Trusts and Ownership: A Common Law Perspective

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In the trust institution introduced by the new Czech Civil Code, 'ownership' of trust 'property' is vested in no-one. What motivates this provision seems to be the view that the common law trust involves a division of ownership, but that such is prohibited in Czech law generally. The purpose of this article is to demonstrate that the idea of the common law trust involving a division of ownership is false. Indeed, English law does not even have a concept of ownership. It instead deals with rights, but even so, these rights are not split when held on trust. The question is how, if at all, these insights can help us understand the newly-introduced Czech trust. The conclusion which is reached is that when the Czech Civil Code provides that the trust property is owned by no-one, it simply means that it is not held beneficially by anyone. The property is not, as might seem at first sight, res nullius.

1. Introduction

The new Czech Civil Code introduces the concept of the trust into Czech law for the first time. Article 1448(1) provides that a trust is created by the settlor (founder, in Czech terms) entrusting 'property' to a trustee (called an 'administrator') for a 'particular purpose' (though the Czech trust is not confined to purposes but also includes people). Article 1448(3) goes on to provide:

> The rights arising from the right of ownership in the property in a trust are exercised by the trustee in his own name and on the account of the trust; however, the property in a trust is not owned by the administrator or the founder, or the person entitled to receive a performance from the trust.

This presents a puzzle, for article 1448(3) seems to provide that neither the settlor, the trustee, nor the beneficiary has 'ownership' of the trust rights, that they are, in other words, owned by no-one. To English eyes, this is odd, for it seems that, in the case of physical things like land or goods at least, they will be derelict, meaning they can be taken by others with impunity.

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The thinking behind this provision seems to be linked to the assumption prevalent among civilian lawyers that the common law trust involves a division of ownership. In Civil law systems, ownership is said to be indivisible, which makes the introduction of anything resembling the common law trust problematic. For that reason, it seems, the Czech legislator has decided to vest ownership in no-one, which apparently solves the problem. The purpose of this article is to demonstrate that the idea of the common law trust involving a division of ownership is false. Indeed, English law does not even have a concept of ownership. Instead, it deals with rights, but even then, these rights are not split when held on trust. The question is how, if at all, these insights can help us to understand the newly-introduced Czech trust.

The argument presented here is that by 'ownership', the Code seems to be talking, not about a particular kind of right, but about how rights are held. More specifically, the word 'ownership' describes the holding of rights beneficially. As will be seen, a trust is one form of non-beneficial right-holding. It is therefore inevitable that the trust involves the introduction of a form of holding which the code says is not 'ownership'. This does not, however, mean that the rights in question become derelict and available for the first taker. The common law has rules for 'ownerless property', but these do not catch rights simply because they are held on trust. In the same way, it should also not apply to 'property' subject to a Czech trust.

The article begins with a description of the common law trust, showing first that it is best understood as one of the five methods English law recognises by which rights can be held, and secondly, that no 'division' of rights occurs when they are placed on trust. It then addresses the concept of 'ownership' in English law. Although it is a word in common parlance amongst both laymen and lawyers, there is no right in English law which goes by the name 'ownership'; the only valid usage of the word is to describe the relationship between a person and a right. The paper then moves on to look at the use of the word 'ownership' in civil law, and notices an ambiguity between right and holding. Looking finally at the Czech trust, it concludes that when the Code provides that the trust 'property' has no owner, it says nothing more than that the rights are not held beneficially, something which is inevitable when rights are held on trust.

2. The common law trust

2.1 What is a common law trust?

Although it is common to give trusts names, for example, the John Smith Family Trust, and to speak of the 'trust property', as if the trust was the 'owner' of something, the common law trust is not a legal person.[1] The key to understanding the concept of the trust is to see it instead as one of the five ways in which the common law recognises that rights can be held. They are as follows:

i. Outright/beneficially/absolutely;[2]
ii. As security for the performance of an obligation;[3]
iii. As executor/administrator of a deceased's estate;
iv. As administrator of an insolvent estate; and
v. As a trustee.

So far as the holding of rights on trust is concerned, this may be for persons or for a limited number of purposes. Trusts for persons may be either fixed or discretionary. In a fixed trust, the entitlement of those who are to benefit under the trust is determined at the outset by the person setting up the trust, while in a discretionary trust the trustees have a choice amongst a class of persons, eg, the settlor's children, as to whom to distribute either or both capital and income. The point of giving the trustees this discretion is to allow them to distribute according to need or when it would be most advantageous from a fiscal perspective or for other considerations.

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[1] So far as charitable objects are concerned, they may be pursued either through a trust or through a corporation, which is of course a legal person. However, a trust corporation holds the rights beneficially, not on trust: in *Re Vernon's WT* [1972] Ch 300, 303. See also *Re ARMS (Multiple Sclerosis Research) Ltd* [1997] 1 BCLC 157; *Phillips v Royal Society for the Protection of Birds* [2012] EWHC 618. There is no objection to the setting up of a corporation to look after specific people, but that is never done.

[2] These are all synonyms.

[3] Commonly known as a mortgage.

With regard to purpose trusts, the general rule in the common law is that only charitable trusts are valid. Charitable purposes, also known as 'public' purposes, are those which benefit a sufficient cross-section of the public and are for purposes which qualify as charitable, viz, the relief of poverty, the advancement of education, the advancement of religion, the relief of the sick, and other similar purposes.[4] A trust for non-charitable purposes is, generally-speaking, void.[5] Thus, a trust to build a 'useful memorial' to the testator was stuck down in *Re Endacott*,[6] Lord Evershed MR saying:

> No principle perhaps has greater sanction or authority behind it than the general proposition that a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries.[7]

Rights can be placed on trust both *post mortem* and *inter vivos*. Any adult natural person or corporation can be a trustee, including the person creating the trust, the settlor. No formalities are required to place rights on trust, save that if a third party is to be the trustee, the settlor must use the requisite formalities to transfer the right into the hands of that person. Those rules, however, are the same as for any transfer of the right. Nor are there any registration requirements, save again those necessary to effect a transfer of the right forming the subject-matter of the trust. No mention of the trust, however, need or even can be made on the register of the right.

Where the settlor is to be the sole trustee, it is not even necessary that the right which is to form the subject-matter of the trust be assignable. It is thus possible to have a trust of non-assignable milk quota,[8] and non-assignable boxing licences.[9] Interestingly, in the latter case, an argument was made that the act of the right-holder declaring himself

[4] See the open-ended list in the Charities Act 2011, s 2.

[5] The exceptional cases are generally regarded as anomalous or wrongly decided.

[6] [1960] Ch 232.

[7] Ibid, at 246.

[8] *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177.

[9] *Don King Productions Inc v Warren* [2000] Ch 291.

a trustee offended, in substance if not in form, a term of a contract prohibiting assignment of the licence. At first instance, Lightman J rejected the argument as follows:

> A declaration of trust cannot prejudice the rights of the obligor. If the contract requires any judgment to be exercised whether by the obligor or the obligee, an assignment cannot alter who is to exercise it or how that judgment is to be exercised or vest the right to make that judgment in the court. The rule in *Saunders v Vautier* (1841) Cr & Ph 240 (which enables the sole beneficiary or beneficiaries to give directions to the trustee) only applies if the beneficiary is entitled to wind up the trust and require the trustee to assign to him the subject matter of the trust. If the trust cannot be determined because the trustee has under the contract held as a trust asset outstanding obligations and has no power to transfer the trust asset to the beneficiary or his order, the rule does not apply: see *in re Brockbank* [1948] Ch 206. Accordingly in a case where the subject matter of the trust is a non-assignable contract and there are outstanding obligations to be performed by the trustee, the beneficiary under the trust cannot interfere.[10]

The point made by Lightman J in respect of the second case he cites, *re Brockbank*,[11] is vitally important in understanding the nature of the common law trust. That was a case where the beneficiaries of a trust sought to replace the trustee because he refused to follow their directions as to how he should exercise his powers under the trust. The court held that the trustee could not be replaced; it was not for the beneficiaries to tell him what to do. Vaisey J said:

> It seems to me that the beneficiaries must choose between two alternatives: Either they must keep the trusts … on foot, in which case those trusts must continue to be executed by trustees duly appointed pursuant … to the original instrument … , and not by trustees arbitrarily selected by themselves; or they must, by mutual agreement, extinguish and put an end to the trusts ….[12]

On the facts, the beneficiaries did not want to wind up the trust, because that would have triggered a liability to tax. They therefore had to leave the trustee to get on with the job.[13]

Although judges and textbooks speak of the subject-matter of the trust as 'property', cases such as *Don King v Warren* show that it is not only property rights

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[10] Ibid, at 321.

[11] [1948] Ch 206.

[12] Ibid, at 209.

[13] Beneficiaries now have a power under section 19 of the Trusts of Land and Appointment of Trustees Act 1996 to direct the trustees to remove and/or replace trustees in certain circumstances.

which can be held on trust; personal rights too can form the subject-matter of a trust. But what is clear is that things, such as land and goods, cannot be held on trust. A trustee may hold a fee simple or a lease of land on trust, but, like all other people, he cannot hold the land itself.

The vast majority of trusts arise because a right-holder declares that rights are to be henceforth held on trust and transfers those rights to the intended trustee or trustees. Alternatively, as we have seen, he may make himself the trustee. Occasionally, however, trusts are said to arise 'by operation of law', by which is meant that they arise without any expression of intent by a right-holder to create them. Such trusts are known as 'constructive trusts'. An example is *Chase Manhattan v Israel-British Bank*,[14] where US$2 million was paid by mistake by one bank to another. Goulding J held that the receiving bank held the money on trust for the paying bank from the moment of receipt. Another is *A-G for Hong Kong v Reid*,[15] where a corrupt public prosecutor was held by the Privy Council to hold on trust for the state monies received as bribes to suppress prosecutions. A third is *Lysaght v Edwards*,[16] where it was held that a contract for the sale of a title to land turns the seller into a trustee for his purchaser of the right contracted to be sold. Each of these cases is contentious, and in fact *Chase Manhattan* was said to have been wrongly decided by the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[17] Moreover, there is an argument that such trusts are not really trusts at all but merely situations in which courts will make orders, *inter alia*, for the payment of money or the conveyance of specific rights.[18] This notion has it that constructive trusts are not true trusts but merely remedies, akin to awards of damages or specific performance.

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[14] [1981] Ch 105.

[15] [1994] 1 AC 324, endorsed by the United Kingdom Supreme Court in *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45.

[16] (1875-6) LR 2 Ch D 499. See generally W SWADLING, 'The Vendor-Purchaser Constructive Trust' in S DEGELING & J EDELMAN (edd), *Equity in Commercial Law* (Sydney: Thomson 2006).

[17] [1996] AC 669, 714-5 (Lord Browne-Wilkinson).

[18] W SWADLING, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399-433. The other orders are for a lien and to be subrogated to the rights of a creditor.

There are two final points to note. The first is that the trust is the product of the common law jurisdiction called Equity. A number of common law doctrines originate here, including that of undue influence, the availability of specific performance of contracts, orders for the specific delivery up of chattels wrongfully detained, and so on. The fact that English law knows two jurisdictions is a product of history, with the King's courts at one point in time being forced to refrain from developing the law. The pressure this caused resulted in another royal jurisdiction springing up, Equity. The second point to note is that a trust is not a species of gift. Thus, the ways in which gifts are made is completely different to how trusts are created. So, while it is possible to create a trust by mere words alone (in the case of a self-declaration of trust), gifts cannot be made in such a fashion.[19]

2.2 Consequences which flow from rights being held on trust

The main consequences which flow from a right being held on trust are as follows:

1. The trustee is accountable to the beneficiaries for the exercise of the rights he holds. This accountability is not dependent on the commission of a breach of trust by the trustee; he is accountable merely by reason of his holding rights on trust.[20] That accountability may lead to a court ordering the trustee to pay money should the rights he holds be exercised in breach of trust and a loss, or gain to the trustee, ensue;

[19] *Cochrane v Moore* (1890) 25 QBD 57.

[20] 'It is the first duty of an accounting party, whether an agent, a trustee, a receiver, or an executor, for … they all stand in the same situation, to be constantly ready with his accounts: *Pearse v Green* (1819) 1 Jac & W 135, 140 (Sir Thomas Plumer MR); *Libertarian Investments Ltd v Hall* [2014] 1 HKC 368, [2013] HKCFA 93, [167]-[168] (Lord Millett NPJ).

2. Rights held on trust are not available to satisfy the debts of the trustee. They are not available for execution; nor do they pass to the trustee's insolvency official should the trustee become bankrupt;[21]

3. If rights are dissipated in breach of trust, their recipient is generally liable to be ordered by the court to return them to the trustee;[22]

4. An adult beneficiary of a fixed trust can in certain circumstances obtain an order from the court that the trustees convey the trust right(s) held on his behalf to himself or to others. He can, in other words, obtain an order for the execution of the trust in his own favour or in favour of others. The leading case is ***Saunders v Vautier***,[23] mentioned above in the quote from ***Don King Productions Inc v Warren***,[24] where the settlor directed the trustees to hold income-generating rights and to accumulate the income therefrom for a young man until he reached the age of 25, whereupon the rights should be conveyed to the young man. When the beneficiary reached 21, the then age of majority, he successfully petitioned the court for an order that the trustees transfer the rights to him. Lord Langdale MR said:

> where a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest in the legacy, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge;[25]

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[21] Insolvency Act 1986, s 283(3)(a), exempting from a bankrupt's estate, inter alia, 'property held by the bankrupt on trust for any other person'.

[22] The exception is where the recipient is a bona fide purchaser for value of a right recognised by the common law (not equity) without notice, actual, constructive or imputed, of the disposition in breach of trust: *Pilcher v Rawlins* (1872) LR 7 Ch 259.

[23] (1841) 4 Beav 115, aff'd (1841) Cr & Ph 240.

[24] Above, text to n 00.

[25] (1841) 4 Beav 115, 116. Interestingly, many jurisdictions in the United States reject this rule, eg, as in *Claflin v Claflin* 149 Mass 19 (1889), as contrary to the wishes of the settlor. For a survey, P MATTHEWS, 'The Comparative Importance of the Rule in *Saunders v Vautier* (2006) 122 LQR 266.

5. Likewise, the beneficiaries of a discretionary trust can, if all agree and all are *sui juris*, petition the court for an order that the trustee(s) convey the trust rights to them or to others.[26] This, however, will not always be possible, for in a discretionary trust with a large class, it will often be impossible to obtain the agreement of all. Indeed, since the decision of the House of Lords in *McPhail v Doulton*,[27] where a discretionary trust for employees and ex-employees of a particular company and their relatives and dependents was held not to be void simply on the ground that it was impossible for the trustees to draw up a complete list of objects, it will be impossible in such cases for the trust to be wound up;

6. The rights of a beneficiary of a fixed trust are available to satisfy the debts of the beneficiary;

7. The rights of a beneficiary of a fixed trust are assignable.[28] There is no need for the beneficiary to obtain the consent of the trustee;

8. Third parties are in limited situations liable to be ordered by a court to pay money for interference with the due administration of the trust. Such liability can be incurred in one of three ways: by inducing the trustee to commit a breach of trust;[29] by assisting the trustee to commit a breach of trust;[30] and by receiving rights dissipated in breach of trust.[31] The exact state of mind necessary for a defendant to incur such liabilities is still a matter of debate. The better view is

[26] *Re Smith* [1928] Ch 915.

[27] [1971] AC 424.

[28] *Hopkins v Hopkins* (1739) West, t Harw 606, 619. The assignment must be made by signed writing: s 53(1)(c) of the Law of Property Act 1925, re-enacting s 9 of the Statute of Frauds 1677.

[29] *Fyler v Fyler* (1841) 3 Beav 550; *A-G v Corporation of Leicester* (1844) 7 Beav 176; *Alleyne v Darcy* (1854) 4 Ir Ch App 199; *Eaves v Hickson* (1861) 30 Beav 136; *Re Midgely* [1893] 3 Ch 282.

[30] *Barnes v Addy* (1874) LR 9 Ch App 244; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Twinsectra v Yardley* [2002] 2 AC 164; *Barlow Clowes v Eurotrust* [2006] 1 WLR 1476; *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492.

[31] *BCCI v Akindele* [2001] Ch 437.

that it that they all require the defendant to have actual (as opposed to constructive) knowledge of the relevant facts;

9. Beneficiaries can 'trace' into unauthorised substitutes. If a trustee in breach of trust exchanges trust rights for other rights, the beneficiaries may elect to make those new rights trust rights. For example, in one very well-known case, *Foskett v McKeown*,[32] a trustee, in breach of trust, took £40,000 which he held on trust and purchased an insurance policy on his own life, made payable to his wife and children. He then shot and killed himself, and the policy paid out £1 million to his family. The trust beneficiaries were able to say that the proceeds of the policy were held for them on trust by the wife and children.

3. Ownership in English law

We now turn to the concept of ownership in English law. Ownership is a slippery word. So far as a common lawyer is concerned, it has two possible senses:

i. as describing a type of right – 'I have a right of ownership over that land, that chair, those shares;'
ii. as describing a relationship between person and right – 'I own a lease of that land; I own those shares.'

In other words, there is ownership as right and ownership as relation. As will be seen, English law only recognises the latter.

3.1 Ownership as right

Despite colloquial usage, the first sense, ownership as right, does not exist in English law. Starting with land law, English law, as with all developed systems of law, knows a

[32] [2001] 1 AC 102.

numerus clausus of property rights with respect to land.[33] The principal ones in that list are the fee simple estate (a right to exclusive possession of land forever), the lease (a right to exclusive possession of land for a limited period, eg, 99 years), easements, profits, restrictive covenants, equities of redemption, and options to purchase.[34] Ownership is not in that list. Lawyers do not convey ownership, only fees simple and leases, and an application to register a right called 'ownership' in the Land Registry would be rejected.

Moreover, any notion of 'ownership' is inconsistent with the fundamental English law principle of relativity of title. Differently to Civilian systems, no distinction is made in English law between ownership and possession. In English law, a person who takes possession of land acquires by that act alone a fee simple title (entitlement) to that land, which binds all save those with superior rights to possession, eg, the person who has been dispossessed. Of course, there will always be someone with the best title, one that is superior to all. But even then, English law does not attach the label 'ownership' to his right, for two reasons. First, its content is identical to those other fee simple titles; the only difference is the number of people it binds. Second, it is never important to identify the person with the best fee simple, for no benefits attach to having such status. There is, for example, no *vindicatio* in English law, no remedy available to an 'owner' which is unavailable to anyone else. The court will grant a dispossessed squatter an order for possession just as readily as it grants it to the person he originally dispossessed. English law consequently never asks whether anyone has 'ownership' because there is no point in it doing so. There is no need because nothing turns on that question.

The position is no different with relation to goods, by which is meant corporeal moveables, or chattels. As with land, a person acquires a right to the exclusive possession forever of a chattel by reducing it into his possession. We see this in the seminal case of *Armory v Delamirie*,[35] where a chimney-sweeper's boy found a ring, which he took to a

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[33] S VAN ERP and B AKKERMANS (eds), *Cases, Materials and Text on Property Law* (Oxford: Hart 2013), ch 3 (SWADLING & AKKERMANS).

[34] Full discussion in A BURROWS (ed), *English Private Law* (Oxford: Oxford University Press 3rd ed, 2013), ch 4 (SWADLING).

[35] (1721) 1 Str 505.

jeweller to be valued. The jeweller removed the stone and returned the empty socket to the boy, refusing to hand over the jewel. The jeweller was successfully sued by the boy in delict, more specifically, the tort of trover, nowadays known as the tort of conversion. Pratt CJ said that though the boy 'did not by such finding acquire an absolute property', he nevertheless had 'such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.'[36] At trial, the defendant refused to produce the jewel, which made valuation difficult. The report states:

> As to the value of the jewel several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the Chief Justice directed the jury, that unless the defendant did produce the jewel, and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages: which they accordingly did.[37]

It should be stressed that a money award in favour of a finder of goods is not an inferior remedy. In English law, there is no right in any person to obtain the delivery up of chattels taken from him without consent.[38] There is no special remedy for people higher up the title chain, no *vindicatio*. Because of this, there is no need to prove anything more than the fact of possession to be entitled to a remedy, which, as with land, once again makes talk of 'ownership' irrelevant.

We have so far been talking about rights which respect to corporeal things, either land or chattels. We have seen that there is no notion of 'ownership as right in respect of either. There is likewise no notion of ownership as right when we move to rights which have no physical thing as their focus, rights such as shares, debts, copyrights, patents, and trademarks. Of course, since we are not talking about rights with respect to physical things, there is no possibility of relative entitlements. But there is still no 'ownership as right' here, for the simple reason that the rights a shareholder has are different to those of

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[36] Ibid.

[37] Ibid.

[38] It is for this reason that the law of property rights in respect of chattels is called 'Personal Property', as opposed to the 'Real Property' of land law, where the courts will grant orders for possession. Orders for delivery up are available in Equity, but only for unique goods. By contrast, an order for possession issues as of course where land is concerned.

a copyright-holder, and different again to a creditor. Using 'ownership' to describe a number of rights with different content would be nonsensical.

3.2 Ownership as relation

The only sense in which the word 'ownership' can properly be used in English law is to describe the relationship between a person and a right. The word 'right' is important here. It cannot be used to describe the relationship between a person and a corporeal thing, as such usage could not accommodate the various property rights which can exist in relation to physical things. So, for example, it is not possible to say 'I own that land', because it would leave no room for describing the type of right (fee simple, lease, easement, profit, and so) the person in question has with respect to the land. It is therefore only possible to speak of ownership of a right.

This, indeed, is how the word 'ownership' is used in English law. Thus, an English lawyer can properly speak of ownership of a fee simple or of a lease of land. Significantly, the courts are happy to describe trustees in that light. So, for example, James LJ in *Smith v Anderson* defined a trustee as:

> a man who is the owner of the property and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*.[39]

The most common usage of the language of ownership in English law occurs in the context of two or more people holding the same right: co-ownership.[40] It is very common, for example, to speak of co-ownership of a fee simple or a lease; likewise with debts, shares and titles to goods. Moreover, co-ownership will be necessary where there are two or more trustees, which is the case in the vast majority of trusts. Like James LJ in *Smith v*

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[39] (1880) 15 ChD 247, 275. 'Property' is here used to describe the right held on trust, rather than any physical thing to which it might relate.

[40] There are two principal forms of co-ownership in English law: joint tenancy and tenancy in common. The main difference between the two is that only in a joint tenancy is there *a jus accressendi*, a right of survivorship; this makes it the ideal form of co-ownership for trustees.

Anderson, therefore, an English lawyer would have no problem saying in the case of multiple trustees that they hold the right in question as co-owners.

4. The common law trust and the division of ownership

Having noted the basics of trusts and ownership in English law, we now turn to examine their interrelationship, more particularly, the notion that creating a trust involves the splitting of 'ownership'.

As already seen, a view common amongst civilians is that the creation of a trust involves a division of ownership, that the trustee has one part of ownership, the beneficiary another. This is then seen as an impediment to the adoption of the trust in their own jurisdictions, where such division is forbidden. 'Ownership' in civilian systems is often said to be 'indivisible'.[41] Thus, Bolgar, writing over fifty years ago, said that the 'basic obstacle to acceptance of the trust [in civilian legal systems] is the concept of autonomous and indivisible ownership'.[42]

The idea that a trust involves a splitting of ownership is also, it must be admitted, a view common amongst English lawyers. It is often said that a trust allows a settlor to 'parcel out the incidents of ownership', so that in the case, for example, of a transfer of shares to T1 and T2 on trust for A for life, remainder to B, such transfer gives the right to income to A, and the right to the shares after A's death to B. In the same vein, a leading practitioner book states:

> The effect of a trust is to divide the incidents of the ownership of the property between the trustee and the beneficiary. … The division in the incidents of ownership is explained as a split in the legal and equitable title to the property.[43]

Likewise, in a recently published student textbook, the author asserts:

> The crucial feature of the trust is that property is held by one person for the benefit of another. This is recognised through the *division* of property rights. One person, known as the 'trustee', holds the legal title to the property. As far as the Common Law is concerned, that person is the absolute owner of the property. But Equity can see that the legal owner holds the property for the

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[41] S VAN ERP & B AKKERMANS, above, n 31, pp 225-6.

[42] V BOLGAR, 'Why no Trusts in the Civil Law?' (1953) 2 Am Jo of Comp Law 204, 210.

[43] J McGHEE (ed), *Snell's Equity* (London: Sweet & Maxwell 32nd ed 2010), para 21-002.

> benefit of somebody else, the 'beneficiary'. The beneficiary therefore has an equitable interest in the property.[44]

Later in the same book, the author states: 'It is the fact that legal and equitable title to property are split that is the essence of the trust …'.[45]

It is not only academic commentators who hold such views; there are many similar comments to be found in the case-law. To take one example amongst many, Lord Diplock in *Ayerst v C & K Construction Ltd* said:

> Upon the creation of a trust ... the full ownership in the trust property was split into two constituent elements, which became vested in different persons: the 'legal ownership' in the trustee, what came to be called the 'beneficial ownership' in the cestui que trust.[46]

If these views are correct, then it would seem impossible to have a trust without splitting ownership. For a number of reasons, however, they are false.

4.1 Charitable trusts have no beneficiaries

The first way of demonstrating the falsity of the notion that a trust involves a split in ownership is to consider the position of charitable trusts, which have no beneficiaries. Take, for example, a trust to feed the poor of London, which is undoubtedly charitable. Though natural persons benefit (a trust will not qualify as charitable unless such persons benefit),[47] it does not follow that the poor of London are the beneficiaries of the trust. They do not, for example, have any rights of enforcement, which are vested in the Attorney-General, not as beneficiary, but on behalf of the Crown as *parens patriae*.[48] Nor

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[44] G VIRGO, *The Principles of Equity and Trusts* (Oxford: Oxford University Press 2nd ed 2016), para 1.4.7 (my emphasis).

[45] Ibid, at para 3.2.

[46] [1976] AC 167, 177. See also *Hardoon v Belilios* [1901] AC 118, 123 (Lord Lindley): 'All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant. This might be proved in many ways. The mode of proof is quite immaterial. Being proved, no matter how, the relation of trustee and cestui que trust was thereby established.'

[47] As Lloyd LJ said in *Helena Partnerships Ltd (formerly Helena Housing Ltd) v The Commissioners for Her Majesty's Revenue and Customs* [2012] EWCA Civ 569, [75]: 'Most charitable purposes provide particular benefits to individuals, whether to the poor person in need of support, the student in need of education, or the patient in need of treatment, to take a few obvious examples. That is the way in which the public benefit is provided.'

[48] 'It is the province of the Crown as *parens patriae* to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of

do the poor of London have the right under the rule in *Saunders v Vautier* to collapse the trust.[49] Indeed, they have no rights whatever with regard to the trust.

The point is illustrated by *A-G v Cocke*,[50] where a claim was brought for an account by the Attorney-General against the trustees of a charitable trust. The claim was brought 25 years after the trust was created, and the trustees argued that the action was time-barred by section 21(3) of the Limitation Act 1980, which provides that 'an action *by a beneficiary* to recover trust property or in respect of any breach of trust ... shall not be brought after the expiration of six years from the date on which the right of action accrued.'[51] Although the section clearly did not apply because no breach was alleged, Harman J also held it was inapplicable because the Attorney-General was not a beneficiary of the trust. Nor did he sue on behalf of those who did benefit, for they were not beneficiaries either. There are no 'beneficiaries' of a charitable trust. Harman J said:

> [Counsel for the Attorney-General] illustrates it by instancing a public charitable trust, for example to provide for the display of artistic works … and says, accurately, that is undoubtedly a charitable trust … . He asks rhetorically 'Who then are the beneficiaries of it?' The only answer can be 'the public at large.' In my judgment there can be no other answer, if the word 'beneficiaries' has any proper meaning. But that would mean that I, as a member of the public, am an interested beneficiary and plainly ought not to adjudicate upon the claim. To state the matter in that way to my mind shows up as a reductio ad absurdum the nonsense of alleging that there is any beneficiary in any meaningful sense of that word under a public charitable trust of this nature.[52]

If trusts really involved a split between legal and equitable ownership, then charitable trusts could not exist, for there would be no-one to hold the so-called 'beneficial interest'. Yet they have long been recognised in English law.

4.2 Beneficiary does not have equitable version of trustee's right

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protecting charities and affording advice and assistance to the court in the administration of charitable trusts': *Wallis v. Solicitor-General for New Zealand* [1903] AC 173, 181-182, *per* Lord Macnaghten.

[49] (1841) 4 Beav 115.

[50] [1984] Ch 414.

[51] Emphasis supplied.

[52] [1988] Ch 414, 419. By s 114 of the Charities Act 2011, the Charity Commission is given the same power to bring proceedings to police the affairs of charitable trustees and corporations as the Attorney-General. By s 115, certain individuals can also bring 'charity proceedings'.

Even in a trust for persons, it is not accurate to say that the 'legal' interest is in the trustee and the 'equitable' interest in the beneficiary. For a start, that would preclude a trust of an equitable right. Yet such trusts are commonplace, especially in the area of secured finance. Moreover, it is not the case that the beneficiary has an equitable version of the trustee's right, for that would mean that English law was in a perpetual state of conflict. Speaking of the rule to be found in the Judicature Act 1873, that in the case of conflicts between law and equity, the rules of equity are to prevail, Maitland said of a trust of a title to land:

> Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here. Had there been a conflict here [section 25] of the Judicature Act [1873] would have abolished the whole law of trusts. Common law says that A is the owner, equity says that B is the owner, but equity is to prevail, therefore B is the owner and A has no right or duty of any sort or kind in or about the land. Of course the Judicature Act has not acted in this way; it has left the law of trusts just where it stood, because it found no conflict, no variance even, between the rules of the common law and the rules of equity.[53]

In truth, the rights of the beneficiary are of a different order altogether than the rights held by the trustee. As we have seen, the rights of the beneficiary are to an account of the exercise of the rights of the trustee, and not some attenuated form of the rights themselves. This is made clear by James LJ in *Smith v Anderson*, in the passage cited above, where he speaks of the trustee as owner of the trust right, subject to an obligation to account to the beneficiaries of the trust.[54]

The point is neatly illustrated by *Schalit v Joseph Nadler*,[55] where a lease of land was vested in trustees on trust for a beneficiary. The beneficiary sought to exercise the remedy of distraint which was available to the trustees, as holders of the lease, for non-payment of rent by the tenant.[56] The court held that the beneficiary could not do so:

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[53] F W MAITLAND, *Equity: A Course of Lectures* (Cambridge: Cambridge University Press 1909), p 17. When Maitland speaks of the trustee being the owner of the 'land', he of course means a right with respect to that land, such as a fee simple or a lease.

[54] (1880) 15 ChD 247, 275.

[55] [1933] 2 KB 79.

[56] The landlord's right of distraint was abolished with effect from 6th April 2014 by Part 3 of the Tribunals Courts and Enforcement Act 2007. However, a statutory scheme (Commercial Rent Arrears Recovery) was immediately enacted, though only for commercial premises.

> The right of the cestui que trust whose trustee has demised property subject to the trust is, not to the rent, but to an account from the trustee of the profits received from the demise. ... The cestui que trust has no right to demand that the actual bank-notes received by the trustee shall be handed over to him or that a cheque for rent drawn to the trustee shall be indorsed over. What he can require is that the trustee shall account to him, after taking credit for any outgoings or other payments properly chargeable, for the profits received from the trust property.[57]

Viscount Sumner spoke in the same terms in the earlier case of *Baker (Inspector of Taxes) v Archer Shee*:

> The trustee has the full … property in the whole of the trust fund and the beneficiary has not. … It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of [the court] to enforce the trust and to compel the trustee to discharge it.[58]

We see this thinking at work in the decision of the Court of Appeal in *MCC Proceeds v Lehman Bros*,[59] where bearer shares were held on trust for the claimant. As shareholders, the trustees had a right to the exclusive possession forever of the share certificates. In breach of trust, they pledged the shares to the defendant as security for a loan. They did so by handing the share certificates to the defendant. The claimant beneficiary brought an action against the defendant for conversion of the share certificates, a tort committed by those who interfere with another's right to the exclusive possession of tangible moveables. The claim was rejected by the Court of Appeal. It was the trustee who had a right to the exclusive possession of the share certificates, not the claimant beneficiary, who could not therefore maintain conversion.[60] It is for the same reason that a beneficiary cannot sue a thief of the subject-matter of rights held on trust;

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[57] [1933] 2 KB 79, 83 (Acton and Goddard JJ). Note that this has nothing to do with the distinction between law and equity, but instead with the fact that the right to rent is vested in the trustee, not the beneficiary, with the result that, *viz a viz* the beneficiary, no money is due. Thus, even if there was a 'fusion' of law and equity, the result in this case would have been no different. Another decision in the same vein in *Atlasview Ltd v Brightview Ltd* [2004] 2 BCLC 191, where beneficiaries of trust of shares wanted to bring an unfair prejudice action under section 459 of the Companies Act 1985. Such an action was only available to members of a company. The action was dismissed on the ground, inter alia, that the claimants were not members.

[58] [1927] AC 844, 850.

[59] [1998] 4 All ER 675.

[60] The reason they did not bring a claim against the defendant in respect of their own right was that it was liable to be defeated by a plea of bona fide purchase for value without notice. No such defence, however, would have applied on the facts to the right to exclusive possession at law. The defendants, however, had not interfered with that particular right; indeed, they were transferees of it.

that is a job for the trustee, though in certain circumstances the trustee must lend his name to the beneficiary should he refuse to sue.[61]

4.3 No division of rights

A third reason why Lord Diplock was wrong in what he said in *Ayerst v C & K Construction Ltd*[62] is that the statement assumes, in the case of a self-declaration of trust, that the right previously held by the settler outright is split in two when he declares that he holds it on trust for another or for a purpose. However, when one examines that proposition, and asks what rights the settlor no longer has in his new capacity of trustee, the answer is, none. Suppose a self-declaration of trust by a holder of company shares. Prior to the declaration, the settlor had a right to vote in company meetings and a right to receive dividends should a dividend be declared. After the declaration of trust, he still has those rights. Of course, he must now *exercise* those rights with the interests of the beneficiary or purpose in mind, but that is a different thing altogether. Another way of looking at this is to ask what rights the beneficiary/enforcer of the purpose has. He has the right to call the trustee to account for his exercise of the rights of a shareholder. But that is a new right, not one that existed before. Prior to the declaration of trust, the settlor had no right to drag himself before a court to account for what he was doing with the shares. The beneficiary's right cannot therefore be a product of any *division* of rights.

We see the correct analysis of this matter in a number of Australian decisions, which hold that the rights of the settlor/trustee remain the same throughout, and that the beneficiary/enforcer is given *new* rights to hold the trustee to account for his exercise of those rights. The best expression of this view is to be found in the judgment of McLelland J in *re Transphere Pty Ltd*, who said:

> [There is imprecision in the notion] that absolute ownership of property can properly be divided up into a legal estate and an equitable estate. An absolute owner holds only the legal estate, with all the rights and incidents that attach to that estate. Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations

[61] These situations are limited. They are described in *Vandepitte v Preferred Accident Insurance Corpn of New York* [1933] AC 20. For full discussion, see L TUCKER, N LE POIDEVIN QC & J BRIGHTWELL, *Lewin on Trusts* (London: Sweet & Maxwell 19th ed 2014), paras 43-01 – 43-016.

[62] [1976] AC 167, 177. The passage is reproduced above, text to n 00.

> which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate.[63]

We are not, in other words, dealing with a zero-sum game, where the total number of rights both before and after the declaration remains the same, as seems to be the view of Lord Diplock in *Ayerst*. The better view is that the rights of the beneficiary/enforcer are, as McLelland J said in *re Transphere*, 'engrafted on' to the right held by the trustee. This is not a division of rights. The trustee has all the rights the settler had before the trust was created. The only difference is that someone else now has the right to compel him to use those rights in a particular way. But this right is new; it does not come from any division of pre-existing rights.

5. Ownership in civil law systems

We now turn to the question of ownership in the civil law, which immediately presents difficulties as there is, not surprisingly, no uniform view on the subject.[64]

The first problem concerns its relationship with another term, 'property'. It will be recalled that article 1448(1) of the Czech Civil Code provides that 'a trust is created by setting aside *property* owned by the founder'. 'Property' is also a difficult word. Sometimes it means 'thing', as in, 'that land or that chair is my property'; at other times, it describes a particular kind of 'right', as in, 'my right is a property right, not a personal right'. As far as the law of trusts is concerned, only the latter usage is possible, for it is impossible to hold physical things on trust: only rights can form the subject-matter of a trust. But even when used in this second sense of type of right, 'property' is still a difficult word, because its use in the code would seem to exclude personal rights from forming the subject-matter of a trust. Yet it is undoubtedly the case in the common law, and this would also seem to be the intention of the drafters of the new Czech Civil Code, that personal rights, for example, debts and shares, are able to form the subject-matter of

[63] (1986) 5 NSWLR 309, 311.

[64] See the very helpful discussion in G GRETTON, 'Ownership and its Objects' [2007] RabelsZ 802.

a trust. In this sense, therefore, the word 'property' in the Code must be read as synonymous with 'right'.

As to ownership itself, like common lawyers, civilians seem to use the word in a number of different ways, sometimes to describe a particular kind of right with respect to a physical thing, such as land or goods, sometimes to express the relationship between a person and a right, as in saying that someone has ownership of, for example, shares. So far as the first meaning is concerned, ownership as right as opposed to ownership as relation, it generally means the right to use the thing, to take its fruits, and to destroy it (*usus*, *fructus*, and *abusus*).[65] This usage makes no sense, however, when we move beyond physical things, to rights such as shares or debts or even intellectual property, for it is impossible to 'use' a share or a debt or a copyright. Moreover, as noted above in respect of English law, the content of the rights of a shareholder are radically different from those of a copyright-holder, which are in turn different from those of the holder of a trademark. It is logically unsound, therefore, to use one word, 'ownership', to describe these radically different rights.

As was seen above, the better common law usage of the word 'ownership' is as describing the relationship between a person and a right. Might this also be how it is used in civil law? One indication that this is so could be said to come from the idea that 'ownership' is indivisible.[66] It might be said that we cannot be here speaking of a right itself rather than the holding of a right, for there are many examples of a division of a 'right' of ownership, scil the *usufruct*, servitudes, and *emphyteusis*, which legal systems such as French law permit. However, orthodoxy has it that such things are not 'ownership', but *iura in re aliena*, rights in the property of another. For a common lawyer at least, this distinction is hard to understand, since such rights do involve a parcelling out of *usus*, *fructus*, and *abusus*, ie, a division of ownership. What this does seem to demonstrate, however, is that some division of ownership is possible, so long only as it

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[65] S VAN ERP & B AKKERMANS, above n 31, pp 213-239.

[66] This is a post-revolutionary French notion, but also seems to be present in the laws of Quebec, and it is the latter which served as the model for the trust imported into the Czech Republic.

does not offend the reason behind the rule, which, in the case of French law, was the prohibition of feudalism. The question then must be whether the institution of the trust is on the same side of the line as the usufruct, and so not seen as infringing the reason for the rule against the division of ownership.

To that end, it is useful to understand something of the history of the common law trust. The common law system of land law was, and, to a certain extent, still is, a feudal system. Land was held of a lord, who in turn held of another lord, and so on up the feudal ladder to the ultimate feudal lord, the king. In that system, it was not possible to make wills of land; the rule instead was primogeniture. Moreover, on the eldest son taking the land, feudal dues were payable to the immediate feudal superior. In addition, the provision of dower and curtesy was obligatory for widows and widowers of deceased title-holder. Finally, feudalism entailed the loss of land for treason, commonplace in a system where disputes as to who should be king were rife. However, all these adverse effects of feudalism could be avoided by the simple expedient of the title-holder conveying his title to the land to trustees during his lifetime to hold it on trust for himself. Now that the title was vested in others, his death or act of treason could not trigger any adverse consequences. The title was, as it were, insulated by being vested in others.

Thus, even if the common law trust is seen as involving a division of ownership, which, as explained above, it does not, it would nevertheless seem to fall on the right side of the line in the sense that it is not a device tending towards feudalism. Indeed, as the lesson from English legal history shows, it is the very opposite. Of course, these problems disappear once we see ownership not as a right but as a relation between a person and a right. It is certainly the case that such usage also appears generally in civil law systems such as French law. It is common, for example, to speak of a person having 'ownership' of shares or patents or debts.[67] Indeed, this usage, ownership as relation, is probably the best way to understand the use of the language of ownership in this part of the Czech Civil Code.

[67] S VAN ERP & B AKKERMANS, above n 31, pp 365-415

6. The Czech Trust

It is in this sense of expressing the relationship between a person and a right that the word 'ownership' would seem to be being used in the Czech civil code. Although no-one has 'ownership' of trust 'property' according to article 1448(3), the 'property' is nevertheless 'entrusted' to the trustee. On the assumption that 'entrust' is not a synonym for 'bailed', which would confine trusts to corporeal moveables, 'entrusted' must mean that the rights which form the subject-matter of the trust are vested in the trustee, ie, held by him. Nor would it seem that the trustee has merely a power with respect to the rights. Rights must be vested in someone – they cannot exist in the air. Indeed, this is what seems to happen in the Quebec trust, on which the Czech trust seems to be modelled, though it should be noted that in that system the 'property' first forms part of a separate 'patrimony', and it is the patrimony which is in turn held by the trustee.[68]

What the Czech Civil Code seems to be saying is that though the rights which form the subject-matter of the trust are held by the trustee, they are not 'owned' by him. This arguably shows that the word 'ownership' is here describing one way in which rights can be held and that the code is now recognising another, namely, 'on trust'. So, when article 1448(3) says the trustee does not 'own' the rights, it does not deny that they are vested in him, merely that he cannot do with them as he wishes. In other words, all article 1448(3) is saying is that the trustee does not hold the rights beneficially. In this sense, therefore, the provision is not as strange as it might at first sight seem. To say that the trustee does not own the trust rights is now merely a statement of the obvious, that the holding by a trustee is a non-beneficial holding. The code is not saying that the rights are vested in no-one, simply that they are not held beneficially by any of the settlor, trustee, or beneficiary. They are, however, vested in the trustee. But they are not held by someone who is their owner because an owner has *usus*, *fructus*, and *abusus* and a trustee has none of these. If a trustee did any of these things with the trust right, he would be liable in an action for breach of trust.

[68] Quebec Civil Code, art 1260.

What of the notion that the trust 'property' is derelict? Concern has been expressed about the Quebec trust that, since the 'property' there also has no 'owner', it is derelict, and can therefore be appropriated by anyone. Thus, Waters writes: 'Some person must own the trust property, because unowned property is subject to appropriation by occupation,'[69] citing articles 935-938 of the Quebec Civil Code as authority. However, what Waters fails to notice is that these provision relate specifically to 'things', with article 935 providing that 'A movable without an owner belongs to the person who appropriates it for himself by occupation.'

What the Quebec Civil Code does *not* talk about is 'property' without an owner. So, article 935 clearly does not apply to shares, debts, copyrights, and so on. The word 'owner' in this context would therefore seem to refer to a right, rather than a way of holding a right. A thing with no owner, therefore, is a thing to which no person has any rights. But in the case of trusts, that right is in existence. It is vested in the trustee, albeit not beneficially. There is no thing, therefore, which is derelict, no thing that any other person can take with impunity. Should a third party take a corporeal thing subject to a trust, the trustee could undoubtedly vindicate against such person. There is no possibility, therefore, of it being derelict.

In this regard, it is notable that English law also has a doctrine of 'ownerless goods', that of *bona vacantia*. In England, 'things' with no 'owner', by which is meant physical things over which no-one holds a title, become the 'property' of the Crown. This doctrine, however, has never applied generally to rights with respect to things held on trust. As the quote from James LJ in *Smith v Anderson* (above)[70] demonstrates, the trustee is the 'owner' of the rights with respect to the thing, in the sense that the rights are vested in him. Since the rights are vested in someone, the thing the subject-matter of the rights is not derelict. The same thinking should be applied to the Quebec and Czech trusts. In both systems, the trustee also holds the relevant rights. The rights are not

[69] D WATERS, M GILLEN & L SMITH, *Waters' Law of Trusts in Canada* (Toronto: Thomson 4th ed 2013), p 0000.

[70] Text to n 00.

'owned', where 'owned' means 'held beneficially', but they are in existence nonetheless. The thing subject to those rights is therefore not derelict.

Finally, what is the effect of the insolvency of the trustee? We have already seen how in English law rights held by a trustee do not vest in his bankruptcy official should he become insolvent. For that reason, such rights are not available to the liquidator to pay his debts. Why is this so? Waters, in his chapter on the Quebec trusts, says the common law 'makes the trustee the owner, and at the same time gives the beneficiary what amounts to a right of ownership, which protects the latter against the bankruptcy of the former'.[71] This is obviously different to the Czech trust, where no-one has 'ownership', including the beneficiary. But it is an inaccurate statement of English law. As we have seen, the beneficiary of a trust in English law has no rights of ownership *viz a viz* the trust rights. If they did, purpose trusts could not exist, for, as was seen above, such trusts have no beneficiaries at all.[72]

The true reason why rights held by the trustee are not available in his insolvency is that insolvency is a statutory regime and the legislature has exempted rights held on trust from being available to satisfy the debts of an insolvent trustee.[73] We see this in the eighteenth century decision of *Scott v Surman*,[74] where Willes CJ said:

> Nothing is vested in the assignees by any of the subsequent statutes but what the commissioners had a power so to dispose of. The words of the Statute of the 13 Eliz. are 'The commissioners shall have power and authority to sell and dispose of such lands which the bankrupt had in his own right, and for such use and interest right or title as such bankrupt had in the same, and his or her money goods chattels wares merchandizes and debts.'[75]

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[71] D WATERS, M GILLEN & L SMITH, above n 69, p 0000.

[72] Text to nn 00-00.

[73] It is also the case that other non-beneficial holdings of rights are exempt, eg, executor: *Farr v Newman* (1792) 4 TR 621.

[74] (1742) Willes 400.

[75] Ibid, 403.

The crucial words are 'in his own right', ie, beneficially.[76] Rights held by a trustee are not held beneficially, and simply do not fall within the statutory scheme for redistribution.

7. Conclusion

The prohibition on the division of ownership in both Quebec law and Czech law is a product of the early nineteenth century French reaction against feudalism. Ironically, it was the trust which was used by the common law to ameliorate many of the unpleasant facets of feudalism, including the rules on primogeniture and the incidence of feudal burdens. It would therefore be something of an irony if the trust could not exist in civilian systems because it was seen as reintroducing feudal ideas.

However, as has been demonstrated above, the trust is not problematic in this regard. The common law trust does not offend the unitary nature of ownership, for there is no division of ownership in the case of a trust. Where rights are held on trust, new rights are created, through which the trustee is controlled in his exercise of the rights he holds on trust. Nothing, however, has been carved out of the trust right. We can carry such thinking across to Czech law. When the code says that the trust 'property' has no owner, it simply means is that the right is no longer held by any person outright. It does not mean that the 'property' is derelict and therefore open to the first taker. It merely describes how trustees inevitably hold rights.

[76] The modern law is to be found in s 283(3)(a) of the Insolvency Act 1986, which provides that 'property held by the bankrupt on trust for any other person' does not form part of the bankrupt's estate.