

**THE DEVELOPMENT OF THE USE AND
THE ORIGINS OF THE MODERN TRUST:
MAITLAND'S THESIS, THE CRUSADES,
AND BEYOND**

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Abstract

This thesis advances a new theory to explain the origin of the use in English law. It defines a use, in the absence of consensus about definition, as occurring when a person (the feoffor) makes an enforceable grant of land (called a feoffment) to another (the feoffee) to hold for the benefit of a third party. The thesis is a reassessment of an accepted truth that crusaders were the first to make uses. Frederic Maitland, the father of legal history, lent his authority to this idea when he suggested that English crusaders employed uses in case of their demise abroad. Subsequent legal historians have put forward other explanations but none have supplanted Maitland's authoritative account. Therefore, it is necessary to return to and re-examine the development of the use. This thesis shows how the legal concept of crusading that developed in the twelfth century attracted both papal and secular legal privileges, which effectively fulfilled the function Maitland had ascribed to uses. Neither the canon law nor English common law created the use in response to the crusading ideology. The current author instead used the crusade lens to move beyond Maitland's thesis to show the first germs of the use are found in the thirteenth-century practices of the Exchequer of the Jews. This court stretched the limits of the common law to give effect to the intentions of feoffors. While the use is absent during the Ninth Crusade, a watershed moment in its development is found in legislation (13 Edw. I, c 1) enacted to give paramountcy to legal intention. In moving beyond the Crusades, the thesis comfortably strips away an assumed connection to equity to prove that the use is a species of common law feoffment with a condition.

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It is my hope, if I do not get the opportunity, that this thesis provides another with a starting point to show how the use developed into the trust in English law (preferably someone versed in the learned laws).

Any errors are my own.

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Abbreviations

BNB	F. W. Maitland (ed.), <i>Bracton's Notebook</i> , London, C. J. Clay & Sons, 1887.
Br., (vol.)	Bracton, <i>De legibus et consuetudinibus Angliae</i> , trans. S. Thorne, G. Woodbine, Cambridge, Harvard University Press, 1968.
Brit.	Anon., <i>Summa de legibus Anglie que vocatur Breitone (Britton)</i> , trans. F. Nichols, Washington D. C., John Byrne, 1901.
Cal. Inq. Misc. (vol.)	<i>Calendar of Inquisitions Miscellaneous.</i>
Cal. Inq. PM. (vol.)	<i>Calendar of Inquisitions Post Mortem.</i>
CCR	<i>Calendar of the Close Rolls preserved in the Public Record Office.</i>
Cod.	P. Kreuger (ed.), <i>Codex Iustinianus</i> , vol. 2, in Kreuger et al., <i>Corpus Iuris Civilis</i> , Berlin, Weidmann, 1906.
CPR	<i>Calendar of Patent Rolls preserved in the Public Record Office.</i>
<i>Decretum</i>	Gratian, <i>Corpus Iuris Canonici: Decretum Magistri Gratiani</i> , A. Richter and E. Friedberg (ed.), Graz, Akademische Druck- U. Verlagsanstalt, 1959.
Dig.	<i>The Digest of Justinian</i> , trans. A. Watson, Philadelphia, University of Pennsylvania, 1985.
<i>EMC</i>	G. Dunphy, <i>The Encyclopaedia of the Medieval Chronicle</i> , Leiden, Brill, 2010.
Fl.	Anon., <i>Fleta seu Commentarius Juris Anglicani</i> , H. Richardson and G. Sayles (ed.), London, Selden Society, 1955 - 1984.
Gai.	<i>Institutes of Gaius</i> , trans. E. Poste, E. Whittuck and A. Greenidge, 4 th edn, Oxford Clarendon Press 1904.
Gl.	Ranulf de Glanvill (?), <i>Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur</i> , trans. G. D. G. Hall (ed.), London, Thomas Nelson and Sons, 1965.
Inst.	<i>Justinian's Institutes</i> , trans. P. Birks and G. McLeod, P. Krueger (ed.), Ithaca, Cornell University Press, 1987.
KCD	J. Kemble (ed.), <i>Codex Diplomaticus Aevi Saxonici</i> , London, Sumptibus Societatus, 1868.
MGH	<i>Monumenta Germaniae Historica.</i>

- Mishneh Torah Maimonides, *Mishneh Torah*, trans. E. Touger, New York, Moznaim, 1987.
- Nov. R. Schoell (ed.), *Novellae*, vol. 3, in Kreuger et al., *Corpus Iuris Civilis*, Berlin, Weidmann, 1912.
- ODNB H. Matthews and B. Harrison (ed.), *Oxford Dictionary of National Biography*, Oxford, Oxford University Press, 2004.
- PREJ J. M. Rigg (ed.), *Calendar of the Plea Rolls of the Exchequer of the Jews*, London, MacMillan & Co, 1905.
- R.H.C. Occ. *Recueil des Historiens des Croisades: Historiens Occidentaux*, 5. Vols., Paris, Imprimerie Nationale (Impériale), 1844 – 1898.
- S P. Sawyer (ed.), *Anglo-Saxon Charters: An Annotated List and Bibliography*, London, Royal Historical Society, 1968.
- SPJE J. M. Rigg (ed.), *Select Pleas, Starrs, etc., Of the Jewish Exchequer, 1220 – 1284*, London, Bernard Quaritch, 1902.
- Summa de Legibus* E. Tardiff (ed.), *Coutumiers de Normandie: La Summa De Legibus Normannie*, vol. 2, Rouen, A. Lestringant, 1896.
- Y. B. *Year Books*.

Chapter 1. Introduction: Maitland's Thesis on the Origin of the Use and its Links to the Crusade Movement

Frederic Maitland bestowed upon the use an air of mythology that survives into modern times as an accepted truth. In a brief passage in Pollock and Maitland's seminal *The History of English Law before the Time of Edward I* (1898), Maitland commented:

A slight but unbroken thread of cases, beginning while the Conquest (1066) is yet recent, shows us that a man will from time to time convey his land to another to the use of a third. For example, he is going on Crusade and wishes that his land shall be held to the use of his children, or he wishes that his wife or his sister shall enjoy the land, but doubts, it may be, whether a woman can hold a military fee or whether a husband can enfeoff his wife. Here there must be at the least an honourable understanding that the trust is to be observed, and there may be a formal interposition of faith.¹

An association with the crusade, intended as an example (referred to in this thesis as 'Maitland's example'), has eclipsed the argument that Maitland intended to make.² It seems that Maitland's continued authority as a legal historian is sufficient to give weight to the example. The logic behind the argument is sound. The crusader, as a landholder who intends to transfer legal possession or seisin, is the feoffor. He holds his land in military fee or tenure that his eldest son will inherit under the rules of primogeniture. In this scenario, however, the crusader wants to ensure the welfare of his wife, sister, and all his children. He makes a use to circumvent the doctrine of primogeniture. The crusader enfeoffs or grants the land to another, the feoffee, who agrees to carry out his wishes to hold the land for the benefit of his loved ones. Maitland does not support the example with evidence but this is no accident. He believed that crusaders made uses, or at least had the opportunity to, because the evidence available to him indicated the use was part of English law throughout the crusade movement.

The object of this thesis is to test whether crusaders made uses during the crusade movement. It is necessary to address this subject because today's law students often have

¹ F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd edn, vol. 2, Cambridge, Cambridge University Press, 1898, p. 230. Note: Translations are my own unless otherwise indicated through use of translated sources.

² The full argument is stated in Pollock and Maitland, *The History of English Law*, vol. 2, pp. 228 – 239.

their first encounter with the use in a brief introduction to courses on equity before moving on to treat the subject of trusts in greater depth.³ The story they hear is familiar:

The trust emerged at the time of the Crusades. Knights would leave to go abroad to fight for the Crusades and they were likely to be absent for some time, possibly many years. Therefore they would leave their property with another who was entrusted with it for safekeeping. The property would be transferred into the name of the friend to be kept for the knight's return and also for the enjoyment of the rest of his family.⁴

This explanation captures the typical student experience, although it may be expected the more studious among them would want further detail. Some trust academics acknowledge that it is a story of convenience told to students for want of a better understanding of the use's origins.⁵ The ongoing problem is that the connection between the use and the crusade movement persists without having ever been tested. In this manner, it has gained the status of an accepted truth in legal history. The current author aims to remedy this unsatisfactory situation. The broad scope of the period studied (1095 – 1381), almost three-hundred years, reflects the fact Maitland did not name which crusade he had in mind. The use has been attributed to both the First Crusade (1096 – 1099) and the Third Crusade (1189 – 1192). Furthermore, the involvement of the future Edward I in the Ninth Crusade (1271 – 1272) provides a further opportunity to find evidence of the use.

The breadth of the study will provide insight into the development of the use and other analogous legal instruments, even if no crusade connection is found. This provides the opportunity for a stronger argument than has previously been made about the use's origins. The alternative arguments raised by other legal historians that have broached the subject of the use have not been successful in supplanting the popular belief about its connection to the crusade. It is also a significant oversight that no previous work has seriously considered the common law as a source of the use in English law. For example, Greg Kelly begins his chapter in the *Law of Trusts* with the statement: 'It is popularly

³ See J. Bray, *A Students guide to Equity and Trusts*, Cambridge, Cambridge University Press, 2012, p. 7; S. Atkins, *Equity and Trusts*, Oxford, Routledge, 2013, p. 27.

⁴ Bray, *A Students guide to Equity and Trusts*, p. 7.

⁵ Atkins, *Equity and Trusts*, p. 26.

believed that trusts first came into common use during the time of the Christian Crusades in the eleventh to thirteenth centuries'.⁶ Afterwards, he comments:

Unfortunately, this led to numerous disputes between the trustees and the beneficiaries, who claimed that they had been deprived of their rights. Often the beneficiaries were minors and therefore had no rights or were unable to require the trustees to carry out their obligations. Such problems could not be dealt with by the common law Courts in England because they dealt with parties on a strict basis according to legal form. These Courts did not recognise or compensate beneficiaries because they were not the legal owners. This led to the development of the English rules of equity or fairness to overcome the strict application of the common law by the ordinary Courts. The Court of Chancery applied rules of equity to require trustees to carry out their obligations to the settlor and to the beneficiaries.⁷

The overarching assumption is that the use, like the trust, is a creature of equity or conscience because the common law had no remedy.⁸ However, an examination through the lens of the crusade movement encompasses significant changes in the common law. In doing so, this thesis abandons the idea that uses started life as a non-legal relationship in favour of the view that a use occurs when: a feoffor grants land to a feoffee with an instruction or condition to convey it to a third party who can enforce the arrangement in a legal sense.

While there is no agreed upon definition of the use, there are three elements that characterise the operation of uses in law that are considered throughout this thesis, namely: (1) the landholder grants legal ownership of land to another person (2) with the intention the new owner does not retain title but transfers ownership to a named third party (3) who is the intended beneficiary of the original grant. Maitland's example incorporates all three elements. The crusader is put into the role of the landholder; military fee is a species of landholding capable of being the subject-matter of a use; and female relatives are people likely to benefit from the creation of a use. The thesis also incorporates the presumption that the crusader could make a use to avoid the rigour of laws related to heirship and coverture. Maitland's example is a useful lens through which

⁶ G. Kelly, 'Trusts and Asset Planning: An Introduction', in S. Sidnell and L. Hamman (ed.), *Law of Trusts*, Wellington, LexisNexis, 2013, para [1.3]. Available from LexisNexis, (accessed 2 August 2017).

⁷ Kelly, *Law of Trusts*, para [1.3].

⁸ See B. Akkermans, 'Property Law', in J. Hage and B. Akkermans (ed.), *Introduction to Law*, Cham, Springer, 2014, p. 81.

to examine the origin of the use in English law since it captures the three elements (1) – (3) that will signal its existence. Reference to these elements allows the current author to define a use in chapter eight as ‘a private feoffment of land to a feoffee or feoffees on a condition to transfer it to some other named person’. In using these elements as a framework, the thesis has deliberately avoided the jurisprudential ambiguities associated with the tenuous idea that a person could make a use to transfer title to personal property. Maitland included a treatment of personal property in his work on uses, but also acknowledged that the delivery of chattels can take a myriad of forms.⁹ The crusade example in the body of his work sensibly avoids reference to personal property. Its omission in this thesis is intended to avoid conflating the use with other distinct arrangements with characteristics that are describable as trust-like in nature.¹⁰

It is unavoidable that an examination of the medieval use will encounter problems of terminology inherent to trust law. There is a tendency to use the terms ‘use’ and ‘trust’ as synonyms since the latter developed as a ‘use upon a use’.¹¹ The consequence of this relationship means the language can be confusing. For example, the terms ‘charitable use’ and ‘charitable trust’ refer to the same arrangement without distinction.¹² Both bear a greater resemblance to gifts *ad pias causas* than the private law uses described in this thesis. The thesis avoids the tendency to conflate the use and the trust, but there are unavoidable analogies drawn between trusts and related legal instruments. Trust concepts are an amorphous subject. It appears the absence of an agreed definition for the use is itself endemic to the confusion present in trust law. The same problem of definition exists for trusts. *Nevill’s Law of Trusts, Wills and Administration*, of which I am co-author, observes that ‘no one has successfully produced a completely satisfactory definition of a trust’.¹³ It later concedes it is easier to understand trust law by showing what a trust is not, namely bailment, agency, debt, and contract.¹⁴ The number of modern trusts are myriad and include express trusts, charitable trusts, resulting trusts, constructive trusts,

⁹ Pollock and Maitland, *The History of English Law*, vol. 2, p. 230.

¹⁰ E.g. *Donatio mortis causa* and *Donatio post obitum* might both be described as trust-like but both are distinct forms of gift.

¹¹ See N. G. Jones, ‘The Use upon a Use in Equity Revisited’, *Cambrian Law Review*, vol. 33, 2002, pp. 67 – 68.

¹² See N. Richardson and L. Breach, *Nevill’s Law of Trusts, Wills and Administration*, 12th edn, Wellington, Lexis Nexis, 2016, pp. 157 – 158.

¹³ Richardson and Breach, *Nevill’s Law of Trusts, Wills and Administration*, p. 3.

¹⁴ Richardson and Breach, pp. 5 – 13.

and other arrangements that seem to fit the trust category e.g. Quistclose trusts.¹⁵ *Nevill's* suggests a trust is an obligation imposed in equity to deal with property in a certain manner.¹⁶ This is ultimately an unhelpful starting point. Nevertheless, the influence of trust law is felt across this thesis. It uses the term *trust-like*, for example, to refer to arrangements reminiscent of trusts because conscience appears to be at the heart of the legal relationship. The *fideicommissum*, later described as a Roman trust, is trust-like because the heir holds property under instruction to convey it to another. It is, however, a form of legacy.¹⁷ It is an unavoidable use of legal terminology to comment that trust-like arrangements have characteristics reminiscent of uses without necessarily satisfying the definition adopted in this thesis.

Writing Legal History

Legal history should not be written with legal practice in mind. No one would suggest that a greater understanding of uses will enrich the everyday practice of law. Lawyers do not need to know about medieval history to excel in their craft.¹⁸ A concession to authorial sentiment is the sole reason why the thirteenth edition of *Nevill's Law of Trusts, Wills and Administration* will include a brief explanation about the use in relation to modern trusts. Otherwise, there is little justification for further analysis in a concise manual on modern trust law.¹⁹ The everyday practitioner often views Legal History as a subject of limited utility.²⁰ As Maitland noted in the nineteenth century, lawyers are, as a rule, not historians.²¹ In his view, this created an unfortunate situation where:

¹⁵ See also Richardson and Breach, pp. 13 – 19 for different types of trust recognised by law.

¹⁶ Richardson and Breach, p. 3.

¹⁷ Dig. 30.1.1.

¹⁸ Maitland, *Why the History of English Law is not Written*, p. 16.

¹⁹ See N. Richardson and L. Breach, *Nevill's Law of Trusts, Wills and Administration*, 12th edn, Wellington, Lexis Nexis, 2016 does not include a passage on the origin of the use.

²⁰ J. Rose, 'Studying the Past, The Nature and Development of Legal History as an Academic Discipline', *The Journal of Legal History*, vol. 31, 2010, p. 127; R. Jarvis, 'Legal History, Teaching Skills Practicing Lawyers Need', *American Journal of Legal History*, vol. 53, no. 4, 2013, p. 498; C. Woodard, 'History, Legal History and Legal Education', *Virginia Law Review*, vol. 53, no. 1, 1967, p. 90; R. Zimmermann, *The Law of Obligations*, Cape town, Juta & Co Ltd, 1990, p. viii.

²¹ Maitland, *Why the History of English Law is not Written*, p. 17; R. L. Schuyler, *Frederic William Maitland, Historian*, London, Cambridge University Press, 1960, p. 11.

The only persons in this country who possess very fully one of the great requisites for the work are as a rule very unlikely to attempt it. They are lawyers with abundant practice or hopes of abundant practice; if they have the taste they have not the time, the ample leisure, that is necessary for historical research.²²

Maitland identified that the people who should have an interest in Legal History and could become the ablest legal historians are also unlikely to demand a treatise on the use. He had pointed out the unfortunate starting point for any inquiry in legal history, and in doing so furnished a reason why many other law books are content to repeat a romanticised view of history.

An elegy for common law legal history seems to affect every modern treatment. Maitland observed that 'the object of a law school must be to teach law, and this is not quite the same thing as teaching the history of law'.²³ He argued that universities ought to appreciate that time constraints mean professors can only nudge students towards the subject.²⁴ The sentiment survives him. Numerous papers attempt to justify legal history in undergraduate curricula by challenging the view that students of law should only study the 'practical subjects' in their pursuit to become lawyers.²⁵ The dismissal of the subject in modern law schools ought to be a surprise because its advocates promote it as a course to instill the critical thinking necessary in academic enterprise.²⁶ Nonetheless, the demands of the profession do not require students to have a historical education beyond the last fifty years of practice.²⁷ This also explains why the same romanticised view of the use persists in law schools. Similar opinions in civil law jurisdictions have also questioned the efficacy of legal history to young lawyers.²⁸ Objections to its inclusion within an

²² Maitland, p. 17.

²³ Maitland, p. 17 see Woodard, *Virginia Law Review*, p. 92.

²⁴ Maitland, pp. 17 – 18; see S. Petrow, 'Overcoming 'Intellectual Colonialism', Aspects of the Teaching of Legal History in Australia from c 1890 to 2006', *Australia & New Zealand Law & History E-Journal*, 2006, p. 17.

²⁵ Maitland, pp. 16- 17; M. Kirby, 'Is Legal History Now Ancient History?', *Australian Law Journal*, vol. 83, no. 1, 2009, p. 37; M. Crackanthorpe, 'The Uses of Legal History', *Law Quarterly Review*, vol. 12, no. 4, 1896, p. 350; Woodard, *Virginia Law Review*, p. 90.

²⁶ C. Fritz, 'Teaching Legal History in the First-Year Curriculum', *American Journal of Legal History*, vol. 53, no. 4, 2013, p. 380; Woodard, p. 91; M. Hoffheimer 'Justinian in the Hinterlands: Roman Law as an Introduction to a Standard Curricular Course on English Legal History', *Legal Education Review*, vol. 1, no. 2, 1989, p. 250.

²⁷ F. Pollock, *The Genius of the Common Law*, New York, The Columbia University Press, 1912, p. 7; P. Garlock, 'Teaching American Legal History in a Law School', *American Journal of Legal History*, vol. 53, no. 4, 2013, p. 385.

²⁸ T. Duve, 'German Legal History, National Traditions and Transnational Perspectives', *Rechtsgeschichte*, vol. 22, 2014, p. 26.

undergraduate curriculum, however, are not as pronounced because the profession does not exert the kind of vocational pressures on curricula found within common law jurisdictions.²⁹ It is unsurprising that desperate legal historians have sought to attribute the disinterest of lawyers in their histories to growing commercialisation of the profession in the twentieth century.³⁰ Indeed, the profession must bear some responsibility for the fewer law academics in common law jurisdictions who have heard of *Bracton*. A market-orientated approach means that legal history struggles to keep a legitimate position in legal education.³¹ Michael Kirby, a retired Australian High Court judge, opined in 2009 that ‘the almost total abandonment of the teaching of legal history in Australian law schools is a most undesirable, even shocking, development’.³² The same view applies to New Zealand in 2017 despite any changes ‘across the ditch’ since Kirby wrote.

The grim picture painted unnecessarily by some commentators appears to foreshadow a bleak future for legal history in law schools despite common opinion it should form part of the legal curriculum as an optional subject.³³ However, the primary issues related to the decline of legal history appear to be systemic. Lawyerly disinterest or a profession-driven market-centric approach to law in New Zealand universities may not provide a full explanation for the apparent poverty of legal history. Legal History as a subject appears to suffer from a crisis of identity about whether it should be taught under the head of Law or History. The confusion appears to stem from a tradition of formalism that isolates Law from other disciplines.³⁴ Nonetheless, it is unreasonable to expect medievalists without a

²⁹ E. Steiner, *French Law: A Comparative Approach*, Oxford, Oxford University Press, 2010, p. 203; R. Shepard, ‘The Importance of Legal History for Modern Lawyering’, *Indiana Law Review*, vol. 30, no. 1, 1997, p. 1.

³⁰ R. Pound, *Interpretations of Legal History*, Cambridge, Cambridge University Press, 1923, p. 10; J. Phillips, ‘Why History Matters’, *Victoria University of Wellington Law Review*, vol. 41, no. 3, 2010, p. 315; Kirby, *Australian Law Journal*, p. 39; D. Abrams, ‘Teaching Legal History in the Age of Practical Legal Education’, *American Journal of Legal History*, vol. 53, no. 4, 2013, p. 484; J. Huffman, ‘From Legal History to Legal Theory, Or is it the other way round?’, *Tulsa Law Review*, vol. 40, no. 4, 2005, p. 580.

³¹ A. Simpson, *Legal Theory and Legal History: Essays on the Common Law*, London, The Hambledon Press, 1987, p. ix; J. Baker, *Why the History of English Law has not been Finished*, Cambridge, Cambridge University Press, 1999, p. 63.

³² Kirby, *Australian Law Journal*, p. 39.

³³ A. Phang, ‘Which Road to the Past? – Some Reflections on Legal History’, *Singapore Journal of Legal Studies*, 2013, p. 16.

³⁴ See Phillips, *Victoria University of Wellington Law Review*, p. 308; D. Rabban, ‘Reconsidering Law’s History: A Response to the Symposium Comments’, *Jerusalem Review of Legal Studies*, vol. 1, no. 1, 2010, pp. 116, 128; R.

legal background to write a history of a private law instrument like the use. The formidable barriers of entry created by the legal profession may dissuade historians from attempting to examine the historical value of such instruments.³⁵ The specialist tools of statutory interpretation, case analysis, and a jurisprudential appreciation of law do not form part of the repertoire of an untrained historian.³⁶ On the other hand, lawyers without a background in History are similarly disadvantaged. They are neither expected to possess a broad appreciation of historical sources nor to envision a legal instrument within its historical context. Moreover, lawyers are unlikely to avail themselves of the technical linguistic skills necessary to examine primary sources. It is unsurprising that lawyers are content to leave questions about medieval legal institutions to the historians who could benefit from their input.³⁷ The barriers of the profession, however, do not prevent historians from recognising the value of monographs on subjects related to law. For that reason, history-conscious lawyers are prized as being rarer than law-conscious historians.³⁸

We do not have to discuss modern legal history in hopeless tones.³⁹ Historians are beginning to reacquaint themselves with the value of law as a historical source. The New Zealand experience suggests, however, that there is a need for more discourse between this specialist history and other historians. Richard Boast in an article titled 'New Zealand Legal History and New Zealand Historians: A Non-meeting of the Minds'⁴⁰ argues that historians have a low opinion of legal history. He highlights that *The New Oxford History of New Zealand* 'has well-written chapters on health, sexuality, "sporting spaces", religion and society, on the family, community, and gender – but not on the law and the legal

Zimmermann, 'Roman and comparative law: The European Perspective (some remarks apropos a recent controversy)', *The Journal of Legal History*, vol. 16, no. 1, 1995, p. 21.

³⁵ T. Barnes, 'Project in Anglo-American Legal History', *American Bar Association Journal*, vol. 56, no. 11, 1970, p. 1077.

³⁶ F. W. Maitland, 'Materials for the History of English Law', in Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History*, vol. 2, Boston, Little, Brown, and Company, 1908, p. 54.

³⁷ See J. Rose, 'Studying the Past, The Nature and Development of Legal History as an Academic Discipline', *The Journal of Legal History*, vol. 31, 2010, pp. 118 – 119.

³⁸ Woodard, *Virginia Law Review*, p. 4.

³⁹ Maitland, *Select Essays in Anglo-American Legal History*, vol. 2, p. 53; R. Gordon, 'Recent Trends in Legal Historiography', *Law Library Journal*, vol. 69, no. 4, 1976, p. 468; L. Friedman, 'The State of American Legal History', *The History Teacher*, vol. 17, no. 1, 1983, p. 110.

⁴⁰ R. Boast, 'New Zealand Legal History and New Zealand Historians: A Non-meeting of the Minds', *The Journal of New Zealand Studies*, no. 9, 2010, pp. 23 – 36.

systems'.⁴¹ He indicates *Oxford Histories* elsewhere feature law and litigation more prominently.⁴² Boast is optimistic about the future of the subject because of the prominence of historians involved in the settlement of historic grievances, and a revitalised interest in private law issues in early New Zealand concerning sheep.⁴³ However, New Zealand legal historians are focused on New Zealand legal history and settler- Māori relations. This focus may make medieval history less appealing to New Zealand law academics. New Zealand legal historians more often learn Māori than Latin or law French. There remains an absence of dialogue between historians and specialist legal historians on the nature of law and its wider societal impacts.⁴⁴ It is plausible that a crusade historian would have found proof or dismissed the notion that uses arose during the crusades if they had considered the question.

The intended audience for this thesis are , principally, legal historians. While every attempt is made to explain legal terminology and jurisprudential ideas, these technical ideas may prove to be a barrier to historians without prior study of law. The legal historian with an interest in early modern trusts will benefit most from a thesis on uses, and it is hoped the present research will enable them to reevaluate the importance of equity's role in the creation of the trust from medieval antecedents. Crusade historians ought to find the study of particular interest since it offers a fresh legal perspective on areas of private law that many have already engaged with. It may also interest lawyers, especially those who specialise in private law, but not with a view to practice.⁴⁵ The interests of historians and lawyers often differ. In a sense, both lawyers and historians attempt to make the past meaningful for modern audiences.⁴⁶ However, the practitioner is interested in history for authoritative precedent to support a case rather than using historical techniques to create a narrative of the past.⁴⁷ This creates an irreconcilable

⁴¹ Boast, *The Journal of New Zealand Studies*, p. 23.

⁴² Boast, p. 23.

⁴³ Boast, p. 32.

⁴⁴ See generally, D. Edlin, *Common Law Theory*, Cambridge, Cambridge University Press, 2008, p. 1.

⁴⁵ This is not intended to devalue the excellent legal histories present in law journals.

⁴⁶ S. Petrow 'Overcoming 'Intellectual Colonialism': Aspects of the Teaching of Legal History in Australia from c 1890 to 2006', *Australia & New Zealand Law & History E-Journal*, no. 19, 2006, p. 1; J. Rose, 'Studying the Past, The Nature and Development of Legal History as an Academic Discipline', *The Journal of Legal History*, vol. 31, 2010, p. 101.

⁴⁷ P. Handler, 'Legal History', in D. Watkins and M. Burton (ed.), *Research Methods in Law*, London and New York, Routledge, 2013, p. 85; A. Hutchinson, *Evolution and the Common Law*, Cambridge, Cambridge University

conflict because, as Maitland observed, ‘what the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better’.⁴⁸ A search for authority to support modern legal arguments traditionally begins at the Statute of Uses 1536 (28 Hen. VIII, c 10), without reference to medieval law, and ignores non-legal sources or implications.⁴⁹

The search for authority in legal practice has unfortunately coloured the study of legal history. It is necessary to comment, therefore, that a modern thesis must not limit itself to the traditions of common law and equity. The modern assertion that the common law comprises only of the threads of judge-made law and equity is wrong.⁵⁰ It is also disingenuous. Edward Coke stated in the fourth part of his *Institutes* that the temporal and spiritual laws are inextricable parts of the English legal system.⁵¹ Further, William Fulbecke made the same observation in *A Parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England* when he identified the learned laws and the common law as the root and stalk of English law.⁵² The common law legal system included and continues to include customary, ecclesiastical, and civilian traditions. This is particularly true for the medieval period. Documents found on the continent could also shed light on a general pattern of pan-European legal responses to events such as the crusades. *The Oxford History of the Laws of England* adopts an holistic approach to English law, which includes a volume devoted to the canon law.⁵³ Whatever appreciation legal historians now have for the expansive nature of English law, however, is challenged by a tendency for common law lawyers to minimise the impact of the learned laws.⁵⁴ There is

Press, 2005, p. 6; B. Palmer, ‘The Historian and the Lawyer’, *American Bar Association Journal*, vol. 32, no. 9, 1946, p. 530; Woodard, *Virginia Law Review*, p. 91.

⁴⁸ Maitland, *Why the History of English Law is not Written*, p. 14.

⁴⁹ Phillips, *Victoria University of Wellington Law Review*, p. 296; Friedman, *The History Teacher*, p. 103.

⁵⁰ A. Tipping, ‘Causation at Law and in Equity –Do we have fusion?’, *Canterbury Law Review*, vol. 7, no. 3, 2003, pp. 450 - 451.

⁵¹ E. Coke, *The Fourth Part of the Institutes of the Laws of England: Concerning the Jurisdiction of Courts*, London, Printed by M. Flesher, 1644, p. 321.

⁵² W. Fulbecke, *A Parallele or conference of the Civil law, the Canon law, and the Common Law of this Realme of England*, London, Printed for the Company of Stationers, 1618, p. 62.

⁵³ R. Helmholz, *The Oxford History of the Laws of England, Volume I: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford, Oxford University Press, 2004.

⁵⁴ J. Martinez-Torrón, *Comparative Studies in Continental and Anglo-American Legal History: Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition*, Berlin, Duncker & Humblot, 1998, pp. 8 – 9.

still institutional reluctance to consider sources of English law outside of the kingdom, which includes the Angevin customs (*coutumiers*) in Normandy.⁵⁵

Legal historians have typically adopted a doctrinal approach to their subject. The doctrinal approach is an application of legal research skills to historical issues and principles.⁵⁶ Douglas Vick argued that doctrinal research is a synthesis of practice and academia, which:

... treats the law and legal systems as distinctive social institutions and is characterized by a fairly unique method of reasoning and analysis. In its purest form, 'black-letter' research aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates.⁵⁷

It is an approach that examines legal sources to understand how a law fits within a coherent legal system.⁵⁸ It emphasises 'the use of reasoning and problem-solving skills such as deductive logic, inductive reasoning and analogy'.⁵⁹ However, a purely doctrinal approach is criticisable because it is too inward-looking and technical when prevailing trends are more holistic and interdisciplinary in nature.⁶⁰ Recent developments point to greater interdisciplinarity, comparative, and empirical methodologies in legal research.⁶¹ Outside the scope of doctrinal legal thinking is acceptance that the law itself can never be

⁵⁵ Martinez-Torrón, *Anglo-American Law and Canon Law*, p. 10; E. Tardiff (ed.), *Coutumiers de Normandie: La Summa De Legibus Normannie*, vol. 2, Rouen, A. Lestringant, 1896, p. iii.

⁵⁶ T. Hutchinson, 'Doctrinal Research: Researching the Jury', in D. Watkins and M. Burton (ed.), *Research Methods in Law*, London and New York, Routledge, 2013, p. 7 see C. Stebbings, 'Benefits and barriers: the making of Victorian legal history', in A. Musson and C. Stebbings (ed.), *Making Legal History: Approaches and Methodologies*, Cambridge, Cambridge University Press, 2012, p. 86.

⁵⁷ D. Vick, 'Interdisciplinarity and the Discipline of Law', *Journal of Law and Society*, vol. 31, no. 2, 2004, p. 178.

⁵⁸ Hutchinson, *Research Methods in Law*, p. 7.

⁵⁹ Hutchinson, *Research Methods in Law*, p. 13.

⁶⁰ Hutchinson, p. 15; A. Bradley, 'Law as a parasitic discipline', *Journal of Law and Society*, vol. 25, no. 1, 1998, p. 71; Stebbings, *Making Legal History*, p. 86; Phillips, *Victoria University of Wellington Law Review*, p. 296; D. Boorstin, 'Tradition and Method in Legal History', *Harvard Law Review*, vol. 54, no. 3, 1941, p. 436; Vick, *Journal of Law and Society*, p. 181.

⁶¹ See T. Hutchinson, *Researching and Writing in Law*, 4th edn, Sydney, Thomson Reuters/Lawbook Co., 2017; T. Hutchinson, 'Defining and Describing What We Do: Doctrinal Legal Research', *Deakin Law Review*, vol. 17, no. 1, 2012, pp. 83 – 119.

objective and it is shaped by external considerations.⁶² The current author views a doctrinal approach as a necessary first step to understand the law.⁶³ It is sometimes necessary, however, to step outside of traditional legal sources.

Modern trends speak to the value of using non-doctrinal sources to explore the development of law within a historical context.⁶⁴ This approach also accepts that the implication of a particular law in society may differ from its theoretical roots.⁶⁵ The intersection between feminist scholarship and family law, in particular, has attracted this kind of analysis.⁶⁶ Daniel Smail's *The Consumption of Justice* (2003),⁶⁷ for example, explores court records from Marseilles to analyse the lives and the mindset of people, including women, who engaged in litigation. There is recent work on the common law that views the subject through a similar lens.⁶⁸ The common law is, therefore, beginning to attract the kind of analysis of law and society done on continental sources. A historical analysis to test the veracity of the association of the use with the crusade movement intends to shed light on law and the legal responses from royal authority and individuals. This approach is more likely to interest legal historians than lawyers.⁶⁹ It appreciates the value of chronicles and other literary sources to understand law and society. An interdisciplinary view of law looks inwards at its development and outwards towards its historical context to step over the restrictive boundaries of closed disciplines.⁷⁰ Such an

⁶² Hutchinson, *Research Methods in Law*, p. 16; see F. Crownie and A. Bradney, 'Socio-legal studies: A challenge to the doctrinal approach', in D. Watkins and M. Burton (ed.), *Research Methods in Law*, London and New York, Routledge, 2013, pp. 34 – 54.

⁶³ See Hutchinson, p. 17.

⁶⁴ Bradley, *Journal of Law and Society*, p. 72; Woodard, *Virginia Law Review*, p. 91.

⁶⁵ Woodard, p. 115; Friedman, *The History Teacher*, p. 103; Phillips, *Victoria University of Wellington Law Review*, p. 295; C. Donahue Jr., 'What Happened in the English Legal System in the Fourteenth Century and Why would anyone want to know?', *Southern Methodist University Law Review*, vol. 63, no. 3, 2010, p. 952; J. Mackintosh, *Roman Law in Modern Practice*, Edinburgh, W. Green & Son Ltd, 1934, p. 27.

⁶⁶ See for example L. Faggion, C. Regina and B. Ribémont (ed.), *La culture judiciaire: Discours, représentations et usages de la justice du Moyen Âge à nos jours*, Dijon, Presses Universitaires de Dijon, 2014.

⁶⁷ D. L. Smail, *The Consumption of Justice*, Ithaca, Cornell University Press, 2003.

⁶⁸ Also J. Conaghan, *Law and Gender*, Oxford, Oxford University Press, 2013; see S. Cammiss and D. Watkins, 'Legal Research in the Humanities', in D. Watkins and M. Burton (ed.), *Research Methods in Law*, London and New York, Routledge, 2013, pp. 34 – 84.

⁶⁹ R. Southern and R. Bartlett, *History and Histories: Selected Papers of R.W. Southern*, Malden, Blackwell Publishing, 2004, p. 66; R. Helmholz, 'Canon Law and English Common Law', in Selden Society (ed.), *The Selden Society Lectures 1951 – 2001*, New York, William S. Hein & Co, 2003, p. 515; W. Klingaman, 'Historians and the Law', *Business and History*, vol. 3, no. 3, 1981, p. 96.

⁷⁰ Vick, *Journal of Law and Society*, p. 171.

approach inevitably draws criticism and may even be regarded as too far-reaching for conclusions of substance.⁷¹

Thesis Outline

Treatments on legal history, as with other histories, must include a chapter -here chapter two- devoted to historiography.⁷² It would surprise historians of other disciplines to learn that some legal histories, especially those who take a doctrinal approach using statute and case law alone, do not include the kind of historiographical analysis considered a standard part of their repertoire.⁷³ The reason for such neglect may lie in a misguided belief that the value of a history of law is limited to furnishing precedent for lawyers.⁷⁴ Nevertheless, a special place must be reserved for Maitland, regarded as the father of English legal history⁷⁵, whose work continues to be the centerpiece of modern treatments of the subject.⁷⁶ A history of the origin of the use is no exception. Richard Helmholz and Reinhard Zimmermann's recent treatment of the subject in *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998) observed: 'F. W. Maitland, the English legal historian whose work, now over 100 years old, continues to furnish the starting point for a great deal of our understanding of the history of English law'.⁷⁷ It is

⁷¹ Vick, p. 164.

⁷² For the use of historiography in Legal History see generally: J. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century*, Cambridge, Cambridge University Press, 1987, p. 1; S. Gerber, 'Bringing ideas back in a brief Historiography of American Colonial Law', *American Journal of Legal History*, vol. 51, no. 2, 2011, p. 359; D. Rabban, 'The Historiography of Late Nineteenth-Century American Legal History', *Theoretical Inquiries in Law*, vol. 4, no. 2, 2003, p. 542 see also T. F. T. Plucknett, 'Maitland's View on Law & History', *Law Quarterly Review*, vol. 67, no. 2, 1951, p. 190; B. Croce, *Theory and History of Historiography*, trans. D. Ainslie, London, George G. Harrap, 1921, p. 121.

⁷³ Rabban, *Theoretical Inquiries in Law*, p. 542; J. Baker, 'Why the History of English Law has not been finished', *Cambridge Law Journal*, vol. 59, no. 1, 2000, p. 66.

⁷⁴ D. Rabban, p. 544; Boorstin, *Harvard Law Review*, pp. 424 – 429.

⁷⁵ An acknowledge made by: M. Hoefflich and D. Guth 'Frederic Maitland and Roman Law: An uncollected letter with comments and notes', *University of Illinois Law Review*, 1982, pp. 442 - 443; W. Ault, 'Maitland – Bigelow Letters', *Boston University Law Review*, vol. 37, no. 3, 1957, p. 286; P. Wormald, 'Frederic William Maitland and the Earliest English Law', *Law and History Review*, vol. 16, no. 1, 1998, p. 1; Schuyler, *Frederic William Maitland, Historian*, p. 1; Southern and Bartlett, *History and Histories*, p. 140; Woodard, *Virginia Law Review*, p. 100.

⁷⁶ See S. F. C. Milsom, 'Maitland', *Cambridge Law Journal*, vol. 60, no. 2, 2001, p. 269; C. Donahue Jr., 'Roman Canon Law in the Medieval English Church: Stubbs vs. Maitland Re-Examined after 75 Years in the Light of some Records from the Church Courts', *Michigan Law Review*, vol. 72, no. 4, 1974, p. 648; D. Rabban, 'From Maine to Maitland via America', *Cambridge Law Journal*, vol. 68, no. 2, 2009, p. 410.

⁷⁷ R. Helmholz and R. Zimmermann, 'Views on Trust and Treuhand: An Introduction', in R. Helmholz and R. Zimmermann (ed.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998, p. 33.

necessary to acknowledge, however, that Maitland did not write about the origin of the use in a vacuum. Nonetheless, Maitland's work was beholden to the influence of the historiographic trends of the nineteenth century.⁷⁸ Likewise, this thesis is indebted to the work and influences of modern approaches to its subject. *Itinera Fiduciae* contains research from both common law and civil law jurisdictions. The central theme is an expansive approach that appreciates trusts may have ties to continental legal institutions.⁷⁹ The editors accept this approach may not discover the germs of the trust and do not seek to settle the issue.⁸⁰ On the other hand, J. M. W. Bean's *The Decline of English Feudalism, 1215 – 1540* (1968) and Robert Palmer's *English law in the Age of the Black Death, 1348 – 1381* (1993) view the use as a product of English law without continental influences.⁸¹ There have also been attempts to link the use to a reception of Islamic principles into English law.⁸² To date, however, no legal historian has supplanted Maitland's example as the common narrative for the origin of uses.

The third chapter begins the thesis's analysis of the evidence that supports an argument that the use was available to crusaders from the outset of the crusade movement. Since Maitland did not designate which crusade he had in mind, but indicated that it had been available since 1066, the First Crusade is a logical beginning to this thesis. It has also been considered as a candidate for the origin of the use.⁸³ Jonathan Riley-Smith, Jonathan Phillips, and Christopher Tyerman have together shed considerable light on the subject. There are many other historians who have made significant contributions. Nevertheless, the thesis is particularly indebted to Christopher Tyerman's *England and the Crusades, 1095 – 1588* (1988), and how the crusades impacted England's politics and society.⁸⁴ The

⁷⁸ C. Sherman, *Roman Law in the Modern World*, vol. 1, Boston, The Boston Book Company, 1917, p. 11; Southern and Bartlett, *History and Histories*, p. 99; Rabban, *Jerusalem Review of Legal Studies*, p. 112; Gordon, *Law Library Journal*, p. 462; E. Breisach, *Historiography: Ancient, Medieval & Modern*, 2nd edn, Chicago, The University of Chicago Press, 1994, p. 309.

⁷⁹ P. Stein, 'Review of *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, Edited by Richard Helmholz and Reinhard Zimmermann', *Cambridge Law Journal*, vol. 59, no. 1, 2000, p. 201.

⁸⁰ D. Ibbetson, 'Review of *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, Ed by Richard Helmholz and Reinhard Zimmermann', *Edinburgh Law Review*, vol. 4, no. 2, 2000, p. 244.

⁸¹ J. M. W. Bean, *The Decline of English Feudalism, 1215 – 1540*, Manchester, Manchester University Press, 1968; R. Palmer, *English Law in the Age of the Black Death, 1348 – 1381: A Transformation of Governance and Law*, Chapel Hill, The University of North Carolina Press, 1993.

⁸² See G. Verbit, *The Origins of the Trust*, Bloomington, Xlibris, 2002.

⁸³ Kelly, *Law of Trusts*, para [1.3].

⁸⁴ C. Tyerman, *England and the Crusades, 1095 – 1588*, Chicago, The University of Chicago Press, 1988.

First Crusade provides a snapshot into the kinds of arrangements crusaders made. In Maitland's example, the crusader is a knight who is expected to employ complex legal devices. Fred Cazel Jr. has provided a valuable starting point to determine how personal wealth affected legal preparation.⁸⁵ Further, the First Crusade also provided a valuable template for the future of the movement. The bridge between the crusade movement and legal history was last crossed by James Brundage's *Medieval Canon Law and the Crusade* (1969).⁸⁶ His work discussed at length how the notion of a crusade jurisprudence, or legal principles applicable to crusaders, developed as part of the canon law. Brundage showed how votive obligations and specific crusader privileges impacted the canon law even though no title dedicated to crusading is found within it or its juristic commentaries.⁸⁷ It is at least plausible that the measures that the canon law introduced to address the concerns that crusaders had for family and property could have included the use.

The fourth chapter explores whether the use was available in English law on the eve of the Third Crusade. It is acknowledged here that it is probable Maitland had this crusade event in mind simply because the Third Crusade garnered the most attention from the English-speaking world. Richard I had paved the way for significant English participation as soon as he became king.⁸⁸ Research into the legal history of the Third Crusade is benefitted by the two great legal treatises that flank the event. The focus of chapter four is on the first. *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur*, known as *Glanvill*, is a treatment of English law as it stood between 29 November 1187 and Henry II's death on 6 July 1189.⁸⁹ This treatise is yet to be critically analysed for evidence of the use. Ranulf de Glanvill, the disputed author of *Glanvill*, was familiar with both the law and the crusade movement. It is reasonable to expect that *Glanvill* would have included the use if it was available on the eve of the Third Crusade. The treatise, however, contains no explicit mention of the use. This alone challenges the belief that the use was available to crusaders. However, it includes other ingredients found in Maitland's

⁸⁵ F. Cazel Jr., 'Financing the Crusades', in K. Setton, H. Hazard and N. Zacour (ed.), *A History of the Crusades: Volume VI: The Impact of the Crusades on Europe*, Wisconsin, University of Wisconsin Press, 1989, pp. 116 – 149.

⁸⁶ J. Brundage, *Medieval Canon Law and the Crusade*, Madison, The University of Wisconsin Press, 1969.

⁸⁷ Brundage, *Medieval Canon Law and the Crusade*, pp. 189 – 190.

⁸⁸ Tyerman, *England and the Crusades*, p. 57.

⁸⁹ T. G. Barnes and A. Boyer, *Shaping the Common Law from Glanvill to Hale, 1188 – 1688*, Stanford, Stanford University Press, 2008, p. 13.

example. *Glanvill* offers valuable insight into the nature of landholding and its heritability in the late twelfth century. It also outlines the legal concerns that Maitland's crusader may have had about the legal position of his female relatives during his absence. Finally, the chapter discusses legal principles that were later explicitly connected to the crusade movement. *Glanvill* outlines relevant legal principles that applied to English crusaders from which the use might be found.

The fifth chapter of this thesis canvasses evidence that supports an argument that the use developed during the Third Crusade. Maitland believed that the use was available beforehand, but it appears that the involvement of Richard I, Coeur de Lion, has added another layer of romanticism that bulwarked the popular belief that the use is connected to this crusade event. This thesis considers two possible sources. First, the legal measures made by Richard in response to legal issues he faced while he was absent. It is prima facie difficult to reconcile the popular idea that Richard was a negligent ruler with the idea that he introduced novel legal institutions like the use.⁹⁰ Nevertheless, modern notions that Richard is a poor source of legal development does not exclude the possibility it developed during his reign. Secondly, it is worth considering that one hundred years had passed since the first Jerusalem expedition. It is reasonable to expect that the considerable changes in legal thinking throughout the twelfth century ought to have changed how crusaders managed their property. Therefore, the use might be found in private law legal responses. The Third Crusade, considering Henry's reforms to English law and the scale of the event, does appear to be a candidate. It is also possible that juristic reflection about crusade and the law furnished a theory of uses in English law. Bracton's *De legibus et consuetudinibus Angliae* (c. 1235) traces the law since *Glanvill* and provides the strongest picture of how the common law responded to the crusade movement.

An acknowledgement that Maitland did not intend to connect the use to the crusade movement means that alternative arguments must be advanced. The sixth chapter of the thesis considers the practices of the Exchequer of the Jews as a possible source for the use. The court itself is tenuously connected to the Third Crusade. Richard created this division of the Court of Exchequer to facilitate collection of royal revenue from Jewish

⁹⁰ See J. Gillingham, *Richard I*, New Haven, Yale University Press, 1999, pp. 2 – 3.

credit activities.⁹¹ Legal historians have overlooked the Jewish Exchequer as a source for the use because it does not fit in either the Germanic or Roman schools of thought. Subsequently, no one has explored its records through either an expansive or insular view of the use. The law practiced in that court was the common law, as it applied to Jews, also known as 'Jewry law'. Nonetheless, it is also possible that England experienced a reception of *halakha* into the common law from the practice of this court. The court Jewish is unique because it has a clear timeline that begins in 1198 and ends after Edward I expelled the Jews on 18 July 1290. The period canvassed explores the evolution of complex legal arrangements during the thirteenth century to determine whether the use developed during this period. The argument that the use could have developed in the Jewish Exchequer is novel. Moreover, the principles related to safekeeping, attorneys, and non-legal arrangements to circumvent the law have qualities associated with trust-like arrangements. Therefore, this thesis will examine whether an argument could be made that supports a thirteenth-century origin of the use in this overlooked jurisdiction.

The seventh chapter entertains the possibility that the use had a connection to the Ninth Crusade. This crusade is not usually proposed as the candidate that Maitland had in mind. It is, however, the final English expedition of note and represents the final opportunity for the use to develop in response to the crusade movement. Prince Edward's (later Edward I) expedition to the Holy Land resulted in a flurry of legal activity in Chancery.⁹² It is an odd feature of earlier scholarship that medieval Chancery is dismissed as a possible source for the use. Nevertheless, the Ninth Crusade is unique because it benefitted from the systematic organisation of royal protections that Henry III granted to crusaders. English crusaders who took part in Prince Edward's crusade contended with the issue of protecting family interests and property during their absence. Furthermore, the period is graced with three authoritative common law treatises that record the impact of the Ninth Crusade on the law. The short titles of these works are *Britton*, *Fleta*, and the *Mirror of Justices*. They are written by unknown authors but together provide a picture of late thirteenth- and early fourteenth- century English law. It is surprising that these treatises have attracted no commentary in relation to the use despite their pivotal commentary on Edward I's activity as a legislator. If the use is not found, it is necessary

⁹¹ M. Prestwich, *Plantagenet England, 1225 – 1360*, Oxford, Clarendon Press, 2005, p. 55.

⁹² S. Lloyd, *English Society and the Crusade, 1216 – 1307*, Oxford, Clarendon Press, 1988, p. 166.

to reevaluate the belief that it had a connection to the crusade movement. Clues may be found in Edward's legislation and the valuable insight provided into the growth of the common law and its policies at the close of the thirteenth century.

The eighth chapter proposes an original argument that legal historians have prematurely dismissed the common law as a possible source for the use. The thesis goes beyond *The History of English Law* to explore whether the use developed in the fourteenth century. Sir Francis Bacon, in his *The Learned Reading of Sir Francis Bacon upon the Statute of Uses*, attributed it to the final years of Edward III's reign.⁹³ The thesis also proposes a conceptual basis for understanding how the use developed in English law in the absence of a definitive answer. It canvasses evidence that supports a theory that the use began life as one of the many kinds of gift with a condition recognised by the common law. No other study has proposed the common law as a source for the use. This challenges the idea that the use is equitable in nature, as many legal historians have assumed, and the belief it emerged as an illegal or unenforceable arrangement. It also divorces the common law use from the equitable trust that developed during the sixteenth century. The thesis also aims to furnish an understanding of the legal principles that governed uses in English law. Moreover, if the use was a recognised legal instrument, the manner of its enforcement must also be discernible. The common law, as recognised in Chancery and the royal courts, ought to furnish supporting evidence. There will remain outstanding questions about its relationship to civilian jurisprudence and the context of its development. Nonetheless, this thesis hopes that a novel argument about the origin of the use will allow legal historians to discuss these questions in a fresh light.

The object of the thesis is to examine the origin of the use with reference to the common opinion that the use developed in response to the crusade movement. It uses the ingredients of Maitland's example, a template that captures the essential elements of the use, as a guide to find the instrument in primary sources both legal and extra-legal. Reference to the preparations of crusaders is useful because, as Maitland pointed out, it is an occasion where it is reasonable to expect the creation of uses. The fact that the Crusades span several centuries means this thesis canvasses significant legal

⁹³ F. Bacon, *The Learned Reading of Sir Francis Bacon upon the Statute of Uses*, London, Printed for Mathew Walbancke, 1642, p. 21.

developments between the eleventh and fourteenth centuries. It lends itself to the adoption of a chronological structure. The tone of the eighth chapter changes as the thesis puts forward a definition of the use rooted in common law principles to supplant the belief that the use has a connection to the crusades. Chapter eight, the final substantive chapter, makes no reference to crusading. In addition to putting to rest the idea that the use has a connection with the crusade, after a rebuttal of Maitland's argument, the conclusions reached would not be possible without reflection on earlier legal developments to give greater control over land. By arguing from absence as this thesis does; the evidence for the practice of making uses is brought into focus.

An Argument from Silence

The author of this thesis has chosen an argument from silence or absence, *argumentum ex silentio*, as a tool to examine whether there is any truth to the common opinion that there is a connection between the use and the crusade movement. It is well-known that there is a tendency to avoid negative arguments or arguments from silence. This stems from a view that argumentation ought to be positive rather than point to an absence.⁹⁴ The absence of evidence means arguments from silence are not typically persuasive. Therefore, it is necessary to acknowledge here that the merits of an argument from silence may vary wildly.⁹⁵ The success of the argument will depend of the robustness of its sources. The requirement that evidence must be robust is found in the conditions that Langlois and Seignobos posited in *Introduction to the Study of History*, which outline when a historian can utilise an argument from silence.⁹⁶ John Lange summarised these conditions as follows:

(1) There is a document, D, extant, in which the event, E, is not mentioned. (2) It was the intention of the author of D to enumerate exhaustively all members of the class of events of which E is supposed to be a member. (3) The author of D was acquainted with all members of the class in question. (4) E must be such that, if it had occurred, the author of D could not have overlooked it.⁹⁷

⁹⁴ S. Barker and M. Jago, 'Being Positive About Negative Facts', *Philosophy and Phenomenological Research*, vol. 85, no. 1, 2012, p. 118.

⁹⁵ J. Lange, 'The Argument from Silence', *History and Theory*, vol. 5, no. 3, 1966, p. 289.

⁹⁶ C. Langlois and C. Seignobos, *Introduction to the Study of History*, trans. G. Berry, London, Duckworth & Co., 1912, pp. 254 – 256.

⁹⁷ Lange, *History and Theory*, p. 290.

Lange noted that an argument from silence need not satisfy all the conditions to be persuasive.⁹⁸ He also suggested that the certainty implicit above can be replaced with a *probable likelihood* that a document (D) would have recorded the event (E).⁹⁹ This acknowledges that the applicability of these conditions relies on a historian's 'subjective estimations of likelihood' in the face of an absence.¹⁰⁰ It also appears to address the naivety associated with an assumption that a source intended to record everything.¹⁰¹ Therefore, scholarly intuition also plays a significant role when making an argument from silence.

Legal sources, as documents (D), lend themselves favourably to arguments from silence because their purpose is to provide the reader with a complete and instructive manual of the law at the time of publication. Chapter four of this thesis, for example, focuses on the treatise *Glanvill* and its discussion of late twelfth-century law. There is a reasonable expectation or probable likelihood that *Glanvill* would have included the use (E) had it existed at the time. The comprehensive nature of medieval legal sources, and legal sources in general, means (1) – (4) outlined above may be satisfied as pre-requisite for making an argument from absence. The treatise *Glanvill* satisfies all four: (1) It is an extant document that outlines the law practised in the royal courts during the twelfth century but does not mention the use. (2) The preface makes clear the author's intention to 'enumerate exhaustively' the general customs of which the use is supposed to be a member. While *Glanvill's* author acknowledges there are unmentioned English customs, the intention of the treatise is to reduce into writing the laws practiced in the royal courts (Gl. preface). The author also tells the reader that the principal subject of their treatise is laws related to real property of which the use is 'supposed to be member' (Gl. 1. 5). (3) It is safe to say its author was acquainted with laws of real property heard in the royal courts.¹⁰² (4) The author would not have overlooked the use if it formed part of the law

⁹⁸ Lange, p. 290.

⁹⁹ Lange, p. 299.

¹⁰⁰ Lange, p. 301.

¹⁰¹ See M. Howell and W. Prevenier, *From Reliable Sources: An Introduction to Historical Methods*, Ithaca and London, Cornell University Press, 2001, p. 76.

¹⁰² R. Turner, 'Who was the Author of *Glanvill*? Reflections on the Education of Henry II's Common Lawyers', *Law and History Review*, vol. 8, no. 1, 1990, p. 119.

of real property practiced in England. The value of an argument from silence is that it can demonstrate an assumed event did not occur when there is near certainty it would have been known and recorded.¹⁰³ Therefore, it can be argued that if the use is not found in *Glanvill*, it is more likely than not that it did not form part of English law when the author wrote the treatise.

Since Lange commented on Langlois and Seignobos' criteria, Mike Duncan has further explored the value of arguments from silence. Duncan states that the strength of the argument depends 'on the rhetor's expert judgment and the audience's evaluation of that judgment, which shifts the burden of proof from the stated evidence'.¹⁰⁴ The reader is challenged to make a subjective assessment of the value of the argument put to them.¹⁰⁵ This is not an unusual situation. As Lange had previously observed, 'like most arguments, it [the argument from silence] is an instrument which depends for its effect largely on the skill and good sense of its craftsman'.¹⁰⁶ Nonetheless, an argument from silence requires an author to take greater care in researching their evidence.¹⁰⁷ This thesis's robust examination of evidence from the crusade movement recognises that the best way to refute an argument from silence is with positive evidence. It adopts an argument from silence as necessary to challenge the strength of Maitland's authority. The connection the latter made with the crusade might be speculative, but it is a foreseeable situation where people would make uses. Therefore, it was also necessary to accept that evidence to support Maitland's thesis might be found. The success of an argument from silence is whether it places the onus back on those who would believe that positive evidence exists.¹⁰⁸ It is again necessary to note the eighth chapter of this thesis turns to positive evidence for the development of the use in English law. It is so placed since one of the advantages of an argument from silence is it 'has an investigative quality that can be used as a pathway to further arguments that wield greater probability and acceptability'.¹⁰⁹

¹⁰³ K. N. Chitnis, *A Manual of Historical Research Methodology*, New Delhi, The Centre for South Indian Studies, 2007, p. 190.

¹⁰⁴ M. Duncan, 'The Curious Silence of the Dog and Paul of Tarsus: Revisiting the Argument from Silence', *Informal Logic*, vol. 32, no. 1, 2012, p. 95.

¹⁰⁵ Duncan, *Informal Logic*, p. 96.

¹⁰⁶ Lange, *History and Theory*, p. 301.

¹⁰⁷ D. Henige, *Historical Evidence and Argument*, Madison, The University of Wisconsin Press, 2005, p. 175

¹⁰⁸ Henige, *Historical Evidence and Argument*, p. 177.

¹⁰⁹ Duncan, *Informal Logic*, p. 95.

The author hopes, therefore, that the argument from absence has been used to good effect to supplant an accepted truth.

The argument from silence made in this thesis benefits from the robustness of medieval legal sources, which differentiates them from other historical sources. It is a robustness that stems from a need for certainty about legal rights and obligations that directs the law towards complete statements either in codifications or juristic works.¹¹⁰ Justinian had envisioned in 529 that the *Digest* would be a perfect statement of law for time immemorial.¹¹¹ However, the later publication of the *Novels* in 529 is a poignant reminder that law was in a constant state of change then as it is now. The motivation of medieval authors to provide an instructive statement of law either as a code or on a particular branch of private law is no different.¹¹² In understanding that law changes over time, the author of this thesis believes that a view of the law in fifty-year increments is the best way to examine whether a legal instrument was available in any given period. Furthermore, the argument from silence benefits from a core precept of legal thinking: reasoning by analogy. It is logical thinking that 'If circumstances X apply, then consequence Y shall (or ought) to follow' that is applied to like situations.¹¹³ It is a way of thinking described as fundamental to the common law and case analysis.¹¹⁴ However, Alan Watson notes Roman jurists also used reasoning by analogy in thinking about and formulating legal principles.¹¹⁵ The same is true about legal thinking in Jewish law.¹¹⁶ This common precept offers the legal historian an advantage that other historians do not enjoy. A modern lawyer using reasoning by analogy can draw conclusions about the law that approach the thinking of a medieval jurist. As Bracton notes, 'if like matters arise let them be decided by like' (*si tamen similia evenerint per simile iudicentur*) (Br. ii, p. 21). It is therefore possible to get into the mind of a medieval jurist and their legal reasoning in a manner not possible for a social historian working on a chronicle.

¹¹⁰ See H. Ávila, *Certainty in Law*, Cham, Springer International Publishing, 2016, p. 2.

¹¹¹ P. Stein, 'Justinian's Compilation: Classical Legacy and Legal Source', *Tulane European and Civil Law Forum*, vol. 8, no. 1, 1993, p. 1.

¹¹² See Br. ii, p. 20.

¹¹³ J. Farrar, 'Reasoning by Analogy in the Law', *Bond Law Review*, vol. 9, no. 2, 1997, p. 149.

¹¹⁴ Farrar, *Bond Law Review*, p. 151.

¹¹⁵ A. Watson 'Roman Law and English Law: Two Patterns of legal Development', *Loyola Law Review*, vol. 36, no. 2, 1990, p. 258.

¹¹⁶ S. Spero, *Morality, Halakha, and the Jewish Tradition*, New York, Yeshiva University Press, 1983, p. 318.

Chapter 2. Historiography: The Legacy of Maitland's Thesis

Frederic Maitland ought to be given a dominant role in the historiography of any thesis that treats the subject of medieval legal history. His legacy is leaving behind research that is still relevant today. The length of his shadow is a testament to the effectiveness of his methodology and the careful use of evidence. He is also the only source that historians and law academics ever cite for the idea that the use originated as a crusade institution. This thesis addresses a subject where the weight of his authority now supports an accepted truth. It is an unfortunate starting point. Maitland coined the crusade connection as an example and actually believed the use had Germanic antecedents. He adopted the views of Anglo-American scholarship to challenge an accepted truth in his time: the use had origins in Roman law. Modern historians now reject both schools and view the use through two different approaches. First, the historians who take an expansive view of the use adopt an interpretation that uses are trust-like institutions received into English law through *ius commune* principles. The second approach adopts an insular view that suggests, since the trust is a unique English phenomenon, that the use also developed in England without external influence. However, neither modern view has supplanted the idea that the use developed out of the crusade movement. A problem of definition may explain why. To move beyond Maitland's thesis, a twenty-first-century legal historian must appreciate that a range of jurisdictions operated in medieval England and be familiar with their legal treatises.

Frederic Maitland and Nineteenth-Century Historiography

Pollock and Maitland's *The History of English Law* was written during a period which the legal historian and botanist Roscoe Pound described as a 'century of history'.¹ In the nineteenth century, historians had moved away from a treatment of legal history

¹ R. Pound, 'The Great Lawyer in History', *Hastings Law Journal*, vol. 3, no. 1, 1952, p. 1; R. Pound, 'What is the Common Law', *University of Chicago Law Review*, vol. 4, no. 2, 1937, p. 177 see J. Altholz, 'Victorian England 1837 – 1091: Bibliography and Historiography', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 5, no. 4, 1973, p. 278.

emphasising the timelessness of law, which characterised preceding centuries.² Christopher Parker commented that the nineteenth-century English historian is supposed to be an insular character with a myopic view of History.³ Tenuous accusations exist that Maitland suffered from Whiggery.⁴ Whig historiography, at its worst, is an extreme example of English insular blindness and propounds a view of history as an evolution, which culminated in England being the zenith of civilisation.⁵ This interpretation, prominent during the eighteenth century, emphasised continuity, nation, and purpose alongside institutions, laws, and customs.⁶ It would be unwise to suggest Maitland or other legal historians leaned towards a particular school; however, they seemingly embody both elements of Parker's description.⁷ They had individual beliefs, thoughts, or agendas that become evident through an analysis of their sources and the structure of their narrative. Ultimately, there is no dominant view about the nature of nineteenth-century English historiography.⁸ There is, however, debate about whether English historians typically form part of the idealist or positivist schools.⁹ The idealist approach imagines history and law as a gradual unfolding of human experiences through unique experiences and responses to unique events.¹⁰ Positivist historiography, led by Auguste Comte and Henry Buckle, sought to identify rules of history through a scientific lens, which remained popular until 1850.¹¹ Leopold Von Ranke propounded the dominant methodology of the period with a view that close analysis of primary sources

² Pound, *Interpretations of Legal History*, p. 9; I. Hunter, 'Natural Law, Historiography, and Aboriginal Sovereignty', *Legal History*, vol. 11, no. 2, 2007, p. 139.

³ C. Parker, 'English Historians and the Opposition to Positivism', *History and Theory*, vol. 22, no. 2, 1983, p. 120.

⁴ R. S. de Montpensier, 'Maitland and the Interpretation of History', *American Journal of Legal History*, vol. 10, no. 4, 1966, p. 264.

⁵ See generally M. Bentley, *Modernizing England's Past: English Historiography in the Age of Modernism, 1870 – 1970*, Cambridge, Cambridge University Press, 2005, p. 24; E. K. Cheng, *Historiography: An introductory guide*, London, Continuum International Publishing Group, 2012, p. 2; Rabban, *Theoretical Inquiries in Law*, p. 544.

⁶ Bentley, *Modernizing England's Past*, p. 24.

⁷ See Parker, *History and Theory*, p. 121.

⁸ Parker, p. 120.

⁹ Parker, p. 120.

¹⁰ R. Pound, *The Spirit of the Common Law*, Boston, Marshall Jones Company, 1921, p. 153; see Parker, *History and Theory*, p. 143 Breisach, *Historiography*, p. 268.

¹¹ Parker, *History and Theory*, p. 123; Breisach, *Historiography*, pp. 272, 275; E. Fuchs, 'Conceptions of Scientific History in the Nineteenth-Century West', in Q. Edward Wang and G. Iggers (ed.), *Turning Points in Historiography: A Cross Cultural Perspective*, Rochester, Rochester University Press, 2002, pp. 151 – 152.

allowed a historian to write objective history.¹² Maitland's approach to legal history can also be examined.

Two schools of legal history dominated nineteenth-century historiography.¹³ Henry Maine's *Ancient Law* (1861) exemplifies the first school of thought. His work dominated the Victorian legal science tradition that sought to examine principles of law through an understanding of the historical relationships between law and societies.¹⁴ Maine modelled his approach on the work of German legal scientists, particularly Carl von Savigny, who used history as a tool to explore how the law responded to societal developments with the aim of solving contemporary problems.¹⁵ Maine took a holistic view of legal history that encompassed perspectives from a variety of different disciplines such as anthropology, philology, and philosophy.¹⁶ This approach had a profound impact on the nineteenth-century historiographical tradition.¹⁷ However, the generalisations present in his work are too far-reaching by modern standards, although his use of legal history to explore the evolution of law remains interesting.¹⁸ Maine's method presented an idealistic approach to legal history, which imagines the evolution of human experience from basic institutions to more complex social structures.¹⁹ The focus of his treatment

¹² K. R. Eskildsen, 'Leopold Ranke's Archival Turn: Location and Evidence in Modern Historiography', *Modern Intellectual History*, vol. 5, no. 3, 2008, p. 427; E. Muir, 'Leopold von Ranke, His Library, and the Shaping of Historical Evidence', *Syracuse University Library Associates Courier*, vol. 22, no. 1, 1987, p. 4; Georg Iggers, 'The crisis of the Rankean paradigm in the nineteenth century', *Syracuse Scholar*, vol. 9, no. 1, 1988, p. 45.

¹³ R. Pound, 'What do we ask of Legal History?', *The American University Law Review*, vol. 11, no. 2, 1962, p. 117; Woodard, *Virginia Law Review*, p. 99; Rabban, *Cambridge Law Journal*, p. 410.

¹⁴ R. Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence*, Cambridge, Cambridge University Press, 1988, pp. 13 – 15; Mackintosh, *Roman Law in Modern Practice*, p. 27; F. Pollock, *Introduction and Notes to Sir Henry Maine's "Ancient Law"*, 2nd edn, London, John Murrar, 1914, p. vii.

¹⁵ Cocks, *Sir Henry Maine*, pp. 26 – 27; M. Reimann, 'Nineteenth Century German Legal Science', *Boston College Law Review*, vol. 31, no. 4, 1990, p. 872; J. Rose, 'Studying the Past: The Nature and Development of Legal History as an Academic Discipline', *The Journal of Legal History*, vol. 31, no. 2, 2010, p. 111; Pollock, *Introduction and Notes to Sir Henry Maine's "Ancient Law"*, p. x; P. Stein, *Roman Law in European History*, Cambridge, Cambridge University Press, 1999, p. 126; Pound, *The Spirit of the Common Law*, p. 154.

¹⁶ Cocks, *Sir Henry Maine*, p. 13.

¹⁷ Cocks, pp. 24, 126; W. Kudrycz, *The Historical Present: Medievalism and Modernity*, Continuum UK, London, 2011, p. 126; H. A. L. Fisher, *Frederick William Maitland*, Cambridge, Cambridge University Press, 1910, p. 18; Pound, *The Spirit of the Common Law*, p. 154; Pound, *Interpretations of Legal History*, p. 125; N. Cantor, 'Medieval Historiography as Modern Political and Social Thought', *Journal of Contemporary History*, vol. 3, no. 2, 1968, p. 100.

¹⁸ Cocks, pp. 146 – 147; A. Diamond, *The Victorian Achievement of Sir Henry Maine: A Centennial Reappraisal*, Cambridge, Cambridge University Press, 1991, p. 95; Rabban, *Cambridge Law Journal*, p. 410; Hutchinson, *Evolution and the Common Law*, pp. 12 – 13.

¹⁹ Rabban, p. 411; Pound, *The Spirit of the Common Law*, pp. 154 – 155; K. Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Princeton, Princeton University Press, 2010, p. 3.

was largely comparative jurisprudence instead of English legal history.²⁰ It is unnecessary to comment further on his work except to note that the methodology employed by Maitland eclipsed Maine's scientific approach to become the foremost model of subsequent historians.²¹ Maitland's treatment of legal history might be viewed as a reprisal against the short-comings of Maine's school of thought.

Maitland pioneered a methodology that appears to have been an inherent part of his genius for legal history. It is the product of a decision to withdraw himself from legal practice to become a medievalist.²² The positive reception of his edition of *Bracton's Notebook* marked the beginning of a short, but successful, career.²³ Maitland was a prodigious writer during his 22 year career despite his battles with illness and winter exoduses to the Canary Islands.²⁴ During this time, he demonstrated that lawyers and legal technique could shed considerable light on historical understanding.²⁵ Professor Maitland's celebrated place in English historiography means he continues to hold an indomitable position in any treatment of medieval history.²⁶ The reference to Maitland's work throughout this thesis is demonstrative of the hold he continues to exercise over the subject. He introduced an evidence-based historical technique to nineteenth-century legal history, which required a systematic study of the primary source material.²⁷ He confined his historical observations to the period that had birthed the legal sources he was working with rather than attempting to make generalisations about the evolution of history.²⁸ The objective evidence-based interpretation of history by Von Ranke to 'tell

²⁰ Pound, *The Spirit of the Common Law*, p. 28; Pollock, *Introduction and Notes to Sir Henry Maine's "Ancient Law"*, p. xiv.

²¹ Diamond, *The Victorian Achievement of Sir Henry Maine*, p. 3; Cocks, *Sir Henry Maine*, p. 146; Bentley, *Modernizing England's Past*, p. 196; Southern and Bartlett, *History and Histories*, p. 142; Rabban, *Jerusalem Review of Legal Studies*, p. 121; Woodard, *Virginia Law Review*, p. 102; Baker, *Cambridge Law Journal*, p. 64.

²² Fisher, *Frederick William Maitland*, p. 23; Cantor, *Journal of Contemporary History*, p. 66; Rabban, *Cambridge Law Journal*, p. 431.

²³ Schuyler, *Frederic William Maitland, Historian*, p. 2; Rabban, p. 432; F. Wiener, 'Bracton in English After Seven Hundred Years', *American Bar Association Journal*, vol. 55, no. 10, 1969, p. 966

²⁴ Schuyler, p. 1; M. Hoeflich and D. Guth, *University of Illinois Law Review*, p. 442; Fisher, *Frederick William Maitland*, pp. 110 -112; Bentley, *Modernizing England's Past*, p. 33.

²⁵ Fisher, *Frederick William Maitland*, p. 176.

²⁶ Fisher, p. 34; Southern and Bartlett, *History and Histories*, p. 4; Woodard, *Virginia Law Review*, p. 106.

²⁷ Schuyler, *Frederic William Maitland, Historian*, p. 3; Kudrycz, *The Historical Present*, p. 126; Bentley, *Modernizing England's Past*, p. 33; de Montpensier, *American Journal of Legal History*, p. 260 but see Rabban, *Cambridge Law Journal*, p. 411; Rose, *The Journal of Legal History*, p. 111.

²⁸ Schuyler, p. 38; Kudrycz, *The Historical Present*, p. 127; G. Gurvitch, *Sociology of Law*, New Brunswick, Transaction Publishing, 1973, p. 96; Fisher, *Frederick William Maitland*, p. 27.

how it really was' seems to have inspired this methodology.²⁹ Maitland viewed history as an open-ended subject that defied attempts to construct definitive narratives.³⁰ He believed the socio-political framework of societies influenced legal development, and interpreted the law as a product of human needs and social will.³¹ Maitland would probably be aghast to learn that one of his examples had become an accepted truth without the critical examination of the evidence that this thesis will undertake.

Modern legal historians can continue to learn lessons from Maitland's sophisticated method, or in his words, to pursue a 'logic of evidence'.³² He used legal records to paint a contextual picture of the law to explore the lives of people and wider society.³³ In the first instance, however, he sought to understand the law itself before attempting to interpret it within its social and intellectual background.³⁴ Maitland's extensive canvass of medieval law and life redefined the history of the common law, which is why his scholarship remains authoritative today.³⁵ He excelled at deconstructing historical ideas by using primary legal materials while appreciating the continuity present in the development of English law.³⁶ His method worked by identifying what was certain before working towards what was uncertain.³⁷ This favours a retrogressive historical treatment that acknowledges the known results of legal developments before turning to identify the causes and processes from which they sprang.³⁸ It did not prevent conclusions in the absence of evidence, and Maitland himself was not afraid to offer educated opinions on legal development.³⁹ In this manner, his genius aimed to provide a starting point for subsequent historians to challenge the ideas presented in his work once more evidence became available.⁴⁰ This was likely his motivation when he published his explanation of

²⁹ A. Smith, *Frederic William Maitland: two lectures and a bibliography*, Oxford, Clarendon Press, 1908, p. 17.

³⁰ Schuyler, *Frederic William Maitland, Historian*, p. 38.

³¹ Fisher, *Frederic William Maitland*, pp. 18, 83; Smith, *Frederic William Maitland*, p. 3.

³² F. W. Maitland, *Why the History of English Law is not Written*, London, C. J. Clay & Sons, 1888, p. 14.

³³ W. Buckland, 'Frederic Maitland', *Cambridge Law Journal*, vol. 1, 1923, p. 279; Southern and Bartlett, *History and Histories*, p. 139; Rabban, *Jerusalem Review of Legal Studies*, p. 107; Phillips, *Victoria University of Wellington Law Review*, p. 107.

³⁴ Baker, *Cambridge Law Journal*, p. 64.

³⁵ Woodard, *Virginia Law Review*, p. 107.

³⁶ Bentley, *Modernizing England's Past*, p. 101; Southern and Bartlett, *History and Histories*, pp. 141 – 142.

³⁷ Bentley, p. 33; de Montpensier, *American Journal of Legal History*, p. 260.

³⁸ Kudrycz, *The Historical Present*, p. 126; de Montpensier, p. 261.

³⁹ Schuyler, *Frederic William Maitland, Historian*, p. 1; de Montpensier, p. 262.

⁴⁰ Bentley, *Modernizing England's Past*, p. 33.

the use. William Buckland anecdotally commented on how Maitland gently introduced challengeable ideas in such a manner that allowed students to consider they had identified the issue themselves.⁴¹ The reference to the crusade movement may have been designed to tempt some hapless student to pick up where he left off.

It is necessary to comment on what Maitland intended to say about the origin of uses. The accepted truth that the use had its origins during the Crusades ignores several other examples advanced in *The History of English Law*.⁴² It also ignores a note titled 'on the phrase 'ad opus' and the Early History of the Use', which includes several additional pages of explanatory material⁴³ and references not considered part of the body⁴⁴ of the text. The body of the text, read together with the explanatory notes, outlines the history of the expression and proceeds to discuss its impact on chattels and land, the latter is the subject of his crusade example. On the origin of the use, Maitland states:

In tracing its embryonic history we must first notice the now established truth that the English word use when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*. True that the two words are in course of time confused, so that if by a Latin document land is to be conveyed to the use of John, the scribe of the charter will write *ad opus Johannis* or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula *ad opus et ad usum*; nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*.⁴⁵

Maitland defined *ad opus meum* in the explanatory notes as 'on my behalf' or 'for my profit' or advantage.⁴⁶ The word *opus* carries two meanings. First, it often means 'task' or 'work'.⁴⁷ It is the second form, meaning 'to serve the needs of' or 'to benefit', which Maitland connected to the use in the medieval period. Maitland limits his treatment on the relationship between the crusade and the use to simply highlight an occasion when people might have made it. He did not intend it to become the dominant narrative.

⁴¹ Buckland, *Cambridge Law Journal*, p. 281.

⁴² See also F. W. Maitland, 'The Origin of Uses', *Harvard Law Review*, vol. 8, no. 3, 1894, p. 127; F. W. Maitland, *Why the History of English Law is not Written*, p. 24.

⁴³ Pollock and Maitland, *The History of English Law*, vol. 2, pp. 233 – 239.

⁴⁴ Pollock and Maitland, pp. 228 – 233.

⁴⁵ Pollock and Maitland, pp. 228 – 229.

⁴⁶ Pollock and Maitland, p. 233.

⁴⁷ Later restated in M. Radin, 'Ad Opus – To the use of', *Illinois Law Review*, vol. 17, 1923, p. 396.

Maitland often aimed to provide a starting point for future research rather than have the final word on the subject.⁴⁸ This thesis is a much-delayed response to one of Maitland's challenges. There is no doubt Maitland based his opinion in *The History of English Law* on the evidence available to him. However, he also outlines the motivation for his work:

I have long been persuaded that every attempt to discover the genesis of our use in Roman law breaks down, and I have been led to look for it in another direction by an essay which some years ago Mr. Justice Holmes wrote on Early English Equity (Law Quarterly Review, vol. i.). Whether I have been successful is not for me to say. I will first state my theory and then adduce my evidence.⁴⁹

Maitland does not outline his reasoning for dismissing a possible Roman law source for the use, but makes it clear that he relied on theories advanced by his American contemporaries. The comment also shows that Maitland was experimenting when he included his explanation of the use. This is clear because, four years prior, he published an article titled 'The origin of uses' in the *Harvard Law Review* (1894) as a 'projected sketch to be included' in his main work.⁵⁰ He is clearly presenting his work on his theory to attract comment before its inclusion in *The History of English Law*. The fact it later appeared unaltered reveals he did not receive the critical review he sought. It is reasonable to posit that his work was either commended by his contemporaries, or he was met with disappointing silence. This lends itself to a conclusion that his reference to the crusade movement was an attempt to enliven the subject.

Traditional Schools of Thought

The collection of essays in *Itinera Fiduciae* represent modern thinking on the nature of both trusts and uses.⁵¹ Its editors' opening chapter begins by canvassing the two schools of thought about the origin of the trust, or rather the use, which existed in the nineteenth century. The text does not limit itself to English legal history. Its purpose is to assess whether there is a historical connection between the English trust and continental legal

⁴⁸ F. Wiener, 'Did Bracton write Bracton?', *American Bar Association Journal*, vol. 64, no. 1, 1978, p. 75.

⁴⁹ Maitland, *Harvard Law Review*, p. 127.

⁵⁰ Maitland, *Harvard Law Review*, pp. 127 – 137.

⁵¹ Stein, *Cambridge Law Journal*, p. 203; Ibbetson, *Edinburgh Law Review*, p. 244.

traditions through a comparative study.⁵² Richard Helmholz and Reinhard Zimmermann identified that two schools of thought have dominated the debate ‘whether the medieval use, the parent or at least a lineal ancestor of the modern trust, had its origins in the Germanic *Salman*, or instead in the Roman law’s *fideicommissum*’.⁵³ The debate between each school remained lively at the close of the twentieth century.⁵⁴ All the contributing authors sensibly limited their definition of a trust or trust-like institution to basic trust structures.⁵⁵ We define a bare trust as ‘a trust where the trustee or trustees hold property on trust with no active duty to perform except to convey it upon demand to the beneficiary or beneficiaries’.⁵⁶ This is sensible because it avoids invoking the complexities of modern trust law that could cloud the function of uses in medieval England and other trust-like structures elsewhere. It is necessary, however, to consider how the two historiographical traditions influence the present thesis.

Germanic Law

Pollock and Maitland wrote of their regret at the beginning of their *The History of English Law* that they had found the state of English legal history much as William Blackstone’s *Commentaries on the Laws of England* (1765 – 1769)⁵⁷ had left it in the previous century.⁵⁸ However, Pound’s ‘century of history’ also included strong contributions to legal history by American historians that mirrored developments in England.⁵⁹ Pollock and Maitland acknowledged their substantive debt to and admiration of American scholarship.⁶⁰ Maitland had frequent correspondence with American legal historians Melville Madison Bigelow, James Barr Ames, and Oliver Wendell Holmes.⁶¹ He shared a close personal relationship with Bigelow and the correspondence between them and

⁵² Helmholz and Zimmermann, *Itinera Fiducia*, p. 30.

⁵³ Helmholz and Zimmermann, p. 32.

⁵⁴ Helmholz and Zimmermann, p. 37.

⁵⁵ Helmholz and Zimmermann, p. 39.

⁵⁶ Richardson and Breach, *Nevill’s Law of Trusts, Wills and Administration*, p. 15.

⁵⁷ W. Blackstone, *Commentaries on the Laws of England*, Oxford, Clarendon Press, 1765 – 1769.

⁵⁸ Pollock and Maitland, *The History of English Law*, vol. 1, p. xxxv see Fisher, *Frederick William Maitland*, p. 23; Pound, *University of Chicago Law Review*, p. 186.

⁵⁹ Rabban, *Jerusalem Review of Legal Studies*, p. 107; Rabban, *Cambridge Law Journal*, p. 434.

⁶⁰ Pollock and Maitland, *The History of English Law*, vol. 1, p. xxxvii.

⁶¹ Rabban, *Cambridge Law Journal*, p. 429; D. Rabban, *Law’s History: American Legal Thought and the Transatlantic turn to History*, Cambridge, Cambridge University Press, 2013, p. 205.

their spouses survive.⁶² All three had contributed essays on the use to the *Select Essays in Anglo-American Legal History* series.⁶³ Maitland even commented in private correspondence that he thought that Ames' essay was the best in the series.⁶⁴ David Rabban's 'From Maine to Maitland via America' (2009) has recently suggested modern English legal historians are reluctant to recognise the American contribution and isolate Maitland from it.⁶⁵ It is arguable that one effect of an insular view of legal history is it allowed Maitland to cast a longer shadow than he did during his lifetime.⁶⁶

The influence of American scholarship on Maitland's work on the use is straight-forward. As noted above, Maitland acknowledged the debt he owed to Holmes' article 'Early English Equity'⁶⁷ whose theory of the use was almost immediately accepted by English and American legal historians.⁶⁸ Holmes argued that 'the feoffee to uses of the early English law corresponds point by point to the *Salman* of the early German law ... the likeness between [them] would be enough, without more, to satisfy me that the latter was the former transplanted'.⁶⁹ The author then connects the feoffee to the power of the executor as a German office.⁷⁰ From Holmes' starting point, Ames concluded 'it may be conceded that the feoffee to uses, down to the beginning of the fifteenth century, was the German *Salman* or *Treuhand* under another name'.⁷¹ He ties the relief granted in the case of a feoffee who failed to perform their obligations to the Chancellor's sense of justice.⁷² The editors of *Itinera Fiducia* comment that the speed with which the Germanic school of thought was accepted occurred because Maitland was its proponent, and that he had

⁶² See Ault, *Boston University Law Review*, pp. 285 – 326.

⁶³ See in particular, M. Bigelow 'The Rise of the English Will', in Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History*, vol. 3, Boston, Little, Brown and Company, 1908, pp. 770 – 781; J. Ames, 'The Origins and Uses of the Trust', in Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History*, vol. 2, Boston, Little, Brown and Company, 1908, pp. 737 – 752; O. W. Holmes, 'Early English Equity', in Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History*, vol. 2, Boston, Little, Brown and Company, 1908, pp. 705 – 721.

⁶⁴ Rabban, *Cambridge Law Journal*, p. 433.

⁶⁵ Rabban, pp. 428- 429.

⁶⁶ Rose, *The Journal of Legal History*, p. 115.

⁶⁷ O. W. Holmes, 'Early English Equity', *Law Quarterly Review*, vol. 1, no. 2, 1885, pp. 162 – 174.

⁶⁸ Helmholz and Zimmermann, *Itinera Fiducia*, p. 33.

⁶⁹ Holmes, *Law Quarterly Review*, pp. 163 – 164.

⁷⁰ Holmes, pp. 163 – 164.

⁷¹ Ames, *Select Essays in Anglo-American Legal History*, vol. 2, p. 740.

⁷² Ames, p. 742.

suggested the only reachable conclusion was that the use had its origins in ancient Germanic roots that flowered in England.⁷³

The small number of subsequent legal historians that have approached the question of the origin of the use have moved away from Maitland's thesis, and this thesis is no exception. The key issue with the Germanic school of thought, as identified by John L. Barton in 'The Medieval Use', is there is no evidence to support the view that the Germanic *Salman* was ever a part of the customary law in England.⁷⁴ Maitland was not familiar with Anglo-Saxon law and his work on it has attracted criticism from modern historians.⁷⁵ It is curious that he makes no attempt to connect the *Salman* to those who held land *ad opus* for another. Nonetheless, Maitland believed the use had its roots in a special usage of the expression *ad opus* found in Anglo-Saxon law. In an explanatory note 'From Frankish models the phrase has passed into Anglo-Saxon land-books' he cites three charters to support his argument.⁷⁶ The charters are formulaic. The first concerns a grant from the Mercian king Coenulf to Archbishop Wulfred, made in 809, of twenty-five hides of land located in Ilbbinctun, Kent 'for the use of the Church of Christ and the monks there who are in the service of God ... free from all secular service except [military] expedition, and the construction of bridges and defences'.⁷⁷ The second charter (822) concerns a grant of land by Coenulf's controversial successor King Beornulf and, although considered spurious, provides the basic ingredients of the formula above.⁷⁸ It reads, 'Beornulf grants to Archbishop Wilfred, *ad opus monachorum* in the service of God, rights in the land at Godmeresham, namely eight plows, free from all [secular] things, except [the three common burdens]'.⁷⁹ The third charter (832) is not a royal grant of land but a private

⁷³ Helmholz and Zimmermann, *Itinera Fiducia*, pp. 33 – 34.

⁷⁴ J. L. Barton, 'The Medieval Use', *Law Quarterly Review*, vol. 81, no. 4, 1965, p. 562.

⁷⁵ P. Wormald, 'Maitland and Anglo-Saxon Law: Beyond Domesday Book', *Proceedings of the British Academy*, vol. 89, 1996, pp. 5 – 6.

⁷⁶ Pollock and Maitland, *The History of English Law*, vol. 2, pp. 233 -234.

⁷⁷ KCD 1025 'ad opus praefatae Christi aecclesiae et monachorum ibidem deo servientium ... liberab ab omnibus saecularibus anxietatibus, exceptis communi expeditione, pontis et arcis constructione'.

⁷⁸ KCD 1028.

⁷⁹ KCD 1028. 'Item eodem anno Beornulfus rex dedit ecclesie Christi et Wlfredo archiepiscopo, ad opus monachorum in eadem ecclesia Deo servientium, uillam Godmeresham terram iuris sui, uidelicet octo aratrorum, liberam ab omnibus rebus, exceptis expeditione, pontis et arcis constructione'. The expression 'three common burdens' is borrowed from N. Brooks, 'The development of military obligations in eighth- and ninth-century England', in P. Clemoes and K. Hughes (ed.), *England before the Conquest: Studies in primary sources presented to Dorothy Whitelock*, Cambridge, Cambridge University Press, 1971, p. 69.

post-obit gift, a bilateral contractual arrangement to take effect after death, made by a priest named Werhard that included a condition that the monastic lands granted to him by an archbishop would return to the monks after his death.⁸⁰

The first issue with Maitland's thesis is that the expression *ad opus* has no special meaning in Anglo-Saxon grants to monasteries. It is, contrary to what Maitland suggested, synonymous with *ad usum*. Numerous charters use the expressions interchangeably throughout the Anglo-Saxon period to denote a conveyance of land to monasteries. For example, a charter (757 x 758), probably authentic, concerns a grant made by King Cynewulf of the Saxons of five manses at North Stoke to a monastery for perpetual possession and *ad usum necessarium*.⁸¹ The interchangeability of the terms is evident in both tenth-⁸² and eleventh-century⁸³ charters. Maitland was correct, however, to suggest the rules surrounding monastic lands were antique by the time of the Conquest. The venerable Bede reports that the synod of Hertford (673) enacted a canon that 'it shall not be lawful for any bishop to disturb monasteries dedicated to God, nor to take away forcibly any part of their property' (cap. 3).⁸⁴ The *Penitential* (668 – 690), attributed to the Byzantine Theodore, expands on this rule to state that a bishop could not take possession of the monastery even if the abbot commits an offense (2.6.5).⁸⁵ It further provides: 'It is unlawful for either a bishop or abbot to alienate the land of the church to another, even though it is within their power. If either is desirous to alienate the land of the Church, they must obtain the consent of the other' (2.6.6).⁸⁶ The rule seems to have relaxed within a century. The Acts of the Council of Celchyth (816) allowed alienation for

⁸⁰ KCD 230.

⁸¹ S 265.

⁸² See S 876, S 583, S 408, S 658, S 690, S 732, S 733, S 734, S 744, S 745, S 759, S 760, S 777, S 829, S 841, S 843, S 876, S 896; KCD 1297; KCD 760; KCD 764; KCD 765.

⁸³ See S 920, S 937, S 1020, 1023, S 964, S 1042.

⁸⁴ Bede, *The Ecclesiastical History of the English People*, trans. B. Colgrave and R. A. B. Mynors, Oxford, Clarendon Press, 1969, p. 350. Ut quaque monasteria Deo consecrate sunt, nulli episcoporum liceat ea in aliquo inquietare, nec quicquam de eorum rebus violenter abstrahere.

⁸⁵ A. Haddan, W. Stubbs and D. Wilkins (ed.), *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, vol. 3, Oxford, Clarendon Press, 1869, p. 195; see also M. Elliot (ed.), *Canones Basilienses*, cap. 110, available at <http://individual.utoronto.ca/michaelelliott/index.html>, 2014 (accessed 29/02/2016); M. Elliot (ed.), *Capitula Dacheriana*, p. 6, available at <http://individual.utoronto.ca/michaelelliott/index.html>, 2014 (accessed 29/02/2016). It is probable that Theodore introduced Byzantine principles into Anglo-Saxon law but further research is necessary.

⁸⁶ Haddan, Stubbs, Wilkins, *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, vol. 3, p. 195; see also Elliot, *Capitula Dacheriana*, p. 6; Elliot, *Canones Basilienses*, cap. 111.

the lifetime of one man, with the consent of the monks, provided it afterward returned to the Church.⁸⁷ Charters made by Archbishop Oswald in the tenth century suggests he took pains to obtain the monk's consent for his various alienations when the rule had relaxed further to include the lifetime of one man and two of his heirs.⁸⁸ At no time, however, is the term *ad opus* employed to convey a meaning distinct from *ad usum*.

Maitland's decision to invoke Anglo-Saxon monastic charters as evidence of the Germanic origins of the use seemed reasonable. There is an implicit trust-like structure implied in grants of land to monks.⁸⁹ The Council of Clovesho (747) states that bishops, abbots, and abbesses should set a good example by treating the monks (and nuns) as their children rather than as servants, care for the needs of the monastery, and faithfully deal with monastic property and not steal it (canon 4).⁹⁰ The bishop or abbot had decision-making power over the community and administered its property on its behalf.⁹¹ However, the idea that the bishop or abbot was in the position of a feoffee struggles against the core precept of corporately-held property that forbids private ownership.⁹² Anglo-Saxon donors intended to give land outright to a community with the ecclesiastic viewed as having a custodial role in respect of his office. This is clear in an abridged charter (832), made by King Aðelwulf at the instigation of Archbishop Ceolnoð, which reads that he gifts land to the 'church of Christ at Canterbury *ad opus monachorum* with fields, woods, meadows, and food for 120 pigs ... I, King Aðelwulf give these donations to Christ free from all secular services except for the [three common burdens]'.⁹³ It is unsurprising, therefore, that today's legal historians have abandoned the idea that the use has a Germanic progenitor while the ongoing association with the crusade movement remains the dominant narrative.

⁸⁷ Haddan, Stubbs, Wilkins, *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, vol. 3, p. 582.

⁸⁸ see KCD 494; KCD 510; KCD 516; KCD 550; KCD 552; KCD 558; KCD 623; KCD 649; KCD 661.

⁸⁹ See Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, p. 9.

⁹⁰ Haddan, Stubbs, Wilkins, *Councils and Ecclesiastical Documents relating to Great Britain and Ireland*, vol. 3, p. 364.

⁹¹ S. Wood, *The Proprietary Church in the Medieval West*, Oxford, Oxford University Press, 2006, p. 9.

⁹² J. Godfrey, *The Church in Anglo-Saxon England*, Cambridge, Cambridge University Press, 1962, p. 152; D. Ganz, 'The ideology of sharing: apostolic community and ecclesiastical property in the early middle ages', in W. Davies and P. Fouracre (ed.), *Property and Power in the Early Middle Ages*, Cambridge, Cambridge University Press, 1995, pp. 17 – 21.

⁹³ KCD 1042.

Roman Law

The second school of thought predates the Germanic theory of uses and relied on, according to Helmholz and Zimmermann, 'evidence of the most circumstantial sort'.⁹⁴ There is little to add to their summary of the Roman law school of thought:

Whatever the cause, the unanimity and persistence of opinion on the point is quite impressive. *Sir William Blackstone* (d. 1780) concluded that English trusts were "in their original of a nature very similar, or rather exactly the same" as the fiduciary institutions of the Roman law, chiefly the *fideicommissum*. *Sir Geoffrey Gilbert* (d. 1720), prolific treatise writer and chief baron of the Exchequer, took the view that legacies in wills had themselves originally been *fideicommissa*, going on to describe the English executor as *fideicommissarius*. *William Cruise* (d. 1824), author of standard works of real property, summed up what was by then a widely accepted position: "The idea of a use and the rules by which it was first regulated, are now generally admitted to have been borrowed by the *ecclesiasticks* [sic] from the *fidei-commissum* of the civil law".⁹⁵

This school, therefore, is built on noticed similarities between the civil law *fideicommissum* and the trust. These similarities are compelling. The *Institutes* states the following arrangement, '[A] testator [who] has written 'Let Lucius Titius be my heir,' he can then add, 'and I ask you, Lucius Titius, as soon as you can accept the estate, to give it to Gaius Seius' (Inst. 2.23.2). Even a lawyer with a bare acquaintance with legal history would quickly recognise a *fideicommissum* as prima facie meeting the definition of a testamentary trust. It was a logical connection to make. It also agreed with the humanist sentiments of early modern England to impose the classics onto aspects of its society.⁹⁶

The Roman law school of thought, unlike its Germanic counterpart, exercised a discernible impact on trust law after the Statute of Uses. It is evidence of Helmholz's assertion that 'it is right to think that some of the elements of trust law in England were shaped by the *ius commune*. The process happened gradually and without much notice

⁹⁴ Helmholz and Zimmermann, *Itinera Fiducia*, p. 37.

⁹⁵ Helmholz and Zimmermann, p. 32.

⁹⁶ Helmholz and Zimmermann, p. 32.

being taken of it'.⁹⁷ Reference to the instrument by English civilians is unsurprising.⁹⁸ However, it is clear there was acceptance of the Roman law school of thought throughout legal practice. For example, in *Penson v Cartwright*⁹⁹ (1615), the King's Bench heard a case to determine whether it should prohibit the Court of Requests from hearing a case that concerned a person whose instructions to their executor included: 'I have, by my will, given such particular legacies [and] I would have you increase the same'. The common law court reasoned 'this by the civil law is termed *commissum fidei*, and held a good legacy'. Therefore, the court prohibited the Court of Requests from hearing the case and deferred the matter to the proper forum to determine testamentary causes (an ecclesiastical court). English lawyers also argued the particulars of trust law according to civil law principles. In *Pierson v Garnet* (1786),¹⁰⁰ Lord Chancellor Thurlow sought to determine whether the precatory words used by the deceased were sufficient to support a trust (i.e. manifest a certainty of intention) 'according to the notions of the civil law'. Therefore, the use's connection to the Roman law by analogy to the trust, like the crusade today, was an accepted truth in English law. One nineteenth-century case notes: 'Trusts, as adopted in our law, we know perfectly well, are taken from the Roman law, *fidei commissum*, a duty imposed upon the good faith, upon a confidence, in the party'.¹⁰¹ The legal profession had bulwarked the idea that the use had its origins in the civil law before the nineteenth century.

It is unlikely that the strength of Maitland's authority alone was enough to replace the Roman school of thought. Nineteenth-century common law romanticised a nationalistic hostility to the civil law that had its origins in the Reformation, which imagined the civil law as authoritarian and posing a moral threat to English law.¹⁰² In reality, common law

⁹⁷ R. Helmholz, 'Trusts in the English Ecclesiastical Courts 1300 – 1640', in R. Helmholz and R. Zimmermann (ed.), *Itinera Fiducia: Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998, p. 159.

⁹⁸ E.g. Dr Lushington preferred the term *fideicommissum* to trust in *Simpson v Forrester* (1829) 1 Knapp [232]; 12 Eng. Rep. 308.

⁹⁹ *Penson v Cartwright* (1615) 1 Cro. Jac. [269]; 79 Eng. Rep. 295.

¹⁰⁰ *Pierson v Garnet* (1786) 2 Bro. C. C. [38]; 29 Eng. Rep. 20.

¹⁰¹ *Heneage v Lord Viscount Andover* (1822) 10 Price [230]; 147 Eng. Rep. 297.

¹⁰² See generally L. Moccia, 'English Law attitudes to the 'Civil Law'', *Journal of Legal History*, vol. 2, no. 2, 1981, p. 158; M. M. Knappen, *Constitutional and Legal History of England*, New York, Harcourt Brace, 1942, p. 45; J. B. Murphy, 'The Influence of the Civil Law upon the Common Law', *Loyola Law Journal*, vol. 13, no. 2, 1932, p. 40; T. W. Marshall, 'Roman law: Its Study in England', *Law Magazine & Quarterly Review of Jurisprudence 5th Series*, vol. 26, 1901, pp. 289 – 291; J. Curran Jr., *Roman Invasions: The British History, Protestant Anti-Romanism, and the Historical Imagination in England 1530- 1660*, Newark, University of Delaware Press, 2002, pp. 136, 183; J.

jurists, for the most part, cooperated with their civilian counterparts.¹⁰³ The popular narrative persisted, nevertheless, that the nationalistic common lawyer ought to regard the civil law as an invasive force to be repelled.¹⁰⁴ Pollock wrote scathingly about some of his contemporaries in *The Genius of the Common Law* (1912): ‘I have known good English lawyers who can see nothing but barbarism in the Middle Ages. I suspect those learned friends of being, I will not say possessed, but in some measure obsessed, by the enemy [civil law]’.¹⁰⁵ It was an unnecessarily virulent attack on the civil law. The civil law influence on English law had already ended when the Probate Act 1857 disbanded the Doctors Commons to end the civilian profession.¹⁰⁶ Writing shortly before its enactment, the civilian John Phillimore thought in *Principles and Maxims of Jurisprudence* (1856) that the common lawyers had a shameful degree of pride in their ignorance of the civil law, the common law being poorer for it.¹⁰⁷ Nevertheless, Pollock is illustrative of the hostility that led to the decline of civil law jurisprudence from English legal thought.¹⁰⁸ The climate was conducive to a new theory to supplant the old.

Maitland does not appear to be immune from the nationalistic attitude of his co-author with regard to Roman law.¹⁰⁹ It is a major theme in his *English law and the Renaissance*

Whitman, ‘The Disease of Roman law: A Century Later’, *Syracuse Journal of International Law & Commerce*, vol. 20, 1994, p. 227; J. Whitman, ‘The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence’, *Yale Law Journal*, vol. 105, no. 7, 1996, p. 1841; Stein, *Roman Law in European History*, p. 2.

¹⁰³ See Moccia, *Journal of Legal History*, p. 158; Helmholz, *The Selden Society Lectures: 1951 – 2001*, pp. 516 – 519; Murphy, p. 42; D. Seipp, ‘The Reception of Canon Law and the Civil Law on the Common Law Courts Before 1600’, *Oxford Journal of Legal Studies*, vol. 13, no. 3, 1983, pp. 389 – 390.

¹⁰⁴ See generally P. Grossi, *A History of European Law*, Oxford, Wiley-Blackwell, 2010, p. 49; M. Amos, ‘The Common Law and the Civil Law in the British Commonwealth of Nations’, *Harvard Law Review*, vol. 50, no. 8, 1937, p. 1252; D. Nestorovska, ‘Influences of Roman Law and Civil Law on the Common Law’, *Hanse Law Review*, vol. 1, no. 1, 2005, p. 79; R. Phillimore, *The practice and courts of civil and ecclesiastical law, and the statements in Mr. Bouverie’s speech on the subject*, London, W. Benning & Co, 1848, p. 7; R. Helmholz, ‘Continental Law and Common Law: Historical Strangers or Companions?’, *Duke Law Journal*, no. 6, 1990, p. 1217; Seipp, *Oxford Journal of Legal Studies*, p. 388.

¹⁰⁵ Pollock, *The Genius of the Common Law*, p. 3.

¹⁰⁶ See generally B. Levack, *The Civil Lawyers in England 1603-1641: The Political Study*, Oxford, Clarendon Press, 1973, p. 201; J. Baker, *An Introduction to English Legal History*, 4th edn, London, Reed Elsevier (UK) Ltd, 2002, p. 169; N. Cox, ‘The influence of the Common law on the Decline of the Ecclesiastical Courts of the Church of England’, vol. 3, no. 1, *Rutgers Journal of Law and Religion*, 2002, p. 43; A. Manchester, ‘The Reform of the Ecclesiastical Courts’, *The American Journal of Legal History*, vol. 10, no. 1., 1966, p. 75; J. Baker, *Monuments of Endlesse Labours: English Canonists and their Work 1300 – 1900*, London, The Hambledon Press, 1998, p. 144.

¹⁰⁷ J. Phillimore, *Principles and Maxims of Jurisprudence*, London, J. W. Parker and Son, 1856, p. 356.

¹⁰⁸ P. Spiller, ‘Roman Law and New Zealand Law’, *New Zealand Law Review*, no. 1, 2005, p. 9; A. Crittenden, ‘Roman Law in Modern Life and Education’, *The Classical Journal*, vol. 15, no. 3, 1919, p. 154.

¹⁰⁹ Helmholz and Zimmermann, *Itinera Fiducia*, p. 34; Milsom, *Cambridge Law Journal*, p. 268; Hoeflich and Guth, *University of Illinois Law Review*, p. 441; P. Goodrich, ‘Poor Illiterate Reason: History, Nationalism and

(1901) that various jurisdictions attempted to withstand and then succumbed to Roman law influence.¹¹⁰ In *The Constitutional History of England* (1919), he states that the growth of the common law during the thirteenth century meant ‘that from the beginning of Edward’s reign, English law becomes always more insular, and English lawyers become more and more utterly ignorant of any law but their own. Thus English law was saved from Romanism’.¹¹¹ He notes that although the common law lost the structure of a civilian system; it resisted the political authoritarianism that Roman law brought with it.¹¹² He concluded ‘English law at this early period had absorbed so much Romanism that it could withstand all future attacks, and pass scathless even through the critical sixteenth century’.¹¹³ These opinions seem to be implicit in Maitland’s belief that the trust was unique to English law and not found on the continent.¹¹⁴ The Germanic school of influence supported his opinion that the use or trust was one of ‘the most distinctive achievement of English law’.¹¹⁵ Wormald noted he was far warmer towards continental influences from France and Germany, and less receptive to arguments supporting the Roman influence on English law.¹¹⁶ Nonetheless, Maitland’s evidence-based approach rested behind his rejection of Roman origins of the use. He understood that legal historians must be versed in both the civil law and ecclesiastical traditions of English law.¹¹⁷ Further, he actively sought out a remedy for what he felt were defects in his knowledge.¹¹⁸ This led him to make a significant contribution that papal decretals were binding in England, which led to a famous controversy with the prominent medievalist William Stubbs who

Common Law’, *Social & Legal Studies*, vol. 1, no. 1, 1992, p. 14; Rabban, *Jerusalem Review of Legal Studies*, p. 110.

¹¹⁰ F. W. Maitland, *English law and the Renaissance*, Cambridge, Cambridge University Press, 1901.

¹¹¹ F. W. Maitland, *The Constitutional History of England*, Cambridge, Cambridge University Press, 1919, p. 21.

¹¹² Maitland, *The Constitutional History of England*, p. 21.

¹¹³ F. W. Maitland and F. Motague, *A Sketch of English Legal History*, London and New York, G. P. Putnam’s Sons and The Knickerbocker Press, 1915, p. 45.

¹¹⁴ F. W. Maitland, *Equity, also the Forms of Action at Common Law*, Cambridge, Cambridge University Press, 1910, p. 23, see Hoeflich and Guth, *University of Illinois Law Review*, p. 441; Helmholz and Zimmermann, *Itinera Fiducia*, p. 244.

¹¹⁵ Maitland, *Equity, also the Forms of Action at Common Law*, p. 23.

¹¹⁶ Wormald, *Law and History Review*, p. 24.

¹¹⁷ Hoeflich and Guth, *University of Illinois Law Review*, p. 443, MS. Add. 7481 reproduced at 444 – 448; see Maitland, *Select Essays in Anglo-American Legal History*, vol. 2, p. 75.

¹¹⁸ Pollock and Maitland, *The History of English Law*, vol. 1, p. xxxvii; F. W. Maitland, ‘Canon Law in England’, in H. A. L. Fisher (ed.), *The Collected Papers of Frederick William Maitland: Downing Professor of the Laws of England*, vol. 3, Cambridge, Cambridge University Press, 1911, p. 145. Particularly in F. W. Maitland, *Roman Canon Law in the Church of England*, London, Methuen & Co, 1898, p. v.

posited the opposite view.¹¹⁹ Therefore, Maitland's rejection of the dominant view was coloured by nationalistic views but not overborne by them.

Modern Debate

The modern debate adopts qualities of the nineteenth-century schools of thought. Historians are divided about whether to adopt an insular or expansive view of the trust, or in this case, the use.¹²⁰ Most essays in *Itinera Fiduciae* took an expansive view:

Continental legal historians are surprised to find that quite apart from the question of the trust's origins, the *ius commune* played a significant part in the development of the English trust. English legal historians are surprised to find that trust-like institution, making use of civilian sources, were in place on the Continent, and that they were not simply *fideicommissa* of the Roman law ... The Roman and Canon laws were thus a continuing factor in the creation and regulation of trusts.¹²¹

The expansive view of trust-like institutions, including the use, draws on *ius commune* influences. Shael Herman's authoritative work 'The Canonical Conception of the Trust' demonstrates that trust-like arrangements allowed the Church to reconcile the reality that it held property with its spiritual aversion towards wealth by conceptualising the clergy as its guardians.¹²² God took the role of the settlor and ultimate beneficiary of ecclesiastic property.¹²³ Herman argues that the canonical usage of the term *usus*, a term that described numerous beneficial interests, was distinguishable from the use because the clergy could only ever enjoy a licence to use and not the incidences of ownership.¹²⁴ He authoritatively challenged Maitland's belief that one purpose of the use was to accommodate Franciscan landholding.¹²⁵ The two arrangements are distinguishable. Franciscan landholding relied on a distinction between ownership and possession, which allowed the Church to hold an enduring interest as a *collegium* without invoking

¹¹⁹ Donahue Jr., *Michigan Law Review*, pp. 651, 678; Cantor, *Journal of Contemporary History*, p. 67; R. Helmholz, *Roman Canon Law in Reformation England*, Cambridge, Cambridge University Press, 1990, p. 5.

¹²⁰ Helmholz and Zimmermann, *Itinera Fiduciae*, p. 37.

¹²¹ Helmholz and Zimmermann, p. 41.

¹²² S. Herman, 'The Canonical Conception of the Trust', in R. Helmholz and R. Zimmermann (ed.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998, pp. 85 – 86.

¹²³ Herman, *Itinera Fiduciae*, p. 88.

¹²⁴ Herman, p. 93.

¹²⁵ Herman, p. 95 see Pollock and F. W. Maitland, *The History of English Law*, vol. 2, p. 231.

individual property rights.¹²⁶ This supports Stephen DeVine's conclusion that the Franciscan model of bare ownership had no influence on uses in English law.¹²⁷ Franciscan title to land was a 'non-transferable, non-hereditary and terminable at death' interest in property.¹²⁸

The editors also advanced the gift *ad pias causas* as a trust-like device that had long predated private law uses in English law.¹²⁹ It was identical in nature to the charitable trust or use.¹³⁰ A thesis on the origin of the charitable use in English law has its clearest germs in the *ius commune*. Cod. 1.3.28.1 permits a bishop to administer pious bequests, namely chattels, for the benefit of the poor or the release of captives.¹³¹ One of the most significant developments in this area of law is found in the following passage: 'If he [the testator] does not specifically state [in his will] the poor intended to benefit, the holy bishop of the town where the testator had his domicile shall receive it and distribute it amongst the poor' (Nov. 131.11.1).¹³² English courts regularly cited this principle in the context of charitable uses to justify that the gift cannot fail for want of uncertain persons.¹³³ The public law character of the charitable use distinguishes it from both private law uses and trusts.¹³⁴ However, the rule long predates the civil law. Its principles can be found during the Roman Dominate in St. Augustine's advice that testators ought to provide for Christ after their children.¹³⁵ It is an arrangement that Herman associates

¹²⁶ Herman, p. 96.

¹²⁷ S. W. DeVine, 'The Franciscan Friars, the Feoffment to Uses, and Canonical Theories of Property Enjoyment before 1535', *Journal of Legal History*, vol. 10, no. 1, 1989, p. 15.

¹²⁸ Herman, *Itinera Fiducia*, p. 105.

¹²⁹ Helmholz and Zimmermann, *Itinera Fiducia*, p. 44.

¹³⁰ Helmholz and Zimmermann, p. 43. See Richardson and Breach, *Nevill's Law of Trusts, Wills and Administration*, p. 155.

¹³¹ See Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, p. 392. The supervisory role of ecclesiastics gave it an equitable or trust-like flavour as discussed in the first chapter, although the term charitable use ought to be best understood as an early modern term. Unfortunately, the subject of charitable uses and trusts, and their relation to gift *ad pias causas* is too vast to canvass in detail and incidental to private law uses.

¹³² Si autem non specialiter dixerit, quomodo pauperibus haec reliquit, praecipimus sanctissimum episcopum civitatis in qua testator habuit domicilium percipere easdem res et eius civitatis pauperibus erogare.

¹³³ *Attorney General v Platt* (1675) 1 Rep. Temp. Finch. [221]; 23 Eng. Rep. 122; *Attorney General v Peacock* (1675) 1 Rep. Temp. Finch. [245]; 23 Eng. Rep. 135.

¹³⁴ See Richardson and Breach, *Nevill's Law of Trusts, Wills and Administration*, p. 159.

¹³⁵ S. MacCormack, 'Sin, Citizenship, and the Salvation of Souls: The Impact of Christian Priorities on Late-Roman and Post-Roman Society', *Comparative Studies in Society and History*, vol. 39, no. 4, 1997, pp. 666 – 668; Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, p. 41.

with the canonical theory of corporate property.¹³⁶ Religious antecedents for the charitable trust have also been seen in the Islamic *Waqf*, neither Roman nor Germanic, which may have penetrated English law through contact during the crusade movement.¹³⁷ Silence about its potential influence is similarly attributed to the crusade.¹³⁸ Michael Gousmett's 'Origins of the Trust' (2017) is the most recent reiteration of this connection. The author comments it is interesting to learn that 'the English trust may not have been a creation of English jurisprudence after all, and that it may have been predated by a concept originating from Islamic traditions'.¹³⁹ Gousmett notices the historiographical trend to ignore the possible connection.¹⁴⁰ Nonetheless, a thesis on the origin of the charitable use (or rather the gift *ad pias causa*) as a trust-like religious device ought to start with the tenets of Jewish law.¹⁴¹ The trust-like elements of the charitable use in English law are clear but it invokes the same theory of *usus* as other ecclesiastical property ownership.¹⁴² Furthermore, the classical definition of a use, as it appears in Maitland's example, does not include principles related to the law of charity.

Helmholz is an authoritative proponent of a possible *ius commune* origin of the use. His chapter in *Itinera Fiduciae*, 'Trusts in the English Ecclesiastical Courts 300 – 1640', describes the enforcement of uses in the ecclesiastical courts.¹⁴³ He lends his authority to the accepted truth: 'Perhaps, the earliest appearance of such a device in an ecclesiastical setting is associated with the Crusades. Early crusaders sometimes conveyed their land to a trustee, to be held to the use of their wives or children while in the Holy Land'.¹⁴⁴ He has fallen into a familiar trap. The only source he cites for this proposition is *The History of English Law* and the example contained within.¹⁴⁵ He adds, 'the strongest early

¹³⁶ Herman, *Itinera Fiduciae*, p. 104.

¹³⁷ M. M. Gaudiosi, 'The Influence of the Islamic Law of Waqf on the Development of the Trust in England: The Case of Merton College', *University of Pennsylvania Law Review*, vol. 136, no. 4, 1988, p. 1245; Verbit, *The Origins of the Trust*, p. 284.

¹³⁸ Gaudiosi, *University of Pennsylvania Law Review*, p. 1255.

¹³⁹ M. Gousmett, 'The Origins of the trust', *New Zealand Law Journal*, no. 3, 2017, p. 107.

¹⁴⁰ Gousmett, *New Zealand Law Journal*, p. 107.

¹⁴¹ Namely the rule in Mishneh Torah, She'elah uFikkadon 5:1.

¹⁴² Herman, *Itinera Fiduciae*, p. 104; Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, pp. 417 – 418.

¹⁴³ Helmholz, *Itinera Fiduciae*, p. 153 see also R. Helmholz, 'The Early Enforcement of Uses', *Columbia Law Review*, vol. 79, no. 8, 1979, pp. 1503 – 1513.

¹⁴⁴ Helmholz, *Itinera Fiduciae*, p. 156.

¹⁴⁵ Helmholz, p. 156.

connection between the Church and the use in England is not, however, related to the Crusades, but rather the Franciscans, who arrived in England early in the 13th century'.¹⁴⁶ Helmholz does appear to prove his thesis that fourteenth-century ecclesiastical courts enforced uses.¹⁴⁷ It is a natural forum because the primary purpose of the feoffment to use was to effectively permit the feoffor to devise land.¹⁴⁸ However, he raises two additional arguments. The first concerns the common law. Helmholz states, 'using the technical terms of the common law, the feoffees were said to hold the land *ad opus*. Their tenancy was said to be for benefit of the *cestui que use*, a general term employed to designate the beneficiary, present or future'.¹⁴⁹ Helmholz appears to have relied on Maitland to reach this conclusion. Second, he argues its enforcement in Chancery arose when it supplanted ecclesiastical jurisdiction over feoffment to uses when it offered a remedy.¹⁵⁰ The possibility that Chancery or the common law courts enforced uses, concurrent with the ecclesiastical courts, has yet to be satisfactorily examined.

On the other hand, the insular approach regards the trust, and uses, as part of an English tradition absent from external influences such as the *ius commune*.¹⁵¹ J. M. W. Bean's *The Decline of English Feudalism* is the modern starting-point for proponents of an insular view of uses. Bean devoted a chapter 'Origins and Development of Uses' to the use in the above text, which he defined with reference to Maitland's *ad opus* hypothesis and its usage in Anglo-Saxon law as a Germanic import.¹⁵² Bean examined a number of cases that he thought illustrated the trust-like character of the use.¹⁵³ He provides an example of a crusader named Sir Otto on the Ninth Crusade where the jurors did not know whether he granted his lands to the bishop as a bailiff or 'with all their rights' (as a feoffee).¹⁵⁴ This suggested to the author that the jurors may have been acquainted with the use. The distinction between a bailiff who did not have seisin and a feoffee who had ownership was plain in the thirteenth century.¹⁵⁵ Bean notes the use, as a trust-like device, came into

¹⁴⁶ Helmholz, p. 156.

¹⁴⁷ Helmholz, p. 159.

¹⁴⁸ Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, p. 421.

¹⁴⁹ Helmholz, *Itinera Fiduciae*, p. 155.

¹⁵⁰ Helmholz, p. 159.

¹⁵¹ Helmholz and Zimmermann, *Itinera Fiduciae*, p. 44.

¹⁵² Bean, *The Decline of English Feudalism*, pp. 104 – 106.

¹⁵³ Bean, p. 109.

¹⁵⁴ Bean, p. 110.

¹⁵⁵ Bean, p. 111.

vogue in the following century.¹⁵⁶ He posits three strands to determine the origin of the use: the existence of a practice whereby one person holds land to the use of another; the development of trusteeship; and the development of the executor as an office.¹⁵⁷ The conclusion that the use found definition in the late fourteenth century defines the scope of his study.¹⁵⁸ Bean concluded, despite an insular approach to his subject, that the common law had no remedy for the use. He concluded that the Chancellor and the King's council enforced uses outside of common law principles.¹⁵⁹

Legal historians have adopted an insular view of uses since Bean. Robert Palmer devotes space in his authoritative account of *English law in the Age of the Black Death* to a description of uses in the late fourteenth century, which connects it to the growth of Chancery as a court of conscience.¹⁶⁰ Palmer's study made no mention of the use as an instrument connected to the *ad opus* expression during the fourteenth century or the crusade movement. He is also highly critical of the expansive approach that Helmholz had adopted in previous work.¹⁶¹ Nonetheless, his brief sketch presents a highly persuasive account that seldom steps outside the evidence. The author does, oddly, suggest that the use cannot be explored purely as a legal instrument.¹⁶² He instead calls the instrument a *social use* to reject many earlier arrangements thought to be uses, and emphasises their sociological rather than legal importance.¹⁶³ This is a more confusing aspect of an otherwise excellent treatment. The second author to adopt an insular approach recently is Joseph Biancalana in his essay 'Medieval Uses' in *Itinera Fiducia*.¹⁶⁴ The author states from the outset that he is setting out to build on Bean's work to explore a theory of the use that is intertwined with the development of Chancery as a court of equity.¹⁶⁵ He posits three strands, like Bean, which was necessary for their creation, but varies his treatment to include 'the three practices of appointing executors, making grants out to receive back

¹⁵⁶ Bean, p. 118.

¹⁵⁷ Bean, pp. 129 – 131.

¹⁵⁸ Bean, p. 149.

¹⁵⁹ Bean, p. 163.

¹⁶⁰ Palmer, *English Law in the Age of the Black Death*, pp. 110 – 132.

¹⁶¹ Palmer, p. 113.

¹⁶² Palmer, p. 113.

¹⁶³ Palmer, pp. 111 – 112.

¹⁶⁴ J. Biancalana, 'Medieval Uses', in R. Helmholz and R. Zimmermann (ed.), *Itinera Fiducia: Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998, pp. 111 – 152.

¹⁶⁵ Biancalana, *Itinera Fiducia*, p. 111.

a life estate-remainder settlement, and making conditional grants combined to form a feoffment to uses'.¹⁶⁶ His work is distinguishable from both Bean and Palmer because he accepts the possibility of multiple forums of enforcement, which includes accepting Helmholz's evidence that they were recognised by the ecclesiastical courts.

The Problem of Definition

The absence of an agreed definition of the use is one reason historians have not yet produced a satisfactory account of its origin to supplant the belief that it originated with the Crusades. There are two principal issues that underlie modern scholarship. The first issue is that historians have adopted broad definitions of the use that could apply to a variety of devices in the medieval period. Palmer discussed this issue (uncharitably) in the following terms:

[A] purely legal definition of the use does not easily define the important changes in landholding in late medieval England. Using the purely legal perception, one can find "uses" long before the fourteenth century, but uses that are not characterized by the artificiality of the fourteenth-century phenomenon. Typical in this regard is [Richard] Helmholz's description of the use: "the essence of the 'use' was the separation of legal title to land from its beneficial enjoyment". The problem with that description of the use as its "essence" is that essence was shared by so many earlier phenomena from which the use is distinctly different – or else the late-fourteenth century developments would not have been as important as everyone admits they were.¹⁶⁷

Palmer further complains that historians have confused both guardians of wards and bailiffs to property as feoffees.¹⁶⁸ The use, while having traditional application to land, has also been in arrangements applying to chattels and monies. Maitland accepted uses could apply to both and offered the following as an example: 'William delivers two marks or three oxen to John, who receives them to the use [*ad opus*] of Roger'.¹⁶⁹ He admits the question of uses on chattels and money is hazy due to nuanced distinctions between ownership and possession, and the above example concerns *ad opus* in the law of

¹⁶⁶ Biancalana, p. 123.

¹⁶⁷ Palmer, *English Law in the Age of the Black Death*, p. 111.

¹⁶⁸ Palmer, p. 112.

¹⁶⁹ Pollock and Maitland, *The History of English Law*, vol. 2, p. 229.

agency.¹⁷⁰ In contrast, Maitland suggested that uses touching land were clearer because of the demarcation between ownership and possession.¹⁷¹ The evidence suggests modern definitions that include chattels and money as uses are also too broad to develop a satisfactory account of their origin.

Biancalana's definition of the use is also illustrative of the dangers associated with a broad definition. He avoids some confusion by confining his treatment to land, distinguishing uses from other trust-like devices that touch chattels, and the freehold or title held by feoffee that distinguishes them from a mere custodian.¹⁷² However, he suggests uses achieved a variety of purposes in England:

Medieval uses can be divided into two great classes, those which transmitted land from one generation to the next and those which did not. [i] Uses of the [second] class were created to secure debts or other obligations, [ii] to avoid creditors, [iii] to evade litigation, and [iv] to circumvent the Statute of Mortmain.¹⁷³

Biancalana cites two fourteenth-century examples of uses under the first head of his second class of use ([i] to secure debts) that are not uses.¹⁷⁴ The first concerns a licence (1375) for Walter fitz Walter to enfeoff three persons of his lands on condition that if Walter pays the feoffees or their executors, he may re-enter the premises.¹⁷⁵ The second concerns a grant (1349) made by the Earl of Lancaster, going to Gascony in the King's service, who granted lands and rents to 'certain persons' to hold for twelve years to pay back a loan.¹⁷⁶ These arrangements are conditional feoffments known as a *vifgage*, a conditional grant of land that allows the grantee to enjoy the fruits of the land for a certain term as security for a loan, which is utilised by the Earl during the Hundred Years War in the same way that crusaders also employed them.¹⁷⁷ The ultimate purpose of the

¹⁷⁰ Pollock and Maitland, p. 230.

¹⁷¹ Pollock and Maitland, p. 230.

¹⁷² Biancalana, *Itinera Fiducia*, pp. 111 – 112.

¹⁷³ Biancalana, p. 112.

¹⁷⁴ Biancalana, p. 112.

¹⁷⁵ CPR (1374 - 1377), p. 191.

¹⁷⁶ CPR (1348 - 1350), p. 374.

¹⁷⁷ See S. Lloyd, 'Crusader Knights and the Land Market in the Thirteenth Century', in P. Coss and S. Lloyd (ed.), *Thirteenth Century England II: Proceedings of the Newcastle Upon Tyne Conference 1987*, Woodbridge, The Boydell Press, 1988, p. 130; Cazel Jr., *A History of the Crusades*, p. 120.

arrangement of this conditional feoffment is to provide security rather than benefit a third party.¹⁷⁸ Palmer similarly conflates pledge arrangements, like the *vifgage*, with uses.¹⁷⁹ He indicates that uses allowed control over the particulars of a pledge during the fourteenth century to include collateral objects.¹⁸⁰ However, the principal purpose of a credit arrangement is to secure a loan rather than benefit a third party.

A broad definition of the use has also led legal historians to suggest that its function is to circumvent the law. Biancalana states feoffers utilised uses to fraudulently grant land to friends to circumvent either [ii] debts and obligations (50 Edw. III, c 6) or [iii] litigation (1 Ric II, c 9) while secretly enjoying the profits. However, these statutes do not specifically discuss issues of fraud that were unique to uses. The idea of hiding property in feoffments (absolute or conditional) is not novel and the law had been on guard against such frauds long before their passage. The common law is replete with examples of feoffments made for fraudulent purposes. For example, a feoffment with a condition could be used to avoid the consequence of litigation.¹⁸¹ In a case dated 1262, the exchequer intervened to prevent a debtor trying to disperse their goods to avoid paying creditors.¹⁸² Furthermore, a felon might attempt to avoid the consequence of forfeiture by granting land to another.¹⁸³ Richard Page 'on or after the day when he was outlawed for the felonious slaying of Thomas Bernard of Maderressey' enfeoffed a number of persons for his life.¹⁸⁴ The law sought to overturn all feoffments intended to defraud. One case concerned a landholder who enfeoffed the defendant of his fee with a clear intention to deprive his lord (the plaintiff) of his legal rights (wardship) contrary to the Statute of *Quia Emptores* 1290 (18 Edw. 1, c 1).¹⁸⁵ The court emphasised this was a 'feigned feoffment' made by collusion. Even too many 'successive alienations' of land that raised suspicion might result in an escheat to the king and later restoration to the feoffor's lawful heir.¹⁸⁶ The feoffment with a condition to achieve an illegal purpose might approach the nature of the use, but the suggestion

¹⁷⁸ E.g. CCR (1377 - 1381), p. 231.

¹⁷⁹ Palmer, *English Law in the Age of the Black Death*, p. 122.

¹⁸⁰ Palmer, pp. 122 – 123.

¹⁸¹ E.g. CPR (1266 - 1272), p. 473 to avoid the consequence of a suit in the ecclesiastical courts.

¹⁸² CPR (1258 - 1266), p. 727.

¹⁸³ E.g. Cal. Inq. Misc. v. 2, no. 1161.

¹⁸⁴ Cal. Inq. Misc, v 4., no. 145 (1371).

¹⁸⁵ Y. B. Mich. no. 76 (19 Edw. III).

¹⁸⁶ E.g. Cal. Inq. Misc. v. 3, no. 342.

the principal purpose of the use is fraudulent is a problematic starting point since it assumes illegality.

The second issue is that the use has been too long dressed in the clothes of the trust as understood in equity. Palmer, like Helmholz in the quote above, states that the fundamental characteristic of the use is that it distinguishes between legal and beneficial ownership.¹⁸⁷ This distinction is used in *Nevill's Law of Trusts, Wills and Administration*, which defines a trust as an obligation imposed by equity as a consequence of this structure.¹⁸⁸ Palmer concludes that 'the use became a secure mechanism enforced by state authority not by the alteration of the common law rules, but rather by the chancellor's enforcement of ethical expectations on behalf of people who were intended beneficiaries'.¹⁸⁹ The remainder of his treatment is coloured by a definition that envisaged the use as cognisant in Chancery according to conscience rather than law. Palmer wrote when, in Biancalana's words, 'the relation and interaction between Chancery as a court of conscience and the common law courts was a largely unexplored subject'.¹⁹⁰ Dennis Klinck has since demonstrated that Chancery did not have exclusive reference to notions of conscience. Klinck concluded that while principles of fairness may have influenced the Chancellor, he did not provide a unique forum of equity nor introduce into English law a notion of conscience informed by the canon law.¹⁹¹ Klinck cites a case from *Statham's Abridgement* (1467), heard in 1453 under the head of conscience, as a noteworthy exception to a dearth of evidence for equitable reasoning in juridical decisions.¹⁹² Chief Justice John Fortescue explicitly commented: 'We are not arguing the law in this case, but the conscience'.¹⁹³ Notably, the judge usually presided over the King's Bench and was not an ecclesiastic.¹⁹⁴ The notion of conscience, however, was referenced to justify the overturning of a use made to benefit a daughter at the expense of another daughter who was her father's lawful heir.

¹⁸⁷ Palmer, *English Law in the Age of the Black Death*, p. 110.

¹⁸⁸ Richardson and Breach, *Nevill's Law of Trusts, Wills and Administration*, pp. 3 – 5.

¹⁸⁹ Palmer, *English Law in the Age of the Black Death*, p. 111.

¹⁹⁰ Biancalana, *Itinera Fiduciae*, p. 144.

¹⁹¹ D. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, Farnham, Ashgate Publishing Limited, 2010, p. 23.

¹⁹² Klinck, p. 23; N. Statham, *Statham's Abridgement of the Law*, trans. M. Klingelsmith, vol. 1, Boston, The Boston Book Company, 1915, pp. 392 – 393.

¹⁹³ Statham, *Statham's Abridgement of the Law*, p. 393.

¹⁹⁴ Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, p. 23.

It is a striking feature of the abovementioned case from *Statham's Abridgement* that the reference to conscience is to overturn a use, which is contrary to modern ideas that trust-like devices ought to be enforced by equitable notions. The arguments are worth canvassing in further detail. Lawyers for the beneficiary of the use made the following argument:

When he declared his will, the daughter had immediately an interest in the land, which he [her father] could not defeat afterwards; no more than where a man enfeoffs me to enfeoff another, who is a stranger to his blood, he cannot revoke it afterwards ... for when he is as well the feoffee of the daughter as the feoffee of the feoffor. And if the daughter declares her will to him, he is bound to do it after the death of the feoffor. And I think that such a declaration of his will is as strong as a condition declared upon a livery of seisin.¹⁹⁵

The law argued by the lawyer is: a feoffment made with a condition imposed on the feoffee to enfeoff another, in this case a use, must be upheld as a matter of law; the daughter can demand the feoffee transfer it to her since she steps into the shoes of the feoffor. Lawyer for the heir, however, argued that the feoffor could have revoked his will at any time and, as a matter of conscience, obliged the feoffee to re-enfeoff the feoffor on discovery of their poverty. Fortescue further reasoned that conscience indicated that no father with a full appreciation of their situation would willingly enfeoff another to the deprivation of their heir. The case illustrates the danger of imposing modern notions of equity onto the use, which is evident by the surprise expressed by the modern English translator that 'our case is not in the Chancery, as one might well expect a case of conscience to be, but in the Exchequer'.¹⁹⁶ The significance of the lawyers for the beneficiary framing their argument around settled common law principles shows that the law pertaining to uses followed livery of seisin rather than ideas of conscience or equity. It suggests the origin of the use may not lie in equity but the common law. The idea that the use has a connection to the common law is explored throughout the thesis in reference to the crusade movement, and expanded on in the eighth chapter to put to rest the accepted truth.

¹⁹⁵ Statham, *Statham's Abridgement of the Law*, pp. 392 – 393.

¹⁹⁶ Statham, p. 393.

The tendency to conflate the use with the trust appears to be a lingering consequence of the Roman law school of thought that associated it with the *fideicommissum*. David Johnston has authoritatively dismissed the idea that English trusts emerged out of the Roman law instrument, but also remarks that the parallels in their respective developments are remarkable.¹⁹⁷ The association between the *fideicommissum* and the *ius honorarium*, a jurisdiction exercised by the praetor to supplement and correct the rigours of the *ius civile* (Dig. 1.1.7.1), means English jurists also built on civilian jurisprudence to associate the use with equity. The description in Inst. 2.23.1 that the origins of *fideicommissa*, as arrangement formed around notions of good faith (*fides*) and not law, resonated with English jurists. It states that Emperor Augustus occasionally ordered consuls to enforce them, but they proved so popular that a regular jurisdiction was created during the principate. The implication is the *fideicommissum* shaped the development of the *ius honorarium*, which George Spence thought analogous to the use's relationship with equity in England.¹⁹⁸ English lawyers drew analogies between the praetor, who enforced *fideicommissa* in Roman law, and the chancellor and their enforcement of trusts.¹⁹⁹ Francis Bacon even calls the praetor a 'chancellor only for uses'.²⁰⁰ The evidence suggests that civil law principles did shape the development of trust law in England from the early modern period.²⁰¹ In the eighteenth century, Chancery demonstrably grafted trust concepts onto the civil law *donatio mortis causa* to extend it to include chose-in-action such as shares.²⁰² As late as 1857, the Lord Chancellor in *Dodd's Case* treated the terms *fidei commissaires* and trustee as interchangeable expressions.²⁰³ Future research will undoubtedly reveal further connections between civil law principles and the development of the trust. In

¹⁹⁷ D. Johnston, *The Roman law of Trusts*, Oxford, Clarendon Press, 1988, p. 1.

¹⁹⁸ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, pp. 325- 326.

¹⁹⁹ See generally Martínez-Torrón, *Anglo-American Law and Canon Law*, p. 54; W. W. Buckland, A. D. McNair, and F. H. Lawson, *Roman Law and Common Law: A Comparison in Outline*, 2nd edn, Cambridge, Cambridge University Press, 1965, p. 5; W. Buckland, 'Praetor and Chancellor', *Tulane Law Review*, vol. 13, no. 2, 1939, p. 163; T. Ridley, *A View of the Civile and Ecclesiastical Law*, London, Printed for the Company of Stationers, 1607, pp. 11 – 12.

²⁰⁰ Bacon, *The Learned Reading of Sir Francis Bacon*, p. 16.

²⁰¹ On civilians adapting civil law principles for English law see R. Helmholz, 'The Origin of Holographic Wills in English law', *The Journal of Legal History*, vol. 15, no. 2, 1994, pp. 97 – 108.

²⁰² L. Breach, 'King v Chiltern Dog Rescue: a timely reflection on the *donatio mortis causa* in New Zealand', *New Zealand Family Law Journal*, vol. 8, no. 11, 2016, pp. 200 – 204.

²⁰³ *Dodd's Case* (1857) 2 DE.G. & J [511]; 44 Eng. Rep. 1087.

the present thesis, it shows how those principles that shaped English thoughts about the trust and equity have also informed modern opinion about the use.

Moving Forward

The continued belief that there is a link between the use and the crusade movement is an unfortunate consequence of a common opinion that issues on which Maitland pronounced do not need explanation beyond his seminal work. The reliance on the accuracy of Maitland's research by distinguished medievalists discussing medieval law and legal institutions illustrates his continued importance in modern histories.²⁰⁴ However, 'legal history, like other history, must always be rewritten'.²⁰⁵ Stroud Francis Charles Milsom eloquently sums up the problem as follows:

There are no scholarly miracles; and if writing so old still has authority that is because people do not look behind it to the evidence. Reliance is natural when the writing set the assumptions upon which generations have worked, when history is so fragmented that nobody looks at the wood in which their particular trees were growing, and when the evidence is intractably legal. And Maitland's magic is not confined to the immediacy with which his readers hear disputes. There is also the lawyer's power to impose a simple and convincing pattern upon complex matters. It became a creed because it *had* to be right.²⁰⁶

Modern scholarship must move past Maitland, although not completely abandon his technique, to write good historical commentary on medieval legal institutions. The excellence of Maitland's work continues to enthral modern readers. The author's apparent intuition for the medieval accompanied by the eloquent flow of his writing means any proposed revision of his work is a daunting challenge.²⁰⁷ Modern historians must be prepared to accept Maitland's treatment of the English use could be wrong. An examination into traditionally ignored elements of English law and a different approach to the utilisation and interpretation of law and legal sources could shed substantial light on medieval history.

²⁰⁴ For example, see M. Prestwich, *The Three Edwards: War and State in England*, 2nd edition, London and New York, Routledge, 2003, p. 118. Prestwich simply directs the reader to Pollock and Maitland's *History of English Law* for an explanation of fine in Prestwich, *Plantagenet England*, p. 420.

²⁰⁵ Boorstin, *Harvard Law Review*, p. 433.

²⁰⁶ Milsom, *Cambridge Law Journal*, p. 269; see Woodard, *Virginia Law Review*, p. 106.

²⁰⁷ Wiener, *American Bar Association Journal*, 1978, p. 75; Woodard, p. 106.

In moving forward, a flexible approach to the subject of English legal history is necessary to satisfactorily examine the origins of the use. Most common law legal academics, it is to be expected, are acquainted with Bracton's *On the Laws and Customs of England* (c. 1230s) as a starting-point for English law in the medieval period.²⁰⁸ The body of common law juristic literature, considerably less ample than the civilian works on the continent, was never far away from the *ius commune* tradition.²⁰⁹ Legal historians appreciate that the common law is a judge-made formulary system that developed during the twelfth century.²¹⁰ The administration of medieval law often loosely consisted of local laws and customs applied on a regional basis rather than a national centralised system.²¹¹ England is unique because the king succeeded in establishing a distinct customary law throughout the kingdom. It is a curious feature of this jurisdiction that the greatest contribution the common law has made to the *corpus* of the law is its official documents rather than literature.²¹² In treating the common law, the legal historian has a problem unique in the discipline of Medieval History. Maitland best described it as follows:

To say nothing of the light they [rolls] throw upon every detail of mediaeval life, they contain the authorities, and it well may be, ultimate authorities for many a rule of the common law which hitherto has been traced no further than Bracton's unverified assertion. However to print these rolls in full would be too large, too costly a task for private enterprise. We have been embarrassed by our riches, our untold riches. The nation put its hand to the work and turned back fainthearted. Foreigners print their records; we, it must be supposed, have too many records to be worth printing;

²⁰⁸ See Maitland, *Select Essays in Anglo-American Legal History*, vol. 2, p. 84.

²⁰⁹ See generally J. L. Barton, 'The Study of Civil law before 1380', in T. Aston, J. Catto and R. Evans, *The history of the University of Oxford: The early Oxford schools*, vol. 1, Oxford, Oxford University Press, 1984, pp. 519- 520; D. Seip, 'Roman Legal Categories in the Early Common Law', in T. Watkin (ed.), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference Cardiff 1987*, London, The Hambledon Press, 1989, p. 11; R. Turner, 'Roman Law in England before the Time of Bracton', *Journal of British Studies*, vol. 15, no. 1, 1975, p. 1; C. Sherman, 'The Romanization of English Law', *The Yale Law Journal*, vol. 23, no. 4, 1914, p. 324; R. Helmholz, 'Magna Carta and the *ius commune*', *The University of Chicago Law Review*, vol. 66, no. 2, 1999, p. 365; A. Duggan, 'Roman, Canon and Common Law in Twelfth-Century England: The Council of Northampton (1164) Re-examined', *Historical Research*, vol. 83, no. 221, 2010, p. 404.

²¹⁰ T. Kuehn, 'Conflict Resolution and Legal Systems', in C. Lansing and E. English, *A Companion to the Medieval World*, Chichester, Wiley-Blackwell, 2009, p. 345; Martinez-Torrón, *Anglo-American Law and Canon Law*, pp. 14 – 15.

²¹¹ Kuehn, *A Companion to the Medieval World*, p. 347.

²¹² Maitland, *Why the History of English Law is not Written*, p. 4; Fisher, *Frederick William Maitland*, p. 25; S. Vogenauer, 'Law Journals in Nineteenth-Century England', *Edinburgh Law Review*, vol. 12, no. 1, 2008, pp. 29 – 31.

so there they lie these invaluable materials for the history of the English people, unread, unknown, almost untouched save by the makers of pedigrees.²¹³

Legal historians, therefore, must overcome a discordant mass of material. It is a task more daunting than the study of continental legal systems.²¹⁴ The volume of official documents and case law in the medieval record presents an intimidating challenge to modern legal historians and would likely pose an unassailable barrier to those uninitiated in law.

Historians of English law must also acquaint themselves with England's civilian tradition. It began when Oxford University first taught from Vacarius' *Liber Pauperum* in the mid-twelfth century.²¹⁵ A *Lectura*²¹⁶ on Justinian's *Institutes* reveals English students had access to a professional education on the civil law.²¹⁷ Therefore, it is unsurprising that a professional class of practicing civilians emerged in the following century.²¹⁸ The ecclesiastical courts provided them with opportunities for employment, particularly in the provincial courts of York and Canterbury, and they could expect judicial roles, to act as advocates and proctors, notaries, or undertake some other administrative function.²¹⁹ The medieval civilian viewed themselves as the equal to their common law counterpart.²²⁰ Nonetheless, much of the civilian literary tradition is post-Reformation.

²¹³ Frederic Maitland, *Bracton's Note Book*, vol. 1, London, C. J. Clay & Sons, 1887, p. 11.

²¹⁴ Pollock, *The Genius of the Common Law*, p. 23; Goodrich, *Social & Legal Studies*, p. 7; Rabban, *Cambridge Law Journal*, p. 413.

²¹⁵ On the influence of the civil law on English law, see P. Stein, 'The Vacarian school', *The Journal of Legal History*, vol. 13, no. 1, 1992, p. 26; H. Hazeltine, 'Vacarius as Glossator and Teacher', *Law Quarterly Review*, vol. 44, no. 3, 1928, pp. 344 – 350; Francis De Zulueta, F. De Zulueta and P. Stein, *The teaching of Roman law in England around 1200*, London, Selden Society, 1990, pp. xxiii, xxvi, xxviii – xxix; J. Brundage, *The Medieval Origins of the Legal Profession: Canonists, Civilians, and Courts*, Chicago, Chicago University Press, 2008, p. 93; J. Brundage, 'Canonists versus Civilians: The Battle of the Faculties', *The Jurist*, vol. 71, no. 2, 2011, p. 319; W. Blackstone, *Discourse on the Study of Law; Being an Introductory Lecture, Read in the Public Schools, October 25, 1758*, Oxford, Clarendon Press, 1758, p. 16.

²¹⁶ British library, Royal MS. 4. B. IV in F. De Zulueta and P. Stein, *The teaching of Roman law in England around 1200*, London, Selden Society, 1990.

²¹⁷ Stein, *The Journal of Legal History*, p. 26; De Zulueta and Stein, *The teaching of Roman law in England around 1200*, pp. xxxviii, lii – liii; C. Donahue Jr., 'Ius commune, Canon and Common Law in England', *Tulane Law Review*, vol. 66, no. 6, 1992, p. 1749.

²¹⁸ Levack, *The Civil Lawyers in England 1603-1641*, p. 146; Brundage, *The Medieval Origins of the Legal Profession*, p. 2; J. Brundage, 'The Rise of the Professional Jurist in the Thirteenth Century', *Syracuse Journal of International Law and Commerce*, vol. 20, 1994, p. 185; P. Brand, *The Making of the Common Law*, London, The Hambledon Press, 1992, pp. 2, 5.

²¹⁹ De Zulueta and Stein, *The teaching of Roman law in England around 1200*, p. 18; Brundage, *The Medieval Origins of the Legal Profession*, p. 23.

²²⁰ J. D. M. Derrett, *Henry Swinburne (?1551-1624): Civil Lawyer of York*, York, St. Anthony's Press, 1973, p. 9

One of the most eminent authors is Henry Swinburne. He wrote treatises on the learned laws in English while at the same time was sufficiently versed in the common law to utilise case law.²²¹ His treatise *A brief treatise of Testaments and last Wills* (1590) and the posthumous publication of *A Treatise of Spousals or Marriage Contracts* (1686) were both written for a purely English-speaking audience.²²² The practice of civil law in England, like other continental jurisdictions, had the opposite problem to the common law as a system rich with literature but meagre access to case law.²²³

The broad lens of the law adopted in this thesis follows the example set in *Itinera Fiduciae* that it is necessary to explore both the common law and *ius commune* traditions.²²⁴ Legal historians have occasionally underestimated the value of *ius commune* sources and their impact on English law. John Pocock suggested ‘the Codes and Digest are useless to the lawyer because they bear no relation to modern society; they are useless to the historian because they are not the law that was practised at Rome at any time in its history’.²²⁵ Legal historians have traditionally neglected its influence on English law partly due to its complexity.²²⁶ However, there has been a resurgence of late twentieth-century scholarship into how the *ius commune* has shaped English law.²²⁷ It is hoped the analysis undertaken by this thesis to examine the canon law concepts of crusading and its impact on the common law adds to this body of research. It is justifiable, as Helmholz observed, because the excellence of the canon law merits attention, even admiration, from those interested in legal development.²²⁸ On the other hand, this approach to legal history continues to be tempered by a tendency to exaggerate the differences between civil law and common law jurisdictions, and ignore their similar historical traditions and legal principles.²²⁹ Modern common law systems minimise the impact of the *ius commune*

²²¹ Derrett, *Henry Swinburne (?1551 – 1624)*, p. 5.

²²² Derrett, p. 19.

²²³ Maitland, *Why the History of English Law is not Written*, p. 4.

²²⁴ See P. Stein, *Cambridge Law Journal*, pp. 201 – 202; Ibbetson, *Edinburgh Law Review*, p. 244.

²²⁵ Pocock, *The Ancient Constitution and the Feudal Law*, 12.

²²⁶ J. A. Brundage, *Medieval Canon Law*, Longman, New York, 1995, p. x.

²²⁷ R. Helmholz, ‘The Transmission of Legal Institutions: English law, Roman law, and Handwritten Wills’, *Syracuse Journal of International Law and Commerce*, vol. 20, 1994, p. 147; Helmholz, *The Selden Society Lectures 1951 – 2001*, p. 515.

²²⁸ R. Helmholz, *The Spirit of Classical Canon law*, Athens, University of Georgia Press, 1996, p. 1.

²²⁹ Martinez-Torrón, *Anglo-American Law and Canon Law*, p. 8.

tradition despite its presence in Anglo-Norman jurisprudence.²³⁰ Moreover, there is an occasional reluctance by legal historians to look to France and other continental places as sources for medieval law in England.²³¹ It is hoped that a study of the use in English law can overcome such reluctance.

Legal historians can also use law to examine the relationship between law and wider society.²³² This requires an appreciation that law forms part of a broader social history, and acceptance of political and economic influence on legal development.²³³ Another dimension to social analysis is the use of law as a source to provide insight into the lives of people, their emotions, and the relationships they share with others.²³⁴ This approach indicates historians may take a holistic view of legal history that acknowledges its context and appreciates how societal norms shape the law.²³⁵ Charles Donahue Jr notes 'any lawyer who can get a firm understanding of how that interactive process works has learned something far more valuable than the factoid that the English law of trusts began in the fourteenth century'.²³⁶ It is unlikely historians, legal or otherwise, will reject the use of legal sources in this manner. Historians are constantly seeking new ways to interpret historical materials through a variety of lenses.²³⁷ The difficulty lies in balancing the legal element with the historical. There exists a transatlantic debate that accuses legal historians of being either ahistorical or non-legal but never balanced.²³⁸ There is an ever-present risk that the historical context will overtake its legal element or vice versa.²³⁹

Conclusion

²³⁰ Martinez-Torrón, pp. 8 – 9.

²³¹ Martinez-Torrón, p. 10; Tardiff, *La Summa De Legibus Normannie*, p. iii.

²³² Mackintosh, *Roman Law in Modern Practice*, p. 106.

²³³ Mackintosh, p. 19; Boorstin, *Harvard Law Review*, p. 436; Donahue Jr., *Southern Methodist University Law Review*, p. 966.

²³⁴ D. L. Smail, *The Consumption of Justice*, Ithaca, Cornell University Press, 2003, p. 589.

²³⁵ Phillips, *Victoria University of Wellington Law Review*, p. 294; Baker, *Why the History of English Law has not been Finished*, p. 2; P. Corfield 'Historians and the Return to the Diachronic', in G. Harlaftis et al (ed.), *The New Ways of History: Developments in Historiography*, London, Tauris Publishers, 2010, p. 28.

²³⁶ Donahue Jr., *Southern Methodist University Law Review*, p. 966.

²³⁷ G. Harlaftis et al., *The New Ways of History: Developments in Historiography*, London, Tauris Publishers, 2010, p. 2.

²³⁸ Rabban, *Jerusalem Review of Legal Studies*, p. 134.

²³⁹ Gordon, *Law Library Journal*, p. 466.

Legal historians continue to mourn Maitland's premature death. There are opinions that, had he survived longer, he could have advanced the historical treatment of legal sources even further.²⁴⁰ The method he used was ahead of his time.²⁴¹ There is no doubt that historians should celebrate Maitland's life and his passion for legal history. At the same time, this thesis attempts to follow Milsom's prudent advice: 'Another irony of this occasion is that historians of medieval England will have to let Maitland die and begin again with less static assumptions. They will mind, but he would not. He meant to open a subject up, not also close it down'.²⁴² Maitland would have recoiled at the thought that a mere example from his pen would have such impact on modern understanding of the use. The dominant narrative is not even what he intended. It is plausible that the attraction to the crusade example was simply because it was easier to understand than the Germanic *ad opus* that Maitland argued for. His preferred school of thought, perhaps because it was not his own, has found few modern followers as a source for the use. However, the Roman school of thought seems to have enjoyed at least a partial revival under an expansive approach that accepts *ius commune* influences on English law. The insular approach, although Helmholz and Zimmermann are critical of it, demands a closer inspection of English legal sources, which remains the foremost barrier to a study of the use. As John Baker notes in *Why the History of English Law* (2000), medievalists continue to struggle under the weight of England's immense riches.²⁴³ Baker predicts that editing the yearbooks for the reign of Edward II would not reach completion until 2750 at the current rate!²⁴⁴

²⁴⁰ Rabban, *Jerusalem Review of Legal Studies*, p. 116; Phillips, *Victoria University of Wellington Law Review*, p. 305; Bentley, *Modernizing England's Past*, p. 33.

²⁴¹ Rabban, p. 135.

²⁴² Milsom, *Cambridge Law Journal*, p. 269 see Woodard, *Virginia Law Review*, p. 108.

²⁴³ Baker, *Cambridge Law Journal*, p. 64.

²⁴⁴ Baker, pp. 76, 84. Assumedly, the estimated time will continue to decay as advances in technology continue.

Chapter 3. Maitland's Thesis of the Use Re-considered in the Context of the First and Second Crusades

Maitland's belief that the use had origins before the Conquest means there ought to be evidence of its practice throughout the crusade movement. This chapter seeks to place the use into that context. Maitland advanced an example in *The History of English Law* with multiple elements which connected it to the Crusades.¹ The first is that the crusader (the feoffor) is a male landholder, a *knight* holding land in military fee, who wishes to ensure the security of loved ones (a wife, sister, son, or daughter) during his absence. Maitland touched on a natural human concern. Therefore, the crusader innovates to address doubts about the existing law. He comes to an arrangement with another adult male (the feoffee) to hold the land *ad opus* ('to the use') of those family members. The legal status of these arrangements is questionable. However, Maitland's suggestion that significant disruptions to the ordinary business of life would result in people making radical arrangements to protect their interests is reasonable. It is the reasonableness of the example that led to it becoming an accepted truth in legal history. The question is whether the evidence supports assertions that there existed a direct relationship between the use and the crusade movement. The First Crusade is a convenient starting point because it is occasionally suggested to have furnished the use, and it illustrates the legal issues of crusading and how the law evolved to address them. It also served as a template for later legal development. The articulation of a crusade tradition in the twelfth century paralleled the growth of the canon law as an intellectual legal system. It is necessary to consider the interaction between the two if a connection between the use and the crusade movement exists.

Crusade Historiography

Maitland drew upon a unique historiographical tradition when he placed the use in the context of a crusade. The crusades have been a subject of fascination for both historians and authors of fiction since the success of the First Crusade.² Christopher Tyerman

¹ Pollock and Maitland, *The History of English Law*, vol. 2, p. 230.

² See generally H. Nicholson, *Love, War and the Grail: Templars, Hospitallers and Teutonic Knights in Medieval Epic and Romance 1150 – 1500*, Leiden, Brill, 2001, p. 5; C. Cahen, 'An Introduction to the First Crusade', *Past &*

captures the impact of the crusades on the discipline of History when he comments 'there have been no centuries since the eleventh when books on the crusades have not been published and secured wide readership'.³ There exists an apparent 'insatiable demand' for crusade histories.⁴ Titillation at the suggestion the use has a crusade connection may have only grown over time. In the last fifty years, the popularity of the Crusades as a subject of study has increased exponentially as an academic subject.⁵ Interest in the crusades has also inspired popular media such as movies and video games, which are fictional accounts that have left a lasting impression on how the modern world views its histories.⁶ Daniel Johnson lamented 'The facts about the crusades are less familiar than the myths'.⁷ In New Zealand, a Cantabrian rugby team called 'Crusaders' utilise the crusader image to highlight the contest element of sport, which likens that particular team's involvement in the competition to a crusade, a relentless pursuit of a goodly cause (in this case a trophy).⁸ Jonathan Phillips states historians have long taken advantage of popular narratives to create interest in their histories by exciting the reader and adding to the mythology of the movement with allusions to epic.⁹ This appears to have come at the expense of a detailed intellectual examination into the less marketable features of the crusades.¹⁰ The assumed connection between the movement and the use appears to be a result of popularity rather than fact.

Present, no. 6, 1954, p. 6; G. Constable, 'The Historiography of the Crusades', in A. Laiou and R. Mottahedeh (ed.), *The Crusades from the Perspective of Byzantium and the Muslim World*, Washington D.C., Dumbarton Oaks, 2001, p. 2; A. Atiya, *The Crusade Historiography and Bibliography*, Bloomington, Indiana University Press, 1962, p. 17; J. La Monte, 'Some Problems in Crusading Historiography', *Speculum*, vol. 15, no. 1, 1940, p. 58.

³ C. Tyerman, *The Debate on the Crusades, 1199 – 2010*, Manchester, Manchester University Press, 2011, p. 1.

⁴ La Monte, *Speculum*, p. 58; Atiya, *The Crusade Historiography and Bibliography*, p. 17.

⁵ K. Qadir, 'Modern Historiography: The Relevance of the Crusades', *Islamic Studies*, vol. 46, No. 4, 2007, p. 536; J. Phillips, *The Crusades, 1095 – 1197*, Harlow, Pearson Education Limited, 2002, p. 1.

⁶ Tyerman, *England and the Crusades*, p. 5; D. M. Hayes, 'Harnessing the Potential in Historiography and Popular Culture when Teaching the Crusades', *The History Teacher*, vol. 40, no. 3, 2007, p. 349.

⁷ D. Johnson, 'How to think about the Crusades', *Commentary*, 1 July 2005, <https://www.commentarymagazine.com/articles/how-to-think-about-the-crusades>, (accessed 20 July 2017). see also C. Tyerman, *The Crusade: A Very Short Introduction*, Oxford, Oxford University Press, 2004, p. 2.

⁸ The association between sports as 'crusades' is discussed in H. Nicholson, *The Crusades*, Westport, Greenwood Press, 2004, p. xl; Qadir, *Islamic Studies*, p. 527; T. Tännsjö, 'Is our admiration for Sports Heroes Fascistoid', in W. Morgan (ed.), *Ethics in Sport*, 2nd edn, Champaign, Human Kinetics, 2007, p. 431; M. Paine, *The Crusades*, Harpenden, Oldcastle Books, 2001, p. 8.

⁹ Phillips, *The Crusades, 1095 – 1197*, p. 1.

¹⁰ La Monte, *Speculum*, p. 72.

It is likely that Maitland appreciated the timeless popularity of the Crusades when he chose it as the background to an explanation about the function of uses. It is plausible that trends in nineteenth-century historiography even inspired him to reference it in his work. The nineteenth century is generally regarded as the romantic period of crusade historiography because of positive impressions found in the work of its historians.¹¹ The crusades had a broad appeal to national enterprise, the human spirit, and the growth of the British Empire.¹² There was an appetite for continental works, for example, the description of the fame, feats, and sufferings of notable crusaders found in the lectures of Heinrich von Sybel, a prominent crusade historian, was sufficiently popular on the continent to be worth translating for an English audience.¹³ English historians produced numerous histories of their own.¹⁴ These histories and the work of fictional authors provided attractive narratives of the Crusades as a period of chivalry and adventure.¹⁵ These accounts resonated with the social elite who admired the qualities associated with and intrinsic to the status of knighthood.¹⁶ They were Maitland's target audience and he may have referenced the crusade movement to create interest in uses. Its inclusion may also betray his own interests in the crusade movement. The work of his sometime rival William Stubbs to edit key primary sources on the Third Crusade would not have gone unnoticed.¹⁷ Maitland would not have been immune to the appeal of popular histories.

While late nineteenth-century trends shaped Maitland's example, the present thesis is a product of the twenty-first century. It is, therefore, necessary to acknowledge that reference to the crusade movement continues to enhance rather than detract from reader interest. It is included in the title of this thesis for that reason. The need to reflect on the

¹¹ Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 8; J. Brundage, 'Recent Crusade Historiography: Some Observations and Suggestions', *The Catholic Historical Review*, vol. 49, no. 2, 1964, p. 504.

¹² Knobler, *Comparative Studies in Society and History*, p. 325; Tyerman, *The Debate on the Crusades*, p. 126.

¹³ H. von Sybel, *The History and Literature of the Crusades*, trans. D. Gordon, London, Chapman and Hall, 1861, p. 1.

¹⁴ E. Siberry, *The New Crusaders: Images of the Crusades in the 19th and early 20th Centuries*, Aldershot, Ashgate, 2000, p. 9.

¹⁵ La Monte, *Speculum*, p. 60; A. Knobler, 'Holy Wars, Empires, and the Portability of the Past: The Modern Uses of Medieval Crusades', *Comparative Studies in Society and History*, vol. 48, no. 2, 2006, p. 309; Tyerman, *England and the Crusades*, p. 6; A. Krey, *The First Crusade: the accounts of eyewitnesses and participants*, Princeton, Princeton University Press, 1921, p. 6.

¹⁶ Knobler, *Comparative Studies in Society and History*, p. 310.

¹⁷ See generally Siberry, *The New Crusaders*, p. 23.

Crusades is itself a product of Giles Constable's remark in 'The Historiography of the Crusades' (2001) that the intellectual study of crusade historiography had attracted very little attention.¹⁸ This is surprising since John La Monte (1940) discussed the wealth of its tradition:

The Crusades have been represented in every phase of historiography from the twelfth to the twentieth century; mediaeval piety, Renaissance chivalry, Reformation fanaticism, eighteenth-century skepticism, nineteenth-century romanticism, and modern critical scholarship have all found in them fit subject for comments and interpretation.¹⁹

Constable indicates that, despite this lengthy pedigree, the subject of crusade historiography is rife with uncertainties.²⁰ This affects fundamental aspects of the subject. Even the elements that define a crusade and the numerals assigned to demarcate them are subject to numerous disagreements and reassessments amongst modern historians.²¹ In part, the debate surrounds the term 'crusade', a seventeenth-century term, which is unknown to the primary sources that simply referred to each event as a pilgrimage or expedition.²² Tyerman suggests the paradox of crusade historiography is that it emerged out of a nebulous phenomenon spanning two centuries rather than from precise events.²³ Tyerman indicates in *The Debate on the Crusades, 1099 - 2010* (2011) that part of the ongoing uncertainty of crusade historiography stems from the fact that the crusades are an awkward topic to conceptualise.²⁴

Recent trends appear to be, at least in part, the result of twentieth-century dissatisfaction. One commentator of the period suggested that 'the more that is written, the less there seems to be of value to the scientific historian'.²⁵ Historians answered La Monte's challenge to produce higher quality treatments.²⁶ Two decades later, James Brundage

¹⁸ Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 1.

¹⁹ La Monte, *Speculum*, p. 59.

²⁰ Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 11.

²¹ Constable, p. 12; Nicholson, *Love, War and The Grail*, p. 24.

²² Constable, pp. 11, 16 - 17; Tyerman, *The Crusade*, p. 9.

²³ Tyerman, *The Crusade*, p. 9; C. Tyerman, *Fighting for Christendom: Holy War and the Crusades*, Oxford, Oxford University Press, 2004, p. 13.

²⁴ Tyerman, *The Debate on the Crusades*, p. 3.

²⁵ Cahen, *Past & Present*, p. 6.

²⁶ La Monte, *Speculum*, p. 58.

observed in 'Recent Crusade Historiography: Some Observations and Suggestions' (1964) that the quality of general histories had improved markedly but specialist histories, such as economic history, were yet to be explored in detail.²⁷ The author also commented, however, there remained numerous unanswered questions about the crusades and its legal history such as the nature of crusader privilege, his role as a pilgrim, his juridical status and obligations, and so on.²⁸ The postulation of these questions anticipated Brundage's later monograph on the legal history of the crusades. Brundage's *Medieval Canon Law and the Crusade* remains the most authoritative statement on the interaction between the law and the crusades that this thesis draws upon. Law is absent from Khurram Qadir's observation that most modern crusade histories are either biographies, social histories, constitutional histories, or bibliographic studies.²⁹ Nonetheless, modern crusade histories must defer to the work of the late Jonathan Riley-Smith and his former students, Tyerman and Jonathan Phillips, as the leading authorities in the twenty-first century.³⁰ This thesis is not an exception. Tyerman's *England and the Crusades* is particularly relevant to this study because the author treats the impact of the crusade on the common law as part of his broader history of English society.³¹ Tyerman and Riley-Smith fundamentally disagreed on the significance of the First Crusade to the development of notions of holy war, and the former suggested that there were no formal crusades until Pope Innocent III.³² Finally, it is worth noting the modern tendency amongst historians to frame their narratives around modern geopolitical concerns.³³ Steven Runciman's multi-volume *A History of the Crusades* (1952 – 1954)³⁴ is an early example of work oft-criticised by historians for contextualising the crusade movement in the light of contemporary east-west relations.³⁵ Phillips rightly observes that the

²⁷ Brundage, *The Catholic Historical Review*, pp. 496, 505 see also Atiya, *The Crusade Historiography and Bibliography*, p. 23; Phillips, *The Crusades, 1095 – 1197*, p. 2.

²⁸ Brundage, *The Catholic Historical Review*, p. 505.

²⁹ Qadir, *Islamic Studies*, pp. 533 – 535.

³⁰ D. Peters, *An Analysis of Jonathan Riley-Smith's The First Crusade and the idea of Crusading*, London, Macat International Ltd, 2017, pp. 58, 65

³¹ Tyerman, *England and the Crusades*, p. 7.

³² Peters, *An Analysis of Jonathan Riley-Smith's The First Crusade and the idea of Crusading*, pp. 53 – 54.

³³ Qadir, *Islamic Studies*, p. 527.

³⁴ S. Runciman, *A History of the Crusades*, Cambridge, Cambridge University Press, 1951 – 1954.

³⁵ G. Constable, *Crusaders and Crusading in the Twelfth Century*, Farnham, Ashgate Publishing Limited, 2008, p. 16.

temptation to place the crusade movement in a contemporary frame only serves to distort its history.³⁶

Constable identified four schools of modern treatment by historians that are also applicable to a legal history. The first are *traditionalists* who define crusades in geographic terms as an eastward expedition, with the capture of Jerusalem at their heart, either to assist Christians or liberate the Levant from Muslim occupation.³⁷ Secondly, *pluralists* who focus on the initiation of the crusade, without geographic limitation or a central aim, and instead place their emphasis on papal authorisation, recruitment, and organisation. While the pluralist study is the more popular lens of study in the modern period, and as such includes the varied objectives of the Second Crusade as part of the movement, the present study has traditionalist overtones because of its focus on the First, Third, and Ninth Crusades.³⁸ This study may also fall within the scope of a *populist* school of thought since it has a heavy emphasis on themes related to the psychological aspect of the crusading.³⁹ This lens of analysis is traditionally concerned with the spiritual motivations of crusaders but it encompasses other forms of preparation.⁴⁰ Therefore, it could conceivably extend to legal preparation, and consequently the use. The final school, *generalists*, are concerned with the crusade as a spiritual undertaking and issues connected to the notion of holy war.⁴¹ The merit behind this school of thought is the lesson to avoid imposing modern views onto the medieval world.⁴² Such categories, welcomed by the lawyer in the legal historian, present only a framework for conceptualising historical works and are subject to varying interpretations.⁴³ Nonetheless, the focus on England follows a modern trend to place the crusades into a national perspective while acknowledging that there is a broad European movement that

³⁶ Phillips, *The Crusades, 1095 – 1197*, p. 3.

³⁷ See generally, Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 12; M. C. Gaposchkin, 'The Place of Jerusalem in Western Crusading Rites of Departure (1095 – 1300)', *The Catholic Historical Review*, vol. 99, no. 1, 2013, p. 2; Nicholson, *Love, War and The Grail*, p. xl.

³⁸ J. Phillips, *The Second Crusade: Extending the Frontiers of Christendom*, New Haven, Yale University Press, 2007, p. xxiii.

³⁹ Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 12; Nicholson, *The Crusades*, p. xl.

⁴⁰ M. Cassidy-Welch and A. Lester, 'Memory and Interpretation: New Approaches to the Study of the Crusades', *Journal of Medieval History*, vol. 40, no. 3, 2014, p. 233.

⁴¹ Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 14.

⁴² Nicholson, *The Crusades*, p. xl.

⁴³ Tyerman, *The Debate on the Crusades*, p. 227.

shaped both ideologies and the law.⁴⁴ It is open to the reader to determine the school that might best fit this thesis.

The reflection on Crusade historiography at the beginning of this chapter, and historiographical analysis in other chapters, are a necessary part of a critical examination of the development of the use. Not only do references to nineteenth-century trends give valuable context for Maitland's ideas, but they show how trends in scholarship and other studies have shaped the present thesis. The focus on the preparation phase of a crusade, as the time when crusaders would make uses, benefits from several modern studies that discuss legal issues related to private property. For example, Tyerman includes extensive comment about the law and crusading throughout *England and the Crusades*, in addition to his chapter titled the 'The Home Front' that directly discusses the impact that a crusade had on property at home.⁴⁵ Simon Lloyd's *English Society and the Crusade, 1216 – 1307* provides a deeper analysis of property law in England during the later crusades.⁴⁶ This thesis also benefited from more general historical treatments of the crusade movement that deal with property law. Fred Cazel Jr's 'Financing the Crusades' in *A History of the Crusades* measures the impact that money supply had on property transactions during the crusades.⁴⁷ Therefore, it must be acknowledged that historians have made valuable contributions on private law and crusading that complement Brundage's more general jurisprudential observations. The quality of these works suggests to the author that the detailed treatment in a thesis intended to rebut an accepted truth may not have been necessary had a crusade historian ever turned their mind to the origin of the use. It is hoped, however, that the attention of a legal historian and trust expert will furnish fruitful insight into the subject.

The First Crusade

The First Crusade served as a template for the interaction between the crusade movement and the law. It has also been advanced as the catalyst for the development of

⁴⁴ Cassidy-Welch and A. Lester, *Journal of Medieval History*, p. 232.

⁴⁵ See Tyerman, *England and the Crusades*, pp. 187 - 228.

⁴⁶ See Lloyd, *English Society and the Crusade*, p. 155.

⁴⁷ See Cazel Jr., *A History of the Crusades*, pp. 116 – 117.

uses. In 1095, Pope Urban II responded to requests for aid from Byzantine Emperor Alexios with a decree at the Council of Clermont that there should be an armed pilgrimage to take back the Holy Land.⁴⁸ Whatever was said, Guibert de Nogent represents contemporary views in his *Dei gesta per Francos* (1107 – 1108): ‘the great news spread through all parts of France, and whoever first heard the news of the papal will went forward to urge his neighbours and family to take the proposed path of God’.⁴⁹ Guibert applied an eloquent style to his history, and the abbot’s work is regarded as a valuable primary source for the reception of the crusade message in France and its preparatory phase.⁵⁰ Urban seemed to have sent a clear message that the papal authority supported the notion of just war in defence of Christendom. Historians continue to debate issues related to the development of the just war concept, and the First Crusade appears to be part of eleventh-century trends regarding this notion.⁵¹ The second message attributed to Urban is the idea that the pope would reward participation with spiritual indulgence.⁵² The combination of these factors appears to be why contemporaries considered the crusade a form of pilgrimage.⁵³ Jonathan Riley-Smith comments that Urban had not offered anything particularly novel but his success lay in his ability to appeal to the ambitions of French nobles.⁵⁴ On the other hand, to regard the First Crusade as a simple

⁴⁸ T. Asbridge, *The First Crusade: A New History*, Oxford, Oxford University Press, 2004, p. 48; J. Riley-Smith, *The First Crusade and the Idea of Crusading*, London, Continuum, 2003, p. 22; Various versions of his speech are reproduced and translated in Krey, *The First Crusade*, pp. 28 – 40.

⁴⁹ Guibert de Nogent, *Dei gesta per Francos*, *R.H.C. Occ.*, vol. 4, p. 140 ‘magnus per universas Franciae partes rumor emanat, et quisque ad quem primo pontificis praeceptum, praevolans fama detulerat, de proponenda Via Dei contiguos sibi ac familiares quosque sollicitat’.

⁵⁰ J. Rubenstein, *Guibert of Nogent: Portrait of a Medieval Mind*, Routledge, New York, 2002, p. 96 – 98; C. Sweetenham, ‘Guibert de Nogent’, in *EMC*, vol. 1, pp. 740 – 741.

⁵¹ See generally Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 27; Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 14; C. Tyerman, ‘Were There Any Crusades in the Twelfth Century?’, *The English Historical Review*, vol. 110, No. 427, 1995, p. 558; Cahen, *Past & Present*, p. 20; Asbridge, *The First Crusade*, pp. 23 – 24; J. Reston, Jr., *Warriors of God: Richard the Lionheart and Saladin in the Third Crusade*, New York, Doubleday, 2001, p. 11; J. D. Charles, ‘Between Pacifism and Crusade: Justice and Neighbour Love in the Just-War Tradition’, *Logos*, vol. 8, no. 4, 2005, p. 91; Nicholson, *Love, War and The Grail*, p. 25.

⁵² Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 28; Tyerman, *The English Historical Review*, p. 553; J. Pryor, ‘Stephen of Blois: Sensitive New-Age Crusader or a Victim of History’, *Arts: The Journal of the Sydney University Arts Association*, vol. 20, 1998, p. 33; F. Duncalf, ‘The Councils Piacenza and Clermont’, in K. Setton and M. Baldwin (ed.), *A History of the Crusades: Volume I: The First Hundred Years*, Madison, The University of Wisconsin, 1969, p. 248.

⁵³ Riley-Smith, p. 24.

⁵⁴ Riley-Smith, pp. 29 – 30.

pilgrimage distorts the views held by its earliest historians, such as Guibert, that it was the most astounding and novel undertaking of the epoch.⁵⁵

Maitland may have had the First Crusade in mind since knights did leave their families and lands to fight a just war in the hope of obtaining some form of spiritual absolution. However, not all the people who took part in the First Crusade satisfy this basic outline of what it meant to be a crusader. While Urban had framed his message to attract magnates and knights capable of realising the military purpose of the expedition, the unplanned consequence of success meant the First Crusade quickly outgrew his ability to direct it.⁵⁶ Tens of thousands of people from all echelons of society left their homes.⁵⁷ The future crusader Ekkehard of Aura describes in his *Hierosolymita* (c. 1107 - 1112) how poor families, the sick, and maimed joined the first expedition because of hardships in France rather than spiritual motivation.⁵⁸ Despite possible source bias, it is probable such groups did view the crusade as an opportunity to escape the harsh conditions of their native lands and settle elsewhere.⁵⁹ These are the people Maitland did not consider part of his example. The idea of crusade as an opportunity for socioeconomic betterment also sat uncomfortably with the ideology of spiritual undertaking that Urban had envisioned.⁶⁰ Typically, the poor did not have the financial means to undertake the journey and their survival depended on the charity of others.⁶¹ Despite the negative views associated with the poor, the eyewitness account of the anonymous *Gesta Francorum et*

⁵⁵ Tyerman, *The Debate on the Crusades*, p. 22.

⁵⁶ Asbridge, *The First Crusade*, p. 49; J. Riley-Smith, 'The State of Mind of Crusaders to the East 1095 - 1300', in J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999, p. 68

⁵⁷ See generally C. Kostick, *The Social Structure of the First Crusade*, Leiden, Brill, 2008, p. 1; Phillips, *The Crusades, 1095 – 1197*, p. 19; S. Runciman, 'The Decline of the Crusading Ideal', *The Sewanee Review*, vol. 79, no. 4, 1971, p. 498; J. Riley-Smith, 'The Motives of the Earliest Crusaders and the Settlement of Latin Palestine, 1095-1100', *The English Historical Review*, vol. 98, no. 389, 1983, p. 721; Cahen, *Past & Present*, p. 26; Tyerman, *The English Historical Review*, p. 567; Pryor, *Arts*, p. 20 (1998), 26; J. Richard, *The Crusades, c 1071 – c 1291*, Cambridge, Cambridge University Press, 1999, p. 29.

⁵⁸ Ekkehard of Aura, *Hierosolymita*, *R.H.C. Occ.*, vol. 5, p. 17; See K. Pfeiffer, 'Ekkehard of Aura', *EMC*, vol. 1, pp. 568 – 569.

⁵⁹ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 35; Riley-Smith, *The English Historical Review*, p. 721 – 722; Kostick, *The Social Structure of the First Crusade*, pp. 102, 106; J. Masschaele, 'Economic Take-off and the Rise of Markets', in C. Lansing and E. English (ed.), *A Companion to the Medieval World*, Chichester, Wiley Black-Well, 2009, p. 90.

⁶⁰ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 40; Riley-Smith, *The English Historical Review*, p. 721; Kostick, pp. 2 – 3; M. Gabriele, *An Empire of Memory: The Legend of Charlemagne, the Franks, and Jerusalem before the First Crusade*, Oxford, Oxford University Press, 2011, p. 153.

⁶¹ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 43; C. Mills, *The History of the Crusades for the Recovery and Possession of the Holy Land*, Philadelphia, Lea & Blanchard, 1844, p. 29.

aliorum Hierosolymitanorum (c. 1100) seems to count the large group led by Peter the Hermit as a legitimate part of the three groups of Franks to depart for the Holy Land.⁶²

The legal arrangements of the poor who took part in the First Crusade are less sophisticated than those who better fit Maitland's model of a crusader. The *pauperes* who joined Peter the Hermit's expedition rushed to leave before the main force and were ignominiously defeated at the battle of Civetot.⁶³ However, the legal arrangements they made were common amongst the socially disadvantaged. The decision to undertake the journey without sufficient economic means must not have been made lightly.⁶⁴ Nevertheless, the evidence indicates the possibility of a fresh start in the Levant drove many to become 'crusaders'.⁶⁵ Their legal arrangements, therefore, typically reflect those made by people who never expected to return to their homes.⁶⁶ Guibert records:

You would have seen extraordinary and even comical things, such as the poor attaching two-wheeled carts to oxen, as if they were horses, and loading their few meagre possessions into it together with their children, while asking at every castle or town on the way whether they had finally reached Jerusalem.⁶⁷

Putting aside the derogatory purpose of this passage, it is clear the people Guibert described would have no value for the complex legal devices organised by those who wished to return home. Instead, they sold the property they could not take with them, such as crops, stock, and other non-essentials.⁶⁸ It is clear the sale of property was the preferred option. Guibert notes that 'the poor inflamed with the same a desire [as the knights, to join the expedition], set out without taking account of the smallness of their

⁶² Anon., *Gesta Francorum et aliorum Hierosolymitanorum*, *R.H.C. Occ.*, vol. 3, p. 121; see B. Spieralska, 'Gesta Francorum et aliorum Hierosolymitanorum', *EMC*, vol. 1, p. 697.

⁶³ Kostick, *The Social Structure of the First Crusade*, pp. 95, 106; J. France, *Victory in the East: A Military History of the First Crusade*, Cambridge, Cambridge University Press, 1994, p. 27; See *Gesta Francorum et aliorum Hierosolymitanorum*, *R.H.C. Occ.*, vol. 3, pp. 122 – 123.

⁶⁴ France, *Victory in the East*, p. 142; Pryor, *Arts*, p. 26; C. Stephenson, 'Commendation and Related Problems', *The English Historical Review*, vol. 59, no. 235, 1944, p. 309.

⁶⁵ Kostick, *The Social Structure of the First Crusade*, p. 184.

⁶⁶ Riley-Smith, *The English Historical Review*, pp. 723, 733.

⁶⁷ Guibert, *R.H.C. Occ.*, vol. 4, p. 142. 'Videres mirum quiddam, et plane joco aptissimum, pauperes videlicet quosdam bobus biroto applicitis, eisdemque in modum equorum ferratis, substantiolas cum parvulis in carruca convehere; et ipsos infantulos, dum obviam habent quaelibet castella vel urbes, si haec esset Iherusalem, ad quam tenderent, rogitare'.

⁶⁸ Kostick, *The Social Structure of the First Crusade*, p. 1.

wealth or properly disposing their homes, vineyards, and fields'.⁶⁹ The implication in this passage is the poor may have simply abandoned the property they could not sell.⁷⁰ It is more likely than not that they made meagre but absolute gifts of their possessions to family and friends, or gifts *ad pias causa* before undertaking their journey.

Knights are the class of people that Maitland considered could have utilised the use before leaving on crusade. There is, however, extensive historiographical debate about what characteristics defined a knight or *miles* because primary sources utilise the term in a broad fashion.⁷¹ The popular image of the knight is that of an indomitable armoured warrior who fights from the superior position of horseback and is a living embodiment of chivalry.⁷² Maitland likely had in mind the Anglo-Norman knight who, according to the legal perspective found in *Statuta et Consuetudines Normannie* (1230), considered their horse and arms as a way of life supported by their land holding (cap. 1.2.3).⁷³ However, the thirteenth-century view of knighthood does not reflect the eleventh century, which tended to characterise the knight by 'title, vocation, and blood' rather than simply being a mounted warrior.⁷⁴ Nonetheless, landholding was associated with wealth. Conor Kostick comments that the term knight could apply to a wide range of people who participated in the First Crusade including those who lost their economic power.⁷⁵ It is sometimes extended to describe crusade leaders who are not necessarily the people ordinarily associated with being knights.⁷⁶ He notes, however, that knights are

⁶⁹ Guibert, *R.H.C. Occ.*, vol. 4, p. 142 'pauperum animositas tantis ad hoc ipsum desiderii aspiravit, ut eorum nemo de censuum parvitate tractaret, de domorum, vinearum et agrorum'.

⁷⁰ C. Tyerman, 'Who went on Crusades to the Holy Land', in B. Kedar (ed.), *The Horns of Hattin: Proceedings of the Second Conference of the Society of the Crusades and the Latin East*, Jerusalem: Yad Izhak Ben-Zvi, 1992, p. 16.

⁷¹ Kostick, *The Social Structure of the First Crusade*, p. 159; Harvey, *Past & Present*, p. 4.

⁷² See generally Nicholson, *Love, War and The Grail*, p. 5; C. Stephenson, 'The Origin and Significance of Feudalism', *The American Historical Review*, 46, no. 4, 1941, p. 807; Kostick, p. 187; M. Bull, 'Origins', in J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999, p. 24; Knobler, *Comparative Studies in Society and History*, p. 293. Also, C. de Pisan, *The Epistle of Othea to Hector or the Boke of Kyghthode*, trans. S. Scrope, London, J.B. Nichols and Sons, 1904, pp. 1 – 2.

⁷³ E. Tardiff (ed.), *Coutumiers de Normandie: Très Ancien Coutumier*, Rouen, Imprimerie de Espérance Cagniard, 1881, p. 2. 'Militi vero absolute arma et equi sui, cum predictis victualibus, remanebunt'.

⁷⁴ B. S. Bachrach, *Merovingian Military Organisation, 481 – 751*, Minneapolis, University of Minnesota Press, 1972, p. 80.

⁷⁵ Kostick, *The Social Structure of the First Crusade*, pp. 166, 180 see also R. A. Brown, *Origins of English Feudalism*, London, George Allen & Unwin Ltd, 1973, p. 27.

⁷⁶ Kostick, *The Social Structure of the First Crusade*, p. 200; C. Kostick, 'Iuvenes and the First Crusade (1096 – 1099): Knights in Search of Glory?', *The Journal of Military History*, vol. 73, no. 2, 2009, p. 391.

distinguished in primary sources from the basic foot soldier or the poor who formed part of crusader armies.⁷⁷ Knights as crusaders were therefore distinguishable from other groups as people with sufficient economic power from the outset to maintain a warhorse, pack animals, and a small entourage of supporters.⁷⁸ In the eleventh century, if uses were available, it is reasonable to expect knights to have the personal wealth to necessitate them.

It is possible to further narrow down the category of knight that Maitland could have considered. The *Alexiad*, written by the Princess Anna Comnena from a Byzantine perspective, states that some crusader leaders, namely Bohemund, intended to ignore the object of the crusade to aid the Empire and seize land for themselves.⁷⁹ Anna viewed the crusader counts as intruders, less reasonable than the Turks, who took her father's financial and military support with no intention of keeping their promises to him.⁸⁰ Her view can be contrasted with the tenor of European accounts that suggested their decision to settle, unlike the analogous intentions of the poor, were a personal sacrifice.⁸¹ Nonetheless, the presence of their families and a clear intention to settle reduced the need to create complex legal arrangements to preserve their interests at home. Maitland's knight is also distinguishable from what primary sources referred to as knights *iuvens* or youths. Kostick indicates that knights considered *iuvens* had set out for personal glory rather than spiritual considerations.⁸² In many instances, *iuvens* may have been in fact younger sons seeking to earn status not otherwise achievable at home.⁸³ They are also not the kind to prima facie have a family or assets to protect at home. The Norman crusader, Tancred, might be counted amongst them as 'a semi-prince' who used the

⁷⁷ Kostick, *The Social Structure of the First Crusade*, pp. 166 – 167, 174.

⁷⁸ See generally France, *Victory in the East*, p. 126; Cazel Jr., *A History of the Crusades*, p. 139; S. Lloyd, 'The Crusading Movement 1096 – 1274', in J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999, p. 53; C. Stephenson, 'Feudalism and its Antecedents in England', *The American Historical Review*, vol. 48, no. 2, 1943, p. 261; B. S. Bachrach, 'Charlemagne's Cavalry: Myth and Reality', *Military Affairs*, vol. 47, no. 4, 1983, p. 181; L. White, *Medieval Technology and Social Change*, Oxford, Clarendon Press, 1962, p. 29; Stephenson, *The American Historical Review*, 1941, p. 807.

⁷⁹ Anna Comnena, *The Alexiad*, trans. E. Dawes, London, Routledge, 1967, p. 266.

⁸⁰ L. Neville, *Anna Komnene: The Life and Work of a Medieval Historian*, Oxford, Oxford University Press, 2016, p. 145; S. Albrecht, 'Anna Komnene', *EMC*, vol. 1, p. 44.

⁸¹ Riley-Smith, *The English Historical Review*, p. 728.

⁸² Kostick, *The Social Structure of the First Crusade*, p. 200; Kostick, *The Journal of Military History*, p. 391.

⁸³ Kostick, *The Social Structure of the First Crusade*, p. 187.

opportunity of the crusade to become a lord and subsequent ruler of Antioch.⁸⁴ Ralph of Caen, a follower of Bohemond and Tancred, associated the subject of his *Gesta Tancredi in expeditione Hierosolymitana* (1118) with the qualities of Norman identity (*gens Normannorum*) such as ambition.⁸⁵ Ralph's narrative is that of a young and violent Tancred, a Sicilian Norman, who is released from his sins by the act of crusading.⁸⁶ This work suggests that what the Anglo-Normans perceived as the epitome of the crusader-knight sat at odds with what Maitland or his reader may have expected.

The kind of crusader that Maitland considers could utilise the use is the knight who expected to be away from their home for a prolonged period but also hoped to return to their families and lands. Guibert's description of crusader sacrifice resonates with the concern that Maitland touched upon:

Leaving behind beautiful wives with their dear sons, for who they put aside their great affection, choosing exile. I say nothing about their honours and possessions, which are matters outside of our concern. But that which does surprise us: is how married men left their wives, who were bound together in love by the gift of children, could be separated without any imminent danger to either.⁸⁷

The surviving letters of Stephen of Blois to Adela provide historians with insight into the affection men had for their wives and children at home.⁸⁸ The condition of family members at home would have been an ever-present concern for crusaders. Stephen charges his sweetest and most amiable spouse (*dulcissimae atque amabilissimae coniugi*) in a letter to diligently 'do what is right, watch over your lands and children, and your vassals, and you will see me as soon as I can return. Farewell'.⁸⁹ There appears to be a concern but not disbelief that she could handle affairs during his absences. Nonetheless,

⁸⁴ Kostick, pp. 262 – 264.

⁸⁵ N. Hodgson, 'Reinventing Normans as Crusaders?', in C. P. Lewis (ed.), *Anglo-Norman Studies XXX: Proceedings of the Battle Conference 2007*, Woodbridge, The Boydell Press, 2008, p. 120; J. Pysiak, 'Ralph of Caen', *EMC*, vol. 2, p. 1252.

⁸⁶ Tyerman, *The Debate on the Crusades*, p. 12.

⁸⁷ Guibert, *R.H.C. Occ.*, vol. 4, pp. 148 – 149. 'Hii uxores clarissimas, cum filiis gratissimis relinquentes, quicquid in affectionibus majus est, proposito postposuerunt exilio. De honoribus possessionibusque reticeo, quae quidem extra nos sunt. Sed illa stuporem nobis generant: quomodo maritorum uxorumque, sobole mediante imo agglutinante charitates, sine alterutrorum periculo abinvicem divelli poterant caritates'.

⁸⁸ See Pryor, *Arts*, p. 57; Riley-Smith, *The Oxford History of the Crusades*, p. 73.

⁸⁹ Stephen of Blois, *Epistle*, *R.H.C. Occ.*, vol. 3, p. 890. 'mando ut bene agas, et tibiae tuae egregie disponas, et natos tuos, et homines tuos honeste, ut decet te, tractes, quia quam citius potero me certe videbis. Vale'.

crusaders must have also appreciated the legal difficulties their absence from home would have caused family members, in particular, women.⁹⁰ Leaders rallied crusaders to fight by reminding them the reason they chose to leave their families (*parentes, uxores, filios*) and honours was to fight on God's behalf.⁹¹ Furthermore, Urban had urged those thinking about joining the crusade to avoid acting rashly and to first seek permission from family.⁹² Family interests were important to crusaders and it is during this preparatory phase that crusaders could and did utilise complex legal arrangements.

The Legal Arrangements of Crusaders

The decision to leave home would have been a very personal and emotional event.⁹³ There is no reason to doubt that husbands and wives debated the merits of the decision.⁹⁴ It is unnecessary here to consider the impact of spiritual motivations behind their decision except to note that Claude Cahen's observation in 1950 that 'gallons of ink have been poured out in discussing whether the Crusade at this stage was more or less religious or self-seeking' remains true today.⁹⁵ What is clear is that each crusader had to overcome the formidable barrier of raising the capital needed to fund their expedition.⁹⁶ Maitland would have likely appreciated that crusaders entered into certain legal arrangements to meet this challenge. It would have been a stressful period for all concerned. He counts the use as a mechanism that the worried crusader may have resorted to in their efforts to ensure the welfare of family during their absence. However, the sale of property to raise the fluid capital necessary to buy equipment sat at the forefront of each knight's crusade preparations. Guibert outlines the short-term impact this had on the French market:

⁹⁰ N. Paul, *To follow in their footsteps: The Crusades and Family Memory in the High Middle Ages*, Ithaca, Cornell University Press, 2012, p. 165.

⁹¹ See Guibert, *R.H.C. Occ.*, vol. 4, p. 201.

⁹² Kostick, *The Social Structure of the First Crusade*, pp. 2 – 3; Gabriele, *An Empire of Memory*, p. 153; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 40; Riley-Smith, *The English Historical Review*, p. 721.

⁹³ Tyerman, *The Horns of Hattin*, p. 13.

⁹⁴ Paul, *To follow in their footsteps*, p. 1.

⁹⁵ Cahen, *Past & Present*, p. 26; See for a full discussion A. Bysted, *The Crusade Indulgence: Spiritual Rewards and the Theology of the Crusades*, c. 1095 – 1216, Leiden, Brill, 2015.

⁹⁶ Lloyd, *Oxford History of the Crusades*, pp. 53 – 54; Riley-Smith, *The Oxford History of the Crusades*, p. 75; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 43.

It was astounding to see everyone buying high and selling low: the rush to leave meant they paid high prices for whatever was necessary for the journey; and sold cheaply the valuables they had, and for so very little when before neither prison nor torture could have torn them away; now they sold everything for a few scant coins.⁹⁷

Guibert had earlier imputed that the poor made imprudent alienations, but it is plain from the above passage that the economic conditions brought about by the First Crusade affected everybody. Riley-Smith poignantly notes that every transaction compounded the inflationary conditions.⁹⁸ Guibert's passage serves as an example of the tendency for sources to distinguish the transactions of knights, as the intended crusader group, from those of the poor.⁹⁹

Riley-Smith notes that the eleventh-century economy limited most legal arrangements made by knights to either selling property or raising loans.¹⁰⁰ The fact that money was a particularly scarce resource during this period means that knights possessed only limited liquid savings to fund a journey.¹⁰¹ If a knight chose not to sell property, the other available option was debt. An ill-financed knight may never begin the journey or be forced to turn back.¹⁰² The need for crusaders to convert property into portable wealth or money is a characteristic of the entire crusade movement. Riley-Smith suggests the grim economic reality of crusading was that the costs outweighed any opportunity for wealth.¹⁰³ Elsewhere he notes the trepidation that crusaders must have faced because 'whether a crusade was a success or a failure, every crusader risked death, injury, or financial ruin, and apprehension shrouded the charters issued before departure like a cloud'.¹⁰⁴ Nonetheless, crusaders did go into debt to fund their expedition. Monasteries played a crucial role in the provision of credit. *Recueil des chartes de L'abbaye de Cluny (1091-1210)* has a small number of charters illustrating mortgages, defined simply in this

⁹⁷ Guibert, *R.H.C. Occ.*, vol. 4, p. 141. 'Erat itaque ibi videre miraculum caro omnes emere, et vili vendere, caro quidem, quae ad usum deferrentur itineris, dum praeproperant; vili vero, dum sumptuum impendia coaggerant, et quae paulo ante nec carceres nec tormenta ab eis extorquere poterant, brevi nummorum numero cuncta constabant'.

⁹⁸ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 44.

⁹⁹ Cazel Jr., *A History of the Crusades*, p. 139.

¹⁰⁰ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 43.

¹⁰¹ Cazel Jr., *A History of the Crusades*, pp. 117- 118; Lloyd, *The Oxford History of the Crusades*, p. 54.

¹⁰² Cazel Jr., p. 117; Tyerman, *The Horns of Hattin*, p. 15.

¹⁰³ Riley-Smith, *The English Historical Review*, p. 723.

¹⁰⁴ Riley-Smith, *The Oxford History of the Crusades*, p. 73.

thesis as a security over land, which crusaders made on the First Crusade. Constable describes them as a valuable source of evidence that describes details not found in narrative accounts of the crusade despite the risk of fraud or later interpolation.¹⁰⁵ The valuable insight charters provide into the specific nature of a legal transaction means evidence for the use might be found in this kind of source.

The charter evidence illustrates what historians already know about the use of loans to raise money.¹⁰⁶ However, it is possible that the use could take the shape of a term or condition in a mortgage arrangement. One charter (1096) states how the knight Achard of Montmerle (debtor) delivered everything he held in the town of Lurerciaco, and his manses at Vergerio and Coohot, to the abbot Hugo at Cluny in exchange for 2000 solidos and four mules so that he could take part in the Jerusalem expedition.¹⁰⁷ The charter attaches several conditions as additional security that strengthens the position of the monastery as creditor. The first is the appointment of guarantors to ensure the agreement is honoured and to remedy any unforeseen issues. The second condition is that if Archard should die or decides to stay in the Holy Land then the monastery shall have full ownership of the granted property. Finally, a condition exists that the monastery shall have the property with perpetual rights if he returns but dies without legitimate heirs. Achard was a celebrated champion and the amount lent reflects his socioeconomic power.¹⁰⁸ This mortgage arrangement can be compared to another arrangement (1096) made with the crusaders Bernard and Odo for their manses at Mâcon for the much lower sum of 100 solidos.¹⁰⁹ The same conditions are attached. However, this charter provides additional information that the grant of property to the abbey in the absence of lawful heirs is for the salvation of the grantor's soul. Crusaders often made donations of this kind.¹¹⁰ In both cases, the final condition has donative characteristics and acts as a gift *ad pias causa* that is ancillary to the primary mortgage arrangement. The evidence from

¹⁰⁵ Constable, *Crusaders and Crusading in the Twelfth Century*, pp. 93, 108.

¹⁰⁶ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 15.

¹⁰⁷ A. Bernard (ed.), *Recueil des chartes de L'abbaye de Cluny (1091-1210)*, vol. 5, Paris, Imprimerie Nationale 1894, pp. 51 – 53.

¹⁰⁸ Kostick, *The Social Structure of the First Crusade*, p. 211.

¹⁰⁹ Bernard, *Recueil des chartes de L'abbaye de Cluny*, vol. 5, p. 59.

¹¹⁰ Riley-Smith, *The Oxford History of the Crusades*, p. 70; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 36.

mortgage charters does not suggest, however, that the use was available during the First Crusade.

The principal concern of mortgage charters of this kind is to transform immovable wealth into portable capital to fund expeditions. Both charters state in their preamble that the debtors are entering the transaction to pursue their desire to join the crusade. Bernard and Odo also add that they are going on crusade for indulgence or the remission of their sins (penance).¹¹¹ However, a secondary concern about family members is also clear. Bernard and Odo framed the operative condition of the gifts *ad pias causas* to ensure they do not deprive their lawful heirs of their patrimony after the death of the crusader. Such concerns about family members are the function that Maitland attributes to the use, although the retention of family patrimony is merely incidental. However, there existed a clear tension between the disposal of wealth and the interests of family members who stayed behind. Fred Cazel Jr. observes that: 'a man who had a family or expected to return from the Holy Land would hesitate to dispose of the source of his and his family's livelihood. But the examples are too numerous to name more than a few'.¹¹² The financial burden would have been shared by the family unit.¹¹³ Wives committed personal wealth, as in Adela's example, to their husband's journey.¹¹⁴ There is evidence that wider family members also gave up portable wealth to support crusaders.¹¹⁵ However, there is no evidence that French crusaders utilised the use to address the very real worry that crusaders would have had about leaving their families.

English involvement in the First Crusade

Thomas Fuller, in his major historical work *The History of the Holy War*, described England as 'the Pope's pack-horse in that age, which seldom rested in the stable, when there was any work to be done'.¹¹⁶ However, the strongest argument against the use

¹¹¹ Bernard, *Recueil des chartes de L'abbaye de Cluny*, vol. 5, pp. 51, 59.

¹¹² Cazel Jr., *A History of the Crusades*, p. 119.

¹¹³ Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 47; Riley-Smith, *The Oxford History of the Crusades*, p. 86.

¹¹⁴ Stephen of Blois, *R.H.C. Occ.*, vol. 3, p. 888.

¹¹⁵ Pryor, *Arts*, p. 39.

¹¹⁶ T. Fuller, *The History of the Holy Warre*, 3rd edn, Cambridge, Printed by Roger Daniel, 1647, p. 20.

appearing in England during the First Crusade is that the 'papal packhorse' is nowhere to be seen. Orderic Vitalis states that news of the First Crusade reached England and caused great excitement, and many people took their families on crusade.¹¹⁷ The English author, however, appears to have given a broad account of the movement across Europe. Its mention appears to be part of his decision to incorporate Baldric of Bourgueil's *Historia Ierosolimitana* into his work.¹¹⁸ The Peterborough Manuscript of the *Anglo-Saxon Chronicle* confirms that news of the crusade reached England in Easter 1096, causing great excitement, and that 'countless people set out with women and children because they wanted to war with heathen nations'.¹¹⁹ However, it continues:

1096. ... Through this journey, the king and his brother Earl Robert became reconciled, in that the king went across the sea, and redeemed all Normandy from him for money ... This was a very heavy year throughout all the English race, both through manifold taxes and also through a very grievous famine which very much afflicted the country in the year. Also in this year, the head men who held this land regularly sent an army into Wales, and greatly afflicted many a man with that; but there was no success in that, but the destruction of men and waste of money.¹²⁰

The impression given by the *Anglo-Saxon Chronicle* is that the English were either too busy fighting the Welsh or too impoverished to contribute soldiers to the First Crusade.

The view of England being unable to commit to the First Crusade because of internal conflict resonates with modern accounts about the decades that followed William I's death.¹²¹ His successor, William II or Rufus, faced numerous threats.¹²² The most formidable threat was from his elder brother Robert, Duke of Normandy, who his father

¹¹⁷ Orderic Vitalis, *The Ecclesiastical History of England and Normandy*, trans. M. Chibnall, vol. 5, Oxford, Clarendon Press, 1975, p. 31. See L. Mathey- Maille, 'Orderic Vitalis', *EMC*, vol. 2, p. 1169. See also *The Chronicle of John Worcester*, trans. P. McGurk, vol. 3, Oxford, Clarendon Press, 1998, p. 83.

¹¹⁸ D. Roach, 'Orderic Vitalis and the First Crusade', *Journal of Medieval History*, vol. 42, no. 2, 2016, p. 200.

¹¹⁹ *The Anglo-Saxon Chronicle*, trans. M. Swanton, London, J.M. Dent, 1996, p. 232; see W. Smith, 'Anglo-Saxon Chronicle', *EMC*, vol. 1, pp. 42 - 43.

¹²⁰ Swanton, *The Anglo-Saxon Chronicle*, pp. 232 – 233.

¹²¹ G. Garnet, *Conquered England: Kingship, Succession, and Tenure 1066 – 1166*, Oxford, Oxford University Press, 2007, p. 187.

¹²² C. Potts, 'Normandy, 911 – 1144', in C. Harper-Bill and E. Van Houts, *A Companion to the Anglo-Norman World*, Woodbridge, The Boydell Press, 2002, p. 42.

passed over as heir to the English kingdom.¹²³ Tensions between the father and his eldest son transferred to the brothers. Robert Curthose tried to assert his influence over the English government and pressed his claim to its throne in 1088 in a failed bid for power.¹²⁴ In 1091, William retaliated in an attack on Normandy that ended in a treaty.¹²⁵ The abovementioned passage from the Anglo-Saxon Chronicle shows the events of the First Crusade had finally reconciled the two brothers. In England, it was a temporary reprieve from inter-sibling conflict.¹²⁶ It is reasonable to suggest William was pleased to see his brother go. William continued to face numerous issues while his brother crusaded.¹²⁷ He and his vassals were preoccupied with the consolidation of Norman power in England, which required them to direct their energies against Scotland and the Welsh.¹²⁸ The situation in England prevented William from joining the crusade.

The existence of threats was a good reason for the kingdom of England to avoid sending men to the crusade. However, the kingdom did play a small role in the events of the First Crusade. William had a passive role as a mortgagor. He loaned his brother 10,000 silver marks that he mortgaged over the entire duchy of Normandy.¹²⁹ It is also possible that the dynastic connections he had with Robert and Stephen of Blois meant his family in England and Northern France was represented without his presence. The excuse that it would not be prudent for the entire family to join the expedition would be reasonable. Furthermore, William could take immediate control of Normandy if Robert died on crusade.¹³⁰ The absence of an active participation from England, however, led the

¹²³ H. Thomas, *The Norman Conquest: England after William the Conqueror, 1189 – 1204*, Plymouth: Rowman & Littlefield Publishers, 2008, p. 58; F. Stenton, *William the Conqueror and the Rule of the Normans*, London and New York, G. P. Putnam's Sons, 1928, p. 371.

¹²⁴ See generally Garnet, *Conquered England*, p. 183; Potts, *A Companion to the Anglo-Norman World*, p. 39; Thomas, *The Norman Conquest*, p. 58; E. Mason, 'Administration and Government', in C. Harper-Bill and E. Van Houts (ed.), *A Companion to the Anglo-Norman World*, Woodbridge, The Boydell Press, 2002, p. 138; R. Sharpe, '1088 – William II and the Rebels', in J. Gillingham (ed.), *Anglo-Norman Studies XXVI: Proceedings of Battle Conference 2003*, Woodbridge, The Boydell Press, 2004, p. 143.

¹²⁵ Henry of Huntingdon, *Historia Anglorum*, trans. D. Greenway, Oxford, Clarendon Press, 1996, p. 417.

¹²⁶ E. Albu, 'Probing the Passions of a Norman on Crusade: The *Gesta Francorum et aliorum Hierosolimitanorum*', in J. Gillingham (ed.), *Anglo-Norman Studies: XXVII Proceedings of Battle Conference 2004*, Woodbridge, The Boydell Press, 2005, p. 15.

¹²⁷ Orderic Vitalis, *The Ecclesiastical History of England and Normandy*, p. 200.

¹²⁸ Swanton, *The Anglo-Saxon Chronicle*, pp. 235 – 236. See Henry of Huntingdon, *Historia Anglorum*, p. 445.

¹²⁹ Thomas, *The Norman Conquest*, p. 58; Potts, *A Companion to the Anglo-Norman World*, p. 39.

¹³⁰ C. W. Hollister, 'Normandy, France, and the Anglo-Norman Regnum', *Speculum*, vol. 51, no. 2, 1976, p. 213.

English-born archdeacon Henry of Huntingdon to take a break from his narrative of English history:

On account of the magnitude of this event, I beg the reader's indulgence for a digression, for it would be impossible to keep silent about the wonderful and mighty works of God, even if I should wish or be compelled to do so, since they concern the duke of the Normans.¹³¹

His account of the First Crusade drew upon *Gesta Francorum et aliorum Hierosolimitanorum* rather than an English crusading tradition.¹³² The absence of active participation from a king or an earl means there is little reason to justify the creation of the use in response to the First Crusade.

Chronicle accounts show that some Englishmen took part in the First Crusade. It appears that they left England under the banner of Robert Curthose. Albert of Aachen in *Historia Ierosolimitana* (1102), the author not relying of the *Gesta Francorum et aliorum Hierosolimitanorum*, counts English (*angli*) amongst the *gens* of the Christian multitude.¹³³ He did not participate in the crusade but used oral accounts from returning crusaders to construct his narrative.¹³⁴ It is likely they knew of English participation. Fulcher of Chartres mentions that both Normans and English (*Normannis et Anglis*) fought under Robert.¹³⁵ On the other hand, Ekkehard indicates that Scottish and Welsh forces joined the English.¹³⁶ It is possible that chroniclers exaggerated English participation to illustrate the widespread appeal of the crusade message. Evidence that English fought in the crusade is harder to find. A potential issue is uncertainty about who might be regarded as English. For example, Ralph of Caen notes an important instance of English involvement when he states the *Angli* who joined Tancred did so because of his loyalty to Alexios (their lord) and 'as a matter of prudence because having removed

¹³¹ Henry of Huntingdon, p. 423. 'Ob cuius rei magnitudinem digrediendi veniam a lectore postulo; nec enim si voluero, tam miranda Dei magnolia tacere vel coactus potero, cum nec absit causa, Normannorum ducis occasio'. See William of Malmesbury, *Gesta Regum Anglorum*, trans. R. Mynors, R. Thomson and M. Winterbottom, vol. 1, Oxford, Clarendon Press, 1998, p. 593. The author makes a similar digression to devote much of book four to record primary accounts of the First Crusade.

¹³² J. Beal, 'Henry of Huntingdon', *EMC*, vol. 1, pp. 769 – 770.

¹³³ Albert of Aachen, *Historia Ierosolimitana*, *R.H.C. Occ.*, vol. 4, p. 291.

¹³⁴ S. B. Edgington, 'Albert of Aachen', *EMC*, vol. 1, p. 24.

¹³⁵ Fulcher of Chartres, *Historia Hierosolymitana*, *R.H.C. Occ.*, vol. 3, p. 328.

¹³⁶ Ekkehard, *R.H.C. Occ.*, vol. 5, p. 16.

themselves from Norman yoke; they once more submitted to it'.¹³⁷ The note appears to be illustrative of Ralph's Norman bias and illustrates potential difficulties with identifying how many crusaders came from England. The evidence suggests this unit of English served in the Emperor's Varangian guard and were descendants of Anglo-Saxons who escaped the Conquest by immigrating to the Byzantine Empire.¹³⁸ If so, then it is unlikely they made use. This group of English was subject to Byzantine rather than English law. The eyewitness account of Raymond d'Aguiler in *Historia Francorum qui ceperunt Iherusalem* provides the clearest example of English involvement when he mentions how thirty ships of *Angli* made the treacherous journey from England and aided the crusader armies by keeping supply lines open.¹³⁹ The emphasis placed on their journey suggests English involvement was an exception to the norm. It appears that William's preoccupation with immediate threats to his kingdom had kept most of the English at home. Even if the use was available, as Maitland suggests, there is no evidence to suggest that English crusaders on the First Crusade ever used it.

The First Crusade as a template for legal development

Canon law jurists, called canonists, were the first to articulate jurisprudential concepts associated with *crusade* and *crusading*. If the use developed as a direct response to crusade activity, it is reasonable to suggest that it emerged out of the canon law during the twelfth century. The period that historians occasionally refer to as the Twelfth Century Renaissance would seem a probable period for its placement.¹⁴⁰ Both the development of law and the rise of a legal profession are included in the buzz of intellectual activity.¹⁴¹ Furthermore, the canon law was a living system that could readily

¹³⁷ Ralph of Caen, *Gesta Tancredi, R.H.C. Occ.*, vol. 3, p. 649.

¹³⁸ J. Birkenmeier, *The Development of the Komnenian Army, 1081 – 1180*, Leiden, Brill, 2002, p. 232.

¹³⁹ Raymond d'Aguiler, *Historia Francorum qui Ceperunt Iherusalem, R.H.C. Occ.*, vol. 3, pp. 290 – 291.

¹⁴⁰ See generally C. Haskins, *The Renaissance of the Twelfth Century*, Cambridge, Harvard University Press, 1957, p. 94; W. Nitze, 'The So-Called Twelfth Century Renaissance', *Speculum*, vol. 23, no. 3, 1948, p. 465; and more recently, R. N. Swanson, *The Twelfth-century Renaissance*, Manchester, Manchester University Press, 1999, p. 2; C. S. Jaeger, 'Pessimism in the Twelfth-Century Renaissance', *Speculum*, vol. 78, no. 4, 2003, p. 1152; especially S. Kuttner, 'The Revival of Jurisprudence', in R. Benson, G. Constable and C. Lanham (ed.), *Renaissance and Renewal in the Twelfth Century*, Toronto, Toronto University Press, 1991, pp. 299 – 324.

¹⁴¹ Brundage, *The Medieval Origins of the Legal Profession*, p. 76; Kuttner, *Renaissance and Renewal in the Twelfth Century*, Toronto, Toronto University Press, 1991, pp. 299 – 302.

adapt principles for legal usage.¹⁴² Roman law principles in the *Digest*, rediscovered in Pavia (c. 1100), are a possible source from which a canon law notion of the use could develop. The important place of Roman law in contemporary politics, namely the Investiture Contest (1075) between Gregory VII and Henry IV, and in higher education indicates jurists had a sophisticated grasp of its principles.¹⁴³ The painstaking work of the civilian glossators who shaped the civil law for contemporary usage led to the expression ‘what the gloss does not recognise, the court does not follow’.¹⁴⁴ In the early twelfth century, a Bolognese monk named Gratian, and probably others educated in the civil law, published the first canon law code to elevate the *ius canonicum* to the same standing as the Roman codes.¹⁴⁵ Gratian’s *Concordantia discordantium canonum* (c. 1140s), known as the *Decretum*, even refers to the *fideicommissum* in the body of his work. C 12, q 3, c 3 defines it as a testamentary device (a legacy¹⁴⁶) alongside gifts *ad pias causa* and other benefices that bishops may deal with in favour of the Church. Its inclusion in the *Decretum* indicates that knowledge of *fideicommissa* had not furnished a canonical theory of the use. However, it is worth examining whether the use developed as part of a canon law conception of the crusade movement.

The *crusade movement*, as it is known, is itself a product of twelfth-century reflection on the First Crusade.¹⁴⁷ The canon law principles related to crusading grew out of the theological concept of *just war*, namely what it meant to be a *miles Christi* and how the law could assist such people.¹⁴⁸ There is an ongoing historiographic debate about the nature of *just war* and its relationship to the crusade movement, but it is derived from Augustinian notions, which define it as a defensive action against an aggressor that is

¹⁴² Stein, p. 49; Helmholz, *The Spirit of Classical Canon law*, p. 6; Kuttner, *Renaissance and Renewal in the Twelfth Century*, p. 306.

¹⁴³ See generally Stein, *Roman Law in European History*, p. 42; Helmholz, *The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, pp. 89 – 90; also K. Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition*, Berkeley, University of California Press, 1993; Brundage, *The Medieval Origins of the Legal Profession*, p. 87; P. Vinogradoff, *Roman law in Medieval Europe*, 2nd edn, Oxford, Clarendon Press, 1929, p. 56.

¹⁴⁴ Stein, p. 49.

¹⁴⁵ A. Winroth, *The Making of Gratian’s Decretum*, Cambridge, Cambridge University Press, 2002, p. 146.

¹⁴⁶ See Dig. 30.1.1.

¹⁴⁷ Tyerman, *The Debate on the Crusades*, p. 23.

¹⁴⁸ Tyerman, p. 24.

legal, sanctioned by a legitimate authority, and conducted with good intentions.¹⁴⁹ Prior to Urban's call-to-arms, eleventh-century theologians debated whether war had a legitimate place in Christian doctrine.¹⁵⁰ Pope Gregory VII took the initial steps in 1074 when he too framed aid to the Byzantine Empire as a defence of the Christian faith.¹⁵¹ He believed the knights who fought in defence of Christendom (and Rome) were like martyrs.¹⁵² The manner in which he framed his message, concerning the relief of Byzantium rather than the deliverance of Jerusalem, may be a reason why the First Crusade did not occur two decades earlier.¹⁵³ Regardless, after the First Crusade, the message that wars approved by God were just resonated in twelfth-century literature.¹⁵⁴ For example, Henry of Huntingdon stated that God approved of the war-like Normans, rewarded them with conquests, and sided with them at the Battle of the Standard (1138) against Scottish forces so they could avenge wrongs committed against the Church.¹⁵⁵ The knights who fought in such wars would be granted spiritual rewards.¹⁵⁶ Furthermore, the rise of permanent military associations such as the Hospital of St. John and the Order of the Temple with monastic precepts of poverty, chastity, and obedience further crystallised *just war* precepts.¹⁵⁷ Popular support for the ideologies of these orders is evident in the substantial donations granted to them to protect the Holy Land.¹⁵⁸

¹⁴⁹ Brundage, *Medieval Canon Law and the Crusade*, p. 20; F. Russell, *The Just War in the Middle Ages*, Cambridge, Cambridge University Press, 1975, p. 86; Reston, Jr., *Warriors of God*, p. 11.

¹⁵⁰ K. Leyser and T. Reuter, *Communications and Power in Medieval Europe: The Gregorian Revolution and Beyond*, London, The Hambledon Press, 1994, p. 189; Tyerman, *The English Historical Review*, p. 558; Cahen, *Past & Present*, p. 20; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 27; Asbridge, *The First Crusade*, pp. 23 – 24.

¹⁵¹ Brundage, *Medieval Canon Law and the Crusade*, p. 26; J. Brundage, *Crusades: A Documentary Survey*, Milwaukee, The Marquette University Press, 1962, p. 2; Cahen, p. 17; T. Mastnak, *Crusading Peace: Christendom, the Muslim World, and Western Political Order*, Berkeley, University of California Press, 2002, p. 18.

¹⁵² Bysted, *The Crusade Indulgence*, pp. 62 – 64; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 6; Mastnak, *Crusading Peace*, p. 18.

¹⁵³ A. Atiya, *Crusade, Commerce and Culture*, Bloomington, Indiana University Press, 1962, p. 48; Brundage, *Medieval Canon Law and the Crusade*, p. 27.

¹⁵⁴ Tyerman, *England and the Crusades*, p. 34.

¹⁵⁵ Henry of Huntingdon, *Historia Anglorum*, p. 715.

¹⁵⁶ Bysted, *The Crusade Indulgence*, p. 211.

¹⁵⁷ See generally Nicholson, *Love, War and The Grail*, pp. 24 -25; A. Falk, *Franks and Saracens: Reality and Fantasy in the Crusades*, London, Karnac Books Ltd, 2010, pp. 133 - 134; Phillips, *The Second Crusade*, p. 3; D. Webb, *Medieval European Pilgrimage, c. 700 – c. 1500*, Basingstoke, Palgrave, 2002, p. 22; Paine, *The Crusades*, p. 49; A. Forey, 'The Military Orders, 1120 – 1312', in J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999, p. 176.

¹⁵⁸ Falk, *Franks and Saracens*, p. 134; Tyerman, *Fighting for Christendom*, p. 3; Phillips, *The Second Crusade*, p. 3; J. Bird, E. Peters, and J. Powell, *Crusade and Christendom: Annotated Documents in Translation from Innocent III to the Fall of Acre, 1187 – 1291*, Philadelphia, University of Pennsylvania Press, 2013, p. 9.

The articulation of a legal definition of *just war* as a principle of the *ius gentium*, or law of nations, dominated the attention of canonists after the First Crusade.¹⁵⁹ Causa 23 of the *Decretum* treats the subject alongside actions that may be brought against the heretics who harm the faith. C 23, q 1 reconciles how Christian tenets of peace can agree with armed resistance against evil out of necessity. The second question emphasises that war is just when it is to defend against attacks from other people or there is a lawful edict to recover property (C 23, q 2, c 1). This refers to war as a *ius gentium* principle (Dist. 1, c 9). It includes the example of Jews who waged a *just war* against the Amorites (C 23, q 2, c 3). Gratian also offers justification for the First Crusade. C 23, q 8, c 11 refers to a rescript by Pope Alexander II to all the bishops of Spain as evidence that a retaliatory war against Jews and Saracens is just if they drive Christians from their towns and homes. However, the *just war* concept alone did not create the crusade movement. Urban's decision to connect the ideas of *just war* and pilgrimage during the First Crusade meant regulations applicable to the status of pilgrim extended to *milites Christi*.¹⁶⁰ This natural link to tenth- and eleventh-century pilgrimages formed the foundation of jurisprudential rules related to crusading.¹⁶¹ Nevertheless, the focus on *just war* concepts suggests canonists were not particularly concerned with the creation of a body of private law principles associated with crusade activity. With the benefit of modern reflection, it can be said that the far-reaching consequences of the First Crusade was the creation of a new institution that necessitated new legal frameworks to be established.¹⁶² However, the evidence suggests that the private law principles that could have included a canon law concept of the use were the result of a flurry of legal activity in response to the Second Crusade.

A Second Crusade in the tradition of the First

The attention of contemporaries after the First Crusade had turned to the question of defining the legal implications of the crusader, as a new kind of warrior-pilgrim, who

¹⁵⁹ See generally Mastnak, *Crusading Peace*, p. 44.

¹⁶⁰ Brundage, *Medieval Canon Law and the Crusade*, p. 10; Nicholson, *Love, War and The Grail*, p. 24; Riley-Smith, *The First Crusade and the Idea of Crusading*, p. 22.

¹⁶¹ Brundage, p. 6.

¹⁶² Bird, Peters, and Powell, *Crusade and Christendom*, p. 17.

enjoyed spiritual rewards but also needed special legal protection.¹⁶³ Furthermore, a crusade movement becomes discernible shortly after the First Crusade when preachers focussed their sermons on the devotional character of its success and exemplifying the justness of their cause.¹⁶⁴ Later crusaders adopted a practice attributed to the First Crusade of sewing crosses onto their clothing to signify their status.¹⁶⁵ However, the next significant advancement in crusade jurisprudence came fifty years after the First Crusade. Zengyi's capture of Edessa prompted Pope Eugenius III to issue a bull called *Quantum predecessores* on 1 March, 1146, which dressed a new expedition in the clothes of the first.¹⁶⁶ The broad message of the bull to protect Christians resulted in concurrent crusades against Slavs east of the Elbe, and the Iberian Peninsula, which is a geographic disparity that agrees with the pluralist rather than traditionalist view of crusading.¹⁶⁷ It is evident Eugenius reflected on the strengths and weaknesses of Urban's campaign with probable regard to histories written by its contemporaries.¹⁶⁸ He directed his message at knights with the intention of making clear that the business of the cross was not for non-combatants.¹⁶⁹ The participation of King Louis VII and Conrad III indicates he gained some measure of success in defining the crusade as a military action led by secular rulers under the banner of the Church.¹⁷⁰ In the end, Bernard of Clairvaux undermined this message by preaching the crusade to *pauperes* with the effect that similarities may be drawn between the participants of the First and Second Crusades.¹⁷¹ Nonetheless, the laws Eugenius issued in *Quantum predecessores* were a product of reflection on the success and shortcomings of the First Crusade. It is the final part of the bull that outlines the Crusader privileges that are most important to determine whether the use has a canon law connection to the crusade movement.

¹⁶³ Brundage, p. 30; Constable, *Crusaders and Crusading in the Twelfth Century*, p. 141.

¹⁶⁴ C. Maier, *Crusade Propaganda and Ideology: Model Sermons for the Preaching of the Cross*, Cambridge, Cambridge University Press, 2000, p. 51; Constable, *Crusaders and Crusading in the Twelfth Century*, p. 8

¹⁶⁵ Nicholson, *The Crusades*, p. xlvii; Bysted, *The Crusade Indulgence*, p. 217; Maier, *Crusade Propaganda and Ideology*, p. 53; Brundage, *Medieval Canon Law and the Crusade*, p. 32.

¹⁶⁶ Phillips, *The Second Crusade*, p. xvii; Paine, *The Crusades*, p. 51 - 54; R. Hiestand, 'The Papacy and the Second Crusade', in J. Phillips and M. Hoch (ed.), *The Second Crusade: Scope and Consequences*, Manchester, Manchester University Press, 2001, p. 36.

¹⁶⁷ Hiestand, *The Second Crusade*, p. 37; Phillips, *The Second Crusade*, p. xviii; G. Constable 'The Second Crusade as seen by Contemporaries', *Traditio*, vol. 9, 1953, p. 214.

¹⁶⁸ Hiestand, p. 36; But see for a counter argument Tyerman, *The English Historical Review*, p. 554.

¹⁶⁹ Hiestand, p. 38; Phillips, *The Second Crusade*, p. 55; Constable, *Traditio*, p. 213.

¹⁷⁰ Hiestand, p. 40.

¹⁷¹ Hiestand, pp. 36- 37; Phillips, *The Second Crusade*, p. xxvi; Paine, *The Crusades*, p. 51.

Gratian had completed his work in the same decade as Eugenius issued *Quantum predecessores*, and the *Decretum* has a brief mention of the legal consequences of the First Crusade. C 23, q 8, c 9 concerns a decretal issued by Pope Celestine III on the *exercitui Francorum*, preceding other examples of just war, which reads:

Every man who sets aside fear and terror, to go against the enemies of the holy faith and its opposition, is driven to manly deeds. The almighty God knows that if you should die for the true faith, for the deliverance of God's country, and the defence of Christendom then you shall be first into heaven.¹⁷²

There is no passage in the *Decretum* that suggests canonists expected a need for novel legal devices to protect crusaders.¹⁷³ The idea of legal privileges granted to a person as a variation of the general law, on the other hand, had fully developed (Dist. 3, c 3). It is probable that the privileges stated in *Quantum predecessores* were entirely novel. Phillips indicates Eugenius based his privileges upon the precedents set by Pope Urban II and already established canons.¹⁷⁴ However, Eugenius appears to have interpreted those precedents with a significant degree of latitude. He drafted the bull to meet a twelfth-century ideology of crusading rather than directly incorporate laws from the First Crusade. This is apparent when Eugenius confirms crusaders will receive, for their efforts, the 'remission of sins which our aforesaid predecessor Pope Urban instituted'.¹⁷⁵ *Quantum predecessores* seems to have crystallised the notion that crusaders would enjoy a remission of sins despite Urban referring to a remission of penance.¹⁷⁶ Instead, Eugenius had followed twelfth-century narratives that seemingly reflect on what Urban ought to have promised crusaders.¹⁷⁷ The topic of remission of sins remains intensely debated amongst historians and it is unnecessary to comment any further.¹⁷⁸ Relevant to

¹⁷² 'Omni timore ac terrore deposito, contra inimicos fidei sanctae et adversarios omnium religionum viriliter agere studete. Nouit enim omnipotens, si quilibet vestrorum morietur, quod pro ueritate fidei, et salvatione patriae, ac defensione Christianorum mortuus est, ideo ab eo celeste premium consequetur'.

¹⁷³ Mastnak, *Crusading Peace*, p. 56. Although the author wrongly suggests here that 'there is no mention of the crusade in the *Decretum*'.

¹⁷⁴ Phillips, *The Second Crusade*, pp. 56 – 57.

¹⁷⁵ M. Doeberl (ed.), *Monumenta Germaniae Selecta*, vol. 4, Munich, J. Lindauer'sche Buchhandlung, 1890, no. 16. '... illam peccatorum remissionem, quam prefatus predecessor noster papa Urbanus instituit'.

¹⁷⁶ See Bysted, *The Crusade Indulgence*, p. 7; A. Andrea, *Encyclopaedia of the Crusades*, Wesport, Greenwood Press, 2003, pp. 165 – 166.

¹⁷⁷ Bysted, p. 32.

¹⁷⁸ Bysted, p. 88.

the development of uses, however, is the fact Eugenius outlined the practical problems crusaders would face, how the law would assist their financial preparations, and how the Church would protect their interests during their absence.

Quantum predecessores instituted regulations to facilitate the types of financial arrangements that Eugenius expected crusaders to make. The First Crusade had provided a template for the financial costs associated with crusading and the value of mortgage arrangements.¹⁷⁹ *Quantum predecessores* provides:

Whoever is burdened with debts, and has undertaken the holy journey with pure hearts, does not have to pay usury on past loans, and if they or others acting for them bind themselves to usurious contracts by oath or faith, we absolve them by apostolic authority. They are permitted to raise money on their lands or other possessions, after informing their relatives or lords, for otherwise they will not wish or have the means to go, so they are free to pledge to the church, ecclesiastical persons, or others of the faithful without any risk of suit.¹⁸⁰

This is a novel introduction to the canon law to facilitate credit arrangements while ensuring crusaders would not be made financially destitute.¹⁸¹ He also allowed the Church to raise money to furnish crusaders with loans through the alienation of land or other property.¹⁸² The privileges associated with raising capital also allowed knights to mortgage property without permission from their lords or families, although the obligation remained to inform them of their decision.¹⁸³ Therefore, crusaders could make grants of land that included conditions analogous to those made by their predecessors that contained instructions about the dissolution of their estate in the event of their death. The provisions related to finances shows that the canon law created novel laws to facilitate crusading and it is at least plausible the use could be included among them.

¹⁷⁹ Phillips, *The Second Crusade*, p. 56; Brundage, *Medieval Canon Law and the Crusade*, p. 160.

¹⁸⁰ Doeberl, *Monumenta Germaniae Selecta*, vol. 4, no. 16. 'Quicumque vero aere premuntur alieno et tam sanctura iter puro corde inceperint, de preterito usuras non solvant, et si ipsi vel alli pro eis occasione usurarum astricti sunt sacramento vel fide, apostolica eos auctoritate absolvimus. Liceat eis etiam terras sive caeteras possessiones suas, postquam commoniti propinqui sive domini, ad quorum feudum pertinent, pecuniam commodare aut noluerint aut non valuerint, aecclisiis vel personis aecclsiasticis vel aliis quoque fidelibus libere sine ulla reclamatione inpignerare'.

¹⁸¹ Brundage, *Medieval Canon Law and the Crusade*, p. 176.

¹⁸² Phillips, *The Second Crusade*, p. 57.

¹⁸³ Phillips, p. 57; Brundage, *Medieval Canon Law and the Crusade*, p. 176.

The more important provisions in *Quantum predecessores*, regarding a possible relationship between the use and the crusade movement, concern the episcopal protection of crusader assets and their families. It states:

We, by the authority of God, concede and confirm, that the wives and children [of crusaders], their goods and possessions, remain under our protection and that of archbishops, bishops, and other prelates of the Church of God. By the same apostolic authority we prohibit all suits against all things held in quiet possession at the time when they took the cross, until such they return or there is certain knowledge of their death.¹⁸⁴

The text appears to be a restatement of Canon 10 of the First Lateran Council 1123.¹⁸⁵ It appears the canon law had reacted shortly after the First Crusade to address the worries that crusaders had about their families and property. The text reads:

To those who set out to Jerusalem to defend the Christian people against the tyranny of the infidel, so that they might receive effective aid, we grant them a remission of their sins, and declare their homes and families and other goods will be under the protection of Saint Peter and the Roman Church, just as the lord Pope Urban decreed. Therefore, whoever distrains or takes away from them, while they are committed to the path, shall be punished with excommunication.¹⁸⁶

The reference to Urban in both passages followed what Guibert recorded: '[Urban] also cursed with a horrible anathema all those who might dare to harm the wives, sons, and possessions of those who took up God's journey for all of the next three years'.¹⁸⁷ *Quantum predecessores* seeks to reassure crusaders that the Church imposes an active

¹⁸⁴ Doeberl, *Monumenta Germaniae Selecta*, vol. 4, no. 16. '... auctoritate nobis a Deo concessa concedimus et confirmamus, atque uxores et filios eorum, bona quoque et possessiones sub sanctae aecclesiae, nostra etiam et archiepiscoporum, episcoporum et aliorum prelatorum aecclesiae Dei protectione manere decernimus. Auctoritate etiam apostolica prohibemus, ut de omnibus, quae, cum crucem acceperint, quiete possederint, nulla deinceps questio moveatur, donec de ipsorum reditu vel obitu certissime cognoscatur'.

¹⁸⁵ Brundage, *Medieval Canon Law and the Crusade*, p. 143; Phillips, *The Second Crusade*, p. 57.

¹⁸⁶ N. Tanner (ed.), *Decrees of Ecumenical Councils*, vol. 1, London, Sheed & Ward Limited, 1990, p. 191. 'Eis qui Hierosolymam proficiscuntur et ad christianam gentem defendendam et tyrannidem infidelium debellandam efficaciter auxilium praebuerint, suorum peccatorum remissionem concedimus et domos et familias atque omnia bona eorum in beati Petri et Romanae ecclesiae protectione, sicut a domino nostro papa Urbano statutum fuit, suscipimus. Quicumque ergo ea distrahere vel auferre, quamdiu in via illa morantur praesumpserint, excommunicationis ultione plectantur'.

¹⁸⁷ Guibert, *R.H.C. Occ.*, vol. 4, p. 140. 'Praeterea omnes illos atroci damnavit anathemate, qui eorum uxoribus, filiis, aut possessionibus, qui hoc Dei iter aggredere, per integrum triennii tempus, molestiam auderent inferre'.

duty on bishops to protect crusader interests within their dioceses.¹⁸⁸ This policy had the effect of suspending legal obligations that concern their estates, including debt and lawsuits, from the time that a crusader took the cross to the time he either he returned or there is notice of his death.¹⁸⁹ These regulations address the issues that Maitland raised about the well-being of English crusader estates during their absence. However, this protection appears to have excluded the need to develop the use or analogous device at canon law since the Church itself would step in as a custodian to safeguard crusader estates.

The possibility that the use developed in England in response to the development of a legal concept of crusading is also doubtful. England remained disengaged from the crusade movement during the first half of the twelfth century. The kingdom had little involvement in military affairs in the East after the First Crusade, and Henry I even refused to meet Bohemond in England (later agreeing to meet him in Normandy) out of fear he would lure Englishmen to his campaign against Byzantium (1107 – 1108).¹⁹⁰ The Anarchy (1135 – 1153) is the foremost reason why there was no significant English involvement in the Second Crusade.¹⁹¹ The ongoing political conflict between Stephen and Mathilda meant both parties stymied efforts to recruit crusaders in their contested realm.¹⁹² However, there was a noteworthy English contingent in crusading activities in Iberia.¹⁹³ The eyewitness account of the priest R[aoul] in *De expugnatione Lyxbonensi* provides a detailed description of English involvement.¹⁹⁴ It is likely the author was a retainer of Hervey de Glanvill, the Anglo-Norman commander, and his account is sympathetic to his leader.¹⁹⁵ He is also careful to note where English crusaders came from. For example, he includes an anecdote about the success of seven youths from Ipswich with a siege engine referred to as a Welsh cat.¹⁹⁶ R[aoul]'s work does not focus on the 'Englishness' of the Anglo-Norman contingent. Instead, it records that Hervey's

¹⁸⁸ Brundage, *Medieval Canon Law and the Crusade*, p. 169; Phillips, *The Second Crusade*, p. 57.

¹⁸⁹ Brundage, p. 179; Phillips, p. 57.

¹⁹⁰ Phillips, p. 7.

¹⁹¹ Phillips, p. 274; Tyerman, *England and the Crusades*, p. 37.

¹⁹² Phillips, p. 98.

¹⁹³ Phillips, p. 98; Tyerman, *England and the Crusades*, p. 35.

¹⁹⁴ M. Branco, 'De expugnatione Lyxbonensi', *EMC*, vol. 1, pp. 511 - 512

¹⁹⁵ Tyerman, *England and the Crusades*, p. 33.

¹⁹⁶ R[aoul], *Expugnatione Lyxbonensi*, in W. Stubbs (ed.), *Chronicles and Memorials of the Reign of Richard I*, vol. 1, London, Longman, 1864, p. clxxv.

address to his troops emphasised the tradition of Norman martial prowess.¹⁹⁷ Despite the distinction made between *gens*, the geographic focus of Hervey's levy was predominantly in England.¹⁹⁸ Their efforts appear to have been cause for celebration in England as Roger of Howden could later reflect (perhaps with bias) that the English found greater acclaim than the better equipped Frankish and German expeditions.¹⁹⁹

The positive results of the Lisbon campaign must have been a glimmer of light in the climate of disillusionment that followed the Second Crusade.²⁰⁰ However, the absence of royal involvement, necessary for a large-scale campaign, meant the crusade was not a significant event in English history.²⁰¹ For analogous reasons outlined above about the First Crusade, it also unlikely that the use would have developed in response to the Second Crusade. English chroniclers could once more treat a crusade as a diversion to their narrative. The Middle English Prose *Brut* makes no mention of it.²⁰² John of Salisbury devotes his attention in *Historia Pontificalis* (1163), likely written during his exile from England, to condemning Conrad and Louis's leadership, their sins, and the harm they caused the faith.²⁰³ The few English who did participate in their eastern adventures were met with suspicion.²⁰⁴ Consequently, the impact of the legal privileges in *Quantum predecessores* on English crusading is unclear. Hervey's expedition makes it clear that crusade recruitment had reached England.²⁰⁵ It is also likely the bull arrived in England as part of Eugenius's appeal for English support.²⁰⁶ If not, Bernard's open letter to the English also outlined the privileges associated with taking the cross, although it is

¹⁹⁷ R[aoul], *Chronicles and Memorials of the Reign of Richard I*, vol. 1, p. clxix.

¹⁹⁸ R[aoul], p. cxliv; Tyerman, *England and the Crusades*, p. 33.

¹⁹⁹ Roger of Howden, *Chronica*, W. Stubbs (ed.), vol. 1, London, Longman, 1867, p. 210; See L. Ruch, 'Roger of Howden', *EMC*, vol. 2, pp. 1291 – 1292.

²⁰⁰ See generally Constable, *Traditio*, p. 266; Phillips, *The Second Crusade*, p. 272; Brundage, *Crusades: A Documentary Survey*, p. 121; Paine, *The Crusades*, p. 56; Tyerman, *The Debate on the Crusades*, p. 25

²⁰¹ Tyerman, *England and the Crusades*, p. 37.

²⁰² *The Brut*, Friedrich Brie (ed.), London, Kegan Paul, 1906, pp. 144 – 145; E. Bryan, 'Prose Brut, English', *EMC*, vol. 2, pp. 1239 – 1240.

²⁰³ John of Salisbury, *Historia Pontificalis*, trans. M. Chibnall, Oxford, Clarendon Press, 1956, p. 11; M. Pollock, 'John of Salisbury', *EMC*, vol. 2, pp. 937 – 938.

²⁰⁴ Tyerman, *England and the Crusades*, p. 32; Phillips, *The Second Crusade*, p. 98; D. Power, 'Henry, Duke of the Normans (1149/50 – 1189)', in C. Harper-Bill and N. Vincent (ed.), *Henry II: New Interpretations*, Woodbridge, The Boydell Press, 2007, p. 125.

²⁰⁵ R[aoul], *Chronicles and Memorials of the Reign of Richard I*, vol. 1, p. cxliv; Tyerman, *England and the Crusades*, p. 33.

²⁰⁶ Phillips, *The Second Crusade*, p. 59.

not known how widely it was disseminated.²⁰⁷ Nonetheless, the absence of a canonical concept of the use coupled with the lack of royal involvement is a good reason to doubt whether the use had a relationship with the Second Crusade. The First Crusade and its conceptualisation in *Quantum predecessores* did, however, provide a foundation for future pronouncements of crusade ideology, the law, and crusader privilege.²⁰⁸ It is necessary to examine these developments to authoritatively dismiss the possibility that the use developed as a direct response to the canon law concept of crusading.

De Crucesignatus

Brundage's *Medieval Canon Law and the Crusade* traces how the canon law developed principles related to the crusade movement. Crusade vows occupy much of his work, which includes the process of their refinement in canonist literature and their impact on the movement.²⁰⁹ On the relationship between the canon law and the crusade movement, he concludes:

It is remarkable how little of the papal legislation regarding the privileges and the practical problems of crusaders found its way into the canonistic collections of the middle ages and into the commentaries of the canonistic writers. Although the canonists recognised the crusader's status, obligations, and privileges, they never really came to grips in a systematic way with the problem of clarifying his role in medieval society. While canonists treated the problems of numerous other groups and institutions of their society specifically and coherently in special treatises and commentaries, no treatise *De crucesignatus* has yet been discovered throughout the vast literature of the medieval canon law.²¹⁰

However, he makes no mention of the use in his work. The establishment of canon law privileges associated with crusading appear to have excluded its development nor is it found later. In *Audita tremendi* (1187), Gregory VIII begins the Third Crusade by calling for a just war to avenge the atrocities perpetrated by Saladin on Christians in the Levant.²¹¹ The Church focussed its energies on preaching its crusade message while the

²⁰⁷ Phillips, p. 97; Brundage, *Crusades: A Documentary Survey*, pp. 91 – 93.

²⁰⁸ Phillips, p. 37; Constable, *Traditio*, p. 253.

²⁰⁹ Brundage, *Medieval Canon Law and the Crusade*, p. 114.

²¹⁰ Brundage, p. 190.

²¹¹ Bird, Peters, and Powell, *Crusade and Christendom*, p. 4; Phillips, *The Crusades, 1095 – 1197*, p. 83.

Third Crusade itself would be dominated by secular monarchs.²¹² Ane Bysted suggested the Pope's principal preacher, Henry of Albano, exercised considerable influence on the emphasis that crusaders needed to avenge the injuries that the Saracens committed against God.²¹³ Crusaders are reminded that their reason for joining the crusade is to seek spiritual rewards rather than monetary gain. Nonetheless, there is no mention of the use in the bull.

Audita tremendi follows the traditions established in *Quantum predecessores*. It restates the established privileges, follows a similar structure, and adopts familiar terminology.²¹⁴ The Third Crusade presented an opportunity for crusaders to both redeem themselves and the mistakes of the disastrous Second Crusade.²¹⁵ Gregory cloaked the privileges related to canon law protection in familiar terms:

The goods and families [of crusaders], from the time they take the cross, are under the protection of the Holy Roman Church and also, the archbishops and bishops and other prelates of the Church of God, it is granted that until they return or there is certain knowledge of their death, that they shall remain free from legal actions against them and the integrity of their goods in the meantime will remain intact and unmolested.²¹⁶

This restatement suggests that *Quantum predecessores* had settled the basic outline of canon law privileges concerning the protection of crusader property and their families. Innocent III restates the privileges again in *Post miserabile* (1198), on the eve of the Fourth Crusade (1202 – 1204), as follows:

²¹² J. Phillips, *Holy Warriors: A Modern History of the Crusades*, London, Vintage, 2010, p. 164; Bird, Peters, and Powell, *Crusade and Christendom*, p. 18.

²¹³ Bysted, *The Crusade Indulgence*, p. 229.

²¹⁴ See Phillips, *The Crusades, 1095 – 1197*, p. 4.

²¹⁵ Bird, Peters, and Powell, *Crusade and Christendom*, p. 4; see for example Ambrose, *The History of the Holy War*, trans. M. Ailes, Woodbridge, The Boydell Press, 2003, p. 29.

²¹⁶ A. Chroust (ed.), *Historia de Expeditione Friderici Imperatoris*, in *Quellen zur geschichte des kreuzzuges Kaiser Friedrichs I.*, MGH (S S rer. Germ. N.S.), Berlin, Weidmann, 1928, p. 10. 'Bona quoque ipsorum, ex quo crucem acceperint, cum suis familiis sub sancta Romanie ecclesie necnon et archiepiscoporum et episcoporum et aliorum prelatorum ecclesie dei protectione consistant et nullam de his que usque susceptionem crucis quiete possederint, donec de ipsorum reditu vel obitu certissime cognoscatur, sustineant questionem sed bona eorum integra interim maneat et quieta'.

To allow all to prepare expeditiously to give aid to the land of the nativity of our Lord, we take the goods of those who have assumed the cross under the protection of Saint Peter and ourselves, and also under the protection of the archbishops, bishops and other prelates of the Church of God...²¹⁷

The temporal privileges were not expanded on until the Fifth Crusade (1217-1221), when Innocent's bull *Quia maior* (1213) repeated almost *verbatim* Canon 71 of the Fourth Lateran Council that included an exemption from tolls and taxes, freedom from paying interest, postponing the repayment of debt until their return, and protection of the crusaders' person alongside the protections offered to family and property. These privileges remained the starting point for the interaction between the canon law and crusading for the remainder of the crusade movement.²¹⁸

Brundage identified several issues with the operation of papal protection that remained unresolved. The foremost being that the full extent of crusader privileges is found in papal bulls and there is no significant canonist commentary on them.²¹⁹ Brundage indicates their undefined scope proved problematic throughout the crusade movement. He provides the example of Bishop Ivo who heard a case (1106) concerning Count Rotrou II of Perche, who built fortifications on a crusader's land during their absence.²²⁰ Ivo reports in his letter that he treated the issue as *sui generis* and referred the case to the papal curia with regret he could not determine the scope of the papal protection.²²¹ Brundage was able to adduce two additional examples from the *Quaestiones Londinenses* (1196 – 1217) that are clearer about the scope of papal protection.²²² The first concerned Richard I's seneschal, who banned two papal legates from entering Normandy during the King's absence, which concluded that papal protection allowed him to forbid papal

²¹⁷ O. Holder-Egger and B. von Simson (ed.), *Die chronik des propstes Burchard von Ursberg*, MGH (S S rer. Germ.), Hannover and Leipzig, Hahnsche Buchhandlung, 1916, p. 103 'Ut autem expeditious ad subvectionem terrae nativitatis Dominicae quilibet accingantur, bona ipsorum, ex quo crucem susceperint, sub Beati Petri et nostra protectione suscipimus; nec non sub archiepiscoporum et episcoporum et aliorum praelatorum ecclesias Dei defensione consistant...'

²¹⁸ See generally C. Maier, *Preaching the Crusades: Mendicant Friars & The Cross in the Thirteenth Century*, Cambridge, Cambridge University Press, 1994, p. 3; V. Ryan 'Richard I and the Early Evolution of the Fourth Crusade', in T. Madden, *The Fourth Crusade: Event, Aftermath, and Perceptions*, Aldershot, Ashgate Publishing Limited, 2008, p. 8.

²¹⁹ Brundage, *Medieval Canon Law and the Crusade*, p. 168.

²²⁰ Brundage, pp. 165 – 166.

²²¹ Brundage, p. 166 see also Bird, Peters, and Powell, *Crusade and Christendom*, p. 17.

²²² Both are reproduced in J. Brundage, 'The Crusade of Richard I: Two Canonical Quaestiones', *Speculum*, vol. 38, no. 3, 1963, pp. 448 – 452.

legates from entering land under crusader privilege.²²³ The second held that a bishop could not violate the privilege of a crusader.²²⁴ Nonetheless, it appears the papal curia determined the scope of the protection purely on a case-by-case basis, and no further articulation of the principle was needed beyond the blanket protection offered by the bulls. The evidence suggests there was no need to further clarify the law. Brundage concluded 'on the whole, complaints about violations of the privileges of crusaders were comparatively few in number and minor in extent'.²²⁵ Instead, crusaders more often abused the privilege by seeking to escape legal obligations or unfavourable political situations.²²⁶ On the use, its development in the canon law was not necessary to bulwark the broad ecclesiastical protections already available to crusaders.

A fetter on the operation of crusader privileges suggests why the canon law did not furnish the use as part of its crusade jurisprudence. Crusaders usually had a right to have an action heard in the ecclesiastical courts for violations of privilege.²²⁷ However, Brundage observes:

The first significant limitation [to this right] came late in the twelfth century, when a decretal of Alexander III directed that the ecclesiastical courts were not to deal with cases in which feudal tenure and other purely secular affairs were at issue, even when such cases involved crusaders.²²⁸

The use as a species of grant of land ought to have fallen into this prohibition even if had it been available to crusaders as part of the canon law. This interaction is only hypothetical, but the absence of significant military participation from England until the late twelfth century means this decretal was already in effect by the Third Crusade. It must be noted, however, 'as *miserabiles personae*, crusaders fell into a peculiar class. Although most of them were laymen, they had legitimate rights to ecclesiastical protection and thus were subject to secular courts in some matters and to ecclesiastical courts in many others'.²²⁹ Therefore, a potential relationship might exist between the use

²²³ Brundage, *Medieval Canon Law and the Crusade*, p. 167.

²²⁴ Brundage, p. 167.

²²⁵ Brundage, p. 187.

²²⁶ Brundage, p. 188.

²²⁷ Brundage, p. 170.

²²⁸ Brundage, p. 171.

²²⁹ Brundage, p. 190.

and the legal concept of crusading as part of secular developments distinct from canon law jurisprudence.

Conclusion

There is no evidence to support the argument that the canon law developed the use in response to the First Crusade, or in the later articulation of legal principles related to the crusades. Neither did Maitland intend to make such an argument. His reference to a crusade in his example must be placed into a context that popularised views of the movement. The temper of crusade historiography has changed significantly since Maitland wrote during a time that, according to La Monte, did not produce an accurate history because of sentimentality.²³⁰ However, while modern historians regard the quality of histories on the Crusades produced in the last sixty years as much higher; the continued desire to attribute the use to a crusade shows the strength of romanticised notions of crusading. The attribution to the First Crusade appears to be a consequence of romanticism rather than evidence. The First Crusade started as a broad movement in France and the Empire, and if the use was available to crusaders, it might be found on the continent. It appears the kind of crusader Maitland imagined for his example, the popular image of the crusader knight, better suits the Third rather than First Crusade. Nonetheless, knights are the group expected to make complex legal arrangements. The use does not appear to be part of their toolkit to protect their interests. Further, the argument in favour of the development of the use in England during the First Crusade would also have to grapple with the fact there was no significant English participation.

The impact of the First Crusade is important, however, because it left a strong impression on medieval historiography that contemporaries of later crusades drew upon to construct a tradition.²³¹ It is reasonable to suggest that English law received the use during this process. The impact of the First Crusade on the law was not immediate since 'it took much of the early twelfth century for the crusade idea to be formulated in both theology and law'.²³² However, the notion of a crusade jurisprudence appears in the bull

²³⁰ Tyerman, *The Crusade*, p. 7; La Monte, *Speculum*, p. 58.

²³¹ M. Bull and D. Kempf, *Writing the Early Crusades: Text Memory and Transmission*, Woodbridge, The Boydell Press, 2014, p. 5; Phillips, *The Second Crusade*, p. 19.

²³² Bird, Peters, and Powell, *Crusade and Christendom*, p. 17.

issued by Pope Eugenius to begin the Second Crusade without reference to uses. The privileges granted in the bull formed a template that persisted into the thirteenth century. The canon law instituted a regime of papal protection to achieve what Maitland had described to be the function of uses during the Crusades: the protection of persons and property. Once more, the absence of royal involvement in the Second Crusade presents a formidable barrier to the development of uses in England. However, the privileges developed in the papal bulls show that a terminology associated with a legal concept of crusading existed. This challenges Tyerman's view that there existed a 'terminological vagueness'. He opines that 'for clarity, definition, and uniformity, one must look at Innocent III and beyond. The twelfth century is crusading's Dark Ages'.²³³ The absence of a canon law principle devoted to the use, however, indicates it bears no connection to the primary source of crusade jurisprudence: the canon law. It is, however, necessary to consider how England's secular laws responded to the crusade movement.

²³³ Tyerman, *The English Historical Review*, p. 555.

Chapter 4. Did *Glanvill* deal with Maitland's notion of Use?

Maitland's example suggests that the use was available to crusaders on the eve of the Third Crusade. This chapter examines whether there is evidence to suggest the use formed part of English law during the twelfth century. The growth of the crusade movement and the rise of the common law occurred together. It is reasonable, therefore, to expect them to influence each other. This assumption supports the idea that uses existed in anticipation of the Third Crusade. If the law recognised the use in any form, it should be discernible in England's *first book* of the common law. Its author Ranulf de Glanvill, if he is the author of *Glanvill*, had intimate connections to the crusade movement. It is reasonable to expect him to include the use if it had utility to English crusaders. The chief justiciar ought to have at least appreciated its existence. Another reason to suspect the use was available during this period is that the elements Maitland associated with making uses are all found within the treatise. Namely, principles related to military fee and the degree of control exercisable over its fortunes. The most important concern for the crusader, and it is implicit in Maitland's example, is the apprehension of death. Maitland would have appreciated the principles that became operative when a crusader died. His awareness of those principles framed his crusader's concern about female relatives. Finally, it is important to examine how the law engaged with crusades. Therefore, this chapter analyses the law in *Glanvill* to determine whether there is evidence to support the accepted truth that uses were available during the late twelfth century.

The Crusade Movement and the Common law

The Third Crusade, as Christopher Tyerman observes, was for the first time in England 'a political priority, touching the lives of many who never contemplated leaving their homes as well as the numerous minority who did'.¹ Once more, the goal was to liberate the Holy Land from the *inimici Christi*.² The participation of a king meant the crusade attracted notable English persons from his inner circle.³ Furthermore, its principal participants

¹ Tyerman, p. 58.

² Falk, *Franks and Saracens*, p. 149.

³ Lloyd, *The Oxford History of the Crusades*, p. 50; Tyerman, *Fighting for Christendom*, p. 50.

were knights rather than the large groups of 'unruly' *pauperes* found in the first and second crusades.⁴ Tyerman's *England and the Crusades* provides an authoritative account of the demographics of this expedition. Numerous notable persons from the political and administrative elite became crusaders, whose accompaniment could include knights, companions, relations, or neighbours.⁵ English crusaders typically divided into groups based on martial obligations, dynastic ties and, geographic and socio-political connections.⁶ Jonathan Riley-Smith observes that lordship played an increased role during the Third Crusade and contrasts it with the prominence of familial influences in earlier expeditions.⁷ Tyerman identifies fifty-nine named *crucesignati* in Pipe Roll evidence. While he acknowledges this is not an accurate representation, he is able to provide some outline of the geographic impact of the crusade ideology which includes: 'Staffordshire, Essex, Hertfordshire, Berkshire, Yorkshire, Huntingdonshire, Norfolk, Suffolk, Sussex, Wiltshire, Bedfordshire, Northamptonshire, and London'.⁸ The *Itinerarium Peregrinorum et Gesta Regis Ricardi*, sometimes attributed to Geoffrey of Vinsauf, states a multitude of English foot soldiers and auxiliaries also accompanied Crusader-knights to the Holy Land.⁹ The lords exercised control over the composition of these forces by deciding which of their *pauperes* and unfree villeins could join them.¹⁰ This crusade, more than its predecessors, was an expedition for the wealthy.¹¹ Jonathan Phillips suggested, 'the Third Crusade could lay claim to being the greatest crusading expedition ever'.¹² It is also the most probable candidate for a connection between the use and crusading in English law.

⁴ Lloyd, *The Oxford History of the Crusades*, p. 49.

⁵ Tyerman, *England and the Crusades*, pp. 67 – 69.

⁶ See generally Tyerman, p. 176 Tyerman, *Fighting for Christendom*, pp. 134 - 135; J. Flori, 'Ideology and motivations in the First Crusade', in H. Nicholson (ed.), *Palgrave advances in the Crusades*, Hampshire and New York, Palgrave Macmillan, 2005, p. 30; Lloyd, *The Oxford History of the Crusades*, pp. 51- 53.

⁷ Riley-Smith, *The Oxford History of the Crusades*, pp. 85 – 86.

⁸ Tyerman, *England and the Crusades*, p. 70.

⁹ Geoffrey de Vinsauf, *Itinerarium Peregrinorum et Gesta Regis Ricardi*, in W. Stubbs (ed.), *Chronicles and memorials of the reign of Richard I*, vol. 1, London, Longman, 1864, p. 148. See H. Nicholson, 'Itinerarium Peregrinorum et Gesta Regis Ricardi', *EMC*, vol. 1, pp. 890 - 891.

¹⁰ See Tyerman, *England and the Crusades*, pp. 173- 174; P. R. Schofield, *Peasant and Community in Medieval England, 1200 – 1500*, New York, Palgrave MacMillan, 2003, pp. 11 - 12; Tyerman, *Fighting for Christendom*, p. 134; J. Scammel, 'The Formation of the English Social Structure: Freedom, Knights, and Gentry, 1066 – 1300', *Speculum*, vol. 68, no. 3, 1993, p. 605.

¹¹ Tyerman, *England and the Crusades*, p. 174; Lloyd, *The Oxford History of the Crusades*, p. 48.

¹² Phillips, *The Crusades, 1095 – 1197*, p. 138.

The impact of the crusade movement in England after the Second Crusade seems to support an argument that connects the use to the Third Crusade. Henry II had made Outremer a central part of royal policy because of dynastic ties to the region, which were created when his grandfather, Fulk of Anjou, became king of Jerusalem and established an Angevin line there.¹³ The extent of his interest in the Holy Land included taxation on his subjects (1166, 1185) and a substantial legacy in his will.¹⁴ He overtly devoted his patronage to the military orders and ensured they were represented in his court.¹⁵ The operation of canon law is also apparent in Henry's various unfulfilled vows to take the cross (1170, 1172, and 1185).¹⁶ It is possible, as Tyerman has speculated, that he was using the law as a political tool to address Capetian threats.¹⁷ Gerald of Wales's *Expugnatio Hibernica* provides a critical report about Henry's refusal to fulfil his vows when Heraclius, the Patriarch of Jerusalem, pleaded for him to take the cross at Reading (1185). Gerald records that Henry offered to send money but refused to go because Phillip II posed an impossible risk to his French domains, and he would not divert John from his prepared campaign in Ireland.¹⁸ Gerald's criticism of Henry in the above episode reflected a general feeling of disappointment felt by some contemporaries.¹⁹ Nonetheless, English chroniclers mirrored the interests of canonists to focus their attention on the law of vows rather than other private law arrangements. For example, Roger of Howden reports that Henry's crusade vow in the *Charter of Absolution*, in penance for killing Thomas Becket, included a term that the pope could defer it.²⁰ Further, Ambroise's *L'Estoire de la guerre sainte* suggests Henry is a cautionary tale of a common canonist warning: those who make vows should immediately take steps to fulfil them.²¹ Nonetheless, the comments from chroniclers indicate England had engaged with the legal aspects of crusading in a manner that had received the most attention from canonists.

¹³ Tyerman, *England and the Crusades*, p. 40.

¹⁴ Tyerman, p. 40.

¹⁵ Tyerman, p. 40.

¹⁶ Tyerman, p. 40.

¹⁷ Tyerman, p. 41 – 42.

¹⁸ Gerald of Wales, *Expugnatio Hibernica*, trans. T. Forester, T. Wright (ed.), Cambridge, Medieval Latin Series, 2001, pp. 68 – 70. See S. Levelt, 'Gerald of Wales', *EMC*, vol. 1, pp. 687 - 688.

¹⁹ J. Hosler, *Henry II: A Medieval Soldier of War*, Leiden, Brill, 2007, pp. 166 – 170.

²⁰ Roger of Howden, *Chronica*, vol. 2, pp. 36 – 37.

²¹ Ambroise, *The History of the Holy War*, p. 32.

England did contribute to the secular arm of crusade jurisprudence. The Saladin Tithe (1188) was the most visible ordinance issued by Henry (and the king of France, Phillip Augustus) at the request of the Holy See in preparation for the Third Crusade.²² It provided for the collection of a tax of one-tenth of rents and movables from each person not participating in the crusade.²³ There is no use mentioned in the Saladin Tithe but Maitland praised it as an important milestone in English law since it represents the first secular attempt to tax chattels.²⁴ The tithe may have also influenced his view of the probable crusader who made the use. It similarly envisioned knights as crusaders since it excluded the arms, horses, and clothing of a knight from taxation (cap. 1). This lends further weight to the suggestion Maitland had the Third Crusade in mind when constructing his example. The Assize of Arms (1181) had made clear before the creation of the tithe that such armaments are movables directly attached to the holding of a military fee (cap. 1).²⁵ It appears the tithe's exclusion of military chattels is an attempt to put pressure on the knights who held them to join the crusade since those who took the cross were exempted from the tax in its entirety (unless they took their vows without their lord's permission).²⁶ It also shows that the secular branch of the crusade movement could produce novel legal institutions in response to the Third Crusade, and England was an active contributor to its jurisprudence. It is apparent ample opportunity existed for the use to develop within this framework more than in earlier crusades.

In addition to making the Holy Land a central part of his administration, Henry concurrently oversaw significant legal reform in England. *Glanvill* enjoys a special place in all historical discussions about the twelfth-century common law. It ought to be acknowledged that the notion of a common law jurisprudence in the twelfth century is somewhat anachronistic since the subject of its evolution out of the *curia regis* remains

²² W. Stubbs (ed.), *Select Charters and other Illustrations of English Constitutional History*, Oxford, Clarendon Press, 1870, pp. 152 – 153.

²³ Falk, *Franks and Saracens*, p. 150; F. Cazel Jr., 'The Tax of 1185 in Aid of the Holy Land', *Speculum*, vol. 30, no. 3, 1955, p. 385.

²⁴ Maitland, *The Constitutional History of England*, p. 67; For further discussion on Henry's financial apparatus see Cazel Jr., *Speculum*, p. 392; H. E. Mayer, 'Henry II of England and the Holy Land', *The English Historical Review*, vol. 97, no. 385, 1982, p. 725.

²⁵ Stubbs, *Select Charters*, pp. 147 – 149.

²⁶ Benedict of Peterborough, *Gesta Regis Henrici Secundi*, W. Stubbs (ed.), vol. 2, London, Longmans, 1867, p. 32

subject to historical debate.²⁷ The term *royal justice* is probably a more apt description of the law practised in the *curia regis* during its early stages.²⁸ Furthermore, a somewhat inaccurate historiographical tradition exists that identifies *Glanvill* as the first book of the common law.²⁹ Important to the present thesis is that the text is perfectly poised for an examination about whether the use would have been available to crusaders on the eve of the Third Crusade. As Paul Brand notes, ‘the clearest overall view of this newly emergent English ‘Common Law’ is to be found in the pages of the legal treatise known as *Glanvill*, which was completed, though not necessarily all written, in the final years of Henry’s reign, between 1187 and 1189’.³⁰ It is unclear why Maitland decided not to refer to this work during his inquiry into the origin of the use.

It is worthwhile revisiting this text to look for clues about the origin of the use considering recent revisions of Maitland’s research. First, his assumption about the heritability of tenure since the Conquest may have influenced his view of the concurrent availability of the use, but it has since been shown that concepts of heritability emerged slowly in the early twelfth century.³¹ Second, Maitland believed the common law, by the time *Glanvill* addressed its subject, had grown out of a slow process of legal development during the eleventh and twelfth centuries.³² However, the accepted view is that the common law grew rapidly as part of Henry’s reign, which stood as a watershed period for reforms in all facets of government.³³ England appeared to command much of his attention, and administrative reforms were not uniform throughout the Angevin Empire. The ‘intensive and authoritative’ character of royal power in England did not reflect the situation elsewhere.³⁴ It is Henry who established in England a system of courts dispensing justice

²⁷ R. Turner, ‘The Origins of Common Pleas and King’s Bench’, *The American Journal of Legal History*, vol. 21, no. 3, 1977, p. 239; S. Mooers, ‘A Reevaluation of Royal Justice under Henry I of England’, *The American Historical Review*, vol. 93, no. 2, 1988, p. 340.

²⁸ Turner, *The American Journal of Legal History*, p. 240; Mooers, *The American Historical Review*, pp. 341, 358.

²⁹ See R. Turner, *Judges, Administrators and the Common Law in Angevin England*, London, The Hambledon Press, 1994, p. 71.

³⁰ P. Brand, ‘Henry II and the creation of the English Common Law’, in C. Harper-Bill and N. Vincent (ed.), *Henry II: New Interpretations*, Woodbridge, The Boydell Press, 2007, p. 215 see also S. J. Bailey, ‘Warranties of Land in the Reign of Richard I’, *The Cambridge Law Journal*, vol. 9, no. 2, 1946, p. 192.

³¹ C.M.A. McCauliff, ‘The Medieval English Marriage Portion from Cases of Mort D’Ancestor and Formedon’, *Villanova Law Review*, vol. 38, no. 4, 1993, p. 940.

³² Maitland, *The Constitutional History of England*, p. 158.

³³ Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 12.

³⁴ R. Turner, ‘The Problem of Survival for the Angevin “Empire”: Henry II’s and His Sons’ Vision versus Late Twelfth-Century Realities’, *The American Historical Review*, vol. 100, no. 1, 1995, pp. 78 – 79.

in a routine fashion in circuits throughout the kingdom.³⁵ The creation of a custom, developed around the notion of *royal justice*, was a response to the growing dissatisfaction of lords' courts.³⁶ Therefore, Maitland may have fallen into the tendency in law to impose continuity where none exists. Catherine M. A. McCauliff's caution applies, 'imposing later terminology on early cases brings a false clarity that does not reflect the real story of these cases, the effort to grapple with the facts and to provide a meaningful solution to conflicts as they arose'.³⁷ The narrative of the use still being in popular usage from the Conquest to the twelfth century, with origins in Carolingian law, seems to suggest such an imposition.

The treatise *Glanvill* is a monument to the juridical advancements under Henry's reign and new attitudes towards administration. It is unlikely that the judicial function of the *curia regis* would have expanded without Henry's intervention.³⁸ His reforms benefited from the intellectual approach to law dominant during the twelfth century and the growing importance of legal documentation.³⁹ This led to the development of standardised procedural machinery.⁴⁰ The text is reminiscent of the *Decretum* because it brings together and organises common law writs into a single body of work. Its purpose is to place English law into a written tradition.⁴¹ In doing so, the author demonstrates sufficient understanding of the civil law to include its terminology and to import its principles, particularly when it treats the subject of debts.⁴² Ralph Turner cautions against suggestions that the common law as expressed in *Glanvill* grew out of civilian or canonical tradition.⁴³ He notes, however, the models were at least available to the author.⁴⁴ The evidence suggests that the work benefited from reflection on this tradition,

³⁵ Brand, *Henry II: New Interpretations*, p. 215; J. Hudson, 'Court Cases and Legal Arguments in England, c 1066 – 1166', *Transactions of the Royal Historical Society, Sixth Series*, vol. 10, 2000, p. 114.

³⁶ Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 7.

³⁷ McCauliff, *Villanova Law Review*, p. 935.

³⁸ Mooers, *The American Historical Review*, p. 341; Hudson, *Transactions of the Royal Historical Society*, p. 115.

³⁹ See generally J. Hudson, *The Oxford History of the Laws of England: Volume II: 871 – 1216*, Oxford, Oxford University, 2012 p. 866; Hudson, *Transactions of the Royal Historical Society*, p. 115; Turner, *Law and History Review*, p. 107; F. Finch, 'Seisin', *The Cornell Law Quarterly*, vol. 4, no. 1, 1919, pp. 8 – 9.

⁴⁰ See Turner, *The American Journal of Legal History*, p. 240; Hudson, *The Oxford History of the Laws of England*, p. 874; Brand, *Henry II: New Interpretations*, p. 218; Mooers, *The American Historical Review*, p. 340.

⁴¹ Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 11.

⁴² Turner, *Judges, Administrators and the Common Law in Angevin England*, pp. 82 – 83; Turner, *Law and History Review*, p. 106.

⁴³ Turner, *Law and History Review*, p. 98.

⁴⁴ Turner, p. 100.

but without burrowing substantive content as is apparent in Bracton's treatise. The genius of *Glanvill*, unlike other works of the *ius commune*, is that it addresses a completely new system of law.⁴⁵ It aimed to furnish a practical manual on procedure within the *curia regis*.⁴⁶ However, the access its author or authors had to writ collections and possibly a register of writs, in addition to assizes, also enabled them to provide commentary on substantive legal principles.⁴⁷ Its thorough treatment of the law allowed it to go beyond its intended audience of justices and clerks, and find favour from consumers of royal justice.⁴⁸ The text outlines the position of the king and private law arrangements.⁴⁹ Both were relevant to crusaders.

Glanvill and the Crusades

There is no direct mention of crusading in *Glanvill* despite the growth of crusade jurisprudence in the twelfth century. However, a relationship between the treatise and crusading ought to exist if the authorship of the law book belonged to Ranulf de Glanvill. Legal instruments associated with the crusade, including the use, might be expected to appear within because of his personal connections to the movement. There is doubt, however, that he is the author. The text itself does not bear a statement of authorship and the association exists namely because it bears his name.⁵⁰ The connection seems to be supported by an apparent statement of attribution by Roger of Howden: 'in the same year [1180], King Henry appointed Glanvill, the most learned justice in England, under whose wisdom preserved the unwritten laws, which we call English laws'.⁵¹ It became a common opinion, in the absence of other candidates, that 'his [Glanvill's] monument, as every

⁴⁵ Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 12; Hudson, *Transactions of the Royal Historical Society*, p. 114.

⁴⁶ See Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 74; Hudson, *The Oxford History of the Laws of England*, p. 872; K. Faulkner, 'The Transformation of Knighthood in Early Thirteenth-Century England', *The English Historical Review*, vol. 111, no. 440, 1996, p. 23.

⁴⁷ Turner, *Judges, Administrators and the Common Law in Angevin England*, pp. 75- 76; Brand, *Henry II: New Interpretations*, p. 226; Turner, *Law and History Review*, p. 101.

⁴⁸ J. Hudson, 'From the *Leges* to *Glanvill*: Legal Expertise and Legal Reasoning', in S. Jurasinski, L. Oliver and A. Rabin (ed.), *English Law before Magna Carta*, Leiden, Brill, 2010, p. 222.

⁴⁹ Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 22.

⁵⁰ J. C. Russel, 'Ranulf de Glanvill', *Speculum*, vol. 45, no. 1, 1970, p. 70.

⁵¹ Roger of Howden, *Chronica*, vol. 2, p. 215. 'Eodem anno Henricus rex Angliae pater constituit Rannulfum de Glanvilla summum justiciarium totius Angliae; cujus sapientia conditae sunt leges subscriptae quas Anglicanas vocamus'.

lawyer knows, is the first great treatise on English law which bears his name'.⁵² However, Howden's weak attribution, despite his being Glanvill's contemporary, has led modern scholarship to question whether he really was the author of the work.⁵³ The issues of authorship, like the origin of the use, also attracted Maitland's attention as one of the great unanswered questions in legal history. He appears to be the first to raise doubts about Glanvill being the author of the treatise.⁵⁴ Josiah Cox Russel, in his defence of Glanvill as its author, criticises modern historiography on this subject and states: 'since Maitland's guesses were usually regarded as brilliant conjectures, doubt was cast upon Glanvill's claim, almost universally granted until then'.⁵⁵ The author here draws attention to the creation of another accepted truth based on Maitland's authority.

Historians do agree that the author (or authors) of *Glanvill* is a person(s) of original intelligence with an in-depth knowledge of the workings of royal justice.⁵⁶ Glanvill certainly had the reputation during his lifetime to meet these criteria.⁵⁷ William of Newburgh held Glanvill in high esteem and described him as 'a man powerful and wise' (*vir potens et prudens*) and later as 'a man of splendid wisdom' (*homo praeclarae prudentiae*).⁵⁸ Gerald of Wales describes his friend in similar terms.⁵⁹ However, the proximity of their relationship, coupled with the fact Gerald does not attribute the work to Glanvill, serves only to raise further doubts. William, noted for his detailed descriptions of important figures, makes no mention of the law book attributed him.⁶⁰ However, the picture of Glanvill's career demonstrates the depth of his involvement with the administration of royal justice. He served mostly as a Sheriff (1163 – 1176) and may have entered the royal purview as early as 1171, which is evident from his role as a witness to

⁵² S. J. Bailey, 'Ranulf de Glanvill and His Children', *The Cambridge Law Journal*, vol. 15, no. 2, 1957, p. 166.

Unfortunately, this is no longer true of either the profession or in academia.

⁵³ Hudson, *The Oxford History of the Laws of England*, p. 872; Turner, *Law and History Review*, p. 112.

⁵⁴ F. W. Maitland, 'Glanville', in S. Lee (ed.), *Dictionary of National Biography: Index and Epitome*, London, Smith, Elder, & Co, 1903, p. 412; Pollock and Maitland, *The History of English Law*, vol. 1, pp. 163 – 164.

⁵⁵ Russel, *Speculum*, p. 69.

⁵⁶ Russel, p. 71; Turner, *Law and History Review*, p. 98.

⁵⁷ R. Turner, 'Religious Patronage of Angevin Royal Administrators, c. 1170-1239', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 18, no. 1, 1986, p. 3.

⁵⁸ William of Newburgh, *Historia Rerum Anglicarum*, in R. Howlett (ed), *Chronicles of the reigns of Stephen, Henry II, and Richard I*, vol. 1, London, Longman, 1885, pp. 297, 302.

⁵⁹ Gerald of Wales, *Expugnatio Hibernica*, p. 44.

⁶⁰ See L. Ruch, 'William of Newburgh', *EMC*, vol. 2, pp. 1512 – 1513.

a royal charter.⁶¹ William reports he captured the Scottish King William the Lion in 1174, which marks the beginning of Glanvill's success as Henry's follower.⁶² Henry appointed Glanvill a royal justice in 1176, and he may have undertaken the role of chief justice as early as 1179 before his official appointment a year later.⁶³ In addition to his judicial duties, Glanvill led multiple military campaigns and diplomatic missions.⁶⁴ He even became regent of England during one of Henry's absences in France.⁶⁵ Maitland would comment on Glanvill's character that 'The picture we get of him is that of an active, versatile man, ready at short notice to lead an army, negotiate a peace, hold a council, debate a cause; above all faithful to his master'.⁶⁶ It is unsurprising that Maitland also concluded that Glanvill could not have found the time for juristic activity.⁶⁷ Historians have also proposed Hubert Walter, Geoffrey Fitz Peter, and Godfrey de Lucy as potential candidates with as little success.⁶⁸ Turner has persuasively dismissed Maitland's favoured candidate, Hubert Walter, because of his education and lack of eloquence.⁶⁹

If Glanvill is the author of the treatise, his connection with crusade activities in England indicates he would have been aware of any noteworthy legal development, such as the use, which was worth mentioning in a treatment of private law. His first connection is familial. His ancestor, Hervey de Glanvill, earned fame for the Glanvill family by leading the English contingent during the Second Crusade. It is possible the crusader status of his ancestor also helped Glanvill start his career.⁷⁰ Such ties to the crusade were a source of personal honour and reference for descendants of crusaders.⁷¹ Russel goes so far as to

⁶¹ Russel, *Speculum*, p. 74; Bailey, *The Cambridge Law Journal*, 1957, p. 163; R. W. Eyton, *Court, Household, and Itinerary of King Henry II*, London, Taylor & Co, 1878, p. 158; S. J. Bailey, 'Ranulf de Glanvill in Yorkshire', *Cambridge Law Journal*, vol. 16, no. 2, 1958, p. 185.

⁶² William of Newburgh, *Historia Rerum Anglicarum*, p. 184; F. West, *The Justiciarship in England, 1066 – 1232*, Cambridge, Cambridge University Press, 1966, p. 55; Bailey, *The Cambridge Law Journal*, 1957, p. 165; A. Lucas, *Ecclesiastical Lordship, Seigneurial Power and the Commercialization of Milling in Medieval England*, Farnham, Ashgate, 2014, p. 242.

⁶³ West, *The Justiciarship in England, 1066 – 1232*, p. 56.

⁶⁴ Russel, *Speculum*, p. 77.

⁶⁵ West, *The Justiciarship in England, 1066 – 1232*, p. 57.

⁶⁶ Russel, *Speculum*, p. 69.

⁶⁷ Pollock and Maitland, *The History of English Law*, vol. 1, p. 164.

⁶⁸ Russel, *Speculum*, p. 69; Turner, *Law and History Review*, p. 98; Turner, *Judges, Administrators and the Common Law in Angevin England*, pp. 92 – 99. See R. Stacey, 'Walter, Hubert', in *ODNB*, vol. 57, pp. 163 – 168; E. Venables and R. Turner, 'Lucy, Geoffrey de', *ODNB*, vol. 34, pp. 698 – 700.

⁶⁹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 164; Turner, *Law and History Review*, p. 114.

⁷⁰ Russel, *Speculum*, p. 78.

⁷¹ Paul, *To follow in their footsteps*, p. 2.

suggest that pride motivated Glanvill to pen *De expugnatione Lyxbonensi*.⁷² Although, Turner argues that Russel's suggestion that Glanvill wrote two texts in his life might be 'over-stretching the matter'.⁷³ Further candidates for the authorship of *Lisbon* bear no connection to the law tract.⁷⁴ Nonetheless, it is reasonable to assert Glanvill's natural interest in his ancestor would result in an explicit acknowledgement of legal principles relevant to crusaders that had developed in English law. Another connection that Glanvill had to the crusade movement, mentioned by Gerald of Wales, is that after Henry took the cross at Gisors in 1188 he returned to England and held a council.⁷⁵ It is probable Glanvill appreciated the legal implications of taking a vow and could advise Henry accordingly. The subject of crusade vows does not appear in the treatise. This is to be expected since the canon law is not its subject. In contrast, the use concerned land and it would be an aspect of crusading worth broaching in the treatise.

The final connection that Glanvill has with the crusade movement is his direct involvement in the Third Crusade.⁷⁶ He had the misfortune of dying at the siege of Acre in 1190 while accompanied by family members, Roger de Glanvill and Hubert Walter, and his steward Reiner.⁷⁷ It was a poetic end for a man with ancestral ties to the crusade. The circumstances of his death may suggest why Glanvill did not receive greater acclaim for the treatise. His involvement in a crusade at the age of seventy does not seem planned. Instead, he may have fallen victim to the steps that Richard I took to purge his court of his father's former followers.⁷⁸ Maitland suggested:

Henry seems to have trusted him [Glanvill] thoroughly and to have found in him the ablest and most faithful of servants. Henry's friends had of necessity been Richard's enemies, and when Henry died, Richard, it would seem, hardly knew what to do with Glanvill. He decided that the old statesman should go with him on the crusade.⁷⁹

⁷² Russel, *Speculum*, pp. 69, 72 – 73. The connection between the two treatise is worth considering further.

⁷³ Turner, *Law and History Review*, p. 112.

⁷⁴ C. W. David, 'The Authorship of the De Expignatione Lyxbonensi', *Speculum*, vol. 7, no. 1, 1932, p. 57.

⁷⁵ Gerald of Wales, *The Autobiography of Gerald of Wales*, trans. H. E. Butler, Woodbridge, The Boydell Press, 2005, p. 98.

⁷⁶ See Tyerman, *England and the Crusades*, p. 65; Russel, *Speculum*, p. 70.

⁷⁷ Tyerman, p. 68.

⁷⁸ Tyerman, p. 70; Bailey, *The Cambridge Law Journal*, 1957, p. 166; R. Heiser, 'Richard I and his Appointments to English Shrievalties', *The English Historical Review*, vol. 112, no. 445, 1997, pp. 8 – 10, 19.

⁷⁹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 163.

There are reasons to suspect Richard may have compelled him. Chroniclers record a narrative that Richard allowed Glanvill to resign as chief justiciar because of his advanced age, which enabled him to fulfil his crusade vows.⁸⁰ William of Newburgh laments '[Glanvill] solemnly renounced his office and had less able successors'.⁸¹ It is difficult to reconcile a view that Glanvill resigned from a judicial posting due to the weariness of advanced years and yet considered himself energetic enough to join the crusade ahead of Richard's forces (not with the King as Maitland asserts). Richard of Devizes' suggestion that Glanvill could have earned remission by paying a fine appears to be an attempt to absolve Richard of responsibility for the death.⁸² The author, his work detailing twenty-seven months of Richard I's reign, took a positive view of the King.⁸³ It is arguable that Richard's disfavour undermined Glanvill's reputation so only a bare attribution of authorship remained. Nevertheless, it appears that Glanvill's connection to the crusade movement bore no influence on the construction of the treatise.

Arguments for and against Glanvill as author is guesswork. Historians continue to suggest that he did not take a direct hand in writing the treatise.⁸⁴ Turner suggests 'it is more likely that the author was one of the thirteen justices active in the *curia regis* in the decade spanning 1179-89'.⁸⁵ John Hudson, on the other hand, opines 'the work reflects the civil servant's pride in his craft', which suggests the possibility it may have been the work of a clerk of lesser status.⁸⁶ Turner also entertains the possibility of multiple contributors. He suggests that this accounts for an unwieldy structure and later uncertainty about who wrote it.⁸⁷ Turner reasoned that the only conclusion reachable is that Henry had people within his court capable of shaping Royal justice into a legal system.⁸⁸ This brings the question of authorship back to Maitland's conclusion that 'we may safely say that it was

⁸⁰ Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 2, p. 87.

⁸¹ William of Newburgh, *Historia Rerum Anglicarum*, p. 303.

⁸² Richard of Devizes, *The Chronicle of Richard of Devizes of the time of Richard the First*, trans. J. Appleby, London, Thomas Nelson and Sons, 1963, p. 7.

⁸³ P. Hayward, 'Richard of Devizes', *EMC*, vol. 2, pp. 1275 – 1276.

⁸⁴ See generally Hudson, *The Oxford History of the Laws of England*, p. 872; Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 90; West, *The Justiciarship in England, 1066 – 1232*, pp. 57 – 61.

⁸⁵ Turner, *Law and History Review*, p. 98; see also pp. 115 -119.

⁸⁶ Hudson, *The Oxford History of the Laws of England*, p. 872.

⁸⁷ Turner, *Law and History Review*, pp. 99, 119.

⁸⁸ Turner, p. 97.

not written without Glanvill's permission'.⁸⁹ Resolving the question of authorship would have provided a clearer picture of the treatise's connection to the crusade movement. The only conclusion reachable is that the treatise coincided with a growing interest in crusading in England. To move forward, it is necessary to consider Maitland's conclusion that the question of authorship is irrelevant in light of its content.⁹⁰ Nevertheless, it can be safely be asserted that had Glanvill or another whom he supervised been familiar with the use as an instrument available to crusaders that they would mention it in the treatise. There is, however, no explicit title devoted to the subject.

Military Fee in the Twelfth Century

The suggestion the use was available before the Third Crusade is more probable than a connection to the First Crusade. Three fundamental ingredients, each connected to the nature of land and its inheritance, form part of Maitland's example. The first ingredient in Maitland's example, the feoffor being a *landholder* enfeoffed in *military fee*, had undergone significant legal development. Maitland understood military fee as a species of land tenure available in England since the Conquest and not before.⁹¹ He benefitted from J. H. Round's seminal argument that:

In approaching the consideration of the institutional changes and modifications of policy resulting from the Norman Conquest, the most conspicuous phenomenon to attract attention is undoubtedly the introduction of what it is convenient to term the feudal system.⁹²

⁸⁹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 165.

⁹⁰ Pollock and Maitland, p. 165; See Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 13; Turner, *Law and History Review*, p. 120.

⁹¹ Maitland, *The Constitutional History of England*, p. 57; For the development of military fee in England see generally S. Thorne, 'English Feudalism and Estates in Land', *Cambridge Law Journal*, vol. 17, no. 2, 1959, p. 193; Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 11; Scammel, *Speculum*, p. 593; H. Thomas, 'Subinfeudation and Alienation of Land, Economic Development, and the Wealth of Nobles on the Honor of Richmond, 1066 to c. 1300', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 26, no. 3, 1994, p. 397; and especially S. Reynolds, *Fiefs and Vassals: The Medieval Experience Reinterpreted*, Oxford, Oxford University Press, 1994; E. Brown 'Tyranny of a Construct: Feudalism and Historians of Medieval Europe', *American Historical Review*, vol. 79, no. 4, 1974, pp. 1063 – 1088.

⁹² J. H. Round, *Feudal England*, London, Swan Sonnenschein, 1895, p. 225.

Modern scholarship has moved beyond the interpretation of a 'feudal system' reduced to its military aspects, and it is now best to avoid the perils of that phraseology.⁹³ Nonetheless, the legal principles that concerned military service were an important part of Anglo-Norman jurisprudence.⁹⁴ The basic features of land held in military fee were the same in both Normandy (*Summa de Legibus*, Dist. 3, c 26) and England (Gl. 9.1) during the twelfth century. The personal relationship between lord and vassal was a necessary element to assign military fee, and contemporaries acknowledged fidelity and martial service as key ingredients for the security of the realm.⁹⁵ It is expressed in legal terms in the passages devoted to the institution of homage where a vassal agreed to be bound to their lord's court while enfeoffed.⁹⁶ The relationship continued until the death of one party or some other intervening event dissolved it.⁹⁷ It is important to distinguish homage as a personal relationship founded upon reciprocity from fealty or a declaration of loyalty. For example, the Assize of Northampton required English knights to swear fealty to the king in addition to the homage given to their lords (cap. 6). Fealty was often something additional to the homage oath. English law on the eve of the Third Crusade required knights to render military services as part of their vassalage 'save for the loyalty due to the king and his heirs' (*salva fide debita domino Regi et heredibus suis*) (Gl. 9.1). The parallel passage in the Norman *Summa de Legibus* prescribed the following form 'I become your man to bear your faith against all men, save the faith of the Duke of Normandy'. (Dist. 4.27.1).⁹⁸

⁹³ Recent historiography is outlined in M. Chibnall, *The Debate on the Norman Conquest*, Manchester, Manchester University Press, 1999, pp. 79, 86 including scholarship on lordship and family issues.

⁹⁴ See Reynolds, *Fiefs and Vassals*, p. 1, which notes some residual value in the term may exist when discussing law but it is here best avoided. On the survival of Anglo-Saxon elements in the common law see generally Chibnall, *The Debate on the Norman Conquest*, p. 85; Hudson, *The Oxford History of the Laws of England*, p. 334; C. W. Hollister, 'The Norman Conquest and the Genesis of English Feudalism', *The American Historical Review*, vol. 66, no. 3, 1961, p. 648. For further discussion of parallels in Normandy see M. Chibnall, 'Military Service in Normandy Before 1066', in R. A. Brown (ed.), *Anglo-Norman Studies V: Proceedings of Battle Conference 1982*, Woodbridge, The Boydell Press, 1983, pp. 65 - 67; R. A. Brown, *The Normans and the Norman Conquest*, 2nd edn, Woodbridge, The Boydell Press, 1985, p. 33; Stenton, *William the Conqueror and the Rule of the Normans*, p. 32; C. Haskins, 'Knight-Service in Normandy in the Eleventh Century', *The English Historical Review*, vol. 22, no. 88, 1907, p. 646.

⁹⁵ Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 18; The social importance of this relationship is acknowledged in Normandy in *Summa de Legibus*, Dist. 4. 27. 2 – 3, which is demonstrative of the power the Dukes of Normandy may have earlier wielded against the King of France.

⁹⁶ McCauliff, *Villanova Law Review*, p. 936.

⁹⁷ Thorne, *Cambridge Law Journal*, p. 196.

⁹⁸ 'Ego devenio homo vester ad portandum vobis fldem contra omnes, salva fidelitate ducis Normannie'. See also for faith later reserved for the sovereign. D. Houard, *Dictionnaire analytique, historique, étymologique, critique et interprétatif de la Coutume de Normandie*, vol. 2, Rouen, Le Boucher le Jeune, 1780-1782, p. 52.

The basic elements of holding land in military fee had been a long-settled part of English law before the Third Crusade. This was, as Maitland found, a necessary step towards the development of uses in English law. However, the relationship between a knight's obligation to their lord and crusading has received scant scholarly attention in modern times.⁹⁹ This is a surprise since the idea of crusade as a form of military expedition and the legal principles concerning holding military fee were an intimate part of the crusade movement.¹⁰⁰ The gap in scholarship is likely due to the difficulty of finding evidence to support an assertion that a particular person was a knight.¹⁰¹ Nonetheless, since 1145 non-legal crusade sources couched crusade ideology with allusions to legal concepts such as 'lord', 'vassal', 'fidelity', 'benefice', and 'martial obligation'.¹⁰² Thirteenth-century crusade literature illustrates the value of this terminology to the movement. The *Dame Einsi est Qu'il M'en Couvient Aler* (1239) states, 'I am prepared for your service and fully equipped: I go to you as your vassal, blessed father Jesus Christ' (St. 4, l. 29 - 30).¹⁰³ A sermon of James of Vitry written about 1240 highlights the value of this temporal analogy to promote a spiritual cause to the laity.¹⁰⁴ He states:

The Lord has indeed suffered the loss of his patrimony and wants to test his friends and find out if you are his faithful vassals. He who holds a fief from a liege lord is rightfully deprived of his fief if he abandons him, when he is involved in a war and his inheritance is taken away from him.¹⁰⁵

James is not suggesting that crusaders are legally bound to God in vassalage.¹⁰⁶ However, the metaphorical reference reflects the reality that the law did bind many crusaders to

⁹⁹ Maier, *Crusade Propaganda and Ideology*, p. 57.

¹⁰⁰ Maier, p. 57.

¹⁰¹ Faulkner, *The English Historical Review*, p. 2.

¹⁰² See generally Maier, *Crusade Propaganda and Ideology*, p. 57; C. Smith, *Crusading in the age of Joinville*, Aldershot, Ashgate Publishing, 2006, p. 118; Riley-Smith, *The Oxford History of the Crusades*, p. 87; M. Routledge, 'Songs', in J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999, p. 95.

¹⁰³ J. Bédier and P. Aubry (ed.), *Les Chansons de Croisade*, Paris, Société de l'Histoire de France, 1909, pp. 194 – 195. 'Je suis tout prêt pour votre service et tout équipé: je me rends à vous comme votre vassal, beau père Jésus-Christ'.

¹⁰⁴ Smith, *Crusading in the age of Joinville*, p. 118.

¹⁰⁵ James of Vitry, *Sermon I*, in *Crusade Propaganda and Ideology: Model Sermons for the Preaching of the Cross*, trans. C. Maier, Cambridge, Cambridge University Press, 2000, p. 99.

¹⁰⁶ J. Powell, *Anatomy of a Crusade, 1213 – 1221*, Philadelphia, University of Pennsylvania, 2010, p. 55.

follow their lords.¹⁰⁷ The crusades for the vassal-knight, notwithstanding possible spiritual motivations, were also an exercise in military service that they were legally obligated to perform.¹⁰⁸ The sermon also carries a more literal legal warning about the consequences of abandoning legal obligations.¹⁰⁹ Non-legal sources also anticipated legal problems. For example, the Angevin *Parti de Mal et a Bien Aturné* (1189) referred to possible legal difficulties in the Third Crusade when it described the possibility that a knight may have performed homage to two lords.¹¹⁰

The idea that vassals would accompany their lords to liberate the Holy Land directly invokes the law related to military fee and highlights the importance of the vassalage relationship implicit in Maitland's example. One reason why we would expect to see uses in *Glanvill*, as an institution connected to military fee, is plain at the outset of the treatise:

When any one complains to the lord king or his justices concerning his fee or free tenement, if the case is such that it ought to be, or the lord king wills that it should be tried in his court, then the complainant shall have [a] writ of summons (Gl. 1.5).¹¹¹

The use directly concerns the subject matter of *Glanvill*. The *curia regis* heard all matters pertaining to land in England, which includes incidents of land ownership such as homage and relief owed to lords by incoming tenants (Gl. 1.3). This jurisdiction reflected the wider policy of royal interest in the control of subinfeudations in England.¹¹² The greater freedom given to knights to control their fees is conducive to the development of uses. Maitland, however, posited his example that the use existed in the environment of the crusade with the assumption that the heritability of tenure had existed since the Conquest.¹¹³ His error does not materially impact the possibility of the use being available before the Third Crusade, but it lends further doubt about whether it was available in England during earlier crusade events.

¹⁰⁷ Smith, *Crusading in the age of Joinville*, p. 118.

¹⁰⁸ Smith, p. 119.

¹⁰⁹ See the consequences outlined in Gl. 9.1.

¹¹⁰ Bédier and Aubry, *Les Chansons de Croisade*, pp. 67 – 69.

¹¹¹ 'Cum quis clamat domino regi aut eius iusticiis, de feodo vel liber tenemento suo, si suerit loquela talis quod debeat vel dominus rex velit eam in curia sua deduci, tunc is qui queritur tale breve de submonitione habebit'.

¹¹² An example of inquiry is the 'Writ of Inquisition of Knight's Service (1166)', in H. Hall (ed.), *A Formula Book of English Official Historical Documents*, vol. 2, Cambridge, Cambridge University Press, 1909, p. 38.

¹¹³ See Thorne, *Cambridge Law Journal*, p. 193; McCauliff, *Villanova Law Review*, p. 938.

The evolution of the English situation proved more amenable to the development of the use. Hudson indicates that the reforms to heritability resulted from the need for certainty after the Anarchy.¹¹⁴ It is apparent that the expansion of royal power over sub-tenants during Henry II's reign resulted in laws of inheritance that developed at the expense of the lord's control over the succession of their fees.¹¹⁵ The heritability of military fee was still being settled. On one hand, it is apparent that lords could still determine whether their vassal's heir inherited land held in military fee which was subject to the payment of a relief.¹¹⁶ On the other hand, vassals hardened their claims to the heritability of freehold land with the additional security of their landholding provided by royal authority.¹¹⁷ Susan Reynolds in *Fiefs and Vassals: The Medieval Experience Reinterpreted* suggests Henry's reign marked a series of reforms that distinguished England from the continent.¹¹⁸ The thrust of his reforms concerned how the law would address legal issues pertaining to land.¹¹⁹ Historians debate whether the rights of tenants that grew out of Henry's reforms were deliberate or accidental.¹²⁰ They had a significant impact on the social fabric of English society. By 1180, subinfeudations became rarer because the lord could only recover a fee by escheat, or failure of heirs, which reduced potential income from landholding.¹²¹ In the thirteenth century, it became common practice for lords to substitute grants of land for other methods to retain their vassals' services.¹²² Historians have frequently suggested the far-reaching consequence of reform was to change the role

¹¹⁴ J. Hudson, *Land, Law, and Lordship in Anglo-Norman England*, Oxford, Clarendon Press, 1994, p. 103.

¹¹⁵ See Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 7; S. Waugh, 'Tenure to Contract: Lordship and Clientage in Thirteenth-Century England', *The English Historical Review*, vol. 101, no. 401, 1986, pp. 812- 813; R. Turner, 'Exercise of the King's Will in Inheritance of Baronies: The Example of King John and William Briwerre', *Albion: A Quarterly Journal Concerned with British Studies*, vol. 22, no. 3, 1990, p. 397; Thorne, *Cambridge Law Journal*, p. 201.

¹¹⁶ Thorne, *Cambridge Law Journal*, pp. 196 - 197; McCauliff, *Villanova Law Review*, p. 938; S. White, 'Succession to Fiefs in Early Medieval England', *Past & Present*, vol. 65, no. 1, 1974, p. 126.

¹¹⁷ See Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 7; Waugh, *The English Historical Review*, p. 813; Turner, *Albion*, 1990, p. 383; Schofield, *Peasant and Community in Medieval England*, p. 22.

¹¹⁸ Reynolds, *Fiefs and Vassals*, p. 371.

¹¹⁹ Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 275.

¹²⁰ Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 2; Hudson, *Land, Law, and Lordship in Anglo-Norman England*, p. 262.

¹²¹ Waugh, *The English Historical Review*, pp. 813, 816; Turner, *Albion*, 1990, p. 383; Thomas, *Albion*, p. 415.

¹²² Waugh, p. 818.

of knighthood in England.¹²³ Therefore, an assumption about the heritability of military fee during the Third Crusade would be correct in the context of the example of uses, but Maitland did not appreciate its novelty.

The English king, in his capacity as duke, wielded a similar jurisdiction in Normandy in an analogous court that possessed a similar vehicle of administration and a system of writs (*Summa De Legibus*, Dist. 1. 2. 2).¹²⁴ It is worth noting, however, why the character of military fee in England had the ingredients necessary to develop the use in the twelfth century, but the instrument is not found in Normandy. Firstly, whatever parity existed in the development of English and Norman law ended when Philip Augustus asserted Capetian authority over Normandy and severed the duchy from England in 1204.¹²⁵ Otherwise, it is possible the passage of time would have brought the legal systems closer together. Secondly, the unknown author of *Gesta Regis Henrici Secundi* (1192), a text at one time attributed to Benedict of Peterborough, indicates that Henry considered his holdings in England differently from the 'other lands across the sea' under the lordship of the French king.¹²⁶ His proximity to the court suggests the different regime of succession laws in the respective jurisdictions reflects a variance in policy towards different parts of the realm.¹²⁷ F. M. Powicke suggested that English law was in a transitional stage of development and did not influence Norman rules.¹²⁸ Within the first hundred years after the Conquest, Normandy furnished rules that strengthened the position of the lords; while the emphasis on royal power in England allowed English knights to enjoy greater freedom of alienation.¹²⁹ In Normandy, the legal principles that developed around succession to all species of land allowed a lord to influence the choice

¹²³ See Harvey, *Past & Present*, p. 42; Scammel, *Speculum*, p. 614; Faulkner, *The English Historical Review*, p. 20; D. A. Carpenter, 'Was There a Crisis of the Knightly Class in the Thirteenth Century? The Oxfordshire Evidence', *The English Historical Review*, vol. 95, No. 377, 1980, pp. 721 – 722, 751; J. Prestwich, 'War and Finance in the Anglo-Norman State', *Transactions of the Royal Historical Society, Fifth Series*, vol. 4, 1994, p. 19; M. Prestwich, 'Miles in Armis Strenuus: The Knight at War', *Transactions of the Royal Historical Society, Sixth Series*, vol. 5, 1995, p. 219.

¹²⁴ F. M. Powicke, *The Loss of Normandy (1189 – 1204)*, Manchester, Manchester University Press, 1913, p. 67.

¹²⁵ See generally Powicke, *The Loss of Normandy*, p. 189; Turner, *The American Historical Review*, p. 93; N. Barratt, 'The English Revenue of Richard', *The English Historical Review*, vol. 116, no. 467, 2001, p. 656.

¹²⁶ Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 1, pp. 194, 198. See L. Ruch, 'Gesta Henry II', *EMC*, vol. 1, p. 698.

¹²⁷ See *Summa Legibus*, Dist. 3, c 23 – 24.

¹²⁸ Powicke, *The Loss of Normandy*, p. 33; See *Summa Legibus*, Dist. 3, c 23 – 24.

¹²⁹ Powicke, *The Loss of Normandy*, p. 60.

of heir.¹³⁰ It is therefore unsurprising the use is absent from the surviving Norman law books because it favours the ability of the feoffee to control their fee irrespective of their lord's wishes. The loss of Normandy and its subsequent divorce from England confined the use to a peculiarity of the latter jurisdiction. It is prudent, therefore, to continue an analysis of uses in England independent of Norman influence.

Heritability and the ability to control descent

The second ingredient in Maitland's example, after land being held in military fee, is a presumed ability to control descent. Henry's reforms had at least made it possible for the use to have a connection to the Third Crusade. Crusaders exercised more control over their fees than their predecessors.¹³¹ Henry had even removed the rule that obliged crusaders to require permission from their family members to alienate land.¹³² *Glanvill* clarifies how the reformed land law operated in the *curia regis*, and the extent that a person could exercise control over their estate.¹³³ However, there is no title devoted to the use nor other principles that indicate it existed when *Glanvill* was written. The evidence suggests that the use was unavailable on the eve of the Third Crusade. A restrictive interpretation of the doctrine of primogeniture is a possible reason why the use did not develop at this stage. Maitland would have appreciated that whatever his crusader-knight wished for their children, they had to work within the rules of primogeniture. The law guaranteed a portion of heritable land to children 'for God alone, not man, has the power to make an heir' (*quia solus Deus heredem facere potest, non homo*) (Gl. 7.1). The policy that guided inheritance to land was predominantly concerned with who was the nearest descendant rather than who was next-of-kin on the ascending line (e.g. father, grandfather).¹³⁴ The crusader who had one son over the age of twenty-one years had the clearest expectations after their death: their land would descend to their

¹³⁰ Powicke, p. 60; Chibnall, *Anglo-Norman Studies*, p. 74.

¹³¹ See Tyerman, *England and the Crusades*, p. 200; Turner, *Albion*, 1990, p. 383.

¹³² Thorne, *Cambridge Law Journal*, p. 194; S. Painter, 'The Family and the Feudal System in Twelfth Century England', *Speculum*, vol. 35, no. 1, 1960, p. 13.

¹³³ See generally Turner, *Judges, Administrators and the Common Law in Angevin England*, p. 7; Hudson, *The Oxford History of the Laws of England*, p. 872; Brand, *Henry II: New Interpretations*, p. 237; Mooers, *The American Historical Review*, p. 340.

¹³⁴ Thorne, *Cambridge Law Journal*, p. 203.

son as their heir (Gl. 7.3).¹³⁵ If the crusader had no lawful heir, the land reverts (escheats) back to the lord because 'the ultimate heir of any person is their lord' (*ultimi haeredes alquorum sunt eorum Domini*) (Gl. 7.17). The use, if it existed, would run counter to this policy.

The operation of law would have impacted on the way in which crusader-knights planned their estates. It is clear the first point of inquiry concerned the nature of their fee. Maitland's crusader is a knight. *Glanvill* states 'for if he was a knight, or holding by military fee, then, according to the law of the kingdom of England, the eldest son succeeds to his father in everything, so that none of his brothers can by right claim any part of it' (Gl. 7.3).¹³⁶ Maitland also indicates his crusader had multiple children. The law distinguishes between children and grandchildren, and male and female issue (Gl. 7.5). This could require the court to make complex calculations about consanguinity. *Glanvill* provides that sons and daughters in the first degree succeeded before grandchildren or the collateral line of the second degree (brothers), which followed the canonical rules on the subject (Gl. 7.3; Gl. 7.4). The common law would later express this rule as 'where there are two or more males in equal degree, the eldest only shall inherit, but the females all together'.¹³⁷ Maitland appreciated that the rationale behind the descent of land is to ensure the unity of the fief through a single male heir capable of performing service.¹³⁸ The idea of unity also appears to have extended to the armaments of the knight that formed part of the fee to keep the costs down for the incoming heir (Assize of Arms, cap. 5).¹³⁹ The strict operation of law appears to explain why exceptions would not be found in *Glanvill* as the purpose of uses would be to deviate from the general rules of inheritance.

Maitland's crusader would have entertained significant concerns about leaving behind a male heir in their minority because his lord would take custody of his fee and the body of

¹³⁵ See S. Painter, 'The Family and the Feudal System in Twelfth Century England', *Speculum*, vol. 35, no. 1, 1960, p. 5.

¹³⁶ 'Quia si miles fuerit, vel per militiam tenens, tunc secundum ius regni Anglie primogenitus filius patri succedit in totum, ita quod nullus fratrum suorum partem inde de iure petere potest'. See BNB, no. 183.

¹³⁷ W. Blackstone, *Law Tracts: in two volumes*, vol. 1, Oxford, Clarendon Press, 1762, p. 190.

¹³⁸ Pollock and Maitland, *The History of English Law*, vol. 2, p. 268.

¹³⁹ Harvey, *Past & Present*, p. 41.

his heir if he died while crusading. The lord would continue to have wardship of both until his heir reached the age of twenty-one (Gl. 7.9). The rationale for wardship is that the lord would train the minor in martial combat.¹⁴⁰ This custodial arrangement is the closest that *Glanvill* comes to the use. Maitland did not confound the two institutions. He understood wardship as a species of guardianship over the ward and his property, allowing him to take rents and profits for the ward's maintenance, which was enforceable against outsiders.¹⁴¹ The law also required a lord to restore the inheritance to the heir in *good condition* after the wardship (Gl. 7.9). The obvious threat to the crusader is that the lord could exert considerable power over the crusader's family and property, and even commit waste. George Spence, Maitland's contemporary, observed in *Equitable Jurisdiction of the Court of Chancery* (1846) that later knights would eventually employ the trust to avoid this situation.¹⁴² However, *Glanvill* supplies no solution to the concerned crusader. The problem is addressed once again in Magna Carta 1215.¹⁴³ Chapter Four reads: 'The guardian of the land of an heir who is under age shall not take from those lands except reasonable rents, customary dues, and service without destruction or damage to men or property'.¹⁴⁴ Maitland likely considered the use a method to avoid the vicissitudes of wardship but not a restraint on the institution.¹⁴⁵

The options available to the crusader to avoid either the rules of descent or the potential consequence of a wardship were limited to *inter vivos* transactions (those made during the lifetime of the feoffor) before they left on crusade. The use in Maitland's example was made *inter vivos*. In *Glanvill*, two kinds of *inter vivos* arrangement were available to crusaders to control their lands. Firstly, the law allowed a knight to dispose of a reasonable part of his heritable land provided there is livery of seisin, or delivery of possession, otherwise the feoffment is incomplete (Gl. 7.1). The reasonable part mentioned in the text refers to a third. It is evident that the law favoured strangers over

¹⁴⁰ Stubbs, *Select Charters*, p. 147. See generally Hudson, *The Oxford History of the Laws of England*, p. 807; C. Harpum, S. Bridge, and M. Dixon, *Megarry & Wade: The Law of Real Property*, 8th edn, London, Sweet & Maxwell, 2012, p. 25.

¹⁴¹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 319.

¹⁴² G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, London, V. and R. Stevens and G. S. Norton, 1846, p. 605.

¹⁴³ Stubbs, *Select Charters*, pp. 288 – 298.

¹⁴⁴ 'Custos terre hujusmodi heredis qui infra etatem fuerit, non capiat de terra heredis nisi racionabiles exitus, et racionabiles consuetudines, et racionabilia servicia, et hoc sine destructione et vasto hominum vel rerum'.

¹⁴⁵ See Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 605.

younger sons because the latter could only be enfeoffed with the permission of their lawful heir (Gl. 7.1). The position of illegitimate children is strengthened here because of the rules related to bastardy, which meant the law disqualified them from ever being heirs (Gl. 7.13; Gl. 7.16). Incidentally, the common law would famously reiterate the law in *Glanvill* (Gl. 7.17). The Statute of Merton (1235) (20 Hen. III, c 9) makes clear that *ius commune* principles surrounding legitimisation were not part of English law. The risk to the crusader is their fee escheated to the lord if their bastard died without issue (Gl. 7.16). In this manner, crusaders could control descent by alienating it to a stranger or a bastard without reference to the use. However, the use is not a feoffment that simply alienates land. Further, Tyerman suggests crusaders tended to avoid outright alienations of their property in the manner outlined in *Glanvill* because it would disinherit their heirs.¹⁴⁶

The second, and closer, arrangement that approaches the use in *Glanvill* is a lawful mortgage that obligated the mortgagor to keep the property intact (Gl. 10.8). This appears to be the foremost strategy by English crusaders to minimise the financial impact of the crusade on their families, although temporary hardship was expected.¹⁴⁷ A mortgage arrangement, unlike a use, allowed the creditor in possession to treat the property like their own. They received seisin for a definite term until the debtor can redeem it. This kind of conditional arrangement is closer to the use but its principal purpose is to benefit the creditor. The fact the mortgagee will probably keep the land intact for the crusader's heir is merely a consequence and not its intended function. English law allowed an heir to bring a plea against the creditor to have the land returned to them unless reasonable cause is shown not to compel its return (Gl. 10.10). However, it did not recognise the heir as having an enforceable legal interest akin to an intended beneficiary. Instead, the foremost question that the law concerned itself with was whether someone was seised of land or not (*confitebitur rem illam suam esse, aut dicet eam suam non esse*) (Gl. 3.1). A warranty, an assurance as to a fact or quality, comes closer. Nonetheless, the notion that independent interests attached to land in the form of a warranty remained in the early stages of development during this period.¹⁴⁸ The legal action arose because the warrantor failed to protect the warrantees' seisin, and not because of a recognised beneficial

¹⁴⁶ Tyerman, *England and the Crusades*, p. 208.

¹⁴⁷ Tyerman, p. 210.

¹⁴⁸ Bailey, *The Cambridge Law Journal*, 1946, pp. 193, 207.

interest.¹⁴⁹ The evidence suggests the law had no concept of the third-party enforceability associated with the use at this stage beyond the concept that a person might be seised for a definite term.

The strongest weapon that the crusader had in their arsenal to protect their land against intrusions from strangers (after forcible ejection) was a writ to disseise the trespasser known as novel disseisin.¹⁵⁰ This required the *curia regis* to undertake a factual inquiry into whether a landholder had been disseised of their fee.¹⁵¹ It determined the lawful owner of the land. The writ of novel disseisin applied ‘when anyone has unjustly and without a judgment disseised another of his free tenement’ (Gl. 13.32).¹⁵² The writ of mort d’ancestor, available to their heir, evolved out of the expansion of the rights of tenants and the heritability of tenure.¹⁵³ The Assize of Northampton (1176) made available a writ mort d’ancestor to an heir against anyone who disseised them of their ancestor’s land (cap. 4).¹⁵⁴ Henry directed this chapter against the lords who refused to admit their tenant’s heir.¹⁵⁵ However, it is understood in *Glanvill* as a writ available against anyone who interfered with the rights of the heir (Gl. 13.2).¹⁵⁶ The rationale behind these writs, Brand observes, was to avoid the wrongful disposition of land and to avoid the negative impact that forcible dispossessions and repossession would have on public order.¹⁵⁷ These writs provided a remedy for crusaders against trespasses but are not evidence that supports the existence of the use in *Glanvill*. To the contrary, their existence suggests that the law did not perceive the use or a similar arrangement as necessary to protect crusader lands.

Legal position of Women

¹⁴⁹ Bailey, p. 196.

¹⁵⁰ Schofield, *Peasant and Community in Medieval England*, p. 21.

¹⁵¹ Hudson, *Transactions of the Royal Historical Society*, p. 115.

¹⁵² ‘Alium iniuste et sine iudicio desaisierit de libero tenement suo’.

¹⁵³ McCauliff, *Villanova Law Review*, p. 934; Brand, *Henry II: New Interpretations*, p. 237.

¹⁵⁴ Stubbs, *Select Charters*, pp. 143 – 145. See McCauliff, p. 934.

¹⁵⁵ McCauliff, p. 941; Brand, *Henry II: New Interpretations*, p. 237.

¹⁵⁶ McCauliff, p. 967.

¹⁵⁷ Brand, *Henry II: New Interpretations*, p. 237.

The final ingredient in Maitland's example is a crusader concerned about his wife, his sister, and his daughter and whether they can be enfeoffed of military fee or whether the land will descend to them. It is to the historian's credit that he devoted attention to his legal history to 'half the inhabitants of England'.¹⁵⁸ Further, the use was a tool that would eventually be used to advance the legal interests of women. Maitland likely knew the concerns of his crusader was unjustified since women could hold military fee.¹⁵⁹ The crusader's doubts seem to reflect a societal view that a woman only had intermediary legal interest in a fee because an incoming husband would be expected to take possession.¹⁶⁰ This view was situated in the law because although a woman could swear fealty to a lord; only a man was capable of performing homage and rendering military service (Gl. 9.2). Maitland intended to touch on an emotionally charged subject: concerns about family and the perceived vulnerability of women. Geoffrey of Vinsauf attempted to recapture the emotional impact on family members by stating that 'whoever set out with their family members, kin, or friends were regarded by them with looks of love and when their loved ones departed, they were unable to hold back their devotion and sorrow' (2.6).¹⁶¹ He described the cheers of a crowd and the tearful goodbyes of family members, in particular women.¹⁶² Women were officially not allowed to participate in the crusade.¹⁶³ In reality, washerwomen and prostitutes accompanied the army and some women may have even had combat roles.¹⁶⁴ Nevertheless, Geoffrey depicted women as enthusiastic supporters of the crusade (who would have joined but for the weakness of their sex), but bore the trauma that an absent crusader would leave behind.¹⁶⁵

¹⁵⁸ Pollock and Maitland, *The History of English Law*, vol. 1, p. 482.

¹⁵⁹ Pollock and Maitland, p. 482.

¹⁶⁰ J. Brundage, 'Widows and Remarriage: Moral Conflicts and their Resolution in Classical Canon Law', in S. Walker (ed.), *Wife and Widow in Medieval England*, Ann Arbor, University of Michigan, 1993, p. 25; Hudson, *The Oxford History of the Laws of England*, p. 807.

¹⁶¹ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 148. '... qui progrediebantur cum suis familiaribus, cognatis vel amicis, eosdem caritatis intuitu prosequentibus, discedentes nimirum amici ab erumpentibus ex pietate sive mœstitia lacrymis se nequibant cohibere'.

¹⁶² Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 148. See also Ambrose, *The History of the Holy War*, p. 34.

¹⁶³ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 33.

¹⁶⁴ H. Nicholson, 'Women on the Third Crusade', *Journal of Medieval History*, vol. 23, no. 4, 2007, p. 349.

¹⁶⁵ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 148.

The inferior legal status of women may have been a cause for concern for married crusaders.¹⁶⁶ The common law doctrine of coverture, existing for the greater part of its legal history, distinguished the status of married women (*feme covert*) and unmarried women (*feme sole*). The former were under the power of their husbands (*baron*).¹⁶⁷ This doctrine meant commentators considered the status of *feme sole* to be a superior legal condition.¹⁶⁸ It is expressed in *Glanvill* as follows ‘the wife is, in a legal sense, under the *potestas* of her husband’ (Gl. 6.3).¹⁶⁹ English law on this subject is reminiscent of the Roman law concept of marriage *cum manu* and the apparent loss of legal status (*capitis diminutio minima*) and property rights that accompanied a woman’s entrance into the *potestas*¹⁷⁰ of her husband as akin to his daughter (Gai. 1. 108 – 115).¹⁷¹ Eighteenth-century common lawyers found such a comparison useful because the effect of marriage likened a wife’s legal status to an infant.¹⁷² However, the theological notion that marriage created a *unity of person* influenced the creation of the common law doctrine rather than the archaic form of Roman law marriage.¹⁷³ The concern Maitland’s crusader had about the doctrine, expressed by Coke, is ‘a man may not grant nor give his tenements to his wife during the coverture, for that his wife and he be but one person in the law’.¹⁷⁴ Maitland challenges the idea that the doctrine had far-reaching societal implications by suggesting community between spouses tempered the harsh consequences of the wife’s legal condition.¹⁷⁵ It is very likely that she would have been party to her husband’s

¹⁶⁶ Tyerman, *England and the Crusades*, p. 71.

¹⁶⁷ See M. Schaus, *Women and Gender in Medieval Europe: An Encyclopaedia*, New York, Routledge, 2006, p. 282; R. S. Donnison, *A Treatise of the Law of Property Arising from the Relation Between Husband and Wife*, 2nd edn, vol. 1, London, Joseph Butterworth and Son, 1826, p. 53; The doctrine formed part of English law until abolished by s 3 of the Married Women’s Property Act 1882 (UK).

¹⁶⁸ Anon., *Baron and Feme: A Treatise of the Common Law concerning Husbands and Wives*, London, Printed by the Assigns of Richard and Edward Atkyns, 1700, p. 22.

¹⁶⁹ ‘Quia cum mulier ipsa plene in potestate viri sui de iure sit’.

¹⁷⁰ *Potestas* in the field of private law refers also to the power of a head of a family (*pater familias*) over its members.

¹⁷¹ This form of marriage was archaic by the time Gaius wrote in 128 as most marriages were *sine manu* (meaning the wife remained in the *potestas* of her *pater familias*). Roman women, it might be opined, enjoyed greater legal status than English women until the doctrine was abolished in 1882.

¹⁷² Anon. *Baron and Feme*, pp. 3 -4; directly treated together in P. Bingham, *The Law of Infancy and Coverture*, London, J. Butterworth and Son, 1816.

¹⁷³ This idea had theological precedent, see C. Reid Jr., ‘“So it will be found that the Right of Women in many Cases is of Diminished Condition”: Rights and the Legal Equality of Men and Women and Twelfth and Thirteenth Century Canon law’, *Loyola of Los Angeles Law Review*, vol. 35, no. 2, 2002, p. 480.

¹⁷⁴ E. Coke, *The First Part of the Institutes of the Laws of England: Or a Commentary on Littleton*, London, Printed by Adam Islip for the Society of Stationers, 1628, p. 112a.

¹⁷⁵ Pollock and Maitland, *The History of English Law*, vol. 2, p. 407.

decision to go on crusade.¹⁷⁶ Further, his absence may not have affected the daily management of the fee which was overseen by his tenants.¹⁷⁷

In the absence of a use-like device, the concept of dower allowed a wife to enforce a legal interest in her husband's estate. The text makes clear that English law had a unique form of dower that concerned the creation of a third interest in freehold lands at the time of marriage called *marriage hood* or a woman's reasonable dower (Gl. 6.1; Gl. 7.1). She owned the land, but could only enforce that right after her husband's death (Gl. 6.17). In the meantime, the following rule applied (Gl. 6.3): 'It is known, that a woman does not have the power to make any disposition of her dower during her husband's lifetime ... Therefore, anyone who has a wife may gift, sell or alienate her dower in whatever way he pleases'.¹⁷⁸ This left a widow in a vulnerable position because whether she could enter the land turned on the question, once again a matter of fact, whether her dower was vacant or not (Gl. 6.4). The crusader in Maitland's example may have alienated dower land as part of his financial preparation. If this was the case, then the land would not be vacant and she would have to rely on her husband's heir to provide her with reasonable compensation if he died on the expedition (Gl. 6.13).¹⁷⁹ Society expected the heir to assist in the recovery of dower land because a husband cannot devise it without their consent.¹⁸⁰ Otherwise, a crusader who alienated dower land could have rendered his wife destitute.¹⁸¹ The decision to alienate land would have been somewhat reckless and counter-intuitive to Maitland's crusader who wished to protect his wife's interest. The existence of dower did guarantee her some legal protection despite her reduced legal status.

Maitland's crusader is also concerned about the status of his daughters and whether they can hold military fee. The common law only permitted a military fee to descend to a daughter if the crusader died without a legitimate son because 'a female never shares in an inheritance with a male' (*mulier numquam cum masculo partem in aliqua hereditate*

¹⁷⁶ Lloyd, *The Oxford History of the Crusades*, p. 50.

¹⁷⁷ C. Dyer, *Everyday Life in Medieval England*, London, The Hambleton Press, 1994, p. 3.

¹⁷⁸ 'Sciendum autem est quod mulier nihil potest disponere circa dotem suam in vita sui mariti ... Potest itaque quilibet uxorem habens dotem uxoris sue donare vendere et alio quo voluerit modo alienare'.

¹⁷⁹ See Bailey, *The Cambridge Law Journal*, 1946, p. 196.

¹⁸⁰ Hudson, *The Oxford History of the Laws of England*, p. 801.

¹⁸¹ Tyerman, *England and the Crusades*, p. 210.

capit) (Gl. 7.3). If a man has multiple daughters, however, they succeeded together save the capital messuage (primary residence) for the eldest daughter (Gl. 7.3). Therefore, a daughter might hold military fee if her father died on crusade. Nonetheless, the crusader still had to consider the institution of wardship if his daughter was a minor (Gl. 7.12). The different ages of majority between men and women means inheritance of patrimonial estate is one of the few instances where the law benefitted the latter first. Once married with the consent of her lord, the incoming husband would perform homage to the lord to acquire the fee.¹⁸² The crusader's sister, in terms of inheritance, is in an even weaker position. Since she is on the collateral line, the land would only descend to her on the failure of brothers (Gl. 7.4). The crusader could alienate, as mentioned above, part of the land to her as a stranger but she would lose power over it if she married. Furthermore, as Maitland indicates, the crusader could hope she or any other stranger would take care of his family's interests. Alienation in this manner would create more risks than it would solve since it meant divesting the family of their legal rights to his property if he should die. The use, however, does not appear to be an option to protect the interests of the women in the crusader's life.

Essoin

The procedural rule known as *essoin* is the closest *Glanvill* comes to addressing a legal principle applicable to the crusade movement. It is a rule that appreciated the natural concern that a crusader would have for their family and property during their absence.¹⁸³ The Canon law anticipated these concerns with privileges.¹⁸⁴ However, English law also contributed to the body of crusade jurisprudence. The belief that the use existed on the eve of the Third Crusade arose because of the expectation that the common law would also respond to the crusader's legal needs. And it did. An *essoin* allowed a party to excuse themselves from appearing in court for some special reason such as an infirmity (Gl. 1.11). The possible excuses that allowed a person to plead an *essoin* were countless as it pertained to questions of fact.¹⁸⁵ Undoubtedly, it was available for crusaders and the

¹⁸² Hudson, *The Oxford History of the Laws of England*, p. 807.

¹⁸³ Tyerman, *England and the Crusades*, p. 215.

¹⁸⁴ See Tyerman, p. 71; Tyerman, *Fighting for Christendom*, p. 137; Riley-Smith, *The Oxford History of the Crusades*, p. 72.

¹⁸⁵ Hudson, *Transactions of the Royal Historical Society*, p. 96.

evidence would suggest the courts appreciated its applicability to the movement. It is a secular expression of the canon in *Audita tremendi* that furnished a privilege to prevent legal proceedings against crusaders until they returned home or died.¹⁸⁶ The evidence suggests that Brundage's observation that 'there is ample evidence from the thirteenth century judicial and administrative records of the English kingdom that the crusader's essoin was frequently pled and was almost always respected in the royal courts' likely applied to the twelfth century.¹⁸⁷

The idea that a crusader could plead an essoin would have encountered no conceptual difficulty in the *curia regis*. There were two options available to them under the law, which once more reflects their dichotomous nature as both warrior and pilgrim. The essoin *de esse in peregrinatione* allowed at least a year and a day for a pilgrimage to Jerusalem or a discretionary period if elsewhere (Gl. 1.29). Pilgrims enjoyed a significantly longer period than other persons going overseas who had forty days to answer a summons (Gl. 1.25). However, most crusaders during the Third Crusade were directly under the command of Richard.¹⁸⁸ Therefore, a crusader could also plead essoin *per servitium regis* throughout the entire time they were in the Richard's service (provided they were not someone usually in the king's service) (Gl. 1.27). However, the chapter states that the essoin only applied in blanket form if the king summoned the essoiner. If they had entered the king's service voluntarily and went overseas, the forty-day period applied. Since *Glanvill* is silent about the crusader, it is unclear what rules applied, although the later adoption of a year and day as enjoyed by the pilgrim suggest the courts applied it to the crusader without conceptual difficulty. In practice, it was likely a matter of when a crusader returned or the court received notice of their death. Nonetheless, English crusaders attempted to avoid the possibility of lawsuits arising during their absence by resolving legal disputes before leaving.¹⁸⁹ This probably

¹⁸⁶ Phillips, *The Second Crusade*, p. 57; Brundage, *Medieval Canon Law and the Crusade*, pp. 15, 172.

¹⁸⁷ Brundage, *Medieval Canon Law and the Crusade*, p. 174.

¹⁸⁸ Tyerman, *England and the Crusades*, p. 183.

¹⁸⁹ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 139; see also Brundage, *Medieval Canon Law and the Crusade*, p. 159.

presented another opportunity to acquire funding.¹⁹⁰ If they wished, however, a crusader could abuse the rule to avoid legal actions by taking the cross and claiming essoin.¹⁹¹

The crusader who wished to plead an essoin had to appoint an attorney to act on their behalf.¹⁹² This rule is straight-forward. The purpose of the essoin is to recognise the principal is unable to come to court (Gl. 1.19). It is an exception to the general principle that a person cannot put another in their place without also being present in court (Gl. 11.1; Gl. 11.5). Brundage notes, citing *Fleta* and the *Patent Rolls* from Henry III's reign, that: 'In England, it was common for crusaders to secure from the king the right to appoint attorneys, usually laymen, to defend their interests before the royal courts'.¹⁹³ Nonetheless, Tyerman adduces evidence that attorneys safeguarded crusader property during their absence. He cites the example of Geoffrey Hose from Wiltshire who paid the exchequer £100 to hold his land in peace and appoint an attorney.¹⁹⁴ The purpose of the appointment was to buttress other legal protections that a crusader enjoyed.¹⁹⁵ An attorney is not the feoffee to use found in Maitland's example for the simple reason that they did not have ownership and cannot answer for land (Gl. 3.1). Such persons did not have a common law action if they were deseised of the land.¹⁹⁶ A custodian of the land also owed a principal warranty over land to maintain its integrity while in their care, and an action to recover *escambium*, land of the same value of that lost, could be brought against them.¹⁹⁷ It is clear Maitland did not conflate the role of attorney with the use although he noted, 'the germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the use, trust or confidence'.¹⁹⁸ The procedural rules surrounding essoin are far removed from the ingredients that Maitland identified as relevant to the use but do demonstrate the emerging common law could engage with crusading.

¹⁹⁰ Constable, *Crusaders and Crusading in the Twelfth Century*, p. 138.

¹⁹¹ Brundage, *Medieval Canon Law and the Crusade*, p. 174; Bailey, *The Cambridge Law Journal*, 1946, p. 192.

¹⁹² Brundage, p. 15.

¹⁹³ Brundage, *Medieval Canon Law and the Crusade*, p. 169.

¹⁹⁴ Tyerman, *England and the Crusades*, p. 71.

¹⁹⁵ Tyerman, p. 216.

¹⁹⁶ J. Shapiro, 'The Shetar's Effect in English Law – A Law of the Jews Becomes the Law of the Land', *The Georgetown Law Journal*, vol. 71, no. 4, 1983, p. 1190.

¹⁹⁷ Bailey, *The Cambridge Law Journal*, 1946, pp. 196 – 197.

¹⁹⁸ Pollock and Maitland, *The History of English Law*, vol. 2, p. 228.

Conclusion

The absence of the use in *Glanvill* challenges Maitland's suggestion that knights used it as part of their crusade preparations. Nonetheless, the argument that the use did have a connection to the Third Crusade is more reasonable than the connection with its predecessors since it did have a profound impact on English history.¹⁹⁹ The crusade movement also had the opportunity to shape secular law by occasion of their concurrent development. Furthermore, Henry II's administrative and legal reforms in England enhanced the position of crusaders. They exerted more rights over their land than earlier crusaders.²⁰⁰ However, there is no title or legal principle devoted to uses in *Glanvill*. If Ranulf de Glanvill wrote or supervised the text, and the use did exist, then he did not include it despite his experience with the crusade movement. Even if he did not write the treatise, its absence demands explanation. The simplest being that the use was not available to crusaders before the Third Crusade. An absent title, as Brundage noted for the canon law, is not necessarily surprising for legal instruments associated with the crusade.²⁰¹ Nonetheless, it is reasonable to expect if the use existed that it would be in *Glanvill*, which the author wrote to furnish a clear and complete statement of the law related to land. The evidence also suggests, contrary to Maitland's original theory, that the use did not form part of English law after 1066. Instead, *Glanvill* is the result of settling common law principles.

Glanvill offers legal historians the best snapshot into English law on the eve of the Third Crusade. The elements of the law Maitland identified as relevant to the creation of uses are present and treated in detail: military fee, descent of land, and probable concern about the legal position of women. Maitland, however, did not fully appreciate the novelty of the common law principles expressed in *Glanvill*. Military fee was an established landholding at the beginning of the twelfth century, but the rules related to the heritability of land were novel to English law before the Third Crusade. Maitland believed, erroneously, that English law had settled questions about heritability of military fee soon after the Conquest.²⁰² The novelty of the law appears to have created a sense that

¹⁹⁹ See Tyerman, *England and the Crusades*, p. 187.

²⁰⁰ See Brand, *Henry II: New Interpretations*, p. 237; Tyerman, *England and the Crusades*, p. 214.

²⁰¹ See Brundage, *Medieval Canon Law and the Crusade*, p. 168.

²⁰² See Thorne, *Cambridge Law Journal*, p. 193.

additional instruments, like the use, were not necessary to enhance the safeguards recently introduced. However, Maitland's crusader also contemplated that the operation of law may not protect his interests. Tyerman indicates situations may have arisen while crusaders were absent where the courts could not intervene.²⁰³ Maitland's crusader also appears to have an apprehension of death. However, the use does not appear to have been available to deviate from the negative consequence of primogeniture and wardship. Furthermore, crusaders could not make uses or other arrangements to support female relatives beyond what the law allowed. In some cases, however, a person had no remedy at law and had to rely on the discretion of the king to protect their interests.²⁰⁴ There is no hint of a secular notion of crusade jurisprudence in *Glanvill*, not even concerning essoin, which Angevin jurists remedied after the Third Crusade. The evidence suggests that the author(s) of the treatise, in the late twelfth century, were happy to leave the legal elements of crusading to the canonists.

²⁰³ Tyerman, *England and the Crusades*, p. 212.

²⁰⁴ See generally R. Turner, 'Changing Perceptions of the New Administrative Class in Anglo-Norman and Angevin England: The *Curiales* and their Conservative Critics', *Journal of British Studies*, vol. 29, no. 2, 1990, p. 114; J. Prestwich 'The Military Household of the Norman Kings', *The English Historical Review*, vol. 96, no. 378, 1981, p. 12; Turner, *Albion*, 1990, pp. 397- 398; W. L. Warren, *Henry II*, Berkeley, University of California Press, 1973, p. 386.

Chapter 5. Use-Like Legal Devices as Responses to the Third Crusade, 1187-1192

The belief that the use has some connection to the Crusades often settles on the Third Crusade as the crusade Maitland had in mind. It is a logical connection. The Third Crusade is known to have had a profound impact on English history. It is likely that popular perceptions about Richard I as a legendary figure strengthened this belief. Nonetheless, no justification has ever been provided for the assumed relationship between the use and the Third Crusade beyond what can be found in Maitland's example. Therefore, this chapter seeks to determine whether there is evidence to support the belief that the use arose during or as a direct response to the Third Crusade. It is first necessary to examine the legal measures Richard, England's crusader-king, took in the preparation phase of his crusade. These measures are divisible into steps taken to address general crusade issues, and those taken to protect the private property of crusaders. Richard's engagement with the law took advantage of the Angevin legal and financial apparatus that historians have frequently praised.¹ Maitland indicated that the use could be found in private arrangements. The second source of evidence, therefore, is the private arrangements made by crusaders to deal with their property. English knights confronted the same kinds of issues, including the protection of their family and property, which characterised legal preparation of earlier crusades.² However, their legal arrangements were coloured by the availability of subsidies that, for the first time, alleviated some of their stresses associated with a prolonged absence. Finally, it is necessary to examine the impact that the Third Crusade did have on English law to determine whether the use developed as a reflection on this third Jerusalem expedition.

Romanticism in Third Crusade Historiography

Romantic elements in the historiographical tradition of the Third Crusade may explain why academics in law schools seldom support their assertions that it is somehow related to the use. Reference to popular ideas associated with crusading also seems to explain

¹ Phillips, *The Crusades, 1095 – 1197*, p. 141.

² See Tyerman, pp. 209 – 210.

why law students are willing to believe the connection despite a dearth of evidence. The Third Crusade inspires more romantic recasting from both academics and fictional authors than any other crusade event.³ Historians give it special attention because it boasts the participation of powerful rulers, interesting figures, great events, and contains many allusions to epic.⁴ James Reston Jr, in *Warriors of God: Richard the Lionheart and Saladin in the Third Crusade* (2001), commented:

The Third Crusade, spanning the years 1187 – 92, is the most interesting of them all. It was the largest military endeavour of the Middle Ages and brought the fury of the entire crusading movement to its zenith. Perhaps more important, it brought two of the most remarkable and fascinating figures of the last millennium into conflict: Saladin, the Sultan of Egypt, Syria, Arabia, and Mesopotamia; and Richard I, King of England, known as the Lionheart.⁵

Histories are frequently framed by the conflict between the Richard Coeur de Lion, King of England, and his Moslem opponent Sultan Salah ad-Din.⁶ Numerous monographs and journal articles on both attest to the popularity of their rivalry.⁷ The Third Crusade, it would seem, is dominated by heroes and villains.⁸ It is unsurprising, therefore, that biographical histories are at the forefront of Third Crusade historiography because they appeal to popular interest in the fascinating personalities and heroism of their protagonists.⁹ Robert Irwin observed that historians have made use of the novelist's toolkit to present their work on the Third Crusade in a manner more exciting than fictional romance.¹⁰ Lawyers might also be forgiven for trying to enliven their subject by drawing on the same toolkit with the accepted truth of the use being a mythology built upon mythologies.

³ Reston, Jr., *Warriors of God*, p. xv; R. Irwin, 'Saladin and The Third Crusade: A Case Study in Historiography and the Historical Novel', in M. Bentley (ed.), *Companion to Historiography*, London and New York, Routledge, 1997, pp. 130 – 131.

⁴ Reston Jr., p. xiv; Phillips, *The Crusades, 1095 – 1197*, p. 138; Constable, *The Crusades from the Perspective of Byzantium and the Muslim World*, p. 4.

⁵ Reston Jr., pp. xiii – xiv.

⁶ Reston Jr., p. xiv; Phillips, *The Second Crusade*, p. xxiii.

⁷ Andrew Ehrenkreutz, *Saladin*, Albany, State University of New York Press, 1972, p. 2.

⁸ Falk, *Franks and Saracens*, p. 153.

⁹ See generally Qadir, *Islamic Studies*, p. 533; Phillips, *The Second Crusade*, p. xxiii; Reston, Jr., *Warriors of God*, pp. xiii – xiv.

¹⁰ Irwin, *Companion to Historiography*, p. 150.

The character of Richard I may share a portion of the blame along with Maitland for the accepted truth that now exists in equity courses. The significant role of an English monarch gives English-speaking readers a greater sense of connection to the Third Crusade than any other crusade.¹¹ Richard is often cast as a hero whose legend, like the use, is more widely known than the details of his life.¹² Both fiction and non-fictional accounts use Richard's character as an exemplar of chivalrous knighthood, which emphasises his bravery, intelligence, brashness, honour, and other qualities reminiscent of epic heroism.¹³ Even the less flattering account by French author Louis Maimbourg's *History of the Holy War* (1686) admits the English king's courage, while praising Phillip Augustus, despite a description of Richard as a person devoid of kindness, debauched, and a money-waster.¹⁴ The positive qualities resound deeper in English histories. Geoffrey of Vinsauf adulates Richard by saying:

He had the *virtus* of Hector, the magnanimity of Achilles, neither inferior to Alexander nor to Roland; he outshone many illustrious characters of our own times. He who had the liberality of Titus, and that which is rare in a soldier, the eloquence of Nestor, and the prudence of Ulysses.¹⁵

In addition to an eyewitness account, the author's use of epic shows off both his refined skills as a writer and his admiration for the King.¹⁶ Modern allusions to classical epic to describe Richard's character continue today.¹⁷ His qualities as a 'warrior-king' have often provided historians with an irresistible template to compare with Saladin, who also enjoys similar renown, as a legendary figure known for his wisdom.¹⁸ However, Maitland

¹¹ See generally J. H. Round, 'Some English Crusaders of Richard I', *The English Historical Review*, vol. 18, no. 71, 1903, p. 475; Reston, Jr., *Warriors of God*, p. xiv; Gillingham, *Richard I*, p. 3.

¹² See Gillingham, p. viii.

¹³ Reston, Jr., *Warriors of God*, p. xv; M. Markowski, 'Richard Lionheart, bad king, bad crusader?', *Journal of Medieval History*, vol. 23, no. 4, 1997, p. 352.

¹⁴ L. Maimbourg, *The History of the Holy War*, trans. J. Nalson, London, Printed by R. H. Jones, 1686, p. 191

¹⁵ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 143. 'Huic autem virtus Hectoris, magnanimitas eart Achillis, nec inferior Alexander, nec virtute minor Rolando; immo nostril temporis laudabiliores facile mutlifariam transcendens. Cujus, velut alterius Titi, et quod in tam famoso milite perrarum esse solet, lingua Nestoris, prudential Ulixis...'. Note similar was said of Tancred during the First Crusade in Ralph, *R.H.C. Occ.*, vol. 3, p. 695.

¹⁶ W. Purcell, *Ars Poetriæ: Rhetorical and Grammatical Invention at the Margin of Literacy*, University of South Carolina Press, 1996, p. 71.

¹⁷ Gillingham, *Richard I*, pp. viii – ix.

¹⁸ See Reston, Jr., *Warriors of God*, p. xv; P. M. Holt, 'Saladin and his Admirers, A Biographical Reassessment', *Bulletin of the School of Oriental and African Studies, University of London*, vol. 46, no. 2, 1983, p. 235; Ehrenkreutz, *Saladin*, p. 3; 'A. 'Ulwan, *Salah Ad-Din Ayyubi (Saladin) Hero of the Battle of Hattin and Liberator of*

may not have had Richard in mind when he thought about his example since nineteenth-century historiography painted Richard as a dedicated warrior but a ruler derelict in his duty to England.¹⁹ It is a view that continues to influence modern novelists and moviemakers who present him as a courageous but a simple-minded king.²⁰

To challenge romantic notions about Richard I and the Third Crusade, the modern law student has access to exceptional histories that do not cast their subject in the romantic glow of yesteryear. John Gillingham stands out as one of the most authoritative voices. He has written extensive biographical accounts on the life and reign of Richard,²¹ including his crusade activities and time in captivity in the Empire,²² with the intention of filling the gaps in knowledge created by romanticised accounts.²³ Writing in 2013, Ralph Turner and Ralph Heiser noted trends in modern scholarship that signal: 'In recent years, scholars employing different criteria have undertaken a re-evaluation of Richard by seeking to place him in his proper late twelfth century context and to judge him by the standards of his own age'.²⁴ The shift away from romantic accounts has provided insight into Richard's preparations and those of his crusaders. The same historiographical trends extend to modern treatments of the Third Crusade. As a subject, the Third Crusade is often addressed in general histories²⁵ or in thematic treatments²⁶ alongside other crusades. Christopher Tyerman, for example, devotes a chapter to the plans, recruitment,

Jerusalem from the Crusaders 532 – 589 A.H./1137 – 1193 C.E., trans. K. Ezzat Abu Zeid, 2nd edn, Cairo, Dar Al-Salam, 2007, pp. 198 – 199.

¹⁹ Gillingham, *Richard I*, pp. 2 – 3; Markowski, *Journal of Medieval History*, p. 352.

²⁰ Bird, Peters, and Powell, *Crusade and Christendom*, p. 11.

²¹ John Gillingham's biographies (as monographs) include: J. Gillingham, *Richard I*, New Haven, Yale University Press, 1999; J. Gillingham, *Richard Coeur de Lion: kingship, chivalry and war in the twelfth century*, London, Hambledon Press, 1994; J. Gillingham, *Richard the Lionheart*, London, Weidenfeld and Nicolson, 1978.

²² See further J. Gillingham, 'The Kidnapped King: Richard I in Germany, 1192 – 1194', *German Historical Institute London Bulletin*, vol. 30, no. 1, 2008, pp. 5 – 34.

²³ Gillingham, *Richard I*, p. viii.

²⁴ R. Turner and R. Heiser, *The Reign of Richard Lionheart: Ruler of The Angevin Empire, 1189-1199*, London and New York, Routledge, 2013, p. 5.

²⁵ E.g. S. Runciman, *A History of the Crusades*, Cambridge, Cambridge University Press, 1951 – 1954; J. Phillips, *The Crusades, 1095 – 1197*, Harlow, Pearson Education Limited, 2002; J. Riley-Smith (ed.), *The Oxford History of the Crusades*, Oxford, Oxford University Press, 1999.

²⁶ E.g. C. Hillenbrand, *The Crusades: Islamic Perspectives*, New York, Routledge, 2000; J. Folda, *Crusader Art in the Holy Land, From the Third Crusade to the Fall of Acre*, Cambridge, Cambridge University Press, 2005; M. Gladysz, *The Forgotten Crusaders: Poland and the Crusader Movement in the Twelfth and Thirteenth Centuries*, Leiden, Brill, 2012 see as an example of other thematic usages L. Diggelmann, 'Of Griffons and Tyrants: Anglo-Norman Views of the Mediterranean World during the Third Crusade', in L. Bailey, L. Diggelmann, and K. Phillips (ed.), *Old Worlds, New Worlds: European Cultural Encounters, c. 1000 – c. 1750*, Turnhout, Brepols, 2009, pp. 11 – 30.

and financing of Third Crusade as part of a wider exploration into the broad impacts of the crusade movement on England.²⁷ These histories have been valuable to the present thesis. However, Legal History remains on the periphery of Crusade scholarship.²⁸ The dearth of legal histories devoted to private law and the Third Crusade may explain why the apocryphal law student continues to believe the use is somehow connected to the crusades. Furthermore, the legal and administrative success of Henry II, discussed in the preceding chapter, have preoccupied legal historians. It could easily be assumed when reading *The History of English Law* that the most interesting legal development during the Third Crusade is that Richard's regulations contained the first recorded instance of tarring and feathering.²⁹ This thesis goes some way to fill the gap in Third Crusade historiography with respect to the private law use.

If Richard is, as popularly accepted, a negligent ruler or unlikely source for legal innovation, the attraction of connecting the use to the Third Crusade appears to have reconciled otherwise mutually exclusive ideas. It is a common narrative device in modern story-telling that brawn and brains are opposite forces. However, prior to the nineteenth century, historians perceived Richard as a capable ruler. Thomas Fuller in his *Holy Warre* (1639) thought Richard settled matters at home 'with the skill of a thousand princes' before his departure.³⁰ This view of the King is more resonant with the idea that the use developed as a response to the Third Crusade. Furthermore, modern historians have reassessed the character of Richard to recognise him as innovative and capable ruler.³¹ For example, historians continue to view him as a courageous leader but also recognise that he made the strategic decision to ensure the long-term survivability of Outremer at the expense of his ability to capture Jerusalem.³² Evidence that supports a connection between the use and the Third Crusade may be directly attributable to Richard. Gillingham observes that 'Richard's overriding priority was now the crusade.

²⁷ Tyerman, *England and the Crusades*, pp. 57 – 86.

²⁸ While the excellent contributions to legal understanding of the crusades made by historians such as Tyerman above cannot be discounted, Brundage, *Medieval Canon Law and the Crusade*, Madison, The University of Wisconsin Press, 1969 remains the best treatment.

²⁹ Pollock and F. W. Maitland, *The History of English Law*, vol. 1, p. 170. See Anon., 'Tarring and Feathering', *Current Comment and Legal Miscellany*, vol. 1, no. 12, 1889, p. 462.

³⁰ T. Fuller, *The History of the Holy Warre*, 3rd edn, Cambridge, Printed by Roger Daniel, 1647, p. 118

³¹ C. Tyerman, *Who's Who in Early Medieval England, 1066 – 1272*, London, Shephard-Walwyn, 1996, p. 249

³² Gillingham, *Richard I*, pp. 3 - 4; Bird, Peters, and Powell, *Crusade and Christendom*, p. 352; J. Riley-Smith, *The Crusades: A short history*, New Haven, Yale University Press, 1987, p. 113.

Contemporaries were unanimous in believing this was his highest duty ... that the prolonged absence of the ruler on crusade would create problems was obvious. They just had to be faced.’³³ More plainly, Richard’s focus included the anticipation of legal problems that he or his crusaders were likely to encounter. He similarly directed his attention towards the security of his realm and legal issues that may arise during his absence.³⁴ Richard attended to both. It is at least plausible that the use could have been part of his early law-making.

Richard might be forgiven for a lack of jurisprudential flair with the laws he made at the outset of the crusade. He is remembered primarily as an absentee king who spent a mere six months in England during his reign. Gillingham reminds us that Richard was foremost a continental ruler who counted England amongst his domains, and not the reverse.³⁵ However, the evidence suggests Richard spent his time productively. He made all the arrangements he could in the brief nine months allotted to the administration of his domains. Contemporaries note Richard appointed William Longchamp as both Chancellor and Chief Justiciar of England so that he held the highest secular offices.³⁶ The fact that William also held a powerful spiritual office as papal legate in addition to his bishopric in Ely prompted Richard of Devizes to note that William held all the exalted offices in England, which made him almost as powerful as the King.³⁷ It might be suggested such appointments were an inappropriate coalescence of executive and judicial power in the hands of a single person when other kings may have distributed such power.³⁸ Nonetheless, there appears to be some agreement amongst historians that Richard made appropriate appointments, and Longchamp’s later vilification did not diminish his decision-making.³⁹ Gillingham suggested that Richard’s preparations at home would likely have been effective but for the event of the King’s imprisonment, and

³³ J. Gillingham, *The Angevin Empire*, 2nd edn, London, Arnold, 2001, pp. 41 – 42.

³⁴ J. Gillingham and R. Griffiths, *Medieval Britain: A very short introduction*, Oxford, Oxford University Press, 1984, p. 30; see also Markowski, *Journal of Medieval History*, pp. 354, 361.

³⁵ Gillingham, *The Angevin Empire*, p. 1.

³⁶ See Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 145.

³⁷ Richard of Devizes, *Chronicle*, p. 13.

³⁸ See Hudson, *The Oxford History of the Laws of England*, p. 502.

³⁹ See Gillingham and Griffiths, *Medieval Britain*, p. 32; S. Painter, ‘The Third Crusade: Richard the Lionhearted and Phillip Augustus’, in K. Setton, R. Wolff and H. Hazard (ed.), *A History of the Crusades: Volume II: The Later Crusaders, 1189 - 1311*, Madison, The University of Milwaukee, 1969, p. 54; Tyerman, *Who’s Who in Early Medieval England*, pp. 250, 260 – 261.

the fractious relationship between John and Longchamp.⁴⁰ Nonetheless, it is clear that Richard arranged affairs in England in a hurry. Geoffrey makes this clear when it states that ‘having made the necessary preparations for his journey, and having arranged the affairs of the King of England as much as time permitted, without delay, he returned to Normandy’.⁴¹ They also reflect a broader pattern of a king wielding his power and working within the existing law to protect his subjects and their subjects from the effects of political threats.

Richard’s contribution to Crusade Jurisprudence

Richard made numerous legal contributions to the Third Crusade. His most visible measure to protect crusader property is the Treaty of Nonancourt (13 January 1190) with Phillip Augustus to ensure co-operation between the two kingdoms ‘to keep faith with each other and their respective armies’ on pain of excommunication anathema.⁴² The effect of this statement was to ensure that the land of crusaders would be protected from trespassers external to the realm. It was similar in nature to the treaty signed by Henry II and Louis VII as part of their crusade preparations.⁴³ Richard of Devizes believed a treaty was necessary for both kings to feel secure enough to leave their respective realms.⁴⁴ Lesser counts and barons also affirmed the agreement to keep the faith between each other.⁴⁵ The treaty itself was not intended to address private law issues, where the use might be applicable, but to protect crusaders from major political upheaval.⁴⁶ It illustrates, nevertheless, that Richard was sympathetic to their concerns. Further, the evidence suggests Richard understood the impact of the legal arrangements he made. When the parties agreed to the treaty, Richard had already decided to repudiate a

⁴⁰ Gillingham, *Richard I*, p. 112; Gillingham, *The Angevin Empire*, p. 42; see also Tyerman, *Who’s Who in Early Medieval England*, p. 253.

⁴¹ Geoffrey de Vinsauf, *Chronicles and memorials of the reign of Richard I*, p. 145 *Præparatis itaque itineri necessariis, et regno Angliæ disposito quantum permiserat temporis angustia, sine mora rediit in Normanniam.*

⁴² Roger of Howden, *Chronica*, vol. 3, pp. 30 – 31; See generally on Richard’s preparations, J. France, *The Crusades and the Expansion of Catholic Christendom, 1000 – 1714*, Oxford, Routledge, 2005, p. 153; Tyerman, *Fighting for Christendom*, p. 53; Painter, *A History of the Crusades*, p. 56.

⁴³ L. Victor and E. Berger (ed.), *Recueil des Acts Henri II*, vol. 2, Paris, Imprimerie Nationale, 1916, no. 506.

⁴⁴ Richard of Devizes, *Chronicle*, p. 15.

⁴⁵ Roger of Howden, *Chronica*, vol. 3, p. 42.

⁴⁶ Gillingham, *Richard I*, p. 123; Painter, *A History of the Crusades*, p. 49.

betrothal with Phillip's sister in favour of an alliance with Navarre.⁴⁷ Phillip, understandably angry, returned from the Holy Land before Richard to instigate an attack against his territories.⁴⁸ However, the effect of the treaty made Phillip's barons reticent to join the King in attacking the lands of a crusader.⁴⁹ The value he placed on the law to effect an outcome is further demonstrable by the use of oaths taken from his brothers, the Scottish king, and Welsh princes to further ensure the security of the realm.⁵⁰ Richard was not as simple-minded as popular portrayals have suggested.

The general regulations he made during the crusade do not introduce the use despite Richard being engaged with legal issues associated with crusading. His legal measures, however, indicate a king using the law to address logistical concerns associated with crusading. Richard of Devizes even suggests that Richard acquired the name 'the Lion' because of how he interacted with the law:

The king of France concealed whatever his men did or suffered, or kept silent about it. The king of England giving no heed to the nationality of anyone involved in a crime, considered every man his subject and left no offence unpunished. For this reason the Griffons [Greek-speaking Sicilians] called one king the Lamb and the other the Lion.⁵¹

This description identifies Richard as an effective administrator of justice rather than a legal innovator, and this distinction appears to characterise his legal activity at the outset of the crusade. The view of Richard as using the law to achieve specific outcomes is evident in the regulations he made during the crusade. At Messina (20 June 1190), he introduced regulations to address murder, theft, bad language, gambling, desertion, inflation, and restrictions on the sale of commodities within the army such as bread, flour, meat, and wine.⁵² The concern with logistics and military discipline seem to highlight

⁴⁷ Gillingham, *The Angevin Empire*, p. 42.

⁴⁸ Gillingham, *Richard I*, p. 6.

⁴⁹ Powicke, *The Loss of Normandy*, p. 126.

⁵⁰ Gillingham, *The Angevin Empire*, p. 42.

⁵¹ Richard of Devizes, *Chronicle*, pp. 16 - 17. 'Rex Francie quicquid sui peccarent vel peccaretur in suos dissimulavit et tacuit. Rex Anglie, pro indifferenti habens cuius crimen involveret, omnem hominem suum reputans, nichil iniuriarum reliquid inultum. Unde et unus dictus est agnus a Grifonibus, alter leonis nomen accepit'.

⁵² Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 2, pp. 130 -132. At p. 110, Benedict reports Richard also addressed criminal matters at Chinon (20 June 1190).

Richard's extensive experience as a military commander.⁵³ Richard made law with an immediate purpose in mind. He also made law that impacted upon private property where it benefitted his soldiers. For example, he restricted the testamentary dispositions of crusaders to half their personal property with the other half entering the common fund controlled by ecclesiastics and military orders.⁵⁴

Richard took steps to protect private property interests in his territories before and during the crusade on a case-by-case basis. J. H. Round's *Calendar of Documents Preserved in France Illustrative of the History of Great Britain and Ireland* includes many examples of Richard granting (either property or privileges) or confirming grants to ecclesiastics made by himself or his family early in his reign.⁵⁵ Richard appears to have addressed ecclesiastical matters⁵⁶ and secular⁵⁷ issues both immediately before his departure in late June and July, and six months later around late December and January (1190/1191). The charter evidence suggests it is also unfair to suppose Richard neglected his royal duties either before or during his campaign. His busy timetable is evident in a charter (7 August 1190) that suggests Richard granted privileges to the abbey of La Boissière at Marseilles 'on the day we set out for Jerusalem, the first year of our reign'.⁵⁸ Several charters from his French domains demonstrate how he protected private property rights while on crusade. In Normandy, Richard granted (9 October 1189) protection to the person and property of Walter de St. Valery, immediate access to justice if this protection was violated, and prohibited legal actions against his property during the King's absence.⁵⁹ The protection explicitly states that Walter's lands were to be treated as if they were part of his demesne. He extends this protection to the abbey of Ardennes, and once more makes an order that it is not to be impleaded from the day he sets out to the day he

⁵³ See generally, K. von S. Kynell, *Saxon and Medieval Antecedents of the English Common Law*, New York, The Edwin Mellen Press, 2000, p. 68; Gillingham and Griffiths, *Medieval Britain*, p. 30; Tyerman, *Who's Who in Early Medieval England*, p. 252.

⁵⁴ Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 2, p. 130.

⁵⁵ See for example J. Round (ed.), *Calendar of Documents Preserved in France Illustrative of the History of Great Britain and Ireland*, vol. 1, London, Eyre and Spottiswoode, 1899, nos. 47, 48, 58, 260, 268, 269, 307, 308, 337, 440, 459, 518, 519.

⁵⁶ See Round, *Calendar of Documents*, vol. 1, nos. 58, 59, 270, 1088.

⁵⁷ See Round, nos. 112, 309, 535, 536, 1253.

⁵⁸ Round, no. 1164. 'Datum apud Marsiliam, die quo mare intravimus Jerosolimam transfretandus sic anno primo regni nostri'.

⁵⁹ Round, no. 45.

returns.⁶⁰ In a slight variation, the protection he grants to the abbey of Lonlay in Normandy states that actions touching the land can only be heard by himself or his chief justiciar during his absence.⁶¹ The above examples from Round's *Calendar* do not concern crusader lands. Nevertheless, they do offer insight into how Richard's protection operated to secure private property rights for a prolonged period. It is an approach, however, which is not conducive to a jurisprudential creation of uses.

The *Calendar* shows that Richard replicated the legal activity in his French territories within his English kingdom, which indicates he broadly applied grants of protection across his realm. A charter (1189) concerns a 'grant by the king to the nuns of Saint-Mary in Wikes, of a fair to be held yearly at Michaelmas for three days, and confirmation of all grants to them by [Henry II], with a further grant of freedom from all pleas and suits etc. in the king's land'.⁶² In another charter (1189), Richard instructs his sheriffs and officers to enforce the liberty of Westminster Abbey.⁶³ He reiterates his instructions in another charter to command his sheriffs and officers to treat his grant of lands and rents to the abbey as if they were part of the royal demesne.⁶⁴ Richard utilised the sheriff's office to protect lands in England at a local level, similar to the situation in his Norman duchy, and granted them the power to seize offenders.⁶⁵ A charter granting a monetary gift and other liberties clearly indicates that the people charged with upholding royal grants in his absence were the sheriffs, justices, and bailiffs, on penalties of a ten-pound forfeiture.⁶⁶ There is no conceptual difficulty with the idea that Richard could extend this protection to crusaders. The full implications are found in a charter (10 November 1189)⁶⁷ addressed to all his Norman liegemen (and subsequently others)⁶⁸, which confirms all the grants of land to the Knights' Templar throughout Normandy, and grants them release from services except those owed to himself. Richard adds their properties should be protected as if his own and that any controversies ought to be heard before himself or his

⁶⁰ Round, no. 520; see also Round, no. 101.

⁶¹ Round, no. 700.

⁶² Public Record Office, *A descriptive catalogue of Ancient Deeds*, vol. 3, London, Eyre and Spottiswoode, 1900, no. A. 5272.

⁶³ E. Mason (ed.), *Westminster Abbey Charters, 1066 - c. 1214*, London, London Record Society, 1988, no. 42.

⁶⁴ Mason, *Westminster Abbey Charters*, no. 46.

⁶⁵ Hudson, *The Oxford History of the Laws of England*, p. 265.

⁶⁶ W. Farrer (ed.), *Early Yorkshire Charters*, vol. 1, Edinburgh, Ballantyne, Hanson & Co, 1914, no. 365.

⁶⁷ Round, *Calendar of Documents*, vol. 1, no. 271.

⁶⁸ Round, no. 272.

seneschal.⁶⁹ Richard instructed his castellans and bailiffs in the manner of his English sheriffs to protect, maintain, and advance the property held under his protection and to pursue suits against transgressors.⁷⁰ There is a further dimension to this charter that requires explanation. He states anyone who had custody of Templar property must guard it against harm.⁷¹ The legal implications of this added duty are unclear but it demonstrates that Richard used the apparatus available to him to protect property rights during his absence.

There is evidence that Richard did extend the above protections to English crusaders and he instructed William Longchamp to safeguard their interests. In a series of charters, the Chancellor prohibited several churchmen from interfering with property held by the deceased Archbishop Baldwin or bringing proceedings against his lands.⁷² The testamentary wishes of Baldwin, who had died at the siege of Acre, were also honoured.⁷³ Ecclesiastics such as the archbishop supported the army and even had combat roles in the expedition.⁷⁴ Longchamp also forbids the bishop of Bath, and the abbots of Reading and Waltham from bringing proceedings against abbot William of Saint-Mary, and the monks there who hold the church at Eynesford and a chapel at Farningham. He makes explicit reference to the crusader status of William in his letter:

Since William journeys forth to capture Jerusalem, in his absence he possesses the church and chapel lawfully and in peace. Hence we strictly prohibit that which is against the assize of crusaders such vexation or molestation, greater still that he holds the church and chapel by donation in the memory of Baldwin, archbishop of Canterbury. We do not expect that condition of the archbishopric, as long as it is in the protection of the lord King and ours, be any way altered.⁷⁵

⁶⁹ Round, no. 271.

⁷⁰ Round, no. 54.

⁷¹ Round, no. 273.

⁷² *Epistolae Cantuarienses*, in W. Stubbs (ed.), *Chronicles and Memorials of the Reign of Richard I*, vol. 2, London, Longman, 1865, pp. 342 – 343 (nos. 367, 368).

⁷³ Tyerman, *England and the Crusades*, p. 63.

⁷⁴ Tyerman, *The Horns of Hattin*, p. 19.

⁷⁵ Stubbs, *Chronicles and Memorials of the Reign of Richard I*, vol. 2, p. 343. 'Willelmus iter arripuit eundi Jerusalem, et quando tunc illud arripuit, ecclesiam illam cum capella prædicta bene et in pace possedit. Hiuc est quod prohibemus districte, ne contra assisam cruce signatis inde vexetur aut gravetur, maxima etiam cum ecclesiam cum capella habeat de donatione bonae memoriae B. Cantuariensis archiepiscopi. Non enim sustinebimus quod status ipsius archiepiscopatus, quamdiu est in custodia domini regis et nostra, in aliquo mutetur'.

This charter might be interpreted to mean that crusader lands must be free from interference and indicates that they are under the protection of the King and Longchamp as chancellor. An alternative view is that the protection granted to Baldwin extends to William since his land is in the protected archbishopric. By analogy, if Richard extended his protection to his tenants-in-chief, their knights would also be protected. The reference made to the assize of crusaders indicates secular protection of spiritual crusader privileges. By contrast, the arrangements mentioned in the previous chapter by Geoffrey Hose in 1188 may not have come under royal protection since he left before the main force.⁷⁶

The use is absent from the abovementioned measures that Richard made to protect private property interests. His arrangements after his return from imprisonment by the Hohenstaufen reinforce the idea he wielded law-making as a tool to accomplish specific objectives.⁷⁷ He returned to a plethora of internal political problems in England, including John's rebellion and personal collection of royal revenues, the external threat posed by Wales, reduced revenue from the prerogatives of royalty that had been unavailable to his officers, and the extraordinary taxation to raise the king's ransom (1193).⁷⁸ Richard is largely remembered for his successful defence of Normandy (1193 – 1198) in the final years of his reign.⁷⁹ However, he also attended to outstanding legal issues immediately after he returned. The *Articles of Eyre* (1194) states in its first chapter that the articles 'concern new and old pleas and all those not yet determined before the King's justiciars' (cap. 1).⁸⁰ The apparent retrospective effect of the articles means these laws are intended to include matters that Richard could not address, and reviews and pleas that are summoned by royal writ, the chief justice, or those persons otherwise before the courts (cap. 2). The measures Richard passed had a sweeping effect, and included: the return of land to the King that escheated after his departure for the Holy Land (cap. 3), ecclesiastical donations (cap. 4), guardianship of children (cap. 5), marriages of young

⁷⁶ Tyerman, *England and the Crusades*, p. 71.

⁷⁷ Hudson, *The Oxford History of the Laws of England*, p. 259.

⁷⁸ Barratt, *The English Historical Review*, pp. 640 – 641.

⁷⁹ V. Moss, 'The Defence of Normandy 1193 – 1198', in J. Gillingham (ed.), *Anglo-Norman Studies XXIV: Proceedings of the Battle Conference 2001*, Woodbridge, The Boydell Press, 2002, p. 145.

⁸⁰ Stubbs, *Select Charters*, pp. 250 - 255. 'De placitis coronae novis et veteribus et omnibus quae nondum sunt finita coram iustitiariis domini regis'.

girls and widows (cap. 6), the prosecution of wrongdoers and those harbouring them (cap. 7), and forgers (cap. 8). Chapter 9 speaks to Richard's reputation as an administrator of justice because it deals with the attacks on the Jewish community by crusaders, including their punishment, which occurred at the outset of his expedition.⁸¹

The abovementioned articles pursue specific legal objectives rather than introduce novel institutions. Richard appears to have been limited in what he could accomplish, and the evidence suggests he never turned his mind to the use. The absence of articles concerning trespassers against crusader lands suggests such an arrangement was not even perceived as necessary during the Third Crusade. The *Articles of Eyre* initiate an inquisition into chattels owned by crusaders who died before they reached Jerusalem to determine 'who held them, what they are, and what they are worth'.⁸² Tyerman opines this is an example of Richard stepping over ecclesiastical primacy in crusade administration.⁸³ An exercise of authority in this manner seems to reflect how the King engaged with the law, which is also evident when he famously ignored the canon law condemnation of tournaments (1194).⁸⁴ It is implicit that trespassers against the estates of crusaders would be remedied. There are several reasons that, when considered together, may explain why the *Articles* do not discuss trespassers against crusader lands. The first is that, as a rule, the opportunity to secretly interfere with movables such as chattels is greater than immovables such as land. Legal issues of this kind would have been known to the courts. Second, the King appears to have protected crusader land with the effect of reducing the opportunities for analogous trespassers. Finally, the operation of law as mentioned in the above chapter created a degree of certainty about who inherited to the crusader's estate. The use would have been an unnecessary addition to laws functioning as the King intended.

Private legal arrangements during the Third Crusade

⁸¹ See generally Tyerman, *The Horns of Hattin*, p. 21.

⁸² Stubbs, *Select Charters*, p. 252. 'Item de cruciatu mortuis ante iter suum arreptum versus Jerusalem, et quis eorum catalla habuerit et quae et quanta'.

⁸³ Tyerman, *England and the Crusades*, p. 225.

⁸⁴ Gillingham, *Richard I*, p. 278.

The private legal arrangements of crusaders are another likely source for the use. As mentioned in the previous chapter, the Third Crusade was a significant event in England that affected all aspects of society. Tyerman states English crusaders, like their continental counterparts, included skimmers, blacksmiths, millers, cobblers, tailors, potters, butchers, vintners, and bakers.⁸⁵ These men appreciated that crusading demanded they risked both their lives and their property.⁸⁶ Each English crusader, even those described as *burgenses* and *rustici* in the Saladin Tithe, held land in some form.⁸⁷ Furthermore, even landholders who did not participate in the Third Crusade made legal arrangements to support those who did.⁸⁸ Legal historians might expect the use to appear somewhere amongst the numerous arrangements that touched land. Tyerman's research leads him to echo the concerns of Maitland's crusader:

Crucesignati were not unaware of the risks they ran and the need to find some sort of reliable security. The search for protection, especially where the only heir was a daughter, was a major theme of many departing crusaders' arrangements. The need for extrinsic guarantees was self-evident; dangers threatened from all sides.⁸⁹

However, most arrangements made by English crusaders followed the same pattern of legal arrangements made by their predecessors on the First Crusade with the exception that money had become readily available, and they did not compete to the same extent to raise it.⁹⁰ Their pre-occupation, nevertheless, remained with financial and spiritual support for the crusade.⁹¹

Tyerman cites numerous charters demonstrating that crusaders frequently sold, leased, or mortgaged land in anticipation of the Third Crusade.⁹² The Angevin government took steps to enable crusaders to make the legal preparations necessary to undertake the expedition.⁹³ Tyerman observes that the '[canon law] crusade privileges were closely

⁸⁵ Tyerman, *The Horns of Hattin*, p. 17.

⁸⁶ Tyerman, *England and the Crusades*, p. 58.

⁸⁷ Tyerman, *The Horns of Hattin*, pp. 17, 26.

⁸⁸ Tyerman, *England and the Crusades*, p. 83.

⁸⁹ Tyerman, p. 215.

⁹⁰ Cazal Jr., *A History of the Crusades*, p. 116.

⁹¹ Cazal Jr., p. 118; S. Lloyd, *The Oxford History of the Crusades*, p. 54.

⁹² Tyerman, *England and the Crusades*, p. 65.

⁹³ Tyerman, p. 61.

integrated into the common law and administered by a usually sympathetic government'.⁹⁴ He outlines the temporal privileges operable during the Third Crusade:

... protection for the cruceignatus, his family, and property; accelerated litigation before his departure; esoin of court after his departure; freedom to sell, lease, or mortgage property with the consent of the interested parties; moratorium on debts; exemption from interest; and immunity from taxation.⁹⁵

The use, it might be noted, does not appear in this list. Furthermore, the secular arm also took an active role in the promulgation of law related to crusading. The ordinances issued by the Council of Geddington (1188) addressed matters such as restrictions on gambling and female participation (stat. 1 – 5).⁹⁶ It made no reference to the use. Both canon law and secular sources also illustrate how significant debt law was to the *corpus* of crusade jurisprudence.⁹⁷ It had been important since the First Crusade. The evidence suggests that few crusaders were willing to take the cross without a clear legal statement on the treatment of crusader debts.⁹⁸ The Geddington ordinances allowed creditors to enjoy the fruits of land lawfully pledged for a period of three years after the crusader set out, but without collecting interest on the money (stat. 6, 7). However, it was in the interests of both debtor and creditor that the law was clear. Richard and Phillip addressed residual uncertainties about the operation of this principle when they passed the regulations at Messina that clarify 'if any crusader having begun their mission receives a loan from another man, then he shall pay his debt. If he takes a loan before his mission, he does not have to pay during his journey'.⁹⁹

The terms contained in mortgages to protect the interests of family members is the closest that crusade jurisprudence comes to contemplating a private law use-like arrangement over land. Crusaders on the Third Crusade pledged land or an interest in

⁹⁴ Tyerman, p. 220.

⁹⁵ Tyerman, p. 217.

⁹⁶ Reproduced in Gervase of Canterbury, *Opera Historica*, in W. Stubbs (ed.), *The Historical Works of Gervase of Canterbury*, vol. 1, London, Longman & Co, 1879, p. 409.

⁹⁷ Cazal Jr., *A History of the Crusades*, p. 121.

⁹⁸ Tyerman, *England and the Crusades*, p. 64.

⁹⁹ Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 2, p. 131. 'Si autem peregrinus aliquis postquam iter arripuerit ab aliquot homine in via aliquid mutuo acceperit, mutuum solvet. De eo autem quod ante iter accepit, non tenetur respondere in via'.

land to a creditor to hold for a term, protecting it while in their possession (else they commit waste), to be returned to them.¹⁰⁰ It has the effect of carrying out the primary purpose of Maitland's use: safeguarding the land and the interests of family members during the crusader's absence.¹⁰¹ Furthermore, the arrangement is transitory in nature unlike an outright alienation because the land would pass back into the patrimony of the crusader. Finally, the creditor is not enfeoffed fully of the land and so never acquires full ownership of it. However, the principal difference that distinguishes the use from a credit arrangement is the latter is a species of obligation. Both parties enter the arrangement with the primary purpose of obtaining a benefit for themselves and not with a mind to benefit a third party. If a credit arrangement benefits a third party, it is incidental to its primary purpose. Nonetheless, credit arrangements could include terms to benefit third parties or achieve purposes outside the scope of a simple loan. These auxiliary purposes, as evident in First Crusade charters, could ensure safeguards are established to ensure devolution of land to the desired heir.

The attempts that creditors and crusader debtors made to circumvent the law come even closer to the theory of the use during the crusades. The grant of a mortgage with a condition annexed to it could circumvent the law, which is a characteristic often subscribed to the use. For example, a charter (1189) records Lord Guy of Dampierre-Saint-Dizier, a crusader, gave a rent of 5 muids of wine from the vine at Moëlain and half a muid of wheat, on condition that if the vine did not produce 20 muids, as previously enjoyed by the lord, the annuity would be allocated the following year.¹⁰² The effect of this charter is to guarantee a return on a loan, effectively interest, contrary to strict prohibitions against usury. The practice happened in England. A charter (1190) made after the coronation of Richard I describes how William de Turevill pledged to Richard of Kent to hold all his lands at Woodcote and Chelmscote in exchange for thirty-three silver marks.¹⁰³ The editor, J. H. Round, indicates the rent arrangements behind this charter evaded the prohibition of usury and allowed Richard to enjoy the difference between the

¹⁰⁰ Cazel Jr., *A History of the Crusades*, p. 120.

¹⁰¹ See Tyerman, *England and the Crusades*, p. 207. The author notes creditors resorted to either the law or armed force to defend their interests.

¹⁰² E. de Barthélemy (ed.), *Recueil des chartes de L'abbaye de Notre-Dame de Cheminon*, Paris, H. Champion, 1883, p. 65.

¹⁰³ J. H. Round (ed.), *Ancient Charters, Royal and Private*, London, Wyman & Sons, 1888, no. 56.

nominal rent and the real annual value.¹⁰⁴ He hypothesised that William de Turevill had been a crusader and this charter is an example of a mortgage arrangement between Christians.¹⁰⁵ Aside from using the arrangement to circumvent the general law, a mortgage with a condition annexed has only a passing similarity to the use. There are further examples of credit arrangements that avoid debt terminology altogether by taking the form of mutual gifts.¹⁰⁶ However, the passing similarities are not sufficient to subscribe to a theory about the use as part of the Third Crusade.

Why no use during the Third Crusade?

The Third Crusade strained the fabric of English society, and it might be expected the use might have alleviated some of the pressure on individual crusaders. J. H. Round's analysis of the 1189 pipe roll evidence showed the significant financial burden of the Saladin Tithe to meet the costs of crusading.¹⁰⁷ The Saladin Tithe, however, was not sufficient to fund the expedition.¹⁰⁸ King Richard's previous military experience meant he appreciated that military campaigns demanded vast sums of money to be successful.¹⁰⁹ Therefore, the King set out to raise money in any manner he could during his time in England, which contemporaries did not comment upon warmly.¹¹⁰ William of Newburgh put the following words into the King's mouth: 'I would also sell London if I could find a suitable buyer'.¹¹¹ Nonetheless, Richard successfully raised the money he needed. Richard de Devizes reports that the fleet departed in splendour.¹¹² Because of the King's efforts, Tyerman comments, 'the Anglo-French expedition which set out two years later came to be dominated by the personality, followers, and resources of Richard I, whose superiority in men, money, and equipment was acknowledged even by hostile witnesses'.¹¹³ He

¹⁰⁴ Round, *Ancient Charters*, p. 94.

¹⁰⁵ Round, p. 95.

¹⁰⁶ Tyerman, *England and the Crusades*, p. 197.

¹⁰⁷ J. H. Round, 'The Saladin Tithe', *The English Historical Review*, vol. 31, no. 123, 1916, p. 448.

¹⁰⁸ Round, *The English Historical Review*, p. 449.

¹⁰⁹ Tyerman, *England and the Crusades*, p. 79.

¹¹⁰ R. Heiser, 'Richard I and his Appointments to English Shrievalties', *The English Historical Review*, vol. 112, no. 445, 1997, p. 1; See for example, Benedict of Peterborough, *Gesta Regis Henrici Secundi*, vol. 2, p. 91

¹¹¹ William of Newburgh, *Historia Rerum Anglicarum*, p. 306. 'Lundonias quoque venderem, si emptorem idoneum invenirem'.

¹¹² Richard of Devizes, *Chronicle*, pp. 15 – 16.

¹¹³ Tyerman, *England and the Crusades*, p. 59.

suggests the Messina decree forbidding crusader serjeants and sailors from changing masters without permission was a French response to prevent Richard outbidding Phillip for men.¹¹⁴ It is clear that English Crusaders benefitted from this money.

Crusaders on the Third Crusade had more options than their predecessors and could draw money from private arrangements, the royal treasury, and the central fund. The greater availability of wealth and its redistribution to crusaders allowed them to make more prudent legal arrangements than their predecessors. The central fund, consisting of assets from dead crusaders, was intended to be a safety-net to benefit the deceased's servants and the poor (Geddington Ordinances, stat. 8).¹¹⁵ This fund was only of marginal significance to most crusaders.¹¹⁶ In contrast, the royal treasury introduced in the Third Crusade fundamentally changed crusading as the royal apparatus actively sought to ease the financial burdens of crusaders.¹¹⁷ Richard, it appears, had raised sufficient money to pay his crusaders and cover part of their costs.¹¹⁸ His direct contribution to crusader costs may have allowed the King to tarry and pursue other objectives such as the conquest of Cyprus without protest, a position unlikely if crusaders did not enjoy direct financial support. Furthermore, he had even set money aside to support the wives of crusaders in hardship.¹¹⁹ The existence of the royal treasury appears to have mitigated the loss of land associated with the crusade movement and, therefore, partly negated the function of the use to protect family patrimony. Nonetheless, the alienation of land was contrary to social *mores* about dynastic continuation tied to its ownership, and Tyerman suggests its practice is a peculiarity of the crusade movement.¹²⁰

The evidence suggests crusaders who left with Richard were better off than the contingent who left for the Holy Land before the King. Ambroise suggests that knights committed themselves to the crusade even if it meant selling off their inheritance.¹²¹ This passage indicates a significant practice of alienation existed at the expense of family

¹¹⁴ Tyerman, p. 64.

¹¹⁵ Tyerman, p. 64.

¹¹⁶ Tyerman, p. 195.

¹¹⁷ Tyerman, p. 203; Cazel Jr., *A History of the Crusades*, p. 148.

¹¹⁸ Cazel Jr., p. 147.

¹¹⁹ Tyerman, *England and the Crusades*, p. 210.

¹²⁰ Tyerman, pp. 208, 211.

¹²¹ Ambroise, *The History of the Holy War*, p. 30.

welfare. Alienation appears more frequently in charters made by those who left before Richard. For example, in 1188 a Norman knight named Paien du Bosc alienated, with his wife's consent, a vineyard to Bishop Maurice of Paris *in perpetuum* and received 20 solidis except for the 8 denariis tax levied as an additional payment to the 'holy knights' or their successors.¹²² Another example is found in the charter made by Reginald of Disesia who donated land to the monks of Cluny for the redemption of his soul.¹²³ They would possess it free from further sale or donation. The willingness to alienate patrimony would also appear to apply to English arrangements. Walter Le Nair gave to the nunnery at Swine two bovates of land capable of supporting one knight at Skirlington, previously held by his father, for five marks for his journey to Jerusalem.¹²⁴ In addition to making family members vulnerable, alienation in this manner excludes the possibility it could be put into use. Those who alienated land likely perceived their actions as an undesirable but expedient method of obtaining cash.¹²⁵ However, not every crusader alienated land in a manner that left family vulnerable. The more careful arrangement made by Roger de Mowbray, leaving before Richard's force, gave his friend William de Tickhill, and his heirs, all his manors in the town of Askham with an advowson for the Church, and all appurtenances in exchange for one mark a year for him and his heirs.¹²⁶ This did not outright divest his family, who retained some of the benefits of the land. Nonetheless, there is no evidence to suggest that the use was available to crusaders leaving before the main force.

The availability of the royal fund, on the other hand, allowed the crusaders who left with Richard to balance the need for funds with the protection of family members. This is evident by the increased number of charters recording arrangements between family members by those who left with Richard. Mortgages between family members did not upset dynastic interests to the same extent as those between strangers while crusaders still received the credit necessary for their journey.¹²⁷ It is also clear family members

¹²² E. de Barthélemy (ed.), *Recueil des chartes de L'abbaye Royale de Monmartre*, Paris, H. Champion, 1883, p. 124.

¹²³ Bernard, *Recueil des chartes de L'abbaye de Cluny*, vol. 5, p. 705.

¹²⁴ Farrer, *Early Yorkshire Charters*, vol. 3, no. 1409.

¹²⁵ Tyerman, *England and the Crusades*, p. 198.

¹²⁶ Farrer, *Early Yorkshire Charters*, vol. 1, no. 547. See H. Thomas, 'Mowbray, Roger de', *ODNB*, vol. 39, pp. 588 – 590.

¹²⁷ Tyerman, *England and the Crusades*, p. 199.

might be trusted to take care of matters at home. John of Penigeston attested with knights and other men that Henry de Wlfei gave a moiety to the canons of St. Oswald for his soul, and that when he set out for Jerusalem that 'I [John] put in my place my brother William, who is the custodian of my lands and heirs' (*posui in loco meo Willelmum fratrem meum, qui est custos terre et heredis mei*).¹²⁸ Family members also supported each other by increasing lands available to the crusader for mortgage. Roger of Peytevin, for example, granted all his land in Normanton to his brother Hugo for his homage and service, and for journeying to Jerusalem in his place.¹²⁹ Finally, charters to family members could include female family members. This is evident in one charter (1189 – 1190) where Roger, son of the knight Richard de Touche, gave to his daughter Matilda (married to Roger de Birkyng) and her heirs his manor with appurtenances (free men, bonds, wards, relief, escheats and all other warranties) at Over Shitlington on the day that he left with King Richard to journey against the Holy Land.¹³⁰ If Matilda, however, died without heirs the land would pass to his sister Agnes and her son and heir Henry de Touche to hold *imperpetuum*. This crusader had no concerns about granting land to women without an intervening male landholder, and the feoffment is intended to benefit foremost his daughter or sister rather than their male heirs. This early example of a reversion clause, if the charter is authentic, is a sound substitution for a use because it allowed the feoffor to benefit a third party if the first arrangement failed. The use continues to be absent from crusader arrangements during the Third Crusade but the availability of a royal fund appears to have reduced the need for it.

Long-term impact of the Crusade Movement on English law

Tyerman summarised his chapter on the Third Crusade with the comment that it would have a profound impact on England's future.¹³¹ This is also true of the law. Legal principles devoted to crusading arose in direct response to the Third Crusade. The germs of the common law, on matters of crusading, were first formed in Normandy. It is evident that both English and Norman jurists in the Angevin Empire began to consider the impact

¹²⁸ Farrer, *Early Yorkshire Charters*, vol. 3, no. 1787.

¹²⁹ Farrer, no. 1573.

¹³⁰ Farrer, no. 1748. Further research into the reversion clause evident in this charter is necessary but outside the scope of this thesis.

¹³¹ Tyerman, *England and the Crusades*, p. 85.

of crusading on the law. A collective policy appears to have driven an effort to clarify the impact of royal privileges to crusaders. The Norman *Summa de Legibus* (c. 1236 - 1250), a collection of Norman customary laws that survived the loss of Normandy, boasts the first title in law devoted to crusading. *De Cruce* (Dist. 4, c 24) reads:

1. Those who assume the cross have the privilege to defer actions that concern pleas of their property. And once they declare their crusader status, they have one year and a day to respond; but if they are captured during or on their pilgrimage, the term is extended to seven years unless they either return in the meantime or are proven to be dead.¹³²
2. Proof requires the testimony of two witnesses or several men of faith on the pilgrimage that returned and swear they saw him either living or dead, or by testimony, or by the letter patents of the diocesan bishop or his official.¹³³

The importance of essoin in the common law, as a contribution to crusade jurisprudence by secular authority, is evident by the fact *De Cruce* does not encompass any other principle connected to the movement. This tentative addition to crusade jurisprudence suggests a conscious effort to limit intrusions on an area of the canon law and its privileges that belonged to the pope, while achieving its object to address an area where jurists felt the existing law was deficient. It appears the principle was first expressed in Norman law but lost its broad title when transplanted into English law.

A legal statement on crusader essoin appears in England during the reign of King John in chapter 52 of Magna Carta 1215.¹³⁴ The chapter allows the king to have respite 'to the common term of crusaders' (*ad communem terminum cruce signatorum*), or to essoin himself from pleas concerning unlawful disseisin of land unless it had arisen before his taking of the cross.¹³⁵ This was a poignant inclusion since John took the cross in March,

¹³² '1. Crucis eciam assumpte privilegium terminationem prorogat querelarum in quibus de proprietate placitatur. Et reportant cruce signati de hereditate terminum respondendi, videlicet unius anni et unius diei; et si interim vel tunc peregrinationem arripuerint, terminum habebuntusque ad vij. annos, nisi interim de peregrinatione redierint vel mors eorum probata fuerit'.

¹³³ '2. Probari autem potest per testimonium duorum testium vel plurium fide dignorum, qui de peregrinatione illa reversi fuerint et juraverint eos vivos et mortuos se vidisse vel per testimonium vel per litteras patentis diocesanii episcopi vel ejus officialis'.

¹³⁴ See generally, D. A. Carpenter, *Magna Carta*, London, Penguin Classics, 2015.

¹³⁵ Stubbs, *Select Charters*, p. 294.

prior to sealing the charter in June, and Innocent later considered the impact the charter had on John's ability to fulfil his vow when he annulled in August of the same year.¹³⁶ Richard Helmholz attributes the 'crusader respite' to *ius commune* sources and suggests reference to a 'common term' in Magna Carta reveals early thirteenth-century uncertainty about its actual length.¹³⁷ The matter being better left silent. However, an alternative explanation is the term was sufficiently well-known to mean a year and a day, as found in the Norman *Summa de Legibus*, in addition to the principles related to essoin that existed before the Third Crusade.¹³⁸ Helmholz may have overstated the *ius commune* influence on Magna Carta when discussing the origin of the crusader essoin in English law. The 'common term' appears to be an explicit adaption of the rule in *Glanvill* concerning essoin *de esse in peregrinatione*, allowing at least a year and a day for a pilgrimage to Jerusalem, and chapter 52 reflects juristic efforts to clarify the type of essoin available to crusaders in Angevin policy.

The use is conspicuously absent from early thirteenth-century attempts to conceptualise secular principles related to crusading. The weight of the evidence does not support what has been supposed: that the use had its origins during the Third Crusade. Neither does it appear to have developed as a consequence thereof. Even if a trust-like relationship existed in an exceptional charter, it does not support the view that the use existed. The Third Crusade is flanked by two great legal treatises and neither of them mentions the use. Bracton's *De legibus et consuetudinibus Angliae* (c. 1230s) indicates that the most profound impact that the crusade movement had on the common law was procedural in nature.¹³⁹ As in the Norman *Summa de Legibus*, the focus continued to be on the subject of crusade essoin. Bracton provides

If it is a simple pilgrimage [to the Holy Land], the essoinee will be given the term of a year and day.
If it is a general passage, the plea ought to be put *sine die* until the essoinee returns and until, because of the privilege of crusaders, certain knowledge is had of his death or return, provided that his

¹³⁶ M. Spencer, 'Innocent III: Magna Carta: Ratione Peccati', *English Studies in Africa*, vol. 16, no. 2, 1973, p. 100.

¹³⁷ Helmholz, *The University of Chicago Law Review*, p. 349.

¹³⁸ Riley-Smith, *The Oxford History of the Crusades*, p. 72.

¹³⁹ See J. L. Barton, 'The authorship of Bracton: Again', *Journal of Legal History*, vol. 30, no. 2, 2009, pp. 117 – 174 for an extensive discussion of this treatise.

departure is not anticipated by the summons, in which case let him appoint an attorney or he will remain undefended. (Br. iv, pp. 76 - 77).¹⁴⁰

After the Third Crusade, it is evident that English jurists had time to assess the impact that crusading had on the common law. Elsewhere Bracton observes that the court must re-summon a plea put *sine die* (not to be heard) because of application of the maxim 'So that the plea then be in the same state in which it was when it remained without day because the aforesaid set out to the Holy Land, from which he has returned, as is said' (Br. iv, p. 324).¹⁴¹ He also notes the existence of a privilege that compelled defendants to answer pleas immediately if the plaintiff is a crusader (Br. iv, p. 377). Furthermore, he even entertains the situation that a crusader's attorneys die while he is on crusade with the result the plea remain *sine die* until his return (Br. iv, p. 87).

In addition to the crusader essoin, Bracton also provides insight into the costs that crusading had on family life. On bastardy, he states that the law does not presume a child to be a man's lawful heir if he has been in the Holy Land for a long time (Br. iv, p. 299). This touched at the fear crusaders had about the infidelities of their wives during their absence. In another example, Bracton cites the case of Henry Boiqueinte who lost a tenement because his father did not make a claim (Br. iv, pp. 354 - 355). Henry argued that his father returned from crusade without sane memory and did not know how to manage his lands. The case was dismissed since the father had taken the habit and Henry could not prove insanity. Nonetheless, the narrative of a crusader returning 'a different person' must have been a plausible concern for family members. Bracton cites two situations applicable to the protection of family and property. The first concerns the circumstance where a crusader's father had died during their journey, and it is also unclear whether they are alive or dead. The law states that the chief lord will have seisin subject to a condition that they restore the land without plea to the crusader if they are living (Br. iii, p. 246). The final relevant principle concerns a wife who was ejected by a wrongdoer when her husband had gone on a pilgrimage to the Holy Land (Br. iii, p. 116).

¹⁴⁰ 'Si autem simplex, dabitur essoniato terminus unius anni et unius diei. Si autem passagium generale, poni debet loquela sine die quousque essoniatus redierit et donec de ipsius obitu vel reditu certissime cognoscatur, propter privilegium crucis signatorum, dum tamen talis non sit summonitione præventus, quo casu attornatum faciat vel remanebit indefensus'.

¹⁴¹ 'Ita quod loquela illa tunc sit in eodem statu in quo fuit quando remansit sine die, eo quod prædictus talis profectus fuit in Terram Sanctam, de qua reversus est ut dicitur'.

This situation is an implicit concern in Maitland's example. The resolution, however, is to allow an exception for the case to continue aided by the judge *ex officio* because she is a victim of fraud. On the use, however, Bracton is silent.

The absence of the use in *De legibus et consuetudinibus Angliae* does not dismiss the possibility it could be available in the thirteenth century. This was Maitland's conclusion when he cited several cases in *Bracton's Notebook* using the expression *ad opus*.¹⁴² One case (1224) seems to strengthen the argument that crusaders employed uses.¹⁴³ Robert placed his patrimonial land into the custody of his younger brother Wydon for the use ('*ad opus*') of his sons when he went to the Holy Land. Robert does not appear to have enfeoffed Wydon. When news of Robert's death reached England, Wydon refused the heir's request to convey the land. The report of the case ends with a note that the parties had reached an agreement that Wydon will hold for his life (*tenendam tota vita sua*). The uncertainty about whether Robert is a crusader or a pilgrim is unimportant. Robert, as a landholder, appears to have arranged Wydon to act as custodian of Robert's lands during his absence. Maitland associated this case and other custodial arrangements with the obligation of the feoffee to keep property safe.¹⁴⁴ He appears to have construed the fact narrowly to suggest that Wydon violated his brother's trust. However, the facts of the case suggest the custodial arrangement never approached the nature of the use. The compromise reached by the parties shows a complex family dynamic existed. The parties acknowledged, despite the doctrine of primogeniture, that Wydon ought to remain on the fee in the form of a life interest or a seisin of land that expired after he died. Wydon's resistance might not reflect a fraudulent intention, but be closer to Robert's will that his younger brother continues to reside on the land with his sons. In this light, the parties' compromise is sensible rather than a validation of Wydon's wrongdoing. The custodial role, as this case illustrates, is akin to an attorney charged with the protection of an interest rather than an intermediary charged with a transferring legal ownership in the nature of a use.

¹⁴² Pollock and Maitland, *The History of English Law*, vol. 2, pp. 235 – 236.

¹⁴³ BNB, no. 999.

¹⁴⁴ See BNB, no. 754.

The case above is the only evidence adduced in *The History of English Law* that links the use to the crusade movement. It is illustrative of the fact that both crusaders and pilgrims to the Holy Land regularly appointed attorneys and custodians to protect legal interests. Maitland cites examples from *Bracton's Notebook* as uses, unconnected to crusading, which appear to reflect the growing complexity of family arrangements rather than use-like devices.¹⁴⁵ For example, one case (1225) concerned a purchase of land by Richard from Godfrey with an underlying agreement that Richard would hold the land for five years before giving it in marriage portion to Godfrey's daughter.¹⁴⁶ The purchase aspect of this transaction, an exchange of consideration in the form of an obligation, distinguishes Godfrey from a feoffee of a use whose role is to merely facilitate the transfer of land. It is the presence of a condition rather than the principal transaction that may have attracted Maitland's interests. These conditions allowed parties to tailor legal arrangements to fit desired outcomes. The evidence suggests the inspiration for Maitland's crusader example is the following passage from *De legibus et consuetudinibus Angliae*: 'I grant to A. such land of mine for a certain term, as in the case of crusaders, provided that if I return, he restore my land to me, and if I die on the journey or do not return, the land will remain to A. in fee' (Br. ii, p. 73).¹⁴⁷ This grant with a condition to transfer back to the original landholder is distinguishable from a use to transfer property to a named beneficiary, as in Maitland's example, but it does highlight that the common law was sufficiently sophisticated that uses might be found in the thirteenth century.

Conclusion

Maitland did not have to mention the Third Crusade for a relationship between it and the use to become an accepted truth in legal history. The mere allusion to the greatest English crusade was sufficient for many trust lawyers. It is arguable general knowledge about Richard I and his involvement bolstered belief in a connection. However, Richard may also be the reason the use did not develop during the Third Crusade. In dealing with the legal issues associated with crusading, the King was an administrator of justice, 'a lion of

¹⁴⁵ E.g. BNB, nos. 1244 (refers to a life interest), 1683 (refers to a marriage portion).

¹⁴⁶ BNB, no. 1683.

¹⁴⁷ 'Concedo A. talem terram meam ad terminum certum, sicut cruce signatorum, et ita quod si rediero, restituet mihi terram meam, et si in itinere mortuus fuero vel non rediero, remaneat A. terra illa in feodo'.

the law', but not a reformer like his father. William Stubbs once commented that 'Richard's reign is in constitutional matters the supplement of his father's; the administrative progress which may be traced in it is to be credited not to himself but to his ministers'.¹⁴⁸ Maitland makes clear that neither Richard nor John added much to the *corpus* of English law.¹⁴⁹ However, Richard was a busy ruler and his engagement with the law reflects the need to find solutions to immediate problems. His use of the law was blunt. The summary that Gillingham puts forward reflects Richard's engagement with the law: 'By the time Richard and Philip eventually rode out of Vezelay together at the start of their crusade (July 1190), everything that could have been done had been done'.¹⁵⁰ The measures canvassed in this chapter suggests Richard was far from being a king devoid of legal initiative. Nonetheless, the use is not present in either his general crusade measures or the protections he granted to individuals.

For the first time in the crusade movement, the Third Crusade furnishes clear evidence that English crusaders made legal arrangements in anticipation of crusading. The law continued to expect crusaders to raise money through either loans or alienation of property. Unsurprisingly, English crusaders utilised the kinds of legal arrangements already familiar to the crusading experience. They also used conditions in mortgages to secure the interests of family members. However, the availability of subsidies had a meaningful impact on the financial stresses associated with crusading. The crusaders who left with Richard had access to the royal funds, which allowed them to make legal arrangements that considered the interests of wider family members. On the other hand, those who left before the King were more likely to alienate land to fund the full cost of their adventure. The use did not appear in the private legal arrangements of crusaders. Furthermore, the second treatise flanking the Third Crusade is silent about the use. Bracton demonstrates that English jurists reflected on the crusades impact on the developing common law. His treatise included a detailed treatment of the crusader *essoin*, which appears to be a legal principle refined after the Third Crusade. Nonetheless, the practice of crusaders to appoint attorneys and custodians over land appears to be the closest English law came to a theory of the use in response to the crusade movement.

¹⁴⁸ Stubbs, *Select Charters*, p. 26.

¹⁴⁹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 170.

¹⁵⁰ Gillingham, *The Angevin Empire*, p. 43.

Chapter 6. Use-Like Devices in Cases before the Jewish Exchequer between 1198 and 1290

It is possible to draw a very tenuous connection between the use and the Third Crusade. Earlier chapters showed that crusaders used credit arrangements as a primary method of protecting their interests. Nothing akin to the use arose as part of the law created as part of the crusade movement during the twelfth century. However, the burgeoning sophistication of twelfth-century legal thinking coupled with the budding common law produced a unique jurisprudence of real property in thirteenth-century England. This chapter explores whether the use arose as an indirect consequence of the Third Crusade rather than a direct result of crusader usage. Richard created a unique legal system in 1194 that eventually formed the Exchequer of the Jews (Jewish Exchequer). This unique branch of the Exchequer lasted less than a century (1198 – 1290) and has a definitive end: the expulsion of the Jews from England. However, legal historians have not scoured the records of the Jewish Exchequer for evidence of the use or use-like arrangements. There are several opportunities for its development in this court. The century-long interaction between the fledgling common law system and the then ancient practices of Jewish law may offer unique insight into the origin of the use. Furthermore, the records of the Jewish Exchequer show this interaction inspired novel dealings in land. It is worthwhile, therefore, to examine the evidence in this previously overlooked court to determine whether the origin of the use rests in the shared experiences of the English Jewish community and the common law.

Historiography: The influence of the Jewish facet of the Common Law

The argument that the use could have arisen from Jewish influences on the common law is novel. However, the search for such influences is difficult because contemporary commentators never explicitly state the Jewish origins of legal principles. Even if such ties were recognisable, the prejudice that isolated the Jewish communities from the societal fabric of England would have made their articulation undesirable and

unpopular.¹ It is unsurprising that whatever interest legal commentators had in the 'customs of the Jewry' disappeared after the expulsion. It did not re-emerge until the resettlement of the Jews in England during the mid-seventeenth century, which prompted numerous treatises on the subject of their legal status with reference to earlier commentaries.² Pollock and Maitland addressed the subject as follows:

Whether the sojourn of the Jews in England left any permanent marks upon the body of our law is a question that we dare not debate, though we may raise it. We can hardly suppose that from the *Lex Iudaica*, the Hebrew law which the Jews administered among themselves, anything passed into the code of the contemptuous Christian. But that the international *Lex Iudaismi* perished in 1290 without leaving any memorial of itself is by no means so certain.³

Despite their cautious approach, the authors identified a few possible areas of influence that other academics have explored further to point to a Jewish impact on the common law. The thrust of their scholarship has been to prove that England's Jewish lenders influenced commercial law in England.⁴

A few important works have shed light on the impact the Jews left on the common law. A wealth of records means that the Jewish communities of England are the best documented in the thirteenth century.⁵ The printing of primary materials by the Selden Society of the *Select Pleas, Starrs, etc., Of the Jewish Exchequer, 1220 – 1284*, edited by J. M. Rigg, and Rigg's *Calendar of the Plea Rolls of the Exchequer of the Jews* have assisted academics to understand the importance of the hundred-year interaction. Joseph Jacobs, *The Jews of Angevin England* (1893) provides an overview of primary source material that relates to England's Jewish history. Modern studies also owe a debt to the seminal achievement of Thomas Madox's *History of the Exchequer* (1711) and his research on the Jewish Exchequer. Historians have since made significant inroads to show how the Jewish

¹ R. Mundill, *England's Jewish Solution: Experiment and Expulsion, 1262 – 1290*, Cambridge, Cambridge University Press, 1998, p. 43.

² J. A. Bush, "'You're gonna miss me when I'm Gone": Early Modern Common Law Discourse and the Case of the Jews', *Wisconsin Law Review*, no. 5, 1993, p. 1237.

³ Pollock and Maitland, *The History of English Law*, vol. 2, p. 475.

⁴ S. Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, Berlin, Duncker & Humblot, 1993, p. 68.

⁵ R. Chazan, *The Jews of Medieval Western Christendom: 1000 – 1500*, Cambridge, Cambridge University Press, 2006, p. 155.

community shaped the law of debt. The prominent Anglo-American legal historian, Harold D. Hazeltine, outlined the impact of the Jewish influence on the rapid growth of gages on land as a popular device to secure loans during the thirteenth century.⁶ Shael Herman also raises novel ideas that are replete with significant observations about debt law.⁷ Finally, Robin Mundill provides a broader overview of the Jewish community from which to contextualise the operation of Jewry law in the thirteenth century.⁸ Historians have an appreciable understanding of the impact of Jewish law on the budding common law system because of the efforts of the above mentioned and several other commentators in this field.⁹ This chapter builds on the existing scholarship and argues the legal arrangements related to debt law had far-reaching implications for the eventual development of uses.

Herman sensibly made clear that research seeking to demonstrate a Jewish connection to English law must distinguish between the proper observance of *halakhic* principles and Jewry law, the latter consisting of regulations that a non-Jewish political body applied to Jews.¹⁰ On the subject of thirteenth-century debt law, he observed: 'Jewish financial practices and customs in England, as elsewhere in Europe, might be only tenuously connected to Jewish law, and the term 'Jewish law' itself was ambiguous'.¹¹ It is also necessary, therefore, for this thesis to make a clear demarcation between the two systems. Jewish law (*halakha*) itself has parallels with Roman law as a complete legal system, which is immutable in character but with a long history of interpretation.¹² The religiosity associated with Jewish law means its study has been traditionally confined to rabbinical learning, although the mid-twentieth century manifested renewed secular

⁶ H. D. Hazeltine, 'The Gage of Land in Medieval England', in Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History*, vol. 3, Boston, Little, Brown, and Company, 1909, p. 664.

⁷ See, in particular, S. Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, Berlin, Duncker & Humblot, 1993.

⁸ See R. Mundill, *England's Jewish Solution: Experiment and Expulsion, 1262 – 1290*, Cambridge, Cambridge University Press, 1998; R. Mundill, *The King's Jews: Money, Massacre and Exodus in Medieval England*, London, Continuum, 2010.

⁹ See for example P. Brand, 'Jews and the Law in England, 1275 – 90', *The English Historical Review*, vol. 115, no. 464, 2000, pp. 1138 – 1158.

¹⁰ Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, p. 68.

¹¹ Herman, p. 68.

¹² H. Cohn, 'The Methodology of Jewish Law: A secularist view', in B. Jackson (ed.), *Modern Research in Jewish Law*, Leiden, Brill, 1980, p. 123.

interest.¹³ The three fundamental sources of Jewish law available during the thirteenth century include the commandments found in the *Torah*, the Talmud or interpretations of the *Torah* made between the first and sixth centuries, and the *responsa* or the responses of rabbis who interpreted the law.¹⁴ Robin Mundill in *England's Jewish Solution: Experiment and Expulsion* (1998) notes the *Torah* circulated widely with little opposition, and the papacy ignored *responsa* despite its disapproval of the Talmudic books.¹⁵ The persistent problem, similar to that faced by civilians, is that 'classical and medieval rabbinic Judaism must constantly balance the need to remain loyal to the *Torah* and its commandments, with the need to make adaptations and changes that serve the interests of the Jewish people and its survival'.¹⁶ Nevertheless, the creation of the *halakhic* codex *Mishneh Torah* (1170 – 1180) by Maimonides, Saladin's vizier, as a forward-looking code, provides valuable insight into the needs of Jewish populations during the thirteenth century.¹⁷ It is likely the use or similar arrangement would be found within its pages if a connection with *halakha* existed in the thirteenth century.

Elements of the use are more likely to emerge from the English experience with Jewry law than through a reception of *halakhic* principles. Herman indicated that Jewry law could either overlap with *halakha* or be irreconcilable with its principles.¹⁸ R. A. Routledge's collection of thirteenth-century enactments demonstrate the operation of Jewry law in England.¹⁹ Jewish communities in England were autonomous in nature, capable of regulating their own composition and affairs under the supervision of the sheriff, which means the Jewish experience with Jewry law could also be a source for the use.²⁰ Furthermore, the prominent place of Jewry law in thirteenth-century law arose out of an immediate connection to the Third Crusade. Richard issued a *charter of liberties*²¹ (1190), reiterated by King John in 1201, which granted certain liberties and confirmed

¹³ Cohn, *Modern Research in Jewish Law*, p. 124.

¹⁴ R. Sandberg, *Development and Discontinuity in Jewish Law*, Lanham, University Press of America, 2001, pp. 1 – 10.

¹⁵ Mundill, *England's Jewish Solution*, p. 32.

¹⁶ Sandberg, *Development and Discontinuity in Jewish Law*, p. 2.

¹⁷ Sandberg, p. 25; E. P. Sanders, *Jewish Law from Jesus to the Mishnah: Five studies*, London and Philadelphia, SCM Press and Trinity Press International, 2016, p. 314.

¹⁸ Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, p. 68.

¹⁹ R. A. Routledge, 'The Legal Status of the Jews in England 1190 – 1790', *The Journal of Legal History*, vol. 3, no. 2, 1982, pp. 91 – 124.

²⁰ Mundill, *England's Jewish Solution*, pp. 34 – 35.

²¹ J. Jacobs (ed.), *The Jews of Angevin England*, London, David Nutt, 1893, p. 134.

Jewish lands, fiefs, pledges, gifts, and purchases made during his father's reign (cap. i). It issued commands regulating disputes between Christians and Jews (cap. ii). It even allowed Jews to take oaths on the *Torah* (cap. iv). The charter presents a telling preoccupation with the preservation of Jewish debts and contained chapters: permitting succession to debts (cap. iii), selling pledges after holding them for a year and a day (cap. v), and enabling heirs in minority to succeed to Jewish debts (cap. vi). Richard issued this charter in response to widespread Jewish massacres both on the eve of and during his crusade, and it makes clear his command that Jews have a status akin to royal chattels (cap. viii). This charter foreshadows the creation of the Jewish Exchequer.

The Crusade influence on the Jewish Exchequer

The Jewish Exchequer and the circumstances of its creation may tenuously link the use to the crusade movement. Richard addressed matters pertaining to the status of the Jews in England after his release from captivity and settlement of affairs with Phillip.²² The *Form of Proceeding on the Judicial Visitation* (1194) makes clear that those who slew the Jews had effectively deprived the king of his revenue.²³ He then set in motion the mechanism that would allow the customs of the Jews to impact upon the budding common law system. The framework for the Jewish Exchequer rests in the *Ordinance of the Jews* (1194), as recorded by Roger of Howden, which offers a clear picture of the registration system instituted to monitor Jewish assets alongside a particular concern with their securities and landholding.²⁴ The *Ordinance* compelled the Jews to take an oath and swear the roll contained an accurate record of all their debts, pledges, rents, and possessions. Roger states that the *Ordinance* ordered Jews to make all their contracts in 'six or seven places' before two Christians and two Jews learned in the law, and two notaries and clerks. Further, the contracts were kept in chests with three locks and keys held by the abovementioned legal experts and clerks. This followed the standard notarial practice of *chirography*, which meant the creditor, lender, and clerk each held a copy of a contract.²⁵ The use of chests or *archae*, however, is a known Jewish method of record

²² Roger of Howden, *Chronica*, vol. 2, p. 329.

²³ Stubbs, *Select Charters*, pp. 250 – 255.

²⁴ Roger of Howden, *Chronica*, vol. 2, p. 338.

²⁵ K. Scott, 'The Jewish Arcae', *Cambridge Law Journal*, vol. 10, no. 3, 1950, p. 446.

keeping that Herman indicates was already nine centuries old.²⁶ He even suggests the English regulation of Jewish life in this manner had origins in the Roman law *fiscus iudaicus*.²⁷ It is evident that Richard made effective use of both Jewish legal expertise and practice to facilitate the lending activities of *his* Jews.²⁸

The eventual creation of a Jewish Exchequer in 1198 as a royal apparatus to ensure efficient dispute resolution in conjunction with royal control over Jewish contracts is an unsurprising development during a century that historians characterise as possessing a complex administrative culture.²⁹ Madox introduces the purpose behind the creation of the Jewish Exchequer in terms disparaging of royal authority:

The King seemed to be absolute Lord of their Estates and Effects, and of the Persons of them, their Wives and Children. Tis true, he let them enjoy their Trade and Acquests: but they seemed to trade and acquire for his Profit as well as their own ... as they fleeced the Subjects of the Realm, so the King fleeced them.³⁰

The judicial function of the Exchequer, therefore, represented the king's interests to follow proceedings that concerned debts owed to his Jews.³¹ If a Jewish creditor failed to record their debt in an official *archa*, not allowing it to be followed, they forfeited it to the king in addition to being fined.³² Nonetheless, it was in the interests of both the Jewish creditor and the king to register the debt to ensure its collection without having to prove the amount owed in court.³³ If an issue arose, the office of *justiciarii Iudaeorum*, occupied by Christians and Jews learned in the law, adjudicated matters pertaining to debt as officers of the Exchequer.³⁴ Furthermore, it had broad jurisdiction to regulate Jewish

²⁶ Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, p. 66.

²⁷ S. Herman 'Legacy and Legend: The Continuity of Roman and English Regulation of the Jews', *Tulane Law Review*, vol. 66, no. 6, 1992, p. 1786.

²⁸ Scott, *Cambridge Law Journal*, p. 446.

²⁹ See Prestwich, *Plantagenet England*, p. 55.

³⁰ T. Madox, *The History and Antiquities of the Exchequer*, 2nd edn, vol. 1, London, Printed for William Owen, 1769, p. 221.

³¹ Madox, *The History and Antiquities of the Exchequer*, vol. 1, p. 232.

³² Scott, *Cambridge Law Journal*, pp. 452 – 453.

³³ Brand, *The English Historical Review*, p. 1139.

³⁴ Madox, *The History and Antiquities of the Exchequer*, vol. 1, pp. 234 – 136.

communities, royal interests in the Jews, and all other major litigation between Jews and Christians.³⁵

Christopher Tyerman concluded on the Third Crusade's impact on English society that it produced no administrative innovation or novel techniques of government.³⁶ However, historians have long connected the crusade movement with the creation of the Jewish Exchequer. The third edition of Charles Molloy's *De Jure Maritimo et Navali: or, A Treatise of Affairs Maritime and of Commerce* (1682) suggests the Jewish Exchequer emerged as a consequence of the Third Crusade as a prudent alternative for the cash-strapped Richard than simply seizing their monies and estates as his father had done.³⁷ It must be noted that the Jews appear to have had legal privileges and some ability to regulate themselves prior to Richard's reign.³⁸ Earlier crusaders had made extensive use of Jewish creditors, which included arrangements that secured loans against property.³⁹ There may have also been precedent for the *archae* system during this period.⁴⁰ Richard's Jewish reforms intended to address the problem of anti-Semitic violence that for both religious and financial reasons seemed to be at its most pronounced at the outset of a crusade.⁴¹ The issue of crusaders killing Jews and seizing their property as part of their crusade preparations dates back to the First Crusade.⁴² It is evident the crusade's fundamental message to defend Christendom against heretics had the unintentional effect of fostering prejudice towards the Jewish people.⁴³ Richard's reforms in 1194 further consolidated his control over the Jews as his chattels, which he also sought to impose before his departure. Both elements suggest that the impetus for reform was internal.

³⁵ Brand, *The English Historical Review*, p. 1139.

³⁶ Tyerman, *England and the Crusades*, p. 84.

³⁷ C. Molloy, *De Jure Maritimo et Navali: or, A Treatise of Affairs Maritime and of Commerce*, 3rd edn, London, Printed for John Bellinger, 1682, p. 400.

³⁸ Brand, *The English Historical Review*, p. 1138.

³⁹ Shapiro, *Georgia Law Journal*, p. 1180.

⁴⁰ Herman, *Medieval Usury and the Commercialization of the Feudal Bonds*, p. 66.

⁴¹ Tyerman, *England and the Crusades*, p. 204; Chazan, *The Jews of Medieval Western Christendom*, p. 162; Shapiro, *Georgia Law Journal*, p. 1194.

⁴² Albert of Aachen, *R.H.C. Occ.*, vol. 4, p. 292; For further on the fortunes of the Jews during the preparatory phases of the First Crusade see R. Chazan, *European Jewry and the First Crusade*, Berkeley, University of California Press, 1998, p. 66; R. Chazan, *God, Humanity, and History: The Hebrew First Crusade Narratives*, Berkeley, University of California Press, 2000, pp. 30, 46.

⁴³ Chazan, *The Jews of Medieval Western Christendom*, p. 53.

Richard's absence from England suggests that external legal influences may have shaped the Jewish Exchequer and its laws. However, it is unlikely that Richard's time in Sicily influenced its creation. Jewish populations in Sicily, with roots in Byzantine and Islamic rule, had a different experience from the experiences of Northern European communities.⁴⁴ In England, their immigration and continued existence were connected to the Norman rulers who directed their activities towards moneylending.⁴⁵ The notion of 'the king's Jews', therefore, came to carry weight. In Sicily, the Norman conquerors had found a large Jewish community with diverse occupations, with a strong reputation for medicine rather than moneylending, and did not materially disrupt their pattern of existence.⁴⁶ However, very few sources provide insight into the operation of Jewry law in the Norman Kingdom.⁴⁷ Norman rulers continued the Moslem practice of collecting tallages or *gisía* from the Jews, which recognised their status as protected peoples within the kingdom.⁴⁸ The incoming Hohenstaufen, after Norman rule in 1194, appear to have maintained the Jewish presence predominantly as intellectuals.⁴⁹ Furthermore, the experience of Jews as money lenders differed significantly from the English situation. Shlomo Simonsohn, who extensively canvassed records in his eighteen-volume *The Jews in Sicily*, concluded: 'no moneylending by Jews is known to have occurred in Sicily during the Norman and Hohenstaufen eras'.⁵⁰ There is evidence to suggest such activity did exist. The Constitutions of Melfi (1231), for example, purport to ban usury but make an exception for the Jews.⁵¹ It reasoned no one can accuse Jews of usury since divine law does not prohibit them from collecting debt, and nor are they subject to papal legislation. However, Simonsohn suggests the constitution merely represented a creative interpretation of the usury canons of the Fourth Lateran Council rather than law representative of the situation in Sicily.⁵² Even if the practice existed in Sicily, therefore,

⁴⁴ Chazan, *The Jews of Medieval Western Christendom*, p. 129; Simonsohn, *Between Scylla and Charybdis*, p. xii

⁴⁵ Chazan, p. 154.

⁴⁶ Chazan, p. 118; D. Matthew, *The Norman Kingdom of Sicily*, Cambridge, Cambridge University Press, 1992, p. 93.

⁴⁷ S. Simonsohn, *Between Scylla and Charybdis: The Jews in Sicily*, Leiden, Brill, 2001, p. 28.

⁴⁸ Simonsohn, *Between Scylla and Charybdis*, pp. 30 – 31.

⁴⁹ Chazan, *The Jews of Medieval Western Christendom*, p. 118.

⁵⁰ Simonsohn, *Between Scylla and Charybdis*, p. 38.

⁵¹ W. Stürner, *Die Konstitutionen Friedrichs II, MGH (Const.)*, Hanover, Hahnsche Buchandlung, 1996, pp. 155 – 156.

⁵² Simonsohn, *Between Scylla and Charybdis*, p. 37.

there appears little to merit the development of an apparatus like the Jewish Exchequer based on Richard's Sicilian experience.

Richard's captivity (Dec. 1192 – 4 Feb. 1194) meant he was more idle in the Empire than the time he spent in Sicily while on crusade.⁵³ The sources, predominantly English, provide some insight into the political consequences of Richard's long period of idleness but little detail about his experiences.⁵⁴ John Gillingham further suggests that the silence of German chroniclers reflects both dissatisfaction at Emperor Henry VI's treatment of Richard, and their embarrassment about the misfortunes of the German crusade experience.⁵⁵ Richard's experience as a prisoner varied from treatment 'with appropriate honours' to being bound in chains and mistreated at Trifels during the Easter of 1193.⁵⁶ The second book of the Scottish *Chronicle of Melrose Abbey* indicates the Emperor treated Richard with respect but its author, sympathetic to the affairs in England, laments the misfortune of Richard's plight from one day being king to another a captive.⁵⁷ William of Newburgh, a source critical of Richard's treatment, indicates Richard received better treatment after he agreed to his ransom in June 1193.⁵⁸ The suggestion he suffered some mistreatment is consistent with the humiliation he endured when he swore homage to the Emperor, an event incurring the silent indignation of English commentators.⁵⁹ Nonetheless, there is no evidence to suggest that his time in captivity influenced the eventual creation of the Jewish Exchequer.

Later developments in the Empire suggests the Jewish Exchequer was a novel English innovation. Robert Chazan indicates a charter issued by Duke Frederick of Austria to the Jews in his duchy (1 July 1244) is the earliest legal statement of Jewish moneylending in the Empire.⁶⁰ Included are chapters outlining ducal protection over the person and

⁵³ See generally Gillingham, *Richard I*, pp. 133 – 140.

⁵⁴ J. Gillingham, 'The Kidnapped King: Richard I in Germany, 1192 – 1194', *German Historical Institute London Bulletin*, vol. 30, no. 1, 2008, p. 18.

⁵⁵ Gillingham, *German Historical Institute London Bulletin*, p. 34.

⁵⁶ Gillingham, p. 22.

⁵⁷ *Chronicle of Melrose*, J. Stevenson (ed.), Edinburgh, Typis Societatis Edinburgensis, 1835, p. 101. See D. Broun, 'Chronicle of Melrose Abbey', *EMC*, vol. 1, p. 367.

⁵⁸ William of Newburgh, *Historia Rerum Anglicarum*, p. 398.

⁵⁹ Gillingham, *German Historical Institute London Bulletin*, p. 28.

⁶⁰ Chazan, *The Jews of Medieval Western Christendom*, p. 88. The charter is reproduced and translated in J. Marcus, *The Jew in the Medieval World: A Sourcebook, 315-1791*, New York, JPS, 1938, pp. 28 – 33.

movement of Jews, associated fines, and issues related to jurisdiction. The provisions related to judicial proceedings and debt, however, contained elements analogous of the situation of English Jews. Chapter 28 reads, 'If a Christian takes his pledge away from a Jew by force or exercises violence in the Jew's home, he shall be severely punished as a plunderer of our treasury'. The implication is that the Jews in Austria are the 'Duke's Jews'. There are several other similarities to Richard's charter granting liberties to the Jews (1190).⁶¹ For example, both charters state that if an action arises between a Christian and a Jew, it must have both a Christian and a Jewish witness to proceed. Both also have provisions that allow a Jewish creditor to sell pledges if they certify holding it for a year and a day. However, Chazan notes that Austria did not introduce a system of managing Jewish debts that approached the sophistication of the English Jewish Exchequer.⁶² The laws are further distinguishable. The scheme of the Austrian charter only concerns movable property, or things capable of being taken into possession, destroyed, or intermingled with the Jews' own chattels (cap. 6 – cap. 7). The explicit mention of bloody and wet clothes further indicates that the Jews could accept all *things* as pledges that did not extend to land (as immovable property). The charter raises questions about the dissemination of Jewry law in Austria and a shared experience with England. Nevertheless, the Jewry law in the Empire does not appear to have influenced the creation of the Jewish Exchequer even if a shared experience is discernible. Evidence found in the court Jewish that might suggest the existence of the use or other trust-like devices is unique to the English experience.

The creation of the Jewish Exchequer appears to be an English innovation independent of Richard's experiences on the continent. The novelty of the system reflects the intersection between Jewry custom in England and the growing complexity of the common law. Coupled with the apparent English penchant for bureaucracy, Chazan expressed no surprise that an analogy is absent in French records.⁶³ He notes the value of the court: 'If we today possessed nothing more than the plea rolls of the Exchequer of the Jews, English Jewry would be far and away the best-documented Jewish community

⁶¹ Jacobs, *The Jews of Angevin England*, pp. 134 – 138.

⁶² Chazan, *The Jews of Medieval Western Christendom*, p. 189.

⁶³ Chazan, *The Jews of Medieval Western Christendom*, p. 155; See also R. Mundill, *The King's Jews: Money, Massacre and Exodus in Medieval England*, London, Continuum, 2010, p. 28.

in thirteenth-century Latin Christendom. In fact, there is much more.⁶⁴ The evidence suggests that the impetus behind the birth of the Jewish Exchequer lies in the inquisition into, and consolidation, of the King's assets after his return to England in September 1194.⁶⁵ This connects it, tenuously, to the Third Crusade. Madox suggested previous administrative experience with Jewish debts on land, including the subordinate exchequer or receipt *Scaccarium Aronis* (1186 - 1201) set up to manage the debt owed to Aaron of Lincoln, provided the model for the creation of the Jewish Exchequer.⁶⁶ Alice Carver Cramer emphasises, however, that the connection between the two is presumptive, despite noting its officials would have been aware of its administrative processes for managing debts.⁶⁷ Regardless, the Jewish Exchequer was established as a permanent court rather than a temporary receipt. The volume of cases demonstrates its importance in the thirteenth century. Its focus on debt law also means the court was at the forefront of developments in the common law related to complex arrangements. This makes it a candidate to develop or illustrate the existence of principles of law that may have shaped the growth of uses during the thirteenth century.

Halakha as the Law of England

The full extent of the influence of Jewish law on English legal history remains unclear and the law cognisant in that court adds to the myriad of jurisdictions historians must contend with. It is also necessary to explore the reception of *halakha* into the *corpus* of English law. England's Jews followed the commands of their religion that obliged them to study the *Torah*, and to honour those who studied it.⁶⁸ A Jewish *Code of Education* (early thirteenth century) reveals the importance of studying scripture, hagiography, the Talmud, and other *halakhic* sources in England's Jewish communities (cap. 8).⁶⁹ Jacobs suggests that a reference to French Jews in the seventh chapter indicates it is likely the code is of English origin.⁷⁰ Jewish families were instructed to send a son to the

⁶⁴ Chazan, p. 155.

⁶⁵ Roger of Howden, *Chronica*, vol. 2, pp. 334 – 339.

⁶⁶ Madox, *The History and Antiquities of the Exchequer*, vol. 1, p. 231; see also Mundill, *The King's Jews*, p. 28.

⁶⁷ A.C. Cramer, 'The Origins and Functions of the Jewish Exchequer', *Speculum*, vol. 16, no. 2, 1941, p. 229.

⁶⁸ Mishneh Torah, Talmud Torah, 1:1.

⁶⁹ Jacobs, *The Jews of Angevin England*, p. 243.

⁷⁰ Jacobs, p. 245.

schoolhouse to study law, alongside Aramaic and Hebrew, for a period of seven years (cap. 1 – 3). Schoolhouses played a prominent role in all Jewish communities.⁷¹ Communities paid for the upkeep of the school, its teachers⁷², and the students (cap. 13 – 14). Jacobs concludes, whatever its origins, the frequent use of Hebrew evident in English legal sources strongly indicates that the Jewry utilised the scheme of education stated in the *Code*.⁷³ Chazan notes Jewish leaders often used their legal education to benefit Christian rulers despite the dominant role of *halakha* being the regulation of domestic and religious life.⁷⁴ The value assigned to legal education suggests that prominent moneylenders, as well as the Rabbis who heard their debt pleas, had a sophisticated grasp of *halakhic* principles at their fingertips. The common place of Jewish women in English credit arrangements also suggests the community encouraged daughters of prominent families to receive an education in *halakha*, although the law did not command it.⁷⁵

The *Mishneh Torah* exerted an authoritative influence on the development of Jewish law in England throughout the thirteenth century. Rabbi Moses of London included reference to Maimonides' teachings in his discussion of Passover services (prior to 1200), which suggests the code had penetrated England late in the twelfth century.⁷⁶ The fact the code had almost uncontested authority in Jewish communities throughout Europe also means it is a useful starting point for a comparative analysis of Jewry law in England.⁷⁷ Similar to the civil law, however, the *Mishneh Torah* would only be a persuasive expression of the customs of the Jewry. The Exchequer would not permit *halakha* to conflict with the common law.⁷⁸ Nonetheless, the *Mishneh Torah* contains legal principles that include a private law trust-like institution found in the book of *Nashim* or laws pertaining to women. The situation has parallels with the doctrine of coverture that placed a wife and

⁷¹ Mishneh Torah, Talmud Torah, 2:1.

⁷² Mishneh Torah, Talmud Torah, 1:7.

⁷³ Jacobs, *The Jews of Angevin England*, p. 251.

⁷⁴ Chazan, *The Jews of Medieval Western Christendom*, p. 41 see J. D. M. Lew, 'Jewish Law – Its Development and its Co-existence in the Non-Jewish World', *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law*, vol. 40, 1976, p. 103.

⁷⁵ Mishneh Torah, Talmud Torah, 1:13.

⁷⁶ Jacobs, *The Jews of Angevin England*, p. 289; See more generally for the early thirteenth century Chazan, *The Jews of Medieval Western Christendom*, p. 119.

⁷⁷ Y. Tobi, 'Caro's *Shulhan Arukh* versus Maimonides' *Mishne Torah* in Yemen', in B. Lifshitz, *The Jewish Law Annual: Volume XV*, London, Routledge, 2004, p. 189.

⁷⁸ See Lew, *Rabels*, p. 112.

her property under the control of her husband.⁷⁹ Husbands of Jewish women had privileged rights to a) the fruits of her labour b) ownerless objects she discovers c) benefit from the profits of her property during her lifetime d) a right to inherit her property that supersedes all other interests.⁸⁰ However, the inclusion of a formal marriage contract (*ketubah*), one of the three positive commandments, is a feature of Jewish marriage law that allowed wives to avoid some of the burdens of marriage.⁸¹ *Ishut* 11:6 permits a woman to make stipulations to protect property in contract, either binding immediately or requiring formalisation, if made after *nisu'in* (final stages of marriage),⁸² which removes her husband's legal privilege to her property except for his right of inheritance.⁸³ This allowed Jewish women greater economic and legal independence to enforce propriety rights than English women in coverture.⁸⁴

Jewish law introduced a trust-like device to circumvent the limitation expressed in *Ishut* 11:6 that a woman could not stipulate against her husband's privilege to inherit her property. Maimonides's reflection on Talmudic literature led him to include the principle in *Ishut* 21:9, which reads:

When a woman signs over all of her property to another person - regardless of whether or not that person is a relative - before she marries, even when there is a provision that if she is divorced or if she becomes a widow, this present is nullified ... her husband is not entitled to benefit from the income of this property. And if she dies in his lifetime, he does not inherit it. [The rationale is] that she gave this property away before she married. When she dies during her husband's lifetime, the recipient of the present acquires full title to it.

Maimonides even states in *Zechiyah uMattanah*, in *Sefer Kinyan* on acquisitions, that a wife was 'merely attempting to circumvent the laws of inheritance. She assigned her property to the other person solely so that her husband would not inherit it. Implicit in the agreement was that if she needed it at any time, it would be returned to her' (6:12).

⁷⁹ See Gl. 6.3.

⁸⁰ *Mishneh Torah*, *Ishut*, 11:3.

⁸¹ *Mishneh Torah*, *Ishut*, 1:2.

⁸² *Mishneh Torah*, *Ishut*, 23:1.

⁸³ *Mishneh Torah*, *Ishut*, 11:6.

⁸⁴ A. S. Kofsky, 'A Comparative Analysis of Women's Property Rights in Jewish Law and Anglo-American Law', *Journal of Law and Religion*, vol. 6, no. 2, 1988, p. 351.

Alina Semo Kofsky termed the arrangement above as 'shetar pisis' and notes it is a controversial inclusion in the *Mishneh Torah* because common Talmudist opinion recognised it to be fraudulent in nature since women often kept such arrangements secret from their husbands.⁸⁵ The author illustrates juristic reluctance to recognise the instrument by quoting Mar Samuel of Nehardea (169 – 257 AD), who stated: 'I formally expound and teach that if a shetar pisis were presented me, I would tear it up and destroy it'.⁸⁶ Rabbinical opposition to this trust-like device reduces the likelihood that the English Jewry incorporated the principle into their customs.

Kofsky likened the shetar pisis to a trust throughout her article by describing the third party as holding legal title for a wife as a trustee, and defined it as a species of trust.⁸⁷ However, even if the English Jewry formally recognised shetar pisis in their communities, this element of Jewish family law did not inspire trust-like devices to circumvent coverture. The first case brought by a feme covert to assert a claim to separate property held in trust occurred in the sixteenth century.⁸⁸ Nonetheless, its approximation to the use is tantalising close. The shetar pisis is better regarded as possessing characteristics of a gift with condition in the traditional sense: as a delivery of property from a donor to a donee. The arrangement agrees with the principle in Zechiyah uMattanah, 3:9 that: 'Whenever a person gives a gift on the condition that it be returned, the gift is valid'. Maimonides viewed the arrangement as a species of gift, which he made clear by referring to it as a gift and by treating it under acquisitions. He also includes circumstances that outline when the gift is perfected: If the wife consents to a transfer of ownership or she dies while the donee is in possession (Ishut, 21:9; Zechiyah uMattanah, 6:12). The absence of a third-party interest, other than the donor or donee, further distinguishes it from a use-like structure. It appears one reason why the gift perfects on death without the mention of other parties is because Jewish law favours direct transmission of property between a donor and donee *inter vivos*, and consequently, did not develop

⁸⁵ Kofsky, *Journal of Law and Religion*, p. 331. The term shetar indicates the existence of a legal document or obligation.

⁸⁶ Kofsky, p. 331.

⁸⁷ Kofsky, p. 331.

⁸⁸ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 555; see also A. Tait, 'The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate', *Yale Journal of Law and Feminism*, vol. 26, no. 2, 2014, pp. 165 – 216.

testamentary rules that emphasised the legal title of third-party beneficiaries.⁸⁹ The association Kofsky made between the trust and shetar pisis is prima facie unusual because *halakha* appears to know nothing approaching the trust concept and modern Jewish cases prefer to treat like arrangements under the head of contract.⁹⁰ The shetar pisis is not found in the records of the Jewish Exchequer, nor did the common law exercise jurisdiction over Jewish family law, but it is evident that other aspects of Jewry law and *halakhic* principles could shape future development of the use.

Early Evidence (1200 – 1250)

The association made between the use and the legal practices of the Jewish Exchequer connect it to developments in debt law during the thirteenth century. The Jewish community was uniquely poised to influence this area of law because the king restricted their principal source of wealth to money lending rather than landholding.⁹¹ It was an uneasy arrangement, as Judith Shapiro notes, ‘at no time during their two-century presence in England were the Jews perceived as more than a necessary evil: a source of capital. The Jews, welcomed as moneylenders, were despised as creditors’.⁹² The Jewish community appeared to be aware of their dilemma. A discussion about usury (1204) reveals that English Jews took pains to justify the practice of usury despite reproach from European communities that argued the prohibitions against it in Deut. 23. 20 also applied to their Christian *brothers*.⁹³ Regardless, the king extended his protection to the community as a whole because their money lending was a significant source of wealth.⁹⁴ The unique confluence of a Jewish monopoly over usury coupled with the comparatively incomplete debt jurisprudence in English law led to the dissemination of principles of the former into the latter.⁹⁵ It incorporated a form of debt contract called the shetar, commonly referred to in records as a starr, which allowed a Jewish lender to seek relief

⁸⁹ Kofsky, *Journal of Law and Religion*, p. 351.

⁹⁰ A. Hofri-Winogradow, ‘Express trusts in Israel/ Palestine: a pluralist trusts regime’, in L. Smith (ed.), *Re-Imagining the Trust: Trusts in Civil Law*, Cambridge, Cambridge University Press, 2012, p. 110.

⁹¹ F. H. Lawson, ‘Assignments of Debts in England from the Twelfth to the Thirteenth Century’, *Law Quarterly Review*, vol. 47, no. 1, 1931, p. 518.

⁹² Shapiro, *Georgia Law Journal*, p. 1193.

⁹³ Jacobs, *The Jews of Angevin England*, p. 224.

⁹⁴ Routledge, *The Journal of Legal History*, p. 93.

⁹⁵ Shapiro, *Georgia Law Journal*, p. 1181.

for the amount owed in both money and other property.⁹⁶ The flexibility of this arrangement, called the Jewish gage, may have become the foundation of the modern mortgage arrangement.⁹⁷ Jewish debt law, however, also introduced ingredients in English law with implications for the later development of uses.

From an early period, the complexity of debt law created an environment conducive to the development of the use as a tool to protect interests beyond those of the owner of the property or their heirs. The Liberate Rolls (1204) record that Benedict, a Jew of Norwich, let the land he held in pledge from Jocelin de Lodnes to Walter de Ravingham.⁹⁸ However, King John ordered Benedict, under the supervision of the Warden of the Jews, to deliver the land to Thomas de Camera to hold until Jocelin's heirs were freed of their debt. The King's reasons are not apparent and the editor notes this is one of the few charters John directed to a Jew.⁹⁹ It illustrates the situation where Jocelin's heirs, as ultimate owners, could enforce a writ of novel disseisin against Thomas if he refused to accept their interest as owners of the land after the satisfaction of the debt. The circumstances of their enforcement, however, does not derive from a beneficial interest. Instead, the intention behind the transaction is to benefit the third parties, Benedict and Thomas, not Jocelin nor his heirs whose land is encumbered with the gage. This transaction does not approach the use at this early date but illustrates that the law juggled multiple interests, and accepted parties who are not the ultimate owner could have an enforceable interest against land.

The presence of competing interests on land from creditors, debtors, heirs, and other parties often leads to attempts to circumvent the law through trust-like instruments. In the early twelfth century, however, the evidence indicates that the most common method to defeat the interests of creditors is to simply grant the land to another party. The grant of pledged land to the Church in frankalmoign appears to be frequently used by debtors in their attempts to defeat their creditor's interests, which resulted in judicial inquiries about priority of interests. A case brought by the Abbot of Girewaus (1218) asked

⁹⁶ Shapiro, p. 1189.

⁹⁷ Shapiro, p. 1180; Hazeltine, *Select Essays in Anglo-American Legal History*, vol. 3, p. 666.

⁹⁸ Jacobs, *The Jews of Angevin England*, p. 230.

⁹⁹ Jacobs, p. 230.

whether land belonging to Wigan de Hereford was put in frankalmoign to his monastery before being given in gage to a Jew.¹⁰⁰ A rule appears to have emerged, as discussed in a case (1220) brought by Isaac of Norwich against the Prior of Royston, which held a grant in frankalmoign could not free land of its existing charges.¹⁰¹ This rule appears to have general applicability. Isaac of Norwich defended a suit in 1220 brought by a widow named Mathilda to recover dower property by claiming he had received the pledge prior to her engagement and it had been enrolled in the Jewish Exchequer.¹⁰² The evidence further suggests the rule developed to dissuade third parties from being complicit to such arrangements. Nevertheless, its effect could be harsh on *bona fide* grantees. The complex case (1220) brought by Dionisia de Bereford against the abbot of Bordele to enforce a writ of novel disseisin, concerned allegations her brother had disseised her of property and later granted it in frankalmoign to the monastery at Bordele before his death.¹⁰³ The justices held the grant to be illegal and queried what damages the monks ought to pay for their trespass against her estate. These cases illustrate the growing sophistication of the law to look beyond possession.

The absence of uses during this early period is highlighted in one case (1218) brought by a creditor named Chera, a Jewess, against Helto Fauciliun for 80 marks.¹⁰⁴ Fauciliun argued the land he inherited could not be subject to the gage because his father had received it by gift (not in the donative sense, but referring to a feoffment) from his grandfather with the condition ‘not to grant, sell, or give it in gage’. Fauciliun wished to avoid the gage with an argument that his father was not entitled to pledge the land contrary to the condition. His argument, however, does not suggest he had an interest approaching beneficial ownership despite the implication that he should have inherited it unfettered. The court does not discuss the effect of the gift on the gage or whether Fauciliun could enforce its condition against Chera because the chirograph allowed him to satisfy the debt from other lands. Nonetheless, this case illustrates by implication that grandparents may occasionally wish to benefit descendants and make provision to do so. This may appear to be a use. However, the grant imposed restrictive conditions on the

¹⁰⁰ PREJ, vol. 1, p. 4.

¹⁰¹ PREJ, vol. 1, p. 23. See R. Stacey, ‘Isaac of Norwich’, *ODNB*, vol. 41, pp. 198 – 199.

¹⁰² BNB, no. 1445.

¹⁰³ PREJ, vol. 1, p. 52.

¹⁰⁴ PREJ, vol. 1, p. 4.

father rather than an active duty to transfer the land to the grandson as the ultimate legal owner. Fauciliun's father was the intended beneficiary of the land and it descended to Fauciliun through the operation of law. If the use had been available, the argument would have been framed as a grant to the father with the positive condition he grant it to the younger Fauciliun. The father's possession to be transitory rather than intergenerational. Furthermore, a later mandate (1220) where the King took all lands held by Fauciliun into his hands to satisfy the debts owed to Chera indicates his argument failed.¹⁰⁵ These early gifts with conditions, however, approach the nature of a use by considering the benefit of parties' other than the feoffee.

Early judgments also addressed issues of grants intended to defeat creditors' interests with reference to the priority of legal rights. In one case (1244), Hugh, son of Hugh, alleged that Belia of Hungerford and her son-in-law Vivant caused him to be unlawfully distrained for a debt with the result of his lands being taken into the hands of the king.¹⁰⁶ The Jewish creditors denied the existence of a writ of distraint but admitted receiving payment for a debt from Hugh's father. They produced a charter that Hugh, the father, gave land in gage for 18 marks with the stipulation that the younger Hugh is unable to contravene the gage by any gift. However, Hugh argued that he is not bound to answer the debt because he was enfeoffed in the land before it had been given in gage. Again, the argument turned on the issue of priority with the implication that Hugh's father had no right to pledge the land. The evidence also illustrates that the justices of the Jews were sympathetic to the loss a third party suffered when discovering a Jewish gage had priority. The case (1244) of Elias against Geoffrey, abbot of Wardon suggests that debtors ought to warrant the next purchasers about hidden encumbrances.¹⁰⁷ The cases available to us, however, suggest that no use-like arrangements ever came before the Jewish Exchequer during the first half of the century. Instead, feoffors used restrictive conditions to control the devolution of land.

There is a passage in *De legibus et consuetudinibus Angliae* that suggests the common law would have been reluctant to enforce a use even if it took the form of conditional

¹⁰⁵ PREJ, vol. 1, p. 33.

¹⁰⁶ PREJ, vol. 1, p. 81.

¹⁰⁷ PREJ, vol. 1, p. 73.

feoffment. Further, it is evidence to suggest the controversial *shetar pisis*, if ever practised in England, would not have been received into usage outside of the Jewish community. Bracton contemplates the scenario where a husband makes a gift to a stranger on the condition that he transfer it to the wife during the husband's lifetime or after death. Such gifts, Bracton says, are invalid as they are an attempt to circumvent the rule that no gift is to pass between husband and wife. (Br. ii, p. 54). He reasons that such gifts are a fraud and even the act of giving it to a third party should be treated as if the gift was made directly. However, there is an arrangement that looks like a use on its face:

The contrary, however, was held, erroneously and by mistake of the court, and, so to speak, by counsel of the court, [in the case] of Godfrey of Crowcombe, who gave land to Robert of Mucegros so that after the death of Godfrey the same Robert might give it to Godfrey's wife (Br. ii, p. 98).

Bracton is at pains to emphasise its enforcement is anomalous and he does not record the case in his notebook. His opposition suggests the utility of the use had not penetrated the legal conscience. Furthermore, that the law should prohibit any arrangement that tried to circumvent the law. On the other hand, the case suggests that the courts occasionally enforced use-like arrangements.

The exceptional nature of the above-mentioned case does not, by itself, support an argument that people made uses. This singular instance of enforcement of a use-like arrangement appears to be an anomaly, and there is no evidence of a sustained practice of this kind in the early twelfth century. Such a development would have had to overcome the weight of Bracton's authority. Instead, this case is demonstrative of the growing expectation that the law ought to accommodate the wishes of those who held land.¹⁰⁸ It does not appear coincidental that the demand for greater flexibility followed the decline in the number of landholders who became knights and an increase in the number who became lawyers instead.¹⁰⁹ The case mentioned in Bracton appears to be a successful attempt to circumvent the operation of law. Joseph Biancalana notes grants designed to

¹⁰⁸ See T. G. Watkin, 'Quia Emptores and the Entail - Subinfeudation and the Family Settlement in Thirteenth Century England', *Tijdschrift voor Rechtsgeschiedenis*, vol. 52, 1991, p. 353.

¹⁰⁹ S. Waugh, 'The Third Century of English Feudalism', in M. Prestwich, R. Britnell and R. Frame (ed.), *Thirteenth Century England VII: Proceedings of the Durham Conference 1997*, Woodbridge, The Boydell Press, 1999, pp. 50 - 51.

control succession had become more common by the 1220s.¹¹⁰ The growing power to control the fortunes of land was an important step towards the eventual development of the use. Maitland commented that: 'But that men were within an ace of obtaining such a power [to control succession] in the middle of the thirteenth century is memorable; it will help to explain those devisable 'uses' which appear in the next century'.¹¹¹ The interpretation of multi-party interest in the Jewish Exchequer meant that the court heard a greater frequency of cases with devices describable as use-like in nature.

Elements associated with uses found in the Jewish Exchequer

The evidence suggests that legal institutions reminiscent of the use were confined to the latter part of the thirteenth century. There are three arrangements present within the case law that signal certain practices in the Jewish Exchequer could have contributed to the future development of uses. The practice of safekeeping property by third parties, use of fictional attorneys, and the transfer of property to other parties to circumvent the law all have qualities associated with trust-like instruments. The records suggest that these arrangements were the innovation of Jewish creditors rather than debtors seeking to avoid debts. Several factors may influence the weight of the evidence. First, the plea rolls for the Jewish Exchequer become more abundant after 1244.¹¹² Second, parties often create trust-like devices in secret arrangements, which makes their function and the intention of the parties difficult to discern. For example, Jacobs cites an example from the Pipe Rolls (1202 – 1204) that states 'Muriel the Jewess owes £100 that she may have for her husband Isaac, the Jew of Oxford, as has been spoken between them'.¹¹³ Jacobs comments that 'what is spoken between them' suggests their marriage was a business partnership and this arrangement was an assignment of debt, which required the king to be compensated.¹¹⁴ It is plausible, as the editor suggests, that the grant was designed to avoid paying the king. A trust-like device could have been utilised in the above scenario but there is no evidence to support its existence. It is imprudent to argue for the existence

¹¹⁰ J. Biancalana, *The Fee Tail and the Common Recovery in Medieval England 1176 – 1502*, Cambridge University Press, 2003, p. 18.

¹¹¹ Pollock and Maitland, *The History of English Law*, vol. 2, p. 27.

¹¹² Bailey, *Law Quarterly Review*, p. 524.

¹¹³ Jacobs, *The Jews of Angevin England*, p. 218.

¹¹⁴ Jacobs, p. 219; Bailey, *Law Quarterly Review*, p. 520.

of a legal instrument beyond what the evidence can tell us, but the matters heard by the Jewish Exchequer pushed the limits of the common law.

Safekeeping

There is an irresistible temptation to conclude the records of the Jewish Exchequer show a direct transmission of *halakhic* principles into England when discussing the laws related to the safekeeping of chattels. She'elah uFikkadon, in the book of *Sefer Mishpatim*, outlines numerous principles analogous to safekeeping in England. It is a significant inclusion because the rule in She'elah uFikkadon 5:1 recognises that the grantor could designate entrusted money to be given to the poor or the redemption of captives, and those groups could claim against the custodian. The potential to associate this rule with the use is clear. It is reminiscent of longstanding Roman law rules that allowed a person to designate money for the release of captives by *fideicommissa*.¹¹⁵ The Roman charitable principle was later expressed in the sixteenth-century *Reformatio Legum Ecclesiasticarum* (1552) (Canon 27.9) and later repeated in the preamble of the Statute of Charitable Uses 1601 (43 Eliz 1., c 4).¹¹⁶ The latter remains the starting point for modern charitable trusts.¹¹⁷ The records of the Jewish Exchequer, however, bear no evidence that suggests English law adopted the rule in She'elah uFikkadon 5:1 to develop a trust-like arrangement. Instead, the cases follow the broader tenor of the principles in She'elah uFikkadon that concerns circumstances where property has been despoiled or lost, and arrangements where the grantor desires the return of a chattel from its custodian. The cases suggest this or an analogous principle became a regular practice by the late 1260s in response to the Second Barons' War. The baronial hostility towards the Jews during this time reflects the continuation of attitudes to their money lending activities that led to the Petition of Barons (1258).¹¹⁸

¹¹⁵ See Cod. 1.3.28.1.

¹¹⁶ See G. Bray (ed), *Tudor church reform: The Henrician Canons of 1535 and the Reformatio Legum Ecclesiasticarum*, Woodbridge, Boydell Press, 2000.

¹¹⁷ Richardson and Breach, *Nevill's Law of Trusts, Wills and Administration*, p. 157.

¹¹⁸ Prestwich, *Plantagenet England*, p. 125.

Several cases concern the transfer of chattels to others for safekeeping. A typical case of this kind is illustrated by an action (1268) brought by Hugh Wychard and Matilda, against a Jew, Isaac, touching a plea of detinue.¹¹⁹ Isaac alleged he delivered, by the hand of his wife Avygotta, chattels worth 15 marks to Hugh and Matilda for safekeeping, but they unlawfully detained them to his loss of £40. Hugh and Matilda denied ever receiving the property. Another example (1270) is Isaac of Northampton who entrusted clothes valued at £12 and 60 solidates of gold for safekeeping to William and Cecilia Le Brode that they refused to deliver to him.¹²⁰ A custodian keeping an object for personal use is contrary to the purpose for which it has been entrusted. Further, the person who delivers them for safekeeping must be their owner.¹²¹ However, Jewish law also contained rules relating to stolen and lost property that had been entrusted. She'elah uFikkadon 7:8 reads: 'When a person entrusts money to a householder, whether it is bound or not, the custodian may not use it. Therefore, if it became lost or stolen, he is not responsible for it'. The rule is reiterated for professional custodians that reasonable steps must be taken to protect property including in the event it is stolen, but otherwise 'if it is lost due to forces beyond his control - e.g., they were taken by armed thieves - he is not liable' (7:6). It is through these rules that the Jewish influence on English law appears to shine through.

Jewish law imposed greater responsibility on parties who received payment or might be expected to professionally keep it safe. The circumstances behind the loss of chattels was material to the law in both *halakha* and English law. The case of Moses and Gamliel of Oxford against Nicholas of Waddington (1268) included a defence raised by Gamaliel that he lost the starr and chattels held by him in safekeeping because the property was stolen while the Earl of Gloucester occupied London during the Second Barons' War (1266).¹²² However, an analogous case (1267) between Lovekin, a cook, against Isaac (and his wife Slema) illustrates when a custodian might be held responsible.¹²³ Isaac alleged that he delivered the chattels to Lovekin for safekeeping at his peril (a warranty which means Lovekin would be liable if he lost them), to which Lovekin acknowledged he received the goods but not at his peril. Further, he said that armed thieves robbed him of the property.

¹¹⁹ PREJ, vol. 1, p. 169.

¹²⁰ PREJ, vol. 1, p. 222.

¹²¹ See SPJE, p. 32.

¹²² PREJ, vol. 1, p. 162.

¹²³ PREJ, vol. 1, p. 145.

It appears that Isaac argued that even if the property was stolen that Lovekin should have a greater degree of responsibility. Since Lovekin is likely to be a shop keep who took money, his liability could be determined under the rule in She'elah uFikkadon 7:6. However, no explicit reference to Jewish law is made. The fact that there was a body of law related to safekeeping in the court Jewish might suggest that the matter at least touched on *halakhic* principles and its rules for lost or stolen property. However, the relationship remains of the circumstantial sort.

Notwithstanding the question of the Jewishness of the practice of safekeeping, it appears the practice surrounding its principles introduced elements associated with trust-like devices. As also alluded to in Mechirah 22:9, the rules of safekeeping operable in England allowed a grantor to designate property to a third party. For example, a case (1270) reads:

William de la Leyhe offered himself on the fourth day against John Le Irreys touching a plea, that he returns to him 6 marks that he delivered to him for safekeeping in equal hand to the use of Abraham of Berkhamsted, which moneys he should have paid the said Jew and did not.¹²⁴

The obligation stated here is that John entrusted property to William with instruction to deliver it Abraham, but William failed to act as instructed. Furthermore, William acknowledged he received the property into his custody to deliver to Abraham. In another case (1266), Aaron of Kingston brought suit for the return of two bowls of mazer-wood worth 20s. against John Harding who unlawfully detained them.¹²⁵ Harding acknowledged he received the bowls but says that 'by token concerted' (*ciphos per intersigna*) with Aaron, that he delivered them to John Alfred. Alfred stated he pledged the bowls to Aaron for 4s., and that Alfred received a token from Aaron 'by placing his hand in the fold of his tunic' (*quod posuit manum suam in sinu suo*). It is by that token that Harding delivered the bowls. It unclear whether Alfred had paid the amount of 3s. and 2d. adjudged owed to Aaron, but Harding was quit of the suit. The token and the ceremony, however, suggested that safekeeping may have included oaths or elements of good faith to carry out the instructions of the grantor. What is absent from these cases is a clear

¹²⁴ PREJ, vol. 1, p. 227.

¹²⁵ SPJE p. 31.

indicator that the designated party could enforce the arrangement against the custodian of the property for not keeping the property safe or making delivery. These arrangements appear to be use-like on their face but the common law did not extend principles related to safekeeping to land. The instruments appear to bear a passing similarity only but show the law closely following the intention of the parties.

Fictitious Attorneys – transfer of legal ownership

A characteristic of a use is that the feoffee acquires legal title to land only to grant it to another party. There is analogy with the many cases involving attorneys in the Jewish Exchequer, which make clear the fictional character of their appointments. F. H. Lawson noted this in his analysis of assignment of debt. The author argued the purpose behind such arrangements is to evade the rule that assignment requires the king's license. Jewish assignors retained nominal ownership while the assignee, acting as an attorney, benefitted from the transaction.¹²⁶ This created a problematic situation: to enforce a debt the assignee must sue in the name of the assignor.¹²⁷ An early example of this practice is contained in the starr (1268) of Gamaliel of Oxford who sold an outstanding debt of £120 to Baldwin for £60, half of the amount owed but more than the principal loan (£37 10s), with the remaining interest to be paid over four years.¹²⁸ This allowed Baldwin to have power to acquit, receive, grant, sell, and compound the debt, and take seisin of lands and chattels in the name of the said Jew. The charter also included guarantees that the debt is good in law and protections for Baldwin against possible legal actions. It is clear both the Jewish creditor and Baldwin benefited from the arrangement despite the latter party being called an attorney. The nominal role of the Jewish creditor is evidenced in the condition that although he retained power to acquit the debt, he could not do so without the consent of Baldwin.

The Jewish Exchequer allowed feoffors to pursue objects with arrangements designed to circumvent the law. A starr (1268) suggests the power stems from the lost Assize of Jews (mid-thirteenth century) coupled with customs that allowed a Christian to buy and

¹²⁶ Lawson, *Law Quarterly Review*, p. 527.

¹²⁷ Lawson, p. 527.

¹²⁸ SPJE, p. 46.

receive an assigned right to collect the principal and interest of debt with the power to 'make acquittance, release, sale, grant, distraint, levy, or seisin, according to the Custom of Jewry'.¹²⁹ Further, it contains a provision that although the Jew is bound to pursue the debt in the courts, the Christian will cover all their expenses. It is notable that the power to appoint an attorney to receive a debt appears contrary to Jewish law in the opinion of Maimonides (Sheluchin veShuttafin, 3:1). Furthermore, England's Jewry law appear to have departed from the rule in Numbers 18:28 that a non-Jew may never be appointed as an agent for any mission whatsoever.¹³⁰ Nonetheless, it appears the principles relating to fictitious attorneys emerged from the unique practice of England's Jewry. Lawson notes their use allowed Jews to avoid the rule against usury (Deut. 23. 20) and charge each other interest on debts through a third-party Christian facilitating the arrangement.¹³¹ The case law also suggested that the Jewish Exchequer accepted the fictitious nature of these appointments. For example, the case (1270) of Alard de Firingham against Waleramm for disseisin concerned a debt of 20 marks, bought by Alard from the Jews Cresse and Cok, which Baldwin de Wayford owed to them.¹³² The charter reads that '[Alard] as *nuncius* of the said Jews had seisin of the said Baldwin's lands and tenements by writ of the king'. The term *nuncius*, or messenger, also appears to signify appointment to act.¹³³ The records suggest, however, that the law gave effect to these kinds of arrangements no matter their terminology. Whatever the nature of the office, it is clear the appointment meant that the attorney steps into the shoes of the Jewish creditor to enjoy legal ownership of the property. The effective transmission of legal title to another party to pursue an alternative purpose is a characteristic approaching the qualities of a use.

By stepping into the shoes of a Jewish creditor, the attorney effectively acquired the legal position of a Jew. Routledge suggests Jews held land *sui generis* in the capacity of the king's chattels.¹³⁴ However, by the mid-thirteenth century, the Assize of Jews restricted

¹²⁹ PREJ, vol. 1, p. 212.

¹³⁰ Mishneh Torah, Hilchos Sheluchin veShuttafin, 2:1.

¹³¹ Lawson, *Law Quarterly Review*, p. 519.

¹³² PREJ, vol. 1, p. 223.

¹³³ See also PREJ, vol. 1, p. 288.

¹³⁴ Routledge, *The Journal of Legal History*, p. 105.

their ability to own land outright.¹³⁵ A Jew could only have a possessory interest in land or 'Jewry Seisin'. The case (1272) of Robert de Houston against Hugh de Vienne, concerning writ of novel disseisin, indicates that the existence of a king's writ of Jewry seisin was the method by which a Jew or their agent could enforce a legal interest against land 'according to the custom of Jewry'.¹³⁶ The writ also imparted on the Christian attorney the limitations imposed on Jews who had seisin of a debtor's land. The case (1272) brought by Roger Syfrewast and Adam de Stratton (his guardian) against Stephen Cheyndut and John de Hertord concerned the debt sold by Hagin and Cok to Henry de Burghill, who subsequently sold it to Adam.¹³⁷ The case states that before selling it, Henry had felled wood contrary to the Assize of Jews, which stated that no Jew nor his attorney may lawfully waste, sell or impair the houses, woods, or gardens or like appurtenances of a manor. Several complaints arose because seised Christians ignored the limitations. The case (1272) of Henry de Kingsfolde against Henry Tregoz concerned Tregoz who had seisin of Kingsfolde's manor in 'the name of a Jew' but 'sold timber, and issues of the houses, garden, herbage etc. receiving £28'.¹³⁸ The imposition of limitations, however, demonstrated that a fictional attorney enjoyed the same incidence of legal title to the property as a Jewish creditor. Recognition of fictional attorneys do not approach the nature of uses but show how far the common law was prepared to bend to accommodate the intentions of both Jews and Christians.

Transfers to avoid the operation of the law

An association between the use and unenforceable trust-like devices to avoid the operation of law is a problematic starting point to found a theory of the use in English law. In England, Jews who converted to Christianity forfeited their property to the king, which Jacobs notes in his attempt to reconstruct the Assize of Jewry.¹³⁹ The records of the Jewish Exchequer reveal that converted Jews attempted to avoid the harshness of this rule by placing their property in the hands of another before their conversion. In the case

¹³⁵ Prestwich, *Plantagenet England*, p. 125.

¹³⁶ PREJ, vol. 1, p. 305.

¹³⁷ PREJ, vol. 1, p. 275. See R. Stacey, 'Stratton, Adam de', *ODNB*, vol. 53, pp. 38 – 39.

¹³⁸ PREJ, vol. 1, p. 286.

¹³⁹ Jacobs, *The Jews of Angevin England*, p. 332.

(1268) of Jospin against Lombard, both sons of Solomon of Marlborough, Lombard's daughter-in-law Joiette converted to Christianity while holding a debt.¹⁴⁰ Jospin accused Lombard of replacing Joiette's name on a chirograph for a debt with his own, which had the effect of depriving the king of the debt by reason of her conversion. Jospin bound all his possessions to the king regarding the truth of the statement. The proximity of the family relationships is an important factor that led to this case being heard by the Jewish Exchequer. It is likely a secret arrangement existed where Lombard agreed to take on the debt to prevent the forfeiture that would have deprived his son and daughter-in-law of the asset. Lombard assumed the risk because he was acting in his family's interest and the interest of his household. Therefore, it is unsurprising that the person who discovered the attempt to circumvent the law is a close family member. The proximity of Jospin to the parties, as a brother, means he is privy to intimate family information. The decision to place his possessions into the hands of the king strengthens the veracity of his allegations. Jospin's motivations are unclear and could range from an attempt to win royal favour or a grudge against his brother.

This case makes clear the object of the arrangement in Lombard's case was to defeat the rule of forfeiture. The chirograph would simply show an assignment of the debt to Lombard. A feature of the law related to assignments is that the assignor did not have to obtain consent from the affected party.¹⁴¹ The debtor, Hugh Lovel who owed 32 marks to Joiette does not appear party to the secret arrangement. He did not receive a benefit from the assignment and still owes 32 marks, which suggests he is an innocent party. Further, he would not have received a benefit from depriving the king of his debt nor is his relationship to Lombard or Jospin such to risk breaking the law. Jospin also summoned Hugh as a witness. Unfortunately, the nature of the arrangement between Lombard and Joiette is uncertain. Several factors are plain. Joiette would have had to agree to assign the debt. It is also unlikely she would have assigned it or took the risk of violating the law without some kind of material benefit. The fact that Jospin does not allege that Lombard bought the debt suggests the intention was to simply assign it by grant. A sale would have brought unwanted attention to the circumstances of the arrangement. The probable

¹⁴⁰ SPJE, p. 43. On the figure of Lombard and a brief description of the case, see R. Mundill, 'Lombard and Son: The Businesses and Debtors of Two Jewish Moneylenders in Late Thirteenth-Century England', *The Jewish Quarterly Review*, vol. 82, no. 1/2, 1991, pp. 137-170.

¹⁴¹ Lawson, *Law Quarterly Review*, p. 527.

situation is that Joiette would have continued to receive profits from the debt as a 'beneficiary' of the secret arrangement even though legal ownership vested in Lombard. However, there is no way to know for certain. The secret nature of such arrangements makes their assessment problematic. It has the hallmarks of an unenforceable trust arrangement to pursue an illegal object since there is a clear transfer of legal ownership to a party not intended to be the ultimate beneficiary. In this case, Joiette and her husband are the presumed beneficiaries. Nonetheless, the idea of an unenforceable use or trust means Joiette would have to confess that she and Lombard conspired to violate the law if she wanted to bring an action to claim back the property. The law did not enforce fraudulent arrangements and, consequently, this case does not support an argument that uses existed in English law.

Edward I took a more proactive approach than his father to quashing this practice. Most of the cases that occurred under this head happened during his reign. The King's claim (1277) against Aaron Crespin concerned a moiety of land with appurtenances in London that had formerly belonged to an allegedly converted Jew named Melkana.¹⁴² The case states the King would quit his claim if the still-living Melkana could prove she had never converted. It is clear the onus is on Aaron to prove no conversion had occurred rather than the fact he had been granted the moiety. In this case, several witnesses attested that there was no conversion, and allowed Aaron to hold the land in peace. Nonetheless, the issue concerned whether Melkana had converted, not that an assignment had occurred, which shows the primary concern is whether the arrangement existed to defeat the interests of the king. Edward acted to quell the practice of fraudulent assignments by offering converts more favourable terms in 1280 to seizure of half their property.¹⁴³ He vigorously pursued forfeited property and brought legal actions against Christians who were liable in debt to a converted Jew.¹⁴⁴ Secret arrangements of this kind, to achieve illegal devices, do not offer a foundation for the recognition of uses in English law. Instead, it shows that people were making extra-legal arrangements that approached the character of the use in the thirteenth century.

¹⁴² SPJE, p. 99.

¹⁴³ Mundill, *England's Jewish Solution*, p. 276.

¹⁴⁴ SPJE, p. 125.

Edward I's reign marked a turning point for Jewish history in England. It is a change documented in the practices of the Exchequer of the Jews until the expulsion. The period of Jewish influence on legal history, at least for the medieval period, ended abruptly in 1290 when the Jews ceased to be a valuable source of income for the King.¹⁴⁵ Edward's religiosity guided his attitudes towards the Jews in England and conversion occupied an important part of his Jewish policy.¹⁴⁶ The records of the Jewish Exchequer suggest Edward adopted a significantly tougher stance than his father. The change in royal tolerance of the Jewish community is evident in the statute of Jewry (1275), which outlawed usury and placed significant restrictions on the person and movement of Jews. Edward even arrested the entire Jewry of England for instances of coin clipping, an act devaluing coin by reducing its weight, and later hanged offenders.¹⁴⁷ Lawson notes Edward exercised the royal prerogative to assign debt at will more frequently than his father.¹⁴⁸ Furthermore, the use of third-party attorneys that Henry had tolerated during his reign disappear entirely from the records. Edward's policy appears to have focussed on removing the legal arrangements that the Jews had exploited and the punishment of their evasive practices.¹⁴⁹ Nonetheless, both the expulsion and definitive end to the Jewish Exchequer raise doubt whether its recognition of trust-like devices left an impression on English law.

Conclusion

The evidence suggests that the use did not develop out of the century-long practices of the Jewish Exchequer. However, legal historians have never raised the possibility. If evidence of uses is within the court's records, the use would have at least a tangential relationship to the crusade movement. There are several elements applicable to the court that favoured the development of novel legal instruments. First, it was created to respond to the legal issues that Richard I encountered during the preparation of his crusade activities. There appears to be no continental template to model the court and, therefore, its practices were a product of English innovation. Second, the court presented an

¹⁴⁵ See Prestwich, *The Three Edwards*, p. 24; Mundill, *England's Jewish Solution*, p. 146.

¹⁴⁶ Mundill, *England's Jewish Solution*, pp. 274 – 275.

¹⁴⁷ SPJE, pp. 95, 122, 128.

¹⁴⁸ Lawson, *Law Quarterly Review*, p. 530.

¹⁴⁹ See Lawson, p. 528.

opportunity for England to receive legal principles from the sophisticated Jewish experience with the law and legal systems. The neglect of the records in the Jewish Exchequer means evidence of the use's creation may have gone unnoticed. Finally, the primary subject of the court concerns private law obligations related to debt. The early thirteenth-century records show that the law had engaged with the idea that multiple parties could have a legal interest in land, and questions about the priority of those interests. These legal issues suggest the common law had become sufficiently sophisticated to develop a lawful conception of uses. It was worth considering whether novel interpretations of common law principles applicable to England's Jewry furnished a theory of uses.

Jewish influence on credit law in England is a celebrated part of legal history. The pattern of tolerance for as long as it benefitted royal interests and the Church compared to the later restrictions imposed by Edward is a compelling narrative.¹⁵⁰ It is engrained in the history of the Jews in medieval England that the justification for their expulsion is the continued practice of usury.¹⁵¹ Nevertheless, their influence on this area of law persisted. Judith Shapiro comments: 'Even while Edward was divesting himself of his Jewish moneylenders, he made their legacy permanent. A small but significant principle of Jewish Law, wherein personal debt superseded rights in real property, had become the law of the land'.¹⁵² She notes the success of Jewish law at regulating the contact between Jews and Christians.¹⁵³ The records suggest, however, the possible influence of Jewish law on the development of the use occurs in a much briefer period between 1250 and 1272. While the principles related to safekeeping appear to have some analogies in *halakha*, the use of attorneys and the attempts by converts to circumvent the law appear to be unique responses by the Jewry to English law. Furthermore, Lawson concludes that 'the customs of the Jewry were unlikely forgotten despite the Court Jewish falling into disuse at the end of the thirteenth century and its impact traced to mortgages and the writ of elegit' offers a general caveat: there is no clear principle of law or writ that connects the customs

¹⁵⁰ Mundill, *England's Jewish Solution*, pp. 38 – 39; Brand, *The English Historical Review*, p. 1139.

¹⁵¹ Brand, p. 1157.

¹⁵² Shapiro, *Georgia Law Journal*, p. 1200.

¹⁵³ Shapiro, p. 1182.

of Jewry to the use.¹⁵⁴ Its legacy is principles that approached trust-like devices, which could survive only as far as the common law permitted.

¹⁵⁴ Lawson, *Law Quarterly Review*, p. 534.

Chapter 7. Evidence for the Existence of the Use between 1271 and 1307

In the figure of Edward I, historians have both crusader and lawmaker. As a lawmaker, the nineteenth-century legal historian Edward Jenks discussed at length how King Edward earned the title 'the English Justinian' in tribute to his role as a legislator, and the extensive number of statutes passed during his reign.¹ It is a title bestowed on him that reflects the role of statute as a vehicle for legal change through parliament rather than the courts.² In contrast, Edward's role in the history of the crusades is somewhat forgettable since a truce shortly into his campaign limited his crusading activity to skirmishes.³ The idea of future crusades, however, never left Edward's mind, and had a discernible impact on his later policies. Nonetheless, in the figure of Edward I we find the best opportunity for the use to take shape in English law in response to the crusade movement. His reign sees the rise of Chancery as an important administrative body.⁴ It is worth considering its function and its potential relationship with the Ninth Crusade (1270 – 1272) to examine whether the crusade inspired the creation of uses in Chancery. Research into the law-making practices of the Ninth Crusade benefits from three legal treatises and the development of Chancery rolls. The ample supply of evidence paints a clearer picture of the English legal response to the crusade, from both royal and individual sources, than any earlier expedition. Furthermore, there is an abundance of evidence that could show the use developed later as a reflection of crusading activities. It is worth considering, however, that there may be no evidence that connects the use to the crusade movement. Nonetheless, Edward's reign is recognised as a watershed period in the history of English law because of the advances in legislative practices to clarify the operation of the common law.⁵ It is necessary to examine whether the developments associated with his reign furnishes evidence for the existence of the use in either the late thirteenth or fourteenth centuries.

¹ E. Jenks, *Edward Plantagenet: Edward I, the English Justinian or the Making of the Common Law*, New York and London, G.P. Putnam's Sons, 1902, p. 335.

² Prestwich, *Edward I*, p. 268.

³ Prestwich, *Edward I*, pp. 66, 78. The author devotes a chapter to his crusading activities at pp. 66 – 87.

⁴ Prestwich, *Edward I*, p. 234; See also J. Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England*, vol. 1, London, John Murray, 1846, p. 207.

⁵ M. Prestwich, *Edward I*, Berkeley and Los Angeles, University of California Press, 1988, pp. 267 – 270.

Chancery and the development of the Use

Chancery, the traditional home of the use, is a reasonable starting point to search for evidence of the use. This apparatus had undergone a significant transformation throughout the thirteenth century. Michael Prestwich comments that 'Chancery used 3 to 4 pounds of wax a week for sealing documents it produced in the 1220s and 1230s, whereas by the late 1260s over 30 pounds was needed'.⁶ Thomas Madox indicated this reflected its diversification away from the affairs of the Exchequer.⁷ In addition to its growth, Thomas Haskett outlines another reason to explore its potential role in the development of uses:

The medieval English Court of Chancery is not a well-known institution ... Paradoxically, this neglect derives in part from the volume of the court's record - too much rather than too little. In addition, the documentation is too unlike other major legal records. A misunderstanding has arisen from preconceptions of jurisprudence, personnel, and process. These have produced the faulty syllogism that because it is Chancery it must be doing what Chancery does, and the benchmark for what Chancery does is the court of the sixteenth and seventeenth centuries.⁸

The dearth of modern commentary devoted to the subject suggests the same misunderstandings persist today. Such neglect means it is possible that the use could have been overlooked in its record.

Haskett also argued it is necessary to reassess the long-accepted truth that medieval Chancery exercised an equitable jurisdiction.⁹ This challenges the narrative in William Holdsworth's multi-volume *A History of English Law* (1903 - 1966), which details how Chancery developed during Edward's reign to supplement defects in the common law.¹⁰ There is some merit to the view. However, the complaint raised in *The Mirror of Justices* (1300) that 'it is an abuse that nowadays right is longer delayed in the king's courts than elsewhere' suggests that its supplemental character reflects procedural rather than

⁶ Prestwich, *Plantagenet England*, p. 55.

⁷ Madox, *The History and Antiquities of the Exchequer*, vol. 1, p. 196.

⁸ T. Haskett, 'The Medieval English Court of Chancery', *Law and History Review*, vol. 14, no. 2, 1996, p. 245.

⁹ Haskett, *Law and History Review*, p. 311.

¹⁰ W. Holdsworth, *A History of English Law*, 3rd edn, vol. 2, Meuthen, London, 1923, p. 346.

jurisprudential issues.¹¹ The author's complaint also reflects the foreseeable consequence of the ascendancy of royal courts over local courts during Edward's reign.¹² *The Mirror of Justices* highlights Chancery's administrative character when it states that the Chancellor is in charge of issuing writs, and in doing so, he does not 'sell or delay or deny remedial writ to anyone'.¹³ Chancery does not have the power to declare justice (*ius dicere*) because that is something conferred by the king's authority on the justices of the Eyre and the king's courts.¹⁴ The traditional view of Chancery as a court of conscience or equity reflects its function in the sixteenth rather than the thirteenth century.¹⁵ A reassessment of this kind has a profound impact on our understanding of the use and its association with the corrective power of Chancery. S. W. Devine believed that the Chancellor's awareness of classical equitable norms led to his jurisdiction over the use and the subsequent choice to conceptualise the instrument in civil law rather than common law terms.¹⁶ A reassessment of the nature of Chancery is a fundamental challenge to this belief.

Haskett concluded that 'chancery was a responsive, quick, inexpensive, and desirable avenue of recourse for those who felt that they had been wronged in ways that no other jurisdiction could remedy. Is this equity? No, not in the sense generally given to that term in most studies of English law'.¹⁷ It may now be comfortably asserted that the law operating in medieval Chancery was the common law. *Fleta* even states that the Chancellor is a person with 'wide experience of the laws of customs of English' (*qui in legibus et consuetudinibus anglicanis noticiam habeant pleniorum*) (Fl. 2.13). It is, therefore, also necessary to challenge the notion that the early Chancellor had no knowledge of the common law. Spence commented that the eventual appointment of common lawyers in the late fourteenth century reflects a concern: 'It seems to have been considered by some that the extraordinary jurisdiction might, if left in the hands of

¹¹ Anon., *The Mirror of Justices*, trans. W. Whittaker, London, B. Quaritch, 1895, p. 156.

¹² Prestwich, *Edward I*, p. 291.

¹³ *The Mirror of Justices*, p. 123.

¹⁴ *The Mirror of Justices*, p. 123.

¹⁵ Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, p. 50.

¹⁶ S. W. DeVine, 'The concept of *epieikeia* in the Chancellor of England's enforcement of the Feoffment to uses before 1535', *University of British Columbia Law Review*, vol. 21, no. 2, 1987, pp. 328 – 329.

¹⁷ Haskett, *Law and History Review*, p. 311.

persons not versed in the common law, be converted to the destruction of the law'.¹⁸ The evidence, however, suggests Chancellors were versed in the common law. Richard Fitz Nigel's *Dialogus de Scaccario*, the author holding numerous ecclesiastical posts in addition to his service as a royal justice,¹⁹ comments on the interrelationship between the Exchequer and king's court, and the prominent position held by the Chancellor to oversee the function of the former in the twelfth century.²⁰ His career and commentary highlight the intertwined nature of royal apparatus and ecclesiastical offices. There is also little difficulty illustrating that Chancery routinely dealt with matters touching the common law in the late thirteenth century. The first charter of the *Calendar of Close Rolls* (1272), for example, includes the Chancellor instructing the Sheriff of York to bring about the king's peace, and the second instructs the king's escheator to assign dower.²¹ The evidence does not appear to support an argument that the medieval Chancellor, even as an ecclesiastic, had no knowledge about the function of his office or officers.

Several nineteenth-century treatments about the function of medieval Chancery provide descriptions about its procedure that divorce its practice from its later equitable jurisdiction. Spence stated that the equitable function of Chancery emerged out of its jurisdiction over recognizances, a party undertaking before the chancellor that something is either true or they will observe a condition, which the author associates with the obligation that the parties will do right.²² D. M. Kerley's *A Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890) outlined the function of medieval Chancery in the following passage:

The answers tell us moreover that the custom of calling a respondent to show cause, which had prevailed in the previous reign [Edward I] in regard to recognizances, was sometimes adopted in considering remitted petitions, but the more general course, as yet, appears to have been to issue a commission to find the facts by inquisition returnable into the Chancery, a plan always adopted in the case of escheats and forfeitures.²³

¹⁸ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 339.

¹⁹ Richard Fitz Nigel, *Dialogus de Scaccario*, trans. E. Amt, Clarendon Press, 2007, p. xvi.

²⁰ Richard Fitz Nigel, *Dialogus de Scaccario*, p. 29.

²¹ CCR (1272 - 1279), p. 1.

²² Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 337.

²³ D. M. Kerley, *An Historical Sketch of the Court of Chancery*, London, C.J. Clay and Sons, 1890, p. 30.

It is important to note, however, that the above passage does not reflect the tenor of Kerley's work, which focuses on Chancery's development as a court of equity to supplement the rigour of the common law.²⁴ Spence also followed his contemporary John Campbell. Campbell suggested it is thanks to the efforts of Robert Burnell that Chancery had full jurisdiction to decide cases on 'wardship of infants, partition, dower, rent-charges, tithes, and goods of felons, and occasionally trespass'.²⁵ Spence and Campbell go too far in their assessment of Chancery's jurisdiction, but their observations about recognizances furnish a good starting-point for the kind of reassessment advocated by Haskett. These nineteenth-century descriptions about the operation of Chancery are more helpful than modern accounts that simply suggest the use developed out of 'English rules of equity or fairness to overcome the strict application of the common law by the ordinary Courts'.²⁶

In addition to its jurisdiction to inquire into affairs touching the interests of the king, Chancery's control over private legal matters, such as the use, stemmed from powers to wield writs in a manner akin to arbitration rather than an inherent equitable jurisdiction.²⁷ Its foremost weapon was a power to inquire into the nature of fact. Haskett comments the power of inquisition reflects early judicial activity.²⁸ However, Maitland's reflection that Chancery was not a court of justice appears to be a more accurate assessment.²⁹ Its utility in the law is illustrated in the following memorandum (8 June 1273):

The abbot of Stanleie, co. Warwick, and Henry Broud came into chancery, and granted that inquiry shall be made by twelve lawful men to be elected for this purpose with the assent of the abbot and Henry, whether or not Henry's father and grandfather and great-grandfather had the reasonable estover that Henry claims to have in the abbot's woods in Stanleie, which estover his grandfather and great-grandfather Avere wont to have there, as it is said, concerning which a plea was moved between them in the king's court; and if it be found by their verdict that Henry's ancestors were wont

²⁴ Kerley, *An Historical Sketch of the Court of Chancery*, p. 20.

²⁵ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 336; Campbell, *The Lives of the Lord Chancellors and Keepers of the Great Seal of England*, p. 207.

²⁶ Kelly, *Law of Trusts*, para [1.3].

²⁷ See Fl. 2.13.

²⁸ Haskett, *Law and History Review*, p. 248.

²⁹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 193.

to have such estover, the abbot grants that he will thereupon come to the king's court and will make to Henry all the security that the king's court shall provide thereupon.³⁰

The purpose of the inquisition in this situation is to determine the veracity of facts that lie behind a plea being heard at a court of law. The parties brought the matter to chancery to avoid potential costs and delay associated with legal action. Both agreed to be bound by the result which, as in modern arbitration, had the effect of settling their dispute before it reached a court of law. The outcomes reached by the parties were flexible, but in this example the parties agreed, if the estover (an allowance out of the land) existed, to reduce the court's role to overseeing enforcement rather than making a judgement. The writ issued out of Chancery reflects what the parties want to achieve in court at a greater cost. Such inquests from Chancery determined the legal dispute because its findings would inform any continuation of the plea before the courts. On 11 June,³¹ the parties nominated the twelve men who would make the inquiry. Their findings are not included in the record.

In the above example, it is unclear whether the parties agreed among themselves to come to Chancery or whether the impetus behind their decision came from judicial recommendation, as may be occasioned in modern courts. Nevertheless, there are numerous instances in the record that show parties were utilising Chancery's power to inquire into facts to enrol their agreements. On 6 February 1273, for example, William Giffard came into Chancery to enrol that he released houses pursuant to an agreement made in the king's court with Cok Hagyn, probably the Jewish Exchequer, who owed him seventy marks.³² It is recorded, 'afterwards Peter de Qurtefeld, attorney of William, came and acknowledged that he had received 21 marks that were in arrear of the said 70 marks, and acquitted the Jew thereof.'³³ The benefit of this arrangement is a record that both parties are able to invoke the enrolment in case of disagreement between them without having to go back to the royal court. The following illustrates the formula frequently used: 'John Isenberd acknowledges [in Chancery] that he owes to John de Hereford 20s; to be

³⁰ CCR (1272 - 1279), p. 48.

³¹ CCR (1272 - 1279), p. 49.

³² CCR (1272 - 1279), p. 43.

³³ CCR (1272 - 1279), p. 43.

levied, in default of payment, of his lands and chattels in co. Southampton. Given by the hand of W. de Merton, the chancellor'.³⁴ Crusaders preparing to leave on the Ninth Crusade also used Chancery in this manner. William de Valencia and Thomas de Clare enrolled an agreement that William had paid Thomas 600 marks while they were in the Holy Land, and that part of the monies owed ought to be satisfied out of debts owed to Thomas for land.³⁵ In addition to the enrolment of agreements, Chancery's power of inquiry could extend to discovering the existence of competing third party claims to litigation already being heard before the courts.³⁶ The legal consequences of Chancery's power of inquest make it an attractive alternative as arbitrator to disputes or potential disputes rather than the costly litigation complained about in *The Mirror of Justices*.

The exercise of a power of inquiry and its association as a cheaper and speedier avenue of justice appears to follow from the increase in Chancery business around 1260. In 1258, a charter records a petition by the burgesses of the lesser commune of Oxford to the king, as the fountain of justice, to inquire into the actions of their magnates and the many wrongs related to tallages and perversions against the king's justice.³⁷ The complaints are couched in language that shows petition to the king as a speedier course of justice. An example includes Walter de Middleton, divested of his possessions by the mayor's bailiffs, who 'prays for mercy and aid from the king, seeing that unless he obtains it speedily, he will be destroyed, slain, and brought to naught'. Matters that touched on the misconduct of officials were part of the business of Chancery, but the complaint regarding its issue of writs of attaint by *The Mirror of Justices* suggests that inquiries both criminal³⁸ and civil occupied a significant part of its attention.³⁹ Nonetheless, its reputation as an avenue of cheap and speedy justice continued into the fourteenth century. A charter (1309) describes how Thomas de la Corderye claimed his brother's messuage as next heir and made:

³⁴ CCR (1272 - 1279), p. 42.

³⁵ CCR (1272 - 1279), p. 45. See H. W. Ridgeway, 'Valencia, William de', *ODNB*, vol. 56, pp. 45 – 49; R. Frame, 'Clare, Thomas de', *ODNB*, vol. 11, p. 768.

³⁶ CCR (1272 - 1279), p. 48.

³⁷ Cal. Inq. Misc. v. 1, no. 238.

³⁸ E.g. Cal. Inq. Misc. v. 1, no. 2208.

³⁹ *The Mirror of Justices*, p. 164.

a fine to have an inquisition as to his right because he could not come to the king's court to obtain a writ, or to send another on account of his poverty, which inquisition being made on the Wednesday next following, and nobody else claiming any right, seisin was delivered to the said Thomas...⁴⁰

The outcome of this example shows a quicker resolution than what could be achieved in court if there was no legal dispute. It is necessary, therefore, to examine evidence for the existence of uses considering its administrative function rather than misconceived notions about equity jurisdiction in the medieval period. Furthermore, if the use is found in Chancery, the evidence suggests its origins would rest within common law principles rather than notions of conscience.

The Ninth Crusade

Chancery played a significant role in the interaction between the law and the Ninth Crusade. This crusade has never been connected to the use despite being England's second-largest expedition to the Holy Land. This might be surprising since neat parallels might be drawn between the figures of Edward I and Richard I who both took the cross as princes and fulfilled their crusade vow, unlike their respective fathers.⁴¹ Christopher Tyerman's treatment of the Ninth Crusade in *England and the Crusades, 1095 -1588* is much briefer than his chapter devoted to the Third Crusade but he opines that Edward fits a *Ricardian* model.⁴² Like Richard's campaign, the ninth expedition ended without achieving its aim, capturing Jerusalem, when Edward made peace with Sultan Baibars (d. 1277) to return to England and succeed his father.⁴³ The comparison generally ends there. The small size of Edward's force limited his military actions to raiding, which meant that 'despite his enthusiasm, Edward had contributed almost nothing towards a political, military, or diplomatic settlement favourable to the Christians of Outremer'.⁴⁴ For this reason, Edward plays a significantly smaller role in crusade historiography than Richard.⁴⁵ Prestwich devoted a chapter to the crusade in his biography of Edward. He concluded that although the Prince failed to make an impact in the east, Edward had

⁴⁰ Cal. Inq. Misc. v. 2, no. 47.

⁴¹ Tyerman, *England and the Crusades*, p. 111.

⁴² Tyerman, p. 124.

⁴³ Falk, *Franks and Saracens*, p. 194.

⁴⁴ Tyerman, *England and the Crusades*, p. 125.

⁴⁵ Prestwich, *Edward I*, p. 66.

earned the status of crusader.⁴⁶ The absence of a noteworthy achievement appears to be the reason why no attempt has been made to attribute the use to Edward's expedition.

Whatever reputation Edward enjoyed as a crusader during his lifetime did not follow him in the minds of historians. George Templeman, reflecting on historiography prior to the mid-twentieth century, makes no mention of Edward's crusade achievements in the list of accomplishments that historians hold up as evidence of the king's historical importance.⁴⁷ David Santiuste notes that popular knowledge about Edward's military triumphs in modern times focusses on his role in the Scottish wars as 'the Hammer of the Scots', which is the name inscribed on his tomb.⁴⁸ However, the Ninth Crusade is, *prima facie*, a more likely period than the Third Crusade for a relationship between the use and the crusade movement to be found in the preparations of crusaders. Tyerman justifies a focus on crusade preparation in his statement that '[although] ephemeral in its consequence, the Lord Edward's crusade nonetheless had demanded considerable administrative efforts'.⁴⁹ The same thoughts are echoed contemporaneously by Prestwich in his biography.⁵⁰ Furthermore, the scale of preparation by the royal apparatus means it is the most documented crusade event in thirteenth-century crusading.⁵¹ Simon Lloyd, publishing in the same year as Tyerman and Prestwich, is an authoritative account of England during the Ninth Crusade. His research led him to observe:

A comprehensive study of the relationship between the English common law regarding the crusader is still wanting, but evidence indicates that the crown and the royal courts responded positively to the needs and privileges of crusaders, upheld ecclesiastical protections, and reacted favourably to the representations of bishops and others on behalf of individual crusaders.⁵²

⁴⁶ Prestwich, p. 81.

⁴⁷ G. Templeman, 'Edward I and the Historians', *The Cambridge Historical Journal*, vol. 10, no. 1, 1950, p. 16.

⁴⁸ D. Santiuste, *The Hammer of the Scots: Edward I and the Scottish Wars of Independence*, Barnsley, Pen and Sword Military, 2015, pp. 2 -3.

⁴⁹ Tyerman, *England and the Crusades*, p. 126.

⁵⁰ Prestwich, *Edward I*, p. 66.

⁵¹ See generally Tyerman, *England and the Crusades*, pp. 86 – 110.

⁵² Lloyd, *English Society and the Crusade*, p. 164.

The present chapter will take steps towards a greater understanding of that relationship, but Lloyd's analysis of the Ninth Crusade and the law furnishes an admirable starting point for future scholarship.

The canon law privileges applicable to crusaders on the Ninth Crusade were the same protections granted to crusaders at the Fourth Lateran Council. The mandate issued 25 April 1263 states that indulgences for sins shall be granted to French crusaders and those who fund others in their place.⁵³ It includes a general statement that those crusaders should enjoy the legal privileges usually enjoyed by crusaders.⁵⁴ The pope appears to be making an appeal to an understood aspect of crusade legal tradition. The exact same formula (5 October 1263) is later used for England and other kingdoms.⁵⁵ It is unsurprising, therefore, that the bull issued on 23 October 1263 is a restatement of the privileges, indulgence, and immunities granted by Innocent III.⁵⁶ For example, it includes familiar restrictions on usury and a command for secular authority to control Jewish lending. Furthermore, ecclesiastical protection for both crusaders and their families is made clear.⁵⁷ As in Maitland's example, knights remained the focus of ecclesiastical recruitment efforts.⁵⁸ The crusaders on the ninth expedition also benefitted from papal subsidies raised from both clerical taxation⁵⁹ and the redemption of crusader vows.⁶⁰ The evidence suggests the canon law never furnished the use in response to the crusade movement. The *Liber Sextus Decretalium* (1294), issued by Boniface VIII, indicates the canon law continued to limit the *fideicommissum* as a kind of legacy and never extended it as a trust-like device to form part of crusader privileges.⁶¹ However, it is in the secular response to crusading rather than the canon law that Maitland's example seems to rest.

⁵³ J. Guiraud (ed.), *Les Registres d'Urban IV (1261 – 1262)*, vol. 2, Paris, Ancienne Librairie Thorin & Fils, 1901, no. 373.

⁵⁴ Guiraud, *Les Registres d'Urban IV*, vol. 2, no. 373. 'Volumus etiam cruce signatos illo privilegio illaque immunitate gaudere que in generali cruce signatorum indulgentia continetur'.

⁵⁵ Guiraud, *Les Registres d'Urban IV*, vol. 2, no. 466.

⁵⁶ Guiraud, no. 467.

⁵⁷ Guiraud, no. 467. 'Porro ecclesiarum prelati, qui in exhibenda justitia cruce signatis et eorum familiis negligentes extiterint sciant se graviter puniendos'.

⁵⁸ Lloyd, *English Society and the Crusade*, p. 82.

⁵⁹ Guiraud, *Les Registres d'Urban IV*, no. 134.

⁶⁰ Guiraud, no. 373.

⁶¹ A. Richter and E. Friedberg (ed.), *Corpus Iuris Canonici: Decretalium Collectiones*, Graz, Akademische Druck- u. Verlagsanstalt, 1959, pp. 1044 - 1045

The context where the use might be found as part of the crusade movement remains the same. Lloyd observes crusaders faced the same kind of temporal challenges as their predecessors, which included the need to settle affairs and instituting safeguards before their departure.⁶² For example, he states many crusaders continued the practice of satisfying debts to prevent aggrieved creditors from upsetting their affairs at home.⁶³ The complexity of crusader legal arrangements before departure continued to depend on their socioeconomic position.⁶⁴ The author comments, however, that 'land hunger' during the thirteenth century changed the nature of the primary legal methods that crusaders utilised to raise cash. Prestwich comments that the prosperity of the late thirteenth century led to the development of high farming practices, and consequently, the practice of placing estates into the hands of managers to cultivate land.⁶⁵ These conditions allowed crusaders the opportunity to attain more favourable terms for their transactions than the disastrous economic conditions reported in the First Crusade.⁶⁶ The least complex method remained the outright sale of land, as decided by Hebert de Boyvill,⁶⁷ which yielded significantly better revenue in a market more favourable to sellers than in the twelfth century.⁶⁸ Robert Charles took the usual step of alienating all his land in exchange for certain letters patent.⁶⁹ However, the logical result of increased demand for land led to shorter supply and a consequent reluctance to alienate.⁷⁰ The stronger bargaining power, Lloyd observes, allowed crusaders to move away from the traditional mortgage arrangements and instead pledge their land in *vifgage* as a species of usufructury pledge that allowed the lender to enjoy the fruits of the land to satisfy their debt.⁷¹ Crusaders, for example, John Lovel⁷², also utilised lease arrangements for a certain term to raise money.⁷³ Therefore, the economic conditions during this period hardened

⁶² Lloyd, *English Society and the Crusade*, p. 155.

⁶³ Lloyd, p. 163.

⁶⁴ Lloyd, p. 155.

⁶⁵ Prestwich, *Plantagenet England*, p. 432.

⁶⁶ Prestwich, p. 427; Lloyd, *English Society and the Crusade*, p. 192.

⁶⁷ CPR (1266 - 1272), p. 425.

⁶⁸ Lloyd, *English Society and the Crusade*, p. 187.

⁶⁹ CPR (1272 - 1281), p. 170.

⁷⁰ Prestwich, *Plantagenet England*, p. 428.

⁷¹ Lloyd, *English Society and the Crusade*, pp. 191 – 193.

⁷² CPR (1266 - 1272), p. 425.

⁷³ Lloyd, *English Society and the Crusade*, p. 193.

the crusaders' resolve to mitigate the extent that their activities impinged on the financial well-being of their families.

The economic situation of the late thirteenth century left its mark on legal preparations made on the Ninth Crusade, which distinguishes this event from the first and third expeditions canvassed in earlier chapters. It is foremost, a crusade characterised by the law of obligations. Leaders preferred to form contracts with the men who served them. The rationale behind creating contractual obligations is that it gave a leader greater control over his forces than relying solely on bonds of fealty.⁷⁴ Lloyd indicates the creation of obligations is a prominent reason why it is one of the most documented crusades.⁷⁵ He comments 'to see a crusading force systematically organised by contract, we have to wait until 1270'.⁷⁶ Tyerman, on the other hand, downplays the novelty of contractual bonds when he suggests the organisation of armies in this manner was characteristic of the thirteenth century.⁷⁷ Prestwich agrees with Lloyd, stating that 'there is, however, no earlier evidence for the use of contracts in the way Edward used them in 1270'.⁷⁸ Tyerman indicates that Edward, as a prince, had to rely on contract because he could not rely on bonds of fealty as he might have done if he were king.⁷⁹ Regardless, both authors tentatively suggest that Edward innovated the use of obligations based on the example set by Louis IX, who had paid the Prince 70,000 *livres tournois* at Paris in 1269.⁸⁰ Edward followed this example to subsidise the costs of the crusaders in his service and subcontracting appears to be one of the purposes that Louis intended the money be put.⁸¹ The use of contracts would be expected to inform the character of legal protections available for crusaders. It is necessary, therefore to examine how Edward's lordship affected the legal protections available to crusaders and whether there is evidence that the royal apparatus introduced uses to make the prospect of crusading more appealing.

⁷⁴ Lloyd, p. 120.

⁷⁵ Lloyd, p. 113.

⁷⁶ Lloyd, pp. 137 - 138.

⁷⁷ Tyerman, *England and the Crusades*, p. 130.

⁷⁸ Prestwich, *Edward I*, p. 69.

⁷⁹ Tyerman, *England and the Crusades*, p. 130.

⁸⁰ Prestwich, p. 69; Lloyd, *English Society and the Crusade*, p. 115.

⁸¹ Tyerman, *England and the Crusades*, p. 126; see J. Riley-Smith, *The Crusades: A History*, 3rd edn, London, Bloomsbury, 2014, p. 237.

Lloyd concluded that crusaders preferred to place their lands and other legal interests into the custody of family or friends.⁸² He offers the example of Hugh de Neville to illustrate the breadth of appointments. Hugh appointed attorneys to act in litigation and to protect his lands, and he nominated his mother and brother as custodians to farm out his lands.⁸³ Lloyd further canvasses a range of other ways crusaders protected their property without mention of the use.⁸⁴ Furthermore, crusaders took advantage of the wider community to ensure their wishes were followed:

Godfrey [le Marbrer] was starting for the Holy Land [on crusade], having called together the neighbours, he caused to come Simon Everard of Worcester, son of his brother, and acknowledged him as his heir if he died on the journey; he did so die, and after his death the said Simon entered the house as his nephew and heir.⁸⁵

An extra layer of protection afforded by community involvement demonstrated an awareness that the law alone did not guarantee the integrity of their estates. The involvement of the community added an extra layer of support during their absence. In comparison, an inquisition (1256) determined that Walter le Galays, a younger son of Arnold le Galays, had entered on his father's land and ejected his eldest son Robert while he was on a pilgrimage to the Holy Land.⁸⁶ Walter's trespass was only discovered because of his later felony and escheat. Lloyd also indicated women remained vulnerable figures and could be left destitute if the crusader failed to assign dower.⁸⁷ However, crusaders appear to have no concerns about enfeoffing female heirs. For example, William de Wheteden enfeoffed one third of the manor at Wheddon Cross to his daughter, Avice, before he left for the Holy Land. Robert de Wheteden, also holding a third, recognised that she should hold it all in exchange for an annual rent. Avice performed homage for the entire land.⁸⁸ Nonetheless, thirteenth-century crusaders do not appear to have made uses as private law arrangements.

⁸² Lloyd, p. 168. See for example Public Record Office, *Ancient Deeds*, vol. 6, no. C. 5468.

⁸³ Lloyd, p. 168. See D. Crook, 'Neville, Hugh de', *ODNB*, vol. 40, pp. 503 – 504.

⁸⁴ See Lloyd, pp. 173 – 174.

⁸⁵ Cal. Inq. Misc. v. 1, no. 1230.

⁸⁶ Cal. Inq. Misc. v. 1, no. 213.

⁸⁷ Lloyd, *English Society and the Crusade*, p. 175.

⁸⁸ C. Chadwick-Healey (ed.), *Somerset Pleas (Civil and Criminal)*, London, Harrison and Sons, 1897 no. 1457.

Chancery and the organisation of the Ninth Crusade

The Ninth Crusade, boasting the involvement of an English prince, was the last crusade to attract significant numbers from England.⁸⁹ If the use had a relationship to the crusade movement, as the accepted truth suggests, then the ninth Jerusalem expedition presents the last occasion to find it. Edward, unlike Richard I, could not advance any innovation in the common law because as a prince, he could not issue ordinances or introduce novel legal ideas in England without the authority of his father. Therefore, the records indicate Henry III, likely acting with the counsel of his son, decided the legal landscape of the Ninth Crusade. The King also had precedent to draw on. Tyerman comments that 'prior to 1250, Henry's behaviour had been conventional - providing individual crusaders with funds, licences to mortgage property, and royal protection, generally supporting papal directive, and taking an interest in the affairs of the Holy Land'.⁹⁰ The presence of the use in English law in response to the Ninth Crusade would turn on whether Henry relied on conventional legal principles related to crusading or did he introduce the use as a novel arrangement.

Development of rolls to record the business of Chancery, including that found in the *Calendar of Patent Rolls* and *Close Rolls* series, provide insight into how Henry's court responded to the Ninth Crusade and the laws utilised to facilitate it. Maitland notes the value of these records when he comments, 'the historian of law and constitution has no longer to complain of a dearth of authentic materials; soon he is overwhelmed by them'.⁹¹ The sheer volume of these records, as Maitland alludes, requires the legal historian to undertake a monumental effort to find information relevant to their subject. Letters patent concern matters of law that the king wished to be known to all his subjects. The *Close Rolls* series collect charters addressed to private individuals. The latter might be likened to papal rescripts found in the canon law as the intention of their promulgation is to address a single matter.⁹² The *Calendar of Inquisitions post mortem* concern a collection of charters documented outside of the rolls series on inquisitions into the extent of individual estates by the king's *escheators*, which was the office responsible for

⁸⁹ See generally Lloyd, *English Society and the Crusade*, p. 84; Falk, *Franks and Saracens*, p. 195.

⁹⁰ Tyerman, *England and the Crusades*, p. 112.

⁹¹ Pollock and Maitland, *The History of English Law*, vol. 1, p. 169.

⁹² E.g. *Decretum*, Dist. 19, c. 1.

taking land into the king's hand if the deceased died without an heir or otherwise descended to the king through the operation of law (escheat). These sources supplement the treatises and cases that furnish historians with an insight into English law.

It is unsurprising that the *Patent Rolls* do not paint the elderly Henry as a reluctant crusader, but instead depict him as a king eager to fulfil his vow. He achieved a happy medium by supporting his heir to go on his behalf without risking the security of his realm by leaving himself.⁹³ Whatever his true intentions, the letters patent demonstrate to his subjects that Edward enjoyed the full support of both Henry and the law. Henry's attention first turned to family interests on the continent. Two charters dated 18 and 20 November 1269 granted his son-in-law John II, Duke of Brittany, certain legal privileges to manage John's estates. The King granted John licence to appoint attorneys, with the power to nominate other attorneys on his behalf. Furthermore, John was permitted to instruct his executors that, in the event of his death, they could hold his lands for two years and receive its issues to administer his will (pay his debts) save for the dowry of his daughter.⁹⁴ A charter issued five days later illustrates Prince Edward may have exercised little control over the law during the Ninth Crusade.⁹⁵ Henry prevents the Prince from alienating land in Gascony to Gailliard de Solio, but allowed him to let out a farm for four years, as well as other rents and issues in Gascony and Oleron, either jointly or in parcels, subject to Louis IX's approval. The organisation of this crusade was entirely the purview of the king, although it is evident Henry protected the integrity of his son's private legal arrangements.⁹⁶ Henry made concurrent arrangements, also beginning in November, to collect the tenth on the ecclesiastical holdings in dioceses permitted by the pope.⁹⁷ The evidence indicates the keeper of the king's wardrobe at Westminster, akin to a treasurer, had collected the majority of the tenth into the royal revenue between

⁹³ D. A. Carpenter, *The Reign of Henry III*, London, The Hambledon Press, 1996, p. 118; Lloyd, *English Society and the Crusade*, p. 232.

⁹⁴ CPR (1266 - 1272), p. 395.

⁹⁵ CPR (1266 - 1272), p. 396.

⁹⁶ For example, CPR (1266 - 1272), p. 455.

⁹⁷ See CPR (1266 - 1272), p. 397; a charter in December ((CPR 1266 – 1272), p. 398) permits the dean of Lincoln to pay a fine to pay Guy de Leziniaco, a crusade, 300 marks either out of a fine owed to the exchequer or the collection of the tenth. It is clear collection was ongoing at the time as collection of the tenth is deposited on 24 January 1270 (see CPR (1266 - 1272), p. 403).

January and February.⁹⁸ The use does not appear in the rolls during the initial stages of crusade preparation.

The next order of business concerned writs of simple protection *cum clausula volumus* issued in favour of crusaders. Common lawyers know this writ as providing protection issued by Chancery to everyone in the king's service either overseas or in Scotland.⁹⁹ Such a writ was issued, for example, in favour of those who accompanied Edward on 30 November 1269 to help him manage his lands in Gascony as part of his preparations.¹⁰⁰ The logic behind simple protection was that 'the Crown would keep an eye on a man's lands and people, and any violation of the king's protection was treated with some seriousness'.¹⁰¹ It is apparent, however, that anybody leaving the realm might apply for protection, including women and ecclesiastics.¹⁰² The evidence also indicates that grants of privilege followed an *ad hoc* pattern either issued in single instances¹⁰³ or collectively. A charter issued 3 March 1270 reads 'Protection with clause *volumus*, for four years from Easter, for Henry de Alemannia, the king's nephew, who has taken the cross and is going with the king and Edward his son beyond the seas in aid of the Holy Land. The like for the following -'.¹⁰⁴ The charter extends the protection to sixteen other crusaders. Henry extended the same protection to a further 81 crusaders (16 July)¹⁰⁵ and 42 crusaders (12 January – 10 February 1271)¹⁰⁶ together. Lloyd calculated 243 such grants.¹⁰⁷ Most of the charters simply state 'protection with clause *volumus*', but a charter issued to Thomas le Norreys explicitly includes 'his men, lands, and possessions' as subject to royal protection.¹⁰⁸ The writ of simple protection *cum clausula volumus* appears to fulfil the purpose of protecting crusader families and property without the need for a use or similar private arrangement.

⁹⁸ E.g. CPR (1266 – 1272), pp. 403, 404, 408, 410.

⁹⁹ Anthony Fitz-Herbert, *The New Natural Brevium*, 6th edn, London, Printed by Eliz. Nutt, and R. Gosling, 1718, p. 62.

¹⁰⁰ CPR (1266 - 1272), p. 397.

¹⁰¹ J. S. Critchley, 'The Early History of the Writ of Judicial Protection', *Historical Research*, vol. 45, no. 112, 1972 p. 196.

¹⁰² See CPR (1292 - 1301), pp. 7, 23.

¹⁰³ See, for example, William de Fenés, 24 January 1270, CPR (1266 - 1272), p. 410.

¹⁰⁴ CPR (1266 - 1272), p. 411.

¹⁰⁵ CPR (1266 - 1272), p. 440.

¹⁰⁶ CPR (1266 - 1272), p. 588.

¹⁰⁷ Lloyd, *English Society and the Crusade*, p. 166.

¹⁰⁸ CPR (1266 - 1272), p. 495.

The King also granted licences to crusaders that allowed them the privilege to make certain arrangements, which is the nearest that the crusade movement comes to developing uses. Henry drew on the same model of privileges that he granted to family members on the continent and later extended them to English crusaders. The King granted licence to crusaders, such as in the case of Edward's close friend Earl Thomas de Clare, to appoint certain person attorneys with the power to appoint others to their office to protect a crusaders' legal interests.¹⁰⁹ The attorney had recourse to Chancery to prove their office if anybody doubted their authority.¹¹⁰ It is apparent in the *Patent Rolls* that Henry adopted a consistent approach to crusader privileges. For example, the privileges granted to Robert Tiptoft replicate privileges earlier granted to John II of Brittany:

Inspeximus and confirmation of letters patent of Edward the king's son, dated at Westminster 12 July, 54 Henry III, granting to Robert de Tybetot, who is going with him to the Holy Land that if he die before his return, his executors or other assigns shall have the power of providing for the keeping and marriage of his heirs and the keeping of his lands without impediment or challenge.¹¹¹

In another example, 'Walter de Wyginton who holds in chief and is going to the Holy Land with Edward the king's son, to lease or pledge all his lands for four years from the time of his setting out' is consistent with the licence Henry earlier granted to Edward himself.¹¹² Tyerman's comment that Henry had been conventional in his grants of protection and licences to crusaders prior to 1250 extends to the Ninth Crusade.¹¹³ The advantage with letters patent granting protection or license is the clear evidentiary record of the crusaders status that can be enforced against anyone who intruded on their interests. The *Close Rolls*, on the other hand, touch matters such as the release of money from the Exchequer to Edward and its apportionment.¹¹⁴ However, he also occasionally granted licence to crusaders in closed form to appoint attorneys in the manner outlined above.¹¹⁵

¹⁰⁹ CPR (1266 - 1272), p. 441. See CPR (1266 - 1272), p. 443 for further crusaders are granted licence to appoint attorneys.

¹¹⁰ Lloyd, *English Society and the Crusade*, p. 167.

¹¹¹ CPR (1266 - 1272), p. 441. See W. Rhodes and R. Davies, 'Tiptoft, Robert', *ODNB*, vol. 54, p. 834.

¹¹² CPR (1266 - 1272), p. 443.

¹¹³ Tyerman, *England and the Crusades*, p. 112.

¹¹⁴ For example, CCR (1268 - 1272), pp. 195 - 196, 213.

¹¹⁵ Three such examples are found, CCR (1268 - 1272), p. 289.

The pattern of administration apparent in the *Patent Rolls* reveals a systematic organisation of the Ninth Crusade that does not include the secular privilege to grant uses.

In addition to the *Rolls* series, the use ought to appear in all or at least one of three late thirteenth-century common law treatises, *Fleta*, *Britton*, or *The Mirror of Justices*, if it developed in connection to the Ninth Crusade. The authors of these treatises are unknown.¹¹⁶ Nonetheless, the only legal principle their anonymous authors explicitly connect to the crusade movement is the crusader essoin (see Fl. 6.8). It remained the most important aspect of crusade jurisprudence in secular law. *Britton* states that the common law recognised the crusader essoin as the foremost species of essoin (Brit. 6.7.3). The author states that a person must always be allowed to enroll an essoin if they are in the service of God or the king (Brit. 6.6.3). In the case of crusaders, the essoin is only effective if they have set out on a general passage *before* the receipt of a summons. The inclusion of 'before' indicates the law wished to address the kind of abuses noted by Brundage, such as taking the cross to avoid lawsuits.¹¹⁷ The complaint made in *The Mirror of Justices* suggests its inclusion did not successfully prevent frequent abuses.¹¹⁸ Further qualifications to the enrolment of essoin are also included in this text that *Britton* or *Fleta* do not mention.¹¹⁹ The exclusion of pleas related to dower, novel disseisin, and darrein presentment harmonised the crusader essoin with that available for other persons in the king's service.¹²⁰ *The Mirror of Justices* also makes clear that jurists expected that future English crusades in the fourteenth century would have drawn upon the same legal tradition.¹²¹ It also states the 'obvious' rule: that a person could not essoin themselves.¹²² Therefore, the evidence shows crusaders frequently appointed attorneys to manage legal affairs in their absence.¹²³ To do so, crusaders had to first receive a *dedimus potestatem* from Chancery.¹²⁴

¹¹⁶ See J. Selden, *Ad Fletam Dissertatio*, trans. D. Ogg, Wm. W. Gaunt & Sons, 1986 pp. 13, 177. Written in 1647, Selden's treatise remains authoritative on the authorship of both *Britton* and *Fleta*. On Selden see Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, p. 167 - 176.

¹¹⁷ Brundage, *Medieval Canon Law and the Crusade*, p. 188.

¹¹⁸ *The Mirror of Justices*, p. 166.

¹¹⁹ *The Mirror of Justices*, p. 84.

¹²⁰ Tyerman, *England and the Crusades*, p. 130.

¹²¹ *The Mirror of Justices*, p. 84.

¹²² *The Mirror of Justices*, p. 83.

¹²³ CPR (1266 - 1272), p. 443; See Lloyd, *English Society and the Crusade*, p. 165.

¹²⁴ *The Mirror of Justices*, p. 166.

An explanation for the absence of the use as part of the legal concept of crusading on the eve of the Ninth Crusade appears to be straightforward. *Britton* provides the following outline of the legal preparations that crusaders made before leaving England:

In the essoin beyond the Grecian sea in a general pilgrimage, it must be observed whether there has been within the year a general passage of any Christian king, or other person sent by the Pope with a great host of Christians; for then this essoin is allowable, and the plea will stand over without day, out of favour for the pilgrims of God, on account of the privilege of those who have taken the cross, until the return or death of the pilgrim. There are some however who obtain our letters patent of protection to be in force for one, two, or three years, and who nevertheless by virtue of our letters patent do also make general- attorneys; and such persons do well and wisely. For no great lord or knight of our realm ought to travel forth of it without our licence, since by that means the kingdom might be left destitute of able persons; and such letters ought to be presently shown in full county or hundred court, or at public places (Brit. 6.7.3).

The chapter reveals that thirteenth-century English law already had in place sophisticated mechanisms to protect crusader property during their absence. This passage can be cross-referenced with the letters patent issued out of Chancery as an accurate account of crusader preparations and the common law. It seems probable the author had reflected on those sources. The systematic approach to the organisation of the Ninth Crusade, as evident in the above passage, seems to have left no room for the use as a legal instrument associated with the venture.

The legal aftermath of the Ninth Crusade

An expectation that uses might be found in legal arrangements after the Ninth Crusade reflects the important long-term consequences of this expedition on the law and legal organisation. Tyerman discusses the impact of this crusade in the following terms:

The nature of the arrangements for the 1270 crusade, although following the precedents of the previous century, had implications for the future. Based on national lay and ecclesiastical taxation, a centralised command structure, and an army raised in the first instance by magnates, who were themselves retained by the commander through written contract who retained their own troops in

the same way, the 1270 crusade conformed to a model which came to dominate English military organisation over the next 200 years.¹²⁵

The model of organisation, however, appears to explain why the use is absent after the Ninth Crusade. It is apparent that the most prominent legal issue after the crusade was the ongoing collection of taxation. Henry desired that the collection proceeded with 'all speed as the quality of the business of the cross requires'.¹²⁶ There were a number of disputes surrounding its collection on ecclesiastical villeinage¹²⁷ and lands in Kent held in gavelkind.¹²⁸ The *Patent Rolls* show Edward continued to deal with collection issues four years later.¹²⁹ Nonetheless, issues of this kind were an anticipated part of crusading as the slow collection of money through taxation was used to pay back money borrowed from merchant societies.¹³⁰ Otherwise, the legal issues that arose in the aftermath of the Ninth Crusade are undramatic. The evidence suggests they mostly concerned errors committed by royal officials. For example, Edward had to pardon one crusader for robberies he allegedly committed in England while he was with the King in the Holy Land.¹³¹ On another occasion (1276), Fulk complained that his father Robert Le Estraunge enfeoffed him before going on crusade but the escheator took the land into the king's hand anyway.¹³² Lloyd comments that the risk associated with misadventure through royal administration led some crusaders to pay monies to the Exchequer to ensure non-interference with their land during their absence.¹³³ The use would not have been an effective remedy to the mistakes of officials and may have even compounded errors.

The absence of significant legal intrusions against crusader property may reflect the stability of English society. It is a feature of the early years of Edward's reign that the King faced no major political disruption.¹³⁴ The relative success of his crusade experience and

¹²⁵ Tyerman, *England and the Crusades*, p. 131.

¹²⁶ CPR (1266 - 1272), p. 423 see also CPR (1266 - 1272), p. 419.

¹²⁷ CPR (1266 - 1272), p. 467.

¹²⁸ CPR (1266 - 1272), p. 495.

¹²⁹ E.g. CPR (1272 - 1281), p. 61.

¹³⁰ Padgett et al, *The Emergence of Organizations and Markets*, p. 126.

¹³¹ CPR (1272 - 1281), p. 169; See also Cal. Inq. Misc. v. 1, no. 2319.

¹³² Cal. Inq. PM., vol. 2., no. 157.

¹³³ Lloyd, *English Society and the Crusade*, p. 174.

¹³⁴ See Prestwich, *Edward I*, p. 249; Tyerman, *England and the Crusades*, p. 131.

its organisation meant Edward took the cross again and began collecting the tenth granted to him by the general council.¹³⁵ However, the legal calm following the Ninth Crusade can be contrasted with the instability that followed the Anglo-French War (1294 – 1298). The immediate cause of the war was the unplanned result of a rivalry between sailors in Gascony and England, which dashed Edward's hopes for another crusade.¹³⁶ From the outset, and unlike his other campaigns, Edward faced political opposition to his demands for men and money.¹³⁷ In the end, it was a costly war and Edward had nothing to show for it except the resentment of his subjects.¹³⁸ The procedure outlined in Brit. 6.7.3 above, including protection *clausum volumus*, applied to this war. English knights benefited from an essoin *de servitio regis* beyond the sea which, like the crusader essoin, was warranted in Chancery (Brit. 6.8). They also appointed attorneys to protect their legal interests.¹³⁹ The *Patent Rolls* show that Edward granted the same kind of licences found in the crusade. For example:

Grant to Hugh Bardolf, going to Gascony on the king's service, that, if he should die in the king's service, and leave his heir within age, the executors of his will shall, during the minority of his heir, hold land of his to the yearly value of 300 marks, for the discharge of his debts and the execution of his will.¹⁴⁰

This letters patent also use the same formula of privileges that Henry III granted to John II and Robert Tiptoft.

The use is also absent from English preparations during the Anglo-French War. Prestwich described the situation during and after the Anglo-French war as a *crime wave*.¹⁴¹ The social unrest reflected the internal turmoil and hardships caused by war, taxation, weather events, and crop failure that had not existed in the prosperous early years of

¹³⁵ CPR (1272 - 1281), p. 136.

¹³⁶ J. Sumption, *The Hundred Years War: Trial by Battle*, vol. 1, London, Faber and Faber Ltd, 1990, p. 80

¹³⁷ Prestwich, *Edward I*, pp. 376 – 377.

¹³⁸ Prestwich, p. 400.

¹³⁹ E.g. CPR (1292 - 1301), p. 27.

¹⁴⁰ CPR (1292 - 1301), p. 87. The same formula is applied to Henry de Grey, CPR (1292 – 1301), p. 87. See J. H. Round, 'Bardolf, Hugh', *ODNB*, vol. 3, pp. 790 – 791.

¹⁴¹ Prestwich, *Edward I*, p. 279.

Edward's reign.¹⁴² *Patent Rolls* in 1298 record many trespasses against those who had protection *clausum volumus* while they were absent in France. In one instance, Master Arnold de Lupi de Tillio left for Gascony on 10 May 1296 in the King's service with protection *clausum volumus* for an indeterminate period.¹⁴³ Later a commission of oyer and terminer, dated 30 May 1306, is formed to investigate allegations that 'different malefactors' entered Arnold's houses at Suthcrek and Marsham in Norfolk, and stole his property.¹⁴⁴ His prolonged absence proved to be an irresistible temptation to would-be trespassers. Other inquests appear in the *Patent Rolls* that detail violations of royal protection. The Patent Roll reveals these incidents of trespass are mostly crimes of opportunity occasionally coupled with violence against the household. William de Bereford and Robert de Retford were commanded to investigate persons who for four days and nights besieged, with 'covered horse', the manor at Cloulyg in Suffolk belonging to Earl Henry de Lacy during his absence in Gascony.¹⁴⁵ The malefactors 'broke his houses there, carried away his goods, cut down his trees in his wood there, and carried them away'. Theft of crops such as corn also occurred during the owners' absence overseas. The prevalent illegal hunting of game animals, such as rabbits and deer, was also inflicted on those under royal protection.¹⁴⁶ It is arguable that whatever legal arrangements landholders made, including uses, would have been ineffective to guard against this criminal activity. Nonetheless, the evidence shows no departure from protections that had previously proved effective. The socio-political stability or instability of the different periods in Edward's reign did not affect the decision of policy-makers to utilise tested legal mechanisms.

There is no evidence to suggest that the eventual creation of uses drew upon the Ninth Crusade or from England's overall crusade experience. The Fall of Acre in 1291 and the demise of Christian holdings in the Levant had the effect of dulling interest in crusading during the first-half of the fourteenth century.¹⁴⁷ Aziz Atiya describes the crusade led by

¹⁴² C. Burt, *Edward I and the Governance of England, 1272 – 1307*, Cambridge, Cambridge University Press, 2013, p. 205; Prestwich, *Plantagenet England*, p. 439.

¹⁴³ CPR (1292 - 1301), p. 189.

¹⁴⁴ CPR (1301 - 1307), p. 475.

¹⁴⁵ CPR (1292 - 1301), p. 378. See J. S. Hamilton, 'Lacy, Henry de', *ODNB*, vol. 32, pp. 181 – 183.

¹⁴⁶ CPR (1292 - 1301), pp. 378 – 379.

¹⁴⁷ A. Atiya, 'The Crusade in the Fourteenth Century', in K. Setton, R. Wolff and H. Hazard (ed.), *A History of the Crusades: Volume III: The Later Crusaders, 1189 - 1311*, Madison, The University of Wisconsin Press, 1975, p. 4

Peter of Cyprus as the 'high-water mark in this history of the Levantine crusade in later medieval times'.¹⁴⁸ Cyprus itself had remained a stronghold for Christian influence in the Holy Land. Peter used it as a base to capture the city of Adalia in 1361 and other coastal settlements.¹⁴⁹ Inspired by his success, Peter toured European courts to muster support for a fresh crusade.¹⁵⁰ The Cypriot king achieved only a small measure of success in England. *Knighton's Chronicle* (1337 – 1396) states Peter was received warmly when he came to England to ask Edward III and his lords to help reclaim the Kingdom of Jerusalem.¹⁵¹ The more detailed description found in *Chronicon Anonymi Cantuariensis*, its author primarily concerned with the events of the Hundred Years War and diplomacy, states that Edward granted Peter men, money, horses, supplies, and a ship.¹⁵² However, Tyerman suggests Edward balked at the idea and had no impetus to become a crusader himself since England no longer had any political investment in the east.¹⁵³ Nevertheless, Peter did secure contracts with the young Earl of Hereford and other English knights to fight in his expedition.¹⁵⁴ He offered them wages and the opportunity for plunder.¹⁵⁵ The evidence suggests that there was no departure from the models of organisation used during the Ninth Crusade or Anglo-French war. The English crusaders who set out in 1364 also received licence to nominate attorneys for that year.¹⁵⁶ They also received protection *clausum volumus* during their absence.¹⁵⁷ Nevertheless, there is no evidence that connects the development of uses in England with this fourteenth-century expedition. It is clear that the accepted truth that the use has some connection with the crusade movement ought to be put to rest.

Paramountcy of intention in the Common Law

¹⁴⁸ Atiya, *A History of the Crusades*, p. 13.

¹⁴⁹ Atiya, p. 14.

¹⁵⁰ Atiya, p. 14.

¹⁵¹ Henry Knighton, *Knighton's Chronicle*, trans. G. H. Martin, Oxford, Clarendon, 1995, p. 187; S. Peverley, 'Knighton, Henry', *EMC*, vol. 2, pp. 969 – 970.

¹⁵² *Chronicon Anonymi Cantuariensis*, trans. C. Given-Wilson, Oxford: Clarendon, 2008, p. 131; E. Kennedy, 'Chronicon Anonymi Cantuariensis', *EMC*, vol. 1, p. 297.

¹⁵³ Tyerman, *England and the Crusades*, p. 290.

¹⁵⁴ Tyerman, p. 291.

¹⁵⁵ N. Housley, 'The Mercenary Companies, the Papacy, and the Crusades, 1356 – 1378', *Traditio*, vol. 38, 1982, p. 279.

¹⁵⁶ E.g. CPR (1364 – 1367), pp. 472, 485.

¹⁵⁷ CPR (1364 – 1367), p. 193.

Edward's activities as a lawmaker rather than crusader appears to have provided the catalyst for the later development of uses in English law. One of his first initiatives was the introduction of laws concerning gifts with a condition. Theodore F. T. Plucknett described the Second Statute of Westminster 1285 (13 Edw. I) as an 'epoch-making' statute.¹⁵⁸ The first chapter *De donis conditionalibus* (13 Edw. I, c 1) created estates in land, which dramatically altered the twelfth-century rule that an estate remained in free marriage until the third heir entered.¹⁵⁹ It makes clear the purpose of the statute was to address an ongoing concern about the nature of conditional feoffments.¹⁶⁰ *De donis* introduced the following rule:

Concerning tenements which are often given on condition, when one gives his land to a man and his wife and to the heirs begotten of that man and woman, with an express condition added that if the man and woman die without heir begotten of that man and woman the land thus given shall revert to the donor or his heir ... even though the condition is not expressed.

Therefore, the common law recognised the above condition as implicit in all gifts of this nature. This statute made it possible to create entails, a limitation on inheritance, to ensure the land returned to the donor if a condition failed. Its introduction, however, appears to be a reaction to changing attitudes in the common law.

The common law policy to give effect to the intention of donors is visible in the practices of the Jewish Exchequer and its recognition of trust-like devices. However, such devices survived only as far as the common law permitted, and the court Jewish was doomed. Merchant societies, developed as a papal initiative against the Hohenstaufen and others (1254 - 1302), had supplied the Ninth Crusade with a quick source of capital that Henry repaid by taxation.¹⁶¹ These societies, assisted by legislation, supplanted the traditional crusade role of Jewish lenders as the primary

¹⁵⁸ T. F. T. Plucknett, *A Concise History of the Common Law*, 4th edn, London, Butterworth, 1948, p. 28.

¹⁵⁹ Plucknett, *A Concise History of the Common Law*, p. 523.

¹⁶⁰ Prestwich, *Edward I*, p. 273.

¹⁶¹ Prestwich, *Plantagenet England*, p. 500; J. Padgett et al, *The Emergence of Organizations and Markets*, Princeton, Princeton University Press, 2012, pp. 123 - 124.

supplier of ready capital.¹⁶² The loss of comparative advantage underlies their eventual expulsion.¹⁶³ The common law disinterest in the affairs of Jews after their expulsion is evident in the treatise written during Edward's reign. *Fleta's* single reference to the Jews concerns the debts owed by the deceased to a Jew coming into the king's hand. (Fl. 2.57). This suggests the treatise was written not long before or immediately after the expulsion. The other two treatises merely contain anachronistic references, which suggest they had been written sometime after the expulsion. *Britton* refers to Jews to illustrate prohibited persons who cannot be seised of land (Brit. 1.16.3). Its reference to coin-clipping without reference to Jews supports a later date for this text (Brit. 1.5.1). Again, *The Mirror of Justices* only refers to Jews in the context of disqualified persons, which is indicative of its fourteenth-century origins.¹⁶⁴ These treatises suggest that the tenuous link that trust-like concepts had to the Third Crusade were severed sometime after the Jewish Exchequer ceased being a special receipt in 1290.

Memory of the Jewish Exchequer, however, must have persisted in the common law through the natural cross-pollination that resulted from the interconnected relationship between the administrative branch and judicial branch of the king's court.¹⁶⁵ The same mobility enjoyed by other judicial offices in the thirteenth century is apparent for the justices of the Jews. The reason for their appointment rested with the whim of the king.¹⁶⁶ Sometimes familial connections with certain courts are apparent. William Briton (Brito), possibly the descendant of a naturalised Jew from Brittany¹⁶⁷, was appointed *iusticiari Iudaeorum* (1234) and afterward served in the court of Durham, held a shrievalty under Hubert de Burgh, and became an itinerant justice.¹⁶⁸ Ranulf Briton (Brito), his brother, also sat on the Exchequer under the

¹⁶² See generally Lloyd, *English Society and the Crusade*, p. 191; B. D. Ovrut, 'Edward I and the Expulsion of the Jews', *The Jewish Quarterly Review*, vol. 67, no. 4, 1977, p. 228; Legislative restrictions are detailed further by Prestwich, *Plantagenet England*, p. 125.

¹⁶³ Prestwich, *The Three Edwards*, p. 18; Brand, *The English Historical Review*, p. 1156.

¹⁶⁴ *The Mirror of Justices*, pp. 60, 199.

¹⁶⁵ B. Wilkinson, *The Later Middle Ages, 1216 – 1485*, London and New York, Routledge, 2013, p. 363.

¹⁶⁶ Madox, *The History and Antiquities of the Exchequer*, vol. 1, pp. 84, 233.

¹⁶⁷ C. Chattock, *Antiquities*, Birmingham, Cornish Brothers, 1884, p. 266.

¹⁶⁸ E. Foss, *Biographia Juridica*, London, John Murray, 1870, p. 123. See also R. Stacey, 'Briton, William', *ODNB*, vol. 7, pp. 692 – 693; F. West, 'Burgh, Hubert de', *ODNB*, vol. 8, pp. 776 – 781.

patronage of de Burgh.¹⁶⁹ When these ties were present, however, they were not overwhelming.¹⁷⁰ Justices of the Jews are recorded to have served on the Exchequer, King's Bench, and Common Pleas in addition to having roles as justices' itinerant without any apparent conceptual difficulty in performing their offices.¹⁷¹ Madox's list of barons who served on the exchequer demonstrates a similar range. Roger Le Brabazon, for example, also served on the King's Bench.¹⁷² The evidence that Brabazon was 'admitted to all the king's courts, councils, and parliaments as often as he might choose to be present' during Edward II's reign illustrates the flexibility of judicial office and the opportunity for the exchange of ideas between courts.¹⁷³ William de Carleton and Peter of Leicester, as the final *iusticiari Iudaeorum* and afterward counted amongst the regular barons of the Exchequer, would have remembered their former offices.¹⁷⁴ William de Carleton had an eminent career in the exchequer, which reached its height when Edward created the title Chief Baron of the Exchequer in 1303 in acknowledgment of his long service.¹⁷⁵ His position suggests he exerted the strongest influence on the survival of any legal principles unique to that receipt into the common law.

The expectation that court officials could move where needed appears to have been an inherent part of their education. William de Middleton, a renowned judge after learning the law as a record clerk¹⁷⁶, served first as a clerk in the Jewish Exchequer (1265) and later had responsibility for keeping writs and the collection of tallage. He then became

¹⁶⁹ Foss, *Biographia Juridica*, p. 124; P. Brand, 'Briton, Ranulf', *ODNB*, vol. 7, pp. 486 – 487. See also Simon Passelewe and Edmund Passelewe as detailed at p. 502.

¹⁷⁰ In the case of William de Warenne, the evidence indicates his father was an itinerant justice but never sat on the exchequer. See Foss, *Biographia Juridica*, p. 705.

¹⁷¹ For example, see the careers of Adam de Greinvill (Jewish Exchequer, itinerant justice, Common Pleas), Hamon Hauteyn (Exchequer, Jewish Exchequer, itinerant justice), Ralph de Norwich (Exchequer (Ireland), Jewish Exchequer, King's Bench), Simon de Pateshull (Jewish Exchequer, Common Pleas), William de Warenne (King's Bench, Jewish Exchequer), John de Wyville (Jewish Exchequer, Common Pleas). Their careers are described in greater detail in Foss, *Biographia Juridica*, pp. 157, 311, 333, 487, 503, 705 and 776 respectively.

¹⁷² Madox, *The History and Antiquities of the Exchequer*, vol. 2, p. 325. See H. Summerson, 'Brabazon, Roger le', *ODNB*, vol. 7, p. 136.

¹⁷³ Foss, *Biographia Juridica*, p. 112.

¹⁷⁴ Foss, p. 157; Madox, *The History and Antiquities of the Exchequer*, vol. 1, p. 237.

¹⁷⁵ Foss, p. 157; R. Beatson, *A Political Index to the Histories of Great Britain & Ireland*, vol. 2, London, Printed for Longman, Hurst, Rees, and Orme, 1806, p. 307.

¹⁷⁶ F. Pegues, 'The Clericus in the Legal Administration of Thirteenth Century England', *The English Historical Review*, vol. 71, no. 281, 1956, pp. 547 – 548.

the custodian of writs in the King's Bench (1276) before his appointment as a baron of the Exchequer (1286).¹⁷⁷ The author of *The Mirror of Justices* identified an issue associated with the broad nature of this method of appointment as it allowed justices and barons to apply their learning and experience from other appointments to whatever court of law they happened to preside over. The author complains, 'it is an abuse that the officers of the Exchequer have jurisdiction in matters other than debts due to the king and his fees and franchises, without original writ from the chancery under white wax.'¹⁷⁸ The nuisance complained about follows from the uncertainty created by the inherent mobility of judicial office. Knowledge of the common law equipped medieval judges with sufficient ability to preside over any royal court. *The Mirror of Justices* indicates the defining characteristic of a judge is the nature of their commission rather than the court they presided over.¹⁷⁹ Therefore, the mobility of judges is a feature of the medieval legal system that indicates the common law had ample opportunity to receive legal principles derived from the Jewish Exchequer's peculiar jurisdiction despite silence from the treatises. The evolution of trust-like devices in the Jewish Exchequer, therefore, may have reflected common law attitudes that the law ought to accommodate the lawful wishes of donors.

The evidence suggests that some trust-like concepts of the Jewish Exchequer survived. *Britton* discusses principles related to safekeeping under the head of obligation:

It is clothed by a material thing, when anything is lent and borrowed, to be restored on a certain day; and by such loans the debtors are bound to restore to the creditors the things borrowed in as good or better condition than they received them, or else their value, unless by accident of fire, water, robbery, or larceny, they have lost them; for against such accidents no one ought to answer for things lost, unless they happened by his own fault or negligence (Brit. 29.3.3).

The survival of these principles is unsurprising since *Bracton* had earlier established them as part of the common law.¹⁸⁰ It is unclear to what extent *halakha* influenced the common law but the fact both jurisdictions agree on fundamental principles suggests the

¹⁷⁷ Madox, *The History and Antiquities of the Exchequer*, vol. 1, p. 234; Foss, *Biographia Juridica*, p. 446.

¹⁷⁸ *The Mirror of Justices*, p. 158.

¹⁷⁹ *The Mirror of Justices*, p. 44.

¹⁸⁰ See Br. ii, p. 284.

opportunity for a transmission of ideas. The rules related to professionals, absent in both *Bracton* and *Britton*, may have been a result of Jewish ingenuity. Nonetheless, the practice of the Jewish Exchequer, as it was relevant to contemporary needs, survived the expulsion because of the interconnectivity of the royal courts. On the other hand, the use of fictitious attorneys was deliberately forgotten. This practice had been condemned in the past and curtailed by restrictions on Jewish transactions.¹⁸¹ The complaint in *The Mirror of Justices* appears to reflect on this earlier practice: 'It is an abuse that those of the exchequer and others receive attorneys and recognizances without original writ from the chancery, whereas no one can do this who has not jurisdiction'.¹⁸² The Jewish Exchequer appears to have overstepped its jurisdiction to give effect to fictitious attorney arrangements.

The growth of trust-like devices appears to reflect the growing paramountcy given to the intentions of the donor prior to the Statute of Westminster. This common law policy is apparent in *De donis conditionalibus*:

After issue begotten and born between them, to whom the lands were given under such condition, heretofore such feoffees had power to alien the land so given, and to disherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift.

The intendment of this passage is to give effect to the intention of the donor to benefit a third-party heir rather than the feoffee. Edward Coke best describes the common law policy behind the statute in the *Second Part of the Institutes of the Laws of England* that 'for disherisons, and breaking the express will and the intention of the donor are wrongs which this Act doth remedy'.¹⁸³ Therefore, the feoffor has legal recourse if the condition is violated. This resonates with the use because its key characteristic is that the feoffee must carry out the instructions of the feoffor.¹⁸⁴ The missing ingredient, however, is whether a third-party beneficiary, who is not the heir, had a cause of action to demand seisin against a feoffee who violated the condition. Plucknett suggests the common law

¹⁸¹ Brand, *The English Historical Review*, p. 1139.

¹⁸² *The Mirror of Justices*, p. 158.

¹⁸³ E. Coke, *The Second Part of the Institutes of England: Containing the Exposition of Many Ancient, and other Statutes*, London, Printed by M. Flesher, 1642, p. 334.

¹⁸⁴ Plucknett, *A Concise History of the Common Law*, p. 566.

courts did not find an effective remedy for this issue.¹⁸⁵ However, the policy to give effect to the intentions of feoffors was not contrary to the tenor of the common law. The latitude that the common law was prepared to treat gifts was stated as early as Bracton, which provides 'modus (limitations on a gift) and condition are of many kinds, [for] we must always adhere to that upon which the parties have agreed, though contrary to what the law would provide, if it is not to the prejudice of others' (Br. ii, p. 67). It appears that the practice in the Jewish Exchequer was the expansion of this common law policy.

Chancery also engaged with the common law principles related to conditional feoffments. In 1273, it issued an order to restore the manor at Toppingho to Margery, widow of John le Ferrun, after an inquisition found the escheator was wrong to take it into the king's hand.¹⁸⁶ In 1272, Baldwin Filliol, a tenant-in-chief, demised the manor to John in an indenture, a contract for service, for 24 years. It provided: 'If the conditions and pacts in the indenture should be observed on Baldwin's part, the charter should be restored to him [Baldwin] at the end of the term'. However, John 'restored the charter and released all his right and claim in the manor by reason of the charter' before the expiration of the term. Baldwin then granted the manor to Margery for the unexpired remainder. The inquisition found John did not die seised of the manor as the original escheator believed and restored it to Margery 'saving the rights of the king in wardship etc'. The escheator acted under a misunderstanding of the common law. He treated the gift as when Baldwin transferred livery of the manor to John. However, a fee is in suspense until the condition of services had been met (Br. ii, p. 144; Brit. 2.5.15). The original transaction between John and Baldwin was a gift with a condition because the charter was issued in triplicate and a neutral party held one copy according to the form of conditional grants prescribed by the common law (Brit. 2.8.2). John held the fee for a term of years and Baldwin could have proven the gift in court. He is saved from doing so, however, by Chancery's power to remedy the mistakes of officials.

Chancery reached the result above by reflecting on common law principles. However, it did not recognise that a use could have existed behind the arrangement. The following rule is important: 'The donor never ceases to possess until the donee begins to possess,

¹⁸⁵ Plucknett, p. 525.

¹⁸⁶ CCR (1272 - 1279), p. 26.

for one having begun the other ceases' (Br. ii, p. 130). John wished to avoid the situation where the diminished title of his wife to occupy the land would foreseeably result in her ejection from the manor after his death. The solution was that legal title passed from John to Baldwin, and then from Baldwin to Margery. It appears the transfer was not originally planned. John initiated the transfer to Baldwin, likely in apprehension of death, because 23 years remained on the original 24-year indenture to prevent the implication that he died seised of the manor. This appears, and it did occur, to be an undesirable result for all involved. Nonetheless, this hidden arrangement approaches the nature of a use since Baldwin is a transitory holder and Margery is the final beneficiary. John could not transfer the land directly to Margery because the conditional nature of his feoffment meant he had imperfect ownership. He needed Baldwin's intervention to complete his wishes during his lifetime since he could not devise the manor in a will contrary to the common law. Furthermore, it is unlikely that John would have quit the manor unless Baldwin agreed to a condition to transfer it to Margery afterward. This transaction is tantalising evidence to suggest that parties made uses during the thirteenth century. It was completed, however, before the matter went before Chancery, and there is no evidence to suggest Margery could have enforced the agreement between John and Baldwin. Instead, it appears Chancery considered that Baldwin assumed full legal title once John quit the manor. His subsequent grant to Margery was merely a courtesy.

Conclusion

The coincidence of Edward as both crusader and a lawmaker seems to be the only element that ties the use to the Ninth Crusade. There is no further evidence that would otherwise suggest a connection. The abundance of legal sources paint a clear picture of the law and its function during the Ninth Crusade without indicating that English crusaders made uses. Instead, the combination of ecclesiastical privilege and protection *clausum volumus* furnished legal protection for families and land to accomplish what Maitland ascribed to the use. *Britton* shows that the common law used the crusade experience as a model for military organisation, replicated in the Anglo-French war, which relied on royal protection and the appointment of attorneys. It did not, however, develop a theory of the use. Even as royal protection failed, the law did not furnish the use as a response. Royal licences, supplementing the canon law privileges of the crusader,

were the only source of protection for knights. The ninth and tenth expeditions were the final opportunity to uncover evidence supporting Maitland example. The design of the crusader privileges and the royal protections show that medieval law was responsive to the predictably natural concern that arises from a prolonged absence from home. It is necessary to conclude, at this stage, that it is time to put the accepted truth to rest.

The absence of evidence to support the accepted truth about a crusade connection shows the need for a stronger argument to supplant the common narrative. It is Edward's role as lawmaker rather than crusader that appears to have inspired the development of the use in English law. The view of English legal history through the lens of the crusade movement, a known catalyst for the creation of legal arrangements, shows a growing trend in the common law to give effect to the intentions of feoffors. However, recent research showing that legal historians have misunderstood the nature of medieval Chancery indicates that the law the Chancellor applied in his decision-making was the common law. *Britton* includes the procedure Chancery applied in its systematic organisation of the Ninth Crusade in his treatise. Furthermore, the evidence suggests that the Second Statute of Westminster was an important milestone in the eventual development of uses. Its development appears to be a positive legislative reaction towards the growth of a policy in the common law to give effect to the intention behind the agreement. *De donis conditionalibus* imposed implicit conditions onto feoffments to protect the interests of feoffors and their heirs. It is unclear how far the practice of the Jewish Exchequer and the trust-like concepts canvassed in the previous chapter informed this policy. Nevertheless, it is unreasonable to suggest that memory of *lex Iudaismi* simply disappeared from the common law with the expulsion. The evidence suggests its practice reflects growing flexibility in the common law to give effect to the donor's intentions before legislative expression enobled the policy as part of English law. It is necessary, therefore, to consider what effect the growth of this common law policy had on the origin of uses in order to supplant the accepted truth that the legal instrument has a relationship to the crusade movement.

Chapter 8. Fourteenth-Century Origins to the Use in the Common Law

Historians have long based their research on a definition of the use that equates the instrument with trust and trust-like concepts. This approach depends on challenged notions about the practice of equity in the medieval period. The implication drawn in this chapter is that the search for the origin of the use has suffered from three centuries of misdirection. This thesis puts forward a new definition of the use as a gift or feoffment with a condition to definitively put to rest the idea that the use has some connection to the crusade movement. It is also a direct challenge to the established view that uses, like trusts, were a product of *conscience* and incompatible with the common law. This definition draws upon sixteenth-century commentary about how the Statute of Uses transformed the common law use into the trust in equity. Previous chapters have outlined how the common law sought to give effect to the intentions of landholders to deal with their land. The use grew out of this policy. This thesis has purposefully adopted a narrow definition, a feoffor grants land to a feoffee to convey to another, to furnish a precise starting-point to define what a use is and to explore where its origins may lie. It is a surprise that legal historians have ignored the common law as a source. In addition to being a known jurisdiction, the common law recognised and enforced legal arrangements analogous to but more complex than the use without conceptual difficulty. By analogy to other common law feoffments, it is also possible to identify the legal principles that governed the operation of uses. This chapter takes a novel approach to argue one of the most enduring mysteries in legal history: the origin of the use.

Uses: A Gift with a Condition

The thesis puts forward the idea that the use developed as a species of gift with a condition. It is necessary to point out that conceptualising the use as a species of gift does not import the donative character of modern gifts. The classification of the use as a common law gift with a condition would make sense to medieval jurists.¹ *Britton* comments: 'Gift is a more general term than feoffment; for gift applies to all things movable and immovable, and feoffment is only of soil, whereof a person, being

¹ On conditional gifts see also Fl. 3.9.

wrongfully ejected, may recover seisin' (Brit. 2.3.1). The text also outlines the effect of a condition. The gift is 'absolute at the beginning', there is livery of seisin, which is 'afterwards restrained by this clause: the [feoffee] shall [only have power] to alien the gift to a certain person' (Brit. 2.3.9). Therefore, the condition acts to fetter the incidences of full legal ownership of the land by requiring the feoffee to perform an additional obligation. In the case of a feoffment of use, the effect of the condition is that the feoffee's ownership is never realised nor intended by the parties. *Britton* indicates a feoffment, like other species of gifts and obligation, must be clothed in five incidents: some material thing capable of being granted, words of agreement, a charter in writing either absolute or conditional, delivery, and a unity of will (*ad idem*) (Brit. 2.8.1). The five incidents are also included in *Fleta* (Fl. 3.7). It follows that a feoffment can only be made if the feoffor is of a sound and disposing mind.² From a starting point that conceptualises the use as a common law feoffment, it is possible to furnish a basic definition of the use: 'A use is a private feoffment of land to a feoffee or feoffees on a condition to transfer it to some other named person'. It might be added 'to avoid restrictions on devises (testamentary grants of land)', which defines the instrument in agreement with early modern commentary.

A definition that associates the use with the common law builds upon Haskett's conclusion that 'the hard work to find this equity before the sixteenth century has been misplaced'.³ The same appears to be true of the use. It is curious that several sixteenth-century authorities seem to have been ignored by modern historians. Foremost is Henry Swinburne's *A Brief Treatise of Testaments and Last Wills* (1590), a civilian, whose treatment of devises included the following description on uses:

there was also sometimes used and practised, of devising lands, tenements, and hereditaments by wills to certain uses, intents and trusts, which wills or testaments of lands, tenements and hereditaments were for the time accompted and take for good. But this custom was reformed in many things...⁴

² See CCR (1272 - 1279), p. 520.

³ Haskett, *Law and History Review*, p. 311 see also Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England*, p. 41.

⁴ H. Swinburne, *A Brief Treatise of Testaments and Last Wills*, London, Printed by John Windet, 1590, p. 72.

The reform to the custom that is mentioned refers to the Statute of Uses (1536), which aimed to protect heirs and address uncertainties surrounding other legal rights that fifteenth-century uses caused.⁵ Swinburne, born in 1551, practised in the ecclesiastical courts from the age of sixteen, and held various judicial postings in addition to his role as an advocate.⁶ The statute was within living memory when he practised law, and it is likely he appreciated the nature of uses and the effect of the statute while writing the treatise that later English courts routinely cited for testamentary issues.⁷ A notable aspect of Swinburne's work is that he treats the use under the following head: *certain cases approved by custom, wherein it is lawful to devise lands, tenements, or hereditaments*. This indicates he conceptualised the use alongside other customary exceptions to the common law that allowed devises of land. Namely, Gavelkind, a customary division of lands amongst all heirs, and land held in Burgage tenure divisible by will.⁸ These customary usages are particular customs, pertaining to a specific locality, while uses appear in Swinburne's treatment as a general custom available throughout England.⁹ The common law did permit customary exceptions to its rules.

Another authoritative work that appears to have been ignored is Edward Coke's *The First Part of the Institutes of the Laws of England: Or a Commentary on Littleton* (1628).¹⁰ The commentary concerns an opinion that Thomas Littleton put forward in his *Tenures* (1481) that discusses whether a release by a feoffee to the feoffor is valid if the latter continues to occupy the land after the feoffment (sect. 462).¹¹ He first canvassed the possibility it would be invalid because there is no privity between the parties in the absence of a lease. However, he adds two reasons why the release is valid. The first is that the feoffer then may occupy the land at the will of the feoffee, and this creates privity between the parties (sect. 463). Littleton opines that the law presumes

⁵ Swinburne, *A Brief Treatise of Testaments and Last Wills*, p. 73.

⁶ Derrett, *Henry Swinburne (?1551 – 1624)*, pp. 7 – 9.

⁷ Cited in *The Duke of St. Albans v Miss Caroline Beaucherk and Others* (1743) 2 ATK [637]; 26 Eng. Rep. 780 (Chancery); *Doe v Evans* (1839) 10 AD & E [227]; 113 Eng. Rep. 88 (King's Bench).

⁸ Swinburne, *A Brief Treatise of Testaments and Last Wills*, p. 70.

⁹ On the distinction between general and particular customs see Blackstone, *Commentaries*, vol. 1, p. 67.

¹⁰ See the discussion on Coke in Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, pp. 114 - 135.

¹¹ On Littleton see Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, pp. 32 - 35.

a privity in the arrangement because only a release to the feoffer and their heirs would be valid (sect. 463).¹² Nonetheless, the arguments Littleton canvassed demonstrate that issues involving uses, prior to the Statute of Uses, could be resolved according to principles of common law and without a special reference to equity. On this part of Littleton's commentary, Coke comments: 'Lands and tenements conveyed upon confidences, uses, and trusts are to be ruled and decided ... by the judges of the law: for that it appears by this and the next section, they are within the intendment and construction of the laws of the realm'.¹³ Coke states the Statute of Uses rendered Littleton's opinion on the issue moot, but he notes 'that uses were at the common law'.¹⁴ On the effect of the Statute, he states that judges construed it 'against the letter' according to principles of equity. The result is that remedy could only be sought in Chancery.¹⁵ Neither Swinburne nor Coke, or Littleton for that matter, connect the use to equity. Swinburne comments that the Statute of Uses reformed uses while Coke, with greater hindsight, can say that the effect of the statute was to bring uses into the equitable jurisdiction of Chancery as trusts.

One plausible explanation for the apparent oversight by legal historians is the careless imposition of equity onto the use by subsequent editors of their work. John D. M. Derrett, Swinburne's biographer, opined that 'editions after his last are defaced with innumerable misprints and errors in citation'.¹⁶ This is observable when comparing accounts of the use in later editions of *A Brief Treatise of Testaments and Last Wills*. For example, a seventh edition published in 1793 removes references to customary law and replaces it with an explanation that is entirely the editor's invention:

The usual way in former days to dispose lands which men had by purchase was be feoffments in trusts; and they directed by their last wills, how those feoffees should dispose the estates; and because a trust was properly under the jurisdiction of a court of equity: That court would compel

¹² Thomas de Littleton, *Littleton's Tenures*, E. Wambaugh (ed.), Washington D. C., John Byrne & Co., 1903, pp. 218 – 219.

¹³ Coke, *Littleton*, p. 272b.

¹⁴ Coke, p. 272b.

¹⁵ Coke, p. 272a.

¹⁶ Derrett, *Henry Swinburne (?1551 – 1624)*, p. 11.

the feoffee to execute the trust, the case he should refuse to do it at the request of the persons for whom he was entrusted.¹⁷

The editor of the fifth edition in 1728 similarly inserts ‘before this statute was made [Statute of Uses] ... [there] was no remedy against [a feoffee] for a breach of trust, but only in Chancery’.¹⁸ Once more the editor is treating the use as a creature of equity. The fourth edition published in 1677 faithfully reproduces Swinburne’s account without correction.¹⁹ Coke’s work received a similar treatment. Charles Butler, for example, included a note next to Coke’s writings on the use that the *cestui que trust* was a feudal idea grafted onto Roman jurisprudence despite his source saying nothing of the kind.²⁰ These later editions continue to colour how historians treat description of uses with reference to equity. For example, David Johnston states Francis Bacon indicated in his *Reading upon the Statute of Uses* that the civil law principles influenced the mind of the chancellor.²¹ However, this description appears to apply only to the later phases of development, when, as Bacon notes, uses found ‘remedy in conscience’ when the common law could not enforce them.²² In fact, Bacon limited his observation to the comment that the *fidecommissum* resembled the use.²³

Precursory devices and the development of Common law policy

The association between the use and equity means that other sources, namely the common law, have been ignored. However, the assertion that the use is a product of the common law is *prima facie* rebutted by the longstanding rule that there could be no devise of land prior to the Statute of Wills (32 Hen. 8, c. 1). Bacon states that uses ‘could never obtain any manner of remedy at the common law’, but at the same time they were

¹⁷ H. Swinburne and S. J. Churchill, *A Brief Treatise of Testaments and Last Wills*, 7th edn, vol. 1, Dublin, Printed by Elizabeth Lynch, 1793, p. 55.

¹⁸ H. Swinburne, Anon. (ed.), *A Brief Treatise of Testaments and Last Wills*, 5th edn, London, Printed by E. and R. Nutt, 1727, p. 118.

¹⁹ H. Swinburne, Anon. (ed.), *A Brief Treatise of Testaments and Last Wills*, 4th edn, London, Printed by George Sawbridge, 1727, pp. 88 – 89.

²⁰ Coke, E., *The First Part of the Institutes of the Laws of England: Or a Commentary on Littleton*, F. Hargrave and C. Butler (ed.), 18th edn, vol. 2, London, Printed for J. & W. T. Clarke, 1832, p. 191a.

²¹ Johnston, *The Roman law of Trusts*, p. 284. See the discussion of Bacon in Barnes and Boyer, *Shaping the Common Law from Glanvill to Hale*, pp. 98 - 113.

²² Bacon, *The Learned Reading of Sir Francis Bacon*, p. 17.

²³ Bacon, p. 15.

instruments capable of devising land.²⁴ Bacon observed the contradiction effectively allowed feoffors to devise land contrary to the longstanding common law rule.²⁵ Swinburne seems to have avoided this apparent contradiction in the common law by suggesting that uses were a general customary exception. The common law, however, encompasses all general customs, which suggests the use never violated the rule against devises. The common law was prepared to enforce all manner of conditions attached to gifts and feoffments since the thirteenth century. Bracton states ‘condition are of many kinds, [for] we must always adhere to that upon which the parties have agreed, though contrary to what the law would provide, if it is not to the prejudice of others’ (Br. ii, p. 67). The latitude in which the common law was prepared to treat gifts provided ample opportunity for the use to develop in English law. On the other hand, this also means there is opportunity to confound uses with similar devices. The most common being custodial relationships.²⁶ Brit. 1.23.11 makes clear that custodial guardianships, such as a lord over a ward or a parson over a church, do not divest their charges of the land. In the case of wardship, the ward is seised in common with their lord. The continued seisin means the ward has an action against a guardian to account for their office in a manner that resembles a bailiff rather than a feoffee.²⁷

The common law was familiar with two conditional devices to control the descent of land that were precursors of the use. The first is the reversion. Reversions are defined by Bracton as a condition, tacit or express, imposed on a feoffment of land given *in maritagium* (marriage portion) that states the land will revert to the feoffor if the feoffee has no descendants (Br. ii, p. 81). The device proved popular during the thirteenth century as a method to control the descent of real property and to prevent escheat. In Bracton’s time, the reversion had developed to encompass other kinds of feoffment.²⁸ Its effectiveness is illustrated in an inquisition (1273) that orders the escheator to deliver lands at Waledon to William Lovel, coming into the king’s hand after the death of his son, because William enfeoffed his son upon condition that the land would revert if he died

²⁴ Bacon, p. 17.

²⁵ Bacon, p. 18.

²⁶ Biancalana, *Itinera Fiduciae*, p. 114, e.g. the arrangement in CPR (1374 - 1377), p. 181 could easily be confused with a use.

²⁷ Barton, *The Law Quarterly Review*, p. 563; Biancalana, *Itinera Fiduciae*, p. 114.

²⁸ E.g. Br. ii, p. 106.

without an heir.²⁹ By the end of the thirteenth century, the reversion allowed feoffors to make flexible grants of land to create life interests. (Fl. 3.12). *Britton* states that a reversion can be attached to a gift that becomes operative if the donee makes an alienation contrary to the intention of the donor (Brit. 1.6.1). Furthermore, reversions never contradicted the common law rule against devises. The court in one case (1339) concerning competing claims to land between a man's wife and his executors, where the latter argued they had been enfeoffed on his deathbed to sell and deal with land for the good of his soul, observed: 'A man would have no small difficulty in devising a reversion, and making that devise maintainable in law, particularly in this case, in which the devise was made to sell and deal therewith for the good of the soul'.³⁰ Nonetheless, it is apparent that despite this limitation that a reversion could be used to make arrangements that were testamentary in nature. For example, an enrolment (1348) records that the brothers Henry and William de Causton bound themselves to William Daunvers, making an enfeoffment to him as security, which included a reversion condition that Henry would secure five chaplains to sing for Daunvers' soul if he died in the meantime.³¹

The second conditional device is the remainder which, when annexed to a feoffment, allowed a person to control how their land descended after their death and the death of others.³² Remainders came into common usage at the beginning of the fourteenth century, not mentioned in either *Britton* or *Fleta*, and allowed feoffors a considerable degree of flexibility to control land. Multiple remainders could determine the fortunes of land through multiple generations. A licence (1328) granted to Robert, son of Robert de Haustede, allowed him to enfeoff Henry de Wodhouse of his land on condition that the feoffee granted it to his mother for life, with a remainder to his father, with remainder in fee tail to his daughter and son-in-law, and with an ultimate remainder to himself in fee simple.³³ The ultimate remainder effectively ensured that the property was not lost to Robert during his lifetime. This example also illustrates how a remainder could facilitate a grant of land to relatives on the ascending and descending line. Furthermore, the

²⁹ CCR (1272 - 1279), p. 62.

³⁰ Y. B. Easter. No. 4 (12 & 13 Edw. III).

³¹ CCR (1346 - 1349), p. 594.

³² E.g. CPR (1374 - 1377), p. 110.

³³ CPR (1327 - 1330), p. 232.

remainder could also delay an heir from entering an estate. For example, an inquisition (1359) into the estate of John de Glydesburgh states he bequeathed tenements, according to the custom of London (burgage tenure), to his brother with a remainder in fee tail to three bastard daughters and an ultimate remainder to his next heir.³⁴ Remainders could also ensure that heirs did receive their inheritance. The grant to a spouse that includes a life interest may impose a condition that they cannot grant it to anybody except their lawful heir, with a remainder over to the heir once the spouse is deceased.³⁵ Both instruments, the reversion and the remainder, were a consequence of a policy in the common law to give effect to the intention of donors and the conditions imposed on feoffments notwithstanding the rule against devises.

The growing popularity of conditional devices to control the fortune of land at the turn of the fourteenth century favours Bacon's argument that uses emerged sometime before Richard II's reign.³⁶ Several legal historians already support this view. Charles Donahue Jr. made a brazen comment, unsupported by evidence, that:

The most important thing that happened in the fourteenth century with regard to the land law was the development of the feoffment to uses, the ancestor of the modern trust. The origins of the use lie before the fourteenth century, but there is little doubt that the practice of making feoffments to uses increased substantially in the fourteenth century. Just how substantially is difficult to determine.³⁷

Donahue Jr. appears to subscribe to an insular view of the use and he builds on what that school accepts. Namely that Anthony D. Hargreaves uncovered the earliest known example of the use in a case in 1409 where the Chancellor ordered re-conveyance of land, that was the subject of a feoffment with an oral condition to re-enfeoff the original feoffer, which the feoffee refused to perform.³⁸ The decision was made in favour of a living feoffor. The conclusion that uses flowed from the expansion of conditional grants recognised by the common law also adopts an insular approach. However, it is also

³⁴ Cal. Inq. Misc. v. 3, no. 326; See also CPR (1301 - 1307), p. 131.

³⁵ E.g. R. Sharpe (ed.) *Calendar of Wills proved and enrolled in the Court of Husting*, vol. 1, London, Her Majesty's Stationery Office, 1889, p. 51.

³⁶ Bacon, *The Learned Reading of Sir Francis Bacon*, p. 19.

³⁷ Donahue Jr, *Southern Methodist University Law Review*, p. 957.

³⁸ A. D. Hargreaves, 'Equity and the Latin Side of Chancery', *Law Quarterly Review*, vol. 68, no. 4, 1952, pp. 481 – 499.

necessary to build on what Joseph Biancalana has already acknowledged: 'The traditional view that the common law courts did not recognize uses is a little too simple'.³⁹ In addition to the rolls series, there are a small number of cases that suggest the common law recognised and enforced uses.

Legal nature of the Uses in England

Legal historians have found evidence of the existence of uses throughout the fourteenth century. However, the frequency in which uses appear in the record is informed by their definition. Biancalana, the most recent authority to advance a fourteenth-century origin, criticised J. M. W. Bean's definition that encompassed custodial arrangements using the expression *ad opus* because they lacked the essential ingredient of uses: transfer of legal title to the feoffee.⁴⁰ However, Biancalana's definition, identified in this thesis as too broad, appears to be coloured by Bean's research. Biancalana argued that 'isolated instances of feoffments to uses appear as early as the 1320s. Uses became more frequent, though not very numerous, in the 1330s and 1340s'.⁴¹ He cites, as an example, an inquisition (1326) that records Robert de Pynkenye enfeoffed his daughter Alice of rent and another for life, which was now held by his heir William de Pynkenye.⁴² It is unclear why Biancalana thought this arrangement approached the nature of a use since the creation of life interests, or term of life, were not novel to the fourteenth century nor the common law. It is arguable that the conditional nature of life interests led to the association with the use. Their explicit mention in Bracton as conditional gifts indicates that feoffors could create life interests over land in the mid-thirteenth century. The condition being that after the expiry of the life interest, the land reverts back to the feoffor or their heir (Br. ii, p. 106). The form of this conditional device did not change when *Britton* treated life interests under the head of reversions (Brit. 1.6.1). Both passages accurately described the law applicable to Robert de Pynkenye and the reversion back to his heir. Biancalana cites several other life interests as evidence of uses being practiced in the early fourteenth century.⁴³ The confusion appears to stem from Bean's observation

³⁹ Biancalana, *Itinera Fiduciae*, p. 148.

⁴⁰ Biancalana, *Itinera Fiduciae*, p. 113; see also Palmer, *English Law in the Age of the Black Death*, p. 112.

⁴¹ Biancalana, p. 113.

⁴² Cal. Inq. Post. Mortem. vol. 7, no. 343.

⁴³ See Cal. Inq. Post. Mortem. vol. 7, no. 281; CPR (1338 – 1340), pp. 110, 216.

that uses could 'comprise several different types of settlements', including life interests, which Biancalana references with approval.⁴⁴ It illustrates that the identification of arrangements as uses ought to be done with care if they are to be distinguished from other species of gift with a condition.

Legal historians have posited examples of arrangements made by people going overseas as uses.⁴⁵ John Barton, Robert Palmer, Bean, Biancalana all identified one legal arrangement as a use that fits the definition adopted in this thesis.⁴⁶ Proceedings in Council (1375) record how John le Hastings, Earl of Pembroke, had licence in 1369 to make a feoffment of certain castles, counties, and lordships, and discretion to alienate or demise all other lands.⁴⁷ Before he went to Gascony to fight in the Hundred Years War, Hastings enfeoffed certain persons and instructed them to carry out the instructions in a schedule. The feoffees brought the schedule to the council at Westminster, 'which was before the council opened, and there viewed and understood' on 5 May 1372. It instructed them to pay his debts if his executors had insufficient chattels to satisfy them and afterward enfeoff named persons of his estate. If he had no heir, Hastings instructed his feoffees to enfeoff Sir William Beauchamp of his estate on condition that he bears his arms and that he and his heirs will bear his name.⁴⁸ Beauchamp agreed to the condition before the council on this date. Hastings had enfeoffed his feoffees with the purpose of carrying out testamentary instructions and enfeoff a third party. Furthermore, it must be observed that Hastings fits the model of a knight about to leave to fight in the Hundred Years War. It is a situation analogous to the example posed by Maitland of a crusader who creates a use as part of his legal preparations to protect his family and property during his absence. Legal historians have vindicated Maitland's instinct that knights made uses before going overseas to fight. The precursor to licences issued to knights during the Hundred Years War are found during the Ninth Crusade as discussed in the previous chapter.⁴⁹ However, those licences granted powers to attorneys and executors as personal representatives without being enfeoffed before the crusader departed.

⁴⁴ Bean, *The Decline of English Feudalism*, p. 118; Biancalana, *Itinera Fiduciae*, p. 113.

⁴⁵ Biancalana, *Itinera Fiduciae*, p. 112; Palmer, *English Law in the Age of the Black Death*, p. 118.

⁴⁶ Barton, *The Law Quarterly Review*, p. 568; Bean, *The Decline of English Feudalism*, p. 164; Biancalana, p. 112; Palmer, p. 129.

⁴⁷ CCR (1374 - 1377), pp. 286 – 288. See R. I. Jack, 'Hastings, John le', *ODNB*, vol. 25, pp. 767 – 768.

⁴⁸ See P. Coss, 'Beauchamp, William', *ODNB*, vol. 8, p. 604.

⁴⁹ See CPR (1266 - 1272), p. 395; CPR (1266 - 1272), p. 441.

The licence granted in this arrangement was necessary for Hastings to leave for France, but does not suggest a person needed legal privileged to make a use (Brit. 6.7.3). Instead, the licence allows his feoffees to enfeoff Beauchamp to continue the Hastings family name if there is no lawful heir. Feoffors practiced this succession strategy throughout the fourteenth century. Edmund Deyncourt received licence in 1314 to enfeoff whomever he wished of all his lands on condition that they bear his surname and arms to preserve his memory since his daughter Isabella was his heir apparent.⁵⁰ This privileged arrangement is reminiscent of and equivalent to civil law adoption. The common law never recognised adoption as an institution.⁵¹ Nonetheless, the evidence indicates a limited practice did exist. The use outlined above is not a privileged arrangement but a private law instrument supported by royal licence. This conferred evidentiary advantages that allowed royal authority to act with certainty. This worked to Hastings advantage. In 1375, the king ordered the escheator not meddle with Hasting's lands in Bergeveny because he held none there. Hastings had enfeoffed his feoffees, who held the land, with instructions to give it to John and Anne for their lives.⁵² Licences also supported the enforcement of other uses. This is evident in a licence (1374) granted to John de Mohun and his wife Joan to enfeoff Simon, bishop of London, and others to his land.⁵³ It records that the king also granted licence by other letters patent for Joan to instruct the feoffees to grant the land to any secular person that Joan 'should wish to name'. The law obligated feoffees to either carry out a feoffor's instructions or obtain a licence from the king to quit the feoffment. In the case above, one of the feoffees released his right to his co-feoffees without licence, which consequentially required the remaining feoffees to pay the king half a mark for a trespass. The trespass is the consequence of not adhering to the condition of their feoffment.

The evidentiary advantages of obtaining a licence meant feoffors sought them before making a use. Simon de Burgh and Joan, joint owners of land, enfeoffed two chaplains of

⁵⁰ CPR (1313 - 1317), p. 89.

⁵¹ See Buckland, McNair, and Lawson, *Roman Law and Common Law*, pp. 42 – 43; R. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice*, Cambridge, Harvard University Press, 2015, p. 96.

⁵² CCR (1374 - 1377), p. 135.

⁵³ CPR (1374 - 1377), p. 26. See R. Dunning, 'Mohun, John de', *ODNB*, vol. 38, pp. 510 – 511.

certain manors with instructions to enfeoff parts of their land to certain third parties.⁵⁴ However, there were other methods available to protect the integrity of uses. The most popular means of protection was an enrolment of the feoffment in Chancery. In 1375, a charter recorded Thomas de Ponynge gave instructions in his will to both his executors and his feoffees to carry out his estate with the latter to perform his will (pay debts) and afterward enfeoff a designated person.⁵⁵ The following year, the king ordered the escheator to release the lands taken into his hands after Thomas' death to allow the feoffees to carry out the instructions of the schedule that had been enrolled and witnessed in Chancery.⁵⁶ This use and the testamentary instructions contained in the schedule could be enforced against would-be intruders. This also applied to knights off to fight in the Hundred Years War. Sir William de Molyns, who is going to France to fight in 1367, enrolled an indenture that enfeoffs four feoffees of his lands under the condition that the feoffees made arrangements for his and his ancestors' souls, enfeoff his heir Richard with a remainder to other children, enfeoff his next heir in default, or, on failure of any heirs, dispose them at their discretion.⁵⁷ The condition continues: If William returns it would be lawful for him to re-enter the lands 'at his will'. In 1372, Sir Ralph Basset made a similar indenture in Chancery before he left for Gascony, which contained instructions to his feoffees that they should enfeoff his wife if he died.⁵⁸ The evidence supports Biancalana's observation that most uses appear towards the end of Edward III's reign, as Bacon had noted in his *Reading*, but the above charters do not illustrate the legal principles that governed uses.

Conceptualising the Use

The striking feature about the history of the use in England is that another species of gift with a condition dominated the record. A landholder could make a feoffment with a condition, referred to here as an enfeoff re-enfeoff condition, which compels the feoffee to re-enfeoff the feoffor as joint owner of the land with a third party. The object of the condition is to resettle the land by changing its legal condition. Barton poignantly noted

⁵⁴ CPR (1374 - 1377), p. 456.

⁵⁵ CCR (1374 - 1377), p. 178.

⁵⁶ CCR (1374 - 1377), p. 309.

⁵⁷ CCR (1364 - 1368), pp. 405 - 406.

⁵⁸ CCR (1369 - 1374), p. 458. See H. W. Ridgeway, 'Basset, Ralph', *ODNB*, vol. 4, pp. 510 - 511.

this species of feoffment appears throughout the fourteenth century and uses, in comparison, occur very rarely even when accounting for the possibility of an incomplete record.⁵⁹ A plausible explanation for this trend is that the enfeoff re-enfeoff arrangement, itself a product of more complicated legal reasoning, provided a more effective mechanism to protect family or property. Barton observed: 'In settlements by feoffment and re-feoffment, it was normal practice to attach to the estate of the feoffee a condition entitling the feoffor to re-enter if the property was not re-conveyed, and such conditions could easily be adapted to settlements to uses'.⁶⁰ This idea can be taken further. It is possible to draw a picture, by analogy to enfeoff re-enfeoff feoffments, about how the common law conceptualised and enforced uses. This approach is contrary to the argument that uses developed out of enfeoff re-enfeoff arrangement.⁶¹ Nevertheless, the evidence suggests both arrangements, as a species of common law feoffment, developed out of the same policy considerations and served a similar function.

The policy to give effect to the intention of feoffors making enfeoff re-enfeoff arrangements is first found in thirteenth-century licences. In 1278, Edward I granted licence to John de Criel 'to enfeoff Walter de Sturton, king's yeoman of the manor of Estwelles, co. Kent, which he holds in chief, for the latter to re-enfeoff the said John and Eleanor his wife (as joint owners), in fee tail, with remainder to the right heirs of John'.⁶² An important feature of the enfeoff re-enfeoff condition is the creation of joint ownership. Bean conflated this function with the purpose of uses.⁶³ The use is distinguished from the enfeoff re-enfeoff condition arrangement because its object is to benefit a third party rather than resettle the fee. However, it is evident that the changes in the common law to accommodate both species of feoffments occurred during the first half of the fourteenth century. The impact of this policy on the common law is illustrated in a case heard in 1346. William Derby brought an action against the Dean of Warwick that concerned land held jointly.⁶⁴ The court noted the law had only recently been settled. Joint ownership created a divisible title in land, which meant a joint owner could not be disseised at law

⁵⁹ Barton, *The Law Quarterly Review*, pp. 571 – 172.

⁶⁰ Barton, *The Law Quarterly Review*, p. 566.

⁶¹ Biancalana, *Itinera Fiducia*, p. 119; Milsom, *Historical Foundations of the Common Law*, p. 177.

⁶² CPR (1272 - 1281), p. 277.

⁶³ Bean, *The Decline of English Feudalism*, p. 118.

⁶⁴ Y. B. Easter. no. 35 (20 Edw. III, pt. 1).

because of the act of a co-owner. This followed from the reasoning that if a joint owner disseised the other who brought an action against them, and title could not be divided, the absurd position would arise that the concerned parties would be both plaintiffs and defendants. Formerly there was no such division of ownership.

The origins of the *enfeoff re-enfeoff* condition are clearer than the *use*. At the beginning of the century, the courts had already settled fundamental principles about the effect of joint ownership in land. The feoffors were the primary beneficiaries of the arrangement. In 1304, the court heard a case concerning a deceased feoffor who had jointly *enfeoffed* his widow, son, and daughter during his lifetime.⁶⁵ The widow remarried but her new husband alienated the land held jointly by her and her children to *Coupe of Canterbury*. The widow and children sought a writ of *novel disseisin* against *Coupe* after the new husband died. It was argued, successfully, that a *feme covert* could not be disseised and the widow's action failed. However, *Hengham* gave the following judgement in favour of the children:

Suppose that three men are joint-feoffees of land, and that Sir Elias my companion disseise all three, and that two of them make releases and acquittances to Sir Elias while he is in seisin. Do you not think that the third shall recover his purparty against Sir Elias? Certainly, he shall be *Novel Disseisin*.

This case indicates that the common law had settled the idea of joint and severable title in land to allow any joint owner to enforce their legal right to the land by the beginning of the century. The estate planning potential of the *enfeoff re-enfeoff* arrangement was clear from the outset of its invention. Its primary purpose was to benefit the feoffor and his descendants.⁶⁶ However, the condition was occasionally designed to benefit the feoffee. In 1302, a case concerned an arrangement where a father did not permit a man to marry his daughter unless he *enfeoffed* her of his land.⁶⁷ The parties reached an agreement that the man would *enfeoff* the father, and then the father would *enfeoff* his daughter. The father was seised for fifteen days and afterward *enfeoffed* his daughter and the man jointly. During the fifteen days, the father let the pasture and carried off the beasts he found there. Furthermore, the court held that the joint *enfeoffment* gave the

⁶⁵Y. B. Hil. p. 74. (32 & 33 Edw. I).

⁶⁶E.g. CCR (1346 - 1349), p. 458; CCR (1364 - 1368), p. 101.

⁶⁷Y. B. (32 & 33 Edw. I), *Criminal Cases of Cornish Iter.* p. 202.

daughter a right in the land beyond the rules of coverture. This case is exceptional but illustrates the flexibility of the arrangement.

Recognizances in Chancery, intended to prevent legal disputes between parties, appear to have been important to the enforcement of all species of conditional feoffment, which includes uses. Concerning the enfeoff re-enfeoff condition, the feoffor and feoffee could acquire a recognizance prior to livery of seisin that outlines the intentions of the parties and the condition to be performed. Upon performance, the recognizance is cancelled and the feoffee is quit of their legal obligation. The arrangement made by Thomas de Faucomberge is a model example:

Thomas should enfeoff certain particular persons of all lands which he holds in fee and heritage, so that they might again enfeoff the said Thomas and Constance his wife under a particular form; and because the said Constance after in November 42 Edward III, appearing in person in chancery, acknowledged that the condition was fulfilled, the king ordered the chancellor that this recognizance should be cancelled, wherefore it is cancelled.⁶⁸

This procedure implies that because Thomas does not name the feoffees, whoever they might be, there is clear intention behind the feoffment that the feoffees are only intermediary landholders. The existence of a recognizance allowed either party to compel performance in a court of law.⁶⁹ Its absence would have made proving non-performance more difficult. Chancery was not the only forum where an undertaking of this nature could be performed. It could also be achieved by a fine before the common law courts.⁷⁰ However, the frequent recognizances issued out of Chancery suggest that people preferred the expedient processes it had developed and tended to avoid the courts of law.

The enforcement of enfeoff re-enfeoff feoffments in the common law courts is illustrative of how the common law principles could easily accommodate the use. The courts could compel the feoffee to perform either during the life of the feoffor or after death. Enforcement during the lifetime of the feoffor was straight-forward. For example, a

⁶⁸ CCR (1364 - 1368), p. 306. See P. McNiven, 'Faucomberge, Thomas de', *ODNB*, vol. 19, pp. 144 – 145.

⁶⁹ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 336.

⁷⁰ E.g. CCR (1313 - 1318), p. 64.

feoffor made a feoffment with a condition stated verbally on livery of seisin that the feoffee will re-enfeoff the feoffor and his wife jointly. The feoffee refused its performance once seised.⁷¹ The court held that the feoffor could oust the feoffee without it being a disseisin because of the intentions of the parties. Before discussing the enforcement of a condition made by a deceased feoffor, it is necessary to appreciate what a completed enfeoff re-enfeoff feoffment could achieve for joint owners. First, it allowed the joint owner to avoid the consequences of escheat. This is illustrated in several orders issued out of Chancery that command the escheator not to molest the lands belonging to William de Roos, because he was jointly enfeoffed with his wife Margery, even though he died without an heir and the land ought to have escheated.⁷² Second, it could avoid the consequences of civil death, a loss of legal rights, which resulted from a felony and the forfeiture. A wife, as joint owner of the land, could compel the escheator to return land that had been taken into his hand because of her husband's felony.⁷³ The fundamental feature that allowed these conditional feoffments to stand in favour of a joint owner is that they were made in good faith and without fraud.

The enforcement of an incomplete enfeoff re-enfeoff condition depended on the good faith of the parties. The Royal courts heard the following case where the condition failed. Robert, Lord of Clifford, obtained licence to enfeoff certain chaplains of his lands in plenary seisin to re-enfeoff to him and his male heirs in the future.⁷⁴ Robert died before he could be re-enfeoffed and the land was taken into the king's hands. The chaplains argued that it was at their pleasure when to re-enfeoff the heir since they still enjoyed the king's licence. However, the court held that failure to re-enfeoff Robert meant the condition failed and the feoffee's continued seisin disinherited the heir. The reason for the decision was issued, the court acknowledges, with the advice of King's Council. It favours the wardship rights of the king. Furthermore, there is an implication that the chaplains were not acting in good faith. The uncertainty of the decision is apparent in the statement that 'through the King's seizure the heir will have the fee simple, and the chaplains, who have no title to their own use, can release, and then the right of everyone

⁷¹ Y. B. Easter. no. 27 (18 Edw. III).

⁷² See CCR (1343 - 1346), pp. 12, 13, 31, 188.

⁷³ E.g. CCR (1343 - 1346), p. 627.

⁷⁴ Y. B. Hil. no. 30 (18 & 19 Edw. III). See H. Summerson, 'Clifford, Robert', *ODNB*, vol. 12, pp. 107 – 109.

will be saved'. A later case with analogous facts had a different result. In 1358, Sir Robert de Manners enfeoffed vicar John de Wyrksall to his land with instruction that he enfeoff Robert, his wife Alina, and his heirs.⁷⁵ Robert died fifteen days later but John enfeoffed Alina with a remainder to Robert's heirs. However, the escheator took the land into his hand under the mistaken impression Robert died seised of the estate. Edward III allowed Alina to keep the land, even though the King lost wardship of Robert's heirs because the grant to John was 'made in good faith and not as a fraud'. The feoffment has the effect of avoiding the incidences of wardship, which is an outcome that the courts acknowledge as approaching a fraud. This charter indicates the length of time between a feoffment and the possible fraudulent activity is considered a relevant factor. The King's apparent knowledge of Robert's good faith may have reflected his position as a trusted favourite.⁷⁶ Nonetheless, the common law enforced the intentions of the parties, even against their lord (Fl. 1.11.11), provided there is no implication of fraud. This principle can be discerned in the enforcement of uses.

Enforcement in the Common Law

The analogies drawn between uses and enfeoff re-enfeoff arrangements, recognising both as common law gifts with a condition, are persuasive since there is a commonality of legal principles. They developed alongside each other as a product of the same policy to give effect to the intentions of mentally sound donors (see Fl. 1.11.8). The paramountcy that the common law gave to the intention of feoffors is illustrated by the rule that a feoffee must 'perform it [a condition] anew' if the feoffor refused to accept its performance.⁷⁷ In some cases, a use could devise land from a family permanently. In 1377, Thomas de Fynchale instructed that certain lands in Solihull are to remain in the hands of his feoffees and sold within two years of his death and 'the purchase money to be paid to Sarah his wife, for the use of his children, and for masses for his soul'.⁷⁸ The primary legal limitation is that the feoffor must make their intentions known to the feoffee. For example, a variation of the condition can only occur if the feoffor intimated they accepted later

⁷⁵ CPR (1358 - 1361), pp. 117 – 118.

⁷⁶ A. Collins, *The Peerage of England*, vol. 1, pt. 2, London, Printed for W. Innys, 1756, pp. 456 – 457.

⁷⁷ Y. B. Easter. no. 8 (20 Edw. III, pt. 1).

⁷⁸ Public Record Office, *Ancient Deeds*, vol. 2, no. C. 1792.

performance or waived the condition.⁷⁹ Another principle is that the feoffor must make the condition plain in their feoffment because failure to notify a feoffee of a condition voided it. This rule is outlined in a case (1340) where the defendant satisfied the first condition but the plaintiff argued that another existed.⁸⁰ The court held the defendant had no notice of the second condition, which meant he acquired good title. There was one legal principle that fundamentally affected the operation of uses as an instrument with the effect of devising land: Both seisin and the condition must be made during the lifetime of the feoffor.⁸¹ The effect of this principle is illustrated in an inquisition (1390) into the affairs of John Atherson, which reveals he made a feoffment in 1370 on condition that the feoffees followed his will, who took seisin of the land, which he would later declare to them.⁸² The feoffees could not perform the condition because Atherson died before making his wishes known. John's land was taken into the hand of the king. Incidentally, this charter concerned tenements in Calais and is evidence that the common law, at least concerning feoffments, applied to that Pale.

On the question of enforcement of uses, the danger associated with it as a tool to devise land is plain: legal intervention is necessary if the feoffee refuses to follow the condition. The petition (1329) to the King's council brought by Henry, son and heir of John Harclay, illustrates the issue:

John de Harcla being in extremis on Tuesday after St. Martin 16 Edward II about the hour of vespers made a charter to Andrew de Harcla and died in the night following about cockcrow seised of 18 bovates of land in Slegil, so that the said Andrew by pretext of the said charter had no seisin thereof in the lifetime of the said John. The charter was made on condition that the said Andrew, having had seisin, should enfeoff Henry son and heir of the said John of the said 18 acres in a certain form as to which the jurors are ignorant. The said Andrew immediately after the death of the said John intruded himself into the said land and held it until by his forfeiture it was taken into the hand of King Edward II.⁸³

⁷⁹ Y. B. Hil. no. 32 (20 Edw. III, pt. 1).

⁸⁰ Y. B. Mich. no. 60 (14 & 15 Edw. III).

⁸¹ See CCR (1374 - 1377), pp. 235, 236 – 237.

⁸² Cal. Inq. Misc, v 5., no. 303.

⁸³ Cal. Inq. Misc. v. 2, no. 1072. See H. Summerson, 'Harclay, Andrew', *ODNB*, vol. 25, pp. 115 – 117; M. Henniger, 'Harclay, Henry', *ODNB*, vol. 25, pp. 117 – 118.

In the above case, Henry is arguing Andrew Harclay disseised him of his lawful inheritance when his uncle violated the condition of the grant and kept the property. It could be expected that John could trust Andrew to convey the property because of their familial relationship (brothers). However, the issue only became known because Andrew forfeited the land and it came into the hands of the escheator. The petition does not expressly state the outcome since Chancery was in the process of cataloguing the land that belonged to John, but it had been seized into the king's hand because of Andrew's forfeiture. His dishonesty played a key role in determining whether the use was valid.

The charter is inherently problematic. Andrew, as its antagonist, was hung, drawn, and quartered for treason after the treaty Edward II empowered him to make with Robert the Bruce contained a term that he would not come to the King's aid if the Scots invaded England and left his lands in peace.⁸⁴ The depth of Edward's personal animosity led him to degrade Andrew in death and strip him of his honours.⁸⁵ It served Edward's purpose to have Andrew cast in the role of the villain, and evidence of a dishonourable betrayal of his brother and kin further speaks to his treasonous inclinations. It appears that Henry Harclay adopted a pragmatic approach in this petition to ensure the family patrimony remained intact. Later he would petition Edward III to pardon his deceased uncle.⁸⁶ The hostility is reflected in the confused legal narrative of the petition. On one hand, it appears that Andrew did receive seisin of the land and refused to perform the condition. However, it is also imputed that Andrew simply intruded on the land to disseise Henry. It is clear, however, legal justification existed to ensure Henry should receive the land either as a natural right as John's heir or as the object of the compact made between his father and uncle. The underlying question, however, is whether John Harclay made a use in the early fourteenth century. It is likely that he did. The legal narrative in this charter at least had to be plausible regardless of the hostility towards Andrew, and there is nothing in this charter to suggest the original feoffment with a condition as a deathbed grant is unusual or illegal on its face. The attack on its validity does not attack its form but the fact livery of seisin did not occur during John's lifetime. The charter suggests the feoffment failed

⁸⁴ R. Haines, *King Edward II: His Life, His Reign, and Its Aftermath, 1284-1330*, Montreal & Kingston, McGill-Queen's University Press, 2003, p. 272; Prestwich, *Plantagenet England*, p. 243.

⁸⁵ Haines, *King Edward II*, p. 273; J. G. Bellamy, *The Law of Treason in England in the Later Middle Ages*, Cambridge, Cambridge University Press, 1970, p. 52.

⁸⁶ Bellamy, *The Law of Treason in England in the Later Middle Ages*, p. 53.

because it was made on a deathbed rather than the arrangement itself was illegal. Furthermore, there is no implication that this charter was illegal because it was made without a licence. Despite this clear confusion, the underlying policy concern is the apparent dishonesty of the Andrew.

The dishonesty element in Andrew's charter, notwithstanding Edward's hostility, plays a key role in the enforcement of other uses. An early example of a use appears in the third volume of the *Calendar of inquisitions miscellaneous*, which demonstrates the law generally sought to enforce uses. The full text of the inquisition (1359) reads:

John de Eglysfeld deceased on Monday after St. Patrick in March 26 Edward III (1352), long before his death enfeoffed by his charter Roger de Kirkeoswald and John Broun, chaplains, of all his lands in co. Cumberland, viz., in Castekayrok, Gamilesby, Grenhowe, Langholm, Cryngildyk, Hedresford, Crokedayk, Eglisfeld, and Kirkebampton, held of divers lords and of the yearly value of 2s., excepting lands in Glassonby, which he held of the king in chief, and 8s. of rent in Kirkebampton whereof he died seised. The said chaplains continued their seisin for two years and afterwards enfeoffed Joan daughter of the said John de Eglysfeld of those lands, who continued her seisin until they were taken into the king's hand by the escheator. These feoffments were made in good faith and not fraudulently.⁸⁷

The original charter appears to have been a grant to the chaplains with the condition that they would enfeoff John's daughter. She does not appear to be his natural heir. It appears the original feoffment was made as part of his estate planning activities in 1349 – 1350, probably with reflection on the earlier death of his famous brother Robert de Eglysfeld, which included separate arrangements for his son and daughter-in-law (also named Joan, as was John's daughter).⁸⁸ The hallmarks of a use are present. First, the feoffor enfeoffs land to a feoffee or feoffees, who hold the land for a period, and afterward convey it to a designated party, in this case, a close relation. Second, both seisin and the condition, if it is stated in the charter, was made during the lifetime of the feoffor. These two features also appear in the use made by John Harclay. Finally, the reassurance that John made the feoffment without fraud carries the implication that the law recognised uses could

⁸⁷ Cal. Inq. Misc. v. 3, no. 289.

⁸⁸ J. Margrath, 'Fresh Light on the family of Robert de Eglesfeld, founder of the Queen's College, Oxford', *Transactions of the Cumberland and Westmorland Antiquarian and Archaeological Society*, vol. 16, no. 2, 1916, p. 264. See also J. Kaye, 'Eglysfeld, Robert de', *ODNB*, vol. 17, pp. 1015 – 1016.

support fraudulent purposes. The explicit mention of good faith means the law, as in the case of *enfeoff re-enfeoff* conditions, must be certain that a feoffor made a use with honest intentions if the feoffor did not have a licence to make the arrangement or enrolled it in Chancery.

The common law policy to give effect to the intentions of the feoffor was restrained, explicitly in *De donis conditionalibus*, by the overarching principle in common law jurisprudence that land should descend to the lawful heir.⁸⁹ It did not yield to human sentiment even if landholders believed the welfare of the family would not be preserved by their heir.⁹⁰ The evidence suggests that landholders, as in the case of John de Hothom, put pressure on their heir to ensure provision for their other children.⁹¹ Nonetheless, the competition between the wishes of feoffors and the doctrine of primogeniture is one area where notions of equity may have affected the frequency of uses. Some notion of equity may have existed in the practice of fourteenth-century common law courts. Chief Justice Stonore presiding over a case in 1343 made a distinction between the common law and equity because the latter justified an *Audita Querela* action.⁹² However, the notions of equity did not favour the enforcement of uses against the interests of heirs. If equitable considerations informed the law related to uses, it is likely the natural right of the heir to succeed to their ancestor ought to prevail over the interests of strangers, and the law did not presume a feoffor intended to disinherit them. This overarching principle informed all forms of gift with a condition. The legal rights of the heir prevailed over the legal interests of the feoffees, which is evident in the controversy concerning the *enfeoff re-enfeoff* arrangement made by the Lord of Clifford discussed above.⁹³ The expectation that land would descend to heirs appears to explain why uses seldom appear in the record while the *enfeoff re-enfeoff* to resettle the title dominated the estate planning strategies of landholders.

Conclusion

⁸⁹ Coke, *The Second Part of the Institutes of England*, p. 334. See further Helmholz, *Natural Law in Court*, p. 103.

⁹⁰ Milsom, *Historical Foundations of the Common Law*, p. 177. See M. Buck, 'Hothom, John de', *ODNB*, vol. 28, pp. 256 – 257.

⁹¹ CCR (1343 - 1346), p. 388.

⁹² Y. B. Easter. no. 24 (17 Edw. III); see P. Jefferies, 'Stonore, John de', *ODNB*, vol. 52, pp. 924 – 926.

⁹³ Y. B. Hil. no. 30 (18 & 19 Edw. III).

The conclusion that a use is a species of feoffment with a condition invokes the principle behind Occam's razor that the simpler of two arguments is the more likely explanation. There is no modern school of thought that connects the use to the common law. However, it is a stronger alternative to an association with equity that has confused the nature of uses by linking it to the trust. The association appears to be a lingering consequence of the Roman law school of thought, which ignored the common law as a source despite authoritative early modern commentary on the subject. The present thesis has adopted a narrow definition of the use as an enfeoffment to a feoffee to transfer land to a third party. It is a definition incompatible with Palmer's approach to the question of the origin of the use, which excludes 'grants to feoffees merely to grant to a third party to accomplish an end that the common law would have otherwise scrutinized too carefully. Such grants were sociologically but not legally significant'.⁹⁴ It is unclear why the author reached the conclusion that such arrangements were not legally significant. However, the narrow definition avoids the problem that is inherent with classifying the use as a gift with a condition. Gifts with a condition encompasses a large swathe of legal arrangements such as reversions, remainders, life interests, enfeoff re-enfeoff conditions, and uses. A broad definition of the use as an independent instrument has led historians to categorise other conditional devices as uses. The narrower approach that the use is a species of gift with a condition meant it sat alongside other conditional devices that operated with similar rules and achieved similar purposes. It is now possible to conclude that the origin of the use lies in the expansion of a common law policy in the late thirteenth century to give effect to the intention of donors. The use and several other conditional devices were the product of this policy.

Historians have noticed most uses are found in the later part of the fourteenth century. In some cases, the events of the Hundred Years War inspired their creation. Maitland was correct to assert that knights fighting abroad would value the use as a device to protect family and property. The role of the licence issued to knights travelling to France, however, is distinguishable from the privileges granted to crusaders. Its purpose was to provide royal protection to a generally available private law instrument rather than confer unique legal rights. Nonetheless, it is reasonable to suggest that the king used royal

⁹⁴ Palmer, *English Law in the Age of the Black Death*, p. 111.

licence to encourage participation in the Hundred Years War. The mechanism of royal protection was valuable to enforcement. A sensible feoffor enrolled their use, and other species of feoffment, in Chancery whenever possible. Since this process left little doubt about the legal position of the parties, it prevented disputes reaching court. Nonetheless, the use appears infrequently in the records of Chancery. The enfeoff re-enfeoff condition, a more complex device than the use, was the preferred device to resettle land and control its fortunes. It could achieve the objects associated with the use, such as avoiding feudal incidences or the operation of law. Another advantage it had over the use, namely as a form of devise, is that the feoffor supervised the transaction. Nevertheless, their shared origin as common law feoffments means the use's legal principles are discernible by analogy to the enfeoff re-enfeoff condition. The foremost rule appears to be that the feoffor must make the use during their lifetime and without imputation of fraud to be a valid feoffment.

Chapter 9. Conclusion

The idea that the use is in some way connected to the crusade movement continues to be a popular belief despite the alternative arguments proposed by legal historians. There is even a slight public interest in disproving the connection. The most recent public comment on the origin of the use is an editorial appearing in the Melbourne newspaper, *The Age*, in August 2017: 'Discretionary trusts originated as far back as Norman England, after William the Conqueror invaded in 1066. We don't really know the origins [of the trust], although some speculate that Crusaders established trusts so their lands could be managed in their absence'.¹ The author here is paraphrasing the example from *The History of English Law* and similarly fails to identify a particular crusade. Moreover, it leaves the reader with the impression that there is at least an arguable relationship between the use and the crusade movement. Accepted truths of this kind have a negative impact on the study of history. Nonetheless, there is also doubt underlying the editorial's historical summary. Such doubts inspired this thesis to explore whether there is evidence to support the assumed connection between the use and the crusade movement. In doing so, it canvassed major instances of English involvement in crusades from the eleventh to the fourteenth century. The conclusion reached by this thesis is that there is no evidence to support a belief that crusaders were the first to make uses. It is hoped that incorrect beliefs about the use and the crusade movement will eventually be dispelled from the popular imagination of academics, lawyers, students, and even the wider public. This thesis has taken the first step towards this aim.

The tone of the thesis has been to disprove long-standing ideas about the use and the Crusades. However, the crusade movement was a valuable lens through which to examine three hundred years of legal development to find evidence of the use. It offered a valuable middle ground between the expansionist and insular view of the origin of uses since the crusades are subject to both secular and spiritual influences. The primary source of crusade jurisprudence is the canon law, which favours an expansive view of the use's origins. Maitland, however, adduced his example to support the idea it had Germanic origins. His approach lends itself to an insular view of the use. The thesis has touched

¹ Editorial, 'Curbing the use of family trusts to avoid tax is about fairness, not class war', *The Age*, 2 August 2017, <http://www.theage.com.au/comment/the-age-editorial/curbing-the-use-of-family-trusts-to-avoid-tax-is-about-fairness-not-class-war-20170802-gxn00.html#comments> (accessed 15/10/2017).

upon both to explore its subject. The crusade lens also benefits from Maitland's instinct about when uses are most likely to appear in the sources. Crusaders made their legal arrangements under extraneous circumstances. The threat to their families and properties was an ever-present concern and they responded by making complex legal arrangements designed to minimise the impact of their crusading activities. The law, both canon and secular, also responded to their concerns in novel ways through privileges and other forms of protection. Therefore, the preparatory phase of the Crusades created an environment conducive to the development of novel ideas such as uses. Despite this circumstance, however, the evidence does not support a conclusion that the origin of the use rests in the crusade movement. The existing legal framework behind the crusades did not necessitate its creation.

The ongoing attraction of the crusade example is that it offers an explanation for the unknown. No alternative argument has proven sufficiently authoritative to supplant Maitland's example. This thesis has responded to the current gap in knowledge by proposing a strong counter-argument to modern beliefs that the use was a proto-equitable device. It also built on recent research that suggests that the law recognised in medieval Chancery was not equity. The thesis argued that the origins of the use rest in the common law feoffment with a condition. It defined a use as a legal arrangement characterised by a feoffor who granted legal title in land to a feoffee with the intention that the feoffee will grant it to a designated third party. The simplicity of the definition is deceptive. The thesis canvassed the records of the Exchequer of the Jews, a court tenuously connected to the crusade movement, which had several legal relationships describable as trust-like in nature that fell short of satisfying the definition of the use advanced in this thesis. However, a classification of the use as a species of gift with a condition suffers from inherent uncertainties, namely, that uses operated alongside numerous other gifts such as the enfeoff re-enfeoff arrangement. This presents many opportunities to confuse other feoffments with the use, but it is hoped that identifying this issue will allow legal historians to guard against such confusion in the future. No historical catalyst is necessary for a person to plan their estate by making a gift with a condition except an apprehension of their mortality. Therefore, the myths created to bridge the inherent uncertainty of the use as a species of gift with a condition appears to

be the reason that the origin of the use, as a common law instrument, has been shrouded for so long.

Final Remarks

Maitland's ongoing authority as a legal historian is the reason why his example has become an accepted truth. It is a testament to his ability that, over a century later, his work continues to be the starting point for any discussion on medieval law in England. This thesis is a response to something he merely said in passing. The accepted truth of his example is an anomaly. More equity lecturers subscribe to the common belief that a connection exists between the use and the crusades than what Maitland had intended to argue. It is a curious coincidence that he argued for the Germanic origin of the use as a reaction to an accepted truth in his time that the use was a product of the Roman law. Modern scholarship has since moved past both nineteenth-century schools of thought. The expansionist view, propounded by Richard Helmholz and others, was valuable to this thesis, encouraging a holistic approach to its subject, which is necessary to examine whether the use had its origins as part of a canon law reaction to crusading. On the other hand, the conclusion reached in this thesis that the use is a product of the common law rests comfortably with the insular view propounded by J. M. W. Bean and others that limit their analysis to English sources. In common, however, is that neither furnished a satisfactory argument to displace the popular association built around Maitland's authority. Legal historians have contributed to the uncertainty surrounding uses by producing varying definitions of the use that are either too broad or conflate the instrument with modern trusts, or both. Furthermore, a wider appreciation of chronicles and non-legal literature that describe how people engaged with the law would have allowed legal historians to set aside misguided notions about the use and the crusades that attracted meagre English participation.

Maitland's invocation of the crusade movement added a layer of popularity to his example that allowed it to become an accepted truth in modern times. The Crusades, as a history, was popular when Maitland wrote and continues to be popular today. However, popularity is no substitute for evidence. Modern belief that uses originate in English law during the First Crusade is unusual since 'one of the most striking features of the First

Crusade was its self-consciously French character'.² Nonetheless, its French character is not a barrier to development on the continent. The absence of evidence, on the other hand, is a formidable obstacle. There was no typical crusader on this expedition, but alienation of property and mortgage arrangements dominated crusader legal preparations. The latter allowed crusaders to include terms that considered the welfare of family members. This thesis concluded that there is no evidence to support the idea that the use developed during the First Crusade. A crusade historian may have reached this conclusion earlier if they considered the subject. The sporadic instances of English involvement, due to the absence of a significant force led by William II, does not justify the use's creation nor is there evidence that the few crusaders who left England utilised the instrument. The same rationale is applicable to the Second Crusade. Nonetheless, this thesis canvassed the profound consequences of the First Crusade as a template for the creation of a jurisprudential notion of crusading and crusader privileges in the twelfth century. The canon law responded to crusader concerns about the welfare of their family and property in the form of papal privileges. Papal protection fulfilled the function that Maitland ascribed to the use without the need for its development in the canon law. The evidence suggests that the canon law, the primary source of law for the crusade movement, did not develop uses during the twelfth century.

The Third Crusade, unlike the First and Second Crusades, attracted significant English participation. Maitland may not have believed that the use developed in response to the crusade movement, but he did believe that it had been available long before the Third Crusade. The twelfth century was *prima facie* amenable to the development of the use in the wake of law reform and political interest in the Levant. Further, there was ample opportunity for the crusade movement to shape the budding common law. It is a surprise, therefore, that *Glanvill* written on the eve of the Third Crusade betrays no influence. There is a reasonable expectation that Ranulf de Glanvill, if he was its author, would have made some reference to a relationship between crusading and the use because of his familial background and experience with Henry's various crusade vows. But the use does not appear in the treatise. Nevertheless, the other ingredients of Maitland's example are present in *Glanvill*. Since the Second Crusade, recruiters couched the tenor of crusade

² Tyerman, *England and the Crusades*, p. 15.

propaganda in terms that made clear knights were the desired participants. Consequently, most crusaders on the third expedition, as Maitland had envisioned, held land in military fee. Knights were the people most likely to make uses since they wielded greater control than their predecessors over the fortunes of their land. However, the use did not exist to modify the operation of law with regard to descent nor the legal position of close female relatives. The silence in *Glanvill* about any legal principle related to crusading, including essoin, indicate that the secular law did not introduce novel laws to facilitate crusading until later. The evidence suggests that the use did not form part of the common law on the eve of the Third Crusade.

The legendary involvement of Richard I, England's *rex cruce signatus*, in the Third Crusade may have enhanced the attractiveness of the accepted truth about uses. Far from being a negligent king, Richard introduced a series of regulations that addressed logistical issues associated with crusading and to manage the interests of crusaders. He also issued orders to sheriffs and bailiffs in both England and Normandy that charged them with the protection of legal interests. Nonetheless, the King did not introduce the use into English law. The object of his measures appears to be a secular attempt to bolster the crusader privileges already available under the canon law. English crusaders did not include the use in their private law arrangements. Their arrangements reflect the arrangements made by earlier crusaders on the continent despite sophisticated advancements in legal thinking during the twelfth century. Private legal arrangements made by crusaders on the Third Crusade followed the familiar pattern of credit raised on a mortgage with collateral terms designed to protect the interests of family. The introduction of subsidies was the most significant development in crusading. It demonstrably alleviated the financial pressure on crusaders allowing them to make more prudent preparations that protected the interests of their families. Nevertheless, the interaction between secular law and the crusade movement did not produce the use during the Third Crusade. The third expedition did, however, inspire a response from the common law. It clarified the availability of a special crusader essoin and several other principles related to crusading. However, Bracton is silent on the use. The conclusion reached in this thesis is that the use did not develop as a direct response to the Third Crusade, the crusade movement, or crusading activities.

This thesis has advanced alternative arguments about the origin of the use in English law. It examined whether there is evidence to suggest that the use developed out of the practices of the Exchequer of the Jews. The court's crusade connection is the circumstances of its creation. Richard I established the court after his return from captivity to facilitate Jewish lending activities and the collection of tallage that helped fund the Third Crusade. The court was a forum unique to English law, and it had no counterpart on the continent. It created legal principles unique to the English legal experience. The common law applied to the Jews, or Jewry law, did not draw on *halakha* to create a theory of the use. However, there were a few devices that had qualities associated with trust-like devices. In the first half of the thirteenth century, the Jewish Exchequer heard complex cases involving multiple interests to land and their priority. Bracton cites an anomalous case that suggests that feoffors made illegal use-like instruments but the common law rejected a theory of uses in the early thirteenth century.³ Nevertheless, legal arrangements became increasingly complex to facilitate Jewish lending practices. Henry III also adopted a tolerant policy towards the lending behaviours of his Jews. The latitude given to Jewish credit arrangements enabled the court to enforce instruments that were trust-like in nature but fell short of a theory of the use. It is probable that there was a reception of its principles to shape common law rules related to safe-keeping, but its principles never extended to land. Henry also tolerated the practice of Christians having Jewry seisin of land under the guise of fictitious attorneys. Edward I quashed this trust-like relationship before it developed further. Moreover, the continued utilisation of unenforceable attempts to avoid the operation of law does not support the idea that uses were lawful in the thirteenth century.

The Ninth Crusade was the final opportunity for the use to develop as a direct response to the events of a crusade. Chancery was the dominant forum for the secular response to this crusade. Previous legal historians have associated the eventual recognition of uses in Chancery with its jurisdiction as a court of equity.⁴ Haskett and others have since shown, however, that Chancery was not a court of conscience until the sixteenth century.⁵ The law that the forum applied to the Ninth Crusade was the common law. Its rolls record

³ Se Br. ii, p. 98.

⁴ Palmer, *English Law in the Age of the Black Death*, p. 111.

⁵ Haskett, *Law and History Review*, p. 245.

how Henry III, in support of his son, granted crusaders protection *clausum volumus* to protect their families and properties in their absence. The licences occasionally granted to crusaders also allowed their attorneys to work with their executors to pay their debts out of their lands without being enfeoffed as a feoffee. *Britton* attests that practices in Chancery did shape the common law when it includes the systematic organisation of the Ninth Crusade as illustrative of the law of England (Brit. 6.7.3). The rolls reveal few legal issues arose as result of the Ninth Crusade. Royal protection would prove ineffective to safeguard the interests of knights during the Anglo-French War (1294 – 1298), but the use would have also been ineffective to remedy the incidences of lawlessness found in Chancery records. However, Edward's activities as lawmaker and the passage of *De donis conditionalibus* was the catalyst for the eventual creation of uses. The statute is a legislative reaction to a developing common law policy to give effect to the intentions of feoffors to control their land. Moreover, it is hoped that a conclusion that ends with the Ninth and Tenth Crusades is sufficient to dispel notions that the use is connected to the Crusades.

The novel argument that the use is a species of feoffment with a condition offers a simple solution to the origins of a legal instrument obscured by many mythologies for a very long time. It radically departs from the idea that because the common law did not recognise trusts that there also existed no basis for the enforcement of uses. Nonetheless, a common law origin of the use as a feoffment with a condition agrees with descriptions of the instrument provided by early modern English jurists such as Swinburne and Coke. It also avoids the associations with equity that later editors added to their works. Confusion with the trust instrument also underlies modern ideas that there is a connection between the use and the crusade movement. *The Age* goes further than most to confound the use with a 'discretionary trust'.⁶ A discretionary trust is a classification given to an express trust that allows the trustee to nominate a beneficiary or the size of their benefit.⁷ Modern conflation of the use with equity appears to be a lingering consequence of the Roman law school of thought. The evidence suggests, however, that the use developed alongside other kinds of conditional gifts at the beginning of the fourteenth century. It formed part of the common law as a private law arrangement, and not a privileged instrument with

⁶ Editorial, *The Age*.

⁷ Richardson and Breach, *Nevill's Law of Trusts, Wills and Administration*, p. 17.

limited availability. However, the fact uses are a simple instrument surrounded by more complex instruments have obscured their origins. Feoffments with a *enfeoff re-enfeoff* condition, growing out of the same common law policy to give effect to donor's intentions, eclipsed the use in the fourteenth century as the preferred estate management device. Nonetheless, their shared legal principles indicate the common law had no conceptual difficulty with the enforcement of uses provided that feoffors made a use during their lifetime, in good faith, and without any imputation of fraud. It is hoped that the argument advanced in this thesis has provided a foundation for a re-assessment of modern understandings of the use in medieval law.

Further Avenues of Research

This thesis has not yet closed the chapter on the history of uses. A conclusion that the use began life as a common law feoffment with a condition does not explain why uses did not come into general practice until the 1370s, and later eclipsed the popularity of *enfeoff re-enfeoff* conditions. Nonetheless, this thesis hopes to have furnished a starting point to explore their place in legal history before the Statute of Uses. The editor of *Select Cases in Chancery* provides a helpful guide for future research into the history of the use:

Whatever may have been the cause of this [people making uses], it is not until the reign of Richard II, when the Court of Chancery was in full swing, that feoffments to uses became general. In these printed cases we find numerous examples during that reign, and the growth of the custom can be traced about the same period in almost any good collection of charters. What gave an enormous impetus to feoffment to uses, was doubtless the discovery that by its means land could practically be devised by will. Unfortunately, as in so many cases, we are without data as to the exact time when this was first done.⁸

This thesis hopes that by arguing that uses were a creature of a common law policy, a clearer picture of their evolution can guide future inquiries into how uses became general law. This thesis proposes the following potential avenues of research to further understand the use as a common law feoffment in the fourteenth century.

⁸ W. Baildon (ed.), *Select Cases in Chancery, A.D. 1364 to 1471*, London, Bernard Quaritch, 1896, pp. xxxviii – xxxix.

Ecclesiastical enforcement of a common law instrument?

The evidence suggests that the editor of the *Select Cases in Chancery* was right to attach weight to the idea that uses became popular as an instrument to devise land. It adds another dimension to the history of the use and its role as a testamentary device. Richard Helmholz demonstrated in 'The Early Enforcement of Uses' (1979) that the ecclesiastical courts enforced uses in the late fourteenth century.⁹ He did not suggest, as this thesis did, that the use was a common law gift with a condition. Instead, he posited that the courts spiritual offered a solution to the 'implausible' suggestion by legal historians that the feoffor relied on the feoffee's good faith to carry out the agreement.¹⁰ The view that the use is a species of a common law gift agrees that feoffors did not have to rely on the feoffee's good faith. Helmholz adduces evidence from cause papers:

For example [*Ex officio c. Smyth & Holyngbroke*], in 1375 the feoffees to uses of a certain John Roger were cited to appear before the court at Canterbury for violating the directions given to them by their feoffor. Upon interrogation, they confessed that they had received ten and three quarters of an acre of land, a windmill, and a grange under Roger's instructions that they convey it to his wife Margery after his death". They admitted violation of this instruction by alienating half the land to a certain Hugh Pryor, but maintained that they had only done so out of compulsion and fear of Hugh. The judge, apparently after a brief hearing, held that the alleged fear had been "empty and insufficient to move a constant man", and that the feoffees must suffer the canonical penalties for failing to carry out their duty.¹¹

Understanding this arrangement is a feoffment with a condition made by John in favour of his wife, which the feoffees did not perform, suggests ecclesiastical courts enforced uses during the same period as there is analogous enforcement in the common law. Helmholz discerned no rationale for ecclesiastical enforcement but did note that all causes concerned uses created by deceased feoffors.¹²

Helmholz believed, at odds with this thesis, that the ecclesiastical courts were the first to enforce uses. He concluded that 'the rise of the Chancellor's jurisdiction over feoffees to

⁹ Helmholz, *Columbia Law Review*, pp. 1503 – 1515.

¹⁰ Helmholz, p. 1503.

¹¹ Helmholz, p. 1505.

¹² Helmholz, p. 1506.

uses is not, therefore, the story of the creation of a legal remedy where previously there had been none. Rather it is the story of continuing enforcement in a new setting'.¹³ However, the evidence suggests that the common law and ecclesiastical courts exercised concurrent jurisdiction. Further, the jurisdictions were not mutually exclusive. It appears to be another example of the courts Christian hearing matters that legal historians ordinarily think of as being cognisant in the secular courts. An analogy can be drawn to ecclesiastical enforcement of other kinds of common law obligation in the fourteenth century.¹⁴ For example, Helmholz demonstrated that common law courts seldom prohibited ecclesiastical courts from hearing matters related to the recovery of debts by executors despite the jurisdictional intrusion.¹⁵ The same may also be true for uses declared in a testamentary instrument. On the other hand, the idea that the use is a common law feoffment also suggests that the geographic distribution of cause papers is misleading. Helmholz notes his evidence pointed to a possibility that the use first emerged in Kent in the same manner as Gavelkind.¹⁶ Palmer stated that the evidence of uses coming before Chancery from all parts of England was 'debilitating for his [Helmholz's] theory'.¹⁷ This thesis agrees that analogy to Gavelkind is contrary to Swinburne's assertion that the common law reckoned uses to be a general custom.¹⁸ An understanding of the use as a common law device suggests that cause papers, potentially from the archiepiscopal see of York, may show enforcement in ecclesiastical courts throughout England.

The idea that the spiritual courts enforced uses as part of their probate jurisdiction appears to be the correct approach for future research.¹⁹ English ecclesiastical courts exercised an anomalously broad testamentary jurisdiction, significantly wider than the courts on the continent, which sometimes contradicted canon law principles to meet the

¹³ Helmholz, p. 1506.

¹⁴ See D. Millon, 'Ecclesiastical Jurisdiction in Medieval England', *University of Illinois Law Review*, no. 3, 1984, p. 635.

¹⁵ R. Helmholz, 'Debt Claims and Probate Jurisdiction in Historical Perspective', *The American Journal of Legal History*, vol. 23, no. 1, 1979, p. 71. See also Helmholz, *The Oxford History of the Laws of England*, p. 359.

¹⁶ Helmholz, p. 1510.

¹⁷ Palmer, *English Law in the Age of the Black Death*, p. 112.

¹⁸ Swinburne, *A Brief Treatise of Testaments and Last Wills*, pp. 72 – 73.

¹⁹ See Helmholz, *Columbia Law Review*, p. 1508.

expectations of testators.²⁰ The idea that uses were enforced as part of probate jurisdiction appears to agree with recognition in Chancery that feoffees frequently acted together with executors to carry out the wishes of the deceased according to conditions stipulated in a will or schedule. The presence of a testamentary instrument may be the common element that allowed an ecclesiastical court to enforce a use with ecclesiastical sanctions. Therefore, the use made by a dead feoffee could be enforced either by the ecclesiastical courts or under the common law. Helmholz wondered, without reference to evidence, whether the ecclesiastical courts enforced uses made by a living feoffor under the law of oaths.²¹ Stephen DeVine's article, intending to build on Helmholz's research by seeking a jurisprudential rationale for ecclesiastical enforcement, suggested that the spiritual courts could have conceptualised uses under the head of *fidei laesio* or breach of faith action (when a feoffee does not carry out a promise made to the feoffor).²² George Spence, who also proposed that ecclesiastics were the first to enforce uses, suggested the same.²³ However, the attempt to find a jurisprudential justification is problematic since the canon law forbade ecclesiastical courts from hearing issues relating to land.²⁴ Further research that builds on this thesis may find that since the common law enforced uses, an ecclesiastical court would not be the correct forum in the case of a living feoffor under the law of oaths or *fidei laesio* jurisdiction. By analogy, it would be similarly improper for a living feoffor to seek ecclesiastical enforcement of an enfeoff re-enfeoff arrangement since there is no will to support the cause being heard. Limited jurisdiction to hear causes concerning testamentary uses could explain the absence of cases involving living feoffers in the ecclesiastical records.

Why the popularity of uses in the late fourteenth century?

²⁰ See generally, M. Sheehan, *The Will in Medieval England: From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century*, Toronto, Pontifical Institute of Mediaeval Studies, 1963, p. 231; Helmholz, *The Oxford History of the Laws of England*, p. 392; R. Helmholz, 'Conflicts between Religious and Secular Law: Common Themes in the English Experience, 1250 – 1640', *Cardozo Law Review*, vol. 12, no. 3, 1991, p. 715.

²¹ Helmholz, *Columbia Law Review*, p. 1506.

²² S. W. DeVine, 'Ecclesiastical Antecedents to Secular Jurisdiction over the Feoffment to the Uses to Be Declared in Testamentary Instructions', *The American Journal of Legal History*, vol. 30, no. 4, 1986, pp. 299, 303.

²³ Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 443.

²⁴ Helmholz, *Columbia Law Review*, p. 1508.

Further research is also necessary to explain the reason behind the popularity of uses in the late fourteenth century. Palmer tied the origin of the use to the Black Death.²⁵ His thesis argued that the plague brought about a change in policy in the law that sought to enhance the rights of landholders at the expense of tenants.²⁶ He ties the use to a stricter interpretation of the legal obligations. He states that ‘the chancellor’s court of conscience, developing at least by the 1370s, was facilitative in reinforcing the use but coercive toward feoffees and others who tried unjustly to take advantage of the rigid common law rules’.²⁷ It is an unavoidable conclusion that the Black Death had far-reaching consequences on medieval society and English law. The evidence supports Palmer’s note that ‘prior to the Black Death, [the use] was an unusual and discouraged phenomenon’.²⁸ Future research may also build on Biancalana’s observation that ‘the devastation of the plague probably moved survivors toward employing new strategies of attempting to assert control over their affairs in the face of great uncertainty’.²⁹ It is surprising, when reading the rolls series, to find fewer mentions of the impact of the plague than expected. The impression left by those records is that the Anglo-French War (1294 – 1298) had a greater effect on English society. Therefore, reference to chronicles and other narrative sources is necessary to measure how the Black Death affected estate management.

The rise of uses has also been connected to the Hundred Years War. Biancalana argues that the organisation of armies through contract meant that the licences that Edward III granted to knights used uses as a legal privilege to encourage participation.³⁰ The King’s son, John of Gaunt, received licence in 1369 to enfeoff numerous feoffees. The licence permitted the feoffees to enter onto John’s land on the day of his death, or within a year after his death, and dispose of it to acquit his debts and carry out his other instructions.³¹ The advantage of the arrangement, as Palmer notes, is that it extended the assets available to pay debts without depriving the lawful heir of their patrimony.³² However, the use of contracts to organise armies during the Hundred Years War drew on a model

²⁵ Palmer, *English Law in the Age of the Black Death*, p. 130.

²⁶ Palmer, p. 1.

²⁷ Palmer, p. 133.

²⁸ Palmer, p. 114.

²⁹ Biancalana, *Itinera Fiducia*, p. 112.

³⁰ Biancalana, p. 136

³¹ CPR, (1367 – 1370), pp. 212 – 213.

³² Palmer, *English Law in the Age of the Black Death*, p. 121.

of military organisation, relying on indentured retainers, which could include service in any war, including those overseas and in support of the Holy Land.³³ The use of contracts, evident during the Ninth Crusade, was 'dramatically accelerated' in both France and England during the Hundred Years War.³⁴ If the use developed in response to the Hundred Years War, then the analogous arrangements found during the Ninth Crusade indicate that a relationship exists between uses, the crusade movement, and the organisation of armies through contract. The evidence does not support the conclusion that uses were unique to warfare. It is also prudent to avoid adding another layer of mythology to the use by unnecessarily replacing the existing association to the crusades with the Hundred Years War.

The growing popularity of uses in the late fourteenth century coincided with the period of general discontent that characterised the final years of Edward's reign.³⁵ The resentment that had accrued was allowed to be expressed after his death. It culminated in a finding by the Good Parliament in 1376 that Edward's favourite, Alice Perrers, due to her apparent exploitation of the aging king, was found guilty of treason and her lands were confiscated.³⁶ However, much of the political dissatisfaction was directed at the figure of John of Gaunt who played a leading role in Edward's court after 1376 and in the early years of Richard II's reign.³⁷ He was viewed as a pretender to the throne who had designs to usurp it, although this is not a proposition supported by evidence.³⁸ It is apparent that much of the discontent was the result of England's war-weariness.³⁹ There was no alleviation during the first years of Richard's reign and the continual council that managed the realm during the King's minority was the scapegoat for England's woes.⁴⁰ The unrest in England culminated in the Peasants Revolt of 1381. Adam of Usk, whose

³³ N. Lewis, 'The Organisation of Indentured Retinues in Fourteenth-Century England', *Transactions of the Royal Historical Society*, vol. 27, 1945, p. 35.

³⁴ M. Mallett and J. Hale, *The Military Organisation of a Renaissance State: Venice c. 1400 to 1617*, Cambridge, Cambridge University Press, 1984, p. 1.

³⁵ See C. Given-Wilson, *The English Nobility in the Late Middle Ages: The Fourteenth-Century Political Community*, London and New York, Routledge, 1996, p. 46.

³⁶ A. Goodman, *John of Gaunt: The Exercise of Princely Power in Fourteenth-century Europe*, Harlow, Longman, 1992, pp. 54 – 55; N. Saul, *Richard II*, New Haven, Yale University Press, 1997, p. 19.

³⁷ Goodman, *John of Gaunt*, p. 54; Saul, *Richard II*, p. 17.

³⁸ Goodman, p. 64.

³⁹ Saul, *Richard II*, p. 33.

⁴⁰ Saul, p. 45.

chronicle covered the events in his lifetime (1377 – 1421), attributed the revolt to the excesses of the magnates.⁴¹ On the other hand, *Knighton's Chronicle* suggests that the catalyst was the abuses and humiliation perpetrated by the tax collectors against the commons.⁴² Nigel Saul opines that the poll tax, a taxation at a flat rate, demonstrates a government grossly out of touch with the mood of the country.⁴³ This revolt, in addition to being a reflection of war-weariness, was also a reaction to the economic aftermath of the Black Death and the use of the law to secure the rights of the lords against their tenants.⁴⁴

The period of upheaval in English society reveals little about the popularity of the use. However, an aspect of the relationship between the law and the Peasants Revolt may suggest why the use was popular during this period. Adam, studying to be a civilian at the time of the revolt, is silent.⁴⁵ However, *Knighton's Chronicle* notes that the demands of the rebels were legal in nature, namely, recognition of their free status and the ability to hunt freely across the realm.⁴⁶ A defining characteristic of the revolt, however, was an apparent hatred of lawyers.⁴⁷ Thomas Walsingham's contemporary account of John Ball's sermons, a leader of the revolt, preached to his listeners that to remove themselves from unnatural injustice and oppression they must 'first kill the king's great lords; then the lawyers, justices and jurors of the country' (*Primo, majores regni dominos occidendo; deinde, juridicos, justiciarios, et juratores patriae*).⁴⁸ Lawyers, the focus of discontent here, may be the reason why uses became popular in the late fourteenth century. The late fourteenth century is characterised by the growth of the peerage, a class of gentry, which appears to be a consequence of the much-debated changes to notions of lordship.⁴⁹ Lawyers, in particular, became associated with the gentry and the idea of upward

⁴¹ Adam of Usk, *The Chronicle of Adam Usk*, trans. C. Given-Wilson, Oxford: Clarendon, 1997, p. 4. See S. Peverley, 'Adam of Usk', *EMC*, vol. 1, pp. 13 - 14.

⁴² Henry Knighton, *Knighton's Chronicle*, p. 209.

⁴³ Saul, *Richard II*, pp. 57 – 59.

⁴⁴ Saul, *Richard II*, p. 60.

⁴⁵ Adam of Usk, *The Chronicle of Adam Usk*, p. xiv.

⁴⁶ Henry Knighton, *Knighton's Chronicle*, pp. 213, 219.

⁴⁷ Saul, *Richard II*, p. 64.

⁴⁸ Thomas Walsingham, *Historia Anglicana*, H. Riley (ed.), London, Longman, 1864, p. 33; See L. Ruch, 'Walsingham, Thomas', *EMC*, vol. 2, pp. 1492 – 1493.

⁴⁹ See Given-Wilson, *The English Nobility in the Late Middle Ages*, p. 83; Discussed at length in J. M. W. Bean, *From Lord to Patron, Lordship in late medieval England*, University of Pennsylvania Press, 1986.

mobility.⁵⁰ During the 1370s, lawyers had become a visible but mistrusted class of wealthy landholders.⁵¹ Palmer suggests they are at least partly responsible for the apparent rise in litigation in the decades following the Black Death.⁵² The rise of the instances of uses during this time, therefore, could be a consequence of increasing legal ingenuity rather than a specific historical event. It is necessary, nevertheless, to avoid making the same mistake that led to the mythology that the use developed in connection with the crusade movement.

Final Comment

The object of this thesis has been to explore the development of uses through the crusade lens and to propose a stronger argument for their origins than Maitland's example. Beyond the scope of this study, however, uses became increasingly complex.⁵³ The evidence indicates that the common law continued to enforce and recognise uses. Biancalana accepted this possibility.⁵⁴ However, the conclusion that the use first developed as a species of conditional feoffment offers an exciting new way to explore how it transformed into the trust. Those intending to undertake such a project are advised to begin with Christopher St. Germain's *The Doctor and Student*.⁵⁵ St. Germain wrote during the most controversial period in the history of the use. The author acknowledges that although uses were being increasingly used to avoid feudal incidences, they were not intended to be instruments of fraud.⁵⁶ St. Germain notes in *A Little Treatise Concerning Writs of Subpoena* (1532) that uses were often made 'many times by the advice of learned counsel'.⁵⁷ He also states that Chancery had begun to intervene on the occasion when

⁵⁰ Given-Wilson, *The English Nobility in the Late Middle Ages*, p. 163; A. Musson, *Medieval Law in Context: The growth of Legal Consciousness from Magna Carta to the Peasant's revolt*, Manchester, Manchester University Press, 1988, p. 62.

⁵¹ Given-Wilson, *The English Nobility in the Late Middle Ages*, p. 63; Musson, *Medieval Law in Context*, pp. 70 – 73.

⁵² Palmer, *English Law in the Age of the Black Death*, p. 3.

⁵³ See generally Biancalana, *Itinera Fiducia*, pp. 145 – 150.

⁵⁴ Biancalana, p. 148.

⁵⁵ C. St. Germain, *The Doctor and Student*, William Muchall (ed.), Cincinnati, Robert Clarke, 1886, pp. 170 – 174. See the essay on St. Germain in S. E. Thorpe, *Essays in English Legal History*, London and Ronceverte, The Hambledon Press, 1985, pp. 211 – 217.

⁵⁶ J. A. Guy, *Christopher on Chancery and Statute*, London, Selden Society, 1985, pp. 75, 85.

⁵⁷ C. St. Germain, *A Little Treatise concerning writs of Subpoena*, in J. A. Guy (ed.), *Christopher on Chancery and Statute*, London, Selden Society, 1985, p. 114.

'feoffees of trust grant a rent-charge, the feoffor has no remedy except to discharge that rent by the rules of the common law'.⁵⁸ The author seems to suggest that the increasingly complex purposes to which feoffors had begun to put uses could not be reconciled with common law principles prior to the passage of the Statute of Uses. A greater understanding of the history of the use will shed light on the legal nature of trusts, in addition to correcting a myriad of mistaken beliefs about uses founded on overlapping mythologies.

⁵⁸ St. Germain, *A Little Treatise concerning writs of Subpoena*, p. 113.

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