A HISTORY OF ENGLISH LAW

BY

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To say truth, although it is not necessary for counsel to know what the history of a point is, but to know how it now stands resolved, yet it is a wonderful accomplishment, and, without it, a lawyer cannot be accounted learned in the law.

ROGER NORTH

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the incidents of tenure.[1] The third object was attained because the Statute of Enrolments, which, as we have seen, must be regarded as an integral part of the Statute of Uses,[2] required the enrolment of all bargains and sales. It is true that the Statute made no provision for covenants to stand seised; nor did its framers foresee that ingenious conveyancers would evade the Statute of Enrolments by the device of a bargain and sale for a term of years followed by a release. But we cannot expect the framers of any statute to possess the gift of prophecy. We have seen that the covenant to stand seised was not a recognized form of conveyance at the time that the Statute was passed;[3] and it was not till many years later that the validity of the method of evading the Statute of Enrolments by means of a bargain and sale for a term of years was finally established.[4]

The question whether the Statute succeeded in accomplishing the fourth of these objects, by abolishing the separation between the legal and the equitable ownership, is rather more complicated. In the first place we must remember that the Statute did not attempt to abolish this separation in all cases. We have seen that it did not apply either to the case where A is possessed of chattels real or personal to the use of B, or to the case where the trustee has active duties to perform. The question is, did it succeed in attaining its object in the case to which it did apply, i.e. where A is seised of hereditaments to the use that he permit B to enjoy the property. The answer is that it did succeed for about a century, because the courts of law and equity set their faces against any attempt to evade the Statute by the limitation of a use upon a use.

Even before the passing of the Statute of Uses there had been at least one case in which the question of the validity of a use limited upon a use had arisen.[5] Whether any, and if so, what effect could be given to the second use was, according to the Doctor and Student, a debateable question.[6] But, on the whole, the courts seem to have inclined to the opinion that

[1] Above 465-466. [2] Above 455 n. 4. [3] Above 425-426.

[4] Lutwich v. Mitton (1621) Cro. Jac. 604; above 460 n. 1.

[5] Brook, Ab. *Feffements al uses* pl. 40 (24 Hy. VIII.); cp. ibid pl. 54 (36 Hy. VIII.); Ames, Origin of Uses and Trust, Essays, A.A.L.H. ii 748; the will of William Bulmer (1524), Test. Ebor. v 189, provides a clear instance by the creation of a use on a use; he directed his feoffees to hold to the use of his wife for fifteen years "to such use and behove as I have charged my saide wif with."

[6] Bk. ii c. 21—the case put is a feoffment to X to the use that he pay a rent to AB; and the question is whether AB holds this rent to his own use if nothing further is said; the Student answers in the affirmative, "without the contrary can be proved, and if the contrary can be proved, and that the intent of the feoffor was, that he should dispose of it for him as he should appoint, then hath he the rent in use to another use, and so one use should be depending upon another use, which is seldom seen, and shall not be intended till it be proved."

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[6] Dyer 155a; Benloe 61

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no effect could be given to it on the following grounds: They were clearly of opinion that if a use was implied by law in favour of anyone, other than a volunteer, no further use could be expressed. Thus we have seen that if A enfeoffed B for a life estate or for an estate tail, B would hold to his own use, whether or no any further use was expressed, because the obligation arising from the tenure between A and B was a sufficient consideration to raise a use in B's favour.[1] On the other hand, if A enfeoffed B gratuitously for an estate in fee simple, no such obligation arose, and a use would be implied in A's favour;[2] but this implied use could be negatived if it was expressly stated that B was to hold to the use of X.[3] A, in other words, could waive a benefit which the law gave him. It was quite a different case if A enfeoffed B in fee simple to the use of X to the use of Y; for here two wholly incompatible uses were expressly limited. It was thought, and on the whole reasonably, that the same principle should be applied to the second of these uses, as was applied to an express use, which was incompatible with an implied use in favour of a tenant for life or in tail.[4] Therefore the use declared in favour of Y was void, because it was incompatible with the use previously declared in favour of X.

For a short time after the passing of the Statute of Uses some uncertainty on this point existed. In 1555, in the case of *Milborn* v. *Ferrers*,[5] the question whether any effect could be given to the second use was doubted; but three years later, in *Tyrrel's Case*,[6] the court of Wards, with the approval of the judges of the court of Common Pleas, decided that the second use was void. The facts of that case were as follows: Jane

[1] Above 429. [2] Above 424. [3] Above 424 and n. 5.

[4] That this was the line of thought comes out clearly in Brook, Ab. *Feffementes al uses* pl. 40—"Home fist feoffment in fee al iiii al son use, et les feoffees fierent done in tayl al estranger sans consideration, qui n'avoit conusance del primer use, habendum in talliato ad usum de cesty que use et ses heires, le tenant in tayle ne sera seisi al primer use, mes al son use demesne quar . . . icy est tenure enter les donors et le donee que est consideracion que le tenant in tayle sera seisi al son use demesne, et eadem lex del tenant a term d'ans et tenant pur vie . . . La coment que use soit expresse ad usum le donor ou feoffor, uncore ceo est consideracion que le donee ou feoffee ceo avera al son use demesne. Et eadem lex ou home vend son terre pur xx li per indenture et execute estate al son use demesne, c'est voide limitation del use;" that this view was followed by the court of Chancery seems clear from Cary 14, "If A sell land to B for £20 with confidence that it shall be to the use of A, yet A shall have no remedy here, because the bargain had a consideration in itself;" cp. Holloway v. Pollard (1606) Moore (K.B.) 761—a decision of Egerton C. that no use upon a use could be recognized.

[5] Dyer 114b—If A and B his eldest son, enfeoff to the use of A to the use of his youngest son for life, provided that the youngest son during his life permits B and his heirs to make leases, reserving the rents to the youngest son during his life, remainder to the use of A in fee, *quære* whether a lease made by A for twenty-one years be good; clearly it is good if the second use is void.

[6] Dyer 155a; Benloe 61; 1 And. 37 pl. 96.

Tyrrel, for £400 paid by G. Tyrrel her son, by deed enrolled bargained and sold to G. Tyrrel all her lands, to hold to the said G. Tyrrel and his heirs, to the use of Jane for life, and after her decease to the use of G. Tyrrel and the heirs of his body, and, in default of issue, to the use of the heirs of Jane. These uses the court of Wards held to be void "because a use cannot be reserved out of an use." "And here it ought to be first an use transferred to the vendee before that any freehold or inheritance in the land can be vested in him by the inrollment. And this case has been doubted in the Common Pleas before now. . . . But all the Judges of the C.B. and Saunders, Chief Justice, thought that the limitation of uses above is void, for suppose the statute of inrollments had never been made, but only the statute of uses, then the use above could not be, because a use cannot be ingendered of a use." Or, as Anderson more intelligently says, "the bargain for money implies in itself a use, and the limitation of another use is merely contrary." In *Dillon* v. *Fraine* he expressly compares this case to the cases in which it had been held that a tenant for life or in tail could be seised to no use but his own, because, the tenure between feoffor and feoffee having raised an implied use in favour of the feoffee, no other use could be expressed.[1]

It would appear from Dyer's report that the court of Wards were of opinion that, if the use had been transferred to G. Tyrrel the son, by indenture inrolled, he might then have declared that he held to the use of Jane Tyrrel for life; but that this could not be done by one conveyance, because a use cannot be reserved out of a use. The reasoning of the court of Common Pleas was, however, somewhat different. They followed precedent, and laid it down that in no case could a use be executed which would contradict a use which arose by implication of law, whether by reason of a feoffment in tail or for life, or by reason of a bargain and sale. About the same time they also decided that no implied use could be raised which would contradict a use expressly declared—a logical decision of what was really the converse case.[2]

[1] 1 And. at p. 313, "It is agreed [by Tyrrel's Case] that if one by deed indented and inrolled bargains and sells land to I.S. to the use of the bargainor for life or in fee or to the use of a stranger, this limitation of a use is wholly void, because by the sale for money a use is implied, and to limit another (even though it be by deed that the other use is limited) is merely repugnant to the first use, and they cannot stand together, and 24 H. 8 Br. tit. Feoffment al Uses 40 [above 429 n. 5] one cannot give land in tail to the use of another, because the tenant in tail cannot be seised to the use of any one else than himself and the heirs of his body, and cannot make a valid feoffment to him to whom the [second] use is appointed."

[2] 1 And. 37 pl. 95—"Note by all the judges that if one without consideration infeoffs another by deed to have and to hold land to the feoffee and his heirs to his

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[4] Wimbish v. Talbois (15
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[5] Winchester's Case (158

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In coming to these decisions the court followed an obvious analogy, and applied both to the use implied from a bargain and sale, and to a use expressly declared, the law in force with regard to the use implied from a gift to A for life or in tail. But we have seen that, towards the end of the sixteenth century, some lawyers thought that the use implied by law in favour of the donee on a gift for life or in tail might be rebutted by express declaration.[1] But if this were so, why should not the use implied from a bargain and sale be likewise rebutted? If this could be done the decision in *Tyrrel's Case* could not stand. But by this time an alternative reason had been found for it. The court of Common Pleas had declined to separate the two uses, and allow the validity of a use declared upon the legal estate arising from the execution of the first use by the Statute.[2] Now a use was not regarded as having any existence at all at law.[3] It is true that in respect to some of its incidents the use of freehold land was assimilated by the chancellor to a hereditament;[4] but it had not all the qualities of a hereditament;[5] so that it could hardly be maintained that it was a true hereditament. But if it was not a hereditament no use declared on it could be executed by the statute.[6] It was in the same position as the use of a chattel real or personal.

But, if this reason is given for the decision, it may be asked why the chancellor should not enforce this second use. In an anonymous case of the year 1580 the judges, in answer to a question asked them by the chancellor, said that the use of a term of years was void in that it was not executed by the Statute of Uses.[7] But it is quite clear that the chancellor recognized these

(the feoffee's) own use, and the feoffee suffers the feoffor to occupy the land for divers years, still the right is in the feoffee, because an express use is contained in the deed, which is sufficient without any other consideration; the law is the same when the feoffment is made to the use of a stranger and his heirs;" see above 424 n. 5, 469.

[1] Above 429 n. 6; Anderson notes this diversity of opinion in his argument in Dillon v. Fraine (1589-1595), 1 And. at p. 313; and in Corbet's Case (1599-1600) 2 And. at p. 136 it was said, "Et (nient obstant le opinion de darren temps) si un done terre a auter in tail al use de auter et ses heyres, cest limitation de use est ouster-ment void come appier 24 H. 8."

[2] Above 470.

[3] Above 430, 440.

[4] Wimbish v. Talbois (1551) Plowden at p. 58 *per* Mountague C.J.; above 437-438.

[5] Winchester's Case (1583) 3 Co. Rep. at f. 2b.

[6] Bacon, Reading 425, "the fourth word is hereditament. . . . This word excludes annuities and uses themselves; so that an use cannot be to a use."

[7] Dyer 369a, "A being possessed of a lease for a term of years granted all his estate . . . to B and C and their assigns *to the use of the said A and his wife* for the term of their lives and of the longer liver of them. And afterwards the said A gave to a stranger such interest as he then had in the said lands in lease, and died. Whether this grant made by A gave all the term of B and C or not? And it was answered by all the Justices and the Chief Baron . . . that the gift or grant of him, in trust for whom the term was granted, was void, and out of the statute of *cestuyque uses* etc.;" after noting this case Crompton, Courts 65, says, "Mes done dun terme

uses.[1] If, it might be said, he enforced one kind of uses not recognized by the common law courts because not executed by the Statute, why should he not recognize another sort? But he certainly did not recognize these uses upon uses;[2] and the reason no doubt is that if the chancellor had enforced uses upon uses, such as those which were created in *Tyrrel's Case*, the king's revenue from the incidents of tenure would again have been depleted, and frauds upon creditors and purchasers,[3] and evasions of the laws imposing forfeitures for treason or felony and penalties for recusancy,[4] would have been facilitated. In short, all the objects specified in the preamble to the Statute would have been frustrated. *Tyrrel's Case* was decided in the court of Wards where the financial interests of the king were likely to have the greatest weight; and the chancellor was a great officer of state with whom similar considerations might also be expected to weigh.[5] However this may be, there is good evidence that at the end of the sixteenth century Lord Ellesmere agreed with the views expressed by those who framed the preamble to the Statute,[6] and expressed dislike for trusts for long terms of years made by tenants in chief, because they were used to defraud the king of his feudal revenue.[7] For these reasons, therefore, the court of Chancery was hardly likely in Ellesmere's time to render the Statute nugatory by recognizing the uses of uses. But, considering the financial straits of the government at the end of the sixteenth and the beginning of the seventeenth century, it was probably the financial reason which weighed the most heavily. At any rate we shall see that it was not till the incidents of tenure had become things of the past that the Chancery finally decided in all cases to enforce as trusts those uses upon uses which *Tyrrel's Case* had

pur ans al use est bon matter a cest jour in conscience, et que il avera *Subpena* in le Chauncerie."

[1] Brook, Ab. *Feffementes al uses* pl. 60 (1556). "Done del terre pur ans ou dun lease pur ans a un use est bon, non obstant le statute de R. 3, quar l'estatut est intend d'avoyder dones de chatels al uses pur defrauder creditors tantum, et sic est le preamble et intent del cest estatut;" cp. 1 And. 293, 294 pl. 302, and last note.

[2] See Holloway v. Pollard (1606) Moore (K.B.) 761, where Lord Ellesmere recognized the rule that there could be no use on a use.

[3] See below 480-482, for the statutes directed against these frauds.

[4] See below 482, for statutes directed against secret trusts for some of these purposes.

[5] Vol. i 396-397 i; vol. v 217; Spedding, Letters and Life of Bacon v 252, where Bacon in a letter to James I. describes the Chancery as "the court of your absolute power."

[6] Hudson, Star Chamber, 69, tells us that Lord Ellesmere was of opinion that the Statute of Wills, which, as we have seen (above 465-466), had deliberately reversed the policy of the Statute of Uses, "was not only the ruin of ancient families, but the nurse of forgeries, for that, by colour of making wills, men's lands were conveyed in the extremity of their sickness, when they had no power of disposing of them."

[7] Cary 8; and the cases cited above 469 n. 4; see also vol. v 306 n. 6; Coke also in Lampet's Case (1612) 10 Co. Rep. at f. 52a pointed out that these trusts for long terms were made with this purpose.

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We must now turn to the broad results of the Statute of Uses upon the future development of uses and trusts at law and in equity.

(3) The Use at Common Law and the Equitable Trust.

The uses executed by the Statute, and thus brought within the sphere of common law jurisdiction, gave a much-needed elasticity to the land law, and enabled this essentially mediæval body of law to be adapted to the changed commercial, industrial, and agricultural conditions of the sixteenth and seventeenth centuries.[2] With the history of the technical developments in the law by means of which they produced this result I shall deal in the second Part of this Book.[3] Here I shall only indicate in brief outline the manner in which they influenced the future development of the land law.

The broad result of the conversion of the uses affected by the Statute into legal estates, was a large addition to the powers of the landowner, and an improvement in the means by which these powers were exercised. Since the Statute was not accompanied by any large reforms of the land law, landowners retained all their existing powers of dealing with their property, and, in addition, gained the new powers and the improved modes of exercising them which were rendered possible by the machinery of the use. The skill with which the conveyancers made use of the position which the statute had thus created enabled landowners to make full use of their opportunities: and they used them with very little interference on the part of the legislature. The chief limitation on their freedom of action came, not from the legislature, but from the courts.

We have seen that, from an early period, the courts had been astute to prevent any direct restrictions upon freedom of alienation.[4] The readiness with which they had allowed the estate tail to be barred by the device of a common recovery showed that they were equally astute to prevent the indefinite fettering of that freedom by the means of unbarrable entails,[5] even when the creation of these entails had the sanction of the legislature; and the restrictions which they placed upon the contingent remainder, the validity

[1] Vol. v 309; vol. vi chap. 8; for earlier cases in which these uses upon uses had been enforced under special circumstances see vol. v 307-309.
[2] Above 438-442.
[3] Pt. II. c. 1 §§ 4, 5 and 6.
[4] Vol. iii 85-86.
[5] Ibid 117-120.