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TRUST AND THE CIVIL LAW

*Ignacio Arroyo Martinez**

SCOPE

The trust is the most distinctive institution of the Anglo-Saxon legal codes. Thus, one can understand the legitimate discomfort that a jurist foreign to the common law system, and more precisely, a Latin jurist, experiences in approaching the subject of the trust—especially before an audience, in good measure, North American.

It is not all strange, therefore, that the first difficulty I encountered in preparing for this conference was a didactic or expository one: to make this presentation suitable for a heterogenous group. How can one speak on “trust and the civil law” before a mixed audience of Spanish and North American lawyers without drawing parallels and without, at times, falling back on sophisticated technicalities? It is clear to me that had I chosen to analyze the trust with regard to the law of a particular country, I would run the risk of confusing the visiting colleagues; but, I am also aware that if I tend toward a minute dissection of the trust from the standpoint of the civil law, I must meet the responsibility of presenting an exposition bristling with details, laden with doctrinal viewpoints apart from jurisprudential principles, and divorced, finally, from applicable legislation.

It is well known that the trust is not regulated by positive law in Spain, just as it is not regulated in other European codes, a situation that is, nevertheless, in contrast with progressive penetration of that concept in the majority of Latin-American countries.¹ It is well

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1. Many scholars have called for the introduction of the trust in countries such as France, Holland, Germany, Switzerland, and Italy. For an overview of this issue in the most representative European legal systems, including the Latin as well as the Germanic systems, see, e.g., R. FRANCESCHELLI, *IL TRUST NEL DIRITTO INGLESE* (1935); W.A. PRESTON, *ETUDE SUR LES TRUSTS ET TRUSTEES* (1904); C. REYMEND, *LE TRUST ET LE DROIT SUISSE* 209 (1954); A.F. VAN HALL, *TRUST* (1896); F. WEISER, *TRUSTS ON THE CONTINENT OF EUROPE* (1936).

The adaptation of the trust in the Roman law systems has been geographically localized in the Latin American regions, with Mexico being the pioneer in instituting the concept, even though its scope has been limited to the banking trust. See R. BATIZA, *EL FIDEICOMISO* 76 (3d ed. 1976) (wherein the author gives an explanation of the primary reasons for the acceptance of that institution in Mexico [hereinafter cited as *BATIZA*]; Peza, *El fideicomiso en Méjico* in *EL FIDEICOMISO EN MÉJICO Y SU VIABILIDAD EN ESPAÑA* 35-37 (Jornadas de Estudio Organizadas por el Banco Nacional de Méjico y el Banco de Bilbao, Madrid 1980). Gradually the Mexican example has been followed in the other Latin American countries, among which, in chronological order of the trust's introduction, are: Colombia, 1923; Chile, 1925; Panama, 1925; Bolivia, 1928 &

known, secondly, that the Spanish courts have maintained an unexplainable silence in regard to the trust, but that there exists, on the other hand, a line of decisions favoring the fiduciary transaction, which, although it has not enjoyed unanimous doctrinal support, has permitted an explanation of the difficult problem of the transfer of property to the fiduciary, the effectiveness of that transfer against third parties, and, therefore, the validity of the fiduciary transaction. On the other hand, it has not escaped any reasonably informed observer that writers on this subject do not all subscribe to the double-effect theory that is, nevertheless, followed by another doctrinal group, which is joined in its view by the Spanish Supreme Court. All of this naturally adds new difficulties to the elucidation of the juridical nature or, if you will permit the expression, to the notion of the trust transplanted in our law. In addition, it is interesting to note at this point that attention has been drawn to the study of succession problems, principally to matters concerning the testamentary executor, substitutions in *fidei commissa*, testamentary trusts, and the "fiduciary heir" (*heredero fiduciario*), this latter institution being typical of Catalonian statutory law.² This means that the study of the trust as a general method of the disposition and administration of property, for acts *inter vivos* as well as for acts *mortis causa*, has occupied, with some exceptions, only a tangential or peripheral position. Finally, it is likewise very familiar that the demands of the increase in business dealings, whether commercial or private, indicate the advantage of having legislative intervention in this field for the purpose of resolving, on the one hand,

1955; Peru, 1931; Costa Rica, 1936; El Salvador, 1937 & 1970 (with the promulgation of the new civil code); Venezuela, 1940 & 1956 (by way of the new trust statute); Nicaragua, 1940 & 1941; Guatemala, 1946 & 1964 (with the new civil code); Ecuador, 1948; Honduras, 1950. Concerning Panama's law of 1925, see R. ALFARO, *EL FIDEICOMISO: ESTUDIO SOBRE LA NECESIDAD Y CONVENIENCIA DE INTRODUCIR EN LA LEGISLACIÓN DE LOS PUEBLOS LATINOS UNA INSTITUCIÓN NUEVA, SEMEJANTE AL TRUST DEL DERECHO INGLÉS* (1920). Strikingly absent from this list are Argentina and Brazil, whose laws do not expressly regulate the trust, although they do not expressly prohibit it either. In those two countries, however, there are some special provisions that contemplate concepts related to the trust, such as, in Argentina, the regulation of debentures which, when issued, are secured by immovables and in Brazil, the so-called fiduciary alienation for purposes of security approved in 1969 by Law 413.

Some of this data has been taken from the only Spanish monograph on the subject, although that work is already out of date. P. CLARET Y MARTI, *DE LA FIDUCIA Y EL TRUST* (1946) [hereinafter cited as CLARET Y MARTI].

2. Among the many important works on substitutions in *fidei commissa*, see, e.g., M. ALBADALEJO, *SUSTITUCIONES FIDEICOMISARIAS* (1956) [hereinafter cited as ALBADALEJO]; V. PUIG FERRIOL, *EL HEREDERO FIDUCIARIO* (1965). Concerning substitutions in *fidei commissa* when shares of stock are involved, see Menéndez, *Consideraciones sobre la sustitución fideicomisaria de acciones*, 512 *REVISTA CRÍTICA DE DERECHO INMOBILIARIO* 9-30 (c. 1976) (also published separately in Madrid in 1976) [hereinafter cited as Menéndez].

the problems of accommodating the peculiar structure of the trust and the specific provisions that one encounters in each case, given the obstacles presented by existing legislation, and resolving, on the other hand, the speculations or controversies by arriving at a specific concept of the trust, whether it be in accordance with the banking trust formula³ or whether it be under the more limited provisions for the so-called investment trust.⁴

I feel that these brief considerations permit me to place suitable limits on the scope of this paper, by which I will only attempt to offer some reflections on "the viability of the trust in civil law systems" and, more particularly, in Spain. With this focus, I believe that I have dispelled some of my discomfort, because I can now discuss the concept and characteristics of the trust with a practical and immediate purpose: to determine the proper place for that institution in light of the necessities of its use in Spain.

DEFINITIONS

The definitions that have been given for "trust" are quite numerous. Before presenting the least controversial one, however, it

3. A respected segment of our doctrinal writers has spoken out in favor of recognizing the banking trust, weakening, therefore, the requirement that fiduciaries be limited to credit entities recognized by law. See, e.g., Garrigues, *Clausura de las jornadas de estudio sobre el fideicomiso*, in *EL FIDEICOMISO EN MÉXICO Y SU VIABILIDAD EN ESPAÑA* (Jornadas de Estudio Organizadas por el Banco Nacional de México y el Banco de Bilbao, Madrid 1980); Sanchez Calero, *Hacia en reconocimiento legislativo en España, del fideicomiso*, in *EL FIDEICOMISO EN MÉXICO Y SU VIABILIDAD EN ESPAÑA* 187, 210 (Jornadas de Estudio Organizadas por el Banco Nacional de México y el Banco de Bilbao, Madrid 1980).

A comparison of case holdings indicates, in effect, the tendency to limit those who can serve as fiduciaries to banks and credit entities, thereby making it possible for the state to exercise more immediate control, through the respective central banks, over the execution of the duties given to the fiduciary. Because the state establishes similar mechanisms of control over other entities, such as insurance companies and other special corporations, it seems reasonable to suggest that such entities be allowed to qualify as fiduciaries also.

4. The provisions of the investment trust naturally vary according to the will of the contracting parties. In general terms one can say that such a trust comprises a series of transactions through which the business entity acquires from its client a sum of money designated for the acquisition of bearer securities that promise to produce, within a certain period, a determined income or yield. The type of investment, the fluctuations in value, the risks of loss, etc. are conditions that are to be determined in the contract establishing the trust, although it is generally the business entity which concerns itself with such conditions during a stipulated period of time.

Under Mexican law, for example, there are detailed regulations governing such transactions by specifying the type of securities that can be acquired on behalf of the beneficiary, such as those securities approved by the National Commission of Securities or those guaranteed by the Federal government. For detailed analysis of this subject, see BATIZA, *supra* n. 1, at 256 n.89.

is wise to advance a preliminary observation: a legal or doctrinal definition is quite a different matter from the diverse meanings given "trust" in the business world. This point is of interest because it permits the delineation of three aspects which ought to be carefully distinguished. (1) In the first place, beyond the scope of this analysis is the economic meaning of trust such as the one arrived at when the trust is associated with monopolistic or quasi-monopolistic enterprise whose purpose is to restrict free competition by collusive practices, such as the limitation of production quotas, the division of markets, and price fixing etc., and whose cash reserves, on the other hand, fall between the purview of the law regulating businesses and that of antitrust legislation. This is the so-called business trust.⁵ (2) Excluded from the scope of this analysis is the other broad meaning of trust that encompasses all legal fiduciary relations, that is to say, the set of relations between persons that arise by reason of the confidence or trust that one of them engenders or places in the other. Naturally, under this second limitation, we draw closer to the topic of concern, in that we are now within the realm of trusts where there are found statements of principles as heterogeneous as the contracts of deposit, loan, mandate, and power of attorney or the concepts of tutorship, testamentary executorship, and agency. All of these are fiduciary relationships or transactions.⁶ (3) Compared with the economic aspect of monopoly, and to the wide range of fiduciary relations, our focus is more limited: it encompasses only the Anglo-Saxon institution of the trust, that is to say, situations where a person separates a portion of his patrimony and transfers the ownership of that part with the stipulation that the person who acquires it must manage it for the benefit or interest of a third party.⁷ With the trust, therefore, there is produced a separation or division of the right of ownership in regard to its administration and its economic benefit in such a way that a person has the ownership of certain property and, at the same time, administers it for the benefit of another according to an established purpose. One should not find it strange from this point of view

5. The business trust, frequently referred to as the "Massachusetts trust," due to its place of origin, involves a hybrid between the joint stock company and the trust, in which the characteristics and peculiar elements of each institution are mixed together. The business trust is a common law device created in order to give continuity to the period during which the trustee, as title holder to the property of the trust, is liable. N. LATTIN, *THE LAW OF CORPORATIONS* 55 *et seq.* (2d ed. 1971). As the use of the business trust increased, the device was slowly becoming a powerful instrument for concentrating economic control in the hands of monopolies for the pursuit of their objectives.

6. Concerning fiduciary transactions, see J. GARRIGUES, *NEGOCIOS FIDUCIARIOS EN DERECHO MERCANTIL* 31 *et seq.* (1955) [hereinafter cited as GARRIGUES].

7. A.W. SCOTT, *THE LAW OF TRUSTS* (3d ed. 1967).

that one writer has helpfully asserted that the trust "creates a new structure in the right of ownership."⁸

Consequently, there are three parties involved: the settlor who establishes the trust; the trustee or fiduciary to whom the ownership is transferred with the stipulation that he administer the property in favor of a third party; and the beneficiary or fideicommissary (*cestui que trust*) who holds the beneficial title to the property, that is to say, the person who receives the equitable title. This tripartite structure allows one to understand why the most important point is found in the fact according to which the trustee does not have the enjoyment or title to the economic advantages of the property, this being so because the trustee is legally bound to give that enjoyment to a third party called the beneficiary. The trust implies, therefore, a peculiar situation by virtue of which a person, who has divided his patrimony, sets aside some of it in order to constitute a trust, transmitting the corpus to another, not for him to take possession of, but for him to administer and manage for the benefit of someone else, who can just as well be the settlor himself. In other words, the institution of the trust rests upon a division of ownership between ownership in form, or legal ownership, and ownership in substance, or *bonitarian* ownership, a distinction that has its roots in the duality of the English law which, as we know, distinguishes between the common law title and the equity title. Legal or formal ownership, then, is subject to the common law, while ownership in substance, or that to be possessed, is subject to the laws of equity, that is to say, the fiduciary's title is protected by the common law courts and the beneficiary's (*cestui que trust's*) by the equity courts.⁹

PURPOSES, ORIGIN, AND DEVELOPMENT

From the standpoint of this initial approach to the question, it is not at all surprising that the notion of the trust is foreign to the codes of the Roman law tradition and that it is contrary to strict principles of English law, being the most important creation of equity. As a legal institution, the trust enjoys a secular history dating back to the thirteenth century, and, according to historical investigations, it can be proved today, without any risk of error, that the trust was born in the pursuit of an illegal purpose: the transfer of lands to bogus

8. II J. RODRIQUEZ RODRIQUEZ, *TRATADO DE SOCIEDADES MERCANTILES* 122 (1947).

9. For a comprehensive bibliography of sources dealing with the evolution, and eventual merger, of common law and equity, see R. DAVID, *LE DROIT ANGLAIS* (3d ed. 1975); H. G. HANBURY, *ENGLISH COURTS OF LAW* (1944).

intermediaries, avoiding in that way the payment of taxes and the enforcement of the laws governing *mortmain*.¹⁰

The subsequent development of the trust is characterized by its accommodation to a diversity of purposes to the point that it is presently the most universal institution, for, next to the contract, it is employed for the greatest variety of purposes, thus: from the protection and care of incompetents, to the distribution of an inheritance or the preservation of a family estate, to the giving of security for the transfer of immovable property, or the issuing of bonds; to the structure of profit-sharing plans for workers, not to mention the many commercial and financial uses such as investment trusts, guaranteed trusts and life insurance, voting trusts, trusts for underwriting purposes, and, finally, the international trusteeship, which the United Nations charter recognizes for the administration of territories and of which England made such valuable use under her territorial policies until the process of decolonization began well into the second half of this century.

FIDUCIARY RELATIONS, MANAGEMENT OF PROPERTY, AND AUTONOMY OF WILL

Setting aside consideration of the different meanings and various purposes of the trust, it is certain that that institution has been maintained in spite of the merger of common law and equity rules and, consequently, that the distinction is not only historic, but conceptual as well. It is wise to recall the definition of the trust proposed by the American Law Institute and set forth in the *Restatement*:

A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.¹¹

There are two aspects of the trust which should be emphasized in regard to the effects of their viability in Spain: on the one hand, the fiduciary relation, and on the other, the division of ownership. Both are centered on a common vertex—the autonomy of the will.

The first aspect clearly presents the need to examine the validity of fiduciary transactions in our law and, more concretely, in its establishment in light of the double-effect theory and of Supreme Court decisions concerning the transferability of ownership or title. In the

10. BATIZA, *supra* n. 1, at 29 *et seq.* See also *id.* at 33 *et seq.* (wherein the author discusses the various hypotheses and the origin of the institutions involved).

11. RESTATEMENT (SECOND) OF TRUSTS § 2 (1959).

second aspect, the question is more delicate because it requires an examination of the management of the property in the trust, that is to say, the so-called fiduciary title. In both cases, nevertheless, it is necessary to draw from one principle which is fundamental to all reasoning in this area: the principle of contractual freedom that positive Spanish law holds sacred.

In effect, if the trust is not regulated by any rule of private law, it does not seem at all risky to stand fully in favor of its validity as furthering the general principle of contractual autonomy expressly established in Articles 1091 and 1255 of the Spanish Civil Code. The first article provides that obligations which arise from contracts have the force of law between the contracting parties and ought to be carried out accordingly (*pacta sunt servanda*). In conformity with the second precept, the contracting parties can establish any agreements, clauses, and conditions which they consider suitable, with the provision that such agreements are not contrary to law, to morals, or to public order. This examination, then, is centered on finding out if the fiduciary nature of a transaction conflicts with the limits mentioned or, more precisely, if some legal disposition exists which prohibits such transactions, since it does not seem that placing confidence in another person goes against what is moral or against public order. The problem is consequently divided into the dual aspects previously pointed out: the business, or fiduciary, structure of the trust and the nature of the titles it comprises.

TYPES OF TRUST: FIDUCIARY TRANSACTIONS MORTIS CAUSA

It should be noted that in no way does this discussion attempt to link the identity between the trust and the fiduciary transaction. Nothing is further from the purpose of this paper than such a risky contention. I intend simply to point out that in order to determine the possible viability of the Anglo-Saxon trust in Spain one must necessarily examine the problem of the general concept of the fiduciary transaction to which the trust is evidently related.

The most authoritative doctrine recognizes that in this type of transaction the fiduciary is given a legal position superior to and broader than that derived from the economic objective which he serves. There is a disproportion between the means and the end which such a transaction attempts to attain. Simply put, the fiduciary transaction transfers ownership in order to obtain a result which, from the legal point of view, does not require such a transfer.¹² Thus, the

12. The structure of the fiduciary transaction has been superbly analyzed and explained in relation to Spanish law by Professor Joaquim Garrigues, whose analysis

legal effect is more abbreviated and, on occasions, different from that which would ordinarily follow as a result of the very method of transfer used. But, it should be pointed out that in this context there is present a notion of the trust that existed under Roman law, the true historic antecedent of the fiduciary transactions: the testamentary trust. Briefly, as the great Roman scholar Schulz has pointed out, the testator ordered that his property be acquired, *mortis causa*, by a fiduciary with the purpose that he manage it for a specified reason, naturally, in accordance with the directions of the *de cuius*.¹³ It deals with, then, "entrusting something to the good faith of another" (*fidei alicuius committere*). In principle, that duty is not legal; it is simply moral. But, when the concept is subject to acts *inter vivos*, the transfer is legally guaranteed because its enforcement is entrusted to the law. The two traditional forms, the guaranteed trust and the so-called management trust, exhibit a common element: the settlor places his confidence in the fiduciary. The first involves a transfer of title with a simple grant of security: the trustee becomes owner for as long as the debt remains unpaid. The transfer thus serves the purpose of insuring or guaranteeing the debt. Correlatively, the management trust involves a transfer of ownership in order for the fiduciary to perform a management task on behalf of someone else.

So, just as *inter-vivos* fiduciary transactions do not conflict in principle with any legal disposition—reserving a point that will be discussed later—the execution of such transactions *mortis causa* does conflict with a series of precepts recognized in the Civil Code with respect to the law of successions. An examination of those laws permits one to draw four conclusions. The first concerns the express prohibition of the testamentary trust, at least as it is interpreted by the most authoritative doctrinal writers, found in paragraph 4 of Article 785: "Those [testamentary dispositions] of which the object is to leave a person the whole or any part of the inheritance to be applied or invested in accordance with secret instructions given him by the testator [shall have no effect]." The second is the indirect nullity that can affect the entire trust if the testator was unscrupulous in regard to the legitimes of his forced or legal heirs. The third is derived from the limits placed on substitutions in *fidei commissa*. Articles 781 to 788 reflect this deep concern which initiated the Age of

decisively influenced the Supreme Court to favor the validity of the fiduciary transaction in the Decision of May 25, 1944, and confirmed in the Decision of January 28, 1946. On the basis of that jurisprudence, and the underlying doctrine, the fiduciary transaction could then be distinguished from a simulated transaction, on the one hand, and from transactions involving bogus intermediaries, on the other. See GARRIGUES, *supra* n. 6.

13. L. DIEZ-PICAZO, *DICTAMENES JURIDICOS* 30 (1981) [hereinafter cited as DIEZ-PICAZO].

Enlightenment—the political daughter of the French Revolution—and which seeks to avoid the indefinite encumbrance of property.¹⁴ Finally, in conflict with fiduciary transactions *mortis causa* is the Civil Code's distrust of successoral contracts in general. The most plausible declaration of such distrust is found in Article 658, which only recognizes the law or a testament as forms of postmortem transfer, or Article 1271, which, in regard to future inheritance, recognizes only those agreements that have as their object the division of an inheritance in accordance with Article 1056.

THE FIDUCIARY STRUCTURE, THE DOUBLE-EFFECT THEORY, AND THE ALTERATION OF TITLE

Setting aside the problems of the trust in regard to transfers *mortis causa*, let us inquire into the protection offered by the trust in transactions *inter vivos*. The business structure of the trust in our law is explained by the double-effect theory.¹⁵ According to this approach, the fiduciary transaction encompasses both the actual transfer of a real right and the creation of a personal obligation. Through the first, the fiduciary acquires a type of irrevocable ownership which, moreover, is effective against third parties. On the other hand, the personal obligation created has a more limited effectiveness: it has relative or inter-party effect only, the object of the obligation being to administer, manage, and oversee—in short, to exercise the right in a limited way and subsequently to restore the property to the grantor or to someone he has designated. The criticisms of the double-effect theory have centered on the injustice found in such a transfer of ownership when a third party in bad faith takes title to the property by virtue of an act of disposition executed by the trustee.¹⁶ The third party knows, or has actual knowledge, that the transferor is only a trustee, i.e., that he has title to the property because someone else has trusted him to carry out an act of administration or to fulfill the purpose of seeing that a debt is secured, and not so that he can dispose of the property. In addition, the transfer involved in establishing the trust is designed to produce economic profits for the benefit of a third person.

In spite of all the criticisms, the jurisprudence of the Supreme court has been reiterated, in the Decision of February 18, 1965, upholding the validity of the trust governed by Article 1274 of the

14. ALBADALEJO, *supra* n. 2, at 104; Menéndez, *supra* n. 2, at 13 n. 10.

15. See generally Garrigues, *supra* n. 6.

16. For De Castro, "the trust, and the theoretical construction of the double effect which usually accompanies it, was born perfect and complete from the head of a jurist, in the style of Minerva." F. DE CASTRO, *EL NEGOCIO JURÍDICO* 708 (1971).

Civil Code on the basis that it constitutes a contract having a legal cause and that it effects the transfer of the property to the fiduciary and is valid as to third parties, it being irrelevant whether or not the third party is in good or bad faith.

Greater protection is afforded, on the other hand, by the alteration of the right of ownership to the patrimony or property of the settlor. Because the splitting of ownership or the disparity of title, which the establishment of the trust creates, occurs within the system of property law and real rights found in the Civil Code, it is subject to the provisions on public order. We have already seen how the trust involves a division of title into legal and *bonitarian* ownership, the first in favor of the fiduciary or trustee, the second in favor of the beneficiary or *cestui que trust*. But, is that polarity between ownership in form and ownership in substance within the autonomy of the will? In other words, can the solitary institution of ownership be separated on a bifurcated level under the protection of contractual freedom? Moreover, can that agreement be enforced against third parties? This, naturally, requires some explanation.

In the codes inspired by the civil law there exist institutions that contemplate the possibility of distributing the powers that make up the right of ownership among various title holders. In order to demonstrate this point, it is sufficient to consider the category of real rights and, among those, the real right of possession as to things belonging to another. Usufruct, right of way, the rights of use and habitation, emphyteusis, and surface rights permit, in effect, the total or partial utilization or exploitation of property belonging to someone else and, in some cases, the appropriation or acquisition of its fruits or income. In the case of usufruct, for example, there is a distribution of proprietary rights between the naked owner and the usufructuary, giving rise to a separate allocation of the income from the property. But the idea that dominates this institution is far from that involved in the trust. The fundamental difference lies in the fact that the Anglo-Saxon concept of trust cuts off, or terminates, a particular individual's ownership. The establishment of a trust affects the right of ownership and not just the range of its powers. By contrast, in a usufruct, the naked owner alone continues as owner, although some of his powers under that right have been diminished. It is a matter of a shared exercise of powers, not of a division of the actual title. For his part, the usufructuary, or other holder of a real right in the property, exercises his right within a contained area, defined with greater or lesser permanence, but without any impingement on the "territory" of origin or the source of his power. This explains why the usufructuary lacks the power to dispose of the property.

The failure of all attempts to explain the trust according to the

institutions of continental law is therefore understandable. A comparison between the trust and any institution within continental law cannot withstand the thrust of severe criticism from either the right or the left. It is sufficient to consider, in this regard, agency, mandate, legacy, endowment, independent patrimonial mass, the contract, or the irregular deposit in order to understand that the rights in property forming the object of a trust are not divided, or distributed, according to the schemes with which we are familiar.¹⁷ As the jurist René David has clearly pointed out, when one recognizes the inadequacy of the concept of ownership with respect to the traditional rights of use, fruits, and abuse, one is in a position to begin to understand the trust. Actually, the trustee is an owner even though his powers are limited by the act establishing the trust and by the laws of equity developed by the Chancery Court. In practice, he has the right to manage the trust property by all acts of administration and disposition; but, on the other hand, he has neither the use nor the benefit of the corpus, nor the right to materially destroy it. It is an ownership so special that it never comprised the *usus, fructus, or abusus*. It is, instead, an ownership of equity.¹⁸

INCOMPATIBILITY OF THE TRUST: RESTRICTIONS ON ENCUMBRANCE AND THE PUBLIC REGISTRY

In any case, and by way of summary, it seems reasonable to conclude that the trust should not be accommodated under Spanish law without legislative action, since the difference between *bonitarian* ownership, i.e., ownership in substance, and formal ownership, i.e., legal ownership or ownership acquired by operation of law, is not easily reconciled with the unitary notion of ownership under the civil law. Along with this notion there exist within the Latin codes what have been aptly called by Pompeyo Claret y Marti as "the enemies of the trust," to wit: the rules against the indefinite encumbrance of property and the system of the public registration of land.¹⁹ The effects of the prohibition against the indefinite encumbrance of property, as we have seen, tend more toward transactions *mortis causa* and, in that respect, I have noted the inappropriateness or invalidity of the trust. Concerning land registration, a principle so deeply grounded in countries such as ours, I will not contend that real rights in immovables should, under the principle of public faith, be registered in order to be effective against third parties. And, even with such help

17. For an analysis of each of these concepts in this regard, see BATIZA, *supra* n. 1, at 66 *et seq.*

18. R. DAVID, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 362 (7th ed. 1978).

19. CLARET Y MARTI, *supra* n. 1. For a similar opinion, see DIEZ-PICAZO, *supra* n. 13, at 35.

from the legislature, I feel that it will be more difficult to find a procedure for guarding against the attack on the so-called *bonitarian* ownership by third parties. On the other hand, I view with greater hope the viability of the trust and the recognition of its effectiveness as between the contracting parties.

CONSIDERATION OF THE "LEGE FERENDA" AND CONCLUSIONS

In conclusion, perhaps it is opportune to ask here what criteria are available to the courts in order for them to regulate adequately the trust in Spain. That is to say, should a fiduciary be exclusively a banking entity; should the transfer establishing the trust have effect *erga omnes*; is it possible to separate the corpus of a trust from the mass of assets in bankruptcy and are special powers of administration necessary in order to do this; is it proper to establish trusts only in favor of juridical persons, or in favor of animals and things as well; must the trustee be appointed at the time the trust is created, or is it lawful to defer that appointment; is it valid for the trustee to also be the beneficiary; are contingent, reserved, or secret trusts desirable; must a trust be established by authentic act, or is an act under private signature sufficient; can the powers of the trustee be granted to a third person, or should this be prohibited? Without proposing that there are no other equally important questions, I will offer here a vote in favor of a concept having confidence as its base, which is equivalent to a showing in favor of the trust, this notion of confidence resting on the idea of good faith coupled with the secular experience of English-speaking people, including the Louisiana attorneys at this Congress. Perhaps the presence of those North Americans may in some way aid in establishing the institution of the trust in Spain.