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Article abstract

The French jurist Pierre Lepaulle argued that the common law trust could be best understood, in civilian terms, as a patrimony by appropriation. This argument has been influential in some civilian receptions of the trust. In fact, Lepaulle misunderstood the nature of the common law trust, which is founded on the obligations owed by the trustee in relation to the trust property. The rights of beneficiaries in the common law trust are neither purely personal rights against the trustee, nor are they real rights in the trust property, but rather they are rights over the rights which the trustee holds as trust property; they have a proprietary character since they persist against many third party transferees of the trust property. This analysis of the common law trust leads to the conclusion that it would be a fundamental change to turn the common law trust into a legal person. More generally, it is argued that any legal system that characterizes the trust as a legal person will find that it has ceased to understand the trust as a fundamental legal institution.

Trust and Patrimony

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ABSTRACT

The French jurist Pierre Lepaulle argued that the common law trust could be best understood, in civilian terms, as a patrimony by appropriation. This argument has been influential in some civilian receptions of the trust. In fact, Lepaulle misunderstood the nature of the common law trust, which is founded on the obligations owed by the trustee in relation to the trust property. The rights of beneficiaries in the common law trust are neither purely personal rights against the trustee, nor are they real rights in the trust property, but rather they are rights over the rights which the trustee holds as trust property; they have a proprietary character since they persist against many third party transferees of the trust property. This analysis of the common law trust leads to the conclusion

RÉSUMÉ

Le juriste français Pierre Lepaulle prétendait que le trust *de la common law pourrait être mieux compris, selon la tradition civiliste, en tant que patrimoine d'affectation. Ce point de vue a profondément influencé quelques réceptions du* trust *en droit civil. En fait, Lepaulle a mal compris la nature du* trust *de la common law, qui est fondé sur les obligations du fiduciaire concernant les biens du* trust. *Les droits des bénéficiaires dans le* trust *de la common law ne sont ni des droits purement personnels, contre le fiduciaire, ni des droits réels dans les biens du* trust*; ils sont plutôt des droits dans les droits détenus par le fiduciaire en tant que biens du* trust. *Les droits des bénéficiaires possèdent un caractère propriétaire parce qu'ils sont opposables à plusieurs tiers qui reçoivent*

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that it would be a fundamental change to turn the common law trust into a legal person. More generally, it is argued that any legal system that characterizes the trust as a legal person will find that it has ceased to understand the trust as a fundamental legal institution.

les biens du trust. *Cette analyse du* trust *de la common law mène à la conclusion que de transformer le* trust *de la common law en personne morale serait un changement fondamental. Plus généralement, il est suggéré que tout système juridique qui qualifie le* trust *de personne morale cesse de le voir comme une institution juridique fondamentale.*

Key-words : *legal persons — patrimony — trust*

Mots-clés : *fiducie — patrimoine — personnes morales*

SOMMAIRE

INTRODUCTION

1. The trust is one of the characteristic features of the common law tradition, but it is not confined to the common law world. An established law of trusts, combined with a civilian understanding of property law, is found in a number of jurisdictions, including both mixed jurisdictions and pure

civil law systems.[1] It is clearly possible to have "trusts without Equity".[2] In this paper, I will attempt to show that the way in which these jurisdictions understand the trust can help common lawyers to understand better their own trust institution. This often happens when we look at our law "outside-in"; that is, when we try to see it with the eyes of others.[3]

2. The main part of this paper is devoted to asking whether the common law trust can be understood as a patrimony in the civilian sense. Contrary to the position taken by the French jurist Pierre Lepaulle, I show that it cannot. The reasons why it cannot be so understood require us to take careful note of several features of the common law trust that are not always noticed even by common lawyers. The essence of the common law trust lies not in any division of ownership of the trust property; this is a metaphor that is as likely to confuse as it is to enlighten. Rather it lies in the fact that the trust beneficiaries hold rights *in* the rights that the trustee holds as trust property. In the conclusion, I relate the trust institution to the idea of legal personality. The common law trust is not a legal person; I argue that it would be a mistake for any legal system to conceptualize the trust as a legal person, since the result will only be to eliminate the trust as a fundamental legal institution.

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1. To what extent trusts existed in continental Europe during the *jus commune* period, or earlier, are large and contentious questions that are not pursued here. The point of reference is now R. HELMHOLZ and R. ZIMMERMANN (eds.), *Itinera Fiduciæ : Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998. It is timely to mention the amendment of the French *Code civil* in February 2007 to create a *fiducie* : arts. 2011 ff.

2. G. GRETTON, "Trusts Without Equity", (2000) 49 *I.C.L.Q.* 599. See also T. HONORÉ, "Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland", in A.M. RABELLO, (ed.), *Æquitas and Equity : Equity in Civil Law and Mixed Jurisdictions*, Jerusalem, Harry and Michael Sacher Institute for Legislative Research and Comparative Law, 1997, 793 and T. HONORÉ, "Trusts : The Inessentials", in J. GETZLER (ed.), *Rationalizing Property, Equity and Trusts : Essays in Honour of Edward Burn*, London, LexisNexis Butterworths, 2003, 7.

3. N. KASIRER, "English Private Law, Outside-In", (2003) 3 *O.U.C.L.J.* 249; P. MATTHEWS, "From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust", in D. HAYTON (ed.), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds*, The Hague, Kluwer Law International, 2002, 203, 204 : "The spectator, as they say, sees more of the game." Pages 213-216 of Matthews' chapter were one of the inspirations for the present paper, as was Gretton's paper cited in the previous note.

1. Is the Common Law Trust a Patrimony?

1.1. Lepaulle's Theory

3. One of the most famous outside-in looks at the common law trust was that of Pierre Lepaulle.[4] He concluded that the common law trust could best be understood, in civilian terms, as a patrimony affected to a destination or purpose. Lepaulle's understanding of the common law trust was this :

> ... *le trust est une institution juridique qui consiste en un patrimoine indépendant de tout sujet de droit et dont l'unité est constituée par une affectation qui est libre dans les limites des lois en vigueur et de l'ordre public.*[5]

4. This theory has been very influential. In Mexico, it directly influenced the drafting of the trust institution that was created by statute in 1932, replacing an earlier kind of trust that was premised on irrevocable mandate.[6] Its influence is also seen in the *Civil Code of Québec.*[7] Most recently, it can be seen in the trust that has just been created in French law.[8]

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4. P. Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international*, Paris, Rousseau et Cie, 1931. Indeed an earlier work was P. Lepaulle, "An Outsider's View Point of the Nature of Trusts", (1928) 14 *Cornell L.Q.* 52.

5. P. Lepaulle, *Traité*, note 4, at 31 (italics in original).

6. Law of 28 June 1932, *Ley General de Instituciones de Crédito*, arts. 346 ff; since 2000, *Ley General de Titulos y Operaciones de Crédito*, arts. 381 ff. For Lepaulle's influence, see R. Batiza, "The Evolution of the Fideicomiso (Trust) Concept under Mexican Law", (1958) 11 *Miami L.Q.* 478, and especially R. Molina Pasquel, "The Mexican Fideicomiso : The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country", (1969) 8 *Columbia J. of Transnational L.* 54.

7. Art. 1261 : "The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right." The juridical analysis of the Québec trust was contentious under the very different provisions of the *Civil Code of Lower Canada*, in force until the end of 1993. This point will be addressed briefly in the Conclusion below.

8. The *Code civil*, as modified by Law no. 2007-211 of 19 February 2007, does not use language directly reminiscent of Lepaulle's idea. The definitional art. 2011 provides : "La fiducie est l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs

5. This section of the present paper asks whether Lepaulle's analysis is accurate as a description of the common law trust. The conclusion is that it is not accurate. Lepaulle's book is full of interesting insights, and his writing style is magnificent; but he made some mistakes about the common law. Even so, the way in which his view does not work actually helps us to see something about the common law trust that common lawyers don't always notice.

6. The idea of patrimony is not, as such, known to the common law. That does not present any problem, because our goal is to determine whether the common law trust can be understood, through civilian eyes, as a patrimony. "Patrimony" has been defined as "the whole of the rights and obligations of a person having economic or pecuniary value."[9] A patrimony is, in a sense, a container; it may be empty, as might be the patrimony of a newborn baby.[10] In the technical sense of the word, however, a patrimony must be capable of containing both assets (pecuniary rights) and liabilities.[11] The assets are available to answer to the liabilities, and in this way the general principle that a person can have only one patrimony serves in part to support the principle that it should not generally be possible to shield assets from creditors.[12]

7. How was Lepaulle led to the claim that the common law trust is a patrimony by appropriation? He wanted to identify

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bénéficiaires." Note however the language of art. 12 of the Law no. 2007-211 of 19 February 2007, which provides in part : "Les éléments d'actif et de passif transférés dans le cadre de l'opération mentionnée à l'article 2011 du Code civil forment un patrimoine d'affectation." Whether or not this is undermined by other provisions (such as *Code civil*, arts. 2025, 2029) is beyond the scope of this paper.

9. Québec Research Centre of Private and Comparative Law, *Private Law Dictionary*, Cowansville, Éditions Yvon Blais, 1991, see "patrimony". Lepaulle's own definition in the *Traité*, note 4, at 40 was "un ensemble de droits et de charges appréciables en argent et formant une universalité de droit". The word "universality" is often used in connection with the idea of patrimony; it is apt to capture the idea that the focus is on the container, not the contents. See G. GRETTON, note 2, at 615, noting that in Roman law, "*universitas* meant a group, considered as a unity".

10. Every person, even a newborn, has various non-pecuniary rights, such as the right to bodily integrity; these are extrapatrimonial.

11. The word is sometimes used in a sense that includes only assets; even the *Civil Code of Québec* partakes of this usage, for example in the provisions on the "family patrimony" (arts. 414 ff); but this is a non-technical sense.

12. See J. BEAULNE, *Droit des fiducies*, 2nd ed., Montréal, Wilson & Lafleur, 2005, at 28-29.

what was essential about trusts.[13] He proceeded by stripping away what he thought was inessential. In most trusts, there are people involved; we typically envisage a settlor, one or more trustees, and one or more beneficiaries. Lepaulle argued that none of these characters was essential. He claimed that in a constructive trust, there is no settlor. He claimed that in a charitable trust, there is no beneficiary; there is only the impersonal charitable purpose. Finally, he pointed to the principle that "a trust will not fail for the want of a trustee", and from it he concluded that the trustee is also not an essential character in the common law trust. Here, I think, he misunderstood the law. Although a trust will not usually fail for the want of a trustee, there is no such thing as a common law trust without a trustee.[14] Ultimately, a common law trust is a way in which a person holds property; both the property and the person holding it in trust are absolutely essential to the common law trust. The principle that a trust will not fail for the want of a trustee is the obverse of the idea that trusteeship is usually not personal but official, which is one of the essential differences between trust and contract. The official character of trusteeship means that once a trust is established *inter vivos*, the death or incapacity of the trustee does not end the trust. A new trustee will be found, either pursuant to machinery in the terms of the trust, or by a court order; and the trust will continue.[15] Similarly, if a trust is established in a will, and the named trustee is unable or unwilling to act, a new trustee will be found one way or

13. P. LEPAULLE, *Traité*, note 4, at 23-31.

14. Moreover, some express trusts *will* fail for want of a trustee, if the settlor made it clear that the identity of his or her chosen trustee(s) was essential to the trust : *Re Lysaght*, [1966] Ch. 191, 207. This is one of many proofs of the underlying obligational character of the common law trust, to which we will return in more detail below.

15. It may be possible, however, that for some period of time the trust property is held on different trusts. Consider the example of the sole trustee who loses legal capacity. When a new trustee is appointed and the property is transferred to him or her, he or she will hold on the original trusts. But what is the situation during the time between the loss of capacity and the appointment of the new trustee? The incapable trustee holds on a kind of trust; if he died, the property would not form part of his estate. But since the trustee is now incapacitated, we cannot say that he owes all of the trust obligations that he originally undertook. During this time, the property is held in trust, but no one holds on the terms of the original trusts. See further L. SMITH, "Unravelling Proprietary Restitution", (2004) 40 *C.B.L.J.* 317.

another.[16] But this does *not* mean that we can sensibly discuss the idea of a trust without a trustee. There cannot be a trust without trust property, and in the common law, for reasons that will be explored more fully below, property is only trust property if it is held in trust by a trustee.

8. Having made this mistake, however, Lepaulle thought that he had shown that none of the settlor, the trustee or the beneficiary was essential to the common law trust. What was left? He argued that the only things that were essential were that there was a patrimony, and that it be affected or appropriated to a purpose. In his understanding, affectation to a purpose was an alternative to saying that the rights and obligations in the patrimony belonged to a person or to a *sujet de droit*.[17] That had to be the case, because he wanted to imagine a trust without any trustee.

9. Although the trustee is essential in the common law trust, we might nonetheless consider whether Lepaulle's idea is still a useful one, with some modification. In the common law trust, the trust assets belong to the trustee; but, as everyone knows, they are not available to the personal creditors of the trustee, nor do they form part of his estate if he should die. Can the common law trust be understood as a separate patrimony, of which the trustee is the titulary? This is the dominant understanding of the trust in Scots law.[18] A trustee has his own private or general patrimony, containing his personal wealth and his personal liabilities. He also holds a special or trust patrimony, in which are found the assets of the trust and its liabilities. His personal creditors thus have access to the personal assets but not the trust assets, while trust creditors have access to the trust assets but not the personal assets. "Trust creditors" here means creditors who interact with the trustee in his capacity as trustee. For example, if he holds immovable property in trust, and he lawfully contracts for the installation

16. Again, however, until a trustee is found, it may be that no one holds on the trusts set out in the will, in the sense that no one is obliged to carry out the terms of that trust. This was overlooked by P. LEPAULLE, *Traité*, note 4, at 24.

17. P. LEPAULLE, *Traité*, note 4, at 50. We will return to this in the Conclusion.

18. K. REID, "Patrimony Not Equity: The Trust in Scotland", (2000) 8 *European Rev. of Private Law* 427; G. GRETTON, note 2; SCOTTISH LAW COMMISSION, *Discussion Paper (No. 133) on the Nature and the Constitution of Trusts*, Edinburgh, The Stationery Office, 2006, at 10-13.

of a new roof, the unpaid roofer is a trust creditor. The trust beneficiaries are also trust creditors, though they could also be personal creditors of the trustee.[19] One implication of this is that when a trustee retires and is succeeded by another, the successor succeeds to the whole trust patrimony, both assets and liabilities. In other words, the retiring trustee is liberated of liability to trust creditors.[20]

1.2 Creditors of Trustees in a Common Law Trust

10. When we look at the common law trust, this analysis may seem promising at the level of trust assets, because the trustee's personal creditors have no access to the trust assets. In other words, the trustee is clearly seen to hold assets in separate "boxes". But something strange appears when we bring trust liabilities into the picture. Let us again assume that our trustee holds a fee simple estate in trust and, acting properly in pursuance of his duties, contracts for the installation of a new roof. The roofer is a trust creditor. What we see in the common law, however, is that this creditor, just like a personal creditor of the trustee, has no direct access to the trust assets. Let us assume everything goes well. Either the trustee pays the roofer out of the trust assets, perhaps writing a cheque on a bank account held in trust; or, the trustee pays out of his own assets, and then, as is his right, reimburses himself out of trust assets. This shows us that the *trustee* can direct trust assets towards the trust creditor. Now assume things do not go well : the roofer does not get paid. In the common law, he must sue the trustee. Moreover, he does not sue him "as trustee". Trustees are not understood to have a "trust capacity". He just sues him. If the roofer gets a judgment, it is not a judgment against the trustee "as trustee"; it is just against the trustee. And, most revealingly, if the roofer comes to execute upon his judgment, he has no more right

19. G. Gretton, note 2, at 612. The beneficiaries are trust creditors in respect of their rights to receive trust property under the terms of the trust. If the trustee committed a breach of trust, leading to a loss of trust assets, the beneficiaries would have a claim for compensation against the trustee's personal assets.

20. G. Gretton, note 2, at 617.

than would a personal creditor of the trustee to execute the judgment against the trust assets.[21]

11. What we see, in other words, is that all of the trustee's liabilities (both personal and trust liabilities) are liabilities of his own personal patrimony. This does not mean, of course, that he must personally pay for the new roof. As we have seen, the trustee generally has the right to apply trust property to properly incurred trust expenses; if he does spend his own money on such expenses, he has the right to reimburse himself out of trust assets;[22] and indeed he enjoys a lien over the trust property as against the beneficiaries for this purpose.[23] He may also have a personal right of indemnity, extending beyond the trust assets, against the trust beneficiaries in certain situations.[24]

12. So the creditor, whether a trust creditor or not, has no direct claim against the trust assets but only against the trustee's personal assets. But in some cases, the trustee's personal assets might be inadequate. In others, it might be the case that the creditor, if he is a consensual creditor, has expressly agreed with the trustee that the creditor's only rights will be against trust assets and not against personal assets. This is not uncommon if the trust assets are being used to carry on a business.[25] Even this contractual stipulation does

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21. *Jennings* v. *Mather*, [1902] 1 K.B. 1 (C.A.).

22. In principle, it would normally be possible to exclude such a right in the trust deed. Some Trustee Acts appear to foreclose this unlikely possibility.

23. *Stott* v. *Milne*, (1884) 25 Ch.D. 710 (C.A.), at 715; *X.* v. *A.*, [2000] 1 All E.R. 490 (Ch.D.). The lien gives a power of sale, under the supervision of the court: *Re Pumfrey*, (1882) 22 Ch.D. 255 (Ch.D.), at 261-262.

24. *Hardoon* v. *Belilios*, [1901] A.C. 118 (P.C.). The limits of this equitable right of indemnity are difficult to draw, but it is clear that it can be excluded by the terms of the trust. Note also that if the trustees act under the control of the beneficiaries, then an agency relationship may be found to be superimposed over the trust relationship, making beneficiaries vicariously liable to third parties: *Trident Holdings Ltd.* v. *Danand Investments Ltd.*, (1988) 64 O.R. (2d) 65, 49 D.L.R. (4th) 1 (C.A.). Because these theories give access to what is clearly a different patrimony—that of a beneficiary—they are not explored here. The equitable indemnity, however, only makes sense in the light of the principle we are concerned with, that even proper trust liabilities are exigible against the personal assets of the trustee.

25. The use of trusts as business associations has occurred to different extents in different jurisdictions, largely affected by taxation considerations. For discussion of the form of words required to ensure the trustee's personal assets are protected, see H.A.J. FORD, "Trading Trusts and Creditors' Rights", (1981) 13 *Melbourne U.L. Rev.* 1, at 3-4; M.C. CULLITY, "Legal Issues Arising Out of the Use of Business Trusts

not give the creditor any direct access to the trust assets; it has effect only between the parties, and all it does is to *deny* the creditor any access to the trustee's personal assets. In these cases, a creditor will seek to force the trustee to use the trustee's right of access to the trust property; and this may well be permitted.[26] This is often called subrogation;[27] but that seems to reflect a failure of terminology on the part of the common law, because subrogation usually arises when a person pays another's debt. What we have here might better be described as a kind of execution.[28] But execution cannot take place before judgment, and execution against a claim belonging to one's judgment debtor has its own special procedures (historically known as garnishment). It might be better still to consider this as an oblique action, in which a creditor is allowed to enforce his debtor's claim against another.[29] Whatever we call it, this gives trust creditors a kind of access to the trust assets; but it is a derivative access. It is *through* the trustee's rights, not direct, as it would be if the trust were a true patrimony, whose own assets were answerable for its own liabilities.

13. This is by no means a pure technicality. It means that the trust creditor's access to the trust assets can never be

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in Canada", in T. YOUDAN (ed.), *Equity, Fiduciaries and Trusts*, Toronto, Carswell, 1989, 181, at 198-200; M.C. CULLITY, "Personal Liability of Trustees and Rights of Indemnification", (1996) 16 *E.T.J.* 115, at 128-130; D. HAYTON, "Trading Trusts, Trustees' Liabilities and Creditors", in J. GLASSON (ed.), *The International Trust*, Bristol, Jordans, 2006), 511, at 515-517.

26. It may be that on a proper interpretation of the facts, the court will conclude that the trustee has granted the creditor a charge over his right of reimbursement: *Re Pumfrey*, (1882) 22 Ch.D. 255 (Ch.D.); H.A.J. FORD, *id.*, at 3-4.

27. For example, *Re Frith*, [1902] 1 Ch. 342 (Ch.D.); P. MATTHEWS, note 3, at 216, note 108; M.C. CULLITY, "Legal Issues", note 25, at 200. This is also the approach in C. MITCHELL and S. WATTERSON, *Subrogation: Law and Practice*, Oxford, O.U.P., 2007, and although I am doubtful of the classification as subrogation, Chapter 12 of this book is the best available textbook treatment of the subject of creditors' rights in common law trusts, a topic often consigned to the footnotes of general works on trusts.

28. See again P. MATTHEWS, note 3, at 216, note 108, who also uses the terminology of execution, and D. HAYTON, note 25, at 522, who refers to "equitable execution."

29. For an example of a codified oblique action, see *Civil Code of Québec*, arts. 1627–1630. Mitchell and Watterson do recognize that claims of this kind form one of three major categories of subrogation as they see it: note 27, at 5-7; this category they label "special insolvency regimes". Their category is narrower than the oblique action, because their category only covers cases in which the two claims are linked, the one serving as an indemnity in respect of the other.

stronger than the trustee's own claim to them. But the trustee's own claim can easily be diminished or lost. It can be restricted or even given up in the trust deed, to which of course the trust creditor is not a party.[30] More seriously, the trustee's claim may not exist where, in contracting with the trust creditor, the trustee exceeded his authority under the trust, even though the creditor may have no knowledge of this.[31] The trustee's claim against the trust assets might even be diminished or eliminated by his commission of an unconnected breach of trust. That breach may create a liability that will be set off to reduce or eliminate his right of reimbursement, to the detriment of the trust creditor who may have had nothing to do with the breach.[32]

14. The case of a bankrupt trustee illustrates one nuance. The trust creditor might think that he will not be too badly affected by the trustee's personal bankruptcy, if there are still trust assets, because those trust assets will not form part of the bankruptcy estate. But as we have seen, those are the very assets that the creditor cannot directly touch. The creditor claims those assets only through trustee's rights (the right of reimbursement, and the supporting lien) over the trust property; but now there is a further difficulty. Those rights are personal assets of the trustee, and therefore they *do* form part of the bankruptcy estate. It could follow that these rights therefore pass to his trustee in bankruptcy for the benefit of *all* the trustee's creditors.[33] The result would be that the bankrupt trustee could recover from the trust assets a sum equal to the debt owed to the trust creditor, but that sum would be divisible *pro rata* among all creditors, both personal and trust creditors.[34] The majority view, however, appears to be that the trust property acquired via the trustee's right of reimbursement should be available in priority to the trust

30. Although some Trustee Acts seem to forbid this.

31. The result is that if the trust is used as a business vehicle, "the creditor is subject to the full rigours of the doctrine of *ultra vires*": H.A.J. FORD, note 25, at 2.

32. *Re Johnson*, (1880) 15 Ch.D. 548 (Ch.D.).

33. This is one reading of *Jennings* v. *Mather*, [1902] 1 K.B. 1 (C.A.) although the case as litigated did not present any conflict between trust creditors and non-trust creditors.

34. This is also the solution in the oblique action in Québec: *Civil Code of Québec*, art. 1630.

creditors, in virtue of whose debts such property became available.[35] But this does not mean that the trust forms a patrimony; quite the opposite, since clearly trust creditors do have access to personal assets of the trustee.[36] It is rather an ordering of different claims in relation to different assets, something that is unusual but not unheard of within a single patrimony.[37]

1.3 Beneficiaries of a Common Law Trust

15. The analysis of the rights of creditors helps to show clearly that the common law trust cannot be understood as a patrimony. So far we have not considered beneficiaries. In fact, there are many parallels between the situation of beneficiaries and that of creditors. Most importantly, a beneficiary has no rights in relation to the trust property except derivatively and through the trustee's rights to that property. This is just another way of saying that the trust cannot exist without the trustee. We need not reopen old debates by asking whether a beneficiary, like a trust creditor, has no real

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35. H.A.J. Ford, note 25, at 19-24; D. Hayton, note 25, at 522; C. Mitchell and S. Watterson, note 27, at 435; A.W. Scott, W.F. Fratcher, and M.L. Ascher, *Scott and Ascher on Trusts*, Vol. 4, Frederick, MD, Aspen Publishers, 2007, at 1902. There was a clear holding to this effect in *Re Richardson*, [1911] 2 K.B. 705 (C.A.), although that was in the context of the trustee's personal indemnity claim against beneficiaries (mentioned above, note 24). One justification for this position is that a trust creditor should have special access to assets arising from the trustee's recourse to the trust property, since that recourse only arises in virtue of the existence of the trust creditor's claim. But at common law that reasoning was not enough to allow a plaintiff, who had a tort claim against an insolvent company, any special access to the insolvent company's indemnity right against its insurer. English courts held that the insurance claim went to benefit all creditors, and this led to statutory intervention : C. Mitchell and S. Watterson, note 27, at 395-397.

36. One author argues that trust creditors should be treated as secured creditors : D.R. Williams, "Winding Up Trading Trusts : Rights of Creditors and Beneficiaries", (1983) 57 *A.L.J.* 273.

37. In the common law, a partnership is not a legal person and has no patrimony; partnership creditors have access to personal assets of the partners, while personal creditors of a partner have access to that partner's share of the partnership assets. Even so, partnership creditors are given first access to partnership property, and vice versa : see for example *Read* v. *Bailey*, (1877) 3 App. Cas. 94 (H.L.), showing that in a case of fraud, one partner may prove against another, in competition with that other's personal creditors. The same kind of ordering obtains in Québec, where a partnership again does not have legal personality : *Civil Code of Québec*, art. 2221, para. 2.

rights but only a claim against the trustee.[38] But we can say that (i) the beneficiary's only rights are rights held *in* the rights of his trustee, while noticing that (ii) these rights of a beneficiary sometimes have effects on third parties. We can substantiate (i) by observing that if a third party wrongfully causes damage to the trust property, there is no claim by a beneficiary against the third party.[39] Only the trustee has a claim, which of course is itself held in trust. We can substantiate (ii) by noticing that some transferees of the trust property cannot take it unencumbered by the claims of the beneficiary. In particular, in what the common law considers only a special case of this general principle, the creditors of the trustee cannot take trust property. But conceptually, this is not because the beneficiary has a right *in* the trust property; it is because the third party is not allowed to interfere with the trustee's obligations in relation to that property. This idea is not alien to the civil law, which also recognizes that while a personal obligation does not create a real right but only a claim against a particular debtor, nonetheless it is possible that there might be claims in delict against third parties who wrongfully interfere in the performance of an obligation.[40] The common law trust was *not* created by changing the idea of property; it was not created by any decision to split ownership into "legal title" and "equitable title".

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38. For example: A.W. SCOTT, "The Nature of the Rights of the Cestui que Trust", (1917) 17 *Col. L. Rev.* 269; H. STONE, "The Nature of the Rights of the Cestui que Trust", (1917) 17 *Col. L. Rev.* 467. More recently, see D.W.M. WATERS, "The Nature of the Trust Beneficiary's Interest", (1967) 45 *Can. Bar Rev.* 219; R. NOLAN, "Equitable Property", (2006) 122 *L.Q.R.* 232.

39. *Leigh and Sillavan Ltd.* v. *Aliakmon Shipping Co.*, [1986] A.C. 785 (H.L.), at 812; *M.C.C. Proceeds Inc.* v. *Lehman Brothers International* (Europe), [1998] 4 All E.R. 675 (C.A.). A mortgagee selling the mortgaged land under a power of sale owes a duty to sell reasonably; if there is a trust, even if the mortgagee is aware of it, the duty is owed to the trustee but not to the beneficiary: *Parker-Tweedale* v. *Dunbar Bank plc (No. 1)*, [1991] Ch. 12 (C.A.). In the words of H. STONE, *id.*, note 38, at 479: "If, therefore, the *cestui que trust* has a right *in rem* to the trust *res* itself, we shall have to admit that, unlike any other right *in rem*, it can not be invaded by a tortious destruction of the *res* which is the subject of the right."

40. See for example S. GINOSSAR, *Liberté contractuelle et respect des droits des tiers : émergence du délit civil de fraude*, Paris, L.G.D.J., 1963; P.-G. JOBIN and N. VÉZINA, *Baudouin et Jobin : Les Obligations*, 6th ed., Cowansville, Éditions Yvon Blais, 2005, at 523-526. Yaëll EMERICH, *La propriété des créances : approche comparative*, Cowansville, Éditions Yvon Blais, 2006, Paris, L.G.D.J., 2007, at 435-455.

Rather, it was created by a distortion of the law of obligations, in particular an enormous expansion of the universally accepted possibility of third party liability for interference with obligations.[41] As the great legal historian S.F.C. Milsom has said :

> The life of the common law has been in the abuse of its elementary ideas. If the rules of property give what now seems an unjust answer, try obligation; and equity has proved that from the materials of obligation you can counterfeit the phenomena of property.[42]

16. The counterfeit acquired the name of "equitable title" and it is still in circulation. It is only a metaphor, which is not to say that it is wrong or even misleading, but only to say that it is not literally true.[43] "Equitable title" suggests a direct relationship between a beneficiary and the trust property. This does not exist. All "equitable proprietary rights" require at least *two* people, in addition to the object of the right.[44] I do not mean that two people must be present in order for there to be a justiciable dispute; I mean that the beneficiary's right itself cannot be understood as a direct relationship between the beneficiary and the trust property. The trustee has rights in the object; that is, rights in the trust property. The trust beneficiary's rights are rights *in* the rights that the trustee holds in the object. Those beneficiary's rights are the converse of the obligations owed by the trustee to the beneficiary, in respect of the trust property. This is why there is no difficulty at all with a trust of purely personal rights, like a debt; there needs to be "trust property", but "property" only in the wide

41. For a fuller account, see L. SMITH, "Transfers", in P. BIRKS and A. PRETTO (eds.), *Breach of Trust*, Oxford, Hart, 2002, 213.

42. S.F.C. MILSOM, *Historical Foundations of the Common Law*, 2nd ed., London, Butterworths, 1981, at 6.

43. L. SMITH, note 15.

44. "At least" two because an equitable interest can itself be made subject to a trust, or otherwise encumbered with an equitable interest such as a charge. Subtrusts may seem exotic but this is how almost all investment securities are held in industrialized common law jurisdictions, at least those which lack a statutory framework for the intermediated holding of securities.

sense that includes all assets.[45] And so again, a trust cannot exist without a trustee.[46]

17. The obligational roots of the common law trust explain a great deal. This is why common law trusts arise rather easily, out of informal transactions as well as formal ones; statutory interventions apart, obligations relating to property can be created quite informally. This is also why common law trusts arise rather easily by operation of law, because obligations relating to property can also arise by operation of law, whether out of wrongdoing or out of unjust enrichment. It is the nature of the equitable tradition to turn any such obligation, *if* it relates to the benefit of ascertained property, into a trust. This is why the trust is still traditionally defined as an obligation in relation to particular property.[47] Equity simply understood the *idea* of an obligation differently from the common law and differently from the civil law tradition. Equity was, and is, much more willing to let obligations (if they relate to the benefit of particular property) have effects on third parties, at least those who were not good faith purchasers for value of the property in question.[48]

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45. A point that puzzled Lepaulle, leading him to reject the idea that a trust beneficiary could possibly have a real right: "Comment le droit du cestui serait-il dans son essence un droit réel alors que la 'res' peut être un droit personnel? Un droit réel sur un droit personnel, quelle logomachie!": P. LEPAULLE, *Traité*, note 4, at 25. The beneficiary's right is not a real right, as a civilian would understand it; but it is a legal relation that can affect third persons. The civil law accepts a similar juristic structure when it allows hypothecs over purely personal claims. This juristic structure is probably best analyzed as a case in which one person holds powers over another person's rights, where "powers" is used in the sense developed by Hohfeld (W.N. HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 3rd printing with new foreword by A.L. CORBIN (ed.), New Haven, Yale U.P., 1964); this would resolve Lepaulle's logomachy, but this point cannot be developed here.

46. Nor can an equitable easement exist, or a restrictive covenant (enforceable only in equity), or an equitable mortgage or charge, without the presence of another person, onto whose rights these equitable interests are engrafted.

47. The very first sentence of a leading textbook (D.J. HAYTON, P. MATTHEWS, and C. MITCHELL, *Underhill and Hayton : Law of Trusts and Trustees*, 17th ed., London, LexisNexis/Butterworths, 2007, at 2): "A trust is an equitable obligation, binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation." (emphasis added). So far from seeing obligations held *in* trust, we see that that obligations (relating to particular assets) are the trust.

48. For a full argument: L. SMITH, "Fusion and Tradition", in S. DEGELING and J. EDELMAN (eds.), *Equity in Commercial Law*, Sydney, Thomson/Law Book Co.,

18. Since the common law trust was crafted out of obligations, it should not be surprising that it is a basic principle that the common law trust is not a legal person. This basic principle is found in every book on the common law of trusts. Nor should it be surprising that the trustee is essential : the trust is the obligation that is owed by the trustee. Another consequence is that the incidents of beneficiaries' equitable interests under trusts can be infinitely variable; founded on obligations, they are not subject to any *numerus clausus*. And another consequence is that the common law trust does not constitute a distinct patrimony. The attempt to understand the common law trust in terms of the civilian idea of patrimony, however, allows us to draw an interesting conclusion. The juristic nature of the common law trust is such that we can say that *only assets, and never liabilities*, are held in trust in a common law trust. This is an important difference from some civilian manifestations of the trust. This also reveals an interesting contrast, within the common law, between the trust and the estate of a deceased person. Common law textbooks typically state that it is fundamental that an estate is not a trust, although they are not so clear on what are the fundamental differences; usually the focus is on differences in the nature of beneficiaries' rights. But a clear difference is that the estate in the common law has the same conceptual structure as the Scottish trust. The personal representative of the deceased acquires the deceased's assets *and* his liabilities; but the personal representative is not personally liable on the liabilities that exist at the time of death. In other words, there is universal succession and the estate is a genuine patrimony.[49]

2005, 19, especially 32-35. Langbein has famously argued for a contractarian understanding of trusts : J. LANGBEIN, "The Conctractarian Basis of the Law of Trusts", (1995) 105 *Yale L.J.* 625. The trust certainly has characteristics of a deal between settlor and trustee; but in order to understand the third party effects of trusts, as for example in the bankruptcy of the trustee, we have to notice two other things : first, that the trustee comes under enforceable obligations to the *beneficiaries* (see J. LANGBEIN, at 646-647); secondly, that where (but only where) obligations relate to the benefit of particular assets, Equity treats third party transferees of such assets as potentially affected by such obligations (compare J. LANGBEIN, at 647-648). In other words, the intentionally-created trust has elements of a deal, but it has to be a deal about particular property.

49. The reason lies, as always, in the history; the nature of the personal representative was strongly influenced by the *ius commune*. The common law executor was

19. The statement that liabilities are never held in trust seems to be a basic one; but it is *not* found in any book on the common law of trusts. Like many unstated truths, when it is brought into the light it reveals a great deal.[50]

20. When common law trustees resign, one of the most contentious issues is the form of indemnity that they will obtain from their successors. They transfer the assets to their successors, but liabilities cannot be assigned; and since the liabilities are personal, there is no possibility of universal succession as there is in Scots law. Their personal liability continues, extending to their personal assets, so it is not surprising that they may seek express indemnities in addition to the rights given to them by operation of law.[51]

2. CONCLUSION: TRUST AND PERSONALITY

21. We have seen that the common law trust is not a patrimony; the trustee is the only one who has direct access to the trust assets. Trust creditors (and even beneficiaries) do not. In the context of business trusts or trading trusts, many commentators have observed that there is some potential

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the Romanist heir, instituted as such by the will and subjected to the fiduciary obligation to apply the property according to the will. See W.S. HOLDSWORTH, *A History of English Law*, repr. ed., 9 vols., London, Methuen/Sweet and Maxwell, 1966, Vol. III, at 572-595 (especially 583-584), and Vol. VI, at 652-657; T.F.T. PLUCKNETT, *A Concise History of the Common Law*, 5th ed., London, Butterworths, 1956, at 737-738; S. WHITTAKER, "An Historical Perspective to the 'Special Equitable Action' in *Re Diplock*", (1983) 4/1 *J.L.H.* 3; R. ZIMMERMANN, "*Heres fiduciarius*?—Rise and Fall of the Testamentary Executor", in R. HELMHOLZ and R. ZIMMERMANN (eds.), *Itinera Fiduciæ : Trust and Treuhand in Historical Perspective*, Berlin, Duncker & Humblot, 1998, 267, at 301-304. The Court of Chancery, which took over from ecclesiastical courts the administration of estates for most purposes after the Restoration in the late 17th century, inevitably assimilated trustees and executors regarding their duties.

50. In *Space Investments Ltd.* v. *Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.*, [1986] 1 W.L.R. 1072 (P.C.), the trustee was a bank and, unusually, it was expressly authorized to deposit trust funds with itself as banker. Effectively, the trustee was authorized to borrow the trust property on its own personal security. It did so and became insolvent; the question was whether the trust beneficiaries had any priority over the other creditors. The courts of the Bahamas held that they did, but the Judicial Committee of the Privy Council reversed these decisions. The judgments reveal some conceptual difficulty with the question of what was the trust property; in fact, once the deposits were made, there was no longer any property held in trust and so no longer any trust. There were only unsecured personal obligations.

51. J.K. KESSLER, *Drafting Trusts and Will Trusts*, 8th ed., London, Thomson/Sweet & Maxwell, 2007, Ch. 31; *Underhill and Hayton*, note 47, para. 83.36, at 1011.

injustice in this.[52] Law reform has been suggested.[53] But this has to be handled with some care, lest there be a fundamental but inadvertent change to the nature of the trust institution.[54] Such a change would involve moving the common law trust towards the conceptual model that prevails in Scotland, or, going further, treating the trust as if it were a distinct legal person.

22. Even in the common law, it is not uncommon to speak of the trust as if it were a legal entity, rather than a way of holding property. Examples abound. In a recent decision of the Supreme Court of Canada on fiduciary obligations, a number of trusts were named as parties to the litigation.[55] Nothing turned on this and nothing was made of it, but a common law trust can no more be a party to litigation than can a contract. It is even more astonishing when such mistakes appear in the statute book. In the U.S., the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated its *Uniform Prudent Investor Act* in 1994. The Act contains these provisions that apply when a trustee delegates the investment function to an agent :

> §9 ... (b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.
>
> (c) A trustee who complies with the requirements of subsection (a) is not liable to the beneficiaries or to the trust for the decisions or actions of the agent to whom the function was delegated.[56]

23. Although no one can owe a duty to a trust or be liable to a trust, these provisions were enacted as law in many

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52. H.A.J. FORD, note 25, at 28-30; D.A. STEELE and A.G. SPENCE, "Enforcement Against the Assets of a Business Trust by an Unsecured Creditor", (1998) 31 *C.B.L.J.* 72.

53. See *Rights of Creditors Against Trustees and Trust Funds*, at 17-18, a Consultation Paper issued in 1997 by the English Trust Law Committee, available at <www.kcl.ac.uk/schools/law/research/tlc/consult.html>. See also *Scott and Ascher on Trusts*, note 35, at 1906-1907.

54. On the dangers of reforming trust law in an unprincipled way, see R. FLANNIGAN, "The Political Path to Limited Liability in Business Trusts", (2006) 31 *Advocates' Q.* 257.

55. *Strother* v. *3464920 Canada Inc.*, 2007 SCC 24.

56. <www.nccusl.org/>.

states.[57] They were copied by the Uniform Law Commission of Canada in its *Uniform Trustee Investment Act, 1997*,[58] and have since become law in some provinces.[59] Again, reflecting the fact that the pressure to "entify" trusts is stronger when trusts are used as business associations, NCCUSL is now drafting a *Uniform Statutory Entity Trust Act* for business trusts. So too in Canada, there are recent (and as yet unproclaimed) amendments to the federal *Bankruptcy and Insolvency Act*[60] that change the definition of "person" to include "income trusts", a term used in Canada to denote business trusts, especially those whose units are traded publicly on stock exchanges.[61] The idea is assimilation to the corporation : there is a whole system for the insolvency of a corporation, aimed at the fair treatment of creditors and providing for the possibility of avoiding bankruptcy if possible; and, the reasoning goes, if trusts are used instead of corporations, the same regime should be available. But the fundamental difficulty is that, as we have seen, only assets and never liabilities are held in trust. It is therefore difficult to see how a common law trust can be bankrupt.

24. Of course, if it were a person, or even a patrimony, it would have liabilities as well as assets, and it could become bankrupt;[62] but changing the definition section of a bankruptcy

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57. See for example Connecticut Statutes, c. 802c, s. 45a-541i. Some states modified the *Uniform Act*; for example, *California Probate Code* s. 16052(b) corrects the error in *Uniform Act* §9(b), while s. 16052(c) repeats the error in *Uniform Act* §9(c).

58. <www.ulcc.ca/>.

59. For example, the Nova Scotia *Trustee Act*, R.S.N.S. 1989, c. 479, s. 3F. Many Canadian Trustee Acts correct these errors (e.g. *Trustee Act*, R.S.O. 1990, c. T.23, ss. 27.2, 28).

60. R.S.C. 1985, c. B-3.

61. By a combination of two amending Acts, the definition of "person" will include a corporation, and the definition of "corporation" will include an income trust : An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement act and to make concequential amendments to other Acts, S.C. 2005, c. 47, ss. 2(3), (5), as amended by An Act to amend the Bankruptcy and Insolvency Act, The Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada 2005, S.C. 2007, c. 36, ss. 1(1)-(3). Note also the combined effect of ss. 124(2), (3) of the 2005 Act and s. 61(2) of the 2007 Act, which will change the definition of "company" in the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, to include income trusts. The CCAA is a statute that allows large compagnies to seed court-supervised protection from creditors with the goal of avoiding bankruptcy.

62. The Scots trust can become bankrupt : G. GRETTON, note 2, at 614; for the same opinion in relation to the Québec trust, see M. CANTIN CUMYN, "La fiducie, un

statute is not apt to change the juridical nature of a fundamental legal institution. The trust is a fundamental institution in the sense that it cannot be understood in terms of other institutions. It is not a sub-category of legal persons, nor of contracts, nor of anything else. Conversely, treating the trust as one of those things—in particular, treating it as a legal person—will, in the long run, threaten to destroy its status as a fundamental institution.

25. For this reason, there is some cause to ask whether the Québec law of trusts might usefully be informed by the experience of Scotland. The legislative provisions in Québec seem to have been inspired by Lepaulle's work in the *Traité*. But there is a difficulty with a trust that is "un patrimoine indépendant de tout sujet de droit".[63] Trust beneficiaries have rights, and the corresponding obligations must be owed by a debtor.[64] In the Scots model, as in the common law model, the trustee is the debtor, even though the Scots model differs from the common law in that the Scots trustee holds the trust debts in trust. But in Québec, following the *Traité*, it appears that the trustee is not the titulary of the trust patrimony; he or she is only the administrator of the property of another.[65] So who is the debtor? If it is not to be the trustee, the only possible answer appears to be that it is the trust itself. This possibility was evident to some extent in Lepaulle's original thesis; he said that the beneficiaries' rights were rights against the trust, not the trustee,[66] while the trustee's obligations were owed to the trust, not to the beneficiaries;[67] but at the same time he denied that the trust was a person or a *sujet*

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nouveau sujet de droit?", in J. BEAULNE (ed.), *Mélanges Ernest-Caparros*, Montréal, Wilson & Lafleur, 2002, 131, at 142.

63. P. LEPAULLE, note 5.

64. *Civil Code of Québec*, art. 1371 : "It is of the essence of an obligation that there be persons between whom it exists, a prestation which forms its object, and, in the case of an obligation arising out of a juridical act, a cause which justifies its existence."

65. *Civil Code of Québec*, arts. 1261 (set out in note 7), 1278 para. 2 : "A trustee acts as the administrator of the property of others charged with full administration." On the other hand, note art. 1278 para. 1 : "A trustee has the control and the exclusive administration of the trust patrimony, and the *titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony* and may take any proper measure to secure its appropriation." (emphasis added.)

66. P. LEPAULLE, *Traité*, note 4, at 44-45.

67. *Id.*, at 43-44.

de droit.[68] This led him into some analytical difficulties, or at least so they seem to me; he had to argue that rights (and presumably obligations) need not belong to any *sujet de droit* :

> Nous constatons, en effet, que les droits ont deux manières d'être : ou bien ils appartiennent à un sujet de droit, ou bien ils sont affectés, de sorte que sujet de droit et affectation sont comme les deux foyers de l'ellipse qui enferme tout le plan juridique.[69]

26. Years later, he said that he thought that the best way to introduce the trust into a civilian system was as a legal person.[70] It is sometimes suggested that Lepaulle changed his mind;[71] but in the *Traité* he was primarily describing the common law trust in civilian terms, which is not the same as advocating how the trust should be introduced by legislation into a civil law system. In Québec, where the codal provisions seem intended to enact the *Traité*'s civilian description of the common law trust, one influential commentator has argued that the trust should be seen as, itself, a *sujet de droit*.[72] The nature of the Québec trust remains under discussion;[73] although it has not featured much in the debates, it seems at least possible that the Scottish model, in which the trustee holds the trust patrimony, could be adopted.[74] Textual arguments from the Civil Code point in both directions;[75] court decisions are similarly inconclusive.[76]

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68. *Id.*, at 43.

69. *Id.*, at 50.

70. P. LEPAULLE, "La notion de 'trust' et ses applications dans les divers systèmes juridiques", in *Actes du Congrès international de droit privé tenu à Rome en juillet 1950*, vol. 2, L'unification du droit / Unification of Law, Rome, Éd. Unidroit, 1951, 197, at 206-207. See also his book review, P. LEPAULLE, (1952) *4 Revue internationale de droit comparé* 377, at 378, and P. LEPAULLE, "The Strange Destiny of Trusts", in R. POUND, E.N. GRISWOLD, and A.E. SUTHERLAND (eds.), *Perspectives of Law : Essays for Austin Wakeman Scott*, Boston, Little, Brown, 1964, 226, at 237-238.

71. E.g. in J. BEAULNE, note 12, at 26.

72. M. CANTIN CUMYN, note 62. Here there is the nuance that the *sujet de droit* is seen as something capable of holding patrimonial rights, but less than a full legal person, hence perhaps unable to hold extrapatrimonial rights or to hold certain positions (such as that of trustee of another trust).

73. See J. BEAULNE, note 12, at 21-50, especially 23-24.

74. See D.W.M. WATERS, M. GILLEN, and L. SMITH, *Waters' Law of Trusts in Canada*, 3rd ed., Toronto, Thomson/Carswell, 2005, at 1353-1356.

75. See for example note 65.

76. One case raised directly the question whether a trust could be a party to litigation, and it was held that it could not, and the proceeding was therefore a

27. The main reason that Québec lawyers would resist the Scots solution lies perhaps in the unsatisfactory analysis of the trust under the *Civil Code of Lower Canada*. The Supreme Court of Canada held that the trust property was owned by the trustee, but that he held a kind of ownership that was *sui generis*.[77] This was strongly criticized by some authors as inconsistent with basic elements of the law of property.[78] But it is important to notice that the Scots solution does not presuppose a kind of *sui generis* ownership.[79] The trustee is the full, civil law owner, with *usus*, *fructus* and *abusus*. The beneficiary has only personal rights against the trustee—more precisely, against the trustee in his quality as trustee, since these rights are exigible only against the trust patrimony.[80] There is nothing in this that is contrary to civilian thinking about property. Indeed, it is quite common to find restrictions on the enjoyment of ownership that are purely obligational, and so long as they are purely obligational, there can be no theoretical objection. A simple example is a sale with reservation of title, called an instalment sale in Québec.[81] Full ownership is in the seller; the buyer has only physical control or detention, not even possession in the civilian sense;[82] and yet the buyer, pursuant to his purely contractual rights, enjoys the property as if he was the owner. Automobiles all over the province are purchased in this way, and there is no concern about *sui generis* ownership. So long as the restrictions on a trustee's ownership arise only in the law of obligations, it can be understood as ordinary ownership. In Québec, the lease of an immovable used as a

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nullity : *Château Wilson inc.* v. *Fiducie familiale Pezeyre-Lacroix-Foch*, (2003) Doc. 500-32-069887-026, 2003-07-23, j. Michel A. Pinsonnault, AZ-50184908 (Q.C.). Other cases show a mixture of trusts named as litigants, without any issue being taken, or trustees named in their capacity as trustees, which is more appropriate to the Scots model. For other citations see D.W.M. WATERS, note 74, at 1354-1355.

77. *Royal Trust Co.* v. *Tucker*, [1982] 1 S.C.R. 250.

78. See M. CANTIN CUMYN, "La propriété fiduciaire : mythe ou réalité?", (1984) 15 *R.D.U.S.* 7.

79. G. GRETTON, note 2, at 616.

80. Rights arising out of a *breach* of trust, however, could be rights against the trustee in his personal capacity. See note 19.

81. *Civil Code of Québec*, arts. 1745-1749.

82. See D.-C. LAMONTAGNE, *Droit de la vente*, 3rd ed., Cowansville, Yvon Blais, 2005, at 212.

dwelling provides an even stronger example.[83] The lessor has full ownership; the lessee has only personal claims and holds no real right;[84] and yet the lessor is generally unable to transfer his or her ownership free of the (formally personal) rights of the lessee.[85] Although the lessor's ownership rights are thus heavily constrained, he or she is not understood as holding *sui generis* ownership. Indeed, if the civilian jurist can picture the extension of this juristic mode of protection of the lessee to all kinds of property, and to all obligations regarding the benefit of property, he or she will have an understanding of how the common law trust arose : not by changing the law of property, but by extending the effects of obligations to third parties.[86]

28. As we have seen, it is definitionally true that a common law trust is not a legal person; but of course this definitional truth does not necessarily hold in other legal traditions. And yet, in any legal tradition, if the trust becomes a legal person then it ceases to be a fundamental legal institution; it becomes instead part of the law of persons, along with business corporations, co-operatives, some foundations, and so on.[87] Of course, it is true that much—perhaps all—of what is done with the law of trusts can, in some sense, be done

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83. *Civil Code of Québec*, arts. 1892-1978; see the editors' "Note to the 2006-7 Edition / Note de l'édition 2006-2007", in J.-M. BRISSON and N. KASIRER (eds.), *Code Civil du Québec : Édition critique / Civil Code of Québec : A Critical Edition*, 14th ed., Cowansville, Éditions Yvon Blais, 2006, at xvi-xxi.

84. Art. 1936.

85. Art. 1937.

86. See nos. 15-16 above. In the terms of the French and Québec legal traditions, "equitable title" is perhaps just a question of *inopposabilité* of a legal title.

87. M. CANTIN CUMYN suggests that only a common lawyer would think that the trust would be diminished if conceptualized as a legal person : "Rapport général", in M. CANTIN CUMYN (ed.), *La fiducie face au trust dans les rapports d'affaires*, Brussels, Bruylant, 1999, 11, at 28. But it is perhaps a misunderstanding to say that "le droit anglais relatif à la personnalité morale n'admet qu'un seul cas de figure, la *corporation*" (emphasis in original), since "corporation" in the common law does not correspond to *société* (as would "company" or "business association"); "corporation" corresponds directly to *personne morale*. The common law knows many kinds of corporations : universities, towns, incorporated golf clubs, co-operatives, and "corporations sole" such as the Crown or a bishopric. Most charities are now run as corporations, even though in times past most took the form of trusts. See David M. WALKER, *The Oxford Companion to Law*, Oxford, Clarendon Press, 1980, see "corporation". Just like the civil law, the common law admits (M. CANTIN CUMYN, *ibid.*) "la multiplicité des personnes morales, de leurs modes de constitution et de leurs régimes juridiques."

through legal persons.[88] Whether legal persons can serve as a functional equivalent for trusts then becomes merely a question of what kinds of legal persons are available, and how flexible are the governing provisions. But the lesson of history is that the trust has arisen, not once but many times and in many forms, exactly because people wished to accomplish lawful and licit goals that they could not accomplish through the use of contracts or legal persons.[89] The "entification" of the trust spells, in the long run, the end of the law of trusts by assimilation. Perhaps we can leave the last word to Lepaulle. After stating that he thought the best way to create a trust by legislation in a civilian system was as a legal person, he said :

> Je ne me cache pas que c'est là une solution facile : au lieu de faire travailler l'esprit sur des conceptions délicates et des constructions audacieuses, elle se contente de prendre dans notre arsenal familier une vieille notion. Mon âme de théoricien s'en attriste un peu, mais le vieux praticien ne peut que s'en réjouir car il travaillera plus vite sur un terrain plus sûr pour le plus grand bien des justiciables.[90]

29. Perhaps he gave up too soon. The learning from Scotland shows how the trust can be understood as a fundamental juristic institution, consistently with civilian notions of property, and without any talk of Equity.

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88. A classic study is F.W. MAITLAND, "Trust and Corporation", in H.A.L. Fisher (ed.), *Collected Papers of Frederic William Maitland*, 3 vols., Vol. 3, Cambridge, C.U.P., 1911, 321.

89. See R. HELMHOLZ and R. ZIMMERMANN (eds.), *Itinera Fiduciæ*, note 1. Of course, trusts have often been used for unlawful and illicit purposes too; but this is a misfortune that they share with contracts and with legal persons. See M. LUPOI, "A Civil Law Perspective on Trusts and the Italian Case", (2005) 11 *Trusts & Trustees* 10, at 13-14.

90. P. LEPAULLE, "La notion de 'trust'", note 70, at 207. There is some irony in this when it is reported that the suggestion that the Québec trust be created as a legal person was rejected by the practitioners : J. BEAULNE, note 12, at 22.

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