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Presumed Resulting Trusts, Intention and Declaration

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ABSTRACT. *Rejecting the competing positions of Swadling and Chambers, this article argues that the law of presumed resulting trusts reflects a very old rule that, upon a voluntary transfer, the fate of the beneficial interest in the property depends on the intention of the transferor. The case law shows that the presumption is of an intention to create a trust for the transferor or provider of the purchase money. It makes no difference if, reflecting the historically important concept of 'retention', this is phrased in negative terms as a presumption that the intention of the transferor was not to pass the beneficial interest to the transferee.*

KEYWORDS: resulting trusts, presumptions, equity, legal history, declaration, intention, restitution

INTRODUCTION

Equity's traditional vision of resulting trusts was sufficiently under-theorised – and based on a history which had been sufficiently forgotten – to make it vulnerable when Peter Birks began to promote an alternative vision of resulting trusts, which saw them as restitutionary in nature.[1] This new vision was developed in more detail by Robert Chambers, notably in his 1997 monograph, *Resulting Trusts*.[2] Chambers argued that resulting trusts were based on intention but only in the sense that they responded to the unjust enrichment that would otherwise occur where a transferor lacked the intention to benefit the person to whom property had been transferred. The Birks/Chambers argument suggested

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[1] See *An Introduction to the Law of Restitution*, revised ed., (Oxford 1989), esp. pp. 54-73; "Restitution and Resulting Trusts" in S. Goldstein (ed.) *Equity and Contemporary Legal Developments* (Jerusalem 1992) . See also "Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case" [1996] R.L.R. 3; *Unjust Enrichment*, 2nd ed. (Oxford 2005), esp. pp. 150-152 and 304-307.

[2] Oxford 1997. See also R. Chambers "Resulting Trusts in Canada" (2000) 38 Alberta Law Review 378; R. Chambers "Resulting Trusts' in A. Burrows and Lord Rodger (eds.) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford 2006); R. Chambers "Is There a Presumption of Resulting Trust?" in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010).

that it would be appropriate for resulting trusts to arise in a much wider range of circumstances than had previously been accepted by the law, including in cases of mistaken payments of money.

In 1996, prior to the publication of Chambers' monograph, William Swadling published an influential article which reacted strongly against Birks' version of the restitutionary explanation of resulting trusts.[3] In his arguments at this time, Swadling for the most part expressed himself in terms compatible with the intention-based approach defended in this article, stating that, where the presumption of resulting trust applies, "what is being 'presumed' is an intention … to create a trust" and advocating use of the label of "presumed intention resulting trust".[4] Only a reference to "a presumption that the transferor had in fact conveyed the land to the transferee on express trust for the transferor"[5] foreshadowed the position he would ultimately come to adopt (and which is described in the text below).

Swadling's arguments found favour in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[6] where Lord Goff remarked that Birks had set out to test the waters in respect of his new vision of resulting trusts and that "the temperature of the water must be regarded as decidedly cold".[7] Notwithstanding the speeches in *Westdeutsche*, which were delivered prior to the publication of Chambers' monograph containing the fully elaborated "absence of intention" theory, Birks and Chambers continued to defend this theory. In 2008, Swadling published another article considering the nature of resulting trusts.[8] This time, however, his position departed more

[3] "A New Role for Resulting Trusts?" (1996) 16 Legal Studies 110.
[4] Ibid., 113. See also the reference in his conclusion to "a presumption of actual intent": ibid., at p. 131.
[5] Ibid., at p. 114.
[6] [1996] A.C. 669.
[7] Ibid., at p. 689.
[8] "Explaining Resulting Trusts" (2008) 124 L.Q.R. 72. See also by the same author: "The Law of Property" in P. Birks and F. Rose (eds.) *Lessons of the Swaps Litigation* (London 2000); "A Hard Look at *Hodgson v Marks*" in P. Birks and F. Rose (eds.) *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (London 2000); "Legislating in Vain" in A. Burrows, D. Johnston and R. Zimmermann (eds.) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford 2013). Note also the contributions to the debate by other scholars, including C. Rickett and R. Grantham "Resulting Trusts—A Rather Limited Doctrine" in *Restitution and Equity Volume 1*; C. Mitchell "Review of *Understanding Unjust Enrichment,* by Jason W. Neyers, Mitchell McInnes and Stephen G.A. Pitel, eds" (2005) 42 Can. Bus. L.J. 143; E. O'Dell "The Resulting Trust" in C. Rickett and R. Grantham (eds.) *Structure and Justification in Private Law: Essays for Peter*

explicitly from (what is regarded by the current author as) the traditional orthodoxy. In Swadling's new presentation of his position, the basis for presumed resulting trusts is that the claimant has made an express declaration of trust in favour of himself or herself, this express declaration being proven by means of an evidential presumption. According to Swadling, the fact proven by presumption cannot be an intention to create a trust because an unexpressed intention is insufficient to give rise to a trust. This "presumed declaration" explanation applies to resulting trusts presumed upon a voluntary transfer of personal property[9] and purchase money resulting trusts[10] but not in relation to "automatic" resulting trusts, a category which, Swadling argues, "still defies legal analysis".[11]

This article suggests, contrary to Swadling's position, that the key issue in relation to presumed resulting trusts is the intention of the transferor to make the transferee a trustee for the transferor. It is this intention that creates a trust. If, as Swadling argues, the presumption were of an express declaration of trust for the transferor, it would be rebutted, contrary to what the case law indicates, if it could be shown that the transferor intended to make the transferee a trustee

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Birks (Oxford 2008); J. Penner "Resulting Trusts and Unjust Enrichment: Three Controversies" in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010); D. Sheehan "Resulting Trusts, *Sine Causa* and the Structure of Proprietary Restitution" (2011) 11 Oxford University Commonwealth Law Journal 1; G. Virgo *The Principles of Equity and Trusts* (Oxford 2012) pp. 245-250; 262-265. See also J. Glister "Is There a Presumption of Advancement?" (2011) 33 Sydney Law Review 39.

[9] A presumption of resulting trust arises in favour of a person who makes a voluntary transfer of personal property to another in circumstances where the countervailing presumption of advancement does not apply. "Voluntary" in this context means gratuitous and appears to include a transfer for nominal consideration: *Hayes v Kingdome* (1681) 1 Vern. 33, 34*; Sculthorp v Burgess* (1790) 1 Ves. Jun. 91, 92. It seems that no presumption arises in the context of a voluntary conveyance of land and, in fact, the better view appears to be that no resulting trust (of the relevant type) can arise in this situation: see Law of Property Act 1925, s. 60(3); J. Mee "Resulting Trusts and Voluntary Conveyances of Land" [2012] Conv. 307 and see also text to note 126 below. Note, however, *Prest v Petrodel Resources Limited* [2013] UKSC 34; [2013] 2 A.C. 415, at [49] where Lord Sumption (with whose reasoning the other Justices of the Supreme Court agreed) apparently assumed that the presumption of resulting trust applies in the case of a transfer of land for nominal consideration. Unfortunately, no authorities were cited, nor was there any mention of Law of Property Act 1925, s. 60(3).

[10] As stated in the leading case of *Dyer v Dyer* (1788) 2 Cox 92, 93 per Eyre CB: "the trust of a legal estate ... results to the man who advances the purchase money" irrespective of who takes the legal title. Note that the Supreme Court of Canada has recently declined an invitation to discard the purchase money resulting trust doctrine in favour of an approach based on unjust enrichment: *Nishi v Rascal Trucking Ltd.*, 2013 SCC 33.

[11] "Explaining Resulting Trusts", at p. 102. This category of resulting trust arises in favour of a settlor who creates a trust that fails to dispose of the entire beneficial interest. The term "automatic" derives from the judgment of Megarry J. in *Re Vandervell's Trusts (No 2)* [1974] Ch. 269, 294.

for the transferor but never expressed this intention.[12] This article suggests that the presumption of resulting trust is not, as Swadling suggests, a tool for proving the existence of evidence (in the form of an express declaration) of an intention to create a trust; rather, it is a tool for proving the existence of that intention itself. The article also rejects Chambers' vision of presumed resulting trusts which suggests that they turn, not on a positive intention, but rather on the absence of intention. By demonstrating the direct path from a finding of an intention to create a trust in favour of the transferor to the actual creation of such a trust, the article counters Chambers' argument that a restitutionary explanation is necessary to explain the accepted categories of presumed resulting trust.[13] In view of its focus on the presumption of resulting trust, this article addresses the voluntary transfer and purchase money resulting trusts, since the current author shares Swadling's view[14] that the third standard category of resulting trust, "automatic" resulting trusts, does not depend on a presumption of intention.

The article begins by arguing, in Part 1, that the case law unequivocally indicates that the presumption of resulting trust is concerned with intention, rather than an express declaration of trust. Part 2 then elaborates, by reference to the historical foundations of resulting trusts, the "presumed intention to create a trust for the transferor" model that is supported in this article. It is explained that, at an early stage in its development, equity developed an approach to voluntary transfers which treated as decisive the transferor's motivation or intention in carrying out the transaction. Part 3 then demonstrates how this model, originally developed in the context of resulting uses, is reflected

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[12] See Chambers "Is There a Presumption of Resulting Trust?", at p. 280; Penner "Resulting Trusts and Unjust Enrichment: Three Controversies", e.g. at pp. 253-255.

[13] Chambers also identifies a number of atypical situations which, he contends, lead to presumed resulting trusts that can only be explained on the basis of his model: see, in particular, *Resulting Trusts*, pp. 21-27. In the view of the current author, the authority relied upon by Chambers is not convincing and cannot plausibly be said to have altered the courts' conception of the presumption of resulting trust. Two of the main authorities upon which Chambers' relies are addressed in this article: *Re Vinogradoff* [1935] W.N. 68 (see text to notes 84-85) and *Hodgson v Marks* [1971] Ch. 892 (see text to notes 118-124). Note also the brief comment on *Ryall v Ryall* (1739) 1 Atk. 59 in note 72 below, the reference to *Brown v Brown* (1993) 31 N.S.W.L.R. 582 (C.A.). in note 78 below, and the discussion in J. Mee "'Automatic' Resulting Trusts: Retention, Restitution or Reposing Trust?" in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010), pp 224-229. Note that Chambers now argues that the presumption of resulting trust is not actually a true presumption:"Is There a Presumption of Resulting Trust?", at pp. 284-287.

[14] "Explaining Resulting Trusts", at pp. 97-98.

in the case law on resulting trusts. This Part also notes that the courts treat positive and negative formulations of the basis for presumed resulting trusts as interchangeable, indicating that there is no difference between the proposition that the transferor intended to create a trust for himself or herself (or to retain the beneficial interest) and the proposition that he or she did not intend to confer a benefit on the transferee. Next, in Part 4, a key objection to the proposed model is considered, namely that an unexpressed intention to create a trust is insufficient to achieve anything. Finally, Part 5 briefly discusses the problems presented for Swadling's model by the purchase money resulting trust scenario.

It should be emphasised that the concern of this article is to elucidate the basis of the modern law on presumed resulting trusts. An insistence on an accurate understanding of the theoretical basis of this type of resulting trust does not necessarily imply support for the continued application of the relevant theory in the future. The question of how the current law might be improved is linked to the complex problem of untangling the purchase money resulting trust and the common intention constructive trust developed in *Gissing v Gissing*,[15] which overlaps to an uncertain extent with the older doctrine.[16] It is beyond the scope of the present article to give these issues the nuanced treatment they require.

PART ONE: INTENTION AND DECLARATION IN THE CASE LAW

It is not an exaggeration to say that the case law makes absolutely clear that the presumption of resulting trust is about intention. In *Jones v Kernott*,[17] in distinguishing between the resulting trust and the common intention constructive trust, Lord Walker and Lady Hale stated that the resulting trust "depends upon the law's presumption as to the intention of the party who makes

[15] [1971] AC 886.

[16] On the common intention constructive trust, see e.g. S. Gardner "Family Property Today" (2008) 124 L.Q.R. 422; K. Gray and S. Gray *Elements of Land Law* 5th ed. (Oxford 2009), pp. 871-905; J. Mee "*Jones v Kernott*: Inferring and Imputing in Essex" [2012] Conv. 167; G. Virgo *The Principles of Equity and Trusts* (Oxford 2012), pp. 321-339.

[17] [2011] UKSC 53; [2012] 1 A.C. 776. Note also *Prest v Petrodel Resources Limited* [2013] 2 A.C. 415, [49] per Lord Sumption, referring to "the ordinary presumption of equity that [the recipient of a gratuitous transfer] was not intended to acquire a beneficial interest in" the properties transferred.

a financial contribution to the purchase".[18] In *Stack v Dowden*,[19] Lord Walker noted "[a] significant judicial comment on the importance of taxonomy in this area"[20] by Peter Gibson L.J. in *Drake v Whipp*,[21] which drew a distinction between the constructive trust and "the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention".[22] In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[23] Lord Browne-Wilkinson referred to a presumption that the transferor or person who advanced the purchase money "did not intend to make a gift to [the transferee]".[24] Going back a little further in time, in *Vandervell v I.R.C.*,[25] Lord Upjohn clearly regarded the presumption as relating to intention.[26]

None of the above is consistent with Swadling's view that the key question relates to an express declaration rather than turning directly on intention. However, Swadling relies on the proposition that "the only intention which counts is one which is expressed"[27] in order to argue that judicial statements that the key issue is intention to create a trust are supportive of, rather than damaging to, his position. If, as Swadling argues, the courts are presuming that there has been an express declaration of trust, it is very difficult to see why they would never have said so explicitly in any of the very large number of resulting trust cases that have been decided over the centuries. In fact, Swadling presents almost no authority that directly supports his position. He argues that in the 19th century case of *Fowkes v Pascoe*[28] "the Court of Appeal … still spoke in terms of a presumption of transferors declaring trusts for

[18] [2012] 1 A.C. 776, at [8].
[19] [2007] UKHL 17; [2007] 2 A.C. 432.
[20] Ibid., at [23].
[21] [1996] 1 F.L.R. 826.
[22] Ibid., 827, quoted by Lord Walker in *Stack* [2007] 2 A.C. 432, at [29].
[23] [1996] A.C. 669.
[24] [1996] A.C. 669, 708. Note also his less orthodox comment (ibid.), seeming to indicate the influence of the common intention constructive trust doctrine, that resulting trusts "are traditionally regarded as examples of trusts giving effect to the common intention of the parties".
[25] [1967] 2 A.C. 291.
[26] Ibid., 312 ("it is a question of the intention of [the transferor]"). Note also the emphasis on intention in *Shephard v Cartwright* [1955] A.C. 431, 446-450 *per* Viscount Simonds; 454 *per* Lord Reid. See also *Pettitt v Pettitt* [1970] A.C. 777, 815F–G per Lord Upjohn; 823G-824D per Lord Diplock; *Gissing v Gissing* [1971] A.C. 886, 902B-C per Lord Pearson.
[27] "Explaining Resulting Trusts", at p. 82.
[28] (1875) L.R. 10 Ch. App. 343.

themselves".[29] However, the judgments in this case make no direct reference to such a presumption. The discussion in the case is fully consistent with the view that the court was considering, in the words of Mellish L.J. in the case, whether the transfers were "intended for the purpose of gifts" or were "intended for the purpose of trusts".[30] It is true that the approach in the case is clearly inconsistent with Chambers' position but it cannot be assumed that anything which is damaging to one side of the existing Chambers/Swadling debate is necessarily supportive of the other side.

Swadling relies heavily on *Cook v Fountain*,[31] a 17th century case that seems to suggest that the fact presumed in the context of resulting trusts is that the claimant actually declared a trust in his or her own favour. Swadling quotes some of the following key passage from the judgment of Lord Nottingham (as he later became):[32]

> "All trusts are either, first, express trusts, which are raised and created by act of the parties, or implied trusts, which are raised or created by act or construction of law; again, express trusts are declared either by word or writing; and these declarations appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances presumes there was a declaration, either by word or writing, though the plain and direct proof thereof be not extant."[33]

In the passage quoted above, Lord Nottingham clearly regards what he calls "presumptive trusts" as a subset of his category of "express trusts". This is consistent with Swadling's position because, according to Swadling's argument, a

[29] "Explaining Resulting Trusts", at p. 81. Note the discussion of this argument by Penner "Resulting Trusts and Unjust Enrichment: Three Controversies", pp. 250-251.
[30] (1875) L.R. 10 Ch. App. 343, 353.
[31] (1676) 3 Swan. 585.
[32] At the time of *Cook v Fountain*, he was Lord Finch L.C.
[33] (1676) 3 Swan. 585, 591. The quote used by Swadling "Explaining Resulting Trusts", at p. 80 begins with the words "appear either by direct and manifest proof" in the middle of this passage and Swadling italicises the words "presumes there was a declaration".

resulting trust is simply an express trust where the fact that the trust has been declared has been proven though the operation of a presumption.

However, upon closer inspection of the case, it emerges that the type of "presumptive trust" which applied in *Cook* did not involve a presumption in the sense envisaged by Swadling, i.e. one that involves a process of "standardized inference",[34] whereby proof of a specific category of primary fact requires the court to find a secondary fact. Instead, what was described in *Cook* was something rather different, a process of inference from circumstantial evidence. In his recent detailed historical analysis of *Coke v Fountain*,[35] Macnair notes the apparent oddity of Lord Nottingham's reference to an express trust the declaration of which appears by presumption and goes on to state that:

> "Its explanation is a change in the meaning of 'presumption' which at the date of *Coke v Fountaine* and for some time before and afterwards meant not simply a legal rule which shifts the burden of proof, but also an item of (more or less strong) circumstantial evidence to be weighed in a calculus of proofs whose centre is the requirement of two witnesses or the equivalent to prove any matter."[36]

Thus, in the passage from *Cook v Fountain* quoted above, the phrase a "violent presumption" means "strong circumstantial evidence as opposed to any presumption of law",[37] contrary to Swadling's assumption that it refers to a modern persuasive presumption of law.[38]

In *Cook*, a trust was found to exist over two leases which had been granted to the defendant but this was on the basis of circumstantial evidence, rather than a presumption of resulting trust triggered by a voluntary conveyance.[39] Due to the lessee's being bound by covenants and being obliged to pay rent, the creation of a lease would not normally qualify as a voluntary

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[34] Swadling "Explaining Resulting Trusts", at p. 74, quoting Murphy J. in *Calverley v Green* (1984) 155 C.L.R. 242, 264 (H.C.A.).
[35] M. Macnair "*Coke v Fountaine*" in C. Mitchell and P. Mitchell (eds.) *Landmark Cases in Equity* (Oxford 2012). Note also M. Macnair *The Law of Proof in Early Modern Equity* (Berlin 1999).
[36] Macnair "*Coke v Fountaine*", at p. 58.
[37] Ibid., at p. 52.
[38] "Explaining Resulting Trusts", at p. 80.
[39] See *Cook v Fountain* (1676) 3 Swan. 585, 593-594.

transaction which could raise a presumption of resulting trust.[40] Significantly, Macnair points out that the trust that was found to exist was not a resulting trust for the grantor at all. Such a trust would have descended under the rules of heirship rather than going to the plaintiff in the case. The trust that was found to exist was instead for a third party; it would benefit the plaintiff as nominated beneficiary under the grantor's will, being a trust to hold the leases "as terms to attend the inheritance".[41] The same point is illustrated by *Oakover v Lady Pettus*,[42] cited by Lord Nottingham in *Cook* as an example of a trust shown by a "violent and necessary" presumption. In that case, a conveyance by a husband to his wife was held, on the basis of strong circumstantial evidence,[43] to be subject to a trust for his daughter – not for the husband.[44]

More generally, Macnair argues that the categorisation of trusts in *Cook v Fountain* "does not in the least represent a view consistently held by Lord Nottingham" and that it contrasts with Lord Nottingham's approach in his extra-judicial writing and in cases both before and after *Cook v Fountain*.[45] Macnair's detailed examination of the historical background to, and the procedural aspects of, the decision in *Cook v Fountain* shows it to have been designed to favour to the maximum extent the plaintiff, whose grandfather and *de facto* guardian was Lord Danby who was then Prime Minister and a political ally of Lord Nottingham.[46] Macnair explains Lord Nottingham's curious classification of trusts as having been instrumental in nature, being designed to facilitate the exclusion of strong evidence of the donative intent of the grantor of the leases.[47]

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[40] Macnair "*Coke v Fountaine*", at p. 59, citing *Warman v Seaman* (1674) 1 Freeman 306. Note also the later case of *Pilkington v Bayley* (1778) 7 Bro. Parl. Cas. 383 (H.L.).
[41] Macnair "*Coke v Fountaine*", at p. 59. See also ibid., at p. 52, referring to D.E.C. Yale's discussion of the idea of terms attendant upon the inheritance in his introduction to the second volume of *Lord Nottingham's Chancery Cases*, (1961) 79 Selden Society, pp. 150-160.
[42] (1676) Rep. temp. Finch 270; *Lord Nottingham's Chancery Cases*, (1961) 79 Selden Society, Case 347 (*sub nom Okeover v Lady Pettus*).
[43] See (1676) 3 Swan. 585, 592-593 per Lord Nottingham.
[44] See Yale's discussion of this case in (1961) 79 Selden Society, pp. 102-103. Note also that, in *Cook v Fountain* (1676) 3 Swan. 585, 592, Lord Nottingham seems to place the purchase money resulting trust in the category of "implied trusts", with "presumptive trusts" being in the other category of "express trusts".
[45] Macnair "*Coke v Fountaine*", at p. 58.
[46] Ibid., at p. 53.
[47] Ibid., at p. 59, referring back to pp. 51-53.

Interestingly, the case was not reported or cited for 150 years after it was decided.[48]

In light of all these points, it appears that *Cook v Fountain* does not support Swadling's position on the nature of the presumption of resulting trust, thus removing the key piece of judicial support he presents for his position. On the whole, therefore, it seems that Swadling's view is inconsistent with the approach of the courts.[49] What the courts have always had in mind is clearly a rule which turns on intention. The next Part explains the nature and historical origins of this rule, after which Part 3 will demonstrate how this long-standing rule is faithfully reflected in the case law up to and including modern times.

PART 2: THE EXPLANATION BASED ON INTENTION TO CREATE A TRUST

The current author shares Swadling's view that the form of the modern presumption of resulting trust was determined by the ancient presumption of resulting use.[50] It is not unusual, in fact, in the history of the law of property and trusts for rules that arose out of conditions prevailing at a particular point in history to survive for centuries after the relevant conditions have disappeared.[51] It will be seen in this Part that the presumption of resulting use, which translated into the presumption of resulting trust, was a presumption that the grantee of land was intended to be a trustee for the grantor. The continuity between the presumption of resulting use and the presumption of resulting trust becomes clear when one compares the historical material on the nature of the presumption of resulting use, discussed in this Part, with the descriptions in the modern case law of the presumption of resulting trust, discussed in the next Part.

As is well-known, the earliest trusts were known as "uses". Sir Edward Coke explained the doctrine in respect of resulting uses as follows:

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[48] Ibid., at p. 35.

[49] Note also Penner's point that the claimant has often succeeded in establishing a beneficial interest in the family home, under what he describes as a resulting trust, in modern family cases where it was accepted that there had been no express discussion between the parties (and therefore no express declaration of trust): "Resulting Trusts and Unjust Enrichment: Three Controversies", at pp. 253-257. This point is complicated by the influence in these cases of the common intention constructive trust.

[50] "Explaining Resulting Trusts", at p. 81ff.

[51] Note, for example, the ancient rule that a conveyance of land without special words of limitation would pass a life estate, rather than a fee simple. This rule survived from early feudal times until its abolition by Law of Property Act 1925, s. 60(1).

> [W]hosoever is seized of land, hath not only the estate of the land in him, but the right to take profits, which is in the 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 ….[52]

The owner of land was regarded as having, as one aspect of his ownership, the right to take the profits from the land and this was regarded as a use vested in him as owner.[53] When a resulting use was created, this pre-existing right was treated as remaining in him if he intended this to happen.[54] As was explained in St Germain's dialogue between *Doctor and Student* (1530):

> "[H]e that has land and intends to give only the possession and freehold thereof to another and keep the profits to himself ought in reason and conscience to have the profits ….."[55]

The approach of the courts focused in a "commonsensical" way[56] on the idea that the absolute owner of land held the "use" alongside the legal title and so might, in some circumstances, retain this use after a transfer of the land.[57] This

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[52] E. Coke *Institutes of the Lawes of England; or, a Commentary upon Littleton* 4th ed. (London 1639) 23a.
[53] W.H. Rowe (ed.) *The Reading Upon the Statute of Uses of Francis Bacon* (London 1804), editor's note 134 to p. 62: "uses were grown to such a familiarity that men could not think of possession but in course of use". See further N. Jones, "Uses, Trusts and a Path to Privity" [1997] C.L.J. 175, 178–182; N. Jones, "Trusts in England after the Statute of Uses: A View from the 16th Century", in R. Helmholz and R. Zimmermann (eds.), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin 1998) pp. 190-192.
[54] See Mee "'Automatic' Resulting Trusts: Retention, Restitution or Reposing Trust?", at p. 214ff; N. Jones "Uses and 'Automatic' Resulting Trusts of Freehold" [2013] C.L.J. 91, 94-98.
[55] T.F.T. Plucknett and J.L. Barton (eds.) C. St Germain *Doctor and Student* (1974) 91 Selden Society, Second Dialogue, ch. 22 [54b]; the spelling in the above quotation has been modernised.
[56] A.W.B. Simpson *A History of the Common Law of Contract* (Oxford 1987), p. 344.
[57] Modern judges and commentators have emphasised the difficulties in principle with the proposition that a person who creates a trust in his or her own favour "retains" the equitable title: *Westdeutsche Landesbanke Girozentrale v Islington London Borough Council* [1996] A.C. 669, 706 per Lord Browne-Wilkinson; Chambers *Resulting Trusts*, at pp. 51-55; Swadling "Explaining Resulting Trusts", at pp. 99-100; see also Jones "Uses and 'Automatic' Resulting Trusts", at pp. 112-114. However, the existence of these difficulties does not mean that the courts did not think in this way in the past. If the courts have built the rules on resulting trusts around "retention", a concept which does not stand up to principled analysis, this means that the relevant rules are indefensible in principle, not that they somehow have always had a different basis.

notion of retention was part of a wider picture whereby "most uses created before 1536 had been tacit resulting uses arising from feoffments made without a consideration moving from the feoffees".[58] Against this background, the courts were developing a set of basic rules as to the creation of uses upon conveyances of land. Given that it had become possible that a conveyance might not pass the beneficial interest, the key question addressed by the law of resulting uses, and now addressed by the law of resulting trusts, is "what is the effect of this conveyance on the beneficial ownership?" It is essential to avoid taking an anachronistic view of this process, whereby one would imagine that the rules on resulting uses were developed at a time when the modern rules on the institution of the trust and the idea of a "declaration of trust" were already settled and that the rules on resulting uses and trusts must have been developed with those rules in mind.

In assessing the effect of a conveyance, the courts looked to see whether it had the effect of "changing the use", so that it would pass from the grantor to the grantee. The courts were concerned with the motivation behind the transfer, the "consideration" for it, in the older sense of that word.[59] As Simpson explained, "[t]he basis of the doctrine [of consideration] in the law of uses is the idea that the factor which motivated a transaction … should be treated as determining the legal effect of the transaction."[60] If the conveyance was for value, that fact demonstrated that the transferee was to take beneficially. It was different where the conveyance was not for value. In such a case, the transferor's intention governed the transfer – it was a voluntary conveyance, a term in which the idea of *volunt* or will is encoded.[61] The transferor's will might have been made clear by an express statement that the transferee was intended to take beneficially, which would settle the use in him.[62] Alternatively, there might have been a declaration that the transferee was to hold on trust, which would also be decisive. In the absence of any expression of intention, an explanation for the

[58] J.H. Baker *The Oxford History of the Laws of England: Vol VI 1483-1558* (Oxford 2003), p. 675.
[59] On this meaning of consideration, see Simpson *A History of the Common Law of Contract*, at pp. 329-332. Compare the discussion in *State Revenue v Dick Smith Electronics* (2005) 221 C.L.R. 496, [22]-[29], [71]-[77] (consideration as "that which moves the transaction").
[60] Ibid., at p. 373.
[61] Ibid., at p. 338 n. 2.
[62] *Anon* (1535) Benl. 16.

voluntary conveyance might be found in the fact that it was made to a close family relation. If, however, there was no other explanation, it was assumed that the intention was that the transferee would be a trustee.

This rule was explained by Bacon, in his early 17th century *Reading on Uses*, on the basis that "because purchases were things notorious, and uses were things secret, the Chancellor thought it more convenient to put the purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; and so made the intendment towards the use, and put the proof upon the purchaser".[63] Another obvious explanation, also offered by Bacon, is that the rule simply reflected the prevalence of uses, having been developed at a time when "uses waxed general".[64] A key reason for the great popularity of uses was that they made it possible to create a power to leave land by will to the beneficiaries of one's choice. Thus, a person making a voluntary transfer of land to someone other than a member of his close family was unlikely to have intended to make a gift to the recipient but probably intended, rather, that the recipient should hold the property to perform the will of the transferor. The first "wills" consisted of the declaration by the transferor of his intentions as to the property, often made when he was on his deathbed.[65]

Where a person made a voluntary conveyance in order to create a power to leave land by will, it was taken for granted that he would remain undisturbed in occupation of his land as before. Thus, the creation of a trust for the grantor in the meantime was not the main purpose of the transaction. The primary point was to facilitate a subsequent declaration by the grantor of his intentions in relation to the property. Therefore, the presumption created by the courts was that the transferee should hold the land according to the wishes of the transferor or, which "was in law the same thing",[66] that the transferee would hold the land on trust for the transferor. This suggests that there was a strong link between (to use modern terminology for convenience) presumed resulting trusts and

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[63] W.H. Rowe (ed.) *The Reading upon the Statute of Uses of Francis Bacon* (London 1804) p. 22.
[64] Ibid.
[65] A.W.B. Simpson *A History of the Land Law* 2nd ed. (Oxford 1986), p. 182.
[66] Baker *The Oxford History of the Laws of England: Vol VI*, at p. 653, citing *Anon* (1549) Wm Yelv. 346, No. 72. See also *Sir Edward Clere's Case* (1599) 6 Co. Rep. 17b, 18a: "a feoffment to the use of his will, and to the use of him and his heirs is all one".

automatic resulting trusts.[67] Voluntary conveyances were frequently made with the intention that the grantee would hold on trusts to be declared later, leading to an automatic resulting trust for the grantor in the meantime. This occurred so commonly that, in the case of any voluntary conveyance to a stranger, it came to be presumed that this was the intention of the grantor. Even today, it seems that the presumption of resulting trust would not be rebutted by evidence that the transferor had intended the recipient to hold on trust for beneficiaries to be specified later and had not considered the fate of the beneficial interest in the meantime. This type of intention must be treated as falling within the presumption, having always been regarded by equity as equivalent to the intention that the transferee should hold on trust for the transferor.

PART 3: THE RULE UNDERPINNING PRESUMED RESULTING TRUSTS

The case law on resulting trusts clearly reflects the rule, described above, that was originally developed in the context of the law of resulting uses. In the leading case of *Vandervell v I.R.C.*,[68] the rule was encapsulated by Lord Upjohn in the following statement of "really elementary"[69] principle:

> Where A transfers, or directs a trustee for him to transfer, the legal estate in property to B otherwise than for valuable consideration it is a question of the intention of A in making the transfer whether B was to take beneficially or on trust and, if the latter, on what trusts."[70]

This statement makes clear that the effect of a voluntary transfer, and whether it amounts to a gift or creates a trust, depends on the intention of the transferor.[71]

Notwithstanding Chambers' assertion that there are other relevant possibilities,[72] it is clear that the courts have seen only two alternatives in terms

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[67] Compare Jones "Uses and 'Automatic' Resulting Trusts", fn. 56 on pp. 98-99.
[68] [1967] 2 A.C. 291.
[69] Ibid., 314.
[70] Ibid., 312. The last six words of this passage, and Lord Upjohn's clear approval (ibid., 313) of the decision of Bacon V.-C. in *Re Curteis' Trusts* (1872) L.R. 14 Eq. 217, raise wider questions as to the basis for the creation of trusts, other than resulting trusts, upon a voluntary transfer of property. Unfortunately, it is not possible to pursue these issues in the present article.
[71] See also *Lavelle v Lavelle* [2004] EWCA Civ 223; [2004] 2 F.C.R. 418, [13] *per* Lord Phillips M.R.: "Where one person, A, transfers the legal title of a property that he owns or purchases to another, B, without receipt of any consideration, the effect will depend on his intention".

of the intention motivating a voluntary transfer or the purchase of property in the name of a third party – that the transaction in question was intended as a gift or was intended as a trust. In *Shephard v Cartwright*,[73] Lord Morton pointed out that a person in whose name shares had been acquired "must have taken those shares either as beneficial owner or as a trustee [either under a bare trust or under certain defined trusts]". His Lordship saw "no third possibility which would be recognised by English law".[74] He rejected the "half-way house"[75] that had been posited by Evershed M.R. and Romer L.J. in the Court of Appeal, in reliance on the old case of *Devoy v Devoy*,[76] whereby the transferor could be regarded as having an intention "betwixt and between"[77] an intention to make a gift and an intention to create a trust. Thus, the task of the court is to allocate the intention of the transferor to one category or the other, even when that intention was confused or the available evidence is contradictory.[78]

In terms of the plausibility of the transferor intending the recipient to be a trustee, it must be remembered that a resulting trust is a bare trust. In *Shephard*, Lord Morton was unable to believe that the father would have intended to make his 16-year-old son, in whose name the father had acquired shares, "a trustee with duties to discharge and trusts to carry out".[79] This ruled out the possibility that the father's intention had been to create "some complicated trust",[80] leaving only the two possibilities that the son was intended to receive a gift or to be a

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[72] *Resulting Trusts*, pp. 21-27. One scenario discussed by Chambers involves cases of "ignorance", where e.g. the claimant's money was used without his authorisation in a purchase. In such cases, the intention of the claimant is irrelevant and the facts fall outside the scope of the presumption of resulting trust, which is a presumption as to the intention motivating a claimant who (himself or herself) makes a voluntary transfer or "in the character of a purchaser" (*Davies v National Trustees Executors and Agency Co of Australasia Ltd* [1912] V.L.R. 397, 401 per Cussen J) pays the purchase price of property. Cases of "ignorance" fall to be dealt with under tracing principles. A link between tracing and resulting trusts was suggested in the early case of *Ryall v Ryall* (1739) 1 Atk. 59, 60 *per* Lord Hardwicke but this line has not been followed in the later case law (as Chambers implicitly accepts in *Resulting Trusts*, pp. 22-23).
[73] [1955] A.C. 431 (H.L.).
[74] Ibid., 451.
[75] Ibid., 452.
[76] (1857) 3 Sm. & G. 403.
[77] [1953] Ch. 728, 765 *per* Romer L.J.
[78] See e.g. *Dullow v Dullow* (1985) 3 N.S.W.L.R. 531 (C.A.). In practice, in a difficult case it may make a difference which presumption is applicable: see *Brown v Brown* (1993) 31 N.S.W.L.R. 582 (C.A.).
[79] [1955] A.C. 431, 452.
[80] This expression was used by counsel in argument in *Shephard* ibid., 439.

bare trustee.[81] Thus, as Lord Morton recognised, the fact that a person would have been quite unsuitable to be a trustee under a different type of trust does not rule out the possibility that the transferor intended the relevant person to hold as a bare trustee.

The point is illustrated by a common fact pattern in the older resulting trust case law that involves stock being purchased in, or transferred into, the joint names of the transferor and a friend or relation. The most obvious intention on the part of the transferor – said by James L.J. in *Fowkes v Pascoe* to apply "universally" in this kind of situation[82] – is that he or she would retain the beneficial interest (and, therefore, the entitlement to dividends) during his or her lifetime, with the other party becoming beneficially entitled by survivorship upon the transferor's death. As in *Fowkes*, such an intention leads to a resulting trust for the lifetime of the transferor.[83] It seems that this would have been the appropriate result on the facts of *Re Vinogradoff*,[84] a case relied upon by Chambers as an example of a resulting trust arising when it was improbable that the transferor intended to make the transferee a trustee. In *Vinogradoff*, a woman transferred stock into the joint names of herself and her four-year-old niece and took the income for herself during her lifetime. The facts strongly suggest that the aunt intended that the gift to the niece would only take effect on the aunt's death and the aunt would retain the beneficial interest during her lifetime. A person can be intended to be a passive nominee at any age.[85]

I. THE PRESUMPTIONS

[81] Ibid., 451-452. The ultimate decision of the House of Lords was that the transactions at issue were gifts.
[82] (1875) L.R. 10 Ch. App. 343, 351.
[83] Ibid., 351 *per* James L.J.
[84] [1935] W.N. 68.
[85] The actual result in *Vinogradoff* was that the resulting trust was not confined to the lifetime of the transferor, who was held to be absolutely entitled under a resulting trust. Chambers argues (*Resulting Trusts* pp. 25-26) that his view of resulting trusts better explains this result, since it was improbable that the transferor intended to make the niece a trustee. It would not be much of a recommendation for Chambers' theory if it could be said to justify "atrocious" (see J. Penner *The Law of Trusts* 8th ed. (Oxford 2012) p. 119) outcomes such as that in *Re Vinogradoff*. In any event, it is no more probable that the aunt "did not intend to benefit" the child than that the aunt intended to make the child a trustee. The problem with the decision on the facts is that it is clear that the aunt intended to confer a benefit on the child (upon the aunt's death).

In determining what intention explains the transaction, the courts are assisted by presumptions which apply where there is no evidence "of the intention with which a transfer is made".[86] The applicable presumptions are, of course, the presumption of resulting trust, which applies when the transaction is between "strangers", and the presumption of advancement, which applies when the transferee is the wife or child of the transferor.[87] The nature of the presumptions was explained by Jessel M.R. in *Marshal v Crutwell*,[88] in light of the authoritative statements of principle by the Court of Appeal in *Fowkes v Pascoe*.[89] Jessel M.R. regarded the task of the court as being to "infer from the surrounding circumstances what the nature of the transaction was".[90] He explained that:

> "The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."[91]

As this passage indicates, the presumption of advancement is a presumption that the transferor or purchaser intended the recipient to take the property as a gift

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[86] *Lavelle v Lavelle* [2004] 2 F.C.R. 418, [13] *per* Lord Phillips M.R.
[87] The precise parameters of the presumption of advancement need not be discussed in detail here. The abolition of the presumption of advancement was envisaged by Equality Act 2010, s.199 but this provision has not been brought into force. See generally J. Glister "Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement" (2010) 73 M.L.R. 807.
[88] (1875) L.R. 20 Eq. 328.
[89] (1875) L.R. 10 Ch. App. 343.
[90] (1875) L.R. 20 Eq. 328, 331. The focus on the motivation behind the transfer reflects the rule originally developed in the context of resulting uses. See also *Christy v Courtenay* (1850) 13 Beav. 96, 99 where Lord Langdale M.R. looked to determine "the character of the transactions, at the time they took place" or, in other words, to assess "what, at the time of these transactions, the father meant to do"; and *Sayre v Hughes* (1868) L.R. 5 Eq. 376, 382 where Sir John Stuart V.-C. stated that the property had been transferred "and the question is, for what purpose?"
[91] (1875) L.R. 20 Eq. 328, 329.

and the presumption of resulting trust is a presumption that the transferor intended the recipient to take as a trustee for the grantor.

Although in most cases the courts do not spell out the nature of the presumption of resulting trust, this seems quite natural. The label "presumption of resulting trust" is fairly self-explanatory, in a way which is not the case under Swadling's or Chambers' model, since it is a "presumption that it was a trust and not a gift".[92] However, a number of cases make clear that the presumption of resulting trust is that the recipient was intended to take as a trustee for the transferor. Occasionally, this is stated baldly, as it was by the New South Wales Court of Appeal in *Dullow v Dullow*:[93] "It is presumed that the intention of the person paying the purchase price is that the property should be held by the person having the legal title in trust for him."[94] In other cases, it is stated slightly more indirectly. Thus, for example, in *Murless v Franklin*[95] Lord Eldon regarded it as settled that "if A. purchases with his own money, and the conveyance is taken in the name of B., an implied trust in favour of A. arises from the payment of the purchase money". However, by way of exception where the presumption of advancement applies, "if a man purchases in the name of his son, and no act is done to manifest an intention that the son shall take as trustee, *that intention* will not be implied from the payment of the purchase money by the father".[96]

In another class of case, the nature of the inquiry emerges clearly from the court's overall approach, often in the context of the possible rebuttal of the

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[92] *Fowkes v Pascoe* (1875) L.R. 10 Ch. App. 343, 352 *per* Mellish L.J.

[93] (1985) 3 N.S.W.L.R. 531.

[94] Ibid., 534 *per* Hope J.A.; Kirby P. and McHugh J.A. concurring. See also *Benger v Drew* (1721) 1 P. Wms 781, 781 per Lord Macclesfield: transferee "is in equity to be intended but as a trustee for [those] by whom the purchase money was advanced"; *Re Kerrigan* (1946) 47 S.R. (N.S.W.) 76, 81 *per* Jordan C.J.: "It has long been established that if a person buys property real or personal, and causes the title which he so acquires to be vested in another, a court of equity, in the absence of evidence of contrary intention on the part of the buyer, raises, and gives effect to, a presumption that the buyer intended the other to hold the beneficial title in trust for the buyer, and so creates a resulting trust."

[95] (1818) 1 Swan. 13.

[96] Ibid., 18 (emphasis supplied). See also *Standing v Bowring* (1885) 31 Ch. D. 282 which involved a voluntary transfer of stock into the joint names of the transferor and her godson. The transferor sought to establish that she was absolutely entitled to the stock under a resulting trust (and not merely entitled to the exclusion of the godson during her lifetime). Lindley L.J. stated (ibid., 289) that "it is impossible to impose such a trust on the Defendant, when the evidence conclusively shews that [the transferor] never intended to create any trust of the kind." He went on to insist that: "[t]rusts are neither created nor implied by law to defeat the intentions of donors or settlors; they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied."

presumption of advancement. Consider, for example, *Sidmouth v Sidmouth*,[97] where Lord Langdale M.R. noted that the applicable law "is subject to so little doubt that it has not been questioned in the argument of this case".[98] He stated that the presumption of advancement could be rebutted by evidence "manifesting an intention that the child shall take as a trustee".[99] He went on to explain that "[s]ubsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so".[100] He proceeded to examine the evidence, seeking to determine if there was "anything to manifest an intention to make the son a trustee for the father".[101] His view was that the evidence did not show that the father "intended his son to be a mere trustee for him"[102] and he concluded that the presumption of advancement had not been rebutted.

II. Positive and Negative Formulations

Given that the courts are concerned to determine whether the relevant transaction is a gift or a trust, there are obviously different ways to phrase the essential question. As well as asking whether the transaction was intended as a gift or a trust, the courts sometimes ask whether or not the transaction was intended as a trust[103] or whether or not the transfer was intended as a gift to the transferee. Also, to the same effect, the courts sometimes consider whether or not the transferor intended to retain the beneficial interest[104] or, in other words, whether or not the transferor intended that the beneficial interest would pass to the transferee. The formulations mentioned in the last sentence reflect the

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[97] (1840) 2 Beav. 447. See also *Shales v Shales* (1701) 2 Freem. 252, 252-253 *per* Wright L.K.; *Finch v Finch* (1808) 15 Ves. Jun. 43, 52 *per* Lord Eldon; *Jeans v Cooke* (1857) 24 Beav. 513, 520-521 *per* Sir John Romilly M.R.; *Christy v Courtenay* (1850) 13 Beav. 96, 98-99, 101 *per* Lord Langdale M.R.; *Beecher v Major* (1865) 2 Dr. & Sm. 431, 435-437 *per* Kindersley V.-C.; *Sayre v Hughes* (1868) L.R. 5 Eq. 376, 382-383 per Sir John Stuart V.-C.; *Chettiar v Chettiar* [1962] A.C. 294, 302 (P.C.) *per* Lord Denning; *Re Bishop* [1965] Ch. 450, 459G-460B; 460G-461A; 463D-E; 463G-464A *per* Stamp J.

[98] (1840) 2 Beav. 447, 454.

[99] Ibid.

[100] Ibid., 455.

[101] Ibid., 456.

[102] Ibid 457.

[103] *Scott v Pauly* (1917) 24 C.L.R. 274, 281 (H.C.A.) *per* Isaacs J.: "No doubt, when all the circumstances are before the Court, the intention of the purchaser to make or not to make the holder of the title trustee is to be determined as a question of fact."

[104] See *Shephard v Cartwright* [1955] A.C. 431, 454 *per* Lord Reid.

strong influence of the idea of retention on the law of resulting trusts. The notion that the beneficial interest resided in the transferor prior to the transfer meant that the question of whether a resulting trust arose could be cast in terms of an inquiry into whether the conveyance altered the location of the pre-existing beneficial interest rather than in terms of the possible creation *de novo* of such an interest. Thus, while this article's phrasing of the basis of the presumed resulting trust in terms of an intention to "create" a trust is accurate in modern terms, the courts often express the same idea in a way that reflects the older idea of retention (so that the equivalent "intention to create a trust" phrasing may seem initially unfamiliar).

Although not acknowledging the role of the idea of retention, Chambers focuses on the language sometimes used by the courts under its influence. He identifies two "main views [in the case law] on the intention being presumed". He suggests that "[t]he first, and seemingly most popular, is that the provider of the property intended to create a trust for himself or herself".[105] The alternative view, which Chambers regards as the better one, "is that the provider did not intend to give the benefit of that property to the recipient".[106] He argues that "this distinction is crucial to our understanding of the resulting trust and of important practical consequences".[107] However, on the view taken in this article, it is misconceived to regard the statements in the case law as reflecting two competing paradigms as to the fact being presumed. Because the courts are making a choice between the two categories of "gift" and "trust", a conclusion that the transferor did not intend a gift (or, to use the languge of retention, did not intend to pass the beneficial interest to the transferree) is equivalent to a conclusion that the transferor did intend to create a trust. It is not the case, as Chambers' view implies, that the courts have been confused, alternating between inconsistent formulations of basic doctrine and failing to notice the serious practical consequences of this confusion, while frequently stating that the law is well settled and free from doubt.[108] Instead, the equivalence of the positive and

[105] *Resulting Trusts*, p. 19.
[106] Ibid.
[107] Ibid.
[108] Compare T.H. Tey "Resulting Trusts in Singapore" (2011) 23 Singapore Academy of Law Journal 607, 612, suggesting that "Singapore judges … haphazardly endorse more than one doctrinal basis within a single decision".

negative formulations explains why courts have appeared to vacillate between them.[109]

The point is illustrated by *Lavelle v Lavelle*,[110] where Lord Phillips M.R. referred to "a presumption that A does not intend to part with the beneficial interest in the property".[111] This might appear to indicate support for Chambers' position until one notices that in the previous paragraph the judge had stated that a resulting trust would arise if A "intends to retain the beneficial interest for himself". Thus, as frequently happens in the case law, the judge was using the negative and the positive formulations interchangeably.[112] This makes perfect sense on the model discussed in this article but not on either Chambers' or Swadling's view (since only the negative formulation is consistent with Chambers' model and only the positive formulation, with the qualification that references to intention must be taken to be hidden references to declaration, fits Swadling's model).

A similar point applies to the language used in *Nelson v Nelson*,[113] a case that has been interpreted as demonstrating that the Australian courts now support Chambers' model.[114] In *Nelson*, there were references to the finding of a lower court (phrased there in these terms) that Mrs. Nelson had "no intention … to confer any beneficial interest" on her children, in whose name she had purchased land.[115] However, in the High Court of Australia, the same finding was also described on a number of occasions in positive terms, e.g. in a reference to the concealment by Mrs. Nelson "of what she was found always to have intended

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[109] The language used will also be affected by whether the court is describing the basis of presumed resulting trusts only or is attempting to encompass "automatic" resulting trusts as well. Unlike presumed resulting trusts, automatic resulting trusts cannot be said to turn on an intention on the part of the transferor to create a trust for himself. Note that the statement by Lord Millett in the Privy Council in *Air Jamaica v Charlton* [1999] 1 W.L.R. 1399, 1412 that the resulting trust "responds to the absence of any intention on his part to pass a beneficial interest to the recipient" was made in the context of an automatic resulting trust case. For the present author's position on automatic resulting trusts, see Mee "'Automatic' Resulting Trusts: Retention, Restitution or Reposing Trust?".

[110] [2004] 2 F.C.R. 418.

[111] Ibid., at [14].

[112] For another example, see *Sayre v Hughes* (1868) L.R. 5 Eq. 376, 382 *per* Sir John Stuart V.-C.: "Did she intend the daughter to be a trustee for her? There seems to be no rational motive for that …. and therefore I cannot presume that no benefit to her daughter was intended."

[113] (1995) 184 C.L.R. 538.

[114] J. Edelman and E. Bant *Unjust Enrichment in Australia* (South Melbourne 2006) p. 60.

[115] Quoted (1995) 184 C.L.R. 538, 586-587 by Toohey J. See also e.g. ibid., 545 and 549 *per* Deane and Gummow JJ.

to be her beneficial ownership" in the disputed property.[116] The case creates no difficulty for the model under discussion.[117]

III. Statutory Formality Rules Related to Land

In this final section of this Part, it is necessary to consider the specific issues that arise in relation to presumed resulting trusts over land. Some of the issues are illustrated by *Hodgson v Marks*,[118] a case regarded by Chambers as damaging to the view that the presumption of resulting trust is a presumption of an intention to create a trust.[119] The claimant in *Hodgson*, an elderly woman, had made a voluntary conveyance of her home to her scheming lodger, on the basis of an oral arrangement that the lodger would hold it on trust for her. It was argued, on behalf of an innocent purchaser from the lodger, that the woman's claim to be entitled to the house in equity was defeated by section 53(1)(b) of the Law of Property Act 1925, which states that "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will". It was accepted in the Court of Appeal that the claimant was entitled to succeed on the basis of the principle that a statute cannot be used as an instrument of fraud.[120] In addition, Russell L.J. held that, because the evidence showed clearly "that the transfer was not intended to operate as a gift",[121] the claimant could establish a resulting trust, a type of trust exempted by section 53(2) from the application of section 53(1) of the Law of Property Act. He rejected the argument of counsel that, because an express trust had been declared "ineffectively" there was "no

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[116] Ibid., 546 *per* Deane and Gummow JJ. See also ibid., 571 *per* Deane and Gummow JJ. and note ibid., 599 per McHugh J.: "her proven intention to retain the beneficial interest … gave rise to a resulting trust".

[117] There are parallels between *Nelson* and *Martin v Martin* (1959) 110 C.L.R. 297 (H.C.A.). In *Martin*, the first instance judge had held that the husband "did not intend that his wife should have the beneficial ownership of the land" he had purchased in her name. In the next sentence after noting this finding (ibid., 303), the judgment of the High Court of Australia (Dixon C.J.; McTiernan, Fullagar and Windeyer JJ.) stated that "[i]t was of course for [the husband] to make out positively that his wife did not take the land beneficially but as a trustee for him". The judgment goes on to state (ibid., 304) that "[t]he burden of proof is firmly placed upon the person asserting that a trust was intended but the issue depends upon the intention with which the property was purchased".

[118] [1971] Ch. 892.

[119] See e.g. *Resulting Trusts*, at p. 25, p. 44, p. 101.

[120] Ibid., 933F-G *per* Russell L.J. (Buckley and Cairns LJJ. concurring).

[121] Ibid., 933.

room" for the creation of a resulting trust.[122] This argument would have led to the "strange outcome" that a claimant would succeed if her evidence was "confined to negativing a gift" but not if it went further and showed that there had been an express declaration of trust.[123]

Russell L.J.'s conclusion is consistent with the view of resulting trusts taken in this article, which suggests that there is no essential difference between a resulting trust arising, in the context of a voluntary transfer, on the basis of unexpressed intention and a bare trust in favour of the grantor that has, in the same situation, been the subject of an express declaration. The underlying rule as to whether the grantor will retain her beneficial interest depends on her intention, whether expressed or not. A resulting trust was triggered by the intention of the transferor to make the transferee a trustee for her, which can equally be described in terms of an intention not to make a gift to the transferee. The creation of such a trust is not affected by the fact that there may have been an express statement of the relevant intention.[124]

Having discussed *Hodgson*, it is necessary to comment more generally on the relationship between the presumed resulting trust over land and section 7 of the Statute of Frauds 1677, the predecessor of section 53(1)(b). Chambers takes the view that, if resulting trusts over land were simply a form of express trust as Swadling believes, they would not have fitted within the exemption in section 8 of the Statute of Frauds, the predecessor of section 53(2) of the Law of Property Act 1925, for any trust that "may arise or result by the implication or construction of law". Chambers argues that it would be surprising for the courts to have recognised resulting trusts over land if this had involved, as he suggests it would have on Swadling's theory, the courts having been willing "to completely disregard Parliament's statutory requirement of form from the

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[122] Ibid.

[123] Ibid.

[124] The current author does not suggest that all aspects of Russell L.J.'s brief discussion of resulting trusts can be reconciled with principle. For example, the learned judge appears to have misunderstood the effect of section 53(1)(b) in the context of an oral declaration of trust over land and his idea (ibid., 933) that an express trust can fail for "lack of form" (triggering a resulting trust in the same way as if the express trust had failed for uncertainty or perpetuity) has been convincingly criticised by W. Swadling "A Hard Look at Hodgson v Marks" in P. Birks and F. Rose (eds.) *Restitution and Equity Volume 1* (London 2000), pp. 69-73.

beginning, without even debating the point".[125] It might be thought that this criticism would also apply, albeit with somewhat less force, in relation to the model defended in this article because, although this model does not suggest that resulting trusts over land are express trusts, it does regard them as intention-based trusts.

However, the premise underlying Chambers' criticism is contradicted by the actual history of the matter. Notwithstanding the assumption to the contrary in *Hodgson*, the better interpretation of the older case law appears to be that, whatever the position before the Statute of Frauds, the voluntary transfer resulting trust in respect of land did not actually survive that statute.[126] Furthermore, a number of cases from the late 17th and early 18th centuries suggested that section 7 of the Statute of Frauds "had the effect either of abolishing or severely restricting the resulting trust arising from the provision of purchase money".[127] These cases were ultimately discredited and the purchase money resulting trust was regarded as falling within the exception in section 8 of the Statute of Frauds[128] but the controversy continued to be discussed into the 19th century.[129] Thus, the history of the matter suggests, as might have been expected on the model defended in this article, that the question of the

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[125] "Is There a Presumption of Resulting Trust?" p. 280.

[126] See the detailed discussion in J. Mee "Resulting Trusts and Voluntary Conveyances of Land, 1674-1925" (2011) 32 Journal of Legal History 215; *Lloyd v Spillet* (1740) 2 Atk. 148, 150; (1740) Barn. Ch. 384, 387-88 *per* Lord Hardwicke ("since the Statute of Frauds … there could be no such resulting trust"); *Young v Peachy* (1741) 2 Atk. 254; *Fowkes v Pascoe* (1875) L.R. 10 Ch. App. 343, 348 *per* James L.J.; *Pink v Pink* (1912) 2 Ch. 528, 536-537 *per* Farwell L.J., explaining as inaccurately phrased a dictum to the contrary by Jessel M.R. in *Strong v Bird* (1874) L.R. 18 Eq. 315, 318. Note also J. Mee "Resulting Trusts and Voluntary Conveyances of Land" [2012] Conv. 307, arguing that Law of Property Act 1925, s. 60(3) was drafted on the basis of this view of the law and that its purpose was to eliminate the possibility that a resulting *use* might arise upon a voluntary conveyance of land.

[127] M. Macnair *The Law of Proof in Early Modern Equity* (Berlin 1999) p. 163. The line of cases to which he refers, which also suggested that the Statute of Frauds prevented the tracing of money into land, is *Kirk v Webb* (1698) Prec. Ch. 84; *Newton v Preston* (1699) Prec. Ch. 103; *Kinder v Miller* (1701) Prec. Ch. 171; *Halcott v Markant* (1701) Prec. Ch. 168; *Shales v Shales* (1701) 2 Freem. 252; *Skett v Whitmore* (1705) 2 Freem. 280.

[128] Note that, as discussed in Part 5 below, in the purchase money situation an express declaration of trust by the provider of the purchase money would not be sufficient in itself to create a trust of the land purchased in the name of a third party because the provider of the money was never the legal owner of the land. It is only by a process of "implication or construction of law" that a trust can be said to arise in favour of the provider of the money on the basis that he or she is the real purchaser and his or her intention should govern the question of ownership in equity.

[129] T. Lewin *A Practical Treatise on the Law of Trusts and Trustees*, 1st ed., (London 1837) pp. 222-224.

relationship between presumed resulting trusts over land and the Statute of Frauds was not an easy one for the courts.

PART 4: INTENTION MAKES NOTHING HAPPEN?

As has been mentioned, although strongly rejecting the Birks/Chambers' theory, Swadling also rejects the "intention to create a trust" model favoured in this article. This Part responds to his key objection to this model. It has been seen that, on Swadling's argument, the resulting trust is simply an express trust, which has as its only distinguishing feature the fact that the declaration of trust is proven by presumption rather than by direct evidence. Swadling argues that if the presumption were merely one of intention "we would be dealing with a rule of substantive law, not procedure, for an unexpressed intention to create a trust when proved by evidence does not generate a trust".[130] However, even on Swadling's view, there is a rule of substantive law in operation, one governing the creation of express trusts by declaration. The position taken in this article is that Swadling mistakes the nature of the substantive rule with which the presumption interacts. As was argued in the previous Part, the relevant substantive rule, stated explicitly in the cases and described as being settled beyond dispute, is that, upon a voluntary transfer of property, whether or not the beneficial interest remains with the transferor is determined by the intention of the transferor.

Swadling's argument proceeds on the basis of an exclusively "modern" understanding of the creation of trusts by a settlor. On this view, the settlor has various powers as owner of his or her property, one of which is to create a trust. The settlor can create a trust either by declaring a trust upon a transfer of the property to a trustee or else, without any transfer, by declaring himself or herself to be a trustee of the property. In both cases, it is necessary that there be some external expression or "manifestation of intent on the part of the person wishing to create such a trust".[131] Trusts created by the settlor respond ultimately to the intention of the settlor but, in order to create a trust, the settlor's intention must

[130] "Explaining Resulting Trusts", at p. 80.
[131] W. Swadling "Property" in A. Burrows (ed) *English Private Law* 3rd ed. (Oxford 2013) p. 215.

be mediated through some express declaration or other objectively verifiable manifestation of intention that can be seen as an exercise by the settlor of his or her power to create a trust. The view advanced in this article is that the rules on resulting trusts were, in fact, developed on the basis of a much older, and now less familiar, vision of the creation of trusts. As has been suggested above, whether a voluntary conveyance of land would pass the beneficial interest was regarded as depending directly on the intention of the grantor.

To support his argument that an unexpressed intention is insufficient to create a trust, Swadling relies upon the comment of Megarry J. in *Re Vandervell's Trusts (No. 2)* that "the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result".[132] However, it seems clear from his judgment as a whole that Megarry J. did not support the view favoured by Swadling. Earlier in his judgment, Megarry J. had stated that "in the first category [i.e. presumed rather than "automatic" resulting trusts], subject to any provisions in the instrument, the matter is one of intention, with the rebuttable presumption of a resulting trust applying if the intention is not made manifest".[133] It is difficult to see how this can be squared with Swadling's core argument that the function of the presumption is to prove that the intention has in fact been made manifest. It is not, of course, surprising that Megarry J. believed that "the matter is one of intention", given that his main preoccupation was to interpret the speeches of the Law Lords in *Vandervell v I.R.C.*[134] where, as has been pointed out earlier in this article, the emphasis was also placed firmly on intention.

Megarry J. prefaced the words quoted by Swadling with the word "Normally"[135] and, after adding the sentence "To yearn is not to transfer", went on to state his next, apparently linked, proposition as follows: "(3) Before any doctrine of resulting trust can come into play, there must at least be some

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[132] [1974] Ch. 269, 294, quoted in "Explaining Resulting Trusts", at p. 80. See also, taking the same view on the insufficiency of intention to create a (non-restitutionary) trust, R. Chambers "Is There a Presumption of Resulting Trust?", at p. 279.
[133] [1974] Ch. 269, 289.
[134] [1967] 2 A.C. 291.
[135] Megarry J. also noted ([1974] Ch. 269, 294) that his propositions "are the broadest of generalisations, and do not purport to cover the exceptions and qualifications that doubtless exist".

effective transaction which transfers or creates some interest in property."[136] In the sentence relied upon by Swadling, Megarry J. referred to an "unexpressed intention in the breast of the *owner* of the property", not to an unexpressed intention on the part of "the transferor" of property. Thus, Megarry J. appears to have been addressing the situation where the settlor makes himself or herself a trustee outside the context of any transfer of the property. While a person can make himself or herself a trustee by simply declaring himself or herself to be such, he or she will not become a trustee if, inside his or her own head, he or she merely resolves or intends that this should happen, without actually making a declaration to that effect. In that context, an unexpressed intention does not suffice to turn the owner of the property into a trustee.

In considering the significance of the fact that unexpressed intention is not operative in the context of making oneself a trustee through a self-declaration of trust, it is important to understand that "[i]t was only at a comparatively late date that the anomalous doctrine became established that there could be a self declaration of trust without consideration".[137] The rules in relation to resulting uses and trusts had long been in existence when "without even discussing the point",[138] in his "unfortunate"[139] decision in *Ex parte Pye* in 1811,[140] Lord Eldon created the rule that a gratuitous self-declaration of trust is valid.[141] The new rule was anomalous because, in respect of a declaration of trust outside the context of any transfer or other legally significant event (such as the making of a contractually binding "covenant to stand seised"),[142] equity could not follow its practice of asking "what was the motivation of the transferor in entering into this transaction?" No transaction had been entered into which one could attempt to explain. In light of this, it can be seen that the expression of intention in the context of a self-declaration of trust plays a different role than in

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[136] Ibid.
[137] H.F. Stone "The Nature of the Rights of the Cestui Que Trust" (1917) 17 Columbia Law Review 467, 474.
[138] G.S. Alexander "The Transformation of Trusts as a Legal Category, 1800-1914" (1987) 5 Law and History Review 303, 329.
[139] *Jones v Lock* (1865) 1 Ch. App. 25, 28 *per* Lord Cranworth ("some decisions, unfortunate I must think them").
[140] (1811) 18 Ves. Jr. 140.
[141] See generally, Alexander "The Transformation of Trusts as a Legal Category", at pp. 328-332; K.W. Ryan "Equity and the Doctrine of Consideration" (1964) 2 Adelaide Law Review 189, 199-201.
[142] See Simpson *A History of Common Law of Contract*, at p. 348ff.

the context of a voluntary transfer of property to another person. In the self-declaration situation, the declaration is not merely evidence of the settlor's motive in entering into a particular transaction in a situation where equity regards that motive as controlling the effect of the transaction – instead, the declaration of trust is *in itself* the transaction and so cannot be a purely internal matter. While the rule originating in *Re Pye* has now been absorbed into the legal system,[143] the much older rules in relation to the resulting trust were settled long before the arrival of Lord Eldon's upstart. It does not make sense to expect the older rules to conform to the logic of rules that were established much more recently.

A further point relates to the concept of retention. Swadling contends that intention in itself makes nothing happen but, on the retention model upon which the law of resulting trusts was developed, a finding of resulting trust is actually a conclusion that "nothing" has happened to the beneficial interest – it has "remained" where it was. The self-declaration situation is different, however, since there is obviously no question of a settlor constituting himself or herself as a trustee for himself or herself. Any trust that is created in this scenario must be for someone else and, in this situation, the beneficial interest (in the terms of the retention model) is passing away from the settlor to someone else, not merely staying where it is. Thus, a desire to respect the position of the owner of property, operating in different ways, is seen in the different rules that apply in the two situations. In relation to a voluntary conveyance, the doctrine of resulting trusts will not regard the owner as giving away the beneficial ownership if this would be contrary to his or her intention; in relation to a possible self-declaration of trust, equity will not treat the owner as depriving himself or herself of the beneficial ownership unless he or she gives some external sign that this is to happen.

PART 5: THE PURCHASE MONEY SCENARIO

[143] The rule can still be seen as radical. Note the comment of J. Hackney *Understanding Equity and Trusts* 2nd ed. (London 1987), 109 writing in the context of personal property: "No other device in the legal system approaches the massive power of these spoken words in Equity: 'I declare myself trustee of this for you.'"

The arguments in the preceding Parts have suggested that a "mere" intention on the part of the settlor is sufficient to create a resulting trust and that therefore, contrary to Swadling's view, it is not necessary to strain credibility by suggesting that in the relevant situations the courts have been making a presumption of an express declaration of trust. The further argument is made in this Part that, in the purchase money resulting trust situation, Swadling's proposed model breaks down. In this context, the idea of a presumption of an express declaration appears to be insufficient to lead to the creation of an express trust in the manner required by Swadling's model.

The crucial point is that the purchase money resulting trust scenario does not involve a direct transfer of property from the settlor to the nominal purchaser. Consider a situation where A pays the purchase price of an item of property to B, the vendor, who then transfers it to C, the nominal owner. In the absence of a substantive rule of equity to the effect that, because A has paid for the property, what he or she intends is decisive – the existence of which Swadling denies – on what basis is A able to create a trust in the scenario under discussion? Both before and after the transfer of the property from B to C, A has had no legal ownership of the property. Therefore, A was never in a position to have declared an express trust over the property and so nothing is achieved by presuming that he or she did so. Thus, in the simple form in which it was originally stated by Swadling,[144] the view that the provider of the purchase money is presumed to have declared a trust in his or her own favour is not tenable.

Swadling now appears to have refined his position. In a recent contribution he states that, in the purchase money scenario, the presumption is "to the effect that the purchaser had obtained the agreement of the person to whom the title was eventually transferred to hold it for him on trust".[145] Swadling cites no authority to support this suggestion, which implausibly requires the constant references in the case law to the intention of the claimant

[144] See "Explaining Resulting Trusts", at p. 102: "the voluntary conveyance and purchase money resulting trusts [arise] because of the operation of a true presumption, the fact proved by presumption being that the transferor declared a trust in his own favour".
[145] W. Swadling "Legislating in Vain" in A. Burrows, D. Johnston and R. Zimmermann (eds.) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford 2013) p. 662.

to be read as referring to an intention that has both been declared by the claimant *and* assented to by the nominal owner. Furthermore, if this were the nature of the presumption, it would be rebutted by evidence showing that nominal owner had never agreed with the claimant that he or she would be a trustee. This cannot be reconciled with the fact that the cases allow for a resulting trust where the nominal owner was unaware of the purchase in his or her name. This is shown by *Shephard v Cartwright*,[146] where the children had been unaware of the registration in their names of shares for which their father had "supplied the cash"[147] but the House of Lords evidently did not regard this as precluding a resulting trust (though it ultimately concluded on the facts, disagreeing with the Court of Appeal, that no trust was created).

Thus, Swadling's "presumed declaration of trust" model runs into difficulties in the purchase money context. The view taken in this article is that equity has dealt with the matter by analogy with the voluntary transfer situation.[148] The purchase money situation is treated as if A, "the real purchaser", had acquired the property for value from the vendor and had then made a voluntary transfer to C, the nominee. The intention of A is regarded as governing the situation, as it is in the voluntary transfer scenario.

CONCLUSION

This article has argued that presumed resulting trusts arise on the basis of a very old rule that the creation of a trust upon a voluntary conveyance of property – and, by analogy, in the purchase money scenario – depends ultimately on the intention of the transferor. This point is clearly demonstrated by the historical material on the presumption of resulting use and by the discussion in the more modern case law on presumed resulting trusts. The explanation offered in this article is, it is submitted, much more firmly rooted in the case law than the competing rationalisations advanced by Swadling and Chambers.

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[146] [1955] AC 431. See also *Sidmouth v Sidmouth* (1840) 2 Beav. 447. Compare, in the voluntary transfer context, cases such as *Duke of Norfolk v Browne* (1697) Pr. Ch. 80; *Re Vinogradoff* [1935] W.N. 68.

[147] Ibid., 445 *per* Viscount Simonds. The case involved the acquisition of shares upon allotment, which was expressly treated by Viscount Simonds (ibid.) as indistinguishable from the purchase of shares.

[148] See the reference by Eyre C.B. in *Dyer v Dyer* (1788) 2 Cox 92, 93 to a "strict analogy" with the rules on resulting uses upon voluntary conveyances.

The article has suggested that Swadling is mistaken to assume that the rules governing the creation of a trust upon a voluntary transfer of property must conform to the "declaration" model suggested by the rules developed (much more recently) in the different context of a self-declaration of trust. The article has also countered Chambers' argument that judicial references to the transferor having no intention to pass the beneficial interest in the property to the transferee indicate that presumed resulting trusts represent a restitutionary response to an absence of intention to benefit the transferee. The article shows that, as well as phrasing the key issue in negative terms, the courts also refer frequently to a positive intention on the part of the transferor to create a trust for himself or herself or, in other words, to retain the beneficial interest. The court's task is to identify and give effect to the purpose underlying the transaction, whether it was to make a gift or to create a trust. It makes no difference whether the fact presumed is described as an intention to create a trust for the transferee or, reflecting the influence of the concept of retention, not to pass the beneficial interest to the transferee.