

# Purposes and Rights in the Common Law of Trusts

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In the English version of the *Civil Code of Québec*, we are told:

“A trust results from an act whereby a person, the settlor, transfers property from his patrimony to another patrimony constituted by him which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer.”<sup>1</sup>

And

“The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.”<sup>2</sup>

To the common lawyer, two features of this conception of the trust stand out: first, the trust is conceived as a patrimony appropriated to a *purpose*, and secondly, the appropriated patrimony, i.e. the corpus of the trust assets, is one in which neither the trustee nor the beneficiary has any real right. (At common law a settlor is never entitled, simply *qua* settlor, to any right either in the trust assets nor to any standing to enforce the trust obligation – the settling of property upon trust is conceived of as a disposition by the settlor of his assets.) It is the appropriation of the trust assets to a *purpose* which particularly jars, since, in general, at common law trusts to carry out purposes are generally impossible and attempts to create them are void from the outset. This might appear surprising to the civilian lawyer, since, as article 1260 C.C.Q. indicates, the appropriation or affectation

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<sup>1</sup> C.C.Q., art. 1260.

<sup>2</sup> C.C.Q., art. 1261.

of a patrimony to a purpose seems to be the essence of the trust<sup>3</sup>. It is the object of this paper to explain how the idea of purpose enters in, when it does, to the structuring of the rights and obligations that constitute a trust at common law, but also to show why, at common law, treating the common law trust as a disposition of assets to be administered so as to carry out a purpose is generally thought to be confused.

First, however, a few words about article 1261 C.C.Q., which should assist us when we look at the issue of purposes in common law trusts doctrine. As Macdonald puts it,

“Because the *corpus* of the trust, even if it is a single thing or single right, constitutes a patrimony which is “autonomous and distinct” from those of the settlor, trustee, and beneficiary, it follows that the property of the trust is ownerless.”<sup>4</sup>

At common law, the idea that the trust property is “ownerless” (at least in the case of private, non-charitable trusts) is more or less anathema. The theoretical difficulty that the idea of the “ownership” of the trust property has posed for common lawyers is whether the trustee, with title to the assets, is to be regarded as the owner subject to an obligation to the beneficiary to deal with those assets according to the terms of the trust – what might be called the “obligational” view of the trust – or whether the beneficiary, as is commonly said, is the “true” owner, the “beneficial” owner of the property, in the “eyes of equity” – a view that might be called the “proprietary” view of the trust. This is not the place to address that controversy<sup>5</sup>. But this is the place to point out one “resonance” of the Quebec civilian law “ownerless” property view with the actual configuration of the rights to the trust property at common law, about which common lawyers themselves often betray confusion.

<sup>3</sup> It is not my purpose here to discuss whether the common law trust can be characterised as the appropriation of a patrimony to a purpose, such that the trustee has two patrimonies, his own and the trust patrimony. For a thorough discussion of that see: Lionel SMITH, “Trust and Patrimony”, (2008) 38 *R.G.D.* 379. See also: Lionel SMITH, “Scottish Trusts in the Common Law”, (2013) 17 *Ed. L. Rev.* 283.

<sup>4</sup> Roderick A. MACDONALD, “Reconceiving the Symbols of Property. Universalities, Interests and Other Heresies”, (1994) 39 *McGill L.J.* 761, 783.

<sup>5</sup> Recent papers discussing the issue are L. SMITH, “Trust and Patrimony”, *préc.*, note 3; Ben MCFARLANE and Robert STEVENS, “The nature of equitable property”, (2010) 4 *J. Eq.* 1; James PENNER, “The (True) Nature of a Beneficiary’s Equitable Proprietary Interest Under a Trust”, (2014) *Can.J.L. & Juris.* (forthcoming).

Let us consider the civilian conception of ownership of a real right (more or less equivalent to property in tangibles, land or objects (chattels) at common law) in comparison to property rights in tangibles at common law, and then see how this comparison plays itself out in the context of the trust. For civilians, a right of ownership in a tangible is classically conceived as a “positive” right – to use, enjoy, and dispose of the tangible thing which is the object of ownership<sup>6</sup>. By contrast, at common law, the right of an owner of a tangible is normally seen as a “negative right”, in the sense that it focusses on the right that correlates with the duty we all have not to trespass on property that is not our own. So, as regards the “tangible contact” of the owner to his property, this is not framed in terms of a right to use or enjoy, but rather in terms of a right to immediate, *exclusive* possession. This has important consequences for the way in which a trust is differently conceived in civilian versus common law.

There are two paradigmatic instances of trusts. The first is the bare trust<sup>7</sup> of land (sometimes with accompanying chattels), as in the case of the trust of the mansion house of a dynastic family settlement, or in the case of the literally millions of trusts of land in England and Wales resulting from the peculiar requirement of English land legislation that any instance of co-ownership of land must take the form of a trust<sup>8</sup>. The second is the modern wealth management trust. The feature to be noticed here about these two kinds of trusts is that in neither case is the *trustee’s* right to possession of tangible assets ever “held on trust” for the beneficiaries: that is, beneficiaries have no interest in this possessory right which the trustee is entitled to by virtue of his legal title, because trust law *specifically prohibits the trustee from taking advantage of his right to immediate, exclusive, possession*. The trustee is never entitled to take possession of the trust assets so as to obtain any benefit from doing so. But moreover, unless the terms of the trust so specify, *neither are the beneficiaries entitled to take possession of the trust property for their benefit*. Of course, in the case of

<sup>6</sup> See: C.C.Q., art. 947.

<sup>7</sup> A “bare trust” is, roughly, a trust in which the trustee holds the property to the order of the beneficiaries. That is, the trustee holds title to the trust asset(s), but the beneficiaries are entitled to direct the trustee in his use of the powers that go with title. In the typical bare trust of land, the beneficiaries will require the trustee to licence their possession of the property so they can occupy it for their own benefit.

<sup>8</sup> See: Edward Hector BURN & John CARTWRIGHT, *Cheshire and Burn’s Modern Law of Real Property*, 18<sup>th</sup> ed., Oxford, Oxford University Press, 2011, chapter 14.

bare trusts of land, as in the typical co-ownership case just mentioned, the terms of the trust do specify this, but it is important to see how this result comes about. It is not the beneficiary's right, just as a beneficiary, that entitles him to possession – it is the fact that the terms of the trust allow or require the trustee *to exercise his powers of title to apply the property to the beneficiaries' benefit by licencing the beneficiaries to take possession*. So in the millions of co-ownership trusts of land imposed in England by law, the trustee-beneficiaries apply the property to their own benefit by occupying it as a residence under a licence they grant to themselves.

In the case of the modern wealth management trust, this point is even clearer. Typically, these trusts hold intangibles, shares, bonds, bank balances, that is, financial interests which are rights *in personam* that, accordingly, can give the trustee no rights to possession at all since they are unpossessible, i.e. intangibles. Where the wealth for investment does consist of a tangible, for instance in land, the trustee must “invest” that land, for example by leasing it for a money rent. Just as much as with the previous case, the beneficiaries' interests lie in the trustee's exercising his powers of title under the terms of the trust and the general law to realise the value of the assets through sale and re-investment, and also of course in the trustee's power to transfer the legal title to the assets, whether as income or as capital, to those beneficiaries so entitled.

I said earlier that even common lawyers often overlook these points. That is, one of the things that seems continually to be underappreciated when considering the interests of beneficiaries under trusts is that their beneficial interests “under the trust” are, for the most part, essentially future, ownership interests. For example, a beneficiary's right to income under a trust is an interest in receiving the legal title to the money that represents the trust income. No beneficiary lives on their “equitable interest” as such; rather the beneficiary lives on its *legal* proceeds, in the form of the money paid out to them in accordance with the interest beneficiary's equitable income interest. The lesson is exactly the same for the capital beneficiaries. When they get their benefit under the trust, they get it *legally*, i.e. they are entitled to the transfer of the legal title to the trust assets. The purpose of pointing this out is simply to show that the entitlement of the beneficiaries under the trust is misunderstood unless the way the beneficiaries actually benefit is made clear. Either their interests are essentially future ownership interests, typically in money or financial assets, or an interest they have because they have the right that the trustee apply the

benefit of tangible trust assets to them by licencing them to possess them, as in the case of co-ownership trusts of land. Viewed in this way, we now see that the beneficiaries' interests could not be a derivative interest in any positive right in the trustee to use or enjoy the trust property; rather it lies in the trustee's obligation to exercise the powers that go with his having title to the assets<sup>9</sup> in the trust corpus to benefit the beneficiaries – either by licencing them to possess tangibles under certain trusts, or to transfer title to the trust assets, usually money, when income and capital payments are made<sup>10</sup>.

In this regard, the Quebec Civil Code's characterisation of the trust property as ownerless is not so bizarre as it might first appear from a common law perspective. To the extent the right to use and enjoy is concerned, the corpus of a common law trust is equally "ownerless" – that is, neither the trustee *qua* trustee nor the beneficiary *qua* beneficiary under the general law is entitled to use and enjoy the trust corpus. And given that the trustee under Quebec civil law is the "titular" of the trust assets, that is he has the powers of title which allow him to transfer, sell, licence and so on, then whilst this particular power to "dispose" of the trust assets is abstracted from the full-blown ownership rights to use, enjoy and dispose in so far as they are conceived to form a unitary whole, the conceptual picture is not so far from the common law trust as the "ownerless" property label invites us to suppose. This conceptual issue is less pressing, or perhaps more difficult to discern, in the case of the common law trust, simply

<sup>9</sup> Rob Chambers reminds me that on one understanding of the nature of common law title to land and chattels, the notion of title is co-extensive with the right to immediate, exclusive possession; that is, the exercise of a power to licence possession of a tangible is an *exercise* of the right to possession, the right comprising both the right correlative to the duty of others not to trespass and the power to release others from this duty. It seems to me (despite the impression I might have given in J.E. PENNER, *The Idea of Property in Law*, Oxford, Clarendon Press, 1997, p. 74-96) that this confuses a conceptual for a justificatory relationship. It is conceptually necessary to distinguish the right (to immediate, exclusive possession) with the power one has to relieve others of that duty, or more generally, to transfer that right, even though on any sound justification of the right to immediate, exclusive use, it is necessary as a matter of justification of the right that it is accompanied by a power to deal with it by license, gift, and so on.

<sup>10</sup> The idea that income and capital interests are interests that the beneficiaries have in receiving payments of money or transfers of assets made to them directly is a simplification. Most trusts allow trustees not only, for example, to pay income payments directly to a beneficiary, but also to "apply" income for the beneficiary's benefit, for example by paying his rent or purchasing a car for him. See: *infra*, note 13.

in virtue of the fact that, as we have seen, the trustee's right to the immediate, exclusive, possession of any tangible trust assets does not entail that he be personally able to exercise this right by using or enjoying the trust assets himself. Just as in the Quebec Civil Law trust, it is his powers to *dispose* of the trust assets which are the essential feature which underlies the normative potentiality of the trust device<sup>11</sup>.

This leads us to one further slight diversion, before we address the role of purposes in common law trusts law, which is to consider the trustee's liability to account. This liability flows from the very nature of the trust relationship<sup>12</sup>. The principal task of the trustee is to keep the trust property separate from his own and to exercise his powers of title over the trust assets to dispose of them according to the terms of the trust. In carrying out this task, he must keep track of what he does with the trust property; this is called "keeping the trust account(s)", and normally involves keeping the documents concerning transactions with the trust property in good order. When a beneficiary suspects that something has gone wrong with the administration of the trust, this is normally because he does not accept the trustee's account, i.e. his record of what he has done with the trust property, and the beneficiary's primary legal right is to have the trustee's "account taken", i.e. reviewed. Thus the way in which the common law conceives of a trustee having duly administered the trust is to properly account for the exercise of his powers over the trust assets, in particular, the trustee properly accounts when he can show that he has applied the trust property to the benefit of the beneficiaries of the trust according to

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<sup>11</sup> There is, on the other hand, a genuine difficulty in the idea that the trustee has no real right in the trust asset, i.e. that the property is ownerless, which is that it would seem that no one is entitled to bring an action against a trespasser who interferes with tangible trust property. Articles 912 and 953 C.C.Q. suggest that only an owner of a real right would be entitled to do so. As I understand it, however, article 1278 al. 1 C.C.Q., which reads (in English), "A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; *he has the exercise of all the rights* pertaining to the patrimony and may take any proper measure to secure its appropriation" (italics mine), is regarded as overcoming this difficulty though, as I also understand, despite this and other provisions the theoretical basis for the trustee's standing in this respect is a matter of some controversy.

<sup>12</sup> See: *Ultraframe (UK) Limited v. Fielding*, [2005] EWHC 1638 (Ch), [2005] All ER. (D) 397, par. 1513-1517 (High Court of Justice, Chancery Division); Peter J. MILLETT, "Equity's place in the law of commerce", (1998) 114 *Law Q. Rev.* 214, 225 and 226.

the terms of the trust. “Applying the property to the benefit of the beneficiaries” can be done in different ways, as the following example shows.

Imagine that, under the terms of a trust, a trustee has a power to appoint trust property to (that is, transfer trust property to), or apply trust property to the benefit of, one of the beneficiaries – call him Lionel. Suppose that the trustee thinks it would make sense for Lionel to have a new car. There are three ways in which this objective can be achieved. The trustee could just give Lionel money from the trust funds to buy a car. Or the trustee could use trust funds to buy the car for Lionel, that is pay the car seller on Lionel’s behalf, so that Lionel acquires title to the car. Or the trustee could use trust funds to buy a car in his own name, i.e. taking title to the car as a trust asset, and then licencing the car to Lionel to use. This would be the safest way of dealing with those irresponsible or feckless Lionels of the world whose existence or perceived existence preys upon the imaginations of fretful settlers – if Lionel had a bad gambling habit, for instance, keeping the car as trust property would prevent Lionel selling it and blowing the proceeds playing online poker<sup>13</sup>.

What this example draws our attention to in a very simple form is the idea that, whilst the beneficiary of a trust is not merely the *factual* beneficiary of money that is spent in a certain way, as might be the case of a poor person who receives money or material goods when a charitable trust for the relief of poverty carries out its purposes – as a beneficiary he is *entitled* to the application of trust funds for his benefit and can legally enforce this right against the trustee by making him account for his disposition of the trust assets – nevertheless the application of trust funds often serves the beneficiary in particular ways or, in other words, serves various purposes which benefit the beneficiary. The courts in the nineteenth century were well used to enforcing trusts to pay for the maintenance, education, and advancement of children. A trust for maintenance is one that will provide for a person’s daily costs of living, a roof over his head and food, clothing, etc.; a trust for education is straightforward;

<sup>13</sup> Different ways of “applying” the trust assets for Lionel’s benefit could be specified in the trust instrument, including, for example, transferring trust funds to another settlement of which Lionel was a or the beneficiary. Indeed, that is the safest way of ensuring that the trustee has maximum flexibility in this respect. The general law has entertained various restrictions on the way in which transactions by a trustee could be regarded as proper applications for the beneficiary’s benefit. See: *Pilkington v. Inland Revenue Commissioners*, [1964] AC 612, [1962] 3 All ER. 622 (House of Lords).

“advancement” here is a technical term referring to “advancing” a young adult in life – typical expenditures of this kind would be the purchase of a commission in the army for a male or the provision of a dowry for a female. In this way, then, purposes do become genuinely legally relevant to the trustee’s discharge of his duty to expend the trust funds properly so that he can present an account which is not subject to legal challenge.

The last example raises the matter of a trustee’s discretions. Trustees very typically have discretion in expending the trust funds. We have already seen an example in the case of Lionel – how best should the funds be spent in order to benefit Lionel by providing him with a car? But in many modern trusts trustees also have a discretion to choose between different “objects”, that is, possible beneficiaries of a trust, for example to choose to expend the property in various amounts to the benefit of the settlor’s spouse and children and various others, for example to choose to devote more resources to one child rather than another because that child is in greater financial need. Moreover, in many modern trusts the trustee has the power to *add* objects to the trust, that is, increase the class of people who may benefit from an expenditure of trust funds, and such provisions are often very widely drawn. It is not uncommon for the trustee to have a discretionary power to add anyone in the world to the class of objects save the trustee himself (and often the settlor (typically for tax reasons)). This might seem like a crazy power to endow the trustee with, but the rationale is simple, and we shall see in a moment that such a power is not as unconstrained as it looks at first glance. The rationale is to give the trustee the maximum flexibility to ensure that the trust property is used in the way a settlor intended. Traditionally, a trust might provide for a settlor’s spouse and children, and for the children’s spouses and their own children. But families, especially these days, can be complicated. People nowadays often have unmarried partners, not spouses, have children out of wedlock, adopt children, marry a partner of the same sex, and so on. Rather than trying to specify in legally effective terms those for whom trust funds might be used, it is considered better simply to give the trustee a discretion to extend the class of objects to those whom it is felt the settlor would have wanted included if he were able to take account of developing circumstances.

The trustee’s discretion in all these respects is not unconstrained, and this brings us to the most general instance in which the notion of “purpose” interacts with the law of trusts. There is an over-arching principle

that any power given to a trustee must be used for the purpose for which it was given. In the words of Templeman J in *Re Manisty's Settlement*<sup>14</sup>:

“The court may also be persuaded to intervene if the trustees act “capriciously”, that is to say, act for reasons which I apprehend could be said to be irrational, perverse, or irrelevant to any sensible expectation of the settlor[.]”<sup>15</sup>

So if, in the example discussed above, Lionel was a drug addict, Lionel himself or any other beneficiaries of the trust could ‘falsify the account’, that is, successfully challenge the trustee’s expenditure of the trust funds, if the trustee used trust money to supply Lionel with heroin, but would not be able to do so if the trustee paid for Lionel’s four-week stay at a rehab clinic. The former, but not the latter, expenditure, would clearly be irrational, perverse, or irrelevant to any sensible intention of the settlor in conferring a discretion on the trustee to apply money for Lionel’s benefit. Similarly, if a trustee used a power to appoint to the class of objects a waiter who had given him excellent service, and then appointed him a large sum from the trust, this use of the trustee’s powers would again clearly be irrational, perverse, or irrelevant to any sensible expectation of the settlor, and the beneficiaries could falsify any such expenditure appearing in the account.

At a more particular level, certain trusts that can be thought of as trusts “for a purpose” have always been allowed at common law. This is a category of trusts under which the beneficiary is only allowed to take a certain amount that is determined by the costs of carrying out a purpose. Here’s an example: “£100,000 to be paid by my trustees to my daughter Barbara in amounts equivalent to those she has expended on her education, the remaining funds to go to my son Peter.” The gift to Barbara is a gift to pay the costs of her education, and on that basis it appears that the settlor has created a trust for the purpose of educating Barbara. Nevertheless, this is not really regarded as a trust for a purpose at common law. Consider this trust: “£100,000 on trust to pay Julia £1,000 on each occasion that Chelsea FC wins a match during the regular football season of 2013-14, all funds remaining to be paid to Timothy.” This trust is perfectly valid, if unusual: the settlor has simply chosen an unusual way of carving

<sup>14</sup> [1974] Ch. 17, [1973] 2 All ER. 1203 (High Court of Justice, Chancery Division).

<sup>15</sup> *Id.*, 26.

up the beneficial interests between the two beneficiaries; it would be odd if such a gift were valid but a gift that limits the amount that a beneficiary receives on the basis of what it costs to educate him were not. But these sorts of trusts are understood to be trusts in which *a share of the trust funds is apportioned to the beneficiaries in reference to the costs of carrying out a well-defined purpose* rather than as a trust for a purpose or a trust to carry out a purpose. The purpose in these trusts is not to be regarded as the replacement of the human *object of the trust* with a purpose; the purpose is part of a device or formula that defines the *share of the trust funds that* a beneficiary, who is fully human, receives. True, if the beneficiary of such a trust does not incur any expenses of the required kind, then they will take nothing; in that way these gifts may certainly provide an incentive for the beneficiary to achieve the purpose, although not always: consider a trust to pay the rehabilitation expenses of members of a mountaineering society who injure themselves by falling off mountains.

The leading case concerning such trusts is *Re Sanderson's Trust*<sup>16</sup>, and for that reason these trusts are sometimes known as *Re Sanderson* trusts. In that case a testator left property upon trust to “pay and apply the whole or any part of the [income] for and towards [the] maintenance, attendance, and comfort” of his mentally disabled brother for the remainder of his life. At the death of this brother there remained unexpended income, and the question was whether those funds should be held on trust for the residuary legatees under the testator’s estate, or whether the money should go into the brother’s estate. In other words, the question was whether the gift was limited to such portion of the income as was required to pay for the brother’s maintenance, or whether it was an absolute gift of the whole amount to him.

Page-Wood VC distinguished the two possible interpretations of testamentary gifts of this kind as follows:

“In reference to gifts of this description, there are two classes of cases between which the general distinction is sufficiently clear, although the precise line of demarcation is occasionally somewhat difficult to ascertain. If a gross sum be given, or if the whole income of the property is given, and a special purpose assigned for that gift, this Court always regards the gift as absolute, and the purpose merely as the motive of the gift, and therefore holds that the gift takes effect as to the whole sum or the whole income, as the case may

<sup>16</sup> (1857) 3 K & J 497, (1857) 69 E.R. 1206 (High Court of Chancery).

be. . . [If] an entire fund is given for the maintenance of children or the like, they take the whole fund absolutely, and the maintenance is treated in effect as simply the motive in making the gift; while, on the other hand, if a portion only of the fund is given for maintenance, then they are entitled to draw out so much only as may be necessary for the purpose specified.”<sup>17</sup>

A body of case law has developed in which the court has been faced with determining whether the settlor of a trust which expresses a particular way in which the beneficiary should benefit intended that the whole of the trust property should go to the beneficiary, the purpose of maintenance, or education, or whatever, merely indicating the motive of the trust, or whether the settlor intended only such a share of the fund should be distributed as is required to meet the costs or expenses of carrying out the purpose for the beneficiary. In *Re Sanderson* Page-Wood VC decided that the brother was only entitled to such part of the fund as was necessary for his maintenance, attendance, and comfort. Nevertheless, it is clear that the brother, and others who benefit under like trusts when the costs or expenses that the trusts cover are met, are just as much human beneficiaries as beneficiaries of other trusts. In particular, *whether* they receive the benefit is not at the discretion of the trustee; the beneficiaries are fully entitled to demand the requisite payments to meet the costs or expenses specified by the trust, although the trustee may have a discretion as to the particular amounts which, in his judgement, meet the intended expense, as for example, a discretion as to how much an individual like the brother in *Re Sanderson* required for his daily needs.

Settlors, then, may devote property to certain purposes *in the sense* that they may leave property on trust to spend any amount of the property, up to all of it, on certain well-defined expenses of named beneficiaries, and these beneficiaries can enforce these trusts, by demanding whatever amounts fall within the expenses or costs defined by the purpose from the trustees.

As mentioned above, trusts of this kind, in particular trusts to pay for the maintenance, education, and advancement of children, were common before the 20<sup>th</sup> century. These costs and expenses are familiar and well-defined. It is not clear that other purposes can be defined so easily. The validity of *Re Sanderson* trusts depends upon whether the “purpose” can

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<sup>17</sup> *Id.*, 503.

be clearly localised to a particular beneficiary as the payment of a certain share of a fund, that share determined by well-defined expenses that he may incur—in other words, only well-defined costs or expenses will be *certain enough to define the putative beneficiary's right in the trust assets* – if the right is not certain, the intended interest under the trust will be void. In *Conway v. Buckingham*<sup>18</sup> the life tenant was required to build a mansion house according to the testator's model; the trust was properly seen as a valid *Re Sanderson* trust, the effect of the testamentary instruction being to diminish the interest of the current beneficiary of the trust (the life tenant) and benefit his successor (the capital beneficiary) by requiring the capitalisation of the income in a particular way. The dispute in the case was whether the amount spent by the life tenant was sufficient given the vagueness of the testator's 'design' or model, and the court held that it was.

The problem of inferring whether a settlor intended a gift of the whole fund with an attached motive or direction, or a gift of such part of the property as is required to meet an expense of the beneficiary, such as his education, has been particularly acute in "appeal" cases, where an appeal has been made to raise funds to provide for individuals who have suffered some misfortune. It is obviously a vexed task to determine whether an amorphous group of often anonymous contributors had one intention or the other, and perhaps these cases should be regarded as in a class of their own. In *Re The Trusts of the Abbott Fund*<sup>19</sup> one Dr Abbott of Cambridge placed money on trust for the support of his family, including two daughters who were deaf and dumb, but the trustee turned out to be a rogue and the trust money disappeared. Several persons in turn sought subscriptions on behalf of the two daughters, which were held by trustees who made quarterly payments to the two women. On the death of the survivor of the two, some £366 remained. The only evidence of the intention of the subscribers was the circular making the appeal for funds, which stated that the fund was to enable the women to reside in Cambridge and to provide for their "very moderate wants", and, if the trustees so decided, to purchase annuities for them. Stirling J decided:

<sup>18</sup> *Conway (Lord) v. Buckingham (Duke of)*, (1711) 1 E.R. 349, [1711] Colles 411 (House of Lords).

<sup>19</sup> *Re The Trusts of the Abbott Fund*, [1900] 2 Ch 326 (High Court of Justice, Chancery Division).

“I cannot believe that [the fund] was ever intended to become the absolute property of the ladies so that they should be in the position to demand a transfer of it to themselves, or so that if they became bankrupt the trustee in bankruptcy should be able to claim it. . . I think that the trustee or trustees were intended to have a wide discretion as to whether any, and if any what, part of the fund should be applied for the benefit of the ladies and how the application should be made. *That view would not deprive them of any right in the fund, because if the trustees had not done their duty—if they either failed to exercise their discretion or exercised it improperly—the ladies might successfully have applied to the Court to have the fund administered according to the terms of the circular.* In the result, therefore, there must be a declaration that there is a resulting trust of the moneys remaining unapplied for the benefit of the subscribers to the Abbott fund.”<sup>20</sup>

The italicised passage makes clear that the trustees were under a duty to use the funds for the benefit of the two ladies, enforceable by those ladies, though of course the trustees doubtless had a fairly broad discretion in determining how best to apply the funds to provide for their “very moderate wants”. This sort of power to devote property to purposes is not always coupled with a duty to exercise it. Traditional trusts, as we have already seen, often included a power to maintain, educate, or advance individuals, typically out of the capital assets of the trust, at the discretion of the trustee. In such cases the only duty which bound a trustee was a duty to consider exercising such a power from time to time.

In *Re Andrew’s Trust*<sup>21</sup> money was raised by subscription for the children of the Bishop of Jerusalem. Again, the evidence as to the objects of the trust was slim, which was found in a letter by the now deceased canon who had initiated the appeal, who described the money as having been collected:

“[...] for and towards the education of Bishop Barclay’s children [and] that it was by no means intended for the exclusive use of any one of them in particular, nor for equal division, but as deemed as necessary to defray the expenses of all, and that solely in the matter of education.”<sup>22</sup>

<sup>20</sup> *Id.*, 330 and 331 (emphasis added).

<sup>21</sup> [1905] 2 Ch 48 (High Court of Justice, Chancery Division).

<sup>22</sup> *Id.*, 49.

The children's education having been provided for under their father's will, the trustees sought a declaration enabling them to distribute the fund to the children. Kekewich J decided as follows:

"Here the only specified object was the education of the children. But I deem myself entitled to construe 'education' in the broadest possible sense, and not to consider the purpose exhausted because the children have attained such ages that education in the vulgar sense is no longer necessary. Even if it be construed in the narrower sense it is, in Wood VC's language, merely the motive of the gift, and the intention must be taken to provide for the children in the manner (they all then being infants) most useful."<sup>23</sup>

The most recent case raising this issue is *Re Osoba*<sup>24</sup>. In the course of his judgment Megarry VC reviewed *Re Abbot* and *Re Andrews* and said:

"I think that you have to look at the persons intended to benefit, and be ready, if they still can benefit, to treat the stated method of benefit as merely indicating... the means of benefit which are to be in the forefront. In short, if a trust is constituted for the assistance of certain persons by certain stated means there is a sharp distinction between cases where the beneficiaries have died and cases where they are still living. If they are dead, the court is willing to hold that there is a resulting trust for the donors; for the major purpose of the trust, that of providing help and benefit for the beneficiaries, comes to an end when the beneficiaries are all dead and so are beyond earthly help, whether by the stated means or otherwise. But if the beneficiaries are still living, the major purpose of providing help and benefit for the beneficiaries can still be carried out even after the stated means have all been accomplished, and so the court will be ready to treat the standard means as being merely indicative and not restrictive."<sup>25</sup>

Whilst there is some sense in this, Megarry VC appears to take an improperly *ex post* view of the interpretation of testamentary gifts. Surely any interpretive strategy should be primarily devoted to figuring out the testator's intention from the outset, when the trustees who are to administer the trust receive the funds. It is then that they must be certain whether the trust is a gift of the whole with a mere motive or a *Re Sanderson* trust of only a part.

<sup>23</sup> *Id.*, 53.

<sup>24</sup> [1978] 1 WLR 791, [1978] 2 All ER. 1099 (High Court of Justice, Chancery Division), varied by [1979] 1 WLR 247, [1979] 2 All ER. 393 (Court of Appeal, Civil Division).

<sup>25</sup> *Id.*, 795 and 796.

This passage also raises other worries for someone trying to understand the proper characterisation of the way the purpose shapes the beneficiary's rights and the trustee's obligations. Do Megarry VC's words about the "means" in a gift of the whole, that they "are intended to be in the forefront", mean that even where the gift is of the whole, the trustees *must first* apply the money according to the motive, to defray the expenses of maintenance or education or whatever, until such time as they are no longer incurred, as when the education of the beneficiary is complete? In other words, does the gift become an absolute one only upon the "purposes" either being accomplished or no longer capable of fulfilment? If so, what happens if before the "purpose" comes to an end, i.e. before the trustees distribute the property as an absolute gift, the beneficiaries all die? Whether the gift is a gift of the whole or only a part surely cannot simply turn on the time of the beneficiaries' deaths, because that would engender a lottery whereby the remaining surplus of a large gift for the education of Albert would go to his estate if he were to die the day after graduation (the purpose being complete, the gift of the whole would now "take"), but would result to the settlor if he died the day before. Megarry VC's guidance on the construction of such gifts cannot, then, be regarded as solving the main issue at stake.

*Re Osoba*<sup>26</sup> concerned a testamentary trust of residue for the maintenance of the testator's widow and his mother, and for "the training of my daughter Abiola up to university grade". There was no other beneficiary specified to take the benefit of any surplus left after the completion of the purposes. The testator's mother had predeceased him, and by the time the case came before the court the testator's widow was dead, and Abiola had finished her university education. The question was whether the surplus funds were to be held on a partial intestacy, all of the trust purposes for the residue now being fulfilled. Megarry VC construed the instructions as to how the money should be spent as a mere indication of motive, and decided that the wife and Abiola together became entitled to the whole fund absolutely on the testator's death.

These cases are of interest to anyone interested in the interaction of purposes with trusts for three reasons. The first is simply that such trusts, which are in the sense explained above a sort of trust for a purpose, exist in the law and are valid so long as they are interpreted as "trusts in which

<sup>26</sup> Préc., note 24.

the subject matter is apportioned to beneficiaries in reference to the costs of carrying out a well-defined purpose”.

Secondly, however, if a share of the trust assets can be apportioned in this way, then it is clear that well-defined purposes may be taken into account in determining how a trustee should distribute the trust property, since such purposes indicate clearly how the subject matter may be expended. Thus these trusts raise the question: even in cases where the beneficiaries’ interests are not limited by the purpose, should the trustees nevertheless take the settlor’s purpose into account? Should they spend the money on the stated purpose first? Should, for example, the trustees have refused to give Abiola the whole trust fund until she was either educated up to university grade, or it became clear that carrying out the purpose was impossible (i.e. no university would admit her)? Perhaps surprisingly, there is no authoritative answer to this question in common law trusts doctrine. One might suggest that the courts should at least require the trustees to comply with the settlor’s directions, not so as to ultimately limit the extent of the beneficial gift, but to give effect in so far as possible to the means by which the settlor chose to give it. Relevant also here is that, in the English law of trusts, according to a principle known as the principle in *Saunders v. Vautier*<sup>27</sup>, if all the beneficiaries interested in a trust fund are of legal capacity and act in concert, they can demand the “collapse” of the trust fund, directing the trustee to pay the money to themselves in such shares as they direct; they can also together agree to proposed variations in the terms of the trust. Thus, it might be right to say that until the beneficiaries together use their *Saunders v. Vautier* rights to vary or collapse the trust, in trusts of this sort individual beneficiaries should be able to insist that the trustees comply with the settlor’s declared means of distribution in so far as it is certain. This, it is submitted, would properly limit the trustee’s discretion through the enforcement of the settlor’s intentions by the people who are appropriately entitled to do so, i.e. the beneficiaries.

Thirdly, and finally, *Re Sanderson*<sup>28</sup> trusts make a nice point of comparison with other property regimes which are enforced by the Court of Equity, such as the rules governing the administration of a person’s estate

<sup>27</sup> (1841) 4 Beav. 115, 49 E.R. 282 (Rolls Court), [1835-42] All ER. 58, Cr & Ph 240 (Court of Chancery).

<sup>28</sup> *Re Sanderson’s Trust*, préc., note 16.

on death or bankruptcy. The intestate successors or beneficiaries under a will or the bankrupt's creditors have no proprietary interest in these estates of property while they are being administered, although they do have rights to ensure they are properly administered and ultimately distributed according to the regime of rules in place. In one sense, then, the executor or administrator or trustee in bankruptcy can be thought of as holding property on "purpose trust", the eventual effect of the purpose being that the property will be distributed to individuals. By contrast with *Sanderson* trusts, however, while these estates are being administered according to their respective rules the "beneficiaries" have no *Saunders v. Vautier* rights to vary the terms of the "rules of distribution". Were English law to recognise true purpose trusts, one would presume that parties interested in the trustees carrying out such trusts would only have limited rights of enforcement of the kind that successors and creditors have<sup>29</sup>.

It is perhaps surprising, given the hesitancy with which some courts have treated the "bindingness" of purposes upon a trustee, that no such hesitancy is revealed in the case of powers to make appointments to carry out a purpose, even an abstract purpose. A power of appointment is a power to divert property away from a beneficiary or class of beneficiaries who would otherwise receive it under the terms of a trust – those who "take in default of appointment" – and expend it by applying the property to the benefit of another person or persons, or to further a purpose. As there is no obligation to exercise powers, there is no need to have a correlative right holder to enforce their exercise; moreover, those who take in default of appointment are the beneficial owners of the property until it is appointed away from them, so a power to devote trust funds for a purpose does not generate any "ownerless property". The courts have expressed their willingness to uphold powers to devote trust property to purposes. For example, in *Re Shaw*<sup>30</sup>, George Bernard Shaw had in his will attempted to settle funds on trust for the purpose of devising a 40-letter alphabet for the English language. Harman J accepted that a power to devote funds to the purpose would have been valid, though the trust was not. By legislation,

<sup>29</sup> For a discussion of the way that the English estate upon death has remarkable structural similarities with the Scottish concept of a trust as a separate patrimony, see: L. SMITH, "Scottish Trusts in the Common Law", *préc.* note 3.

<sup>30</sup> *Re Shaw*, [1957] 1 WLR 729, [1957] 1 All ER. 745 (High Court of Justice, Chancery Division), appeals were "dismissed by consent on terms agreed by the parties" (*Re Shaw*, [1958] 1 All ER. 245).

Ontario law deems that an invalid purpose trust will be treated as a power to appoint trust funds to the stated purpose<sup>31</sup>.

Those who take in default of appointment, while they can ensure that the trustee does not exercise the power improperly, cannot, however, insist that the trustee exercise the power; they would be unlikely to insist even if they could, because every such exercise will diminish the amount of property they will receive in default. Thus while a settlor can empower a trustee to spend the trust property on a purpose, there will be no one who can insist that the power be exercised<sup>32</sup>. Therefore a settlor creating a power cannot ensure that the trust property will be applied to the purpose he desires, although, obviously, if he gives the power to a trustee who is loyal to him and shares his devotion to the purpose, he may be confident that the property will be applied to it despite the absence of any legal means of enforcement.

The foregoing survey makes it clear that there is nothing in the common law of trusts which really lines up with the idea of a patrimony affected or appropriated to a purpose. Nevertheless, genuine “purposes”, in the sense of applications of the trust property in ways other than merely paying trust assets over to the beneficiaries, do clearly figure in the doctrine, but treated in such a way that they are largely regarded as peripheral. Perhaps this is unsurprising in a law of trusts in which trusts are centrally

<sup>31</sup> *Perpetuities Act*, R.S.O. 1990, c. P.9, s. 16. The provision begins:

“16.(1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the *trust* is created for an illegal purpose or a purpose contrary to public policy, the *trust* is valid so long as and to the extent that it is exercised either by the original trustee or the trustee’s successor, within a period of twenty-one years, [...]” (emphasis added).

The use of the word “trust” in the places italicised suggests something of a confusion, for the provision purports to replace the trust *duty* to apply the funds in the original instrument with a power, which the trustee has no (trust) duty to exercise. I am grateful to Lionel Smith for pointing out this troublesome aspect of the provision to me.

<sup>32</sup> For this reason, Lionel Smith argues that any settlor who tried to create a trust instrument that purported to impose a duty upon a trustee to exercise, or even from time to time consider exercising, a power to devote funds to an abstract purpose would be void for attempting to impose a duty without a correlative right of enforcement, though one suspects that it would be unusual to find a case in which the terms of the trust purported to do so. But see *supra*, note 31 for the idea that the notion of trust (meaning duty) and power are often confusingly intertwined.

regarded as “structured gifts” – dispositions of property to beneficiaries in complicated fashions – in which the role of the beneficiary as human recipient of the trust assets looms so large.