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AN INTRODUCTION TO THE STATUTE OF USES*

By WENDELL CARNAHAN†

USES BEFORE THE STATUTE OF USES

The origin of the use is unknown. The Roman law had a device somewhat analogous to the use in the fidei commissum and the German law in the trenhand or salmon¹ but this received no recognition in England until the first development of Trusts shortly before the Statute of Uses. It was not until about the time of the Statute Quia Emptores² that freedom of alienation of real estate was generally recognized in England³ and in spite of the theory of that statute that the transferee of the land was to stand in the position of his transferor in relation to the feudal overlord, the latter was not protected as fully as the feudal law had formerly provided. During the middle ages the Church exercised a high position politically and morally and there were a great number of conveyances of land to Church purposes. Inasmuch as the Church was a perpetual organization there was no likelihood of the land reverting to the Crown. Consequently, to curb this practice, were passed various statutes of mortmain⁴ prohibiting the conveyance of lands to the Church.

This prohibition was undoubtedly a strong factor in the development of a mode of transfer to avoid the statutes, but other factors must be considered.

It will be remembered that upon a number of reasons the feudal overlords could take over real estate, either permanently

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* This article presupposes that the student is familiar with the early property law of tenures, possessory estates and non-possessory estates before considering the problems of uses. The purpose of the article is to present in elementary form the common aspects of uses with a brief contact with future interests which occasion difficulty to those beginning the study of real property.

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¹ See Bogert, Trusts, Sec. 2.
² 18 Edw. I, c. 1. 3 (1290).
³ See Plucknett, Concise History of the Common Law, 327–332, for discussion of development of alienability of lands.
⁴ Magna Carta, Sec. 43 (1217), contained a provision against conveyance in mortmain; conveyances in mortmain by way of use were abolished by 15 Rich. II, c. 5 (1391).
or for a limited period of time. Among these were forfeiture for conviction of felony, violation of various feudal incidents, and wardship where the ancestor left a minor heir. These circumstances furnished additional inducement for a new type of transfer of ownership of land. For example, A, owning Blackacre, was likely to die leaving a minor son as his heir with the consequence that during the minority the lord would take possession of the land and its proceeds. If A could transfer the land to his friend B with the understanding that B would hold it until the son reached 21, giving to the son the rents and profits during his minority, then the interests of A and the son would be protected from the encroachments of the feudal overlord. Or if A wished to provide against the possibility of forfeiture or escheat, he could convey with the understanding that B would allow A to live on the land during his lifetime and on his death convey to named persons. This device of conveying to another person became very popular and during the development of the plan a great portion of the land in England was held in this form of tenure.

There were certain difficulties with this procedure in its early stages. For example, since B was legal owner, it would follow that his wife was dowable; since B was the legal owner, neither A nor the son of A would have an action to compel B to perform the promise given to A. To remedy these defects Chancery soon took jurisdiction to compel the performance of his promise by the grantee, B (called the feoffee to uses), in favor of his promisee (called the cestui que use). It was but a short step thereafter to hold that the wife of the grantee was not dowable and that the land was not subject to execution by his creditors. The practice of Equity was to treat B as the legal owner and to exert coercion to compel his performance. The effect of this attitude of Chancery in compelling performance of the undertaking by the holder of the land, analogous to our modern idea of the enforceability of trusts, fostered the practice of conveying to uses and led to the development of many new reasons for such conveyance. For example, at this time land was not divisable although chattel interests were subject to bequests. Suppose that A desired to give the property to C at the death of A; A could convey to B to hold to the use of A (analogous to an equitable life estate, since B held the legal title) and
upon the death of A for B to convey the property to C or to such other person as A might name in his last will. The will itself would be inoperative to convey the title but with Chancery enforcing the intended purpose of A and B, through personal coercion of B, then C would secure the benefit of the property as effectually as though the power to devise by will existed in A.

Numerous other purposes for such conveyance to uses are not hard to imagine, and the enforcement by Equity led to the idea that title to property consisted of two distinct sorts of things: first, the seisin or legal title; and second, the use or equitable title, i.e., a title enforceable in equity. Hence one person could have the seisin and another person the use and for practical purposes the use was the main thing.

**Equitable Presumption Regarding Resulting Uses**

So common did this practice become that Equity developed several prima facie presumptions concerning the use upon the transfer of seisin or legal title. There were three principal cases in which a conveyance was made without a declaration by the transferor as to where the use should go in which Equity laid down presumptions. The first typical case was one in which A simply conveyed the fee to B and his heirs without anything further being said. Now if B had paid for the land it could be supposed that the payment was for the two portions of the title, that is, the (legal) seisin and the (equitable) use. But if B had paid no consideration then there were two possibilities; either A had given the land to B, or A had simply transferred it to B to hold for A and his heirs, that is, to B in fee to the use of A in fee. Equity promptly declared, based upon the commonness of such type of proceeding, that where the use was not declared and no consideration was paid to raise a presumption of a use in B in fee, that the parties must have intended A to have the use in fee. In other words, the presumption was raised that the use resulted to A.

As a corollary to this, suppose that A conveyed the fee to B to the use of B in fee; here the express declaration of the use rebutted the presumption and showed an intention to create an executed gift. Suppose that A conveyed the fee to B in consideration of £50 to the use of B for life. Here there was the presence of consideration and also the fact of a declaration of
the use. Several presumptions were possible but Equity took a reasonable view which was that the consideration should apply only to the declared use, i.e., the life estate in B, and not to the fee simple estate and, consequently, A would take a resulting use in fee subject to the express life estate in B. The consideration was referred only to the declared use.

A second case occurred when A paid X for a tract of land and, instead of having the conveyance of title made to A, title was transferred by X to B. When B was not related to A, one cannot readily imagine why A would pay for land conveyed to a stranger. Equity said that the only explanation was that there was some sort of an agreement between A and B that B should hold for A; that is, again, B held the seisin for the use of A in fee. The technical conclusion as before was that there was a resulting use to A in fee.

A third situation closely akin to the first kind of resulting use existed where A conveyed the fee to B for a particular declared purpose, as for the use of X for life, or on some other use which did not purport to dispose of the whole beneficial interest. Since a fee simple estate could be made up of a number of smaller particular (particles) estates, such as estates for years and for life, what disposition should be made of the portion of the fee which remained, called the reversion? A logical conclusion would be that in this case also it resulted to the grantor and this was so held. A similar situation occurred where A conveyed to B in fee for a purpose which would exhaust the fee but the purpose failed. For example, A to B and his heirs to the use in fee of the children of X. But X died childless so that the use-purpose failed. Again the courts held that upon the failure of the expressed use the title resulted to the grantor, A. Each of these presumptions was based upon the common experience of the times.

A corollary of these rules, the importance of which will be pointed out later, was that wherever a resulting use occurred, the use always came back to the grantor of the same size estate which he had had before the conveyance to uses. That is, if A conveyed to B a fee simple title or a life estate to uses under circumstances which gave rise to a resulting use, A always got back the same estate which he had conveyed. These three prin-
principal types of resulting uses form the basis for most of the modern cases of resulting trusts.

In each of these resulting uses the reason why the court of Chancery presumed as a matter of fact that the land conveyed was held on a use for the feoffor or for the one who had paid the purchase money was largely because of the lack of consideration. This in turn was important only because such conveyance upon oral promises to hold for the benefit of A had become so common that it was fair to assume that any conveyance which was not paid for and not expressly made to the use of the feoffee or another specific person was intended to be to the use of A who caused the conveyance to be made. This presumption was a true presumption of fact and hence rebuttable by evidence which would show a contrary intent as, for example, a gift. The courts were simply taking judicial notice of the great number of conveyances which were being made to uses and enforced the presumed intention of the parties by implying the resulting use. Upon similar reasoning Equity held that where a conveyance was procured by fraud or duress the use was to be held for the defrauded party and from this rule we get the modern idea of constructive trusts.

**Bargain and Sale and Covenant to Stand Seised**

While uses remained in this equitable stage of development this situation was presented: Suppose that A agreed to sell and to deliver possession of Blackacre to B for the sum of £500 which B paid, and then A failed or refused to execute the conveyance. There could be no legal title in B for lack of feoffment. The remedy for the return of the money might be inadequate as a practical matter and what B had wanted was the land. This situation was the beginning of the modern remedy of specific performance and Equity there said that A should be compelled to convey the property to B. As explanation it was said that by the payment of the money the title to the land was held by A to the use of B. This meant that the equitable title was in B and the type of transfer was known as the bargain and sale.

Another method of raising a use without transferring possession was the covenant to stand seised which was similar to the bargain and sale. It consisted of a promise under seal by the owner of the land to hold it to the use of a particular beneficiary
who was related by blood or marriage. Equity had held that it was the consideration which furnished the basis for the use; here there was no consideration but its place was taken by the two elements of a sealed instrument and a conveyance to one related by blood or marriage, i.e., a situation in which there was a strong indication that a gift was intended. The covenant to stand seised operated in the same manner as the bargain and sale with this exception, it seems to have been first recognized at law, and then only after the Statute of Uses.

It will be noticed that in both these cases the transferor kept the legal title himself. He could use this method only where he intended to give the use to someone other than himself. Both conveyances were ineffective at common law for want of a livery of seisin; the bargain and sale came to be enforced in Equity as binding upon conscience because of the receipt of the money; and the covenant to stand seised was in reality an extension of the bargain and sale in the case of close relations which derived its validity from the Statute of Uses. While originally there was not even in form a promise in the bargain and sale it gradually changed its form to an express promise to hold the use in which case it also came under the terms of the Statute of Uses.

The Statute of Uses

There were, however, numerous ends sought to be attained by the mechanism of the use which did not meet with popular approval. For example, it became common for disseisors or persons whose titles were insecure to transfer their estates to powerful lords so that the latter could defend the title of their feofors; similarly, lessees transferred their estates upon uses to others to embarrass reversioners or remaindermen in proceedings for waste; and at an early period it was common for owners of property to put it in the names of others, for the use of the transferror, so that the property would be beyond the reach of creditors, would not be subject to forfeiture for treason or felony, and would not escheat. The use was also employed to defeat dower and curtesy, neither of which could exist in the use in the early law. In England curtesy soon came to be recognized in equitable estates but dower was not until well into the nineteenth century and then only by legislation.

* 3-4 Wm. IV, c. 105 (1833).
To prevent many of these abuses several statutes were passed, as early as Richard III, for the purpose of curtailing the effect of uses but the statutes were not sufficiently strong. It seems that even the feudal overlords were opposed to the repeal of the use for, although they lost as to some lands, they gained as tenants of other lands. The Crown, however, almost always lost and only by great political pressure was passed the Statute of Uses in 1535.

There has been some dispute as to the purpose of the statute but it is now generally taken that the Statute of Uses was not intended to abolish uses; certainly it did not. What the statute did accomplish was to turn into legal estates the uses to which it applied in order to prevent the undesirable consequences of a division of legal and equitable ownership. The statute provided that where any person shall stand or be seised of any lands to the use of another, that in every such case the person that shall have the use shall stand and be seised to all intents, constructions and purposes in the law of such like estate as he shall have in use, trust or confidence in the land.

The purpose of this statute was to convert the equitable use into a legal seisin, vesting as a matter of law the legal title in the one who would have had merely an equitable use; thus in those cases in which Chancery had held a resulting use, enforceable in equity but not at law, after the statute would carry back to the grantor the same legal title as he had had before the conveyance. The courts might well have abandoned the presumption of a resulting use for it was hardly reasonable to presume, after the statute, that the transferor had intended to go through a transaction whose final results would be nothing, but they still adhered to it. The great influence of the presumption still survives today in the general inclusion in deeds of a consideration for as low as one dollar, and even though in law it is not necessary.

**Uses Raised upon Transmutation of Possession—Springing and Shifting Uses**

The earliest development of uses, and a practice which continued for some time after the statute, lay in the raising of uses upon an actual transfer of physical possession of the land or,

1 Rich. III, c. 1 (1483).
27 Hen. VIII, c. 10 (1535).
as is more technically stated, a use raised upon transmutation of possession. It is necessary that this be clearly understood in order to trace the subsequent important development of the use raised without transmutation of possession. It will be recalled that the common law placed great importance upon the actual transfer by delivery of the land in every conveyance. This reached its highest development in the conception of the livery of seisin in the feoffment in which the grantee went on the land and there received from the grantor a twig or piece of turf in symbol of delivery of the entire tract. Similar formalities were undergone in connection with the conveyance of lease and were at least presumed in the cases of the fictitious suits known as the fine and common recovery.

Let us see how such a conveyance would operate after the Statute of Uses: The simplest form is presented by a conveyance by A in fee to B and his heirs to the use of C and his heirs. Before the statute, B held the legal fee and C the use in fee which Equity would enforce; by the statute the use was executed by passing the legal title directly and automatically to C. A more difficult application is presented by the following case: A, owning in fee, wished to provide for occupancy of the land by himself for the remainder of his life, then to X for ten years and then to Y in fee. A would enfeoff his friend B and his heirs to hold the land to the use of X for ten years, beginning on the death of A, and then to the use of Y and his heirs. Applying the principles outlined above, there being no consideration paid by B, B could not hold the legal title for himself and Equity would have enforced the uses. But the Statute of Uses had declared that the legal title follows the equitable title (which was in A and his heirs, since the estates of X and Y were not to become possessory until the death of A), automatically executing the use so that by the operation of this statute A holds again a fee simple title in the land, derived from a resulting use. However, A had intended to provide a term of ten years for X, commencing on the death of A, and thereafter followed by an estate in fee in Y. In executing the use which resulted to A some consideration must be taken of the interests which A desired to create in X and Y. This could be accomplished if we construe the estate of A as a life estate followed by a vested remainder in X for ten years and then to Y in fee. But the resulting use in
A, executed by the statute was a **fee** rather than a **life estate** and it was a common law rule that there could be no remainder after an estate in fee. It was necessary then to construe the interest in this way: To A in fee for the life of A, then to X for ten years and then to Y in fee. The idea was that on the death of A the interests of X and Y (created in interest by the conveyance to use) came into possession to cut off the fee estate in A and his heirs or, in other words, to spring from the fee estate of A and hence were known as “springing uses”.

Let us consider another illustration of the operation of the statute. A desired to give his property to X and on the death of X to his children, but if X should have no children, then to Y in fee. If A were to convey the property under the common law forms of conveyance it might well be that X would outlive A so that A would be unable to direct the property to Y in the event of X dying childless. Suppose, however, that A enfeoffs B to the use of X and his children, and if X dies without children then to Y and his heirs. The Statute of Uses would then give a legal estate in fee to X and his children with the possibility that if X died without children then the fee would go to Y. This appears again as a remainder after a limitation in fee, but it was the intention of A that the use should be held for X and his children but if he had no children then to Y. The fee is out of A and in X and his children but upon the happening of the contingency, the death of X without children, then the estate is to go over to Y. This was known as a “shifting use”. The difference between a shifting use and a springing use is that a springing use arises upon a limitation to cut off an estate in the original grantor, whereas a shifting use always cuts off an interest in a former grantee. It is possible to have a conveyance containing both springing and shifting uses. Thus: A enfeoffs B and his heirs to the use of X and his heirs after the death of A, (resulting use to A in fee, springing use to X in fee upon the death of A), but if the Empire Railroad shall be extended to Dover then to the use of Y and his heirs (shifting use from X in fee to Y in fee).

Another rule of the common law was that it was impossible for there to be a livery of seisin to arise in the future, due to technical feudal requirements that an estate must at all times be vested in a particular individual. Suppose, however, that A
enfeoffs B to the use of X in fee, beginning one year after the
death of A. Again, there would be a resulting use in fee executed
by the statute into a legal estate in A which would pass at
the death of A to his heirs, but would thereafter spring to X in
fee. Thus by the operation of the statute it was possible to cre-
at interests which were impossible by the common law. If, as
was formerly supposed, it was the purpose of the Statute of Uses
to abolish uses it will be seen that its purpose failed and that by
the operation of the statute a great impetus was given to the
creation of the new types of interests, which were possible under
the statute but impossible under the common law, the shifting
and springing uses and the creation of interests to arise in the
future being only a few examples.

USES RAISED WITHOUT TRANSMUTATION OF POSSESSION—LEASE
AND RELEASE

In the instance of the bargain and sale if there was an ex-
pressed undertaking the Statute of Uses operated to make the
legal title follow the use. Hence there was provided an ex-
tremely simple and informal way of passing the legal title in
cases where consideration was paid. While it was necessary that
consideration exist, it had been settled that Equity would not
inquire into the adequacy of the consideration. The informality
of such methods of conveyance caused danger in creating encum-
brances upon property which would not readily be known and
the same session of Parliament which enacted the Statute of Uses
also passed the Statute of Enrollments in order to give
to the bargain and sale some of the notoriety which had accom-
panied the old feoffment. The statute provided that in any
case of the transfer of a freehold estate the instrument thereof
must be recorded.

This statute, if given logical effect, would have destroyed
much of the secrecy which the new procedure had made pos-
sible. The passage of this statute led to the development of a
new form of conveyance known as the "lease and release" to
evade the requirements of enrollment. This was a method of con-
vveyance without transfer of possession. In order to understand
this new mechanism it is necessary to consider the common law

*27 Hen. VIII, c. 16 (1535).
method of release and also one of the provisions of the Statute of Uses.

The common law recognized a mode of conveyance by deed known by the name of release which was the method of conveying a fee title by one out of possession (remainderman or reversioner) to a tenant in possession. The method usually employed was for the owner to give to the tenant a lease putting the tenant into possession and then to execute the deed conveying the additional estate, so that the tenant then had two interests—the leasehold plus the reversion (or remainder)—and upon the principle that the greater estate swallowed the smaller estate a merger of the two took place, giving to the tenant the fee simple. For this conveyance to operate it was, however, necessary that the tenant be in actual possession at the time of the release.

An apparent defect in the Statute of Uses formed the basis for a novel development. The statute provided that whenever one shall be seised to the use of another, any person having the use shall be deemed to have such like estates to all intents, constructions and purposes in the law as he had in the use. Suppose that A owning in fee wished to grant to B an estate for one year and did so by bargain and sale of the term. While at common law it had been necessary for A to put B into possession, we have seen that Equity would enforce the conveyance and that the statute had declared that the equitable use was executed into a legal estate. It was soon decided that B held a legal estate under the statute without having been placed in possession. B then having the legal estate without the necessity of actual possession, A would be in a position to execute to him a release of A's reversionary interest in the fee, and all without any actual entry upon the land. The practice became to combine these two transactions into one paper containing two parts, the first known as the lease and the second as a release, the latter being dated one day later. Since the Statute of Enrollments applied only to estates of freehold the lease and release, not coming within its terms, did not require enrollment for validity and secrecy of transfer was continued. Hence the new form of conveyance was really a combination of the common law conveyances and the new equitable conveyances which had been transformed into legal estates by the Statute of Uses. It became a very popular

method of conveyance in England but never achieved any great importance in America, probably because most jurisdictions did not adopt the Statute of Enrollments.

Another statutory provision was made in 1676 by the Statute of Frauds requiring writing in the creation of all conveyances of lands, whether raised in connection with a common law conveyance (excepting leases for three years or less) or by trust.¹¹

**Statute of Uses and the Modern Trust**

We have seen that before the Statute of Uses Equity was enforcing a number of situations upon grounds which sound very similar to our modern idea of a trust. If the Statute of Uses had been taken at face value this developing power of Chancery would have been destroyed. It soon became apparent, however, that there were several situations which were not provided for by the statute; whether these loopholes left in the statute were intentional on the part of the draftsmen is not known.

The effect of the statute was to execute the use and it was soon held that the statute was spent when one use was executed. In *Tyrrel's Case*,¹² Jane Tyrrel bargained and sold for a consideration to her son George Tyrrel, in fee, to the use of Jane for life, remainder to the use of George Tyrrel in tail, or in default of issue, remainder to the use of the heirs of Jane, clearly indicating an intent that George should hold to the use of Jane for life. It has been pointed out that the bargain and sale was itself a declaration of use and this was executed by the statute, thereby giving to George the fee simple, with an expressed use thereafter to Jane for life, and so forth. The question was whether Jane took a valid estate for her life. It was held that the statute had executed the first use and was therefore spent and could not execute the second use to Jane, who therefore took nothing. Hence the statement that a use on a use is void, and this although the intention of the parties was defeated.

This situation must be distinguished from a use after a use which was valid. For example, suppose that Jane had enfeoffed George (a common law conveyance and not under the Statute of Uses) to hold to the use of Jane for life and thereafter to the

¹¹ 29 Car. II, c. 3, Secs. 1, 2, 7, 8, 9 (1676).
use of X for life and thereafter to the use of Y in fee. In the
case of these successive uses, it taking all of them to exhaust the
fee, the statute would apply as there is nothing inconsistent
about them, and the uses would be transformed into legal estates,
I. e., resulting use to Jane in fee for her life, then to X for life,
and to Y in fee, the latter operating as springing uses.

Within a hundred years after Tyrrel's case we find that
the courts were enforcing the use upon a use, resort first being
had to Equity to carry out the intent of the parties, the mode
of enforcement being similar to the modern trust. Sambach v.
Dolston. 13 "Because one use cannot be raised out of another,
yet ordered, and the defendant ordered to pass according to the
intent."

It was likewise soon held that the Statute of Uses would not
operate where the grantee of the land had active duties in respect
to holding the estate for the beneficiary, enforcement thereof
being carried out in Equity. 14 For example, A to B to the use
of C, charging B with the duty of improving and renting the
land and paying over to C the annual rents and profits; the
statute did not interfere with the arrangement but permitted B
to hold and improve and rent the land and carry out the inten-
tion of A. But when the purposes of the trust had been ac-
complished and the grantee (trustee) no longer had active duties
to perform, then the statute executed the use.

The statute said "when one is seised to the use of another,"
and since there was no seisin in personal property, it followed
that the statute could not operate upon a transfer of chattels.
Again Equity stepped in to enforce the intent through the
mechanism of a trust.

Applying the same clause of the statute, I. e., seised, the
statute could not operate unless the one holding the property
had a freehold estate. To illustrate, A, owning in fee, wished
to hold to the use of B for one year (or one hundred years). This
could be done by bargain and sale since A was seised (I. e., fee is
freehold) to the use of B. But suppose that A had an estate of
one hundred years and wished to dispose of the residue to B
and executed a bargain and sale thereof. This would not be

14 See Durfee, The Statute of Uses and Active Trusts, 17 Mich. L.
Rev. 87 (1918).
executed by the statute since A was not seised of an estate (the term being a non-freehold interest) to the use of B. If this were not enforced as a trust the intention would be defeated.

We have already referred to the doctrine of the equitable "purchase-money" resulting use, occurring where A purchased property from X, but took title in the name of B. This use was not executed by the statute and again resort was had to enforcement in Equity through a trust. Through these loopholes it was possible for Equity to work out the doctrines and jurisdiction of the modern law of trusts.

There were two other situations in which the Statute of Uses could not operate. It did not operate upon an estate tail which had been created by a separate statute, De Donis Conditionalibus, and it did not appear that the Statute of Uses had intended to operate in contravention of the Statute De Donis. Secondly, suppose that A enfeoffed B in fee to the use of A for life, nothing being said as to the balance of the use and there being no consideration; or suppose that A bargained and sold to B for £10 to hold to the use of A for life. Here it would seem that there should be a resulting use to A, but to do so would give A again a legal fee whereas he had expressly stated his intention to get a life estate. Therefore the resulting use would be repugnant to the expressed intention which was held to govern.

Restrictions upon Limitations—(a) Rules of Construction

Shortly after the Statute of Uses there was also enacted the first great Statute of Wills, making possible the disposition of realty upon testate succession. It was quickly discovered that as one could create new sorts of property interests under the Statute of Uses—particularly the shifting and spinging uses—that the same types of interests could be created by wills, and the name "executory devises" was given to such mode of creation. Perhaps the following outline will indicate the terminology and the mode of creation of these interests more clearly.

15 See Scott, Resulting Trusts Arising upon the Purchase of Land, 40 Harv. L. Rev. 669 (1927).
17 13 Edw. I, c. 1 (1285).
18 32 Hen. VIII, c. 1 (1540).
By conveyances
inter vivos
By testamentary disposition
(executory. devises)

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<th>Springing uses</th>
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It will be seen that this developing type of conveyancing was at points in serious conflict with the limitations upon transfer which had evolved out of the feudal necessities of the common law. For example, at common law a contingent remainder (at first held utterly invalid) had been recognized as valid provided that the contingent remainderman was actually ready to take possession of the estate (i.e., the contingency had happened) whenever and however the preceding particular estate had terminated. But under the Statute of Uses and the Statute of Wills not only was it possible to create by way of use vested interests but also contingent interests, each analogous to remainders. One of the common law modes of preventing abuse of contingent remainders was the device of barring them by the fictitious suits of the fine and common recovery developed in connection with the estate tail, by making a technical forfeiture of the preceding particular estate before the contingency had happened upon which the remainderman was to take. Since he was not yet ready to take the estate, the contingency having not yet occurred to determine the existence of his interest, his claim was lost. The question was then raised as to whether the common law methods of barring contingent remainders applied to contingent remainders created by way of uses and devises. It was held that the rules applied and that the new types of contingent interests were also destructible.

For example, in *Chudleigh's Case* A enfeoffed B and his heirs to the use of B and his heirs for the life of C, A's eldest son, and then to the use of C's first son, then unborn, in tail. The result was that B had an estate pur autre vie, and then over to C's unborn son. After A's death and before C had a son, B enfeoffed in fee to C; this destroyed B's life estate by the tortious alienation. C later had a son. C conveyed to D in fee and died. C's son sued D in trespass. It was held that C's son had

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*1 Coke 120a, 76 Eng. Rep. 270 (1595).
only a contingent remainder, although created by way of use, and that it was destroyed.20

A similar question was this: Are shifting and springing uses upon contingencies created by uses limited after fee estates destructible upon the same principle as contingent remainders? To illustrate: A having three sons, B, C and D, devised to B and his heirs, but if B dies without issue leaving D surviving, then to D in fee. On the death of A, son B entered and suffered a common recovery to the use of himself and heirs, and then conveyed the land to X. Son B died without issue, leaving D surviving him; D entered on X and the question was whether the contingent interest of D, created as a shifting use after a limitation in fee, was destroyed by the common recovery. On these facts the famous case of *Pells v. Brown*21 held that the interest of D was not destroyed, thus settling that executory devises after limitations in fee are indestructible.

From these cases developed a principle of construction to avoid having property limited in contravention of the common law rules; that principle was that wherever possible a limitation would be construed as operating under the common law rather than under the Statute of Uses or Statute of Wills. To illustrate the importance of this distinction: A enfeoffed B (or willed to B) Blackacre to hold to the use of X in fee and if Y should outlive X then to the use in fee of the oldest child of Y who should survive Y, and if all of Y's children fail to survive Y, then to Z and his heirs. Patently this conveyance would violate all the rules of common law conveyancing. The limitation to the child of Y is a limitation after a fee, mounting a fee upon a fee, and hence invalid at common law; further it depends upon a contingency, the survival of Y over X; it also violates the common law which provided that there could be no gap in the seisin, no estate to arise in future, whereas we cannot tell until the death of Y who is to take the property and the fee would be in abeyance. This could, however, operate under the statute and only under the statute, hence under the rule in *Pells v. Brown* was indestructible. Similarly the alternative limitation to Z is operative as a shifting use although it, also, depends upon a contingency. Hence the limitation would be good.

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20 The famous Archer's Case, 1 Coke 66b, 76 Eng. Rep. 146 (1599), was in accord holding that a contingent remainder created by way of use was barred by a tortious alienation by the prior holder of the land.

Suppose, however, that we modify the italicised portion to read: "to the use of \( X \) for life" etc. Now the limitation could operate at common law as a contingent reminder in a double aspect, i.e., it is uncertain whether the child of \( Y \) or \( Z \) and his heirs take, but either of them will take upon a contingency. Hence, a common recovery by \( X \) (before the death of \( Y \) leaving a child surviving him) would bar both the child of \( Y \) and \( Z \) and his heirs.

**Restrictions upon Limitations—(b) The Rule Against Perpetuities**

Another rule to curb the abuses of these new limitations was the Rule Against Perpetuities, a rule against remoteness of vesting *in interest* (not a vesting in possession, since even at common law vested remainders and reversions were valid). As the rule was finally developed it may be stated as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." To this was later added periods of gestation.

Applying this rule to the last illustration given—\( A \) to \( X \) in fee and if \( Y \) should outlive \( X \) then to the use in fee of the oldest child of \( Y \) who should survive \( Y \), and if all of \( Y \)'s children fail to survive \( Y \), then to \( Z \) and his heirs—it appears that either of the alternatives, i.e., whether the property goes to a child of \( Y \) or to \( Z \) in fee, will be determined by the expiration of the life of \( X \) plus the life of \( Y \) (which may be determined before or after the death of \( X \)) and although the life of \( Y \) may be more than 21 years after the death of \( X \), nevertheless \( Y \) also was alive at the time of the grant. Therefore either limitation, i.e., to the child of \( Y \) or to \( Z \) and his heirs, will be determined within lives in being (\( X \) and \( Y \)) even without the necessity of resort to the additional period of twenty-one years, hence the limitation is valid as far as the rule against remoteness of vesting is concerned. The last clause of the limitation was stated "to \( Z \) and his heirs," a phrase of limitation; suppose it be changed to read, "the heirs of \( Z \)." \( Z \) cannot have heirs while living, but the limitation is still not too remote since, again, \( Z \) is a life in being at the time of the conveyance.

Suppose that a limitation reads: To \( X \) for life and there—

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2 Gray, Rule Against Perpetuities, 3d ed., Sec. 201.
after to the child of Y who shall first attain age twenty-five; and suppose that at the time of the conveyance Y was unmarried. Again, Y is a life in being, but it is not certain that any child will attain age twenty-five within twenty-one years after the death of Y. For example, Y may die leaving a child one year old. Consequently, since it does not appear that any child of Y must take within twenty-one years after the death of Y, the limitation would be void.

From the foregoing it has appeared that the Statute of Uses had a number of far-reaching effects. In the first place it formed the basis for new concepts of conveyancing, making commonplace a documentary type of conveyance (bargain and sale, lease and release and warranty deed) as distinguished from the common law symbolic delivery of possession; second, it formed the basis for further breaking down the feudal concepts of property ownership by introducing many new interests in property (springing and shifting uses, either inter vivos or by will, contingent remainders by way of use, and gaps and laps in seisin); third, it furnished the basis of a new development of Equity jurisdiction in the field which has become the modern law of Trusts; fourth, it led to development of new concepts in the field of property which are commonly called Future Interests (including powers of appointment, the rule against perpetuities and other interests mentioned above).

The learning which developed around the Statute of Uses and its effects constitutes the basis for our modern law of real property in almost every phase. In spite of the fact that the Statute of Uses was repealed in England in 1925 and in spite of the fact that a number of jurisdictions in America have enacted statutory provisions governing the form of deeds which in greater or less degree dispense with the more technical aspects of the Statute of Uses, the latter continues today to be the foundation of an understanding of the modern law of property either statutory or common law.

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