases.

But SPELMAN J.K.B., SHELLEY and FITZHERBERT JJ.C.P., and FITZJAMES C.J.K.B., were of the contrary opinion. For such a will is a declaration of trust: namely, a showing to the feoffee of his intention as to how the feoffee should act. The feoffee is obliged in conscience to perform the trust; but the devisee has no remedy at law to compel the feoffee to perform the will. And by his will the devisor does not give any of the land, but only his use, and so the feoffee’s estate is not impaired in any respect: but because the use is changed out of cestuy que use into the person to whom he has given it by his will, the devisee may enter and make a feoffment under the statute of Richard III.[42]

PORT J.K.B. was of the same opinion, but he spoke so softly (*cy base*) that the said chancellor and secretary understood him to be of the other opinion; and therefore they thought the majority of justices were of the same opinion as themselves. Therefore all the justices were commanded to appear before the king; and the king commanded them to assemble in order to agree in their opinions. And those who were of opinion that the will was void would have the king’s best thanks.

Then the justices reassembled before the said chancellor and secretary, and debated this question. And FITZJAMES C.J., FITZHERBERT and SPELMAN JJ., perceiving the opinion of the chancellor, secretary and other justices, who were men of great reason (and also the greater part in number[43]), conformed with their opinion. However, SHELLEY J. was not there because he was ill, and ENGLEFIELD J. was in Wales.

THE STATUTE OF USES (1536)

27 Hen. VIII, c. 10; *Statutes of the Realm*, vol. III, p. 539 (untr.).

Where by the common laws of this realm lands, tenements and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin matter of record [or] writing sufficient, made bona fide without covin or fraud; yet nevertheless divers and sundry imaginations subtle inventions and practices have been used whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries and other assurances craftily made to secret uses, intents and trusts, and also by wills and testaments sometimes made by nude parole and words, sometimes by signs and tokens, and sometimes by writing, and for the most part made by such persons as be visited with sickness in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance, at which times they being provoked by greedy and covetous persons lying in wait about them do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries and other like assurances to uses confidences and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur faire fitz chivaler el pur file marier*, and scantly any person can be certainly assured of any lands by them purchased nor know surely against whom they shall use their actions or executions for their rights, titles and duties, and also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king’s highness hath lost the profits and advantages of the lands of persons

[42] 1 Ric. III, c. 1, see p. 15, above.

[43] In the absence of Shelley J. Spelman does not say whether Port J. attended this meeting.

attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other inconveniences have happened and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm, and for the extirping and extinguishment of all such subtle practiced feoffments, fines, recoveries, abuses and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness or any other his subjects of this realm shall not in any wise hereafter by any means or inventions be deceived, damaged or hurt by reason of such trusts, uses or confidences: it may please the king's royal majesty that it may be enacted by his highness, by the assent of the lords spiritual and temporal and the commons in this present parliament assembled, and by the authority of the same, in manner and form following, that is to say:

1. That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means whatsoever it be; that in every such.case, all and every such person and persons and bodies politic that have or hereafter shall have any such use, confidence or trust in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence or trust in remainder or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust or confidence of or in the same; and that the estate, title, right and possession that was in such person or persons that were, or hereafter shall be, seised of any lands, tenements or hereditaments to the use, confidence or trust of any such person or persons or of any body politic be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence or trust, after such quality, manner, form and condition as they had before. in or to the use, confidence or trust that was in them. . . .[44]

[Concerning jointures:]

4.[45] And be it further enacted by the authority aforesaid, that whereas divers persons have purchased, or have estate made and conveyed of and in divers lands, tenements and hereditaments unto them and to their wives, and to the heirs of the husband, or to the husband and to the wife and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives or for term of life of the said wife; or where any such estate or purchase of any lands, tenements or hereditaments hath been or hereafter shall be made to any husband and to his wife in manner and form expressed, or to any other person or persons and to their heirs and assigns to the use and behoof of the said husband and wife or to the use of the wife as is before rehearsed, for the jointure of the wife: that then in every such case, every woman married having such jointure made or hereafter to be made shall not claim nor have title to have any dower of the residue of the lands, tenements or hereditaments that at any time were her said husband's, by whom she hath any such jointure, nor shall demand nor claim her dower of and against them.that have the lands and inheritances of her said husband; but if she have no such jointure, then she shall be admitted and enabled to pursue, have and demand her dower by writ of dower after the due course and

[44] Section 2 contains a similar provision where several feoffees were seised to the use of any of themselves; and s. 3 enacts that where there was a use for payment of rent, the person entitled to the rent should be deemed to be seised of the rent.

[45] Section 6 in *Statutes at Large.*

order of the common laws of this realm, this act or any law or provision made to the contrary thereof notwithstanding. . . .[46]

[Preservation of status quo:]

9.[47] And forasmuch as great ambiguities and doubts may arise of the validity and invalidity of wills heretofore made of any lands, tenements and hereditaments, to the great trouble of the king's subjects, the king's most royal majesty (minding the tranquillity and rest of his loving subjects) of his most excellent and accustomed goodness is pleased and contented that it be enacted by the authority of this present parliament that all manner true and just wills and testaments heretofore made by any person or persons deceased, or that shall decease before the first day of May that shall be in the year of our Lord God 1536, of any lands, tenements or other hereditaments, shall be taken and accepted good and effectual in the law, after such fashion, manner and form as they were commonly taken and used at any time within 40 years next afore the making of this act; anything contained in this act or in the preamble thereof, or any opinion of the common law to the contrary thereof,[48] notwithstanding. . . .

THE STATUTE OF ENROLMENTS (1536)

27 Hen. VIII, c. 16: *Statutes of the Realm*, vol. III, p. 549 (untr.).

Be it enacted by the authority of this present parliament that from the last day of July which shall be in the year of our Lord God 1536 no manors, lands, tenements or other hereditaments shall pass, alter or change from one to another whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made by reason only of any bargain and sale thereof. except the same bargain and sale be made by writing indented, sealed, and enrolled in one of the king's courts of record at Westminster; or else within the same county or counties where the same manors, lands or tenements so bargained and sold lie or be, before the *custos rotulorum* and two justices of the peace and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrollment to be had and made within six months next after the date of the same writings indented . . . . Provided always that [neither] this act, nor anything therein contained, extend to any manner lands, tenements or hereditaments lying or being within any city, borough or town corporate within this realm, wherein the mayors, recorders. chamberlains. bailiffs or other officer or officers have authority or have lawfully used to enrol any evidences, deeds or other writings within their precinct or limits, anything in this act contained to the contrary notwithstanding.

THE STATUTE OF WILLS (1540)

32 Hen. VIII, c. 1; *Statutes of the Realm* vol. III, p. 744 (untr.).

Where the king's most royal majesty in all the time of his most gracious and noble reign hath ever been a merciful, loving, benevolent and most gracious sovereign lord unto all and singular his loving and obedient subjects, and by many times past hath not only shewed and imparted to them generally by his many, often and beneficial pardons heretofore by authority of his parliament granted, but also by divers other ways and means many great and ample grants and benignities, in such wise as all his said subjects been most bounden to the uttermost of all their powers and graces by them received of God to render and give unto his majesty their most humble reverence and obedient thanks and services, with their daily and continual prayer to Almighty God for the continual preservation of his most royal estate in most kingly honour and prosperity; yet always his majesty, being replete and endowed by God with grace, goodness and liberality, most

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[46] There follow three provisos: that dower should not be barred if the jointure was lawfully recovered against the widow without collusion, that the act should not extend to widows whose husbands were dead before it was passed; and that a widow could refuse a jointure assured after marriage and demand dower instead.

[47] Section 11 in *Statutes at Large*.

[48] This presumably refers to *Lord Dacre's Case*; see p. [15], above. The act recognises that the decision had changed the received opinion, and prevents it from having retrospective effect.

tenderly considering that his said obedient and loving subjects cannot use or exercise themselves according to their estates, degrees, faculties and qualities, or to bear themselves in such wise as that they may conveniently keep and maintain their hospitalities and families, nor the good education and bringing up of their lawful generations, which in this realm (laud be to God) is in all parts very great and abundant, but that in manner of necessity, as by daily experience is manifested and known, they shall not be able of their proper goods; chattels and other movable substances to discharge their debts and after their degrees set forth and advance their children and posterities: wherefore our said sovereign lord, most virtuously considering the mortality that is to every person at God's will and pleasure most common and uncertain, of his most blessed disposition and liberality, being willing to relieve and help his said subjects in their said necessities and debility, is contented and pleased that it be ordained and enacted by authority of this present parliament, in manner and form as hereafter followeth, that is to say:

1. That all and every person and persons having, or which hereafter shall have, any manors, lands, tenements or hereditaments, holden in socage or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the king our sovereign lord by knight's service, by socage tenure in chief, or of the nature of socage tenure in chief, nor of any other person or persons by knight's service, from the twentieth day of July in the year of our Lord God 1540 shall have full and free liberty, power and authority to give, dispose and devise, as well by his last will and testament in writing or otherwise by act or acts lawfully executed in his life, all his said manors, lands, tenements or hereditaments, or any of them, at his free will and pleasure; any law, statute or other thing heretofore had, made or used to the contrary notwithstanding.

2. And that all and every person and persons having manors lands, tenements or hereditaments holden of the king our sovereign lord, his heirs or successors, in socage, or of the nature of socage tenure, in chief, and having other manors, lands, tenements or hereditaments holden of any other person or persons in socage, or of the nature of socage tenure, and not having any manors, lands, tenements or hereditaments holden of the king our sovereign lord by knight's service, nor of any other lord or person by like service, from the twentieth day of July in the said year of our Lord God 1540 shall have full and free liberty, power and authority to give, will, dispose and devise, as well by his last will or testament in writing or otherwise by any act or acts lawfully executed in his life, all his said manors, lands, tenements and hereditaments, or any of them, at his free will and pleasure; any law, statute, custom or other thing heretofore had, made or used to the contrary notwithstanding.

3. Saving always and reserving to the king our sovereign lord, his heirs and successors, all his right, title and interest of primer seisin and reliefs, and also all other rights and duties for tenures in socage, or of the nature of socage tenure, in chief, as heretofore hath been used and accustomed; the same manors, lands; tenements or hereditaments to be taken, had and sued out of and from the hands of his highness, his heirs and successors, by the person or persons to whom any such manors, lands, tenements or hereditaments shall be disposed, willed or devised, in such like manner and form as hath been used by any heir or heirs before the making of this act; and saving and reserving also fines for alienations of such manors, lands, tenements or hereditaments holden of the king our sovereign lord in socage, or of the nature of socage tenure, in chief, whereof there shall be any alteration of freehold or inheritance made by will or otherwise as is aforesaid.

4. And it is further enacted by the authority aforesaid that all and singular person or persons having any manors, lands, tenements or hereditaments of estate of inheritance[49] holden of the king's highness in chief by knight's service, or of the nature of knight's service in chief, from the said twentieth day of July [1540] shall have full power and authority by his last will by writing or otherwise by any act or acts lawfully executed in his life to give, dispose, will or assign two parts of the same manors, lands, tenements or hereditaments in three parts to be divided, or else as much of the said manors, lands, tenements or hereditaments as shall extend or amount to the yearly value of two parts of the same in three parts to be divided, in certainty and by special divisions, as it may be known in severally, to and for the advancement of

[49] By 34 & 35 Hen. VIII, c. 5, s. 3, this is defined to mean estates in fee simple only, so that an entail could not be barred by will.

his wife, preferment of his children, and payment of his debts, or otherwise, at his will and pleasure; any law, statute, custom or other thing to the contrary thereof notwithstanding.

5. Saving and reserving to the king our sovereign lord the custody, wardship and primer seisin or any of them, as the case shall require, of as much of the same manors, lands, tenements or hereditaments as shall amount and extend to the full and clear yearly value of the third part thereof, without any diminution, dower, fraud, covin, charge or abridgment of any of the same third part or the full profits thereof.[50]

6. Saving also and reserving to the king our said sovereign lord all fines for alienations of all such manors, lands, tenements and hereditaments holden of the king by knight's service in chief, whereof there shall be any alteration of freehold or inheritance made by will or otherwise as is abovesaid.

[Sections 7–9 provide that a person holding some land in chief by knight service and other land by knight service may devise two-thirds, with a similar saving to the king. Sections 10–11 provide that a person holding land of mesne lords by knight service, and holding other land in socage, may devise two-thirds of the land held by knight service and all the land held in socage, reserving to the lord the warship of the land held by knight service. Sections 13–16 deal with procedural matters, and s. 14 with joint tenancies and dower.]

The Fee Tail

Baker and Milsom, *Sources*, pp. 61–4

A Discussion of Common Recovery (1531)[51]

St German's Doctor and Student, Selden Soc. vol. 91, p. 156 (book I, ch. 26, of the 1531 ed.; untr.).

. . . *Doctor*. I have heard say that when a man that is seised of lands in tail selleth the land, that it is commonly used that he that buyeth the land shall for his surety and for the avoiding of the tail in that behalf cause some of this friends to recover the said lands against the said tenant in tail; which recovery, as I have been credibly informed, shall be had in this manner: the demandants shall suppose in their writ and declaration that the tenant hath no entry but by such a stranger as the buyer shall list to name and appoint, where indeed the demandants never had possession thereof, nor yet the said stranger; and thereupon the said tenant in tail shall appear in court and by covin and by assent of the parties shall vouch to warranty one that he knoweth well hath nothing to yield in value, and that vouchee shall appear and the demandants shall declare against him; and thereupon he shall take a day to imparl in the same term; and at that day by assent and covin of the parties he shall make default; upon which default, because it is a default in despite of the court, the demandants shall have judgment to recover against the tenant in tail, and he over in value against the vouchee. And this judgment and recovery in value is taken for a bar of the tail for ever. How may it therefore be taken that that law standeth with conscience that, as it seemeth, alloweth and favoreth such feigned recoveries?

Student. If the tenant in tail sell the land for a certain sum of money, as is agreed betwixt them, at such a price as is commonly used of other lands, and for the surety of the sale suffereth such a recovery as is aforesaid, what is the cause that moveth thee to doubt whether the said contract—or the recovery made thereupon for the surety of the buyer that hath truly paid his money for the same—should stand with conscience?

Doctor. Two things cause me to doubt therein. One is for that that after our Lord had given the land of behest to Abraham and his seed, that is to say to his children in possession, always to continue, he said to Moses (as it appeareth [in] *Leviticus* 25) the land shall not be sold for ever, for it is min . . . [and] it seemeth that he doth against the example of God that alieneth or selleth the land that is given to him and to his children as lands entailed be give. Another cause is this: it appeareth by the commandment of God that thou shalt not covet the house of thy neighbour. . . .

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[50] This is explained by 34 & 35 Hen. VIII, c. 5, s. 9, as extending to lands which descend to the heir of the devisor in fee tail as well as in fee simple.

[51] For a precedent of 1508, see Selden Soc. vol. 94, p. 270.

Student. . . . it apppeareth that the said prohibition was not general for every place . . . [or] to all people . . . . And to thy second reason which is grounded upon the commandment of God, it must needs be granted that it is not lawful to any man unlawfully to covet the house of his neighbour . . . but then it remaineth for thee yet to prove how in this case this tailed land that is sold by his ancestor, and whereof a recovery is had of record in the king's court, may be said [to be] the land of the heirs.

Doctor. That may be proved by the law of the realm: that is to say, by the statute of Westminster the second, the first chapter,[52] where it is said [that] the will of the giver expressly contained in the deed of his gift shall be from henceforth observed . . . for it is holden commonly by all doctors that the commandments and rules of the law of man, or of a positive law that is lawfully made, bind all that be subjects to that law according to the mind of the maker. . . .

Student. But some hold that the said statute of Westminster the second was made of a singularity and presumption of many that were at the said parliament for exalting and magnifying of their own blood; and therefore they say that that statute, made by such a presumption, bindeth not in conscience.

Doctor. It is very perilous to judge for certain that the said statute was made of such a presumption as thou sepakest of . . . but it is good and expedient in this case, as it is in other cases that be in doubt, to hold the surer way: and that is that it was made of charity, to the intent that he nor the heirs of him to whom the land was given should not fall into extreme poverty . . . and certain it is that it is not apparent that there was any such corrupt intent in the makers of the said statute. How may it therefore be said that the law is good or right-wise that not only suffereth such thing against the statute but also against the commandment of God?

Student. To that some answer and say that when the land is sold, and a recovery is had thereupon in the king's court of record, that it sufficeth to bar the tail in conscience: for they say that, as the tail was first ordained by the law, so they say that by the law it is annulled again.

Doctor. Be thou thy self judge if in that case there be like authority in the making of the tail as there is in the annulling thereof; for it was ordained by authority of parliament, the which is always taken for the most high court in this realm before any other, and it is annulled by false supposal. . . .

Student. I cannot see but that after the law of the realm [the recover] is a boar of the tail. . . .

Doctor. . . . If thou can yet shew me any other consideration why the said recoveries should stand with conscience, I pray thee let me hear thy conceit therein: for the multitude of the said recoveries is so great that it were great pity that all they should be bound to restitution that have lands by such recoveries, since there is none that (as far as I can hear) disposeth them to restore. . . .

Student. The matter is great, for as thou sayest there be so many that have tailed lands by such recoveries that it were great pity and heaviness to condemn so many persons and to judge that they all were bound to restitution; for I think there be but few in this realm that have lands of any notable value but that they or their ancestors, or some other by whom they claim, have had part thereof by such recoveries. . . . And so that yet I trust that ignorance may excuse many persons in this behalf.

Doctor. Ignorance of the deed may excuse, but ignorance of the law excuseth not. . . .

Student. What then, shall we condemn so many and so notable men?

Doctor. We shall not condemn them, but we shall shew them their peril.

Student. Yet I trust that their danger is not so great that they should be bound to restitution. For John Gerson sayeth . . . *quod communis error facit jus*, that is to say, a common error maketh a right. . . .

Doctor. . . . the said recoveries, though they have been long used, may not be taken to have the strength of a custom, for many (as well learned as unlearned) have always spoken against them, and yet do. And

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[52] Statute of Westminster II (1285); see [§ 5B above].

furthermore, as I have heard say, a custom or a prescription in this realm against statutes of the realm prevails not in law.

Student. Though custom in this realm prevaileth not against a statute as to the law, yet it seemeth that it may prevail against the statute in conscience: for though ignorance of a statute excuseth not in the law, nevertheless it may excuse in conscience: and so it seemeth that it may do of a custom. . . .

The Doctor denies this proposition, and the difference is left unresolved, with the Student noting the Doctor's advice that men should refrain from recoveries thereafter.

THE DUKE OF NORFOLK'S CASE

(Chancery), 3 Ch.Cas. 1, 22 Eng.Rep. 931 (1682)[53]
in C. Donahue, T. Kauper & P. Martin, *Cases and Materials on Property 686–91* (1st ed. 1974) [DKM rev. CD]

[Out of fifty-four some-odd pages in the original report and with the help of some of our predecessors (particularly, A. Gulliver, *Cases and Materials on the Law of Future Interests* (1959) 371–75, the editors [of DKM] have distilled the following statement of the case:

[*Dramatis Personae*

Lord Nottingham—The Chancellor, called by Mr. Justice Story "the Father of Equity."
Henry Frederick Howard—Earl of Arundel, the Settlor.
Thomas Howard—Arundel's eldest son (of six, and one daughter).
Henry Howard—Arundel's second son, later Duke of Norfolk, Earl Marshall of England, the foremost peer in all England and the defendant.
Charles Howard—Arundel's fourth son, Henry's brother, and the plaintiff.
Sir Orlando Bridgeman—the conveyancer who drew up the trust indentures (*ergo* the villain), later Chief Baron of the Court of Exchequer, Chief Justice of the Court of Common Pleas and Lord Keeper of the Great Seal.

[*Plot*

Two indentures [drawn up in 1647] were involved. The first was a conveyance to uses (which were passive therefore executed into legal interests by the Statute of Uses) for the benefit of the following persons in the following order:

1. The Settlor for life
2. His wife for life
3. Trustees for 200 years in trust[54] to hold in accordance with the terms of the second indenture
4. Henry and the heirs male of his body
5. Charles and the heirs male of his body
6. Edward (the fourth son) and the heirs male of his body
7. Francis (the fifth son) and the heirs male of his body
8. Bernard (the sixth son) and the heirs male of his body
9. The heirs of the Settlor.

The second indenture named the beneficiaries of the 200-year trust created by the first indenture:

1. To Henry and the heirs male of his body so long as Thomas or any male issue of his body live
2. If Thomas die without issue in Henry's life or if Thomas' issue should fail so that the Earldom descend to Henry, then to Charles and the heirs male of his body
3. Edward and the heirs male of his body
4. Francis and the heirs male of his body
5. Bernard and the heirs male of his body
6. Henry and the heirs male of his body

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[53] A somewhat different report, based on Nottingham's notebook, is given in Baker and Milsom, *Sources*2, 189–94. We continue to use the traditional report here because we suspect that it was taken down as Nottingham delivered it. Nottingham died shortly after this; so his manuscript report may well have been a draft that he never had the opportunity to revise for publication.

[54] The trust was not an active one (DKM in error here), but it was not executed under the statute both because it was not a freehold and because it was a use on a use. See *Duchess of Suffolk's Case* [*Bartie v Herenden*] (1560), Baker and Milsom, *Sources*2, 142–4.

7. The heirs of the Settlor.

[Clause 2 of the second indenture was the one principally at issue in the case. Apparently the idea of the scheme was to provide for the younger sons a means of livelihood, while the earldom existed in an elder son. Further, if the earldom should descend into the lines of younger sons, the property upon which the trust was imposed would descend to the line of the next younger brother.

[Thomas, the eldest son of Arundel, was *non compos mentis* and "a very weak man." After Arundel died in 1652 Thomas' brother Henry kept Thomas for the rest of his adult life prisoner in Padua, chiefly to prevent him from having issue. It had been the intention of Arundel that Henry should, upon succeeding to the earldom (the title was changed to a dukedom at Henry's behest), pass the enjoyment of the trust res to his next younger brother, Charles, because presumedly the ducal estate would provide Henry an adequate living. In 1675, two years after the death of his mother, Henry suffered a common recovery of the land involved to the use of himself and his heirs. This form of conveyance by judicial proceeding had the effect of barring the entail and giving Henry a fee simple subject to the term of years. The same year, by Henry's connivance, the trustee of the term, one Marriot, assigned the term to Henry, thus merging in him both the legal and equitable term. At law the term was probably extinguished by merger into the fee thus destroying Charles' interest. But how would equity view these dealings? In 1677 Thomas died; the contingency mentioned in the second indenture occurred; Henry became the Duke, and Charles sued him in Chancery.

[The case came up for argument twice. The first time, Nottingham asked the three chief law judges to advise him, then ignored their unanimous opinion but allowed for further argument so that ". . . if any Man can convince me that I am in an Error, or make it appear to me, that I am mistaken in the Law, in the Opinion I have given, which as yet I see no Cause in the World to change, God forbid, but I should hear them; but on the other Side, this Cause must not everlastingly be put off . . . ." 3 Ch.Cas. at 38, 22 Eng.Rep. at 954. Re-argument and final opinion followed in 1682.

[The opinions were delivered orally, and the reports of them vary somewhat in quality and completeness, but the gist of them is clear:]

NOTTINGHAM, L. C. [After reciting the facts:] . . .

[N]othing in the World can excuse *Marriot* from being guilty of a most wilful and palpable Breach of Trust, if *Charles* have any Right to this Term: So that the whole Contention in the Case is, to make the Estate limited to *Charles* void; void in the original Creation; if not so, void by the comon [*sic*] recovery suffered by the now Duke, and the Assignment of *Marriot*. If the Estate he originally void, which is limited to *Charles*, there is no harm done; but if it only be avoided by the Assignment of *Marriot*, with the Concurrence of the Duke of *Norfolk*, he having Notice of the Trusts, then most certainly they must make it good to *Charles* in Equity, for a palpable Breach of Trust, of which they had Notice. So that the Question is reduced to this main single point, Whether all this Care, that was taken to settle this Estate and Family, be void and insignificant; and all this Provision made for *Charles* and the younger Children to have no Effect?

. . . Now *first*, These Things are plain and clear, and by taking Notice of what is plain and clear, we shall come to see what is doubtful.

. . . That the Trust of a Term . . . can be limited no otherwise in equity, than the Estate of a Term . . . can be limited in Law: For I am not setting up a Rule of Property in Chancery, other than that which is the Rule of Property at Law.

. . . It is clear, That the legal Estate of a Term for Years, whether it be a long or short Term, cannot be limited to any Man in Tail, with the Remainder over to another after his Death without Issue; That is flat and plain, for that is a direct Perpetuity.

. . . If a Term be limited to a Man and his Issue, and if that Issue die without Issue, the Remainder over, the Issue of that Issue takes no Estate; and yet because the Remainder over cannot take place, till the Issue of that Issue fail, that Remainder is void too, which was *Reeve's* Case; and the Reason is, because that looks towards a Perpetuity. . . .

These Things having been settled, and by these Rules has this Court always governed itself: But one Step more there is in this Case.

. . . If a Term be devised, or the Trust of a Term limited to one for Life, with twenty Remainders for Life, successively, all the Persons *in esse*, and alive at the Time of the Limitation of their Estates, these, tho' they look like a Possibility upon a Possibility, are all good, because they produce no Inconvenience, they wear out in a little Time with an easy Interpretation, and so was *Alford's* Case. . . .

But now let us, I say, consider whether this Limitation be good to *Charles* or no. It hath been said, . . . it is against all the Rules of Law, and tends to a Perpetuity.

. . . If it tends to a Perpetuity, there needs no more to be said, for the Law has so long laboured against Perpetuities, that it is an undeniable Reason against any Settlement, if it can be found to tend to a Perpetuity.

Therefore let us examine whether it do so, and let us see what a Perpetuity is, and whether any Rule of Law is broken in this Case.

A Perpetuity is the Settlement of an Estate or an Interest in Tail, with such Remainders expectant upon it, as are in no Sort in the Power of the Tenant in Tail in Possession, to dock by any Recovery or Assignment, but such Remainders must continue as perpetual Clogs upon the Estate; such do fight against God, for they pretend to such a Stability in human Affairs, as the Nature of them admits not of, and they are against the Reason and the Policy of the Law, and therefore not to be endured.

But on the other Side, future Interests, springing Trusts, or Trusts executory, Remainders that are to emerge and arise upon Contingencies, are quite out of the Rules and Reasons of Perpetuities, may, out of the Reason upon which the Policy of the Law is founded in those Cases, especially, if they be not of remote or long Consideration: but such as by a natural and easy Interpretation will speedily wear out, and so Things come to their right Chanel again. . . .

But then we come to consider the limitation, and there it is agreed all along in Point of Law, That the Measures of the Limitations of the Trust of a Term, and the Measures of the Limitations of the Estate of a Term, are all one, and uniform here, and in other Cases, and there is no Difference at Chancery or at Common Law, between the Rules of the one and the Rules of the other; what is good in one Case, is good in the other. And therefore in this Case the Court is agreed too, that the Limitations made in this Settlement to *Edward, &c.*, are all void, for they tend directly and plainly to Perpetuities, for they are Limitations of Remainders of a Term in Gross after an Estate-tail in that Term, which commenceth to be a Term in Gross, when the Contingency for *Charles* happens.

Thus far there is no Difference of Opinion: But whether the Limitation to *Charles* . . . whether that be void too, is the great Question of this Case, wherein we differ in our Opinions.

It is said, that is void too; and yet . . . I would be glad to see some tolerable Reason given why it should be so. . . .

Now on the other Side, I would fain know . . . where the Limitation doth not tend to a Perpetuity, nor introduceth any visible Inconvenience, what should hinder that from being good: For tho' if there be a Tendency to a Perpetuity, or a visible Inconvenience, that shall be void for that Reason; yet the bare Limitation of the Remainder after an Estate-tail, which doth not tend to a Perpetuity, that is not void. Why? . . . [S]ee . . . the Reasons why it so. . . .

[The Chancellor then points out that a fee simple cannot be followed by a remainder; yet it can be limited by an executory interest. Similarly,] if a Lease for Years come to be limited in Tail, the Law allows not a present Remainder to be limited thereupon, yet it will allow a future Estate arising upon a Contingency only, and that to wear out in a short Time.

But what Time? And where are the Bounds of that Contingency? You may limit, it seems, upon a Contingecncy to happen in a Life: What if it be limited, if such a one die without issue within twenty-one Years, or 100 Years or while *Westminster-Hall* stands? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear; for the just bounds

of a Fee-simple upon a Fee-simple are not yet determined, but the first Inconvenience that ariseth upon it will regulate it.

First of all then, I would fain have any one answer me, where there is no Inconvenience in this Settlement, no Tendency to a Perpetuity in this Limitation, and no Rule of Law broken by the Conveyance, What should make this void? And no Man can say that it doth break any Rule of Law, unless there be a Tendency to a Perpetuity, or a palpable Inconvenience. Oh, yes, Terms are meer Chattels, and are not in Consideration of Law so great as Freeholds, or Inheritances. These are Words, and but Words, there is not any real Difference at all, but the Reason of Mankind will laugh at it: Shall not a Man have as much Power over his Lease as he has over his Inheritance? If he have not, or shall be disabled to provide for the Contingencies of his own Family that are within his View and Prospect, because it is but a Lease for Years, and not an Inheritance of a Freehold. There is that Absurdity in it which is to me insuperable, nor is the Case, that was put, answer'd in any Degree. A Man that hath no Estate but what consists in a Lease for Years, being to marry his Son, settled this Lease thus: In Trust for himself in Tail, till the Marriage take Effect; and if the Marriage take Effect while he lives, then in Trust for the married Couple; is this future Limitation to the married Couple good or bad? If any Man say it is void, he overthrows I know not how many Marriage-Settlements: If ye say it is good, why is it not a future Estate in this Case as good as in that, when there is no Tendency to a Perpetuity, no visible Inconvenience? . . .

Now if *Charles Howard's* Estate be good in Law, it is ten Times better in Equity. For it is worth the Considering, that this Limitation upon this Contingency happening (as it hath God be thank'd), was the considerate desire of the Family, the Circumstances whereof required Consideration, and this Settlement was the Result of it, made with the best Advice they could procure, and is as prudent a Provision as could be made. For the Son now to tell his Father, that the Provision that he had made for his younger Brother is void, is hard in any Case at Law; but it is much harder in Chancery, for there no Conveyance is ever to be set aside, where it can be supported by a reasonable Construction, and here must be an unreasonable one to overthrow it. . . .

. . . I must decree for the Plaintiff in this Case, and my Decree is this:

That the Plaintiff shall enjoy this Barony for the Residue of the Term of two hundred Years; the Defendant shall make him a Conveyance accordingly, because he extinguished the Trust in the other, and the Term, contrary to both Law and Reason, by the Merger and Surrender, and common Recovery. And that the Defendants do account with the Plaintiff for the Profits of the Premisses by them or any of them received since the Death of the said Duke *Thomas*, and which they or any of them might have received without wilful Default; and that it be referr'd to Sir *Lacon William Child*, Knt., one of the Masters of this Court, to take the said Account, and to make unto the Defendants all just Allowances; and what the said Master shall certify due, the said Defendants are to pay unto the Plaintiff, according to the Master's Report herein to be made: And that the Defendants shall forthwith deliver the Possession of the Premisses to the Plaintiff and that the Plaintiff shall hold and enjoy the said Barony of *Grostock*, with the Lands and Tenements thereto belonging, for the Residue of the said Term of two hundred Years, against the Defendants, and all claiming by, from, or under them. And it is further ordered and decreed, That the said Defendants do seal and execute such Conveyance of the said Term to the Plaintiff as the Master shall approve of, in Case the Parties cannot agree the same; but the Defendants are not to pay any Costs of the Suit.

Notes and Questions

1. Why did Bridgeman create such an extraordinarily complex conveyance? In particular, why did he establish the trust of the term of years? While we may never fully know the answer to these questions, here are some possibilities:

(a) Since Taltarum's Case, Y.B. 12 Edw. 4, f. 19a, pl. 25 (1472), *translated in* K. Digby, An Introduction to the History of the Law of Real Property 255–58 (5th ed. 1897), an estate tail at law could last only so long as the present holder wished it to last. He could by common recovery bar the entail and take a full fee simple. But the common recovery was not available to the holder of an equitable interest (and probably not to the holder of a legal term of years), thus the device which Henry used to bar the entail of his reversion would not help him so far as the interest in the intervening term was concerned.

(b) Contingent remainders had the unfortunate quality of destructibility. See pp. 550–52 *supra*. This could take place by merger or by premature termination of the preceding interest, if, for example, the holder of that interest committed treason and forfeited his interest (an event which had happened before in the Howard family). Bridgeman, however, had invented, and the courts had upheld, the device known as the trust to preserve contingent remainders. A simple form of such a trust might be: to *A* for life, remainder to *B*, *C* and *D* in trust for the life of *A* to preserve contingent remainders, then to *A*'s surviving children. Can you see how this device prevents the destruction of the children's contingent remainder? Can you see how it might be involved in the principal case?

(c) Finally, and probably most important, Bridgeman was forum shopping. Despite Nottingham's statement that the rule concerning perpetuities was the same in law and equity, it was not. Child v. Baylie, Cro. Jac. 459, 79 Eng. Rep. 393 (K.B., Ex. Ch. 1618), had decided that an interest very similar to Charles' in the principal case was void as a perpetuity. Wood v. Sanders, 1 Ch. Cas. 131, 22 Eng. Rep. 728 (1669), on the other hand, decided in Chancery by Bridgeman himself, came out the opposite way on almost precisely the same question. Further, Chancery had not ceased to be the policy-oriented court of conscience which it originally was. Bridgeman probably thought he would be better off in such a court. Why?

2. Granted that Charles' interest was valid, can you think of a reason, apart from the breach of trust argument, why the holding of the term and the fee together by Henry would not destroy his interest? Is Charles' interest destructible? In Pells v. Brown, Cro. Jac. 590, 79 Eng. Rep. 504 (K.B. 1620), the court held executory interests not to be destructible. Can you see why the seventeenth century courts became concerned about perpetuities? Consider the following grant: to Henry and the heirs male of his body, but if the land is not used as a residence, to Charles and the heirs male of his body. Now reconsider the policies behind the Rule Against Perpetuities.

3. "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. Gray, The Rule Against Perpetuities § 201 (4th ed. 1942). This is the classic statement of the rule. That it is not the holding of the principal case should be clear. Lord Nottingham's test of "visible inconvenience" is far vaguer. While remoteness of vesting was suggested as a test almost from the beginning of the Rule, an alternative test of the suspension of power of alienation also held some sway. See Avern v. Lloyd, L.R. 5 Eq. 383 (1868). Under this rule no interest was void if living persons could together convey a fee without regard to when their interests might vest. This alternative was disapproved in *In re* Hargreaves, 43 Ch. Div. 401 (1890) and since then the common law rule in both England and America has been one of remoteness of vesting. Can you think of policy argument supporting the rule of *Avern v. Lloyd*? Similarly it was not until Cadell v. Palmer, 1 Cl. & F. 372, 6 Eng. Rep. 956 (H.L. 1834), that the period of the Rule—the familiar lives in being plus twenty-one years was settled. . . .

Consider again the limitation in the principal case. Would it qualify under the modern rule? If Charles' interest be regarded as a remainder in fee tail male, is it vested? May it be regarded as such an interest? In our view it makes no difference how Charles' interest is categorized, because it will become a present possessory interest, or fail, within Henry's lifetime. You will recall, however, *supra* pp. 549–50, that a remainder may become vested even though it has not become a present possessory interest. If a grant is in the form: to *A* for life, remainder to *A*'s children for their lives, remainder to *B* and his heirs, then *B* has a vested remainder even though *A* is alive and has no children. Since *B*'s interest is vested there is no perpetuities problem, although the interest may not become a present possessory one until long after lives in being plus 21 years. On the other hand, when does an executory interest vest? There was little learning on this topic at the time of the principal case since executory interests were indestructible, and thus the contingent-vested distinction was not made with respect to such interests. It was eventually decided that executory interests would not be considered to have "vested" for the purposes of the Rule until they became present possessory interests. Thus, if the grant above had read: to *A* for life, remainder to *A*'s children for their lives, and one day after the death of the last child of *A*, to *B* and his heirs, then *B*'s interest could not vest in possession until one day after the death of *A*'s last surviving child, an event which may take place well beyond the period of the Rule. (*B*, of course, is not a measuring in either event since the grant does not specify that *B* need himself survive the last of *A*'s children. Nor may *A*'s children be measuring lives since *A* may have a child after the effective date of the grant.)

This is not the only example of an instance in which "vesting" has taken on a peculiar and highly technical meaning for perpetuities purposes. For example, a vested remainder subject to open (a gift to a class at least one member of which is determined) is not "vested" for purposes of the Rule until all possibility of further opening is precluded. Rights of entry and possibilities of reverter are generally regarded as "vested" as of their creation, even though they may not become possessory, if at all, for many generations. This brief introduction may serve to explain why it took Gray over 800 pages to explain his simple statement of the Rule. [. . .]

4. The literature on the Rule is legion. Perhaps the best introduction for the student is two sparkling articles by the late Professor W. Barton Leach: *Perpetuities in a Nutshell*, 51 Harv. L. Rev. 638 (1938); *Perpetuities: The Nutshell Revisited*, 78 Harv. L. Rev. 973 (1965). (Can you think of a more suitable container?) For a discussion of the Rule in light of modern statutory developments, see R. Lynn, The Modern Rule Against Perpetuities (1966).

F. CRIMINAL LAW: THE HAY-LANGBEIN DEBATE

Douglas Hay, "Property, Authority and the Criminal Law"

in *Albion's Fatal Tree* (New York 1975), 17–63

I

The rulers of eighteenth-century England cherished the death sentence. The oratory we remember now is the parliamentary speech, the Roman periods of Fox or Burke, that stirred the gentry and the merchants. But outside Parliament were the labouring poor, and twice a year, in most counties in England, the scarlet-robed judge of assize put the black cap of death on top of his full-bottomed wig to expound the law of the propertied, and to execute their will. 'Methinks I see him,' wrote Martin Madan in 1785,

> with a countenance of solemn sorrow, adjusting the cap of judgement on his head . . . His Lordship then, deeply affected by the melancholy part of his office, which he is now about to fulfill, embraces this golden opportunity to do most exemplary good—He addresses, in the most pathetic terms, the consciences of the trembling criminals . . . shows them how just and necessary it is, that there should be laws to remove out of society those, who instead of contributing their honest industry to the public good and welfare, have exerted every art, that the blackest villainy can suggest, to destroy both . . . He then vindicates the *mercy*, as well as the *severity* of the law, in making such examples, as shall not only protect the innocent from outrage and violence, but also deter others from bringing themselves to the same fatal and ignominious end. . . He acquaints them with the certainty of speedy death, and consequently with the necessity of speedy repentance—and on this theme he may so deliver himself, as not only to melt the wretches at the bar into contrition, but the whole auditory into the deepest concern—Tears express their feelings—and many of the most thoughtless among them may, for the rest of their lives, be preserved from thinking lightly of the first steps to vice, which they now see will lead them to destruction. The dreadful sentence is now pronounced—every heart shakes with terror—the almost fainting criminals are taken from the bar—the crowd retires—each to his several home, and carries the mournful story to his friends and neighbours;—the day of execution arrives—the wretches are led forth to suffer, and exhibit a spectacle to the beholders, too aweful and solemn for description.[1]

This was the climactic moment in a system of criminal law based on terror: 'if we diminish the terror of house-breakers,' wrote Justice Christian of Ely in 1819, 'the terror of the innocent inhabitants must be increased, and the comforts of domestic life must be greatly destroyed'. He himself had dogs, firearms, lights and bells at his own country home, and took a brace of double-barrelled pistols to bed with him every night.[2] But his peace of mind mostly rested on the knowledge that the death sentence hung over anyone who broke in to steal his silver plate. A regular police force did not exist, and the gentry would not tolerate even the idea of one. They remembered the pretensions of the Stuarts and the days of the Commonwealth, and they saw close at hand how the French monarchy controlled its subjects with spies and informers. In place of police, however, propertied Englishmen had a fat and swelling sheaf of laws which threatened thieves with death. The most recent account suggests that the number of capital statutes grew from about 50 to over 200 between the years 1688 and 1820.[3] Almost all of them concerned offences against property.

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[1] Martin Madan, *Thoughts on Executive Justice with Respect to our Criminal Laws, particularly on the Circuit*, 1785, pp. 26–30.

[2] Edward Christian, *Charges delivered to Grand Juries in the Isle of Ely*, 1819, pp. 259, 260n; see below, p. 53, n. 1.

[3] Sir Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, 4 vols., 1948–68, vol. 1, p. 4.