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USES AND "AUTOMATIC" RESULTING TRUSTS OF FREEHOLD

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ABSTRACT. *Drawing upon the history of the doctrine of the old use, Professor John Mee has suggested both that the extent of the authority for a "retention" approach to "automatic" resulting trusts has been overlooked, and that while as a matter of history a "retention" approach has significant support, as a matter of principle in the modern law it is not fully satisfactory, so that it is necessary to look elsewhere for a theoretical explanation for the "automatic" resulting trust. This article examines the reasons for the inconsistency identified by Professor Mee, seeking to elucidate the relationship between uses and trusts, to contribute to the history of resulting uses and trusts, and to explain why the modern "automatic" resulting trust has become a rule in search of a rationale.*

KEYWORDS: *Trusts, uses, history, resulting, automatic, retention*

Professor John Mee has recently considered[1] "the retention approach" to "automatic" resulting trusts,[2] characterised by Mr Hackney as "proprietary arithmetic":

> If I give land to trustees on trust for A for life, remainder to the first child to be born to A after the making of the gift, and A has no such child, the land will be held on trust for me after A's death. This is called a resulting trust, though … it does not spring back in any theoretical sense. This rule does not depend upon a presumption of intention, but on a simple process of proprietary arithmetic – what I once had and have not granted away, I keep.[3]

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[1] J. Mee, "'Automatic' Resulting Trusts: Retention, Restitution, or Reposing Trust?", in C. Mitchell (ed.), *Constructive and Resulting Trusts* (Oxford 2010), 207, discussed in Graham Virgo, *The Principles of Equity and Trusts* (Oxford 2012), 262–265. See also J. Mee, "Resulting Trusts and Voluntary Conveyances of Land, 1674–1925" (2011) 32 Journal of Legal History 215, and J. Mee, "Resulting Trusts and Voluntary Conveyances of Land" [2012] Conveyancer 307.

[2] This terminology derives from the judgment of Megarry J. in *Re Vandervell's Trusts (No. 2)* [1974] Ch. 269. For its appropriateness, see Mee, "'Automatic' Resulting Trusts", p. 210.

[3] J. Hackney, *Understanding Equity and Trusts* (London 1987), 153. The other category of resulting trusts is those which are "presumed", in cases of voluntary conveyance or purchase of property in the name of another.

This approach faces the obstacle that "the ideas of 'locating' the beneficial interest, or engaging in 'proprietary arithmetic' concerning the beneficial interest, presuppose the existence of a separate beneficial interest under a subsisting trust".[4] As Mr Swadling put it,

> the settlor generally has no equitable interest to retain. Suppose I convey my fee simple … to a friend to hold on trust for "such objects of benevolence and liberality as he in his absolute discretion should most approve of." The trust will fail for want of objects and the friend will hold the title for me on resulting trust. But I have "retained" nothing. At the beginning … I had a fee simple title to land. At the end … that title is held by my friend. What I now have is an interest under a trust, something I did not have before.[5]

While acknowledging this difficulty, Professor Mee has "mine[d] the early law reports to show that there is more to the idea that the beneficiary of a resulting trust 'retains' an interest in the trust property than modern writers generally recognise",[6] while concluding nevertheless that retention, "though strongly rooted in authority, does not appear to provide a satisfactory theoretical explanation for the resulting trust":[7] "[t]he interest of the beneficiary under a trust is, in an important sense, 'not carved out of a legal estate but impressed upon it'", and it is necessary "to look beyond the retention idea for a satisfactory theoretical explanation of the automatic resulting trust".[8] Professor Mee identifies the tension between "the weight of historical authority in favour of [the retention theory]"[9] and its failure to "provide a satisfactory theoretical explanation for the resulting trust",[10] but does not resolve it. Resolution, it is suggested, requires further investigation of the "complexity surrounding the usage of the terms 'use' and 'trust' before and after the Statute of Uses 1536", which, as he accepts, is understated in Professor Mee's argument.[11] A full history of "automatic" resulting trusts (and of resulting trusts more generally) will require consideration of forms of freehold title other than the fee simple, together with chattels real and personalty, and detailed examination of the relevant

[4] Mee, "'Automatic' Resulting Trusts", p. 210.
[5] W. Swadling, "Explaining Resulting Trusts" (2008) 124 L.Q.R.72, at 99–100.
[6] C. Mitchell, in Mitchell (ed.), *Constructive and Resulting Trusts*, preface, p. v.
[7] Mee, "'Automatic' Resulting Trusts", p. 221.
[8] Ibid. For historical discussion of the beneficiary's interest, see N. Jones, "Trusts in England after the Statute of Uses: A View from the Sixteenth Century", in R. Helmholz and R. Zimmermann (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin 1998), 173, at 190–192, and N.G. Jones, "The Trust Beneficiary's Interest before *R. v. Holland* (1648)", in A. Lewis, P. Brand and P. Mitchell (eds.), *Law in the City: Proceedings of the Seventeenth British Legal History Conference, London, 2005* (Dublin 2007), 95.
[9] Mee, "'Automatic' Resulting Trusts", p. 218.
[10] Ibid.
[11] Mee, "'Automatic' Resulting Trusts", p. 217 n. 47 (referring to N.G. Jones, "Uses, Trusts and a Path to Privity" [1997] C.L.J. 175, at 178–182).

case law.[12] This article's more limited aim is to begin the process by examining the structure of uses and trusts of the freehold estate in fee simple, to which Professor Mee's analysis is directed.

Observing that "[a] use and a trust may essentially be looked upon as two names for the same thing",[13] Professor Mee argues that resulting uses could be understood in terms of retention; that the doctrine of the old use to which the retention analysis of resulting uses gave rise "applied equally in relation to resulting trusts";[14] and that in consequence "when Lords Upjohn, Wilberforce and Reid spoke in *Vandervell* of the beneficial interest under a resulting trust 'remaining' in the settlor, they were reflecting an approach which had consistently been adopted by Equity for four centuries".[15] But while the doctrine of the old use – rooted in the period before the Statute of Uses 1536[16] – was applied to resulting trusts after 1536, in important respects uses and trusts were not the same. Before 1536 the transferor of a fee simple in circumstances giving rise to a resulting use could be conceived as having retained the use which had previously existed in him distinct

[12] Copyhold land might also be included, albeit copyhold tenure no longer persists. The story in relation to forms of property other than the freehold estate in fee simple is complex. The questions include the effect upon the operation of uses and trusts of tenurial relationships (as in, for example, estates in fee tail and terms of years), and the extent to which the distinction between uses and trusts applicable to the fee simple applied to chattels real and personalty. Opinion was divided in these areas. For discussion of the fee tail, see, inter alia, D.E.C. Yale (ed.), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge 1965), 245–246, and 248 ("whether tenant in tail can stand seised to an use is a point much controverted in our books"), and W.H. Rowe (ed.), *The Reading upon the Statute of Uses of Francis Bacon* (London 1804), 114 ff (observing, at p. 114, that "Whether an estate tail can be by express limitation to the use of another has been *vexata quaestio*"). Rowe argued that "at this day … an estate tail cannot be by express limitation to the use of another": ibid., p. 193. See also J. Gilbert, *The Law of Uses and Trusts*, 3rd ed., by E.B. Sugden (London 1811), 19. But compare, for example, F.W. Sanders, *An Essay on Uses and Trusts*, 5th ed., by G.W. Sanders, vol. 1 (London 1844), 87–88. See also Co. Litt. 19b, and T. Lewin, *A Practical Treatise of the Law of Trusts*, 5th ed. (London 1867), 5. On terms of years, there was doubt, at least initially, as to whether there could be a use in the sense considered in this article (see Jones, "Trusts in England after the Statute of Uses", p. 173, at pp. 180–181). And the difficulty over tenure also applied: Lord Nottingham concluded that "a lease for life or years without consideration is to the use of [the] lessee. So if lessee for life or years assigns his estate without consideration, no use results, but it is to the use of the grantee, because the payment of the rent to him in reversion implies a consideration, and it is to the use of the grantee … and this by implication of the law, though no use be limited to the grantee", Yale (ed.), *Nottingham's 'Manual' and 'Prolegomena'*, p. 246. None of these difficulties was conducive to a retention analysis of resulting trusts of fees tail or terms of years. The case of pure personalty is more obscure, though difficulties over the existence of uses of pure personalty in the sense discussed in this article probably arose.

[13] Mee, "'Automatic' Resulting Trusts", p. 217, quoting Lord Mansfield C.J.K.B. in *Burgess v Wheate* (1759) 1 Black. W. 123, at 155. The point is repeated in Mee, "Resulting Trusts and Voluntary Conveyances of Land, 1674–1925" (2011) 32 Journal of Legal History 219, while referring in a note to discussion of the differences between uses and trusts by D.E.C. Yale, and by N.G. Jones. In "Resulting Trusts and Voluntary Conveyances" [2012] Conveyancer 307, Professor Mee moves somewhat closer to suggesting a distinction between uses and trusts: "there were, in principle, significant differences between ancient uses and modern trusts", ibid., p. 322, and refers to "the possible difference between a use and a trust": ibid., p. 322

[14] Mee, "'Automatic' Resulting Trusts", p. 217

[15] Referring to *Vandervell v Inland Revenue Commissioners* [1967] 2 A.C. 291, at 308, 313, 314, and 329. The extent to which such "reflection" was conscious is unclear.

[16] 27 Hen. VIII, c. 10.

from the legal title. This analysis was not directly applicable to trusts after 1536, and from application of the old rules to a new situation sprang the tension between "the weight of historical authority in favour of [the retention theory]"[17] and its failure to "provide a satisfactory theoretical explanation for the resulting trust".[18]

Retention and Resulting Uses Before the Statute of Uses

I have suggested elsewhere that the word "use" has more than one meaning in English law.[19] In one sense "to the use of" simply means "for the benefit of",[20] but in the context of freehold land "use" also has a narrower meaning, more germane to present purposes, under which the use was conceived as "thinglike" and distinct from the "possession" or legal title, and thus capable of retention by the transferor following conveyance of the legal title.[21]

A. The "Thinglike" Use

It became the practice in late medieval England to make feoffments of freehold land to the uses of a last will,[22] allowing, in effect, a will of such land, otherwise impossible at common law.[23] Such uses were passive, the feoffees being seised of the land, and the feoffor enjoying it as if an owner until his death.[24] Such uses became so common that a feoffment with no consideration or use expressed was understood to have been made to the use of the feoffor.[25] As Thomas Audley observed in 1526, "where no use is expressed in the consideration of a deed the law expounds the use for the benefit of he from whom the possession is departed".[26]

[17] Mee, "'Automatic' Resulting Trusts", p. 218.
[18] Ibid., p. 221.
[19] Jones, "Uses, Trusts and a Path to Privity", p. 175, at pp. 176 ff.
[20] 'The student will understand the subject more easily if he … starts from the fact that "use" simply means "benefit"', C. Sweet, "The True Doctrine of the Old Use", 63 The Solicitors' Journal & Weekly Reporter, 23 Nov. 1918, 79, at 80 n. 1.
[21] For "thinglikeness" in the context of incorporeal hereditaments, see Sir Frederick Pollock and F.W. Maitland, *The History of English Law before the time of Edward I*, 2nd ed. (Cambridge 1898), vol. 2, 124–125. For conceptions of the use as an hereditament, see Jones, "The Trust Beneficiary's Interest before *R. v. Holland* (1648)", at pp. 96–99.
[22] Or to the use of feoffor and his heirs, which was the same thing: Sir John Baker, *Oxford History of the Laws of England*, vol. 6, *1483–1558* (Oxford 2003), 653 n. 4, citing *Anon.* (1549) Wm. Yelv. 346, no. 72. A feoffment was a common law conveyance of freehold by entry upon the land with symbolic delivery of seisin.
[23] For medieval uses see J.L. Barton, "The Medieval Use" (1965) 81 L.Q.R. 562; J. Biancalana, "Medieval Uses", in Helmholz and Zimmermann (eds.), *Itinera Fiduciae*, pp. 111 ff; Baker, *Oxford History of the Laws of England*, vol. 6, ch. 35.
[24] That the beneficiary enjoyed the land as if an owner gave rise to conveyancing uncertainty, for which a remedy was attempted by the statute 1 Ric. III, c. 1 (1484).
[25] For discussion of this, see A.W.B. Simpson, *A History of the Common Law of Contract: the Rise of the Action of Assumpsit* (reprinted Oxford 1987), 344.
[26] "ou nul use est expresse in le consideracion dun fait le ley expound le use pur le benefit de celuy a que le possession est departed", British Library (BL) MS. Hargrave 87, fo. 438v. Audley was reading in the Inner Temple on the statute 4 Hen. VII, c. 17. As Simpson observes, such rules were

In this context developed the "thinglike" use.[27] As Professor Mee notes,[28] before the Statute of Uses 1536 the owner of freehold land could be conceived as having, in Christopher St German's words,

> two things in him, that is to say, the possession of the land which after the law of England is called the frank tenement or the free hold, and the other is authority to take thereby the profits of the land, wherefore it follows that he that has land and intends to give only the possession and freehold thereof to another and to keep the profits to himself ought in reason and conscience to have the profits seeing there is no law made to prohibit, but that in conscience such reservation may be made. And so when a man makes a feoffment to another and intends that he himself shall take the profits, then that feoffee is said [to be] seised to his use that so enfeoffed him.[29]

The "use" in this sense was the "authority to take … the profits of the land". Every owner of freehold land had such a use, together with the "possession", that is, the legal title,[30] and it became common to speak of one being seised of land to his own use:[31] in 1526 Audley gave repeated examples of dealings with land by one "seised to his own use",[32] and twenty years earlier Robert Rede J.C.P. had discussed a sale of land by "one [who] is seised to his own use".[33]

By the early sixteenth century the judges – addressing uses through the statute 1 Richard III, c. 1 (1484), which gave cestui que use power in some cases to convey a legal title[34] – had begun to conceive of "the use"

originally "[c]ommonsensical" (*History of the Common Law of Contract*, p. 344). Compare Gregory Adgore's observation in his reading on the statute 1 Ric. III, c. 1 in about 1490, that a feoffment to a husband and wife and their heirs "is to the use of the husband and wife, and not to the use of the feoffors, for it shall not be understood that a man wishes to enfeoff a married woman to his use", Lincoln's Inn MS. Maynard 3, fo. 196 (translated).

[27] Jones, "Uses, Trusts and a Path to Privity", p. 179.

[28] Ibid., pp. 214–215.

[29] Christopher St German, *Doctor and Student*, T.F.T. Plucknett and J.L. Barton (eds.) (Selden Soc. 91) (London 1974), 222, from the second dialogue, published in English in 1530, rendered into modern orthography. The date "1518" given by Professor Mee seems to be a slip.

[30] For "possession" and "use" in St German's senses see *Brent's Case* (1575) 2 Leo. 14, pl. 25, at 16 per Manwood J.C.P., "even though the possession is now executed to the use [by the Statute of Uses] …".

[31] Cf. Professor Chambers's suggestion that "At one time a person may have been able to hold property for his or her own use, so that a transfer with no consideration and no declaration of use would leave the use behind", R. Chambers, *Resulting Trusts* (Oxford 1997), p. 53.

[32] "home seisi a son proper use", BL MS. Hargrave 87, at fos. 438v and 439.

[33] "on est seisi a son use demesne", Y.B. Hil. 21 Hen. VII, fo. 18, pl. 30 (1506).

[34] "The question which could hitherto arise only before the chancellor, and only in terms of his choosing whether to decree a conveyance in accord with an earlier or a later declaration of will, would now arise in a common law court in an action to try title", S.F.C. Milsom, *Historical Foundations of the Common Law*, 2nd ed. (London 1981), 216, referring to the effect of the statute 1 Ric. III, c. 1. Mr. Barton's caveat should be kept in mind: "Of more interest for us are the common law decisions on specifically equitable topics, which provide the basis for the accepted account of the law of uses before the Statute of Uses. It should be emphasised, however, that it is necessary to use them with a good deal of caution. Not all the common law judges were particularly happy at the idea of receiving the doctrines of the Chancery *in complexu*, or even fully aware of what those doctrines were", Barton, "The Medieval Use", p. 562, at pp. 574–575. For the statute of 1484 see Baker, *Oxford History of the Laws of England*, vol. 6, pp. 654 ff.

as an entity. Uses indeed turned upon personal trust and privity: "if there is no privity or trust there can be no use",[35] and feoffees to uses might be called "feoffees on trust",[36] but trust and confidence co-existed with a perception that the beneficiary had a form of property in the land. In about 1490, reading on the statute 1 Richard III, c. 1 (1484), Gregory Adgore repeatedly referred (in English) to cestui que use as the "owner" of the land;[37] Audley made the same point in 1526:

> a use is a property or ownership of land or something else, real or personal, depending solely on confidence and trust between those who are in actual possession and are accounted owners by the common law of such lands and things whereon the use depends, and those who have a use in the same thing whereon the use depends;[38]

and before 1536 the judges had come to discuss uses in "thinglike" terms. So it could be said that before the statute of 1484 a will made by "he who had the use" was not good;[39] that feoffees might claim "the use of [the] land to the use of the issue in tail";[40] that it was a question "what estate [someone] had in the use";[41] and that "the use in fee descended" to one who thereupon entered the land.[42] As Maitland put it, "'the use' is turned into an incorporeal thing".[43]

The position was summarised almost a century ago by Edgar Durfee:

> [a]t the time of the Statute [of Uses], English land was so largely held to uses, (passive uses, of course) that property in land was thought of as a duality – seisin and use. Even when the equitable relation of feoffee and cestui did not obtain, when the legal estate was unencumbered by an outstanding use, the idea of duality remained and the tenant was said to be seised to his own use, the use being characterized as "conjoined" to the seisin. When the use was "divided" from the seisin, the cestui usually had possession, that

[35] Per Roo, serjeant, in *Gervys v Cooke* (1522), J.H. Baker (ed.), *Year Books of Henry VIII, 12–14 Henry VIII, 1520–1523* (Selden Soc. 119) (London 2002), 108, at 111.

[36] Per Kingsmill, serjeant, in *Anon.* (1502), J.H. Baker (ed.), *Reports of Cases by John Caryll*, pt. 2, *1501–1522* (Selden Soc. 116) (London 2000), 395. As Simpson put it, "The institution of the use began life as a personal trust or confidence reposed in a feoffee to uses by the feoffor", Simpson, *History of the Common Law of Contract*, p. 357.

[37] Sir John Baker, *Baker and Milsom, Sources of English Legal History: Private Law to 1750*, 2nd ed. (Oxford 2010), 112 n. 26.

[38] Ibid., p. 118.

[39] "cestuy qui avoit le use", per Shelley and Englefield J.J.C.P., Y.B. Trin. 19 Hen. VIII, fo. 9, pl. 4, at fo. 10b.

[40] "les feoffees ne sont barrez a claimer le use de terre a le use de le issue in tail", per Fitzjames C.J.C.P. and others, Y.B. Trin. 19 Hen. VIII, fo. 13, pl. 11, encompassing both the "thinglike" approach to uses, and the broader meaning of use as benefit.

[41] "quel estat Giles ad in le use", per Mountague, serjeant, Y.B. Pas. 27 Hen. VIII, fo. 5, pl. 15.

[42] "le use en fee descenda a un P.G.", Y.B. Mich. 21 Hen VII, fo. 33, pl. 28.

[43] F.W. Maitland, "Trust and Corporation", in H.A.L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. 3 (Cambridge 1911), 321, at 343.

> tangible element of property which at that day, even more than now, approximated to ownership.[44]

This being so, the tenant seised to his own use might transfer seisin to another while retaining the use.

B. Separating Possession and Use

As Durfee suggested, the use might be "conjoined" to the seisin (or possession), or "divided" from it,[45] as, for example, by a feoffment not disposing of the whole of the use. Professor Mee refers to Coke's observation that

> whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter.[46]

Here is the concept of retention of the "ancient" or "old" use, which plays a large part in Professor Mee's argument. As Charles Sweet put it of the period before 1536 "every feoffment was presumed to be made for the benefit of the feoffor, so that the feoffee took nothing but the seisin or legal estate; the 'use' or beneficial ownership did not pass by the feoffment, but remained in the feoffor".[47] And it followed that "if, after 1536, a man seised in fee conveyed the land to feoffees without showing any intention of giving them the beneficial ownership, the use of the fee remained in him, and the statute [of uses] gave him back, not the same estate as he had before, but a similar estate, corresponding to the use which remained in him … In the language of Lord Coke, he was in of the old use."[48]

Sweet supposed that the doctrine of the old use, being a "common law doctrine", could not have pre-dated the Statute of Uses,[49] but its roots may lie before 1536.[50] In the reports of John Caryll, junior, made between about 1527 and 1537 it is noted that "where a feoffment is made without consideration and no wrong is done upon the feoffment, this shall be to the first use. But if any wrong is done it shall always be

[44] E.N. D[urfee], "The Statute of Uses and Active Trusts", 17 Michigan Law Review (1918–19), 87, at 90.
[45] The terms "divided" and "conjoined" were used by Bacon: Rowe (ed.), *Reading of Francis Bacon*, p. 45.
[46] Mee, "'Automatic' Resulting Trusts", p. 214, quoting Co. Litt. 23a.
[47] Sweet, "'A Song of Uses.' Some Reflections and a Moral" (1919) 35 L.Q.R. 127, at p. 128.
[48] Ibid., p. 129, referring to Co. Litt. 23a.
[49] Sweet, "'A Song of Uses'", at p. 128: "It is a common law doctrine, and can only be explained on common law principles." In referring to common law principles, Sweet seems to have had in mind principles applicable to uses executed by the Statute of Uses.
[50] Sweet may have overlooked the effect of the statute 1 Ric. III, c. 1 (1484) in requiring the common law judges to consider uses.

taken to the use of the feoffor",[51] while, in contrast, "if a tenant in tail makes a feoffment without consideration, the feoffees shall be seised to the use of feoffor and his heirs and not to the first use".[52] This may appear a distinction without a difference, but reflects the doctrine of the old use: where a feoffment is "to the first use" the feoffor retains the use – the old, or "first" use – which was in him before the feoffment; in contrast, where a feoffment is made, or taken to have been, "to the use of the feoffor", the feoffor acquires a new use, distinct from that which was previously in him.

The same point arose in the Common Pleas, probably in 1535. "Before the Statute of Uses someone was seised of land which came to him by descent from his mother, and he made a feoffment in fee to his own use.[53] The question is, whether this land shall descend to the right heirs on his father's side or to the heirs on his mother's side?" Serjeant Willoughby "said that it must descend to the heirs on his mother's side". Thomas Bromley disagreed, "for when he has made a feoffment to his use he is in as by a new estate; for it is like a purchase, which is a new estate. Since he is in by a new estate, the land ought to descend to the right heirs on his father's side." Serjeant Browne was not convinced: "Suppose someone is seised of land in gavelkind or borough English, and makes a feoffment in fee to another: the land shall descend to the right heirs by the custom and not to the heirs by the common law."[54] Browne's point was agreed by the whole court, and he repeated it as a judge in 1542: "if someone makes a feoffment without consideration of land whereof he is seised from his mother's side, the use shall be to the same heir and shall follow the tenancy. The law is the same of a feoffment of lands in gavelkind", but one of the serjeants said "he had seen a book in which it is adjudged that the land ought to descend to the heirs on his father's side".[55]

The discussion in 1535 concerned a feoffment made "before the Statute of Uses". As Professor Mee shows, the point did not cease to be relevant with the passing of the statute: the concept of retaining an old use, and the consequent question of descent *ex parte paterna* or *materna*, continued to be discussed for centuries in relation both to uses executed by the Statute of Uses and in relation to trusts.[56]

[51] Ibid., p. 385 no. 31.
[52] Ibid., p. 401 (probably in the Inner Temple).
[53] Seemingly meaning a feoffment expressed to be to his own use.
[54] Baker (ed.), *Reports of Cases in the time of King Henry VIII*, vol. 2, p. 449.
[55] Ibid., p. 448. For later discussion of this point, see Gilbert, *Law of Uses and Trusts*, 3rd ed., p. 439 and references there.
[56] It may be suggested that the concept of retaining a use was applicable both to situations now conceived as giving rise to "automatic" resulting trusts, and to situations now conceived as giving rise to "presumed" resulting trusts. In both cases the question was whether the settlor had disposed of the use. The point was put in argument in *Shortridge v Lamplough* (1700) 7 Mod. 71: "If a man at this day make a feoffment in fee to another and his heirs generally, without declaration of use or consideration, it shall be to the use of the feoffor … When one makes a feoffment to particular

The Doctrine of the Old Use After 1536

The Statute of Uses executed uses, rejoining use and possession by transferring possession from feoffees to cestui que use. Executed uses now took effect at common law – as was said in argument in the King's Bench in *Davis v Speed* (1692), "this is a conveyance by way of *use*, which before the statute [of uses] was considered only as a *trust*; but now by uniting the possession to those uses, they are governed by the known rules of the common law"[57] – while unexecuted uses continued to take effect in equity, forming the basis of the modern law of trusts.[58] As Professor Mee argues, the doctrine of the old use continued to be applied to uses after 1536, and was applied "equally in relation to resulting trusts".[59] But, as will be seen – uses and trusts being not in all respects the same – application of the doctrine of the old use to resulting trusts could not be explained on the same basis as was possible in the case of resulting uses.

A. Uses and the Doctrine of the Old Use after 1536

"[T]he statute [of uses] did not, nor indeed could, alter the nature of the use",[60] and the concept of retention of the old use was applied to executed uses at common law after 1536. As has been seen, Coke said that

> whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits, which is in nature of the use, and therefore when he makes a feoffment in fee without valuable consideration to divers particular uses, so much of the use as he disposeth not, is in him as his ancient use in point of reverter.[61]

Coke likewise observed elsewhere that "when the feoffor disposeth of the profits for a particular time *in praesenti*, the use of the inheritance shall be to the feoffor and his heirs, as a thing not disposed of".[62]

uses, so much of the use as he does not dispose of remains in him as his old use: and he said that there was no difference when there were particular uses limited and no use at all; for what draws the use out of the feoffor? It is either the consideration, or the expressing it to be to the use of another; and that reason holds in both cases", per Raymond, at pp. 71–72. Wells on the other side "agreed, that in all sorts of conveyances, if there be not a consideration or use expressed, or necessarily implied, the use shall remain in the conveyancer": at p. 73.

[57] 4 Mod. 153, at 154–155 (emphasis in the original).

[58] The unexecuted uses were uses upon uses, uses where the feoffees (or trustees) had active duties to perform, and uses of property other than freehold land.

[59] Mee, "'Automatic' Resulting Trusts", p. 217.

[60] Sanders, *Essay on Uses and Trusts*, 5th ed., vol. 1, p. 85, referring to Coke's observation in *Cowper v Frankline* (1616), 3 Bulstrode 184, at 185, that "The statute of 27 Hen. 8 doth only execute old uses, but doth not create any new uses."

[61] Co. Litt. 23a.

[62] Co. Litt. 271b, glossing Littleton's observation before the Statute of Uses that "when a feoffment is made to a future use, as to the performance of his last will, the feoffees shall be seised to the use of the feoffor and of his heirs in the meantime".

Other examples may be given. In *Abbot v Burton* (1708) the question arose in the Common Pleas of the effect of a common recovery of an estate in fee simple: if husband and wife were seised of lands in right of the wife which she had by descent on the part of her mother (*ex parte materna*), and suffered a common recovery to the use of the husband and wife for life, and then to the heirs of their two bodies, remainder to the right heirs of the wife, and died without issue, should the land pass to the wife's heirs *ex parte materna* or *ex parte paterna* (on the part of the father)? Judgment was for the heirs *ex parte materna*, Trevor C.J. giving the opinion of the court that

> [b]efore [the Statute of Uses], the law considered the *estate of the land* and *the use of the land* as two distinct things; and therefore before that statute, if a man had made any conveyance … he might therein by express limitation have declared the use of the land; or if there were no express limitation, the law gave it back to him again; for he was not to pass away the pernancy of the profits, without some consideration, or estoppel, by express limitation; so that a man might at common law have separated the use and the estate … then comes this statute [of uses] … This statute executes the possession of the land in the same plight and manner as the use was before; therefore as this conveyance is, this ancient use which results back, was not a new use; for it must be an old use, if it result back as not disposed of, and so much of the ancient use still remains in him as was undisposed of. Now if the use would have gone this way before the statute, it will still go the same way since the statute. It is the same thing whether the antient use comes back by implication of law, or by limitation of the party.[63]

The decision in *Abbot v Burton* was accepted in the King's Bench in *Roe d. Crow v Baldwere* (1793).[64] Counsel repeated Coke's observation that "so much of the use as he disposeth not, is in him as his ancient use in point of reverter", observing that "The principle … as to freeholds, is that the old use remained, and that the statute [of uses] gives the legal estate the same quality" as the unexecuted use had.[65]

And in the following year, in his notes to *A Treatise of Equity*, John Fonblanque observed,

> [w]e have already had occasion to refer to the doctrine of resulting uses, where no consideration or declaration of the uses appears on the conveyance, and the principle upon which an use will result in

[63] 11 Mod. 181, at 182 (emphasis in the original). See also the same case at 2 Salkeld 590, and 1 Comyns 160. Trevor C.J. referred to *Godbold v Freestone* (1694) 3 Lev. 406, where a very similar question had arisen in the Common Pleas. The same point had been disputed there in 1535 (see above, at n. 54), but the whole court rejected the suggested difference between the cases: "in both cases the fee remains in the donor, and was never drawn out of him", 3 Lev. 406, at 407.

[64] 5 T.R. 104.

[65] 5 T.R. 104, at p. 105. It was asked whether this applied to copyhold land, and held that it did.

> those cases, namely, that so much of the use as a man does not dispose of remains in him, extending to cases where a man makes a feoffment, or other conveyance, and parts with, or limits only, a particular estate, and leaves the residue undisposed of, it follows, that where there is a feoffment to particular uses, the residue of the use shall be to the feoffor.[66]

The doctrine of the old use, and with it the concept of such of the use as was undisposed of remaining in the grantor,[67] was well known long after 1536: as Charles Sweet put it in 1919, in the last days of the Statute of Uses,[68]

> [t]he doctrine of the old use is still in force, … its true nature is obscured by the name of "resulting use", under which it is now generally known. This name is unfortunate, because it suggests the idea of returning or coming back … The inaccuracy is obvious, because the essential quality of the old use is that it remains in the grantor, and is never drawn out of him.[69]

In respect of resulting uses, the ancient doctrine of the old use – and with it a retention concept of resulting uses – persisted after the Statute of Uses into modern times.

B. Trusts and the Doctrine of the Old Use after 1536

The Statute of Uses did not execute all uses: some remained unexecuted and continued to take effect in equity. Such unexecuted uses included uses where the trustees had active duties; uses in the form of a use upon a use; and uses of property other than freehold land.[70] It is clear that the doctrine of the old use was applied to unexecuted uses, or

[66] *A Treatise of Equity, with the addition of marginal references and notes by John Fonblanque*, 2 vols. (London 1793–94), vol. 2, 137. The passage which Fonblanque annotated might have been a summary of St German: "For every man that hath lands, hath thereby two things in him; the one the possession of the land, which, in the law of *England*, is called the freehold; and the other, the authority to take the profits of the land, which is the use." The *Treatise*, first published anonymously in 1737, was attributed to Henry Ballow. See M. Macnair, "The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries", in Helmholz and Zimmermann (eds.), *Itinera Fiduciae*, p. 201 n. 9.

[67] As Spence put it, "the use, in most cases, remains rather than results" (G. Spence, *The Equitable Jurisdiction of the Court of Chancery*, vol. 1 (London 1846), 510).

[68] The statute was repealed by the Law of Property Act 1925, s. 207 and Sched. 7.

[69] Sweet, "'A Song of Uses'", at p. 131. From the idea of the use remaining in the grantor, it seemed to follow that "no use can result but to the owner of the estate" (Spence, *Equitable Jurisdiction of the Court of Chancery*, vol. 1, p. 488). So it was said in argument in *Davis v Speed* (1698) Shower 104, at 105, that "here was an Use by implication in the Husband; tho' none could result back to the Husband, because he had none before". It also followed that there might be a difference between a use which "remained" and a use which "returned", see *Pibus v Mitford* (1674) 1 Ventris 372, per Twisden J.K.B. at 375–376. From this it was argued that a purchase in the name of another gave rise not to a resulting but to a constructive trust, Spence, *Equitable Jurisdiction of the Court of Chancery*, vol. 1, pp. 510–511.

[70] For discussion of unexecuted uses, see Baker, *Oxford History of the Laws of England*, vol. 6, pp. 683–686; Jones, "Trusts in England after the Statute of Uses", pp. 178–181.

trusts, of freehold after 1536. Professor Mee refers to Henley L.K.'s observation in *Burgess v Wheate* (1759) that

> an use, whether declared or resulting, must ensue the nature of the land, and retain the same quality; and whether it be expressed or resulting, makes no manner of difference … Uses at common law, and trusts now, must ensue the nature of the land … In the case of a resulting use, the true reason is, that 'tis never out of the grantor. In the case of trust, 'tis the same – 'tis the old trust,[71]

to nineteenth-century treatise literature,[72] and to Lord Nottingham's observation in the 1670s that "At Common Law, if fine, recovery or feoffment were made without consideration, an use did result back again to the donor by implication of law … So also at this day a trust results in such cases, by [the opinion of] all",[73] though the approach was older: in about 1600 it was noted that if

> any lands or goods be conveyed to one upon trust which is unlawful or ungodly … if a bill be exhibited by the heir or executor of him who made such gift or conveyance, my lord [keeper] [Sir Thomas Egerton] will relieve such heir or executor, for this case of [a] trust in Chancery is like the case of [a] use at the common law. And therefore, if a feoffment be made to an unlawful use, it is plain the land reverts back again. So is it in [the] case of [a] trust.[74]

It being said that "trusts are to be governed by the same rules that uses were before the statute of uses",[75] and given that the doctrine of the old use turned upon retention of the use, the question arises as to why "the idea of retention, although it does reflect the reality to some extent, is not fully accurate" as an explanation of "automatic" resulting trusts in the modern law, with the consequence that it is "necessary … to look beyond the retention idea for a satisfactory explanation of the automatic resulting trust".[76] An answer lies in the differences between uses and trusts, which were not in all respects the same thing.

[71] 1 Black. W. 184–185. For *Burgess v Wheate*, see P. Matthews, "*Burgess v Wheate* (1759)", in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in Equity* (Oxford 2012), ch. 5.

[72] W. Preston, *An Essay in a Course of Lectures on Abstracts of Title* (London 1818), vol. 2, 436; C. Watkins, *An Essay on the Law of Descents*, 4th ed. by J. Williams (London 1837), 243–244; Gilbert, *Law of Uses and Trusts*, p. 28.

[73] Yale (ed.), *Nottingham's 'Manual' and 'Prolegomena'*, p. 245.

[74] W.H. Bryson (ed.), *Cases Concerning Equity and the Courts of Equity*, vol. 1 (Selden Soc. 117) (London 2001), 293 no. 146. For an example, see *Croft v Evet* (1605), Bryson, ed., *Cases Concerning Equity and the Courts of Equity*, vol. 1, p. 342 no. 124, and references there, and discussion in G.H. Jones, *History of the Law of Charity* (Cambridge 1969), 82.

[75] Per Lord King L.C., in *Mansell v Mansell* (1732) Cases T. Talbot 252, at 261. For a later example, see *Buchanan v Harrison* (1861), 1 J. & H. 662, at 668–669, where in argument Rolt Q.C. and Baggallay Q.C. quoted Co. Litt. 23a in relation to "so much of the use as he disposeth not of", and applied the doctrine of resulting uses to resulting trusts. See also, below, text following n. 84.

[76] Ibid., pp. 220–221.

The Distinction Between Uses and Trusts

A. Two names for the same thing?

Professor Mee suggests that "use" and "trust" may be regarded as two names for the same thing:

> For convenience, the term "trust" was used where a separate equitable interest continued to exist after the operation of the Statute of Uses, while the term "use" was reserved to describe interests which were executed by the Statute. However, the terminology did not have any substantive significance, so that, for example, a conveyance "to X on trust for Y" would have been executed by the Statute, in just the same way as a conveyance "to X to the use of Y".[77]

Executed uses after 1536 were indeed normally referred to as "uses", perhaps because there was no enduring relationship of trust or confidence. Conversely, unexecuted uses after 1536 were frequently, but not invariably, called trusts.[78] It is also true that it would make no difference to the operation of the Statute of Uses whether the conveyance spoke of a "use" or a "trust". This is not surprising. The statute spoke of "use, trust or confidence",[79] and in the 1540s it was said that "[a] feoffment to A and his heirs in trust that B and his heirs shall take the profits is an use in B and executed by the statute notwithstanding the word *trust*",[80] a point repeated verbatim by Lord Nottingham in the 1670s.[81] In this sense, "'use' and 'trust' are not sacramental terms".[82] But this alone cannot show that uses and trusts were the same: it need not follow from lack of substantive significance in the terminology that in all respects there was no distinction between them.

Professor Mee further observes that "the rules applied by equity in relation to trusts developed in various ways after the revival of trusts subsequent to the Statute of Uses", suggesting that this reflected a process, as Henley L.K. put it in *Burgess v Wheate* (1759), by which equity had shaped trusts "much more into real estates, than before

[77] Mee, "'Automatic' Resulting Trusts", p. 217.

[78] Before 1536 uses were also called trusts, for example in 1522 Fitzherbert J.C.P. observed that "use nest forsque trust et confydens" ("a use is nothing other than a trust and confidence"), Baker (ed.), *Year Books of Henry VIII 12–14 Henry VIII 1520–1523*, p. 114.

[79] "The statute might just as well have been called the Statute of Trusts, or the Statute of Confidences save that in the accustomed phrase the term use came first", P. Bordwell, "The Conversion of the Use into a Legal Interest", 21 Iowa Law Review 1, at p. 13 (1935).

[80] Sir Robert Brooke, *La Graunde Abridgement* (London 1573), Feffements al Uses, pl. 52 (1544–45) (emphasis in the original).

[81] Yale, ed., *Nottingham's 'Manual' and 'Prolegomena'*, p. 238.

[82] F.W. Maitland, *Equity*, 2nd ed., by John Brunyate (Cambridge 1936), 38. The point was made in argument in *Eure v Howard* (1712): a limitation expressed to have been "in trust for" was executed by the Statute of Uses "as absolutely as if it had been said to the use of … for the statute makes no difference between an use and a trust, but mentions them both promiscuously", Prec. Ch. 338, at 345.

when they were uses",[83] and arguing that since the doctrine of the old use turned upon treating the use as imitating the land, further development of this approach would not lead to any change of doctrine.[84]

It is indeed clear that there was a tendency for the rules developed in respect of uses to be applied to trusts, if only as an initial guide:[85] "It was inevitable … that the rules of the use should be applied to the new trust. The learning of the law of uses had been kept alive in Chancery and an attempt at adaptation was altogether natural and understandable …"[86] We have seen Egerton L.K.'s conclusion that "if a feoffment be made to an unlawful use, it is plain that the land reverts back again. So it is in [the] case of [a] trust." In *Lord Grey v Lady Grey* (1676/7), considering the difference between a voluntary feoffment to a stranger and the same conveyance to a son, Lord Nottingham asked "How can this Court justify itself to the world, if it should be so arbitrary as to make the law of trusts differ from the law of uses in the same case?"[87] And in *Burgess v Wheate*, in the context of discussion of whether a trust estate was liable to escheat, Henley L.K. observed that:

> the lord chief justice [Lord Mansfield] does not state any difference in the metaphysical essence between an use and a trust, but that there was a difference in the law by which the one and the other was directed; and I think there is no difference in the principles, but there is a wide difference in the exercise of them. It was as much a principle of this Court, that the use should be considered as the land, or as imitating the land, formerly as now; though the rules were not carried formerly so far, nor the reasoning nor directions (when they were less understood) as at present … It was said, the difference consists in this: that equity has shaped them much more into real estates, than before when they were uses. … But why? Not from any new essence they have obtained, but from carrying the principle further, … and I think they should have equally extended in this Court the rules and principles of uses, as well as trusts …
>
> That an use and trust are the same, seems adopted by all the great persons who have presided in this Court.[88]

[83] 1 Black. W, at 180.

[84] For further consideration of the application of the rules of uses to trusts after 1536 see Jones, "The Trust Beneficiary's Interest before *R. v. Holland* (1648)".

[85] D.E.C. Yale (ed.), *Lord Nottingham's Chancery Cases*, vol. 2 (Selden Soc. 79) (London 1961), 110.

[86] Ibid., 88. Though, as Professor Mee suggests, the rules of uses and the rules applied to trusts were not identical, see, for example, ibid., pp. 113–114, discussing *Elliot v Elliot* (1677) 2 Ch. Cas. 231, Yale (ed.), *Nottingham's Chancery Cases*, p. 517 no. 690, p. 566, no. 751.

[87] Yale (ed.), *Nottingham's Chancery Cases*, vol. 2, p. 481 no. 643, at p. 484, considered ibid., pp. 110–113, with the observation that while in holding that a voluntary disposition of land raised a presumption of trust resulting to the grantor Nottingham "clearly grounded himself upon the analogy of the use and also arguments of convenience", "[i]t is equally certain that he did not regard the old law of uses as governing resulting trusts generally; it was merely an initial guide". For further discussion of *Grey's Case* see J. Glister, "*Grey v Grey* (1677)", in Mitchell and Mitchell (eds.), *Landmark Cases in Equity*, ch. 3.

[88] Henley L.K. went on to refer to Nottingham's dictum in *Lord Gray v Lady Gray*, quoted immediately above.

But that the rules of trusts were the same as, or developed from, the rules of uses, need not demonstrate "[t]hat an use and trust are the same": "It is true that in the eighteenth century some very eminent judges could say that trusts were only uses reappeared under a new name, but they were concerned with problems of applying principles of the old use to the new trust. This assimilation tended to hide the fundamental difference which in truth divided uses from trusts."[89]

B. Structural Differences between Uses and Trusts

In one sense it was commonplace that a use was a trust: in creating the use, trust (or confidence) was placed in the feoffees. So it was said in the Common Pleas in *Beckwith's Case* (1589) that "an use … is but a trust and confidence";[90] and in *Pitfield v Pearce* (1639) it was agreed in the King's Bench that "a use is but a trust betwixt the parties".[91]

But while uses might turn upon trust in the feoffees, the underlying structure of unexecuted trusts of the fee simple differed from that of uses to which the statute applied. That uses and trusts were not the same is reflected in Egerton L.K.'s treatment of a conveyance of a lease for years to A to the use of B: "my lord [keeper] … will decree it for B … for my lord says that an use at the common law was but a trust and was always to be excused or relieved by subpoena. So, he says, in this cause where a use will not properly rise, yet for the trust's sake I will relieve it."[92] As Nottingham put it,[93]

> That which now is a trust is conceived by some to be only an use at second hand … Yet doubtless that which is now a trust is and always was a thing quite different from an use. Otherwise there could be no such thing as a trust now. For the statute [of uses] doth in express words declare that where any person is seised to the use, trust or confidence of another, possession shall go according etc.
>
> And therefore if a trust at this day[94] did not differ from such trusts or confidences as are mentioned in the statute [of uses], it would follow that all trusts now would be executed as uses, and so there could be no such thing left as a bare trust.

The distinction, Nottingham suggested, turned upon the scope of the statute 1 Richard III, c. 1 (1484) which had created uncertainty, removal of which was the purpose of the Statute of Uses. The Statute of Uses thus applied only to "such trusts and confidences by virtue of

[89] D.E.C. Yale, "The Revival of Equitable Estates in the Seventeenth Century: An Explanation by Lord Nottingham" [1957] C.L.J. 72, at 83.
[90] 2 Co. Rep. 56b, at 58b.
[91] March N.R. 50. The same point had been made before 1536, see, for example, per Fitzherbert J.C.P. in 1522, note 78 above.
[92] Bryson (ed.), *Cases Concerning Equity and the Courts of Equity*, vol. 1, p. 303 no. 119–200 (*c.* 1598–*c.* 1602).
[93] Yale (ed.), *Nottingham's 'Manual' and 'Prolegomena'*, pp. 236–237 (*Prolegomena*, ch. 12, ss. 1–3).
[94] Nottingham was writing in 1674 (Yale (ed.), *Nottingham's 'Manual' and 'Prolegomena'*, p. 76).

which the cestui que trust had power to dispose of the land by 1 Rich. 3".[95]

The statute 1 Richard III, c. 1 rendered a conveyance by cestui que use good against those having or claiming any title or interest in the land "only to the use" of cestui que use. This phrase was difficult,[96] but Nottingham fitted it into his theory: the cases outside the Statute of Uses were "the cases of them who claim to their own use, but in trust for another".

1. Active trusts

In Nottingham's view there was an essential difference between a use of freehold land which was executed by the Statute of Uses, and a use (or trust) which was not. Where feoffees to uses were passively to permit cestui que use to take the profits, the feoffees were seised "only to the use" of cestui que use, and the use would be executed. Where feoffees were to take the profits and deliver them to cestui que use, the feoffees were seised to their own use, but upon trust for cestui que use: without the use – the "authority to take … the profits of the land", as St German put it – the trust could not be performed. In case of active duties, cestui que use had not a use, but a beneficial interest under a trust.[97] The Statute of Uses was understood to operate by rejoining use and possession which had become separated: as it was put in *The Earl of Clanrickard's Case* (1615), "the owner of the land hath power, to give the use, … and the statute couples the lands unto it".[98] This being so, Nottingham argued, the Statute of Uses was inapplicable where feoffees were seised to their own use, but upon trust for another: absent a division between use and possession, the statute had no application.[99] An unexecuted active trust of freehold land was structurally distinct from an executed passive use of such land.

Nottingham's analysis may have "something of the air of an *ex post facto* rationalisation",[100] but his approach was not new when he

[95] Nottingham was not writing legal history. Removal of uncertainty stemming from the statute 1 Ric. III, c. 1 may have been an element behind the Statute of Uses, but other factors were at play, notably the financial interests of the Crown. The exclusion from the Statute of Uses of uses of leases paralleled, Nottingham argued, the exclusion of such uses from the statute 1 Ric. III, c. 1, though that leases were outside the statute of Richard was not always fully clear, see Jones, "Trusts in England after the Statute of Uses", pp. 178–179.

[96] See, e.g., discussion in *Dalamere v Barnard* (1567/68), 1 Plowd. 346, at 349 ff.

[97] "a mere right to an accounting": D[urfee], "The Statute of Uses and Active Trusts", at p. 90.

[98] *Richard, earl of Clanrickard v Robert Sidney, Viscount Lisle* (1615) Hobart 273, at 280, per Sir Henry Hobart C.J.C.P. In the decades after 1536 Chancery pleadings referred to the Statute of Uses as "the statute made … for the uniting of possession to uses", or "for the transferring of possessions to [or 'into'] uses", see Jones, "Trusts in England after the Statute of Uses", p. 191.

[99] Though it was held to be possible for a man to covenant to stand seised of the fee simple to the use of himself and his heirs, and for this use to be executed: *Englefield's Case* (1591) 7 Co. Rep. 11b at p. 13b.

[100] Yale, "Revival of Equitable Estates in the Seventeenth Century", p. 86; Milsom, *Historical Foundations*, p. 236.

set it out in the 1670s. Nottingham himself referred to an example of 1544–45 in Brooke's *Abridgment*, where it was said that if a "man makes [a] feoffment in fee to his use for term of life, and after his death J.N. shall take the profits, this makes a use in J.N." But if it were said that after the settlor's death the feoffees shall (actively) take the profits and pay them to J.N. "this does not make a use in J.N. for he does not have them [*scil*. the profits] except by the hands of the feoffees".[101]

The point appeared again in *Meynell v Sacheverell* (1607), concerning freehold land conveyed in trust to provide a schoolmaster. On reference from Chancery to Walmsley and Yelverton J.J.K.B., the land was directed to be conveyed to trustees, to the use of the trustees, "and that the … parties to whose use the … [conveyance shall be made] and such persons as shall hereafter have the use and estate of the … lands and premises … to the uses and intents aforesaid shall and may take and employ the rents and profits of the lands" for the purposes of the trust:[102] trustees to pay over profits were to have both estate and use.

Similarly, in *Humphreston's Case* (1575)[103] it was concluded that were land conveyed by common recovery upon active trust to make a reconveyance, the recoveror must be seised to his own use before reconveyance: Gawdy J.Q.B. "held strongly" that if the re-conveyance was to be made "the use and the possession should be adjudged in the recoverers".[104] As Wray C.J.Q.B. put it, the recoverors "shall be seised to their own use, until they make the estate for that was the use implied".[105] The point had been noted some fifteen years earlier: "If a man makes a feoffment upon condition to re-enfeoff the feoffor, the feoffee is seised to his own use and shall take the profits."[106]

And if Nottingham's approach was not new in his time, it remained current after his time. The point was made by Lord Hardwicke L.C. in *Willet v Sandford* (1748):

> It is necessary to take notice of the different interests in land at this day. There are three kinds: First, the estate in the land itself; the ancient common law fee. Secondly, the use: which was originally a creature of equity, but since the statute of uses, it draws the estate in land to it; so that they are joined and make one legal estate. Thirdly, the trust: which the common law takes notice of, but which carries the beneficial interest and profits in this

[101] Sir Robert Brooke, *La Graunde Abridgement* (London 1573), "Feffements al uses", pl. 52.
[102] The National Archives: Public Record Office C 78/113/9.
[103] 2 Leo. 216. See Milsom, *Historical Foundations*, p. 238.
[104] 2 Leo. 216, at 217.
[105] Ibid., at p. 218. In other words, upon a conveyance of the fee to A, with a use expressed in favour of B for life, A would be seised to the use of B for life with remainder to the use of the grantor in fee. Wray further supposed that if the reconveyance was not made "within convenient time", the use "should be revested again in him who suffered the recovery".
[106] *Anon*. 1559–60, Cambridge University Library MS. Ff.5.4, fo. 43v (dated "2 Eliz"). See also the same point in *Bettuan's Case* (1575–76) 4 Leo. 22.

> court; and is still a creature of equity, as the use was before the statute.[107]

Applying this analysis to the facts of the case – concerning a devise upon trusts, including a charitable trust, and a subsequent codicil making alterations to the trusts – Hardwicke concluded that "By the will, the estate in the land, and the use, are devised to the … trustees and their heirs; for a devise of land … carries the estate in the lands, and the use too, without saying to the use of the devisee; but the trust and beneficial interest is in the charity."[108] As Nottingham put it, the trustees claimed to their own use, but in trust for another.

The same analysis was adopted in 1791 by Francis Sanders. Referring to the definition of a trust as "a trust or confidence, which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land",[109] Sanders observed that this

> would naturally lead a person to imagine that there existed no difference between these two words [*scil.* "use" and "trust"]; and indeed it must be admitted that use, in its common acceptation, generally annexes the idea of a trust, especially when we speak of them, as existing before the statute of uses. However, … we shall find, that even previous to the passing of the statute of uses … there was a settled distinction between uses and trusts.[110]

The true distinction before 1536, Sanders argued, was that

> a use was properly so called, when a man made a feoffment in fee to a friend, by which the possession or seisin being transferred to the feoffee, the feoffor placed a confidence in him to permit such person or persons as he should or had named, to receive the profits; and also to make such legal estates as such person or persons should direct. This confidence was the use … This use, on account of its dividing the land into two estates, viz., an estate in the land, and an estate in the use or profits, was reduced into a regular system. But a trust did not, in its original meaning, make this regular division of property into use and possession, but it rather signified, that a man had made a conveyance of his lands to another, by which conveyance he not only gave the possession, but also the use, or right to take the profits, to the grantee:[111] but there

[107] 1 Ves. Sen. 186, at 186.
[108] Ibid., at p. 187.
[109] *Chudleigh's Case* (1589–95), 1 Co. Rep. 120a, at 121a–121b; Co. Litt. 272b.
[110] F.W. Sanders, *An Essay on the Nature and Laws of Uses and Trusts. Including a Treatise on Conveyances at Common Law; and those Deriving their Effect from the Statute of uses* (London 1791), 8–9.
[111] As it was put in argument in *Perrot's Case* (1594), "there are three types of limitation of uses, the one where a man reserves the possession and parts with the use, as where he covenants to stand seised upon good consideration, or bargains and sells the land. The second where he parts with the possession and keeps the use, as where he enfeoffs others without consideration, or to the use of himself and his heirs. The third where he gives the possession and also the use to one or divers other people", Moo. K.B. 368, at 380 (translated).

> was a kind of personal trust reposed in the grantee, that he would retain both the possession and use in order to answer some special intent or purpose.[112]

The same analysis applied after the Statute of Uses:

> If a man … conveys land to one (without declaring any use, and there being no consideration), in trust or to the intent that he should convey to a stranger; in order to make this conveyance, and to perform the trust, the grantee must have in him both the use and possession, though the former is not expressly declared to him. … So likewise, if a man is enfeoffed to the intent or in trust to be re-enfeoffed, or to the intent to be vouched, or to the intent to suffer a recovery, none of these intents, or trusts, are uses. For, indeed in all these cases … the land and the use must be construed to remain in the grantee, in order that the trust or intent may be executed.[113]

The same view was taken by Thomas Lewin, echoing Bacon's distinction between special and general trusts:[114] "It is clear that the statute [of uses] embraced *uses of lands* only, and did not extend to … *special trusts* … because the trustee combined in himself both the legal estate and the use, though compellable in Chancery to direct them to a particular purpose."[115]

Nottingham's approach to the distinction between uses and active trusts takes its place in a line of analysis stretching back to the 1540s and forwards into the nineteenth century. It is difficult to see how it could have been otherwise. If the Statute of Uses was not to bite, a trust of a fee simple required active duties in the trustees, or to be in the form of a use upon a use. The former, by implication, had the same structure as the latter: in both cases the elements of use and possession were held together ("conjoined" in Bacon's word),[116] but upon trust for the beneficiary. To the extent that active duties caused trustees to be seised to their own use no use could be retained by the settlor; in the absence of active duties, any use of freehold retained by the settlor would be executed by the Statute of Uses;[117] in neither case could a retained use take effect as a resulting trust.

[112] Sanders, *Essay on Uses and Trusts* (1791), pp. 14–15.
[113] Ibid., pp. 16–18. Revisions were made in subsequent editions, but the distinction between uses and trusts continued to appear, see, e.g. F.W. Sanders, *An Essay on Uses and Trusts and on the Nature and Operation of Conveyances at Common Law, and of those which Derive their Effect from the Statute of Uses*, 5th ed. by G.W. Sanders and J. Warner (London 1844), 2–3.
[114] Rowe (ed.), *Reading of Francis Bacon*, p. 8.
[115] Lewin, *Treatise of the Law of Trusts*, 5th ed., pp. 5–6 (emphasis in the original).
[116] Rowe (ed.), *Reading of Francis Bacon*, p. 45.
[117] Except where the trust was created in the form of a use upon a use, as to which see discussion immediately below.

2. Passive trusts

Feoffees with active duties were seised to their own use by necessary implication.[118] The same situation could be created expressly. So, taking Nottingham's example, if a feoffment was made to A and B to the use of them C and D and their heirs, in trust that the feoffor should receive the profits,[119] this

> trust built on an use would not have been executed by the statute … for such a trustee could not have disposed of the land within 1 Rich. 3, because 1 Rich. 3 makes good the conveyance of cestui que use against all persons claiming only to his use, which reaches not the cases of them who claim to their own use, but in trust for another.[120]

More difficult was a feoffment "to A and his heirs to the use of A and his heirs in trust that B and his heirs shall take the profits". This, Nottingham argued, "is still an use executed; for the first use is idle to A being no more than the law speaks":[121] a use conjoined with the possession in A and his heirs could not be created merely by expressing a use in favour of A. This view was in due course rejected, the point finally being settled in *Doe d. Lloyd v Passingham* (1827).[122]

The key was whether in such a limitation A and his heirs were in by the common law, or by the Statute of Uses. Opinions varied. In *Tipping v Cosins* (1695), for example, Serjeant Wright took Nottingham's approach: "the use limited to the feoffees is void, and they are in by the common law, as where a man makes a feoffment to certain trustees and their heirs, to the use of them and their heirs in trust for J.S. this trust is executed by the statute".[123] Holt C.J.K.B. disagreed, holding that the feoffees were in by the Statute of Uses,[124] but that "whether the feoffees take by the common law or by the statute, yet where the use is once disposed of to them and their heirs (whether the statute executes it or not) there cannot be an use upon an use, nor a trust upon such an use to be executed by the statute".[125]

[118] The boundary between active and passive might be elusive: "There are many difficult cases of interpretation where active and passive duties are run together, e.g., a trust to pay rent to A or to permit him to take the rents": Yale, "Revival of Equitable Estates", p. 83 n. 36. See further Maitland, *Equity*, pp. 38–41.

[119] This seems to mean a limitation to A and B, to the use of A, B, C and D and their heirs, in trust for the settlor: Yale (ed.), "Revival of Equitable Estates", p. 80 n. 30.

[120] Yale, ed., *Nottingham's 'Manual' and 'Prolegomena'*, p. 237.

[121] Ibid., p. 238.

[122] 6 B. & C. 305 (an earlier stage is reported at 2 Car. & P. 440).

[123] Comberbach 312, at 313.

[124] Because the limitation of the use was different from the estate of the land, "as where a man makes a feoffment to certain trustees and their heirs, to the use of them and their heirs in trust for J.S. this trust is executed by the statute", ibid., at p. 313.

[125] Ibid.

The same point was made in *Doe d. Lloyd v Passingham*: Bayley J.K.B. observing that

> a distinction has been taken where the limitation is to A., to the use of A. in trust for B., and it is said that then A. is in by the common law. That is true; but he is in of the estate clothed with the use, which is not extinguished but remains in him. In the case of *Meredith v Jones* … it is said "For it is not an use divided from the estate, as where it is limited to a stranger, but the use and the estate go together." That case therefore shews, that although the trustees in this case might be in by the common law, yet they were in both of the estate and the use.[126]

Sanders put it as follows:

> if a use be limited to a feoffee … such use, generally speaking is not executed by the statute, but the feoffee … is in by the common law. In this case, notwithstanding the grantee is in by the *common law*, yet after declaration of the use to him, he has not only a seisin, but a *use*; although not the use which the statute requires; and therefore that seisin, which before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited upon it … The ground of this construction is, that before the statute, real property was divided into use and possession; but there was no third kind of interest then known. Consequently, when the seisin was transferred to A. B. and his heirs, and it was added, to *the use* of him, and *his heirs*, he had both the legal and the beneficial interest; and there is nothing in the statute to alter the nature of his estate.[127]

Feoffees might therefore be seised to their own use, but upon trust for another, not only by implication from active duties, but by express limitation of a use – including a limitation "to A and his heirs to the use of A and his heirs" – so preventing execution even in passive

[126] 6 B. & C. 305, at 314–315, referring to *Meredith v Joans* (1631) Cro. Car. 244. See also *sub nom. Jenkins v Young*, Cro. Car. 230, and Jones W., 254. In similar vein, Holroyd J.K.B. observed that though the trustees took seisin by the common law, "yet they take that seisin to the use of themselves … They are, therefore, seised in trust for another, and the legal estate remains in them", 6 B. & C. 305, at 316, and Littledale J. said that while it was true that the trustees took the estate by the common law, they took it "coupled with the use", ibid., at 317. Professor Mee suggests that the difference between a use and a passive trust in the form of a use upon a use "appears a rather subtle one" in the case of "bare" trusts (Mee, "Resulting Trusts and Voluntary Conveyances of Land", p. 291 n. 29). This is no doubt in some senses true: the beneficiary of a bare trust is in practical terms in a position closely analogous to that of the beneficiary of a pre-Statute of Uses passive use. But after 1536 if a bare trust of freehold land was to exist unexecuted, it must have been in the form of a use upon a use, with the result that it would be impossible to conceive of the settlor-beneficiary of a bare resulting trust as having retained his old use. The question, as indicated below, then becomes whether he may be conceived as having retained something else.

[127] Sanders, *Essay on Uses and Trusts*, 5th ed., pp. 89–91. The reference to not having the "use which the statute requires" is presumably to absence of seisin to the use of another, which the Statute of Uses required. As Bacon put it "every man was seised to his own use, as well as to the use of others: therefore because the statute [of uses] would not stir nor turmoil possessions settled at the common law, it puts in precisely this word 'other', meaning the divided use and not the conjoined use", Rowe, ed., *Reading of Francis Bacon*, p. 45.

cases.[128] And since in such cases the feoffees were seised to their own use, no use could be retained by the settlor to take effect as a resulting trust.

A Doctrine of the "Old Trust"?

Unexecuted trusts of estates in fee simple took the form, expressly or impliedly, of a use upon a use, the trustees, being seised to their own use, but upon trust for another. To the extent that this was so, no use could be retained by the settlor, while any use which was retained would be executed. Rules applied to uses were applied to trusts after 1536, but uses and trusts not being the same thing, "automatic" resulting trusts could not be explained after the Statute of Uses on the basis of the settlor's retention of the old use.[129]

An explanation for "automatic" resulting trusts parallel to the retention of the use might have nevertheless have developed had it become possible to think of the settlor not only as having been seised to his own use, but also as having had an "old trust", or beneficial interest, alongside the old use. There are suggestions of such thinking. In *Lord Paget's Case* (1589) Thomas Egerton argued that "when a use is raised by feoffment, there all is out of the feoffor, the land is gone, the use is gone, the trust is gone, nothing remaineth but a bare authority to raise uses out of the possession of the feoffees".[130] As has been seen, in *Burgess v Wheate* Henley L.K. observed that in "the case of a resulting use, the true reason is, that 'tis never out of the grantor. In the case of trust 'tis the same – 'tis the old trust."[131] And in *Roper v Radcliffe* (1712) Parker C.J.K.B., having considered the doctrine of the old use, said that

> A man in consideration of equity has an estate in land as a trust; this is as a use in consideration of law, and follows the person of *cestui que trust*, being a beneficial, interest and profit. And so much of the trust as in a conveyance is undisposed of the executor … has in him as his antient trust. This is called a *resulting trust*.[132]

A similar conception – in terms of a pre-existing "beneficial interest" – is seen in nineteenth-century cases. So in *Northen v Carnegie*

[128] Limitations in the form of a use upon a use became common, if not standard, practice, occurring not only in passive arrangements, but also in active trusts of freehold. The form's commonness appears in Lord Hardwicke's assertion in *Hopkins v Hopkins* (1738) 1 Atk. 581, at 591, that in consequence of trusts in the form of a use upon a use (Hardwicke's example being a "limitation to *A.* and his heirs, to the use of *B.* and his heirs, upon trust for *D.*"), the Statute of Uses had had "no other effect than to add at most, three words to a conveyance". For a suggestion that the use upon a use form "early became generalised", see Jones, "Use upon a Use in Equity Revisited", pp. 77 ff.

[129] I am grateful to one of the anonymous referees, and to Dr Peter Turner, for a number of case references in this section.

[130] 1 Leo. 194 at 197, in Exchequer Chamber.

[131] 1 Black. W, 123, at 185.

[132] 9 Mod. 181, at 186 (emphasis in the original).

(1859)[133] Kindersley V.-C. observed that "so far as [the settlor] had not parted with the beneficial interest, it remained in him as a resulting trust. It was not a new estate, but merely so much *remaining* in him as he had not parted with", and in *Standing v Bowring* (1885) Lord Halsbury L.C. concluded that "both the beneficial and legal interest in these consols passed to the Defendant".[134]

But a concept of an "old trust", or of a pre-existing "beneficial interest" analogous to the old use and distinct from the "legal interest", has not secured a place in the modern law, and it is said, referring to *Goodright v Wells* (1781)[135] and subsequent cases, that "a man cannot be a trustee for himself".[136] As Professor Chambers put it,

> the interest which the settlor has … as the beneficiary of a resulting trust, is an equitable interest which is different from the legal ownership he or she had at the beginning. Except as restricted by equity or statute, the legal owner has the full beneficial enjoyment of property at common law and does not have an equitable interest in his or her own property.[137]

Herein lies the difficulty facing a "retention" explanation of "automatic" resulting trusts: lacking a counterpart to the old use, the modern law does not admit of an explanation of such trusts which turns upon retention of the beneficial interest.

Conclusion

It was possible before the Statute of Uses to conceive of the owner of freehold land as seised to his own use. From this it followed that an "automatic" resulting use might be conceptualised in terms of retention of the use of which the settlor had not disposed. After 1536 such an approach was applied to uses executed by the statute, manifesting itself in the application to executed uses of the doctrine of the old use. The same doctrine was applied to trusts after 1536, and the doctrine of resulting trusts itself may well be a product of this process: as Thomas Egerton put it, "if a feoffment be made to an unlawful use, it is plain the land reverts back again. So is it in [the] case of [a] trust."[138]

[133] 4 Drew. 587, at 593 (emphasis in the original).
[134] (1885) 31 Ch. D. 282, at 286. See also *Holroyd v Marshall* (1862) 10 HLC 191 at 209, and *Rose v Watson* (1864) 10 HLC 672, at 678, where Lord Westbury L.C. spoke of specifically enforceable contracts as passing "the beneficial interest", or as passing ownership "in equity".
[135] 2 Doug. K.B. 771. For subsequent cases see K. Gray and S.F. Gray, *Elements of Land Law*, 5th ed. (Oxford 2008), para. 8.1.61.
[136] *Goodright v Wells* (1781) 2 Doug. 771, at 778, per Lord Mansfield C.J.K.B.
[137] Chambers, *Resulting Trusts*, p. 52. And see ibid., p. 54: "The settlor's interest as beneficiary of the resulting trust is a new interest which did not exist before the transfer of property to the trustees."
[138] Bryson (ed.), *Cases Concerning Equity and the Courts of Equity*, vol. 1, p. 293 no. 146. Mr. Yale observed that "the general proposition of resulting trusts bears upon it the mark of the law of uses", Yale (ed.), *Nottingham's Chancery Cases*, vol. 2, p. 112.

But while rules of uses developed before the Statute of Uses were applied to trusts after 1536 – producing practical effects analogous to those produced by the same rules in the context of executed uses, and giving rise to statements which might suggest that trusts were "only uses reappeared under a new name"[139] – the underlying structures of uses and trusts were not the same; the assimilation of the rules of uses to the rules of trusts "tended to hide the fundamental difference which in truth divided uses from trusts".[140] The trust "took the likeness of the use", while being "perfectly distinct" from it.[141] A trustee of freehold, whether upon active duties or upon a trust expressed in the form of a use upon a use, was seised to his own use upon trust for another. The use having passed to the trustee, no retention of it was possible, while a use which did not pass to the trustee, but was retained by the settlor, would be executed by the Statute of Uses. The enduring attraction of "proprietary arithmetic"[142] reflects the influence of the retention conception of resulting uses, but in the case of trusts in the modern law – lacking a secure counterpart to the old use – that conception could not be precisely replicated, leaving the "automatic" resulting trust as a rule in search of a rationale.[143]

[139] Yale, "Revival of Equitable Estates", p. 83.
[140] Ibid.
[141] Lewin, *Treatise of the Law of Trusts*, 5th ed., pp. 8–9.
[142] See, e.g., Lord Upjohn's observation in *Vandervell v IRC* [1967] 2 A.C. 291 at 313, that "if the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him". For the suggestion that "overtones of the Statute of Uses" may be seen in Upjohn J.'s judgment in *Grey v Inland Revenue Commissioners* [1958] 3 Ch. 375 at 382, see P.G. Turner, "The High Court of Australia on Contracts to Assign Equitable Rights" [2006] Conveyancer 390, at 392.
[143] Attempts to provide a rationale have, of course, been made, by Professor Mee and Professor Chambers among others. Discussion of these attempts is beyond the scope of this article. See also Professor Penner's suggestion that the difficulty is caused by a "very *theoretical* objection to the concept of 'beneficial title'" (original emphasis), and might be overcome by recognising "a continuing beneficial interest in property even though the legal structure under which it is held changes" (James Penner, "Resulting Trusts and Unjust Enrichment: Three Controversies", in Mitchell (ed.), *Constructive and Resulting Trusts*, p. 237, at p. 262), which seems to be a suggestion that a right analogous to an "old trust" might be recognised in the modern law. Since the repeal of the Statute of Uses in 1925, uses in the sense discussed in this article have largely fallen from view outside the context of legal history. But they have not been abolished, and arguably still exist. The doctrine of the "old use" might thus have scope to operate in the modern law in the form of a trust, though only to the extent that modern trusts are not active (cf. the view that "all modern trusts are active", Milsom, *Historical Foundations*, p. 236).