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USES OF USES*

WILLIAM F. FRATCHER**

Attempts have been made to trace the origin of the trust to the *fideicomissum* of Roman law,¹ the *salman* of medieval German law,² and the Islamic *wakf*.³ It seems probable that ideas derived from all of these devices have influenced the development of the trust. What is certain is that the trust, and the power of appointment also, developed from a medieval English device for holding land known as the *use*.⁴ Professor Maitland found evidence of conveyances to bishops to the use of churches and monasteries as early as the first quarter of the ninth century and conveyances to private persons to the use of members of their families as early as the first quarter of the thirteenth,⁵ but the use device only became common after the Franciscan Friars reached England in 1224. Unlike the earlier Benedictine and Cistercian orders, which had already secured ownership of large tracts of agricultural land,⁶

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**Professor of Law, University of Missouri.


2. IV W. Holdsworth, History of English Law, 410-412, n. 418 (1924) [hereinafter cited as Holdsworth]; Holmes, Early English Equity, 1 L.Q.R. 162-174 at 163 (1885); Holmes, Law in Science and Science in Law, 12 Harv. L. Rev. 443, 446 (1899).

3. Thomas, Note on the Origin of Uses and Trusts—*WAQFS*, 3 S.W.L.J. 162-166 (1949). In view of the known connection of the Franciscans with the development of the use device, it should be recalled that St. Francis spent parts of the years 1219 and 1220 in Islamic territory.


6. The Cistercians, for example, reached England in 1127, built a hundred monasteries in the century which followed, and added only one between 1227 and the dissolution of the monasteries under Henry VIII. Butler, Encyclopaedia Britannica (11th ed. 1910). It would seem from this that the order had acquired ample land before the enactment of the Statute of Mortmain in 1279.

(39)
the Franciscan Rule forbade acquisition of property by friaries subject to it. The friars needed hospitals and poor houses for their ministry to the poor, the sick and the aged in towns. They met their needs by having land conveyed to municipal corporations to the use of their friaries. Other religious organizations adopted the use device after the enactment in 1279 of a statute which provided for forfeiture to the overlord of lands conveyed to religious corporations. Because the ordinary method of conveying land was by feoffment, a person who conveyed land to uses was known as the feoffor, the person to whom he conveyed as the feoffee to uses, and a person for whose benefit the use was created as a cestui que use. These correspond to the settlor, the trustee and the beneficiary of modern trust terminology.

The meretricious hyperboles of the Preamble to the Statute of Uses and incautious remarks of legal writers who should have known better have given rise to a misleading notion that the creation of uses was regularly motivated by fraudulent purposes. This unfortunate legend may have contributed to the rejection of the trust device by legal systems outside the ambit of Anglo-American law. The legend sprang from the type of thinking which, under modern conditions, confuses tax avoidance with tax evasion. Concealment of a taxable transaction by disguise is fraudulent; use of a different non-taxable transaction

7. F. MAITLAND, EQUITY (2d ed. 1936) 24-25; Brown, Maitland, Pollock and Maitland, op. cit. supra notes 4, 5.
8. Statute of Mortmain, 7 Edw. I, stat. 2 (1279). It was possible to secure exemption from the statute by means of a royal license in mortmain but this took time and money. 27 Edw. I, stat. 2, § 1 (1299); 34 Edw. I, stat. 3 (1306) (consent of mesne lord, if any, required); 18 Edw. 3, stat. 3, c. 3 (1344). The use device protected the religious organization while negotiations for a license in mortmain were proceeding. Barton, The Medieval Use, 81 L.Q.R. 562 at 565 (1965). After more than a century the penalty of the Statute of Mortmain was extended to conveyances to municipal corporations and conveyances to anyone to the use of religious persons. Stat. 15 Rich. 2, c. 5, §§ 4, 7 (1391). See 23 Hen. 8, c. 10 (1531).
9. DIBY 276, note 1. It was usual to have multiple feoffees to uses, who held as joint tenants, the survivors and survivor taking the whole when members of the group died. By replacing members of the group as each died, the feudal dues to the overlord which fell due when a sole proprietor died were avoided. IV Holsworthy 421-422 (1924); T. PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 580 (5th ed. 1956) [hereinafter cited as PLUCKNETT].
10. RESTATEMENT (SECOND) OF TRUSTS § 8, comment b.; § 14, comment c.; § 200, comment b.
11. 27 Hen. 8, c. 10 (1535). The Preamble, for example, characterized wills of land as an unmitigated evil. The falsity of this canard was soon demonstrated by the enactment of legislation expressly authorizing wills of land. Statute of Wills, 32 Hen. 8, c. 1 (1540).
12. E.g., SANDERS 15-16.
USES OF USES

to avoid taxation is not fraud. In view of the long-believed legend that
the uses of uses were all fraudulent, it seems desirable to explain in some
detail why, by the fifteenth century, the greater part of the land in En-
gland had been conveyed to uses.\textsuperscript{13}

After the Norman Conquest of 1066 most of the land in England
was granted by William the Conqueror to earls and barons who, on
feudal principles, were bound to raise and command military forces of
the Kingdom and to act as members of the King's Great Council, con-
servators of the peace and civil judges.\textsuperscript{14} The rents and profits of the
lands so granted were intended as reimbursement of expenses and com-
ensation to the grantees as public officers. Thus the holding of high
public office and the holding of land by a tenant-in-chief of the Crown
were one and the same. These tenants-in-chief subinfeudated some of
their lands to under-tenants who were bound to assist their overlords
in the performance of their public duties and the under-tenants sub-
infeudated some of their holdings to working farmers. During the first
century after the conquest, however, the King's Court was chiefly con-
cerned with the rights and duties of the immediate tenants-in-chief of
the Crown, nearly all of whom held their lands as an incident of hold-
ing public office. During this century the tenure of public office and land
by such tenants-in-chief was precarious. They could be and sometimes
were deprived of office and land by the King. Upon the death of a
tenant-in-chief the King granted his office and land to whom he chose,
sometimes to a son of the deceased tenant, sometimes to a stranger.\textsuperscript{15}
Such a tenant-in-chief held only a terminable life estate in the land which
could not be transferred and ceased at his death or earlier failure to
perform satisfactorily his public duties.

By the beginning of the thirteenth century it had become recog-
nized that, if land had been granted to a tenant "and his heirs," the
tenant held an estate in fee simple. The property passed at the tenant's
death to his heir, subject to payment of a sum of money, known as a

\begin{itemize}
  \item \textsuperscript{13} Chief Justice Frowike in Anon., Y.B. 15 Hen. 7, Mich., pl. 1 (C.P. 1499);
  I E. COKE, INSTITUTES *272a [hereinafter cited as COKE].
  \item \textsuperscript{14} G. BARROW, FEUDAL BRITAIN 42-43 (1956); I POLLOCK AND MAITLAND
  230-231 (2d ed. 1898). English Feudalism differed from that on the Continent in
  that under-tenants owed direct and primary loyalty to the King and were bound
  to furnish troops and fight only in the King's wars. F. MAITLAND, CONSTITUTIONAL
  HISTORY OF ENGLAND 161-164 (1908); D. STENTON, THE FIRST CENTURY OF EN-
  GLISH FEUDALISM 1066-1166, 10, 13-14, 111-13 (1932).
  \item \textsuperscript{15} G. ELLIS, EARLDOMS IN FEE 1-11 (1963); Thorne, English Feudalism and
\end{itemize}
“relief,” to the overlord. In the case of a tenant-in-chief of the Crown, the estate was subject to the King’s right of “primer seisin,” which was the right to receive a year’s profits. The King’s Court, however, still chiefly concerned with the estates of tenants-in-chief of the Crown, defined the heir’s right of inheritance in terms suitable only if land ownership is equated with high public office. Upon the tenant’s death, the estate passed as a unit to the eldest son or, if he was dead, to his eldest son, to the complete exclusion of all other descendants of the deceased tenant. If there were no descendants, parents and grandparents were ineligible to succeed as heirs, as were brothers and sisters of the half blood and all collateral relatives who were not of the blood of the ancestor from whom the deceased tenant had acquired the land. If no relative eligible to succeed as heir existed, the estate passed by escheat to the overlord. Rural land could not be devised by will, so the tenant was unable to avoid escheat by this means or to make provision for his wife, his parents, or his daughters and younger sons. If the heir of a tenant by military service was a minor, the overlord was entitled by virtue of the feudal perquisites of wardship and marriage, to: (1) possess the land and the heir during his minority; (2) keep the rents and profits which accrued during this period; and (3) control the marriage of the heir, which meant, in practice, to demand a large sum for consent to a suitable marriage.

A statute enacted in 1290 prohibited further subinfeudations but

16. Assize of Northampton, c. 4 (1176); Magna Carta, 9 Hen. 3, c. 2 (1225). The latter statute set the relief of an earl at £100, that of a baron at 100 marks and that of a knight at 100 shillings. II BLACKSTONE *66. When a tenant-in-chief had subinfeudated land to an undertenant, the undertenant was not deemed, for this purpose, to become a tenant-in-chief if the original tenant-in-chief’s estate escheated to the King. Magna Carta, 9 Hen. 3, c. 31 (1225).
17. II BLACKSTONE *200-*240; II POLLOCK AND MAITLAND 260-313. The injustice of this scheme of descent was greatly aggravated by its gradual extension by the royal courts to estates of under-tenants, including the working farmers who held by socage tenure and had never been public officers in any sense. II POLLOCK AND MAITLAND 260-313.
18. II BLACKSTONE *72-73, *245.
19. II POLLOCK AND MAITLAND 314-332; M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND 266-281 (1963). Disposition of land by will was possible before the Norman Conquest. Id. at 83-99. Land in towns held by burgage tenure was commonly devisable by will after the conquest.
20. Magna Carta, 9 Hen. 3, cc. 3-6 (1225); II BLACKSTONE *67-71. Tenants in socage, the normal tenure of free working farmers, whose feudal service was to provide agricultural products rather than to perform military duties, were not subject to these perquisites of wardship and marriage. Magna Carta, 9 Hen. 3, c. 27 (1225); II BLACKSTONE *88.
permitted tenants in fee simple to convey their lands inter vivos by way of substitution, that is, in such manner that the transferee became an immediate tenant of the transferor's lord subject to the same feudal obligations as the transferor. The power of a tenant in fee simple to convey his estate was, however, hedged about by a number of severe restrictions which made it ineffective as a method of making family settlements and wills. Apart from expensive judicial proceedings, the only recognized method of transfer of a possessor's estate in fee simple was by feoffment with livery of seisin. This required both parties to the transaction to go through a formal ceremony on the land, an inconvenience if either was at a distance from the land or in poor health. From this requirement of present delivery of seisin or possession it followed that a conveyance could not be made to take effect in the future: a tenant in fee simple could not enfeoff his second son effective as of the feoffor's death, the feoffor to retain possession until then. In 1305, it became possible for a tenant in fee simple to convey an estate in remainder to become possessory in the future, provided he also conveyed the present right to possession at the same time. Thus a tenant in fee simple could enfeoff his brother for the life of the feoffor with remainder in fee simple to the second son of the feoffor; but this would, of course, deprive the feoffor of the enjoyment of the land for the rest of his life. Moreover, the tenant could not provide in this manner for his afterborn children. Fourteenth century authority indicated that remainders limited to unborn persons were void, and their effectiveness was highly doubt-

22. I COKE *49a; DIGBY 48; T. LITTLETON, TENURES § 70 (1481); W. SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES *210. It became possible to perform the ceremony by attorneys empowered by warrant to act for the parties. COKE, supra; J. PERKINS, PROFITABLE BOOKE § 210 (1642).
23. Hogg v. Cross, Cro. Eliz. 254, 78 Eng. Rep. 510 (1591); Barwick's Case, 5 Co. Rep. 93b, 77 Eng. Rep. 199 (1598); DIGBY 218-219. It would have been possible to secure the desired result by making two conveyances. A, owning in fee simple, could enfeoff B in fee simple. Then B could enfeoff A for life with remainder in fee simple to the second son of A. This would, however, have involved payment of two fines for alienation if A was a tenant-in-chief of the Crown. See note 21 supra. Moreover, the first feoffment would really be a feoffment to uses and B could not be forced to make the second feoffment unless uses were enforceable in some manner. PLUCKNETT 577-578; Barton, The Medieval Use, 81 L.Q.R. 562, 565-566 (1965).
ful in the fifteenth century.\textsuperscript{26} Even after their validity had been judicially established in the sixteenth century,\textsuperscript{27} they were subject to destruction by the holder of the preceding life estate for his own benefit.\textsuperscript{28} Perhaps the severest restriction of all was that a tenant in fee simple could not convey any interest in land whatever to his wife.\textsuperscript{29} Conversely, he could not convey free of his wife's dower, which was a right to occupy, as long as she survived him, a third of all lands which he had owned at any time during the marriage.\textsuperscript{30}

The statute of 1290 recognizing free inter vivos transfer of estates in fee simple\textsuperscript{31} was also, in reality, a recognition of the fact that, during the two centuries since the Norman Conquest, tenure of land had ceased to be identical with tenure of public office and had become simply general and beneficial ownership. The duties of military tenants to raise and command military forces had been commuted into a tax payable in money.\textsuperscript{32} The status of earls and barons as members of the King's Great Council, soon to become the House of Lords, had ceased to have any connection with tenure of land.\textsuperscript{33} Their functions as conservators of the peace had passed to sheriffs and would soon pass to justices of the peace, royal appointees whose offices were not related to land-holding.\textsuperscript{34} Virtually all of their jurisdiction as civil judges had passed to royal courts presided over by justices appointed by the King without reference to tenure of land.\textsuperscript{35} Had the vigorous legislative leadership of King Edward I continued for another generation it is probable that the glaring deficiencies in land law which sprang from the now obsolete identification of land tenure with tenure of public office would have been corrected.

\textsuperscript{26} T. Littleton, Tenures § 721 (1481); III Holdsworth 134-136 (1923).

\textsuperscript{27} Butler v. Bray, 2 Dyer 189b at 190b, 73 Eng. Rep. 418 at 420 (1560); Chudleigh's Case, 1 Co. Rep. 120a at 130a, 134b, 76 Eng. Rep. 270 at 296, 304 (1589-95); Goodright v. Cornish, 1 Salk. 226, 91 Eng. Rep. 200 (1694).


\textsuperscript{29} I Coke *112a; J. Perkins, Profitable Booke § 595 (1642). The scheme of two conveyances suggested \textit{supra}, note 23, could be used for this purpose but it would have the same disadvantages.

\textsuperscript{30} Magna Carta, 9 Hen. 3, c. 7 (1225); I Coke *30b-32a; J. Perkins, Profitable Booke (1642) §§ 301, 319, 328, 329. This troublesome encumbrance could have been justified in 1100 as a pension scheme for widows of public officers.


\textsuperscript{32} I Pollock and Maitland 266-275.

\textsuperscript{33} F. Maitland, Constitutional History of England 80-84 (1908).

\textsuperscript{34} \textit{Id.} at 41, 206-209, 233-234.

\textsuperscript{35} \textit{Id.} at 132-133, 204-205.
by statute. But Edward's successors were either weak or interested in other matters, such as foreign war. Statutory reform of the English land law was not commenced until the sixteenth century or completed until the twentieth.

In the meantime, landowners made feoffments to uses in order to protect themselves and their families against the gross injustices of a system of land law which was centuries out of date. They wanted to make wills of land in order to make decent provision for their wives, daughters and younger sons, and to prevent escheat when they were survived by parents, half brothers and sisters, or uncles, aunts and cousins not related to the ancestor from whom the land was descended. They wanted to save their young orphan children from the gross abuses which overlords made of the iniquitous perquisites of wardship and marriage. These had become nothing but an unfair tax, payable only by those who were least able to pay solely because they inherited lands during minority. They wanted to be able to convey land free of dower and to provide for their widows in some other way. They wanted to provide for efficient and responsible management of lands of infants and persons absent on crusade. These were not fraudulent purposes in any modern sense of the term. Yet the curious paradox is that the eventual success of the use device was probably due to its extensive utilization for another purpose which may appear fraudulent to modern eyes. Until 1483, the only legislative reaction to the mushrooming growth of the use device was a series of statutes prohibiting its utilization for purposes contrary to public policy, such as to defraud creditors.

36. See text accompanying note 50 infra.
37. Frauds on creditors: 50 Edw. 3, c. 6 (1377); 2 Rich. 2, stat. 2, c. 3 (1379); 11 Hen. 6, c. 5 (1433); 3 Hen. 7, c. 4 (1486) (trusts of chattels); 19 Hen. 7, c. 15 (1503). Evasion of the Statute of Mortmain: 15 Rich. 2, c. 5 (1391); 23 Hen. 8, c. 10 (1530). Obstruction of reversioner or remainderman's right to possession: 1 Hen. 7, c. 1 (1485). Obstruction of adverse claims to title: 1 Rich. 2, c. 9 (1377); 4 Hen. 4, c. 7 (1402); 11 Hen. 6, c. 3 (1433). It is interesting to note that, whereas the statutes of 1377, 1379, 1402, and 1433 make the feoffment to uses void, the statute of 1530 treats the feoffment as valid but makes the use void, and those of 1392 and 1485 not only treat the feoffment as valid but make the cestui que use the legal owner of the land to the extent necessary to protect persons injured by the transaction. This last approach, of treating the cestui que use as the legal owner for limited purposes, was followed in 1 Rich. 3, c. 1 (1483), which empowered the cestui que use to convey legal title without the joinder of the feoffee to uses; 1 Rich. 3, c. 5 (1483), which conferred legal title on the cestui when the then king was the feoffee to uses; 4 Hen. 7, c. 17 (1487), which gave the lord the perquisites of relief and wardship when a cestui que use of land held by military tenure died intestate after Easter, 1490; and 19 Hen. 7, c. 15 (1503), which
a tacit legislative recognition of the propriety of feoffments to uses for other purposes.

To understand the judicial reaction to feoffments to uses it is necessary to know something of the English court structure of the period when the problem arose. From a time before the Norman Conquest, royal justice was sought by application to the Lord Chancellor, who was the King's principal secretary of state and keeper of the Great Seal. From 1238 to 1529 the Chancellor was usually a bishop and the King's father confessor. After 1285 he was looked upon as the King's chief minister. Until the twelfth century, disputes between tenants-in-chief of the Crown were decided by the Curia Regis, over which the King presided in person. This body sometimes consisted of only a small group of great officers of state, later known as the Council, and sometimes included a much larger assembly of earls and barons, which, in the thirteenth and fourteenth centuries, became the House of Lords, the upper house of Parliament. During the latter half of the twelfth century, royal justice was extended to most disputes over possession of land, even when tenants-in-chief of the Crown were not involved. As a result of this expansion of jurisdiction, with consequent increase in the volume of litigation, the trial and decision of disputes over land came to be delegated, by writs issued by the Chancellor under the Great Seal, to a Court of Common Pleas composed of salaried royal judges selected from among experienced practising lawyers. For a century the Chancellor exercised a wide discretion in framing new writs to meet varied situations. That discretion was greatly curtailed in the thirteenth century, as a result of which any further substantial enlargement of the jurisdiction of the Court of Common Pleas required legislation. The residual jurisdiction of the Curia Regis or Council remained, however, and most of this was
gave the lord the perquisite of relief when a cestui que use of land by socage tenure died intestate. It will be observed that the last two statutes preserve the effectiveness of the will of a cestui que use for defeating feudal dues.

38. I Holdsworth 34-56, 195-203, 252-253, 395-412 (1922); F. Maitland, Constitutional History of England 133-135 (1908). The courts of King's Bench and Exchequer, which later acquired concurrent jurisdiction with the Court of Common Pleas over some types of land cases, applied the same common law and used, in general, the same procedure.

39. II Holdsworth 512-22 (1936); Provisions of Oxford (1258) (no new writs without command of King and Council); Statute of Westminster II, 13 Edw. I, stat. 1, c. 24, § 2(4) (1285) (cases not within the general scope of existing forms of writ to be referred to Parliament).

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delegated to the Chancellor, whose position as head of a distinct Court of Chancery was recognized by statute in 1340.\textsuperscript{40}

The Court of Common Pleas examined the contents of instruments under seal,\textsuperscript{41} but other disputed matters of fact were referred by it for decision to a jury, summoned by the sheriff, consisting of twelve landowners of the county in which lay the land in dispute. Until the sixteenth century the jury was required to decide such questions from its own knowledge. The Court of Common Pleas would not permit the receipt of testimony of the parties or other persons with knowledge of the facts.\textsuperscript{42} The procedure of the Court of Common Pleas was adequate to determine disputes over the contents of sealed instruments and such notorious facts as feoffments and disseisins. As to little-known matters like secret instructions given by a feoffor to his feoffees to uses it was virtually useless. The Court of Chancery, however, like the ecclesiastical courts, examined the parties and other witnesses under oath in order to determine disputed questions of fact.\textsuperscript{43}

To the limited extent that its jurisdiction and procedure permitted, the Court of Common Pleas recognized and enforced uses. Thus a \textit{cestui que use} was treated as a landowner for the purpose of qualifying for jury service.\textsuperscript{44} Moreover, if a feoffment to uses was made on condition that, if the feoffee failed to perform his fiduciary duties to the \textit{cestui que use}, the feoffor might enter the land and terminate the estate of the feoffee to uses, the Court of Common Pleas would enforce the con-

\textsuperscript{40} 14 Ed. 3, stat. 1, c. 5 (1340); I HOLDsworth 401-409 (1922). At this time the Chancellor was John De Stratford, Archbishop of Canterbury, Doctor of Civil Law of Oxford University. His principal subordinates in the Chancery (e.g. the Master of the Rolls) were, as was usual for several centuries, clergymen who commonly had earned doctorates in civil law at English or French universities. E. Foss, \textit{Biographia Juridica} 636-638 (1870); B. Wilkinson, \textit{The Chancery Under Edward III} 98-178, 199-203 (1929).

\textsuperscript{41} Cecily v. B., R.S.Y.B. 20 Edw. 1 258 (1292); IX HOLDsworth 164 (1926).

\textsuperscript{42} I HOLDworth 275-284, 298-350 (1922); IX HOLDsworth 178-185, 193-196 (1926); F. Maitland, \textit{Constitutional History of England} (1908) 124-140, 211; II POLLOCK AND MAITLAND 622 (2d ed. 1898). Thus in Anonymous, R.S.Y.B. 20 Edw. 3, Mich., pl. 3 (II 168-170) (1346), Mr. Justice Sharshulle (soon to become Lord Chief Justice of England) said: "It appears to us that in every case in which enquiry is to be made as to the points of the writ by assize or by jury, no proof by witnesses can be made any more than in an Assize of Novel Disseisin***." The common law courts did not permit the parties and other interested persons to testify until compelled to do so by statute in 1851. 14 & 15 Vict., c. 99, § 2 (1851).

\textsuperscript{43} V HOLDsworth 285-286 (1924); IX HOLDsworth 340-341 (1926).

\textsuperscript{44} I COKE *272a-272b.
Such a condition could be enforced, however, only by the feoffor or his heir. As the commonest purpose of a feoffment to uses was to cut off the heir in favor of a daughter or younger son, this type of enforcement would be worse than useless to the typical cestui que use after the death of the feoffor. What the cestui que use needed was a procedure by which he could sue to compel the feoffee to uses to do his duty. This the Court of Common Pleas did not provide. It followed that, if there was to be such a remedy, it would have to be provided by the residual jurisdiction of the Council, exercised by or through the Lord Chancellor.

In normal times feoffees to uses were trustworthy friends who did their duty without compulsion. If normal peace and order had prevailed in fifteenth century England there might never have been enough pressure to prod the Chancellor into developing a remedy for the cestui que use. But in October, 1386, a group of conspirators led by the uncle and cousin of King Richard II secured control of Parliament and, by threatening to depose him, coerced Richard into dismissing his Lord Chancellor. The Great Seal was entrusted to one of the conspirators, and the King was forced to approve its attachment to a charter which transferred most of the powers of the Crown to the conspirators. The King soon escaped from the conspirators and, with the aid of his dismissed Chancellor, secured an opinion from the royal judges that the charter trans-

45. Pyper v. Geffreson, Y.B. 11 Rich. 2, Mich., no. 507 (1387) (Ames Foundation Y.B. Series, V (118-119). In this case William atte Halle enfeoffed three persons in fee simple on condition that they enfeoff the feoffor's wife, Margaret, for life, with remainder in fee simple to the child of William with which Margaret was then pregnant. The feoffor died and Margaret gave birth to Elizabeth. The feoffees enfeoffed Margaret for life with remainder in fee to Geffreson, father of the defendant. Elizabeth entered and enfeoffed Aleyenossen, who enfeoffed the plaintiff. It is worthy of note that, in this case, the Court of Common Pleas recognized the validity of a limitation of a future use to an unborn person. There is no record of its recognizing the limitation of a legal contingent remainder in an unborn person until 1430. As the condition was not broken until after Elizabeth's birth, the problem of destructibility of equitable contingent remainders in unborn persons was not raised. The fact that Elizabeth was en ventre sa mere when the feoffment to uses was made weakens this case somewhat as a demonstration of the validity at common law of limitations of uses in unborn persons. Ames, The Origin of Uses and Trusts, 21 Harv. L. Rev. 261-274 at 264 (1908); Barton, The Medieval Use, 81 L.Q.R. 562-577 at 566-569 (1965).


47. Anonymous, Y.B. 4 Edw. 4, Pasch., pl. 9 (1464). Mr. Serjeant Catesby (later a justice of the Court of Common Pleas) argued unsuccessfully that Chancery law, which treated the cestui que use as owner, was the common law of the land and should be applied in the Court of Common Pleas. Digby, 294-296 contains a translation of the report.
ferring the royal powers was void. The conspirators then regained control, forced the dismissal of the judges, and prosecuted the former Chancellor and judges before the House of Lords, charging that the giving of the judicial opinion to the King was an act of treason. They were shrewd in their choice of a forum because a trial in the ordinary courts might well have resulted in an acquittal, it being hard to empanel a jury without a single honest member. They acted less wisely in asking the new judges, the serjeants of the common law and the advocates of the civil law, to give an opinion as to the sufficiency of the charges. The judges and lawyers returned a unanimous opinion that the charges were insufficient. Despite this, the House of Lords, without hearing, sentenced the dismissed Chancellor and judges to be “drawn and hanged as traitors and their heirs disinherited, lands and tenements, goods and chattels to be forfeited to the king.” The former Lord Chief Justice of England was stripped and hanged stark naked. The former Lord Chancellor and some of the former judges escaped with their lives but their lands and goods were forfeited in accordance with the sentence. These incidents put every landowner in England into frightful jeopardy. They had known, of course, that treason entailed death and forfeiture, but not that loyal service to the lawful king was treason. Worse was in store.

The disorder grew into a century-long contest for the throne among various descendants of King Edward III. During this century there was intermittent civil war, three kings were deposed and murdered, a fourth was killed in battle, and treason prosecutions, with their concomitant of forfeiture, multiplied. If a landowner supported either faction he was likely to lose both head and land, because each faction was out of power from time to time. If he supported neither he was almost certain to lose his lands for failure to perform his feudal duties to the “true king,” that is, whatever faction was in power for the time being. It is no occasion for wonder that most of the land in England was enfeoffed to uses in the hope of avoiding forfeiture for “treason.”

48. I Cobbett’s State Trials 90-135 (1809); II Hume, History of England 8-11 (1828). Forfeiture of lands and goods for treason probably antedated the Norman Conquest. By 25 Edw. 3, stat. 5, c. 2 (1350) it was provided that the forfeiture of all lands for treason, including those of under-tenants, was to the Crown.


50. It was provided by 21 Rich. 2, c. 3 (1397) that forfeiture of lands for treason involving compassing and purposing the death or deposition of the King or raising men and horses to fight the King should extend to lands held as cestui
who changed sides in the civil war failed to perform their fiduciary duties. The result was tremendous pressure upon the Chancery to provide an adequate remedy for the cestui que use. It did so.

In 1350 the King's Council examined a feoffee to uses with a view to enforcing his duties under a foystment to the use of the King. Because extant records of the Court of Chancery in the fourteenth and early fifteenth centuries are scanty and rarely contain mention of the decision or decree, it is difficult to establish the exact date when the Chancellor began to enforce the fiduciary duties of feoffees to uses at suit of a cestui que use. There is a record of a petition to the Chancellor made sometime between 1393 and 1399 which assumes his authority and willingness to compel a feoffee to uses to convey land as directed by the will of the feoffor. The records establish that by 1459 the judges of the common law courts of King's Bench and Common Pleas recognized the power of the Chancellor to compel feoffees to uses to perform their fiduciary duties. It is evident that he had been exercising this power for some time. After some hesitation, the Chancellor undertook to enforce the use against the heir of the feoffee to uses and against

que use and as tenant in tail. This statute was, in effect, repealed by 1 Hen. 4, c. 10 (1399). Lands held as cestui que use or as tenant in tail were not subject to forfeiture for treason during the fifteenth century. I COKE *392b, III COKE *19. Both were subjected to forfeiture for treason by 26 Hen. 8, c. 13, § 5 (1534).

51. In re Fabel's Uses, The King v. Blount, SELECT CASES BEFORE THE KING'S COUNCIL 1243-1482, 33 (Selden Society Vol. 35 for 1918) (1350). In this case Gilbert Blount was sworn and testified that, shortly before his death, Thomas Fabel, a tax collector indebted to the King in an amount over £400, delivered goods and enfeoffed lands to Blount and five other men on condition that the goods and lands be sold to the extent necessary to pay the debt and the proceeds devoted to this purpose. Thus the feoffees to uses had a power of sale, upon the exercise of which the interest of the King as cestui que use would shift from the land to the proceeds of sale. The idea of a trust under which the interests of both the trustee and the beneficiary are property interests in a fund, the subject matter of which changes from time to time, is not new.


53. The Case of Sub Poena in the Chancery, SELECT CASES IN THE EXCHEQUER CHAMBER 1377-1461 173 (Selden Society Vol. 51 for 1933) (1459); The Rights of the Married Woman, SELECT CASES IN THE EXCHEQUER CHAMBER 1461-1509 12 (Selden Society Vol. 64 for 1945) (1467). While the development of a remedy for enforcement of uses was proceeding the Chancellor often associated common law judges with himself in the decision of cases and referred those of great difficulty to all of the justices of the Courts of King's Bench and Common Pleas sitting together in the Exchequer Chamber. Hemmant, Introduction to SELECT CASES IN THE EXCHEQUER CHAMBER 1377-1461, supra, xxxvii, liv-lyvii, lix-lxi, lxvii-lxxviii. This being so, the suggestion of some of the older writers that the enforcement of uses sprang from the anxiety of the chancellors, usually bishops, to protect uses for religious purposes created before 1391, is of doubtful soundness. E.g., SANDERS 15.

persons to whom the feoffee conveyed the land, if they had notice of the use or had not paid a valuable consideration. As the *cestui que use* was nearly always in actual occupation of the land, it followed as a practical matter that the feoffee to uses could not convey the land free of the use. Unless the terms of the feoffment to uses provided otherwise, the feoffee to uses, or whoever took title to the land from him subject to the use, owed three duties to the *cestui que use*, the performance of which would be compelled by the Chancellor: (1) to permit the *cestui que use* to occupy the land and enjoy the rents and profits; (2) to defend the title in actions at law by and against third parties; and (3) to convey the land as directed by the *cestui que use*.

As holder of the legal title, the feoffee to uses was a feudal tenant holding of the feoffor's former lord. He, therefore, was responsible for the aids payable to the lord when the lord's eldest son was knighted, his eldest daughter married, and his person required ransom. If a sole feoffee to uses died without heirs, the land escheated to the lord, free of the use. If he died with an heir of full age, relief and, if a tenant-in-chief, primer seisin, were due the lord; if he died with a minor heir, the lord had the usual perquisites of wardship and marriage; and, if he died survived by a widow, she was entitled to dower, free of the use. Escheat, relief, primer seisin, wardship, marriage control, and dower could be avoided, however, by having numerous feoffees to uses, who held as joint tenants. When one died the survivors took the whole by right of survivorship and, when the group grew small, new joint tenants could be added to it. Thus the feoffees to uses resembled a perpetual corporation which never died. The *cestui que use* did not hold as a feudal tenant of anyone. When he died no lord was entitled to escheat, relief, primer seisin, wardship or marriage and his widow took no dower in the use.

The use device was intended to give the *cestui que use* all the advantages of full ownership of the land, less some of the burdens of ownership, and with the additional power of devising his interest. In the enforcement

55. Anonymous, Y.B. 11 Edw. 4, Trin., pl. 13 (1471); Anonymous, Y.B. 14 Hen. 8, Mich., pl. 5 (1523); Abbot of Bury v. Bokenham, 1 Dyer 7b, 73 Eng. Rep. 19 (1536). In 1402, the House of Commons petitioned for the creation of a remedy against persons to whom feoffees to uses wrongfully conveyed the land. The petition was referred to the Council. Rot. Parl., iii, 511, quoted in PLUCKNETT at 578.

56. F. BACON, READING UPON THE STATUTE OF USES 10 (1804 ed.); F. HARGRAVE and C. BUTLER, NOTES ON LORD COKE'S FIRST INSTITUTE, Butler's Note 77, V (11), to I COKE *191a (1812); Id., Butler's Note 231, II to I COKE *271b (1812) [hereinafter cited as HARGRAVE AND BUTLER].

57. HARGRAVE AND BUTLER, op. cit. supra note 56; PLUCKNETT 580-583.
of uses the Chancellor, with the active collaboration and guidance of the judges of the common law courts, brought this intention to full realization. He enforced estates in uses, in fee simple, in fee tail, for life and for years, which corresponded to the legal estates in land recognized by the common law. A cestui que use in fee simple could devise his use by will and transfer it inter vivos without paying a fine and without the cumbersome feoffment with livery of seisin. He could, moreover, limit a use to his wife, and create estates in use to commence in the future, without a supporting particular estate. He could create estates in use which cut off a fee simple, and uses in unborn persons that could not be destroyed by the living. None of these things could be done at common law. For example, a feoffment could be made to the use of the feoffor for life, remainder to the use of his wife for life, remainder to the use of his second son in fee simple, but if the second son should die without issue surviving him, to the use of the feoffor’s unborn third son in fee simple, and if no such third son should exist, to the use of all the feoffor’s daughters, whether or not born before the feoffment, in fee simple.

If a feoffment was made in fee simple, without consideration and without a declaration of the uses, the feoffee held to the use of the feoffor in fee simple. The feoffor could, either at the time of making the feoffment or thereafter, inter vivos or by will, declare the uses to the feoffee. Incident to declaring the uses the feoffor could reserve a power to revoke uses so declared and a power to declare new uses. For example, the feoffor might de-

58. See note 53 supra.
60. Rothanhale v. Wychingham, 2 Cal. Proc. Ch. iii (1413-1422); Williamson v. Cook, Select Cases in Chancery, 115 (Selden Society Vol. 10 for 1896) (1417-1424); F. Bacon, Reading Upon the Statute of Uses 20-21 (1804 ed.); I Coke *271b; Hargrave and Butler, Note 138 to *111b; E. Jenks, Short History of English Law (1934 ed.) 104; F. Sullivan, Historical Treatise on the Feudal Law 166-167 (1772); Stat. 4 Hen. 7, c. 4 (1487); 7 Hen. 7, c. 3 (1490); 3 Hen. 8, c. 4 (1511).
61. F. Bacon, Reading Upon the Statute of Uses 16 (1642); W. Cruise, Essay on Uses § 36 (1795); G. Gilbert, Law of Uses and Trusts 26 (2d ed. 1741); O. W. Holmes, The Common Law 408 (1881); Sanders 65.
64. I Coke *271b.
clare that the feoffment was to the use of the feoffor for life, remainder to the use of the feoffor's wife for life, remainder to the feoffor's second son in fee simple, reserving power in the feoffor to revoke the uses so declared and appoint new uses. More commonly, the feoffor would simply declare that the feoffment was to the use of the feoffor for life, remainder as he should by will appoint.

Power to appoint uses could be conferred on others, whether or not they held interests in the land. Thus a feoffor could declare that a feoffment was to the use of the feoffor for life, remainder to the use of the feoffor's wife for life, remainder as the wife might by deed or will appoint (general power of appointment), or, remainder to such of his children as the wife might by will appoint (special power of appointment). Moreover, the feoffor could confer on the feoffee to uses power to sell, lease or mortgage the land. As legal owner the feoffee could convey the legal title even though the feoffor conferred no power of sale but in that case, as has been seen, a purchaser from him would take subject to the use. If the feoffor conferred a power of sale on the feoffee to uses, a sale by the feoffee pursuant to the power would give the purchaser the use as well as the legal title to the land and the cestui que use's interest would be transferred from the land to the proceeds of sale, which the former feoffee to uses would then hold to his use. Thus a feoffee to uses' power of sale was essentially a power to appoint the use. Hence the fifteenth and sixteenth century chancery recognition of the validity of powers to appoint uses is the basis of the modern law of trustees' powers as well as that of the modern law of powers of appointment. Both are of great importance in the current use of the trust as an estate planning device.

This somewhat detailed account of the origin of uses and powers has been designed to enable the reader to judge for himself whether the creation of uses was motivated by fraudulent purposes. Their creation for certain purposes which were against public policy was restrained by statute. The legislature, the executive and the judges of the common law courts all co-

65. HARGRAVE AND BUTLER, Butler's note 231, III (4) & (5) to *271b; IV HOLDSWORTH 474-475 (1924); VII HOLDSWORTH 150-151 (1926).
66. See cases cited note 55 supra.
67. See materials cited note 65 supra.
68. See text supra at notes 11, 12. The Crown's argument that a feoffment to the use of the feoffor's will was fraudulent because it deprived the King of his feudal rights of wardship and marriage was decisively rejected in The King v. Lord Dacres, Y.B. 27 Hen. 8 Pasch. pl. 22 (1535), a case argued before the Lord Chancellor and all the common law judges.
69. See statutes cited note 37 supra.
operated with the Chancellor, who was prime minister as well as being speaker of the House of Lords and chief judge, in the creation of a remedy for the enforcement of uses for purposes not condemned by statute and the powers inseparably connected with them. The four main purposes were: (1) the avoidance of ancient burdens imposed for the support of a feudal system which had ceased to exist, (2) the avoidance of a system of inheritance which was palpably unjust, (3) the attainment of ease and flexibility in conveyancing not possible with primitive legal rules, and (4) the efficient management of property of persons unable to manage their own.

The equity of the Chancellor was a means of reforming an archaic system of law which, with changing conditions, had become both unjust and a severe curb on the development and prosperity of the country. The other principal means of reforming law without legislation, the legal fiction, has also been criticized as fraudulent. Whether legislation is a better method of reforming law than equity or legal fictions is a legitimate subject of inquiry, but a flat assertion that the desire to reform an obsolete system of law which is no longer just is a fraudulent purpose is scarcely defensible.

The use device, as developed by the fifteenth century chancellors, involved risks for innocent purchasers of land. A *cestui que use* in possession of and enjoying the rents and profits of land was actually the beneficial owner and appeared to be the absolute owner. Yet a purchaser from him might be ousted at common law by feoffees to uses of whose existence and title he was unaware. This could occur without fraud on the part of the *cestui que use*, who might be ignorant of transfers made by the feoffees to uses. Nineteen months before the fatal day upon which the fall of White Surrey caused the simultaneous termination of the Wars of the Roses, the Royal House of Plantagenet and the Middle Ages, the English Parliament attempted to remedy this evil by enacting a statute providing that a conveyance made by a *cestui que use* should be good and effectual "against all other having or claiming any Title or Interest in the same, only to the Use of the same Seller, Feoffor, Donor, or Grantor, Sellers, Feoffors, Donors, or

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72. 22 August 1485. See Shakespeare, The Tragedy of Richard the Third; with the Landing of Earle Richmond, and the Battell at Bosworth Field, Histories, Actus Quintus, Scena Secunda 201-204 (First Folio ed. 1623).
Grantors, or his or their said heirs.\(^\text{73}\) This meant that a cestui que use had statutory power to convey the legal title of the feoffees to uses as well as his own beneficial ownership. The statute was, therefore, an important step toward recognizing the interest of the cestui que use as legal ownership.

When feoffees to uses held to the use of \(A\) and his heirs, so that \(A\) had an equitable fee simple, the common law courts recognized that \(A\) had power under the statute to convey the whole legal fee simple\(^\text{74}\) or an estate of lesser duration.\(^\text{75}\) When, however, the feoffees to uses held to the use of \(A\) for life and thereafter to the use of \(B\) and his heirs, \(A\) had power under the statute to convey only an estate for his own life\(^\text{76}\) and \(B\) had no statutory power to convey during the life of \(A\).\(^\text{77}\) Moreover, if the feoffees held to the use of \(A\) and the heirs of his body, so that \(A\) had an equitable estate tail, or to the use of \(A\) and his successors, Abbots of Croyland, so that \(A\) had an equitable fee simple in his capacity of abbot (corporation sole), \(A\) had power under the statute to convey only an estate for his own life.\(^\text{78}\) The statute did not give the cestui que use the rights of a legal owner against wrongdoing third parties\(^\text{79}\) and it did not deprive the feoffees to uses of power to make conveyances which would cause trouble for purchasers from the cestui que use.\(^\text{80}\)

The statute of Richard III\(^\text{81}\) thus provided only a partial solution of the problem with which it was concerned. It did nothing to solve two other problems connected with uses which became prominent in the sixteenth century. First, the modes of conveyance of legal estates in land known to the common law involved a formal ceremony in the presence of witnesses, a judicial proceeding of record in a public office, or a written instrument under seal. Uses, however, could be created and transferred by an oral bargain and sale made in private, without any of the protections against fraud.

\(^{73}\) 1 Rich. 3, c. 1 (23 January 1483/84) (emphasis supplied). The italicized words are a translation of the original French, “soulement al oeps.” Statutes of the Realm II (1816) 478. The statute was repealed by the Statute Law Revision Act, 1863, 26 & 27 Vict., c. 125.

\(^{74}\) Anonymous, Y.B. 9 Hen. 7, Pasch., pl. 13 (1494) (livery of seisin could be made by attorney in fact).

\(^{75}\) Anonymous, Y.B. 5 Hen. 7, Mich., pl. 11 (1489) (lease for years); Anonymous, Y.B. 8 Hen. 7, Hil., pl. 1 (1492) (lease for years).

\(^{76}\) Anonymous, Y.B. 4 Hen. 7, Mich., pl. 9 (Exchequer Chamber 1488).


\(^{79}\) Anonymous, 15 Hen. 7, Hil., pl. 4 (C.P. 1499), Trin., pl. 23 (1500), Mich., pl. 1 (1500).


\(^{81}\) 1 Rich. 3, c. 1 (23 January 1483/84).
and mistake afforded by the common law modes of conveyance. Second, uses had an adverse effect on the royal revenues which was felt increasingly as decline in the value of money caused by inflation reduced the purchasing power of funds received by the treasury. During the two centuries following the enactment in 1290 of the statute abolishing subinfeudation, escheats and forfeitures of mesne seigniories resulted in most land being held immediately of the King. Consequently, the loss of feudal dues avoided by means of the use device fell mainly on the King. A medieval king was expected to "live of his own"; that is, to pay the expenses of domestic government from his feudal land revenues; taxes could be levied only with the consent of Parliament, which tended to impose them only for unusual needs, such as foreign war. Moreover, both the taxes levied by Parliament and most of the feudal dues had been fixed in money amounts in earlier centuries, so that the purchasing power of their products was greatly reduced by inflation. The feudal dues which retained their full value, despite the drastic decline in the value of money, were the King's rights to escheats, forfeitures, primer seisin, wardship and marriage. These were precisely the feudal dues most easily and frequently avoided by means of the use device.

King Henry VII met the fiscal needs of the Crown by procuring parliamentary acts of attainder forfeiting lands held to the use of supporters of

85. III Holdsworth 81 (3d ed. 1923).
86. IV Holdsworth 446-447, 450 (2d ed. 1937). The Norman kings were able to do this. W. Cunningham, op. cit. supra note 83, at 148.
88. The amounts of the "tenths" and "fifteenths" levied by Parliament were fixed in 1334. W. Cunningham, op. cit. supra note 83, 548-549. The aids payable by tenants when their lord's eldest son was knighted, his eldest daughter married and his person required ransom and the scutage payable in lieu of furnishing knights were fixed at low rates in 1350. F. Maitland, op. cit. supra note 87, at 179-180. The relief payable when a tenant died was fixed in amount as early as 1225. See note 16 supra. As to the fines for alienation payable by tenants in chief of the Crown, see note 21 supra.
89. II Blackstone *72-73, *245.
90. See notes 48 and 50 supra.
91. See note 16 supra.
92. See note 20 supra.
his predecessors\(^9\) and other persons who opposed him\(^9\) and by employing ruthless commissioners of escheats whose illegal exactions became notorious.\(^9\) His successor determined to effect a more regular and permanent solution to the problems of uses. After prolonged negotiations between the King, the Lords and the Commons,\(^9\) Parliament enacted four statutes which settled the use problems in England for four centuries and still affect Angloid law elsewhere. The Statute of Enrolments required bargains and sales of estates in land to be in writing under seal and recorded in a public office.\(^9\) Two statutes permitted devise of land by written will but subjected the devisee to the same burdens of primer seisin, relief and fine for alienation which an heir would have borne.\(^8\) The fourth enactment, which is the most

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93. See, e.g., 7 Hen. 7, c. 21 (1491), Statutes of the Realm II (1816) 565, reciting the terms of one of the acts of attainder of 1 Hen. 7 (1485). 11 Hen. 7, c. 1 (1494) put a stop to this practice for the future by providing that faithful service to a de facto king should not be deemed to be treason or involve forfeiture.

94. E.g., 7 Hen. 7, c. 23 (1491). 4 Hen. 7, c. 17 (1488-9) subjected the minor heirs of *cestuis que use* of lands held by knight service who died intestate to the feudal burdens of wardship and marriage but this statute could be avoided by making a will. 19 Hen. 7, c. 15 (1503-4) subjected the heirs of *cestuis que use* of lands held by socage to relief but this, too, could be avoided by making a will. These statutes and 3 Hen. 7, c. 16 (1486), which permitted suits on behalf of *cestuis que use* to be conducted in the names of feoffees to uses who had been outlawed, attainted or convicted of treason or felony, illustrate the increasing tendency to treat the *cestui que use* as owner of the land.

95. IV COKE *196-98; I COBLET'S STATE TRIALS 286 (1809); W. CUNNINGHAM, op. cit. supra note 83, at 487; F. MAITLAND, op. cit. supra note 87, at 183; Fratcher, Sovereign Immunity in Probate Proceedings, 31 Mo. L. REV. 127, 130 (1966). The illegal methods of these commissioners were prohibited by 1 Hen. 8, c. 8 (1509).

96. IV HOLDSWORTH 449-467 (2d ed. 1937).

97. 27 Hen. 8, c. 16 (1535/36). Cf. cases cited note 82 supra. This statute did not extend to bargains and sales of estates for years. Heyward's Case, 2 Co. Rep. 35a, 36a, 76 Eng. Rep. 489, 496 (1595). It was possible to avoid the recording requirement for bargains and sales of estates for life, in fee tail and in fee simple by making a bargain and sale of an estate for years followed by a common law deed of release to the tenant for years. Lutwich v. Mitton, Cro. Jac. 604, 79 Eng. Rep. 516 (1621). The Statute of Enrolments was repealed by the Law of Property Amendment Act, 1924, 15 & 16 Geo. 5, c. 5, s. 10, 12(3), sch. 10.

98. Wills Act, 32 Hen. 8, c. 1 (1540); Wills Act, 34 & 35 Hen. 8, c. 5 (1542). Cf. authorities cited notes 19, 60 supra. The second statute explained and supplemented the first. These statutes permitted, in most cases, the devise of all lands held by socage tenure but only two-thirds of lands held by knight's service, thus preserving part of the overlord's feudal rights of wardship and marriage. See Bar- ton, The Statute of Uses and the Trust of Freeholds, 82 L.Q.R. 215, 222-225 (1966). The restriction on devises of land held by knight's service could be avoided by making a feoffment to a stranger to the use of such persons as the feoffor might by will appoint, so that the feoffor's will was an exercise of a power of appointment rather than a devise under the statutes. Sir Edward Clere's Case, 6 Co. Rep. 17b, 77 Eng. Rep. 279 (1559); Megarry, The Statute of Uses and the Power to Devise, 7 CAMB. L.J. 354 (1941). The restriction ceased to exist when all tenures by knight's service were converted into free and common socage. Ordinance of 24 Feb-

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important for this study, the Statute of Uses,99 "executed" uses by transferring the legal title of the feoffees to uses to the cestui que use, each cestui receiving a legal estate corresponding in type and duration to his use. Unlike the statute of Richard III, the Statute of Uses operated in the same manner when the estate in use was in fee tail or in expectancy (reversion or remainder) and when the cestui que use was an abbot or other corporation as when an individual held a presently possessory use in fee simple.100 Moreover, the Statute of Uses went beyond the statute of Richard III by giving the cestui que use the full rights and burdens of a legal owner and by depriving feoffees to uses of these rights and burdens.101 The Statute of Uses did not abolish uses in existence when it was enacted, prohibit the creation of new uses, change the methods of creating uses, prevent the creation of estates in use which could not previously have existed as legal estates, or change the categories of persons who could be cestuis que use.102 The statute operated in the same manner on uses in existence when it became effective and on those created thereafter.

If determination of the scope of the Statute of Uses had been entrusted to a non-English tribunal, hostile to the trust concept, the statute might have been held to execute all uses. If that had occurred, there would be no law of trust. But the interpretation of the statute was left to English judges, products of a society whose thought, through centuries of familiarity with uses, had become so permeated with the trust concept that it was imbedded in the theories of corporations, partnerships, unincorporated societies, family property and politics.103 Such judges could not allow the statute to abolish

99. 27 Hen. 8, c. 10 (1555/36), repealed by Law of Property (Amendment) Act, 1924, 15 & 16 Geo. 5, c. 5, § 1; Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 1 (10), 207, sch. 7.

100. Cf. authorities cited notes 73, 77, 78 supra.

101. Cf. authorities cited notes 79, 80 supra.


103. R. Borden, IMPERIAL RELATIONS, SELECTED SPEECHES ON THE CONSTITUTION II 266 (Emden, ed. 1939) (United Kingdom Government trustee for overseas dominions); IV Holdsworth 476-480 (2d ed. 1937) (family law; unincorporated societies); F. Maitland, op. cit. supra note 87, at 431 (King trustee of public property); at 530 (Parliament trustee of its powers); Maitland, Introduction to O. Gierke, POLITICAL THEORIES OF THE MIDDLE AGE xxviii-xxxvii (1958) (King trustee of his powers for the people; corporations, partnerships and societies); Maitland, The Unincorporate Body, Trust and Corporation, SELECTED ESSAYS 128-222, (1936).
the concept. Moreover, the process of interpretation proceeded for three centuries and much of it occurred after the Royal Treasury had ceased to have a substantial interest in the execution of uses.\textsuperscript{104} It was inevitable that the judicial interpreters found in the statute, or read into it, a number of exceptions of uses which it did not execute. A use which is not executed by the Statute of Uses is a trust and the exceptions to the statute will be discussed in the terminology of trust law. The importance of the Statute of Uses in jurisdictions where it, or legislation like it, is in force is that one who seeks to create a trust must come within one of the exceptions to the statute or his creation will be executed by the statute and so may fail to achieve his purpose.

Most mediaeval uses were passive; the only duties of the feoffees to uses were those imposed by law: (1) to permit the cestui que use to occupy the land and enjoy the rents and profits; (2) to defend the title in actions at law by and against third parties; and (3) to convey the land as directed by the cestui que use.\textsuperscript{105} Active trusts to provide efficient management of property were relatively rare but they had existed from the inception of the use device for such purposes as managing land while the beneficial owner was absent on crusade.\textsuperscript{106} Within ten years after the enactment of the Statute of Uses, the English courts indicated that a trust under the terms of which the trustee had the active duties of collecting the rents and profits and paying them over to the beneficiary was not executed by the statute.\textsuperscript{107} It may be that this exception of active trusts was read into the Statute of Uses because of a theory that it was applicable only to those uses embraced by the Statute of Richard III.\textsuperscript{108} Later English decisions indicate that a duty imposed on the trustee by express terms of the trust to convey the land to the beneficiary is enough to make the trust active and except it from

\textsuperscript{104} By the Tenures Abolition Act, 12 Car. 2, c. 24 (1660), the King consented to the abolition of tenure by knight's service in exchange for a perpetual tax on beer, spirits, coffee and tea. The last important case interpreting the Statute of Uses was Doe ex dem. Lloyd v. Passingham, 6 B. & C. 305, 108 Eng. Rep. 465 (1827).

\textsuperscript{105} Bacon, op. cit. supra note 56, at 10; Hargrave and Butler, Butler's note 77, V (11) to I Coke *191a (1812); Id., Butler's note 231 to I Coke *271b (1812).

\textsuperscript{106} Bracton's Note Book, pl. 999 (1224), quoted in II Pollock and Maitland 233 and in Maitland, The Origin of Uses, 8 Harv. L. Rev. 133 (1894).


execution by the Statute of Uses. Terms of the trust imposing active duties upon the trustee may not prevent partial execution by the Statute of Uses. If land is conveyed to A and his heirs (fee simple) upon trust to collect the rents and profits and pay them over to B during his lifetime and, after B's death, to permit C and his heirs to take the rents and profits, C's remainder would be executed by the statute into a legal estate, leaving A with only a legal estate for the life of B upon trust for B.

The English courts also excepted some passive trusts from execution by the Statute of Uses. Because the statute was restricted to situations in which a person stood "seized" to the use of another, it was held that it did not execute a trust when the property held by the trustee was an estate for years in land. Because the statute was restricted to "lands, tenements and hereditaments," it was held that it did not execute a trust when the property held by the trustee was in movables, including tangible chattels and investment securities. If land was conveyed or devised to the use of A and his heirs (fee simple) upon trust to permit B to take the rents and profits during his lifetime and, after B's death, to collect the rents and profits and pay them over to C and his heirs, the life interest of B would be executed by the statute into a legal estate, leaving A with only a legal future estate to commence in possession upon the death of B.


110. Shapland v. Smith, 1 Bro. C.C. 75, 28 Eng. Rep. 94 (Chancery 1780); Silvester ex dem. Law v. Wilson, 2 Term Rep. 444, 100 Eng. Rep. 239 (K.B. 1788). Conversely, it would seem that if land is conveyed to A and his heirs (present fee simple) upon trust to permit B to take the rents and profits during his lifetime and, after B's death, to collect the rents and profits and pay them over to C and his heirs, the life interest of B would be executed by the statute into a legal estate, leaving A with only a legal future estate to commence in possession upon the death of B.

111. Anonymous, 3 Dyer 369a, 73 Eng. Rep. 827 (Exch. Ch. 1580); Symson v. Turner, 1 Eq. Cas. Abr. 363, 21 Eng. Rep. 1119 (1700). That is to say, one could be "seized" within the meaning of the statute only of an estate for life or in fee by free tenure. As copyhold tenure was simply the old villein tenure, which was unfree, the statute did not execute a trust of a copyhold estate. Hargrave and Butler, Note 231, III (5) to COKE I *290b; see Rowden v. Maltster, Cro. Car. 42, 44, 79 Eng. Rep. 641, 642 (1620).

A and his heirs upon trust for B and his heirs (use on a use) the statute executed the use of A into a legal estate but did not affect the trust for B; consequently A held the legal title upon passive trust for B.\textsuperscript{113} If the owner of land, without conveying to another and without consideration, declared himself trustee for a beneficiary not related to him by blood or marriage, the trust was not executed by the statute, even though passive.\textsuperscript{114} There is some authority for the proposition that when a trust is created by will, execution by the Statute of Uses can be prevented by an express manifestation of intention.\textsuperscript{115} Resulting trusts,\textsuperscript{116} which arise by implication of law, and constructive trusts,\textsuperscript{117} which are imposed by judicial fiat to remedy unjust enrichment, are excepted from execution by the Statute of Uses.

The Statute of Uses or similar legislation is in force in Ireland,\textsuperscript{118} Liberia\textsuperscript{119} and the parts of the British Commonwealth which have Angloid law.\textsuperscript{120} These jurisdictions tend to follow the English decisions as to its

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\textsuperscript{114} Cf. Steele v. Wallar, 28 Beav. 466, 54 Eng. Rep. 445 (1860). This case involved a trust of copyhold land, which would not have been executed by the statute in any event (\textit{supra} note 111), but this result is necessary even as to freehold land because a use could not be raised in this manner before the statute. Warde v. Tuddingham, 2 Rolle Abr. 783 pl. 5 (1605).

\textsuperscript{115} Burchett v. Durdant, 2 Vent. 311, 86 Eng. Rep. 458 (Exch. 1690); Baker v. White, L.R. 20 Eq. 166 (1875); In re Tanqueray-Willame and Landau, 20 Ch.D. 475, 478 (1882); In re Brooke, [1894] 1 Ch. 43. \textit{Contra}, Broughton v. Langley, 2 Salk. 679, 91 Eng. Rep. 577 (K.B. 1703). The theory for making an exception here is that the Wills Act, 1540, having been enacted after the Statute of Uses, modified it.


\textsuperscript{117} See I A. SCOTT § 73.1. This is because the trustee of a constructive trust has an active duty to convey to the beneficiary.

\textsuperscript{118} The Statute of Uses (Ireland), 1634, 10 Car. 2, Sess. 2, c. 1, Statutes Revised (Northern Ireland) I (1956) 20.

\textsuperscript{119} See Liberian Code (1956) tit. 6 § 91, 1160, 1192, tit. 5 § 508(6); Liberian Law Reports II (1960) ix.

\textsuperscript{120} Spencer v. Registrar of Titles, [1906] A.C. 503 (Privy Council on appeal from Western Australia); Conveyancing Act § 44(2), Conveyancing and Law
effect, including those establishing exceptions from its operation.121 The Statute of Uses or similar legislation is in force in most of the United States of America.122 American courts tend to follow the English view that active trusts are excepted from execution by the statute123 but some do not consider an expressly imposed duty to convey to or at the direction of the beneficiary sufficient to make a trust active.124 New York and several other states have statutes providing that every trust under which the beneficiary is entitled to possession and the rents and profits is executed, even though the trustee has active duties.125 The New York Statute has been held to extend to trusts of chattels and investment securities as well as those of land.126

Early American judicial opinions gave lip service to the English decisions excepting some types of passive trusts from execution by the Statute of Uses.127 In modern American law, however, these have been largely superseded by a doctrine that a trustee's legal estate does not extend beyond the period during which he has active duties to perform, despite the settlor's use of language which would be sufficient to convey a fee simple to a grantee who was not a trustee.128 In theory, this doctrine differs from the Statute of Property Act, 1898 § 33, New South Wales Stat. 1824-1957 II 780, 918; Smith v. Dawes, 1 Legge 802 (New South Wales Sup. Ct. 1854); Gamble v. Rees, 6 Q.B. 396 (Upper Canada 1850); In the Will of Blake, O'Neil v. Hart, 11 Argus L. Rep. 133 (Victoria 1904). Berry v. Berry, 16 Nova Scotia Rep. 66 (1882) has been cited as holding that the Statute of Uses is not in force in Nova Scotia, but it did not do so. The obiter dictum of one of the judges (p. 78) that "It has never been held that the Statute of Uses and Enrolments are in force in this Province," was made in the context of an argument which was relevant only to the Statute of Enrolments.


123. RESTATEMENT (SECOND) OF TRUSTS § 69; the cases are collected in I A. SCOTT § 69.1.

124. Cornwell v. Orton, 126 Mo. 355, 27 S.W. 536 (1894). Other cases are collected in I A. SCOTT § 69.1. Cf. notes 109, 121 supra.

125. N.Y. Estates, Powers and Trusts Law §§ 7-1.1, 7-1.2. Similar legislation in sixteen states is collected in I A. SCOTT § 68.1 n. 3. See also Rarick, The Trustee's Estate and the Ultimate Interest II, 8 OKLA. L. REV. 133 (1955).


127. They are collected in I A. SCOTT §§ 68, 70-72, and discussed in Rarick, The Trustee's Estate and the Ultimate Interest I, 8 OKLA. L. REV. 1, 12-24 (1955). E.g., Guest v. Farley, 19 Mo. 147 (1853) (use on a use). But see Blumenthal v. Blumenthal, 251 Mo. 693, 703, 158 S.W. 648, 651 (1913).

of Uses as to time of operation. If land is conveyed to \( A \) and his heirs upon trust for \( B \) during his life and thereafter for \( C \) and his heirs, with active duties during the life of \( B \) but not thereafter, the Statute of Uses, if applicable, converts the fee simple of \( A \) into an estate \textit{pur autre vie} at the time of the creation of the trust.\(^{129}\) If the Statute of Uses is inapplicable, it would seem that the American doctrine permits \( A \) to retain the fee simple, with the powers of an owner in fee simple, during \( B \)'s lifetime, but terminates his estate on the death of \( B \), as if \( A \) himself had died at the same time leaving \( C \) as his sole heir. As so applied, the doctrine merely eliminates the necessity of a conveyance from the trustee to the remainderman. If, however, by confusion with the rules under the Statute of Uses or otherwise, the doctrine is held to operate at the time of the creation of the trust, its application can have serious consequences, particularly in those states where a duty to convey to the beneficiary is not deemed to be an active duty even though expressly imposed by the terms of the trust. For example, if land is conveyed or devised to \( A \) and his heirs "in fee simple absolute," upon trust to take possession, keep the premises in repair, pay taxes, collect the rents and profits, and pay them over to \( B \) so long as \( B \) shall live and, upon the death of \( B \), to convey to the descendants of \( B \) then in being, the trustee may take only an estate for the life of \( B \), and the descendants of \( B \) a legal contingent remainder. If this is so, unless \( A \) has powers of conveyance independent of ownership, a conveyance or lease by \( A \) would give the purchaser or lessee only an estate which will expire on the death of \( B \).\(^{130}\) The practical effect is to make the fee simple inalienable during the life of \( B \).

Some American courts have extended the doctrine to trusts of chattels and securities.\(^{131}\) When this is given the effect of making transfers of the

\(^{129}\) Hargrave and Butler, Butler's Note 231, III (1), to Coxe I 271b; Restatement (Second) of Trusts § 69, comment b (1959). Cf. id., comment d; W. Sheppard, Grand Abridgment Pt. IV 172-174 (1675).

\(^{130}\) Rarick, The Trustee's Estate and the Ultimate Interest III, 8 Okla. L. Rev. 265, 267-272 (1955). The reduced duration of the trustee's estate may have other troublesome consequences. Adverse possession against the trustee may not bar the remaindermen. Id. at 272-276. Cf. Benson v. Fekete, 424 S.W.2d 729 (Mo. 1968). The trustee may not represent the remaindermen in litigation. Rarick, supra at 285-293. The trustee may be unable to insure buildings for their full value. Rarick, supra at 325.

If the terms of the trust expressly empower the trustee to sell the fee, he is usually held to have a fee simple. Rarick, op. cit. supra note 127, at 35. E.g., Ewing v. Shannahon, 113 Mo. 188, 20 S.W. 1065 (1892). This is curious because such a trustee does not need the normal powers of an owner in fee to convey the fee; it is the trustee without express power of sale who needs them.

\(^{131}\) Dixon v. Dixon, 123 Me. 470, 124 Atl. 198 (1924); Bellows v. Page, 88 N.H. 283, 188 Atl. 12 (1936); In re Lowitz Estate, 360 Pa. 91, 61 A.2d 342
trust property impossible for an extended period, the result is most undesira-
able. The intention of the settlor to provide for efficient management of the
trust property is thwarted for no reason at all, since the original purpose of
the Statute of Uses, to protect the feudal revenues of King Henry VIII, no
longer exists. Perhaps the worst feature of this strange doctrine is its effect
in making it uncertain whether any trustee has the whole legal title to trust
property or only an estate of limited duration. Such uncertainty discourages
vigorous, efficient management by the trustee, and deters third persons from
dealing with him to the detriment of the very persons whom the settlor
intended to benefit.

It will be recalled that, under the common law, remainders limited to
unborn persons were subject to destruction by the holder of the preceding
life estate for his own benefit. The common law doctrine of destructibility
of contingent remainders was extended to remainders in use executed by the
Statute of Uses. To prevent the operation of this doctrine, seventeenth
century conveyancers invented the trust to preserve contingent re-

132. See cases cited note 28 supra.
133. Chudleigh's Case, 1 Co. Rep. 120a, 76 Eng. Rep. 270 (1595); Archer's
(1597).
134. Garth v. Cotton, 3 Atk. 752, 753-55, 26 Eng. Rep. 1231, 1232-33 (Chanc-
ery 1753); II Blackstone *172; VII Holdsworth 112 (1926); F. Pollock, THE
LAND LAWS 223-225 (1896); Fratcher, Trustor as Sole Trustee and Only Ascertain-
Dormer, 6 Brown 351, 2 Eng. Rep. 1127 (1740); Garth v. Cotton, 3 Atk. 752, 26
Eng. Rep. 1231 (1753); Atty.-Gen. ex rel. Univ. of Cambridge v. Lady Downing,
Wilm. 1, 97 Eng. Rep. 1 (1767); Astley v. Micklethwait, L.R. 15 Ch.D. 59 (1880).
See Cole v. Moore, Moore K.B. 806, 72 Eng. Rep. 917 (1607); Symance v. Tattam,
1 Atk. 613, 26 Eng. Rep. 385 (1737). An equitable tenant in tail could, however,
bar equitable remainders following the estate tail, whether vested or contingent, by
926 (1796). This seems to have been the rule as to uses before the Statute of
Uses. Anonymous, Brooks New Cases 91, 73 Eng. Rep. 887 (1483). This is why
it was possible to resettle estates when a tenant in tail in remainder came of age.

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a valuable consideration, to recreate the remainders.\textsuperscript{138} If the trustees conveyed to a purchaser who paid value without notice of the trust, the purchaser took free of the trust but the High Court of Chancery would compel the trustees to buy lands of equal value and convey them to the wronged contingent remainderman.\textsuperscript{137} It became customary in English landed families to settle lands so that living persons held only life estates, with remainders in fee tail, protected by trusts, to their unborn sons. When a remainderman in tail came of age, he was expected to join the current life tenant in effecting a resettlement, after which he would have only an estate for life, with remainder in fee tail to his unborn sons, protected by a trust.\textsuperscript{138}

The custom of settlement and resettlement of land by means of the trust device had serious economic disadvantages, both to the families which followed it and to the country at large. Unless the terms of the trust empowered the trustees to convey and mortgage the fee simple and give long leases, no one could do so. The life tenant in possession could neither raise funds to finance repairs and improvements by mortgage or lease nor sell the land to purchasers who had the means needed to improve it. Hence buildings tended to fall into disrepair and land could not be utilized to its maximum potential.\textsuperscript{139} In 1882\textsuperscript{140} Parliament began a legislative reform of the law of trusts which was not completed until 1925. Under statutes enacted in the latter year, the only permitted legal estates in land are the fee simple absolute in possession and the term of years absolute. Life interests, entailed interests, interests of infants (persons under twenty-one years of age), undivided shares, powers of appointment and all future interests are permitted only as beneficial interests under trusts.\textsuperscript{141} Trustees of land have statutory powers, which cannot be cut down by the terms of the trust, to convey, mortgage and lease the land free of the trust.\textsuperscript{142} The Statute of Uses was repealed.\textsuperscript{143} Under this legislation, land cannot be made inalienable by means


\textsuperscript{139} T. Scrutton, Land in Fetter (1886).

\textsuperscript{140} Settled Land Act, 1882, 45 & 46 Vict. c. 38.

\textsuperscript{141} Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 1.

\textsuperscript{142} Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 38, 41, 71, 106; Trustee Act, 1925, 15 & 16 Geo. 5, c. 19, § 16; Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 28.

\textsuperscript{143} Law of Property (Amendment) Act, 1924, 15 Geo. 5, c. 5, § 1, sch. 1; Law of Property Act, 1925, 15 to 16 Geo. 5, c. 20, § 1, 207, sch. 7. See Bordwell,
of trusts or future interests; the means of improving it and applying it to the most advantageous purposes are always available. The interests of all beneficiaries of trusts are interests in a potentially changing fund rather than in specific land.

In a sense, the repeal of the Statute of Uses was illusory because the extensive powers conferred on all trustees of land by the 1925 legislation make all trusts of land active, so that they would not be executed by the Statute of Uses in any event. Nevertheless, the repeal of the Statute of Uses has a very important effect of restoring certainty to the law of trusts. In England and Wales settlors of trusts, trustees, and persons who deal with trustees need no longer that the Statute of Uses has executed the legal estate out of the trustees, wholly or partially, thus nullifying conveyances, leases and other acts done by the trustees. When, in 1402, the House of Commons petitioned for effective enforcement of the rights of cestuis que use, it recognized that trusts serve valuable purposes. The High Court of Chancery responded magnificently, but for four hundred years after 1535 the Statute of Uses interposed a troublesome barrier to the creation of trusts and a constant threat of destroying them by execution. Parliament acted wisely in repealing the statute in England and Wales. Other jurisdictions oppressed by the uncertainties produced by the Statute of Uses could well do likewise.

American states which have extended the principle of the Statute of Uses to trusts of chattels and trusts under which the trustee has a duty to convey to the beneficiary, directly or by means of the doctrine that the trustee's legal estate cannot extend beyond the period during which he has active duties, need more than mere repeal of the Statute of Uses. They need legislation to ensure that a settlor's intent that the trustee shall have the fee simple in land and the whole legal title to chattels is not thwarted by judicial extension of a policy adopted to protect the feudal revenues of King Henry VIII. Henry VIII is dead. Uses have uses.

The Repeal of the Statute of Uses, 39 HARV. L. REV. 466 (1926); Smith, op. cit. supra note 131, at 62-63.
144. See text accompanying notes 107 and 109 supra.
145. Cases cited notes 110, 115, 121 supra.
146. See note 55 supra.
147. Cases cited notes 121, 124-126, 131 supra.
148. See text accompanying notes 128-130 supra.