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DEVELOPMENT OF USES AND TRUSTS*: CONTRACT OR PROPERTY, AND EUROPEAN INFLUENCES AND IMAGES*

SOMMARIO: 1. *Ad opus* and precursors. – 2. Late medieval uses/ *trusts*. – 3. *Caesurae*, and early *trusts* to 1659. – 4. Enlightenment *trusts*, 1659-c. 1760. – 5. Further propertisation late 1700s-late 1800s. – 6. Conclusion.

How far was the development of the English *trust* influenced by continental ideas, particularly the civilian *fiducia,* and how far 'indigenous'? To summarise extremely briefly: (1) the expression *ad opus*, turned into Law French as *al oeps* or *al huys*, hence English 'to the use', is not in fact English in origin, but came from early Latin Christian writers *via* Carolingian practice; it was applied in the 1200s-1300s to three '*trust*-like' practices which were not yet *trusts*, one of which – liability to account – had clear Roman antecedents. (2) There is a reasonable ground to suppose that there was influence of *fiducia* and *confidentia* on the expressions used, and perhaps on Chancery practice, in the period from the mid-1400s to 1515 when Chancery was essentially run by civilians and canonists. However, the evidence is extremely slender. (3) The continuity of Chancery doctrine was broken by developments between 1515 and 1594. Subsequent use of Roman analogies for the *trust* – usufruct, *fideicommissum,* and *depositum* – and the eventual development of a claim that the "*trust was derived from fideicommissum*" – are either strategic counters in argument about whether the *trust* was property or obligations, or rhetorical ornaments.

This is a bald summary of around 600 years of history (1200s-1800s). The present paper is hence inevitably mainly based on the existing secondary literature. It also inevitably leaves out a lot of questions about how *trusts* were practically used, which bear on the conceptualisation issues on which I focus. Nonetheless, there is some use to be had out of looking at the issue in the longue duree on the basis mainly of the literature: some patterns become more visible on this basis.

There are a number of distinct periods involved in the history: (1) the expression 'ad opus' and precursors of the *trust* (before the mid 1300s);

(2) late medieval uses/*trusts*, between the mid 1300s and 1536; (3) after a gap or *caesura* between 1515 and 1594 in Chancery, and between 1536 and more roughly the same date in relation to *trusts*, arguments and developments between approximately 1594 and 1659; (4) developments between approximately 1659 and, even more roughly, 1760 (or perhaps later); and (5) developments between, roughly, the 1790s and c. 1900.

1. *Ad opus* and precursors.

The expression 'ad opus Johannis' 'for the benefit of John' or 'on account of John', in law French 'al oeps Jean' or 'al huys Jean' (from the latter form came English 'to the use of John') was used in connection with forms which were precursors of the *trust* and gave a name to the late medieval use/*trust*. Francis Bacon argued in 1600 that this was 'barbarous' Latin and therefore must date to the reign of Richard II (1377-99),[1] but FW Maitland showed in 1898 that transfers expressed to be *ad opus* a person other than the transferee go back well before this date.[2] The expression *ad opus N*, meaning 'for the benefit of N', or perhaps more exactly 'To N's account', in conveyances and related documents, goes back, in fact, to Carolingian Francia, perhaps initially in governmental or institutional contexts where it was necessary to distinguish personal from institutional receipts or transfers. The usage had already been 'received' in this sense in Anglo-Saxon England in the 800s.[3] Behind it in turn is less precise late antique Christian usage.[4] 'Opus' meaning 'benefit' was in use in classical Latin (in Cicero

[1] F. Bacon, *The Learned Reading of Sir Francis Bacon ... upon the Statute of Uses,* London, 1642 (reprint, Forgotten Books, 2012), p. 18-19; for the original date, J. Baker, *Readers and Readings in the Inns of Court and Chancery*, London, in *Selden Soc.*, 2000, p. 49.

[2] F. Pollock, F.W. Maitland, *History of English Law*, 2nd ed., reissued, Cambridge, CUP, 1968 (cited hereafter as P&M *HEL*), p. 233-239. Cf. also Holmes (1885), 1 LQR 162 at 163-64 n. 4; Note (1887), 3 LQR 115-116.

[3] P&M *HEL*, p. 233-34; C. du Fresne Cange (sieur) et al., *Glossarium mediae et infimae latinitatis*, ed. augm., Niort, L. Favre, 1883-1887, *s.v. opus (4)* and *(5)* at http://ducange.enc.sorbonne.fr/opus; J.F. Niermeyer, C. van Kieft, *Mediae Latinitatis Lexicon Minus,* Leiden, Brill, 1976, *s.v. opus (2).*

[4] There is substantial use in sources in Migne's *Patrologia Latina*: 791 hits from

and Horace), though not common, and there is one instance of 'ad opus' in this sense in the *Digest,* Macer quoting an earlier text called the *Disciplina Augusta*.[5]

The phrase was used in connection with three forms which might be considered as precursors of the late medieval use/*trust*. Perhaps closest to the Carolingian usage was transfer from A to B contemplating immediate retransfer by B to C, or to A on different terms to A's prior holding. An extremely common form was surrender to a feudal superior for regrant to a transferee: common form at the lowest level, in manorial courts, from the beginning of the surviving manorial records in the 1200s until the abolition of 'copyhold tenure' in 1922.[6] As Biancalana pointed out in 1998, this is not yet a *trust*: because immediate transfer over, rather than continued holding on behalf of a beneficiary, is contemplated.[7] Nonetheless, for the brief moment between surrender and regrant, the lord does momentarily 'hold for the benefit of' the intended grantee.

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simple search for *ad opus* at http://pld.chadwyck.com/, and while many are later, there are several early hits which require this sort of sense. For just a few examples, St. Cyprian of Carthage, *Ep.* 60, *PL* 4, 361A, "*ad opus Dei*"; Venantius Fortunatus, *Vita S. Hilarii,* 2.9, *PL* 9, 197C, "*dum aquam ad opus suum deportaret die Dominico*"; St. Ambrose, *De Paradiso*, c. 13, *PL* 14, 307A, " *non facile*, ... *videtur ad opus aliquod esse sumendum*".

[5] C.T. Lewis, C. Short, *A Latin Dictionary*, Clarendon, 1962, have *s.v. opus III. A. 2,* this sense, citing Cicero, *Lael.* 14.51, *Off.* 3. 11. 49, 3.32, 115 and Horace, *Serm*. 1.9.27, 2.6.116. Macer. D. 49.16.12.1, military commanders sending soldiers *ad opus privatum*, 'on private business'. "Disciplina Augusta" appears to be a Hadrianic slogan (S.P. Mattern, *Rome and the Enemy*, Berkeley, CA, U Cal Press, 1999, p. 206), but it is possible that the text cited by Macer is actually from Augustus (C.R. Whitaker, *Rome and its Frontiers,* London, Routledge, 2004, p. 91-92), in which case the usage would be contemporaneous with those of Horace. There are 12 other instances of the phrase "ad opus" in the *Digest*, of which eight clearly refer to building work, two to forced labour as a penalty, one to agricultural work (*opus rusticum*), and one to an unidentified task imposed by or on a testator. There is one instance in the Code, referring to agricultural work (here *opus rureste*).

[6] L.R. Poos, L. Bonfield (a cura di), *Selden Society* 114 (hereafter SS), p. 78-79; early examples e.g G.C. Homans, *English Villagers of the Thirteenth Century*, New York, 1975, p. 144, 145, 204; abolition, Law of Property Act 1922 s 128 & Schedules 12 & 13.

[7] In R. Helmholz, R. Zimmermann (a cura di), *Itinera Fiduciae* (hereafter *IF*), Berlin, Ducker & Humblot, 1998, p. 111-152, 121-22.

The second 'precursor form' was arrangements in which property was controlled by A to manage it on behalf of B, but B had the *seisin* or possession,[8] and A's control was what a Romanist would call 'detention'. Joseph Biancalana studied this form in a 2001 article.[9] It is again not yet a *trust*: this time because the beneficiary has legal possession.

The third 'precursor form' is liability to account. Liability to account (*rationem* or *rationes reddere*) was present in classical Roman private law: notably in the cases of guardianship, mandate, partnership and *negotiorum gestio*.[10] The early English legal development has been most recently studied by Paul Brand.[11] The normal remedy may at first have been in local courts.The *common law* action of account initially enforced the liability of a bailiff (employed estate manager) to account to the employer-landowner. By statutes of 1259 and 1267 the liability was stated to apply to guardians in socage. Around 1277, a new writ form was created to enforce the liability to account of what would in modern times be called commercial agents.[12] This version was occasionally justified as being by *lex mercatorum*.[13] Here, though the writ form simply asserted that the defendant had been receiver

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[8] G.E. Woodbine's notes to his edition of *Glanvill*, Yale University Press, 1932, p. 262, 281-282, show that *seisin* could be functionally equivalent to *possessio,* contrary to the arguments of F. Joüon des Longrais, *La Conception Anglaise de la Saisine*, Paris, Jouve & Co, 1924. SFC Milsom's arguments in *Legal Framework of English Feudalism*, Cambridge, CUP, 1976, address an earlier period. However, T.F.T. Plucknett, *The Medieval Bailiff*, London, Athlone Press, 1954, p. 16-22, argued that the idea that the holder in another's name was not seised developed over the 1200s.

[9] 22 *JLH* issue 2, 14-44.

[10] Guardianship: J.A.C. Thomas, *Textbook of Roman Law*, p. 453-463; mandate: D. 17.1.56.2 (Papinian); partnership: R. Zimmerman, *The Law of Obligations*, p. 460-61; *negotiorum gestio*, J. Inst. 3.27.5.1, D.3.5.2 (Gaius).

[11] P. Brand, *Kings, Barons and Justices*, Cambridge, CUP, 2003, p. 65-69, 312-33, and Ch. 13, from which what follows unless otherwise cited.

[12] For the development of agency *terminology* at *common law* from the 1600s see M. McGaw, *A History of the Common law of Agency with particular reference to the concept of irrevocable authority coupled with an interest,* D.Phil thesis, Oxford University 2005, Ch 5.

[13] P. Brand (above n. 11), p. 322-23; he makes the point that such defendants had previously been charged as 'bailiffs'. For the *lex mercatorum* justification see *Novae Narrationes* 80 SS 17, 108; *Registrum Omnium Brevium* (*ROB*), London, 1634, p. 135r.

of the claimant's money,[14] by the early 1300s it was possible in the count, the claimant's first pleading, to assert that the defendant in this form of account was to deal with the money for the benefit of the claimant: for the *proficuum*, profit, or *commodum,* benefit, of the claimant, or "al oeps", or "al huys" of the claimant.[15] In *Le Taillour v Atte Medwe* (1320), where "al oeps" is used in the French count and by one of the judges, what is involved is clearly what in later law would be called a *trust* for an infant of a money legacy due to him, paid by the executors to a *trustee*.

2. Late medieval uses/ *trusts*.

Around 1350 landowners started to turn grant-regrant transactions into transfers to groups of transferees to hold *ad opus* for themselves, and then to give effect to their last will (and various other variants; but this one was the 'stereotype' case). The period has been most systematically studied by Biancalana.[16] The primary motivation he finds for the change is increased control of the devolution of property on death – particularly overcoming the *common law* rule against wills of freehold land – and flexibility in relation to the payment of debts; this is parallel to motivations for similar devices found elsewhere in Europe by the other contributors to *Itinera Fiduciae*.

The most fundamental point for present purposes to emerge from Biancalana's study (and Richard Helmholz's work on the church courts in the same period and later) is that the device was not 'binding only in honour' as of this period, unlike an early Roman *fideicommissum*: it was fairly straightforwardly enforceable as an obligation. The problems were in relation to uses/*trusts* of freehold land, where (a) specific enforcement of covenants to convey had ceased to be available at *common law*, and (b) the *common law*'s procedural rules, lacking any mechanism for compulsion to answer on oath or to produce documents in court, had difficulty in coping with complex conveyancing.

The solution was that in the 1400s uses became first in practice, later in theory, the business of the summary jurisdiction in the Chancery. This jurisdiction probably originated as appeal to the 'absolute' sovereign power of the king against the *potestas ordinata* of regular law: a form of administrative

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[14] *Early Registers of Writs* 87 SS, 208-09, 211-12; *ROB*, p. 135-36.

[15] *Novae Narrationes* 293 = *Le Taillour v Atte Medwe,* 1320, 104 SS 39; Id., p. 293-94, *Pye v Fox* (undated).

[16] In *IF* (above n. 7). What follows from this unless otherwise referenced.

review of judicial action. There was at first no particular connection to the enforcement of uses, though there are a few early instances; the Chancery was mainly concerned with all sorts of miscarriages of justice at *common law*.[17] It used compulsion to confess as a means of proof and coercive imprisonment as a general form of execution.[18]

Beginning in the 1420s, and developing more rapidly from the 1450s, four developments occurred in parallel in relation to this jurisdiction. The judicial staffing of the court shifted from career civil servants (and among the actual Chancellors senior aristocrat politicians), to qualified canonist and civilian lawyers.[19] The (common lawyer) reporters of cases began

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[17] For the indeterminate subject-matter, see M.E. Avery, in *BIHR* 42, 1969, p. 129-144, 129-134; Id., in *LQR* 86, 1970, p. 64-97; J.B. Post, *Equitable Resorts before 1450*, in EW. Ives, A.H. Manchester (a cura di), *Law, Litigants and the Legal Profession*, London, 1983; T.S. Haskitt, *The Medieval English Court of Chancery*, in *Law & Hist. Rev.* 14, 1996, p. 245; and for the administrative character, N. Pronay, *The Chancellor, the Chancery, and the Council at the end of the Fifteenth Century*, in H. Hearder, H.R. Loyn (a cura di), *British Government and Administration*, London, 1974, p. 87-103, 88-90.

[18] Compulsion to confess: M. Macnair, *The Law of Proof in Early Modern Equity*, Berlin, Duncker & Humblot, 1999, ch. 2. Coercive imprisonment: *Reynolde v Knott* (1459) 51 SS 147 is an early example; from the later 1500s cases on the issue are to be found in the reports.

[19] N. Pronay (above n. 16), p. 91-92; M. Beilby, *The Profits of Expertise: the Rise of the Civil lawyers and Chancery Equity*, in M. Hicks (a cura di), *Profit, Piety and the Professions in Later Medieval England*, Gloucester, 1990, ch. 6, p. 82-83. The first Chancellor to have been a practising canonist (as opposed to a career diplomat holding a law degree or degrees from early in his career) was Edmund Stafford in 1396-99 and 1401-03; Richard II's motive in 1396 was fairly political (Stafford argued in parliament for *quod principi placuit habet vigorem lex*) but as Keeper of the Privy Seal in 1392-96 Stafford is thought to have initiated the Council committee for poor men's causes which later became the Court of Requests, a subsidiary court of 'equity' abolished in 1641. There is then a period of administrator and aristocrat-politician Chancellors down to 1426, followed by two canonists (John Kemp and John Stafford) between 1426 and 1454, followed by aristocrat-politicians to 1467, followed by canonists and civilians to 1515. Data from *Oxford Dictionary of National Biography,* (hereafter *ODNB*) *s. nn.*

In relation to the Masters of the Rolls the development is rendered obscure by the silence of *ODNB* and other biographical sources as to the earlier careers of these officials between 1415 and 1471, though Pronay infers from limited information

to regard cases in the English side of Chancery as reportable. The jurisdiction began to have a name, found in these reports: the jurisdiction in 'conscience'.[20] And an increasing share of the jurisdiction's business came to be dealing with uses of land.[21]

Since the judicial staff were qualified civilians and canonists (though the bar were common lawyers) it is frustrating that we can only see what they thought in occasional 'flashes of light' (infrequently reported cases) in a general darkness. It seems not unlikely that there is a connection with another development in the 1400s. This is the supplementation or replacement of the words *oeps/*use with the words 'confidence' and '*trust*' in descriptions of the relation.[22] 'Confidence' seems, as Michele Graziadei has suggested, to echo the *confidentia beneficialis* discussed (with disapproval) by the canonists.[23] '*Trust*' is a Middle English word thought to have an old Norse etymology. It was used by the 1382 Wycliffe Bible to translate *fiducia* in Vulgate Proverbs 3.5 and Isiah 31.1, and the *Promptorium Parvulorum*, an English-Latin dictionary from c. 1440, gives: "*Troste: confidencia, fiducia*"; the slightly later *Catholicon Anglicum* (1483) gives: "Triste: *fiducia ex bona consciencia est, confidencia temeritatis est, & cetera*".[24] As Graziadei pointed out, the clas-

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in relation to John Kirkby (MR 1447-61) that they climbed a career ladder within the Chancery rather than having university education. From 1471 to 1534 they were exclusively civilians or canonists.

On the Masters, Pronay makes clear that they were career clerks in the 1450s, civilians in the 1470s (and thereafter down to the late 1500s: B.P. Levack, *Civil lawyers*, p. 62-63; E. Heward, *The Masters in Ordinary*, Chichester, Barry Rose, 1990, p. 5 and *passim* in the lists of Masters.

[20] J. Baker, *Oxford History of the Laws of England* (hereafter *OHLE*), Vol. 6, Oxford, OUP, 2003, p. 174 n. 25 and text there; on the shift from 'conscience' to 'equity' to describe the jurisdiction, *id.* 39-48; an interpretation, M. Macnair, in *OJLS* 27, 2007, p. 659-681.

[21] M.E. Avery (above n. 16) at (uses); N. Pronay (above n. 16), p. 94-96 argues for commercial matters, but it is not clear that he has sufficiently distinguished between *English* or 'conscience' business and *Latin* or '*common law*' business (e.g. by *audita querela*) arising from enrolment of contracts in Chancery. Cf. J. Baker, *OHLE* 6, p. 187-189.

[22] J. Baker, *OHLE* 6, p. 654 n. 10 and text there.

[23] In *IF*, p. 346-349.

[24] *OED*, *s.v. trust (noun)*; the etymology at id. s.v *trust* (adj); S.J.H. Herrtage (a cura di), *Catholicon Anglicanum*, London, EETS, 1881, p. 393. The Ordinary Gloss to the Bible texts cited, as it appears in Migne, *PL* 113 *ad loci,* adds nothing.

sical Roman *fiducia cum amico* was referred to in a rhetoric textbook widely used in the middle ages, Boëthius' commentary on Cicero's *Topica*. Though the idea was amalgamated with testamentary fideicommissary substitutions by the Glossators, and the classical concept was not retrieved until humanist writers in the 1500s, the idea of an ownership subject to a fiduciary obligation to transmit and to account for fruits remained attached to *fiducia* and *fiduciarius* in late medieval civilian discourse.[25]

The period also saw a process of 'propertisation' of the use/*trust*: both in the sense that the beneficiary's interest became descendible on intestacy, assignable, and finally (by statute) subject to the beneficiary's creditors; and in the sense that the *trustee*'s heirs, and transferees from the *trustee* if they had notice of the *trust*, came to be bound by it. It is not clear, however, that the *trust* assets were free from the claims of the *trustee*'s creditors. The decisive step was taken in an Act of 1484 which provided that the beneficiary could effectively convey the legal title.

The Act of 1484 led to some new theorisation of the use by common lawyers. In particular, Sir John Baker has shown that this involved the use of a new word, or more exactly the revival of an old one: the English, originally Anglo-Saxon, word owner,[26] not previously used by lawyers for the holder of a real right to land,[27] now appears intrusively in Law French discussions of the beneficiary's interest.[28]

Conversely to the English-Latin dictionaries, Sir Thomas Elyot's Latin-English dictionary, *Bibliotheca Eliotae, Eliotis Librarie,* London, 1542, *s.vv.* has "*Confidentia*, *trust*, hope, certayn assurance, also madde hardynce" and "*Fiducia*, *truste*, confidence; sometyme hope. It is properly that *truste*, wherin any thynge is delyuered by one man to an other, to thyntente that he shall redelyuer it, whan he is required"; "*Fiduciaria mancipatio, aut uenditio,* a state in landes made upon confidence of *truste*; a mortgage" and "*fiduciaria possessio,* possession to another mannes use, or upon condition." It should be noted that Elyot also has "*Fideicommissarius,* a feoffee of *trust*" and *"Fideicommissum,* a feoffment of *truste*"; so that this analogy is already available.

[25] M. Graziadei, in *IF*, p. 332 n. 15, p. 343-346.

[26] *Oxford English Dictionary* (hereafter *OED*) s.v. "own", "owner".

[27] Though it had been for used in a quasi-legal context for the owner of moveables: e.g. *Rot. Parl.* iv. 345b (= *Statutes of the Realm* ii 258) (1429), a petition / local Act dealing with robbers on the Severn. Cited in *OED* (above).

[28] *OHLE* 6, p. 658. The citations id. n. 44 are to Wode *arg* YB P 4 Hen 7 fo. 8v pl. 9 ("le Statut donne pouvoir a cesti qe fuit *owner* a granter un rent, &c.",

What is it doing? The beneficiary does not have a fee or an estate. But he nonetheless under the 1484 Act has the power of freely disposing of the land. In that sense he has *dominium* within Bartolus's definition of that right, the "*ius, de re corporali, perfecte disponendi, nisi lege prohibeatur*": 'the right, in relation to a corporeal thing, of completely disposing of it, unless this is prohibited by law'.[29] But to call him *dominus* would be in English legal Latin to say that he was feudal superior;[30] to say in insular French that he had domain (not much in use) would be to say that he had sovereignty (as of a king or emperor);[31] to say that he had *demesne* would be to say merely that the object of his right was one of which "manual occupation, possession or receipt" was possible, i.e. that it was neither subinfeudated, nor an incorporeal right like an advowson.[32] To call the beneficiary 'owner' – in English – thus captures the effect of the 1484 Act without muddling up the Latin or French terminology of the land law.

3. *Caesurae*, and early *trusts* to 1659.

At this point there are two *caesurae,* in relation to the Chancery and in relation to uses/*trusts*. In the Chancery, the succession of qualified civilians

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and to Gregory Adgore's Reading on the 1484 Act (also c. 1489). A statute of 1491 giving special privileges to persons engaged in military service overseas refers to the contingency that "eny suche ownor to whos use the seid feoffement shalbe made ..." dies in service, and to "all suche feoffee or other suche persons as the same feoffoure or ownor shall depute and assigne ...": Stat. 7 Hen 7 c. 2 s. 5, *SR* ii 550. Thomas Audley's *Reading* on the 1590 Act, J. Baker, S.F.C. Milsom (hereafter B&M), *Sources of English Law: Private Law to 1750,* 2nd ed., Oxford, OUP, 2010, p. 118, defines a use as "a property or ownership of land or something else, real or personal, depending solely on confidence and *trust* between those who are in actual possession and are accounted owners by the *common law* ... and those who have a use *in the same thing whereon the use depends* ..." Sir John Baker has confirmed to me (private communication) that in the French text translated here the word "ownership" is intrusive English; I should say that he does not agree with the explanation of the use of the word in this context offered below .

[29] *Commentaries*, ad D. 41. 2. 17 (18), widely cited.

[30] E.g. Statute of Mortmain 1279; Statute *Quia Emptores* 1290; *ROB* fo. 3r, *regula **.

[31] *Anglo-Norman Dictionary* at http://www.anglo-norman.net/, s.v. domain.

[32] T. Littleton, *Tenures* § 10, in T.E. Tomlins (a cura di), *Lyttleton, his Treatise of Tenures*, New York, Russell & Russell, 1841, reissued 1970, p. 14-15.

and canonists was broken by the appoinment of Cardinal Wolsey (Chancellor 1515-1529). Wolsey seems to have converted the court into a form of what would now be called 'alternative dispute resolution'.[33] After Wolsey's fall in 1529, the next two Chancellors were common lawyers (though the 1540s and 50s saw civil servants and politicians appointed) and from the 1560s common lawyers were 'normal'.[34] But the 'ADR' character of the

[33] On Wolsey's Chancery, see F. Metzger, *Das Englische Kanzleigericht unter Kardinal Wolsey,* Ph.D. dissertation, Erlangen, 1977; Id., *The Last Phase of the Medieval Chancery*, in A. Harding (a cura di), *Law Making and Law Makers in British History*, London, RHS, 1980. On Star Chamber, J.A. Guy, *The Cardinal's Court*, Hassocks, Harvester, 1977. This is my interpretation of data collected by these authors; their analysis looks to continuity with the early 1400s Chancery, missing discontinuity with the lawyer-run Chancery of 1467-1515. On the latter cf. J. Baker, *OHLE* 6, p. 44, 175-77.

[34] One would expect Audley (LC 1533-44), who had polemicised against Chancery, to be a '*common law* rigorist', but in *Re Lord Dacre of the South* he is high-handed in the interests of the revenue (J. Baker, *OHLE* 6, p. 669-672), and in *Docwra v the Prior of the Hospitallers* just high-handed (M. Macnair, *Arbitrary Chancellors and the problem of predictability*, in E. Koops, W.J. Zwalve (a cura di), *Law & Equity approaches in Roman Law and Common law*, Leiden, Martinus Nijhoff, 2014, ch. 4, p.85-86. Wriothesley (LC 1544-47) was a civil servant and courtier rather than a lawyer and so heavily involved in foreign policy that the judicial work was deputised to the Master of the Rolls and two Masters (ODNB). Paulet/Winchester (LK 1547), though qualified as a barrister in his youth, had been a financial administrator for most of his career, and seems to have been a stopgap. Richard Rich (LC 1547-52), though originally a common lawyer, had been a financial administrator for a long time before appointment. Thomas Goodrich (LC 1552-53) was a DCL and diplomat before becoming a bishop, but had been an active diocesan bishop for 17 years before appointment. Stephen Gardiner (LC 1552-55) was a civilian and canonist academic, then a diplomat, from 1532 a bishop and defender of ecclesiastical jurisdiction and a writer against protestantism (but still a diplomat). It is likely that he was primarily engaged in politics and foreign affairs during his brief tenure of the seals. Nicholas Heath (LC 1555-58) was a churchman, initially a Reformer who went back over to Catholicism later in the reign of Henry VIII. Nicholas Bacon (LK 1558-79) was a lawyer working for the revenue from 1538 until his appointment as Chancellor, who managed to survive under Mary in spite of personal identification with the Reform camp; he defended a broad 'prerogative' view of the Chancery jurisdiction (Robert Tittler, *Nicholas Bacon* (London 1976) 73-74). Thomas Bromley (LC 1579-87), a former *common law* judge, reportedly deferred to the judges. Christopher Hatton (LC 1587-91) was

court seems to have persisted until the 1590s, when Thomas Egerton as Master of the Rolls (from 1594) and Lord Keeper (from 1596), combined laying down present rules for lawyers and reporters, with his collaborators, especially William Lambarde, digging up old precedents.[35]

In relation to *trusts*, the government of Henry VIII for revenue reasons forced through first a judicial decision in *Re Lord Dacre of the South* (1535) that there could be no will of a use of land, and then, by way of this, the Statute of Uses 1536, which 'executed' the standard use of freehold land, passing the legal estate to the beneficiary; finally, the Statute of Wills 1540 and its Act of Explanation (1542) allowed wills of land, while preserving the royal interest in the revenue as to one third of lands held in military tenure.[36] This legislation knocked out the sort of use/*trust* which had been 'propertised' in the late 1400s and the main motivation for creating such uses; though since the devolution on death of freehold land on the one hand, and moveables and leases on the other, remained separate, there was a motivation for creating testamentary *trusts*. But the Statutes left un-'executed' uses where the *trustees* had active duties, uses of leases (or of money or specific moveables) and, by a slightly later construction, 'uses upon uses' where a conveyance operated to A to the use of B to the use of C. The use/*trust* language now bifurcated: executed uses at *common law* being called uses, while unexecuted uses, still enforceable in Chancery, were now called '*trusts*'.

Neil Jones has studied the early development of the post-1536 *trust*.[37] When the nature of the '*trust*' came to be discussed in the 1590s, the dominant view seems to have been that it sounded in privity, i.e. was obligation-

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a courtier and parliamentary manager much concerned with foreign policy, said by his *ODNB* biography to have leaned on one of the Masters, Richard Swale, to handle the judicial business. John Puckering (LC 1592-96) was a common lawyer, but Neil Jones in *ODNB* says that "Almost all his chancery orders date from after Sir Thomas Egerton's appointment as master of the rolls in April 1594". Masters of the Rolls between 1534 and 1603 were common lawyers; though there was a period of appointing civilians to the Rolls between 1603 and 1641. Data from *ODNB, s. nn.,* unless otherwise cited.

[35] J.A. Guy, *The Public Career of Sir Thomas More*, Brighton, Harvester, 1980, and W.J. Jones, *The Elizabethan Court of Chancery*, Oxford, OUP, 1967; again, the inferences are my own from the data discussed by the authors.

[36] Systematic discussion in J. Baker, *OHLE* 6, p. 661-683.

[37] The broadest- ranging piece is his chapter in *IF*, p. 172-205.

al.[38] Coke at least strengthened the point by the assertion in his report of *Dillon v Freine, Chudleigh's Case* (1594) that the beneficiary had *ius neque in re neque ad rem,* a piece of canonist terminology which had only once been used in the Year Books as printed, so is likely to have been taken by Coke from some source in the learned laws.[39] Though the earlier cases on the point are discussions of the pre-1536 use in the context of executed uses, it is clear that the view that the beneficiary had a *chose in action,* i.e. the benefit of an obligation, was shared by Egerton LK, and applied by him in 1596 to produce the result that the wife's beneficial interest under a *trust* – like other choses in action – did not survive to her husband on her death but went to her administrators; in 1599 that it was no breach for *trustee* to re-convey to settlor at the expense of a donee beneficiary; and in 1600, on the advice of the judges, that the beneficial interest was, like other choses in action, not assignable.[40]

That said, there was a process of propertisation of the *trust*, which by Egerton's time extended to the existence of the doctrine that the *trustee*'s heirs, and transferees from the *trustee* with notice, were bound, and to the

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[38] One aspect of 'privity' usage can be set aside: the rule that persons who took 'in the *per*' from the *trustee* were bound, but not persons who took 'in the *post*' by escheat; W.J. Jones, *IF*, p. 196-97, M. Macnair, *op. cit*., p. 227-28. The liability to escheat was an inherent infirmity of the legal title given by the settlor to the *trustee* and the taker 'in the *post*' was therefore in by title paramount the *settlor*, and hence also paramount the beneficiary. The second case discussed by Jones, that of the disseisor, can be set on one side, since – as he reports 196 n. 148 – the beneficiary could proceed in equity to compel the *trustee*/s to take proceedings against the disseisor at law.

[39] Canonist: B. Tierney, *The Idea of Natural Rights*, p. 18-19, 58 (other index references are later). Only once used: Bracton has *ius in re,* used non-technically (2.127, 3.393, 4.42), not *ius ad rem*. Sjt Fortescue (later CJ and author of *De laudibus legum angliae*) uses the contrast in YB M 19 Hen 6, fo. 20r, pl. 41, at 20v, of a parson presented and inducted but not yet in possession, who, he says, may not have *jus in re* but has *jus ad rem* (confidence in the search is slightly undermined by the fact that though both expressions are present in Seipp's summary, only searching for "*jus ad rem*" brought the case up; so there *may* be other examples). The common form of the Coke quotation as "*neque in re neque in rem*" is not an error by Coke but a typographical error introduced at some point after the first edition of 1601, which has the correct form.

[40] W.J. Jones, *IF*, p. 193-196; the last point, in *Sir Moyle Finch's Case*, 1600, Coke, *4th Inst*. p. 85, is particularly noteworthy. .

beneficiary's interest descending on intestacy according to (some of) the *common law* rules, and, by the 1620s, being assignable. The process of increasing propertisation continued through the 1600s.[41]

The period around 1600 also saw the beginning of the use of Romanising images or analogies to explain the *trust* in *common law* literature. These are more 'proprietary' in character; but they appear also to be mainly ornamental rather than operative. Thus in *Brent's Case* (1575) Harpur J and Dyer CJ both identified the use with usufruct, albeit in different ways: Harpur thought that the *trustees* were usufructuaries, Dyer that the beneficiaries were usufructuaries.[42] The usufruct analogy had no operative effect in the decision reached.

Francis Bacon read (lectured) on the Statute of Uses in 1600.[43] Bacon famously rejected a usufruct analogy in favour of an analogy with *fideicommissum.* After negative arguments, his positive definition of a use is that *Usus est dominium fiduciarium Use is an owner's life [ownership] in trust*.[44] So that *Usus est status, sive possessio totius, differ. secundum rationem fori quam secundum naturam rei*, for that one of them is in Court of Law, the other in Court of Conscience ... (pp 7-8).

He goes on to make an analogy with the historical development of *fideicommissa,* first unenforceable, then enforced by the Emperor, then a Praetor fideicommissarius, then 'legalised' by the *scc. Trebellianum* and *Pegasianum* (pp. 15-16). This analogy is supplemented with another, with copyhold (formerly villein) tenures and their gradual transition to being enforceable at *common law* (pp 16-17).

It is necessary to be clear what Bacon is doing with this argument. He is not stating the dominant position, but arguing against it: the dominant position was that the beneficiary had a chose in action which was to a limited extent treated as a property right; Bacon is arguing, in contrast, that the beneficiary had a species of *dominium* which is governed by separate rules of the forum 'conscience'. Both the argument at 7-8, and the use of the his-

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41 D.E.C. Yale, *Introduction to* 79 SS, p. 87-99; W.J. Jones, *The trust beneficiary's interest before R. v. Holland,* in A. Lewis, P. Brand, P. Mitchell (a cura di), *Law in the City*, Dublin, Four Courts Press, 2007, p. 95-118.

42 B&M 157, p. 160, 161.

43 G. Bacon (n. 1). Quotations below from this text (though it is self-evidently defective).

44 "Owners' life" is pretty clearly a typo for "ownership".

tory of *fideicommissum*, are there to support the fundamental claim that the beneficiary has a species of *dominium*.

Bacon argues this line for two reasons. The first is simply to demonstrate legal skill by contrarianism. He was at the date of this reading in difficulty and attempting to retrieve royal favour.[45] Displaying the ability to argue an unexpected line would promote his career. The second is that the Reading is an intervention in the ongoing debate about conveyancers' use of the statutory magic of the Statute of Uses to create forms of settlement of land which would create practical inalienability, "perpetuities". This concern was a current major debate; and characterising the use as a species of *dominium* would arguably strengthen the argument against inalienability devices.[46]

If read in its contemporary context, therefore, though Bacon's 'civilian' argument is doing operative work in his general argument, but it is not a statement of a view common among the profession or doing operative work in the law. For this we have to wait for the later influence of Bacon's Reading – after time had blurred the memory of Bacon's acute personal-political opportunism and judicial corruption, notorious to his contemporaries, and the *trust* had evolved to become more proprietary in its operative consequences.[47]

A different use of the analogy with *fideicommissum* is found in the *Institutiones Iuris Anglicani* of John Cowell, Regius Professor of *Civil law* at Cambridge, published 1605. Cowell's book is a crude 'institutional' work which attempts to state English law using the books and titles of Justinian's *Institutes* as a Procrustean bed. What, then, was to be put under Inst. 2.23 *De fideicommissis hereditatibus*?[48] The answer was, for the first,

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[45] L. Jardine, A. Stewart, *Hostage to Fortune,* London, Phoenix, 1999, p. 233-239.

[46] Cases, B&M, p. 169-182. Discussion J. Baker, *Introduction to English Legal History*, 4th ed. (hereafter *IELH*), London, Butterworth, 2002, p. 284-289. An additional possible motive is arguing *against* Coke, towards whom Bacon displayed sharp antagonism at this period: L. Jardine, A. Stewart (n. 45), p. 245, 253-55.

[47] Later influence: below, text at n. 79-85. Notorious to contemporaries: L. Jardine, A. Stewart (n. 45), *passim*.

[48] Inst. 2.24 *De singulis rebus per fideicommissam relictis* could be applied in the ecclesiastical courts, and Cowell says so.

> Haereditates fideicommissariae nullo in usu sunt apud nos. Aliquid tamen illis simile repraesentant eae *fiducia*e, quas in dando terras nostris extraneis, ad usum tamen nostrum & haeredum nostrorum, vel etiam hominibus privatis ad commodum corporis politici, collocare solemus. ...
> *In the 1651 translation,* These Inheritances are out of use with us, yet those *Trusts* are something parallel with them, by which we are used to give our Lands to Strangers to the use of us and our Heirs, or to private persons to the use and profit of a Body politic. ...[49]

Here we find a relatively late example of *fiducia = trust*. The *fideicommissum* analogy is tentative ("Aliquid ... illis simile"), and is not a serious analysis but merely suggested by Cowell's method of crude copying of the titles of J. Inst. to construct his *Institutiones*.

4. Enlightenment *trusts*, 1659-c. 1760.

David Yale has studied in depth *trusts* in the work of Lord Nottingham, Lord Keeper 1673-75 and Lord Chancellor 1675-82.[50] I have myself written on the theorisations of *trusts* in circulation between approximately 1660 and 1740.[51] It is reasonably clear that the general shape of the legal conceptions involved persisted from the early 1700s beyond 1740, but that there were some shifts in the late 1700s. I say 'c. 1760' in the subhead as marking merely the terminus of my own study; there is then something of a gap before the next period to have been studied, beginning towards the end of the century.

This period saw continuing propertisation of the *trust* – for example, it is in this period that the courts of equity are first attested blocking execution by the *trustee*'s creditors on the *trust* assets,[52] and the Statute of Frauds 1677 s. 10 made the benefit of a *trust* of freehold land accessible to the

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[49] Latin, p. 143; English, *The Institutes of the Lawes of England*, London, 1651, p. 152.

[50] D.E.C. Yale, *Introduction to* 79 SS, p. 87-150.

[51] M. Macnair, in *IF*, of which what follows is a summary unless otherwise referenced.

[52] D.E.C. Yale, *Introduction to* 79 SS, p. 93, 175-76.

beneficiary's creditors. On the other side, however, implied *trusts* were pervasive, and/or the expression '*trust*' was very much more widely used than was later to be the case, so that the boundary between *trust* and contract was fuzzy.

The explanation of this apparent contradiction is, I think, two aspects of the context. The first is the 'propertisation' of other relations originally obligational in character. The second is the extent to which questions of priority were at this period determined by interpersonal considerations of risk and fault rather than by technical property rights.

(i) propertisation of contracts: The lease of land for a term of years, originally contractual, had been propertised in a development effectively culminating in 1499 with the provision of a remedy allowing specific recovery against all the world.[53]

The interest of the mortgagor in a mortage in fee (conveyance of ownership to the creditor, analogous to the classical *fiducia cum creditore* rather than to a *hypotheca*), was originally merely obligational, if that. It was 'propertised' by Chancery intervention at some point between the 1590s and 1650s; this intervention was still controversial down to 1654, but by 1667 it was accepted by Hale CB that the equity of redemption was a property right.[54]

Choses in action in general were in theory not assignable, though in practice they could be assigned by warrant of attorney (equivalent to Roman *procuratio in rem suam*); an express power in commissioners in bankruptcy to assign the bankrupt's choses in action was created by the Bankrupts Act 1604; legislation of the Civil War and Common-

[53] Summary account J. Baker, *IELH*, p. 298-301. There is an extensive literature on the topic by both legal and economic historians, not really relevant here.

[54] Early development: D.P. Waddilove, in *CLJ*, 2014, p. 142; controversial: Francis Moore's advice to Williams LK, D.E.C. Yale (a cura di), *Lord Nottingham's Two Treatises*, Cambridge, CUP, 1965, p. 78-80, 79, and attempted limits, Chancery Ordinance 1654 ss. 30, 49-52, at http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp949-96; accepted: *Pawlett v Attorney General* (1667) Hardr 465, 145 ER 550, Hale CB at 469, ER 552: "There is a diversity betwixt a *trust* and a power of redemption ... a power of redemption is an equitable right inherent in the land, and binds all persons in the post, or otherwise." Hale also recognised the development but commented critically on it in *Roscarrock v Barton* (1672) *Two Treatises* (above) 284 at 285, (*Roscarrick*) 1 Ch Cas 217, 22 ER 769, at 219-220, ER 770-771 (slightly differently reported).

wealth period in the 1640s-50s created assignable public debt securities; the whole period, but particularly the Restoration and the period after 1689, saw extensive growth in the use of negotiable instruments (bills of exchange, etc) and the creation of new forms of such instruments; and by the 1670s the Chancery was treating choses in action in general as assignable, at least in cases a civilian might have called 'delegation', and not long after wherever the assignment was supported by a consideration.[55] The financial revolution of the 1690s added to the class of choses in action a more extensive range of government securities, and in addition various corporate securities, sometimes with express statutory provision for assignment.[56] This context meant that characterising contracts as creating something like property rights more generally was perhaps natural.

(ii) Priorities: the period was characterised in priorities law by the dominance of the priority of purchasers and creditors over volunteers, and questions of interpersonal risk and fault. The priority of purchasers and creditors was given by statutory *Actio Pauliana*-type remedies against transfers in

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[55] Assignment of choses by warrant of attorney: McGaw, thesis (above n. 12) 208-213. Bankrupts: Bankrupts Act 1603 [1604] s. 13. Parliament and Commonwealth, e.g.: April 1646: An Ordinance for the Continuation of Excise or New-Impost, until the 29. of September, 1648.', in *Acts and Ordinances of the Interregnum, 1642-1660*, ed. C H Firth and R S Rait (London, 1911), at http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum, pp. 846-847; 'October 1646: An Ordinance for securing of all those that shall advance the Two hundred thousand pounds for the service of the State.', id. 884; April 1648: An Ordinance for the further ascertaining the arrears of the Soldiers upon their Debentures, and securing all those that shall purchase the same.', id. 1126-1127; 'June 1652: An Additional Act for Sale of the Fee-farm Rents.', id. 583-588. Negotiable instruments: J.S. Rogers, *The Early History of the Law of Bills and Notes,* Cambridge, CUP, 1995. Chancery and delegation, *Anon* (n.d.: 1667 x 1672) 2 Freem 145; 22 ER 1118, *Fashion v Atwood* (1679) 2 Ch Cas 6, 22 ER 819, 79 SS 775, (1688) 2 Ch Cas 36, 22 ER 835; general, *Crouch v Martin* (1707) 2 Vern 595, 23 ER 987; *Atkins v Dawbury* (1714) Gilbert Reports 88, 25 ER 61.

[56] Literature too extensive for full citation. Major contributions include P.G.M. Dickson, *The Financial Revolution in England*, London, Macmillan, 1967; L Neal, *The Rise of Financial Capitalism*, Cambridge, CUP, 1990; on secondary markets in company shares, A.L. Murphy, *The Origins of English Financial Markets*, Cambridge, CUP, 2009.

trust to defeat creditors, beginning in 1374 and systematised by the 'fraudulent conveyances' statutes of 1571 and 1584, which, by containing express exemptions for conveyances for value, were taken to create a presumption that voluntary conveyances were fraudulent as against subsequent purchasers and creditors. This general approach was extended by the adoption of the civilian 'badges of fraud' doctrine in *Twyne's Case* (1601), and, as far as chattels and money were concerned, by the 'apparent ownership' rule in the 1624 Bankrupts Act.[57]

The priority of purchasers was also given by the extent of the doctrine of *bona fide* purchase for value and without notice. In modern law this refers to *bona fide* purchase of a legal interest for value and without notice, and is a defence only against equitable, not legal claims. Neither limitation held in this period. A volunteer holder of a legal title would be defeated by a purchaser or creditor at law or in equity by virtue of the Fraudulent Conveyances Acts. In addition, the defence of purchase was a defence against any equitable relief. But the complex conveyancing practices of the period had the effect that legal title to land in many cases practically could not be litigated without the assistance of equity. Further, if legal title was litigated by the common means of the action of ejectment, this involved the use of fictitious parties.[58] The fictions pre-

[57] *Actio Pauliana*-type remedies: (1376) 50 Edw. III c. 6, (cf. also *De Chirton's Case*, 1350) 2 Dyer 160a, 73 ER 349, where the Exchequer seized land which Walter Chiriton, the leader of a syndicate farming the customs, which had become insolvent, had purchased in the name of "friends" "a defrauder le roy", and discussion J.L. Barton, *The Medieval Use*, in *LQR* 81, 1965, p. 568; (1487) 3 Hen VII c. 4; (1571) 13 Eliz. I c. 5, (1584) 27 Eliz. I c. 4. The proviso for conveyances bona fide on good consideration is in s. 3 of each Act. Useful, if late, systematic discussion in W. Roberts, *A Treatise on the Construction of the Statutes 13 Eliz. c. 5 and 27 Eliz. c. 4 relating to voluntary and fraudulent conveyances,* London, 1800; recent academic discussion, C. Willems, *Actio Pauliana und fraudulent conveyances*, Berlin, Duncker & Humblot, 2012, *Twyne's Case* 3 Co. Rep. 80b, Moo KB 638, John Hawarde, *Les Reportes del Cases in Camera Stellata*, ed. W.P. Baildon (privately printed, 1894), at 125-129. The authority cited for the 'badges' doctrine (in Hawarde's report only) is the *Provinciale* of the English canonist William Lyndwood, written c. 1422 x 1434. In the standard edition, Oxford, 1679, the relevant passage is at pp. 161-62. Bankrupts Act 1623 [1624] 21 Jac. I c. 19 s. 11.

[58] Convenient summary discussion of ejectment in J. Baker, *IELH*, p. 301-303. The use of the old real actions was occasionally possible, but rarely, since Chancery

vented any *res judicata* from arising between the real parties: the losing party could simply start again with new fictional parties. The successful party could obtain equitable relief in the form of an injunction against new ejectments.[59] But any equitable relief could be barred by plea of purchase; and this included ancillary relief in connection with *common law* litigation.[60]

The doctrine also inherently incorporated questions of risk and fault. 'Notice' included both what came to be called implied notice (to the party's lawyers) and constructive notice (where the party would have discovered the encumbrance by the exercise of proper care) and, indeed, in a rather excessive stretch by Lord Hardwicke, implied constructive notice: where the party's lawyer would have discovered the encumbrance had he consulted old files relating to another client, though at law the encumbrance was made void against purchasers by non-registration.[61]

Lord Hardwicke explains this doctrine by saying that notice makes the purchase not *bona fide*, and hence – citing the *Digest* – fraudulent.

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would not enforce against a purchaser discovery of the names of the persons seised, who had to be made defendants in any real action, thus usually stopping the claimant at the first hurdle: 1 Equity Cases Abridged 76-77, 21 ER 890.

[59] *Earl of Bath v Sherwin* (1709) 4 Bro PC 373, 2 ER 253; *Leighton v Leighton* (1720) 1 P Wms 671, 24 ER 563, 4 Bro PC 378, 2 ER 256; *Barefoot v Fry* (1724) Bunb 158, 145 ER 631.

[60] Cases on the issue are too numerous for citation even of examples to be useful. General discussions, Lord Nottingham, *Prolegomena* ch. 6, in *Two Treatises* (n. 54), p. 204-212; Sir John Comyns, *A Digest of the Laws of England*, London, 1764 [structure and core written c. 1700] tit. *Chancery*, sub-tit. *(4 I) Purchase,* p. 229-233; Richard Francis (a cura di), *Maxims of Equity,* London, 1727 [the original text probably written c. 1700, the notes edited to 1727], p. 61-65, deals with the issue under the maxim "Where Equity is equal, the law must prevail", selecting cases which fit this model; 1 Equity Cases Abridged [1732] tit. *Purchase and Purchaser,* 353-359, 21 ER 1097-1101; 2 Equity Cases Abridged [1757] tit. *Purchasor*, 677-690, 22 ER 569-580; interestingly, there is no systematic discussion but only casual references in Sir Jeffrey Gilbert, *The History & Practice of the High Court of Chancery*, Washington, DC, Morrison, 1874 [aka *Forum Romanum* and *Lex Praetoria*] [written early 1720s]) and in [Henry Ballow attr] *A Treatise of Equity* [1737] (Dublin, 1756). A modern account of the early law in D.E.C. Yale, *Introduction* to 79 SS, *67-87, 160-185.*

[61] *Le Neve v Le Neve* (1748) 3 Atk 646, 26 ER 1172.

The broad conception of fraud as any conduct inconsistent with a general requirement of good faith had substantially wider implications. Thus, for example, non-disclosure of an interest when questioned would postpone that interest to a new interest purchased by the person who asked the question.[62]

Delay or other carelessness in making a claim could be characterised both at law and in equity as laches (carelessness) to defeat the claim. Conversely, failure to claim while aware of an adverse claim might be characterised as acquiescence, making the adverse claim good.[63]

Assumption of risk was offered as a generalising explanation of the apparent ownership rule. In *Burgess v Wheate* (1759), for example, Henley LK offers it as justifying the risks affecting the beneficiary, of sale by the *trustee* to a *bona fide* purchaser without notice, and of escheat or forfeiture by the *trustee*.[64]

This context, then, meant that the dividing line between proprietary and contractual claims mattered less than it did in medieval law, and than it does in modern law.

Bacon's analogy of the use/*trust* with the Roman *fideicommissum* was used by Lord Nottingham in his *Prolegomena*. It may have assisted Nottingham to reach 'proprietary' results in relation to *trusts*, as Yale argues he aimed to; though *Turner v Turner* shows him taking a 'chose in action' approach when to do so would save the effectiveness of a common conveyancing form. Beyond this, the *fideicommissum* analogy certainly did not have operative effects in Nottingham's discussion; and it was not used in the law reports until *Burgess v Wheate* (citing Bacon). The analogy was explicitly criticised by the civilian Thomas Wood in his *New Institute of the Imperial or Civil law* (1704), pointing out that fideicommissary substitutions were more analogous to English entails.[65]

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[62] E.g. *Hobbs v Norton* (1682) 1 Vern 136, 23 ER 370; *Ibbetson v Rhodes* (1706) 2 Vern 554, 23 ER 958.

[63] Macnair 'Length of time and related equitable bars 1660-1760' in planned forthcoming prescription volume, provisional title *Praescriptio omnia Iura tolluntur,* ed. Schrage.

[64] *Burgess v Wheate*, *Attorney-General v Wheate* (1757, 1759) 1 Eden 177, 28 ER 652, at 218, 246, ER 668, 678, 1 W Black 123, 96 ER 67, at 156, 179, ER 81, 91.

[65] Nottingham: *Two Treatises* 238. Discussion, M. Macnair, in *IF*, p. 214-215.

Jeffrey Gilbert in his *Law of Uses*, a very rough draft dating to around 1700, explained the origin of uses by reference to usufruct in the *civil law*, claiming that clerical expertise in the *civil law* brought it in. But though, as I argued in 1998, this had some explanatory value for *trusts* as they were practised in Gilbert's time, he seems to have thought better of it: when he wrote the *Lex Praetoria* in the early 1720s, it is dropped (though origins in clergy influence remains in this text). The only reference to usufruct in the printed reports is in 1766, a doomed attempt by counsel to save an attempt in a will to entail shares without creating a *trust*, by arguing that the testator was creating a usufruct.[66]

The author of the *Treatise of Equity*, who was heavily reliant on Pufendorf,[67] begins his account of *trusts* by characterising the relation as "a *depositum*, or *trust*". There is little evidence in the text of direct use of the *depositum* analogy, but it is clear that he did use the identification with *depositum* to place private *trusts* in general within the general contractual framework which he had set up at the beginning of the book, rather than within a proprietary framework.[68] This, in fact, allowed more analytical system than Nottingham's or Gilbert's treatment.

Depositum, unlike usufruct and *fideicommissum, is* found in the cases, if not in very many, to discuss *trusts* and *trust*-like relations. The clearest example is Lord Hollis's Case (1680) "a depositum, and a *trust* thereupon to the lady" but the relation between Latin *depositum* and *trust* begins with civilians arguing canon law in *common law* cases on commendams in 1611 and 1616, and continues down to the 1740s. The primary context is what would arguably be *trusts* of money, and a distinction between deposit and debt. *Depositum* is also found in Holt CJ's discussion of duties of care in bailment in *Coggs v Barnard* (1703) and thereafter in that context, and as a

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Burgess v Wheate (n. 64) *per* Henley LK at 1 Eden 246, 28 ER 668, 1 W Black 179, 96 ER 91. Wood: 4th ed. 1730 p. 189.

[66] *Tothill v Pitt* (1766) 1 Madd 488, 56 ER 179, Sewell MR, rvsd on appeal to Lords Commissioners, this in turn rvsd and Sewell MR's decree restored *Earl of Chatham v Tothill* (1771) 7 Bro PC 453, 3 ER 295.

[67] D. Ibbetson, *Historical Introduction to the Law of Obligations*, Oxford, OUP, 1999, p. 218-19.

[68] M. Macnair, *IF*, p. 216-218.

form of security perhaps distinct from pledge.[69] English 'deposit' is, however, mostly non-technical.[70]

[69] *Lord Hollis's Case* (1680) 2 Vent 345, 86 ER 477, probably Grimston MR. Civilians: *Le Case de Commenda* (1611) Davis 68, 80 ER 552, *Colt v Glover* (1617) 1 Rolle 451, 81 ER 600. Money *trusts*: *Harris v Peter de Bevoice* (1624) 2 Rolle 441, 81 ER 904, (Ley CJ at 442), *Pheasant v Pheasant* (1670) 1 Ch Cas 181, 22 ER 752, 2 Vent 340, 86 ER 475, Serjeant Goodfellow *arg* (orphans' money in London; rejected), *Monk's Case* (1672) 1 Vent 221, 86 ER 148 (money in court), *Cheek v Viscount Lisle* (1673) Rep t Finch 98, 23 ER 53, 73 SS 23, 52 (portion money left with father of bride, suggested by counsel but rejected), *Fouke v Lewen* (1682) 1 Vern 88, 23 ER 331 (discussion of *Pheasant*). *Coggs v Barnard* (1703) 2 Ld Raym 909, 92 ER 107, and various other reports; Holt CJ explicitly refers to "*trust*" in this context; *Mytton v Cock* (1739) 2 Stra 1099, 93 ER 1057. As a form of security, *Evans v Canning* (1675) Rep t Finch 209, 23 ER 114 (the editor, William Nelson, citing Domat on the point), *Bank of England v Glover* (1702) 2 Ld Raym 753, 92 ER 3 (counsel *arg,* rejected), *Nickson v Brohan* (1712) 10 Mod 109, 88 ER 649 (point introduced by the court), *King v King* (1735) 3 P Wms 358, 24 ER 1100 (citation of a decision on hypothecation of a ship). The expression is also used where '*trust*' might have been used in constitutional argument by Wright B *diss* in *Wedderburn* (1746) Foster 22, 168 ER 12, arguing that "He considered the trial by the same, jury which is sworn and charged with the prisoner, as part of the *jus publicum*; as a sacred *depositum* committed to the judges which they ought to deliver down inviolate to posterity".

[70] English 'deposit' – There are moderately numerous cases concerning forfeitable deposits in contracts of sale (analogous to Justinianic *arra*) and deposits of money required in connection with judicial procedures. More relevant are *Boswell v Coats* (1670) 1 Mod 33, 86 ER 709 (legacy for infant 'deposited' with third party, i.e. *trustee*); *Coppin v Coppin* (1725) Cas t King 28, 25 ER 204 ("to make the real estate chargeable in his hands as a deposit, would be running foul of the Statute of Frauds" – "deposit" here means an implied *trust* for the creditors); *Lechmere v Earl of Carlisle* (1733) 3 P Wms 211, 24 ER 1033 (counsel attempt a distinction between "money being deposited in the hands of *trustees* to be invested and where there is no such deposit" merely contractual obligation, rejected); *Mackenzie v Marquis of Powis* (1737) 7 Bro PC 282, 3 ER 183, French contract of deposit "confiées comme un depôt" analysed as *trust* so as to be outside of the Statute of Limitations: per counsel, "his remedy lay properly in a court of equity, as it was the case of a deposit, which is a *trust*"); *Pearce v Waring* (1737) West t Hardw 148, 25 ER 866, at 154/869 (Lord Hardwicke C: "But there are subsequent circumstances in favour of the plaintiff; and, first, the breaking open the box clandestinely, and taking out the papers. The box was sealed up, and left with the defendant as a sacred deposit. This

For the sake of completeness I also searched the English Reports CDROM for *fiducia* and *fiduci**, not expecting to find much because of the absence of the word from the doctrinal literature. The result of the search is that *fiducia* was used to translate '*trust*' and *fiduciarius* '*trustee*' in a number of cases where it was necessary to plead the existence of a *trust* in a claim at *common law*, particularly but not exclusively in Edward Lutwyche's *Livre des Entries* published in 1704.[71] At this date, and given the complete silence on this front of cases and doctrinal literature, it must be clear that '*fiducia*' and '*fiducia*rius' in this context are merely Latin translations of '*trust*' in the technical meaning to be found in the English equity doctrine, and do not import any Roman analogy. This usage disappeared with the coming into force from 1733 of the Act of 1731 requiring legal proceedings to be in English. English 'fiduciary' was rare throughout the period, though *OED* has examples from the 1640s: it appears in a Law French report from 1623, and then resurfaces very occasionally in the 1700s for cases analogous to trusteeship.[72]

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has been called an imprudent act; but I must call it a great breach of good faith, an act of fraud"); *Thomson v Noel* (1738) West t Hardw 304, 25 ER 951 (deposit with stakeholder); *Hartop v Hoare* (1743) 3 Atk 44, 26 ER 828 (Lee CJ; analysis using *Coggs v Barnard*); *Gage v Bulkeley* (1745) Ridgw t Hardw 278, 27 ER 829 (same issues as *Mackenzie*); *Roe d Noden v Griffits* (1766) 4 Burr 1952, 98 ER 17 (Lord Mansfield CJ at 1961/21; lord in copyhold surrender & regrant).

[71] The book is a formulary or collection of precedents of pleadings, which, however, included sketchy reports of the decisions on them (mostly in Common Pleas). Since printed reports of cases in Common Pleas were infrequent at this period, later lawyers, including the editors of the *English Reports,* treated it as a series of reports. *Graves v Hatchet* (1687) 1 Lutw 415, 125 ER 218; *Death v Dennis* (1687) 1 Lutw 459, 125 ER 241; *Lambert v Lane* (1687) 1 Lutw 306, 125 ER 160; *Rex v Lenthal* (1688) 3 Mod 143, 87 ER 92; *Slaughter v Pierpoint* (1688) 1 Lutw 451, 125 ER 237; *Blisse v Frost* (1689) 2 Vent 63, 86 ER 310; *Clarke v Peppin* (1689) 2 Vent 97, 86 ER 330; *Lechmere v Toplady* (1690) 2 Vent 156, 86 ER 365; *Royston v Baston* (1699) 1 Lutw 633, 125 ER 332; *Bishop of Exeter v Freake* (1699) 1 Lutw 901, 125 ER 499; *Talbot v Woodhouse* (1699) 2 Lutw 1471, 125 ER 811; *Wilkes v Kirby* (1700) 2 Lutw 1519, 125 ER 837; Lynch v Clemence (1700) 1 Lutw 571, 125 ER 300; *Treene v Hiccox* (1701) 1 Lutw 614, 125 ER 322; *Brinley v Burgh* (1701) 1 Lutw 623, 125 ER 327; *Feltham v Cudworth* (1702) 2 Ld Raym 760, 92 ER 8; *R v Griffin* (1733) 7 Mod 197, 87 ER 1186, W Kely 292, 25 ER 621, Ridgw t Hardw 38, 27 ER 750.

[72] *Standen v University d'Oxon and Whitton* (1623) W Jon 17, 82 ER 11 (ad-

5. Further propertisation late 1700s - late 1800s.

Developments in *trust* law between the early 1800s and 1914 have been systematically studied by Stuart Anderson in the *Oxford History of the Laws of England* vol. XII (2010). Though Anderson's study formally covers only 1820-1914, his work in fact goes back as far as the Chancellorship of Lord Eldon (1801-1826, with a brief interval in 1806-07). Eldon's work is also studied by Joshua Getzler.[73]

Anderson's fundamental point is that from the time of Lord Eldon there was a shift towards the idea of the *trust* as *a donative* relation between the settlor and the beneficiaries, hence as primarily belonging in the sphere of property rather than that of obligations. This shift involved the development of the modern law relating to 'certainties' of *trusts* from very scattered earlier antecedents (mainly in cases on the interpretation of wills), and – especially – of the modern law of 'constitution' of *trusts*.[74] Both bodies of doctrine set out to reduce the scope of implied *trusts* and to separate *trust* more sharply from contract and from barely moral obligations. The shift to a proprietary-donative conception also produced the emergence of the non-contractual 'declaration of self as *trustee*'. The process of transition in his view takes some time, beginning with or around the time of Lord Eldon, but not completed until mid-century.

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vowson; Hutton J); *Bishop of Winchester v Knight* (1717) 1 P Wms 406, 24 ER 447 (copyholder's liability to account for profits from waste; Lord Cowper C); *Baxter v Burfield* (1747) 2 Stra 1266, 93 ER 1172 (contract of apprenticeship requiring personal performance by master; Lee CJKB); *Garth v Cotton* (1753) Dick 183, 21 ER 239, 1 Ves Sen 546, 27 ER 1196 (tenant for life's duty to remainderman; Lord Hardwicke C).

[73] *Fiduciary investment in the shadow of financial crisis: Was Lord Eldon right?*, in *Journal of Equity* 3, 2009, p. 219; 'Morice v Bishop of Durham (1805)', in C. Mitchell, P. Mitchell (a cura di), *Landmark Cases in Equity*, Oxford, Hart, 2012; Professor Getzler has other work on Eldon in progress. MR Chesterman argued in 1984 for a transition in the nature of family *trusts* at the same period from settlements of land to management of funds: *Family Settlements on Trusts: landowners and the Rising Bourgeoisie*, in G.R. Rubin, D. Sugarman (a cura di), *Law, Economy & Society*, Abingdon, Professional Books, 1984), ch. 1. This is, however, only indirectly relevant to present concerns.

[74] In addition to Anderson cf. M. Macnair, *Equity and Volunteers,* 1988, in *Legal Studies* 8, p. 172-188.

Anderson draws attention in connection with this process of further propertisation of the *trust* concept to the restrictive interpretation of the Elizabethan statutes of fraudulent conveyances and their effective supersession when the Bankruptcy Act 1869 extended bankruptcy, and its priorities rules, to all debtors.[75] The point can be extended: the mid-1800s saw a general transition away from the system of priorities based on interpersonal allocation of risk and fault towards a more property-based *nemo dat* conception of priorities. As well as restrictive construction of the fraudulent conveyances legislation, the same held, as de Lacy shows, for the apparent ownership doctrine in bankruptcy. Perhaps by way of the extension of equitable remedies to *common law* in the run-up to the procedural fusion of law and equity,[76] perhaps by virtue of the new concept of *trusts*, the doctrine of purchaser for value and without notice became restricted in its effects to purchase of a legal interest and to defeat only equitable interests.[77] The scope of the concept of fraud was radically reduced in mid-century, and generally expressed ideas of a requirement of 'good faith' in contracting became restricted to specific classes of cases.[78]

The proprietary shift in the nature of *trusts* was accompanied, and arguably preceded, by a shift in the use of civilian analogies for it. I have argued above that *depositum* was the most significant analogy, so far as analogies were used at all, in the period 1660-1760. However, as already indicated, Bacon's analogy with *fideicommissum* was adopted by Lord Mansfield CJ and Henley LK in *Burgess v Wheate,* and William Blackstone in the 1766 second volume of his *Commentaries on the Laws of England* adopted Bacon's argument wholesale.[79] This approach thereafter became the dominant

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[75] Anderson, p. 262-268. Cf. the more elaborate discussion of J. de Lacy, in Id. (a cura di), *The Reform of UK Personal Property Security Law: Comparative Perspectives*, Routledge, 2012, ch. 1.

[76] M. Lobban, *Preparing for fusion*, Part II, in *LHR* 22, 2004, p. 565, 587-590.

[77] D.E.C. Yale, *Introduction to 79 SS,* p. 67, 163, attributes the modern limits on the plea to Lord Westbury in *Phillips v Phillips* (1861) de G F & J 208.

[78] F. Macnair, in E. Simpson, M. Stewart (a cura di), *Sham Transactions*, Oxford, OUP, 2013, ch. 2, p. 47-48; good faith, Id., in J. Hallebeek, et Aa.Vv. (a cura di), *Inter cives necnon peregrinos: essays in honour of Boudewijn Sirks*, Goettingen, V&R unipress, 2014, p. 469-481, 472-73, 479-81.

[79] Bl. Comm., p. 327-337. The argument is absent from his earlier *An Analysis of the Laws of England*, Oxford, 1756, which has at p. 59 "Uses and *Trusts*: Which are a Confidence reposed in the Terre-Tenant, or Tenant of the Land, that he shall

orthodoxy. Capel Lofft in 1779 simply wrote *fideicommissum* in Latin for English '*trust*'.[80] John Fonblanque in the second volume of his expanded edition of the *Treatise of Equity* (1794) added a long note on *fideicommissum* to contradict the *depositum* analogy in the text, following Bacon and 'firming up' Bacon's *analogy* claim into a claim that this was the origin of uses.[81] Cruise in 1796 took the same line.[82] Sugden in 1811 similarly used a note to 'correct' Gilbert's *Uses*.[83] Story followed Blackstone and Fonblanque.[84] Spence if anything elaborated the argument.[85]

The chronology here suggests that the use of Bacon's *fideicommissum* arguments by Henley and Blackstone may have led to the drive towards a fully proprietary-donative conception of the *trust* under Eldon and later, rather than the *fideicommissum* analogy being adopted to fit existing propertisation of the *trust*.

This dominance continued down to the late 1800s, when the issue began to be addressed by the new species of legal historians influenced by German historical scholarship. The first outcome was Oliver Wendell Holmes' 1885 argument that the *trust* derived from the 'Germanic' *salmann*; then came Maitland's derivation of *use* from *oeps* and that in turn from *ad opus*.[86] By the time of his lectures on equity, Maitland was arguing that the *trust* "perhaps forms the most distinctive achievement of English lawyers"; but his definition of the *trust* was, broadly, obligational; giving rise to a debate which has continued ever since as to whether the beneficiary's interest

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permit the profits to be enjoyed, according to the Directions of *cestuy que Use,* or *cestiy que Trust*." The point is here merely preliminary to consideration of conveyances operating by way of the Statute of Uses and, in effect, gives an (imperfect) pre-1536 definition.

[80] *Principia cum juris universalis tum præcipue anglicani*, 2nd ed. 1779, p. 560.

[81] Dublin, 1795, p. 1-4.

[82] R. Helmholz, R. Zimmermann, in *IF*, p. 32.

[83] 3rd ed. 1811, p. 3 n. 2, following *Blackstone*.

[84] *Commentaries*, 13th ed., Boston, Little Brown, 1886, p. 268-69.

[85] *The Equitable Jurisdiction of the High Court of Chancery*, Philadelphia, PA, Lea & Blanchard, 1845, p. 435-444. It should be said by way of *caveat* that both F.W. Sanders, *An essay on uses and trusts* ..., 3rd ed., London, 1813, and T. Lewin, *A practical treatise on the law of trusts and trustees*, London, 1837, did *not* use the *fideicommissum* argument.

[86] Holmes and Maitland cited above n. 2.

is *in rem* or *in personam.*[87] We have now arrived both at modern *trusts* law and at the beginning of the history.

6. Conclusion.

Why did what was originally an obligation become propertised, not once, but twice and perhaps even three times (if developments in the 1600s and in the 1800s are counted as separate instances? There is a sense in which we could add to these cases the shadowy case of the Roman *fiducia,* obligational ... but with the *usureceptio fiduciae* allowing the transferor to usape, presumably for the benefit of purchasers and incumbrancers from him;[88] and/or the clearer case of the *fideicommissum*. Here the problem leading to the *scc. Trebellianium* and *Pegasianum* is transparently the implications of the institution of *fideicommissum* both for regulatory rules (the *Lex Falcidia,* etc) and for priorities in relation to creditors.[89] It seems to me to be reasonably clear that the fundamental drivers in relation to the propertisation of *trusts*, both in the late 1400s and in the 1600s, are the same concerns: avoidance of regulatory rules (and revenue problems) and problems of priorities. The case of the 1800s is less clear. Here it seems that the fundamental shift drives in the opposite direction: by shifting towards a donative-proprietary approach and *qui prior est tempore, potior est iure*, the judges of this period produce the result of facilitating regulatory avoidance and 'moral hazard' in relation to debts.

The second issue posed is English lawyers' use of continental/ civilian materials. 'Looking across the channel' at recent literature on concrete issues in the *ius commune*, it seems to me that even if civilians may have argued to their political masters that the *Corpus Iuris* was a supplementary source which worked *imperio rationis*,[90] when they argued in practice, they

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[87] *Equity, and also the Forms of Action at Common law*, Cambridge, 1929, p. 23, 23-24, 43-45. A recent contribution, reviewing the debate as well as contributing to it, is M.W. Lau, *The Nature of the Beneficial Interest – Historical and Economic Perspectives*, 2013, http://papers.ssrn.com/sol3/ papers.cfm?abstract_id =2213055.

[88] G. 2. 59, 60.

[89] W.W. Buckland, *Textbook*, p. 353-56; D. Johnston, *The Roman Law of Trusts,* ch. 2.

[90] The point is more asserted in the modern literature than any actual examples

proceeded on the basis that (a) it was a very large statute in force *ratio imperii*, except insofar as possibly derogated from by local statute or custom; and (b) that analogies could be drawn from any part of it to any other part.[91]

Comparing English common lawyers, they used the corpus of *English statutes*, together with the *Register of Writs*, in the same way: that it was statutory material in force, and that analogies could be drawn across the whole body of the law without regard to subject-matter. This is reflected in the development of *trusts* law, in that statutory provisions, on their face of a limited character, were rapidly generalised and gave rise to conceptual shifts in the law as a whole: examples to be seen in the generalising use of the 1484 Act on the beneficiary's power to convey the *trust* property, of the Elizabethan fraudulent conveyance statutes and *Twyne's Case*, and of the apparent ownership doctrine in bankruptcy.

Common lawyers' attitude to the Roman sources was very different. Nobody could seriously make a *translatio imperii* argument that the *Corpus Iuris* was in force *ratione imperii* in England, since the country was understood to have been conquered by the Anglo-Saxons before the adoption of the *Code* and *Digest,* let alone the Pragmatic Sanction of 554, it was never part of the Carolingian empire, and there was no English royal order to use the *ius commune* beyond very limited jurisdictions.[92] The basic categories

being cited: e.g. R.C. VAN CAENEGEM, *An Historical Introduction to Private Law*, Cambridge, CUP, 1992, p. 59; M. CAPPALLETTI, J.H. MERRYMAN, J.M. PERRILLO, *The Italian Legal System: An Introduction*, Stanford, CA, Stanford UP, 1967, p. 31, treat it as specifically French. T. WALLINGA, *The Common History of European Legal Scholarship*, in 4 *Erasmus LR* #1, 2011, p. 1 at 15 treats the tag as humanistic/ early modern.

[91] On theoretical aspects of the problem cf. T. KUEHN, *A Late Medieval Conflict of Laws: Inheritance by Illegitimates in Ius Commune and Ius Proprium*, in *LHR* 15, 1997, p. 243-273; N.E. HATZIMIHAIL, *Bartolus and the Conflict of Laws*, in *RDHI* 60, 2007, p. 11-79: in both discussions it is clear that local statutes are treated as (perhaps) derogating from the *Corpus Iuris* as *in force*. Concrete examples relevant to present concerns in the discussions in the essays in *IF*; or in E.J.H. SCHRAGE (a cura di), *Ius Quaesitum Tertio*, Berlin, Duncker & Humblot, 1998, or J. HALLEBEEK, H. DONDORP (a cura di), *The Right to Specific Performance,* Antwerp, Intersentia, 2010.

[92] Already A. DUCK, *De Usu & Authoritate Iuris Civilis Romanorum*, London, 1651, lib. 2 c. 8 made this point clear. In contrast J. COWELL, *Institutiones* (above n. 48 & text there) argued that "legem nostram communem (quam dicimus) nihil aliud esse quam Romani & feudalis mistionem" (Epistle Dedicatory, sig. A2v).

of public/ private, criminal/civil, property/obligations and contract/delict were received into English law at an early date, presumably *imperio rationis*.[93] Otherwise, English lawyers' use of Roman sources was that of magpies, who took what appeared to be useful or decorative and ignored the rest.

There is no period where common lawyers didn't borrow bits here and there, and even the great anti-civilian ideologue Edward Coke borrowed (though using various devices to conceal his borrowing in his published work).[94] In the context of *trusts*, the initial practice of uses was, as Biancalana has shown, fairly straightforwardly enforceable – as an obligation – in existing law, and did not therefore need a borrowed concept. Problems in practice drove the shift into enforcement in Chancery; and this shift does seem to have produced a borrowed concept. If a time machine allowed us to talk to the learned lawyers who ran the Chancery in the later 1400s but left behind virtually no records of their reasoning, or as yet undiscovered manuscripts gave us some window of vision of it, we might well find that they were applying 'straight' civilian and canonist reasoning as to *fiducia* or *confidentia*. But when we find common lawyers from the 1570s or 1690s referring to usufruct to explain *trusts*, or from the 1600s, 1670s, 1760s and ownwards referring to *fideicommissum*, what is being done is to either to try to fortify an argument by an analogy, or to decorate it by the display of 'classicism'. The 15th century use/*trust*/confidence is therefore close to *fiducia*; the post-1590 later *trust*, in its several forms, is substantially further distant from it, because heavily naturalised in the context of English statute law.

[93] Discussion e.g. D.J. Seipp, *Roman Legal Categories in the Early Common law*, in T.G. Watkin (a cura di) *Legal Records and the Historian*, London, Hambledon, 1989, ch. 2.

[94] Cf. Wood, who said that Coke taught the common lawyers the use of the *Regulae Iuris*: T. Wood, *New Institute,* 4th ed. 1730, *Preface*, p. 86.