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The Origins of the Statute of Uses

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The Reformation Parliament which sat from 1529 to 1536 was one of the most constitutionally significant assemblies in the history of these islands.[1] Moreover, with the passing of the Statute of Uses 1536 it was also one of the most significant in the history of English (and Irish) private law.[2] The importance of the Statute of Uses has long been recognised and should not be understated.[3] The statute enacted the most radical reform of English landholding since at least *Quia Emptores* (1290), and perhaps even the Conquest. This chapter explores the statute's origins and its passage through Parliament: from its earliest drafts, to the Commons rejection of proposed reform, then through the courts, to its eventual enactment in 1536. It will be argued that orthodox accounts of the statute's passage are inadequate, and an alternative view is proposed.

The mischief that the Crown sought to remedy with the passage of the Statute of Uses was the avoidance of feudal incidents caused by feoffments to uses. A use of freehold land would be created when a landholder enfeoffed feoffees to uses for the benefit of *cestui que use*.[4] It was

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[1] S. E. Lehmberg, *The Reformation Parliament 1529–1536* (Cambridge, 1970).

[2] Note that the Statute of Uses was not enacted in Ireland until 1634, when it was passed, alongside the Statute of Wills, by the Irish Parliament: Statute of Uses, 27 Hen. VIII, c. 10 (1536); Statute of Uses (Ireland), 10 Chas. I, sess. 2, c. 1 (1634); Statute of Wills (Ireland), 10 Chas. I, sess. 2, c. 2 (1634).

[3] See J. H. Baker, *Oxford History of the Laws of England, 1483–1553*, vol. 6 (Oxford, 2003) (hereafter Baker, *OHLE*), 672–86; N. G. Jones, 'Trusts in England after the Statute of Uses: A View from the 16th Century', in R. Helmholz and R. Zimmerman (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin, 1998), 173; and N. G. Jones, 'The Authority of Parliament and the Scope of the Statute of Uses 1536', in M. Godfrey (ed.), *Law and Authority in British Legal History 1200–1900* (Cambridge, 2016), 13–32.

[4] *Cestui que use* is a shortened version of *cestui a que use le feoffment fuit fait* (he to whose benefit the feoffment was made). A feoffment with livery of seisin was 'the classic medieval

common practice by the fifteenth century for landholders to seek to avoid the common law rule prohibiting the devise of land by last will by enfeoffing feoffees to their own use and to perform the feoffor's last will.[5] One effect of feoffments to uses to perform last wills was that the land would not be inherited and therefore the feoffor's feudal lord would be deprived of incidents arising from inheritance.[6] From the fourteenth century, the Crown had sought to protect itself from the avoidance of incidents, with varying degrees of success, through the provisions of the Statute of Marlborough, c. 6, and from the mid-1520s there was a renewed focus on the avoidance of incidents,[7] which culminated in the passage of the Statute of Uses. The effect of the Statute of Uses was to annex legal title to the use, that is to say, following the creation of a use the feoffees would no longer stand seised of the land but, by operation of the statute, legal title would follow the use and *cestui que use* would be seised.

The passage of the Statute of Uses through the Reformation Parliament was difficult, with the Crown facing significant opposition from the Commons. Our understanding of the statute's passage is shaped by a number of draft bills, and other documents related to the statute which came to the attention of historians following the late nineteenth-century publication of volumes five to eleven of the *Letters and Papers of Henry VIII*.[8] Reconstructing the passage of the statute through Parliament has, however, proved particularly challenging.[9] It has been

conveyance' made by a feoffor with seisin and usually accompanied by a charter or deed. For more detail, see A. W. B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford, 1986), 119–21.

[5] J. L. Barton, 'The Medieval Use', *Law Quarterly Review*, 81 (1965), 562–77; J. Biancalana, 'Medieval Uses', in R. Helmholz and R. Zimmerman (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin, 1998), 111–52; J. M. W. Bean, *Decline of English Feudalism* (Manchester, 1968), 104–79.

[6] H. E. Bell, *An Introduction to the History and Records of the Court of Wards and Liveries* (Cambridge, 1953), 1; Simpson, *History of Land Law*, 16–19. The most notable feudal incidents were wardship and relief, with the Crown also benefitting from prerogative wardship and primer seisin.

[7] 52 Hen. III, c. 6 (1267). I have addressed the avoidance of feudal incidents through feoffments to uses in the period up to 1529 elsewhere: A. J. Hannay, '"By Fraud and Collusion": Feudal Revenue and Enforcement of the Statute of Marlborough, 1267–1526', *Journal of Legal History*, 42 (2021), 65.

[8] J. S. Brewer et al. (eds.), *Letters and Papers of Henry VIII*, 21 vols. (London, 1862–1932) (hereafter *LP*). Vols. 5–13, which cover the period between 1531 and 1538, were published between 1880 and 1893.

[9] Baker, *OHLE*, 664–5; Bean, *Decline*, 258–70; W. S. Holdsworth, *A History of English Law*, 16 vols. (London, 1922–66) (hereafter Holdsworth, *HEL*), vol. 4, 95–6; E. W. Ives, 'The Genesis of the Statute of Uses', *English Historical Review*, 82 (1967), 673; Lehmberg,

generally thought that following a compromise with a number of peers a bill was put before the Commons which was then rejected in 1532, leading King Henry VIII to turn to the courts. This led to the litigation in *Dacre's Case* (1533–35), following which the Commons position was untenable, and they were forced to capitulate by passing the eventual Statute of Uses, a defect in which was remedied by the swift passage of the Statute of Enrolments.[10]

Through detailed analysis of surviving draft bills, this chapter will argue that the traditional interpretation of the passage of the Statute of Uses and the Statute of Enrolments is incorrect. We will consider six earlier draft proposals, four of which were rejected, to present a more complete picture of the origins of both statutes.[11] Consideration will first be given to the drafts leading up to the Commons rejection of the Crown's proposal in 1532, before turning to the litigation in *Dacre's Case* and the later drafts. Reconstructing the passage of the statutes and presenting a more accurate and complete account allows for more detailed consideration of both difficult doctrinal questions relating to the Statute of Uses and important constitutional issues relating to the relationship between the Crown, Parliament and the courts in the mid-sixteenth century.

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Understanding the progress of early drafts of the Statute of Uses has not proved to be straightforward. The publication of *Letters and Papers of Henry VIII* brought to our attention a number of documents relating to the Act. Of these, two in particular have shaped our understanding of the passage of the statute: the text of a draft bill, and an agreement between

Reformation Parliament, 94–5; T. F. T. Plucknett, 'Some Proposed Legislation of Henry VIII', *Transactions of Royal Historical Society*, 19 (1936), 119.

[10] Statute of Enrolments, 27 Hen. VIII, c. 16 (1536). For a more detailed summary, see Baker, *OHLE*, 664–5.

[11] The four which were rejected are: The National Archives Public Record Office (TNA PRO) SP 1/56, ff. 36–9; *LP*, vol. 4, no. 6043, printed in: Holdsworth, *HEL*, vol. 4, 572–4; BL, MS Cotton Titus B.I, f. 486; *LP*, vol. 5, no. 396; TNA PRO SP 1/101, ff. 286–91; *LP*, vol. 10, no. 246, printed in: Holdsworth, *HEL*, vol. 4, 580–1; TNA PRO SP 1/101, ff. 303–21; *LP*, vol. 10, no. 246 (6), printed in Holdsworth, *HEL*, vol. 4, 582–6. The final two are the drafts of the Statute of Uses which are almost identical to the eventual statute: TNA PRO SP 1/101 ff. 252–60; *LP,* vol. 10, no. 246 (1) (incomplete draft of the Statute of Uses, c. 1535/6); TNA PRO SP 1/101, ff. 261–81; *LP*, vol. 10, no. 246 (2) (complete draft of the Statute of Uses, c. 1535).

Henry and a number of peers on the feudal incidents of primer seisin and wardship. Both are dated in *Letters and Papers* to 1529; however, as we shall see, the agreement with the peers appears to have been later.[12]

Furthermore, we know from Thomas Cromwell's remembrances that Henry instructed him to prepare a 'bill of primer seisin' to be presented in the third session of Parliament, which ran from 15 January to 28 March 1532.[13] We also learn from Edward Hall, who was sitting in the Commons at the time, that on 18 March 1532 Henry confronted the Commons, lamenting their lack of progress on his 'bill concerning wards and primer seisin' and saying that he already had the agreement of the peers to limit the avoidance of feudal incidents.[14] After their rejection in March 1532 of Henry's 'bill of primer seisin', the king turned to the courts in *Dacre's Case* (1533–35), following which three further drafts of the Statute of Uses and one of the Statute of Enrolments were calendared in *Letters and Papers*.

It seems clear that the bill presented to the Commons in 1532, as reported by Hall, was the one drafted by Cromwell. Furthermore, the agreement with the peers in *Letters and Papers* must be what Hall reported the king as relying on in his confrontation with the Commons in March 1532. However, understanding the draft bill in *Letters and Papers* has proved more difficult. It is unlikely that this draft bill was the one prepared by Cromwell in 1532; as we shall see, it is more likely that it was a separate draft prepared and rejected earlier in the Parliament.

As noted, the editor of *Letters and Papers* calendared the earlier draft bill immediately before the agreement with the peers and dated both to 1529.[15] This approach was followed by Holdsworth but is likely to reflect no more than the date for the beginning of the Reformation Parliament.[16] For the draft bill, a date of 1529 seems likely but for a number of reasons it is unconvincing for the agreement with the peers.[17]

[12] Draft bill: TNA PRO SP 1/56, ff. 36–9; *LP*, vol. 4, no. 6043; printed in Holdsworth, *HEL*, vol. 4, 572–4. Agreement with the peers: BL, MS Cotton Titus B.IV, ff. 114–18; *LP*, IV, no. 6044; printed in Holdsworth, *HEL*, vol. 4, 574–7. The agreement with the peers was signed by thirty of the fifty-six lords temporal. For the composition of the Lords: see Lehmberg, *Reformation Parliament*, 36–7.

[13] BL, MS Cotton Titus B.I, f. 486; *LP*, vol. 5, no. 396.

[14] E. Hall, *Henry VIII*, ed. by C. Whibley, 2 vols. (London, 1904), vol. 2, 203.

[15] *LP*, vol. 4, nos. 6043, 6044.

[16] Holdsworth, *HEL*, vol. 4, 572–7.

[17] Bean, *Decline*, 265–7.

Of the peers who signed the agreement, five were ennobled on 1–2 December 1529, after Parliament had been summoned: Barons Bray, Burgh, Hussey, Wentworth and Windsor. Indeed, of those five, three had sat in the Commons at the opening in August.[18] The first session concluded on 17 December, and with only a very short period between their ennoblement and the end of the session, it seems unlikely that the agreement can be dated to 1529.

Although it seems clear that a date of 1529 can be dismissed, settling on a more accurate date is difficult. The agreement must have been concluded before 18 March 1532, when the king referred to it when lamenting apparent lack of progress in the Commons for his 'bill concerning wards and primer seisin'.[19] However, the task is complicated by the presence of two other signatories: Thomas Grey, marquis of Dorset, and Edward Stanley, earl of Derby. The negotiations with the peers must have begun, and been at an advanced stage, before 10 October 1530, the date of Dorset's death. In addition, the negotiations are unlikely to have concluded much before 24 January 1531 when Derby, following his maturity, sued his livery and entered into his inheritance.[20] The earl's date of birth is uncertain: it was most likely late 1509 or 1510,[21] which would make him around twenty-one in January 1531. It is possible that the king allowed Derby to enter into his inheritance early on condition of his agreement, which could suggest a late 1530 date for the agreement.

Ascertaining the connection, if any, between the draft bill and the agreement with the peers has proved difficult. The main provisions of the bill were radical and proposed wholesale reform of landholding. First, the bill proposed the abolition of all entails, so that upon enactment all lands, tenements and other hereditaments would be held in fee simple.[22] A later clause would have excluded the nobility from this abolition while providing that any alienation by a nobleman must be licensed by the king. Second, the bill would have rendered all uses invalid unless enrolled in the Court of Common Pleas. Third, it provided that, immediately

[18] Lords Hussey, Wentworth and Windsor: Bean, *Decline*, 260.
[19] Hall, *Henry VIII*, vol. 2, 203.
[20] TNA PRO C 66/656, m. 24 (*LP*, vol. 5, no. 119 (22)). Livery was performed at York Place on 22 January and confirmed by privy seal at Westminster on 8 February. Bean gives a date of 31 January, but it is not clear why: Bean, *Decline*, 266.
[21] L. A. Knafla, 'Stanley, Edward, Third Earl of Derby (1509–1572), magnate', *Oxford Dictionary of National Biography* (online), 23 September 2004.
[22] Holdsworth, *HEL*, vol. 4, 572. Note that this appears to be solely addressing estates in fee tail and would not affect a life estate granted out of the fee simple.

following the sale of any land, tenement, or other hereditament, the deed was to be read out in the parish or parishes in which the land lay and was then to be registered in the shire town. The remaining provisions concerned limitation and should be viewed very much as measures to simplify landholding. A limitation period of five years following a fine or recovery was proposed, after which the land was to be treated as held in fee simple. A further limitation period of forty years was outlined in the final provision, within which any claims against title must be made.[23]

It has been suggested that this earlier draft bill was designed to effect a degree of social engineering by reasserting the social and economic privileges of the nobility under the king,[24] but as Bean has argued, 'such an imaginative scheme' seems very unlikely.[25] The proposed abolition of entails in the draft bill is perhaps better seen as symbolic, the real focus of the bill being elsewhere. Following the decision in *Taltarum's Case* (1472), entails could be broken by common recovery.[26] Although the abolition of entails would have removed the need to effect a common recovery, and indeed the expense of doing so, it is likely that the concession to the peers was 'intended as a sop to the pride of the nobility',[27] as opposed to being of any tangible benefit. It has been argued that the concession to the peers in the draft bill persuaded them to support Henry's efforts to limit loss of feudal revenue through uses in his agreement with the peers.[28] This position is untenable: whilst there was some advantage to the peers in the provisions of the draft bill, it is difficult to suggest that this was enough to justify a quid pro quo in relation to incidents. Furthermore, a textual analysis of the draft bill renders it very unlikely to have been the same as Cromwell's 'bill concerning wards and primer seisin' which was rejected in 1532.[29]

[23] It is worth noting that forty years was not one of the periods set out in the Statute of Limitation of Prescriptions, 32 Hen. VIII, c. 2 (1540), although it was a canon law period, and appeared in Chancery in the later sixteenth century, which may suggest a canonist, or at the very least Chancery, influence on the draft. For further detail on limitation periods more generally, see H. Dondorp, D. J. Ibbetson and E. J. H. Schrage (eds.), *Limitation and Prescription: A Comparative Legal History* (Berlin, 2019).

[24] Plucknett, 'Some Proposed Legislation of Henry VIII', 121–4.

[25] Bean, *Decline*, 260–1.

[26] *Taltarum's Case* (*Hunt v. Smyth*) (1472): TNA PRO CP 40/844, m. 631; YB Mich., 12 Edw. IV, f. 14, pl. 16; f. 19, pl 25; YB Mich., 123 Edw. IV, f. 1, pl. 1; J. H. Baker (ed.), *The Reports of Sir John Spelman*, 2 vols. (93–4 Selden Society, London, 1976–77), vol. 2, 204.

[27] Bean, *Decline*, 260.

[28] Baker, *OHLE*, 664–5; Bean, *Decline*, 259–61; Holdsworth, *HEL*, vol. 4, 450–1.

[29] Hall, *Henry VIII*, vol. 2, 203.

An alternative explanation has been offered by Ives, who argues that the earlier draft bill and the agreement with the peers were unrelated as the draft bill, rather than being an official proposal, was in fact written by a 'well-intentioned but inexperienced' amateur.[30] To support his position, Ives advances two arguments. He contends firstly that the impractical nature of several of the provisions, particularly in relation to registration, suggest that it was ill-conceived and not an official proposal, and secondly, that the draft bill focused on general reform, rather than being specifically aimed at the avoidance of feudal incidents through uses.[31]

The first of Ives' arguments is not wholly compelling. As he himself accepts, '[t]he fact that suggested legislation is ill-conceived does not, of course, establish that it is unofficial in origin'.[32] Furthermore, that a radical proposal to completely overhaul late medieval English landholding would create difficulties is not merely unsurprising, it is to be expected. The second limb of Ives' argument is more interesting. He argues that the draft bill was unlikely to be official as it was not focused on the avoidance of feudal incidents. However, this is a somewhat anachronistic observation, as contemporary critiques of uses also considered wider issues.[33] Furthermore, the registration requirement for uses would have addressed concerns relating to certainty and permitted the pre-existing legislation concerning incidents (the Statute of Marlborough, c. 6 (1267) and 4 Henry VII, c. 17 (1490)) to be more easily enforced.[34]

[30] Ives, 'Genesis of the Statute of Uses', 677–9. Lehmberg agreed with Ives that the content of the bill indicates that it was unofficial before going on to suggest that the bill was likely connected to the Statute of Enrolments: Lehmberg, *Reformation Parliament*, 94–5. *Cf.* G. R. Elton, 'Parliamentary Drafts, 1529–1540', *Bulletin of the Institute of Historical Research*, 25 (1952), 117, 132.

[31] In contrast to the agreement with the peers in which incidents were central. Clauses 1 and 2 outlined the king's prerogative right to wardship. Clauses 3, 4 and 5 stipulated the amount of military tenure land that could be devised by last will to two-thirds, leaving the king with wardship of one-third. For more detail, see Bean, *Decline*, 261–3.

[32] Ives, 'Genesis of the Statute of Uses', 679.

[33] Note in particular the *Damna Usuum*: TNA PRO SP 1/101, f. 282 (*LP*, vol. 10, no. 246), printed in Holdsworth, *HEL*, vol. 4, 577–80. See also Thomas Audley's reading at the Inner Temple: BL, MS Hargrave 87, ff. 427–55; CUL, MS Ee. 5. 19, ff. 1–17; Duke of Northumberland MS 475, f. 187v; University of Illinois at Urbana-Champaign MS 27, ff. 69–95v. The anonymous *Replication of a Serjeant at the Laws of England*: J. Guy (ed.), *The Replication of a Serjeant at the Laws of England,* in *Christopher St German on Chancery and Statute* (6 Selden Society Supplementary Series, London, 1985), 99–105.

[34] For the continuing importance of Marlborough, see Hannay, 'By Fraud and Collusion'.

The most plausible explanation is that the draft was official but did not directly correspond to the agreement with the peers in the manner that has been suggested. The evidence connecting them is shaky at best. Indeed, when the contents of the two are considered side-by-side, it appears to be far more persuasive that they were unrelated; the contents of the draft bill and of the agreement with the peers are manifestly different. It seems that the early draft bill received a cold reception in the first session of Parliament and the Crown changed tack, likely reaching an agreement with the peers by January 1531.

The agreement with the peers was likely concluded ahead of the second session of Parliament, 16 January to 31 March 1531. In his chronicle, Hall makes no reference to a bill being presented to the Commons in the second session,[35] and Cromwell's 'bill concerning wards and primer seisin' was prepared for the third session, 15 January to 28 March 1532. The Imperial ambassador to England, Eustace Chapuys, reported to Charles V, Holy Roman Emperor, in March 1531 that '[t]he Parliament continues, but has done nothing, as I am told, and it is supposed the King keeps it sitting for some mysterious purpose'.[36] It seems likely that following the agreement with the peers, the king entered into a period of negotiations with the Commons over feudal incidents which may have been the 'mysterious purpose'. In another letter, dated 30 January 1532, Chapuys reported that Parliament was debating feudal incidents,[37] and on 14 February 1532, Chapuys wrote that the king was seeking to obtain one-third part of feudal property.[38] This corresponds with the agreement for one-third with the peers and the date fits with the Commons' subsequent rejection of the proposal on 18 March 1532, reported by Hall. In other respects, however, Hall's account appears, at least initially, somewhat difficult to reconcile with Chapuys.

Following on from his recounting of Henry's speech to the Commons, Hall explained that the king's proposal was for half of military tenure land to be devisable by last will,[39] as opposed to the two-thirds in the agreement with the peers and outlined by Chapuys. He then goes on to declare that the Commons erred in either not accepting this proposal or at least

[35] Hall, *Henry VIII*, vol. 2, 203; Bean, *Decline*, 267.
[36] *LP*, vol. 5, no. 120.
[37] Ibid., no. 762.
[38] Ibid., no. 805.
[39] Hall, *Henry VIII*, vol. 2, 203–4.

not pushing back against the king to negotiate him down to a third or a quarter, 'which offer [Hall] was credibly informed the king would have taken'.[40] As he was a lawyer and an MP sitting in the Commons at the time, it is tempting to defer to Hall. For Bean, Hall was more reliable than Chapuys, and he argued that Hall's assertion suggests that Henry had in fact reached a second agreement with the peers for one-half, which was rejected by the Commons. This is rather tenuous and not an especially convincing reading of the evidence. As the Imperial ambassador resident in England, Chapuys had good access to information and was writing contemporaneously; his accuracy is too readily doubted by Bean. Although Hall had better information – he was very possibly in the room throughout – he was likely writing much later.[41]

It is possible to reconcile the accounts of Hall and Chapuys. It is more likely that Hall, writing at least a decade later, misremembered the order of the king's proposals, than that Chapuys, writing contemporaneously, was wrong in February 1532. The most plausible explanation appears to be that, rather than Henry increasing his demands after the agreement with the peers, there was a significant period of negotiation, initially with the peers, in which Henry started at half and was negotiated down to a third. Negotiations then continued with the Commons and Henry instructed Cromwell to prepare a 'bill of wardship and primer seisin', based on the agreement with the peers, ahead of the third session. This bill was eventually rejected by the Commons in March 1532, prompting Henry's strikingly ominous foreshadowing that he would 'search out the extremity of the law'.[42]

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Following the failed attempt to legislate, Henry then turned to the courts. The first peer to die, having enfeoffed feoffees to perform his will, following the Commons' rejection of the bill in March 1532 was Thomas Fiennes, Baron Dacre of the South (died 9 September 1533): *Dacre's Case* was to be the king's test case.[43] The case began with an

[40] Ibid., 204.

[41] The first edition covering the period up to 1532 was not printed until 1548, a year after Hall's death, and revised edition to the end of the reign, based on Hall's notes, was published posthumously in 1550.

[42] Hall, *Henry VIII*, vol. 2, 203.

[43] *Re Lord Dacre of the South* (1533–35), TNA PRO C 142/80/24–5 (inquisition); C 42/2/32 (traverse); YB Pasch. 27 Hen. VIII, f. 7, pl. 22.

inquisition post-mortem in Chancery, before being referred to the Exchequer Chamber. Following the exertion of significant pressure on behalf of the Crown, the king prevailed and it was held that uses of freehold land were incapable of being devised by will.[44] Furthermore, not only were future wills devising land considered to be invalid, but any title that was traced through a will at any point in the past was now vulnerable.[45] The king's threat to 'search out the extremity of the law' had been realised beyond the Commons' worst imaginings. The situation was untenable, and legislation required. The only real question was how the Crown would approach a remedy.

Surviving documents calendared in *Letters and Papers* give important insight into the Crown's approach. Three drafts of the Statute of Uses and one of the Statute of Enrolments have survived which enable us to trace the development of the Crown's thinking in light of the litigation in *Dacre's Case*.[46] Turning first to the Statute of Uses, it is clear that two separate approaches to legislation were considered. The first proposed a scheme which was to apply common law rules for legal title to uses but this was not pursued beyond an initial draft.[47] The second proposed to annex the legal estate to the use and would become the Statute of Uses. Two drafts have survived, the first an early draft and a second which was the same in substantive content but was in a more formal and parliamentary style[48]; indeed, it is almost identical to the Statute of Uses itself.

The first draft was clearly an early version. It is more concise and without the style or character expected of a formal bill but is nonetheless interesting and informative. The comparatively short document begins by declaring that the common law had been subverted by uses. The remedy proposed, as noted, was, in effect, to apply the common law of real property to uses.[49] As Baker notes, the bill sought to effect an extension of the provision in 4 Henry VII, c. 17 (1490), which treated

[44] Baker, *OHLE*, 671.
[45] Ibid., 672.
[46] TNA PRO SP 1/101, ff. 286–91; *LP*, vol. 10, no. 246 (4). Printed in Holdsworth, *HEL*, vol. 4, 580–81; TNA PRO SP 1/101 ff. 252–60; *LP*, vol. 10, no. 246 (1); TNA PRO SP 1/101, ff. 261–81; *LP*, vol. 10, no. 246 (2); TNA PRO SP 1/101, ff. 303–21; *LP*, vol. 10, no. 246 (6). Printed in Holdsworth, *HEL*, vol. 4, 582–6.
[47] TNA PRO SP 1/101, ff. 286–91; *LP*, vol. 10, no. 246 (4). Printed in Holdsworth, *HEL*, vol. 4, 580–1.
[48] TNA PRO SP 1/101 ff. 252–60; *LP*, vol. 10, no. 246 (1); TNA PRO SP 1/101, ff. 261–81; *LP*, vol. 10, no. 246 (2).
[49] Holdsworth, *HEL*, vol. 4, 457.

the heir of *cestui que use* who died intestate as if his ancestor had died seised.[50] It was viewed by Holdsworth as being 'useless, or almost useless, to the king',[51] and by Lehmberg as 'not very advantageous to the Crown financially'.[52] The central point to this argument is that the draft would not prevent the devise of land. However, as noted by Bean, this is a misreading of the text. Whilst certainly 'clumsy', the effect of the provision was to treat the *cestui que use* as if he had been in possession at common law, which would include preventing the devise of land by last will.[53]

It has been presupposed that this initial draft, like the later drafts beside which it is calendared, was prepared after the decision in *Dacre's Case*.[54] However, this is almost certainly not the case. If the decision in *Dacre's Case* was as fundamental and substantively damaging to the security of title as it appears to have been, then the Commons was in no position to object to anything Henry's government put forward. There was no need in 1535–36 for subtle negotiation or compromise; following *Dacre's Case*, the Commons had lost. Furthermore, the draft did nothing to remedy the vulnerability that landholders faced in the decision in *Dacre's Case*. It is much more likely that the initial draft can be dated to the period before the decision in *Dacre's Case*.[55]

It has been suggested that a memorandum of October 1533 demonstrates that Cromwell was contemplating further legislation at this point.[56] This relies on reading two consecutive notes on instructions to the Crown's lawyers – the first relating to the order of the king's wards and the second to investigate Lord Dacre's will – as being connected. The inquisition following Dacre's death was not held until January 1534. Although possible, it therefore seems unlikely that Cromwell was considering legislation before the inquisition, and the reference to 'order of the king's wards' is rather too vague to support a conclusion that Cromwell was considering legislation. However, later in 1534, the inquisition had been traversed by Dacre's feoffees, and it appears that

[50] Baker, *OHLE*, 672,n. 127.
[51] Ibid.
[52] Lehmberg, *Reformation Parliament*, 236.
[53] Bean, *Decline*, 288.
[54] Parliament was scheduled to meet in November 1535, however, due to plague in London this was delayed until February 1536: Lehmberg, *Reformation Parliament*, 217 (nn. 1–2).
[55] Baker, *OHLE*, 672, n. 126; Ives, 'Genesis of the Statute of Uses', 692.
[56] Ives, 'Genesis of the Statute of Uses', 690; BL, MS Cotton Titus B. I., ff. 453, 478; *LP*, vol. 6, no. 1381.

Cromwell was less than confident of a positive outcome. In autumn 1534 he sought the advice of the judges,[57] and a memorandum noting the need for Cromwell to find 'some reasonable way to be devised for the king's wards and primer seisin' could suggest that he was considering legislation.[58] Although the Dacre litigation had begun, the outcome was far from certain. It can be suggested that the 'reasonable way to be devised' in the memorandum was the draft bill,[59] but that it was not pursued beyond this initial draft. The memorandum suggests that the bill may have been prepared ahead of the sixth session, 3 November to 18 December 1534.[60] The content of the draft, particularly the preamble, strongly resembles the complaints raised in the *Damna Usuum*, a contemporary list of complaints on the 'mischiefs, wrongs and inconveniences' which were caused by the employment of uses.[61]

Parliament was set to return in November 1535, following the decision in *Dacre's Case* in Easter Term, but due to plague it did not return until February 1536.[62] There is some evidence of very minor negotiation over the precise form of the eventual Statute of Uses. This can be seen in two further drafts: the first an early draft which was subject to slight amendments before a second in formal parliamentary style which was almost identical to the eventual Statute of Uses, with only some minor deletions to clause 10.[63] The main provision was for the legal estate to be annexed to the use. Where previously, following a feoffment to feoffees to the use of *cestui que use* the feoffees would stand seised with the *cestui que use* merely having the use of the land, by operation of the Statute of Uses, following such a feoffment legal title would cease to be vested in the feoffees and would automatically vest in the *cestui que use*. The solution enacted by the Statute of Uses was remarkably simple yet there were significant oversights.

[57] Ives, 'Genesis of the Statute of Uses', 691.
[58] BL, MS Cotton Titus B. I, f. 159v; *LP*, vol. 9, no. 725. For the date, see Ives, 'Genesis of the Statute of Uses', 692, n. 2. The memorandum states that it was to be prepared 'for the next session', which was planned be in November 1535.
[59] TNA PRO SP 1/101, ff. 286–91; *LP*, vol. 10, no. 246 (4). Printed in Holdsworth, *HEL*, vol. 4, 580–1.
[60] Lehmberg, *Reformation Parliament*, 216, n. 3.
[61] See above, n. 33.
[62] TNA PRO SP 1/101, ff. 282–5; *LP*, vol. 10, no. 246 (3). The text is printed in Holdsworth, *HEL*, vol. 4, 577–80. For more detail on the *Damna Usuum*, see A. J. Hannay, 'Damna Usuum: Common Law, Conscience and the "Sufferance of Uses"', *Cambridge Law Journal* 84 (in press).
[63] Ives, 'Genesis of the Statute of Uses', 693.

As well as express and resulting uses, the statute also executed implied uses that arose to the benefit of the purchaser on a bargain and sale. Following the Statute of Uses, the purchaser would stand seised by virtue of the statute, thus removing the time to make enquiries.[64] Before the Statute of Uses this was common practice and would have caused significant difficulties for conveyancers. Unlike issues relating to dower and jointure, which were addressed in the Statute of Uses itself,[65] it appears that the drafters did not recognise the problem with implied uses until a relatively late stage. This was addressed by the passing of the Statute of Enrolments later in the seventh session.[66]

The Statute of Enrolments has long been recognised as part of the same scheme as the Statute of Uses. Indeed, Francis Bacon, in his 1600 reading at Gray's Inn, stated that it was 'but a proviso' to the Statute of Uses.[67] The eventual Statute of Enrolments was short and contained no preamble. It prevented the automatic execution of implied uses by providing that no estate or inheritance or freehold would pass by virtue only of a bargain and sale unless the bargain and sale was 'indented, sealed and enrolled' within six months at a court of record in Westminster or in the county in which the land was situated.[68]

Like the Statute of Uses itself, we are assisted in understanding the origins of the Statute of Enrolments by the survival of an earlier draft bill.[69] The draft bill is a great deal more ambitious and sophisticated than that which was eventually passed. An initial point to make is that the draft bill is far longer than the eventual Statute of Enrolments. In addition, unlike the statute itself, the draft contains a broad preamble in the conventional style.[70] Following the preamble, the substance of the draft begins by providing that after the last day of July 1536 the use of any

[64] Baker, *OHLE*, 677.
[65] 27 Hen. VIII, c. 10, clauses 4–7.
[66] 27 Hen. VIII, c. 16; J. M. Kaye, 'A Note on the Statute of Enrolments 1536', *Law Quarterly Review*, 104 (1988), 617.
[67] F. Bacon, *The Learned Reading of Sir Francis Bacon upon the Statute of Uses* (1642), 46; Bean, *Decline*, 291; Holdsworth, *HEL*, vol. 4, 462–3; Simpson, *History of Land Law*, 188.
[68] To be enrolled in the county or counties in which the land was held it must have been enrolled before 'the *Custos Rotulorum* and [two] Justices of the peace and the Clerk of the Peace of the same County or Counties or [two] of them at least whereof the Clerk of the Peace to be one'. *SR*, vol. 3, 549; J. H. Baker, *Baker and Milsom Sources of Legal History: Private Law to 1790*, 2nd ed. (Oxford, 2019), 135.
[69] TNA PRO SP 1/101, ff. 303–21; *LP*, vol. 10, no. 246 (6). Printed in Holdsworth, *HEL*, vol. 4, 582–6.
[70] Lehmberg, *Reformation Parliament*, 238.

lands, tenements and hereditaments should not pass unless agreed in writing, made under seal and enrolled.[71] The remaining clauses outline a series of administrative reforms empowering the king to appoint officers in each shire who would be responsible for recording and entering the same writing within forty days on to a roll to be deposited in the Chancery which could be inspected by interested parties. Failure to enrol within the specified forty days would result in the disposition being void.

The content of the draft bill is interesting. The draft speaks of declared uses, proposing that all uses would be invalid unless they were declared in writing and enrolled. That is to say, it applied to express uses, and resulting uses arising from a feoffment or other form of conveyance, for no express use or consideration, but not uses implied into a bargain and sale. The Statute of Enrolments that was eventually enacted was far more limited and addressed only implied uses. The inclusion of other uses in the draft bill and not in the eventual Act itself may explain Lehmberg's apparent confusion in arguing that the Statute of Enrolments was specifically addressed to 'secret conveyances',[72] which are generally understood to have been resulting uses, such as in 1 Richard III, c. 1.[73]

The fact that the draft gives a date of the end of July 1536 after which uses were to be invalid unless they were in sealed writing and enrolled is interesting. The seventh session of Parliament ended on 14 April 1536, so the draft must have been completed before then – indeed completed with time to change tack and pass the subsequent Statute of Enrolments. It is likely that the draft's July date was proposed to allow time to implement the administrative bureaucracy that the king was empowered to establish, the scale of which was substantial, and is suggestive of a date far in advance of the end of parliamentary session in April. The Statute of Uses itself was to take effect from 1 May 1536. As this draft of the Statute of Enrolments would have taken effect, had it been enacted, almost three months after the Statute of Uses, it appears unlikely that it was prepared after the Statute of Uses.

That the draft required the enrolment of all declared uses appears to suggest a number of things in relation to the drafting of the Statute of

[71] TNA PRO SP 1/101, ff. 303–21; *LP*, vol. 10, no. 246 (6). Printed in Holdsworth, *HEL*, vol. 4, 582 (numbered by Holdsworth as clause 1).

[72] Lehmberg, *Reformation Parliament*, 238.

[73] Baker, *OHLE*, 655–60, 675; A. J. Hannay, 'The Statute of Richard III (1484) and the Emergence of Beneficial Ownership in Freehold Land', in C. Mitchell and D. Foster (eds.), *Essays in the History of English Equity* (London, in press).

Uses. The draft bears a striking similarity to the first draft bill dated to 1529 in *Letters and Papers*, which required all declared uses to be enrolled with the Common Pleas.[74] Indeed, it may be that this draft of the Statute of Enrolments is a more developed, and narrower, version of the 1529 draft bill. The 1529 draft was quickly rejected in favour of a more direct approach focused on feudal incidents, but it may be that those who prepared it continued to propose a much broader reform to the law of real property. With regard to the draft's purpose, and its relationship to the Statute of Uses, two alternative explanations can be suggested.

The first is that it was an alternative to the Statute of Uses in which, rather than attaching legal title to the use, the Crown could seek to protect itself from loss of feudal revenue by requiring all declared uses to be enrolled. As we have noted in relation to the 1529 draft bill, it is possible that this would have provided a greater protection to the Crown from loss of feudal incidents, but only to a limited extent in allowing easier enforcement of earlier legislation. If the draft was prepared before the decision in *Dacre's Case*, this understanding of the draft of the Statute of Enrolments may be more plausible, as a creative means of providing some protection to the Crown, but it seems unlikely. A more probable explanation for the draft is that it was prepared alongside the Statute of Uses and was intended to apply to those uses of land which were not caught by the Statute of Uses, that is to say, uses of non-freehold land and those with active duties.[75] This could therefore represent a more holistic reform to the law of uses generally, and one which sought to reconcile uses with the broader law of real property. However, it is likely that as a result of practical and administrative difficulties it was ultimately not pursued, only for the idea of enrolment to be quickly resurrected in a hasty reassembling of the initial draft directed solely at implied uses to address the flaw in the Statute of Uses.[76]

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[74] TNA PRO SP 1/56, ff. 36–9; *LP*, vol. 4, no. 6043, printed in Holdsworth, *HEL*, vol. 4, 572–4.

[75] This assumes that the Statute of Uses was not intended to apply to uses with active duties and of non-freehold land, which seems likely. For the intended scope of the statute, see Jones, 'Authority of Parliament', 13.

[76] For the haste in which the statute was passed, see G. R. Elton, *Reform and Reformation: England 1509–1558* (London, 1977), 146–7, although, as Baker notes, Elton misunderstood the purpose of the Statute of Enrolments: Baker, *OHLE*, 678, n. 149.

Ascertaining the precise path through the Reformation Parliament of Henry VIII's attempts to address the uncertainty caused by uses, including the loss of revenue from the avoidance of feudal incidents, is far from straightforward. Previous historians have suggested that an initial bill, linked to an agreement with the peers, was rejected by the Commons in 1532 before the litigation in *Dacre's Case* led to the Crown prevailing and the enactment of the Statute of Uses. In this chapter, we have seen that close evaluation of the evidence supports a re-evaluation of this orthodoxy, particularly in the period before *Dacre's Case*.

A textual analysis of the 1529 draft Commons bill and the agreement with the peers demonstrates that they are manifestly different schemes and suggestions of a close connection between them is unconvincing. It is much more probable that rather than one Commons draft bill we have two: the 1529 bill,[77] which was quickly abandoned, and, following a period of sustained negotiations and subsequent agreement with the peers,[78] Cromwell's 'bill of wardship and primer seisin', which was rejected by the Commons in March 1532.[79]

At this point, the Crown changed tack and sought to pursue the avoidance of incidents in the courts in *Dacre's Case*. Likely doubting the outcome in *Dacre's Case*, it seems that Cromwell prepared a compromise bill for the sixth session of Parliament, in late 1534, but it was not presented.[80] Following this, substantial pressure was applied to the judges, ensuring the Crown's success in *Dacre's Case*, and the Commons were undone. At this point it appears that two schemes were considered. Firstly, one which would require the enrolment of all uses, evidenced in what has become known as the draft of the Statute of Enrolments,[81] and a second which became the Statute of Uses, and for which two drafts survive.[82] The first scheme likely faltered due to administrative unworkability; however, following the eventual passage of the Statute of Uses, a

[77] TNA PRO SP 1/56, ff. 36–9; *LP*, vol. 4, no. 6043 (1529 draft bill), printed in Holdsworth, *HEL*, vol. 4, 572–4.

[78] BL, MS Cotton Titus B.IV, ff. 114–18 (*LP*, IV, no. 6044), printed in Holdsworth, *HEL*, vol. 4, 574–7 (agreement with the peers).

[79] BL, MS Cotton Titus B.I, f. 486; *LP*, vol. 5, no. 396.

[80] TNA PRO SP 1/101, ff. 286–91; *LP*, vol. 10, no. 246 (1534 draft bill), printed in Holdsworth, *HEL*, vol. 4, 580–1.

[81] TNA PRO SP 1/101, ff. 303–21; *LP*, vol. 10, no. 246 (6), printed in Holdsworth, *HEL*, vol. 4, 582–8.

[82] TNA PRO SP 1/101 ff. 252–60; *LP*, vol. 10, no. 246 (1); TNA PRO SP 1/101, ff. 261–81; *LP*, vol. 10, no. 246 (2).

scheme of enrolment was resurrected to prevent the automatic execution of implied uses.

In his 1600 reading, Francis Bacon described the Statute of Uses as 'the most perfectly and exactly conceived and penned of any law in the book'.[83] As we have seen, its origins and drafting are rather more complex than Bacon allowed. The statute that was enacted in 1536, and transplanted to Ireland in 1634, was the result of sustained negotiations and significant intellectual, parliamentary and judicial scrutiny. As well as providing a far clearer understanding of technical questions relating to uses and trusts, the passage of the Statute of Uses and the Statute of Enrolments elucidates important features of the relationship between the Crown, the peers, the commons and the judiciary in this fundamentally important period in our history.

[83] Bacon, *Bacon upon the Statute of Uses*, 25.