Revue générale de droit

Classification of Property and Conceptions of Ownership in Civil and Common Law

Barbara Pierre

Volume 28, Number 2, June 1997

URI: https://id.erudit.org/iderudit/1035639ar
DOI: https://doi.org/10.7202/1035639ar

See table of contents

Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Pierre, B. (1997). Classification of Property and Conceptions of Ownership in Civil and Common Law. *Revue générale de droit*, *28*(2), 235–274. https://doi.org/10.7202/1035639ar

Article abstract

This paper examines the classification of property in common law and civil law, by contrasting the conceptions of ownership in each tradition. The author aims to provide a comparative analysis of the fundamental concepts and institutions of the law of property in each tradition. This is deemed useful, not only for promoting a better understanding of the law of property by jurists in both traditions, but also for enabling the jurist of one tradition, to find his way in the unfamiliar territory of the other tradition.

The author demonstrates that ownership in common law—insofar as it exists—is constructed on the ruins of the feudal system. Having been developed in an *ad hoc* manner from such origins, the law of property is seen to be an amalgam of technical and complex principles, built around institutions which sometimes have archaic features that serve no useful purpose in the present day. The theory of "estates", which is espoused, is however acclaimed for its flexibility, its most celebrated attribute being that invaluable institution, the Trust.

Ownership in civil law in contrast, is shown to have developed from the romanisation of the feudal system. The law of property, its principles and institutions, are more systematically and rationally organised. They are therefore more easily assimilated and applied. The theory of absolute ownership which is at its core, is however criticised for being, to some extent, inflexible.

Using this historical and conceptual background, the author shows that underneath the façade of similar powers over land in the two traditions, lies fundamental juridical differences in the nature and characteristics of the institutions—even those bearing the sames names.

Classification of Property and Conceptions of Ownership in Civil and Common Law*

BARBARA PIERRE
Lawyer, Member of St. Lucia Bar
Castries

ABSTRACT

This paper examines the classification of property in common law and civil law, by contrasting the conceptions of ownership in each tradition. The author aims to provide a comparative analysis of the fundamental concepts and institutions of the law of property in each tradition. This is deemed useful, not only for promoting a better understanding of the law of property by jurists in both traditions, but also for enabling the jurist of one tradition, to find his way in the unfamiliar territory of the other tradition.

The author demonstrates that ownership in common law — insofar as it exists — is constructed on the ruins of the feudal system. Having been developed in an ad hoc *manner from such origins, the law of property is seen to be an amalgam of technical and complex principles, built around institutions which sometimes have archaic features that serve no useful purpose in the present day. The theory of "estates", which is espoused, is however acclaimed for its flexibility,*

RÉSUMÉ

Cet article traite de la distinction des biens en common law et en droit civil, en juxtaposant les conceptions du droit de propriété. L'auteure vise à fournir une analyse comparative des concepts et des institutions fondamentaux du droit des biens, dans ces deux traditions. Elle prétend que cette analyse est utile afin de promouvoir une meilleure compréhension du droit des biens pour les juristes des deux traditions, celle qu'il connaît aussi bien que celle, étrangère à sa formation, dans laquelle il doit se frayer un chemin.

L'auteure montre que le droit de propriété dans la common law — dans la mesure où il existe — est construit sur les ruines du système féodal. Ayant été développé d'une manière ad hoc, *le droit des biens est un amalgame des principes techniques et complexes, construit avec des institutions à l'occasion archaïques, aujourd'hui inutiles. La théorie des* estates *qui est épousée, est néanmoins acclamée pour sa flexibilité, son attribut le plus célèbre*

* Major Research Paper for LL.M. under the supervision of Professor Ernest Caparros.

its most celebrated attribute being that invaluable institution, the Trust. Ownership in civil law in contrast, is shown to have developed from the romanisation of the feudal system. The law of property, its principles and institutions, are more systematically and rationally organised. They are therefore more easily assimilated and applied. The theory of absolute ownership which is at its core, is however criticised for being, to some extent, inflexible.

Using this historical and conceptual background, the author shows that underneath the façade of similar powers over land in the two traditions, lies fundamental juridical differences in the nature and characteristics of the institutions — even those bearing the sames names.

étant l'inestimable institution du Trust.

Par opposition à la common law, il est évident que le droit de propriété en droit civil a été développé en romanisant le système féodal. Le droit des biens, ses principes et ses institutions, est organisé d'une manière plus systématique et plus rationnelle. Il est donc plus facile à comprendre et à appliquer. La théorie d'un droit absolu de propriété, qui constitue son fondement, a fait l'objet de nombreuses critiques comme étant trop rigide.

En utilisant cet arrière-plan historique et conceptuel, l'auteure démontre qu'au-dessous des façades des pouvoirs semblables par rapport aux fonds dans les deux traditions, il existe des différences juridiques fondamentales dans la nature et les caractéristiques des institutions mêmes celles qui ont une nomenclature semblable.

TABLE OF CONTENTS

INTRODUCTION

Trite, though it may be, that the common law has no specific concept of ownership as is found in the civil law,[1] the nature of this distinction, and its consequences for the classification of property, have not been explored to any great extent by jurists. The law of property was noted as being the most neglected of all the private law areas open to common law-civil law comparison.[2] Those comparisons of the law of property that have been made, have focussed on particular institutions, primarily the trust.[3] Even the few comparisons of ownership, are contrasts between ownership as an institution in the civil law, and various institutions in the common law; and that, primarily from the perspective of the common lawyer.[4] There is little, if any, comparison, focussing on the relative notions of proprietorship,[5] with a view to enabling a better grasp of the differences in the classification of property, and with the purpose of facilitating an improved understanding of the law of property generally, in the two traditions.

Yet, this kind of study, like all studies using the comparative method,[6] is quite valuable. The benefits are twofold : it enables a better understanding of one's own system, and provides a wider range of solutions to problems common to the two traditions. These benefits are particularly desirable in the area of the law of

1. While there is not one civil law, nor one common law, the principles discussed here are traits which legal systems belonging to one or other tradition, have in common. However, the English common law and the French civil law (including that of Québec and St. Lucia which are based on it) will be focussed on in this essay.

2. J.H. MERRYMAN, "Ownership and Estate (Variations on a Theme by Lawson)", (1974) 48 *Tul.L.R.* 916-945, p. 916.

3. More recent examples include, J.E.C. BRIERLEY, "The New Quebec Law of Trusts : The Adaptation of Common Law Thought to Civil Law Concepts", in H.P. GLENN, dir., *Droit Québécois et Droit Français : Communauté, Autonomie, Concordance*, Cowansville, Les Éditions Yvon Blais Inc., 1993, pp. 383-397; Y. ROSSIER, "Étude comparée de certains aspects patrimoniaux de la fiducie", (1989) 34 *McGill L.J.* 817, p. 879 *et seq.*

4. J.H. MERRYMAN, *loc. cit.* note 2. This article itself is the most extensive of such a comparison. The writer also notes that the major works on this subject are : F.H. LAWSON, *Introduction to the Law of Property*, (1958), now published as F.H. LAWSON & B. RUDDEN, *The Law of Property*, 2nd ed., Oxford, Clarendon Press, 1982, and C. NOYES, *The Institution of Property*, (1936). See also A. BOUDREAU-OUELLET, "Aspects conceptuels et juridiques du 'droit de propriété'", (1990) 21 *R.G.D.* 169-180 : although the writer briefly points out the main differences in the conception of ownership in the civil law and the common law, the article focusses on ownership in the common law.

5. "Proprietorship" here refers to all the institutions in the tradition through which the benefit of land is allocated among persons. Thus, in respect of the civil law it means not just ownership, but other real rights. In the case of the common law it refers to all interests in land.

6. For a discussion of the methodology, aims and purposes of the comparative method see, K. ZWEIGERT & H. KÖTZ, *Introduction to Comparative Law*, 2nd ed., Oxford, Clarendon Press, 1987.

property. The classification of property in a legal tradition both reflects and generates a particular approach to allocating the powers and benefits of property generally, and of land in particular. In other words, it creates a mind-set, which is manifested in the kinds and deployment of institutions recognised in the tradition, and influences the options that are perceived for responding to the demands of our changing societies. An understanding of a different approach to the similar problem faced by a society governed by the rules of another tradition, therefore has the distinct advantage of avoiding narrow-mindedness in the search for possible solutions.

Not only is it valuable, this kind of study is also necessary. Understanding the differences in the classification of property and in the modes of thought, is indispensable for successful navigation in environments where these two major traditions of the western world are encountered. Comparisons between individual institutions are of limited use in this respect. As was pointed out by one author commenting on the differences between English law and French law, "[i]t is not just that the individual concepts are different, but that the whole conceptual landscape can be significantly different so that the problem you are studying does not arise conceptually in the same way".[7]

These environments in which the two traditions are encountered are numerous. In the mixed or bi-juridical jurisdictions like Québec, Louisiana and St. Lucia, the legislator and jurist (authors and practitioners) alike, must possess this knowledge. Otherwise, instead of being enriched by cross-fertilisation, the legal system will be deformed by a mix-up of inconsistent principles. There is also the case of the federal legislator in unions comprising a plurality of traditions, for example Canada and the United States; of judges in Courts hearing matters from common law and civil law jurisdictions, or disputes involving a conflict of laws; of doctrinal authors, and practitioners, working in these environments.

An adequate grasp of the fundamentals of the classification in the law of property of these two traditions, makes it possible for such persons to avoid falling victim to the many potential pitfalls. They will be able to discern the subtle distinctions between the classifications of the various powers over land that each tradition recognises. For example, between the *realty/personalty* dichotomy in the common law, and the *real rights/personal rights* dichotomy in the civil law; between *realty* in the common law, and *immovables* in the civil law, and similarly, between *personalty* in the former, and movables in the latter; between *real rights* — in relation to land at any rate — in the civil law, and the common law concept of *hereditaments*.

The risk of erring is that much higher because the institutions in the traditions, though decidedly different, occupy the same position on the landscape; that is to say, they fullfil similar functions and often lead to the same practical result. This is the case in respect of, for example, the *hypothec* in the civil law, and the *mortgage* in common law, both of which facilitate the use of land as security for obligations; the *lease* in the civil law, and *leasehold interest* in the common law, both of which are mechanisms used to procure a periodical rent from land, in exchange for the enjoyment of it; the "Trust" in the civil law and the common law, which enable the separation of the administration of the land from the enjoyment of the benefits. Such similarity in nomenclature makes jurists even more susceptible to error.

---

7. J. BELL, "English Law and French Law — Not So Different?", (1995) 48 *C.L.P.* 63-101.

There are several instances in which both legislatures and jurists, in Canada and beyond, have succumbed to the illusion of similarity in substance, suggested by the similarity in function or nomenclature.

A leading Canadian text on real property in the common law contains this paragraph : "The common law distinction between real and personal property differs from the civil law distinction between immovables and movables. The two sets of terms are largely, but not entirely, coterminous in meaning. The differences are of concern in the conflict of laws. Basically, the term "immovables" comprises land and anything affixed thereto or part thereof. Real property may be similarly defined. However, there is this main difference that real property does not include leaseholds. This is due to an accident of history".[8] The problem here is that one may conclude that the lease in the civil law is an immovable, but it is not.

The Québec legislature has introduced legislation concerning land in matters of public law modelled on that of England or common law Canada which do not conform to civil law principles. One writer notes :

> [...] En calquant des lois conçues dans un cadre de common law, le législateur québécois a formulé le droit public des biens en marge du droit civil. Certes, il utilise des notions de droit privé tels le bail, la vente, la propriété, l'usufruit, mais sans que leur soient attribués le sens et le régime juridique qui est le leur en droit civil. La révision récente de plusieurs lois relatives au domaine public les a sans doute améliorées au plan linguistique, mais leur corrélation avec le droit civil reste à faire. Ainsi, cette législation utilise la terminologie du bail ou de la location pour des concessions qui paraissent néanmoins accorder au concessionnaire un droit réel de jouissance des terres publiques.[9]

The legislature of St. Lucia is also guilty of legislation which ignores basic civilian principles. The *Land Registration Acts*[10] for example, give a token recognition of the civil law lease. It includes in the definition section, the meaning contained in the civil code. However most of the articles in the main body of the principal Act treat the lease as the common law leasehold interest.

Yet another example is the decision of the Privy Council, in the heavily criticised *Matamajaw*[11] case, that the right to fish was an object of ownership, separate from the land itself and other rights therein. This was the result of a misunderstanding of the classification of property in the civil law. First, it was thought, wrongly, that a personal servitude was not a real right. Their lordships therefore concluded that the right to fish was a real right and thus not a personal servitude. Second, they were of the view that a real right in land was necessarily a right of ownership, and that a part of the prerogatives of ownership, in this case the right to fish, could be split off and itself be the object of ownership. In effect, the judges

---

8. A.H. OOSTERHOFF & W.B. RAYNER, *Anger and Honsberger Law of Real Property*, 2nd ed., Aurora (Ontario), Canada Law Book, 1985, vol. 1, p. 9.

9. M. CANTIN CUMYN, "Le droit privé des biens : à l'enseigne de la continuité", in H.P. GLENN, dir., *op. cit.* note 3 p. 375; for specific examples of such legislation see, by the same author, "Essai sur la durée des droits patrimoniaux", (1988) 48 *R. du B.* 3-46, footnote 86.

10. *Land Adjudication Act*, 1984; *Land Adjudication (Amendment) Act*, 1986; *Land Registration Act*, 1984; *Land Registration (Amendment) Act*, 1986; *Land Registration (Amendment) Act*, 1987 (No. 2 of 1987); *Land Registration (Amendment) Act*, 1987 (No. 5 of 1987); *Land Registration (Amendment) Act*, 1989.

11. *Matamajaw Salmon Club* v. *Duchaine*, [1921] 2 A.C. 426.

equated the right to fish to the *profit à prendre* of the common law, which is classified as a hereditament and therefore the object of ownership. In so doing they distorted the civil law by importing the common law notion of plurality of owners on one parcel of land.[12]

The consequences of such errors, which are all too numerous, is that the efficacy of the law is undermined by the uncertainty thus introduced. Problems of theory become practical problems when the confusion in the classification of property makes it difficult to determine what rules are applicable in a given situation.

The contemporary relevance of the classification of property and rights therein is manifested in the revolutionary changes taking place in the civil law in regard to the incorporation of an institution analogous to the common law trust. As has been acknowledged in the case of Québec, the elaboration of the civilian trust concept will require inspiration from the common law. In view of the potentially large role that this concept can play, even supplanting existing civil law institutions, the importance of being able to discern those principles of the common law that are incompatible with the civil law is clear.

In light of the foregoing, the aim of this paper is to provide a basis from which the law of property in the two traditions can be better understood. It is not intended to attempt a summary of the principles in both traditions. As is clear from the above, it is the view of this author that the differences in the kind of rights that exist in each tradition, and their classification, is a direct result of the contrasting conceptions of ownership. Thus the approach taken to achieve the aim is to explain the relative conceptions of ownership. In that way, one will have — what is as good as, or perhaps better than, the principles themselves : a map that will assist in their discovery.

Ownership is the institution employed in civil law to describe man's interaction with all things, whether land or other objects. In traditional theory it denotes the totality of powers that can be exercised over, and benefits that can be derived from, property. The right is therefore described as absolute, and *ipso facto*, unitary. Using this as a core concept, the civil law endeavours to explain the reality of different combinations of powers and rights in land. This it does successfully — for the most part at any rate, providing a framework on which is built the whole of the law of property. Through this unifying concept, and the framework of rights generated by it, the law of property is made simple, easily assimilated by the student and easily applied by jurists. Moreover this institution enables the principles of the law of property to be organised in such a way that it is suited to codification.

However there are disadvantages. The theory built on the framework of this institution has weak points. Certain rights in land, pertaining to old (e.g. lease and hypothec) as well as recently evolved ways of using property (e.g. trust), cannot be made to fit snugly in the framework. In addition, new forms of property which have developed in modern society (intellectual property) present a challenge. Thus the unifying concept, which is so useful, can prove to be restrictive. It is, criticised for not being as flexible as one would desire to respond to innovations in man's use of property, and the development of new sources of wealth.

---

12. For critical comments of the case see J.E.C. BRIERLEY & R.A. MACDONALD, *Québec Civil Law : An Introduction to Québec Private Law*, Toronto, Edmund Montgomery, 1993, paras 261, 285, 286, 292; P.B. MIGNAULT, "L'avenir de notre droit civil", (1922-23) 1 *R. du D.* 104-116, p. 115; S. NORMAND, "Une relecture de l'arrêt Matamajaw Salmon Club", (1988) 29 *C. de D.* 807-813.

In contrast, a concept of ownership is not part of the common law of real property. The pursuit for "the owner" is an entirely civilian preoccupation. There is at present no unifying concept which is, or can be, used, to systematise the complicated structure of technical rules which constitutes the common law of real property.[13] Man's interaction with the land is described using a variety of concepts. The predominant one is that of "estate". But there are others, for example, "hereditaments", and "interests".

Having no specific, technical meaning for "ownership", the word is used indiscriminately to refer to several different powers over, or benefits in, the land. It is most often used to describe the person who has what is called the "fee simple absolute in possession". This interest constitutes the greatest powers and benefits over the land that is possible in the common law today. In reality it differs little from the civil law owner. That is to say the two have similar powers over the land. "Owner" is also used in reference to the holder of any "estate", the person with an "equitable interest", or the person who has "seisin".

These concepts, being intimately related to the endurable character of land, are restricted to the explanation of the interaction with land; it is not extended to objects. This highlights one consequence of the difference in conception of ownership : while the basic rules governing property apply equally to objects and to land in the civil law, the common law has one set of rules for objects and another for land. Civil law refers to a *droit des biens*, and the common law, to a "law of real property".

Different rules for land and for other objects is one factor contributing to the complexity of the common law of real property, although less so now than previously. The primary factor however, is the manner of its development. The common law has developed through a pragmatic approach : the manipulation of its principles to solve immediate concrete problems, and legislative intervention where it was considered necessary to avoid abuse, or to correct a problem created by this manipulation. The present law of real property is thus a collection of all the institutions which have survived the piecemeal alterations since the 12th century.

In Part I, ownership will be looked at in detail. It will be seen that although the conceptions of ownership are not at all similar, the structure of rights which they map out coincide, for the most part. That is to say, with the exception of certain interests in the common law (future interests) which have no counterpart in the civil law, the powers exercisable over land are the same. The nature of the institutions through which these rights are given effect are not, however.

In Part II, some particular institutions will be examined to demonstrate how the conception of ownership works to determine the nature and classification of institutions that exist in the tradition. The institutions chosen for this focus are the lease, the mortgage/hypothec and the trust. These institutions were chosen because (i) they are important from the point of view that they are used most frequently in practice; (ii) errors are constantly made in respect of them, and (iii) their nature and classification using the framework generated by the conception of

13. Merryman advances the view that a central concept is necessary for the proper development of the English common law. He proposes the use of the concept of "estate" for this purpose. He declares it preferable to that of "ownership", being "more sophisticated, more richly and variously useful, and freer from extra-legal cultural baggage". He recognises that it must first however be freed of "the useless antiquarianism and arcane complexity that now characterize it" : J.H. MERRYMAN, *loc. cit.* note 2, p. 945.

ownership in each tradition is not without difficulty, so that the "map" outlined in Part I is insufficient for a proper understanding of them.

I. DISTINCTIONS BETWEEN THE CONCEPTIONS OF OWNERSHIP

Rights in relation to land in the English law of property developed in an *ad hoc* manner. There did not exist a notion of "rights", so much as a notion of "interests in land". These "interests" in land were created as and when the need arose, largely through the use of the concept of "estates". This concept of estates is in one sense then, the common law counterpart of the civilian ownership. Both of them, having developed at the turning point of English and French law in the late medieval period, have established the way in which the powers exercisable over land are perceived, in short, the mind-set of the common and civil lawyer respectively.

Today the holder of the estate known as the "fee simple absolute in possession" is hardly distinguishable from the civil law owner from the point of view of the rights that they can exercise over their land. They can both "sell" it (or allow it to pass to their heirs by their act or the operation of the law), give others the right to take part of its benefits, or use it as security for obligations. To effectively distinguish between estates and ownership, one needs rather, to understand the concepts from a historical perspective : how the concept came to be established and the modifications giving rise to their contemporary perception (A). It is only against this background that their nature and characteristics can be truly appreciated (B); and the juridical difference between acts with a similar practical result be perceived, for example the lease, mortgage/hypothec and the trust. (II).

A. EVOLUTION OF OWNERSHIP

The law of property in England and France took different paths from the period of the decline of feudalism in these countries. Since England pretty much retained the feudal structure to construct its law of property, it is necessary to start with the appropriation of property as it existed under the feudal system. We will then see how the decline of this system affected English law and how its romanisation transformed French law.

1. The feudal system

The concept used to designate the appropriation of land in both France and England was "seisin" (*saisine*). This concept developed as part of the customary law of France during the late medieval period (10^{th} and 12^{th} centuries) when the feudal system governed the social order.[14] It was transplanted in England

14. A.-M. PATAULT, *Introduction historique au droit des biens*, Paris, Presses Universitaires de France, 1989. This author notes that although the words connoting ownership in Roman law, *dominium* and *proprietas*, continued to be used in some documents during this period, it was devoid of the meaning ascribed to it in Roman law; that, during the 9^{th} and 10^{th} centuries, Roman law was no longer known in France (the exact extent of its decline being a matter of dispute among jurists), having disappeared because of the political and economic changes of the middle ages. Landholding was constructed around the feudal customary law concept of saisine, in the void left by the decline of the Roman law : p. 19, 83.

when the Normans introduced the feudal system in that country after the Norman Conquest in 1066.[15]

Landholding in the feudal system was inextricably bound with the status of persons, that is to say their position in the feudal hierarchy. Land was held from a person of superior status[16] — "seignior" in France, "lord" in England — in favour of whom the tenants were obligated to perform certain services, or pay certain taxes and fees in relation to possession of the land. This fact was captured in the adage "*nulle terre sans seigneur*". The king owned all the land. He gave grants of it to his lords, and kept some in respect of which he acted as lord. In exchange, the lords were required to perform a particular kind of service, for example providing the king with an army. The lords themselves did the same, securing different services, so that there was a whole pyramid, with the king at the top, and the tenants at the bottom. Persons in between were tenants in relation to those above and lord in relation to those below. The relationship between the lord and the man was described as tenure.

The other important aspect of the feudal system is the fact that the tenant was not entitled to the land outright. He was regarded as holding it. This "holding" signified the power to enjoy the uses or returns of the land. It is this entitlement to enjoy the uses of the land held in tenure that is referred to as seisin. Thus a person with seisin described in a Norman compilation of customary rules of the mid 13th century as, "Celui qui la possède, la moissonne, la laboure, en perçoit les fruits et les produits".[17]

Seisin was also applicable to other rights related to the land which entitled their holder to "returns" or uses of the land. For example the right of the seigniors or lords to taxes and fees as mentioned above.[18] There were many other rights for example the right to use the land for a specific purpose : the right to pass.[19] There were thus as many persons seised in respect of a parcel of land, as there were uses of the land. Feudal landholding is for this reason regarded as a multi-owner system.

As seisin could only apply to property which was enduring and from which one could get returns periodically, it was not applicable to movables. Thus

---

15. R.C. VAN CAENEGEM, *The Birth of the English Common Law*, 2nd ed., Cambridge University Press, Cambridge, 1988, p. 89; see also D. ROEBUCK, *The Background of the Common Law*, 2nd ed., Hong Kong, Oxford University Press, 1990.

16. There were exceptionally in France, tenures — *francs-alleux* — which were not held from a seignior, having been obtained from relatives. See A.-M. PATAULT, *op. cit.* note 14, pp. 50 *et seq.*

17. "*Summa de legibus Normanniae*", quoted by A.-M. PATAULT, *id.*, pp. 21-22.

18. Authors described this duality of interests in relation to the land as "double domaine", comprising "*domaine direct or éminent*" of the seignior and "*domaine utile*" of the tenant. PATAULT notes that this attempt by authors to apply the Roman dominium to the existing relations with the land was not accurate, since it did not show the obligations that were ancillary to the landholdings. A.-M. PATAULT, *id.*, p. 133.

19. The following persons are identified by PATAULT as having seisin, "[...] le seigneur, le vassal, le tenancier, le bailleur à rente [...] le usager, la collectivité villageoise, sans compter les partages purement privés dont l'objet est trop modeste pour avoir laissé beaucoup de traces écrites, le foin à l'un, le regain à l'autre, ou les arbres à l'un, l'herbe à l'autre [...]", A.-M. PATAULT, *id.*, p. 134. In the common law there were in addition to seignories : advowsons, tithes, franchises, rents, easements and profits, offices and dignities, which conferred seisin : J.H. BAKER, *An Introduction to English Legal History*, 3rd ed., London, Butterworths, 1990, pp. 272 and 281.

there was a difference between the appropriation of these movables "*cateux*"and land, "*heritage*", or in English, "*chattels*" and "*hereditaments*"[20].

2. The decline of the feudal system : English common law

Feudal relationships gradually declined from about the 12th century. As they decline, so too do the kinds and importance of the obligations consequent on status, which were superimposed on landholding. In the course of the centuries, land came to be increasingly important for its own sake, as an asset — of the tenant —, as personal services became obsolete or were replaced by money payments, and as those money payments were themselves abandoned, their value having been eroded by inflation.

This change in the social order necessitated an accompanying change in the legal concepts to fit the new ideas of appropriation of land which were emerging. The consequent "modernisation" of legal rules was effected earlier in England than in France. As a result of this time lag, the new ideas of appropriation in France were fashioned using the roman concepts, which had by then become widespread in Europe. In England however, this modernisation was started, in absence of the rebirth of the roman concepts, by amending existing institutions. It was continued in the same vein despite the emerging romanist approach on the continent.[21] The feudal framework was thereby crystallised in the English law of property.

The English law of property responded to the change in the social order by the modification of tenures and the introduction of the concept of "estates".

The modification of the tenures culminated in (a) their reduction in number to one : "free and common socage",[22] (b) the commutation of their "inci-

---

20. For the things included in these categories see J.H. BAKER, *id.*, p. 281.

21. This is not to say that the common law was totally untouched by any Roman influence. On the contrary, English lawyers read Roman law and at one point, relied heavily on Bracton. Commenting on the decline of the authority and use of the Roman law in the fourteenth and fifteenth centuries, Holdsworth states : "The results of this were partly good and partly bad. They were good in that the native development of the common law and of the English constitution was assured. They were bad in that the common lawyers became wholly ignorant of that fund of legal principles and material for legal speculation which were stored up in writings of the civilians and canonists, and in the texts upon which they commented. The common lawyers ceased, for the most part, to care for broad principles, and they ceased to speculate. The result was that in the fourteenth and fifteenth centuries the common law tended to become more and more technical and less and less rational. It seemed likely that it would end by losing all grasp of broad principle, and become merely an "evasive commentary upon writs and statutes". To lawyers of such an age, the literary style, the large outlook, the vigorous commonsense of Bracton appeared strange. It was unusual — as unusual as in the days of Blackstone — to find a lawyer whose book was literature. His Roman could not be understood by men whose knowledge of the subject (if they had any at all) was confined to a few maxims and proverbs". W. HOLDSWORTH, *A history of the English Law*, London, Sweet and Maxwell, 1966 rep., vol. III, p. 287.

22. For a summary of the major types of tenures see R.M. MEGARRY & H.W.R. WADE, *The Law of Real Property*, 5th ed., London, Stevens & Sons, 1984, pp. 14-28 : generally, there were free tenures (Tenures in Chivalry, Tenures in Socage and Spiritual Tenures), unfree tenures (for example villeinage later called copyhold) and other miscellaneous tenures. See also, D. ROEBUCK, *op. cit.* note 15, pp. 52-53, and J.H. BAKER, *op. cit.* note 19, p. 282.

dents" to the payment of money, and (c) to the increase in the power of the tenant over the land.

The first factor which worked to reduce the number of tenures was the prohibition of subinfeudation.[23] This refers to the transfer of land by the creation of a new tenancy — another level in the pyramid — by the tenant. Thus, no new tenancies were created after 1290.[24] Theoretically, the lords of the land today are the persons who were lords in 1290. The second factor was the change of all tenures to free and common socage, and the abolition of all burdensome incidents.[25] In consequence of these changes persons lost track of who the lords were : they were often not stated in the document of alienation, and they did not bother to exact performance of services that had grown ancient, nor to collect the money payments the value of which had been eroded by inflation. Where the identity of the lord was not known, the courts presumed that the land was held directly from the crown.[26]

Thus the number of levels in the feudal pyramid shrank and the restrictions incident on tenure were reduced. This was accompanied by the augmentation of the tenant's powers over the land. He became free to transfer his estate *inter vivos*,[27] and later by will.[28] The explanation of these developments consists of an account of the introduction of the concept of estates.

We will turn therefore to the introduction of the concept of "estates". Under the feudal system, land was not part of the patrimony of the tenant. Grants were made to him in exchange for his personal service. It was a personal contract, not capable of devolving on his heirs upon his death. However, when personal services decreased in importance, for example military service with the decline in the treat of war, the lord was more inclined to promise to grant the land to the tenant's heirs : he was no longer concerned as much with the *personal* service, as with

---

23. *Quia emptores terrarum* 1290, B. & M. 9-10; all transfer of land had to be made by the transfer of the tenancy (substitution).

24. Except tenancies-in-chief by the King, who was not subject to the statute *Quia emptores terrarum* 1290, *ibid.*

25. *Tenancy Abolition Act* 1660, reducing tenures to free and common socage, copyhold and frankalmoign, and abolishing all burdensome tenures. Copyhold and frankalmoign were brought to an end by the *Law of Property Act* 1922, which came into effect at the beginning of 1926 : R.M. MEGARRY & H.W.R. WADE, *op. cit.*, note 22, pp. 28-36. (*The Law of Property Act* 1922 was part of the extensive reform of the law in the period 1922 to 1925. The other Act through which the reform was introduced was the *Law of Property (Amendment) Act* 1924. They were repealed and replaced by the consolidating Acts of 1925 which are together referred to as the 1925 property legislation. They consist of the *Settled Land Act* 1925, the *Trustee Act* 1925, the *Law of Property Act* 1925, the *Land Registration Act* 1925, the *Land Charges Act* 1925, the *Administration of Estates Act* 1925 : *id.*, p. 9).

26. *Id.*, p. 36.

27. This had been prohibited by the doctrine according to which the heir apparent had a definite interest in the land. This doctrine declined by about 1200, the heir apparent being deemed to have merely *spes successionis* (the hope of succeeding). The restrictions had also been informed by considerations of the rights and duties involved in the realtion of lord and tenant : W. HOLDSWORTH, *op. cit.* note 21, p. 76.

28. Under the feudal regime, land, with a few exceptions, could not be left by will. "To have allowed wills would not only have diminished the lord's right of taking the land by escheat and have been a hardship to the heir, but it would have run counter to a feudal policy which demanded that every transfer should be notorious and public" : E.H. BURN, *Cheshire and Burn's Modern Law of Real Property*, 13th ed., London, Butterworths, 1982, p. 41.

being able to obtain revenue from the tenants,[29] and it suited him to please the tenant by acceding to the request that the heirs of the tenant be admitted upon the death of the tenant. This was done by grants "to [the tenant] and his heirs".

At first "and his heirs" constituted "words of purchase", describing the class of grantees. The heirs' right however was merely personal against the lord to be admitted as tenant upon the death of the existing tenant. Later, the doctrine according to which the heirs' right had to be preserved was no longer acknowledged, and the tenant was allowed to alienate his interest in the land to their prejudice. Their interest then became a mere *spes successiones*, and the words "and his heirs" constituted "words of limitation". They described the extent of the tenant's estate in the land and therefore his powers over it. "And his heirs" created a "fee simple" estate, but "and the heirs of his body created a 'fe tail' estate. Both had particular consequences in law and was distinguished from the usual feudal interest which was designated the life estate.[30] The tenant was later accorded the right to will by the *Statute of wills* 1540.[31]

By the end of the 17th century landholding was transformed. Estate became property. That property was the property of the tenant. He was entitled not only to use it, but to dispose of it by alienation or will. In the case of the "fees" it could also devolve on his heirs. The lord was eclipsed. He was irrelevant for all practical purposes. In the property regime that resulted from this pragmatic case by case development of the law, the term owner came to be used in relation to the estate holder, the equitable owner and the holder of seisin.

Estate holder

As stated above, the land came to be the asset of the tenant. "Owner" though he had become, he remained nevertheless, a tenant with an estate in the land. It was thus that ownership came to mean holding the land in tenure for an estate.

The relationship of lord and man which is signified by tenure, is of little importance today in determining rights in relation to property. The usual practice is for rights in land to be described merely in relation to estates. The owner of land may have a fee simple interest, a fee tail or a life interest.

---

29. This revenue was sometimes money paid instead of performing the services owed, sometimes money to which the lord was entitled by the "incidents", for example "wardship", "marriage", "aids" and "fines". For a discussion of incidents see W. HOLDSWORTH, *op. cit.* note 21, pp. 54-73.

30. The "fee simple estate" continues for as long as the tenant has heirs. The "fee tail", for as long as the tenant has linear descendants. "Fee" denotes that (i) it is an estate of inheritance, and (ii) that it might continue forever. The life estate was therefore not a "fee". These are freehold estates. There were different types, for example the "fee simple absolute", "fee simple upon condition", or the "determinable fee". They could be "in possession", "in reversion," or "in remainder". R. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 38-40, 59-102. Later there were also leasehold estates. These are discussed more fully later in the essay. By virtue of section 1 of the *Law of Property Act* 1925 the only type of estate that can exist at law is the "fee simple absolute in possession" and the leasehold estate. For a summary in chart form see J.H. BAKER, *op. cit.* note 19, p. 16. See also A.H. OOSTERHOFF, & W.B. RAYNER, *Anger and Honsberger Law of Real Property*, 2nd ed., Ontario, Canada Law Book Inc., 1985, pp. 23-24 and 90-92.

31. This had been prohibited by the doctrine according to which the heir apparent had a definite interest in the land. This doctrine declined by about 1200, the heir apparent being deemed to have merely *spes successionis* (the hope of succeeding).

Since the *Law of Property Act* 1925, the fee simple absolute in possession is the only one of those three which can exist as a legal estate. As in him resides the full interest in the land which he can convey to another, this "tenant in free and common socage for an estate in fee simple absolute in possession", is usually called "owner" for short. The holder of the life estate and the fee tail, though still owners, are merely equitable owners.

Equitable owner

The separation of the enjoyment of property and its administration, though not unique to the common law, is solved by the fragmentation of title into a legal and equitable title. It is this fragmentation that is indigenous to the common law, and is discussed more fully in the second part of this essay. Both the holder of the legal title and that of the equitable title are regarded as owners of the land.

The forms of equitable ownership are in essence, rights to land that are recognised by the courts, not in their common law jurisdiction, but in their equitable jurisdiction. They result from equitable principles developed in the Court of Chancery, in order to attenuate the sometimes harsh rules in the old common law courts. For example in the above cases, it protects the beneficiary, mortgagor, and holder of fee tail or life estate, from suffering loss from acts of the trustee, mortgagee and the holder of the fee simple absolute respectively; acts which they are perfectly entitled to do at law, but in justice and good conscience they should not be allowed to do because of the prejudice to these persons. Equity follows the law and does not take away a person's legal rights. However, it punishes someone for relying on it.

The legal-equitable ownership exists in various contexts. There is first of all the equitable ownership of the holders of the life, fee tail and fee simple estate (except the fee simple absolute in possession), referred to above.

There is also the equitable ownership of the mortgagor. His ownership comprises a bundle of rights which are together referred to as the "equity of redemption". Like the rest of the English law of property, this peculiar method of using property as security is a product of the historical evolution of this use of the land. The mortgage is discussed more fully in the second part of this essay. Suffice it to say here that in equity, the mortgagor is regarded as being the owner of land encumbered by a mortgage, notwithstanding that the legal title is vested in the mortgagee. The mortgagor can deal with his equitable estate in the same manner as any holder of the estate, *i.e.* he can transfer it *inter vivos*, or by will, settle it, lease it, or mortgage it.[32]

Thirdly, there is the equitable ownership of the beneficiary of the trust, who is referred to as the *cestui que trust.*

Seisin

As there were several persons entitled to the land, and no abstract concept of ownership, a dispute as to title was not solved by determining who was the owner. The concept of seisin was used for this purpose. The principle was that the person entitled to exercise all the rights of ownership of land was the person seised of it. This person was therefore, for all practical purposes, the owner of the land.

This was true whether or not one was wrongfully seised. Seisin in theory means legitimate possession. However one's possession is presumed legiti-

32. R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, p. 919.

mate.[33] Thus the one in possession, regardless of whether or not he was lawfully in possession, was presumed seised, and entitled to all the rights and benefits of ownership. It is true that where the possession is wrongful, as when the true owner is dispossessed, the latter has the right to get back into possession through one of several forms of action, depending on the nature and length of time since the dispossession (Writ of right, writ of entry, or novel disseisin). However, until he got the land back, he had nothing and the person with seisin, though wrongfully, had all.

3. The romanisation of the feudal system : French civil law

In France, in contrast, jurists, were seduced by the simplicity of the roman property concepts.[34]

The Roman concept of *dominium* and *proprietas*, which signified a total dominion of all things, movables as well as land, was particularly appealing in this era, when feudalism and its trappings were increasingly seen as promoting subservience, and when the desire for freedom was becoming more and more keenly felt.

In Roman law, there was a fundamental division, established by Gaius in the second century, between all corporeal things (*res*), and all incorporeal things (*jura*).[35] Thus *res* denoted the things themselves, the physical, while *jura* denoted the relationship between the things and man, created by the intellect, *i.e.* rights. *Dominium* was perceived as appropriation of a thing in its substance. Not as a legal relation, the product of the intellect. It was inextricably bound with the object itself. Dominion of things by man was regarded as something natural and direct that did not require the intervention of a man-made legal relationship. In Roman law therefore, the concept of proprietorship was corporeal; it was *res*, not *jura*. It was separate and distinct from, and contrasted with, all the other rights in land, *i.e.*, *jura*.

From the second half of the 12th century these French jurists sought to systematise the customary law then prevailing,[36] using the Roman concepts. Progress in this endeavour was slow until the French revolution of 1789, which carried the transformation to fruition by abolishing the feudal system.[37] The *Déclaration des droits de l'homme et du citoyen* of 1789 espoused a philosophy that was consistent with the Roman idea of ownership : article 2 affirmed the validity of natural law and article 17 described ownership as an "inviolable and sacred right". The

---

33. "Any distinction between seisin and possession as the basis of title is obscured by the well-established rule that possession of land, if exclusive of other claimants and not otherwise explained, is evidence of seisin in fee simple" : *id.*, p. 106, citing *Peaceable d. Uncle* v. *Watson*, (1811) 4 taunt. 16, p. 117.

34. These were being revived by the universities in the school of liberal arts of Bologne, in the north of Italy from the end of the 11th century. Their study was based on the compilations of Justinian, which later came to be known as the *Corpus Juris Civilis*. It is from the Bolognese school of glossators, founded by Irnerius at the end of the 11th century, that the Roman law spread to all of Europe : A.-M. PATAULT, *op. cit.* note 14, p. 84.

35. This division was a consequence of his *summa divisio* of things into : that which is divine and that which is human.

36. The general customary law differed from place to place. Also there was only customary law in the north, but much written law in the south.

37. The French Revolution is seen to have completed a change in the concept of ownership which had already taken root in the ideas as well as in practice, with the falling into disuetude of the seigniorial incidents : A.-M. PATAULT, *op. cit.* note 14, pp. 84, 87 and 163.

place of the Roman idea of ownership was given an enduring character by codification in article 544 of the French *Code Napoléon* 1804.

It should be noted that the perception of the jurists was coloured by the prevailing view of land in terms of its productivity, as opposed to its matter. Therefore they constructed the Roman idea of total dominion over land, by uniting all the uses of the land in the same person. Thus ownership is seen in terms of the union of three attributes; *usus*, *fructus* and *abusus*. Article 544 of the Code civil states : "La propriété est le droit de jouir et de disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements". It is thus a relationship between a person and a thing — a right.[38]

Thus the French idea of ownership has a slightly different perspective than that of the Romans in that the latter is *res*, but the former is *jura*.[39] However the concepts denote the same idea of complete dominion.[40]

Article 406 C.C.L.C. 1866 codified the same notion in respect of the province of Québec. According to this article, "ownership is the right of enjoying and disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulations".[41]

One may conclude that this was an importation of the French law, owing to the facts that the law in force in Québec at the time of codification was the pre-revolutionary French law, as contained in the *Coutume de Paris*, and furthermore, that the province was part of the British Empire from about 1760. However this is not the case. Article 406 codifies the then existing Québec law. Despite the British rule the French law continued to apply in relation to private law.[42] This was not affected by the introduction of English rules of civil procedure nor of proof. In addition, as noted earlier, the pre-revolutionary French law was a mixture of custom — primarily the *Coutume de Paris*, which had become the *droit commun coutumier* of France — and Roman principles. Moreover, legislation had made the Québec law develop in the same direction as France. Thus the notion of ownership prevailing at the time of codification in Québec, was the Roman concept of ownership.[43]

---

38. G. CORNU, *Droit Civil : Introduction, les personnes — les biens*, 2nd ed., Paris, Monchrestien, 1986, pp. 381 *et seq.*

39. W.W. BUCKLAND, *A Textbook of Roman law*, 2nd ed., Cambridge, Cambridge University Press, 1932, pp. 186-189; J.E.C. BRIERLEY & R.A. MACDONALD, *Québec Civil Law : An introduction to Québec Private Law*, Toronto, Edmond Montgomery Publications, 1993. However the civil law creates a fiction and declares this right to be corporeal; See P.B. MIGNAULT, *Le droit civil canadien*, t. 2, Montréal, Wilson & Lafleur Ltée, 1916, p. 395, D.-C. LAMONTAGNE, *Biens et propriété*, 2nd ed., Cowansville, Les Éditions Yvon Blais Inc., 1995, p. 18. But see G. CORNU, *id.*, p. 350, para. 919 which seems to suggest that it is incorporeal.

40. A.-M. PATAULT, *op. cit.*, note 14, p. 110.

41. This has now been replaced by article 947 of the *Civil Code of Québec* 1994 which reads "Ownership is the right to use, enjoy and dispose of property fully and freely, subject to the limits and conditions for doing so determined by law". Further comment will be made on the change in wording later in this essay.

42. For a discussion of the controversial issue of the introduction of the English law relating to land law, in particular in respect of free and common socage, see John E.C. BRIERLEY, "The Co-existence of Legal Systems in Québec : 'Free and Common Socage' in Canada's 'pays de droit civil'," (1979) 20 *C. de D.* 277-287.

43. M. CANTIN CUMYN, *loc. cit.* note 9, pp. 375-377.

Article 361 of the C.C.S.L. contains the same definition of ownership as article 406 of the C.C.L.C. As in Québec, this was a codification of the law in force at the time of the promulgation of the Code in 1879.

This definition of ownership has been subjected to much criticism, and justifiably so. The owner is not entitled to enjoy his land in the "most absolute manner". This language was rhetoric coming out of the revolutionary sentiments and imported by Québec and St. Lucia. There are, and must be, restrictions imposed in order that his enjoyment does not affect the enjoyment by others of their land. The articles themselves hint at such restrictions. But more importantly, his powers are being increasingly restricted, as the law of property is used to perform a social function. In recognition of this, the new Québec Code tempers the description of the extent of powers that the right of ownership confers.[44]

B. THE NATURE AND CHARACTERISTICS OF OWNERSHIP

The foregoing shows that idea of ownership in the common law, insofar as it exists, is based on the multi-proprietorship system that was feudalism. Whereas that in France, and Québec and St. Lucia which were based on it, is the adoption of the Roman concept of *dominium*. With this background it is now possible to embark on a contrast of the nature and characteristics of each notion.

1. The nature

The nature of the common law and civil law ownership differs by virtue of (a) the existence of an obligation, (b) the notion of property and (c) the object of the right.

a) The existence of an obligation

Perhaps the key to understanding the difference in the classification structure of the two traditions is that while ownership in the common law comprises property and obligation, that of the civil law consists of property only.

As stated above, the English maintained the feudal framework of landholding even though they modified it somewhat. The modifications merely deemphasized the obligations, and restricted the types that could be imposed. They did not do away with them altogether.

One writer comments on the effect of the principal legislation importing changes, in this way : "the fundamental principles of the law of ownership of land remain the same as before the legislation of 1925. Land is still the object of feudal tenure; the Sovereign remains the lord paramount of all the land within the realm; every parcel of land is still held of some lord [...] and the greatest interest which any subject can have in land is still an estate in fee simple and no more".[45] Another states, "Our law has preferred to suppress one by one the practical consequences of tenure rather than to strike at the root of the theory of tenure itself. It remains pos-

---

44. *Civil Code of Québec*, art. 947. See note 40 *supra*.

45. C. WILLIAMS, "The fundamental principles of the present law of ownership of land," (1931) 75 S.J. 848.

sible, therefore, that in rare cases not covered by the statutory reforms recourse may have to be had to the feudal principles which still underlie our land law".[46]

Thus, as was the case in the feudal regime, there is an obligation to the lord that is superimposed on the holding of the land. It is an incident of landholding, not an accessory contractual obligation. Although the incidents or obligations no longer have any practical importance,[47] the recognition of the existence of this obligation is essential to the understanding of the concept of estate, and in order to distinguish ownership under the common law and the civil law.

The civil law concept of ownership, inspired by sentiments exactly opposite to that underlying the English law, involved the liberation from those obligations. The property/obligation dichotomy, characteristic of feudal landholding, was transformed into pure property. The return of the feudal obligations is prevented from reoccurring in Québec by article 59 of the "*Seigniories's Act*"[48] which prohibits perpetual rents on land, and the imposition of any obligation to pay a money or perform a service or any other kind of dues similar to those of the feudal period. This prohibition on perpetual rents, as completed by a subsequent Act,[49] was incorporated in articles 389-394 of the C.C.L.C. 1866. A similar prohibition is contained in articles 347-350 of the C.C.S.L.

b) The notion of property

The property aspect of the common law ownership, and the pure property in the civil law are not themselves identical notions. This is an important distinction since it determines what is considered a proprietary right, and subject to the law of property, as opposed to a mere personal right in each tradition.

In the civil law it will be remembered, the notion of ownership is confounded with the thing itself. The right is *in* the land, considered as establishing a *direct link* between the person and the thing. It is referred to as a real right, the consequences of which are that it is enforceable against all persons, and it accords among other benefits a *droit de suite* and a *droit de préférence* to the holder. To determine whether a right is proprietary the civilian lawyer considers whether it is a direct right in the thing.

In the common law on the other hand, as pointed out earlier, one is not regarded as owning the land itself, but an estate in it. The right is *against* or pertaining to the land, which signifies that this right is *enforceable against all persons*. The English realty/personalty distinction is therefore made, not as in the civil law, on whether the right creates a direct link (*jus in re*) or not (*jus in personam* and *jus ad rem*), but on the basis of whether it is enforceable against the whole world (*jus in rem* or realty) or not (*jus in personam* or personalty). It is true that a real right is

---

46. R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, p. 37.

47. "For practical purposes, therefore, the law of tenure is no longer of assistance in solving problems about rights over land. The owner in fee simple is regarded as absolute owner, and the fundamentals of his title depend on principles which have nothing to do with tenure", *id.*, p. 37. "Tenure is a notion which the student is bound to encounter when beginning the study of property law. He must be warned not to devote much attention to it", F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, p. 80.

48. *Seigniories' Act* S.R.Q. 1941 c. 321. This Act has not been reproduced in the revisions of 1964, 1977, nor the permanent revision commenced in 1980 of the laws of Québec. It is nevertheless still in force : see R.S.Q. 1964, vol. V, Concordance Table, p. 34.

49. *Acte concernant les rentes foncières, les rentes constituées et les rentes viagères*, S.R.B.C. 1861, c. 50.

also enforceable *erga omnes*, but this is merely a consequence of its real nature, not, as in the case of realty, the essence of it. To determine whether a right is proprietary therefore, the common lawyer considers whether it can be enforced against the whole world or not. Thus, as will be seen later, what was once considered personal rights evolved into proprietary rights when they were made enforceable against practically the whole world.[50]

The lease, discussed below, provides a striking example of how these two approaches can lead to different results in classification.

c) The object of property

The common law ownership, *tenure in free and common socage for an estate in fee simple absolute in possession*, is an estate. It is categorised as a hereditament, in particular a corporeal hereditament. Hereditaments also comprise rights, for example easements and profits, which, though not estates, are considered rights of property. They are called incorporeal hereditaments, to distinguish them from estates in land.[51] They are hereditaments or rights of property because the holder is considered as having seisin, and is therefore entitled to recovery *in specie*, not just damages.

As indicated in the previous section, owner is used in the common law to describe not just the person entitled to an estate in land, but also of all other hereditaments. The object of ownership is therefore always incorporeal.

In the previous section it was seen that ownership in the civil law was a real right, a right in the thing itself. It links the person to the thing directly, in contrast to the personal right which links the person with another. A material object is a necessary implication of the civilian ownership. Ownership of an incorporeal thing is not, strictly speaking, accurate in the context of civil law. A distinction is made between the *owner* of things, and the *holder* of rights.

It should be pointed out however, that it has been argued[52] that ownership should be used to refer to the exercise of power not only over physical things, but also over things which are the product of the intellect. In other words, that the object of ownership may be incorporeal. This view is part of a theory that all rights, including the right of ownership, is best explained as a relationship between persons. The present classification into real and personal rights is criticised as being defective in that it fails to deal adequately with mixed rights (like leases) and incor-

---

50. This is the case with for example, the equitable interest of the beneficiary of the trust. Originally his rights, being only in equity, were merely personal against the trustee, because equity acts *in personam*. Eventually his right was made enforceable against everyone except the *bona fide* purchaser for value without notice. His right was thenceforth considered proprietary — an equitable estate in land, contrasting with a legal estate which is enforceable against everyone. On the nature of the right of the beneficiary see the recent article, F. SONNEVELDT, "The Trust — An Introduction", introduction to F. SONNEVELDT & H.L. VAN MENS, eds., *The Trust: Bridge or Abyss Between Common and Civil Law Jurisdictions?*, Boston, Kluwer Law and Taxation Publishers, 1992, 1-17, p. 6.

51. In common law, because of the similarity between the fee simple absolute in possession, and ownership in the sense of appropriation, the fact that it is an estate in land that is owned, and not the land itself, is a distinction that is usually glossed over. The designation of property in land as corporeal is such an example.

52. See for example, S. GINNOSSAR, *Droit réel, propriété et créance, élaboration d'un système rationnel des droits patrimoniaux*, Paris, 1960.

poreal things that are sources of value (like intellectual property).[53] These criticisms notwithstanding the *summa divisio* of real and personal rights remain important in the civil law, and was recently reaffirmed by its adoption in the new Québec Code.[54]

2. The characteristics

Owing to the particular nature of ownership in the common law and the civil law, it displays contrasting characteristics in each tradition which are useful to distinguish the two notions.

a) The extent of the right

"Ownership" in civil law is, by nature, absolute. Absolute here is used to mean the *total* appropriation of the thing, and the consequent absence of an intermediary between the owner and the land. In so doing the civil law eschews a distinction between the appropriation of land and that of other objects. Ownership entitles one *directly* to "*plena in re potestas*" — full power — in the land. This full power has been summarised by one writer as being the right to the full economic and social benefit that the land affords.[55] In traditional theory, as indicated earlier, it comprises *usus*, *fructus*, and *abusus*.[56]

Usus denotes the right of the owner to use the thing personally according to its destination. *Fructus* denotes the right to take the fruits of the land, and to keep them or consume them. Fruits is used here in its legal sense, meaning the periodic returns from the land which do not decrease its substance. They are of three types :[57] natural,[58] industrial,[59] and civil.[60] "Consume" is here used in the legal sense

---

53. For a discussion on intellectual property see generally G. CORNU, *op. cit.* note 38, pp. 653-666; F. ZENATI, *Les Biens*, Paris, Presses Universitaires de France, 1988, p. 58, comments on the French legislation expressly creating *propriété incorporelle*.

54. See J.E.C. BRIERLEY, "Regards sur le Droit des Biens dans le Nouveau Code Civil du Québec", (1995) *R.I.D.C.* 33-49; the author comments on whether by the change in the definition of ownership effected by the C.C.Q. 1994, whereby the word "property" is used instead of "thing" as the object of the right, it is intended that the object of ownership be either corporeal or incorporeal.

55. G. CORNU, *op. cit.* note 38, p. 389.

56. Although article 544 C. civ., article 406 of the *Civil Code of Lower Canada* (C.C.L.C.), and art. 361 of the *Civil Code of St. Lucia* (C.C.S.L.) contain only the terms *enjoy (jouir)* and *dispose (disposer)*, the former is regarded as encompassing both *usus* and *fructus* and the latter, as denoting *abusus*. G. CORNU, *id.*, pp. 386 *et seq.*; P.B. MIGNAULT, *Le droit civil canadien*, t. 2 & 9, Montréal, Wilson & Lafleur Ltée, 1916, pp. 477 *et seq.* (For the view that "disposer" is not equivalent to *abusus*, see F. ZENATI, *op. cit.* note 41, p. 113, and F. ZENATI, "Propriété et Droits Réels", (1996) *R.T.D. civ.* 166-179. The *Civil Code of Québec* 1994, art. 947, now separates ownership expressly into the right to "use", "enjoy" and "dispose".

57. The C.C.Q. has replace this classification of three types of fruits with the following classification : capital fruits and revenues : arts 908-910 C.C.Q.

58. The spontaneous produce of the soil, and the produce and offspring of animals : art. 583 C. civ., art. 448 C.C.L.C., art. 399 C.C.S.L.

59. Those which are obtained by the cultivation or working of the soil : art. 582 C. civ.; art. 448 C.C.L.C., art. 399 C.C.S.L.

60. These include the rent of houses, interest on sums of money, and arrears of rents : art. 584 C. civ. : art. 449 C.C.L.C., art. 400 C.C.S.L. Although not strictly fruits, reclassed as such because they are periodical and do not diminish the substance of the thing. They are civil because it is the civil law that deems them to be fruits : W. de M. MARLER, *The Law of Real Property*, Toronto, Buroughs, 1932, p. 186.

meaning material consumption, or legal consumption. *Abusus* refers to the right to perform material acts of destruction and legal acts of disposition in relation to the land. Material acts of destruction refers to, for example, demolishing, or burning. Legal acts of disposition refers to alienation of the land, or the creation of real rights, whether principal or accessory. These rights are taken to imply certain lesser powers, for example the power to renovate, and the power to perform acts of administration.[61]

However, the qualification made earlier concerning the restrictions on the enjoyment of the rights of the owner is reiterated. Ownership is therefore a general right. The owner can, in theory, do everything. Restrictions must be imposed in order to limit his powers.

One of the consequences of this absolute appropriation is that the right continues to exist as long as the object exists. For this reason, ownership in civil law is also regarded being perpetual.[62]

Ownership in common law does not represent such an absolute concept. The proprietor of land in England, in contrast to the owner of an object, is not considered as appropriating the land absolutely. As is clear from the foregoing, land is held in tenure and for a period, which though uncertain, is limited. It is not appropriated.

It is acknowledged that this is a distinction with little practical difference at present. Changes in the law have caused the tenant in fee simple absolute in possession to have an array of powers over the land, and to be subject to statutory restrictions, similar to that of the owner in civil law. Nevertheless, the notion of ownership, tenure of an estate, is, by its nature, not absolute.[63]

b) The level of abstraction

There is no concept of an abstract ownership in the common law. It is relative. This is the result of the notion of seisin discussed earlier. The common law did not know an abstract right of ownership. As stated earlier, the person held entitled to exercise the rights associated with ownership was the person seised, regardless of whether seisin is wrongful or rightful. In a dispute concerning title the remedies available did not enable the determination of the issue in an abstract manner. All that was decided was which of the disputing parties had a better right to immediate possession. It was not relevant that there was a third party, not party

---

61. G. CORNU, *op. cit.* note 38, pp. 388-9.

62. G. CORNU, *op. cit.* note 38, p. 394 emphasizes that the quality inheres in the nature of ownership by the statement, "Que serait la propriété si elle était temporaire? Ce serait la négation de la propriété". He cites the following four other reasons for attributing this quality to ownership : it is hereditary, cannot be prescribed, cannot be acquired by force and is constrained only by the continued existence of its object. See also D.-C. LAMONTAGNE, *op. cit.* note 40, p. 132; MARLER does not recognise this as a characteristic of ownership, because he notes the existence of a temporary ownership which he describes as "incomplete" : W. de M. MARLER, *op. cit.* note 60, p. 32. However this conclusion is derived because he includes as owners the emphyteutic lessee and the institute of a substitution, which are not generally regarded as owners. See also A. COSSETTE, "Considerations sur le droit de propriété et son évolution", (1968) 70 *R. du N.* 277; A. BOUDREAU-OUELLET, *loc. cit.* note 4, p. 169.

63. R.M. MEGARRY & H.W.R. WADE note that, "To Joshua Williams' statement that "the first thing the student has to do is to get rid of the idea of absolute ownership", Maitland added "and the next thing the student has to do is painfully to reacquire it". R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, p. 59.

to the suit, who really had tenure.[64] Thus in practice, ownership is not the tenure of an estate in land, but the relative concept of the better right of possession.[65]

The civil law, in contrast, conceived by intellectuals and fashioned by doctrine, is abstract. It is the central institution of the civil law of property and of paramount importance in its systemisation. From this concept in which all possible rights and powers over land reside, which is therefore valid against the whole world (*erga omnes*), the civil law elaborates its whole theory of the allocation of rights in land. Its central importance is reflected in the quest of Québec jurists to locate ownership in the context of the trust, as it existed under the former Québec Civil Code, in order to integrate it into the existing civilian property structure. The Québec Trust is discussed later.

c) The number of owners

Another feature distinguishing the common law and civil law idea of proprietorship is the number of proprietors that can exist concurrently in relation to the same parcel of land. This is the most obvious and most frequently cited consequence of the concept of the civilian ownership and common law theory of estates.

Bearing in mind that the owner is a tenant for an estate, it is seen that several tenancies can exist on the land concurrently, through the process of subinfeudation and the creation of settlements.

Subinfeudation, it will be remembered, is where a tenant grants an estate to another, who in turn grants a tenancy to yet another. There is in theory no limit to the number of tenancies that can be created in this way. The result of subinfeudation is an estate in possession, and a series of estates in reversion, each one of lesser duration than the one out of which it is carved. As indicated above, although in theory the tenures that existed in 1290 still exist today, there is little or no evidence of these tenures today. In practice they do not play an active role in transactions relating to property. In theory, the presumption that *nulle terre sans seignior*, and that by which the Crown is held to be the lord of the land in absence of proof of any other, have the effect that all persons are deemed to hold from the Crown.

A settlement is the creation of a succession of estates in a single deed or will. Thus land granted to A for life, remainder to B and his heirs was settled land, in which A had a life estate and B a fee simple in remainder. Both of them were owners.[66] In contrast to subinfeudation therefore, this created an estate in posses-

---

64. This decision as to who was has the better right to possession, as opposed to who is the absolute owner, has its origins in early real actions which bound the parties alone : W. HOLDSWORTH, *op. cit.* note 21, p. 89.

65. See R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 106-108. See also F.S. PHILBRICK, "Changing Conceptions of Property in Law", (1937-8) 86 *U. of Pa. L. Rev.* 691, p. 702 : "[...] title is no more than relatively better right to immediate possession [...]"

66. Since 1882, by the *Settled Land Act* 1882, 45 & 46 Vit. c. 38, Parliament has ensured that, no matter how far into the future the interests may arise, they are merely interests in a fund. This may be invested in land, but the land itself can be sold at any moment, and the beneficial interests switched to the proceeds of sale and any investment thereof : F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, p. 176. It should also be noted that settlements are subject to the Rule against Perpetuities. The effect of this rule is to invalidate interests that vest too remotely. The classic statement of the rule is that of Gray, derived from doctrine and several cases, and is that : No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest : J.C. GRAY, *Rule against Perpetuities*, 4th ed., s. 201. For a discussion on settled land see R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, p. 311 *et seq.* For a discussion on the Rule against Perpetuities see J.H.C. MORRIS & W. BARTON LEACH, *The Rule against Perpetuities*, 2nd ed., London, Stevens & Sons, 1962.

sion and a series of estates in remainder. Settlements gives rise to a feature, characteristic of the common law, and not seen in the civil law : latent ownership. During A's tenure, B's interests are latent.

Such succession of interests can no longer exist *at law*. Before 1926, when there were three different freehold estates which could exist in possession, in remainder, or in reversion, all of them could be created in any combination. Since 1926, by virtue of section 1 of the *Law of Property Act* 1925, there is only one legal estate, the fee simple absolute in possession. Fee simple absolute in possession is not a limited estate, and so no interest can be created after it. However, settlements can still be created. The estates will merely "take effect as equitable interests".[67]

The fragmentation of title into equitable and legal ownership, discussed above, also creates a plurality of owners in the land. So too does the split of the benefits of the land into hereditaments, each being treated as a separate object of ownership.

The hallmark of ownership in the French civil law in contrast, is its exclusive character. This characteristic is a direct consequence of its absolute nature. Since "ownership" means absolute appropriation, there can be only one "owner" in respect of each thing. This does not mean that only one person can have rights in the property. "Ownership" can be split, that is to say, several persons may share the right of ownership. Also, the "owner" may give parts of his total bundle of rights to other persons. However in both instances (discussed more fully later) there is still one right of ownership in respect of a parcel of land.

d) The relation with other rights in the property structure

This section examines the structure or map of rights resulting from each conception of proprietorship.

In the doctrine of estates ownership does not exist as a right separate and apart from other rights in land. All are equally interests in land. They are the component parts of the total powers that exist in relation to the appropriation of the land, each treated as an independent entity, an object of separate ownership. From the previous sections it can be seen that, as pointed out by one writer, this is the result of the fragmentation of title accompanying the notion of tenures, which created a mental atmosphere favourable to the division of ownership on other lines also.[68]

The land law is therefore without a centre. It comprises many technical rules about estates, legal and equitable, and about the incorporeal hereditaments.[69] Although the principles have evolved over the years they still have at their core, the historical concepts from which they were derived.[70] They therefore cannot be

---

67. *Law of Property Act* 1925, s. 1. (U.K.). R.M. MEGARRY & H.W.R. WADE explain that the result is that the fee simple absolute in possession, the legal estate, is held upon trust to give effect to the lesser interest in equity : *id.*, p. 124.

68. F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, p. 81.

69. See R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 815 et seq.; J.H. BAKER, *op. cit.* note 19, 281.

70. F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, pp. 232-233 states in respect of the mortgage, discussed more fully later in this essay : "The whole conceptual structure of mortgages has become little more than a nuisance. [...] Nothing would be lost if the notion that the mortgagee has an interest in the mortgage property were entirely given up and the existence of the equity of redemption entirely disregarded".

understood without regard to their history, which still forms an integral part of English land law. These corporeal and incorporeal hereditaments are contrasted with personalty from which the land law was separated. The distinction was made because a different set of principles applied to each. For example, future interests could only be created in realty at law, realty had to be conveyed by deed, and it devolved on the heir instead of the next-of-kin.[71]

The civil law notion of an absolute ownership necessarily means that there is no other right like it. Other rights in land are placed in two groups : they are either modes of ownership (for example co-ownership and superficie) or dismemberments of it (for example use, usufruct, emphyteusis and servitudes). In contrast to ownership and its modes which are the *jus in re*, each dismemberment is *jus in re aliena* — a right in the land owned by another. The question is often raised whether the enumeration of rights in the Code is limitative, in other words that there can be no other real rights than those mentioned in the Code.[72]

II. DISTINCTIONS BETWEEN PARTICULAR INSTITUTIONS

In the treatment of the lease, the mortgage/hypothec and the trust, the consequences of the differing conceptions of ownership is conspicuous.

A. THE LEASE

The peculiar nature of a lease makes it an anomaly in both the civil law and the common law. The doctrine of estates and that of the unitary-absolute ownership have led to interesting results in its classification in one tradition as compared to another.

In the common law the lease is defined thus : "A lease is a document creating an interest in land for a fixed period of certain duration, usually in consideration of the payment of rent. The interest so created is called a *term of years*, but it is also often referred to as a *lease or a leasehold interest*".[73]

In contrast, a lease is defined in the civil law as, "a *contract* by which a person, the lessor, *undertakes to provide* another person, the lessee, in return for a

71. Owing to the development in the doctrine of tenures and estates and succession initiated by the 1925 legislation, there is very little real difference between the two categories and at least one author advocates that the two should be combined in a law of property, instead of a law of real property : "Although the *Law of Property Act* 1922 described itself as 'an Act to assimilate [...] the law of real and personal estate', the last sixty years have seen few text-books take the hint. [...] There are, of course, irreducible differences between movable and immovable property, [...] but there is a great deal of doctrine common to both", F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, at p. vi; see also pp. 19-20 and 76-78, 225-226.

72. M. CANTIN CUMYN, "De l'existence et du régime juridique des droits réels de jouissance innommés : Essai sur l'énumération limitative des droits réels", (1986), *loc. cit.* note 48. This is advanced as one argument against the introduction of trusts in a civil law jurisdiction : V. BOLGAR, "Why No Trusts in the Civil Law?", (1953) *Am. J. Comp. L.* 204-219.

73. R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, at p. 628, emphasis added. Both the document and the interest is referred to as a lease.

rent, with the enjoyment of a movable or immovable property for a certain time [...]"[74]

Having regard to the common law structure of property, the rights conferred by the common law lease is a right of property — an interest in land. That of the civil law concept is clearly not a right of property. It is merely personal and not a real right.

It is evident from the common law definition, that the lease has two aspects : the "interest in land" or "term of years" or "leasehold", and the obligation to pay a rent. The "interest in land" or "term of years" or "leasehold" is the same kind of right as the fee simple, fee tail or life interest. They are all rights to the land for a term of years. Thus like these interests, the lease is an estate. However, in contrast to the others which have a term that is limited but uncertain, the lease has a term that is limited and certain. Thus it differs from these interests in that it is not a freehold estate; it is considered less than a freehold.

The obligation to pay the rent is an incident of the tenure between the lessor and the lessee, or more appropriately, the landlord and the tenant. Incidents of tenure as indicated in the above, were the feudal services owed to the lord in consequence of the possession of land by the tenant. Having been commuted to money payments and fallen into desuetude in respect of the freehold estates, the leasehold estate is the only instance where it survives. In recognition of the nature of this rent as an incident of tenure, it is categorised as "rent service", and distinguished from "rent charge". A rent charge is the rent paid for the possession of land where there is no relationship of landlord and tenant. It is a corporeal hereditament, as opposed to the lease, which is not a hereditament at all, but personalty, in particular, chattels real.

This peculiar status of leases in the common law as an estate in land, but not a hereditament, requires some explanation.

The present status of leases as chattels real is the result of its evolution. Initially, leases were no more than contractual rights. The tenant had little protection from dispossession. Although he could enforce his right to possession against the lessor and his grantees by virtue of the writ *quare ejecit infra terminum*,[75] he only had a right of damages against the rest of the world by virtue of the remedy known as *de ejectione firmae* (the action in ejectment). In other words he had no protection *in rem*.

The reason for this state of affairs has been identified[76] as being the original purpose of the lease. In contrast to the then prevalent forms of feudal land-

---

74. C.C.Q., art. 1851, emphasis added; (This is to be distinguished from "leasing" in articles 1842-1850 which refers to the commercial credit transaction which is restricted to movables). It should be noted that this definition was first introduced in 1974 (1973, c. 74, art. 1). It emphasizes the contractual nature of the lease more than did its predecessor, introduced in 1866. This is particularly evident in the French version of the text. Art. 1851 reads, "Le louage, aussi appelé bail, est le contrat par lequel une personne, le locateur, *s'engage* envers une autre personne, le locataire, *à lui procurer*, moyennant un loyer, la jouissance d'un bien, meuble ou immeuble, pendant un certain temps [...]"; Art. 1601 of the 1866 Code in contrast reads, "Le louage des choses est un contrat par lequel l'une des parties, appelée locateur, *accorde* à l'autre, appelée locataire, la jouissance d'une chose pendant un certain temps, moyennant un loyer ou prix que celle-ci s'oblige de lui payer", emphasis added. See CIVIL CODE REVISION OFFICE — COMMITTEE ON THE LAW OF LEASE AND HIRE OF THINGS, *Report on the contract of lease and hire of things*, Montréal, 1970.

75. Invented in the 1230's by William Raleigh : J.H. BAKER, *op. cit.* note 19, p. 338.

76. *Id.*, pp. 387-340; see also R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, App. 1.

holding which were for a life or a succession of lives, and thus were family interests, the lease was a financial interest. It was given as security by the lessor for money loaned by the lessee. The lessee reimbursed himself from the land. When this type of lease decreased in popularity, another, the husbandry lease became prevalent. Under this lease a farmer with insufficient funds to purchase an estate, could pay the rent for the possession of the land by the fruits of his labour. Thus in neither case was it intended to transfer any interest in land to the lessee. Hence the view of it as a contract.

However, in the 15th century the need to protect the lessee grew with the importance of this contract. Under pressure, the rules preventing the recovery of possession by the dispossessed lessee gave way, and at the turn of the 16th century, lessees were allowed to recover possession, in addition to damages. They thus had what was equivalent to an action *in rem*. Consistent with the above mentioned theory of *ubi remedium, ibi jus* and the nature of rights in property in common law, he was considered as having an estate in land. Since there can be no estate without tenure, he was regarded as holding in tenure from the lessor. Although now tenure for an estate, it was not classed as property (realty), with the other established categories. It remained a chattel. In recognition of the remedy *in rem*, it was deemed a chattel real. Thus its status as personalty and not realty, is, like much of English law of property, a result of history and not of logic.

Today, the leasehold interest is the only other interest (the first being the fee simple absolute in possession) which, by virtue of the *L.P.A.* 1925, can exist as a legal estate.

The civil law lease is not a real right, but a personal right created by contract. The obligation to pay the rent is contractual. It is what in the Canadian legal community is called the prestation[77] owed by the lessee. The right to occupy the premises is not a charge on the land, but the right to the prestation of the lessor, who has the obligation to provide enjoyment of the property. In other words the rent and the occupation of the land are the obligations of this bilateral contract of successive performance.[78]

However the facts that (a) the lessee's right is enforceable against the whole world (*erga omnes*), not just the lessor, and (b) his right may be enforced against anyone purchasing the premises from his landlord (right to follow) has caused some doubts as to its contractual nature and sparked much debate, in France as well as in Québec.[79]

The balance is in favour of the view that it is an obligation. This is not only justifiable, but the necessary result of the structure of property law, which derives from the civil law concept of ownership. As is pointed out by Jobin,[80] it is the relationship between the lessor and the lessee that determines the nature of the lease. The addition, to a personal contract, of privileges relating to an object, does not change the nature of the contract, nor the rights thereunder. The fact that the lessee is given protection which in summary makes his right enforceable against

77. See C.C.Q., art. 1378.

78. See C.C.Q., arts. 1380 and 1383.

79. See for example J. DAINOW, *La nature juridique du droit du preneur à bail dans la loi française et dans la loi de Québec (Canada)*, Paris, 1931. For further examples, in relation to both France and Québec, see P.-G. JOBIN, *Traité de droit civil — Le louage de choses*, Montréal, Les Éditions Yvon Blais Inc., 1989, p. 47.

80. P.-G. JOBIN, *id.*, p. 48.

third parties and is given a right to follow, does not change the fact that at the heart of the contract is the lessor's obligation to procure the lessee's enjoyment of the property. This negates the possibility of a real right. The real right has a passive subject. In other words it does not entitle the holder to require any act from someone else. Only that others respect the right. Furthermore, it is not from the land that the obligation is owned, but from the lessor; notwithstanding that the lessor's obligation concerns the land. In other words, the land is not the object of the right, merely the seat of it.[81]

The contractual character of the lease, was emphasized in Québec by reform of 1973, which *inter alia*, amended the definition of the lease.[82]

While having the thing as the seat of the right is not sufficient to transform it into a real right, that is to say, *jus in re aliena*, it is sufficient to make it more than the ordinary personal right, *jus in personam*. In respect of an ordinary *jus in personam*, the whole of the property of the debtor is the common pledge of his creditors for the performance of his obligations. Not a particular one. The identification of a particular property as the seat of the right means therefore that the lease (and the priority) is a special kind of personal right. Its special nature is captured in the latin adage *jus ad rem*.[83]

The relationship between the lessor and the lessee is therefore regulated in civil law by contractual principles. The principle of consensualism and that of privity of contract being two important examples. However, the Code does establish special rules necessitated by the particular nature of the contract. They are concerned for example with establishing the scope and extent of the obligations of the lessor and the lessee. However where the normal contractual rules are unsatisfactory the Code establishes exceptional rules.[84]

The scope and obligations of the lessor and the lessee in common law in contrast, being governed by the law of property, the scope and extent of their obligations — referred to as covenants — to each other is determined by the principles of "privity of contract" and "privity of estate".

The privity of contract operates in the same way as in the civil law to make obligations enforceable only by and against contracting parties. Obligations are enforceable by and against parties between whom there is no privity of contract, only where there is a relationship of landlord and tenant, or, using the common law jargon, where there is privity of estate. For example, as between the assignee of the lease, and the lessor, or between the purchaser of the lessor, and the lessee. The benefit and burden of the convenants are deemed to "run with the land" because they are seen as part and parcel of the estate. Enforceability is restricted

---

81. The lease is not unique. There are other personal rights which are related to a specific thing in this way, for example, the deposit : art. 80 C.C.Q. *et seq.*; the loan for use : art. 2317 C.C.Q. *et seq.*; and the priority : art. 2651 C.C.Q. *et seq.*; For an examination of the nature of a priority see D. PRATTE, *Priorités et Hypothèques*, Sherbrooke, Revue de Droit Université de Sherbrooke, 1995, pp. 317 *et seq.*

82. See CIVIL CODE REVISION OFFICE, COMMITTEE ON THE LAW OF LEASE AND HIRE OF THINGS, *op. cit.* note 74, p. 8.

83. Priority is not called *jus ad rem* but this is what it appears to be by nature.

84. For example the principle of privity of contract (*effet relatif du contrat*), the lessor has no direct recourse against the sub-lessee for breaches by the latter of obligations in the principal lease. Thus the Québec Code ameliorates the harsher effects of this principle through articles 1620 C.C.L.C. (art. 1933 C.C.Q.) and 1655.1 C.C.L.C. (art. 1934 C.C.Q.).

therefore to those covenants which are said to "touch and concern the land", like payment of rent or effecting repairs.[85]

B. THE MORTGAGE/HYPOTHEC

Whether it is the common law or the civil law, land, in addition to being a thing to be used, or to be traded, is also used as security for obligations. This refers to a transaction pursuant to which the land or its value, in whole or in part, is reserved, to be appropriated by the creditor, in the event the obligation owed to the creditor is not performed. The mortgage and the hypothec respectively, are the principal institutions used in the common law[86] and the civil law[87] for this purpose.

The mortgage and the hypothec of immovables produce the same reality. The borrower remains entitled to use, enjoy or dispose of the property (subject to certain restrictions aimed at preserving the value of the security). The lender, on the other hand has no immediate rights in the land, being entitled, only in the case of the default of the debtor to fulfill the obligation (usually a loan) secured by the mortgage or hypothec, to use the land to satisfy the debt.

A closer look at these institutions will reveal that the common law and civil law have used two entirely different methods of achieving this end. The nature of the mortgage and the hypothec of immovables are far from similar, and reflect in the common law the absence of, and in the civil law the reliance on, an abstract concept of ownership.

---

85. For examples of covenants which are deemed to touch and concern the land see R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 744-745.

86. Other institutions in the common law which facilitate the use of land as a security are (1) the "charge" : while no charge exists at common law, there is a statutory legal charge, introduced in 1925 by the *Law of Property Act* 1925, and an equitable charge; and (2) the "equitable lien" : the lien at common law gives the creditor the right to retain the property of the debtor until the debt is paid; it does not give him the right to sell and is extinguished if possession is given up; it is not a security but merely a means of coercing the debtor into payment; the equitable lien not only gives a right to the creditor to maintain possession but also to apply to the court for a declaration of charge and for an order for sale of the land. The "pledge or pawn", which gives the lender certain powers of sale, is not used in the case of land as it requires that the lender be put in possession, although title remains in the borrower : R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 913-914. See also P. JACKSON, "The Need to Reform the English Law of Mortgages", (1978) 94 *L.Q.R.* 571 for a criticism of the variety of forms of mortgage and suggestions for reform.

87. Other institutions in the civil law which facilitate the use of land as security are (1) the "privilege" : though this is created in special circumstances established by law, and thus is not consensual, the creditor is entitled to be paid from the proceeds of sale in priority to chirographic creditors; (2) The pledge, which is referred to as the "antichrèse" in respect of immovables; this required depossession and was very rarely used in Québec. Since the coming into force of the new Québec Civil Code in 1994, the only form of security that can be created is the hypothec or a "prior claim". However the institution has been modified and most of the sureties which existed under the old Code, exist under the new Code in the form of a hypothec or a "prior claim". It should be noted that the term "pledge" is used as an alternative to "hypothec of movable with dispossession". For a list of the comparative security devices under the old Code and the new Code, see J.B. CLAXTON, *Security on Property and the Rights of Secured Creditors under the Civil Code of Québec*, Cowansville, Les Éditions Yvon Blais Inc., 1994, p. 11. See generally L. PAYETTE, *Les sûretés dans le Code civil du Québec*, Les Éditions Yvon Blais Inc., 1994; D. PRATTE, *op. cit.* note 79; J. DESLAURIERS, *Précis de droit des sûretés*, Montréal, Wilson & Lafleur Ltée, 1990.

Nature

The common law mortgage is a good example of the innovation by the common lawyers in manipulating the existing institutions to attain a desired goal. However it also illustrates quite well that the paramountcy of pragmatism over a rational systematisation in its historical evolution, left a legacy of unnecessary complexities in the contemporary common law.

The unnecessary complexity is evident from the definition of the mortgage, which is probably incomprehensible to the civilian. Megarry & Wade state that, "The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, i.e. that upon repayment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be reconveyed".[88]

In other words, to use his property as security, the landholder in the common law (mortgagor) has to transfer his interest in it — whether equitable or legal — to the lender (mortgagee)! Not surprisingly, this peculiar method of creating a security, derives from the historical methods of raising money. Thus yet again common law legal history must be delved into.

Charges were not known at common law. Resort was therefore had to a pledge (gage) of the land. The lender was given possession required to constitute a pledge, by giving him an interest in the land.[89]

Originally, the interest given was a lease for years to the lender. In the 13th century two new forms developed. The first was a lease of the land for years to the mortgagee, with a proviso that if the debt was not paid, the mortgagee would be entitled to the fee. The other was an immediate conveyance of the fee to the mortgagee. Upon payment of the debt on a certain date, the mortgagor would be entitled to "re-enter" and "determine" the estate of the mortgagee, or the conveyance was deemed void, depending on what was stipulated in the conveyance. By the 17th century, and up until 1926 when the *Law of Property Act* came into force, the usual form of mortgage was the conveyance in fee simple, with a covenant to reconvey the property, if the money was paid on the fixed date. The difference in this last stage was that upon payment the mortgagor received a document reconveying title to him, which facilitated proof of his title. If the mortgagor had only a leasehold interest, the mortgage took the form of an assignment of the whole lease or a subdemise.

Under the mortgage therefore the mortgagee had an estate in the land. On default by the mortgagor, he (the mortgagee) would gain the mortgagor's whole estate in the land, and the debt would not be deemed extinguished. The mortgagor on the other hand, had merely the right to redeem the land, providing the loan was paid on or before the date specified in the contract.

---

88. R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, at p. 913, citing as authority the House of Lords decisions of *Noakes & Co. Ltd.* v. *Rice*, [1902] A.C. 24, 28, approving *Santley* v. *Wilde*, [1899] 2 Ch. 474, *per* LINDLEY M.R.; also, *Swiss Bank Corporation* v. *Lloyds Bank Ltd.*, [1982] A.C. 584, 595, *per* BUCKLEY L.J.

89. The word "mortgage" (*mortuum vadium*) was initially used in contradistinction with "living gage" (*vivum vadium*), to distinguish between the situation where the lender in possession took the principal as well as the profits of the land, not setting it off against the debt, and the situation where he did. Later, by the 15th century, however, the use of the term extended to all arrangements through which a loan was secured by a conveyance of real property : J.H. BAKER, *op. cit.* note 19, p. 353, R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, p. 915.

In equity however, the mortgagor came to have what is called the "equity of redemption", an equitable estate in the mortgaged land, referred to above. Since the 17th century, equity intervened to ameliorate the hardship to the mortgagor. As a result of this intervention the mortgage became a true instrument of security. Firstly, the mortgagees were discouraged from taking possession of the land by the equitable rule requiring him to pay a full rent to the mortgagor. Secondly, the mortgagees were only allowed to get the value of the debt owed from the property. The difference between this value and the value of the estate belonged to the mortgagor. It was the measure of the value of his equity of redemption.[90] Being itself an estate in land, it could be enforced against the mortgagee or anyone claiming title from him, except a *bona fide* purchaser without notice of the mortgage.

The *Law of Property Act* 1925 did not change this fundamental nature of the mortgage. It is thus that the security is created by a conveyance of the interest of the mortgagor, to the mortgagee, while the mortgagor is allowed to remain in possession. This Act did restrict the estate that could be conveyed to the mortgagor : in the case of the fee simple, the only estate was a term of years absolute, and in the case of the leasehold, a sub-demise, *i.e.* a term of years of at least one day shorter than the lease. The underlying policy being to keep the legal title — fee simple or leasehold — in the hands of the true beneficial owner.[91]

This Act also introduced a simplified form for creating a mortgage : a charge by way of legal mortgage. This enables the mortgage to be created without a complicated legal document containing provisions relating to a "conveyance" or "right of redemption". It avoids the disadvantage of the mortgage which obscures the real nature of the transaction, without a sacrifice of any of the advantages : the holder of the charge is fully protected as if he had an actual term of years. It is therefore in substance a mortgage.[92]

The equitable mortgage, created by the mortgage of an equitable estate, or a contract to create a legal mortgage — specifically enforceable as a mortgage in equity — was based on analogous principles.[93]

In contrast to the common law, the nature of the hypothec is explained in civil law by reference to the attributes and characteristics of that central right, ownership. It is described as an accessory real right.

The classification as a real right points to the fact that, as in the case of ownership, (and its modes and dismemberments) the creditor has a direct right in the thing itself. This direct right in the thing is in the form of certain remedies against the land itself. It is manifested by the *droit de suite* and the *droit de préférence.*[94] The *droit de suite* refers to the right to follow the thing hypothecated

---

90. The equity of redemption must be distinguished from the equitable right to redeem. The former is the sum of all the rights of the debtor in the land. The latter term refers to one of those rights, in particular, the right accorded by equity to redeem the mortgage even after the legal date — that contained in the deed of conveyance — for redemption has passed. As a result of this right accorded by equity, the mortgagee, in order to enforce the security, had to commence an action for "foreclosure" : R.M. MEGARRY & H.W.R. WADE, *op. cit.* note 22, pp. 917-919.

91. *Id.*, p. 919.

92. *Id.*, p. 936.

93. *Id.*, pp. 926-28.

94. It is to be noted that in Québec, since the coming into effect of the new Code on January 1st, 1994, this characteristic is no longer restricted to real rights. Art. 2650 grants this prerogative to those rights designated as "prior claims", and identified in art. 2651. These rights are not however real rights : D. PRATTE, *op. cit.* note 81, pp. 317-319.

in whosoever hands it is. It does not matter that the current owner is someone other than the original borrower, in other words, that there is no privity of contract. As a direct right, it is the land itself that owes the right conferred on the creditor by the hypothec. The *droit de préférence* refers to the right to get the benefits of the right conferred by the hypothec before other creditors.

Its status as an *accessory* real right signifies that, unlike ownership, a *principal* real right (and its modes and dismemberments which are also principal real rights), which entitles the holder to any of the powers over land of *usus*, *fructus* or *abusus*, the hypothec is ancillary to a principal obligation. It is intended only to give the creditor of this obligation remedies against the land, in the event of default by the debtor. As such, in contrast to ownership, it does not give him any immediate right to use, enjoy, or dispose of the land.[95]

This accessory character is manifested in several ways. Pratte[96] groups them under four broad principles :

1. The hypothec cannot exist alone, without a principal obligation. Thus if the principal obligation is null, the hypothec created to guarantee it is also null.
2. The hypothec is subject to the same modalities as the principal obligation. Thus it is conditional if the principal obligation is conditional,[97] and for a term if the principal obligation is for a term.[98] Jurists in both France and Québec have conflicting views whether it is possible to create a hypothec where the principal obligation is eventual. Some are of the view that this is not possible because the principal obligation which it secures does not come into existence until the prestation for which the obligation is owed is carried out.[99] Others are of the opinion that the accessory character of the hypothec should not be so narrowly construed.[100] One argument used is that the accessory character is important at the point in time when the creditor seeks to realise his security, and not to determine the time at which the hypothec is created.[101]
3. The hypothec follows the principal obligation if it is transferred. Thus if there is a cession of the debt due to the creditor, the new creditor is entitled to get the benefit of the hypothec.[102]

---

95. This fact has caused some jurists to dispute the "real" nature of the hypothec, and to criticise the *summa divisio* of the civil law into real and personal rights for failing to deal adequately with the hypothec and other rights, for example the lease.

96. D. PRATTE, *op. cit.* note 81, pp. 36-38.

97. Arts. 1497-1507 C.c.Q.

98. Arts. 1508-1517 C.c.Q.

99. POTHIER, *Oeuvres*, vol. 5, éd. Dupin, 1831, p. 144 : *Traité de l'hypothèque*, ch. 1, sect. 2; The Québec court adopted a similar view in *Désilets* c. *Martel*, (1879) 5 Q.L.R. 125, (C. rev.), p. 126; and dismissed a hypothecary action seeking to enforce such a hypothec.

100. In *Quintal* c. *Lefebvre*, (1880) 3 L.N. 347 (C.S.), p. 348, the Québec Superior Court, relying on doctrine more recent than Pothier, treated as valid a hypothec created for a loan disbursed by instalments.

101. For this argument and a discussion of the issue of the hypothecation of future interests see : L. PAYETTE, "Des priorités et des hypothèques", in BARREAU DU QUÉBEC et CHAMBRE DES NOTAIRES DU QUÉBEC, *La réforme du Code civil*, vol. 3, "Priorités et hypothèques, preuve et prescription, publicité des droits, droit international privé, dispositions transitoires, Sainte-Foy, Les Presses de l'Université Laval, 1993, 229-301, p. 91-93. The new Québec Code expressly adopts the second, more favoured, view in its articles 2688 and 2797.

102. In case of novation, the hypothec is not transferred, but extinguished, although the creditor may expressly stipulate that it be applied to the new debt. (1662-64 C.C.Q.). In the case of delegation or indication of payment, the hypothec is unaffected : D. PRATTE, *op. cit.* note 81, p. 38.

4. The extinction of the principal obligation, whether by payment, prescription, expiry of the term, novation, compensation, confusion, release, impossibility of performance or discharge of the debtor, results in the extinction of the hypothec.[103]

Two other characteristics of the hypothec are worth noting. According to civil law principles the hypothec is indivisible.[104] That is to say that the object to which it is attached, and every part of it, is liable for the whole of the amount. Thus if the object is divided, the hypothecary creditor can bring an action to enforce the hypothec against any one, or both, of the new lots. This characteristic is not however essential to its nature. It can be waived by the creditor in whose interest the principle is established. An express provision to the contrary can also override it.[105]

The other characteristic of the hypothec is that it is immovable. This however is not essential to its nature. Thus, while it is limited to immovables in France,[106] St. Lucia[107] and, until the coming into force of the new Code, in Québec, it can be movable or immovable under the new Québec code.[108]

The difference in the nature of the mortgage and the hypothec is evident when the mortgagee or creditor respectively enforces the debt. In both cases the debt is actionable in a personal action against the mortgagor, debtor. However to enforce the security generally, the mortgagee has more options than the hypothecary creditor. The only method of realising the debt through the enforcement of the security is in a hypothecary action.[109] This enables surrender and judicial sale of the immovable. The mortgagee may however :

1. Take the property in payment (in this instance the mortgagee also has the option of judicial sale of the immovable);
2. Sell (out of court);
3. Appoint an administrator;
4. Take possession.

---

103. Arts. 1671 and 2797 C.C.Q.

104. Art. 2662 C.C.Q.; 2017 (1) C.C.L.C.; 2114 *Code civil.*

105. For example art. 1051 C.C.Q.; 441j C.C.L.C.

106. 2114 : *Code civil* "L'hypothèque est un droit réel sur les immeubles affectés à l'acquittement d'une obligation. Elle est, de sa nature, indivisible, et subsiste en entier sur tous les immeubles affectés, sur chacun et sur chaque portion de ces immeubles. Elle les suit dans quelques mains qu'ils passent"; 2119 : "*Les meubles n'ont pas de suite par hypothèque*".

107. 1908 C.C.S.L. : "Hypothec is a real right, and is a charge upon immovables specially pledged by it for the fulfilment of an obligation, in virtue of which charge the creditor may cause the immovables to be sold in the hands of whomsoever they may be, and has a preference upon the proceeds as fixed by this Code". This is similar to the definition in art. 2016 C.C.L.C.

108. Art. 2660 C.C.Q. : "A hypothec is a real right on a movable or immovable property made liable for the performance of an obligation. It confers on the creditor the right to follow the property into whosoever hands it may be, to take possession of it or to take it in payment, or to sell it or cause it to be sold and, in that case, to have a preference upon the proceeds of the sale ranking as determined in this Code".

109. The hypothecary creditor also has actions to protect his rights : an action to protect the value of the secured property against deterioration by the possessor (art. 2054 C.C.L.C.), to recover damages for such deterioration (art. 2055 C.C.L.C.), and to accelerate the loan for diminishing the creditor's security (art. 1092 C.C.L.C.); an action to interrupt prescription (arts. 2057, 2257 C.C.L.C.), which permits the creditor to avoid the 10-year prescription of the hypothec by a good faith acquiror of the immoveable who did not personally assume the hypothecary debt (art. 2251 C.C.L.C.); or to be collocated upon the proceeds of sale in the event that the immovable is sold at a time when the hypothecary debt is not due (716) C.C.P. : J.E.C. BRIERLEY & R.A. MACDONALD, *op. cit.* note 12, pp. 638-649.

The New Québec Code has now expanded the remedies available to the hypothecary creditor. He therefore has open to him avenues similar to the English mortgagee :

1. Take property in payment;
2. Sell (out of court);
3. Take possession.

C. THE TRUST

The trust is of particular interest in this study. This institution is crucial to the common law but unknown in the civil law,[110] and at the heart of this strange occurrence, is the difference in the notion of ownership. On the one hand, the separation of equitable and legal title through which the English trust operates, is unknown in the civil law, as shown above. On the other hand, the theory of unitary absolute ownership in civil law provides no mechanisms that could be used for the creation of that peculiar triangular relationship that characterises the trust.[111]

The civil law jurisdictions are however, under increasing pressure to deal with the trust. The issue of its recognition is raised in cases involving conflict of laws, which are ever more numerous in this age where international transactions are commonplace. The problems thereby arising have been addressed through a treaty recently concluded, seeking to provide rules concerning the recognition of trusts in such cases.[112] In addition to pressure in respect of recognition, there is pressure from interests within the civilian legal system itself, clamouring for the benefits accorded by the trust of their common law neighbours. As a result, the introduction of the trust concept is now being contemplated in France, and is, and has been for quite some time, a reality in both Québec and St. Lucia. However, only in France and in the new Québec Code has the legislator made a point of "civilising" the trust so that its introduction does not deform the

---

110. Maitland notes that the bookshelves of an English lawyer have stout volumes entitled "Law of Trusts", that trusts are all over the Reports and almost all his acquaintances are trustees : F.W. MAITLAND, *Selected Essays*, Cambridge, 1936, pp. 142, 143. While Brierley states that the notion of trusts is not even included in the training generations of Québec law students.

111. The impossibility of the English trust in the French civil law was discussed by H. MOTULSKY, "De l'impossibilité juridique de constituer un 'Trust' anglo-saxon sous l'empire de la loi française", (1948) 37 *Rev. crit. De droit internat. privé*, pp. 453-468; J.-P. BÉRAUDO, *Les Trusts anglo-saxons et le droit français*, Paris, L.G.D.J., 1992. See also V. BOLGAR, *loc. cit.* note 72; For a recent summary of the tremendous number of articles on this subject see M. CANTIN CUMYN, "La fiducie et le droit civil," in Faculty of Law, McGill University, *Meredith Memorial Lectures : Estate Planing*, Montréal, Les Éditions Yvon Blais Inc., 1992, pp. 159-175, H.P. GLENN, *"Le trust et le jus commune", in P. LEGRAND Jr., Common Law d'un siècle à l'autre*, Les Éditions Yvon Blais Inc., 1992, pp. 87-114 approaches the issue by examining the question whether the common law trust developed from Roman law in the first place and is therefore not totally incompatible. As to the Canon law origins see : A.-A. MORIN, "Des origines de la fiducie, un exemple concret des racines institutionnelles des droits occidentaux dans le droit ecclésiastique", 7 (1995) *Ius Ecclesiae*, pp. 481-493.

112. *The Hague Convention Concerning the Law Applicable to the Trust and its Recognition.* It was agreed on July 1st, 1985. As of March 1st, 1992, it had been signed by eight countries (Australia, Canada, United States, France, Italy, Luxemburg, Netherlands and United Kingdom) but ratified by only three (Australia, Italy and United Kingdom).

property structure. Only these will be looked at more closely for the purpose of comparison with the English trust.

The English trust is difficult to define because of its multifarious uses in the common law. One writer has commented that the purposes for which the trusts can be created are as unlimited as the imagination of lawyers.[113] For present purposes it is described according to its effect and by reference to the different categories. It separates the administration and enjoyment of the property by attributing a legal estate to the trustee and a beneficial estate in the beneficiary or *cestui que trust*. It can be express, constructive, resulting and statutory.[114]

An express trust is a trust created intentionally by the settlor, whether *inter vivos* or by will. The constructive and resulting trusts are implied by the court exercising its equitable jurisdiction, and are sometimes together called implied trusts. The court will find a resulting trust where the circumstances are such that it is reasonable to presume that the settlor did not intend to relinquish the beneficial interest, in whole or in part, of the property. For example if property is purchased in the name of another; or the settlor transfers the legal title, making provision for only part of the benefit of the property to enure to the beneficiary.[115] The court uses the constructive trust to deprive someone with legal title to the property from holding it purely for his own benefit, when in good conscience he is not entitled so

---

113. A.W. SCOTT, *The Law of Trusts*, Vol. 1 Para. 1 Boston, 1987. It has however been given a definition, in language neutral enough to encompass both a common law and a civil law notion of the institution, by the *Hague Convention on the Law Applicable to Trust and on their Recognition* by the *Recognition of Trusts Act*, 1987 (U.K.) as follows :

> For the purposes of this Convention, the term 'trust' refers to the legal relationships created — intervivos or on death — by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics —
> the assets constitute a separate fund and are not a part of the trustee's own estate;
> title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;
> the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.
> The reservation by the settlor of certain rights and powers and the fact that the trustee may himself have rights as a beneficiary, are not necessarily inconsistent with the existence of a trust.

For the distinctions between the trust and other institutions in the common law see also J. MARTIN, *Hanbury and Maudsley, Modern Equity*, 12th ed., London, Stevens & Sons, 1985, pp. 46 *et seq.*

114. There is no generally agreed classification of trusts : *Halsbury's Laws of England*, 4th ed. Reissue, Vol. 48, London, Butterworths, 1995, para. 523, where trusts are grouped into two categories, (i) express trusts, which are created expressly or impliedly by the actual terms of some instrument or declaration, or which by some enactment are expressly imposed on persons in relation to some property vested in them, whether or not they are already trustees of that property; and (ii) trusts arising by operation of law (other than express trusts imposed by enactments).

115. *Re Vandervell's Trusts (No. 2), White* v. *Vandervell Trustees Ltd.*, [1974] Ch. 269, p. 291, *per* MEGARRY J. (reversed without affecting this point [1974] Ch. 269, CA). See also *Halsbury's Laws of England, op. cit.* note 114, paras. 523 and 599 *et seq.*

to do.[116] It has been used, for example to redistribute property among spouses.[117] Statutory trusts are those arising in the circumstances prescribed by statute.[118]

Express trusts are particularly versatile, and new ones are continually invented. They can be private or public (charitable). The private trusts can be discretionary or fixed.

This trust concept cannot fit in the structure of property generated by ownership in the civil law as the Québec experience attests. That province was faced with the task of integrating the trust concept in the law of property. The circumstances leading to this can be explained shortly.

The Code of 1866 contained two articles, articles 869 and 964, which contemplated a separation of administration and the benefit of property. The former related to foundations and legacies for charitable purposes. The latter to fiduciary substitutions for particular individuals. They were seen as relics of the ancient French law relating to "fiducie", in force in the province before codification.[119] The separation, only hinted at in those articles, was made more substantial by legislation of 1879,[120] which was incorporated into the Code in 1888, by way of articles 981a to 981n. This legislation extended the methods of creating trusts, formerly restricted to wills, to donations, and completed article 869 by setting out detailed principles in relation to charitable purposes. The problem was that the legislation failed to establish a legal regime for the trusts. This was exacerbated by legislation introducing different types of trust, but no principles applicable generally,[121] and compounded by the fact that the origin of the legislation of 1888 was unknown. It was therefore left to the jurists to establish a legal regime for it.[122] No theory advanced gained widespread acceptance. The opportunity was therefore taken on the revision of the Code, to establish a legal regime for the trust that did not run foul of civilian principles.

---

116. *Boardman* v. *Phipps*, [1967] 2 AC 46, HL. See also *Halsbury's Laws of England*, *id.*, paras. 523 and 585 *et seq.*

117. See for example Lord Denning's "new model constructive trust" in *Eves* v. *Eves*, [1975] 3 All ER 768. This revolutionary extension of the constructive trust has been criticised, and the courts are seen to be moving away from it, opting for a mere extension of the traditional constructive trust in cases such as *Burns* v. *Burns*, [1984] Ch. 317, CA; *Lloyds Bank plc* v. *Rosset*, [1991] 1 AC 107, HL : *Halsbury's Laws of England*, *id.*, paras. 586 *et seq.*

118. For example, the trust for sale of co-owners established by the *Law of Property Act* 1925, sections 34-36. See also the *Administration of Estates Act* 1925 s. 33; the *Land Registration Act* 1925 s. 75(1); the *Settled Land Act* 1925, s. 36(2).

119. For a discussion of these articles, see J.E.C. BRIERLEY, "De certains patrimoines d'affection : Les articles 1256-1298", in textes réunis par le BARREAU DU QUÉBEC ET LA CHAMBRE DES NOTAIRES DU QUÉBEC, *La réforme du code Civil, Personnes, successions, biens*, Sainte-Foy, Presses de l'Université Laval, 1993, pp. 735-782; G. BRIÈRE, *Donations, substitutions et fiducie*, La Collection Bleue, Montréal, Wilson & Lafleur Ltée, 1988, pp. 265 *et seq.*; D.N. METTARLIN, "The Québec Trust and the Civil Law", (1975) 21 *McGill L.J.* 175-237, pp. 204-205.

120. *An Act Respecting Trusts*, R.S.Q. 1879, c. 29.

121. Particularly *Special Corporate Powers Act*, R.S.Q. c. P.-16; also *Companies Act*, R.S.Q. c. C-38, s. 31.

122. Concerning the origin, nature, and legal regime applicable to the trust under the Civil Code of Lower Canada see a summary of the views of writers in S. NORMAND & J. GOSSELIN, "La fiducie du Code civil : un sujet d'affrontement dans la communauté juridique québécoise", (1990) 31 *C. de D.* 681-729, who places the jurists in three categories, the pragmatists who view the trust as being of English origin, the protectionists, who were of a contrary opinion, and the innovators, whose primary concern was to propose in the Civil law the introduction of concepts that they felt better adapted to the trust.

The problems encountered by jurists when searching for a legal regime for the trust of the former Code, illustrates how the trust concept is incompatible with the classical civilian theory of property.

Firstly, a unitary absolute right of ownership cannot be located among the interests of the settlor, the trustee or the beneficiary. The settlor has transferred his right in the property. The essence of the trust is to avoid ownership in the beneficiary. The trustee only has the right to administer and alienate the immovable. It was not that the rest of the trio of real rights, the *fructus*, was held by the other two parties — the settlor and the beneficiary. It apparently did not exist. The settlor obviously did not have it, and neither did the beneficiary, who had no real rights in the trust property.[123]

Secondly, it is seen that the interests in the tripartite relationship cannot be described using any of the other real rights. The emphyteutic leases and the servitudes are clearly inapplicable. A study of the usufruct shows that they are not applicable either, the most important difference being that the usufructury is entitled to enjoy the property as owner, while the trustee is not.[124]

Nor is it identical to other institutions relating to property law, in particular substitutions and the *fiducie*.

In order to constitute a substitution, the institute must have ownership (in the civilian sense) of the property, subject to delivering it over to the substitute. "An 'institute' without control, possession, direct enjoyment of the property or the ability to prevent waste is not an institute, any more than the usufructuary without those rights is a usufructuary".[125] Moreover the substitute is destined to have ultimate ownership of the capital, while the beneficiary may be entitled to the revenue only.

The *fiducie*, though similar to the trust in that it is based on confidence and trust in someone else, can also be distinguished from the trust concept. This concept of the French *ancien régime* was derived from the Roman law, and inherited by Québec. The close similarity merits a detailed examination.

In Roman law there were the *fiducia* and the *fideicommis*. The former were of two types, *fiducia cum amico* and the *fiducia cum creditore*. The *fiducia cum amico* had a wide application, being used to perform the function of a variety of nominate contracts, which had not as yet been introduced into the civil law, such

---

For a summary of the views concerning the location of ownership see Y. CARON & J.E.C. BRIERLEY, "The Trust in Québec", (1980) 25 *McGill L.J.* 421-444, who analyse the jurisprudence and doctrine which seek to locate the civilian right of ownership in the rights of either the trustee, the beneficiary or the settlor (*constituant*). Before the solution introduced by the new Civil Code, discussed later, the weight of opinion seemed to be in favour of attributing ownership, albeit *sui generis*, in the trustee. This solution was advocated in *Royal Trust* v. *Tucker*, [1982] 1 S.C.R. 250. The Supreme Court claimed support for this conclusion on ambiguous statements in the earlier case of *Curran* v. *Davis*, [1933] S.C.R. 283. The former case was strongly criticised by writers : J.E.C. BRIERLEY, "L'affaire 'Tucker' sous les feux du droit comparé", (1984) 15 *R.D.U.S.* pp. 3-5; M. CANTIN CUMYN, "La propriété fiduciaire : mythe ou réalité?", (1984) 15 *R.D.U.S.* pp. 7-23. A.J. MCCLEAN, "*Tucker* v. *Royal Trust Co.*, Through Common Law Eyes", (1984) 15 *R.D.U.S.* pp. 31-43.

123. C.C.Q. art. 1261.

124. For a discussion on the usufruct and substitution within a trust see D.N. METTARLIN, *loc. cit.* note 119, p. 179 *et seq.*

125. *Id.*, p. 189.

as the deposit, the loan for use or the pledge. The *fiducia cum creditore* was more restricted, being used to secure a loan, performing the function of the hypothec. They have been defined as "l'acte juridique par lequel une personne, le fiduciaire, rendue titulaire d'un droit patrimonial, voit l'exercice de son droit limité par une série d'obligations parmi lesquelles figure généralement celle de transférer le droit au bout d'une certaine période, soit au fiduciant, soit à un tiers bénéficiaire".[126] In other words, the *fiducie* was a contract attached to the transfer of property, under which the *fiduciaire* was obliged to deal with the property in a particular manner.

In contrast, the *fideicommis* could be created only by will. The object was to constitute a temporary administrator of property of a deceased person for someone whom the deceased wished to benefit, but whom for one reason or another it was not possible or not preferable to name him as legatee.[127]

The *fiducie* in ancient French law corresponds to the *fideicommis* only; the *fiducia* had gone into disuetude in the Roman law with the introduction of the nominate contracts mentioned above. It was therefore not included in the Justinian compilations, which was a source of inspiration in ancient French law.[128]

Neither the *fiducia*, nor the *fideicommis* were identical to the trust.

The *fiducia* :

1. was a contract (either *inter vivos* or *mortis causa*) and required the *consensus ad idem* of the donor/*fiduciant* and the donnee/*fiduciaire*; the trust is made by the unilateral declaration of the settlor or imposed by the court or by statute.
2. was subject to the principles of the law of obligations; the trust is subject to the very different equitable principles.
3. recognised a sole and absolute ownership in the *fiduciaire*, the property forming part of his patrimony, and liable to be included in his assets on a bankruptcy, his matrimonial regime and his succession; the trust recognised ownership in both the trustee and the beneficiary, and the property was not confounded with that of the trustee.
4. entitled the beneficiary to merely a personal action against the *fiduciaire*, and was in the position of a mere chirographic creditor; the beneficiary of the trust had a right to revendicate the property against all, except the purchaser for value without notice.
5. focussed on a contractual relationship between the *fiduciant* and the *fiduciaire*; the existence of a beneficiary was critical to the creation of the trust, and he alone could require the trustee to perform his duties under the trust.
6. was much more limited in scope than the trust. For the most part it performed the function of what is referred to as a 'bare trust'.[129]

The more important differences in the case of the *fideicommis* are that it :

1. can only be an act *mortis causa*, that is, operate on the death of the donor.
2. recognises a sole and absolute right in the beneficiary. The right of the *fiduciaire* varied, but was less than ownership.

---

126. C. WITZ, *La Fiducie en droit privé français*, Paris, Economica, 1981, no. 16.
127. J.-P. BÉRAUDO, *op. cit.* note 111, pp. 28-32.
128. *Id.*, p. 30; M. CANTIN CUMYN, *loc. cit.* note 111, pp. 165-166.
129. J.-P. BÉRAUDO, *id.*, pp. 28-32; M. CANTIN CUMYN, *ibid.*

One is unable to find a parallel even if one were to venture out of the realm of property law. For example in the law of obligations or that relating to legal persons. A comparison between the trust and institutions in the civil law other than property law institutions is however beyond the scope of this paper.[130]

The new Québec Civil Code achieves a separation of the administration and benefit of property so that the beneficiary has no real right, the settlor is divested of the property, and the trustee has only powers of administration and sale, without derogating from the fundamental principle that ownership comprises *usus*, *fructus*, and *abusus*, by using the concept of *patrimoine d'affectation*, introduced in the new Code.[131] The trust concept is thus rendered an independent institution, and no longer merely a type of donation or of testamentary disposition.[132]

The concept of patrimony is well established in civil law. It is as unique to it as the legal and equitable estates is to the common law. It is the idea through which the civil law expresses the perspective of things as objects of appropriation, and is axiomatic in the theory of real rights derived from ownership. This perspective of things as belonging to a patrimony informs the content and arrangement of all the principles in the civil codes. In the C. civ., the C.C.L.C. and the C.C.S.L., the first Book contains principles concerning the identity and characteristics of those who can have a patrimony ('Persons'), the second Book contains principles on the nature and classification and of the property and rights forming part of the patrimony, essentially the law of property ('Of Property, Of Ownership And Of Its Different Modifications'), and the third Book contains principles on the acquisition and exercise of the rights therein, relating to for example successions, gifts, contracts — including certain ancillary principles like prescription, delict or tort, ('Of The Acquisition And Exercise Of Rights Of Property').[133]

In traditional civil law the patrimony is that which is owned by a person, whether natural or legal. The 'things' which form part of the patrimony were consequently objects of ownership and other real rights. The effect of the new Civil Code of Québec patrimony of traditional civil law has been relegated to *a type of* patrimony, by the introduction of the '*patrimoine d'affectation*'. The property in the patrimony are not objects of any real right. The revolutionary nature of this institution is not merely in respect of the characteristics of this patrimony, but in the very idea that there can be species of patrimonies : one to which the traditional structure of real rights applies, and another which is wholly outside the structure of real rights.

---

130. For such a comparison see J.-P. BÉRAUDO, *id.*, pp. 19-33.

131. The proposed solution of having the trust as a patrimony of the trustee, though separate from his own, was not satisfactory. It did not solve the problem of the location of ownership. The other option of institutionalising the trust, making it a legal person, was not acceptable to businessmen. It was argued that it would afford no substantial additional advantages, in view of the fact that they already had use of the corporation : Y. CARON & J.E.C. BRIERLEY, *loc. cit.* note 122.

132. For a discussion of the new Québec trust see J.E.C. BRIERLEY, "Regards sur le droit des biens dans le nouveau Code civil du Québec", (1995) *R.I.D.C.* pp. 33-49; J.E.C. BRIERLEY, *loc. cit.* note 119; J.E.C. BRIERLEY, *loc. cit.*, note 3.

133. The *Civil Code of Lower Canada* contains an additional book entitled COMMERCIAL LAW, Bk 4. In Civil Code of St. Lucia, "Part" is used instead of "Book" and there is also an additional Part entitled TRUSTEES. In both Québec and St. Lucia these additional books are marks of the influence of English law.

Ownership of the property is thus rendered irrelevant. As between the trustee and the beneficiary in their capacity as such, it is not the property itself that the law is concerned with, but its value. The principles relating to this *fiducie* are directed at ensuring that the real rights and the value is applied to a particular charitable purpose, or for the benefit of a person.

The characteristics of the trust is revolutionary in respect of the place accorded the institution in the civil law, and the juridical nature of the rights of the trustee and beneficiary.

The trust is no longer a mode of gift or testamentary disposition of property. It is independent of them both, being outside of the notion of the *patrimony as object of real rights*, around which they are constructed. In making the trust a *patrimony appropriated to a purpose*, the new Civil Code eschews the common law conception of the legal and equitable ownership, the *sui generis* fiduciary ownership which had been attributed to it by the courts inspired by this common law dichotomy, the "personalization" of the trust which was originally advocated for the new Code, and the similar "institutionalization" of the trust, suggested by the French writer Lepaulle, and advanced in Québec by Marcel Faribault. It is expected that, by freeing it from donations and testaments and according it a separate legal regime, it will with time come to serve similar, though admittedly less extensive, functions as the common law trust.[134]

The trustee is manager, not titulary of the trust. The trust funds are separate from his, and he has no real rights in it. He has the rights and duties that are associated with this function. He is similar to the testamentary executor in that his acceptance of the responsibility of being a fiduciary is necessary, and the registration of his name in respect of the property is merely to acknowledge his position and the rights flowing from it. Unlike the director his powers are not similar to a mandatory; neither are they the same as a simple depository.[135]

The beneficiary does not have real rights, nor the remedies of enforcement based on the real character of such rights. In this respect his position is different from the usufructuary and the substitute. He is however not a mere creditor of the trustee (the consequence of the idea of the *sui generis* fiduciary ownership). He has the rights of the ordinary creditor, but also other rights which creditors do not have. It may be said that he is a creditor of the trust. The extent of his rights are not exhaustively dealt with in the Code. For example the question is open as to whether he has a right to follow the value of the property in the hands of a third party, a kind of *droit de suite* — similar to the English common law concept of 'tracing'. As opposed to real rights this *droit de suite* would be linked to the value of the property and not the property itself.[136]

France however proposes to introduce the trust concept, not as part of the law of property, but as part of the law of obligations. The Bill proposes to incor-

---

134. For a list of some of those functions see, J.E.C. BRIERLEY, *loc. cit.* note 3, p. 386. It will be less extensive because, by way of example, the implied trusts of the common law are not part of the Québec law of trusts, the concept of unjust enrichment being used instead.

135. J.E.C. BRIERLEY, *id.*, pp. 393-394.

136. See J.E.C. BRIERLEY, *id.*, p. 395 where the author suggests the use of principles concerning restitution (arts. 1699 *et seq.*) as the basis for such a right in the beneficiary.

porate a new title in the Civil Code (Book III, Title 16, Articles 2062-2070).[137] It is defined in article 2062 as follows : "La fiducie est un contrat par lequel un constituant transfère tout ou partie de ses biens et droits à un fiduciaire qui, tenant ces biens et droits séparés de son patrimoine personnel, agit dans un but déterminé au profit d'un ou plusieurs bénéficiaires conformément aux stipulations du contrat". Thus unlike the English trust it cannot be created by implication or by judgement of the court. Like in Québec it will not, therefore, be as flexible as its English counterpart.

CONCLUSION

Ownership in the common law and civil law may appear to the layman to be like six and half a dozen — a distinction without a difference; or with very little at any rate. Ownership of land accords him practically the same advantages in England as in France, Québec and St. Lucia. The few practical differences that do exist are continually being reduced. The use of a trust mechanism, its absence in the civil law having long been a source of frustration for many businessmen, is now being introduced. On the other hand, horizontal ownership of flats called 'commonhold' is being considered in England.[138]

Even at a conceptual level, the similarities are increasing. The trust in Québec takes the classification of property to a new dimension, and in so doing creates a striking similarity between it and the English common law. It introduces a distinction between things on a broader level than that of movables and immovables or corporeal and incorporeal. It can be said that the most general classification of property now in Québec is that between on the one hand, the patrimony, object of real rights, and on the other, the patrimony appropriated for a purpose. It is a classification based on the way of dealing with things, rather than a classification based on the nature of the thing. In this, Québec has moved away from the French civil law system which spawned it.

A similar division has gained precedence in England. The eminent English jurist, F.H. Lawson, concludes that the one distinction which now outweighs all others in English Law is "that between physical objects regarded as things to be used and enjoyed physically as specifically identified individuals, and what may be in the broadest sense called investments, of which the money value alone is relevant. It may be expressed summarily as one between objects and wealth, or between use-value and exchange value".[139]

---

137. The Bill is published at 19 *Revue de droit bancaire et de la course* 122. For a discussion of this Bill see I.A. KOELE, "France : A Law Proposal Introducing 'La Fiducie'", in F. SONNEVELDT & H.L. VAN MENS, eds., *The Trust, Bridge or Abyss Between Common and Civil Law Jurisdictions?*, Boston, Kluwer Law and Taxation Publishers, 1992, pp. 65-82; and M. CANTIN CUMYN, "L'Avant-projet de loi relatif à la fiducie, un point de vue civiliste d'outre-Atlantique". *D.* 1992, Chron. xxiii, 117.

138. This is not now possible because the common law does not have any mechanism to enable the enforcement of the reciprocal positive obligations such as repair and maintenance which is necessary in this form of ownership. A draft Bill has been prepared annexed to the Working Paper of the Lord Chancellor's Department, entitled *Commonhold : A Consultation Paper (with draft Bill annexed)*, November 1990, Cm 1345. For a discussion of the factors hindering the adoption of this Bill, see D.N. CLARKE, "Commonhold — A Prospect of Promise, (1995) 58 *M.L.R.*" pp. 486-504.

139. F.H. LAWSON & B. RUDDEN, *op. cit.* note 4, p. 226.

The jurist however must recognise the juridical differences underlying those similar institutions. Indeed, the greater the extent of the similar institutions, the more important this understanding becomes to equip the jurist to draw from the reservoir of experience that the other tradition provides.

Barbara Pierre
P.O. Box 468
CASTRIES, St. Lucia
West Indies
Tel. : (758) 452-2850
Fax : (758) 451-6515