The Statute of Uses: A Look at Its Historical Evolution and Demise

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The Statute of Uses: A Look at Its Historical Evolution and Demise*

David T. Smith

Subsequent to a discussion of the use's origin, Professor Smith proceeds to delineate both the political background and enactment of the Statute of Uses. He evaluates the specific provisions of the Statute and their effect upon medieval and modern land conveyances, including the prevailing law of future interests. The author concludes with a discussion of the successes and failures of the Statute and its resultant repeal in England as part of the English land reform legislation of 1925.

The Statute of Uses1 was passed by the English Parliament in 1535 and became effective in 1536. This enactment, the apex of legislative attempts to control conveyances to uses, is probably the most important piece of legislation dealing with English land law. Its far-reaching consequences are still felt today in both England and the United States. It is the purpose of this article to examine the historical background of the Statute and to investigate its consequences culminating with its repeal as part of the English property reform legislation of 1925.

I. ORIGIN OF THE USE

In order to historically appraise the events that led to the enactment of the Statute of Uses, it is first necessary to consider the origin of the use.2 It is a fundamental fact that the passage of the Statute was dependent upon the creation of the use, in the absence of which there would have been no need for the Statute of Uses. As to the origin of uses numerous questions could be asked; however, the most

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1 27 Hen. 8, c. 10 (1535).

2 The term "use" has been defined as follows: "A confidence reposed in another, who was made tenant of the land, or terre-tenant, that he would dispose of the land according to the intention of the custei que use or him to whose use it was granted and suffer him to take the profits." BLACK, LAW DICTIONARY 1710 (4th ed. 1951).
crucial are: "Prior to its appearance in England was it known elsewhere?" and "When did the use first make its appearance in England?"

With respect to the former inquiry, one may choose from four principal but divergent theories: the English use was of (1) Roman origin, (2) German origin, (3) Roman-German origin, or (4) English origin.

A. The Four Principal Theories

The Roman origin theory was advanced by the earliest writers on uses. These authorities identify the Roman *fidei-commissum* as the ancestor of the English use. *Fidei-commissum* permitted the Romans to circumvent laws prohibiting certain persons from obtaining property by will in that it allowed a devise of property to a person legally capable of being a devisee with a request that this party deliver the property to another person who was incompetent to take directly. Although at first there was no legal obligation on the part of the first devisee to the second party, the relationship subsequently became legally enforceable. While there was present the element of confidence or trust, it must be understood that *fidei-commissum* dealt with property passing by devise only. On the other hand, the English use, even in its earliest stages, was seldom, if ever, the result of a devise. It has been stated that mainland clergy brought the idea of *fidei-commissum* to England in order to avoid the mortmain statutes and thus were the originators of the English use. It is therefore possible that the use concept came from the fertile minds of ecclesiastical lawyers seeking means to avoid the consequences of the Statute *De Religiosis* and other mortmain statutes which prevented gifts of land to church organizations without royal consent. By accepting this logic, one would place the origin of the English use in the fourteenth century. The Roman theory can be attributed to the similarity between the *fidei-commissum* and the *feoffment* to uses, both being means making

3 Blackstone is considered the leading exponent of the theory that the English use had a Roman origin. See 2 BLACKSTONE, COMMENTARIES *328.

4 *Fidei-commissum* has been defined as follows: "In the civil law, a species of trust; being a gift of property (usually by will) to a person, accompanied by a request or direction of the donor that the recipient will transfer the property to another, the latter being a person not capable of taking directly under the will or gift." BLACK, op. cit. supra note 2, at 752.

5 7 Edw. 1 (1279).

6 See, e.g., Magna Carta, c. 43 (1217 ed.).

7 2 BLACKSTONE, op. cit. supra note 3, at *328.
possible the future disposition of property through a third person and circumventing laws preventing such disposition. In essence, the feoffee to uses was deemed comparable to the *baeres fiduciarius*; the *cestui que use* to the *fidei-commissarius*.

The German theory was suggested by Mr. Justice Holmes. He was of the opinion that the early scholars were in error and that the use did not have a Roman origin but, rather, had its origin in the Salaman or Treuhand of early Germanic law. Holmes indicated that the feoffee to uses was merely the Salaman under a different name. In the law of the Salian Franks — the *Lex Salica* — about the fifth century, A.D., a mysterious person referred to as Salmannus was called upon to aid in completing the transfer of property in certain cases, usually in matters pertaining to the appointment or adoption of an heir. The argument for generic equality between Salmannus and the English feoffee to uses rests primarily upon the practice under Salic law according to which the Salmannus was handed a symbolic staff by the donor, which he, in due course, and with due solemnity, handed to the donee. A virtually identical ritual took place in England until modern times with respect to the transfer of copyhold, whereby a staff was handed to the steward of the manor as a first step in conveying copyhold land to another, the surrender to the steward being an expression to the use of the donee or purchaser. Under the German theory, then, the origin of the English use should be dated at the time of the Norman Conquest, 1066 A.D., since the concept of the Salaman did not exist in Anglo-Saxon law, and, as has been authoritatively reported, many elements of Teutonic Salic law were imported into England during this period by William the Conqueror.

The Roman-German theory was put forth by Frederick Maitland, who regarded the use as a fiduciary arrangement not legally recognized at its inception, which gave rise to an intermediate

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8 "A fiduciary heir, or heir in trust; a person constituted heir by will, in trust for the benefit of another . . . ." BLACK, op. cit. supra note 2, at 842.

9 "In the civil law, this term [*fidei-commissarius*] corresponds nearly to our *cestui que trust.* It designates a person who has the real or beneficial interest in an estate or fund, the title or administration of which is temporarily confided to another." *Id.* at 752.

10 See Holmes, Early English Equity, 1 L.Q. REV. 162 (1885).


12 See 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW 410-14 (1924).

proprietary interest in favor of a beneficiary. It is Maitland's view that the word "use" stems from the Latin *opus*:

First as to words. The term "use" is a curious one; it has, if I may say so, mistaken its own origin. You may think that it is the Latin *usu*, but that is not so; it is the Latin *opus*. From remote times — in the seventh and eighth centuries in barbarous or vulgar Latin you find "ad opus" for "on his behalf." It is so in Lombard and Frank legal documents. In Old French . . . this becomes *a l'oes, ues*. In English mouths this becomes confused with "use."°

The Latin phrase *ad opus* first made its appearance in England in the ninth century.° And, since this expression appeared in the records of the early Franks and Lombards,° the presumption arose that the concept of the use came from Germanic sources.

Finally, the English theory proposed by Professor Ames° considered the origin of the English use from an institutional standpoint, *i.e.*, that the use gave rise to a relationship from which flowed rights and duties. Under Ames' approach the use has no continental ancestor. Rather, it is the offspring of the English Chancellor, its date of birth being the time when the first decree enforcing the rights of a *cestui que use* was handed down. By this theory any historical conclusions become mere conjecture, and it is most probable, therefore, that the use came into existence in the early part of the fifteenth century.°

**B. Origin Concluded**

One other theory, though not a member of the principal schools of thought, is worth discussing as it negates the four primary theories. It was offered for consideration some eighteen years ago at a conference on the law of the Middle East° and indicates that uses and trusts had been introduced into the English legal system by crusaders returning from the Middle East. It was contended that crusaders had observed the operation of *waqfs*° under Islamic law and had concluded that they were a possible instrument for avoiding the distasteful elements of feudal tenure. *Waqfs* arose as a

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° Maitland, Equity 24 (2d rev. ed. 1936). (Footnotes omitted.)
15 Pollock & Maitland, op. cit. supra note 13, at 234.
16 Id. at 233.
17 Ames, Lectures on Legal History 237 (1930).
18 Ibid.
19 This conference was held at Lennox, Mass., September 20-24, 1948.
20 These are defined as Islamic endowments of property to be held in trust and used for a charitable or religious purpose. Webster, Third New International Dictionary (1961).
device to overcome Koranic restrictions with respect to the minutely
detailed prescriptions concerning the passage of property to heirs
and combined the ideas of trust, family entail, and charitable foun-
dation. The theory of *waqfs* was firmly entrenched as a part of
Moslem law in the second half of the first century of Islam (A.D.
670-750).21

The answer to the first question, "Prior to its appearance in Eng-
land was the use known elsewhere?," dictates the answer to the sec-
ond one, "When did the use first make its appearance in England?,"
because the answer to the latter question depends upon which theory
of origin is followed. However, no matter what theory one pre-
fers, Roman, German, Roman-German, English, or Islamic, one
thing is certain—uses arose in England as an escape from the
many burdens attached to the holding of legal title to land under
the feudal system.

II. USES BEFORE THE STATUTE OF USES

A. *Reason for the Development of Uses*

The principal reason for the development of uses lay in the fact
that feudal burdens and disabilities related only to the holders of
legal title, while, conversely, the rights under a use could not be
forfeited nor could uses be charged with other feudal incidents.

Thus, there were numerous advantages which led to the employ-
ment of the use as a legal device, for example: (1) one could evade
the feudal incidents of wardship, marriage, and relief; (2) the law
of forfeiture for treason and escheat for felony would have no ap-
lication; (3) the mortmain statutes could be circumvented;22
(4) property could be lawfully hidden from creditors; (5) property
could be transferred to aliens; and (6) a person could invest him-
self with a power similar to that of devising land.23 In fact, even
the dower rights possessed by the wife of a *cestui que use* could be
defeated, for these would not attach themselves to the equitable in-
terest.

In essence, during the period when the feudal system was at its
height many disabilities attached to the holding of legal title under
the common law; however, the owner of land would bypass them
merely by enfeoffing another with legal title, reserving the use to

21 See Thomas, *Note on the Origin of Uses and Trusts — WAQFS, 3 Sw. L.J. 162
(1949)* for a discussion of this theory.

22 An end was put to this practice by 15 Rich. 2, c. 5 (1391).

himself. As a matter of tactics, the owner of the land would actually enfeoff not one person but three or four as joint tenants having right of survivorship. This method would alleviate the likelihood of problems in that it would be more difficult to find a bona fide purchaser for value and without notice of the legal interest where more than one title holder was involved. In this regard it must also be remembered that the feudal incidents would attach to the legal interest of a sole titleholder who died. Although his successor would be bound by the same equitable obligations, the inheritance would have decreased in value. Yet with legal title held jointly, when one feoffee died nothing passed to his heirs; instead, the legal title remained with the other feoffees, and if the ranks of the feoffees thinned, the group could be increased to its original size with a few further enfeoffments.  

B. Creation of Uses

Prior to examining the legal effect of the use it seems worthwhile to dwell briefly on the creation of uses during the medieval period. The English use with which this article is concerned is what might today commonly be called the passive trust, i.e., a relationship whereby the legal title is transferred by one person to another, the latter merely holding bare legal title for the benefit of someone else. There is no more to it than that. Trusts, as we think of them today, evolved from uses which imposed positive duties of care or management on the part of the person holding for another.

In feudal times there were several ways to create a use. First, it could arise from a feoffment to certain declared uses. O might enfeoff A and his heirs to the use of B and his heirs. O then lost his ownership interest, A gained a legal fee simple absolute, and B received an equitable fee simple absolute. Often, the feoffment would be to the use of O, the grantor. In fact, the practice of

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24 A use, not being an estate in the land, was not the subject of tenure, and consequently, on the death of the cestui que use, the lord had no wardship or marriage of the heir, the land did not escheat on the death of the cestui que use without heirs, and it was not forfeited when the cestui que use was attainted of treason or felony. The legal ownership, however, represented by the feoffee to uses, was subject to the incidents of tenure, which could be enforced against the land, but by vesting the seisin in two or more feoffees jointly, whose number was renewed from time to time, and the survivor of whom took the whole legal estate, the burdens incident to the descent of land were generally avoided. 1 TIFFANY, REAL PROPERTY § 223, at 392-93 (3d ed. 1939). (Footnotes omitted.)

25 For simplicity's sake, one feoffee, rather than a group, will be used in feoffment examples throughout this article.
making a feoffment to the use of the grantor became so widespread that a rule arose creating a presumption of a resulting use to the grantor in many cases. For example, if \( O \) enfeoffed \( A \) and his heirs to the use of \( B \) for life, a resulting use in fee was presumed in \( O \)'s favor after \( B \)'s death. The same presumption of a resulting use applied if \( O \) merely enfeoffed \( A \) and his heirs. This presumption was rebuttable, however. It could be overcome by showing that the feoffee gave consideration, and of course it did not apply where there was an express declaration of a use.

Not only would a use come about in connection with the transfer of legal title, but it would similarly arise when the holder of legal title retained it and transferred only the equitable interest. This method of creating a use was termed the bargain and sale. For example, \( O \), for consideration, would bargain and sell land to \( A \) and his heirs by a written instrument. This would not give \( A \) legal title since livery of seisin was lacking, yet the beneficial equitable interest, the use, was regarded as being with \( A \). \( O \)'s bargain and sale raised the use in \( A \). The rights and duties that flowed from the bargain and sale after consummation were identical to those resulting from the feoffment to uses, \( i.e. \), the bargainee was on a parity with the \textit{cestui que use}, and the bargainor had the same status as the feoffee to uses. The most popular method of creation, though, was the former, utilizing a transfer of the legal title to a feoffee and a promise by him that he would allow whomever the feoffor indicated to have the possession and enjoyment of the land.

C. Recognition of the Use as a Legal Device

The early English common law was extremely rigid in nature, and in order for a remedy to be granted it was necessary that the writ precisely fit the requested remedy. The result of adherence to technicalities such as this substantiates Ames' pronouncement that the use of today is a product of the equitable jurisdiction of the Chancellor.\textsuperscript{26} The idea of one man holding to the use of another was abhorrent to the common law relating to hereditaments. The recognition of the interest of anyone not actually seised or entitled to a definite estate in the land was viewed as encouraging the evasion of those obligations constituting the basis of English feudal society.\textsuperscript{27} As a consequence of this attitude, the interests of the beneficiary of a use were not protected by the law courts, nor were


\textsuperscript{27} \textsc{Holdsworth, op. cit. supra note} 12, at 414.
they enforceable by the ecclesiastical courts. The initial result, then, was that uses were treated as merely honorary obligations. Therefore, a person holding land to the use of another might deny that he so held, appropriate the property, and suffer no adverse consequences.28 It is to be noted, therefore, that the use was not too effective a device if it could not be legally enforced.

Fortunately for the cestui que use, a change for the better occurred with the development of the Court of Chancery. Although the procedure at common law was not adequate to try cases which involved a breach of trust,29 the Court of Chancery employed a flexible procedure30 which was well suited to discover and remedy such breaches. By the beginning of the fifteenth century it was only a natural consequence that beneficiaries victimized by the many fraudulent conveyances of property to uses31 should apply to the Chancellor for relief, as these frauds were the result of the law courts' failure to recognize the use. Therefore, by this time the development of the use by Chancery had begun, the earliest known application having come in the last years of the fourteenth century.32

III. **Political Background of the Statute of Uses**

A. **Reason for the Statute of Uses**

There is one overpowering reason for the enactment of the Statute of Uses. King Henry VIII was broke! As more eloquently put forth by Holdsworth: "Some years before the passing of the Statute of Uses fiscal necessities led Henry VIII to reflect upon the depletion of his feudal revenues."33 Henry was in dire need of money. Borrowing was not satisfactory because he would lose his personal popularity, a popularity already somewhat tarnished due to past divorce proceedings and threatened legislation against the Church.34 Thus, the king looked toward the restoration of his feudal revenue as the source from which a permanent increase in royal revenue might be drawn.35 Henry's attention be-

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28 See AMES, op. cit. supra note 17, at 236-37.
29 4 HOLDSWORTH, op. cit. supra note 12, at 418.
30 ibid.
31 Id. at 419.
32 Id. at 420.
33 Id. at 450.
34 ibid.
35 ibid.
came focused upon the land law, and in 1529 two measures were
drafted for submission to Parliament.

B. Proposed Legislation of 1529

The first of these proposed measures would have both revolu-
tionized and simplified the existing property law. This bill was
intended to give certain privileges to the nobles, who in turn were
to make concessions to the king. These concessions, consisting of
seventy-three articles, constituted the second portion of the at-
temted legislation.

36 It began by reciting the “grate trobull, vexacion, and unquietness amongst
the kynges sugettes... for tyttyll of londes, tenements, and other heredita-
tments... as well by intayle as by uses and forgynge of false evidence.” It
went on to provide the following drastic remedies: (1) All entails were to
be abolished and none were to be permitted for the future, “so that all man-
ner of possessions be in state of fee simple from this day forward for ever.”
(2) No uses of any land were to be valid, “onles the same use be recordid
in the kynges courte of the commen place.” A special officer of the court
was to be deputed to keep a separate roll for each shire, and he was to charge
certain fees for keeping the roll. (3) To avoid the risk of forgery, all pur-
chasers were required, as soon as the deed of conveyance was sealed and livery
of seisin made, to have the deed openly read in the parish church or churches
where the land was situate, “att suche tym as mosste people be present.”
The priest was to “fyrme the said deede,” and it was to be registered “in the
schere towne in which the land lay.” (4) All lands of which recoveries had
already been suffered or fines levied were, after the lapse of five years, to
be held in fee simple by those in whose favour the recovery had been suffered
or the fine levied; and all seised of lands of which they or their ancestors had
been peaceably seised for forty years without claim made were to have an
indefeasible title. (5) Entails were still to be permitted “to the nobyll men
off thys realme being within the degree of a baron;” and no one was to buy
such noblemen’s land without the king’s license. If such license were given,
the deed must comply with the formalities required for ordinary conveyances,
and the purchaser was to hold in fee simple. Id. at 450-51. (Footnotes
omitted.)

37 Under these articles the king was to have the wardship of the lands of all
his tenants holding of him for an estate of inheritance by knight service in
chief and leaving an infant heir (excepting only the fees of the Archbishop of
Canterbury and the Bishop of Durham between Tyne and Tees), whether
the tenant had the use or the legal estate. If the land was devised or other-
wise settled, the king was to have the wardship of a third (notwithstanding
such devise or settlement) from the lands so devised or otherwise settled;
but with a saving for the rights of tenants under existing settlements. If part
was devised or otherwise settled, and part not, the king was to elect whether
he would take the part not devised or settled, or whether he would take the
third. If the land held of the king by knight service in chief did not amount
to a third of all the tenant’s lands, and he devised or otherwise settled all his
other lands, the king was to have the wardship of the lands held in chief
and of so much of the other lands as would amount to a third of all his lands.
Any estate coming to the ward from his ancestor who held of the king, by
reason of the expiration of a particular estate, was to be held by the king,
unless otherwise settled. The same rules were to apply to lands held of the
king by reason of any escheat, honour, or otherwise, and not in chief. On
As far as Henry was concerned these measures were all well and good. Yet, it was one thing to make agreements with the nobility, and another to have the House of Commons ratify the bills. These measures had to be approved by Commons, and this did not happen. The primary reason for their failure in Commons was the vocal disapproval of the lawyers and large landowners of lesser rank than barons. The latter felt that they would be deprived of their power to make family settlements and secret conveyances. The former opposed the measures primarily for financial reasons, as they envisioned themselves being deprived of a large amount of profitable business.88

G. The Ultimate Solution

However, despite this false start, Henry was not yet ready to quit trying. He attempted to put through the same proposals in 1532 and, for the same reasons, failed again. A new way had to be found. Perhaps success lay in an alliance between himself and the interests in the House of Commons which had blocked his origi-
nal scheme. He chose to ally himself with the lawyers because of the feeling among them that uses furthered fraudulent practices. But more important, it is submitted, was what Holdsworth calls a "professional jealousy of the Chancery." The lawyers preferred the law courts gaining jurisdiction over uses since Chancery was doing a going business in them, thereby depriving the lawyers of significant revenue.

The king's approach to this problem was typical of his diplomatic methods. He frightened the landowners with stringent inquiries into settlements which deprived him of his rights and simultaneously frightened the lawyers by hearing a petition against abuses in the administration of the law. What is more important, from the legal-historical point of view, is that Henry was successful.

In 1535-1536 Henry VIII presented Parliament with "a list of grievances suffered by the realm from uses, three draft bills concerning uses and wills, and one draft bill concerning the enrollment of covenants, contracts, bargains, or agreements made with reference to the uses of lands." The Statute of Uses and its supplementary statute, the Statute of Enrollments, were the basic outgrowth of this material.

The list presented to Parliament contained a multitude of de-

80 Ibid.
81 Ibid.
82 Ibid. at 454.
83 Ibid.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid. at 455.
88 27 Hen. 8, c. 16 (1535). In its most important part, this enactment reads as follows:

[From the last day of July, A.D. 1536, no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed and enrolled in one of the king's courts of record at Westminster, or else within the same county or counties where the same manors, lands, or tenements so bargained and sold lie or be, before the custos rotulorum and two justices of the peace, and the clerk of the peace of the same county or counties, or two of them at the least, whereof the clerk of the peace to be one; and the same enrollment to be had and made within six months next after the date of the same writings indented; the same custos rotulorum, or justices of the peace and clerk taking for the enrollment of every such writing indented before them, where the land comprised in the same writing exceeds not the yearly value of forty shillings, ii s. that is to say, xvi d. to the justices, and xvi d. to the clerk; and for the enrollment of every such writing indented before them wherein the land comprised exceeds the sum of xlv s. in the yearly value us. that is to say ii s. vi d. to the said Justices,]
tailed grievances suffered by the realm. The disadvantage of uses was approached from four viewpoints, that of: (1) the cestui que use, (2) the public at large, (3) the king and lords, and (4) the law. Holdsworth observed:

The cestuique use is at the mercy of a fraudulent bailiff or feoffee; nor can he take action against a trespasser. He loses his curtesy, and his wife her dower. The king loses his forfeitures and king and lords lose their incidents of tenure. The public at large is defrauded because no man can tell against whom to bring his action, nor is anyone secure in his purchase. The law is wholly uncertain — “the openyons of the Justices do chaunge dely apon the suertyez for landes in use.” The use is, “but the shadowe of the thyng and not the thyng indeyd.” It causes the law to be double, and to sever the real from the apparent ownership, “which is a grett disseytt.”

It is this writer’s opinion, however, that the list of grievances, taken as a whole, was a mere cover-up for the true reason behind the enactment of the Statute of Uses. The grievances are somewhat in the nature of a judicial opinion that is written to rationalize a decision, yet which is not the real reason for the court deciding the case as it did. The real reason, though, is found among the grievances. It is that the king suffers severely by the populace of the nation “using the use.” It must also be pointed out as an additional rationale for the Statute’s wording that the king was compelled to tread rather lightly for fear that the new bills would meet the same fate as their predecessors.

Two different schemes were set forth in the three draft bills dealing with the problem of the use. In the words of Holdsworth:

The less thoroughgoing scheme begins with a short general preamble to the effect that by means of uses “the good old lawes of the realme be nygh subverted”; and then goes on to subject the equitable interest to the liabilities of the legal estate for certain purposes, and to limit the modes in which uses can arise. Thus the estate of the cestuique use is made liable to forfeiture on attainder, to curtesy, to his ancestors’ specialty debts to which the

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and ii. s. vi. d. to the said clerk for the inrolling of the same: And that the clerk of the peace for the time being, within every such county, shall sufficiently inrol and ingross in parchmen the same deeds or writings indented as is aforesaid; and the rolls thereof at the end of every year shall deliver onto the said custos rotulorum of the same county for the time being, there to remain in the custody of the same custos rotulorum for the time being, amongst other records of every of the same counties where any such inrolment shall be so made, to the intent that every party that hath to do therewith, may resort and see the effect and tenor of every such writing so inrolled. 2 CHITTY, STATUTES OF PRACTICAL UTILITY 727 (6th ed. 1911).

47 HOLDWORTH, op. cit. supra note 12, at 455-56. (Footnotes omitted.)
heirs were bound, and to the incidents of tenure. Recoveries, fines, feoffments, releases, and confirmations by cestuique use were to have the same effect as if the cestuique use had had the legal estate. For the future no uses were to have any legal effect except those clearly expressed at the time of conveyance; and a recovery was not to be suffered to any other use but to that of the recoveror. No bargain, contract, covenant, or agreement with reference to land was to change the use of the land. Those injured by the breach of such contracts were confined to their remedies for breach of contract. Then comes a clause, the effect of which would have been somewhat revolutionary, as it would, apparently, have prevented a recovery from affecting the interests of remaindermen and reversioners without their own consent.48

This first scheme would have cured the evils produced by uses by subjecting them to many of the incidents of feudal tenure. But, what is more important, this plan would still allow land to pass by devise, the principal cause of King Henry’s loss of revenue making it unacceptable from his viewpoint. Consequently, it never had a chance to become law.

The second scheme, in essence, became the Statute of Uses. Here the legislators attacked the matter of uses in a straightforward rather than oblique, manner. The legal estate was annexed to certain uses in land.49 It was indicated that as a consequence the various evils attending the separation of legal and equitable estates were eliminated.50 It must be noted, though, that uses were not abolished, and, as a result, opportunities still remained for the development of the use in the land law of England.

Ancillary to the plans concerning uses was the draft bill dealing with the enrollment of covenants, contracts, bargains, or agreements made with respect to the uses of land.51 Appropriate administrative procedure was also set forth to carry this latter bill into effect. Thus, a comprehensive program was developed for registering conveyances which would, if enacted, considerably simplify a segment of the English legal system. Such was not to be the case, however, as the proposed bill failed to pass in 1536. The ultimate Statute of Enrollments was not nearly as comprehensive.

This constitutes the political background of the Statute of Uses.

48 Id. at 456. (Footnotes omitted.)
49 Id. at 457.
50 Ibid.
51 It proposed to enact that the use of lands should not pass nor be created by reason of “any recoveries, fines, feoffments, gifts, grants, covenants, contracts, bargains, agreements, or otherwise,” unless declared by writing under seal and enrolled as provided by the act. Further, it provided that, for the future, all evidences of any kind should be enrolled. Id. at 457-58. (Footnotes omitted.)
Professor Maitland has said that “The Statute of Uses was forced upon an extremely unwilling parliament by an extremely strong-willed king.” This writer, though, tends to be in agreement with Holdsworth. In this respect, it is submitted that the strong-willed king first had to frighten and then conciliate the common law lawyers in order to get the Statute through the House of Commons and that essentially the Statute of Uses was a compromise measure, though one which influenced most significantly the whole future of the law of real property.

IV. Statute of Uses

A. Objectives of the Statute

Essentially the Statute of Uses had four objectives: (1) restoration to the king of his revenue from the incidents of tenure; (2)
abolition of the power to devise; (3) certainty of publicity of conveyancing; and (4) elimination, in the case of uses to which the Statute applied, of the separation between legal and equitable ownership.

B. The Preamble

The Statute begins with a rather lengthy preamble which is not of substantive importance. However, a consideration of it in the light of the political forces shaping the Statute allows one to appraise its true historical value. The preamble is “an official statement of the numerous good reasons which had induced the government to pass so wise a statute — the sixteenth-century equivalent of a leading article in a government newspaper upon a government measure.”54 This writer submits that in contemporary parlance the preamble was nothing more than propaganda — propaganda on the part of King Henry in order to rally support for enactment. The preamble is the fruit of the king-lawyer alliance. It contains all the objections to uses which were common to the lawyers of the period — along with the objections of the king. The latter objections, it is submitted, were of greatest importance, since it was Henry who started the ball rolling, the lawyers merely rolling along with the ball.

or hurt, by reason of such trusts, uses, or confidences: it may please the king's most royal majesty that IT MAY BE ENACTED, That where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust in fee-simple, fee-tail, for term of life or for years or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust, of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before, in or to the use, confidence, or trust that was in them. 2 CHITTY, op. cit. supra note 46, at 721.

54 4 HOLDSWORTH, op. cit. supra note 12, at 460.
C. The Substantive Statute

The objective of the Statute of Uses was to take the legal estate from the legal titleholder and vest it in the equitable titleholder, i.e., the holder of the use. The first clause of the Statute is substantively important. It reads as follows:

That where any person or persons stand or be seised, or at any time hereafter shall be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner means whatsoever it be; that in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust in fee-simple, fee-tail, for term of life or for years or otherwise, or any use, confidence, or trust in remainder or reverter shall from henceforth stand and be seised, deemed, and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates as they had or shall have in use, trust, or confidence of or in the same.55

Paraphrased, this clause amounts to the following: if any person or persons happened to be seised of (or might become seised of) any lands or other hereditaments to the use of any other person or persons, for estates in the use of fee simple, fee tail, for life, or for years, then those other persons should be seised of like estates which they had in the use. A simple example should suffice. If via a feoffment, A and his heirs received land to the use of B and his heirs, then A’s legal fee simple absolute was taken from him and vested in B. Of course, for the Statute to operate it was a requisite that the legal titleholder be given an estate sufficient to execute the use.

In examining the wording of the Statute it is important to note, as was pointed out in the previous sections dealing with proposed legislation, that it was the clear intent of the lawmakers not to abolish the use. This is observed from the fact that the Statute provided not only for existing uses but also for future uses. Its purpose was merely to cure, by converting uses into legal estates, the various evils attributed to the division of legal and equitable ownership.

55 27 Hen. 8, c. 10 (1535).
There are also loopholes to be found in the Statute. For example, the first clause deals only with the case of a person seised to the use of another. Therefore, the Statute would not apply where one was merely possessed to the use of another; nevertheless, the most numerous class of uses was executed. As a consequence, landlords entitled to the benefit of uses became burdened with all the liabilities of legal ownership. Furthermore, the power of devise with respect to their lands was gone.

V. CONSEQUENCES OF THE STATUTE OF USES

A. Substantive Consequences

Although this article is primarily concerned with an historical discussion of the Statute of Uses and the events related to it, it is appropriate that some space be allotted to a discussion of the substantive consequences of the Statute, especially as related to modern American law.

The most important substantive consequence is found in the Statute's effect on the law of future interests. If, for example, prior to the Statute O enfeoffed A and his heirs, to the use of B and his heirs from and after the time when B attains the age of twenty-one years, there would be a resulting use in O if the feoffment was without consideration. The use would spring from O upon B's attaining the designated age. Thus, B had an equitable future interest called the "springing use." Similarly, if, for example, O enfeoffed A and his heirs to the use of B and his heirs, but if B dies without leaving surviving children, then to the use of C and his heirs, there was an equitable interest in C known as the "shifting use." After the passage of the Statute of Uses, these equitable interests were transformed into legal ones and became known as executory interests.

Thus, from the substantive standpoint the Statute created new future interests which were legal in nature and which enabled their transferees to divest vested estates in other parties. The springing executory interest divests a vested estate in the creator of the interest or in a successor to the creator. The shifting interest divests a simultaneously created vested estate in another transferee. This executory interest is a future interest created in a transferee which is not a remainder. It should also be pointed out that since these new interests were non-destructible in nature, one could, after the Statute of Uses, tie up property for an indefinite period. Consequently, in the
Duke of Norfolk's Case we see the first application of the Rule against Perpetuities as a common law policy opposed to remoteness of vesting.

The Statute of Uses can also be considered to have revolutionized the art of conveyancing, for the bargain and sale as it operated under the Statute can be considered the forerunner of today's deed. One need only consider the language of the general warranty deed where the premises states that the grantor does "give, grant, bargain, sell and convey" his land to see the Statute's impact. However, the short statutory form generally does away with this language. Although it is the bargain and sale which is the predecessor of today's deed, the Statute of Uses plays no part in the transfer of title. We are not concerned with the raising and execution of the use but rather with the proper execution and delivery of the deed. These factors constitute the requisite elements to transfer title from the grantor to the grantee. In this respect, there is no further need to consider the necessity of creating a use, springing or shifting, in order that there be a springing or shifting executory interest. Such an interest would be created by the transfer of title by deed. The words of transfer in the deed, called executory limitations, give rise to these interests. In essence, then, although the Statute of Uses altered the development of land law, it cannot really be considered of substantive importance at the present time. This is true even though the Statute is considered to be in force in most American states, for all states have legislation which allows deeds to take effect without possession of land being transferred and which permits, a fortiori, springing and shifting interests.

Another point that seems significant is the consideration of interests not changed or affected by the Statute. As pointed out in the previous section, the object of the Statute was to convert the equitable interest of the useholder into a legal interest, such a conversion supposedly serving as a cure-all for the grievances mentioned in the preamble. What is to be noted, however, is that the Statute had no application to personalty. One could transfer personalty to A and his heirs for the use of B and his heirs, and the legal and equitable title would be split, because, from the Statute's wording, personalty was not included. There is no inconsistency,

56 3 Ch. Cas. 1 (1682).

57 See, e.g., OHIO REV. CODE § 5302.03 (Supp. 1965) which reads as follows: "In a conveyance of real estate or any interest therein, the word 'grant' is a sufficient word of conveyance without the use of more words." OHIO REV. CODE § 5302.05 (Supp. 1965) contains a form for the statutory general warranty deed in fee simple.
though, since it was not personalty that was causing King Henry financial loss. Another factor is that the Statute referred only to instances in which the legal titleholder was seised of the property. For this reason, the Statute did not apply to realty other than freeholds, nor did it deal with a "use on a use." If lands were, for example, bargained and sold by \( O \) to \( A \) and his heirs, to the use of \( B \) and his heirs, the use of \( A \) was transferred into a legal estate; however the second use, that to \( B \), was not executed but remained equitable. This doctrine of non-execution of the second use was developed by a law court\(^{58}\) rather than in equity, and for approximately one hundred years after the Statute of Uses, Chancery refused to recognize the validity of a use on a use, the second use being deemed void. Finally, in the seventeenth century, long after the revenue purposes of the Statute had ceased to be crucial, the validity of the second use was recognized in equity.\(^{59}\) Thus, the jurisdiction of Chancery over uses was to a large extent restored, and one could, despite the Statute of Uses, bring about a separation of the legal and equitable interests in a freehold estate by adding to the conveyance a few words creating a use on a use.

Last, but certainly not least, was the fact that, with the enactment of the Statute, the modern law of trusts truly began to emerge, for "active uses," where the legal titleholder was obliged to perform affirmative management duties, were held to be unexecuted. Those active uses are in actuality today's trusts. One should note that since the Statute of Uses is considered a common law rule in many states, it is in fact the Statute that vests legal title in the trust beneficiary where realty is involved and the trust is passive.\(^{60}\) The rule of the Statute has generally been applied to personal property on the theoretical basis that the reason of the rule is equally applicable or, more pragmatically, that equity should not keep alive a useless trust.\(^{61}\)

B. Legal-Historical Consequences

In considering the legal-historical consequences of the Statute of Uses, the Statute of Enrollments is to be considered as one with

\(^{58}\) Tyrrel's Case, 2 Dyer 155a, 73 Eng. Rep. 336 (1557).


\(^{60}\) Express passive trusts are, of course, rare. The Statute of Uses and its American counterparts have no application to resulting and constructive trusts. See BOGERT, TRUSTS AND TRUSTEES § 206 (2d ed. 1965).

\(^{61}\) Ibid.
it. It would appear that the best way to examine these consequences would be to compare its successes with its failures.

1 Successes of the Statute of Uses.—In general the Statute of Uses was successful with respect to the following: (1) restoration of the king’s revenue; (2) substitution of written transfers in place of formal delivery of land by feoffments; and (3) increased dispositive power of land owners. 62

The Statute of Uses was quite effective from a financial standpoint. 63 The king’s coffers were again filled with feudal revenue. It is to be noted that not until the seventeenth century, approximately one hundred years after passage of the Statute, did Chancery give protection to the use on a use. 64 By that time feudal revenue could no longer be considered an important source of income. 65

The Statute might be considered to have had its financial shortcomings, however, as indicated by Professor Bordwell:

The success of the Statute of Uses in reviving the King’s revenue was, however, at best but a doubtful one. These revenues were feudal, and uses had been in [sic] a fair way to accomplish a peaceful overthrow of what was overthrown only by violence on the Continent when the Statute of Uses intervened. Its success in this respect therefore was reactionary, and, like most reactionary successes, merely temporary. The Commonwealth accomplished what the Statute of Uses prevented the use from doing. Viewed as a revenue measure, the Statute of Uses would have occupied only a secondary place in the history of the law. 66

Of legal-historical importance, also, was the fact that the Statute was a step forward in the field of conveyancing. Prior to the Statute, the primary method of conveyancing was the feoffment, a crude method operating by formal delivery of land. Although this device was quite suitable for medieval England, it grossly lacked the efficiency of the bargain and sale which after passage of the Statute became elevated to legal conveyancing status, i.e., became a means of

63 See 4 Holdsworth, A History of English Law 467 (1924); Bordwell, supra note 62, at 468. Professors Casner and Leach, however, would disagree with Holdsworth, Bordwell, and this writer. They point out that “although we have made no search of the fiscal records of the Crown, we infer that Henry VIII failed to reap the pecuniary harvest which motivated his sponsorship of the Statute.” Casner & Leach, Cases on Property 386 (1951).
65 Practically all of the feudal incidents were erased by the Statute of Tenures, 12 Car. 2, c. 24 (1660).
of granting legal title. It is submitted that the Statute of Enrollments purposely made this latter device a legal conveyance. Thus, in short, the Statute of Uses brought about the substitution of written for formal conveyances and, consequently, the “death” of the feoffment.

A third accomplishment of the Statute lay in the power it gave to the landowner in disposing of his property. In fact, one was able to do as he wished with his land so long as that which he chose to do was neither testamentary nor illegal. 67 Crucial in this respect, of course, was the creation of the new legal future interests.

(2) Failures of the Statute of Uses.—The Statute of Uses had its debit as well as the credit side. It was unpopular! The truth of the matter is, however, that its unpopularity arose not from its character as a fiscal measure but rather from its suppression of the power to devise land by “using the use.” Pressure along this line became so strong that the Statute of Wills 68 was enacted in 1540. This empowered wills to carry the legal estate and obviated the need for the use as a testamentary device. No livery of seisin was required, and the Statute was construed as permitting the creation of new future interests unhampered by the restrictions applicable to conveyances of land. However, these new legal future interests, springing and shifting executory devises, were viewed as being analogous to their inter vivos counterparts.

A second failure of the Statute is attributable to the attempts made to enroll the new written transfers. During the pre-Statute period when the use was at the height of its popularity, a habit of secrecy had emerged — a habit not easily shaken. This limited-publicity approach received a severe jolt when Parliament enacted the Statute of Enrollments providing that no bargain and sale of a freehold estate should be effective unless in writing, under seal, and enrolled in designated public offices. The Statute of Enrollments filled the gaps left by the Statute of Uses. Had this Statute not been enacted, it would have been possible for one to have conveyed a freehold estate by an oral bargain and sale, since the Statute of Uses required no writing for a valid bargain and sale, nor was any writing required prior to the Statute. Moreover, a substantial tax was inflicted upon the enrollment process.

The Statute of Enrollments was repugnant to a large segment

67 The first application or foundation of the Rule against Perpetuities came in the Duke of Norfolk’s Case, 3 Ch. Cas. 1 (1682). Thus, for more than one hundred years after enactment of the Statute, there were no prohibitions against remoteness of vesting.

68 32 Hen. 8, c. 1 (1540).
of the populace; consequently, new methods of conveyancing, such as the covenant to stand seised\(^{60}\) and the lease and release\(^{70}\) came to the forefront. In fact, the lease and release became the most commonly used method of conveying land in England until the middle of the nineteenth century. These conveyancing forms took advantage of the Statute of Uses while evading the provisions of the Statute of Enrollments which concerned only the bargain and sale of a freehold.

Another failure lay in the fact that the Statute might be circumvented by the doctrine of the use on a use. In this respect it was said that, in actuality, the Statute "had no other effect than to add at most, three words to a conveyance."\(^{71}\)

It is submitted that the greatest failure of the Statute of Uses was its inability to eradicate the double ownership, legal and equitable, which ultimately grew into the modern law of trusts. In Bordwell's words:

The fact that the Statute of Uses did not itself declare any uses void left the way clear for the continued separate existence of any use not executed by the Statute. Therefore, when active trusts were held not to be within the operation of the statutes by the law courts, there was nothing for equity to do but to enforce them as before. If anyone was to blame for the continued operation of active trusts, it was not, therefore, the courts of equity, but the law courts for their too narrow construction of the Statute, or the drafters of the act in not making all these equitable interests void. The construction, however, would seem to have been a reasonable one and not such as the drafters of the Statute would have cared to avoid had they thought of it. No serious criticism of the Statute or of its interpreters can be made, it would seem, because of the continuance of active trusts. This was neither evasion nor scholasticism.\(^{72}\)

It appears then that the evasion of the Statute came about with the recognition of trusts and the use on a use. Equity, therefore, in

\(^{60}\) If \(O\), a fee simple titleholder, by written instrument under seal promised to hold his land to the use of ("covenanted to stand seised to the use of") a relative (and his heirs) in consideration of natural love and affection or to the use of another (and his heirs) in consideration of marriage, the covenant raised a use. The consideration was blood or marriage, and a necessary element was that the use be declared by an instrument under seal. The use was executed by the Statute of Uses and legal title passed from \(O\) to the transferee.

\(^{70}\) \(O\), a fee simple titleholder, simply leased land to \(A\) (for example, for a one-year period) by a bargain and sale. The Statute of Uses gave \(A\) a legal (and equitable) estate for years, and \(O\) having a legal (and equitable) reversion in fee simple. \(O\) then released his reversion to \(A\). This release operated under the common law rather than under the Statute of Uses, and merger gave a possessory fee simple absolute.

\(^{71}\) Hopkins v. Hopkins, 1 Atk. 580, 591 (1738) (Lord Hardwicke speaking). The three words appear to be "in trust for."

\(^{72}\) Bordwell, supra note 62, at 472. (Footnotes omitted.)
due time regained the ground which the Statute had threatened
to take from her. The initial attitude of the common law courts, on
the other hand, was shown in *Chudleigh's Case*, the first common
law case dealing with the Statute. The preamble was taken at face
value rather than as the propaganda that it was.

VI. THE STATUTE — REFORM AND REPEAL

As previously indicated, two of the chief effects of the Statute
of Uses lay in the substitution of simplified transfers for the old
feoffment and in the ease of disposition of property afforded the
landowner. Still, the lease and release was a somewhat awkward
method of conveyance. In the same vein, resort to the use and the
Statute of Uses presented a somewhat rocky road if one was at-
ttempting to create a freehold *in futuro*.

In 1829, therefore, the English Real Property Commissioners, in
their First Report, proposed: (1) that all estates were to be transfer-
able by simple deed; and (2) that this deed should make it possible
to create directly freeholds *in futuro* as well as limited interests in
terms for years. Although the first proposal became effective in
1841, the second failed to pass. It was again urged in 1862 along
with the further recommendation that the Statute of Uses be re-
pealed in its entirety.

One must note, however, that the early reform took cognizance
of the gains that had been made because of the Statute. Unfortu-
nately, this was not the case with the English Law of Property Act
of 1925. This ultimate reform was directed against the entire
system of land law of which the Statute was a part. In actuality,
the Statute was an innocent bystander, since it had multiplied the
legal interests with which the reform legislation was concerned.
Therefore, the repeal of the Statute of Uses in England must be con-

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73 1 Co. Rep. 120a, 76 Eng. Rep. 270 (1590). Coke and Bacon were of counsel
for the defense in this case, yet they construed the Statute of Uses differently. Coke
believed that the object of the Statute was the restoration of the common law and that
it was inapplicable to future interests that did not exist at common law. Therefore,
he would not recognize springing or shifting uses but would recognize future uses cor-
responding to recognized legal interests such as, for example, remainders. Bacon did
not see eye to eye with Coke and deprecated him because of his views. Later, Bacon,
in his *Reading on the Statute* recognized most of the interests which Coke denied.
Coke’s exposition of this case can be considered the last stand of the old common law
against the changes of time — changes which took a concrete shape with the develop-

74 *Id.* at 477.

75 4 & 5 Vict., c. 21 (1841).

76 15 & 16 Geo. 5, c. 20 (1925).
sidered an expression of dissatisfaction with the entire law of real property into which the Statute happened to be integrated. This new legislation wiped out as legal interests: fee tails, life estates, executory devises, springing and shifting uses, and remainders, the only interests excepted being fee simples in possession and leaseholds.

One of the most important aspects of the Statute of Uses had been the creation of legal interests out of those which prior to the Statute had merely been equitable. The Law of Property Act of 1925, on the contrary, had as its purpose not only the reconversion into equitable interests of those interests made legal by the Statute but also the further equitable transformation of those partial and successive interests which were characteristic of the old common law. The end result of the act, then, was to increase the number of equitable interests—interests which had been decreased by the Statute of Uses.

In summary, it is to be noted that the Statute of Uses was not the primary objective of the reform legislation of 1925. Rather, the Statute was looked upon as an example of the law of real property which itself was the object of reform. The simple purpose of the Law of Property Act of 1925 was to substitute the law of chattels real for the law of real property. The Statute was repealed because it had no application to chattels real. It is ironical, however, to point out that, in one sense, the new reform did go hand in hand with the Statute, i.e., both were aimed as solving the dual—legal and equitable—ownership problem. In this respect, it is submitted that neither succeeded.

VII. **CONCLUSION**

"Around, and around, and around she goes, and where she stops, nobody knows." These words, characteristically uttered by the carnival barker as he spins the wheel of chance, are fitting words with which to conclude this article on the evolution and demise of the Statute of Uses. This discussion began with the origin of the use and ended with the repeal of the Statute. The words quoted above seem, in a sense, to spell out what actually happened historically, for in many respects the Law of Property Act of 1925 caused the English land law to revert to the status it occupied prior to the Statute of Uses. It is suggested that the carnival barker's words could yet be prophetic of the future, when a partial spin of the wheel might well bring the law closer to that of the years immediately following passage of the Statute of Uses.