Explaining resulting trusts

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L.Q.R. 72 THE most difficult question one can ask about resulting trusts is why they arise. The word "result" comes from the Latin *resalire* or *resultare,* meaning "to spring back". When used to qualify the word "trust", it tells us that the trust "springs back", which is only to say that its beneficiary is the person who made the transfer of rights now forming the subject-matter of the trust. But it does not tell us why.

There have been two recent attempts to explain the incidence of resulting trusts. Lord Browne-Wilkinson has said that they arise because of a presumption that the transferor intended them so to do.[1] Birks and Chambers, by contrast, argue that they are the law's response to "non-beneficial transfers".[2] This latter thesis is particularly important because it is extrapolated from to generate resulting trusts in the generality of unjust enrichment cases.[3] This article will argue that neither thesis is correct. Of the three trusts traditionally classified as resulting,[4] two arise because of a legal presumption that a trust was declared by the transferor in his own favour. Like the express trust, they are species of consensual trusts. The third, however, arises where there is no proof, by evidence or presumption, of a declaration of trust in favour of its beneficiary. In that respect, it arises by operation of law. But exactly why the law should impose a trust in such circumstances has yet to be satisfactorily explained, though one thing this cannot be is as a response to a "non-beneficial transfer".

I. THE TRADITIONAL CATEGORIES OF RESULTING TRUSTS

Because the word "resulting" looks to the identity of the beneficiary and not the reason why the trust arises, resulting trusts inevitably cut across the categories with which they are traditionally aligned, express, implied, and constructive trusts, which do ask that question. In order to keep them in check, judges and textbook-writers artificially limit their incidence to three situations:

L.Q.R. 73 i. where it is proved by evidence[5] that rights were voluntarily transferred by A to B *inter vivos* and A is not the father (or other person standing *in loco parentis*) of B or the husband of B. Here, a presumption arises which, unless rebutted, causes B to hold the rights so conveyed on trust for A. We will call this a "voluntary conveyance resulting trust";

ii. where it is proved by evidence that A *inter vivos* paid C in whole or in part to convey rights to B, and A is not the father (or other person standing *in loco parentis*) of B or the husband of B. Here, a presumption arises which, unless rebutted, causes B to hold the rights so conveyed on trust for A, either in whole or in part.[6] We will call this a "purchase-money resulting trust";

iii. where it is proved by evidence that A conveyed rights to B either *inter vivos* or *post mortem,* to hold on declared trusts which are void because they lack objects, offend the rule against perpetuities, or both. Here, B will hold the rights so conveyed on resulting trust for A. We will call this a "failed trust resulting trust".

There are at least four differences between the voluntary conveyance and purchase-money resulting trusts and the failed trust resulting trust. First, as we have seen, voluntary conveyance and purchase-money resulting trusts do not arise where the transfer or provision of purchase-money is made by a father to his child or a husband to his wife. In such cases, a "presumption of advancement" is said to arise. However, since no fact is there proved by presumption, it is more accurate to describe this only as a situation where the resulting trust presumption does not apply. [7] Secondly, as we have also seen, neither voluntary conveyance nor purchase-money resulting trusts arise in the case of transfers by will. [8] Thirdly, voluntary conveyance and purchase-money resulting trusts do not arise where the right transferred is an interest under a trust. [9] And fourthly, no voluntary conveyance resulting trust arises where the interest conveyed is something different from that held by the transferor. Failed trust resulting trusts, by contrast, can arise in all four situations.

*L.Q.R. 74 II. PRESUMPTIONS: USE AND ABUSE

It is a matter of agreement on all sides that the first two resulting trusts arise because of the operation of a presumption. We need, therefore, to understand how presumptions work. [10] This is especially important for, as we will see, the main protagonists in this debate demonstrate some fundamental misunderstandings in this regard.

(a) "True" presumptions

Presumptions properly-so-called form part of the law of proof. Generally speaking, facts can be proved by admission, judicial notice, or evidence. In the absence of admission and judicial notice, the general rule is that facts must be proved by evidence, the burden of proving those facts lying on the party alleging them to have occurred. Very occasionally, however, proof by evidence of one fact, the "basic" or "primary" fact, gives that party to the litigation the benefit of another fact, the "secondary" fact, without any need to adduce evidence in proof. In such cases, the fact is proved by presumption. The burden then lies on the other party to adduce evidence to rebut the presumption. [11] If they do not, the tribunal of fact *must* find the secondary fact proved.

Such presumptions, variously known as "legal presumptions" or "presumptions of law", are described in *Cross on Evidence* as the only "true presumptions". [12] They usually arise because the existence of the secondary fact is the most likely inference to draw from proof by evidence of the basic fact. [13] "Presumptions", said Murphy J. in *Calveley v Green,* "arise from common experience … If common experience is that when one fact exists, another fact also exists, the law sensibly operates on the basis that if the first is proved, the second is presumed. It is a process of standardized inference." [14]

A well-known legal presumption is that of legitimacy. Proof by presumption that a child is the legitimate issue of a husband and wife *L.Q.R. 75 occurs on proof by evidence that the child was born to the wife, that it was born during lawful wedlock or within the normal period of gestation after wedlock had ended, and that the husband was alive at the date of conception. [15] It is then for the other side to adduce evidence in rebuttal showing that the husband could not be the father. However, though known as the "presumption" of legitimacy, it is vital to appreciate that legitimacy is not the secondary fact proved, for legitimacy is a legal conclusion from proved facts. When we say that a child is presumed legitimate, what we mean is that it has been proved by presumption, not evidence, that the husband impregnated the mother and that it was this impregnation which led to her giving birth.

(b) "False" presumptions

Unfortunately, the word "presumption" is a much misused term, and there are at least four senses in which it used to describe something different from the legal presumption outlined above. None are "true" presumptions, for they either involve no issue of proof, or, when they do, no question relating to proof of a secondary fact on proof by evidence of a primary fact. In this sense, they are all misnomers.

(i) Presumptions indicating the location of the burden of proof

The most common misuse occurs in statements indicating the location of the burden of proof in a civil or criminal trial. So, for example, there is said to be a "presumption" of innocence in favour of the defendant in a criminal trial.[16] However, as *Cross* points out: "There is no basic fact at all, and the presumption does no more than express the incidence of the relevant burden."[17] In truth, therefore, a rule of law as to the incidence of the burden of proof is being restated in adjectival terms with the language of presumption adding nothing.

(ii) Presumptions describing rules of substantive law

A second misuse occurs when the word "presumption" is used to describe, not a rule of evidence, but of substantive law. So, for example, there is said to be a "presumption" that a child under the age of 10 years cannot commit a crime,[18] and that a criminal conviction is conclusive evidence in certain civil proceedings that a crime has been committed.[19] Such "presumptions" are often known as "irrebuttable presumptions of law", but this immediately shows that they are not presumptions at all. ***L.Q.R. 76*** Being incapable of dislocation by contrary evidence, they tell us nothing whatever about proof.

(iii) Presumptions of fact

A third misuse lies in the use of the word "presumption" to describe a rule providing that upon proof by evidence of one fact, a tribunal of fact *may* find a second fact proved in the absence of sufficient evidence to the contrary. Examples of such "presumptions" include the "presumption of intention", that a person intends the natural consequences of his acts,[20] and the "presumption of guilty knowledge", that an accused proved by evidence to have been found in possession of goods recently stolen the acquisition of which he cannot explain is "presumed" to be guilty of handling stolen goods.[21] These are variously called "presumptions of fact" or "provisional presumptions". But though close to legal presumptions, they are different in that they are not concerned with the allocation of the burden of proof, the tribunal of fact not being compelled, as it is with legal presumptions, to find the fact in question proved.[22] They have therefore been described as "no more than rational inferences to be drawn in the light of experience and common sense … The law does no more than recognize factual probability."[23]

(iv) Presumptions as rules of construction

A fourth misuse occurs in the context of the construction of words in statutes,[24] wills, deeds, and other instruments. Thus, there are said to be "presumptions" that: a consolidating statute is not intended to effect a change in the law[25]; statutes are not intended to operate retrospectively[26]; the operation of statutes is confined to the United Kingdom[27]; the benefit of a covenant restrictive of the user of land is annexed to each and every part of the dominant tenement[28]; and a contracting party intends to deal with the person in front of him.[29] Even the rules laid down in the Sale of Goods Act 1979 for the passing of property under a ***L.Q.R. 77*** contract of sale, despite themselves never using the word, are said by some textbook-writers to involve "presumptions".[30] None, however, are true presumptions, for in none is a question of proof of facts in issue.

III. THE TRADITIONAL EXPLANATION OF "PRESUMED" RESULTING TRUSTS

Because the voluntary conveyance and purchase-money resulting trusts are universally accepted as resting on a presumption, they are collectively, though somewhat unfortunately known as "presumed" resulting trusts. Two questions arise. Is the word "presumption" being used in its true sense? If so, what is the fact proved by presumption?

(a) The type of presumption in "presumed" resulting trusts

The presumption in play in the "presumed" resulting trust is undoubtedly a legal presumption. This is illustrated by cases where: (i) the presumption is dispositive of the result where no contrary evidence is adduced; (ii) evidence is admitted to rebut the presumption; and (iii) courts refuse to invoke the presumption where there is no gap in the evidence.

(i) Presumption dispositive of the result

In *The Venture,* [31] Percy Stone proved by evidence that he contributed £550 towards the £1,050 purchase price of a title to a yacht which had been conveyed by the vendor to Percy's brother, Andrew. When Andrew died intestate, his widow claimed possession of the yacht, alleging that Percy had only provided the £550 by way of loan. Percy alleged that the money was put up by way of partnership, and that title to the yacht had been held by his brother on trust for them both. Neither party adduced any evidence to substantiate these allegations. The registrar held that Percy had failed to make out his case and gave judgment for the widow. The Court of Appeal held this approach to be fundamentally misconceived.

"On its being proved that Percy Stone had advanced a certain part of the purchase money, the presumption of law arose that he was beneficially entitled to a corresponding share in the yacht. It was for the plaintiff to displace that presumption by bringing evidence to the contrary; but she has entirely failed to bring any such evidence. The Court must therefore give effect to the presumption, and must hold that, as the defendant paid a part of the purchase money, he acquired an interest in the yacht …." [32]

L.Q.R. 78 The same view of the operation of the presumption is found in Mellish L.J.'s judgment in *Fowkes v Pascoe,* [33] where the presumption is described as a "rule of law" which "must prevail" even though "the court might not believe that the fact was in accordance with the presumption". [34]

(ii) Presumption rebutted by contrary evidence

Decisions in which contrary evidence has been effective to rebut the presumption are legion. Thus, in *Dyer v Dyer,* Eyre C.B. said: "it is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence." [35] An example is *Fowkes v Pascoe* itself. [36] The facts proved by evidence were that the testatrix had an only child, a son. He predeceased her, leaving a widow, who remained living with the testatrix and who remarried from her house. The widow's son and daughter from her second marriage were treated by the testatrix as her own flesh and blood. During her lifetime, the testatrix bought a number of annuities in the joint names of herself and her surrogate grandson, by this time a young man, which annuities at the time of her death were valued at some £7,000. As the successor of joint tenants, the issue was whether the surrogate grandson held them outright or on resulting trust for the testatrix's estate. At first instance, Sir George Jessel M.R. held that a presumed resulting trust arose in favour of the testatrix's estate, which trust had not been rebutted. [37] His decision was reversed on appeal, Mellish L.J. saying:

"… if there is evidence to rebut the presumption, then … the Court must go into the actual facts. And if we are to go into the actual facts, and look at the circumstances of this investment, it appears to me utterly impossible … to come to any other conclusion than that the … investment was made for the purpose of gift and not for the purpose of trust. It was either for the purpose of trust or else for the purpose of gift; and therefore any evidence which shews that it was not for the purpose of trust is evidence to shew that it was for the purpose of gift." [38]

L.Q.R. 79 **(iii) Presumption cannot be resorted to where there is no gap in the evidence**

An example of a case where the court refused resort to the presumption where the evidence was complete is *Goodman v Gallant.* [39] A title to a house was vested in the claimant's husband on trust for himself and the claimant as joint tenants. The marriage broke down and the husband left. The claimant and her lover, the defendant, successfully negotiated to jointly buy out the husband's interest. A conveyance was executed by the husband, claimant, and defendant, reciting that the title was conveyed to the claimant and defendant "upon trust for themselves as joint tenants". They later fell out, and the claimant sought a declaration that she had a three-quarter share under a purchase money resulting trust. Her claim failed. There was no room, said the court, to invoke a presumption where the words accompanying the transfer were proved by evidence. [40]

(b) What is the fact proved by presumption in a presumed resulting trust?

At the outset, it must be noted that just as the fact proved by presumption in the case of legitimacy is not legitimacy, so too the fact here cannot be "resulting trust", for "resulting trust" is similarly a legal response to proved facts.

It is accepted on all sides that in times past, the fact proved by presumption was that the transferor declared a use, the forerunner of the modern trust, in his own favour. In the fifteenth, sixteenth, and seventeenth centuries, it was standard practice for those with fee simple estates in land to put them in use for themselves. The device of a "feoffment to uses" was also employed in purchases of such titles. [41]

To have a fee simple title in use for oneself had a number of advantages. [42] First, it allowed a will of the title to be made. Secondly, it avoided reliefs and wardship. Thirdly, it allowed the title to be used for the payment of debts on death. [43] Fourthly, it avoided both dower [44] and curtesy. [45] Fifthly, it enabled the creation of settlements of land of greater complexity than was possible at law. [46] And sixthly, it avoided escheat ***L.Q.R. 80*** and forfeiture for treason, the latter being especially problematic in the turbulent times of the late fifteenth century. [47]

In fact, so common did feoffments to uses become, that it was said that "few men be sole seised on their land". [48] But because it was not usual to include words of trust on the face of the conveyance, and because such transfers were gratuitous, it was difficult to distinguish them from outright transfers. The solution lay in the use in certain cases of a presumption of a declaration to uses. Thus, in *Cook v Fountain,* Lord Nottingham L.C. spoke of trusts where the declarations

"appear either by direct and manifest proof, or violent and necessary presumption. These last are commonly called presumptive trusts; and that is, when the Court, upon consideration of all circumstances *presumes there was a declaration,* either by word or writing, though the plain and direct proof thereof be not extant." [49]

The presumption of declaration of trust was not, however, universally applied. As the same judge later explained in *Grey v Grey*:

"A feoffment to a stranger, without consideration, raised a use to the feoffor; but a feoffment to the son, without other consideration, raised no use by implication to the father, for the consideration of blood settled the use in the son, and made it an advancement." [50]

It is important to appreciate that the fact proved by presumption was, as Lord Nottingham makes clear, a declaration to uses, not merely that the feoffor possessed at the time of the transfer an unexpressed intention to create a use. Were it otherwise, we would be dealing with a rule of substantive law, not procedure, for an unexpressed intention to create a trust when proved by evidence does not generate a trust. As Megarry J. said in *Re Vandervell's Trusts (No.2),* "the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result." [51]

L.Q.R. 81 IV. HAS THE PRESUMPTION CHANGED?

Though admitting that the fact proved by presumption in this early period was a declaration of trust, both Birks and Chambers argue that this is no longer the case. The fact proved by presumption today, they say, is a "non-beneficial transfer". [52]

It is said that the presumption changed around 1660, when trusts replaced uses. The reason was the enactment of two statutes, the Wills Act 1540 and the Tenures Abolition Act 1660, [53] the former allowing fee simple titleholders to leave their interests by will, the latter abolishing a number of feudal incidents. Their combined effect, says Chambers, was to remove the incentive for title-holders to create trusts for themselves.

The argument, however, is weak, for the two statutes addressed only some of the reasons causing titleholders to create trusts for themselves. As we have seen, such trusts were also used to avoid dower and curtesy, to allow for the creation of more sophisticated settlements than was possible at law, and to make the testator's title to land available to pay his debts. These purposes still subsisted after 1660. [54]

Moreover, there are a number of cases since 1660 in which the judges saw themselves operating the resulting trust no differently from the resulting use. Thus, in 1788, in *Dyer v Dyer,* we are told that the purchase-money resulting trust operates "on a strict analogy" with the old law on uses. [55] And in *Fowkes v Pascoe,* [56] the Court of Appeal in 1875 still spoke in terms of a

presumption of transferors declaring trusts for themselves. We saw this in the dictum of Mellish L.J. discussed above [57]; it is also found in the judgment of James L.J., who asked whether it was:

"… possible to reconcile with mental sanity the theory that [the deceased] put £250 into the names of herself and her companion, and £250 into the names of herself and Defendant, *as trustees upon trust for herself*? What trust--what object is there conceivable in doing this? If this case were tried before a jury, no Judge could withdraw the facts of the contemporaneous purchases and of their repetition from the consideration of a jury, and, in my opinion, no ***L.Q.R. 82*** jury would or could be found who would hesitate to say that the thing was done by way of gift and not trust." [58]

Nor did the content of the presumption change in the twentieth century. Thus, in *Pettitt v Pettitt,* Lord Diplock criticised the presumption of resulting trust as an inference of fact "which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era." [59] If the presumption had really changed, however, why is it described as anachronistic? Further, in *Rathwell v Rathwell,* Dickson J. said:

"Resulting trusts are as firmly grounded in the settlor's intent as are express trusts, but with this difference--that the intent is inferred, or is presumed as a matter of law from the circumstances of the case." [60]

Given that the only intention which counts is one which is expressed, [61] for Dickson J. at least, the content of the presumption in 1978 was still a declaration of trust.

Finally, there is the decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC.* [62] Westdeutsche transferred substantial sums of money to Islington pursuant to contracts which in subsequent litigation were held to be ultra vires the local authority. [63] It sought to recover the money and compound interest thereon. Its claim to interest turned on whether the money was held by the authority as trustee at the point of receipt. Adopting Birks' argument, it argued that because the payments were made pursuant to a void contract, they had been paid gratuitously, and thus gave rise to a presumed resulting trust. Since that trust arose because of a "presumption of non-beneficial transfer", and because there was no evidence that the money had been paid by way of gift, the resulting trust was unrebutted. The argument was rejected *in limine.* [64] The presumption of resulting trust, said Lord Browne-Wilkinson, ***L.Q.R. 83*** "is rebutted by evidence of any intention inconsistent with such a trust, not only by evidence of an intention to make a gift." [65]

It must, however, be admitted that there are dicta which appears to support the contrary view. In *Nelson v Nelson,* [66] a mother provided the purchase price for a freehold title to land, the conveyance being made to her children so as to enable her to make fraudulent claims to state benefits. The title was later sold, and the mother sought a declaration that the children held the proceeds of sale for her on trust. In the High Court of Australia, Deane and Gummow JJ. spoke of the evidence showing that she "had no intention to confer any beneficial interest" over the title or the proceeds of sale on her children. [67] But too much should not be made of this, for the precise nature of the fact proved by presumption was not in issue. The only question was whether the "presumption" of advancement applied in the case of a gratuitous transfer from mother to child, and, if it did, whether the mother's illegal conduct precluded her from adducing evidence in rebuttal.

Also said to support a change in the content of the presumption is an obiter dictum of Lord Millett in the Privy Council decision in *Air Jamaica Ltd v Charlton,* [68] which concerned the distribution of the surplus of a pension trust which failed as offending the rule against perpetuities. The Privy Council held that the surplus was prima facie held on resulting trust for the contributors, the employer and the employees. Clause 4 of the trust deed, however, provided that: "No moneys which at any time have been contributed by the [employer] under the terms hereof shall in any circumstances be repayable to the [employer]." Did this clause prevent a resulting trust arising? As we will see, [69] the House of Lords in *Vandervell v IRC* [70] held that the failed trust resulting trust arises, not because of the operation of a presumption, but by operation of law. Proof by evidence of a contrary intention was therefore irrelevant. Applying this reasoning, Lord Millett described the argument that no resulting trust could arise as

L.Q.R. 84 "… wrong in principle. Like a constructive trust, a resulting trust arises by operation of law, though unlike a constructive trust, it gives effect to intention. But it arises whether or not the transferor intended to retain a beneficial interest--he almost always does not--since it responds to the absence of any intention on his part to pass a beneficial interest to the recipient. It may arise even where the transferor positively wished to part with the beneficial interest, as in *Vandervell v Inland Revenue Commissioners* …." [71]

It is said that this statement now represents the "prevailing view" of resulting trusts. [72] This, however, is doubtful. *Air Jamaica v Charlton* provides nothing more than an unremarkable application of a decision of the House of Lords; it did not attempt to say anything new about resulting trusts. And in any case, since only a failed trust resulting trust was in issue, it says nothing of the content of the presumption operating in the other types of resulting trust.

This is not to say that the presumption of a declaration of trust should continue. Presumptions represent a "consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of evidence to the contrary." [73] This article does not seek to defend the continuation in the modern day of a presumption of declaration of trust where the common experience is that citizens do not generally create trusts for themselves. The point is only that no change in the content of the presumption has yet occurred in the view of the courts.

We should finally note the argument of Chambers that a presumption of declaration of trust is inconsistent with the modern law on certainty of intention:

"Why should the presumed intention to create a trust be effective to do so? It would contradict the well established requirement of certainty of intention to create a trust. As du Parcq L.J. stated in *Re Schebsman,* "unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think the court ought not to be astute to discover indications of such an intention."' [74]

This objection, however, confuses questions of substance and procedure. What du Parcq L.J. was concerned with in *Re Schebsman* [75] was the construction of words proved by evidence to decide whether they amounted to a declaration of trust. Exercises of construction, as we have *L.Q.R. 85* seen, are not presumptions at all. [76] Indeed, if the same judge had been asked to construe the meaning of the words proved by presumption in a presumed resulting trust, *scil.*, "I give you these rights to hold for me on trust", he could not but have found that they amounted to a declaration of trust.

V. A PRESUMPTION OF "NON-BENEFICIAL" TRANSFER?

History apart, how do Birks and Chambers arrive at a presumption of "non-beneficial transfer"? Though it forms the crux of their argument, their reasoning on this point is brief. In talking of the voluntary conveyance resulting trust, Birks says:

"… when it is thinking in terms of resulting trusts, equity approaches gifts with suspicion. Outside relationships, few and narrow, within which gift-giving is to be expected--relationships, that is, which generate the presumption of advancement--it presumes that the "gift' is not one. In short the apparent donor gets his gift back unless, when the matter is double-checked, his intention to give is evident … He gets his property back, it jumps back to him under a resulting trust, unless there is affirmative proof that he intended it not to … Equity … starts from the assumption that an apparent gift--that is, a transfer without consideration--must result back to the apparent donor, and then, before it will allow the transferee to retain the benefit of the transfer, it requires positive evidence outside the fact of the transfer without consideration showing that the donor did indeed intend to donate." [77]

Chambers speaks in similar terms:

"Equity tends to be suspicious of gifts and often asks the recipient of an apparent gift to prove that it was intended as a gift. The failure to do so means that it will be held in trust for the apparent donor. In other words, the apparent gift creates a presumption of resulting trust." [78]

And later:

"The essential fact of intention, common to all cases of resulting trust, is the provider's lack of intention to benefit the recipient." [79]

Five separate propositions seem to be involved here: that gratuitous transfers are "apparent gifts"; that equity is suspicious of gifts; that *L.Q.R. 86* equity consequently presumes that "apparent gifts" are "not gifts"; that the presumption of "not-gift" is

a presumption of "non-beneficial transfer"; and that a "presumption" of "non-beneficial" transfer triggers a trust in favour of the transferor. Each proposition, however, as will be demonstrated below, is false.

(a) Gratuitous transfers outside the range of advancement are "apparent gifts"

If we are to see the transfers which trigger the first two types of resulting trust as "apparent gifts", then we need to know the sense in which the word "apparent" is used. Unfortunately, this is nowhere spelt out. However, one thing we can say is that it is not used as a synonym for "presumed", for we would then be talking about presumed gifts, not presumed trusts. Perhaps what is meant is its ordinary dictionary meaning, "seeming", "appearing to the senses or mind, as distinct from what really is; not real". [80] But this is not its meaning either, for the gratuitous transfers with which we are concerned are not "seeming gifts", merely ambiguous transfers. In the cases where the presumption applies, the facts proved by evidence are equivocal, for though the transfer might have been outright, it could also have been on trust. The evidential gap is closed, at least in cases outside the range of advancement, by the court finding as a matter of presumption that the transferor declared a trust in his own favour. Nor can "apparent gift" mean a transfer having one of the attributes of a gift, viz. that no value was given in exchange for the transfer, as they could just as well be called "apparent trusts", for these too involve gratuitous transfers. It is therefore not correct to describe gratuitous transfers outside the range of advancement as "apparent gifts".

(b) Equity is suspicious of gifts

Because in the majority of cases what is proved by evidence is a gratuitous transfer to a person outside the relationships of advancement, which proof triggers the "presumption" of resulting trust, not the "presumption" of advancement, it is easy to see how the "presumed" resulting trust might be thought to reflect a presumption by equity "against generosity". [81] But even if it was correct to see it in this way, it is not the same thing as saying that equity is "suspicious" of gifts.

If it is really true that equity entertains a suspicion of gifts, how then do we explain the many situations in which this "suspicion" does not arise? Why, for example, are "apparent gifts" of life estates, entails, or interests ****L.Q.R. 87*** under trusts not "suspicious"? Why are *post mortem* "apparent gifts" not suspect? And most importantly, why is the "suspicion" not present when words of gift are proved by evidence to have accompanied the transfer? These difficulties disappear if we think instead in terms of presumptions. In the first two cases, there is potentially a declaration of trust. But because in neither does it make sense for the transferor to have created a trust for himself, no presumption of declaration arises. And in cases where it is proved by evidence that an outright transfer was made, the presumption is not triggered for the simple reason that no ambiguity remains. It is therefore wrong to couch the presumption in terms of a "suspicion", for in so doing, we leave the realm of presumptions altogether.

But even if it was right to talk of a "suspicion" of gifts, a further difficulty arises. Exactly why should equity be suspicious of "apparent" gifts? Unfortunately, no authority is provided for this assertion. Indeed, it seems only to have been arrived at by working backwards from the existence of the "presumed" resulting trust itself. Thus, we are told:

"The true nature of the presumption of resulting trust is revealed by the evidence which confirms or rebuts the presumption. The courts ask whether the apparent donor intended to make a gift and not whether he or she intended to create a trust." [82]

However, as we saw from *Fowkes v Pascoe*, [83] this would not seem to be the case. Moreover, even if it was, it does not follow that because proof by evidence of a gift rebuts the presumption, the presumption must be one of "not-gift". The question at issue in these cases is whether the transferee took the rights outright or on trust, and proof by evidence of an intention to make a gift simply shows that it was not a transfer on trust.

The idea that we are dealing with a "suspicion" of gifts has led Chambers to state that courts of equity use the "presumption" of resulting trust as a "safeguard against the unintended loss of assets". [84] However, this provides no clue as to the origins of the "suspicion", for if it really is unintended losses which concern the courts, why is the concern not present when the transfer is between father and child or husband and wife? Moreover, it cannot be completely unintended losses which are its concern, for there is in every case in which a resulting trust arises an effective conveyance of rights. In reply, it might be said that by "unintended" is meant the sort of vitiation of intent found in cases of unjust enrichment. This is clearly the view of Birks, who wrote: "It is as though equity cynically supposes that a transferor who receives ****L.Q.R. 88*** no value for his transfer must necessarily be labouring under a mistake or some other defect of judgment." [85] Unfortunately, why equity should jump to this conclusion is not then explained. Indeed, even if it did, we still need an explanation why transfers proved by evidence to contain

words of gift are not viewed in this way. Moreover, it is hardly the most likely inference to draw from the facts proved by evidence, for common experience shows that most gratuitous transfers are not mistaken or otherwise defective. Once again, these difficulties disappear if we think in terms of presumptions, not suspicions.

Furthermore, a search of the equity textbooks for anything remotely resembling a "presumption" that transferors labour under defects of judgment when making voluntary dispositions turns up nothing. The nearest we get is the equitable doctrine of undue influence, where, on proof by evidence of certain facts, a presumption arises that a gift was procured by undue influence. That it is this which is referred to is evident from the description of one of the situations attracting the presumption, a large gift from a parent to a child, as a "situation of which equity ought to be suspicious". [86] The two doctrines, however, are distinct. First, the presumption of undue influence, at least outside certain fixed categories of relationship, [87] only arises where there is proof by evidence that the donor reposed trust and confidence in the donee. [88] Secondly, the presumption is not confined to gifts: a conveyance for consideration can still attract its operation. [89] Thirdly, the presumption applies to the grant of lesser interests, which is never the case with "presumed" resulting trusts. [90] Fourthly, it is not restricted to transfers outside the relationships of advancement. [91] And fifthly, and most tellingly, proof by evidence of words of gift does not prevent the presumption arising. Indeed, many of the cases involve transfers where it is admitted that the transfer was made as a gift. [92] How can a court "presume" that a transfer was not a gift when it is admitted on all sides that it was? It cannot be right, therefore, to equate the presumption of resulting trust with the presumption of undue influence, or, more generally, with a presumption of vitiated consent to the transfer.

L.Q.R. 89** ***(c) Equity presumes that apparent gifts are "not gifts"

Even if it was correct to say that a proved by evidence gratuitous transfer to a person outside the relationships of advancement is an "apparent gift", and further, that equity is "suspicious of gifts", it cannot be the case that courts presume that the transfer was "not a gift", for this is to confuse inferences of fact with inferences of law. In this respect, a "presumption" that the transferor "did not make a gift" is no different to a "presumption" of "legitimacy" or "resulting trust", for whether a transfer will be recognised as effecting a gift is a question of the application of legal rules to proved facts. [93] We still need to know the fact, proved by evidence or presumption, which makes the transfer "not a gift".

The same confusion, between inferences of fact and law, can be seen in the fact that no case relied on by Chambers in support of his argument as to the nature of the fact presumed involves a true presumption. [94] All are decisions in which the totality of the facts was proved by evidence; the only issue was the legal inference to be drawn from those facts. Take, for example, *Dullow v Dullow,* where it was proved by evidence that a mother paid for a title to land to be conveyed to her two sons. Hope J.A. said that despite the fact that she was "lacking in any familiarity with the elementary concepts of property ownership" and "did not have any clear view of what legal results flowed from her intentions", "[her] intention was to reserve a beneficial interest in the properties for herself during her lifetime". [95] This intention entitled her to a "resulting trust of a life estate" [96] :

"Cases of this sort support the view that the presumption of resulting trust is of an intention to create a trust. However, the other view can also explain every one of these cases, because the provider's intention to keep any portion of the beneficial interest necessarily means that he or she does not intend to pass that interest to the recipient." [97]

But even if this "other view" was right, it is a legal conclusion from proved facts, not proof of a fact itself. Indeed, the result in the case could not have been reached through the application of the presumption, for proof by evidence that the mother provided the whole purchase price would have given her a trust of the fee simple, not merely an interest for life.

***L.Q.R. 90** The same confusion is evident in the next class of case relied on, that concerned with "ignorance", where the claimant's money is, without his consent, used by the defendant to purchase rights for himself. In the seven cases cited, [98] the court found a resulting trust in the claimant's favour. In none, it is said, could an intention to create a trust be inferred. The ignorance of those whose money was used is said to show that the

"only possible inference, capable of giving rise to a resulting trust, is that they did not intend to benefit the recipients of the property." [99]

But even if it could be said of the respective claimants that they had "no intention to benefit" the defendants, it is once again a legal inference from facts proved by evidence, not the proof of an additional fact through the operation of a presumption.

(d) The "presumption" of "not-gift" is a presumption of a "non-beneficial transfer"

A further difficulty concerns the description of the subject-matter of the "presumption" of "not-gift" as involving a "non-beneficial transfer". What precisely is a "non-beneficial transfer" is nowhere explained. What we do know, however, is that the word "beneficial", when spoken of rights, is commonly used in two different senses. The first is as an adverb, to describe how a right is held. The second is as an adjective, to describe a particular type of right. Only the first usage is correct.

Rights can be held in one of three ways: outright; on trust; or as security for the performance of an obligation. To say that a person holds a right beneficially is only to say that he does not hold it on trust or as security. So, for example, in *Vandervell v IRC,* [100] Lord Upjohn said that it was a question of intention [101] whether the taxpayer and the trustee company "intended that the option should be held by the trustee company beneficially or as a trustee …" [102] But when it is said of a person with an interest over, say, land that they have a "beneficial interest" in that land, this can only mean that they hold in respect of that land a right of a type known as "beneficial". However, though there are legal and equitable rights over land, there is no third category of "beneficial" rights. Similarly, though I may hold a title to a chattel outright (beneficially), ****L.Q.R. 91*** on trust, or as security, I have no right to that chattel which can be described as "beneficial". And though I may hold the benefit of a chose in action outright (beneficially), on trust, or as security, there is again no "beneficial interest" I have against the debtor separate from my right to sue. "Beneficial", therefore, cannot be contrasted with legal or equitable, because those terms describe the two different jurisdictions which make up the common law; there is no third jurisdiction called "beneficial".

Unfortunately, it is this second sense which seems to have been adopted. Thus, Birks tells us that:

"there is a resulting trust whether the transfer is made upon an initially valid trust or not, whenever it is found that the transferor did not intend that, in the events which have happened, the transferee should hold beneficially and, further, did not indicate any intention as to any other person or persons in whom the beneficial interest should be located." [103]

Thus, though he starts by speaking of a transferee holding "beneficially", Birks immediately slips into talk of a "beneficial" interest. Examples of the second usage can also be found in Chambers' work. Thus, he describes the content of the presumption as being "that the provider did not intend to give the benefit of that property to the recipient", [104] and that the cases cited in support of his argument for the content of the presumption are ones concerning resulting trusts "in which the provider did not intend to benefit the recipient and yet could not have intended to retain the beneficial interest …" [105]

Perhaps "beneficial" is here being used as a synonym for "equitable"? A person entitled under a trust is known as a beneficiary, and is sometimes described as having a "beneficial" interest. So, and again in *Vandervell v IRC,* [106] Lord Upjohn spoke of a body to which shares had not yet been transferred as having "no legal or beneficial interest in the shares". [107] But this is not how Chambers uses the word, for he is at pains to stress that an equitable interest under a trust is not the same thing as a beneficial interest, and that the phrase "beneficial interest" can cover both legal and equitable interests. [108]

****L.Q.R. 92*** Might it then be that a "non-beneficial" transfer is nothing more than a transfer not intended as a gift? [109] The difficulty is that this would lead to resulting trusts arising in situations in which no one would say they should. We know, for example, that no resulting trust arises in the case of a transfer proved by evidence to have been made for valuable consideration. Yet when a vendor conveys rights pursuant to a contract of sale, it is clear that he has no intention of making a gift to his purchaser. In the same way, though a citizen paying their validly demanded tax bill can hardly be said to be making a gift, no resulting trust arises. "Benefit" cannot therefore be equated with "gift", and "not-benefit" with "not-gift".

A different meaning seems to emerge from Chambers' discussion of *Dullow v Dullow,* [110] where, as we saw, [111] an intention by the mother to create a trust in her own favour was said to be equally consistent with the view that she did not intend to benefit her sons. This might be seen to show that the word "benefit" is being used as a synonym for "hold outright". Such usage would cure the problem of resulting trusts in cases of contracts of sale or payments of taxes, for though such transferors do not intend to make gifts, they do intend the recipients to take outright (beneficially). This usage is also implicit in the discussion of the failed trust resulting trust. In such cases, he says, the fact proved by evidence, that the transferee was to take the rights as trustee, shows that he was not meant to take beneficially. [112] An intention not to benefit a person is thus equated with an

intention to vest in him rights not to be held outright. However, we immediately run into a further problem, for we know that both Birks and Chambers consider cases of mistaken payments to involve non-beneficial transfers. Indeed, their whole thesis rests on a perceived correspondence between the traditional categories of resulting trusts and the generality of cases of unjust enrichment. It is, however, difficult to see how the typical unjust enrichment scenario can be said to involve a "non-beneficial transfer", where "non-beneficial" means "not outright".

Take the well-known case of *Kelly v Solari.* [113] An insurance company claimed to have paid out £197 10s on a life insurance policy to the widow of the assured having forgotten that the policy had lapsed. Assuming it was indeed mistaken, it was held that it could recover the sum from the widow in a common law action for money had and received. But it can hardly be said that the company did not intend the right to be held by the widow outright. It thought it owed her the money and its intention ***L.Q.R. 93*** in transferring the right to her was to discharge its perceived obligation. One does not discharge a debt by transferring money to ones creditor to hold "not outright". Thus, the plaintiff's intention can have only been to constitute the widow an outright holder of the right, and if "beneficial" is to be equated with "outright", then there clearly was an intention to "benefit" her. [114] Of course, the company was acting under a mistake, but it was a mistake as to its motive for the transfer, not the capacity in which the rights were to be held.

But even if the law did recognise a notion of "non-beneficial transfer" distinct from a transfer on trust or as security, it is difficult to see how the "fact" of such transfer can form the subject-matter of the presumption triggered by proof by evidence of a gratuitous transfer. We have seen how presumptions "arise from common experience". [115] However, the most likely inference to draw from a gratuitous transfer is hardly that it was "non-beneficial", that the transferee was not meant to take the transferor's "beneficial" interest. Assuming again that such an interest can exist, and, further, that a "non-beneficial" transfer can form the subject-matter of a presumption, this "fact" would seem no more likely than a declaration of trust for the transferor. Indeed, it seems to contradict the facts proved by evidence, for if it really was the transferor's intention "not to benefit" the transferee, why did he make the transfer at all?

(e) The presumption of non-beneficial transfer triggers a trust in favour of the transferor

The final claim is that the law responds to proof by presumption of the "fact" of "non-beneficial" transfer by raising a trust in favour of the transferor. Of course, the trust response is irresistible if the fact proved by presumption is a declaration of trust, for we know that the law responds to proof by evidence of that fact with a trust, and proof by presumption can yield no different result. But why is the raising of a trust a response to proof by presumption of a "non-beneficial" transfer? The reason is to be found in Chambers' discussion of the failed trust resulting trust, of which he says:

"Because the beneficial interest has not been completely disposed of and the trustees were not intended to enjoy the benefit of the legal ownership for themselves, the resulting trust arises." [116]

L.Q.R. 94 But this explanation only works if there is such a thing as a "beneficial interest" separate from the legal interest, and, as we have seen, this is not the case. If there is no such interest, its disposal can never be described as "incomplete".

VI. LORD BROWNE-WILKINSON'S EXPLANATION OF FAILED TRUST RESULTING TRUSTS

The rule that a transfer accompanied by a declaration of trust which fails to declare effective trusts generates a resulting trust in favour of the transferor is sanctioned by many years of authority. [117] Typical is *Morice v Bishop of Durham,* where the testatrix left her residuary estate to the Bishop of Durham "on trust for such objects of benevolence and liberality as the Bishop in his own discretion should most approve of." The court held that the objects were uncertain and the intended trust void, with the consequence that the rights were held by the bishop on trust for the testatrix's estate. [118]

In an obiter dictum in *Westdeutsche Landesbank Girozentrale v Islington LBC,* Lord Browne-Wilkinson said that this trust was no different from the other resulting trusts and arose because of the operation of a presumption:

"Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention." [119]

But while it is true that the language of presumption can be found in some of the failed trust resulting trust cases, it is not a true presumption at all.

There is sometimes an initial question whether, in the events which have happened, the transferee was intended to take outright the rights over which there was no effective declaration of trust or whether the trust was intended to extend to the whole. This is a matter of construction which, if answered in favour of the transferee, prevents a resulting trust arising. The question is unfortunately often described as involving a "presumption" of resulting trust, though one which can be "rebutted" by "proof" that the transferee was intended to take absolutely. [120]

L.Q.R. 95 However, as we have seen, this is not a presumption at all, for no additional facts are proved. [121] All that is involved is a question of the construction of facts already proved by evidence. [122] In truth, the raising of the resulting trust is a question of intention only in a negative sense, and then not as a matter of presumption. The initial exercise of construction merely decides whether the transfer was or was not outright and not whether the transferor intended to create a trust for himself in the latter event. Moreover, the content of the words accompanying the transfer having been proved by evidence, it is impossible in such circumstances to invoke a presumption to prove that the uttered words had some different content.

In Lord Browne-Wilkinson's defence, it might be said that the resulting trust arising on failure does so because of a "presumption" that, in the events which have happened, the transferor would have wanted the rights to be so held. But this does not work either. The first difficulty is that, as we have seen, an unexpressed intention is never enough to create a trust. [123] The second is that in all likelihood the transferor did not address his mind to the question. Indeed, it was for this reason that Harman J. in *Re Gillingham Bus Disaster Fund* rejected presumed intent as the explanation for such trusts. The resulting trust could not

"rest on any evidence of the state of mind of the settlor, for in the vast majority of cases no doubt he does not expect to see his money back: he has created a trust which so far as he can see will absorb the whole of it." [124]

Even if not contemplated, might it be said, adopting the economists' fiction that people are selfish, that this is what the transferor would have wanted had he thought about it? [125] This explanation, however, fares no better than the last, for once we admit that we are dealing with a fictitious intent, not only do we step outside the realm of presumptions, but we immediately encounter the problem that the House of Lords has forbidden courts from creating trusts based on speculative intent. As Lord Morris of Borth-y-Gest said in *Gissing v Gissing*:

"When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs: it only finds how they did. The court cannot *L.Q.R. 96* devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had." [126]

Moreover, insurmountable difficulties arise in terms of rebuttal if we see the failed trust resulting trusts as resting on a presumption. If the "presumption" is that a trust was declared in the transferor's favour, the only facts capable of rebutting it will be ones showing that the transferee was to take outright or as security. Yet we already know, having undertaken the process of construction discussed above, [127] that this particular transferee was intended to do neither. Indeed, the resulting trust only arises, the trust only fails, *because* this conclusion was reached. There can therefore be no facts capable of rebutting the "presumption", and an irrebuttable presumption is, as we have seen, [128] no presumption at all.

VII. *VANDERVELL V IRC*

That we are not here dealing with a presumption was the ratio decidendi of the House of Lords in *Vandervell v IRC*. [129] Vandervell wished to donate a substantial sum of money to the Royal College of Surgeons to establish a chair of pharmacology. He was the beneficiary of a trust of a parcel of shares in a private company (the company), of which he was also managing director and principal shareholder. The trustee was National Provincial Bank Ltd. There was also a settlement for his children, the trustee of which was Vandervell Trustees Ltd (the trustee company). On Vandervell's instruction, the shares were transferred by the bank to the college, his intention being that the college take the shares outright. The plan was for the company to declare a dividend on the shares sufficient to fund the chair. The reason the donation was structured in this way was to ensure that a substantial part of the total sum, 33.33 per cent, was given, not by Vandervell himself, but by the public purse. The dividends were to be gross dividends from which tax at 33.33 per cent would be deducted at source. That tax would then be recovered by the college as a charity. But the scheme would only work if Vandervell divested himself of all rights in respect of the shares. A

failure to do so would mean that, by virtue of s.415 of the Income Tax Act 1952, he would be liable to surtax (a higher rate tax of 50 per cent) on the dividends declared. Unfortunately for Vandervell, his accountant advised that it be arranged for the college **L.Q.R. 97* to grant to the trustee company an option to buy back the shares once they had served their purpose. For estate duty purposes, it was thought prudent that the company be made public before Vandervell's death and therefore inadvisable for a parcel of shares to be left outstanding in the hands of a third party. There was, however, no settled plan as to what was to happen to the shares on their return. Two possibilities were that they be applied to the children's settlement or to a new settlement in favour of the company's employees. One thing was certain, however: the shares would not go back to Vandervell, for that would ruin the tax efficiency of his scheme.

The dividends were duly declared and paid, but the Inland Revenue charged Vandervell surtax on the amounts, arguing that the option to purchase was held by the trustee company for him on resulting trust, and that he had therefore failed to divest himself entirely of any interest in the shares. To reach that conclusion, three issues had to be decided. First, who was the grantor of the option? Secondly, in what capacity did the trustee company take the option? And thirdly, on the assumption that Vandervell was the grantor and that the trust company took the option on trust for undeclared objects, who was the beneficiary of the failed trust resulting trust?

A majority of their Lordships [130] held that though the college was in terms the grantor of the option, the real grantor was Vandervell. Though it had been asked to grant the option,

"this was a matter of courtesy; at this time the college had no legal or beneficial interest in the shares and they could only comply with it…. [I]n law … it was [Vandervell] who procured the college to grant the option to the trustee company." [131]

But because no words of trust were expressed in the grant to the trustee company, it was not immediately obvious how it took the option, especially when it was known that its objects went beyond merely acting as a trustee. The Court of Appeal [132] resolved the issue by the use of a "presumption" of resulting trust: the grant of the option being gratuitous, the trustee company was "presumed to have acquired the benefit of the option upon a resulting trust in favour of the settlor." Although that presumption could be rebutted by proof by evidence that Vandervell intended the trustee company to hold the option outright or on some other trusts, it had not been rebutted, for "the evidence shows that the settlor did not intend to grant the benefit of the option to the trustee company **L.Q.R. 98* beneficially nor did the trustee company intend to accept it for its own benefit." [133]

However, an approach based on presumptions is flawed for, as we have seen, presumptions only operate where there is a gap in the evidence, whereas here, all the relevant facts were known. In truth, the Court of Appeal's "presumption" was a rule of construction, not evidence, a fact clearly appreciated by the House of Lords. Looking at the evidence, Lord Reid and Lord Donovan held that the grant of the option was not on trust at all. No trust was declared in the grant to the trust company, and it was perfectly consistent with Vandervell's plans that the company took the option outright or "beneficially". [134] The majority, however, held that the option had been granted to the trustee company on trust. Lord Upjohn, with whom Lord Pearce agreed, doubted whether the presumption of resulting trust could apply to options to purchase, but said that he need not decide that question because "the facts and circumstances are sufficient for this purpose without resort to this long stop presumption." [135] His Lordship found that the intention of Vandervell was that the option be held by the trust company upon such trusts as he or the trustee company should from time to time declare. Lord Wilberforce likewise rejected the use of presumptions to resolve the issue, saying there was

"no need, or room … to invoke a presumption. The conclusion, on the facts found, is simply that the option was vested in the trustee company as a trustee on trusts, not defined at the time, possibly to be defined later." [136]

A trust for objects to be defined later being void for want of objects, a failed trust resulting trust arose in Vandervell's favour which, because it was not triggered by a fact proved by presumption, could not be rebutted by proof by evidence of any fact whatever.

That the resulting trust in *Vandervell* had nothing to do with a presumption is also made clear in Megarry J.'s judgment in *Re Vandervell's Trusts (No.2),* [137] in which he coined the terms "presumed" and "automatic" to describe the operation of the two types of resulting trust. After a detailed analysis of the speeches of Lords Upjohn and Wilberforce, he said that the case showed that the failed trust resulting trust did "not depend on any intentions or presumptions," but was "the automatic consequence of [the settlor's] failure to dispose of what is vested in him." [138]

*L.Q.R. 99 The *Vandervell* litigation therefore shows that an explanation of the failed trust resulting trust in terms of a presumption of intent does not work. Despite Lord Browne-Wilkinson's obiter comments in *Westdeutsche,* the failed trust resulting trust, both as a matter of logic and of the highest authority, arises for a reason having nothing to do with proof by presumption of anything, least of all an intent by the settlor to create a trust for himself.

VIII. WHY DO FAILED TRUST RESULTING TRUSTS ARISE?

If it is not an intent proved by presumption, then what is it which causes failed trust resulting trusts to arise?

(a) The Vandervell *explanation*

As we have seen, Megarry J. described the failed trust resulting trust as arising "automatically". [139] This label is misleading. "Automatic" means "self-acting; having the power of motion or action within itself." [140] However, there is nothing "automatic" about the law. The failed trust resulting trust does not arise of its own volition, but because courts say it does. Moreover, there need be no such response, for we know that where the failed trust is charitable, the funds are often applied *cy près*. Nor is it an inevitable response here. If our only concern is to strip out the enrichment of the transferee of the failed trust, it could be done by giving the settlor a personal claim in unjust enrichment for the value received. [141] However, by awarding the settlor the benefit of a trust, we take the rights out of the estate available for distribution to the unsecured creditors and give him a privileged position in relation to them.

Megarry J. was of course only paraphrasing the speeches of Lord Upjohn and Lord Wilberforce in *Vandervell v IRC*. What for Lord Upjohn made the trust "automatic" was the fact that, "If the beneficial interest was in A and he fails to give it away effectively to another or others or on charitable trusts it must remain in him." [142] Lord Wilberforce spoke in similar terms: "But the equitable, or beneficial interest, cannot remain in the air: the consequence in law must be that it remains in the settlor." [143] However, a theory based on "retention" of an equitable interest does not work either, for the settlor generally has no equitable interest to retain. Suppose I convey my fee simple title to land to a friend to hold on trust for *L.Q.R. 100 "such objects of benevolence and liberality as he in his absolute discretion should most approve of." The trust will fail for want of objects and the friend will hold the title for me on resulting trust. But I have "retained" nothing. At the beginning of the story, I had a fee simple title to land. At the end of it, that title is held by my friend. What I now have is an interest under a trust, something I did not have before.

Might it be said that prior to the transfer, I had both a legal and an equitable right, and that though I gave away the former, I retained the latter? This seems to be implicit in the reasoning of Lord Upjohn and Lord Wilberforce. But it is mistaken, for having an equitable right is the consequence of there being a trust, not the reason why one arises. As Lord Browne-Wilkinson explained in *Westdeutsche*:

"A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk about the [transferor] "retaining' its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the [recipient]. If so, an equitable interest arose for the first time under that trust." [144]

Thus, although Lord Upjohn and Lord Wilberforce correctly identify the failed trust resulting trust as not resting on a presumption, the reason they go on to give as to why it arises is flawed. There is no retention of anything by the settler: a new interest arises in his favour and there is nothing "automatic" about it.

(b) The Chambers explanation

The view taken by Chambers is that the failed trust resulting trust does not rest on a presumption. But that does not mean that he agrees with the explanation in *Vandervell*. Instead, the three types of resulting trust are said to be one and the same, the only difference being that the fact "presumed" in the voluntary conveyance and purchase money resulting trusts is now the fact "proved" in the failed trust resulting trust. [145] Since in the latter the facts show that the transferee was not meant to take outright *L.Q.R. 101 but only as trustee, albeit for a trust which has failed, a transfer with "no intention to benefit" has been

"proved" to have occurred. However, for reasons which echo those given when rejecting his explanation of the "presumed" resulting trust, this explanation does not work either.

First, the contrast between "proof" and "presumption" is false. As we have seen, presumptions, like evidence, are methods of proof, so that "presumed" facts are just as much proved as facts proved by evidence. [146]

Secondly, it is impossible to say that the trust arises because of proof of a transfer with "no intention to benefit", for such a transfer is, as we have seen, [147] something unknown to English law. There are transfers which cause transferees to hold outright, on trust, or by way of security, but there is no fourth category, at least where that phrase describes something distinct from a transfer on trust or as security.

Thirdly, even if there was such a thing, the phrase "transfer with no intention to benefit" does not describe a fact and is therefore not susceptible of proof, by evidence or presumption. At best, "transfer with no intention to benefit", like "legitimacy" and "resulting trust", is a legal conclusion from proved facts. Thus, while it makes sense to describe *Morice v Bishop of Durham* as involving a proved by evidence mistaken transfer, we cannot say that it involved a proved by evidence "transfer with no intent to benefit the transferee", for what would now be "proved" would be a legal conclusion from facts, not an additional fact in itself.

Finally, even if "transfer with no intention to benefit" was a fact susceptible of proof, there is no compelling reason why the law should respond to its "proof" by raising a trust. As we have seen, if our only desire is to strip out the transferee's enrichment, a response in the nature of a personal claim for the value received serves that purpose perfectly well. Indeed, because it ensures equality of treatment between creditors in the event of the transferee's insolvency, it might be thought to do it better.

IX. CONCLUSION

Before any progress can be made in the search for an explanation of resulting trusts, a secure understanding of presumptions is required. There are many false presumptions, but only one true one, the presumption of law, where proof by evidence of one fact generates proof of a second fact without the need for evidence. This is the type of presumption in play in presumed resulting trusts. The difficulty with the two explanations of resulting trusts examined in this article is that this does not seem to have been appreciated.

L.Q.R. 102 We saw that the voluntary conveyance and purchase money resulting trusts arose because of the operation of a true presumption, the fact proved by presumption being that the transferor declared a trust in his own favour. This was the position in the seventeenth century and nothing has changed since. The argument of Birks and Chambers, that the fact "presumed" in such circumstances is that the transferor did not intend to benefit the transferee, was shown to be based on a number of misunderstandings. First, gratuitous transfers outside the relationships of advancement are not "apparent gifts", only ambiguous transfers. Secondly, suspicions are not the same things as presumptions, and in any case, equity is not "suspicious" of gifts. Thirdly, it is not possible for equity to "presume" that "apparent" gifts are not gifts, for "not-gift" is at best a legal conclusion from proved facts, not a fact in itself. Fourthly, a "presumption" of "not-gift" cannot be a "presumption" of "non-beneficial transfer" for the law does not recognise a notion of non-beneficial transfer distinct from transfers on declared trusts or as security. And fifthly, no satisfactory explanation was given as to why, assuming there is such a thing as a "non-beneficial transfer", the law should respond to its "proof" by the raising of a trust for the transferor. For these reasons, the argument that there should, by a logical extension of the traditional resulting trusts, be resulting trusts in the generality of cases of unjust enrichment is unsustainable.

We then examined the resulting trust which arises on proof by evidence of a transfer of rights on trusts which fail. Though Lord Browne-Wilkinson said it arose because of the operation of a presumption, Lord Upjohn and Lord Wilberforce showed in *Vandervell v IRC* [148] that this was not so: there is no room for a presumption where all the facts have been proved by evidence, and in the case of a failed trust resulting trust there is no fact left outstanding. However, the explanation then put forward by their Lordships in *Vandervell* itself did not work, for the settlor retains nothing when making such a transfer. And Chambers' explanation, framed in terms of "proof" of a "non-beneficial transfer", failed for the very same reasons that a "presumption" of "non-beneficial transfer" could not be the explanation of the "presumed" resulting trust.

Thus, though we have a convincing though anachronistic explanation for the "presumed" resulting trust, the "automatic" resulting trust still defies legal analysis.

WILLIAM SWADLING.

Footnotes

1 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 708.

2 P. Birks, "Restitution and Resulting Trusts" in S. Goldstein (ed.), *Equity and Contemporary Legal Developments* (1992), pp.335-373; "Trusts Raised to Reverse Unjust Enrichments: The *Westdeutsche* Case" [1996] R.L.R. 3; R. Chambers, *Resulting Trusts* (1997); "Resulting Trusts in Canada" (2000) 38 Alberta L.R. 378; "Resulting Trusts" in A. Burrows and Lord Rodger of Earlsferry, *Mapping the Law: Essays in Memory of Peter Birks* (2006), pp.247-264.

3 The only such claims not generating resulting trusts would be those involving transfers of rights under contracts later frustrated or terminated for breach: Birks, fn.2 above (1992), pp.346-359; Chambers, fn.2 above (1997), pp.143-170.

4 These are enumerated immediately below. For reasons of space, other cases, e.g. those involving surpluses and so-called *Quistclose* trusts, will not be discussed.

5 Wherever the phrase "proved by evidence" is used, it should be taken to include proof by admission.

6 A resulting trust also traditionally arose where A and B contributed unequally to the purchase price and the title was conveyed to A and B as joint tenants, whereby A and B held as equitable tenants in common in proportion to their contributions (*Lake v Gibson* (1729) 1 Eq. Cas. Abr. 290). In *Stack v Dowden* [2007] UKHL 17, a majority of the House of Lords held that this rule no longer applied in the case of "matrimonial or quasi-matrimonial homes".

7 "It is called a presumption of advancement but it is rather the absence of any reason for assuming that a trust arose": *Martin v Martin* (1959) 110 C.L.R. 297 at 303 (Dixon C.J., McTiernan, Fullager, and Windeyer JJ.).

8 *Rogers v Rogers* (1733) Cas. T. Talbot 268.

9 Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846), p.454.

10 The best account is P. Murphy, *Murphy on Evidence,* 10th edn (2007), pp.632-643. See also I.H. Dennis, *The Law of Evidence,* 3rd edn (2007), pp.508-513; H. Malek Q.C. (ed.), *Phipson on Evidence,* 16th edn (2005), paras 6-16-6-31; Sir John Smith, *Criminal Evidence* (1995), pp.47-53; C. Tapper, *Cross and Tapper on Evidence,* 11th edn (2007), pp.146-151.

11 The amount of evidence required in rebuttal depends on whether the presumption is "persuasive" or "evidential". In the case of persuasive presumptions, the evidence in rebuttal must show on a balance of probabilities the untruth of the fact proved by presumption. In the case of evidential presumptions, the burden will be discharged if sufficient evidence is adduced to make the existence of the fact proved by presumption a live issue.

12 *Cross and Tapper on Evidence,* fn.10 above, p.144.

13 This is not the only reason. They sometimes arise because of the seriousness of the allegation (possibly the explanation of the presumption of legitimacy: Murphy, fn.10 above, p.635), or to resolve evidential impasses (e.g. the statutory presumption in s.184(1) of the Law of Property Act 1925 regarding the order of death of joint tenants in circumstances where it is uncertain which survived the other).

14 (1984) 155 C.L.R. 242 at 264 (Murphy J.). The contrast drawn between proof and presumption is unfortunate. It is more accurate to talk of proof by evidence and proof by presumption.

15 *The Banbury Peerage Case* (1811) 1 Sim. & S. 153; *The Poulett Peerage Case* [1903] A.C. 395.

16 *R. v Keogh* [2007] EWCA Crim 528; [2007] 1 W.L.R. 1500.

17 *Cross and Tapper on Evidence,* fn.10 above, p.144.

18 Children and Young Persons Act 1933 s.50.

19 Civil Evidence Act 1968 s.13(1).

20 *R. v Steane* [1947] K.B. 997; Criminal Justice Act 1967 s.8.

21 *R. v Schama and Abramovitch* (1914) 11 Cr. App. R. 45; *R. v Garth* [1949] 1 All E.R. 733.

22 For this reason, the "presumption of fact" is described by *Phipson* (fn.10 above) as a misnomer: para.6-17.

23 P. Carter, *Cases & Statutes on Evidence,* 2nd edn (1990), p.77.
24 A whole chapter is devoted to the "presumptions" used in the construction of statutes in G. Dworkin, *Odgers' Construction of Deeds and Statutes,* 5th edn (1967), pp.387-416.
25 *H v H* [1968] 3 All E.R. 560 at 566 (Sir Jocelyn Simon P).
26 *Ward v British Oak Insurance Co Ltd* [1932] 1 K.B. 392 at 397 (Scrutton L.J.).
27 *Jefferys v Boosey* (1854) 4 H.L.C. 815 at 970 (Lord Brougham).
28 This is how most textbooks present it: e.g. C. Harpum, *Megarry & Wade: The Modern Law of Real Property,* 6th edn (2000), p.1031, fn.1. However, in the case relied on, *Federated Homes Ltd. v Mill Lodge Properties Ltd* [1980] 1 W.L.R. 594, Brightman L.J. correctly spoke, not of a presumption, but of a rule of construction.
29 *Ingram v Little* [1961] 1 Q.B. 31 at 61 (Pearce L.J.).
30 So, e.g. Bridge describes them as "presumptive rules of intention": M. Bridge, *The Sale of Goods* (1997), p.62.
31 [1908] P. 218; (1907) 77 L.J.P. 105.
32 (1907) 77 L.J.P. 105 at 108 (Farwell L.J., giving the judgment of the court). The corresponding passage in [1908] P. 218 at 230, is essentially the same, though the phrase "presumption of law" is rendered only as "presumption".
33 (1875) L.R. 10 Ch. App. 343. The facts of this case are discussed immediately below.
34 (1875) L.R. 10 Ch. App. 343 at 353. See also *Rathwell v Rathwell* (1978) 83 D.L.R. (3d.) 289 at 303, where Dickson J. described the presumption as a "matter of law". Similar comments are found in *Stack v Dowden* [2007] UKHL 17; [2007] 2 W.L.R. 831, where Lord Neuberger (at [123]) described the presumption as effecting a shift in the burden of proof and Lord Walker spoke of it in matrimonial cases as no longer operating as a "legal presumption" (at [31]). Though Baroness Hale described it as "not a rule of law" (at [60]), her Ladyship would only seem to be there saying that the presumption is capable of rebuttal.
35 (1788) 2 Cox. Eq. Cas. 92 at 93.
36 (1875) L.R. 10 Ch. App. 343.
37 (1875) L.R. 10 Ch. App. 343 at 345, n.1.
38 (1875) L.R. 10 Ch. App. 343 at 353.
39 [1986] Fam. 106.
40 [1986] Fam. 106 at 110-111 (Slade L.J.).
41 Rather than the vendor enfeoffing the purchaser and the purchaser enfeoffing his trusted friends, the purchaser simply instructed the vendor to enfeoff his feofees direct, who would then hold to the purchaser's will.
42 See generally, A.W.B. Simpson, *A History of the Land Law,* 2nd edn (1986), pp.173-207.
43 Though the common law rule was that debts died with the debtor, there was a concern that the deceased would suffer eternal damnation unless they were repaid.
44 *Chaplin v Chaplin* (1733) 3 P. Wms. 229 at 233-234; F.W. Saunders, *An Essay on the Nature and Laws of Uses and Trusts* (1791), p.109.
45 Saunders, fn.44 above, pp.109-110.
46 Simpson, fn.42 above, p.175.
47 "During the contests between the houses of *York* and *Lancaster,* as it was the constant practice to attaint the vanquished, almost all the lands in *England* were conveyed to Uses": W. Cruise, *An Essay on Uses* (1795), p.30.
48 Christopher St Germain, *Doctor and Student; or Dialogues between a Doctor of Divinity and a Student in the Laws of England* (1528-1531), ii, c.22.
49 (1676) 3 Swanst. 585 at 591 (emphasis supplied). The word "violent" is here used in the sense of "strong" or "compelling". In modern terminology we would call it a persuasive presumption: fn.11 above. The presumption nowadays is only evidential: *Pettitt v Pettitt* [1970] A.C. 777 at 814 (presumption "readily rebutted by comparatively slight evidence": Lord Upjohn).
50 (1677) 2 Swanst. 594 at 598.
51 [1974] Ch. 269 at 294. Though in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 708, Lord Browne-Wilkinson spoke of a presumption of "intention", the point was not there in issue.
52 See the passages set out below, text to fnn.77-79.
53 Chambers, fn.2 above (1997), p.20.
54 So, e.g. J.A. Strahan and G.H.B. Kendrick, *A Digest of Equity* (1905), p.177 state that the practice "of taking conveyances of freeholds in the names of other persons than the purchaser to bar dower" continued

until the passing of the Dower Act 1833. See also Lord Nottingham's list of "mischiefs" carried on by trusts in the place of uses: D.E.C. Yale (ed.), *Lord Nottingham's "Manual of Chancery Practice" and "Prolegomena of Chancery and Equity"* (1965), p.48.

55 (1788) 2 Cox. Eq. Cas. 92 at 93.

56 (1875) L.R. 10 Ch. App. 343.

57 Text to fn.38.

58 (1875) L.R. 10 Ch. App. 343 at 348-349 (emphasis supplied). See also *Standing v Bowring* (1886) 31 Ch.D. 282, where the question was whether the presumption of resulting trust had been rebutted on the evidence. Lindley L.J., at 289, framed the inquiry thus: "The Plaintiff … rested her case on equitable grounds, and sought to establish a trust in her favour. No trust will suffice short of an absolute trust for herself. But it is impossible to impose such a trust on the Defendant, when the evidence conclusively shews that she *never intended to create any trust of the kind*" (emphasis supplied).

59 [1970] A.C. 777 at 824. While it is true that his Lordship immediately before spoke of presumptions of "fact", the point was not in issue. And the mistake is easily made, for though we are dealing with "inferences" of fact, the "inference" arises from a presumption of law. The same error is present in the statement of Chambers that "The presumptions of resulting trust and advancement are presumptions of fact, that fact being the intention of the person who has provided property to another": Chambers, fn.2 above, (1997), p.11.

60 (1978) 83 D.L.R. (3d.) 289 at 303.

61 Text to fn.51.

62 [1996] A.C. 669.

63 *Hazell v Hammersmith & Fulham LBC* [1992] 2 A.C. 1.

64 Chambers seeks to downplay the significance of *Westdeutsche,* saying: "… the only issue on appeal was the claimant's right to interest. With no examination of the underlying unjust enrichment, the case reveals little about why proprietary restitution was unavailable": Chambers, fn.2 above (2006), p.257. What cannot be denied, however, is that the House did address and reject the initial premise of Professor Birks' thesis. It mattered not, therefore, that the precise ground of recovery was not identified, for it could have made no difference to the final result.

65 [1996] A.C. 669 at 708. It must be admitted that Lord Browne-Wilkinson had immediately before described the presumed resulting trust as involving a "presumption that [the transferor] did not intend to make a gift to [the transferee]". But this must be a slip, for it is precisely the argument of Birks which his Lordship immediately goes on to reject. Moreover, as we will see below (text to fnn.100-114), an intention not to make a gift, since it describes a legal conclusion from proved facts, cannot form the subject-matter of a presumption. Unfortunately, the statement probably misled Baroness Hale (at [60]) and Lord Neuberger (at [114]) in *Stack v Dowden* [2007] UKHL 17; [2007] 2 W.L.R. 831.

66 (1995) 184 C.L.R. 538.

67 (1995) 184 C.L.R. 538 at 549.

68 [1999] 1 W.L.R. 1399.

69 Text to fnn.130-139.

70 [1967] 2 A.C. 291.

71 [1999] 1 W.L.R. 1399 at 1412.

72 Chambers, fn.2 above (2006), p.248.

73 *Pettitt v Pettitt* [1970] A.C. 777 at 823 (Lord Diplock).

74 Chambers, fn.2 above (1997), p.34.

75 [1944] Ch. 83.

76 Text to fnn.24-30.

77 Birks, fn.2 above (1989), pp.343-344.

78 Chambers. fn.2 above (1997), p.11.

79 Chambers, fn.2 above (1997), p.21.

80 J.A Simpson and E.C.S. Weiner, *The Oxford English Dictionary,* 2nd edn (1989), Vol.I, p.563.

81 J. Hackney, *Understanding Equity and Trusts* (1987), p.149; *Stack v Dowden* [2007] UKHL 17 at [60] (Baroness Hale).

82 Chambers, fn.2 above (2000), p.394. See also Birks, fn.2 above (1996), p.18.

83 See the passage from James L.J.'s judgment cited above, text to fn.58, and that of Lindley L.J. in *Standing v Bowring* (1886) 31 Ch.D. 282 in fn.58.

84 Chambers, fn.2 above (2000), p.386.

85 P. Birks, *An Introduction to the Law of Restitution,* rev. edn (1989), p.64.
86 Chambers, fn.2 above (2000), p.386.
87 e.g. parent/child (*Turner v Collins* (1871) 7 Ch. App. 329); solicitor/client (*Wright v Carter* [1903] 1 Ch. 27); spiritual leader/follower (*Allcard v Skinner* (1887) 36 Ch.D. 145).
88 Described by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180 at 189-190, as "Class 2B undue influence".
89 e.g. *Huguenin v Baseley* (1807) 14 Ves. 723; *Tufton v Spurni* [1952] 2 T.L.R. 516.
90 *Goldsworthy v Brickell* [1987] Ch. 378.
91 *Simpson v Simpson* [1992] 1 F.L.R. (transfer from husband to wife).
92 As, e.g. in *Allcard v Skinner* (1887) 36 Ch.D. 145.
93 A useful summary of the law of *inter vivos* gifts can be found in the entry entitled "Gifts" by P. Pettit in Lord Mackay of Clashfern (ed.), *Halsbury's Laws of England* (2004), Vol.20(1), pp.1-55. See also E.L.G. Tyler and N.E. Palmer, *Crossley Vaines' Personal Property,* 5th edn (1973), pp.299-321; R. Chambers, "Conditional Gifts", in N.E. Palmer and E. McKendrick, *Interests in Goods,* 2nd edn (1998), pp.429-60; J. Hill, "The Role of the Donee's Consent in the Law of Gift" (2001) 117 L.Q.R. 127. The rules on *post mortem* gifts can be found in the standard works on succession.
94 The argument is made in Ch.1 of his book: fn.2 above, (1997).
95 (1985) 3 N.S.W.L.R. 531 at 541.
96 Chambers, fn.2 above (1997), p.21.
97 Chambers, fn.2 above (1997), p.21.
98 *Ryall v Ryall* (1739) 1 Atk. 59; *Lane v Dighton* (1762) Amb. 409; *Williams v Williams* (1863) 32 Beav. 370; *Merchants Express Co v Morton* (1868) 15 Gr. 274; *Sharp v McNeil* (1981) 36 O.R. (2d.) 473; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717.
99 Chambers, fn.2 above (1997), p.21.
100 [1967] 2 A.C. 291.
101 The "question of intention" to which his Lordship refers is discussed below, text to fnn.120-122, 133-137.
102 [1967] 2 A.C. 291 at 315. There was no question in the case of the particular right being held as security.
103 Birks, fn.2 above (1992), p.352.
104 Chambers, fn.2 above (1997), p.19.
105 Chambers, fn.2 above (1997), p.21. See also Chambers (1997) at p.25: "Her intention to create a trust was significant because it proved the lack of intention to transfer the beneficial interest."
106 [1967] 2 A.C. 291.
107 [1967] 2 A.C. 291 at 313.
108 Chambers, fn.2 above (1997), p.55.
109 "All resulting trusts arise in response to the same type of event: the receipt of an asset by someone who was not intended to be its beneficial owner. In other words, there was a lack of intention to make a gift': Chambers, fn.2 above (2000), p.387.
110 (1985) 3 N.S.W.L.R. 531.
111 Text to fn.97 above.
112 Chambers, fn.2 above (1997), p.43.
113 (1841) 9 M. & W. 54.
114 cf. The Rt Hon. Sir Peter Millett, "Restitution and Constructive Trusts" (1998) 114 L.Q.R. 399 at 412.
115 *Calveley v Green* (1984) 155 C.L.R. 242 at 264 (Murphy J.). Though it is acknowledged that this is not the only reason why legal presumptions arise (fn.13 above), no other reason has been put forward here.
116 Chambers, fn.2 above (1997), p.54.
117 An early case is *Lloyd v Spillett* (1740) 2 Atk. 148.
118 (1804) 9 Ves. 399.
119 [1996] A.C. 669 at 708. His Lordship's references to the common intentions of the parties and the presumed intentions of the trustee are odd. As we have seen, the fact proved by presumption is a declaration of trust by the *transferor.*
120 See, e.g. M.M. Bigelow, *Story's Commentaries on Equity Jurisprudence as Administered in England and America,* 13th edn (1886), para.1199. In *re West* [1900] 1 Ch. 84 at 89, Kekewich J. said that there was a "presumption that a gift in trust is not a beneficial gift".
121 Text to fnn.11-14. This point seems not to be appreciated by Chambers: fn.2 above (1997), pp.45-46, 51, 66.

122 This point is also made in D. Waters, M. Gillen and L. Smith, *Waters' Law of Trusts in Canada,* 3rd edn (2005), p.107.
123 Text to fn.51 above.
124 [1958] Ch. 300 at 310. The decision foreshadowed that of the House of Lords in *Vandervell v IRC* [1967] 2 A.C. 291, discussed immediately below.
125 *cf. Restatement of the Law of Trusts* (1935), p.1247.
126 [1971] A.C. 886 at 898. Similar statements can be found in the speeches of Viscount Dilhorne (at 900) and Lord Diplock (at 904-905). Apparent statements to the contrary in *Stack v Dowden* [2007] UKHL 17; [2007] 2 W.L.R. 831 fall foul of the doctrine of precedent, for no invocation of the 1966 Practice Statement (*Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234) was there made.
127 Text to fn.120-122 above.
128 Text to fnn.18-19 above.
129 [1967] 2 A.C. 291.
130 Lord Donovan dissenting: [1967] 2 A.C. 291 at 320.
131 [1967] 2 A.C. 291 at 314 (Lord Upjohn).
132 [1966] Ch. 261.
133 [1966] Ch. 261 at 289 (Diplock L.J.)
134 [1967] 2 A.C. 291 at 308-309 (Lord Reid), 321-323 (Lord Donovan).
135 [1967] 2 A.C. 291 at 315.
136 [1967] 2 A.C. 291 at 329.
137 [1974] 1 Ch. 269.
138 [1974] 1 Ch. 269 at 294.
139 *Re Vandervell's Trusts (No.2)* [1974] Ch. 269 at 294.
140 *Oxford English Dictionary,* fn.80 above, Vol.I, p.805.
141 Especially since the bar on recovery of payments made under mistake of law was removed in *Kleinwort Benson v Lincoln CC* [1999] 2 A.C. 349.
142 [1967] 2 A.C. 291 at 313.
143 [1967] 2 A.C. 291 at 329.
144 *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 706. His Lordship's talk of a "separation" of legal and equitable rights is unfortunate, for it implies their prior existence, like the separation of the yolk and white of an egg. We should instead talk in terms of the equitable interest being "engrafted upon", not carved out of, the legal interest: *Re Transphere Pty Ltd* (1986) 5 N.S.W.L.R. 309 at 311 (McLelland J.).
145 "… the resulting trust arises because the provider did not intend to benefit the recipient. There is no need to resort to a presumption of the provider's intention where it has been proved": Chambers, fn.2 above (1997), p.43.
146 *cf.* Chambers' distinction of "actual" and "presumed" facts: fn.2 above (1997), p.43.
147 Text to fnn.100-114 above.
148 [1967] 2 A.C. 291 at 329.

