TRUSTS WITHOUT EQUITY

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> "Perhaps the greatest difficulty the civilians have in accepting the trust is caused by what I have come to regard as an English peculiarity logically detachable from the trust, namely, the distinction between the legal and the equitable estate. In Scots law, which, even if it did not invent and develop the trust for itself but took it over from England—the point is doubtful—has accepted it without inhibitions or reservations, no such distinction has ever been known. There the trustee becomes owner and the beneficiary acquires a contractual right against him."[1]

I. INTRODUCTION

FOR the comparatist the trust is problematic. For this there are two main reasons. The first is that the slogan of modern comparative law—"compare function rather than form"—does not work for the trust.[2] One cannot identify the function of the trust because there is no such function. The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations,[3] quasi-securities over assets,[4] schemes for collective investment,[5] vehicles for the administration of bankruptcy, vehicles for bond issues,[6] and so on and so forth.[7] In software terminology, trusts are emulators. They are not even confined to private law. They can exist in public law, and can also straddle the private/public boundary.[8]

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1. F. H. Lawson, *A Common Lawyer Looks at the Civil Law* (1953) p.201.

2. Despite this, valuable attempts to identify "trust-like" devices in non-trust legal systems have been made: see for instance Hein Kötz, *Trust und Treuhand* (1963); Christian de Wulf, *The Trust and Corresponding Institutions in the Civil Law* (1965); W. A. Wilson (Ed.), *Trusts and Trust-Like Devices* (1981).

3. Both non-profit quasi-corporations, such as the Inns of Court, and quasi-companies, with the shareholders being the beneficiaries and the directors the trustees. For a classic study see John H. Sears, *Trust Estates as Business Companies* (2nd edn, 1921).

4. Quasi-mortgages, quasi-pledges, quasi-hypothecs etc. This may be done in three ways. (1) The debtor transfers assets to a neutral third party to hold as trustee for the lender and for the debtor. (2) The debtor may transfer to the creditor to hold as trustee for both parties. (Compare the Roman *fiducia cum creditore* and its modern versions.) (3) The debtor may declare a trust over his own assets with himself as trustee, holding for himself and the lender. All three of these patterns can be found in one jurisdiction or another.

5. The unit trust. Paradoxically, investment trusts, which are also collective investment schemes, are not trusts.

6. Debenture trusts.

7. "*Si l'on demande à quoi sert le trust, on peut presque répondre: 'à tout.'* " ("What is the trust used for? Almost everything." Pierre Lepaulle, *Traité Theorique et Pratique des Trusts* (1932) p.12.)

8. They are not even confined to national laws: they extend to public international law. See for instance Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (1999).

The second reason why trusts have proved so problematic for the comparatist is that there is a widespread belief that they are a special product of the common law tradition and, in particular, of its law/equity duality,[9] and thus intrinsically mysterious to the civilian tradition. Trusts are supposed to be an Athanasian mystery. The Hague Convention on the Recognition of Trusts tells us that "the trust, as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution...".[10] The trust is unique because it is founded on the division between law and equity and the consequent division of property rights into legal and equitable. The Privy Council has said that "the distinction between the legal and the equitable estate is of the essence of the trust."[11]

Or again, in the *International Encyclopaedia of Comparative Law* Professor Fratcher writes:

> The trust is a legal device developed in England whereby ownership of property is split between a person known as a trustee, who has the rights and powers of an owner, and a beneficiary, for whose exclusive benefit the trustee is bound to use those rights and powers.[12] ... The interest of a beneficiary is ... a property interest in the subject matter; it is not a mere personal or contract claim against the trustee. Neither trustee nor beneficiary has a mere *ius in re aliena*. In other words, the interests of both the trustee and the beneficiary in the subject matter are interests *in rem*.[13] Because both the trustee and the beneficiary have, concurrently, *in rem* interests in the same subject matter, the creation of a trust normally involves a splitting of ownership.

The trust, it seems, is English, the trust is part of property law, and the trust is based on a separation between ownership in law and ownership in equity. Maurice Amos, also writing in comparative vein, took the same

9. "Though the English do not lay exclusive claim to having discovered God, they do claim to have invented the trust with two natures in one." (T. B. Smith), *International Encyclopaedia of Comparative Law* Vol.VI, chap.2, para.262.

10. (Preamble.) As one usually finds in texts where two or more languages are authentic, there are significant differences between the authentic versions. The French text reads: "*Le trust est une institution caractéristique crée par les jurisdictions de l'equité dans les pays de common law.*"

11. *Abdul Hameed Sitti Kadija* v. *De Saram* [1946] 208 (Ceylon) at 217. (Privy Council, quoting with approval R. W. Lee, *Introduction to Roman-Dutch Law* (3rd edn, 1931), p.372.)

12. This passage is from Vol.VI, chap.11 at the beginning of para.1. The following passage is from the same chapter at the end of para.3 and the beginning of para.4.

13. One may remark that since a *ius in re aliena* is itself a *ius in rem* this inference is hard to follow. The father of modern Dutch law, E. M. Meijers, wrote that "*het Engelsche zakenrecht is en zijn constucties en ook in vele zijner regenlinen, eenige eeuewn bij die van het Europeesche yasteland ten achter.*" (Quoted H. F. W. D. Fischer at 1957, *Tydskrif vir hedendaagse Romeins-Hollandse* Reg.25 at 35/36.) This remark is so undiplomatic that it is better left untranslated. It is also less than fair, but passages such as that quoted in the text enable one to understand why Meijers descended to invective.

view: "the heart of the difficulty lies in the fact that trust property has two contemporaneous owners."[14]

And yet there have been doubters. Lawson was one.[15] Likewise, Bernard Rudden has written that "the orthodox explanation, given in terms of the traditional distinction between law and equity, provides only a historical and not a rational account of the trust."[16] The doubters are right. The trust does not have to be conceptualised within the framework of English law. The trust presupposes neither equity nor divided ownership. The *ius commune* tradition already has the categories with which to understand the trust. Scots law, which has known the trust since the 17th century and has more or less successfully integrated it within an almost pure *ius commune* system of property law, shows how.[17]

II. CAN THE TRUST BE EXPLAINED IN TERMS OF THE LAW OF OBLIGATIONS?

CAN trust be explained as forming part of the law of obligations, perhaps as a special form of contract? To some extent it can.[18] It is too seldom stressed that to be a trustee a person must so consent.[19] He voluntarily undertakes the obligations of the trust. The civil law tradition is familiar with the *fiducia cum amico*,[20] in which a person transfers the ownership of assets to another, for the purpose of administration, the recipient being bound—as a matter of the law of obligations—to administer them in a certain manner. How near does that go to the trust?

One objection to seeing trusts as contracts is that the trust does not obey the dictates of privity theory, but then privity is hardly a universal truth, and even in the common law world is as honoured in the breach as in the observance. *Stipulatio alteri* can achieve a great deal, and indeed one may suspect that its historical absence from English law[21] was a

14. (1936/7) 50 *Harvard Law Review* 1249, at 1264.

15. See for instance the quotation at the beginning of this article.

16. "Things as Things and Things as Wealth" (1994) 14 *Oxford Journal of Legal Studies* 806, at 89. And cf. the same author's remark that "while the separation [between law and equity] may be the historical reason for the invention of the trust concept, it does not seem an adequate analytical reason, for it fails to explain the Scottish trust." ("Equity as Alibi" in Stephen Goldstein (Ed.), *Equity and Contemporary Legal Developments* (1992), at p.36.

17. This article has the ambitious aim of trying to catch the essence of the trust, whether used for private or for commercial purposes. Inevitably, however, it cannot investigate all the manifold uses to which trusts are put.

18. Cf. J. H. Langbein, "The Contractarian Basis of the Law of Trusts" [1995] 105 Yale L.J. 625.

19. In the normal case. There can also be cases of trusteeship by force of law, without contract. But it is, after all, a general truth that obligations may arise *ex lege* as well as *ex voluntate*.

20. The *Verwaltungstreuhand* of German law corresponds to this form of *fiducia*. For *fiducia* in general in Roman law see *Inst Gaii* 2,60.

21. England has recently made further inroads into privity by the Contracts (Rights of Third Parties) Act 1999. For privity and trusts see N. G. Jones, "Uses Trusts and the Paths to Privity" (1997) 56 C.L.J. 175.

motive for the development of the trust, with its freedom from the shackles of privity. It is also true that the trust does not conform to classical notions of contract formation, but few today would regard that as a point of great significance. Nineteenth century theories of contract formation have been eroded by experience and by reflection.

Another possible objection to the attempt to understand the trust as a sort of contract is the fact that a beneficiary can in some circumstances hold liable a third party who acquires trust property in bad faith. This fact is often held up as an illustration of the semi-real nature of the beneficiary's right. But nothing is more common than for legal systems to provide that if A breaks his contract with B as a result of collusion with C, C may have some liability to B.[22] It does not follow that a right is real merely because the holder of that right can claim the protection of the law against interference by third parties.[23]

If C did not act in *bad faith* but took *gratuitously*, he may be liable to B, where A is a trustee and B is a beneficiary, but again this is not so surprising: all legal systems provide that gratuitous transfers are potentially reversible where the transferor is insolvent[24]—and if he is solvent B should suffer no loss anyway.

Another objection to the "obligational" view of the trust is that it does not explain why breach of trust may attract criminal sanctions. But this is not a special feature of the trust: persons in a fiduciary position may be prosecuted for fraud, and there are many fiduciaries apart from trustees. And the concept of a fiduciary exists also in the civil law tradition.[25]

In brief: trusts are capable of generating both third party rights and third party liabilities. But the same is true of contract law. There are, indeed, some differences, in these areas, between trusts and contracts, but the differences are matters of detail.

The main difficulty in the obligational view of trusts is that it does not explain the effect of the trust in relation to the rights of creditors—the

22. Tony Honoré has written that "the conclusion must be that civil law systems are capable of protecting the trust beneficiary by the doctrine of notice to the same extent as does English law by its recourse to equitable interests in property." ("Obstacles to the Reception of the Trust? The Examples of South Africa and Scotland" in A. M. Rabello (Ed.), *Aequitas and Equity* (1997).)

23. A point well made within the Anglo-American tradition by Harlan Stone: "The Rights of the Cestui Que Trust" (1917) 17 *Columbia Law Review* 467.

24. That is to say, the set of rules whereby donations, and other juridical acts, by an insolvent debtor, which have the effect of diminishing the value of the debtor's estate, may be voidable at the instance of the unpaid creditors. The detailed rules vary from one legal system to another but (at least in the civil law world) all derive from the *actio pauliana*.

25. *Tutor rem pupilli emere non potest: idemque porrigendum est ad similia; id est ad curatores procuratores et qui negotia aliena gerunt.* (Dig.18, 1, 34, 7. "A tutor cannot buy a thing belonging to his ward; this rule extends to other persons with similar responsibilities, that is curators, procurators and those who conduct another's affairs." (Translation *per* Alan Watson's edition.)

"insolvency effect". This (the priority which the beneficiaries have over the trustee's creditors) is surely the central fact of the trust which any theory must recognise and explain.[26] If the trust is in its essence a contract, it will not defeat the rights of the owner's other creditors.

III. TRUST AS AGENCY?

SOMETHING like a trust can be created by locating ownership in the "beneficiary", and conferring on the "trustee" extensive contractual powers, including powers of alienation. Such an arrangement can involve "mandate without representation."[27] If things are done in this way, the insolvency effect is explained: the creditors of the "trustee" are defeated, because it is the "beneficiary" who is the owner. In the *bewind* of Dutch law, and of the Roman-Dutch systems of southern Africa, we see this idea developed into a formal institution.[28] But though it functions as a trust, the *bewind* is not trust, for a simple reason: the location of legal title is the reverse of the trust.[29]

IV. DO THE BENEFICIARIES HAVE RIGHTS *IN REM*?

SO is Professor Fratcher right in saying that "the trust is a legal device developed in England whereby ownership of property is split"?[30] Is the Privy Council right to say that "the distinction between the legal and the equitable estate is of the essence of the trust"?[31] Is Amos right to say that "trust property has two contemporaneous owners"?[32] Is it true that "the

26. This is so even though most reported trust cases do not turn on this issue. As a comparison, the central doctrine of company law is the separate personality of the company, even if most reported company law cases do not turn on this point.

27. This conceptualisation of the trust was common in Scots law in the 17th and 18th centuries. Trust was often described as a combination of *depositum* and *mandatum*, with the *depositum* being a deposit of ownership rather than possession. See further James Dalrymple (Lord Stair), *Institutions of the Law of Scotland* (1681) 1,13,7 and 4,6,3; Andrew McDouall (Lord Bankton), *Institute of the Laws of Scotland* (1751) 1,18,12; John Erskine, *Institute of the Law of Scotland* (1773) 3,1,32.

28. However, it does not seem to be used much in practice, either in the Netherlands or in Southern Africa. In *Heritable Reversionary Co.* v. *Millar* (1892) 19 R.(H.L.) 43 Lord Watson opined that in the Scottish trust the beneficiaries are the owners and the trustee has no real right—in the effect the *bewind* concept. But this was a maverick view, shared by no one before or since. Something like the *bewind* exists in the *Ermächtigungstreuhand* in Austrian law. (See generally Peter Apathy (Ed.), *Die Treuhandschaft* (1995).)

29. Interestingly, South African legislation classifies the *bewind* as a sort of trust: see the Trust Property Control Act 1988. The South African view is that what is important is not so much ownership as control. (See also H. R. Hahlo at (1961) 78 *South African Law Journal* 195.) As against this, one may argue that if control, rather than ownership, is the test, then company directors would be "trustees." But company directors, though occasionally called trustees, are fiduciaries but not trustees.

30. *International Encyclopaedia of Comparative Law* Vol.VI, chap.11, para.1.

31. *Abdul Hameed Sitti Kadija* v. *De Saram* [1946] 208 (Ceylon) at 217. (Privy Council, quoting with approval R. W. Lee, *Introduction to Roman-Dutch Law* (3rd edn, 1931), p.372.)

32. (1936/7) 50 *Harvard Law Review* 1249, at 1264.

dual division of title into formal or legal ownership and substantial or bonitary ownership is essential to the trust"?[33] Turning the question around, is it true that "the ... basic obstacle to acceptance of the trust [in legal systems with a civilian property law] is the concept of autonomous and indivisible ownership"?[34] (It is important to emphasise that these quotations—and others in similar vein might be cited—were not intended by their authors to be confined to *English* law.)

Are beneficial rights proprietary, or real, rights? Is ownership divided? One reason why the question is so difficult is that it can be asked at different levels. As a question addressed to the individual systems of the common law tradition, the answer has to be affirmative.[35] It is true that even within that tradition there have been doubters, but the "*in rem*" view has come to prevail. And it might be argued that that is the only level—the level of particular legal systems—at which the question makes sense. There is no *Begriffshimmel*, no "heaven of concepts." But that is too short an answer. Lawyers from different traditions have to speak with each other, and not merely by way of academic debate. No one would say that, since "sale" has no absolute system-neutral meaning, therefore the Convention on the International Sale of Goods is a pointless exercise. And especially within the European Union we have to try to understand each other. The very existence of the Union, with its constantly-expanding sphere of Union-wide legislation, means that there has to be a system-neutral background of shared legal ideas. I do not wish to say anything of the idea of the *ius commune europaeum novum* except to observe that in *some* sense it must exist *already*, for Union legislation must use law-bound language.

Thus there is a problem: a system-neutral language is both necessary and impossible. I cannot resolve this antinomy. What this article attempts to do, is to understand the trust from an admittedly civilian standpoint,

33. J. Garrigues, "Law of Trusts" (1953) 2 *American Journal of Comparative Law* 25, at 33.

34. V. Bolgar, "Why no Trusts in the Civil Law?" (1953) 2 *American Journal of Comparative Law* 204, at 210.

35. Beneficial rights are personal rights in English law, it is true, but the key point is that they are also proprietary. Some scholars have agonised over this. Maitland: "If a foreign friend asked me to tell him in one word whether the right of the English *Destinär* (the person for whom property is held in trust) is *dinglich* or *obligatorisch*, I should be inclined to say: 'No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. In the ultimate analysis the right may be *obligatorisch*, but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigenthum*." (H. A. L. Fisher (Ed.), *Collected Papers of Frederick William Maitland* (1911) Vol.III, at p.326. For Maitland's thoughts on how, historically, the beneficial interest evolved from a personal right into a quasi-real right, see his *Equity* chap.9 (pp.112–114 of the 1949 edition). But Maitland's views remain (that beneficial rights are not truly real) a minority one.

but at least a standpoint which is not tied to any particular civilian system. And here Scots law offers a singularly good point of entry. It is a mixed system whose property law is a remarkably pure *ius commune* system,[36] but which, nonetheless, has had the trust at least in a rudimentary form—since the 17th century—a far longer period than the other mixed systems—and which, moreover, has the trust as part of its unenacted law. The basics of the Scots law of trusts do not hang upon the construction of a statutory text.

On that basis, and in that sense, what are the objections to regarding the right of a trust beneficiary as a real right?[37]

(1) A real right is presumptively valid *erga omnes*. By contract, a beneficial right is not.[38]
(2) If the right of the beneficiary is real, how is it that a person acquiring from the trustee can take free from the rights of the beneficiary? If the beneficiary's right is personal, the difficulty disappears: the third party is acquiring from the owner, and no other real rights affect the asset.
(3) In international private law beneficial interests behave much more like personal rights than like real rights.
(4) In general, real rights in immovables can be, and usually must be, registered, whilst personal rights do not need to be, and in general cannot be, registered.[39] In this respect beneficial rights follow personal rights.
(5) The rights of the beneficiary are transferable in the same manner as any personal rights, namely by assignment or cession, and not by the means used for the transfer of real rights.

36. The standard text is K. G. C. Reid, *Law of Property in Scotland* (1996).

37. In the following I do not mention the well-known argument that a beneficial right in a trust cannot be a real right because of the *numerus clausus* of real rights. This argument is valid in the context of international private law, when the courts of Utopia (where the trust is now known) have to decide what effect to give, in Utopia, to a foreign trust. If Utopia has a *numerus clausus* of real rights, the right of a beneficiary cannot be real to the extent that it is subject to the internal law of Utopia. That is certainly a cogent position. But the *numerus clausus* argument is no answer to the argument that the beneficial right is indeed real in the jurisdictions which admit it. The nature and number of real rights was not fixed for all time by Ulpian or Tribonian or Accursius or Voet or Windscheid. It is a conception capable of change and development. If, say, French law wishes to adopt the trust, the doctrine of *numerus clausus* is no obstacle.

38. The fact that a purchaser in bad faith may be liable to the beneficiary has nothing very special about it: most legal systems have some such rule, whereby X, buying from an owner Y, in knowledge of Z's personal rights against Y, may be liable to Z. (Details of the rule naturally vary from one jurisdiction to another.)

39. Obviously there is considerable variation between different systems, but this principle will be generally found to be reliable.

(6) Real rights are normally subject to the "principle of specificity". They are like labels glued to particular things. Consider the paradigm examples: ownership, servitude, pledge. But beneficial rights attach not so much to things as to funds, whose contents are—or may be—constantly shifting while at the same time the fund continues as an entity. Where a beneficial right involves a right to a particular asset—as where A conveyed land to B for A's own use while A went off to crusade—there may be some plausibility about describing it as real. That plausibility declines where the beneficial right is a right simply to money, without reference to any particular asset at all.

(7) Beneficial rights are often indeterminate. It may be certain that a person is a beneficiary and yet it may be wholly uncertain what his rights are. It may even be wholly uncertain whether he will ever benefit at all—a strong example of this being the discretionary trust.[40] Moreover, the very identity of beneficiaries may be indeterminate, as where a trust confers benefits on the unborn issue of a named person. Whilst personal rights can (more or less) be reconciled with this sort of thing, real rights cannot.[41] Of course, some beneficial rights might be real and others not: but that seems rather arbitrary.

(8) The central problem of the trust is to explain the insolvency effect—the fact that the rights of the beneficiaries are, in principle, unaffected by the insolvency of the trustee. If the rights of beneficiaries were real, that would be an explanation. Yet it seems to be accepted that there exist at least some kinds of trust where it is senseless to attribute equitable ownership to the beneficiaries. Charitable trusts are examples of this, as are other "purpose" trusts, and indeed even in discretionary private trusts arguably examples may also be found.[42] Yet *the insolvency effect operates in all trusts regardless of whether the rights*

40. The fact that, even within the conceptual structure of the common law, beneficiaries may have not rights *in rem*, is a point stressed by Maurizio Lupoi: see his *Introduzione al Trust* (1994) and *Trusts* (1997).

41. It must, however, be conceded that the civilian tradition has sometimes been rather wobbly on this point. Take Art.629 of the Austrian Civil Code (ABGB): "*Das Eigentum des Fideicommiss-Vermögens ist zwischen allen Anwärtern und dem jedesmaligen Fideicommiss-Inhaber geteilt. Jenen kommt das Obereigentum allein; diesem aber auch das Nutzungseigentum zu.*" (The ownership of entailed property is split between the heirs in expectancy and the heir in possession. To the former belongs the *dominium directum*; to the latter the *dominium utile*.) This was, understandably, disapproved of by the pandectists as being uncivilian. It was repealed immediately after the *Anschluss* in 1938, and was not revived with the restoration of Austrian independence. Thus the Nazis spread that Pandectism of which they disapproved. This one codal provision deserves an article to itself.

42. For discussion see e.g. R. A. Pearce & J. Stevens, *Law of Trusts and Equitable Obligations* (1998) pp.418–420.

of the beneficiaries are "real" or not. Thus the theory that beneficial rights are real does not even solve the problem for which it was created. It is—at best—the fifth wheel on the car.[43]

(9) It is often remarked that the trustee is treated as owner "only" as regards third parties, whilst as between trustee and beneficiary it is the beneficiary who is owner. But this is a muddle, and in fact the true conclusion is the opposite one: beneficial rights are in fact not real. Real rights are defined primarily in terms of third party effect.[44] The fact that in third-party terms—for instance in suing an intruder for trespass or registering a title—it is the trustee who is owner shows where ownership lies. There is nothing mysterious or puzzling about an owner who undertakes, by way of obligation, to hold the whole benefit for someone else: to call that "divided ownership" is mystification.[45]

The Court of Justice has been obliged to consider whether a beneficial right is a real right in the context of Article 16 of the Brussels Convention.[46] This provides that in an action concerning "rights *in rem* in immovable property" jurisdiction belongs to the courts of the country where the property is situated. Quoted here is the official English translation. The original text was of course not drafted in English. The French text speaks of *droits réels immobiliers*. A Scots lawyer would not translate this as "rights *in rem*" but as "real rights",[47] but EU texts and international conventions naturally have their English language version framed in terms of English law, and the same is true when they are transposed into domestic UK law by Westminster legislation. Though natural, this can be problematic for the Scots lawyer, as the present example illustrates. In *Webb* v. *Webb*[48] the Court of Justice had to decide what Article 16 meant in relation to trusts. A father bought property in France but arranged for the son to be registered as owner. Later they fell out, and the father sued in the English courts for a declaration that the son held for the father on trust. One line of defence for the son was that this

43. A connected point is that the trusts assets themselves may be partially or wholly personal rights (even "equitable" rights), and it could hardly be that the rights of the beneficiaries are real while those of the trustee are personal.

44. Robinson Crusoe had no law. When an island has two people, there must be law—*ubi societas ibi ius*—but only personal rights are needed, not real rights. Real rights will arrive with the third castaway.

45. A similar muddle occurs in the Sale of Goods Act 1979. The heading above s.16 reads: "Transfer of property as between seller and buyer."

46. Transposed into UK law by the Civil Jurisdiction and Judgments Act 1982.

47. Other European languages use the local vernacular term too, not the Latin. It is curious that it should be English law that uses the Latin phrase. Presumably this is because the traditional meaning of "real" in English law is "immovable."

48. [1994] E.C.R. I-1717 (Court of Justice Case No.C-294/92).

was an action *in rem* and so the English courts did not have jurisdiction. The Court of Appeal referred the matter to Luxembourg, which held that Article 16 did not apply, because the action did not concern real rights in French property. There has been some disquiet in England about this decision. To a Scots lawyer it looks obviously correct. In Scots law the right of a beneficiary is a personal right and not a real right. So what conclusion can we draw from the decision? The natural conclusion is that the term right *in rem* as used by lawyers in the common law tradition does not precisely correspond to the civilian conception of a real right.[49] Right *in rem* is a wider conception: it includes rights regarded as real rights in the civilian tradition but it includes some other rights too. Hence the official English version of Article 16 is a mistranslation. Or at least so it seems when viewed from north of the border, and also, it seems, from Luxembourg.

A connected terminological point concerns the word "proprietary." In the common law systems it is natural to distinguish remedies (and rights) into personal and proprietary. When translating into civilian terminology, one must be careful. Many "proprietary" remedies and rights are, in civilian terms, real, but others are not. For instance, it is unclear to what extent Scots law recognises a right to trace. But to the extent that it does, the right is not classifiable as "proprietary",[50] since the tracer has no real right. The point is primarily linguistic rather than substantive.

The legal realist will be impatient with all this agonising about whether a right is real or not. Concepts should be our servants and not our masters. But we cannot escape formalism. Those who claim to reject formalism are fellow formalists with a rival theory of their own.

V. TRUST AS PATRIMONY

THE concept of patrimony is that of the totality of a person's assets, and, in its broader sense, his liabilities also. It is sometimes supposed to have been an invention of 19th century legal scholars. That view might seem to receive support if one looks at most standard texts on Roman law, which refer to *patrimonium* only in the sense of the *patrimonium caesaris*, the imperial patrimony. But that view is quite wrong. For example, only a little research in the sources is necessary to show that the later civilian concept of patrimony, or something pretty near it, already existed in Roman law. The word *patrimonium* is used in this sense by Papinian,[51] by

49. "It is almost impossible to convey to continental lawyers the exact sense in which an English lawyer uses the terms *in rem* and *in personam*." H. C. Gutteridge, *Comparative Law* (1946) p.123. That is perceptive. One might add that it is almost impossible to convey to Anglo-American lawyers the exact sense in which a civilian lawyer uses the terms "real" and "personal."

50. The word "proprietary" is not normally used in Scots law, being a word heavily laden with the doctrines of English equity.

51. Dig.31.77.19.

Paul,[52] by Pomponius,[53] by Scaevola,[54] and by Ulpian.[55] The concept was to be developed later in the civilian tradition, but it has been there from almost the beginning. What happened in the 19th century was, rather, a reaction against the idea of special patrimonies and in favour of a single general patrimony.[56]

This is not the place to elaborate on the concept of patrimony, though it may be observed that one of its benefits is to remove a terrible temptation: the temptation to equate what is *mine* with what I *own*. All my rights are mine, but not all my rights are rights of ownership. One of the first lessons of property law is to distinguish real rights from personal rights, and, amongst the real rights, to distinguish ownership on the one hand from the limited real rights on the other hand. If I am owner of a thing and enter into an unexecuted contract of sale with you, my patrimony still, at this stage, has the real right, while in your patrimony there is a personal right. In my patrimony there is also a personal right, to the price, while in the larger sense of patrimony we both have obligations: my obligation to convey and deliver and your obligation to pay and accept.

The concept of patrimony, or something much the same, is known also to English law, under the name of "estate"[57] or, sometimes, "fund."[58] "Estate" has more than one meaning, but in the sense of winding up the "estate" of a deceased person, or administering the "estate" of a bankrupt, the word is being used too in the sense of patrimony.

In general, the principle is: one person, one patrimony. Everyone has a patrimony, no one has more than one. But the civilian tradition admitted qualifications to this principle. As well as his ordinary patrimony, a person could sometimes have a "special patrimony." (Such as *dos* or *peculium* in the Roman law.) For example, matrimonial property regimes sometimes necessitated the existence of a special patrimony.[59] In such a special

52. Dig.10.2.38.

53. Dig.46.6.9. This passage, however, excludes claims (*nomina*) from the concept. That is different from the modern concept. The fact that Roman law at that time had not fully developed the institution of *cessio* (assignment) is a partial explanation.

54. Dig.12.6.61.

55. Dig.5.3.25. These citations are illustrative, not exhaustive.

56. "It has often been considered in civil law countries that 'each person has a patrimony, each person has only one patrimony.' This construction is essentially due to the reading by some French authors of some provisions of the French Civil Code." Michel Grimaldi and Francois Barrière in Arthur Hartkamp (Ed.), *Towards a European Civil Code* (2nd edn, 1998), at p.578.

57. Herbots has written that "English law has ... no theory either of estate or of personality." ("*Het Engels recht kent ... geen theorie van het vermogen, noch een theorie van de rechtspersoon.*") J. H. Herbots (Ed.), *Le Trust et la Fiducie* (1997), at p.7. That goes too far, though one can see why, from a continental standpoint, Herbots was tempted to say it.

58. There is not much discussion of the concepts of patrimony and special patrimony in the English language. On this lack see Ansay, "Third Way?" in J. Basedow, K. J. Hopt & H. Kötz (Eds), *Festschrift für Ulrich Drobnig* (1998).

59. In which case it should perhaps have been called a matrimony.

patrimony there is real subrogation, i.e. the principle that a thing bought with money from that source was part of that special patrimony, and conversely.[60] Thus the assets of the special patrimony are segregated from the general patrimony, and to some extent the civilian tradition has likewise accepted segregation of liabilities also. Real subrogation is the key to the doctrine of patrimony, and patrimony is the key to the trust.

In other words, a trust is a special patrimony. There is nothing surprising about this conclusion,[61] except that it has not been more widely understood. One frequently meets continental lawyers who fret and puzzle about the trust, to whom the trust is an *arcanum*, to be understood only in terms of the mysteries of equity, those who have swallowed whole that remarkable statement in the preamble to the Hague Convention on the Recognition of Trusts about the trust being a "unique legal institution" which was "developed in courts of equity in common law jurisdictions", those who accept at face value the assertion that the right of the beneficiary is a right *in rem*. Yet the civilian tradition actually has and has always had the appropriate concepts.[62] There is an irony here.

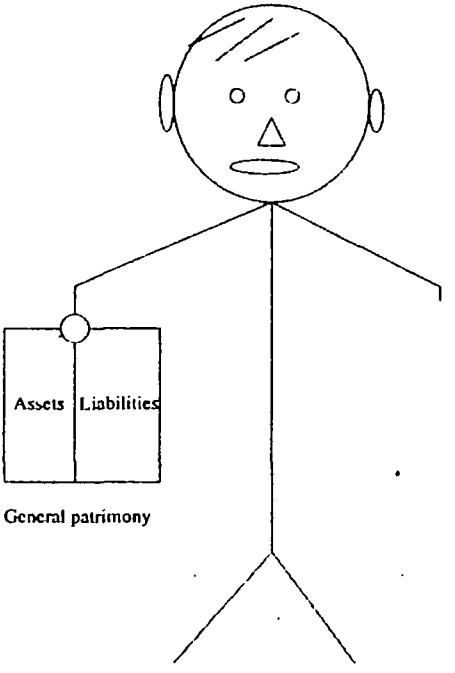
Here are three pictures. The first shows the ordinary case of one person and his patrimony, the patrimony being a bag with two parts, namely the liabilities and the assets. The second is the case of the person who is also a trustee: it illustrates the essential principle of one person, but two patrimonies. The third shows the trust which has two trustees. Their title is a "joint" one, as opposed to co-ownership: that is a necessary feature of the trust.[63]

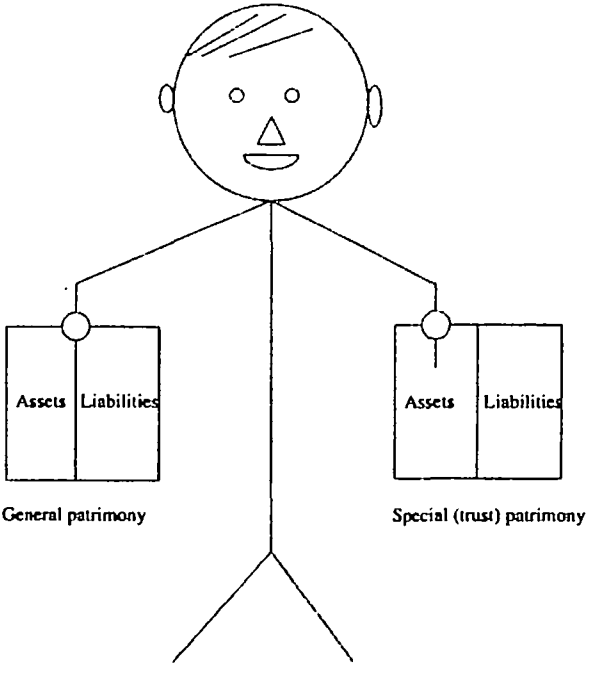
60. For the history, see Arno Welle *In universalibus pretium succedit in locum rei, res in locum pretii: eine Untersuchung zur Entwicklungsgeschichte der dinglichen Surrogation bei Sondervermögen* (1987).

61. The point was developed by the French comparatist Pierre Lepaulle in his *Traité Théorique et Practique des Trusts* (1932). This is one of the seminal treatments of the subject. One area where Lepaulle's thought was influential is Latin America. (It was eventually published in a Spanish version in Mexico: *Tratado teorico y pratico de los trusts* (1975).) For Lepaulle's thoughts near the end of his life see "The Strange Destiny of Trusts" in Roscoe Pound (Ed.), *Perspectives of Law: Essays for Austin Wakeman Scott* (1964).

62. To what extent the civilian concepts go back to Roman law itself, and to what extent they are post-Roman developments, is open to debate. H. Patrick Glenn concludes that "the trust ... is part of a pan-European tradition and was developed in opposition to another pan-European tradition, that of Roman law." ("The Historical Origins of the Trust" in A. M. Rabello (Ed.), *Aequitas and Equity* (1997).) Glenn's essay is of value but the second part of the sentence quoted goes too far.

63. Joint ownership may be compared with the *Gesamthandeigentum* as opposed to the *Miteigentum* of German law.





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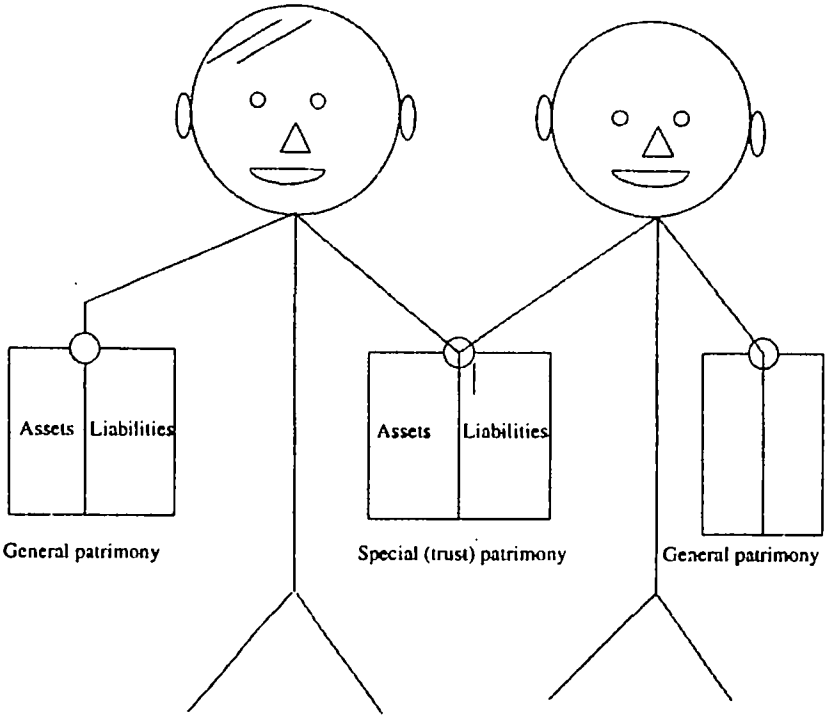

With the explanation of trust as patrimony everything falls into place. The rights of beneficiaries are personal rights.[64] They are personal rights against the trustee,[65] enforceable against the special patrimony. (And sometimes, depending on the legal system and the circumstances of the case, against the general patrimony also.[66]) Conversely, personal rights

64. Are they founded on promise or on contract? Or perhaps they are another form of voluntary obligation? I would analyse the trust obligation as a special form of promise. But the question is probably of limited importance. A more interesting question is whether beneficiaries need to have any *rights* at all. It may be that benefit can be separated from enforceability, and in fact this is one of the current issues in international trust law. For perceptive discussion see Paul Matthews, "The New Trust: Obligations without Rights?" in A. J. Oakley (Ed.), *Trends in Contemporary Trust Law* (1996). See also Paul Baxendale-Walker *Purpose Trusts* (1999). A trust of this sort is especially problematic in legal systems which recognise the division of ownership, for it means that the trustees have legal ownership (and nothing more) but the equitable ownership is in a void. Actually this is yet another argument to show that beneficial rights cannot be real.

65. Lepaulle did not agree. For him the rights of the beneficiaries, though personal, were enforceable against the trust rather than against the trustee. Likewise, the duties of the trustees were owed, not to the beneficiaries, but to the trust itself. (*Traité Theorique et Pratique des Trusts* (1932), pp.42–44.) This view of matters virtually turns the trust into a juristic person. Thus shareholders have rights against the company, not against the directors, and directors owe their duties to the company, not to the shareholders.

66. These personal rights form, of course, part of the beneficiary's patrimony.

enforceable against the trustee in his personal capacity are not (in general) enforceable against the special patrimony. *There is thus no need to seek to classify the right of beneficiaries as being in some way privileged or quasi-real or as in some way "trumping" the rights of the creditors of a trustee in his personal capacity.* There is no need to resort to duality of ownership. Instead of duality of ownership, there is duality of patrimony. As for the fact that a trust estate is a "fund" the constituent items of which may change without changing the identity of the fund, this is of the essence of the idea of a patrimony. It is also essential to the trust concept. Indeed the chief reason why the German *Treuhand* falls short of the trust is that in the *Treuhand* real subrogation does not fully operate.[67] (There may, indeed, be subrogation (*Surrogation*) in respect of the "internal" relationship, that is to say, as between *Treuhänder* and *Treugeber*, but this has no "external" effect.)

Far from beneficial trust rights having *priority*, they are in fact *postponed* claims. For if a trust becomes insolvent, the claims of the beneficiaries are postponed to the claims of those who are creditors of the trust. If anything needs to be explained, it is *this* fact. But the explanation is not difficult. It is the explaining of priority which is difficult—very difficult indeed unless one invokes the idea of a real right. But explaining postponement is unproblematic. (And no one would seek to argue that ordinary creditors of a trustee all have real rights.) The conception is simple: a beneficial right is a personal right which is to be met only when creditors have been provided for. (Indeed, in commercial transactions subordinated debt is common and can be created purely by contract.)

The patrimonial conception of the trust also explains, or at least underlies the explanation of, other features. It helps to explain why a trust will not fail for want of a trustee, so that even if all the trustees die the trust continues, and new trustees can be appointed.[68] It helps to explain how it is that a court can take a trust out of the hands of the existing trustees and place it in the hands of new trustees. It explains why a trust estate, as such,

67. The German *Unmittelbarkeitsprinzip*, according to which assets held in *Treuhand* are protected from creditors of the *Treuhänder* only if they are the original "trust" assets—i.e. the exclusion of real subrogation—strikes me as lacking a stateable basis in legal doctrine. If there is a special patrimony then there must be real subrogation. If there is no special patrimony, the immunity to creditors is inexplicable (unless the right of the beneficiary is real). Kötz admits that the insolvency effect of the *Treuhand* is "incompatible with the theory that the beneficiaries' interest in the *Treuhand res* is a mere right *in personam*." (Hein Kötz, "National Report for Germany" in D. J. Hayton, S. C. J. J. Kortmann & H. L. E. Verhagen, *Principles of European Trust Law* (1999) 85, at 94.) The term "*quasidinglich*" which is sometimes encountered in the German literature merely masks the problem. The current German law lacks conceptual coherence. It may be added that Kötz has taken the view that the refusal of the German courts to allow real subrogation in *Treuhand* does not reflect any basic principle of German law. (See H. Kötz, "*Die 15 Haager Konferenz und das Kollisionsrecht des Trust*" (1986) 50 *Rabels Zeitschrift* 562, at 579/580.)

68. A point which Lepaulle considered to be of the highest significance.

can be made bankrupt, at any rate in Scots law[69] and in South African law.[70]

So can trusts be located in the civil law taxonomy of private law? They can. Trusts do, indeed, impinge deeply upon both the law of obligations and the law of property, but they do not belong essentially to either. They belong to the doctrine of patrimony, and the doctrine of patrimony belongs to the law of persons.[71] The trust is itself not a person. A special patrimony never is. But a special patrimony operates very like a person, as an autonomous, quasi-personal, fund.

The patrimonial model of the trust here advanced is not an original one. Others have said much the same. According to the *Principles of European Trust Law*,[72] "in a trust, a person called the 'trustee' owns assets segregated from his private patrimony and must deal with these assets for the benefit of another person called the 'beneficiary' or for the furtherance of the trust." Liechtenstein law provides that "the trust estate is to be treated as a separate patrimony and the creditors of the trustee have no claim on it."[73] Again Tony Honoré has written that "the trust estate is a separate fund vested in the trustee ... The conception of a separate fund is not confined to common law systems. Other systems of law admit or have admitted the idea: for example the *peculium* of Roman law, the *patrimoine d'affectation* of French law, the *Sondervermögen* of German law."[74] F. H. Lawson remarks that "in the common law countries a *Sondervermögen* can easily be created by means of a trust."[75] Frans Sonneveldt observes concisely that "the trustee has actually two patrimonies."[76]

The Hague Convention on the Recognition of Trusts[77] is of particular interest to the comparatist since it attempts to explain the trust in a more or less system-neutral manner. "The term 'trust' refers to the legal

69. *Bain* (1901) 9 S.L.T. 14; Bankruptcy (Scotland) Act, s.6(1)(a).

70. *Magnum Financial Holdings (Pty) Ltd* v. *Summerly* 1984 1 S.A. 160.

71. This is their home, but like most items in any taxonomy there are cross-overs, and it cannot be denied that trusts must be mentioned under the heads of obligations and property. Those who are sceptical of this whole approach will say that this is tantamount to admitting the trust as an autonomous conception that cannot be located in the taxonomy. I would not agree. After all, the entirety of the law of persons, natural and juristic, is permeated by the law of obligations and the law of property.

72. D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen (Eds) (1999).

73. "*Das Treuhandvermögen [ist] als Fremdvermögen zu betrachten und es haben daher die Gläubiger des Treuhänders hierauf keinen Anspruch.*" *Personen- und Gesellschaftrecht* Art.915. (Text from M. Lupoi, *Trust Laws of the World* (2000) Vol.II p.1159.)

74. "Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland" in A. M. Rabello, *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997) 793, at 812.

75. *International Encyclopaedia of Comparative Law* Vol.VI, chap.2, para.42.

76. Frans Sonneveldt and Harrie van Mens, *The Trust: Bridge or Abyss between Common and Civil Law Jurisdictions?* (1992) p.5.

77. Implemented in the UK by the Recognition of Trusts Act 1987.

relationship created—*inter vivos* 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: (a) The assets constitute a separate fund and are not part of the trustee's own estate. (b) Title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee. ..."[78] This may not be perfect, but it avoids equity and divided ownership, and "separate fund" is special patrimony.[79]

VI. PATRIMONY AND PERSONALITY

IN Roman law *universitas* meant a group, considered as a unity. A flock of sheep was a *universitas*. As with sheep so with persons: groups of people, considered as a group, was a *universitas*.[80] A patrimony was a *universitas*. The *haereditas iacens*, which was what the patrimony was called after the death but before the entry of the heir, was a *universitas*. A *universitas* of this sort became known in the *ius commune* as a *universitas rerum* (or *bonorum* or *iuris*)[81] to distinguish it from a *universitas personarum* (or *hominum*).[82] A *universitas personarum* was considered as a person—a corporation—in Roman law.[83] Roman law did not quite take that step for the *universitas rerum*, though it came close to it in some cases, such as the *haereditas iacens*.

But every such collectivity is potentially a person. "*Universitas*" itself has both meanings. Eventually the civil law tradition came to recognise two sorts of juristic person: the *universitas personarum*, the corporation, and the *universitas rerum*, the foundation.[84] (The common law tradition

78. The Convention is authentic in English and French. The French text reads: "*Aux fins de la présente convention, le terme 'trust' vise les relations juridiques créées par une personne, le constituant—par acte entre vifs ou à cause de mort—lorsque des biens ont étés placés sous le controle du trustee dans l'intéret d'un bénéficiare ou dans un but déterminé. Le trust présente les caractéristiques suivantes: (a) Les biens du trust constituent une masse distinct et ne font pas partie du patrimoine du trustee. (b) Le titre relatif aux biens du trust est établi au nom du trustee ou d'une autre personne pour le compte de trustee.*" *Masse* can mean general or special patrimony, but tends to be used only in certain contexts, such as bankruptcy.

79. All the more curious that the Convention's preamble (see earlier) is so unsatisfactory.

80. "*Universitas alia rerum est, ut grex, peculium, hereditas; alia hominum, veluti collegium licitum, municipium, civitas, vicus, pagus.*" Johannes Voet, *Commentarius ad Pandectas*. (Liber III, Titulus IV, I. One kind of *universitas* is of things, such as a herd or a *peculium* or a *hereditas*. The other kind is of persons, such as an authorised guild, a municipality, a city, a village or a canton.)

81. In German a *Sachgesamtheit*.

82. In German a *Personengesamtheit*.

83. Roman law did not have a developed theory of juristic personality, but the statement in the text can be defended from the charge of being anachronistic.

84. In Latin, French and German: *fundatio, fondation, Stiftung*. To what extent this conceptualisation was due to Savigny, and to what extent it is medieval, I am unqualified to discuss. On this see the work of Feenstra, such as "L'Histoire des Fondations" (1956) 24 *Tijdschrift voor Rechtsgeschiedenis* 381, and "Foundations in Continental law since the 12th century" in Richard Helmholz & Reinhard Zimmermann (Eds), *Itinera Fiduciae* (1998).

has not gone down this road, recognising only corporations.[85]) A foundation is a juristic person which is not a corporation. It has no members. It is an autonomous patrimony dedicated to a purpose—a *Zweckvermögen*. Some writers regarded the *Zweckvermögen* as having no owner at all. Others described it as owning itself.[86] Others argued that it was "owned" by the "purpose" itself. Others again argued that notionally one could distinguish the juristic person (though memberless) from the estate which was owned: this latter is the dominant conception.

All this casts light on a variety of difficulties. Article 1261 of the Québec Civil Code reads thus:

> *Le patrimoine fiduciare, formé des biens transférés en fiducie, constitue un patrimoine d'affectation autonome et distinct de celui du constituant, du fiduciaire, ou du bénéficiaire, sur lequel aucun d'entre eux n'a de droit réel.*[87]

In Québec law trust assets are ownerless. This, at first sight startling, conception is actually part of the civil law tradition: we have here the patrimony which is wholly autonomous, which has been divorced from any personality, but which has not become a personality in its own right. Lepaulle, who influenced the Québecois conception, took the view that: "It is impossible to translate the rights of the trustee into those of an 'owner' in our [i.e. French or, more broadly, civilian] conception of property. He has neither *usus* nor *fructus* nor *abusus*."[88] One understands the logic, but it is not an inescapable one. Scots law, whose system of property law is at least as civilian as that of France, is able to say that the trustee is owner. Indeed, he does have the rights of *usus* and *fructus* and *abusus*: it is merely that he is under an obligation to use those rights for others.

Personality and patrimony are not wholly separate concepts. *Universitas* could mean either. If one recognises personality one must recognise patrimony: personality implies patrimony. But in addition, as soon as one

85. Both traditions have their conceptual problems: consider the corporation sole in English law and the *Einmanngesellschaft* in German law. (For the latter's triumphant march across Europe see Council Directive 89/667.)

86. *Als subjekt von Rechten und Verbindlichkeiten wird das Vermögen selbst gedacht, zu welchem sie gehören.* (The patrimony itself is considered the subject of the rights and obligations which pertain to it.) B. Windscheid *Lehrbuch des Pandektenrechts*. (Vol.I, p.223 of 8th edn.)

87. The English text (which is also authentic) reads: "The trust property, consisting of the property transferred, 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." For discussion of this provision see J. E. C. Brierley, 1995 *Revue Internationale de Droit Comparé* 33. For an attempt (before the new code) to come to terms with the trust see Marcel Faribault, *De la Fiducie dans la Province de Québec* (1936).

88. "*Il est ... impossible de traduire les droits du trustee comme étant ceux d'un 'propriétaire' dans notre conception de la propriété. Le trustee n'a ni l'usus ... ni le fructus ... ni l'abusus.*" (1955) 7 *Revue Internationale de Droit Comparé* 318, at 319. *Usus, fructus* and *abusus* were in the *ius commune* taken as the essence of ownership.

recognises a special patrimony, one is committed to seeing that patrimony either as a person or as a quasi-person.[89] Special patrimonies tend to function as persons, and historically they have shown a tendency to become persons. Lepaulle suggested that it might be better to conceptualise trusts as persons.[90] South African law at one time came close to doing so.[91] The Québec trust goes as far as it is possible to go without actually passing over into personality. Indeed, one might even ask whether, after all, that boundary has not in fact been crossed. In ordinary language the noun "trust" is a person-word. Idiom treats it like "company". "This land is owned by a trust." "These shares are held by a trust." "Trusts are lucrative clients." "The trust is liable for this debt." Ordinary language is right.[92]

VII. TRUSTEESHIP AS AN OFFICE

IN his various writings on trust law, Honoré has emphasised the concept of "office," and through his influence this has become a key idea in South African trust law. The trustees may hand over to other trustees, and thereafter be freed from further responsibility: this is a form of *universal succession*, for the new trustees succeed to the whole assets and liabilities of the special patrimony, but it is a universal succession which can occur *inter vivos*. Moreover, the trustee, as the holder of an office, is removable and replaceable by the court: this is a striking contrast to purely

89. K. W. Ryan (at (1961) 10 I.C.L.Q. 265) criticises Lepaulle for failing to distinguish between *Zweckvermögen* and *Sondervermögen* (special patrimony). But Lepaulle's point is precisely that a trust is both a *Sondervermögen* and a *Zweckvermögen*. At n.21 Ryan writes that "the concept of *Sondervermögen* has ... nothing to do with legal personality." This is too strong. It is literally true that in the *Gemeines Recht* a *Sondervermögen* was not a person, and that remains true in, for instance, modern German law. But this literal truth misses the substantive truth.

90. For instance: "*La solution la plus efficace et la plus simple est de doter le trust de la personne morale.*" ("The most effective solution is to endow the trust with juristic personality." (1952) 4 *Revue Internationale de Droit Comparé* 377. Ansay's approach is comparable: see his valuable "Third Way?" in J. Basedow, K. J. Hopt & H. Kötz (Eds), *Festschrift für Ulrich Drobnig* (1998). Swiss international private law seems to treat foreign companies as persons: see N. Poncet, "Trusts and Switzerland" (1998) 26 *International Business Lawyer* 324.

91. See cases cited in A. M. Honoré & E. Cameron, *Honoré's South African Law of Trusts* (4th edn, 1992), p.53. South Africa is an interesting source of ideas as to how the trust should be integrated into a basically civilian system. The *inter vivos* trust tends to be explained on the basis of the *stipulatio alteri*. And until *Braun* v. *Blann & Botha NNO* 1984 2 S.A. 850 the trust was often classified as a form of *fideicommissum*. The relationship between the *fideicommissum* and the trust is a subject which cannot be entered into here. (See further David Johnston, *The Roman Law of Trusts* (1988).) Fideicommissary substitution is a long way from the trust, but the *fideicommissum purum* is certainly trust-like. *Fideicommissum* was one of the sources of the Scottish trust.

92. If one thinks of a trust as a person, then trustees transmogrify themselves into representatives of that person, as directors are the representatives of a company. In this connection I cannot forbear to mention s.323 of the US Federal Bankruptcy Code which describes the trustee as being the "representative of the estate." However, there can be little doubt that this personalisation of the estate was unintended.

contractual arrangements. The contrast with, say, the German *Treuhänder* is a striking one. Honoré argues that "it is the office that makes the difference between entrusting and trust."[93] The fact that a beneficiary who is dissatisfied with his trustee may ask the court to appoint a new trustee is so familiar that we forget how remarkable it is. Imagine a debtor who, if he is dissatisfied with his creditor, may ask the court for a better one. That is the trust. Honoré's concept of office is an important one.[94] Trust is patrimony, plus office.

VIII. DOES IT ALL MATTER ANYWAY?

WHO cares how the trust should be conceptualised? One reason is that if there is to be legal science, *Rechtswissenschaft*, there must be taxonomy. In principle taxonomies can be changed: it may be said that if the trust does not fit into a traditional *ius commune* taxonomy, then so much worse for the taxonomy. But altering a taxonomic system is as inconvenient as changing the classification system in an ancient library. If we are serious about law, trusts must be located in the system.

Another reason is that the trust is expansive. It is expansive in that some jurisdictions have adopted it while others are thinking of doing so, and it is also expansive in that even those jurisdictions which do not have it increasingly often have to deal with trusts—even if they have not acceded to the Hague Convention on the Recognition of Trusts. How the trust should be conceptualised is thus a current issue. In 1992 a serious attempt was made to introduce the trust into French law.[95] There are pressures to introduce it to Belgian law, to Dutch law and to other systems. One detailed proposal by a distinguished Belgian lawyer would provide that ownership is vested in the beneficiaries while the trustee has a "real right of administration", an interesting conception which would be a sort of cross between the trust and the *bewind*.[96] The issues discussed in this article are of practical importance. It is important that lawyers in the civil law tradition understand that the trust is not a "unique institution" and has no necessary connection with equity.

93. "Obstacles to the Reception of the Trust? The Examples of South Africa and Scotland" in A. M. Rabello (Ed.), *Aequitas and Equity* (1997).

94. There may be scope for debate as to whether the element of office is truly essential to the trust. (In South African law the answer is affirmative.)

95. "*La fiducie est un contrat par lequel un constituant transfère tout ou partie de ses biens et droits à une fiduciare qui, tenant ces biens et droits séparés de son patrimoine personnel, agit dans un but déterminé au profit d'un ou plusieurs bénéficiares conformément aux stipulations du contrat.*" (*Fiducie* is a contractual arrangement whereby a settlor transfers all or part of his assets and rights to a fiduciary, who holds such assets and rights separately from his personal patrimony, and acts according to a determinate objective for the benefit of one or more beneficiaries in accordance with the terms of the contract.) French text from F. Sonneveldt (Ed.), *Trust: Bridge or Abyss between Common and Civil Jurisdictions?* (1992) p.68. For discussion see P. Rémy, "National Report for France" in D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen (Eds), *Principles of European Trust Law* (1999).

96. See Matthias Storme in J. H. Herbots (Ed.), *Le Trust et la Fiducie* (1997).

Finally, clear analysis shows why the trust, though immensely useful, is also dangerous. Legal systems have tended to agree that juristic personality, because of its dramatic consequences, should be subject to certain conditions, including (with some minor exceptions) the requirement of publicity. Yet the trust, which can be created by a private and even secret act, comes close to being a juristic person. Seen in that light, one can understand why many legal systems have traditionally been so reluctant to recognise special patrimonies. Legal systems contemplating the reception of the trust should be conscious of the implications of such a reception.

IX. SCOTS LAW

SCOTS law is a mixed system. Some areas are derived from English law, others are civilian, while others are home-grown. Scots property law is particularly civilian, and yet Scotland not only has the trust but has had it for a long time—at least since the 17th century—and has it by common law rather than by enactment,[97] (unlike those other civilian or mixed systems which have the trust, such as South Africa,[98] Québec,[99] Sri Lanka,[100] Louisiana,[101] Mexico,[102] Panama, Puerto Rico, Liechtenstein and so on). It is a native species, rather than an introduced one. It is integrated into the legal ecology. Especially and crucially, it is integrated into a property law system which is civilian.[103] Everyone thinks his own system to be of galactic importance, but Scots law does have a special significance in the area of trusts. As such, it deserves the attention of comparatists, an attention which it has not sufficiently received. Lawson was an exception. Scots law locates ownership in the trustee,[104] and classifies the rights of beneficiaries as simple personal rights, but yet has

97. For the origins of the trust in Scotland see Gretton, "Scotland: The Evolution of the Trust in a Semi-Civilian System" In Richard Helmholz & Reinhard Zimmermann (Eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (1998).

98. See Tony Honoré, "Trust" in Reinhard Zimmermann & Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa* (1996).

99. See above.

100. See L. J. M. Cooray, *The Reception in Ceylon of the English Trust* (1971).

101. See L. Oppenheim, "The Drafting of a Trust Code in a Civil Law Jurisdiction" in W. A. Wilson (Ed.), *Trusts and Trust-like Devices* (1981).

102. See further R. M. Pasquel, "The Mexican Fideicomiso: The Reception Evolution and Present Status of the Common Law Trust in a Civil Law Country" (1969) 8 *Columbia Journal of Transnational Law* 54. This contains an account of the influence of Lepaulle's thought on Mexican law.

103. But one must not exaggerate the clarity of Scots law in this area. The idea that the right of a beneficiary might be real was often toyed with, even in our own times. A leading scholar, W. A. Wilson, wrote in 1981 that the insistence of the Scottish courts that "the beneficiary has merely a personal right" was "regrettable." (W. A. Wilson (Ed.), *Trusts and Trust-like Devices* (1981), at 239.

104. Already in 1681 Lord Stair laid it down that whilst "the property of the thing intrusted, be it land or movcables, is in the person of the intrusted, else it is not a proper trust." (*Institutions of the Law of Scotland* 1,13,7.)

an apparatus of trust law which is, if not quite as extensive and sophisticated[105] as that of English law, yet able to do pretty well everything that business people can fairly ask for. In saying this, I wish to make no special claim for the sagacity of Scots law. Scots law did not consciously take the concept of *patrimonium* and then develop it *eleganter*. A legal system which decides to have a trust concept which is to be functionally comparable to the English trust (and the English trust was, especially in the second half of the 19th century, a major influence on the Scottish trust), but which at the same time wishes to preserve its property law system and thus is not prepared to accept equity, really has only one direction to move in. Even today it would be untrue to say that Scots lawyers have fully clarified their thinking about the nature of the trust.[106] Nevertheless, Scots law has something here of interest to the world.[107]

105. Nor quite as frightening for the civilian?

106. Scottish universities should teach trusts as part of the law of persons, but, following English practice, they usually teach the subject as part of property law. And the Scotland Act 1998, in defining "private law" includes trusts under property, not persons. (See s.126. The definition is, incidentally, of the greatest interest to comparatists. It defines private law as (1) general part, (2) persons, (3) obligations, (4) property, (5) actions. This is the classical Roman taxonomy of *personae, res et actiones* (with "things" divided into obligations and property) plus the pandectist general part.

107. It is encouraging to see that the Scottish experience may prove influential if the Netherlands adopts the trust: see S. C. J. J. Kortmann and H. L. E. Verhagen, "National Report for the Netherlands" in D. J. Hayton, S. C. J. J. Kortmann and H. L. E. Verhagen (Eds), *Principles of European Trust Law* (1999). The "National Report for Scotland" (by K. G. C. Reid) in this volume is of value.