den and his heirs, with various covenants in the same indenture that the tenements should be free from incumbrances and that the duchess and her heirs would make further assurance, and the like. And, notwithstanding all these facts, when the duchess returned from [Poland] she exhibited a bill in Chancery,[15] averring that this whole conveyance was upon trust and confidence to her use, and [to the use] that Herenden and his heirs would re-enfeoff her etc. And she was received to make this averment of this secret use, against the consideration and the express use; and upon proof thereof she had a decree against Herenden to re-enfeoff her. (By the report of Serjeant Barham.[16])

There was a like case between the earl of Pembroke, heir to the marquess of Northampton, complainant, and R. King and Geoffrey Skot, defendants, in Chancery. But the first case was stronger: that a use in secrecy and confidence should be averrable against a bargain, consideration, express use, indenture and fine.

(b) Decree of Sir Nicholas Bacon L.K.:
C33/22, fo. 62 (untr.).

A decree is upon the deliberate and advised hearing and debating of the matter between the said parties, in the presence of their learned counsel, this present term of St Hilary [1560], that is to say the twelfth day of February in the second year of the reign of our sovereign lady Elizabeth by the grace of God queen of England, France and Ireland, defender of the faith etc., made for the plaintiff in these words following:

Forasmuch as it did manifestly appear to the lord keeper and to this court, and was well and substantially proved in this court, as well by sundry depositions of sundry persons of good credit as also by divers notes of accounts, letters and other notes in writing as well of the proper hand of the said defendant as of others, and by divers other good and substantial matters proved and shewed to this court, that the said lands and tenements in the counties of Norfolk, Lincoln and Warwick, conveyed to the said Walter Herenden and his heirs, and the said lease . . . by the said complainant and Lady Katharine his wife were made upon special, faithful and secret trust and confidence and to have been employed to the use and behoof of the said complainant and Lady Katharine and

15 A *subpoena* was granted in Trinity term 1559; C33/19, fo. 187.

16 Nicholas Barham, serjeant at law 1567–77, who was admitted to Gray's Inn in 1540, and as a fellow Kentishman must have known Herenden well. This recollection by him was reported in 1572, not in 1560.

other the intents and meanings aforesaid, and not meant to be to the profit or benefit of the said defendant: it is therefore ordered, adjudged and decreed by the said lord keeper and the said Court of Chancery that the said lease so made upon trust and confidence as is before declared shall be and is now absolutely surrendered, made void and cancelled . . . and . . . that the said complainant and Lady Katharine his wife, their heirs and assigns, shall quietly have, occupy and enjoy the said manors . . . and all other the premises with their appurtenances in the counties of Norfolk, Lincoln and Warwick, conveyed and assured to the said Walter Herenden and his heirs as is aforesaid, without any let, interruption or disturbance . . . [and that Herenden and his wife should make such assurance to the plaintiff and his wife as the plaintiff's counsel should advise.] And this decree, being signed with the hand of the said lord keeper, is delivered to Thomas Powle, attorney for the said plaintiff, to be enrolled.

Powle.

Herenden died soon after this decree, and Richard Bartie sued his heir by bill in Parliament: *House of Commons Journals*, vol. I, p. 63 (21 January 1563).

ANON. (1563)

Moo. K.B. 45, pl. 138; BL MS. Add. 24845, fo. 61v.

A fine was levied by a husband and wife, and the conusee rendered the same lands back to the husband and wife and the heirs of the wife; and an indenture was made whereby it was recited that the render should be to the use of the husband and wife and the heirs of the husband. The question was, whether the limitation of the use by the indenture would hold?

DYER C.J. It seems to me that it is good enough, for the indenture should rule the use even though there is an implied use in the render to their own use.

BROWNE J. The possession is transferred to the [cestuy que] use by the statute, and therefore a use cannot be expressed upon a use. For instance, a feoffment to John Style to his own use, and that he should be seised to the use of R. H.: this is void with respect to R. H., because the use and possession were already in John Style. Likewise, if a man bargains and sells his lands for money, and limits a use thereon, it is void. But here the render must of necessity be to the heirs of one of them, and no use is implied by it.

body and custody of the lands, tenements and hereditaments, as livery, primer seisin, relief, and other profits which should or ought to appertain to the king, according to the true intent and meaning of the said former act and of this present act, as though no such estates or conveyances by covin had ever been had or made, until the said office be lawfully undone by traverse or otherwise.

16 And that the other lord and lords of whom any such manors, lands, tenements, or hereditaments shall be holden by knight's service as is aforesaid shall have their remedy in such cases for his or their wardships of bodies and lands by writ of right of ward; and shall distrain and make avowry or cognisance by themselves or their bailiffs for their reliefs, heriots and other profits which should have been to them due by or after the death of their tenant, as if no such estate or conveyance had been had or made . . .

ANON. (1538/39)

Brooke Abr., *Feffements al uses*, pl. 50.

If A. covenants with B. that when A. shall be enfeoffed by B. of three acres in Dale, then the said A. and his heirs and all others seised of the said A.'s land in Sale shall be seised thereof to the use of the said B. and his heirs; and A. makes a feoffment of his land in Sale; and then B. enfeoffs A. of the said three acres in Dale: there A.'s feoffees shall be seised to B.'s use, even if they had no notice of the use, for the land is and was bound with the aforesaid use into whose hands soever it should come. It is not like the case where a feoffee in use sells the land to someone who has no notice of the first use, for in the above case the use had no existence until the feoffment was made of the three acres, and then the use began.

TYRREL'S CASE (1557)

Dyer 155 ('in the Court of Wards').[9]

Jane Tyrrel, widow, for the sum of £400 paid by G. Tyrrel her son and heir apparent, by indenture enrolled in Chancery in 4 Edw. VI, bargained, sold, gave, granted, covenanted and concluded to the said G. Tyrrel all her manors, lands, tenements, etc., to have and to hold the same to the said G. Tyrrel and his heirs for ever, to the use of the said Jane during her life without impeachment of waste, and immediately after her decease to the use of the said G. Tyrrel and

9 Also reported in 1 And. 37, pl. 96; Benl. 61, pl. 108.

the heirs of his body lawfully begotten, and in default of such issue to the use of the heirs of the said Jane for ever. Query well whether the limitation of those uses upon the *habendum* is not void and impertinent, because a use cannot be springing, drawn or reserved out of a use, as appears prima facie. And here there ought to be first a use transferred to the vendee before any freehold or inheritance in the land can be vested in him by the enrolment. And this case has been doubted in the Common Pleas before now, so query what the law is.

But all the judges of the Common Pleas, and SAUNDERS C.B., thought that the limitation of uses above was void: for, suppose the Statute of Enrolments[10] had never been made, but only the Statute of Uses,[11] then the above case could not be; because a use cannot be engendered of a use.[12]

BARTIE v HERENDEN (1560)

(a) BL MS. Lansdowne 1067, fo. 27;
MS. Add. 35941, fo. 31v; LI MS. Maynard 77, fo. 31;
MS. Maynard 86, fo. 110; HLS MS. 2079, fo. 124;
French text in 93 L.Q.R. 36.

Note that the course of the Chancery (*cursus cancellariae*) by reason of equity is used contrary to the common law in that a use may be averred upon a fine, feoffment or recovery, against a use expressed in the same feoffment or set out in the indenture which expressly leads the use to the other. And this was recently in experience there in a suit between the duchess of Suffolk[13] and Herenden of Gray's Inn.[14] For when the duchess went across the sea in the time of Queen Mary, she levied a fine to Herenden in respect of various manors and hereditaments, and an indenture was made between them reciting a consideration of a large sum of money paid by Herenden to the said duchess, and several other considerations, and also reciting that the use should be to Heren-

10 See p. 115, above.
11 See p. 112, above.
12 Cf. Anderson: '. . . for the bargain for money in itself implies a use, and the limitation of the other use is absolutely contrary. . .'
13 Katharine Bartie (1519–80), baroness Willoughby d'Eresby, dowager duchess of Suffolk, now the wife of Mr. Richard Bartie (the actual plaintiff). She had escaped from house arrest in 1555 and fled to the Continent to escape religious persecution, having in 1554 conveyed her property to Herenden (in the manner indicated in the report) to avoid its forfeiture: 93 L.Q.R. 34; Dyer 176; *House of Commons Journals*, vol. I, p. 41.
14 Walter Herenden, admitted in 1541.