When interim measures are requested the Court's jurisdiction raises a question of judicial propriety and issues of propriety have a logical priority over questions pertaining to the merits. It is therefore regrettable that in the *Aegean Sea* case this point was ignored and convenience apparently allowed to prevail over principle.

Although the Greek request for interim measures was refused, the Court rejected Turkey's suggestion that the case be removed from its list and required the parties to prepare their written submissions. Unless therefore the dispute is resolved, the next step will be the Court's decision on the complex question of its jurisdiction to deal with the merits of the case.

J. G. MERRILLS.

THE USE UPON A USE IN EQUITY 1558–1625

FEW mysteries in the revealed history of English law are as irritating as the "great mystery"[1] surrounding the origin of the modern trust in the form of the "use upon a use." The motives for creating equitable interests after the Statute of Uses are far from obvious, but the generally received story[2] is that the recognition in equity of the second use first occurred as a result of conveyancing accidents when implied and resulting uses were overlooked.[3] Since deliberate evasion of the revenue purposes of the statute was unlikely to have been permitted, the conclusion has been drawn that the passive trust, purposely created by way of a double use, did not become part of the conveyancer's stock-in-trade until the half-century or so after the abolition of feudal revenues in 1645.[4] The conventional version of the story is based on very sparse references in print, and most historians have freely admitted its uncertainty; the full story must await a history of conveyancing and a detailed study of the Chancery records for the period 1550–1650. The present writer admits to a lack of inclination to undertake that work himself, but has found two unpublished texts

1 S. F. C. Milsom, *Historical Foundations of the Common Law* (1969), p. 205.

2 Reservations, which tend to the same conclusion as this note, but for different reasons, have already been aired by J. L. Barton, "The Statute of Uses and the Trust of Freeholds" (1966) 82 L.Q.R. 215–225; and Milsom, *op. cit.* in note 1, pp. 208–210.

3 As in *Tyrrell's Case* (1557) Dyer 155.

4 For both aspects of the orthodox view see F. W. Maitland, *Equity* (1908), p. 42; J. B. Ames, *Lectures on Legal History* (1913), pp. 243–247; W. S. Holdsworth, *History of English Law*, iv (1924), pp. 471–473; v (1924), pp. 307–309; vi (1924), pp. 641–642; T. F. T. Plucknett, *Concise History of the Common Law* (1956 ed.), pp. 599–602; D. E. C. Yale, "Equitable Estates in the 17th Century" [1957] *Cambridge Law Journal* 72–86; J. E. Strathdene, "*Sambach* v. *Dalston*: an Unnoticed Report" (1957) 74 L.Q.R. 550–560; H. Potter, *Historical Introduction to English Law* (1958 ed.), pp. 611–614; A. W. B. Simpson, *Introduction to the History of the Land Law* (1961), pp. 183–184, 189–191; R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (4th ed. 1975), p. 168.

which seem to throw sufficient doubt on the traditional learning to justify an announcement of their existence.

The first text is a report of a case which came before Lord Keeper Bacon in 1559–60, only two years after the common-law judges had decided in *Jane Tyrrell's Case* that the second use was void at law. It arose from the very unusual circumstances attending the persecution of the celebrated Protestant heroine Lady Katharine, dowager Duchess of Suffolk (1519–80), heiress to the barony of Willoughby de Eresby, and since 1553 the wife of a commoner, her former gentleman-usher Mr. Richard Bertie (1518–82). She had been too warm a supporter of Ridley and Latimer and had unwisely made an enemy of Gardiner, so that on Mary's accession her position was distinctly dangerous. By the end of 1554 she was under virtual house-arrest in London, and in February 1555 she crept out in disguise at dawn to make a dramatic escape to the Netherlands, to Germany, and finally to Poland.[5] In September the Privy Council took steps to recover her property as forfeited, she having "contemptuously without licence departed the realme."[6] She had, however, in March 1554 taken the precaution of conveying some of her lands to a Maidstone lawyer called Walter Herenden. In order to dispel the appearance of collusion, the conveyance was by fine and the covenant to levy the fine expressed a consideration given by Herenden, and in addition a release was executed in Herenden's favour.[7] According to the report, the consideration was a large sum of money. But in the text of the indenture as enrolled at Maidstone in 1564 in connection with a later suit, the consideration was Herenden's faithful service, "great paynes and travayle" in litigation, and "the good wyll zeale and love which the seid Rycherd and Ladye Katherine doo beare to the seid Walter and for other good causes and consyderacions."[8] The conveyance was expressed to be "to the only use and behove of the seid Walter Herenden and of his heyres." Nothing more could have been done at common law to vest the fee simple beneficially in Herenden. In 1558 Lady Katharine returned to England, and was restored by Queen Elizabeth I to all her confiscated property.[9] Herenden, however, for reasons which are not clear, declined to reconvey the lands vested in him and was sued in Chancery by Bertie and his wife. The complainants were allowed to prove that the conveyance of 1554 was "upon special trust and confidence to employ and use the same to the

[5] There are two full biographies: Lady Georgina Bertie, *Five Generations of a Loyal House* (1845), pp. 1–56; Lady Cecilie Goff, *A Woman of the Tudor Age* (1930). For Richard, see also the *Dictionary of National Biography* and A. B. Emden, *Biographical Register of the University of Oxford 1501–1540* (1974), pp. 45–46.

[6] J. R. Dasent (ed.), *Acts of the Privy Council*, v (1892), p. 180.

[7] The release is only mentioned in the 1565 suit: note 16 below.

[8] Transcribed without comment by Lady Georgina Bertie, *op. cit. in* note 5, pp. 500–502.

[9] *Calendar of State Papers (Domestic) 1547–1580*, p. 135.

proffitt and behou
and Herenden (wh
of February 12, 1
the secret trust. N
case which might
also to be noted
type " to A to the
use of B to the u
Serjeant Barham,
1572, that the d
proposition that
though it was con
by reason of equ
" contrary to the
decisive case on t
followed in the *E*
chance, an unfort
therefore eventual
decision itself hac
very special circu
second discovery
Before proceed
could be taken
the *cursus Cance*
by Serjeant Barh
use was not reco
that interpretatior
is another case w
reports give the i
came to be a majc
conveyances drav
litigious with a
effects in conscie
discussion. By 15
unexecuted) was
Wray J. in 1573
out against the no

[10] Will in P.C.C.,

[11] The troublesom
which see Strathden
219–220. This other is
been distinguished
mentioned in Egerton

[12] R. v. Crompton, *I*

[13] *Note* (1573), Lin
Dyer 369*b*.

litional learning to
before Lord Keeper
on-law judges had
e was void at law
ling the persecution
, dowager Duchess
oughby [de Eresby]
er gentleman-usher
warm a supporter
nemy of Gardiner,
stinctly dangerous.
arrest in London,
t dawn to make a
y, and finally to
ps to recover her
y without licence
ch 1554 taken the
Maidstone lawyer
rance of collusion,
to levy the fine
nd in addition a
ling to the report,
in the text of the
ction with a later
ce, "great paynes
le and love which
o the seid Walter
The conveyance
f the seid Walter
ıave been done at
Ierenden. In 1558
stored by Queen
len, however, for
e lands vested in
wife. The com-
ıce of 1554 was
e the same to the

ve Generations of a
of the Tudor Age
by and A. B. Emden,
), pp. 45–46.

op. cit. in note 5,
c) 1547–1580, p. 135.

profit and behouf of the said Richard Bartie and Ladie Kateryne." Had Herenden (who died the same year)[10] was compelled by a decree of February 12, 1560, to refeoff the complainants in accordance with the secret trust. Now there are, it is true, overtones of politics in this case which might be thought to annul its value as a precedent. It is also to be noted that the feoffment (as in *Tyrrell's Case*) was of the type "to A to the use of A to the use of B," rather than "to A to the use of B to the use of C." Nevertheless, it appears from a report by Serjeant Barham, which circulated widely in the profession ill or after 1572, that the decision was taken clearly to support the general proposition that a secret trust could be enforced in equity even though it was contrary to an express use. "The course of the Chancery by reason of equity" in such a case was, according to the report, "contrary to the common law." For contemporaries this was the decisive case on the effect in equity of a "repugnant" use, and it was followed in the *Earl of Pembroke's Case* before 1572. It was mere chance, an unfortunate chance, that the report was never printed and therefore eventually passed from sight. It does not follow that the decision itself had any immediate impact on conveyancing, since the very special circumstances were unlikely to recur; this is where the second discovery completes the outline picture.

Before proceeding to that, there is one troublesome case which could be taken to mean that Lord Keeper Egerton was unaware of the *cursus Cancellariae* settled by Sir Nicholas Bacon and reported by Serjeant Barham, and has been taken to mean that the use on a use was not recognised in equity until the seventeenth century. But that interpretation of the case has already been questioned, and there is another case which suggests the contrary.[11] Manuscript and printed reports give the impression that the nature of estates by way of use came to be a major concern of the Elizabethan courts, perhaps because conveyances drawn in the wake of the 1535 Statute were becoming litigious with a change of generations. Unexecuted uses and their effects in conscience were certainly among the principal topics of discussion. By 1594 a use expressed upon a lease for years (being unexecuted) was enforceable in the Chancery[12]; yet we learn from Wray J. in 1573 that "the opinion of the Middle Temple" long held out against the notion that such a use was not executed by the Statute.[13]

10 Will in P.C.C., Register *Mellershe*, 67.

11 The troublesome case is *Holloway* v. *Pollard* (1605) Moo. 761, pl. 1054; on which see Strathdene, *op. cit.* in note 4, p. 552; Barton, *op. cit.* in note 2, pp. 219–220. The other is *Finch's Case* (1600) 4 Inst. 86, though the second use there has been distinguished as being "active," and it could be that all the "trusts" mentioned in Egerton's time were of that nature.

12 R. Crompton, *L'Authoritie et Jurisdiction des Courts de la Roygne* (1594) p. 65.

13 *Note* (1573) Lincoln's Inn MS. Misc. 791, f. 10v. For the rule, see *Anon.* (1580) Dyer 369.

The reluctant Middle Templars, according to Wray J., were defying the opinion of all the judges of England—a remarkable instance of the strength of the Inns of Court tradition—and it is a reasonable conjecture that they could already foresee the perpetuity nightmares which lay ahead.[14] If there could be such resistance to what seems in retrospect a fairly clear piece of statutory interpretation, it is easier to understand how the status of the use upon a use could have been doubted in some quarters even after the two decisions of Sir Nicholas Bacon. But our second new text suggests that, despite hostility, the *cursus Cancellariae* was manifestly settled by the time of Lord Keeper Williams.

Henry Sherfield, in his 1624 reading on the Statute of Wills 1540, spoke of these "upstart" trusts in a manner which shows that, although the trust was not yet beyond theoretical attack, it had become an established feature of English law. Sherfield's view was that trusts ought to be abolished, because they endangered the common-law scheme of estates: an argument reminiscent of the attacks on uses by Thomas Audley and the anonymous serjeant a century earlier.[15] If the tone of Sherfield's remarks implies recent innovation, then perhaps Williams or his predecessor Francis Bacon was responsible for putting trusts on a regular footing; but that is more than can yet be proved. Sherfield implied that flexibility of conveyancing was the object of these trusts; but what precisely Jacobean conveyancers were trying to achieve will require much further study to discover. At least we can now assert with some confidence that the use on a use was recognised in equity at least 10 years before *Sambach* v. *Dalston*, and can surmise that it had perhaps been continuously recognised since 1560.

I

KATHARINE, DUCHESS OF SUFFOLK *v.* HERENDEN

Before Sir Nicholas Bacon L.K., 1560[16]

Nota quod cursus cancellarie equitatis causa contra communem legem <*utitur*>[17] quod un use serra aver sur un fine, ou feffment [ou recoverie][18] encounter un use expresse deins mesme le feffment, ou

[specifie][19] deins
auter. Et ceo fuit
le Duchese de Su
quant el allast o
fine al H[erunde
fuit enter eux fa
de money paye
consideracions][2
et ces heires o
tenementes fuer
heires ferroynt
ceux matters non
exhibite bille in
sur truste et con
[ront][27] etc. Et
le consideracion
decre vers Heru
serjeant.[28]

Et tiel fuit
marquesse de N
(defendant), en
encounter un ba
un use en cecrec

H

[From
. . . Now it [the
much upon the

[14] See *Risden* v. *Tuffin* (1597) Tothill 122; *Anon.* (1599) Cary 8; *Lampet's Case* (1612) 10 Rep. 46 at f. 52.

[15] J. H. Baker, *Introduction to English Legal History* (1971), p. 134.

[16] Brit. Lib. MS. Lansdowne 1067, f. 27 (repunctuated). The report is written under the year 14 Eliz. I (1572). Other versions: Brit. Lib. MS. Additional 35944, f. 31v; Lincoln's Inn MS. Maynard 77, f. 31; MS. Maynard 86, f. 110; Harvard Law Sch. MS. 2079, f. 124. Record, *sub nom. Bartie* v. *Herenden*: Bill of complaint, C3/8/27; Decree and Order Book, C 33/21, ff. 10, 57; second action (1565), C 78/25, m. 37. I am indebted to Dr. Edith G. Henderson of the Harvard Law School for tracing these records.

[17] patitur *Harvard MS.*

[18] *Harvard MS.* only.

[19] *Harvard MS.* c
[20] fait per directe
[21] Walter Heren
Admissions to Gra
at Maidstone befor
professional status)
(1540) K.B. 27/1114
[22] mencionant *H*
[23] *Harvard MS.* c
[24] auter *Harvard*
[25] a H. et ses hei
[26] Blank. Reword
[27] reassureront *H*
[28] Nicholas Barh
[29] Brit. Lib. MS.
passage in the two
Stowe 424, ff. 39–91

specifie] vi. deins [b]indentur <que duce>[20] l'use expressement al auter. Et ceo fuit ore tarde in experience la en suit per subpena parenter la Duchese de Suffolk vers Herunden de Gray's Inne.[21] Car le duchesse quant el allast ouster le mere in temps le royne Marie avoyt levie un fine al H[erunden] de divers maners et hereditaments, et un indenture fuit enter eux fait <declarant>[23] un consideracion d'un grand sonte de money paye al dit duchesse per H[erunden] [et pur pluasors auters consideracions][24] et auxy declarant que la use seroyt al use H[erunden] et ces heires ove divers covenantes in mesme l'indenture que les tenementes fueront voyde d'encumbrances et que le duchesse et ces heires ferroynt <ouster>[24] assurance <et huiusmodi>.[25] Et, toutes ceux matters non obstant, le duchesse a son revener de [ ][26] exhibite bille in le chauncery averrant que tout ceo conveiance fuit sun truste et confidence a sa use que H[erunden] et ces heires refeffe-[ront][27] etc. Et fuit resceve a le averment de cel secret use encounter le consideracion et le use expresse, et sur ceo prove [el] avoyt un decre vers Herunden de lui refeffer arreire, per report de Barham serjeant.[28]

Et tiel fuit le case parenter le Counte de Pembroke heire le marquesse de Northampton (complainant) et R. Kinge et Jeoffery Skot (defendant), en le chauncery. Mes le primer case fuit plus forte, que encounter un bargayne, consideracion, use expresse, indenture, et fine, un use en cecrecy et confidens seroyt averable.

II

Henry Sherfield's Reading on Wills

Lincoln's Inn, March 1624

[From his recapitulation of the first day's reading][29]

. . . Now it [the use] is become an usurper and hath encroached soe much upon the right of estates, the antient darling of the common

19 *Harvard MS. only.*
20 fait per directer *Harvard MS.*
21 Walter Herenden, admitted to Gray's Inn in 1541: J. Foster, *Register of Admissions to Gray's Inn 1521–1889* (1889), col. 14. He was engaged in legal work at Maidstone before 1540, when he brought an action of slander (not mentioning professional status) in respect of an allegation of forgery: *Herenden* v. *Fenton* (1540) K.B. 27/1114, m. 23.
22 mencionant *Harvard MS.*
23 *Harvard MS. only.*
24 auter *Harvard MS.*
25 a H. et ses heires *Harvard MS.*
26 Blank. Reworded in *Harvard MS.* Presumably Poland is intended.
27 reassureront *Harvard MS.*
28 Nicholas Barham, serjeant-at-law 1567–77.
29 Brit. Lib. MS. Hargrave 402, ff. 34v–35 (repunctuated). There is no trace of this passage in the two full versions of Sherfield's reading in MS. Hargrave 90 or MS. Stowe 424, ff. 39–91.

lawe, that now estates in land wrought by the common lawe are but as shaddowes, and the use the body and substance. The use was wont to follow and attend the estate, but now the estate is past and repast as the use doth passe: it drawes the state to it, and not it to the state.

And now, because the use is somewhat clogged that it cannott daunce up and downe att all tymes soe lightly as it could before it was clogged with the state, there is now a bastardly use start up by the true name which the use had at first—which is "Trust and Confidence." For now a man may passe his landes by fine or feoffment etc. to the use of J.S. in fee, and yett upon trust and confidence for the feoffor or any other; which is now an use upon a use, like the projecte of making salt upon salt,[30] all nought.

And this upstart hath as great a place in the Court of Chancery as ever uses had; and it wilbe noe doubt as perillous to the common lawes. And I did then, and still doe, thinke that it were most happye to this state if uses and trustes of that kinde were extirpated totally.

J. H. BAKER.

[30] The meaning of this allusion is obscure, but the "projecte" is perhaps connected with the patent for salt manufacture which Parliament held void, on the advice of the judges, in 1626; *Journals of the House of Commons*, i, 842, 856, 864.