Fiduciary Principles in English Common Law

Joshua Getzler

The Oxford Handbook of Fiduciary Law
Edited by Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff

Print Publication Date: May 2019 Subject: Law, Trusts Law, Legal System
Online Publication Date: May 2019 DOI: 10.1093/oxfordhb/9780190634100.013.26

Abstract and Keywords

This chapter discusses fiduciary principles in the historical English common law. The term “fiduciary” today connotes high standards of loyalty and good faith in the performance of discrete obligations, the management of assets or the conduct of relationships, and the concept of fiduciary duty is often traced back to equitable notions of good conscience and undivided loyalty rooted in the moralistic approach of Chancery judges. However, a prior source of fiduciary standards lies in the common law doctrine of account. Legal accounting regulation began in the feudal age with Exchequer control of fees and services, rents and taxes. Feudal accounting was codified in the twelfth century to control the behavior of lords who stood as guardians for underage heirs, with particularly extensive duties being applied to guardians of wards in socage (or agricultural) tenure. Accounting systems were then extended to control management chains within manorial units embracing the lord’s farm agents of stewards, bailiffs, and reeves. The chapter then shows how the common law courts extended accounting and waste remedies to third parties through augmentation of disseisin actions to permit tracing and following procedures for entrusted assets. The prohibition of unauthorized profit-taking by fiduciaries or others in positions of influence or good faith and the use of an array of personal and proprietary remedies thus precedes the rise of the Court of Chancery by some three centuries. It is then shown how Chancery came to dominate fiduciary accounting procedures in modern times, building on an expansion of jurisdiction in the eighteenth century as the Chancellors struggled to repress managerial fraud in the private and public spheres. Today, following fusion of law and equity, we are seeing the assimilation of equitable remedies for breach of fiduciary duty with negligent liability for tortious harm, and the folding of the primary fiduciary duties into contract. Fiduciary accountability, born long ago within the early common law, is now being undermined by the blanket application of much simpler common law concepts.

Keywords: common law, equitable conscience, accountability, legal accounting, socage, waste, profit-taking, equitable compensation, breach of fiduciary duty, fiduciary principles

I. Historical Fiduciary Terminology

THE term “fiduciary” as a distinct concept, connoting high standards of loyalty and good faith in the performance of obligations or the management of assets, is hardly found in English law before the nineteenth century. Writers in medieval and renaissance England tended to reserve the notion of *fiducia* for religious faith or political belief. The notion of a *fiducia* as a legal entrustment was known to English civilian scholars from classical and canonist sources, but it took time for the phrase to enter into local usage. General lexicons began to use *fiducia* as a Latinate synonym for trust or confidence from the mid-fifteenth century. By the sixteenth century a “fiduciary” entrustment might describe the engraftment of obligations or conditions onto property, so as to move the enjoyment from the titular owner to another person, the *cestui que use*, or trust beneficiary, so creating a secondary claim vested in the *cestui* comparable to the *dominium utile* of the civilians. However, a conditional conveyance of property to be held on trust was more usually denoted as a holding “to the use of another” (*ad opus*), or perhaps as a *custodia*, and the holder of the property was never or rarely described in the noun sense as a “fiduciary.”[1] The various Latinate terms for entrustment appear to be both imprecise and interchangeable in early English law, colored by the practical context of their usage. In 1542, Sir Thomas Elyot wrote that “Fidutia, truste, confidence … is properly that truste, wherin any thynge is delyuered by one man to another, to thyntente that he shall **(p. 472)** redelyuer it, whan he is required.”[2] Elyot added the variants of *fiduciaria mancipatio* for a mortgage, and *fiducaria possessio* to denote a conditioned conveyance to another’s use. Francis Bacon, writing in 1600, made the same point: “*Usus est dominium fiduciarium*—Use is an ownership in trust.”[3] Such fiduciary labels were elegant echoes of civilian language, but seldom appeared as working concepts in the case law. All that “fiduciary” meant was “pertaining of trust.”

One isolated case of an owner-manager of assets being labeled as a fiduciary appears in a recusancy litigation of 1620, raising the difficult question as to whether a confiscation of a legal estate destroys trusts erected on the estate. The court used the adjectival fiduciary idea here in a manner identical to trusteeship: “*Sed il agree que le dit estate fuit en trust & un fiduciary estate*.”[4] This is hardly surprising terminology, for the trust of land lay at the core of fiduciary institutions for much of the later medieval and early modern periods. The basic fiduciary idea at work here was non-access or non-benefit; the trustee was to hold the asset for another and not enjoy it for himself.[5] Here again, the fiduciary principle appears merely as a fancy name for trusteeship.

Some modern scholars have built on this functional identity of trusteeship and fiduciary office. Peter Birks, in an influential article of 2000, supposed that fiduciary duties were really an early modern abstraction of obligational ideas from the medieval custodial trust of land, a metaphor or removal of ideas from one context to another. He wrote, “The word ‘fiduciary’ can be used to export any incident of the express trust, proprietary as well as obligatory.”[6] But this historical picture may be doubted. Custodial relationships such as the equitable trust, extending and transforming proprietary relations by engrafting *in personam* duties onto basic ownership, were not the only type of relationship named or conceived as fiduciary in early modern law. We find that many different means of splitting control of sharing legal powers could wear the fiduciary label, or attract fiduciary regulation, mostly with nothing to do with the conventional equitable trust.

Postmedieval examples make very clear the enormous variety of fiduciary relationships. In the 1717 case of *Bishop of Winchester v. Knight*, Lord Chancellor Cowper held that that “the Tenant is a sort of Fiduciary to the Lord, and it is a Breach of the Trust which the Law reposes in the Tenant for him to take away the Property of the Lord.”[7] In 1732, John Ayliffe wrote of the civil-law *antichresis* or “mutual use” as a security device with English analogues, whereby the creditor enjoyed the possession, use, and profits of the pledged asset as a security for repayment, but then had to account for any surplus to the debtor:

[T]he Fruits and Profits of the Pawn, or Mortgage [sic], are reckon’d into the Principal, and computed as Part thereof. And, in this sense, an *Antichresis* is a *Fiduciary* (p. 473) Possession, or a Possession in Trust: which kind of Possession is not perfect and absolute, but (as it were) a depositary Thing, out of which an Account must afterwards be given touching the Fruits and Profits thereof received; and the *Fiduciary*, or Person in Trust, may be compelled to render this Account.[8]

In 1746, the Court of King’s Bench held that an indenture of apprenticeship was non-assignable and non-descendible to heirs or debtors of a deceased master, so that an executor could not claim to stand in the shoes of the master and direct the apprentice:

The binding was to the man, to learn his art, and serve him, without any mention of executors. And as the words are confined, so is the nature of the contract; for it is fiduciary, and the lad is bound from a personal knowledge of the integrity and ability of the master.[9]

The scatter-gun usage of the fiduciary label found before 1800 to cover a disparate range of juristic phenomena suggests that the fiduciary principle in the historical law does not arrive in neat linguistic packages. We need to dig a little deeper to discover where and how fiduciary doctrine is operating.

II. Controlling the Fiduciary: Equitable Conscience and Common Law Accountability

It might be helpful to pause and examine present-day denotations of fiduciary obligation to sharpen our sense of what we are looking for in the past; this will help us look for differences across time. In today’s law, fiduciary principles are described in terms of powers allied to duties, disabilities, and liabilities.[10] A person in a fiduciary relationship or office must apply himself or herself to the task in hand with due attention, wielding managerial, advisory, dispositive, or agency powers in good faith, with proper purposes always in mind, respecting the conditions upon which powers were conferred. Above all, the fiduciary may not take unauthorized profits or personal gains, and must avoid (p. 474) conflicts of interest, unless released from these disabilities by a freely consenting beneficiary or principal with full information. Such constraints serve to guide managerial power and prevent its perversion into self-interested abuse of trust.[11]

These principles were settled by the English courts of equity in the mid-nineteenth century,[12] building on the work of Lord Chancellors in the late seventeenth and early eighteenth centuries.[13] Equitable fiduciary enforcement was marked by a moralizing language of conscience and good faith, connecting to the ecclesiastical and confessional foundations of the Lord Chancellor's powers,[14] as well as the Crown's prerogative supervisory authority as *parens patriae*, with later courts refracting the notion of conscionability into a kind of natural-law social contract.[15] The equitable conscience jurisdiction had long been seen as the main carrier of modern fiduciary principles; but since fusion of administration of law and equity after 1873, and with modern positivism driving a wedge between legal and moral regulation, there has been a gradual translation of the old equitable concepts into common-law languages of contractarian bargains hedged by *ex lege* duties of prudence or reasonable care.[16]

There is a sharp historical irony at work here. In absorbing or fusing equitable fiduciary law into common-law forms, lawyers have largely been unaware of an alternative tradition of fiduciary regulation sustained in the courts of common law, centuries before the Court of Chancery came into existence. This jurisdiction was based on the taking of accounts of guardians, managers, agents, and like actors charged with handling the assets and affairs of others. The remedies of account were later absorbed into the Chancery conscience jurisdiction to become a major part of trust, agency, and partnership regulation,[17] and the original common law elements fell from view. It would add to our understanding of fiduciary principle to bring accounting and accountability back into view as an authentic common law praxis. With accountability revived alongside duties of conscience, we may be able to effect a more perfect fusion of legal and equitable fiduciary ideas.

(p. 475) III. Common Law Doctrines of Account

To *account* for one's conduct at law comes in two stages: first, to report or describe the steps taken in managing assets or affairs, and secondly, to make a *reckoning* of the management—to make good any shortfalls, and to bring all affairs to a due state of performance—to make the account whole. Legal accountability leads an entrusted manager or agent to perform as one ought to have performed, to carry out the primary duty of management to a requisite level. As a concomitant, to *audit* managerial conduct is to hear an account and then assess the due reckoning. Such auditing may be performed by a person or institutional agency who is not necessarily the principal to whom the account is owed, for example by a court-appointed auditor or by a master or judge of the court itself. The courts of common law, joined by local feudal and mercantile courts, were busy ordering accounts from an early date, sometimes as a proof of the level of debt relations in contract with simplified proof and enforcement procedures,[18] and sometimes as a dynamic method of keeping accountable parties up to the demands of their official or status duties.[19] The mixture of reporting and enforcing was captured in the idea of a reckoning, an old idea with Germanic semantic roots suggesting both to describe and to answer for one's liabilities, often with a religious connotation of balancing and purging one's soul.

Accounting relationships, like promise-keeping and honesty, importantly exist outside formal legal regulation; account is a creature of social life and not just of law. Individuals will constantly give accounts—that is, offer stories or explanations of conduct—to those they interact with and rely upon, and so maintain mutual responsibilities without resorting to law to enforce the sharing of narratives or the scrutiny of performances. Legal requirements of accounting might be superimposed on social obligation where there is a special vulnerability to power, where wrongdoing or poor performance can be concealed, or where high standards of conduct are especially socially valuable. Accounting duties as reporting requirements are today codified and mandatory for many joint businesses, such as registered corporations and charities, partly for tax reasons, and partly to protect creditors and investors. Reporting here serves as an essential counterpart to the public enforcement and protection afforded by recognition of separate legal personality and entity status.[20] But courts have been less sure of enforcing due (p. 476) accounting in cases of unincorporated private enterprises such as partnerships and trusts, absent insolvency regulation.[21] Debates over the secretiveness of trust arrangements, especially in offshore incarnations designed to minimize the appearance of ownership and liability to tax, are one of the burning issues in today's world.[22] It seems particularly urgent now to understand the historical bases of legal accounting regulation.

IV. Fees and Services, Rents and Taxes: Origins of Legal Account

Early feudal organization created a pressure for the development of legal accounting systems to control fiscal flows within and between feudal units.[23] Anglo-Norman feudalism involved a ladder of tenures stretching from free and unfree peasantry working the land through a chain of manorial lords and tenants up to the Crown. High levels of fealty or loyalty, involving mutual care and protection between lord and tenant, were an ideal component of feudal tenure; and it was a form of treason or betrayal to act in complete breach of the tenurial loyalties, such as to abandon a lord in military need or to side with his enemies, with forfeiture of the tenure as the first remedy for such a blatant conflict of interest. Fees, that is the estates or rights to seisin granted to tenants, would also be subject to various military, labor, honorable, and (ultimately) monetary services owed to the lord. These transfers functioned as a combination of protection money, funding for governmental services, and payment of economic rent in cash or kind for access to capital. Maitland remarked that if services, rents, and taxes could have been distinguished from one another in the early common law, then feudalism would have been impossible.[24]

The Norman rulers of eleventh-century England made a notable contribution to accounting with the Domesday Book of 1086, requiring reports of the productive and fiscal values of manors or organized farms at three static points—pre-Conquest, the date of Conquest at 1066, and the date of the Domesday returns twenty years later. The fiscal needs of the

Angevin Crown in the twelfth century in turn required monetization of the king's claims against his tenants, and the new national system of account was described (p. 477) in the Dialogue of the Exchequer, probably written in 1177 by Richard FitzNagel, who served as a treasurer to both Stephen and Henry II. FitzNagel related how Henry II had to deal not only with a plague of disseisins in the wake of Stephen's anarchic reign but also a jumble of tenurial claims to services up and down the feudal ladder that caused great discontent among the farmers. Meanwhile, the king needed money to fuel his mobile military campaigns, of far greater value than the old claims to victuals levied against local manors. One solution was to institute a more elaborate national system of tax accounting, building on the inquests of feudal dues under Henry I. The old inquests involved accounting by placing coins as counters on a large checkered cloth, measured out by trusted Barons of Exchequer, a practice that ran from at least 1118. The coin symbolized duly charged debts, and would be removed from the table, representing discharge of the debt, after submission and ratification of strictly evidenced payments or allowances. This Exchequer system was adapted by Henry II to make each sheriff liable to the Crown for all dues from the estates in his respective county, in monetized form. The Exchequer used single-entry bookkeeping to record charges and discharges of due debts, with each entry inscribed in pipe rolls. Alongside this ran a crude but effective system of issue of wooden tally sticks representing executory debts. The tallies would be broken into matching halves to represent the charge and then recombined and stored upon discharge. Other documentary evidence by voucher or other receipts would be admitted to record payments. The sheriffs were responsible for realizing the taxed income flows from the manors of their respective counties and could accordingly force an account on the tenants within their jurisdiction. Accounting at the Exchequer and county levels also had an adjudicative and regulatory function, as the hierarchy of courts produced a balance sheet of wrongdoing with associated forfeitures and fines, applying coercion and control to the population while extracting wealth to maintain the apparatus of government.[25]

Writs freely issued by the king's Chancery to enforce royal claims to an account were adapted, probably later in Henry II's reign, so as to enforce an account between non-governmental actors lower down the feudal ladder.[26] Due accounting in the manorial economy ensured a ready flow of fiscal return to the topmost layers of government, and in that sense, public and private accounting enforced by royal actions formed a mutually supporting symbiosis. The Barons who met in the Exchequer Chamber to take sheriffs' accounts came to serve as an important royal court, deciding legal claims involving continuous relationships of management or running debt. The Angevin accounting system based on the Exchequer is thus an important foundation of the common law and of centralizing royal power, perhaps of equal significance as the system of possessory assizes administered by royal courts at Westminster and on circuit, also built up in Henry II's reign.

(p. 478) V. Control of Bailiffs, Stewards, and Officials

The extension of accounting systems in the later twelfth century came to embrace the lord's farm agents of steward, bailiff, and reeve, with local courts instituting controls modeled on the Exchequer and county practices. This was regulation, not of governmental or feudal services, but of intramanorial management. The combination of war expenditure and rising population made this an era of price inflation where long leases at fixed rents led to a stagnation of returns flowing to the upper levels of the tenurial ladder. These factors—a desire to extract higher values from units of agrarian production, and the availability of new accounting mechanisms—combined to encourage a transformational shift in the techniques of manorial farming across the thirteenth century. This was "demesne" (or direct or high) farming, involving closer monitoring and disciplining of workforces through tighter control by manorial supervisors, and a turn to production for the market rather than autarkic production and local trade in kind. New cadres of literate accounting professionals trained outside the church were summoned into existence by the new praxis of rationalized micromanagement.[27]

Similar techniques were used to control expenditures by public officials, who might be granted mandates and resources by the Crown and Parliament to pursue military, trading, and other governmental commissions. Incompetent management and defalcations could lead to claims for an account played out in public as political theatre, being enforced not according to regular legal procedures, but rather by the motion of peers in great councils, backed by the threat of impeachment or trial for treason. Henry II launched such a case against Thomas Becket in 1164, who had kept back some £30,000 in military funds after a failed campaign in France and then claimed clerical immunity from any personal debt liability. The Council ordered his arrest and imprisonment to compel an account, leading Becket to flee to France.[28] In such political account cases lay the seeds of the parliamentary procedure of impeachment for abuse of public office, a process that would be followed many times in later English history; and impeachment in turn was one of the streams feeding new equitable controls extended over fiduciaries in the late seventeenth and early eighteenth centuries.[29]

(p. 479) VI. Control of Chivalrous Guardians

The 1215 Magna Carta codified and intensified a mode of feudal accounting controlling the behavior of lords who stood as guardians for underage heirs.[30] Such heirs under chivalrous or military tenures could not be admitted to the fee of their father because they could not provide the necessary military services, and so their expected lands and their person were taken under the control of the granting lord until they attained their majority. Extraction of income and capital from land held in guardianship was a massive source of revenue to higher lords and the Crown, as were fines and payments taken from the person of the ward (e.g., costs of provision, sale of the ward's marriage rights, and entry fines on granting of a new seisin). Magna Carta chapter 4–6 sought to restrain waste of estates held in guardianship, making the guardian accountable for "tunneling" and destruction of assets, though the lord was still permitted to take "reasonable" profit from the assets. Recompense for losses and due accounting and investment of profits could be ordered, and the estate might be transferred away to two royal representatives if the guardian proved incorrigible. Abuse of the ward's personal rights, such as a sale of the marriage to a demeaning partner, was also proscribed. The guardian-lord's power was thus bent toward the interests of the ward, who stood vulnerable to that power, with crown supervision backed up by the threat of confiscation and retransfer of the estate to fresh trustees appointed by the king, who presumably would then do right by the ward. It is less clear if practical remedies against the lord were directly available to the heir; the Magna Carta text makes no mention of ex ante restraint of guardian actions, for example, by prohibition; nor is there mention of any remedy of compensatory damages for loss caused to the land or pecuniary restitution to make up missed or diverted investment of profits. However, both prohibition and damages for waste were identified in Henry de Bracton's treatise *De Legibus*, dating some ten or so years after Magna Carta,[31] and such remedies were then codified in 1285 by the Statute of Westminster II chapter 14. The result was to reconceptualize waste actions as a form of account for private damage to the heir's inheritance or reversion, a "horizontal" remedy between subjects, as well as a "vertical" remedy to sustain the public or administrative order of due tenurial relationships that fell under the supervisory jurisdiction of the Crown.

(p. 480) VII. Socage Guardianship and Account

Two generations after Magna Carta, the duties applied to guardians were greatly enlarged by the 1259 Provisions of Westminster and the 1267 Statute of Marlborough. One of the chief reforms was to apply extensive accounting duties to guardians of wards in socage (or agricultural) tenure. In effect, and to use an anachronistic description, these provisions constituted socage guardians as trustees disabled from taking personal profit. Guardians holding military or chivalrous tenures could still keep the reasonable issues as compensation for the temporary abatement of services from the heir, as licensed by ancient feudal custom; but guardians were now disbarred from the profits of socage tenures, the normal form of holding involving fixed services in return for agricultural land. Even before Magna Carta, socage tenures had attracted a special protection. Glanvill stated a simple rule that a socage wardship should go to the side of the family to which the property could not descend. "For, by law, wardship of a person never goes to anyone who might be suspected of being able, or of wishing, to claim any right in the inheritance."[32] It was a very wise prophylactic rule to eliminate incentives that might cloud the motives of supposedly upright guardians and rulers.[33]

An accounting remedy was developed by statute to supply the necessary tools for regulation of the sensitive socage guardian duties regarding the profits of the land. The 1267 Statute of Marlborough chapter 17 not only prohibited waste of a socage estate held for a ward, but required the guardians to "answer him through a lawful accounting for the issues [profits] of the said inheritance with due allowance made to those guardians of their reasonable expenses."[34] The socage heir could take factual control (though not legal possession) of the land at age 14, since he was then held able to hold a plough, and he could claim an account of all issues of the land during his minority from that moment, subject to deduction for the guardian's expenses in realizing the profits. There was much case law debating when the guardian could rightly claim that his expenses did swallow all the profits, requiring the court to "tax" or measure the claimed expenses to prevent them from becoming an exorbitant wage or profit-share.

This "lawful accounting of issues" can be seen as a positive accounting measure to capture due profits, taking its place alongside the negative accounting measures of waste, used to combat losses or subtractions from the estate through the remedies of prohibition, damages, and confiscation of wardship. In the wake of the thirteenth-century legislation, judges did in fact run waste and account remedies together, and in 1314, Bereford CJCP cryptically states that account is to be the sole remedy for the socage (p. 481) ward on both the loss and gain sides.[35] The idea floats downstream into the common law; in Fitzherbert's *Natura Brevium* of 1534, we have a laconic note that "Waste lies not against the Guardian in Socage, but Account or Trespass."[36] Milsom concludes that waste was subsumed within account claims; the more potent remedy was to have the king remove the guardian and so direct the issues to the heir, with account yielding payments to fill in shortfalls in the guardian's receipts.[37] In the same way courts today order account and compensation against a defaulting trustee to bring the trust assets back to their due state, and often displacing the trustee's title by assignment to the beneficiary or to fresh trustees. It is interesting that judges of the fourteenth century seem as unsure as those of the twenty-first whether damages for loss are a useful remedy for bringing an abused estate back to its due asset level.[38]

VIII. The Union of Account and Waste

By the late thirteenth century, the central courts had created a complex of correlative legal relations extending accounting and waste remedies to third parties through augmentation of disseisin actions to permit tracing and following procedures for entrusted assets. Moreover, account lent itself to interpleading and reflective actions to take into account multipartite relations. For example, a guardian who assigned land to the disherison of the ward might have the wardship removed to the next non-inheriting relative to stand as guardian.[39] A guardian could sue for disseisin or waste on behalf of a ward against a third party where the ward was prevented from suing.[40] A ward could sue his guardian's assignee for both the capital and misappropriated income.[41] An estate in wardship that was degraded or wrongfully assigned could be recovered by suing a steward in place of the lord if the lord could not be brought to court.[42] Moreover, account actions permitted interpleading to adjust for third-party claims, notably Crown tax debts that might take priority over internal manorial accounting.[43] Bailiffs answerable to a lord for profits and outgoings could in turn sue to enforce account against tenants and servants on behalf of the lord,[44] though legislation was passed to require objective proof of wrongdoing and so stop the bailiffs using account procedures oppressively (p. 482) against the workforce.[45] Concomitantly lords were given extended control over their bailiffs; for example, allowing lords to apply not only distress of goods, but bodily attachment and even outlawry to absconding bailiffs in order to ensure a due account was made and satisfaction of outstanding debts given in the context of management of the lord's land.[46]

The multipartite aspects of the account jurisdiction thus escaped from the normal bilateralism of common-law relations. Perhaps the most important extension came with the 1285 Statute of Westminster II, chapter 11, known as the Accountants Act, which applied the legal accounting process to "all manner of receivers," thus making the leap from manorial bailiffs outward to agents and fiduciaries generally:

Concerning servants, bailiffs, chamberlains, and all manner of receivers, which are bound to yield account, it is agreed and ordained, that when the masters of such servants do assign auditors to take their account, and they be found in arrears upon the account, all things allowed which ought to be allowed, their bodies shall be arrested, and by the testimony of the auditors of the same account, shall be sent or delivered unto the next jail of the King's in those parts.[47]

The 1285 statute prescribed an elaborate system of audit, listed possible offsets and defenses, and, by licensing attachment of the person of the receiver (and not just his assets), created a new and potent method to enforce performance of the account. Factors, bailees, agents, executors, and other receivers of money or goods on another's behalf were swept into the jurisdiction, as were merchants with debt liabilities under running or static accounts; much of the trading and credit economy now fell to be regulated under the new procedures. Thus the idea of legal accountability, first codified in Magna Carta in 1215, had burst its feudal bounds just seventy years later; and by the fifteenth century, account is acknowledged to furnish a general law of management. In a 1494 Year Book report we read, "In every case where one has a thing in his keeping, he is chargeable in an action of account if he has it not to his own use."[48] The seventeenth-century common law courts continued the expansion, subjecting receivers, bailees, and executors to strict account duties;[49] and Parliament completed the work with legislation making joint tenants accountable to each other for gains and losses inter se, thus opening (p. 483) up partnerships and joint stock enterprise to accounting disciplines.[50] Account over the centuries had given birth to a complex law of fiduciary regulation.

IX. Equity: Disabling Profit-Taking

Common law accounting migrated into the Court of Chancery in the sixteenth and seventeenth centuries. But the action changed in tenor: Chancery was enforcing an *in personam* jurisdiction of conscience centered on trust administration, not feudal, manorial, and mercantile receipts. We must therefore ask what were the modern fiduciary relations that Equity made subject to its own inquisitorial accounting mechanisms. We may jump forward to the early eighteenth century and continue the historical inquiry with what is acknowledged to be the seminal fiduciary accounting case in Equity, and also one of the most enigmatic.

Lord Chancellor King's 1726 decision of *Keech v. Sandford*, preserved in a cryptically brief report, excluded a trustee from exploiting a business opportunity, namely, the acquisition of a lease on renewal, where the prior lease was held by the trustee for an infant. The trustee could not renew the lease in his own sole name and control because he came to the asset by virtue of his office.[51] This case is taken to be the *locus classicus*, the first great equitable statement of fiduciary duty, embodying the no-profit or no undeclared self-interest rule. The case made a sharp break with the more permissive attitudes of earlier law permitting trustee self-enrichment. There were, for example, extant rulings permitting trustees and executors to profit from investments of estate assets pending distribution, on the argument that, since the trustees were primarily bound to maintain possession of assets, they became strictly liable for market losses resulting from sending out the assets to be traded in the hands of others; to counterbalance that risk they should be permitted to keep any gains. Thus Lord Chancellor Macclesfield in a 1718 case held:

[I]f an executor or trustee of money places it out in the funds, or on other security, whereby he gains considerably, that he shall have the whole benefit thereof to himself, in respect of the hazard he run of being a considerable loser thereby, which he must have borne.[52]

Keech v. Sandford established precisely the opposite default rule, arguing that any profit arising from fiduciary office was presumptively or in potential a fraud, and that it would be safest for trustees either to deny themselves such benefit, or if they took the benefit, to hold it on constructive trust as if they were investing on behalf of the beneficiary.[53] (p. 484) It was no rebuttal of the presumption to argue that some profit made available to the fiduciary would not in any case have been acquired for the beneficiary; that was the precise argument that Sandford, the trustee, had tried to make in the present case, namely, that the lessor of the asset had refused to renew the lease if it would be held on trust for an infant. Lord King stated these rather complex ideas in a briefly reported judgment that has served as a kind of Rorschach test of fiduciary theory ever since:

I must consider this as a trust for the infant; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed to *cestui que use*; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease: but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que* use.[54]

To paraphrase: it was all too easy for a trustee to make the "no harm done" argument, concealing evidence of the abusive path by which profits that ought to have gone to the trust had been diverted into his or her own pocket. Indeed, the pleadings suggested that the trustee had set up the whole situation so that the lessor, who was embroiled in commercial ventures with the trustee and had received some favors in the run up to the case, had denied the lease for the trust corruptly, suggesting that the entire "no harm" argument offered to the court had been perjured.[55] Lord King chose rather to decide against the trustee on a legal presumption, without fixing him with subjective wrongdoing: "though I do not *say* there is a fraud in this case." King's judgment further suggests that even if the profits had not been diverted, it was surely a bad idea for trustees and other agents to spend a good deal of their efforts in office looking out for themselves rather than their charges; the temptations of profit might warp their judgment even if they were not consciously seeking to do wrong. Better to ban all profit-taking and materially conflicted interest by a trustee, absent the most stringent proof of good faith conduct, including fairly won consent from a fully informed beneficiary.

Keech was decided by Lord King in the wake of the South Sea Bubble crash and the ensuing disgrace of his predecessor Lord Chancellor Macclesfield, who had permitted his Chancery staff to use court funds for private speculation, probably to recover the costs of fees or bribes they had had to pay the Chancellor to purchase their offices, thus making Macclesfield a collaborator in their graft. The Chancery officials had lost all of those investment funds in the 1720 market crash, including the vast fortune of a mentally disturbed duchess whose wealth had been placed under the protection of the court. The family of the duchess successfully organized Macclesfield's impeachment in the House (p. 485) of Lords following his dismissal from office by Walpole. Macclesfield was imprisoned and forced to make complete reimbursement from his own pocket, and his disgrace may have brought home to the legal and political elites the risks of allowing the powerful to abuse their office for profit, at the risk of those they were supposed to be providing for. Macclesfield's destruction may have helped provide the impetus to reverse the corrupting rule of trustee enrichment that he had stated as Chancellor in 1718, issued as he himself was conniving in defalcation of Chancery funds. Even in the corrupt and cynical world of Hanoverian law and politics, a line had to be drawn; the failure of the gatekeeper-in-chief demanded a strong response if the entire system of legal accounting was not to be delegitimized.

Keech was sparsely cited over the next eighty years, but the novel fiduciary principle it announced worked itself quietly into the law, as eighteenth-century courts came to undo past permissive precedents and block unauthorized profit-taking by fiduciaries or others in positions of influence or good faith. Fiduciary discipline was extended to mortgagees and auctioneers with powers of sale;[56] remainderman in competition with a life tenant,[57] or vice versa;[58] and partners with mandates of disposition.[59] However, a rival stream of permissive authority continued for some time, allowing executors to take the unallocated estate residue as a gratuitous reward for their labors. Such enrichments were seen to be a legitimate expectation or perquisite of office, impliedly consented to by settlors and beneficiaries, for example, where the executor was simultaneously a beneficiary or legatee under the testamentary trust.[60] Some positive evidence of testator's intent might be required to exclude the executors from benefit.[61] This last bastion of trustee privilege was gradually eliminated after 1750, though Parliament eventually legislated to ram the point home that executors were not to be presumed to receive any benefit from office unless this was clearly allocated in the will.[62]

Policy reasons to support the no-profit disability and the associated rule against self-dealing or acquiring any assets from a trust were explored in a series of judgments by the Lord Chancellors from the middle of the eighteenth century. In 1740, Lord Chancellor Hardwicke forbade trustee-executors from negotiating an allowance for their work to be paid by the beneficiary; the trustees had used their monopoly position unduly to extract advantages from a *cestui* at his most vulnerable point.[63] In 1747, Lord Hardwicke gave a further forensic explanation as to why a trustee could not personally acquire trust assets, whether at public auction or by private treaty, as there would always be a risk of **(p. 486)** undervalue: "nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it."[64] In the 1795 case of *York Buildings v. Mackenzie*, a solicitor served as fiduciary agent for a public sale of assets of an insolvent company; he bought company land for himself and developed it to great profit over a period of years. The House of Lords reversed the lower Scottish courts to hold that the land had to be surrendered to representatives of the company. The court accepted the appellant counsel's explanation of the *Keech* principle:

The ground on which the disability or disqualification rests, is no other than that principle which dictates that a person cannot be both judge and party. No man can serve two masters. He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expence of those for whom he is entrusted.

The danger of temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of the mere necessity of the case, work a disqualification; nothing less than incapacity being able to shut the door against temptation where the danger is imminent, and the security against discovery great, as it must be where the difficulty of prevention or remedy is inherent to the very situation which creates the danger. The wise policy of the law has therefore put the sting of a disability into the temptation as a defensive weapon against the strength of the danger which lies in the situation.[65]

The idea expressed here of prophylaxis, of removing temptation to betray a beneficiary's interest by imposing a disability on self-interested conduct, was further developed by Lord Chancellor Eldon in a series of judgments following closely in the wake of the *York Buildings* litigation. There was some irony here, as Eldon himself had served as senior counsel for the losing side, and had spent great pains trying to undo the arguments for imposing fiduciary controls on the solicitor-agent.[66] In *Ex parte Lacey*,[67] at the end of his first year as Chancellor in February 1802, Eldon made a major restatement of the grounds of fiduciary liability. The facts concerned a fiduciary insolvency agent self-dealing in the bankrupt estate. Lord Eldon ruled that such conduct was dangerous and was to be proscribed because the court could never know which valuable information about the sale the fiduciary may have withheld; moreover, the temptation to exploit his position may have dulled his own awareness of the interests of his principals.

[T]hough you may see in a particular case, that he has not made advantage, it is utterly impossible to examine upon satisfactory evidence in the power of the Court, by which I mean, in the power of the parties, in ninety-nine cases out of an hundred, (p. 487) whether he has made advantage, or not. Suppose, a trustee buys any estate; and by the knowledge acquired in that character discovers a valuable coal-mine under it; and locking that up in his own breast enters into a contract with the *Cestuy que trust*: if he chooses to deny it, how can the Court try that against that denial? The probability is, that a trustee, who has once conceived such a purpose, will never disclose it; and the *Cestuy que trust* will be effectually defrauded.[68]

X. Equity: Reversing Losses

It was well understood that an ultra vires misapplication of trust assets was strictly to be accounted for. No finding or presumption of wrongdoing was necessary to effect restitution. The default position was that the trustee should keep the assets safely in his possession; but the trust instrument or the principal's or beneficiary's instructions could shift the default rule and license exploitation of the assets whether by lease or by sale and reinvestment. Under the terms of the authority, only safely identified investment targets could be permitted; a wrongful disbursement to an incorrect person or into an incorrect asset class would be "falsified," or struck off the account, and the fiduciary would have to restore the fund to the position it would have been in had execution of the mandate been correct. An order for a "common account" responded to wrongful disbursements or exceeding the terms of the power-conferring mandate, and operated either to bring the assets back into the fund, or to ratify their substitution for other valuable assets. By contrast, "wilful default" accounting acted to "surcharge" the account, or require a payment by the fiduciary to bring to the fund a sum that should have been collected had all gone according to plan, or to compensate a loss by damage that should have been avoided. No breach of the express trust terms was necessary in such a case—merely a specific performance order to put in to the trust or restore to the trust what should have been expected. The two categories could overlap, as where the missing value may have gone into the trustee's own pocket, and would now have to be disgorged and put into the trust fund.[69]

More difficult was a case where reasonable profits that ought to have been earned were never realized; for example, was it a kind of waste for a trustee of land to fail to lease out or cultivate a meadow and leave it dormant? In 1678, Lord Keeper North expressed his doubt that the court could ever order payment of "imaginary values" or counterfactual unrealized profits.[70] An alternative view was that trustees should always pay in simple or even compounded interest if the asset was prone to be exploited on prudent business lines. In 1711, Lord Harcourt ruled that where a captain of a ship had taken over the trading (p. 488) monies of a dead companion and had invested them to good profit, he had to account for all the profits, including those in excess of normal simple interest, as he had *elected* to serve as a fiduciary undertaking the business of the dead man on behalf of his family; but at the same time, no losses caused in the normal course of business could be ascribed to such a trustee *de son tort* if he used normal prudence in the management as with his own goods.[71] In the much-cited 1754 judgment of *Belchier v. Parsons*, Lord Hardwicke ruled that where a trustee or fiduciary had taken ordinary care to sell goods, including reasonable use of a broker or other delegate, then there could be no liability in account if the value was lost due to the agent's insolvency or some other unforeseen mishap:

This court has laid down a rule with regard to the transactions of assignees, and more so of trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own. … But where trustees act by other hands, either from necessity or conformably to the common usage of mankind, they are not answerable for losses.[72]

The point of the judgment seems to have been that there was no wilful default causing the loss, since the putting out of the goods with an agent was implicitly authorized by normal usages. But it seemed that a stricter liability for losses would apply where there was any hint of a wilful default in the use of fiduciary powers, a falling down in the due care and prudence that could be expected of the fiduciary. A key authority here was *Charitable Corporation v. Sutton*, decided a decade earlier by Lord Hardwicke in 1742. The case involved passive co-trustees of a large joint stock company whose funds had been fraudulently extracted by a coterie of active managers. The passive trustees argued against solidary duty, claiming that their innocence of the defalcations prevented liability ever arising. Lord Hardwicke riposted:

The … objection was … on this general point of breaches of trust and gross neglects of the several directors … that some acts are joint, others separate, and each is answerable only for his own particular acts and neglects. … If this be so, it is laying the axe to the root of the tree. … But it is not so; for where there are many trustees, and some are guilty of one breach and some of others, or where there is a gross negligence, and the loss is so complicated as it cannot be apportioned, I think they are all jointly liable.[73]

The *Sutton* case emphasized a rule that had been extant since the early seventeenth century: a group of fiduciaries with joint responsibility for assets had a duty to act as a group with internal monitoring and discipline.[74] Other cases moved further to hold that a fiduciary had to give accurate advice promoting the interests of entrusting persons, and could be attached for losses for omitting to give due advice or warnings as to risk.[75] **(p. 489)** Perhaps the high-water mark came in 1783, when Lord Chancellor Loughborough suggested that the strict anti-profits rule should be mirrored by strict liability for loss, in the sense that the fiduciary bore the onus of proof to show blamelessness:

In some of the reports a confused notion prevails that an executor or trustee is not answerable for the loss, where he would be answerable for the profits, but I take that to be quite erroneous, and that it has been long established in this court, that in these cases every thing shall be taken against the executor; if any profits are made, he must account for them; if any loss happens, he must bear it; and it does not alter the case that the executor has improved the estate by lending money on personal security; for the Court will not consider the whole account of his dealings together, but must consider every single transaction by itself.[76]

Equitable fiduciary duties now moved into the expanding space of corporate directors' duties and other areas of joint action such as partnership firms. The nineteenth century saw much litigation developing tests for associating third-party advisers, receivers, and joint investors with the fiduciary liabilities of trustees, directors, and other principals, culminating in the cataclysmic litigations surrounding the collapse of the City of Glasgow Bank in 1878.[77] But as equitable regulation grew, its disciplinary effects were often felt to be harsh, and many judges and commentators protested that stringent ascription of liability from all members of a group to the directing parties would keep able people away from fiduciary office.[78] In the 1874 case of *Barnes v. Addy*, the Court of Appeal held that agents, solicitors, or other assistants to fiduciaries could only be attached for fiduciary breach if the assistant had knowledge of a fraud, or who had taken in trust property in breach of trust.[79] This set off a debate about third-party liability that has almost dwarfed in scale litigations over primary fiduciary duty itself, as litigants will often purse solvent legal or financial agents for the frauds of their clients.[80] In the 1883 case of *Speight v. Gaunt*,[81] the Court of Appeal and the House of Lords replaced the strict-liability approach for loss caused by a primary fiduciary default not including fraud with a fault-based approach aligned with the emergent common-law tort regime of negligence.[82] The assimilation of equitable compensation for breach of fiduciary duty and negligent liability for tortious harm continues apace.[83]

XI. Envoi

This historical survey of fiduciary institutions has suggested that juristic amnesia is a constant threat to sound case law, and that a deeper appreciation of the resources of common-law accounting and the equitable regulation of powers, duties, and disabilities would serve us well. Notwithstanding the fashion among eminent judges and jurists today, the accountability of fiduciary managers armed with extensive powers over the lives and fortunes of others is not all reducible to contracts and torts. Paying a liquidated sum as a secondary remedy to correct for breaches of promise or other forms of wrongdoing does not answer to the requirement that an agent should serve a principal with loyalty, focusing on the best possible performance of the primary duty. Classically, the fiduciary had to go beyond reaching a contractual or *ex lege* tort standard of performance, and was to report constantly on the management process and make the management good if shortfalls or diversions of value were revealed. The beneficiary had ready access to court to force an account and reckoning, and this constant pressure kept the fiduciary within bounds and repressed abuse of powers. We forget these fiduciary principles to our peril; it is a history worth recovering.

Acknowledgments

I thank Evan Criddle for improvements of the text; he has a patient and discerning eye.

Notes:

([1]) Michael Macnair, Development of Uses and Trusts: Contract or Property, and European Influences and Images, 66 Studi Urbanati 305, 311–312 (2015); see further essays in Itinera Fiduciae: Trust and Treuhand in Historical Perspective (Richard Helmholz & Reinhard Zimmermann eds., 1998).

([2]) Thomas Elyot, Bibliotheca Eliotae, ¶ F, ante I (London, 1542), cited by Macnair, supra note 1, at 312.

([3]) Francis Bacon, Reading on the Statute of Uses 7 (London, 1642).

([4]) Standen & Alii v. University d’Oxon & Whitton (1620) W. Jones 17, 26; 82 E.R. 11, 15.

([5]) David J. Seipp, Trust and Fiduciary Duty in the Early Common Law, 91 B.U. L. Rev. 1011 (2011).

([6]) Peter Birks, The Content of Fiduciary Obligation, 34 Israel L. Rev. 3, 11 (2000).

([7]) (1717/1744) 2 Eq. Cas. Abr. 225, 227; 22 E.R. 191, 192.

([8]) John Ayliffe, The Law of Pledges, or Pawns 4 (London, 1732). The *antichresis* was also known as a “vifgage” or “live” pledge because the creditor controlled and enjoyed the live profits of the pledged asset; see Laurent Waelkens, Amne Adverso: Roman Legal Heritage in European Legal Culture 314–322 (2015), and for classical antecedents, David Johnston, Fiduciary Principles in Roman Law, this volume.

([9]) Baxter v. Burfield (1746) 2 Str. 1266, 1267; 93 E.R. 1172.

([10]) This recalls Wesley N. Hohfeld’s analytical schema, set out in Fundamental Legal Conceptions as Applied in Judicial Reasoning (Walter W. Cook ed., 1919), which itself drew heavily from the law of fiduciaries and trusts, with important influence from Frederic W. Maitland’s Equity: A Course of Lectures (1909). See further Joshua Getzler, Frederic William Maitland—Trust and Corporation, 35 U. Queensland L.J. 171 (2016).

([11]) Leading treatments of the modern law include Paul D. Finn, Fiduciary Obligations (1977, reprinted 2017); Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties (2010); Tamar Frankel, Fiduciary Law (2011).

([12]) See Michael Lobban, in The Oxford History of the Laws of England XII: 1820–1914—Private Law 601–610 (William Cornish et al. eds., 2010).

([13]) D. E. C. Yale, Introduction, 2 Lord Nottingham’s Chancery Cases 124–150 (D. E. C. Yale ed., 79 Selden Society 1961).

([14]) Richard H. Helmholz, Fiduciary Principles in the Canon Law, this volume.

([15]) Joshua Getzler, Law, Self-Interest, and the Smithian Conscience, in Law in Theory and History 250 (Maksymilian Del Mar & Michael Lobban eds., 2016).

([16]) See AIB Group (UK) Plc v. Mark Redler & Co Solicitors [2015] A.C. 1503, 1527 (U.K. Sup. Ct.) where Lord Toulson derided the older accounting approaches to fiduciary duty as "the literary costume of equitable debt"; cf. Main v. Giambrone [2017] EWCA Civ 1193; Charles Mitchell, Stewardship of Property and Liability to Account, 2014:3 Conveyancer 215 (2014); Equitable Compensation and Disgorgement of Profit (Simone Degeling & Jason N. E. Varuhas eds., 2017).

([17]) Samuel L. Bray, Fiduciary Remedies, this volume.

([18]) A. W. B. Simpson, A History of the Common Law of Contract 53–135 (1975); S. F. C. Milsom, Account Stated in the Action of Debt, 82 L.Q. Rev. 534 (1966).

([19]) E. O. Belsheim, The Old Action of Account, 45 Harv. L. Rev. 466 (1932); T. F. T. Plucknett, The Medieval Bailiff (1954); Samuel J. Stoljar, The Transformations of Account, 80 L.Q. Rev. 203 (1964); James Watson, The Duty to Account: Development and Principles (2016); Amir Licht, Lord Eldon Redux: Information Asymmetry, Accountability, and Fiduciary Loyalty, 37 Oxford J. Leg. Stud. 770 (2017).

([20]) See Item Software (UK) Ltd. v. Fassihi [2005] 2 B.C.L.C. 91, at [63]–[64] per Arden LJ; John Lowry, The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure, 68 Cambridge L.J. 607 (2009).

([21]) Schmidt v. Rosewood Trust Ltd. (Isle of Man) [2003] 2 A.C. 709 (Privy Council).

([22]) Brooke Harrington, Capital Without Borders (2016); Adam Hofri-Winogradow, The Stripping of the Trust: A Study in Legal Evolution, 65 U. Toronto L.J. 1 (2015).

([23]) See Christopher Wickham, Framing the Early Middle Ages: Europe and the Mediterranean, 400–800, at 72–137, 212–241 (2005).

([24]) 2 Frederick Pollock & Frederic W. Maitland, The History of English Law Before the Time of Edward 1–6 (2d ed. 1898).

([25]) S. F. C. Milsom, Historical Foundations of the Common Law 25–26 (2d ed. 1981).

([26]) See Paul Brand, Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England 65 (2003) (dating the first "private" account writs to c. 1184–1185).

([27]) See Zvi Razi & Richard Smith, The Origins of the English Manorial Court Rolls as a Written Record: A Puzzle, in Medieval Society and the Manor Court 36 (Zvi Razi & Richard Smith eds., 1996); John Sabapathy, Officers and Accountability in Medieval England 1170–1300 (2014).

([28]) 2 English Lawsuits from William I to Richard I, Case 421, at 433–457 (Raoul van Caenegem ed., 107 Selden Society 1991).

([29]) See Joshua Getzler, Rumford Market and the Genesis of Fiduciary Obligations, in Mapping the Law 577 (Andrew Burrows & Alan Rodger eds., 2006); and see infra text accompanying notes 51–62.

([30]) Joshua Getzler, Magna Carta Clauses 4 and 5 and the Origins of Accountability, in Challenges to Authority and the Recognition of Rights ch. 6 (Catharine MacMillan & Charlotte Smith eds., 2018).

([31]) See 3 Henry de Bracton, De Legibus et Consuetudinibus Angliae 411 (Samuel E. Thorne trans., 1968–1977) (drawing on Bracton's Note Book, no. 1201 & no. 1840 (1227/28)); Novae Narrationes, cxc–cxcviii, 15–18, 129–132, 305–310 (Elsie Shanks & S. F. C. Milsom eds., 80 Selden Society 1963).

([32]) Ranulf de Glanvill, On the Laws and Customs of the Realm of England (c. 1187–1189) § VII, 11, at 84–85 (G. D. G. Hall ed., 1965). The same rule is repeated in 2 Bracton, supra note 31, at 254.

([33]) Cf. 1 Kings 21:19.

([34]) Translation from Brand, supra note 26, at 477.

([35]) Y.B. Mich. 8 Edw. 2, pl. [16]; see also Seipp No. 1314.117ss.

([36]) Anthony Fitzherbert, La Novel Natura Brevium f. 59E (London, 1534).

([37]) S. F. C. Milsom, Historical Foundations of the Common Law 240 (2d ed. 1981); S. F. C. Milsom, The Legal Framework of English Feudalism 155–157 (1976).

([38]) Cf. AIB, supra note 16.

([39]) Statute of Westminster (1275) ch. 48.

([40]) Statute of Westminster II (1285) ch. 15.

([41]) Y.B. Mich. 2 Edw. 2, pl. [14] (1314); Seipp No. 1309.051ss.

([42]) Glanvill, supra note 32, XI: 1–2, at 131–134.

([43]) E.g., Y.B. Pasch. 21 Edw. 4, pl. 21b–22a, Seipp No. 1481.033.

([44]) Plucknett, supra note 19, at 11–15.

([45]) E.g., Magna Carta (1215) ch. 38; Watson, supra note 19, at 39–76.

([46]) Statute of Westminster II (1285) ch. 11; Watson, supra note 19, at 78–83.

([47]) Statute of Westminster II (1285) ch. 11.

([48]) Y.B. Mich. 10 Hen. 7, pl. 6a–7a, 12 (1494); see also Paul Brand, The Equity of the Common Law Courts, in Law and Equity 39 (Egbert Koops & Willem Zwalve eds., 2013); Paul Brand, Merchants and Their Use of the Action of Account in Thirteenth and Early Fourteenth Century England, in Medieval Merchants and Money 293 (M. Allen & M. Davies eds., 2016). Accounting for executors took a different juristic path: see Nye Perram, The Operations and Present Operation of the Action in Devastavit, Fed. Jud. Scholarship 23 (2012).

([49]) E.g., Dodderidge v. Anthony (1621) Winch 52; 124 E.R. 44; Hackwell v. Eastman 1616 Cro. Jac. 410; 81 E.R. 580; Harris v. De Bervoir (1624) Cro. Jac. 688; 79 E.R. 596; East India Company v. Blake (1673) Rep. Temp. Finch 117; 23 E.R. 64.

([50]) Administration of Justice Act 1705 s. 27 (Lord Somers' Act).

([51]) (1726) Sel. Cas. Temp. King 61; 25 E.R. 223.

([52]) Bromfield v. Wytherley (1718) Prec. Ch. 505; 24 E.R. 227; cf. Holt v. Holt (1670) 1 Ch. Cas. 190; 22 E.R. 756.

([53]) See Joshua Getzler, "As If." Accountability and Counterfactual Trust, 91 B.U. L. Rev. 931 (2011).

([54]) (1726) Sel. Cas. Temp King 61, 62; 25 E.R. 223.

([55]) D. R. Paling, The Pleadings in Keech v. Sandford, 36 Conv. 159 (1972); Getzler, supra note 29, at 581–589; Andrew D. Hicks, The Remedial Principle of Keech v. Sandford Reconsidered, 69 Cambridge L.J. 287, 289–299 (2010).

([56]) Rakestraw v. Brewer (1728) 2 P. Wms. 511; 24 E.R. 839.

([57]) Addis v. Clement (1728) 2 P. Wms. 456; 24 E.R. 811; Owen v. Williams (1773) Amb. 734; 27 E.R. 474.

([58]) Taster v. Marriott (1768) Amb. 668; 27 E.R. 433.

([59]) Featherstonhaugh v. Fenwick (1810) 17 Ves. Jun. 298; 34 E.R. 115.

([60]) North v. Crompton (1671) 1 Ch. Cas. 196, 22 E.R. 759; Adams v. Gale (1740) 2 Atk. 106; 26 E.R. 466; Child v. Gibson (1743) 2 Atk. 603; 26 E.R. 761.

([61]) Fane v. Fane (1681) 1 Vern. 30, 23 E.R. 284, 79 S.S. 904; Jefferies v. Harrison, Executor of Sir Thos. Travel (1736) West Temp. Hardwicke 18; 25 E.R. 797.

([62]) Bishop of Cloyne v. Young (1750) Ves. Sen. 285; 28 E.R. 527; Blewett v. Millett (1774) 7 Bro. P.C. 367; 3 E.R. 238; Stone v. Theed (1787) 2 Bro. C.C. 243, 247–248; 29 E.R. 135, 137; Executors Act 1830.

([63]) Ayliffe v. Murray (1740) 2 Atk. 58; 26 E.R. 433.

([64]) Whelpdale v. Cookson (1747) 1 Ves. Sen. 9; 27 E.R. 856.

([65]) York Buildings v. Mackenzie (1795) 7 Bro. P.C. 42, 63–64; 3 E.R. 432, 446.

([66]) Supra n 65, 68-70; 449-450; York Buildings Company against Alexander Mackenzie, Pleadings (1791–1793).

([67]) (1802) 6 Ves. Jun. 625; 31 E.R. 1228.

([68]) (1802) 6 Ves. Jun. 625, 627; 31 E.R. 1228, 1229; similar: Ex parte James (1803) 8 Ves. Jun. 337; 32 E.R. 385; Ex parte Bennett (1805) 10 Ves. Jun. 381; 32 E.R. 893.

([69]) Robert Chambers, Liability, in Breach of Trust 1 (Peter Birks & Arianna Pretto eds., 2002); Hall v. Libertarian Investments Ltd. [2013] HKCFA 93, [166]–[172] per Lord Millett NPJ; Agricultural Land Management Ltd. v. Jackson (No. 2) [2014] WASC 102, [300]–[399] per Edelman J.

([70]) Palmer v. Jones (1683) 1 Vern. 144; 23 E.R. 376 (North L.K., criticizing Nottingham L.C.'s 1678 judgment; see 79 S.S. No. 824).

([71]) Brown v. Litton (1712) 1 P. Wms. 140; 24 E.R. 329.

([72]) (1754) 1 Kenyon 38, 96 E.R. 908.

([73]) (1742) 9 Mod. 349, 356, 88 E.R. 500, 504.

([74]) Townley v. Sherborne (1633) Bridgman 35, 123 E.R. 1181; Joshua Getzler, Laying the Axe to the Root of the Tree? Shielding a Co-trustee from Liability, in Defences in Equity 183 (Paul Davies, Simon Douglas & James Goudkamp eds., 2018).

([75]) Bulkley v. Wilford (1834) 8 Bligh N.S. 111; 5 E.R. 888.

([76]) Adye v. Feuilleteau (1783) 3 Swanston 90; 36 E.R. 784, 785, S.C. 1 Cox 24, 25; 29 E.R. 1045, 1046; Newton v. Bennet (1784) 1 Bro C.C. 359, 361–362; 28 E.R. 1177, 1179; Piety v. Stace (1799) 4 Ves. Jun. 620, 622–623; 31 E.R. 319, 320.

([77]) Gillespie v. City of Glasgow Bank (1879) L.R. 4 App. Cas. 632; Cuninghame v. City of Glasgow Bank (1879) 4 App. Cas. 607.

([78]) Chantal Stebbings, The Private Trustee in Victorian England 98–162 (2001).

([79]) (1874) L.R. 9 Ch. App. 244.

([80]) Pauline Ridge & Joachim Dietrich, Accessories in Private Law (2015); Paul S. Davies, Accessory Liability (2015).

([81]) Speight v. Gaunt (1883) 22 Ch. D. 727; (1883) 9 App. Cas. 1.

([82]) See Joshua Getzler, Duty of Care, in Breach of Trust 41, supra note 69.

([83]) See authorities cited supra note 16.

Joshua Getzler

Joshua Getzler is Professor of Law and Legal History at the University of Oxford; Fellow and Tutor in Law at St. Hugh's College, Oxford; and Conjoint Professor of Law at the University of New South Wales.