McGILL LAW JOURNAL

Montreal

Volume 21 1975 *Number 2*

THE QUEBEC TRUST AND THE CIVIL LAW

Daniel N. Mettarlin *

> If there is anything more interesting than that famous chapter on snakes in the complete history of Ireland, it is a trust code in a Civil Law Jurisdiction.
>
> J. M. WISDOM [1]

This is the first of a two part article on the law of trusts in Quebec. In the first part the author will attempt to demonstrate that the trust of articles 981a C.C. and following should be regarded as a purely Civil Law institution. The author will try to show that the trust of articles 981a C.C. and following was not suddenly introduced into Quebec law in 1879, but was an institution with roots in early Civil Law. Basing himself on the continuity of the trust in Civil Law, the author will attempt to construct a theory which will indicate who owns the trust property and which will integrate the trust into the Civil Law. In the second part of the article, the author will indicate how the doctrine and jurisprudence have regarded the trust, and will discuss the practical consequences of his theory with regard to the problems which have plagued the trust in Quebec.

INTRODUCTION

The introduction of articles 981a C.C. and following to the Quebec Civil Code has engendered a host of disputes. Are the articles based on Common Law or Civil Law? Who owns the trust property? Can the donor be a trustee? Are the provisions of the Civil Code dealing

* Member of the Notarial Bar of the Province of Quebec.

[1] Cited in Lepaulle, "The Strange Destiny of Trusts" in *Perspectives of Law, Essays for Austin Wakeman Scott* (1964), 226, 238.

with executors applicable to trustees? Can one create inter vivos trusts in favour of unborn persons? For what period of time and for how many beneficiaries in succession may a trust exist? The solution to such questions requires an extensive examination of the history and nature of the Quebec trust.

"Pure" Civil Law[2] has always considered the trust to be incompatible with its basic principles. Those Civilian jurisdictions which have no legislation permitting trusts have consistently held any attempt by a donor or testator to create a trust to be null. Moreover, the grounds of nullity have not been based on minor and easily surmountable technical difficulties; they have been founded on the basic incompatibility of the trust with the principles of the Civil Law:

> Nous concluons donc, en définitive ... à l'impossibilité juridique de créer un Trust ...;[3]
>
> ... le Trust est ... *inassimilable en droit français* ...;[4]
>
> ... le Trust ... a été considéré, en effet, comme réfractaire à toute assimilation sur le continent européen.[5]

Consequently, those Civilian jurisdictions, such as Quebec, which have wished to allow its citizens to create trusts have found it necessary to enact special legislation permitting them to exist.[6]

However, the enactment of enabling legislation cannot remove the trust's incompatibility with certain basic principles of the Civil Law. In those Civilian jurisdictions which permit the trust, this incompatibility is translated into endless, seemingly insoluble problems, such as determining who owns the trust property or indeed whether anyone owns it; whether the rights of the beneficiaries are real or personal; and whether the trust is to be interpreted in accordance with the Common Law, the Civil Law, or as a special institution with rules of its own.

Of course it would be possible to ignore the philosophic uncertainties and through detailed legislation solve the practical problems of the trust. However, in order to remain within the spirit of

---

[2] By "pure" Civil Law the author means Civil Law unaffected by any legislation dealing with trusts; that is, as if arts.964, 869, and 981a C.C. *et seq.* had never been enacted.

[3] Motulsky, *De l'impossibilité juridique de constituer un "Trust"* (1948) 37 Rev. crit. dr.int.pr. 451-467; see also Merryman, *Ownership and Estate* (1974) 48 Tul.L.Rev. 916, 940 ("The phenomenon of the trust is ... an 'alien concept' ").

[4] *Ibid.*, 464.

[5] Mankiewicz, *La fiducie québecoise et le trust de Common Law* (1952) 12 R. du B. 16, 17.

[6] *Ibid.*, 17 ("... Québec a été obligée de le régler dans le cadre d'un droit écrit").

the Civil Law, to encourage predictable and orderly solution of problems, and to avoid unwieldy legislation (in the United States the major work on trusts runs to six volumes),[7] it is desirable to have reference to a philosophical framework.

We may divide into two camps those Quebec jurists who have attempted to analyze the trust theoretically.

One group, whom we shall call the "Civilists", believe that the rights and duties of the trustees and beneficiaries can be deduced from the principles of the Civil Law, particularly from the principles of the law of property. They accept as applicable to the trust the Civil Law maxim that all property must have an owner and every owner must be a legal person. According to the "Civilists", once the question of who owns the trust property is answered, most of the problems relating to the trust can be solved.

In opposition, the group we shall call the "Institutionalists" have argued that the trust cannot be successfully analyzed in Civilian terms, but is to be regarded as a special and somewhat alien institution with its own rules and principles deducible from logic, specific legislation and perhaps even from the Common Law.[8] The "Institutionalists" hold to the view that no one owns the trust property and that its rules can be determined apart from the Civil Law.

THE CIVILIST POSITION

Those who regard the trust as part of the Civil Law must deal with two difficulties: an interpretive difficulty and a substantive difficulty.

---

[7] Scott, *The Law of Trusts* 3d ed. (1967).

[8] Those who regard the trust as being inspired by the Common Law are difficult to categorize. Ironically, the author would categorize them as Civilists because they have hitherto accepted as applicable to the trust the basic Civilian principle that all property must have an owner. The quest for ownership of the trust is a purely Civilian preoccupation; Common Law does not demand that trust property have an owner and no legal consequences would flow from ownership even if it could be found within the trust.

If those who believed the trust was of Common Law inspiration were to truly import the Common Law of trusts, they would simply note that the trustee (who has "legal title") has certain rights and duties and the beneficiaries (who have "equitable title") have other rights and duties. They would thus conclude that the Quebec trust is really an ownerless, legislatively-created institution with its own special rules and principles derived from the legislation of arts.981a C.C. *et seq.* and from the Common Law.

The Interpretive Difficulty

It is, of course, a basic principle of the Civil Law that ownership cannot be in suspense at any time.[9] However, most trusts for some reason do not appear to vest ownership in anyone. For example, examine the following trust (which we will refer to as "Trust A"):

> To my trustees to pay the income to my wife, and on her death to deliver the capital to my son if he is living, and if he is not living, to deliver the capital to his children.

In this trust, the settlor does not appear to have vested ownership of the trust property in anyone *during the wife's lifetime;* nor indeed does he appear to have created any real rights at all while she is living.

However, we may compare a trust which was created by Jonathan (later Judge) Wurtele, who introduced articles 981a C.C. and following to our law. His trust reads:

> *Secondly*:
>
> I will, devise and bequeath the usufruct of my Estate to my beloved wife...;
>
> *Thirdly*:
>
> I will, devise and bequeath my Estate ... to my sons and daughters...;
>
> *Tenthly*:
>
> I constitue my said Executors trustees of my Estate; and I invest them with the seizin and possession of all the property... of which I may die possessed.[10]

One can readily see the difference between the Wurtele trust and Trust A. In the Wurtele trust the settlor expressly vested ownership in a person or persons (his sons and daughters); in Trust A the question of ownership is left unsettled and one must interpret the document to find the owner.

The interpretive problem for the Civilist is that he must find someone whom the settlor intended or is deemed by law to have intended to be owner. If ownership is in suspense during the wife's lifetime, we are forced to arrive at one of the following conclusions:

---

[9] There is no need to quote authority for this basic principle; however, the reader may wish to consult the following sources:

Mignault, *La Fiducie dans la Province de Québec* (1937) 5 Travaux de la semaine internationale de droit 35, 45, f.n.1; *Fraser* v. *Fraser* (1907) 16 B.R. 304, 312; *La Société d'Administration Générale* v. *Delle Hébert* (1925) 39 B.R. 124, 126; *Breard* v. *Mongeau* (1936) 61 B.R. 199, 203; *Préfontaine* v. *Dillon* (1922) 33 B.R. 314, 320: "La propriété des biens, sous notre droit, doit toujours reposer sur la tête de personnes vivantes, même dans le cas de legs dont l'effet est suspendu...".

[10] See Appendix, *infra,* Wurtele Testamentary Trust.

(a) Trusts such as Trust A are invalid on the grounds that ownership can never remain in suspense. The consequence of this conclusion is that the only type of trust that would be valid in Quebec is one similar to that created by Jonathan Wurtele; or

(b) Trusts such as Trust A are valid despite the hiatus in ownership, and the Institutionalists are correct. On this view the trust will be an ownerless institution outside the basic principles of property law, to be interpreted in accordance with its own special rules and principles, many of which lie outside the Civil Law.

In reality, the interpretive difficulty is easily surmountable. One can always find someone whom the settlor intended or is deemed to have intended to be owner. The more difficult question is whether that person is really an *owner* under the Civil Law. This is the substantive difficulty.

The Substantive Difficulty

Even assuming one can interpret Trust A so as to find someone whom the settlor intended to be the owner (whether wife, son, settlor or trustee), is such a person in reality the *owner* of the property? Or put differently, if one studies the essence of the trust institution as created in articles 981a C.C. and following and one analyzes the rights and powers of the beneficiaries and trustees, one is compelled to ask whether it is possible for anyone to truly own trust property.

One can go further and ask whether *any* of the normal Civilian methods of holding property or having real rights therein, namely usufruct, substitution or ownership, are compatible with the nature of the trust as permitted under articles 981a C.C. and following.

The Interpretive Difficulty Analyzed

As mentioned above, in some trusts it is clear whom the settlor *intended* to be the owner or holder of a traditional real right:

> I give the usufruct to my wife, the ownership to my son; X is to be trustee with the powers of articles 981a C.C. and following.
>
> I give the property to my wife, and on her death to my son; X is to be trustee with the powers of articles 981a C.C. and following.

In the first trust the settlor obviously intended his son to be the owner and his wife the usufructuary; in the second trust he clearly wished his wife to be the institute and his son the substitute.

However, suppose a trust reads:

> To my trustees, to pay the income only to my wife, and on her death to deliver the capital to my son if he survives my wife, and if he does not, to deliver the capital to his children, if they survive my wife.

Can it be said that the testator intended anyone to own the property subject to the trust? An answer may be suggested by looking at a similarly drafted clause in a document which, however, does not create a trust. For example, assume the testator had left the following bequest:

> I give the revenues only to my wife, and my son is to inherit the property on her death if he survives her; if my son does not survive my wife, on her death, the capital is to belong to his children if they survive her.

Further assume that the court finds the wife is not an institute subject to a substitution, but the legatee of a right to revenues only[11] (which would be the most logical conclusion since a beneficiary of revenues who is not charged to deliver capital cannot be considered as an institute). Since the wife is not an institute, it therefore appears that during the wife's lifetime the testator has not bequeathed the ownership to anyone mentioned in the will. In such circumstances the court would not find the will null on the grounds that ownership is in suspense; instead, it would find the testator's intestate heirs to be the owners, based upon article 838 C.C.,[12] on the presumption against intestacy, and upon a desire to

---

[11] In the author's opinion, our courts would find the wife is not an institute because a beneficiary of revenues not charged with delivery over of the capital cannot be considered as an institute. The case of *Dame Cogne* v. *Trust Général du Canada* [1969] B.R. 591, which dealt with a similar legacy contained within a trust, held:

> "Les légataires qui reçoivent des revenus ... ne sont pas tenus de les rendre. Il n'y a pas de biens substitués.... Le testateur a établi, non une substitution au sens de la loi, mais une succession de légataires qui ont droit aux revenus..." (*per* Salvas J., 597).
>
> "Les légataires ... n'ont donc aucuns biens à conserver ni à rendre .... En résumé, les légataires ... sont des légataires des revenus ..." (*per* Choquette J., 595).

A similar conclusion, again involving a trust will, was reached in *Masson* v. *Masson* (1912) 47 S.C.R. 42, where the court held that the revenue beneficiaries were not institutes but legatees of income rights only.

It is further the author's view that the wife could not be considered to be a usufructuary since she is given only the right to revenues, and not a usufruct in the property. For a distinction between a usufructuary and a beneficiary of revenues, see Proudhon, *Traité des droits d'usufruits, d'usage, d'habitation, et de superficie* (1824), vol.1, 2 and 53-4.

[12] Art.838 C.C. states:

> "The capacity to receive by will is considered relatively to the time of the death of the testator; *in legacies the effect of which remain suspended after the death of the testator,* whether in consequence of a condition, or in the case of a legacy to children not yet born, or a substitution, this capacity is considered relatively to the time at which the right comes into effect.
>
> ...Even in the case of suspended legacies, already referred to in this

maintain the deceased's testamentary plan. The court probably would interpret the will as a substitution in which the intestate heirs are institutes, the son a substitute and the wife the holder of a personal right to claim revenues from the testator's heirs.[13]

This was the solution the court arrived at in *Robert* v. *Martin*;[14] it has been sanctioned by Quebec doctrine[15] and finds its textual

---

article, it suffices that the legatee be alive or conceived, subject to the condition of being afterwards born viable, and that he prove to be the person indicated at the time the legacy takes effect in his favour" (emphasis added).

[13] As indicated *supra*, f.n.11, it is the author's view that the wife is not a usufructuary but a beneficiary of a right to claim revenues only. Proudhon, *supra*, f.n.11, has stated:

"... le legs d'usufruit diffère essentiellement du legs des revenus ... lequel n'a que la nature d'une pension à payer par l'héritier qui jouit lui-même de l'héritage."

"La perception des revenus ne se rattache point à la détention du fonds: elle ne suppose point que celui qui en profite, jouisse lui-même de l'héritage ... doit être payée par le tiers détenteur ...".

For a distinction made by the Quebec courts between a usufruct and the right to claim revenues, see *Guaranty Trust Company of New York* v. *The King* [1948] S.C.R. 183, 196 *et seq. per* Taschereau J., and *Laverdure* v. *Tremblay* [1937] A.C. 666, 678 *et seq. per* Lord Maugham.

[14] (1918) 27 B.R. 54. In this case, the testator left his property to his brother Médéric as institute, with the obligation to deliver the property on Médéric's death to the latter's children born and to be born, and failing such children, to the testator's nephews and nieces. The brother Médéric renounced to the estate and had no children. The court was faced with the question of the disposition of the revenues until the brother's death. The court held (at 58-9):

"Il est clair, très clair, que nous sommes mis en présence d'une substitution fidéicommissaire dans laquelle Médéric Longtin est le grevé et ses enfants possibles les appelés. Ses neveux... n'auront ces biens que si Médéric, leur oncle, n'a pas d'enfants. Ils n'hériteront pas, à un moment... nécessairement arriver, mais à une date indéterminée dont l'échéance dépend d'une condition... ils sont des héritiers conditionnels.... Et... leurs droits possibles sont suspendus... ils n'ont droit, pour le moment, ni aux capitaux, ni aux revenus. Alors, à qui les attribuer dans l'intervalle ...? *Car il faut que les biens appartiennent ... à quelqu'un.* ... Vu la renonciation de Médéric Longtin, les revenus — jusqu'à son décès — vont aux héritiers *ab intestat* de Julien Longtin [the testator]. Ces derniers, au décès de Médéric Longtin, *remettront le capital* à ses enfants, s'il en a, si non aux demandeurs" (emphasis added).

The Court found the ab intestate heirs of the testator to be the owners charged with handing over the property on the brother's death to the substitutes.

[15] Mignault, in *Le droit civil canadien* (1899), vol.4, 263-4, also indicates that in such a case the ownership of the property would be vested in the testator's intestate heirs. However, Mignault suggests that the intestate heirs are not charged with a substitution but rather are owners subject to a

basis in article 838 C.C., which permits conditional bequests and bequests to persons not existing at the time of the testator's death. This conclusion is likely to be closer to the testator's intention than any other, as it results in his testamentary plan being held valid and his heirs inheriting the property if his son predeceases his wife.[16]

With the above analysis in mind let us examine the following trust will:

> To my trustees to pay the income to my wife during her lifetime, and on her death to deliver the capital in ownership to my son, if he is living, and if he is not living to his children then living.

Except for the trust aspect there is no difference between this bequest and the previously examined non-trust will:

> I give the revenues only to my wife, and my son is to inherit the property on her death if he survives her; if my son does not survive my wife, on her death, the capital is to belong to his children if they survive her.

In the non-trust will we concluded that the court would find the intestate heirs to be the owners. Since we are assuming for the moment that ownership is compatible with and indeed mandatory in a trust will, in the latter situation the logical conclusion is that the court similarly will find the intestate heirs to be the owners, subject to the trust.[17]

If the trust is inter vivos rather than testamentary, the problem is somewhat more complicated but also results in a satisfactory con-

---

resolutive condition. Faribault, in *La Fiducie dans la province de Québec* (1936), 182-4, para.169, agrees with Mignault that the intestate heirs are the owners but disagrees that they are owners under a resolutive condition. He believes they would be institutes subject to a substitution. The author tends to favour the view of Faribault, particularly since superior protection is given beneficiaries under a substitution.

[16] A further question arises: which of the testator's ab intestate heirs are the institutes? Since ownership cannot remain in suspense, on the testator's death it must pass to the intestate heirs who are living at his death.

Assuming the testator had only one child, this would mean the testator's wife and son would inherit. The result is that on his wife's death (assuming the son dies before the wife), the successors to the property would be the son's heirs and the wife's heirs.

[17] The heirs would either be owners under a resolutory condition or owner-institutes subject to a substitution (see *supra*, f.n.14). Whether a substitution is compatible with a trust and the rights of the institutes in a substitution subject to a trust will be dealt with *infra*. The court could, of course, find the trustees to be the owners, but we will assume for the present discussion that they will follow the basic concepts of the Civil Law and therefore will not find them to be the owners. See also *infra* for a discussion of the possibility of ownership vesting in the trustees and the author's rejection of this alternative.

clusion. For example, assume the creation of the following inter vivos trust:

> To my trustee to pay the income to my wife, and on her death to deliver the capital to my son if he survives my wife, and if he does not to such of his children as survive my wife.

It is extremely difficult, if not legally impossible, to interpret this trust as a substitution, since the only possible institute is the donor and it is probably impossible to create a substitution in which the donor is also institute.[18]

The obvious conclusion is that the donor has retained ownership while donating ownership under a suspensive condition to his son.

---

[18] A substitution inter vivos can only be created by way of gift (929 C.C.), and one cannot give a gift to oneself. However, it is not entirely clear that the creation of a substitution in which one is the owner involves a gift to oneself. One can give the ownership to another and retain the usufruct (art. 777 C.C.). Why cannot one give rights as a substitute to others and retain the rights of an institute for oneself? The traditional answer has been that a substitution requires a gift of ownership and therefore one cannot create a substitution by giving only personal rights to the substitutes, retaining ownership for oneself. By retaining the rights of an institute, one is simply unilaterally restricting one's rights as owner (namely, by restricting alienation and preventing waste), but one has not divested oneself of ownership.

This analysis is not entirely convincing, but it does appear to be sanctioned by the Civil Code of Quebec. Thus art.925 C.C. states, "La substitution fidéicommissaire est celle où celui qui *reçoit* est chargé de rendre la chose..." (emphasis added); and art.934 C.C. states, "The testator may impose a substitution either upon the *donee* or the *legatee* whom he benefits, or upon his heir on account of what he leaves him as such" (emphasis added). Other articles of the Civil Code, such as 933 and 935, reinforce the impression that a substitution can only be created by a gift of ownership.

One can also argue that if one attempts to create a substitution and retains ownership, one has created an illegal gift mortis causa. In other words, the donor, by retaining ownership and granting only personal rights to the substitutes, has in effect stated that the donees will inherit only if they survive the donor; if not, the property will remain with the donor. This is a traditional gift mortis causa, to which has been added a restriction on the donor's rights of alienation and abutendi.

While this argument does have merit, it does not apply to all substitutions. It would not apply to a substitution in which a donor remained as institute, but stated that the substitution would open, not on the donor's death, but on the death of another person. The only argument against the validity of such a substitution is that the creator thereof must totally divest himself of ownership.

If the courts should hold such a substitution valid, then the above inter vivos trust may validly be interpreted as a substitution in which the donor is the institute. If, however, such a substitution is impossible, then the only solution is to find that the above trust contains a gift of conditional ownership to the children, the donor having retained the ownership until the condition occurs. This is permitted by art.782 C.C.

In other words, the settlor is owner and the son conditional owner under the suspensive condition of surviving his mother.[19] This is permitted by article 782 C.C., which allows the donor to stipulate

> ... that a gift inter vivos shall be suspended, revoked, or reduced under conditions which do not depend solely upon the will of the donor.

Thus the inter vivos trust also can be interpreted to satisfy the principle that ownership cannot remain in suspense.[20] However, this leads into the next and more difficult question. Are what appear to be "usufructs", "substitutions" and "ownership" really such? In other words, are ownership and the other real rights incompatible with the trust?

The Substantive Difficulty Analyzed

The Usufruct within a Trust

Let us examine a usufruct contained within a trust.

> I give the usufruct of my property to my wife and the ownership to my son; I appoint X as trustee with the powers of articles 981a C.C. and following.

---

[19] This is not a gift in contemplation of death, since the person the son must survive to inherit is not the donor but a third party.

[20] A difficult question arises with regard to gifts of conditional ownership to persons not living at the time the trust is created, because arts.771 and 929 C.C. state that, except in marriage contracts, gifts inter vivos in favour of unborn persons are only permitted if a substitution is created. For example in the trust,

> "To my trustees to pay the income to my son and on his death to deliver the capital to his children then living",

there has been no substitution created since the donor has retained ownership (see *supra*, f.n.18). Therefore, the gift to the unborn would be invalid.

The problem results no matter what theory of trust ownership is adopted. If we determine that the trustees are owners of the trust it is obvious no substitution can exist; the only possible institutes are the trustees, and they cannot be institutes since they do not inherit the property if the son dies without children, nor do they ever benefit from the income. If one accepts the Institutionalist view that the trust property is ownerless, clearly no substitution exists.

Whatever theory of the trust one supports, one is left with the problem that in the above trust no substitution has been created, yet only through a substitution can one make an inter vivos gift to the unborn. No theory of the trust can solve this problem. It is therefore not possible to deny the validity of the theory of conditional settlor ownership on the grounds that as a consequence of this theory no inter vivos trust can be validly created in favour of the unborn.

In the second part of this article we will discuss whether gifts to the unborn can be made in trusts in which no substitution has been created. We will see that Quebec doctrine and jurisprudence have validated such gifts, on the grounds that the trust itself is a special legislative exception to

Is the wife really a usufructuary? It does appear that the classic administrative trust envisaged and created by articles 981a C.C. and following[21] and the usufruct are incompatible.

The essence of the usufruct is the usufructuary's right to *personally and directly* hold and enjoy the property, and his obligation to preserve it for the naked owner:

---

the rule that one must have a substitution to benefit the unborn by way of inter vivos gift.

[21] The reader will note that the author has not stated that all trusts are incompatible with the usufruct, but only those trusts which the author has called "administrative trusts" envisaged by arts.981a C.C. *et seq.* However, the reader should note that "administrative trusts" are almost the only type of trust created by settlors in Quebec.

By "administrative trust" the author means a trust created to administer property for beneficiaries. It seems to be the only type of trust dealt with or indeed contemplated by arts.981a C.C. *et seq.*, which define a trustee as a person seized as "depositor and administrator" and constantly refer to the trustee's administration. As is clear from the text, the usufruct is incompatible with the "administrative trust".

It does however seem possible to create certain types of non-administrative trusts in which a valid Civil Law usufruct and naked ownership could be incorporated. A settlor could create a "bare trust" in which the duties of the trustee would be to receive the property and *immediately* turn it over to the true possessor and administrator, the usufructuary. The settlor could also create a "conditional administrative trust" in which a true Civil Law usufructuary would administer and possess the property until the occurrence of a certain event, at which time an administrative trust would be created. Such a trust could read:

> "I give the usufruct of my house to my wife, and the ownership to my son. My wife is to live in the home, enjoy it, administer it, and pay all charges of upkeep; I appoint X as trustee. My trustee, but only with the consent of my wife, may sell the property. In the event of a sale or destruction by fire or other cause, the proceeds are to be administered by my trustee."

One could also create what the author would term a "watchdog trust". In a "watchdog trust", the settlor would expressly create a valid Civil Law usufruct; the usufructuary would be given the minimal essential rights of direct enjoyment, possession and administration, but would be subject to the supervision of a trustee whose powers would be so denuded as to be compatible with a usufruct.

One can imagine a settlor giving his wife a true usufruct and his son the naked ownership. At the same time he might be fearful that the property would be wasted and that the son would be reluctant to sue his mother to prevent this, or that the mother might be deprived of her rights by her son, whom she would be anxious to please. Thus he might create the following type of trust:

> "I give the usufruct of my home to my wife and the ownership to my son. My wife is to have the right to live in and enjoy my home, to administer it, and to pay all charges of upkeep. I appoint X as trustee subject to the above. Neither my wife nor my son may sell or borrow

> Il faut donc, pour véritablement caractériser une constitution d'usufruit, que la délivrance de la chose doive être faite à l'usufruitier pour en jouir *par ses mains* ... et en cela le legs d'usufruit diffère essentiellement du legs des revenus... lequel n'a que la nature d'une pension à payer par l'héritier qui jouit lui-même de l'héritage.[22]

It is also of the essence that the usufructuary must have the right to possess the property without intermediary and be able to revendicate it against all persons:

> ... qu'a l'usufruitier appartient la possession ... [il] détient réellement la chose, ... de ses propres mains ... .[23]
>
> ... Il résulte ... que l'usufruitier ... doit avoir tous les avantages des interdits possessoires ... .[23a]

---

upon their rights, either outright or by anticipation, or terminate the trust, without the trustee's consent."

Under the above trust, administration and possession would fall to the usufructuary and the naked owner would have the right to prevent waste. (If these rights were not granted to the usufructuary and the naked owner, a Civil Law usufruct would not have been created.) The trustee would have only those rights which are compatible with a usufruct, such as the right to sue the usufructuary to force him to administer the property if the naked owner did not exercise his rights, perhaps the right to revendicate the property from third parties in certain circumstances, and perhaps the right to assume administration in the cases provided in art.480 C.C. either as sequestrator or as a true administrative trustee (in which case one could state that a conditional administrative trust had been created). In view of the fact that the naked owner cannot be compelled to make repairs, it is difficult to see what actions the watchdog trustee could take on behalf of the usufructuary, other than protecting her against unwise alienation of her rights.

One could even imagine granting the watchdog trustee certain limited specific rights of administration, which by law one could take away from a usufructuary or naked owner without destroying the essence of the usufruct. Thus one could perhaps grant the trustee the right to improve the property without diminishing the usufructuary's enjoyment, or perhaps the right to make major repairs provided it was done in a manner compatible with the usufructuary's rights.

The conclusion to be drawn from the above analysis and the text is that the usufruct is essentially incompatible with all but the watchdog, bare or conditional administrative trust.

Since the author is only at this moment attempting to demonstrate that the system of real rights envisaged by our Code to convey future rights, such as the usufruct and substitution, is incompatible with all but a few inconsequential trusts which have been grafted on to true usufructs and substitutions, it is not necessary at this point to analyze what new types of real rights might be compatible with the trust and are implicitly created by arts.981a C.C. *et seq.*; nor will the author at this point discuss what real rights, if any, the beneficiaries of administrative trusts may have.

[22] Proudhon, *supra*, f.n.11, 2 (emphasis added).

[23] *Ibid.*, 1.

[23a] *Ibid.*, 21.

Moreover, the usufructuary must also personally and directly administer the property and be able to preserve it against waste:

> Le droit de jouissance appartenant à l'usufruitier implique naturellement le *droit d'administration* ... .[24]

Indeed, it is of the essence of the usufruct that a donor or testator be unable to deprive a usufructuary of his right of administration:

> ... le testateur ne pourrait pas séparer l'administration de la jouissance ... .[25]

A usufructuary without the plenitude of these rights is not a usufructuary as envisaged by the Civil Law. Thus, if one gives a trustee the right of administration, one has not created a usufruct; furthermore, if one deprives the beneficiary of possession, revendication and the ability to preserve the property, one has not created a usufruct. Articles 981a C.C. and following effectively vest all these rights in the trustee; therefore, although the settlor may call the beneficiary a usufructuary, this will not make him so. The author submits that the rights possessed by the beneficiary of an administrative trust do not amount to the real right of usufruct, or indeed to any real right envisaged by the Civil Law.[26]

In reality, the "usufructuary" within the classic administrative trust appears to have little more than personal rights against the trustee to receive revenues and, in certain circumstances, to be maintained in occupation of specific property (much like the personal claim of a tenant against the landlord to be maintained in occupancy).

The concept of usufruct is thus incompatible with the administrative trust as set forth by articles 981a C.C. and following, at least as regards the "usufructuary". The author would also suggest that the trust is incompatible with the essence of "naked ownership".

There exist certain rights of which the naked owner cannot be deprived.

First, it is of the essence of naked ownership that if the usufructuary commits waste or permits the deterioration of the property, the naked owner may take direct action to obtain

---

[24] Huc, *Commentaire du Code Civil*, vol.4, 258, quoted in *Guaranty Trust Co. of New York* v. *The King* [1948] S.C.R. 183, 199.

[25] *Ibid.*

[26] Whether or not the beneficiary may by intention or by law have real rights in the property subject to a trust will be discussed later. However, even assuming that a beneficiary may have real rights, such as the right to revendicate in the event of a prohibited alienation by the trustee or in the event of the trustee's failure to act, the type of real right given would not be one envisaged by the Code, but would be a special type of real right which could be created only within a trust.

> ... either ... the absolute extinction of the usufruct ... or the entry of the proprietor into possession ... subject to the obligation of annually paying to the usufructuary ... a fixed sum ... .[27]

If the naked owner cannot prevent the usufructuary from wasting the property, the donor or testator would not have created a usufruct but a substitution de residuo.

It is also of the essence of naked ownership that the naked owner have during the usufruct all the rights of ownership which are not dismembered or taken away by the usufruct:

> Le nu propriétaire conserve l'exercice de tous les droits de propriété compatibles... [avec l'usufruit]. Il peut donc ... exercer ... toutes les actions qui appartiennent au propriétaire ... par exemple une action en bornage.
>
> Le nu propriétaire est autorisé à faire, *sur la chose grevée* d'usufruit, les actes matériels tendant à sa conservation, lors même qu'il en résulterait pour l'usufruitier quelque ... diminution de jouissance ... ainsi ... le nu propriétaire peut procéder aux grosses réparations des bâtiments soumis à l'usufruit ... .
>
> ... propriétaire est en droit de faire reconstruire les bâtiments détruits par un incendie ou par tout autre accident.[28]

A "naked owner" without the right to make necessary repairs, to take direct action to prevent extinctive prescription or to assume personal administration in case of waste is not a naked owner. In an administrative trust subject to naked ownership, these rights belong to the trustees. The sole right apparently belonging to the naked owner is the right to appoint a new trustee in case of poor administration; however, this is a right which belongs to all beneficiaries under the trust, including the holder of a merely personal right to receive revenues.

In a non-trust situation, if the testator or donor were to create a "usufruct" but state that the naked owner could not make repairs or prevent waste, the court would either consider these clauses as not written, or hold the whole gift or legacy null, or consider the usufructuary to be owner subject to a substitution. The courts would not consider that a usufruct had been created, and there is no reason to assume the decision would be otherwise in a trust situation.[29]

---

[27] Art.480 C.C.

[28] Aubry et Rau, *Cours de droit civil français* (1869) vol.2, 508, para.233.

[29] One could conceive of the possibility of creating a usufruct and subjecting the naked ownership only to a trust. Thus the property would be administered by a usufructuary, but the naked owner's rights would be subject to an administrative trust in which he could not prevent waste or make repairs, these being the duties of the trustee. However, in such a case the beneficiary would not be an owner but the holder of a new type of

The Substitution within a Trust

Is it possible to create a substitution within the administrative trust envisaged by articles 981a C.C. and following? Let us examine the following trust subject to a substitution:

> I give the property to X and on his death to Y. A is to be trustee with the powers of articles 981a C.C. and following.

An essential characteristic of a substitution is that the institute be seized as owner of the property,[30] subject to the obligation of delivering it over to the substitute. An "institute" without control, possession, direct enjoyment of the property or the ability to prevent waste is not an institute, any more than the "usufructuary" without these rights is a usufructuary.[31] The "institute" subject to an administrative trust has none of the real rights which are of the essence of the substitution, and in reality has no more rights than a mere beneficiary with a personal right to receive income from the trustee.[32]

Thus the substitution as envisaged by the Civil Law is incompatible with the administrative trust set forth in articles 981a C.C. and following. The institute does not have the necessary minimal rights required by Civil Law to be an institute, nor does he seem to have any real right envisaged by the Civil Code.[33]

Undismembered Ownership and the Trust

There are only two kinds of ownership: undismembered and dismembered. We have observed that the customary dismemberments of ownerhip, such as usufruct and substitution,[34] are incompatible with the normal administrative trust. But what of undismembered

---

real right not envisaged by the Code. At this moment the author is not attempting to analyze what types of new real rights, if any, might be compatible with a trust but only to demonstrate that the real rights known to Civil Law are incompatible with all but the bare trust, the conditional trust and the watchdog trust (see *supra*, f.n.21).

[30] See art.944 C.C.

[31] See arts.947, 949 and 958 C.C.

[32] See *Masson* v. *Masson* (1912) 47 S.C.R. 42, and *Dame Cogne* v. *Trust Général du Canada* [1969] B.R. 591, esp. at 597.

[33] The same comments in f.n.21 concerning the usufruct would apply to the substitution. A settlor could thus create a substitution within a non-administrative or watchdog trust by denuding the trustee of his powers of administration and possession.

[34] The substitution is not technically a dismemberment since the institute is considered a full owner subject to a resolutive condition; the substitute is not considered the holder of a real right until the substitution opens. See Mignault, *Le droit civil canadien* (1901), vol.5, 108 *et seq.* For a discussion of a possibly compatible dismemberment, sec *infra*, 218.

ownership? If neither dismembered nor undismembered ownership are possible within an administrative trust, what remains of the Civilian principle that all property must have an owner?

Article 406 C.C. defines undismembered ownership[35] as

> ... the right of enjoying and of disposing of things *in the most absolute manner* [emphasis added].

Neither the settlor (in the case of an inter vivos trust) nor his heirs (in the case of a testamentary trust) nor any of the beneficiairies have the rights of absolute ownership as defined in article 406 C.C. They neither administer nor possess the property; they do not enjoy it; they cannot control, sell, or destroy it; they cannot even collect revenues from it. Clearly none of these persons are undismembered owners.

The same situation prevails even in the simplest trust, such as the following:

> I give the ownership to my son; however X is to be trustee of the property with all the powers of articles 981a C.C. and following, and is to pay income to my son until he reaches the age of 30 years.

The son has no right to alienate, destroy or control the property nor has he any direct right to prevent waste, to administer or to enjoy it. It is his, and yet it is not his, until he is 30 years old. Whatever rights he does have are not undismembered ownership within the meaning of article 406 C.C. Undismembered ownership is thus incompatible with the trust, at least as regards the settlor, his heirs and the beneficiaries.[36] The only other potential owner would appear to be the trustee. Is this possible?

The Trustee as Civil Law Owner

Some jurists have maintained that the trustee is the owner of the property subject to a trust. Apart from the negative argument that the trustee, by elimination, is the only person who can own the trust property, these jurists have based their arguments on the fact that at Common Law the trustees have "legal title", and on the wording of article 9811 C.C.

However, in the author's opinion their arguments are incorrect. As will be demonstrated, articles 981a C.C. and following are based

---

[35] Once ownership cannot be dismembered by creating a valid usufruct or substitution (which, as we have seen, can only be personal rights within a trust), the only kind of ownership which remains possible within an administrative trust is full and undismembered ownership as defined at art.406 C.C. *Cf. Succession of McCan* 19 South. 220 (1896), 222.

[36] Of course, undismembered ownership would not only be incompatible with an administrative trust but with a watchdog trust as well.

not on the Common Law but on the Civil Law.[37] Any attempt to explain the trust in Common Law terms is historically inaccurate.[38]

---

[37] The jurists who believe the trust to be inspired by Common Law include Mignault, *A propos de fiducie* (1933-34) 12 R. du D. 73; Graham, *Some Peculiarities of Trusts in Quebec* (1962) 22 R. du B. 137; Gagné, (1952) Trav. Assoc. H. Capitant 192, 201; Mankiewicz, *supra*, f.n.5, 33; *Curran* v. *Davis* [1933] S.C.R. 283, 302 *per* Rinfret J.

Among those who believe that the trust is not based on Common Law is Billette, *La fiducie* (1933-34) 12 R. du D. 159; and *La fiducie des articles 869 et 964* (1932-33) 11 R. du D. 532. See also his *Traité théorique et pratique de droit civil canadien* (1933), vol.1, 194 and 197, para.264. Sharing this view are Surveyer, *Pouvoirs et obligations des éxécuteurs et administrateurs* (1950) 10 R. du B. 7, 13; Faribault, *supra*, f.n.15, 66 *et seq.*, paras.49 *et seq.;* and *Mathison* v. *Shepherd* (1908) 35 C.S. 29, 52-3.

[38] The view that the trust is either based on, or inspired by, the Common Law is an example of an all too common tendency to make seemingly logical but unsubstantiated historical speculations without adequate historical research. No evidence of any nature has ever been brought to show that the trust was based on or indeed inspired by the Common Law; yet Quebec law is replete with statements such as "il est *indubitable* que le legislateur s'est inspiré... du droit anglais..." (Mignault, *supra*, f.n.37, 76; emphasis added) or "il est *difficile de ne pas conclure* que le chapitre de la fiducie... est vraiment d'inspiration anglaise" (*Curran* v. *Davis* [1933] S.C.R. 283, 302 *per* Rinfret J.; emphasis added). Perhaps the most speculative of these comments is that of Mankiewicz, *supra*, f.n.5, 33, who has written, "L'auteur du projet de loi, qui était un canadien anglais, n'a *probablement* pas fait de recherches sur l'ancien droit français. Son but a été d'établir dans le droit civil québecois une institution très familière aux canadiens anglais..." (emphasis added).

Faribault, *supra*, f.n.15, 66 *et seq.*, para.49, gives an excellent policy reason reason why the legislature should not be presumed without any tangible evidence to have based the trust on the Common Law. After analyzing the complicated nature of the Common Law trust with its origins in the intricate English land law, its division between equitable and legal rights, and its constructive, resulting and implied trusts, he concludes:

> "On n'insère pas d'un seul coup, sans explication, toute une institution nouvelle, avec ses principes, ses formes, sa procédure, ses précédents, ses applications et ses arrêts, dans un corps de doctrine organisé rationnellement, harmonieusement, d'origine et de conception différentes ...".

However, reasons of policy aside, the view that the trust is based on or inspired by the Common Law is historically invalid, as shown below.

The Quebec legislature in art.981a C.C. defined the trust in the exact same terms as did the ancient French authors. Moreover, Jonathan (later Judge) Wurtele, who introduced the legislation as a Private Member's Bill, drafted a trust one month after the enactment of the legislation in which he expressly used the Civil Law terms "usufruct" and "substitution" to apply to the rights of the beneficiaries and clearly vested ownership in other beneficiaries. (Wurtele, a leading Quebec Civilist, was educated at Laval University. He was one of the founders of the Crédit Foncier and became Attorney-General of Quebec and later a judge of the Appeal Court of Quebec. He was an English speaking Civilian in the tradition of Francis Walton, Thomas McCord and Charles W. Day.)

This will be discussed at length below. Moreover, the Common Law concept of "legal title" is not in any way equivalent to the Civil Law concept of ownership.[39] At Common Law the beneficiaries are spoken of as having "equitable title" and the trustee as having "legal title". When Common Law lawyers state that the trustee has "legal title" they mean only that the trustee has a bundle of rights which are known as legal title, which is different from the rights comprised within Civil Law ownership. Indeed, it is possible for legal title to vest at Common Law in depositaries, agents, etc.

Another argument, a textual one based on article 981l C.C., is equally without foundation.

Textual Argument

To begin our analysis, it is helpful to look to the words of the Code itself. Articles 981a and 981b C.C. give the trustees the seizin of the trust property; however, these articles expressly state that the trustees are seized only as administrators and depositaries. Nowhere does the law state that the trustees are owners or have the rights of owners.

However, some have argued that despite the clear wording of articles 981a and 981b C.C., article 981l C.C. implies that the trustees are the owners. The article reads as follows:

Only conjecture supports the view that the trust was of Common Law inspiration. One can theorize that since the trust was well known at Common Law, Wurtele must have turned to the Common Law when he drafted the legislation; one can further theorize that his fellow English speaking Quebeckers had been longing for the flexibility of the Common Law trust and that Wurtele met this need. This speculation, of course, ignores the facts that what was introduced was nothing like the Common Law trust; that there is a distinction between wishing to have the flexibility of a trust and introducing it in a way that is compatible with Civil Law; and that a Civil Law trust had existed in Quebec for centuries.

The verbatim use of the French texts, the use of the Civilian terms in the trusts that Wurtele himself drafted, the fact that a trust in one form or another had been in existence in ancient French law and in Quebec for centuries, and the fact that what was finally introduced bears almost no similarity to the Common Law trust but is strikingly similar to the Civilian trust, demands more from those who believe the trust to be of Common Law inspiration than mere conjecture. There is no evidence that the trust of arts.981a C.C. *et seq.* is based on the Common Law; there is abundant and convincing evidence to the contrary.

[39] See Philbrick, *Changing Conceptions of Property in Law* (1937-8) 86 U. of Pa. L.Rev. 691, 702: "...title is no more than relatively better right to immediate possession (and so of user...)". See also Dias, *Jurisprudence* (1970), ch.13, and Waters, *Law of Trusts in Canada* (1974), 10-16.

> At the termination of the trust, the trustees must render an account, and deliver over all moneys and securities in their hands to the parties entitled thereto ....
>
> They may also execute all transfers, conveyances, or other deeds necessary to vest the property held for the trust in the parties entitled thereto.

If the trustees are not owners, it is argued, why must they "vest the property" ("transférer la propriété") in the beneficiaries?

The answer is evident. When a trust is created, most of the assets are registered in the trustees' names and kept in their possession. On termination of the trust, it is necessary for the trustees to transfer possession and registration to the beneficiaries so that they may deal with the property. Article 981l C.C. simply sets out the requirements of this transfer and delivery, which may take place either by physically handing over the trust assets (paragraph one) or by transferring registration (paragraph two).

This interpretation is clear from the wording. The article speaks of "property held for the trust", which refers to the property itself and not to the transfer of ownership.[40] When the Code refers to ownership it does not use the term "property" (406 C.C.).

It is evident from the wording of articles 981a C.C. and 981b C.C. that the legislature has taken great pains to avoid giving ownership to the trustees. The legislature has expressly stated that the trustees are seized only as depositaries and administrators and has never described them as owners. If the text of the law supports any argument, it is that the trustees are *not* the owners.[41] There thus appears

---

[40] The use of the term "propriété" in the French version of art.981l C.C. is more ambivalent, since the French version of art.406 C.C. uses the term "propriété" to denote ownership. However, if one reads the term "propriété" with the words that follow, "propriété *tenue en fiducie*", the meaning becomes clear. The article is referring to the actual goods and assets held in trust, not the ownership thereof. As further evidence, the term "propriété" is used throughout the French versions of arts.981a, 981b, 981d, 981j and 981m C.C. to apply to assets and not to ownership.

[41] Mankiewicz, *supra*, f.n.5, 36 *et seq.*, gives a number of textual arguments why the trustees are not the owners; his argument based on art.981j C.C. is particularly interesting (at 39). Faribault, *supra*, f.n.15, 76 *et seq.*, paras.54 and 55, also gives useful textual arguments why the trustees are not the owners. However, one cannot better analyze the text of arts.981a C.C. *et seq.* than by quoting from Billette, *Etudes de jurisprudence* (1932-3) 11 R. du B. 38, 39:

> "Le 'transport' de biens au fiduciaire n'est pas une aliénation. On peut transporter son bien à un emprunteur, à un mandataire... ou par les contrats de nantissement, de louage, etc. Dans aucun de ces cas on n'aliène.... Le fiduciaire n'acquiert la propriété d'aucune chose. Ce n'est pas 'la propriété', le droit de propriété, qui lui est transporté, mais uniquement

to be little textual basis for trustee ownership.[42]

---

des choses ou 'propriétés mobilières ou immobilières' (art.981a). On n'est pas possesseur du droit de propriété, mais de choses ou 'propriétés'. ...Le fiduciaire n'acquiert que la possession. Il n'est saisi que comme possesseur. Il ne revendique que la possession. Il n'est que l'administrateur et le dépositaire de la chose ...: la possession, l'administration et le dépôt, et rien de plus. ...Les mots *possession, administration, dépôt* sont, on nous l'accordera, bien connus de notre système de droit français. Et, vu que le législateur nous dit, en termes exprès, que le fiduciaire n'est qu'un possesseur, qu'un administrateur, donc qu'un mandataire, qu'un dépositaire, et rien de plus...".

[42] The main proponent of the theory of trustee ownership is Mignault. He argues that since ownership cannot remain in suspense, someone must be owner. Who, therefore, is the owner?

"Assurément, pas le donateur, qui, dans une donation, doit se dessaisir de son droit de propriété.... S'il s'agit d'un testament, le testateur n'existe plus... et ses héritiers légaux sont sans droit, car la succession testamentaire exclut la succession légale (art.597)....

Ce droit de propriété n'appartient pas, non plus, au bénéficiaire, à qui la chose n'est pas transportée par la donation ou le testament..... ...Il ne reste que le fiduciaire, car nous ne pouvons supposer que le titre de propriété ne soit nulle part." (Mignault, *supra*, f.n.37, 76).

Mignault then proceeds to give various textual arguments to support this position.

With the greatest respect, the learned author appears to be incorrect in several elements of his analysis. First, a donor can retain ownership of the property by virtue of art.782 C.C. Further, as we have seen, if in a will ownership is not vested in a legatee, it will be vested in the intestate heirs subject to the rights bequeathed in the will. Therefore, it does appear that a donor can give ownership under a suspensive condition, and a testator can bequeath ownership to his intestate heirs either expressly or implicitly by failing to bequeath it in his will.

Mignault does recognize that the so-called ownership of the trustee is not a true Civil Law ownership, since the trustee receives no benefits whatsoever from his ownership and his non-beneficial ownership is merely temporary (see Mignault, *supra*, f.n.9, 43 and *supra*, f.n.37, 78). In other words, to arrive at the concept of trustee ownership, Mignault has had to postulate a temporary ownership without any benefits. This completely contradicts the Civil Law concept of ownership. In a sense Mignault is an Institutionalist. He admits that the trustee is not a Civil Law owner but is owner because the legislator has wished to create an ownership without any right to benefit or inherit. There is essentially no difference between saying that the trust is ownerless but the trustee and beneficiaries possess certain rights, and saying that the trust is owned but the owner has no rights to ever benefit.

Mignault's views have been followed by Rinfret J. both in the case of *Curran* v. *Davis* [1933] S.C.R. 283, and in *Intervention* (1937) 5 Travaux de la semaine internationale de droit 143. This view has been rejected by many, including Mankiewicz, *La fiducie québecoise et le trust de Common Law* (1952) 12 R. du B. 16; Faribault, *La fiducie dans la province de Québec* (1936); and Billette, *La fiducie* (1933-34) 12 R. du D. 159.

Trustee Ownership by Default

The last argument which has been put forth in support of trustee ownership is that, since all property must have an owner and since no one else possesses the minimal requirements of Civil Law ownership, by elimination the trustee must be owner. However, the cogency of this argument depends upon the trustee's possessing the minimal requirements of ownership. The author submits that the trustee does not possess these minimal rights.

First, it is of the essence of ownership that it be perpetual; ownership cannot be temporary:

> Le Droit de Propriété est un Droit Perpétuel. ... *il n'existe pas de droit de propriété temporaire;* on ne peut pas céder la propriété de sa chose pour un temps limité.[43]

However, the trustee's rights can only be temporary; the cases of *Masson* v. *Masson*[44] *and Dame Cogne* v. *Trust Général du Canada*[45] are irrefutable authority for this proposition.[46]

Further, it is of the essence of ownership that the owner must have some right to personally benefit from his property. While the right to benefit may be in temporary abeyance (as in the case of naked ownership), when the benefits granted to others cease, as they must, the owner ultimately must enjoy at least some of the benefits of ownership described in article 406 C.C.[47]

---

[43] Mazeaud et Mazeaud, *Leçons de droit civil* 3d ed. (1966), 1106, para. 1347; see also Planiol et Ripert, *Traité pratique de droit civil français* (1952), 222, para. 213, where it is stated, "De sa nature, le droit de propriété est perpétuel".

[44] (1912) 47 S.C.R. 42.

[45] [1969] B.R. 591.

[46] It is possible to create an ownership which is resoluble and therefore in that sense temporary. Thus Mignault, *supra*, f.n.37, 78, has written:

> "Il peut être *temporaire et résoluble*, comme dans le cas du grevé de de substitution, ou résoluble d'une façon absolue, comme le droit de l'acheteur dans une vente à réméré. Pourquoi le législateur ne pourrait-il pas créer un droit de propriété temporaire et restreint quant à ses effets?" (emphasis added).

Ownership can only be temporary if it is conditional and subject to a resolutory clause. It cannot be temporary in the sense that it is subject to a term. One cannot sell property to someone for 20 years, but one can sell property subject to a condition. Trustee ownership is not subject to a condition, but to a term — it *must* end. This is to be contrasted with substitution, where the ownership of the institute is subject to a resolutory condition, and the institute may remain owner if the condition fails.

[47] See Noyes, *The Institution of Property* 1st ed. (1936), for one of the most interesting theoretical discussions of ownership.

The author submits that the trustee has no such right to benefit from the trust property and possesses only the rights of administration and possession.

Indeed, the Civil Code itself seems to deny him this right. Article 981a C.C. states:

> All persons ... may convey property ... to trustees ..., *for the benefit of* ... persons in whose favour they can validly make gifts or legacies [emphasis added].

Article 981b C.C. states:

> Trustees, ... are seized ... *for the benefit of the donees or legatees* of the property ... [emphasis added].

These articles clearly suggest that the trust property is to benefit the donee or legatee, but not the trustees themselves.

Analysis confirms the trustee's inability to benefit from the property. For example, we may examine the following trust:

> Income to my wife during her lifetime; capital to my son on her death but only when and if he reaches the age of 30. The X Trust Company is to be trustee, and in the case of vacancy shall be replaced by a judge of the Superior Court.

Let us assume that the trustee is the owner of the trust property. Since the son is to be owner on the wife's death, during the wife's lifetime the trustee must be either an institute-owner within a substitution or an owner subject to a resolutive condition. If the testator's son predeceases the testator's wife, the Trust Company or a court-appointed replacement will inherit the property as absolute owner. This is a logically tenable but highly undesirable conclusion.[48] Furthermore, it is contrary to article 964 C.C., which states that the trustee:

> ... does not retain the property in the event of the lapse of the ulterior disposition .... The property in such cases passes to the heir... .[49]

---

[48] In the text we have discussed the trustee's inability to benefit in case of a lapse of the capital bequest. A similar conclusion applies in the case of a lapse of the income bequest. If the trust had read,

> "Income to my wife for 20 years, and capital to my child but only on the expiry of the 20 year period and only if he is then living and married. I appoint X to be trustee",

and the wife had died during the 20 year period, the income would not belong to the trustee but to the intestate heirs or, in the case of a donation, the donor.

[49] It can be argued that art.964 C.C. does not apply to arts.981a C.C. *et seq.*, or if it does, that it does not apply to inter vivos trusts. To support this view it can be maintained that art.964 C.C., enacted in 1866, applied *only* to the ancient or pre-1866 fiducie and that arts.981a C.C. *et seq.*, enacted in 1879, created a totally different institution. As further evidence for this view it should be noted that art.964 C.C. speaks of "ministres" whereas art.981a C.C. speaks of "fiduciaires". Moreover, art.964 C.C. refers only to trusts created by will, whereas arts.981a C.C. *et seq.* apply to trusts created both

If one is willing to grant the trustee the right to inherit, one perhaps logically could state that the trustee is the owner. However, this appears to be contrary to the text and spirit of articles 981a and 981b C.C., to the text and spirit of article 964 C.C., and to the history

---

by will and by gift.

One difficulty with accepting the above arguments is that they would apply with equal force to art.869 C.C. and would lead to the possible conclusion that inter vivos charitable trusts are impossible in Quebec. This is because arts.981a *et seq.* speak of trusts in favour of "persons", and one could therefore contend that the "purpose" trust is excluded from the scope of these articles. Thus, a charitable trust would remain subject to the ancient law and could be created by will alone. The author submits that this view is ill-founded.

Furthermore, there was little doubt that the trustee or "héritier fiduciaire" could not inherit trust property before 1866 and that the codifiers recognized this principle in art.964 C.C. That the codifiers regarded the article as being a codification of existing law is evidenced by the lack of square brackets and the reliance upon ancient French authors as the sole sources of the article.

The Supreme Court of Canada in the case of *Masson* v. *Masson, supra,* f.n.44, 77 and 89, also indicated that art.964 C.C. was a codification of existing law and applied to the testamentary trust which existed in Quebec before 1879.

Thus there is little doubt that the pre-1879 testamentary trust was governed by art.964 C.C. In 1879 the testamentary trust was made subject to arts.981a C.C. *et seq.* These articles do not indicate who will inherit a testamentary trust if the beneficiaries predecease the testator or the trustee; however, art.964 C.C. was not abrogated. Can it be assumed that the legislature intended to abrogate the law of testamentary trusts as it existed prior to 1879 and permit trustees to inherit to the exclusion of the testator's heirs? If so, why did the legislature leave art.964 C.C. intact, remain completely silent on the subject in arts.981a C.C. *et seq.* and continue to define trustees in exactly the same manner as ancient law (namely as "depositaries and administrators") when it was clear in ancient law that "depositaries and administrators" could not inherit the property? One cannot attribute to the legislature's silence the intention to abrogate the previous law and to permit testamentary trustees to inherit to the exclusion of the testator's family. Such an intention must be expressly stated.

If one admits that the trustees should not be able to inherit in the case of a testamentary trust created by virtue of arts.981a C.C. *et seq.*, there appears to be little reason to distinguish the case of an inter vivos trust. It would be contrary to common sense to make such a distinction and thus permit a trust company or court-appointed person or group of persons to inherit the property to the exclusion of the settlor and his family.

Faribault, *supra,* f.n.15, 378, para.326, arrives at a similar conclusion:

> "L'article 964 n'est rédigé que pour les legs parce qu'il s'applique d'abord à la vieille fiducie du droit français qu'il était impossible de créer par donation. Mais ses termes sont assez généraux pour embrasser la fiducie organisée en 1879 par les articles 981a et suivants, et comme celle-ci peut être créée par donation, l'article 964 s'appliquera également dans ce cas...".

of the trust. Such an absurd conclusion would have to be expressly stated and not merely presumed.

Moreover, even those who argue that the trustees are owners admit that the trustees can neither benefit from nor inherit the property. Thus Mignault writes:

> ... le fiduciaire ... ne peut jamais devenir propriétaire pour lui-même. La caducité qui ne peut provenir que de la personne de la bénéficiaire, fait remonter le patrimoine au disposant ou a ses héritiers.[50]

Rinfret J. states:

> .... les "trustees" ont véritablement tous les droits du propriétaire sur la chose donnée, sauf qu'ils ne peuvent en tirer aucun avantage personnel... .[51]

It therefore appears that, in order to find that ownership vests in the trustee, Mignault and Rinfret J. have been forced to postulate a temporary ownership without any benefit, along with an "owner" whose only right is to administer the property that he "owns". The author respectfully suggests that denuding the trustee of all rights of ownership yet calling him an owner does nothing to solve the problem, since an owner who can never benefit from his property simply is not an owner under the Civil Law. This is not ownership, but administration called by another name.[52] We may therefore conclude that the trustees cannot be Civil Law owners of the trust property.

What possibilities then remain in terms of finding the owner of the trust? There are two:

(a) The Institutionalists[53] are correct and the trust is an ownerless institution which is incompatible with both the traditional real rights of the Civil Law and with the principle that property must be owned. In other words, the trust is a special legislative creation with its own rules and principles. This is the conclusion of Faribault and Lepaulle, and will be discussed in detail below.[54]

(b) Trusteeship is in itself a new form of dismemberment of ownership. In the same way that an owner can be deprived of certain

---

[50] Mignault, *supra*, f.n.9, 43; see also *supra*, f.n.37, 78, where Mignault has stated, "il n'en bénéfice pas personnellement, il n'en profite pas, au cas de caducité de la fiducie".

[51] *Curran* v. *Davis*, *supra*, f.n.37, 294.

[52] As was suggested *supra*, f.n.42, in a sense Mignault is an Institutionalist. As stated above, to denude the trustee of essential rights of ownership but to call him an owner is not to solve the problem that ownership as defined by the Civil Law cannot remain in suspense.

[53] See discussion *infra*: "The Institutionalist Position".

[54] Faribault, *supra*, f.n.42; Lepaulle, *Traité théorique et pratique des trusts* (1932).

real rights by a permitted dismemberment such as usufruct or a prohibition to alienate, so may the owner be deprived of certain real rights through the creation of a trust. As we will indicate, the trustee may be regarded as the holder of a real right or power of administration. Under this theory, ownership and the trust are compatible and the trust can be integrated successfully into the Civil Law. In other words, article 405 C.C., viewed in the light of articles 981a C.C. and following, would be interpreted to read:

> A person may have over property either a right of ownership, or a simple right of enjoyment or a right to administer as trustee, or a servitude to exercise.[55]

However, logical analysis alone will not indicate which of these theories is superior. For this we must turn to history, from which we will see that the trust has had a long existence in Civil Law, and is derived from an ancient Civil Law institution known as the fiducie. The author also will attempt to show that the trust is subject to ownership, but not by the trustee.

HISTORY OF THE QUEBEC TRUST

There existed under pre-Napoleonic French law an institution known as the "fiducie".[56] The fiducie was an institution which permitted a testator to charge a person ("le fiduciaire") to hold property on deposit and administer it for a minor until the minor attained a specified age, which probably could not extend beyond majority. The fiduciaire was simply an administrator and was not permitted to benefit in any way from the property or its revenues. If the minor were to predecease the testator, the property would belong to the testator's heirs; if the minor survived the testator but died before the specified age, the property would belong to the minor's heirs. It could never belong to the fiduciaire.

---

[55] The author has indicated and will discuss more fully that a true usufruct and a true substitution are compatible only with what he has called a "watchdog trust" but not with the "administrative trust". The extent to which beneficiaries may have real rights will be discussed in the second part of this article.

[56] This institution still exists under modern French law. It is considered to be one of the exceptions to the French rule prohibiting substitutions. See Graulich, *La fiducie en Belgique* (1937) 5 Travaux de la semaine internationale de droit 9; see also Baudry-Lacantinerie et Colin, *Traité théorique et pratique de droit civil* 3d ed. (1905), vol.2, 490.

Henrys described the fiduciaire as a *"dépositaire et administrateur*[57] ... [qui] est censé ... posséder ... pour un autre ...".[57a] Similarly, Merlin described the fiduciaire as a person "... chargée ... *d'administrer* la succession et de la *tenir en dépôt* jusqu'au moment ou elle doit la remettre *au véritable héritier*".[58] The similarity between the definition of the pre-Civil Code fiduciaire and that of the Civil Code trustees, who are described as "dépositaires ... et administrateurs pour ... des donataires et légataires" (981b C.C.) is striking, and this exactitude in wording seems to suggest that the modern Quebec trust is derived from the ancient "fiducie". It is therefore helpful to examine the pre-1879 fiducie in some detail.

La Fiducie

The fiducie formed part of the law of both *les pays de droit coutumier* and *les pays de droit écrit,* and had its source in the Roman law.[59] Under Roman law all property bequeathed to minors had to be administered either by a *paterfamilias* or a tutor. The one exception was that a testator could appoint a relative or close friend to hold the property for the minor and administer it for the minor's benefit:

> ... Polidius n'avoit été institué que pour conserver les biens à la fille de la testatrice, et pour empêcher qu'elle ne tombât sous la charge des tuteurs ... .[60]
>
> En la Loy *Sejus* comme au s. Polidius, le testateur apprehendoit que son fils ne tombât en la tutelle de quelque personne qui dissipât ses biens: et c'est pourquoi il y chercha ce remede ... un guardien et dépositaire, pour lui en commettre l'administration ... .[61]

---

[57] Henrys, *Oeuvres* 5th ed. (1738), vol.1, 748 (emphasis added).

[57a] *Ibid.,* 736.

[58] Merlin, *Répertoire universel et raisonné de jurisprudence* 4th ed. (1812), vol.5, 214.

[59] In ancient France there was a feudal institution known as the "garde noble". This institution enabled the "gardien" to benefit from and administer a minor's property, sometimes to the detriment of the minor. Renusson, "Le traité de la garde noble et bourgeoise" in *Oeuvres* (1780), 16, indicates that the fiducie was a legitimate method of avoiding this institution. See also Guyot, *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale* (1784), vol.8, 61. Thus it is conceptually possible that the fiducie developed in *les pays de droit écrit* as a method of avoiding the "garde". However, in both *les pays de droit écrit* and *les pays de droit coutumier,* the fiducie was adopted from Roman Law.

The ancient French authors who commented on the fiducie based their analysis on the Roman institution and considered it as being derived from the law of Rome; see *infra,* f.ns.60, 61, 62.

[60] Henrys, *supra,* f.n.57, vol.3, 70.

[61] *Ibid.,* 71.

> La testatrice avait déclaré disposer de cette manière, afin de confier la fortune de sa fille [la fille de la bénéficiaire] à l'intérêt qu'y prendrait son parent, plutôt qu'a des tuteurs ... .[62]

The ancient French authors who commented on the fiducie based their analysis on the Roman institution. French doctrine stated that a fiducie could only be created for the benefit of minors, and that it had to terminate either upon the minor's death or upon his attaining the age specified in the document creating the fiducie, which probably could not extend beyond majority.[63] The powers of the fiduciaire could not exceed those of administration, and he probably had no power to alienate. Although there has been some dispute on the point, a fiducie probably could be created only by will.[64] If the settlor violated the above criteria, the bequest would either be null or deemed a substitution in which the so-called fiduciaire would be put in the position of an institute entitled to the revenues.[65]

Maynard, one of the first French authors to comment on the fiducie, indicated that the property must be left to

> ... le fils du testateur ... mis dans les mains de sa mere, ou d'autre proche parent, ou d'un ami intime, et qu'il l'ait chargé [le fiduciaire] de rendre sans rien retenir, et à certain tems; ce sont les trois circonstances requises, pour reconnaître l'héritier fiduciaire, et s'il est simple dépositaire de l'héredité.[66]

---

[62] Merlin, *supra*, f.n.58, 214.

[63] Most authors simply stated that a fiducie could only be created for a minor and had to terminate at a time certain; very few expressly dealt with the problem as to whether the time certain could extend beyond minority. Henrys, *supra*, f.n.57, vol.1, 736, seems to suggest that the time must be puberty or majority and this seems logical. Faribault, *supra*, f.n.15, 37, states categorically that the fiducie could not extend beyond the age of majority. Merlin, *supra*, f.n.58, 215, suggest indirectly that the time fixed for delivery need not be puberty or majority and bases himself on Roman law. It is possible that since *patria potestas* could extend beyond majority, Roman law may also have permitted the fiducie to extend beyond majority, but it appears doubtful that this principle would have been imported into the ancient Civil Law. Since the fiducie could only be created for minors, it appears illogical to conclude that it could extend beyond majority, especially as the fiducie was an exception to the principal that testamentary administration could not be permitted beyond a year and a day, and as an exception should be interpreted restrictively.

[64] Baudry-Lacantinerie et Colin, *supra*, f.n.56, 490, suggest that the modern French fiducie can be created by gift. Graulich, *supra*, f.n.56, 9, disagrees. Faribault, *supra*, f.n.15, 37, also states that the fiducie could only be created by will. The author has been unable to find any express indication as to whether or not the fiducie could be created inter vivos.

[65] If the document could not be interpreted so as to permit the fiduciaire to keep the revenues, the bequest could only be interpreted as being null.

[66] Maynard, *Notables et singulières questions de droit écrit, jugées au Parlement de Toulouse* (1751), vol.1, 814.

Similarly, Henrys indicated that, in order to create a fiducie,

> ... ce soit un pere qui laisse des enfans mineurs, et qu'il les délaisse sous la charge d'une personne proche, comme ... une mere, ... que cette personne proche ... soit chargée de leur remettre les biens dans un tems certain ... lorsque les enfans seront faits puberes, ou qu'ils seroient devenus majeurs.[67]

Guyot also demanded the same criteria:

> ... il faut qu'elle soit faite par un père dont les enfans soient mineurs et que l'héritier soit chargé de rendre après un certain temps.[68]

All the ancient French commentators agreed that it was the beneficiaries who owned the property and not the fiduciaire. These authors regarded the fiduciaire as a simple administrator with no right to benefit from revenues or the principal:

> ... il répugne qu'il fût ... fiduciaire, et propriétaire, ces deux qualités n'étant pas compatibles ... .[69]

> ... l'héritier fiduciaire ... est ... guardien et dépositaire ... la propriété des biens ne lui est pas acquise ... .[70]

> ... fiduciaire ... [est] ... la personne que le testateur a chargée ... d'administrer la succession et de la tenir en dépôt jusqu'au moment où elle doit la remettre au véritable héritier ... ce n'est pas sur sa tête que repose la propriété des biens du défunt; il n'en est que l'administrateur.[71]

> ... le fils, à qui l'heredité doit être remise dans un certain tems, est censé deslors heritier ... .[72]

The fruits belonged to the minor as a consequence of his ownership, and not to the fiduciaire:

> ... fiduciaire ne fait pas siens les fruits ... il doit les rendre avec l'hérédité même, à l'époque réglée par le testament.[73]

A further consequence of the fiduciaire's lack of ownership was that if the beneficiary predeceased the testator, or survived the testator but died before the age he was to inherit, the property belonged not to the fiduciaire but to the testator's heirs in the first case, and to the minor's heirs in the second:

> De ce que l'héritier Fiduciaire n'est pas saisi de la propriété ... il suit encore que la fiducie n'est pas éteinte par le prédécès de la personne à qui il est chargé de rendre; et que, dans ce cas, l'effet s'en transmet de plein droit à l'héritier de cette personne.[74]

---

[67] Henrys, *supra*, f.n.57, vol.1, 736.
[68] Guyot, *supra*, f.n.59, vol.7, 364.
[69] Henrys, *supra*, f.n.57, vol.1, 742.
[70] *Ibid.*, 736.
[71] Merlin, *supra*, f.n.58, 214.
[72] Henrys, *supra*, f.n.57, vol.3, 71.
[73] Merlin, *supra*, f.n.58, 215.
[74] Merlin, *ibid.*

La Fiducie in Quebec prior to 1879

After the British victory over the French in 1763, Quebec jurisprudence (probably through erroneously interpreting the "freedom of willing" legislation of 1774 and 1801)[75] began to expand the scope of the fiducie but in wills only.

As we have seen, the fiducie had extremely limited scope in ancient French law. It permitted administration of property during minority only, and if the minor died during minority, the fiducie had to terminate. Quebec jurisprudence after 1763 expanded both the testamentary executorship and the testamentary fiducie by permitting testamentary executorship beyond a year and a day and by allowing the fiduciaire to administer property for both majors and minors, even during the lifetimes of several beneficiaries in succession.

The most instructive case dealing with the pre-Codification expansion of the fiducie is *Freligh* v. *Seymour*.[76] Mr Freligh left his property in trust, directing the trustees to pay part of the income to his daughter and to accumulate the rest. On the daughter's death the trustees were directed to deliver the capital to the daughter's issue, and if none were living, to use the capital for charitable purposes.

An intestate heir attacked the validity of the trust on the grounds, *inter alia*, that is was not a valid fiducie as permitted by the *Coutume de Paris* since it permitted property to be administered for the lifetime of a major and then ordered that on the major's death the property was to be delivered over to persons other than the major's intestate heirs.

The court found the trust to be valid despite its violation of the principles of the fiducie. Meredith J. stated:

> ... as to the capacity of the respondent, I hold he is a *fiduciary* legatee; a quality which, in my opinion is recognized in our law, *and which, to my knowledge, has been upheld in all the Courts of the Province in cases in which I have been interested.*[77]

Duval J. held:

> The appellant not being able, in the opinion of the testator, to administer the estate, would have required an agent to do so; the testator as he had a right to do, appointed that agent, whatever be the name given to him, whether executor, administrator, trustee, or any other... .[78]

---

[75] Billette, *Au sujet des origines historiques de la fiducie* (1932-3) 11 R. du D. 365, 368.

[76] (1855) 5 L.C.R. 492.

[77] *Ibid.*, 506 (emphasis added).

[78] *Ibid.*, 505.

The view expressed by the Court in *Freligh* v. *Seymour* was confirmed by the Supreme Court of Canada in the case of *Masson* v. *Masson.*[79] The *Masson* case involved a will executed in 1841 which became executory in 1847 (the year of the testator's death). The Supreme Court held that a testamentary trust which was to be administered during the lifetime of the testator's children and grandchildren was valid in Quebec in 1847, despite the *Coutume de Paris.* The Court held that the testator had created a valid "fiducie or trust".[80]

In view of the cases of *Freligh* v. *Seymour* and *Masson* v. *Masson,* there is little doubt that by 1866 testamentary trusts as we now know and use them were valid in Quebec. The Codifiers of 1866 were directed to base the Civil Code not only on the *Coutume de Paris* but also upon the "décisions, les usages et la pratique de nos diverses cours . . .".[81] Unfortunately, the Codifiers were extremely laconic concerning the fiducie. Article 869 C.C. would at first glance appear to be the relevant article codifying the existing law:

> A testator may name legatees who shall be merely fiduciary ["légataires seulement fiduciaires"] or simply trustees ["simples ministres"] for charitable or other purposes within the limits permitted by the law . . .; he may also deliver over his property for the same objects to testamentary executors.

Fitzpatrick C.J. in the case of *Masson* v. *Masson*[82] assumed that the article applied to the expanded fiducie; Billette is of the same opinion.[83] However, the opinion has more recently developed that the words "or other lawful purposes" are to be read *ejusdem generis* with the word "charitable" and that the article therefore applies only to charitable or benevolent public trusts. Faribault is of this view,[84] and it has some support from the Codifiers' comments. In light of the comments of Rinfret J. in *Valois* v. *de Boucherville,* it appears to be the dominant view in Quebec:

> Il n'est pas . . . nécessaire en cette cause, de définir la portée des mots "autre fins permises". Une trop grande généralisation pourrait être empêchée par l'application de la règle *ejusdem generis.* Il nous suffit de savoir que l'article s'adresse à toutes fins semblables "aux fins de bienfaisances", qui y sont expressément mentionnées .... Les Com-

---

[79] (1912) 47 S.C.R. 42.

[80] *Ibid.,* 87, 88, 90 (Anglin J.), 69 (Fitzpatrick C.J.).

[81] *Second Report of the Commissioners for the Codification of the Laws of Lower Canada,* 140.

[82] *Supra,* f.n.79, 73.

[83] Billette, *supra,* f.n.75.

[84] Faribault, *supra,* f.n.15, 40 *et seq.,* esp. at 44 (" . . . 869 . . . se rapporte exclusivement aux legs pieux et aux fondations et ne touche en rien à la fiducie pour le bénéfice d'individus spécifiquement désignés ou nommés").

> missaires ont voulu, par cet article, introduire dans le code la loi qui jusque-là régissait les legs pour des objets pieux, de charité ou de bienfaisance. C'est donc l'ancien droit en matière de charité, ... Les Commissaires précisent que l'article expose "la loi sur les legs pour objets pieux, de charité ou de bienfaisance". Cela confirmerait qu'il faut entendre les "autres fins permises" comme signifiant autres fins du même genre.[85]

This would leave only article 964 C.C., which is rather obscure, as having any relevance to the pre-1879 trust. Article 964 C.C. reads:

> The legatee who is charged as a mere trustee, ["simple ministre"] to administer the property and to employ it or deliver it over in accordance with the will, even though the terms used appear really to give him the quality of a proprietor ... rather than that of a mere executor or administrator, does not retain the property.

The Supreme Court of Canada in *Masson* v. *Masson*[86] stated that article 964 C.C. was a codification of the pre-1866 jurisprudence expanding the fiducie. However, whether it was or not, the article only deals with one point, lapse, and does that somewhat unsatisfactorily.[87] The article does not concern itself with the rights, powers, duties and liabilities of trustees, such as their right to grant power of attorney, to act by majority or to alienate without the consent of the beneficiaries. Clearly a draftsman who attempted to create a trust prior to 1879 would be faced with many uncertainties.[88]

---

[85] *Valois* v. *de Boucherville* [1929] S.C.R. 234, 263.

[86] *Supra,* f.n.79, 77 (Fitzpatrick C.J.) and 89 (Anglin J.); *contra,* Faribault, *supra,* f.n.15, 44-5, believes it concerns only the ancient fiducie.

[87] All the ancient authors agreed that if the beneficiary survived the testator but predeceased the trustee, the trustee could not inherit. However, d'Thevenot d'Essaule, *Traité des substitutions* (1889), 162, suggested that if the beneficiary predeceased the testator and the fiduciaire survived the testator, the property would belong to the fiduciaire. His view is isolated and in the author's opinion incorrect. Faribault, *supra,* f.n.15, 378, suggests that the term "lapse" as used in art.964 C.C. applies only to the situation in which the beneficiary predeceases the testator. The article in the author's opinion cannot be limited to such a situation.

All the ancient authors, including d'Essaule, agreed that the trustee would not inherit if the beneficiary survived the testator.

By explicitly rejecting the isolated view raised only by d'Essaule, the Codifiers clearly did not intend to change the law to permit the trustee to inherit if the beneficiary survived the testator but predeceased the trustee. In such a case it was quite clear that the beneficiary should transmit the property to his heirs.

[88] What the Codifiers intended with respect to the fiducie, or whether they had any specific intention at all with regard to the fiducie, is unclear. One would have thought that, since art.869 C.C. specifically uses the term "légataires seulement fiduciaires" (the very term ancient law used to apply to the fiducie), art.869 C.C. was intended to apply to both public and private trusts. However, the Codifiers' comments on art.869 C.C. suggest that the

comments of Rinfret J. in *Valois* v. *de Boucherville, supra,* f.n.85, are correct and the article only applies to charitable and benevolent public trusts.

This would leave art.964 C.C. as the sole article concerned with the fiducie. As we have seen, the Supreme Court of Canada in *Masson* v. *Masson, supra,* f.n.79, viewed this article as codifying the pre-1879 Quebec law on the fiducie. By contrast, Faribault, while regarding the article as applicable to the fiducie, felt that it applied only to the ancient fiducie of the *Coutume de Paris.* The author agrees with the view taken by the Supreme Court that the article includes the expanded pre-Codification fiducie.

Art.964 C.C. does not refer to the "héritier fiduciaire" but to the "simple ministre" (translated in English as "mere trustee"). Art.869 C.C. speaks of both the "simple ministre" and the "légataire fiduciaire". Can it then be argued that art.964 C.C. is not dealing with the "héritier fiduciaire" at all but with another institution, the "simple ministre"?

In the author's opinion art.964 C.C. does deal with the héritier fiduciaire. The terms "héritier fiduciaire" and "simple ministre" had well defined meanings in ancient law. The term "simple ministre" was used as a generic term to describe persons who did not benefit personally under a will but had certain duties to perform. Examples are executors,

> "...le simple ministre de sa volonté, comme sont nos executeurs testamentaires ... aucune libéralité en leur endroit" (Ricard, *Traité des donations* (1771), vol.2, 418, para.753);

institutes "pur et simple" (an institute who was obliged to turn over the property immediately on the death of the testator to the substitute, no term or condition being attached to the substitution; see d'Thevenot d'Essaule, *supra,* f.n.87, 102 *et seq.*); and perhaps the héritier fiduciaire,

> "gardien et dépositaire... comme il ne fait que prêter son ministère" (Henrys, *supra,* f.n.57, vol.1, 736).

d'Thevenot d'Essaule, whom the Codifiers quoted as a source of art.964 C.C., defined the "ministère" as:

> "Si cependant il paraissait que celui qui a été chargé de rendre, n'a été choisi que pour exécuter la volonté du testateur, sans que celui-ci eut entendu le gratifier ... est *simple ministre*" (*supra,* f.n.87, 162-3, paras. 538-9).

There is some slight basis for arguing that art.964 C.C. does not apply to the fiduciaire. The Codifiers cite as sources for art.964 C.C. d'Thevenot d'Essaule and Ricard. In pages not cited by the Codifiers, d'Essaule suggests that the héritier fiduciaire can benefit from the administered property in one specific case, thus suggesting that the héritier fiduciaire is to be distinguished from the ministre (*supra,* f.n.87, 164, para.541). However, d'Essaule himself expressly recognizes that this view is contrary to that of Ricard, whom the Codifiers also cite.

If d'Essaule's view is correct and the "simple ministre" does not include the héritier fiduciaire, there would be no article in the Civil Code prior to the year 1879 dealing with the fiducie. This would not mean that the fiducie did not exist, but simply that the Codifiers did not deal with it.

However, the author submits that d'Essaule's view of the héritier fiduciaire was incorrect. Therefore, there appears to be little basis for arguing that the héritier fiduciaire is not a "simple ministre". As mentioned above, this was the view taken by the Supreme Court in *Masson* v. *Masson.*

The Legislation of 1879

As the reader will have realized, the legislation of 1879[89] did not suddenly introduce the trust into Quebec law. Rather, it was simply the latest step in the history of a Civil Law institution which had existed for centuries. The legislation was designed to further codify the existing trust and to clarify certain problems which the existing law of trusts had left unsettled.

As we have seen, by 1866 Quebec had developed a sophisticated form of testamentary trust, similar to testamentary trusts created today. For example, the following trust was held valid in *Freligh* v. *Seymour*:

> Unto his ... friend John Brush Seymour ... all ... his property ... to have and to hold ... upon trust, ... the said John Brush Seymour shall ... pay ... unto his daughter Mrs Jane Freligh ... the annual sum of seventy-five pounds ... for and during the natural life of the said Jane Freligh ... [any surplus to be invested] ... [S]hould his daughter ... depart this life, leaving issue ... the said issue ... shall be the universal legatee of the said testator of all his property ... and if the said Jane Freligh should depart this life without leaving any such issue ... to ... a Grammar School.[90]

Such trusts were regarded by the jurisprudence as an expansion of the existing fiducie.[91]

Unfortunately, the Codifiers of 1866 left unsettled a myriad of questions concerning the rights, powers, duties and liabilities of the trustees and beneficiaries, and failed to take the opportunity to extend the trust to gifts inter vivos.[92] Evidently further legislation was necessary, and in 1879 Jonathan (later Judge) Wurtele introduced *An Act respecting Trusts*[93] which subsequently became articles 981a C.C. and following.

The new legislation indicated how trustees were to be replaced, clarified their powers, stated that decisions could be by majority, and defined the liability of the trustees and the beneficiaries. For

---

[89] In 1879 the Legislature of Quebec passed "An Act Respecting Trusts", S.Q. 42-43 Vict. 1879, c.29, which was almost a verbatim copy of what are now arts.981a C.C. *et seq.* This Act was later incorporated into the Civil Code with slight changes by R.S.Q. 1888, art.5803.

[90] *Supra*, f.n.76, 493-495, f.n.3.

[91] *Supra*, f.ns.76 and 79.

[92] Further confusion existed because the Codifiers also failed to distinguish between testamentary executors and testamentary administrators (see art.921 C.C.) and failed to indicate to what extent if any arts.905 C.C. *et seq.*, dealing with testamentary executors and administrators, applied to testamentary trusts. Indeed, even today it is uncertain if art.913 C.C. applies to trusts either in its terms or in its principles.

[93] S.Q. 42-43 Vict. 1879, c.29.

the first time, the trust was expressly extended to gifts. However, its continuity with the fiducie is obvious. As was seen above, the legislation uses words to describe the trust which are identical to those used in ancient law to describe the fiducie. Article 981b C.C. reads:

> Les fiduciaires ["trustees"] ... sont saisis comme *dépositaires et administrateurs*, pour le *bénéfice des donataires ou légataires* ... [emphasis added],

while the French authors Henrys[94] and Merlin[95] (who synthesized ancient French pre-Revolutionary law) described the fiduciaire in similar terms.

For these reasons alone it would seem that articles 981a C.C. and following were simply an extension and refinement of the existing Civil Law fiducie by which the trustees held and administered property for the benefit of the beneficiary, who was the true owner.[96] As Hutchinson J. stated in *Mathison* v. *Shepherd*:

> ... there is not a word .. to indicate that it introduces a new system, incompatible with our prior law on the subject .... The conclusion seems to be unavoidable that the statute ... certainly extended our law ... "as one continuous whole".[97]

Any doubts as to the Civilian nature of the Quebec trust may be resolved by examining the terms of the two documents in the Appendix to this article. These are a testamentary trust and an inter vivos trust, both drafted by Jonathan Wurtele himself. The former was created in 1876 and the latter in 1879, one month after the passage of the legislation. In both of these documents Jonathan Wurtele indicated quite clearly that he intended certain beneficiaries to own the trust property, and that he further desired real rights such as usufruct, substitution and ownership to apply to the trust. This suggests compatibility with the Civilist viewpoint that all property must have an owner, and further suggests that, as in the ancient fiducie, the trustee is *not* the owner. Of course, we have seen already some of the problems which arise in connection with the granting of such real rights in a trust, but a solution will be discussed later.

The creation of the inter vivos trust of 1879 apparently was closely linked to the introduction of the new trust articles into the Civil Code. In private conversation the author learned that Mr Wurtele's brother-in-law was in serious financial difficulty at the time and wished to create an inter vivos trust to protect his wife (Jonathan

---

[94] Henrys, *supra*, f.n.57.

[95] Merlin, *supra*, f.n.58.

[96] Henrys, *supra*, f.n.57, vol.1, 742: " ... il répugne qu'il fut héritier fiduciaire et propriétaire ces deux qualités n'étant pas compatibles".

[97] (1908) 35 C.S. 29, 52, 53.

Wurtele's sister). The family wanted to have the property administered for her benefit yet removed from her husband's creditors. As we have seen, it was probable that under the existing law of Quebec an inter vivos trust could not be created validly. In 1879 Jonathan Wurtele introduced as a Private Member's Bill what are now articles 981a C.C. and following.[98] On October 27, 1879, one month after the legislation was enacted, Jonathan Wurtele's brother-in-law, by Deed of Trust executed before Notary Baynes and registered at Montreal West under number 2073, created an inter vivos trust for his wife. Jonathan Wurtele was named one of the trustees.

The preamble of the trust reads:

> ... in pursuance of the Act of the Legislature of the Province of Quebec assented to on the eleventh day of September last, intituled "An Act respecting Trusts" conveyed to Jonathan ... Wurtele ... in trust ... for the use and purposes hereinafter mentioned ... .

Let us examine both the testamentary trust created in 1876 and the inter vivos trust of 1879.

The relevant parts of the 1876 testamentary trust read as follows:

> I will, devise and bequeath the usufruct of my Estate to my beloved wife ... until her death ... .
>
> I will, devise and bequeath my Estate, (but subject to the usufruct given to my beloved wife,) to my sons and daughters and to the lawful issue of any of my children who may predecease me, to be divided by roots, but subject to the substitutions hereinafter created, instituting my said sons and daughters and the issue of any predeceased children, my universal legatees.
>
> I substitute the shares of my said daughters in my said Estate to their lawful issue, respectively.
>
> I nominate and appoint ... Jonathan Wurtele ... to be the Executor[s] .... I constitute my said Executors trustees of my Estate ... .
>
> After the death of my said wife, ... to pay ... net annual income ... of my Estate, to my children, or the issue of my children ... until their respective shares in the capital of my said Estate are paid.

From these provisions it appears quite clear in Wurtele's mind that the trustees were not owners and that ownership was vested in certain beneficiaries, subject to a usufruct and a substitution.

The inter vivos trust created one month after enactment of the legislation contained, *inter alia*, the following provisions:

> Who in pursuance of the Act of the Legislature of the Province of Quebec assented to on the eleventh day of September last, intituled "An Act respecting Trusts" conveyed to Jonathan ... Wurtele of the City of Montreal, Esquire, Queens Counsel ... and ... present and accepting, in

---

[98] Enacted as S.Q. 42-43 Vict. 1879, c.29, imported into the Civil Code with slight alteration by R.S.Q. 1888, art.5803.

> trust ... . All the household furniture and effects now contained in the dwelling house ... situated on Ontario Avenue ... and the other moveable property mentioned ... in the schedule hereunto annexed ... .
>
> This conveyance in trust is made ... to the said trustees for the benefit of the children issue of his said marriage, to wit Louisa ... James ... Archibald ... John ... Norman ... Allan ... Arthur ... to whom ... by these presents gave the same in consideration of the love he bears them.
>
> This gift and conveyance in trust is made subject nevertheless to the usufruct and enjoyment of the said furniture and other moveable property by the said [donor] and his said wife Dame Louisa Sophia Campbell Wurtele and by the survivor of them ... .[99]
>
> This gift is made subject to a substitution in favour of such children as may hereafter be born of his marriage ... and consequently any such children and his children hereinabove named shall together own and have the said furniture and other moveable property share and share alike ... .

While the wording of this trust is less clear, it seems that the intention here also was that the beneficiaries were to be the owners insofar as ownership is compatible with the trust, and that usufruct, naked ownership, and substitution could be created within a trust.[100]

Thus, not only did Wurtele use wording identical to that used by the ancient Civilian authors in devising the new trust legislation, but he also designated certain beneficiaries as owners in the very documents he drafted. Historically, it appears, therefore, that the trust is a child of the Civil Law and was intended to be compatible with the principle that all property must have an owner. Yet, as we have seen, no one — donor, testator, beneficiaries or trustees — has sufficient rights to be owner at Civil Law. This leaves two possible solutions: the Institutionalist view that the trust is ownerless, but is to be interpreted as much as possible within the principles of the Civil Law, and the view that the trust is owned but that the

---

[99] In reality this was a true usufruct, since it was stated that "The trustee will allow the said... [donor] and Dame Louisa Sophia Campbell Wurtele to have the use and employment of the said furniture and moveable property...". However, the trust went on to state that if there was destruction by fire, or sale of the furniture with the consent of the usufructuaries (but note that the consent of the naked owners was not required), the proceeds would be invested and any income paid to Dame Wurtele for her use and expenditure. The trustees were obliged to keep the furniture insured in the names of the trustees but to collect all premiums from the donor and his wife.

This donation seems to suggest that Wurtele was aware of the distinction between a usufruct and a right to income in property subject to a trust. In the author's opinion, the trust of the furniture should be regarded as a true usufruct within a watchdog trust, which would become an administrative trust in the case of fire or sale.

[100] However, in the author's opinion the usufruct contemplated by Wurtele would be a trne usufruct within a watchdog trust. We will discuss *infra* the concept of a substitution within an administrative trust.

rights of ownership have been reduced by a new dismemberment — the real right of administration of the trustee.

THE INSTITUTIONALIST POSITION

As mentioned above, it is not possible to "own" trust property under an administrative trust within the Civil Law definition of ownership. This is true even of trusts where the settlor expressly has vested ownership in someone, as in the Wurtele trusts. The rights so granted do not amount to ownership. Yet it is a fundamental principle of the Civil Law that all property must have an owner. We are thus faced with a dilemma.

Some authors have attempted to cut the Gordian Knot by suggesting that no one owns the trust property on the grounds that the trust is a special institution created by law with its own rules and principles, one of which being that the property can be ownerless. The main proponents of this view are the French author Pierre Lepaulle[101] and the Quebec author Marcel Faribault.[102]

Lepaulle states that the trust cannot be integrated into the Civil Law theory of ownership. He regards the trust as an ownerless fund ("un patrimoine ... sans maître") watched over and administered by guardians (the trustees) who must use the assets for the purposes for which the trust was created. He defines the trust as " ... un patrimoine indépendant de tout sujet de droit ... constituée par une affectation".[103] Lepaulle gives as examples of such "patrimoines" the vacant succession, the succession under benefit of inventory and the foundation. He argues that the trust is simply another example of this concept.

However, the weight of French doctrine has rejected the view that one can create ownerless patrimonies under French law. It has been argued in opposition to Lepaulle's theory that the examples given are not unowned patrimonies but are perfectly compatible with Civil Law ownership and that the very idea of an ownerless patrimony or fund is incompatible with the Civil Law.[104] Thus Planiol and Ripert wrote:

> Il faut se garder toutefois de tomber d'un excès dans l'autre et, parce que la doctrine classique a tendu à l'extrême le lien qui unit le patrimoine à la personnalité, vouloir que le patrimoine devienne tout à fait indépendant

---

[101] Lepaulle, *Traité théorique et pratique des trusts* (1932); for an interesting commentary on this work, see Rheinstein, (1934) 43 Yale L.J. 1049.

[102] Faribault, *supra*, f.n.15.

[103] Lepaulle, *supra*, f.n.101, 31.

[104] See Faribault, *supra*, f.n.15, 101-3; also Motulsky, *supra*, f.n.3, 459 *et seq.*

> de la personne ... toutes ses traditions l'éloignent de l'idée d'un patrimoine qui n'appartiendrait à personne.[105]

Mazeaud summed up this view when he wrote:

> Il n'est pas de patrimoine sans une personne, physique ou morale, qui serve de support à ce patrimoine ... masse de biens ne constitue pas un patrimoine par le seul fait qu'elle est affectée à une oeuvre. Il est nécessaire que l'oeuvre reçoive d'abord la personnalité; ... .[106]

> Dans le système français, la personne domine le droit: on ne conçoit pas un droit dont une personne ne serait pas titulaire. D'aucuns hésiteront donc à adopter la conception, ... d'un patrimoine sans maître et, par suite, de droits n'ayant pas une personne pour titulaire. Encore faut-il remarquer que, en créant des personnes morales, notre droit, depuis longtemps, a implicitement tourné le principe qui donne à tout droit une personne pour titulaire: là où la personne manquait, on l'a créée.[107]

However, Lepaulle did perform a valuable service. Writing for a jurisdiction which had no special legislation permitting the trust, he demonstrated that the trust could be analyzed in Civil Law terms and was not inextricably linked to the Common Law. Lepaulle's theory probably would have fared better in Quebec. If one admits that trust property is ownerless, the argument of French doctrine that an unowned patrimony is illegal can be met in Quebec with the argument that articles 981a C.C. and following have permitted the trust, and hence specifically permit the creation of an ownerless patrimony.

Because Marcel Faribault was writing in Quebec, he did not have to develop a theory to validate the trust, but simply had to reconcile the trust as legislated with the principles of Quebec Civil Law. Faribault agrees with Lepaulle that no one owns the trust property; however, he also agrees with French doctrine that an ownerless patrimony is contrary to the essence of the Civil Law "patrimoine" and hence impermissible.[108] He therefore does not accept the possibility that the Quebec legislature intended to introduce the concept of an unowned patrimony into Quebec law in 1879.

Faribault instead developed his own theory of the trust. He maintains that under articles 981a C.C. and following no one owns the trust. He also agrees that it is a basic principle of our law that all property must have an owner. However, the answer to this conundrum is simple. Since articles 981a C.C. and following have been

---

[105] Planiol and Ripert, *Traité pratique de droit civil français* 2d ed. (1952), vol.3, 26-27, para.21.

[106] Mazeaud, *Leçons de droit civil* 4th ed. (1967), vol.1, 319, para.286.

[107] *Ibid.*, 327, para.297.

[108] Faribault, *supra*, f.n.15, 101-103.

enacted by the legislature, the trust must be regarded as a special institution expressly created by law in which the legislature has decided to permit unowned property. The trust is therefore strictly a creature of the legislature and should be considered apart from any concept of "patrimoine". Faribault observes that throughout Quebec law there are various unincorporated entities or bodies which, without "owning" property, have rights of administration and alienation therein. The trust, he concluded, is such an unincorporated entity (which he calls an "institution ... organisme").[109] Like other legislatively-created non-incorporated entities, such as unions, syndicates and co-operatives, the trust does not have legal personality and hence cannot "own" the trust property (since property can only be owned by legal persons), but can administer and alienate property, sign contracts and incur liabilities.

Faribault describes the trust as:

> Une institution ... organisme constitué pour atteindre un but[110] ... une entité distincte des individus qui la composent ... .[111]

He goes on to state that not only legal persons have been given legal rights:

> La loi positive devra donc réglementer les institutions qui s'impose .... Notre législation positive a d'ailleurs employé ... deux moyens. Le plus simple est évidemment de reconnaître ... la personnalité morale. C'est ce qu'on a fait toutes les fois qu'on parle de corporation.
>
> ... L'autre moyen consiste à n'employer aucun terme qui reconnaisse expressément la personnalité morale ou l'existence corporative, mais à édicter suffisamment de règles, *autrement inexplicables*, pour qu'il faille conclure sans conteste à une reconnaissance de la personnalité ... syndicats coopératifs ... nous réservons le nom de personnes morales, ou de corporations, à celles des institutions que la loi qualifie spécifiquement de telles, et nous emploierons le mot institution pour désigner celles où la reconnaissance expresse fait défaut, si la réglementation existe, puisque cette dernière suffit.[112]

Faribault's importance is not his definition of the trust as "un organisme constitué pour atteindre un but...", but rather his concept of the trust as an unincorporated entity expressly created and regulated by law, in which the property subject to a trust is ownerless because the law permits this. Faribault's contribution is his insight that just as the law expressly permits the union, syndicate and co-operative, which are not legal persons, to have rights, administer and alienate property, so the law expressly permits the same for the trust.

---

[109] Faribault, *supra*, f.n.15, 106, para.75; 148, para.120.
[110] *Ibid.*, 107.
[111] *Ibid.*, 128.
[112] *Ibid.*, 135-7 (emphasis added).

Faribault's view that there could exist an unincorporated entity with powers to hold, administer and alienate property without owning it was not original with him. The possibility of an unincorporated entity either endowed with legal personality or with some form of legal status was much discussed in early twentieth century legal thought. As unions and other unincorporated organizations proliferated, serious practical problems arose with regard to their funds, their legal liability, and their right to sue and be sued.

In this context, many authors denied that there was any legal principle that only physical or State-created persons could possess rights, deal with property, incur liabilities and sue and be sued. They argued that human beings by themselves and without State intervention could create bodies possessing these powers as well as legal status. Thus Harold Laski wrote:

> Surely it is but a limitation of outlook not to extend the conception of personality ... [I]t is a strange notion that a Roman Church ... a Standard Oil Trust ... should be ... devoid of group will because ... certain mystic words have not been pronounced over them by the State ... .[113]
> ... we [meaning the proponents of Laski's views] treat the personality of ... group persons as real and apply ... that reality throughout the ... law; we say that the distinction between incorporate and voluntary association must be abolished. We say that the trust must be made to reveal the life that glows beneath ... .[114]

Similar views were expressed by jurists in almost all Western countries, although different jurists formulated these views in varying ways. In France some jurists, such as Renaud, spoke of the theory of the Institution. These jurists stated that there existed at Civil Law numerous bodies or organisms which, whether incorporated or not, had a legal existence. For the proponents of this view, the test of legal existence was not incorporation, but whether each body or organism formed

> ... un groupement d'individus assujettis à un ordre dont la raison d'être est l'obtention d'une fin par les mêmes moyens ... .[115]

Organisms or bodies which met this test were defined as "institutions" and were held to have legal existence whether or not they were incorporated.[116]

---

[113] Laski, *The Personality of Associations* (1910-11) 24 Harv.L.Rev. 404, 417.
[114] *Ibid.*, 424.
[115] Faribault, *supra*, f.n.15, 116. Faribault on the the same page quotes from Delos, who defines it as "un groupe organisé, ou du moins en mal d'organisation". Actually, the theory of the Institution attempted to fit most legal activity under its aegis. It even regarded contracts as organisms for the benefit of its members.
[116] See Faribault, *supra*, f.n.15, 135-7.

The proponents of these views lost the theoretical battle. Most courts rejected their theories.[117] However, they did win the war. Many legislatures began to enact statutes recognizing the existence of many unincorporated associations, granting them legal status without going so far as to grant them legal personality. Thus in Quebec, numerous statutes regulate unions, co-operatives, syndicates and the like, granting them the right to hold and alienate property, to have limited liability and to sue and be sued.

It is against this background of theoretical debate and practical legislation that Faribault constructed his theory. Faribault adopted Renaud's theory of the Institution, arguing that the trust is an example of an institution which, like the union and the co-operative, has been recognized by law and expressly given the right to hold and alienate property, despite its lack of legal personality.

His theory has been criticized on the grounds that Quebec law has never accepted the theory of the Institution or any similar theory; nor, it was argued, has the Civil Law granted unincorporated entities or organisms rights over property which only legal persons can possess. Thus Mignault has written:

> J'ai eu l'avantage d'écouter la lecture d'une thèse pour le doctorat où l'auteur se prévalait de la nouvelle théorie de l'*institution* pour dire que c'est la fiducie elle-même, en tant qu'*institution*, qui devient propriétaire des biens donnés ou légués. La théorie de l'*institution* n'a pas encore été admise chez nous, et il me semble impossible de recounaître la personnalité à la fiducie qui constitue une aliénation *sui generis* et non un sujet de droit.[118]

However, with respect, in the author's opinion this criticism misses the point. Faribault's view does not depend on the validity of the theory of the Institution or the unincorporated entity. His concept in essence is that the trust is a creation of the legislature permitting ownerless property. However, Faribault's view is subject to three different criticisms, one serious but answerable, and the other two unanswerable.

First, the principle that all property must have an owner is not merely a theoretical dogma but has important practical implications.

---

[117] In Quebec the battle was lost in the case of *Society Brand Clothes Ltd.* v. *Amalgamated Clothing Workers of America et al.* [1931] S.C.R. 321; an echo of this battle is found in the argument as to whether a partnership is a person and whether it has legal status. See also Caron, "De l'action réciproque du droit civil et du common law dans le droit des compagnies de la Province de Québec", in Ziegel, *Studies in Canadian Company Law* (1967), 102, 110-111.

[118] Mignault, *La fiducie dans la province de Québec* (1937) 5 Travaux de la semaine internationale de droit 35, 45 (emphasis added).

It is particularly crucial to the law of gifts and successions. For example, let us examine the following bequests:

> I give my property to my wife and on her death to my son.
>
> Income to my wife and on her death the capital is to belong to my son.

In both cases the testator has not indicated who is to inherit should his son predecease his wife. Such lapses are common in testamentary bequests, and each legal system has developed over the centuries its own principles and rules to determine how the property will devolve in such a situation. The Civil Law concept which determines devolution in such a case is ownership. To the question "Who will inherit?", the answer is "The owner": in the first case, the property would devolve to the wife as institute-owner; in the second, the testator's heirs would be the beneficiaries. If we abandon the concept of ownership in the trust, we have no other mechanism for determining one of the most important problems of the will or the gift.[119]

There is, however, a response to this argument. Faribault could answer that although there is no owner of the trust, rules of devolution could be evolved as if there were an owner. In other words, we would determine who would have been the owner in accordance with the ordinary rules of Civil Law, and then conclude that the property would devolve as if it were owned by that person. We would bestow on that person the rights of ownership without his actually having the ownership. Thus in the legacy,

> Income to my wife and on her death the capital is to be delivered over to my children ... ,

if the children predecease the wife, the trust property would remain in the intestate heirs in accordance with article 838 C.C. It is therefore possible to construct a general theory of devolution without ownership,[120] although this raises further problems such as whether

---

[119] The concept of ownership would have some utility in determining the rights of revendication of the beneficiaries and the extent to which the beneficiaries could terminate the trust prior to its specified termination date, but these are not as crucial as the question of devolution. In abandoning ownership, one is also led to conclude that the beneficiaries' rights are moveable in nature, a conclusion which has many consequences, especially with regard to matrimonial regimes.

[120] Faribault does develop a rather complicated theory of the devolution of property, different from that stated in the author's text above.

Faribault, *supra*, f.n.15, states that there is implied in every trust a prohibition to alienate which prevents the beneficiary from alienating either the trust property or the beneficiary's interest in the trust (*i.e.*, his right in the present or future to receive trust property). He concludes at 385:

"Cette prohibition résulte des instructions données aux fiduciaires de ne

or not to permit other consequences of ownership, for example owner revendication (which Faribault himself rejected).

However, there are two other criticisms of the theory which are more difficult to answer. The first is that Faribault's theory is refuted by the history of the Quebec trust. As we have seen, the trust in Quebec is rooted in the ancient French fiducie, under which ownership was vested in the minor-beneficiary. Historically there is no support for the ownerless trust concept. The second criticism is that

---

remettre le capital qu'à une époque déterminée, ou de payer subséquemment les revenus à un autre. Ne possédant un droit acquis dans les biens de la fiducie qu'à l'arrivée du terme le bénéficiaire ne peut en disposer; il ne peut même pas disposer de son intérêt, parce que s'il le pouvait, le tiers acquéreur pourrait bien, lui, demander la remise du capital.... [C]eci explique ... toute la dévolution de l'intérêt bénéficiaire."

He gives several examples of trusts in which it is difficult to determine to whom the property devolves. Three of his examples are:

1. 'To my trustees to pay the income to my wife.'

Nothing is said in the trust document as to what is to happen to the capital; to whom the capital devolves is a question of interpretation.

2. 'To my trustees to pay the income to my son until he is thirty-five.'

Nothing is stated in the trust document as to whom the capital devolves if the son dies before 35.

3. 'To my trustees to pay the income to my wife then to my children, and finally to deliver the capital to my grandchildren.'

Nothing is stated in the trust document as to whom the property will devolve if the children die without children.

Faribault states that in the first example the prohibition to alienate creates a right in favour of the donor or of the testator's heirs to inherit the property. He bases himself on art.972 C.C. which states:

"When the prohibition is not made for another motive, it is interpreted as establishing in favour of the party disposing and his heirs a right to get back the property."

In the second example Faribault argues that the prohibition to alienate is established in favour of the son, so that if the son dies a substitution opens in favour of the son's heirs.

In the third example he argues that the prohibition to alienate results in the children, or rather their heirs, inheriting the property if the children die without children of their own.

Faribault's theory is subject to certain difficulties. Firstly, it cannot explain the devolution of property in a case where alienation is permitted. Secondly, since his theory depends on determining for whose benefit the prohibition to alienate was created, one can imagine a Pandora's box of distinctions in complicated trusts which would lead to endless litigation. The concept of presumed ownership would have made Faribault's theory of the devolution of property more definite.

it *is* possible to integrate the trust into the Civil Law of ownership, thus rendering Faribault's theory unnecessary. The author respectfully would propose a theory which he feels can integrate fully the trust into the Civil Law and which is consistent with the history of the trust.

THE TRUST AS A DISMEMBERMENT OF OWNERSHIP

The author submits that a solution to the dilemma surrounding the ownership of the trust in Quebec is to regard the trust as a permitted method of dismembering administrative powers or rights from ownership. Put another way, the rights or powers granted to the trustee are a dismemberment of the owner's rights, just as the rights granted the usufructuary are a dismemberment of the owner's rights. Whereas the dismemberment of the right of enjoyment does not negate ownership, so the dismemberment of the right of administration similarly does not deny ownership. The dismemberment which is a usufruct is defined as " . . . the right of enjoying things of which another has the ownership . . .",[121] while a trust may be defined as " . . . the right of administering things of which another has the ownership".[122]

Civil Law permits certain of the benefits of ownership to be dismembered from ownership and granted to persons other than the owner; hence the usufruct. However, Civil Law traditionally did not permit the dismemberment from ownership of only a right or power to administer without any right to benefit from the property administered. Before administration could be dismembered, Civil Law required as a matter of public order that it be joined to enjoyment:

---

[121] Art.443 C.C.

[122] One can argue that the term "right" implies benefit and the trustee does not benefit from his administration, so that "power" might be a better word. However, there is no doubt that administration is a dismemberment. There is some similarity between the dismembered administration permitted by art.981a C.C. and the dismembered alienation created in art.970 C.C. However, in the latter case, the power of alienation is simply taken away without being vested in anyone, while in art.981a C.C., administration is granted to another who can regain it if lost through the right of revendication.

The trustee is not the only "administrator" of a dismembered ownership recognized in Quebec law; the executor is in a similar position. Moreover, under ancient law, the fiduciaire for a minor was in an identical position. Certainly nobody would assert that French law in 1600 had a theory of the Institution or the ownerless fund.

> Le droit de jouissance appartenant à l'usufruitier implique naturellement le droit d'administration ... le testateur ne pourrait pas séparer l'administration de la jouissance pour l'attribuer à une personne autre que l'usufruitier ... .[123]
>
> Le droit à l'usage suppose nécessairement le droit d'administrer.[124]

In ancient law there was one exception to the rule that administration alone could not be dismembered from ownership or enjoyment: the fiducie. The fiduciaire could administer for the true owner without receiving any benefits whatsoever.[125] He was the holder of a right or power of pure administration. The modern trustee or "fiduciaire" (as he is called in the French version of article 981a C.C.), who is the descendant of the ancient fiduciaire, is likewise the holder of a dismembered right or power of pure administration for the benefit of the true owner and the other beneficiaries. The trust may therefore be regarded as a legislatively-created dismemberment of ownership, recognized for centuries and regulated and expanded after 1763.

The author would suggest that the trustee be considered as the holder of a "Real Right of Administration"; however, since no benefits are granted to the trustee, an equally acceptable terminology could be a "Real Power of Administration". Whether one calls the trustee the holder of a real right or a real power, there is little doubt that a dismemberment from ownership of administration is involved, and that the power of administration given the

---

[123] Huc, *Commentaire du code civil,* vol.4, as quoted in *Guaranty Trust Co. of New York* v. *The King* [1948] S.C.R. 183, 199.

[124] *Guaranty Trust Co. of New York* v. *The King, ibid.*

[125] The fiduciaire was not a tutor; see Merlin, *supra,* f.n.58, 215. The tutor is the legally-created personal representative of an incapable person. He stands in the place of the minor-owner for the purpose of exercising the latter's rights. The fiduciaire is the privately-imposed administrator of property for the owner and his legal representatives. He cannot deprive the tutor of the right of administration. Thus in the Louisiana case of *Succession of McCan* 19 South. 220 (1896), 228 (quoting and approving *In Succession of Fouchet* 30 La.Ann. 1020 (1878)), it was stated:

> "... by the laws of the state the tutor is alone and exclusively entitled to administer the property belonging to his wards... [and] cannot be deprived of the administration of their property by the appointment of ... administrators ...".

The Court also stated in *Succession of McCan,* 231:

> "... a tutor has the absolute right to administer the property of his wards, and that it is out of the power of a testator to deprive him of it."

This reasoning would apply to any Civil Law jurisdictions which permit testamentary tutorship. The fact that one can appoint a testamentary tutor to exercise an incapable's right of ownership is irrelevant to the question of whether one can deprive an owner (or in the case of incapacity, an owner through his legal representative) of the right to administer.

trustee is not only given to him personally but is *attached to the property* subject to the trust, as is any real right. We shall now examine the difference between an ordinary or "personal" administration and an administration attached to property, which we shall term "real" administration.

Personal and Real Administration

The Civil Code calls the trustee "an administrator... of the property ... conveyed ... in trust".[126] However, the trustee is more than the usual administrator or mandatary in that his administration is attached to the property and, like the executor, he has the right to sell.

Ordinarily, a person can give another a mandate to administer property. The mandator can even oblige himself not to revoke the mandate.[127] However, the obligation to submit to the mandatary's administration is a personal obligation, binding only on the mandator, and does not follow the property. If the mandator were to sell the property, even if the mandate were registered against it, the purchaser would not be obliged to suffer the administration unless he so agreed.

Similarly, if a donor gave property to his wife as usufructuary and to his son as naked owner, and all three agreed that X would administer the property until the wife's death, if the usufructuary were to sell her interest, the purchaser would not be obliged to suffer X's administration without so agreeing. By contrast, if a valid trust were created, the alienation of the usufruct would not affect X's right or power to administer the property even if the purchaser did not consent to it. It is this ability to follow or be attached to the property which gives the trustee's power its character of being real.

It should be emphasized that such a dismemberment of administration from ownership is not contrary to any provision of the Civil Code. Article 406 C.C. states that ownership is the complete right to enjoy, use, alienate and even destroy property. Just as article 443 C.C. allows the owner to grant another the right of enjoyment, articles 981a C.C. and following permit the owner to grant another the right to administer it:

---

[126] Art.981b C.C.

[127] The obligation not to revoke cannot be perpetual; a perpetual irrevocable mandate of administration is illegal. See Planiol et Ripert, *Traité pratique de droit civil français* 1st ed. (1932), vol.11, 845, para.1492, and Sallé de la Marnierre, *Le Mandat irrevocable* (1937) 36 Rev.trim.civ. 241.

> Trustees ... are seized as depositaries and administrators ... of the property ... and may claim possession of it ... .[128]

Indeed, many authors who have attempted to analyze the Common Law trust and relate it to the Civil Law have perceived the essence of the trust as the creation of a purely managerial or administrative interest in property. Thus H.R. Hahlo has written:

> The trust of English law ... is but one species of the genus "trust". As the very word indicates, the characteristic feature of the trust is not the division between legal and equitable ownership — this is the specific device employed by English law to achieve the purposes of the trust — but the separation between the control which ownership gives and the benefits of ownership.[129]

The Trust and the Traditional Real Rights

It is now in order to draw certain conclusions regarding the trust as a dismemberment of ownership and its relationship to the Civil Law of property.

---

[128] Art.981b C.C.

[129] Hahlo, *The Trust in South African Law* (1961) 78 S.Afr. L.J. 195. See also Nussbaum, *Sociological and Comparative Aspects of the Trust* (1938) 38 Colum.L.Rev. 408, 410, and Ryan, *An Introduction to the Civil Law* (1962), 221. Minz, *Succession of Simms — "The [Civil] Law is a Jealous Mistress"* (1966-67) 41 Tul.L.Rev. 885, 908-909, states:

> "However, the opposition to adopting the trust because it created foreign concepts of legal and equitable rights was probably only a formalistic technique employed by the courts. For the essential functional or substantive character of the trust can be understood in *any legal system* as a separation of control of property and interest in property" (emphasis added).

The reader should note that because of special enabling legislation, trusts are now valid in Louisiana. Previously they were illegal.

The view that the trust is really a dismemberment of ownership has been criticized on the grounds that the creation of a real right or power of administration instead of merely dismembering ownership diminishes it, and therefore is not a true dismemberment. Thus Merryman, *Ownership and Estate* (1974) 48 Tul.L.Rev. 916, 941, f.n.65, has written:

> "... it should be pointed out that the parts do not add up to the whole. In the typical private trust, the *corpus* is immune from the general creditors of both trustee and beneficiary; it cannot legally be wasted, abused or invested in highly speculative ventures nor allowed to lie idle if there is a reasonable prospect of productive use ... . Thus, when property is placed in trust, there may be not only a division, but also a *contraction of ownership.*"

Actually this very criticism can be made of the usufruct or the substitution and does not appear to be valid.

The Trust and Ownership

The trust, regarded as a dismemberment from ownership of the real right or power of administration, is perfectly compatible with the principle that all property must have an owner.

For example, in a testamentary trust such as

> To my trustees to pay the income to my wife and on her death to deliver the capital to my children ...,

the owners are the intestate heirs, the whole in accordance with article 838 C.C.[130] If this trust were inter vivos, the owner would be the settlor in accordance with article 782 C.C. and the children would be owners but under a suspensive condition. In both of these trusts, a real right or power of administration would lie in the hands of the trustees.

The Trust and Real Rights other than Ownership

We have seen that, under the proposed theory, ownership is compatible with the administrative trust. Is the system of real rights constructed by the Civil Law to convey future interests, *e.g.*, usufructs and substitutions, compatible with the administrative trust?[131] If so, what rights do usufructuaries and institutes have within a trust?

The Usufruct within a Trust

Let us examine the following trust:

> I give the use and usufruct of my home to my wife during her lifetime; I give the ownership to my son. X is to be trustee.

Assuming that this trust is to be interpreted as an administrative trust contemplated by articles 981a C.C. and following, what are the rights of the usufructuary?

To answer this question, we must first ask two preliminary questions:

(i) Was it really the settlor's *intention* to create a usufruct within the above trust?

(ii) Is it *possible* to create a usufruct within the above trust?

(i) The intention to create a usufruct within an administrative trust

As we have seen, article 981b C.C. states:

---

[130] Whether the heirs are institute-owners or owners under a reslutory condition depends upon the interpretation to be given to art.838 C.C.

[131] We have seen that usufructs and substitutions would be compatible with non-administrative trusts such as watchdog trusts, bare trusts and conditional administrative trusts. These are discussed *supra*, f.n.21 and *infra*, f.n.141.

> Trustees, for the purposes of their trust, are seized as depositaries and administrators .... .

The article also gives the trustees extensive rights of possession and revendication of the trust property:

> Trustees ... may claim possession of it, even against the donees or legatees for whose benefit the trust was created. ... trustees may sue and be sued and take all judicial proceedings for the affairs of the trust.

Article 981j C.C. states that the trustees' rights may be exercised without the consent of the beneficiaries:

> The trustees, without the intervention of the parties benefited, administer the property vested in them and dispose of it, invest moneys which are not payable to the parties benefited, and alter, vary and transpose, from time to time, the investments, in accordance with the provisions and terms of the document creating the trust.

Other articles of the Civil Code also refer to the trustees' duties and obligations of administration.[132]

A bequest of a usufruct necessarily involves a bequest of possession, administration, control and revendication in favour of the usufructuary. Yet articles 981a C.C. and following give all these rights to the trustee. What can a knowledgeable settlor have in mind when he creates a usufruct subject to an administrative trust? Surely he must know the rights created are incompatible.

We may return to the trust set forth above, namely:

> I give the use and usufruct of my home to my wife during her lifetime; I give the ownership to my son. X is to be trustee.

One possibility is that the settlor did not intend to create a usufruct at all, but used the term "usufruct" incorrectly as a poorly worded direction to the trustees to maintain his wife in occupation of the home, just as a landlord is obliged to maintain a tenant. On this view, the wife would have only a personal right to be maintained in occupancy of the home; while her right would be greater than that of the normal income beneficiary to receive income or living space at the trustees' *discretion,* it would still amount only to a personal right against the trustees and not to a real right in the property.[133]

A detailed examination of the trust document, particularly the powers given the trustee and the rights given the so-called "usufructuary", would be required to determine whether the settlor really intended to create a usufruct. This point is made by article 928 C.C. in another connection:

---

[132] Arts.981e, 981k, 981m and 981n C.C.

[133] See the discussion of usufruct *supra,* with respect to the Civilist position.

> A substitution may exist although the term **usufruct** be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered .... .

That the courts will look behind the words used to analyze the substance of the instrument is seen in the cases of *Masson* v. *Masson*[134] and *Dame Cogne* v. *Trust Général du Canada*.[135] In these cases, the Supreme Court of Canada and the Quebec Court of Appeal, respectively, held that despite the use of the term "substitution" to describe the rights of certain beneficiaries under a trust, the beneficiaries were really only holders of personal claims to income.

Thus, given the essential nature of the trust, it could be argued that in some circumstances the use of the term "usufruct" was merely a poor choice of words designed to distinguish the wife's rights from those of a mere income beneficiary, and not intended to grant the true rights of a usufructuary.

(ii) The possibility of creating a usufruct within an administrative trust

a) **Incompatibility with usufruct**

Let us return to the following trust:

> I give the use and usufruct of my home to my wife during her lifetime; I give the ownership to my son. X is to be trustee.

Assuming the intention to create a valid usufruct,[136] is it *legally possible* to create a usufruct within an administrative trust?

We have seen that the trust can be regarded as a real right or power of administration. We have also seen that this real right can be dismembered from ownership. Is it also possible to dismember the real right of administration from a usufruct? If this is possible, it would leave the usufructuary with a real right of direct enjoyment in the property which is protected by a right to revendicate the enjoyment, the whole subject to the administration of the trustee.

It could be argued that this is impossible because possession, control and revendication are necessary for proper administration of the trust property. Therefore, permitting direct control and revendication of trust property by the beneficiary would inhibit proper administration by the trustee, which is the essence of the trust mechanism.

This argument does have some support. First, the Code seems to demand that the trustees possess and control the trust property so that they may administer it. Article 981b C.C. states:

---

[134] *Supra*, f.n.79.

[135] [1969] B.R. 591, esp. at 597.

[136] In the text the author has discussed only the usufruct; however, the same reasoning will apply to the substitution.

> Trustees, for the purpose of their trust, are seized as depositaires and administrators for the benefit of the donees or legatees of the property, ... and may claim possession of it even against the donees or legatees for whose benefit the trust was created. ... and while it lasts, the trustees may sue and be sued and take all judicial proceedings for the affairs of the trust.[137]

Articles 981j, 981l and 981d C.C. all strongly suggest that the trustees must have some control and possession of the trust property.

Further, the jurisprudence has insisted that no trust can be created without a transfer or delivery of the trust property to the trustees.[138] A logical corollary of this proposition is that the trustees must keep possession and control of what is delivered to them. This viewpoint has been set forth by St. Jacques J. in the case of *Brissette* v. *Dame Brissette*:

> Les biens dont les trois légataires n'ont pas l'administration, ni le contrôle, ne sont pas transportés à l'exécutrice testamentaire fiduciaire, ce qui est l'essence de la fiducie (art. 981a C.C.) ... .[139]

There also appear to be strong public policy arguments against permitting the usufruct within an administrative trust. First, as we will see, the complexity of the questions and solutions involved in permitting the co-existence of a real right of enjoyment protected by revendication and an effective right of administration suggests that the legislator did not intend such a situation to exist. Secondly, Civil Law has a policy interest in the effective administration of property. It can be argued that it is against public policy to allow one person to completely control and possess property but to leave the administration without possession or control in the hands of another.

Thus one can argue that the logical consequences of a mandatory conveyance to administrative trustees, and the complexities and policy consequences resulting from a real right of administration divorced from possession, revendication and control, demand that the administrative trustee have control and possession, and that this is implied in articles 981a and 981b C.C.

If this conclusion is correct, it would be impossible to create a usufruct within a trust. The so-called "usufructuary" would be unable to have administration, possession, or control of the property. He would have no real rights at all, except possibly a right to revendicate the property *for the trust* in case of a prohibited trustee alienation.[140] However, we shall now look at the other side of the

---

[137] Art.981b C.C.

[138] *O'Meara* v. *Bennett* [1922] 1 A.C. 80.

[139] (1936) 61 B.R. 557, 562.

[140] What rights the beneficiaries of trusts can have will be discussed in the second part of this article.

coin, and analyze the argument that the usufruct is compatible with the trust.

b) Compatibility with usufruct

We have seen that the administrative trust and ownership are compatible. This compatibility is achieved by regarding the rights of the trustee as a real right of administration dismembered from ownership. Perhaps the same may be said for the usufruct. Given freedom of willing and the right to create a trust, why cannot one within a trust dismember the right to administer from usufruct, leaving a residual real right of enjoyment protected by revendication, but subject to trustee administration? One can argue that it is not against public order to endow a person with a real right of enjoyment but to free him of administrative burdens, particularly since freedom from administration is what the trust is designed to achieve.[141]

However, certain practical problems arise which raise doubts as to the possibility or legal desirability of such a trust. To explore these problems, we shall examine three types of usufruct within an administrative trust: a usufruct of a home, of an apartment building and of common shares.

One can readily imagine a settlor granting his wife the right to possess and live in a home, and appointing a trustee to free her of the administrative burdens. In such a case the settlor would probably wish the wife to be able to protect her right to live in the home by

---

[141] We are discussing only the administrative trust. We have seen that true Civil Law usufructs are compatible only with certain non-administrative trusts, namely:

a) the bare trust in which the trustee is simply obliged to immediately deliver the property to the usufructuary;

b) the conditional administrative trust in which the usufructuary administers until a certain event, at which time the trustee's administration begins. In such a trust, of course, the administrative trust does not really begin until the event occurs;

c) the watchdog trust in which a true Civil Law usufruct with the minimum essential rights of administration, possession, direct enjoyment and revendication is created, with a watchdog trustee who has only supervisory powers. The duties of a watchdog trustee are not to administer but to ensure that both usufructuary and naked owner are protected and not despoiled by one another. Such a watchdog trust could be combined with a conditional administrative trust such that in the case of abuse by the usufructuary, the trustee would assume administration.

We have seen that Jonathan Wurtele in 1879 created what would either be a conditional administrative trust, or a watchdog trust combined with a conditional administrative trust. (See the Appendix to this article.)

revendication against all persons, including the trustee.[142] Further, the wife should be able to deprive the trustee of his right to sell the property free of the usufruct; otherwise, the trustee effectively could deprive the wife of her right to live in the home.

However, serious problems arise in such a trust with regard to repairs, maintenance and expenses. The trustee as administrator would have the right (and the obligation) to execute contracts for repairs and upkeep, such as heating, painting and snow removal. How are these contracts to be paid for in a usufruct subject to an administrative trust?

Article 468 C.C. indicates that the "usufructuary is ... liable for the lesser repairs", and article 471 C.C. states that the "usufructuary is liable ... for all ordinary charges". Article 475 C.C. adds that the "usufructuary is ... liable for the costs of such suits as relate to the enjoyment". Do these articles lead to the conclusion that the trustee has the power to execute contracts, but that the usufructuary alone, and not the trust, is to be held liable on them towards third parties?[143] Or are we to consider that in executing such contracts, the trustee binds the trust, but has a right on behalf of the trust to recover "usufructuary" expenses from the usufructuary?[144] In either case, the trustee would have the power to render the usufructuary liable and even bankrupt as a result of contracts and expenses the usufructuary might not have desired to incur.[145]

A possible solution would be that the trustee has the power to bind only the trust, and that neither the trustee nor third parties have a recourse against the usufructuary. This solution seems logical

---

[142] If the beneficiary were denied the ability to protect her right by revendication, it should not be considered as a real right valid against third parties.

[143] On this view neither the trustee nor the trust would be liable for such contracts. Of course, the trustee is never personally liable for contracts executed within his powers: "Trustees are not personally liable to third parties with whom they contract" (art.981i C.C.).

[144] The reader will remember that the example postulated is a usufruct of a home in which there are no revenues for the trust from which can be deducted usufructuary expenses. The solution is not simplified if a revenue-bearing property is made subject to the trust, since the usufructuary and not the trust would be entitled to the revenues.

[145] In the second case, third parties would have certain direct rights against the usufructuary to ensure payment. If the trustee failed to sue the usufructuary for the costs incurred, the third parties could sue the usufructuary on behalf of the trust by virtue of art.1031 C.C. ("... Creditors may exercise the rights and actions of their debtor when to their prejudice he refuses or neglects to do so; with the exception of those rights which are exclusively attached to the person.")

and more in keeping with the nature of the trust.[146] However, its adoption violates two aspects of the usufruct. Firstly, it violates articles 468, 471 and 475 C.C. Secondly, under the Civil Code, the naked owner cannot lose his capital for debts incurred by and properly chargeable to the usufructuary. In an administrative trust which could not claim usufructuary expenses from the usufructuary, the capital could be subject to seizure for debts properly chargeable to and incurred for the sole benefit of the usufructuary.[147]

Presumably, in such circumstances the trustee might be able to sell the property subject to the usufruct and pay such usufructuary expenses out of the income realized from the invested proceeds of sale, if sufficient.[148] However, the possibility remains that the capital could be diminished due to usufructuary debts, which is a result in keeping with the nature of a substitution de residuo and not with a usufruct. Moreover, it is not clear whether a trustee subject to a usufruct has the power to sell the property free of the usufruct; it is doubtful he would have this power if it were not expressly given him.

Possibly the best solution is to regard the trust property as liable for debts incurred by the trustee for the benefit of the usufructuary,

---

[146] It would seem that normally trustees bind only the trust and have no power to bind the beneficiaries; nor would the trustees normally have the right to recover expenses incurred for the trust from the beneficiaries who are not personally liable either to the trustees or to third parties for acts done on behalf of the trust: See Faribault, *supra*, f.n.15, 370, para.316.

It could be argued that the use of the term "usufruct" derogates from the above principles and gives the trustee the right to sue a usufructuary for usufructuary expenses if revenues are insufficient. This is especially so if the direct control and possession of the usufructuary, and his right to prevent a sale free of the usufruct, prevent a proper and efficacious administration of the property.

[147] Normally, the trustee does not have the power to encroach upon capital to pay debts properly chargeable to income. If this power is given him, the usufruct approaches the substitution de residuo in which the capital can be diminished by expenses chargeable to an income beneficiary. If this power is not given the trustee, his only recourse would be to sell the property and charge income expenses to the income realized from the reinvestment of the proceeds. This, of course, assumes that the bequest permits the trustee to sell free of the usufruct. If the trustee is unable to sell without the consent of the usufructuary, all that can be done if the usufructuary refuses to give his consent is to await judicial sale by the creditors, or to claim that there is a duty upon the usufructuary to consent to the sale in certain circumstances. Of course, if the revenues after sale were insufficient, the consequences would be a seizure and sale of the trust capital to pay usufructuary debts.

[148] If the trustee had the power to charge such expenses to the capital, the settlor would have created a substitution de residuo rather than a usufruct.

but to permit the trust (and indirectly the creditors under article 1031 C.C.) to have recourse against the usufructuary. While such a solution seems in keeping with the nature of the usufruct, it still would allow a trustee to render a usufructuary liable and perhaps bankrupt for expenses for which the trustee contracts but which the usufructuary might not have desired.

Assuming one can satisfactorily solve this problem, a further difficulty arises. Will tradesmen deal with a trustee whose only method of paying them is to sue the usufructuary or to sell the property? If not, how can the property be effectively administered?

This problem becomes even more acute in an administrative trust subject to the usufruct of a revenue-bearing property. Suppose the wife no longer wishes to live in the home and it is rented by the trustee, or suppose an apartment building is subject to a usufruct and an administrative trust. Presumably if the trustee is to effectively administer the property, he must be in receipt of revenues to pay the bills. But the revenues go to the usufructuary, not to the trustee.

The problem of bill payment and effective administration in an administrative trust subject to a usufruct arises even in the simplest of trusts. For example, in an administrative trust of common shares subject to a usufruct, questions would arise as to payment of accounting and valuation fees, expert advice and brokerage commissions. Further, in some instances proper administration would involve physical access to stock certificates. Thus, effective administration would seem to involve the right to collect revenues and some physical possession by the trustees. One may well ask how these requirements may be reconciled with the rights of the usufructuary.

It could be argued that the situations posited above are not truly trust problems, but result from the principle of freedom of willing and its inherent concomitant, poor draftsmanship. One could argue that any testamentary institution, whether it be a usufruct, substitution or trust, will involve certain problems, especially if one permits freedom of willing, but that these problems can be solved by proper draftsmanship. For example, in the above case the settlor could have given the trustee access to sufficient funds. Failing wise draftsmanship, the problem is left to be solved by the courts.

Thus two views seem possible:

1) One view would be that freedom of willing would permit a settlor to give a direct right of enjoyment protected by revendication to a usufructuary and to grant the right of administration to another. If the settlor does not provide the

trustee with direct access to sufficient funds to carry out his administration, it is not a matter of public order or a situation contrary to the essence of the trust. After all, the trustee would be able to sell or hypothecate the trust assets and perhaps would have the right to sue the usufructuary for recovery of expenses. This, of course, raises the question whether a trustee in this situation can sell the property without the usufructuary's consent, or sue a beneficiary personally for recovery of expenses. While these problems are difficult, the courts could evolve subtle distinctions to make both these recourses possible, depending upon the circumstances. Certainly they do not appear to be against public order.

2) A second view is that there is a public interest in the efficacious administration of property, and therefore it would be illegal to permit direct enjoyment in such a manner as to prevent effective administration. According to this view, a settlor could either create a watchdog trust (with certain limited powers in the trustee not incompatible with the usufructuary's administration), or an administrative trust (subject to certain limitations on the trustee's powers if the testator so desired), in which the trustee could collect the revenues, pay expenses and deliver the balance to a beneficiary whose rights could *not* include direct enjoyment. If more than one property were subjected to a trust, *e.g.*, a revenue-bearing property and a property to be used directly by the beneficiary, one could state that the usufructuary only could have a true usufruct on the "use" property (subject exclusively to a watchdog trust), and only a right to revenues or other benefits from the second property, but no usufruct therein.

While the second view could lead in certain cases to a Pandora's box of subtle difficulties and distinctions, the author prefers it on the grounds that one of the primary goals of the Civil Law has been to provide for efficacious administration of property.

Although there is some dispute concerning the extent to which the concept of the *numerus clausus* — or limited numbers of nominate real rights — exists in Quebec, it is the author's view that it is not possible under Quebec law for individuals to create real rights at will. Generally most Civil Law systems state that the Civil Law recognizes only a limited number of real rights which it has expressly or implicitly created, and it is not possible for individuals to add to their number or change their content drastically. While the case of *Matamajaw Salmon Club* v. *Duchaine*,[149] in which the creation

[149] [1921] 2 A.C. 426.

of a real right of fishing was upheld by the Privy Council, has added some confusion to this matter in Quebec, it is the author's view that the case should be confined strictly to the situation therein contemplated, in view of the fact that such rights were permissible under the law of Quebec prior to codification.

Mazeaud has written:

> ... les personnes sont libres, en principe, de créer entre elles n'importe quel lien de droit, de telle sorte qu'il n'est pas possible de donner une énumération limitative des droits personnels. Il n'en va pas de même pour les droits réels ... il ne peut appartenir qu'au législateur de définir les pouvoirs que l'homme est en droit d'exercer sur une chose. *Il a donc donné une énumération limitative des droits réels.*[150]
>
> ... les droits réels sont en nombre limité ... (la volonté du titulaire du droit peut transférer ce droit réel à autrui, mais non le créer); c'est la loi qui, seule, est susceptible de créer les droits réels, de préciser les pouvoirs d'une personne sur une chose ... .[151]

Similarly, Josserand has stated:

> ... la liste des droits réels est fixée, *ne varietur*, par le législateur. En effet, l'organisation et les modalités de la propriété, droit réel... intéressent l'ordre public; et d'ailleurs, si l'on comprend que les parties puissent, à leur gré établir des rapports juridiques qui ne lieront qu'elles-mêmes, on s'expliquerait moins volontiers qu'elles fussent autorisées à instituer à leur guise des droits qui, étant opposables à tous, constitueraient une gêne pour la collectivité ... .[152]

In creating the usufruct, the substitution and the real right of ownership, Quebec law has developed a well defined system of administration resulting in efficacious use of property. Although administration may be dismembered through the trust, there should be some attempt to limit the number of bizarre administrative divisions that may be devised in the name of freedom of willing. The law must reflect the public interest in the proper administration of property and in the limiting of lawsuits.

In another context it has been stated that "Le droit de jouissance appartenant à l'usufruitier implique naturellement le droit d'administration",[153] and that "le testateur ne pourrait séparer l'administration de la jouissance".[154] If it is against public order to prevent a person from administering property which he enjoys, it also should be contrary to public order to permit a person who simply enjoys

---

[150] Mazeaud, *Leçons de droit civil* 3d ed. (1966), vol.2, 1054, para.1287 (emphasis added).

[151] *Ibid.*, (1963), vol.1, 192, para.164.

[152] Josserand, *Cours de droit civil positif français* 3d ed. (1938), vol.1, 744-745.

[153] Huc, quoted in *Guaranty Trust Co. of New York* v. *The King, supra,* f.n.123, 199.

[154] *Ibid.*

a property to possess and control it free of all administrative burdens and duties.

Because of these extreme complexities and for the reasons above stated, it is the author's view that it would be best to cut the Gordian knot and state that a usufruct and administrative trust are incompatible.[155]

The Substitution within a Trust

A substitution subject to an administrative trust has two elements: the element of institute ownership and the element of institute direct enjoyment protected by revendication.

We have seen that under the proposed theory, the element of ownership is compatible with an administrative trust. Thus in the following administrative trust,

> I give the property to my trustees in trust, my son to be institute and his children substitutes ...,

if the children predeceased the son, he would keep the property as owner.

In our discussion on usufruct we have noted the serious problems that arise from the division of direct enjoyment from administrative rights and burdens, and have reached certain conclusions. In the author's opinion the same reasoning and analysis would apply to the substitution, and it is therefore the author's view that the element of institute direct enjoyment is incompatible with an administrative trust.

Summary

The following conclusions may be drawn regarding the compatibility of the two major Civil Law dismemberments of property, namely the usufruct and the substitution, with the trust as a dismemberment of the "real right of administration":

1. Ownership by the institute and the naked owner is compatible with the trust. This is because the trust is a Civil Law institution and subject to the principle that all property must have an owner.

---

[155] The author's opinion that the usufruct should be considered incompatible with the administrative trust seems to run counter to the fact that Judge Wurtele in 1879 created a trust containing a usufruct. The answer is that the Wurtele trust does not create an administrative trust but a watchdog trust combined with a conditional administrative trust (see f.n.21). It is a watchdog trust because the wife is a true usufructuary with power of possession, direct enjoyment and administration; it is also a conditional administrative trust because upon sale of the trust property, the trustees are given the power of administration and the usufruct ends.

2. Usufruct and substitution are compatible with the watchdog and conditional trusts.[156]
3. With regard to the administrative trust, two approaches seem possible:

   i) The direct enjoyment of the usufructuary and the institute is compatible with the administrative trust. According to this view, it would be possible to divorce administration from direct enjoyment. In the administrative trust subject to a usufruct or substitution, the trustee would have the right to sue the usufructuary or institute for the normal charges of enjoyment, or to charge the capital for such expenses. Enjoyment would be protected by revendication, which could be exercised by the usufructuary or the institute.

   ii) It is contrary to the Civil Law to divorce administration from direct enjoyment, since this would prevent efficacious administration of property and would render litigation within the trust a constant possibility. Under this view, the usufructuary or institute could not have direct rights of enjoyment but only the right to demand net revenue or perhaps to be maintained in peaceable occupation by the trustee. It is possible, however, that the use of the terms "usufruct" or "substitution" could be evidence of the settlor's intention to prohibit trustee alienation without beneficiary consent; therefore in the case of an invalid alienation, the beneficiaries might have a right of revendication.

The author prefers the second conclusion.

CONCLUSION

Historically and intellectually, the Quebec trust is a Civil Law institution which permits the appointment of administrators who do not benefit. Consequently, its problems should be interpreted solely in the light of the Civil Law. For example, the duration of the trust must be governed by article 932 C.C.; the trust must have an owner; and ownership must be analyzed in the light of articles 838 C.C. and 782 C.C.

Why then have so many theoretical problems been raised regarding the nature of the trust? The answer flows from a failure to examine the history of the trust and the insistence upon either regarding it as an import from the Common Law (which is historically incorrect) or as an institution which suddenly appeared in 1879,

[156] See the discussion of these types of trusts *supra*, f.ns.21 and 141.

without background or past. An examination of its history shows us that trusts have existed under Quebec law for centuries, and that the Code articles are based upon the early Civil Law trust, particularly the fiducie.

The difficulty which courts have had in analyzing the Quebec trust is compounded by the manner in which most trusts are drafted. Drafting provides the basis for the division of the trust into two classes, distinguishable because of their wording. We will call one class the "Wurtele Trust", and the other the "Customary Trust".

In the Wurtele Trust, the draftman clearly vests ownership in a specific beneficiary. For example, the ownership is expressly vested in the children in the following trust:

> I give the usufruct of my property to my wife and the ownership to my children. I name X as trustee with all the powers of articles 981a C.C. and following.

In the Wurtele Trust there is no doubt whom the settlor wishes to be owner. The problem is that because of the possessory and administrative rights granted the trustees, the owner has not the essential *minimal* rights required of an owner by Quebec law. As we have seen, the conundrum is solved by regarding the trust as a valid method of dismembering ownership by granting purely administrative rights over property to trustees. In the above trust, the Civil Law owners are the children subject to the administrative rights of the trustees. This is, of course, similar to the situation which existed under the fiducie of ancient French law.

Of course, as pointed out above, there are problems which arise even in the Wurtele Trust. Is the person who is called a "usufructuary" but denuded of administration and possession a valid usufructuary? Or is he simply a holder of a right to personal revenues? To what extent can the "usufructuary" or the owner revendicate property improperly alienated by the trustee? Are the "usufructuary's" and owner's rights moveable or immoveable?[157]

The author submits that the fact that problems exist in no way detracts from the nature of the trust as a Civil Law concept in which administration is dismembered from ownership or enjoyment. Such problems will remain no matter which theory of the trust is adopted. In the author's opinion, it is preferable that the solution be within the context of the Civil Law.

---

[157] This latter point will be important in determining whether the rights of the beneficiaries form part of community of property or not (see arts.1275 and 1276 C.C.) and will have relevance in other cases where it is important to determine whether the rights of beneficiaries are moveable or immoveable.

It is not, however, the Wurtele Trust, which clearly indicates who is the owner, which has led to the confusion surrounding the trust. Rather, it is the Customary Trust which has done so.

The Customary Trust, unlike the Wurtele Trust, does not vest ownership in anyone expressly, and it is this failure which has engendered the greatest confusion as to who owns the trust. A typical Customary Trust reads as follows:

> To my trustees to pay the income to my wife during her lifetime, and then to pay the income to my children in equal shares; on the death of each child, the trustees are to deliver his share to his issue then living, and if none of his issue are then living, to my issue then living, by roots. I name X to be trustee with the full powers granted him by articles 981a C.C. and following.

This type of trust could readily lead one to the conclusion that until the death of the wife and children, no one owns the trust property (except perhaps the trustees). However, if we apply the Civil Law to the trust and regard the trustees as holders of administrative rights only, there is no real obstacle to determining the owner of the property. The relevant Civil Code articles are 838 C.C., if the trust is testamentary, and 782 C.C., if it is inter vivos.

Article 838 C.C. states that a testator may name persons to become owners subsequent to his death, and may even name as owners persons not living at the date of his death on the condition that they be born later. Of course, during the interval the owners will be the testator's intestate heirs. Assuming the above trust was testamentary, it is clear that the testator has bequeathed the ownership to his children's issue, but only on the condition that they survive the testator's wife and children. They are owners under a suspensive condition. However, upon the testator's death the persons seized with immediate ownership, subject to a resolutive condition, are the testator's intestate heirs.[158]

Assuming that the trust set out above is inter vivos, then the solution may be found by applying article 782 C.C., the relevant Civil Code article. This article states that ownership may be granted upon a suspensive condition. In the above trust, the settlor has clearly given his children's issue ownership under a suspensive condition only, retaining ownership subject to a resolutive condition in himself.

Of course, problems remain to be solved in the Customary Trust as well. If the heirs are considered owners, does this trust not create

---

[158] As the author has previously stated, they could be regarded as institutes under a substitution.

four successive degrees of beneficiaries, in violation of article 932 C.C.? In an inter vivos trust, could the settlor have named himself trustee? Could he make a gift in favour of unborn children without creating a substitution? These problems will be among those explored in the second part of this article.

The first part of this article has been a discussion of the theory of the trust and its relationship to the Civil Law of property. In the second part, the author will turn to the practical problems surrounding the trust and discuss them in the light of the above analysis and the relevant jurisprudence. He will indicate also how the trust has been interpreted by the courts and authors in Quebec.

APPENDIX

Inter vivos Deed of Trust

On this twenty-seventh day of October, one thousand eight hundred and seventy-nine. —

Before Mtre O'Hara Baynes, Notary Public, for the Province of Quebec, residing in the City of Montreal,

Came and appeared John Rankin of the City of Montreal, Esquire, Merchant,

Who in pursuance of the Act of the Legislature of the Province of Quebec assented to on the eleventh day of September last, intituled "An Act respecting Trusts" conveyed to Jonathan Saxton Campbell Wurtele of the City of Montreal, Esquire, Queens Counsel, and John Beattie of the same place, Esquire, Merchant, present and accepting, in trust for the children issue of his marriage with Dame Louisa Sophia Campbell Wurtele and subject to the reservations and for the use and purposes hereinafter mentioned, to wit: —

All the household furniture and effects now contained in the dwelling house of the said John Rankin situated on Ontario Avenue in the said City of Montreal and the other moveable property mentioned and described in the schedule hereunto annexed and signed by the parties for identification.

This conveyance in trust is made by the said John Rankin to the said Trustees for the benefit of the children issue of his said marriage, to wit Louisa Sophia Margaret Campbell Rankin, James Luther Rankin, Archibald John Rankin, John Rankin, Norman Scott Rankin, Allan Coats Rankin, Arthur Glen Ernest Rankin to whom the said John Rankin by these presents gave the same in consideration of the love he bears them.

This gift and conveyance in trust is made subject nevertheless to the usufruct and enjoyment of the said furniture and other moveable property by the said John Rankin and his said wife Dame Louisa Sophia Campbell Wurtele and by the survivor of them during their lives, but with the condition that they will use the said furniture and moveable property in a proper manner and renew such things as may be broken or destroyed in the use thereof and pay the premiums for the insurance thereon.

This gift is made subject to a substitution in favor of such children as may hereafter be born of his marriage with the said Dame Louisa Sophia Campbell Wurtele and consequently any such children and his children hereinabove named shall together own and have the said furniture and other moveable property share and share alike; and in event of any of the children now born or to be born dying before the death of both of the said John Rankin and the said Dame Louisa Sophia Campbell Wurtele, the share of such child shall revert and devolve to the surviving children, subject to the substitution in favor of such children as may be afterwards born.

The said Trustees will during their lives allow the said John Rankin and Dame Louisa Sophia Campbell Wurtele to have the use and enjoyment of the said furuiture and moveable property but shall keep the same insured in their, the said Trustees, names for such amount as may to them seem sufficient and recover the premiums for such insurance from the said John Rankin and after his death, should she survive him, from the said Dame Louisa Sophia Campbell Wurtele.

In the event of the said furniture and other moveable property being destroyed by fire, the said Trustees shall invest the insurance money in accordance with the Act hereinabove mentioned and during the life of the said John Rankin, they shall invest the revenue in like manner but after his death should the said Dame Louisa Sophia Campbell Wurtele survive him they shall pay over the income of the investments to her for her use and expenditure.

The trust hereby created shall last until the death of the said John Rankin and his said wife and afterwards until the youngest of the said children shall have attained the age of twenty-one; and upon the termination of the said trust, the said Trustees shall, if the furniture and moveable property have not been destroyed by fire, sell and realize the same and divide the proceeds among the children of the said John Rankin, issue of his said marriage, share and share alike, giving in the case of the death of any of them leaving issue their share to such issue; and if the said furniture and moveable property should have been destroyed by fire, they shall divide the investments of the insurance money in like manner.

If at any time the said John Rankin and after his death the said Dame Louisa Sophia Campbell Wurtele should consent to the sale of the whole or any part of the said furniture and moveable property the said Trustees shall then sell and dispose of the same and deal with the proceeds in the same manner as they are instructed to deal with insurance money.

Should the trust last after the death of the said John Rankin and the said Dame Louisa Sophia Campbell Wurtele, the said Trustees shall thereupon sell and dispose of the said furniture and moveable property and invest the proceeds; and the income of the investments whether from the proceeds of the sale of such furniture and moveable property or from the insurance money should the same have been destroyed by fire shall be paid over yearly to the said children or to the tutor of such of them as are minors.

In case it should be necessary to replace Trustees under this deed the remaining Trustee shall have the power to appoint but during the life of the said John Rankin with his concurrence and after his death with that of the said Dame Louisa Sophia Campbell Wurtele. It shall not be necessary to give any notice to the benefited parties before replacing any Trustee.

Whereof act

Thus Done and Passed at the said City of Montreal in the office of the undersigned Notary where these presents are to remain of record under the number four thousand nine hundred and sixty-three on the day month and year first hereinbefore written and signed by the said parties with me the said Notary after being duly read.

(Sgd.) JOHN RANKIN
J. WURTELE
JOHN BEATTIE
O'HARA BAYNES, N.P.

Unprobated Testamentary Trust

I, John Rankin, of the City of Montreal, Esquire, Merchant, being of sound intellect and capable of alienating my property, do make and publish this my will in manner following:

First: — I direct that all my just debts and my funeral and testamentary expenses be paid and satisfied by my Executor and Trustees hereinafter named, with all convenient speed after my death.

Second: — I will, devise and bequeath the usufruct of my Estate to my beloved wife Louisa Sophia Campbell Wurtele, until her death, or in the event of a second marriage being contracted by her, then only until such second marriage.

Thirdly: — I will devise and bequeath my Estate, (but subject to the usufruct given to my beloved wife,) to my sons and daughters and to the lawful issue of any of my children who may predecease me, to be divided by roots, but subject to the substitution hereinafter created, instituting my said sons and daughters and the issue of any predeceased children, my universal legatees.

Fourthly: — I substitute the shares of my said daughters in my said Estate to their lawful issue, respectively.

Fifthly: — I have made provision in the deed of partnership formed between me and my nephew John Beattie, for two of my sons to enter into partnership with him, and to continue with him the business of our firm. In consequence of the advantage thus given I will, order and direct that in the event of any of my sons availing themselves of the said right, one-third shall be deducted from the share of my Estate devolving to them and shall be added in equal proportions to the share of my sons who may not become members of the firm to be so formed to continue the business of our said firm.

Sixthly: — I will, and ordain should any of my sons die without lawful issue before receiving the whole of his share of my said Estate and of any additions thereto, that the whole or such portions thereof as may not have been conveyed, transferred and paid over to him, shall fall and devolve and I substitute the same to his surviving brothers and sisters, and to the lawful issue of any of his brothers and sisters who may have predeceased him, to be divided by roots, and the proportions falling and devolving to his sisters, to be substituted in the same manner as their own shares in my said Estate.

Seventhly: — I will and ordain in the event of any of my daughters dying without lawful issue, that her share of my said Estate and any additions thereto, shall fall and devolve, and I substitute the same to her surviving brothers and sisters and to the lawful issue of any of her brothers and sisters

who may have predeceased her, to be divided by roots, and the proportion falling and devolving to her sisters to be substituted in the same manner as their own shares in my said Estate.

Eighthly: — In the event of default of survivorship in the cases mentioned in the sixth and seventh articles, I substitute my brother, my sister, and the lawful issue of my deceased sister Sarah and the lawful issue of my said brother and sister, should they have previously died, to be divided by roots.

Ninthly: — I nominate and appoint my beloved wife, my nephew John Beattie, and my friends George Stephen and Richard B. Angus, both of the said City of Montreal, Esquires, to be the Executors of my will with power beyond the year and day limited by law, and until the full execution and accomplishment of all its provisions.

Tenthly: — I constitute my said Executors trustees of my Estate; and I invest them with the seizin and possession of all the property, moveable and immoveable of which I may die possessed, or to which I may be in any wise entitled, to be held by them and by the survivors or survivor of them and by the substitute and substitutes who may be appointed to replace them, in trust for the following uses, purposes and intents, to wit:

1° To administer and manage my Estate during the continuance of the trust thus created, with power to sell any and all immoveable property and receive the proceeds thereof, — to sell and transfer all stocks and all debts, and receive the price thereof; — to invest all moneys forming part of my capital, and to vary and change all and any investments made or held by my Estate, the whole as may see[m] fit in their discretion, but subject to the limitation hereinafter expressed; and to collect and receive all sums and claims due to, and also the revenue and income of my said Estate.

2° To deduct the costs and charges of the administration and management of my Estate, and to pay over to my said beloved wife quarterly, during her life, or so long as she shall remain a widow and no longer, the Balance or net annual income or revenue of my said Estate.

3° After the death of my said wife, or should she contract a second marriage, then after such second marriage, to pay over after deduction of the costs and charges of administration and management, such net anuual income or revenue of my Estate, to my children, or the issue of my children, in the proportions in which they may be entitled to share my said Estate, and until their respective shares in the capital of my said Estate are paid.

4° When and so often as any of my said sons attains the age of twenty-three years, to allot to him his share in the capital of my said Estate; and to convey, transfer and pay over to him one-half of such share forthwith, and the other half when he reaches the age of twenty-five years; provided however that my beloved wife be dead or have forfeited the enjoyment of my Estate by a second marriage, and otherwise, on the occurrence afterwards of either of such events.

5° In case any of my sons should die leaving lawful issue, before his share in my Estate shall have been allotted to him, when the eldest of such issue attains the age of majority, to allot to such issue their share in the capital of my said Estate; and to convey, transfer and pay over to each of such issue his proportion of the said allotment as fast as they respectively become of age; provided also however that my beloved wife be dead or have forfeited the enjoyment of my Estate by a second marriage, and otherwise on the occurrence afterwards of either of such events. In case any of my said sons

should die leaving lawful issue after the allotment of his share has been made, but before the whole thereof has been conveyed transferred and paid over to him, to transfer convey and pay over to each of such issue his proportion of the said balance as fast as they respectively attain their majority.

6° After the opening of the substitutions created of the shares of my daughters, when the eldest of the substitutes of such shares respectively attains the age of majority, to allot to such substitutes respectively, their share in the capital of my Estate, and to convey, transfer and pay over to each of such substitutes his proportion of the said allotment as fast as they respectively become of age; provided also however that my beloved wife be dead or have forfeited the enjoyment of my Estate by a second marriage; otherwise, such allotment shall only be made on the occurrence afterwards of either of such events. And

7° In the event of any portion in their hands of my said Estate falling and devolving, under the substitution hereinabove created, to my brother and sister and to the issue of my deceased sister Sarah, or to the issue of my said brother and sister, to convey, transfer and pay over to them forthwith such portions of my said Estate.

Eleventhly: — I will and ordain that the trust created by me shall subsist and last until the whole of my Estate has been allotted, conveyed, transferred and paid over by my said Executors and Trustees to the parties respectively entitled thereto under the bequests hereinabove made and the substitutions hereinabove created.

Twelfthly: — I give my Executors and Trustees full power to compound, arbitrate, or otherwise compromise or settle any demand or claim either belonging to or against my Estate; I direct and order that all investments to be made by my Executors and Trustees shall be confined to Real Estate in the City of Montreal, debentures or other securities of the Dominion or Provincial Governments, debentures or stock of the said City of Montreal, Montreal or Quebec Harbour debentures and first mortgages on real property in the Island of Montreal.

Thirteenthly: — I will and order that the act of a majority of my said Executors and Trustees or of my said Executors and Trustees and the substitutes to be appointed, or of such substitutes, as the case may be, at any time shall be equivalent to the act of the whole of them, and that the survivor and survivors or such Executors and Trustees, or such survivors and survivor with the substitute and substitutes to be appointed, or such substitutes as the case may be shall exercise all the powers conferred upon my said Executors and Trustees as effectually as if they were all living and acting as such; and I declare that my said Executors and Trustees and the substitutes to be appointed shall in no wise be held liable for the acts and deeds of each other; but that each shall be liable for his or her own acts only and that no one of them shall be liable for any act, matter or thing done or omitted to be done by him or her as such Executor and Trustee or substitute, unless in the doing or omitting to do the act matter or thing for which he or she may be attempted to be made chargeable, he or she shall have been guilty of manifest and wilful misconduct.

Fourteenthly: — In the event of the death, refusal to accept or resignation of any of my said Executors and Trustees, I will and ordain that a substitute or substitutes may be appointed by the remaining Executors and Trustees or Executor and Trustee, by notarial deed, naming, designating and appointing

such substitute or substitutes and that such replacing of such Executors and Trustees shall be continued successively and as long as the duration of the Trust hereinabove created may require, in the same manner by my said Executors and Trustees and such substitutes or by such substitutes alone, whenever a vacancy may occur.

Fifteenthly: — I will and ordain that the income or revenue of the shares of my Estate bequeathed to my daughters shall be an alimentary allowance, and that the same shall be exempt from seizure and incapable of being assigned and transferred; I also will and ordain that the said shares of my said daughters shall not fall into but shall on the contrary be excluded from any community of property which may exist between them and their respective husbands and that the said Income or revenue thereof shall be paid to them on their own receipts, without the intervention or assistance or authorization of their respective husbands being required, and that the same shall be free from the control of their said respective husbands and in no way liable for their debts.

Sixteenthly: — I revoke all wills which I may have previously made, declaring this to be my last will and testament.

In testimony of all which I have hereunto set my hand and seal this twentieth day of June, One thousand eight hundred and seventy-six, in duplicate.

JOHN RANKIN

Signed, Sealed, published and
Declared by the above named John Rankin,
as and for his last will and testament in the
presence of the undersigned witnesses who have
hereunto subscribed their names as witnesses at
the request of the said testator,
in the presence of him and of each other.
Three marginal notes initialed are good and
eight words struck out are null.

J. WURTELE
Q.C. Montreal

A. BRANEHAUD
Advocate, Montreal

In a codicil dated April 19, 1880, the testator substituted Jonathan Wurtele as an executor of his will and trustee of the Estate, replacing Richard B. Angus and George Stephens.