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The Seventeenth-Century Revolution in the English Land Law

Charles J. Reid Jr.

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THE SEVENTEENTH-CENTURY REVOLUTION IN THE
ENGLISH LAND LAW

CHARLES J. REID, JR.1

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INTRODUCTION

The twin theses of this Article are that the English land law was transformed in the three quarters of a century running roughly from 1625 to 1700, and that it was the English Revolution which also dominated these seventy-five years that was responsible for this transformation. The theses of this Article run counter to the accepted historiography of English law. This historiography—classically represented by such giants as T.F.T. Plucknett and Sir William Holdsworth and found more recently in the scholarship of such eminent historians as S.F.C. Milsom—views the history of English law as the incremental building up of structures first established in the days of Henry II or Edward I.2 This historiography has a long pedigree. Indeed, as Harold Berman has established, it was a part of the ideology of the English Revolution itself that the history of the English common law consists of the gradual elaboration of premises laid down at a very early date.3

But while legal historians celebrate the seamless continuity of the English legal system, historians investigating other questions about seventeenth-century England have come to the conclusion that this was a decisive time in the history of that nation and its relationship to the larger world. It was in the seventeenth century that England established itself as a global economic power, with colonies and interests extending from the Caribbean, to the Atlantic seaboard of North America, to the coasts of Africa, and to the Indian subcontinent. In the fifteenth century, England had occupied a peripheral place on the edge of the European continent. In the seventeenth century, the same location that had previously kept England isolated now acquired strategic significance as England expanded its reach to global dimensions.

What is sometimes overlooked by the historians documenting this transformation is the revolution that occurred in its midst. But it must be borne in mind that the seventeenth century in England was not only a period of global


3 See generally Harold J. Berman, The Origins of Historical Jurisprudence: Coke, Selden, Hale, 103 YALE L.J. 1651 (1994). The peculiarly English belief that the development of the common law consists of a gradual and faithful evolution from first premises is on vivid display in Berman's treatment of Sir Edward Coke's historicism. See id. at 1681-1694 and Sir Matthew Hale's response to Thomas Hobbes's attack on the common law. Id. at 1714-18. Very often, biological metaphors were made use of to describe the nature of this gradual growth. See, for instance, Berman's treatment of Thomas Hedley's speech to Parliament in 1610. Id. at 1686, n.93 ("The common law, being the 'work of time,' is accommodated to the kingdom as 'the skin to the hand, which groweth with it'").
expansion, but also a time of revolutionary upheaval. The first foreshadowings of these upheavals can be detected in the increasingly frosty relations between James I and Parliament, and can be traced through Charles I's attempt to rule without Parliament—his "personal rule"—the ensuing Civil War and Commonwealth period, the Restoration of the Stuarts to the throne in the person of Charles II, the Glorious Revolution of 1688/89 that resulted in the deposition of James II and the arrival of William and Mary from the Continent, and the enduring settlement that was finally worked out between Crown and Parliament in the 1690s.

This Revolution, furthermore, was not simply a random occurrence, some transitory illness in an otherwise healthy body politic. Rather, the events that constitute the English Revolution represent a "great revolution" in the sense described by Harold Berman. It was a total upheaval of the society that resulted by the year 1700 in the creation of a new ensemble of institutions and beliefs.

It should not be surprising that these upheavals had an impact on the law. Indeed, it has already been established that the English Revolution imparted to the West a new jurisprudence—historical jurisprudence—that is distinctly different from both natural law and positivism. The historical jurisprudence takes as normative not transcendent principles of moral reasoning good for all times


This Article builds on Berman's theory of the relationship of law and revolution and applies it in the specific context of the transformation of the English land law.

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and places, nor the pronouncements of a duly constituted political authority, but the lived experiences of the people.\textsuperscript{5}

But legal philosophy was not all that was transformed. The English land law was also remade, "modernized," by this revolutionary upheaval. This point was made well by Percy Bordwell: Sir Edward Coke, the early seventeenth-century common lawyer, Bordwell observed, "stood between the old system of land law and the new while Lord Mansfield [1704-1793] was the embodiment of the new."\textsuperscript{6}

It is the purpose of this Article to explore systematically the creation of the new system of land law in the seventeenth century. The Article opens with a brief introduction to some of the major events of the seventeenth century to assist readers unfamiliar with this period. Successive sections will then treat the abolition of the feudal tenures and the adoption of socage tenure, the defeat of copyhold and the triumph of the enclosure movement, the creation of the rule against perpetuities and the strict settlement, and the creation of the modern trust and mortgage instruments.

I. THE ENGLISH REVOLUTION

A. A Schematic Chronology of the Revolution

In 1603, James VI of Scotland succeeded to the throne of his distant relative, Queen Elizabeth I, and took the title of James I of England. In the best of circumstances, James would have found the governance of England difficult. But James proved to possess both a prickly personality and a political maladroitness that consistently put him at odds with leading figures in the realm.\textsuperscript{7} The situation was further exacerbated by James's pointed advocacy of

\textsuperscript{5}See Berman, supra note 3, at 1731-38 (exploring the growth and development of historical jurisprudence in the eighteenth and nineteenth centuries); Harold J. Berman, Toward an Integrated Jurisprudence: Politics, Morality, History, 76 CAL. L. REV. 779, 788-97 (further analyzing historical jurisprudence and its nineteenth-century development in Germany).

\textsuperscript{6}See Percy Bordwell, Seisin and Disseisin, Part I 34 HARV. L. REV. 592, 621 (1920-1921). Elsewhere in the same article, Bordwell speaks of a "revolution in land law" occurring in the seventeenth century, although he makes little of this insight. Id. at 601. George Haskins, in an important article on the origin of the rule against perpetuities, has also recognized the importance of the revolutionary conditions of the seventeenth century but, like Bordwell, draws no larger conclusions about the transformation of the English land law. See George L. Haskins, Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities, 126 U. PA. L. REV. 19 (1977) [hereinafter Extending the Grasp]. Cf., George L. Haskins, "Inconvenience" and the Rule For Perpetuities, 48 Mo. L. REV. 451 (1983) (further elaborating the arguments found in "Extending the Grasp of the Dead Hand").

\textsuperscript{7}For examples of both James's personal irritability and his political clumsiness, see William McElwee, The Wisest Fool in Christendom: The Reign of King James I and VI 90-126, 145-62 (1958).
a theory of royal absolutism that was entirely shorn of the soft edges and careful qualifications found in Tudor political thought.\textsuperscript{8}

James reigned from 1603 to 1625. His relations with his own judiciary steadily deteriorated over these two decades. This deterioration can perhaps best exemplified by his relationship with Sir Edward Coke. In a series of decisions in the 1600s and 1610s, Coke came to assert the primacy of the common-law courts over courts such as Star Chamber or High Commission, that were an outgrowth of the royal prerogative.\textsuperscript{9} A more gifted politician might have been able to sidestep a confrontation with the assertive Coke, but James was entirely lacking in such talents. James and Coke confronted one another directly over the relationship of the royal power to the common law in the \textit{Case of Commendams} (1616) and while Coke was removed from his position as Chief Justice of King's Bench as a result his perceived challenge to royal authority, the monarchy was ultimately weakened by this conflict as well.\textsuperscript{10}

James's relations with Parliament also grew steadily worse. Again, one might take a single episode as representative of conditions late in James's reign. In 1621, James summoned Parliament to meet as conflict with Spain loomed. James requested an appropriation of £500,000 be approved, in order to prepare for war. Parliament voted only £160,000, which James promptly spent. Thereupon, the King requested the balance be approved without explaining how he had made use of the £160,000. Parliament took exception at the refusal to offer an explanation, and not only did not approve further expenditures; it challenged James's conduct of relations with Spain and prepared a "Great Protestation," meant as a statement of "the ancient and undoubted birthright and inheritance of the subjects of England."\textsuperscript{11} James responded by tearing the Protestation from the House Journal and dissolving Parliament.\textsuperscript{12}

James was succeeded as king in 1625 by his son Charles, who ruled as Charles I. Charles would have even more difficulty with Parliament than his father. Charles convoked four parliaments between 1625 and 1629, with each session growing stormier. The Parliament that met in 1628 approved the Petition of Right, which, as its title suggests, sought from Charles a number of concessions that were asserted to belong to the English people as of right. Among its requests—made in strong language and supported by recitations of legal

\textsuperscript{8}See \textit{The Political Works of James I} (Charles H. McIlwain, ed. 1918). Cf. Berman, \textit{supra} note 3, at 1667-1672 (analyzing James's theory of royal absolutism) and at 1673 (analyzing the impact of James's crudely expressed absolutism on Parliament).

\textsuperscript{9}These cases are analyzed in detail in Berman, \textit{supra} note 3, at 1682-86.

\textsuperscript{10}See \textit{Catherine Drinker Bowen, The Lion and the Throne: The Life and Times of Sir Edward Coke} (1552-1634) 342-390 (1956) (detailing Coke's tenure as Chief Justice and his encounter with King James). The \textit{Case of Commendams} involved a challenge to the royal power to grant ecclesiastical benefices. The facts can be found at \textit{id.} 370-74.


\textsuperscript{12}\textit{id.} For a review of James's relations with Parliament in the earlier years of his reign, see \textit{Smith, supra} note 11, at 290-94.
precedent—the Petition sought the abolition of arbitrary taxation and royal agreement that taxes ought only to be levied with "common consent by act of Parliament," the cessation of arbitrary arrests, and an end to the practice of quartering of troops in citizens' homes. Charles "reluctantly agreed" to Parliament's demands.

The Parliament of 1629 proved even more intractable from Charles's perspective. Again, a king found himself challenged in his foreign policy. Charles had gone to war with France and Spain, but Parliament refused to vote the funds necessary to prosecute the campaigns successfully. As a result, Charles first made peace with his foreign adversaries and then dissolved Parliament in 1629, attempting to rule the country for the next eleven years without convening another assembly.

Charles's "personal rule" proved to be a disaster both for the nation and for Charles personally. Charles surrounded himself with figures—such as Archbishop William Laud—who were widely unpopular, and he proceeded to try to avoid the requirement that Parliament approve new requests for taxes by extracting as much revenue as possible from those sources traditionally available to the monarch.

By 1640, however, Charles's circumstances had grown desperate. Three years earlier, Scotland had rebelled against Charles's religious policies and raised an army with the intention of going to war with England. Charles responded first by borrowing money and then by seizing the assets of the wealthiest business in England, the East India Company, but when these expedients failed he found that he had no other course but to reconvene Parliament.

And so in 1640 what later became known as the Long Parliament was convened. Parliament immediately commenced to assert its rights against the King and prepared a set of grievances known as the Grand Remonstrance, which was issued in November, 1641. Parliament also began to take action against the king's closest ministers, causing the Earl of Strafford to be executed and Archbishop Laud to be arrested. In the midst of this constitutional struggle, the Irish rebelled. Parliament feared that if the militia were called up to meet the Irish threat it might used to crush parliamentary independence and so enacted in early 1642 a Militia Bill placing command of the armed forces under parliamentary control. Charles rejected the Bill, but Parliament responded by

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13 *Id.* at 309-10 (discussing in greater detail these and other provisions of the Petition of Right).
14 *Id.* at 310.
15 *Id.* at 311-13.
16 *Id.* at 313-16. See also KEVIN SHARPE, THE PERSONAL RULE OF CHARLES I 105-30 (1992). Some of these sources included the feudal incidents and the fines extracted from the operation of the commissions on depopulation and enclosures. These sources, and their abolition, are discussed *infra* at notes 162-63 and accompanying text.
making it an ordinance of the realm. Charles "ordered the people by proclamation to disobey the ordinance of Parliament" but "both houses of Parliament declared that their ordinance must be obeyed."18

Parliament also asserted ever more vigorously an even broader array of rights against the Crown. A set of Nineteen Propositions, which aimed at restricting the royal prerogative in a variety of ways, were enacted and forwarded to Charles. Acceptance of these propositions "would have left [Charles] a puppet king," and this was not a result Charles desired.19 Charles would go to war rather than sacrifice those parts of the royal prerogative demanded by the Nineteen Propositions. Civil war broke out in August, 1642.20

The war bore inconclusive results at first. Things began to turn badly for Charles beginning in 1645, with the organizing by Parliament of the "New Model Army" under the command of Oliver Cromwell. The purpose of the Army was to provide "a more speedy, vigorous, and effectual prosecution of the war," and it succeeded in this task, defeating Charles's forces in several important engagements.21 Charles surrendered to the Scots in 1646, hoping that he might thereby set the Scots off against the parliamentary army, but his hopes would prove illusory and he soon found himself kidnapped by the parliamentarians in the summer of 1647. He escaped that November, but was quickly taken prisoner once again. Parliament decided to place Charles on trial for treason against the realm. Charles refused to answer the charges directly and defended himself by arguing that the court lacked jurisdiction. In the event, Charles was found guilty and executed in January, 1649.22

The beheading of Charles only shifted the venue of the struggle for power in England. Oliver Cromwell, who had emerged as one of the strongest of the revolutionary leaders, forcibly disbanded the Long Parliament in 1653, marching several hundred musketeers into the House of Commons and

18 Id. at 320-24 (summarizing the struggle of 1641-1642); at 324 (quoting Charles's call to disobey the parliamentary ordinance and the parliamentary response).

19 Id. at 325. Smith states:

Under the terms of the Nineteen Propositions, the privy councillors, the principal officers and judges of the state, the tutors of the king's children, all were to be appointed only with the approval of Parliament. The king was asked to put all forts and castles under Parliament's control; to dismiss his military forces; to take away the votes of all Catholic peers; to promise that his children would not conclude any marriage not approved by Parliament; to enforce the laws against Jesuits, priests, and Popish recusants. Such were the major demands of the Nineteen Propositions.

Id.


21 See SMITH, supra note 11, at 331.

22 Id. at 337-39.
declaring "I will put an end to your prating."23 Cromwell thereafter governed as Lord Protector until his death in 1658, while various experiments in devising a workable Parliament and constitution foundered. In 1659, negotiations were begun with Charles's son. These negotiations led to the restoration of the monarchy in May, 1660.24

The Restoration—by which the reign of Charles II (1660-1685) is customarily known—was a period of enormous outward expansion and economic growth. England's interests in North America and India were steadily expanding. At home, London took on the trappings of a center of world commerce, with an opulent court and the construction of monumental architecture, courtesy of Christopher Wren.25

But the Restoration was not a turning back of the clock to a time before the Civil War.26 The monarchy, as James I and as Charles I had understood it was dead and would not be revived. Rather, the Restoration represented the fulfillment of parliamentary ambitions. Charles II had been summoned back to England in 1660 by the Long Parliament—which had reconstituted itself after Cromwell's death—and neither this Parliament nor its successors were desirous of relinquishing their new authority. The prerogative courts, for instance, which had been abolished in the 1640s in the full flush of parliamentary success, were not about to be restored.27

Charles II died in 1685, and was succeeded by James II. While Charles had been covertly sympathetic with the Catholic cause, James was openly pro-Catholic, and his religious inclinations soon landed him in trouble. By the 1680s, the English elites had for the most part turned Protestant and—since much about their status depended upon religious affiliation—they were not about to countenance a threat to their position. Once again, opposition to a king mounted in Parliament. James was deposed in 1688, and William and Mary were invited by leading members of Parliament to take possession of the vacant throne. Eventually deciding that resistance was futile, James left the country.28

1689, then, represents the definitive establishment of the parliamentary monarchy. A Declaration of Rights was enacted into law in 1689, and Parliament turned its attention to the enactment of a whole panoply of

23 Id. at 345.
24 Id. at 347-50.
26 See Berman, Law and Belief in Three Revolutions, supra note 4, at 598 ("there was no going back . . . ").
27 As one historian has put it: "Parliament did not restore the monarchy of Charles I, but retained those subsequent reforms which benefited its members as a class, an estate, or an institution." HUTTON, supra note 25, at 155. On the abolition of the prerogative courts, see infra notes 84 and 91 and accompanying text.
28 See SMITH, supra note 11, at 363-68.
legislation intended to reform vast areas of law.\textsuperscript{29} The revolutionary fevers were abating and a new order was being born.

\textbf{B. The Gentry and Revolution}

There were many causes of the English Revolution and to reduce this question to the claim that it was the revolution of the landed gentry would be simplistic.\textsuperscript{30} But so long as one avoids reductionism, it is nevertheless possible to assert that the gentry were among the chief participants in the Revolution and among its chief beneficiaries.

To understand the position the gentry occupied in English society in the seventeenth century, one might begin with the situation two hundred years earlier, in the fifteenth century. An old and prestigious nobility occupied the very top of the English social hierarchy. It was once taken as a commonplace that in the fifteenth century this "ancient, fractious nobility to a great extent destroyed itself during the Wars of the Roses, and that the early Tudors completed the repression of its remnants and governed through bureaucrats of middle class origin."\textsuperscript{31} But even if this stereotype has now fallen into disrepute, one might nevertheless safely state that the leading families of England engaged in a relentless competition for power throughout the fifteenth century, which sometimes resulted in bloody rounds of fratricidal slaughter.\textsuperscript{32}

And while it would be an overly facile generalization to state that the Tudor monarchs "completed the repression" of the "remnants" of this group, it is nevertheless the case that the Tudor monarchs, beginning with Henry VII, appealed to the "middle sorts" at the expense of the nobility.\textsuperscript{33}

Occupying second place, then, in fifteenth-century society were the gentry, "who formed the largest group of the kingdom's landowners in terms of

\textsuperscript{29}On the English Declaration of Rights, see Lois G. Schwoerer, The Declaration of Rights (1981); for an example of the new outburst of parliamentary legislation in the area of the reform of criminal procedure, see Samuel Rezneck, The Statute of 1696: A Pioneer Measure in the Reform of Judicial Procedure in England, 2 J. Mod. Hist. 5 (1930).

\textsuperscript{30}Some of these various causes are reviewed in Lawrence Stone, The Causes of the English Revolution, 1529-1642 (1972).

\textsuperscript{31}J.R. Lander, Crown and Nobility, 1450-1509 13 (1976).

\textsuperscript{32}Two recent and helpful accounts of this recurrent warfare are Alison Weir, Lancaster and York: The Wars of the Roses (1995) and Robin Neillands, The Wars of the Roses (1992).

\textsuperscript{33}Thus Geoffrey Elton states concerning Henry VII and the nature of his appeal to the English public:

Fundamental to [Henry VII's] dynasty was, as is commonly recognised, the support of his people, a support which the Tudors rarely endangered and never lost. Most Englishmen had little interest in noble faction and those who suffered from the disturbed times only wanted a king who would restore order, no matter if his rose were white or red . . . .

numbers." As is perhaps to be expected, the gentry of fifteenth-century England was a diverse group, with substantial differences existing between the resources and expectations of the "upper" and the "lesser" gentry. Even in the fifteenth century, the gentry came to be defined by their relationship to the land. The possession of a substantial estate conferred on the fifteenth-century gentleman status, power, and privilege. More than an economic resource, land was a political resource, which—when held in substantial amounts—conferred on its possessor authority within society.

The question of the relative status of the gentry in the sixteenth century has been one of the more keenly debated historiographic questions of the last half century. Was the gentry "rising" or "falling?" There is no need, for our purposes, to resolve this question. Rather, it suffices to note that the gentry was restless. Monarchies throughout Europe were consolidating power and making novel and broad claims to power. James I's doctrine of royal absolutism was derived from and had counterparts in continental developments.

These claims threatened the wealth and status of landed elites throughout Europe, and England was no exception. Indeed, there were uprisings throughout Europe in the middle decades of the seventeenth century, from Catalonia and Portugal in the West, to that part of the Ukraine subject to the Polish king in the East. One common denominator in all of these uprisings was


36 See Kate Mertes, *Aristocracy*, in FI FTEEN-CENTURY ATTITUDES: PERCEPTIONS OF SOCIETY IN MATE MEDIEVAL ENGLAND (Rosemary Horrox, ed., 1994). Mertes states:

Landholders, once the gods of the little land they ruled, still retained political authority over their manors. They had a limited but important judicial role in manorial courts, deciding many cases of petty personal and property crime; and it was their status as landholders that got them appointed to commissions of the peace that played such a large role in county affairs, and sometimes brough them to parliament.

Id. at 49.


38 For an example of the sort of royalist theorizing found on the Continent, see JEAN BODIN, ON SOVEREIGNITY (Julian H. Franklin, ed. and trans., 1992).
resistance on the part of threatened landed classes to a centralizing monarchical power that advanced ever more comprehensive powers to tax or otherwise claim the property of its subjects.39

The English Revolution differed from these other uprisings in the degree of success that the revolutionaries enjoyed. Charles I was overthrown and executed at least in substantial part because of the threat he posed to the property of his subjects. That class with the most to lose—the gentry—then set about constructing a system of property law that would accomplish two essential aims: It would be secure from irrational seizure by the Crown; and it would promote the gentry's essential interests. It would prove to be a durable system. Large parts of the system erected by the gentry remain in effect even today both in Great Britain and in the United States.

II. THE ABOLITION OF THE FEUDAL INCIDENTS AND THE TRIUMPH OF SOCAGE TENURE

One of Charles I's principal sources of revenue during his personal rule was derived from his exploitation of the feudal incidents, particularly knight-service and wardship. These incidents were obligations that attached to the holding of land and dated back to a time in English history when all land was held on the basis of the martial prowess of the landholder. They had been revived by the early Tudor monarchs in a desperate search for new sources of revenue. The gentry, however, saw these practices as threats to their status and their economic well-being, and as fundamentally irrational since they were unconnected to any real economic activity.

This Section details the struggle between those who profited by the feudal incidents—chiefly supporters of the monarchy—and those who advocated their abolition—chiefly members of the parliamentary party. Free and common socage tenure was particularly favored by the gentry as a substitute for the

39 Perez Zagorin states:
Amidst these differences and the prevalence of particular causes, one broad feature nevertheless characterized in some degree the context of nearly all the mid-century rebellions. Most of them were directed against a monarchical power which, however vulnerable at the moment of revolt because of war or other difficulties, had grown during the preceding decades more centralized, more capable of imposing its will, more uniform in controlling and disciplining all ranks of its subjects. ... The inherited and prescriptive privileges of assemblies of estates, the liberties of provinces and of degrees of men, were pared down, became thin and emaciated, or were rendered lifeless at the feet of the all-conquering Leviathan. ... To finance government, war, and courts, the princes challenged or obtained a taxing power that invaded their subjects' security of property. It was inevitable that so far-reaching an application of royal power among peoples not yet fully habituated to bear the yoke should give rise to popular and aristocratic reaction.

ZAGORIN, supra note 4, at 4-5. I owe this reference and this general line of argument to Harold Berman.
feudal incidents, since it did not carry with it the obligation to perform services or pay fees to the Crown, and could therefore be easily acquired, put to use, or alienated. With the triumph of Parliament in the mid-seventeenth century, socage tenure would prevail and remains today the principal land tenure in England.

40 The "free and common" language must be stressed. Socage tenure is described by Simpson as being historically "the great residual category of tenure . . . ." A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 11 (2d ed., 1961). Socage tenure during the twelfth through sixteenth centuries might have attached to it a variety of services and obligations. By the seventeenth century, however, a type of socage tenure had developed which was "free and common," which is "only another way of saying that it is just held . . . free (of services) and common (in the sense of immune from special customary incidents) . . . ." Id. at 13. Littleton's definition of socage tenure is found at infra note 60. The story of the triumph of free and common socage tenure forms Part II A-C of this Article.

41 Id. at 199. One also finds occasional references to socage tenure in American law. Thus one finds in the New Jersey Statutes:

The tenures of honors, manors, lands, tenements, or hereditaments, or of estates of inheritance at the common law, held either of the King of England, or of any other person or body politic or corporate, at any time before July fourth, one thousand seven hundred and seventy-six, and declared, by section three of an act entitled 'An Act Concerning Tenures,' passed February eighteenth, one thousand seven hundred and ninety-five, to be turned into holdings by free and common socage from the time of their creation and forever thereafter, shall continue to be held in free and common socage, discharged of all the tenures, charges, and incidents enumerated . . .

N.J. REV. STAT. § 46.3-2 (1994). The New Jersey Statutes continue:

Nothing contained in this title shall take away or be construed to take away or discharge any rents certain, or other rights incident or belonging to tenure in common socage created prior to July fourth, one thousand seven hundred and seventy-six, and due or to grow due to this state or any person, or the distresses incident thereto.

N.J. REV. STAT. § 46.3-4 (1994).

The South Carolina Code provides: "The only tenure of land in this State is that of free and common socage." S.C. CODE ANN. § 27-5-10 (Law Co-op. 1993).

The case of Charping v. J.P. Scurry and Co. 372 S.E.2d 120 (S.C. Ct. App. 1988) involved the question of the enforceability of a covenant limiting future construction on a parcel of land to four residential units included in the deed to the land. The majority concluded that the covenant was a personal and not a real one, and was not enforceable on the facts of this case. In dissent, Judge Gardner argued that the covenant might be more appropriately interpreted as a real one and went on to maintain that the Court might have resolved this question more appropriately through reliance on common-law socage tenure. Id. at 125 ("It would, in my mind, be more appropriate to apply the principles of the common law . . . . in the form of free and common socage . . . .").
A. Origins of Knight Service and Wardship

Knight service was "[t]he most honourable and most burdensome of the freehold tenures . . . ."42 To understand the order that the revolutionaries uprooted one must first appreciate the main lines of that order. It was—and remains—a truism of English property law that all land is held either mediately or immediately from the Crown. But the meaning of this truism has changed significantly over the centuries. Indeed, the most important transformation that this truism underwent occurred in the middle decades of the seventeenth century, as a direct result of the English Revolution.

In the fifteenth-century world represented by a work like Thomas Littleton's Treatise on Tenures,43 one encounters a baffling array of ways in which one might hold land. Grand serjeanty, petit serjeanty, knight service, frankalmoign, and other tenures were among the most important, but by no means the only tenures.44 Each of these tenures, again, might be held directly of the Crown, or indirectly, through a lord, and could be distinguished one from the other on the basis of the service the tenant owed the lord or the Crown.45 But from the standpoint of the leaders of English Revolution, it was knight service that stood out as a uniquely onerous institution, because it was knight service that provided the Crown with the means of imposing burdensome and essentially "irrational" fees and assessments on the gentry.

Knight-service had its origin in the days following William I's Conquest of England in 1066. William parceled out land as a reward to those loyal retainers who fought at his side at the Battle of Hastings. The land was conferred on the basis of proven martial prowess, with the expectation that those tenants-in-chief who held directly of the king would provide similar service in the future, should it be required.46 And while the king was the only person in England legally permitted to raise an army, William's tenants-in-chief were nevertheless permitted to parcel out the land they held of the Crown to other


44 See SIMPSON, supra note 40, at 6-15 (summarizing the major tenures). Grand serjeanty was the holding of land "in return for some service of a personal nature, which was to be performed for the lord of whom the lands were held." Id. at 9. Petty serjeanty involved the holding of lands in return for "providing the King with some small article pertaining to war . . . ." Id. at 14. Frankalmoign "was created when lands were granted in return for an obligation to perform spiritual services on behalf of the grantor, and it came to be essential that no secular services could be reserved in the grant." Id. at 10. Knight service is explained infra at notes 46-50, and accompanying text.

45 Id. at 6-7.

46 See HOLDSWORTH, supra note 2, at III, 38; and SIMPSON, supra note 40, at 2.
loyal retainers—called mesne lords—in return for service within an agreed-upon number of knights the lord was obliged to provide the king.\textsuperscript{47}

By the time one reaches Henry II (1154-1189), however, knight service was being regularly commuted for a money payment known as scutage. Henry’s tenants-in-chief, in turn, began as well to commute the military service required of their retainers to scutage payments.\textsuperscript{48} By the end of the fourteenth century, however, scutage itself seems to have disappeared, "superseded by other and newer forms of taxation."\textsuperscript{49} And by the time one reaches Littleton’s century, accordingly, scutage had become "purely notional" and "never in practice exacted."\textsuperscript{50}

But scutage was not the only money payment (called generically the "feudal incidents") tenants-in-chief and mesne lords were required to make. An array of payments or services might be demanded of the tenant, most of which might be traced back to the character of the granting of land in knight service by William the Conqueror.

The most important feudal incidents for our purposes were relief and wardship. In theory—as well, it seems, in practice—knight-service was originally non-inheritable. After all, there is no necessary reason to expect that one’s son automatically had the military talents that made his father so particularly valued to William’s campaign.\textsuperscript{51} But already by the early twelfth century this principle was being relaxed in practice. While one might lack a legal right to claim an estate by knight service, one might nevertheless "take it up on payment of a just and lawful relief."\textsuperscript{52} "[T]his [practice] amounts to a recognition of the right of the heir to inherit, or perhaps be regranted the lands."\textsuperscript{53}

Wardship is the other feudal incident relevant to our account. "Wardship means two things, wardship of the land, and wardship of the body[]."\textsuperscript{54} Wardship of the land meant simply this: that where a tenant dies seised of a freehold estate leaving an heir who has not yet reached the age of majority, the

\textsuperscript{47} See HOLDSWORTH, supra note 2, at III, 39 (discussing "the policy of the Norman kings . . . that military service was due to no one but the king . . . ."); and at 40 (discussing the relationship of mesne lords to tenants-in-chief and the Crown).

\textsuperscript{48} Id. at 42.

\textsuperscript{49} Id. at 45.

\textsuperscript{50} SIMPSON, supra note 40, at 7.

\textsuperscript{51} Id. at 16.

\textsuperscript{52} Id. Cf. PLUCKNETT, supra note 2, at 534 (elaborating on the concept of feudal relief).

\textsuperscript{53} SIMPSON, supra note 40, at 17. Closely related to the payment of relief was the doctrine of primer seisin, which was an additional payment the tenant-in-chief had to make to the king in order to be seised of the estate. Id. at 17-18.

\textsuperscript{54} PLUCKNETT, supra note 2, at 534.
lord may retain the land and profits until the heir reaches his majority.\textsuperscript{55} Similarly, wardship of the body meant this much: that the lord must provide for the maintenance and education of the ward, but might also arrange the ward's marriage.\textsuperscript{56} While the ward was not "compelled to accept the marriage" . . . "refusal was a serious thing."\textsuperscript{57} Where the ward rejected the lord's choice of a spouse, he "might then have to forfeit the value of the marriage to his lord."\textsuperscript{58} It must be stressed that these incidents pertained only to lands held by knight service.\textsuperscript{59} Indeed, the common law evolved a sophisticated system of guardianship to protect minors who inherited land held in socage tenure.\textsuperscript{60}

By the late fifteenth century, wardship, relief, and the other feudal incidents pertaining to the Crown were in the process of falling into desuetude. Much land was already held in socage tenure. And even where land was held in knight service, Chancery had developed a system that had begun to serve as an alternative to the common law scheme of estates, of which knight service and its accompanying feudal incidents were a part. This alternative system—based on the feoffment to uses—allowed the routine evasion of feudal obligations,\textsuperscript{61} and is explored below in our discussion of the seventeenth-century creation of modern equity.\textsuperscript{62}

The loss of revenue from the feudal incidents came to be acutely felt beginning with the accession to the throne of the Tudor dynasty in the person of Henry VII, and even more so, during the reign of his son, the ambitious and restless Henry VIII. The feudal incidents represented an untapped and promising source of funds.

\textsuperscript{55}Id. It was also the case that the lord was not accountable to his ward. According to Simpson: "The lord was not accountable for the profits of the land, but could treat the wardship as an assignable right; in fact, wardships were bought and sold as investments and were the most lucrative of the incidents of tenure." SIMPSON, supra note 40, at 18.

\textsuperscript{56}See SIMPSON, supra note 40, at 18.

\textsuperscript{57}Id.

\textsuperscript{58}Id.

\textsuperscript{59}Holdsworth states: "These rights of wardship and marriage were confined to the tenures by knight service and grand sergeancy. They were never extended to socage and petty serjeanty." HOLDSWORTH, supra note 2, at III, 65.

\textsuperscript{60}This system is reviewed at id. 65-66. In the fifteenth century, one finds Littleton defining socage tenure negatively in the following terms: "'Tenure in Socage is, where the tenant holdeth of his lord the tenancie by certeine [i.e., definite] service for all manner of service, so that the service be not knights service.'" LITTLETON, supra note 43, § 117 (quoted in SIMPSON, supra note 40, at 11). Simpson notes that socage is "the only tenure of any importance met with in modern land law." Id. at 11.

\textsuperscript{61}Simpson notes that by the time one reaches the early Tudor period "the technique of evading incidents had reached a perfection which a modern income tax practitioner might well envy." SIMPSON, supra note 40, at 21.

\textsuperscript{62}See infra at notes 249-64 and accompanying text.
B. The Sixteenth-Century Revival of the Feudal Incidents

Pressed for new sources of revenue, Henry VIII began a two-pronged attack on the evasion of income represented by the feoffment to uses. One prong of this attack, the enactment of the Statute of Uses, is explored below in connection with the creation of modern Chancery beginning in the 1660s.63 The second prong of this attack, with which we are presently concerned, was the revival of the feudal incidents, especially relief and wardship.64

Early in his reign, Henry decided to continue the policy first established by his father of searching out "hidden" instances of knight service.65 Where a landholder was found to hold a portion of his lands in knight service, relief and wardship might be claimed from the landholder and his heirs.66 Henry VIII would direct the money so received from relief payments be placed—not, as one might expect, in the Exchequer—but in the King's Chamber, and—in order to realize immediate profit—would often have the wardships so obtained put up for sale on what had become a flourishing market in the sale and resale of these valuable rights.67

Reliance on knight service and its attendant feudal incidents became an even more important instrument of royal policy beginning in the mid-1530s with Henry VIII's seizure and sale of monastic and ecclesiastical lands. In 1509, the year of Henry's coronation, several million acres of land were under Church control.68 This wealth was "the accumulation of nearly a thousand years of endowments and purchases"69 and was a very inviting target for a government that had just declared itself free from the Roman Church and had already taken steps to discredit a celibate clergy and the monastic life.70 In 1535, Henry ordered that a comprehensive survey of the wealth of the monasteries be under-

63 See infra at notes 265-73, and accompanying text.
64 This attack had important antecedents in the reign of Henry VII, who was the first to realize the importance both of relief, and especially of wardship, to Crown revenue. See JOEL HURSTFIELD, THE QUEEN'S WARDS: WARDSHIP AND MARRIAGE UNDER ELIZABETH I (1958). It was through Henry VII's machinations that wardship, "[a]n antiquated and moribund institution[,] was called back to life for a totally irrelevant purpose: revenue." Id. at 7.
66 Id. at 134-35.
67 Id. at 136.
taken, a task that was performed with alacrity and thoroughness. 71 In January, 1536, then, armed with carefully collected data on the wealth of the monasteries, Henry had his allies in Parliament introduce an act dissolving all monasteries worth less than two hundred pounds. 72 The large monasteries, those worth more than two hundred pounds, were subsequently dissolved individually in the years 1538-1540. 73 Two-thirds of all monastic holdings were sold to private parties before 1547, while much of the remaining ecclesiastical property of England—monastic lands as well as the holdings of episcopal sees, collegiate churches and innumerable other ecclesiastical entities—was sold by 1554. 74

What was significant about the sale of these lands was that Henry VIII made sure to require that most monastic lands sold to private parties were "[held] by knight-service of the Crown." 75 What this meant in practice was that the Crown could claim feudal dues from individual landholders if so little as a single acre of their aggregate holdings was held as knight service. 76

71 The results of this survey were recorded in a work known as the Valor Ecclesiasticus, "Ecclesiastical Wealth." This survey was the subject of an important study by ALEXANDER SAVINE, ENGLISH MONASTERIES ON THE EVE OF THE REFORMATION (1909), which remains valuable for its contribution to our knowledge of the monastic wealth during Henry VIII's reign. Scholars today continue to agree that "[t]he dissolution of the Monasteries has taken its place in historical studies... as a revolution in landownership, second only to that which followed the Norman Conquest." JOYCE YOUINGS, THE DISSOLUTION OF THE MONASTERIES 15 (1971).


73 Id. at 235.


75 HURSTFIELD, supra note 64, at 10.

76 Id. at 6. A large array of feudal incidents were implicated in the sale of the monastic lands.

[T]here were... charges to which the purchaser became liable. He was normally obliged to pay an annual rent and, more important still, in the vast majority of cases the recipient was required to hold his lands in knight service in capite. By the creation of the military tenure in chief, the crown in effect reserved to itself the various feudal incidents associated with that relationship, of which the most important were wardship and livery, that is, payment by the heir of a premium before entering upon his lands. In the payment in livery we have in essence the primitive notion of death duties. Moreover, even when the lands were divided and subdivided, they brought with them to each of the purchasers these burdens and 'casualties.'

HURSTFIELD, supra note 65, at 137.

It became apparent by the latter decades of the sixteenth century that the sale of the monastic and ecclesiastical lands was only a temporary expedient for solving the Crown's cash flow problems. The English monarchs, however, continued to resort to
The sale of these lands effectively created a flood of new feudal incidents and wardships. In 1540, accordingly, there was established by statute a court, called the Court of Wards and Liveries, which had competence over the feudal incidents, especially wardship. The Court was empowered to conduct "inquisitions post mortem" to determine whether any parts of the estates of the deceased property-holder were held of knight service or were otherwise held immediately of the Crown. Where the Court reached an affirmative decision, the landholder or his heir thereby became responsible for all of the feudal incidents, including wardship.

The Court of Wards reached the apex of its success during the tenure of Robert Cecil, Lord Burghley (1599-1612). Burghley succeeded in identifying and pursuing on behalf of the Crown increasing numbers of wardships throughout his time as Master of Wards, but his final years on the bench coincided with—and quite possibly incited—widespread loathing of the whole institution of wardship among the populace, in particular, members of the gentry.

The sale of real estate as a means of addressing financial needs right up to the eve of the Revolution. Christopher Clay states:

By 1640, therefore, the landed property of the Crown had been largely whittled away. Most of the ancient royal forests remained, even though some of these had been disafforested and sold off, and the sovereign still had a wide selection of palaces and parks to choose from, but of the many hundreds of rent yielding manors and farms which had still belonged to Queen Elizabeth at her accession, only a scattered remnant survived.

Clay, supra note 68, at 145.

Hurstfield has explained how the Court became a revenue collection device:

After forty years of trial and error, the Crown in 1540 knew exactly where it stood. It was fully armed with a Court of Wards and a body of skilled officials. It had asserted its rights. If a tenant of the Crown died while holding land by a so-called knight service, then his heir, if under age, became a ward of the Crown. He rarely stayed a royal ward except in name. Soon his guardianship would be sold, sometimes to his mother, more often to a complete stranger. With his guardianship would go his 'marriage'—the right to offer him a bride whom he could rarely afford to refuse, for his refusal meant that he must pay a crushing fine to his guardian. Meanwhile, his land would also have passed into wardship, either to his guardian or to someone else, for them to snatch a quick profit until the ward was old enough to reclaim his own.

Hurstfield, supra note 64, at 18.

The procedure of inquisition post mortem is explained in H.E. Bell, An Introduction to the History and Records of the Court of Wards and Liveries 69-70 (1953). It was the duty of county officials—who themselves had an interest in the proceedings—to notify the Court of the deaths of tenants who might be seised in some part of their estate, of Crown lands. Id. at 70.

See Hurstfield, supra note 64, at 260-282 (documenting Lord Burghley's tenure, his success, and the popular complaints lodged against his rule).
C. Popular Resistance to the Feudal Incidents and the Eradication of the Practice

By the early years of the seventeenth century, the Court of Wards was rapidly becoming a very unpopular court. The practice of wardship itself was falling into disrepute.\(^8\) Enforced marriage, the essential premise on which the whole practice of wardship rested, was increasingly under attack, both by the new urban classes and by a gentry that felt it infringed on the freedom to arrange one's personal affairs.\(^8\) It was even satirized on the London stage in the play *The Miseries of Inforst Marriage*, by George Wilkins (1607).\(^8\)

Wardship came under attack for other reasons as well. It was seen to violate basic human dignity and sound economic practice. This attack was first put classically by that diplomat and regius professor of law, Sir Thomas Smith (1513-1577) in his *De Republica Anglorum*, published posthumously in 1583:

Many men doe esteeme this wardship by knightes service verie unreasonable and unjust, and contrarie to nature, that a Freeman and Gentleman should be bought and solde like an horse or an oxe, and so change gardians as masters and lorde: at whose governement not onely his bodie but his landes and his houses should be, to be wasted and spent without accounts, and then to marie at the will of him, who is his naturall Lorde, or his will who hath bought him, to such as he like not peradventure, or else to pay so great a ransome.... So he, who had a father, which kept a good house, and had all things in order to maintain it, shall come to his owne, after he is out of wardshippe, woods decayed, houses fallen down, stocke wasted and gone, land let forth and plowed to the bare and to make amends, shall paye yet one yeares rent for relief and *ouster le maind*, beside other charges, so that not of manie yeres and peradventure never he shall be able to recover, and to the estate where his father left it.\(^8\)

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\(^8\) See Bell, *supra* note 78, at 133-149 (providing a detailed account of the steady decline of the Court of Wards in public esteem).

\(^8\) See Stone, *supra* note 30, at 603-604. Stone identifies two phases to the attack on enforced marriage. The first phase, which began in the late sixteenth century, criticized wardship as violating the natural rights of parents and relatives to see to the education and marriage of their offspring. The second phase, which flourished in the first decades of the seventeenth century, criticized wardship for violating the free choice of the spouses. The second phase, Stone indicates, was far more radical, and shifted "from criticism of the abuses of the system to direct attacks on the system itself." *Id.* at 604.

\(^8\) See George Wilkins, *The Miseries of Inforst Marriage* (1607 reprinted 1963). See also Glenn H. Blayney, *Wardship in English Drama* (1600-1650), 53 STUD. PHILOLOGY 470 (1956). Blayney argues that by the first decades of the seventeenth century wardship had come to be considered "a social evil," and was the target of a number of dramatic attacks. *Id.* at 470-84. To emphasize the widespread nature of the attacks on wardship, Blayney makes a persuasive case that Shakespeare's *All's Well that Ends Well* can only be understood against the backdrop of pervasive criticism of wardship. *Id.* at 477-78.

\(^8\) Thomas Smith, *De Republica Anglorum* 128-29 (Mary Dewar, ed., 1982).
These criticisms began to resonate politically. As early as 1584, the Court of Wards was attacked as a prerogative court and therefore illegitimate. The issue of abolishing the Court of Wards was raised for the first time in governmental circles in James I's first Parliament, in 1603-1604. The issue of abolition was taken up again in 1609-1610. Appreciative of the need to provide a substitute for the loss of funds abolition of wardship represented, Parliament proposed that an annual tax take its place, but these proposals went nowhere. Finally, "[i]n 1621, the House of Commons set up a committee" to investigate complaints against the Court of Wards and—one has the impression—that committee was kept rather active by petitioners who felt their causes had been mishandled.

The Crown, however, remained inattentive to the agitation against the feudal incidents. Charles I, during his period of personal rule, came to view wardship as a vitally important source of revenue. The 1630s witnessed a number of efforts on the part of Charles's Masters of Wards to devise increasingly clever means of extracting larger sums from those subject to wardship. Popular resentment only grew more intense.

The parliamentarians who opposed Charles, not surprisingly, targeted the Court of Wards for elimination. It was a court, in the eyes of many parliamentarians, as onerous as Star Chamber. The Grand Remonstrance of the Long Parliament attacked the Court as "hav[ing] been grievous in exceeding [its] jurisdiction" and as "weaken[ing]" and "ruin[ing]" "the estate of many families." Parliament considered a variety of expedients for replacing the Court of Wards, and finally declared the institution abolished on 24 February, 1645, a declaration that was confirmed in 1660, in the "Act for taking away the Court of Wards and Liveries, and Tenures in capite, and by Knights-Service" (popularly known as the "Statute of Tenures" and "plausibly ascribed to" Sir Matthew Hale). This statute also outlawed the feudal incidents and declared

See BELL, supra note 78, at 135. Plucknett, however, asserts that the Court of Wards should be numbered among "those predominantly common law courts which were... the creation of the Tudors. . . ." PLUCKNETT, supra, note 2, at 174.

See BELL, supra note 78, at 138.

Id. at 139-41.

Id. at 140-41.

Id.

These efforts are documented in SHARPE, supra note 16, at 108.

Id.


See BELL, supra note 78, at 158-59.

The text of the statute is found at 12 Car. II c. 24 (1660). On the Statute's authorship, see CHALLIS'S LAW OF REAL PROPERTY, CHIEFLY IN RELATION TO CONVEYANCING 23 (Charles Sweet ed., 3d ed. 1911). Matthew Hale was one of the most important of the
that henceforth "all Tenures hereafter to be created by the King's Majesty, his Heirs or Successors ... shall be adjudged to be in free and common Socage only ... "94 The English land law was to be put upon a new foundation. No longer could the Crown create tenures that carried with them irrational fees or obligations. Free and common socage, that is socage freed of feudal obligations, would henceforth be the only tenure the Crown might create.

Perhaps the final word on the importance of these developments can be found in Sir William Blackstone, that late but crucial spokesman for the parliamentary ideology. To Blackstone, the statute outlawing the Court of Wards and knight's service was more important to the civil property of the realm than even Magna Carta. Blackstone explained:

[It was a] statute, which was a greater acquisition to the civil property of this kingdom than even Magna Carta itself; since that only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the Statute of King Charles [abolishing the Court of Wards] extirpated the whole, and demolished both root and branches.95

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94Id.

95II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 77 (reprinted in 1966). Blackstone's attack on knight service and wardship, and all of the feudal incidents, was unrelenting. He continued:

For the present, I have only to observe, that by the degenerating of knight-service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen bound by their interest, their honour and their oaths, to defend their king and country, the whole of this system of tenures now tended to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries. In the mean time, the families of all our nobility and gentry groaned under the intolerable burthens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages they were liable to in defect of personal attendance, which, however, were assessed by themselves in Parliament, they might be called upon by the king or lord paramount for aids, whenever his eldest son was to be knighted, or his eldest daughter married; not to forget the ransom of his own person. The heir, on the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of relief or primer seisin; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith very feelingly complains, 'when he came into his own, after he was out of wardship, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and ploughed to
III. The Enclosure Movement, The Domestication of Copyhold, and the Destruction of Rights in Common

A. Background to the Enclosure Movement of the Seventeenth Century

The word "enclosure" is one of those loaded terms of English historiography. The term itself has a certain chameleon quality in that it takes on particular colorations of meaning depending on the intentions of the user. Joan Thirsk has proposed a definition that—while laconic—is nevertheless useful for our purposes. She has described the enclosure of land as the process of "extinguish[ing] common rights over it . . . "96 Because common rights were

be barren,' to make amends he was yet to pay half a year's profits as a fine for suing out his livery; and also the price or value of his marriage, if he refused such wife as his lord and guardian had bartered for, and imposed on him; or twice that value, if he married another woman. Add to this, the untimely and expensive honour of knighthood, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a license of alienation.

Id. at 75-76.

Modern scholars share Blackstone's enthusiasm for the achievement of the Statute of Tenures and the abolition of the feudal incidents. Peter Roebuck has offered the following synthesis:

Major emphasis has been placed on the political significance of the final abolition of the Court of Wards and Liveries in 1660. Not only did it remove a substantial source of grievance against the crown but, as part of a wider settlement whereby Charles I surrendered ancient dues in return for revenue granted by Parliament, it formed a major signpost on the road from a feudal to a constitutional monarchy. . . .

It has been suggested that the more substantial landowners benefited in three respects from abolition: fiscally; collectively, in relation to other groups in rural society; and managerially, insofar as the reform increased their capacity to conduct their affairs effectively. Their financial position improved with the disappearance of the feudal exactions associated with wardship to which the majority of them had previously been liable. . . . Secondly . . . landowners were able, much more easily than hitherto, to bend copyholders to their will in matters relating to agricultural improvement. . . . The third suggestion is that, because following the abolition of feudal tenures ownership of land became absolute, future prospects for long-term planning and investment by landowners were greatly enhanced. Once free of the threat of periodic interference from the crown or its agents, proprietor confidence grew and was reflected in the way in which the management of landed wealth was exercised.


being eliminated, furthermore, "it was usual for the encloser to hedge or fence the land." 97

Establishing a chronology for the enclosure movement has been a difficult and contentious task. Thirsk notes that enclosure as she has defined it had been a feature of English life since at least the year 1000. 98 But beginning in the years after 1500 the process began to arouse intense feelings of popular outrage. 99 The popular resistance that began under the early Tudors has caused some historians to see the sixteenth century as pivotal for the emergence of enclosure. Tawney, for example, argued that the progress made by enclosure in the sixteenth century was crucial to "the undermining of the small farmer's position" and that the sixteenth century may therefore "be regarded as a long step in the commercialising of English life." 100

Economic historians in the decades after Tawney wrote have quarreled with his chronology. The enclosure movement might have been the focus of social criticism in the sixteenth century, but—so it was claimed—it was really the eighteenth century when it came into the ascendance. D.N. McCloskey speaks for this school of thought when he states: "The eighteenth century, then, in the second half of which Parliament added broad powers of compulsion to the tools available for dismantling the open-field system, is the pre-eminent century of English enclosure." 101

This view has now been effectively challenged. The seventeenth century has come to be seen as crucially important to the enclosure's movement growth and consolidation. J.R. Wordie, for instance, writes: "It was during the

97 Id. Closely related to the process of enclosure is that of engrossing, which involved "the amalgamation of two or more farms into one. The superfluous farmhouse was either left to fall into decay, or, with a small piece of land attached to it, was down-graded to accommodate a cottager." Id. at 201. Enclosure is our specific concern in this Article, because Parliament's attitude toward it, changing from implacable hostility to warm approbation, represents the triumph of what had become, by the mid-seventeenth century, the gentry's program.

98 Id. at 201.

99 Thirsk states:

Enclosing and engrossing were two of the most controversial topics in sixteenth-century England. They provoked animated discussion in the alehouses, inspired outspoken sermons from the pulpit, and stirred passions and community loyalties in the fields and muttered imprecations against the selfish and the rich. They incited many minor local riots and one larger disturbance, which spread across three Midland counties.

Id. at 200.


seventeenth century that England swung from being mainly an open-field country to being mainly an enclosed one.\textsuperscript{102} Wordie bases this conclusion on a review of scholarship that establishes that relatively little enclosure occurred in the sixteenth century in spite—or perhaps because of—the vast popular resistance and that by the mid-eighteenth century "three-quarters of England was enclosed."\textsuperscript{103}

While economic historians have been actively engaged in establishing the chronology of enclosure, less has been said about its legal aspects. Early on, Tawney recognized that enclosure must have presupposed a legal revolution as much as an economic revolution. On Tawney's account, the enclosure movement was made possible by the lawyers' abandonment of copyhold—the generic term used to describe the property rights of small landholders—in favor of leasehold.\textsuperscript{104}

Our account is concerned chiefly with the legal implications of the enclosure movement. Economic history will be employed where it elucidates the path the enclosure movement followed, but it will not be the chief focus of our inquiry. From the vantage point of legal history, Tawney was correct to focus on copyhold as crucial to understanding the progress of the enclosure movement, but it was only in the seventeenth century, especially in its second half, that copyhold would be pushed from the center of English debates over enclosure to the margins. The seventeenth century witnessed an effort to consolidate numerous small holdings held by individual yeomen and peasants in the hands of larger, more efficient, land-holders. This movement to consolidate took the form of a struggle to diminish—or even eliminate altogether—copyhold rights.

But the enclosure movement has a paradoxical aspect to it where legal history is concerned. It involved an attack on copyhold, which was preeminently the individual rights small landholders enjoyed over particular parcels of land, and the limiting of access to open fields and the exercise of rights held in common by broadly defined and diffuse groups of individuals. The enclosure movement attacked both of these practices. In its attack on common rights, the enclosure movement was the particular beneficiary of

\textsuperscript{102} Id. at 495.

\textsuperscript{103} Id. at 488. It must also be noted that significant enclosures occurred prior to the sixteenth century. See MAURICE BERESFORD, THE LOST VILLAGES OF ENGLAND 102-5 (1987) (discussing fifteenth-century enclosures).

\textsuperscript{104} Tawney wrote:

From a legal point of view, the great feature of the period is the struggle between copyhold and leasehold, and the ground gained by the latter. Before the century begins, leases for years, though common enough on the demesne lands and on land taken from waste, are the exceptions so far as concerns the land of the customary tenants. When the century closes, leasehold has won many obstinately resisted triumphs; much land that was formerly held by copy of court roll is held by lease; and copyhold tenure itself, through the weakening of manorial custom, has partially changed its character.

TAWNEY, supra note 100, at 1.
steadily increasing amounts of parliamentary legislation through the latter half of the seventeenth and the first half of the eighteenth centuries. Both of these developments—the attack on copyhold and the movement for parliamentary enclosure—will be explored below.

B. The Attack on Copyhold

1. Fifteenth-Century Conditions

Historians have traditionally employed the colorful expression "bastard feudalism" to describe English economic relations in the fifteenth century, and even though J.M.W. Bean has recently cautioned against the use of this term, Bean also concedes that "if we construe 'feudalism' in England as a body of relationships between lord and man that was based on the tenure of land, the characteristics of late medieval lordship are distinctly different [from what had gone before]." The term "bastard feudalism" was first used with its modern meaning by K.B. McFarlane. See K.B. McFarlane, Bastard Feudalism, 20 BULLETIN OF THE INSTITUTE OF HISTORICAL RESEARCH 161 (1945) reprinted in K.B. MCFARLANE, ENGLAND IN THE FIFTEENTH CENTURY: COLLECTED ESSAYS 23 (1981). Roughly put, McFarlane's use of this term was meant to signify a shift in the organization of society from tenure to contract. Classic feudalism was organized around the principle that the great lords of the king would hold land in return for the reciprocal obligation to perform military service. But by the fifteenth century, the king no longer relied on his great lords for military service but rather entered into contractual relationships with military leaders, essentially mercenaries, who agreed to furnish specified numbers of troops in return for cash payments.

McFarlane goes into considerable detail about the sort of contractual relationships that governed the relations among monarch, military leaders, and troops. It is the specifics of McFarlane's research into these contractual relationships that Bean calls into question. See generally J.M.W. BEAN, FROM LORD TO PATRON: LORDSHIP IN LATE MEDIEVAL ENGLAND (1989) (exhaustively analyzing indentures and patent rolls to demonstrate that the system did not work as McFarlane described it). But even if "bastard feudalism" does not carry exactly the meaning McFarlane ascribed to it, it remains a useful term for the way it signifies the very different set of economic relationships that had come into being in the fifteenth century.

This whole controversy has recently been reviewed by Michael Hicks, who tries to reconcile Bean and McFarlane. While McFarlane's focus was too narrow to be sustained indefinitely without serious qualification, Bean has himself drawn gone too far in criticizing his conclusions. Hicks has proposed an understanding of the concept of bastard feudalism sensitive to modern research on fifteenth-century England. See MICHAEL HICKS, BASTARD FEUDALISM 1-42 (1995) (analyzing the controversy between McFarlane and Bean); id. at 43-68 (proposing the existence of several "varieties" of bastard feudalism).
known as the Black Death and subsequently collapsed. Of course, manors themselves, understood as estates held by large landholders, did not cease to exist; indeed, they remained a large part of the English countryside, but they functioned along very different lines after the mid-fourteenth century.

Emerging from the wreckage of the traditional manorial economy was a new class of yeomen. Yeomen have been described as "wealthy villagers whose appearance is one of the most significant social developments of the later Middle Ages." Economically and socially, there were substantial differences within the class of yeomen. But despite the existence of considerable differences between and among individual yeomen, one can nevertheless distill some generalizations about them from recent work on the subject. Yeomen tended to come from peasant backgrounds, but were men who had themselves held positions of responsibility within the manorial economy or whose families had exercised such responsibility. It has been estimated that "[p]robably most villages had one or two families who were at least approaching yeoman status, although they must have formed a very small proportion of the rural population as a whole, possibly no more than three or four per cent." In the course of the fifteenth century, the new class of yeomen "acquired a substantial proprietary interest in the soil." It is this "substantial proprietary interest" that came to be known as "copyhold."

2. The Creation and Judicial Protection of Copyhold

The term "copyhold" was short hand for "tenure by copy of the court roll according to the custom of the manor." Littleton defined copyhold thus:

Tenant by copy of court roll is, as if a man be seised of a manor, within which manor there is a custom and hath been in use, time out of mind of man, that certain tenants within the same manor have used to have lands and tenements to hold to them and their heirs, in fee-simple, or fee-tail, or for term of life, etc., at the will of the lord according to the custom of the same manor. And such a tenant may not alien the land by deed; for then the lord may enter as to a thing forfeit to him, but if

106See Robert C. Allen, Enclosure and the Yeoman 64 (1992) ("[t]he manorial system . . . lasted from the end of the eleventh century until the late fourteenth. It collapsed under the impact of the Black Death of 1348-9 and the subsequent century of population decline").

107Clay, supra note 68, at 57.

108See F.R.H. Du Boulay, Who Were Farming the English Demesnes at the End of the Middle Ages? 17 Econ. Hist. Rev. 443 (2d series 1965). There was "a considerable difference between . . . yeomen and yeomen." Id. at 451.

109See Clay, supra note 68, at 57.

110Id. at 58.

111Allen, supra note 106, at 66.

he will alien his land to another, it behoveth him according to the
custom to surrender the tenements at some court, etc., into the hand
of the lord, to the use of him that shall have the estate, in such form or
effect.\textsuperscript{113}

The relationship of the copyholder to the lord requires special emphasis.
First, copyhold was a sort of inferior estate that existed within a manor held in
fee simple by a lord.\textsuperscript{114} This was an uneasy fit, since, according to Littleton,
copyhold might also be held in fee simple or fee-tail. Littleton states further
that copyhold was held "at the will of the lord according to the custom of the
manor." One might take this passage, referring as it does to the "will of the lord,"
as stating that copyhold was held at the sufferance of the lord, and such an
interpretation might—or might not—have been true for Littleton's age.\textsuperscript{115} But
by the time one reaches the time of Sir Edward Coke, a different gloss was put
on this expression. Coke interpreted this passage as referring only "to the
're-commencement of the tenant's title,'"\textsuperscript{116} and Leadam, the great
nineteenth-century historian of the enclosure movement, concurs with Coke
that the reference to the "will of the lord" must not be understood as establishing
a tenancy at will.\textsuperscript{117} Finally, it must be noted that even though a copyholder
might have a fee simple or fee-tail interest in his copyhold, he was not free to
alienate it, although he might enfeoff the estate to the lord for the benefit of

\textsuperscript{113}\textit{Littleton}, \textit{supra} note 43, at § 73.

\textsuperscript{114}Although Littleton does not make the point sufficiently clear, it seems that the
lord's interest in the manor could co-exist with the copyholder's interest in his estate
because the two estates were grounded ultimately in different systems of law. The lord,
regardless of the nature of his tenure, held by the common law, while the copyholder
held in virtue of customary law. \textit{See Kerridge}, \textit{supra} note 42, 60-61.

\textsuperscript{115}For a discussion of the problems posed in interpreting the expression "at the will
of the lord according to the custom of the manor" in fifteenth-century texts, see \textit{Charles

\textsuperscript{116}\textit{Sir Edward Coke}, \textit{The Compleat Copyholder}, § 32 (1630) (\textit{quoted in I.S. Leadam,
690 (1893)).

\textit{Coke} elsewhere elaborates upon the limitations placed upon the lord's will:
But now copyholders stand upon a sure ground, now they weigh
not their lord's displeasure, they shake not at every sudden blast
of wind, they eat, drink, and sleep securely, only having a special
care of the main chance, viz., to perform carefully what duties and
services soever their tenure doth exact and custom doth require;
then let lord frown, the copyholder cares not, knowing himself safe
and not within any danger, for if the lord's anger grows to expulsion,
the law hath provided several weapons of remedy, for it is at his
election whether to sue a subpoena or an action of trespass against
the lord. Time hath dealt very favourably with copyholders in divers
respects.

\textit{Coke}, \textit{The Compleat Copyholder}, sec. 9 \textit{quoted in Kerridge}, \textit{supra} note 42, at 163.

\textsuperscript{117}\textit{Id.} at 690.
some third party. In this way, the geographic integrity of the larger manor is maintained.

While much about the origin of copyhold is shrouded in mystery, it clearly has its roots in the customary law of individual manors and it clearly gained halting legal recognition by the middle decades of the fifteenth century, as Chancery began to provide some degree of protection for copyholders who had become dispossessed of their estates.118

It was in the sixteenth century, however, when copyhold would reach its full vigor. By the close of the reign of King Henry VIII, Chancery had become the copyholder's regular protector.119 Star Chamber and the Court of Requests also played a significant role in protecting the copyholder.120 Beginning in the 1550s, the common-law courts began to extend protection to copyhold, and by the Elizabethan period these courts had worked out a refined set of principles to govern the affairs of copyholders.121 Copyhold seemed poised to become a useful and integral part of the English legal system.

3. The Triumph of the Gentry and the Domestication of Copyhold

_Pace_ Tawney, copyhold as a legal institution seems to have peaked in the first years of the seventeenth century.122 It was then when copyhold became the subject of learned treatises by Charles Calthrope123 and Sir Edward Coke,124 and the beneficiary of a sophisticated series of rules worked out by both the common-law and the prerogative courts.125 But decline was setting in even as copyhold enjoyed its triumph.


119 See GRAY, _supra_ note 115, at 34.


121 See GRAY, _supra_ note 115, at 54-146.

122 Thus Robert Allen writes: "The early seventeenth century marked the high point of yeoman property rights. These rights, however, were not absolute and were not sufficient to protect yeoman social structure. Large landowners continued to resist royal efforts to protect peasants..." _See_ ALLEN, _supra_ note 106, at 77.


124 See COKE, _supra_ note 116.

125 See _supra_ notes 119-21, and accompanying text.
The Statute of Tenures declared explicitly that copyhold was not to be eliminated.\textsuperscript{126} Even so, copyhold would never be restored to the position it had occupied even at the time James I came to the throne.\textsuperscript{127} In part, the story of this decline is a story of changing economic conditions. Copyholders were still present in significant numbers at the Restoration, but after the mid-seventeenth century, the status of copyholders and their security at law had ceased to be "a live social issue."\textsuperscript{128}

But along with changing economic conditions, one must also be cognizant of the changed legal climate. The prerogative courts, which had provided generous protection to copyholders of an earlier day, were eliminated.\textsuperscript{129} But

\textsuperscript{126}See 12 Car. II c. 24, sec. 7: "Provided also, and be it further enacted That this Act, or any Thing therein contained, shall not take away, or be construed to take away . . . nor to alter or change any Tenure by Copy of Court-Roll . . . ."

\textsuperscript{127}Concerning conditions early in the seventeenth century Alan MacFarlane states: "About one-third of all English land was held by copyhold in the early seventeenth century." \textit{See} Alan MacFarlane, \textit{The Origins of English Individualism: The Family, Property, and Social Transition} 83 (1978).

\textsuperscript{128}Christopher Clay, \textit{Landlords And Estate Management In England}, in \textit{V Agrarian History of England and Wales}, part II 198-99 (Joan Thirsk, ed., 1985). Christopher Clay has given a sophisticated portrait of the situation copyholders faced in the mid-seventeenth century:

\begin{quote}
In the England of the mid-seventeenth century customary tenures were still widespread and important, although the proportion of the rural population holding their land in this way was very much smaller than it had been a hundred years earlier. In the sixteenth and early seventeenth centuries, on manors all over the country, tenants who had thought they enjoyed the protection of custom had discovered that in law they were mere tenants-at-will. In some places, where the land was especially valuable, they had been evicted and their holdings enclosed and then relet as large farms at much higher rent. Perhaps more commonly, after futile legal wrangling, they had been obliged to accept the new situation. They continued to occupy their lands, but as non-customary leaseholders they invariably had to pay more for them. Even where tenures had been undeniably customary there had been innumerable disputes between manorial lords and their tenants about what exactly local custom prescribed, and in particular how much the tenants could be made to pay for their tenancies. By the middle of the seventeenth century, however, these controversies were dying down, in part because few tenants remained whose customary status could be challenged, and few manors where ambiguous customs had not been spelt out one way or another. It was also in part because the common law had clarified many formerly contentious issues.

. . . It may therefore be said of the period 1640-1750, that, except at the very beginning of the it, neither the security of customary tenants nor the extent of their financial obligations was a live social issue.
\end{quote}

\textit{Id.}

\textsuperscript{129}Star Chamber was abolished by Act of Parliament in 1641. \textit{See} 16 Car. I c. 10. Blackstone stated that the Court of Requests was "virtually abolished" by the same Act of Parliament that abolished Star Chamber. \textit{See} III William Blackstone, \textit{Commentaries}, Bk. § 50 (\textit{quoted in Holdsworth, supra} note 2, at 415). Holdsworth notes
even more important than the elimination of this source of protection, was the philosophy embodied in the Statute of Tenures. Although the Statute purported to make room for copyholders, its logic was hostile to these small customary landholders. The Act aimed at eradicating the efflorescence of feudal tenures that had built up over five-hundred years of English legal history, and declared that henceforth all tenures to be created by the king were to be "in free and common socage." To be sure, copyhold was explicitly exempted from the operation of this clause, but it was exempted only because the Statute’s drafters must have perceived this logic and sought to insulate copyhold from it.

In any event, copyhold as a legal institution was doomed. Sir Roger North, for instance, pursuing the logic of the Statute, called for the abolition of copyhold. A substantial case-law continued to build up around copyhold in the eighteenth century, but this was a case-law largely divorced from English realities. Holdsworth declared that copyhold had become by the eighteenth century "a mischievous anachronism," and that "its recent history is mainly the history of expedients for its extinguishment." Copyhold was finally abolished in its entirety in the early part of the twentieth century.

that the Act did not specifically declare Requests abolished, but that it ceased to meet as a court after 1642, and that "after the Restoration, though Masters of Request were appointed, they performed no judicial duties." Id. at 416.

130 12 Car. II c. 24, § 4.

131 Sir Roger North used the premise of the Statute of Tenures—the abolition of the royal tenancies in chief—to call for a similar abolition of copyhold: "It was somewhat unequal, when the Parliament took away the royal tenures in capite, that the lesser tenures of the gentry were left exposed to as grievous abuses as the former." Sir Roger argued as well on what might be termed efficiency grounds that copyhold ought to be abolished because it had simply become too expensive for the poorer sorts to pay the fees required to retain it:

Small tenements and pieces of land that have been men's inheritances for divers generations, to say nothing of the fines, are devoured by fees. So that, if it were only to relieve the poorest of the land owners of the nation from such extortions and oppressions without more, there is reason enough to abolish the tenure.

Id.

132 The case law surrounding copyhold is comprehensively reviewed in John Scriven, A Treatise on the Law of Copyholds (7th ed. 1896).

133 Holdsworth, supra note 2, at VII, 308.

C. Open Fields, Common Rights, and Parliamentary Enclosure

1. Enclosure and Resistance in the Sixteenth Century

A large portion of English farming, at the time Henry VIII ascended to the throne, was performed by farmers working within an extraordinarily complex system of open fields and common rights. This system, whose roots are traceable back to the days of William the Conqueror, poses a whole series of interesting questions for the legal historian—most of which, regrettably, have gone generally unexplored.135

135 The open-field system has been described as:
[a] system of cultivation with farmers allotted strips of land in the field which could be re-allocated from time to time [that] was common among freemen and sokemen at the time of the Norman Conquest, especially in the Danelaw where serfdom was less common. . . .
The system continued in full force after the Conquest for varying periods in various localities. The strips represented roughly one acre or a day’s ploughing. . . . The general idea was to provide equal treatment by scattering the allotments to each farmer among the various fields of the manor or township. . . . The system worked well for a time but became inconvenient and time-consuming and hardly motivated improvements. Lords began to consolidate their demesnes and the example was followed on the rest of the fields. Mediaeval manorial extents show parts of a manor or village as open field but with increasing enclosure as time went on. A survey of the West Field of Cambridge in 1370 describes 1,000 parcels of land strip by strip. Fitzherbert, in 1523, refers to the common practice of neighbouring strip owners exchanging various strips so as to produce compact holdings and enclosing these. In 1563, there are like accounts from East Anglia.


Those who worked the land in this system had varying levels of legally cognizable rights. Eric Kerridge has described the situation:
A common field is one in which various parts or parcels of land (or the use of them) belong to individual proprietors, who exercise sole proprietary rights when the land is in crop but leave them in abeyance when it is not, so that when not in crop, the land is under the general management of all the proprietors in common and by common agreement. Thus a common field is alternately closed for cropping and thrown open to all the commoners, that is, to all the owners of common rights. . . . It goes without saying that common fields, meadows, marshes, pastures, heaths, woods, and all commons whatsoever are common only to the proprietors and to no one else.


Kerridge has elsewhere added: “A common field was a tract of land subject to common rights of pasture except when in crop and then necessarily fenced against stray animals, kept several to the individual cultivators and debarred to all other commoners. The essence of a common field was in these common rights.” Id. at 5.

Historians have generally tended to ignore the legal issues posed by these arrangements. As Kiralfy has observed: “The enclosure movement has been very fully examined by economic and social historians. However, they have tended to omit consideration of legal details.” Supra at 26.
In the seventeenth century, this system of farming was targeted for "improvement." In fact, the system was fundamentally transformed. From a legal perspective, the peculiar engine of transformation, in the later part of the seventeenth century and, even more, in the eighteenth century, became private parliamentary decree. Our concern is with how it happened that Parliament came to dominate these developments and with the nature of the transformation thus worked.

If enclosure had been practised to at least some degree in England from shortly after the year 1000, it nevertheless did not arouse great passion until the end of the fifteenth century. Excitement was particularly aroused at that time over rural depopulation. It was perceived that villages that had been steadily inhabited for several hundred years were being emptied of their people. The conclusion was quickly drawn that the enclosures of wealthier landholders—especially those working to obtain large areas of contiguous pastureland for sheep-grazing—were responsible.

This novel phenomenon was denounced by the intellectual and religious establishment of early Tudor England. Thomas More, for instance, in his _Utopia_, described sheep that devour people and depopulate towns, connected enclosure with the growth of poverty and idleness, and proposed that laws be enacted to punish the wealthy and "greedy" landholders whose irresponsible actions had brought these dire conditions to pass. Hugh Latimer, a yeoman's

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136 It seems that enclosure first came to the attention of Parliament in 1484, when "a reference by the lord chancellor to enclosures and depopulation implied that the government considered these matters urgent enough to call for action." Thirsk, supra note 96, at 214. In 1491, the depopulation of the English countryside was denounced in biblical terms by John Rous, who counted 58 villages as having been destroyed in the County of Warwickshire alone. See _Historia Regum Angliae_ (1491) (printed 1716, 2d ed., 1745). This work is analyzed in _Beresford_, supra note 103, at 81-82.

137 Thomas More wrote:

Your sheep ... which are usually so tame and so cheaply fed, begin now, according to report, to be so greedy and wild that they devour human beings themselves and devastate and depopulate fields, houses, and towns. 

In order that one insatiable glutton and accursed plague of his native land may join field to field and surround many thousand acres with one fence, tenants are evicted. Some of them, either circumvented by fraud or overwhelmed by violence, are stripped even of their own property, or else, wearied by unjust acts, are driven to sell. By hook or by crook the poor wretches are compelled to leave their homes—men and women, husbands and wives, orphans and widows, parents with little children and a household not rich but numerous, since farming requires many hands.

In wandering from place to place, what remains for them but to steal and be hanged—justly, you may say!—or to wander and beg.

Thus, the unscrupulous greed of a few is ruining the very thing by virtue of which your island was once counted fortunate in the extreme.
son himself, similarly declared in his inaugural sermon before King Edward VI that the yeomanry was being destroyed by enclosures and that it was the king's responsibility to stop the destruction. 138 Nor were the intellectuals and religious leaders alone in their protests. Popular uprisings against enclosure were also a part of the early Tudor scene. The Pilgrimage of Grace, for instance, the 1536 challenge to Henry VIII's authority, had causes "not unconnected with enclosure." 139 Throughout the sixteenth century, furthermore, peasants enjoyed considerable success bringing actions against enclosers in the royal courts. 140

The political response to this sense of outrage and resistance remained for much of the sixteenth century openly sympathetic to the opponents of enclosure. The first statute that attempted to limit the practice of enclosure was enacted in 1487 but addressed only conditions on the Isle of Wight. 141 A statute directed "agaynst pylling doun of tounes" and meant to apply to the whole of England was enacted the next year. 142 Yet another measure was enacted on a temporary basis in 1515 and made permanent in 1516. This Act was directed against the conversion of arable land to pasture, and ordered that all enclosures

Cast out these ruinous plagues. Make laws that the destroyers of farmsteads and country villages should either restore them or hand them over to people who will restore them and who are ready to build. Restrict this right of rich individuals to buy up everything and this licence to exercise a kind of monopoly for themselves."


138 See Elizabeth T. Hastings, A Sixteenth-Century Manuscript Translation of Latimer's First Sermon Before Edward, 60 PUB. MOD. LANGUAGE ASSN OF AM. 959 (1945). Latimer declared:

But let the preacher preach til his tong be worne to the stompes, nothing is amended. We have good statutes made for the commenwelth as touching comeners, enclosers, many metings and Sessions, but in the end of the matter their commeth nothing forth. . . .

For if ye bryng it to passe, that the yomanry be not able to put their sonnes to schole (as in dede universities do wonderously decaye all redy) and that they be not able to mary their daughters to the avoiding of whoredome, I say ye plucke salvation from the people and utterly distroy the realm.

For by yomans sonnes, the fayth of Christ is, and hath bene mayntained chefely. Is this realme taught by rich mens sonnes? No, no . . . ."

Id. at 989.

139 Thirsk, supra note 96, at 219.

140 See JOAN THIRSK, TUDOR ENCLOSURES 6 (2d ed. 1989) ("[t]he many . . . enclosure cases heard in the courts at Westminster combine to portray a far from docile peasantry, invoking 'ancient custom' to good effect").

141 See 4 Hen. VII c. 16 (1487); cf. Thirsk, supra note 96, at 214 (analyzing the contents of this statute).

142 4 Hen. VII c. 19; cf. Thirsk, supra 96, at 214 (analyzing this statute); BERESFORD, supra note 103, at 103-105 (quoting from this statute and further analyzing it).
to have taken place after February, 1515, were to be restored to their formerly arable state "after the maner and usage of the country where the seid lond lyeth." The penalty for noncompliance was "the forfeiture of half the profits from the holding to the lord of the fee so long as offence continued." Nor was the political establishment content with simply declaring enclosure in violation of the laws of England. Cardinal Wolsey, then the lord chancellor of England, resolved that the laws against enclosure should be strictly enforced.

Two years later [in 1517] Wolsey appointed a commission of enquiry into depopulation — a more effective instrument for measuring the scale of the problem than any used hitherto. It reflected the importance attached to the subject by the government . . . . The commissioners were ordered to conduct investigations in all but the four northern counties of England, to report on villages and houses pulled down since 1488, the amount of land then in tillage and now in pasture, and the amount of parkland enclosed for the preservation of wild animals. In 1518, when the commission was still conducting enquiries, the first offenders began to appear in Chancery, and in a decree of the court issued that year it was ordered that all who pleaded for pardon should, within forty days, pull down all enclosures made since 1485, unless they could prove that their enclosures were beneficial to the commonwealth. . . .

Prosecutions by the Crown in the court of Chancery and in the court of King's Bench continued for the next twenty years. Indeed, opposition to enclosure remained a standard part of the English political scene for most of the rest of the sixteenth century. Statutes attacking and outlawing a variety of innovations were enacted throughout the Tudor period, and the creation of commissions dedicated to the extirpation of the new agricultural practices remained important. This situation, however, would change dramatically as the forces of revolution gathered strength in the early years of the seventeenth century.

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143 7 Hen. VIII c. 1, Statutes of the Realm III, 176-177; cf. Thirsk, supra note 96, at 215 (analyzing the statutory language). Other provisions of the Act required that "villages and habitation which on the first day of the present Parliament were 'for the more part' occupied in tillage were to continue so," and that "all buildings that were decayed were to be rebuilt within a year." Id. at 215.

144 Thirsk, supra note 96, at 216. The drafters of the Act worked on the assumption that where "the overlord was not zealous in the cause of the commonwealth then the next superior lord could seize." BERESFORD, supra note 103, at 106.

145 Thirsk, supra note 96, at 216; cf. I.S. LEADAM, THE DOMESDAY OF INCLOSURES, 1517-1518 (1897) (collecting and analyzing the findings of the commission against enclosures).

146 See id. at 216-232.
2. The Seventeenth-Century Triumph of the Enclosure Movement

In 1601, the question was raised in Parliament whether to repeal some of the enclosure legislation of the previous century. Sir Walter Raleigh led the effort, raising a series of arguments against the desirability of prohibiting enclosures: enclosure laws did not work, Raleigh charged, because the poor, whom the laws aimed to protect, could not afford to work the land even if their access to it was legally guaranteed. Furthermore, enclosure laws were not needed for the national welfare because foreign trade may produce as much grain as England needs. Raleigh closed by declaring that freedom—which was every Englishman's desire—was infringed by prohibitions on enclosure.

In 1607, in response to a peasant uprising in the Midlands counties, the government established a commission to see to the enforcement of the anti-enclosure laws. This commission would prove to be "the last large-scale enquiry" into the enforcement of these laws. Indeed, opinion in government circles had already begun to shift in favor of a prudent accommodation of enclosure. A memorandum prepared for the Privy Council in July, 1607, for instance, at the time of the Midlands uprising, proposed the need to strike a balance between the requirement "that the poor man shall be satisfied in his end, habitation, and the gentleman not hindered in his desire, improvement."

147 See Sir Simonds D'Ewes, A Compleat Journal of the Votes, Speeches, and Debates Both of the House of Lords and House of Commons (1693). Sir Simonds D'Ewes records Raleigh as stating:

I think this Law fit to be repealed, for many poor men are not able to find seed to sow so much as they are bound to plough, which they must do or incur the Penalty of the Law. Besides, all Nations abound with Corn. France offered to serve Ireland with Corn for sixteen shillings a quarter, which is but two shillings the bushel; if we should sell it so here, the Ploughman would be beggared. The Low-Country man and the Hollander, which never soweth Corn, hath by his industry such plenty that they will serve other Nations. . . . And therefore I think the best course is to set it at liberty, and leave every man free, which is the desire of a true English man.

Id. at 674.

Raleigh is recorded as expressing similar preferences for economic freedom elsewhere: "I do not like the constraining of them to use their Grounds at our wills but rather let every man use his Ground to that which it is most fit for, and therein use his own Discretion." Quoted in Maurice Beresford, Habitation Versus Improvement: The Debate on Enclosure By Agreement, in Essays in the Economic and Social History of Tudor and Stuart England: In Honour of R.H. Tawney 40, 44-5 (F.J. Fisher, ed., 1961).

148 Thirsk, supra note 96, at 236.

149 A Consideration of the Cause in Question Before the Lords Touching Depopulation (1607) quoted in Thirsk, supra note 96, at 236.

Traditional notions of customary rights also came under attack in Gateward's Case, 77 Eng.Rep. 344 (1607). Robert Smith, who asserted that he had by custom "est commorans et inhabitans . . . in an ancient house" for some time and continued to do so, brought an action in trespass quare clausum fregit against Stephen Gateward, for intruding on his dwelling. According to Coke, the Court of Common Pleas declared:
The rhetoric of improvement soon came not only to challenge but actually displace the older anti-enclosure sentiments. The changing climate of opinion is mirrored in good measure in the proposal John Shotbolt advanced in his essay entitled *Verie necessary considerations for the Weale Publique*. Shotbolt argued that, properly pursued, a policy of enclosure would benefit the entire realm. Depopulation might be avoided and the "Weale Publique" advanced. In 1623, Adam Moore, in his *Bread for the Poor*, made similar arguments. Gabriel Plattes, whose *Discovery of Infinite Treasure* was published in 1639, echoed his predecessors in claiming that enclosure in fact increased national wealth and so improved the lot of the poor. The

There are but four manner of commons, sc., common appendant, appurtenant, in gross, and by reason of vicinage, and this common *ratione commorant et resident* is none of them . . . . What estate shall he have who is resident in the common, when it appears he hath no estate or interest in the house (but a mere habitation and dwelling), in respect of which he ought to have his common? For none can have interest in common in respect of a house in which he hath no interest. Such common will be transitory, and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner and interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. 77 Eng. Rep. at 344-345.

E.P. Thompson sees within *Gateward's Case* and its progeny "the ulterior rationality of capitalist definitions of property rights." E.P. THOMPSON, *CUSTOMS IN COMMON* 133 (1991). Less dramatically and less dogmatically, another commentator has recently noted that "the chief policy concern" of the Court in *Gateward's Case* "was that landowners be able to enclose." The Court achieved this result by emphasizing that it would enforce only customs that were certain. See Note: *Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 79 CORNELL L. REV. 183, 191 (1993).

Beresford indicates that this work is undated, but it may date from the late 1610s or early 1620s. See Beresford, *supra* note 147, at 54.

Shotbolt argued:

The vulgar or common sorte of people . . . might nowe bee persuaded and make a generall Triall of the contrary course, that is freely and willingly to assent to a speedy and generall Inclosure in all partes of the Kingdome and bee humble Suitors to his Majestie not only to yeild his Royall assent thereunto or to tollerate the same but rather to endeavour by all means possible to sett so good a business in hand for soe generall Inriching to all sortes and every particular.

*Quoted in id.* at 54.

Summarizing Shotbolt's argument, Beresford states: "For him, enclosure was not the first step toward a change in land use, but a means to more efficient arable production." *Id.* at 54.


See *GABRIEL PLATTE's, A DISCOVERY OF INFINITE TREASURE HIDDEN SINCE THE WORLD'S BEGINNING* (1639); cf. W.E. TATE, *THE ENGLISH VILLAGE COMMUNITY AND THE ENCLOSURE MOVEMENT* 76 (1967) (analyzing Plattes's arguments). Tate provides other examples of mid-seventeenth century opinion shifting in favor of the enclosers. Thus in
pro-enclosure arguments were part of a national debate that endured through the 1650s.\textsuperscript{155} The debate was assisted in part by the changing nature of enclosure: While enclosure in the sixteenth century meant the fencing off of land to accommodate sheep-farming, the new enclosure practices entailed the adoption of agricultural techniques that had the effect of greatly increasing the food supply.\textsuperscript{156} Arguments based on improvement carried greater resonance when large numbers of people were benefited.

The debate, however, was short-lived and one-sided. With the Restoration of Charles II in 1660, it was no longer possible, according to W.E. Tate, even to make the anti-enclosure argument: "From about this time onwards [1660] writers...in general no longer argue the pros and cons of enclosure, or for that matter of engrossing, or of converting the peasant proprietor into a wage-earning labourer. All three alike are in general taken for granted."\textsuperscript{157}

The new intellectual respectability achieved by the pro-enclosure forces came to be felt in the political arena as early as the 1610s and 1620s. By this time, Parliament had come to view its own anti-enclosure legislation with increasing scepticism. "In 1618, the government decided that 'tillage is become much more frequent and usual, corn is at reasonable rates,' and appointed a commission of judges and others in order that 'the rigor of the statutes may be mitigated according to these present times and occasions.'\textsuperscript{158} In 1624, Parliament opened debate on whether the anti-enclosure legislation of the preceding century should be repealed. Sir Edward Coke denounced the old legislation as "so like labyrinths, with such intricate windings or turnings as little or no fruit proceed-

\textsuperscript{155}A play by Philip Massinger, staged in the early 1630s, presented the character of Sir Giles Overreach, a notorious encloser:

\begin{quote}
Extortioner, tyrant, cormorant, or intruder On my poor neighbour's right or grand incloser Of what was common to my private uses; ...\end{quote}

Philip Massinger, A New Way To Pay Old Debts (1633) quoted in W.E. Tate, supra note 154, at 75.


\textsuperscript{157}Tate, supra note 154, at 78-79. Tate notes, however, that agricultural writers in particular continued to advocate enclosure through the 1660s and 1670s: "Almost without exception...agricultural writers of the day either take for granted the desirability of enclosure or strongly recommend it." Id. at 82.

\textsuperscript{158}Thirsk, supra note 96, at 236.
ed from them."159 In the event, Parliament was successful in obtaining a partial repeal of the old enclosure legislation.160

As with wardship, opposition to the anti-enclosure legislation came to a head during Charles I's personal rule. A new enquiry into enclosures and depopulations was organized in 1630, ostensibly to enforce the remaining anti-enclosure laws, but the real purpose was to exploit one more source of revenue to finance Charles's effort to govern without convening Parliament. Beresford has called the operation of this commission "a familiar mixture of paternalism and pick-pocketry."161 A number of prosecutions were brought in Star Chamber, although a number of landowners were able to avoid prosecution by the payment of fines.162 But the landowners would have their revenge. In 1644, after the parliamentarians had seized power, Archbishop Laud, one of Charles's most prominent supporters, was tried for treason. Among the charges preferred against him was the allegation that "he did a little too much countenance the commission for depopulations."163 Laud was found guilty of this and other offenses and publicly beheaded in January, 1645.

3. Parliamentary Enclosures

The first half of the seventeenth century not only witnessed the emergence of powerful new intellectual defenses of enclosures; it also witnessed—as might be guessed from what has already been reviewed—renewed efforts to make enclosure a living social reality. These efforts are first noticeable, early in the century, in the private agreements landowners had begun to reach with the holders of common rights to enclose commons and extinguish group rights of access. In this way, it was hoped, the anti-enclosure legislation on the books might be avoided.

By the 1620s and 1630s, Chancery approval was often sought for these agreements. The affected parties would enter a collusive agreement, and then summon a judge to hear the matter. Those enjoying common rights would present documentation purporting to establish an agreement to exchange their rights with some encloser on receipt of certain consideration but then allege the lord was obstructing the fulfillment of the contract. The lord would then judicially acknowledge the agreement, and the Chancery judges would duly record the fact of the enclosure.164

159Quoted in Thirsk, supra note 96, at 236. Elsewhere Coke declared that anti-enclosure laws were "unnecessary statutes unfit for this time...snares that might have lien heavy upon the subject." Third Part of the Institutes, quoted in Beresford, supra note 144, at 49.

160Thirsk, supra note 96, at 236.

161See Beresford, supra note 144, at 50.

162The operation of this commission, and the prosecutions brought in Star Chamber are rigorously detailed in Sharpe, supra note 16, at 471-473.

163Quoted in Thirsk, supra note 96, at 237.

164The methods employed in reaching these agreements are reviewed in Tate, supra note 154, at 47. Cf. E.M. Leonard, The Inclosure of Common Fields in the Seventeenth Century,
Parliamentary approval of such agreements, however, was a much rarer phenomenon. Two parliamentary decrees approving private enclosure agreements dating to the early seventeenth century are extant.165 These agreements, however, seem to be anomalous.

By contrast, by the time one reaches the middle decades of the eighteenth century, parliamentary enclosure had become routine. A standard procedure had been developed, and private acts to enclose proliferated.166 It has been estimated that "[a]fter 1760 altogether there were about 5,400 enclosure acts and enclosures under general acts, covering . . . more than seven million acres—say a fifth of the area of England."167 It was this proliferation that was denounced by Karl Marx: "The law itself becomes the instrument of theft of the people's land. . . . The Parliamentary form of robbery is that of Acts for enclosures of Commons, in other words, decrees by which the landlords grant themselves the people's land as private property, decrees of expropriation of the people."168

The gap between 1604 and 1760 is a large one, and—if one follows the standard chronology—any role for the English Revolution would seem to be thereby excluded. This view, however, has been challenged by W.E. Tate, who has seen the period between 1660 and 1690 as crucial to the development of "Georgian era" enclosure, by which he means eighteenth-century parliamentary enclosure:

For our purpose [the study of the history of enclosure] we may consider the 'Georgian' era [the eighteenth century after the 1714 accession to the throne of King George I] as beginning not in 1714 when the Elector became King. The operative date is rather, perhaps, 1660, when the impoverished squires returned from the Continent . . . or perhaps better still 1688/9, when their sons established the parliamentary monarchy.169

Tate documents this assertion by pointing to the increasing standardization of parliamentary enclosure decrees found in the latter half of the seventeenth

19 TRANSACTIONS ROYAL HIST. SOCY 101, 108-113 (new series, 1905) (providing examples of judicially approved enclosure chiefly from the 1630s).

165 See TATE, supra note 154, at 50. The agreements are for Radipole in Dorset (1603) and Marden in Herefordshire (1606). Id.

166 On the procedure utilized, see Frank A. Sharman, An Introduction to the Enclosure Acts, 10 J. LEGAL HIST. 45 (1989).


169 TATE, supra note 154, at 80.
century, and to the steady growth in the number of such decrees. The new advocates of parliamentary enclosure justified their actions by appeal not only to the doctrine of improvement as expressed in the economic literature of the preceding fifty years, but also to the results of experiments conducted in the fledgling field of agronomy.

Thus were common rights and common fields on their way to becoming things of the past. These traditional arrangements had fallen into disfavor. They were no longer defended by lawyers and politicians, and indeed had been denounced by those who sought to "improve" England's condition. Improvement in turn meant reliance on the new, scientifically validated means of production and was justified by recourse to arguments based on efficiency or on economic liberty. The poor themselves would be helped—so it was claimed—by the overall increase in the standard of living that would result from the eradication of the old order and the adoption of new approaches.

IV. FREE ALIENABILITY, THE RULE AGAINST PERPETUITIES, AND THE ADOPTION OF THE STRICT SETTLEMENT

We are engaged in analyzing the revolutionary transformation of the English land law in the middle and later decades of the seventeenth century. So far we have examined the abolition of the feudal tenures, the adoption of socage tenure as the main form of holding land, and the impact of the enclosure movement on older patterns of agriculture and landholding. But these were not the only revolutionary changes. The lawyers of the years 1640-1700 were also forced to reach a new understanding of the principle of the free alienability of land and the proper limits to place on this principle.

It has been often, but wrongly, asserted that the seventeenth century in England witnessed the unequivocal triumph of the principle of the free alienability of land. It is more appropriate, however, to see the period as giving rise to a set of enduring compromises between two competing impulses: The need to maintain a market in land satisfactory to meet rising levels of demand,

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170 The early acts are listed in Tate, supra note 154, at 50. The first parliamentary enclosure after 1606 occurred in 1664 and the next in 1668. The pace steadily increases as the end of the seventeenth century approached. See id. The importance of the late seventeenth century to the parliamentary enclosure movement is further analyzed at id., 80-82.

171 Id. at 80-81. One such discovery was the new awareness that turnips might be planted as a feed crop for sheep and cattle on enclosed lands, thus greatly increasing the yield. Id. at 80-81.

Two books that helped to shape the late seventeenth century debate were Samuel Fortrey's England's Interest and Improvement published in 1663 and Andrew Yarranton's England's Improvement by Land and Sea published in 1677 and republished 1681. These works and others like them emphasized economic growth and continual "improvement" as the means to achieve national supremacy. As Yarranton wrote concerning the necessity of adopting enclosure: "[B]y adopting enclosure we could] outdo the Dutch without fighting, pay debts without money, and set at work all the poor of England." Quoted in Tate, supra note 154, at 81).
on the one hand, and the desire of the gentry, on the other, to conserve their landholdings and pass them down intact to the next generation. The creation of the Rule Against Perpetuities and the strict settlement must be understood against the backdrop of these conflicting desires. Both of these institutions had the effect of constricting the free alienability of land in order to meet the dynastic requirements of the gentry, and together they represent the striking of a complicated and delicate balance between the desirability of free alienability and the imperative that landed estates and family property be preserved. The struggle over how this balance was struck is explored below.


1. The Debate Over the Free Alienability of Land

Marxist historiography, represented classically in a work like C.B. MacPherson's Political Theory of Possessive Individualism, has maintained that seventeenth century England witnessed the emergence of a new and unfettered market in land. Indeed, MacPherson argues that during the seventeenth century England became a "possessive market society" that recognized, inter alia, that "land and resources are owned by individuals and are alienable."\(^{172}\) Elaborating on this point, MacPherson continues: "Labour, land, and capital, as well as products, become subject [in the mid-seventeenth century] to the determination of the market."\(^{173}\) These developments, MacPherson argued, represented a decisive break with the customary and status-based society of the preceding centuries, which stressed the authoritative allocation of productive work and which lacked "markets in land and labour."\(^{174}\) Thus, in MacPherson's view, the traditional restraints on the formation of a market in land were dissolving, and a new free market was being born.

The reality, of course, is a good deal more complicated than MacPherson's simple schema suggests. Indeed, debate can be found over the proper limits on the free alienability of land as early as the twelfth and thirteenth centuries. In this early period, it was unclear whether the tenant holding a fee simple could alienate it without permission of his lord. Indeed, the fee simple itself was only then coming into existence, and only gradually did it acquire the characteristics we associate with it: indefiniteness of duration, inheritability, and alienability.\(^{175}\) Only gradually was it recognized that a fee simple might be


\(^{173}\) Id.

\(^{174}\) Id. at 49.

alienated by the tenant even where the grantor had not specifically so provided in the grant.\(^{176}\)

The statute *Quia Emptores* (1290) represents a significant landmark in the development of a notion of free alienability. The problem that confronted the drafters of *Quia Emptores* was the issue of subinfeudation and might best be illustrated by a hypothetical: Suppose A held a manor of the Duke of York, who in turn held of the king in knight's service. Suppose further that A wished to alienate a portion of this manor to B. B would hold his estate of A and would owe his feudal incidents to A, not to the Duke of York or to the King. The difficulty confronting the Duke of York or the king in these circumstances was that their receipt of feudal dues depended upon the performance of increasing numbers of sub-tenants occupying situations similar to B's.\(^{177}\)

*Quia Emptores* changed this situation fundamentally.\(^ {178}\) As Sir Frederick Pollock has put it:

> It was enacted that every freeman might thenceforth dispose at will of his tenement, or any part thereof, but so that the taker should hold it from the same chief lord, and by the same services. The incomer became the direct tenant of the chief lord, and liable to him, and to him only, for a proportionate part of the services due in respect of the original holding.\(^ {179}\)

It has been asserted that *Quia Emptores* "established [the] principle of the free alienation of land."\(^ {180}\) While *Quia Emptores* was intended to strengthen the

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\(^{176}\)This development is traced in *Simpson*, supra note 40, at 85.

\(^{177}\)Sir Frederick Pollock explains the situation: Before 1290 the feudal tenant who alienated the whole of his land put the new tenant in his place as regards the lord; but if he alienated a part only, the effect was to create a new and distinct tenure by *subinfeudation*, as it is called. Thus, if the king granted a manor to Bigod, and Bigod granted a part of it to Pateshull, Bigod was tenant as regards the king, and lord as regards Pateshull. Bigod remained answerable to the king for the services and dues to be rendered in respect of the whole manor, and Pateshull to Bigod in respect of the portion Bigod had granted him. Pateshull, again, might grant over to Raleigh a portion of what he had from Bigod, and so to that portion would be Raleigh's lord, and Raleigh would be his tenant. . . . These under-tenures were constantly multiplying, and not only titles became complicated, but the interests of superior lords were gravely affected. The lord's right to the services of his tenant were in themselves unchanged by any subinfeudation; but his chance of getting them practically depended on the punctuality of the under-tenants, against whom he had no personal rights, in rendering their contribution to the immediate tenant.


\(^{178}\)Edward I c.1 (1290).

\(^{179}\)Pollock, supra note 177, at 71.

position of the great feudal lords and to put an end to subinfeudation it "actually marked the beginning of the end" of the whole system. 181 Free tenants could henceforth "substitute a new tenant for all or part of their land without [their] lord's consent." 182

But despite the establishment of the principle of free alienability of land, important questions remained open: Granted that a tenant in fee simple might freely alienate his land, might he nevertheless prohibit future tenants from doing the same? If he did possess this power, then what were its limits? 183

These two questions would have been answered in the opening decades of the fifteenth century by reference to a statute nearly contemporaneous with Quia Emptores—the Statute De Donis, enacted in 1285. 184 This statute created a category of estate known as the fee tail, which worked as follows: A party holding a fee simple interest would grant an interest, called a fee tail, to some other party. The holder of the fee tail might possess it for life and pass it on to his heirs, but he was forbidden from alienating it outside his lineal descendants. When the line eventually failed, the estate reverted to a specified reversioner or his heirs. Under the terms of the statute De Donis, furthermore, the fee tail so created was unbarrable; that is, it could not be broken by the party enjoying possession. This sort of arrangement had a not surprising impact on the market for such land. 185 George Haskins has explained:

Increasingly, during [the fourteenth and fifteenth centuries] the problem became the practical one of marketability: a grantee might take land in good faith believing it to be freely alienable as the equivalent of a fee simple only to discover subsequently that the land had been entailed several generations back, that the lineal descendants of a prior grantee had died out, and that now a valid claim might be asserted by the heirs of the reversioner or remainderman under the original grant. Apparently, so much of the land in England had been tied up in entails of this sort that it became unsafe to take a conveyance lest one lose it in the manner described. 186

181 Id. at 152.
182 Id. at 153.
183 These were important questions from the perspective of England's wealthy families. Dukeminier and Krier have framed the problem thus:
One of the great and continuing conflicts in the development of English property law arose out of the desire of the heads of rich families to make land inalienable. In a real sense, land was family power, status, and wealth, and those who controlled it wanted to make it impossible—or, if not impossible, at least very difficult—for their descendants to alienate it.
Dukeminier & Krier, supra note 180, at 163.
185 See Haskins, Extending the Grasp, supra note 6, at 28 (explaining the operation of the fee tail as created by the Statute De Donis).
186 Id. at 28.
King's Bench, in *Taltarum's Case* (1472), fundamentally altered the operation of the unbarrable fee tail. The Court recognized that a party holding a fee tail interest could suffer a "common recovery" which would have the effect of breaking the entail and transforming the fee tail interest into a fee simple one. It remained possible, even after *Taltarum's Case*, to place restrictions on the future alienability of land which might be enforced by equity, but at least at common law the effect of this case was to promote free alienability. Henceforth *Taltarum's Case* gave those holding restricted fee tail estates the choice to suffer a common recovery thereby converting their interest to a fee simple. Dynastic arrangements that relied on the fee tail for their security were no longer secure.

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188 Casner and Leach have called the decision in *Taltarum's Case* "an all-time high in legalistic hocus-pocus." See A. James Casner & W. Barton Leach, *Cases and Text on Property* 256 (1969). Casner and Leach describe the common recovery as "a collusive law suit," and explain the operation of this device in the following terms:

The rule of law which made disentailment possible proceeded in two steps: (a) it was first held that a tenant in tail could convey a fee simple provided that he substituted lands of equal value for those conveyed; (b) it was next held that a judgment for the recovery of lands of equal value could be substituted for the entailed lands. With such a rule, plus a complacent blindness of the goddess Justice, the rest was easy. Suppose A, tenant in tail of Blackacre, wanted to convey a fee simple to B. B brought a writ of right (the highest form of real action) against A, claiming title to Blackacre, and demanding that a judgment be awarded that he recover the same. A in his answer alleged (falsely) that he had acquired title from C and that C had warranted the title, wherefore he 'vouched C to warranty,' i.e. called upon him to defend the title to Blackacre and demanded that if C should fail in the defense of the title, A should be given judgment to recover from C lands equal in value to Blackacre. C admitted (falsely) that he had warranted as A alleged. Then C allowed judgment to go in favor of B by default. Under the judgment B recovered Blackacre from A, and A was given a judgment against C to recover lands of the same value as Blackacre. The catch, of course, was that C was carefully chosen as a person who owned no lands at all; so the judgment against him was worthless. (C was usually the court crier and was known as the 'common vouchee'—whence the judgment was called a common recovery).

Of course, after B got the fee simple, he could convey it directly back to A; thus, more frequently than not, B as well as C was a 'straw man' who was brought into the picture merely to turn A's fee tail into a fee simple.

Id. at 256-57, n. 13.

189 See infra notes 190-225 and accompanying text (discussing equitable limitations on free alienability).
2. Early Seventeenth-Century case law limitations on free alienability

Chudleigh’s Case, known in Coke’s Reports as the Case of Perpetuities, decided in 1595, represented the substantial accommodation the Elizabeth Age continued to extend to the principle of free alienability. In his argument in Chudleigh’s Case, Sir Francis Bacon spoke for the spirit of the age when he repeatedly condemned "perpetuities." When Bacon used the term "perpetuity" in this pejorative sense, he had in mind unbarrable entails and perpetual freeholds. Speaking generally, one might safely understand Bacon’s argument to reflect the sort of commitment to free alienability found in Taltarum’s Case. Efforts by a tenant to perpetuate his estate through devices that created unbreakable life estates in successive heirs, in Bacon’s estimation, must not receive the support of the law.

Thus "[b]y the early seventeenth century the struggle for free alienability had met with considerable success." But this broad accommodation of free alienability was being rendered insecure at the very time it seemed triumphant. Two cases in particular are important for the doubt they cast on the scope of free alienability. The case of Pells v. Brown (1620) involved litigation over a disposition made by a certain farmer, William Brown, Sr., for his two sons, William, Jr., and Thomas. The disposition gave the farm to Thomas, the younger son, but also provided that in the event Thomas died without issue

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190 The report of Chudleigh’s Case is found at 1 Co. Rep. 113b (1589-1595), 76 Eng. Rep. 261. Chudleigh’s Case was the ultimate judicial response to the efforts of conveyancers to use the Statute of Uses to create the sort of arrangements that Taltarum’s Case had rendered insecure. See infra notes 191-94 and 275-80 and accompanying text (discussing the relationship of Chudleigh’s Case to the Statute of Uses).


192 See BACON, supra note 191, at 623-36 (criticizing unbarrable entails and perpetual freeholds); cf. Bordwell, supra note 175, at 437-438 (analyzing Bacon’s attack on these practices).

193 See Bordwell, supra note 175, at 438; see also COQUILLETTE, supra note 191, at 134. The Elizabethan opposition to perpetuities, understood as perpetual restraints on the alienation of land, is also reflected in contemporary legislation. See William S. Holdsworth, An Elizabethan Bill Against Perpetuities, 35 LAW Q. REV. 258 (1919) (analyzing late sixteenth-century legislative efforts to restrict further the use of perpetuities). The judges in Chudleigh’s Case cloaked their opposition to perpetuities in theological garb. “Perpetuities,” the Court declared, "do befight against God." Quoted in John S. Grimes, Runnymead Revisited, 6 VAL. L. REV. 135, 136 (1972).

194 See Haskins, Extending the Grasp, supra note 6, at 31.

during William Jr.'s lifetime, the farm should go to William. 196 Once in possession of the estate Thomas, acting under the belief that he enjoyed a fee tail interest, suffered a common recovery in order to convert his estate to a fee simple and then proceeded to alienate the estate to the Pells family. 197 Thomas died without issue during William Jr.'s lifetime, and William brought an action to invalidate the transfer of the estate to the Pells. 198

The Court held in favor of William Jr., declaring first that Thomas was mistaken in his belief that he possessed a fee tail. Rather, Thomas had "a fee simple subject to an executory interest because the failure of Thomas's issue was to be determined at a specific point in time, namely during William Jr.'s life." 199 The Court then proceeded to announce flatly that a fee simple interest of this sort was indestructible and that this had always been so.200

John Grimes has claimed that the Court's decision in Pells v. Brown amounted to a "new Runnymede." 201 George Haskins has termed the outcome "truly revolutionary." 202 Less flamboyantly, John Chipman Gray has opined that "the Rule against Perpetuities had to be invented to control the indestructible future interest created by Pells v. Brown . . . ." 203 For our purposes, Pells v. Brown is important because it represented an early attempt to accommodate the principle of free alienability with the ascendant gentry's desire to preserve the integrity of their estates.

Manning's Case, decided by the Court of Common Pleas in 1609, was the second case to put into doubt the scope of the principle of free alienability. 204 Haskins has described the state of the law prior to 1609:


199 See Haskins, Extending the Grasp, supra note 6, at 33.

200 The Court held that the estate could not be good by remainder, but "by way of contingency, and by way of executory devise to another, to determine the one estate, and limit it to another, upon an act to be performed or in failure of performance thereof, etc., for the one may be and hath always been allowed . . . ." Cro. Jac. at 592, 79 Eng. Rep. at 505-506.

Doderidge, at least, did not think that this was always the rule. He dissented, asserting: "[William] had but the possibility to have a fee, and quasi a contingent estate, which is destroyed by this recovery before it came in esse: for otherwise it would be a mischievous kind of perpetuity which could not by any means be destroyed." Cro. Jac. at 592, 79 Eng. Rep. at 506.

201 See Grimes, supra note 193, at 140.

202 Haskins, Extending the Grasp, supra note 6, at 33.


204 Co. 94b, 77 Eng. Rep. 618 (1609).
Before Manning's Case was decided the owner of a term of years who attempted to divide the term into a life estate in one person and what appeared to be a remainder in another, would find that the remainder was void. The conception of freehold estates and the dignity that lay behind that conception was, roughly speaking, that a life estate engulfed a term for years; therefore, the effect of the pre-1609 view was that the life tenant owned the entire term, and after his death, he might provide for the disposition of whatever remained of the term. A grantor was thus not permitted to fetter alienability even within a term for years.\(^{205}\)

The judges in Manning's Case repudiated this understanding of the law. Edward Manning, the decedent in the case, possessed a fifty-year term interest in a mill. He attempted to leave a life interest in the mill to his wife Mary, and upon Mary's death, to leave the remainder to Matthew Manning. The question presented was whether Matthew could take under the terms of the disposition. Had the law prior to 1609 been applied, Mary's life estate would have extinguished Matthew's remainder. The Court, however, held "[t]hat Matthew Manning took . . . not by way of remainder, but by way of an executory devise . . . "\(^{206}\)

The cumulative effects of Pells v. Brown and Manning's Case were to raise questions about the commitment of the common-law courts to a broad principle of free alienability, and, more affirmatively, to provide a conceptual apparatus to conveyancers who in the middle decades of the seventeenth century began to search more earnestly than ever before for means by which to keep intact the large landed estates of their gentlemen clients. Sir Orlando Bridgman, who was one of England's great legal minds of the middle seventeenth century but who was also politically out of favor in 1647,\(^{207}\) was employed as a conveyancer at the time the Earl of Arundel approached him with a delicate problem: How to provide adequately for his sons, one of whom had become insane.

3. The Duke of Norfolk's Case

"Henry Frederick Howard, the Earl of Arundel and Surrey, was a member of one of the oldest and most prominent families in England."\(^{208}\) His problem was as follows:

\(\text{205 See Haskins, Extending the Grasp, supra note 6, at 33-34.}\)


\(\text{207 Biographical data on Orlando Bridgman can be found in IV Lord Campbell, Lives of the Lord Chancellors 87-102 (1880); Simpson, supra note 93, at 76-77.}\)

\(\text{208 Haskins, Extending the Grasp, supra note 6, at 19.}\)
In 1647 he was faced with the serious problem of how to provide for certain of his younger children through the disposition of one of his estates, the barony of Grostock. Thomas, the Earl's eldest son, was insane; yet by law upon his father's death he was entitled to succeed to the Earldom, which required enormous supporting family wealth. The insanity of Thomas posed no small problem to the Earl. Some provision had to be made for the possibility that Thomas might have a son who, if born, would in turn succeed to the Earldom and therefore should have its attendant estates. Moreover, there were also other children to be provided for. The Earl's desire was that his next eldest son, Henry, should have at least the income accruing from the barony of Grostock during Thomas's life; and if Thomas should die in Henry's lifetime without leaving male issue then living and if Henry should succeed to the Earldom and its estates it was the Earl's intent that his third son, Charles, should have the income from the barony of Grostock.\(^{209}\)

Sir Orlando Bridgman, relying especially on Manning's Case, "used the device of a term of years followed by an indestructible executory interest" in effectuating the Earl's request.\(^{210}\) He drafted an instrument creating a two-hundred year term of years with named trustees to oversee it, and included the following provisions:

The property was to be held for the use of the Earl during his own lifetime and then for his widow. Then during the life of the eldest son, Thomas . . . and of his male issue, if any; it was to be in trust for the benefit of the second son, Henry Howard, and the heirs male of his body; but with the provision— and this was the essential feature involved—that in case the eldest son, Thomas, should die without issue during the life of Henry and thereby the Earldom with the estates accompanying it should descend to Henry, then the trust as to this Grostock barony was to be for the benefit of the brother Charles and the heirs male of his body.\(^{211}\)

The Earl died in 1652 and his widow passed away in 1673. Thomas succeeded to the estate, dying without male issue in 1677. In 1662, Charles II restored to the Howard family the title of the Duke of Norfolk—which had been forfeited in 1554—and Thomas became, at least in name, the fifth Duke of Norfolk. Following Thomas's death, Henry, the second son, succeeded in turn to the title.\(^{212}\) Two years before Thomas's death, in 1675, "legal title had been

\(^{209}\text{id.}\)

\(^{210}\text{id. at 35.}\)

\(^{211}\text{Herbert Barry, The Duke of Norfolk's Case, 23 VA. L. REV. 538, 547 (1937).}\)

\(^{212}\text{id. at 543-47 (reviewing these facts at greater length). Arrangements had been made for Thomas to live his adult life "in safe keeping in Padua," and he never took possession}\)
ostensibly transferred to Henry." After Thomas's death, Henry moved further to secure his holdings by suffering a common recovery in order to prevent his younger brother Charles from realizing his interest. Charles brought an action in Chancery seeking to enforce the terms of the agreement and Henry defended his claim by asserting that Charles's interest was a perpetuity and so void. The issue presented to the Court was whether Charles's interest was a perpetuity and, even more fundamentally, what constituted a perpetuity?

The case was to be heard by Heneage Finch, Lord Nottingham, in January, 1681. Finch had been born in 1621 into an old gentry family that traced its pedigree to Henry Fitzherbert, who had been Chancellor in the time of Henry I. Heneage's father had been Speaker of the House of Commons in the Parliament of 1626. Heneage himself was admitted to the bar in 1645, and did his best to avoid the political controversies of the Commonwealth period. With the Restoration, Finch—who had gained respect for "his deep learning [and] solid abilities"—was named Solicitor General by Charles II. He was also elected to Parliament in 1661 as a representative of the University of Oxford. In 1673, Finch was named Keeper of the Great Seal and carried out the functions of Lord Chancellor; in 1675, he was named Lord Chancellor, and in 1681 he received the title the Earl of Nottingham, by which he is generally known today. Nottingham's career in Chancery would earn for him the title the "Father of Equity."  

Realizing the importance of the case, Nottingham enlisted the services and advice of three prominent common-law judges, Sir Francis Pemberton, Chief Judge of King's Bench, Sir William Montagu, Lord Chief Baron of the Exchequer, and Sir Francis North, Chief Judge of Common Pleas. All three of the judges took the position that Henry should be allowed to take the estate by common recovery. Montagu framed the issue the most clearly, arguing that the insidious doctrine that an executory interest might be indestructible, which had its start with Pells v. Brown, must be repudiated. Otherwise:

Admit that Case to be good Law, where will you stop, if you admit the Limitation of a Term after an Estate-tail, where shall it end? For if after one, it may as well be after two; and if after two, then as well after twenty; for it may be said, if he die within twenty Years without Issue,
and so if within 100, and there will be no end; and so a Perpetuity will follow.\textsuperscript{218}

Nottingham, however, kept his own counsel. He ruled in favor of Charles, and declared that English law could accommodate perpetuities, properly qualified. Indeed, in the context of the time, Nottingham's decision can more properly be said to have established a rule of perpetuities, rather than a rule against perpetuities.\textsuperscript{219} As if responding to Montagu's concerns, Nottingham asked: "They will perhaps say, where will you stop . . . ? Where? Why everywhere, where there is not any Inconvenience, any Danger of a Perpetuity."\textsuperscript{220} And to the question, how ought one to discern whether a particular arrangement constituted a perpetuity, Nottingham replied that "the Necessity of Things, and the Nature of Commerce" could serve as fit standards.\textsuperscript{221}

Lord Nottingham retired from the bench in 1682, and was succeeded as Chancellor by Chief Justice North, one of the common-law judges who had rendered advice in The Duke of Norfolk's Case. North took the first available opportunity to repudiate Nottingham's decision, but Parliament in 1685 restored the rule as Nottingham had articulated it.\textsuperscript{222} Thus restored, the principle of The Duke of Norfolk's Case "has not been shaken since."\textsuperscript{223}

\footnotesize{\begin{itemize}
\item \textsuperscript{218}3 Ch. Cas at 19, 22 Eng. Rep. at 942-943, quoted in Haskins, Extending the Grasp, supra note 6, at 40 (analyzing Montagu's argument).
\item \textsuperscript{219}See Haskins, Extending the Grasp, supra note 6, at 44 ("[w]hat evolved from [Nottingham's] decision was . . . not a rule for perpetuities, but a rule of perpetuities").
\item \textsuperscript{220}3 Ch. Cas. at 36, 22 Eng. Rep. at 953, quoted in Haskins, supra note 6, at 43 (discussing Nottingham's flexibility regarding what constituted an impermissible perpetuity); see also GRAY, supra note 203 (providing further discussion on this point).
\item \textsuperscript{221}3 Ch. Cas. at 31; 22 Eng. Rep. at 950.
\item \textsuperscript{222}On the later history of The Duke of Norfolk's Case, see Barry, supra note 211, at 557-560.
\item \textsuperscript{223}GRAY, supra note 203, at 162. Gray continues: The Duke of Norfolk's Case marks the close of the first stage of the history of the Rule against Perpetuities. It was now a settled point that a future interest might be limited to commence on any contingency which must occur within lives in being. Whether this period could be extended remained to be determined. Id. at 162-63.
\item The development of the modern rule against perpetuities, that an executory interest, to be valid, must vest, if at all, not later than twenty-one years after a life in being at the time the interest is created, was a gradual process that is explored in GRAY, supra note 203, at 169-77.
\item Some modern commentators have advocated a return to the more flexible understanding of the Rule Against Perpetuities embodied in Lord Nottingham's decision. See Adam J. Hirsch and William K.S. Wang, \emph{A Qualitative Theory of the Dead Hand}, 68 IND. L. J. 1, 55 n.223 (1992) (arguing that Lord Nottingham's reasoning in the Duke of Norfolk's Case could provide a source "for fundamental rethinking" in the area of perpetuities law).
\end{itemize}
What is important for our purposes is the compromise that Lord Nottingham forged between the needs of the gentry and the principle of free alienability. As Haskins has observed, "[i]f any values were reflected in Nottingham's thinking, they were almost certainly those of the landed gentry party to which he belonged." Perpetual freeholds and unbarrable entails could have the effect of creating irrational clogs on the alienability of land and were to be avoided. But at the same time, the family estate was to be preserved, and kept secure from those occasional irresponsible persons who would squander precious resources. The Rule Against Perpetuities, like so much else of English land law, was the product of the revolutionary developments of the seventeenth century.

B. The Strict Settlement

1. Background

A second device—the strict settlement—was also invented by the common lawyers of the middle and later decades of the seventeenth century to secure the continuity of the large landed estates. As Dukeminier and Krier make clear, the principle of free alienability has always clashed with the interests of wealthy families. A son impulsively wishes to draw on family resources to satisfy some immediate fancy (daughters were usually not in a position to take such action). His father, taking the long view, refuses to let his son have his way, and—to ensure the son does nothing rash—tries to plan his estate in a way that prevents the son from taking precipitate action after the father has passed from the scene.

224See Haskins, Extending the Grasp, supra note 6, at 43.

225Haskins has stated:

Lord Nottingham's resolution of the perpetuities problem was the kind of decision that would please Tory landowners of the 1680s. These landowners did not want complete destructibility, which could ruin the family estate in a generation. They did want freedom to transfer land, but they also wanted some means of protecting the family from lunatics, wastrels, gamblers, and the like by maintaining some degree of control over the future disposition of the land. Lord Nottingham provided them with a compromise between complete alienability and the power to tie land up for a perpetuity.

Id. at 44.

226Concerning the strict settlement, Eileen Spring has observed:

The strict settlement occupies a prominent place in the history of real property law. It does so because it was the culmination of landowners' legal history, and because with its invention the structure of English property law was substantially complete and was to remain essentially unaltered until 1925, a structure in one way and another to be marveled at.


227See supra note 180.
In the fourteenth and for much of the fifteenth centuries, the large magnates placed their reliance in such devices as unbarrable entails, but—as noted—Taltarum's Case made such reliance treacherous. Opposition to unbarrable entails continued to characterize the thinking of common lawyers in the seventeenth century. Thus Edward Coke declared: "By the wisdom of the Common Law all estates of inheritance were fee simple and what contentions and mischiefs have crept into the quiet of the law by these fettered inheritances, dailie experience teacheth us." There was thus a need to create a system that did not make use of the disfavored unbarrable entail or the despised perpetuity but that nevertheless could satisfy the requirements of the landed gentry.

In the late sixteenth and early seventeenth centuries, the common-law courts began to deploy contingent remainders and fee tails in ways that held out some promise the needs of the landed classes might be satisfied. These efforts, however, went only part of the way satisfying the gentry. As Lloyd Bonfield has observed, although the contingent remainder "began to provide a 'safe harbour' for those settlors unwilling to dabble in perpetuities and other executory interests of dubious validity," these devices could not be used

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229 Coke on Littleton 96 quoted in Lloyd Bonfield, Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement 16-17 (1983). That Coke had in mind unbarrable entails is clear from the criticism he levelled at the Statute De Donis. Id. at 17.

230 Bonfield identifies four developments as crucial to these early efforts. In particular, there were four developments. First, the decision in Colethirst v. Bejushin [1 Plowden 20, 75 Eng. Rep. 33 (1551)] enabled the landowner to employ alternative contingent remainders in marriage settlements which would ensure that the patrimony descended to his eldest son in tail, or, if he predeceased his parents, to a younger son so long as both were living at the time of settlement. Secondly, the court in Wild's Case [6 Co. Rep. 16b, 77 Eng. Rp. 277 (1599)] confirmed that a gift over to children after a grant to their parents might take effect by way of remainder even though the children were not in esse at the time of the devise, thereby facilitating the execution of pre-nuptial settlements. Thirdly, the common law courts undertook to protect settlements of short-term duration from certain of the rigours of the rules of destructibility by modifying the rule in Shelley's Case [1 Co. Rep. 88b, 76 Eng. Rep. 199 (1579)]. Finally, the courts endeavoured to construe remainders in settlements which did not tend towards perpetuities as vested rather than as contingent if such an interpretation was at all possible.

Bonfield, supra note 229, at 25.

231 Id. at 26.
apart from a traditional understanding of freehold estates. The fee tail, used in combination with contingent remainders, remained popular as well, but "the entail was settled in the heir male . . . with the hope, rather than the assurance, that it would descend unimpinged."

The problem, then, was this: A wealthy magnate might be able to pass Blackacre to the generation that followed him, but he could not be sure that it would not thereafter be squandered. The conveyancers who worked on behalf of the large estate holders were charged with the responsibility of devising an

Bonfield has traced the rules that governed the use of contingent remainders in the early seventeenth century:

Because of the fear that contingent remainders might be employed to create lengthy settlements, the common law courts formulated a number of . . . requirements which applied exclusively to these interests. By far the most important was that the estate which supported a contingent remainder must be a freehold interest. The legal rationale supporting this rule was . . . related to the problem of seisin: if the supporting estate was not a freehold, where would seisin lie pending the occurrence of the contingency? . . .

A corollary to this rule recognized that in a conveyance of a freehold followed by a contingent remainder, the contingent remainder must vest or fail before or upon the termination of its supporting freehold estate. . . .

If by its terms the contingent remainder did not operate within these rules, the interest would not be protected by the law; or, as contemporary lawyers would say, it was "destroyed." For the most part, these rules of destructibility of contingent remainders were successful in frustrating attempts to create lengthy settlements in legal estates.

Id. at 26-27.

Bonfield explored the early seventeenth-century case law to sketch out the permissible boundaries for reliance upon contingent remainders. Id. at 27-34. Summarizing the rules,

The doctrine enunciated, one of 'possibilities,' allowed the judges to defeat remainders which were based upon contingencies that were considered to be too remote. But the definition developed was hazy, and perhaps purposely so, because the doctrine supplied a technical reason to set aside settlements which fettered inheritances for more than a generation, while allowing the judges to uphold ones that did not.

Id. at 34. Cf. Charles Sweet, Double Possibilities, 30 LAW Q. REV. 353 (1914) (analyzing the early common law rules regarding "possibilities" and contingent remainders); and Charles Sweet, Contingent Remainders and Other Possibilities, 27 YALE L. J. 977 (1918) (further exploring these issues).

Bonfield, supra note 229, at 49. A portion of Bonfield's book is given over to a study of surviving records of strict settlements, and he indicates that the most popular form of settlement included contingent remainders and fee tails: "This form, 'life estate to groom, remainder to bride for life as jointure, remainder in tail to the heirs male of their bodies,' was, with various modifications, employed in sixty-four of the eighty-four (76.2%) marriage settlements in the data set." Id.

This form of settlement was vulnerable on at least two fronts. It could be broken should the holder of the fee tail suffer a common recovery, and it could be broken where the estate is alienated while the remainders were contingent. See id. at 51.
instrument that might both withstand judicial scrutiny and succeed in meeting this need.

2. Purefoy v. Rogers, the Conveyancers’ Response, and the Development of the Strict Settlement

The essential problem thus remained the question of the long-term security of estate planning. The decision of Chancery in Purefoy v. Rogers (1670) only made matters more difficult.234 Harold Berman has described the decision thus:

[I]n the case of Purefoy v. Rogers [it was held] that if A gave (or left by will) land to B, with the condition that after B’s death it should pass to B’s first son who shall reach the age of 21—then B could frustrate the donor’s intention by disposing of the land at any time before he had a son who reached the age of 21. The contingent remainder . . . , that is, the minor son’s interest, could be destroyed. The technical reason for this rule was that if B should die before his eldest son reached 21, no one would own the land—there would be an ‘abeyance of seisin’ and this would be an intolerable situation.235

Sir Orlando Bridgman, the conveyancer who had drafted the instrument that was at issue in the Duke of Norfolk’s Case, has also been traditionally associated with the development of the strict settlement, although the evidence supporting this association has been called into question.236 But determining exact responsibility for the creation of this legal institution is unnecessary. It is sufficient to point out that the strict settlement was a product of the 1660s and 1670s and that it met the needs and embodied the ideology of the landed gentry. The form of the strict settlement was intended to respond to the decision in Purefoy v. Rogers, but it also struck a blow at the sort of unfettered freedom to alienate that had vexed the landed gentry since Taltarum’s Case repudiated the unbarrable entail. The strict settlement operated as follows: It was proposed that a trust be interposed between the son (B in the above hypothetical) and the grandson (the minor son in the above hypothetical) and that the trustees

234 Wms. Saunders 380, 21 Eng. Rep. 980 (1670). Simpson sees Purefoy v. Rogers as a serious limitation on the principle of free alienability found in Chudleigh’s Case: “In the course of the seventeenth century the ruling in Chudleigh’s Case was whittled down until it became the rule in Purefoy v. Rogers . . . .” See SIMPSON, supra note 40, at 204-05.


236 See BONFIELD, supra note 229, at 60-65 (reviewing the evidence pro et contra on the question of Bridgman’s role in the creation of the strict settlement and finding much of it to be the product of eighteenth-century legend). But see SPRING, supra note 226, at 141-142 (questioning Bonfield’s analysis of the evidence against Bridgman’s invention of the strict settlement).
should be charged with the responsibility of preserving the contingent remainder. B would receive a life estate which he could not alienate, since legal title would have vested in the trustees, and the contingent remainder held by the trustees for the grandson would vest upon the grandson's birth.²³⁷

The next step was to make sure that the grandson carried on the arrangement for the next generation. Casner and Leach explain that continuity was made to depend on the aging process and the maturity of the son and grandson. By the time the grandson reaches the age of majority, the son would have reached his forties or fifties and would:

feell\] himself the guardian of the family honor, tradition, and estates. G. may be rebellious and undisciplined, but he cannot disentail and thereby acquire a fee simple in remainder, because disentailment is possible only for a tenant in tail in possession; so, no matter what wild and radical ideas G may have at the age of 21, he can do the family estates no damage. It was at this point that, traditionally, S called G in for a chat. He explained to him that, having arrived at manhood’s threshold, G would be wanting to make the Grand Tour of the continent, and present himself at the London season; this would take money, but there were family funds, controlled by S, available for members of the family who showed that they had the family interests at heart. S further explained that one of the important interests of the family was the continuation of the family estates and that there were a few papers to be signed to that end, now and at once. Thus gently nudged, it was traditional for G to sign as requested and thus make available to himself those advantages which flow from a generous parental allowance. The resettlement which would be created at this point comprised the following steps:

a) S, the life tenant, and the trustees surrendered their estates to G, the remainderman in tail. This made him a tenant in tail in possession.

²³⁷Berman notes:

[the strict settlement]... made it possible to preserve the form of this rule [that of Purefoy v. Rogers] while avoiding its impact upon the great families who sought to maintain their dominant position over generations and centuries. [There was] created a trust to stand between S., the son, and G., the grandson, the trustees being charged with preserving contingent remainders; and the trustees estate vested... immediately upon the gift to S. The formula was: To S for life, remainder to Trustees for life of S in trust for life and to preserve contingent remainders, remainder to S's first son in tail male (i.e., to descend in the male line), with successive remainders in tail male to the other sons of S. By this scheme the son, S, is deprived of his power to convey the land prior to the birth of a grandson, since there is a vested estate in the trustees; and any attempt by the trustees to dispose of the land contrary to the trust will be void. When the grandson, G, is born, his remainder vests.

Berman, supra note 235, at 109.
b) G suffered a recovery in favor of the family solicitor, thus making the solicitor the owner of the fee simple.

c) The family solicitor conveyed to S for life, remainder to G for life, remainder to Trustees for the lives of S and G to preserve contingent remainders, remainders to the first and other sons G in tail male, remainders to the second and other sons of S in tail male. Thus the basic pattern was pushed forward one generation. S could now rest easy in the confident belief that G would have no power to put the estates out of the family until he had a son 21 years old; and by that time G in his turn would be settled down, devoted to a shire life of farming and fox hunting, and determined to see that the family estates were preserved.238

3. The Social Significance of the Strict Settlement

Historians in recent decades have come to understand the strict settlement as a device that had the utmost importance for the functioning of elite social structures in England for a period that runs roughly from the Restoration of Charles II to the outbreak of World War I. Sir John Habakkuk, in a series of works spanning better than a half-century has pioneered this effort.239 His

238CASNER & LEACH, supra note 188, at 357-358.
Eileen Spring recounts the predicament of the poet Percy Shelley, who, at the age of twenty-one, attempted to break the strict settlement that had kept the family estate intact:
Settlement's force . . . is starkly demonstrated in the story of the poet Shelley. A descendant of the family of sixteenth-century legal notoriety, Shelley was of their blood but not of their spirit. He refused on idealistic grounds to join his father in resettling the family estate, balking at passing it on to his unborn son, "one whom I know not—who might, instead of being the benefactor of mankind, be its bane, or use [the estate] for the worst purposes." Unable to make his father see matters in this unaristocratic light but in need of an income until he should inherit, Shelley set out to bar the entail so far as he could do so by himself, planning to borrow on his expectations. . . . [After finding that such borrowing was practically impossible] Shelley came to the realization that the only reasonable way for him to gain an immediate income was to capitulate to his father and reestablish the estate. "When I look back," he later wrote, "I do not see what else I could have done than submit. What is called firmness would have left me in total poverty."


239H.J. Habakkuk, English Landownership, 1680-1740, 10 ECON. HIST. REV. 2 (1940) (a study of "[t]he general drift of property in the sixty years after 1690 . . . in favour of the large estate and the great lord"). See also H.J. Habakkuk, The Rise and Fall of English Landed Families, 1600-1800, 29 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 187 (5th series, 1979) (reviewing marriage and inheritance patterns and sales practices among the gentry in the two centuries specified); H.J. Habakkuk, The Rise and Fall of English Landed Families, 1600-1800, II, 30 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 199 (5th series 1980) (reviewing issues of mortgages, borrowing, and indebtedness on the part of the English landed
work tends to avoid grand sociological speculation and is concentrated instead on questions central to the internal operations of the system. How did the strict settlement system of the seventeenth through nineteenth centuries differ from what had come before? Why did men who enjoyed fee simple interests in land choose to become life tenants? How were younger sons and daughters provided for in a system that openly favored primogeniture?

Habakkuk's answers to these and other similar questions are interesting and stimulating. But perhaps the profoundest part of his argument occurs in his discussion of the sense of enduring class solidarity the strict settlement promoted. The gentry would not have become or remained the ruling class of England for over two hundred years without the external pressure created by a legally enforceable doctrine of strict settlement. 240

J.V. Beckett has made similar arguments. From the English Revolution to the opening volleys of the Great War:


And it was the strict settlement which guaranteed that land remained within families that possessed power, both social and political. But not only did the strict settlement play a conservative function in keeping intact the holdings of the large estates; it also played a positive role in forming the aristocratic ethos...
that the governing classes of England lived by for over two centuries. "Since estates were a trust from generation to generation, the ethos demanded that they be preserved, and preferably improved." Principles of good stewardship were to be followed, which demanded that modern agricultural methods be utilized and natural resources properly exploited. It was only natural that the landed classes, both gentry and aristocracy, would direct this sense of duty not only to private economic matters, but also to the public welfare. Out of a sense of obligation, the English landed classes came to assume positions of leadership, both locally and nationally, and to discharge the duties of office with a disinterested sense of public spirit.

242 Id. at 6.


244 The terms "aristocracy" and "gentry" are used interchangeably. Caution is necessary when making such broad generalizations. Significant differences existed between the gentry and the aristocracy on many levels. Strictly defined as members of the peerage of the realm, the aristocracy, for the later seventeenth and much of the eighteenth centuries, was severely limited in numbers, consisting of about 160 titled families. See GORDON E. MINGAY, ENGLISH LANDED SOCIETY IN THE EIGHTEENTH CENTURY 6 (1963). The gentry, on the other hand, probably numbered somewhere between 8,000 and 20,000 families, depending on how one defines one’s terms. Id. Indeed, many members of the upper levels of the gentry "would have been regarded as nobility by continental standards." JOHN ASHTON CANNON, ARISTOCRATIC CENTURY: THE PEERAGE OF EIGHTEENTH-CENTURY ENGLAND 10 (1984). Mingay and Cannon, in their above-cited works, have both explored areas where gentry and aristocracy differed in their economic situation and social expectations. Nevertheless, where the need to conserve landed estates was concerned, the gentry and the aristocracy were of one mind. Michael Bush has explained:

The peerage and the gentry were closely related, sharing the same belief in birthright, conceiving themselves as members of the same ruling class and deriving their wealth and local influence from the same landed source. The connexion was confirmed by kinship and recruitment. Gentry rose into the peerage while the younger sons of the peerage descended into the gentry. Intermarriage between peerage and gentry families was common. Furthermore, it could not be said that the two had mutually opposed interests: if the one gained an increase in power and wealth it was not necessarily at the other's expense.


245 See BECKETT, supra note 241, at 9-10. Beckett declared that:

The responsibility exercised by the aristocracy in economic development was matched by a similar concept of duty and service in regard to the leadership of both the locality and the nation. The aristocratic power base lay in rural England, symbolized by the country house and its attendant park on which they lavished vast sums of money to maintain the family's prestige. . . . [M]ost aristocrats recognized that time in the country made sound economic sense and fulfilled their duty to stand at the head of the community. . . .
Eileen Spring, finally, has weighed in with an evaluation of the strict settlement that—at least when seen from the vantage point of social importance of landed estates—does not substantially differ with Habakkuk and Beckett.246 Spring argues that the strict settlement "established a family constitution, the character of which is summed up in three words: patrilineal, primogenitive, and patriarchal."247 It was both the product of a gentry that wished to consolidate its political power and social status, and a means by which the values of that class came to be reinforced: "[T]here can be no doubt that in giving the aristocratic ethos a legal vehicle, settlement went far to strengthen it."248

Thus the spirit of the English Revolution infused the land. The leadership class that emerged victorious in the seventeenth century had found the means to cement its position in society. The principle of free alienability was balanced against dynastic interests. Estates were consolidated and preserved, and the aristocratic ethos reinforced and transmitted forward in time, as fathers passed on to sons the obligations of "good birth." This sense of duty and responsibility—owed first to family, then to nation, finally to generations past and those as yet unborn—that animated the English aristocracy for so long, would finally exhaust itself in places like Verdun and Ypres. That it managed

[T]he concept of service was [also] carried into the government of the state. With their large stake in the land, the aristocracy expected to govern, and they often did so at great personal cost, since London life was expensive and neither MPs nor peers were paid. In the wake of the Revolution of 1688, the aristocracy came to control every aspect of government, both executive and legislative.

Id.

246 It must, however, be noted that on a somewhat different topic—the impact of the strict settlement on the structure of the English family—Spring has taken a powerfully articulated and distinctive stance, challenging much of the accepted historiography. For example, Lawrence Stone has argued that the creation of the strict settlement—like the abolition of the Court of Wards—was representative of a new individualism asserting itself in the middle and latter decades of the seventeenth century and played the role in the creation of an "affective family." LAWRENCE STONE, THE FAMILY, SEX, AND MARRIAGE IN ENGLAND, 1500-1800 239-244 (1977). Lloyd Bonfield has also generally endorsed this interpretation of the strict settlement. See Lloyd Bonfield, Marriage, Property, and the "Affective Family," 1 LAW HIST. REV. 297 (1983). See also Lloyd Bonfield, Affective Families, Open Elites, and Strict Family Settlements in Early Modern England, 29 ECON. HIST. REV. 341 (2d series, 1986); Lloyd Bonfield, Strict Settlement and the Family: A Differing View, 41 ECON. HIST. REV. 461 (2d series, 1988). Eileen Spring has vigorously challenged this interpretation of the evidence. Eileen Spring, The Family, Strict Settlement, and Historians, 18 CAN. J. HIST. 379 (1983); Eileen Spring, Law and Theory of the Affective Family, 16 ALBION 1 (1984); Eileen Spring, The Strict Settlement: Its Role in Family History, 41 ECON. HIST. REV. 454 (2d series, 1988). The resolution of this debate is peripheral to our main thesis—that the strict settlement was a creation of the English Revolution and allowed the landed gentry to consolidate a position of primacy in English society that lasted for over two centuries.

247 See SPRING, supra note 226, at 144.

248 Id. at 145.
to hold center stage for over two centuries is a tribute, at least in part, to the success of the legal institution known as the strict settlement.

V. THE CREATION OF MODERN CHANCERY AND THE DEVELOPMENT OF TRUSTS AND MORTGAGES

A. The Statute of Uses and the Rise of Modern Chancery

1. The Conceptual Rigidity of the Common Law Scheme of Estates and the Feoffment to Uses

In England, at the time Henry VIII ascended to the throne, there were really two systems of land law that existed side by side. There was, first, the common law scheme of estates, which was conceived of as a hierarchy of interests in land with the fee simple at its apex, and which used the doctrine of seisin as the means of determining who legitimately enjoyed a freehold interest in a given piece of real estate. But there also co-existed with the common law scheme of estates a system of rights enforceable in Chancery that had developed around the "use." 249

Landholders in the fifteenth and sixteenth centuries wished to avoid the common law scheme of estates where possible for two reasons. The first was a desire to escape the requirement of the feudal incidents. The second was the longing for a system that avoided some of the conceptual rigidity of the common law scheme, thus accommodating more complex transactions.

The feudal incidents are discussed above. 250 But even where the satisfaction of feudal incidents was not a concern, one might have wished to avoid the common law system because of its inflexibility. The conceptual rigidity of the system was the result of enormous stress being placed on seisin and enfeoffment ("livery of seisin") as the foundation of most transactions. The concept of seisin has been called a "mystery" by no less an authority than Maitland, 251 but might best be understood as the outward and visible sign of the ultimate right to possess, use, and alienate a given parcel of land. 252


250 See supra notes 64-68, 76-77, and 95, and accompanying text (analyzing the feudal incidents and the desire of landholders to avoid their consequences).

251 See F.W. Maitland, The Mystery of Seisin, 2 LAW Q. REV. 481 (1886). Maitland was speaking ironically.

252 Bordwell states: Seisin and disseisin meant quite different things to our medieval lawyers. The one suggested peace and quiet, the other robbery, burglary, piracy, and the like. . . . Seisin was fundamental. "It was so important that we may almost say that the whole system of our land law was law about seisin and its consequences" (quoting II F. POLLOCK AND F.W. MAITLAND, HISTORY OF ENGLISH LAW, 30) . . . .

"Seisin meant possession. . . .

"But if seisin meant possession, it meant much more than what
Enfeoffment consisted of the handing over of seisin and was the formal transfer of a landed estate. To be valid, livery of seisin required the entry onto the land of the parties to the conveyance and the performance of acts which third parties would understand as the handing over of the estate by the grantor to the grantee. Enfeoffment, furthermore, had to take place in the present. A could not enter his estate together with B and declare to B that "you are hereby enfeoffed of this estate to take effect next St. Crispin’s Day." Reinforcing this rule on enfeoffment, was the basic principle that seisin had to be continuous. Because enfeoffment could occur only in the present and because seisin could suffer no gaps, a freehold estate in futuro could not be created.

This conceptual rigidity ruled out of bounds any transaction that did not take effect immediately. Landholders thus found it advisable to search for alternatives to the common-law scheme of estates as a means of structuring their more complex property arrangements. It was in this search for alternatives that the "use" was invented.

we ordinarily think of as possession, the power to control a physical thing. It was closely connected with the idea of enjoyment...."

Bordwell, supra note 6, at 592-593.

By the early seventeenth century courts were forced to deal with the limits of the right to possess, use, and alienate a given parcel of land in the context of litigation over what sort of activities constituted a nuisance. See Daniel R. Coquillette, Mosses From an Old Manse: Another Look at Some Historic Cases About the Environment, 64 CORNELL L. REV. 761, 765-81 (1979) (analyzing early case-law on the relationship of seisin and nuisance).

253 Bordwell states:
The transfer of the freehold was confined to a present transfer because the freehold was the possession and the possession could be shifted only by acts of possession such as delivery and entry. When these acts took place, the change of possession or freehold took place and not at some subsequent time.

Percy Bordwell, The Conversion of the Use to a Legal Interest, 21 IOWA L. REV. 1, 6-7 (1935).

254 Livery of seisin... meant delivery of possession. It was the operative fact of the feoffment, and the feoffment dominated the transfer of land. As the livery was the operative fact of the feoffment and not the charter, which was merely evidentiary, the feoffment was effective instantly or not at all. Livery was a present, physical fact, and unlike agreement or intention could not reach into the future. As a consequence, we have the common law scheme of estates. Such only as could be conceived of in terms of the present were possible."

Bordwell, supra note 6, at 593.

255 Bordwell describes the problem:
Ruled out of the common law scheme of estates was the freehold in futuro... [There cannot be a situation] where after a grant to one, the continuity is broken by a gap and then a second freehold is limited to someone else, as to B for life and one year after B's death to A. The common law abhorred a vacuum and would not allow the freehold to be in abeyance.

The Conversion of the Use Into a Legal Interest, supra note 253, at 5.
The term "use" was "a vernacular term derived from the old French oeps, which was in turn derived from the Latin opus." The idea was that seisin would be granted to one party for the benefit of another. As Bean puts it, "Land was granted to A to the use of B: the grant could have been either by B himself or by a third party who intended that the land should be held for the benefit of B." The beneficiary of this arrangement was called the cestui que use, a term derived from Law French, which is retained in the law of trusts and estates even today.

The doctrine of the use is traceable to the efforts of the late thirteenth-century Franciscans "to live without property of any sort or kind." Since the Franciscans could not own property outright, but nevertheless had to eat and drink, wear clothing and reside in habitations, some third party had to hold property for their benefit.

Although, as Bean indicates, reliance on the use "appears to have begun among the lower orders of feudal society," by the time one reaches the close of the fourteenth century "a number of important landowners" had turned to this device as a way of making their post mortem dispositions. The result was that "[i]n the years 1350-1500 landowners . . . enjoyed a freedom in the disposition of their inheritances that was denied to their thirteenth-century ancestors."

Initially, and for the entire duration of the fourteenth century as well as much of the first half of the fifteenth, the enforcement of uses occurred in the ecclesiastical courts. Only gradually, over the course of the middle decades


257 Id. at 104. Richard Helmholz has described the operation of the use: The holder of the freehold land—the feoffor—would convey land during his lifetime to feoffees to uses. They in turn held it for the benefit of the feoffor, or sometimes of a third party—the cestui que use—under instructions to convey the land to persons to be named in the feoffor's will. Richard H. Helmholz, The Early Enforcement of Uses, 79 Columbia L. Rev. 1503, 1503 (1979).

258 Bean has noted that "this is a shortened form of the phrase cestui que use le foennment fuit fait." Bean, Decline of English Feudalism, supra note 256, at 104, n.2. The full expression signifies that one party was being enfeoffed with the estate for the benefit of the other.

259 F.W. Maitland, The Origin of Uses, 8 Harv. L. Rev. 127, 136 (1894). Bean has challenged Maitland's account of the origin of uses by pointing to evidence that some sort of primitive use was in existence prior to the emergence of the Franciscans. See Bean, Decline of English Feudalism supra note 256, at 129. But even Bean concedes that the use derived its conceptual apparatus and sophistication from Romanist and canonist sources. Id. at 131-32. Cf. S.W. DeVine, The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment Before 1535, 10 J. Legal Hist. 1 (1989) (further examining the connections between the Franciscans and the foennment to uses).

260 Bean, Decline of English Feudalism supra note 256, at 122, 124.

261 Bean, supra note 34, at 553.

262 See Helmholz, supra note 257, at 1504-11.
of the fifteenth century, did Chancery become the usual court to which one would resort for enforcement. Thus "by the 1450s, 90 per cent of all cases coming before the Chancellor were concerned with uses."  

2. 1536-1660: From the Statute of Uses to the Statute of Tenures

As already indicated, the Tudor monarchs were in steady need of a healthy cash flow nearly from the time Henry VII defeated Richard III at Bosworth Field. The promise represented by feudal incidents that were going uncollected was simply something that could not be resisted. As already noted, Henry adopted a two-pronged approach to this issue. On the one hand, he set out to revitalize feudal institutions and sources of revenues, a step discussed above. But he also decided that he must put a stop to the extent possible to the practice of evading feudal incidents.

This commitment meant that Henry would have to challenge the whole practice of the enfeoffment to uses. The reliance of the landed classes on the use had become pervasive. Henry decided that he would attempt to have enacted in Parliament a statute that would force the landed classes to reduce this reliance, and the result was the Statute of Uses. Maitland declared that "the Statute of Uses was forced upon an unwilling Parliament by an extremely strong-willed King." Enactment of the Statute in 1536 was the product of several years of pressure brought to bear on Parliament by Henry.

The Preamble to the Statute of Uses consisted of an extended diatribe against the unscrupulous employment of this device. Uses were the product of "diverse

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264 See Avery, The Effectiveness of Chancery, supra note 263, at 84.

265 See supra notes 64-68 and 76-77, and accompanying text.

266 Roland Greene Usher states that by the year 1500 "[t]he Common Law Judges [had] declared more than once that the greater part of the land of England was held by uses." Roland Greene Usher, The Significance and Early Interpretation of the Statute of Uses, in I Wash. U. (St. Louis) Stud. pt. ii (1913) at 42.

267 Frederic W. Maitland, Equity 34 (1936).

268 Holdsworth has argued that a draft bill introduced into Parliament in 1529 should be taken as the direct ancestor of the Statute of Uses, although the provisions of this draft bill differed from the final product in some significant details. See Holdsworth, supra note 2, at IV, 450-51, and 572-74. This view was subsequently challenged by E.W. Ives, The Genesis of the Statute of Uses, 82 Eng. Hist. Rev. 673 (1967). The ultimate resolution of this controversy is unnecessary for our concerns. Evidence of this controversy suffices to demonstrate that extensive reliance on uses had resulted in a significant loss of revenue to the Crown, which Henry sought to repair by legislative action.
and sundry Imaginations, subtle Inventions and Practices," and resulted in "fraudulent Feoffments, Fines, Recoveries, and other Assurances." The purpose of the Statute was "to extirp[ ] and extinguish[ ]" these practices.

Henry VIII, however, could not simply declare the use abolished. To have abolished the use tout court would have resulted in enfeoffing those lawyers and others who were serving as feoffees for beneficiaries. Thus:

the legal title had instead to be taken away from those feoffees and given to the beneficiaries. The statute accordingly provided that where A was seised of property to the 'use, trust, or confidence' of B, then B was thereafter to be deemed to be seised of the property 'to all intents, purposes, and constrictions in the law, of and in such like estates as [he] had or shall have in use. In other words, whenever A was seised of property to the use of B, the statute effected a notional or fictional livery of seisin from A to B. B, the cestuy que use, was to be the statutory owner of the legal estate, and the feoffee (A) merely a channel through which the seisin passed in an instant of time to B. . . . The purpose and effect of executing the use was that the beneficial owner would always die seised, so that his last will and testament was ineffective at common law and the feudal incidents attached on descent to his heir. The common-law position was so completely restored that the Crown regained its prerogative rights in addition to wardship and relief.

Subsequent judicial interpretation of the Statute resulted in three categories of uses being exempted from execution: These were uses on other than freehold estates; uses imposing active duties upon the feoffee; and the use on a use.

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269 17 Hen. VIII c. 10 (pmbl.).

270 Id.


272 Id. at 217. On the feudal incidents of wardship and relief, see supra notes 51-58, 64-68, and 76-77 and accompanying text. By its terms, the Statute of Uses not only executed most uses, it also reinstated primogeniture as the exclusive means of conveying landed estates between the generations. This restoration provoked a popular outcry sufficiently forceful that, four years later in 1540, Parliament enacted the Statute of Wills which "conferred for the first time the legal power to dispose of freeholds by will, save that tenants by knight-service had to leave at least one third to descend." Id. at 218.


Bordwell makes the point that the Statute did not explicitly exclude the active trust from its terms. Rather, this result was the product of subsequent judicial reasoning about the functioning of uses:

One of the characteristics of the use had been . . . that the cestui had the right to take the rents and profits; hence in a case which arose soon after the Statute, it was said that if the feoffee was himself to take the rents and profits and deliver them to the beneficiary, this was not a use. It was a short step from this to hold that such a case was not within the Statute and that in such a case the feoffee retained the possession in
Two fundamentally different approaches arose to interpreting the Statute of Uses, especially as it pertained to reliance upon the use as a means of creating future interests that impeded alienability on the part of heirs.\textsuperscript{274} Chudleigh's Case (1594), which resolved the question of the so-called "contingent use" in favor of the common law, became the vehicle by which the two competing visions of the Statute of Uses were framed. The first approach is associated with Sir Edward Coke and might be termed the strict approach. Coke grounded his interpretation on what he conceived the purpose of the Statute to be: the extirpation of those uses which had the effect of evading the common law scheme of estates and which thereby posed a threat to the health of the Kingdom. In his report of Chudleigh's Case, Coke echoed the language of the Statute of Uses by declaring that a use was a "trust" or "confidence," thus perhaps assisting in the linguistic transformation by which property arrangements once structured by reference to the "use" came to be grouped under the rubric of "trust."\textsuperscript{275} But Coke also understood King's Bench to declare order that he might carry out his trust. Thus arose that 'second spring of uses' of which Bacon wrote.

Bordwell, \textit{supra} note 253, at 13.

\textsuperscript{274} See COQUILLETrE, FRANCIS BACON, \textit{supra} note 191 at 129-30. English land law sometimes seemed like a constant struggle between dynasty-minded settlers, who tried to tie up family lands for generations, and heirs who wanted to sell the lands with clear title for cash. One way to attempt to tie up the land from free alienation was to create contingent future interests in the land. To use a simplistic example: a grant to "B and his heirs, as long as they live on the land, remainder to C," might tie up the land if enforceable. But it was not enforceable, because it violated one of strict common law rules governing contingent future interests, namely, that once a grantor parts with a fee simple "there is nothing left to grant, for he has exhausted the whole quantum of his interest." The contingent remainder, granted to C and his heirs, was void, and B could sell the land with clear title. Ingenious lawyers, seeking to escape common law limitations and to tie up land for their dynasty-minded clients, turned for help to the Statute of Uses. Perhaps contingent future interests in land created through a "use" would be treated more leniently by the courts? For example, suppose the grant above were "to A and his heirs, to the use of B and his heirs, so long as they shall live on this land, remainder to C and his heirs." Before the Statute of Uses, it could be argued that the above delivered a full fee simple to A, and so did not violate the common law rule. If Chancery enforced the executory interest in equity, it would be effective as a "shifting use," i.e., on the happening of the contingency, the use would 'shift' from B and his heirs to C and his heirs. Of course the entire legal estate would be fully vested, at least technically, in A and his heirs, subject to the use. After the Statute of Uses, the "use" would be executed, and A would drop out of the picture, and B would receive a legal estate. But would C's executory interest be enforceable, or would it be void as contrary to the common law limitations?

\textsuperscript{275} On the probable origins of the term "trust" in the Statute of Uses, see MILSOM, \textit{supra} note 2, at 207-08.
that at common law a use was not capable of conferring rights on the party who was its beneficiary.\footnote{276} and that contingent uses could not survive the adoption of the Statute of Uses.\footnote{277} In essence, Coke found in Chudleigh's Case authority for his position that a use had to conform to the rules of possession governing the common law scheme of estates.

Sir Francis Bacon, in his Reading on the Statute of Uses, adopted what might be called a broad understanding of the use. Although he had been on the same side as Coke in the oral argument to Chudleigh's Case, he quarreled with Coke over the relationship of the use to the common law scheme of estates. Bordwell states:

Bacon, unlike Coke, liked the use. He was not, like Coke, enamoured of the old common law and saw in the logic of the use the chance to escape from the confines of the latter. In contrast with the scholastic, common law jargon of Coke, his exposition of the differences between the use and the possession was modern and universal. Far from

\footnote{276}{A use is a trust or confidence, which is not issuing out of the land, but as a thing collateral annexed in privity to the estate, and to the person touching the land, \textit{scil.}, that the \textit{cestuy que use} shall take the profits, and that the terre-tenant shall make estates according to his direction. So that, he who hath a use hath \textit{nota jus neque in re neque ad rem}, but only a confidence and trust for which he hath no remedy by the common law, but his remedy was only by \textit{subpoena} in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned, till they did perform it, and therefore the case of a use is not like unto commons, rents, conditions, etc., which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the terre-tenants, or by disseisins, or by escheats, etc., as uses may . . . .}

\footnote{277}{And if by any construction out of this Act, contingent uses should be preserved: 1. Greater inconveniences would follow than were before. 2. Great absurdities would from thence likewise ensue. For . . . land would pass against the rule of the common law from one to another so easily, and upon such secret conditions and limitations, that no person could no in whom the estate of the land did remain.}

\footnote{1\textit{Co. Rep. 121b, 76 Eng. Rep. at 273-275.}}


agreeing that uses imitated in any way possession, he urged that they stood upon their own reasons utterly differing from cases of possession in respect to their raising, preservation, and extinguishment.278

Coke and Bacon wrote at a time during which reliance upon the use had become treacherous. Bacon himself stated that as the result of the Statute of Uses "the inheritances of this realm are tossed at this day, as upon a sea, in such sort that it is hard to say which bark will sink, and which will get to the haven: that is to say, what assurances will stand good and what will not."279 Even those uses not executed by the Statute were not always enforced by the Chancellor. Thus, for instance, Simpson records that some Chancellors viewed uses for a term of years—which as a use upon a non-freehold estate was not executed by the Statute—"as fraudulent evasions of the Statute of Uses" and so declined enforcement.280 But when, after 1660, the use was revitalized under the guise of the trust, it was Bacon's more flexible conception that would prevail.

3. The New Chancery and the Expanded Doctrine of Trusts

With the enactment of the Statute of Tenures, "[t]he economic purpose of the Statute of Uses had disappeared."281 There was no longer any need to prevent the evasion of the feudal incidents, since the feudal incidents had now themselves been effectively abolished. Simultaneously, the Court of Chancery reasserted itself. Austin Scott, Percy Bordwell and other leading scholars all agree that the Court of Chancery now entered into its "modern" period.282

278Bordwell, supra note 275, at 12-13.

Where Coke saw the use as conferring no rights on the cestui, Bacon defined it as a form of "ownership":

So as now we are come . . . to the affirmative, what an use is; agreeable to the definition in Delamer's Case, where it is said: an use is a trust reposed by any person in the terre-tenant, that he may suffer him to take the profits, and that he will perform his intent. But it is a shorter speech to say, that usus est dominium fiduciarium: Use is an ownership in trust.

VII FRANCIS BACON, READING ON THE STATUTE OF USES in BACON'S WORKS 400-401 (James Spedding, ed. 1872). Cf. COQUILLE, FRANCIS BACON supra note 191, at 132-35 (further elaborating on areas of disagreement between Coke and Bacon).

279BACON, supra note 278, at 395.

280SIMPSON, supra note 40, at 187. Active uses were more regularly given effect by the Chancellor. Id. at 201. On the use upon a use, see infra notes 284-93 and accompanying text.

281SIMPSON, supra note 40, at 187.

282Austin Scott divides the history of Chancery into four periods. The fourth and final period began in the middle decades of the seventeenth century when "[t]he old philosophy of uses . . . gave way to a new philosophy of trusts based upon clearer conceptions of public policy and of the nature and purposes of the law." I AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS, 22(3d ed. 1967).
Substantially responsible for this development was Lord Nottingham, who—as noted—was also instrumental in resolving the Duke of Norfolk's Case. 283

Accompanying the revitalization of the Chancery was a revitalization of the use. This revitalization occurred through the mechanism of the use upon a use. This so-called "double use" had been given unfavorable treatment in 1557, in Jane Tyrrel's Case. 284 Milsom has explained the situation:

The bargain and sale enrolled had come to be regarded as the equivalent of a feoffment, and it was easy to forget that it worked only because the bargain and sale raised an implied use. If then a grant to uses was intended, and the land was conveyed to the feoffee by this method instead of by feoffment, a use upon a use necessarily resulted. In Tyrrel's Case in 1557 a tenant in fee simple desired to settle land upon herself for life, remainder to her son in tail, remainder to her own right heirs. She bargained and sold to the son to those uses, presumably intending that the Statute [of Uses] should execute them. But they were held void as repugnant to the implied use. 285

Despite this condemnation, John Baker has found evidence that the use upon a use was enforced in a few "special cases" even in the sixteenth century. 286 But,

Percy Bordwell divides the history of Chancery into three periods, but agrees with Scott that the modern period commences with the mid-seventeenth century. Bordwell states:

With the third period, Chancery came into its own. Back of this period Chancery doctrine is dim and uncertain. The third or modern period is one of great systematic development. The Chancellor... was the inheritor of a great tradition and he made the most of it, but he had much more in common with the common law judges... and his court took on the habits of courts of law to a much greater extent than when it was thought of as a court of conscience.

Bordwell, supra note 253, at 4.

283 See supra notes 216-21 and accompanying text.


285 Milsom, supra note 2, at 208. It is important to stress the distinction between the bargain and sale and enfeoffment. It was held beginning in the early sixteenth century that a completed bargain and sale agreement would result in the creation of a use to the benefit of the purchaser as soon as the purchase price was paid but before the buyer has been able to take possession. "The underlying notion here is that it would be unconscionable of [the seller] to hold to his use after he had been paid the money." See Simpson, supra note 40, at 178.

Baker continues, what had been a "trickle" in the sixteenth century, grew into "a common form" in the seventeenth. 287

It is the emergence of this "common form" that is our concern. The case of Sambach v. Dalston (1634) is frequently understood as the first step in the effort to revitalize the use upon a use, 288 but as Simpson has demonstrated this case did not introduce any new theoretical innovations. Rather, Chancery simply intervened in order to remedy a poorly drafted conveyance by requiring "that the legal estate be conveyed to the second cestui que use." 289

Indeed, as Simpson has shown, it was not until after the enactment of the Statute of Tenures, in the case of Ash v. Gallen (1668), 290 that Chancery showed itself ready to put the use upon a use on a solid theoretical footing:

In Ash v. Gallen there was another blunder. The parties to a conveyance had intended to convey by feoffment to uses, but the conveyance had been mismanaged and there had been a bargain and sale to uses; thus inadvertently but incompetently they had limited a use upon a use. It was suggested that the second use could be enforced as a trust, and in the context this seems to envisage the first cestui que use holding in trust for the second, rather than actually conveying the land. 291

It was then left to Lord Nottingham to work the use upon a use into a form that lawyers might productively employ. Distinguishing between a use and a trust, Nottingham declared "that 'if a use be limited upon a use, though the second use be not good in law nor executed by the statute, yet it amounts to a declaration of trust and may be executed in Chancery." 292 By the early

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287 See Baker, supra note 271, at 329.

288 On Sambach v. Dalston, see J.E. Strathdene, Sambach v. Dalston: An Unnoticed Report, 74 LAW Q. REV. 550 (1958) (the most thorough review of this case); cf. Milson supra note 2, at 208-09 (an example of a scholar who places relatively too much weight on Sambach).

289 See Simpson supra note 40, at 202. Simpson continues:
This amounts to saying that since the Statute of Uses fails to execute the second use, yet, since it was unconscionable not to execute it, equity would insist upon its execution by private conveyance. The decision in Sambach v. Dalston did not therefore open any doors to deliberate evasion of the statute's design to end the separation of legal and equitable ownership.

Id. at 202.

290 1 Ch. Cases 114, 22 Eng. Rep. 720 (cited and analyzed in Simpson, supra note 40, at 190-91). Indeed, counsel for plaintiff argued that "tho' a Use could not rise as a Use upon a Use, yet as a Trust it would in Equity." 1 Ch. Cas. at 114, 22 Eng. Rep. at 720.

291 Simpson, supra note 40, at 203.

eighteenth century, this conception of the use upon a use as a trust enforceable by Chancery had become a commonplace means of avoiding the operation of the Statute of Uses and structuring dispositions of property.293

Furthermore, as Lord Nottingham’s distinction between trusts and uses suggests, a whole new range of meanings was imputed to the word "trust" beginning in the 1670s and 1680s. Analysis of this word centered around the nature of the property interest the beneficiary had in the trust and would lead ultimately to the creation of a refined system of equitable estates that conferred on the beneficiary substantial rights which the Chancellor stood ready to protect.

As noted above, Coke in his report of Chudleigh’s Case denied that a use or trust conveyed rights at law to the beneficiary and so concluded that a disappointed beneficiary’s only remedy was to seek a subpoena in Chancery.294 Bacon, on the other hand, was willing to define the interest a beneficiary enjoyed as a form of "ownership."295 It was, however, Coke’s limited conception that dominated the legal analysis of the first half of the seventeenth century. To the extent that rights were recognized at all, they were personal rights; the cestui que use might possess a chose in action, that is, he might enjoy a personal right to seek relief in Chancery, but otherwise the cestui "could expect only very limited protection."296

Matters changed dramatically beginning in the mid-seventeenth century. Rex v. Holland (1648) "was a genuine precursor to the forthcoming shift .... "297 Holland involved the status of land "put in trust for the use of an alien, and the question was whether this violated the rule forbidding aliens to 'purchase' English lands."298 Counsel for the cestui—whose chief interest was in seeing to the validity of the transaction—maintained that a trust did not create an estate but conferred on the beneficiary only a cause of action. Thus the prohibition on

293 See SIMPSON, supra note 40, at 204-06.
294 See supra note 277 and accompanying text.
295 See supra note 278 and accompanying text.
296 VERNON VALENTINE PALMER, THE PATHS TO PRIVITY: A HISTORY OF THIRD PARTY BENEFICIARY CONTRACTS AT ENGLISH LAW (1992) at 123. Palmer continues:
[The cestui's] remedy was confined to the person trusted, that person’s heir, or sometimes his alienee if he took with notice of the use. Hence, the trust asset was still subject to the claims of the trustee’s creditors, to the rights of dower and curtesy, and liable to escheat to the Crown for the felony or attainder of the trustee. It was not until the trust estate was seen as the direct property interest of the cestui that such intervening claims were defeated.

Id.
298 PALMER, supra note 296, at 123.
foreign ownership of land was not violated. King's counsel, however, argued that a trust "was not a thing meerly in action, but an hereditament," that is, a real interest in land. Chief Justice Rolle, for his part, cautiously opened the door to an expanded notion of the trust by concluding that the nature of a trust "was not fixed, but was dependent upon that of the asset placed in trust." The decision in Rex v. Holland, D.E.C. Yale records, "is the opening of the way for Lord Nottingham's work." In a number of important cases over the course of his tenure as Chancellor, Nottingham constructed the modern notion of the trust as an equitable estate out of the old case law and statutory law governing uses. On the one hand, Nottingham moved to secure the rights of the cestui against violation by the trustee or by those who had claims against the trustee. Thus, for instance, in the case of Bevant v. Pope Nottingham determined that the dower rights of the trustee's wife could not be met with assets drawn from the trust. Similarly, in the case of Medley v. Martin Nottingham ruled that the trustee's creditors could not satisfy their claims against the trustee from the trust since to do so would violate the rights of the cestui.

On the other hand, Nottingham acted to treat the assets of the trust as the cestui's own assets where the cestui had exposed himself to liability. Thus in Grey v. Colville Nottingham permitted a creditor who had obtained a judgment against the cestui to satisfy that judgment by recourse to the assets of the trust. And in Tooke's Case Nottingham held that "where the trust consisted of a lease that the cestui had mortgaged, then the lease should be sold to pay off the cestui's indebtedness."

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299 Id. Cf. Rex v. Holland, 82 Eng. Rep. at 498 ("it was a trust for an alien to take the profits of the land, and in that the alien had no estate in the land; . . . this trust was a thing only in action . . . .")


302 See Yale, "Introduction," supra note 302, at 91.


These decisions by Lord Nottingham, it has been said, had a "revolutionary effect" on the development of trusts.\textsuperscript{309} Henceforth "the cestui was recognized as an owner . . . ."\textsuperscript{310} The concept of an equitable estate had essentially been created. The rule in \textit{Chudleigh's Case} was eventually "whittl[ed] down" and it became possible as well to create contingent future uses enforceable by Chancery.\textsuperscript{311} The eighteenth century judiciary would propound elaborate rules governing the operation of equitable estates but it is unnecessary, for the purposes of this Article, to pursue these developments further. It suffices to have shown that the way was now opened for the judicial recognition of complex transactions. The use, the abuse of which at least the Statute of Uses aimed to "extirpate," had now—with the abolition of the feudal tenures—provided the foundation for the growth of a whole new area of law. Again, one sees the land law being revolutionized.

\textbf{B. The Equitable Mortgage}

\textbf{1. Common-Law Antecedents}

Etymologically, the word "mortgage" probably has its roots in the notion of the "gage," "which appears in England as early as the Domesday Book."\textsuperscript{312} While the gage in its earliest incarnation predates the appearance of credit transactions,\textsuperscript{313} by the time one arrives at the age of Glanvill (c. 1187) it has come to play a role in certain sorts of primitive financial arrangements.\textsuperscript{314} By

\begin{itemize}
  \item \textsuperscript{309} See e.g., PALMER, supra note 296, at 125, note 196.
  \item \textsuperscript{310} Id. at 125.
  \item \textsuperscript{311} On the "whittling down" of the rule in \textit{Chudleigh's Case}, see SIMPSON supra note 40, at 218-19; on the complex story of the development of the relationship of trusts and future interests, see id. at 218-31. On the role played Purefoy v. Rogers played in this whittling down, see infra note 234 and accompanying text.
  \item \textsuperscript{312} PLUCKNETT, supra note 2, at 603.
  \item \textsuperscript{313} Id. at 603.
  \item \textsuperscript{314} Id. at 604. Ann Burkhart tells us:
    Our information about the gage comes from Glanville, who described two primary types of gage in use at this time, the \textit{vif gage} or \textit{vivum vadium} ('living pledge') and the \textit{mort gage} or \textit{mortuum vadium} ('dead pledge'). According to Glanville, under both types of gage the gagor authorized the gagee to take possession of the encumbered land and to collect the rents and profits from it.
    Depending on the type of gage given, however, the financial consequences were vastly different. Pursuant to a \textit{vif gage}, the gagee was required to apply the rents and profits to reduce the outstanding debt. Glanville described this form of security as 'just and binding,' Glanville denounced the \textit{mort gage}, on the other hand, as 'unjust and dishonest' because the gagee was not required to apply the rents and profits to reduce the debt. The pledge was 'dead' because the pledged property was not generating any benefit for the gagor.
\end{itemize}
the time one reaches Bracton's age, however, in the middle decades of the thirteenth century, a more structured form of gage had come into being: "the popular form of gage [had become] a lease for years to the creditor, under the condition that, if the debt be not paid at the end of the term, the creditor shall hold the land in fee."315

As the feudal land law took on a finished form in the fifteenth century, conceptual problems became apparent with the Bractonian form of the mortgage, especially in the relief granted to the mortgagor upon default:

Courts could not logically justify the transformation of a term for years, which was characterized as a chattel real, into a fee estate without a further conveyance from the borrower. The primary difficulty with this result was that a term for years was not created by the formal requisite of livery of seisin, which was a necessary element of a fee estate. Therefore, courts concluded that the lender's interest upon the borrower's default was only that of a termor rather than that of a fee owner.316

Thomas Littleton stepped forward to remedy this problem. In his treatise on Tenures he proposed that:

[T]he borrower conveyed not merely possession when the loan was made, but rather the fee title by formal livery of seisin. This fee estate was created subject to the borrower's right to re-enter if he paid the loan according to the terms of the gage. If the borrower failed to perform in full on the specified day, which, ironically, was termed 'law day,' the lender's fee estate became absolute regardless of the value of the property in relation to the amount of outstanding debt. Moreover, the borrower had no judicially recognized right of redemption . . . .317

But the development of this solution to the problem of the sort of estate the mortgagor conveyed posed problems of its own. Indeed, its logic required the courts of common law to adopt a strict formalism when confronted with a borrower who had defaulted. Since the borrower had conveyed a fee simple


Plucknett suggests that the mortgage, or "dead pledge" received this name because those who made this sort of pledge thereby committed usury, a deadly sin. PLUCKNETT, supra note 2, at 604.

315Hazeltine, supra note 314, at 655. Hazeltine continues: "During the term the gagee has the possessio or seisin of a termor, and this possession is protected by writ. On default of the debtor the fee shifts at once and without process of law to the creditor; the fee, the land itself, is thus forfeited for the debt." Id. Cf. Burkhart, supra note 314, at 310-11 (providing further information on the operation of the Bractonian mortgage).

316Burkhart, supra note 314, at 311.

317Id. at 312 (summarizing Littleton's Tenures).
estate to the lender subject to payment in full on "law day," the court had no choice but to give legal recognition to this arrangement. Courts of common law might have dealt with the borrower in these circumstances "strictly and unsympathetically," but conceptually they had little choice in the matter.

Chancery commenced to rectify this situation beginning in the later decades of the fifteenth century. The Chancellor proceeded slowly and tentatively at first, resolving each case on issues peculiar to it. While the jurisdictional basis for the Chancery's actions at this early period is unknown, it has been hypothesized that relief was granted in these early cases where it was obvious that the mortgagee had unfairly taken advantage of the mortgagor.

By the time one arrived at the age of Elizabeth I, however, relief in Chancery had become a regular occurrence. It was at this time that the Chancellor began to grant relief in situations where the mortgagor "had failed to pay on the stated day . . . ." But while the Chancellor was proving himself willing to relieve the mortgagor from a rigid application of the requirement that the entire mortgage be satisfied on the "law day" under penalty of loss of the estate, he nevertheless required the mortgagor to demonstrate that the failure to satisfy the obligation was the result of some peculiar hardship.

In 1625, however, in the case of Emmanuel College v. Evans, the Chancellor dropped the requirement that the mortgagor plead hardship. Indeed, in the Emmanuel College case:

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318 Simpson, supra note 40, at 243.


The intention which the Court of Common Law followed was the literal intention of the condition, which was forfeiture of land in the case of non-payment on the day named. Such was the situation at common law, and it is difficult to conceive on what ground the Courts of Common Law could have given relief, even had they been so inclined. The mortgagee, by default of the mortgagor, had become the absolute owner in pursuance of the condition. The mortgagor then had no remedy. The land was lost to him now and forever. Id. at 21. Cf. Simpson, supra note 40, at 243-244 (providing additional detail concerning the role the courts of common law played in the enforcement of mortgage agreements).

320 See Simpson, supra note 40, at 244.

321 See Turner, supra note 319, at 21-4. The typical situation presented to the Chancellor in this early period, according Turner, involved: "[p]roperty . . . delivered or conveyed as a security [where] the debt was duly paid on the day, or if no day was fixed, when it had been satisfied out of the rents and profits . . . ." Id. at 21. In these circumstances, the Chancellor would order the mortgagee, who was by the terms of the mortgage in possession of a fee simple interest, to reconvey the property to the mortgagor. Id.

322 Id. at 24.

323 Id. at 25-26. It seems that Chancery first began to grant relief from the rigid application of penal bonds, and then extended this practice to mortgages. Id.

[W]e find that ... relief has been extended to forfeitures of mortgages in general, irrespective of fraud or other special circumstances as the ground of relief. What is more, the relief has soon not only become general in the sense that it can be given apart from special circumstances, but it has come to be looked on as a definite rule of the Court that such relief shall always be given.\footnote{Turner, supra note 319, at 27. Turner continues: 
Very soon the mortgagor considers that he has a right to redeem in Chancery, although the day is passed for such redemption at law. He no longer asks for relief as of special favour, but asks that the usual clemency be shown him. Two limitations only are imposed by the Chancellors on this new custom of granting general relief to all mortgagors upon condition forfeited. First, the mortgagor must come and tender the principal, interest, and costs within a reasonable time after the forfeiture; and secondly, should the mortgagor require his money, he can go to the Court and obtain a decree ordering the debtor to pay by a fixed date or be foreclosed forever of his power of redemption.}

It is unclear why the Emmanuel College Court ruled as broadly as it did. The reporter who recorded the Emmanuel College opinion declared that the decision was based on the conception of the mortgage as "being but a security."\footnote{1 Ch. Rep. at 20, 21 En. Rep. at 495. On the significance of the conception of mortgages as security interest.} Turner, however, asserts that this is the only pre-Restoration case that expressly conceives of mortgages as security interests.\footnote{See Turner, supra note 319, at 38.} Perhaps, Turner concludes, since the report of Emmanuel College was only written down in the 1680s, the reporter was anachronistically superimposing a later conception onto an earlier period of time.\footnote{Id. at 37.} But whatever the reason, it became clear beginning in the 1620s that the Chancellor was now ready regularly to grant mortgagors relief from oppressive circumstances.

2. The Development of the Equitable Mortgage

The circumstances that prevailed in 1660, at the time of the Restoration of Charles II, were as follows: Chancery had, since the 1620s, recognized that a mortgagor had a power or right to seek the redemption of a forfeited mortgage under certain conditions. There was no longer any need for the mortgagor to demonstrate hardship, but at the same time some foundational issues remained unanswered. What was the basis upon which the Chancellor granted relief? What were the limits of the relief that might be obtained?\footnote{Turner has described the situation: 
By the time of accession of Charles II the mortgagor had acquired a}
An important step toward clarifying these questions was taken in the case of 
Pawlett v. Attorney General.\(^{330}\) Pawlett did not involve a mortgage, but rather 
posed the question whether a trust estate might be escheated to the Crown as 
a penalty for felony. It was argued on analogy to the mortgagor's equity of 
redemption that a trust was not subject to such an escheat.\(^{331}\) Matthew Hale, 
however, acting in his judicial capacity, rejected the claimed analogy and 
instead proposed that a mortgage was something more than a trust:

> I conceive that a mortgage is not merely a trust; but a title in equity.... 
> There is a diversity betwixt a trust and a power of redemption; for a 
> trust is created by the contract of the party, and he may direct it as he 
> pleaseth; and he may provide for the execution of it .... But a power 
> of equity is an equitable right inherent in the land .... Because it is an 
> ancient right, which the party is entitled to in equity .... [t]he law takes 
> notice of it and makes it assignable and deviseable.\(^{332}\)

Hale's assertion that the power of redemption amounted to a title in equity 
and was assignable and deviseable marked a significant advance in 
understanding the theoretical foundation of the Chancellor's jurisdiction over 
mortgages. But Hale's opinion was flawed in some crucial respects. For one 
thing, it articulates a backward-looking notion of the trust, which was to fall 
into disrepute during Lord Nottingham's tenure.\(^{333}\) For another thing, 
Hale—who was the most sophisticated historian of his day—simply engages 
in bad history. The power of equitable redemption was not an ancient right, 
but for the most part a novel development of the previous half-century still in 
need of explanation. What is important for our purposes is that Hale provided 
this explanation: The power of redemption was now understood as a "title in 
equity."

Subsequent case law, especially the decisions of Lord Nottingham, explore 
the parameters of this new equitable estate. Perhaps the most important of 

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indicates that Hale's description of the equity of redemption as "an ancient right" is 
"rather obscure." See Turner, supra note 319, at 52.

\(^{333}\)On Hale's conservatism with respect to trusts and uses, see Turner, supra note 319, 
at 52-53.
these cases is *Thornbrough v. Baker* (1676), which involved the question "whether, on the mortgagor’s redeeming in equity after the decease of the mortgagee, the heirs of the latter or his personal representatives were entitled to the money.” The question was an important one because it raised the old issue of the type of right the mortgagee enjoyed: was it a real interest in the land, extinguishable upon the mortgagor’s satisfaction of the debt? Or was it merely a personal right to the payment of the debt? Nottingham favored the latter alternative, reasoning that:

> [I]n natural Justice and Equity, the principal Right of the Mortgagee is to the Money, and his Right to the Land is only as Security for the Money; wherefore, when the Security descends to the Heir of the Mortgagee attended with an Equity of Redemption, as soon as the Mortgagor pays the Money, the Lands belong to him, and only the Money to the Mortgagee, which is merely personal, and so accrues to the Executors or Administrators of the Mortgagee.

Thus, not only did the mortgagor enjoy an equitable estate that the Chancery would protect, the mortgagee’s right was now defined as a personal one limited—in ordinary circumstances—to a claim for the money. Subsequent cases would develop rules governing the relationship between mortgagor and mortgagee, but this case law would take shape along the premises Nottingham had laid down. Lord Hardwicke, in the eighteenth century, proposed that the mortgagor might, for equitable purposes, be seised of the estate, but in advancing this proposition he was only building upon the foundation laid down by Hale and Nottingham.

These new developments were both the product of the gentry’s needs and facilitated the growth of a market in land. Status, investment, and speculation remained the reasons behind a brisk market in land for the late seventeenth and much of the eighteenth centuries. But rather than examine the functioning of this market in the abstract, one might do well to consider a single

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335 Turner, supra note 319, at 58.
338 For Lord Hardwicke’s contribution to the development of the mortgage, see Turner, supra note 319, at 65-87.
339 See Habakkuk, supra note 239, at 403-12 (exploring these varied motives for the purchase of land).
historical figure as representative of the sort of person who was instrumental in bringing about these new conditions and in benefitting from them.

One might consider Sir John Banks. The son of a father who was a successful woollen draper in London and a mother drawn from the lesser gentry, Banks made a fortune in business, first helping to outfit the Cromwellian navy during the 1650s, and later serving as one of the directors of the East India Company. Banks was strategically situated to promote trade with both India and Africa, and he was also a pioneer in the development of public finance, drawing upon the assets of the East India Company to finance various royal ventures, but always with a *quid pro quo* exacted. He kept a close alliance with the family of Lord Nottingham throughout his public career, and Banks's daughter eventually married into that family. He served in Parliament for a total of twenty-six years from the 1660s to the 1690s, where "[b]usiness interests and the profitability of government finance combined with a cool, secular, rational opportunism to produce a government Tory who had decided where to go to see that his bread was buttered . . . ." Throughout his active years, Banks not only busied himself with business ventures and political maneuvering, but also steadily built an estate for himself and his family. He acquired his first landed estate through a marriage settlement with his bride, who came from a more established family, and thereafter continually added to his holdings throughout his business life. While these acquisitions were intended to provide Banks with social status, they were also to be improved, to use the vocabulary of the time. And Banks was a fastidious keeper of his estates, seeking to draw appropriate profits from them.

The new land law was the product of men who for the most part shared the background and the value system of Sir John Banks. The compromises embodied in the new land law—the balance struck between free alienability and the need to preserve the intergenerational integrity of the large estates, the development of trusts, and the new and sophisticated conception of mortgages—no doubt met with their general approbation. It had, after all, now become their land law.

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341Id. at 70-78.
342Id. at 108-09.
343Id. at 190-91.
344Coleman, supra note 340, at 170-71.
345Id. at 42-52, 119-47, and 172-84.
346Id. at 172-84.
CONCLUSION

At the outset of this Article, two theses were put forward for examination: That the English land law was transformed in the years roughly 1625-1700 and that the English Revolution was the engine responsible for this transformation. The transformation that the land law underwent should be obvious. The enforcement apparatus—preeminently the Court of Wards and Liveries—erected by Henry VIII as part of his resurrection of the feudal tenures was abolished in the 1640s by the parliamentary party that had seized power from Charles I. This abolition was subsequently confirmed by the Statute of Tenures, which was enacted by the Restoration Parliament in 1660.

The Statute of Tenures represented the triumph of the new order not only in its abolition of the Court of Wards but in other ways as well. Henceforward, according to the terms of the Statute, the Crown was prohibited from creating new forms of feudal tenure and thereby prevented from imposing new forms of irrational fees and obligations upon the landed classes. New estates could only be held in free and common socage tenure. In this way, the land law was being placed upon a new conceptual foundation.

The logic of the Statute of Tenures extended as well to such ancient forms of landholding as copyhold. As demonstrated above, in the course of the sixteenth and early seventeenth centuries, the Courts, especially the Chancery, had conferred upon copyhold a substantial amount of judicial protection. But copyhold was part of an old system of feudal estates which was destined to atrophy in the years after 1660. Its fate was to become a 'mischievous anachronism' whose later history consisted mainly of "expedients for its extinguishment" and which was finally entirely abolished in the early twentieth century.

Similarly, public sentiment about enclosure underwent a dramatic transformation in the years around 1660. Sixteenth-century elites had been emphatic in their opposition to enclosure. It was denounced as a destructive and exploitive practice by such stalwarts as Thomas More and Hugh Latimer. This opposition was codified into a whole series of anti-enclosure laws, which were at least occasionally rigorously enforced.

But by the early seventeenth century, a noticeable shift in public opinion was well underway. The purposes served by enclosure were in the midst of a transformation in the middle decades of the seventeenth century. In the sixteenth century, enclosure was practised in order to aggregate together large tracts of land to accommodate sheep grazing. But in the seventeenth century, enclosure was coming to be practised in order to take advantage of the new agricultural techniques then being developed. Because larger numbers of people were benefited, the rhetoric of "improvement" which was invoked to justify enclosures met a warm reception from the 1620s onward. Indeed, in the decades after 1660 it became increasingly difficult even to make the anti-enclosure argument.

All of these developments might be said to have favored those who benefited from economic development—the entrepreneurs, those farmers who utilized the latest scientific techniques, and other such groups. But to see these developments as representing a new form of "possessive individualism" loses sight of the strong role that the family—especially the elite family concerned
with intergenerational survival—played in shaping other parts of the land law. The cause of economic development must be seen as a frequent opponent of dynastic stability.

These two rival interests—the need to allow for economic development and the requirement that family estates be preserved and handed down to the next generation—were the subject of an enduring compromise worked out by the common lawyers in the years after 1660. The main lines of this compromise are sketched above. The Rule Against Perpetuities, the Strict Settlement, and the modern trust were all aspects of this compromise. Free alienability of land would be allowed, but in appropriate circumstances this principle might also be strictly subordinated to family interests. The plight of the poet Shelley, as documented above, illustrates how truly little the free alienability of land meant in a contest with a father who insisted that the family’s strict settlement be observed.

Particular features of this compromise—most notably the notion of an equitable estate which became the basis of the modern mortgage—would have the effect of promoting the idea of land as a commodity, to be bought and sold for profit. But this sort of commerce was to occur in the larger context of the requirement that family dynastic interests were to be protected.

Historians have explored particular components of this transformation in the land law. What has been missing in the literature, however—and what it is hoped that this Article has provided—is an overview of the full dimensions of the transformation that was worked. The English land law was not merely reformed in small, incremental steps. Rather, major portions of it were fundamentally reconceived. Old institutions were abolished or marginalized, while new institutions were invented. The title of this Article, "The Seventeenth-Century Revolution in the English Land Law," seems fully justified.

But was this transformation a product of the English Revolution? The evidence justifies an affirmative answer to this question as well. First, it must be stressed that particular features of the transformation were the direct product of the parliamentary party’s victory. This is the case, for instance, with the abolition of the Court of Wards and Liveries. The abolition of this Court was one of the priorities for the triumphant parliamentarians in the 1640s.

The same can also be said for the Statute of Tenures. The Restoration Parliament which enacted this piece of legislation had no desire to return to the days when the Crown could exploit knight service and the other feudal tenures as a means of extracting wealth from the landed classes. The relationship of the Crown to these tenures was fundamentally altered. The king could no longer create feudal tenures and was deprived of the means of enforcing the old feudal dues. The Statute of Tenures might thus be seen as part of the larger program of limiting royal prerogative and power that was carried out by Parliament beginning in 1660.

The Statute of Tenures subsequently bore profound consequences for much else in the English land law. Since the feudal tenures were no longer an important source of Crown revenue, the Statute of Uses had lost its central purpose—there was no longer any need to restrict recourse to uses as a means of preventing a loss of income to the Crown. The door was thus opened to
renewed experimentation with the concept of the use. This was the door through which such important figures as Lord Nottingham quickly moved.

This evidence, taken alone, justifies a conclusion in favor of a relationship between the English Revolution and the transformation of the English land law. But more broadly speaking, one can see in the land law the carrying out of a program that had gradually taken shape from at least the 1620s onward. Royal power was to be placed within strict limits and made subject to substantial supervision by the Parliament. The economic interests of the landed classes were to be promoted, but long-term dynastic concerns were also to be protected. English society had acquired a character that it would not lose until after the Great War of 1914-1918.