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Ecclesiastical Origin of the Use

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THE ECCLESIASTICAL ORIGIN OF THE USE

I

Introduction

The Law of Trusts looms large upon the horizon of juristic history. It is the cornerstone of Equity, that branch of the positive law of England and the United States which rescued the unresponsive Common Law from the quagmire of decay. Before the passage of the Statute of Uses [1] in 1535, trusts were generally known as uses. The origin of trusts was dependent upon the creation of uses. To understand the history of the trust, the origin of the use must, therefore, be known. When did the use first make its appearance in England? That this is a question of considerable importance to the legal scholar and jurist is clear from the attempts which celebrated students [2] of historical jurisprudence have made to find a satisfactory answer. While they have pursued different courses in the quest, and while they have arrived at divergent conclusions concerning the contributions of Roman and Teutonic laws, respectively, to the production of the English use, it is to be noted that they all agree upon its ecclesiastical origin.[3] But long before the ecclesiastical invention of the English use, it was known upon the Continent under other names. Its basic philosophy is coincident with humanity.[4]

II

The Use as a Social, Extra-Judicial Device

The practice of delegating authority to perform important acts is so ancient that it most likely existed from time im-

1 27 HEN. VIII, c. 10.

2 For example, Maitland, Blackstone, Holmes and Ames.

3 *Infra* notes 61 to 83.

4 Thus, see, Bacon, *Reading on the Statute of Uses*, 14 BACON'S WORKS (Spedding, Ellis and Heath ed. 1869) 311, 312. There he writes: "An use is no more but a general trust, when a man will trust the conscience of another better than his own estate and possession; which is an accident or event of human society which hath been and will be in all laws."

memorial. A generic notion of agency was obviously comprehended and applied by primitive man long before it was evidenced by written record. Honor, integrity, and moral perception were recognized as ideals to which men should aspire. Reason apprehended a natural law which sanctioned fidelity in the execution of confidential tasks. This prehistoric tendency among men to repose trust in friends and relatives resulted in arrangements under which persons held property for the benefit of others. The consequent proprietary relationships were the first manifestations of the use concept.

In their most general and rudimentary sense, uses were utilized by primitive societies to preserve communal property, such as that of the family, the clan, and the kindred.[5] Among the Romanic [6] and Teutonic [7] racial groups, they were developed into a system, which made possible the entailing of familial interests of property and substance, and the future disposition of private possessions. In medieval English society, they were indispensable devices for the accomplishment of numerous purposes.[8] But an examination of the legal systems of these peoples reveals the fact that there was an invariable lag between the social utilization of the use, and its legal enforcement. Impetus to its extra judicial employment was given by the limitations of the positive law.

The use as a nonlegal arrangement was resorted to by the Romans to offset the narrowness of the *Jus Civile*. Under this law, certain persons were not allowed to be beneficiaries of a legal testament.[9] But a testator might devise his property to one who might be an heir, with a specific request that

5 KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW (1930) 279; RADIN, HANDBOOK OF ROMAN LAW (1927) 449.

6 RADIN, *op. cit. supra* note 5, at 449, 450, and 451.

7 *Loc. cit. supra* note 6.

8 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1924) 408, 443 *et seq.*

9 INSTITUTES 2, 23, 1.

The *Jus Civile* was the law applicable only to Roman citizens. The Emperor Caracalla, in 212 A. D., extended Roman citizenship to all free subjects of the Empire. The distinction between *Jus Civile* and *Jus Gentium*, the law for foreigners based on natural equity, was thus broken down. Besides the *Jus Civile* and the *Jus Gentium*, the Romans recognized a *Jus Naturale*.

he should transfer it to another person who might not lawfully take it directly. These fiduciary bequests were known as *"fidei commissa."* [10] The person named to carry out such trusts was described as the *"haeres fiduciarius."* [11] The beneficiary was called the *"fidei commissarius."* [12]

In like manner, the Teutonic tribes applied the principle that one person might hold and dispose of property according to another's requests.[13] Frequently they too employed the use to make possible the conveyance of land after the grantor's death by entrusting its transfer to third persons. The Salic law of the early Germans, like the *Jus Civile,* imposed restrictions upon the power to make a will. Under this feudalistic, Salic law, it was impossible to devise land probably because the seisin or possession must be transferred *inter vivos.*[14] But a *Salman* or *Treuhand* might be designated to whom the grantor would turn over the property during the latter's lifetime, with instructions that, upon the grantor's death, it should be transferred to specific beneficiaries.[15]

In early English law, a feoffee to uses might hold land *"ad opus"* or *"in usum"* for a *cestui que use* to avoid the rigor of the positive law.[16] The latter enjoyed a peculiar, indefinite type of ownership. The application of the use concept in England had far reaching effects, particularly from the twelfth and thirteenth centuries onwards. After this period, these results were religious, political, social, ecomonic, and legal.[17]

III

Enforcement of Uses by Positive Law

The Roman Law preceded the Salic in the matter of enforcing the use concept. Upon the recommendation of in-

10 INSTITUTES 2, 23, 1.
11 DIGEST 36, 1, frags. 48, 69, 3.
12 *Loc. cit. supra* note 11.
13 4 HOLDSWORTH, *op. cit. supra* note 8, at 410 *et seq.*
14 See MAINE, ANCIENT LAW (3d Am. ed. 1888) 190.
15 4 HOLDSWORTH, *op. cit. supra* note 8, at 410 *et seq.*
16 2 POLLOCK AND MAITLAND, THE HISTORY OF ENGLISH LAW (1895) 226 *et seq.*
17 *Loc. cit. supra* note 8.

fluential jurists, the Emperor Augustus (63 B. C.-14 A. D.) determined to afford the *fidei commissarius* or beneficiary a legal remedy,[18] and he accordingly ordered the consuls to assume an authoritative jurisdiction over *fidei commissa.*[19] This legitimation proved so popular among the Romans that later on a special judicial officer, namely, the *Praetor fidei commissarius,* was appointed to exercise a permanent jurisdiction over these fiduciary requests.[20] Roman law enforced the *fidei commissum* because the jurisconsults realized that justice demanded the carrying out of the reasonable intentions of testators, and that positive law should respond to the demands of natural equity.[21] Justinian in the sixth century, A. D., began to equate *fidei commissa* and legacies, and thus gave wider legal recognition to these confidential arrangements.[22] While the Salic Law, first formulated by the Franks in about the sixth century, A. D., contains references to a *Salman,* an intermediary by whom land might be transferred either in the lifetime or after the death of the original conveyancer, yet it is uncertain whether the *Salman* was ever under a legal obligation to carry out his trust.[23] The English common law courts were enforcing uses of personalty from about the twelfth century.[24] There is also some slight evidence tending to show that the common law in this same period was preparing to give a remedy to a plaintiff who was the *cestui que use* of land.[25] But by the middle of the fourteenth century, there was definitely no such relief.[26] It was not until the first quarter of the fifteenth century that the chancellors began to enforce uses of land.[27] With these facts in mind, it is possible to understand and evaluate the most

18 INSTITUTES 2, 23, 1 and 12.
19 INSTITUTES 2, 23, 1; *ibid.* 2, 25.
20 *Loc. cit. supra* note 19.
21 *Loc. cit. supra* note 19.
22 INSTITUTES 2, 20, 3.
23 4 HOLDSWORTH, *op. cit. supra* note 8, at 411, n. 3.
24 AMES, LECTURES ON LEGAL HISTORY (1930) 238.
25 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW (1927) 246.
26 4 HOLDSWORTH, *op. cit. supra* note 8, at 416.
27 AMES, *op. cit. supra* note 24, at 237.

influential theories which have been thus far advanced to describe the origin of the English use.

IV

The Four Dominant Schools of Thought

A. The Germanic Origin of the English Use of Land. The view that the English feoffee to uses was the Teutonic *Salman* or *Treuhand* under another name was first advanced by Holmes [28] in the latter part of the nineteenth century. He was inspired by a work [29] of the German author Beseler, who had described the character of this Teutonic fiduciary. The conclusions which Holmes reached have affected other legal scholars. The school of thought to which they belong considers the English use of realty in its most elementary form as merely a fiduciary relationship, not enforced by law, involving the *inter vivos* transfer of land to a trusted person, who in turn is to convey it to a beneficiary designated by the feoffor, after the latter's death. The origin of the English use is thus referred to the eleventh century, *i. e.*, the time of the Norman Conquest, when many elements of the Teutonic Salic Law were imported into England by the Conqueror, for the idea of the *Salman* was not present in Anglo-Saxon law.[30] The argument is based, first, upon analogies between the *Salman* and the English feoffee to uses,[31] and secondly, upon the fact that the English executor, during the period of Glanvill (d. 1190 A. D.) was not a universal successor, as was the Roman *haeres*, but resembled the *Salman*.[32] From this it is concluded that the notion of the *Sal-*

28 Holmes, *Early English Equity*, 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1908) 705. (This essay was first published in 1885.)

29 Namely, *Erbvertragen*. Note the unique theory advanced by Crackanthorpe, *The Uses of Legal History* (1896) 19 AM. BAR ASS'N REP. 343, 355, namely, that even if the *Salman* evolved into the feoffee to uses, still the idea of the *Salman* may have resulted from the impact of the Roman law of later Empire upon Teutonic law.

30 2 HOLDSWORTH, *op. cit. supra* note 25, at 97.

31 Holmes, *op. cit. supra* note 28, at 707 *et seq.* See Salic Law, *de hac famirem*, c. 46.

32 Holmes, *op. cit. supra* note 28, at 709.

man was evidently understood in England in the twelfth century, and that it was also applied to the *post-mortem* transfer of land.[33] The *Salman* thus became the feoffee to uses. The most important resemblances between the *Salman* and the English feoffee to uses were that both were most frequently used for the transfer of land after the death of a grantor. In each instance the grantor was entitled to the use of the land until he died. In each there was the element of confidence.[34]

B. The Roman Theory. Blackstone is one of the leading exponents of the theory that the Roman *fidei commissum* was the legal precedent which inspired the use.[35] This was the classical explanation until the writings of Holmes[36] and Maitland.[37] The members of the Roman school look upon the use in its most rudimentary form as an arrangement by which one person holds lands for another with the implication of agency and bailment, recognized by the legislative branch of the state as a dangerous social scheme, which must be regulated, but still outside the jurisdiction of the judiciary. The origin of the English use in this sense may indeed be traced to the final quarter of the fourteenth century.[38] It has been pointed out[39] that in this period continental ecclesiastics who had brought the idea of the Roman *fidei commissum* into England to avoid the rigor of the Mortmain Statutes were originating the English use. This theory is largely based upon the likenesses between feoffments to uses and *fidei commissa.* The feoffee to uses corresponded to the *haeres fiduciarius,* the *cestui que use* to the *fidei com-*

33 Holmes, *op. cit. supra* note 28, at 710.

34 Holmes, *op. cit. supra* note 28, at 707, 708.

35 2 BLACKSTONE'S COMMENTARIES 328. The Statute of Uses resembled the *Senatus Consultum Trebellianum* passed in 56 A. D., since both legislative enactments sought to vest complete ownership of the property in the beneficial owner. Among the authors who agree with Blackstone are Spence and Gilbert. See HOLLAND, THE ELEMENTS OF JURISPRUDENCE (13th ed. 1924) 250.

36 Holmes, *op. cit. supra* note 28.

37 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 228 *et seq.*

38 2 BLACKSTONE'S COMMENTARIES 328.

39 *Loc. cit. supra* note 38.

missarius. Both made possible the future disposition of property through a third person. Both were means of avoiding the limitations of the strict law.[40] The late fourteenth century English use connoted the relationship of agency and bailment, as did the *fidei commissum*.

C. The Romano-Germanic Theory. The Theory that both Roman and German elements contributed to produce the use was advanced by Maitland.[41] In determining the origin of the English use, he regards it as a fiduciary arrangement which gave rise to an indeterminate, proprietary interest in favor of a beneficiary, with no certain recognition by positive law. The use in this connection is equivalent to a relationship which was expressed by the Latin phrase *"ad opus."* This phrase probably first appears in ninth century England.[42] It is present in the Anglo-Saxon land books of that date.[43] Adherents of this school have presumed that the idea of the use came from Germanic sources because this expression appears in the records of the early Franks and Lombards.[44] It became Gallicized to *"al os,"* or *"ues,"* [45] and thus it appears in the Laws of William the Conqueror [46] and Domesday Book.[47] Later the phrase was changed to "use." Similarly the old French phrase *"cestui a qui oes le feffement fut fait"* evolved into *"cestui que use."* [48]

But Maitland believed that, in the early thirteenth century, medieval Roman law most probably contributed to the origin of the English use.[49] He has now shifted his point of view and is regarding the use as a fiduciary relationship

40 *Loc. cit. supra* notes 10, 35.

41 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 228 *et seq.* Holdsworth refers to the opinions there expressed as those of Maitland. See 4 HOLDSWORTH, *op. cit. supra* note 8, at 415.

42 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.

43 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.

44 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.

45 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.

46 1 LEGES WILHELMIS, 2 parag. 3.

47 D. B. i. 60B. 209.

48 4 HOLDSWORTH, *op. cit. supra* note 8, at 411 n. 8, citing 3 MAITLAND, COLLECTED PAPERS 343n.

49 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 235.

which is still beyond judicial jurisdiction, but which raises jural implications. Does the *cestui que use* have a mere enjoyment of the property which represents the subject matter of the feoffment, or is he a beneficial owner? Maitland writes that this question arose as a result of the action of the mendicant Franciscan Friars, who went to England in the first part of the thirteenth century, employed the device of an *"ad opus"* to circumvent their vow of poverty,[50] and contended that an *"ad opus"* was equivalent to the *"usus"* of the Roman law, rather than the *fidei commissum.*[51] Only a mature legal system like the Roman law could afford analogies to bring out such subtle distinctions. It seems to follow from Maitland's account [52] that this identification of the *"ad opus"* with the Roman *"usus"* perhaps tended to bring about the widespread employment of the word *"use"* in place of the phrase *"ad opus,"* which was eventually abandoned.

D. The English Origin of the Equitable Use of Land. The opinion of Ames [53] is representative of those legal historians who consider the origin of the English use of land only from the institutional point of view, *i. e.*, as a relationship from which flowed legal rights and duties, definitely and systematically cognized by the courts. This attitude tends to reduce to conjecture [54] all historical conclusions concerning the extralegal production of the use, and to refer its birth to the act of that English Chancellor who first handed down a decree enforcing the rights of the *cestui que use.*[55] This took place [56] sometime during the first quarter of the fifteenth century, although there is no written evidence of such a decree until about 1446 A. D.

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50 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 229.

51 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 235.

52 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 235.

53 AMES, *op. cit. supra* note 24, at 237.

54 AMES, *op. cit. supra* note 24, at 237.

55 AMES, *op. cit. supra* note 24, at 237.

56 AMES, *op. cit. supra* note 24, at 237.

V

The Ecclesiastical Factor in the Different Theories

Despite the variation of opinion as to the period in which uses were invented, and irrespective of the distinctive manner in which representative legal authorities have discussed the origin of the use, one sweeping conclusion with which they all agree, either expressly or impliedly, may be made, namely, that the English use was the product of ecclesiastical legal scholarship. This generalization appears from an examination of the different hypotheses. But this angle has not been hitherto emphasized, namely, the unanimity of the legal historians on this point, although they disagree as to other important matters relative to the history of the use. The principal interest of writers who have dealt with the early history of the English use has been in the matter of racial derivation.[57] Shall the honor be accorded Romanic or Teutonic law? Rather the credit should go to a distinctive jural and philosophical tradition upheld and applied by the medieval ecclesiastics. The English use is more properly the creation of jurisprudence than of any system of positive law. From the jurisprudential point of view, the use has proved a powerful equitizing medium, suggested by the natural law, of inestimable value to mankind during eras which were characterized by juristic stagnation and artificiality. Upon the assumption that the facts set forth by Holmes, Blackstone, Maitland, and Ames, in support of their respective contentions, are correct, and that their conclusions have been logically drawn, the vital and outstanding role played by the Church may be realized from what they have written.

In presenting his theory, Holmes maintained [58] that foreign, *i. e.*, Roman, law introduced the practice of testamentary disposition among the Germanic tribes. The native con-

[57] This is evidenced by the fact that practically all the authorities have taken a controversial position on the question whether the use is of Romanic, Teutonic, Romano-Teutonic, or exclusively English origin.

[58] Holmes, *op. cit. supra* note 28, at 708.

ception of the *Salman* or *Treuhand* was utilized to enforce wills of personalty. The result was that a person analogous to the *Salman* became the executing intermediary.[59] The idea was said to have been carried into England.[60] But all this implies that ecclesiastical influences were at work, because the whole system of testamentary disposition during the medieval period, in both England and the continent, was identified with Churchmen, who were concerned with the effectuation of the last will and the last confession.[61] These usually were made together. It may therefore be implied that ecclesiastical legalists linked up the Germanic *Treuhand* with the last will, and that they transplanted the ideas of the continental executor and the *Salman* into England, because according to Holmes,[62] feoffments to uses of land were most frequently intended to achieve *post-mortem* ends, which were forbidden by law, and all such dispositions were peculiarly within the province of the Church. But it is not necessary to rely merely on implications. Holmes has expressed the opinion that the ecclesiastical court was the original forum for devisees. Referring to the use, he writes:[63]

"The foundation of the claim is the *fides*, the trust reposed and the obligation of good faith, and that circumstance remains as a mark at once of the Teutonic source of the right, and the ecclesiastical origin of the jurisdiction."

According to the Roman theory of the use, which has been advanced by Blackstone, and by numerous other authorities, the importance of the part played by the Churchmen is even more manifest. He exclusively credits [64] the continental ecclesiastics with the introduction of the use into England, and states that the clerical chancellors held such devices "to be *fidei commissa* and binding in conscience; and therefore assumed the jurisdiction which Augustus had vested in his

59 Holmes, *op. cit. supra* note 28, at 708.
60 Holmes, *op. cit. supra* note 28, at 709.
61 2 HOLDSWORTH, *op. cit. supra* note 25, at 95 *et seq.*
62 Holmes, *op. cit. supra* note 28, at 708, n. 1.
63 Holmes, *op. cit. supra* note 28, at 716.
64 2 BLACKSTONE'S COMMENTARIES 328. See 3 BLACKSTONE'S COMMENTARIES 51, for the ecclesiastical origin of the writ of *subpoena*.

praetor, of compelling the execution of such trusts in the Court of Chancery." [65] Certainly Blackstone in thus attributing such a distinction to the clerics may not be accused of undue partiality, for at the same time, he stresses an evasive purpose for which the use was being employed, namely the avoidance of the effects of the Mortmain Statutes.[66]

Maitland has expressly and impliedly ascribed the invention of uses to ecclesiastical factors. From his account, there is a presumption that uses began as soon as property was held *"ad opus."* But such a proprietary tenure arose in the medieval period when the character of the ownership of Church property was in dispute.[67] Was such property owned by the ecclesiastical custodians of the property, or by the individual Church, or by the deceased patron saint, or by God Himself? The phrase *"ad opus"* was perhaps coined to indicate that the one who had an *"ad opus"* was a living incorporeal person, owning the property in an unusual and distinctive way, but still not capable of that type of ownership which was possible by one who was in the flesh. This most probably explains why there are so many examples of the phrase to describe ownership by a Church or a deceased Saint. In the Frankish *formulae* [68] of the Merovingian period, for example, mention is made of property given to a Church *"ad opus."* Similar examples appear in the Anglo-Saxon land books, during the time of Kenulf [69] and Beornwulf [70] of Mercia, *i. e.,* in the ninth century, A. D. It is true that Maitland has shown that the phrase *"ad opus"* was not invariably employed in reference to ecclesiastical purposes, but then it seems only reasonable, that the concept should have been extended, first, to include secular beneficiaries, such as women [71] and children,[72] who were unable to own land in their

65 2 BLACKSTONE'S COMMENTARIES 328.
66 *Loc. cit. supra* note 65.
67 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 226.
68 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.
69 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.
70 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.
71 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 228.
72 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 228.

own right, because of the rigor of the feudal law, as they were incapable of performing the fighting services; secondly, to describe the peculiar ownership of certain property by the sovereign [73] in his official capacity; and thirdly, to make possible the *post-mortem* transfer of land which might not be devised.[74] In 1080 A. D. the phrase *"ad usum fratrum eternaliter"* was employed [75] to describe an interest in property which was deeded to an abbot. In 1185 A. D. it expressed [76] proprietary control by an almonry which was in charge of the monks of the Canterbury Cathedral monastery in relation to certain parochial churches.

Maitland generalizes in these words:

"It is an old doctrine that the inventors of the use were the clergy, or the monks. We should be nearer the truth if we said that to all seeming the first persons who in England employed the use on a large scale were, not the clergy, nor the monks, but the friars of St. Francis." [77]

That the Franciscans were enjoying the benefits of property through the *"ad opus"* or *"in usum"* is shown by records,[78] to which Maitland refers, showing that such municipalities as Oxford and London were acting as feoffees to the use of these ecclesiastics. The Dominicans were also the beneficiaries of such feoffments.[79] In fact, the Popes exercised an influence in determining the jural implications of the *"ad opus,"* to judge from the Bull *Exiit qui seminat,*[80] in which Nicholas III, in 1279 A. D. declared that the beneficiary of an *"opus"* or *"usus"* was not the owner of property, and from the statement [81] of Pope John XXII, in 1322 A. D., that the distinction between use and property was erro-

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73 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 231.

74 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 228.

75 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 232. See 4 HOLDSWORTH, *op. cit. supra* note 8, at 415.

76 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 234.

77 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 229.

78 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 234.

79 See: JENKS, A SHORT HISTORY OF ENGLISH LAW (1913) 96; MAITLAND, EQUITY (1932) 25, 26.

80 Mentioned in 4 HOLDSWORTH, *op. cit. supra* note 8, at 417, and in 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 235.

81 See 2 POLLOCK AND MAITLAND, *op. cit. supra* note 16, at 235.

neous. Under Maitland's theory, therefore, the ecclesiastical factor was dominant in the creation of the English use.

If the position taken by Ames [82] is correct, *i. e.*, that it is inaccurate to speak of the use until it began to be enforced by the chancellors, and that its origin therefore dates from the beginning of the fifteenth century, the rise of the use was entirely dependent upon the theophilosophical jurisprudence of the Church. Her theology, ethics, and general philosophy based upon a natural law, which was perceived by reason, and which aimed at the judicial recognition of natural justice constituted the creative force. Indeed it is agreed among legal scholars that the equitable jurisdiction over uses was the result of the efforts of clerics who were imbued with a Thomistic conception of legal philosophy.

VI

Conclusion

From the documentary evidence which is now available, it seems impossible to determine with certainty whether the predominant influence upon the ecclesiastics, undoubtedly the originators of the English use, was Germanic or Romanic. The strongest point in favor of the former theory is the fact that after the Roman legions had been withdrawn in the fifth century, A. D., the principal racial infusions into Britain were Teutonic. It was natural that these migrations should result in the diffusion of the legal concepts which had been existent among the Germanic tribes, while they were upon the Continent. Among such notions was that of agency involving the *post-mortem* disposition of land. But it likewise appears that since the Church had begun her evangelizing mission in an environment which was under the jurisdiction of Roman law, and therefore had borrowed much from that system, and since the use was the invention of ecclesiastics, versed in this jural discipline, inclined to compare notions

82 AMES, *op. cit. supra* note 24, at 237.

of agency with the *"usus"* and the *"fidei commissum,"* it is inescapable that considerable inspiration must have been drawn from Latin juridical sources. Possibly it is better to conclude that Romanic and Germanic jural conceptions both contributed to the creation of the use, which, in the sense of a vague proprietary relationship, sprang up in England at an early date, but which became a peculiarly English legal notion only under the hand of the Chancellor.

In conclusion, it is interesting to note that the idea of the *"usus"* has become fused with that of the *"fidei commissum."* This blending is the root of the modern trust concept. This was not the conscious work of the Chancellors, but it tends to explain why there is nothing comparable to the trust outside of the Anglo-American legal system. A use or trust in its technical sense resembles a *usus* because while the *cestui que trust* has the jural right to use and enjoy the trust property, still there is vested in the trustee a certain ownership.[83] It is like a *fidei commissum* in so far as it indicates the idea of agency and bailment, *i. e.*, connotes a certain type of ownership in the *cestui que trust*.[84] It is therefore not surprising that continental lawyers were unable to create such an anomalous and ingenious category of juristic rights which arose from the separation of law and equity.[85]

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83 See SALMOND, JURISPRUDENCE (8th ed. 1930) 284, 285, 286, 287.

84 SALMOND, *loc. cit. supra* note 83. See: MAITLAND, *op. cit. supra* note 79, at 31, 33; Hart, *The Place of Trust in Jurisprudence* (1912) 28 L. QUAR. REV. 290, 297.

85 4 HOLDSWORTH, *op. cit. supra* note 8, at 418.