

STUDENT ARTICLE

**CIVIL LAW JURISDICTIONS AND THE ENGLISH TRUST IDEA: LOST IN TRANSLATION?**

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This piece is a short discussion on the English; and more widely the common law concept of the trust and its traditional exclusion from civil law systems. It seeks to unearth that the apparent distaste civil law systems have for the common law trust is rooted in each system's respective attitude to rights in property and at least some degree of mistranslation. This apparent gulf in understanding can be bridged by incorporating the trust into the more ancient Roman law concept of the patrimony, thereby making the trust sit more comfortably in civil law jurisdictions. In bridging the divide, this new appreciation for the trust challenges us as common lawyers to reconsider the traditional common law premise of the trust as being less about proprietary interest as it is about personal rights and obligations.

**INTRODUCTION**

The legal historian and renowned comparative jurist Frederic Maitland, (b 1850-d 1906) keenly espoused the trust as England's greatest export to the body of legal theory:

“If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think we should have any better answer to give than this, namely the development from century to century of the trust idea.”<sup>1</sup>

There can be little doubt the trust has proved an incredibly versatile instrument spreading throughout the common law world from a means to protect family estates and assets into banking, commerce, charities and even

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<sup>1</sup> F W Maitland *Selected Essays* Hazeltine, Lapsley and Winfield (eds) (Cambridge: Cambridge University Press, 1936) p 129.

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public and administrative law.<sup>2</sup> The focus of this piece turns on Maitland's characterisation of the trust as an English concept; particularly how valuable such a characterisation is and how readily the trust can be embraced by civil law systems, which do not share in England's common law heritage. If the trust is so extraordinary, why has its development been so limited among civilian jurisdictions?<sup>3</sup>

### THE TRUST IN THE CIVIL AND COMMON LAW TRADITION

There is no universally agreed definition of a trust only a number of distinctive characteristics such as the splitting of property into legal and equitable or beneficial ownership, and the duty of the trustee to hold and manage the property in accordance with the rules established in a trust for the benefit of the beneficiaries.<sup>4</sup>

Maitland attributes the development of the 'trust idea' to the ingenuity of Englishmen and their development of the Common Law.<sup>5</sup> This fixation with the Englishness of the trust, while patriotic, has inhibited its exploration and adoption among civil jurists. Those factors which in England and other common law countries, we associate to be vital to the understanding of the trust, for example its presupposed connection with the law of property and equity,<sup>6</sup> can perhaps act as a barrier to better conceptual understanding. While the trust traces its origins to the 'use' in the Medieval Court of Chancery, we may be better able to understand the essence of the trust concept by divorcing it from its historical context that has perhaps conditioned our perceptions of what a trust *must* be. Cloaking the trust in its English historical context hinders our understanding of it in terms of rights, relationships and duties. In short, this piece focuses less about *what* the trust concept *is*, but *how* the trust concept can be better *understood*.

Maitland's enthusiasm fails to appreciate that the trust is hampered in its development by the premise that it is a product of the common law tradition, the law/equity duality which is otherwise mysterious to civilian legal

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<sup>2</sup> P Lepaulle "Si l'on demande à Quoi Sert le Trust, on Peut Presque Répondre: 'à Tout.'" ['What is the Trust Used For? Almost Everything'] *Traité Théorique et Pratique des Trusts in Droit Interne, en Droit Fiscal et en Droit International* (Paris: Rousseau et Cie, 1932) p 12.

<sup>3</sup> P Lepaulle "Trusts and the Civil Law" (1933) 15 1 *Journal of Comparative Legislation and International Law* 18.

<sup>4</sup> Halsbury's Laws of England, Vol 48 (2007 Reissue) Trusts.

<sup>5</sup> F H Lawson *A Common Lawyer Looks at the Civil Law* University of Michigan Law School Lectures (1953) 201, and B Rudden "Things as Things and Things as Wealth" (1994) 14 *Oxford Journal of Legal Studies* 806.

<sup>6</sup> G L Gretton "Trusts without Equity" (2000) 49(3) *The International Comparative Law Quarterly* 599.

systems.<sup>7</sup> The trust does not have to be conceptualised within the framework of English law: “The orthodox explanation, given in terms of the tradition distinction between law and equity, provides only a historical and not a rational account of the trust.”<sup>8</sup> In précis, the law of trusts, as understood by common lawyers, is an offshoot of the law of property, whereby ownership is divided.<sup>9</sup> This (traditionally English) analysis founders in legal systems that do not recognise split ownership of property. A major semantic gulf opens up when we talk about trusts as part of the law of property, which cascades into problems with the identification, status and function of the trustee and the tripartite relationship between the trustee, the settlor and the beneficiary which are worthy of better explication for sake of clarity, both for ourselves and civil jurisdictions. The French jurist Pierre Lepaulle states, “[. . .] it is impossible to translate the rights of the trustee into those of an ‘owner’ in our [ie French or more widely civilian] conception of property. He has neither usus nor fructus nor abusus.”<sup>10</sup>

The civil law methodology is to regard the ownership of property as carrying both inseparable rights and obligations. (See the discussion of the patrimony below) Civilians regard the separation of benefit and liability in property (seen in the English trust by the division between legal and equitable title) as difficult, even ideologically objectionable.<sup>11</sup> Apparent is the deeply held intellectual difference between English and civilian property ownership. The English approach to property has historically been as a means to greater personal freedom for the individual, while the civilian approach sees property ownership as carrying innate and inalienable responsibilities towards the community at large.<sup>12</sup> This is most patent with regard to French and German

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<sup>7</sup> G L Gretton, *ibid*, at 600 “The...reason why trust have proved so problematic for the comparatist is that there is a widespread belief that they are a special product of the common law tradition and, in particular, or its law/equity duality, and thus intrinsically mysterious to the civilian tradition.”

<sup>8</sup> B Rudden, *above n 5*, at 89.

<sup>9</sup> *Abdul Hameed Sitti Kadija v De Saram* [1946] 208 (Ceylon) at 217 PC “...the distinction between the legal and equitable estate is the essence of the trust.”

<sup>10</sup> “Il est...impossible de traduire les droits du trustee comme étant ceux d’un ‘propriétaire’ dans notre conception de la propriété. Le trustee n’a ni l’usus...ni le fructus ni l’abusus.” P Lapaulle, *Revue Internationale de Droit Comparé Vol 7* (1955) 318, at 319. Usus, fructus and abusus were in the *ius commune* taken as the essence of ownership.

<sup>11</sup> F H Lawson, *above n 5*, at 201 “Perhaps the greatest difficulty the civilians have in accepting the trust is caused by what I have come to regard as an English peculiarity logically detachable from the trust, the distinction between legal and equitable estates.”

<sup>12</sup> V Bolgar “Why no Trusts in Civil Law?” (1953) 2 *American Journal of Comparative Law* 204 at 210: “The...basic obstacle to acceptance of the trust [in legal

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notions of corporate social responsibility, placing a strong emphasis on the company as a social rather than purely economic enterprise.<sup>13</sup> However, it is conceded that this contrast (particularly with respect to corporate social responsibility) may diminish with the advent of the new codified director's duty provisions in Companies Act 2006.<sup>14</sup>

By comparison, the English trust allows separation of the responsibility of property ownership (liability) from its enjoyment. The origins of the trust have long been disputed but separation has proved a useful means to circumvent historical traps to greater personal liberty through the ownership of property, the principle modern example being taxation on capital gains, property and inheritance.<sup>15</sup>

Moving on to divorce the trust from its socioeconomic context we discover that the fundamentals of the trust mechanism have very little to do with the world of property but are in fact a very sophisticated arrangement of personal rights and duties between various parties; the settler/testator, the trustee, the beneficiary and any outside third party. Respective analysis of the trust in terms of personal rights rather than property rights is the great misunderstanding between civilians and common lawyers. A hangover from the trust's proprietary (English) trappings is the description attached to respective rights as either 'rights in *rem*' (property rights) or 'rights in *personam*' (personal rights). There is no direct translation between the common law '*rem*' and civilian 'real rights',<sup>16</sup> neither is there a correlative division between proprietary and personal remedies so in comparing the two systems simple mistranslation has been a serious obstacle to wider adoption of the trust concept.

Rights against the trustee can be both proprietary and personal, an action for damages for breach of trust being the obvious example. It will be a very unusual circumstance for a trustee to have divested himself of trust property and remain a trustee. Such a scenario would be, where the trustee has allowed trust property to diminish to nil value or has passed it to an 'equities darling' for a insignificant value to which the beneficial interest then attaches. (In either case, it is still arguable that the trustee is vested with trust property, just not valuable property).

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systems with a civilian property law] is the concept of autonomous and indivisible ownership."

<sup>13</sup> M Yavisi "Shareholding and Board Structures of German and UK Companies" (2001) 22 2 *Company Lawyer*.

<sup>14</sup> "Duty to promote the success of the company" Companies Act 2006, s 172. Note the expanded list of the key 'stakeholder' groups.

<sup>15</sup> *Vandervell v IRC* [1967] 2 AC 291, Re *Vandervell's Trusts (No 2)* [1974] Ch 100, see also J Langbein "The Contractarian Basis of the Law of Trusts" (1995) 105 *Yale Law Journal* 625 for a discussion as to the origin of the trust.

<sup>16</sup> *Webb v Webb* [1994] 3 All ER 911 (ECJ Case No C-294/92).

A trustee then is always personally liable, whether vested with property or not and if explaining to a civilian jurist, that in either case, the beneficiary will always have a personal action against a trustee, whether he is vested with property or not, the distinction between proprietary and personal remedies becomes otiose.

## THE TRUST AS PATRIMONY

A solution that would perhaps level the semantic differences would be to view the trust idea through the concept of the patrimony, looking not to property law's *rem/personam* taxonomy, but to the general totality of a person's assets and liabilities to better understand the trust.<sup>17</sup> The patrimony is a remnant from the Roman law *patrimonium* but was later readopted and developed in the 19<sup>th</sup> Century by civilian jurists.

The patrimony is a figurative 'bag' of freestanding legal relationships attaching to an individual having two parts conjoined together; both assets and liabilities. The appropriate visualisation would be of a man carrying a bag of shopping, all the assets and liabilities in the bag belong to him. Now imagine the man in addition to carrying his shopping is also carrying the shopping bag of someone else in his other hand. Although he carries the second bag with him, its contents are not his entitlement but are freestanding.

The patrimony model is useful to better understand the trust idea because it does not equate 'what I have' with 'what I own,' all my rights are mine but not all rights are rights of ownership. The trust is a special patrimony, where assets and liabilities are a separate 'bag' of assets and liabilities segregated from the trustee's personal patrimony. The rights of the beneficiary are personal against the trustee and enforceable against the special patrimony. This avoids the need to classify the beneficiaries' rights as real (ie as against the trustees' creditors) as the duality of ownership is actually duality of patrimony. This also goes to explain why the trust will not fail for want of a trustee, as his patrimony will survive him if he parts with it.<sup>18</sup>

The patrimony model has resonance with the Hohfeldian analysis of rights and correlative duties.<sup>19</sup> The patrimony is entirely personal, negating the need

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<sup>17</sup> "...due to a particular construction of the French Civil Code it has often been considered in civil law countries that each person has...only one patrimony." M Grimaldi and F Barrière, in A Hartkamp (Ed), *Towards a European Civil Code* (Netherlands: Kluwer Law International, 2<sup>nd</sup> edn, 1998) at 578.

<sup>18</sup> P Lepaule, above n 3 at 20 "The res must be composed of rights...so a trust can be formed only with rights which can be disconnected from the person, moreover the res is in fact disconnected from any person forming neither part of the assets of the trustee or the cestui."

<sup>19</sup> W N Hohfeld "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710.

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to consider Hohfeld's second category of jural relationship the privilege/no-right correlative. While the second category might ordinarily seem to apply to liberties in the context of constitutionally guaranteed freedom from interference, the privilege/no-right correlative can also be construed as a right in *rem*, being good against the world at large.

The English mistaken premise lies in the inability to analyse the trust in a way not rooted in our own historical perceptions, treating the trust as an exclusively English peculiarity using the quintessentially English tools, of law and equity, rights in *rem* and in *personam*.<sup>20</sup> Using the patrimony, a right in *rem* is 'proprietary' only as shorthand to say it is personally enforceable against the world of people who may try to interfere with an asset. It is not one right in *rem* but an aggregate of many rights in *personam*.<sup>21</sup> A right in *personam* (in which equity operates) is a narrower collection of claims, not against the whole world but against a more limited class of persons. Rights in *rem* or *personam* are essentially respectively larger or smaller bunches of personal claim rights, further underlining the idea that a trust idea rooted in property or real rights is an artificial hindrance to civilian understanding.

### THE TRUST AS A CONTRACT

Viewing the trust as patrimony (essentially personal) and not proprietary allows it to fit more easily into civilian understanding, having much greater applicability to the law of obligations than property, the law of obligations being personal. This is not a new idea, having already been advanced by Honore<sup>22</sup> and Hayton<sup>23</sup> but serves to underline the gulf between common law and civilian understanding of the trust as semantic only. This dissection of the trust as 'personal' has been developed among common law (particularly American) jurists into a discussion as to whether the trust is actually a specialised form of contract.<sup>24</sup>

The notion of the trust as a contract or promise is most patent in the many 19<sup>th</sup> Century cases concerning the failed settlement of trust property. It has long been the maxim that equity will not assist a volunteer, so a beneficiary must provide consideration or have privity as a party to the covenant to be

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<sup>20</sup> T B Smith, *International Encyclopaedia of Comparative Law* Vol 6 Ch 2, para 262. "Though the English do not lay exclusive claim to discovering God, they do claim to have invented the trust with two natures in one."

<sup>21</sup> J Langbein above n 15, p 636 'Tracking the Common Law Estates.'

<sup>22</sup> "Obstacles to the Reception of Trust Law? The Examples of South Africa and Scotland" in A M Rabello (ed) *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (Jerusalem, 1997) 792, at 812.

<sup>23</sup> D Hayton *Principles of European Trust Law* (Aspen Publishers Inc, US, 1999).

<sup>24</sup> J Langbein, above n 15.

able to enforce the trust personally or through the trustee.<sup>25</sup> As in contract, the wronged party may seek redress by way of damages at common law or specific performance. However, the contractual parallels diverge where the beneficiary is the issue of marriage consideration. Here the only remedy will be to seek specific performance in equity rather than damages.

The trust's development as a legal institution and structure, despite its trappings in the corpus of English property law, is innately about personal relationships between settler, trustee and beneficiary which make it readily analysable using Hohfeldian and civilian contractual terminology.<sup>26</sup> Even the traditional English features of a contractual relationship are easily recognisable using a 'personal' analysis; for example consensual formation, wide independence over the terms and evidencing a common intention or consensus between the parties, such analysis is easily translated into the establishment and governance of modern trusts. Even Maitland's own analysis was to regard the trust as a 'bargain' rather than as proprietary.<sup>27</sup>

The English emphasis in determining trust disputes is to look to the intention of the settler to establish the meaning of the arrangement, an approach with strong contractual parallels. If the trust is a bargain, then the certainty of the terms on which the bargain is reached becomes key. Lord Bridge firmly held that any agreement found solely upon an inference drawn from the way the parties conducted their personal affairs and relationships was not worthy of the title:

“The first and fundamental question [. . .] is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has [. . .] been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been.”<sup>28</sup>

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<sup>25</sup> *Re Plumtre's Marriage Settlement* [1910] 1 Ch 609.

<sup>26</sup> F H Lawson above n 5, at 200 “The tree-cornered relation of settler, trustee and [beneficiary]...is easily explained in the modern law in terms of a contract for the benefit of a third party.”

<sup>27</sup> F Maitland “Equity, a Course of Lectures” (John Brunyate rev ed 2d ed 1936) at p 29). “[...]the trust[...]originates in agreement....[M]en ought to fulfil their promises, their agreements; and they ought to be compelled to do so...[T]he Chancellor begins to enforce a personal right, a jus in personam, not a real right, a jus in rem – he begins to enforce a right which in truth is a contractual right, a right created by a promise.”

<sup>28</sup> *Lloyds Bank v Rossett* [1991] 1 AC 107.

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In express provisions both *inter vivos* and testamentary trusts can easily be analysed as elaborate contractual arrangements between settler and trustee to hold property for the rights of a third part (the beneficiary). The duration of the trust, maybe spanning several generations makes the drafting of a detailed contract inappropriate. The gaps are filled by terms requiring good faith, loyalty and prudence on the part of the trustee in the performance of his duties.<sup>29</sup> Millet LJ however, while not accepting the trustee's core obligations include the duties of skill and care, prudence and diligence, did identified an irreducible core of duties to "[. . .]perform the trusts honestly and in good faith for the benefit of the beneficiaries [as being] the minimum necessary to give substance to the trust, but in my opinion it is sufficient."<sup>30</sup>

The resulting trust can be treated in a similar way without difficulty as resulting trusts are simply 'founded' on the basis of an intention (or lack of intention) on the part of the settler to fully divest themselves of all the interest in the trust property.<sup>31</sup>

A contractual analysis of the constructive trust is perhaps more difficult because the constructive or 'implied trust', as it is sometimes called, has a remedial quality that sets it apart conceptually from the resulting and express trust. The arguments between academics about whether the constructive trust is a court imposed remedy or the result of an implied (but otherwise hidden) intention between the parties are well rehearsed and have not definitively been laid to rest. The accusation that the constructive trust is actually a remedy and not a trust proper has a stronger resonance when we consider a number of the cohabitation disputes over trusts of land.<sup>32</sup>

It is in the cohabitation cases of the later 20<sup>th</sup> Century especially where we see the most apparent tension between the traditional, flexible role of equity to do best justice between the parties and the need for certainty and predictability which has long been the desired policy of the law of real property. After what might be described as a period of judicial fence sitting as exactly how to deal with these cases and the concerted efforts of the late Denning LJ, who, among his peers, seemed the most happy to play fast and loose with the 'remedial' constructive trust to affect an equitable outcome,<sup>33</sup> the English approach now

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<sup>29</sup> F Easterbrook & D Fischel, "Contract and Fiduciary Duty", 36 *JL & Econ* 425-438 (1993) "[A] fiduciary relation is a contractual one characterised by unusually high costs of specification and monitoring. The duty of the loyalty replaces detailed contractual terms[...]"

<sup>30</sup> *Armitage v Nurse* [1998] Ch 241 at 254.

<sup>31</sup> *Standing v Bowring* (1885) 31 Ch D 282 (per Lindley LJ at 289).

<sup>32</sup> For examples of the constructive trust used as a general equitable remedy see *Gissing v Gissing* [1971] AC 886, *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch 638.

<sup>33</sup> *Hussey v Palmer* [1972] 1 WLR 1286 (per Lord Denning MR at 1289).

appears to be to shoehorn the otherwise remedial character of a constructive trust into terms of an implied agreement to a trust relationship.<sup>34</sup>

In arguably the most important recent decision on residential constructive trusts,<sup>35</sup> both Lady Hale (for the majority) and Lord Neuberger (dissenting) make common intention rather than ‘fairness’ the appropriate yardstick to ascertain beneficial entitlement.<sup>36</sup> However, their respective methodologies still differ between the majority’s holistic approach<sup>37</sup> and the more austere measure of intention evidenced by the parties’ financial contribution. As a matter of practice, while the court’s agreement on intention, as the appropriate measure is to be welcomed, the majority’s approach to ascertain intention remains unsatisfactory, being nebulous and lacking in certainty.

That said, an intention or contractual based analysis of the constructive trust equips us to make better sense of its place among established categories of trust mechanism, laying to rest what would otherwise appear to be the constructive trusts status as the fifth column.

## OPPOSITION TO THE TRUST AS A CONTRACT

The varied objections to a contractual analysis of the trust<sup>38</sup> include raising conceptual hurdles in translating a tripartite trust arrangement into bilateral privity of contract. If the trust is contractual, how can it make third parties liable to proprietary remedies of tracing and how can a unilateral declaration of trust possibly be squeezed into our understanding of a contract? At the time of his writings, Austin Scott’s critique of the trust as a contract using the trust tripartite structure had weight especially against English privity rule. Scott’s objection has now been neutralised with respect to trust, by statutory intervention in the shape of the Contract Rights of Third Parties Act 1999 although the principle has long been recognised in the United States.<sup>39</sup>

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<sup>34</sup> *Lloyds Bank v Rossett* [1991] 1 AC 107.

<sup>35</sup> *Stack v Dowden* [2007] 2 AC 432.

<sup>36</sup> *Ibid*, at para 144 (per Lord Neuberger) and paragraph 60 (per Lady Hale) “The search is to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it [the jointly owned cohabitant home].”

<sup>37</sup> *Ibid* paragraph 69 (per Lady Hale). Note also at paragraph 70 that the checklist of factors the court may consider is non-exhaustive and akin to those in Matrimonial Causes Act 1973, s 25 providing a backdoor by which amorphous considerations of fairness can still linger.

<sup>38</sup> A Scott “The Nature of the Rights of the Cestui Que Trust” (1971) 17 Colum L Rev 269.

<sup>39</sup> *Lawrence v Fox* 20 NY 268 (1859) “The duty of the trustee to pay the [beneficiaries], according to the terms of the trust, implies a promise to the latter to do so.”

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Further, Scott mistakenly makes his tracing argument against the contractual nature of the trust by presuming that trusts are about property and not personal right and obligations, however this has already been dealt with above as not being fundamental to our understanding of the trust concept.<sup>40</sup> Further still, a proprietary (tracing) remedy can be interpreted as simply a means to affect a personal action for recovery of trust property from its current holder, simply seeking out first who to claim from and not providing an end in itself (its restoration).<sup>41</sup>

Other contractual parallels can be seen in relation to trustee exemption clauses on which Millet LJ supplied valuable guidance.<sup>42</sup> As with the law of contract there was no rule precluding the exclusion of liability, including gross negligence, save that no exclusion can be made for dishonesty. In a later case<sup>43</sup> it was argued that, trust clauses should have parity with the law of contract and should be construed more stringently against the party who made the document. However, Millett LJ remarked that while in a contractual setting this is appropriate because the party relying on the clause will typically be the party who has drafted the document, that approach is not so appropriate in the trust setting where the clause is the work of the testator. Millett LJ held that since trustees accept office on the terms of a document for which they are not responsible they are entitled to have the protection of having the document fairly construed according to the natural meaning of the words used and not restrictively.

However, a paradox then arises (if the trust is also a contract with the beneficiary) meaning that upholding such a clause diminishes the rights of a beneficiary from suing trustees when they too have not had the chance to contribute to the terms when the trust deed was drafted.

It is conceded that a unilateral declaration of trust defies common law bipartisan contractual analysis but can perhaps be rescued if scrutinised again through the special patrimony. The special patrimony of a trust situation, with

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<sup>40</sup> E Weinrib “The Fiduciary Obligation” (1975) 25 U Toronto LJ 10, at 120 “[P]roperty is itself merely the label for that crystallised bundle of economic interests which the law deems worthy of protection...affixing the label of property constitutes a conclusion not a reason. The difficulty is not to supply a label but to identify the protected interest.”

<sup>41</sup> H Stone “The Nature of the Rights of the Cestui Que Trust” (1917) 17 Colum L Rev 467, at 477 “the real reason for the liability of the third party is the unconscientious interference with the right in personam which the [beneficiary] has against the trustee, and not any right in rem against the asset.”

<sup>42</sup> *Armitage v Nurse* [1998] Ch 241 at 254 “It is, of course, far too late to suggest that the exclusion in a contract of liability for ordinary negligence or want of care is contrary to public policy. What is true of a contract must be equally true of a settlement.”

<sup>43</sup> *Bogg v Raper* (1998/99) 1 *International Trusts & Estates Law Reports* 267.

seeming duality in ‘ownership’ means that as a body of rights and liabilities it is freestanding, disconnected from any person, forming neither the property of the trustee nor of beneficiary. Instead of being crystallised around an individual or legal entity, in whose favour the court may decree performance, it owes its existence to the end to which it is devoted: its appropriation. The instance of a unilateral declaration of trust is the settler transferring personal property to a special patrimony for an end to which the court is objectively able to determine. In this way, a freestanding patrimonium not vested in anyone but with a particular appropriation, facilitates a working civil law understanding of charities and private purpose trusts of imperfect obligation, with no discernable beneficiary, without need for reference to a common law contract or property construct.

## CONCLUSION

What is the purpose or value in analysing the English trust concept in such minutiae? The history of the trust idea has shown it is expansive; it has already spread throughout the common law world from the ‘use’ in the English Court of Chancery. There is clearly no singular governing trust concept that finds application across all jurisdictions, whether between common and civil law or inter-common law. As capital markets pay less and less attention to geographical boundaries, trusts are being exported to jurisdictions (particularly civil ones) that have historically been unable to understand their conceptual underpinning. Thus it becomes vital to circumvent the trust as a ‘unique English institution’<sup>44</sup> and any necessary connection with equity which has historically proved a barrier to its wider adoption and better understanding.<sup>45</sup> Maitland may have been right; the trust is an extraordinary legal concept but long gone are the days of claims of its exclusive Englishness. New ideas about how to conceptualise the trust are being reverberated back into the traditional common law understanding from inroads made into civil law jurisprudence. The trust idea has broken moulds in its application; it is ironic that perhaps the English trust idea is itself a mould ready to be cracked open.

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<sup>44</sup> Preamble to the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) “. . . the trust as developed in courts of equity in common law jurisdictions and adopted with some modifications in other jurisdictions, is a unique legal institution.”

<sup>45</sup> G L Gretton, above n 6, at 601 “The trust does not have to be conceptualised within the framework of English Law. The trust presupposes neither equity nor divided ownership.”