Resulting Trusts and Voluntary Conveyances of Land[*]

Introduction

Can a resulting trust arise upon a voluntary conveyance of land? This question is "inextricably bound up in centuries of English legal history"[1] involving partially forgotten learning about uses and the Statute of Uses 1536. The matter "is still curiously unsettled",[2] despite s.60(3) of the Law of Property Act 1925 which states that "In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee." The modern case law on this subsection is inconclusive but suggests that, while a presumption of resulting trust arose upon a voluntary conveyance of land prior to 1926, this presumption has been eliminated by s.60(3).[3] However, the case law appears to indicate that a resulting trust can nonetheless arise if it can be established on the evidence that this was intended by the grantor.[4] On this basis, it has been suggested that the impact of s.60(3) is to reverse the burden of proof.[5] Doubts remain, however, "as to why the legislature would abolish the presumption in such obscure language and then only in cases of voluntary conveyances of titles to land".[6] It has been suggested that the

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[1] *Lohia v Lohia* [2001] EWCA Civ 1691, at [24] *per* Mummery L.J.

[2] P. Pettitt *Equity and the Law of Trusts* 11th edn (2009) p.178. See also Law Commission *The Illegality Defence: A Consultative Report* (CP No 189, 2009) p.105 ("unresolved").

[3] See *Lohia v Lohia* (2000) 3 I.T.E.L.R. 117 (Judge Strauss Q.C.); [2001] EWCA Civ 1691 (C.A.); *Ali v Khan* [2002] EWCA Civ 974.

[4] See *Lohia v Lohia* [2001] EWCA Civ 1691, at [25] *per* Mummery L.J.; *Ali v Khan* [2002] EWCA Civ 974, at [24] *per* Morritt V.C. See also *Hodgson v Marks* [1971] Ch. 892.

[5] A.J. Oakley *Parker and Mellows: The Modern Law of Trusts* 9th edn (2008) p.300.

[6] W. Swadling "Property: General Principles" in A. Burrows (ed.) *English Private Law* 2nd edn (2007) p.293.

enactment of s.60(3) may have been related to the repeal of the Statute of Uses and so not have been intended to make any substantive change to the rules on resulting trusts.[7]

This article examines the complex questions surrounding the proper interpretation of s.60(3). It will be suggested that the modern debate has been hampered by a number of misconceptions about the position prior to the enactment of the subsection, in particular by a failure to understand fully the complex relationship between resulting uses and resulting trusts. However, even when these misconceptions are addressed, the unfortunate drafting of s.60(3) makes it difficult to be categorical about its effect. Nonetheless, this article will suggest that the best view is that the effect of the subsection is that no resulting trust can now arise upon a voluntary conveyance of land, although in suitable circumstances an oral trust can be enforced in favour of the grantor on the basis of the principle that a statute cannot be used as an instrument of fraud. In practical terms, this position, although reached on the basis of a different analysis, represents only a slight refinement upon that suggested by the modern case law. The article begins in Part 1, with a consideration of that case law. It proceeds in Part 2 to a consideration of the legal position prior to the enactment of s.60(3), before moving on in Part 3 to an analysis of the various possible interpretations of the subsection. Although this article does not engage directly with the ongoing controversy as to the underlying nature of resulting trusts in general,[8] it is hoped that its arguments may help to inform this wider discussion.

[7] See e.g. Swadling *ibid*; B. McFarlane *The Structure of Property Law* (2008) pp.758-759; J. McGhee *et al* *Snell's Equity* 32nd edn (2010) p.761.
[8] See e.g. W. Swadling "Explaining Resulting Trusts" (2008) 124 L.Q.R. 72; R. Chambers "Is There a Presumption of Resulting Trust?" in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010).

I. The Modern Case Law

There has been relatively limited consideration of s.60(3) in the case law. In *Hodgson v Marks*,[9] Russell L.J. left open "the debatable question whether on a voluntary transfer of land by A to stranger B there is a presumption of a resulting trust".[10] The facts of *Hodgson* are well-known and involved a scheming lodger who persuaded an elderly house-owner to convey a house to him, on the basis of an oral understanding that he would hold it on trust for her. At first instance, Ungoed-Thomas J. held[11] that an enforceable trust had arisen on the basis of the principle in *Rochefoucauld v Boustead,*[12] which prevents fraudulent reliance on the statutory requirement of signed evidence in writing in respect of the enforcement of a trust over land.[13] On appeal, the Court of Appeal agreed that a trust had arisen in favour of the grantor. The court clearly accepted the *Rochefoucauld v Boustead* argument.[14] However, Russell L.J. also seemed to favour the view that, even if s.60(3) had eliminated the presumption of resulting trust upon a voluntary conveyance of land, the doctrine of resulting trust still applied with a reversed burden of proof.[15]

Subsequently, in *Tinsley v Milligan*,[16] Lord Browne-Wilkinson suggested that "[b]efore 1925, there was … a presumption of resulting trust when land was voluntarily transferred by A to B: it is arguable, however, that the position has been altered by the

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[9] [1971] Ch. 892.
[10] *Ibid,* 933.
[11] *Ibid,* 907-909.
[12] [1897] 1 Ch. 196. See generally, T.G. Youdan "Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Boustead*" (1984) 43 C.L.J. 306.
[13] See Law of Property Act, s.53(1)(b).
[14] [1971] Ch. 892, 933G. Russell L.J. gave the only judgment, with which Buckley and Cairns L.JJ. concurred.
[15] *Ibid*, 933D.
[16] [1994] 1 A.C. 340.

1925 property legislation".[17] However, the source cited by Lord Browne-Wilkinson, in fact, directly contradicted his view, stating that a resulting use arose upon a voluntary conveyance prior to 1926 but that no resulting trust was presumed.[18]

Lord Browne-Wilkinson's assumption that a resulting trust was presumed prior to 1926 was shared by Judge Strauss Q.C. at first instance in *Lohia v Lohia*,[19] the most important of the modern cases. Judge Strauss Q.C. cited *Dyer v Dyer*[20] as authority for this proposition[21] but in fact that case relates to the purchase money resulting trust and states only that a resulting *use* was presumed upon a voluntary conveyance of land. The judge then moved on to consider whether the presumption of resulting trust had been abolished by s.60(3). Having quoted Chambers' discussion of the question,[22] the judge concluded that "on a plain reading of s 60, the presumption has been abolished".[23] He felt that the subsection "provides in effect that a voluntary conveyance means what it says; it is not necessary to use additional words to make it effective".[24] According to the judge, this did not mean that it was now impossible for a resulting trust to arise but that the effect of s.60(3) was "to make it necessary for the person seeking to establish a resulting trust to prove it".[25] On appeal in *Lohia*, the Court of Appeal unanimously accepted the view of Judge Strauss Q.C. that the property in question had been transferred with the intention that the transferee would take beneficially, so that no resulting trust could arise. Sir Christopher Slade found it unnecessary to express any view "on the knotty question

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[17] *Ibid,* 371.
[18] See P.V. Baker and P. St. J. Langan *Snell's Equity* 29th edn (1990) p.182.
[19] (2000) 3 I.T.E.L.R. 117; R. Chambers "*Lohia v Lohia*" (2001) 15 Trust Law International 26.
[20] (1788) 2 Cox 92, 93.
[21] (2000) 3 I.T.E.L.R. 117, 126.
[22] *Ibid,* 127-28, quoting R. Chambers *Resulting Trusts* (1997) pp.18-19.
[23] *Ibid,* 129.
[24] *Ibid*.
[25] *Ibid*.

whether the presumption of resulting trust on the voluntary conveyance of land survives the enactment of Section 60(3) of the Law of Property Act 1925".[26] Mummery L.J. also assumed that there had been a presumption of resulting trust prior to 1926.[27] He felt that "it would be bold for this court to pronounce upon" the question of whether that presumption had been abolished "without having heard very extensive argument".[28] Since the appeal could be resolved on other grounds, he preferred "to express no concluded view" on the point.[29]

The subsequent case of *Ali v Khan*[30] involved a transfer of a family home from a father to two of his daughters. The transfer was expressed to be in consideration of £25,000, although the house was worth three times that amount. In the view of Morritt V.C., with whom Rix L.J. and Sir Swinton Thomas agreed, the transfer had taken place pursuant to a family agreement whereby the daughters would be enabled to borrow money on the security of the property to finance their marriages. Relying on *Haigh v Kaye*[31] and *Re Duke of Marlborough*[32] (and citing *Rochefoucauld v Boustead*[33]), Morritt V.C. held that there was no objection to the admission of oral evidence as to the true purpose of the transfer. His Lordship referred to the first instance decision in *Lohia* as establishing that s 60(3) had abolished the presumption of resulting trust upon a voluntary conveyance of land.[34] Unfortunately, he did not appear to be aware of the more cautious approach of the Court of Appeal in *Lohia*. Morritt V.C. went on to state that, although the

[26] [2001] EWCA Civ 1691, at [34].
[27] *Ibid,* at [21].
[28] *Ibid,* at [24].
[29] *Ibid,* at [26]. Kennedy L.J. agreed with both judgments.
[30] [2002] EWCA Civ 974.
[31] (1872) L.R. 7 Ch. 469.
[32] [1894] 2 Ch. 133.
[33] [1897] 1 Ch. 196.
[34] [2002] EWCA Civ 974, at [24].

presumption of resulting trust had been abolished, there was no suggestion that this "precludes a party to the conveyance from relying on evidence from which a resulting trust may be inferred".[35] Morritt V.C. concluded on the evidence that the house was held on resulting trust for the father.[36]

To summarise, the discussion in the modern case law assumes that there was a presumption of resulting trust prior to 1926. It suggests, subject to doubt because the comments in *Ali v Khan* were made without reference to the views of the Court of Appeal in *Lohia*, that that presumption has been eliminated by s.60(3) but that a resulting trust may be established on the basis of the evidence as a whole.

II. The Position Before 1926

In order to determine the impact of s.60(3), it is clearly necessary to understand the position prior to its introduction. There is no doubt that, prior to 1926, a presumption of resulting use arose upon a voluntary conveyance of freehold land. The author has elsewhere addressed in detail the more difficult question of whether or not a resulting trust could also arise in these circumstances, arguing that the better view is that it could not.[37] This Part reviews the relevant arguments, both as a matter of principle and of authority, in respect of this question. It also points out that, prior to 1926, the principle that a statute cannot be used as an instrument of fraud could clearly lead to the enforcement of a trust in favour of the grantor in the context of a voluntary conveyance, although this type of trust would not normally be described as a resulting trust.

[35] *Ibid*. See also *Crown Prosecution Service v Malik* [2003] EWHC 660 (Admin), at [27] *per* Richards J.
[36] [2002] EWCA Civ 974, at [35].
[37] J. Mee "Resulting Trusts and Voluntary Conveyances of Land: 1673-1925" (2011) 32 Journal of Legal History 215.

A. Uses and the Presumption of Resulting Use

Uses were the medieval precursors of trusts, providing a means of creating a power to leave land by will to beneficiaries of the grantor's choice, as well as allowing the evasion of feudal dues.[38] The Statute of Uses 1536 had the effect of executing uses, i.e. turning them into legal interests in the hands of the beneficiary of the use. However, the advent of the Statute, and the subsequent revival by equity of the passive trust in the form of a "use upon a use",[39] did not mean that uses ceased to be recognised by the legal system. In fact, they continued to be routinely created by conveyancers for various purposes, e.g. in order to create legal executory interests.[40] Similarly, resulting uses continued to exist alongside resulting trusts. Up to 1926, a resulting use would be presumed if a voluntary conveyance of freehold land was made simply "to X in fee simple".[41] No presumption arose, however, if consideration was given for the conveyance or if it was made for "good consideration" to a close relative of the transferor.[42] After the Statute of Uses, any resulting use which arose would be executed, so that the donee would not even retain the legal title and the conveyance would be completely ineffective. The presumption would be rebutted if, as became normal, the conveyance was made "unto and to the use of" the transferee.[43]

[38] See J.L. Barton "Medieval Uses" (1965) 81 L.Q.R. 562.
[39] See generally, N.G. Jones "The Use upon a Use in Equity Revisited" (2002) 33 Cambrian Law Review 67.
[40] See E.H. Burn and J. Cartwright *Cheshire and Burn's Modern Law of Real Property* 17th edn (2006) pp.514-516.
[41] *Beckwith's Case* (1589) 2 Co. Rep. 56b, 58a; *Armstrong v Wolsey* (1755) 2 Wils. K.B. 19; C. Sweet "'A Song of Uses': Some Reflections and a Moral" (1919) 35 L.Q.R. 127, 130; C. Harpum, S. Bridge and M. Dixon *Megarry and Wade: The Law of Real Property* 7th edn (2008) p.413.
[42] See A.W.B. Simpson *A History of the Common Law of Contract* (1975, repr. 1987) pp.334-335, 364-365.
[43] *Anon*. (1535) Benl. 16; Sir John Baker, *Oxford History of the Laws of England* (2003) vol.6, 1483–1558, p.675.

B. A Putative Pre-1926 Resulting Trust Doctrine: Issues of Principle

The issue of whether a resulting trust could arise upon a voluntary conveyance prior to 1926 has been the subject of controversy since at least the 18^{th} century. However, it is possible to identify a number of arguments of principle which, while they do not prove definitively that it would have been impossible for equity to have presumed a resulting trust upon a voluntary conveyance of freehold land prior to 1926, indicate that such a putative doctrine would have involved considerable complexity and would not have served any obvious purpose.

It is important to bear in mind that, if a resulting trust were to have arisen upon a voluntary conveyance of freehold land prior to 1926, it would have to have done so in circumstances where the possibility of a resulting use had been ruled out by the inclusion of a statement that the conveyance was intended to be for the use of the grantee. If the conveyance was simply made "to X" then a resulting *use* would have arisen and been executed by the Statute of Uses, leaving the grantor with the legal title and leaving X with nothing. Equity could not have simultaneously presumed this resulting use and a resulting trust because the creation of a resulting trust would have led to a different result, whereby X, the grantee, would hold the legal title on trust for the grantor. The justification for the creation of a resulting trust upon a voluntary conveyance "unto and to the use of" the grantee would have to have been that, while the conveyance appeared on its face to be absolute, it was probably intended by the grantor to be subject to a trust which was not declared openly. This trust could have been seen as a "use upon a use" (i.e. a trust in favour of the grantor built "upon" the use in favour of the grantee expressed in the conveyance), so that it would not have been executed by the Statute.

Thus, the idea of a resulting trust arising in the context of a voluntary conveyance of freehold land is a relatively complex one, involving the assumption that equity was willing to engage in "double second-guessing" of voluntary conveyances – by presuming, first, that a grantor who made a conveyance "to X" did not really intend X to take beneficially and, secondly, that a grantor who expressly made the conveyance "unto and to the use of X" did not mean X to take beneficially either. It is, in fact, arguable that the phrase "unto and to the use of X" is equivalent to an express statement that the conveyance is to be for X's benefit, so that its inclusion should have ruled out a potential resulting trust as well as a resulting use. However, it would be possible, taking one view of the historical difference between uses and trusts, to argue that the inclusion of the phrase merely clarified that there was to be no resulting use but left open the possibility of a resulting trust.[44] Nonetheless, even on this view, it would seem that the inclusion of a phrase such as "unto and to the use of X as an absolute gift" (or even simply "to X as an absolute gift") would have ruled out either a resulting use or trust, since it clearly shows an intention that X should take beneficially. This raises the question of what the point would have been in equity's deciding to raise a presumption of resulting trust upon a voluntary conveyance of freehold land, since the result would simply be that the grantor

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[44] For Lord Nottingham's view that a trust "is and always was a thing quite different from [a] use", see D.E.C. Yale (ed.) *Lord Nottingham's "Manual of Chancery Practice" and "Prolegomena of Chancery and Equity"* (1965) p.236; D.E.C. Yale "The Revival of Equitable Estates in the Seventeenth Century: An Explanation by Lord Nottingham" (1957) 15 C.L.J. 72. See also N.G. Jones "Uses, Trusts and a Path to Privity" (1997) 56 C.L.J. 175, 176-182, discussing the distinction between the "conjoined use" and the "separated use". See further J. Mee "Resulting Trusts and Voluntary Conveyances of Land: 1673-1925" (2011) 32 Journal of Legal History 215, 219-220.

would have had to include a second set of ritual words (besides "unto and the use of") in order to ensure that the grantee would take beneficially.

It must also be noted that there is an important distinction between freehold land and leasehold land or pure personalty. The Statute of Uses applied only where the legal owner was "seised" of lands and, therefore, did not apply to assignments of leasehold property[45] or to transfers of personalty. Such assignments and transfers were not normally stated to be "unto and to the use of" the donee. At some point subsequent to the Statute of Uses, it appears to have been accepted that a presumption in favour of the grantor would apply in the context of voluntary transfers of leasehold land[46] and of personalty.[47] This led to the creation of an equitable interest which, due to the limitations on the scope of the Statute of Uses' operation, would not be executed and which could, therefore, be referred to as a "trust". However, this resulting trust can be seen as analytically equivalent to the resulting use which was presumed in the context of voluntary conveyances of freehold land. The question did not arise as to how this presumption of resulting trust would co-exist with a presumption of resulting use operating in the same situation.

Finally, it is necessary to mention the purchase money resulting trust doctrine. At first sight, it is tempting to conclude by analogy with this doctrine (whereby a resulting trust is presumed to arise in favour of a person who contributes to the purchase price of

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[45] R. Megarry and H.W.R. Wade *The Law of Real Property* 4th edn (1975) pp.157-158.
[46] *Warman v Seaman* (1675) 1 Freem. Ch. 306; *R. v Williams* (1735) Bunb. 342. See also *Duke of Norfolk v Browne* (1697) Pr. Ch. 80.
[47] See e.g. *Standing v Bowring* (1885) 31 Ch. D. 282; *Re Vinogradoff* [1935] W.N. 68; *Vandervell v I.R.C.* [1967] 2 A.C. 291, 312-313; *Tinsley v Milligan* [1994] 1 A.C. 340, 371. It has generally been assumed that s.60(3) applies only to conveyances of land and does not affect conveyances of pure personalty. See e.g. J. Mowbray *et al Lewin on Trusts* 18th edn (2007) pp.294-295; B. McFarlane *The Structure of Property Law* (2008) p.758.

property)[48] that a resulting trust must have arisen upon a voluntary conveyance of land, since the two situations seem logically similar.[49] However, it has been pointed out that the inference that a trust was intended is more plausible in the purchase context than in the voluntary conveyance context, since e.g. the real purchaser may have wished to avoid publicity or hoped to avoid the claims of creditors or there may have been more than one contributor to the purchase price.[50]

Furthermore, a distinctive feature of the purchase money situation is that the person making the conveyance, the vendor of the land, is not the person whose intention is relevant to the possible establishment of the trust. Unlike in the case of a voluntary conveyance, it is difficult to see why it should be fatal to a claim by the true purchaser that the vendor has conveyed the property "unto and to the use of" or even "unto and to the use of and as an absolute gift to" the nominee. The issue is not whether the vendor intended the nominal purchaser to take beneficially but rather whether the intention of the person who put up the purchase money was to have the beneficial interest. Thus, there is an essential structural difference between the voluntary conveyance situation and the purchase money resulting trust scenario. A final point is that, unlike in the context of a voluntary conveyance, where there is no doubt that a resulting use was capable of arising, it does not seem that, up to 1926, the purchase money resulting trust doctrine operated alongside a purchase money resulting use. Therefore, the complexity inherent in the co-existence of a resulting use doctrine and a resulting trust doctrine did not arise in the

[48] Though not, it has been held, in respect of conveyances into joint names in the 'domestic consumer context': see *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432; *Kernott v Jones* [2011] UKSC 53.
[49] See e.g. D. Waters "The Doctrine of Resulting Trusts in Common Law Canada" (1970) 16 McGill L.J. 187, 199.
[50] A.W. Scott, W.F. Fratcher *The Law of Trusts* 4th edn (Boston, 1989) vol.5, p.136. See also R. Chambers "*Lohia v Lohia*" (2001) 15 Trust Law International 26, 29.

purchase money context. In fact, it is arguable that the purchase money resulting trust doctrine is simply a later adaptation of the resulting *use* (rather than running parallel to a doctrine whereby a resulting trust would arise upon a voluntary conveyance of freehold land). This idea was supported by Eyre C.B. in the leading case of *Dyer v Dyer*[51] when he suggested that the purchase money resulting trust doctrine was developed "on a strict analogy to the rule … that where a feoffment is made without consideration, the use results to the feoffor".[52]

C. The Case Law

Contrary to the assumptions of many modern commentators, the pre-1926 case law on balance does not appear to support the idea that a resulting trust could arise upon a voluntary conveyance of freehold land. Prominent support for the view that a resulting trust was presumed in the relevant situation was to be found in *Lewin*.[53] Apparently simply following *Lewin*, and with no citation of authority or analysis, Maitland adopted the same position.[54] Although there was some other support for this view,[55] the greater number of textbook writers (including e.g. Underhill, Ashburner, Jenks and Cheshire) in fact rejected this conclusion.[56]

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[51] (1788) 2 Cox 92.
[52] *Ibid*, 93 per Eyre C.B.
[53] For Lewin's first definitive statement of this position, see Thomas Lewin *A Practical Treatise on the Law of Trusts and Trustees* 5th edn (1867) p.116.
[54] A.H. Chaytor and W.H. Whittaker (eds), F.W. Maitland *Equity Also the Forms of Action at Common Law: Two Courses of Lectures* (1913), pp.79-80. Maitland's editors found it necessary to include a special note "to draw the student's attention to th[e] diversity of opinion" which existed on the point: *ibid,* p.413.
[55] See e.g. W.J. Whittaker (ed.), F.D. White and O.D. Tudor *White and Tudor's Leading Cases in Equity A Selection of Leading Cases in Equity* 8th edn (1912) vol.2, pp.833-834; T.C. Williams (ed.), J. Williams *Principles of the Law of Real Property* 23rd edn (1920) p.194.
[56] See e.g. A. Underhill *The Law Relating to Trusts and Trustees* 7th edn (1912) p.160; W. Ashburner *Principles of Equity* (1902) p.130; E. Jenks (ed.) *A Digest of English Civil Law* 2nd edn (1921) vol.2, p.813; p.1103; G.C. Cheshire *The Modern Law of Real Property* (1925) p.414, p.594. See also, taking the same

The major authorities were collected in the various pre-1926 editions of *Lewin*.[57] The cases which have been thought to support the view that a resulting trust could arise in the relevant situation include the judgments of Lord Nottingham in *Lady Tyrrell's Case*,[58] *Warman v Seaman*,[59] *Elliot v Elliot*[60] and *Grey v Grey*,[61] as well as two later decisions, *Duke of Norfolk v Browne*[62] and *R. v Williams*,[63] and a dictum of Jessel M.R. in *Strong v Bird*.[64] The author has reviewed this case law in detail elsewhere,[65] reaching the conclusion that many of the cases cited in favour of the view that a resulting trust could arise are not in fact in point. When one considers the full range of reports of *Lady Tyrrell's Case*,[66] it becomes clear that the case did not concern a voluntary conveyance of land but rather the release of a charge over land on the basis of an abuse of a fiduciary relationship. None of *R. v Williams*, *Warren v Seaman* and *Duke of Norfolk v Browne* involved freehold land, the first two cases involving leasehold land and the third involving an unusual type of chattel real.[67] Although this has been overlooked by commentators, the dictum of Jessel M.R. in *Strong v Bird*, which revealed an assumption

view, G.W. Sanders and J. Warner (eds), F.W. Sanders *An Essay on Uses and Trusts* 5th edn (1844) vol.1, pp.365-366; J.B. Ames *A Selection of Cases on the Law of Trusts* 1st edn (1881-1882) pp.262-263.

57 See the last of these, C.C.M. Dale and G.E. Streeten (eds.), T. Lewin *A Practical Treatise on the Law of Trusts and Trustees* 12th edn (1911) p.164.

58 (1674) 1 Freem. K.B. 304.

59 (1675) 1 Freem. Ch. 306.

60 (1677) 2 Ch. Cas. 231. There is a much more detailed report in D.E.C. Yale (ed) *Lord Nottingham's Chancery Cases*, vol.2 (Selden Society Vol.79, 1961) 566.

61 (1677) 2 Swans. 594. The case is also reported in D.E.C. Yale (ed) *Lord Nottingham's Chancery Cases*, vol.2 (Selden Society Vol.79, 1961) 481; Rep. Temp. Finch 338; 1 Ch. Cas. 296. See also *Lord Nottingham's Chancery Cases*, vol.1 (Selden Society Vol.73, 1957) 393; (1676) 2 Freem. Ch. 6.

62 (1697) Pr. Ch. 80.

63 (1735) Bunb. 342.

64 (1874) L.R. 18 Eq. 315, 318.

65 J. Mee "Resulting Trusts and Voluntary Conveyances of Land: 1673-1925" (2011) 32 Journal of Legal History 215, 224-238.

66 (1674) 1 Freem. K.B. 304; also reported *sub nom Shipton v Tyrrell* in *Lord Nottingham's Chancery Cases*, vol.1 (Selden Society Vol.73, 1957) 150; *Shipton v Hampson* (1674) Rep. Temp. Finch 145; *Shipton v Tyrrell* (1676) Rep. Temp. Finch 286, also reported *Lord Nottingham's Chancery Cases*, vol.1 (Selden Society Vol.73, 1957) 272.

67 The conveyance was of a "right of next avoidance" of a church, i.e. of the right to make an appointment to the living of that church when the next vacancy arose.

that a resulting trust could arise in the relevant situation, was regarded as erroneous in a higher court in *Pink v Pink*,[68] where Farwell L.J. explained that Jessel M.R. must have been thinking, not of the voluntary conveyance situation, but rather of the purchase money situation where a resulting trust could indeed arise.[69]

In the end, the authority in favour of the possibility of a resulting trust arising in the relevant situation amounts to the decision of Lord Nottingham in *Elliot v Elliot*, a clear dictum by the same judge in *Lewys v Williams*[70] and some less clear remarks by him in *Grey v Grey*.[71] On the other side are the decision of Lord Hardwicke in *Lloyd v Spillet*[72] and the clearly expressed view of the same judge in *Young v Peachy*,[73] as well as a strongly worded dictum of James L.J. in *Fowkes v Pascoe.*[74] Although the issue was never conclusively resolved, it seems reasonable to conclude that Lord Hardwicke's view, never seriously challenged in the later cases up to 1926, represents the better view of the law from the mid-eighteenth century up to the advent of s.60(3).

This assessment is not shaken by a consideration of the approach of other jurisdictions in which the same issue has arisen. It has been suggested in one leading text that "[i]n jurisdictions where there is no statutory equivalent of LPA 1925, s.60(3), a gratuitous transfer of title from B to A produces a resulting trust in favour of B".[75] Although the authorities cited in support of it are Australian, this statement does not convey the full complexity of the Australian analysis on the point. In fact, the Australian

[68] [1912] 2 Ch. 528.
[69] *Ibid*, 536-537.
[70] (1674) *Lord Nottingham's Chancery Cases*, vol.1 (Selden Society Vol.73, 1957) 105, 106.
[71] (1677) 2 Swans. 594, 598.
[72] (1740) 2 Atk. 148; Barn Ch. 384.
[73] (1741) 2 Atk. 254, 256-257.
[74] (1875) 10 Ch. App. 343, 348.
[75] K Gray and S Gray *Elements of Land Law* 5th edn (2009) p.841. See also R. Chambers *Resulting Trusts* (1997) pp.14-15.

authority clearly favours Lord Hardwicke's view. The foundations of the Australian view were laid by Cussen J. in the Victorian case of *House v Caffyn*,[76] where Cussen J. took the view that no resulting trust could arise upon a voluntary conveyance of land "unto and to the use of" the grantee.[77] However, he was dealing with a conveyance of Torrens land, in which context it was not the practice to include the formula "unto and to the use of". Cussen J. concluded that, in this situation, a resulting use would be presumed. Since he took the view that the Statute of Uses did not apply to land registered in Victoria under the Torrens system, this resulting use would not be executed. Therefore, according to Cussen J., the resulting use would be a subsisting equitable interest and would be equivalent to a resulting trust.[78]

While it is easy to misunderstand Cussen J.'s position because of the complexity introduced by the impact of the Torrens legislation (and its interaction with the Statute of Uses), he explicitly preferred Lord Hardwicke's view that no resulting trust could arise upon a voluntary conveyance "unto and to the use of" the grantee. More recent New South Wales cases have accepted the approach of Cussen J. on this point and have gone on to hold that the process whereby a resulting use would be created due to the ancient presumption of resulting use (and would be equivalent to a resulting trust if not executed by statute) is prevented by the Conveyancing Act 1919 (N.S.W.), s.44(1).[79]

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[76] [1922] V.L.R. 67. Judgments, which make no signficant contribution in respect of the issues under discussion, were also given by Irving C.J. and Schutt J.
[77] See also *Wirth v Wirth* (1956) 98 C.L.R. 228, 235-236 *per* Dixon C.J.; 241 *per* Tiernan J.
[78] *Ibid*, 78-79. On a strict view, the equivalence would not be complete: see text to notes 119-120 below, referring to the historical difference between uses and trusts.
[79] See *Newcastle City Council v Kern Land Pty Ltd* (1997) 42 N.S.W.L.R. 273; *Bhana v Bhana* [2002] NSWSC 117; *Singh v Singh* [2004] NSWSC 109; contrast *Ryan v Hopkinson* (1990) 14 Fam. L.R. 151, 155 *per* Bryson J. (disagreeing on the effect of s.44(1)). Occasional modern *dicta* to the effect that a resulting trust is presumed upon a voluntary transfer of "property" (see *Napier v Public Trustee (Western Australia)* (1980) 32 A.L.R. 153, 158 *per* Aickin J.; *Nelson v Nelson* (1995) 132 A.L.R. 133, 182 *per* McHugh J.) do not appear to contemplate the case of a transfer of non-Torrens land which is expressed to be "unto and to

The courts in the United States have come down decisively in favour of Lord Hardwicke's view.[80] However, in Canada, relying essentially on the argument that consistency with the purchase money resulting trust requires this conclusion, the courts have arrived at the view that a resulting trust was presumed upon a voluntary conveyance of land.[81] Thus, it can be said that in Australia and the USA the courts have favoured Lord Hardwicke's position and it is only in Canada that the opposite view has been taken.[82]

D. When Could a Trust Arise in Favour of the Grantor?

It has just been argued that, prior to 1926, no resulting trust could arise upon a voluntary conveyance of land. This does not mean, however, that the grantor would necessarily have been unsuccessful in establishing a trust in his favour. In a number of cases, it was held that an agreement that the grantee would hold the land on trust for the grantor could be enforceable on the basis of the *Rochefoucauld v Boustead* principle that the Statute of Frauds cannot be used as an instrument of fraud. For example, in *Davies v Otty* (No.2),[83]

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the use of" the grantee; note that very little land in Australia is unregistered (e.g. less than 1% in Western Australia, where *Napier* originated: see A. Bradbrook, S. McCallum, A. Moore, *Australian Real Property Law* 4th edn (2007) p.216, n.687). Section 44(1) is discussed further in the text to notes 99-100 below. Note also S. Barkehall Thomas "Parent to Child Transfers – Gift or Resulting Trust?" (2010) 18 Australian Property Law Journal 75.

[80] See G.G. Bogert; A. Morris Hess; G.T. Bogert; R. Chester *The Law of Trusts and Trustees* 3rd edn (2005) §453; A. Scott, W. Fratcher *The Law of Trusts* 4th edn (Boston, 1989) vol.5, §405.

[81] See *M.D. Donald Ltd. v Brown* [1933] S.C.R. 411, 414-415; *Niles v Lake* [1947] S.C.R. 291, 297; 301-2; *Neazor v Hoyle* (1962) 37 W.W.R. 104, 111-117; *Goodfriend v Goodfriend* [1972] S.C.R. 640, 646; *Pecore v Pecore* [2007] 1 S.C.R. 795, at [24]; [85]-[86].

[82] The issues do not appear to have arisen before the Irish courts: see H. Delany *Equity and the Law of Trusts in Ireland* 5th edn (2011) pp.152-153; Land and Conveyancing Law Reform Act 2009 (Ireland), s.62(3), which is similar to s.60(3) except that it refers to a resulting 'use' rather than 'trust'. Note a recent decision of the High Court of Trinidad and Tobago, *Bleasdell v Singh* (26 March 2010) (available on the website of the Trinidad and Tobago Courts at http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/gobin/2007/cv_07_02389DD26mar2010.pdf, where Gobin J. referred in detail to the divergent views on the question but felt (*ibid*, at [8]) that she should "decline to unravel it". See also *Re Matthews* [1993] 2 N.Z.L.R. 91.

[83] (1865) 35 Beav. 208.

the plaintiff was (unjustifiably as it turned out) concerned that he might be indicted for bigamy and transferred certain lands to the defendant, his step-son, on the basis of an understanding that the defendant would transfer the lands back to him when "the unpleasantness was over".[84] Sir John Romilly held that the defendant could not rely on the requirement of signed evidence in writing contained in s.7 of the Statute of Frauds (the modern equivalent of which is s.53(1)(b) of the Law of Property Act 1925), since in the circumstances it would be dishonest of him to keep the land.[85]

Thus, a trust could be enforced in favour of the grantor if he could show positive evidence that the grantee had agreed to hold on trust for him. In modern analysis, there is disagreement as to the nature of this type of trust. Many commentators prefer to classify it as constructive in nature, although a plausible case has been made that it is instead an express trust, enforceable on the basis of oral evidence which is admitted in order to prevent fraud.[86] It does not appear, however, that there are strong grounds for arguing that the trust should be classified as a resulting trust. Given that its basis is the avoidance of fraud on the part of the grantee, the trust is "resulting" only in the unhelpfully loose sense that any trust in favour of a grantor can be described as "resulting in pattern".[87]

This means that it does not appear to be accurate to describe the pre-1926 law as being that "a resulting trust would arise if circumstances pointed to the conclusion that the grantee was not intended to take beneficially", thus suggesting a reversal of the

[84] *Ibid*, 210.
[85] See also *Haigh v Kaye* (1872) L.R. 7 Ch. 469; *Re Duke of Marlborough* [1894] 2 Ch. 133.
[86] See the discussion in W. Swadling "A Hard Look at Hodgson v Marks" in P. Birks and F. Rose (eds) *Restitution and Equity* (2000), pp.65-68; W. Swadling "The Nature of the Trust in *Rochefoucauld v Boustead*", in C. Mitchell (ed.) *Constructive and Resulting Trusts* (2010).
[87] P Birks *An Introduction to the Law of Restitution* rev'd edn (1989) pp.60-61. See *Rudkin v Dolman* (1876) 35 L.T. 791 where the relevant type of trust was described as resulting, apparently in this sense. See also *Ali v Khan* [2002] EWCA Civ 974; *Kuppusami v Kuppusami* [2002] EWHC 2758 (Ch).

normal burden of proof in respect of the resulting trust.[88] Not only is the trust in question more precisely categorised as constructive or express, there is also a difference of substance. Consider a case in which X intends that Y should hold on trust for him but does not inform Y of this prior to the conveyance.[89] In this situation, notwithstanding X's intention, it cannot be said that Y has induced the conveyance to him by fraud; he has taken the property with a clear conscience and it is difficult to see why it would be fraudulent for him to rely on the statutory rules in order to insist upon the absolute character of the conveyance to him (even after learning subsequently of the grantor's intention). Thus, it seems that the law prior to 1926 would not have prevented Y from taking beneficially in the example under discussion. If, however, one were to apply the resulting trust doctrine with a reversed burden of proof, Y would be required to hold on a resulting trust because it is clear that X intended that Y should hold on trust for him.

III. The Interpretation of Section 60(3)

A. The Background to s.60(3)

In trying to understand the subsection, it is useful to consider what the drafters were likely to have been trying to achieve. The undisputed position at the time was that a presumption of resulting use arose upon a voluntary conveyance of freehold land unless the formula "unto and to the use of" was included. Out of an abundance of caution, this formula was also invariably included in conveyances for value,[90] presumably in case a question arose as to whether consideration had actually been given for the conveyance. Thus, the existence of the presumption of resulting use affected all conveyances and was

[88] C Harpum, S Bridge, M Dixon *Megarry and Wade: The Law of Real Property* 5th edn (2008) p.414.
[89] Compare the facts of *Re Vinogradoff* [1935] W.N. 68, which involved personal property.
[90] F.T. Maw *Elphinstone's Introduction to Conveyancing* 7th edn (1918) pp.12-13; p.129.

clearly an obstacle to the simplification of the law of property which the 1925 legislation sought to accomplish. The repeal of the Statute of Uses[91] did not, of itself, address the reason for the insertion of the formula “unto and to the use of” in standard conveyances of freehold land (not involving the creation of a trust). This is because the Statute of Uses did not invent uses or create the presumption of resulting use. Uses and resulting uses predated the Statute, which represented an attempt to deal with the consequences of their existence. Immediately prior to the Statute, the presumption of resulting use would have meant that a conveyance simply “to X and his heirs” (instead of “unto and to the use of X and his heirs”) would pass only the legal title to the donee, who would have to hold it to the use of the grantor. After the Statute, this resulting use would be executed, so that the donee would not even retain the legal title and the conveyance would be completely ineffective. Thus, while the Statute made the problem worse, it did not create the underlying difficulty and, therefore, its repeal did not remove that underlying difficulty – it was necessary to go further and to introduce a separate provision to eliminate the presumption of resulting use.

In light of these observations, it seems fairly clear that the intention of the drafters of s.60(3) was to remove the need to include the formula “unto and to the use of” in conveyances of land. This view is supported by a consideration of the legislative history. The provision was not included in the original reforming Act, the Law of Property Act 1922, but rather formed part of the Law of Property (Amendment) Act, 1924.[92] The purpose of this Act was to “correct errors and supply omissions in the Law of Property Act, 1922, which a further scrutiny has disclosed” and to facilitate the consolidation of

[91] See Law of Property Act 1925, s.207 and Sch.7.
[92] See Third Sch., para. 16.

statute law relating to real property.[93] The provision currently under discussion fell into the category of "amendments of the law on minor details to remedy the errors and omissions mentioned above".[94] In describing the changes made in the relevant Schedule to the Bill, the Memorandum states that "[t]he proposed amendments in this Schedule are mainly of a drafting character or relate to mere improvements in machinery".[95] It then discusses certain specific changes made in that Schedule of comparatively greater importance but makes no reference to the provision under discussion.[96] The likelihood seems to be that, in drafting the 1922 Act, it had been assumed that the mere repeal of the Statute of Uses would be sufficient to eliminate the possibility of a resulting use and the consequent need to make conveyances of land "unto and to the use of" the grantee. This would be an understandable mistake to make[97] and, indeed, a similar misunderstanding can be detected in some of the leading modern texts.[98] It seems that, when this oversight was noticed subsequently, the relevant subsection was introduced in order to eliminate the problem. The contrary view, that the introduction of the subsection was unrelated to the repeal of the Statute of Uses and was intended to make a free-standing change to the law of resulting trusts, seems far less plausible in light of the language used in the memorandum to the relevant Bill.

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[93] See Memorandum prefixed to the Law of Property (Amendment) Bill 1924 (H.L.), p. i. This memorandum contains "the substance" of the unpublished report (May 1924) of a committee chaired by Mr. Justice Romer: J.H. Johnson "Bibliography of the New Property Acts (Annotated), 1896-1925" (1926) 42 L.Q.R. 67, 71. The relevant committee contained "some of the most eminent conveyancers whom we have": Viscount Cave, H.L. Debates 16 March 1926 vol.63, c.578.
[94] See the Memorandum to the 1924 Bill note 93 above, p. i.
[95] *Ibid,* p. ii.
[96] *Ibid,* pp. ii-iii.
[97] The same mistake can be seen in Anon. "The Law of Property Act, 1922 – II. The Repeal of the Statute of Uses" (1922) 66 Solicitors' Journal 662, 662; E. Harvey *The Law of Property Act 1922: How Will it Work?* (1923) p.37.
[98] See e.g J. McGhee *et al Snell's Equity* 32nd edn (2010) p.761; D. Hayton, P. Matthews and C. Mitchell *Underhill and Hayton Law of Trusts and Trustees* 18th edn (2010) p.486; R. Smith *Property Law* 6th edn (2009) p.128.

The wording of s.60(3) is reminiscent of a provision which was drafted only a few years earlier, s.44(1) of New South Wales' Conveyancing Act 1919, which states that "No use shall be held to result merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared." Given that it states that "No use shall be held to result …", it was clearly designed to eliminate the possibility of a resulting use (in a context where the reforming legislation did not repeal the Statute of Uses).[99] The two provisions take slightly different approaches in that the New South Wales provision states that a conveyance which is made simply "to X" will not lead to a resulting use just because it is voluntary, while s.60(3) states that a voluntary conveyance will not lead to a resulting trust just because it is made simply "to X". However, the two provisions are otherwise very similar, suggesting that they had the same purpose. The New South Wales Royal Commission Report which preceded the introduction of s.44(1) states that it "alters the old implication of a resulting use to a settlor from a simple conveyance of land, without consideration and without the declaration of any trust or use". Its effect was said to be that "a conveyance purporting to be made from A to B, without more, will pass to B the whole estate of A."[100]

B. The Orthodox Alternative Interpretations of s.60(3)

In seeking to interpret s.60(3), commentators have usually identified the central question as being whether or not a pre-1926 presumption of resulting trust (which is assumed to have existed) survived the enactment of s.60(3). One answer to this question has been

[99] The Statute of Uses was ultimately repealed in New South Wales by the Imperial Acts Application Act 1969, s.8(1).
[100] Report of Royal Commission on Conveyancing Bill (1918) p.4.

that s.60(3) "was merely intended to remove a conveyancing inconvenience",[101] i.e. the doctrine of resulting uses which created the need to include extra words in a conveyance indicating that the grantee was to take for his own use. On this view, the enactment of s.60(3) was "only consequential to the repeal of the Statute of Uses 1536"[102] and its effect is that "the vestiges of the use are removed without affecting modern trust principles in any way".[103] This suggests that, since s.60(3) has no effect on the "substantive law of resulting trust",[104] the pre-1926 presumption of resulting trust survives today. This position has been regarded as attractive by a number of commentators.[105]

However, the majority view is that s.60(3) must be taken to eliminate the pre-1926 presumption of resulting trust, although a resulting trust can still arise if the grantee can adduce evidence showing that this was the intention. This would mean that the impact of s.60(3) is to reverse the burden of proof in respect of a pre-1926 resulting trust doctrine.[106] Curiously, this view is often described as interpreting s.60(3) "literally"[107] or taking it "at face value"[108] or concluding that "it simply means what it says".[109] This tendency can be traced back to a reference to "a plain reading" by Chambers, which was

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101 R.A. Pearce, J. Stevens, W. Barr *The Law of Trusts and Equitable Obligations* 5th edn (2010) p.272.
102 R. Chambers *Resulting Trusts* (1997) p.16.
103 *Ibid*, p.18.
104 J. McGhee *et al Snell's Equity* 32nd edn (2010) p.761.
105 B. McFarlane *The Structure of Property Law* (2008) pp.758-759; W. Swadling "Property: General Principles" in A. Burrows (ed.) *English Private Law* 2nd edn (2007) p.293; J. McGhee *et al Snell's Equity* 32nd edn (2010) p.761 ("[t]he preferable interpretation"); A.J. Oakley *Parker and Mellows: The Modern Law of Trusts* 9th edn (2008) p.299 (support for this position in previous editions retracted due to authority to the contrary).
106 It is not clear what view is taken by advocates of this interpretation as to the fate of the pre-1926 presumption of resulting use. It is possible that it is assumed, wrongly, that the repeal of the Statute of Uses of itself eliminated the resulting use: see text to notes 97-98 above.
107 J. McGhee *et al Snell's Equity* 32nd edn (2010) p.761. See also Law Commission *The Illegality Defence: A Consultative Report* (C.P. No.189, 2009) p.105 ("a literal interpretation").
108 D. Hayton, P. Matthews, C. Mitchell *Underhill and Hayton Law of Trusts and Trustees* 18th edn (2010) p.486.
109 K. Gray and S. Gray *Elements of Land Law* 5th edn (2009) p.842.

taken up by Judge Strauss Q.C. in *Lohia*.[110] However, it seems unjustifiable to suggest that a provision the meaning of which has been debated for almost a century, and the language of which has also been described as "oracular"[111] and "obscure",[112] is somehow susceptible to a plain reading or a literal interpretation. The specific, complex, wording of the provision must be respected.

In the view of the current author, both of the interpretations of s.60 that have just been described are, for a number of reasons, flawed. The first point is that, as has been suggested already in this article, the better view is that no resulting trust (as opposed to a resulting use) could arise upon a voluntary conveyance prior to 1926. If this argument were to be accepted, there could be no question of a pre-1926 presumption of resulting trust surviving today nor would it be possible to argue that s.60(3) had reversed the burden of proof in respect of a pre-1926 resulting trust doctrine. It also seems that the interpretations under discussion would be misconceived even if, contrary to the position adopted in this article, it were concluded that a resulting trust doctrine applied to voluntary conveyances prior to 1926. This is because such a doctrine, if it ever existed, would have been only a secondary doctrine which was triggered in circumstances where the operation of the doctrine of resulting uses was prevented by the inclusion of the phrase "unto and to the use of" the grantee. As was pointed out earlier, a putative pre-1926 presumption of resulting trust could not have applied upon a pre-1926 conveyance "to X" because this situation was the domain of the presumption of resulting use; the two doctrines could not have applied simultaneously to the same conveyance because the

[110] R. Chambers *Resulting Trusts* (1997) p.18; (2000) 3 I.T.E.L.R. 117, 128-129 *per* Judge Strauss Q.C.
[111] D. Hayton, P. Matthews, C. Mitchell *Underhill and Hayton Law of Trusts and Trustees* 18th edn (2010) p.486.
[112] W. Swadling "Property: General Principles" in A Burrows (ed.) *English Private Law* 2nd edn (2007) p.293.

creation of a resulting trust would have led to a different practical result (grantee holding on trust for grantor) to the creation of a resulting use (legal title in the grantor).[113] It follows that s.60(3) could have had no impact on a putative pre-1926 resulting trust doctrine since the operation of the subsection is clearly limited to a situation where a resulting trust could never have arisen prior to 1926, the case of a conveyance which is "not expressed to be conveyed for the use or benefit of the grantee" (a type of conveyance to which the presumption of resulting use applied instead).

However, the fact that s.60(3) would not affect a putative pre-1926 resulting trust doctrine does not mean that there would be any practical scope for the operation of such a doctrine after 1926. It seems clear that the doctrine could not apply to a post-1925 conveyance "to X", since it did not apply to such a conveyance prior to 1926 and, as has just been pointed out, s.60(3) would have had no effect on the scope of the doctrine (so that the real question, discussed in the next section, would be whether the doctrine of resulting uses might still apply despite s.60(3)). It is, of course, possible that a modern conveyancer would follow the advice of some textbook writers[114] and include in a voluntary conveyance an express statement that the conveyance is intended to be "for the benefit of", or is made "as a gift to", the grantee. This type of express statement could be seen as taking the conveyance out of the scope of the doctrine of resulting uses and potentially into the territory of a pre-1926 resulting trust doctrine. However, such an express statement also clearly indicates that the grantee is intended to take beneficially, which is inconsistent with the creation of a resulting trust. Thus, whether a modern

[113] See the discussion under the heading "A Putative Pre-1926 Resulting Trust Doctrine: Issues of Principle" above.
[114] For example, J. Martin *Hanbury and Martin: Modern Equity* 18th edn (2009) p.269; R.A. Pearce, J. Stevens, W. Barr *The Law of Trusts and Equitable Obligations* 5th edn (2010) p.273.

voluntary conveyance is made "to X" or "to X for the benefit of X", there seems to be no scope for the application of a pre-1926 doctrine of resulting trust (if such a doctrine ever existed).

C. The Impact of s.60(3) on the Presumption of Resulting Use

It is submitted that the key question in respect of s.60(3) relates, in fact, to its impact on the pre-1926 doctrine of resulting uses. This point is obscured by the fact that the subsection uses the phrase "resulting trust" rather than "resulting use". The explanation for the drafters' choice of the word "trust" seems to be that, if the doctrine of resulting uses had survived the repeal of the Statute of Uses, the use which would have arisen upon a voluntary conveyance of land would not have been executed (in the absence of a statute to execute it). It could therefore have been regarded as a trust, in the sense of a surviving equitable interest.[115] This illustrates the dangers in the assumption that resulting uses were not "substantive", dwelling instead in a realm of mere conveyancing technicality.[116] If it could be said, prior to 1926, that resulting trusts and resulting uses "inhabit[ed] different universes",[117] this was primarily because the Statute of Uses converted uses into legal interests the instant they arose.

There appear to be three possible interpretations of the impact of s.60(3) on the pre-1926 doctrine of resulting uses.

(i) It is Completely Ineffective

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[115] Although, as will be pointed out below, complications would result if one took seriously the historical difference between uses and trusts: see text to notes 119-120 below.

[116] See Law Commission *The Illegality Defence: A Consultative Report* (C.P. No.189, 2009) p.105 ("a previous technicality of the law").

[117] *Ryan v Hopkinson* (1990) 14 Fam. L.R. 151, 155 (NSW SC).

It could be argued that, strictly speaking, a resulting use could never have arisen "*merely* by reason that the property is not expressed to be conveyed for the use or benefit of the grantee". For a resulting use to arise it was necessary, in addition, that there not be a close family relationship between the parties to the conveyance, since the existence of such a relationship would be sufficient to prevent the presumption from arising. Furthermore, it was also necessary that there was no oral evidence as to the donor's intention which would rebut the presumption of resulting use (since it seems clear that the pre-1926 presumption of resulting use was capable of being rebutted by oral evidence as well as by a written statement in the conveyance).[118] Thus, it could be argued that the subsection achieves nothing, since it prevents a resulting use from arising merely because of the existence of certain circumstances which, in any event, would never have been enough on their own to trigger the creation of a resulting use. The effect of this interpretation would be that the presumption of resulting use would survive s.60(3) and, given the repeal of the Statute of Uses, could be regarded as equivalent to a presumption of resulting trust. However, unlike the interpretation (discussed above) whereby the subsection is seen as eliminating the doctrine of resulting uses and leaving a pre-1926 presumption of resulting trust intact, this interpretation regards s.60(3) as entirely ineffective.

While this interpretation represents the most rigorous interpretation of the wording of the subsection, it cannot be reconciled with the modern authorities on s.60(3). Another difficulty is that it envisages the survival of the ancient rules allowing for the creation of a resulting use. While it is true that a resulting use would take effect as a subsisting equitable interest given the repeal of the Statute of Uses and so would be

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[118] See G.W. Sanders and J. Warner (eds), F.W. Sanders *An Essay on Uses and Trusts* 5th edn (1844) vol.1, pp.104-105; H. Stone "Resulting Trusts and the Statute of Frauds" (1906) 6 Columbia Law Review 326, 329.

broadly similar to a trust, there is the complication that there were, in principle, significant differences between ancient uses and modern trusts, even though these differences were masked for centuries by the fact that all uses were executed by the statute and immediately turned into legal interests. For example, the *cestui que use* under a use was entitled to take the profits of the lands himself, unlike the beneficiary under a trust who can only receive the benefit of the land through the hands of his trustee.[119] Therefore, the interpretation under discussion could mean, awkwardly, that the kind of resulting "trust" which would arise upon a voluntary conveyance would be somewhat different in nature to other forms of resulting trust.[120] It is, of course, possible that the historical differences could simply be overlooked but the need to engage with this complication seems to represent a disadvantage of the interpretation under discussion.

Rather than dismissing the subsection as completely ineffective due to its poor drafting, it seems preferable to look for an interpretation which matches the likely legislative intention in enacting it.

(ii) It Reverses the Burden of Proof

An alternative interpretation is to regard the use of the word "merely" in s.60(3) as indicating that only the *presumption* of resulting use is abolished, so that a resulting use (which would now take effect as a resulting trust given the repeal of the Statute of Uses, subject to the possible difference between a use and a trust discussed in the previous section) would arise if the grantor could provide evidence that the grantee was not

[119] G.W. Sanders and J. Warner (eds), F.W. Sanders *An Essay on Uses and Trusts* 5th edn (1844) vol.1, p.2. See also note 44 above.
[120] The point was not noticed in *House v Caffyn* [1922] V.L.R. 67 by Cussen J, who assumed that a resulting use to which the Statute of Uses did not apply would take effect as a trust.

intended to take beneficially – the existence of this evidence would count as an additional factor so that the resulting trust would not arise *merely* because of the absence of the extra words in the conveyance.[121]

While a case can be made for this interpretation, it does encounter some problems. The most plausible interpretation of the word "implied" in s.60(3) seems to be that it means "created by implication of law". If this is what the word means, the interpretation under discussion suggests that the elimination of the presumption of resulting use is being achieved in a roundabout way, by stating that a resulting use would not be created merely because (i) the circumstances which would have triggered the presumption are present and (ii) there is no evidence which would have rebutted the presumption. However, the actual words of the subsection are inadequate in relation to both of these points. In terms of describing the circumstances which triggered the presumption, although there is mention of the conveyance being voluntary, there is no mention of the requirement that the parties be strangers rather than falling within a class of relationship which would trigger the presumption of advancement. In terms of rebutting evidence, while there is a reference to the absence of additional words in the conveyance, there is no reference to an absence of rebutting evidence from outside the conveyance.[122] The interpretation under discussion requires it to be assumed that neither the fact that the parties are strangers nor the fact that there is no evidence of intention from outside the conveyance to rebut the presumption counts as an additional factor which would permit a resulting use to arise but the existence of evidence that the grantor

[121] This seems to be the position taken in C. Harpum, S. Bridge, M Dixon *Megarry and Wade: The Law of Real Property* 5th edn (2008) pp.414-415.
[122] See text to note 118 above.

did not intend the grantee to take beneficially does so count. However, it is difficult to see how the words of the subsection can be said to dictate this particular distinction.

It could be argued instead that the word "implied" should be read as meaning "presumed" (although this seems implausible since, if this had been the intention, it seems more likely that the latter word would have been used). This variation on the interpretation under discussion would suggest that s.60(3) means that no resulting use will be presumed merely because the conveyance is voluntary and there are no additional words in the conveyance. This does not avoid the difficulty that there is no mention of the need for the parties to be strangers. It also runs into a syntactical problem, since it suggests that, although a resulting use will not be presumed merely because of the circumstances mentioned in the subsection, a resulting use will be indeed be presumed – which in this context means rebuttably presumed – if the evidence demonstrates that the grantee was not intended to take beneficially. However, if this is what the evidence demonstrates, it does not make sense to think in terms of a rebuttable presumption since the resulting trust would simply be found to exist. This version of the relevant interpretation, therefore, is also problematic.

(iii) It Eliminates the Doctrine of Resulting Uses

The final interpretation, which leads to a practical result which is broadly similar to the previous one, is the one favoured by the present author as the cleanest and most logical. This interpretation is that the subsection should be interpreted to give effect to what seems to have been its purpose, to remove the ancient doctrine of resulting uses and to make it unnecessary to include extra words in conveyances of land. On this view, the subsection should be read as eliminating any possibility of a resulting use (which would have taken effect as a trust) arising upon a voluntary conveyance.[123] If one was attempting to achieve this result, an obvious wording would have been simply the blanket statement that “No resulting trust shall be implied upon a voluntary conveyance of land”. This, however, would be too extensive in its scope, since it would prevent a resulting trust from arising in the context of a voluntary conveyance to the grantee on trust where there was a gap in the beneficial interests.[124] It might also be thought to risk preventing a trust from being enforced in favour of the grantor on the basis of the *Rochefoucauld v Boustead* principle, applied in cases such as *Davies v Otty* (No.2),[125] since such a trust could loosely be described as a resulting trust. This suggests that the probable reason for the inclusion of the word “merely” in the subsection was to avoid interfering with the operation of these other equitable principles, based on different rationales to the doctrine of resulting uses. Given that in practice the presumption of resulting use was invariably rebutted by the fact that the property was “expressed to be conveyed for the use or benefit of the grantee”, it is perhaps understandable that the drafters would have overlooked other possible ways of preventing the creation of a resulting use. They seem to have identified the problem to be addressed as the fact that in a voluntary conveyance of land it was necessary to include extra words and to have dealt with that simply by providing that no resulting trust would arise in favour of the grantor just because those extra words were not included.

[123] Note that this was the stated intention behind the broadly similar s.44(1) of the Conveyancing Act 1919 (N.S.W.): see text to note 100 above.
[124] On the type of resulting trust which arises in these circumstances, see e.g. J. McGhee *et al Snell's Equity* 32nd edn (2010) pp.763-767.
[125] (1865) 35 Beav. 208.

It is not being contended that this interpretation avoids all the problems of the previous one and it is conceded that it requires acceptance of the fact that the drafting of the subsection was poor.[126] However, it does seem somewhat more natural to regard the subsection as a clumsy attempt to eliminate the possibility of a resulting use, while preserving the fraud principle applied in cases such as *Davies v Otty* (No.2), rather than as a clumsy attempt to reverse the burden of proof in respect of resulting uses (which seems, on the face of it, a somewhat strange objective for the provision). Furthermore, this interpretation has the advantage that there no complications resulting from the historical differences between uses and trusts, since a trust which is enforceable in favour of the grantor on the basis of the fraud principle would clearly be a modern trust. Beyond this, the only practical difference between the two interpretations is that this final interpretation would not allow a trust to arise in favour of the grantor on the basis of a privately held intention which was not communicated in advance to the grantee,[127] whereas the previous interpretation would.

This practical difference means that the final interpretation represents a slight refinement of the practical position indicated by the modern case law. However, as a matter of authority, there does not seem to be any major obstacle to the acceptance of this refinement. In the leading case of *Lohia*, no trust was found to exist on the facts and the Court of Appeal expressly recognised that the relevant issues could not be resolved without a proper consideration of the complex history of the law in this area. Therefore, this case cannot reasonably be regarded as standing in the way of a clarification of the

[126] As is, in fact, the case in relation to another basic reforming provision contained in s.60: see J. Mee "Words of Limitation and Section 60 of the Law of Property Act 1925" [2008] Conv. 129 (raising questions as to the drafting of s.60(1)).
[127] See text following note 88 above.

law based on a full analysis of that history. The authority of *Ali v Khan* is weakened by the fact that the judgment of Morritt V.C. makes no reference to the approach of the Court of Appeal in *Lohia*. While the trust which arose in *Ali v Khan* was described as a resulting trust, *Rochefoucauld v Boustead* was cited and reliance was expressly placed on cases applying the fraud principle. Therefore, neither *Ali v Khan*, nor *Hodgson v Marks* where the application of the fraud principle clearly formed part of the *ratio* of the case, seems to preclude the interpretation under discussion.

Conclusion

This article has considered the question of whether a resulting trust can arise upon a voluntary conveyance of land. It has suggested that much of the modern debate on the meaning of s.60(3) has been hampered by a mistaken assumption that the key question is whether or not a supposed pre-1926 presumption of resulting trust survived the enactment of s.60(3). It has been argued that, instead, the central question relates to the impact of the provision on the pre-1926 doctrine of resulting uses. It has been suggested that the purpose of s.60(3) of the Law of Property Act was to simplify conveyancing by making it possible to make conveyances of land “to”, rather than “unto and to the use of”, the grantee. This means that it must have been directed against the old doctrine whereby a resulting use was presumed upon a voluntary conveyance of land. While the drafting is not ideal, it seems reasonable to interpret s.60(3) as sufficient to remove this doctrine, while preserving the distinct principle that a trust can be enforced in favour of the grantor where it would be fraudulent for him to rely on the requirement of signed evidence in writing in order to defeat an oral agreement to hold the land on trust (and also preserving the rule that a resulting trust can arise where there is a gap in the beneficial interests in a voluntary conveyance to the grantee on trust). Although this is not the current author's preferred view, a case can also be made for an alternative interpretation, leading to a broadly similar result, whereby the subsection merely reverses the burden of proof in respect of the creation of a resulting use (which would operate as a resulting trust given the repeal of the Statute of Uses).

It seems that there are clear advantages to the position favoured in the modern case law and essentially supported in this article. It is difficult to see a justification in modern times for presuming a resulting trust upon a voluntary conveyance of land. Some commentators are attracted by the argument that there should be consistency between the rules in respect of land and of personal property.[128] There are two answers to this point. The first is that it would indeed be desirable if both types of property could be dealt with in the same way but only if the appropriate rule could be applied to both cases, i.e. that no presumption of resulting trust would arise upon a voluntary conveyance. As was clear as long ago as the 19th century, "in the immense majority of cases, conveyances, voluntary and otherwise, are made with the actual intention of conveying both the equitable and the legal title".[129] The presumption of resulting trust in this context is an anachronism which should not be tolerated in the modern law. The second point is that there is indeed a significant difference between land and personal property in terms of voluntary transfers, in that conveyances of land must take place by deed. As history has shown, the main practical consequence of an insistence by equity that voluntary conveyances of land are not to be taken at face value is simply that conveyancers automatically include extra words in the deed to address this point and that problems occasionally arise when these

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[128] See e.g. J. McGhee *et al Snell's Equity* 32nd edn (2010) p.761; R.A. Pearce, J. Stevens and W. Barr *The Law of Trusts and Equitable Obligations* 5th edn (2010) p.273.
[129] G.H. Smith *The Law of Private Right* (1890) p.55.

words are accidentally omitted. There seems to be no value in a rule which merely complicates deeds of voluntary conveyance. Furthermore, it would be most unsatisfactory in practical terms if, even after the enactment of s.60(3), it was still necessary to express a conveyance of land to be for the use or benefit of the grantee in order to avoid a resulting trust. As Judge Strauss Q.C. pointed out at first instance in *Lohia v Lohia*, this would turn s.60(3) into "something of a trap for the unwary conveyancer, since the suggestion implicit in its wording that it is no longer necessary to use the old formula would be misleading".[130]

Given that injustice can be avoided through an application of other established equitable principles (i.e. the principle that a statute cannot be used as an instrument of fraud), it would represent a step forward in terms of clarifying and simplifying the law of resulting trusts if it were recognised that no resulting trust can arise upon a voluntary conveyance of land.[131]

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[130] (2000) 3 I.T.E.L.R. 117, 129.

[131] Unless, of course, the conveyance was made upon an express trust which does not exhaust the beneficial interest.