# Resulting Trusts and Voluntary Conveyances of Land 1674-1925

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*This article considers whether a resulting trust could arise upon a voluntary conveyance of land prior to 1926, a question which was the subject of much controversy amongst leading judges and writers in past centuries. Based on an analysis of the case law, which starts in the seventeenth century, the article argues that the better view is that no resulting trust could arise in the relevant situation prior to 1926. Arguments are advanced to explain why this interpretation is consistent with principle, emphasising the complexity inherent in the proposition that a resulting trust doctrine existed alongside the presumption of resulting use in the context of voluntary conveyances of land.*

## *Introduction*

One of the oldest and most tangled controversies in the law of trusts related to whether a resulting trust could arise upon a voluntary conveyance of land prior to 1926.[1] Prior to 1926, a resulting use was presumed if a voluntary conveyance of freehold land was made simply 'to A' and his heirs, so that conveyances were invariably made 'unto and to the use of A' and his heirs. What was uncertain was whether, in the case of a voluntary conveyance of land, a resulting trust (as distinct from a resulting use) could arise notwithstanding the fact that the conveyance was expressly stated to have been made 'unto and to the use of' the grantee. Two of the greatest Lord Chancellors, Lord Nottingham and Lord Hardwicke, featured on opposite sides of the argument. Text-book

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I am indebted to the anonymous referees and to the editor, Dr. Neil Jones, for their very helpful comments and suggestions in respect of a previous draft of this article. I am also grateful to Mr. Ben McFarlane and Dr. Mary Donnelly. The usual disclaimer applies.

[1] In relation to the law's treatment of voluntary conveyances more generally, note the statute 27 Eliz. c.4 which was interpreted to allow voluntary conveyances of land to be defeated by a subsequent sale to a purchaser for value, even one with notice of the prior voluntary conveyance. The law was changed by the Voluntary Conveyances Act 1893. See generally, W.C. Prance (ed.), A.J. Hunt *The Law Relating to Fraudulent Conveyances* 2nd edn. (London 1897), Chapters 18-23. The modern law is contained in Law of Property Act 1925, s. 173.

writers 'conflicted … freely on the question',[2] which remained relevant until the legal position was transformed by the repeal of the Statute of Uses[3] and the introduction of section 60(3) of the Law of Property Act 1925.[4] Prominent writers such as Lewin[5] and Maitland[6] suggested that a resulting trust was presumed in the relevant situation.[7] However, many other writers rejected this position, including Sanders,[8] Hill,[9] Ashburner,[10] Leake,[11] Underhill,[12] Jenks,[13] Strahan[14] and Cheshire.[15] Based on a

[2] C. Harpum, S. Bridge, M. Dixon *Megarry and Wade: The Law of Real Property* 7th ed. (London 2008), 414. There was a tendency on both sides not to engage properly with the opposing viewpoint, as noted by T. R. Blamey 'Resulting Trusts Arising from the Absence of Consideration' (1935) 1 Res Judicatae 235, 235.

[3] Law of Property Act 1925, s. 207 and Seventh Schedule.

[4] Section 60(3) 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.' For case law interpreting this obscurely drafted provision, see *Lohia* v *Lohia* (2000) 3 ITELR 117 (Judge Strauss QC); [2001] EWCA Civ 1691 (CA); *Ali* v *Khan* [2002] EWCA Civ 974. These cases suggest that the modern law is that no presumption of resulting trust arises upon a voluntary conveyance of land but that a resulting trust can nonetheless arise if it is established on the evidence that a trust was intended by the grantor. However, the better view of section 60(3) (which cannot be discussed in detail in this article) seems to be that it was intended to eliminate the presumption of resulting use upon a voluntary conveyance of land and was drafted on the basis of the view (favoured in this article) that no resulting trust, as distinct from resulting use, could arise upon a voluntary conveyance of land. On this view, the modern law is that no resulting trust or use can arise upon a voluntary conveyance of land, although a trust could arise on the basis of the principle in *Rochefocauld* v *Boustead* [1897] 1 Ch 196 in a case where the grantee sought to rely on section 53(1)(b) of the Law of Property Act 1925 to defeat an orally expressed trust.

[5] For a statement of Lewin's final view (after some prevarication in earlier editions), see T. Lewin *A Practical Treatise on the Law of Trusts and Trustees* 5th ed. (London 1867) 116. This view was maintained by his subsequent editors; see e.g. C.C.M. Dale and G.E. Streeten (eds.) 12th ed. (London 1911) 164. See also G. Crabb *The Law of Real Property* (London 1846) vol. 2, 558-559; H.H. White (ed.), W. Cruise *A Digest of the Laws of England Respecting Real Property* 4th ed. (London 1835) vol. 1, 394.

[6] A.H. Chaytor and W.H. Whittaker (eds.), F.W. Maitland *Equity Also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge 1913) 79-80. Apparently simply following Lewin, Maitland cited no authority in support of his view and, in a note which collects some of the relevant sources, his editors thought it 'desirable to draw the student's attention to th[e] diversity of opinion' which existed on the point': ibid*.*, 413. Lewin's view was also taken in W.J. Whittaker (ed.), F.D. White and O.D. Tudor *A Selection of Leading Cases in Equity* 8th ed. (London 1912) vol. 2, 833-834 (though contrast F.D. White and O.D. Tudor, 6th ed. (London 1886) vol. 1, 251-252); T.C. Williams (ed.), J. Williams *Principles of the Law of Real Property* 23rd ed. (London 1920) 194 (though contrast J. Williams *Principles of the Law of Real Property* 13th ed. (London 1880) 164-165).

[7] In modern cases in which the historical position has been mentioned, it has been assumed that this was the case: see *Tinsley* v *Milligan* [1994] 1 AC 340*,* 371 *per* Lord Browne-Wilkinson; *Lohia* v *Lohia*, (2000) 3 ITELR 117, 126 *per* Judge Strauss QC; *Lohia* v *Lohia* [2001] EWCA Civ 1691, at [21] *per* Mummery LJ; at [34] *per* Sir Christopher Slade; *Ali* v *Khan* [2002] EWCA Civ 974, at [24] *per* Morritt VC.

[8] F.W. Sanders *An Essay on Uses and Trusts* 2nd ed. (London 1799) vol. 1, 216-217; G.W. Sanders and J. Warner (eds.), 5th ed. (London 1844) vol. 1, 365-366.

[9] J. Hill *A Practical Treatise on the Law relating to Trustees* (London 1845) 72-74.

[10] W. Ashburner *Principles of Equity* (London 1902) 130.

consideration of arguments of principle, and an analysis of the case law from the 1670s up to the early twentieth century, it will be argued in this article that the better view is that, in fact, no resulting trust could arise upon a voluntary conveyance of land made 'unto and to the use of the grantee' prior to 1926.

The argument in the article proceeds as follows. Part I discusses the relationship between the resulting use and the resulting trust. It points out the difficulties inherent in the proposition that prior to 1926, in the context of a voluntary conveyance of land, a presumption of resulting trust could have operated alongside a presumption of resulting use and explains that the resulting trust in respect of leasehold property and personalty can be seen as the counterpart of the resulting use in respect of real property. This Part also notes that, although the purchase money resulting trust doctrine appears at first inspection to provide support by analogy for the idea of a pre-1926 presumption of resulting trust in the context of a voluntary conveyance of land, a closer analysis suggests that the analogy drawn by the courts may, in fact, have been between the resulting *use* upon a voluntary conveyance of land and the purchase money doctrine. Part II then considers in detail the case law prior to 1926. The article ultimately concludes that, on balance, the more convincing view is that reflected in two decisions of Lord Hardwicke

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[11] A.E. Randall (ed.), S.M. Leake *An Elementary Digest of the Law of Real Property* 2nd ed. (London 1909) 103. Leake took the same view in the first edition (London 1874) 134.
[12] A. Underhill *The Law Relating to Trusts and Trustees* 7th ed. (London 1912) 160. Underhill had expressed the contrary view in the first four editions of his textbook: see 4th edition (London 1894) 174.
[13] E. Jenks *A Short History of English Law* 2nd ed. (London 1920) 225; E. Jenks (ed.) *A Digest of English Civil Law* 2nd ed. (London 1921) vol. 2, 813; 1103.
[14] J.A. Strahan *A Digest of Equity* 4th ed. (London 1924) 221-222.
[15] G.C. Cheshire *The Modern Law of Real Property* (London 1925) 414, 594. Note also the similar views of two American writers: G. Spence *The Equitable Jurisdiction of the Court of Chancery* (Philadelphia 1850) vol. 2, 197-199; J.B. Ames *A Selection of Cases on the Law of Trusts* 1st ed. (Cambridge, MA 1881-1882) 262-263. The editors of *Snell* regarded the point as uncertain: H.G. Rivington and A.C. Fountaine (eds.), E.H.T. Snell *Snell's Principles of Equity* 19th ed. (London 1925) 112-113.

in the 18th century, to the effect that no resulting trust could arise upon a voluntary conveyance of freehold land prior to 1926.

## *I. Resulting Uses, Resulting Trusts and the Statute of Uses*

When equity revived the passive trust in the form of the 'use upon a use',[16] it drove 'not mere coaches and four but whole judicial processions with javelin men and trumpeters' through the Statute of Uses 1536.[17] A consequence of the manoeuvre by means of which the statute was outflanked was that, up until the repeal of the Statute of Uses in 1926, uses continued to exist alongside trusts and to be deliberately created by conveyancers for various purposes.[18] Similarly, resulting uses continued to exist alongside resulting trusts. The following discussion considers the complex relationship between resulting uses and resulting trusts.

### *1. Resulting uses*

Uses were the medieval precursors of trusts.[19] Amongst other attractions, conveyances to uses provided 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. Before the Statute of

[16] See generally, N.G. Jones 'The Use upon a Use in Equity Revisited' (2002) 33 Cambrian Law Review 67.
[17] F.W. Maitland *The Collected Papers of Frederic William Maitland* (Cambridge 1911) vol. 1, 191, quoted by R. Megarry and H.W.R. Wade *The Law of Real Property* 4th ed. (London 1975) 171.
[18] One important example relates to legal executory interests; conveyancers created so-called 'springing and shifting interests', forbidden by the common law remainder rules, by means of a grant to uses which was executed by the Statute. See E.H. Burn and J. Cartwright *Cheshire and Burn's Modern Law of Real Property* 17th ed. (Oxford 2006), 514-516. In the context of the continued deliberate creation of uses, resulting uses would arise (and be executed by the Statute) where there was a gap in the beneficial interests under the use. Thus, the resulting use presumed upon a voluntary conveyance was not the only resulting use known to the law after the Statute.
[19] See J.L. Barton 'Medieval Uses' (1965) 81 LQR 562. See also the following essays in R. Helmholz and R. Zimmermann (eds.) *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin 1998): J. Biancalana 'Medieval Uses'; R. Helmholz 'Trusts in the English Ecclesiastical Courts 1300-1640'; N.G. Jones 'Trusts in England after the Statute of Uses: A View from the 16th Century'.

Uses 1536, a presumption of resulting use arose upon a voluntary conveyance of freehold land, reflecting equity's view that the likely intention of the grantor would have been to retain the beneficial interest under a use.[20] This presumption continued to operate after the Statute of Uses,[21] until the advent of section 60(3) of the Law of Property Act 1925.[22] No presumption arose if consideration was given for the conveyance or if it was made for 'good consideration' to a close relative of the transferor.[23] The presumption would be rebutted if, as became normal, the conveyance was made 'unto and to the use of' the transferee.[24] It seems to have been accepted (at least at a later stage) that it was also possible to rebut the presumption by parol evidence.[25] After the passing of the Statute of Uses, it was still necessary for a voluntary conveyance of land to be made 'unto and to the use of the grantee'. Chambers suggests that '[t]he statute executed the use in favour of the feoffee and the legal estate would pass'.[26] This, however, is mistaken. The Statute of Uses applied only to any person or persons seised of any lands or hereditaments 'to the use confidence or trust of any *other* person persons or of any body politic'[27] and had no application in a situation where a person held property to his own use.[28] The fact that a

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[20] C. St Germain *Doctor and Student* (ed) TFT Plunkett and J.L. Barton (Selden Society vol. 91, 1974), Second Dialogue, ch. 22, pl. 54b; E. Coke, *Institutes of the Law of England; or, a Commentary upon Littleton* (4th edn) (London 1639) 23a. On the role of the notion of 'retention' in the history of resulting trusts, see J. Mee '"Automatic" Resulting Trusts: Retention, Restitution, or Reposing Trust?', in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010).
[21] See e.g. *Beckwith's Case* (1589) 2 Co. Rep. 56b, 58a; *Armstrong* v *Wolsey* (1755) 2 Wils. K.B. 19; G.W. Sanders and J. Warner (eds.), F.W. Sanders *An Essay on Uses and Trusts* 5th ed. (London 1844) vol. 1, 97-98; C. Sweet '"A Song of Uses": Some Reflections and a Moral' (1919) 35 LQR 127, 130; *Megarry and Wade* (7th ed. 2008) note 2 above, 413.
[22] See note 4 above.
[23] See A.W.B. Simpson *A History of the Common Law of Contract* (Oxford 1987), 334-335; 364-365.
[24] *Anon.* (1535) Benl. 16; J. Baker *The Oxford History of the Laws of England: Volume VI 1483-1558* (Oxford 2003) 675.
[25] *Roe* v *Popham* (1778) Doug. 26; G.W. Sanders and J. Warner (eds.), F.W. Sanders *An Essay on Uses and Trusts* 5th ed. (London 1844) vol. 1, 104-105.
[26] R. Chambers *Resulting Trusts* (Oxford 1997) 17.
[27] Section 1 (emphasis added). See also section 2.
[28] *Meredith* v *Joans* (1631) Cro. Car. 244; *Doe d. Lloyd* v *Passingham* (1827) 6 B. & C. 305; A.W.B. Simpson *A History of the Land Law* 2nd ed. (Oxford 1986) 204-206; N.G. Jones '*Tyrrel's Case* (1557) and

voluntary conveyance of land was made to the grantee to his own use merely rebutted the presumption of a resulting use.

### *2. Resulting uses and resulting trusts*

When, subsequent to the Statute of Uses, passive trusts were revived in the form of 'a use upon a use', it became theoretically possible that a presumption of resulting trust might arise upon a voluntary conveyance of land where (as would normally happen in practice) the presumption of resulting use was rebutted by the fact that the conveyance was expressed to be made 'unto and to the use of' the grantee. As a preparation for analysing this possibility, it is necessary to consider the relationship between uses and trusts and, after that, the neglected issue of the relationship between resulting uses and resulting trusts.

While the complexity of the question should be noted, it appears to have been accepted in the 18th century that, '[a] use and a trust may essentially be looked upon as two names for the same thing'.[29] It is certainly true that there were significant differences

the Use upon a Use' (1993) 14 Journal of Legal History 75, 84; *Megarry and Wade* (4th ed. 1975) note 17 above, 159.

[29] *Burgess* v *Wheate* (1759) 1 Black. W. 123, 155 per Lord Mansfield. The element of complexity may be of some significance in terms of understanding the different views which were taken by Lord Nottingham and Lord Hardwicke in respect of the issue discussed in this article. Lord Hardwicke commented in *Lloyd* v *Spillet* (1740) 2 Atk. 148, 150 that uses 'were exactly the same with what trusts are now, and I wonder how they ever came to be distinguished'. Lord Nottingham, on the other hand, noted in his *Prolegomena of Chancery and Equity* (D.E.C. Yale (ed.) *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge 1965), 236) that '[t]hat which now is a trust is conceived by some to be only [a] use at second hand'. Rejecting this view, he argued (ibid.) that 'that which is now a trust is and always was a thing quite different from [a] use'. Otherwise, he felt (ibid., 237), 'all trusts now would be executed as uses, and so there could be no such thing left as a bare trust'. Lord Nottingham's reasoning turns the distinction between the 'conjoined use' and the 'separated use': see D.E.C. Yale 'The Revival of Equitable Estates in the Seventeenth Century: An Explanation by Lord Nottingham' (1957) 15 CLJ 72; N.G. Jones 'Uses, Trusts and a Path to Privity' (1997) 56 Cambridge Law Journal 175, 176-182; see also N.G. Jones 'The Use upon a Use in Equity Revisited' (2002) 33 Cambrian Law Review 67, 74-76. The idea was that, before the Statute of Uses, it had been recognised that a landowner held both the possession, i.e. the legal title, and the use, i.e. the right to take the profits from the land. The device of the use involved a separation of these two elements of ownership, so that the feoffee

between, on the one hand, the rules which applied to uses prior to the Statute of Uses and, on the other hand, the rules which were subsequently developed to govern trusts after the Statute of Uses.[30] However, it does not follow from this that there was a conceptual difference, besides the fact that one was executed by the statute and the other was not, between post-Statute 'uses' and post-Statute 'trusts'. Rather, as Lord Mansfield pointed out, there is not 'any metaphysical difference in the essence of the things themselves'.[31] It became customary, in the interests of convenience, to employ the term 'trust' where a separate equitable interest continued to exist after the operation of the Statute of Uses, with the term 'use' being reserved to describe interests which were executed by the Statute. However, the terminology did not have any substantive significance, so that, for example, the Statute would operate upon a conveyance of land 'to X on trust for Y' in just the same way as upon a conveyance 'to X to the use of Y'.

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held the legal title, subject to the passive obligation to allow the cestui to exercise his right to take the profits. However, under an active trust there was instead a conjoined use, whereby the feoffee had both the legal title and the use united in him, subject to a fiduciary obligation (e.g. to collect the rents from the property and pay them to the cestui). Such 'active' trusts were not executed by the Statute of Uses, which aimed to unite the legal title and the use, because the two were already united in the feoffee. This suggests an explanation for the willingness of the courts to recognise passive trusts in the form of a use upon a use after the Statute of Uses. When a conveyance was made 'unto and to the use of' the trustee, this meant that the possession and the use were united in the trustee. Therefore, any second use which was built upon this first use was not a 'divided use' which would be executed by the statute but rather a trust, in which the legal title and the use were united in the trustee, subject to a fiduciary obligation to the beneficiary. On this theoretical view, the trust would differ from a use in that the trustee, rather than the beneficiary, would have the right to take the profits of the land, although the trustee would be obliged to exploit this right for the benefit of the beneficiary. (The difference, however, appears a rather subtle one if one is considering a 'bare' trust, a category encompassing resulting trusts, which would in principle have entitled the beneficiary to occupy the land in question, just as a use would have). On Lord Nottingham's view that uses and trusts are two quite different things, it is easier to see why equity would have been willing to presume a resulting trust where a resulting use had been precluded by the fact that the conveyance was made 'unto and to the use of' the grantee.

[30] For example, in terms of priorities, the range of third parties bound by a trust came to be greater than those formerly bound by a use. See e.g. Simpson *History of Land Law* note 28 above, 181 (discussing the former distinction between those who came to the land *in the post* and *in the per*).

[31] *Burgess* v *Wheate* (1759) 1 Black. W. 123, 155. See also ibid., 180 per Lord Henley LK: 'That [a] use and a trust are the same, seems adopted by all the great persons who have presided in this Court.'

The presumption of resulting use was a presumption that the grantee held the legal interest and the grantor held the equitable interest. In a world without the Statute of Uses, a resulting use would have been equivalent to a resulting trust. The resulting use is described as a 'use', rather than a trust, essentially because it was executed by the Statute of Uses, leaving the beneficiary with the legal title rather than with an equitable interest. In light of the continuing operation of the presumption of resulting use, there is considerable complexity involved in the suggestion that a resulting trust could have arisen upon a voluntary conveyance of land prior to 1926. One is dealing with a conveyance which necessarily was expressed to have been made for the benefit of ('unto and to the use of') the donee, or else a resulting use would have arisen and been executed by the Statute of Uses, thus giving the legal interest to the grantor and pre-empting any possibility of a resulting trust in his favour. The effect of a resulting trust could not have been to contradict the statement in the deed that the conveyance was 'to the use of' the grantee; if the resulting 'trust' merely had the effect of showing that the conveyance was really 'to the use of' the grantor instead of the grantee, it would not have been a trust at all but rather a resulting use which would have been executed by the Statute of Uses.[32] Therefore, any presumed resulting trust would have to have been a 'use upon a use'. The argument would be that, while a voluntary conveyance 'unto and to the use of' the grantee 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 would be a 'use upon a use'

[32] There is no evidence to suggest that pre-1926 resulting trusts were executed by the Statute of Uses. See generally J. Mee 'A Stake Through the Heart of the Statute of Uses: A Response to Professor Pearce' (1996) 47 NILQ 367.

(i.e. a trust in favour of the grantor built 'upon' the use in favour of the grantee expressed in the conveyance) and so would not have been executed by the Statute.[33]

One problem with this argument relates to how a presumption of resulting trust along these lines could have been rebutted. The fact that the conveyance stated expressly that it was for the benefit of the donee (i.e. 'unto and to the use of' him) would necessarily have to be regarded as insufficient to rebut the presumption of resulting trust if it was to have any significance independent of the presumption of resulting use. It was argued in *Sanders on Uses* that, if a resulting trust were to have arisen upon a voluntary conveyance 'unto and to the use of' the grantee, then there could have been 'no such thing as a voluntary conveyance, so as to vest a beneficial interest in the grantee'.[34] It might be suggested that, if making a conveyance 'unto and to the use of' the grantee was enough to rebut the presumption of resulting use, then making the conveyance 'unto and

[33] Different modes of conveyance would have been employed over the span of legal history considered in this article (for a summary, see R.E. Megarry and H.W.R. Wade *The Law of Real Property* 2nd ed. (London 1959) 167-171). One early method, the conveyance by means of a bargain and sale enrolled, proceeded on the basis of the execution of an implied use, so that any use declared on the conveyance would have constituted a 'use upon a use'. Therefore, in the context of such a conveyance which was made 'unto and to the use of the grantee', there would already be a use upon a use and, therefore, arguably no room for a resulting trust in favour of the grantor. However, the popularity of this mode of conveyance was displaced in the 17th century by a new method involving a bargain and sale combined with a lease and release (see *Lutwich* v *Mitton* (1621) Cro. Jac. 604; Simpson *History of Land Law* note 28 above, 189-190). This form of conveyance was the normal (but not invariable) mode of conveyance from the later part of the 17th century up until the Real Property Act 1845, which introduced the conveyance by deed. (A conveyance by lease and release was used in the leading case of *Lloyd* v *Spillet* (1740) 2 Atk. 148; Barn. Ch. 384, considered below, text to notes 116-129). A feature of this form of conveyance was that the release took effect at common law, not as a result of the Statute of Uses, so that any use declared on the release would not be a use upon a use. Thus, it seems that this form of conveyance was similar to the old feoffment and the conveyance by deed under the Real Property Act, in that a use declared in favour of the grantee would not constitute a use upon a use. Therefore, it does not appear that changes in the standard modes of conveyance are of crucial significance in terms of the issue considered in this article (although the matter is complex and it is necessary to note the contrary view of H. Stone 'Resulting Trusts and the Statute of Frauds' (1906) 6 Col. LR 326, 331).

[34] F.W. Sanders *An Essay on Uses and Trusts* 2nd ed. (London 1799) vol. 1, 217; G.W. Sanders and J. Warner (eds.), F.W. Sanders *An Essay on Uses and Trusts* 5th ed. (London 1844) vol. 1, 365. See also J. Kent *Commentaries on American Law* 1st ed. (New York 1830) vol. 4, 301. Sanders somewhat overstated the point because, even if a statement on the face of the deed were regarded as insufficient to rebut the presumption of resulting trust, it would be possible in some cases to rebut the presumption by reference to evidence from outside the deed itself, e.g. of statements made by the donor at the time of the transaction. However, such evidence would not always exist or still be available by the time a dispute arose.

to the use of the grantee on trust for the grantee' should have been enough to rebut a presumption of resulting trust. Yet, it would seem rather odd to require a triple declaration that the conveyance is being made 'unto' the grantee 'to the use of' the grantee 'on trust for' the grantee. Moreover, given that a person cannot hold on trust for himself, this triple declaration appears to do no more than state that the conveyance was intended to be for the benefit of the grantee, in the same way as simply making the conveyance 'unto and to the use of' the grantee.[35] Thus, there seem to be logical difficulties with the idea of a presumption of resulting trust which would exist alongside a presumption of resulting use (although it is not being argued that, in principle, the law could not simply have ignored this point and have been willing to presume a resulting trust in the absence of a double statement that the donee was to take beneficially).[36]

The previous discussion has highlighted the difficulties associated with the idea of a presumption of resulting trust upon a voluntary conveyance of land, operating where the implication of a resulting use has been ruled out by the inclusion of an express statement that the conveyance is for the benefit of the grantee. This helps to explain why, as will be discussed in the next Part, the case law does not demonstrate clear-cut support for it. It should be emphasised that the complexity described above relates to the

[35] "It is the intention of the parties, to be collected from the face of the deed, that gives effect to resulting uses": G.W. Sanders and J. Warner (eds.), F.W. Sanders *An Essay on Uses and Trusts* 5th ed. (London 1844) vol. 1, 102.

[36] The argument which has been made in this and the preceding paragraph is more difficult to maintain if one takes the view that uses and trusts are fundamentally different (see note 29 above). On that view, it could be argued that the phrase 'unto and to the use of' did not indicate that the land was for the benefit of the donee and, while precluding a resulting use, would not prevent the creation of a resulting trust (although an alternative formulation along the lines of 'as an outright gift to' would appear sufficient to rule out either a resulting use or a resulting trust). However, the view that uses and trusts are fundamentally different does not dictate the conclusion that it must have been possible for a resulting trust to arise upon a voluntary conveyance. Given that trusts and uses are regarded as quite distinct, one could not regard a putative resulting trust upon a voluntary conveyance 'unto and to the use of' the grantee as necessarily justified by the same reasoning which had led to the presumption of a resulting use where that formula was not included. The possibility would remain that equity did not see the need to intervene in this two-fold fashion.

possibility of recognising a doctrine of resulting trusts which would be superimposed upon an existing doctrine of resulting uses. In this regard, it is relevant to consider the position in relation to personal property, in respect of which the doctrine of resulting uses did not originally apply. Although the position in relation to a voluntary conveyance of personal property has not been free from uncertainty,[37] it seems that, at some uncertain point in the centuries subsequent to the Statute of Uses, it became established that a presumption of resulting trust would arise in this situation.[38] Thus, by analogy with the position in relation to land, a presumption that the grantor intended to retain the beneficial interest was extended to the context of voluntary conveyances of personal property. This led to the creation of an equitable interest which would not be executed by the Statute of Uses (since the Statute did not apply to personal property). This equitable interest could, therefore, be referred to as a 'trust'. Crucially, however, it did not constitute a 'use upon a use' and the question did not arise as to how this presumption of resulting trust could co-exist with a presumption of resulting use operating in the same situation.

The same considerations are relevant in the context of voluntary conveyances of leasehold property. The Statute of Uses applied only where the legal owner was 'seised' of lands and, therefore, did not apply to conveyances of leasehold property.[39] At a stage subsequent to the Statute of Uses, it appears (though the matter is not entirely clear) to have been accepted that a presumption in favour of the grantor would apply in the context

[37] See e.g. Rivington and Fountaine (eds.), *Snell's Equity* 19th ed. (1925) note 15 above, 112; E.P. Hewitt and J.B. Richardson (eds.), *White and Tudor's Leading Cases in Equity* 9th ed. (London 1928) vol. 2, 763, referring to *George* v *Howard* (1819) 7 Price 646.
[38] See e.g. *Standing* v *Bowring* (1885) 31 Ch. D. 282; *Re Vinogradoff* [1935] WN 68; *Vandervell* v *IRC* [1967] 2 AC 291, 312-313; *Tinsley* v *Milligan* [1994] 1 AC 340, 371.
[39] *Megarry and Wade* (4th ed. 1975) note 17 above, 157-158.

of voluntary conveyances of leasehold land.[40] The consequence of this was the creation of an equitable interest which was not executed by the Statute of Uses and which, therefore, could be referred to as a 'trust'. Thus, the resulting 'trust' which was presumed in the context of a voluntary conveyance of leasehold property, just like that which arose in relation to pure personalty, can be seen as analytically equivalent to the resulting use which was presumed in the context of voluntary conveyances of freehold land. The resulting 'trust' presumed in the context of pure personalty and leasehold land did not constitute a 'use upon a use' and, therefore, its existence does not support the argument that a resulting trust, in the different sense of a 'use upon a use', was presumed in the context of voluntary conveyances of freehold land. This point must be remembered in assessing the significance, in the context of voluntary conveyances of freehold land made 'unto and to the use of' the grantee, of authorities which suggest that a presumption of resulting 'trust' would arise upon a voluntary transfer of personal property or leasehold land.[41]

### *3. Distinction from the purchase money resulting trust*

It is tempting to argue that, by analogy with the purchase money resulting trust doctrine,[42] that a resulting trust must have arisen upon a voluntary conveyance of land, since the two

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[40] *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.

[41] See the discussion of *R* v *Williams* (1735) Bunb. 342 and *Duke of Norfolk* v *Browne* (1697) Pr. Ch. 80 in the text accompanying notes 96-115 below. While a transfer of leasehold property or personalty was not generally made 'unto and to the use of' the grantee, it seems that the inclusion of an express statement that the transfer was for the benefit of the donee might well have been sufficient to rebut the presumption of resulting trust which would arise in the context of a voluntary transfer of such property.

[42] Other forms of resulting trust appear to raise rather different issues. For example, in the case of the resulting trust which arises from a failure to dispose of all of the beneficial interest in property, the settlor has expressly made the recipient of the property into a trustee and this provides a basis (which clearly does not exist in the voluntary conveyance context) for denying the trustee any beneficial interest in the

situations seem logically similar.[43] It is useful, therefore, to consider whether a distinction can be drawn between the voluntary conveyance situation (where this article suggests that no resulting trust could arise) and the situation in which the purchase money resulting trust doctrine applies. The origins of the purchase money resulting trust doctrine are, unfortunately, rather obscure. One view is that the doctrine was developed in the late 17th century.[44] On this view, having been developed after the Statute of Uses, the doctrine would not have been based on a pre-Statute doctrine that a resulting *use* would arise in favour of the person who put up the money for a purchase. Therefore, the purchase money doctrine could not be seen as having been overlaid upon the doctrine of resulting uses in the way which would have occurred if a resulting trust could have arisen upon a voluntary conveyance 'unto and to the use of' the grantee. Therefore, there would be no awkward overlap between resulting uses and resulting trusts, which would help to explain why (on the hypothesis defended in this article) the law accepted that resulting trusts could arise upon a purchase in the name of another but not upon a voluntary conveyance. However, the matter is far from clear, and it may be that equity did recognise an implied use in the context of a purchase in the name of another, although this did not survive the

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property. For a textbook discussion of this type of resulting trust, from the end of the period considered in this article, see C.C.M. Dale and G.E. Streeten (eds.), T. Lewin *A Practical Treatise on the Law of Trusts and Trustees* 12th ed. (London 1911) 166-170.

[43] For a modern argument along these lines, see e.g. D. Waters 'The Doctrine of Resulting Trusts in Common Law Canada' (1970) 16 McGill L.J. 187, 199.

[44] This is the impression given by Simpson *History of Land Law* note 28 above, 203, citing *Anon.* (1683) 2 Vent. 31, although he does not discuss whether or not the doctrine had earlier parallels prior to the Statute of Uses 1536. The argument that the purchase money doctrine developed after the Statute of Uses gains some support from the fact that the Statute of Wills 1540 created an incentive to adopt the practice of purchasing in the name of another: see J.L. Barton 'The Statute of Uses and the Trust of Freeholds' (1966) 82 LQR 215, 223-224; N.G. Jones 'Estate Planning in Early-Modern England: 'Having' in the Statute of Wills 1540' in J. Tiley (ed.), *Studies in the History of Tax Law*, vol. 1 (Oxford 2004). The likelihood that the courts would presume that a trust was intended in favour of the persons who put up the purchase money would seem to be increased by the existence of a 'not infrequent' (Jones ibid., 233) practice involving the creation of express trusts in favour of such persons.

Statute of Frauds 1677.[45] On that hypothesis, there could have been a period of time during which the purchase money resulting trust existed alongside a purchase money resulting use.

Leaving aside the question of the origins of the purchase money resulting trust, it can be pointed out that a distinctive feature of the situation triggering this kind of trust 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 on trust for') 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. This essential factual difference between the voluntary conveyance situation and the purchase money

[45] It is arguable that, from before the Statute of Uses 1536, the use would follow the consideration, so that a use would have been implied in favour of a third party who had supplied the purchase money. See Bro. Feof. Al. Uses 40, cited by F.W. Sanders *An Essay on Uses and Trusts* 2nd ed. (London 1799) vol. 1, 68: 'if A had delivered money to J.S. for the purpose of purchasing lands for him, and J.S. had purchased them *to his own use*, no use could have resulted to, or be implied in, A.' (original emphasis). The negative statement here appears to imply the positive proposition that, if there had been no declaration of the use in favour of the nominee, an implied use would have arisen in favour of the person who supplied the consideration. It is possible that the apparent disappearance of this type of implied use was due to the Statute of Frauds 1677. In *Lamplugh* v *Lamplugh* (1709) 1 P. Wms. 111, 112-113, Lord Cowper is reported as having ruled 'that the statute of frauds and perjuries, which says "that all conveyances, where trusts and confidences shall arise or result by implication of law, shall be as if that act had never been" must relate to trusts and *equitable interests* and cannot relate to an *use* which is a *legal estate*' (original emphasis). This is puzzling since it is clear that, even after the Statute of Frauds, a resulting use could arise upon a voluntary conveyance where there was no express statement that the conveyance was 'to the use of' the grantee (so that it seems that such a resulting use must be treated as coming within the exception, adverted to in the above quote from Lord Cowper, in section 8 of the Statute of Frauds). It is possible to speculate that Lord Cowper was actually holding only that there could no longer be an implied use in favour of a third party, for example on the basis that the third party had supplied the purchase money. Since such an implied use would have been executed by the Statute of Uses, it would have given the third party (who was not a party to the relevant conveyance) a legal title and its continued survival could have been regarded as undesirable in light of the problems it might create in terms of the law of priorities. See also F.W. Sanders *An Essay on Uses and Trusts* 2nd ed. (London 1799) vol. 1, 111 (neither the grantor nor the grantee could aver a use in favour of a third party after the Statute of Frauds).

resulting trust seems sufficient to counter the argument that the two situations are so similar that a resulting trust must have arisen upon a voluntary conveyance by analogy with the purchase money resulting trust situation.[46] In fact, although this late-18th century view cannot be taken as determinative, a different analogy was suggested in *Dyer* v *Dyer*,[47] the leading case on the purchase money resulting trust. According to Eyre C.B., the purchase money resulting trust doctrine represented a suitably adapted version of the resulting *use* doctrine, having been developed 'on a strict analogy to the rule … that where a feoffment is made without consideration, the use results to the feoffor'.[48]

## *II. An Analysis of the Case Law Prior to 1926*

The discussion now turns to an analysis of the case law relevant to whether, prior to the advent of section 60(3) of the Law of Property Act 1925, a resulting trust could arise upon a voluntary conveyance 'unto and to the use of' the grantee. The relevant cases have been cited by textbook writers since the 18th century. The major authorities were collected in the various pre-1926 editions of Lewin's textbook.[49] The cases cited in this textbook as supporting the existence of a presumption of resulting trust in the relevant situation include, amongst others, the judgments of Lord Nottingham in *Lady Tyrrell's*

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[46] Modern writers have pointed out that the inference that a trust was intended is more plausible in the purchase context than in the voluntary conveyance context: see A.W. Scott, W.F. Fratcher *The Law of Trusts* 4th ed. (Boston, 1989) vol. 5, 136 (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). See also R. Chambers '*Lohia v Lohia*' (2001) 15 Trust Law International 26, 29. The logic of this point does not appear to be confined to the modern period.

[47] (1788) 2 Cox 92.

[48] Ibid., 93 per Eyre CB.

[49] 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 ed. (London 1911) 164.

*Case* (1674),[50] *Warman* v *Seaman* (1675),[51] *Elliot* v *Elliot* (1677)[52] and *Grey* v *Grey* (1677),[53] as well as two later decisions, *Duke of Norfolk* v *Browne* (1697)[54] and *R* v *Williams* (1735).[55] Other cases cited clearly relate to personal property and are, therefore, not relevant to the issue under discussion.[56] In a frequently cited note on the point, Maitland's editors cited the final four of the cases listed above,[57] while, in modern times, *Megarry and Wade* cites *Duke of Norfolk* v *Browne* and *R* v *Williams*[58] and Chambers cites these two cases and also *Lady Tyrrell's Case* and *Elliot* v *Elliot*.[59] All of the works mentioned above also cite the decisions of Lord Hardwicke in *Lloyd* v *Spillet* (1740)[60] and *Young* v *Peachy* (1741),[61] which suggest that no resulting trust could arise. The cases will now be considered in chronological order, beginning with the decisions of Lord Nottingham, followed by *Duke of Norfolk* v *Browne* and *R* v *Williams*, and then by the two decisions of Lord Hardwicke. At times, the analysis draws on alternative reports, some of which were not available when the older writers considered the issue.[62] The

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[50] 1 Freem. K.B. 304.
[51] 1 Freem. Ch. 306.
[52] 2 Ch. Cas. 231.
[53] 2 Swans. 594.
[54] Pr. Ch. 80.
[55] Bunb. 342.
[56] See *Hayes* v *Kingdome* (1681) 1 Vern. 33; *Sculthorp* v *Burgess* (1790) 1 Ves. Jun. 91; *Ward* v *Lant* (1701) Prec. Ch. 182; *A.G.* v *Wilson* (1840) 1 Cr. & Phil. 1. Another case cited, *Davies* v *Otty* (No. 2) (1865) 35 Beav. 208, involved land but was expressly decided on the principle that the Statute of Frauds could not be used as an instrument of fraud (see note 137 below for discussion of this principle). Note the criticism that Lewin's view was 'not borne out by the decisions quoted in support of it': E. Jenks (ed.) *A Digest of English Civil Law* 2nd ed. (London 1921) vol. 2, 813. See also J.B. Ames *A Selection of Cases on the Law of Trusts* 1st ed. (Cambridge, MA 1881-82) 262; *House* v *Caffyn* [1922] VLR 67, 78 per Cussen J.
[57] A.H. Chaytor and W.H. Whittaker (eds.), F.W. Maitland *Equity Also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge 1913) 413.
[58] *Megarry and Wade* (7th ed. 2008) note 1 above, 414.
[59] *Resulting Trusts* (Oxford 1997) 17.
[60] 2 Atk. 148.
[61] 2 Atk. 254.
[62] Note the two volumes of Lord Nottingham's manuscript reports, edited by D.E.C. Yale, which have been published as part of the Selden Society Annual Series. See vol. 73, 1954 ('1 Lord Nottingham's Chancery Cases') and vol. 79, 1961-62 ('2 Lord Nottingham's Chancery Cases').

analysis of the case law will then conclude with an examination of *dicta* in more recent pre-1926 decisions.

### *1. Lord Nottingham's decisions*

*A. Lady Tyrrell's Case*

The earliest case to be considered is *Lady Tyrrell's Case* (1674).[63] In this case, certain lands had been left to Sir Toby Tyrrell, subject to a charge for the payment of £2,000 to his daughter, Lucy.[64] At the request of her father, Lucy released her interest in the land. Lord Nottingham (as he later became)[65] is reported to have stated that if the giving of the release 'were done by the daughter without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money'.[66] The idea of a 'resulting trust' in the context of the release of a charge (rather than a transfer of property) is somewhat puzzling, since it is not clear what property would be held on resulting trust. What was envisaged by Lord Nottingham was that the father would be liable to pay the money to his daughter, although the land would be released from the charge.

To try to understand the import of Lord Nottingham's reported remark, it is necessary to consider what was at issue in the relevant litigation.[67] Sir Toby had 'sent for'

[63] 1 Freem. K.B. 304.
[64] Lucy was the great-great-great-granddaughter of Jane Tyrrel of *Jane Tyrrel's Case* (1557) Dyer 155a. See <http://www.mkheritage.co.uk/wdahs/thornton/docs/pedigree.html>, accessed 12 May 2011.
[65] Heneage Finch became Lord Keeper in 1673 and Lord Chancellor in 1675. He was made Earl of Nottingham in 1681: D.E.C. Yale, 'Finch, Heneage, first earl of Nottingham (1621–1682)' in H.C.G. Matthew and B. Harrison (eds.) *Oxford Dictionary of National Biography* (Oxford 2004) vol. 19, 565.
[66] (1674) 1 Freem. K.B. 304, 305. This comment is not mentioned in Lord Nottingham's own report of this stage of the litigation: *Shipton* v *Tyrrell* (1674) 1 Lord Nottingham's Chancery Cases 150.
[67] As well as the reports already cited, see *Shipton* v *Hampson* (1674) Rep. Temp. Finch 145; *Shipton* v *Tyrrell* (1676) Rep. Temp. Finch 286, also reported (1676) 1 Lord Nottingham's Chancery Cases 272.

his daughter[68] and 'pressed [her] … that he might keep her portion of £2,000 in his hands'.[69] He 'importuned her to give him a release for it, that so his lands might be discharged thereof',[70] to facilitate the creation of a settlement in favour of his eldest son, Thomas, who was about to marry.[71] Sir Toby subsequently died, charging payment of the £2,000 on his personal estate and leaving the residue of his personal estate to Lucy. Sir Toby's wife claimed to be entitled to retain her jewels as paraphernalia, which would make these valuable items of personal property unavailable to make good Lucy's £2,000. If Lucy's entitlement had depended on her father's will, a claim to paraphernalia would have prevailed against her ('because *bona paraphernalia* are liable to debts but not devisable')[72] and her entitlement could also have been reduced because, contrary to a stipulation in the will, she had married without the executors' permission. However, the widow's claim to paraphernalia failed and Lucy was also held to be entitled to the full £2,000 notwithstanding her marriage.

On the facts, there could be no doubt that Lucy's claim to the £2,000 was independent of her father's will. He had promised that 'he would take and improve, and pay to her' the portion money.[73] Since he had agreed to be accountable to her for the money, with interest,[74] it was clear that she had at least the status of a creditor and, indeed, the arrangement between the parties arguably created an express trust.[75] The purpose of Lord Nottingham's remark about the possibility of a resulting trust may have

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[68] (1674) Rep. Temp. Finch 145, 145.
[69] *Shipton* v *Tyrrell* (1676) Rep. Temp. Finch 286, 286.
[70] Ibid.
[71] The settlement recited that Lucy's £2,000 had been paid out of the portion of £4,000 which was provided by the father of Thomas's new wife.
[72] As explained by Yale in a footnote: (1674) 1 Lord Nottingham's Chancery Cases 150, 150.
[73] (1674) Rep. Temp. Finch 145, 145.
[74] See also (1676) Rep Temp Finch 286, 286.
[75] See (1674) Rep. Temp. Finch 145, 145 (Lucy and her husband 'exhibited their Bill, to have this Trust performed for the payment of the said 2000 *l.* ...').

been to suggest that, even if the facts had been different and Lucy had given the release without the promise of anything in return, her father would have remained liable to her for the £2,000 and her claim would still have been independent of his will. It does not appear surprising that Lord Nottingham would suggest that, if a father induced his daughter (who was around 21 years old at the time)[76] to give a release of this nature for no consideration, he would remain liable to her for the relevant sum. However, this conclusion may owe more to equity's aversion to the abuse of a fiduciary position[77] (or to undue influence) than to the rules on resulting trusts.[78] In any event, it seems clear that Lord Nottingham's *dictum* as to the possibility of a 'resulting trust', whereby the father would be chargeable for the payment of money, does not provide support for the argument that a resulting trust can arise upon a voluntary conveyance of land 'unto and to the use of' the grantee.

*B. Elliot v Elliot*

The report of *Elliot* v *Elliot* (1677) cited by Lewin and Chambers[79] is brief and difficult to interpret. Matters are clarified by the longer report based on Lord Nottingham's own manuscript.[80] The case involved a father who was the mortgagee of a property. The father subsequently purchased the equity of redemption in the name of his younger son,

[76] Lucy was baptised on 12 October 1643: see *The Register of the Parish of Thornton in the County of Buckinghamshire 1562-1812* (Exeter 1903) 20. The settlement on her brother, Thomas, appears to have been made in February 1665: see <http://www.mkheritage.co.uk/wdahs/thornton/docs/tyrellinfo.html> accessed 12 May 2011. Thomas' marriage took place in 1666: G.E. Cokayne *Complete Baronetage* (Exeter 1902) vol. 2, 35.
[77] See Hovenden's note (8) to Freeman's report, (1674) 1 Freem. K.B. 304, 305.
[78] Note that Lord Nottingham sometimes publicly concluded that a transaction gave rise to a trust, when privately he regarded it as a clear case of equitable fraud: see *Mildmay* v *Duckett* (1678) 2 Lord Nottingham's Chancery Cases 633, 636; *Ayscough* v *Ayscough* (1681) 2 Lord Nottingham's Chancery Cases 876, 876. I am indebted to one of the anonymous referees for this point.
[79] 2 Ch. Cas. 231.
[80] (1677) 2 Lord Nottingham's Chancery Cases 566.

Thomas, and made a transfer to Thomas of his own interest as mortgagee in the land (in which Thomas's mother joined in order to bar her claim to dower). The mortgagor is described as having 'joined' in the conveyance to Thomas, so that it may be that the two steps were accomplished at the same time. Thus, the case partly involved the purchase of land in the name of another, and indeed is described entirely in those terms in the report of the first hearing of the case.[81] However, the view of Lord Nottingham was clearly that a resulting trust could arise upon a voluntary conveyance of land. He explained that 'the constant and uniform resolution of this Court hath been that, if a father purchase lands in the name of the son or convey lands to a son' no trust would be raised even though 'such a conveyance from the father to a stranger would have raised a trust'.[82] The implication is that the doctrine of resulting trusts applies upon a voluntary conveyance of land, in the same way as upon a purchase in the name of another, although the presumption of advancement normally prevents a resulting trust being presumed as between father and son. At the time of the conveyance to him in *Elliot*, Thomas had long been married 'and set up for himself in the world',[83] and Lord Nottingham decided that no presumption of advancement applied in the circumstances.[84] This meant that a resulting trust did indeed arise in favour of Thomas. The case concerned facts which had arisen prior to the Statute of Frauds 1677 but Lord Nottingham referred to sections 7 and 8 of that statute and expressly envisaged that his decision would be of relevance in terms of the future application of these provisions.[85]

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[81] (1677) 2 Lord Nottingham's Chancery Cases 517, 517.
[82] (1677) 2 Lord Nottingham's Chancery Cases 566, 568.
[83] Ibid.
[84] This approach does not reflect the later development of the law in relation to the presumption of advancement, as mentioned in a note by Yale ibid. See generally J. Glister 'The Presumption of Advancement' in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010).
[85] (1677) 2 Lord Nottingham's Chancery Cases 566, 568.

*C. Grey v Grey, Lewys v Williams and Warman v Seaman*

*Grey* v *Grey* (1677)[86] involved the purchase of lands by a father in the name of his son. Lord Nottingham rejected the argument that there should be a resulting trust, taking the view that 'where the father intends a trust, he ought to see it declared in writing, or supported by direct proof, and not rest upon constructions'.[87] Having pointed out that a feoffment to a stranger without consideration raised a use in the grantor but a feoffment to a son did not because it was regarded as an advancement, he went on to ask: 'How can this court justify itself to the world, if it should be so arbitrary as to make the law of trusts to differ from the law of uses, in the same case?'[88] It appears from the context that the thrust of Lord Nottingham's reasoning was to show that 'the law will never admit any implication of trust between father and son'[89] and that he was arguing that the law on advancement in the context of resulting uses upon a voluntary transfer provided an analogy which should not be ignored in the context of the purchase of lands in the name of another.[90] It does not appear that he was necessarily concerned to argue that a resulting trust would arise upon a voluntary conveyance of land. This interpretation is supported by the presentation of this aspect of Lord Nottingham's judgment in another report of the case.[91]

Whatever one concludes about the status of the *dicta* in *Grey* v *Grey*, there is a more clear-cut *dictum* of Lord Nottingham in the earlier case of *Lewys* v *Williams*

[86] 2 Swans. 594; 2 Lord Nottingham's Chancery Cases 481; Rep. Temp. Finch 338; 1 Ch. Cas. 296. See also (1676) 1 Lord Nottingham's Chancery Cases 393; 2 Freem. Ch. 6.
[87] (1677) 2 Swans. 594, 600.
[88] Ibid., 598.
[89] (1677) 2 Lord Nottingham's Chancery Cases 481, 484. This report is very close to that in Swanston but contains two extra sentences at this point, including the words quoted in the text.
[90] Compare *Dyer* v *Dyer* (1788) 2 Cox 92, 93 per Eyre CB.
[91] (1677) Rep. Temp. Finch 338, 341.

(1674)[92] to the effect that '[u]pon a feoffment without consideration [a] use was implied at law and a trust now for necessity'.[93] There is also the view attributed to Lord Nottingham in *Warman* v *Seaman* (1675)[94] that 'if a lease for years be made without any consideration, there will be a resulting trust for the lessor; but if there be any consideration there can be no resulting trust'.[95]

### *D. Summary of Lord Nottingham's approach*

Overall, it seems clear that Lord Nottingham was indeed of the view that a resulting trust could arise upon a voluntary conveyance of land. However, the only case which involved a decision to this effect appears to be *Elliot* v *Elliot*, which actually seems to have concerned a hybrid conveyance which was both a purchase in the name of another and a voluntary conveyance of an interest in land previously held by the grantor. There is also a clear *dictum* of Lord Nottingham to the same effect in *Lewys* v *Williams*, less clear remarks in *Grey* v *Grey*, and a *dictum* in *Warren* v *Seaman* in the context of leasehold property. It has already been argued that *Lady Tyrrell's Case* does not, on closer inspection, appear to be in point.

## *2. Decisions between Lord Nottingham's and Lord Hardwicke's*

This section examines two frequently cited cases decided between the times of Lord Nottingham and Lord Hardwicke. On closer analysis, it will be seen that these cases did

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92 1 Lord Nottingham's Chancery Cases 105. The relevant *dictum* is pointed out by Yale in his introduction to 2 Lord Nottingham's Chancery Cases, 105.
93 (1674) 1 Lord Nottingham's Chancery Cases 105, 106.
94 1 Freem. Ch. 306.
95 Ibid., 308. Compare the fuller report (1675) 1 Lord Nottingham's Chancery Cases 217, 218, which does not state definitively that a resulting trust will arise in this situation. It became established at a later stage that the grant of a lease could not trigger a resulting trust because 'every lessee is a purchas[e]r by his contract and his covenants': see *Pilkington* v *Bayley* (1778) 7 Bro. Parl. Cas. 383, 387.

not actually involve voluntary conveyances which would have been made 'unto and to the use of' the grantee and so the cases are not directly relevant to the question of whether a resulting trust can arise upon such a conveyance.

*A. Duke of Norfolk v Browne*

The report of this case, decided in 1697, is only six lines long.[96] The case involved a grant which had been made by the previous Duke of Norfolk to a clergyman, 'much intrusted and employed by him'.[97] The grant was of the next avoidance of a church, i.e. the right to make an appointment to the living of that church when the next vacancy arose. The grantee 'knew nothing of the making of this grant, and being examined in a cause, deposed that he did not purchase it of the duke'.[98] Lord Keeper Somers is reported as holding that 'This is a resulting trust for the grantor, there being no other trust declared.'[99]

The Duke of Norfolk in 1697 was Henry Howard, the seventh Duke. His father, the sixth Duke who was also named Henry Howard, was therefore the grantor in the case.[100] As a Roman Catholic,[101] the sixth Duke was potentially vulnerable to various statutory restrictions in respect of making appointments to clerical offices.[102] The circumstances in the case, therefore, made it very likely that the transfer to the grantee

[96] Pr. Ch. 80. The same report appears at 1 Eq. Ca. Abr. 381, pl. 4.
[97] Ibid., 80.
[98] Ibid.
[99] Ibid.
[100] Note that the Duke of Norfolk held one of the largest ecclesiastical 'patronage empires' in England: J. Cannon *Aristocratic Century: The Peerage of Eighteenth Century England* (Cambridge 1987) 64.
[101] See J. Miller, 'Howard, Henry, sixth duke of Norfolk (1628–1684)' in H.C.G. Matthew and B. Harrison (eds.) *Oxford Dictionary of National Biography* (Oxford 2004) vol. 28, 374.
[102] See generally, R. Phillimore (ed.), R. Burn *The Ecclesiastical Law* 9th ed. (London 1842) vol. 3, 155-162.

was intended to be made on trust.[103] The grantor, the sixth Duke of Norfolk, died in 1684, so that the grant in question must have taken place before then.[104] It is not certain whether it took place after the Statute of Frauds 1677.[105] The crucial point in assessing the significance of the case for present purposes is that the right which was granted, and which was held on resulting trust, was a chattel. An advowson is 'the perpetual right of presentation to an ecclesiastical living' and constitutes real property.[106] A right of next avoidance confers only a right to make the next appointment and this lesser right qualifies as a chattel real.[107] As has been mentioned previously, the Statute of Uses applied only where the legal owner was 'seised' of lands. Therefore, it had no application where a leasehold interest was conveyed to the grantee, nor where a limited interest such as the next avoidance of a church was the subject matter of a grant. A grant of a next avoidance was not normally made 'unto and to the use of' the grantee.[108] Therefore, although it is not possible to be certain without knowing the exact wording of the conveyance at issue, there is no reason to think that this formula was used in *Browne*. This means that *Duke of Norfolk* v *Browne* does not provide authority for the proposition that a resulting trust

[103] The relevant legislation 'seems to have been widely evaded by the use of Protestant trustees': Cannon *Aristocratic Century* note 100 above, 64.

[104] The grantee was almost certainly Dr. Cuthbert Browne, who managed the Duke's Sheffield estates for him, as well as performing clerical duties. See J. Hunter *Hallamshire: The History and Topography of the Parish of Sheffield in the County of York* (London 1819) 245-246. Browne died in 1692: ibid., 245.

[105] Henry Howard became Duke in December 1677, after the coming into force of the Statute of Frauds in June 1677, but had been de facto head of his family since 1652. His older brother, Thomas Howard, the fifth Duke, had been incarcerated in Italy as a lunatic since 1645: Miller note 101 above, 374. Prior to appearing to answer charges of recusancy in 1680, Henry Howard transferred all his estates to Anglican trustees (including Browne), an arrangement which lasted for the rest of his life: J.M. Robinson *The Dukes of Norfolk* 2nd ed. (Chichester, West Sussex 1995) 131. This may suggest that the isolated transfer of the next avoidance at issue took place prior to 1680.

[106] *Megarry and Wade* (7th ed. 2008) note 1 above, 1316.

[107] See G. Crabb *The Law of Real Property* (London 1846) vol. 1, 142; J. Mirehouse *A Practical Treatise on the Law of Advowsons* (London 1824) 76.

[108] Note the precedent for the grant of a next avoidance in R. Burn *The Ecclesiastical Law* 2nd ed. (London 1767) vol. 1, 43. Contrast this with the precedent for the grant of a perpetual advowson ibid., 41.

could arise in circumstances where a resulting use was ruled out by an express statement in the conveyance that it was being made 'unto and to the use of' the grantee.

*B. R v Williams*

In *R* v *Williams* (1735),[109] another case reported briefly, '[t]wo joint purchasers of a lease for years assign this lease to a third person (a friend of one of the jointenants, and with the consent of the other), but it was without consideration, and no declaration of trust was given, and so the defendant confessed in his answer'.[110] The two original joint tenants continued to receive the profits jointly after the assignment.[111] The holding of the Court of Exchequer was that 'though survivorship is looked on as odious in equity, yet … in this case the trust shall survive for the benefit of the surviving cestuy que trust only'.[112] The question '[u]pon the bill and answer' was whether the beneficial interest in the lease was in the original owners of the lease as joint tenants or as tenants in common.[113] It seems that the creation of a resulting trust was taken for granted by the court, so that it only had to concern itself with the entitlements under the trust which 'shall result'.[114] The key point about *R* v *Williams* is that it concerned a leasehold interest in land. Such an interest was not affected by the Statute of Uses and (although the report does not indicate the precise wording of the conveyance in question) an assignment of a lease would not

[109] Bunb. 342.
[110] Ibid., 342.
[111] Ibid., 343.
[112] Ibid.
[113] Ibid., 342.
[114] One reading of the case is that, although the defendant admitted, in his answer under oath, that the conveyance to him had been made on trust, no clear declaration of trust had been made, so that the settlors took under a resulting trust of the type which arises where there is a gap in the beneficial interests under an express trust (a different type of resulting trust to the one under discussion in this article).

have been made 'unto and to the use of' the assignee.[115] Therefore, as with *Duke of Norfolk* v *Browne*, the case is not authority for the proposition that a resulting trust could arise in a situation where a resulting use was precluded by the fact that the conveyance is made unto and to the use of the grantee.

### *3. Lord Hardwicke's decisions*

#### *A. Lloyd v Spillet*

Having considered the cases which have been regarded as supporting the possibility of a resulting trust upon a voluntary conveyance of land, the discussion now turns to the two leading cases pointing in the opposite direction. The first of these cases, *Lloyd* v *Spillet* (1740),[116] provides the most detailed treatment of the question in any of the pre-1926 cases. By his will, John Stamp left his property to three trustees on trust inter alia to pay £15 per annum to the two plaintiffs, his cousins and heirs at law,[117] and (following several legacies) to hold the residue on trust to pay specified sums each year for the benefit of certain 'dissenting, Presbyterian and Independent ministers'. A week later, Stamp conveyed, by means of a lease and release,[118] all his real estate unto and to the use of the same three men and, another four days later, he transferred all of his personal property to them, subject to the right to enjoy the benefit of this property during his life. It was stipulated in each conveyance that it was to be made void upon the payment of ten

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[115] See e.g. the precedent in G. Horsman *Precedents in Conveyancing* vol. 1 (London 1744) 145.
[116] 2 Atk. 148; *sub nom Lloyd* v *Spillit* (1740) Barn. Ch. 384. Note also the earlier hearing of the case before Lord Talbot reported *sub nom Loyd* v *Spillet* (1734) 3 P. Wms. 344. A more detailed report of this earlier judgment (based on a manuscript report), which usefully clarifies aspects of the facts, is to be found in C. Viner *A General Abridgment of Law and Equity* 2nd ed. (London 1791) vol. 8, 149 (hereafter referred to as 'Viner').
[117] Confusingly, in the various reports, the plaintiffs are also described as Stamp's sisters and as his nieces. However, in his will, Stamp refers to them as his cousins: *National Archives* Catalogue Number Prob. 11/584/143.
[118] See note 33 above.

shillings by Stamp to the grantees. The conveyances gave no indication that the grantees were to hold on trust. Stamp kept the deeds in his own possession and died a few weeks later. The trustees obtained administration of the estate, as trustees, and initially they paid the annuities to the plaintiffs. Later, however, they 'refused to continue the payment thereof, and did likewise refuse to pay any of the dissenting ministers'.[119] The plaintiffs argued that the voluntary *inter vivos* conveyances led to a resulting trust in favour of the testator and also had the effect of revoking his will, so that, as his intestate successors, they should be entitled to his property. In the alternative, they sought that they should, at least, be paid their small annuities under the will.

The case was first adjudicated upon by Lord Talbot LC in 1734. He regarded the actions of Stamp as representing an (unsuccessful) attempt to defeat the rights of his widow in respect of his estate.[120] In Lord Talbot's view, the intention of the testator was clearly that the plaintiffs should have their small annuities and that the surplus of the estate should go to the charitable purposes specified in the will.[121] Interestingly, Lord Talbot appeared to accept the argument, made by the Solicitor General on behalf of the defendants, that 'Resulting trust is, where a trust is raised but part disposed, etc but here no trust is raised for any purpose, etc.'.[122] This limited conception of the scope of resulting trusts, as covering only cases involving a gap in the beneficial interests under an express trust, seems to have been in Lord Talbot's mind at the end of his judgment when

[119] (1734) 3 P. Wms. 344, 345.
[120] Viner note 116 above, 150; 151. The basis of the widow's entitlement was the 'custom of London', which applied to freemen of London: for discussion, see R. Phillimore (ed.), *Burn's Ecclesiastical Law* 9th ed. (London 1842), vol. 4, 570-580.
[121] (1734) 3 P. Wms. 344, 346.
[122] Viner note 116 above, 150.

the report states that he held 'that there is no pretence for a resulting trust, the whole being disposed of, etc.'.[123]

In 1740, the case was reheard before Lord Hardwicke LC, who upheld the decision of Lord Talbot. In relation to the question of whether a resulting trust arose in respect of the conveyance of the real estate, Lord Hardwicke took the view that it was crucial that the conveyance was expressed to be 'unto and to the use' of the grantees. That prevented any question of a resulting use arising. It had been argued that, although the conveyance had expressly been made to the use of the grantees, 'there is no trust in this case declared to the grantees; and therefore … there is a resulting one for the benefit of Stamp and his heirs'.[124] In Lord Hardwicke's view, whatever the position might have been between the Statute of Uses and the Statute of Frauds, 'since the Statute of Frauds … there could be no such resulting trust in the present case'. He went on to explain that:

> ''Tis indeed true, that in that Statute there is an exception of trusts arising by operation of law. But … those have been but of two kinds, either where the conveyance has been taken in the name of one man, and the purchase money paid by another, or where the owner of an estate made a voluntary conveyance of it, and made a declaration of the trust in relation to one part of the estate, and has been silent with regard to the other part of it. … These his Lordship said have been the only two instances he remembered of trusts, that have been allowed of to

[123] Ibid., 151.
[124] (1740) Barn. Ch. 384, 387.

arise by operation of law since the Statute of Frauds and Perjuries, unless where there has been a plain and express fraud.'[125]

Lord Hardwicke went on to argue that 'the lines are exactly drawn with regard to resulting trusts, and the heir at law must shew an express trust for him in order to [e]ntitle himself'.[126] Lord Hardwicke's description of trusts arising by operation of law has been criticised as being overly limited in ways unrelated to the point under discussion.[127] Be that as it may, Lord Hardwicke was clearly of the view that no resulting trust could arise upon a voluntary conveyance of land and this emerges clearly from both available reports[128] of his decision.[129]

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[125] Ibid., 387-88. See also (1740) 2 Atk. 148, 150.

[126] (1740) 2 Atk. 148, 151.

[127] See e.g. J. Fonblanque (ed.) *A Treatise of Equity* 5th ed. (London 1820) vol. 2, 116-117.

[128] Admittedly, the reputation of neither reporter seems to have been very high. Thomas Barnardiston, in particular, has been subjected to a fair deal of judicial criticism in previous centuries. Lord Mansfield, for example, was said to have 'regarded it as marvellous to those who knew Barnardiston's manner of taking notes that he 'should so often stumble upon what was right', though 'there was not one case in his book, which was so throughout'' (see N.G. Jones, 'Barnardiston, Thomas (1706–1752)' in H.C.G. Matthew and B. Harrison (eds.) *Oxford Dictionary of National Biography* (Oxford 2004) vol. 3, 969-970). In relation to John Tracy Atkyns, it appears also that 'the reputation for accuracy of the published reports was not of the highest': N.G. Jones, 'Atkyns, John Tracy (1706–1773)', ibid., vol. 2, 855.

[129] In light of the reported judgments of Lord Hardwicke, it seems somewhat surprising that he upheld Lord Talbot's order that the annuities were payable to the next of kin (rather than holding that the intended trustees were entitled to take beneficially on the basis of the inter vivos conveyances). Interestingly, in *Attorney General* v *Cock* (1751) 2 Ves. Snr. 273, 274, counsel commented that *Lloyd* v *Spillet* 'came first before Lord Talbot, and twice afterwards before Lord Hardwicke, and each time received a different determination', with the ultimate result that ('quite contrary to intent of testator' in Lord Hardwicke's view) 'the trustees had it to their own use, and the charity did not come into question'. On first inspection, this appears to indicate that the trustees prevailed at a subsequent hearing. However, it seems that the case was being confused with *Attorney General* v *Spillet* (1739), which is reported in A. Highmore *Charitable Uses* 1st edn. (London 1787), 68 and which also came before both Lords Talbot and Hardwicke. See *Addlington* v *Cann* (1744) 3 Atk. 141, 150 *per* Lord Hardwicke (and note also *Cook* v *Duckenfield* (1743) 2 Atk. 562, 566, where Lord Hardwicke is reported as referring to '*Floyd* v *Spillet*' but, given his reference to children of the testator, appears to have meant *Attorney General* v *Spillet*).

*B. Young v Peachy*

The last of the older cases is *Young* v *Peachy* (1741).[130] The case involved certain real property which was held by Zaccheus Bredon for life and then for his two daughters in fee tail. One of the daughters, Margaret, was married to Joseph Fox, who was 'in very bad circumstances'.[131] A witness swore that Zaccheus had said that he would endeavour to persuade Margaret and Joseph to transfer their interest in the property to Zaccheus in order to protect it from Joseph's creditors. The property was indeed transferred to Zaccheus, by means of a recovery which barred the entail, and the recovery was declared to be to the use of Zaccheus and his heirs 'but no consideration whatsoever was paid by Zaccheus, or any other on his behalf, to Margaret and her husband'.[132] Soon afterwards, Joseph and Margaret fled to South Carolina 'to secrete themselves from their creditors'[133] but, from the time of the conveyance to him, Zaccheus continued to pay £30 per annum to Margaret. Subsequently, Zaccheus himself became bankrupt. He then died and, the next year, both Joseph and Margaret died, without issue. Zaccheus' other daughter, Lydia, brought an action claiming that her sister's moiety had descended to her and that she was now entitled to it. Two arguments were made on her behalf. The first was that a trust had arisen by implication since the transfer had been made without valuable consideration and the second argument was that Zaccheus' assignees in bankruptcy should be compelled to execute a reconveyance of the property on the grounds of fraud.

[130] 2 Atk. 254. See also *Willis* v *Willis* (1740) 2 Atk. 71, 71 where Lord Hardwicke is reported as stating that trusts by operation or construction of law, which are excepted from the Statute of Frauds, 'are when the legal interest is in another, but the purchase money has been paid by a third person'.
[131] (1741) 2 Atk. 254, 255.
[132] Ibid.
[133] Ibid.

Lord Hardwicke rejected the argument that a trust arose by implication of law, stating that:

> '[T]rusts by implication, or operation of law, arise in such cases, where one person pays the purchase money, and the conveyance is taken in the name of another, or in some other cases of that kind; but the rule is by no means so large as to extend to every voluntary conveyance …'[134]

His Lordship felt that 'the plaintiffs could not be relieved under the notion of a trust; however, he thought that they had a proper ground to be relieved upon under the head of fraud'.[135] He argued that the conveyance to Zaccheus was 'obtained in order to answer for one particular purpose, but … [he] has attempted to make use of it for a very different one'.[136] This appears to be a reference to the fact that Zaccheus had mortgaged the property to a third party after he had obtained the conveyance of the moiety in question. It had been objected that it was contrary to the Statute of Frauds to admit oral evidence as to the fact that the purpose of the conveyance was to protect the property from Joseph's creditors. However, according to Lord Hardwicke, 'if that objection should be allowed, the statute would tend to promote frauds rather than prevent them'.[137] Therefore, he felt

[134] Ibid., 257.
[135] Ibid.
[136] Ibid.
[137] Ibid., 258. See also *Hutchins* v *Lee* (1737) 1 Atk. 447; (1737) West T. Hard 257, an earlier case where Lord Hardwicke admitted parol evidence of a trust over leasehold land in order to prevent section 7 of the Statute of Frauds 1677 from being used as an instrument of fraud. The principle which was applied by Lord Hardwicke in these cases, as it was later developed by the courts, has been described as the doctrine in *Rochefoucauld* v *Boustead* [1897] 1 Ch. 196. See generally, T.G. Youdan 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld* v. *Boustead*' (1984) 43 CLJ 306. On the basis of this doctrine, where an oral declaration of trust was made at the time of a voluntary conveyance of land, this trust could be enforced (notwithstanding the absence of evidence in writing). This doctrine is subject to certain

that, even if there had been no other factors in the case, the recovery should be set aside. However, he noted that another strong circumstance in favour of granting relief was that the conveyance in question had been obtained by a father from his child.[138]

Thus, *Young* v *Peachy* contains another clear statement from Lord Hardwicke that a resulting trust cannot arise upon a voluntary conveyance of land.

*C. Lord Hardwicke's reliance on the Statute of Frauds*

One interpretation of Lord Hardwicke's position in *Lloyd* v *Spillet* and *Young* v *Peachy* is that he believed that a resulting trust arose in the situation under discussion, by analogy with the purchase money resulting trust doctrine, but was rendered unenforceable by the Statute of Frauds 1677. On this understanding, Lord Hardwicke's reasoning might appear odd, since section 8 of the Statute creates an exemption for trusts implied by law.[139] It should be remembered, however, that the extension of the Statute of Frauds beyond its literal sense in order to give maximum effect to its purpose was common in late 17th and early 18th century courts of equity.[140] In this connection, it is interesting to note the line of cases suggesting that the Statute of Frauds had an impact upon the purchase money resulting trust, in that, unless the payment of the purchase money by the claimant was disclosed on the face of the conveyance, there was a requirement of evidence in writing

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limitations. For example, given its nature, the doctrine would not appear to apply where there was no oral declaration of trust, as in a case in which X intended that Y should hold the land on trust for X but failed to express this to Y prior to making a voluntary conveyance to Y. Compare the facts of *Re Vinogradoff* [1935] WN 68, a personal property case. The doctrine does not involve the creation of a resulting trust but rather the enforcement of an express trust (or, on another view, the imposition of a constructive trust): see generally, W. Swadling 'The Nature of the Trust in *Rochefoucauld v Boustead*', in C. Mitchell (ed.) *Constructive and Resulting Trusts* (Oxford 2010).

[138] (1741) 2 Atk. 254, 258.

[139] Cf. the comment of Yale in his introduction to 2 Lord Nottingham's Chancery Cases, 111.

[140] See M.R.T. Macnair, *Law of Proof in Early Modern Equity* (Berlin 1999) 162-163.

that the claimant had in fact supplied the purchase money.[141] On the basis of a purposive view of the Statute of Frauds, this made sense because it could be argued that to admit parol evidence 'would introduce all the mischiefs [the Statute] was intended to prevent; that it would introduce an utter uncertainty into all men's titles, for the best title could be spoiled by proving the purchase money to be another person's'.[142] The relevant line of authority was eventually overturned[143] but controversy rumbled on into the 19th century, with disagreement as to whether, if the nominal purchaser denied the trust, parol evidence to the contrary could be admitted after that person's death.[144] Thus, in another context involving a form of resulting trust, the courts had been tempted to insist that, in the absence of written evidence, the existence of a resulting trust could not be alleged unless it could be made out on the basis of what was stated in the conveyance. In the case of a voluntary conveyance 'unto and to the use of the' grantee, the conveyance contained an express statement that it was for the benefit of the grantee. In such circumstances, a court of equity could well have considered that it was contrary to the spirit of the Statute of Frauds to allow a resulting trust to be set up in favour of the other party to the conveyance.[145]

While the Statute of Frauds rationalisation is not implausible, it does not seem to chime with the argument which Lord Hardwicke is reported as having advanced. His

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[141] *Kirk* v *Webb* (1698) Prec. Ch. 85; *Newton* v *Preston* (1699) 1 Prec. Ch. 103; *Heron* v *Heron* (1701) Prec. Ch. 163; *Kinder* v *Miller* (1701) Prec. Ch. 171; *Halcott* v *Markand* (1701) Prec. Ch. 178; *Skett* v *Whitmore* (1705) 2 Freem. Ch. 280; *Ambrose* v *Ambrose* (1716) 1 P. Wms. 321; *Deg* v *Deg* (1727) 2 P. Wms. 412.
[142] See the argument of counsel which prevailed in *Kirk* v *Webb* (1698) Prec. Ch. 85, 88 (Baron Somers agreeing with Powell J.). The House of Lords upheld this decision on appeal: see ibid., 88.
[143] *Ryall* v *Ryall* (1739) 1 Atk. 59; *Willis* v *Willis* (1740) 2 Atk. 71; *Bartlett* v *Pickersgill* (1760) 1 Cox 15; *Lane* v *Dighton* (1762) Amb. 409; *Knight* v *Pechey* (1759) 1 Dick. 327; *Lench* v *Lench* (1805) 10 Ves. 511.
[144] See T Lewin *A Practical Treatise on the Law of Trusts and Trustees* 1st ed. (London 1837) 222-224.
[145] Note the argument of the Solicitor General at the 1734 hearing of *Lloyd* v *Spillet* that 'where a conveyance purports to be made for the benefit of A. it is contrary to the statute of frauds to say or prove it for the benefit of B.': Viner note 116 above, 150.

argument was that he was ‘now bound down by the statute of frauds and perjuries, to construe nothing a resulting trust, but what are there called trusts by operation of law’ and that the recognised categories of resulting trusts arising by operation of law did not extend to the case of a voluntary conveyance of land.[146] Thus, it may be more plausible to believe that Lord Hardwicke’s view was that no resulting trust could arise upon a voluntary conveyance ‘unto and to the use of’ the grantee because equity’s intervention in the context of voluntary conveyances of land was limited to the doctrine of resulting uses. This meant that any trust upon which the grantor might seek to rely would have to be express in nature and so, after the Statute of Frauds, could not be enforced in the absence of evidence in writing (unless a refusal by the court to enforce it would involve condoning ‘a plain and express fraud’[147]). While counsel would naturally seek to categorise a possible trust in favour of the grantor[148] as ‘resulting’ in nature, in order to bring it within the exception in the Statute of Frauds, Lord Hardwicke insisted that any such trust would not arise by operation of law and so could not properly be categorised as ‘resulting’. Thus, rather than failing to grasp the modern idea of a ‘resulting’ trust as a non-express trust arising by operation of law and falling within the exception in the Statute of Frauds, it is possible that Lord Hardwicke was helping to establish this modern conception.[149]

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[146] *Lloyd* v *Spillet* (1740) 2 Atk. 148, 150.
[147] *Lloyd* v *Spillit* (1740) Barn. Ch. 384, 388.
[148] For example, an oral express trust in favour of the grantor to be proven by circumstantial evidence. Compare the idea of a ‘presumptive’ trust, mentioned by Lord Nottingham as a subset of express trusts in *Cook* v *Fountain* (1676) 3 Swan 585, 591.
[149] There is a risk of anachronism if one assumes that the term ‘resulting trust’ in early judgments must already bear the precise meaning which attaches to it in modern discourse. Note that s. 8 of the Statute of Frauds does not use the familiar modern terms, ‘resulting trusts’ and ‘constructive trusts’, referring instead to any conveyance by which ‘a Trust or Confidence shall or may arise or result by the Implication or Construction of Law’. Note also the language used by Lord Nottingham in *Cook* v *Fountain* (1676) 3 Swan 585, 591.

## *4. The 19th and Early 20th Century Case Law*

There is a long gap from the decisions of Lord Hardwicke to the next significant authority.[150] In *Strong* v *Bird* (1874),[151] Jessel MR gave an example to illustrate his reasoning (on a point unrelated to resulting trusts) which revealed an assumption on his part that a resulting trust would be presumed upon a voluntary conveyance of land. He referred to the example of a person who made an imperfect gift of land to A.B. 'and afterwards conveyed that estate to A.B. by a general description, not intending in any way to change the previous gift'.[152] Jessel MR asked whether, in such circumstances, there would be 'any equity to make the person who had so obtained the legal estate a trustee for the donor?'[153] According to Jessel MR, '[t]he answer would be that there is no resulting trust; that is rebutted by shewing that the person who conveyed did not intend the person taking the conveyance to be a trustee'.[154] This *dictum* of Jessel MR is often cited in discussions of the point at issue[155] but it does not appear to have been noticed that Farwell LJ, another 'equity lawyer of great distinction',[156] later attempted to clarify the relevant *dictum*.

In *Pink* v *Pink* (1912),[157] Farwell LJ made the following comments:

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[150] Note the assumption of counsel in *Fordyce* v *Willis* (1792) Bro. C.C. 577, 588, not referring explicitly to Lord Hardwicke's decisions, that the types of resulting trust identified in those decisions 'are the only two species of resulting trusts left'.
[151] L.R. 18 Eq. 315.
[152] Ibid., 318. In referring to a transfer 'by a general description', Jessel MR appears to mean one which covers a number of different properties but does not specify each individually, e.g. a transfer of 'all my lands in Shropshire'.
[153] Ibid.
[154] Ibid.
[155] See e.g. *Megarry and Wade* (7th ed. 2008) note 1 above, 414; Chaytor and Whittaker (eds.), Maitland *Equity* note 57 above, 413; Chambers *Resulting Trusts* (Oxford 1997) 17-18.
[156] So described by C. Harpum 'Specific Performance with Compensation as a Purchaser's Remedy – A Study in Contract and Equity' (1981) 40 CLJ 47, 60.
[157] [1912] 2 Ch. 528.

> 'I venture to think that the illustration given by Sir George Jessel [in *Strong* v *Bird*][158] lacks one explanatory sentence to make it accurate. I think his Lordship was thinking, not of a voluntary conveyance by the owner to A.B., because that would be perfectly binding, unless the owner afterwards sold to a purchaser for value,[159] but of the conveyance on purchase by the owner to A.B. by C.'s direction, in which case the resulting trust for C., who finds the money, does arise. … It was a resulting trust of that nature which he had in his mind …'[160]

Thus, Farwell LJ regarded Jessel MR's *dictum* as inaccurate on its face and concluded that Jessel MR must have been thinking of the different situation of a purchase in the name of a third party, where a resulting trust could actually arise.

Within a year of *Strong* v *Bird*, Jessel MR took the view at first instance in *Fowkes* v *Pascoe* (1875)[161] that a presumption of resulting trust arose in the context of a voluntary transfer of stock. In his judgment on appeal, James LJ[162] stated that he would assume for the purpose of argument 'that the implication of a resulting trust does arise as much in the case of a transfer as in that of a purchase of stock, although that certainly is not the case with regard to a conveyance of land'.[163] In addition to the English cases,[164] it

[158] (1874) L.R. 18 Eq. 315, 318.
[159] It seems that Farwell LJ was here referring to the statutory provisions concerning voluntary conveyances and subsequent purchasers for value: see note 1 above.
[160] [1912] 2 Ch. 528, 536-7.
[161] L.R. 10 Ch. App. 343. The judgment of Jessel MR is reproduced ibid*.*, 345n.
[162] Like Jessel MR, James LJ was highly regarded by his contemporaries: see G.H. Jones, 'Jessel, Sir George (1824–1883)' in H.C.G. Matthew and B. Harrison (eds.) *Oxford Dictionary of National Biography* (Oxford 2004) vol. 30, 86.
[163] (1875) L.R. 10 Ch. App. 343, 348. As Cussen J. noted in *House* v *Caffyn* [1922] VLR 67, 76, Lord Hardwicke's statements in *Lloyd* v *Spillet* had been 'brought pointedly to [the] attention' of James LJ by

is necessary to refer to *House* v *Caffyn*,[165] a Victorian case decided in 1921 where, in an impressive judgment, Cussen J carefully considered the relevant arguments and expressed his agreement with the views of Lord Hardwicke and James LJ.[166] While Cussen J accepted that no resulting trust would arise upon a voluntary conveyance of land 'unto and to the use of' the grantee,[167] he held that, because conveyances in Victoria involving registered land did not include this formula, a resulting use would be presumed to arise in the case of such a conveyance to a stranger.[168] In Cussen J's view, the Statute of Uses did not apply to registered land in Victoria, so that the relevant resulting use would not be executed and was, therefore, equivalent to a resulting trust.[169]

## *Conclusion*

The views expressed by Lord Hardwicke in *Lloyd* v *Spillet* and *Young* v *Peachy* support the proposition that no resulting trust could arise upon a voluntary conveyance 'unto and to the use of' the grantee (and this view also appears to have been supported by Lord Talbot in *Lloyd* v *Spillet*). It has already been argued that many of the cases which have

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counsel in *Haigh* v *Kaye* (1872) L.R. 7 Ch. 469, 472, not long before James LJ made his remarks in *Fowkes*.

[164] Two other English cases may be mentioned. In *Crichton* v *Crichton* [1895] 13 R 770, 785, North J stated that 'on a voluntary conveyance by a father to a son no trust results by operation of law', possibly indicating a view that a trust would result if the relationship between the parties were different. Note also the judgment of Stuart VC at first instance in *Coultwas* v *Swan* (1870) 18 WR 746, arguably also providing some support for the view that a resulting trust could arise in the context under discussion. On appeal, the decision was explained on the basis of other principles: see (1871) 19 WR 485.

[165] [1922] VLR 67 (Full Court of Victoria Supreme Court).

[166] Schutt J stated ibid., 85 that he was 'inclined to agree' with Cussen J's reasoning on this question but he expressed no concluded view. Irving CJ, who dissented in the result, took no view on the merits of the relevant issue. See also *Wirth* v *Wirth* (1956) 98 CLR 228, 235-6 per Dixon CJ; 241 per Tiernan J.

[167] [1922] VLR 67, 75-8.

[168] Ibid., 78-9.

[169] Ibid., 78.

been cited against this proposition, e.g. *Lady Tyrrell's Case*,[170] *Duke of Norfolk* v *Browne*[171] and *R* v *Williams*,[172] are not actually in point. The main authority against Lord Hardwicke's position is represented by *Elliot* v *Elliot*[173] and, to a lesser extent, by *Lewys* v *Williams*,[174] cases decided by Lord Nottingham (before the Statute of Frauds, if this is thought to be relevant). It does not seem that the issue was ever conclusively resolved, perhaps because its theoretical interest was greater than its practical importance.[175] However, on balance, 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 section 60(3) of the Law of Property Act 1925.

[170] (1674) 1 Freem. K.B. 304.
[171] (1697) Pr. Ch. 80.
[172] (1735) Bunb. 342.
[173] (1677) 2 Ch. Cas. 231; (1677) 2 Lord Nottingham's Chancery Cases 566.
[174] (1674) 1 Lord Nottingham's Chancery Cases 105.
[175] In this context it is important to note the role of the principle that a statute cannot be used as an instrument of fraud in providing an alternative basis for giving effect to an oral understanding that the grantee would hold the land on trust for the grantor: see note 137 above.