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DAMNA USUUM: COMMON LAW, CONSCIENCE AND THE "SUFFERANCE OF USES"

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ABSTRACT. The *Damna Usuum* was a series of complaints about the operation of uses written during the negotiations with the Commons which culminated in the Statute of Uses (1536). Through detailed analysis of the manuscript, this paper demonstrates that the *Damna Usuum* has been misunderstood by legal historians. Rather than being a public document intended to persuade the Commons to support reform; the *Damna Usuum* can be shown to be a series of rough notes prepared by the Crown's lawyers ahead of their negotiations with the Commons. Furthermore, this has a significant impact on our understanding of how contemporary lawyers conceptualised pre-1536 uses in a period in which they had taken on more proprietary "thing-like" characteristics.

KEYWORDS: *uses*, *trusts*, *conscience*, *equity*, *law and equity*, *Statute of Uses*.

I. INTRODUCTION

Before the early sixteenth century feoffments to uses had become increasingly popular in family land settlements.[1] This had a number of intended and unintended consequences for the operation of the common law of real property. Indeed, in the 1526 autumn reading at the Inner Temple, Thomas Audley decried feoffments to uses for their "evil purpose of destroying the good laws of the realm".[2] In the decade that followed, the Crown was particularly concerned with stemming the avoidance of feudal incidents caused by the employment of uses.[3] What

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[1] J. Baker, *An Introduction to English Legal History*, 5th ed. (Oxford 2019), 267–78; J. Baker, *The Oxford History of the Laws of England*, *1483–1553*, vol. 6 (Oxford 2003) (hereafter, Baker, *OHLE*, vol. 6), 653–54; J.L. Barton, "The Medieval Use" (1965) 81 L.Q.R. 562; J. Biancalana, "Medieval Uses" in R. Helmholz and R. Zimmerman (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin 1998), 111.

[2] British Library (BL) MS. Hargrave 87, ff. 427–57, f. 437v, printed and translated in J. Baker, *Baker and Milsom Sources of English Legal History*: *Private Law to 1750*, 2nd ed. (Oxford 2010), 118.

[3] Baker, *OHLE*, vol. 6, 665–79; A. Hannay, "'By Fraud and Collusion': Feudal Revenue and Enforcement of the Statute of Marlborough, 1267–1529" (2021) 42 The Journal of Legal History 65.

became known as the Tudor campaign against uses culminated with the litigation in *Dacre's Case* (1533–35),[4] and in the enactment of the Statute of Uses (1536),[5] with the modern trust emerging from exceptions to the statute.[6] A number of important documents relating to the passage of the Statute of Uses survive from this period;[7] among these is an intriguing document endorsed as *Damna Usuum* and "Inconveniences for the Sufferance of Uses".[8]

The *Damna Usuum* is a detailed tract outlining an assortment of complaints on the "mischiefs, wrongs and inconveniences" caused by the employment of feoffments to uses. Traditional accounts of the passage of the Statute of Uses have focused on fiscal feudalism, tending to see earlier attempts at reform as failing to address the root of the problem.[9] This view is also reflected in how the *Damna Usuum* has been understood by historians. The first to discuss the *Damna Usuum* in any detail was William Searle Holdsworth in the fourth volume of his *A History of English Law*, in which he considered the *Damna Usuum* to have been put before Parliament alongside the earlier drafts[10] and

[4] *Re Lord Dacre of the South* (1533–35), The National Archives: Public Record Office (hereafter, TNA PRO) C 142/80/24-5 (inquisition); C 42/2/32 (traverse); Y.B. Pasch. 27 Hen. VIII, f. 7, pl. 22.

[5] Baker, *OHLE*, vol. 6, 672–79; E.W. Ives, "The Genesis of the Statute of Uses" (1967) 82 English Historical Review 673; A.J. Hannay, "The Origins of the Statute of Uses" in N. Dawson, D. Capper and C. McCormick (eds.), *Law and Constitutional Change: Essays in Legal History* (Cambridge 2025 (forthcoming)).

[6] N. Jones, "Trusts in England after the Statute of Uses: A View from the 16th Century" in Helmholz and Zimmerman (eds.), *Itinera Fiduciae*, 173; N.G. Jones, "The Trust Beneficiary's Interest before R. v. Holland (1648)" in A. Lewis, P. Brand and P. Mitchell (eds.), *Law in the City: Proceedings of the Seventeenth British Legal History Conference, London, 2005* (Dublin 2007), 95; N.G. Jones, "Wills, Trusts and Trusting from the Statute of Uses to Lord Nottingham" (2010) 31 The Journal of Legal History 273; N.G. Jones, *Sixteenth-Century England: A View from the Trusts Cases* (London 2023).

[7] The surviving documents include six drafts of the Statutes of Uses and Enrolments, four of which were rejected, with two almost identical to the final Statute of Uses, as well as an agreement with a number of peers. Their survival was first brought to the attention of historians by the publication of J.S. Brewer et al. (eds.), *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, vols. 1–21 (London, 1862–1932). Their importance to legal historians was noted by William Stubbs in the late nineteenth century and F.W. Maitland at the beginning of the twentieth century: F.W. Maitland, *English Law and the Renaissance: The Rede Lecture for 1901* (Cambridge 1901), 45, fn. 11; W. Stubbs, *Seventeen Lectures on the Study of Mediaeval and Modern History and Kindred Subjects Delivered at Oxford, under Statutory Obligation in the Years 1867–1884; with Two Addresses Given at Oxford and Reading*, 3rd ed. (Oxford 1900), 321. The text of three draft bills and the agreement with a number of peers is printed in W.S. Holdsworth, *A History of English Law*, vol. 4 (London 1923) (hereafter, Holdsworth, *HEL*, vol. 4), 572–77, 580–86. For more detail and for dating of the draft bill, see Hannay, "Origins of the Statute of Uses".

[8] TNA PRO SP 1/101, ff. 282–85; J. Gairdner (ed.), *Letters and Papers*, vol. 10 (London 1887), 89, no. 246(3). The text is printed with numbers for each complaint added in Holdsworth, *HEL*, vol. 4, 577–80. Note that in SP 1/101 there are two foliations: the first are handwritten and in the same hand as references to the volume number and entry number for *Letters and Papers*, and a second printed number. For the *Damna Usuum*, the handwritten foliations, which are preferred here, are ff. 282–85, whereas the printed foliations are 219–21v. Black and white photographs of the manuscript can be viewed on State Papers Online, available at http://link.gale.com/apps/doc/MC4301880250/SPOL?bookmark-SPOL&xid=6f161868 (last accessed 17 February 2025).

[9] Baker, *OHLE*, vol. 6, 652–86, 661–79; Barton, "Medieval Use", 568–77; J.M.W. Bean, *The Decline of English Feudalism* (New York 1968), 257–93; S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981), 200–33, 216–22; A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford 1986), 171–73; T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed. (New Jersey 2001), 579–80, 583–84; cf. Hannay, "Fraud and Collusion", 71–76.

[10] Holdsworth, *HEL*, vol. 4, 455.

thought that it may have been the preparatory work for the Statute of Uses[11] – a view that was supported by J.M.W. Bean.[12] In the most recent scholarly consideration of the *Damna Usuum*, Sir John Baker has argued that the document was written with the intention to persuade the Commons, who had recently rejected proposed legislation, to support the scheme which eventually became the Statute of Uses.[13]

This article argues that the *Damna Usuum* has been misunderstood by legal historians. It will be argued that it was not drafted as a single document but was composed in stages. The initial purpose of the *Damna Usuum* appears to have been as rough notes to support the Crown's officers in the negotiations with the Commons during the Reformation Parliament; however, these negotiations were abandoned after the decision in *Dacre's Case*. At which point it appears likely that the *Damna Usuum* was repurposed as the raw material for the preamble to the Statute of Uses. Furthermore, it will be argued that the implications of this are significant. Through detailed textual and physical analysis of the manuscript and consideration of the critiques raised in it, a much fuller picture of the nature of uses, which had become increasingly proprietorised in the decades before the passage of the Statute of Uses,[14] and their relationship with the wider common law emerges. Although the importance of revenue concerns and of political considerations should not be underestimated, this article argues that they have been overstated at the expense of other, valid, concerns about the effect of uses on the common law.

II. Uses and the Statute

The *Damna Usuum* was concerned with the effect of the employment of feoffments to uses of freehold land. A use of freehold land was created where legal title in the land was transferred by a feoffor to his feoffees to uses for the benefit of *cestui que use*. After the feoffment, the feoffees were seised of the land at common law but by the early fifteenth century

[11] Ibid., at 456.
[12] Bean, *Decline*, 289, fn. 1.
[13] Baker, *OHLE*, vol. 6, 668.
[14] Ibid., at 654–61, 658; A.J. Hannay, "The Statute of Richard III (1484) and the Emergence of Beneficial Ownership in Freehold Land" in D. Foster and C. Mitchell (eds.), *Essays on the History of Equity* (Oxford 2026 (forthcoming)); Jones, "Trust Beneficiary's Interest", 95; M. Macnair, "Development of Uses and Trusts: Contract or Property, and European Influences and Images" (2015) 66 Studi Urbinati, A – Scienze Giuridiche, Politiche ed Economiche 305, 312–13. For the later debate on the nature of the beneficiary's interest into the twentieth century, see D. Foster, "Historical Conceptions of the Express Trust, c 1600–1900" in S. Degeling, J. Hudson and I. Samet (eds.), *Philosophical Foundations of the Law of Express Trusts* (Oxford 2023), ch. 5, 110. The nature of the beneficiary's interest remains a controversial debate amongst modern legal scholars: see e.g. B. McFarlane and R. Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1; cf. H. Dagan and I. Samet, "The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime" (2023) 86 M.L.R. 701; E.C. Zaccaria, "The Nature of the Beneficiary's Right under a Trust: Proprietary Right, Purely Personal Right or Right against a Right?" (2019) 135 L.Q.R. 460.

they were bound in conscience to the feoffor's wishes by Chancery subpoena.[15] Before the late fifteenth century it had become increasingly common for landholders to enfeoff feoffees to their own use and to perform their wills.[16] The popularity of such arrangements famously led Serjeant Frowyk, looking back to the late fifteenth century from 1502, to remark that "the greater part of the land of England was in feoffments upon confidence".[17] This increased employment of feoffments to uses led to somewhat inevitable tension between the interest of *cestui que use*, whose rights were upheld in conscience and the strict, conservative common law position, which held that *cestui que use* had "no more to do with the land than the greatest stranger in the world".[18]

Following a number of early precursors, the use in the form of the "intergenerational use"[19] emerged in the early fourteenth century allowing landholders to circumvent the common law rule prohibiting the devise of land by last will.[20] As a result of feoffments to uses to perform last wills, land would not descend directly to the heir upon the death of the feoffor, as the feoffees would remain seised whilst they performed the feoffor's last will. This had a number of important effects on the operation of the common law, notably, as the land was not inherited, the feoffor's lord would be deprived of valuable feudal incidents.[21] 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, chapter 6, the use of which continued until the passage of the Statute of Uses in 1536.[22]

Furthermore, around the turn of the sixteenth century, the relationship between conscience-based uses and the common law was further complicated by a positive strengthening of the interest of *cestui que use*. The statute 1 Ric. III, c. 1 (1484) gave *cestui que use* the power to convey land which was held only for his use.[23] The statute was enacted to protect purchasers from uncertainty with regard to title caused by the employment of feoffments to uses; however, its effect was to empower *cestui que use* to convey a freehold estate in land which was held only

[15] Baker, *Introduction*, 270, fn. 20.
[16] Barton, "Medieval Use", 562; Biancalana, "Medieval Uses", 111; Bean, *Decline*, 104–79; A.J. Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries* (PhD thesis, University of Cambridge, 2022), available at https://doi.org/10.17863/CAM.93112 (last accessed 25 January 2025).
[17] *Dod v Chyttynden* (1502) Y.B. Mich. 15. Hen. VII, f. 13, pl. 1; J.H. Baker (ed.), *Reports of Cases by John Caryll. Part II: 1501–1522* (110 Selden Soc.) (London 2000) (hereafter, *Caryll's Reports*, pt. 2), 395–96.
[18] Ibid. For doubts on the veridicity of Frowyk's statement, particularly in light of the statute 1. Ric. III, c. 1 (1484) and the gradual reception of uses into the common law, see Hannay, "Statute of Richard III".
[19] Biancalana, "Medieval Uses", 112.
[20] Milsom, *Historical Foundations*, 208.
[21] H.E. Bell, *An Introduction to the History and Records of the Court of Wards and Liveries* (Cambridge 1953), 1; Simpson, *History of the Land Law*, 16–19.
[22] Hannay, "Fraud and Collusion", 65, 71–88.
[23] Baker, *OHLE*, vol. 6, 655–59; Hannay, "Statute of Richard III".

for his use.[24] An indirect effect of the statute was to further the reception of uses into the common law,[25] with *cestui que use* being referred to as the "owner" of land held to his use shortly after the statute was enacted.[26] However, this was not without controversy and shortly after a renewed campaign against uses began.[27]

From the mid-1520s increased attention was given once again to the loss of feudal revenue affected by feoffments to uses. In addition to a number of practical measures against uses,[28] an intellectual campaign emerged with Audley forcefully arguing against uses and the conscience-based jurisdiction of the Chancellor in which they were upheld.[29] By the end of the 1520s, the Crown's approach to uses had turned to ambitious legislative reform which culminated a decade later in the passage of the Statute of Uses. The statute operated to execute feoffments to uses by attaching legal title to the use.[30] That is to say, following the creation of a use, legal title would follow the use and *cestui que use* and not the feoffees, would be seised of the land.[31] Although the importance of the Statute of Uses has long been acknowledged,[32] understanding the passage of the statute through Parliament has proved more difficult.

[24] Lincoln's Inn MS. Maynard 3, ff. 191–210 (Gregory Adgore's reading, c. 1490/91): "C'est statute est fait tout pur l'advantage de vendees." Y.B. Mich. 5 Hen. VII, f. 3, pl. 11 (1489): "s'il entre et fait leas ou feoffment, pur ceo que le Statut don pouvoir a luy loyalment, et ceo tout pur avantage d'el lesse, et nemy pur avantage d'el feoffor." Y.B. Hil. 15 Hen. VII, f. 2, pl. 4 (1490): "[A]l Statut, ceo fuit fait en l'avantage de ceur que claim ascun interest pur le feoffor, et nemy per l'avantage le feoffor." Y.B. Trin. 15 Hen. VII, f. 12, pl. 23 (1500): "[L]e Statut de R. le 3 per feffment sur confidence ne fuit fait al feffor, mes al proft des auters qui purchase ve eur."

[25] Baker, *OHLE*, vol. 6, 654–59; Hannay, "Statute of Richard III".

[26] Lincoln's Inn MS. Maynard 3, ff. 191–210, passim; see e.g. f. 199v: "Si un feoffee devie et son heir enter il est feoffee de trust et le owner poit enter sur luy." Note also Y.B. Pasch. 4 Hen. VII, f. 8, pl. 9 (Wode sjt.): "le Statut voile pouvoire a cestui que fuit owner a grant un rent." The use of the English word "owner" in the context of land held in use is significant in that it was able to capture the distinctive effect of the 1484 Act in proprietorising the use whilst not granting *cestui que use* a fee or an estate and without compromising the meaning of the legal Latin or Law French *dominus* or *demesne*. For more detail, see Macnair, "Development of Uses and Trusts", 312–13.

[27] Baker, *OHLE*, vol. 6, 665–72; Hannay, "Fraud and Collusion", 80–87. The debate over the proprietary/contractual nature of the trust began in this period and remains controversial for modern legal scholars: see note 14 above.

[28] Baker, *OHLE*, vol. 6, 664–66.

[29] BL MS. Hargrave 87, ff. 427–57; Cambridge University Library (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. A short extract is printed in Baker, *Baker and Milsom*, 118–19. Similar criticisms were raised in the 1530s by the anonymous author of "A Replication of a Serjeant at the Laws of England": J.A. Guy (ed.), *Christopher St. German on Chancery and Statute* (6 Selden Soc. Supplementary Series) (London 1985), 99–105.

[30] For more on the effect of the statute, see Jones, "Trusts in England after the Statute of Uses", 173.

[31] The modern trust emerged from the exceptions to the Statute of Uses; that is to say, uses which were not executed by the statute, namely uses of non-freehold land, uses in the form of a use upon a use and uses in which the feoffees retained active duties. For more detail, see e.g. Baker, *OHLE*, vol. 6, 683–86; N.G. Jones, "*Tyrrel's Case (1557)* and the Use upon a Use" (1993) 14 Journal of Legal History 75; Jones, "Trusts in England after the Statute of Uses", 173, 178–81; N.G. Jones, "The Use upon a Use in Equity Revisited" (2002) 33 Cambrian Law Review 67.

[32] The statute was the subject of a reading by John Boys shortly after its enactment and the later famous readings of Sir Edward Coke and Sir Francis Bacon. Boys: BL MS. Harley 1912, f. 174. Coke: BL MS. Hargrave 33, ff. 134–59v; Professor Sir John Baker MS. 32, ff. 1–2v; The Earl of Leicester MS. 725, 14 ff. (in Coke's own hand, largely consisting of the cases for his reading); F. Bacon, *The Learned Reading of Sir Francis Bacon, One of Her Majesties Learned Counsell at Law, Upon the*

The Statute of Uses was enacted after a series of lengthy negotiations, rejected bills and tense litigation towards the end of the Reformation Parliament.[33] It is likely that the Crown's first attempt at reform was rejected in the first session of the Parliament in late 1529.[34] Following this rejection, the Crown entered negotiations with both Houses, reaching an agreement with a number of peers,[35] which was in turn rejected by the Commons in March 1532.[36] At this point, Edward Hall reports the king promising the Commons that he would "seek out the extremity of the law",[37] a promise which became the litigation in *Dacre's Case*.[38] One further draft bill was prepared c. 1534,[39] likely as a compromise in case the Crown was unsuccessful in *Dacre's Case*.[40] However, it was not needed. Following significant pressure from the Crown, the justices reached a unanimous decision which left titles devolved through uses vulnerable.[41] This was sufficient for the Commons to capitulate and the eventual Statute of Uses was enacted in 1536.[42] The list of complaints known as the *Damna Usuum* was found alongside these draft bills and agreements relating to the passage of the Statute of Uses.

III. The Manuscript, Authorship and Purpose

On 28 July 1540, following a precipitous fall from grace, Thomas Cromwell, the king's chief minister since the early 1530s, was executed on Tower Hill.[43] The downfall of Thomas Cromwell has been described as "unusually sudden" and "full of mystery".[44] For our present purpose,

Statute of Uses: Being His Double Reading to the Honourable Society of Grayes Inne (London 1642). For more on the statute generally, see e.g. Baker, *OHLE*, vol. 6, 672–74; Ives, "Genesis of the Statute of Uses", 673.

[33] Hannay, "Origins of the Statute of Uses"; Ives, "Genesis of the Statute of Uses".

[34] TNA PRO SP 1/56, ff. 36–39; Brewer (ed.), *Letters and Papers*, vol. 4, no. 6043 (1529 draft bill), printed in Holdsworth, *HEL*, vol. 4, 572–74.

[35] BL MS. Cotton Titus B. IV, ff. 114–18; Brewer (ed.), *Letters and Papers*, vol. 4, no. 6044. The text is also printed in Holdsworth, *HEL*, vol. 4, 574–77.

[36] E. Hall, *Henry VIII*, vol. 2 (London 1904), 203. For more detail, see e.g. Hannay, "Origins of the Statute of Uses"; Ives, "Genesis of the Statute of Uses", 682–83.

[37] Hall, *Henry VIII*, 203.

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

[39] TNA PRO SP 1/101, ff. 286–91; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246, printed in Holdsworth, *HEL*, vol. 4, 580–81. For the dating, see Hannay, "Origins of the Statute of Uses".

[40] Hannay, "Origins of the Statute of Uses"; Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries*, 85–86.

[41] J.H. Baker (ed.), *The Reports of Sir John Spelman*, vol. 1 (93 Selden Soc.) (London 1977), 228–30, printed in Baker, *Baker and Milsom*, 131–32; Baker, *OHLE*, vol. 6, 669–72.

[42] There are also two further drafts which were prepared after *Dacre's Case*. 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; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246(1) (incomplete draft of the Statute of Uses, c. 1535/36); TNA PRO SP 1/101, ff. 261–81; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246(2) (complete draft of the Statute of Uses, c. 1535).

[43] G.R. Elton, "Thomas Cromwell's Decline and Fall" (1951) 10 Cambridge Historical Journal 150; D. MacCulloch, *Thomas Cromwell: A Life* (London 2018), 506–31.

[44] For G.R. Elton, "[E]ven in the uncertain and tempestuous times of Henry VIII, Cromwell'sfall from power was unusually sudden and precipitate" and for Jack Scarisbrick, "Cromwell's fall and judicial murder are

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however, the importance of Cromwell's fall is in what he left behind. Following his arrest on 10 June 1540, Cromwell's house and goods were seized,[45] including his extensive archive of surviving papers which contained several important documents relating to the passage of the Statute of Uses, including the account of "mischiefs, wrongs and inconveniences" caused by uses endorsed as *Damna Usuum*.[46]

The manuscript of the *Damna Usuum* consists of five pages with text on one side and part of an envelope endorsed on one end as *Damna Usuum* and on the other as "Inconveniences for Sufferance of Uses". The pages and envelope were bound into the volume SP 1/101 alongside draft bills of the Statute of Uses, the Statute of Enrolments and other Acts which were passed in the later sessions of the Reformation Parliament.[47] Reference to *Letters and Papers* is noted on page 1 with "Vol. X 246(3)" appearing in the bottom left corner, with the stamp of the State Paper Office in the top left corner. There are two foliations, both using *recto and verso*, one printed in the top right corner beginning 219 and another in pencil in the centre at the bottom of the third and fifth pages as 283 and 284.[48] The notes are fairly rough and are not presented with any degree of formality. A reproduction of the text is included in volume 4 of Holdsworth's *A History of English Law*, in which he also numbered the 43 complaints.[49]

The authorship of the *Damna Usuum* is unclear. As Holdsworth noted, the handwriting changes,[50] which, when combined with the somewhat disjointed structure and repetitions, is indicative of it being the work of more than one person. In his printed edition, Holdsworth was likely correct when he suggested that the *Damna Usuum* was the work of two hands, one on the first page and again from the third to the fifth pages, with a second hand on the second page.[51] The second hand is clearly distinct; it is a more classic secretary hand, while the first hand is thinner

full of mystery": Elton, "Thomas Cromwell's Decline and Fall", 150; J.J. Scarisbrick, *Henry VIII* (Berkeley and Los Angeles, CA 1968), 376, 375–80.

[45] Gairdner and Brodie (eds.), *Letters and Papers*, vol. 15, no. 766.

[46] A Tudor personal archive generally consisted of an "out-tray", that is copies of letters sent, and an "in-tray", those received. The majority of Cromwell's surviving papers were letters that he received and his "remembrances", essentially short to-do lists, which appear to have been preparation for his meetings with the king. Shortly following his arrest, Cromwell's secretary, Ralph Sadler, set about destroying the papers in his out-tray, so that what has survived is largely Cromwell's in-tray and remembrances. For more detail, see MacCulloch, *Thomas Cromwell*, 1–3.

[47] Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246. The *Damna Usuum* itself is no. 246(3).

[48] In the printed foliations, it is ff. 219–21v, in the handwritten foliations it is 282–84v. The 282 is missing from the first page. The handwritten foliations were preferred by Holdsworth and Baker and they are also used here: Baker, *OHLE*, vol. 6, 668–69; Holdsworth, *HEL*, vol. 4, 577.

[49] *Holdsworth*, *HEL*, vol. 4, 577–80.

[50] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246(3); ibid., at 578–79, nos. 12, 20.

[51] Holdsworth, *HEL*, vol. 4, 455, 578–79. The first hand ends after no. 12 and recommences at no. 21; nos. 13 to 20 are in the second hand. Black and white photographs of the manuscript can be viewed on State Papers Online, available at http://link.gale.com/apps/doc/MC4301880250/SPOL?bookmark-SPOL&xid=6f161868 (last accessed 17 February 2025). The link is to the original manuscripts contained in Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246, which begins on f. 253 (also foliated as 201); the *Damna Usuum* begins on f. 282 (f. 219).

and slants slightly to the right. On the reverse, the phrase *Damna Usuum* appears to be in the same hand as on the second page, although this can only be advanced with caution as it is just two words which are predominantly minims. The endorsement, "Inconveniences for the Sufferance of Uses", appears to be a later addition.

There are some subtle distinctions in the hand from the first page to the third onwards; however, as noted, Holdsworth is likely correct that they are the same. On the first page reference is made to "*cestui a que use*" and on page three onwards the phrase "*cestui que use*" is used.[52] Letter formation is not always exactly the same; for example, the formation of "*usez*" on page one is subtly distinct from that on page three, on page three the "z" is notably longer than on page one.[53] Furthermore, there are larger gaps between sentences and paragraphs from the third page onwards and the text is slightly larger. Notwithstanding these distinctions, given the more prevailing similarities, it would be unsafe to conclude anything other than the hand from the first page continuing from the third.

Turning to the authorship question, the *Damna Usuum* was found amongst Cromwell's papers and was almost certainly drafted on his behalf during the negotiations which culminated in the passage of the Statute of Uses. The likely candidates for authorship are those lawyers who were close to Cromwell during the Reformation Parliament. It is probable that Audley was first among them – a number of the arguments made in the *Damna Usuum* echo those made by Audley in his 1526 reading – others who may have also been involved were Christopher Hales, Ralph Sadler, Richard Rich and Thomas Wriothesley.[54] However, neither hand could be identified[55] and it therefore seems most likely that the authors were clerks on behalf of Cromwell and his legal associates.

* * *

[52] Holdsworth, *HEL*, vol. 4, 578–79, nos. 4, 21, 23, 26, 30, 32, 33, 35.

[53] Ibid., nos. 3, 12, 28.

[54] J.H. Baker, "Hales, Sir Christopher (d. 1541), Judge", available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-11909 (last accessed 24 May 2024); P.R.N. Carter, "Rich, Richard, First Baron Rich (1496/7–1567), Lord Chancellor", available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-23491 (last accessed 24 May 2024); M.A.R. Graves, "Wriothesley, Thomas, First Earl of Southampton (1505–1550), Administrator", available at https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-30076 (last accessed 24 May 2024).

[55] Comparisons have been made with the hands of Cromwell himself, and the lawyers and secretaries in Cromwell's circle during the Reformation Parliament: Thomas Audley (TNA PRO SP 1/131, f. 99; Gairdner (ed.), *Letters and Papers*, vol. 13, pt. 1, no. 775); Christopher Hales (TNA PRO SP 1/131, f. 1; Gairdner (ed.), *Letters and Papers*, vol. 13, pt. 1, no. 661); Richard Rich (BL Cotton MS. Otho C/X f. 220); Ralph Sadler (TNA PRO SP 1/235, f. 78; SP 3/7, f. 77); Thomas Wriothesley (TNA PRO SP 1/143, f. 106). The hands of Sadler and Rich do bear some resemblance to f. 282v, more so Sadler than Rich, but there are clear distinctions in letter formation in both. Notably the bottom right of the "h's" of both Sadler and Rich falls below the line to the left before sweeping back on itself to the right to join the next letter; whereas, in the hand on f. 282v the bottom right of the "h's" also falls to the left but continues on to loop round.

The 1924 printed edition of the *Damna Usuum* has been invaluable in bringing the existence of the document and its content to the attention of legal historians. However, the fact that Holdsworth presented the *Damna Usuum* as a continuous, numbered list has somewhat distorted our understanding of the document, its composition and its purpose.[56] There is strong evidence within the manuscript to suggest that the *Damna Usuum* is not a continuous document and that it was composed in several stages. This is significant in what it tells us about the nature and purpose of the document.

The first page has both a clear introduction and an obvious conclusion which indicate that it was initially self-contained, rather than the first page of a longer document. It begins with a short preamble in which the author declares: "[h]ere after follows a small part in regard of the mischiefs, wrongs and inconveniences which the King's subjects do suffer by sufferance of uses within this realm".[57] This page ends with the author declaring that he has "omit[ted] the great number of doubts which do rise by uses".[58] That this first page should be viewed as being self-contained can be further supported by the fact that there is no obvious continuation from the end of the page either in the second hand on the next page or when the initial hand continues on the third page.

The second page begins by asking whether a law can be good if when one man benefits hundreds are disadvantaged;[59] it continues by complaining that disputes relating to uses are dominating both arbitration and litigation in the king's courts,[60] before proposing a solution that uses should be abolished.[61] For Baker, this was the remedy being "hidden away in the middle";[62] however, if this page is recognised as being distinct and standalone this cannot be the case. Although not as pronounced as the preamble on the first page, these somewhat hyperbolic statements and the proposed remedy, when they are combined with the change in hand, could, and perhaps should, be construed as introducing a distinct document.

Following these initial complaints and the proposed remedy, the issues raised on the second page become much narrower and more specific; for example, the author decries the impact of uses on dower and curtesy,[63] and on making the presentation of an advowson.[64] That the second page should be viewed as a distinct document can be further supported by physical evidence at the end of the page. The final complaint, which

[56] Notwithstanding the limitations of Holdsworth's list, for ease of identifying individual complaints, reference to his numbering has been used here.
[57] Holdsworth, *HEL*, vol. 4, 577.
[58] Ibid., at 578, no. 12.
[59] Ibid., no. 13.
[60] Ibid., no. 14.
[61] Ibid., no. 15.
[62] Baker, *OHLE*, vol. 6, 668.
[63] Holdsworth, *HEL*, vol. 4, 578, no. 16.
[64] Ibid., no. 17.

considers the effect of uses on forfeiture following a felony, murder or treason being committed by *cestui que use*, is marked by punctuation to indicate the end of the text; this is followed by a significant gap leaving around one-fifth of the page blank.[65] There was clearly room for continuation on the second page which was not utilised; however, notwithstanding this, and the distinct hand, there does appear to be some connection to the following pages.

The third page begins with a degree of reiteration from the second. As noted above, the final complaint on the second page decries the effect on forfeiture when *cestui que use* has committed a felony, murder or treason.[66] The first issue raised on the third page is not a direct repetition of this but echoes it with a similar concern over the effect of *cestui que use* being outlawed.[67] This is interesting in that it suggests some relationship between the second and third pages; however, ascertaining the nature of that relationship is challenging. That they address very similar – yet distinct – points could indicate a continuation from the second to the third page. However, that the second page ends with a substantial gap following the final complaint and that it is in a different hand suggest that any continuation was unlikely to be contemporaneous, which would further indicate that the *Damna Usuum* was composed in stages.

Following this first complaint, the manuscript continues with an identifiable structure across the third and fourth pages. The remainder of the third page goes on to consider several scenarios in which uses subvert the operation of the common law. For example, that there would be no remedy available at common law for *cestui que use* in actions of account, trespass or waste.[68] The last item on the third page appears to be a summary of what has come before in which it is decried that uses began by fraud and deceit and that they should not be allowed by common law.[69] The *Damna Usuum* continues on the fourth page with two complaints about careless feoffees,[70] and another summary of the point that uses prevent remedies being sought at common law.[71] This is followed by two complaints which centre on uncertainty arising from two statutes enacted in the 1480s,[72] before a return to the point that uses undermine actions available at the common law.[73] The last item on the

[65] Ibid., at 579, no. 20.
[66] Ibid.
[67] Ibid., no. 21.
[68] Ibid., nos. 22, 23, 24.
[69] Ibid., no. 29.
[70] Ibid., nos. 30, 31.
[71] Ibid., no. 32.
[72] Ibid., no. 33, 1 Ric. III, c. 1 (1484); no. 34, 1 Hen. VII, c. 1 (1485). For more detail on the statutes, see e.g. Hannay, "Statute of Richard III"; Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries*, 31–36.
[73] Holdsworth, *HEL*, vol. 4, 579, nos. 35, 36.

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fourth page is a very clear conclusion, the text beginning with "finally", in which the author decries uses for having begun by deceit and that they subvert the common law and customs of the realm.

The final page of the *Damna Usuum* represents perhaps the best example of how Holdsworth's edition, by presenting the *Damna Usuum* as a list of numbered complaints, has resulted in our misunderstanding of the document. That the fifth page does not continue on from the fourth is demonstrated by the fact that it begins with an indented preamble,[74] which Holdsworth simply noted as item 37 and is followed by an initial complaint which begins "firstly".[75] That is not to say that the *Damna Usuum* was simply bound into SP 1/101 in the wrong order. In addition to the clear introduction, the text ends halfway down the page which would appear to eliminate the possibility of a continuation either on an earlier or lost page. The more likely explanation is that the fifth page was left unfinished and that the *Damna Usuum* is at least four connected yet distinct documents.

The first page with its explicit introduction and conclusion is clearly a self-contained document. The second page is in an identifiably different hand to the remainder of the document. When combined with this, the first few lines of this page, including the proposed remedy that uses be abolished, can reasonably be construed as introductory. Furthermore, that there is a significant gap from the last item to the end of the page appears to rule out any immediate continuation on another page. The internal structure of the third and fourth pages appears to demonstrate that they should be read together and there is a clear conclusion on the fourth page, with the last complaint beginning "finally".[76] The last page of the *Damna Usuum* is also standalone; it begins with a clear, indented preamble, followed by a complaint beginning "firstly" and with text which ends halfway down the page, making an immediate continuation on a new page unlikely, with the final page being a distinct draft.

* * *

It is easier to demonstrate that the *Damna Usuum* is not one continuous document than it is to ascertain its purpose and how the component parts relate. The evidence is circumstantial at best and renders any conclusions somewhat speculative. The first to consider the purpose of the document was Holdsworth who suggested that the *Damna Usuum*, alongside the early draft bills, were "before Parliament",[77] and that it "may well have been the raw material upon which those who drew the preamble to the

[74] Ibid., at 580, no. 37.
[75] Ibid., no. 38.
[76] Ibid., at 579, no. 36.
[77] Ibid., at 455.

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[S]tatute [of Uses] worked".[78] These two statements are somewhat difficult to reconcile and turn on what Holdsworth meant by "before Parliament". The most obvious reading is that Holdsworth considered the *Damna Usuum* to have been a public document which was put to Parliament for their consideration; this can be supported by the fact that he considered the *Damna Usuum* to have been "an able statement of the case against uses".[79] This characterisation of the *Damna Usuum* as a public document does not sit easily with the second suggestion that it was the raw material from which the preamble to the Statute of Uses was written. The next to consider the purpose of the *Damna Usuum* were Theodore Plucknett, who merely directly quoted Holdsworth,[80] and Bean, who speculated in a footnote that it may have been the preliminary work for the preamble to the Statute of Uses.[81]

In the most recent consideration of the *Damna Usuum*, Baker characterised it as a public document which was intended to persuade the Commons to support reform.[82] To support this position he relied upon Holdsworth's edition to identify concern over the avoidance of feudal incidents as the thirty-ninth complaint of 43. That Baker's conclusion is based on concern over the avoidance of incidents appearing towards the end of the document must render it unsafe. The *Damna Usuum* is clearly more than one document, with concern over incidents appearing as the second substantive complaint on a distinct page which cannot be easily connected to the rest of the document. That is not to say that Baker is necessarily incorrect to argue that the *Damna Usuum* was drafted with the intention to persuade, aspects of the document are certainly dramatic and compelling. Nor that the avoidance of incidents is downplayed, whilst there is a degree of repetition between the pages, concern for incidents still only appears once. However, the physical evidence of the manuscript renders the *Damna Usuum* very unlikely to have been intended as a public facing document. It is unique, there are no known copies and it was composed in several stages. Furthermore, the presentation of the manuscript is rough and it lacks the formality which would be expected of a public document.

There are striking similarities between the complaints raised in the *Damna Usuum* and in the preamble to the Statute of Uses.[83] As we have noted, both Holdsworth and Bean tentatively suggested that the *Damna Usuum* was the basis of the preamble.[84] By considering the nature and

[78] Ibid., at 456.
[79] Ibid.
[80] Plucknett, *Concise History*, 585.
[81] Bean, *Decline*, 289, fn. 1.
[82] Baker, *OHLE*, vol. 6, 668.
[83] *The Statutes of the Realm* (London, 1810–29), 12 vols (hereafter *SR*), vol. 3, 539, printed in Baker, *Baker and Milsom*, 132.
[84] Bean, *Decline*, 289, fn. 1; Holdsworth, *HEL*, vol. 4, 455.

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composition of the document we are able to see more clearly that this is very likely to be the case. The preamble begins by outlining the common law position that land is not devisable by last will before turning to a number of examples which appear to be drawn from the *Damna Usuum*. Concerns over the capacity of those making wills are outlined,[85] as is the effect of uses on feudal incidents,[86] on curtesy, dower and forfeiture,[87] as well as the uncertainty facing those wanting to pursue real or personal actions against *cestuis que use*.[88] The preamble ends by reiterating the central point that uses subvert the operation of the common law, a claim repeated throughout the *Damna Usuum*.[89] Of course, correlation is not automatically indicative of causation and the *Damna Usuum* cannot be said to be definitively the raw material from which the preamble was drawn; however, it is a particularly compelling fact that there is not a single substantive complaint in the preamble which is not in the *Damna Usuum*.

In attempting to understand the nature and purpose of the *Damna Usuum* the timing is important. Given the complexity of the *Damna Usuum* and that the manuscript was composed in several stages, it seems improbable that it was prepared in the short months between the Crown's victory in *Dacre's Case* in Easter Term 1535 and the return of Parliament in early 1536.[90] Moreover, that the *Damna Usuum* was drafted before Easter 1535 seems to be confirmed by the fact that no mention is made of the effect of the decision in *Dacre's Case*, which would have been of great concern to the Commons as it rendered any title traced through a will vulnerable.[91] If the *Damna Usuum* was simply the notes for drafting the preamble of the Statute of Uses one would expect the more developed first and final pages to bear more similarities with the eventual preamble, whereas the complaints that appear in the preamble are drawn from across the whole document. This would suggest that the *Damna Usuum* was prepared earlier, likely as rough notes during the negotiations with the Commons, which were repurposed as the raw material from which the preamble to the Statute of Uses was drawn.

There are important features on the various pages of the *Damna Usuum* which may tell us about the composition of the document and its initial purpose. As noted above, both the first and final pages begin with similar, indented preambles. None of the other pages have such a clear introduction. Furthermore, there is evidence to suggest that a number of the complaints on the first and last pages are summaries of those which

[85] Holdsworth, *HEL*, vol. 4, 578, nos. 8, 9.
[86] Ibid., at 580, no. 39.
[87] Ibid., at 578–79, nos. 16, 20, 21.
[88] Ibid., at 578–80, nos. 5, 16, 22, 23, 27, 32, 33, 41, 42.
[89] Ibid., at 579–80, nos. 20, 22, 23, 27, 32, 36, 38.
[90] S.E. Lehmberg, *The Reformation Parliament 1529–1536* (Cambridge 1970), 216, fn. 3.
[91] Baker, *OHLE*, vol. 6, 672.

are outlined in more detail elsewhere. For example, item one on the first page raises concerns relating to the operation of the statutes 1 Ric. III, c. 1 (1484) and 1 Hen. VII, c. 1 (1485), which are considered in more detail on the fourth page.[92] The effect of uses on the operation of the common law, both generally and specifically in personal and real actions is considered in numerous examples across the second to fourth pages.[93] This concern over real actions is considered in outline on the first and final pages,[94] with personal actions noted on the final page, although they are absent from the first.[95] These apparent summaries may indicate that the middle three pages were composed first and were relied upon in the drafting of the first and final pages.

Ascertaining the nature of the first and final pages and the relationship between them is difficult and any conclusions are inherently speculative. Yet there are important distinctions between the two pages which may be informative. The text on the first starts by declaring: "[H]ereafter follows a small part in regard of the mischiefs, wrongs and inconveniences which the king's subjects do suffer by sufferance of uses within this realm". Whereas the final page begins: "[h]ere follows for what purpose and intent feoffments to uses have been practiced in this realm'". The preamble on the final page is more ambitious and more sharply focused than that on the first. Rather than highlighting the suffering caused by uses, the second preamble repeats Audley's concern for the "evil purpose" of uses by focusing on wrongdoing.[96] There are also a number of further stylistic differences. Each item on the final page begins with the same phrase "to the intent that…",[97] whereas there is no such consistency on the first.

The concerns on the final page, particularly towards the end of the text, are also generally much shorter and more concise than elsewhere in the document. This is very clearly demonstrated in the two items which concern real and personal actions,[98] and also immediately above this in an item which summarises an earlier complaint about the effect of *cestui que use* committing murder, treason or felony.[99] Moreover, with the important exception of concern over feudal incidents, each complaint on the final page is a summary of points which have been raised between the second and fourth pages. In contrast, the first page introduces new ideas and focuses which do not appear elsewhere in the document, such

[92] Holdsworth, *HEL*, vol. 4, 579, nos. 33, 34.
[93] Ibid., at 578–79, nos. 16, 22, 23, 27, 32, 33.
[94] Ibid., at 578, 580, nos. 5, 41.
[95] Ibid., at 580, no. 42.
[96] Ibid., no. 38 ("to the intent and evil purpose that …"); BL MS. Hargrave 87, f. 437v, printed in Baker, *Baker and Milsom*, 118 ("evil purpose of destroying the good laws of the realm").
[97] Holdsworth, *HEL*, vol. 4, 580, nos. 38 to 43.
[98] Ibid., nos. 41, 42.
[99] Ibid., at 579–80, nos. 20, 40.

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as the concern around litigation and the uncertainty of the judges[100] and capacity in relation to wills.[101] The most striking difference between the first and final pages is in how they end. The final item on the first page declares that the author has "omit[ted] the great number of doubts which do rise by uses",[102] whereas the final page appears to have been abandoned without being finished. The text ends around halfway down the page and the final complaint, which is concerned with uncertainty facing those acquiring land, cannot be viewed as a conclusion. This would appear to indicate that either the final page was an early draft which was rejected, with the author starting again on the first page, or it was intended to be the final version, but the task was abandoned entirely.

It is significant that the only mention of the effect uses had on the avoidance of feudal incidents appears towards the beginning of the final page. It may be that Baker is correct to highlight that the Commons were unlikely to be persuaded by this concern over the avoidance of incidents; they had rejected the Crown's initial proposal in March 1532. This could explain why the text ends so abruptly. If the document was drafted with the intention to persuade, it could have been recognised that concern over incidents would be unlikely to prove convincing and that the focus should be elsewhere. Alternatively, it may be that outlining concern over incidents was unnecessary because, unlike in other areas of the common law, the effect of uses on incidents was already widely understood. That the avoidance of incidents does not appear between the second and fourth pages, yet it is included alongside the concise summaries on the final page, could be supportive of the latter. The avoidance of feudal incidents was a long-standing and well-known issue arising from uses detailed consideration of which was unnecessary.

The most likely explanation for the composition and purpose of the *Damna Usuum* is that it was prepared as rough notes to support the Crown's officers during their negotiations with the Commons during the Reformation Parliament. As we have noted, the second to fourth pages were likely drafted first and from these the later first and final pages were written. Which of these two was intended as the final version of the document is unclear; there are reasons to support or dismiss either. The text on the first page is complete; however, its structure and composition are much less focused than that on the final page, which was left unfinished. It may be possible to connect the *Damna Usuum* more closely to the short-lived, abandoned draft of 1534.[103] In the latter

[100] Ibid., at 578, nos. 2, 3, 4.
[101] Ibid., nos. 8, 9.
[102] Ibid., no. 12.
[103] TNA PRO SP 1/101, ff. 286–91; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246(4), printed in Holdsworth, *HEL*, vol. 4, 580–81; noted in Bean, *Decline*, 288. For more detail and discussion of the 1534 date, see Hannay, "Origins of the Statute of Uses".

part of 1534 Cromwell was actively seeking a solution as a favourable decision in *Dacre's Case* was far from guaranteed. In autumn 1534 he sought the advice of the judges and made a memorandum to find "some reasonable way to be devised for the king's wards and primer seisin".[104]

Ultimately, the *Damna Usuum* was made redundant by the decision in *Dacre's Case*. The scheme that it can most likely be connected to was abandoned and the Crown proceeded with what became the Statute of Uses. At this point, it appears that the *Damna Usuum* found its second purpose as the raw material from which the preamble to the statute was composed. The similarities between the concerns raised in the preamble and those in the *Damna Usuum* are striking. Although the purpose of the *Damna Usuum* was to persuade, that is not to say that the complaints that were raised within it were not valid. Indeed, as Holdsworth noted, the *Damna Usuum* makes an "an able statement of the case against uses",[105] and the document is invaluable in what it tells us about the operation of feoffments to uses in the period immediately before the enactment of the Statute of Uses.

IV. Common Law, Conscience and the "Sufferance of Uses"

From the turn of the sixteenth century, contemporary lawyers were being forced to engage with the somewhat inevitable tension caused by the increasing interaction of uses which were upheld in conscience with the common law.[106] One importance of the *Damna Usuum* for legal historians seeking to unpack the nature of uses in this period is that it gives very detailed and specific complaints about the operation of uses. This can be somewhat contrasted with the broader attacks on the nature of the Chancellor's jurisdiction in Audley's reading and "A Replication of a Serjeant at the Laws of England".[107] Furthermore, in being initially composed as notes to support the Crown's officers in their negotiations with the Commons, the *Damna Usuum* gives invaluable insight into the approach taken by the Crown.

That the document was composed in stages has resulted in the complaints initially appearing to be somewhat random, with some points being repeated and others apparently contradictory.[108] In addition to more general and hyperbolic complaints – such as that uses began by deceit and fraud,[109]

[104] Ives, "Genesis of the Statute of Uses", 691. BL MS. Cotton Titus B. I, f. 159v; Gairdner (ed.), *Letters and Papers*, vol. 9, no. 725. For the date, see Ives, "Genesis of the Statute of Uses", 692, fn. 2. The memorandum states that it was to be prepared "for the next session", which was planned to be in November 1535.
[105] Holdsworth, *HEL*, vol. 4, 456.
[106] Baker, *OHLE*, vol. 6, 654–60; Hannay, "Statute of Richard III".
[107] Guy (ed.), *St. German on Chancery and Statute*, 99–105.
[108] E.g. Holdsworth, *HEL*, vol. 4, 578, nos. 8, 9.
[109] Ibid., at 579–80, nos. 29, 36, 39, 40. Note that this complaint is very similar to the argument advanced by Audley in his 1526 reading.

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that they dominated arbitrations and the courts,[110] and that for every positive effect from the employment of uses there were a hundred negatives,[111] commonalities are apparent. There are two clearly identifiable and related themes in the document: the uncertainty caused by uses and that uses undermined operation of the common law. Both of these themes are apparent in the first complaint in the *Damna Usuum* which declared that there could be no common law action against *cestui que use*, except by statute, and that a number of doubts persisted for purchasers of land.[112]

That uses caused a degree of uncertainty with regard to landholding was a frequent complaint throughout the late fifteenth and early sixteenth centuries and this appears to have been central to the Crown's negotiating position. Following the creation of a use to perform a landholder's last will, the landholder would frequently remain in occupation of the land, in receipt of the profits,[113] and perhaps even in possession of the title deeds,[114] notwithstanding that "the common law adjudge[d] the feoffee to be the true owner".[115] The *Damna Usuum* made a number of general complaints with regard to the uncertainty which flowed from uses. For example, that there was doubt as uses creating "double", that is to say deceitful, law,[116] and that the "opinions of the justices do change daily".[117] The latter was likely a reference to the several reported decisions which disputed the nature of uses and the rights of *cestui que use* from the 1490s onwards.[118]

A more specific complaint contained in the *Damna Usuum* and one which echoed a key theme in Audley's 1526 reading, was directed at wills. For Audley, uses to perform last wills, whilst initially a good purpose, had been employed collusively "for the evil purpose of destroying the good laws of the realm".[119] On the first page it was complained that uses to perform last wills were problematic as testators who were close to death

[110] Ibid., at 578, no. 14.
[111] Ibid., no. 13.
[112] Ibid., no. 1.
[113] BL MS. Hargrave 87, f. 437v, printed in Baker, *Baker and Milsom*, 118.
[114] As in Y.B. Trin. 6 Hen. VII, f. 3, pl. 2 (1491).
[115] BL MS. Hargrave 87, f. 437v, printed in Baker, *Baker and Milsom*, 118. The point that *cestui que use* appeared to the world as the tenant and owner is also made in the *Damna Usuum*: Holdsworth, *HEL*, vol. 4, 578, no. 35.
[116] Holdsworth, *HEL*, vol. 4, 579, no. 32; Baker, *OHLE*, vol. 6, 668, fn. 107. A further example of the general uncertainty caused by uses can be seen in no. 3, which complained of feoffors who had enfeoffed feoffees of land across different counties yet only performed livery of seisin in one, a practice which it seems was likely to be common.
[117] Holdsworth, *HEL*, vol. 4, 578, no. 2.
[118] See e.g. *Lady Hastings v Bishop of Salisbury and Hungerford* (1492) Y.B. Trin. 10 Hen. VII, f. 29, pl. 24; J.H. Baker (ed.), *Reports of Cases by John Caryll. Part I: 1485–1499* (109 Selden Soc.) (London 1999) (hereafter, *Caryll's Reports*, pt. 1),75, 81, 102–4; *Dod v Chyttynden* (1502) Y.B. Mich. 15. Hen. VII, f. 13, pl. 1; *Caryll's Reports*, pt. 2, 395–96, 396; *Sandys v Bray* (1511) TNA PRO CP 40/993, m. 541; *Caryll's Reports*, pt. 2, 610; *Gervys v Cooke* (1522) Y.B. Mich. 14 Hen. VIII, f. 4, pl. 5, printed in J.H. Baker (ed.), *Year Books of Henry VIII: 12–14 Henry VIII, 1520–1523* (London 2002), 108. For general discussion of the uncertainty arising from the reported cases, see Hannay, "Statute of Richard III".
[119] BL MS. Hargrave 87, ff. 427–57, 437v, printed in Baker, *Baker and Milsom*, 118.

did not know what they were writing.[120] The point which followed was also critical of land passing by last will but considered the issue from an alternative, somewhat contradictory, angle by declaring that wills could be easily undone by two witnesses attesting to lack of capacity in the ecclesiastical courts.[121] The vulnerability of wills and effect of defects in a will were considered by Audley in the eighth lecture of his 1526 reading at the Inner Temple.[122] If a will was found to be invalid the testator, Audley argued, would be considered to have died intestate for the purposes of 4 Hen. VII, c. 17.[123] The vulnerability of wills was further exposed by the Crown's attempts to stem the loss of feudal incidents by attacking the validity of individual wills which were deemed "fraudulent" or "collusive" in inquisitions *post mortem*.[124] However, notwithstanding this tension, the orthodoxy appears to have been that wills devising uses were in principle considered valid, as they were frequently pleaded in the common law courts up to 1535.[125]

Towards the end of the fourth page of the *Damna Usuum* attention turned to the uncertainty which arose from the operation of two late fifteenth century statutes: 1 Ric. III, c. 1 (1484) and 1 Hen. VII, c. 1 (1485).[126] These statutes were enacted to address the uncertainty that arose when landholders remained in visible occupation of land following the creation of a use to perform their last will. The Ricardian Statute sought to protect purchasers by making conveyances of land by *cestui que use* that was held only for his use good and effectual;[127] and the Henrician Statute allowed an action of formedon to be brought against the pernor of profits, who in this situation was *cestui que use*.[128] The author of the *Damna Usuum* complained that there were a number of doubts, mischiefs and uncertainties which arose through the operation of both statutes. Indeed, the preamble to the Statute of Richard III decried "privy

[120] Holdsworth, *HEL*, vol. 4, 578, no. 8.
[121] Ibid., no. 9; see also R.H. Helmholz, *The Oxford History of the Laws of England*, *Volume I: The History of the Canon Law and Ecclesiastical Jurisdiction, 597–1649* (Oxford 2004), 402.
[122] BL MS. Hargrave 87, ff. 427–57, 445–47v.
[123] Ibid., ff. 445–47v; for the operation of 4 Hen. VII, c. 17, see Baker, *OHLE*, vol. 6, 661–62.
[124] Hannay, "Fraud and Collusion", 65, 76–80; *Re Sir Christopher Wroughton, Hungerford v Regem* (1516) TNA PRO KB 27/1021, Rex m. 8; TNA PRO KB 29/148, m. 55; *The Earl of Derby's Case (1522)*, *Caryll's Reports*, pt. 2, 731, no. 524; see Baker, *OHLE*, vol. 6, 669, fns. 110, 111.
[125] *Re Longford* (1523) TNA PRO C 142/79/173 (inquisition); TNA PRO KB 27/1047, Rex m. 3 (traverse); TNA PRO E 159/304 Hil. 17 Hen. VIII, mm. 23–25 (ousterlemain); J. H. Baker (ed.), *The Notebook of Sir John Port* (102 Selden Soc.) (London 1986), 136, no. 102; *Archbishop of Canterbury v Wyatt* (1524–25) TNA PRO CP 40/1044, m. 419; *Bele v Benet* (1527) TNA PRO CP 40/1054, m. 419; Baker (ed.), *Spelman*, 228, fn. 3; *Archbishop of Canterbury v Morley* (1527) TNA PRO CP 40/1054, m. 615; *Roberts v Sadler* (1527) TNA PRO CP 40/1054, m. 530; *Basse's Case (1535)* TNA PRO CP 40/1084, m. 442; *Capell v Pygot* (1535) CP 40/1086, m. 537; Y.B. Pasch. 27 Hen. VIII, f. 11, pl. 28; *Tylden v Lylle* (1535) TNA PRO CP 40/1086, m. 601; see Baker, *OHLE*, vol. 6, 669, fns. 112, 113, 114. Furthermore, that a will devising the use was considered valid was implicit in 4 Hen. VII, c. 17, being limited to those dying intestate.
[126] Holdsworth, *HEL*, vol. 4, 579, nos. 33, 34.
[127] Baker, *OHLE*, vol. 6, 655; Hannay, "Statute of Richard III".
[128] Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries*, 32–36.

and unknown feoffments [which caused] great uncertainty [...] and grievous vexations [...] among the king's subjects".[129]

That there was concern and uncertainty over the operation of both statutes for contemporary lawyers is further demonstrated by the fact that both statutes were the subject of Inns of Court readings in the late fifteenth and early sixteenth century.[130] The most significant of these was the reading of Gregory Adgore on the Statute of Richard III at the Inner Temple in 1490/91. Adgore's reading is particularly interesting because he was the first to select a contemporary statute outside of the traditional cycle of readings.[131] The importance of Adgore's reading is further demonstrated through the survival of four sets of near-complete manuscript notes from his lectures. Of the other readings on the two statutes, only the reading of John Petit on 1 Hen. VII, c. 1 (Gray's Inn, 1518) has more than one set of surviving notes, with two incomplete manuscripts.[132]

By operation of the statute *cestui que use* had acquired the power to alienate land which was held only to his use;[133] however, it was held that he was not able to license another to act on his behalf.[134] Moreover, as the statute only gave *cestui que use* the power to alienate and he remained unseised, *cestui que use* lacked the necessary possession to support actions of account,[135] trespass or forcible entry.[136] A number of

[129] *SR*, vol. 2, 477.

[130] 1 Ric. III, c. 1 (1484): Gregory Adgore, Inner Temple (1490/91), CUL MS. Hh. 3.10, ff. 19–28; University of Kansas MS. D. 127; Lincoln's Inn MS. Maynard 3, ff. 191–207; University College Oxford MS. 162, ff. 103–10. John Hynde, Gray's Inn (1518), Harvard MS. 125, no. 102. Edmund Knightley, Middle Temple (1523), CUL MS. Hh. 3.9, ff. 91v–92v. 1 Hen. VII, c. 1: John Petit, Gray's Inn (1518), BL MS. Harley 5103, ff. 18–21v; Lincoln's Inn Misc. MS. 486(1), ff. 12v–13v. Edmund Mervin, Middle Temple (1523 or 1530). There are no surviving manuscript notes of Mervin's reading, but it is referenced in R. Brooke, *La Graunde Abridgement* (London 1573), "Feffments", pl. 19 (1530); "Pernor de Profits", pl. 4 (1530). For further detail on the identification of Mervin with 1 Hen. VII, c. 1 in 1523, see Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries*, 110–11.

[131] Baker, *OHLE*, vol. 6, 464; Hannay, *Uses in the Later Fifteenth and Early Sixteenth Centuries*, 110–11.

[132] BL MS. Harley 5103, ff. 18–21v; LI Misc. MS. 486(1), ff. 12v–13v.

[133] Following the statute, *cestui que use* could sell (Y.B. Pasch. 9 Hen. VII, f. 26, pl. 13 (1494) (Bryan C.J.C.P.)); grant a lease (*Dod v Chyttynden* (1502) Y.B. Mich. 15. Hen. VII, f. 13, pl. 1; *Caryll's Reports*, pt. 2, 395–96, 396); grant the next presentation upon an advowson (*Litton v Harvey* (1502) TNA PRO CP 40/1070, m. 103). The same point is made in the *Damna Usuum*: TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, no. 17. Note that it was also held that *cestui que use* could fell timber (*Lady Hastings v Hungerford* (1492) Y.B. Trin. 10 Hen. VII, f. 29, pl. 24).

[134] *Cestui que use* could not license his attorney or a friend to sell for him (Y.B. Pasch. 9 Hen. VII, f. 26, pl. 13 (1494) (Bryan C.J.C.P.)); nor could he license another to fell timber for him (Adgore's reading, c. 1490/91, Lincoln's Inn MS. Maynard 3, f. 202v); nor grant the next presentation of an advowson (*Sandys v Bray* (1511) TNA PRO CP 40/993, m. 541; Baker (ed.), *Spelman*, 234, 236; Anon. Reps. Henry VIII, 24, 25–26). It should also be noted that the question of whether *cestui que use* could make the next presentation upon an advowson was left undecided in *Lady Hastings v Hungerford*. Note also that the *Damna Usuum* mentioned that *cestui que use* could not license another to take timber, graze animals nor take them to slaughter: TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, nos. 18, 19.

[135] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, no. 24.

[136] Adgore's reading, Lincoln's Inn MS. Maynard 3, ff. 201–201v: "Feoffees al use de A et ses heirs et A fait lease pur terme de vie cest forsquez pur part de lour interest car le reverson [*sic*] devient en eux feoffees

uncertainties arose with regard to leases.[137] Whilst it was clear that *cestui que use* could grant a lease for life – the statute expressly empowered him to do so – it was not clear whether seisin would be passed.[138] Furthermore, there was some uncertainty as to whether *cestui que use* could reserve a rent service upon a lease,[139] as the reversion was understood as being in the feoffees.[140] The orthodox view appears to have been that he could, but only by deed.[141] As he was unseised, *cestui que use* could not distrain without his feoffees,[142] nor would he have an action of waste,[143] so the proper recourse to recover unpaid rent would be an action of debt.[144] Alternatively, Baker has identified examples of practice whereby *cestui que use* sought to reserve a right of entry in respect of the lease.[145] More generally, Edmund Knightley, in his 1523 reading, thought that *cestui que use* could enter for breach of condition imposed by him, though not upon a feoffment in mortgage.[146]

As we have noted, the effect of the statute was that every disposition by *cestui que use* would be "good and effectual" against the disponor's heirs and those holding only to his use.[147] Although this addressed the uncertainty facing purchasers by affirming titles acquired from unseised *cestuis que use*, it had a number of unforeseen effects which contributed to further the uncertainty which flowed from uses, particularly around the nature of the interest held by *cestui que use*. One of the most notable

all use A et ses heire et A fait feoffement sur condicon de paiment et non paiment et un reentre per defaulte etc. Et A reenter semble A retiendra et les feoffees."

137 Baker, *OHLE*, vol. 6, 656–57.

138 The question of whether seisin passed on a lease for life granted by *cestui que use* was demurred in *Mordaunt v Byrde* (1523) TNA PRO CP 40/1040, m. 435; see ibid., at 656, fn. 29.

139 Baker, *OHLE*, vol. 6, 656. It should also be noted that *cestui que use* could not confirm rents paid: SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, no. 26.

140 The question of whether the reversion was in the feoffees or the feoffor following the grant of a lease by *cestui que use* was posed by Frowyk in 1489: Y.B. Mich. 5 Hen. VII, f. 5, pl. 11 (1489): "Touts le justices et serjeants negaverunt et issint l'Opinion del Court fuit, et le reversion apres le lease est in le feoffee sur confidence, et nemy in le feoffor"; cf. Danvers J.C.P.: "Come un home poit entre sur son lesse pur terme de vie, et fait feoffment, son reversion passera et uncore il est disseisor quant a son lesse."

141 Y.B. Mich. 5 Hen. VII, f. 5, pl. 11 (1489) (Bryan C.J.C.P.): "le rent est void, s'il ne soit per fait. Come apres le Stat de Quia emptores terrarium ou ne poit reserve a luy rent sans fait mes ove fait il poit"; *Warre's Case (1493)* Y.B. Hil. 8. Hen. VII, f. 9, pl. 1 (Kebell sjt.): "peradventure cest rent n'est un reserve sans fait, mes per zfait peradventure cest bon" ; see Baker, *OHLE*, vol. 6, 656, fn. 31.

142 *Dokker v Slyngesby* (1488) TNA PRO KB 27/909, m. 37; *Dod v Chyttynden* (1502) TNA PRO CP 40/960, m. 437, *Caryll's Reports*, pt. 2, 395–96, 396; Y.B. Hil. 15 Hen. VII, f. 2, pl. 4; Y.B. Trin. 15 Hen. VII, f. 12, pl. 23; Y.B. Mich. 15 Hen. VII, f. 13, pl. 1; Baker, *OHLE*, vol. 6, 656, fn. 27.

143 TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL* vol. 4, 579, no. 23.

144 *Warre's Case (1493)* Y.B. Hil. 8 Hen. VII, f. 9, pl. 1 (Kebell sjt.): "le feoffor avera action de debt."

145 E.g. *George v Sedler* (1522) TNA PRO CP 40/1036, m. 469; CP 40/1054, m. 530; Baker (ed.), *Spelman*, 1, 81, 227 (right of entry reserved by feoffees to perform the will of *cestui que use*); *Bygge v Hyett* (1524–25) TNA PRO CP 40/1045, m. 513 (right of entry reserved for *cestui que use*, undetermined demurrer); see Baker, *OHLE*, vol. 6, 656–57, fn. 33.

146 CUL MS. Hh. 3.9, f. 92: "un entre sur cez feoffez et fait feoffment sur condicon le condicon enfreint cestui que use fist le feoffment entre lez feffez n'entre sur luy auterment est de feoffment fait in mortgage per luy" ; see also Y.B. Mich. 5 Hen. VII, f. 5, pl. 11 (1489) (Bryan C.J.C.P.): "si le feoffor fait feoffment sur condicion [. . .] et pur ceo que le condition est infreint, le feoffor puit entre, et retenir la terre a luy in perpetuum."

147 *SR*, vol. 2, 477.

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aspects of Adgore's reading is his description of *cestui que use* after the statute being the "owner" of land that was held for his use.[148] This is in stark contrast to the position adopted by Serjeant Frowyk in 1502 that *cestui que use* had "no more to do with the land than the greatest stranger in the world", by Audley in 1526,[149] and in the *Damna Usuum* itself.[150] The nature and extent of the interest held by *cestui que use* was a matter of significant contention in the early sixteenth century, with a number of highly technical reported cases which strengthened the proprietary aspect of the use.[151] However, as demonstrated by Audley in his reading and by its inclusion in the *Damna Usuum*, extending this right to one of ownership was controversial in the period immediately before the Statute of Uses and it remains so to this day.[152]

The second identifiable theme running through the *Damna Usuum*, which also touched on the uncertainty that flowed from uses, was the argument that uses served to undermine the common law.[153] As noted, the point is strikingly similar to the argument advanced by Audley in his reading, that uses had been "for the evil purpose of destroying the good laws of the realm",[154] which may further support the suggestion that Audley was involved in the drafting of the *Damna Usuum*.[155] This perspective was also advanced by the anonymous author of "A Replication of a Serjeant at the Laws of England", who argued that uses "began of an untrue and crafty invention to put the king and his subjects from that [which] they ought to have of right by the good, true common law of the realm".[156] Although the similarities between the *Damna Usuum* and both Audley's reading and "A Replication" must be stressed, there are also important distinctions. Unlike Audley's reading and "A Replication", the *Damna Usuum* was not concerned with the nature of the chancellor's jurisdiction; its purpose was to support the Crown's agents in their

[148] Lincoln's Inn MS. Maynard 3, ff. 191–210, passim. See e.g. f. 199v: "Si un feoffee devie et son heir enter il est feoffee de trust et le owner poit enter sur luy." Note also Y.B. Pasch 4 Hen VII, f. 8, pl. 9 (Wode sjt.): "le Statut voile pouvoire a cestui que fuit owner a grant un rent." For the importance of the use of the English word "owner" see note 26 above.

[149] See note 119 above.

[150] Holdsworth, *HEL*, vol. 4, 579, no. 35: "cestui que use [. . .] seems to be tenant and owner to the world which is a great deceit."

[151] See note 118 above.

[152] BL MS. Hargrave 87, f. 437v, printed in Baker, *Baker and Milsom*, 118. Note that Baker cites the manuscript as f. 438 but it is in fact 437v: "for the common law adjudges the feoffee to be the true owner." For more detail on the debate, see Hannay, "Statute of Richard III". For the subsequent debates on the real/personal nature of the trust, see note 14 above.

[153] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 580, no. 36.

[154] BL MS. Hargrave 87, ff. 427–57, 445–47v.

[155] It must be noted, however, that by the 1530s Audley's approach had found support within the legal profession, with Master Hare repeating the view that uses were invented as a fraud of the common law: *Caryll's Reports*, pt. 1, 374–75, no. 13; see Baker, *OHLE*, vol. 6, 667, fn. 98.

[156] Guy (ed.), *St. German on Chancery and Statute*, 103–4. For the question of authorship of "A Replication of a Serjeant", see Baker, *OHLE*, vol. 6, 43, fn. 225.

negotiations with the Commons with its critiques focused on the uncertainty caused by uses and their interaction with the common law.

A particular aspect of the *Damna Usuum*'s consideration of how uses undermined the common law was its stress upon the ways in which uses caused the loss of common law actions, protections and rights. We are told that *cestui que use* would have no actions of account or waste,[157] and that uses served to deprive women of dower and men of curtesy.[158] Further issues arose as a result of the feoffees, and not *cestui que use*, being seised. There was concern that feoffees could be corrupt and *cestui que use* would be left without a remedy at common law.[159] It was also highlighted that if the last feoffee died, his wife would be entitled to dower and if his heir was underage he would be in ward.[160] This is interesting as it appears to demonstrate, first, that the Crown's approach to their negotiations with the Commons before c. 1534 focused most heavily on the vulnerability of *cestui que use* and, second, that M.P.s were not persuaded by this, apparently valuing the flexibility of uses over these vulnerabilities.

Further, more general concerns as to how uses undermined the common law were also raised, in particular that uses caused delays in real actions,[161] that they could be employed to avoid the enforcement of judgment debts,[162] and that uses enabled land to be granted to the church without licence.[163] The best known of these is the effect that uses had in facilitating the avoidance of feudal incidents.[164] As we have noted, this appears once in the *Damna Usuum* towards the beginning of the final page. It is particularly interesting to note that the avoidance of incidents only appears once in the manuscript and not in the earliest part on pages 2 to 4. For Baker, this was feudal incidents being downplayed,[165] which may well be correct; the Crown's focus on highlighting the vulnerability of *cestui que use* would support this. It may also simply be that the avoidance of incidents was so well understood — and the broader

[157] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, nos. 23 (no action of waste against the tenant if *cestui que use* granted a lease), 24 (no action of account against bailiffs), 27 (no action of waste against women with jointures or the feoffees).

[158] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 578, no. 16.

[159] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL*, vol. 4, 579, no. 25. It was debated whether an action on the case at common law might lie against a disobedient feoffee, but no conclusion was reached: *Gresley v Saunders* (1522) TNA PRO CP 40/1046, m. 415, CP Mich. 1522 (reported: Y.B. Pasch. 14 Hen. VIII, f. 24, pl. 2); Baker (ed.), *Spelman*, 22–23; Bro. Abr., "Feoffments al uses", pl. 48, printed in Baker (ed.), *Year Books of Henry VIII*, 170–75.

[160] Holdsworth, *HEL*, vol. 4, 579, no. 31. Both of these points would prejudice *cestui que use*.

[161] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL* vol. 4, 578–80, nos. 5, 28, 41.

[162] Ibid., nos. 6, 30, 42.

[163] TNA PRO SP 1/101, f. 282; Gairdner (ed.), *Letters and Papers*, vol. 10, no. 246; Holdsworth, *HEL* vol. 4, 578, no. 7. It seems that this was at issue notwithstanding the statute 15 Ric. II, c. 5 (1391).

[164] TNA PRO SP 1/101, f. 284; Holdsworth, *HEL*, vol. 4, 580, no. 39.

[165] Baker, *OHLE*, vol. 6, 668.

uncertainty affected by uses far less understood — that preparatory work on incidents was unnecessary.

V. Conclusion

Since the 1920s, our understanding of the *Damna Usuum* and its purpose has been inextricably linked to Holdsworth's edition in which he presented the document as being a continuous list. Careful analysis of the manuscript has shown that rather than being a single document, the *Damna Usuum* was composed in stages. This has significant implications for our understanding of the purpose of the document and what it tells us about the nature of uses immediately before the enactment of the Statute of Uses. Previous historians have thought that the *Damna Usuum* was a single tract presented to the Commons to garner support for reform and that it may have been the material from which the preamble to the Statute of Uses was drawn. This article has shown that the *Damna Usuum* was most likely initially prepared as private notes during the Crown's negotiations with the Commons; there is no evidence that it was ever presented to them. Moreover, we can be more confident than the speculations of Bean and Holdsworth that it may have been the raw material from which the preamble was drawn to argue that this was almost certainly the case.

The *Damna Usuum* was an impressive – and highly informative– consideration of the problems which arose from feoffments to uses before the Statute of Uses. Although uses were considered to be "but a shadow of the thing",[166] the shadow that they cast over the common law was long. The uncertainty caused by the creation of uses and that they would cause a degree of tension with the operation of the common law was perhaps inevitable. From the late fifteenth century, the use had developed to look much less like a purely personal right against the feoffees upheld in Chancery and much more like an independent and real right in the land.[167] These developments were subject to sharp criticism, of which the *Damna Usuum*, written at the height of the Crown's struggle with the Commons over reform, was the most direct and comprehensive.

The document shows that the employment of feoffments to uses caused great uncertainty and had significant, wide-ranging effects on the operation of the common law. The Statute of Uses has long been understood to have been the culmination of a long campaign by the Crown to limit the loss of revenue affected by the employment of feoffments to uses. The importance of feudal incidents to these concerns is downplayed in the *Damna Usuum*. It

[166] Holdsworth, *HEL*, vol. 4, 579, no. 15.
[167] Baker, *OHLE*, vol. 6, 654–60; Hannay, "Statute of Richard III".

is likely that this is because the effect of uses on the avoidance of incidents was much better understood than their effect on the wider operation of the common law. This is the most important aspect of the *Damna Usuum*. It shows us that the uncertainty surrounding the increasingly proprietary use immediately before the Statute of Uses was very real. Although the avoidance of incidents was clearly central to the Crown's motivations, detailed consideration of the *Damna Usuum* shows that the wider impact of uses in undermining the operation of the common law should not be underestimated.

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