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AN OUTSIDER'S VIEW POINT OF THE NATURE OF TRUSTS

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It has already been remarked that trusts are the most amazing part of the Anglo-American Law for the Civil Law jurist. Indeed such amazement does not begin when he encounters a trust instrument for the first time: in most instances, he will compare it (if he has some imagination!) with some civil law technique that will look to him rather similar. But, when afterwards he will examine other trust deeds, he will have to compare them with quite different techniques of his own system. Hence, after the study of one definite trust, he may say: "Trusts are the same thing as our *fideicommissum*." But his further experiences will show him that they are not so easily understood and that they may sometimes look like a usufruct, an executorship, a donation with charge, a dotal regime, a wife separate estate regime, fiducia, etc. Such comparisons—and others—have been made by many European Courts. This leads the civilian to realize that he has only seen external and partial aspects of the trusts, and has failed to understand their nature. If he tries to grasp it, he will confront the same disappointing experience as that of the young Prince who runs after a Fairy: when he is on the point of reaching her, she has taken another form, ceases to be a beautiful lady, but has become a white bird, or an old witch!

If, in order to avoid such misadventures, the civilian leaves aside concrete trust instruments and turns to books dealing with the subject in general, he will be somewhat puzzled, as most often the authors content themselves with distinguishing trusts from other relationships, and telling what trusts are not, but fail to reach a conclusion and tell you what they are. When text books endeavour to give in their definition something more than a mere rough and rapid description, it is apparent that they adopt one of the two following theories: the first one according to which the trust is a right *in personam* held by the *cestui que trust* against the trustee, the second one holding that it is a partition of property rights between the *cestui* and the trustee. Unfortunately, the partisans of each theory seem to have preemptory arguments to destroy the other one, so that the poor civilian remains somewhat lonely on the battle-field.

Indeed such absence of synthesis may be without great inconveniences in Anglo-Saxon countries, where trusts accompany the

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rhythm of life, from the cradle to the grave, where every one knows what it is from seeing it functioning at the home as in the office. But the civilian, being an outsider, is bound to consider trusts from a logical point of view if he wants to understand them, and intuition could not be a safe guide for him. Such point of view may also perhaps be of some interest to Common Law lawyers precisely for that reason that it is an outsider's view point. As Paul Claudel once put it: "It is sometimes dangerous to listen to poets, but remember that, being in the moon, they are the only ones to see the earth as a whole!"

If our aim is worth while, the result reached will be of some interest only if the proper method is used. What is going to be our method? The answer is quite simple: We want to make a synthesis. We must, therefore, take into account all the facts, *i.e.* the whole law of trusts and all kinds of them—whether express or constructive and resulting—whether private or charitable.

Supposing these facts known, and before making our own synthesis, we must first examine if any one of the two classic theories on the nature of trusts is satisfactory. Let us consider them separately and take first the theory according to which the essence of the trust is to be found in a right *in personam* of the *cestui* against the trustee.

At first glance it appears that such a theory should at least be completed: in order to explain why the *cestui* has the right to follow the *res*, it should be said that the right *in personam* of the *cestui* is protected by a lien good against third parties in most cases; and, of course, a lien is a right *in rem*!

Even so completed the theory is not satisfactory for many reasons. We will give but few of them, since such criticisms have been often made:

1. When the *res* is real property, the *cestui's* interest is considered also as real property;

2. The *res* is in no way part of the assets of the trustee; it can not be attached by his creditors; in some States, at the death of the trustee, the title passes to the court, according to statutes that have never been considered as depriving any one of property without due process of law;

3. The *cestui* can sue third parties in his own name when the trustee can not or will not act.

4. The essence of the trust can not be a right *in personam* of the *cestui*, since in many cases the *cestui* is not a person. Who would be the "person" in most charitable trusts and in a number of private trusts, like *In re Dean*, for example?

We may, therefore, conclude that the *in personam* theory fails to explain the nature of trusts and does not fit with all the facts we have to take account of.

Is the theory according to which trusts are a partition of property rights (one having the legal title, the other the equitable title) more satisfactory? It does not seem to us that it is. In order to speak of partition, one must have at least two parties; in order to speak of equitable title, one must find a title holder. Where would such an indispensable element be found in a trust to erect a monument to the first husband of one's wife, or for one's dogs and horses, or for saying masses, etc.? Does not a good deal of the originality and value of trusts come from the fact that *cestuis* need not always be considered by law as "entities"?

Moreover the *res* of the trust can be a debt for instance: could any one say that there is in such cases a right *in rem* on a right *in personam*?

Finally, we will see a little later that a trust can not be a partition of the element of individual ownership because if one makes an addition of all the rights of the trustee and those of the *cestui*, the result gives something very different from the notion of ownership.

We come, therefore, to the conclusion that the *in rem* theory is unable to reach the nature of trusts.

What is the reason of the failure of both theories? In our opinion, a defective method of approach to the problem. It seems to us that any one starting from the notion of right could not reach any result, since it is impossible to point out one single definite right (or duty) that is to be found necessarily in all trusts. For instance, it cannot be said that a trustee must necessarily preserve the substance of the *res*, since in cases of trusts for the benefit of creditors, he must most often sell it. It cannot either be stated that the trustee has an absolute duty to account, since in discretionary trusts he may be freed from such an obligation. It is submitted that if one could take one by one all the rights and duties that the trustee and the *cestui* have, one would realize that each of these rights and duties taken separately could be stricken out without destroying the trust in its essence.

Moreover, in considering a number of concrete trust-instruments, one is amazed to realize how widely rights and duties of the diverse parties may differ from one trust to another: for instance, if an individual puts his property in a Trust Company simply to avoid temporarily the trouble of administration of his fortune, the rights and duties of the trustees will differ widely from those of the trustees of the Carnegie Foundation in which property had been put in trust to

promote the establishment of peace in the world. In the first example, the *cestui* fully capable controls the property and checks the trustee through a number of rights given to him; in the second one, the *cestui* is a generous dream, a hope, a chimera incapable of having any right.

If, on the one hand, no definite right nor obligation is of the essence of the trust, if, on the other hand, the number and scope of rights and obligations of the parties may vary widely from one trust to another, we must go necessarily beyond these two notions and look for the dynamic principle that organizes and determines from the outside both rights and obligations.

Where shall we find that dynamic principle? One might be inclined to say that it is the intention of the settlor; but it would not be a satisfactory explanation, since we want to find what is the essence of all trusts, including, therefore, in our study resulting and constructive trusts.

We may be led in the right direction by recalling: 1. That all that is necessary for the existence of a trust is a *res* and an appropriation of that *res* to some aim; 2. That a trustee is not necessary for the existence of the trust, but becomes indispensable for its normal functioning. The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the *res* be properly appropriated to the aim to which it has been devoted, either by the settlor, by the court, or by operation of law. The rights that the trustee will have in each particular case depend on his obligations; they are tools given to him for the fulfillment of his duties, and such duties are determined by the appropriation to which the *res* has been devoted. Hence, it is apparent that: trustee, *cestui*, rights and obligations of either of them are only means for reaching an end and that no one of these means is in itself essential to the existence of the trust; that the essence of such legal institution can only be found in the *res* and its appropriation to some aim. Trusts appear to us, then, as a segregation of assets from the *patrimonium* of individuals, and a devotion of such assets to a certain function, a certain end. When property is held in trust, one knows how it is going to be used; its purpose, its *raison d'être* are determined; while, on the contrary, when property is subjected to private ownership, no one knows what is going to become of it. We may then formulate this first conclusion that *a trust is an appropriation of assets*; that some one will be in charge of such appropriation and that the whole world must respect it.¹

¹Whether third parties having no knowledge of the trust are bound or not to refrain from interfering with it, is a matter of no importance in the study of the nature of trusts, for this simple reason that the protection of *bona fide* third

At this point one may stop and ask: "Can not a corporation be considered also as an appropriation of assets and, if that is so, what is the difference between a trust and a legal entity?"

It is indeed striking to remark that trusts are often used in America as a substitute for corporations; but nevertheless we do not admit the theory according to which a corporation is an appropriation of assets; it is clear, for instance, that a corporation sole does not involve in itself any idea of property.

Moreover, the notion of appropriation is not at all as fundamental in a corporation as in a trust for this reason that in each jurisdiction corporation laws together with the Common Law have established a number of fixed rules determining most of the rights and duties of directors, shareholders, etc. The idea of appropriation instead of being the supreme master has only a strictly limited field defined by what can be put in the by-laws. In other words, we do not see in corporations anything more than in many other legal techniques in which the intention of the parties has a certain area within which it can be enforced. Hence, the notion of trust is quite different from that of corporation and it can alone be qualified as an appropriation of assets.

But we must go beyond our first conclusion because assets do not appropriate themselves by an act of God. There must be a practical device to realize such an appropriation. As the device is always the same: the requirement of a trustee, we are here again in front of an essential element that must be incorporated in our synthesis. There need not be any settlor, any *cestui*, but there must be a trustee, who must be a person in the eye of the law.

Is that second necessary element that we have just pointed out the last one that we need? It seems so, since: 1. Neither a settlor nor a *cestui* are essential parties in a trust; 2. The rights of the trustee are only secondary, may vary in each case, and are simply means allowing him to perform his duties, or to be reimbursed, or compensated, for having performed them; 3. All the trustee's obligations depend on only one fundamental obligation: that of assuring to the *res* its appropriation; 4. The three essential elements of a trust: a *res*—an appropriation—a trustee, have been taken into account.

parties is a question of general policy of the law and has nothing to do with this or that particular technique. If third parties must deal normally with the trustee, it is because the latter is in charge of the appropriation; but if the *cestui* can act in case of failure of the trustee to do so, it is because the idea of appropriation is paramount. It is for the same reason that the creditors of the trustee have no right in the *res*, and that his heirs do not get any part of it.

We are therefore in a position to propose the following definition of the trust: an appropriation of assets realized by means of a legal "person" who is subjected to the obligation of taking all reasonable steps to realize such appropriation, and who has all the rights necessary to fulfill such obligation.

It is submitted that such a definition gives the essential elements without which a trust can not be conceived, and applies to all kinds of trusts—express or implied (constructive and resulting), private, public, or charitable.

We are now able to examine the different consequences that flow from the nature of the trust.

I. The first consequence is that if the trust is an appropriation of property, it is a notion thoroughly different from the idea of private ownership, but which is, so to speak, on the same level. It is most striking to realize that such a deduction is amply confirmed by the study of the way in which trusts function, since such study shows that, on the one hand, all essential elements of individual ownership may be missing in a trust, and, on the other hand, elements entirely ignored in property law may be found in trusts. Let us examine rapidly these two points.

We will remark in connection with the first one that the idea of individual ownership is substantially the same in all civilized countries that have not adopted communistic theories. When an American, an Englishman, an Italian, a Frenchman say: "I own this house," all of them mean that they can live in it, rent it, pull it down, transform it, sell it, give it away, etc. For the sake of brevity the Roman Law said that individual ownership meant *usus* (right of enjoyment), *fructus* (right to get the rents, fruits, crops, income of all kinds), *abusus* (right to destroy the *res*, or to dispose of it in any way). It is quite possible that all of these three elements may be missing in a trust. The *usus* disappears in all cases where the *res* must be rented; such would be the case if, for example, the *res* is a farm and the *cestui* a minor child. The *fructus* does not exist either when the *cestui* is entitled to a fixed interest, or if the trust is discretionary: neither the trustee nor the beneficiary has the right to take the whole income for himself. As to the *abusus*, it must be noticed that the trustee is never allowed to destroy or give away the *res*, and that he may often be forbidden to sell it.

Moreover, when one speaks of individual ownership, one means that the thing owned must necessarily be part of the assets of some one, while that is not necessarily true for a trust *res*. Let us take, for example, a discretionary trust in favor of A— for life, the *res* to be

turned over to A——'s unborn children at A——'s death. The capital is not a part of the assets of the trustee, since his own creditors have no rights in it, since he cannot dispose of it, etc. As A——'s children are not yet in existence, and as A—— has nothing to do with the capital, the latter is part of no one's assets. As to the income, it is not a part of A——'s assets, since he has no right to it, the trust being discretionary; it is not either a part of the trustee's assets, since the portion of the income he does not pay over to the *cestui* must be accumulated. Therefore the *res* is in nobody's *patrimonium*. Hence it must be clear that all elements essential to the idea of individual ownership may be missing in a trust.

On the other hand, two elements quite foreign to the idea of individual ownership are inherent to the trust: the first one is the right to follow the *res* in its economic transformations. The *res*, in case of ownership, is a concrete, definite thing, whereas, in case of trust, it is a somewhat intangible economic element that can take successively different forms: yesterday it was a horse, today it is the cow for which the trustee has exchanged the horse, tomorrow it will be the Victrola bought with the money obtained by the sale of the cow. The object of private ownership is concrete, the object of trusts is intangible.

Moreover, private ownership is the consecration of individualism: in a village, in which all property would be subjected to private ownership, the fields may be full of weeds and uncultivated, the houses may fall into decay, the trees may be covered with ivy. Ownership means freedom: even anti-social freedom, it does not involve in itself the idea of effort, of care, of efficiency. But in a village where all property would be held in trust, fields must be well ploughed, carefully cultivated, houses must be kept in good repair, and trees must be pruned. Trusts involve the duty of preservation, of good management, of production: it has a social value by which it opposes itself to ownership. The two legal institutions have back of them two profoundly different and even opposed philosophies. It is indeed significant to see them both flourish side by side in Anglo-Saxon countries where individualism and social spirit are at the same time developed to a high degree. We may therefore conclude on this point in saying that Anglo-Saxon countries have two different regimes for property: individual ownership and trusts.²

²No wonder then, that the *res* of a trust may consist in something that does not fit in the categories of real and personal property. *Green v. Polgham*, 1 Sim. & St. 398 (Ch. 1823).

II. The second consequence that we draw from our definition is that the so often criticized theory of "right without subject" could be considered under a more favorable light in the law of trusts.

To put it roughly, the theory referred to here is this: There is no reason why a right should always require a subject: *i.e.* some person who is entitled to it. One understands that it is necessary to be a person to enforce a right; but enforcement is quite different from the right itself. Anything that is worth being protected by law should have rights: animals, things, ideas, etc. According to such a theory, in a corporation it is the corporate property that has the rights of the corporation, while the Board of directors have only the power to enforce them.

It is indeed striking to realize that most of the objections made against such a theory would lose their strength when applied to trusts.

Let us review briefly these objections.

a) It is said, at first, that that theory has socialistic tendencies, since it depossesses the individual in favor of the idea of appropriation. The answer is simple: We have seen that it is quite true in case of trusts. Individual ownership is superseded by the idea of appropriation, and nevertheless America is perhaps the country of the world most remote from socialism.

b) A second objection often made is that, if the owner was overshadowed by the idea of appropriation, he would lose control over the property. The answer is that it is not an objection but an explanation, since it is perfectly true that, as long as the appropriation is continued, neither the settlor, nor the *c. q. t.* can object, and that the former owner ceases in most cases to have the right to change the appropriation.

c) It is further said that, if there is no entity (physical or legal) considered as the subject of the rights in property, the State could take over such property, while no one would be in a position to make a legitimate protest. If such an obligation means that the State has the power to take over such property, that is true, but it is just as true in case of private ownership, since by force, the State can always do what it wants against private individuals. If the criticism means that no one has the possibility of protecting the property, that is not true since the main duty of the trustee is precisely to do so. If, finally, the objection purports to suggest that the State might realize itself the appropriation, it will certainly make English and American readers smile. Indeed there is no practical danger that the American Government, for instance, will grant to itself the monopoly of being

trustee. Moreover, as far as the English Government does it through the institution of the Public trustee, it does it to everybody's satisfaction.

d) The last objection usually made against the theory of rights without subject is that any right supposes a will to exercise it, and that a will cannot be conceived without a subject. We may dismiss quickly such a criticism and answer: Of two things one: either the proposition that any right supposes a will is an *a priori*, or an *posteriori*, principle; in the first case, it would be nothing more than an hypothesis, which must be abandoned if it does not succeed; in the second case, it is clear that the principle would be true only if really there are no rights without subject. In other words the objection presupposes what it purports to prove.³

It seems therefore that an explanation of the trust that would cast aside the classic theory of a right might have been attempted in connection with trusts. But such attempt has not been made by Anglo-Saxon theorists who are still faithful to the notion that no rights can exist without a subject: if the *cestui* is a person in the eye of the law, he will have some rights, if he is not, he will not have any. As to the trustee, his rights will always be in some one; for example, if not otherwise provided by law, will, or trust deed, they will pass to his heirs at his death, as long as the court has not appointed a new trustee.⁴ That leads us to the third consequence of our definition.

III. If the trust maintains the theory of no right without a subject, we must find for such right another foundation than the one given in the two classical theories.

According to the first one, the basis of rights is to be found in the free will of the subject. It is apparent that such a theory cannot

³Is it not strikingly significant to see that the propounders of the theory of rights without subject have proposed the distinction between two kinds of rights: *Genuss* and *Verfügung*, that correspond very closely to the rights of the *cestui* and those of the trustee? The rights of the first category are those protecting the enjoyment of the property, while the others correspond to the power exercised over it: for instance, the rights of an unborn child over some property are of the first category and do not require any will, while the rights of the guardian over the same property are of the second type and cannot be conceived without a will. Exactly the same thing can be said for the *cestui* and the trustee. The exercise of the trusteeship cannot be conceived without the exercise of a will; on the contrary, a *cestui* may be conceived without any will, since a monument, a dream of Peace may be considered as *cestuis*.

⁴There is, however, one instance in which the subjective theory does not seem to work: that is in States that have provided by statute that title will rest in the court at the trustee's death. As a court is not a legal entity, we do not see who is the subject of the trustee's rights during that time.

explain the rights of the trustee, since they depend on the obligations he has to fulfill, and since obligations are a partial abdication of one's freedom and may be considered as a first step towards slavery.

The second theory is not more satisfactory since it explains the existence of rights by the protected interests of the subject itself, and since it is quite clear that a trustee does not exercise any rights for his own benefit.

The only possible theory is that the *rights of the trustee have their foundation in his obligations*: they are *tools* given to him in order to achieve the work assigned to him. The trustee gets all the tools necessary for such end, but only those, in order to allow him to insert his effort in society and to work either for someone else, or for an idea recognized as worth while in the community in which he lives.

We reach therefore a social theory of subjective rights that opposes itself to the classical theories based on individualism.

Law is a system of social control; society cannot be explained by a mere addition of individuals: we are not, therefore, astonished to realize that any theory that explains subjective rights only by and for the individual is not satisfactory.

We may then conclude that trusts appear as a most coherent legal institution: it is not a part of the law of property: it opposes itself to it in this that property law is based on individualism, while trusts are in their essence a social institution; but trusts are on the same plan as individual ownership. Moreover, the technique of the trusts preserves the classical concept of "no right without a subject," but it can only maintain it if we replace the purely individualistic basis of such theory by a widely social foundation. Hence trusts form a logical whole if one does not try to force them into frames that are not fitted for them. It is submitted that if one ceases to explain trusts by using the difference between the jurisdiction of common law and equity courts, legal title and equitable title, rights *in rem* and rights *in personam*, many fallacious explanations may be avoided and the true nature of trusts may be better discovered.

Such a drastic conclusion will perhaps be excused, since it does not pretend to be more than the point of view of an indiscreet outsider.