

HISTORICAL PERSPECTIVE ON THE STATUTE OF USES

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Introduction

In the Fall of 1886, an action came on in the Manitoba Court of Queen's Bench which concerned a small parcel of land in the Parish of St. James, now a suburb of Winnipeg.¹ The plaintiff, Sinclair, sought to have letters patent to the parcel set aside or to have the land declared to be held in trust for him by the defendant, Mulligan. A written conveyance or transfer was involved, and the case turned on the question of whether or not several old English statutes had been in force in the territories under the jurisdiction of the Hudson's Bay Company when the conveyance had been made in 1856. In dismissing the plaintiff's claim, Mr. Justice Killam held that the law in force when the transaction was made was the law of 1670 England,² that, in particular, the *Statute of Uses* was a part of that law,³ and that "The [Hudson's Bay] [C]ompany was, by its charter, authorized to exercise civil and criminal jurisdiction in the countries granted to it. . ."⁴ At the time in question, what are now the Provinces which lie to the West of the Ontario border were within "the countries granted to" the Company, the southern parts being within Rupert's Land proper, and the northern and western reaches comprising part of the "Indian Territories" leased to the Company from 1821 to 1859.⁵ Moreover, Mr. Justice Killam's judgment, upheld on appeal,⁶ was in accord with the law then in force in Manitoba and the North-West. The *Statute of Uses* was part of the English law of 15 July 1870, which was received by Manitoba in 1875⁷ and by the Territories in 1886.⁸ In the eastern provinces the *Statute* was part of the received English law, which came in by operation of common law.⁹

In the opinion of the legal historian, W.S. Holdsworth, the *Statute of Uses* was "perhaps the most important addition that the legislature

* Of the Department of History, University of Alberta, I am indebted to Jonathan Faulds, Esq. L.L.B., who read the legal sections of this paper with a critical eye, and whose suggestions for change were relevant, to the point, and invariably acted upon.

1. *Sinclair v. Mulligan* (1886), 3 Man. L.R. 481.
2. *Id.*, at 487.
3. *Statute of Uses*, 27 Hen., c. 10 (U.K.); *Id.*, at 490.
4. *Id.*, at 487.
5. Hudson's Bay Company, *Charters, Statutes and Orders in Council Relating to the Hudson's Bay Company* (1931) 217-18.
6. *Sinclair v. Mulligan* (1887), 5 Man. L.R. 17.
7. *Court of Queen's Bench Act*, 1874, 38 Vict. c. 12, s.1.; Consol. S.M. 1880, c. 31, s. 4.
8. *North-West Territories Act amendment*, 49 Vict., c. 25, s. 3 (Can.).
9. See *Blankard v. Goldy* (1694), 2 Salkeld 411, 91 E.R. 356 (K.B.); *Case 15 - Anonymous* (1722), 2 P. Wms. 75, 24 E.R. 646 (K.B.); and *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045, for a full discussion of how English possessions were perceived to have received English law.

ever made to our private law."¹⁰ He had ample grounds for his opinion: The *Statute* caused revolutionary changes in English land law which, in turn, laid the foundation of the modern trust. It also engaged the critical attention of the most eminent legal scholars and practitioners at the turn of the 17th century, when both Edward Coke and Francis Bacon chose it as the subject of their law readings at the Inns of Court. Moreover, as E.W. Ives has demonstrated, it is one of the few English statutes which has played a part in fomenting armed rebellion.¹¹

While England repealed this archaic *Act* in 1922 and replaced it with legislation¹² more appropriate to a modern commercial and industrial society, no western province or, indeed, any Canadian legislature, has seen fit to follow the English example. Accordingly, the *Statute of Uses* and the executory interests it gave rise to are still important elements of Canadian real property law.

As befits its continuing importance, the *Statute* is discussed in textbooks on real property and legal history. Very often, however, such treatments are not wholly comprehensible to students and even to some legal practitioners. Explanations of many medieval legal procedures are necessary to comprehend fully the operation of the *Statute* and its many ramifications, and such discussions often use archaic words and phrases undefined in modern law dictionaries. It is the purpose of this essay to remedy some of these defects by tracing the development of the *Statute* in terms of the general development of English land law, and to concentrate on aspects of the *Statute* important to legal practitioners today.

In the context of real property, "use" means "benefit."¹³ Prior to the enactment of the *Statute*, if one individual had a "use" in a piece of land, what was meant was that he enjoyed the benefit of taking the profits from that land, the legal title to which was held by some other individual. While such an arrangement, divorcing enjoyment of land from its legal title was awkward, often expensive, and not protected by common law courts, it served a purpose of great importance: flexibility in the management, control, and disposition of real property. There was, for example, the medieval tax evader, the person who put his land into uses to legally avoid payment to the Crown of the financial burdens or "incidents" laid on him by common law.¹⁴ On the other hand, there were those who resorted to the use for strictly legitimate and laudable reasons, as when a father made a marriage settlement for a daughter, or provided capital for a son just setting up in business. Also, loans could be secured by means of a use.¹⁵ Perhaps most im-

10. 4 Sir William Holdsworth, *A History of English Law* (3rd ed. 1945) 409.

11. E. Ives, "The genesis of the Statute of Uses" (1967), 82 E.H.R. 673.

12. *Law of Property Act, 1922*, 12 & 13 Geo. 5, c. 16 (U.K.).

13. 2 *Jowitt's Dictionary of English Law* (2nd ed. 1977) 1837.

14. In what follows, "common law" will be used to denote the law developed in the courts of King's Bench, Common Pleas and the Exchequer.

15. J. Barton, "The Medieval Use" (1965), 81 Law Q. Rev. 562.

portant of all, an instrument could be raised by means of which a person could pass on, or devise lands after his death — in effect, a will.¹⁶ The reason why society was driven to this legal but complicated system of circumventing the common law was simple: that law was rigid, inflexible, and either prohibited such dispositions, or made them extremely difficult to accomplish.¹⁷ To understand why this was so, it is necessary to have some knowledge of why and how the common law developed these characteristics.

Early Land Systems

In any primitive society land is the prime object of value and source of wealth. On it is grown much of the food which sustains life, and from beneath its surface are mined the minerals which become weapons and fortifications, agricultural implements and dwellings, and objects of commerce and adornment. In short, in such societies, land is the source of economic well-being, and it follows that those who have an abundance of fruitful and productive soil are the envy of those who do not. Ultimately, it was this fact which caused the Vikings from the rocky and barren northlands and the invaders from the East to sweep down on the broad acres of lower Europe to plunder sources of moveable wealth and, where possible, to win control of the land itself. In turn, this caused the gradual evolution of a response to the barbarian threat in the form of European feudalism. This system, the name of which is modern invention, was not based on a coherent and uniform system of thought, but rather on group or area response to a specific problem.¹⁸ Hence, the relative importance of the elements¹⁹ which were characteristic of the feudal system varied considerably from time to time and from place to place.

In the face of the threat from the North, two similar societies began to develop in England and the lands immediately across the Channel during the centuries which preceded the Battle of Hastings. Both had a sound economic base in arable land, and both developed a system of levies on land to provide men and money for their military forces. However, while there was a superficial resemblance between the two systems, and each was effective in producing fighting men or their fiscal equivalent, they had developed from different traditions and this had caused them to evolve significantly different qualifications for acquiring and holding land, and dissimilar approaches to the administration of justice.

In England, Germanic traditions supplanted Roman after the departure of the legions in the fifth century. The invaders were

16. From the 11th century to the *Statute of Wills* (32 Hen. 8, c.1.) in 1540, land could not be devised under common law. Only chattels were devisable and such devises were first administered by ecclesiastical courts and then, in the 16th and 17th centuries, by Chancery. T. Plucknett, *A Concise History of the Common Law* (4th ed. 1948) 697, 704.

17. See *Cheshire's Modern Law of Real Property* (10th ed. 1967) 48ff.

18. G. Sayles, *The Medieval Foundation of England* (2nd ed. 1958) 210.

19. For a detailed examination of these elements, see *Id.*, at 205, or *Supra* n. 16, at 476-91.

organized in accordance with the concept of the *Comitatus* whereby "a great chief would surround himself with a band of chosen warriors and enter into a close personal bond with them,"²⁰ which was sealed with an oath of fealty to the leader.²¹ After subduing the inhabitants, the invaders became occupiers and the paramount chiefs assumed regal titles and created a nobility by rewarding the faithful service of their supporters with titles of dignity and grants of land. Of course, these grants did not give the noble, or grantee, possession of the soil itself; rather, he received rights and privileges over the mass of freemen and slaves or bondmen who actually occupied and worked the land. However, there must frequently have been some question about the details of precisely what rights the noble did have in respect of given lands, both to his lord and to his tenants, because there were several types of landholding. Apparently, they ranged from absolute ownership, where the holder had no obligations to anyone in respect of the land he held, to absolute dependency, or slavery, where, in return for a small plot, the bondman had to perform whatever tasks were set by his master.²² Grants which were made could be either large or small and, by the 11th century, could include one or more "hundreds," or "wapantakes," the Anglo-Saxon administrative divisions on which statutory assessments for men and money for war were levied.²³ With one exception, it was upon these divisions, and the greater division of the shire, or county, that the judicial system was based. The shire and the hundreds courts administered a rudimentary royal justice,²⁴ modified or amplified by local custom, which was based upon the "Dooms" or law codes of the Anglo-Saxon monarchs. The exception was the King's Court, the Witan, which exercised its jurisdiction only in respect of a special class of landholding, or when a subject complained that he could not get his case heard in the local court.²⁵

Across the Channel, Duke William followed the European practice of the time which had been influenced by Roman law.²⁶ He also ennobled his followers and made grants of land to them, but the arrangement by which he did so was much more business-like, or contractual, than the English practice. The land, or "fief," be it large or small, constituted a single assessable unit, and was held at the Duke's pleasure, which was dependent on the fulfillment of specified services agreed to before the grant was made.²⁷ This agreement was made by the solemn and ceremonial act of homage by which the noble pledged to become the Duke's man — his vassal — in respect of the

20. *Supra* n. 16, at 480.

21. F. Maitland, *Domesday Book and Beyond* (1897) 69-70; 1 F. Pollock and F. Maitland, *The History of English Law before the time of Edward I* (2nd ed., 1898) 300.

22. Maitland, *Supra* n. 21, at 29, 227-58.

23. H. Richardson and G. Sayles, *The Governance of Medieval England* (1963) 105.

24. R. van Caenegem, *The Birth of English Common Law* (1973) 12.

25. *Supra* n. 16, at 488; 1 A. Robertson, *The Laws of the Kings of England from Edmund to Henry I* (1925) 25.

26. *Supra* n. 16, at 481 ff; Pollock and Maitland, *Supra* n. 21, at 66, 77-78.

27. *Supra* n. 23.

land he held of him.²⁸ If the services required the noble to provide knights for military service; he could carve out sub-fiefs from his own lands and grant them to, or enfeoff, suitably qualified fighting men, and accept their homage to him alone, a process known as subinfeudation. In turn, the man at arms could enfeoff freemen to provide for his physical and spiritual health and to occupy and work the land. If disputes arose between those who held directly of the Duke — his tenants in chief — they were settled in the ducal court. Similarly, if disputes arose between tenants of the noble, they were settled in his court, the private court of the fief.²⁹ In a word, these were feudal courts because the right to convene them arose directly from the feudal doctrine that the lord was empowered to give justice to his vassal by reason of the bond of homage between them. Since there was no body of law similar to the Anglo-Saxon Doms, this was necessarily a local and particular justice. Therein lie the chief differences between Norman and English laws and courts. While this system of direct authority allowed the lord to react quickly to a military attack, or other external threat, there was a flaw in the system, so far as Duke William was concerned. If he and his vassal fell out, the latter had a private army whose men owed allegiance to him alone, by virtue of their individual acts of homage. Not infrequently, such questions flared into open rebellion.³⁰

Effects of the Norman Conquest

The situation in England after the Norman Conquest in 1066, with regard to landholding and courts, became rather complex and is not altogether clear even today, as any reading in authoritative secondary sources will demonstrate.³¹ There are, however, certain incontrovertible facts which serve as signposts to the direction taken by events, but between these signposts there are several different routes. A basic fact on which there is almost universal agreement is that the new king introduced the Norman system of landholding and feudal courts to England after he came to power.³² But it was a gradual process which went on all through the reign.³³ Moreover, he did not thereby abolish the English tradition and practice; on the contrary, he laid down that "all men shall keep and observe the law of King Edward relating to the tenure of estates and all [other] matters, with the additions which I have decreed for the benefit of the English nation."³⁴ Thus, the Norman system of landholding, with its feudal law administered in feudal courts, was imposed on already existing English practice.

28. *Id.*, at 105-11.

29. Pollock and Maitland, *Supra* n. 21, at 72-73; Sayles, n. 18, at 236.

30. Pollock and Maitland, *Supra* n. 21, at 68.

31. *Id.*, at 88-93; see also Plucknett, *Supra* n. 16, at 486-94.

32. *Supra* n. 23, at 104-05; Pollock and Maitland, *Supra* n. 21, at 92; *Supra* n. 16, at 13.

33. *Supra* n. 23, at 99.

34. *Supra* n. 25, at 241.

However, William and his chief legal adviser, the learned cleric Lanfranc, were evidently not satisfied with this state of affairs, because another enactment provided that "all freemen shall affirm by covenant and oath, that, both in and out of England, they will be loyal to King William, and along with him uphold his lands and honour with the utmost loyalty, and defend them before him against his enemies."³⁵ While at first sight this article seems merely to extend the English practice of swearing allegiance to the paramount lord, to the Norman landholders, it is suggested that its interpretation by the Crown caused fundamental changes to both Norman and English landholding and legal systems.

By thus going over the heads of his feudal tenants in chief to extend a bond of allegiance directly between himself and the vassals of his barons, William I severed the similar bond between baron and vassal imposed by the act of homage. For, if the provisions of this enactment were enforced, then it would at least cause serious heart searching on the part of a knight who would follow his lord into battle against the king, if it did not entirely abolish the split loyalties which had enabled baronial armies to be raised against William in Normandy. More importantly, however, this law laid the foundation for the demise of feudal law and courts on the basis of the proposition that if a man gives his allegiance to the king, he deserves the king's protection in a dispute with his lord, a proposition as true today as it was then.

Whatever the English thought of the enactment, there is little doubt that William I and his legal advisers interpreted it to mean that English landholders became vassals of the king and thus held their land directly or indirectly of the Crown. In this way, the several landholding systems or tenures, of pre-Conquest England were terminated, and came to be supplanted by a system of tenures held in accordance with the theory that every acre in the realm is held of the king.³⁶

Tenure

As in Normandy, tenure was based on the idea of a contract or bargain between lord and vassal, where the former granted land to the latter in return for specified services. Initially the performance of military duty was the service stipulated for³⁷ but, over the years land came to be granted to satisfy the infinite needs and wants of the landholder. In addition to men at arms, he found servants for his hall, labourers for his fields, and those whose special skills could be secured

35. *Id.*, at 239.

36. In essence, this is the interpretation of the English jurist, John Reeves. 1 J. Reeves, *History of the English Law* (2nd ed. 1787) 36. Later writers mention the *Statute* but do not make any definitive statement as to how the pre-Conquest English landholding systems came to an end. See e.g. Pollock and Maitland, *Supra* n. 21, at 98, 230 ff.

37. *Supra* n. 23, at 106.

in no other way, such as hangmen.³⁸ He also procured animals for the hunt, weapons, clothing, food, drink, money, and solace for his soul after death.³⁹ Frequently, the burden of service was heavy, as when a tenant in chief had to find 40 or more knights. But it could also be so light as to be a mere token. Such was the service required of Roger de la Zouch, who held lands for which he had to find annually a chaplet of roses on Midsummer day.⁴⁰ Varied as services came to be, the majority fell within certain broad categories of tenure,⁴¹ that is to say: military, spiritual, servile or residual.⁴²

Military

For a century after the conquest, knight service was the principal military tenure.⁴³ During this time the tenant, together with the knights required by his tenure, rode and fought with the king's host for 40 days. Such a force proved to be more than adequate to keep order in the realm, or to put down trouble on the borders. But it was not sufficient to make a crusade or to prosecute a war in France. Hence, in the early years of Henry II's reign, and perhaps before, service with the army began to be commuted to a fixed money payment — scutage or shield money — to pay full-time soldiers.⁴⁴ A process which probably hastened this change was that land held by knight service was being alienated or transferred to persons who could not perform knight service; *i.e.*, they were not men at arms.⁴⁵ As knights and their steeds became more heavily armoured and prices for arms and equipment rose, the fixed amount raised by scutage proved more and more inadequate to equip and pay the army. It was abandoned in the 13th century,⁴⁶ and other methods of taxation were employed to finance the king's host. However, it is important to keep in mind that the tenure did not change; even though the tenant did not have to follow the king to the wars, or to pay scutage, he still held his fief or fee by knight service. Hence, he was still subject to other obligations or burdens, usually termed "incidents" which had attached to knight service over the years.

For the most part, these incidents had originated in the early days

38. 1 Coke, *Institutes of the Laws of England* (1670) 86a.

39. The specific items are enumerated in Blount, *Antient Tenures* (1679) which, so says the preface, were set down to amuse and edify the student, weary from studying Lyttleton. *Id.*, at ii.

40. *Id.*, at 12.

41. Services, as stated in a feoffment, or deed or grant, were immutable until the tenure terminated. Even if the service were commuted to a cash payment, that payment stood for the service and could not be altered by the landlord. *Supra* n. 16, at 502.

42. The incipient scheme of classifications can be seen in *Domesday Book*, *Supra* n. 21, at 151 and this is broadened and amplified in the works of the legal writers Glanville, G. Hall (ed.), *The treatise on the laws and customs of the realm of England commonly called Glanvill* (1965); and Bracton, S. Thorne (trans. and ed.), *2 Bracton on The Laws And Customs of England* (1968), in the 12th and 13th centuries. It is described in full maturity by Thomas Lyttleton in T.E. Tomlin's (ed.), *Lyttleton, His Treatise of Tenures* (1970).

43. Pollock and Maitland, *Supra* n. 21, at 252.

44. *Id.*, at 267.

45. *Id.*, at 273.

46. *Supra* n. 16, at 503.

of active knight service, when it was of vital importance that each fief supplied its quota of fighting men. Homage, the solemn ceremony which bound the tenant to his lord, and which sealed the covenant to provide men at arms, was the most important of the incidents at this time. But, as the military bond weakened and fell away in the 13th century, so homage gradually lost its meaning and significance.⁴⁷

An incident of more lasting importance related to the disposition of a tenant's land on his death. When such an event occurred, there were two options open to the monarch or lord: he could re-grant the fief to a new tenant, or he could, depending on the circumstances, work out various arrangements with the heirs of his deceased tenant. For reasons which will be explained later, he usually followed the latter course and such will be assumed in what follows.

If the tenant was succeeded by a son who had reached the age of 21,⁴⁸ the age of majority, he would have to pay a "relief," or succession tax. In early days the relief was an arbitrary assessment, but by Glanville's time it had been fixed in accordance with the custom of the realm.⁴⁹ If the tenant's son was below the age of majority, both he and the inheritance were taken in wardship by the monarch or lord. This meant that the child was brought up in the court of his lord until he had attained his majority. At this point he could claim the inheritance by payment of the relief. While a child was in wardship, the right to the rents and profits from the fee were vested in the lord who paid for his ward's upkeep and for a military replacement for his dead tenant. The same procedure applied for a girl who was the heir to a military fee, except that she would also come into her inheritance when she married, regardless of age.⁵⁰ The right to arrange such a marriage was also an incident of tenure, for obvious reasons: "since the husband of the heiress is bound to do homage to the lord for that tenement, the agreement and consent of that lord is necessary for doing it, lest he be forced to receive homage for his fee from an enemy or some otherwise unsuitable person."⁵¹

As the tenant must fight his lord's battles, so must he give him "aids" of money on certain occasions. At first, the occasions were many and were not set down at law.⁵² Gradually, the lord's demands were whittled down until it was enacted that a tenant must pay only three aids: "that for redeeming his [lord's] body, that for marrying his daughter, and that for knighting his son. . ."⁵³

47. Pollock and Maitland, *Supra*, n. 21, at 305.

48. Glanville, *Supra* n. 42, at 82.

49. *Id.*, at 108.

50. *Id.*, at 85.

51. *Ibid*

52. *Supra* n. 16, at 505.

53. Pollock and Maitland, *Supra*, n. 21, at 350.

In quite another class is the incident known as the heriot. According to Pollock and Maitland, the origin of the heriot is an Anglo-Saxon practice whereby the horses and arms lent to a man by his lord were returned when the man died.⁵⁴ In time, as land replaced horses and arms as the gift, a money payment was demanded instead of the return of the land. This practice was taken over by the Normans and merged with the "relief" discussed above.⁵⁵

Finally, there were the incidents of escheat and forfeiture. When a tenant committed a breach of homage, such as refusing to do the service promised, or had stood against his lord, he committed the feudal crime of felony. As such, upon conviction, his land escheated to, or was recovered by his lord. If a man was convicted of treason, his lands were forfeited to the king, no matter whom he held them of.⁵⁶

There were other military tenures besides knight service, such as castle guard and grand serjeanty, but since the services and incidents appertaining to them were similar to those of knight service, they will not be discussed further.

Spiritual

When men became concerned with the state of their souls, and worried about their passage to the hereafter, they cast about for ways to ease that passage. Even before Norman times, one method was to grant land to the Church, in return for which the Church would intercede with the Almighty on the donor's behalf, by means of prayers, masses, and so on. After the Conquest, tenants by this service were said to hold of the donor by the spiritual tenure of Frankalmoin, or free alms, or its variant, tenure by divine service.⁵⁷ While some doubt exists about whether or not secular services or incidents attached to the spiritual tenures during the Norman period, there is no doubt about the situation in later times. By the 13th century it was decided that the Church bore no secular burdens for land it held by spiritual tenures.⁵⁸ Where a landholder who was himself a tenant made a grant to the Church by subinfeudation the results could be particularly troublesome to the tenant's lord. By this time the monetary value of the services due from the tenant were nugatory in all probability, and any income in cash or kind to the lord came from the imposition of the incidents of tenure — wardship, marriage and so on. After he had granted the land to the Church, the tenant's only return took the non-negotiable form of prayer and, since the value of the incidents due to the lord were calculated on the income to his tenant, the lord's income was similarly reduced. Furthermore, since the Church would never die or commit a felony the land would never escheat to the tenant and thus

54. *Id.*, at 350.

55. On the death of a villien, or bondman, his best beast was taken by the lord as a heriot. *Id.*, at 317.

56. *Id.*, at 351.

57. *Id.*, at 240.

58. *Id.*, at 244-47.

restore the lord's income.⁵⁹ Once this was established, unscrupulous clerics and tenants not infrequently practised collusion to avoid the incidents⁶⁰ in the following manner: B would grant land he held of A to God and the Abbey of X to be held in frankalmoin. The Abbot of X would then re-grant the lands to B to be held by some secular tenure, whereby the burden of the incidents would be reduced. The situation then would be that A retained only the services owed by B, the Abbey had rights to and income from a piece of land, and B continued to occupy the land, but with a reduced burden of incidents. Understandably, larger landowners became concerned and prevailed on the Crown to legislate on the matter. In a series of enactments beginning with the *Great Charter of 1217*, and culminating with the *Statute of Mortmain* in 1279, grants in frankalmoin were progressively circumscribed and then forbidden, except when royal licence had first been granted.⁶¹

Servile

Servile tenure was unfree, or villien tenure. In contrast with all other tenures, for which the services were fixed and certain, the primary characteristic of unfree tenure was that the services consisted of taking orders and doing whatever the overseer directed on any given day.⁶² This came to be known as "copyhold" tenure and as such it was not comprehended in the operation of the *Statute of Uses*.⁶³

Residual

Residual tenure is the grab-bag for all tenancies which do not fall within the categories discussed above. Socage tenure was perhaps the most important of this variant. The first socage tenants were probably freemen who received their grants in return for fixed and certain agricultural services.⁶⁴ But soon these were joined by people such as Roger de la Zouch, with his nominal service of a chaplet of roses. This might have been the result of an alienation by a father to his son on marriage, or a gift to a faithful servant, or Roger may have paid a substantial sum, and received his grant by subinfeudation. At the other end of the scale was the person who paid a substantial rent or performed substantial, but fixed and certain agricultural services. The main characteristics of socage were thus that it was unmilitary and that it may have involved agricultural services.⁶⁵ Hence, while the tenant may have owed homage to his lord he was not subject to scutage, wardship or marriage.

59. A. Simpson, *An Introduction to the History of the Land Law* (1961) 50.

60. *Supra* n. 16, at 510.

61. *Id.*, at 511.

62. Pollock and Maitland, *Supra* n. 21, at 371.

63. A villien is a tenant at will. *Id.*, at 365. As such he is not seised of the land, and thus is passed over by the *Statute*.

64. *Id.*, at 292.

65. *Supra* n. 16, at 506.

For those who lived in towns, burgage tenure was the equivalent of socage in the countryside. The townsman who held by burgage usually received his tenement from his lord for a small money rent and some agricultural service, and was exempted from aids, marriage or homage and, usually, from reliefs.⁶⁶

Inheritance

When William's knights did homage to him for their fiefs after the Conquest, or when they enfeoffed tenants, there was probably no doubt about what services were due, or by what tenure the man was to hold of his lord. But for how long could he hold the lands: during pleasure, for a fixed term, for life, or was the fief or tenement to be heritable? The sources are divided on this question: Plucknett holds that William's knights were given lands for life, and that if they died their heirs had to bargain with the king for the fief, with no assurance that it would be granted to them.⁶⁷ On the other hand, Pollock and Maitland claim that such grants were heritable, as they had been in Normandy, but subject, of course, to the feudal incidents, particularly escheat and forfeiture.⁶⁸ However these conflicting claims may be resolved, what is not in doubt is that by 1100, the year of Henry I's coronation, the fief of a deceased tenant in chief was inheritable on payment of a relief.⁶⁹ "Having gone that far," as Plucknett remarks, "it must rapidly have spread all through the feudal network."⁷⁰ Thus, within half a century of the Conquest, the law had arrived at the point where, by inheritance, the most ample interest that can be had in land devolved upon an heir.

In theory, when Glanville wrote in the 12th century, and in the practice later developed at common law, a person so situated could do what he chose with his inheritance; he could, for example, cultivate it, or waste it,⁷¹ or he could alienate or devise it in his will to whomever he pleased. In fact, he was very much circumscribed by law. To begin with, it came to be the custom at this time that lands could not be devised by will;⁷² a custom which hardened into a rule of law that was to operate until 1540.⁷³ Then there was the right of a widow to occupy a portion of her deceased husband's lands for life to be considered — a life tenancy in dower.⁷⁴ (The reciprocal right of a widower to occupy half the lands held heritably by his wife — with the curious title of life tenancy by the curtesy of England — did not appear in law until the

66. *Id.*, at 507.

67. *Id.*, at 494.

68. Pollock and Maitland, *Supra* n. 21, at 70, 314, 316.

69. Robertson, *Supra* n. 25, at 277.

70. *Supra*, n. 16, at 494.

71. See Blount, *A Law Dictionary* (1670) for a definition of "waste" used in this context.

72. 2 Pollock and Maitland, *Supra* n. 21, at 315. There were occasional exceptions to this rule where devise was allowed by local custom. *Ibid.*

73. *Statute of Wills*, 32 Hen. 8, c.1. (U.K.).

74. Glanville, *Supra* n. 42, at 58-59.

13th century.⁷⁵) More to the point though, it can be seen in *Glanville* that, if a landholder had offspring he could have only alienated "a certain part of his free tenement,"⁷⁶ and then only with the consent of his heir, except that he could have given a *maritagium* or marriage portion to a daughter without such consent.⁷⁷ The author makes plain the reason for this rule: to alienate land without consent would be to disinherit his offspring, who would each take an equal share of the inheritance.⁷⁸ However, this practice, if prolonged, would tend to reduce a large fief to a pattern of small holdings. That this was not desired, particularly in the military fees, is demonstrated by the fact that inheritance by primogeniture became the practice among military tenants by the end of the 12th century,⁷⁹ and soon spread to the other tenures by operation of law.⁸⁰ Under this rule, the eldest son inherited all his father's lands.

While this caused consternation among younger sons and daughters, and great friction within families, by this very result, it also caused land to become freely alienable.⁸¹ Henceforth, a father could sell land during his lifetime without being obliged to obtain the consent of his eldest son, the heir presumptive. But the new freedom of alienation had many ramifications both in the short and the long term.

Reactions to Free Alienation

For future generations, the most important effect it had was the change it helped to bring about in the administration of law, and in law itself. It will be recalled that William I introduced feudal justice to England in that he and his court heard only cases concerning his tenants in chief and they, in turn, dealt with litigation among their tenants. Also, that the old English courts of the hundred and the shire were left functioning. With free alienability of land, landowning became more diffused through the population with the result that it was difficult to know which court to turn to for justice in a dispute over land.⁸² With increasing frequency, men petitioned the King and his court for relief, and with increasing frequency the King heard their pleas and gave judgment. Hence, as the Crown engrossed more and more legal business, centralized royal courts — King's Bench and Common Pleas — were elaborated and joined the long established Exchequer Court⁸³ to hear such pleas. In this way, the law, chiefly land law, which had been restricted to tenants in chief gradually became the

75. 4 Bracton, *Supra* n. 42, at 360.

76. *Glanville*, *Supra* n. 42, at 69.

77. *Ibid.*

78. *Id.*, at 71.

79. *Supra* n. 16, at 498.

80. *Id.*, at 500.

81. *Id.*, at 478.

82. *Supra* n. 24, at 15-16.

83. *Id.*, at 17-18.

common law of the realm.⁸⁴

In the short term, the new freedom was the source of grave problems for the landowner. To begin with, if land were freely alienable then, by definition, a landholder could exercise no control over the persons his tenants may choose to grant or sell their land to. Neither could he control the method of alienation, which could be effected in two ways. "The grantor may substitute the grantee in his own place in the feudal pyramid; or else he may subinfeudate by creating a new tenure between himself as lord and the grantee as tenant."⁸⁵ While both methods were unsatisfactory, from the lord's point of view, the latter had the most disturbing ramifications because, as with the grant in frankalmoin, discussed above, he stood to lose the feudal incidents. That is to say, if A, his tenant, granted his estate to B for a substantial sum, and the service of providing a red rose on midsummer day, B got the land, A kept the purchase price and the lord was left with the services due from A (which by this time may have been nugatory if his tenure were by knight service), and the incidents calculated on the value of one or more red roses. This state of affairs came to an end with the enactment of *Quia Emptores* (Since purchasers...), which provided, in part, that:

henceforth every freeman shall be permitted to sell his land or tenement, or a part of it, at pleasure; yet so that the feoffee shall hold that land or tenement of the same principal lord [of whom the feoffer held] and by the same services and customs by which the feoffer earlier held....⁸⁶

In this way, the feudal incidents were assured to the lord.

A second problem had to do with marriage portions. Evidently, the practice of giving *maritagia* described in *Glanville* became widespread and operated in the following manner: A, the father and donor would grant lands to B, the donee and husband of his daughter, C, free of feudal incidents for three generations, but subject to the condition that if there were no issue from the marriage, the grant would revert to A.⁸⁷ Clearly, the expressed intentions are to provide an income for B and C, an inheritance for their offspring, and to keep the property within the family. However, this express intention came to be set aside by a rule of law which evolved in the years after *Glanville* wrote, and which was enunciated by Bracton about 1256. It had to do with the interpretation of the word "heirs." The gift of A (above) was: "To B and C and their heirs..."⁸⁸ The natural meaning of these words is that the heirs of B and C should inherit the property of their parents. Bracton,⁸⁹ however, chose to treat the word "heirs" as a word of

84. *Id.*, at 18-19.

85. *Supra* n. 16, at 508.

86. I. C. Stephenson and F. Marcham (ed. and trans.), *Sources of English Constitutional History* (Rev. ed. 1972) 174.

87. *Glanville*, *Supra* n. 42, at 92-93.

88. *Supra* n. 16, at 517.

89. 2 Bracton, *Supra* n. 42, at 68.

limitation, and not of purchase, and so gave the parents the right to alienate the land,⁹⁰ whether or not heirs were born and, if there had been issue, to thus disinherit them. As this practice increased, so complaints to the Crown increased.⁹¹ Finally, in 1285, the statute *De Donis Conditionalibus* (Concerning gifts) put an end to this practice. After reviewing the whole situation, it was enacted that:

the will of the donor according to the form manifestly expressed in the charter shall henceforth be observed, in such wise that those to whom a tenement is thus given upon condition shall not have power of alienating it and preventing it from remaining to their issue after their death, or else to the donor or his heir if issue shall fail, either by reason that there was no issue at all or if there were, that the heir of such issue had failed.⁹²

In effect, this statute created a special legal class of land holding — the fee tail — whose duration was conditional and unknown, in contrast to the two classes known previously. The first of these was the fief, or fee for life, such as the widow in dower had. Her interest in the land expired with her. The second was the fee simple, an interest without any limitations such as the lands which descended to an heir who took in accordance with the law of primogeniture. As named by later writers,⁹³ these three periods of duration of tenancy were “estates” of freehold: that is to say, the estate tail, the estate for life, and the estate in fee simple.⁹⁴ Freehold estates are contrasted with estates in land where the duration of the interest is less than a life estate, such as a lease or term for a specific number of years, or less.

Seisin

All things considered, the land law had assumed a position of extreme rigidity by the end of the 13th century. By statutory instruments, which were generated either by the Crown or by holders of large estates,⁹⁵ a landowner could no longer make grants in frankalmoin, his means of avoiding feudal incidents had been cut off and he could not alienate entailed land. Moreover, the procedure for granting alienable land came to be subject to strict legal rules which were elaborated by common law benches to protect “seisin” of land.

Seisin is synonymous with possession; not necessarily possession in terms of occupancy of land, but rather of legal rights or interests in

90. Technically, by this rule, the parents came into what was later called an estate in fee simple. The distinction between words of purchase and limitation is well defined by G.C. Cheshire, who states “Words of purchase (*perquisitio*) point out, by name or description, the person who is to acquire (*perquiri*) an interest in land; words of limitation indicate the size of the interest given by some instrument. A ‘purchaser’ in this technical sense does not denote a person who buys land, but one to whom land is expressly transferred by *act of parties*, as for instance by conveyance on sale, by gift or by will ... ‘and his heirs’ ... merely indicate the *quantum* of interest that [the purchaser] is to take, and gives the heirs nothing by direct gift.” *Supra* n. 17, at 170.

91. *Supra*, n. 16, at 521.

92. 13 Edw. 1, c. 1 (U.K.). Quoted in *Id.*, at 522.

93. See e.g., 2 Sir William Blackstone, *Commentaries on the Laws of England* (3rd ed. 1768) 103 ff. Although Lyttleton develops the theory of estates in freehold, nowhere in his book is the word “estate” to be found.

94. “Tail” comes from the French *taille*: to cut down or prune. Hence, fee tail is a cut down or conditional fee, from the fact that the tenant in fee tail cannot alienate the property.

95. *Supra* n. 16, at 511.

land. Thus, the peasant who tilled his freehold acres was said to be seised in demesne of Blackacre, while the lord he held of was seised in service of Blackacre.⁹⁶ What made seisin of vital concern in the medieval age was that the feudal incidents

which in the early history of tenure were of such consequence to the lord were enforceable against the person seised and only against him; and again that it was only against the same person that an action for the recovery of land could be brought. It was necessary that there should always be some person capable of meeting adverse claims and preserving the seisin for successors. The effect of not knowing who was actually seised of land would be the loss of public and private rights therein, and therefore two inviolable rules that became established were that there must never be an abeyance of seisin, or in other words that there must be an uninterrupted tenancy of the freehold; and that every transfer of a freehold estate must be effected by an open and public delivery of seisin. Any disposition that would cloud the title to the seisin was forbidden at common law.⁹⁷

In concrete terms, the second of these rules meant that, to ensure the identity of a freehold tenant was well known in a neighbourhood, any transfer of land had to be made as a public ceremony, on the acres in question. There, in full view of all who cared to see, the feoffor would speak the words of gift and present the feoffee with a piece of turf or a twig from the property, and so make a gift, or feoffment with livery of seisin.⁹⁸ The first rule, as interpreted by common law judges, often frustrated the most reasonable desire of a person who wishes to make a grant of some future interest in land. For example, a gift: to A and his heirs when he becomes twenty-one, would be void from the start because until A reached that age, the estate would be in limbo and the lord deprived of his incidents. Moreover, since no person would be seised of the estate, seisin would not be able to be passed to A.⁹⁹ In addition to this, there was the even more basic rule that once a grantor had made a gift of an estate in fee simple, he could make no further limitation of it, because his whole interest had been alienated.¹⁰⁰ Thus, a feoffment: to A and his heirs, but if B marries, then to B and his heirs, would be void. Over the years, the bench placed even more restrictions on future interests, and the concise and formal expression of its judgments have come down to us as the legal remainder rules reproduced in every modern text on real property.¹⁰¹ In such circumstances, lawyers began to search for ways and means to circumvent the common law.

The Usage of Uses

Evidently, it was ecclesiastical advocates learned in civil and

96. 2 Pollock and Maitland, *Supra* n. 21, at 38.

97. *Supra* n. 17, at 40-41.

98. 2 Pollock and Maitland, *Supra* n. 21, at 83.

99. *Supra* n. 17, at 72; *Supra* n. 59, at 185.

100. *Supra* n. 59, at 84.

101. See e.g., *Supra* n. 17, at 215-18.

canon law, and familiar with Continental landholding practice who, in the last years of the 13th century, found a way round the impasse. For them the specific problem was the *Statute of Mortmain*.¹⁰² The device they employed to get round the prohibition of grants in frankalmoin was the "use".¹⁰³ In short, a person who wished to enfeoff the Church after *Mortmain* could separate legal title to land from beneficial interest, and grant the latter, for example, to Abbey A and the former to a third party, B, in the form: to B and his heirs to the use of A. When the grant became binding with livery of seisin, B who thus had the legal ownership of the estate, was termed the "feoffee to uses," while Abbey A was the *cestui que use*, a corruption of *cestui a que use le feoffment fuit fait* (the one for whom the benefit was made). In this situation the feoffee to uses had no active duties to perform, and did not benefit from the transaction. This came to be called a "passive use," in comparison with an "active use," where the feoffee had specific duties to perform such as the collection of rents. Variations of this practice came to be employed by lay persons in the 14th century,¹⁰⁴ but at first there were some serious drawbacks. As the owner of the legal interest, the feoffee was responsible for the feudal incidents, aids, and so on. When he died, it was on his estate that the relief was levied, and it was his children who were taken in wardship. Thus, while the *cestui que use* benefitted greatly from the use, the feoffee to uses or his heirs could find themselves under great and unexpected financial burdens. This was solved by making a group of persons feoffees to uses.¹⁰⁵ Moreover, if, as one of the group died off, another was appointed, these feoffees became a perpetual body, and so the feudal incidents could be avoided entirely. In part, this practice helped to avoid an even more serious problem, from the point of view of the grantor and the *cestui que use*.

This was the failure of the feoffee to give effect to the trust imposed on him by the grantor. If the feoffee chose not to let the *cestui que use* enter on the land or to deny him the rents and profits, the latter had no recourse in the common law courts, because the bench would not recognize or enforce a complaint against a person with legal seisin of the land in question. However, if a group comprised the feoffee, there was less chance of the beneficial owner being deprived of his interest.¹⁰⁶ Nevertheless, as the records show,¹⁰⁷ beneficiaries to uses were being deprived of their interests. Since they could get no hearing from common law courts, they petitioned the King in council for redress.¹⁰⁸ It will be recalled that such a procedure was ancient

102. *Supra* n. 15, at 565.

103. See text, *Supra* n. 13-17. In the main, legal history texts have argued that the employment of the use began at a much earlier date. In later research Barton has shown that this is not the case. *Supra* n. 15.

104. *Supra* n. 15, at 566.

105. *Supra* n. 16, at 549.

106. *Ibid*.

107. *Id.*, at 547.

108. *Ibid*.

practice which, in the past had helped to give rise to the courts of common law.¹⁰⁹

Now, it was to give impetus to the creation of another court which administered a system of law supplementary to, but different from, the common law. This was to be the Court of Chancery in which the Lord Chancellor exercised an equitable jurisdiction. In the reign of Edward I, petitions for redress from *cestuis que use*, which were heard by the King in council, were encouraged¹¹⁰ and hence began to increase in number. Over the years, the volume of these and other complaints became so great that the council could not deal with it all, and began to refer the more routine petitions to the Chancellor and his large body of clerks, "sometimes (but not always) endorsing them with a brief instruction what to do."¹¹¹ What he did was to give relief based on a medieval conception of ideal justice, or equity.

According to this doctrine,¹¹² God's eternal law is paramount, and it may be given to man by revelation, or it may be seen in the law of nature. To be valid, the laws of a particular state must spring from, and be in accordance with, these laws.¹¹³ Now, it may be that a human law is a fair rule for the majority, and based on divine law and thus valid. But it may also be true that the application of this man-made rule works hardship in a particular case. Therefore, in order to achieve ideal justice it is not necessary to alter or amend the law itself but rather to devise a rule which will alleviate the individual hardship.¹¹⁴

Such was the function of the Chancellor and the courts of equity. In the case of a *cestui que use* who complained that he had been deprived of the beneficial or, as it came to be called, the equitable use of lands, the procedure was as follows. The Chancellor would issue an order for the feoffee to uses to appear before him, under pain of some penalty (*sub poena* — under penalty). When arrived, he would interrogate the feoffee (a process unheard of at common law) and, if satisfied that there was substance to the complaint, would order the feoffee to perform some definite act, such as paying over rent to the *cestui que use*. Of course, the Chancellor could make no order concerning the land in question, because it was under the jurisdiction of the common law. However, the threat of action by Chancery was usually sufficient, because, if balked, it "coerced and imprisoned the person of the legal owner who obstinately resisted its authority."¹¹⁵

109. *Id.*, at 170.

110. *Ibid.*

111. *Id.*, at 172.

112. See Saint Germain, *Doctor and Student* (1523) 1st Dialogue, c. 1, for this doctrine in an original formulation, and *Supra* n. 1, at 280 ff. for an interpretation.

113. Saint Germain, *Supra* n. 112, at c. 16.

114. *Id.*, at c. 16.

115. *Supra* n. 17, at 485.

Once this point had been reached, limitation of land to uses became common (circa 1400),¹¹⁶ and equity courts developed a doctrine whereby uses arose by operation of law, in addition to those expressly created. If, for example, A enfeoffed B and C gratuitously, with the intention of granting uses to third parties at a later date, by deed or will, the courts would hold that a use was thereby raised in A, who could continue in the occupation and enjoyment of the estate, until his grants became effective.¹¹⁷ On the other hand, if valuable consideration passed from X to Y in respect of a conveyance of Blackacre then, in the absence of a deed or other written instrument, Y, the grantor, was held to be seised to the use of X, the purchaser. This latter transaction was termed a "bargain and sale."¹¹⁸

While a bargain and sale or any other method of raising a use could be employed to convey equitable estates, to endure, such estates had to be raised by a person who held his land in fee simple. The individual who held in fee tail could make grants to uses but, unless his heirs agreed to such grants, they could, under the provisions of *De Donis*, recover the land in the courts after the death of their ancestor.¹¹⁹ This situation prevailed well into the 15th century, by which time there was great opposition to entailed estates which were, in effect, perpetual interests in land.¹²⁰ Hence, bench, bar, and statute were combined to create devices to "bar the entail." Prior to *De Donis* one method of conveying land had been for the tenant to "levy a fine." This was a collusive action at law which was compromised, with the terms of the compromise then becoming the terms of the conveyance. It was brought about in the following manner: B wanted to buy, and A wanted to sell Blackacre. They went to court, where B, who had paid for the land, claimed it was his; A denied this, and so the action proceeded. However, before judgment was given A and B asked leave to compromise the issue, and provided the bench with the detail of their agreement. The object of the whole procedure was then drawn up by the court — a tripartite indenture — which set out the details of ownership. The "foot" of the indenture was retained by the court both as a permanent record of the transaction, and as the final concord (*finalis concordia*) to all actions pertaining to the land in question.¹²¹ This device was specifically prohibited by *De Donis*, in respect of estates tail, but was brought back by the *Statute of Fines* in 1488 for the express purpose of barring entails.¹²²

116. *Supra* n. 16, at 48.

117. *Supra* n. 10, at 423-24.

118. *Id.*, at 424. Another implied use was that made in respect of love and affection. For example if a father raised a use in favour of his son, love and affection was considered to be sufficient consideration, and the use would vest in the son. But this development did not come about until after the *Statute of Uses*. *Id.*, at 426.

119. Sir Robert Megarry and H.W.R. Wade, *The Law of Real Property* (3rd ed. 1966) 85.

120. *Supra* n. 17, at 235.

121. 3 Holdsworth, *Supra* n. 10, at 236-37.

122. 4 Hen. 7, c. 24 (U.K.).

Long before this, however, another method of barring entails known as "the common recovery" had been devised.¹²³ This, too, took the form of a collusive action. Again, B wanted to buy and A wanted to sell Blackacre, so they went to court, where B claimed title to the land in fee simple. A produced C, his warrantor, the man from whom A supposedly purchased the land and who must stand good for it. C, who was a party to the collusion, admitted selling the land to A and so the action proceeded between B and C with A as an onlooker. At some point C asked leave to confer with B outside the court, from where he quickly disappeared. B then went back to court, told his story to the bench, who would hold C in contempt, and award Blackacre to B. A was awarded land of similar value at C's expense, which C did not have, and which A did not expect. Thus, all parties got what they wanted: Blackacre went to B, A got the purchase price, C got his fee, and the court had the satisfaction of seeing another entail barred. Now, B could make grants to uses from the new fee simple estate he acquired as the result of either a fine or a common recovery.¹²⁴ Moreover, the same sort of collusion was practised to bar a wife's dower, or a husband's curtesy.¹²⁵

Thus, in the 14th and 15th centuries, the work of Edward I and his parliaments had been undone, and more. For now, by putting lands in uses, testators were able to devise equitable estates to family and friends, a practice which had been forbidden for centuries. Similarly, the strict legal rules pertaining to the limitation of remainders by *inter vivos* conveyances had been circumvented. It was now possible, for example, to make a grant which "shifted" from one person to another when some future event occurred, in the form: To A and his heirs to the use of B and his heirs, but if C marries, then to the use of C and his heirs. Similarly, uses could be created which "sprang up" at some future event, such as the limitation: to D and his heirs to the use of E and his heirs when E shall receive his degree. For those who wished to, the mortmain statutes could be got round and, a big boon for all landowners, feudal incidents could be avoided if judicious attention were paid to the selection of feoffees to uses, and to their replacement on retirement or death. Finally, forfeit and escheat could be avoided by the political activist in the troubled 15th century, if he put his lands in the hands of friends before he ventured forth to aid Yorkist or Lancastrian.¹²⁶ From all of this, it is evident that the Crown and the great landowners were suffering a large loss of revenue.

Enactment of the *Statute of Uses*

However, when Henry VIII acceded to the throne in 1509, this loss did not appear to be of great concern. His father, Henry VII, had left

123. *Supra*, n. 59, at 121.

124. *Id.*, at 121-22.

125. *Id.*, at 65-66.

126. *Supra* n. 17, at 50.

the royal coffers full, and the broad acres of the royal demesne were generating a large revenue for the Exchequer. But Henry VIII was a spendthrift in peace and, especially in the early years of his reign, in war, and it was not long before a search was on for additional sources of revenue. In this not unsuccessful search, Henry VIII and his advisers soon hit upon the idea of re-asserting the regal right to feudal incidents, which feoffment to uses had whittled away. But, since the right to create uses was now an equitable right, enforceable in Chancery, the problem was to find a legal method of ensuring that income from the incidents accrued to the Crown. Since it was a legal problem, the Monarch chose the statutory route, through Parliament, to solve it.

In 1529, a Crown-sponsored bill was introduced in the House of Commons which would have declared uses invalid, unless publicly registered, and would have abolished entails except for those in favour of lords of the realm.¹²⁷ Evidently, this concession, as well as a written agreement with the peers on this subject, was made to ensure passage of the bill in the House of Lords. Since the Commons was the stronghold of landholders of all degrees, and the royal bill would cost them dearly, it was not popular and did not pass. Neither did other bills aimed at the same problem and introduced in 1531 and 1532,¹²⁸ even though the Monarch attempted to intimidate the Commons in order to get a bill through in the latter year.¹²⁹ He then changed his tactics. Forsaking, for the moment, a parliamentary route, Henry VIII went to law. This took the form of interesting himself personally in *Dacre's Case*,¹³⁰ which was heard by the chief judges of the realm in the

Exchequer Chamber in the Trinity term of 1535. This suit specifically concerned the employment of uses and a will to evade royal rights of wardship, the very point which Henry had been attacking in his abortive legislation. What is more, the royal lawyers claimed that Dacre's settlements were void, not simply on the ground that the will was a deliberate attempt to defraud the king, but because land could not be devised by common law, and the judges came round to that view.¹³¹

Legally, this decision outlawed the use, and until it "was legalized, hundreds of families remained without protection for their estates."¹³² With this common knowledge as a club, Henry VIII returned to Parliament and secured passage of a far more stringent bill than those of former years.

*An Act Concerning Uses and Wills*¹³³ opens with a recital of the Monarch's bill of complaints.¹³⁴ This recital is, as W.S. Holdsworth

127. *Supra* n. 11, at 679.

128. *Id.*, at 682-83.

129. *Id.*, at 685.

130. *Id.*, at 691. Ives quotes from manuscript sources of the case which are in the British Museum.

131. *Id.*, at 688.

132. *Id.*, at 692.

133. 27 Hen. 8, c. 10 (U.K.).

134. 27 Hen. 8, c. 10, s. 1 (U.K.).

remarked, "the sixteenth century equivalent of a leading article in a government newspaper upon a government measure."¹³⁵ It then prescribed that if A is seised of lands to the use of B, such seisin shall henceforth vest in B. This goes to the heart of the matter. By abolishing the separation between the legal and the equitable estates, B — the *cestui que use* — is now seised of the whole interest in the lands. As such, any litigation over the land would have to be conducted in a common law court, and feudal incidents would be due directly from B or his heirs. Such incidents would be all the more certain, too, because, as land cannot be devised by will at common law, the estate B is seised of would devolve on his heir in accordance with the law of primogeniture. Another prime objective of the Crown was attained by abolishing secrecy in conveyancing. This was effected by concurrent legislation, — the *Statute of Enrollments*¹³⁶ which provided that any conveyance of land to uses must be recorded, by royal officials appointed for the purpose of maintaining such records, within six months of the date of purchase. All of this applied to persons who had an interest in land as a result of a limitation to uses at the time the *Statute* came into effect. Thereafter, if a grant to uses were made, the *Statute* would "execute"¹³⁷ the use, or vest the whole interest in the *cestui que use* at the instant the transaction became effective. The feoffee to uses would become a man of straw and, with few exceptions,¹³⁸ would pass out of the picture permanently and completely.

Significance of the *Statute*

What of the future? Why should a person resort to the use when all its benefits had been abolished? In short, because it soon became apparent that there were important advantages to be gained by doing so. For example, if A bargained and sold Blackacre to B for substantial consideration, he would thereby raise a use in favour of B, as before 1535. But now, the *Statute* would execute the use and vest B with full legal title to the land. Hence, the journey to the estate, and livery of seisin, were unnecessary. Not unnaturally, the bargain and sale soon became the standard method of conveyance.¹³⁹

135. *Supra* n. 10, at 460.

136. *An Act concerning Enrollments of Bargains and Contracts of Lands and Tenements*, 27 Hen. 8, c. 16 (U.K.).

137. 27 Hen. 8, c. 10, s. 12 (U.K.).

138. The *Statute* did not execute active uses. Therefore, the feoffee seised of land to an active use remained so seised. See also *Supra* n. 16, at 560-61.

139. *Supra* n. 59, at 181. While the courts allowed some latitude to conveyances in this respect, they resisted attempts to restore the *status quo ante*. This the profession tried to do by limiting a use upon a use in the form of a grant: to A to the use of B to the use of C. (Such a grant was never formulated before the eighteenth century. It is used here to make the explanation less involved.) The argument then ran that the *Statute* should execute the use, whereby A would drop out, the legal title would vest in B, and the equitable title in C. *Id.*, at 189. This formulation is not unlike the modern trust — but the argument was not to be allowed by the courts for well over a century. *Id.*, at 191. In fact, the bench decided against limitations of a use upon a use on the basis of the decision in *Tyrrel's Case* (1557), 2 Dy. 155a; 73 E.R. 336 (K.B.). Jane Tyrrel bargained and sold lands to her son, which raised a use in his favour, but the deed stipulated that the land was to be held to Jane's use for life. Thus, she was seised to the use of her son to the use of herself — a use upon a use. The bench held the second use to be void as being repugnant to the first, and fee simple vested in her son.

However, of far greater significance was the fact that by employing a conveyance to uses, the legal remainder rules could be avoided.¹⁴⁰ These, it will be recalled, were the rules which governed future interests in *inter vivos* transfers of land under the common law, and which, by all expectations, should have governed the legal estates vested in *cestuis que use* by the *Statute*. Such was not the case and therefore, grants to uses of the form: To A and his heirs to the use of B and his heirs when B attains the age of twenty-one,¹⁴¹ or, To C and his heirs to the use of D and his heirs, but if E graduates from Oxford, then to the use of E and his heirs,¹⁴² soon became common under the name of executory uses. Moreover, the courts allowed even greater latitude to testators who became able to devise land under the *Statute of Wills* in 1540,¹⁴³ such gifts becoming known as executory devises. Limitations of this nature were subject to the rules which governed executory uses, but the word "use" did not have to appear in the will. Thus a devise: To D and his heirs, but if E graduates from Oxford then to E and his heirs, was equivalent to the grant to use specified above.

The question is, why did the courts allow legal practitioners to circumvent the rules? There is no definitive answer to this question since, as A.W.B. Simpson remarks,¹⁴⁴ and as independent research has shown, there are no reported cases which deal with the problem. The response of legal writers to this fact is curious. Some, such as Spence¹⁴⁵ and Ames,¹⁴⁶ are silent on the question; others, such as Plucknett¹⁴⁷ and Cheshire¹⁴⁸ specify that springing and shifting uses were converted into legal estates, but offer no explanation of the phenomenon. Of all the texts consulted for this paper, only two offer plausible explanations. The first, and most succinct, is that advanced by Megarry and Wade.¹⁴⁹ Their interpretation is based on the passage in the *Statute of Uses* which lays down that every "person or persons ... that have or hereafter shall have [a] use, confidence or trust in fee simple ... shall from henceforth stand and be seised [of] like estates as they had or shall have in use...." Accordingly, runs Megarry and Wade's argument, "[t]he legal remainder rules could not prevail against the express provision of the Statute that the *cestuis que use* should be seised and possessed of the like estates as they had in the use."¹⁵⁰ In view of the absence of any evidence of litigation on this question, it appears that this explanation, based on an interpretation of the

140. These rules are set out in their modern form in Cheshire, *Supra* n. 17 at 215-18.

141. *Id.*, at 215. A springing use which abrogates the rule that there shall be no abeyance of seisin.

142. *Id.*, at 218. A shifting use void at common law because it limits a fee upon a fee.

143. 32 Hen. 8, c.1. (U.K.).

144. *Supra* n. 59, at 185.

145. I Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) 435-65.

146. J. Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 233-42.

147. *Supra* n. 16, at 557.

148. *Supra* n. 17, at 220.

149. *Supra* n. 119, at 195.

150. *Ibid.*

Statute itself, and simple though it is, is probably correct.

The interpretation of A.W.B. Simpson is not rooted in the *Statute*, and is much more involved. It is best told in his own words:

In cases arising soon after the Statute of Uses the courts would be dealing largely with conveyances to uses drawn up before the Statute, drawn by conveyancers who relied on the then practice of the Chancellor. As we have seen the courts deliberately minimized the extent to which the Statute interfered with private property by suggesting that the vesting of the legal estate in the *cestui que use* would not have been a breach of trust by the feoffee before 1535. To be consistent in this reasoning they had to hold that the legal estate after the Statute vested automatically in the same person who, in the view of Equity, would have had the use before. Once they took this view in the case of pre-1535 conveyances they could find nothing in the Statute of Uses to indicate that they ought to apply any different rule to post-1535 conveyances to uses. Thus anybody who would have been equitable owner before 1535 must obtain the legal estate after 1535, common law rules as to the limitation of estates notwithstanding.¹⁵¹

Naturally, landholders and conveyancers were quick to realize that the new rules (regardless of how they had come into effect) allowed for much greater flexibility in the disposition of estates. As the years passed, new and even more ingenious limitations were made to innumerable variations of executory interests — an expression which came to include both executory uses and devises¹⁵² — so that “the late sixteenth and early seventeenth centuries may justly be called the age of the fantastic conveyance....”¹⁵³ If a conveyance can be made: To A to the use of B at twenty-one, why not to the use of B’s son, after his father’s death, and then to his grandson, at twenty-one? If there can be a devise: To X and his heirs, but when Y marries, to Z and his heirs, why cannot a later shift be devised to the son of Z, and then to his son and so on? In both these cases, it is not difficult to see that something approaching an entailed estate is in the making or, as it came to be known, the problem of perpetuities.¹⁵⁴

As demonstrated above, before the *Statute of Uses*, judges were not disposed to allow land to be made inalienable by limitation to entailed estates. Their successors after the *Statute* were of a like mind, and when the long-term ramifications of limitations to executory interests became clear, they clamped down. In *Chudleigh’s Case*, which hinged on the limitation of a shifting executory use, the Court stated:

If a feoffment be made to the use of A for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only; in this case, if this limitation should be good, the inheritance would be in no body; but this limitation is merely void, for the

151. *Supra* n. 59, at 185-86.

152. *Supra* n. 17, at 222.

153. *Supra* n. 59, at 186.

154. *Supra* n. 17, at 234.

limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession.¹⁵⁵

This was interpreted to mean that limitations to uses were to be subject to the same rules which governed remainders at common law. Unfortunately for the bench, since the rule was not directly relevant to the case at bar, it was *obiter* and thus not binding on future courts. Nevertheless, it was later made explicit and extended to executory devises.¹⁵⁶ In *Purefoy v. Rogers*, a case involving a contingent legal remainder and a later bargain and sale of the same land, Hale, C.J. said "where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise but a contingent remainder only...."¹⁵⁷ Although the Imperial Parliament saw fit to partially negate this rule in 1877 by amending legislation,¹⁵⁸ no Canadian legislature has followed the English example. Hence, it is still a rule of law in all Canadian jurisdictions today.

The Statute Today

In practical terms, this means that if one wishes to make an executory grant or devise, it must be worded so as to break one or more of the legal remainder rules. Thus when Lester Jackson left his quarter section to his wife, Bessie, so long as she remained his widow, but upon her remarriage, to his daughter, Evelyn, the gift was a valid (shifting) executory devise.¹⁵⁹ The land would vest in Evelyn if and when her mother remarried because the will was drafted so as to violate the canon that a remainder is void if the grantee takes possession by cutting short the prior estate¹⁶⁰ (*i.e.*, Bessie's estate). Again, when Hector Ross made a gift of two half-sections to a nephew, Donald Ross, providing that Donald would "come to Canada and farm the land that I am now in possession of," he raised a valid (springing) executory devise,¹⁶¹ since this provision would break the rule that a remainder must be granted in the same document which limits or grants the prior estate.¹⁶² On the other hand, in what looks like an executory shifting devise John Walker's will specified that all his real property was to go to his wife, Ellen, and on her death the residue of his estate was left to his brothers and sisters.¹⁶³ After Mrs. Walker died, a dispute arose between her heirs and the devisees under her husband's will, and recourse was had to law. The court of first instance held that effect was to be given to the wishes of the testator. On appeal

155. (1595), 1 Co. Rep. 113b, at 138a; 76 E.R. 261, at 320 (K.B.).

156. *Supra* n. 59, at 204-05.

157. (1671), 2 Wms. Saund. 380, at 388; 85 E.R. 1181, at 1192 (K.B.).

158. *An Act to amend the Law as to Contingent Remainders, 1877*, 40 & 41 Vict., c. 33 (U.K.).

159. *In re Jackson Estates* [1940] 1 D.L.R. 283; [1940] 1 W.W.R. 65 (Sask. C.A.).

160. *Supra* n. 17, at 217.

161. *Re Ross Estate* [1967] 59 W.W.R. 572 (Sask. Q.B.).

162. *Supra* n. 17, at 215.

163. *Re Walker* (1925), 56 O.L.R. 517 (C.A.).

it was held that the gift to the blood relations was void. In effect, the Court ruled that the testator's provision did not constitute an executory devise because, as the gift to the relations was to vest at the termination of the widow's estate, it could be construed as a remainder and hence would be subject to the remainder rules. As such the gift over was in breach of the rule that there could be no remainder after a fee simple, and was therefore void.¹⁶⁴ Since Mrs. Walker's estate was valued at \$38,000, it is evident that there must have been some disgruntled and undone devisees after the judgment was pronounced.

While the world has changed radically since the *Statute of Uses* was enacted 450 years ago, the *Statute* has not; hence it still has the power to enmesh and entrap the untutored and unwary. Originally drafted to empower Henry VIII's government to enforce the efficient collection of an early medieval land tax that was already out of tune with the times, it has for that reason gathered a large accretion of case law. These facts are the root cause of the undoing of the devisees under the Walker will.¹⁶⁵ Because the person who drafted the will could not distinguish between an executory devise and a legal remainder, the ramifications operated to defeat the reasonable wishes of a testator in a setting and a society undreamed of by the legislative draftsmen of 1535. It is thus evident that some knowledge of the facts set out in this paper, and the ability to draft an appropriately formulated future interest in order to give effect to a testator's wishes, is an integral and necessary part of a legal education. For if an incorrect limitation is made and the disputants go to law, the bench finds no difficulty in interpreting the medieval lore associated with the *Statute of Uses*, to the dismay of the unsuccessful litigant and the chagrin of his legal adviser.

164. *Supra* n. 17, at 218.

165. *Supra* n. 163, at 521.

