

TRUST: A COMMON-LAW INSTITUTION IN A CIVILIAN CONTEXT

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The topic assigned to me is perhaps slightly misleading in the historical sense, for the trust concept has its roots not in the common law but much earlier in the civil law itself. Long before there was any common law of England, long before there was any England, the Institutes of Justinian, published on November 21, 533,¹ contained a chapter entitled *Concerning Trust Estates*.² Trusts originated in Roman law as a means of avoiding testamentary restrictions. If a person wished, for example, to leave property to someone under a disability, such as a foreigner or other disqualified legatee, it would be done through a fiduciary, in a trust arrangement.³ Such trusts were not enforceable until the time of Augustus, when trusts were made legally binding, and a special trust praetor called the *Fideicommissarius* was appointed to enforce them.⁴

The civilian origin of trusts has in recent years received considerable scholarly attention, and in 1988 an entire book was published by Oxford on *The Roman Law of Trusts*, by Professor Johnston.⁵ The book is fascinating, but also rather baffling, to a modern civilian, especially when discussing topics like intestate trusts, which seems to us an oxymoron, for no one in Louisiana can imagine a trust on intestacy. The explanation seems to be that informal documents, or even oral expressions, passed charges to the intestate

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1. See HANS J. WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 169 (1951).

2. J. INST.2.23.1. J.B. Moyle's translation of the INSTITUTES entitles the chapter "Of Trust Inheritances." Compare INSTITUTES OF JUSTINIAN 94 (J.B. Moyle trans., 5th ed. 1949) with 2 THE CIVIL LAW 81 (S.P. SCOTT trans., 1932) (translating chapter title as "Concerning Trust Estates").

3. See EUGENE D. SAUNDERS, *LECTURES ON THE CIVIL CODE OF LOUISIANA* 304 (Alfred J. Bonomo ed., 1925); ALAN WATSON, *THE LAW OF SUCCESSION IN THE LATER ROMAN REPUBLIC* 35 (1971); John H. Tucker, *Substitutions, Fideicommissa and Trusts in Louisiana Law: A Semantical Reappraisal*, 24 LA. L. REV. 439, 444-45 (1964).

4. See Tucker, *supra* note 3, at 445.

5. See DAVID JOHNSTON, *THE ROMAN LAW OF TRUSTS* (1988).

heir.⁶ The extreme case was the *fideicommissum nutu*, the trust established merely by a nod without any verbal intervention whatever.⁷ And implied or constructive trusts enjoyed in Roman law a status considerably grander than they possess in modern Louisiana. Johnston gives the following example:

Paul 2 *decretorum* D.36.1.76 pr. Qui filium et filiam habebat testamentum fecit et ita de filia sua caverat: ἐντ'έλλομαί σοι μὴ διατίθεσθαι πρὶν τέκνα σοι γενέσθαι. Pronuntiavit imperator fideicommissum ex hac scriptura deberi, quasi per hoc quod prohibuisset eam testari petisset ut fratrem suum heredem faceret: sic enim accipiendam eam scripturam ac si hereditatem suam rogasset eam restituere.

A testator who had a son and daughter made a will and provided for his daughter as follows: 'I instruct you not to make a will until you have children.' The emperor pronounced that a trust was due on these words as if, by prohibiting her from making a will, he had requested that she should make her brother heir: the wording is to be treated as if he had asked her to make over his estate.⁸

The importance of trusts in Roman law is summed up by Professor Johnston as he concludes that "the trust finally under Justinian became the predominant legal institution."⁹ He further argues that Roman trust law influenced the formation of English trusts. Citing Pollock, Maitland, Bacon, and Blackstone, he finds the weight of authority and opinion to be in favor of civil-law influence on the Statute of Uses; and further, since "chancery is well known to have been influenced by the rules of canon law, which in turn derived from Roman law . . . it would be surprising if the influence of the civil law did not seep gently into equitable minds."¹⁰

Scott, on the other hand, took the view that the ancestor of the English trust was the Germanic *Salman* or *Treuhand*, which was "a person to whom property was transferred by another for purposes to be carried out either in the lifetime or after the death of the person making the transfer."¹¹ But Story followed the attribution of trusts to the

6. See WATSON, *supra* note 3, at 12.

7. See JOHNSTON, *supra* note 5, at 178.

8. *Id.* at 177.

9. *Id.* at 287.

10. *Id.* at 285.

11. AUSTIN W. SCOTT, *THE LAW OF TRUSTS* § 1.9, at 28 (3d ed. 1967).

Roman *fideicommissum*.¹² And Johnston cites a singular similarity in the Roman and English law of trusts. The Code of Justinian (A.D. 531), after providing for the fusion of trusts and legacies, said: "Where there should prove to be a conflict between legacies and trusts, this should be brought into line with the trust, as the more humane institution, and resolved in accord with its character."¹³ Similarly, in England, the Judicature Act of 1873 provided for the fusion of law and equity, stating: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."¹⁴ Thus, Roman law in 531 provided that trusts should prevail over legacies, and English law in 1873 provided that equity should prevail over law and that trusts were a matter of equity.

Consequently there seems substantial ground for questioning the received wisdom that the trust is, by origin, a common-law institution. Nevertheless, it is certainly clear that the modern trust, where the trustee holds and administers property for the beneficiary, is to be distinguished from the Roman trust where the continuous separation of legal title and beneficial interest was not contemplated.¹⁵

In the redaction of the Louisiana Civil Code, *fidei commissa* were prohibited. Opinion is divided on whether that prohibition was aimed at common-law trusts. Saunders, for example, wrote that "when the code was framed the law of Louisiana was brought in close contact with the common law, and at the common law . . . the trust to a large extent prevailed."¹⁶ The redactors here in excluding *fidei commissa* were merely banning what they feared and did not understand.¹⁷ Tucker called that "unjustified speculation," because "a scholar with the breadth of learning in the civil law of Moreau Lislet would [not] have used a technical term of the Roman civil law . . . to prohibit the use of an alien legal concept."¹⁸ He concluded that the rejection of *fidei commissa* in Louisiana was not "for the purpose of prohibiting the English common law trust."¹⁹

12. See GEORGE G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 2, at 15 (2d rev. ed. 1984).

13. JOHNSTON, *supra* note 5, at 286.

14. Supreme Court of Judicature, 1873 (Eng.); see JOHNSTON, *supra* note 5, at 286.

15. John Minor Wisdom, *A Trust Code in the Civil Law, Based on the Restatement and Uniform Acts: The Louisiana Trust Estates Act*, 13 TUL. L. REV. 70 75 (1938).

16. SAUNDERS, *supra* note 3, at 305.

17. *Id.*

18. TUCKER, *supra* note 3, at 465.

19. *Id.* at 469.

Regardless of whether the trust concept originated in Roman, Germanic, or English law, and regardless of precisely what was prohibited when *fidei commissa* were excluded from our law, it is clear enough, as evidenced by the Trust Act of 1920, the Trust Estates Act of 1938, and by the present Trust Code of 1964, that trusts are very much a part of Louisiana law today. What adjustments are necessary in a civilian framework to accommodate the trust? Surely the most notable and difficult is the question of substitutions in trust.

Article 1723 of the Louisiana Trust Code provides: "A disposition authorized by this Code may be made in trust although it would contain a prohibited substitution if it were made free of trust."²⁰ Tucker believed firmly that there can be no such thing as a substitution in trust, and indeed that the very term "substitution in trust" is an antilogy.²¹ There was some concern that the Louisiana courts might transform a natural suspicion of trusts into clear antipathy, and strike down almost any trust even when no classical substitution could plausibly be found.²² Such fears were engendered by cases such as *Succession of Guillory*²³ and *Succession of Meadors*.²⁴ In *Guillory* a will provided that property should be held in trust for A, and "at the death of A" there was a bequest of the same property to B.²⁵ The bequest to B sprang into existence at the death of A, rather than at the creation of the trust. In *Meadors* a trust was established for A, and "upon the death" of A and at termination of the trust, the trustee should distribute the property to B.²⁶ Again there was no present vesting of principal in B, but only what seemed to be a bequest of principal *in futuro*.

These decisions preceded the Trust Code of 1964, and very likely would have been decided the same way after its enactment, because there is nothing in the Trust Code clearly authorizing such dispositions, and hence article 1723, quoted above, would not apply. Article 1723 merely says that a disposition "authorized by this Code" may be made in trust even though it contains a prohibited substitution.²⁷ It does not follow that *any* prohibited substitution is

20. LA. REV. STAT. ANN. § 9:1723 (West 1991).

21. Letter from John H. Tucker to Thomas B. Lemann (Feb. 4, 1966) (on file with author).

22. Substitutions are prohibited by Art. 1520 of the Louisiana Civil Code. See LA. CIV. CODE ANN. art. 1152 (West 1993). For the benefit of Canadian readers, a substitution in Louisiana would be, for example, a bequest to A in full ownership but without the right of alienation, and at A's death the bequest is to devolve upon B, thus robbing A of the power of testation with respect to the property bequeathed.

23. 232 La. 213, 94 So. 2d 38 (1957).

24. 135 So. 2d 679, 681 (La. Ct. App. 2d Cir. 1961).

25. 232 La. at 214-15, 94 So. 2d at 39.

26. 135 So. 2d at 681.

27. LA. REV. STAT. ANN. § 9:1723.

automatically saved by placing it in trust.²⁸ On the contrary, a substitution must be "authorized by this Code" to be valid. The Trust Code does not explicitly authorize such substitutions as those found in *Guillory* and *Meadors*. Those and similar cases grew out of common-law wills drafted in other states, which did not take account of the principles, much less the nuances, of Louisiana law. Taken together, these cases demonstrate that it is not at all possible to import the common-law trust and deposit it whole; if so it will probably not survive.

A similar fate was visited on the trust in *Succession of Simms*,²⁹ where a Texas will bequeathed Louisiana property to trustees for the benefit of A, and held that "after her death . . . said properties shall pass"³⁰ to B. The Louisiana Supreme Court found that "title to the property did not vest in the principal legatees until the trusts terminated, at which time there was a second transfer—a second vesting—of title, referred to by one writer as the 'hallmark of the prohibited substitution.'"³¹

Many of our substitution cases have involved conditional rather than outright substitutions. A conditional substitution is a disposition in which, depending on subsequent events, a substitution may or may not take place. A conditional substitution could, for example, be a bequest to A in full ownership, but if he dies without issue, then to B. If A dies with issue, there is no substitution, there is no double disposition, and there is no deprivation of A's power of testation. He is not obligated to leave the property to his issue; he can leave it (subject to forced heirship) as he pleases. But on the other hand, if he dies without issue, then the original testator has purported to bequeath the same property to someone else, and that is a substitution.

The earliest conditional substitution considered by a Louisiana court is apparently the one found in *Cloutier v. Lecomte*,³² an 1814 case in which the will provided a legacy to A, but if he died without issue then to B. The court found a substitution, saying: "That it is a substitution, appears upon the face of it; reasoning upon this would be worse than nugatory."³³ Another conditional substitution was found in *Wailes v. Daniell*,³⁴ an 1859 case involving a Mississippi will that bequeathed property to A, but if he died without issue then to B. The

28. *Id.*
29. 250 La. 177, 195 So. 2d 114 (1966).
30. *Id.* at 232, 195 So. 2d at 120-21.
31. *Id.* at 230, 195 So. 2d at 133.
32. 3 Mart. (O.S.) 481 (La. 1814).
33. *Id.* at 485.
34. 14 La. Ann. 585 (La. 1859).

court held that the disposition constituted a substitution.³⁵ A similar result was reached in *Succession of McCan*.³⁶ In *Succession of Ledbetter*³⁷ there was a bequest to A, but should A have died without an heir or child, then to B. The court held: "The bequest in this case is as plain a substitution as can be conceived."³⁸ Indeed, as Saunders said in his Lectures, "the conditional substitution was as obnoxious to the law as the absolute substitution and is void even though no substitution does take place."³⁹

Now let us attempt to transpose these conditional substitutions into trust. The Louisiana Trust Code was amended in 1974⁴⁰ to authorize limited conditional substitutions: to A in trust, but if he dies intestate and without descendants then to B. Such a disposition in trust is now valid. It would not have been valid outside of trust in 1974,⁴¹ but article 1723 validates any substitution in trust authorized by the Trust Code.⁴² Conditional substitutions in trust that go beyond the 1974 legislation are not valid. Thus a bequest in trust to A, but if he dies without issue then to B, is not authorized by the Trust Code because it is not limited to the case where B dies intestate and without descendants; it would therefore fail. A somewhat similar trust was found in *Crichton v. Succession of Gredler*,⁴³ where the will established a trust for A and B, but if either died without children then his interest should go to the other, and if both died without children then the bequest should go to the children of C.⁴⁴ The court found a prohibited substitution not authorized by the Trust Code.⁴⁵ The result has been criticized as unnecessarily harsh, in that the income interests of A and B could have been sustained under Trust Code articles 1802 and 2251, with only the principal, rather than the entire trust, falling into intestacy.⁴⁶

In its Report to the Legislature accompanying the submission of the Trust Code of 1964, the Louisiana State Law Institute noted traditional difficulties surrounding the jurisprudence of substitutions in

35. 14 La. Ann. 586-87 (La. 1859).

36. 48 La. Ann. 145 (La. 1896).

37. 147 La. 771, 85 So. 908 (1920).

38. *Id.* at 779, 85 So. at 911.

39. SAUNDERS, *supra* note 3, at 303.

40. LA. REV. STAT. ANN. §§ 9:1972-9:1981.

41. *Baten v. Taylor*, 386 So. 2d 333, 336 n.1 (La. 1979).

42. LA. REV. STAT. ANN. § 9:1723.

43. 256 La. 156, 235 So. 2d 411 (1970).

44. *Id.* at 159-61, 235 So. 2d at 412-13.

45. *Id.* at 172-73, 235 So. 2d at 416-17.

46. Edward F. Martin, *Louisiana's Law of Trust: 25 Years after Adoption of the Trust Code*, 50 LA. L. REV. 501, 528-29 (1990).

Louisiana, and cited three "constituent characteristics" of the prohibited substitution:

- (1) A double liberality, or a double disposition in full ownership, of the same thing to persons called to receive it, one after the other;
- (2) Charge to preserve and transmit, imposed on the first beneficiary for the benefit of the second beneficiary;
- (3) Establishment of a successive order that causes the substituted property to leave the inheritance of the burdened beneficiary and enter into the patrimony of the substituted beneficiary.⁴⁷

It has not always been easy to apply the foregoing criteria to particular cases. For example, in *Succession of Materiste*⁴⁸ the contested will bequeathed property in trust for brothers and sisters as income beneficiaries, and the principal to "the descendants of my brothers and sisters by root. If any of my brothers and sisters does not leave descendants, then that portion shall go to the descendants by roots of the brothers and sisters who do leave descendants."⁴⁹ A very similar disposition had been invalidated as a substitution in *Gredler* just three years earlier, but the court in *Materiste* held that the above provision should be construed as a vulgar substitution,⁵⁰ i.e., the principal vested in the descendants in being at the death of the testatrix.⁵¹

Could the *Gredler* will have been similarly interpreted? That will was perhaps somewhat more explicit than the *Materiste* will, so that it would have been rather difficult to find a vulgar substitution in *Gredler*. A new level of complexity was before the court in *Succession of Burgess*,⁵² where the will established a trust for A and B, but if either died intestate and without descendants his interest vested in the other. As noted above, such dispositions were authorized for the first time in the 1974 amendments to the Trust Code,⁵³ but were not authorized at the time the Burgess trust was created. The court observed that "there is considerable merit" in the argument that the trust should be invalidated as substitutions under the *Gredler* ruling, but the

47. La. St. L. Inst., Report by the Louisiana State Law Institute to Accompany the Proposed Louisiana Trust Code, reprinted in LA. REV. STATE. ANN. 9:1721 (West 1991).

48. 273 So. 2d 617 (La. Ct. App. 1st Cir. 1973).

49. *Id.* at 619.

50. *Id.* at 622.

51. LA. CIV. CODE ANN. art. 1521.

52. 359 So. 2d 1006 (La. Ct. App. 4th Cir. 1978), writ denied, 360 So. 2d 1178 (La. 1978).

53. LA. REV. STAT. ANN. §§ 9:1972-9:1981.

distinction that saved the *Burgess* trust was that the conditional shift applied only if one of the beneficiaries died intestate. Since there was no attempt to impair the power of testation, which is always a chief vice of the prohibited substitution, the court held that there could not be a substitution in the *Burgess* trust.⁵⁴

It is unfortunate that the Louisiana courts, over the years, have occasionally invalidated as substitutions dispositions that were actually invalid on other grounds. For example, a bequest of usufruct to A, naked ownership to his issue living at his death *per stirpes*, is not a true substitution because A has only a usufruct interest, but it violates the ancient principle of our law that title to property must be vested with certainty, and may not be *in nubibus*.⁵⁵ Yet courts have occasionally characterized similar dispositions as prohibited substitutions. A bequest in trust with A as income beneficiary, and the principal beneficiaries to be A's issue living at his death *per stirpes*, would likewise be invalid. Trust Code article 1803 requires that with certain exceptions a beneficiary must be in being and ascertainable at the creation of the trust. Consequently, a beneficiary whose identity could not be ascertained until termination of the trust is not a permissible beneficiary of a testamentary trust.⁵⁶ As another example, a bequest in trust for A as income beneficiary, and the principal beneficiary to be the oldest child of A living at A's death, would also violate article 1803.

The question can then arise, is the entire bequest in trust to be struck down, with the property going in intestacy, or is the income portion to be upheld and only the principal disposition to pass in intestacy? The result depends on construction of Trust Code article 2251, which provides that the trust does not fail unless the invalid provision cannot be separated from the rest without defeating the purpose of the trust.⁵⁷

We can imagine a true substitution in trust: to A in trust for life, as income and principal beneficiary (but with no power of invasion), and at his death the principal shall be paid to his estate; but if he dies without issue, then the principal shall be paid to B. Such a bequest should satisfy all the traditional requirements of a substitution: a double liberality, a charge to preserve and transmit, and the establishment of a successive order. That trust could not be sustained under present law. Could it be argued nonetheless that the income disposition stands, and only the principal goes into intestacy by application of the severance provision of article 2251? That should

54. 359 So. 2d at 1024.

55. SAUNDERS, *supra* note 3, at 301.

56. LA. REV. STAT. ANN. § 9:1803.

57. *Id.* § 9:2251.

depend on the court's finding of what the settlor intended as "the purpose of the trust."

But what, from a policy standpoint, is wrong with allowing a bequest in trust to *A*, but if he dies without descendants, then to *B*? Is it not reasonable for a trust settlor to prefer that if his legatee has no children, the trust property shall devolve according to the wishes of the settlor himself rather than the wishes of the legatee? Such a desire seems eminently reasonable, and could be easily achieved by eliminating the words "intestate and" from Trust Code article 1973, which would then read: "The trust instrument may provide that the interest of either an original or a substitute principal beneficiary who dies without descendants during the term of the trust or at its termination vests in some other person or persons, each of whom shall be a substitute beneficiary."⁵⁸ Since substitutions in trust are expressly authorized,⁵⁹ there would then be no impediment to allowing the execution in Louisiana of one of the most frequent features of common-law trusts. In fact, a civil-law rationale for that sort of disposition has been advanced by the French commentators Aubry and Rau:

[T]here is a great difference between a person who pretends to regulate with impunity the transmission of his property to the heirs of his heirs, and specially to the descendants from them, and one who, foreseeing the possibility that his legatee will have no children, provides a new destination for the property bequeathed. It was the will of an individual to regulate the transmission of his property for several generations that Article 896 [La. Civ. Code art. 1520] intended to prevent. This will is not present when the testator foresees beforehand, and hopes, that the legatee will have descendants and if so, leaves him incomplete liberty to dispose of the things bequeathed to him.⁶⁰

The courts and legislature of Louisiana have struggled to reconcile the requirements of a hybrid Trust Code in a civilian jurisdiction, with sometimes inharmonious results. But the juridical overlay has, on the whole, not been unsuccessful. Incremental adjustments are certainly necessary as the law develops, and the trust law of Louisiana, both legislative and jurisprudential, is still evolving. Louisiana and Québec remain significant exemplars of legal fusion.

58. LA. REV. STAT. ANN. § 9:1973.

59. *Id.* § 9:1723.

60. 11 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS § 694, at 311 n. 7-7 (La. St. L. Inst. Trans., 6th ed. 1969).

