MEDIEVAL STUDIES 117:
ENGLISH CONSTITUTIONAL AND LEGAL HSTORY

Take-home exam

Professor Donahue, Ms. Shadrina

December 1: 2:00 p.m.—December 11: 2:00 p.m.

INSTRUCTIONS

This is a take-home exam. It will be posted on the course website on December 1 at 2:00 p.m. *The exam should be returned to Ms. Shadrina with a copy to Professor Donahue* (shadrina@g.harvard.edu, cc. rspang@law.harvard.edu) *as an email attachment*, any time before 2:00 p.m. on December 11.[1] You should also return the final version of your paper at the same time and by the same method. (If technology fails you, you can leave a paper copy of the exam and the final paper in front of Prof. Donahue's office door [Hauser 512].)

After you have downloaded the exam, you may not discuss it with anyone until you have turned in your answers, nor may you discuss the exam with anyone who has downloaded it or picked up a hard copy of it, even if you do not yet have the exam, nor may you discuss the exam with who has not yet turned in his/her answers, even if you have. This means, as a general matter, that you may not discuss this exam with anyone between 2:00 p.m. on December 1 and 2:00 p.m. on December 11.

This is an open-book exam. You may use any materials that you want. The exam is not, however, intended to be a library exercise. You should be able to do it with just the multilithed materials assigned for the course, your class notes, and Baker's *Introduction*.

There is no limit on words, but conciseness will be rewarded and verbosity penalized. One way to be concise is not to recite at length material that was contained in the lectures. By and large, we know that material, and in a take-home exam we can assume that you do too. What we are interested in is your ideas, how you put the material together. If you find yourself writing more than ten double-spaced typewritten pages on either part of the exam, you are probably writing too much. (Part II has two questions. Don't write more than 5 pages on either question, and you should think more in terms of 3 or 4 pages on each question.

This exam consists of two parts, each of which offers a choice of questions. You are to answer:
one question from Part I: either A or B,
two questions from Part II: either A or B, **and** either C or D.

In the past, in order to get better coverage of the course, we have limited the choices on Part II on the basis of what you chose to write about in Part I. While Part IA is more closely related to Part IIA and Part IB is more closely related to Part IIB, they are sufficeintly far away that we will not be limiting your choices in Part II this year on the basis of what you choose in Part I. Since we are trying to get coverage of the entire course, we will be more impressed if your choices do not deal with topics on which you have written your paper.

[1] This is the 'official' deadline because take-home exams are supposed to be completed before the beginning of exam period. We are giving everyone an automatic extension into the first week of exam period, deadline: Fri., Dec. 15 at 11:59 p.m. After that, you need to get in touch with Ms. Shadrina. We have a 'drop-dead' deadline for getting in grades at the end of the exam period (Dec. 20). We will probably be able to come up with a date later than Dec. 15, but we simply cannot handle an exam or final paper that arrives after 11:59 p.m. on Tue. Dec. 19.

The two parts of the exam will be given approximately equal weight. For what the information is worth, we regard Questions IA and IB as being of approximately equal difficulty, Question IIB as more difficult than IIA, and Question IID as more difficult than IIC. We'll take that into account in evaluating the answers. Finally, the paper counts equally with each part of the exam, but we will use it break ties, so it has a bit more weight than either part of the exam.

MEDIEVAL STUDIES 117, PART I

Answer one *of the following questions.*

I.A.

Read the following document carefully (Materials, p. VII–32 to VII–34, with the explanatory footnotes considerably expanded)*. Then answer the questions that follow it.*

Doige's Case
[Shipton v. Dogge]
Y.B. Trin. 20 Hen. VI. fol. 34. pl. 4 (Ex. Ch. 1442)[2]

Note from the Records[3]

The Common Bench roll for Easter term 1442 (CP 40/725 m. 49d) records an action on the case brought by one William Shepton against Joan, widow of John Dogge of London: "[W]hereas the same William had bargained with the said Joan in London to buy from her two messuages, 28 acres of arable land and one acre of meadow with the appurtenances in Hoxton in the county of Middlesex, for a certain sum paid in advance to the same Joan; and the same Joan had there undertaken to make a feoffment thereof to the said William and his heirs within a certain period now elapsed: the aforesaid Joan, craftily scheming to defraud him the said William in that behalf, sold the aforesaid messuages, land and meadow with the appurtenances within the aforesaid period to John Melburne, and within the same period falsely and deceitfully made a feoffment thereof to the same John and his heirs; to the damage of the selfsame William £40 etc."

The defendant did not appear. No continuance is recorded beyond Michaelmas 1442. In Trinity term 1442, Shepton (now called 'Shipton') commenced another action in similar form, but in the court *coram rege* (KB 27/717, m. 111). The bill is entered as 'a plea of falsity and deceit' and adds the details that Mrs. Dogge had undertaken to convey the land in fee simple within a fortnight of the sale, which was on 12 February 1439, and that she had been paid £110. The words 'in that behalf' were also replaced, so that she was alleged to have craftily schemed to defraud the plaintiff of the messuages, land and meadow. The damage was laid as £200. Mrs. Dogge entered a special demurrer, on the express grounds that the facts alleged amounted to a covenant, and so the plaintiff should have brought an action of covenant rather than deceit The court took advisement until Hilary term 1443. Meanwhile the matter was adjourned in the Exchequer Chamber for consultation with the other judges, and the Y.B. reports the argument there in Trinity term 1442.

A bill of deceit was brought against John Doige[4] in the King's Bench. And the plaintiff counted that he bargained with the said John on such a day and year to buy from the said John so much land for £100 to him paid. Of which land he was to enfeoff the said plaintiff within fourteen days, and that the said John enfeoffed one A. of the same land and so deceived him. And the defendant demurred on this bill, for that, on the matter thus shown, the plaintiff should have a writ of Covenant and not this action. And now in the Exchequer Chamber.

Ayscough, JCP.[5] If a carpenter takes upon himself to make me a house and does not do so, I shall not have a writ of trespass, but only an action of covenant (if I have a specialty). But if he makes the house badly, I shall have an action of trespass on my case; for this misfeasance is the cause of my action. So in our case, if the defendant had kept the land in her hands without making feoffment, then the plaintiff would only have a writ of covenant. And I think the case is all one when the defendant makes feoffment to a stranger and when he keeps the land in his hands. Wherefore the action does not lie. Also, the bill says 'he had bargained to buy', and those words do not prove that bought. Consequently, it cannot be taken as deceit, when the bargain did not reach the state of an accord.

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[2] Another transcription and translation of this case may be found in Selden Society, vol. 51, p. 97. Fifoot's translation is here collated with that of Baker and Milsom, *Sources*, p. 434–8, who used the Selden Society translation.

[3] From Baker and Milsom, *Sources*, p. 433–4.

[4] As is typical of Year Book reports, the reporter gets the names of the parties mixed up. The record shows that the plaintiff was Joan Dogge (a name that we tend to spell 'Dodge'), widow of John Dogge.

[5] William Ayscough, Justice of Common Pleas, 1440–1454.

PASTON, JCP.[6] Yes, sir. The bargain proves an accord, namely when the money is paid.

BABTHORPE, B.[7] Suppose the defendant had charged the land after making he bargain, and then enfeoffed the plaintiff; he would not have a writ of deceit. (AYSCOUGH agreed with this.) And the law is the same in my view, whether the defendant charged the land or whether she enfeoffed another of all the land.

Wangford.[8] The defendant has done some wrong, on which the action of deceit is founded; for by the act of enfeoffing a stranger she has disabled herself from making feoffment to the plaintiff, even if she buys back the land afterwards and enfeoffs him.[9] . . . So, if I retain a man to buy for me a manor for a certain sum and then he buys it for himself, on this I shall have an action of deceit.[10] And so in our case.

Stokes,[11] to the same intent: Suppose I retain one who is skilled in the law to be of counsel with me in the Guildhall at London on a certain day and he does not come on that day, whereby my cause is lost, now he is liable to me in an action of deceit; and yet he has done nothing. But because he has not done what he undertook to do and I am thereby damaged, he is liable in deceit. . . .

PASTON. Suppose a man bargains to enfeoff me, as in our case here, and he afterwards enfeoffs another, and then he re-enters and enfeoffs me and the other ousts me. Now here the action of covenant may not be brought, because he has at last enfeoffed me according to his covenant; and yet the deceit remains upon which an action may be based. Wherefore it does not always follow that where there is a covenant the action of deceit will not lie.

BABTHORPE. Suppose the defendant had enfeoffed a stranger, reserving to himself an estate tail, and had then enfeoffed the plaintiff, is not this a great deceit? (Implying that it would have been.) And yet it sounds in covenant.

AYSCOUGH. If the feoffment has been made wrongly by such a fraud, it is a wrong in the nature of a misfeasance. But in our case no feoffment is made to the plaintiff, properly or improperly, and so there is nothing done save the breach of covenant.

NEWTON, CJCP.[12] The defendant has disabled herself from keeping her covenant with the plaintiff because she has enfeoffed another and, moreover, the day has passed by which the feoffment should have been made. To what effect, then, would he have a writ of covenant, when the defendant cannot be held to any covenant with him, even if there was a specialty? (Implying that it would be pointless.) Now, when the plaintiff has made a firm bargain with the defendant, the defendant can demand the purchase price by a writ of debt, and in conscience and in right the plaintiff ought to have the land, even though the property cannot pass to him in law without livery of seisin. For it would be amazing law (*merveillous Ley*), then, if there should be a perfect[13] bargain under which one party would be bound by an action of debt and yet be without remedy against the other. Wherefore the action of deceit well lies.

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[6] William Paston, Justice of Common Pleas, 1429–1444, a member of the well-known gentry family of Norfolk.

[7] William Babthorpe, Baron of the Exchequer, 1429–1443.

[8] Probably William Wangford, who was only an apprentice at this time. He became a serjeant in 1453 and died in 1459.

[9] A complicated argument about warranty is omitted here.

[10] See *Somerton v. Colles* (1433), Mats. p. VII–30.

[11] This may be the Stokes (no given name found) who was admitted to Lincoln's Inn in 1420, and is found on lists of members of the Inn as late as 1442. See Baker, T*he Men of Court 1440–1550*, 2:1466. His role would have been that of an apprentice here.

[12] Richard Newton, Justice of Common Pleas, 1438–1439; Chief Justice of Common Pleas, 1439–1448,

[13] Reading 'par fait' as 'parfait'.

FORTESCUE, CJKB.[14] If by a deed of indenture I lease land to a man for a term of years by deed indented and then I oust him within the term, and twenty years (say) after the end of the term he brings an action of covenant against me, the action lies well; and yet he cannot recover the term itself, but damages only. So in this case. And as to the argument that, because he has disabled himself from executing the covenant, the action of deceit lies, I will put you a case where the party has disabled himself and yet no action lies save covenant. For suppose I make a lease for a term of years to *Paston*, and then I lease the same land to *Godrede*,[15] who goes into occupation: now I have disabled myself from giving *Paston* his lease, and yet he shall have only a writ of covenant against me.

PASTON. Because a man can have a writ of covenant, it does not follow that he shall not have a writ of deceit; for perchance all the covenants are kept and yet he is deceived. For suppose a carpenter takes upon himself to make me a house of a certain length and width and height, which he does, but makes default in the joinery or some such thing, which is outside the covenant; now the action of covenant will be of no use to me because he has kept all the covenants, and yet I shall have an action of trespass on my case for his misfeasance. So here, though I can have a writ of covenant, yet, since she has disabled herself as aforesaid, I shall have deceit.

NEWTON. If I bail a certain sum of money to *Paston* to bail over to *Fortescue*, now, if *Paston* does not do this, he will be liable to me in an action of account and also in an action of debt, and it is at my pleasure which I shall bring,[16] but when I have brought the one, the other is extinguished. So in this case here there are two actions, covenant and deceit, and so the party may bring deceit if he wishes. Wherefore, etc.

FRAY, CB.[17] If the defendant in our case had ousted her feoffee and had then enfeoffed the plaintiff, now all the covenants would be fulfilled; and suppose that later the feoffee were to oust the plaintiff, is the plaintiff to have no action now because he could not have an action of covenant? Surely, he shall. . . .

PASTON. It is not true that in every bargain there must be a covenant. For if I buy from you a horse without your warranting him to be sound, here there is no covenant, and yet there is a bargain; and if he is unsound I shall have a writ of trespass on my case against you and shall allege that you sold him to me, knowing him to be unsound. A case came before the Common Bench, where the plaintiff bargained to have 14 bales of grain from the defendant and the defendant sold them to him, knowing the said grain to be diseased, and the action was upheld. [But look at the record of this case: for there it was warranted that the said grain was merchantable].[18] Wherefore it is right that the plaintiff should have an action of deceit on such a bargain even if, had he a specialty, he could also have a writ of covenant.

WESTBURY, JKB.[19] If a man, after such a bargain as in our case and before the feoffment, made a statute merchant[20] and then made the feoffment, the party should have a writ of deceit. So here.

FORTESCUE. If this case be law that *Newton* has put, then indeed there would be no question of the law in our case; for if each party is bound by action on a bargain, then it will be proper to maintain this

[14] John Fortescue, Chief Justice of King's Bench, 1442–1461.

[15] William Godrede, Justice of King's Bench, 1434–1455, although he does not speak in our report.

[16] Fifoot, *History and Sources*, p. 272, references a case in 1368 that so holds.

[17] John Fray, third Baron of the Exchequer, 1426–1435, second Baron of the Exchequer, 1435–1436, Chief Baron of the Exchequer, 1436–1448.

[18] These words would seem to have been inserted by the reporter.

[19] William Westbury, Justice of King's Bench, 1426–1445.

[20] See *Mats.*, p. VII–8.

action of deceit.

PASTON. Come then to this case.

FORTESCUE. Willingly. I would agree that, if I buy a horse from you, now the property in the horse is in me, and for this you shall have a writ of debt for the money and I shall have detinue for the horse on this bargain. But that is not so in our case. For, though the plaintiff has a right to have this land in conscience, yet the land does not pass without livery. Wherefore, etc.

PASTON. In our case the contract is good without specialty, and a good contract will bind both parties. What reason is there, then, that the one shall have an action of Debt and the other shall have no action? (As if to say, there is no reason, since in right (*en droit*) he should have the land.

And it was adjourned.

[The record shows that in Hilary term 1443 judgment was given for the plaintiff to recover £20 damages, as assessed upon a writ of enquiry. It will be noted that the damages fell far short of the purchase price and the £200 claimed in the count. Either the count was grossly exaggerated or, perhaps more likely, Mrs. Dogge had already returned to Shipton the money that he had paid in advance. CD]

NOTE

Baker and Milsom, *Sources*, 395, note varying results in similar cases in the second half of the 15th century. They also report (*id.*, 395–400, a number of cases in the same period in which the court and the serjeants agonize over whether the action on the case may be brought for nonfesance. In the meantime, Professor Baker notes (*Introduction*, pp 380–1): "The plea rolls . . . contain many undetermined actions based on nonfeasance dating back to the fourteenth century. It is unlikely that many of these cases came before the court judicially, but obviously the clerks of the court were happy to issue mesne process upon writs alleging nonfeasance, and presumably most of the cases were settled without recourse to legal argument. That it was so often ignored in practice may have been one reason why the distinction between misfeasance and nonfeasance broke down."

Write a commentary on this case. Your principal focus should be on the case itself and the arguments that the judges are making. You should begin by setting it in its context. (*Don't forget to state the obvious: What was the Exchequer Chamber? What were the "Benches" over which the justices presided? Etc.*) *The way we told the story of which this case was a part in class we focused on the possible concurrence of assumpsit and covenant. But this is not a case of assumpsit, and it might be useless to speculate what would have happened had it been. It does, however, involve the maxim "not doing is no trespass," a concept that seems very much on the minds of the judges, even though the maxim does not appear until late in the 16th century. What are the various analogies that are proposed either to get around the maxim or to apply it? The standard explanation of the result in this case is that Mrs. Dogge did do something; she disabled herself from ever being able to perform the contract. That may not, however, be rightt, just as Baker's analysis of the case (*Introduction, *p. 358–9) may not be right. The person who needed to be convinced (and was convinced since the case came from his court), was Fortescue. How does Paston talk Fortescue into deciding that the action should lie? How do we explain the curious references to 'conscience' as early as 1442?*

I.B.

Examine the following extract from St. German's Doctor and Student *II.22* (Materials *pp. IX–34 to 35*). *In the* Materials *I used the edition by William Muchall, first published in 1787, in a 19th-century American printing, so that the spelling would be familiar to you. Muchall's footnotes, which are included in the* Materials*, are omitted here. They cite many authorities that are much later than 1531, and are not particularly accurate. I have here added some notes in square brackets, principally to explain the technical terms that St. German uses and to expand on the statutory citations.*

CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT
Second Dialogue, ch. 22 (1531)

Doct. . . . I pray thee touch shortly some of the causes why there hath been so many persons put in estate of lands to the use of others as there have been; for, as I hear say, few men be sole seised of their own land.

Stud. There have been many causes thereof, of the which some be put away by divers statutes, and some remain yet. Wherefore thou shalt understand, that some have put their land in feoffment secretly, to the intent that they that have right to the land should not know against whom to bring their action, and that is somewhat remedied by divers statutes that give actions against pernors and takers of the profits.[1] And sometime such feoffments of trust have been made to have maintenance and bearing of their feoffees, which peradventure were great lords or rulers in the country: and therefore to put away such maintenance, treble damages be given by statute against them that make such feoffments for maintenance.[2] And sometime they were made to the use of mortmain, which might then be made without forfeiture, though it were prohibited that the freehold might not be given in mortmain; but that is put away by the statute of R. 2.[3] And sometime they were made to defraud the lords of wards, reliefs, heriots,[4] and of the lands of their villeins: but those points be put away by divers statutes made in the time of king H. the 7th.[5] Sometime they were made to avoid executions upon a statute-staple, statute-merchant and recognisance:[6] and remedy is provided for that, that a man shall have execution of all such lands as any person is seised of to the use of him that is so bound at the time of execution sued, in the 19th year of H. 7.[7] And yet remain feoffments, fines, and recoveries in use for many other causes, in manner as many as there did before the said statute. And one cause why they be yet thus used is, to put away tenancy by the courtesy and titles of dower.[8] Another cause is, for that the lands in use shall not be put in execution upon a statute-staple, statute- merchant, nor recognisance, but such as be in the hands of the recognisor at the time of the execution sued.[9] And

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[1] [The statute being referred to is probably 1 Ric. 2, c. 9, amended by 4 Hen. 4, c. 7. Anon. v. Windsor, Y.B. 6 Ric. 2, M. 11 (Ames Foundation, p. 72–73; cf. *id.*, p. *80–82*) suggests that the statute was read broadly. The statute of 1 Hen. 7, c. 1 is squarely on point, but it is limited to those who want to bring an action of formedon. CD]

[2] [Normally, the feoffees are the social inferiors of the *cestui que use*; here, they are his superiors, and the *cestui que use* receives "maintenance and bearing" (the latter referring to the heraldic device of the feoffee[s]) from the feoffee(s). The statute being referred to may be 1 Ric. 2, c. 9, amended by 4 Hen. 4, c. 7. That statute, however, refers to double, not treble, damages. CD.]

[3] [15 Ric. 2, c.5. CD]

[4] [A type of inheritance tax, owed to the lord, on copyhold land. CD.]

[5] [4 Hen. 7, c. 17 is on point. St German's plural ('statutes') is odd. He may have thought that 1 Hen. 7, c. 1 or 19 Hen. 7, c. 15 was relevant. CD]

[6] [All of these devices allowed the creditor to execute on the land of the debtor if the debtor does not pay his debts. As Baker, *Introduction*, 5th ed., p. 333 describes it: "A different form of security (after 1285) was the 'statute merchant' – and (after 1353) its analogue the 'statute staple' – whereby the borrower could by means of a registered contract charge his land and goods without giving up title or possession; if he failed to pay, the lender became a tenant of the land until satisfied, under a special kind of tenancy which was treated as a chattel for succession purposes but was protected by the assize. At first these devices were only for merchants, and were the only kind of mortgage available to alien merchants, who could not own freehold land. Then in 1532 a 'recognizance in the nature of a statute staple' was introduced for non-mercantile parties, though it was of little use outside the Metropolis since the statute had to be registered in one of the central courts at Westminster or in the City of London.." Since St. German is writing in 1531, he is probably describing a version of the recognisance that was in existence prior to its statutory authorization in 1532. Recognisances are also mentioned along with statutes merchant and staple in 19 Hen. 7, c. 17. CD]

[7] [19 Hen. 7, c. 17 is squarely on point. CD]

[8] [St. G. seems to be saying here that the widow of the *cestui que use* was not entitled to dower in lands held to the husband's use, nor was the husband of a married female *cestui que use* entitled to curtesy. CD]

[9] [Presumably, this is matters not covered by stat. 19 Hen. 7, c. 17; otherwise, this sentence is repetitious. CD]

sometime lands be put in use, that they should not be put in execution upon a writ of *extendi facias ad valentiam*.[10] And sometime such uses be made that he to whose use, etc., may declare his will thereon:[11] and sometime for surety of divers covenants in indentures of marriage and other bargains. And these two last articles be the chief and principal cause why so much land is put in use. Also lands in use be not assets neither in a *Formedon*, nor in an action of debt against the heir: ne they shall not be put in execution by an *elegit* sued upon a recovery, as some men say.[12] And these be the very chief causes, as I now remember, why so much land standeth in use as there doth: and all the said uses be reserved by the intent of the parties understood or agreed between them, and that many times directly against the words of the feoffment, fine, or recovery: and that is done by the law of reason, as is aforesaid.

Write a commentary on this passage. Your principal focus should be on the passage itself and its meaning. You should begin by setting it in its context. (*Don't forget to state the obvious: Who was St. German? What is a use? How were they enforced? Etc.*) *You should, of course, also examine the prior and subsequent history of the institutions to which the passage refers, but you need not discuss at any length the developments after the Statute of Uses of 1536 and the Statute of Wills of 1540. The statutes that the Student cites are interesting and worth some comment. The texts are given below. If you come to the conclusion that the Student, and perhaps St. German, is arguing that the abuses of uses had largely been obviated by statute, you would be in good company. That, however, is an argument that is open to counter-argument. Of course, very shortly after St. German wrote, a much more radical change was made.*

Statutes to which St. German is probably referring:

Stat. 1 Richard II, c. 9 (1377) (the translation is from the *Statutes of the Realm* from the French original):

ITEM, Because it is complained to the King, that many People of the said Realm, as well great as small, having Right and true Title as well to Lands, Tenements, and Rents, as in other personal Actions, be wrongfully delayed of their Right and Actions, by Means that the Occupiers or Defendants, to be maintained and sustained in their Wrong, do commonly make Gifts and Feoffments of their Lands and Tenements which be in Debate, and of their other Goods and Chattels, to Lords and other Great Men of the Realm, against whom the said Pursuants, for great Menace that is made to them, cannot nor dare not make their Pursuits; and also on the other Part Complaint is made [to the King,] that oftentimes many People do disseise other of their Tenements, and anon after the Disseisin done, they make divers Alienations and Feoffments, sometime to Lords and Great Men of the Realm to have Maintenance, and sometime to many Persons of whose Names the Disseisee can have no Knowledge, to the Intent to defer and delay by such Frauds the said Disseisees, and the other Demandants and their Heirs, of their Recovery; to the great Hindrance and Oppression of the People: It is ordained and established, That from henceforth no Gift or Feoffment of Lands, Tenements, or

[10] [A method of collecting debts owed to the Crown, whereby the sheriff took land of the debtor to the extent of the value of the debt to the Crown.. CD]

[11] [This was what was at stake in *Lord Dacre's Case* (1535), *Mats*., p. IX 92 to IX 95].

[12] [Baker, *Introduction*, p. 73–4, explains the institutions at stake here: "A judgment for money, whether for a debt, damages, or costs, was primarily enforced at common law by the writ of *fieri facias* (fi. fa.), which ordered the sheriff to seize the defendant's chattels and cause the sum to be 'made up' (that is, raised by sale). Freehold land was not liable at common law to execution for a money judgment, except in an action by the king, or against an heir sued on his ancestor's bond, or against a recognizor. In 1285, however, Parliament introduced an alternative procedure called *elegit*, under which a judgment creditor could elect instead of fi. fa. to have the defendant's goods and a moiety of his lands delivered to him as a security. In practice it came to operate like a mortgage, the debtor remaining in possession and paying an assessed rent until the debt was paid off." 'Assets' in formedon were more complicated, but St. German's point is basically the same. Land held to use did not count as such an asset for purposes of formedon. CD]

Goods be made by such Fraud or Maintenance; and if any be in such wise made, they shall be holden for none and of no Value; and the said Disseisees shall from henceforth have their Recovery against the first Disseisors, as well of the Lands and Tenements, as of their Double Damages, without having Regard to such Alienations; so that the Disseisees commence their Suits within the Year next after the Disseisin done: And It is ordained and stablished, That the same Statute shall hold Place in every other Action [in] Plea of Land where such Feoffments be made by Fraud or Collusion, to have their Recovery against the first such Feoffor: And it is to wit, that this Statute ought to be understood where such Feoffors thereof take the Profits.

Stat. 4 Henry IV, c. 7 (1402) (the translation is from the *Statutes of the Realm* from the French original):

ITEM, Whereas in the Statute made the First Year of King Richard the Second, it was ordained, That where several Persons did disseise other of their Freehold, and made Feoffment to divers People, as well to have Maintenance, as also to make the Disseisees to be ignorant against whom they ought to take their Writ, that the Disseisees in such Case might take their Writ against them which thereof shall take the Profits so that the Disseisees commence their Suit within the Year next after the Disseisin; and the same Ordinance should hold Place in every other Action or Plea where such Feoffments be made by Fraud or Collusion, to have their Recovery against such Feoffors, if they thereof take the Profits: Our said Lord the King thinking the said Statute to be very mischievous and prejudicial to his People, because of the Shortness of the Time, by the Assent of the said Lords, and at the Request of the Commons aforesaid, hath ordained and stablished, That such Disseisees shall have their Action against the first Disseisor, during the Life of the same Disseisor, so that such Disseisor thereof take the Profits at the Time of the Suit commenced. And as to other Writs in Plea of Land, the Demandant shall commence his Suit within the Year against him which is Tenant of the Freehold at the Time of the Action accrued to him, so that such Tenant thereof take the Profits at the Time of such Suit commenced; notwithstanding the said Statute.

Stat. 1 Henry VII, c. 1 (1485) (the statute as recorded in the parliament rolls is in English, though there are manuscripts of it in French; I have used the modernized spelling found in *Parliament Rolls of Medieval England* [British History Online]):

An act that the demandant in a formedon shall have his action against the taker of the profits.

Where various of the king's subjects who have cause of action by formedon in the descender or else in the remainder, on the strength of any entail of and for lands and tenements, have been defrauded and delayed in their said actions and frequently left without remedy because of enfeoffments made of the same lands and tenements to unknown persons with the intention that the demandants should not know against whom they shall take their action, be it ordained, decreed and enacted, by the advice of the lords spiritual and temporal and the commons assembled in this present parliament, and by authority of the same, that the demandant in every such case have his action against the taker or takers of the profits of the lands or tenements demanded, of which any person or persons have been enfeoffed to his or their use, and that the same taker or takers named as tenant or tenants in the said action have the same vouchees and thereupon pray in aid and have all other advantages as the same taker or takers should have had if they were indeed the tenants, or as their feoffees should have had if the same action had been directed against them. And if any person happens to die having feoffees to the use of him or his heirs, and the said heir against whom the action is brought as taker is underage, then the same heir shall have his age in the said action directed against him, and all other advantages, as if his ancestor had died seised of the said lands and tenements at issue. And also, be it ordained by the said authority that all recoveries in any such actions against such taker or takers of the profits of the said lands and tenements shall be of the same force and effect against such taker or takers and their heirs, and their said feoffees

and their heirs, and the co-feoffees of the said takers and their heirs, as though the said taker or takers, or their heirs, were indeed tenants or feoffees to their use, as is aforesaid, of the freehold of the said lands and tenements during the said action.

Stat. 15 Richard II, c. 5 (1391) (the translation is from the *Statutes of the Realm* from the French original):

ITEM, Whereas it is contained in the Statute De religiosis, That no Religious, nor other whatsoever he be, do buy or sell, or under Colour of Gift, or Term or any other Manner of Title whatsoever, receive of any Man, or in any Manner by [Gift'] or Engine cause to be appropriated unto him any Lands or Tenements, upon Pain of Forfeiture of the same, whereby the said Lands and Tenements in any Manner might come to Mortmain; And if any Religious, or any other, do against the said Statute by Art or Engine in any Manner, that it be lawful to the King, and to other Lords, upon the said Lands and Tenements to enter; as in the said Statute doth more fully appear: And now of late by subtile Imagination, and by Art, and Engine, some religious Persons, Parsons, Vicars, and other spiritual Persons, have entered in divers Lands and Tenements, which be adjoining to the Churches, and of the same, by Sufferance and Assent of the Tenants, have made Churchyards, and by Bulls of the Bishop of Rome have [dedicated and hallowed the same,'] and in them do make continually Parochial Burying without Licence of the King and of the chief Lords; therefore it is declared in this Parliament, That [it] is manifestly within the Compass of the said Statute. And moreover it is where agreed and assented, That all they that be possessed by Lands to the Feoffment, or by other Manner, to the Use of Religious, or other spiritual Persons, of Lands and Tenements, Fees, Advowsons, or any Manner other Possessions whatsoever, to amortise them, and whereof the said religious and spiritual Persons take the Profits, that betwixt this and the Feast of St. Michael next coming, they shall cause them to be amortised by the Licence of the King and of the Lords, or else that they shall sell and aliene them to some other Use between this and the said Feast, upon Pain to be forfeited to the King, and to the Lords, according to the Form of the said Statute of Religious, as Lands purchased by religious People: And that from henceforth no such Purchase be made, so that such religious or other spiritual Persons take thereof the Profits, as afore is said, upon Pain aforesaid; and that the same Statute extend and be observed of all Lands, Tenements, Fees, Advowsons, Lands to the Use of Gilds or Fraternities. And moreover it is assented, because Mayors, Bailiffs, and Commons of Cities, Boroughs, and other Towns which have a perpetual Commonalty, and others which have Offices perpetual, be as perpetual as People of Religion, that from henceforth they shall not purchase to them, and to their Commons or Office, upon Pain contained in the Statute de religiosis; and [whereas others be possessed] or hereafter shall purchase to their Use, and they thereof take the Profits, it shall be done in like Manner as is aforesaid of People of Religion.

Stat. 4 Henry VII, c. 17 (1489) (the statute is in English; I have used the modernized spelling found in *Parliament Rolls of Medieval England* [British History Online]):

An act against fraudulent enfeoffments, intended to defraud the king of his wards.

Where by a statute made at Marlborough it was ordained that when tenants fraudulently made enfeoffments to cause the lords of the fee to lose their wards, the lords should have writs to recover their wards against such feoffees, as in the said statute, among other things, more fully appears [see the next statute]; since which statute was made many schemes have been and still are contrived, by enfeoffments, fines and recoveries as well as otherwise, to deprive lords of their wards of lands held of them by knights' service

Be it therefore ordained, decreed and enacted, by authority of this present parliament, that the said statute of Marlborough be observed and kept in everything according to its form and effect. And moreover, be it ordained and enacted by the said authority that if any person or persons, of whatever

estate, degree or condition he or they are, is or hereafter shall be seised in demesne or in reversion by inheritance, being an immediate tenant of the lord of any castles, manors, lands and tenements or other hereditaments held by knights' service in his or their demesne as of fee, to the use of any other person or persons and his heirs only, and if he to whose use he or they are so seised dies with his heir underage, with no will declared or made by him in his lifetime concerning the things stated, or any of them, the lord of whom such castles, manors, lands, tenements and hereditaments are immediately held shall have a writ of right of ward for the body as well as for the land, as the lord should have had if the same ancestor had been in possession of that estate so enfeoffed to use at the time of his death, and no such estate was made or had to his use. And if any such heir is of full age at the death of his ancestor, he shall pay a relief as if his ancestor, whose heir he is, had been in possession of that estate so enfeoffed to use at the time of his death, and no such estate was made or had to his use. Be it also decreed and enacted by the said authority that such heir or heirs so in ward shall have the same action of waste against the said lords or against those in whose ward they are, as they or any of them should have had and recovered, such damages and penalties to go to the said lord and guardians as if their ancestors had died seised of the same. And moreover, if any such lord brings any such writ of right of ward against such person or persons and is barred in it, that then the same defendant or defendants shall recover damages against the said plaintiffs for their wrongful vexation in the same. Provided always that this act shall begin to take effect in respect of the heirs of those dying after Easter 1490.

Statute of Marlborough, 52 Henry III, c. 6 (this is the statute referred to in the previous statute; the translation is from Baker and Milsom, *Sources*, p. 20, from the Latin original):

Concerning those that make feoffment of their inheritance to their first-born sons and heirs under age, so that the lords of the fees thereby lose their wardships; it is provided, agreed and granted, that no chief lord shall lose his wardship by reason of such feoffment.

Further concerning those, who wishing to hand over lands for term of years so that the lords of the fees shall lose their wardships, make up false feoffments which allege that they are satisfied of the service reserved in [those feoffments] up to a stated time, and that after such time the feoffees shall be bound to pay some amount much exceeding the value of those lands, so that after that time the lands will revert to [the grantors], because nobody will want to hold them for so much [service]; it is provided and granted that no chief lord shall lose his wardship by this kind of fraud. But still it shall not be lawful for [such lords] to disseise such feoffees without judgment, but they shall proceed by writ to recover such wardships, and by the witnesses named in the charters of such feoffments, together with other free and lawful men of the countryside, and by [comparing] the value of the land with the amount of service reserved after the aforesaid stated time, it shall be determined whether such feoffment was made in good faith or fraudulently to deprive the chief lords of their wardship. And even if the chief lords in such cases recover their wardship by judgment of the court, still there shall be saved to the feoffees their action against the heir when he comes of age to recover their term or their fee.

And if any chief lords maliciously implead any feoffees, pretending that it is such a case, when the feoffments were made lawfully and in good faith, then there shall be adjudged to the feofees damages and costs which they have by the aforesaid plea, and those claimants shall be heavily punished by amercement.

Stat. 19 Henry VII, c. 15 (1504) (the statute is in English; I have used the modernized spelling found in *Parliament Rolls of Medieval England* [British History Online])

Concerning executions made against feoffees . . . :

The commons assembled in this present parliament pray that where many different persons are cheated of their execution of and upon recognizances, statutes of the staple, and statutes merchant made to them, as well as of their debts and damages recovered in an action of debt or trespass or in other actions, and

likewise the lords of whom any lands and tenements are held in socage are cheated of their reliefs, and sometimes of their heriots, because the person who is bound or condemned in this way, and also the person who of right ought to be the true tenant of the lord from whom such lands and tenements are held, causes various persons to be seised of the said lands, tenements and other hereditaments to his use only, by fine, feoffment, recovery or otherwise, he taking the profits of the same, to the great harm, deceiving and deception of all the king's true liege people within this his realm, if a remedy is not provided. In consideration of which be it ordained, decreed and enacted by the king our sovereign lord, by the assent of his lords spiritual and temporal and of the commons assembled in this present parliament, and by authority of the same, that henceforth it shall be lawful for every sheriff or other officer to whom any writ or precept is or shall be addressed, at the suit of any person or persons, to have execution on any lands, tenements or other hereditaments against any person or persons of, for and upon any condemnation, statute merchant, statute of the staple, or recognizance hereafter to be made or awarded, to do, make and deliver execution to the party suing on that matter, on all the lands and tenements of which any other person or persons is in any way seised or hereafter shall be seised to the sole use of the person against whom execution is so sued, just as the said sheriff or other officer might or ought to have done if the said party against whom execution shall hereafter thus be sued had alone been seised of the said lands and tenements by the same title as they so seised to his use at the time the said execution was sued.

And moreover, be it ordained by the said authority that the lords of whom any such lands or tenements are held in socage shall henceforth, after the death of the person to whose use any person or persons is seised as is aforesaid, with no will declared on the matter, shall have his relief, heriot and all other duties, just as the said lord ought or might have had if he had died seised of the same.

Provided always that every such person against whom execution is or shall be given on lands and tenements being in the possession of other persons to his use, may have all such advantages in the law against the person or persons having execution on the aforesaid lands and tenements, as he might or should have had if he alone had been seised of the said lands and tenements when the said execution was sued.

And moreover, be it ordained by the said authority that if any bondman purchases any lands or tenements in fee-simple, fee-tail or for term of life or term of years, and causes estate to be made to various persons to his use, or takes estate to himself and to various others jointly with him, and to his use and benefit, it shall be lawful for the lord of any such bondman to enter during the same use into the said lands and tenements and every part of them thus purchased by his bondman, in the same manner and form as he might have done if the said bondman alone had been seised of the said lands and tenements in fee or otherwise.

END OF PART I

MEDIEVAL STUDIES 117, PART II

Answer either Question A or Question B. You can answer either Question II.A. or IIB without regard to what you answered in Part I. Then answer either Question II.C. or Question II.D. You can choose between these two questions without regard to what you answered in Part I.

II.A.

The following table lists the estimates (some quite uncertain) of the population of England at the dates mentioned:

Domesday Book (1086)	=	? 2 million
Population in 1300	=	?? 6 to 7 million
Poll Tax Returns (1377)	=	? 2.5 to 3 million
Population in 1410	=	? 2.25 million
Population in 1541	=	c. 2.774 million
Population in 1600	=	c. 4 million
Population in 1635	=	c. 5 million

While there are large debates about the reliability of these numbers, most students of the problem agree that shifts of population along these lines occurred in the periods that we have studied. Behind these numbers lies a social structure that also changed considerably over the course of time. Write a general essay on effect of overall changes in English population and social structure on law and governance. The essay might begin by outlining the obvious reaction that occurred to the Black Death of 1348–9 in the ordinance of Laborers and its aftermath. It should, however, go on to consider the less obvious effects, such as the legal and governmental reaction to the great increase in population (and prices) that occurred in the 16th century (and the accompanying changes in social structure) and the difficulty of finding specific reactions to the population crunch that seems to have occurred at the end of the 13th century. Your essay should consider the possible effects of these changes on private law, particularly the so-called 'personal actions', and the possibility that changes in law and governance may have affected social structure (and perhaps even population). A good essay will coherently pursue an overall theme about the relationship of law and governance, on the one hand, and society on the other.

II.B.

Professor Milsom writes: "The life of the common law has been in the unceasing abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit almost all the phenomena of property." He also argues in another place that the effect of the assizes of Henry II was to convert obligation into property. Sketch the history of English land law from 1150 to 1600 showing how it illustrates Milsom's points. Then ask yourself some questions: (1) What does this story tell us about the distinction between property and obligation? (2) Assuming that the distinction has some validity, so what? Should we be concerned the development came about by "unceasing abuse"?

Answer one of the following questions. You may choose either Question II.C. or Question II.D., without regard to which questions you answered in Part I and without regard to whether you chose to answer Question II.A. or II.B.

II.C.

Consider the following quotation from Thomas Pitt Tasswell-Langmead's *English Constitutional History* (11th ed. 1960, but 1st ed. 1875):

"The career of tyranny and extortion upon which Richard [II] had entered alienated all classes of the nation, and speedily led to his deposition. The time had now come of which the parliament had

warned the king 1386, when it became 'lawful with the common assent of the people of the kingdom to depose the king from his royal throne, and in his stead raise up some other of the royal race upon the same'.[33] In the solemn exercise of the greatest its powers, parliament was careful to observe every formality and precaution which the constitutional lawyers of the day could suggest. But although Richard was induced to resign the crown, and Henry of Lancaster laid claim to it, the deposition, the vacancy of the throne, and the subsequent election of Henry, are each recorded in the most distinctive terms in the official entry on the rolls of parliament."

While there is little in this statement that is factually inaccurate (indeed, recent work would tend to confirm that in his last years Richard did enter upon a "career of tyranny and extortion"), no historian today would describe the events of 1399 in this way. Write a general essay beginning with the deposition of Richard II in 1399 and broadening out to include the other medieval depositions and finally the entire issue of the rise of parliament and its powers in which you explain to a careful reader why it is that Tasswell-Langmead's description of the events of 1399 cannot be accepted.

II.D.

A major historiographical question in European history (the problem is not confined to England) is how we should characterize the systems of governance from 1300–1600. "Feudal monarchy," with qualifications, is probably acceptable for the period from 1050 to 1200, perhaps to 1300. By 1600 we clearly have early modern territorial nation-states. Three or four hundred years, however, seems to be a long time to describe the polity as "transitional." On the basis of what you have learned this semester how would you describe the system of governance of England from the "feudal era" to the "early modern nation-state." Finding a single phrase to describe it is perhaps not so important as describing what it was and what it was not, how it differed both from what it had been in 1200 and what it came to be in 1600. Specific examples can, and should, be drawn, from the history of theory, from the history of law, both as conceived and as applied, and from the history of institutions.

THE END

[33] The quotation comes from a chronicler, and the context is the impeachment of the chancellor, Michael de la Pole. Whether the statement was made by "parliament" or by the duke of Gloucester as head of a commission sent to treat with Richard is unclear. Most students today think that if the statement was made at all, it was made by Gloucester.