USES AND THE STATUTE OF USES

1. What is a use? Title to the property is held by someone other than the person who gets the benefits from the property.
   a. The modern trust (or the Roman *fideicommissum* or the Islamic *waqf*) are examples.
   b. The medieval feoffment to uses, feoffor, feoffees, *cestui que use*

      O—>A, B, and C and to the survivor of them, to the use of O

      This is a feoffment to uses. The conveyance would be made by the ancient form of conveyance of a freehold, by feoffment with livery of seisin.

      O is the feoffor

      A, B, and C, are the feoffees. They hold by joint tenancy with right of survivorship, which means that when one of them dies the others inherit and the heirs of the first to die do not inherit.

      The person who has the use (O in this case) is called the *cestui que use*.
   c. Who are the feoffees? People whom O trusts
   d. Most medieval uses were passive: the feoffees didn't manage the property
2. The origins of the medieval use
   a. Lords holding *ad opus* their tenants, surrender and regrant, remained common with copyhold which was not subject to Quia emptores
   b. Use of a "straw" where one wanted to make a conveyance to one's self. One can't make a livery of seisin to one's self if one already has the seisin. I might want to convey my land to hold by myself and my wife, or I might want to convey my land to hold in fee tail rather than fee simple.
   c. The Franciscans
   d. Avoidance of statute of Mortmain (1279), statute of 1391
   e. Conditional grants, e.g., a grant to feoffees to hold until the religious house got a mortmain license. Rule that the conditions had to be fulfilled within the lifetime of the feoffor, perhaps the beginnings of a Rule Against Perpetuities.
   f. Guardians in socage. Statute of Westminster I (1275). Here the guardians are more like modern trustees.
   g. Testamentary dispositions. A grant to feoffees to hold to the use of the feoffor's will.
   h. The arrangement becomes permanent
3. Uses and the law
   a. Common law, after some hesitancy, does not recognize interest of the *cestui*. In 1464 the feoffees were allowed to sue the *cestui* in waste for cutting trees on the land.
   b. Chancery does recognize it. By 1425 2/3 of the work of the Chancellor's court involved uses. Complicated cases: Between 1450 and 1483 it was established in Chancery that the heir of the feoffee was bound by the use. Sometime before 1463 it was established that conveyees of the feoffees were bound by the use unless they had paid value for the land and

had no notice of the use (the concept of the bona fide purchaser without notice of the equity [our b.f.p.]).

> (For the date between 1450 and 1483, see Hussey, CJKB, in Y.B. 1482: "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.")

c. The notion of the resulting use: By the late 15th century (possibly as early as 1465) uses had become so common that it came to be held that if a conveyance was made and no consideration passed for the conveyance, chancery would assume that the purpose of the conveyance was for the feoffees to hold to use of the feoffor. Perhaps even more remarkably it came to held that if consideration was paid for land and the conveyance was not made, the person who received the consideration would be deemed to hold the land to the use of the person who paid the consideration.

d. Statute of 1 Richard 3, c.1 (1484) allows the *cestui que use* to make a feoffment of the land even without the concurrence of the feoffees.

4. In 1500 Serjeant Frowyk estimated that half the land in England was held to uses, and a generation later St. German confirms that the practice was widespread (*Mats.* p. IX–35): "And sometimes such uses be made that he to whose use, etc., may declare his will thereon: and sometime for surity 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." The rigidities of the common-law of inheritance. The principal rigidity the people wanted to avoid seems to have been the failure of the common law to make provision for younger sons and daughters. The principal devices for avoiding these rigidities were the common recovery (which we'll talk about in a later lecture) and the use. By last quarter of the 15th century, if not before, no entail could be maintained if the present holder didn't want it to be maintained. That's the common recovery. The use proved to be the method whereby new settlements could be made without at the same time depriving the landowner of the benefits of the land during his lifetime.

5. The uses of uses. Consider the will of Lord Dacre of the South (*Mats.* p. IX–91)

   a. Almost all of the lord's land was held by feoffees to uses. They were to hold the chief manor, Herstmonceaux in Sussex, for a year to raise money for the staff, and then hold it for Thomas, the lord's heir, his grandson, his eldest son, William, having predeceased him, until Thomas was 24 and convey it to him in fee tail male, with remainder in fee tail male to his second son, with remainders over.

   b. They were to convey other manors and lands to his younger sons directly in fee tail male, with remainders over.

c. The lord's wife was to get a substantial amount (over £100), apparently annually from the income of all his lands, as part of his marriage settlement with her, and also a manor, the value of which is not given.

d. The feoffees were to use the income from about a third of the lord's remaining lands "for the performance of my will." This was almost certainly to pay his debts and funeral expenses, and probably to pay various legacies to people or institutions. The income from the rest of his lands was to be used to raise a marriage portion of 500 marks (£333) for the lord's niece. After this was done, they were to make all these lands over to his heir in tail male after he had reached the age of 24.

e. The annual value of all of the lord's holdings was estimated at over £1000. Taking out the lands that were eventually to end up in the hands other people, the annual value of the land that his heir would receive was slightly over £700. Thomas, the heir, was 18 at the time; had the lord's will been executed, he would not have gotten access to this money until he was 24.

6. Disadvantages of the use from the point of view of public policy

a. Secret conveyance. No one knew who really owned what.

b. Evasion of feudal incidents. There are references to evasion of feudal incidents in the Statute of Marlborough at the end of Henry III's reign and a number of Inquisitions Post Mortem of the 14th century apply the notion of "fraud on the king's rights." This would not normally be held in a case like Lord Dacre's.

7. Fiscal feudalism

a. Statutes in the reign of Henry VII (1489, 1504) – the heir of the intestate *cestui* (but not the devisee) subject to the incidents

b. Proposed statute of 1529. Henry VIII, desperately in need of cash to finance his French wars, cut a deal with the peers. One-third of the land held to use would be subject to the feudal incidents. The Commons rejected the deal in 1532.

c. Arguments against the use and *Lord Dacre's Case* (1535). The CP, relying on the 1484 statute, was suggesting that uses were subject to the common law. Some argued that uses are dishonest. This argument is found in *Doctor and Student*, with the obvious corollary that they are not to be enforced in equity. All of these arguments and more were well summarized by Thomas Audley in a reading that he gave (on a stat. of 1489) at the Inner Temple in 1526. Audley became Chancellor on the resignation of Thomas More in 1533. In 1534 he appointed Thomas Cromwell as master of the rolls. In 1535 Audley heard Lord Dacre's Case in Chancery in the presence of all the judges of England and Cromwell. The vote was originally 5 to 5, but Port J. mumbled and was counted on the wrong side. The resulting minority were later persuaded to give way to the majority by promise of the "king's good thanks." The case held that it was against the nature of land to be devisable by will, and that a will of the use of land was just as invalid as the will of the land itself.

d. Statute of Uses (1536): Under it, legal title in a feoffment to uses passed automatically to the *cestui que use*. Much more important for parliament at the time, all previous feoffments to uses and the conveyances made pursuant to them were validated.

e. Statute of Enrollments (1536): Designed to eliminate the problem of secret conveyances by requiring that the bargain and sale of freeholds be recorded.

f. Statute of Wills (1540): Authorized, for the first time, the devise of much of English land, a devise that would be valid in law. One-third of the land devised by a tenant in chief would be subject to the feudal incidents. The same parliament also established a separate court of wards, so great was the anticipated wardships from the new statute.

g. The king's success was short-lived. By the end of the 16th century ways had been found once more to avoid the feudal incidents. The abolition of military tenures in 1660 marks the formal end of the feudal incidents, but they had long since ceased to be of real practical consequence. The Statute of Enrollments was even shorter lived, as methods were found to avoid its reach by using a form of conveyance different from bargains and sales of freeholds. Except for copyhold, public records of land-titles are the product of the 20th century in England.

8. What happened next?

a. The statute of uses put an end to estate-planning flexibility like that employed by lord Dacre. The statute of wills in 1540 restored the power to devise but it was still not clear just how much could be accomplished under the statutes. The story is very complicated. I can only mention a few of the developments here.

b. The first step logically, if not chronologically, was with regard to the active use. A simple example is the trustees to raise portions in Lord Dacre's will. If I enfeoff someone to raise portions or instruct the executors in my will to hold land to raise portions, the use will not be executed under the statute until the portions have raised, and in the meantime Chancery will supervise the feoffees, now called trustees, or the executors.

c. Not only can this be used to raise portions, but it can also be used for marriage settlements. If I want my daughter to have an independent income of her not subject to her husband, I can give property to trustees and tell them to manage it and pay the income to my married daughter. This is woman's separate equitable estate, and it was quite common in the early modern period..

d. The rise of the charitable use. Remember the Franciscans and the statute of mortmain. Note the Elizabethan statute of charitable uses (1602) confirming practices that had developed over the past 67 years.

9. After the passage of the Statute of Uses the courts began to ask what kinds of future interests could have been created in equity prior to the statute. The discussion was quite academic, because entailed uses are the only types of future interests in uses that are discussed prior to the S/Uses, and this so far as we can tell was itself only academic. All the real *cestuis* prior to the statute, again, so far as we can tell, had what at law would have been regarded as a full fee simple absolute.

a. The first and most obvious problem was what to do with the simple creation of a life estate and a remainder by way of a use: "O—>to A to use of B for life remainder to C." The problem was that the seisin was in B by the statute; nothing in the statute spoke of B's seisin supporting a remainder. James Dyer, CJCP, who died in 1582, said that the remainder was supported by the "spark of right," *scintilla iuris*, that remained in the feoffee after the statute executed the use. The same idea was applied to executory devises created by wills by brute force, because nothing in the statute of wills speaks of execution of uses.

b. In 1595, the old Exchequer Chamber decided *Chudleigh's Case*, a case that says that contingent future interests can be destroyed by the present holder of the life estate conveying to the holder of a vested interest that followed the contingent interest. The rule applied both to contingent remainders and to executory interests, a new form of future interest that had been concocted on the basis of the Statute of Uses.

   [We may not have time for this is class, but it's quite interesting:] The settlement involved in *Chudleigh's Case* was bizarre. In 1557, a year before his death, Sir Richard Chudleigh conveyed his land to various feoffees to the use of himself and his heirs begotten on the body of a married woman who was not his wife, with remainder over to another married woman who is not his wife, with remainders over to four other married women who were not his wives. This arrangement should not be taken as indicating the old man's marital plans, but rather it was a device designed to ensure that Sir Richard would have a fee tail that he could convert into a fee simple by common recovery if the circumstances changed, but would not become a fee tail after possibility of issue extinct, which might have upset the rest of the plan. In default of issue so named, the feoffees where to hold the property to the use of Sir Richard's will for ten years, and then to hold it during the life of Christopher, his first son, and after Christopher's death to make the property over to Christopher's eldest son in fee tail male. Sir Richard died in 1558, and in 1559 the feoffees conveyed the land to Christopher, who had notice of the 1557 deed. Christopher had a son in 1561. Christopher conveyed the land for value in 1564, which interest by mesne conveyances came into the hands of one John Freine. By various mesne conveyances, the interest of Christopher's eldest son came into the hands of one William Dillon, who entered. Freine entered on Dillon, and Dillon sued him in trespass. While it is not entirely clear what the purpose of the original settlement was, it seems that Christopher in 1557 had been accused of murder and had fled to France. If he had been convicted of murder, the land would have been forfeited. The original settlement was apparently designed to ensure that the land bypassed Christopher. The fact that the feoffees then conveyed the land to Christopher may have been the result of the fact that the charge of murder was dropped by 1559.

   The case came to a hearing in 1595 in the old Exchequer Chamber before all the justices of England. It held that the contingent future interest of the unborn eldest son of Christopher was destroyed by the conveyance that the feoffees who had a life estate for the life of Christopher made to Christopher. The rule announced, that contingent future interest were destructible, was said to apply both to contingent remainders and to executory interests, a new form of future interest that had been concocted on the basis of the Statute of Uses.

c. But the King's Bench reversed course in *Pells v. Brown* in 1620. That case holds a contingent executory interest was not destroyed when the present holder of the fee subject to a contingent executory interest suffered a common recovery.

   [We may not have time for this is class, but it's quite interesting:] The facts in *Pells v. Brown* are simpler than those in *Chudleigh's Case*. William Browne the defendant's father, had two sons, William and Thomas. In 1587, he devised the land in question to Thomas in fee simple, subject to the condition, which created an executory interest, that if Thomas should die without issue while William was living, the land would go to William in fee simple. Thomas did have issue, but the issue predeceased him. In 1609, Thomas suffered a common recovery, and, if the recovery were valid, became thereby seised of the land in fee simple absolute. He devised the land to one Edward Pells and Pells's wife and died 1619.

William, Thomas's brother, took Pells's animals which were on the land as damage feasant. Pells sued William in replevin, raising the issue of validity of Pells's interest for King's Bench.

d. The fact that executory interests were indestructible ultimately led to the modern rule against perpetuities, in the second half of the 17th century. We'll talk about that in a future lecture. The fact that contingent remainders were destructible lead to the creation of the strict settlement. We'll also talk about strict settlement in a future lecture. From the point of view of history, the strict settlement is more important than the modern rule against perpetuities.