LEGAL HISTORY: ENGLISH LEGAL HISTORY

Professor Donahue

Take-home exam

April 27: 12:00 p.m.—May 8: 5:00 p.m.[1]

INSTRUCTIONS

This is a take-home exam. It will be posted on the course website on April 27 at 12:00 p.m. (or shortly thereafter). You may, if you wish, pick up a hard copy in my assistant's office (Hauser 506) any time after that. *The exam should be returned to me* (rspang@law.harvard.edu) *as an email attachment*, any time before 5:00 p.m. on May 8. 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 the box in front of my office [Hauser 512].) *Please note that this is different from the usual procedure. You do not turn in the exam to the Registrar's Office.*

After you have downloaded or picked up a hard copy of 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. This means, as a general matter, that you may not discuss this exam with anyone between 12:00 p.m. on April 27 and 5:00 p.m. on May 8.

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 and your class notes.

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, I know that material, and in a take-home exam I can assume that you do too. What I am interested in is your ideas, how you put the material together. If you find yourself writing more than five double-spaced typewritten pages on any question, you are probably writing too much. (You will probably write more than five pages on Part II, because it has two questions, but don't write more than 5 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 order to cover the course better, there are some limits on your choices.

If you choose to answer Question IB, you **must** choose IIA.

If you choose to answer Question IA, you can answer **either** Question IIA or IIB.

Whatever you choose for Part I, you can answer **either** Question IIC or IID, but you must answer one or the other. Obviously, I'm trying to get coverage of the entire course. Hence, I will be more impressed if your choices do not deal with topics on which you have written your paper.

[1] Those who are planning to graduate please note: This is the 'official' deadline. I can give you an automatic extension to May 10 (please let me know by email if you have to do that). May 10 is the 'drop-dead' deadline for both the exam and the final version of the paper. If I get them later than that, your graduation is in jeopardy.

The two parts of the exam will be given approximately equal weight. Since Part II has two questions, you'll probably be writing more overall on Part II than you will on Part I. For what the information is worth, I 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. I'll take that into account in evaluating the answers. Finally, the paper counts for 1/3 of the overall grade mathematically, but I use it break ties, so it has a bit more weight than either part of the exam.

LEGAL HISTORY: ENGLISH LEGAL HISTORY, PART I

Answer one *of the following questions. If you choose Question I.B, you must answer Question A in Part II. If you choose Question I.A, you can answer either Question I.A or Question I.B in Part II.*

I.A.

Read the following document carefully (Materials, p. IX–70). *Then answer the questions that follow it.*

ANON.
Y.B. Pasch. 22 Edw. 4, fol. 6, pl. 18 (1482)

In the Exchequer Chamber before all the justices of the one Bench and the other and in the presence of several serjeants and apprentices, the archbishop of York, then chancellor of England,[2] sought the advice of the justices upon the grant of a subpoena.

And he said that a complaint had been made to him that one was under obligation by Statute Merchant[3] to another and had paid the money but had taken no release; and, notwithstanding this payment, the creditor sued out execution.

And he said that the creditor, if he were examined, could not deny the payment. How then, Sirs,

should I grant a subpoena or not?

FAIRFAX, J:[4] It seems to me against all reason to grant a subpoena, and by the evidence of two witnesses[5] to subvert matter of record. For, where one is bound in this manner, he need not pay without acquittance or release. So, where a man is obliged on an obligation, he need not discharge his duty unless the obligee will make him an acquittance; and so it seems to me that this is his folly.

THE CHANCELLOR said that it was the common course in the Chancery to grant relief against an obligation;[6] just as in the case of a feoffment upon trust, where the heir of the feoffee is in by descent or otherwise. For we find record of such cases in the Chancery.

HUSSEY, CJ:[7] When I first came into Court, which is not yet thirty years ago, it was agreed in a case by all the Court that, if a man had enfeoffed another on trust and if he died seised, so that the heir was in by descent, then the Subpoena would not lie; and there is good reason for this. For, just as, by a subpoena, one descent might be disproved in the Chancery by two witnesses, so by the same reasoning twenty descents might be disproved; which is against reason and conscience. And so it seems to me that it is less harmful to make him who suffers his feoffee to die seised of his land to lose his land than to work a disinheritance by evidence in Chancery. And so, in the case of the Statute Merchant and also in that of the obligation, it is less harmful to make him pay again through his negligence than by two witnesses in the Chancery to disprove a matter of record or a matter in specialty. For it is all due to his negligence, since he need not have paid on the obligation before taking an acquittance or release from the plaintiff. Such is the law.

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[2] Thomas Rotherham, Chancellor 1474–1483.

[3] See *Materials*, p. VII-8.

[4] Guy Fairfax, JKB (justice of King's Bench) 1477–1495.

[5] This is a reference to the fact that the Chancery followed the Romano-canonical system of proof and required a minimum of two witnesses to establish any proposition of fact.

[6] This is standard word in this period for an instrument under seal.

[7] William Hussy, CJKB, 1481–1495.

Whereupon the Chancellor said that it would seem great folly to enfeoff others of one's land.

And then the Chancellor agreed to the Statute Merchant, because it was matter of record.

Write a commentary on this case. Your principal focus should be on the case itself and its meaning. 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? What was a subpoena? Etc.*) *There are two legal issues that are critical in the case.* (*1*) *What is the difference between a "statute merchant"* (*see* Materials, p. VII-8) *and the "obligation," which the Chancellor tells us he has been granting relief against as a matter of "common course"* (*see* Materials, p. IX–19). (*2*) *What is the relevance of the analogy that the Chancellor draws to the heir of the feoffee to uses?* (*Hussey, CJCP, may not be telling the whole story about this. In 1502, John Vavasour, who was Hussey's contemporary from the point of view of his creation as serjeant* (*1478*)*, while sitting as a justice of Common Pleas, said, "a subpoena was never allowed against his [the feoffee's] heir until the time of Henry VI, and on that point the law was changed by Fortescue, CJ."*) *Finally, what light does this case cast on the incautious statement made in lecture that there is no evidence that the common lawyers were concerned about what was going on in Chancery until the chancellorship of Cardinal Wolsey?*

I.B.

Examine the following extract from St. German's Doctor and Student *II.22* (Materials pp. IX–34 to 35). *This extract has been edited; you need deal only with the matters that are covered here, but you should deal with all those that are covered here.*

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.[8] 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.[9] 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.[10] And sometime they were made to defraud the lords of wards, reliefs, heriots,[11] 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.[12] Sometime they were made to avoid executions upon a statute-staple, statute-merchant and recognizance:[13] and remedy is provided for

[8] [The statute being referred to may be 1 Ric. 2, c. 9, amended by 4 Hen. 4, c. 7. CD]

[9] [Normally, the feoffees are social inferiors of the *cestui que use*; here, they are his superiors, and *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. The statute, however, refers to double, not treble, damages. CD.]

[10] [15 Ric. 2, c.5. CD]

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

[12] [4 Hen. 7, c. 17; 19 Hen. 7, c. 15. CD]

[13] [All of these devices allow the creditor to execute on the land of the debtor if the debtor does not pay his debts. CD]

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.[14] And one cause why they be yet thus used is, to put away tenancy by the courtesy and titles of dower. ... And sometime such uses be made that he to whose use, etc., may declare his will thereon: 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. ... And these be the very chief causes, as I now remember, why so much land standeth in use as there doth ...[15]

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 length the developments referred to in Muchall's note* (*footnote 15*) *at the end* (*which was written in the 18th century*)*. You need not get into the details of the statues to which the Student refers. You can assume that they were passed for and achieved the purposes that he says they were.*

END OF PART I

LEGAL HISTORY: ENGLISH LEGAL HISTORY, PART II

Answer either Question A or Question B. If you chose to answer Question B in Part I, you should answer Question II.A. If you chose to answer Question A in Part I, you can answer either Question II.A. or IIB. 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

[14] [19 Hen. 7, c. 17. CD]

[15] [Note by William Muchall, writing probably in 1787:] It was evidently the intention of the legislature when they made the statute 27 H. 8, c. 10 [the statute of Uses], to abolish uses by transferring the possession to the use; but the strict construction of that statute defeated the intent of it, and gave rise to trusts of land too tedious to be here enumerated, exactly of the same nature as uses were at Common law. ...

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 choose 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'.[1612] 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 Tasswell-Langmead's description of the events of 1399 cannot be accepted.

[16] 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.

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