

Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty

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Abstract

This article investigates the development of accountability and fiduciary loyalty as an institutional response to information asymmetries in agency relations, especially in firm-like settings. Lord Eldon articulated the crucial role of information asymmetries in opportunistic behaviour in early nineteenth century, but its roots are much older. A thirteenth century trend toward direct farming of English manors and the transformation of feudal accounting after the Domesday Book and early Exchequer period engendered profound developments. The manor emerged as (possibly the first) profit-maximizing firm, complete with separation of ownership and control and a hierarchy of professional managers. This primordial firm relied on primordial fiduciary loyalty - an accountability regime backed by social norms that was tailored for addressing the acute information asymmetries in agency relations. Courts have gradually expanded this regime, which in due course enabled Equity to develop the modern duty of loyalty. These insights suggest implications for contemporary fiduciary loyalty.

Keywords: fiduciary, loyalty, accountability, accounting, corporate governance, firm, agency

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This article investigates the development of accountability and fiduciary loyalty as an institutional response to information asymmetries in agency relations, especially in firm-like settings. Lord Eldon articulated the crucial role of information asymmetries in opportunistic behaviour in early nineteenth century, but its roots are much older. A thirteenth century trend toward direct farming of English manors and the transformation of feudal accounting after the Domesday Book and early Exchequer period engendered profound developments. The manor emerged as (possibly the first) profit-maximizing firm, complete with separation of ownership and control and a hierarchy of professional managers. This primordial firm relied on primordial fiduciary loyalty - an accountability regime backed by social norms that was tailored for addressing the acute information asymmetries in agency relations. Courts have gradually expanded this regime, which in due course enabled Equity to develop the modern duty of loyalty. These insights suggest implications for contemporary fiduciary loyalty.

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1. Introduction

Judicial and scholarly discourse about fiduciaries' duty of loyalty has emphasized the 'no conflict' and 'no profit' rules as a vehicle for coping with opportunistic behaviour much more than disclosure duties.¹ This article seeks to rebalance this image of the structure of fiduciary loyalty by considering the roots of the fiduciary duty to account as an institutional response to acute information asymmetries. In this view, a duty of self abnegation ('no conflict') and a duty of full disclosure stand on equal footing. Only together can they constitute the fiduciary's duty of loyalty to fulfil her mission of promoting the beneficiary's interest.

Classic statements of the rationale that underlies fiduciary loyalty² strongly allude to selfish motivations. Lord Chancellor King in *Keech v Sandford* said that 'it is very obvious what would be the consequence of letting trustees have the lease.'³ In *York Buildings Co v Mackenzie* Lord Thurlow cited 'the danger of temptation.'⁴ Lord Herschell in *Bray v Ford* famously noted that 'human nature being what it is, there is danger... of the person holding a fiduciary position being swayed by interest rather than by duty.'⁵ Regardless of whether people are hopelessly selfish, however, this factor alone cannot explain the legal imperatives of fiduciary loyalty. Information asymmetries prevent beneficiaries from fending against fiduciary opportunism (a.k.a. the 'agency problem') because the fiduciary will always enjoy informational

¹ For clarity of analysis I assume that '[a] fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence', in line with *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ).

² This concept is adopted, with agreement, from M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart Publishing, 2011).

³ (1726) Sel Cas Ch 61.

⁴ (1795) 3 ER 432, 446.

⁵ [1896] AC 44, 51; see also *Breen v Williams* (1996) 186 CLR 71, [27].

superiority vis-à-vis her beneficiary and vis-à-vis any court trying to adjudicate a dispute between them.

Information asymmetries are ubiquitous. They exist, and can therefore facilitate opportunistic behaviour, in virtually every relationship, from simple sales contracts to the most complex relations. They become acute, however, in fiduciary relations, where the parties' power and vulnerability are extreme. This fundamental insight, that particularly acute information asymmetries underlie the law of fiduciary loyalty, was articulated in special detail in a line of decisions by Lord Eldon in the early 19th century. In *Ex parte Lacey*, which involved a purchase of trust property by the trustee, Lord Chancellor Eldon explained Equity's strict attitude against such transactions:

[The trustee] must according to the rules of this Court be watched with infinite and the most guarded jealousy; and for this reason; that the Law supposes him to have acquired all the knowledge a trustee may acquire; which may be very useful to him; but the communication of which to the *Cestuy que* trust the Court can never be sure he has made.⁶

In *Lacey*, and shortly thereafter in *Ex parte James*⁷ and in *Ex parte Bennett*,⁸ Lord Eldon captured the crucial role of information asymmetries in facilitating opportunistic behaviour, which is distinct from individual motivations ('human nature').⁹ Moreover, he has identified the special danger to fiduciary relations from information that modern economic theory dubs 'non-observable' and 'non-verifiable'. The former relates to information about performance, breach, or surrounding circumstances ('state of nature') that is unavailable to the principal if the agent has

⁶ (1802) 31 ER 1228, 1228.

⁷ (1803) 32 ER 385.

⁸ (1805) 32 ER 893.

⁹ For earlier articulations of this idea see *Whelpdale v Cookson* (1747) 27 ER 856 (Hardwicke LC); *York Buildings*, (n 4), 446; for an analysis see JS Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in A Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford: Oxford University Press, 2006) 577.

unique skills, for which reason she may have been hired in the first place. The latter denotes information about a breach, for instance, that is beyond the grasp of a judge, rendering the principal helpless against it. Thus,

the question, what knowledge [the trustee] has obtained, and whether he has fairly given the benefit of that knowledge, to the *cestui que* trust, which he always acquires at the expence of the *cestui que* trust, no Court can discuss with competent sufficiency or safety to the parties.¹⁰

Economic theory holds that any attempt at cooperation between people is bedevilled by the risk of opportunism¹¹ - defined by Williamson as ‘self-interest seeking with guile’¹² - due to a combination of the parties’ self-oriented motivations and asymmetric information. The theory of the firm and agency theory in particular address firm boundaries and its internal organization in light of these factors and thus go beyond treating the firm as a ‘black box’.¹³ Self-interestedness and information asymmetries render the agency problem a problem without solution. The avenues that the theoretical literature suggests for mitigating this problem primarily include ownership - ie, having the principal do the job himself rather than delegating it - and using fixed-claim contracts that leave the agent no discretion - for example, using debt contracts instead of equity investment.¹⁴ Such options are irrelevant for fiduciary relations, which are established for delegating discretionary power to the fiduciary.

¹⁰ *James* (n 7) 389.

¹¹ For surveys see P Aghion and R Holden, ‘Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?’ (2011) 25 *Journal of Economic Perspectives* 181; P Walker, ‘Contracts, Entrepreneurs, Market Creation and Judgement: The Contemporary Mainstream Theory of the Firm in Perspective’ (2015) 29 *Journal of Economic Surveys* 317.

¹² OE Williamson, *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (London: Collier Macmillan Publishers, 1985), 47.

¹³ NJ Foss, H Lando, and S Thomsen, ‘The Theory of the Firm’ in B Bouckaert and G De Geest (eds), 1 *Encyclopedia of Law and Economics* 631, 632–633 (Cheltenham: Edward Elgar, 2000).

¹⁴ O Hart, *Firm, Contracts, and Financial Structure* (Oxford: Oxford University Press, 1995); JC Stein, ‘Agency, Information and Corporate Investment’ in G Constantinides, M Harris and R Stulz (eds), *IA Handbook of the Economics of Finance: Corporate Finance* (Amsterdam: Elsevier, 2003) 111.

Societies may implement informal (non-legal) institutions that could moderate selfish behaviour through culture and social norms.¹⁵ Information asymmetries, however, resemble a force of nature in that no mechanism can help one know something beyond the information one can obtain. Information asymmetries thus exert a more pernicious effect in terms of facilitating opportunistic behaviour than selfish motivations do. The duty of loyalty constitutes society's formal (legal) attempt to mitigate the risk of fiduciary power abuse. Yet without full disclosure of all material information the proscriptions of the 'no conflict' and 'no profit' rules lose their efficacy, and fiduciary loyalty as a whole is rendered hollow.

This article traces the origins of full disclosure as a main pillar in fiduciary loyalty in the latter's incarnation as the duty to account through a detailed review that combines economic theory, accounting history and legal history. This regime is an outcome of an evolutionary process that began with the Norman Conquest and was perfected during the 'long thirteenth century' (c.1180- c.1320). These developments enabled the formation of accountability as a social institution and a general doctrine of fiduciary loyalty, as they provided courts with an effective framework for coping with information-asymmetry-driven opportunism. Legal historians who studied the action of account have not dealt with the accounting aspect, while accounting historians ignore the legal implications of those early developments. Weaving together these strands of scholarship sheds light on the structure of contemporary fiduciary loyalty. It should be emphasized at the outset that this article is neither an exercise in originalism nor a call for adopting an originalist approach to fiduciary law. Nor does this article purport to cover every stage and aspect in the development of

¹⁵ J Sobel, 'Interdependent Preferences and Reciprocity' (2005) 43 *Journal of Economic Literature* 392; S Della Vigna, 'Psychology and Economics: Evidence from the Field' (2009) 47 *Journal of Economic Literature* 315.

legal accounting. Its primary goal is to enrich the analysis of fiduciary loyalty with insights from other disciplines that may help expose its internal logic.

2. From Feudal Accounting to Fiduciary Accountability

A. Domesday and the Exchequer

Commissioned by King William the Conqueror in 1085, the Domesday inquest was the most extensive national survey until nineteenth century censuses.¹⁶ Surveys have been held prior to William's reign by Egyptian Pharaohs, Roman emperors, Anglo-Saxon kings, and in Carolingian Europe during the ninth century.¹⁷ Charlemagne thus sent survey commissioners to re-establish his authority over his vassals.¹⁸ The latter case in particular may have inspired the Norman king to conduct his inquest. The Domesday inquest covered literally all men and inventory in every manor. The data were compiled into structured records, one for each manor, that specified its value in terms of the income it could yield in light of the productive resources found in it.¹⁹

Domesday's approach to manorial value represented a paradigm shift in conceptualizing the manor as a firm. Manors have been 'firms' already in the Anglo-Saxon period, at least etymologically, but in the theory-of-the-firm usage they were 'black box' firms. During the reign of King Edward the 'Confessor', royal manors in nearly every shire had the duty of the 'farm of one night' (Latin *firma unius noctis*) which required a manor to supply the royal court with cash, kind, or both, considered

¹⁶ NJ Higham, 'The Domesday Survey: Context and Purpose' (1993) 78 *History* 7; DC Douglas, *William the Conqueror: The Norman Impact Upon England* (California: University of California Press, 1964) 347–356; D Roffe, *Domesday: The Inquest and the Book* (Oxford: Oxford University Press, 2000) 54–70.

¹⁷ JR Edwards, *A History of Financial Accounting* (London: Routledge, 1989) 23–31; A Godfrey and K Hooper, 'Accountability and Decision-Making in Feudal England: Domesday Book Revisited' (1996) 1 *Accounting History* 35.

¹⁸ S Harvey, *Domesday: Book of Judgement* (Oxford: Oxford University Press, 2014), 54; Godfrey and Hooper, *ibid*, 41.

¹⁹ AR Bridbury, 'Domesday Book: A Re-Interpretation' (1990) 105 *English Historical Review* 284.

sufficient to supply the court for a full single day.²⁰ Collecting these dues by the sheriff was known as ‘farming the shire’.²¹ The scope and composition of this farm was not necessarily related to manorial productive capacity.²² Land-based taxation of manors reflected a similar view of the manor as a black box in disregarding its internal organization.

Domesday partially opened this black box by systematically considering the manor’s composition in order to assess the cashflow it could generate, which appears to have been relatively efficient.²³ Domesday thus exhibited a conception of the manor consistent with Coase’s insights about the firm as a coordinated assembly of assets, detached from the market while in need of management. This conceptualization of the manor as a firm on the operational side consequently invoked the challenges that firms pose - namely, the principal-agent problem and the information asymmetries that it thrives on. The development of the Exchequer, discussed next, was a crucial step in that direction.

In 1110, King Henry I was intent on raising a dowry for marrying his daughter Matilda, aged eight, to King Henry V of Germany, the Holy Roman Emperor-designate. Henry I entrusted the task of collecting this marital aid to Roger of Salisbury, his Chancellor, later Bishop of Salisbury and then Justiciar (first minister).

²⁰ On the Anglo-Saxon ‘farm’ (Old English *feorm*) see HR Loyn, *Anglo-Saxon England and the Norman Conquest* (London: Longman, 2nd ed, 1991) 314–315.

²¹ PA Stafford, ‘The “Farm of One Night” and the Organisation of King Edward’s Estates in Domesday’ (1980) 33 *Economic History Review* 491; RS Hoyt, *The Royal Demesne in English Constitutional History: 1066–1272* (New York: Cornell University Press, 1950) 20–23; JL Grassi, ‘The Lands and Revenues of Edward the Confessor’ (2002) 117 *English Historical Review* 251, 259–263; J Getzler, ‘“As If” Accountability and Counterfactual Trust’ (2011) 91 *Boston University Law Review* 973, 977–978.

²² Stafford, *ibid.*, 501.

²³ J McDonald, ‘Efficiency in the Domesday Economy, 1086: Evidence from Wiltshire Eestates’ (2010) 42 *Applied Economics* 3231.

To accomplish this task Roger fashioned the Exchequer, which by 1110 was already in place, and presided over its business.²⁴

The Exchequer was the result of an evolutionary process more than of a revolutionary one. Although it was Roger's brainchild, he did not start from a clean slate.²⁵ In this sense it resembled the Domesday inquest as having been inspired by similar earlier practices. Roger's ingenuity was one of a systems integrator. He assembled several components - some new, some familiar - to create a complex, interlocking financial administrative system that later evolved into an effective mechanism of accountability. The Exchequer's innovative design integrated a set of elements for collecting, processing, recording, and verifying information. For example, the Exchequer reintroduced the abacus in England; it used the Pipe Rolls for a durable record and tallies as short-term memory sticks, and so forth.²⁶ Its most famous feature, as described by fitz Nigel's *Dialogue of the Exchequer* (c.1179),²⁷ was the large table with a chequered tablecloth that functioned as a non-electronic spreadsheet for executing calculations and displaying balances.²⁸ The Exchequer had

²⁴ WC Hollister and AC Frost, *Henry I* (New Haven: Yale University Press, AC Frost ed, 2001) 216–217; MJ Jones 'Origins of Medieval Exchequer Accounting' (2009) 19 *Accounting, Business and Financial History* 259 (hereinafter Jones, Origins); MJ Jones, 'The Role of Change Agents and Imitation in the Diffusion of an Idea: Charge and Discharge Accounting' (2008) 38 *Accounting and Business Research* 355 (hereinafter Jones, Diffusion).

²⁵ Jones, Origins, *ibid*; D Oldroyd, 'Accounting in Anglo-Saxon England: Context and Evidence' (1997) 2 *Accounting History* 18–22.

²⁶ Jones, Origins, *ibid*, 271; RL Poole, *The Exchequer in the Twelfth Century* (Oxford: Clarendon Press, 1912) 42–46; MJ Jones, 'The *Dialogus de Scaccario* (c1179): The First Western Book on Accounting?' (2008) 44 *Abacus* 443, 462–463 (hereinafter Jones, Dialogue); WT Baxter, 'Early Accounting: The Tally and Checkerboard' (1989) 16 *Accounting Historians Journal* 43, 64–68.

²⁷ E Amt and SD Church (eds and trans), *Dialogus de Scaccario, and Constitutio Domus Regis: The Dialogue of the Exchequer, and the Disposition of the King's Household* (Oxford: Oxford University Press, 2007) (hereinafter *Dialogue*).

²⁸ FS Thomas, *The Ancient Exchequer of England; the Treasury; and Origin of the Present Management of the Exchequer and Treasury of Ireland* (London: Petherham, 1848) 21–22; see also SD Church, 'The Exchequer Cloth, c1176-1832: The Calculator, the Game of Chess, and the Process of Photozincography' in D Roffe (ed), *The English and Their Legacy, 900-1200: Essays in Honour of Ann*

a transformative effect on English society, including by stimulating lay literacy and a shift from oral to written records. The demands of the royal Exchequer and courts of law compelled knights in the shires and burgesses in the towns to create lesser bureaucracies of their own with compatible practices.²⁹

B. Charge and Discharge

Charge and discharge accounting is a generic term for single-entry accounting systems that cover the flow of resources over a period of time. This method does not distinguish between capital and revenue transactions.³⁰ Often referred to as ‘stewardship accounting’, its primary objective is to ensure the principal about the integrity of the agent and to enable the agent to prove his honesty.

The Upper Exchequer with the table at its centre was the physical arena in which accountability was enacted according to the logic of charge and discharge accounting. If the table, abacus, pipe rolls and tallies were the hardware of the system then charge and discharge accounting was its software. Like other features of the Exchequer, charge and discharge accounting was not entirely novel. Rudimentary versions of this method have been used since antiquity - from Babylonia to Pharaonic Egypt to the classical Roman period - for purposes of recording wealth and monitoring agents, including estate managers (*villicus*).³¹ The English method was

Williams, (Woodbridge: Boydell Press, 2012) 245; Poole (n 26) 100–102; MH Mills, ‘Experiments in Exchequer Procedure (1200–1232)’ (1925) 8 *Transactions of the Royal Historical Society* (4) 151.

²⁹ MT Clanchy, *From Memory to Written Record, England 1066–1307* (London: Blackwell, 3d Ed., 2013) 19; Z Razi and R Smith, ‘The Origins of English Manorial Court Rolls as a Written Record: A Puzzle’ in Z Razi and R Smith (eds.), *Medieval Society and the Manor Court* (Oxford: Clarendon Press, 1996) 36, 37.

³⁰ Edwards (n 17) 33–34.

³¹ S Carmona and M Ezzamel, ‘Accounting and Accountability in Ancient Civilizations: Mesopotamia and Ancient Egypt’ (2007) 20 *Accounting, Auditing & Accountability Journal* 177; GEM De Ste Croix, ‘Greek and Roman Accounting’ in AC Littleton and BS Yamey (eds), *Studies in the History of Accounting* (Homewood, IL: Richard D Irwin, 1956) 14; D Rathbone, ‘Accounting on a Large Estate in Roman Egypt’ in R Parker and BS Yamey, *Accounting History: Some British Contributions* (Oxford: Clarendon Press 1994) 13; RH Macve, ‘Some Glosses on Greek and Roman Accounting’ in R Parker

either reinvented or inspired by the Roman one, which was primitive in several respects.³² In any event, charge and discharge as exercised by the Exchequer was then the first fully functioning accounting method in the West, preceding by some three hundred years the double-entry accounting method, which has come to dominate business and public administration.³³ British administration continued to rely on charge and discharge accounting until the nineteenth century, and in several contexts it was still practiced in late twentieth century.³⁴

The Exchequer summoned the sheriff ('shire-reeve') to account for the king's revenues during the passing year. The different revenues expected from the sheriff and from several other accountants formed two categories: fixed and certain versus casual and uncertain.³⁵ Fixed and certain revenues included rents from royal *demesne* manors and from earls and other tenants-in-chief who held manors in the shire, payments ('farms') imposed on persons, cities, or towns, and additional irregular payments that were charged in gross sums.³⁶ Uncertain revenues included county incomes from court fees and fines imposed in criminal courts.³⁷ However, these sums could be determined *ex post* and were readily observable and verifiable.

The total of these revenues, together with the carry-over balance of last year's account, was the sheriff's 'charge'. This sum was represented by piles of coins,

and BS Yamey, *Accounting History: Some British Contributions* (Oxford: Oxford University Press, 1994) 57; JD Edwards, 'Early Bookkeeping and its Development into Accounting' (1960) 34 *Business History Review* 446, 448–450.

³² Edwards (n 17) 33.

³³ Jones, *Dialogue* (n 26) 444–445; SM Jack, 'An Historical Defence of Single Entry Book-Keeping' (1966) 2 *Abacus* 137, 139–143, 158.

³⁴ R Brown, *A History of Accounting and Accountants* (London: Frank Cass, 1905/1968) 58; WT Baxter, 'The Account Charge and Discharge' (1980) 7 *Accounting Historians Journal* 69; WE Stone, 'The Development of Charge and Discharge Accounting, 1183 to 1660' (1993) 5 *Accounting History* 4.

³⁵ Thomas (n 28) 49; Poole (n 26) 127–128.

³⁶ Thomas, (n 28) 49–51; Poole (n 26) 135–136.

³⁷ Thomas, (n 28) 51–53.

serving as counters. The sheriff would then gradually clear this balance by producing tallies, vouchers, or other references for prior payments (‘profer’), authorized expenses (eg, for hosting the king or his guests upon a formal writ), and allowable deductions (eg, religious contributions). The Calculator would work each such ‘discharge’ by removing coins off the table. The process was exceedingly strict as the sheriff had to show formal justification for every discharge, without which it was his personal responsibility for the balance, including items that were disallowed (‘falsified’) or added (‘surcharged’).³⁸ At the end of the process, ‘his whole charge and discharge was read and cast up in open Court,’ before the entire audience of the king’s earls sitting as Barons of the Exchequer, the Treasurer, Auditors, and other officers.³⁹ Finally, the sheriff had to pay the balance, minus authorized carry-overs and delays (‘respites’⁴⁰), or else he was liable to be put in irons.⁴¹ Scholars agree that the accounting process was quite an ordeal for the sheriff. The strongman of the shire in regular days was described as ‘trembling in his boots when the time came for his reckoning at the chequered table.’⁴²

Let us pause for an interim assessment of the Exchequer as an accountability institution. The sheriff’s role as a collection agent was only one among his other military, administrative, and judicial responsibilities.⁴³ The monitoring challenge that

³⁸ Thomas, (n 28) 54–57; Jones, *Dialogue*, (n 26) 459–460; R Cassidy, ‘Adventus Vicecomitum and the Financial Crisis of Henry’s III Reign, 1250–1272’ (2011) 126 *English Historical Review* 614.

³⁹ Thomas, (n 28) 56; Poole (n 26) 94–126.

⁴⁰ C Noke, ‘Respites in Charge and Discharge Statement’ (1996) 6 *Accounting, Business and Financial History* 247.

⁴¹ Baxter, (n 34) 75.

⁴² JH Baker, *An Introduction to English Legal History* (London: Butterworths, 2002) 23; see also Jones, *Dialogue*, (n 26) 467; Church, (n 28) 247–248.

⁴³ DA Carpenter, ‘The Decline of the Curial Sheriff in England 1194–1258’ (1976) 91 *English Historical Review* 1, 1–2; J Sabapathy, *Officers and Accountability in Medieval England 1170–1300*

the Exchequer system faced was thus limited to ensuring that all the monies due to the king find their way to his coffers either as silver coins in the Lower Exchequer or notionally as authorized expenses. Roger of Salisbury's primary and long-lasting achievement was in developing a highly effective mechanism for documenting and verifying the sheriff's accountability to the king. A key feature of the Exchequer was its openness. Its ritualistic procedure ensured transparency while validating royal authority.⁴⁴

In terms of information asymmetries the Exchequer dealt mostly with costly information, eg, due to keeping records in a twelfth century medieval environment. Charge and discharge accounting has a grim logic that what is not properly discharged remains charged. This burden shifting incentivized the sheriff to provide as much information as possible to justify his performance. While rents and farms had been determined in association with perceived productive capacity, they were preset in fixed sums based on Domesday rents or as determined later by the Barons of Exchequer.⁴⁵ With regard to unobservable or unverifiable information, the system adopted a diametrically opposite approach. A purposeful effort was made to reduce irregular revenues to certain sums even at the cost of loss of accuracy and of revenue. The Royal Exchequer thus became agnostic to the actual income generated by the manors.

The upshot was that the Royal Exchequer could at most be defined as an audit system. It was not a full-disclosure, genuine accountability system. The king as

(Oxford: Oxford University Press, 2014) 82–87; WA Morris, *The Medieval English Sheriff to 1300* (Manchester University Press, 1968).

⁴⁴ Cf M Ezzamel, 'Order and Accounting as Performative Ritual: Evidence from Ancient Egypt' (2009) 34 *Accounting, Organizations and Society* 348.

⁴⁵ Carpenter (n 43) 3–5, 27; Jones, Dialogue, (n 26) 454; MJ Jones, 'Sources of Power and Infrastructural Conditions in Medieval Governmental Accounting' (2010) 35 *Accounting, Organizations and Society* 81, 91–92.

principal waived nearly every claim with regard to the residual interest in his properties. Such a radical approach is nonetheless consistent with the economic analysis of principal-agent relations under information asymmetries. An optimal strategy for the principal-owner in such circumstances is to forego his equity interest in favour of debt.⁴⁶ Presetting rents and farms (especially close to capacity), charging fines in gross sums and similar practices converted claims that are hard to observe or verify into fixed claims that could be dealt with more easily by the accounting process, subject only to cost considerations. Bearing in mind the administrative technologies of the era, this design choice seems not only reasonable but admirable. In tandem, the Exchequer system enabled the sheriff to take advantage of his informational superiority by appropriating undisclosed revenues. Whatever he could put his hands on without having to account for was his, which may explain why some people paid for nomination to the office.⁴⁷ Inevitably, this situation also created a problem of unscrupulous and even abusive sheriffs.⁴⁸

C. Manorial Accounting

An inflationary shock around 1200 was accompanied by a prolonged trend of population expansion and economic growth, leading to rising grain prices.⁴⁹ These circumstances caused landholders to abandon the mode of renting or ‘farming’ (ie, letting for a fixed ‘farm’) their estates and instead adopt a mode of actively managing

⁴⁶ Stein (n 14).

⁴⁷ Carpenter (n 43) 5, 24–27; Jones, Dialogue, (n 26) 467; Poole, (n 26) 127–129.

⁴⁸ Baker, (n 42) 16; A Harding, *England in the Thirteenth Century* (Cambridge: Cambridge University Press, 1993) 154–156.

⁴⁹ P Latimer, ‘Money and the English Economy in the Twelfth and Thirteenth Centuries’ (2011) 9 *History Compass* 246; BMS Campbell, ‘Factor Markets in England before the Black Death’ (2009) 24 *Continuity and Change* 79; M Bailey, *The English Manor c1200-c1500* (Manchester: Manchester University Press, 2002) 97–109; PDA Harvey, ‘The Manorial Reeve in Twelfth-Century England’, in R Evans (ed.), *Lordship and Learning: Studies in Memory of Trevor Aston* (Woodbridge: Boydell Press, 2004) 125, 135–138.

their properties - known as ‘*demesne* farming’, ‘high farming’ or ‘direct farming’. Direct farming involved selling to the market with a view to maximising revenue. The motivations for this change probably included a desire to adjust rent levels to changing prices and new opportunities for exploiting the decreasing value of labour relative to land.⁵⁰ This trend was confined to England, however, with no parallel in the Continent notwithstanding similar circumstances there.⁵¹

The manor was the focal unit of the transformation to direct farming. A typical manor comprised arable land cultivated primarily for grains, a common pasture, some woodland or fishery, a small village for peasants and artisans, and a manor house for the lord.⁵² In most cases, however, the lord did not reside in the manor (he often had more than one). A hierarchy of agents thus had developed for running the manor.⁵³ At the top there was the steward, who swore to serve his master’s interests to the utmost of his ability. The steward was responsible for the entire estate. In practice, however, he was an outsider who visited the manor a few times a year. Often coming from the clergy (also in lay estates), and sometimes having legal education, his main responsibilities included laying down general policy for the manor, deciding on major developments, selecting the bailiff and holding manorial courts.⁵⁴ The ‘dirty boots’ officials who actually ran the manor’s daily life were the bailiff and the reeve, or one

⁵⁰ RA Bryer, ‘Accounting for the Social Relations of Feudalism’ (1994) 24 *Accounting and Business Research* 209; M Bailey, ‘The Concept of the Margin in the Medieval English Economy’ (1989) 42 *Economic History Review* 1.

⁵¹ Bailey, (n 49) 98.

⁵² Bailey, (n 50) 2–11; HS Bennett, *Life on the English Manor: A Study of Peasant Conditions, 1150–1400* (Cambridge: Cambridge University Press, 1937/1962) 41–60; E Miller and J Hatcher, *Medieval England: Rural Society and Economic Change 1086-1348* (London: Routledge, 1978/2014) 189–199; SL Waugh, *England in the Reign of Edward III* (Cambridge: Cambridge University Press 1991) 102–110.

⁵³ Bennett, *ibid* 156–178; Bailey, (n 49) 98–100.

⁵⁴ TFT Plucknett, *The Medieval Bailiff* (London: Athlone Press, 1954) 3–5.

person holding both offices.⁵⁵ The bailiff was a freeman, a salaried professional nominated by the lord and living in the manor house, who might take responsibility for a number of manors under an oath of fealty before the steward (on which more below).⁵⁶ The reeve was a landholding peasant, whom the unfree tenants of the manor elected annually from among themselves, in consideration for which he received substantial benefits. As ‘a man of the manor, [he knew] every field in it, and [was] acquainted from boyhood with the eccentricities and habits of every person inhabiting its cots.’⁵⁷ During the era of direct farming these functionaries formed a class of professionals whose expertise was rooted in long experience.

The move to direct farming brought the manor closer to a modern firm. Chandler has argued that before the rise of the modern firm - the large-scale enterprise with absentee owners and salaried professional managers - firms have been small and personally owned and managed, usually by family members. ‘[A]s late as 1840 there were no middle managers in the United States... At that time nearly all top managers were owners; they were either partners or major stockholders in the enterprise they managed.’⁵⁸ Johnson and Kaplan second: ‘Before the early nineteenth century,... [t]here were no “levels of management” or long-term salaried employees.’⁵⁹ Although the English manor was anything but the giant American corporation with its dispersed

⁵⁵ Bailey, (n 49) 99; Plucknett, *ibid* 4–5.

⁵⁶ S Waugh, ‘Tenure to Contract: Lordship and Clientage in Thirteenth-Century England’ (1986) 11 *English Historical Review* 811, 817–818.

⁵⁷ HS Bennett, ‘The Reeve and the Manor in the Fourteenth Century’, (1926) 41 *English Historical Review* 358, 360; Harvey, (n 49) 125.

⁵⁸ AD Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge MA: Harvard University Press, 1977) 3.

⁵⁹ HT Johnson and RS Kaplan, *Relevance Lost: The Rise and Fall of Management Accounting* (Boston: Harvard Business School Press, 1987) 6. See also AA Berle and GC Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, 1932).

shareholders and hierarchical armies of managers, it had already displayed governance features that firms call for.

Precedents for estate managers existed already in ancient Egypt and in the Roman Empire.⁶⁰ In the latter case those delegates tended to be the owner's sons or his slaves through the institution of *peculium* - a fund of assets managed by the slave for his master.⁶¹ English direct farming was different. The bailiff was a free agent, and even the reeve could redeem himself from office. In deciding to shift to direct farming English landlords exercised their control powers only notionally while remaining absentee owners and delegating these powers to a hierarchy (skeletal as it may have been) of salaried professional managers who were not bound by family ties or slavery status that could motivate compliance. Landlords thus turned manors into rudimentary yet genuine firms in the modern sense of this term.

Running the manorial firm with a managerial team engendered agency problems by necessity. The reeve and bailiff enjoyed information superiority just as the Roman slave did with regard to his *peculium*.⁶² Unlike Roman masters, however, English landlords could not mete harsh corporal punishments nor could they offer extreme rewards comparable to manumission. The latter reward was crucial for coping with unobservable and unverifiable information that characterized managing a

⁶⁰ Ezzamel, (n 31); Rathbone, (n 31).

⁶¹ R Gamauf 'Slaves Doing Business: The Role of Roman Law in the Economy of the Roman Household' (2009) 16 *European Review of History* 331; JJ Aubert, 'Dumtaxat de Peculio: What's in a Peculium, or Establishing the Extent of the Principal's Liability' in P du Plessis (ed), *New Frontiers: Law and Society in the Roman World* (Edinburgh: Edinburgh University Press, 2013) vol 10, 193.

⁶² Waugh (n 52) 104: 'No lord could outwit [the reeve]'; Plucknett, (n 54) 6: 'no auditor could unravel [the reeve's] peasant cunning'; Auber, *ibid* 197: 'No one except the slave in charge of the *peculium* may actually know with precision and accuracy what it is made of.' See also G Dari-Mattiacci, 'Slavery and Information' (2013) 73 *Journal of Economic History* 79, 83–86.

peculium.⁶³ In the absence of such intense incentives for compliance with the lord's expectations and of internal constraints on opportunistic behaviour due to father-son relations, the reeve/bailiff's information superiority exacerbated the agency problem, rendering their lords essentially powerless.⁶⁴ Contemporary sources warn against unscrupulous agents who exploit this superiority. *Walter of Henley's Husbandry*, a representative of a genre of self-help guidebooks for lords and stewards,⁶⁵ thus admonishes:

Yea, many theare bee which... knowing that the thing is an other mans and not their owne they take it with the right hand and the lefte as they may best extort it and their unfaithfulness not be perceived. Looke upon your things often and cause them to be looked upon and then suche as serve you will so muche the rather eschewe to doe evell and wille endeouvre to doe the better.⁶⁶

Walter's concerns were not unfounded. Robert Carpenter's treatise contained detailed examples for ways in which the reeve/bailiff could derive and hide private benefits.⁶⁷ The *Seneschaucy* (steward), of the same genre, thus instructs:

Whenever the [steward, bailiff and reeve] have made a profit or caused loss during the year this will be seen through the audit in a day or two; and it will be easy to recognize good sense and improvements or folly... The auditors may thereby make their inquiries into doubtful transactions.⁶⁸

Such advice to closely monitor the agents required a monitoring system. Jones advances a compelling account of the channels through which Exchequer accounting diffused throughout the country during the thirteenth century. Briefly, key charismatic

⁶³ Dari-Mattiacci, *ibid* 97–98. Silver argues that the incentive problem was resolved by granting *peculia* to self-selling slaves. M Silver, 'At the Base of Rome's *Peculium* Economy' (2016) 22 *Fundamina* 67.

⁶⁴ C Dyer, 'The Ineffectiveness of Lordship in England, 1200–1400' (2007) 196 *Past and Present* 69; cf P Roebuck, 'Absentee Landownership in the Late Seventeenth and Early Eighteenth Centuries: A Neglected Factor in English Agrarian History' (1973) 21 *Agricultural History Review* 1.

⁶⁵ D Oschinsky, *Walter of Henley and Other Treatises on Estate Management and Accounting* (Oxford: Clarendon Press, 1971); see also PDA Harvey, 'Agricultural Treatises and Manorial Accounting in Medieval England' (1972) 20 *Agricultural History Review* 173.

⁶⁶ Oschinsky, *ibid* 341–342.

⁶⁷ M Carlin, 'Cheating the Boss: Robert Carpenter's Embezzlement Instructions (1261x1268) and Employee Fraud in Medieval England' in B Dodds and CD Lidd (eds.) *Commercial Activity, Markets and Entrepreneurs in the Middle Ages* (Woodbridge: Boydell Press, 2011) 183.

⁶⁸ Oschinsky, (n 65) 395.

individuals who participated in the Exchequer process as barons or as sheriffs came to appreciate it, such that when the need to monitor agents arose for them, they implemented the system they were familiar with. Jones points in particular to Walter of Merton, Bishop of Rochester and chancellor under Henry III and Edward. After Walter moved Merton College to Oxford in 1274, its warden was subject to an audit before a panel of scholars in an exchequer chamber with a chequerboard table.⁶⁹ This diffusion likely was part of the broader bureaucratization trend of manors and boroughs inspired by the Royal Exchequer. Dobie adds that ‘the clergy who were involved in royal administration both influenced and were influenced by royal financial procedures.’⁷⁰ The Exchequer framework thus was adopted with all of its characteristic features by monasteries, lay estates and manors, towns and boroughs. ‘Exchequers’ became commonplace. Searching inquiries before an audience in the Exchequerian tradition that terrified the accountants were held regularly by itinerant auditors in manor houses and in monasteries, by sheriffs in their town castles, and even in public houses (including a discharge for ale and wine at the audit).⁷¹

Accountability in this format became a widespread practice that was repeatedly enacted and observed by all societal members in numerous contexts. It was thus institutionalized as a social norm - a mode of behaviour widely perceived as accepted and expected. Typically for social institutions, causal effects between direct farming and manorial accounting likely were mutual. Harvey thus related the

⁶⁹ Jones, Diffusion, (n 24) 366–368.

⁷⁰ A Dobie, ‘The Development of Financial Management and Control in Monastic Houses and Estates in England c1200–1540’ (2008) 18 *Accounting, Business and Financial History* 141, 153–154.

⁷¹ Jones, Diffusion, (n 24) 360–364; Bryer, (n 50) 220–221; Baxter, (n 34) 75; Bennett, (n 52) 158, 189; Bailey, (n 49) 97, 105, 109; Dobie, (n 70) 144–145; A Dobie, ‘The Role of the General and Provincial Chapters in Improving and Enforcing Accounting, Financial and Management Controls in Benedictine Monasteries in England 1215–1444’ (2015) *British Accounting Review*, 1, 11; RH Jones, ‘Accounting in English Local Government from the Middle Ages to c1835’ (1985) 15 *Accounting and Business Research* 197, 206–208.

development of manorial accounting to direct farming due to the need to monitor the bailiff.⁷² In tandem, in the light of the fact that direct farming was not practised in Europe, Oschinsky argued about this ‘English exceptionalism’ that the Exchequerian-manorial accountability system was causative: ‘because [German lords] had neither the reliable staff of trained officers nor records comparable to the accounts.’⁷³

To support direct farming, however, manorial accounting had to be adjusted to a more challenging monitoring task. Manorial accounting used a simplified version of the Royal Exchequer in terms of hardware,⁷⁴ but its ‘software’ - charge and discharge accounting - needed modification. Periodical surveys provided the baseline in resemblance to the Exchequer’s reliance on the Domesday inquest.⁷⁵ The charge section in Exchequer accounts comprised three main items: carry-over arrears, preset rents, and court fees and fines. Standardized account templates for manorial accounts imported these items. But this framework did not accommodate receipts from sales of produce and livestock. Another item had to be added to the charge section for receipts from such sales, together with a parallel item in the discharge section for necessary expenses (eg, repairs, purchase of seeds, or expenses of harvest). The balance hopefully reflected a surplus (*proficium*), which was due from the bailiff.⁷⁶

The additional items that covered direct farming activity differed radically in their informational properties from the charge and discharge items used by Royal Exchequer accounting. The latter were all observable and verifiable. Direct farming

⁷² PDA Harvey, *Manorial Records* (London: British Records Association Archives and the User 5, 1984) 5–7.

⁷³ Oschinsky, (n 65) 213; see also Razi and Smith, (n 28) 38–43; cf Harvey (n 65).

⁷⁴ Jack, (n 33) 151.

⁷⁵ Bailey, (n 49) 21–41.

⁷⁶ C Noke, ‘Accounting for Bailiffship in Thirteenth Century England’ (1981) 11 *Accounting and Business Research* 137, 141–143; Edwards, (n 17) 35; Jack, (n 33) 153.

items were not. Accounting for direct farming required first to monitor every single activity on the manor, per crop, per kind of livestock, etc., down to eggs and sides of bacon, and then assess the surplus.⁷⁷ The respective charge and discharge items called for full disclosure of unobservable and unverifiable information. Only the reeve/bailiff could know if crops were meagre because of vermin, or bad weather, or villeins' low efforts, or embezzlement. Carpenter's treatise vividly demonstrates:

Whoever shall have 150 breeding ewes, some of them will be barren, some will die before giving birth, some will abort, and some of the lambs will come from maiden ewes. (Note that sometimes a ewe has two lambs in one year.) When it is said that six were barren, it will be reported that nine were barren; and [when] four died before giving birth, it will be reported that five aborted; and when it is said that ten were born of maiden ewes, it will be reported that five were born of maiden ewes. And thus you will make a profit of twelve lambs or twelve skins.⁷⁸

The very notion of 'charge' was thus stretched beyond its simple meaning. Amounts due could not be charged unless first disclosed by the reeve/bailiff. In a striking manifestation of information asymmetry, the space for that sum would be left blank, awaiting the accountant to provide the necessary information.⁷⁹ The manor as a firm under direct farming thus exposed the lord to (absentee) ownership risks and uncertainties. Put differently, while Exchequer accounting handled claims that resembled debt more than equity, manorial accounting had to do the opposite.

Aware of human nature being what it is, landlords did not naively rely on reeves and bailiffs' benevolent candour. Their accounts were assessed against demanding (and controversial) targets, eg, as multiples of seed quantity. Setting a target imitated the fixed 'farm' charge, incidentally disguising the actual information

⁷⁷ PDA Harvey, 'Manorial Accounts' in RH Parker and BS Yamey (eds), *Accounting History: Some British Contributions* (Oxford: Clarendon Press, 1994) 91.

⁷⁸ Carlin, (n 67) 185; D Oschinsky, 'Medieval Treatises on Estate Accounting' (1947) 17 *Economic History Review* 52, 55.

⁷⁹ MH Mills, 'The Reforms at the Exchequer (1232–1242)' (1927) 10 *Transactions of the Royal Historical Society* (4) 111, 125, referring to the royal *demesne* experiment discussed below.

asymmetry. The itinerant auditors who examined the accounts were strict professionals with deep knowledge of the business so as to counterbalance the reeve/bailiff's informational advantage.⁸⁰ Absent a convincing, well-supported account for his failure to meet a target, he was made to meet it by disallowing the discharge.⁸¹ In addition, stewards held presentment sessions in manorial courts, in which juries of elite villagers provided hard-to-observe information about the reeve/bailiff's management on issues that today we would classify as involving loyalty, care and business judgment.⁸² Landlords in later periods, and possibly earlier, employed spies to obtain information on estate management beyond the information provided in the financial accounts.⁸³ Finally, an 'excess' (*excessus*) accounting item may have served to give the reeve/bailiff a stake in the surplus with a view to aligning his interests with the lord's, not unlike modern equity-based remuneration.⁸⁴ These measures together reflect keen awareness of information asymmetries in agency/fiduciary settings and the elaborate mechanisms needed for ensuring accountability.

A particular episode underscores the differences between Royal Exchequer accounting and the fuller accountability regime that had evolved from it for direct farming. A marital aid again provided a stimulus. King Henry III in 1235 levied an 'aid' tax to raise money for the marriage of his sister to Holy Roman Emperor

⁸⁰ Bennett, (n 52) 190–191; Noke, (n 76) 145; Noke, (n 47) 344; Bailey, (n 49) 103; Edwards, (n 17) 40; Jack, (n 33) 139. On the audit proceedings see Brand, (n 113) 51–53.

⁸¹ Bailey, (n 49) 104.

⁸² C Briggs, 'Monitoring Demesne Managers through the Manor Court before and after the Black Death' in R Goddard, J Langdon and M Muller (eds.) *Survival and Discord in Medieval Society. Essays in Honour of Christopher Dyer* (Turnhout: Brepols, 2010) 179.

⁸³ FM Miley and AF Read, 'Spies, Debt and the Well-Spent Penny: Accounting and the Lisle Agricultural Estates 1533–1540' (2016) 26 *Accounting History Review* 83.

⁸⁴ C Noke, 'Agency and the *Excessus* Balance in Manorial Accounts' (1991) 21 *Accounting and Business Research* 339, 343–345; see also D Postles, 'The *Excessus* Balance in Manorial Accounts' (1981) 54 *Bulletin of the Institute of Historical Research* 105.

Frederick II.⁸⁵ A year later, the king's council began an experiment of direct farming in royal *demesne* manors with a view to increasing revenues. A limited set of manors were handed to three 'custodian' or 'bailiff' sheriffs, who were charged specifically to maximize the long-term value of those manors. They were to pay the king all the manorial profits and receive in return a fixed annual salary, similar to bailiffs of lay manors.⁸⁶ The regular sheriffs, who used to function as heavy-handed creditors, lacked the expertise and entrepreneurial personality that was necessary for running a for-profit manorial firm. 'The sheriff's office was not equipped for estate management. It knew how to manage money not men.'⁸⁷ The experiment improved productivity, but monitoring complex manors from afar proved impractical relative to collecting rents.⁸⁸ Beyond the political ramifications of depriving sheriffs of the income they could derive from their positions, direct farming of royal manors required the Barons of the Exchequer to engage in full-fledged manorial accounting, which they could not handle. The experiment was thus terminated in 1240.⁸⁹

Earlier attempts at direct farming of royal *demesne* for revenue maximization failed for similar reasons. For example, in 1204, King John began an experiment, in which certain sheriffs had to account at the Exchequer as custodians rather than as

⁸⁵ Carpenter, (n 43) 37.

⁸⁶ RC Stacey, 'Agricultural Investment and the Management of the Royal Demesne Manors, 1236–1240' (1986) 46 *Journal of Economic History* 919; Carpenter (n 43); BL Wild, 'Royal Finance under King Henry III, 1216–72: The Wardrobe Evidence' (2012) 65 *Economic History Review* 1380, 1380–1384.

⁸⁷ AR Bridbury, 'The Farming Out of Manors' (1978) 31 *Economic History Review* 503, 514. Cf Wild, *ibid* 1383; Stacey, *ibid*, 923–932.

⁸⁸ Bridbury (n 87) 514–515; MM Postan 'A Note on the Farming Out of Manors' (1978) 31 *Economic History Review* 521, 522.

⁸⁹ Carpenter, (n 43) 3, 19–21; Stacey, (n 86) 922; Mills, (n 79).

farmers for variable income beyond the standardized shire farms.⁹⁰ That system, too, was abandoned, primarily due to administrative difficulties, in addition to the approaching crisis of 1215 that culminated in the Magna Carta.⁹¹ These experiments demonstrated that holding an agent-run, open-ended, profit-oriented enterprise depends on utilising a full-disclosure-based accountability system. Without the perfection of such a system for direct farming of lay and ecclesiastical manors the royal manor experiment could not have been carried out. Moreover, finding this type of accountability regime impractical necessarily entailed giving up on direct farming and resorting to fixed increments, in line with modern economic analysis.

Out of necessity and drawing on prior experience, manorial accounting perfected a regime of accountability that can fairly be described as primordial fiduciary loyalty, as it comprised precursors of both ‘no conflict’ and ‘full disclosure’ components. This regime governed individuals who, due to a combination of undertaking and status, committed to exercising discretionary power over other people’s assets on their behalf and in their best interest. The full disclosure element in this regime was not merely ancillary or supportive; it was constitutive.

By way of a brief digression, a few words regarding the ‘no conflict’ component of fiduciary loyalty. Upon assuming office, the steward and the bailiff took an oath of fealty to the lord, without doing homage. An oath of fealty (Old French *feauté*: fidelity, loyalty; related to Latin *fides*: faith) entailed an obligation to faithfully uphold the lord’s interests.⁹² The oath of fealty was essentially a promise of

⁹⁰ BE Harris, ‘King John and the Sheriff’s Farms’ (1964) 79 *English Historical Review* 532. An earlier attempt yet took place in the 1180s, but the sheriffs accounted for fixed rents. Morris (n 43) 28–29; D Miller ‘Farming of Manors and Direct Management’ (1973) 26 *Economic History Review* 138.

⁹¹ Harris, *ibid* 539–540.

⁹² FL Ganshof, *Feudalism* (Toronto: University of Toronto Press, 1964) 27–68; M Bloch, *Feudal Society* (Chicago: University of Chicago Press, 1961) 145–189; C Stephenson, *Mediaeval Feudalism*

loyalty reinforced by an appeal to God with physical contact with a sacred object like a relic or a book of Gospel. In the bilateral feudal relationship the undertaking of loyalty (Latin *fidelitas*) was accompanied by an entitlement to benefice (Latin *beneficium*), rendering the lord a beneficiary. Having been imported to England from France, and deriving from Carolingian sources, the substance of fealty according to Ganshof may look familiar to fiduciary lawyers: ‘The Carolingian notion of loyalty was thus essentially negative in character, consisting of nothing more than the duty of undertaking nothing against the interests of the person to whom one owes fealty.’⁹³ Fealty nonetheless had several facets, including certain affirmative (prescriptive) obligations.⁹⁴ More research is warranted to examine possible roots of the ‘no conflict’ rule in medieval fealty.⁹⁵ Perhaps they go back earlier.⁹⁶ The above seems suggestive, however.

Returning to full disclosure, the duty to account for direct farming denied the reeve/bailiff any benefit that might stem from his service without a fully-informed authorization or justification to support a discharge. This requirement ‘to account to his lord for every penny received, every peck of corn harvested, every egg laid’⁹⁷ thus foreshadowed the ‘no profit’ rule of fiduciary loyalty. ‘No steward, bailiff, or servant,’ insisted the *Seneschaucy*, ‘no reeve, beadle, or hayward ought to take at a

(Ithaca: Cornell University Press, 1942) 18–21; K Pennington, ‘Feudal Oath of Fidelity and Homage’ in K Pennington and MH Eichbauer (eds.) *Law as Profession and Practice in Medieval Europe: Essays in Honor of James Brundage* (Aldershot: Ashgate, 2011) 93.

⁹³ Ganshof (n 92) 35.

⁹⁴ Ganshof (n 92); Pennington (n 92).

⁹⁵ Getzler, (n 9) 590–597 advances four models for the sources of fiduciary obligations, including the feudal homage and fealty and the liability to account. Of these models, Mitchell prefers co-ownership relations. C Mitchell ‘Equitable Compensation for Breach of Fiduciary Duty’ (2013) 66 *Current Legal Problems* 307, 308.

⁹⁶ Silver, (n 63) 88 mentions Roman mutual loyalty oaths upon self-sale to slavery. Helmholz mentions oaths by Roman guardians to carry out their duties in the interests of the infant. RH Helmholz, ‘Roman Law of Guardianship in England, 1300-1600’ (1978) 52 *Tulane Law Review* 223, 244.

⁹⁷ Harvey, (n 49) 125.

token price or even at full price, anything which is in their care, because it is not right that they should buy cheaply or at full price what they should improve and then sell at profit for their lord.⁹⁸ This regime relied on a transparent system of full disclosure and audit, which in turn cultivated societal support, and demand, for accountability. The *Seneschaucy*, being a non-legal source, thus reflected (perhaps an idealized) social norm. Finally, the grim logic of charge and discharge accounting caused the reeve/bailiff to meet the lord's expectations one way or another, as if he performed his task as he had sworn to do, much like a modern fiduciary.⁹⁹

The Black Death reached England in 1348 and wrought havoc in English society and economy. By the end of the century, nearly all landlords have abandoned direct farming and tried to revert to rentier farming; manorial accounting declined as well.¹⁰⁰ Recent historical research has been adding institutional factors to extant Malthusian and Marxian theories about those events.¹⁰¹ The landed elite tried to reverse the tide. The Ordinance of Labourers 1349 and the Statute of Labourers 1351 thus were intended to return pay to its pre-plague level. New forms of action, including assumpsit and trespass on the case were harnessed to regain control over lower classes.¹⁰² Against this backdrop, the decline of manorial accounting did not stem from any functional deficiency but simply from severe shortage in competent professionals who were crucial for operating the accountability apparatus, once again showing the essentiality

⁹⁸ Oschinsky, (n 65) 271.

⁹⁹ Cf Getzler, (n 21); PJ Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214; *Hall v Libertarian Investments Ltd* [2013] HKCFA 93, [153]-[154] (Lord Litton NPJ), [167] (Lord Millet NPJ).

¹⁰⁰ Harvey, (n 49) 105–110; Bailey, (n 49) 109.

¹⁰¹ C Briggs, *Some Recent Trends in the Rural History of Medieval England*, working paper (University of Cambridge, 2016).

¹⁰² RC Palmer, *English Law in the Age of the Black Death, 1348–1381: A Transformation of Governance and Law* (Chapel Hill, NC: University of North Carolina Press 1993) 76–78, 169–293.

of accountability to agency/fiduciary relations.¹⁰³ The knowledge and social endorsement of accountability as a governance institution that had developed during the preceding ‘long century’ did not vanish, however. The next part discusses how the legal system took the baton and preserved and developed accountability into its current state.

3. Accountability and Disclosure in Fiduciary Loyalty

A. Account

When it appeared in the common law around the end of the twelfth century, the action of account was a measure for manorial lords against bailiffs who refused to render accounts.¹⁰⁴ Plucknett and Brand noted that actions of account were brought both in county courts and in the king’s courts, although little is known about such actions in the former courts.¹⁰⁵ Stoljar argued that ‘[a]ccount... did not begin as the expression of a general principle, such as a principle of accountability, of application to all manner of agents and fiduciaries.’¹⁰⁶ Getzler takes a broader perspective, claiming that together with sister writs like novel disseisin and nuisance, account marked the origin of the English common law as a new system of jurisprudence, each dealing with a separate mischief - account being responsible for making the agent to act as if all duties had been duly performed.¹⁰⁷ Pointing out the informational conundrum, Belsheim noted that account addressed issues that the forms of action of

¹⁰³ Waugh, (n 56) 812–816.

¹⁰⁴ SJ Stoljar, ‘The Transformations of Account’ (1964) 80 LQR 203, 203–204; CHS Fifoot, *History and Sources of Common Law: Tort and Contract* (Wesport: Greenwood Press, 1949) 268; P Brand, *Kings, Barons and Justices: The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge: Cambridge University Press, 2003) 65; Sabapathy, (n 43) 38.

¹⁰⁵ Plucknett, (n 54) 22–24; Brand, *ibid* 65. The reeve was subject to seigniorial justice in the manor courts.

¹⁰⁶ Stoljar, (n 109) 204.

¹⁰⁷ Getzler, (n 21) 978.

debt and detinue could not.¹⁰⁸ Debt had to be liquidated, while the lord had (and could have) no idea what was due to him. Likewise for detinue: either there was no chattel that had been taken and had to be restored, or the lord did not know about this without an account. Several other legal scholars have dealt with the action of account, some quite some time ago.¹⁰⁹ The legal literature has directed its attention to legal developments subsequent to the action's appearance. In doing so it has failed to link it to the non-legal aspects of manorial accounting that this paper deals with. This section provides a non-exhaustive overview of the development of account, progressing in leaps and bounds through its eight hundred years of existence while emphasizing the earlier stages.¹¹⁰

The structure of the action of account provided an optimal response to the landlords' need for accountability. In the first stage, the court would endorse the lord's right by declaring the defendant his bailiff. The second stage - the actual accounting - was then essentially outsourced to professional auditors (later, to Chancery masters). In applying charge and discharge accounting this process reversed the normal mode of litigation. The bailiff, like all future accountants, bore the burden of showing that he had discharged his duties properly. Requiring him to make full disclosure neutralized as much as practical his informational advantage over the lord-plaintiff. In the third stage, the resulting balance, now liquidated, would be returned to the court and given the force of judgment as debt, thus mobilizing the state's

¹⁰⁸ EO Belsheim, 'The Old Action of Account' (1932) 45 *Harvard Law Review* 466, 469.

¹⁰⁹ WM Lile, 'Bills for Account' (1922) 8 *Virginia Law Review* 181; JB Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (Cambridge: Harvard University Press, 1913) 116–121; CC Langdell, 'A Brief Survey of Equity Jurisdiction (Part IV)' (1889) 2 *Harvard Law Review* 241; see, more recently, SFC Milsom, *Historical Foundations of the Common Law* (London: Butterths, 2nd ed, 1981) 275–282; J Eichengrun, 'Remedying the Remedy of Accounting' (1985) 60 *Indiana Law Journal* 463; DJ Seipp, 'Trust and Fiduciary Duty in the Early Common Law' (2011) 91 *Boston University Law Review* 1011, 1034–1035.

¹¹⁰ For later periods Stoljar, (n 109) remains the seminal study.

enforcement powers. The Provisions of Westminster, 1259 authorized auditors to instruct the sheriff to imprison non-accounting bailiffs.¹¹¹

The action of account proved successful and was subsequently applied to a growing circle of defendants that today we would readily classify as fiduciaries. Plucknett described this expansion as a process in which ‘[a]s the middle ages proceed more and more people are admitted into the category of bailiffs’, consequently making them liable to account, where the word ‘bailiff’ carries the ‘fundamental idea of one person being placed in control of another’s property’.¹¹² Referring to ‘a deliberate and sustained attempt to extend the availability of the action’ on behalf of the courts and the king’s Chancery, Brand points to the geographical diffusion of the action of account throughout England, in addition to the types of relationships and transactions for which it became available.¹¹³

The Provisions of Westminster, 1259 and later the Statute of Marlborough, 1267 added guardian in socage to the bailiff as owing a duty to account. As persons responsible for land in feudal tenure during the infancy of the heir, guardians in socage had power over another’s assets resembling that of bailiffs.¹¹⁴ The Statute of Westminster, 1285 added a category of accountants comprising ‘all manner of receivers’, which was a major cause for the loss of distinctness of account.¹¹⁵ The

¹¹¹ Stoljar, (n 109) 205, 213–214; Fifoot, (n 109) 273–274; Milsom, (n 109) 276; Plucknett, (n 54) 25; Brand, (n 104) 66.

¹¹² TFT Plucknett, ‘Words’ (1929) 14 *Cornell Law Quarterly* 263, 271, 272; Plucknett, (n 54) 16–19.

¹¹³ P Brand, ‘The Equity of the Common Law Courts’ in E Koops and WJ Zwolve (eds), *Law & Equity: Approaches in Roman Law and Common Law* (Leiden: Martinus Nijhoff, 2014) 39, 45–53; Getzler, (n 9) 593–595.

¹¹⁴ Brand, (n 104) 66–69, 348–361, 403–404 argues that actions of account against guardians in socage likely were common in county courts. The socager swore an oath of fealty though he did not usually do homage. FM Maitland, *The Constitutional History of England: A Course of Lectures Delivered* (New Jersey: Law Book Exchange, 2001) 31.

¹¹⁵ Milsom, (n 109) 280; Fifoot, (n 109) 270–271. Brand, (n 104) 402 documents earlier enforcement proceedings.

‘receiver’ may have been an extension beyond manorial bailiffs to persons who were given goods or money to transact in them for the plaintiff.¹¹⁶ The need to specify the nature of the defendant in the old forms of action engendered indiscriminate references to ‘bailiff or receiver’, thus starting a gradual dilution of the label ‘bailiff’. This category later expanded to include partners, who received assets with a view to transact in them at the receivers’ discretion though not as agents.¹¹⁷ From the late 1270s designating as ‘bailiff’ or ‘receiver’ in actions of account became common between merchants, in county courts and later in Chancery courts.¹¹⁸ Towards the end of the thirteenth century, the label ‘bailiff’ was attached to custodians in *custodia*, a precursor of the trust, so as to make them accountable.¹¹⁹ By that time, actions of account also named as ‘bailiff’ people who as stewards were responsible for managing their lord’s legal affairs and people who specialized in providing litigation-related services, not unlike modern attorneys.¹²⁰

The scope of ‘bailiff’ later expanded further yet to include people who on their own initiative undertook to deal in assets for the benefit of others (like a fiduciary *de son tort*¹²¹), while at the same time, efforts were made to exclude people who dealt in assets on their own account.¹²² The liability to account had to rest on one of the

¹¹⁶ Stoljar, (n 109) 206.

¹¹⁷ Stoljar, (n 109) 213; Brand, (n 113) 45–53; WS Holdsworth, ‘The Early History of Equity’ (1914–1915) 13 *Michigan Law Review* 293, 295.

¹¹⁸ P Brand, ‘Merchants and their Use of the Action of Account in Thirteenth and Early Fourteenth Century England’, paper delivered at the University of London, 8 November 2013, http://podcast.ulcc.ac.uk/accounts/SAScasts/medievalmerchantsandmoney/MMM_20131108_o_Brand.mp3 accessed 13 December 2016 .

¹¹⁹ J Biancalana, ‘Thirteenth-Century *Custodia*’ (2001) 22 *Journal of Legal History* 14, 23–24.

¹²⁰ P Brand, ‘Stewards, Bailiffs and the Emerging Legal Profession in Later Thirteenth-Century England’ in TH Aston and R Evans (eds.), *Lordship and Learning: Studies in Memory of Trevor Aston* (Woodbridge: Boydell Press 2004), 139, 143, 148–150; cf Plucknett, (n 54) 15.

¹²¹ *Dubai Aluminum Company Ltd v Salaam* [2002] UKHL 48, [138] (Millet LJ).

¹²² Milsom, (n 109) 280–281; Fifoot, (n 109) 272.

accepted categories, which were all based on some form of undertaking, while within such categories a defendant could not avoid rendering accounts even if no debt was outstanding,¹²³ akin to status-based liability. Some actions of account concerned considerable sums and their number grew, until by mid-fourteenth century there were many more actions of account than of debt and covenant.¹²⁴

These developments took place in a period of gradual shift from a feudal agrarian economy to greater reliance on markets and business and decline of serfdom.¹²⁵ The various relations mentioned above are particularly vulnerable to agents' opportunism, such that the social institution that had emerged may have facilitated this economic activity. Thus, manorial accounting, the legal action of account, and the social norm of accountability were intertwined in the social transformation of the era as they facilitated absentee ownership of quasi-firms and, once established, could be extended to other fiduciary-type relations.¹²⁶

The amalgamation of these institutions into a coherent concept of fiduciary loyalty took centuries, and it took place primarily in Equity courts. The advantages of account notwithstanding, it was burdened with procedural drawbacks that had characterized the common law system and motivated litigants to seek redress in Equity courts.¹²⁷ While common law courts continued to handle actions of account for

¹²³ Fifoot, (n 109) 273; Milsom, (n 109) 281.

¹²⁴ Fifoot, (n 109) 269–270.

¹²⁵ Campbell, (n 49); Latimer, (n 49); D Routt, 'The Late Medieval Countryside: England's Rural Economy and Society, 1275–1500' (2013) 11 *History Compass* 474; J Langdon and J Maaschaele, 'Commercial Activity and Population Growth in Medieval England' (2006) 190 *Past and Present* 35.

¹²⁶ Cf Palmer's theory on interrelations between legal, social and economic factors in the same period. RC Palmer, 'The Economic and Cultural Impact of the Origins of Property: 1180–1220' (1985) 3 *Law and History Review* 375. On a norm of entrepreneurship in that period see Langdon and Maaschaele, *ibid.* Palmer's timeline of economic events is debatable. P Latimer, 'The English Inflation of 1180–1220 Reconsidered' (2001) 171 *Past and Present* 3.

¹²⁷ Fifoot, (n 109) 273–275; Belsheim, (n 108) 499–500; Ames, (n 109) 116–117.

some time,¹²⁸ Equity eventually came to dominate accounting through its bill of account, which was more flexible than the common law action of account; the latter gradually declined.

Equity's takeover of account facilitated the integration of two bodies of knowledge: accounting and law. First, the Chancery had first-hand knowledge of the accounting process. The Chancellor or his deputy sat at the head of the table in the Royal Exchequer, right next to the Justiciar who presided over the session, and acted as a check on the Treasurer.¹²⁹ Ecclesiastical estates were pivotal in the diffusion and development of manorial accounting from Exchequerian accounting (recall Walter of Merton). Second, the post of the Chancellor (in addition to the Master of the Rolls and other masters) was held nearly invariably by clergymen. Being familiar with Roman law, either directly or through canon law,¹³⁰ these officials were aware of several legal relationships that included liability to account and were handled by ecclesiastical courts.¹³¹ Referring to guardians and executors, Getzler argues with regard to the use of land that the Court of Chancery 'could draw on a body of fiduciary accounting

¹²⁸ Stoljar, (n 109) 218–221; Brand, (n 113) 45–53; J Baker, 6 *Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003) 875–878.

¹²⁹ Thomas, (n 28) 5; Jones, *Dialogue*, (n 26) 454.

¹³⁰ TS Haskett, 'The Medieval English Court of Chancery' (1996) 14 *Law and History Review* 245, 255–266; see also R Helmholz, 'Trusts in the English Ecclesiastical Courts 1300–1640' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciaie: Trust and Treuhand in Historical Perspective* (Berlin: Duncker and Humblot, 1998) 153, 157–160; J Biancalana, 'Medieval Uses' in *Itinera Fiduciaie*, *ibid.* 111, 142–145. With regard to a later period see M Macnair, 'Equity and Conscience' (2007) 27 *Oxford Journal of Legal Studies* 659, 669–672; R Havelock, 'The Evolution of Equitable 'Conscience'' (2014) 8 *Journal of Equity* 128; R Havelock, 'Conscience and Unconscionability in Modern Equity' (2015) 9 *Journal of Equity* 1; G Dodd, 'Reason, Conscience and Equity: Bishops as the King's Judges in Later Medieval England' (2014) 99 *History* 213.

¹³¹ Helmholz, (n 96); R Zimmermann, 'Heres fiduciarius? Rise and Fall of the Testamentary Executor' in R Helmholz and R Zimmermann (eds), *Itinera Fiduciaie Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998) 278; J Biancalana, 'Testamentary Cases in Fifteenth-Century Chancery' (2008) 76 *Legal History Review* 283. Query how much the clergy knew about accounting by Roman slaves with regard to the *peculium*. Du Plessis, (n 61) 195–197; WW Buckland, *The Roman Law of Slavery: The Conditions of the Slave in Private Law from Augustus to Justinian* (Cambridge: Cambridge University Press, 1908) 494–495.

ideas to add to its own distinct theory of holding of land subject to duties of equitable conscience.¹³²

Equity was thus poised to further develop account and accountability. It is neither possible nor necessary to cover here its full development.¹³³ Consider, superficially, two prominent examples, in which Equity integrated a liability to account with the framework of charge and discharge accounting. First, the trust.¹³⁴ Even before the trust matured, Equity gave effective protection to a *cestui que use*, the precursor of the trust beneficiary with regard to land, in the form of account.¹³⁵ That is, regardless of whether the use, and later the trust, evolved from the Roman *fideicommissum* or from other sources that entailed a duty to account, the key here is that the English account implemented charge and discharge accounting as described above. Fast-forwarding a few centuries, Equity analogized from trustees to company directors of chartered companies.¹³⁶ Unincorporated companies did not even call for analogy, as they relied on trustees under deeds of settlement.¹³⁷ Directors’

¹³² Getzler, (n 21) 979–980; see also R Helmholz, ‘Trusts in the English Ecclesiastical Courts 1300–1640’ in *Itinera Fiduciae*, *ibid.* 153; J Biancalana, ‘Medieval Uses’ in *Itinera Fiduciae*, *ibid.* 111, 142–145.

¹³³ On early stages of accounting in non-fiduciary contexts see Stoljar, (n 109); see generally P Devonshire, *Account of Profits* (New Zealand: Thomson Reuters, 2013).

¹³⁴ In considering it, ignore its proprietary features. See, eg, Biancalana, (n 130); M Macnair, ‘The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries’ in *Itinera Fiduciae*, (n 130) 207, 213–215, 227–229; NG Jones, ‘Uses, Trusts and a Path to Privity’ (1997) 56 *CLJ* 175, 176–182; S Herman, ‘*Utilitas Ecclesiae*: The Canonical Conception of the Trust’ (1996) 70 *Tulane Law Review* 2239.

¹³⁵ WS Holdsworth, 3 *A History of English Law* (London: Methuen, 3rd ed, 1923) 426; Jones, *ibid.* 189–191; on account in *custodia* see Biancalana, (n 118).

¹³⁶ *Charitable Corporation v Sutton* (1742) 26 ER 642; see also *Regal (Hastings) Ltd v Gulliver* [1967] AC 134. See, eg, Getzler, (n 9) 595–596; LS Sealy, ‘The Director as Trustee’ 1967 *CLJ* 83; R Nolan ‘*Regal (Hastings) Ltd v Gulliver* (1942)’ in C. Mitchell and P. Mitchell (eds), *Landmark Cases in Equity* (Oxford: Hart Publishing, 2012) 499.

¹³⁷ Here, too, one can ignore the proprietary/entity aspects of the corporate form. See, eg, R Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720–1844* (Cambridge: Cambridge University Press, 2000) 137–144; see also J Getzler and M Macnair, ‘The Firm as an Entity before the Companies Acts’ in P Brand, K Costello and WN Osborough (eds), *Adventures of the Law:*

accountability in both cases provided crucial means for regulating the agency problems that the (quasi-)corporate structure entailed.¹³⁸

In *Ex Parte Dale and Co.*, Fry J stated: ‘What is a fiduciary relationship? It is one in respect of which if a wrong arise, the same remedy exists against the wrongdoer on behalf of the principal as would exist against a trustee on behalf of the *cestui que* trust.’¹³⁹ This famous dictum is accurate only in part, however. While courts have exported trustee-like obligations from the trust to other relations, the trustee’s core obligation, to account, was imported to the trust from earlier fiduciary-like relations. It is because of importing this obligation that the trustee is a fiduciary.¹⁴⁰ From the bailiff to the trustee to the director to the generic fiduciary, the applicable accountability regime has remained stable. Thus, in *Ultraframe (UK) Ltd v Fielding (No 2)* Lewison J referred to a trustee to describe a director’s accounting,¹⁴¹ and in *Hall v Libertarian Investments Ltd* Lord Millet NPJ discussed a generic fiduciary using terms that would have made any bailiff cringe:

Proceedings of the Sixteenth British Legal History Conference, Dublin, 2003 (Dublin: Four Courts Press, 2005) 267.

¹³⁸ Recent studies examine contractual and statutory measures, drawing on R La Porta et al., ‘Law and Finance’ (1998) 106 *Journal of Political Economy* 1113; R Harris, ‘The Private Origins of the Private Company: Britain 1862–1907’ (2013) 33 *OJLS* 339; J Foreman-Peck and L Hannah, ‘Some Consequences of the Early Twentieth-Century British Divorce of Ownership from Control’ (2013) 55 *Business History* 543; T Guinnane, R Harris and NR Lamoreaux, ‘Contractual Freedom and the Evolution of Corporate Governance in Britain, 1862 to 1929’ (2014) NBER Working Paper 20481; J Foreman-Peck and L Hannah, ‘UK Corporate Law and Corporate Governance before 1914: A Re-interpretation’ (2015) EHES Working Paper 172; GG Acheson, G Campbell and JD Turner, ‘Common Law and the Origin of Shareholder Protection’ (2016) QUCEH Working Paper 2016-04. These measures are at best controversial. The more advanced approach focuses on curbing self-dealing, which is at the heart of fiduciary loyalty. S Djankov et al., ‘The Law and Economics of Self-Dealing’ (2008) 88 *Journal of Financial Economics* 430.

¹³⁹ (1879) 11 Ch 772, 778; see also *Gwembe Valley Development v Koshy* [2003] EWCA Civ 1048 [89]; *Hospital Products*, (n 1) [28]; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467 [27]. For discussions see, eg, LS Sealy, ‘Fiduciary Relationships’ (1962) 20 *CLJ* 69, 72–73; EJ Weinrib, ‘The Fiduciary Obligation’ (1975) 25 *University of Toronto Law Journal* 1, 5; P Birks, ‘The Content of Fiduciary Obligation’ (2000) 34 *Israel Law Review* 3, 8.

¹⁴⁰ Cf *Mothew*, (n 1) 18.

¹⁴¹ [2005] EWHC 1638 (Ch) [1513], [1516].

Trustees and most fiduciaries are accounting parties... the beneficiary or principal is entitled to an account as of right... Once the plaintiff has been provided with an account he can falsify and surcharge it. If the account discloses an unauthorised disbursement the plaintiff may falsify it, that is to say ask for the disbursement to be disallowed... He is entitled to ask for an inquiry to discover what the defendant did with the trust money... If on the other hand the account is shown to be defective because it does not include property which the defendant in breach of his duty failed to obtain for the benefit of the trust, the plaintiff can surcharge the account...¹⁴²

The transformation of account, to borrow Stoljar's words, with regard to fiduciary relations was characterized by expansion more than transmutation. Both the underlying logic and the structure of accountability have changed remarkably little between the early 1200s and the early 2000s. This stability does not indicate stagnation or ossification, however. Over time, double-entry bookkeeping has replaced the single-entry method; generally accepted accounting principles of financial statements are constantly evolving; rules on what information is deemed material also change. These technical changes have not affected the need for full disclosure that stewardship accounting addresses, which remains as vital as ever.

B. Prescriptive disclosure

The preceding sections outline an integrative reading of the evolution of the accounting and the law of accountability. This analysis may be relevant for several current topics in fiduciary law. For example, in the light of *Armitage v Nurse*¹⁴³ and *Schmidt v Rosewood Trust Ltd*¹⁴⁴ one might ask whether the irreducible core of fiduciary loyalty comprises full disclosure, to the beneficiary or at least to a supervising court.¹⁴⁵ Or, in the wake of *AIB Group (UK) Plc Ltd v Mark Redler &*

¹⁴² *Libertarian*, (n 99) [167]–[170]

¹⁴³ [1997] EWCA Civ 1279, [1998] Ch 241, 253–254 (Millet LJ).

¹⁴⁴ [2003] UKPC 26 [51] (Lord Walker).

¹⁴⁵ I believe that it does. See, eg, R Chambers, 'Liability' in P Birks and A Pretto (eds), *Breach of Trust* (Oxford: Hart Publishing, 2002) 1, 7; D Hayton, 'The Irreducible Core Content of Trusteeship' in AJ Oakley (ed) *Trends in Contemporary Trust Law* (Oxford: Clarendon Press, 1996) 47, 53; *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [31] (Walker LJ); J Getzler, 'Inconsistent Fiduciary Duties

Co¹⁴⁶ and given profound changes during the twentieth century in fault-based liability for economic loss, what should be the contours of liability for harm to fiduciary assets, bearing in mind that ‘account is not a remedy for wrong.’¹⁴⁷ Recent contributions about this vast subject point to modes of accounting that were standard in the nineteenth century: account in common form and account founded on wilful default.¹⁴⁸ Here it will be noted only briefly that it is the former account that particularly distinguishes fiduciaries from other parties who may need to disgorge illicit profits. Called for regularly or on demand and without allusion to any fault, one conjectures that it is the contemporary incarnation of the bailiff’s biannual account.

This section considers another case in point, namely, the nature of the duty of loyalty as proscriptive or prescriptive, and maintains that a prescriptive duty of full disclosure is one of two pillars on which fiduciary loyalty rests, on equal footing with the proscription of conflict of interests. English law, especially after *Item Software (UK) Ltd v Fassihi*,¹⁴⁹ considers full disclosure to be part of the duty of loyalty in that fulfilling this duty requires the fiduciary to provide the beneficiary with material information. So does the law in Delaware, where full candour is required from fiduciaries.¹⁵⁰ A court in Canada has adopted the English approach,¹⁵¹ while in

and Implied Consent’ (2006) 122 LQR 1; cf R Nolan, ‘“The execution of a trust shall be under the controul of the court”: A Maxim in Modern Times’ (2016) 2 Canadian Journal of Comparative and Contemporary Law 469.

¹⁴⁶ [2014] UKSC 58.

¹⁴⁷ *Libertarian*, (n 99) [167].

¹⁴⁸ M Conaglen, ‘Equitable Compensation for Breach of Trust: Off *Target*’ (2016) 40 Melbourne University Law Review 126; J Edelman, ‘An English Misturning with Equitable Compensation’ in S Degeling and J Varuhas (eds.), *Equitable Compensation and Disgorgement of Profit* (Oxford: Hart, 2017); see also J Penner, ‘Falsifying the Trust Account and Compensatory Equitable Compensation’, *ibid*.

¹⁴⁹ *Item Software (UK) Ltd v Fassihi* [2004] EWCA Civ 1244 [41] (Arden LJ); see also *Hilton*, (n 145).

¹⁵⁰ *Malone v Brincat*, 722 A.2d 5, 13–14 (Del. Sup. 1998) (Holland, J.).

¹⁵¹ *Procon Mining & Tunnelling Ltd v McNeil*, 2010 BCSC 487, [132]–[137] (Ross J).

Scotland the question was left open.¹⁵² In contrast, Australian courts have rejected this proposition, albeit with varying degrees of explicitness or passion. The Australian stance rests on a more fundamental view of the duty of loyalty as proscriptive by nature - a view that does not easily accommodate a duty of full disclosure as a primary fiduciary obligation.¹⁵³ At least since the Australian High Court's decision in *Breen v Williams*, fiduciary loyalty is seen as exhausted by the proscriptive 'no conflict'-'no profit' rules - a position that the Court recently reiterated.¹⁵⁴ Scholars differ on this issue, too, either generally, as regards the proscriptive/prescriptive conundrum, or more specifically, with regard to disclosure.¹⁵⁵

The economic theory of opportunism teaches that self-interestedness and information asymmetries together engender opportunism in general and in principal-agent relations in particular. Eliminate one of these factors and the problem

¹⁵² *Commonwealth Oil & Gas Co Ltd v Baxter* [2009] CSIH 75 [82] (Lord Nimmo Smith).

¹⁵³ *Breen*, (n 5) [41]–[42] (Gaudron and McHugh JJ); *Pilmer v Duke Group* [2001] HCA 31 [128] (Kirby J); *Friend v Brooker* [2009] HCA 21 [84]; *The Bell Group Ltd (In Liq) v Westpac Banking Corporation* [2001] WASC 315 [192] (Owen J); *P & V Industries Pty Ltd v Porto* [2006] VSC 131 [23]–[25] (Hollingworth J); *P & V Industries Pty Ltd v Porto (No 2)* [2007] VSC 64 [29] (Hollingworth J); *Westpac Banking Corporation v The Bell Group Ltd (in liq) (No 3)* [2012] WASC 157 [1957]–[1977] (Drummond AJA); *Howard v Commissioner of Taxation* [2014] HCA 21 [56] (Hayne and Crennan JJ); *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2015] WASC 105 [52]–[55] (Le Miere J).

¹⁵⁴ *Howard*, (n 153). Cf *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liq)* [2001] FCA 1628 [31]–[33] (Finkelstein J). In *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65 [1072]–[1081], the Federal Court of Australia referred to a 'fiduciary's obligation to disclose the conflict.'

¹⁵⁵ See, generally, JD Heydon, 'Modern Fiduciary Liability: The Sick Man of Equity?' (2014) 20 *Trusts and Trustees* 1; Getzler, (n 1) 42–44; L Smith, 'Can We Be Obligated to Be Selfless?' in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford, Oxford University Press, 2014) (hereinafter Smith, *Selfless*); L Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7 *Journal of Equity* 37 (hereinafter Smith, *Prophylaxis*); Conaglen, (n 2) 201–203; M Conaglen, 'Interaction between Statutory and General Law Duties Concerning Company Director Conflicts' (2013) 31 *Company and Securities Law Journal* 403; D Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21 *King's Law Journal* 333. On disclosure see J Lowry, 'The Duty of Loyalty of Company Directors: Bridging the Accountability Gap Through Efficient Disclosure' (2009) 68 *CLJ* 607; M Harding, 'Two Fiduciary Fallacies' (2007) 2 *Journal of Equity* 1; L Ho and PW Lee, 'A Director's Duty to Confess: A Matter of Good Faith?' (2007) 66 *CLJ* 348; A Berg, 'Fiduciary Duties: A Director's Duty to Disclose His Own Misconduct' (2005) 121 *LQR* 213; J Armour and M Conaglen, 'Directorial Disclosure' (2005) *CLJ* 48; RC Nolan, 'A Fiduciary Duty to Disclose?' (1997) 113 *LQR* 220; L Smith, 'The Motive, Not the Deed', in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: LexisNexis Butterworths, 2003) 53 (hereinafter Smith, *Motive*).

disappears. If the agent is not selfish the principal does not care about not knowing about her deeds. If the principal can know everything about the deeds selfish motivations can be blunted with appropriate incentives. It is the amalgam of both factors that gives the agency problem its nasty properties. Any social institutional response seeking to effectively address the problem therefore should deal with both of them. The common law regime of fiduciary loyalty does this most straightforwardly: it prohibits any pursuit of self-interest (or non-beneficiary interest), and it requires full disclosure by the fiduciary. The first prong aims to counteract self-interestedness; the second - information asymmetries.

Between these two factors, self-interestedness may seem more vexing than information asymmetries. Selfishness elicits strong emotions and can sustain serious ethical debates.¹⁵⁶ Information asymmetries might appear dull in comparison. Some courts indeed tended to belittle the issue as an ordinary evidential difficulty.¹⁵⁷ In the academia, Langbein has dismissed the informational problem in the light of a ‘revolution in Equity’s fact-finding’.¹⁵⁸ Gilson and Schwartz downplay this issue in one paper, yet acknowledge it formally in another.¹⁵⁹ Such views are misguided, however. As it hinges on the drop of information gathering costs thanks to procedural

¹⁵⁶ For a review see PB Miller, ‘Justifying Fiduciary Duties’ (2013) 58 McGill Law Journal 969; see also Conaglen (n 2) 67–79; Smith, Selfless, (n 155); Smith, Motive, (n 155); I Samet, ‘Guarding the Fiduciary’s Conscience: A Justification of a Stringent Profit-stripping Rule’ (2008) 28 OJLS763; A Laby, ‘Resolving Conflicts of Duty in Fiduciary Relationships’ (2004) 54 American University Law Review 75.

¹⁵⁷ *Holder v Holder* [1968] Ch 353, 398 (Danckwerts LJ).

¹⁵⁸ JH Langbein, ‘Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?’ (2005) 114 Yale Law Journal 929, 944–950; see also AD Hicks, ‘The Remedial Principle of *Keech v Sandford* Reconsidered’ (2010) CLJ 287, 293. Getzler, (n 9) 586–589, provides a fuller analysis; see also Getzler, (n 21) 986–987; C Mitchell, ‘Causation, Remoteness and Fiduciary Gains’ (2006) King’s Law Journal 325, 326.

¹⁵⁹ Cf RJ Gilson and A Schwartz, ‘Constraints on Private Benefits of Control: Ex Ante Control Mechanisms versus Ex Post Transaction Review’ (2013) 169 Journal of Institutional and Theoretical Economics 160, 167; RJ Gilson and A Schwartz, ‘Corporate Control and Credible Commitment’ (2015) 43 International Review of Law and Economics 119, 122.

advances, Langbein's thesis applies to observable, though costly, information. It ignores unobservable and unverifiable information. Gilson and Schwartz are explicit about this gap. These views thus share a common weakness in that they assume away the problem. Abuse of fiduciary power thrives precisely on information asymmetries that these views deny or deny their importance. A social institutional response therefore should strive to minimize them as much as practical through full disclosure.

Lord Eldon, for one, certainly did not downplay this problem. He underscored its severity especially with regard to unobservable and unverifiable information.¹⁶⁰ Echoing the *Seneschaucy* on the irrelevance of the price in self-dealing and foreshadowing the 'no further inquiry' doctrine, Lord Eldon emphasized that the fairness of the transaction is immaterial because the court can never verify the full circumstances.¹⁶¹ The fiduciary 'is out of the reach of investigation,' he said; 'no Court is equal to the examination and ascertainment of the truth in much the greater number of cases.'¹⁶² This is a very different claim than, say, 'the examination and ascertainment of the truth is too onerous for any Court,' as Langbein implies. Lord Eldon obviously did not discover information asymmetry nor did he design fiduciary accountability. His seminal contribution in this context – to which this paper pays homage (and swears fealty) – lies in using principled reasoning to explicate its pernicious effect on fiduciary relations.

In terms of legal doctrine, fiduciary law implements an equally strict approach with regard to both prongs of the opportunism problem - the motivational and the

¹⁶⁰ *Lacey*, (n 6) 1228, quoted above; *James*, (n 7) 345; *Bennett*, (n 8) 400; see also *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592 (Rich, Dixon and Evatt JJ); *Gwembe*, (n 139) [44]; R Flannigan, 'The Adulteration of Fiduciary Doctrine in Corporate Law' (2006) 122 LQR 449, 451.

¹⁶¹ See, eg, *James*, (n 7) 388; *Aberdeen Railway Company v Blakie Brothers* [1854] UKHL 1, (1854) 1 Macq 461, 471 (HL) (Lord Cranworth LC), citing *James*.

¹⁶² *James*, (n 7) 388; see also *Bennett*, (n 8) 400.

informational. A fiduciary would be deemed to have breached the ‘no conflict’ rule even while acting in good faith and while bestowing benefits on the beneficiary.¹⁶³ The prophylactic rationale that underlies the conflict-profit proscription¹⁶⁴ motivates equally forcefully the duty of full disclosure. Inasmuch as prophylaxis is concerned, disclosure actually may have a stronger claim: ‘Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’¹⁶⁵ Or as Green J put it: ‘But the key is disclosure – “sunlight bleaches”.’¹⁶⁶

Brandeis’s Sunlight maxim reflects an important insight: that the beneficial effects of disclosure may go beyond equalising the information set of the parties. Disclosure may also affect motivations, ie, self-interestedness, as it makes the agent’s conduct salient to herself and to others. Disclosure thus may inhibit socially condemned conduct at least among agents who are sensitive to the injunctive force of social norms; in this case - the norms of loyalty and accountability. Disclosure furthermore exposes the agent to informal enforcement as it may trigger opprobrium and shaming by other societal members and thus may facilitate compliance due to external social incentives.

¹⁶³ *Boardman v Phipps* [1967] 2 AC 46; *Regal (Hastings)* (n 136); cf *Murad v Al-Saraj* [2005] EWCA Civ 959 [81]–[83] (Arden LJ); *Foster Bryant Surveying Ltd v Bryant* [2007] EWCA Civ 200 [76]–[77] (Moses LJ).

¹⁶⁴ *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 [404]–[420] (Heydon JA); Conaglen, (n 2) 194; Smith, Prophylaxis, (n 155); J Getzler, ‘Am I My Beneficiary’s Keeper? Fusion and Loss-Based Fiduciary Remedies’ in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney: Thomson LBC, 2005) 239.

¹⁶⁵ LD Brandeis, *Other People’s Money and How the Bankers Use It* (New York: Stokes, 1914) 62.

¹⁶⁶ *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2014] EWHC 30, [6] (QB), reversed on other grounds in *The Northampton Regional Livestock Centre Company Ltd v Cowling* [2015] EWCA Civ 651.

Disclosure is therefore expansive, nearly total, and surely above and beyond any measure of disclosure found in other legal contexts.¹⁶⁷ Although ‘fishing expeditions’ are considered illegitimate, in the accounting process ‘[t]he Master has liberty to make *a roaming inquiry* regarding the assets the trustees should have received’.¹⁶⁸ Courts have used similar terms without hesitation.¹⁶⁹ Still, courts are not Utopian. The reach of both prongs of fiduciary loyalty is delineated with the same yardstick of materiality. Where the ‘no conflict’ rule is concerned, there has to be ‘a real sensible possibility of conflict’.¹⁷⁰ Similarly, ‘full disclosure’ or ‘utmost candour’ are satisfied if the fiduciary discloses all the material information.¹⁷¹

Full disclosure thus cannot be treated merely as a collateral duty supporting the prohibition of self-interestedness. Just as eliminating information asymmetries would undo opportunism, so would removing full disclosure cause the edifice of fiduciary loyalty to collapse. Loyalty without proactive accountability is meaningless. Thus, the development of accountability to charge *all* receipts and thus encompass the residual financial interest in the manor, coupled with the Exchequerian mechanism of transparent audit, was crucial for direct farming of manorial firms. Manorial accountability, once perfected, could evolve into a general regime of accountability-based loyalty for partners, trustees and all other fiduciaries.

¹⁶⁷ Cf, in non-fiduciary relations, where disclosure has been questioned, O Ben-Shahar and CE Schneider, *More than You Wanted to Know* (Princeton: Princeton University Press, 2014).

¹⁶⁸ *Chambers*, (n 145) 19 (emphasis added), following *Glazier v Australian Men’s Health (No 2)* [2001] NSWSC 6, [42], reversed on other grounds in *Meehan v Glazier Holdings Pty Limited* [2005] NSWCA 24.

¹⁶⁹ *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 2 All ER 92, 97; *Coulthard v Disco Mix Club Ltd* [1999] 2 All ER 457, 481.

¹⁷⁰ *Boardman*, (n 163) 124 (Upjohn LJ); see also M Conaglen, ‘The Extent of Fiduciary Accounting and the Importance of Authorisation Mechanisms’ (2011) 70 CLJ 548, 551.

¹⁷¹ *Furs*, (n 160) 592; *Fitzwood*, (n 153) [31]; *Gwembe*, (n 139) [44], [65]; see also *Rosenblatt v Getty Oil Co*, 493 A.2d 929, 944 (Del. Sup. 1985).

This development in turn was linked with the institutionalisation of accountability as a generalized social norm rather than a secluded body of expert knowhow. Had accountability not taken root as a social norm, it is hard to imagine the trust becoming so widespread in England, without a shared understanding of what it entails for trustee conduct. As Matthews notes (perhaps with some hyperbole), ‘[a]nother aspect of the trust is cultural. Anglo-Saxons have grown up with trusts all around them. Everyone they know is either a trustee or a beneficiary, or both. Trusts are part of the history of the country, and part of the fabric of their society.’¹⁷² That today one speaks about office holders as ‘discharging’ their ‘stewardship’ duties, unaware of this metaphor’s origins in now-extinct charge and discharge accounting of feudal times, attests to the profound social impact of this institutionalisation process.

What to make of the fact that fiduciary law deals proscriptively with self-interestedness but prescriptively with information asymmetries? With respect, not much. The basic point, that a fiduciary must not withhold material information with regard to her service as a fiduciary, has some solid references beside *Fassihi* and *Hilton*.¹⁷³ Courts and scholars have also noted that a sharp proscriptive/prescriptive distinction becomes fuzzier and less defensible when one introduces the elusive omission/commission distinction into the analysis.¹⁷⁴ These analytical impurities may stem from the fact that fiduciary accountability is an ancient legal regime, perfected in an era that did not neatly distinguish between right and remedy or performance and breach and still defies these distinctions. Instead, it comprises an array of rules that

¹⁷² P Matthews, ‘The Place of the Trust in English Law and in English Life’ (2013) 19 *Trusts & Trustees* 242, 245.

¹⁷³ *Fassihi*, (n 149); *Hilton*, (n 145). See, eg, *London Loan & Savings Co v Brickenden* [1934] 3 DLR 465, 468 (PC); *Nocton v Lord Ashburton* [1914] AC 932, 965 (HL).

¹⁷⁴ *DFD Rhodes*, (n 153) [53]; *Pilmer*, (n 153) [127]; Getzler, (n 9) 595; L Fioris, ‘Precluding Prescriptive Duties in Fiduciary Relationships: The Problems with the Proscriptive Delimitation’ (2012) 40 *Australian Business Law Review* 166, 167–170.

revolve around a continuous commitment to faithful service, at the core of which lies a continuous commitment to account. One may thus frame the ‘no profit’ rule not only as an elaboration of the proscriptive ‘no conflict’ rule but also as a derivative of a prescriptive ‘full disclosure’ rule, where ‘no profit’ means ‘no profit unless fully disclosed and authorized’. In either case ‘no profit’ cannot serve as a complete substitute for the primary rule. The ‘full disclosure’ rule imposes on the fiduciary a broader, more fundamental obligation to account.

4. Conclusion

About nine hundred years ago, Roger of Salisbury had the ingenuity of putting together several administrative components to create the Royal Exchequer as a novel audit apparatus for tax collection. A hundred years later, this organizational technology was upgraded to fit the task of manorial direct farming by adding a functionality of full disclosure, notwithstanding the inherent challenges of dealing with the information asymmetries that this entailed. Walter of Merton, among several others, may have contributed to spreading this technology, now deserving of the title ‘accountability’, throughout the country, leading to its becoming a social institution. These pioneering figures and their contemporaries may have been drawing inspiration from earlier, even ancient, sources in Roman and canon law. Be it as it may, the social institution of accountability and the legal regime of fiduciary loyalty that have thus emerged remain dependant on this disclosure-based infrastructure. Lord Eldon, writing some two hundred years ago, was instrumental in this development. Granted, not every medieval practice or norm merits adhering to today, but few would deny that accountability does.

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