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Fraud, Trusts and Trusting: Enforcing Crown Forfeitures in Equity, *c.*1570–1620

David Foster

Faculty of Laws, University College London, London, UK

ABSTRACT

Conveyances with informal agreements to hold for the benefit of the transferor initially proved efficacious in avoiding statutory forfeiture provisions. In the late sixteenth century, the equity side of the Exchequer developed a capacious doctrine of revenue fraud designed to capture such informal arrangements and to subject the transferor to liability for crown forfeitures. Initially drawing inspiration from the 'badges of fraud' in the Statute of Fraudulent Conveyances 1571, the Exchequer quickly lowered the evidentiary threshold required to prove a conveyance fraudulent. A key badge of fraud was an 'entrusting' of the transferee by the transferor. The presence of a conveyance 'in trust' eventually became the sole evidence required to hold certain conveyances fraudulent under the statute. In the longer term, these cases became the precedential basis for holding the beneficiary's right under a trust liable to forfeiture as a matter of doctrine.

KEYWORDS Trust; forfeiture; crown; exchequer; equity; fraudulent conveyances; outlaws; recusants; traitors; fugitives

I. Introduction

Those who expected to find themselves liable to crown forfeitures might take steps to conceal their property in the name of another. From the medieval period, statutory forfeiture provisions had been passed to capture property hidden by means of a use or trust,[1] but these provisions proved difficult to enforce where property was conveyed subject to an informal agreement to reconvey or to hold 'in trust' for the transferor. Notwithstanding the succession of statutes designed to prevent the avoidance of legal rights by

CONTACT David Foster david.foster@ucl.ac.uk Faculty of Laws, University College London, Bentham House, London WC1H 0EG, UK

[1] J.M.W. Bean, *The Decline of English Feudalism, 1215–1540*, Manchester, 1968, 137–140; J.G. Bellamy, *The Law of Treason in England in the Later Middle Ages*, Cambridge, 1970, 191–195; J.G. Bellamy, *The Tudor Law of Treason*, London, 1979, 34–35. These special forfeiture provisions were extended to all cases of treason by the Consequences of Attainder of Treason Act 1541 (33 Hen. VIII, c.20).

feoffments to uses,[2] we find in the preamble to the Statute of Uses 1536 the continuing complaint that, by uses, 'the king's highness hath lost the profits and advantages of the lands of persons attainted'.[3] From the late sixteenth century, the case law increasingly focused on so-called 'fraudulent conveyances' which had the effect of defeating the crown of its forfeitures. The expansive approach to fraud adopted on the equity side of the Exchequer proved effective in protecting crown revenues flowing from forfeitures. Litigation touching fraudulent conveyances made 'in trust' arose in the context of forfeitures for outlawry,[4] recusancy,[5] departure from the realm without licence,[6] and treason.[7] By the second decade of the seventeenth century, the case law had coalesced into a relatively stable body of rules governing crown rights in equity.

This article considers the case law in the period *c.*1570–1620 and the emergence of clear principles governing crown forfeitures on the equity side of the Exchequer. As we shall see, references in the cases to 'conveyances in trust' left ambiguous the technical form of the disputed conveyance; whether a mere informal 'entrusting' or a more formally drafted 'trust' in the form of an active use or use upon a use.[8] The fluidity of the language of trusts and trusting would prove fertile ground for subsequent developments – particularly as later jurists came to regard these early cases as determining the incidents of the beneficiary's right under a trust.

II. Trust, Fraud and Forfeiture

An enduring issue for the crown when enforcing its right to forfeitures of property held upon trust was that legal rights such as forfeiture did not reach equitable rights under trusts without specific statutory intervention. There were two reasons for this: first, trusts were not recognized at common law and as such, the traitor-beneficiary was not regarded as sufficiently linked to the land such that it could be forfeited for his treason.[9] Second, the crown was not regarded as privy to the trust such

[2]On the late medieval regulatory statutes affecting the use, see F. Bacon, *Reading on the Statute of Uses*, London, 1642, 20–25.
[3]27 Hen. VIII, c.10.
[4]*R* v *Byron* (1599) The National Archives: Public Record Office (PRO) E 123/26/59; *R* v *Howse* (1600) PRO E 123/28/68.
[5]*AG* v *Hoord* (sub. nom. *Ford and Sheldon's case*) (1606) 12 Co. Rep. 1.
[6]*R* v *Nottingham* (1609) Lane 42.
[7]*AG* v *Raleigh* (1609) Hardres 498; *AG* v *Abington* (1613) 118 Selden Society 408.
[8]N.G. Jones, 'Uses, Trusts and a Path to Privity' [1997] 56 CLJ 175, at 176–182. See also D. Fox, 'Purchase for Value Without Notice', in P.S. Davies, S. Douglas and J. Goudkamp, eds., *Defences in Equity*, London, 2018, 53, at 55: 'The case law from which Coke and Bacon drew their explanations emphasised that the use was almost a non-legal arrangement'.
[9]*AG* v *Hoord*, 2 (per Popham CJ); *R* v *Nottingham*, 45 (per Sjt Hutton *in arguendo*); *AG* v *Abington*, 418 (per Hobart AG *in arguendo*) and 421–422 (per Tanfield CB). These authorities are discussed in detail below.

that it might claim the benefit of the land in equity.[10] Where, however, the trust was created as part of a fraudulent scheme to defeat the crown of its legal rights, the courts were willing to treat the legal estate as though vested in the beneficiary and, thereby, hold the land subject to the forfeiture in favour of the crown.

The Statute of Marlborough 1267[11] was an early statutory protection for the crown in this regard. That statute applied to 'collusive' feoffments to uses designed to deprive the crown of its rights as feudal lord.[12] Outside of the feudal context, however, the common law was beginning to develop a concept of revenue fraud as early as 1350. In *Walter de Chirton's case* (1350), reported by Dyer and printed in 1586, Walter de Chirton was imprisoned for a debt of £18,000 owing to the crown.[13] An inquisition found that de Chirton had used the king's money to purchase lands in the name of another to his own use. The Exchequer Chamber held that the king was entitled to seize the lands held to de Chirton's use until the debt was repaid (by means of an extent). Dyer's report of the case makes specific use of the language of fraud: 'it was found by inquisition, that he [de Chirton] had purchased certain lands with the king's money, and by covin caused the vendor to infeoff his friends in fee to defraud the king, and nevertheless took the issues and profits of the lands to his own use'.[14] By the 1580s, the case was taken to show that feoffments to uses would not bar the crown's claim where they were part of a fraudulent design to evade the king's rights. Instead, the *cestui que use* was treated as though they were the legal owner and the land transferred to feoffees decreed liable to the crown debts of the *cestui que use*. Following the printing of Dyer's reports, the case was regularly cited to justify equitable interventions vindicating crown rights in the face of fraud.[15]

[10] *AG* v *Abington*, 409 (per Coventry *in arguendo*): 'a trust is less than a use. And a thing in privity cannot be forfeited'. See also the earlier decision in *Witham* v *Waterhouse* (1596) 4 Co. Inst. 87: 'this trust … was a thing in privity, and in the nature of an action, for which no remedy was by writ of *subpoena* … for the trust runneth in privity in this case, and a husband should not be tenant by the curtesy of an use, nor the lord of the villein should have it at the common law'. For detail on the doctrine of privity and the trust, 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*, forthcoming, and D. Foster, 'Enforcing Equitable Rights Against Non-Privies, *c*.1590–1680', in D. Foster and C. Mitchell, eds., *Essays on the History of Equity*, forthcoming.

[11] 52 Hen. III, c.6.

[12] Henry Hobart's reading in 1603 on the statute 27 Eliz. I, c.4 (Cambridge University Library MS, Dd.5.50, fo. 28, at fo.29) distinguished 'fraud apparent' from 'fraud averrable', explaining that fraud apparent was required to engage the Statute of Marlborough. For a recent discussion, see A.J. Hannay, '"By Fraud and Collusion": Feudal Revenue and Enforcement of the Statute of Marlborough, 1267–1526', 42 JLH (2021), 65, esp. 67–80.

[13] 2 Dyer 160a. See also discussion of *Fabel's case* in J.L. Barton, 'The Medieval Use' (1965) 81 LQR 562, at 568.

[14] 2 Dyer 160a.

[15] The case was cited in: *AG* v *Hoord*, 3 (per Popham CJ); *R* v *Earl of Nottingham*, 48 (per Hobart AG *in arguendo*); *AG* v *Abington*, 413 (per Davenport *in arguendo*); and *Sir Edward Coke's Case* (1623) Godb. 289, 294 (per Dodderidge J) and 299 (per Hobart CJCP).

Whilst *de Chirton's case* represented the common law basis for the Exchequer's intervention in cases of fraudulent conveyances, many statutes of the Tudor era contained anti-avoidance provisions which also employed the language of fraud. The Statute of Explanation of Wills 1542, for example, stipulated that fraudulent conveyances to evade wardship, primer seisin, livery, relief and marriage were void as against the crown,[16] whilst the Statute Against Fugitives 1571 provided that fraudulent conveyances were similarly incapable of evading forfeitures for departing the realm without licence.[17] A difficulty with these provisions, however, was their requirement of an 'office found' for the king; i.e. they required a general jury verdict in favour of the crown or an express finding that fraud was present on the facts.[18] This was a high bar at the best of times and it was not uncommon for juries to return a special verdict reciting the facts of the case but without a general verdict in favour of the crown or an express finding of fraud.[19]

In *R* v *Nottingham* (1609),[20] for example, the jury found that, prior to departing the realm, the defendant had made a conveyance: 'in trust … for [himself] … but the intent of the same indenture the jurors in the said inquisition named referred to the judgment of the law'.[21] Without a finding of fraud, the anti-avoidance provisions of the Statute Against Fugitives were not engaged and the crown was threatened with loss of its forfeitures. Having been denied a remedy at common law, the attorney general would then bring an information on the equity side of the Exchequer. By this means, cases touching crown forfeitures came to be litigated in equity.

In the litigation which ensued, questions emerged as to whether equity could decree a forfeiture in circumstances not governed by statutory forfeiture provisions. The statutes required an office found for the crown, but was it open to the barons of the Exchequer to find fraud without a jury verdict to that effect?[22] Moreover, if equity was to decree a forfeiture, how was the

[16] 34 & 35 Hen. VIII, c.5, s.8.
[17] 13 Eliz. I, c.3, s.3.
[18] F.W. Maitland explained that the term 'office found' is one 'of tight compression. An office found is the verdict of an inquest taken *ex officio* (Angl. of office) by a royal officer for the ascertainment of the king's right' (see L. Alston, ed., *De Republica Anglorum*, Cambridge, 1906, Appendix A, 149).
[19] Such special verdicts are also seen in the Court of Wards upon finding a long lease. See *Crowe's case* (1614) British Library Lansdowne MS 608, fo.42v in which the jury 'left it to the court to decree it if they could, without a jury'.
[20] Lane 42.
[21] PRO E 126/1/177v. Similarly, the inquisition in *AG* v *Abington* found the trust of a lease but made no specific finding of fraud. The question of whether a forfeiture could be decreed was left to the judges.
[22] It had been objected, for example, that there was no equity to extend a penal statute. See argument of counsel for the defendant in *AG* v *Hoord*, 2: 'the court cannot adjudge that these recognisances belong to the King by equity of the said statute, because it is penal'. Cf. *Twyne's case* (1602) 3 Co. Rep. 80b, at 82b, discussing the extension of the Statute of Fraudulent Conveyances 1571 to conveyances which defrauded the crown, where it was explained that the statute was 'expounded beneficially to suppress fraud'.

fraud to be proved?[23] The answer to these questions was to be found in the Statute of Fraudulent Conveyances 1571.[24] That statute was understood to permit a finding of fraud on the basis of circumstantial evidence.[25] This 'badges of fraud' approach did away with a need for a jury verdict for the crown[26]; the question of fraud was to be determined by the judges alone.[27] From at least the mid-1590s, the barons demonstrated a willingness to infer fraud from surrounding circumstances in defence of crown forfeitures.[28] Through a judicial finding of fraud on the facts, conveyances upon trust could be subjected to liability for the beneficiary's forfeitures.

III. The Statute of Fraudulent Conveyances 1571

The Statute of Fraudulent Conveyances 1571[29] was initially designed to prevent conveyances which defrauded creditors but was construed by the barons of the Exchequer to include conveyances which defrauded the crown of its forfeitures.[30] The opening section of the statute provided for the:

> abolishing of feigned, covenous and fraudulent feoffments … which … have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end … to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs.[31]

[23] There were particular difficulties in proving intention. It had been said by Bryan J in 1477 that: 'the thought of man is not triable, for the devil himself knoweth not the thought of man' (YB Pas. 17 Edw. IV, fo.1, 2, pl.2). See also the Statute against Fugitives 1572 (14 Eliz. I, c.3) which referred to the 'secret thought of the fugitive' and *AG* v *Abington*, 417: 'of this intent there can be no proof, because the Devil himself is not cognisant of the thoughts of man'.

[24] 13 Eliz. I, c.5.

[25] *Pauncefoot* v *Blunt* (1594) 3 Co. Rep. 82a, 138 Selden Society 563; *Twyne's case* (1602) 3 Co. Rep. 80b; Moo. KB 638; and Hawarde's report in W.P. Baildon, *Les Reportes del Cases in Camera Stellata, 1593 to 1609*, privately printed, 1894, 125–129.

[26] See *Pauncefoot* v *Blunt* (1594) 138 Selden Society 563–564 in which Coke specifically distinguished the provisions of the Statute of Fraudulent Conveyances 1571 from the requirement of an office found in the Statute Against Fugitives 1571 (13 Eliz. I, c.3): 'And see the statute of 13 Eliz., c.3, of fugitives; but there an office must be found concerning the covin'.

[27] *R* v *Nottingham*, 48 (per Hobart AG *in arguendo*), in which the requirement of a jury verdict in favour of the king in *de Chirton's case* was deemed unnecessary on the grounds that: 'we are in a court of equitie by English bill, where the judges are only to adjudge upon the fraud, and there [i.e. in *de Chirton's case*] they were in a court of law, and the fraud was a matter of fact, which ought to be expressly found by the jury, as appears by the books'.

[28] It should be noted that, from at least the late 1580s, the Chancery was willing to infer fraud from surrounding circumstances in the bankruptcy context; see, for example, *Lowe* v *Stockden* (1589) PRO C 33/77/447v. I am grateful to one of the anonymous reviewers for this reference.

[29] 13 Eliz. c.5.

[30] *Pauncefoot* v *Blunt* (1594) 3 Co. Rep. 82a: 'the stat. 13 Eliz. c.5 … doth not extend only to creditors, but to all others who had cause of action, or suit, or any penalty, or forfeiture' (i.e. including the crown). See also 138 Selden Society 563–564 in which Coke remarked that the word 'forfeiture' in the statute 'shall not be understood [to mean] the forfeiture of a bond or recognizance etc., but such a forfeiture as there is in our case for recusancy'.

[31] 13 Eliz. I, c.5.

The broad aims of the statute were achieved by declaring every such conveyance enforceable only against the grantor, their heirs and successors. The statute stipulated, moreover, that the conveyances were to be declared void against others, 'any pretence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding'.[32] The provisions of the statute thus permitted the court to set aside conveyances where fraud could be inferred from the circumstances of the case. In 1585, John Tindall's reading on the Statute of Fraudulent Conveyances 1585[33] listed revocable conveyances, secret conveyances and conveyances in two parts as examples of arrangements caught by the statute.[34] Coke's report of *Twyne's case* (1602)[35] similarly set out a list of circumstances which might attract a finding of fraud, including: feigned consideration or absence of consideration; departing the realm after conveyance; reservation of a power of revocation; and the grantor remaining in possession of the property conveyed. Where these badges of fraud were present, the conveyance could not be pleaded to bar the crown's title by forfeiture.

Between the 1590s and 1620s, however, the number of 'badges' required to find fraud was gradually narrowed. In *AG* v *Hoord* (1606),[36] for example, a trust for a recusant was held to be a fraud, despite having been created prior to the promulgation of the statutory forfeiture provisions in the Religion Act 1586.[37] Such cases suggested that the evidence required by the Exchequer to find a fraud under the statute could be relatively slight. *Hoord's case* demonstrated that, once an act of forfeiture was committed, a pre-existing trust might be decreed fraudulent. This line was pushed further by Sir Henry Hobart in 1613, who argued that:

> Where a man has one seised to his use in trust and commits treason, that the king shall have it by decree. And although his estate was secretly lodged in the hands of another and that, at the time of this conveyance, he does not have an intent to commit treason, yet when he has committed treason, the king will have it.
>
> But it is objected that the statute [of 1571] is made against fraudulent conveyances and not against conveyances in trust, and that the conveyance within this statute should be fraudulent in the beginning and in the bowels of the conveyance. But if such construction shall be allowed this statute will be illusory.[38]

[32] Ibid.
[33] 27 Eliz. I, c.4.
[34] Lincoln's Inn MS 367, fo. 85 at fo. 91.
[35] 3 Co. Rep. 80b. The alternative reports of Moore and Hawarde give variations on this list of badges of fraud. For detail on the civilian context which lay behind the reasoning in *Twyne's case*, see C. Willems, 'Coke, Collusion, and Conveyances: Unearthing the Roots of Twyne's Case' 36 JLH (2015), 129.
[36] *AG* v *Hoord* (1606) 12 Co. Rep. 1; 117 Selden Society 345; PRO E 126/1/50.
[37] 29 Eliz. I, c.6.
[38] *AG* v *Abington*, 415.

In this argument, Hobart seemed to suggest that conveyances upon trust which antedated the treason, and even antedated the intention to commit treason, might be decreed fraudulent. This current of legal thought came close to an assertion that all trusts were, by their very nature, a fraud upon the crown and ought always to be forfeit for the acts of the beneficiary.[39]

Hobart was not alone in this view; uses and trusts had long been associated with the language of fraud.[40] In the 1590s, Coke had remarked that 'there were two inventors of uses, fear and fraud; fear in times of troubles and civil wars to save their inheritances from being forfeited; and frauds to defeat due debts, lawful actions, wards, escheats, mortmains etc'.[41] In 1623, Sherfield had similarly referred to uses as 'nothing but fraudulent tricks to deceive the king and the subject of wardships, reliefs, debts, estates in land, and of just duties out of or by reason of the land'.[42] Nevertheless, there were those who attempted to disaggregate trust from fraud. In his reading on the Statute of Uses, Francis Bacon sought to distinguish the two concepts by reference to the underlying purpose of the arrangement:

> a use is no covin, nor [is it a] collusion, as the word is now used, for it is to be noted, that where a man doth remove the [e]state and possession of land, or goods, out of himself unto another upon trust, it is either a special trust or a general trust. The special trust is either *lawful or unlawful*. The special trust unlawful is … as where it is to defraud creditors, or to get men to maintain suits, or to defeat the tenancy to the *praecipe*, or the statute of mortmain, or the lord of their wardships or the like, and those are termed frauds, covins, or collusions. The special trust lawful is, as when I enfeoff some of my friends, because I am to go beyond the seas, or because I would free the land from some statute, or bond [which] I am to enter into … and infinite the like intents and purposes which fall out in men's dealings and occasions, and this we call confidence, and the books do call them intents, but where the trust is not special, nor transitory, but general and permanent, there it is a use; and therefore these three are to be distinguished, and not confounded [;] covin, confidence, use.[43]

Whereas Hobart had regarded all trusts fraudulent as against the crown, Bacon only considered trusts fraudulent where the conveyance was designed to achieve an unlawful purpose, such as the evasion of a

[39]Cf. the Fraudulent Deeds of Gift Act 1487 (3 Hen. VII, c.4) which rendered void all gifts of chattels made in trust for the donor in order to defraud creditors. See also *Anon.* (1570) 3 Dyer 294, at 295.
[40]J.H. Baker, *Oxford History of the Laws of England*, vol. VI, Oxford, 2003, 666–668.
[41]*Chudleigh's case* (1594) 1 Co. Rep. 120a, 121b; the same sentiment appears in Coke's reading on the Statute of Uses in 1592 (British Library Hargrave MS 33, fo. 135, at fo. 139). See also *Twyne's case* (1602) 3 Co. Rep., 81a.
[42]British Library Hargrave MS 402, fo.34v.
[43]Bacon, *Reading on the Statute of* Uses, 6–7. See also, *AG* v *Abington*, 409 (per Coventry *in arguendo*): 'And he denies that is fraud because then fraud and trust are all one, which he denies'.

forfeiture. By the 1620s, the position reached in the cases reflected the divergence in opinion between Bacon and Hobart; in *AG* v *Abington* (1613) the equity side of the Exchequer held that trusts of leases were always a fraud on the crown where they had the effect of defeating a forfeiture, but that trusts of the inheritance remained generally immune to common law forfeitures.

The implications of this elision between trust and fraud for the development of the trust more generally were significant. By the 1620s, fraud was so easily proved in cases of conveyances 'upon trust' that it was not inconceivable to think that certain trusts were forfeit simply as a matter of doctrine. Indeed, this was the position reached by the mid-seventeenth century in *R* v *Holland* (1648)[44] and, following the Restoration, Hale CB was willing to venture 'that in some cases trusts of inheritance are forfeitable' as well.[45] By the 1670s, it could even be said that the beneficial interest itself was forfeit, and not merely the legal estate to which the trust was annexed.[46] In effect, the courts had recognized a privity between the beneficiary and the crown by forfeiture such that the crown might claim the benefit of the trust in equity. Through these decisions, the beneficiary's right became increasingly crystalline, strengthening the case for its recognition as an equitable interest in land.[47] In subjecting the beneficiary's right to the same liabilities as the legal estate, the developments in the period *c.*1570–1620 were, therefore, a crucial step in the reification of the trust. The remainder of this article will assess how fraud came to justify crown forfeitures in equity in the first place and how, almost simultaneously, the barons came to erode the evidentiary requirements for fraud in defence of the crown revenue.

IV. Outlaws, Recusants, Traitors and Fugitives

The statutory badges of fraud were first applied in cases touching crown forfeitures for outlawry. This approach to fraud was then extended to conveyances by recusants, traitors and fugitives in the early seventeenth century. Each context will be taken in turn.

[44]Aleyn 14; Style 20, 40, 75, 84, 90, 94 (forfeiture of a trust of a copyhold for alienage).

[45]*AG* v *Sands* (1669) in W.H. Bryson, *Equity Cases in the Court of Exchequer, 1660–1714*, Arizona, 2007, 14. Hale CB's view was based on the opinion that the statute 33 Hen. VIII, c.20 applied to trusts (and not merely to uses); see M. Hale, *History of the Pleas of the Crown*, vol. I, London, 1736, 247–248. Cf. J.L. Barton, 'The Statute of Uses and the Trust of Freeholds' (1966) 82 LQR 215, at 216–217.

[46]*AG* v *Fitzjames* (1672) British Library Add. MS 36,197, fo.394, at fo.398: 'after the outlawry the trust of the lease was vested in the king, though not the estate in law'. See also *Balch* v *Wastall* (1718) 1 P. Wms. 445, at 445–446.

[47]Writing *c.*1670, both Sir Matthew Hale and Lord Nottingham had described the beneficiary's right as an 'equitable interest'; see Hale, *Pleas of the Crown*, vol. I, 247–248 and D.E.C. Yale, ed., *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity*, Cambridge, 1965, '*Prolegomena*', c.12, s.5.

1. Forfeiture for Outlawry

Where a defendant to an action or suit refused to appear, he could be outlawed, and his property held forfeit to the crown. The precise effect of a forfeiture for outlawry depended upon whether the outlawry was civil or criminal in nature. In an outlawry for treason or felony, the outlaw would forfeit both his goods and his realty.[48] In an outlawry on a personal action, however, the outlaw would forfeit his goods and merely the profits of his freehold land.[49] Regardless of the type of outlawry, it was not uncommon for those threatened with outlawry to convey their property to another in order to avoid forfeiture. The Exchequer was thus required to develop mechanisms to capture property so conveyed. Such conveyances were often described as conveyances 'to the use of' or 'in trust for' the outlaw. In a series of cases in the late sixteenth century, the Exchequer held that such conveyances 'in trust' were a fraud and could not be pleaded to bar the crown's title by forfeiture.

The case of *R* v *Morgan* (1582)[50] was cited for the following proposition: where, prior to outlawry, A takes a bond in B's name to be held upon trust for A, the bond will be forfeit for the outlawry.[51] The case is only obliquely referred to in the subsequent case law and often for a variety of propositions of law[52]; indeed, the case seems to have been a favourite of Tanfield CB's when discussing the Elizabethan precedents.[53] Nevertheless, the facts of the case – as derived from the records – give some indication as to how early forfeiture cases proceeded when the property of outlaws lay in the hands of others.

On 4 July 1582, a commission issued to inquire what property Myles Morgan 'had in his possession and right, or any other to his use and behoof' at the time of his outlawry on 3 June 1578.[54] By the time the commission

[48]Vin. Abr., vol. xxii, 335, *Utlawry*, Tit.D, pl.6. Freehold land would not be forfeit until inquisition (Vin. Abr., vol. xxii, 344, *Utlawry*, Tit.P, pl.4), but leases were forfeit immediately upon outlawry (i.e. upon a 'bare outlawry'). This point was argued in *Finch* v *Throgmorton* (1586) 2 Leo 205 and affirmed by Tanfield CB in *Sir Edward Dimmock's Case* (1609) Lane 60, at 63. As a result, an outlaw could, prior to inquisition, alienate his freehold land and defeat the King's title by forfeiture (Vin. Abr., vol. xxii, 342, *Utlawry*, Tit.O, pl.1–3, 5, 7–8). Similarly, a lessee, prior to outlawry, might assign his lease and avoid the forfeiture.

[49]Vin. Abr., vol. xxii, 334, *Utlawry*, Tit.D, pl.1–2. On a civil outlawry, goods were forfeit immediately, whilst the profits of his land were not forfeit until inquisition (see Vin. Abr., vol. xxii, 344, *Utlawry*, Tit.P, pl.4).

[50]PRO E 123/7/265.

[51]118 Selden Society 475; Cro. Jac. 512; Vin. Abr., vol. xxii, 333, *Utlawry*, Tit.C, pl.9.

[52]Cf. *Sir Edward Coke's Case*, 294: '24 Eliz. in *Morgan's case* it was adjudged, that lands purchased in the names of his friends for his use, were extended for a debt due by him to the King'.

[53]It was cited by Tanfield CB in *AG* v *Carr* (1618) 118 Selden Society 475 under the name of 'Jones'; cf. the report at Cro. Jac. 512, at 513 in which the defendant's name is listed as 'Birket'; and cf. Tanfield's opinion in *Sir Edward Coke's Case*, 292 in which the defendant's name is listed as 'Morgan'. A search of the records in this period reveals an outlawry of one Myles Morgan (outlawed on 3 June 1578) at PRO E 123/7/265. The indexes for the period contain no references to an outlawry of a Jones or a Birket, nor to relevant cases involving defendants by the names of Jones or Birket.

[54]PRO E 123/7/265. For what precisely Myles Morgan was outlawed, the records do not say; Viner states it was an outlawry on a personal action (see Vin. Abr., vol. xxii, 333, *Utlawry*, Tit.C, pl.9).

issued, Myles Morgan was deceased.[55] The commission found Myles Morgan had been entitled to a lease of the manor of Bassaleg, Monmouthshire, and the tithes of that manor. The commissioners appointed Richard Herbert and others to collect the tithes and hold them to the queen's use. After collecting the tithes belonging to the manor of Bassaleg from one Edmond Morgan, Herbert and his men were set upon by Henry Morgan and William Morgan and a band of some forty men 'armed and arrayed in warlike manner'.[56] Herbert was assaulted, and the tithes collected by him were carried away. The order records that a further one hundred men were stationed nearby to assist, these being led by a further cadre of Morgans: Roland and Thomas,[57] who, we are told, were two of the queen's justices of the peace in Monmouthshire at the time. After the assault on Herbert, the commissioners commanded Edmond and Thomas Morgan to appear; they refused, and a new commission issued to arrest those involved. The commission also ordered:

> forasmuch as … much of the lands, goods, chattels, leases, rents, bonds, writings and other things that were the said Myles Morgan's at the time of his said outlawry and sithence could not be found, that a new commission shall be directed … concerning the premises as also to take … into their hands and safe custody … all such other goods, chattels, rents, tithes, sums of money and other things as by the said new commission shall be hereafter found to belong to her majesty by reason of the said outlawry … And it is lastly ordered that all such persons as have or shall have any of the goods, chattels, tithes or other things aforesaid in their hands our custody … shall forthwith yield and deliver the said goods and chattels to the commissioners … and shall also pay unto them the same rent and sums of money at such time and times as the same shall grow due or ought to be paid.[58]

The original commission had commanded a seizure of any property held to Myles Morgan's use at the date of his outlawry. This second commission was less specific; it merely commanded a seizure of any of Myles Morgan's property, possession of which had fallen into the hands of others. Nevertheless, the case suggests that there was indeed a nascent jurisdiction to order forfeiture of property held to the use of an outlaw in 1582. For an elaboration of the principles on which this jurisdiction was conducted and explicit reliance on the 'badges of fraud' approach, however, we must look to the cases of the 1590s.

The first case in which the Exchequer is reported to have applied the Statute of Fraudulent Conveyances 1571 to crown rights was *Pauncefoot* v *Blunt*

[55]PRO PROB 11/63/614. The date of probate was 6 December 1581. From Morgan's will, we know that Walter Hopkins and Lewis Thomas held various leases upon trust for Morgan. The will directed the trustees to surrender in court all such conveyances required to settle the estate, without encumbrance, upon the heirs of Morgan's body. The trustees were also directed to make a true account of profits received from a lease for three years granted upon trust for payment of debts.
[56]PRO E 123/7/265.
[57]Thomas Morgan was outlawed in 1584/85 (see PRO E 178/1514).
[58]PRO E 123/7/265.

(1594). The case appears in Coke's notebooks[59] and his report of *Twyne's case* (1602)[60] but is otherwise unreported.[61] From the records, we find that John Pauncefoot was indicted for recusancy in November 1583.[62] Thereafter, he fled to the Low Countries and was outlawed upon the indictment (thus triggering a forfeiture for outlawry).[63] A month prior to his indictment, however, John Pauncefoot had assigned various goods and leases to Edward Blunt (or Blount) for consideration stated but not paid (i.e. feigned consideration). Richard Pauncefoot, son of John Pauncefoot, brought his bill in the Exchequer (on behalf of the queen) against Edward Blunt to have the assignments set aside. The barons of the Exchequer decreed that:

> John Pauncefoot … doubting that shortly after he should be outlawed upon the indictment aforesaid, and that thereupon the said … lease … by force of the said outlawry would be forfeited and come to her majesty, he the said John Pauncefoot by fraud and covin between him and the said Edward Blount and of covenous intent and purpose to deceive and defraud her majesty of such rights benefits and profits thereof … did by his deed in writing … grant and convey … the said lease, term and estate for years … unto the said Edward Blounte contrary to the Laws and statutes of this realm and contrary to equity and good conscience[.] It is therefore … declared … that the said grant and conveyance so fraudulently and covenously made … was and is by the laws of this realm … taken and adjudged void, frustrate and of no effect and validity to all intents and purposes against the Queen's majesty.[64]

The fact that the conveyance was made immediately prior to the outlawry upon trust with only a feigned consideration was sufficient evidence from which to make a finding a fraud.

The account in Coke's notebook suggests that there was some debate as to the proper means of pursuing the forfeiture. Coke wrote that:

> Some thought it was void by the common law [citing *de Chirton's case*] … And some thought it would be void under the statute of 3 Hen. VII, c.4 [Fraudulent Deeds of Gift Act 1487]. Although it seemed from the preamble that, even though the body of the Act is general, this Act only applies to creditors who would be defrauded of their duties, it seemed to some, that since the purview was general, it relieved all others who are defeated by such covinous gifts of anything which should accrue to them. But it seemed to everyone that the statute of 13 Eliz. [c.5], makes this clear … ; for the words are 'to the intent to defraud creditors and others of their just and lawful actions, debts, accounts, damages, penalties, forfeitures, heriots … ', by which words shall not be

[59] 138 Selden Society 563.
[60] *Twyne's Case* (1602) 3 Co. Rep. 80b, at 82a.
[61] For other citations of *Pauncefoot's case*, see: *R* v *Earl of Nottingham*, 44 (per Sir Henry Montague *in arguendo*) and Whittaker's reading in 1627 on the statute 13 Eliz. I, c.5 (British Library Hargrave MS 91, fos. 330v–331).
[62] PRO E 123/18/163 and PRO E 123/22/13v.
[63] PRO E 123/18/163.
[64] PRO E 123/22/13v.

> understood the forfeiture of a bond or recognizance etc., but such a forfeiture as there is in our case for recusancy. See … the statute of 13 Eliz., c.3, of fugitives; but there an office must be found concerning the covin.[65]

There were, therefore, various possible routes to the forfeiture under the existing law, but the Statute of Fraudulent Conveyances 1571 was preferred – not least because it avoided the need for an office found in favour of the crown.

Discussing *Pauncefoot* v *Blunt* in the course of his report of *Twyne's Case* (1602), Coke stated that 'it was resolved by all the Barons, that the stat. [of Fraudulent Conveyances] 13 Eliz. c.5 extends to it'.[66] For the avoidance of doubt, Coke explained that:

> it was resolved, that this word 'forfeiture' should not be intended only of a forfeiture of an obligation, recognizance, or such like (as it was objected by some, that it should, in respect that it comes after damage and penalty) but also to every thing which shall by law be forfeited to the King or subject. And therefore if a man, to prevent a forfeiture for felony,[67] or by outlawry makes a gift of all his goods, and afterwards is attainted or outlawed, these goods are forfeited notwithstanding this gift.[68]

Coke thus understood the case to stand for the broad proposition that, wherever the crown's rights were defeated by a conveyance, the courts could apply the badges of the fraud approach to set the conveyance aside.[69]

Ultimately, *Twyne's case* (1602) would put the finishing touches to the badges of fraud approach, with Coke's report giving the classic statement of that decision. As Willems has recently argued, however, the badges of fraud approach derived from late medieval civilian ideas which had been in circulation in England long before the decision in *Twyne's case*.[70] Indeed, there is now further evidence to suggest that the 'badges of fraud' were used to vindicate crown rights in other cases between 1594 and 1602. In *R* v *Byron* (1599–1600),[71] for example, Henry Byron, prior to his outlawry for debt, bargained and sold land to William Arrowsmith. Byron's creditor informed the court that:

> Henry Byron minded to defraud [the creditor] of her said debt, and to defraud her majesty of the profits of his lands hath fraudulently and of purpose made a

[65] 138 Selden Society, 563–564.
[66] 3 Co. Rep., 82a. This point does not appear Moore or Hawarde's reports (cited at n.25 above).
[67] Possibly a reference to *Armstrong's case* (1586/7). The case is cited by Tanfield CB in *AG* v *Carr* (1618) 118 Selden Society 475, 476. *Armstrong's case* has not yet been identified in the indexes to PRO E 123 between 1584 and 1589.
[68] 3 Co. Rep., 82a.
[69] The same approach would be taken in *AG* v *Hoord*, 2.
[70] Willems, 'Coke, Collusion, and Conveyances'. See also J.L. Barton, 'Introduction' in T.F.T. Plucknett & J.L. Barton, eds., *St German's Doctor and Student* (Selden Society 91), London, 1974, xliii.
[71] PRO E 123/26/59. The case (referred to as '*Birow's case*') was cited in *AG* v *Abington*, 418 (per Hobart AG *in arguendo*) and 420 (per Montague *in arguendo*).

> conveyance but two or three months before the said outlawry after judgment … and further that the said Arrowsmith hath openly given out in speeches before the undersheriff of Lanc[ashire] … that he never gave anything for the said lands nor ever had any possession thereof but only used as a friend in trust by the said Henry Byron being his master[.] And to make the said fraud more evident that the said Henry Byron hath caused to be inserted into the conveyance made to the said Arrowsmith a condition that if the said Henry Byron his heirs or assigns should at any time then afterwards pay or tender … unto the said William Arrowsmith his heirs or assigns … the sum of 3s, 4d that then and from thenceforth the said bargain and sale should cease determine and be utterly void.[72]

As this was a civil outlawry, the remedy was a forfeiture of the profits of freehold land for the life of the outlaw (rather than a forfeiture of the land itself). As such, the Exchequer ordered the lands to be seized into the queen's hands and an account of the incomes arising since the outlawry. *R* v *Byron* demonstrated the badges of fraud approach in action; the conveyance was made after judgment in a civil suit, upon a feigned consideration, in trust for the bargainor, with the bargainor remaining in possession and reserving a power of revocation. The presence of these badges of fraud was sufficient for the court to decree the crown entitled by forfeiture for outlawry.

The following year, *R* v *Howse* (1600)[73] applied the badges of fraud approach under the statute to a case of purchase in the name of another.[74] In 1595/96, Robert Howse was outlawed after judgment in 'very many several suits' for payment of debt.[75] The following year, Howse took recognisances from two of his own debtors in the names of William Marler and William Power to hold in trust for himself.[76] The first debtor, John Carew, acknowledged a recognizance for £1000 to Marler and Power who held it in trust for Howse. The second debtor was Matthew Ewens, a baron of the Exchequer; Baron Ewens became bound, at Howse's request, to Marler and Power for £100, again, to be held in trust for Howse. The Exchequer decreed:

> It appeared to this court that the said Howse to whose use the said statute and obligation were made and acknowledged stood outlawed at the time of the

[72]PRO E 123/26/59.

[73]PRO E 123/26/54v, 210v, 223v, 295v; PRO E 123/27/ 204v; PRO E 123/28/68. The case is cited in: *AG* v *Hoord*, 2 ('if a man outlawed buys goods in the names of others, the King shall have the goods in the same manner, as if he had taken them directly in his own name'); *R* v *Earl of Nottingham*, 48 (per Hobart AG *in arguendo*); and *AG* v *Abington*, 410 (per Coventry *in arguendo*), 418 and 420 (per Hobart AG *in arguendo*).

[74]For a discussion of purchase in the name of another and the application of the statutes of Wills and Explanation of Wills, see N.G. Jones, 'Estate Planning in Early-Modern England' in J. Tiley, ed., *Studies in the History of Tax Law, vol. I*, Oxford, 2004, 227, at 231–237.

[75]PRO E 123/26/54v.

[76]The bonds were taken in trust after Howse's outlawry. Had the bonds been taken in Howse's own name, they would have been immediately forfeited to the crown by the outlawry without inquisition (see Vin. Abr., vol. xxii, 334, *Utlawry*, Tit.D, pl.1–2).

> making and acknowledging of the same statute and bond and the money for which the said statute and obligation were made were to be paid to the said Howse and the said statute and obligation should have been first made to him for the payment thereof but afterwards when the said Howse perceived by his learned counsel that if the bonds were taken in his name the same should belong to her majesty therefore he the said Howse of purpose by fraud and covin to deceive her majesty of the forfeiture by the said outlawry of Howse caused the same statute and bond to be taken in the name of the said Marler to the use of the said Howse with condition for the payment of the money to the said Howse … Whereupon the court is of opinion that the said statute and obligation and the sums of money therein contained do and of right ought to belong to her majesty by reason of the said outlawries.[77]

The fact of the trust (created after outlawry) was, therefore, sufficient to prove fraud and permit the court to decree a forfeiture of the recognizance.

The application of the statutory badges of fraud approach to purchase in the name of another was a crucial development. *Pauncefoot* v *Blunt* and *R* v *Byron* had been resolved in favour of the crown by treating the initial conveyance from the outlaw as void for fraud. If the conveyance was void, then legal title remained in the outlaw and the property was liable to forfeiture. Where the outlaw took property in the name of another, a decree that the conveyance was void against the crown would be insufficient to protect the crown's right by forfeiture; after all, legal title had never passed from the outlaw, so treating the conveyance as void would not give the crown title by forfeiture.[78] In *R* v *Howse*, the barons instead reasoned that, had the recognisances been taken in the outlaw's own name, the crown would have been entitled. The barons then proceeded as though legal title had been vested in the outlaw and decreed a forfeiture accordingly. In effect, the outlaw's right under the trust was treated as though it were the legal title to the trust property itself. The justification for this fiction was the fraud that would have otherwise been perpetrated on the crown. Clearly, fraud was proving itself just as flexible in vindicating crown rights as trusts had been in avoiding them.

2. Forfeiture for Recusancy

The Religion Act 1580[79] provided that those failing to attend divine service were liable to a monthly fine of £20. The Religion Act 1586 contained sophisticated anti-avoidance clauses to prevent the evasion of these monthly

[77] PRO E 123/28/68.

[78] Cf. *John Leedes' case* (1589/90) PRO SP 12/235/72 in which it was said that the anti-avoidance provisions of the Religion Act 1586 (29 Eliz. I, c.6) did not extend to cases of purchase in the name of another. Section 4 of the 1586 Act was eventually held to apply to property purchased in the names of others in *AG* v *Hoord* (including trusts created prior to the outlawry). Both cases are discussed immediately below.

[79] 23 Eliz. I, c.1.

penalties.[80] Where a recusant made a conveyance, revocable at his election or in trust for himself or his family, Section 1 provided that such conveyances were void as against the crown. There was no requirement for a jury verdict in favour of the crown or an express finding of fraud.[81] Meanwhile section 4 of the same Act provided for the seizure of the goods and two thirds of the recusant's lands for nonpayment of the recusancy fines. These provisions were clearly an improvement upon the simpler anti-avoidance provisions in the Statute of Explanation of Wills 1542 and the Statute Against Fugitives 1571 (which had required a jury verdict for the crown), but they were far from perfect.

A statement of case, drawn from a legal opinion in the state papers, well illustrates the holes in the recusancy legislation.[82] In 1589/90, the crown was informed of the recusancy of one John Leedes. Leedes held various properties in Sussex and was known to be the beneficiary of several trusts. The question was whether the crown could seize the property held upon trust for Leedes and counsel was instructed to give an opinion on the matter.[83] The facts were as follows: in 1570, Leedes departed the realm without licence. In 1571, the Statute Against Fugitives[84] was passed and the crown claimed the profits of Leedes' freehold land in Sussex, including a significant house at Wappingthorne, as a forfeiture. In 1572, the crown granted its right to the income of Wappingthorne to Leedes' father-in-law, Thomas West.[85] At some stage thereafter, John Leedes returned to England, whereupon Thomas West agreed to hold the income of Wappingthorne on trust for Leedes. Around the same time, Leedes also purchased other lands in the names of others on trust to pay the profits to himself.

The central issue for the crown was the operation of the forfeiture provisions in the Religion Act 1586. The statement of the crown's case contained the following remarks:

> it seemeth doubtful whether … the lands so granted by the Queen as is aforesaid, or purchased by the said J[ohn] L[eedes] in other's names (tho' himself take the profits) shall or may be seised into the King's hands, according to the statute made 29 Eliz. [c.6], for the clause contained in the said Act whereby fraudulent assurances, made by recusants or to their use, was meant to be made void, is only penned in effect thus: vizt. that every feoffment, gift, grant &c. had or made; or to be had or made by the recusant,

[80] 29 Eliz. I, c.6.
[81] 29 Eliz. I, c.6, s.1.
[82] PRO SP 12/235/72 (*c.*1590). An identical opinion appears at PRO SP 12/229/148; it is dated 1589, but is almost unreadable. The names in the opinion are anonymised (e.g. John Leedes is referred to merely as 'J.L.'). The identities of the parties have been ascertained by reference to the close rolls (see PRO C 66/1084/2531 for the record of the crown's grant of John Leedes' lands to Thomas West).
[83] Although unsigned, it might tentatively be suggested that the author of the opinion was the attorney general, John Popham.
[84] 13 Eliz. I, c.3.
[85] PRO C 66/1084/2531.

> and which is or shall be revocable at his pleasure, or in any wise meant for his behoof, relief or maintenance; or at his disposition or wherewith or whereby he shall be maintained, shall be deemed, and taken as void against the Queen, for levying of any sums due to the Queen for recusancy. Which words literally make no estates void, which are held to the use of any recusant but such only as were first created and made by the gift or grant of the recusant himself, albeit the lands, which others hold to his use, tho' not of his own gift be within the intention thereof and would no doubt have been provided for, if it had been thought on by the Penners of the Law.[86]

In the view of the framer of the statement of case, section 1 of the 1586 Act required a grant from the recusant himself, but John Leedes had never granted either of the properties to his trustees. Wappingthorne had been granted to Thomas West by the crown, whilst the other lands had been purchased in the names of trustees and had never been vested in John Leedes himself. The simple device of purchase in the name of another was, therefore, sufficient to avoid the forfeiture provisions of the 1586 Act. The crown was thus left without remedy.

The author of the opinion had relatively little to say on the topic of forfeiture, weakly concluding that:

> I think by another branch of the statute of 29 Eliz. [c.6] against recusants that J [ohn] L[eedes] taking the profits of the lands, although under colour of the grant of the forfeiture for fugitives the lands may be seised to the Queen's majesty. These questions require sound, good deliberation and upon further advisement, I will better resolve therein.[87]

The reference to 'another branch' of the Religion Act 1586 was likely an allusion to section 4, which permitted the crown to seize lands, goods and chattels for nonpayment of the recusancy fines. It may be that counsel considered a purchase in the name of another to be caught by these statutory forfeiture provisions (notwithstanding that the trusts antedated the 1586 Act).[88] Never having been convicted of recusancy, however, Leedes would first have had to be indicted, convicted and failed to pay the fines before those provisions could be engaged. In any case, no further state papers survive relating to Leedes's case and it is perhaps unsurprising that no further process seems to have issued against his lands.[89] Leedes was eventually convicted of recusancy in the 1590s and lived under the constraints of those laws until his death in 1606.[90] Notably, an inquisition post mortem records his dying seised of the manor of Wappingthorne, proof that Leedes had seemingly

[86]PRO SP 12/235/72.
[87]Ibid.
[88]This position was eventually reached by Popham CJ in *AG* v *Hoord* (discussed immediately below).
[89]A search of the indexes to PRO E 123 between 1589 and 1598 revealed no entries pertaining to John Leedes or Thomas West. The legal opinion does not name John Leedes' trustees or the property he purchased in their names; it may be that further process issued against these, as yet, unknown individuals.

managed to avoid a forfeiture for his recusancy.[91] Leedes' case thus demonstrates that the statutory forfeiture provisions were relatively easily avoided by manipulation of the trust in the latter half of the sixteenth century.

It was not until the early seventeenth century, in *AG* v *Hoord* (1606),[92] that the badges of fraud approach was used to plug this gap in the 1586 Act. In that case, the equity side of the Exchequer – on the advice of the common law judges – held the crown entitled to recognisances which had been acknowledged in trust for a recusant on the grounds that 'all recognisances, which were taken in other men's names … shall be presumed in law to be so taken to the intent to defeat the king of his forfeiture'.[93] The case is a rare example of the language of presumed fraud in the reports and seems to indicate a lowering of the evidential threshold required to prove fraud in the Exchequer. In that case, Hoord, fearing a conviction for recusancy, had instructed his debtors to acknowledge several recognisances to various others who, in turn, would hold the recognisances in trust for Hoord. In all, Hoord took seven recognisances in trust for himself; the majority were taken after 1586, but one recognizance was taken on 9 November 1584, prior to the passing of the forfeiture provisions in the Religion Act 1586. On 20 June 1599, Hoord was convicted of recusancy and, upon his subsequent failure to pay the recusancy fines, his property was declared forfeit under the Religion Act 1586.[94] The question for the court was whether trusts of recognisances were within the forfeiture provisions of the Religion Act 1586 and, if so, whether trusts created prior to the Act were nevertheless subject to those provisions.

The attorney general (Sir Edward Coke) brought an information on the equity side of the Exchequer but, after hearing counsels' arguments, the lord treasurer (Thomas Sackville, 1st Earl of Dorset) and the barons of the Exchequer thought the matter 'of great weight and consequence' and 'thought fit to take some reasonable time to consider of the matter and see precedents and to have the opinion of some of the judges'.[95] The subsequent proceedings were reported at length by Coke.

Before the judges, counsel for Hoord argued that there was no forfeiture of a use at common law and that the same principle ought to apply to the trust:

> forasmuch as no Act of Parliament extends to this case, it was said, that the common law doth not give any benefit to the King: for at the common law,

[90]PRO PC 2/22/88 records a request for leniency submitted to the privy council by the ailing Leedes who 'so aged and troubled with dyvers infirmyt[i]es in that sorte as he is not able to styr abrode, muche lesse to travell without indangering of his lyfe, and therfore he hathe made humble sute to be spared'.
[91]PRO C 142/291/123.
[92]PRO E 126/1/50.
[93]12 Co. Rep., 2 (per Popham CJ).
[94]PRO E 126/1/50.
[95]Ibid.

> in a far stronger case, if *cestuy que use* had been attaint of treason; this use forasmuch as it was but a trust and confidence, of which the law did not take notice, it was not forfeited to the King, and could not be granted: and if an use shall not be forfeit, of which there shall be a *possessio fratris*, &c and which shall descend to the heir; *a multo fortiori*, a mere trust and confidence shall not be forfeited.[96]

According to Hoord's counsel, the beneficiary had no right or interest cognizable at law but merely an obligation in confidence to which the crown could lay no claim; in other words, because the trust was not recognized at common law in the first place, the traitor could not be regarded as having a sufficient link with the land to trigger a forfeiture.

Counsel's analogy with forfeiture for treason was instructive. At common law, the use had not been forfeit upon the attainder of the *cestui que use* without an express statute. In the later reign of Henry VIII, two statutes were passed which reversed the common law position,[97] but these statutory forfeiture rules seem not to have been applied to the trust.[98] Rather, the trust was analogized to the 'use at common law', i.e. the use before it was subject to statutory regulation making it liable to legal demands such as forfeiture.

Following this line of argument, Popham CJ admitted that neither a use nor a trust was forfeit for treason at common law 'because it is not a thing of which the common law taketh any notice, for that cestuy que use, hath neither *jus in re*, nor *jus ad rem*'.[99] Nevertheless, Popham asserted that, where fraud was present, a trust could be decreed forfeit:

> by the common law, when any act is done with an intent and purpose to defraud the King of his lawful duty, or forfeiture by the common law, or Act of Parliament, the King shall not be barred of his lawful duty and forfeiture *per obliquum*, which belongs to him by the law, if the act was done *de directo*.[100]

For this proposition, the chief justice relied upon two precedents. The first was *R* v *Howse* (1600),[101] in which a forfeiture was decreed where an outlaw bought property in the name of another, and the second was *Walter de Chirton's case* (1350),[102] concerning execution of crown debts against property purchased in the name of another. Such a practice of

[96] 12 Co. Rep., 2.
[97] 26 Hen. VIII, c.13 and 33 Hen. VIII, c.20.
[98] *Sir Francis Englefield's case* (*c.*1594) 1 And. 293. See also Barton, 'The Statute of Uses', 216–217.
[99] 12 Co. Rep., 2. The language of *ius in re* and *ius ad rem* is reminiscent of that used in *Chudleigh's Case* (1594) 1 Co. Rep. 120, 121a and Co. Litt. 272b.
[100] 12 Co. Rep., 2.
[101] Although not expressly named as such in Coke's report: 'if a man outlawed buys goods in the names of others, the King shall have the goods in the same manner, as if he had taken them directly in his own name' (12 Co. Rep., 2).
[102] 2 Dyer 160a.

citation seems to suggest that the jurisdiction to decree forfeiture for fraud was starting to coalesce in the early seventeenth century such that it could be extended by analogy to new contexts.

Counsel for Hoord had objected that 'no fraud or covin appears in the case'[103] – at least, in part, because one of the trusts had been taken prior to the passing of the 1586 forfeiture provisions. For how could it be said that Hoord had intended to evade the statutory forfeiture provisions before they had been promulgated? In response, the Chief Justice seems to have adopted something akin to a badges of fraud approach. Popham explained:

> there was covin apparent: for when he [Hoord] was a recusant continually after that statute of the 23 El[iz.] [i.e. Religion Act 1580] and for *that* chargeable to the King, for the forfeiture[104] given by the same act, it shall be intended that he took these recognisances, in the name of others, with an intent to prevent the King of levying of the forfeiture: and all the recognisances, which were taken in other men's names after the said act, shall be presumed in law to be so taken, to the intent to defeat the King of his forfeiture.[105]

The language of a presumed intent in Popham's reasoning seemed to push beyond the scope of the previously decided cases.[106] In *R* v *Howse* (1600), fraud had been inferred from the fact that the trust had been created after the outlawry (i.e. after the crown's title by forfeiture had arisen). In *AG* v *Hoord*, Hoord had not been convicted of recusancy at the time the trusts had been created; the crown's title by forfeiture did not arise until Hoord had failed to pay the statutory fines. For Popham, however, the mere fact that Hoord was a recusant, and so liable to be fined at the time the trusts were made, was sufficient to prove the conveyance fraudulent.[107]

Popham's judgment seemed to lower the evidentiary threshold required to prove a fraud. With this observation, the political context surrounding the punishment of recusancy in the period ought not to be overlooked. A flavour of this context can be gleaned from the Exchequer decree. Once Popham's opinion had been certified into the Exchequer, the barons decreed that the recognisances:

[103]12 Co. Rep., 1.

[104]This appears to be a reference to the fines for recusancy; the Religion Act 1580 contained no provision for the forfeiture of goods or chattels for non-payment of the fines. It may be that, where a beneficiary failed to pay the recusancy fines, they became a crown debtor which, in turn, would trigger liability under *de Chirton's case*.

[105]12 Co. Rep., 2. Emphasis in original.

[106]It has not been possible to check Coke's printed report against his original notes of the case; the note-books at British Library Harley MS 6686 stop in the term prior to the decision in *AG* v *Hoord* and the subsequent notebook is missing (see J.H. Baker, 'Coke's Note-books and the Sources of his Reports' 30 CLJ (1972), 59, at 65).

[107]12 Co. Rep., 3: 'although [Hoord] was not a convict until 41 El[iz. (1599)] that is not material, for at all times before that, he was subject to a forfeiture for his recusancy'.

> were taken in trust and confidence to the use and behoof of the said Thomas Hoorde and … are forfeited and for that also they conceive that the said recognisances were … to defraud His Majesty of the said forfeitures which would be very prejudicial to His Majesty's profit and a very dangerous example to other like obstinant recusants to attempt and practice the like cunning and fraudulent conveyances if this so crafty and subtle practice should not be suppressed.[108]

The language of deterrence in the record is a clear indicator of the Exchequer's motives. To have held in favour of Hoord would have been to incentivise the making of similar trusts to evade forfeiture. This policy of deterrence may well have been sufficient to justify the court presuming fraud in any case where a conveyance by a recusant had the effect of evading a crown forfeiture.[109]

3. Forfeiture for Treason

Following *AG* v *Hoord* (1606), *AG* v *Raleigh* (1609)[110] may be seen as both extending the badges of fraud to forfeiture for treason and further lowering the evidentiary threshold required to prove fraud.[111] The issue in *AG* v *Raleigh* was whether land conveyed prior to committing an act of treason could be decreed forfeit and, like the decision in *AG* v *Hoord*, appeared to raise the issue of presumptions of fraud to justify a forfeiture. In 1609, Sir Walter Raleigh was attainted of treason for his alleged role in the Main Plot of July 1603. Any property of which he was seised or possessed at the date of the treason (i.e. July 1603) was forfeited to the crown. Sir Walter fought the king's title by forfeiture strenuously. In the Exchequer, Sir Walter alleged that he was neither seised nor possessed of any real property, having disposed of much of his wealth prior to July 1603. The question for the Exchequer was whether the crown might nevertheless be entitled to the lands conveyed prior to the treason. The several extant reports of the case contain conflicting accounts of the facts. It is, therefore, necessary to have recourse to the record to construct a timeline of events.[112]

On 18 January 1592, the queen prevailed upon the newly installed Bishop of Salisbury (John Coldwell) to part with the manor of Sherborne, Co.

[108]PRO E 126/1/50.

[109]See also *AG* v *Carye* (1609) PRO E 126/1/137 in which, after conviction, a recusant had purchased lands in the name of another. Such a purchase was clearly fraudulent as against the crown. The trustee ultimately compounded for the value of the trust property, rather than challenge the crown's right to the forfeiture.

[110]Hardres 498; Lane 48; Lincoln's Inn MS Misc. 499, 253, 423 and 486; 117 Selden Society 364; Hale, *Pleas of the Crown*, vol.I, 251. These reports are helpfully collected in W.H. Bryson, *Reports of Cases in the Court of Exchequer, 1608–1648*, Indianapolis, 2016, 52–54.

[111]A.J. Hunt, *The Law Relating to Fraudulent Conveyances*, 2nd ed., London, 1897, 120: 'In *Sir Walter Raleigh's case*, the act of treason upon which the attainder followed was long after the date of settlement, but the instrument was nevertheless held void'.

[112]PRO E 126/1/108, 114, 127 and 146.

Dorset, for a term of 99 years. On 27 January, the queen assigned the lease for 99 years to Sir Walter Raleigh. In 1598, the queen took a conveyance of the manor in fee from the Bishop of Salisbury and conveyed the same to Sir Walter. Prior to the grant of the fee, Sir Walter had assigned the lease to his infant son (also called Walter) to prevent a merger of the lease with the fee.[113]

On 20 February 1603, Sir Walter purported to convey the inheritance to himself for life, remainder to his son. It was upon this ground that Sir Walter could claim he was not seised of the inheritance at the time of his alleged treason in July 1603. When the conveyance was examined by the Exchequer, however, it was found that: '[t]hat part of the sentence that should have appointed the said Sir Walter Raleigh his heirs and assignees of such as he had estate in the same premises to stand seised thereof to the intended uses was utterly omitted'.[114] Sir Walter's counsel admitted that 'the fault of the said deed and conveyance was so apparent and gross that it could cause no use to rise nor could be in any way wise maintained or defended and therefore did in all humility leave the said case to the judgment of the court'.[115] As a result, the lord treasurer (Robert Cecil, Lord Salisbury), the chancellor of the treasury (Sir Julius Caesar) and the barons of the Exchequer decreed that conveyance 'utterly void and insufficient and of no force to bar the king's majesty … of the inheritance thereof'.[116]

Having decreed a forfeiture of the inheritance, the court turned to the lease for 99 years. Sir Walter argued that the lease of Sherborne, having been assigned to his son in 1597/8, could not be subject to the forfeiture. Under section 5 of the Statute of Fraudulent Conveyances 1571, a conveyance was excepted from the statute where it was made 'upon good consideration and *bona fide* lawfully conveyed … to any person … not having … notice or knowledge of such fraud, covin or collusion'.[117] Sir Walter explained his motive behind the assignment thus:

[113]Hardres 498. Such a conveyance would also bar his wife's dower of the inheritance; indeed, Sir Walter later apologised to his wife for leaving her such a meagre estate at his death, see E. Edwards, *Life of Sir Walter Ralegh, vol. II*, London, 1868, 284. Sir Walter's motives for making the assignment appear from his private correspondence with Robert Cecil (later Lord Salisbury, the lord treasurer and judge in *AG* v *Raleigh*). In December 1594, Sir Walter wrote to Cecil of his fear that execution might be taken against his property in satisfaction of a debt on which he was surety. In the letter, Sir Walter confided that he had conveyed his estates to his son such that judgment creditors might have no execution thereupon (see R.A. Roberts, ed., *Calendar of the Cecil Papers in Hatfield House*, *vol. V*, London, 1894, 46–77). Had this fact entered the court record, the case for setting aside the lease for fraud would have been all the more straightforward; on which, see Hobart AG's argument in *R* v *Nottingham*, 47: 'the statute of 13 Eliz. [I, c.5] is to avoid all fraudulent conveyances, against such as by any means may be hindered thereby, yet the intention was not to defraud the party, who is thereby defrauded; but some other, and therefore although [the conveyance] was not to defraud the King in our case, yet being fraudulent it is void against him by this statute, for he should be hindered thereby'.

[114]PRO E 126/1/114. 10 November 1609.

[115]Ibid.

[116]Ibid.

[117]13 Eliz. I, c.5, s.5.

> for the natural love and affection which he bore to the said Walter Raleigh his then only son and being still desirous as well to settle and establish some estate of and in the castles lordships and manors of Sherborne … for his better maintenance and advancement, as also for some livelihood and provision for his wife … he the said def[endant] did bona fide … without any intention of deceit … assign … the residue of the said lease … unto his said son without any power of revocation reserved.[118]

Sir Walter's description of the conveyance as '*bona fide*' and having been made for 'natural love and affection' may have well been a reference to section 5 of the Statute of Fraudulent Conveyances 1571. If it was a reference to this section, it was nevertheless a weak argument; *Twyne's case* (1602) was clear that consideration of natural love and affection was insufficient to satisfy the requirements of section 5.[119]

In response to Sir Walter's plea, the attorney general (Sir Henry Hobart) produced witnesses who alleged that Sir Walter had retained possession of the land and treated the lease as his own ('as if the interest and estate … had been plainly and *bona fide* in … Sir Walter Raleigh and not in his son'[120]). The witnesses claimed that Sir Walter had, *inter alia*: taken the rents and profits to his own use; granted diverse copyholds; sued and been sued in his own name in relation to the lease; and surrendered the lease to the bishop of whom it was held in exchange for a grant of the premises in fee farm.[121] Moreover, the witnesses alleged, Sir Walter did all of this 'without making any mention of the estate thereof to be in his said son or wife or any other but himself'.[122] Following this review of the evidence, the attorney general concluded that 'either there were no such leases or estates made at all or if any such leases and estates were made by him … the same were made but in trust for the use of the said Sir Walter and not bona fide to the use and benefit of such as the same were made or pretended to be made unto'.[123]

Reconstructing the attorney general's arguments from the records, it seems that, for Hobart, the donor's retention of possession was itself evidence of a conveyance made 'in trust' to defraud the revenue.[124] Such an argument certainly suggests an elision of ideas of trust and fraud, but it was not wholly unorthodox. After all, Coke's report of *Twyne's case* had

[118]PRO E 126/1/146, 23 November 1609.
[119]3 Co. Rep., 81a-81b. This point does not appear Moore or Hawarde's reports (cited at n.25 above).
[120]PRO E 126/1/146.
[121]Ibid. (citing especially the evidence of John Meeres). The surrender of the lease to the Bishop of Salisbury in exchange for a grant in fee farm was set aside by the Exchequer.
[122]Ibid.
[123]Ibid.
[124]A similar point is made in Whittaker's reading in 1627 on the statute 13 Eliz. I, c.5 (British Library Hargrave MS 91, fo.330, at fo. 332v): 'and it is said that a conveyance to sons is a voluntary conveyance and which conveyance to sons implies a trust and therefore a trust is fraud of the statute of 27 Hen. VIII against purchasers' (author's translation).

also used the language of trust and fraud in conjunction with a donor retaining possession: 'Here was trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with trust, and trust is the cover of fraud'.[125] The language of 'trust' here is used in the sense of 'collusion' between donor and donee.[126] This shift in language from 'trust' to 'fraud' placed the two words on equivalent footing and seemed to suggest that all cases of 'trusts' or 'entrustings' of property were a fraud if they had the effect of defeating the crown's rights by forfeiture.[127] As the grounds for finding fraud widened, it became increasingly arguable that all trusts were frauds and, hence, that all trusts were forfeit.[128]

Ultimately, the retention of possession point was damning for Sir Walter and he failed to produce any witnesses in his defence.[129] The Exchequer accepted the attorney general's argument, holding that the assignment had been made in trust for Sir Walter and was a fraud on the crown. The record gives a flavour of the disbelief with which the court had heard Sir Walter's defence that the assignment had been made *bona fide* and without fraud:

> It fully and plainly appeared unto this court that the said Sir Walter Raleigh from time to time and always sythens the said lease of 99 years of the premises was made and assigned unto him, as well as sythens [1598] … being the time of the said conveyance … supposed to be made for his said son, … had … received the rents issues and profits … and kept the courts of the said manors and granted copyholds expressly in his own name … without ever making mention of any estate or interest thereof to be in his said son[.] And for that it likewise appeared that the said Walter Raleigh the son at the time of the said pretended conveyance … was but of the age of six years and no more whereby it seemed *utterly improbable* that the said Sir Walter would convey over his said lease and interest in the said … manors … and wholly

[125]3 Co. Rep. 80b, 81a (author's translation). The original reads: 'Icy fuit trust enter les parties, car le donor possesse tout, et use eux comme les biens propres, et fraud est tout foits apparel et clad ove trust, et trust est le cover de fraud'. The translation at 76 ER 809, 813, alters the meaning by shifting from 'with trust' to 'with a trust': 'Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud'. Coke's reports were translated into English in 1658. The 1658 edition reads 'fraud is always apparelled with trust'. This section has become 'a trust' by the 1776 edition.

[126]On the distinct uses of the language of 'trust' in the context of fraudulent conveyances, see also Willems, 'Coke, Collusion, and Conveyances', 137.

[127]See also Bramston's reading in 1623 on the statute 27 Eliz. I, c.4 (British Library Hargrave MS 402, fo. 26, at fo.31v) asserting that conveyances 'sur confidence' were caught by the Statute of Fraudulent Conveyances 1585 because the preamble treated fraud and trust together and citing *Twyne's case* for the proposition that '[t]rust [est] un marque de fraud'.

[128]The same line would be taken by Hobart AG in his argument in *AG* v *Abington*, 415. Cf. Bacon, *Reading on the Statute of Uses*, 6–7.

[129]Sir Walter's solicitor, John Shelbury, merely explained that: 'the reason why they examined no witnesses was that for they having talked with such as they did purpose to have examined in the said cause, they found that although they [the proposed witnesses] could speak for the making of the said pretended conveyance, yet they could not say whether the same were made in trust or not, and therefore thought it to small purpose to examine them' (PRO E 126/1/146).

> vest the same in the said Walter Raleigh his son being an infant of so tender years thereby leaving it in the power of his son at any time when he should come to years of judgement utterly to exclude and put him out of the main part of his living and estate.[130]

It thus appeared that the lord treasurer and the barons simply refused to believe that anyone would convey such a term to an infant absolutely. The decree concluded:

> It is therefore upon all the said proofs … this day declared … by … this court that the said pretended conveyance and assignment of the said lease … was and were made upon secret trust and confidence only to the use and benefit of the said Sir Walter and to be disposed at his will and pleasure[.] And that therefore the king's majesty ought and is to have the same by force and reason of the said attainder of the said Sir Walter Raleigh in as full and ample manner as if the same had been in the hands and possession of the said Sir Walter Raleigh himself and not assigned over to his said son or others to his use as is pretended[.][131]

In a later case, the attorney general (Sir Henry Hobart) explained the reasoning in *AG* v *Raleigh* in the following terms:

> although no fraud be found in the case, but only it appeareth by circumstances of witnesses here examined, that Sir Walter Raughley took the profits of the land, and held courts in his own name until the attainder, yet the said assignment was conceived to be in trust, and therefore decreed to be void against the king as for fraud, although he was convicted of treason a long time after, and so the king's title, subsequent to the said assignment.[132]

Hobart's explanation of the case is notable for the assertion that the finding of a conveyance 'in trust' was itself sufficient to prove a fraud ('the assignment was … in trust, and *therefore* … void … for fraud'[133]). Developing the position in *AG* v *Hoord* (1606), the cases seemed to be moving towards a presumption of fraud in all instances where the crown was defeated by a conveyance made 'in trust'.[134]

In *AG* v *Raleigh*, as in *AG* v *Hoord*, the conveyance was made prior to the crown's title by forfeiture having arisen. Unlike Hoord, who had been a recusant at the time of making the trusts, there was no evidence to suggest that Raleigh had assigned the lease in the expectation that the crown would claim his estates by forfeiture. Such an expectation had been a badge of fraud in *Pauncefoot* v *Blunt* (1594) and *R* v *Byron* (1599) but was absent from *AG* v *Raleigh*. Sir Walter had assigned the lease at least five years before the

[130]PRO E 126/1/146. Emphasis added.
[131]Ibid.
[132]*R* v *Nottingham*, 48.
[133]Ibid. Emphasis added.
[134]12 Co. Rep., 2: 'all recognisances, which were taken in other men's names … shall be presumed in law to be so taken to the intent to defeat the king of his forfeiture'. The shift toward presumed fraud would become clearer in the case of *AG* v *Abington* (discussed below).

treason of which he was convicted took place and at a time when he may have had no reason to suspect he would be indicted for treason; certainly, no evidence to the contrary appears on the record.[135] In *Raleigh*, the retention of possession under a voluntary conveyance was sufficient to conclude that the conveyance was made 'in trust' and was fraudulent as against the crown. *Raleigh's case* demonstrated a further lowering of the evidential bar for proving fraud in forfeiture cases and came ever closer to decreeing that all conveyances 'in trust' were a fraud on the revenue and, for that reason, liable to forfeiture.

4. Forfeiture by Fugitives

Fugitives were those who departed the realm and, upon receipt of a royal command, refused to return. Fugitives were liable to forfeiture of their property in England.[136] In 1571, parliament extended the definition of a fugitive to those who departed the realm without licence and did not return within six months (or upon receipt of a royal command).[137] The anti-avoidance provision in section 3 of the Statute Against Fugitives 1571 provided that fraudulent conveyances, entered into after the would-be fugitive had determined to pass out of the realm, were void as against the crown.[138] The section required an office found before the crown could seize property concealed by the fugitive in the names of others.[139] However, this provision was almost immediately found to be unworkable; it was unclear how the intention not to return was to be proved. The Statute Against Fugitives 1572 was passed to remedy this problem. This statute provided that the fugitive's intention:

> which is but a secret thought of the fugitive, whatsoever his words or speech be, is not material, but the act and deed subsequent, viz. the not returning of every such fugitive according to his licence … shall be taken and deemed a sufficient proof of the precedent determination of the same party not to return according to his licence; anything to the contrary hereof in any wise notwithstanding.[140]

This clarifying provision seems not to have resolved all doubt, however, and, in *R* v *Earl of Nottingham* (1609),[141] the attorney general was forced to bring an information in the Exchequer after a jury failed to return a finding of fraud against Sir Robert Dudley.

[135]Indeed, the reports are clear that the purpose of the conveyance was to prevent merger of the lease with the inheritance (117 Selden Society 364).
[136]Forfeitures in these circumstances had occurred since at least the reign of Edward II (see 2 Dyer 128b, pl.61).
[137]13 Eliz. I, c.3.
[138]Ibid., s.3.
[139]Ibid., s.3.
[140]14 Eliz. I, c.6, s.2.
[141]Records found at: PRO E 126/1/129, 129v, 132v, 138 and 177v.

In that case, prior to his failure to return to England upon royal command, Sir Robert Dudley made a revocable conveyance in fee simple to the Earl of Nottingham, for consideration expressed in the deed, but not paid. The earl covenanted to grant such estates to whomever Sir Robert should appoint. Thereafter, the earl granted a lease to Sir Robert Lee upon trust to pay the profits thereof to Lady Dudley for ten years (if the earl's estate should continue so long unrevoked). Sir Robert travelled to Venice with royal licence but, upon receiving news of Sir Robert's conversion to Catholicism and his apparently bigamous marriage to his cousin, the king commanded his return under pain of forfeiture of his lands in England.[142] Sir Robert refused the order to return and a commission issued to discover what lands Sir Robert held 'or others for him in use, or upon confidence'.[143] The jury returned a special verdict finding the revocable grant of the fee to the Earl of Nottingham. The verdict concluded that the conveyance 'was made in trust and confidence for the said Sir Robert Dudley and to be disposed at his will and pleasure … but the intent of the same indenture the jurors in the said inquisition named referred to the judgment of the law'.[144]

Lacking a general verdict for the crown or an express finding of fraud by the jury, the attorney general exhibited an information in the Exchequer to have a decree in equity for the lands held for Sir Robert Dudley's benefit. Counsel for the crown (Sir Henry Hobart AG and Sir Henry Montague) argued explicitly from the Statute of Fraudulent Conveyances 1571, making significant use of the previous decisions in which fraud had justified forfeitures for crown debt, outlawry and recusancy.

Drawing upon the badges of fraud in *Twyne's Case*, Montague contended that the findings upon inquisition amounted to proof that the conveyance was made in trust and was fraudulent in nature:

> trust between parties is fraud, as to the King, and in this case the badges of fraud are found by the office. First, his purpose to go beyond the seas. Secondly, his bargainees are not privy to the deeds.[145] Thirdly, no sum was paid by them. Fourthly, here is a power of revocation. Fifthly, covenants to execute all grants, as Sir Robert Dudley appointed. Sixthly, the subsequent act, that is, viz. his staying beyond the seas, and his not returning upon the king's command, and although there be no fraud between the parties who are the bargainees, and so the fraud is only of one partie … there are divers cases in our books to prove the inveterate hatred, which our law beareth to

[142]S. Adams, 'Sir Robert Dudley (1574–1649)', Oxford Dictionary of National Biography, 2004. Available online at: https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-8161.
[143]Lane, 42.
[144]PRO E 126/1/177v.
[145]The Earl of Nottingham had alleged that he was not privy to the deed until after it had been executed (see Lane, 42).

> all acts which are fraudulent … and as it is said in *Twines case* … all frauds are covered with trust expressed, or implyed, and here is an express trust … that this conveyance being void by reason of the fraud, by the law it is more clear, that it shall be decreed to be void.[146]

The fact that the conveyance was revocable, upon trust, lacking consideration and made prior to the grantor's departure from the realm was a sufficient basis from which to make a judicial finding of fraud, notwithstanding the jury's failure to return an express finding of fraud on the inquisition.

Serjeant Hutton, for the defence, argued that there was a trust between the parties and that the common law took no notice of trusts. He asserted that 'this confidence betwixt the bargainor, and the bargainee was as an use at the common law'[147] and, therefore, could not be forfeit 'without an express statute'.[148] Regarding the argument from fraud, he variously argued: that there were no badges of fraud ('in our case there are not any badges of fraud, but only a trust betwixt the bargainees, and … a bargain and trust may be made without fraud, although the bargainor continues in possession'); that the jury had returned no verdict of fraud ('the jury here have found no fraud, and … that the fraud ought to be found by the jury'); and, finally, that, even if there had been fraud, an express statute was still required ('a trust or confidence is not forfeitable (although they are begotten by fraud) without a special act of parliament').[149]

In response, the attorney general argued that the circumstances of the case were sufficient grounds to find a fraud, noting: first that 'a conveyance which is revokable at the will of the bargainor is meerly fraudulent against any interest of forfeiture'[150]; and, secondly, that by Sir Robert's refusal to return, a 'contempt subsequent is a sufficient proof … that the conveyance was made fraudulently to prevent the prejudice, which might accrue unto him by such contempt'.[151] The attorney general then urged the same expansive reading of the Statute of Fraudulent Conveyances 1571 found in *Pauncefoot* v *Blunt* (1594):

[146]Lane, 44.
[147]Ibid., 45.
[148]Ibid., 45. Hutton specifically contrasted the present case with the statutory provisions governing trusts of chattels. According to Hutton, trusts of chattels were governed by the Fraudulent Deeds of Gift Act 1487 (3 Hen. VII, c.4): 'if a man outlawed purchase goods, or takes an obligation in trust, the King shall have them, for this is by the statute of 3 H. 7, cap. 4, but this concerns not land, and therefore we are at the common law'.
[149]Ibid., 45.
[150]Ibid., 47. Cf. *Colville* v *Parker* (1607) Cro. Jac. 158: 'Tanfield [CB] cited it to be adjudged in one *Woodie's case*, where one after marriage voluntarily assigned a lease of years quasi in jointure for his wife, and took the profits, and afterwards sold it to one who had not any notice of this conveyance, that it was within the statute [27 Eliz. I, c.4], although at first it was not made upon trust to be revoked, nor any clause of revocation therein, because it was a voluntary conveyance at first, and shall be intended fraudulent at the beginning'.
[151]Ibid., 47. Hobart AG here drew upon the Statute against Fugitives 1572 (13 Eliz. I, c.6) and the idea of 'transferred malice' in *R* v *Saunders* (1573) 2 Plow. 473 as authority for the proposition that subsequent conduct could prove prior intent.

> although it hath been objected, that by the common law none shall avoid a conveyance by reason of fraud, except he who hath a former interest, and the statutes give no authority to any, but to purchasers, upon valuable consideration, yet I say, that the statute of 13 Eliz. [I, c.5] is to avoid *all* fraudulent conveyances, against such as by any means may be hindered thereby … also the proviso in this statute saveth such conveyances only, which are upon good consideration, and bona fide … but in this conveyance … the bargainees paid no money, nor ought to take no profits of the land, nor dispose of any estate therein; and therefore [a] fraud … [and] *Twyne's case* proveth our case effectually to be a void conveyance which cannot be answered.[152]

The clear thrust of Hobart's argument lay in the badges of fraud and the Statute of Fraudulent Conveyances 1571. Any statutory requirement of a jury verdict to entitle the crown could be superseded where the evidence was such as to permit a court of equity to infer fraud from surrounding circumstances.

Hobart duly concluded that 'although here is not any fraud expressly found by the office, yet he thought, that the equity of the case appears plainly; and that it shall be for the King'.[153] By way of authority, he cited *R* v *Howse*, *AG* v *Hoord* and *AG* v *Raleigh* as examples of cases decided for the king without fraud having been found by the jury.[154] On this point, the attorney general specifically distinguished *de Chirton's case* where fraud was expressly found by the jury on the grounds that:

> we are in a court of equitie by English bill, where the judges are only to adjudge upon the fraud, and there [i.e. in *de Chirton's case*] they were in a court of law, and the fraud was the matter of fact, which ought to be expressly found by the jury, as appears by the books.[155]

Hobart thus distinguished fraud at common law and in equity. Fraud in the common law courts was a matter for the jury; either the jury had to return a general verdict for the crown, or a specific finding of fraud had to be returned for the court to proceed. By contrast, fraud in equity was a matter for the judge and could proceed by the badges of fraud and notwithstanding a requirement for an office found.

The decision of the court is not reported in detail. Lane's report merely concludes that 'the barons decreed for the King, and the lord treasurer agreed'.[156] Nevertheless, *R* v *Nottingham* (1609) provides clear evidence of

[152]Ibid., 47. Emphasis added. Hobart AG would pursue this same line of reasoning more avidly in *AG* v *Abington*, 417; 'it is not necessary that proof be made that it was to deceive purchasers, but it is sufficient if it was to his use, because *Twine's case*, where an estate is with power of revocation and levies a fine, and on account of his clause of revocation it is gone, and yet it is within the statute as to the purchaser'.
[153]Ibid., 48.
[154]Ibid., 48.
[155]Ibid., 48.
[156]Ibid., 48. The record provides little insight into the reasons for the decree. PRO E 126/1/177v states merely that 'all the said castles, manors, lands and tenements and hereditaments and premises

the currency held by the badges of fraud approach by end of the first decade of the seventeenth century. By 1609, the badges of fraud were widely used to justify crown forfeitures of any stripe, whether for outlawry, recusancy, treason or departure from the realm. Regarding the nature of the 'trust' in the case, the records and reports are unclear but *R* v *Nottingham* appears to have been a case involving an informal entrusting of property – not least because the transferee was not aware of the conveyance until after it had been executed.[157] Only Montague and Hutton had conceived of the parties' actions as giving rise to 'a trust'.[158] Nevertheless, the arguments in the case do suggest that, when applied to the beneficiary's right under a trust, the badges of fraud could make deep inroads into the idea that trusts were not liable to legal demands such as forfeiture. The Statute of Fraudulent Conveyances 1571 had made findings of fraud an almost routine matter on the equity side of the Exchequer. As a result, forfeitures of trust property for the acts of the beneficiary became increasingly common; it was perhaps only a matter of time before it came to be recognized that certain trusts were liable to the forfeitures of the beneficiary as a matter of doctrine – and this is precisely what began to happen in *AG* v *Abington* (1613).

V. *AG* v *Abington* (1613): A Landmark in Forfeiture

In *AG* v *Abington* (1613), Tanfield CB laid down a clear doctrinal rule that trusts of leases were forfeit for treason (because they were a fraud on the revenue) but trusts of the inheritance remained immune to forfeiture (because they were not recognized at common law). The case marked a decisive shift in the Exchequer's approach to equitable forfeiture and formed something of a landmark in the case law. Thereafter, trusts of leases were decreed forfeit as a matter of course in the Exchequer – although trusts of the inheritance would continue to cause doctrinal headaches over the subsequent decades.

In October 1599, Thomas Abington purchased a lease for 21 years from Windsor, but directed Windsor to convey the lease to Throckmorton to hold for the benefit of Abington. In November of the same year, Windsor conveyed the fee to the use of Abington and the heirs male of his body. In 1603/4, Abington suffered a common recovery to the use of Hawkins, to be held by Hawkins upon trust for Abington.[159] By this convoluted conveyancing mechanism, both the freehold and leasehold estates were held

before mentioned shall be and ought to be forthwith seised and taken into his majesty's hands according as that behalf appertaineth'.

[157]Ibid., 42.

[158]Ibid., 44 (Montague) and 45 (Hutton).

[159]PRO E 124/16/17. Lane's report at 118 Selden Society 408 gives an erroneous date of 10 Jac. for the common recovery; Calthrop's report at 118 Selden Society 418–419, gives the date as 42 Eliz.

upon separate trusts for the benefit of Abington. Abington was attainted for treason in 1606 (for his involvement in the gunpowder plot) and the question for the Exchequer was whether Abington's right under either trust was forfeit.

Both trusts had been created prior to Abington's treason and there was no evidence to suggest Abington had expected a forfeiture at the time the trusts were created. Counsel for the crown pushed the argument from fraud. The core question before the court was whether all trusts effected a fraud on the revenue such that they could be decreed liable to crown forfeitures. Previous cases had come close to this resolution, but *Abington* decided the point explicitly: the trust of the lease was forfeit on the grounds that it was a 'trust and fraud'.[160] By this stage, it was apparently clear that all trusts of leases were fraudulent against future forfeitures. The position as to the trust of the inheritance, however, was less clear and the trustees of the inheritance traversed the crown's claim to the land. The question arose whether the trust of a fee could be liable to the forfeitures of the beneficiary.

1. Arguments of Counsel

Whilst the chief baron's reasoning is reported only very briefly, the arguments of counsel in the case were reported at length by Lane and Calthrop. The arguments demonstrate well the uncertainties arising from the developing case law, especially regarding the status of the trust at common law, the operation of the badges of fraud and the differential treatment between trusts of leases and trusts of the inheritance.

A. Trusts at Common Law

A key idea for the arguments in *Abington* was the analogy between the trust and the 'use at common law'.[161] Over time, the use had been modified by statute to make it *inter alia*: grantable[162]; liable to wardship[163]; liable to debts[164]; liable to seizure by the lord where the *cestui que use* was his villein[165]; subject to mortmain[166]; and liable to forfeiture for attainder of treason.[167] Of the trust, however, no similar statutes had been passed. As such, counsel were inclined to view trusts as akin to 'uses at common law', i.e. uses before statute subjected them to the same demands as the legal estate. Such an analogy led counsel to distinguish trusts and post-statute

[160]PRO E 124/21/95.
[161]Cf. *AG* v *Hoord* 12 Co. Rep., 2 (argument of counsel); *R* v *Nottingham*, 45 (per Sjt. Hutton *in arguendo*).
[162]1 Ric. III, c.1.
[163]4 Hen. VII, c.17; 19 Hen. VII, c.15, s.2.
[164]19 Hen. VII, c.15, s.1.
[165]Ibid., s.2.
[166]15 Ric. II, c.5.
[167]21 Ric. II, c.3; 26 Hen. VIII, c.13; 33 Hen. VIII, c.20.

uses; uses which survived the Statute of Uses would, naturally, continue to be governed by the older legislation, whilst trusts were distinct and did not fall within the statutes which regulated the use.

Davenport and Coventry (counsel for Abington), for example, argued that trusts were not recognized at common law and could not be forfeit without an express statute. Davenport took great pains to distinguish uses and trusts in his argument:

> this trust does not belong to the crown by forfeiture for treason because uses and trusts are greatly different in the law, because a use, express or implied, granted that it does not have much reputation, yet the law esteems them more than they really are. And on account of this, they are in the nature of inheritance, of which there will be *possessio fratris*, which use is grantable, demisable, and wardship shall be of them. And the statutes have taken great notice of uses … But the law does not have such regard or esteem for a trust, which is but a voluntary agreement not issuing out of land, but a personal trust to a party … But if a use before [the statute of] 27 [Hen. VIII] will not be forfeited for treason by the common law, then neither [shall it] in equity, because a decree should follow the use, and that it will not be forfeited by the common law appears by the feeble power that *cestui que use* has in the land.[168]

Coventry similarly remarked that 'a trust of land is not forfeit because it differs from a use, because … a use cannot be out of a use, but a trust can be out of a use. Therefore a trust is less than a use. And a thing in privity cannot be forfeited'.[169] Counsel for Abington, therefore, emphasized the distinction between the post-statute use and the trust, emphasizing the view of a trust as an obligation in equity, binding only those privy to the confidence. In their view, the trust was an insubstantial, ephemeral right incapable of attracting liability to forfeiture at common law.

Hobart AG (counsel for the king) challenged this argument directly. For Hobart, it was no argument to say that uses of the inheritance were not forfeit at common law and that, therefore, the same should be said of trusts:

> the argument is that a use of an inheritance is not forfeit at common law, therefore it will not be decreed in equity. And [yet,][170] the same argument can be made in the case of a use upon a lease for years, and *a fortiori* because a use of a lease for years remains at common law, and it is not transferred by the statute [of Uses] and it is only a trust.[171]

Calthrop reports the same section of Hobart's argument thus:

[168] 118 Selden Society, 410–411.
[169] Ibid., 409.
[170] My inclusion for sense.
[171] 118 Selden Society 408, 418.

> And even though these cases aforesaid were in case[s] of a lease for years and chattel real forfeited, and the case at bar is of an estate of inheritance, he says that it will not make any difference because the reason of both cases holds all one, and if any be more strong it appears that the estate of freehold will be forfeited inasmuch as the statute of 27 Hen. VIII [c.10] extends to it, where it never extended to uses and trusts reserved upon chattels.[172]

In these passages, Hobart seemed to turn the argument for Abington on its head. According to Hobart, uses of leases, which had escaped execution by the Statute of Uses, were themselves often referred to as 'trusts'; nevertheless, it was clear from the barons' first ruling in *Abington* that uses (or trusts) of leases were forfeit for treason. If trusts of leases were liable to forfeiture, then the same principle ought to be applied *mutatis mutandis* to other trusts, including trusts of the inheritance.[173]

In addition to this line of argument, Hobart advanced a more novel view in favour of forfeiture. Hobart began by noting that the law's policy of punishing traitors by forfeiture was frustrated where property was conveyed upon trust.[174] The Statute of Uses 1536[175] operated to execute the use and, thereby, guaranteed the forfeiture. But trusts defeated the legislative intent of the statute because they had escaped its operation. The attorney general argued that the role of a 'court of conscience' was 'to imitate them that have an intention to provide a remedy but overlooked it'.[176] In other words, equity ought to pursue the legislative intention behind the Statute of Uses and decree trusts forfeit for treason. Hobart warned that 'if it is not so, the statute will be illusory because everyone will have secret uses of their land'.[177]

In effect, Hobart argued that equity ought to replicate the effect of the Statute of Uses by subjecting the beneficiary's right under a trust to the same demands as the legal estate.[178] This argument was clearly designed to avoid the argument that trusts were not recognized at common law, but it also demonstrated Hobart's conception of the beneficiary's right; later in his argument, he would describe the beneficiary as having 'the land in effect'.[179] Hobart thus viewed the beneficiary as the true owner of the land

[172]Ibid., 421.
[173]Even if trusts of the inheritance had remained immune to forfeiture after the Statute of Uses 1536, Hobart nevertheless argued that the Statute of Fraudulent Conveyances 1571 had 'made a change of this law' (see 118 Selden Society, 418).
[174]118 Selden Society, 413: 'it will be great security to traitors if they can convey or take in trust and thus defraud the prudence of the law, which disinherits the heir and defeats the dower by attainder of treason'.
[175]27 Hen. VIII, c.10.
[176]118 Selden Society, 414.
[177]Ibid., 414.
[178]He argued, moreover, that no great inconvenience would arise from this rule because those purchasing the estate would have a defence of *bona fide* purchase against the King (see 118 Selden Society, 413).
[179]118 Selden Society, 418. See also Hobart's comment at 118 Selden Society, 416, regarding the beneficiary's right to the profits: 'profits of land is the land itself'.

and, hence, liable for the same demands as the legal estate. For Hobart, just as the use had become increasingly 'thing-like' and, eventually, justiciable at common law, so too ought the real aspect of the trust be developed to avoid the same mischief as that arising from the use.[180]

B. Fraud

Arguments as to the status of the trust at common law aside, it was common ground that a forfeiture might nevertheless be decreed where the conveyance was made to defraud the crown. What continued to distinguish counsel on either side was whether forfeiture could be decreed without a jury verdict in favour of the crown and, if so, what would amount to proof of fraud for that purpose. The earlier decisions in *Twyne's case* and *AG* v *Hoord* had seemed to suggest that the judges could infer the presence of fraud from the mere fact of the trust. In *Abington's case*, Richardson (counsel for the king) argued that all trusts were simply to be regarded by the court as frauds on the crown: 'fraud and trust are all one as appears in *Twyne's case* … because by it the king is deceived as well as by fraud'.[181] On the other side, Coventry rejected any equivalence between trust and fraud 'because then fraud and trust are all one, which he [Coventry] denies'.[182] Instead, counsel for Abington argued that forfeiture of a trust should only be decreed where the jury had found fraud by their verdict. Coventry had asserted that 'upon the statute of 13 Eliz. [c.5] there must be express fraud',[183] whilst Davenport similarly asserted that 'to the objection that it is apparent fraud, I deny that a conveyance upon trust is fraudulent against a future forfeiture'.[184] Counsel for Abington thus seemed to suggest that the mere fact of a trust, created prior to an act of treason, was an insufficient basis from which to make a judicial finding of fraud; the finding of fraud was to be reserved to the jury. To hold otherwise – so Coventry argued – was to treat all trusts as frauds where they had the effect of defeating the revenue.

Against Coventry's submissions, the attorney general thought it was sufficient that the trust avoided the forfeiture for the court to conclude the conveyance was fraudulent. From the Statute of Fraudulent Conveyances 1571, Hobart AG drew the following proposition:

[180]For a discussion of the reification of the use/trust in Chancery around this time, see N.G. Jones, 'The Trust Beneficiary's Interest before *R* v *Holland* (1648)' in A.D.E. Lewis, P. Brand and P. Mitchell, eds., *Law in the City: Proceedings of the Seventeenth British Legal History Conference*, Dublin, 2007, 95.
[181]118 Selden Society, 409.
[182]Ibid., 409. Cf. Bacon, *Reading on the Statute of Uses*, 6–7.
[183]118 Selden Society, 410.
[184]Ibid., 412 and, on same page: 'if it be fraud by the Statute of 13 Eliz. [I, c.5], this statute must have a construction that it must be fraud in being or appearance afterward, but not to prevent an action of escheat which is subsequent'.

> Where man has one seised to his use in trust and commits treason, that the king shall have it by decree. And although his estate was secretly lodged in the hands of another and that, at the time of this conveyance, he does not have an intent to commit treason, yet when he has committed treason, the king will have it.[185]

Later in his submissions, Hobart explained that the beneficiary's intention at the time of the conveyance was irrelevant: 'the question here is not [one] of intent, but of the effect'.[186] For Hobart, the finding of a trust which defeated the crown of its forfeitures was itself sufficient to engage the statute. The mere fact of the trust proved the fraud, and the trust could not be pleaded to bar the crown's title by forfeiture. Hobart argued that a holding to the contrary would render the crown's right nugatory.[187] Finally, he argued, the Statute of Fraudulent Conveyances had saved only conveyances made *bona fide*, but 'not estates to the use, because nothing is more contrary to good faith than to have an estate seem otherwise than it is in truth'.[188] In these arguments, we can perceive a clear shift in how the badges of fraud were being used. *Twyne's case* listed half a dozen circumstances, the presence of which justified a finding of fraud on the facts. In Hobart's argument, only one such circumstance was required before fraud might be found by the court. Fraud and trust, which had been blurred in *Twyne's case*, were now almost elided in defence of the royal revenue.

C. Trusts of Chattels and Trusts of the Inheritance

The final theme in the arguments of counsel is a distinction taken between trusts of chattels and trusts of the inheritance. Counsel for Abington argued that whilst the precedents had permitted forfeitures of trusts, such forfeitures were limited to trusts of chattels. In support of this contention, they relied explicitly on the *Marquis of Winchester's case* (1583) in which it had been held that rights of action touching the inheritance were not forfeit by the act of attainder of Henry Norries.[189] Coventry observed that:

> for response to the precedents for *House's case* and others, they are but personal things. And [there] is a difference between personal and real things, because [in] *Winchester's case* a right of personal actions should be forfeit,

[185] Ibid., 415.
[186] Ibid., 416.
[187] Ibid., 415: 'it is objected that the statute is made against fraudulent conveyances and not against conveyances in trust, and that the conveyance within this statute should be fraudulent in the beginning and in the bowels of the conveyance. But if such construction shall be allowed this statute will be illusory, which the law will not allow because it is sufficient if [there] be a general intention of fraud, although it be not applied properly to each particular, because if one has an intent to defraud a creditor and compounds with him and then defrauds another, it is within this law because reason says that it was to defraud, when one is defrauded with it'.
[188] Ibid., 416. Cf. Richardson's view that 'fraud and trust are all one as appears in *Twyne's case*' (118 Selden Society, 409).
[189] 3 Co. Rep. 1.

> but not of real actions … And he says that upon the statute of 13 Eliz. [I, c.5] there must be express fraud.[190]

Davenport too explained that:

> [As] for the precedents, I do not receive any satisfaction because all of them are chattels, and [there] is a difference between them and freeholds which are not denizens *per legal judicium*. And in the *Marquess of Winchester's case*, right[s] of real actions are not forfeited but [rights] of personal [actions] are … [In *de Chirton's* case] the debtor of the king with the money of the king purchases land in the name of a friend, and there was special intent to defraud the king, and the money was attached in the king, and yet the land is seised only to the extent that the money be paid.[191]

It is difficult to distinguish from these remarks whether counsel considered that a forfeiture was decreed in these cases because there was fraud or because they involved trusts of chattels or because they conceived all trusts of chattels to be fraudulent. Nevertheless, it was true to say that, in the cases involving trusts of the inheritance, the barons had not decreed a forfeiture of the inheritance itself. In *de Chirton's case*, the remedy against the inheritance was an extent until the debt was repaid and, in *R* v *Bryon*, the remedy was a forfeiture of the income of the land for the life of the outlaw. The remedy in each case was for years only and could be distinguished from the case law involving chattels (e.g. *R* v *Howse* and *AG* v *Hoord*) in which the barons had decreed a forfeiture of the trust property itself. From these cases, counsel for Abington collected an inchoate principle that there could be no forfeiture of the trust of an inheritance.[192]

That equity was hesitant to decree against the inheritance has been remarked upon in the mortgages context,[193] and it may be that a similar hesitancy operated in the forfeiture context. Plucknett explained that:

> The fundamental limitation of [the prerogative courts'] jurisdiction came from the common law rule that a man could not lose his land, save by a royal (which was interpreted as a common-law) writ. Legal estates in real property were thus beyond their reach. It likewise followed that prerogative courts could not try treason or felony, for forfeiture or escheat of land would be involved.[194]

[190] 118 Selden Society, 410.
[191] Ibid., 413.
[192] It is perhaps notable that neither Coventry nor Davenport made an attempt to distinguish *R* v *Nottingham* in which forfeiture of the trust of an inheritance had indeed been decreed.
[193] D.P. Waddilove, 'Why the Equity of Redemption?', in C. Briggs and J. Zuiderduijn, eds., *Land and Credit: Mortgages in the Medieval and Early Modern European Countryside*, Cham, 2018, 128–131. See also Lord Nottingham, '*Prolegomena*' in Yale, *Nottingham's Two Treatises*, c.12, s.12 (citing *Pawlett* v *AG* (1667) Hardres 465: 'Only in cases of inheritance the court of Exchequer is tender how they decree away the inheritance from the king without privy seal so to do … But in cases of chattels [the] Court of Wards and Exchequer often relieve against [the] king').
[194] T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed., Indianapolis, 2010 reprint, 176–177.

Regarding the Chancery and Star Chamber, however, Plucknett did note that '[t]his did not prevent Chancery from adjudicating upon uses, or the Council in Star Chamber from awarding possession'.[195]

The precise ambit of any rule against decreeing forfeitures of land was not, therefore, altogether clear cut. Conjecture aside, there remained a specific reason why the badges of fraud might not justify a forfeiture on the facts of *AG* v *Abington*. Section 3 of the Statute of Fraudulent Conveyances 1571 expressly excluded common recoveries from its operation; Abington having conveyed the inheritance to Hawkins by means of a common recovery, the badges of fraud might not have been applied to void the conveyance. This argument was considered only by Hobart who concluded that the section did not operate where the common recovery was suffered to the use of another in trust for the grantor – such conveyances were, in their nature, a fraud.[196] The point was not adverted to in the briefly reported judgment of Tanfield CB, but may nevertheless have been a ground for distinguishing trusts of leases from trusts of the inheritance (or at least those conveyed by common recovery).

To the objection that the precedents did not extend to the inheritance, Hobart AG cited *R* v *Byron* (or Birowe) to show that the Exchequer already awarded remedies against the trust of an inheritance:

> *Birowe's case* … works upon the inheritance because it draws a lease for years out of the inheritance, because it is more to charge an inheritance or lease for years than to transfer a bare lease for years because, at common law, a lease for years was deviseable but not a lease for years out of an inheritance.[197]

For Hobart, it was irrelevant that the remedy in *R* v *Byron* was for years only; the fact that a remedy was decreed at all demonstrated that there was no jurisdictional or precedential bar to decrees touching trusts of the inheritance. By the early seventeenth century, trusts of leases could be decreed forfeit and trusts of the inheritance were not entirely immune to the decrees of the Exchequer. Drawing the cases together, Hobart worked to subject the trust to the full range of legal demands owing to the crown.

2. Judgment

The Exchequer was faced with a stark choice. According to Davenport and Coventry, trusts were not recognized at common law and therefore took free of the crown's legal demands (excepting cases where the jury returned a verdict in favour of the crown). On the opposing side, Hobart contended that, under the Statute of Fraudulent Conveyances, all trusts were a

[195]Ibid., 177, n.1.
[196]118 Selden Society, 416.
[197]Ibid., 418.

fraud on the revenue and ought to be decreed liable to forfeiture. Tanfield CB and the *puisne* barons did not accept either position. The chief baron instead distinguished trusts of leases and trusts of the inheritance, concluding that:

> a trust and confidence of lands of inheritance conveyed over will not be forfeited because we see that, by the common law of the land, a use was not forfeitable, and a trust and confidence at this day is of the same nature that a use was at common law. But if a lease for years or other chattel were granted over in trust, it seems to them that this trust should be forfeited to the king because *de minimis non curat lex*, and the law was [that] such assignments of chattels [are] to be fraud.[198]

In *Abington*, both trusts had been created prior to the treason and it appears that no evidence of fraud – other than the creation of the trusts themselves – was present on the facts. Nevertheless, the barons decreed the trust of the lease a fraud and liable to forfeiture, whilst holding the trust of the inheritance immune to the crown's demands. Tanfield's decree suggested that trusts of leases were now presumed to effect a fraud on the crown and would be held forfeit as a matter of course.[199] Trusts of the inheritance, meanwhile, were not presumed to effect a fraud; they were not recognized at common law and continued to escape liability for forfeiture. Forfeiture of the trust of an inheritance, it seemed, would only occur where there was overwhelming evidence of fraud (i.e. as in *R* v *Nottingham*). *AG* v *Abington* (1613) was a remarkable decree. Fraud could be presumed, but it would not be presumed in every case. Instead, it seemed that the applicable rule depended upon the subject matter of the trust itself.

In 1618, the decision in *AG* v *Carr* extended the resolution in *Abington* to forfeitures of goods and chattels for attainder of felony.[200] In that case, the king had granted two leases of 21 years for the provision of goods to the royal household to Sir John Daccombe[201] to hold upon trust for the Earl of Somerset (Robert Carr). Somerset was attainted of felony for the murder of Thomas Overbury and the attorney general filed an information in the Exchequer seeking a declaration that the trust was forfeit to the crown. Tanfield CB, upon conference with the all the judges, decreed:

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[198]Ibid., 421–422.

[199]The Fraudulent Deeds of Gift Act 1487 (3 Hen. VII, c.4) may have given support to this conclusion; for which see *R* v *Nottingham*, 45 (per Hutton *in arguendo*): 'if a man outlawed purchase goods, or takes an obligation in trust, the King shall have them, for this is by the statute of 3 H. 7, cap. 4'. Cf. Coke's notebook entry for *Pauncefoot* v *Blunt* (1594) 138 Selden Society 563, suggesting that the statute of 1487 was limited to creditors and did not extend to the crown claiming by forfeiture. Perhaps more significant in this regard was the general approach adopted to long leases in the Court of Wards and the Chancery in the period *c.*1590–1620, for which see: N.G. Jones, 'The Influence of Revenue Considerations upon the Remedial Practice of Chancery in Trust Cases, 1536–1660', in C.W. Brooks and M.J.W. Lobban, eds., *Communities and Courts in Britain, 1150–1900*, London, 1997, 99, and N.G. Jones, 'Long Leases and the Feudal Revenue in the Court of Wards, 1540–1645', (1998) 19 JLH, 1.

[200]Cro. Jac. 512; Jenk. 293; Hob. 214; 118 Selden Society 475; and Hale, *Pleas of the Crown*, vol.I, 248. Records at: PRO E 124/24/394, PRO E 124/27/266v; PRO E 124/28/194v.

[201]Then the Chancellor of the Duchy of Lancaster.

> this trust was a thing forfeited to the King, notwithstanding that … the interest of the lease was never in the Earl himself and [was] afterwards assigned by the Earl to others in trust for him, because it is all one where the lease is made originally to one in trust for another and where the lease [is] made to the lessee and it is assigned over in trust for the benefit of the lessee.[202]

Trusts of leases were, therefore, decreed forfeit for attainder of felony. The report is brief, but it is nevertheless surprising that fraud was not mentioned at all by the chief baron. By 1618, trusts of leases were clearly seen as liable to crown forfeitures as a matter of course.

6. Conclusion

By the dawn of the seventeenth century, the idea that trusts were not cognizable at common law, and which had long shielded the beneficiary's right from liability to legal demands, was being eroded. The emergence of the badges of fraud made it easier for the crown to subject trust property to forfeitures for the acts of the beneficiary. Initially developed in the context of informal 'entrustings' of property, the badges of fraud approach rapidly expanded and eventually threatened to treat all trusts as frauds for revenue purposes.

With the decision in *AG* v *Hoord* (1606), the immunity of the trust to forfeiture came under greater strain. Once the badges of fraud became a means for presuming fraud, the evidentiary requirements for proving fraud were effectively emptied of content. In both *AG* v *Hoord* and *AG* v *Abington*, the trusts antedated the crown's right by several years and were created at a time when the beneficiary had no reason to suspect a forfeiture. On these facts, the barons were nevertheless willing to conclude that the conveyance was fraudulent, notwithstanding the impossibility that a fraud was intended at the time the conveyance was made. If the finding of a trust of a lease was sufficient to find a fraud, such a decree was tantamount to holding that trusts of leases were liable to forfeiture as a matter of doctrine. After all, the fraud may never have existed, and the finding of fraud merely conjured from the fact that the crown was denied its forfeiture. In subsequent decades, the language of fraud would become less pronounced, ultimately collapsing into a simple doctrinal rule: trusts of leases were liable to forfeiture.

Once the language of fraud had given way to this doctrinal rule, it became conceivable that all trusts might be subject to the full range of legal demands to which property was subject at common law.[203] Over

[202] 118 Selden Society, 476. In support, Tanfield CB cited *Jones' case* (1582) (otherwise known as *Morgan's case*; discussed above at n.53).

[203] For further detail, see D. Foster, *Legal Demands Against the Beneficial Interest under a Trust, c. 1590–1759*, unpublished PhD thesis, Queen Mary University of London, 2020, chapter 5.

the succeeding decades, the Exchequer – assisted by the courts of common law – came increasingly to subject trust property to the legal liabilities of the beneficiary as matter of doctrine and without reference to the badges of fraud.[204] By the restoration, it could even be said that 'after the outlawry the trust of the lease was vested in the king, though not the estate in law'.[205] By permitting a legal demand such as forfeiture to attach to the equitable right itself, the equity side of the Exchequer had taken a major step in the proprietisation of the beneficiary's right under a trust.

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Notes on Contributor

David Foster is a Lecturer in the Faculty of Laws, University College London.

[204] *AG* v *Bindloes* (1628) 118 Selden Society 556 (liability to execution for crown debts); *R* v *Holland* (1648) Aleyn 14; Style 20, 40, 75, 84, 90 and 94 (liability to forfeiture for alienage); *AG (ex rel. Goswell)* v *Sydenham* (1670) LI MS Misc 500, fo.197v; PRO E 126/10/194v (liability to forfeiture for outlawry).
[205] *AG* v *Fitzjames* (1672) British Library Add. MS 36,197, fo.394, 398 (liability to forfeiture for outlawry).