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'Automatic' Resulting Trusts: Retention, Restitution, or Reposing Trust?

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A. INTRODUCTION

This chapter examines the nature of so-called 'automatic resulting trusts',[1] focusing on a number of alternative conceptualisations of the process of their creation. The aim is to explain, as a matter of authority and principle, the justification for the substantive rules in relation to the creation of this type of resulting trust. One prominent explanation is that the beneficial interest under a resulting trust has been 'retained' by the settlor – in other words, it is 'never drawn out of him.'[2] It seems to have been assumed in the literature that this view is of relatively modern origin, stemming from the decision of the House of Lords in the leading case of *Vandervell v IRC*.[3] Chambers, for example, has argued that 'the passive concept of the resulting trust .... requires a view of equitable ownership which is contrary to history and precedent'.[4] However, support for this idea in *Vandervell* was no novelty but rather reflected authority spanning hundreds of years. It will be pointed out in this chapter that the retention approach to resulting trusts had direct practical consequences in English law right up to modern times.

The existence of this authority does not, of course, prove that the retention idea holds true or provides a satisfactory theoretical explanation for the existence of the automatic resulting trust. As well as seeking to correct the record in relation to the history of the retention idea, this chapter will seek to interrogate that idea more closely to determine whether it has any plausibility in theoretical terms. Having undertaken a Hohfeldian analysis of the position, it will be suggested that it is an exaggeration to contend that the settlor under a resulting trust retains *no* pre-existing rights. However, many of the rights under a resulting trust cannot, strictly speaking, be said to have been 'retained'. Therefore, the retention explanation, though strongly rooted in authority, does not appear to provide a satisfactory theoretical explanation for the resulting trust.

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* I am grateful to Dr Mary Donnelly for her comments on this chapter. Any errors which remain are solely my responsibility.

1 This chapter adopts this convenient term to describe the category of resulting trust under discussion, notwithstanding the suggestion by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 708, that such trusts do not operate 'automatically' because of the possibility that the settlor may have intended to abandon the property. While the current author does not accept the validity of Lord Browne-Wilkinson's argument on this point, it is not proposed to pursue the matter in this chapter. On the label 'automatic', see further the text to nn 12-13.

2 *Godbold v Freestone* (1695) 3 Lev 406, 407; 83 ER 753, 754.

3 [1967] 2 AC 291.

4 R Chambers *Resulting Trusts* (Oxford, OUP, 1997) 104. See also W Swadling 'Explaining Resulting Trusts' (2008) 124 Law Quarterly Review 78, 99.

An alternative vision of the resulting trust is as an instrument of restitution. This alternative vision derives from the academic literature, rather than from the traditional discourse of equity. It involves the idea that the legal interest passes to the trustee and 'then' a resulting trust attaches to his legal interest to reverse the unjust enrichment which would otherwise arise. This idea was initially advanced by Birks[5] and has been vigorously developed by Chambers.[6] However, the repeated assertions in the cases and historical texts that the interest under a resulting use or trust is 'no new thing, but part of that which the owner of the land had'[7] appear damaging to the claim that there is a foundation in 'history and precedent' for the proposition that the resulting trust is an instrument of restitution. Furthermore, the arguments of principle against the retention idea, relied upon by Chambers in support of the restitution theory, appear on a closer analysis to be equally damaging to his view of the resulting trust.

In seeking a defensible theoretical basis for the automatic resulting trust, this chapter rejects both the retention and the restitution approaches and puts forward a different explanation (which does not require any modification of the existing substantive rules). Drawing on a consideration of the origins of the trust concept, it is argued that the key feature in the relevant situation is the fact that the settlor has transferred property to another person, reposing trust in that person to hold the property according to the settlor's instructions. This explanation requires a distinction to be drawn between the creation of a trust in this general sense and the creation of a particular trust in favour of specified beneficiaries. It is argued that, even if the beneficiaries are not validly specified, the trust does not truly 'fail' – it simply gives way to a resulting trust. Thus, the underlying reason for the creation of an automatic resulting trust is that the settlor intended to make the recipient of the property a trustee: to use Maitland's words, 'I have made A a trustee for somebody, and a trustee he must be – if for no one else then for me or my representatives'.[8]

Before moving on to consider the relevant arguments, it will be necessary, in the next section, to look briefly at the type of resulting trust on which this chapter will concentrate.[9] This section will give a sense of the theoretical work which is required in terms of justifying this class of resulting trusts. It will also anticipate the ultimate conclusion to be offered in the chapter.

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[5] P Birks 'Restitution and Resulting Trusts' in S Goldstein (ed) *Equity and Contemporary Legal Developments* (Jerusalem, Hebrew University of Jerusalem, 1992) 335; P Birks 'Trusts Raised to Reverse Unjust Enrichment: The *Westdeutsche* Case' [1996] RLR 3; P Birks *An Introduction to the Law of Restitution* revised edn (Oxford, Clarendon Press, 1989) esp 54-73; P Birks *Unjust Enrichment* 2nd edn (Oxford, Clarendon Press, 2005) esp 150-152 and 304-307.

[6] Chambers (1997) (n 4); R Chambers 'Resulting Trusts in Canada' (2000) 38 Alberta Law Review 378; R Chambers 'Resulting Trusts' in A Burrows and Lord Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, OUP, 2006) 247.

[7] *Samme's Case* (1609) 13 Co Rep 54, 56; 77 ER 1464, 1466.

[8] J Brunyate (ed) F W Maitland *Equity: A Course of Lectures* revised edn (Cambridge, CUP, 1936) 77.

[9] The other types of resulting trust are called 'presumed' resulting trusts (although terminology is controversial in relation to all forms of resulting trust), and arise upon a voluntary conveyance or where the claimant has advanced some or all of the purchase price for property which is conveyed into another's name.

B. 'AUTOMATIC' RESULTING TRUSTS

In a well-known statement of the law in *Re Vandervell's Trusts (No 2)*, Megarry J coined the term 'automatic resulting trust', explaining that:[10]

> The second class of case is where the transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of. Here B automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others.

This type of resulting trust can arise in a variety of circumstances.[11] Although this would be curious thing for a settlor to do, he might in theory convey property to a trustee to hold 'on trust' without specifying particular beneficiaries (or to hold on trusts to be specified in the future). A more likely situation would be that the trusts which are specified by the settlor might, due to an oversight, fail to exhaust all the beneficial interest, for example if the settlor did not foresee a possible turn of events. Another possibility is that some or all of the trusts specified by the settlor might infringe a legal rule, failing, for example, because of the rule against perpetuities. It is undisputed that a resulting trust arises in these types of situation, so that the discussion in the literature focuses on the justification for the existing rules.

In a recent important contribution to the debate, Swadling[12] suggests that the term 'automatic' is misleading as a label for the relevant type of resulting trust because 'there is nothing 'automatic' about the law. The … resulting trust does not arise of its own volition, but because courts say it does.'[13] Swadling's objection appears to be to a tendency to assume that the law on this point is inevitable. Those sympathetic to the traditions of property or trusts law sometimes assert that the creation of this kind of resulting trust depends 'on a *simple* process of proprietary arithmetic; what I once had and have not granted away, I keep',[14] or that resulting trusts in general operate '*simply* as a series of

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[10] [1974] Ch 269, 294. Megarry J was summarising the position as established in the leading decision of the House of Lords in *Vandervell v IRC* (n 3).

[11] See e.g. Maitland (n 8) 75-7.

[12] Note also his earlier publications on the topic including W Swadling 'A New Role for Resulting Trusts?' (1996) 16 Legal Studies 110; W Swadling 'The Law of Property' in P Birks and F Rose (eds) *Lessons of the Swaps Litigation* (Oxford, Mansfield Press, 2000) 242; W Swadling 'A Hard Look at *Hodgson v Marks*', in P Birks and F Rose (eds) *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (London, Mansfield Press/LLP, 2000) 61.

[13] Swadling (2008) (n 4) 99. This criticism of Megarry J's choice of label may be misplaced, since it seems likely that Megarry J was merely concerned to emphasise that this type of resulting trust arises without reference to any presumption, a position accepted by Swadling: *ibid* 94-9. The current author also sees no role for a presumption in the context of the kind of resulting trust under discussion. On the analysis favoured in this chapter, one is dealing with a situation where (i) the existence of a trust has been established and (ii) there has been no valid allocation of some or all of the beneficial interests under that trust. This means that, at a prior stage, one has ruled out the possibility that the settlor has filled the gap in the beneficial interest by allocating it to the trustee or to anyone else, including himself. Thus, there is no room for a presumption that the settlor intended to create a trust (since we already know that he did) nor is there room for a presumption that he validly allocated the relevant portion of the beneficial interest to anyone (since we already know that he did not).

[14] J Hackney *Understanding Equity and Trusts* (London, Fontana, 1987) 153 (emphasis added).

default rules to locate the beneficial interest in property'.[15] In fact, the matter is not so straightforward because the ideas of 'locating' the beneficial interest, or engaging in 'proprietary arithmetic' concerning the beneficial interest, presuppose the existence of a separate beneficial interest under a subsisting trust.[16]

Taking a different view, Swadling considers that a trust 'fails' whenever, and to the extent that, the settlor has not validly specified a destination for the beneficial interest under an intended trust. For him, it is not clear why a resulting trust, seen as a new trust, should arise from the ashes of the 'failed trust'.[17] From a similar starting point, Chambers argues that the resulting trust arising upon a 'failed trust' is restitutionary in nature (as are the other kinds of resulting trust), in that it arises to compel the trustee to 'give up' the enrichment he has acquired from the settlor.[18] Swadling responds to this by questioning why the response to the unjust enrichment should be proprietary in nature (to the prejudice of the trustee's creditors), in other words by asking why the law's response is not a personal remedy against the trustee.[19] It is unclear how this question is to be convincingly answered on Chambers' analysis. Swadling himself offers no answer, reaching the stark conclusion that this type of resulting trust 'still defies legal analysis'.[20]

However, it would be surprising if it were impossible to provide a theoretical justification for the rule under discussion, given that it seems an eminently sensible one. It is true that, as Swadling points out, the creation of a resulting trust is less advantageous to the trustee's creditors than the alternative approach of allowing the trustee to take the property beneficially, subject only to the possibility of a personal action in unjust enrichment.[21] However, without suggesting that this point is decisive in itself, it may be noted that there would be no question at all of the trustee's creditors having access to the value in question but for the circumstance (entirely fortuitous from their point of view) that something went wrong with the settlor's attempt to allocate the beneficial interests under the trust. The settlor, prior to creating the trust, had a power to make himself a beneficiary under the trust and, in its rules on the automatic resulting trust, equity is merely achieving what the settlor could have achieved himself by cautiously adding a proviso to the effect that any portion of the beneficial interest which has not been successfully allocated should belong to him. Looking at the question from the viewpoint of the settlor, a rule under

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[15] C Rickett and R Grantham 'Resulting Trusts – A Rather Limited Doctrine' in *Restitution and Equity* (n 13) 39, 48 (emphasis added).

[16] It may be useful to mention that, in this chapter, the current author is using the terms 'equitable' interest and 'beneficial' interest interchangeably to refer to the interest of a beneficiary under a trust. A person is described as holding 'beneficially' when they hold outright as legal owner and there is no trust in existence.

[17] Contrast E O'Dell 'The Resulting Trust' in C Rickett and R Grantham (eds) *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford, Hart Publishing, 2008) 379, 389, referring to 'trusts which apparently fail'.

[18] Chambers (1997) (n 4) chap 2.

[19] Swadling (2008) (n 4) 99 and 101.

[20] *Ibid* 102.

[21] *Ibid* 99 and 101.

which he becomes entitled under a resulting trust seems an entirely appropriate response to a failure in his attempt to allocate the beneficial interests; such a rule preserves the possibility of his making a renewed attempt to dispose of the beneficial interest.[22] It seems plausible to suggest that such a rule would reflect the legal response which settlors *as an abstract class* would be likely to prefer in the scenario under discussion (even if some settlors might, in individual sets of circumstances, prefer a rule that the trustee would take beneficially).[23] In devising the rules surrounding the trust, an institution to which equity gives its protection and approval, it seems clearly desirable to take an approach which facilitates those who make use of that institution and which does not punish them for any slip they may make.

The position, then, appears to be that one is faced with a fundamental preliminary question in relation to this class of resulting trusts. Does the trust 'fail' when the settlor has been unsuccessful in allocating the beneficial interests under an intended trust (in which case it is difficult to justify the creation of a resulting trust in its place) or does the trust survive, so that the consequent resulting trust only allocates the beneficial interest under a trust which the settlor has established. This chapter argues that, in order for 'automatic' resulting trusts to be justified, it is necessary to adopt the second answer. It will be suggested later in the chapter that this choice can be seen as dictated by the nature of a trust in equity, as demonstrated by the origins of the concept. In any case, a choice must be made one way or another and a significant element in making this choice must be an assessment of the attractiveness of the consequences of each option. The view taken in this chapter is that the choice underlying the current rules is clearly the right one. It is important, though, to concede that the relevant rules reflect a particular choice which, like all choices, could conceivably have been made differently.

The discussion now moves on to a consideration of possible conceptualisations of the automatic resulting trust, beginning with the notion of retention.

C. THE IDEA OF RETENTION

In the leading case of *Vandervell v IRC*, Lord Upjohn argued that 'if the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him.'[24] Similarly, Lord Wilberforce insisted that 'the equitable, or beneficial interest, cannot remain in the air: the

[22] On this occasion, there would be the legislative requirement under Law of Property Act 1925 s 53(1)(c) that the transfer of his existing beneficial interest must be in writing.
[23] One conceivable alternative rule would be that equity would allocate the beneficial interest on the basis of a guess as to what allocation the particular settlor would have made if he had realised that his intended allocation was invalid for some reason or if he had known that he had failed to provide for some contingency. However, it quickly becomes obvious that this kind of guesswork would not provide the kind of certainty necessary in the context of property rights (and one would still need to develop a default rule which would apply where there was insufficient evidence to form the basis of any guess as to the hypothetical intentions of the individual settlor).
[24] *Vandervell v IRC* (n 3) 313.

consequence in law must be that it remains in the settlor.'[25] These comments do not stand alone and it is relatively common for courts at the highest levels to refer to the retention of a beneficial interest in the context of resulting trusts.[26]

The retention approach favoured in *Vandervell* is criticised by Chambers in his influential monograph where he argues that '[t]he interest which the settlor has at the end of the story, as a beneficiary of a resulting trust, is an equitable interest which is different from the legal ownership he or she had at the beginning.'[27] Chambers goes on to quote the following remarks of Lord Browne-Wilkinson in the *Westdeutsche* case (made, interestingly, in the course of rejecting a version of the restitution thesis favoured by Chambers himself):[28]

> A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title.

Swadling takes a similar view on the idea of retention:[29]

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

Thus, the retention idea has been subjected to significant criticism in the recent literature. Later in this chapter, the merits of this criticism will be

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[25] *Ibid* 329. See also, in the same vein, *ibid*, 307-8 (Lord Reid).

[26] Examples include *Shephard v Cartwright* [1955] AC 431, 454 (Lord Reid); *Tribe* v *Tribe* [1996] 1 Ch 107 (CA) 129, 134 and 135 (Millett LJ); *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (PC) 1412 (Lord Millett); *Lavelle v Lavelle* [2004] EWCA 223, [2004] 2 FCR 418 [13] (Lord Phillips MR).

[27] Chambers (1997) (n 4) 52. It might be argued that there can be no question of the retention of rights under a resulting trust because prior to the creation of the trust, the settlor – being the legal owner – had no rights recognised by equity: Chambers, *ibid* 52, appearing to rely on this argument when quoting a passage from Hackney (n 14) 25. The premise of this particular argument, however, is false (note the criticism by Swadling 'Property' (2000) (n 12) 265-7). It is standard for equity to recognise that X is the owner of certain property in a case where X holds that property beneficially (and there is no trust in existence). If this were not the case, how could equity ever have recognised a resulting trust consequent upon a voluntary transfer, since this involves equity taking note of the fact that the transferor was the owner prior to the transfer? See generally WN Hohfeld 'The Relations Between Equity and Law' (1912-1913) 11 Michigan Law Review 537, 553-4 (discussing instances of 'the concurrence of law and equity').

[28] *Westdeutsche* (n 1) 706.

[29] Swadling (2008) (n 4) 99. See also W Swadling 'Property: General Principles' in A Burrows (ed) *English Private Law* 2nd edn (Oxford, OUP, 2007) 272-4, making the point in more detail.

considered and it will be concluded that, although overstated to some degree, the criticism is essentially well-founded at a theoretical level. However, it is unfortunate that the extent of the authority for the retention idea has been overlooked. The next part will attempt to set the historical record straight in this respect, before the discussion moves on to an assessment of whether the retention explanation can be sustained as a matter of principle (and then on to an examination of alternative explanations for the automatic resulting trust).

D. HISTORY OF THE RETENTION IDEA

As is well-known, the earliest trusts were known as 'uses'. In Christopher St Germain's famous dialogue between *Doctor and Student* (1518), the student is asked to explain the origin of uses and responds as follows:[30]

> [S]uch lands and goods as a man has, ought not to be taken from him but by his assent or by order of a law and then since it be so, that every man that has lands has thereby two things in him, that is to say, the possession of the land, which after the law of England is called the frank-tenement, or the freehold, and the other is authority to take thereby the profits of the land; wherefore it follows, that he that has land, and intends to give only the possession and freehold thereof to another, and keep the profits to himself, ought in reason and conscience to have the profits.

The doctrine developed by the courts in relation to resulting uses reflects the same thinking. Sir Edward Coke explained the doctrine as follows:[31]

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

This passage makes clear the way in which the matter was visualised by equity. An absolute owner of land (which is not subject to any use in favour of another person) was regarded as having, as one aspect of his ownership, the right to take the profits from the land,[32] and, when a resulting use was created, this pre-existing right was treated as remaining in him. Significantly, as well as being referred to as 'cestui que use', the beneficiary of a use was also known as the

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[30] T F T Plunkett and J L Barton (eds) C St Germain *Doctor and Student* (Selden Society vol 91, 1974) Second Dialogue, chap 22 [54b].

[31] E Coke *Institutes of the Lawes of England; or, a Commentary upon Littleton* 4th edn (London, M Flesher et al, 1639) 23a, quoted by C Sweet '"A Song of Uses": Some Reflections and a Moral' (1919) 35 LQR 127, 130. At the end of this passage, the word 'reverter' means 'reversion'.

[32] The word 'use' was sometimes used, in a broad sense, to refer to such a right of a landowner (though there was no equivalent of a trustee involved and a 'use' of this nature would not attract the operation of the Statute of Uses 1535). See N Jones 'Uses, Trusts, and a Path to Privity' [1997] CLJ 175, 176-182 for discussion of the complex distinction between the 'conjoined use' and the 'separated use'. See also N Jones 'Trusts in England after the Statute of Uses: A View from the Sixteenth Century' in R H Helmholz and R Zimmermann (eds) *Itinera Fiduciae* (Berlin, Duncker and Humblot, 1998) 190-2.

'pernor of profits', i.e. the taker of the profits.[33] The basic requirement of the trustee or feoffee to uses was simply 'the passive one of allowing the cestui que use to take the profits of the land'.[34] As a practical matter, where a settlor created a trust in his own favour, he would normally be able to continue his enjoyment of the land in the same manner as prior to the creation of the use, with no intervention on the part of the trustee being required. This reality lent plausibility to the proposition that the settlor in this case 'retained' rights over the land, notwithstanding the fact that he was no longer the legal owner.[35] Thus, it was explained in *Samme's Case*, decided in 1609, that '[a] use of land (which is but a pernancy of the profits) is no new thing, but part of that which the owner of the land had'.[36]

This view of the creation of uses had very important practical implications, particularly in the context of succession law. Formerly, the doctrine of descents was, in the words of Blackstone, 'a point of the highest importance; and … indeed the principal object of the law of real property in England.'[37] On intestacy, real property descended under the rules of heirship and a person's heir was traced from the most recent 'purchaser' of the land. The word 'purchaser' bore a technical meaning and did not assume, for example, that any value had been given by the purchaser. Essentially, a purchaser was someone who acquired land otherwise than by descent or inheritance. The crucial distinction, then, was between the acquisition of an estate by descent or by purchase.[38] Where an estate was acquired by purchase, 'the estate acquires a new inheritable quality, and is inheritable by the owner's blood in general as a feud of indefinite antiquity', i.e. there were no restrictions on the heirs of the new owner who could inherit.[39] On the other hand, if an estate was acquired by descent, as for example when an eldest son took as heir on the intestacy of his parent, the estate retained its pre-existing inheritable quality. Thus, property which had descended to a person from his father's side (*ex parte paterna*) would continue to descend on intestacy to the heirs of the father, and property which had descended from the mother's side (*ex parte materna*) would continue to

[33] See e.g. A W B Simpson *A History of the Land Law* (Oxford, OUP, 1986) 174. The word 'pernor' is related to the French word 'prendre', meaning to take.

[34] *Ibid*. Beyond this, the feoffee's other responsibilities were simply to 'make estates' according to the direction of the cestui (i.e. to follow any instructions which the cestui might give requiring the land to be transferred to the cestui or anyone else) and to take any necessary steps to recover possession of the land if he had been disseised 'and so the feoffor disturbed'. See the description of the 'three parts' to a use in G W Sanders and J Warner (eds) F W Sanders *An Essay on Uses and Trusts* 5th edn (London, Maxwell & Son, 1844) vol 1, 2.

[35] See further text to nn 56-62, discussing the fact that certain liberties are retained by the beneficiary under a resulting trust.

[36] *Samme's Case* (n 7) 13 Co Rep 56.

[37] W Blackstone *Commentaries on the Laws of England* 14th edn (London, A Strahan for T Cadell and W Davies, 1803) vol 2, 201.

[38] This 'great distinction' was also important because 'An estate by purchase will not make the person who acquires it answerable for the acts of his ancestors; as an estate by descent will': H Chitty *A Treatise on the Law of Descents* (London, J Butterworth, 1825) 4; and see further Chitty, *ibid*, 324 ff in relation to debts.

[39] *Ibid* 4.

descend to the mother's heirs.[40] If there were no heirs on the relevant side, then on intestacy the property would be lost by escheat and the heirs on the other side could not take.[41]

The inheritable quality of X's land would be changed if he conveyed it to Y who then conveyed it back to X. The rules of descent under discussion involve the proposition that when 'a person takes an estate which never vested … in [his] ancestor, he shall take by purchase'.[42] In the example just given, X would take a new estate by purchase from Y, rather than the old estate which had descended to X originally, and so it would subsequently descend to X's heirs generally.

The question arose as to whether, when X conveyed the legal estate to Y and created a use in his own favour, this use constituted a new estate. If so, then it would be an estate which had never vested in X's ancestor, with the consequence that it could be inherited by the heirs on either side, even though the land in question had previously been inherited by X from (say) his mother's side. The answer to this question was absolutely clear: if a person who held land *ex parte materna* created a use in his own favour, that use would descend on intestacy to his heir *ex parte materna*. Precisely the same approach was taken in relation to resulting uses. The resulting use was not a new estate but merely the 'old use' which had previously resided in the grantor and which had originally come to him by descent. As Coke concluded, having explained the position in relation to resulting uses:[43]

> So it is with lands of the part of the mother, the use shall goe to the heir of the part of the mother, which could not be, if it were not the old use, but a thing newly created.

After the Statute of Uses 1535, uses (including resulting uses) were executed, so that legal and beneficial ownership merged in the cestui que use. This meant that the person entitled under the resulting use would be entitled to the legal estate. Crucially, however, 'in the language of Lord Coke, he was in of the old use'.[44] As Sweet explained in 1919, '[a]t the present day, if a man conveys land to X and his heirs without consideration and without declaring any use', the conveyance would have absolutely no effect (including on changing the inheritable quality of the land) 'because owing to the doctrine of the old use and the operation of the Statute of Uses, the seisin goes around in a circle, returning to the place it started from.'[45]

Before discussing the position in relation to trusts, it may be useful to clarify the distinction between uses and trusts. There is not, in fact, 'any

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[40] Similarly, lands subject to the customary rules of gavelkind or borough-English would continue to descend according those rules.
[41] This rule was finally altered by the Law of Property Amendment Act 1859 s 19, which allowed in the other class of heirs in the event of a total failure of heirs on the first side.
[42] Chitty *Descents* (n 38) 4.
[43] Coke (n 31) 23a, quoted by Sweet (n 31) 130.
[44] Sweet (n 31) 131.
[45] *Ibid* 130 n 5 (the point being that the circumstances would create a resulting use, which would be executed by the Statute of Uses).

metaphysical difference in the essence of the things themselves' – '[a] use and a trust may essentially be looked upon as two names for the same thing'.[46] For convenience, the term 'trust' was used where a separate equitable interest continued to exist after operation of the Statute of Uses, while the term 'use' was reserved to describe interests which were executed by the Statute.[47] However, the terminology did not have any substantive significance, so that, for example, a conveyance 'to X on trust for Y' would have been executed by the Statute, in just the same way as a conveyance 'to X to the use of Y'. It is certainly true that the rules applied by equity in relation to trusts developed in various ways after the revival of trusts subsequent to the Statute of Uses. For example, the range of third parties bound by a trust was greater than those formerly bound by a use.[48] In this and certain other respects, 'equity has shaped [trusts] much more into real estates, than before when they were uses.'[49] The doctrine of the old use was already reflective of the principle that the use 'should be considered as the land, or as imitating the land'.[50] Therefore, it follows that the process of 'carrying the principle farther'[51] would not lead to any change in the doctrine.

That this was the case is confirmed by a number of nineteenth century texts which are clear that the doctrine of the old use applied equally in relation to resulting trusts. For example, Preston states that 'the fee taken under a resulting use, or under a resulting trust, or under an express declaration of use; or under an express declaration of trust in favour of the former owner; will descend from the first purchaser under the former ownership' and that this rule 'depends altogether on the rules applied by courts of equity, anterior to the statute of uses'.[52] The rule had been stated clearly in the 'great case'[53] of *Burgess v Wheate* in 1759. Lord Keeper Henley (speaking in the context of descent) stated the position as follows: [54]

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[46] *Burgess v Wheate* (1759) 1 Black W 123, 155; 96 ER 67, 81 (Lord Mansfield). See also *ibid* 1 Black W 180 (Lord Henley): 'That [a] use and a trust are the same, seems adopted by all the great persons who have presided in this Court.'

[47] The statement in the text understates the complexity surrounding the usage of the terms 'use' and 'trust' before and after the Statute of Uses 1535. For detailed discussion, see Jones (1997) (n 32) 76-182.

[48] See e.g. Simpson *History of Land Law* (n 33) 181 (discussing the former distinction between those who came to the land *in the post* and *in the per*). Note that, since the term 'use' is used to refer to an interest which was executed by the Statute of Uses, thus ceasing to be an equitable interest, the question could never arise of the extent to which uses after the Statute would bind third parties as an equitable interest.

[49] *Burgess v Wheate* (n 46) 1 Black W 180 (Lord Henley).

[50] *Ibid*.

[51] *Ibid*.

[52] R Preston *An Essay in a Course of Lectures on Abstracts of Title* (London, W Clarke & Sons, 1818) vol 2, 436. To similar effect is J Williams (ed) C Watkins *An Essay on the Law of Descents* 4th edn (London, S Sweet, 1837) 243-4: 'as such use, whether expressly limited or resulting, was the ancient use … and so, as it were, a portion of the *old estate*, such trust, so limited or resulting, must be a portion of the old estate also'. See also E Sugden (ed) G Gilbert *The Law of Uses and Trusts* 3rd edn (London, W Reed, 1811) 28, citing *Fawcet v Lowther* (1751) 2 Ves Sen 300, 28 ER 193; Chitty *Descents* (n 38) 10 and 272; D Yale (ed) *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'* (Cambridge, CUP, 1965) 245.

[53] Blackstone *Commentaries* (n 37) vol 2, 246.

[54] *Burgess v Wheate* (n 46) 1 Black W 185. There is another crisp statement to similar effect in *Northen v Carnegie* (1859) 4 Drew 587, 593; 62 ER 225, 227 (Kindersley V-C).

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

The doctrine of the 'old use', although carrying the ancient authority of Lord Coke, continued to have real practical importance up to the end of 1925. Although reforming legislation in 1833 altered the rules of descent in relation to express uses and trusts, this legislation did not apply to resulting uses and trusts.[55] The Administration of Estates Act 1925 s 45 abolished the rules in relation to descent to heirs, except in relation to fees tail, although these rules continued to be important for a considerable time in relation to titles which depended on questions of descent arising before 1926. It may also be noted that section 51 of the 1925 Act (as amended) provides that the old rules of descent should continue to apply in the case of 'any beneficial interest in real estate [held at his death by] a person of unsound mind or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity'. This exception means that the rules under discussion would have had (limited) practical significance well into the second half of the 20th century.

Thus, it will be seen that when Lords Upjohn, Wilberforce and Reid spoke in *Vandervell* of the beneficial interest under a resulting trust 'remaining' in the settlor, they were reflecting an approach which had consistently been adopted by equity for four centuries. Having recognised the weight of historical authority in favour of this way of looking at the resulting trust, the next section of the chapter considers whether the retention idea is satisfactory as a theoretical explanation.

E. ANALYSIS OF THE RETENTION IDEA

On a strict legal analysis, is there any plausibility in the retention idea? Or is Swadling correct to contend that when a resulting trust arises in my favour (over land in his example), I have '"retained" nothing'? Considering the matter in light of Hohfeld's classic analysis of rights, the owner of land does not simply have 'rights' but rather a 'complex aggregate' of claim-rights, liberties, powers, and immunities.[56] The fee simple owner of land has certain claim-rights against each

[55] See the Inheritance Act 1833 s 3, which provided that in the future 'when any land shall have been limited … to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof.' This reform did not affect the position in relation to resulting uses or trusts because in such cases the estate is not 'limited' to the grantor. See Sweet (n 31), 130 n 5; Watkins *An Essay on the Law of Descents* note 52 above, p 241.

[56] See e.g. WN Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-17) 26 Yale Law Journal 710, 767.

person in the world in respect of the land, for example that each of those persons should keep off the land. In respect of actually occupying and enjoying the land, the owner has a series of liberties against everyone else in the world, to occupy and enjoy the land in various ways, with the result that these other people have 'no right' to prevent this occupation or enjoyment.

When a resulting trust is created, it seems (looking at the position without reference to the complexity introduced by the Trusts of Land and Appointment of Trustees Act 1996)[57] that the settlor *does* retain these liberties against all the other persons in the world. The beneficiary under a bare trust has a liberty (in equity) as against the trustee to occupy and enjoy the land and the trustee has 'no right' (in equity) against the beneficiary that the beneficiary should refrain from doing those things. It is tempting to emphasise, as Hope JA did in *DKLR Holdings Co (No 2) Pty Ltd v Commissioner for Stamp Duties*, that 'at law a *cestui que trust* has no right to possession'. [58] However, as Hohfeld persuasively argued many years ago, in refuting the position of Maitland that there was no conflict, or virtually no conflict, between law and equity,[59] what is relevant is the 'net residuum derived from a "fusion" of law and equity.'[60] In other words, in cases where equity gives a different answer to the common law, the answer that matters is the one given by equity. A common law court (if there were still any such courts in existence) would not see the beneficiary as having a liberty as against the trustee to occupy the land but this position would be overridden in equity and thus the position recognised by the legal system is that the beneficiary has the liberty in question.

It is true that, prior to the creation of the resulting trust, the settlor had claim-rights as against the other people in the world that they should stay off his land etc. Once the legal title has passed to the trustee, the settlor loses those claim-rights and as beneficiary he has 'no right' as against other people in respect of their occupying the land etc (although, in fact, if the beneficiary is in possession, his possession gives him claim-rights as against the other people in the world besides the trustee).[61] However, he does acquire new claim-rights against the trustee that the trustee should enforce the trustee's claim-rights as legal owner against other people to ensure that they keep off the land etc. Thus, in this respect, the beneficiary under the resulting trust does not 'retain' his

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[57] See C Harpum, S Bridge, and M Dixon *Megarry and Wade: The Law of Real Property* 7th edn (London, Sweet and Maxwell, 2008) 477-481. Prior to the 1996 Act, it was clear that a beneficiary under a bare trust was entitled to occupy the land (*ibid* 478). The statutory right of occupancy conferred on beneficiaries by the 1996 Act is subject to certain conditions, although such conditions cannot, in practice, be imposed by trustees in the case of a bare trust (*ibid* 479-480). It seems reasonable to assume that the underlying nature of the resulting trust has not been altered by the recent introduction of this legislation in relation to land and the following discussion therefore focuses on the position at common law.

[58] [1980] 1 NSWLR 510 (NSWCA) 519.

[59] Note, for example, these famous comments of Maitland (n 8) 17: 'Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed'.

[60] Hohfeld (1916-17) (n 56) 767. See also his comment *ibid*: '[many] substantive equitable rules **...** are in conflict with *so-called* legal rules, – the latter being *pro tanto* 'repealed,' and rendered as invalid as statutes that have been repealed by a subsequently enacted constitution.'

[61] See Swadling (2007) (n 29) 273; *Mount Carmel Investments Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078.

claim-rights – he loses them and they are replaced by claim-rights against the trustee. However, there is one important set of claim-rights which the beneficiary does retain, i.e. his claim-rights (in equity) as against the trustee that the trustee should stay off the land etc. Since the trustee is the legal owner and therefore the most likely candidate, as a practical matter, to seek to exercise his liberties in a manner interfering with the beneficiary's enjoyment of the land, it is of obvious practical value to have this set of claim-rights against him.[62]

Thus, it would seem that the beneficiary under a resulting trust does 'retain' some of his pre-existing entitlements but it is also clearly true that he acquires other new entitlements and loses other pre-existing entitlements. This means that the idea of retention, although it does reflect the reality to some extent, is not fully accurate, notwithstanding the fact that aspects of the criticism of the retention point can be refuted. One might be tempted to gloss over the theoretical problems with the retention idea and to try to maintain the line that the beneficiary under a trust 'in substance' has the title to the property, so that it can be argued that in substance the retention idea holds true.[63] Unfortunately, when one is analysing the position as a matter of principle, rather than simply on the basis of authority, this is not fully satisfactory. The interest of a beneficiary under a trust is, in an important sense, 'not carved out of a legal estate but impressed upon it'.[64] Trying to uphold the retention thesis without offering a proper answer to this point involves an unnecessary fudging of the theoretical

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[62] In addition, the beneficiary loses various powers in relation to the land (e.g. to convey the legal title to a third party) and these are replaced by claim-rights against the trustee. Also, the trustee acquires a power (but not a liberty) as against the beneficiary to convey the property to a third party in a manner which extinguishes the beneficial entitlement of the beneficiary.

[63] See Rickett and Grantham (n 15) 49 and 59. Note also Penner's argument in chap 8 part D. One of the hypothetical examples Penner relies upon in support of the idea of retention 'in substance' involves an unregistered owner of land who subsequently obtains a registered title under the Land Registration Act 2002. Penner suggests that Chambers' and Swadling's positions would require them to contend that the landowner's registered interest is a wholly new one, whereas Penner can more plausibly contend that the landowner's interest is substantially the same as before. The current author agrees that the landowner's interest in this example is not a completely new one, because many of his claim-rights, liberties, powers and liabilities are the same as before he registered his title. (Hohfeld's analysis of rights was used earlier in this Part to make the similar point that it is an exaggeration to suggest that a person who creates a trust in his own favour over land retains "nothing": contrast Penner's view (chap 8 n 92) on the utility of Hohfeld's work in this context). On the other hand, the landowner's interest in the example is not truly identical to the one he had before, since some of his claim-rights, liberties, powers and liabilities are different. Whether, in this example or in the context of the resulting trust, one can describe the person's past and present interests as "substantially" the same simply depends on what meaning one wishes to ascribe to the slippery term "substantially". This chapter seeks to emphasise the historical significance of the retention idea in the context of resulting trusts (and it is relevant in other contexts also: compare Swadling 'The Vendor-Purchaser Constructive Trust' in Degeling and Edelman (eds) *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) pp 481-485). However, in seeking to counter the persistent argument that resulting trusts respond to unjust enrichment, an argument which appeals primarily to principle, it is essential to be as precise as possible. In the current author's view, this requires recognition of the fact that, strictly speaking, the beneficiary under a resulting trust does not "retain" his interest.

[64] *DKLR Holding Co (No 2) Pty Ltd v Commissioner for Stamp Duties* (1982) 149 CLR 431, 474 (Brennan J). See also *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311 (McLelland J); Jones (1998) (n 32) 190 (suggesting that 'the creation of a trust is a process of cumulation, not of division').

position and, if one is taking this kind of liberty in defence of one's own position, one cannot object to similar inconsistencies at the level of principle in competing theoretical positions. It will be necessary, therefore, in this chapter to look beyond the retention idea for a satisfactory theoretical explanation of the automatic resulting trust.

F. THE IDEA OF RESTITUTION

1. The Unjust Enrichment Theory

Chambers has argued that the concept of restitution underlies all resulting trusts. The resulting trustee has been unjustly enriched because 'the provider of the property did not intend to benefit the recipient'.[65] Chambers' categorisation of resulting trusts as restitutionary requires that they 'cause one person to give up something to another',[66] that something being an enrichment (or its value in money) which has been received at the expense of the other person.[67] His categorisation of resulting trusts would, therefore, be inappropriate if resulting trusts merely preserved a pre-existing entitlement of the settlor,[68] or if (which is a different proposition) such trusts did not involve the resulting trustee giving up any property received at the expense of the settlor.

If one wishes to see the trustee as being required to 'give up' or restore something to the beneficiary under the resulting trust, one is drawn towards a metaphorical conception of the creation of a resulting trust whereby the trustee takes the 'full' legal title, upon which equity 'then' fastens by creating a trust to effect restitution. The imperative to regard the trustee as taking a benefit, of which he can be stripped, leads to a visualisation in which the trust is created an imaginary instant *after* the trustee has taken legal title to the property. The reality, however, is that the trust is created neither before nor after the conveyance but at the same instant.

In the context of the restitution argument, an impression of a chronological progression may be created by looking first at the position 'at common law' and then shifting perspective to look to the position 'in equity'. This is an optical illusion, however, because the beneficiary's equitable rights come into being at the same time as the trustee's common law rights and there is never a moment when the trustee possesses the common law rights free of a trust. Obviously, in a hypothetical common law court, the trustee would be seen as having an unencumbered legal interest but that is simply to tell an incomplete story – the full story is that the common law view has been trumped by equity, leaving the trustee with just a 'bare' legal interest.[69]

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[65] Chambers (1997) (n 4) 41.
[66] *Ibid* 94.
[67] *Ibid* 93-107.
[68] *Ibid* 102-4.
[69] It is sometimes contended that the trustee has the 'entire' legal interest, as does someone who owns beneficially, but *holds* this legal estate on trust for the beneficiary. However, this idea of 'holding' is revealed as a misleading metaphor when one thinks more precisely about ownership as an aggregate of jural relations – see Hohfeld's critique of Maitland's position on the relationship between law and equity: Hohfeld (1916-17) (n 56) 769-770. See further, text to nn 59-60.

In defending the restitution thesis, Chambers' strongly rejects the 'retention' idea, suggesting that the retention reasoning in *Vandervell* is inconsistent with 'the true nature of the resulting trust itself'.[70] In light of the long pedigree of the retention argument, one must wonder as to the meaning of 'truth' in the context of this assertion. As a matter of authority, the law's approach in the context of descent seems to establish clearly that the interest held by the settlor under a resulting trust is not one which was ever held by the trustee. This seems damaging to Chambers' contention that the 'true' situation is that the trustee has been required to give up an interest to the settlor.

In terms of authority in relation to the idea of restitution, it is useful to consider the decision of the High Court of Australia in *DKLR Holding Co (No 2) Pty Ltd v Commissioner for Stamp Duties*,[71] '[t]hat dreaded stamp duty case'.[72] Chambers relies on this case partly to combat the challenge from the retention idea and partly because it appears to offer some support for the conceptual basis of the restitution idea. Most useful to his position seems to be the remark of Aickin J in *DKLR* that '[i]t is of the nature of a resulting trust that it arises when the entire interest is vested in the transferee and at the very moment it becomes so vested.'[73] While even this *dictum* concedes the obvious truth that the resulting trust is created at the same instant when the trustee acquires his legal interest, the suggestion that the trustee acquires 'the entire interest' in the property seems to assist Chambers' argument.

The facts of *DKLR* were unusual. The case concerned the stamp duty implications of a voluntary transfer by a company called '29 Macquarie' to another company called 'DKLR Holding'. Given the intention of the transferring company, this transfer would (on one interpretation of the New South Wales registration of title legislation) have triggered a resulting trust. However, prior to the conveyance, DKLR had executed a declaration that it would hold the land on trust for 29 Macquarie. This added factor in the case made it more plausible to regard the equitable interest ultimately held by the settlor as, in a sense, coming from the trustee.[74] Interestingly, in his judgment in *DKLR*, Mason J (with whom Stephen J agreed) referred to the creation of 'a resulting trust of the equitable estate which has not been disposed of',[75] thus showing apparent support for the retention approach.

Finally, in terms of putting the *dicta* in *DKLR* into context, it is important to note the comments on the case by Deane J in the High Court of Australia in *Corin v Patton*. He stated that *DKLR*:[76]

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[70] Chambers (1997) (n 4) 52.
[71] *DKLR* (HCA) (n 64).
[72] So called by counsel in argument before the High Court of Australia in *Mary Metledge t/as Metledge & Associates v Koutsourais & Anor* [2005] HCATrans 425 (17 June 2005).
[73] *DKLR* (HCA) (n 64) 464.
[74] This point was certainly in the mind of Brennan J, who stated immediately after the passage quoted by Chambers (1997) (n 4) 53, that the 'charter of 29 Macquarie's interest was DKLR's declaration, not the memorandum of transfer' from 29 Macquarie: *DKLR* (HCA) (n 64) 474.
[75] *DKLR* (HCA) (n 64) 459.
[76] (1990) 92 ALR 1, 28.

> turned upon the principle of stamp duties law that 'duty is levied on instruments, not on the underlying transactions to which they give effect'.[77] That principle of stamp duties law is to be contrasted with the general approach of equity to pay regard to substance rather than mere form.

Deane J went on to state that:[78]

> [A]s Mason J clearly recognized in the *DKLR Holding Co Case* (at p 450), equity permits an owner of property to convey it to another as bare trustee for himself or for a third party. In such a case, it is convenient to speak of the transfer as being of a bare legal estate. If more precise analysis is required, it is that the equitable rights of the beneficiary attach to the property at the instant of transfer and the transferee receives the property subject to the equitable obligations of a bare trustee for the transferor or the third party …. [and a transferee in such a position would not] have ever had any beneficial interest in the property transferred.

As a matter of authority, therefore, *DKLR* does not take the restitution thesis very far. There remains for that thesis the difficulty of the line of authority discussed in part D which insists that the interest under a resulting trust is 'no new thing'[79] and bases important practical consequences on that conclusion.

2. Arguments of Principle

Turning from authority to principle, it seems that Chambers' argument against the retention idea contains the seeds of an argument against his own position. The reason why Chambers considers that the grantor 'retains' nothing after the creation of the resulting trust seems to be that, prior to its creation, he did not have a separate equitable title; what he has after the creation of the trust is an interest under a trust, which is different to the legal title which he held before.[80] But this same point seems to defeat the argument that, by giving a beneficial interest to the grantor, one is requiring the trustee to 'give up' an enrichment (or its equivalent in money) which he has received at the expense of the grantor. If ending up with a beneficial interest under a trust does not involve 'retaining' one's former legal interest, how does being given a beneficial interest under a trust amount to a restoration of that legal interest? Chambers emphasises that resulting trusts 'are normally bare trusts, meaning that the trustee's primary duty is to convey the property to (or at the direction of) the beneficiary'.[81] However, one cannot equate holding an interest under a trust with holding the property beneficially at law, simply by reference to the fact that the beneficiary's

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[77] The internal quote is from Mason J in *DKLR* (HCA) (n 64) 449.
[78] *Corin* (n 76) 28.
[79] *Samme's Case* (n 7) 13 Co Rep 56.
[80] Chambers (1997) (n 4) 52.
[81] *Ibid* 94. Note that, if the object of the exercise were simply to put the recipient of the property under a duty to convey that property back to the settlor, this could most simply be achieved by means of an order of the court requiring the recipient to make such a conveyance – there would be no need to regard a trust as having come into existence at the time of the original transaction.

interest under the trust gives the beneficiary (amongst other rights) a power to call on the trustee to transfer the legal interest to him, so that he would ultimately end up holding beneficially. After all, if having a power to call on the trustee to convey the legal interest was equivalent to holding beneficially, one could fairly say that the grantor retains his interest when a resulting trust arises in his favour – initially, he held beneficially and, once the resulting trust has arisen, he holds an interest under a trust which allows him to call upon the trustee to convey the legal interest to him.

The problems with the retention idea also highlight another important difficulty with Chambers' thesis. For Chambers, '[a]ll resulting trusts come into being because the provider did not intend to benefit the recipient.'[82] The description of the basis of resulting trusts, which recurs frequently throughout his work on the subject, is a 'lack of intention to benefit the recipient'.[83] The resulting trust is 'equity's response to the receipt of property by someone who was not intended to have the benefit of that property.'[84] Chambers is at pains to emphasise that 'the essential fact of intention, common to all cases of resulting trusts' is not a 'positive' intention but rather an absence of intention. He explains that:[85]

> there is a difference between a presumption that the provider *did not intend* to benefit the recipient and a presumption that the provider *intended not* to benefit the recipient. Only the latter can explain all of the cases of resulting trust … .

This point is crucial in the scheme of Chambers' overall argument. His ultimate project is to establish the radical proposition that the resulting trust comes into existence in a far wider range of circumstances than the existing orthodoxy would accept, so that there would be a proprietary remedy in the form of a resulting trust 'in every case in which the provider is entitled to restitution on the basis of non-voluntary transfer'.[86] Thus, the resulting trust could arise, for example, in cases of mistaken payment or of undue influence or unconscionability or in suitable cases of 'failure of consideration'.[87] A difficulty in the way of this argument is the plausibility of the counter-argument that the traditional categories of resulting trust turn on an intention (which, in some cases, is proven through the operation of a presumption) on the part of the settlor to create a trust. If the resulting trust indeed turns on a positive intention to create a trust, then it cannot operate in the new categories of case which Chambers envisages, given that these new cases do not involve any intention on the part of the settlor to create a trust. Hence, Chambers' concern to establish the

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[82] *Ibid* 2.
[83] See e.g. Chambers (1997) (n 4) 21.
[84] *Ibid* 33.
[85] *Ibid* 21.
[86] *Ibid* 113. This is subject to the requirements that '(i) the enrichment consists of assets capable of being the subject matter of a trust and (ii) the recipient does not obtain the unfettered beneficial ownership of those assets before the right to restitution arises'.
[87] *Ibid* chap 5 ('Vitiated Intention') and chap 6 ('Qualified Intention').

proposition that the basis for all resulting trusts is an absence of an intention to benefit the recipient.

In a recent critique of Chambers' position, Swadling finds it difficult to see when an 'absence of intention' could arise in practice, leading him to inquire 'if it really was the transferor's intention 'not to benefit' the transferee, why did he make the transfer at all?'[88] It is true that, in the context of a transfer of property (on which Swadling's analysis in the relevant article tends to focus), it is at first sight difficult to see when there would be a total absence of intention to make the transfer, without a plea of *non est factum* being possible.[89] However, Chambers' argument relies for the most part on cases in the domain of the purchase money resulting trust. In that context, it is easy to envisage a person's money being used to fund the purchase of property in another's name without the first person's knowledge, such a case fitting well into the 'absence of intention' paradigm. Chambers places strong emphasis on the fact that certain older English cases which recognised that a trust should arise in this situation, including *Ryall v Ryall*,[90] referred to the relevant trust as 'resulting'.[91] Chambers categorises such cases as examples of the resulting trust and, emphasising the fact that these cases do not involve a positive intention to create a trust, he identifies the concept of 'absence of intention to benefit' as the feature which unites these examples with the other categories of resulting trust. This provides him with a basis to argue for the extension of the resulting trust to new situations which he regards as also satisfying the 'absence of intention to benefit' criterion.

On closer inspection, it appears that Chambers' argument essentially hinges on an ambiguity in the word 'benefit'. Chambers' reasoning runs into problems because the idea of an absence of intention to 'benefit' must, for the purposes of his position, cover two different situations: (i) an absence of intention to give any sort of interest to the recipient (to cover cases like *Ryall v Ryall*) and (ii) an intention to give the legal title to the recipient so that the recipient would hold on trust rather than taking beneficially (to cover the

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[88] Swadling (2008) (n 4) 93.

[89] It could arise, however, in a case triggering a right to rectification, as where the written conveyance included an interest in property which the transferor had not intended to be covered by it.

[90] (1739) 1 Atk 59, 26 ER 39. See also *Lane v Dighton* (1762) Amb 409, 27 ER 274; *Williams v Williams* (1863) 32 Beav 370, 55 ER 145.

[91] Chambers (1997) (n 4) 21-3. Chambers also discusses (at 22-3) a handful of Canadian cases, by far the most recent of which is *Re Kolari* (1981) 36 OR (2d) 473. It is unclear what claim is being made in respect of the authority of these cases. Given the development in Canadian law of the constructive trust as an instrument to remedy unjust enrichment (following *Pettkus v Becker* [1980] 2 SCR 834), it seems doubtful that the cases establish as a matter of authority that the current position in Canadian law is that a resulting trust, rather than a constructive trust, arises to remedy unjust enrichment in the situation under discussion. There is no assertion by Chambers that these are the only Canadian cases falling within the relevant fact pattern, so that it may be that only cases invoking the resulting trust have been cited. One case not mentioned is *Duff v Duff* (1988) 12 RFL (3d) 435 (Ontario Supreme Court) (cited in A Scott and W Fratcher *The Law of Trusts* 4th edn (Boston, MA, Little, Brown & Co, 1989) vol 5, §440.1) where, without her knowledge, a husband used his wife's share of the proceeds of sale of a house to purchase another property in his own name. Hoilett LJSC decided (*ibid*, 447-8) that the husband held the new property on a constructive trust for his wife.

'automatic resulting trust' and the other traditional examples of the resulting trust, excluding cases comparable to *Ryall v Ryall*). The second of these intentions involves a positive intention to create a trust, not merely an absence of intention to benefit the recipient. As Chambers is content to accept in the context of the 'retention' argument (and as is clearly established by *Westdeutsche*), it is a fallacy to suggest that a person who holds property beneficially holds a separate equitable interest alongside a separate legal interest.[92] Therefore, it is simply not tenable to suggest, as Chambers does,[93] that a person could intend to pass the legal interest but, without holding the positive intention of creating a trust giving rise to a separate equitable interest, could 'lack' an intention to pass the equitable interest. It would suit Chambers' argument if it could be said that such a person intends to give the recipient the legal title but has an absence of intention in respect of giving him 'the benefit' of the property. The trouble is that there is no such thing as 'the benefit' of the property as distinct from legal ownership or the equitable interest under a trust[94] – if one is to have any intention or absence of intention as to what will happen to the equitable interest, one must first intend to have a trust under which there will be a separate equitable interest. It should be stressed again that if there really were such a thing as the 'benefit' of the property, which the settlor possessed prior to the transfer and which he might fail to intend to transfer along with the legal title, then the retention thesis would be perfectly viable in principle.

The argument in the last paragraph suggests that Chambers 'essential fact of intention' actually covers two distinct mental states, one an absence of intention to give any interest to the recipient of the property and the other a positive intention to have the recipient hold on trust rather than hold beneficially.[95] It is certainly possible to find words which describe the latter intention in terms of a mixture of positive and negative aspects, for example by stating it as a positive intention to create a trust coupled with an absence of intention to have the trustee take the beneficial interest under the trust. It is arguable that the negative aspect of this formulation adds nothing because the reference to a positive intention to make the recipient a trustee presupposes an intention to have a beneficiary or beneficiaries other than the trustee (or to have a trust for a purpose) in respect of the portion of the beneficial interest under discussion. Furthermore, the formula 'an absence of intention to have the trustee

[92] Lord Browne-Wilkinson's purpose in *Westdeutsche* (n 1) 706 in pointing out this fallacy was, in fact, to defeat an argument based on the conceptualisation of the resulting trust favoured by Chambers.

[93] See Chambers (2000) (n 6) 390, arguing that a resulting trust can arise in favour of someone who was aware that he was conveying the property to another person but 'simply failed to address [his] mind to the issue of beneficial ownership'.

[94] See the critique by Swadling (2008) (n 4) 90-3.

[95] Swadling (2008) (n 4) appears to assume that Chambers' idea of 'lack of intention to benefit' (and Birks' similar formula 'non-beneficial transfer', on which Swadling primarily focuses) must bear only one meaning. This leads him to struggle to pin down which meaning is intended. The current author differs from Swadling in concluding that the relevant formulations were intended by their authors to be sufficiently broad to cover both of the mental states identified in the text to this footnote (so that if either were present there would be a 'lack of intention to benefit' or a 'non-beneficial transfer').

take the beneficial interest' is overly inclusive in terms of identifying the cases where a resulting trust will come into existence, since it clearly covers cases of express trust.[96] Thus, when unpacked, the phrase 'lack of intention to benefit the recipient' is simply a short-hand for 'an absence of intention to give the recipient the legal title or a positive intention to make the recipient a trustee coupled with the absence of a valid allocation of the relevant portion of the beneficial interest to the trustee or anyone else or for any valid purpose'. This is far less convincing as a unifying principle for resulting trusts, which Chambers envisages as carrying a significant amount of weight in terms of justifying a radical expansion in the scope of such trusts. Unlike Chambers' preferred phrasing, this more detailed formulation emphasises the difference between cases involving an absence of intention and cases falling under the traditional categories of resulting trust. This encourages a straightforward riposte to Chambers' argument, which is to deny that the absence of intention cases are properly to be classified as examples of resulting trust (facilitating the argument, favoured by the present author, that the unifying feature of all resulting trusts is that they turn on the intention of the settlor to make the recipient of the property a trustee).[97]

One subset of absence of intention cases, including those where a trustee makes unauthorised use of trust money to make a purchase in his own name, appears to involve a standard application of tracing principles.[98] Following *Foskett v McKeown*, a case in this category 'does not involve any question of resulting or constructive trusts',[99] because the original express trust can be seen as covering the property which has been purchased using trust funds. It is not surprising, given the factual similarities between this aspect of the law of tracing and the purchase money resulting trust scenario, that they should sometimes be conflated.[100] However, this does not make them the same, especially since there is an important difference in the rules applicable to the two situations, in that a person whose money has, with his consent, been used to acquire property (so that he is entitled under a resulting trust) must take his proportionate share of the loss if the property goes down in value. In the tracing context, however,

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[96] As pointed out by S Gardner *An Introduction to the Law of Trusts* 2nd edn (Oxford, OUP, 2003) 136. Gardner develops a concept of 'proprietary inertia' *ibid* 132-7 as an alternative basis for resulting trusts. However, it is difficult to see how the idea of 'inertia' provides a solution to the difficulty with the retention idea, especially when Gardner seems to be thinking in terms of the property 'remaining' with the settlor: *ibid* 136.

[97] Although the voluntary conveyance and purchase money resulting trusts have not been analysed in detail in this chapter, it is submitted that they fit into the analysis advanced in the text. This chapter is part of a wider project which will involve the author in dealing specifically with these other types of resulting trust.

[98] See Swadling 'Property' (2000) (n 12) 254-6.

[99] [2001] 1 AC 102, 108 (Lord Browne-Wilkinson). See also Lord Millett's statement at 127 that 'A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also'. Chambers does not agree: see generally R Chambers 'Tracing and Unjust Enrichment' in J Neyers et al (eds) *Understanding Unjust Enrichment* (Oxford, Hart Publishing, 2004) 263.

[100] Compare N Glover and P Todd 'The Myth of Common Intention' (1996) 16 Legal Studies 325, 335, seeking to explain the purchase money resulting trust by reference to principles set out in the tracing case of *Re Hallett's Estate* (1880) 13 Ch D 696, 708 (Jessel MR) – rather than vice versa, as in Chambers' argument, where it seems that a tracing rule is being justified by reference to the doctrine of resulting trusts.

where the person's money has been used without consent, he is entitled to opt instead for a charge over the property reflecting the amount of his money which was used in the purchase.[101] In another subset of the absence of intention cases, where property is acquired on the basis of theft or fraud,[102] English authority indicates that the property acquired would be held on a constructive trust, rather than a resulting trust.[103]

To sum up, it is important to realise that Chambers' ambiguous phrase 'lack of intention to benefit' artificially ties together two distinct principles, one of which is based on a positive intention of the settlor to create a trust and another of which is not. The fact that in a limited number of early tracing cases the label 'resulting trust' was applied in a scenario involving an absence of intention proves relatively little, given that that usage has not generally been followed in the modern case law and runs counter to the approach of the House of Lords in *Foskett.* By grouping the two sets of cases together, Chambers is able to assemble a more secure foundation for his contention that the principles of resulting trusts could apply in a far wider range of circumstances than is currently accepted in the law. The argument is weakened significantly, however, if it is conceded that the mainstream categories of resulting trust actually turn on a positive intention to create a trust and so do not provide any support for an extension of the resulting trust to a greater range of cases which are said to involve an absence of intention.[104]

G. AN ALTERNATIVE VIEW: REPOSING TRUST

This part seeks to develop a more satisfying theoretical rationalisation for the automatic resulting trust, drawing on equitable discourse on the nature of resulting trusts and also on the historical development of trusts generally.

1. Metaphorical Conceptions of the Resulting Trust in Equity

The word 'resulting' derives from the Latin 'resultare', meaning to spring or leap back. Its technical legal meaning seems closely related to a non-legal sense of the English word as meaning '[t]o recoil; to rebound or spring back' which, though now obsolete, seems to have been current at the time when the term was

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[101] See e.g. *Re Hallett's Estate* (n 101) 709. Compare Chambers (1997) (n 4) 190-1.

[102] See e.g. the facts of *Collings v Lee* [2001] 2 All ER 332 (CA).

[103] See *Westdeutsche* (n 1) 716 (Lord Browne-Wilkinson). The constructive trust solution is clearly established in American law in cases where one person's money is used without permission in the purchase of property, with the imposition of such a trust being seen as based on unjust enrichment. See Scott and Fratcher (n 91) vol 5, 145-8 (distinguishing this from the purchase money resulting trust).

[104] In fact, these other cases to which Chambers proposes to extend the resulting trust do not involve a true absence of intention but rather an intention which is, in some sense, 'qualified' or 'vitiated'. As a matter of principle, there is an important distinction between the claim that 'I was not even aware of this transfer' and, on the other hand, the claim that 'I did intend this transfer but …'. See further K F K Low 'The Use and Abuse of Taxonomy' (2009) 29 Legal Studies (forthcoming), text to nn 28-37.

attached to trusts.[105] What is to be understood by the metaphor – implicit in the word 'resulting' – of springing or leaping back, or recoiling, or rebounding? Interestingly, it seems to constitute an alternative visualisation of the resulting trust in equity, existing alongside the idea of retention. Where a preference is expressed between them, it has tended to be for the notion of retention. Sweet,[106] for example, argued that the term 'resulting' is 'unfortunate, because it suggests the idea of returning or coming back' and he was adamant that using it in that sense would be 'an error' since it is inconsistent with the idea of retention (which, as has been discussed, had a solid basis in actual legal rules). Nonetheless, the 'springing back' or 'rebounding' metaphor seems likely to have explanatory value, given that is embedded in the very label applied to resulting trusts.

One way of looking at the relevant metaphor is to suggest that, by the act of conveying the property to the trustee to hold 'on trust', the settlor is seen as having separated the legal and the equitable interests and sent them off into the ether towards their intended recipients. The bare legal title is successfully projected on to the trustee but the equitable interest does not carry to anyone – it is 'in the air'[107] for an imaginary instant and, since it has no place to land, it springs 'back' to the settlor. This idea of the beneficial interest rebounding (as it were, against the brick wall it has come up against) does not involve the idea that it has come back *from* someone else. This point is conveyed by another metaphor to which equity has resorted – the idea contained in '[e]arly references to Equity, like Nature, abhorring a vacuum'.[108] This suggests the image of a physical template for a trust, with a space for the trustee (holding the bare legal title) and a space for the beneficiaries (holding the beneficial interest). If there is a 'gap' in the ownership of the beneficial interest, the settlor is drawn in to fill this 'vacuum'– hence, in a sense, the settlor is drawn towards the beneficial interest, rather than the reverse as in the other metaphors.

The line of thought underlying these metaphors, although giving a useful flavour of the equitable rules in relation to resulting trusts, is insufficient to provide a full theoretical explanation of those rules. The difficulty does not lie in the concept of a trustee holding a 'bare legal title' since this is actually a coherent description of the interest of a trustee *in the eyes of equity* (which means in the eyes of our legal system).[109] The difficulty is instead that 'a bare legal title' is a relational idea – a trustee's rights are limited, as compared to someone who holds beneficially, because the trustee's aggregate of claim-rights, liberties, powers and immunities is altered *in relation to a particular beneficiary or beneficiaries*.[110] It is not truly coherent to say that a person holds a 'bare legal

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[105] *The Oxford English Dictionary* 2nd edn 1989 *OED Online* Oxford University Press 21 March 2009 <http://dictionary.oed.com/cgi/entry/50204534> sv 'result *v*', giving examples from the 16th, 17th and 18th centuries.

[106] Sweet (n 31) 130.

[107] *Vandervell v IRC* (n 3) 329 (Lord Wilberforce).

[108] *Ibid* 313 (Lord Upjohn) who regarded such references as 'delightful but unnecessary'.

[109] See text to nn 59-60 above.

[110] The proposition in the text is not phrased so as to accommodate the possibility of charitable / purpose trusts but the existence of such trusts does not alter the substance of the point being made.

title' in the abstract, without reference to anyone else's position.[111] However, it must be remembered that this difficulty does not afflict the rule which proceeds from the metaphors under discussion. The trustee ends up having a bare legal title with the settlor as the beneficiary, so that there is never really a moment when the beneficial interest is in transit, unsuccessfully moving towards a beneficiary who cannot be reached; instead the beneficial interest instantly vests in the settlor. In fact, it may be helpful to regard the metaphors as illustrating the conceptual impossibility which the resulting trust is seen as avoiding. Equity says that the beneficial interest '*cannot* remain in the air' or that it will not countenance a vacuum in the beneficial interest – these things would make no sense and, so, cannot be.

It will be noticed, however, that the thinking which has just been discussed is dependent on a central assumption, i.e. that, where land has been conveyed 'on trust' to X, then X must hold as trustee even if the particular trusts on which he has been required to hold have failed. It could, naturally, be argued that this is a flaw in equity's approach and that the problem of a trustee without a beneficial interest could equally be solved by saying that there is no trust, so that the recipient never becomes a trustee and simply takes beneficially. The injustice which that would create could then be addressed by giving the settlor a personal claim in unjust enrichment against the intended trustee.[112] An account of the automatic resulting trust is, therefore, not complete without a justification for the assumption that a trust comes into existence in the circumstances under discussion. The following section attempts to provide this justification.

2. Why Does a Trust Come into Existence?

It is submitted that equity concludes that a trust exists in the 'automatic resulting trust' situation because the settlor has created a trust. This explanation involves distinguishing between two different things (a distinction which is critical, it is submitted, to understanding all forms of resulting trust): (i) the creation of a trust through giving property to a trustee to be held on trust, thereby reposing trust in him and (ii) the declaration of the particular trusts under which the trustee is to hold. The point is that what Chambers and Swadling call 'a trust which fails' does not truly fail for the purpose of the rules on resulting trusts. Equity does, of course, recognise the 'three certainties', without which an express trust will 'fail'.[113] For example, where property is conveyed to someone and the transferor imposes a purely moral duty on the recipient in respect of the property, no trust is created due to an absence of certainty of intention to create a trust and the recipient takes the property beneficially. However, 'failure' has a different meaning in the context of certainty of objects; it means, not that the intended trustee will take beneficially, but that there will be a resulting trust for the settlor. Where the other requirements for a valid trust are present but there is a failure in terms of certainty of objects, the trust in sense (i) above does not

[111] Compare *Burgess v Wheate* (n 46), where the beneficiary under a trust died without heirs and, since the doctrine of escheat to the Crown was held not to apply and there was no beneficiary in whose favour to enforce the trust, the trustee was permitted to retain the property for his own benefit.

[112] See Swadling (2008) (n 4) 99 and 101.

[113] Compare Chambers (1997) (n 4) 44-5.

fail, it is only the particular trusts in sense (ii) above which fail.[114] Hence, there is a resulting trust for the settlor. As Megarry J put it in *Vandervell* (*No 2)*: 'Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of.'[115]

Why then does equity regard a trust as having been created once property is given to a trustee 'on trust'? The point may be approached by looking back at the origins of the concept of a trust. Consider the following passage from Simpson's treatment of the question:[116]

> In protecting the *cestui que use* the Chancellor most commonly proceeded by giving effect to the wishes, intention, or will (*volunt*) of the feoffor or settlor. His wishes might be declared either informally by parole, or they might be expressed formally either in writing or by a deed, such declarations being made on the occasion of the feoffment. Alternatively, the uses might be declared subsequently … .

Thus, the essential idea was of someone conveying land to another person to be held according to the first person's wishes. As it was put in one old case, uses were directed 'by the will of the owner of the lands: for the use is in his hands as clay in the hands of the potter'.[117] The 'most potent attraction of putting lands in use'[118] was that it allowed the settlor to acquire a power to devise his lands. A common way of doing this was making a conveyance to feoffees 'to the use of my will',[119] so that the first 'wills' simply consisted of the expression by the settlor of his intentions as to the property, often made when he was on his deathbed.[120] Simpson explains that:[121]

> Such a transaction was not originally thought to … raise any issue different in principle to that raised by a feoffment to uses designed to create a settlement *inter vivos* …; the basic policy was that the wishes and intention of the settlor, whatever they were, should be respected.

Against this background, it is inconceivable that a trust would be regarded as 'failing' from the start in the case of a voluntary conveyance to a trustee to hold e.g. 'to the uses of my will'. Instead, this was a paradigmatic example of a trust, with land being transferred to be held according to the settlor's instructions. This illustrates the basic point that there was (and still is, it

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[114] Note that Chambers (*ibid* 45) relies on a passage from Maitland ((n 8) 76) to demonstrate that 'the words, "on trust", do not create a trust.' It is submitted, however, that Maitland's emphasis in the relevant passage is on the fact that, while the settlor has made it clear that the recipient is to be a trustee, he 'has not saddled him with any *particular* trust' (emphasis added).
[115] *Vandervell (No 2)* (n 10) 294.
[116] A W B Simpson *A History of the Common Law of Contract* (Oxford, OUP, 1987) 334.
[117] *Brent's Case* (1583) 2 Leonard 14, 16; 74 ER 319, 320 (Manwood J).
[118] Simpson *History of Land Law* (n 33) 182.
[119] Simpson *History of Contract Law* (n 116) 334; R Megarry 'The Statute of Uses and the Power to Devise' [1941] CLJ 354.
[120] Simpson *History of Land Law* (n 33) 182.
[121] Simpson *History of Contract Law* (n 116) 334.

is submitted) a distinction between the creation of a trust – an arrangement under which the trustee was obliged to hold the property according to the settlor's expression of his will – and the expression of his will itself. This corresponds to the distinction contended for above, i.e. between the creation of a trust and the allocation of the beneficial interest to specific beneficiaries.[122]

In this context, the doctrine of resulting uses is readily comprehensible. Where property was conveyed to a trustee to hold to uses which were to be declared in the future, the question arose as to the fate of the land in the meantime. Given that a trust was clearly in existence, the only reasonable solution was to conclude that the land should be held to the use of the settlor, thus preserving his ability to determine subsequently what should happen to the land. To allow the trustee to take the property beneficially would have been to ignore the trust which the settlor had reposed in the trustee. Equity's willingness to take account of this 'trust' (in the non-technical sense) has been crucial to equity's enforcement of trusts[123] and its associated willingness to prefer the rights of the beneficiaries over the trustee's creditors and to protect those rights against third parties other than *bona fide* purchasers for value. Therefore, if one asks why there should be a trust in the case of what is (misleadingly) termed a 'failed trust', the short answer is 'for the same reason as in the case of any trust'.

On this view, the automatic resulting trust is a hybrid. The creation of the trust itself is seen as arising from the decision of the settlor, while the allocation of the beneficial interest to the settlor is seen as occurring because of a rule of the law of equity devised to fill any gap in the beneficial interest under a trust. Adherents of Birks' taxonomy of causative events (in terms of 'consent', 'unjust enrichment', 'wrongs' and 'other events')[124] might ask to which category the causative event belongs. The rule creating a resulting trust in this situation can be seen as one of the background rules which are triggered when a person chooses to create a trust. It is part of a package of rules which cover matters which the settlor may not have consciously considered – such as, for example, the rules imposing various powers and duties on a trustee in terms of investment or the rules about liability for breach of fiduciary duty. In this sense, the allocation of the beneficial interest to the settlor in the context of an automatic resulting trust may be seen as resembling an implied term in a contract. Implied contractual terms are challenging for the Birksian taxonomy and, in some instances at least, might arguably be best placed outside the 'consent category' and allocated instead to the 'other events' category.[125] It may be that this categorisation would also be appropriate in the context of the approach advocated in this chapter, but this depends on one's understanding of the breadth of the 'consent' category.

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[122] Compare the comment of Maitland quoted as text to n 8: 'I have made A a trustee for somebody, and a trustee he must be'.

[123] See Jones (1998) (n 32) 193-4 for discussion of the personal element of trust and confidence which was central to the early idea of the trust.

[124] For recent discussion of this taxonomy, see Low (n 104).

[125] *Ibid*, text to nn 77-9. See also *ibid*, text following n 13, noting the danger of assuming that the other three categories are somehow 'hierarchically superior' to the miscellaneous category.

H. CONCLUSION

This chapter has considered the justification for the 'automatic' resulting trust. It has been pointed out that, as a historical matter, the dominant explanation has been that the settlor 'retains' any beneficial interest of which he has not disposed. At the level of authority, this explanation provides a well-established justification for the existing rules. Since the view taken in this chapter is that these existing rules are satisfactory, this is not in itself an objectionable state of affairs. However, advocates of a radical expansion in the scope of operation of resulting trusts have argued that the retention idea is flawed at the level of principle, providing support for the idea that the existing rules should be altered to allow resulting trusts to operate as an instrument to reverse unjust enrichment in a wide variety of cases. The relevant issues have been investigated in this chapter and it has been concluded that the retention explanation, though deeply rooted in authority, is not fully satisfactory at the level of principle. It has also been noted that the proposition that all resulting trusts should be regarded as being based on unjust enrichment is not supported by authority and, at the level of principle, is vulnerable to some of the same criticisms as the retention idea.

This chapter has identified an alternative rationalisation of the existing rules (which does not involve any modification in the content of those rules). It has been suggested that, in the context of the 'automatic' resulting trust, equity is confronted with the question of what should happen when property is given on trust to a trustee but the particular trusts indicated do not exhaust the beneficial interest or are invalid. The rule chosen by equity in this situation, that there should be a resulting trust for the settlor, is difficult to fault as a matter of justice. It has been argued that it proceeds on the basis of a logically prior decision by equity that, once property has been conveyed to a trustee in whom the settlor has reposed trust to hold it according to the settlor's instructions, the trust will not 'fail', even where there is a failure in the particular trusts declared or a failure to declare any such trusts. Once one is willing to accept that a trust has been brought into existence by the conveyance to the trustee, so that someone must become entitled to the beneficial interest under that trust, it is difficult to justify anyone besides the settlor taking any unallocated beneficial interest. Although the existing rule is not the only conceivable option, it seems clearly preferable to the alternatives.[126] Thus, this chapter has sought to show that the automatic resulting trust does not truly 'def[y] legal analysis'[127] but is defensible as a matter of principle.

[126] See the discussion in the text following n 20.
[127] Swadling (2008) (n 4).