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1066-1535*

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Abstract of Thesis:

Stephen Ward DeVine

"The Ecclesiastical Contributions to the Development and Enforcement of the English Feoffment to Uses, 1066-1535"

This study aims to put the medieval feoffment to uses into its broad historical context, portraying its origin as an outgrowth of the landholding "nobility's" desire to evade the burdens of post-Conquest Norman feudalism. Those burdens were, so far as they related to freehold lands and tenements, chiefly, the rule against devises, the prohibition (until 1290) of alienation by substitution, the incidents of tenure, and the prohibition of gifts of freehold into mortmain (usually to ecclesiastical institutions).

The Church's involvement with the feoffment to uses occurred in various ways: Its theologians provided a Christianized epieikeia which the Chancellor appropriated to aid disappointed cestuis - who generally had no common law rights in the freehold realty held to their use; its canonists enunciated theories of third party enjoyment-without-ownership of freehold realty especially suited to the needs of the Franciscan Friars Minor, who were also cestuis of feoffments to uses; it registered and had jurisdiction over administration of probate of wills, which often contained instructions to feoffees. There is, indeed, evidence that ecclesiastical courts were the first to enforce feoffees' obligations, and therefore to protect cestuis, relinquishing this jurisdiction as the Chancellors of England (nearly all of whom were high-ranking ecclesiastics), began to order specific performance of the "use's" purposes.

This study concludes, therefore, that ecclesiastical contributions to the development and enforcement of the feoffment to uses up to 1535 (the year of the Statute of Uses), were pervasive, if, from the standpoint of the institutional Church, largely indirect, and occurred on both theoretical and administrative planes.

The Ecclesiastical Contributions
to the Development and Enforcement
of the English Feoffment to Uses,
1066 - 1535

by
Stephen Ward DeVine

Submitted for the Degree of
Bachelor of Civil Law,
of the Faculty of Law,
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Respectfully dedicated in memory of

Francis Bernard DeVine

and

Harold Lee Ward

whose combined understanding
of the law and history,
the Church and the land,
as well as of much else,
has inspired their grandson,
among others.

Introduction

At its most basic level this study constitutes an exercise in the legal history of a reactive idea known as the feoffment to uses,¹ and of the ecclesiastical role in the origin and elaboration of that idea. This study seeks to view a relatively narrow legal topic in a broad context, in the belief that the components of medieval society were much more internally integrated than the bare legal relics which seem to comprise their legacy to the contemporary legal matrix. As Holdsworth stated, "(i)n the Middle Ages law did not occupy a sphere so separate from the spheres of politics and morals as it occupies in modern times. Both political and moral questions were looked at from a legal point of view"²

Holdsworth's statement, as far as it goes, is central to the argument of this study; but it does not go very far. For it is also the case that political and moral factors - both of which could accurately be styled "ecclesiastical" - shaped legal questions and the legal institutions which gradually evolved from their repeated occurrence. In addition, one must note that while it may have taken Calabresi, Posner, and the "Chicago School" to make explicit the internal links between legal institutions or assumptions and economic realities or trends, these links have always constituted some of the underlying determinants of the common law of England. The competing interests in a land-based economy were certainly central to the rise of the feoffment to uses.



Yet these factors have not received adequate attention from legal historians. One of the present generation of legal historians, speaking of the study of legal history, ventures an explanation: "perhaps by its seeming to fall between the two disciplines of law and history, its basic relevance to both is sometimes overlooked."³ This study seeks to rectify that oversight, but cannot be exhaustive. One should at the outset, nevertheless, identify some of the basic historical problems involved and adumbrate one's resolution of them.

First, as regards the feoffment to uses, at least, the study of origins is destined to oversimplify or, worse, merely create an institutional myth. For history, like contemporary affairs of which it is the consubstance recollected or reconstructed from the past, is not institutional however much legal historians may have created the opposite impression.⁴ People - angry, irrational, fearful, pious, self-interested, selfless, powerful, and aspiring - inhabit history no less than contemporary society. Therefore, a study of beginnings fails to take the human or the unrecorded sufficiently into account unless it admits the limits of the known or knowable. For ideas - of which the feoffment to uses was a truly ingenious and durable example - tend to be of organic, not institutional, germination. And a popularly employed extra-legal idea - and the feoffment to uses was both - is still less likely to reveal its origins. One comes, in the final analysis, to the conclusion

once expressed by von Campenhausen: "The history of ideas is in constant flux, and every turning-point, every end and beginning posited by the historians, is a purely symbolic simplification."⁵

One is reduced, therefore, to a study of ingredients without, however, succumbing to the temptation of exaggerating any one ingredient so as to depict analogy as causality. A simple etymological caveat illustrates this point. Studies of the modern trust, or of equity in general, commonly begin with a description of the feoffment to uses and the debt owed by the trust to feoffments to uses. These discussions invariably, if sometimes implicitly, suggest sequence and causality,⁶ where one ought at the most to claim analogy for the relationship. Nevertheless, the notion of a trust-feoffment to uses link receives superficial reinforcement from an etymological misconception. As will be shown, the feoffment to uses was originally based solely on the confidence - the trust - of the feoffor in the feoffee's willingness to carry out the feoffor's intent. The unwary reader, therefore, buttressed by the above-described remarks linking trusts and feoffments to uses, may think "ah... 'trust', in Latin fiere in French fier, therefore, in English a part of the word feoffment."

In fact, the concept of fiduciary, now known to trusts as it was known in Roman law,⁷ does derive from the Latin fides or fiere. But the word "feoffment" and its kindred words which will form the building-blocks of this study have

no etymological linkage whatsoever with the cited Latin words. "Feoff" stems from the early middle English "feoffen", through the Anglo-French "feoffer" and the Old French "fieuffer" or "fieffer", meaning to put one in legal possession of freehold.⁸ Hence, Baker says: "A feoffee is a person to whom a fee simple is granted. The grant in fee is called a feoffment."⁹ "Use", to complete the term, is the law-French word for the Latin opus,¹⁰ "via the Old French oepe."¹¹

At its core, then, the feoffment to uses approximates to a principal-agent relationship¹² in which the feoffee - grantee of the fee simple - is trusted by the feoffor - grantor - to carry out the feoffor's intentions. That seems simple enough, and seems to have nothing to do with the Church. Depending on what one means by the Church or by "ecclesiastical", it may be true that the feoffment to uses was independent of the Church. Certainly the Church as an institution did not create the "use" as a sub-institution to be employed throughout Christendom.¹³ That being the case, it remains true that the ecclesiastical contribution to the development and enforcement of the feoffment to uses was pervasive, if indirect. For, bearing in mind the integrated nature of medieval society, the adjective "ecclesiastical" must have a broad construction. It must include religiously-induced reactions, whether of theological, magisterial, legislative, or pietistic origin. It must also encompass those effects, not easily measurable, which

ordained clergy had on the objects of their attentions - in this case, the feoffment to uses. And, it must take into consideration the administrative structures in and through which these "religious" worked. Accordingly, this study will require much discussion of the feoffment to uses which is not explicitly ecclesiastical in orientation, but which points towards, or reflects, an ecclesiastical involvement in one of a variety of forms.

This ecclesiastical involvement is seen through a limited amount of evidence, some of which raises more questions than it answers. Early petitions to the Chancellor, for example, are rarely even indorsed; almost never does one find the case's outcome.¹⁴ One is reduced to deducing the case's import from a look at comparable cases in the common law courts, measuring the petitioner's bill against the common law rule, and by evaluating the petition within the larger social context of the time. And, given the relatively modest number of extant cases concerning feoffments to uses, whether in the Chancery or the common law courts, one cannot be very bold even about one's hypotheses; legal historians have often reached a variety of conclusions based on the same or similar evidence. Unpublished medieval records, in addition, remain the province of those versed in the twin sciences of paleography and diplomatics. The net result is that one may be reduced to making a commentary on commentaries, comparing them and assessing the degree to which any one of them conforms its conclusions to the limitations of the evidence it presents.

One of the tasks this study does not assay is to determine the origins of the feoffment to uses: Study of the development and enforcement of a legal concept assumes the concept's existence, at least in a rudimentary form. When this study does direct its attention to the question of possible antecedents, it does so only to determine whether an ecclesiastical influence subsisted in the alleged antecedent. If, therefore, a possible forerunner of the feoffment to uses has no apparent ecclesiastical ingredients, it is presumed not to have been an ecclesiastical influence on the evolution of the English feoffment to uses, and so to be outside the scope of this study.

The Teutonic Salman constitutes such an institution. Essentially a symbolic surrender of ownership to the lord, who then undertook to convey the property inter vivos or post mortem,¹⁵ the Salman relationship was, like the early feoffment to uses, based on the reliance of the grantor on the grantee's trustworthiness.¹⁶ At a very general level, the Salman-"use" comparison looks fruitful; it has stimulated various legal historians after Holmes first argued the connection.¹⁷ But the Salman is wholly devoid of an ecclesiastical tint, and that it is anything but an analogy to the early feoffment to uses in England, no one has succeeded in demonstrating.¹⁸ For both these reasons, it is outside the scope of this study. On the other hand, the present author has felt it necessary to dispute suggestions of Roman antecedents to the "use", since during the Middle Ages

canonists saw themselves as creating a successor to the Roman civil law.¹⁹ In terms of form, indeed, the two laws were related.²⁰ Thus one must survey not only the canon law, but also the Roman law for ecclesiastical contributions to the regularization of the English feoffment to uses.²¹

Despite the uncertainty as to ultimate origins, it is certain that the feoffment to uses had become a pervasive institution in England by the fifteenth century.²² Considering the widespread employment of the "use", the relatively small number of petitions to the Chancellor, no less than cases reflecting feoffments to uses brought in the common law courts, indicates that most of the time the "use" was effective to serve its employers' purposes.

Penultimately, why end this study with the year 1535? The best reason is that 1535 saw the enactment of the Statute of Uses,²³ Henry VIII's response to the loss of feudal "incidents" - rights producing revenues - on account of the characteristics of the "use". While the Statute of Uses did not end feoffments to uses, it forced them to adapt to it as a major new point of reference.²⁴ To employ an analogy, when the course has been changed, one is running a different race, notwithstanding that he is still running. The year 1535 has additional significance for two reasons. First, the printed Year Books, which had, in rather casual form by today's standards, chronicled the early cases in the royal - common law - courts, end that year, symbolically closing what one might call the first age of the common law. Second,

and also more of symbolic than actual significance, Sir Thomas More, successor to Cardinal Wolsey as Chancellor and first of the post-Reformation lay Chancellors,²⁵ was executed at Henry VIII's order in 1535. The fall of Wolsey in 1529, followed by that of More four years later culminating in the latter's execution, signals a new centralization of power in the King's person. The King was to be the sovereign over the Church in England,²⁶ would no longer tolerate the "use" as a form of tax-evasion,²⁷ and would not suffer strong, independent-minded leadership in the person of his Chancellor. In short, 1535 seems a significant year not only for the feoffment to uses, but for the administration of English law in general. As such, it is a more logical place than others at which to stop.

To close these introductory remarks this author feels warranted in making an initial recourse to Christopher St. Germain, who in the second of his Dyaloge / s / ... Bytwyxt a Doctoure of Dyuynte and a Student in the Lawes of England,²⁸ written in 1530, has his Student answer one of the Doctor's questions with these words: "why so moche lande hath ben put in vse yt wyll be somewhat longe and peradventure to some man tedyous to shewe all the causes pertyculerle...."²⁹ And he, too, then left his reader to decide.

1. Feudalism and the Judicial Topography
of England After the Conquest:
An Overview

Prefatory to an understanding of the function of either the feoffment to uses or the emergence of the medieval Chancellor's equitable jurisdiction is at least a brief introduction to the feudal system and to the post-Conquest judicial context. For the feoffment to uses and the Chancellor's enforcement of that institution were reactive to feudalism and the rules of common law which emerged in the royal courts to support feudal landlord-tenant relationships.

The Norman conquerors quickly moved to replace the Anglo-Saxon land ownership with their own structure of feudal interdependent tenancies. The Norman system was designed to consolidate their hold on the conquered territory by control of the land-based economy and by making easy the calling-up of a large army to protect the realm. By making reliable knights his tenants in chief, demanding military service of them in return for the land they were allowed to hold, the king secured both objectives. The knights became obligated to their leader and his successors, and received ample land in fee (feodum) of the king. The knights, as tenants in chief, imposed similar obligations in various amounts on their own tenants as the price of the freehold granted, and soon a pyramidal structure of domestic society emerged designed for military preparedness.¹

From the inception of the feudal system in England immediately following the Norman Conquest, a landlord's privileges were reckoned to include the right to preside over courts for determining his tenants' rights among themselves and with respect to him.² These manorial courts were of two types: the court baron, for suits of the lord's freehold tenants (those having inheritable full possessory rights during their lifetimes), and the lord's steward's court (the court customary), for non-freehold tenants.³ Since feoffments to uses were means of transferring freehold, this study is not concerned with the lord steward's court; Maitland, indeed, believed that the court baron was the only manorial court functioning.⁴ The landlord presided over his court baron, but his tenants by knight service acted as judges and, therefore, rendered decisions.⁵ The manorial court baron met once every three weeks, there accomplishing not only the resolution of disputes, but also the landlord-tenant formalities, such as homage and livery of seisin,⁶ which marked the personal bonds between feudal landlords and their tenants.

To do homage, the feudal tenant-to-be would go before the lord, placing his hands between the lord's, and pledge his faithfulness.⁷ The lord was obligated to accept the homage of the heir of a deceased tenant on payment of a "relief", not to exceed that demanded of the deceased tenant.⁸ "Relief" was simply a payment by way of buying the inheritance - the right to succeed to the tenancy - back from the lord,

who held the tenancy in the interim following a tenant's death and preceding acceptance of the homage of the heir.⁹ The lord's interim holding was known as "primer seisin". Under Magna Carta, the relief payment became standardized, £5.00 for a fee in knight's service; one year's profits for a socage fee.¹⁰ Once the lord accepted the heir's homage, the lord "seised" him - formally gave the heir possession of the land.¹¹ This was important, since in the feudal period seisin of freehold, and not "ownership" in modern parlance, was the full status in land, since everyone was technically another's tenant, derived ultimately from the king's position as landlord of his tenants in chief.¹² The ceremony of livery of seisin impressed the heir's new status with respect to the land on the local population: The landlord would publicly pass "a twig or clod of earth" from the land to the heir.¹³ Thereafter, the heir was tenant in freehold, capable of subinfeudating - standing in a lord's position with respect to other tenants in the land - and, after the legal reforms of Henry II's reign, had a right of recourse to the royal courts.¹⁴

Before turning to a brief description of the royal courts, though, one should note the nature of the tenant's obligations to his lord. The tenant by knight service, at least to the mid-twelfth century, had specific military obligations. He was to be present in time of war with a certain number of soldiers and a specified amount of military equipment.¹⁵ But about 1300, during the reign of Edward I,

the personal service obligations of the tenancy by knight service gave way to feudal "incidents", rights of the landlord in lieu of his tenant's actual military services.¹⁶ The landlord could arrange for military services by contract,¹⁷ but the tenurial relationship now benefitted him primarily through the incidents of tenure, which were available under certain circumstances, chiefly after the previous tenant's death.¹⁸ In considering these feudal incidents in the context of the rise of the feoffment to uses, one must bear in mind the great financial burden and familial dislocation they might cause the tenant.¹⁹ There was, in other words, every reason to try to evade the incidents; if all did, all but the king benefitted, offsetting the loss of those incidents through one's sub-tenants' evasions.

Strongly indicative of the military side of a feudal military tenancy is the incident called "aids", essentially a fixed-rate tax payable by the tenant when his landlord found himself in truly dire financial difficulties. Most important of the situations in which "aids" became due was when the lord had been taken captive and needed to raise ransom²⁰ - an extremely common situation during the Crusades and the Hundred Years War. Also of residual military significance was the fine paid for a licence to alienate one's tenancy. This fine gave the lord a financial hedge against the substitution of a less valuable warrior for the tenant whose homage he had accepted. A licence to alienate was not, however, needed to subinfeudate, because it did not

change the original landlord-tenant arrangement.²¹ As the service element of the military tenancy gave way to financial payments, the licence to alienate lost what justification it once had, and it was merely another occasion on which the lord might levy a fine. Primer seisin of lands held by tenants in chief was also limited to tenancies by knight service, and usually amounted to payment to the king of the new tenant's first year's profits from the land.²²

Wardship was one of the most objectionable feudal incidents, but also had its origins in the days of actual service military tenancies.²³ When the heir of a deceased tenant was under twenty-one years of age, the lord was entitled to take the heir as his ward, enjoying all profits of the tenancy until the heir came of age.²⁴ Part of the lord's wardship right was the choice of a suitable spouse for the infant heir. Given the large financial transactions that preceded marriages of landed tenants at this time, the lord stood to gain much - a fact which might influence his determination of who might be a "suitable" mate.²⁵ Needless to say, the family of an infant heir disliked wardship and marriage intensely; those incidents deprived the family of the right to choose the heir's spouse (and therefore to seek maximum status) as well as to reap the proceeds of a valuable marriage agreement. Though not required to accept the lord's choice of spouse, substantial penalties for failure to do so curtailed the family's enthusiasm for that option.²⁶

Two other incidents of tenure had less military justification, even in their origins. First, if a tenant died without an heir, his tenancy escheated to the lord; an estate would also escheat to the lord if the tenant were convicted of a felony.²⁷ Second, the common law recognized dues customary in a locale or manor, provided the exactions were not excessive. Most common of these was "heriot", the lord's right to take what he deemed the "best" chattel of his deceased tenant.²⁸

These, then, were the obstacles tenants, especially those holding by military service, sought to evade. But the feoffment to uses, the means tenants developed for evading most of these incidents would not have been necessary but for the common law rules designed to enforce feudal relationships and applied in the royal courts. Consideration of these rules follows in the context of their evasion, but it is timely now to survey the juridical landscape at the time of the rise of the "use" and of the Chancellor's equitable jurisdiction.

The Norman Curia Regis, which travelled with the king, spawned three royal courts. The court of Common Pleas, also known as the Common Bench and dating from the late twelfth century,²⁹ was, pursuant to Magna Carta, permanently situated - at Westminster.³⁰ It heard all sorts of cases, including occasional pleas of the Crown,³¹ and had since the reign of Henry II exercised most of the royal jurisdiction over freehold tenures, making its caseload heavier than that of

the other two royal courts.³² It was the court of Common Pleas which, about 1500, took jurisdiction over copyhold tenures,³³ giving those holding less than freehold a royal (and thus more impartial) forum in which to bring disputes against their landlords.³⁴ This jurisdiction, helpful as it could be to the copyholder, did, nevertheless, put the court of Common Pleas in the business of determining manorial customs, something not easy to do from Westminster.³⁵

A kindred court, the King's Bench, became an institution distinct from the king's Council in the early years of Edward I's reign (1272-1307).³⁶ Considered to be staffed by the most learned of the king's justices,³⁷ the King's Bench became the forum for important Crown pleas, for state trials, and generally for those matters of particular concern to the sovereign. The King's Bench also had jurisdiction over allegations of error by the judges of the Common Bench.³⁸ By the fourteenth century, the King's Bench served primarily as a venue for actions of trespass vi et armis against the king's peace, the idea being that preservation of the rule of law and social tranquility was an inherently royal concern. But the allegation of vi et armis became a mere jurisdiction-triggering recitation designed to bring the real cause of action before a royal tribunal.³⁹ As this amounted to a consolidation of royal control over the populace, substance was sacrificed to form, and the King's Bench entertained these actions.

These two royal courts, once they had, pursuant to Magna Carta, permanently situated themselves at Westminster, faced still more acutely the problem of determining facts which had occurred in distant places. Clearly, it was impractical, if not impossible, to have local assizemen come to the courts in Westminster Hall to render their findings.⁴⁰ Accordingly, the newly centralized royal courts had to decentralize at least the fact-finding function - in a sense a compromise with their ancestry in the roving Norman Curia Regis. The function - not a court - which evolved had two conceptually distinct parts: the "commission" of assize and the system based on the writ nisi prius.⁴¹

The commission was, in Baker's words, "an ad hoc grant of judicial authority by letters patent under the great seal of England."⁴² Commissioners were, in other words, formally deputized to decide ("oyer and terminer") certain types of criminal matters arising in a certain locale,⁴³ or even to try one important matter.⁴⁴ A commission could, on the other hand, be sent to try all those imprisoned in a certain place - the commission of gaol delivery.⁴⁵ For civil matters, the petty assizes of Henry II provided for a commission by a letter patent to take the response of men of the relevant locale (for land, the county where it was situated) to a specific question of fact.⁴⁶ Whatever the sort of commission of assize, the commissioners derived their authority from the letters patent they received; they did not have to be justices of the royal courts.⁴⁷

At nisi prius it was otherwise: Justices of the courts sitting at Westminster were by writ to take findings of fact from local juries, to be brought back to Westminster to form the factual basis for a legal judgment in an action of trespass^{or} on pleas brought in the courts of King's Bench or Common Pleas.⁴⁸ The writ ordered a local jury to appear at Westminster on a certain date nisi prius the justices had come to the relevant county to take the jury's finding - which everyone concerned expected they would do.⁴⁹

Discernible in the twelfth century, the second Statute of Westminster⁵⁰ formally installed the nisi prius system as a function of the royal courts. In combination with the commissions of assize, the nisi prius system constituted the forerunner of the circuit system, for royal justices could serve both as assize commissioners and in a nisi prius capacity.⁵¹

The third of the royal courts, the court of the Exchequer of Pleas, also dates from the first half of the thirteenth century. It arose, as one might expect, out of the royal interest in collecting revenues and debts owed to the Crown.⁵² It was not necessary, however, that the action be primarily concerned with a debt owed to the Crown in order to be brought in the court of the Exchequer. An action between parties owing money to the Crown, or actions between merchants could be brought there. In addition, executors could invoke the court of Exchequer's jurisdiction if the testator had owed the Crown. Finally, a party owing

the Crown money could implead another party owing him (but not the Crown), on the theory that the impleaded party constituted the barrier to the Crown's debtor's repayment.⁵³ The breadth of such interlinkages of debtors, as well as the growth of a commercial economy,⁵⁴ meant that the court of Exchequer developed an expansive civil jurisdiction.⁵⁵

The three royal courts did not, however, comprise the only courts of nation-wide jurisdiction. After the separation of royal and ecclesiastical courts following the Norman Conquest, and throughout the period of this study, ecclesiastical courts applied the canon law as derived from Scripture, writings of the early Church "fathers", and a variety of canonical formulations culminated and systematized by Gratian around 1140,⁵⁶ and later glossators, of whom the most notable Englishman was Lyndwood.⁵⁷ The pope supplemented these treatises with authoritative pronouncements - bulls, or situational but also authoritative responses to requests for instructions or appeals - decretals. Maitland's conclusion that this complex of laws - the canon law of Rome - was binding on the pre-Reformation English church, a rebuttal of Stubbs's argument, has survived subsequent scholarly scrutiny.⁵⁸ Indeed, Baker amplifies Maitland's view, asserting: "No English king, nor royal judge [of the Middle Ages] would have dreamed of disputing the spiritual authority of the Canon law of Rome."⁵⁹ The jurisdictional question, of course, revolved around defining the limits of the "spiritual".

Not surprisingly, the Church took a broader view of its jurisdiction than did secular authorities.⁶⁰ For example, the universal claims of the Church to do justice where secular law was incapable of doing so, and judicially to protect the poor and powerless were not recognized in England.⁶¹ But the general jurisdictional ambit the Church asserted over sins did manifest itself in England: The English Church courts took jurisdiction over cases of defamation, usury, sins of sexuality, and over the violation of sworn obligations (fidei laesio).⁶² Clerics who were accused of felonies, too, were brought before the ecclesiastical tribunals under jurisdictional purpose of correcting sinners.⁶³ In England, the Church courts' jurisdiction over ecclesiastics was limited to accusations of felonies, and even in those cases the royal courts could first render a verdict of guilt or innocence; though not binding on the ecclesiastical courts, the secular court verdict would require the Church to imprison the cleric pending purgation in ecclesiastical proceedings.⁶⁴

But the Church courts asserted jurisdiction over more than sins and sinners; in large measure, ecclesiastical jurisdiction in England served an administrative function within society. Thus, not only did the Church have jurisdiction over its own property and over its revenues,⁶⁵ but it also had exclusive jurisdiction over testamentary matters (not including inheritance of freehold lands and tenements),⁶⁶ marital relations, and questions of a person's legitimacy.⁶⁷

Probably the Church took jurisdiction over testamentary matters to assure distribution of testamentary alms by those wishing to enhance their chances of eternal life; over marital matters because marriage involved not only vows, but a sacrament; and over sworn obligations as a means of saving the soul of the defaulting party.⁶⁸ Although in the latter case a party could obtain a writ of prohibition to prevent the ecclesiastical court from hearing an action fidei laesio, this seems not often to have occurred;⁶⁹ royal writs were more expensive than desirable to poor litigants having an ecclesiastical remedy already. Ecclesiastical courts seem, moreover, routinely to have ignored writs of prohibition.⁷⁰ Perhaps because by the mid-thirteenth century the royal courts had assumed jurisdiction over determining whether the Church courts might themselves take jurisdiction over a matter⁷¹ and were armed with sanctions against ecclesiastics who disregarded their writs of prohibition,⁷² disputing parties frequently submitted to informal ecclesiastical arbitration of their disagreement.⁷³ This kept a matter intramural, avoiding a collision with secular prerogatives (which in England included the right of presentation to an ecclesiastical benefice).⁷⁴

The judicial apparatus through which the Church administered its law had several tiers. Vivified by its process, a complete litigational tour of the English ecclesiastical court system would have been as follows. Either an "apparator" or a complainant directly sought the archdeacon's

or bishop's judicial involvement in a matter of ecclesias-
 tical jurisdiction.⁷⁵ Most likely, the action would go to
 the archdeacon's court; the archdeacon would issue a
 citation, much like what became the Chancellor's subpoena,
 threatening excommunication if respondent failed to appear.
 Once in the⁷⁶ answer the charges brought against him. On the
 Church's court, the form of the proceedings depended on the
 nature of the accusation: If the question was essentially
 of a personal sin - between God and the respondent
 ultimately - the court would proceed by taking respondent's
 oath and that of "comparators" he secured concerning the
 truth of the matter. The court would, on the other hand,
 proceed by evidence - presentation of witnesses and docu-
 ments - primarily where two parties were disputing their
 rights and obligations with respect to each other. Finally,
 in a matter of broad public interest or ecclesiastical
 policy, the court would probably proceed by inquest.⁷⁷
 The ecclesiastical court in question could impose a
 variety of sanctions. Frequently, the courts imposed
 excommunication - severance from the ecclesiastical commu-
 nity - for a time or until conditions, for example public
 penance⁷⁸ or financial restitution⁷⁹ (two other available
 sanctions), had been made. Ecclesiastical courts could,
 by writ de excommunicato capiendo, enlist the secular power
 to enforce an excommunication; the sheriff would arrest
 and imprison the offender until he had been absolved or had
 undertaken to fulfill the terms of the ecclesiastical court's

judgment.⁸⁰ The Church itself could imprison clerics not only for punishment (as a form of the price of the offence), but also as penance (as a form of self-amelioration in view of the offence).⁸¹ Other sanctions effective against clerics were of "irregularity" and suspension or deprivation of one's holy orders; these deprived the cleric of income from benefices and other ecclesiastical sources - very likely the reason these sanctions were effective.⁸² Monition, as the term implies, warned the offender to reform or face a stiffer penalty.⁸³

As indicated above, these processes were typical of the ecclesiastical court system, a multi-tiered structure which the potential litigant could enter at various levels. One might commence an action in the archdeacon's court or the consistory court of a bishop, ordinarily the former.⁸⁴ Rural deans aided the archdeacon in the administrative chores attending the archdeacon's court. But the precise function or limitations of the archdeacon's court varied from diocese to diocese.⁸⁵ In all likelihood, of course, the archdeacon's was the court of first instance for routine matters of discipline.⁸⁶ The bishop's consistory court, when not engaged in a trial function, heard appeals from the archdeacon's court.⁸⁷

From the bishop's consistory court a disappointed litigant could appeal to the proper provincial court - to the archbishop of Canterbury's Court of Arches, or to the archbishop of York's Chancery Court.⁸⁸ Appeal from the

provincial court was to the pope,⁸⁹ although in practice the majority of such appeals were addressed not by the pope, nor by the papal Curia, but by the pope's English delegates ad hoc. An appellant might, indeed, go so far as to suggest to the pope which delegates he would consider suitable to hear his appeal.⁹⁰ But papal delegates could, by the mid-thirteenth century, also try cases; they did not have to wait for an appeal. This function was a natural extension of the canonical idea then emerging that the pope was the juridical universal ordinary (iudex ordinarius omnium).⁹¹

The story of the conflict between the Church's large juridical network and the royal courts over the bounds of ecclesiastical jurisdiction is long and outside the scope of this study. Suffice it to note that the Church's jurisdiction over probate of wills and fidei laesio, exercised by the earliest stages of the evolution of the feoffment to uses,⁹² is highly relevant in considering the Chancellor's role in the emergence of the "use". The relationship between royal and ecclesiastical jurisdictions in medieval England was, in sum, neither unmixed cooperation, nor pitched struggle; there existed a productive tension at the jurisdictional frontiers.⁹³

The Chancery did not become the fourth court sitting at Westminster until the Chancellorship of John Stafford (1432-1450), bishop of Bath and Wells and archbishop of Canterbury.⁹⁴ Soon after the end of Stafford's term, the Chancery court, dealt primarily with land enfeoffed to uses.⁹⁵

But the Chancery began neither as a court, nor as a forum for enforcing feoffments to uses. The Chancery and the Exchequer, rather, constituted the two great administrative departments of the royal government; the Chancery served as the royal secretariat. The Chancellor, as head of this department, supervised the king's scribes, mostly clerics, a role evident in the early Norman period.⁹⁶ In time, the Chancellor's role expanded to what one might term that of a multi-purpose secretary of state.⁹⁷

The Chancellor kept the king's great seal, symbolic of the king's authority and necessary for the authentication of all royal documents issued by the Chancery.⁹⁸ The Chancellor's chief subordinate was the Master of the Rolls, who kept the royal records - the close and patent rolls - and appointed the lesser Chancery scribes. The Master of the Rolls supervised eleven other clerici ad robas (the Tudor masters of the Chancery), who were either doctors of civil law, or "doctors of both laws."⁹⁹ Below the clerici ad robas were twelve "bougiers", whose officers were styled "clerks of the Crown in Chancery". Their juniors were the "clerks of the Petty Bag", who supervised administrative elements of the common law.¹⁰⁰ Under the twelve clerks of the Crown in Chancery were twenty-four clerks de cursu, who actually drafted royal writs issued through the Chancery.¹⁰¹ Substantial growth of the Chancery's business, especially into an adjudicative forum, occasioned new officers, notably the "Six Clerks", who began as assistants to the Master of

the Rolls, and themselves finally directed sixty clerks.¹⁰²

The Chancellor's judicial role originated through the secretarial function of the Chancery. Since to commence an action in the common law courts one had to obtain a royal writ,¹⁰³ and since the Chancellor's twenty-four clerks de cursu drafted such writs, the Chancellor was from the start involved in administration of the king's judicial system.¹⁰⁴ His involvement with questions of tenancies in land had several possible origins. Royal grants of property had to be issued under the great seal,¹⁰⁵ as did writs concerning royal property interests and ordering local officials to conduct investigations as to the king's feudal rights to the estate of a deceased tenant in chief.¹⁰⁶ The "writ of right", dating from the reign of Henry II at the latest, and also issued by the Chancery, was a prerequisite to compelling a tenant to defend his freehold interest in the royal courts. This writ not only obliged the lord to whom it was addressed to do right between the disputing parties, but implied that the king might be willing to intervene if the lord failed in that obligation.¹⁰⁷

With the writ of right, one is very close to situating a supervisory jurisdiction concerning freehold of land in the Chancery. But the actual emergence of the Chancellor as an adjudicative officer occurred not by his association with the issuance of writs, so much as by delegation of the king, through the king's Council, to hear complaints of

injustice.¹⁰⁸ The extraordinary adjudicative function was first, therefore, the Chancellor's, and only later, when the volume of petitions so dictated, the province of a court of Chancery.¹⁰⁹ Ironically, petitions to the Chancellor were not initiated by writ.¹¹⁰ This was typical of a venue the very appeal of which was its informality and flexibility as compared to the common law courts.¹¹¹ The Chancellor or his delegate¹¹² could entertain petitions for redress anywhere. If moved by a petitioner's informal bill, the Chancellor would issue a subpoena - a summons enforced by a penalty - ordering the addressee to appear for examination.¹¹³ The Chancellor had power to act as examiner, judge, and jury, determining questions of fact as well as of law.¹¹⁴ The Chancellor's basic remedy was a decree ordering defendant's specific performance of his obligations with respect to the petitioner.¹¹⁵ In practice, he seems to have availed himself of the expertise of common law judges when addressing a question over which the common law courts exercised jurisdiction. The Chancellor saw himself, in other words, as within the common law, but capable of adjusting it to the dictates of justice in particular cases.¹¹⁶

Where do all these features of the judicial topography of post-Conquest England fit into a discussion of the ecclesiastical role in the development and enforcement of the feoffment to uses? This study will argue that ecclesiastical involvement in the evolution of the "use" occurred in

various ways at differing levels. The medieval Chancellors who began secular enforcement of cestui interests under feoffments to uses were nearly all high-ranking ecclesiastics, were aware of canonical process, and seem to have imported that process into the judicial process of the Chancery.¹¹⁷ This study argues that the medieval Chancellors did not, however, import substantive notions of Romano-canonical third party enjoyment,¹¹⁸ but that the Franciscan friars benefitted under such canonical concepts until the "use" had become widespread; the choice between devices would have rested with the grantor, not the friars.¹¹⁹ Nobility, the powerful landholding sector of feudal society, comprised the class of grantors - to the Franciscans and other religious institutions, but also to the non-heirs of their choice. For them, the "use" was a social and economic necessity.¹²⁰ Arrayed against them were the rigid common law rules regarding freehold tenancies, including the rules prohibiting devises and of the indivisibility of freehold tenants' rights. On their side, they found the ecclesiastical courts, especially in those courts' testamentary and fidei laesio jurisdiction.¹²¹ In time, the Churchman-Chancellors took over the enforcement of cestui interests under "uses". In so doing they acted on the Aristotelian principle of epieikeia revived and Christianized by Aquinas, who wrote from familiarity with a more purely canonical principle of dispensation articulated by Gratian.¹²² The ecclesiastical contribution to the

development and enforcement of the "use" was, therefore, indirect but pervasive. Indeed, high-ranking ecclesiastics constituted an important part of the nobility who created the "use" to advance their own interests¹²³ - and to a consideration of whom this study now turns.

2. The English "Nobility" and the Feoffment to Uses

One cannot stop at an introduction of the various institutions that were to figure in the development and enforcement of the feoffment to uses, for without a large number of people interested in the advantages offered by the "use", it never would have evolved. This group of people were at once landlords and tenants of freehold. To the extent that they were freehold tenants, they were subject to the burdens of the feudal relationship between landlord and tenant, notably to the feudal incidents (after the decline of actual military service obligations). To the extent, moreover, that these tenants were human, they wanted not only to avoid the feudal incidents, but to achieve a certain measure of wealth and social status, as well as to distribute their wealth as they wished among family members and for charitable purposes.

Only persons of substantial wealth would, of course, have much concern over the distribution of their property. These people one may group under the term "nobility" provided that, after McFarlane, one notes the capaciousness of the term as applied to late medieval Englishmen. McFarlane describes a sort of armigerous fraternity composed not only of barons, but of all the "noble", as opposed to the "poor".¹ But one's classification within this nobility of the relatively powerful, wealthy, and well-connected, varied. An abundance of freehold land evidenced a tenant's

status within the nobility thus defined.² One could acquire or enhance these indicators of nobility through military prowess, royal service, commercial success, a career in the Church or the common law, or by a prudent marriage (measured in financial terms).³ Careful planning could yield a high status within the nobility through the accumulation of acquired wealth and the preservation of inheritances.

But while status required the accumulation of wealth and its investment in land, it also dictated the dispersal of landed wealth. For it was a cause of social stigmatization within the nobility for a freeholder to fail to provide for all his sons - legitimate or not.⁴ Oddly enough, the concomitant reduction of the heir's inheritance did not so stigmatize the freehold tenant. Moreover, the heir had a legal right only to what the tenant-ancestor possessed on the day of his death.⁵ Even without a freehold tenant's affection for all his children, not just for his legal heir,⁶ the above considerations practically invited the noble freeholder to find ways to take from what would, upon his death, become the heir's and give it to family members who were not heirs.⁷

Means of avoiding overendowing the heir and failing to provide adequately for other family members, though, required one to take into account the heir's right to inherit the freehold upon a tenant's death, as well as the common law rule which emerged not later than 1300 absolutely prohibiting the devise of land.⁸ Basically, these limited

the tenant's means of providing for non-heirs to transfers of the freehold, or a part of it, inter vivos.⁹ From the freehold tenant's standpoint, this was a real drawback, for he had no desire to lose the possession and enjoyment of his lands during his lifetime. The tenant's reluctance to alienate his freehold inter vivos served to protect the heir,¹⁰ but his security had limits. A freeholder might at least delay the heir's seisin of the freehold by jointure or entail.

Jointure was, quite simply, a joint tenancy with right of survivorship in the spouse's freehold, established explicitly in a marriage agreement. The price of wedding a great heiress in the fourteenth and fifteenth centuries might well be an agreement to grant her a jointure in at least some of her fiancé's lands.¹¹ For as long as the widow survived her husband, then, the heir could not enter into that portion of the inheritance in which she had a jointure.¹²

An entail, by contrast, worked to the advantage of any non-heir while delaying the heir's seisin of the freehold indefinitely. In an entail the tenant took a life estate in the freehold with the remainder to go, for example, to his younger son and that son's issue.¹³ But the entail was not as much an answer to the tenant's needs as at first glance it might seem. To begin with, the entail was irrevocable by the grantor; a change in his affections or financial means could not undo the entail.¹⁴ Secondly, the

second Statute of Westminster ("De Donis") of 1285 provided that the younger son's issue had to survive to the fourth generation before the freehold again became alienable.¹⁵ Until that time, the original heir (and his heirs) had a vested reversionary interest. The common law courts of the fourteenth century made the entail still less appealing to potential grantors by removing the limit of four generations on the original heir's reversionary interest.

Not surprisingly, then, the nobleman seeking to spread his wealth among the members of his family desired a combination of the entail's reserved life estate and the finality of the inter vivos conveyance. It seems likely that this confluence of aims, reinforced by the desire to evade the Statute of Mortmain of 1279,¹⁶ and the common law's other relevant prohibitions, produced the hybrid concept known as the feoffment to uses. The holder of the fee - the feoffor - gave his fee to some trusted friends - his feoffees - who then took full legal rights to the freehold with the understanding that they would perform the purposes feoffor expressed. The feoffor's purposes benefitted some person(s) or some institution - the cestui que use.¹⁷ The first cestui was likely to be the feoffor himself, as that would accomplish his aim of retaining a life estate in his freehold. The feoffor could make himself cestui by explicit provision, or by giving the land to feoffees with no instructions. It was assumed that freeholders simply did not wish to give away their tenancy; hence a "resulting use" in favour of the

feoffor arose.¹⁸ The feoffor-cestui could thereby accomplish another of his objectives, de facto revocability of the gift. The feoffment to uses itself was irrevocable, but a feoffor-cestui who had reserved the right at the time of the enfeoffment could, by his last will, declare his instructions as to further uses to which the feoffees should put the freehold after his death.¹⁹ Because the transfer from feoffor to feoffees occurred inter vivos, and because one could revoke a will by executing a subsequent will, the effect of this form of feoffment to uses was to avoid the anti-devise rule, as well as to achieve revocability. Sometimes even the lawful heir benefitted from a feoffment to uses, for as cestui the heir did not have to suffer the burden of such feudal incidents as, for example, wardship, which might otherwise apply at the time of his tenant-ancestor's death.²⁰

The case of Abbot of Bury v. Bokenham²¹ provides a good example of the feoffment to uses and its capabilities in 1535, the very year of Lord Dacre's case and the Statute of Uses. Bokenham, a tenant by knight service of the Abbot, had died leaving an infant heir as cestui of the lands he had enfeoffed to uses. The Abbot brought a writ of ward, seeking his feudal incident of wardship during the infant's minority. The judges held that, because of the feoffment to uses, not the deceased feoffor-cestui, but his feoffees, held the freehold by knight service of the Abbot. Therefore, they held that the Abbot had no right to wardship of the

infant cestui, since the infant's father had not died seised of the freehold.²²

The entire judgment rested on a mere determination of who held the freehold at the time of the feoffor's death; the common law judges were not enforcing the feoffment to uses, but only recognizing the enfeoffment of feoffees. Fitzherbert, J., concurring with Shelley, J., explained this common law position regarding feoffments to uses: "the use is nothing in law, but is a confidence; the which trust might be broken, and for the same reason the use altered; for the common law doth never favour the use; for an use is not a right, nor is any action given in law, if a man be deforced of it, by which he may recover it; for it is an inconvenience and an impossibility in law, that two men should simultaneously and separately own the same freehold." ²³

And Shelley, J., had noted that a cestui could instruct his feoffees to alienate the freehold, while feoffees could change the uses to which they held on their own initiative.²⁴

The cestui's lack of legal powers to compel feoffee's performance of the feoffor's intentions was the most important shortcoming of the medieval "use", and would occasion the Chancellor's intervention as administrator of the equitable corrective within the common law.²⁵

In the meanwhile, though, the feoffment to uses was effective in disrupting pre-marital negotiations between noble families. Because marriage agreements could confer wealth, they could also confer status on a family of lesser

or faded fortunes. But while the father of an heiress could demand jointure in the husband's lands, the father of a daughter he sought to marry to an heir was in a less desirable bargaining position. In the latter case, the question would become how much in marriage portion the daughter's father would have to pay to secure for his daughter the hand of an heir. The price (after the maritagium of land had declined), could be high for an heir of a powerful and wealthy family. Therefore, fathers of brides who would have to pay the price of status to secure a suitable heir as son-in-law,²⁶ were greatly concerned lest a feoffment to uses should alienate some of the heir's expectancy, and therefore erode the value of the marriage agreement to the daughter's family. The father of the bride would then get less status and security than the amount of his payment for the heir's hand merited. To guard against being thus disappointed or defrauded, the bride's father would, increasingly often after 1450, condition the marriage (and payment of the marriage portion) on the groom's father's willingness to enter into a contract, or to take an oath, not to alienate the heir's expectancy in the realty.²⁷ This brought the bride's father into a common area of interest with the heir, tending by 1500 to strengthen the system of primogeniture against the depredations on it by grants inter vivos, the entail, and especially the feoffment to uses.²⁸

The head of the same noble family might, then, with respect to its different members and its varying fortunes, have divergent interests in availing himself of, or limiting employment by another of, the feoffment to uses. If he as landlord were faced with his tenant's employment of the use, he would be unenthusiastic, for he would lose those feudal incidents due him on a tenant's death before seising the previous tenant's heir of the freehold. But if he saw himself as a tenant, he was, on the whole, favourably disposed towards the feoffment to uses, for it enabled him to provide for non-heirs during or after his lifetime according to his affections and, in the case of younger sons, in the manner required by his social status. He could indulge a status-conferring appetite for what McFarlane calls "largesse", the opposite of the also consuming passion of noblemen for luxury. To the former end, the freeholder enfeoffed others to the uses of his will, therein providing that the lands be sold to provide funds for a chantry, or made a religious institution a cestui; in either case he avoided the prohibition of gifts of land into mortmain. To live luxuriously instead, the freehold tenant took a lifetime's profits of his lands, avoiding both the expense of the feudal incidents and, especially, the utter loss of having the family's inheritance go off to another family through a female heir.²⁹ As father of a bride-to-be, the freehold tenant negotiated a marriage agreement not undermined by a feoffment to uses; as father of a male heir, he

might have tried to employ the "use" to limit a bride's interest in the family lands.

Whether seeking wealth, honour, self-indulgence, salvation, or generally engaged in the nobility's cult of status, nearly all freeholders found the feoffment to uses a convenient extra-legal concept.³⁰ But while most landlords could, if they considered themselves as tenants, find ample reason to employ the "use", the same was not true of the king, for he was no one's tenant³¹ and would be no one's cestui. Why, then, did the king for so long tolerate the enforcement of the feoffment to uses by his highest administrative official, the Chancellor? The usual answer is that the kings of England were, until Henry VIII, too precariously perched on the throne to challenge the time-honoured privileges of the nobility.³² And certainly those summoned to Parliament on the basis of their land-based wealth, the barons,³³ were not in the least disposed to curtail a major means of the control and consolidation of that wealth by legislating a limitation on the feoffment to uses. That would have been a gratuitous action against self-interest.

McFarlane hints at one and suggests still another reason for the lack of royal action against the feoffment to uses. First, cash-wealthy nobles were in a position to become lenders.³⁴ Notably in the Hundred Years War wealthy nobles loaned money and provisions to the king; it would have been profoundly destabilizing and contrary to his

self-interest for the king, by limiting the availability of the feoffment to uses, to curtail a major means of preserving landed wealth. Secondly, McFarlane notes that the king's tenants in chief could not alienate their freehold except by royal licence. The king was, in other words, theoretically able to stem the loss of his feudal incidents occurring on account of feoffments to uses by his tenants in chief.³⁵ This theory suggests that the king allowed his clever sub-tenants to fall prey to the mechanism they had created; their tenants needed no licence to alienate freehold.³⁶

McFarlane's explanation for the royal restraint, though, implies much stronger kings than in fact ruled England in the Middle Ages. It also suggests that Henry VIII did not have an overriding interest in drastically curtailing the feoffment to uses, a suggestion belied by Henry's tireless efforts to secure passage of a statute limiting "uses", as well as to consolidate his power.³⁷ Once he succeeded in the latter, he turned to the former objective. But, as Baker notes, by 1500 English feudalism was moribund due to the effects of the feoffment to uses.³⁸ The attempted resuscitation of the feudal system did not alter the fact that freeholders had grown accustomed to being able to alienate their land fairly freely through the "use". By 1540, therefore, Parliament had to modify the effects of the Statute of Uses to again allow for the nobility's desire to alienate their freeholds.³⁹

3. The Limits of Roman Law Analogies to the Feoffment to Uses

Historians of the common law and of English equity have expended much energy in trying to determine the extent of the Roman - civil - law's influence on the Chancery and whether Roman law antecedents shaped the development of the feoffment to uses. Their inquiry is, on the whole, tangential to the interests of this study. Yet it remains the case that if Roman law influenced the development of the Chancery, it did so through an ecclesiastical medium, the canon law which itself owed its form, though not its substance, to Roman law, particularly to Justinian.¹ The evidence suggests only a Roman analogy to the feoffment to uses, though in a later chapter this study advances the theory that the Church introduced a Roman law-tinted form of third party ownership that served the needs of the Franciscan friars in England until the feoffment to uses offered an indigenous alternative.² In general, too, any influence the Roman law had on the English law is of the most attenuated sort.³ Roman law had no discernible influence on the Chancellor's application of equitable principles in enforcing the feoffment to uses.

Differences far outweigh superficial analogies when one compares the feoffment to uses and its closest approximations in Roman law.⁴ The analogies are, in fact, highly misleading; for that reason alone they serve as circumstantial

evidence of the indigenous origins of the feoffment to uses. Nor are these differences surprising, for the feoffment to uses arose to avoid the harsher consequences of post-Conquest Norman feudalism, chiefly the feudal incidents of tenure, which became embedded in the English common law. Rome's experience was, to say the least, different; it paralleled the English common law in seeking to articulate the limits of tolerable behaviour, of course, but at that level of generality analogies become meaningless.

With those precautionary notes, one turns to comparing the Roman concepts of ownership with those to which England's feoffment to uses responded. First, Roman law paralleled the common law in holding that ownership, which Roman jurists styled dominium, was indivisible.⁵ But Roman law recognized that the owner might owe the use of property to someone else; put another way, someone other than the owner might have a right to utilize or occupy the property for his own ends.⁶ Accordingly, one might have two sorts of property assets, full ownership (dominium), or ownership of another's obligation to one with respect to the property.⁷ The latter right Roman jurists styled usufructus, an enforceable right to some portion of the property's full utility value - iura in re aliena, which one might term an encumbrance on the owner's capacity to enjoy his property.⁸ Usufructus constituted the fullness of rights to employ and enjoy another's property: Usufructuarii, as the term implies, had full rights to the produce, therefore potentially the

profits, of the property. Usus constituted a lesser right included in usufructus, but which one could have without the rights of a usufructuarius. The owner of a usus had a right to occupy, but not to take the fruits of, the property in question.⁹ Justinian subdivided the usus right into habitatio, the right of usus as applied to houses, and operae servorum, a usus right to the services of slaves.¹⁰ The holder of the latter two forms of usus could not only take the benefit himself, but hire it out.¹¹ Finally, usufructus, or any of its lesser included rights, could arise by legacy.¹²

The cestui's position under a feoffment to uses differs entirely from that of the usufructuarius in Roman law. First, the common law recognized no rights in the third party cestui.¹³ His position was completely outside the common law's interest in preserving the feudal system and in making title to realty easily ascertainable. He was at the mercy of the feoffees who held to his use, as witnessed by his pleas for the Chancellor's protection. Second, the usufructus, or usus diminutives, applied to all forms of property, but in practice the feoffment to uses applied only to real property.¹⁴ Third, the usufructus was a right in property that could be passed on by legacy. The feoffment to uses was a one-time event which had to be created inter vivos and gave the cestui no rights whatsoever. His feoffees enjoyed full "ownership", the equivalent of combining the Roman dominium with usufructus, for the cestui was merely

tenant at sufferance of his feoffees.¹⁵ The cestui's ability to alienate his enjoyment of the property, whether inter vivos or by will, amounted to no right at all so long as he was without the power to compel his feoffees' performance of his wishes as expressed in the "use's" terms. And, lest one should cling to straws, Maitland has proved that the English "use" (in the context of a feoffment) does not stem from the Latin usus at all, but from opus.¹⁶ All these differences are evident, if through a limited number of references, within the one instance in which a descendant of the Roman usufructus and feoffment to uses existed side-by-side: in the early days of the English Franciscans.¹⁷

Finally, had the Roman usufructus spawned the feoffment to uses, there would have been no need for the Chancellor's intervention at all: Roman law recognized the usufructuarius's property interest; it would be absurd to suggest that this enforceable property interest evolved in England, and England alone, to an unenforceable, non-interest, sharing no attributes of its parent right except that it stood in contra-distinction to an indivisible legal ownership - not itself much more than a verbal similarity. If that were not enough to sever the feoffment to uses from the Roman usufructus, one should reflect that if one holds that the Chancellor recognized these differences and in enforcing the feoffment to uses was trying to make the use into a usufructus, he failed on two measures: First, he never changed the common law rule which gave all rights and powers

in freehold realty to the feoffee, but only granted exceptions from its full force; he did not even try to change the common law rule. Second, if imitating the Roman law's enforcement of the rights of usufructuarii, it is strange that the Chancellor's sole remedy, specific performance of the feoffor's intent, was unavailable under Roman law.¹⁸ The usufructuarius did not need specific performance; his rights were in rem, independent of the owner's person.¹⁹

Roman law did, however, have a closer, though still unrelated, analogy to the feoffment to uses. The Roman fideicommissum was originally a tacitly recognized mechanism whereby a testator could make bequests to classes of persons - the unmarried, childless, or indeterminate,²⁰ for example - who could not normally inherit property under a will.²¹ The fideicommissum was a testamentary instruction, not in any particular form nor necessarily in writing, which manifested the intention that a beneficiary under the will (or the heres ab intestato) should pass some of his benefits on to some party by law ineligible to be a beneficiary.²² The fideicommissum could only become effective after death; it could not be created inter vivos.²³ Still, the benefit's passage to the ultimate beneficiary could, by the testamentary instruction, be delayed until the occurrence of some future event.²⁴ The party through whom the bequest passed to the legally ineligible beneficiary, denominated the fiduciarius, was bound by honour and trustworthiness, but not by law. The Emperor Augustus (r. 27 B.C.-14 A.D.)

nevertheless sometimes ordered his consuls to enforce the relationship.²⁵ Thereafter, while the fideicommissum was not a part of the formulary system administered by the Urban Praetor, it received legal recognition as a relationship under the supervisory jurisdiction of an extraordinary praetor fideicommissarius.²⁶

The fideicommissum was not, however, an early form of feoffment to uses; at best it constituted an early and imperfect analogy to some characteristics of the English "use". In the first place, the common law never enforced the feoffment to uses where a third party stood to benefit under a will's instructions. At its most expansive, the common law enforced a feoffor-cestui's right of reentry for feoffees' failure to carry out a condition (probably of a reconveyance) of the enfeoffment. Second, the Chancellor was permitted a scope within which to exercise an equitable function, but he never received royal endorsement of his function in enforcing the feoffment to uses. In fact, the power of the Chancellors was inversely proportional to that of the king. A weak monarch could not risk offending his baronial and landowning classes by refusing to seem to condone a relationship whereby those classes benefitted in such important ways.²⁷ By the same token, relatively strong monarchs like the Tudors neither wanted strong Chancellors, nor the feoffment to uses circumventing their interests. Henry VIII succeeded in ridding himself of the more burdensome characteristics of both.

A third difference relates to the legal prohibitions to which the fideicommissum and the feoffment to uses responded. Under Roman law, certain sorts of people could not take property by bequest; the fideicommissum aimed at allowing these people to benefit under a will if the testator so desired. But the feoffment to uses with testamentary instructions applied only to devises, since the common law allowed one to bequeath chattels. The feoffment to uses, then, sought to evade the prohibition of the testamentary transfer of a certain sort of property; almost any person could be a cestui.²⁸

Related to this difference is a fourth distinction: While the fideicommissum could not be created inter vivos (had there been any reason for wanting to do so), one could create the feoffment to uses no other way. For an attempt to create a feoffment to uses by will actually produced an attempted devise of land, which even the Chancellor would not consider enforcing.²⁹ This points to a fifth difference, relating to the intermediaries through whom grantors accomplished their ends. The fiduciarius had to be a beneficiary under the will.³⁰ But the feoffment to uses' usual purpose of evading the anti-devise rule of the common law would have collided with that very rule had feoffees been cestuis. The whole point of the "use" as an evasion of the anti-devise rule then, was to get the property to the ultimate beneficiary without aid of a power of devise and without the testator's losing the enjoyment of his property during his lifetime. Finally, the fiduciarius of a fideicommissory relationship was a short-term conduit for

passage of property at a time specified by the testator.³¹

A feoffee to uses, by contrast, tended to stand in a relationship of uncertain duration, since the feoffor's time of death was uncertain and since the conditions of the feoffment, whether stated at the time of the feoffment or in the testamentary instructions, might not occur.

The sum of all these differences forces one to conclude that the Roman fideicommissum, like the usufructus and its derivative concepts, is nothing more than an interesting comparison when set alongside the English feoffment to uses. Causality is out of the question, though because the English trust of chattels was not formed by reaction to an anti-bequest rule and could arise by will, historians of the trust have had less reason to reject the fideicommissum as a kindred concept, perhaps an antecedent.³² Holdsworth put the matter succinctly: "the antiquity of the idea of one man holding to the use or on account of another is one thing; the antiquity of the use as developed by the court of Chancery in England is quite another."³³ Maitland concurred: "I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it. I believe that it was a natural outcome of ancient English elements."³⁴

Remarkable, in fact, is the very lack of influence of Roman law, even when cloaked in canonical guise, on the development and enforcement of the feoffment to uses. For, in thirteenth century Oxford and Cambridge, as in the great

continental universities, especially Paris and Bologna, the study of Roman and of canon law flourished.³⁵ The study of Roman law retained its popularity in the English universities despite early fourteenth century opposition from canon law (which sought to become the new universal Corpus Juris),³⁶ and from official preference for an indigenous common law.³⁷ The then-significant courts of the English universities, in fact, applied Roman civil law, (as did the court of Admiralty and the court of the Constable and Marshall).³⁸ But by the mid-thirteenth century, the prevalence and maturity of the common law in England precluded any substantial reception of Roman civil law.³⁹

Within the context of the development of the feoffment to uses, therefore, the importation of Roman law doctrines would have been inefficient at best, for the Roman law by its very origin and nature failed to take into account the English common law or the latter's feudal matrix. Since feudalism and the common law were the dominant causes of the rise of the feoffment to uses, the Roman law of usufructus, usus, or fideicommissum could have no useful function for transferors of English realty. Even the English Franciscans, who did import the Roman usufructus in a canonical guise, abandoned it when convinced of the suitability and advantages of the feoffment to uses.⁴⁰

Indeed, though much is made of the canon law's debt to Roman law, the debt is to a way of codifying and applying the law and not to substantive principles of the Roman law.⁴¹

Medieval canonists put the theology of the early Church "fathers", as well as the Aristotelian principle of epieikeia into a codified form of ecclesiastical law. They did not, however, re-codify the Roman law's substance as the Church's law.⁴² The sum of the debt of canon law to Roman law in the context of ecclesiastical contributions to the feoffment to uses is especially superficial and tenuous: It amounts to the form of a comprehensive codification and the method of non-recognition of (binding) precedents.⁴³ When it treated third party ownership, canon law was situational and served the Church's own interests; it did not mimic the Roman law, but borrowed a vocabulary of ownership and enjoyment suitable to its own formulations.⁴⁴ In short, the Roman law's contribution to canon law notions of third party ownership for another's enjoyment amount to the form of canon law. For substance the canon law could make its own way, sometimes with a Roman law vocabulary. But with respect to the feoffment to uses, the canon law merely provided a theory of dispensation from valid law - which represented a Christianization of Aristotelian epieikeia.⁴⁵

4. The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment

Although typically given a nod of recognition in accounts of the early "use",¹ the Franciscans' role in its development has consistently been underanalyzed. This study seeks to rectify that shortcoming by viewing the Franciscan friars (hereinafter friars) in the context of their theology and spirituality, and of canonical pronouncements which furthered these ends. The results are fruitful for the study of the early "use", for they enable one to get at the heart of the question whether the "use" was of Roman or canon law extraction, or an indigenous reaction to English conditions.

Historians have a good and nearly contemporary account of the friars' arrival and early years in England. Thomas de Eccleston began compiling information for his De Adventu Fratrum Minorum in Angliam² approximately 1232 and spent twenty-five years working on it, completing it in 1258 or 1259.³ It is a study in precision, beginning with the words: "Anno Domini MCCXXIV, tempore domini Honorii (III) papae, scilicet eodem anno quo confirmata est ab eo regula beati Francisci, anno domini regis Henrici (III), filii Johannis, octavo, feria tertia post festum nativitatis Beatae Virginis [September 8] quod illo anno fuit die dominica, applicuerunt primo Fratres Minores in Angliam apud Dovoriam; quatuor scilicet clerici et quinque laici."⁴ Five of the original nine Franciscans stayed in Canterbury, while the other four

went on to London. The leader of the London-bound contingent, Richard of Ingworth was, by October of 1224, on his way to found the community in Oxford.

The friars in England seem to have taken their vows of poverty seriously, at least in the first century or so after their arrival.⁵ They were also popular, not only as preachers, but also among potential adherents to the religious life. Their numbers, therefore, quickly increased. In England, as elsewhere, the question became how the friars could remain true to their vows of absolute poverty when they agreed that they needed certain things, including shelter.⁶

Francis himself had foreseen the problem. Whereas in his Rule of 1221 he had said, "live in obedience, in chastity and without property," in 1226, the year he died, Francis included in his spritual Testament the injunction: "Take heed that the friars absolutely should not accept churches, poor houses and other things that might be built for them, except in such manner as befits holy poverty, as we promised in the Rule; they should be accepted only as by strangers and pilgrims."⁷

The Oxford friars under Richard of Ingworth had addressed this problem within a year after their arrival, for Thomas de Eccleston reports that in 1225, "conduxerunt domum [quandam] in area, in qua sunt modo, a Richardo le Muliner, qui infra annum contulit aream et domum communitati villae ad opus fratrum."⁸ This house was, in other words,

held under an ad opus feoffment to uses of what was to become (and may already have been) the ordinary English variety.⁹ Holdsworth lumps this "use" together with explicitly Roman forms of third party ownership in discussing the friars as beneficiaries in London, Canterbury and Oxford.¹⁰ It is unclear from his text whether Holdsworth meant to imply that the 1225 ad opus "use" to the Oxford friars was of Roman derivation or kinship.¹¹ But at another part of his treatise Holdsworth's exposition makes clear that he did not generally fail to distinguish between the ad opus use and its Roman law analogies.¹²

The view that the friars employed the ad opus use which was emerging in the landowning sector of English society at this time is not surprising, and is not devalued by the argument that the friars took some of their ideas of third party ownership from canon law, and perhaps therefore indirectly from Roman civil law, sources.¹³ Indeed, the sole extant case of the Franciscans' involvement in the enforcement of a feoffment to uses appears to relate to an ad opus "use" in Oxford.

In the 1308 case entitled Oxford v. Friars Minor¹⁴ a widow brought a common law action to recover the one-third of her deceased husband's land owned during the marriage to which dower entitled her.¹⁵ Her husband had sold the land and tenements to Edmund, late Earl of Cornwall, and cousin of King Edward II, his heir. Cornwall had enfeoffed others of the properties in St. Ebb's, Oxford (of which his widow

sought to recover her one-third share) to the use of the friars.¹⁶ The friars' guardian responded in the only way his vows allowed, a response unassailable even at common law - which enforced dower rights, but declined to enforce third party beneficiaries' interests under feoffments to uses. The guardian responded "that he has neither fee nor freehold ... but only use and easement by the grant of Edmund, late Earl of Cornwall", a writing which reported that Cornwall had bought the properties from the petitioner's late husband.¹⁷ "And therefore [the friars' guardian] says that he has and claims nothing in the said tenements save at the will of the King...", and so seeks judgement on the writ in the friars' favour.¹⁸

Although the Year Book report does not state the case's outcome, it almost certainly was in favour of the friars. Though the common law courts felt capable of doing what was right, their judges construed what was right to be what was reasonable.¹⁹ And reason dictated the common law rule that the holder of the fee simple, or feoffee, was the legal owner for all purposes - that no one had superior right to his lands.²⁰ In addition, the friars' guardian was correct in stating the friars' position as cestui at common law: they were tenants at sufferance of their feoffee with no enforceable rights in the lands of which they had the use.²¹ Ironically, their complete absence of rights in the properties most likely enabled the friars to retain the enjoyment of, in effect to enforce an unrecognizable interest in, the

properties in St. Ebb's. For a feoffment to uses extinguished dower rights; this would have been the case even if the widow's husband had enfeoffed his land to the friars' use - even, in other words had there not been the intermediate alienation to Edmund, Earl of Cornwall. As the Student informs St. Germain's Doctor regarding the feoffment to uses, over two hundred years after the St. Ebb's case, "one cause why they be yet vsed ys to put away tenancy by the curtesy and tytles of dower."²² Because the common law courts did not, in cases of feoffments to uses such as the St. Ebb's case, enforce dower interests, the disappointed widow had to look elsewhere for relief. It would be surprising if she found any relief, for when rules of equity later developed, they did not even recognize dower; as a result feoffments to uses nearly rendered dower extinct.²³

That the 1308 St. Ebb's case has caught at least the fleeting attention of legal historians is not surprising: Scholars generally concede that the friars were among the earliest, if not the earliest employers of the feoffment to uses, as they needed to stand in the position of a cestui, and the St. Ebb's case is the only extant case involving a dispute over the friars' rights under a "use". But it is surprising that legal historians have not discovered the likely reason for this virtual absence of litigation by friars over the "use". It may be explainable by a myopia which has afflicted legal historians who have

tended not to look outside the law for the history of the law.²⁴ In studying the feoffment to uses, this would constitute a fatal scholarly error.

In 1308 the English friars were still zealous in observing their vows of poverty and all other injunctions of the Franciscan Rule. The Rule, so far as the friars were concerned at least, comprised three parts: the Rule of 1221, which Pope Innocent III had refused to confirm;²⁵ the Rule of 1223, composed by St. Francis with the aid of Ugolino, Cardinal Bishop of Ostia, and Cardinal Protector of the Order, and confirmed by Pope Honorius III on 29 November 1223;²⁶ and St. Francis's spiritual Testament, intended to be binding, but declared not binding on the friars by papal bull.²⁷ The friars did not distinguish between then, but adhered to the spirit of poverty embodied in the threefold Rule.²⁸ The friars were not legalistic,²⁹ therefore, the net effect of rendering their founder's Testament non-binding was to regularize their role as beneficiaries of others' ownership of real and personal property. To the extent that Francis's spiritual Testament had forbidden them to benefit by others' ownership of property, the Testament was abrogated not by papal bull, but by consensus among the friars (who had requested the bull).³⁰ But for all other purposes the friars regarded the Testament as fully binding. They therefore obeyed its injunction against ownership of lands and tenements,³¹ as well as the following words from the Rule of 1221: "The friars must take

heed that, where they are, in a hermitage or anywhere else, they must not appropriate to themselves any place or contend any place with others."³²

Bearing in mind that obedience to Francis was a cornerstone of Franciscan life,³³ and that the friars were less concerned with the legal letter than the spirit (which tended to produce a more stringent and comprehensive injunction) of the threefold Rule,³⁴ one must conclude that the Franciscans did not attempt to enforce their rights as cestuis because they believed that would be inconsistent with the Rule of St. Francis. But what about the St. Ebb's case? The friars were brought into court by another's writ; they did not choose to go there to enforce any purported rights. Ironically, the assertion of their poverty and powerlessness - in effect, of their tenancy at sufferance - meant, in the view of the common law, that the widow had no action against them; they had no rights whatsoever in the land. The Franciscans of Oxford could not, consistent with observance of the Rule, have failed to plead their de facto tenancy at sufferance; they did not, however, seek to enforce a property interest or right. That they were not brought into court more often in this sort of case indicates that, where a widow was seeking land and tenements as dower, the position of the common law after 1308 (if not before) was that she had no rights against the feoffee to uses, much less against the cestui que use. In addition, the great popularity of the English friars at this time,³⁵ and

the desire of the people to be somehow associated with them,³⁶ would have inhibited potential plaintiffs from dragging them into court to answer for the roof over their heads.

The St. Ebb's case has caused legal historians all the more difficulty for being unique. Barton cites it for the proposition that, "in actual fact as well as in tradition, the first persons who regularly had property held by others to their use were the Franciscan friars, and they adopted this course because they had no option in the matter."³⁷ One can agree with the apodosis while balking at the boldness of Barton's protasis.³⁸ Feoffments to uses were certainly in existence by the time the St. Ebb's case occurred.³⁹ It is, moreover, unlikely that the Franciscans originated the ad opus use which was at the center of the St. Ebb's case, and which later became such a common feature of English landholding. Its English antecedents are too apparent, and relate to secular landholding and transfers. And, as will be shown, the Franciscans, in particular, had other means of obtaining enjoyment of the land without its ownership. They had no need to invent the English feoffment to uses; laypeople, however, did. Still, Barton is correct in interpreting the St. Ebb's case as an instance of the adoption of the feoffment to uses. The ad opus use was as good for the friars' purposes as the analogous, but unrelated, forms of third party enjoyment with which the Franciscans, in England as well as elsewhere, were familiar. The choice, it seems, would have been the intending grantor's.

The latter point brings one into momentary conflict with another legal historian who, in his brief remarks about the Franciscans and the feoffment to uses, fails adequately to differentiate between an indigenous ad opus "use", discussed above, and the Roman law's division of property rights in lands and tenements. It is not on the subject of Roman influence on Franciscan third party enjoyment of land as articulated by the popes that one must part company with Milson.⁴⁰ But to the implication that all Franciscan beneficiaries were at the receiving end of a Roman dominium-usufructus dichotomy,⁴¹ one must object. Indeed, Milson uses the 1308 St. Ebb's case in support of his argument; speaking of that case, Milson states: "The grant of usus⁴² had surely been inspired by the Franciscans themselves, and if the matter was [then] analysed at all it must have been in civilian [i.e. Roman] terms."⁴³ One can agree that if the Franciscans analyzed the St. Ebb's situation, the descriptive words which would have come to their minds would have been borrowed from canon law, and thus probably Roman law, sources.⁴⁴ But the Franciscans had absolutely no reason to analyze the transaction. They had gotten the enjoyment of the property without its ownership; that was all that mattered to them.

Yet a common lawyer looking at the St. Ebb's transaction saw a feoffment to uses of the ordinary, home-grown, ad opus variety.⁴⁵ This one concludes from the defence the friars made to the widow's claim, and by the probable result of the

case, as evidenced by other (albeit later) cases and common law rules. In addition, the common law judges, unless they happened also to be clerics,⁴⁶ probably would not have been able competently to handle a case involving Roman law concepts; if they had such difficulty, though, the case report does not reflect it. Perhaps most damaging to Milsom's argument, though, is its own assumption that the Franciscans "inspired" not only the occasion, but also the legal vehicle for the Earl of Cornwall's generosity.⁴⁷ It seems highly unlikely that the Earl would have employed an unfamiliar Romano-canonical legal mechanism to make a land transfer for which he and his peers knew a familiar and effective alternative, the feoffment to uses. Milsom also seems not to attach any importance to the fact, apparent even from the brief St. Ebb's case report, that it was manifestly not the friars, but the Earl who chose to make the friars beneficiaries of the St. Ebb's properties. It seems logical to conclude that, so long as it would accomplish his purpose, the Earl would have employed the feoffment to uses then becoming popular among the English landowning class.⁴⁸

Milsom's view that the Franciscans were, in the St. Ebb's case, resolving a question relating to their position under a Roman-style usus is much less tenable than the alternative view outlined above. This alternative view requires a break with tradition and recognition that the Franciscans were not legalistic; they accepted the enjoyment

of necessary lands and tenements through any means which did not conflict with their vows of poverty. The upshot of this historical realism is the realization that if Barton is correct that the Franciscans were the first "who regularly had property held by others to their use",⁴⁹ it was not just one form of "use" through which the friars benefited. It seems possible that there were two entirely distinct forms of third party ownership benefitting the friars.⁵⁰ The first, like that of the St. Ebb's case, was borrowed from primarily secular sources; it was indigenous and, as Baildon⁵¹ and Barton⁵² note, merely "adopted" by the friars.

The second, to which this account will presently turn, was more purely ecclesiastical in origin, more universal in scope, and more Franciscan in purpose and character. The retrospective search for a chain of institutional antecedents to the feoffment to uses may have blinded legal historians to its existence, or allowed it to be subsumed in later manifestations of the "use", from which it seems to be absent. One should not be surprised at its disappearance. The St. Ebb's case proves that by 1308 at the latest there was an English mechanism - the feoffment to uses - which served the friars' purposes, and was for their interests, given their Rule, adequate at common law. As the "use" became increasingly the subject of supervision by the king's Chancellor in the late fourteenth century, the Franciscans had still more reason to feel secure. That is to say, the

"use" was, even by 1308, growing towards maturity. The friars, too, were growing, but away from the strict adherence to poverty of their early years.⁵³ They were therefore growing out of their early need for third-party ownership; where it was still found desirable, there was no reason for them not to use the English feoffment to uses, cognizable for some purposes at least in English courts, unlike their canonical equivalent. Accordingly, the latter, more distinctively Franciscan form of third party enjoyment disappeared, leaving only the feoffment to uses. But before it did, it had a significant history largely neglected by legal historians,⁵⁴ and to which this study now turns.

To trace the earlier, non-English forms of third party enjoyment which the friars enjoyed, one must go back to the very early history of the Franciscans. Pope Honorius III had approved of the followers of Francis, though the Pope had found their proposed Rule, the Regula Primitiva of 1221, too unstructured. But Honorius III approved the more detailed Rule of 1223, which Francis had drafted with the help of his friend of at least five or six years, Ugolino dei Conti, Cardinal Bishop of Ostia and nephew of Honorius III's predecessor, Pope Innocent III.⁵⁵ At Francis's request⁵⁶ Honorius had, in 1217, made Ugolino Cardinal Protector of the emerging Order of Friars Minor.⁵⁷ He seemed an ideal choice from the standpoint of the Pope, as well as of Francis. The Pope was eager to turn the spiritual zeal

of the Franciscans into an evangelical tool in the Church's service.⁵⁸ Ugolino, sympathetic to the mystical tradition in Christianity, was also an astute and experienced statesman and ecclesiastical leader.⁵⁹ Francis, for his part, pursued humility in part through obedience to the papacy.⁶⁰ But he also knew the value of having friends at the institutional heart of the Church. Ugolino, his trusted friend and that of the popes, who shared his spirituality, if not the friars' way of life, was the ideal representative of the Friars Minor in the Curia.

Ugolino, son of a Count of Segni, pursued his education at the universities of Paris and Bologna, twin centers of the Roman law revival, and fonts of theological and canon law studies. He became, by comparison to his peers in historical retrospect, a "brilliant theologian and canonist."⁶¹ He used this training to the advantage of the friars first and conspicuously when, after Francis returned from a trip to the Holy Land and Egypt to find the friars at Bologna had bought a house, he resolved the resulting spiritual crisis within the Order by proclaiming that he owned the house, but would allow the friars to inhabit it.⁶² Indeed, Philip of Perugia, writing in the early fourteenth century, says Francis had foreseen the need for the Order's Cardinal Protector to play precisely this role.⁶³ At least one historian has been too quick to call this a decisive moment in the history of land ownership,⁶⁴ but it does evidence a growing trend towards the revival of Roman law's bifurcated

ownership of land, a conceptualization which, through canonical modifications, became a regular feature of Franciscan life. The Bologna house crisis is just the first instance of Ugolino's exercise of his civil and canon law learning to facilitate the friars' observance of their Rule, while making them increasingly dependent on the institutional Church.

When elected to the papacy in 1227, Ugolino, now Pope Gregory IX, forgot neither the friars,⁶⁵ nor his interest in canon law.⁶⁶ The combination produced results interesting in the context of this study. Gregory IX was astute enough to realize that, in addressing the Franciscans' need for property while respecting their unwillingness to own it, he was advancing the Church's interest. An evangelical call to poverty would not be very effective if not accompanied by the friars' own example of radical Christian poverty.⁶⁷ The friars in England achieved success in attracting audiences, penitents, alms, and vocations,⁶⁸ an indication that they were in fact observing their vows of poverty to the popular satisfaction.

The friars seem, indeed, to have been too hard on themselves; their anti-materialism was depriving their growing numbers of the very requisites of life. Therefore in response to a request from the Order's provincial ministers for an authoritative interpretation of the Rule and Testament, on 28 September 1230 Gregory IX promulgated the bull Quo elongati.⁶⁹ For the purposes of this study, this

bull is important for integrating the enjoyment-ownership dichotomy formally into canon law.⁷⁰ Essentially Quo elongati elaborated the concept of "spiritual friends" first set forth in the Rule of 1223, no doubt under Ugolino's influence. The spiritual friends could hold necessities for the friars use; the bull seems to have been equally applicable to what today's lawyer would call real as well as personal property. This departure from Francis's aim of absolute lack of property had been foreseeable to the founder, as it had been foreshadowed in the Rule of 1223 and in the resolution of the Bologna house crisis. Gregory IX, as a friend of Francis and of the Franciscans, deemed the compromise of Quo elongati preferable to unleashing large numbers of beggars on the world, or, by the impracticability of the aim of absolute poverty, allowing necessity to appear to be hypocrisy. Both risks would have brought the friars from popularity into disrepute.

A messenger, John of Malvern, personally brought a copy of Quo elongati to England shortly after its promulgation.⁷¹ Most likely, the friars welcomed the Pope's interest,⁷² but Quo elongati did not change the life of the English friars significantly, if at all. The English friars, at least, seem already to have had recourse to the Roman law antecedents of Quo elongati's "spiritual friends". In Canterbury, Thomas de Eccleston notes that in 1225 the townspeople gave the friars the enjoyment of a chapel and house, "quia fratres nihil omnino appropriare sibi voluerunt,

facta est communitati civitatis propria, fratribus vero pro civium libitu commodata."⁷³ Holdsworth noted in this account the Roman commodata; and in another of the same year concerning the friars in London, he perceived the Roman usufruct.⁷⁴ Eccleston reports, "Londoniae [autem] hospitatus est fratres dominus Johannes Ywin, qui emptam pro fratribus aream communitati civium appropriavit, fratribus autem usufructum ejus[dem] pro libitu dominorum devotissime designavit"⁷⁵ A fifteenth century Register of the London friars records the deed referred to in the latter account, but it does not refer to usufruct.⁷⁶ The Register does, however, record that prior to inhabiting the house referred to in the deed and in Eccleston's account, the London friars had occupied, but not owned, another: "conduxerunt sibi [fratres] per amicos spirituales domum quandam in Cornhyll a Johanne Travers"⁷⁷

Clearly, then, Quo elongati was not the English friars' first experience with the concept of possession of property by "spiritual friends" to the friars' use. Thomas de Eccleston and the London Register prove that, in one form or another the English friars were beneficiaries of others' ownership from the time of their arrival in England. It seems likely that for their own intramural purposes the friars found the arrangement entirely adequate. Besides, it would not have mattered if they were dissatisfied, for the Rule of 1221 forbade any attempt to enforce interests in lands and tenements.⁷⁸ In addition, it is unlikely that

either Cardinal Protector or pope would have allowed the friars to be defrauded of their property needs.

On the other hand, when dealing with the extra-ecclesiastical world, English friars probably found it best to observe the rules of the secular forum. If this is a correct supposition, it explains why the friars in St. Ebb's were the cestuis of what appears to be a feoffment to uses granted by the Earl of Cornwall. The general concept was nothing new to the friars and, although they were not to attempt to enforce their enjoyment interest in property, one would be surprised if they chose to prevail upon an intending grantor to transfer the property by a means unfamiliar and totally outside the bounds of royal justice.

Nothing else relating to the English friars would enhance an understanding of the English feoffment to uses. But a cursory look at the papal bulls which followed and elaborated on Quo elongati is useful to provide an idea of what notions of property ownership the medieval Chancellors of England, nearly all of them high-ranking ecclesiastics,⁷⁹ may have had in mind when it fell to them to enforce feoffments to uses.

Two years after Gregory IX's death in 1241, the Cardinal of Genoa, Sinibaldo Fieschi, was elected Pope, taking the name Innocent IV. Innocent IV, himself a prominent canon lawyer,⁸⁰ promulgated two bulls relevant to enjoyment without ownership of property, both directed at

the Franciscans and building on the foundation of Quo elongati.

The first, Ordinem vestrum,⁸¹ altered the situation after Quo elongati in that while lands and tenements used by the friars had, under the earlier bull, remained in the ownership of its donors, under Ordinem vestrum, the Holy See was to have title to the property unless the donor expressly reserved his rights in it.⁸² In addition, friars were allowed the enjoyment of property not only necessary, but also merely useful.⁸³ The other bull of Innocent IV, Quanto studiosus,⁸⁴ gave the friars' provincial ministers power to appoint agents to buy, sell, and administer properties held in the friars' behalf, according to the friars' instructions. Many friars believed that this last bull, in particular, crossed the line between poverty and ownership; it gave the friars too much control over their property. Accordingly, in their chapter meetings of 1254 and 1260, they voluntarily chose to adhere to the more stringent guidelines of Quo elongati, and not to avail themselves of the two bulls of Innocent IV.⁸⁵

Bonaventura, who had become Minister General of the Order in 1257, may have guided the friars to their decision, for his Expositio regulae reaches precisely the same conclusion.⁸⁶ Not surprisingly, Bonaventura seems to have analyzed the friars' interests in Roman law terms, separating dominium from usufructus of property. He reiterated the ban on the friars' attempting to enforce their own property interests.

And he asserted that all property the friar used actually belonged to the Church.⁸⁷ Critics, including some within the Church, saw the latter assertion as an empty recitation designed to perpetrate a convenient ruse. In 1270, Gerard of Abbeville, a priest, made this complaint,⁸⁸ and it would serve as the foundation of Pope John XXII's bull Ad conditorem canonum⁸⁹ which nevertheless retained the dominium-usus dichotomy as regarded lands and tenements (over which the Church retained dominium).⁹⁰

The Franciscan experience with, and papal pronouncements concerning, third party enjoyment of property held by others illustrates certain points hitherto largely overlooked by legal historians. First, the institutional Church developed a canon law framework to accommodate its Franciscan members. This framework, like the canon law as a whole, borrowed and adapted Roman civil law terminology. Second, the canonical response, as well as its Roman law antecedents, could not but have been in the minds of the high ranking ecclesiastics who shaped the development of the feoffment to uses as medieval Chancellors of England.⁹¹

But the St. Ebb's case of 1308 illustrates that by that date at the latest, two distinct forms of third party enjoyment were operative in English Franciscan life. The feoffment to uses which gave rise to the St. Ebb's case borrowed nothing from the Romano-canonical dominium-usus dichotomy of ownership. Yet the analogy was, from the beneficiaries' standpoint, close enough that the friars would not have

balked at the Earl of Cornwall's preference for the ad opus "use" in making his grant. Indeed, it is likely that, as the English feoffment to uses grew to maturity, and since the common law courts effectuated the underlying feoffment, the friars felt their theological and legal position secure enough within the emerging English legal topography to allow their earlier Romano-canonical notions of ownership to fall into desuetude.⁹²

The historical conclusion, then, is that the Franciscans may have provided the occasion for the introduction of Roman civil law terminology and concepts into the field later occupied by the feoffment to uses, but that those Roman law concepts had no direct influence on the development of the English "use". They were separate legal devices to the Franciscans, and should remain so to historians of today. The Roman law's split ownership remained restricted to Franciscan (and possibly other ecclesiastical) needs; it made no incursions into English secular life. The feoffment to uses, then, was a predominantly English institution, in origin as well as in later application.

5. Epieikeia and the Chancellor's Enforcement of the Feoffment to Uses

In considering the early feoffment to uses, Milsom comments: "The rise of the equitable jurisdiction and the rise of uses have been considered separately by historians, who have assumed the former as a necessary condition of the latter. But it is likely that uses were as much a cause as a product of regular chancery intervention, of an equitable jurisdiction which would evolve into a secondary system of law."¹ Milsom's hypothesis conforms to the evidence, and is an important assertion. But in making this point, one must make the further assertion that while "uses" may have greatly stimulated the Chancery's regular equitable jurisdiction, it is very likely that the medieval Chancellors' awareness of longstanding equitable principles stimulated them to take jurisdiction over uses in the first place. This study now turns to a brief exposition of the basic equitable principle of epieikeia, following it into some early petitions to the Chancellor relating to feoffments to uses.

Aristotle first articulated the equitable concept in his Nicomachean Ethics, in which he stated, "the equitable (τὸ ἐπιεικὲς) is just, but not the legally just but a correction of legal justice."² But he did not mean to set the equitable principle at odds with the law. Instead, Aristotle thought the equitable was implicit in laws which,

because of their general applicability are drafted in general terms, opening the possibility that in a given case the law as drafted may not be an adequate representation of the equity it intends. The Philosopher puts it thus: "When the law speaks universally, ... and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission - to say what the legislator himself would have said had he been present, and would have put into his law if he had known And this is the nature of the equitable, a correction of law where it is defective owing to its universality."³

Finally, in a statement redolent of wishful-thinking, Aristotle adds that the equitable man, "though he has the law on his side is equitable"⁴ Here, the Philosopher virtually defines a term by means of the term, but his minimal meaning is nonetheless clear: to do equity is to go beyond the law, but not farther than the law's shadow extends. The point is significant for the understanding of the Chancellor's equitable role in the enforcement of feoffments to uses. The Chancellor went beyond the law in an area neither preempted by, nor illegal under the common law of England.⁵ That the common law declined to enforce cestuis' expectations under "uses" did not indicate the "use's" illegality, but a combination of a lingering feudal policy⁶ and a judicial determination that in the matter of ownership of freehold simplicity and certainty was better

than complicating matters by recognizing and enforcing dual rights of ownership.⁷ In a land-based political and economic system,⁸ the common law judges' rigidity to the point of inflicting great hardship on cestuis was understandable. The key point, then, is that in recognizing cestui rights in feoffments to uses, the medieval Chancellors were acting in a complementary, and not a competing, role vis-à-vis the common law courts, in entirely the way Aristotle envisioned. But because there were too few Aristotelian "equitable" men serving as feoffees, some cestuis had to resort to the Chancellor's equitable sense instead.

The Aristotelian notion of equity becomes an ecclesiastical contribution to the Chancellor's enforcement of feoffments to uses because it was especially through the Church's most prominent systematic theologian, Thomas Aquinas, that Aristotelian epieikeia was recovered and effectuated in the Middle Ages. Aquinas, writing approximately a century after Gratian's Decretum had appeared, succinctly described the jurisprudential space canon law was to fill in the Church: "sicut ad seculares principes pertinet praecepta legalia juris naturalis determinativa tradere, de his quae pertinent ad utilitatem communem in temporalibus rebus, ita etiam ad praelatos ecclesiasticos pertinet ea statutis praecipere quae ad utilitatem communem fidelium pertinent in spiritualibus bonis."⁹

Gratian, for his part, did not doubt the validity or utility of his enterprise; he set out to unify the Church's law into a single authoritative treatise as his title, Concordia Discordantium Canonum, makes clear.¹⁰ This work, commonly called the Decretum, never received official endorsement, yet it was the unrivalled canon law authority in England, as throughout Christendom, for thirty or forty years after its completion about 1140.¹¹ And, in thirteenth century Oxford and Cambridge, Gratian's Decretum constituted the basic source of canon law instruction.¹² Even after its period of unrivalled sway, the Decretum remained the first and fundamental reference point in canon law.¹³ As a result, one cannot determine the importance of Gratian's notion of an epieikeia by the brevity of its articulation. Gratian stated: "consuetudinis autem uel constitutionis rigor nonnumquam relaxatur."¹⁴ In short, Gratian's formulation of a dispensing equity within the context of the Church¹⁵ reached a large audience, some of the English members of which certainly occupied positions of great significance in Church and state - including royal judges¹⁶ - at the dawn of the feoffment to uses and the rise of the Chancellor's equitable jurisdiction.¹⁷

Gratian divided religious usage into "moralia" and "mystica". The latter were variable manifestations of the unchanging truths of the former. Accordingly, Gratian saw the customs of the Jewish law as "mystica", prefigurations of the Christian sacraments.¹⁸ The Old Testament "moralia"

could be preserved even by wholly discarding the "mystica" of Jewish religiosity, according to Gratian. Though not in highly developed form, this theory did allow for the replacement of human accretions in the interest of preserving the divine essence of religion. And coming in the context of the canonist's hierarchy of laws, one can conclude that the customary law at the base of the legal hierarchy could if expedient be changed to reflect more precisely the natural-divine law at the top of the hierarchy.¹⁹

Aquinas reflects the same thinking in stating that "lex naturalis non immutatur quin ut in pluribus sit rectum semper quod lex naturalis habet; potest tamen mutari et in aliquo particulari et in paucioribus, propter aliquas speciales causas impediennes observantiam talium praeceptorum...."²⁰

But Aquinas goes beyond a

consideration of lex naturalis to deal with lex humana:

"oportet leges humanas esse proportionatas ad bonum commune.

Bonum autem [commune] constat ex multis; et ideo oportet

quod lex ad multa respiciat, et secundum personas et

secundum negotia et secundum tempora."²¹ And

in a classic restatement of the Aristotelian concept,

Aquinas continues: "Contingit autem multoties quod aliquid observari communi saluti est utile ut in pluribus, [quod] tamen in aliquibus casibus est maxime nocivum. Quia igitur legislator non potest omnes singulares casus intueri, proponit legem secundum

ea quae in pluribus accidunt, ferens intentionem suam ad communem utilitatem."²²

In such cases, Aquinas recognized that the rule should be dispensed from, but only by the highest authority in the area. He did not relish the thought of individual choice in the observance of either canon or secular law.²³

Accordingly, when he applied the epieikeia principle to secular laws, he situated dispensing authority with the sovereign. "Est etiam princeps," Aquinas said, "supra legem in quantum, si expediens fuerit, potest legem mutare, et in ea dispensare pro loco et tempore."²⁴

The Chancellor of England was the king's chief civil servant, de facto vice-regent, and chief statesman. Accordingly, what became his equitable jurisdiction - the power to alter the common law rule in a particular case - was in accordance with Aquinas' injunction that the power to do equity should reside in the ruler. This point is buttressed by the realization that the Chancellor's equitable jurisdiction was by delegation of the king.²⁵ Petitions for equitable redress were first addressed to the king, who delegated them to his Council for determination.²⁶ Of the Council's members, the Chancellor was the one most likely to have received training in canon law and theology - and therefore in rejuvenated Aristotelian equity. In addition, the Chancellor headed the king's secretariat, the Chancery, through which common law writs were obtainable. The Chancellor was, for all these reasons, the most appropriate

royal official to whom the king could delegate his equitable role in the administration of justice.

But much as the common law courts had good reason not to enforce feoffments to uses, the Chancellor had every reason not to seek to change the common law to protect cestuis. For the Chancellor, as the king's virtual alter ego sought first and foremost to maintain the rule of law in an often turbulent kingdom. To do so required that the law remain relatively unchanging. Aquinas had recognized the Chancellor's interest: "Habet autem ipsa legis mutatio, quantum in se est, detrimentum quoddam communis salutis, quia ad observantiam legum plurimum valet consuetudo.... Unde quando mutatur lex diminuitur vis constrictiva legis, inquantum tollitur consuetudo. Et ideo nunquam debet mutari lex humana, nisi ex alia parte tantum recompensetur communi saluti quantum ex ista parte derogatur."²⁷

Writing nearly three hundred years after Aquinas, St. Germain's doctor of divinity restated the equitable principle. "Equyte", he asserted, "is a ryghtwysenes that consideryth all the pertyculer cyrcumstaunces of the dede whiche also is temperyd with the swetnes of mercye."²⁸ Significantly, it is not the student of common law, but the doctor of divinity who expounds the concept of equity. Indeed, the Student had stimulated the Doctor's discourse with the request, "shewe me what is that equytie yt thou hast spoken of byfore: and that thou woldest that I shulde keep."²⁹

Note that the Student's request implies that the doctor of divinity wanted the Student, as the personification of the common law, to do equity. In other words, the Doctor wanted the law to take account of equitable considerations in particular factual contexts. What the Doctor did not seek, then, was a change in the common law.³⁰ The common law's failure to do equity in cases arising from feoffments to uses created the breach into which the Chancellor, as "keeper of the king's conscience,"³¹ stepped and out of which, as Milson noted, the Chancellor's equitable jurisdiction may in large measure have grown.

St. Germain's doctor of divinity continues to tell the Student about equitable principles, this time with respect to laws, with the clear implication that equity existed in canon law and theology, but was a stranger to the English common law of the time. In his words,

makers of lawes take hede to suche thynges
as may often come and not to euery particuler
case for they coulde not though they wolde []
And therefore to folowe the wordes of the lawe
were in some case both agaynst Iustyce & the
common welth: wherfore in some cases it is
good and even necessary to leue the wordis
of the lawe & to folowe that reason and
Justyce requyreth & to that intent equitye
is ordeyned that is to say to tempre and
myttygate the rygoure of the lawe. And it
is called also by some men epicaia. The
whiche is no other thyng but an excepcyon
of the lawe of god or of the lawe of reason
from the generall rewles of the lawe of man:

when they by reason of theyr generalytye wolde in any partyculer case Iuge agaynste the lawe of god or the lawe of reason the whiche excepcion is secretelv vnderstande in euery generall rewle of euery posytyue lawe.³²

St. Germain's exposition of the need for equity echoes Aristotle, Gratian and Aquinas. But his final terms of reference bear explication, best and most fairly supplied by the use of his own definitions earlier in the same dialogue. The eternal law, St. Germain's Doctor considers to be the overriding rule of purpose and potential in creation. It is, therefore, the fundamental law from which all other laws derive, to the extent they are in conformity with it, their existence and validity.³³

That portion of the eternal law which God reveals the doctor of divinity calls the law of God;³⁴ when and to the extent revealed through a ruler, the eternal law is called the law of man.³⁵ Finally, "when the lawe eternall or the wyll of god is knowen to his creatures resonable by the lyght of naturall vnderstandynge or by the lyght of naturall reason then it is called the lawe of reason."³⁶

Thus, the forms of law could not remain static; increased divine revelation and heightened use of reason could alter the appropriateness of a particular rule of positive law.³⁷ Yet common law rules of land ownership had, by St. Germain's time, become rigid,³⁸ creating hardships for cestuis and often allowing feoffees to frustrate feoffors' intentions with impunity.³⁹ The medieval

Chancellor, as ecclesiastic, stood in the intellectual and jurisprudential tradition of St. Germain's doctor of divinity. While supporting the validity of the common law rules concerning freehold, the Chancellor had the power, as well as philosophical and theological justification, for intervening to dispense from the common law rules because of the injustice they might work in particular cases.⁴⁰

The Chancellor's intervention to rectify these cases of hardship was, then, consonant with familiar canon law and theological principles, had a strong philosophical pedigree, and was exercised by delegation of the king and his Council within the context, if without the facilitation, of the common law and its judges.

It remains to examine cases of Chancery intervention to protect feoffors and cestuis frustrated by uncooperative feoffees to uses legally secure in their indivisible common law ownership⁴¹ of the freehold in question. By way of establishing the equitable exception, though, one must first set forth a few cases where the common law rule prevented the fulfillment of the purpose of the "use".

A case before the King's justices in 1465 renders stark the contrast between the common law and the Chancery attitudes towards feoffments to uses.⁴² Plaintiff had been enfeoffed to defendant's use. Defendant then enjoyed the fruits of the land, whereupon plaintiff brought against him a writ of trespass vi et armis for this alleged despoliation of the land. Catesby, J., noted that because plaintiff, as

feoffee, owned the fee in the land in question, defendant was merely plaintiff's tenant at sufferance having precisely the same status as if he had not been cestui under the "use". As holder of the fee, in other words, plaintiff was owner of all legal rights in the land and defendant had no legal rights in the land. Moile, J., added, "(t)his action should will [sic] be in Chancery," because defendant was seeking enforcement of the intent of the feoffor.⁴³ In other words, by 1465, the common law courts recognized that the cestui's rights were cognizable in the Chancery. Catesby referred to the equitable principle when he stated: "Le ley le Chancery eft le comen [i.e. universal] ley del terre, la le def. ava avantage de tiel matter et feoffe^mt"⁴⁴ But, added Moile, defendant had no such protection at common law, and ordered the defendant to leave plaintiff's land.

This result was very harsh from the cestui-defendant's standpoint, of course, but in addition it did violence to the feoffor's intentions in creating the use. In the context of the rigid application of the autonomous feoffee-freeholder rule, Catesby and Moile had not only noted the Chancellor's equitable role in such cases, but practically endorsed defendant's recourse by petition to the Chancellor. It was not a case of antipathy between the common law rule and an equitable principle which the Chancellor might apply, but a simple situation of making one's defence in the wrong department; for tailor-made justice under the law, the cestui had to petition the Chancellor.

In a 1502 case,⁴⁵ one sees a variation on the common law theme established in the previous case. Feoffor had apparently enfeoffed others to his own use, possibly with the intention of making further instructions in his will - a quasi-devise,⁴⁶ or of limiting those who might inherit his interest to the heirs of his body - a fee tail. As the report does not state the reason, one can only speculate. But whatever his reason, the feoffor-cestui took alarm at the damage being done to the land by a stranger's farm animals, so he brought a writ of trespass to have them removed. The feoffor-cestui's action was not allowed, on the grounds that the action belonged to the feoffee as owner of full rights to the freehold.⁴⁷ The feoffor-cestui was merely the feoffee's tenant at sufferance; accordingly he had no enforceable interest in the land.

The result would have been different had feoffor put a condition in the deed of feoffment requiring feoffee to bring all actions of trespass maintainable concerning the land. Had that been done, the common law would have granted feoffor-cestui a right of reentry for feoffee's breach of the condition of the enfeoffment.⁴⁸ Feoffor-cestui's position in the actual case was especially difficult since the Chancellor would have had to find a condition to the above effect in order to send feoffor-cestui back to the common law courts to maintain his action. For specific performance of the purpose of the feoffment would not help the feoffor-cestui in this case: what he wanted was to bring an action

of trespass, and even the Chancellor lacked jurisdiction over trespass actions.⁴⁹ Ultimately, in other words, the common law courts would have had to recognize a property interest in feoffor-cestui in order to allow him to bring a trespass action. By the same token, the case underscores the rigidity of the common law indivisibility of freehold ownership, for had the common law recognized an owner's interest in feoffor-cestui, he could have brought his trespass action. As it was, he remained at the mercy of the feoffee and without remedy.

The common law judges were not, however, immune to the logic and moral force of the cestui's complaint against uncooperative feoffees. In 1521 the judges of the King's Bench did recognize the existence of a "use" for purposes of deciding whether an alienee of a feoffee had good title to the land in question.⁵⁰ As the feoffee, having been paid for the alienation, had no interest in preventing the transfer, in order to exercise their ordinary function of determining title to the freehold, the judges had to allow the original feoffor to raise the question. Feoffor did this through reentering for feoffee's failure to carry out an implied condition of his feoffment to hold to feoffor's use. The judges, through Brooke, admitted that where feoffor made a grant of freehold trusting in the feoffee to hold the property to his (feoffor's) use, a "use" existed.⁵¹ Brooke claimed that he was applying common reason, not conscience, and that such reason was the essence

of the common law.⁵² But he also noted that if a feoffee was guilty of misfeasance with respect to the feoffor's purpose in creating the use, feoffee was accountable in conscience. By this Brooke undoubtedly meant that the feoffor-cestui could enforce the terms of the feoffment to uses in the Chancery.⁵³

For his part, though, as a common law judge, Brooke had to opt for reason. And, he reasoned that one who purchased freehold from a feoffee knowing of the underlying "use", was guilty of fraud, and therefore could not take good title to the freehold.⁵⁴ The effect of this was to preserve the "use" in feoffor-cestui's favour without specifically enforcing it as a "use". What the common law enforced was an underlying condition of the enfeoffment. If feoffee breached it by alienating the land, feoffor could reenter.

By the same token, Brooke reasoned that one who purchased freehold from a feoffee not knowing of the underlying use, did take good title to the land, because the common law "won't wound the innocent".⁵⁵ This reversal of result makes clear that the common law, at least in 1521, did not intend to enforce uses,⁵⁶ but would not allow an alienee knowingly to perpetrate a fraud on the feoffor-cestui. Ironically, the common law would not prevent feoffees themselves from defrauding the cestui to whose use they held absent feoffees' breach of at least an implied condition. Thus, the feoffor-cestui was sometimes protected by a common

law right of reentry for breach of a condition of the enfeoffment, while the third party cestui had no such right and was truly dependent on the Chancellor's sense of equity.⁵⁷

The legal helplessness of third party cestuis would form the basis for the Chancellor's exercise of the equitable principle derived from Aristotle through the medium of the Church. The first recorded instance of an appeal to the Chancellor arising out of a feoffment to uses arose in the mid-1390's.⁵⁸ Its facts closely parallel those of the 1521 case discussed above with the crucial exception that the cestui was a third party, and not the feoffor. Therefore, no conditional feoffment and resulting use could be implied at common law. The cestui had to resort to petitioning the Chancellor for relief.

Cestui, a widow, claimed that two of three feoffees to her use were induced by an outside party to sell their rights in the freehold to the third feoffee. The outsider induced the third feoffee to sell the tenements to him, also by fraud. Cestui, deprived of the tenements, claimed she lacked profits on which to live, therefore she prayed the Chancellor "for God and in way of holy charity" to nullify the two sales, restoring her to a position as cestui.⁵⁹

The widow's plea implies that only by restoring her to her previous position would the Chancellor do justice according to what St. Germain subsequently called God's law. Her plea was for equity to be done considering the particular facts of her case and notwithstanding that she had no right

to the tenements - but the outsider did - according to the common law. The widow's plea, then, would to Aristotle have been a textbook case for the need for an equitable principle in law. Aquinas would have agreed. And, as Chancellor, de Stafford was virtual vice-regent with the King's delegated authority to do what amounted to Aristotelian equity as interpreted by Aquinas.⁶⁰ But in addition, de Stafford, like so many of his medieval counterparts as Chancellor, was a bishop. He therefore stood in the canonical tradition of Gratian, as well as in the philosophical wake of Aristotle and Aquinas, as regards the need to do equity to particularize the law's generality in articulating justice. Indeed, de Stafford and other ecclesiastical Chancellors of the Middle Ages could hardly have helped noticing, assuming they were familiar with Scripture, that the idea of furthering legal purpose through occasional dismissal from the letter of the law was employed by Jesus of Nazareth.⁶¹ On all counts, then, the disappointed cestui could expect the Chancellor to react favourably to her petition.

Though no result accompanies the widow's petition, it would be surprising if the Chancellor did not at least issue a subpoena to compel feoffees and the fraudulent outsider to appear in a few days time to answer under oath the petitioner's allegation. The subpoena was enforceable by fine or imprisonment, or both.⁶² The Chancellor himself, or by his delegate, would first examine the feoffees as to whether

a "use" in fact existed, for without that, the self-proclaimed cestui could have no remedy.⁶³ The Chancellor's interrogatory procedure, imported by the ecclesiastical Chancellors - perhaps subconsciously - from the ecclesiastical courts' procedure, was well suited to this inquiry.⁶⁴ The Chancellor also could remove the case to the Exchequer Chamber for consultation with all the judges if he found that desirable.⁶⁵ Assuming he retained jurisdiction over the matter, he could issue an order which, if in favour of the cestui-petitioner, would compel specific performance by the feoffees of the terms of the original feoffment to uses.⁶⁶ This, of course, might require that the fraudulent alienee of the feoffees be deprived of title to the freehold.

The widow's petition implied that she hoped for equity beyond the requirements of the law in appealing to the Chancellor. A petition of the mid-1420's makes explicit the generic plea, usually implied in the petitions of those who appealed to the Chancellor's sense of equity.⁶⁷ The petition also stands in instructive comparison to the conditional feoffments to uses which, as previously discussed, the common law courts would, for limited purposes, recognize.

Petitioner was the heir of a feoffor who had enfeoffed feoffees on the condition that if the lands were ever sold, the proceeds should be given to the heir at a rate of £40 per year. The feoffor died and subsequently the feoffees sold the lands. But the feoffee holding the proceeds of the sale refused to give the money to the feoffor's heir

as had been agreed as a condition of the original enfeoffment. Note that had feoffor's heir reentered for breach of the condition of the original enfeoffment, he would have been guilty of a trespass against the new feoffees, who had no duties whatsoever towards the heir. Therefore, the feoffor's heir had no common law rights against either set of feoffees with respect to the sale of the lands. Accordingly, the disappointed cestui-heir, having recounted the facts of the matter, concluded his plea to the Chancellor: "And so it is, most reverend [Lord], that the said suppliant cannot have any remedy ... by the law of Holy Church, nor by the common law of the land: May it please your most gracious Lordship, in honour of God and on account of righteousness, to grant writs [of subpoena against feoffees] ... to come before you in the King's Chancery, which is the Court of Conscience, there to answer thereto as reason and conscience demand, otherwise the said suppliant is and will be without remedy, which God forbend."⁶⁸

Between 1422 and 1426, at least one alienee sought to avail himself of that very procedure to compel feoffees to convey freehold to him.⁶⁹ The alienee complained that while cestui had, by agreement with his feoffees, sold him his interest in some land, and although alienee had paid a large portion of the purchase price (presumably to the cestui), feoffees refused to enfeoff him of the lands in question. Accordingly, he requested a subpoena to compel feoffees' appearance for examination before the Chancellor,⁷⁰

"and on their examination to cause right to be done to the said suppliant, for God and in way of charity."⁷¹

The case is interesting not only for the unusual factual situation; but because the prayer for redress at the end of the petition makes explicit that the alienee-petitioner sought "right" judgement - equitable judgement - notwithstanding the feoffees' legal entitlement to retain the full prerogatives of freehold of the lands.⁷² The closing phrase - "for God and in way of charity" - had by then become formulaic, indicating a pure appeal to the Chancellor's equity, against all common law authority if necessary. It was, in essence, a plea for compassion and therefore legal flexibility.

In a petition of circa 1398 petitioner again complained of feoffees' failure to enfeoff him.⁷³ Under the terms of a marriage agreement between two sets of parents, the husband-to-be was to endow a chantry for his future mother-in-law's soul and go through with the marriage. In return, the bride's father's feoffees were to convey certain freehold to the newly-wed couple. This they failed to do, prompting the new husband to appeal to the Chancellor's equitable sense alleging £200 damages arising from setting up the chantry, and seeking specific performance of the marriage agreement. For, he asserted, he had no legal compulsion to use against the feoffees (since they had full rights of ownership at common law). Therefore, "he prayeth remedy for God and in way of charity", the routine prayer

for equitable dispensation from the law's rigidity. As usual, one does not know the Chancellor's response.

Fathers and sons, too, by the early fifteenth century not infrequently stood in a feoffor-cestui relationship with respect to each other.⁷⁴ The father's motives for entering into such an arrangement varied, but important among them would be to provide for younger sons or to evade the feudal incidents of tenure which rendered the landlord's seisin of a tenant's heir inconvenient and costly.⁷⁵ Because feoffors enfeoffed those they trusted, their friends, they seem not to have thought it necessary to guard against feoffees' fraud or misappropriation of the realty. Sometimes, though, feoffors misplaced their trust, with the result that their sons, as disappointed cestuis, had to appeal to the Chancellor for equitable review of the feoffees' conduct.

Two such petitions from the early fifteenth century are illustrative. In the first, the cestui-son complained that his father's feoffees had alienated the lands which were to be held to the son's use. The cestui, having no common law remedy,⁷⁶ sought the Chancellor's subpoena to compel the chief transgressor-feoffee to appear, under pain of £100 fine if he did not, to be examined by the Chancellor. Almost simultaneously with this petition, the Commons in 1402 petitioned the King (Henry IV) to amend the law in order to protect third party cestuis against alienations of the land held to their use by feoffees. The King took the

matter under advisement, but did not undertake to change the law.⁷⁷

In the second of these petitions, the father had enfeoffed lands to the use of his son until the son reached the age of eighteen years, at which time the feoffees were to enfeoff the son.⁷⁸ When the cestui-son reached the age of eighteen, his father's four feoffees, two of whom were parsons, refused to enfeoff the son, deciding instead to hold the land for their own use, enjoyment and profit. The son brought his petition for a subpoena and consequent examination of feoffees by the Chancellor, praying ultimately that the Chancellor would order their specific performance of the father's intentions in enfeoffing them. Thomas Langley, then in his second term as Chancellor, undoubtedly knew exactly what the cestui-son meant when he closed his petition with the words, "for God and in way of charity; considering, most gracious Lord, that the said suppliant can have no recovery at common law."⁷⁹

A final example, also from the early fifteenth century, was almost the same problem of the dishonest feoffee, but unusual in that there had only been one feoffee.⁸⁰ Petitioners were a wife and her second husband, and her son by her first marriage. After the first marriage, the widow had enfeoffed a certain Robert "upon the full and entire trust she had in his person and faithfulness ...",⁸¹ to a use she would later declare. She seems to have been a poor judge of character, or irrational in her bereavement, for

her feoffee soon alienated the land in connivance with another, apparently recovering the land's use for himself. Petitioners, of course, had no common law remedy: The feoffment to Robert had been unconditional; he owned the land and could do with it as he wished. Accordingly, petitioners appealed to the Chancellor's - archbishop Arundel's - sense of equity, concluding "that the said suppliants are without recovery if they have not your most gracious lordship [sic] and aid touching the things aforesaid."⁸²

The above cases illustrate the medieval Chancellor's exercise of an equitable jurisdiction which reached its height in the fifteenth century as a result of his application of equitable principles to the exigencies of cestuis.⁸³ After 1426, indeed, petitions relating to "uses" formed the bulk of those addressed to the Chancellor.⁸⁴ Although the Chancellor's reaction to these petitions is almost never recorded, one may assume that petitions for his equitable intervention would not have persisted, let alone increased in number, had he not been willing to grant relief.⁸⁵ Based on this reasoning, one may deduce that the cestui was, by the second quarter of the fifteenth century at the latest, often able to secure relief from the rigid rules of the common law of land transfers. But the picture of the Chancellor's application of ecclesiastically tinted Aristotelian principles of equity in protecting cestuis is incomplete without considering the extent to which the Chancellor's jurisdiction was not merely protective, but

primarily enabling. To this end, this study now turns to the employment of feoffments to uses for quasi-testamentary purposes.

6. Origins and Enforcement of the Feoffment
to the Uses to be Declared in
Testamentary Instructions

The common law prohibition against devises of land¹ dates from the Norman Conquest which, within a century, had, in regard to tenures in land, completely replaced the Anglo-Saxon system with a pyramidal feudal system. After the Conquest, all land was ultimately held by tenants in chief, who generally provided military service to the king in return for a freehold deemed to be of commensurate value.² The tenant in chief, exacted similar services in smaller values from those whom he subinfeudated as his tenants. The relationship was considered personal; services exacted were individually negotiated and valued. It made sense, therefore, that the landlord-tenant relationship was technically terminated by the death of either.³ When one of the king's tenants in chief died his tenancy escheated and the king could choose his successor, meanwhile taking the profits and services due on the land. So long as the tenant holding of the landlord paid the services due to the landlord, it was irrelevant to the landlord how many or which others the tenant subinfeudated to serve him.

In such a social system, the kingdom's very security depended on each tenant fulfilling his military duties to his landlord. And, towards the lower end of a chain of tenancies, were tenants by socage, whose services took the form of farming the land.⁴ Under either system of tenure,

it was important that the tenant be male in order to perform the full value of services for which he received his freehold. Nothing but a system of primogeniture⁵ made any sense, given the services required. Each tenant's heir merely had to pay a "relief", do homage, and "enter" the land in order to be seised of the tenancy.⁶ Given the nature of the demands made on a tenant's services it was not unfair that if the tenant's heir was under the age of majority, the landlord could claim the child as his ward, taking the profits of the land until the heir reached majority. After all, the tenant could not expect to get land of great value without giving anything of value in return.

Because the tenancy agreement was based on an individual's performance of specified services, substitution of another for the tenant was unthinkable, and so (until 1290) prohibited at common law without purchase of a licence from the landlord.⁷ Without this rule, a weakling or cripple, woman or child might be given a tenancy in return for which he or she would be incapable of performing the services due to the landlord by the tenant whose homage the landlord had accepted. Accordingly a will disposing of the tenancy, in whole or in part, might create a non-performing layer of the landlord-tenant pyramid which could, multiplied by other such wills, undermine the entire social and military system.⁸ Thus, the devise of freehold was prohibited at common law⁹ and remained so until passage of the Statute of Wills in 1540.¹⁰

As early as a century after the Conquest, military tenures were often actually paid for by means of money or in terms of military supplies, or foodstuffs. Called "scutage", these non-service payments for tenancies enabled the king and his landlords to buy services they had previously demanded in person from their tenants.¹¹ As the replacement for services in a service-based society, scutage payments were an important source of income to the landlord. To the king, landlord ultimately of all and tenant of no one,¹² the feudal incidents obviated the need to levy taxes,¹³ a fact which figured in Henry VIII's thinking in seeking to revive the feudal incidents through passage of the Statute of Uses in 1535.¹⁴

With so much at stake, the king naturally wanted to have control over land transfers. With the Conquest, a first step had occurred with the separation, albeit along somewhat fuzzy lines, of royal and ecclesiastical jurisdictions.¹⁵ King Henry II further limited the Church's jurisdiction by extracting archbishop Becket's agreement, at Clarendon in 1164, that the royal courts had the right to decide all matters relating to the Church's freehold lands.¹⁶ Added to the fact that freeholders already had access to the royal courts,¹⁷ the extension of royal jurisdiction over ecclesiastical freehold meant that the recognition of land tenures was firmly ensconced in the royal courts.¹⁸

But here the shift from a system of freehold tenancies based on services due from the tenant during his life, to a mere vestige of the former system whereby the landlord accepted payments as a condition of accepting the tenant-to-be's homage and seising him of the freehold, becomes more critical. For if he could avoid the post mortem homage-seisin ritual, the tenant could avoid many of the expenses of feudal incidents, while arrogating to himself the choice of who would take what portion of his freehold when he died. The tenant's desire was based not only on financial self-interest, but also on dealing fairly with family members who would not, under the system of primogeniture, be entitled to any of the deceased tenant's freehold.¹⁹ Finally, the widespread evasion of the feudal incidents, especially by means of circumventing the common law prohibition of devises, indicates a change in attitude toward land ownership: where tenancy had once been a privilege bestowed by a superior, freeholders now saw themselves as holders of rights in land which could be transferred by the same logic as justified one's alienation of his chattels. The statute Quia emptores terrarum of 1290,²⁰ which allowed alienation of freehold by substitution without licence, added substance to this change of attitude. The feoffment to uses was the ingenious mechanism adopted to effectuate the transfer of freehold to avoid the anti-devise rule and the feudal incidents of tenure.



Glanvill, in his Tractatus de Legibus, described the first and most obvious means of avoiding the feudal incidents while doing as one pleased with at least some of one's freehold. The tenant could simply give away a portion of his land, limited to acquired land, as opposed to inherited land.²¹ If the tenant only owned acquired land, and had inherited none, then he could not even give all his acquired land away, for that would be to disinherit his heir, still forbidden at the end of the twelfth century.²² Indeed, the inter vivos gift of freehold had still another important limitation, for one could not make such a gift when dying, lest he should, through mental lapse or in his spiritual torment, be over-generous to others - for example the Church - while disinheriting his heir.²³ Just when the exceptions are seeming to engulf the permissive rule, Glanvill allows that "a gift of this kind [freehold land] made to another in a last will can hold good if made and confirmed with the heir's consent."²⁴ The various limitations on how much of what kind of freehold could be transferred inter vivos were removed at common law soon after Glanvill's treatise.²⁵

In short, writing between 1187 and 1189 Glanvill observed the following scenario: Landowners could give away as much of their freehold as they wanted inter vivos, but could give away none after their death (unless, according to Glanvill, the heir consented, which would have been unlikely²⁶); the timing of the gift made all the difference

as to whether it was legal.²⁷ Yet landowners wished to retain possession of their lands during their lifetimes;²⁸ few seem to have found the inter vivos gift of land an attractive means of escaping the feudal incidents or of bestowing largesse on non-heirs.²⁹

Holdsworth claimed to have found evidence of feoffments to uses in records of conveyances of the late twelfth and early thirteenth centuries.³⁰ His conclusion is what one would expect given that the enforcement of the common law's prohibition of devises dates from that period,³¹ and that a landowner could turn a "use" to quasi-testamentary effect.³² The would-be devisor would enfeoff a number of his friends to his own use for life, and then to the uses to be declared in his will.³³ That this was an effective method is verified three centuries later by St. Germain's Student of the common law who notes that, "sometyme suche vses be made that he/to whose vse & c. may declare hys wyll thereon . . .,"³⁴ one of the two "chyeft & pryncypall causes why so moche lande is put in vse."³⁵ The feoffor could, in the alternative, merely enfeoff feoffees to the uses of the will, which, until the will became effective, created a resulting use to the feoffor.³⁶ In either case, to the landlord's great frustration, the feoffor got exactly what he wanted: the de facto devisability of his freehold.

Like any "use", the feoffment to uses to be declared in the feoffor's will had to have present effect - the feoffees took full rights in the freehold at the time of

their enfeoffment - but, like any will, the will declaring the uses to which feoffees were to put the freehold in question was fully revocable until death. This was a feature attractive even to those feoffors who did not mind giving up the present enjoyment of their land; for when the uses of a feoffment to uses were expressed at the time of the feoffment, they were irrevocable.³⁷ Changes in one's affections or in the conduct of the intended recipients of one's bounty under the feoffment to uses (as, for example, when they turned rebellious or to dissolute living), rendered expression of the ultimate purposes of the "use" simultaneous with the enfeoffment undesirable. The feoffor would, therefore, simply bind himself by making a feoffment to his own use, holding his feoffees to effectuate whatever the uses declared in his will. The will did not make a devise, but merely expressed the testator's instructions. Technically, then, the freehold did not change hands through the will, so the anti-devise rule and feudal incidents were avoided.³⁸

So long as the technical legality of the feoffment to uses to be declared in the will was recognized by the common law courts, there could be no barrier to the Chancellor's enforcement of the feoffees' obligations to carry out the instructions contained in the will. But once the common law measured the legality of the transaction by its net effect, it was bound to find an unlawful devise, a prospect of unmixed blessing only to the king himself.³⁹ As a

result it took a strong monarch exercising persistent pressure on the Commons to secure passage of a statute drastically limiting the use.⁴⁰ In the end, it was the aggregate judicial officials of the day, after consultation in the Exchequer Chamber, and not the Commons, which proved susceptible to royal pressure. Armed with the judges' decision in Lord Dacre's case,⁴¹ Henry VIII could easily secure passage of the Statute of Uses of 1535, for the Statute merely followed the case in looking to the net result, and not the technical effect, of the feoffment to uses to be declared in the feoffor's will.⁴² Sacrificing chronology to coherence of reasoning, this study now turns to a brief consideration of Lord Dacre's case, as it illustrates what would have been the result of the Chancellor's failure to enforce testamentary instructions to the testator's feoffees.

Lord Dacre, a tenant in chief of King Henry VIII, had enfeoffed others to his use for life, then to the uses to be declared in his will. His will instructed feoffees to hold to the use of two younger sons, with profits of residual lands to go to his executors to pay his debts, funeral expenses, and the marriage portions of two daughters. A jury found that the purpose of Lord Dacre's enfeoffment had been to deprive the king of the incidents of lordship and primer seisin (until the heir's payment of "relief").⁴³ Dacre's feoffees demurred, and the Chancellor, Sir Thomas Audley - common law-trained - adjourned the matter to the

Exchequer Chamber for private discussion. There an interesting dialogue occurred, with the Chancellor and the king's high officials condemning Lord Dacre's conveyance as a will of land.⁴⁴ The cestui (Lord Dacre), they reasoned, could not give away in his will that which he had already given away through the original enfeoffment.⁴⁵ Audley, et al., were simply looking at the net effect of the transaction; their position was what one might have expected from the closest collaborators of a strong king.

Most of the common law judges, on the other hand, took the technically correct and by then traditional Chancery position that a feoffor-cestui, "by his will ... gives none of the land but only his use, so that the feoffee's estate is not impaired in any point, ... for such a will is a declaration of the trust, to wit, a showing to the feoffee of his [feoffor-cestui's] intention how the feoffee should act, and the feoffee is obligated in conscience to perform it."⁴⁶ Another of the judges added that since reason was at the heart of common law, and because many "inheritances" depended on carrying out the terms of "uses", "uses" should be considered as consistent with the common law.⁴⁷ Just when it looked as though this position would carry the day, the king ordered the judges to agree on a verdict, "and all who were of opinion that the will was void would have the king's good thanks."⁴⁸

Apparently the king's "good thanks" were good incentive, for Spelman admits that once the judges reassembled he and

his party were moved to agree with the Chancellor's position.⁴⁹ The result was a great victory for the king and the beginning of the end of feoffments to uses to be declared in a feoffor-cestui's will.

For the purposes of this study in evaluating the ecclesiastical contribution to the development and enforcement of the feoffment to uses, Lord Dacre's case is important because it indicates that at no time previous to 1535 had there been any prohibition on the employment of a will to instruct feoffees to uses.⁵⁰ Since it was not until the twelfth century that the common law rule against devises of freehold was enforced at all, and since after that date it is not until the mid-fourteenth century that the Chancellor appears regularly to have enforced the terms of the feoffor-cestui's will,⁵¹ is it not reasonable to suppose that some other person or forum had, before the Chancellor's intervention, enforced these wills?⁵²

Maitland was the first to suggest that ecclesiastical courts may have exercised such a role prior to the Chancellor's intervention.⁵³ Recently, one researcher, Helmholtz, has discovered a number of cases in the diocesan courts of Canterbury and Rochester dating from approximately 1375 to 1450 which tend to support Maitland's conjecture.⁵⁴ The feoffments to uses appear to be "ordinary"⁵⁵ in the sense that they were not secured by the feoffees' oaths, and all the cases concern testamentary instructions to a deceased feoffor-cestui's feoffees.

The findings, to the extent accurately interpreted from diocesan manuscripts certainly represent antecedents in the ecclesiastical courts to the Chancellor's subsequent intervention to enforce testamentary instructions to feoffees.⁵⁶ But Helmholz himself is quick to note the limitations of the evidence: Both dioceses are in Kent, under the provincial (or diocesan) jurisdiction of the archbishop of Canterbury. It would have been unlikely that his local jurisdiction, let alone his status as many tenants' landlord, would have invited challenges over a few cases of testamentary instructions to feoffees.⁵⁷ Similar cases do not exist in the consistory court records of York and Ely surviving from this period.⁵⁸ Court records of the other thirteen English dioceses do not exist for the period.⁵⁹

One senses, then, that if the ecclesiastical courts truly formed the antecedent jurisdiction to that of the Chancellor in cases of testamentary instructions to feoffees to uses, either the records do not survive, or the cases Helmholz discovered are unrepresentative of the type of testamentary instruction over which ecclesiastical courts took jurisdiction prior to the Chancellor's intervention. Based on Helmholz's findings and the types of cases over which historians know ecclesiastical courts took jurisdiction,⁶⁰ the second alternative seems a distinct possibility.

Part of Helmholz's discovery was the very ordinariness or informality of the feoffments to uses with testamentary instructions he found, for it was already known that Church

courts, in England as elsewhere, would, from the Norman Conquest onwards, take jurisdiction over formal agreements buttressed by a party's oath.⁶¹ An action of fidei laesio in the Church courts lay against one who breached an agreement bound by an oath. This was true also of feoffments to uses secured by an oath, notwithstanding that, from the reign of Henry II such actions, when they involved lay feoffments, were subject to "writ of prohibition to courts Christian".⁶² The Church courts routinely ignored these writs of prohibition especially when, as in cases arising from the violation of an oath, a sin was involved.⁶³ This was a simple matter of reference to the theological and canonical theories of a hierarchy of laws; a positive law could not be allowed to frustrate enforcement of the law of God.⁶⁴

Simple breach of promise, of course, was also a sin but canon law regarded it as minor compared to breach of promise bound by an oath.⁶⁵ Indeed, canonists disagreed as to whether a simple promise, called nudum pactum,⁶⁶ could support an action for fidei laesio in ecclesiastical courts.⁶⁷ It would, therefore, not be surprising to find few fidei laesio actions entertained in Church courts based on unsworn promises relative to such actions based on sworn promises. Helmholtz's findings in the diocesan court records of Canterbury and Rochester precisely follow this pattern of relation, and so may be taken to support the jurisdictional theory derived therefrom.⁶⁸

By the early fifteenth century, in fact, Helmholz notes a decline in the number of nudum pactum feoffments to uses in Canterbury and Rochester and a rise in actions involving "uses" supported by sworn promises.⁶⁹ This could indicate either of two things: The canonists finally determined that nudum pactum promises did not belong in their courts in fidei laesio actions or that such promises were, at least when made as part of a feoffment to uses to be declared in feoffor-cestui's will, now enforceable elsewhere. One cannot know the truth of the first alternative, but the second seems plausible. In fact, it was at precisely this time, in the reign of Richard II (1377-99), that the Chancellor of England began to enforce cestui rights under feoffments to uses.⁷⁰ There would have been no lack of communication between the two jurisdictions; not only were nearly all the Chancellors during this period bishops, but two - Sudbury and Arundel - were archbishops of Canterbury, the very province and one of the two dioceses from which Helmholz drew his conclusions.⁷¹ These ecclesiastical Chancellors would have been well aware of the shortcomings of the ecclesiastical courts in enforcing the nudum pactum feoffment to uses under guise of fidei laesio. They might therefore, have felt it desirable to intervene to end the canon law dispute over the nudum pactum-fidei laesio jurisdictional question, by exercising the principle of epieikeia to ameliorate the cestui's plight. In addition, considering the Chancellor's role as statesman and chief

minister, his intervention in these cases would concentrate testamentary jurisdiction over land in the secular realm, ending the Church courts' perceived need to flout Henry II's prohibition of lay fee jurisdiction and the writs of prohibition based thereon.⁷²

Pursuant to this theory, one notes that in the mid-fifteenth century promises enforceable in the Church courts as fidei laesio came also to be enforceable by a common law action of assumpsit.⁷³ Enforcement of the nudum pactum, on the other hand, came into secular justice through the Chancellor: In the exercise of epieikeia, the Chancellor chose to follow the canon law party that favoured enforcing the nudum pactum (no more an enforceable contract at common law than under the Roman law), in those cases where the promisor had intended to bind himself (i.e., where a causa existed).⁷⁴ This suggests the desirability of the Chancellor's intervention from the standpoint of the cestui under a will's instructions to feoffees: Whereas the nudum pactum constituting the agreement (to carry out his will's instructions) between feoffor-cestui and his feoffees was enforceable either rarely, only in certain locales,⁷⁵ only according to certain canonists, or officially not at all in the ecclesiastical courts,⁷⁶ enforcement of such agreements was emerging as a major constituent in the Chancellor's equitable intervention.⁷⁷ Indeed, given the widespread desire to make devises of freehold, the inception of petitions to the Chancellor arising out of these nudum pactum feoffments to

the uses declared in wills may have constituted the reason why the bulk of the Chancellor's equitable case-load was, by the end of the fifteenth century, derived from cestuis' common law vulnerability under feoffments to uses.⁷⁸

Availability of writs of subpoena, investigative process and, if appropriate, specific performance of the agreement underlying a nudum pactum feoffment to uses⁷⁹ may have stimulated these petitions for equitable redress for the first time or, to the extent the nudum pactum feoffment to uses had been enforceable in ecclesiastical courts, merely prompted cestuis to petition the Chancellor instead of the Church - perhaps to obtain secular sanctions against dishonest feoffees in a time of declining spirituality.⁸⁰ Perhaps, in addition, because of canonical disagreement as to whether nudum pactum agreements incorporated in feoffments to uses were justiciable in the ecclesiastical courts, petitioners simply sought a more certain review and remedy by the Chancellor, as word got around that he might intervene in such matters. The Chancellor may in addition have been the forum of choice for many disappointed cestuis, because even if the ecclesiastical courts did take jurisdiction over a nudum pactum feoffment to uses under the guise of fidei laesio, petitioner had, at the minimum, to show a promise or agreement; it was not a justiciable sin to break a "promise" one never made.⁸¹ The Chancellor required no such showing, being willing to imply an agreement or promise from the conduct of feoffor and feoffees.⁸²

In the final analysis, the conclusion outlined above as to a transfer of jurisdiction over a feoffor-cestui's testamentary instructions to his feoffees to uses remains a hypothesis - more likely than not true, based on the available evidence. But Helmholz believes all the surviving medieval consistory court records now have been searched for cases of feoffments to uses.⁸³ The result is the relatively few such cases, all involving testamentary instructions after the feoffor-cestui's death.⁸⁴ They arose in only two, albeit important, dioceses in Kent in the late fourteenth and early fifteenth centuries. One must agree, therefore, with Helmholz, that whether ecclesiastical courts routinely took jurisdiction over feoffments to uses declared in wills probably cannot ever be proven.⁸⁵ Helmholz leaves the subject at that - a discovery made, its possibilities noted, its limitations recognized.

But for determining the ecclesiastical contribution to the development and enforcement of the feoffment to uses, such resignation, while honest, ought not to close the question. For putting Helmholz's findings in the context of the simultaneous development of secular jurisdiction over sworn promises and the rise of petitions to the Chancellor by disappointed cestuis, while recognizing the broader political and jurisdictional trends of the times, engenders the hypothesis of the present study as above argued. The hypothesis is internally consistent, takes account of the positive indications of the evidence, as well as of its

limitations, and fits reasonably into the complex history of the rise of the Chancellor's equitable jurisdiction. It tends, in fact, to confirm Milson's suggestion that the rise of the feoffment to uses may have operated as much as a catalyst, as of a consequence, of the development of the Chancellor's equitable jurisdiction.⁸⁶

Based on this hypothesis, then, the Chancellor, once he had begun to act on petitions from cestuis or beneficiaries under a will instructing feoffees to uses, was engaged in the rectification of an ecclesiastically recognized problem relating to agreements of dubious status with respect to ecclesiastical courts' fidei laesio jurisdiction. In the sense of correcting a jurisdictional shortcoming of the ecclesiastical courts, one which had permitted injustices towards cestuis, then, the Chancellor was using his awareness of canon law and ecclesiastical court practice to build an improved and more adaptable equitable structure for doing justice on an ecclesiastical foundation. In another sense, and to the extent that the nudum pactum feoffments to uses Helmholz discovered in the diocesan court records of Canterbury and Rochester were typical of at least a small amount of those courts' activities in the earlier Middle Ages, the Chancellor was continuing an ecclesiastical form of justice, epieikeia, in the context of the feoffment to uses⁸⁷ - a secular mechanism - in the forum best suited to the epieikeia function in an increasingly centralized and secularized society.

Whichever of these interpretations one prefers, since proof of either is beyond historical hope, one must note that the jurisdictional transfer from ecclesiastical to secular courts was gradual and not marked by jurisdictional wrangling.⁸⁸ The canon law deferred to positive law to the extent that the positive law produced a just result.⁸⁹ The complementary relationship between the two jurisdictions undoubtedly owed much in practice to the personal link the Chancellor constituted between them both as ecclesiastic and as administrator of the equitable principle of epieikeia within the common law realm.⁹⁰ Given their common interests and the Chancellor's high ecclesiastical rank, it would have been surprising if the overriding story had been one of jurisdictional dissonance, rather than of harmony.

This complementarity across jurisdictional borders is evident in the context of feoffments to uses declared in wills. For while, by the fourteenth and early fifteenth century petitions by beneficiary-cestuis for the Chancellor's enforcement of a will's instructions are routine, ecclesiastical courts retained full jurisdiction over wills.⁹¹ Wills, even when they contained instructions to feoffees, were recorded in diocesan registers in spite of Henry II's prohibition of ecclesiastical jurisdiction over lay fee and of the illegality of devises. The Church circumvented the latter prohibition on technical analysis of the transaction such as that employed by Spelman et al. in Lord Dacre's case. Evading the prohibition of ecclesiastical jurisdiction

over lay fee required only slightly more agility: the Church took the position that it was not engaged in a matter of lay fee, but of ensuring that the testator's last wishes were kept once he or she, being dead, was powerless to do so.⁹² Indeed, the word of one's last confessor might establish enforceable instructions to the testator's feoffees to uses.⁹³ Once the Chancellor had intervened, he had merely to subpoena the priest to answer under oath whether instructions were given and, if so, what they were. The Chancellor could, thus, use his interrogatory procedure to aid feoffees in determining what the testator's instructions were, then require them to fulfill them. Feoffees did not have to obey the instructions unless the testator's intent was manifest in them.⁹⁴ In examining the confessor, therefore, the Chancellor exercised a means of enforcing testator's last wishes that promoted the interests of cestuis and furthered the canonical duty of the Church to effectuate last wills.

The most striking cases of the complementary function of Church and Chancellor in enforcing feoffments to uses, however, arise from written wills. Probated in the bishop's courts,⁹⁵ instructions to feoffees in these wills came to be enforced by the Chancellor. This division of labour, as discussed above, worked to the mutual interests of Church and State. The Church could register wills, including those containing instructions to testator's feoffees to uses - which frequently benefitted the Church⁹⁶ - being sure of

the Crown's power to enforce a testator's final wishes and to rectify feoffees' fraud or to clarify their confusion. The Crown, for its part, acquired a form of elective testamentary jurisdiction, as well as the ability to interpret the anti-devise rule interstitially and intramurally via the Chancellor. The Chancellor's ultimate exercise of this power - this time on behalf of the Crown - occurred in Lord Dacre's case.

Until Lord Dacre's case, however, the Chancellor's secular power lent force to the Church's interest in the observance of a testator's last wishes.⁹⁷ Although research reveals no instance in which the Chancellor is recorded to have enforced the instructions to feoffees in a will, one can juxtapose such wills with petitions to the Chancellor based on similar wills. Many feoffor-cestuis left wills instructing feoffees to hold land or its profits, or to convey land to the Church. These wills could have two basic purposes: to evade the Statute of Mortmain by channeling de facto gifts of freehold to religious institutions through a "use", or to "pay" the Church for prayers for the testator's, and often his family's, souls.

The Statute of Mortmain⁹⁸ of 1391 attempted to stop unlicensed grants of freehold to ecclesiastical institutions; such grants terminated feudal incidents to the overlord - ultimately the king - because institutions, unlike people, do not die. Therefore, a grant to a religious institution deprived the feudal lord of income derived after the death

of his tenant prior to seising his tenant's heir of the freehold.⁹⁹ The feoffment to uses effectively skirted the Statute of Mortmain, for it allowed the feoffor to give the use and profits of his land to the religious institution without giving the institution ownership of the freehold. Few feoffers, though, would have been so generous as to give away enjoyment of their lands during their lifetimes, even to the Church. The feoffment to uses to be declared in feoffor's will provided the perfect answer: Feoffor enjoyed his land and its profits for life, then in his will instructed his feoffees that the religious institution was to have the use and profits of the land in perpetuity. A resulting use to the feoffor and a will stating such instructions had the same effect. And since the duties of feoffees passed on death to their heirs,¹⁰⁰ the testamentary instructions on a feoffment to uses could perpetually avoid both the Statute of Mortmain's prohibition and the anti-devise rule of the common law, at least where there were to begin with several feoffees.

Two wills of the late Middle Ages illustrate the use employed to this testamentary purpose. The first, that of Sir Thomas Neville, Lord Furnival, of 1406 or 1407, left Furnival's feoffees very precise directions as to how he wanted his lands and their profits distributed.¹⁰¹ In a section of his will distinct from that in which he bequeathed his chattels, Sir Thomas instructed his feoffees to enfeoff his nephew, Robert Lumley, in fee simple of some manors in

County Derby; to enfeoff other lands and tenements to Robert Pudsay, and so forth to others not his heirs.¹⁰² But he included instructions to hold certain lands and their profits to the use of the Prior and Convent of Worsop, apparently motivated by a desire to make amends for his sins.¹⁰³

The second of the two wills, that of Sir John Rocliff of Colthorpe, is of comparable intent. Feoffor had, in the deed enfeoffing his feoffees, specified that they would hold "to the use and performance of my last will."¹⁰⁴ He therefore, retained the enjoyment of his property during his lifetime. His will, probably drafted by one of the Grey Friars of York,¹⁰⁵ provided that the profits of his lands be given to those friars in perpetuity.¹⁰⁶ In return, the friars were to pray for his and his family's souls, and to bury him in the Grey Friars' Church in York, to the left of his father - who had evidently also found proximity to the friars and provision for their prayers a convenient way of safeguarding his soul.¹⁰⁷

Not wanting to risk termination of his gifts or of the friars' prayers, Sir John specified that, "whan it shall fortune that there bee of my said feoffes lyving but ij or iij at the moste", the warden of the York Grey Friars was to choose six more, whom the original feoffees were to enfeoff.¹⁰⁸ Such a replacement was, at least by the early sixteenth century, not unusual. The desire to ensure perpetual prayers by a testamentary instruction on the

replacement of feoffees is well illustrated by the following passage from a will of 1524:

I will that my feoffes that I have enfeoffed in my landes ... make a sure, sufficiente, and lawfull astate in the lawe to such other feoffes as they shall thynke good, by th' advice of my sone Richarde ... [of certain lands and tenements] to th' use and entent to have a priest to say Masse and other divine service ... and that saide feoffes enfeoffe other sex, or eight, or moo feoffes, in the saide landes, so that the saide landes remane and be ever in feoffes handes¹⁰⁹

The testamentary instructions on the feoffment to uses, then, might be clear, but what if the feoffees simply refused to carry out the instructions. A petition to the Chancellor dating from the period 1422-26 indicates the Chancellor's willingness to intervene.¹¹⁰ But the Prioress of the Nuns of Thetford's petition was no cut-and-dried case for relief. Testator's will required his feoffees to give his land to the Nuns of Thetford, or to sell the land holding the proceeds for the nuns' use and benefit.¹¹¹ This the sole surviving feoffee refused to do, keeping the profits of the land until he sold it, then keeping the proceeds of the sale. The Prioress sought a subpoena against the feoffee, the Chancellor's interrogation of him, and specific enforcement of testator's will, "for God and in the way of charity."¹¹² If the feoffee, though, were to enfeoff the Nuns themselves, he would create a mortmain problem.¹¹³ On the other hand, failure to honour her

petition would mean that the purpose of feoffor's use, as expressed in his last will, would be frustrated - an idea abhorrent to the Church in principle, even when it did not stand to gain under the will.¹¹⁴ In addition, there was something objectionable about depriving a beneficiary, nuns in particular, of an additional means of livelihood, though this sentiment found no expression in the law.

The Chancellor must, then, as churchman¹¹⁵ and as the king's chief minister, have been torn. That this was so is indicated by the petition's indorsement (extremely rare during this period) directing that the subpoena be granted, but that the matter be heard before the King's Council, instead of by the Chancellor alone.¹¹⁶ There the full range of royal and equitable interests could be discussed by those most concerned. As the Chancellor's equitable function had originally arisen by delegation of the king via his Council, the action taken on the Prioress's petition amounted to a deferential relinquishment of equitable power in a difficult case. It seems a reasonable guess that the confluence of royal interests and equitable principle in the King's Council would have produced a compromise: The uncooperative feoffee would be ordered to give the proceeds of sale of the lands to the nuns, avoiding the mortmain problem created by the will's first alternative.¹¹⁷

Testamentary instructions to feoffees could also serve the purpose of having prayers offered for the souls of the testator and others he might designate. Already illustrated

by the will of Geoffrey Proctor, this sort of instruction occurred fairly frequently in wills of the fifteenth century.¹¹⁸ The will of William, Lord Latimer, probated in 1381, provides an early example.¹¹⁹ Latimer instructed his feoffees to sell his London houses to the highest bidder and to use the proceeds to set up a chantry staffed by two priests who would pray perpetually for his soul and that of King Edward III. In 1398, John of Gaunt, son of King Edward III and father of Henry Beaufort, in an extremely long and detailed will, gave instructions that his feoffees were to spend some of the profits of the lands of which he had enfeoffed them to set up a chantry.¹²⁰ John of Gaunt's will is, in this respect, interesting because it shows that even those closest to the king had reasons to employ the "use" to create a quasi-devise.¹²¹ The will of Thomas Cheworth provides an interesting counterpoint to those of Latimer and John of Gaunt because it gave instructions to set up a chantry only if he died without male issue to take his lands.¹²² In that event, prayers at the chantry were to be offered not only for his own soul, but for those of all Christians¹²³ - by contrast to Latimer's limiting intention. Perhaps the most charming example, however, comes from the will of Thomas, Lord Scrope, who instructed that profits of his lands be used, inter alia, to pay a priest to, "sing for my saule vij yere; and that they [his feoffees] see yt the said preste be an able preste."¹²⁴ One wonders whether he expected the Chancellor (or Church) to intervene if the priest were, in some sense, not "able".

The Chancellor's willingness to intervene to enforce testamentary instructions to feoffees is indicated, too, where the instructions were that debts¹²⁵ or the terms of a marriage agreement¹²⁶ (which amounted to the same thing) be paid. Latimer's will had provided for the sale of his manors to the highest bidder, with the proceeds to go towards his debts, if his personal property did not serve to meet those obligations.¹²⁷ Scrope, seeker of the "able" priest, had made a similar provision.¹²⁸ Two fifteenth century wills instruct the testator's feoffees to carry out the terms of marriage agreements. Richard Barton's will specified how the feoffees were to transfer real property as previously agreed with the fathers of the two spouses-to-be of his son and daughter.¹²⁹ Sir Henry Vavasour, in a codicil to his will, instructs his feoffees to perform the marriage agreement he has made with his son's fiancée's father.¹³⁰ Apparently, the wedding had been planned between execution of his will and of this codicil. Requiring feoffees to perform the terms of these agreements, or to make good an indebtedness, was an obvious point at which the Chancellor could enforce nudum pactum feoffments to uses of dubious enforceability under canon law,¹³¹ as well as to extend the range of relief available to cestuis to include testamentary matters.

Most commonly, of course, wills instructed feoffees to provide for widows and children who were not heirs to the father's estates; the strict rule of primogeniture, as well

as ordinary affection for one's family, dictated that these sorts of instructions should predominate.¹³² Out of a very wide variety of such provisions made in wills, only a few examples will be cited to indicate the breadth of testators' wishes at the close of the Middle Ages.

Robert Lascelles, in about 1507, provided for his wife and children in a codicil devoted exclusively to instructing his feoffees.¹³³ That was ordinary, but Lascelles also gave instructions that his feoffees should give to any conceived, but not yet born, son or daughter certain lands or the profits of those lands, respectively.¹³⁴ Sir Thomas Markenfield, by contrast, directed that his feoffees should hold some of the profits of his former lands to enable his son and heir to get two years of education at Oxford, followed by three years at one of the Inns of Court.¹³⁵ And William Vavasour, having provided for prayers for his family's souls, closes his will's instructions by denying that he ever promised his nephew any lands at the time of the latter's marriage, saying he stood ready to answer to God on the matter.¹³⁶ If God did not ask, at least the Chancellor might; armed with the will's denial, his feoffees would have a probative answer.

The ordinary type of petition for the Chancellor's enforcement of testamentary instructions benefitting family member beneficiaries is illustrated by one from Bishop Langley's second term as Chancellor.¹³⁷ Petitioner, grandson of feoffor-testator, sought a subpoena to compel

the then feoffees (enfeoffed by the sole remaining heir of the original feoffees), to enfeoff certain estates to him in tail, as had been his grandfather's instructions to his feoffees. Three of the six new feoffees refused to enfeoff him, prompting him to seek the Chancellor's intervention with the plea: "May it please your most gracious Lordship to consider that the said suppliant can have no remedy at common law ... for God and in way of charity."¹³⁸ The grandson was just as much outside the common law's protection as if he had been a cestui under a feoffment to uses effective during feoffor's lifetime.

Egregious cases demanded only fine-tuning of the basic remedy of specific performance of the testamentary instructions. In one such case, not only did his feoffees fail to hold profits of testator's lands to the use of his widow, but one of them deprived her of her daughter's wardship by kidnapping the daughter.¹³⁹ Evidently, he also hoped to deprive the widow of the profits of arranging a suitable marriage for her daughter.¹⁴⁰ The twice-disappointed widow not only sought specific performance, but indemnification for the profits of wardship lost due to the feoffee's action. One may safely assume, in spite of the record's silence, that the Chancellor was receptive to the widow's plea.

Finally, one must ask what in these wills indicates that testators expected their testamentary instructions to be enforced. One must admit that the wills contain no "or

else" clauses; instead, the attitude towards enforcement seems precatory. The will of Roger Flore of London and Oakham, probated in 1428 and which Holdsworth calls typical of wills containing instructions to feoffees, closes with the prayer that God, through the intercession of Saint Mary and all the saints, will give his feoffees the grace to act according to the will's instructions.¹⁴¹ Thirty years later, Sir Thomas Chaworth began his will by noting that he had enfeoffed all his lands, tenements, and appurtenances to the uses declared in his will, "and tenderly besichith and praith them [his feoffees] of ye grete truste and cordiall affeccion that he hath in thaim, yat thei wille vohsafe to perfourme and execute his wille in forme yat foloith"¹⁴² The cestui /testator-feoffee relationship in each case seems to be based upon friendship and confidence, and not upon legal compulsion. Accordingly, one should read these prayers as signs of deference and affection, respect for, and not distrust of, the feoffees. Cestui-testators, after all, did not want to have their instructions enforced, but merely wanted them observed. The words of entreaty also suggest the spiritual significance the Church accorded to one's last will.¹⁴³

One must, nonetheless, ask whether the relationship was really as informal as these precatory words suggest to a modern-day lawyer. For a variety of reasons, one doubts that it was. First, as discussed above, there is at least some evidence that cases involving feoffments to uses

declared by a deceased feoffor were heard in at least some Church courts.¹⁴⁴ The evidence has, as stated, its limitations, but does not stand alone, for there is broader evidence of the enforcement of testamentary instructions to feoffees. By the time Flore and Chaworth drafted their wills, petitions to the Chancellor for enforcement of testamentary instructions were frequent. The mere frequency of these petitions, let alone the Chancellor's already evident exercise of equitable principles in response to cestuis' vulnerability even when feoffors were still alive,¹⁴⁵ indicates that by the first half of the fifteenth century at the latest, testators could expect the Chancellor to order specific performance of the testamentary instructions they gave to their feoffees.

In addition, by the time of Flore and Chaworth's wills, the jurisdictional transfer of unsworn obligations was, under the evidence and hypothesis presented above, nearly complete.¹⁴⁶ Testators probably could take it for granted by then that if the Church courts did not take fidei laesio jurisdiction over a feoffee's failure to comply with his instructions, at least the Church registered and probated wills.¹⁴⁷ The testamentary instructions to feoffees, then, comprised part of a valid expression of a deceased person's last wishes for distribution of his property, honouring which was the Church's sacred obligation.¹⁴⁸ The ecclesiastical Chancellors of the Middle Ages would have been familiar and in agreement with the Church's views on the

subject; they bridged the sacred-secular jurisdictional divide. This dual identity of the Chancellor may have had a psychological appeal to disappointed beneficiaries. Because, moreover, to the Church it was more important that justice be done, than that it be the institution to administer justice, the Church did not resist the rise of the Chancellor's jurisdiction over testamentary instructions to feoffees.¹⁴⁹ Had the Church resisted, it would have had to resist the very beneficiaries it sought to protect, for the jurisdictional transfer did not occur by authoritative fiat, but by acquiescence to the apparent wishes of beneficiaries, who seem to have begun, by the late fourteenth or early fifteenth centuries, to prefer to bring their petitions for redress under the secular umbrella, rather than under that of the Church. Presumably, after all, the fraudulent feoffee had, consciously or unconsciously, removed himself from the circle of those frightened by the threat of ecclesiastical (temporalized spirtual) penalties.¹⁵⁰

Finally, considering that it was the common law of the realm which prohibited devises and failed to give cestuis rights to compel their feoffees' performance of a feoffor's intentions, there was both good reason and psychological appeal to petitioning for the Chancellor's, rather than the Church's, exercise of epieikeia. If the laws of the realm constituted the cestui's problem, it made sense to seek a dispensing and remedial authority of greater than equal moral authority, at least in a given case. Finding

that countervailing authority at the highest level of the government, personified by the Chancellor who himself bore clear traces of the Church's epieikeia function, the ecclesiastical courts, a petitioner's only other sufficiently powerful remedial venue, seemed no better than a second choice.

In short, the Crown itself, in the person of the Chancellor, provided the means whereby beneficiaries under testamentary instructions finally could be confident of compelling feoffees to conform their conduct to the will's terms. It was, therefore, the king, by condoning his Chancellor's actions, who, by the fifteenth century, made feoffors confident of their ability to avoid the common law rule against devises. But by the same token, the Crown could terminate feoffors', and therefore cestuis', ability to avoid the common law's prohibitions by employing the feoffment to uses - hence the result in Lord Dacre's case.

But this power of the Crown did not begin in the secular sphere, it only found its most appropriate home there - which would have come as no surprise to Aristotle and Aquinas. For it was the Aristotelian principle of epieikeia, as rearticulated in the Church of the Middle Ages, most notably by Aquinas, that provided the theoretical content of the Chancellor's jurisdictional role in medieval England. It does not denigrate equity's debt to Aristotle, moreover, to argue that the administrators of the equitable - medieval Chancellors - saw themselves as applying an

ecclesiastical principle - a Christianized Aristolianism. Their immediate debt was to Aquinas. Boat, captain, and cargo were all, in other words, of ecclesiastical origin, crossing the hazy jurisdictional channel separating Church and State.

Lord Dacre's case and the Statute of Uses may, then, have a significance beyond limiting the feoffment to uses. For in Henry VIII's efforts to strengthen the English State, in significant part with respect to the Church, it was natural that he limit the Church's power within the State. The break with Rome of 1534¹⁵¹ went far towards this goal, but vestigial influences of the pre-Reformation Church remained in the equitable practice of the Chancellors. The problem was how to secularize epieikeia in the Chancery. Henry tried appointing a common lawyer lay person as Chancellor, but Sir Thomas More proved to be more committed to the Roman Church than many of his episcopal predecessors had been. The problem, then, was not so much the difference between ordained and lay-Chancellors, nor even of common lawyers and those trained in canon law (witness the minority - common law judges - in Lord Dacre's case), but the re-secularization of a principle - how to change Aquinian back to Aristotelian epieikeia in the Chancery. The means of Henry's success in this venture were to strike a telling, but not fatal, blow to the feoffment to uses by engineering the result of Lord Dacre's case and consequently passage of the Statute of Uses, both in 1535.¹⁵²

To limit the feoffment to uses was to curtail the Chancellor's power as ecclesiastical conscience of State: Henry not only struck at the feoffment to uses as the majority of the Chancellor's epieikeia function, but thereby also tacitly confirmed the point Milsom was to make - that the feoffment to uses was a primary vehicle of the rise of the Chancellor's equity jurisdiction.¹⁵³ With Lord Dacre's case and the Statute of Uses, Henry achieved, by a drastic limitation of an almost universally employed device, a more complete separation of Church and State. As an ironic footnote, one observes that this limitation was applied to a wholly English device of secular origin; indeed, the "use's" only direct ecclesiastical tie - ecclesiastics' role in its enforcement - was, by 1535, vestigial.

7. Conclusion

In closing, one aims not to restate or repeat arguments made above, much less to make additional claims, but merely - and briefly - to remind the reader of some salient points. First, this study has sought to put the feoffment to uses into its wider historical context, hoping to illuminate the scope of ecclesiastical contributions to that legal concept's development and enforcement. In so doing, this study has viewed the "use" not as just another substitution of English law, but as fundamentally a pragmatic reaction to feudal constraints on the alienation of freehold lands and tenements. The "nobility" of medieval England, those of substantial wealth - including land - and influence, found in the transactions creating a "use" a convenient means of avoiding the feudal incidents of tenure, as well as a socially necessary way of bestowing freehold upon non-heirs, chiefly family members and the Church.

The feoffment to uses, in other words, developed as a reaction to the Norman feudal system in post-Conquest England. But while it first becomes evident at the time of the twelfth century Roman law revival, it bears little resemblance to the Roman concepts of usufructus and fideicommissum. Indeed, one cannot simply interpret a document conveying freehold land to one party ad usum of another as a Roman usus; in England it was more likely to

indicate the quite different ad opus feoffment to uses. Neither did canon law's restatement of Roman law bring Roman law concepts of property ownership to bear on the feoffment to uses. When canon law formed the basis for a Roman-style dominium-usufructus dichotomy, that concept is distinguishable from an ad opus "use": The Franciscans were beneficiaries of both concepts; both were equally suited to their needs.

But the Franciscans did not constitute the only ecclesiastics involved in the early feoffment to uses. The medieval Chancellors of England were nearly all high-ranking ecclesiastics; they bridged the jurisdictional gap separating Church and royal courts. With one foot firmly planted in each camp, they imported into the interpretation and enforcement of the common law the Christianized Aristotelian epieikeia of Aquinas. Nowhere was the importation of epieikeia a more significant development than where feoffments to uses existed, for application of epieikeia allowed the Chancellor to enforce the cestui's interest in freehold land without either "executing the use" (i.e., making the cestui a feoffee, as the Statute of Uses would), or challenging the validity of the relevant common law rules.

Ecclesiastical epieikeia imported by ecclesiastics into royal jurisprudence also had the effect of furthering the Church's objectives in testamentary matters. The English Church had the right to register and probate wills pursuant to its duty to effectuate the last wishes of the

dying. Since a feoffor-cestui's last will often stated the uses to which his feoffees were to hold after his death, by ordering specific performance of feoffees' obligations under feoffments to uses, the Chancellor could often give secular force to the Church's testamentary interests. In fact, in some dioceses at least, testamentary instructions to feoffees to uses were enforced in the Church courts. The Chancellor may, therefore, have imported this jurisdiction as well as the theory under which to enforce it (epieikeia) into royal jurisprudence. And, one cannot but note that ecclesiastical foundations often benefitted under feoffments to uses, for "uses" could circumvent the statutes prohibiting conveyances of freehold lands and tenements into mortmain.

In short, when medieval churchman-Chancellors began enforcing the feoffment to uses, the English Church was able to serve a variety of its own interests, as well as those of wealthy landholders, through the agency of its own officials acting at the highest level of royal government. The Church, in other words, exercised a pervasive, if indirect, role in the evolution of the "use" - a role both spiritually and temporally convenient, at the theoretical no less than at the administrative centre of the common law. For at the core of any common law rule was its purpose which, in particular cases - a disproportionate number involving cestuis' interests under feoffments to uses - only the Chancellor's application of a Christianized epieikeia could effectuate.

Appendix: Churchman-Chancellors as an
Ecclesiastical Contribution to the
Evolution of the Feoffment
to Uses

As has become evident, the Chancellor and his Chancery were the focus of the enforcement of the English feoffment to uses. The Chancery adopted some forms of canon law procedure, notably judicial examination of the respondent under oath; and its intervention in general helped to shape a flexible alternative to the rigidified land law of conveyances administered in the common law courts. In so doing, the Chancery advanced the interests not only of landowners seeking flexible means of conveyance or of providing for family members who were not heirs, but also of the Church, which would have been deprived of many landowners' gifts of realty but for the development and the Chancellor's enforcement of the feoffment to uses. It is fitting now to address the question whether the maturation of the feoffment to uses in the Chancery was, at least in part, an ecclesiastical contribution to English land law not on account of any legal doctrines imported from the Romano-canonical tradition, but merely because the medieval Chancellors and their administrative assistants tended overwhelmingly to be ecclesiastics of high standing.

The first clause of Magna Carta had, in 1215, declared that the English church should be free, meaning free to elect its own officials in accordance with canon law.¹ But

during that very century, the selection of English bishops would be made by the king, subject to confirmation by a perfunctory and predictable vote of assent by the cathedral chapter involved.² By the fifteenth century, the heyday of the Chancellor and of the feoffment to uses, the method had changed little. The king had merely to secure the pope's confirmation before having his nominee voted-in by the cathedral chapter. Once elected, the bishop paid his homage to the king, after which followed his consecration and enthronement.³

In the light of the method of their selection, as well as of the fact that they were usually more preoccupied with the administration of their temporalities, with politics, and in their consistory courts than with spiritual edification,⁴ it may seem far-fetched to call the contributions of the Chancellors of the Middle Ages ecclesiastical at all. Such a denigration of their religious zeal or status, however, implies an irrelevant retrospective value-judgment.

True, the medieval English bishop was likely to be a political friend or reliable relation of the king or of his close associates.⁵ But they were also chosen as politicians, statesmen, and administrators of proven ability. Many were educated and cosmopolitan, products of the universities at Bologna or Paris, or those emerging at Oxford and Cambridge.⁶ Some, indeed, can without exaggeration be called scholars, for example Robert Grossteste, bishop of Lincoln, Richard le Poore, bishop of Salisbury and Durham, and Richard,

bishop of Chichester.⁷ Besides their education, some would have had judicial experience as archdeacons or rural deans. Indeed, of those who were university-trained in the Middle Ages and were priests, those who did not become academics tended to become civil lawyers.⁸ Finally, and very significantly, the king did not have to pay salaries of ecclesiastical officials co-opted into the business of state. The "faithful" and the bishop's feudal tenants provided, often lavishly, for the bishop they seldom, if ever, saw. From the king's standpoint, therefore, there was no reason not to appoint a high-ranking and reliable ecclesiastic to that central administrative post, the Chancellorship of England.

In short, medieval English bishops were not usually selected by their ecclesiastical superiors, but by the king, and they were chosen for their education and administrative talents, along with political reliability. It is unlikely that, had the decision been left solely to the Church as Magna Carta had envisioned, the episcopal nominees would have differed significantly. Given that the medieval Chancellors were largely taken from the episcopal ranks, and that they greatly enhanced the utility of the feoffment to uses by enforcing the cestui's interests, one generalizes, but is not incorrect, in asserting that the Churchman-Chancellors themselves comprised an ecclesiastical contribution to the development and enforcement of the feoffment to uses. For as McFarlane stated of "institutions" (which

word in the present context might encompass either the Chancellor's epieikeia jurisdiction, or the feoffment to uses itself), they "seem to have a life of their own, but this is only an appearance. They are born, develop, change, and decay by human agencies. Their life is the life of the men who make them."⁹ In the context of that generality, the present author includes the following brief outlines of the medieval Chancellors as ecclesiastics.

These biographical sketches do not purport to be comprehensive, but only to identify, with dates where possible, the major ecclesiastical positions held, formerly held, or to be attained by those who were Chancellors of England between 1066 and 1535. Information adding to one's appreciation of the ecclesiastical function or temperament of the individual is included when ascertainable. Laymen who became Chancellors are also included where their credentials would form an interesting contrast to those of their ecclesiastical colleagues. In many cases, relevant dates and even titles are only historical approximations based on the available evidence. The numbers following each name indicate the year(s) during which that individual was Chancellor of England. In compiling this list, the present author has made extensive use of E. Foss, A Biographical Dictionary of the Judges of England, 1066-1870, (1870), and N. Underhill, The Lord Chancellor (1978).

List: Chancellors and the Church,
1066-1535

Herfast (also known as Herfastus or Arfastus), by 1068, to 1070. Monk of Abbey of Bec in Normandy; then became one of William, Duke of Normandy's chaplains - before the Conquest. After the Conquest, probably King William's first Chancellor. Retired, mid-1070, to become bishop of Helmham, Norfolk (which see became see of Thetford in 1075). (d. 1084).

Osmund, 1070-78. Nephew of William the Conqueror, and Count of Seez in Normandy. After Conquest, created Earl of Dorset and Chancellor. Sometime (probably after his Chancellorship), he became ordained and bishop of Sarum. Canonized by Pope Calixtus III in 1457. (d. 1099).

Maurice, 1078-85. One of the chaplains of William, Duke of Normandy, at time of Conquest. Became bishop of London in 1083 or 1085; if the earlier date, then held bishopric for two years while Chancellor.

Gerard, 1085-?. (No reliable information).

Robert Bloet, pre 1090, to 1093. Accompanied William Rufus to England to succeed William the Conqueror. Resigned Chancellorship in 1093, probably to become bishop of Lincoln, in which post he remained influential on William II and Henry I. (d. 1123).

William Giffard, 1093-1101. A chaplain to the Conqueror. Consecrated bishop of Winchester in 1107 (although elected to that post around 1100). Credited with attracting the Cistercian monks to England. (d. 1129).

Roger of Salisbury, 1101-02. Curate at Caen, noted for the brevity of his masses when Prince Henry and his courtiers were in attendance. Seems to have resigned Chancellorship at about the time he was appointed bishop of Salisbury (though he was not actually consecrated a bishop until

1107, when the investiture controversy had been resolved).
(d. 1139).

Waldric, 1102-07. Possibly bishop of Laon. (No other reliable information).

Ranulf, (also known as Arnulph), 1107-23. A chaplain to Henry I. Foss says he "did not live long enough to attain the episcopal honours usually awarded to chancellors," but was said to be "Abbas de Salesbia" (probably Selby). Foss, Judges of England at 546 (1870). (d. circa 1123).

Geoffrey Rufus, 1123-33. No details prior to the commencement of his term as Chancellor in 1123. Became bishop of Durham in 1133. Held much property, especially ecclesiastical (e.g. vacant sees), in fifteen counties. (d. 1140 in Durham Castle).

Robert de Sigillo, 1133-35. Sometime bishop of London. (No other reliable information).

Roger le Poer, 1135-39. Son of Roger of Salisbury, supra. (Other details, including his ecclesiastical status, unknown).

Philip de Harcourt, 1139-40. Scant mention; no ecclesiastical details.

Robert de Gant, 1140-54. Provost of Beverley; dean of York from 1148 to his death (i.e. when he was Chancellor). (d. 1154).

Thomas Becket, 1154 (or 1155)-1162. Always headed for an ecclesiastical career: At age ten, he was placed under the care and tutelage of Robert, prior of Merton. Attended schools in London, then in (university of?) Paris. Attached to the household of archbishop Theobald, who made him canon of St. Paul's and Lincoln, and beneficiary of some ecclesiastical "livings". Theobald also sent him to study canon and civil law at Bologna and Auxerre - after

which Becket functioned as archepiscopal ambassador to Rome. Made archdeacon of Canterbury in 1153, as well as provost of Beverley (succeeding Robert de Gant, supra). Henry II, immediately after his coronation, made Becket Chancellor. (N.B. all Becket's previous experience had been ecclesiastical, and that he was the first non-Norman Chancellor.) Henry II gave Becket custody and profits of a number of vacant bishoprics and abbacies. On June 2, 1162, Becket was ordained priest (evidently having taken only minor orders previously); on June 3, 1162, he was consecrated archbishop of Canterbury, having resigned the Chancellorship. (d. 1170).

Geoffrey Ridel, 1162-73. A chaplain of Henry II, and Becket's successor as archdeacon of Canterbury in 1162 (but there was no love lost between the two). From 1169-73, Ridel was custodian of the vacant see of Ely; became bishop of Ely in 1173. (d. 1189).

Ralph de Warneville, 1173-82. Sacrist of Rouen; treasurer of York. After Chancellorship, archbishop of Lisieux. (d. ?).

Geoffrey, 1182-89. Bastard son of Henry II, and a deacon. Became priest to become bishop of Lincoln; as such, was first Chancellor who was certainly Chancellor while holding a bishopric. Cf. N. Underhill, The Lord Chancellor at 17-18 (1978). But see re Maurice, supra. Later, Geoffrey became archbishop of York. (d. ?).

William of Longchamp, 1189-97. Richard I's Chancellor (until Longchamp's death). Became bishop of Ely and papal legate in England, Wales and Ireland (through Pope Clement III) while Chancellor. Was also an extremely powerful figure - chief justiciary and co-regent - while the king was away on Crusade. (d. 1197).

Eustace, 1197-99. Dean of Salisbury, 1195; archdeacon of Richmond, 1196. Bishop-elect of Ely, August 1197;

consecrated March 8, 1198 (therefore, was already Chancellor). Chancellorship ended with King Richard's death in 1199. In 1207, with the bishops of London and Worcester, Eustace demanded that King John allow the return to England of Stephen Langton, archbishop of Canterbury; their boldness led to five years of ostensibly voluntary exile. (d. 1214).

Hubert Walter, 1199-1205. Circa 1185 became dean of York. Founded a Premonstratensian monastery for the repose of the souls of his parents and of his patron Ranulph de Glanville and the latter's wife. Immediately after Richard I's coronation, Walter became bishop of Salisbury; went on Crusade with Richard I. Became archbishop of Canterbury in 1193, and soon was Chief Justiciary (in which capacity he raised Richard I's ransom), as well as papal legate in England. Under papal pressure, resigned as Chief Justiciary in 1198. Walter crowned King John, thereafter becoming the King's first Chancellor. Founded monasteries at Dereham and Wolverhampton. (d. 1205).

Walter de Gray, 1205-14. 1205 - purchased Chancellorship for 5,000 marks, to be paid in £500 sums twice yearly. Archdeacon of Totnes and prebend of Exeter, 1207. Elected bishop of Lichfield and of Coventry, 1210 or 1213; elections later nullified. Resigned Chancellorship and was elected bishop of Worcester, 1214. May 24, 1216, became archbishop of York (another office he seems to have bought). (d. 1255).

Richard Marsh, 1214-26. Bishop of Durham from 1217.

Ralph Neville, 1226-44. Dean of Lichfield, 1214; chancellor of Chichester 1222; November 1223, became bishop of Chichester. Built mansion for self and successor bishops of Chichester, eventually occupied by the Earls of Lincoln, who gave their title to it - now the core of Lincoln's Inn, in Chancery Lane. (The name

Chancery Lane is, therefore, said to point to Neville's occupation of this mansion.) Monks of Canterbury elected Neville archbishop in 1231; Henry III approved, but Pope Gregory IX refused to confirm the election (apparently accepting the complaint that Neville was uneducated and potentially rebellious). Neville fell from royal favour in 1236, but retained the Chancellorship through his popularity with the barons. Although elected bishop of Winchester in 1238, Henry III persuaded the Pope to annul the election (to preserve the vacancy for the queen's uncle). (d. 1244).

(1244-55: Period of retrenchment; Chancellors weak and insignificant, and their terms brief).

Henry de Wengham, 1255-60. Bishop of London from 1259.

Nicholas de Ely, 1260-61; 1263. Archdeacon of Ely circa 1249. Treasurer of Exchequer, 1262, and after his brief term as Chancellor in 1263. Bishop of Worcester, 1266; translated to bishopric of Winchester, 1267. (d. 1280).

Walter de Merton, 1261-63; 1272-74. Educated at convent of Merton and became a clerk of Chancery. Prebend of St. Paul's, Exeter, and Salisbury. July 1274, elected bishop of Rochester, resigning the Chancellorship approximately two months later. (d. 1277).

John Chishull, 1263-64; 1268-69. Archdeacon of London, 1262; chancellor of the Exchequer, 1264; dean of London, 1268; treasurer of Exchequer, 1270-72; bishop of Lincoln from 1273. (d. 1280).

Thomas Cantilupe, 1264-65. Studied under Robert Kilwarby (later archbishop of Canterbury and cardinal), in Oxford. Then went to Paris-Sorbonne to study philosophy and to Orléans to study civil law. Then returned to Oxford, where he took a doctorate in canon law. Chancellor of Oxford University, 1262. After resigning as Chancellor of England, returned to Oxford and took a doctorate in divinity.

Archdeacon of Stafford, 1266; canon of York, Lichfield, London and Hereford. Bishop of Hereford, 1275, in which office Cantilupe became a champion of ecclesiastical freedom from royal control (cf. Becket). (d. 1282). Miracles were associated with Cantilupe's bodily remains. Pope John XXII canonized Cantilupe on April 17, 1320; he was the last Englishman to be canonized until fairly recently. Cantilupe's "arms" remain those of the bishops of Hereford.

Walter Giffard, 1265-66. Canon of Wells and a chaplain to the pope, in 1264 he was elected bishop of Bath and Wells. Resigned Chancellorship in 1266, soon after his appointment as archbishop of York. Served also as sheriff of Nottingham and Derby; a regent of the realm when Edward I was gone at the start of his reign; constable of the Tower of London; possibly treasurer of Exchequer. (d. 1278).

Godfrey Giffard, 1266-68. (Brother of his predecessor as Chancellor, Walter Giffard). Archdeacon of Barum (Barnstaple), 1265; chancellor of the Exchequer, 1266, prior to becoming Chancellor of England. June 1268, became bishop of Worcester, continuing as Chancellor until October 29, 1268. Head justice in eyre in counties of Hereford, Hertford and Kent. (d. 1301).

Richard Middleton, 1269-72. One of king's justices, 1262-69. Apparently was at least in minor orders (of the Church).

Robert Burnell, 1274-92. Canon of Wells and archdeacon of York, circa 1269-73. Elected bishop of Bath and Wells, 1275. Monks of Canterbury elected Burnell archbishop in 1278, but Pope Nicholas III annulled the election (and installed John Peckham). Burnell was the longest serving Chancellor thus far, holding the office until his death in 1292.

John Langton, 1292-1302; 1307-10. Clerk in Chancery and first person clearly to be denominated Master of the Rolls. Canon of Chichester, Lincoln and York. Made archdeacon of Canterbury in 1299, by direct action of Pope Boniface VIII (who, however, had refused to confirm King Edward I's selection of Langton for the bishopric of Ely in 1298). Became bishop of Chichester, 1305, and seems to have taken his episcopal duties seriously. (d. 1337).

William Greenfield, 1302-05. Summoned to Parliament from 1293. Canon of York by 1299, and became dean of Chichester that year. Elected archbishop of York, 1304. Supporter of the Knights Templar at Council of Vienne, 1311. (d. 1315).

William Hamilton, 1305-07. Clerk of Chancery; archdeacon of West Riding of Yorkshire, 1292; dean of York, 1298, as well as dean of the Church of St. Burian, Cornwall. (d. 1307).

Ralph Baldock, 1307. Archdeacon of Middlesex, 1276; dean of St. Paul's, 1294; elected bishop of London in 1304 (but only consecrated in 1306). (d. 1313).

Walter Reynolds, 1310-14. Edward II made Reynolds bishop of Worcester in 1308 and archbishop of Canterbury in 1313.

John Sandale, 1314-18. An official of the Exchequer; co-treasurer by 1303. Chaplain to Edward II. Chancellor of the Exchequer, 1307, in which capacity he was involved in ordering the arrest of the Knights Templar. Treasurer of England from 1310-12. Made treasurer of Lichfield, canon of York, and possibly dean of London in 1310. Elected bishop of Winchester, 1316. Became treasurer of England after resigning Chancellorship. (d. 1319).

John Hotham, 1318-20; 1327-28. Canon of York. Chancellor of the Exchequer, from December 1312; resigned to become bishop of Ely, July 20, 1316. Treasurer of Exchequer, 1317-18, and often a special emissary of the king.

Edward III made Hotham his first Chancellor, though Hotham retired to administer his diocese after just one year. (d. 1336).

John Salmon, 1320-23. Prior of Ely (hence, also known as John of Ely). Elected bishop of Norwich, 1299; held that bishopric throughout his Chancellorship, and to his death in 1325.

Robert Baldock, 1323-26. Archdeacon of Middlesex, 1314. Active in royal circles from 1317. Elected bishop of Norwich in 1325, but abjured his election when he found out that the Pope (John XXII) himself desired to make the appointment. Died imprisoned (for taking the side of Edward II against Queen Isabella), and bereft of possessions, in 1327.

Henry Burghersh, 1328-30. As canon of York five times recommended by Edward II to Pope John XXII, Burghersh became bishop of Lincoln in 1320. Treasurer of the Exchequer from soon after accession of Edward III; resigned to become Chancellor of England in 1328; treasurer again from 1335-40. (d. 1340).

John Stratford, 1330-34; 1335-37; 1340. Doctor of laws, Merton College, Oxford; active in royal legal circles by 1317. Archdeacon of Lincoln, 1319. Archbishop Hubert Walter (see supra) appointed Stratford dean or chief judge of the Court of Arches - where Stratford earned a high reputation. Served frequently as emissary to the pope. Was in Avignon (at papal court) in 1323 where, on the death of the bishop of Winchester (R. de Asser), Stratford secured that bishopric for himself. This made Edward II angry (for he had intended Robert Baldock - see supra - for the see); the pope (John XXII) insisted, and so prevailed: The King finally relented, and Stratford became one of Edward II's most loyal servants. Edward III brought Stratford into his inner circles of government, making him Chancellor in 1330. Stratford was translated

to the archbishopric of Canterbury, November 1333; resigned as Chancellor, 1334, but held the office twice more. (d. 1348).

Richard de Bury, 1334-35. (Real name, Richard de Aungerville).

At Oxford, acquired a reputation as a bright, learned, and morally strong individual. After Oxford, went to Durham as a monk. Circa 1319, became tutor to Edward II's heir-apparent; when his tutee became Edward III, de Bury received high royal preferments, and became prebend of Lincoln, Sarum, and Lichfield. Dean of Wells, 1332; a chaplain to Pope John XXII, 1333. Pope John appointed de Bury bishop of Durham in 1333; ironically, his old confrères, the monks, had elected a different candidate. Was both treasurer of Exchequer and Chancellor in 1334. Acclaimed by all as fair and very learned, a bibliophile (giving books to Durham - now Trinity - College, Oxford) and a warm personality. De Bury: the archetypal medieval Churchman-Chancellor and statesman. (d. 1345).

Robert Stratford, 1337-38; 1340. Brother of John Stratford (see supra). Oxford-educated parson of Stratford-on-Avon; became Chancellor of Oxford University. Chancellor of Exchequer, 1331. When his brother John was on his various foreign missions, he entrusted Robert with the Great Seal; so Robert functioned as de facto Chancellor from a date earlier than his installation as Chancellor (succeeding John Stratford) in 1337. By September 1334, was archdeacon of Canterbury; also canon of St. Paul's and Lincoln. Resigned Chancellorship and became bishop of Chichester in 1338. Had a high reputation as both politician and courageous prelate. (d. 1362).

Richard Bintworth, 1338-40. Bishop of London.

Robert Bourchier, 1340-41. Summoned to Parliament of 2 Edward III as knight from Essex. Chief justice, King's Bench in Ireland, 1334. Again summoned to Parliament, 1340. Edward III returned from France alarmed by rumours,

and dismissed Robert Stratford, wishing to appoint a lay Chancellor in his place; Bouchier was chosen. Subjected to much opposition, Bouchier resigned the Chancellorship the next year. Became a peer, 1343. (d. 1349).

Robert Parving (also known as Parning), 1341-43. Serjeant at law, 1330; king's serjeant from 1335. Justice of Common Pleas, 1340; after just two months in that role, Parving became chief justice, King's Bench. Resigned to become treasurer of Exchequer, by the end of 1340. (d. 1348).

Robert Sadington, 1343-45. Appointed chief baron of Exchequer, 1337; became treasurer, 1339. (d. 1350).

John Offord, 1345-49. Dean of Arches, early in Edward III's reign; extraordinary royal ambassador; professor of civil law; canon of St. Paul's; by 1339, archdeacon of Ely; dean of Lincoln, 1344. Archbishop of Canterbury, 1348, by agreement of Edward III and Pope Clement VI to annul the monks' election. (d. 1349 - prior to his enthronement at Canterbury).

John Thoresby, 1349-56. Noted at Oxford as a scholarly person, Thoresby studied divinity and took a degree in both (canon and civil) laws. Clerk in Chancery, 1327; member of mission to Pope John XXII, to persuade the Pope to canonize Thomas, Duke of Lancaster. Master of the Rolls, 1341; canon of Lincoln, 1344, and a frequent royal ambassador to the papal court. Became bishop of St. David's, 1347; translated to bishopric of Worcester, 1350; became archbishop of York, 1352. Longest serving Chancellor of Edward III; retired from Chancellorship in 1356, but remained active as archbishop of York. With the approval of Pope Innocent IV, Thoresby settled the longstanding dispute over precedence between the archepiscopal sees: The archbishop of York became "primate of England", while the archbishop of Canterbury (then, Islip) became "primate of all England". Thoresby was a man of

high standards who had a correspondingly high reputation among his contemporaries. (d. 1373).

William of Edington, 1356-63. Educated at Oxford. Canon of Salisbury, 1335; chancellor of the Exchequer, 1344; Pope Clement VI's choice as bishop of Winchester, 1345 - Edward III agrees, 1346; treasurer of Exchequer, 1346 to at least 1356. First prelate of Order of the Garter, 1349; (Edington's successor bishops of Winchester were also to hold that position). Monks elected Edington archbishop of Canterbury in about 1365, but he declined, preferring to stay in Winchester. (d. 1366).

Simon Langham, 1363-67. Monk, 1349, prior and abbot of Westminster, 1355. Treasurer of Exchequer, 1360-63. Elected bishop of both London and Ely in 1362; he chose Ely. Pope translated Langham to be archbishop of Canterbury, 1366. Pope Urban V also lavished a cardinalate on Langham; Langham's acceptance of that honour offended Edward III; Langham, therefore, resigned as archbishop and went to the papal court at Avignon. About 1372, Langham became Cardinal of Preneste (although he was known as the Cardinal of Canterbury). His efforts at mediation between France, England, and the Pope restored him to Edward III's friendship. Held prebend at York; was archdeacon and treasurer of Wells; and was dean of Lincoln. (d. 1376).

William of Wykeham, 1367-71; 1389-91. A royal chaplain by 1359, but not ordained priest until 1362. Held many prebends and ecclesiastical "livings", becoming archdeacon of Northampton in 1363 (a post he traded for the archdiaconate of Lincoln). Also reported to have been archdeacon of Buckingham. After having held several positions by royal patronage, became bishop of Winchester in 1366; became Chancellor of England before his consecration in 1367. Lords and Commons alike pressured Edward III to replace Wykeham with a layman, alleging that a religious

and political bias was being built into the government by perennially having Churchmen as Chancellors; Wykeham resigned. Richard II wanted Wykeham as his Chancellor, so Wykeham resumed the office. Wykeham took his episcopal duties seriously, and is remembered as a reformer and a restorer in Winchester. Founded St. Mary College, Winchester, and St. Mary College of Winchester in Oxford (now Winchester College and New College, Oxford, respectively). These institutions were begun not to further education in itself, but to educate priests, whose numbers had declined by ninety per cent due to the plagues. (d. 1404).

Robert Thorpe, 1371-72. A layman, Thorpe was master of Pembroke College, Cambridge. King's serjeant at law, 1345; justice trying felonies in Oxford, 1355; justice of assize; chief justice, Common Pleas, from 1356-71. Thus, Wykeham's replacement as Chancellor in 1371 was a prominent common lawyer. (d. 1372).

John Knyvet, 1372-77. Another prominent common lawyer: justice of Common Pleas, 1361; chief justice, King's Bench, 1365. Replaced as Chancellor when Edward III, influenced by the Duke of Lancaster, decided it was again time to appoint an ecclesiastic as Chancellor. (d. 1381).

Adam Houghton, 1377-78. Oxford-educated cleric. Provided to see of St. David's in 1361, by Pope Innocent VI - which seems not to have been disagreeable to Edward III, who made Houghton Chancellor in 1377. (Richard II reappointed him.) (d. 1389).

Richard Scrope, 1378-80; 1381-82. Knight and distinguished warrior, Scrope owed his rise to the petition of Parliament that drove ecclesiastics like Wykeham from high government office. During his second term as Chancellor, he showed an independence which made Richard II eager for Scrope's retirement. (d. 1403).

Simon Sudbury, 1380-81. Studied for a clerical career, taking a doctorate in canon law in France. By 1358, a chaplain of Pope Innocent VI and auditor of the papal palace - positions of high papal favour. Chancellor of Salisbury, 1360; bishop of London, 1361; archbishop of Canterbury, 1375. Especially unpopular during Wat Tyler's rebellion; probably because of pressure on the king (Richard II) on his account, Sudbury resigned Chancellorship in 1381. Eventually Sudbury was taken from the Tower of London by the mob, who brutally executed him. The mob's animus was misdirected; Sudbury was competent and of good character. (d. June 14, 1381).

William Courtenay, 1381. Doctor of civil law, Oxford; later chancellor of Oxford University. Prebend of Exeter, Wells, and York. Bishop of Hereford, 1369; translated to bishopric of London, 1375. Replaced Sudbury as both Chancellor and archbishop of Canterbury (though Courtenay was Chancellor for only three months). (d. 1396).

Robert Braybrooke, 1382-83. Canon of Lichfield and archdeacon of Cornwall, 1376; dean of Salisbury, 1380. September 1381, succeeded William Courtenay as bishop of London. Took his ecclesiastical duties seriously, and seems not to have liked being Chancellor. (d. 1404).

Michael de la Pole, 1383-86. Layman engaged in a military career; summoned to Parliament. Earl of Suffolk, 1385.

Thomas Arundel, 1386-89; 1391-96; 1407-09; 1412-13; (and ten days in 1399, just after Henry IV came to the throne). Arundel had powerful friends: When he was twenty-one, he became archdeacon of Taunton (1373), and when twenty-two became bishop of Ely (1374); he was below the canonically proper age to hold these titles. Translated to archbishopric of York by papal bull, 1388. On death of archbishop Courtenay (see supra), Arundel became the first archbishop of York to be translated to the archbishopric of Canterbury, 1396. But in 1397, Arundel was convicted

of treason and banished. In exile, he joined with Henry Bolingbroke's party, to which association he owed many subsequent royal favours, including his last three terms as Chancellor. Arundel did become a persecutor of heretics, but on the whole had the reputation of a bright, efficient, and courageous civil servant. (d. 1414).

Edmund Stafford, 1396-99; 1401-03. Educated for the priesthood at Stapledon Hall, Oxford (which became Exeter College in his honour). By age forty was dean of York; keeper of privy seal, 1391; bishop of Exeter, 1395. After retiring from Chancellorship in 1403, remained "trier of petitions" in Parliament, and a member of the king's council. (d. 1419).

John Scarle, 1399-1401. By 1382, a fairly senior clerk of Chancery; receiver of petitions in Parliament, 1382-97; clerk of Parliament, 1386-94; Master of the Rolls, 1394-97. After retirement from Chancellorship, remained on king's council until his death. Archdeacon of Lincoln, 1402-03. (d. 1403).

Henry Beaufort, 1403-05; 1413-17; 1424-26. Second son of John of Gaunt, Duke of Lancaster, by his mistress Catherine Swinford; legitimized, 1397, in which year he became dean of Wells and prebend of Lincoln. Educated at Aix-la-Chapelle and Queen's College, Oxford; chancellor, Oxford University, 1399-1400. Bishop of Lincoln, 1398; succeeded Wykeham as bishop of Winchester, 1405 (translated through Henry IV's influence); resigned as Chancellor, but remained a member of the king's council. When Henry V, his tutee at Queen's College, Oxford, became king, Beaufort again became Chancellor; resigned in 1417, purportedly to make a pilgrimage to the Holy Land, but probably to attend the Council of Constance, as self-appointed English representative. The Council resolved three claimants' dispute by naming Martin V pope. The new pope made Beaufort a cardinal and apostolic legate in

England, Ireland, and Wales, 1418. (But Henry V forbade Beaufort's acceptance of these positions, as archbishop Chicheley felt threatened by the prospect.) Beaufort did complete his pilgrimage to Jerusalem from Constance. Active in Henry VI's council. In 1426, Pope Marin V again named Beaufort cardinal, with title of Presbyter of St. Eusebius, Cardinal of England. Beaufort returned to England from Calais in 1428 as papal legate. Beaufort also serves as a prime example of the medieval English Churchman-Chancellor, a nobleman who bestowed largesse to found a hospital and almshouses, both while alive and through his will. (d. 1447).

Thomas Langley, 1405-07; 1417-24. Educated for the priesthood at Cambridge. Canon, 1400, and dean, 1401, of York. Keeper of king's privy seal, 1403-05. Elected to succeed Richard Scrope as archbishop of York, but the pope demurred, so Langley contented himself with the bishopric of Durham, 1406. Pope John XXIII (the first by that title) made Langley a cardinal in 1411; Henry IV did not mind, if his appointment of Langley as an executor of his will gives any indication. Ambassador of Henry V to the king of France, with whom Langley concluded a one-year truce. Langley was a generous benefactor of the see of Durham and of its cathedral. (d. 1437).

Sir Thomas Beaufort, 1410-11. Younger brother of Henry Beaufort (also legitimized by statute of 1397). A lay Chancellor, successor to Arundel, Thomas Beaufort was primarily a military man, and appears not to have liked the office of Chancellor. Became earl of Dorset, July 1412; duke of Exeter and knight of the Garter, 1416; an executor of the will of Henry V. Counsellor to the protectors appointed by Parliament during the minority of Henry VI. Became justice of north Wales. (d. 1427).

John Kemp, 1426-32; 1450-54. Educated at, and became a fellow of, Merton College, Oxford. Became a practitioner

in the ecclesiastical courts, becoming dean of the Court of Arches in 1415. Was archbishop Chicheley's vicar general, and became archdeacon of Durham. Bishop of Rochester, 1418; translated to bishopric of Chichester, February 1421; translated to bishopric of London, November 1421; became archbishop of York, April 1427; cardinal priest of St. Balbina, December 1439; succeeded John Stafford as archbishop of Canterbury in 1452, and became cardinal bishop of St. Rufina. A great benefactor of the Church, at his death in 1454 Kemp was Chancellor, archbishop of Canterbury, and cardinal.

John Stafford, 1432-50. Took a degree in both laws at Oxford, and became an advocate in the ecclesiastical courts. Successively dean of the Court of Arches; archdeacon of Salisbury, 1419; chancellor of Salisbury, 1421; keeper of the privy seal late in reign of Henry V and early in that of Henry VI; treasurer of the Exchequer and dean of St. Martin's, London, 1422; dean of Wells, 1423; elected bishop of Bath and Wells, 1425; (first to be called "lord Chancellor", from 1432-50); archbishop of Canterbury and apostolic legate in England, 1443. (d. 1452).

Richard Neville, 1454-55. Only lay Chancellor of Henry VI's reign. Earl of Salisbury from 1428. Executed, 1460.

Thomas Bourchier, 1455-56. Soon after 1420, was a student at Nevill's Inn, Oxford; chancellor of Oxford University, 1434-37. Dean of St. Martin's, London, 1433; bishop of Worcester, 1435. In that same year, Bourchier was the monks' choice to become bishop of Ely, but Henry VI did not approve; nonetheless, all parties were agreeable to the translation in 1443, when Bourchier became bishop of Ely. Archbishop of Canterbury, from 1454; created cardinal, 1472 (though selected for that honour in 1464). Was one of the arbitrators between Edward IV and the king of France in 1475. Bourchier seems to have been more

opportunistic than principled, as indicated by his survival in high office during that turbulent period. Nonetheless, he was reputed to be generous to the poor. (d. 1486).

William Waynflete, 1456-60. Attended Wykeham's College of St. Mary, Winchester, then took a bachelor's degree in both laws at Oxford. Ordained priest, 1426. (Head-)master of "Winchester" for eleven years, before Henry VI got Waynflete to go to his new college at Eton as its first (head-)master (along with plenty of his Wykehamist colleagues). Enthroned as Henry Beaufort's successor as bishop of Winchester in 1448. Edward IV pardoned Waynflete for being a partisan of Henry VI, making Waynflete trier of petitions in his first Parliament. Waynflete founded Magdalen College, Oxford, in 1448, hoping to foster there the study of divinity and philosophy. (d. 1486).

George Neville, 1460-67; 1470-71. Youngest son of Richard, Earl of Salisbury (see supra). Trained for priesthood at Baliol College, Oxford, subsequently becoming chancellor of the university. Elected bishop of Exeter in 1455, when only twenty-two years old (through his father's influence); the popes would not, however, confirm the election until 1460, when George Neville was twenty-seven years old. Archbishop of York, from 1465. Fell from favour, 1472, and imprisoned until 1475. Died in 1476, and was buried in York Minster without even a grave marker.

Robert Stillington, 1467-70; 1471-73. Took doctorate in both laws as student at All Soul's College, Oxford. His ties with the House of York brought him a succession of preferments: canon of Wells, 1445; treasurer of Wells, 1447; archdeacon of Taunton, 1450; canon of York, 1451; dean of St. Martin's, London, 1458; archdeacon of Berks, 1463; archdeacon of Wells, 1465; bishop of Bath and Wells, 1466. Stillington's political fortunes varied after his terms as Chancellor. (d. 1491).

Laurence Booth, 1473-74. Studied at Cambridge; Master of Pembroke Hall, 1450; later, chancellor of the university. Provost of Beverley, 1453; canon of York and of Lichfield, 1453; archdeacon of Richmond, 1454; dean of St. Paul's, 1456; Pope Calixtus III appointed Booth bishop of Durham, 1457; September 1476, translated to become archbishop of York. (d. 1480).

Thomas Rotherham, 1474-75; 1475-83. Education: Eton, and in 1444 became one of the first scholars of King's College, Cambridge; later, a fellow and, about 1480, Master of Pembroke Hall; subsequently chancellor of the university. Chaplain to Edward IV, keeper of privy seal, provost of Beverley, and bishop of Rochester - all in 1468; translated to bishopric of Lincoln, 1472. In 1475 Rotherham was, with John Alcock (see infra), one of two Chancellors of England (a situation created in contemplation of Rotherham joining Edward IV in his invasion of France). After his return, Rotherham served as Chancellor until the end of Edward IV's reign. Archbishop of York from 1480. Imprisoned by Richard, Duke of Gloucester, in Tower of London, 1483, but released when the Duke, as Richard III, had been crowned. Became a trier of petitions in Richard III's first Parliament, 1484; served same function in first Parliament of Henry VII in 1485. Benefactor of the two universities, and of the diocese of York. (d. - of plague - 1500).

John Alcock, 1475 (co-Chancellor); 1485-86. Doctor of both laws, Cambridge, 1466. Advocate in ecclesiastical courts; prebend of Salisbury and St. Paul's, 1461; dean of Chapel of St. Stephen, Palace of Westminster; Master of Rolls, 1471; resigned to become bishop of Rochester, 1472; translated to bishopric of Worcester, 1476; translated to bishopric of Ely 1486. Founder of Jesus College, Cambridge (at old nunnery of St. Radegund). Universally recognized for his piety (including abstemiousness), and his learning. (d. 1500).

John Russell, 1483-85. Education: New College, Oxford - fellow from 1449 - doctorate in canon law. Chancellor of the university, about 1484, (about which time that office ceased to be an annual appointment). Prebend of St. Paul's, archdeacon of Berks., 1466; keeper of privy seal, 1475; bishop of Rochester, 1476; translated to bishopric of Lincoln, 1480; trier of petitions, first Parliament of Henry VII (1485-86). (d. 1494).

John Morton, 1486-1500. Education: Baliol College, Oxford, earning a doctorate in both laws. "Moderator" of school of civil law, 1446; chancellor of the university, 1494. Advocate, Court of Arches; clerk or master in Chancery, 1456, (and personal chancellor to Edward, Prince of Wales); Master of the Rolls, 1472-79; archdeacon of Winchester, Huntingdon, Berks., and Leicester - 1474-77. Edward IV secured the bishopric of Ely for Morton in 1478. Richard III, by contrast, imprisoned Morton - with good reason: Morton was central to the plots to overthrow Richard III. Accordingly, when the earl of Richmond became Henry VII, Morton stood in the royal favour. October 1486, Morton translated by papal bull (secured through Henry VII's agency), from Ely to the archbishopric of Canterbury. As a reward for his reforming efforts, directed at increasing the spirituality of priests and "religious", Morton was made a cardinal (by title of St. Athanasius) in 1493. Benefactor of the poor, Ely, and universities. (d. 1500).

Henry Deane, 1500-02. From Wales; educated at one of the English universities. Prior of Llanthony Secundus (near Gloucester), 1461; Chancellor of Ireland, 1494; deputy and justiciary of Ireland, 1496, becoming bishop of Bangor the same year; translated to bishopric of Salisbury, 1500; archbishop of Canterbury from January of 1501, then becoming papal legate in England. (d. 1503, at latest).

William Warham, 1502-15. Student at Wykeham's College of St. Mary, Winchester, then at New College, Oxford, where

he became a fellow (1475), and took a doctorate in both laws. Ordained by 1488; advocate, Court of Arches; precentor of Wells, 1493; Master of the Rolls, 1494-1502; archdeacon of Huntingdon, 1496. Elected bishop of London, 1501; archbishop of Canterbury, 1503; "keeper" of Great Seal, 1502-04, but only styled Chancellor after 1504; chancellor of Oxford University, 1506; resigned Chancellorship of England, 1515, in the face of Wolsey's driving ambition. Died in 1532, outliving Wolsey, thereby precluding Wolsey's reaching the one high office he desired, but had not already held - the archbishopric of Canterbury (though one cannot deny Wolsey's greater power up to 1529).

Thomas Wolsey, 1515-29. Bachelor's degree, Oxford, at age of fifteen; became fellow of Magdalen College, the College's bursar, and Master of Magdalen's Grammar School. Ordained circa 1500. Chaplain to Henry Deane, archbishop of Canterbury (see supra), and one of Henry VII's chaplains. Henry VII secured the deanship of, and two prebends at, Lincoln for Wolsey in February 1509. Wolsey was thirty-eight years of age in 1509 when Henry VIII took the throne; he soon became the new king's alter ego. Canon of Windsor; dean of Hereford; dean of York, 1513; bishop of Tournay, France, 1513, as well as precentor of St. Paul's; bishop of Lincoln, February, 1514; archbishop of York, September 1514; cardinal (title of St. Cecilia), and papal legate, 1515. Archbishop Warham called Wolsey at this, his heyday, "inebriated with prosperity". (Foss, Judges of England at 753.) Simultaneous with the above, Wolsey became abbot of St. Albans and, from 1518, bishop of Bath and Wells; resigned the latter bishopric in order to occupy the more valuable see of Durham (1522-29); in 1529, before his fall, he had himself translated to the bishopric of Winchester, also for financial reasons. Founder of Cardinal College, Oxford (which became King's College after Wolsey's fall, and finally Christ Church

when the diocesan seat moved to Oxford). (d. 1530).

Sir Thomas More, 1529-32. Henry VIII's layman Chancellor, intended to be the answer to Wolsey's independence through ecclesiastical wealth and power. Thomas More was son of Sir John More, a judge of the King's Bench. As a boy, he served in the household of Cardinal Morton (see supra) (whom More continued to admire). Common law-trained, Thomas More became speaker of the House of Commons in 1523. Adversary of Wolsey, though it was unequal combat; More was something of a gadfly from Wolsey's perspective. Agreed with Henry VIII on all substantial matters except, of course, the divorce question. Resigned Chancellorship in 1532, when he felt the lines between Church teaching and Henry VIII's course were so unequivocally and irrevocably drawn that to remain in office would be hypocrisy. (executed, 1535).

Thomas Audley, 1532-44. A common lawyer educated at the Inner Temple. Like More, a civil servant of the second tier prior to his appointment as Chancellor. (Thomas Cromwell had been the obvious candidate.) Cromwell did succeed in limiting the Chancellor's powers. Audley's title was, for example, keeper of the Seal until 1533, even though he exercised the Chancellor's Star Chamber and king's council roles. Like More, Audley had been speaker of the House of Commons, but unlike More, became a mere administrative adjunct of the real policy-maker, Thomas Cromwell. This secondary role, as well as his involvement in the State trials of Henry VIII's reign - and in drafting the drastic legislation of the second quarter of the sixteenth century - have preserved for Audley his unflattering reputation. (d. 1544).

Statistical Abstract

N.B. these figures do not include those holding episcopal rank after their last term as Chancellor. Neither are those included who were both bishop and Chancellor for only a few months. Finally, these sums cannot claim to be definitive, as there are many gaps and discrepancies in the accounts of the medieval Chancellors.

108 Chancellorships between circa 1068 and 1535.

86 different men were Chancellors during that period.

39 of those eighty-six were, at some time while Chancellor, bishops.

13 of those eighty-six were, at some time while Chancellor, archbishops of Canterbury.

8 of those eighty-six were, at some time while Chancellor, archbishops of York.

Most (by far) were in Holy Orders (i.e. ordained), while Chancellor, and held sub-episcopal positions in the Church.

4 Chancellors of this period were subsequently canonized:
Osmund, bishop of Sarum;

Thomas Becket, archbishop of Canterbury;

Thomas Cantilupe, bishop of Hereford;

Sir Thomas More.

NOTES

The introductory signals, abbreviations, and form of citations are in accordance with A Uniform System of Citation 13th ed. by Columbia, Harvard, & Pennsylvania Law Reviews, and the Yale Law Journal (1981). The first citation of many sources will give an abbreviation which will be used thereafter in citing that work. Articles, Comments, and Notes are cited in full the first time they appear in a chapter; subsequent references to such a source in the same chapter refer the reader to the earlier, full, citation. Notes are numbered sequentially within headings - Introduction, chapters, and Appendix - subdividing the text of this study. Full publication details are, of course, given in the Bibliography, which begins infra at page 206.

Notes to Introduction

1. Cf., 2 F. Pollock & F. Maitland, The History of English Law Before the Time of Edward I at 239 (early feoffment to uses "a vague idea") (2d ed. 1898, reissued 1978 with introduction by S. Milsom) (hereinafter cited as Pollock & Maitland, HEL, preceded by vol. number).
2. Holdsworth, The Reception of Roman Law in the Sixteenth Century (pt. 1), 27 Law Q. Rev. 387,392 (1911).
3. J. Baker, An Introduction to English Legal History vii (2d ed. 1979) (hereinafter cited as Baker, IELH).
4. Cf., K. McFarlane, The Nobility of Later Medieval England 280 (1973) (quoted infra Appendix, text accompanying note 9) (hereinafter cited as McFarlane Nobility).
5. H. von Campenhausen, The Fathers of the Greek Church 5 (1963).
6. See, e.g., G. Keeton & L. Sheridan, The Law of Trusts 18 (10th ed. 1972) (hereinafter cited as Keeton & Sheridan, Trusts) ("The modern trust grew out of the medieval custom of putting land and other forms of property to use"); Ames, The Origin of Uses and Trusts, in 2 Select Essays in Anglo-American Legal History 737,749 (1908) ("the modern trust, growing out of the use upon a use, is in

substance the same thing as the ancient use"). (Hereinafter the three volumes of Select Essays in Anglo-American Legal History will be cited as Select Essays, preceded by the volume number. The title of the essay will be cited in full when first cited); J. Riddall, Law of Trusts 2 (1977) ("the trust emerged under the name of 'use' in the later middle ages; ... the development of trusts was checked by the Statute of Uses 1535..."); P. Pettit, Equity and the Law of Trusts 10-11 (4th ed. 1979) (virtually equating "uses" and trusts, and saying that after the Statute of Uses the "use" became the trust); A. Scott, 1 The Law of Trusts §1, at 6-9 (3d ed. 1967) (semantic imprecision, employing "use" and "trust" to mean the same early legal concept) (hereinafter cited as Scott, Trusts, preceded by volume number).

7. See, e.g., W. Buckland & A. McNair, Roman Law and Common Law 177 (2d ed. 1965 rev. by F. Lawson).
8. "feoff", Oxford English Dictionary 159 (1933).
9. Baker, IELH at 211 n.22.
10. 2 Pollock & Maitland, HEL at 228-29 ("the earliest history of 'the use' is the early history of the phrase ad opus". Scribes "in course of time confused" ad opus with ad usum).
11. Baker, IELH at 212 n.23 and accompanying text; 4 W. Holdsworth, A History of English Law 411 n.8 (1924) (hereinafter cited as Holdsworth, HEL, preceded by volume number). See generally Note, 2 Pollock & Maitland, HEL at 233-39, especially 234.
12. S. Milson, Historical Foundations of the Common Law 200 (2d ed. 1981) (hereinafter cited as Milson, HFCL). Pollock and Maitland call it "an informal agency", but refer in this context only to chattels. 2 Pollock & Maitland, HEL at 229. The danger lies in taking the principal-agent analogy too far - so as to imply enforceability of the "use" as a principal-agent relationship, which would be inaccurate.
13. But see ch. 4 at text accompanying notes.69-70, 81-90 (canonical formulations for property enjoyment without ownership utilized by Franciscans).
14. Scott notes the vagueness and, to the modern eye, incompleteness, of early Chancery records. He also points out that such records may not have been made until long after the cases they report. 1 Scott, Trusts §1, at 11. Fifoot calls the bundles of early Chancery petitions in the Public Record Office in London, "an appalling treasure heap". C. Fifoot, History and Sources of the Common Law 302 at text accompanying notes 64 and 65 (hereinafter cited as Fifoot, HSCl).

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15. G. Keeton & L. Sheridan, Equity 143 (1969) hereinafter cited as Keeton & Sheridan, Equity); 4 Holdsworth, HEL at 411 n.1; 2 Pollock & Maitland, HEL at 230-31; Holmes, Early English Equity, 2 Select Essays 705, at 707 (1908).
16. 4 Holdsworth, HEL at 411; Holmes, supra note 15, at 708; Ames, supra note 6, at 742 n.2.
17. Holmes, supra note 15. See, e.g., 4 Holdsworth, HEL at 410-11.
18. Holmes seems satisfied by the mere analogy of a trusting relationship to the feoffment to uses. Holmes, supra note 15, at 708, 716. But the Salman was, in fact, much closer to the English executor under a will. 4 Holdsworth, HEL at 411. Holmes persuaded Ames of the Salman - "use" connection up to the time the "use" became enforceable in the Chancery. Ames, supra note 6, at 740, 742. But Milsom notes, "there is no evidence that [the Salman] ever came to these shores, let alone survived to play any part in the rise of the use." Milsom, HFCL at 200.
19. A. Smith, Church and State in the Middle Ages 49 (1913) (Roman civil law maxim Roma est patria omnia is translated into a canon law equivalent as early as the mid-thirteenth century: Papa est iudex omnium) (hereinafter cited as A. Smith, Church and State); Archbishops' Commission on Canon Law, The Canon Law of the Church of England 33 (1947) (Gratian, at Bologna during the twelfth century Roman law revival, as inaugurator of canon law as the triumphant successor to the Roman civil law) (hereinafter cited as Report of Archbishops' Comm'n).
20. Report of Archbishops' Comm'n, supra note 19, at 33-34 (Gratian and later canonists consciously paralleled the Roman civil law's "purpose", "form", and scope - a point made in much greater detail on the cited pages).
21. See infra ch.3.
22. See generally 1 Scott, Trusts §1.3, at 13. See also infra ch. 6 note 78 and accompanying text.
23. 27 Hen.8, c.10 (1535) (sometimes dated 1536, see, e.g., Ives, The genesis of the Statute of Uses, 82 Engl. Hist. Rev. 673 (1967); 1 Scott, Trusts §1.4, at 14).
24. See generally P. Pettit, Equity and the Law of Trusts 11 (4th ed. 1979); Barton, The Statute of Uses and the Trust of Freeholds, 82 Law Q. Rev. 215 (1966).
25. Robert Bouchier, Chancellor from 1340-41, was the first lay Chancellor.
26. Act for the Submission of the Clergy, 25 Hen.8, c.19 (1534).

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27. Statute of Uses, 27 Hen.8, c.10 (1535).
28. More commonly and hereinafter referred to as Doctor and Student, the full title of St. Germain's work is, Dialogus de Fundamentis Legum Angliae et de Conscientia (1523) (trans. into English, 1531, under title quoted in text); Seconde dyaloge in Englysshe bytwene a Doctour of dyuynyte & a Student in the law of Englande (1530).. Both dialogues are contained in 91 Selden Soc. (1974) (T. Plucknett and J. Barton eds.), to which volume citations to Doctor and Student in this study refer.
29. Doctor and Student, dialogue 2, ch.xxii, at 223.

NOTES TO CHAPTER 1:FEUDALISM AND THE JUDICIAL TOPOGRAPHY OF
ENGLAND AFTER THE CONQUEST: AN OVERVIEW

1. This system has great import for the feoffment to uses in the context of the common law rule against devises. See infra ch.6, at text accompanying notes 1-10.
2. G. Keeton, The Norman Conquest and The Common Law 142 (1966) (hereinafter cited as Keeton, Norman Conquest).
3. Id. at 143.
4. Id.
5. Id.; Capua, Feudal and Royal Justice in Thirteenth-Century England: The Forms and the Impact of Royal Review, 27 Am.J. Legal Hist. 54,84 (1983).
6. Capua, supra note 5, at 83.
7. T. Plucknett, A Concise History of the Common Law 533 (5th ed. 1956) (hereinafter cited as Plucknett, Concise History).
8. Baker, IELH at 199.
9. Id. at 205-06.
10. Id. On knight service and socage, see generally also infra ch.6, at text accompanying notes 1-6. Primer seisin and relief payments were abolished in 1267 for all but tenants in chief (who remained subject to these valuable prerogatives of the king until the seventeenth century). Baker, IELH at 205-06.
11. Baker, IELH at 199.
12. Id.; Keeton, Norman Conquest at 146.
13. Hamburger, The Conveyancing Purposes of the Statute of Frauds, 27 Am.J. Legal Hist. 354,355 (1983).
14. Keeton, Norman Conquest at 143.
15. Id. at 153.
16. Baker, IELH at 204.
17. Keeton, Norman Conquest at 154.

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18. Baker, IELH at 204. N.b., the tenant by socage was not subject to all the feudal incidents. The tenant by socage generally had just to pay his agricultural dues - in cash or in kind - to maintain his tenancy. Keeton, Norman Conquest at 152; Plucknett, Concise History at 537.
19. Accord, see e.g., 1 Scott, Trusts §1.4, at 16 (describing the feudal incidents and noting that, "they bore heavily on the tenant").
20. Baker, IELH at 204-05. The lord might also exact "aids" to raise funds for his daughter's dowry or to have his son knighted. In 1275, the amount of "aids" due for such purposes was set at twenty shillings per knight's fee. Id.
21. Id. at 205. The statute Quia emptores terrarum, 18 Edw.1 (1290), ended sub-infeudation and allowed alienation by substitution without payment of a fine, except for tenants in chief.
22. Keeton, Norman Conquest at 150; Plucknett, Concise History at 534.
23. See infra ch.6 at text following note 6.
24. Baker, IELH at 206; Keeton, Norman Conquest at 150. Unlike a wardship under a military tenancy, wardship under a tenancy by socage lasted only until the ward's fourteenth birthday, and his guardian was usually a relative. Significantly, the guardian in a tenancy by socage was accountable for profits of the lands and tenements during the wardship. Id. See also Plucknett, Concise History at 537.
25. Baker, IELH at 206-07.
26. If a ward declined to marry the lord's choice of spouse, he had to pay the lord the amount of the marriage agreement the lord had negotiated. If a ward married on his own, without the lord's consent, after 1267 he had to remain a ward until the wardship had brought the lord twice the "value" of the ward's marriage. Id. at 207.
27. Id. at 206. Accord, 1 Scott, Trusts §1.4, at 16. Cesser of services, wilfully failing to carry out services due the lord with respect to the tenancy, was a felony in the early feudal period in England. Plucknett, Concise History at 536. If convicted of treason (a much more common event in the Middle Ages than now), the tenant's holdings reverted to the Crown - the injured party - by forfeiture. 1 Scott, Trusts §1.4 at 17 (especially during Wars of the Roses).

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28. Baker, IELH at 206. Statute 19 Hen.7, c.15 (1503) (extended "heriot" and "relief" to cases in which a cestui que use of a tenancy by socage died intestate).
29. Plucknett, Concise History at 148-49.
30. Id. at 149 n.4 and accompanying text. The Common Bench may in practice have been sitting in Westminster fairly regularly before Magna Carta. Id.
31. Id. at 148 n.2 and accompanying text (citing 1 Holdsworth, HEL at 51 n.6).
32. Keeton, Norman Conquest at 154.
33. Copyhold was land held in accordance with manorial customs (which, of course, varied from manor to manor). Id. at 144.
34. Id. at 153
35. Id. at 144, 153.
36. Plucknett, Concise History at 150-51.
37. Id. at 148.
38. Id. at 150, 155.
39. Keeton, Norman Conquest at 112-13.
40. Baker, IELH at 18; A. Kiralfy, Potter's Historical Introduction to English Law and its Institutions 112, 114-15 (4th ed. 1958) (hereinafter cited as Kiralfy, Potter's Hist.).
41. On itinerant justices as antecedents of these later royal assizes, see generally Kiralfy, Potter's Hist. at 110-11.
42. Baker, IELH at 19.
43. Id.
44. Plucknett, Concise History at 166.
45. Kiralfy, Potter's Hist. at 114; Plucknett, Concise History at 155 (re oyer and terminer, as well as gaol delivery).
46. Baker, IELH at 19, 71, 201-02 (re novel disseisin and mort d'ancestor—and the popularity of those assizes).
47. Plucknett, Concise History at 166.

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48. Actions in rem relating to land were not originally meant to be brought in the royal courts, but in manorial courts. Kiralfy, Potter's Hist. at 112 n.13.
49. See Baker IELH at 19. The justices would sit in banc at Westminster during terms of court, going on circuit between terms. Kiralfy, Potter's Hist. at 113.
50. Statute of Westminster II, 13 Edw. 1, c.30 (1285) (c.30 also called Statute of Nisi Prius, see e.g., Kiralfy, Potter's Hist. at 112 n.12 and accompanying text).
51. Kiralfy, Potter's Hist. at 112-13; Plucknett, Concise History at 166-67. On the emergence of the commissions of assize and of the nisi prius system, see generally Baker, IELH at 18-20; Kiralfy, Potter's Hist. at 110-15; Plucknett, Concise History at 155-56, 165-67.
52. Keeton, Norman Conquest at 111-12; Plucknett, Concise History at 159-60.
53. Keeton, Norman Conquest at 111-12. On Exchequer pleas jurisdiction, see generally, Plucknett, Concise History at 160-61.
54. See generally, L. Little, Religious Poverty and the Profit Economy in Medieval Europe (1978) (hereinafter cited as L. Little, Religious Poverty).
55. Keeton, Norman Conquest at 111-12.
56. P. Winfield, The Chief Sources of English Legal History 57 (1925) (hereinafter cited as Winfield, Chief Sources). On Gratian and his Decretum, see infra ch.5 at text accompanying notes 10-19.
57. Donahue, Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of Some Records from the Church Courts, 72 Mich. L. Rev. 647,650 (1974). On Lyndwood, see generally F. Maitland, Roman Canon Law in the Church of England 1-50 (1898) (hereinafter cited as Maitland, Roman Canon Law).
58. Maitland's basic argument in Roman Canon Law is encapsulated in, for example, his remarks at id. 81 & 83 (distinguishing the question whether Roman canon law was binding from the question whether it was actually always applied; Maitland concluded that Roman canon law was always binding on the English church, a refutation of Stubbs's argument). On the continued prevalence of Maitland's view among modern scholars, see, e.g., Donahue, supra note 57, at 648-55; Gray, Canon Law in England: Some Reflections on the Stubbs-Maitland Controversy, 3 Studies in Church Hist. 48, 50-51 (1966).

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59. Baker, IELH at 111.
60. In York's Consistory Court between 1300 and 1399, for example, Donahue found that fully forty per cent of the cases "ought" to have been brought in the royal courts. Wills and marital cases, however, were not among the cases over which the Church's jurisdiction was questionable. Donahue, supra note 57, at 660.
61. R. Rodes, Jr., Ecclesiastical Administration in Medieval England, The Anglo-Saxons to the Reformation 58 (1977) (hereinafter cited as Rodes, Eccles.Admin.).
62. Id. (including n.82 on p.229). Accord, Baker, IELH at 112. On fidei-laesio, see also infra ch.6, especially text accompanying notes 61-63, 73, 81, and 2 Pollock & Maitland HEL at 189-92.
63. Rodes, Eccles.Admin. at 57.
64. Id. at 138-39.
65. Id. at 57.
66. Keeton, Norman Conquest at 151. By the Constitutions of Clarendon of 1164, the Church retained jurisdiction over land provided there was agreement that it was held in frankalmoign, a spiritual services tenancy. If the parties did not agree on this point, an assize utrum was held to determine whether the tenancy was by frankalmoign - and hence whether the Church courts had jurisdiction over the matter. This can be seen as a royal attempt to curb the scope of canon law. See generally id.
67. Rodes, Eccles. Admin. at 57; G. Squibb, Doctors' Commons 1 (1977); Baker, IELH at 112.
68. Rodes, Eccles. Admin. at 57-58.
69. Id. at 142 (English church courts did a "flourishing business" in fidei laesio despite the availability of writs of prohibition).
70. Id. at 58. Accord, Helmholtz, Assumpsit and "Fidei Laesio", 91 Law Q. Rev. 406, 406-07 (1975). One could, in theory, pursue a remedy for the same cause of action in both royal and ecclesiastical courts in cases of jurisdictional overlap, or in the absence of a writ of prohibition to the ecclesiastical court. Donahue, supra note 57, at 664 n.91.
71. Rodes, Eccles. Admin. at 58.
72. 2 Pollock & Maitland, HEL at 665, text accompanying note 4.
73. Rodes, Eccles. Admin. at 142-43.

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74. Id. at 57.
75. On "apparitors", see id. at 138.
76. Id. at 142.
77. See generally id. at 143-46 (giving details of ecclesiastical court process).
78. Id. at 91-94.
79. Id. at 94-96.
80. Id. at 90.
81. Id. at 94.
82. Id. at 90, 96-98.
83. Id. at 91.
84. Id. at 138.
85. A. Smith, Church and State at 47. On rural deans, see generally Rodes, Eccles.Admin. at 104, text accompanying note 10.
86. Cf. Baker, IELH at 111. On archdeacons' duties and courts, see generally Rodes, Eccles.Admin. at 102-03.
87. Baker, IELH at 111; A. Smith, Church and State at 47. On the mechanics of the consistory court, see Rodes, Eccles. Admin. at 103-04.
88. Baker, IELH at 111; A. Smith, Church and State at 46. Note that a "complicated and overlapping" web of other archepiscopal courts existed, for example the archbishop of Canterbury's Prerogative Court for testamentary matters. See generally id. at 46-47. (On the Canterbury Prerogative Court in particular, see Rodes, Eccles.Admin. at 109).
89. Baker, IELH at 111. This appellate jurisdiction was part and parcel of the canonical conception of the pope as episcopus episcoporum. A Smith, Church and State at 45.
90. A. Smith, Church and State at 47-48.
91. Id. at 49.
92. See infra ch.6, at text accompanying notes 70 and 91.
93. Baker, IELH at 111; Rodes, Eccles.Admin. at 17, text accompanying note 49 (secular cooperation in the enforcement of ecclesiastical sanctions); Donahue, supra note 57, at 699-700 (describing the interdependence of ecclesiastical and secular jurisdictions).
94. Baker, IELH at 89. But cf. 1 Scott, Trusts §1, at 10 (Chancery an established court by end of reign of Henry V - 1422). Stafford was archbishop of Canterbury from 1443.

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95. Baker, IELH at 89, text accompanying note 14. Baker states that in 1425, previous to the establishment of the Chancery court at Westminster, petitions relating to "uses" already constituted roughly two-thirds of the Chancellor's case-load as dispenser of epieikeia. Id. at 212 n.26.
96. Keeton, Norman Conquest at 82-83. Baker notes that the term "chancery" is taken from the "latticed screen or chancel behind which the clerks worked". Baker, IELH at 84. For a more detailed discussion of the term "cancelli", see Hollond, Some Early Chancellors, 9 Cambridge L.J. 17, 17 ff. (1945-47).
97. Baker, IELH at 85; R. Evershed, Aspects of English Equity 10 (1954) (calling the early Chancellor "Secretary to the Sovereign").
98. Baker, IELH at 84-85.
99. Id. at 85. "Both laws" refers to canon law and civil law, not the common law. Squibb, Doctors' Commons at 1, 15 (Common law was not taught at the universities - not until Blackstone's time at Oxford - therefore one could not hold a doctorate in common law).
100. Baker cites inquisitions upon the death of a tenant in chief (to determine royal rights to the tenancy) as an example. Baker, IELH at 85-86.
101. Id. at 85.
102. Id. The Six Clerks became, by the last quarter of the sixteenth century, "the only proper attorneys of the Chancery". Baker, Lawyers Practising in Chancery 1474-1486, at 4 J. Legal Hist. 54, 56 (1983). But Common Pleas attorneys also presented pleas there. Baker says that the position of these two sets of attorneys with respect to each other in the Chancery is uncertain. Id.
103. The English writ was a royal mandate, ordering or prohibiting performance of a specific action, written on parchment and under the royal seal, addressed to someone, usually requiring a report on the addressee's response to the writ's dictate(s) to be submitted to the king. Flahiff, The Writ of Prohibition to Court Christian in the Thirteenth Century (pt. 1), 6 Medieval Studies 261, 262 (1944).
104. Baker, IELH at 84-85. The Chancellor also had exclusive jurisdiction over common law actions of, or between, members of his department. Id. at 87.
105. Id. at 84.
106. Id. at 87.

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107. Keeton, Norman Conquest at 155.
108. Baker, IELH at 87.
109. The Chancellor's orders were first issued "in the name of the king in council", then by "the court", referring to the king's council, and finally by the Chancellor alone - by 1473. Baker, IELH at 87. Accord, Note, The Right to a Nonjury Trial, 74 Harv.L.Rev.1176, 1180 (1961).
110. Baker, IELH at 88.
111. See generally, e.g., 1 Scott, Trusts §1.4, at 14-15 (re rigidification of the common law in the fourteenth and fifteenth centuries).
112. Delegation occurred by the Chancellor's authorization, dedimus potestatem, regardless of whether the delegate was a member of the Chancery staff. Baker, IELH at 88.
113. Id.
114. F. Maitland, Equity and the Forms of Action at Common Law 5 (1913) (hereinafter cited as Maitland, Equity).
115. On the Chancellor's power to compel specific performance, see generally P. Pettit, Equity and the Law of Trusts 10-11 (4th ed. 1979).
116. See generally infra ch.5.
117. See infra chs. 3,5, and Appendix.
118. See generally infra ch.3, summarized at text accompanying notes 41-45.
119. See infra ch.4, discussion beginning at text accompanying note 55, summarized at text accompanying note 92.
120. See infra ch.2, at text accompanying notes 4, 16-20, and following note 28.
121. See infra ch.6, at text accompanying notes 53-70.
122. See infra ch.5, at text accompanying notes 2-27. On "dispensation" in the canon law or ecclesiology of present day, see E. Moore, Canon Law, at 151-52 (Eastern Orthodox "economy" and Roman Catholic dispensation) and 153-55 (dispensation in Church of England).
123. "Taking 'the church' in its narrowist [sic] sense - as the authorities: that is, bishops and monastic heads - church and nobility were from a sociological angle, in most places and periods of the middle ages, the same". A. Murray, Reason and Society in the Middle Ages 319 (1978). On bishops functioning as powerful nobles, see Rodes, Eccles.Admin. at 107.

NOTES TO CHAPTER 2:

THE ENGLISH "NOBILITY"

AND THE FEOFFMENT TO USES

1. McFarlane, Nobility, at 6-7. The research and insights collected in McFarlane's Nobility, published posthumously in 1973, but articulated at various points in his career, form the foundation of this chapter.
2. Id. at 8, 10.
3. Id. at 11.
4. Id. at 71-72. It was not similarly stigmatizing to disinherit an heiress, for she took her inheritance out of the family upon marriage. Id. at 72.
5. Id. at 270. But cf. Glanvill, Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur, bk.vii, ch.1 (G. Hall ed. & trans. 1965) (hereinafter cited as Glanvill).
6. McFarlane, Nobility at 61.
7. 1 Scott, Trusts §1.4, at 17.
8. McFarlane, Nobility at 62-63.
9. Id.
10. Id. at 63.
11. Id. at 64-65.
12. Id. at 65.
13. Id. at 64.
14. Id. at 68.
15. 13 Edw. 1, c.1 (1285). Accord, McFarlane, Nobility at 63.
16. De viris religiosis, 7 Edw. 1 (1279).
17. Hereinafter "cestui".
18. Less important for the purposes of this study is the implied "use": Upon a bargain and sale of realty, the common law deemed the purchaser to be the cestui of a "use"; seller was the feoffee. See, e.g. Y.B. Hil. 21 Hen.VII, pl.30, f.18 (1506) (Rede, J.). An implied use based on the bargain and sale of freehold could be recognized in a common law action of assumpsit as a means of protecting the purchaser's interest prior to being seised of the freehold. Baker, introduction to 94 Seld. Soc., at 198.

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All Year Book citations in this study, unless cited to a modern reporter, are to the edition traditionally attributed to Sir John Maynard (but see Baker, IELH at 155 n.6, denying that Maynard was actually editor of the 1679-80 "Maynard" edition).

19. McFarlane, Nobility at 69. See generally infra ch.6, at text accompanying notes 33-38.
20. McFarlane, Nobility, at 69, 76-77. The Statute of Marlborough, 52 Hen.III, c.6 (1267) attempted to prohibit collusive "uses" between fathers and their heirs when declared in wills. The Statute of 4 Hen.VII, c.17 (1489) built upon the earlier Statute. See generally, Baker, introduction to 94 Seld.Soc., at 193-95.
21. K.B. 73 Eng.Rep.19 (1 Dyer 8a) Trin.28 Hen.VIII (1535).
22. 73 Eng. Rep. at 19-20.
23. Id at 26.
24. Id. at 25. The Statute 1 Ric.III, c.1 (1483) allowed cestuis to make a binding feoffment of the freehold held to their use. This was to protect those who purchased from cestuis.
25. See generally infra ch.5.
26. McFarlane, Nobility at 83 ff.
27. Id. at 81-82. The marriage portion would be paid to the groom's father. Id. at 85.
28. Id. at 278.
29. Id. at 270.
30. See generally id. at 92-96.
31. 1 Scott, Trusts §1.5, at 19 (king is always lord).
32. See, e.g., K. Pickthorn, Early Tudor Government, Henry VIII, at 284 (1934, reprinted 1967) (hereinafter cited Pickthorn, Henry VIII); 4 Holdsworth, HEL at 448. Cf. Avery, The History of the Equitable Jurisdiction of Chancery before 1460, at 42 Bull.Inst.Hist.Research 129, 143 ("surely no accident that the most important period in the development of chancery coincided with the greatest weakness of the Crown").
33. McFarlane, Nobility, at 269.
34. Id. at 92.
35. Id. at 218-19. See also Baker's discussion of this power in introduction to 94 Seld.Soc. at 192.

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36. This refers to the period after enactment of the statute Quia emptores terrarum, 18 Edw.1 (1290). Quia emptores ended the practice of subinfeudation and provided that, except for land held in chief of the Crown, land was to be alienable by substitution and without payment of a fine. See Baker, IELH at 205, 208-09.
37. On Henry VIII's campaign to secure passage of a statute limiting "uses", see Pickthorn, Henry VIII at 282-85; Ives, The genesis of the Statute of Uses, 82 Engl.Hist. Rev. 673, especially at 697 (1967). Baker discusses legislative efforts by Henry III and Edward III to curb "uses" in 94 Seld.Soc. at 193-95.
38. Baker, IELH at 214. Cf. Baker, introduction to 94 Seld.Soc. at 193 (feudalism and primogeniture as "relics of Norman servitude best forgotten", to early Tudor freeholders).
39. Statute of Wills, 32 Hen.8, c.1 (1540) (expressly authorizing devises of freehold). Accord, see 1 Scott, Trusts §1.4, at 17-18.

NOTES TO CHAPTER 3:

THE LIMITS OF ROMAN LAW ANALOGIES

TO THE FEOFFMENT TO USES

1. Rodes states, "the major contribution of the Roman law to the canonical system was its structure". Rodes, Eccles.Admin. at 66.
2. See infra ch.4, at text accompanying and following note 55.
3. There are Roman vestiges, but few arrived directly. Plucknett, Concise History at 297-99. Bracton's very Roman description of English law, moreover, may indicate Bracton's understanding of Roman law (though Maitland doubted this), but it cannot be considered a true gauge of the Roman content of the English common law in Bracton's time. See generally, id. 261-62 and sources there cited.
4. Accord, see Maitland, Equity at 8-9.
5. B. Nicholas, An Introduction to Roman Law 157 (1962) (hereinafter Nicholas, Rom.Law). The present author has relied heavily on Nicholas's work for the portrayal of Roman law contained in this chapter.
6. Id. at 99-100.
7. Id.
8. Id. at 141.
9. Id. at 144.
10. Id.
11. Id.
12. Id. at 145.
13. See, e.g. infra ch.5 at text accompanying notes 43-44. Note that usufructus is a two-party concept, while the English "use", in theory at least, involves three parties; that two of the theoretical three parties might be the same person does not diminish the validity of this point.
14. Technically, the feoffment to uses could apply to both moveables and immoveables. But because the common law allowed bequests of moveables (while prohibiting devises), there was no need for a means of circumventing a common law prohibition in the case of moveables.
15. See, e.g. infra ch.4 note 21 and accompanying text; ch.5 at text accompanying notes 42-43.

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16. See 2 Pollock & Maitland, HEL at 228-29, and Note at 233-39.
17. See generally infra ch.4.
18. Nicholas, Rom. Law at 101.
19. Id. at 141.
20. Id. at 268. Hadrian (r. 117-138 A.D.) forbade indeterminate persons, such as the unborn, to take via the fideicommissum, but Justinian (r. 527-565 A.D.) repealed this prohibition. Id.
21. Id. at 267.
22. Id. at 267-68.
23. Id. at 269.
24. Id. at 268.
25. By the reign of Augustus, it was established that a duly executed codicil to a will could set up a fideicommissum. Id. at 270. This implies nothing as to its enforceability, which rarely was ordered.
26. Id. at 267.
27. Holdsworth argues, for example, "Henry VII could not have effected a thorough-going reform, upon a matter which touched so nearly the pecuniary interests of the most powerful class in the country, without risking a throne which was none too secure". 4 Holdsworth, HEL at 449. Accord, see supra ch.2, at text accompanying notes 30-34.
28. Exceptions would be the king (who, as overlord of overlords, had nothing to gain by the designation of cestui), convicted felons (the "attained" - cf. Plucknett, Concise History at 431, text accompanying note 1), and traitors.
29. See infra ch.6, at text accompanying note 46. Cf. infra ch.5, at paragraph in text preceding note 27. The whole point of epieikeia was to stay within the law - which prohibited devises - while sometimes allowing escape from that law's too harsh effects.
30. See, e.g., W. Buckland & A. McNair, Roman Law and Common Law 177 (2d ed. revised by F. Lawson 1965).
31. Id.
32. But they have rejected it. Id. Cf., e.g., Keeton & Sheridan, Equity at 143 (noting that in Ceylon - Sri Lanka - the trust and fideicommissum exist distinct, side-by-side).

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33. 4 Holdsworth, HEL at 449 n.1. Cf. A. Murray, Reason and Society in the Middle Ages 107 (1978) (dependence of one man upon another is a commonplace of societies, and of the essence of the feudal system).
34. Maitland, Equity at 36.
35. See, e.g., P. Vinogradoff, Roman Law in Medieval Europe 56 (2d ed. 1929) (Bologna); id. at 97 (in Oxford at close of twelfth century, canon law pushes Roman law aside) (hereinafter cited as Vinogradoff, Rom.Law).
36. Keeton, Norman Conquest at 63 (co-existence of Roman law and canon law after Gratian's Decretum, with the latter constituting a "formidable limitation to all secular jurisdiction"). Accord, Winfield, Chief Sources at 59. See also, the medieval painting reproduced in Cheetham, Keepers of Keys, facing p.216 (showing Justinian, holding the Corpus Juris, facing Clement V. (r.1305-14), who faces outward).
37. Vinogradoff, Rom. Law at 97-98.
38. Holdsworth, The Reception of Roman Law in the Sixteenth Century (pt. 3), 28 Law Q.Rev.131, 143 (1912).
39. Keeton, Norman Conquest at 63. Scholars have advanced a variety of reasons why Roman law did not take root in England. Van Caenegem says it was merely a question of timing: Henry II had acted before the great thirteenth century Roman law revival. Van Caenegem, L'histoire du droit et la chronologie, Réflexions sur la formation du 'Common Law' et la procédure romano-canonique, in 2 Études D'Histoire Du Droit Canonique (Paris: 1965). Holdsworth suggests that the history of civil law in practice shows that the Roman civil law could not have improved on the deficiencies of the common law. Holdsworth, supra note 38, at 138.
40. See infra ch.4, at text accompanying note 92 (summarizing text preceding it). In addition, it is possible to overestimate the Roman law influence on canon law concepts: what is certain is the importation of Roman terminology; what remains uncertain is the importation of the underlying Roman legal concepts. Cf., e.g., W. Buckland & A. McNair, supra note 30, at 148.
41. Rodes, Eccles.Admin. at 66; Report of Archbishops' Comm'n at 21-22.
42. Id. It is arguable that provision for wills is a canonical borrowing of substantive Roman law, Report of Archbishops' Comm'n at 39, but it is not conclusively established. W. Buckland & A. McNair, supra note 30, at 148. Bequests of moveables and the origin of the will are well outside the scope of this study. To the extent that the will is relevant to this study, one takes that device as he finds it at the time in question. See infra, ch.6.

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43. Report of Archbishops' Comm'n at 35.
44. See infra ch.4, at text accompanying notes 69-77 and 81-90.
45. See infra ch.5, at text accompanying notes 10-19.

NOTES TO CHAPTER 4:

THE FRANCISCAN FRIARS, THE FEOFFMENT TO USES,
AND CANONICAL THEORIES OF PROPERTY ENJOYMENT

1. E.g., Baker, IELH at 211, text accompanying note 22; Plucknett, Concise History at 577, text accompanying note 3; Baildon, Select Cases in Chancery, 10 Selden Soc. at 49 n.3 (1896) (hereinafter cited as 10 Seld.Soc.).
2. Citations are to the edition of 1951 by A. Little (completed by J. Moorman)(hereinafter cited as Eccleston).
3. Id. at 1. Accord, J. Moorman, A History of the Franciscan Order 72 (1968) (hereinafter cited as Moorman, Franciscan Order).
4. Eccleston at 3.
5. A. Little, Studies in English Franciscan History 5 (1917) (hereinafter cited as A. Little, Studies).
6. Id. at 4.
7. Rule of 1221: in Francis of Assisi, Writings and Early Biographies, M. Habig ed., 31, at 31 (1973)(hereinafter cited as Francis (Habig edn.)). Testament: in X. Schnieper, St. Francis of Assisi 13, at 14 (1981)(also Habig edn. 65, at 68). The confirmed Rule of 1223 reiterated the objectives of the Rule of 1221. (See Habig edn. at 57.) The Latin forms of the Rule of 1223 and of the Testament are contained in Regula et Constitutiones Generales Ordinis Fratrum Minorum at V and XIII (at XV)(1953)(hereinafter cited as RCGOFM).
8. Eccleston at 22.
9. 2 Pollock & Maitland, HEL at 228-29.
10. 4 Holdsworth, HEL at 416 n.6 and accompanying text.
11. Id.
12. Id. at 433-34.
13. See infra text accompanying notes 69-70, 81-90. See also supra ch.3 at text accompanying notes 40,44.
14. Y.B. 2 Edw. II, no.143 (1308), printed at 19 Seld.Soc. 75 (1904).
15. Baker, IELH at 229.
16. Cf. Eccleston at 9: In 1225, "conduxerunt sibi domum in parochia S. Abbae" Eccleston indicates that the friars did not stay long in this house, but at the very least his account demonstrates that, from their arrival in Oxford, the Franciscan friars resided in and about St. Ebb's.
17. 19 Seld. Soc. 75, at 75-76.
18. Id. at 76.

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19. See, e.g., Y.B. Hil.19 Edw.III, f.3 (1344-45) (re rights in a tenancy in land), in Rolls Series, vol.18 & 19 Edw.III 374 (L. Pike ed. 1905), Stonore, J.: "ley est resoun." Id. at 379. Thorp, J.: "nulle ensaumple est si fort come resoun" Id. at 377.
20. See, e.g., Y.B. Pasch. 4 Edw.IV, pl.9, f.8 (1465).
21. Accord, e.g., Anon. K.B. 72 Eng.Rep.199 (Keil 42, pl.7) (1502) (Frowyk, J.: cestui, like trespassor, has no rights in the land; he is feoffees' tenant at sufferance); Y.B. Pasch. 4 Edw.IV, pl.9, f.8 (1465) (Catesby, J.: cestui is tenant at sufferance of, and may be trespassor against, feoffee).
22. Doctor and Student, Dialogue 2, c.xxii, at 224.
23. Baker, IELH at 229-30.
24. Cf. supra Introduction at text accompanying note 3 (Baker quotation).
25. Printed in X. Schnieper, St. Francis at 12; and in Francis (Habig edn.) at 31, both supra note 7.
26. Rule of 1223 printed in RCGOFM at V (Latin), and Habig edn. at 57, both supra note 7. See also R. Brooke, Early Franciscan Government 69 (1959) (hereinafter cited as Brooke, Fran. Gov't.)
27. Gregory IX, Quo elongati (28 Sept.1230) in 1 Bullarium Franciscanum 68-70, no.G9, 56 (IV) (G.J.Sbaralea ed. Rome: 1759). Francis's Testament reflects the notion of the three part Rule, e.g.: "in omnibus Capitulis...quando legunt Regulam, legant et ista verba." RCGOFM at XVI.
28. Brooke, Fran. Gov't. at 75.
29. Id.
30. Id. at 74.
31. See supra note 7 and accompanying text.
32. Printed in X. Schnieper, supra note 7, at 12 (emphasis added). Cf. Francis (Habig edn.) at 38.
33. Brooke, Fran.Gov't. at 108. See also Rule of 1223, c.1, in Christianity Through the Thirteenth Century, infra note 55, at 344-45; and RCGOFM at V.
34. Brooke, Fran. Gov't. at 75.
35. Moorman, Franciscan Order at 172, 514.
36. J. Moorman, The Franciscans in England 35, 67-68 (1974) (hereinafter cited as Moorman, Fran. England).
37. J. Barton, The Medieval Use, 81 Law Q.Rev.562, 565 (1965).

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38. His protasis restates 2 Pollock & Maitland, HEL at 231. Certainly, however, a strong case can be made that the landholding "nobility" were the first to employ the "use" with any frequency; they had every incentive so to do, while the friars had canonical theories of property enjoyment without ownership. Compare supra ch.2 (generally), with infra (this chapter), text accompanying notes 69-90.
39. See infra note 48.
40. Milsom alludes to property ownership schemes articulated by the popes at the end of the thirteenth century. Milsom, HFCL at 203. Pollock and Maitland give a fuller, albeit brief, account of these schemes at 2 Pollock & Maitland, HEL 238 (XIII). This study finds the papal formulations of the first half of the thirteenth century more instructive.
41. Milsom, HFCL at 203.
42. Milsom makes explicit that he believes the grant to be of a Roman usus, but the terms of the grant do not indicate why this should be so. (See 19 Seld.Soc. at 75 ff.). Pollock and Maitland make the point that scribes "confused" the words usus and opus, using either or both, without regard to technical differences, to express the ad opus feoffment to uses. 2 Pollock & Maitland, HEL at 228-29. The case report is simply inconclusive as to precisely what the grant meant by "usum" (see infra note 43). Given the facts of the St. Ebb's case, and that usus and opus were written interchangeably, one must at the minimum be much more cautious than Milsom in asserting that the issue in the St. Ebb's case centered on a Roman-style usus.
43. Milsom, HFCL at 203. The friars proffered a document stating their cestui expectancy in the St. Ebb's properties, and from which Milsom quotes. That document employed the words "usum plenarium et aisiamentum." Those words, although in Latin, do not point to a Roman law source; they were non-technical descriptive terms employed in property grants at common law. See Baker, IELH at 354-55.
44. See supra ch.3 at text accompanying note 44.
45. N.b. Pollock and Maitland's point, on the mistranslation of usus by scribes. 2 Pollock & Maitland, HEL at 228-29.
46. In the twelfth century, royal justices were often clerics. See Keeton, Norman Conquest at 69-70. But the St. Ebb's case arose in the early fourteenth century.
47. Milsom, HFCL at 203.

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48. The St. Ebb's case would certainly constitute an early feoffment to uses, but by no means the first. McFarlane dates the feoffment to the uses to be declared in testamentary instructions to 1297. McFarlane, Nobility at 69. Bean notes several "uses" during the reign of Edward II (r.1307-27). J. Bean, The Decline of English Feudalism, 1215-1540, at 104-79, especially at 118-19 (1968).
49. Barton, supra note 37, at 565.
50. Pollock and Maitland approach, but do not fully adopt, such a conclusion, in noting the confluence of a papal revival of Roman law terminology and the medieval Franciscan's particular property requirements. 2 Pollock & Maitland, HEL at 239 (XIV).
51. 10 Seld. Soc. at 49 n.3.
52. Barton, supra note 37, at 565.
53. Moorman, Fran. England at 72-74.
54. One would not, but for Milsom's allusions (HFCL at 203), and Pollock and Maitland's adumbrations (2 HEL at 238 (XIII)), exaggerate to say "completely" neglected by legal historians."
55. Pope Innocent III had, in 1210, approved the Friars Minor as a brotherhood within the Church without, however, endorsing any particular "rule" for them. L. Little, Religious Poverty at 150. The Rule of 1223, as approved by Honorius III, is translated and printed in Christianity Through the Thirteenth Century at 344-50 (M. Baldwin ed.1970). The Latin is found in RCGOFM at V.
56. Brooke, Fran. Gov't. at 61, 65-67.
57. N. Cheetham, Keepers of the Keys: The Pope in History 134 (1982) (hereinafter cited as Cheetham, Keepers of Keys).
58. Id.
59. Id.; Brooke, Fran. Gov't. 69-71, 75-76.
60. Brooke, Fran.Gov't. at 108. Both Francis's and the Pope's interests in having a Cardinal Protector for the Friars Minor are reflected in the Rule of 1223, c.1 (obedience to Pope Honorius and his successors, as well as to Francis and his successors mandated), c.12 (Cardinal Protector as outside "governor" and "corrector" of the Order), translated and printed in Christianity, supra note 55, at 344-45 and 350, respectively.(Latin in RCGOFM at V and XII, respectively.)
61. Cheetham, Keepers of Keys at 134.
62. Brooke, Fran.Gov't. at 72, text accompanying note 3.

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63. Id. at 68. The choice of someone of Ugolino's prominence parallels the Roman law tradition that a fiduciarius be not merely a trusted friend, but also socially and politically important.
64. L. Little, Religious Poverty at 164.
65. As pope, Ugolino sometimes wore the Franciscan habit in public as emblem of his devotion to the ideals of that Order. Clothed in the Friars' habit, he engaged in works of charity which indicated that not only his dress, but also his inclinations, were towards the ideals of the Franciscans. See Brooke, Fran.Gov't. at 69-70.
66. Ugolino, as Pope Gregory IX, completed a comprehensive codification of canon law, the Decretalia (or Decretals), in 1234.
67. L. Little, Religious Poverty at 185-86.
68. See generally Moorman, Fran. England at 37-38, 62-77.
69. Quo elongati, cited supra note 27. Strictly speaking, the provincial ministers' request violated St. Francis's spiritual Testament, which forcefully forbade the friars to, "desire or axe or to settle or purchase any letter [i.e. papal decretal] or writyng from the court of Rome, nother for the churche nor for any other maner of place..." (From a fifteenth century English translation of the Testament in Monumenta Franciscana(Rolls Ser. vol.2), 562, at 564)(1859). Since Gregory IX had intimate knowledge of the Franciscans' needs with respect to property (vide the Bologna house crisis of 1219), it seems likely that the ministers' request was a matter of form only, designed to preclude any impression that Gregory was autocratically exercising authority over, and imposing structure on, the reluctant or unwilling friars. Because one of his intentions was to render St. Francis's Testament not binding on the Order (an intention possibly revealed in advance to the ministers), Gregory probably had no qualms about making the price of his intervention the ministers' technical violation of the Testament.
70. The ownership-enjoyment dichotomy of Quo elongati was not, however, a new legal concept even in the Church. Not only had the resolution of the Bologna house crisis of 1219 prefigured it, but also in the eighth century Bishop Chrodegang of Metz had drafted a regula for the canons of his cathedral which provided that they would convey their property to the Church and receive profits from that property during their lifetimes. L. Little, Religious Poverty at 100.
71. Brooke, Fran.Gov't. at 43.
72. Accord, id. at 75.

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73. Eccleston at 20.
74. 4 Holdsworth, HEL at 416 & 416 n.6. But n.b. Baker, IELH at 355 (commodum is an imprecise term).
75. Eccleston at 21.
76. Monumenta Franciscana, supra note 69, at 494-95.
77. Id. at 493.
78. See Rule of 1221, printed in X. Schnieper, supra note 7, at 12.
79. Robert Bouchier, Chancellor from 1340-41, was the first layman to become Chancellor. Not all the churchman-Chancellors held "high" rank within the Church. See generally infra Appendix.
80. Cheetham, Keepers of Keys at 136.
81. (14 Nov. 1245), at 1 Bullarium Franciscanum, supra note 27, 400-02, no.14, 114 (XI).
82. Moorman, Franciscan Order at 120.
83. Brooke, Fran. Gov't. at 250.
84. (19 Aug. 1247) 1 Bullarium Franciscanum, supra note 27, at 487.
85. Brooke, Fran. Gov't. at 264.
86. Moorman, Franciscan Order at 142, 152 (citing Expositio regulae in S. Bonaventura, Opera Omnia (Quaracchi ed.), viii, 418-22).
87. Id. Cf. Nicholas III, Exiit qui seminat (14 Aug. 1279), in Seraphicae Legislationis Textus Originales, at 181-228, (Quaracchi ed. 1897). Exiit qui seminat drew a not altogether novel distinction between usus juris and usus facti, but seems addressed primarily at moveables, since the question regarding ownership and enjoyment of lands and tenements had long since been resolved.
88. Moorman, Franciscan Order at 129-30.
89. (8 Dec. 1322), in 5 Bullarium Franciscanum at 233-46 (C. Eubel ed. 1898).
90. Moorman, Franciscan Order at 316-17.
91. See infra Appendix.

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92. Cf. the position of the Grey Friars (Franciscans) of York as cestuis under the will of Sir John Rocliff of Colthorpe, Knt. (6 Dec. 1531), Test. Ebor. V, no.219, 79 Surtees Soc.319 (1884). This will makes absolutely clear that the Grey Friars were to be cestuis under an ordinary English feoffment to uses, and not beneficiaries under any Romano-Canonical analogy. If, therefore, the St. Ebb's case of 1308 represents the beginning of a trend, Rocliff's will shows it at its apex, for the friars probably drafted his will. Id. at 319, "note".

NOTES TO CHAPTER 5:

EPIEIKEIA AND THE CHANCELLOR'S ENFORCEMENTOF THE FEOFFMENT TO USES

1. Milsom, HFCL at 213.
2. The Nicomachean Ethics of Aristotle, bk.v.10, at 133 (D. Ross trans. 1954) (hereinafter cited as Aristotle, Nicomachean Ethics).
3. Id.
4. Id. at 134.
5. Cf. Aquinas: "voluntas humana ex communi conducto potest aliquid facere iustum in his quae secundum se non habent aliquam repugnantiam ad naturalem iustitiam. Et in his habet locum ius positivum." T. Aquinas, Summa Theologiae II.2, q. 57, art. 2, resp., in Marietti edn. tomus II at 278 (1962) (hereinafter cited as Aquinas, Marietti edn., followed by tomus number).
The Chancellor, in enforcing cestui interests under feoffments to uses, filled precisely the sort of equitable gap Aquinas described.
6. Cf. Barbour, Some Aspects of Fifteenth-Century Chancery, 31 Harv.L.Rev. 834, at 849 (1918): "Feudalism as a practical system had ceased to be of importance long before the law which was bottomed upon it had adapted itself to a new environment". Cf. also Baker, introduction to 94 Seld.Soc. at 193.
7. Around 1200, the justices of England were "all for extreme simplicity", (2 Pollock & Maitland, HEL at 313), and so favoured primo-geniture and the absolute control of freehold lands and tenements by the feoffee.
8. Keeton put it well: "The land law was the cement which held together feudal society" Keeton, Norman Conquest at 146.
9. Aquinas, Summa Theol. II.2, q. 147, art. 3, resp., in Blackfriars edn. vol. XLIII at 96 (1968) (also Marietti edn., tomus II at 636). Cf. S. Chodorow, Christian Political Theory and Church Politics in the Mid-Twelfth Century: The Ecclesiology of Gratian's Decretum at 99 (1980) (hereinafter cited as Chodorow, Gratian): Chodorow notes Gratian's "commitment to the idea that the Church is a juridical community and as such must be equated with other, secular communities".
10. Accord, B. Tierney, Religion, law, and the growth of constitutional thought, 1150-1650, at 13 (1982).
11. Report of Archbishops' Comm'n at 25. The Decretum remained the benchmark of canonical jurisprudence long thereafter.
12. J. Moorman, A History of the Church in England 88 (3d. ed. 1973, using 2d American ed. 1980) (hereinafter cited as Moorman, Church in England).

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13. See C. Duggan, Twelfth-century Decretal Collections and their Importance in English history 16, 21 (1963) (twelfth century canonical influence of Decretum) (hereinafter cited as Duggan, Decretal Collections).
14. Translated: "The stringency of customary and ["uel" - see discussion in Chodorow, Gratian at 101, text accompanying note 8] of legislative laws, moreover, may sometimes be relaxed". The original Latin form is found in Decretum Magistri Gratiani, Dist.XIV, II pars., contained in Corpus Iuris Canonici at 34 (Editio Lipsiensis Secunda, A. Friedberg ed. 1879, reprinted 1928).
15. Cf. S. Kuttner, The History of Ideas and Doctrines of Canon Law in the Middle Ages 15 (1980): "Only he who is blind to the mystery of the Church could find that the bond of law and the bond of love are mutually exclusive, that justice and mercy cannot meet on the plane of law. To the mind of the classical canonists they did meet, and from the opposites of law and mercy there arose the ideal of aequitas canonica, which permeates their analytical thought and their solution of cases at every step".
16. During the reigns of Henry II and of his sons, many royal judges and administrators were bishops, and so would certainly have been familiar with the canon law (as well as civil and common laws). See, e.g., M. Sheehan, The Will in Medieval England at 138, especially note 125, and accompanying text. Accord, Winfield, Chief Sources at 57 (kings of twelfth and thirteenth centuries frequently appointed canon law-trained ecclesiastics to royal judge-ships).
17. Gratian's thinking on "dispensation" was formulated with secular institutions in mind, rendering importation of those thoughts into the secular setting unproblematic. As Chodorow notes, "Gratian looked at the hierarchy of laws from the standpoint of the political community, and he looked upon the Church as a community analogous to other juridical communities". Chodorow, Gratian at 97.
18. Id. at 102-03 (from Decretum, Tractatus de legibus, Dist. 6, post c.3, quoted in Latin at Chodorow, Gratian, 103 n.13).
19. See generally Chodorow, Gratian at 105-11.
20. Aquinas, Summa Theol. II.1, q. 94, art. 5, resp., in Blackfriars edn. vol. XXVIII at 92 (1966) (also Marietti edn., tomus I at 429).
21. Aquinas, Summa Theol. II.1, q. 96, art. 1, resp., in Blackfriars edn. vol. XXVIII at 118 (1966) (also Marietti edn., tomus I at 435).
22. Aquinas, Summa Theol. II.1, q. 96, art. 6, resp., in Blackfriars edn. vol. XXVIII at 138 (1966) (also Marietti edn., tomus I at 439).

23. Cf. Gratian's views, summarized at Chodorow, Gratian at 122: "To permit individuals to act on their own authority would be to endorse the disintegration of the Church by depriving the regularly constituted authority of its power to judge".
24. Aquinas, Summa Theol. II.1, q. 96, art. 5, resp., in Blackfriars edn. vol. XXVIII at 136 (1966)(also Marietti edn. tomus I at 439).
Cf. Chodorow's characterization of Gratian's thought at Gratian 133-34 (Church rulers -especially pope- to obey ecclesiastical laws except when legislating as ecclesiastical sovereign). Cf. also Bracton's statement regarding the king: "non debet esse major eo in regno suo in exhibitione juris [Sed] locus erit supplicationi, quod factum suum corrigat et emendet, quod quidem si non fecerit, satis sufficit ei ad poenam, quod Dominum expectet ultorem." De Legibus et Consuetudinibus Angliae, Bk.1, c.8, no.5 at 40 (translated at 41) (T. Twiss ed., Rolls Series vol.70-I, 1878, reprinted 1964) (hereinafter cited as Bracton, De Legibus).
25. See Note, Toward Principles of Jury Equity, 83 Yale L.J. 1023, at 1024 n.3 (1974).
26. Cf. Barbour, supra note 6, at 849: "Doubtless the cestui que use first appealed to the [king's] council, but by the time of Henry V petitions to the Chancellor are very common."
27. Aquinas, Summa Theol. II.1, q. 97, art. 2, resp., in Blackfriars edn. vol. XXVIII at 146 (1966)(also Marietti edn., tomus I at 441).
28. Doctor and Student, Dialogue 1, c.xvi, at 95.
29. Id. at Dialogue 1, c.xv, at 95.
30. Cf. Aquinas, Summa Theol. II.1, q. 97, art. 2 resp., in Blackfriars edn. vol. XXVIII at 146 (1966)(also Marietti edn., tomus I at 441), quoted supra at text accompanying note 27.
31. The phrase is Sir Christopher Hatton's, Chancellor from 1587-91. The ideas contained in this well-turned phrase, however, long antedate Hatton, although the notion of "conscience" had, before the demise of the Churchman-Chancellors, a more spiritual connotation than it later did. See N. Underhill, The Lord Chancellor 92 (1978). Following the period of this study, it is evident that the Chancellor's "conscience" became ever more rigidly circumscribed so as not to be idiosyncratic with the Chancellor. See generally C. Allen, Law in the Making 406-07, 409-10 (7th ed. 1964).
32. Doctor and Student, Dialogue 1, c.xvi, at 97.
33. Id., Dialogue 1, c.i, at 9.
34. Id., Dialogue 1, c.i, at 11.
35. Id.

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36. Id. Cf. Aquinas: "lex humana in quantum habet rationem legis in quantum est secundum rationem rectam; et secundum hoc manifestum est quod a lege aeterna derivatur." Summa Theol. II.1, q. 93, art. 3, resp., in Blackfriars edn. vol. XXVIII at 60 (1966) (also Marietti edn., tomus I at 422).
37. Cf. F. Dowrick, Justice according to the English Common Lawyers at 51 (1961) (natural law formulations of Aquinas and St. Germain, among others, were "at best approximate expressions of fragments of a sublime concept, the eternal law of God") (hereinafter cited as Dowrick, Justice).
38. Holdsworth reasons, "the land law, because it was so much more detailed than any other branch of the common law, suffered most from the precocious fixity attained by so many of the rules of the common law." 4 Holdsworth, HEL at 414 (as early as the twelfth century).
39. The feudal system demanded the common law's protection of feoffees, even at the expense of feoffors' or cestuis' frustration; to recognize others' interests would lead to the evasion of feudal obligations, and so undermine the social structure. Id.
40. Cf. Dowrick, Justice at 52 (second of three uses of natural law in public jurisprudence is to determine the justness of a positive law enactment without regard to its validity).
41. To be "seised of", and not to "own", land is the accurate description of the feudal landlord-tenant structure. Baker, IELH at 199. But when talking of the maximum rights in lands and tenements under the common law - freehold - as compared to those rights under another legal system, or in the abstract, the term "ownership" seems an economical compromise between the general and the precise; it is used advisedly.
42. Y.B. Pasch. 4 Edw. IV, pl.9, f.8 (1465).
43. Id.
44. Id.
45. Anon. K.B. 72 Eng.Rep.199 (Keil 42, pl.7, Frowyk, Sjt.) (1502).
46. See infra ch.6, text accompanying notes 33-38 (re testamentary instructions to feoffees to uses).
47. On this point see 4 Holdsworth, HEL at 430 n.4 and accompanying text.
48. Cf. Avery, The History of the Equitable Jurisdiction of Chancery before 1460, at 42 Bull.Inst.Hist.Research 129, 135-36 (feoffor's common law power of reentry for feoffees' failure to reconvey according to condition).

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49. Trespass actions belonged in the King's Bench. See e.g., Keeton, Norman Conquest at 112-13.
50. Y.B. Mich. 14 Hen.VIII, pl.5, f.4 (1521).
51. Id. at f.8.
52. Id. Cf. Thorp and Stonore, JJ., at Y.B. Hil.19 Edw.III, f.3 (1346), in Rolls Ser. vol.18 & 19 Edw.III at 376-79 (L.Pike ed. 1905).
53. Cf. Avery's assertion: "The great expansion of the chancellor's jurisdiction in the fifteenth century ... resulted from his defence of the interests of the cestui-que-use and this became, in the reign of Henry VI [1422-61], the main raison d'être of the court [of Chancery]." Avery, supra note 48, at 135. By 1521, therefore, Brooke's statement could only have referred to the cestui's ability to enforce the "use" in the Chancery.
54. Accord, Avery, supra note 48, at 137 (only bona fide purchasers for value, without notice, take free of the "use").
55. Y.B. Mich. 14 Hen.VIII, pl.5, f.4, at f.8 (1521). Accord see 6. Anon. K.B. (1510-22), in 1 Spelman's Reports, 93 Seld.Soc.231 (J.Baker ed. 1977) (lack of notice to bona fide purchaser for value extinguishes original feoffment to uses).
56. For, in Holdsworth's words, "at common law the use was nothing at all - not even a chose in action", so far as its enforcement was concerned. 4 Holdsworth, HEL at 440.
57. Avery, supra note 48, at 135-36; Barton, The Medieval Use, 81 Law Q.Rev. 562, at 566-67 (1965).
58. Godwyne v. Profyt, Petition 45, at 10 Seld.Soc.48. Cf. 4 Holdsworth, HEL at 420, text accompanying note 2; Barton, supra note 57, at 568. Baildon agrees with Holdsworth's date of "shortly after 1393" for this petition. But this date is problematic: The petition is addressed to the Chancellor as bishop of Exeter. Edmund de Stafford was both bishop of Exeter and Chancellor of England from 1396-99 and 1401-03. His predecessor, Thomas Arundel, was bishop of Ely, and archbishop of York from 1388 (and archbishop of Canterbury from 1396), but he was never bishop of Exeter. No bishop of Exeter was Chancellor around 1393. Therefore, the likely date of this petition is after 1396 and during de Stafford's Chancellorship, unless it was erroneously addressed to the bishop of Exeter.
59. 10 Seld.Soc. at 49.

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60. Cf. Holdsworth, The Reception of Roman Law in the Sixteenth Century (pt.IV), 28 Law Q.Rev.236, at 236 (1912) (Chancellors looked to scholastics for principles of conscience to exercise the epieikeia function in cases of the common law's rigidity).
61. See, e.g., as typical of the Synoptic accounts, Mark 2:23-28 (picking corn on sabbath - sabbath for man ...); Mark 3:1-6 (curing a man's withered hand on sabbath in violation of prohibition of work on sabbath); Mark 7:1-23 (generally), especially 7:7(b), "You put aside the commandment of God to cling to human traditions." Outside the Synoptic tradition, see, e.g., John 5:1-18 (generally - cure on sabbath), especially 5:17, "My Father goes on working, and so do I"; John 7:21-24 (form v. substance of Mosaic law), especially 7:24, "Do not keep judging according to appearances; let your judgement be according to what is right". All quotations from The Jerusalem Bible (1966 & 1967). Cf., "Jesus' religious deed was done, in other words, in accordance with Jewish religious Law and laws, but was invested with an added dimension of effectiveness and power ... through his genial perception of the Law's inmost significance, its original purpose." G. Vermes, The Gospel of Jesus the Jew 40 (48th Riddell Memorial Lectures, Univ. of Newcastle upon Tyne, 17-19 March 1981). The apostle Paul took a different, antinomian, view. Id. at 45. (See, e.g., Galatians 3). Cf. also Bracton, who says that God-in-Jesus Christ wished to conquer evil, "justitiae ratione; et sic esse voluit sub lege, ut eos, qui sub lege erant, redimeret, noluit enim uti viribus, set ratione et iudicio." De Legibus, Bk.1, c.VIII, no.5, at 38 & 40 (translated at 39 & 41).
62. Avery, An Evaluation of the Effectiveness of the Court of Chancery Under the Lancastrian Kings, 86 Law Q.Rev. 84, 86-88 (1970).
63. Cf. Petition 126 (1422-26), 10 Seld.Soc. at 122 (Chancellor asked to examine witnesses, including alleged feoffees, as to whether a "use" existed - apparently as an adjunct to another matter not reported). See generally Avery, supra note 62, at 90; Avery, supra note 48, at 137.
64. Avery, supra note 48, at 137; Holdsworth, supra note 61, at 236. See also supra ch.1, text accompanying note 77 (fact finding methods in ecclesiastical courts).
65. See M. Hemmant, introduction to Select Cases in the Exchequer Chamber Before All the Justices of England, 1377-1461, 51 Seld. Soc. xi, at xiv (1933): "on a question of law of great importance arising, the Chancellor adjourned the case into the Exchequer Chamber that he might have the opinion of all the judges". For examples of this in cases of feoffments to uses, see, e.g., Case 35, 51 Seld.Soc.

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at 173 (also reported in Y.B. Trin. 37 Hen.VI, pl.23, f.35 (1459)); Reynolde v. Knott, 51 Seld.Soc. at 147 (Hil.37 Hen.VI); Y.B. Pasch. 10 Hen.VII, pl.13 [misprinted as "31"] f.20 (1495) does not refer to Exchequer Chamber, but its removal appears to be to the Exchequer Chamber - where the Chancellor could consult the common law judges). On the Exchequer Chamber, see generally Hemmant's introduction to 51 Seld.Soc. (beginning at xi).

66. Keeton & Sheridan, Trusts at 21.
67. Petition 123 (1422-26), 10 Seld.Soc. at 120.
68. Id. at 121.
69. Petition 127 (1422-26), 10 Seld.Soc. 122.
70. Most likely, the Chancellor would delegate the task of examination to the Master of the Rolls. Accord, Baker, IELH at 95.
71. 10 Seld.Soc. at 123.
72. The Chancellor, as the king's "conscience" in legal matters, is called upon to do justice, as was the king's duty to his subjects. See, e.g., Bracton, De Legibus Bk.2, ch.XXIV, no.2, at 442 (translated at 443): "Est eni corona regis facere justitia & iudicium, & tenere pace....". To do justice may, as Aristotle and Aquinas recognized, require dispensation from the letter of the law in order to effectuate the law's underlying purpose. This is the Chancellor's epieikeia function, to which petitioner appeals. Cf. also John 7:24 (Bible), quoted supra note 61. It is interesting to note that the traditional oath taken by common law judges requires them to "do right to all manner of people after the laws and usages of this realm" Promissory Oaths Act, 31 & 32 Vict. c.72, s.4 (1868) (codification of the long-standing oath). The appeal to the Chancellor should not, however, be interpreted in the light of this oath to mean the common law judges had failed to fulfill their oaths to "do right"; it is, rather, an appeal to the very same obligation of the Chancellor, whose power pursuant to his obligation to "do right" was not limited by the letter of the law. The whole point of petitioning the Chancellor was that, even if the common law judges did "do right", they could only do so within their powers; only the Chancellor possessed the juridical means fully to address petitioner's complaint.
73. Petition 40 (post 1398), 10 Seld.Soc. 43.
74. See, e.g., McFarlane, Nobility at 71.
75. See, e.g., id. at 69.

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76. Petitioner indicated this by praying the Chancellor's aid, "for God and in way of charity". Petition 72 (circa 1402), 10 Seld.Soc. 69, at 70.
77. Plucknett, Concise History at 578 n.6 and accompanying text; 4 Holdsworth, HEL at 417.
78. Petition 117 (1417-24), 10 Seld.Soc. 114.
79. 10 Seld.Soc. at 115.
80. Petition 99 (1407-13), 10 Seld.Soc.93. The date is established by the years in which Thomas Arundel was both Chancellor and archbishop of Canterbury, as indicated in the petition's address. Arundel, who became archbishop of Canterbury in 1396, was Chancellor part of that year and, thereafter, from 1407-09 and 1412-13.

It was unusual to have just one feoffee because the idea of a "use" was to create a potentially perpetual interest. The feoffee's duties descended to his heirs, who were bound to perform them. Avery, supra note 48, at 136. But if there were just one feoffee, there would be less chance of his having an heir, as well as more chance of fraud, since his bad faith could not be offset by the other feoffees' honesty.

81. 10 Seld.Soc. at 94.
82. Id. at 94-95.
83. Avery, supra note 48, at 135.
84. Id. at 136.
85. Id. at 129.

NOTES TO CHAPTER 6:ORIGINS AND ENFORCEMENT OF THE FEOFFMENTTO THE USES TO BE DECLAREDIN TESTAMENTARY INSTRUCTIONS

1. Hereinafter the word "devise" is, for clarity and efficiency, used in its modern sense to refer to a testamentary gift of real property. "Bequest" refers to a testamentary gift of personal property. Cf. 2 Pollock & Maitland, HEL at 338.
2. Keeton, Norman Conquest at 146.
3. Baker, IELH at 222.
4. Keeton, Norman Conquest at 147; Plucknett, Concise History at 537, text accompanying notes 1-3.
5. Primogeniture among siblings functioned as follows:
 - (a) between males - firstborn takes;
 - (b) between females - equal shares;
 - (c) son always preferred to a daughter;
 - (d) daughter preferred to ancestor's brother or collateral relations.
 See generally McFarlane, Nobility at 270.
6. Maitland, Equity at 324.
7. Until Quia emptores terrarum, 18 Edw.I (1290). See supra ch.1, at note 21 (re provisions and effects of Quia emptores).
8. 1 Scott, Trusts §1.4, at 17. Sheehan denies that after the Norman Conquest wills of land could not possibly be made. With the permission of the king, or other land-lord where applicable, a devise might be made. M.Sheehan, The Will in Medieval England 268 (1963). Sheehan offers an example of such a will, dating from 1118-19, in which the dominant question appears to have been whether Prince Henry, or the bishop of Bath and Wells, should decide its terms. Id. at 168. The Bishop prevailed, finding a conflicting later will which left the land in question to the priory and monks of Bath. But Sheehan notes that by the end of the twelfth century, the common law had succeeded in prohibiting wills of land. Id. at 269, 281.
9. Maitland, Equity at 26.
10. Keeton & Sheridan, Trusts at 20. (Statute of Wills, 32 Hen.VIII, c.1 (1540)).
11. Baker, IELH at 198; Plucknett, Concise History at 532-33; 2 Pollock & Maitland, HEL at 269.
12. Keeton, Norman Conquest at 146.

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13. Holdsworth, HEL at 446-47.
14. Statute of Uses, 27 Hen.VIII, c.10 (1535). See, e.g., Baker, IELH at 215; Pickthorn, Henry VIII at 282-84.
15. Rodes, Eccles.Admin. at 16, text accompanying note 43; Keeton, Norman Conquest at 61,64.
16. See Constitutions of Clarendon 1164, printed in Documents Illustrative of English Church History 68, at 69,71 (H. Gee & W. Hardy ed. 1921). Accord, Keeton, Norman Conquest at 64.
17. See supra ch.1, at text accompanying notes 14 & 32.
18. See generally Rodes, Eccles.Admin. at 51-52 (re ecclesiastical temporalities and spiritualities for jurisdictional purposes).
19. Maitland, Equity at 26; Helmholz, The Early Enforcement of Uses, 79 Colum.L.Rev.1503, at 1509 (1979); Avery, The History of the Equitable Jurisdiction of Chancery before 1460, in 42 Bull.Inst.Hist.Research 129, at 139-40 (1969). See also supra ch.2, at text accompanying notes 4-7.
20. 18 Edw. I (1290).
21. Glanvill, Bk.vii, c.1, at 69-70.
22. Id. at 71. But cf. the situation in the fourteenth and fifteenth centuries, supra ch.2, at text accompanying notes 4-7.
23. Glanvill, at 70. Glanvill claims the heir's disinheritance was likely to result because of fathers' preference their younger sons. Pollock and Maitland make the point that Glanvill's observation demonstrates the landowning class's dislike of a strict system of primogeniture. 2 Pollock & Maitland, HEL at 274 n.1. See supra ch.2 at text accompanying notes 4-7. Accord, Sheehan, Will in Medieval England at 272-73.
24. Glanvill at 70.
25. Glanvill, ed.'s note at 184-85.
26. Pollock and Maitland, nevertheless, note some twelfth century instances in which an heir joined in an ancestor's alienation by gift of inherited freehold. 2 Pollock & Maitland, HEL at 309.
27. Accord, Sheehan, Will in Medieval England at 270.
28. Avery, supra note 19, at 139-40.
29. Sheehan, Will in Medieval England at 273.

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30. 4 Holdsworth, HEL at 414-15. Cf. Sheehan, Will in Medieval England at 274 (many ingenious efforts to make devises in thirteenth century).
31. Maitland, Equity at 26.
32. Accord Keeton, & Sheridan, Trusts at 20.
33. 4 Holdsworth, HEL at 423; Maitland, Equity at 25-26.
34. Doctor and Student, Dialogue 2, c.xxii, 91 Seld.Soc. at 224.
35. Id. The other reason was to serve as the substance of the bargain in various agreements, including marriage agreements. Id.
36. Baker, IELH at 213; 4 Holdsworth, HEL at 423; Maitland, Equity at 33.
37. See, e.g., Barton, Equity in the Medieval Common Law, in Equity in the World's Legal Systems 139, at 149 (1973) (prevailing view).
38. Cf. 4 Holdsworth, HEL at 446.
39. See generally McFarlane, Nobility at 77; 4 Holdsworth, HEL at 446-49.
40. Statute of Uses, 27 Hen.VIII, c.10 (1535). See also infra note 42.
41. Re Lord Dacre of the South (dec'd) (1535), Spelman's Reports, vol.1, 93 Seld.Soc. 228 (1977); also at Y.B. Pasch.27 Hen.VIII, pl.22, f.7.
42. For the abortive legislative efforts preceding the Statute of Uses of 1535, and re Henry VIII's pressure politics with respect to royal revenues and uses, see generally Ives, The genesis of the Statute of Uses, 82 Engl.Hist.Rev. 673, especially at 697 (1967). See also Pickthorn, Henry VIII at 282-85.
43. 93 Seld.Soc. at 228-29; Y.B. Pasch. 27 Hen.VIII, pl.22, f.7, at ff. 7-10.
44. 93 Seld.Soc. at 229. They did admit that in some places local custom permitted a will of land. Accord, Sheehan, Will in Medieval England at 274-78.
45. 93 Seld.Soc. at 229.
46. Id.
47. Y.B. Pasch. 27 Hen.VIII, pl.22, f.7, at f.10.
48. 93 Seld.Soc. at 230.

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49. Id.
50. There had, however, been legislative limitations placed on feoffments to uses. See generally Ives, supra note 42, at 674-75 (previous legislative attempts to curb the "use").
51. Keeton & Sheridan, Trusts at 20-21; Helmholz, supra note 19, at 1503 (Helmholz places date at second quarter of fifteenth century).
52. Accord, Milsom, who notes: "Traditions do not survive unsupported", asking whether in the "immediate" medieval English "background" to the Chancellor's intervention, quasi-feoffments to uses were being made and enforced. He suggests local and ecclesiastical courts as the jurisdictions most likely to have entertained such actions. Milsom, HFCL at 200-01.
53. 2 Pollock & Maitland, HEL at 232.
54. Helmholz, supra note 19, at 1504, 1513.
55. Cf. id. at 1505-06.
56. Milsom (HFCL at 202), and Scott (1982 Supplement to 1 Scott, Trusts §1.3, at 1), both follow Helmholz's conclusions re the cases he found.
57. Helmholz, supra note 19, at 1510.
58. Id.
59. Id. at 1511.
60. Id. at 1506-07 (Wills); Helmholz, Assumpsit and "Fidei Laesio", 91 Law Q.Rev. 406, at 406 (1975) (fidei laesio).
61. Id.
62. Keeton & Sheridan, Trusts at 20. See generally Flahiff, The Writ of Prohibition to Court Christian in the Thirteenth Century (pt.1), 6 Medieval Studies 261, at 261 (1944) (re what a writ of prohibition was).
63. Helmholz, supra n.60, at 423. Cf. Milsom, HFCL at 202: could the Church fail to intervene when souls - those of feoffors and feoffees - otherwise "might be imperilled?"
64. See, e.g., Aquinas, Summa Theol. II.1, q. 96, arts. 4 & 5.
65. Helmholz, supra note 60, at 409 n.14.
66. The nudum pactum was originally a Roman law concept. See W. Buckland & A. McNair, Roman Law and Common Law at 223, 229 (2d ed. revised by F. Lawson 1965).

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67. Helmholz, supra note 60, at 406. But one thirteenth century canonist, Hostiensis, said - following the analogy of marriage - that words of agreement, without formalities, should be enforced by "penitential" sanctions in ecclesiastical courts. See 2 Pollock & Maitland HEL at 195 n.2 and accompanying text.
68. The "uses" in the cases Helmholz discovered were not "spiritual", but mundane, in nature. That the Church courts took jurisdiction over them indicates an encroachment on royal jurisdictional claims over promises relating to secular matters. See Helmholz, supra note 19, at 1506; 2 Pollock & Maitland, HEL at text accompanying note 5.
69. By the last third of the fifteenth century, the ecclesiastical court records of Canterbury and Rochester contain no cases of feoffments to uses. Helmholz, supra note 19, at 1511. Not until this time do records of the other fifteen (of seventeen) English dioceses survive in statistically reliable quantity.
70. Keeton & Sheridan, Trusts at 20-21. See generally Helmholz, supra note 19, at 1511-12.
71. See generally infra Appendix.
72. 2 Pollock & Maitland, HEL at 201 (re Church courts flouting Constitutions of Clarendon, 1164).
73. Assumpsit was an action for damages. Helmholz, supra note 60, at 412. Fidei laesio, on the other hand, offered a remedy of specific performance and, sometimes, public penance; excommunication was a possible sanction. Id. at 424 n.73 and accompanying text. The choice between these actions, therefore, seems to have been based on what remedy one sought: Most fidei laesio actions could have been brought in the common law courts as assumpsit. Id. at 426.
74. See Fifoot, HSCl at 306-07. Cf. Helmholz, supra note 60, at 430: "assumpsit paralleled fidei laesio in form more closely than it did the contracts enforced in Chancery practice," (which were inferable from the parties' actions, and need not have been formalized by oaths, seals, etc.). Id. at 430-31.
75. Helmholz, supra note 19, at 1510.
76. Helmholz, supra note 60, at 406.
77. Helmholz, supra note 19, at 1511. Cf. 2 Pollock & Maitland, HEL at 232 (feoffment to uses "lives a precarious life" until Chancellor intervenes to enforce cestius' interests).

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78. Avery, supra note 19, at 135 (petitions by fifteenth century cestuis became the "main raison d'être" of the Chancellor's court).
79. Helmholz, supra note 19, at 1509.
80. Cf. Helmholz, supra note 60, at 431 (decline in fidei laesio actions during this period because of declining spirituality). See also Fifoot, HSCl at 305, text accompanying note 84 (suggests that Chancellor, seeing the gap between the Church's jurisdictional claims and its ability effectively to enforce its sanctions, because he approved of the Church's goal in these matters, intervened to apply secular force to that goal's achievement).
81. Helmholz, supra note 60, at 430.
82. Id. at 430-31.
83. Helmholz, supra note 19, at 1510.
84. Id. at 1506.
85. Id. at 1510-11, 1513.
86. Milsom, HFCL at 213.
87. Helmholz, supra note 19, at 1513.
88. Id. at 1511-13; 2 Pollock & Maitland, HEL at 198.
89. Helmholz, supra note 19, at 1507 n.26 and accompanying text.
90. Cf. R. Evershed, Aspects of English Equity at 14-15 (1954): "The rules of Equity grew up side by side with, and were complementary to, the rules of law; and with the rules of law and the rules of the Ecclesiastical Courts... and of the Admiralty Courts together formed a single and coherent whole, the corpus juris Angliae." Evershed seems to have given in to an excess of rhetorical and descriptive enthusiasm, but the kernel of truth in his statement remains. Cf. also Fifoot, HSCl at 305, text accompanying note 84 (discussed supra at note 80).
91. See, e.g., Helmholz, supra note 19, at 1507.
92. Id. at 1507, 1513.
93. 2 Pollock & Maitland, HEL at 337; Avery, supra note 19, at 137 (extremely informal expressions, such as whispers to one's confessor, might constitute such instructions).
94. 4 Holdsworth, HEL at 431.

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95. Sheehan, Will in Medieval England at 138; 2 Pollock & Maitland, HEL at 341-42 (by time probate of wills is evident - in thirteenth century - Church courts have that jurisdiction).
96. The Church benefitted not only as a cestui under the wills' instructions, but also because fees for probating testamentary estates were high. See Rodes, Eccles. Admin. at 141, text accompanying note 106.
97. Accord, Helmholz, supra note 19, at 1513.
98. 15 Ric.II, c.5 (1391). The Statute of Mortmain culminated the post Magna Carta campaign against gifts of lands and tenements into mortmain. See Keeton & Sheridan, Trusts at 157.
99. Keeton & Sheridan, Trusts at 20, 156-57.
100. Avery, supra note 19, at 136. Cf. also, Keeton & Sheridan, Trusts at 20 (multiple feoffees and succession to their duties).
101. 3 Test.Ebor., No.8 (12 March 1406-07), 45 Surt. Soc. Society (hereinafter Surt.Soc.) at 40 (1864).
102. Id. at 43
103. Id. See generally supra ch.1, at text accompanying note 68. Cf. also infra provisions for prayers in wills discussed at text accompanying notes 118-124.
104. 5 Test.Ebor., no.219 (6 Dec.1531), 79 Surt.Soc.319, at 321 (1884).
105. Id. at 319, "note".
106. Id.
107. See supra ch.4, at note 36 and accompanying text (popular desire to be somehow associated with the Franciscan friars).
108. 79 Surt.Soc. at 321. It seems likely that the six new feoffees were to be in addition to the remaining two or three original feoffees, but one cannot ascertain this.
109. Will of Geoffrey Proctor of Bordley, 5 Test.Ebor., No.150 (10 June 1524), 79 Surt.Soc.182, at 183-84 (1884). Cf. infra text accompanying notes 118-124.
110. Petition 122, Select Cases in Chancery, 10 Seld.Soc. at 119 (1422-26).
111. Cf. generally McFarlane, Nobility at 54-55.
112. 10 Seld.Soc. at 120.

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113. He could enfeoff the nuns, but only after purchasing an expensive licence from the Crown. See McFarlane, Nobility at 54.
114. Helmholz, supra note 19, at 1507-08, 1513.
115. Both Chancellors of this period, Thomas Langley and Henry Beaufort, were bishops. See infra Appendix.
116. 10 Seld.Soc. at 120.
117. It is unlikely that the common law judges would have reached the same result, for the common law did not recognize third party interests limiting feoffees' dominion over their lands and tenements. Concerning the evasion of the mortmain prohibition via a feoffment to uses, see Y.B. Mich.14 Hen.VIII, pl.5, f.4, at f.8 (1521) (express feoffment to uses necessary to evade mortmain prohibition); Note 6, Serjeant's Inn (1522-31), Spelman's Reports, vol.I, 93 Seld.Soc.138 (1977), (tenant in chief of king prevented by mortmain prohibition from being feoffee to uses of prioress and nuns). This is probably not the same case as that of Petition 122, since it seems to come from the common law courts. In addition, the feoffee in Petition 122 is not reported to be a tenant in chief of the king.
118. In addition to those discussed below, see, e.g., Will of Sir Thos. Markenfield, 4 Test.Ebor., no.63 (8 April 1497), 53 Surt.Soc.124, at 124 (1868); Will of Wm. Vavasour, Esq., 4 Test.Ebor., no.126 (14 June 1504), 53 Surt.Soc.228, at 230; Will of Robert Lascelles of Brakenburgh, 4 Test.Ebor., no.157 (20 Feb. 1507-08), 53 Surt.Soc.269, at 272.
119. Testamentum Domini Willielmi De Latymer, no.83 (written 10 July 1381; probated 31 May 1381), 4 Surt.Soc.113 (1836). Maitland thought this to be the first will containing instructions to feoffees to uses. Maitland, Equity at 30, text accompanying note 1. McFarlane corrected Maitland, claiming there were many earlier examples (at least from 1297). McFarlane, Nobility at 68-69.
120. Testamentum Illustrissimi Principis Johannis De Gaunt Ducis Lancastriae, 1 Test.Ebor., no.174 (3 Feb. 1398), 4 Surt.Soc.223, at 238 (1836). John of Gaunt's son, Henry Beaufort, would be Chancellor three times, from 1403-05, 1413-17, and 1424-26.
121. Cf. Maitland, Equity at 30.
122. Testamentum Domini Thomae Cheworth Militia Defuncti, 2 Test.Ebor., no.179 (16 Jan.1458), 30 Surt.Soc.220, at 228 (1855).
123. Id.

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124. Will of Thomas Lord Scrope of Masham, 4 Test.Ebor., no.33 (by 1493), 53 Surt.Soc.72, at 73 (1868).
125. See, e.g., Cheworth's will, supra note 122, at 222-23 (profits of certain lands to pay debts).
126. Id. at 223.
127. Latimer's will, supra note 119 at 115-16.
128. Scrope's will, supra note 124, at 73.
129. Testamentum Ricardi Barton, 2 Surt.Soc., no.171 (10 Aug. 1440), 30 Surt.Soc.215, at 216 (1855).
130. Will of Sir Henry Vavasour of Haslewood, 4 Test.Ebor., no.84 (8 Sept.1499), 53 Surt.Soc.at 165 (1868) (separate codicil containing instructions to feoffees).
131. See generally supra text accompanying notes 65-68; Fifoot, HSCL 305, text accompanying note 82 (from 1303 writs of prohibition in cases re debt). Cf. Helmholz, supra note 60, at 406; 2 Pollock & Maitland, HEL at 195 (Hostiensis's canon law theory: that, as in marriage, informal agreement supported by the parties' intention is binding).
132. See supra note 5 (rule of primogeniture); ch.2, text accompanying notes 4-9.
133. See Will of Robert Lascelles of Brakenburgh, supra note 118, at 272.
134. Id. at 272-73.
135. Will of Sir Thos. Markenfield, supra note 118, at 125.
136. Will of Wm. Vavasour, supra note 118, at 230.
137. Petition 118, (1417-24), 10 Seld.Soc. 115.
138. Id.
139. Petition 100 (1399-1413), 10 Seld.Soc.95. Evidently, the feoffee-kidnapper also hoped to deprive the widow of the profits of arranging a suitable marriage for her daughter.
140. See McFarlane, Nobility at 83 ff. (re profitability of marriage agreements).
141. 4 Holdsworth, HEL at 568,571.
142. Will of Cheworth (also spelled Chaworth) supra note 122, at 221.
143. See, e.g., Helmholz, supra note 19, at 1507.

(Notes to pages 127-131)

144. See generally supra text accompanying notes, and notes 53-83.
145. A cestui could instruct his or her feoffees to alienate all or part of his or her expectancy. Abbot of Bury v. Bokenham, K.B. 73 Eng.Rep.19, at 25 (1 Dyer 8a) Trin.28 Hen.VIII (1535).
146. See supra text accompanying notes 73-77.
147. See, e.g., Helmholz, supra note 19, at 1507.
148. Id. See supra text accompanying note 92; ch.1, text accompanying note 68.
149. Helmholz, supra note 19, at 1512-13.
150. Cf. Dowrick, Justice at 69 (litigation begins after parties to a disagreement have abandoned Christian principles of compromise).
151. Act of Supremacy, 26 Hen.VIII, c.1 (Nov.1534) (printed in Gee & Hardy, Documents, supra note 16, at 243 ff.).
152. See generally Barton, The Statute of Uses and the Trust of Freeholds, 82 Law Q.Rev. 215 (1966) (re the partially prohibitive effect of the Statute of Uses).
153. Milsom, HFCL at 213 (quoted supra ch.5 at note 1).

NOTES TO APPENDIX:CHURCHMAN-CHANCELLORSAS AN ECCLESIASTICAL CONTRIBUTION TO THE
EVOLUTION OF THE FEOFFMENT TO USES

1. See W. Stubbs, Select Charters (9th ed. H. Davis, 1929 printing) at 292: "quod Anglicana ecclesia libera sit, et habeat jura sua integra, et libertates suas illaesas; et ita volumus observari; quod apparet ex eo quod libertatem electionum, quae maxima et magis necessaria reputatur ecclesiae Anglicanae " See also, Moorman, Church in England at 84.
2. Moorman, Church in England at 100-01; Rodes, Eccles. Admin. at 176.
3. Moorman, Church in England at 141; Rodes, Eccles. Admin. at 176-77 (suggesting that this change occurred as early as the pontificate of John XXII (r. 1316-34). The change was largely cosmetic; in practice, the king's power of appointment was virtually unlimited. Id. at 106, 201.
4. Moorman, Church in England at 101, 137, 141. The bishops of Durham enjoyed the powers of virtual sovereigns of a state-within-a-state, while defending the northern border of England and applying the common law on behalf of the king within the palatinate of Durham. See generally, G. Lapsley, The County Palatine of Durham (1900). (To complete the picture of the Durham bishops' powers, see F. Barlow, Durham Jurisdictional Peculiars (1950)). Rodes found evidence that Durham's bishops' powers within their palatinate originated because of the presence of St. Cuthbert's bodily remains in Durham. Rodes, Eccles. Admin. at 230 n.87.
5. Moorman, Church in England at 100-01.
6. Id. at 88 (scholarship at early universities); Rodes, Eccles. Admin. at 106 (types of men tapped for the episcopacy).
7. Moorman, Church in England at 100. See also their biographical sketches in The Concise Oxford Dictionary of the Christian Church (E. Livingstone ed. 1977).
8. Moorman, Church in England at 142. In England and Wales in 1500, of the two archbishops and thirteen bishops who had university degrees, ten had degrees in canon and/or civil law. The same was true of four of seven deans, and thirty of fifty-eight archdeacons who had degrees. G. Squibb, Doctors' Commons at 2 (1977).
9. McFarlane, Nobility at 280.

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