

1979

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Recommended Citation

Richard. H. Helmholz, "The Early Enforcement of Uses," 79 Columbia Law Review 1503 (1979).

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The Early Enforcement of Uses

R. H. Helmholz *

As a means of avoiding feudal incidents and of evading the common law rule prohibiting devises of freehold land, the feoffment to uses, ancestor of the modern trust, enjoyed a popularity at least from the reign of Edward III (1327-1377).¹ The holder of freehold land—the feoffor—would convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or sometimes of a third party—the cestui que use—under instructions to convey the land to persons to be named in the feoffor's will.² Enforcement of the feoffor's directions, however, long posed a problem. What of the feoffee who refused to carry out those directions after the feoffor's death? What of the situation where the directions were ambiguous or contradictory? Except in special circumstances, the common law courts would neither enforce nor interpret the use,³ and the Chancery's jurisdiction over uses developed only gradually during the second quarter of the fifteenth century.⁴

How can so important and so widespread an institution have existed without legal sanction? Can its effectiveness really have rested solely on the conscience and good sense of the feoffees prior to the time the Chancellor began to intervene? This seems implausible. Yet it is the answer that historians of the law have had to give. Professor J.M.W. Bean, the latest and most thorough investigator of the medieval use, suggests some informal checks on the potentially dishonest feoffee, but in the end he is obliged to leave the

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1. J.M.W. BEAN, *THE DECLINE OF ENGLISH FEUDALISM, 1215-1540*, at 120 (1968); F. MAITLAND, *EQUITY* 23-42 (1909); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 578 (5th ed. 1956); Fratcher, *Uses of Uses*, 34 *Mo. L. Rev.* 39 (1969).

2. The essence of the "use" was the separation of legal title to land from its beneficial enjoyment. Since the common law prohibitions, like the rule against devises of land, applied only to the legal estates, the "use" enabled landowners to treat the land as their own but to avoid the restrictions and penalties associated with legal title. Thus forfeiture for treason, the feudal incidents of wardship and marriage, the demands of creditors, and the Statute of Mortmain could all be avoided. It was common to convey to several feoffees jointly to protect against the legal restrictions being applied to any of them individually, and additional feoffees could be named as time went on. The Statute of Uses, 27 Hen. 8, c. 10 (1536), was passed specifically to put an end to these evasions of the common law. The ability to devise lands was quickly restored, because of pressure from the land-owning classes, in the Statute of Wills, 32 Hen. 8, c. 1 (1540).

3. Y.B. Pasch. 4 Edw. 4, pl. 9 (1464) *per* Moyle. See generally J. BAKER, *INTRODUCTION TO ENGLISH LEGAL HISTORY* 212 (2d ed. 1979); A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* 164 (1961).

4. A commons petition of 1402 assumes that no remedy was then available in Chancery. 3 *ROTULI PARLIAMENTORUM* 511. The most recent and thorough accounts of the rise of the Chancellor's jurisdiction over uses are Avery, *An Evaluation of the Effectiveness of the Court of Chancery Under the Lancastrian Kings*, 86 *L.Q. Rev.* 84 (1970); Avery, *History of Equitable Jurisdiction before 1460*, 42 *BULL. INST. HIST. RESEARCH* 129 (1969). Avery's conclusions have since been challenged by Nicholas Pronay: *The Chancellor, the Chancery and the Council at the End of the Fifteenth Century*, in *BRITISH GOVERNMENT AND ADMINISTRATION: STUDIES PRESENTED TO S. B. CHRIMES* 87 (H. Hearder & H. Loyn eds. 1974). However, his principal point concerns the representativeness of Avery's geographical sample and consequent assessment of the reasons for the rise of the court of Chancery. They affect the point of this Article, the development of the enforcement of uses, only marginally.

question of legal sanctions unresolved.⁵ Others have found themselves in the same quandary, compelled to leave a large gap in time between the rise of uses and the possibility of their enforcement.⁶

A possible solution to the puzzle is that early uses might have been enforced by the courts of the Church. Maitland suggested it long ago.⁷ The suggestion has since found few adherents, however, for two fundamental reasons. First, a rule of the royal courts prohibited the Church's tribunals from taking jurisdiction over cases touching freehold land; and second, there has been no positive evidence in favor of the suggestion. The force of the first reason has been diminished in recent years; research has shown beyond doubt that the medieval Church exercised jurisdiction in several areas forbidden to it by the common law, despite the threat of royal prohibitions.⁸ However, the second reason remains. The possibility has rested on speculation alone.⁹

In fact, good evidence to support the suggestion does exist: the court records from the ecclesiastical courts of the dioceses of Canterbury and Rochester contain many cases involving feoffments to uses. The records are in manuscript. They are hard to read, and often difficult to interpret.¹⁰ As a consequence, until recent years they have been left largely unexplored. However, the records furnish the best test of the actual scope of the Church's jurisdiction, and although they do not allow for absolutely confident generalization, they tend to prove that some English Church courts regularly enforced feoffments to uses. Because of the light they shed on the early history of the use, their evidence merits presentation and assessment.

Ecclesiastical Enforcement of Uses

From the last quarter of the 14th century, when the earliest surviving Canterbury Act books begin, up through the middle of the 15th century,

5. J.M.W. BEAN, *supra* note 1, at 156: "Of all the precautions . . . none was absolutely effective."

6. *E.g.*, 4 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 432 (3d ed. 1945) ("In early days the relation between the feoffee to uses and the feoffor or cestuique use was of a strictly personal character."); T. PLUCKNETT, *supra* note 1, at 578 ("So far, the cestui que use had no legal protection."); 1 A. SCOTT, THE LAW OF TRUSTS § 1.3, at 14 (3d ed. 1967) ("[U]ses were mere honorary obligations resting upon the good faith of the feoffee."). *See also* A. KIRALFY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW 606 (4th ed. 1958); J. AMES, *The Origin of Uses*, in LECTURES ON LEGAL HISTORY 233, 236-37 (1913); Barton, *The Medieval Use*, 81 L.Q. REV. 562, 569 (1965); Cook, *Straw Men in Real Estate Transactions*, 25 WASH. U.L.Q. 232, 233 (1940); Hargreaves, *Equity and the Latin Side of Chancery*, 68 L.Q. REV. 481, 489 (1952).

7. 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 232 (2d ed. 1898, reissued 1968): "Some of them may have been enforced by the ecclesiastical courts."

8. *See, e.g.*, B. WOODCOCK, MEDIEVAL ECCLESIASTICAL COURTS IN THE DIOCESE OF CANTERBURY 92 (1952); Donahue, *Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-examined after 75 Years in the Light of Some Records from the Church Courts*, 72 MICH. L. REV. 647 (1974); Helmholz, *Debt Claims and Probate Jurisdiction in Historical Perspective*, 23 AM. J. LEGAL HIST. 68 (1979).

9. S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 171 (1969).

10. G.R. Elton has described them, for example, as "among the more strikingly repulsive of all the relics of the past." G. ELTON, ENGLAND, 1200-1600, at 105 (1969).

cases involving uses appear as regular parts of the business of the diocesan courts there and at Rochester. The records leave little doubt that quite ordinary feoffments to uses were involved. For example, in 1375 the feoffees to uses of a certain John Roger were cited to appear before the court at Canterbury for violating the directions given to them by their feoffor. Upon interrogation, they confessed that they had received ten and three quarters of an acre of land, a windmill, and a grange under Roger's instructions that they convey it to his wife Margery after his death.¹¹ They admitted violation of this instruction by alienating half the land to a certain Hugh Pryor, but maintained that they had only done so out of compulsion and fear of Hugh. The judge, apparently after a brief hearing, held that the alleged fear had been "empty and insufficient to move a constant man,"¹² and that the feoffees must suffer the canonical penalties for failing to carry out their duty.¹³

Seventy-five years later, at Rochester, the feoffees to uses appointed by Robert Wode appeared as defendants before the consistory court. Wode had declared in his nuncupative will that he wished his feoffees to hold his lands and tenements for the use of his son until the son reached the age of 21, then to convey to the son. If the son died before that age they were to sell the land and to apply a designated part of the proceeds to his widow and the rest "in the best manner to benefit the health of [Wode's] soul and to please God."¹⁴ Remainders, even contingent remainders, were no strangers to the ecclesiastical officials when created in connection with a use. The cestui que use who held such an interest evidently had a right in the Church courts to enforce it against the feoffees.

The Basis of Jurisdiction Under the Canon Law

What justification in law can be given for the existence of such cases in the records of the Church courts? The records themselves articulate no reasons, but it is clear as an initial matter that no "special factors" can

11. *Ex officio* c. Smyth & Holyngbroke, Canterbury Act book Y.1.1, f. 94v (Diocesan Archives, Canterbury Cathedral Library. All subsequent references to Canterbury manuscript material refer to this archive repository.). A full list of Canterbury Act books is found in B. WOODCOCK, *supra* note 8, at 140.

12. This was the standard test of the canon law. 2 CORPUS JURIS CANONICI, col. 220 [X 1.40.4] (A. Friedberg ed. 1879).

13. They were excommunicated. What action they had to take to have the sentence lifted, and whether or not they took it, unfortunately does not appear in the surviving records.

14. Rochester Act book DRb Pa 2, f. 214r (1453) (Kent County Archives, Maidstone. All subsequent references to Rochester material refer to this archive repository.). The actual entry reads: "Thomas Filpot et Willelmus Barker feoffati existunt usque ad etatem filii sui xx annorum et quod tunc remaneat heredibus suis et si contingat heredes suos obire infra etatem predictam quod tunc terras et tenementa venderent et dicta Johanna habeat inde x marcas et quod residuum disponatur per eosdem feoffatores et executores suos meliori modo quo viderint anime sue salutem proficere et deo complacere." ("Thomas Filpot and William Barker are enfeoffed until the twentieth year of his son, and then the lands are to remain to his heirs; but, if it should happen that his heirs die before the aforesaid age, then they should sell the lands and tenements and the said Joan should have ten marks therefrom and the residue should be disposed of by the same feoffees and executors in the best manner that shall appear to profit his soul and to please God.")

explain their presence. The feoffees in the two cases above, for example, were laymen. Clerical status of the defendants could therefore not have been the reason for the Church's jurisdiction.¹⁵ Nor can the land involved in such cases have been held by burgage tenure, which might have come under the Church's probate jurisdiction because it was devisable by custom.¹⁶ Medieval boroughs were small in area, and in many cases too much land was involved for this exception to have given jurisdiction.¹⁷ Moreover, where the scribe noted the parish of the feoffor, it was often a rural parish.¹⁸

Nor can leasehold, which was for many purposes treated as a chattel interest and was therefore subject to the Church's testamentary jurisdiction, offer a good explanation for the presence of these cases in the court records.¹⁹ The cases involving uses never mentioned the existence of a lease. A direction that the feoffee should sell the land in certain circumstances was mentioned often enough that the feoffor's interest must have been a fee. Furthermore, had the land involved in the cases been devisable in the first place it is hard to see why a feoffment to uses would have been necessary at all.²⁰ Therefore, the cases found in the remaining records must have been just what they seem: disputes over quite ordinary uses. They were not special cases in which the English common law conceded jurisdiction to the Church.

On the other hand, the surviving cases suggest one limitation on the Church's jurisdiction. The cases found in the records all dealt with a use established by someone who was dead at the time of the suit. In none was a living feoffor seeking to enforce a use against his feoffees. Of course, too many records have disappeared over the course of centuries to permit a categorical assertion that the Church courts never enforced a use where the feoffor was still alive. Theoretically, such a suit was possible under the canon law, which claimed jurisdiction over obligations undertaken under oath.²¹ Because feoffees often swore formally to fulfil the grantor's directions as part of the original enfeoffment, it would have been possible for

15. This has been suggested as a possible source of jurisdiction over some uses. See J.M.W. BEAN, *supra* note 1, at 154; Barton, *supra* note 6, at 566.

16. Burgage tenure was the tenure by which most land in ancient boroughs or towns was held. It was subject to many local customs, one of the most frequent of which was devisability. The right was not, however, unlimited or everywhere in effect. See M. BATESON, *Introduction to 2 BOROUGH CUSTOMS* (21 Selden Soc. xcii 1906); M. HEMMEON, *BURGAGE TENURE IN MEDIAEVAL ENGLAND 130-44* (1914).

17. See, e.g., Luke c. Austyn, Canterbury Act book Y.1.3, f.20 (1416), in which three virgates of woodland (*tres virgate bosci*) was the subject of a suit in the Church court.

18. E.g., Canterbury Act book Y.1.3, f. 62v (1418) (the decedent-feoffor had lived in Reculver); *Ex officio* c. Symond, Rochester Act book DRb Pa 3, f. 337v (1457) (the decedent-feoffor had lived in Hadlow). Neither is listed as a borough in M. BERESFORD & H. FINBERG, *ENGLISH MEDIAEVAL BOROUGHES: A HAND-LIST 128-31* (1973).

19. See A. SIMPSON, *supra* note 3, at 131.

20. This point was made long ago by William Somner in *A TREATISE OF GAVELKIND 152-53* (1726).

21. See Esmain, *Le serment promissoire dans le droit canonique*, 12 *REVUE HISTORIQUE DE DROIT FRANCAIS ET ETRANGER* 248 (3d serv. 1888); Helmholz, *Assumpsit and Fidei Laesio*, 91 *L.Q. REV.* 406 (1975).

a living feoffor to have sued them before an ecclesiastical tribunal. However, if the surviving records are representative, this did not happen. The cases that appeared before the Church courts all involved probate jurisdiction, either directly or indirectly.

This limitation indicates the reasons for and the nature of ecclesiastical intervention. As is well known, the English Church exercised probate jurisdiction throughout the Middle Ages, and even afterwards. One of the responsibilities attendant upon that jurisdiction, in the eyes of the men who exercised it, was the duty to secure a person's final wishes.²² Since testators frequently put instructions to feoffees into their last will and testament, documents involving uses of land inevitably came before the ecclesiastical courts. Although a strict separation between land and movables could have been made, the medieval Church regarded such a division as artificial; it sought to enforce all of the decedent's final wishes where it could.²³ The enforcement of uses, according to this view, seemed a legitimate part of the Church's probate responsibility. Where the feoffees were not carrying out the feoffor's instructions, they became in effect "impeders" of the decedent's will,²⁴ and so the court records style them.²⁵

There was a second reason favoring intervention where the feoffor was dead. A principle of canon law held that the courts of the Church should provide justice whenever secular law was inadequate.²⁶ Although the English Church courts did not always act on this potentially sweeping principle, they did not ignore it completely. A living feoffor normally had a remedy at common law: he could enter for breach of the condition.²⁷ The cestui que use, however, could not, and since after the death of the original feoffor he alone would have any incentive to complain, there was no other

22. The most useful account of the functioning of the probate jurisdiction of the Church court is still H. SWINBURNE, *TREATISE OF TESTAMENTS AND LAST WILLS* (1st ed. 1590-1591). The growth and history prior to 1300 is well covered in M. SHEEHAN, *THE WILL IN MEDIEVAL ENGLAND* (1963). See also R. GOFFIN, *THE TESTAMENTARY EXECUTOR IN ENGLAND AND ELSEWHERE* (1901).

23. See *REGISTRUM JOHANNIS DE PONTISSARA, EPISCOPI WYNTONIENSIS 773* (19 Surrey Record Soc., C. Deedes ed. 1923): "una et indivisa esse debeat finalis expeditio testamenti" ("the implementation of the testament should be one and undivided"). See also Jacob, *The Archbishop's Testamentary Jurisdiction*, in *MEDIAEVAL RECORDS OF THE ARCHBISHOP OF CANTERBURY* 35, 47 (1962).

24. See Archbishop Stratford's Provincial Constitution *Caeterum contingit interdum* (1343), given in W. LYNDWOOD, *PROVINCIALE (SEU CONSTITUTIONES ANGLIAE) 171-79* (1679). Lyndwood's gloss, at 169 s.v. *residuis*, cites approvingly the opinion of the Continental canonists Hostiensis and Innocent IV, "qui dicunt, quod quaelibet voluntas testatoris rationabilis dici potest pia, et servari debet" ("who say that any sort of rational will of the testator can be called pious and should be complied with").

25. E.g., *Ex officio* c. Smyth & Holyngbroke, *supra* note 11, in which the defendants were held to have incurred "sententiam maioris excommunicationis a sanctis patribus contra impediendes ultimas voluntates decedentium in hac parte latam" ("the sentence of major excommunication imposed by the holy fathers against impeders of the last wills of decedents in this regard").

26. 2 *CORPUS JURIS CANONICI*, cols. 250-51 [X 1.2.10, 11]. For a modern commentary on the principle involved, see Tierney, "*Tria Quippe Distinguit Iudicia*" . . . *A Note on Innocent III's Decretal Per Venerabilem*, 37 *SPECULUM* 48 (1962).

27. See T. LITTLETON, *TREATISE OF TENURES* § 355 (1841 ed. re-issued 1978); Barton, *supra* note 6, at 566.

way in which the use could be enforced prior to the rise of the Chancellor's jurisdiction. Because of this gap in secular remedies, enforcement of uses by the Church as part of its probate jurisdiction fit neatly with the canon law's injunction. Without this remedy, a decedent's final wishes would have been legally unenforceable.

Nature of the Cases Heard and Remedies Given

Most litigated cases in the surviving records seem to have dealt not with the outright dishonesty of the feoffees but with uncertainty engendered by contradictory instructions from the original feoffor. An illustrative example is a 1465 *ex officio* prosecution from Rochester. The decedent's will apparently contained directions contrary to those the feoffees had received as part of the original feoffment.²⁸ Were the first instructions binding or were they subject to change by will? The feoffees claimed that they were genuinely uncertain about what to do. A second example is a Canterbury case from 1398, where the feoffees of Thomas Manddenyle were sued by his executor. They had evidently refused to obey the testamentary direction, but they "exhibited judicially a certain condition" containing a contradictory direction.²⁹ They did not know which direction bound them, and they had refrained from acting for that reason.³⁰

A firm line between dishonesty and honest perplexity is, of course, hard to draw, particularly on the basis of record evidence. Defendants, even dishonest ones, almost always have an excuse. The devisee in one case, for instance, claimed that the original grant had been made to such uses as the feoffor should designate; the feoffees replied that it had been to such use as they themselves should select.³¹ In another case one party maintained that the land granted was to be disposed of for the soul of the grantor; the feoffees maintained that the grant had been unconditional.³² It is difficult to determine whether these were honest justifications, or only excuses. In an age when the grant of land need not have been by deed, and in which the Church courts would enforce the wishes of a dying man with no requirement of a testamentary writing, there was inevitably much room for uncertainty and disagreement. The merits of most resulting quarrels are now past

28. *Ex officio* c. Watsons, Rochester Act book DRb Pa 3, f. 506r. The feoffee claimed that the testator "non potuit disponere de ii acris in testamento eo quod ipse et socius erant feoffati ad aliud usum" ("could not dispose of the two acres in his testament because he and his companion were enfeoffed to a contrary use").

29. *Stace* c. *Frend & Godard*, Canterbury Act book Y.1.2, f. 136v: "dicti vero feoffati exhibuerunt judicialiter certam condicionem cuius quidem condicionis commissarius decrevit partibus copiam" ("the said feoffees exhibited in court a certain condition, a copy of which the Commissary decreed to the parties").

30. In neither of these two cases does the record contain a decision of the court. We cannot even know with certainty what principles of interpretation the courts used.

31. *In re* Testament of Richard Middleton, Rochester Act book DRb Pa 3, f. 481 v. (1464). One witness testified that he had heard the grantor say "quod feoffavit eos ex confidentia ad usum suum et non ad usum illorum" ("that he enfeoffed them out of trust to his [own] use and not to their use"). The feoffees maintained the opposite.

32. *Herford* c. *Fen*, Canterbury Act book Y.1.4, f. 107v (1423).

untangling. But while one may admit existence of the problem of dishonesty among feoffees, the evidence suggests that disputed cases stemmed from lack of clarity more than from conscious impeding of a decedent's declared wishes. The Church provided a necessary forum for the interpretation of contradictory directions.³³

Once the directions had been determined, the remedy normally available in the Church court was an order against the feoffees to fulfil the terms of the feoffment. For example, in a suit brought at Canterbury in 1416 against Henry Austyn, the feoffee to uses of William Germyn, the Act book records that "the aforesaid Henry was ordered to restore the three virgates of woodland" which should have been held for the feoffor's sons.³⁴ In a Rochester case from 1438 the record reads simply that after the will and testament had been read, the feoffees "being warned in court to carry out this last will, withdrew."³⁵

The records unfortunately supply no evidence on what remedies the Church courts offered in more complicated cases, if indeed any was available. Where the feoffees had alienated the land to a purchaser, we cannot be sure whether the remedy would extend to action against the alienee. Nor is there any sign of the recovery of money damages from defaulting feoffees. So far as the records reveal, an order for specific performance was the sole remedy available. The records are likewise unclear about other complexities of the law surrounding uses. There is no evidence, for example, regarding a problem that later vexed the Court of Chancery, whether action could be taken against the heirs of the feoffees.³⁶

The records provide some, but not conclusive, evidence on other points of importance in the history of the use. Most uses were declared in favor of members of the feoffor's family, although uses in favor of religious purposes do appear, particularly where part of the land was to be sold and applied as the feoffees should determine best for the feoffor's soul.³⁷ One case from Canterbury shows incidentally that the feoffees were paid for their services.³⁸ Other cases show that there could be a continuing use established to cover chattels as well as land.³⁹ But these may

33. The situation was apparently the same later in Chancery. See, e.g., *The Case of the Sub Poena in Chancery* (1459), in *SELECT CASES IN THE EXCHEQUER CHAMBER* 173 (51 Selden Soc. 1933). See also S. MILSOM, *supra* note 9, at 183.

34. *Luke c. Austyn*, Canterbury Act book Y.1.3, f. 20: "Et monitus est dictus Henricus ad restituendum tres virgatas bosci." Evidence from this case is also found in *Deposition book X.10.1*, fols. 106-106v.

35. *Fraunceys c. Rede*, Act book DRb Pa 1, f. 49v: "Et moniti ad perficiendum ultimam voluntatem huiusmodi in iudicio recesserunt."

36. *Y.B. Pasch. 22 Edw. 4*, pl. 18 (1492); *Keilwey* 42b (pl. 6), 72 Eng. Rep. 199 (1502).

37. See, e.g., note 14 *supra*.

38. *Canterbury Deposition book X.10.1*, f. 112b (1417): One witness, Thomas Reynold, deposed that the direction had included "quod quilibet feoffatorum haberet pro labore suo xl denarios" ("that each of the feoffees should have 40d. for his labor").

39. E.g., *Comubere c. Executors of Brode*, *Canterbury Deposition book X.10.1*, f. 137v. The plaintiff there was described as "unus feoffatorum bonorum dicti Johannis Brode et supervisor bonorum suorum" ("one of the feoffees of the goods of the said John Brode, and [also] supervisor of his goods").

be isolated cases, and it is impossible to generalize from them. Unfortunately, no learned commentary on the subject exists. William Lyndwood, the only contemporary canonist who might be expected to speak about the subject because of his familiarity with English court practice, was silent.⁴⁰ Thus it is regrettably true that we must leave most questions of legal and social detail unanswered.

The Extent of Ecclesiastical Enforcement

In evaluating the evidence in the surviving records the most perplexing problem is to determine whether or not enforcement of uses was general throughout the English Church. The cases discussed in the Article some from only two dioceses, Canterbury and Rochester, both of which lie within the county of Kent. Medieval England contained seventeen dioceses, of which two others—Ely and York—have regular court records surviving from the period before the Chancellor began regularly to intervene.⁴¹ Neither seems to contain cases involving uses.

There is, however, a not insignificant possibility that this absence of York and Ely cases is simply a product of chance. Both dioceses have only partial court records surviving. York has no systematic Act books recording litigation heard before the consistory court.⁴² Ely has a single Act book, covering the years 1374-1382.⁴³ The records at Rochester and Canterbury are much fuller; both have many Act books surviving. The lack of evidence of actions brought against feoffees to uses from other English dioceses may therefore reflect no more than the accident of survival. If so, the Church courts held jurisdiction over uses, just as they did over other aspects of medieval jurisdiction that ran counter to common law rules.⁴⁴

Nevertheless, the fact that all the evidence comes from the two English dioceses that lay within the county of Kent is undeniably troublesome. The pre-eminent influence there of the archbishop of Canterbury, not only England's most powerful churchman but also a powerful secular landlord within the county, suggests at least the possibility of a special place for the Church courts in his diocese.⁴⁵ Not every man would question the rights of an archbishop who happened also to be his lord.

The existence in Kent of a special custom of inheritance, called gavelkind, also suggests a possible explanation for the predominance of cases involving uses there. Under this customary system, all male children shared

40. W. LYNDWOOD, *supra* note 24, at 166-79.

41. There is a list of most of the surviving medieval court records in R.H. HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 233-36 (1974).

42. See Donahue, *supra* note 8, at 656-57.

43. Act book EDR D/2/1, Ely diocesan archives, Cambridge University Library. There are, of course, also scattered records of judicial proceedings in Church courts, e.g., 4 *REGISTERS OF ROGER MARTIVAL, BISHOP OF SALISBURY 1315-1330* (68 *Canterbury & York Soc.* 1975) [hereinafter cited as *REG. MARTIVAL*]. In the absence of sustained records, however, it seems impossible to draw conclusions from them except as to the cases that actually appear in them.

44. See works cited in note 8 *supra*.

45. See generally F. DU BOULAY, *THE LORDSHIP OF CANTERBURY* (1966).

equally in a decedent's lands, unlike the system of primogeniture that largely prevailed elsewhere.⁴⁶ One would not initially think that gavelkind promoted feoffment to uses. Provision for equal inheritance seems to demand a feoffment to uses and subsequent division by will less than the system of primogeniture. On the other hand, the researches of Avery and Pronay have shown how prominently Kentish feoffments figured in the rise of the Chancellor's jurisdiction.⁴⁷ The later records of Chancery indicate that the feoffment to uses was particularly prevalent in Kent,⁴⁸ or at least that Chancery litigation over uses was particularly prevalent there. It may be that the uncertainty of gavelkind (*i.e.*, which child would get what land) made uses that allowed the devise of land, and disputes over them, especially common in Kent. If this is true, then one would expect uses to appear frequently in the Canterbury and Rochester records and not in the less complete records of the courts at Ely and York, not because the ecclesiastical courts there would not entertain them, but because there were fewer disputes over uses within these dioceses and because their surviving records are not abundant enough to show the smaller number of cases heard in them.

The reasons for the restriction of the existing evidence to Canterbury and Rochester, and the possibility that courts of other dioceses heard suits brought to enforce uses, are questions that must, in the end, be left open. Although matters of legitimate speculation, in the present state of research there appears to be little direct evidence one way or the other. No court records survive. It is only from the last third of the fifteenth century that court records from dioceses other than Canterbury and Rochester survive in quantities significant enough to inspire confidence in conclusions drawn from them.⁴⁹ By then, however, even the records from Canterbury and Rochester contain no cases involving feoffments to uses. The ecclesiastical jurisdiction of those courts over uses had disappeared.

Disappearance of Ecclesiastical Jurisdiction

Cases involving feoffments to uses cease to appear in the court records after the middle third of the fifteenth century. The last unambiguous example found comes from 1465,⁵⁰ and they probably had been gradually declining in numbers long before. By that date, of course, the jurisdiction of Chancery over uses had been established. If not the major proportion of the Chancellor's jurisdiction, suits involving uses were at least established

46. See 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 260-63 (5th ed. 1942); T. ROBINSON, *COMMON LAW OF KENT; OR, CUSTOMS OF GAVELKIND* (2d ed. 1858).

47. See works cited in note 4 *supra*. I am indebted to Dr. J.A. Guy for this point.

48. However, it does not appear that Professor Bean noticed any particular prevalence of Kentish uses. See J.M.W. BEAN, *supra* note 1.

49. See R.H. HELMHOLZ, *supra* note 41, at 233-35.

50. *Ex officio* c. Watson, Rochester Act book DRb Pa 3, f. 506r. The last case found at Canterbury is Glastonbury c. Newman & Newman, Canterbury Act book Y. 1.6, f. 28v (1464), although it is not entirely clear from the entry that the feoffees were being called upon to do more than produce the decedent's will.

as normal parts of Chancery business.⁵¹ The evidence of the Church court records is consistent with the natural supposition that ecclesiastical jurisdiction declined as the Chancellor's jurisdiction grew.

The Church courts put up little apparent fight to retain their jurisdiction over uses. The ecclesiastical officials were certainly capable of sustained efforts to protect jurisdictional rights they considered important,⁵² but neither the court records nor other contemporary evidence suggests that the loss created a stir of any kind. Such a graceful surrender made sense, of course, even under the Church's own law. Canon law did not consider testamentary jurisdiction to be exclusively spiritual in nature, as it did some other parts of ecclesiastical jurisdiction, marriage for example.⁵³ Lyndwood, the most famous fifteenth century English canonist, clearly directed that the secular laws on the subject of inheritance were to be deferred to.⁵⁴ The Church court records for testamentary causes unrelated to uses also show that this was not a merely theoretical injunction; the judges in practice looked to local custom and to English secular law.⁵⁵ More important, by the time the Church had lost its jurisdiction over feoffees, the Chancery regularly offered the cestui que use a remedy against a feoffee.⁵⁶ Since one of the reasons that Church courts took cognizance of uses in the first place was the lack of an adequate secular remedy,⁵⁷ there was no longer the same need for canonical intervention.

In the eyes of most contemporaries, the end of ecclesiastical intervention against feoffees to uses and the rise of the enforcement of uses by Chancery must have seemed a natural development. Although in form the Church courts merely exercised in personam jurisdiction over feoffees, title to freehold land was ultimately at issue, and the royal courts had long since declared a special interest in all disputes over freehold.⁵⁸ Extension of protection to a previously unprotected aspect of the devolution of land was therefore a natural result both of this principle and of the medieval notion that the King had a residual responsibility to do justice. The Chancery in the late Middle Ages was the court where this responsibility took concrete shape.⁵⁹

51. See the articles by Avery, *supra* note 4.

52. Helmholtz, *Writs of Prohibition and Ecclesiastical Sanctions in the English Courts Christian*, 60 MINN. L. REV. 1011, 1021-30 (1976).

53. *E.g.*, 3 HOSTIENSIS, COMMENTARIA IN LIBROS DECRETALIU 74 [at X 3.26.3, no. 7] (Venice 1581).

54. W. LYNDWOOD, *supra* note 24, at 172 s.v. *mobilibus*. See also M. SHREHAN, *supra* note 22, at 120-38.

55. See, e.g., REG. MARTIVAL, *supra* note 43, at 66 (1322), a case in which the ecclesiastical judges refused to probate a will because of possible royal interest in the decedent's chattels. They delayed "until [they] should be fully informed by experts in the law of the realm."

56. See note 4 and accompanying text *supra*.

57. See note 26 and accompanying text *supra*.

58. R. GLANVILL, TREATISE ON THE LAWS AND CUSTOMS OF THE REALM OF ENGLAND, bk. XII, c. 25 (G. Hall ed. 1965); Constitutions of Clarendon, cap. 9 (1164), in W. STUBBS, SELECT CHARTERS 165-66 (9th ed. 1921); R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 212-31 (77 Selden Soc. 1959).

59. See J. BAKER, *supra* note 3, at 84-93; J. BARTON, ROMAN LAW IN ENGLAND, 50-71, esp. 69-70 (*Ius Romanum Medii Aevi*, V 13a 1971).

Even in the eyes of ecclesiastics, the development was not necessarily cause for complaint or discouragement. No doubt the loss of jurisdiction caused some diminution in fees to the lawyers practicing in the courts at Rochester and Canterbury. But cases involving uses never formed more than a small part of the total cases heard there, and during the years when the jurisdiction over uses was disappearing any "slack" was more than taken up by the rise in ecclesiastical jurisdiction over sworn contracts.⁶⁰ Moreover, we should not exaggerate the extent of ideological disagreement between churchmen and common lawyers.⁶¹ The canon law granted primary jurisdiction over questions of feudal tenure to secular courts and, as noted above, it never held that testamentary jurisdiction was its exclusive right.⁶² Some canonists might even have seen the growth of Chancery jurisdiction in a positive light, as an affirmation of the canonical principle that in the absence of special circumstances the wishes of a dead man should be enforced by legal sanction.

Conclusion

The evolution of the enforcement of uses from ecclesiastical to Chancery jurisdiction serves as an example of the role that canon law has played in the growth and development of our common law. Modern students of legal history may regard it as part of the long continuing absorption into the secular law of remedies once available only in the courts of the Church.⁶³ The rise of the Chancellor's jurisdiction over feoffees to uses is not, therefore, the story of the creation of a legal remedy where previously there had been none. Rather it is the story of continuing enforcement in a new setting.

This understanding of the early enforcement of uses is suggested, though it is not conclusively proved, by the records at Canterbury and Rochester. It is well to re-emphasize the limited geographical scope of the evidence. But the evidence of regular ecclesiastical intervention prior to the rise of the Chancellor's jurisdiction, at the very least, makes it possible to think that the Church courts played an important role in the growth and enforcement of uses. It becomes more than the purely speculative possibility it has hitherto been.

60. B. Woodcock, *supra* note 8, at 84.

61. See Jones, *The Two Laws in England: The Later Middle Ages*, 11 J. CHURCH & STATE 111, 113-14 (1969).

62. See, e.g., the papal decretal *Per venerabilem*, 2 CORPUS JURIS CANONICI col. 714 [X 4.17.13]. Its effect limited the ecclesiastical rights to confer legitimacy of birth to spiritual matters; absent special circumstances this would not affect rights in inheritance. See also note 26 and accompanying text *supra*.

63. See generally Sheehan, *Canon Law and English Institutions*, in PROCEEDINGS OF THE SECOND INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 391 (S. Kuttner & J. Ryan eds. 1965); Bassett, *Canon Law and the Common Law*, 29 HAST. L.J. 1383 (1978).