

McGILL LAW JOURNAL
REVUE DE DROIT DE MCGILL

Montreal

Volume 25

1980

No. 4

The Trust in Quebec*

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The law of trusts in Quebec has puzzled scholars, largely because of the difficulty of explaining the rights of the parties involved. There also are difficulties in attempting to reconcile the trust with traditional civilian concepts, such as the notion of "absolute ownership". We shall review briefly the introduction and the place of the trust in the law of Quebec, and then examine the various interpretations to which the institution has given rise in order to provide, in a final section, a statement of the work of proposed revision accomplished in Quebec in recent years.

I. Introduction and place of the trust in Quebec

A. *The old law and the Code of 1866*

Staunch civilians claim that the trust (or at least one form of trust) has always existed in their system, which had roots in Roman law, was perpetuated through old customary law, and maintained in modern codifications. Trusts are discerned by these scholars in various kinds of substitutions and testamentary executorships. Where an heir was charged with a condition or an

* This paper, posthumously published here, was delivered in substantially this form at the September 1974 meeting of the Society of Public Teachers of Law in Exeter, England. It was prepared for publication and extensively documented by Professor J. E. C. Brierley, Sir William Macdonald Professor of Law, Faculty of Law, McGill University.

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express *stipulation pour autrui*, the term "fiduciary" was often used to characterize his obligation to transfer or remit all or part of his bequest to designated beneficiaries. These stipulations were generally limited to gifts *inter vivos* or testamentary dispositions. One of the debated questions was whether the "fiduciary" had rights of enjoyment in the property subject to the disposition, in which case there was a mere substitution, or whether his position was more properly characterized as one where he had no rights at all, in which case he had only an obligation to pass the property to the beneficiary (for instance, at the latter's majority) and was therefore acting as trustee. In this latter case, however, the trust's similarity to testamentary executorship made it rather difficult to distinguish between the two. In fact, the scarcity of actual trusts under the old law and the lack of judicial decisions make it difficult to appreciate fully the nature and purpose of such trusts at that time. Faribault, a leading Quebec scholar on this question, reports his frustrated attempts to find useful precedents.¹

While a study of old French law (or, for that matter, of Roman law) would be interesting for the purpose of linking trusts with modern civilian principles, it would throw little light on current problems of interpretation or of law reform. In Quebec, the use of the *Coutume de Paris* would appear to have rendered the trust almost non-existent in practice. The Civil Code of 1866 did, however, contain two provisions that may be regarded as reproducing the old French law in the codified law of Quebec. The first, article 869 C.C., concerns testamentary gifts made to fiduciaries for charitable and religious purposes. Such "trusts" are explicitly restricted to these purposes and thus are not strictly in the tradition of the old French law,² although there are conflicting opinions on this point.³ The other provision, article 964 C.C., repeats the old law in so far as it provides that where a bequest, made for the benefit of designated beneficiaries, appears to give title to a fiduciary and the disposition becomes impossible to fulfil, the fiduciary, having no right in the property, must return it to the heirs of the original testator. This particular type of bequest, although it appears to be a substitution, is nonetheless construed as a *fiducie* or a form of testamentary execution. Notwithstanding the use of the word "trustee" in the English version of this provision in the Code of 1866, its French

¹ Faribault, *Traité théorique et pratique de la fiducie ou trust du droit civil dans la province de Québec* (1936), 36-41.

² *Ibid.*, 42-45, 199.

³ *Ibid.*; see also *Valois v. de Boucherville* [1929] S.C.R. 234, 260-63.

origins are not seriously disputed. Indeed, it has served as a basis for a modern civilian interpretation of the trust in the present law of Quebec.⁴

The turning point in the history of trusts in Quebec is the Quebec Act of 1774.⁵ This statute, while maintaining the French civil law in the province of Quebec, also introduced the principle of freedom of testation, and thus removed the restraints of the old French law on testamentary gifts. The result was an increase in the number of wills containing trusts in the Anglo-Saxon tradition, even though there were no provisions on the matter other than those mentioned above.^{6a}

B. *The trust legislation of 1879*

It was not until 1879 that a statute respecting trusts was adopted.⁶ In 1888, these provisions were incorporated into the Civil Code as articles 981*a* through 981*n* C.C. With the exception of the *Special Corporate Powers Act* of 1914,⁷ which authorizes the creation of trusts for bond or debenture holders, and of the *Trust Companies Act*,⁸ which contains some references (not relevant for present purposes) to trusts, there has been no other legislation on trusts in Quebec to date.

The Act of 1879 is surprisingly short and simply drafted when compared with trust provisions in other jurisdictions. It will be more useful in the present context to reproduce its principal provisions as found in the Civil Code since 1888 than to summarize them:

Art. 981a. Toute personne capable de disposer librement de ses biens, peut transporter des propriétés mobilières ou immobilières à des fiduciaires par donation ou par testament, pour le bénéfice des personnes en faveur de qui elle peut faire valablement des donations ou des legs.

Art. 981a. All persons capable of disposing freely of their property may convey property, moveable or immovable, to trustees by gift or by will, for the benefit of any persons in whose favor they can validly make gifts or legacies.

⁴ Mettarlin, *The Quebec Trust and the Civil Law* (1975) 21 McGill L.J. 175.

⁵ *An act for making more effectual provision for the government of the province of Quebec in North America*, 14 Geo. III, c. 83, s. 10 (U.K.).

^{6a} See, e.g., *Abbott v. Fraser* (1874) L.R. 6 P.C. 96.

⁶ *An Act respecting Trusts*, S.Q. 1879, c. 29. The origins or source of the provisions are not known.

⁷ S.Q. 1914, c. 51; now L.R.Q. 1977, c. P-16.

⁸ Now L.R.Q. 1977, c. C-41.

Art. 981b. Les fiduciaires, pour les fins de la fiducie, sont saisis, comme dépositaires et administrateurs, pour le bénéfice des donataires ou légataires, des propriétés mobilières ou immobilières à eux transportées en fiducie, et peuvent en revendiquer la possession, même contre les donataires ou légataires pour le bénéfice desquels la fiducie a été créée [L]es fiduciaires peuvent poursuivre et être poursuivis et prendre tous procédés judiciaires pour les affaires de la fiducie.

Art. 981e. Les pouvoirs d'un fiduciaire ne passent pas à ses héritiers ou autres successeurs

Art. 981j. Les fiduciaires, sans l'intervention des parties bénéficiaires, gèrent la propriété qui leur est confiée et en disposent, placent les sommes d'argent . . . et changent, modifient et transposent, de temps à autres, les placements

Art. 981b. Trustees, for the purposes of their trust, are seized as depositaries and administrators for the benefit of the donees or legatees of the property, moveable or immoveable, conveyed to them in trust, and may claim possession of it, even against the donees or legatees for whose benefit the trust was created [T]he trustees may sue and be sued and take all judicial proceedings for the affairs of the trust.

Art. 981e. The powers of a trustee do not pass to his heirs or other successors

Art. 981j. The trustees, without the intervention of the parties benefited, administer the property vested in them and dispose of it, invest moneys . . . and alter, vary and transpose, from time to time, the investments

The other provisions in articles 981*a* to 981*n* C.C. provide rules of administration, accounting, and procedure not dissimilar to the trust rules of any other jurisdiction or to rules applicable to testamentary executors.

There has been considerable comment on the legal implications of this trust. The courts have said on many occasions that while the Quebec trust could perhaps operate like the common law trust, it is by no means to be interpreted or governed by the rules and precedents of the common law.⁹ The words used by the legislature in 1879 may have created a mechanism called the "trust" and an institution that operates as a trust, but they have not defined the legal nature of this method of transferring property.

Trusts have been widely used in practice, and few difficulties have been experienced in the ordinary course of drafting gifts and wills in which they are contained. The courts have found little difficulty in determining that the application of these provisions was to be restricted to the situations specified in the Civil Code, and have not allowed them to serve as a base for developing such

⁹ E.g., *Curran v. Davis* [1933] S.C.R. 283, 301; *Laliberté v. Larue* [1931] S.C.R. 7; *Laverdure v. Du Tremblay* [1937] A.C. 666 (P.C.).

institutions as the declaration of trust¹⁰ or a unit trust for investment purposes (even as an outgrowth of a "family" trust).¹¹

Among the many questions that have never been taken to court are the possibilities of the constituent of the trust (hereinafter called the "trustor"¹²) being a trustee, of a beneficiary serving as a trustee, and of the premature termination or variation of the trust. In fact, some believe that it is preferable not to enter into litigation over the law of trusts, for fear that the courts may crystallize some aspect of the practice that has so far remained flexible. However, it is inevitable that from time to time such questions are litigated and the result shows that there is no prevailing unanimity on the nature of the trust in Quebec.

II. Interpretations of the trust

Article 981a C.C. refers to a conveyance of property to trustees. This gives rise to two problems: the first concerns the source of the provision and its relationship to the principles of civil law or, alternatively, to the law of the Anglo-Saxon trust; the other concerns the legal effects of this conveyance. While the property is conveyed to trustees, to whom is ownership transferred? Is the trustee owner, or is it the beneficiary who owns, or is it yet some other person? Is this owner vested with full ownership¹³ or is his right qualified, restricted or divided? In other words, does the conveyance create both "legal" and "beneficial" ownership?

The fact that the trustee does not have any personal rights in the trust property is reminiscent of the old French *fiducie* and of testamentary execution. Yet, since it is admitted that none of the beneficiaries of the trust has a real right in the trust property, it follows that ownership is either in suspense (the *usus* and *fructus* not being vested in anyone) or that some other explanation (such as "split" ownership or legal personality) has to be found as the

¹⁰ *F.g., O'Meara v. Bennett* [1922] A.C. 80 (P.C.).

¹¹ *E.g., Crown Trust Co. v. Higher* [1977] 1 S.C.R. 418; *Cantin Cumyn, Crown Trust Co. v. Higher: La fiducie de placement en droit civil québécois* (1977) 23 McGill L.J. 687.

¹² The word "trustor", adapted from the term of Scots law, "truster", is employed to refer to the person constituting the trust, whether it be created by gift *inter vivos* or by will. [The term was not adopted in the final draft of the Civil Code Revision Office; see *infra*, note 49. — J.E.C.B.]

¹³ *Cf. art. 406 C.C.*: "Ownership is the right of enjoying and of disposing of things in the most absolute manner, provided that no use be made of them which is prohibited by law or by regulation".

basis of the trust in Quebec. The various possibilities, four in number, will now be reviewed.

A. *The trustee as owner*

1. Judicial interpretations

A significant number of judges favour the view that, under a Quebec trust, the trustee is the owner of the trust property. The argument is simple: by article 981a C.C., the conveyance of the property is to the trustee and therefore he is the owner; there is no reason to argue to the contrary, since, under Quebec law, there has to be one owner of the property at all times. This opinion is generally credited to the Supreme Court of Canada in *Curran v. Davis*, and to Mignault who expressed it more explicitly.¹⁴

In fact, the findings of Rinfret J. in the *Curran* case, which appear to point to the proposition that the trustee is owner, have been exaggerated by subsequent writers. In the *Curran* case, much of the discussion was concerned with establishing that the beneficiaries of the trust were not the beneficial owners of the property. The Court was also concerned with the question of distinguishing the Quebec trust from the English trust. As put by Lord Buckmaster in *O'Meara v. Bennett*, "an examination of the question of how far the transaction would have been valid under English law is misleading until it is ascertained to what extent English law applies".¹⁵ Earlier, in *Laliberté v. Larue*, Mr Justice Rinfret had stated in the Supreme Court that "[i]l serait inconcevable que le législateur eût voulu introduire d'un seul coup le 'trust' anglais avec sa complexité et ses [multiples] aspects si foncièrement étrangers à l'économie du droit de Québec".¹⁶

The beneficiary was therefore regarded as a creditor of the trust but not as an owner of its property. On the other hand, Rinfret J. never said in the *Curran* case that the trustee actually was the owner. He said that the trustee has no *usus*, no *fructus* and no *abusus*, that he only has the "executive powers" to act in respect of the property, that he is without title and only an "apparent owner".¹⁷ The *Curran* case has generally been relied upon, however,

¹⁴ *Curran v. Davis*, *supra*, note 9; Mignault, *Droit civil canadien* (1901), vol. 5, 151 *et seq.*; Mignault, *A propos de fiducie* (1933-34) 12 R. du D. 73, 76 (comment on *Curran v. Davis*).

¹⁵ *Supra*, note 10, 84.

¹⁶ *Supra*, note 9, 18.

¹⁷ *Supra*, note 9, 293, 305-6.

as meaning that the trustee is the owner of the trust property, albeit in a special way.¹⁸

Two other cases merit mention in this connection. First, in *Greenshields & Chartered Trust Co. v. The Queen*, Locke J. (dissenting), citing the *Curran* case, summed up as follows:

As declared by the article [article 981a C.C.], the property is held by the trustees for the benefit of the *cestuis-que-trust*. The legal title is vested in the trustees as well as the right to possession but, from the time of the death of the testator, that estate was in their hands impressed with a trust in favour [of the beneficiaries]. To say this is but to paraphrase the language of Rinfret J. in *Curran's* case.¹⁹

This *sui generis* right of the trustee is not further explained. One is reminded of a substitution without enjoyment by the institute.

Second, in *Reford v. National Trust Co.*, the same idea was stated more recently in the Quebec Court of Appeal:

En vertu de la loi (art. 981a et s. C.C.) et du contrat, la propriété dudit fonds est transmise aux fiduciaires, mais ce n'est pas la propriété définie à l'article 406. Pendant l'existence de la fiducie, les fiduciaires ont les pouvoirs les plus étendus de vendre, ... mais ... ils doivent rendre compte Toutefois, pendant ce temps, la propriété n'est pas en suspens; elle est nécessairement restreinte par l'effet de la fiducie et elle repose sur la tête des fiduciaires. Ces derniers n'ont, sans doute, qu'un droit limité de propriété bien qu'ils aient le pouvoir de conférer aux acquéreurs des biens sujets à la fiducie un titre complet de propriété. C'est là une dérogation aux principes généraux de notre droit civil, mais c'est une dérogation voulue par le législateur.²⁰

This finding confirms the ownership of the trustee, and makes it *sui generis*, but it is a solution that does not totally conform with the opinion of Rinfret J. in the *Curran* case, nor does it appear to be totally justified by article 981a C.C. itself. If the trustee is not the full owner of the trust property and the beneficiary is not owner of what remains, there appears to be an inconsistency. The court attributes this anomaly to the creation of a new type of ownership, distinct from that of article 406 C.C., a conclusion that is quite conceivable but not fully warranted by the provisions of the Civil Code.

In any event, the trust under the Civil Code is clearly to be distinguished from that arising out of a trust deed for debenture holders, where property of a debtor is transferred in guarantee to a trustee for the purpose of receiving a debt. The Supreme Court has held that these trusts are not ordinary trusts and are not equivalent

¹⁸ Cf., e.g., *Guaranty Trust Co. v. The King* [1948] S.C.R. 183, 205-6.

¹⁹ [1958] S.C.R. 216, 224.

²⁰ [1968] B.R. 689, 697-98.

to common law trusts.²¹ The law of security is the law primarily applicable to such transfers, and the trust is only an incidental element of these borrowing agreements.

2. Legal writings

Legal writers have not always agreed with the courts on the interpretation of the legal nature of the Quebec trust. In fact, there is much resistance to the judicial conclusions outlined above.

Mignault first held the view that the ownership of the trust property vests in the beneficiary.²² He changed his mind after the *Curran* case, and suggested that the trustee be regarded as the owner of the property in view of his broad powers of alienation.²³ Several subsequent writers also support Mignault's view that the trustee is the owner of the trust property, although he must be seen as an owner *ès qualité*.²⁴ Many practitioners prefer this approach because it enables them to rely on the earlier judicial precedents, and because of its similarity to the Anglo-Canadian trust.

B. *The beneficiary as owner*

While fewer writers have suggested that the property of the trust vests in the beneficiary of the trust, this theory has been strongly supported by at least two Quebec authors.²⁵ The principal reasons prompting this solution are that the trustee has powers of administration over the property, but has no rights in it. The capital beneficiary is said to be the ultimate owner because he is the person intended by the trustor to receive the property when the administration of the trust is terminated. No cases have been found in support of this view.²⁶

²¹ See *Laliberté v. Larue*, *supra*, note 9, 17-18.

²² Mignault, *Droit civil canadien*, *supra*, note 14.

²³ Mignault, *A propos de fiducie*, *supra*, note 14.

²⁴ Lavallée, *Donation fiduciaire* (1932-33) 11 R. du D. 227; Graham, *Some Peculiarities of Trusts in Quebec* (1962) 22 R. du B. 137; Dussault, *La fiducie dans le droit québécois — II* (1963) 5 C. de D. 57.

²⁵ Billette, *A propos de fiducie* (1932-33) 11 R. du D. 38 (comment upon the decision of the Quebec Court of Appeal in *Curran*); Billette, *Au sujet des origines historiques de la fiducie* (1932-33) 11 R. du D. 365; Billette, *La fiducie* (1933) 12 R. du D. 159; Mankiewicz, *La fiducie québécoise et le trust de Common Law* (1952) 12 R. du B. 16. See also Jobidon, *Commentaire sur la fiducie* (1928) 30 R. du N. 215 and 225.

²⁶ To the author's and editor's knowledge, no case has differed from the conclusions in the *Curran* case.

C. *The trustor and his heirs as owner*

Another theory on the theme of ownership has been advanced by Mettarlin in a thorough piece of research on the historical and civilian background of the Quebec trust.²⁷ This interpretation of the articles on the trust of the Civil Code removes the matter of ownership from the machinery of the trust by relying upon two concepts — suspended ownership and a new real right relating to the administration of the property. It is said that where a conveyance is made under a trust, a right of ownership opens in favour of the ultimate capital beneficiary. However, this right is suspended by a condition.²⁸ If the condition is satisfied by events, the right is made absolute; if it is not satisfied, the transfer to the capital beneficiary is void and the property is recovered by the trustor or, if he is dead, by his heirs. It is therefore said that the remote owners of the property are, throughout, the trustor and his heirs, but that their ownership ceases on satisfaction of the condition. Their ownership is also devoid of all enjoyment; the right to enjoyment arises only if the suspensive condition is not satisfied. During the period of the trust's existence, however, the trustee has absolute rights of possession, control and alienation with respect to the trust property; the heirs of the trustor, the trustor and the beneficiaries, whether income or capital, must comply with the trustee's decisions. Mettarlin therefore sees the administration of the trustees as a new form of real right, a dismemberment of full ownership, and lasting for the duration of the trust.

This theory of the trust brings us back to the old French law in so far as it assimilates, in large measure, the position of the trustee to that of the testamentary executor. But the idea of seeing a dismemberment of ownership in an exclusive power of administration is new and, even though not outside the concepts of the civil law, it does not necessarily follow from the text of articles 981*a* through 981*n* C.C. In any event, in the Quebec legal system, it is not necessary to have a real right in property in order to confer exclusive powers upon an administrator. This can be done merely by a declaration of the law (for example, a legal mandate) and is done in many parts of the Civil Code.²⁹ The main point of Mettarlin's theory is to state

²⁷ Mettarlin, *supra*, note 4.

²⁸ *E.g.*, "in trust for my wife for life, and then for my son, Pierre, on his attaining his fortieth birthday".

²⁹ *E.g.*, in relation to guardians (arts. 290 *et seq.*), condominium managers (arts. 441*q et seq.*), testamentary executors (arts. 905 *et seq.*), and sequestrators (arts. 1817 *et seq.*).

that the trustee is not an owner, but merely an administrator with full and exclusive powers.

The idea that the heirs of the trustor (or the trustor himself) remain owner until the opening of the ultimate right of the capital beneficiary has one major weakness. Indeed, this interpretation (as in one possible view of substitutions) is based on the doctrine of conditions: one person is owner under a suspensive condition (the capital beneficiary, or the substitute) and another is owner under a resolutive condition (the heirs of the settlor, or the institute). When the condition is satisfied, or when it fails, one of these persons is declared the owner, not only at that time but for the whole period, and he is deemed to have been the owner during the intervening period.³⁰ Under a trust, however, there is no such condition. The right of the capital beneficiary is not a conditional right; it is only an eventual right, as is that of the person in whose favour the reversion takes effect. There is no condition and therefore no retroactive effect. The consequence of this is that an owner has to be found during the existence of the trust, yet neither of these persons qualifies. The capital beneficiary does not qualify because, by definition, his right does not open at all before the trust instrument so provides — he has no right in the property before that time. The heirs of the settlor do not qualify because the settlor has to transfer his property in the first place in order that there be a trust.³¹ It is difficult to see how he could transfer it and, at the same time, retain his ownership, albeit conditionally.³² When the reversion takes place, there is a new transfer of the property by the trustee to the person entitled to it, but there is no retroactivity.³³

D. *The trust as owner*

The impossibility of attributing a full right of ownership in the trust property to either the trustor, the trustee, or the beneficiary has led to another interpretation which consists of isolating the property and identifying a separate entity as its owner. This solution has taken a variety of forms, but they all can be traced to one principle: the personification of the trust. Seen as a legal person, the trust owns the property under the exclusive and absolute

³⁰ Art. 1085 C.C. provides that "the fulfilment of the condition has a retroactive effect from the day on which the obligation has been contracted".

³¹ See art. 981a C.C.

³² See *Reford v. National Trust Co.*, *supra*, note 20, 699.

³³ Art. 981l C.C.

management of the trustee who accordingly has full administrative powers. The beneficiaries have personal rights only.

This idea was advanced by the French jurist Lepaulle who first suggested a form of *patrimoine affecté* (an independent patrimony, without an owner)³⁴ for the trust property and then, at a later stage, proposed that the trust itself be considered an ordinary legal person.³⁵ It was also developed by Faribault as an outgrowth of the notion of "institution", itself developed earlier in France.³⁶ The basis for this solution is quite simple. The Civil Code does not clearly attribute ownership to either the trustee or the beneficiary; on the contrary, both suffer important limitations on their rights. Moreover, the Code refers to "the property of the trust" and to "the trust" as though it were a separate entity. Finally, this solution has none of the shortcomings or difficulties of the other theories.

It seems quite clear, in view of the diverse theories on the present law of trusts in Quebec³⁷ and of the fragmentary character

³⁴ Lepaulle, *Traité théorique et pratique des trusts en droit interne, en droit fiscal et en droit international* (1932).

³⁵ Lepaulle, "La Notion de 'trust' et ses applications dans les divers systèmes juridiques", in *Unidroit, Actes du congrès international de droit privé* (1951), vol. 2, 206.

³⁶ Faribault, *supra*, note 1, 128. A more detailed analysis of this solution is found in the author's doctoral thesis: Caron, *The Trust for Bond-holders in the Province of Quebec* (unpublished D. Phil. thesis, Oxford, 1964).

³⁷ Another theory would use the *stipulation pour autrui* of art. 1029 C.C. This is not a new proposal, and it was dismissed by Faribault in his study, *supra*, note 1, 88 *et seq.* The main difficulty with the *stipulatio* is that at no time does the trustee benefit from, or profit by, the trust or the conveyance of the trust property; the person taking the *stipulatio* does benefit. Moreover, whether or not the instrument which creates a trust can be called a "contract", it is obvious that the intention of the trustor is not to enter into an agreement with the trustee, but to affect property for the benefit of the beneficiaries. The trustee is an intermediary, one who undertakes to carry out the trust and to administer for the benefit of the designated beneficiaries; he owes no obligation to the trustor, as does the promisor under a *stipulatio*.

Likewise, the trustor is not an obligee as regards the trustee, the latter having no relation with him except that of accepting the trust and of claiming possession of the trust property once it is constituted. Whereas the beneficiary of a *stipulatio* has the privilege of accepting it personally and whereas the stipulator may revoke the *stipulatio* until it has been accepted (art. 1029 C.C.), it is quite clear that the acceptance of a trust by the trustee binds all other parties: *Curran v. Davis*, *supra*, note 9, 305.

Finally, the beneficiary of a *stipulatio* has a personal action against the promisor, who is his debtor and must perform the terms of the agreements. The trustee is under no such obligation; he is not the immediate debtor of the beneficiary and never incurs a personal liability in the normal course

of the provisions in the Code, that legislative reform is necessary. Judging by the operation of the Quebec trust in practice, there are only a few matters in need of clarification or development: certainly the legal nature of the trust should be defined more precisely and the trust should be extended to cover situations other than gifts and wills. With respect to the legal nature of the trust, it is to be hoped that the new Quebec Civil Code will determine clearly the owner of the rights involved. For this purpose, only two major avenues remain open: ownership by the trustee and the personification of the trust.

III. Revision of trust law in Quebec

The choice of a legal definition of the trust lies between two options: "trustee" ownership and "trust" ownership (personality). The Law of Trusts Drafting Committee of the Civil Code Revision Office,³⁸ which commenced work in 1973, started with the first option. It provided that the trust property would be owned by the trustee, although this ownership would not be full and absolute in the sense of article 406 C.C. A new concept of "fiduciary ownership" was introduced. The limitation of the trustee's ownership took two main forms: the trustee, as trustee, was denied all personal rights of enjoyment in the property, and the property of the trust was said to constitute a separate patrimony in the trustee.

The provisions of the first draft covered not only the nature of the trust, but also its formation, operation, and termination, and these provisions were honed as they went through three successive versions. But problems remained with the theoretical rudiments of the new trust. If the trustee had no personal right of

of his administration. The beneficiaries are not really third parties, even when they are not parties to the trust deed, or when they do not exist at the time of the deed; their assent is given by the trustee as their representative and only in that quality, not as an independent third party. Even if one were to say that the trustee is the owner of the trust property, there could not be a true *stipulatio*, because the trustee, by definition, takes no advantage from the trust.

³⁸ The Committee members were the late Professor Y. Caron (Chairman); Wainwright Professor P.-A. Crépeau, President of the Civil Code Revision Office; Professor J. E. C. Brierley, who prepared the first three drafts; Gale Professor (as he then was) D. W. M. Waters, who acted as consultant; and, in the later stages of the work, Me (now Professor) Madeleine Cantin Cumyn. This Committee concluded its principal work in the spring of 1976, but the drafting continued into the spring of 1977 after the intellectual journey narrated in Part III by Professor Caron. — J.E.C.B.

enjoyment in the property, where did the *fructus* lie? Moreover, if the trust property constituted a separate patrimony in the trustee, this was surely tantamount to saying that there were in him two persons, which, it could be argued, amounted to personifying the trust.

At this point the writer assumed the task of preparing a fourth draft and in this version, which was completed in December 1974, the second option (trust ownership) was adopted. What follows is an extended extract from the draftsman's comments upon that draft, at the point where the nature of the trust as a personified entity is developed. The draftsman's comments, intended for those members of the profession in the province who were later asked to give an opinion upon the new draft, review the dilemma faced by the Committee, and the conclusions drawn by the draftsman.

A. *Fiduciary ownership and its deficiencies*

Were the law to see the trustee as a fiduciary owner of the trust property, it would also have to hold that the trustee could have no personal right of enjoyment and that he could not confound the trust property with his own (the trust property being vested in him as a separate patrimony); nor could the trust property, like his own, pass to his heirs or legal assigns. This kind of ownership would thus depart from classical civilian notions. A number of conceptual and practical questions would moreover be left unanswered by this approach.

1. **Enjoyment**

On the basis of a "fiduciary ownership", the trustee would be vested with "ownership" without enjoyment. But, as contrasted with usufruct, this conception of trust does not make the trustee "bare owner" while the beneficiary has enjoyment. Under a trust it is, of course, desirable that the beneficiary have no real right whatever in the trust property; but, if the trustee were vested with "fiduciary ownership", the vesting of residual rights of property (enjoyment), if not in the beneficiary, remains unclear.

2. **Successive trustees**

Should the trustee be "fiduciary owner", a serious difficulty arises concerning the continuation of fiduciary ownership where the trustee resigns, dies, disappears, or is removed. The property has to be transferred from one trustee to another and a fiction

would have to be used to cover the gaps between the effective cessation of one trustee's powers and the appointment of his successor. Moreover, it is now expressly intended, as a matter of present positive law, that the trust property will not pass to the trustee's heirs (article 981e C.C.).

3. Legal nature

The most considerable difficulty arising from the concept of fiduciary ownership in a civilian context relates to the very identification of the legal nature of the trust. In its simplest terms, what rules of interpretation will be applied to the new law of trusts by the courts and others? Will resort be had to common law (including equity) precedents in matters of interpretation? Is it realistic to leave open the implication that, by mere use of the word "trust", we are referring to centuries of jurisprudential experience in the English courts of law and equity, and are thereby permitting the Quebec law of property to be influenced by the same rules and approach? Our courts have had to discuss this question before in relation to articles 981a through 981n C.C., and they have concluded that, although the machinery of the trust comes from the common law (and equity), it does not mean that all the rules of England relating to trusts apply in Quebec.³⁹

Having attempted to follow the common law spirit as much as possible by borrowing the notion of fiduciary ownership, the authors of the earlier draft, when confronted with the prospect of a notion of "split ownership" (legal title and equitable title) flowing from it and possibly involving the importation of this mass of precedent, were unwilling to take up formally such a position.

B. *Trusts having legal personality*

In the present writer's view, the use of legal personality supplies a more civilian approach to the problem. This solution appears to answer most of the problems raised by the introduction of trusts into a civilian context and raises fewer problems of its own.

One might say that trusts came to English law almost as an historical accident in medieval times. The concept has been flexible enough to be used to this day in common law jurisdictions to

³⁹ E.g., *Curran v. Davis*, *supra*, note 9, 301; *Laliberté v. Larue*, *supra*, note 9, 16 and 18.

support many new arrangements concerning property and groups of persons. One may similarly observe that civil law countries have also managed to adapt to many of the same situations through the use of a quite different concept, that of legal personality. From a civilian point of view, the personification of the trust appears to be a logical and normal development. Indeed, one only has to observe the treatment of *fondations*, *sociétés* (partnerships), *comités d'entreprise*, and *masses des obligations* in modern French law to verify this trend. If we examine the essential purposes of the trust, the use of the concept of personality in a civilian jurisdiction will be seen to be appropriate.

1. Purpose of trusts

For the authors of the draft, the question was not just a matter of opting for one theory or another. Their task was to broaden the scope of the Quebec trust (as contained in articles 981*a* through 981*n* C.C.) while bringing some clarification to the concepts used. In making the trust available for more purposes, it had to be harmonized fully with other provisions of Quebec law.

What, then, is to be expected of a trust? Is it fair to say that one of the major aims of a trust is to divest the trustor (or the transferor) of property, while ensuring that the property does not vest in the beneficiary? If so, one may also say that the other major purpose of a trust is to place the property under the administration of a trustee who is responsible for the performance of the terms of the trust. We are not contemplating situations where a trust is used simply as an alternative to the *contrat de prête-nom* or to the *contre-lettre* in order that one person may appear to be the owner while he has secretly agreed to own for another.

What is really sought in a trust is, plainly, a machinery of administration. The trustee is expected to treat the trust property not as his own, but as that of another: he must apply the standards of loyalty, honesty, care, skill, and diligence implied in the duty of administration of the property of others; he may not personally enjoy the fruits or advantages of the property; the property does not pass to his own heirs; and the trustee may be removed from office upon motion. These are not the characteristics of ownership; nothing in the trust indicates or requires that the trustee be the owner of the trust property.

On the other hand, it is expected that the trustee will, unless otherwise instructed by the trustor, exercise the broadest powers and that he will be entitled to act, with respect to the property,

as if he were the owner. But acting as an owner does not mean that one is owner. This is the position of many kinds of administrators of the property of others: company directors, mandataries, and testamentary executors are typical examples. Yet, in each of these cases, no one would suggest that the director, the mandatary, or the executor actually owns the property placed under his administration.

Why then should the trustee be regarded as an owner? The only obvious answer has been stated above: because it is intended that neither the trustor nor the beneficiary be vested with ownership of the trust property. Faced with this dilemma, and taking into account the fact that the trustee must not be seen (*qua* trustee) as a beneficial owner of the trust property, the common lawyer has a solution: fiduciary (legal) ownership. The civilian, however, has yet to be able to visualize such a new form of ownership; where it becomes imperative that property not vest in particular individuals, and when a common purpose or interest arises with respect to the property, his idiosyncrasy suggests "legal personality". Historically, the use of legal personality has evolved as the civilian counterpart of the English trust.

2. Civilian institutions and the trust as a legal person

In modern times, estate planners, traders and businessmen have made the broadest possible use of existing institutions in order to achieve their goals. However, their ingenuity has been limited to the further testing of old tools. Basically there are three institutions available which may be vested with property rights: the corporation, the partnership, and the trust. This trilogy has been the bread and butter of the common law planner. To him, the three are based on different legal concepts, are subject to different legal rules, and serve different purposes. In this context, he knows that legal personality is a feature of the corporation, a feature quite useless to him where other situations are concerned. The civilian has also known equivalent mechanisms without, however, the trust. For many situations the concept of ownership was flexible enough; it allowed usufruct, rights of habitation and substitutions to take their place within his system. Quebec law, immobile for so long on these matters, was nevertheless augmented in 1879 by a form of trust to be used as an alternative mode of *inter vivos* gift and in wills. Seen in the light of article 981*b* C.C., this trust appears to be merely another type of administration of the property of another. French law, more aggressive and faced with more urgent problems,

has made a liberal use of alternative mechanisms, including legal personality (the most obvious example being the *fondation*).

The crucial difference between the common law and the civil law approaches to these organizational problems appears to be the jurisprudential meaning of the concepts used. Whereas, for example, "property" is a vehicle of rights for the common law lawyer, it is a fixed and monolithic concept to the civilian. On the other hand, "legal personality" for the civilian is a vehicle of rights, whereas the common law lawyer thinks of it as a monolithic concept restricted to the corporation. For example, in the common law a corporation is a legal person but a partnership is not. In France, both *sociétés anonymes* (corporations) and *sociétés* (civil and commercial partnerships) have legal personality.

To the civilian, an artificial legal person is simply a subject of rights and duties. The form and the purpose of the arrangement may vary, the responsibilities of those involved may change, but at all times property rights are vested in a legal person. To illustrate this, let us compare corporations, partnerships and trusts.

The main characteristic of the corporation (the business corporation) is its total independence from its members and its perpetual duration. The property and funds vested in the corporation are totally separate from those of its members and are exclusively devoted to the corporate objects. The corporation, being a legal person, is a subject of rights and duties and can hold property — but its real purpose is independence of control. Legal personality alone cannot achieve this because such independence of control is a feature not of legal personality but of corporate personality.

Partnerships, on the other hand, are also seen by civilians as legal persons for purposes, *inter alia*, of holding assets, carrying on business and litigating. Their purposes and main characteristics are different from those of corporations. Partnership does not require total independence or separation of the legal person from its members. Persons are the main feature of partnership, and the agreement is said to be *intuitu personae* in such a way that, if one partner dies or retires, the others have to agree to keep the partnership in existence. The partnership, as a legal person, is a vehicle to hold property but the persons-members predominate.

The parallel may be extended to trusts. The main characteristics of the trust are to divest the trustor of his ownership, to place the property under the administration of the trustee, and to make sure that the beneficiaries have no rights in the trust assets while the property is administered for their benefit (or for a purpose). The

trust, as a legal person, is a vehicle used for holding property, but the directions of the trustor and the benefit of the beneficiaries are its main features. Total independence is not sought: the beneficiaries' interest must remain predominant. There is, however, an effective separation of, in the first place, ownership and beneficial interest, and, in the second place, ownership and management.

This result has been seen by some of the leading civilian writers on trusts. Lepaulle, whose concept of *patrimoine affecté*⁴⁰ was a departure from the traditional common law approach to trusts, wrote:

Il y avait, me semble-t-il, une autre route à suivre, plus fidèle au *trust*, plus assimilable et plus facile à manier. Elle consistait à faire du *trust* une personne morale, dont le *trustee* serait le gérant, la charte du *trust* étant constituée par l'acte constitutif, les tiers étant protégés par une inscription à un registre ou à une publicité, le ministère public étant chargé de la surveillance des *trusts* au profit d'incapables ou constituant des fondations.⁴¹

Applied to trusts, the notion of legal personality solves most of the major difficulties exposed above: property rights vest in the trust rather than in the trustee and, consequently, there is no problem with residual rights or transfer of rights in case of substitution of trustees. It might have been possible to provide that residual rights would not vest at all, but this would have seriously encroached upon the concept of ownership. It might also have been possible to say that ownership vests retroactively in the substitute trustee in order to fill the gap, or to have these rights vest in the Public Curator where there is a delay in the appointment of a successor trustee. But these appeared to be patching-up solutions, more artificial than the idea of legal personality which brings stability throughout the entire existence of the trust. Finally, one has to admit that the "split ownership" trust of the common law and the "legal-person" trust proposed in the civil law both rely upon legal fictions.

It is suggested that, from a civilian point of view, these two theories are but one in reality. For example, let us assume that the trustee were the owner (fiduciary owner) of the trust property. It is understood that this ownership brings him no personal right of enjoyment; the trust property has to be segregated in his hands; and it is necessary to declare that trust property is a separate patrimony in the trustee. Translated into civilian jurisprudential language,

⁴⁰ Lepaulle, *supra*, note 34.

⁴¹ Lepaulle, *supra*, note 35.

this means that the trustee possesses a dual personality: his own person and a person *ès qualité* as trustee. Effectively, the fiction of the law operates to "personalize" the trustee who has fiduciary ownership. The same result is obtained under the legal personification of the trust, with the mechanical difference that the trust, rather than the trustee, is personalized. This has the advantage of making the trustee an administrator who can be replaced indefinitely without disturbing the stability of the trust. It also has the advantage of keeping the notion of absolute ownership intact.

Thus, from a civilian point of view, the net result is jurisprudentially identical in both cases, and it is only a matter of labelling the thing created. Moreover, the route of legal personality has some advantages over the other with respect to ownership and administration — it provides both continuity and flexibility. It may be noted finally that the definition of the legal nature of the trust has no effect on the other provisions in the proposed new Civil Code chapter on trusts. In fact, all the other provisions are exactly the same, regardless of a definition. One main advantage is, however, gained: any reference to the trust would now have full legal meaning.

IV. Conclusion

Since the circulation of the fifth draft to various members of the Quebec profession for their comments, a variety of responses has been received and these are now being considered. Some are primarily concerned with the tax implications of the proposed articles, others with civil law doctrine, and still others reflect the views of those who participate in trust and securities businesses across Canada. While Quebec is a civil law island in a substantially common law continent, business practices across Canada tend to be uniform and there is a strong preference in many quarters for the maintenance of the highest possible degree of uniformity. It is interesting to note that the idea of trust personification has been rejected in Louisiana which preferred, in 1964, to make the trustee owner of the trust property.⁴²

It is quite apparent that to call a trust a legal person is a radical change for those familiar with the Anglo-Canadian trust. However, as explained above, it makes very little difference whether the property vests in the trust or in the trustee, because the trustee is

⁴² See Louisiana Trust Code § 1781.

always understood as owning the property, not for himself, but as a separate patrimony.

The ultimate goal is to define the trust not in terms of owning or of transferring property but as a mode of administration under which the trustee has the fullest powers under the law and the terms of the particular trust instrument. This formulation is the only way of reconciling the different notions of trust which exist in various jurisdictions, especially where civil law and common law principles meet and sometimes clash. In any event, the civilian needs a codification of the law of trusts which enables him to avoid recourse to the common law and the mammoth number of precedents which it involves. This purpose will not be achieved unless the notion of trust is reconciled with the basic concepts of the civil law.

Editor's Post Scriptum

J. E. C. Brierley*

It is appropriate to complete the account provided by the late Professor Caron in Part III of his article with a brief *post scriptum* in order to record the final thinking of the committee charged with proposing the reform on the subject of the trust. The concept of "fiduciary ownership" which rested upon the principle of a separation of patrimonies in the trustee was developed in the first three drafts of the committee.⁴³ This approach did not resolve the matter of the localization of the beneficial dimension of ownership or the vesting of the title of owner (*dominium*) as defined by article 406 C.C. It was therefore abandoned, principally upon Professor Caron's initiative, in the subsequent drafts in favour of attributing legal personality to the trust itself. Caron's thinking on this possibility had already been traced by him in earlier writings.⁴⁴

The concept of legal personality for the trust, on the basis of the ideas expressed here, was developed by Caron in the drafts prepared in 1974.⁴⁵ To affirm, as article 4 of the fifth draft did, that

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⁴³ Prepared in May 1973, October 1973, and April 1974.

⁴⁴ Caron, "Les associations et groupements dépourvus de la personnalité juridique en droit civil et commercial québécois" in *Travaux de l'Association Henri Capitant* (1969). t. XXI, 181.

⁴⁵ The fourth draft was prepared in August and the fifth in December of that year.

"a constituted trust is a legal person" was seen by him to be a safer conceptual framework within which to place the trust in the Quebec context. The trust itself would be vested with the *dominium* of the trust property and the trustee, like the director of a corporation, would have the administrative power to deal fully with it. However, this notion was not well received by those to whom the revised draft was referred for opinion. The resort to legal personality was, if anything, found by many to be even more artificial than fiduciary ownership. The Caron proposal suggested a mold for the trust that was unfamiliar to those in the business milieu and it did not correspond to the vision of the trust that had come to be accepted by the courts, however awkwardly this vision was poised within the traditional civilian principle of ownership. Why, indeed, it was asked, retain the trust at all if it was only to exist in personified form? Should not the trust be viewed as an alternative to, rather than a duplication of, the path of corporate personality?

Therefore, the sixth draft⁴⁶ marked a partial return to the earlier analysis. Legal personality for the trust and fiduciary ownership were suggested as alternative general solutions, but personality alone was proposed as the framework for trusts created for a public interest; article 6 of this draft adopted the continental French terminology of *fondation* for such purpose trusts. Even here, however, no truly useful purpose was seen to attach to this new clothing for a purpose trust;⁴⁷ the anomalies of ownership involved in these trusts, although even greater than those involved in trusts for persons, had not prevented the courts from giving to them full effect. All reference to legal personality was therefore dropped from the final published version of the texts of the drafts.⁴⁸

The final, official and published version⁴⁹ of the draft articles therefore makes no reference to legal personality in regard to purpose trusts or those constituted for the benefit of persons,⁵⁰ nor does it expressly refer to fiduciary ownership. Article 600 provides

⁴⁶ Prepared in March-April 1976.

⁴⁷ See art. 869 C.C. The purpose trust envisaged by art. 6 of the draft was a somewhat expanded version.

⁴⁸ Reports XLIV, June 1976, and XLV, 1977.

⁴⁹ Civil Code Revision Office, *Report on the Québec Civil Code* (1977), vol. I, Book IV, arts. 600-638; vol. II, t. I, 523-31.

⁵⁰ The commentary to draft article 488 (vol. II, t. I, 505) refers to "a trust" as though it were a person, but even the present law adopts this form of expression (*cf.* art. 981*b* para. 2, art. 981*c* C.C.) without forcing the conclusion that either the trust of art. 981*a* and or that of art. 869 C.C. is endowed with legal personality.

that a trust is constituted when a person "transfers property to be held for the benefit of a person or the fulfilment of a purpose". Article 602 merely specifies that the trust "must be accepted by the trustee". Article 603 declares:

Les biens transportés en fiducie forment un patrimoine distinct.	Property transferred in trust constitutes a patrimony which is distinct from that of the trustee.
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Article 624 makes clear that the trustee has the fullest possible powers of administration over the trust property.⁵¹

Given the theory of the patrimony deriving from the nineteenth century jurisprudential thought contemporaneous with the drafting of the Civil Code,⁵² statutory recognition that the trust property is distinct from the trustee's own property appears to be an essential requirement for the operation of the trust in the Quebec context. But what of ownership of the trust property? If neither fiduciary ownership nor personality for the trust are explicitly adopted, how does the final draft resolve the matter of the coexistence of the trust with the exigencies of the traditional principle of ownership?

The answer is simply that it does not resolve this question at the level of explicit textual expression. In this regard the proposed texts mark no apparent advance over the existing legislation. But are they, for all of that, unsatisfactory because this matter of

⁵¹ These are provided in draft articles 487-550 which constitute a codification of all the principles related to the administration of property belonging to other persons and deal with custody (*la garde*), involving the obligation to conserve; simple administration (*la simple administration*), involving the obligation to perform acts that maintain property in good repair; and full administration (*la pleine administration*), which imposes the obligation to make it productive.

⁵² Aubry & Rau, *Cours de droit civil français d'après la méthode de Zachariae* 5e éd. (1917), t. IX, 333-39, 349-52. Among these celebrated principles relating to the unity and indivisibility of the patrimony is that which states (at p. 336): "Que la même personne ne peut avoir qu'un seul patrimoine, dans le sens propre du mot". Certain exceptions recognized in French law apply in Quebec law as well, such as legacies by general title (art. 873 C.C.), the effects of benefit of inventory or separation of patrimonies in the law of succession (arts. 671 and 743 C.C.), the legal return of property to ascendant relations (art. 630 C.C.), reserved property of married women (arts. 1425a *et seq.*) and, it must be especially noted, the case of "les biens compris ... dans un fidéicommis universel ou à titre universel [qui] forment une universalité juridique distincte du patrimoine du ... fidéicommis" (p. 339). The fact that the elaborate theoretical construction of Aubry and Rau on this matter has been contested by more recent writers does not lessen the need for a clear legislative articulation of the principle of such separation, which the force of intellectual tradition in this connection would probably otherwise deny.

seeming fundamental principle is not legislatively formulated? I think not. Under the present law, as judicially interpreted, the title to the trust property can be viewed as vesting in the trustee for the duration of the trust — not, of course, for his beneficial enjoyment but only *in trust* until such time as there is remission by him to the entitled capital beneficiary. This is clearly suggested in the present jurisprudence. Although Rinfret J., in *Curran v. Davis*, qualified the trustees as only “apparent” owners with regard to third parties, and held that they do not have “title” even though the trust property is in their names with “à peu près tous les droits du propriétaire”, the context of his remarks shows that he was demonstrating only that their position was one that did not inure to their own benefit.⁵³ The idea was put more clearly by Salvais J. in *Reford v. National Trust*; he stated that the ownership of trust property is transferred to trustees, since it cannot be in suspense, but that their ownership is not that of article 406 C.C.⁵⁴ In other words, the ownership of the property is “reposing” in the trustees in trust. The power of the trustees to act derives not from the proposition that they are regular owners or persons vested with some new species of real right, but rather from the fact that the function of trustee carries with it most of the attributes of power normally associated with ownership. This point has been obscured because one is drawn to use the language of “rights”, associated with owners, when one is referring to the “powers” of trustees. But it is surely no great violation of any root principle in the civil law to affirm, as a gloss upon both the present and proposed texts, and as Mignault stated over forty-five years ago,⁵⁵ that the trustee has the right/power or title of an owner, except as to the benefit, for the purposes of the trust. The position, so stated, is hardly a new one in view of the long-standing acceptance of the purpose trust of article 869 C.C. The fact that the *fructus* vests neither in the trustee nor in any other person does not constitute an obstacle to the acceptance of the trust within the civil law, as it is not the only instance where a prerogative of ownership (as provided in article 406 C.C.) is denied the owner.⁵⁶

⁵³ *Curran v. Davis*, *supra*, note 9, 293, 305.

⁵⁴ *Supra*, note 20, 697.

⁵⁵ Mignault, *A propos de fiducie*, *supra*, note 14, 76: “[Le législateur] pouvait ... faire reposer le titre de propriété sur la tête du fiduciaire pendant la fiducie ... Il n'est pas nécessaire pour cela de suivre le législateur anglais dans la distinction qu'il fait entre la propriété légale et la propriété équitable, il suffit d'accepter le résultat que la loi anglaise consacre”.

⁵⁶ Cf. arts. 968 *et seq.* whereby the owner of property may be denied the *abusus*. Restrictions on the *usus* are numerous.

Indeed, this analysis, which also can be articulated under the present law, is reinforced by an important feature of the draft which marks an advance over the present texts. After much debate on the intrinsic merits of the idea and whether the present law was already to the same effect, it was decided by the drafting Committee that not even a first beneficiary need be in existence at the time of the constitution of the trust. Draft article 633 provides that the beneficiary's right must open not later than ninety-nine years after the trust is established. Therefore, a beneficiary need not, even as the institute in a substitution, be in existence at the time of the creation of the trust in order that the title to eventual ownership of the property be seen to repose in him rather than in the trustee.⁵⁷

The proposal to include within the range of possible beneficiaries a future (but specified) person not in existence at the time of the constitution of the trust might have prompted the final working committee to follow through to the logical consequence that title vests in the trustee at the creation of the trust. But it refrained from doing so and the problem of the coexistence of the trust mechanism and civilian principles of ownership remains under the proposed texts as much as under those now in force. In the final analysis, one can only conclude that some matters are better left unsaid, even in the work of law reform.

⁵⁷ This provision was settled in committee even before the Superior Court decided *Tucker v. Royal Trust Co.* [1976] C.S. 895 per Mackay J. *Tucker* was approved by *Fyshe v. Royal Trust Co.* C.S. Montreal, Jan. 7, 1977, no. 500-05-019922-762 per Meyer J. But cf. *Harwood v. Moncel* (1923) 61 C.S. 497. In the light of arts. 771 and 838 C.C., the issue is clearly more arguable under the present law in respect of trusts by way of legacy than it is in respect of trusts by way of gift.