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THE SIGNIFICANCE AND EARLY INTERPRETATION OF THE STATUTE OF USES*

In or about the year 1500, three facts regarding uses became so prominent as to demand attention. First and foremost stood the fact that feoffments to uses had become or were becoming a popular method of conveyance.¹ The Common Law judges declared more than once that the greater part of the land of England was held by uses.² The benefits of uses as a tenure were so apparent—the escaping of the feudal incidents and of the liability of the land to distress for debt, the ease with which the use could be sold or devolved, the ability to create future estates—that, while a certain allowance must be made for an element of exaggeration in the statements regarding its popularity, there can be little doubt that they were substantially true.

Uses had been very much employed during the Wars of the Roses to save the family lands from escheat and forfeiture. Coke was inclined to believe that this was not an inconsiderable influence in effecting their great and rapid growth.³

Next in importance ranked the fact that uses and *cestui que use* were fully recognized and protected only in Equity. Statutes had been passed, cases had arisen in the Common Law Courts, and at times a certain protection had been afforded the *cestui que use* at Common Law; but there can be little doubt that it was far from being complete protection. The Common Law judges regarded the feoffee to uses as the legal owner of the estate, and as legal holder not only of the seisin but of the specific enjoyment of the land. He might sell it or entail it or dispose of it as he would, and so long as he followed the Common Law forms, the *cestui que use* had no remedy except in equity. The *cestui que use* possessed, indeed, no nominal right whatever to sue the feoffee at Common Law in a real

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¹ Some have thought that the words "ad usum" in *common law* forms occur first in Henry VII. See Madox, *Formulare Anglicanum*, form 353, 14 Hen. VII, and 354, 21 Hen. VII. Bacon thought that uses had most favor between 11 Henry VI and 1 Richard III. Bacon on Uses, p. 27.

² Year Book, 19 Hen. VIII, f. 24. Year Book, 27 Hen. VIII, f. 10, and also f. 21. Coke was of this opinion, probably on the authority of these very precedents. Co. Litt. 272 a.

³ 1 Coke, Chudleigh's Case. "There were two inventors of uses, fear and fraud, fear in times of troubles and civil wars to save their inheritances from being forfeited, and fraud to defeat due debts, lawful actions, wards, escheats, mortmains, etc."

action, for he had no land at Common Law and was not in the eye of the Law in legal possession of any. Thus if the land of England was becoming to a considerable extent land enfeoffed to uses, and if the cestui que use had full protection only in equity, it was becoming sufficiently plain that there was danger that the active land law of England would in the future be found rather in the books of the Lord Chancellor than on the Rolls of the Common Pleas.

Thirdly, appeared a most important fact, that the immediate effect and perhaps the chief purpose of uses was the freeing of the land from feudal incidents and dues. No formal livery, seisin, or entry, was necessary to vest a valid equitable estate in the cestui que use. No wardship, marriage, aids, primer seisin, or the like, could be demanded from him, for legally he held no estate. Here was a serious pecuniary loss to the King and the great landlords. The revenue of a great estate during wardship went in large measure to the overlord: primer seisin was a whole year's income from the estate and sometimes more. All feudal incidents were in large measure pecuniary, and to deprive the lord of them at a time when ready money was scarce, rents paid (even when commuted) chiefly in kind, and the possibility of selling produce small because of the non-existence of anything like a general demand outside the immediate neighborhood, was a far more serious matter than we of the twentieth century are at first liable to imagine. These incidents often comprised the whole of the lord's revenue outside of what he needed for actual subsistence. Then, too, in the early sixteenth century, the need for money, or rights which could be turned into money, was infinitely greater than ever before, and hence in like proportion more valuable. The great man, the powerful man, was coming to be not so much the man who owned great estates and had many tenants, as the man with ready money to buy the costly clothes and armour, to hire the troops of personal servants and liveried retainers, in which the age delighted. In the middle ages land had been the great social force. In the sixteenth century, ready money was coming to be so necessary an adjunct to a great estate, that, without it, the land would ensure small social prestige and slight political power.

In this prevalence of uses, this protection of uses only by equity, and this loss of the feudal incidents from lands enfeoffed to uses, we find the reasons for the movements which culminated in the Statute of Uses. The Common Law Courts, finding that the control of the land of the realm was passing from their hands into

the Court of the Chancellor, seem to have voluntarily accepted the use and the *cestui que use* as of much the same status at Common Law as in Equity. They frankly recognized the fact that the feudal incidents were lost by the creation of a use. Then the King and his nobles, angered by the loss of their feudal dues, and apprehensive lest the new attitude of the Common Law Courts should become precedent and thus rob them of all hope of recovering their incidents, passed the Statute of Uses—after one refusal by the Commons in 1532—to extirpate uses, not to preserve them and make them legal.

The Common Law judges, then, accepted the equitable use and declared that for some purposes at least it was legal. They declared that uses were at Common Law as well as in Equity. Before the statute of *Quia Emptores*, they asseverated, there was a tenure between the feoffor and feoffee which was such a consideration as entitled the feoffor to be seized to his own use.⁴ Frequently the existence of the use at Common Law was placed upon broader grounds and the clearest statement of these grounds appeared in the very year in which the Statute of Henry VIII was passed. "Et semble que un use fuit a l' Common Ley: car un use n'est autre chose forsque un trust, que les feoffors mit in le feoffe sur le feoffment. Et si nous dirromus que nul' use fuit a le Common Ley, ensuroit que nul trust fuit a le Common Ley, ce qui ne peut estre, car un trust ou confidence est chose qui est fort necessaire entre homme et homme, et au moins nul' Ley prohibe ne restrain home, mes que il peut mettre la confidence a autrui."⁵

A strong tendency displayed itself in the courts to regard as legal the canceling of the feudal incidents by means of uses.⁶ They, however, made one distinction—that land held of the King in capite should still be subject to all its feudal burdens.⁷ There were decisions which recognized the right of the *cestui que use* to devolve his land by will and even recognized his right at law to change that will.⁸ The *cestui que use* might will his feoffees to sell his lands after

⁴ Brook, *New Cases*, March's translation, 89 (1522); Brook, *Abr. Feoff. al Uses*, pl. 25, 7 Hen. VII; etc.

⁵ Year Book, 27 Hen. VIII, f. 8 a. York, J. loquens. A precisely similar statement, though not so strong, is in Year Book, 14 Hen. VIII, f. 4, pl. 5.

⁶ Year Book, 28 Hen. VI, f. 11; Year Book, 38 Hen. VI, f. 61 and 62; Year Book, 10 Hen. VII, f. 10; and 12 Hen. VII, f. 21; 26 Hen. VIII, f. 2 and 3.

⁷ Keilway, 176.

⁸ Brooke, *Abr. Feoff. al Uses*, pl. 1.

his death and they would be bound by the will, and, even if the original feoffees suffered recovery or allowed anyone to enter by purchase, the new possessor would be bound by the will.⁹ The sale of a use would be good at law.¹⁰ "Cestui que use est lie in statute merchant [i. e., the use will be subject to distraint for his debts] et le court tient que executor serra sue del terre in use."¹¹ But a recovery suffered by the cestui que use in tail would bind his feoffees only during his life.¹²

The most famous case of all, directly in point here, is the great case concerning Lord Dacres' will in 27 Henry VIII.¹³ The Crown lawyers boldly attacked uses, declaring that they did not exist at Common Law, that before the time of legal memory (1189) they did not exist and therefor could not exist at Common Law. But the judges declared the contrary. "Et que un use fuit a le Common Ley est prove per les Statutes faits in temps le Roy R. l' 2 et H. l' 4. . . . Et auxi il ad este tenu moult ans que un use fuit a le common ley per Common opinion de tout le Realm . . . Un use n'est auter chose forsque un trust, quel trust un poit vendre ou donner a son plaisir. Car jeo dy que n'est ascun doute mes si jeo vend' a vous mon use, maintenant sur la vente l'use est change in vous hors dem a personne, isint j'entend, *si jeo dy a vous jeo don mon use de tiels terre a vous, per ceux parols vous avez l'use, car l'use ne passe sicome le terre passe: car le terre ne poit passer sans liveres, mes use per nue parol. . . . Et issint per mesme l'reason que use poit passer per parol', per mesme reason il poit passer per devis.*" Montague, the Chief Justice, added, "Et auxi come adeste di in moult statutes que use fuit a le Common Ley. Come le statut de 50 Ed. III. Et si fuit nul raison proverat come in le Civil Ley est dit, Communis error facit jus. *Et serra grand mischief de changer le Ley a or, car moult inheritances del Realm depend a cest jour in uses, issint que il serra grand confusion si ce serra fait.*"

Over this state of affairs, the Sergeant of the Laws of England in his Replication to the Student of the Laws of England, waxed wroth.¹⁴ "By soche uses, the good common lawe of the Realme, to

⁹ *Id.*, pl. 12, 14 Hen. VII and 15 Hen. VII.

¹⁰ *Id.*, pl. 15, 21 Hen. VII.

¹¹ *Id.*, pl. 25, 7 Hen. VII.

¹² *Id.*, pl. 2, 19 Hen. VIII.

¹³ Year Book, 27 Hen. VIII, f. 7-10.

¹⁴ This tract, of whose authenticity there seems to be no doubt, has come down to us only in a manuscript copy which seems to be of the date of late Elizabeth or early James the First. The tract was probably written after 1530 and certainly before 1535. So far as we know it was not printed until Hargrave included it in his *Law Tracts*, I, p. 329 (1737). This would tend to show, if it

the which the kings subjects be inherite, is subuerted and made as voyde, so that none of the said subjects can be and stand in any surety of any possession. . . . Neither deede, ne fyne, ne yet recoverye, which make men's titles by the Common Lawe, maketh or enforceth any man's title at this daye; and all because of this false and craftie invention of uses as I thincke. . . . And yet do ye, that be students of the Common Lawe of the realme, maintaine this untrue and crafty invention in the Chauncery by the colour of conscience contrary to the studie and learning of the common lawe and contrary to reason and also the lawe of God."

Such, therefore, being the attitude of the Courts, the King and his lords became alarmed. The Common Law courts had hitherto been the only means of enforcing the paying of the feudal incidents,¹⁵ and if they now refused to recognize their binding force at law the incidents would be indeed lost. Hence, the King and the great landowners secured the passage of the Statute of Uses to extirpate and extinguish Uses for all time. The language of the Statute itself seems clear enough on that point. "Where by the Common Laws of this Realm, Lands (etc.) be not devisable by Testament nor ought to be transferred from one to another, but by solemn Livery and Seisin, Matter of Record," land is conveyed by "fraudulent feoffments," "craftily made to secret uses," by testaments, "sometimes made by nude parolx and words, sometime by signs and Tokens." As a result of these practices, feudal lords have lost their just incidents and dues, and suffered manifold other wrongs. Wherefore this act is passed, "for the extirping and extinguishing of all such subtle practiced Feoffments, Fines, Recoveries, Abuses, and Errors heretofore used and accustomed in this Realm, to the subversion of the good and ancient laws of the same, and to the Intent that the King's Highness or any other his Subjects of this Realm, shall not in any wise hereafter by any means or inventions be deceived, damaged, or hurt, by reason of such Trusts, Uses and Confidences."

Of the enacting clauses there are, however, two possible readings. Each holder of a use should "from henceforth *stand and be seised*, deemed and adjudged *in lawful seisin, estate, and possession*" of the lands in use "to all intents, construction, and purposes of the law of and in such like estates as they had or shall have in use."

proves anything, that the ideas it advocated were not as popular with the legal profession as the ideas of the "Doctor and Student" which he denounced, for the latter book was reprinted time and time again.

¹⁵Outside, of course, of the local manorial courts, which had been not only ineffective in dealing with the lords and larger tenants, but were now almost entirely superseded by the Common Law Courts and the Assizes.

And that "the Estate, Right, and Possession" of the *feoffees to uses* should be henceforth in the *cestui que use* "after such Quality, Manner, Form, and Condition as *they* had before in or to the Use, Confidence, or Trust that was in *them*." The first section probably meant simply that the *cestui que use* should have legal estate in fee simple fee tail, etc. ("estates" in its strict sense), as he had before a use in fee simple, fee tail, etc. The second meant to vest in the *cestui que use*, not that sort of an estate *he* had himself previously held either in equity or at law, but to vest in him at law the very estate which the *feoffees to uses* already held in law. Technically the estate had to pass to the *feoffees* before they could pass it on and the statute meant that they should pass on precisely that bundle of rights and duties which they received. The makers of the statute certainly never meant, as was later held, that the clause was to be read as vesting in the *cestui que use* the estate of "like quality" as he previously had either at law or in equity. Nothing is said of the estate he *had*; he is mentioned only in connection with the estate he is about to receive.

The first of these interpretations seems to have had some considerable currency immediately after the passage of the statute, but was later superseded by the second view which, with some notable exceptions, has held its own ever since. The real intent of the statute has been completely nullified and even ignored. Passed to abolish Uses, it has been their chief bulwark at Common Law, and treated as their sole legalization. Nor was its actual effect as important as has been sometimes thought. Chief Justice Vaughan said¹⁶ that the effect of the statute had been to introduce a general form of conveyance by which persons may execute their intents and purposes at pleasure, "without observing that rigour and strictness of the law for the possession as was requisite before the statute." Lord Hardwicke said¹⁷ that the statute had no other effect than to add at most three words to a conveyance.

But its first effect seems, however, contrary to many opinions, to have been quite what was intended.¹⁸ In 28 Henry VIII the year following the statute, it was said in court that "the *feoffees* might sell the land and change the possession of it by the same reason that they could limit the use to whom they pleased." Even though they had no authority from the *cestui que use*, they might still alter the

¹⁶ Vaugh., p. 50.

¹⁷ 1 Atk. 591.

¹⁸ It is difficult to find cases where the relation of the *cestui que use* and the *feoffees* is the subject of the case, but most cases regard the point indirectly, and seem to support the point in the text. The reader who wishes to pursue

use, "for by the first feoffment made to them, they have a general authority to change the use at their pleasure."¹⁹ In the next year, it was held that the feoffees to uses could suffer a recovery of the land and it would bind the cestui que use in tail and his heirs.²⁰ That is to say, the use was treated as a legal estate subject to its rights and burdens, but it was an inferior estate at law to that vested in the feoffee. The cestui que use does not by any means displace the feoffee in the eye of the law. In 37 Henry VIII, a man was seized of an acre of land in possession and of another acre as cestui que use, and made a deed of feoffment of both. He made livery of seisin of possession of one, but not of the other, and the Court held that the land in use would not pass, because he had made no livery.²¹ The two estates were not only considered to be of the same validity, but they did not merge even when held by the same man (there was here apparently no question of a difference of tenure). Moreover, the land in use would not pass without livery; the statute had made the use a legal estate subject to its inconveniences, burdens, and technicalities. It had not freed it from them and placed it in its former position at equity.

The greatest case in support of this view is one too long for much comment here—Chudleigh's case in 31 Elizabeth, reported by Coke (1st Report). Here the statute was literally interpreted according to the ideas of its makers. "The full intent of the makers of the act of 27 Henry VIII was . . . to extirpate and extinguish all uses, in such manner as the statute hath limited."²² "It would be then against the express intent of the makers of the act to preserve uses other than they were by the common law, for they intended sub modo to extirpate and extinguish them." "Uses invented and limited in a new manner not agreeable to the ancient common laws of the land, such uses are utterly extirpated and extinguished by this act." And all the judges and barons held "that the statute of 27 Henry VIII should not (against the express letter of it) be construed by equity for the maintenance of these contingent uses."²³ Yet even here, despite their manifestation of desire to execute the intent of

the subject further will find most in Dyer, Moore, and the Abridgements. Benloe is servicable.

¹⁹ Dyer, f. 8, pl. 14.

²⁰ Bro. Abr., tit. Feof. al Uses, pl. 56; 29 Hen. VIII.

²¹ Bro. Abr., tit. Feof. al Uses, pl. 55; 37 Hen. VIII.

²² Coke seems to be speaking in this sentence, though probably his words are based on something said in the case. But if they merely stood for what he personally thought the law was, they are quite as good evidence here, as if they had been the dicta of one of the judges.

²³ Most contingent uses are today recognized as among those executed by the statute.

the founders of the statute, the decision does recognize the validity of all future uses, if only they are limited according to the Common Law, and decides merely that contingent uses are not thus limited. Strictly speaking, "limited" should mean no more than that they must follow the Common Law rules regarding remainders, reversions, and the like. It does not necessarily refer to the relative positions of the cestui que use and his feoffee.

The idea of the strict interpretation of the statute soon was changed to the theory which now obtains, that the statute executes at once and *de facto* in the cestui que use an estate, which is much more nearly the old equitable estate which he formerly had in chancery than the same estate at law which was already existent at law in the feoffee. He seems to have lost the right to escape the feudal incidents, but to have retained the old privilege of sale, conveyance, jointure, and the like. The Common Lawyers found a system of law and precedent regarding uses already in force in equity, and finally ended by accepting a great deal of it, instead of creating a system of their own. How much they adopted is still a matter of warm dispute between the Common Lawyers and the partisans of equity. And with the equitable system the courts also assumed much of the equitable theory of interpretation, though not without reluctance. A certain amount of pressure seems to have been an element in this acceptance. It seems to be true, despite the controversial statements of both parties, that the severe attitude of the Common Law Courts toward uses immediately after the passage of the statute did, for a time at least, send suitors back to equity in search of the remedies which they did not find at Common Law. Indeed, the statute seems to have been at first unpopular.²⁴ Then, to save their own prestige and jurisdiction, the Common Law Courts gave up the attempt to enforce the letter of the statute, returned to their former opinions and recognized the estate of the cestui que use as very much the same in law that he would have had in equity before the statute. It is easily possible to find cases that contravene this position, for the early decisions are anything but harmonious, and a failure of the bench to agree at all was by no means uncommon under Henry VIII and his immediate successors. There is also eminent authority to

²⁴ The Northern Rebels placed in their proclamation (article II): "They desire the repeal of the Act of Uses, which restrains the liberty of the people in the declarations of their wills, concerning their lands, as well in payment of their debts, doing the King service and helping their children." *Let. and Pap. Henry VIII*, vol. XI, no. 705. The King's answer is in vol. XI, no. 780. See also vol. X, no. 246, for draft acts proposed to Parliament in 1534-35, and a long list of grievances suffered from uses, drawn probably by a Royalist lawyer.

the effect that modern uses existed at Common Law before the statute.²⁶ But even if we grant the existence of uses at Common Law, it would be difficult to maintain that uses *as they existed under Henry VIII before the statute* were not in the main an equitable production. It also seems to be true that the uses which were finally put in practice at Common Law by means of judicial decision were in the main the old equitable uses.

In 1864, the Common Pleas, by Erle, Ch. J., recognized an Anonymous case of 1582²⁶ as the beginning of the modern doctrine. "Nota," reads that case, "that cestui que use at this day is immediately and actually seized and in possession of the land, so as he may have an assise or trespass before entry against any stranger who enters without title." The notable point here is that the cestui que use is so completely vested with the legal estate by the action of the statute upon the use, that he had no need to enter or perform (apparently) any Common Law formality in order to be entitled to an action of trespass where possession was the essence of the action. Some years later²⁷ the judges were divided in opinion whether or not cestui que use must enter before he possesses an estate. Glanvill, "He hath no freehold, neither in deed nor in law before entry." . . . Anderson, "He shall have possession here by force of the statute and it is in cestui que use before agreement or entry." Yet, in the end, the judges refused him an action of trespass because not having entered, he had no possession.

Perhaps the clearest statement at this time of the modern doctrine is in Calthorp's Case.²⁸ "Le feoffee devant 27 Hen. 8 fuit le sole party, que fuit entend d'aver benefit per le grant en judgment del common ley, et cestui que use navoit ascun interest mes tiel que le Chancery allow in conscience; et ore puis 27 H. 8 cestuy que use *ad le possession en tiel quality et forme come il ad le use.*"

A most singular history, this history of the Statute of Uses and of its interpretation. Made to extirpate uses, and particularly to

²⁶ I have no wish here even to touch the controversy upon the origin of Uses between Professor Maitland and Dean Ames on the one side and Mr. Justice Holmes and Mr. Salmond on the other. Whatever the origin of Uses, or the phrase "ad opus" or "oeps" was and whatever its early significance was (which is far more difficult to demonstrate), there can be little doubt that the system of uses was the creation of equity and not of the Common Law.

²⁶ Cro. Eliz. 46. Common Bench. See Erle in *Heelis v. Blain*, C.B.N.S. 90.

²⁷ Owen, 87. 41 and 42 Eliz.

²⁸ Moore, 102, pl. 247. Cf. *Cooper v. Fraklin*, Cro. Jac., 400 (1616), "The statute never intended to execute any use but that which may be lawfully compelled to be executed before the Statute. . . . The Chancery could not compel him at the Common Law to execute the estate and so the statute doth not execute it at this day." See also *Sammes Case*, 13 Co. 54.

protect the Common Law forms of conveyance and to annul the position taken by the Courts previous to 1535, the statute stands today as the legalization of conveyance by uses, and as the basis of the very theories of Common Law interpretation which it was particularly designated to abrogate.

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