Trust and confidence

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Journal Article

Law Quarterly Review

L.Q.R. 2009, 125(Apr), 253-287

Subject
Legal systems

Other related subjects
Trusts

Keywords
Confidentiality; Contracts; Fiduciaries; Jurisprudence; Legal history; Mutual wills; Performance

L.Q.R. 253 "THREE things are to be judged in a Court of Conscience: Covin, Accident and Breach of Confidence." One wonders why this common sentence of Chancery practitioners, related by Sir Edward Coke, [1] should refer to "breach of confidence" rather than to "breach of trust".

One also wonders why the draftsmen of the Statute of Uses felt it necessary to write "a use, confidence or trust", [2] thereby including "confidences" among the evils they meant to extirpate. Would the reference to uses and trusts not have been enough? [3]

Starting with the Gloss, the *jus commune* had developed a legal theory on "confidentia", well-known and applied throughout Europe. The thesis of this paper is that continental learning enriched English legal practice in the second half of the 15th century by providing a set of principles and rules that came to be shared and on which an original product was devised by the English: the modern law of trusts.

The *jus commune* doctrines on *confidentia* were mostly rooted out by the codes of the civil law countries; they survive in the customary law of some Spanish regions, [4] such as Navarra, [5] Aragón [6] and Cataluña, [7] and in Latin America, where the expressions "comisión de confianza", "encargo de confianza", "depósito de confianza", "fideicomiso" are current. [8]

The "confidenze" have had a long history also in Southern Italy, where they signalled assets bequeathed to an ecclesiastical body for a specific purpose. The assets were owned by that ecclesiastical body but would not merge into its general estate, so that statutes prohibiting churches ***L.Q.R. 254*** and religious bodies from receiving testamentary gifts would not apply to *confidenze.* [9]

Not much else of the *jus commune* doctrines on *confidentia* has remained alive in the civil law. [10]

1. "Affiaunce"

Between the end of the 14th and the beginning of the 15th century the earliest petitions to the Chancellor relating to matters that are today within the law of trusts made no mention of "trust". The pivotal word was "affiaunce".

The suppliants who petitioned the Chancellor shortly after 1393 stated that they had conveyed lands to a priest "pur la graunt *affiaunce* qu'ils avoient en le dit Thomas Profyt qi fuist lour confessour". [11]

A few years later a widow complained that she "enfeoffa un Robert Sturmy de Coldon sur pleine et entier *affience* qeux el avoit en sa persone et sa foialte … pur ent faire et disposer solonc l'entent et volente de l'avantdite Katerine". [12]

A young man related that he had left a coffer with his mother when he was about to set out on a pilgrimage to the Holy Land "par la graunde *affiance* q'il avoit en sa dite miere sur toutz autres". [13]

Around the same time John Greene for "la grand *affiance* et affection" enfeoffed several people to enfeoff his brother and heir after his death. [14]

"Affiance" was used in 1408 to explain why the plaintiff had allowed the defendant to collect debts owed the plaintiff. [15]

The sentence "pur l'affiance que jay en vous" is in a case of 1411. [16]

"Affiance" and the verb "afier" are attested in French from the beginning of the 12th century. [17] They covered a wide semantic area [18]: ***L.Q.R. 255*** "se fiancer" (a most important promise under Canon law), [19] "donner sa parole" but also "se confier, mettre sa confiance dans". "Affiance" comes from vulgar Latin "affidare", that encompassed the same area.

In view of the ongoing debate on loan-words from French (or Central French) to Middle English [20] and on the stress placed on Anglo-French as a third language, [21] it is relevant to show that "affiance" or "affiaunce" in England covered that same area: the relationship with God or with lords, friends or relatives is the subject of expressions like "in ##i mercy is mon affyaunce" (1390), "Myn affiaunce & my faith is ferme in ##is bilieue" (c. 1400), "Sirs, in whom I most affie" (c. 1425), "In God sall er fast affy" (c. 1450) [22]; "solemn pledge" is attested in narrative sources: "furent obliggez par serment et par autre affiaunce" [23]; "to betroth" is the meaning of "affidare" in Bracton [24] and in the earliest occurrences of "afier" found in law reports. [25]

The legal sources quoted above refer to the "affiaunce" placed in a person to do something. This meaning is current also in non-legal sources, where they often translate "confidere" or "fiducia" of Latin religious texts; for instance, in a Psalm around 1350 "Ich affie me in our Lord" corresponds to the original "In Domino confido" and "Blished ben hij, ##at afien in him" translates "confidunt" with "afien". [26] That opened the way to the substitution of "confidence" for "affiaunce".

2. "Confidence"

"Affiaunce" was connected with French legal notions but the learned *jus commune* terminology was centred on another word, that shared the same root as "affiaunce": "confidence". "Affiaunce" in legal sources died out quickly in England [27] and was replaced by "confidence" around the ***L.Q.R. 256*** middle of the 15th century. While "trust" was not yet a legal concept or category and there was no body of rules relating to trusts, the legally binding effects of confidence were recognised in the Continent and would be recognised in England as well. [28] We shall examine the two textual facets of "confidence": "confidence" by itself and the expression "trust and confidence".

The first occurrences of "confidence" by itself in the printed sources may be in two cases of 1452 and in a case of 1453 [29] which will be discussed below. In 1462 Davers J. opined that if "mon feoffee de confidence soit disseisie" a subpoena lay to compel him to sue the disseisor. [30] In 1464 the pleading of a feoffment "sur confidence" in a case of trespass before the Common Pleas elicited the comment by Moyle J: "Cest bon matter d'estre en le Chauncery, car le defendant la avera l'entent & purpose de tiel feoffement, car per conscience de cest en le Chancery home avera remedy sur l'entent de tiel feoffement, mes icy per cours del comen ley en le comen Bank ou Bank le Roy auterment est, car le feoffee avera le terre", and later: "le commen ley del terre en cel case varie de le ley de Chancery en cel point". [31]

In that same year a witness deposed before the diocesan court at Rochester that the testator "feoffavit eos ex confidentia ad usum suum et non ad usum illorum" [32]; in 1477 Serjeant Catesby argued that in a sale "chescun mitera confidence en auter" [33]; in 1478 a case arose because "un feme fist feoffment sur confidence" whilst she was a "feme sole", but then married and, "durant le coverture", expressed her will to her feoffees [34]; feoffments "sur confidence" were dealt with again in 1478 ("un tort per le commen ley, mes en conscience est auter") [35] and in cases of 1489 ("feoffees sur confidence", "feoffors sur confidence"), [36] 1490 ("feoffor sur confidence", another case of trespass) [37] and 1492, when the Chancellor, Cardinal Morton, speaking before the Chief Justices of Common Pleas and of King's Bench, stressed the remedies available only in equity: "car per feffement

sur confidence le feffor n'ad ascun remedy per Comon Ley, & uncore per conscience il ad". [38] Cases verging on *L.Q.R. 257* feoffments "sur confidence" occurred again in 1492 ("feffment in fee sur condition and confidence"), [39] twice in 1493 ("un home fuit enfeffe sur confidence" [40] and "feoffees sur confydens"), [41] twice in 1500, [42] and twice in 1502. [43]

The expression "feoffment sur confidence" became a proper term of art at the beginning of the 16th century. Already Littleton had referred to "enfeoffments sur confidence", [44] but it was Fitzherbert who aligned himself to the prevailing language of the Yearbooks and would write "feoffment sur confidence" where Statham had employed "trust". [45] Brooke's *Abridgement* would then list 64 precedents under the indexentry "Feoffees and feoffments sur use et confidence" in spite of the fact that he treated most of them as ordinary cases of uses. [46]

According to Rowe, arguing in 1522, "confidence" was required to raise a use: "Car ou un use sera est requis que sont deux choses, s. confidence et privity". [47] A use, according to Fitzherbert who was speaking from the bench in the year that the Statute of Uses was enacted, "is nothing in law, but is a confidence" [48]; in that same year Serjeant Montague argued in Lord Dacre's case that "confidence fuit a le Comon Ley". [49] In an anonymous case reported by Cary the court says: "And this confidence extendeth not only to taking of the profits, but also that the feoffees shall do acts for the good of the feoffor". [50] "Confidence" later occurred in sentences like "sur confidence de faire le jointure", [51] "the use is … no more than a confidence for the use of the land" and "feoffor sur confidence", [52] "pro confidentia et fidelitate", [53] "sur confidence al behoof le pl'", [54] "sur confidence de faire le lease", [55] "sur confidence pur levyer portions pur ses *L.Q.R. 258* children", [56] "ad procure certaine de ses amies ester infeoffe nemy a son use, mes sur confidence enter luy & ses amies, issint que il poet disposer de ceo". [57]

Chief Justice Popham opined in 1595 before all the justices of England: "uses in such sense as we now take them were not at the common law, but were invented in times of trouble, for fear, or in times of peace, by fraud"; "the confidence was at the common law, but not that we now call use". [58]

Francis Bacon, lecturing at Gray's Inn, explained that the proper word to define the many instances of uses or trusts that had by then developed was "confidence". [59] This approach had a lasting effect if in 1822 Graham J. could say: "What is in point of equity a trust? It is a confidence [60] It is interesting to note that Lord Mansfield, having to explain trusts and uses in 1759, selected a passage from Finch that read: "Qant ascun home ad ascun chose al auter use, sur confidence que auter prendera les profits, cesty que avera les profits est dit d'aver un use". [61]

3. "Trust", "Trust and Confidence"

The noun "trust" had been used at times in conjunction with "affiaunce" in non-legal sources as if the two words were synonymous [62] and when "confidence" took over from "affiaunce", "trust" attached itself to "confidence". In Middle English "trust" was a common and lay word; it needed to be prodded by a recognised legal concept. That explains both why the word "trust" on its own is found in some of the earliest petitions [63] and in Yearbooks as well as in private documents of the same period [64] and why it then tends to disappear from the Yearbooks, roughly from *L.Q.R. 259* the second half of the 15th century. [65] At that time the legal notion was usually expressed either by the word "confidence" alone, as we have just seen, or by the expression "trust and confidence", to which we shall turn now.

The expression "trust and confidence" took hold from the middle of the 15th century. It was in a petition around the middle of the century, [66] in the report of an action of deceit of 1460 ("jeo done trust and confidence a vous, si jeo suy disceive…"), [67] in a pleading of 1464 ("fist le feoffmental pl' pur trust et confidence" [68]) and in 1471 when "fuit clerement tenus" that high offices "sont grantes per le Roy a un home sur trust and confidence" [69] (the same meaning is in T. Smith's *De republica Anglorum* [70]).

"Trust and confidence" appeared in a charter by Henry VII granting lands [71] as in subsequent charters: "al eux et lour heires, sur trust & confidence". [72]

It then occurred in sentences like: "that is the trust and confidence he reposed in him to take his counsel", [73] "comme le feffor met confydens et trust", [74] "of great trust and confidence of late enfeoffed …", [75] "il avoit miz confidenz et trust", [76] "solely on confidence and trust". [77] Fitzherbert, with whom Pollard J. concurred, explained ***L.Q.R. 260*** what a use was in these words: "Et use n'est forsque trust et confidence, que le feffor met en le personne son feffee accord a son estat". [78]

"Et ilz dysoyent ouster que un use fuit ryen auter mez solement un confidence et truste etc.". [79] The final "etc." gives the idea that what followed was well known and did not have to be spelt out. "Trust and confidence" must have become a common sentence around this time (1550s).

In fact, there are many subsequent examples of "trust and confidence": "for the great trust and confidence", [80] "tout ceo conveiance fuit sur truste et confidence" (with reference to a secret trust of 1554 [81]); "upon trust and confidence" [82] ; "upon the great trust and confidence" [83] ; "upon special trust and confidence"; [84] "the lease was made in trust and confidence"; [85] "at common law a use being but a trust and confidence"; [86] "sur confidens et trust"; [87] "feoffments made upon trust and confidence"; [88] "sur confydens & trust"; [89] "sur trust & confidence que il payeroit" (to a creditor of the settlor) [90] ; "le quel fuit appel use, trust & confidence" [91] ; "who hath the use hath … only a confidence and trust" [92] ; "uses were things merely in trust and confidence". [93]

L.Q.R. 261 After the end of 16th century law reports show many other occurrences [94] ; in his *Reading on Wills* of 1623 H. Sherfield maintains that "trust and confidence" is the "true name". [95]

In an interesting recollection of his days as a practitioner, Baron Wood, delivering his judgment in *Heneage* v *Lord Viscount Andover,* said:

"Having in the early part of my legal life been much accustomed to conveyancing, I recollect that trust and confidence in conveyances are always used as synonymous terms, and in general a trust is introduced in this way, "in trust and confidence'." [96]

"Confidence" has slowly branched out all its original *jus commune* potentialities into the new domains of fiduciary relationships and of the duty of fidelity [97] and it has received important statutory recognitions, as in the Indian Trusts Act 1882, where a trust is described as "an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner …" [98] and in the Theft Act: "in breach of the confidence reposed in him". [99]

1. "Fideicommissum confidentiale" or "fiduciarium" and the lack of "commondum"

Turning to continental sources, one has to set aside the time-honoured alleged vicinity between trusts and the Roman law of *fideicommissa,* for continental Medieval law evolved a new institution, the "fideicommissum confidentiale" or "fideicommissum fiduciarium". "Confidentia" was at its root. The origin of this institution is in the gloss of Accursius to the word "fiduciarius" in D. 36.1.48 (46): "quia multum confidit de eo". Bartolus later used the same verb: "confidit de fide haeredis". [100]

L.Q.R. 262 Baldus in the 14th century saw the fiduciary as someone charged with a mission, a sort of *pia causa,* and held that he could keep nothing for himself: "Non credo quod iste Pollidius possit retinere quartam …. Nam licet nomen et ius haeredis habeat, tamen tamquam minister ad opus pietatis videtur." [101]

The word "minister", employed by Baldus, was a key-word that tied in well with the practice of testamentary executors. The Roman "institution of the heir" had fallen into desuetude in most European lands and the executors (under a variety of names, such as "commissarii", "fideicommissarii", "manufideles", "distributores") had taken its place. [102] They too, according to Durante and other 13th century writers, were *ministri.* [103] The person charged with a *fideicommissum confidentiale* or *fiduciarium* was solely an instrument of the will of the testator, a *minister* "apud quem nihil remanere debet", as the Roman Rota, a highly respected tribunal, put it in 1612. [104]

The reference by Baldus to the *quarta* was to the rule of Roman law that entitled the heir or legatee charged with a *fideicommissum* to retain one fourth of the assets before handing them over (the *quarta* was also called "Falcidia" or

"Trebellianica"). [105] Throughout continental Europe the Roman rule was applied whenever an ordinary *fideicommissum* was concerned, [106] so that one of the fundamental differences between the Roman-style *fideicommissum* and the medieval *fideicommissum confidentiale* or *fiduciarium* was that in the latter the fiduciary had to hand over to the beneficiary everything he had received. The same rule applied to executors, as was already clear in the ordinary Gloss: "Cum alicui sic relinquitur ut ministro, sicut ***L.Q.R. 263*** fit quotidie commissariis, petere non potest relictum". [107] This functional analogy between the "haeres fiduciarius" and testamentary executors found its way into English law, where executorship was characterised an "an office de trust" [108] and specifically a trust "de necessite". [109]

The fiduciary could not retain any *commodum*; possibly, a return to the very origins of the *fideicommissa,* when *fideicommissa* appealed to "pudor". [110] The Roman Rota followed the approach of the doctors and held in 1614 that "haeres fiduciarius tenetur restituere totam haereditatem una cum fructibus, non retenta pro se aliqua quarta" [111] ; French courts took the same position. [112] And, should the fiduciary die before performing the confidence, his heirs were bound to perform it. [113]

Thus, it was clear that a *ius commune* institution existed, under which the party who received something, often clouded in secrecy (hence "tacitum fideicommissum" and the French "fidéicommis tacite"), for a purpose (usually to benefit another party) had no beneficial claim on the assets he received and had to turn them over. Hence, not only "minister" but also "custos" as in the English grant made by a knight about to depart for the third Crusade (1189-92): "custos terrae et heredis mei". [114] The English knew that land given "in fidem" or "sub confidentia" was a civilian institution and that it called for appropriate language: Smith's "fiduciary ***L.Q.R. 264*** possessores" [115] echoed the expression coined by G. Budé, "possessio quaedam fiduciaria". [116]

Current expressions among the doctors and in the judgments of the Roman Rota were "testes ad probandam confidentiam", [117] "testamentum confidentiale" [118] and "haeres fiduciarius, idest institutus sub fiducia et confidentia" [119] (note here the similarity with the English expression "trust and confidence", discussed above) and at the end of the 17th century C.A. De Luca published "De confidentiali haeredis institutione", a treatise where all the authorities were put in order and many instances of *confidentia* discussed. [120]

Throughout the *jus commune* two current catch-phrases were: "Haeres fiduciarius non sentit commodum" [121] and "Haeres fiduciarius seu confidentialis dicitur potius custos et minister, quam verus haeres". The second of those sentences shows a conceptual difficulty that was already apparent in the passage by Baldus: "licet nomen et ius haeredis habeat, tamen tamquam minister ad opus pietatis videtur"; civil lawyers were never able to solve the contrast between the title ("ius haeredis") and the function ("minister"); as we shall see, the English identified a lasting solution.

The first key issue that characterised the *jus commune* institution, the lack of *commodum,* was captured by Sir John Fortescue, Chief Justice of the King's Bench, when a case arose in 1452 on a testament that devised land to the son of the testator and to three more people in fee and entitled one of the three to reap the profits of the land for the duration of his life, saying nothing as to what was to follow after his death. It was the first case to arise under a will, the closest one could get to the *heres fiduciarius*. Fortescue cut it short: either the surviving devisees denied that ***L.Q.R. 265*** it was a devise made "de confidence" or they had to release to the heir of the deceased. The other judges concurred. [122] Confidence had provided the conceptual reference that was required to decide the case: its *jus commune* rules on the lack of *commodum* entailed that the fiduciaries could not keep the land for their own profit and it mattered not, Fortescue said, whether the litigation arose from a feoffment or a devise.

It was again Fortescue who made a subpoena issuable against the heir of a feoffee sur confidence, [123] a position too lightly dismissed as befitting "anyone with a smattering of civilian learning" [124] since it ran counter to basic principles of the common law of that time, as the outburst by Hussey, C.J.K.B., in 1482 made clear. [125] On the other hand, it conformed with the civilian position, according to which the lack of *commodum* extended to the heirs of a fiduciary. [126]

The profound civil law knowledge of John Fortescue is well known. [127] In 1452 he combined the Roman and the canonical rules on the revocation of donations (ingratitude of the donee: Roman [128] ; birth of another child: canonical [129]), applied them as if they were rules of conscience and reason (they were that too) and allowed the feoffor to change the terms of the confidence. [130]

By drawing a clear dividing line between *confidentia* and other arrangements, he set a chain of events in motion that would find its terminal point in the works of Francis Bacon.

*L.Q.R. 266 2. Confidences as "a kind of contract"

Continental "confidentiae" were quite often secret confidences and so were many feoffments to uses. [131] It became a recurring theme that secrecy was attendant to fraud, to collusion [132] and to evading basic legal principles. Of "secrete intent" speaks St German's doctor, [133] followed by many other sources: statements like "un use al commencemente fuit invente al entent de faire fraude al comen ley", [134] "dona clandestina sunt semper suspiciosa", [135] "fraud and trusts are all one", [136] "uses at common law were nothing but secret confidences" [137] are but some examples of the current view, well grounded in the statutes of Richard III [138] and of Henry VIII. [139]

The same attitude prevailed in France [140] and in the Continent generally (as had been the case in ancient Rome [141]), although Cardinal De Luca, who had a remarkable experience as a practising lawyer, took a more relaxed view and identified several instances of meritorious, although secret, confidences. [142]

A secret confidence, especially when it was connected with a will, would require some sort of understanding between the testator and the person in whom he confided. Bartolus analysed that understanding, an informal agreement that was outside the realm of the law of wills. Wills required formalities and the civil law had strict rules on the role of witnesses and on their number. By contrast, obligations would arise from a variety of causes, subject to more liberal rules of evidence. Bartolus took the view that the confidence reposed by the testator in his fiduciary successor had effects similar to those of a contract: "ponere in fide haeredis, ita quod haeres promittat hoc defuncto, sapit naturam contractus". [143] That was a strong position, but subsequent doctors ***L.Q.R. 267*** followed and confirmed it. Giason del Maino at the end of the 15th century and then Mandelli and Graziani stated that the promise made by the successor to the testator had the legal strength of a contract. [144] It was not a contract and did not bind the testator (who could change his mind), but it was to be enforced as if it were a contract; its root was, as Bartolus wrote, "ponere in fide haeredis".

Bracton's notebook shows that the *laesio fidei* enforced by the *curia christianitatis* usually related to the breach of what we would today call binding engagements or "contracts". [145] The conceptual notion of "obligation" was at that time clothed in pure civilian robes [146] and canon and civil law were currently applied. [147] In one of the earliest English cases the party being charged with the "affiaunce" "iura par soun Verbum Dei lez suisditz condicions en touz poyntz de parfourmer". [148] A sworn agreement. The oath then fell into desuetude but, well before the term "use" became the controlling one, the words that appeared most frequently were "condicion" and "entente". They both designated a purpose to be achieved by the persons charged with the confidence: the "entente of the feoffement" [149] or "le covenant entre eux". [150] That would explain the reference to the action upon the case founded upon a deceit in:

"Cesti a que use per le comen ley, si lez feffez executount auter estate que il voille eux aver, action sur son cas gist vers eux pur ceo que il avoit mis confidenz et trust in eux a ceo faire et pur le disceit laction sur le caz gist." [151]

It was difficult to find room for these agreements in the common law of that time, just as it had been difficult in the *jus commune.* When Lord Nottingham wrote that "trust is a kind of contract", [152] a sentence with no ***L.Q.R. 268*** common law precedent to support it, he was subscribing to the civilian theory from Bartolus on. Its only possible legal basis was the faith reposed in the fiduciary, as is shown by a dictum of Page Wood V.C., that marks the end of an adventurous legal passage:

"Where a person, knowing that a testator in making a disposition in his favour intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust." [153]

"Upon the faith", just as in Bartolus' "ponere in fide haeredis".

3. The fiduciary as a witness

Thus, English and civilians alike looked at something that was non-testamentary, even when the basic disposition was in a will or had the nature of a will, [154] and could be vaguely shaped as an agreed obligation; both had to face problems relating to the rules of proof.

The person in whom the confidence was placed might be the only person who knew what the testator had in mind. Scaevola relates that Theopompus left assets to Pollianus to take care of Crispina's dowry and he described Pollianus in a codicil as "sciens mentem meam". [155] The Glossator Vivianus explained that Theopompus must have appointed Pollianus as the one who would reveal Theopompus' mind, [156] so that Pollianus' statement was to be taken as Theopompus' own statement: "hic voluit testator, quod potuit, sicut et si ipse iurasset". [157] Odofredus noted that a testator may make the ordinary rules concerning the lack of weight of a single witness inapplicable [158] and Bartolus stated: "et tunc dictum illius est quodammodum testimonium veritatis defuncti magis quam iudicium deponentis". [159]

The practice of leaving instructions to the fiduciary, that referred to something that only the two interested parties knew, was very old. It is ***L.Q.R. 269*** found in the Digest: "Ita fidei heredis commisit: "rogo fundum Titio des de quo te rogavi"' [160] and was a current practice in the *jus commune.* A judgment by the Roman Rota of 1614 relates to a will that had the following sentence: "I appoint Mr. Pietro Alli as my general heir, in whom I confide, and I know he will perform my mind, as he knows it" [161] (it is the same turn of phrase of Scaevola's passage: "sciens mentem meam"). There are many examples in *jus commune* sources of verbal and confidential instructions [162] and it is interesting to note that later English cases show identical dispositive structures, as appears from the following sentences: "Having a perfect confidence she will act up to those views which I have communicated to her, in the ultimate disposal of my property after her decease" [163] or "trusting that she will carry out my wishes, with which she is fully acquainted". [164]

The fiduciary is not only a "confidens persona" [165] but also a "testis", even the only one, and what he says is conclusive evidence of the intentions of the testator. [166] The Renaissance theme of the "duae personae" [167] provided the cultural foundation of this view, which was endorsed by Tartaglia and by Cardinal De Luca. As an Irish court would later put it, the testator intends "to set up after his decease, not an executor or a trustee, but as it were a second self". [168]

Once accepted that confidence was not to be governed by the rules concerning the law of wills, the evidentiary rules followed in England were those of the *jus commune*: the terms of the confidence, even a testamentary confidence, could be proved by the testimony of the fiduciary. That has remained true in modern trust law. [169]

***L.Q.R. 270** 4. The secret fiduciary. The lack of formalities*

A fiduciary may not wish to make it known that he is a fiduciary, acting for people or entities to whom the deceased could not legally bequeath anything. Hence the rule that he, if attacked by disappointed members of the deceased's family, may keep the assets if he deposes that he is not a fiduciary and that the assets are for himself alone. This rule is found in French judgments from 1580: the plaintiffs "peuvent exiger que le légataire … affirme que le legs est sérieux, qu'il ne prête pas son nom, qu'il entend en profiter, et qu'il ne le remettra point à personnes ou incapables ou indignes de recevoir des libéralités du testateur". [170]

Alternatively, when the confidence is hardly deniable but its terms appear from a document that is not a will nor a codicil the advice given by Angelo degli Ubaldi in the 14th century was to plead its invalidity (with a mind to perform it in secret): "sis cautus tu advocate haeredis, ut non confitearis absolute relictum, cum haeres convenitur, sed semper adiicias non relictum solemniter". [171]

These two lines of conduct are found in many English cases, first on trusts to perform a "superstitious use", [172] as secret devises to the Roman Catholic church or anyhow in its favour were labelled at least until 1832, [173] then on trusts that were in violation of the Statute of Frauds or the Statute of Mortmain. [174] The initial cases on Popish recusants did not go well for the defendants, either because there was evidence of the secret purpose [175] or because the defendant was naïve enough to plead that the bequest "belonged to God and his Saints". [176] In subsequent cases, mainly relating to the Statute of Frauds or the Statute of Mortmain,

defendants took the advice of Angelo degli Ubaldi: the Statute of Frauds was neatly pleaded by confidential successors in order to show that they were not *L.Q.R. 271* bound by the informal document where the true intention of the testator had been set out. [177]

Bracton knew well one of the most frequent instances involving confidence in the civil law, a device to evade the prohibition enacted by Justinian against donations between husband and wife, a rule that was current in the common law of his time:

"Item esto quod cum talis donatio directe fieri non possit a viro uxori vel a contrario, constante matrimonio, si fiat indirecte ita quod vir dederit extraneo ut extraneus statim vel post mortem suam rem datam det uxori." [178]

It is the same structure that we find in Pothier, who adds the refinement of allowing the donee to act on his understanding of what is the gift's purpose:

"Lègue lesdits biens à un ami de sa femme avec lequel il n'a aucune convention de les rendre à sa femme, et à qui il ne donne de son vivant aucune connoissance de ce legs, dans la confiance qu'il a que ce légataire devinera facilement l'intention qu'il a eue en faisant ce legs." [179]

That was exactly what happened in England: the testator relied on his successor to understand the religious purpose of his devise, so that the successor could either deny the existence of a secret confidence or demur, thus keeping the assets bequeathed to him (and apply them to the religious purpose). [180]

The opposite case of a successor who pleads the lack of formalities in order not to perform an informal confidence was a subject-matter that Justinian had addressed: if the successor "ad legis suptilitatem decurrat", "omnimodo cogendus est solvere". [181] "An dicat "Non potes petere, quia minus solempne': in quo casu cogitur, ut hic", commented Bulgarus. [182] In the words of Bartolus, "quando testator noluit solemniter testari, sed confidit de fide haeredis, haeres tenetur ad prestationem illius legati civiliter et naturaliter". [183] Baldus too opined that the successor was bound *L.Q.R. 272* to perform the intention of the testator, although it was not in his will, "quando habet plenam et veram scientiam oneris, quod dicitur iniuntum fidei suae". [184]

That was precisely the position taken by Chancery judges: the lack of the required formalities cannot be pleaded by a successor even if the understanding between him and the testator contravened the Statute of Frauds or the Statute of Wills, for otherwise there would be a fraud. [185] In the same vein Baldus had spoken of a defence that was required "propter dolum et mendacium" of the party who sheltered behind the lack of legal formalities. [186]

Subsequent civilian doctors retracted into the domain of conscience and, not having a Court of Conscience at hand, into legal irrelevance. Thus Francesco Mantica [187] and later Sigismondo Scaccia. [188]

5. Impossibility of performance

The performance of the confidence, secret or otherwise, may sometimes become impossible because events occur that the testator had not taken into consideration. Such was the case submitted to the Catalan jurist James Cancér in the second half of the 16th century with reference to a will under which the testator had appointed his uncle Paolo to transfer all the testator's assets to the child that his wife was about to deliver "per lo que de el tinct molta confiansa". The testator died immediately afterwards and his wife had a miscarriage; "Testator putavit posthumum nasciturum et sic in casu non nativitatis nihil providit". Cancér held that the will embodied a fiduciary disposition. It followed that Paolo could not retain anything for himself and the estate had to go to the heir at law of the testator. [189] because of the great trust that he had in him."

Cancér's opinion was approved by Torre in the following century [190] and formed the basis of C.A. De Luca's position with respect to a confidential will in favour of an outlaw:

L.Q.R. 273 "In secundo casu, quo fiduciarius sit haeres institutus, tunc secuto casu quod haeres fiduciarius restitutionem facere non possit ob incapacitatem et impedimentum banni, non remanent bona penes nudum ministrum, sed transferunt in alium vocatum et in defectum ad alios haeredes ab intestato ipsius testatoris." [191]

The same legal issue came up for decision by the King's Bench in 1619 with reference to an inter vivos conveyance made by King Henry VII, with the intention that the feoffee reconvey the land to a third party. The words "trust and confidence" in the charter raise a use, so that, an impossibility to grant over having arisen, "le feoffor avera tout l'estate arrere … car ne fuit son intent que son feoffee prendera riens". [192] Today we would speak of a resulting trust and perhaps of "non-beneficial transfers". [193]

6. The "Fideicommissum purum" and the "debitum in praesenti solvendum in futurum"

Should the person to whom the successor is meant to deliver the assets die before the day appointed for the execution of the confidence in his favour, the question arises whether the fiduciary may keep the assets for himself.

The passage of Iavolenus in D. 36.1.48 (46) related to a "fiduciarius heres" who was to release the estate to Seius, the son of the testator "cum ad annos sedecim pervenisset" [194]; Seius died before reaching that age. The Gloss stated: "Fuit fideicommissum relictum pure, & eius petitio in certum tempus dilata", that is to say, the date for delivery attached to the execution only and was not to be taken as a condition. Thus, the beneficiary having died, the assets belonged to those who took from the deceased by law. That was also the opinion of Odofredus, Bartolus and of subsequent doctors: "Dies certae aetatis non fuit adiecta substantiae dispositionis, sed executioni". [195]

The notion of "fideicommissum relictum pure" is crucial in the Gloss, for the "fideicommissum purum" is a disposition that has to be performed immediately or at a given date in favour of a specified person and leaves no discretion in the successor [196]; "pur et simple sans condition, ou à jour **L.Q.R. 274* certain, pendant la vie de l'héritier". [197] The fiduciary is then a "nudus minister", a *jus commune* expression that Bartolus discussed at length, of which "bare trustee" is a calque. [198]

A legal issue very similar to the one discussed by Iavolenus came up in a case of 1704, where the young lady to whom a certain sum was to be given by the fiduciary under a will at the latest upon her death "or sooner if there be occasion for her better advancement and preferment" died at sixteen, the fiduciary having died eight days before the testatrix. The court ruled that the fiduciary was a bare trustee so that the sum had to go to the heirs at law of the young lady. [199] This matter came up again in 1711, when the lawyers used the expression "debitum in praesenti solvendum in futurum" and added, "with this agrees the law of the Spiritual Court". [200]

Iavolenus' passage was quoted by the Master of the Rolls in 1801 together with other Roman law sources concerning "petitio in tempus legitimae aetatis dilata" and he concluded: "This distinction has been transferred from the Civil Law to ours". [201]

7. The purposes

Leaving to one side the old arrangements "to parfourme my wille", the purposes served by confidences on both sides of the Channel were remarkably similar.

Protection from creditors is attested early in England and is one of the instances of secret trusts in the Continent; protection from political adversities and proscriptions is also found in both areas. Common were the furtherance of purposes prohibited by the law, among which was the market of ecclesiastical benefices or *confidentia simoniaca* [202]; the safeguards against prodigal children, that were identified by Menochius [203] and then became a specific instance of trust in English law; provisions for children under age or born out of wedlock; alms and other charitable or pious uses; the preservation of obedience within the family. [204]

**L.Q.R. 275* With reference to the latter purpose, one of the earliest English cases concerned a feoffment in favour of one of the daughters of the feoffor, but then "il vient a mesme le feffee et dit que cesty file que duist aver la terre ne voile estre marie par luy ne este bien governe par que il revoke son volunte & voile que l'auter file aver al dit terre apres son decease". [205] In 1675 both an English and a French case verged upon fiduciary dispositions aimed at keeping family members in obedience, [206] and the French case discussed the discretionary power of the fiduciary as to the choice of the beneficiary ("pouvoir d'élire" in French terminology), a power that appears in contemporary English [207] and Roman Rota [208] cases.

Both an English and an Italian case of the 17th century concerned persons who committed a crime after disposing of their wealth in favour of fiduciaries; the common assumption was that they had planned on not owning any asset when the punishment would fall on them. [209]

8. Mutual wills

The *jus commune* developed a theory of mutual wills that was well attested by 1769, when *Dufour v Pereira,* [210] the first English case on mutual wills, was decided by the Chancellor, Lord Camden. [211] He declared, "this case must be decided by the law of this country", for "the everlasting maxims of equity and conscience, upon which the jurisdiction of this court is built, are capacious enough, not only to comprehend this, but every other case that may happen; and that the justice of this court is co-extensive with every possible variety of human transactions". [212] However, he also ***L.Q.R. 276*** commented that "the case was so new, that the counsel were driven to resort to foreign authors, where these testaments are in use". [213]

We do not know for certain what "foreign authors" were cited by counsel but there are enough textual correspondences between the words used by Lord Camden in his judgment and *jus commune* sources to allow us to identify the civilian texts the Chancellor read and to convince us that he based his judgment on them.

Mutual wills, often in the form of joint wills, were typically a Northern European institution; by chance, the cultural milieu of the Hanoverian kings under which Lord Camden was serving. No continental writer doubted the validity of mutual wills; however, even where they were joint wills (one document only), the wills were two, so that, in principle, each of them was subject to revocation [214] in the light of the Roman law principle, accepted in England from at least 1588, that "voluntas est ambulatoria usque ad extremum vit%8A exitum" (where the reference to Ulpianus in D. 34.4.4 is obvious). [215]

The key questions related to whether one of the testators could change his will without letting the other know and to whether the survivor of the two testators could revoke his own will.

As to the former question, that was not directly in point in *Dufour v Pereira,* Lord Camden referred to "an authority" cited by counsel, according to which either party could change his will during the life of the other, even in secret, and commented:

"The law of these countries then must be very defective, and totally destitute of the principles of equity and good conscience: for nothing can be more barbarous, than a law, which does permit in the very text of it one man to defraud another. The equity of this court abhors the principle."

The opinion quoted to Lord Camden was one of those current on the Continent, [216] and the words the Chancellor used to distance himself from it ("this court abhors the principle") were those written by ***L.Q.R. 277*** C. van Bynkershoek "abominor hos mores". [217] Lord Camden admits that revocation by one of the testators was possible "provided the party intending it, had given notice to the other of such revocation"; that was the other continental view, propounded by several authors. Its basis was a 1591 judgment by the Parlement de Paris, hinged on the necessity of notice: "La revocation du testament mutuel qui est fait par l'un des conioncts par une declaration particuliere, ne peut etre valable, si elle n'est signifiée à l'autre, estant le defaut de signification une espece de dol". [218] Moreover, French writers had opined that a revocation by one when the other was on his death-bed would have been "frauduleuse" and that the power to revoke was to be "moderée avec équité". That was the view to which Lord Camden subscribed.

The opinion according to which revocation was not possible after the death of one of the testators hinged on the mainly Dutch notion of a common patrimony: "eorumdem patrimonio consolidato, et ad unicum patrimonium redacto" [219]; "communiter velut unam unius patrimonii massam in unum collatam". [220] That is precisely what Lord Camden says: "The property of both is put into a common fund, and every devise is the joint devise of both". [221] This, Lord Camden concludes, is a contract, and "the first that dies, carries his part of the contract into execution", thus echoing solemn French case law [222] and the prevailing continental view: "qu'il a même reçu son execution, en ce qui concerne le survivant". [223] However, continental authorities had also provided equitable reasons, such as for instance:

"Parce qu'il a une fois adhéré et que les deux volontés s'estans unies et donné la foi, il n'est pas juste que celle qui reste trompe celle qui n'est plus et renverse ce qu'elles ont estably d'un commun consentement." [224]

Mutual wills, continental authors had written, "transeunt in naturam contractus". [225] English law had not been ready to receive a contractual **L.Q.R. 278* dimension from the *jus commune* in the formative era of the law of trusts. Now it was, at least in areas free from authority, as mutual wills. [226]

1. The achievement of the English

The history of trusts has several intertwined strands and cannot be written as yet.

One strand appears when one analyses the position of a tenant in copyhold who wished to assign his holding. He had to go to his lord and surrender it to him. His tenure was thus terminated and the lord could do with the land what he pleased. However, it was customary to surrender the tenure in favour ("al ops", "ad opus") of the tenant's assignee and the tenant trusted his lord to oblige [227] although there were conflicting opinions as to the lord's freedom to do otherwise. [228]

Another strand concerns entitlements that were understood to belong not to a person but to an office, so that whoever filled that office could claim them not for himself but "ad opus"; thus, the right to damages suffered in case of trespass could be enforced by a new abbot even if it was a personal action "purceo qil est a recover damagez al ops del meason". [229]

A third strand came to the foreground because of the Franciscan friars; their "uses", certainly linked to Roman-canonical theories that just could not obtain in English law, allowed enjoyment of land or of its profits without any title under the theory of estates but also bound the friars not to use the land or its profits for ends other than their own maintenance and the necessities of their mission [230]; "in proprios usus" was actually an expression current before their arrival in England. [231] They adopted it for their own purposes.

**L.Q.R. 279* A fourth strand relates to "ad opus" or "al use" when these expressions identify the person to whose advantage certain acts or activities had to be performed, such as the person to whom books were to be delivered, [232] the passenger about to sail overseas without a "brief de passage" whose goods were kept by the local Vicar "pur saluement estre gardez al oeps du dite" passenger, [233] the infant for whom rents were put by, [234] the lady "cum qua [the defendant] commisit adulterium et eandem imprignavit", for whose benefit money was to be managed. [235]

We are no longer speaking of land nor of feoffments. Academic research has been regularly spell-bound by the feoffments to uses as the eponym instance of trusts, so that many fiduciary arrangements, such as those just referred to or else relating to leases, [236] to an "obligacion", [237] to money to be employed for the soul of the donor after his death [238] or to pay the debts of the party who had appointed the fiduciary [239] or for other specific purposes, [240] and generally to chattels, where "la propertie est change maintenant pur ceo que le limitation del use change la propertie", [241] have been treated as appendants to the basic theory. Recent scholarship has somewhat given their due to fiduciary arrangements not relating to land [242] but a single theory encompassing all areas, if one is needed, has failed to appear.

**L.Q.R. 280* Arrangements concerning chattels bring forward very clearly the fifth strand, the "contractual" one, that concerns land as well, with active duties imposed on fiduciaries. [243] The frequent occurrence of the word "entente" in the earliest cases referred to intentions and agreements that the parties meant to be binding. Examples of promises made by fiduciaries and of common understandings abound. [244]

Of a different nature are those arrangements that are made to the use of the entrusting party ("a son oeps"), of which there are many, as when the feoffees were bound to convey the land to the person to whom the feoffor would sell it. [245]

And then there is the sixth strand, among the oldest and most persisting, "to parfourme my wille", [246] that could find no support in any indigenous legal notion.

Some of the strands or sub-strands thus sounded in property (the feoffments to uses proper), while others sounded in contract or in a noman's land (the "affiance" or "confidence"). Neither of these approaches could be fruitful: the former could go no farther than to protect conditional uses [247] and certainly it was no answer to say that uses were "things collateral annexed to the person touching the land" [248] or that they were "annexed in privity to the estate of the land" [249]; the latter could not overcome the requirement of consideration and of privity. [250]

While the *jus commune* sentence "custos and minister" had juxtaposed the profiles of property and obligation, the developing English law of trusts realised that a bolder and more encompassing approach was required, that would unify those two profiles: coming from afar, confidence provided the answer. But, then, did confidence really come from afar?

Until the first quarter of the 16th century ecclesiastical courts were the current venue in matters relating to *fidei laesio* in England [251] and would apply canon law, in those times inextricably linked with the *jus commune. Confidentia* entailed promises and understandings, a common "entente" between the parties, hence a contractual strand that the doctrines of the ***L.Q.R. 281** time, in the Continent as in England, could not fit within any "contractual" theory. Bartolus' "confidit de fide haeredis" [252] referred to a *fides* given and relied upon, whose *laesio* entailed canonical sanctions and, in the Continent, legal sanctions as well.

English ecclesiastical lawyers were well at ease with *jus commune* literature. [253] Academic research is still wanting in this area and contemporary documentation is far from being satisfactory, [254] but there are enough data to detect a constant flow of literature from the Continent to England, manuscript first and then printed books, to institutions, such as college [255] and later university [256] libraries, and to private lawyers. [257] It included not only the basic Roman sources and their Glosses but *commentaria, consilia,* treatises, law reports from the Rota as well as from Spain and France, even local statutes.

When petitions relating to trusts and confidences reached the Chancellor the matter was no longer a *res integra.* [258] Therefore, it is not surprising that a bold declaration of the legal effects of the promises made by fiduciaries should be expressed in 1468 by Chancellor Stillington, bishop of Bath and Wells and a *doctor legum,* in a case that concerned a promise made *per fidem,* the wording of ecclesiastical cases. [259] While the defendant sought to have the case dismissed, alleging that it should by heard by an ecclesiastical court, the Chancellor held that it could proceed in Chancery and, by way of example, referred to trusts and uttered that famous expression "Deus est procurator futurorum". [260] We are 16 years after Fortescue's judgment [261]; at that time ecclesiastical courts regularly heard cases of *fidei laesio* and applied canon and civil law. Stillington linked trusts with promises made *per fidem*; he was trying to bring into Chancery those cases that he used to hear in his own ecclesiastical court. The legal theory in a court of conscience was bound be the same as in ***L.Q.R. 282** an ecclesiastical court; [262] Stillington says so: the common basis of the two jurisdictions is the "enfriendre del faith", where "enfriendre" is the English word for the Latin "laesio"; so that "enfriendre del faith" is the canonical "fidei laesio". When Fortescue had said "nous sumus a arguer la consciens icy et nemy la ley" [263] he had been making the same point: we shall take over the body of rules that have until now been applied in the ecclesiastical courts; that meant the *jus commune.*

The strength of "confidence" as a legal concept was made exceedingly clear in a well-known case relating to third party purchasers, when one of the pleaders addressed Chancellor Morton, another *doctor legum,* [264] with these words: "in all the cases (put) by my lord Morton LC, they are mixed with confidence, and because there is no remedy by the common law, yet on the confidence that the parties put in the others to have the things according to the covenant between them …". [265] That was the issue: "confidence" was a legal concept to which legal rules were attached; they would and did make certain English developments impossible and require others to take place. For instance, Serjeant Littleton said in 1462 that feoffees could keep the land if the party to whom they were to make estate would or could not accept it [266]; that was no longer good law once confidence, that entailed the lack of *commodum* by the fiduciary, took over. [267] The same applies to the initial English position according to which the feoffor could not enforce a use against the heirs of the feoffees. [268]

Francis Bacon styled himself "a professor of the common law" [269] but would give the civil law its due. [270] He took stock of whither judicial precedents were leading and blended obligation and property [271]: "Fides est obligatio conscientiae unius ad intentionem alterius" [272] and went on: "It is a shorter speech to say, that usus est dominium fiduciarium. Use is an ***L.Q.R. 283** ownership in trust." [273] This was approved by Lord Nottingham, who spoke of "jus fiduciarium" [274]; Sir Robert Chambers

quoted Bacon's sentence in his Oxford lectures and went on with his translation of "dominium fiduciarium": "fiduciary property". [275]

That was the achievement of the English, who gave it substance, lest it remained a purely conceptual exercise, by their unique vision of a Court of Conscience within the body politic.

2. The civil law

Behind or beneath all this was the civil law. In their famous *Supplicacion* of 1547 to Edward VI the common lawyers lamented that the decrees issued by the Court of Chancery were "moste grounded upon the Lawe Civile" and that the judges there, "being Civilians and nat learned in the Comen Lawes", would decide "according either to the saide Lawe Civile or to their owne conscience". [276]

But then, as a judge was later to admit sadly in the King's Bench: "touts pais sont govern per le civil ley". [277]

English lawyers had always known that well. The Lancastrian monarchy employed *doctores legum* in key positions and the Tudors staffed the Chancery with civilian masters [278]; their list is impressive and shows a total civilian dominance, [279] the relevance of which was reinforced by the fact that several Chancellors were University graduates in canon or civil law or both.

The King's courts and the ecclesiastical courts had found easily mutually convenient arrangements as to their respective jurisdictional spheres. [280] Attempts were made to evolve rules, especially concerning ***L.Q.R. 284** adwowsons, that would conform to canon as well as to English law, a *jus mixtum* that the King's judges knew could not come into being without the co-operation of those learned in canon law. [281] In spite of the many statements of principle to the contrary, [282] it was clear that the civil law was no enemy of the common law; that had been so even in those periods that are commonly thought to be devoid of any civil law learning, as for instance in the reign of Richard II, when civilians were called in both at the Merciless Parliament [283] and following the king's capture by the future king Henry IV in 1399. [284]

In the 15th and 16th centuries common lawyers not only showed respect to the civil lawyers (and vice versa) but would quite frequently co-operate with them, going so far as to call civilians into their courts and to seek their advice in less formal surroundings; common lawyers would regularly defer to civilians when civilian rules were to be applied, [285] just as civilian Chancellors would seek guidance from common law judges in common law matters. [286] In 1594 messengers were sent to Italian and German universities, researching "les mieux opinions de les civilians et canonistes de cel matter" [287] and opinions by continental doctors and law faculties were accepted in Admiralty. [288] Cary reports that he argued a case in 1601 together with two doctors on the meaning of the maxim "fraus non est ***L.Q.R. 285** fallere fallentem". [289] Shortly afterward the Attorney-General referred to the common law and the civil law as "brethren". [290]

Little wonder that this was so, since most of the Englishmen's lives--birth, marriage, probate, defamation, adultery and incest, tithes, succession to personal property, legitimacy, maritime matters, breach of faith, contracts made abroad, military matters--was governed by or also by the civil law via the ecclesiastical courts or the court of Admiralty or the Court of the Constable and Marshall and since all the new jurisdictions--Star Chamber, Court of Requests, Court of Augmentation, Court of Wards and Liveries, Council of the North, Council of the Marshes, [291] not to mention the University jurisdictions and the Equity side of the Exchequer, where common lawyers had no difficulty in applying romano-canonical rules of procedure and evidence [292] -- followed civil law procedure if not substantive civil law itself (at times somewhat anglicised). In most of those courts common lawyers would mix with civilians just as doctors of civil law were at times admitted to the Inns of Court. [293]

The Renaissance, that is, when the Chancellor took the relay from ecclesiastical courts in matters of confidence, lowered any fences that had previously been raised [294]; "leur ley", never truly a sign of aloofness, [295] came to share that feeling of commonalty that had emerged in philosophy and literature. That feeling of commonalty made it easier to appropriate solutions from "leur ley" with a view to improving the common law. In order to do so, one did not have to be a doctor of civil law, just an ordinary plain-reasoning common lawyer in keeping with his age, [296] who, coming into contact with a particular segment of the civil law, would find a solution appealing to him and apt to satisfy the current needs of society. Such occasions were not wanting.

L.Q.R. 286 It was that feeling of commonalty, as a consequence of which boundaries became blurred, that allowed Serjeant Vavisour to state that a wife's apparel "est appelle en nostre ley paraphernalia" [297] or Fortescue to blend Roman and canon law rules [298] or Serjeant Keble to describe a known civilian rule as originating "in conscience" [299] or Bracton to came back as an authoritative source. [300] Latin sentences taken from civil law sources were now labelled as such; for instance, "in le Civil Ley est dit, Communis error facit ius" [301] and theories that clearly belonged to canon or civil law were adopted without any difficulty, such as the distinction between *malum in se* and *malum prohibitum* [302] or the maxim "iudex secundum alligata et probata non secundum conscientiam iudicat" [303] or the prevailing civilian theory on impossible conditions. [304]

There has been much debate on a wrong issue since Maitland expressed his view on a possible takeover by the civil law in the 16th century, as did other writers for the reign of James I. That could not have been, for no civil law *system* ever existed in Europe after the demise of the Western Roman empire. There was a civil law *method,* actually there were more than one, and a civilian *attitude* to the solution of legal issues; and there were civilian *principles* and *rules,* some of which appealed to common lawyers, as had [305] and will for centuries. [306] It was no longer Roman law, even less Imperial law. [307] It was a unique blend of canon law, often de facto adapted to local customs [308] or simply updated for lack of ancient sources, [309] revised Roman law doctrines, brought to the knowledge of the legal community through the practice of the canon law, the rulings of the highest continental courts, the opinions by doctors: in short, the *jus* ***L.Q.R. 287*** *commune.* Much of this shared only the faintest background with Roman law and such was the case of *confidentia.*

This article has attemped to show a common identity of principles and rules between the *jus commune* on "confidentia" and the early English law of trusts and confidences. While one may be unable to detect the channels along which continental learning flowed into English legal practice, [310] I would submit that it did.

MAURIZIO LUPOI.

Footnotes

1 E. Coke, *The Fourth Part of the Institutes of the Laws of England,* 5th edn (1681), at p.84; see also Lord Nottingham's *Prolegomena of Chancery and Equity* (D.E.C. Yale edn, 1965), at p.191. Slightly different versions exist, such as: "Three things are to be helpt in Conscience/Fraud, and accident, and things of confidence": see M. Macnair, "Equity and Conscience" (2007) 27 O.J.L.S. 659 at 677.

2 "Where any person or persons stand to be seized, or at any time hereafter shall happen to be seized, of any lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons": Statute of Uses 1535 s.1. See also Statute of Frauds 1677 s.8.

3 See also Statute of Frauds s.VIII: "Provided alwayes That where any Conveyance shall bee made of any Lands or Tenements by which a Trust or Confidence shall or may arise …".

4 For the history of Spanish law on this subject see S. Cámara Lapuente, *La fiducia sucesoria secreta* (1996); A. Iglesia Ferreirós, "Fides, heres fiduciarius, helemosinarii, marmesores. Historia del derecho y derecho comparado" (2003) *Trusts e attività fiduciarie* 5.

5 "herederos de confianza": Ley 289-295 of Law 1/1973 of March 1, 1973 (Fuero nuevo o compilación del derecho civil foral de Navarra).

6 "De la fiducia sucesoria": arts 124 et seq. of the Law of February 24, 1999, n.1.

7 "El testador podrá instituir o designar herederos o legatarios de confianza a personas individuales para que den a los bienes el destino que les haya encomendado confidencialmente, de palabra o por escreto": arts 150 et seq. of Law 40/1991 of December 30, 1991, n.40.

8 S. Rodríguez Azuero, *Negocios fiduciarios* (2005).

9 Court of cassation of Rome, May 5, 1897, (2007) *Trusts e attività fiduciarie* 456.

10 It is arguable that "confidentiae" still have a place in the civil law; in addition to the Italian judgment of 1897, see the judgment by the Spanish Tribunal Supremo, October 30, 1944, No.1180, (2007) *Trusts e attività fiduciarie* 277.

11 *Godwyne v Profyt* (> 1393), Select Cases in Chancery (W.P. Baildon ed., 1896, SS 10) (hereafter Select Cases in Chancery) No.45.

12 *Byngeley v Sturmy,* Select Cases in Chancery, No.99.

13 *Johan Harleston,* petition (1413-17), Select Cases in Chancery, No.116.

14 Unpublished petition that M.E. Avery, "The History of the Equitable Jurisdiction of Chancery before 1460" (1969) 42 *Bulletin of the Institute of Historical Research* 129 at 140 dates to 1406-07 or 1417-24.

15 *Dent v Gernon* (1408) Select Cases in Chancery, No.95.

16 Y.B. Mich. 13 Hen 4 pl. 4, per Thirning, C.J. C.P.

17 "Affidare" is found in England in writs of Henry I and of Stephen relating to monasteries and abbeys: *Placita Anglo-normannica* (M.M. Bigelow ed., 1879), pp.88 and 149, perhaps referring to sworn statements.

18 What follows relies on "Le trésor de la langue française informatisé" at *http://atilf.atilf.fr/tlf.htm* [Accessed January 22, 2009].

19 The writ *causa matrimonii praelocuti* was probably a lay version of canonical rules; in Lord Dacre's case it was taken as an instance of "confidence" by Serjeant Montague: (1535) Y.B. Pasch. 27 Hen 8 pl. 22, fol. 10.

20 See W. Rothwell, "Arrivals and Departures: the Adoption of French Terminology into Middle English" (1998) 79 *English Studies* 144.

21 See W. Rothwell, "The Missing Link in English Etymology: Anglo-French" (1991) 60 *Medium Aevum* 173.

22 *Middle English Dictionary,* sv "affiaunce", sv "affien".

23 *Chronique de London* (G.J. Aungier ed., 1844), at p.32: "Et mesme l'an l'esvesqe de seint Andreu, sire Robert le Brus, le counte de Carrik, et touz les autres barounes d'Escoce, furent oblygez par serment et par autre affiaunce à Weimouster, qe jammès ne mesprendrent vers Engeltere …".

24 Bracton, *De legibus et consuetudinibus Angliae* (G.E. Woodbine ed.; transl. by S. E. Thorne, 1968), fo. 29: "postquam eam affidaverat".

25 "ou un homme affie un femme" ("affiaunce" in another ms.): *Thornsett v Whaite* (1311) Y.B. Hil. 5 Edw 2 pl. 9, Year Books of Edward II, 5 Edward II (W. C. Bolland ed., 1915, SS 31), at p.38; "par cele affiaunce": *Blaket v Loveday* (1312) Y.B. Trin. 5 Edw 2 pl. 21, Year Books of Edward II, 5 Edward II (W. C. Bolland ed., 1916, SS 33), at p.211; same meaning in (1369) Y.B. Hil. 43 Edw 3 pl. 26; (1409) Y.B. Mich. 11 Hen 4 pl. 30.

26 Middle English Dictionary, sv "affien".

27 Other than when it meant "betrothal'; see Y.B. Trin. 11 Hen 6 pl. 2 (1433): "per verba de praesenti insimul affiere"; (1440) Y.B. Hil. 18 Hen 6 pl. 3; (1468) Y.B. Pasc. 8 Edw 4 pl. 11: "si jeo promise et affie un feme de lui espouser"; (1495) Y.B. Hil. 10 Hen 7 pl. 2.

28 A clear statement to this effect is in P.Vinogradoff, "Reason and Conscience in Sixteenth-century Jurisprudence" (1908) 24 L.Q.R. 373 at 381.

29 Fitzherbert, *La Graunde Abridgement* (1514), "Devise", 22 and "Sub pena", 23 and 19.

30 (1462) Y.B. Pasch. 2 Edw 4 pl. 6 (fol. 2).

31 (1464) Y.B. Pasc. 4 Edw 4 pl. 9 (A.K.R. Kiralfy, *A Source Book of English Law* (1957), at p.260, in modern English).

32 R.H. Helmholz, "The Early Enforcement of Uses" (1979) 79 *Columbia Law Review* 1503, fn.31.

33 (1477) Y.B. Pasc. 17 Edw 4 pl. 2.

34 (1478) Y.B. Mich.18 Edw 4 pl. 4.

35 (1478) Y.B. Mich.18 Edw 4 pl. 29 (sale of trees made by the feoffor without a licence by the feoffee).

36 (1489) Y.B. Mich. 5 Hen 7 pl. 11.

37 (1490) Y.B. Hil. 5 Hen 7 pl. 3

38 (1492) Y.B. Pasc. 7 Hen 7 pl. 2.

39 (1492) Y.B. Mich. 8 Hen 7 pl. 4.

40 (1493) Y.B. Pasc. 8 Hen 7 pl. 3.

41 *Sygemond v Spenser* (1493) Caryll's Reports, *Reports of cases by John Caryll* (J.H. Baker ed., 1999, SS 115) (hereafter Caryll's Reports) 132.

42 (1500) Y.B. Trin.15 Hen 7 pl. 22 ("enfeffa sur confidence", "feffees sur confidence", "confidence mise en eux") and pl. 23 ("feffor sur confidence", "feffees sur confidence", "feffment sur confidence").

43 *Dod v Chyttynden* (1502) Caryll's Reports, 407 ("feoffees sur confidence"); *Anon* (1502) Keilway 42, pl. 7 ("feoffee sur confidence").

44 Littleton *on Tenures,* l. III, § 464.

45 Compare Fitzherbert, *La Graunde Abridgement* (1514), "Devise", 22 with Statham, *Abridgment* (about 1490), "Devise", 8 (Y.B. Trin. 30 Hen 6); Fitzherbert "Sub pena", 19 with Statham "Sub pena", 1 (Y.B. Mich. 31 Hen 6); Fitzherbert "Sub pena", 23 with Statham "Conscience", 1 (Y.B. Mich. 31 Hen 6).

46 R. Brooke, *La Graunde Abridgement* (1576).

47 (1522) Y.B. Mich.14 Hen 8 pl. 5 (*Gervys v Cooke,* Yearbooks of Henry VIII (J.H. Baker ed., 2002, SS 119) 108 at 111).

48 *Abbot of Bury* v *Bokenham* (1535) 1 Dyer 7b at 12a.

49 (1535) Y.B. Pasch. 27 Hen 8 pl. 22 (fol. 10).

50 *Anon* Cary 10.

51 *Anon* (1561) Moore (KB) No.91.

52 *Dalamere v Barnard* (1567) 1 Plowd. 346 at 352.

53 In a charter of 1574, related in *Ughtred's case* (1591) 7 Co. Rep. 9b.

54 *La Dame Burgs case* (1599) Moore (KB) 602.

55 *Griffith v Smith* (1604) Moore (KB) No.1040 at 754.

56 *German v Rislay* (1616) W. Jones 418 at 419.

57 *Le Grand Case in le Court Gards* (1622) 2 Rolle 294 at 296, relating a case where a custom collector, being indebted to the King, had hidden his wealth.

58 *Chudleigh's case* (1589-95) 1 Co. Rep. 120a at 139b-140a.

59 F. Bacon, "Reading upon the Statute of Uses", in *Works of Francis Bacon* (J. Spedding, R.L. Ellis and D.D. Heath eds., 1859), VII, 400.

60 *Heneage v Lord Viscount Andover* (1822) 10 Price 230 at 282.

61 *Attorney-General v Wheate* (1759) 1 Eden 177 at 226, at 248.

62 Occurrences of this can be found in *Middle English Dictionary,* sv "affiaunce".

63 See *An Anthology of Chancery English* (1984) sv "trust"; the petition to the Chancellor by Henry Beaufort, bishop of Winchester, on behalf of one of his tenants is of interest: "enfeoffed of trust". See also (early Henry VI) Select Cases in Chancery, No.135: "enfeoffed … for trust and socour"; (1438) *Bowre v Fokes,* Kiralfy, *A Source Book of English Law* (1957), at p.281: "enfeoffed upon trust"; (1441) *Rous v FitzGeffrey,* Select Cases in Chancery, No.138: "enfeoffed … upon trust"; *Brigge v Brigge* (1442) Select Cases in Chancery, No.136: "upon tryst to perform his will"; *Chamberleyn v Kirkton,* dated by Kiralfy late Henry VI (at p.263): "enfeoffed … upon special trust".

64 See, e.g. the "testamentum" of Thomas Walwayn (1415): "Of this testament I make & ordeyne myn Executours … that they trewly ffulfille my last wille as I trust in them": *Fifty earliest English wills in the Court of Probate, London: A. D. 1387-1439* (F.J Furnivall ed., 1964), leaf 253; or the will of William, seventh baron Lovel of Tichmarsh (1454-55): "the which I haue enfeoffed vppon grete truste"; "haue enfeoffed, vppon grete faith and truste,": *Lincoln diocese documents,* 1450-1544 (A. Clark ed., 1914), VIII.

65 I have found the following occurrences of the word "trust" by itself in the Yearbooks of this latter period: "feoffments de trust": (1465) Y.B. Mich. 5 Edw 4 pl. 16; "si jeo enfeoffe un home en trust": (1468) Y.B. Pasch. 8 Edw 4 pl. 10; "feoffee de trust" (1471) Y.B. Trin. 11 Edw 4 pl. 13; (1482) Y.B. 22 Pasch. Edw 4 pl. 18; (1522) Y.B. Mich. 24 Hen 8 pl. 2.

66 *Chamberleyn v Kirkton* (late Henry VI), Kiralfy, *A Source Book of English Law* (1957), at p.263 in modern English): "for the great Confidence and Trust that they had in …".

67 (1460) Y.B. Trin. 1 Edw 4 pl. 10 (J.H. Baker and S.F.C. Milsom, *Sources of English Legal History. Private Law to 1750* (1986), at p.511 in modern English).

68 (1464) Y.B. Pasc. 4 Edw 4 pl. 9.

69 Y.B. Trin. 11 Edw 4 pl. 1.

70 T. Smith, *De republica Anglorum* (1565, first published in 1583), l. II, ch. 18: "Leete or law day is not incident to everie mannor, but to those onely which by special graunt, or long prescription have such libertie. This was as may appeare first a speciall trust and confidence and commission given to a fewe put in trust by the Prince".

71 "Jeo grant al Thomas Lovell & ses heires al intent & sur confidence & trust que …"; the text of the charter is reported in *Treswallen v Penhules* (1619) 2 Rolle 66.

72 "al eux et lour heires, sur trust & confidence q ils estoyeront seisy al mesmes les uses limit al Sir Edw[ard] Clere & sa feme": *Gibons v Marltiward* (1592) Moore 594; see also *Wildegose v Wayland* (1596) in Baker and Milsom, *Sources of English Legal History* (1986), at p.125. "Trust and confidence" had by then entered the current conveyancing jargon: see the text accompanying fn.96 below.

73 *Oliver v Emsonne* (1514) 1 Dyer 1b at 2a.

74 (1522) Y.B. Mich. 14 Hen 8 pl. 5 (*Gervys v Cooke,* Yearbooks of Henry VIII (J.H. Baker ed., 2002, SS 119) 108 at 111) fol. 8, per Broke J.

75 *Rede v Gill* (1515), Kiralfy, *A Source Book of English Law* (1957), at p.281.

76 *Anon* (1531) W. Yelverton, *Notebook,* in *Reports of cases from the time of King Henry VIII* (J.H. Baker ed., 2004, SS 121) (hereafter Yelverton's *Notebook*), p.296 at p.297.

77 Th. Audley, "Reading on Uses" (1526), in Baker and Milsom, *Sources of English Legal History* (1986), at pp.103-104.

78 (1522) Y.B. Mich. 14 Hen 8 pl. 5 (*Gervys v Cooke,* Yearbooks of Henry VIII (J.H. Baker ed., 2002, SS 119) 108 at 111) fol. 7.

79 *Anon* (1549), Yelverton's *Notebook,* at p.347.

80 *Byllyngesley v Barons* (1548/49), N. Jones, "Trusts in England after the Statute of Uses: A View from the 16th Century" in R. Helmholz and R. Zimmermann (eds), *Itinera fiduciae* (1998), at p.180.

81 The report of this case was published by J.H. Baker "The Use Upon a Use in Equity" (1977) 93 L.Q.R. 33; it is now in *Cases concerning Equity and the Courts of Equity* (W.H. Bryson ed., 2001, SS 117) 93, under the name *Bartie v Herenden.*

82 *Hodges v Payne* (1561), Jones, "Trusts in England after the Statute of Uses" (1998), p.173 at p.179.

83 *Jones v Mustyn* (1566), Jones, "Trusts in England after the Statute of Uses" (1998), at p.193.

84 *Sharpe v Hill* (1568), Jones, "Trusts in England after the Statute of Uses" (1998), at p.192; *Josselyn v Luson* (1548/49), Jones, "Trusts in England after the Statute of Uses" (1998), at p.179.

85 *Rooke v Staples* (1577), Jones, "Trusts in England after the Statute of Uses" (1998), at p.197.

86 *Wolf v Shelley* (1581) 1 Co. Rep. 93b at 101b.

87 *Paget's case* (1590) 1 Anderson 259.

88 *Porter's case. Attorney-General v Porter* (1592) 1 Co. Rep. 22b.

89 *Paget's case* (1592) 1 Anderson 259 at 260.

90 *Worleys case* (1594) Moore (K.B.) 725.

91 *Le Seignior Buckhursts case* (1595) Moore (K.B.) 488.

92 *Chudleigh's case. Dillon* v *Freine* (1589-95) 1 Co. Rep. 120 a, at 121 b.

93 *Corbet's case* (1600) 1 Co. Rep. 83b.

94 For instance, in the first three decades of 16th century: *Bulleyn v Bulleyn* (1603) Goulds 134: "the words upon trust and confidence will not make a condition, by reason that the devisor had a speciall trust and confidence in the devisee"; *Croft v Jane Evetts* (1606) Moore 784: "there was no meaning the feoffees should take any thing to their own uses, but only upon trusts and confidences"; *Treswallen v Penhules* (1619) 2 Rolle 66: "trust & confidence reposed in le grantee"; *Daniel v Ubley* (1626) Jones W. 137: "si feffment fuit fait al feme sur trust & confidence a conveyer ceo al J.S."; *Baker v Lee* (1629) Jones W. 213: "il assigne son interest al 4 persons sur trust & confidence, al luy mesme pur vie, & apres a tiel uses intents & purposes, come il le declare per son darren volunt".

95 H. Sherfield, "Reading on Wills" (1623), in Baker and Milsom, *Sources of English Legal History* (1986), at pp.125-126: "there is now a bastardly use started up by the true name which the use had at first--which is "trust and confidence"'.

96 *Heneage v Lord Viscount Andover* (1822) 10 Price 230 at 295.

97 R. Flannigan, "The [Fiduciary] Duty of Fidelity" (2008) 124 L.Q.R. 274.

98 Indian Trusts Act 1882 s.3. The same sentence is in the Trusts Ordinance of Sri Lanka.

99 Theft Act 1968 s.4(2)(a).

100 *Commentaria, ad* C. 6.42.32. The spelling "haeres" instead of "heres" was common in the Middle Ages.

101 Baldo degli Ubaldi, *Commentaria in secundam Digesti Veteris partem,* ad librum XXIII Digesti, § Cum Pollidius, n.2.

102 R. Caillemer, *Origines et développement de l'exécution testamentaire* (1901); K.O. Scherner, "Formen der Treuhand im alten deutschen Recht" in Helmholz and Zimmermann (eds), *Itinera fiduciae* (1998), at

p.237; R. Zimmerman, "Heres fiduciarius?" in Helmholz and Zimmermann (eds), *Itinera fiduciae* (1998), p.267 at pp.280-286.

103 The positions of G. Durante, "De ultimarum voluntatum executoribus" in *Speculum iudiciale* and of other doctors is analysed in depth by F. Treggiari, *Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario* (2002), I, at pp.217-251.

104 Rota Romana, February 24, 1612, Romana Census 20 mil., Aureae decisiones S. Rotae Romanae coram Alexandro Ludovisio (1667), dec. 544.

105 The references are to the lex Falcidia of 40 BC and to a *senatusconsultum* of AD 56.

106 A. Gabriello, *Communes conclusiones* (1593), l. IIII, Ad Trebellianum, where the opinions of many doctors are collected; see also, with reference to different geographical areas: *Lo codi* (H. Fitting and H. Sucher eds, 1906) VI, at p.94; C. Henrys, *Recueil d'arrests remarquables donnez en la cour de parlement de Paris* (1660), t. II, l. V, quest. VI; P. Stockmans, *Decisionum curiae Brabantiae sesquicenturia* (1670), decc. 38 e 39; for later sources see N. Chorier, *La jurisprudence du célèbre conseiller et jurisconsulte Guy Pape* (1769), at pp.187-189.

107 Gloss to "ut ministrum", D. 31.17 pr.

108 "cest un office de trust le quell est comyse a eux, et ils ne poent comytter cel office as auterz", *Anon.* (1527) Yelverton's *Notebook,* at p.363

109 "car ce trust est de necessite, quar un mort home ne poit performer son volounte demesne": (1522) Y.B. Mich. 14 Hen 8 pl. 5 (*Gervys v Cooke,* Yearbooks of Henry VIII (J.H. Baker ed., 2002, SS 119) 108 at 115).

110 Inst., 2.23.1: "fideicommissa appellata sunt, quia nullo vinculo iuris, sed tantum pudore eorum qui rogabantur continebantur".

111 Rota Romana, January 24, 1614, Romana haereditatis de Alexijs, Decisiones S.R.R. coram Iacobo Cavalerio (1629), dec. 557, n.2. See also Rota Romana, June 4, 1640, Bononiensis iurispatronatus, Decisiones S.R.R. coram Coelio Bichio (1671), dec. 35.

112 A. D'Espeisses, "Traité des successions testamentaires et ab intestat", in *Les oeuvres de M. Antoine Despeisses* (1685) I, at p.211: no entitlement to the "Fourth" "car tel héritier n'a pas esté institué en sa propre faveur, mais à la seule considération du fideicommissaire, le testateur ayant voulu son héredité luy estre renduë apres certain temps, avant lequel il ne luy estoit pas expedient qu'elle luy fut renduë"; J.-M. Ricard, *Traité des donations* (1754), at p.540: "L'heritier fiduciaire ne peut pas distraire la Trebellianique"; G. Du Rousseaud de la Combe, *Recueil de jurisprudence civile du pays de droit écrit et coutumier* (1785) "Quarte trebellianique", n.10.

113 A. Gomez, *Commentariorum libri tres* (1572), t. I, cap. V, n.26: n.26: "mortuo fideicommissario, ante illud tempus transmittet ad haeredes"; M.A. Peregrino, *De fideicommissis* (1603), art. III, n.19: "ille fideicommissarius, quamvis ante diem decedat, fideicommissum transmittit in suos haeredes".

114 J.E. Sayers, "English charters from the third crusade" (1966) 39 *Bulletin of the Institute of Historical Research* 95.

115 Smith, *De republica Anglorum* (1565), l. III, ch. 8: "And some uncunning Lawyers that would make a newe barbarous latine worde to betoken lande given in fidem, or as the Italian saith in fede, or fe, made it in feudum or feodum. The nature of the worde appeareth more evident in those which we call to fef, feoff, or feoffees, the one be fiduciary possessores, or fidei commissarij, the other is, dare in fiduciam, or fidei commissum, or more latinely, fidei committere". Sir Thomas Smith had studied law at Padua before taking up his chair as the first Regius Professor of Civil Law at Cambridge. See P. Stein, "Sir Thomas Smith: Renaissance Civilian" [1978] *Acta Iuridica* 79.

116 See M. Graziadei, "The Development of "Fiducia' in Italian and French Law from the 14 th Century to the End of the "Ancien Régime"' in Helmholz and Zimmermann (eds), *Itinera fiduciae* (1998), p.327 at pp.343-346. The first edition of Budé's *Annotationes* was published in 1508.

117 S. Graziani, *Disceptationum forensium iudiciorum,* t. IV (1622), disc. 650, n.23.

118 See, e.g. Rota Romana, February 24, 1616, *Romana haereditatis de Alexijs,* coram Cavalerio, Decisiones S.R.R. coram Iacobo Cavalerio (1629), dec. 381 (765); Rota Romana, January 23, 1671, *Romana census,* coram Calataiu, S.R.R. Decisiones recentiores (1678), dec. 23: "testamentum fuit mere confidentiale".

119 A. Benielli, *Consilia seu Responsa* (1699), I, cons. 64, nn. 51 e 53

120 C.A. De Luca, *De confidentiali haeredis institutione* (1697).

121 On the eve of the codification era T. M. Richeri summed up the basic characters of an institution about to disappear except where a statute saved it: "Fiducia a fideicommisso differt. Heres fideicommissi restitutione gravatus … potest, donec praestitum a testatore restituendi tempus adveniat, bona

fideicommisso supposita administrare, fructus proprio iure ex illis percipere …. Sed heres cum fiducia scriptus … nullum ex hereditate emolumentum percipit": T.M. Richeri, *Codex rerum in pedemontano senatu aliisque supremis patriae curiis judicatarum* (1784), 367; similar expressions were in De Luca, *De confidentiali haeredis institutione* (1697), Ch. CII, n.2.

122 "jeo ne veier diversite enter feffement & devise quant a cel entent, pur que il ne voile le dedire, s. que il fuit de confidence, il est reason que vous relessent al heire, quod omnes justices concesserunt": (1452) 30 Trin. Hen 6: Fitzherbert, *La Graunde Abridgement* (1514), "Devise", 22.

123 *Anon* (1502) Keilway 42, pl. 7: "[Vavisor] dit ouster que le Subpoena commence en temps Ed. le 3, mes ceo fuit touts fois envers le feoffee sur confidence mesme, car envers son heire le Subpoena ne fuit jammes sufferable jesque al temps H. 6 et en ceo point fuit la Ley change par Fortescue Chief Justice".

124 J.L. Barton, "The Medieval Use" (1965) 81 L.Q.R. 562 at 570.

125 (1482) Y.B. Pasc. 22 Edw 4 pl. 18; *Select Cases in the Exchequer Chamber,* M. Hemmant ed., (1948, SS 64), 53; see Kiralfy, *A Source Book of English Law* (1957), at p.261 in modern English (Kiralfy identifies this case as pl. 22, but the correct number is 18); this case is also printed in C.H.S. Fifoot, *History and Sources of the Common Law* (1949), at p.325.

126 A. Gomez, *Commentariorum libri tres* (1572), t. I, cap. V, n.26: n.26: "mortuo fideicommissario, ante illud tempus transmittet ad haeredes"; M.A. Peregrino, *De fideicommissis* (1603), art. III, n.19: "ille fideicommissarius, quamvis ante diem decedat, fideicommissum transmittit in suos haeredes".

127 According to Chrimes he is "to be regarded as the true founder of the English school of comparative law and comparative politics": Sir John Fortescue, *De Laudibus Legum Angliae* (S. B. Chrimes ed., 1949, xxxii-xxxiii). It is certainly striking that Fortescue was able to cite more than once from the Gloss by Accursius (see Chs 42 and 43 of his *De Laudibus Legum Angliae*) in addition to five references to the Institutes, two to the Digest and one to the Code. However, if we knew more about the civilian learning of his time we would not be surprised.

128 Inst. 2,7: "etsi plenissimae sint donationes, tamen si ingrati existant homines in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praestavimus certis ex causis eas revocare".

129 Its origin is in the *Decretum Gratiani* (Migne, *Patrologia Latina,* vol.187, at p.461 (1078A)).

130 "nous sumus a arguer la consciens icy et nemy la ley, & moy semble que il puit changer sa volunte pur especial cause, mes auterment nemy, et si jeo aye issue fille et jeo sue malade, et jeo enfeffe home & die a luy que ma file aver la terre apres mon deceas, apres jeo revyve et aver issue fitez ore est consciens que le fitz aver la terre, car il est mon heire, et si jeo ust ewe fitez al temps jeo ne voile aver fait tiel volunte, et issint est si jeo voile que un de mes fitez aver la terre, et puis il devient laron ["baron' in the original] &c.": (1452) Mich. 31 Hen 6, Fitzherbert, *La Graunde Abridgement* (1514), "Sub pena", 23.

131 S.F.C. Milsom, *Historical Foundations of the Common Law* (1981), at pp.216-220.

132 Yorke, *Notebook,* in *Reports of cases from the time of King Henry VIII* (J.H. Baker ed., 2003, SS 120), at p.141: "Auxi trusts fueront en temps E. le premier … scilicet de feffementz faitz par collusion".

133 St German, *Doctor and Student* (T.F.T. Plucknett and J.L. Barton eds., 1974, SS 91), Ch.22.

134 (c. 1533) *Note* in *Reports of John Caryll, Junior, Reports of cases from the time of King Henry VIII* (J.H. Baker ed., 2004, SS 121), 374.

135 *Twyne's case* (1601) 3 Co. Rep. 80b at 81a.

136 *Attorney-General v Abington* (1613-19), *Cases concerning Equity and the Courts of Equity* (W.H. Bryson ed., 2001, SS 117), No.210.

137 *Cook v Fountain* (1672) 3 Swans 585, per Lord North C.J. at 587.

138 1 Rich. 3, ch. 1.

139 27 Hen. 8, ch. 10 (Statute of Uses).

140 J. Domat, *Les loix civiles dans leur ordre naturel* (1689) part II, l. V, tit. 3, sect. 3, V: "ces dispositions secrètes, qui en apparence regardent les personnes interposées et qui en effet et dans le secret sont destinées à qui la Loi défend de donner. Et ces sortes de fidéicommis sono illicites".

141 D. Johnston, *The Roman Law of Trusts* (1988), Ch.III.

142 G.B. De Luca, *Theatrum veritatis et iustitiae* (15 vols, 1669-73), IX, disc. 79: "Puta ex motivo meritorio humilitatis ne eius bona opera pateant; sive ob qualitatem personarum quibus bona restituenda sint, ne exinde aliqua oritur sinistra suspicio".

143 Bartolo da Sassoferrato, *Commentaria, ad* D. 30. 55 n.2.

144 G. del Maino, *In secundam Codicis partem commentaria, ad* C. 6.42.32 ("et sic videtur haec dispositio transire in vim contractus"). I. Mandelli, *Consiliorum liber tertius* (1566), cons. 529, n.6: "Si vero haeres promittit expresse testatori aliquid facere et ita res transit in contractum, cum habeat expressam voluntatem

duorum …". Graziani, *Disceptationum forensium iudiciorum,* t. IV (1622),, disc. 650, n.32: "Et non mirum si sufficiunt duo testes, quando testator fecit sibi dare fidem de restituendo alicui haereditatem, quia tunc talis promissio transit in vim contractus, qui non requirit plures testes quam duos". "Si vero haeres promittit expresse testatori aliquid facere et ita res transit in contractum, cum habeat expressam voluntatem duorum."

145 Bracton's *Note Book* (F.W. Maitland ed., 1887), Nos 50, 351, 670, 1464, 1893.

146 Britton (F.M. Nichols ed., 1865), I.29.2: "Par contract nest ele en plusours maneres par l'unité de assent des parties, qe acune foiz est nue et sauntz garnement, et acune foiz vestue".

147 See N. Adams and C. Donahue, Select Cases from the Ecclesiastical Province of Canterbury. c. 1200-1301 (1981, SS 95), Introduction.

148 *Godwyne v Profyt* (>1393), Select Cases in Chancery, No.4.

149 See, e.g. *Rous v FitzGeffrey,* Select Cases in Chancery, No.138, where the petitioners required the defendants "to refeoffe them accordyng to th'entent of the first feoffement"; Select Cases in Chancery, No.71 (the same expression); (1465) Y.B. Mich. 5 Edw 4 pl. 16.

150 (1492) Y.B. Pasc. 7 Hen 7 pl. 2 (at fol. 12).

151 Yelverton's *Notebook,* at p.299.

152 Lord Nottingham's *Prolegomena of Chancery and Equity* (D.E.C. Yale edn, 1965), Ch. X, No.12. Lord Nottingham had studied civil law at Oxford (Christ Church), where he obtained the degree of Doctor of Civil Law in 1665.

153 *Wallgrave v Tebbs* (1855) 2 Kay & J. 313 at 321; see also *Moss v Cooper* (1861) John. & H. 352 at 366.

154 cf. P. Critchley, "Instruments of Fraud, Testamentary Dispositions, and the Doctrine of Secret Trusts" (1999) 119 L.Q.R. 631.

155 D. 33.4.14 (Scaevola). It was a codicil in Greek, the Latin translation was in the Gloss.

156 "quia Theopompus voluit stari super hoc dicto Polliani, ut apparet ex dictis verbis quae dixit in codicillis. Vivianus" (I am quoting from the Lugduni, 1558 edition of *Digestum Vetus*).

157 Gloss to "quantitas" in D. 33.4.14.

158 "statur dicto unius si voluit testator": Odofredo, *In secundam partem Infortiati commentarii, ad* D. 33.4.14. On the "unus testis" see Treggiari, *Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario* (2002), I, at pp.182-191 (contemporaries of Odofredus) and 260-264 (subsequent authors). See also the doctoral dissertation of 1700 by F.C. Harpprecht, "Disputatio de suprema voluntate unico testi concredita", in *Dissertationes academicae* (1737), disp. 57.

159 Bartolo da Sassoferrato, *Commentaria, ad* D. 33.4.14.

160 D. 49.14.40 pr. (Paulus).

161 "Nomino mio herede universale il Signor Pietro Alli, del quale mi confido, & sò esseguirà secondo lui sà la mente mia": Rota Romana, January 24, 1614, Romana haereditatis de Alexijs, Decisiones S.R.R. coram Iacobo Cavalerio (1629), dec. 557, n.2.

162 e.g. "Guido Jordanus scripta haerede Virginia eam gravavit moriendo restituere haereditatem ei, cui ipse oretenus communicaverit": De Luca, *Theatrum veritatis et iustitiae* (1669-73), l. X, disc. 182, Perusina erectionis canonicatus.

163 *Podmore v Gunning* (1836) 7 Simons 644.

164 *Irvine v Sullivan* (1869) L.R. 8 Eq. 673.

165 De Luca, *De confidentiali haeredis institutione* (1697), Ch. I, n.4: "tunc simulatur persona veri haeredis per confidentem personam"; cf. R.J. Pothier, *Traité des donations,* 688: "homme de confiance" (this citation is to the 1819 edition).

166 De Luca, *Theatrum veritatis et iustitiae* (1669-73), l. X, disc. 182, nn. 6 e 9: "cui licet unico ob eius fidem a testatore probatam ad perfectam et concludentem probationem deferendum est"; A. Tartaglia, *Tractatus de reservatione statutaria* ... (1708): "Fiduciarius neque se habeat ad instar Arbitri Executoris et Ministri, sed potius ad instar Testis, cuius fides a Testatore probata sit, qui cum iuramento voluntatem communicatam patefacere debet".

167 E.H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (1957).

168 *McCormick v Grogan* (1867) 1 IR Eq. 313 at 328 per Christian L.J.

169 See, e.g. *Re Fleetwood* (1880) 15 Ch. D. 594, *Blackwell v Blackwell* [1929] A.C. 318 HL.

170 Supremus Senatus Galliarum, December 23, 1580, in A. Robert, *Rerum iudicatarum libri IIII,* ed. tertia (1599), l. I, ch. III. On the same line see Parlement de Paris, February 11, 1716, related by J.B. Denisart, *Collection de décisions nouvelles,* 5.ème édition (1766), "Fidéicommis", and, with more details, by Ph. Merlin, *Répertoire universel et raisonné de la jurisprudence,* 13.ème éd., t. XIV (1821) "Fidéicommis

tacite"; and Parlement de Toulouse, August 8, 1738, in J.-B. Furgole, *Traité des testamens, codiciles, donations à cause de mort, et autres dispositions de dernière volonté* (1779), at p.575. See also Pothier, *Traité des donations,* t. IX, partie I, art. III.

171 Angelo degli Ubaldi, *In codicem commentaria, ad* C. 6.42.32, n.4 (see Treggiari, *Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario* (2002), I, at p.449, n.56).

172 C. Stebbings, "Roman Catholics, Honorary Trusts and the Statute of Mortmain" (1997) 18 *Legal History Review* 1.

173 Roman Catholic Charities Act 1832.

174 See G. Jones, *History of the Law of Charity 1532-1827* (1969), Ch.VII.

175 *Croft v Jane Evetts* (1606) Moore 784: it was found that the true purpose of the enfeoffment to the use of the settlor and his heirs was "to confer the profits of the lands upon such persons as were of his own persuasion in Religion, in trust for the maintenance of superstitious, unlawful and disloyal uses".

176 *R. v Lady Portington* (1693) 1 Eq. Ca. Abr. 95, Salkeld 162. Cases relating to wills in favour of Jews are collected in Amber 228.

177 "That the construction aimed at by the plaintiffs would be totally destroying the statute of frauds, the great fence of our property, if a paper which may be formed after a person has made his will, shall be admitted to be a declaration of trust only in those persons who had an absolute devise by the will without any trust": *Adlington v Cann* (1744) 3 Atkyns 141 at 148.

178 Bracton, *De legibus et consuetudinibus Angliae* (G.E. Woodbine ed.; transl. by S. E. Thorne, 1968), f. 29. Bracton adds that such an arrangement was mistakenly held valid in court.

179 Pothier, *Traité des donations,* t. IX, partie I, art. III, n.99.

180 *Paine v Hall* (1812) 18 Ves. Jun. 475; *Wallgrave v Tebbs* (1855) 2 Kay & J. 313. On the denials by defendants in cases relating to "honorary trusts" for catholics see Stebbings, "Roman Catholics, Honorary Trusts and the Statute of Mortmain" (1997) 18 *Legal History Review* 1.

181 C. 6.42.32; see also Inst. 2.23.12.

182 Bulgarus' opinion was related by Azzo: Treggiari, *Minister ultimae voluntatis. Esegesi e sistema nella formazione del testamento fiduciario* (2002), I, at p.194, n.61.

183 *Commentaria, ad* C. 6.42.32, n.2.

184 Baldo degli Ubaldi, *Commentaria in VI etc. Codicis libros, ad* C. 6.42.32, n.26.

185 *Wallgrave v Tebbs* (1855) 2 Kay & J. 313 at 321; *Podmore v Gunning* (1832) 5 Simons 485 at 495: "notwithstanding the Statute of Frauds, this Court will interpose to prevent a party from being deprived of his rights by means of fraud"; *Stickland v Aldridge* (1804) 9 Ves. Jun. 517 at 519 per Lord Eldon: "if a father devises to his youngest son; who promises, that, if the estate is devised to him, he will pay £10,000 to the eldest son, this Court would compel the former to discover, whether that passed in parol; and, if he acknowledged it, even praying the benefit of the statute, he would be a trustee to the value of £10,000". Cf. D.R. Hodge, "Secret Trusts: the Fraud Theory Revisited" [1980] Conv. 341 and, more in general, L.A. Sheridan, *Fraud in Equity* (1957), at pp.146-166.

186 Baldo degli Ubaldi, *Commentaria in VI etc. Codicis libros, ad* C. 6.42.32, n.8.

187 F. Mantica, *De coniecturis ultimarum voluntatum* (1588), l. II, tit. XIII, n.17.

188 S. Scaccia, *Tractatus de commerciis et cambio* (1619), §1, q. 7, par. 2, ampl. 19, n.114.

189 I. Cancér, *Variae Resolutiones iuris Cesarei, Pontificij, & Municipalis Principatus Cataloniae* (1594) I, Ch.I.

190 G. Torre, *De pactis futurae successionis* (1673), l. III, Ch.VIII, n.45: "consuluit optime Cancer, quod quia Posthumus non potuit succedere, eo qui prodijt abortus, haereditas restitui deberet haeredi ab intestato Testatoris".

191 De Luca, *De confidentiali haeredis institutione* (1697), Ch.XIII.

192 *Treswallen v Penhules* (1619) 2 Rolle 66.

193 cf. W. Swadling, "Explaining resulting trusts" (2008) 124 L.Q.R. 72.

194 See Johnston, *The Roman Law of Trusts* (1988), at pp.193-194.

195 Odofredo, *In secundam partem Infortiati commentarii,* ad D. 36.1.48(46); Bartolo da Sassoferrato, *Seconda Bartoli super Infortiato, ad* D. 36.1.48(46); see later J.P. Fontanella, *De pactis nuptialibus* (1659), gl. VIII, p.IV, cl. V: "Quamvis decedat is in cuius favorem fuit facta institutio ante haeredem fiduciarium nihil caducatur, sed fit transmissio ad haeredes illius tanquam de iure ei acquisito per dictum haeredem fiduciarium".

196 See, among Roman sources: D. 35.1.79 pr.: "purum legatum est, quia non condicione, sed mora suspenditur"; Gai., 2.250: "et liberum est vel sub condicione vel pure relinquere fideicommissa, vel ex die certa".

197 G. de Maynard, *Notables et singulières questions de droit écrit jugées au parlement de Toulouse* (1751), t. I., l. V, ch. 85.

198 Bartolo da Sassoferrato, "Nudus minister quis dicatur" in *Commentaria, ad* D. 31.17; see also the passage from De Luca in the text accompanying fn.191 above.

199 *Eeles v England* (1704) 2 Vern. 466.

200 *Stapleton v Cheales* (1711) Prec. Ch. 317.

201 *Hanson v Graham* (1801) 6 Ves. Jun. 239.

202 Several Popes, notably Pius IV and Pius V, reacted sternly against this form of *confidentia*: see F. Parisius, *De confidentia beneficiali prohibita tractatus* (1595).

203 G. Menochio, *Consilia sive responsa* (1620), cons. 1135, n.17: "ne illi quibus volunt relinquere dilapident bona, faciunt haeredem fiduciarium, qui deinde illis in viam bonam reversis restituat".

204 These as well as other purposes are discussed by J. Biancalana, "Medieval Uses" in Helmholz and Zimmermann (eds), *Itinera fiduciae* (1998), at p.111.

205 (1452) Mich. 31 Hen 6, Fitzherbert, *La Graunde Abridgement* (1514), "Sub pena", 23; see the text accompanying fn.130 above.

206 *Okeover v Lady Pettus* (1675) Lord Nottingham's Chancery Cases, I (D.E.C. Yale ed., 1957, SS 73), No.347: "the deed was a trust for her daughter and made only to keep her in obedience"; Parlement de Paris, July 3, 1675, Journal du palais (1701), I, 681 "à la charge de rendre son heritage, ou partie, a celuy de ses deux fils aînez qui luy seroit le plus obéissant lorsqu'il auroit atteint l'âge de vingt-six ans".

207 *Massey v Sherman* (1739) Amb. 520: "amongst all or such of my children as she in her discretion shall think most proper, and as they, by their future conduct towards her, shall be deserving of the same".

208 Rota Romana, January 22, 1768, *Romana successionis, coram* Olivatio, Decisiones S.R.R. coram Bartholomaeo Olivatio, t. VI (1786), dec. 648: to those of the testator's children who would develop a good character, for the testator could not know "qualis quisque indolis esset extiturus".

209 H. Rolle, *Un Abridgment des plusieurs cases et resolutions del common Ley* (1668), sv "Fraud": feoffment to the use of the infant child of the feoffor, who ten days afterwards "commit treason": "le feffment serra adjuge fraudulent". An identical case is in Ondedeio, *Consilia sive responsa* (1604), I, cons. 46: "donationem fecerunt ad reparandum ne bona transirent in fiscum vel à tyrannis illius temporis occuparentur: erat enim donator tempore donationis in inimicitiis et partialitatibus, quae tunc vigebant, involutus, et parum post donationem homicidium commisit".

210 *Dufour v Pereira* (1769) Dick. 419; a fuller report of this case is in F. Hargrave, *Juridical Arguments and Collections* (1799), Vol.2, at p.304. See the recent article by R. Croucher, "Mutual Wills: Contemporary Reflections on an Old Doctrine" (2005) 29 *Melbourne University Law Review* 390.

211 Charles Pratt, then Lord Camden (1714-94), was educated at Eton and then at Cambridge (King's College). For his life see H. Swanston Eeles, *Lord Chancellor Camden and his family* (1934).

212 Hargrave, *Juridical Arguments and Collections* (1799), Vol.2, at p.307.

213 Hargrave, *Juridical Arguments and Collections* (1799), Vol.2, at p.307.

214 O. Da Ponte, *Consilia* (1550), cons. 174, n.1: "Dico breviter quod licet fuerit unicum pergamenum in quo ambo coniuges sunt testati, iuris tamen potestate, duo censentur, sicut duo fuerunt testantes"; A. Gaill, *Observationum practicarum Imperialis Camerae Libri Duo* (1613), Obs. CXVII, 2: "non pro unico sed duobus habendum est".

215 *Forse and Hembling's Case* (1588) 4 Co. Rep. 60b: "The making of a will is but the inception of it, and it doth not take any effect till the death of the devisor, for omne testamentum morte consummatum est; et voluntas est ambulatoria usque ad extremum vit%8A exitum".

216 See, e.g. D. Covarruvias, *De testamentis,* in *Opera Omnia* (1599), pars II, 19-23; B. Carpzov, *Iurisprudentia forensis romano-saxonica* (1638), pars III, constit. II, def. XI: "Testamentum sive donatio mortis causa inter coniuges reciproca, invita etiam altera parte, revocari et mutari potest"; S. van Leeuwen, *Censura forensis Theoretico-pratica,* editio tertia, pars prima (1685), l. III, cap. II, n.15: each may "irrequisito altero semper mutare et revocare".

217 C. van Bynkershoek, *Opera omnia* (1767), at p.389. On van Bynkershoek (1673-1743) see K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (1998).

218 Parlement de Paris, June 15, 1591, in G. Louet, *Recueil d'aucuns notables arrests donnez en la cour de parlement de Paris,* 3rd edn (1612), at p.1000.

219 van Leeuwen, *Censura forensis Theoretico-pratica,* editio tertia, pars prima (1685), l. III, cap. II, n.15,.
220 J. Voet, Commentariorum ad Pandectas libri quinquaginta, t. II, L. XXVIII, tit. III, 11.
221 Hargrave, *Juridical Arguments and Collections* (1799), Vol.2, at p.308.
222 J. de Montholon, *Arrests de la Cour prononcez en robbes rouges* (1645), arr. 18.
223 J.-M. Ricard, *Traité des donations* (1713), t. II n.265.
224 C. Henrys, *Recueil d'arrests remarquables donnez en la cour du parlement de Paris,* t. I, 3.ème éd. (1662), L. V, q. 34.
225 Louet, *Recueil d'aucuns notables arrests donnez en la cour de parlement de Paris,* 3rd edn (1612), at p.1000.
226 cf. *Re Dale (Deceased). Proctor v Dale* [1994] Ch. 31 Ch D.
227 *Select Cases in Manorial Courts. 1250-1550* (L.R. Poos and L. Bonfield eds., 1998, SS 114), case No.74.b (1358): "reddere debeat terram suam in manum domini ad opus alterius"; case No.128.a (1411): "Henricus Cate … reddidit in manum Johannis Rolf tenentis domini unum cotagium … ad opus Isabelle uxoris suae". See L. Bonfield and L.R. Poos, "The Development of the Deathbed Transfers in Medieval English Manor Courts" in Z. Razi and R. Smith, *Medieval Society and the Manor Court* (1996), at p.117; C.M. Gray, *Copyhold, Equity, and the Common Law* (1963).
228 See the debate related in Yelverton's *Notebook,* at pp.304 and 309.
229 *Readings and Moots at the Inns of Court in the Fifteenth Century* (S.E. Thorne ed., 1854), I, cxviii.
230 See S.W. DeVine, "The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment before 1535" (1989) 10 *Journal of Legal History* 1; D.J. Seipp, "The Concept of Property in the Early Common Law" (1994) 12 *Law and History Review* 29 at 69-72.
231 Henry II and Richard granted freedom from tolls and customs "de rebus ad usos proprios" to the Abbey of Furness: "Houses of Cistercian monks: The abbey of Furness" in *A History of the County of Lancaster* (W. Farrer and J. Brownbill eds, 1908), Vol.2, at pp.114-131; grants of 1198-1205 and of 1201 "in proprios usus" are in *English Episcopal Acta,* III (C.R. Cheney and E. John eds, 1986), No.430 and No.446 (1201) respectively; see also the 1233 grant of a church by the bishop of Chichester to Arundel priory "in proprios usos": Id., XXII (P.M. Hoskins ed., 2001), No.54. Maitland and other writers have traced "ad opus" to a much earlier period; see S. Herman, ""Utilitas Ecclesiae': The Canonical Conception of the Trust" (1996) 70 *Tulane Law Review* 2239.
232 See the charter of "Concordia" of 1279 in *The Cartulary of Blyth Priory* (T.T. Timson ed., 1973), No.406.
233 (c. 1394) Select Cases in Chancery, No.73.
234 *Anon* (1406) Bellewe 99: "que touts les profits en le mesne temps serra gard al oeps lenfants".
235 *Anon* (1490), in *A Series of Precedents and Proceedings in Criminal Causes* (1847), 1973: "coram Magistro Doctore Jan, commissario comparuit Johannes Gunton, civis et dier London, et tactis per eum sacrosanctis Dei Evangeliis ad ea corporaliter iuravit de fideliter satisfaciendo et solvendo Johanni Bellawe et Ricardo Milard, ad usum Elizabethe Medigo, cum qua commisit adulterium et eandem imprignavit, et in recompensacionem ejusdem dilicti, solveret iiii l., forma sequente …".
236 See *Inglefield case* (1593) 1 Anderson 294: "touts les Juges agree que le use de Lease poit estre"; *Anon* (1604) Cary 25; *Massenburgh v Ash* (1684) 1 Vern. 234.
237 (1462) Y.B. Pasc. 2 Edw 4 pl. 6; *Norton v Colyngborne* (c. 1474), Select cases before the King's Council (I.S. Leadam and J.F. Baldwin eds., 1918, SS 35), at p.115: "an obligacion" given by the plaintiff to the defendant "of grete truste he hadde".
238 (1468) Trin. 8 Edw 4 pl. 12; it followed that the creditors of the deceased donor were not entitled to an account; see also (1450) *Re Bragge* in A.D. Hargreaves, "Equity and the Latin side of Chancery" (1951) 68 L.Q.R. 481 at 495.
239 The earliest occurence of this is in 1350: Examination of Gilbert Blount, Select cases before the King's Council (I.S. Leadam and J.F. Baldwin eds., 1918, SS 35), at pp.33-34. Cary 25 relates a case of 1604, where the purpose of the feoffment was to pay the debts of the feoffor; in 1 Anderson 293 the purpose was to guarantee the delivery of a golden ring. See J. Biancalana, "Medieval Uses" (1998), at p.111.
240 See the two petitions in Kiralfy, *A Source Book of English Law* (1957),at pp.267-268.
241 *Anon,* Richard Pollard, *Notebook,* in *Reports of cases from the time of King Henry VIII* (J.H. Baker ed., 2004, SS 121) 270: "Mez auterment est lou jeo baile certen bienz a un auter home al use dun auter, quar en ceo case la propertie est change maintenant pur ceo que le limitation del use change la propertie".
242 R. Cross, "The Statute of Uses and the Trust of Freeholds" (1966) 82 L.Q.R. 215; R.H. Helmholz, "Trusts in the English Ecclesiastical Courts 1300-1640", in Helmholz and Zimmermann (eds), *Itinera fiduciae* (1998), at pp.160-162; J. Biancalana, "Thirteenth-Century Custodia" (2001) 22 *Journal of Legal History*

14; Jones, "Trusts in England after the Statute of Uses" (1998), at p.179. Already W. Maitland, "The Origin of Uses" (1894) 8 *Harvard Law Review* 127, thereafter in *The Collected Papers of Frederick William Maitland* (1911), II, at p.403, had called attention to trusts not relating to land.

243 See above, II.2.

244 In addition to the references in fns 148-151 and 232-241 above, see the *Megod's case,* Jones, "Trusts in England after the Statute of Uses" (1998), at p.191 and Biancalana, "Medieval Uses" (1998), at p.150 (a tripartite indenture of 1434).

245 See, e.g. (1454) Y.B. Trin. 37 Hen 6 pl. 23.

246 Examined by S.W. DeVine, "Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to the Uses to be Declared in Testamentary Instructions" (1986) 30 *American Journal of Legal History* 297.

247 Barton, "The Medieval Use" (1965) 81 L.Q.R. 562 at 566-569.

248 *Dalamere v Barnard* (1567) 1 Plowd. 346 at 352.

249 E. Coke, *The Selected Writings and Speeches of Sir Edward Coke* (S. Sheppard ed., 2003), II, at p.736.

250 See A.W.B. Simpson, "The equitable doctrine of consideration and the law of uses" (1965) 16 *University of Toronto Law Journal* 1; V.V. Palmer, *The paths to privity* (1992); N.G. Jones, "Uses, Trusts and A Path to Privity" [1997] C.L.J. 175.

251 R.H. Helmholz, "Assumpsit and *fidei laesio*" (1975) 91 L.Q.R. 406.

252 *Commentaria, ad* C. 6.42.32.

253 R.H. Helmholz, *The Oxford History of the Laws of England* (2004), Vol.I, at pp.187-200.

254 T. James, *Ecloga Oxonio-Cantabrigiensis* (1600); H.O. Coke, *Catalogus codicum MSS qui in collegiis aulisque oxoniensibus hodie adservantur* (1852); *Oxford College Libraries in 1556* (1956); N.R. Ker, *Fragments of Medieval Manuscripts Used as Pastedowns in Oxford Bindings* (1954); A. Wijffels, *Late Sixteenth-Century Lists of Law Books at Merton College* (1992); N.R. Ker, *Records of All Souls College Library 1437-1600* (1971); E.S. Leedham-Green, *Books in Cambridge Inventories* (1986).

255 P. Morgan, *Oxford Libraries Outside the Bodleian,* 2nd edn (1980); N.R. Ker, "Oxford College Libraries in the Sixteenth Century" (1959) 6 *Bodleian Library Records* 459; E. Craster, *The History of All Souls College Library* (1971); J. Buxton and P. Williams (eds), *New College, Oxford* (1979).

256 See *The first printed Catalogue of the Bodleian Library 1605* (1986).

257 R.J. Fehrenbach and E.S. Leedham-Green, *Private Libraries in Renaissance England* (1992-2004: 6 vols); Leedham-Green, *Books in Cambridge Inventories* (1986).

258 See the reference to "confidentia" in the case before the diocesan court at Rochester: Helmholz, "The Early Enforcement of Uses" (1979) 79 *Columbia Law Review* 1503, fn.31.

259 Many references to this effect are in Helmholz, "Assumpsit and *fidei laesio*" (1975) 91 L.Q.R. 406.

260 (1468) Y.B. Pasch. 8 Edw 4 pl. 11; "futurorum" should be "fatuorum" according to some.

261 See fn.122 above.

262 See, in general terms, A.W.B. Simpson, *A History of the Common Law of Contract. The Rise of the Action of Assumpsit* (1975), at pp.400-402: "It is hardly conceivable, if the identity and careers of fifteenth- and early-sixteenth-century chancellors are borne in mind, that as judges in conscience they could avoid deriving ideas from the canon and civil law".

263 See fn.130 above.

264 DCL. He had been educated at Balliol College, Oxford; he was appointed Master of the Rolls in 1472, then Chancellor in 1487.

265 (1492) Y.B. Pasc. 7 Hen 7 pl. 2. Modern rendering by Seipp.

266 (1462) Y.B. Pasch. 2 Edw 4 pl. 6. It was a very well argued case, Choke J. changed his mind twice.

267 See above, II.1.

268 See fns 123-126 above and accompanying text.

269 D.R. Coquillette, *The Civilian Writers of Doctors' Commons* (1988), at p.123 n.147, p.259 n.553.

270 In his *Maxims of the law* he writes: "I have not affected to disguise into other words than the civilians use, to the end they might seem invented by me": *Works of Francis Bacon* (1859), VII, 321.

271 Francis Bacon had joined Trinity College when he was 12; he was then admitted to Gray's Inn and studied in Paris and Poitiers. He was given credit for his studies "partim in transmarinis regionibus" (see generally D.R. Coquillette, *Francis Bacon* (1992)). His mentor had been Sir Julius Caesar, the son of an Italian immigrant, who, after an M.A. at Oxford (Magdalen College) obtained a doctorate in Paris in 1581 and went on to be a Master in Chancery, a Judge in Admiralty, Master of Requests, Chancellor of the Exchequer and Master of the Rolls (1614): see L.M. Hill, *The Ancient State Authoritie, and Proceedings of the Court of Requests by Sir Julius Caesar* (1975), Introduction.

272 Francis Bacon gave credit to Azo for this definition.
273 *Works of Francis Bacon* (J. Spedding, R.L. Ellis and D.D. Heath eds., 1859), VII, 401.
274 Lord Nottingham's *Prolegomena of Chancery and Equity* (D.E.C. Yale edn, 1965), at p.239.
275 R. Chambers, *A Course of Lectures on the English Law* (T.M. Curley ed., 1986), II, 245. Chambers had the Vinerian Chair in 1766 immediately after Blackstone. He then went to India, where he later became Chief Justice: T.M. Curley, *Sir Robert Chambers: Law, Literature, and Empire in the Age of Johnson* (1998).
276 *Acts of the Privy Council of England,* n. s., II (J.R. Dasent ed., 1890, Kraus reprint, 1974), at pp.48-50. On this period see M. Blatcher, *The Court of King's Bench 1450-1550. A Study in Self-help* (1978).
277 *Tucker v Cappes and Jones* (1625) 2 Roll. Rep. 497.
278 N. 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.L Chrimes* (H. Hearder and H.R. Lyon eds., 1974), at p.87; J. Woolfson, *Padua and the Tudors. English Students in Italy, 1485-1603* (1998), at pp.58-59; see also W.J. Jones, *The Elizabethan Court of Chancery* (1967); M.L. Cioni, *Women and law in Elizabethan England with particular reference to the Court of Chancery* (1985); M. Beilby, "The Profits of Expertise: The Rise of the Civil Lawyers and Chancery Equity" in *Profit, Piety and Profession in Later Medieval England* (M. Hicks ed., 1990), p.72 at p.83 (cited by D.J. Seipp, "The Reception of Canon Law and Civil Law in the Common Law Courts before 1600" (1993) 13 O.J.L.S. 388, n.145).
279 E. Heward, *Masters in Ordinary* (1990), at pp.79-81 provides a detailed list.
280 R.H. Helmholz, "Conflicts Between Religious and Secular Law: Common Themes in the English Experience, 1250-1640" (1990) 12 *Cardozo Law Review* 707; C. Donahue Jr, "Roman Canon Law in the Medieval English Church" (1973-74) *Michigan Law Review* 647 at 660-664.
281 (1456) Y.B. Pasc. 34 Hen 6 pl. 9, per Aysshton J.: "Chescun advowson & Patronage sont depende parenter les deux Leis; cestassavoir la Ley del' Eglise, & nostre ley; Issint le vray determination de tiel advowson est "per Jus mixtum'; le droit de tiel advowson covient estre determine per ambideux Leis: purquoy covient a nous d' aver le conusance auxibien del' un Ley come del' auter Ley, devant nous donons ascun Jugement, mes "nonobstant' purquoy ne sumus verament appris de lour Ley, devant que nous avons enquis de eux que sont appris & graduats de mesme la Ley".
282 See J. Getzler, "Patterns of Fusion" in P. Birks (ed.), *The Classification of Obligations* (1997), at p.157; Jones, *The Elizabethan Court of Chancery* (1967), at pp.491-493. Modern scholarship tends to do away with the cliché of perennial aversion and strife.
283 The Merciless Parliament (February 1388) decided on charges of treason under the rules of law of the Parliament itself, seen as a court of law, and civil lawyers were there together with common lawyers: "A quel temps les Justices, & Sergentz, & autres Sages du Ley de Roialme, & auxint les Sages de la Ley Civill, feuront chargez de par le Roi notre dit Seigneur de doner loial conseil as Seigneurs du Parlement de duement proceder en la cause de l'Appell sus dit" and they agreed that the appeal by the accused "ne feust pas fait ne afferme solonc l'ordre que l'une Ley ou l'autre requiert", so that both the common and the civil law were called into play: Rotuli Parlamentorum et Petitiones et Placita in Parliamento tempore Richardi R. II, 22-244. See S.B. Chrimes, "Richard II's Questions to the Judges, 1387" (1956) 72 L.Q.R. 365.
284 A commission of doctors and bishops was convened: C. Donahue Jr, ""Ius Commune', Canon Law, and Common Law" (1991-92) 66 *Tulane Law Review* 1745 at 1760-1762.
285 Seipp, "The Reception of Canon Law and Civil Law in the Common Law Courts before 1600" (1993) 13 O.J.L.S. 388 at 406-412. See also the quotation in fn.281 above.
286 See (1495) Y.B. Pasch. 10 Hen 7 pl. 13.
287 *Lady Katherine Grey's case* (1564), Reports from the Notebook of Sir James Dyer (J.H. Baker ed., 1994, SS 109), case 140.
288 A.Wijffels, "Sir Julius Caesar and the Merchants of Venice", in *Festschrift für Bernhard Diestelkamp* (F. Battenberg and F. Ranieri eds., 1994), 195 refers to an opinion delivered by M.A. Peregrinus; A. Wijffels, ""Ius gentium' in the practice of the court of Admiralty around 1600" in D. Ibbetson and A. Lewis (eds), *The Roman Law Tradition* (1994), p.119 at p.124 n.12.
289 *Woodford v Multon* (1601) Cary 12.
290 B.P. Levack, *The Civil Lawyers in England 1603-1641. A Political Study* (1973), at pp.136-151; the quotation in the text is at p.146, from Sir Henry Hobart, Attorney General, speaking in 1610.
291 Two doctors presided over the Council of the North and Council of the Marshes, respectively Tunstall (doctorate at Padua) and Roland Lee.
292 W.H. Bryson, *The Equity Side of the Exchequer* (1975); see also H. Horwitz, "Chancery's "Younger Sister': The Court of Exchequer and Its Equity Jurisdiction 1649-1841" (1999) 72 *Historical Research* 160.

293 Levack, *The Civil Lawyers in England* (1973), at pp.122-129; Heward, *Masters in Ordinary* (1990), lists several such occurrences.

294 See F.W. Maitland, "The English Law and the Renaissance" (1901) in *Historical Essays* (1957), at p.135; W.S. Holdsworth, "The Reception of Roman Law in the Sixteenth Century" (1911) 27 L. Q. R. 387; J.H. Baker, "English Law and the Renaissance" [1985] C.L.J. 46; R.H. Helmholz, "Continental law and common law: historical strangers or companions?" [1990] *Duke Law Journal* 1207, par. II; Vinogradoff, "Reason and Conscience in Sixteenth-century Jurisprudence" (1908) 24 L.Q.R. 373.

295 See (1409) Y.B. Mich. 11 Hen 4 pl. 30: after apprentice Rolf spoke of canon law as "lour ley", Tyrwhit, judge of the King's Bench, retorted: "Vous ne dire pas ley; nostre ley; mes per ley de Saint Esglise"; and see the letter by William Paston to a lawyer in Rome, retained by him, where "in yowr lawe" clearly is only a descriptive term (*Paston letters and papers of the fifteenth century,* 1971, I, 3).

296 See D. Ibbetson, "Common Lawyers And The Law Before the Civil War" (1988) 8 O.J.L.S. 142.

297 (1478) Mich. 18 Edw 4 pl. 4.

298 See fn.130 above and accompanying text.

299 (1492) Y.B. Pasch. 7 Hen 7 pl. 2 (fol. 11).

300 D.E.C. Yale, ""Of No Mean Authority': Some Later Uses of Bracton" in *On the Laws and Customs of England. Essays in Honour of Samuel E. Thorne* (M.S. Arnold, T.A. Green, S.A. Scully, S.D. White eds, 1981), at p.383; D. Ibbetson and A. Lewis, "The Roman Law Tradition" in D. Ibbetson and A. Lewis (eds), *The Roman Law Tradition* (1994), p.1 at pp.9-10. For an additional occurrence see *Re Lady E. S.* (c. 1530/35), Yelverton's *Notebook,* at p.292.

301 (1535) Y.B. Pasch. 27 Hen 8 pl. 22 (fol. 10).

302 *Note,* John Cargyll, Jr, *Reports,* in *Reports of cases from the time of King Henry VIII* (J.H. Baker ed., 2004, SS 121), 385.

303 Macnair, "Equity and Conscience" (2007) 27 O.J.L.S. 659 at 672-677.

304 (1462) Y.B. Pasch. 2 Edw 4 pl. 6 per Choke J. (foll. 2-3)

305 See S. Worby, "Kinship, the Canon Law and the Common Law in Thirteenth Century England" (2006) 80 *Historical Review* 443; R. Helmholz, *The* ius commune *in England* (2001).

306 For specific instances see J.H. Baker "Counsellors and Barristers" [1969] C.L.J. 205 on the Roman theory on the *honorarium* of legal counsellors, adopted in England and explained by Serjeant John Davis in 1615 "almost in the words of the Digest"; D. Ibbetson, "How the Romans Did For Us: Ancient Roots of the Tort of Negligence" (2003) 26 *University of New South Wales Law Journal* 475.

307 cf. W. Senior, "England and the Mediaeval Empire" (1924) 40 L.Q.R. 483.

308 See C. Donahue, "Roman Canon Law in the Medieval English Church" (1974) 72 *Michigan Law Review* 647.

309 See R.H. Helmholz, "The Roman Law of Guardianship in England, 1300-1600" (1978) 52 *Tulane Law Review* 223.

310 cf. D. Ibbetson, *Common law and "ius commune"* (2001), at pp.19-20.

