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Donative Trusts and Equity at Common Law

Thomas E. Simmons

DONATIVE TRUSTS AND EQUITY AT COMMON LAW

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Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.

FREDERICK W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (A. H. Chaytor & W. J. Whittaker eds., 2nd ed. 1936).

Abstract

The historical evolution of express donative trusts in the English Middle Ages down to today both explains and frames the basic elements of a common law trust. Today, trusts in common law countries – and also in many civil law jurisdictions with the exception of China – are utilized in the private donative context to preserve and administer family wealth in ways not otherwise achievable. This paper outlines the basic elements of a common law donative trust from a functional perspective, explaining how trusts work as a form of gratuitous transfers and why.

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* Thomas E. Simmons is an associate professor at the University of South Dakota School of Law in Vermillion, South Dakota (USA) where he teaches courses in *Trusts & Wills, Estate Planning, Property*, and *Professional Responsibility*. Prior to joining the legal academy in 2013, he practiced trusts and estates law for thirteen years in South Dakota, a state which is typically seen as the premier American jurisdiction for trust law, along with Nevada and Delaware. This summer, he is co-teaching a course titled *Comparative [In]Tangible Property* to American and Chinese law students at the Southwest University of Political Science and Law (SWUPL) with Professor Yuanyuan Bai, Ph.D. He thanks the faculty of SWUPL for this opportunity to present this paper on trust law from a common law jurisdiction perspective.

This brief paper presents an introduction to the historical origins of private, non-commercial, donative trusts in the context of equity and the common law of England. It also sketches the primary characteristics of trust law which underlie the popularity of trusts in private wealth management in common law jurisdictions.

Historical Origins

Although some antecedents to trusts can be identified in German and Roman law, the origin of trusts is typically traced to Medieval England.* Owing to the residual influence of the successful French-Norman invasion of England in 1066 C.E. by William the Conqueror and his troops, French legal terminology described the relations of the parties to a trust (or "*use*" as a trust was then called, a corruption of the Latin "*opus*" meaning benefit): To create a trust in real property, a landowner (that is, a *feoffor*) transferred (or *enfeoffed*) land to a trustee-transferee (a *feoffee to uses*) for the benefit of a beneficiary (the *cestui que use*). Trusts soon became ubiquitous. By the time of the rule of Henry V (1413-1422 C.E.), the majority of the real property in England was held in trust.†

What explains this popularity? Trusts allowed individuals to skirt legal barriers to accomplish their ends. A respected treatise on trusts puts it this way: "English jurists centuries ago suggested that the parents of the trust were fraud and fear and that the court of conscience was its nurse."‡ One could even say that some of the motivations for the use of trusts were dishonorable. The American Revolution several centuries later was itself born in large measure out of objections to paying English taxes; the result was the birth of a country. The trust too was born out of the aim of tax evasion – or at least out of the aim of avoiding "feudal incidents."

When William the Conqueror set about ruling the country he had overthrown, he recognized that the primary source of wealth and power was land. He therefore claimed it all for himself and rewarded and empowered his allies and supporters with use of vast tracts, conditional upon a continuing allegiance (political as well as financial) to his throne. William's trusted allies, in turn, divided the conditional use of their holdings to powerful men, and so on. At the lowest level of this feudal pyramid of wealth and fidelity, a lord would permit the cultivation of his lands

in exchange for knight service. The lord was also entitled to relief (or taxes, essentially), upon certain events such as the marriage of a ward, the knighting of a son, or the devise of lands to the next generation of vassals. To avoid these inheritance-like taxes triggered by the transfer of use rights from father to son, ingenious lawyers created the trust. With a trust, the feudal incidents might be avoided because the beneficial use could pass without the need for a legal transfer overseen by the lord.

Initially, trusts were unenforceable in the English courts of law. Canon law prohibited priests from owning property as wealth ownership was inconsistent with a vow of poverty. If a priest came into wealth in the form of real property, he might convey legal title to a trustee, instructing the trustee to distribute the rents to the priest. If a trustee breached the trust agreement and used the property for himself, the priest might sue, asking the court to order the title to be re-conveyed to the priest. This kind of relief was typically denied. The law courts reasoned that if the trustee held legal title then the priest had no grounds to complain about how the property was used.

A second class of courts developed over a long period of English history based upon the authority of the King's chancellor to grant relief "in the King's conscience" when litigants were unsatisfied with the verdict of a court of law. These chancery courts (or "courts of equity") eventually came to compete with the courts of law. While initially, equity offered relief based on precepts of fairness which were less cumbersome than the inflexible writ system of the courts of law, equity eventually became as cumbersome and inefficient as the law courts.[§] This strange bifurcation of courts: courts of law and courts of equity underscored both the development and arrangement of trusts. The courts of law would recognize legal title to a trust *res* in the trustee, but the courts of equity would enforce the fiduciary responsibilities of a trustee to her beneficiaries.

There were attempts to counter-act the spread of trusts. During Henry VIII's reign (1509-1547 C.E.), in an attempt to recapture the lost revenue that trusts were causing, the Statue of Uses (1535 C.E.) was passed by Parliament to invalidate "passive" trusts where the trustee had no real active duties to perform.[**] The intent of the Statute of Uses was to convert, by legislative fiat, a bifurcated equitable title back to legal title. Ultimately, the attempts to defeat the common law trust were unsuccessful. "Passive" trusts have been largely superseded by trustees with active responsibilities to discharge.

Today, the trust is widespread in common law countries:

> Trusts have now pervaded all fields of social institutions in common law countries. They are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems.[††]

What explains the trust's continuing popularity? Before attempting to answer this question, a brief foray into trust theory is required.

Three Theories

There are three primary theories or ways of thinking about trusts. Each theory standing alone is incomplete and fails to fully describe all of the characteristics of a trust, but each contributes to a complete understanding. The discussion which follows will articulate each theory, identify its strengths, and identify its shortcomings.

The primary way of thinking about a trust is as a kind of agreement or contract. A trust agreement has two contracting parties: the settlor and the trustee. Indeed, trust instruments are often captioned "trust agreement" and read very much like an agreement between two parties: a grantor (or settlor) (the transferor of property) and a trustee (the *feoffee to uses*). For example, a trust instrument – let's call it the "Simmons Trust Agreement" – might read as follows:

> This Trust Agreement dated 24/06/2016 is between Thomas E. Simmons, *settlor*, and Dr. Yuanyuan Bai, *trustee*. The grantor delivers to the trustee the sum of 10,000 RMB as the trust estate. The trustee agrees to preserve the trust estate, to follow the terms of this agreement, and to make distributions for the benefit of Ethan Simmons, a minor child (the grantor's son) as *beneficiary*. The trustee will distribute 10 RMB to the beneficiary on the first day of each month. In addition, the trustee may distribute additional amounts to the beneficiary for the beneficiary's educational expenses as

the trustee deems appropriate. Any funds remaining upon the beneficiary's 18th birthday shall be delivered to him and the trust shall then terminate.

The theory of a trust as a contract is consistent with the "meeting of the minds" between the grantor and the trustee.‡‡ The grantor can set the terms of the trust in any lawful manner so long as the trustee agrees to those terms. The grantor may identify additional or successive beneficiaries, may provide for the removal and replacement of the trustee, and endow the trustee with extensive powers over trust property (such as the power to invest, exchange, lease, encumber, etc.). Clearly, the agreement of a trust would qualify as an express third party beneficiary contract and the beneficiary would, under contract law, have the power to enforce the terms of the trust against a non-performing trustee even though the beneficiary was not originally a party to the agreement.§§

And yet a trust is not entirely analogous to a third party beneficiary contract. For one thing, the grantor – after entering into the agreement with the trustee – typically lacks standing to enforce the trust agreement. For another, a trustee is not even an essential requirement to a trust, it being often recited that a trust shall not fail for want of a trustee. Another aspect of trust law that goes beyond a mere agreement is the fiduciary nature of the office of trustee; the trustee owing elevated duties of care and loyalty to the beneficiary of her trust.***

A second theory to explain trusts is the entity theory.††† Trusts, in many ways, are akin to corporations or other artificial legal persons. Indeed, trusts have many hallmarks of persons. Trusts can sue and be sued. Trusts can hire and fire consultants or employees. Trusts can buy and sell property. For the most part, trusts have their own tax identification number under U.S. law and file annual tax returns. Thus, in many ways, a trust is like a corporation with the trustee as its officers or board of directors. And yet the trustee of a trust holds legal title to trust assets, while in a corporation neither the board nor the officers have legal title to the firm's assets. The entity theory is therefore also inadequate to explain how a trust functions.

A third theory which seeks to explain the workings of a trust focuses on the relation of the principal parties – trustee and beneficiary – to trust property (the "trust estate" or *res*). The property itself in a trust is bifurcated. One part of the property (the legal title) vests in the trustee as legal title holder; the other (beneficial title) vests in the beneficiary.‡‡‡ A deed conveying property to a trust typically names the trustee as title holder.

For example, a deed conveying Blackacre to the Simmons Trust described above would read:

> Thomas E. Simmons, *grantee*, hereby conveys Blackacre, in the province of Sichuan, PRC, along with all improvements and fixtures thereto to Dr. Yuanyuan Bai, as trustee of the Simmons Trust under a trust agreement dated 24/06/2016, *grantee*.

Absent savings legislation, when a trustee resigns or is otherwise replaced by a successor trustee, a new conveyance needs to be recorded to vest legal title in the new trustee (e.g., from Dr. Yuanyuan Bai as trustee, to the new trustee of the same trust). This cumbersome process is never necessary with realty held by a corporation. In a trust, the trustee holds legal title to trust property with all the attendant powers and authority, but the trustee holds title not for the trustee's own enjoyment or use. Instead, the beneficiary holds "equitable" title and – subject to the restrictions of the trust instrument and the discretion of the trustee – is permitted to enjoy the trust *res*. Thus, the property itself is bifurcated into legal title and beneficial (or equitable) title. The trustee owns, but may not enjoy, the *res*, while the beneficiary enjoys, but lacks any power to transfer, encumber, lease, or convey the *res*. The shortcoming of this third theory is that it cannot explain how a trust can act, and be acted upon, like an entity.

Two Trust Characteristics

The fundamental characteristic of any trust and that which fuels the correct operation of a trust arrangement are the duties of a trustee to the beneficiary or beneficiaries of a trust.[xii] A leading common law trust treatise explains:

> All trustees are subject to common law duties and equitable rules or principles which in some instances have been codified by statute. For example, the trustee must not personally profit from his administration of the trust. The trustee must continually demonstrate good faith in administering the trust and in dealing with

beneficiaries.

> The trustee has the duty to collect and preserve the property made subject to the trust. The trustee is under a duty to segregate the trust assets and not to mingle them with his own assets or the assets of other trusts. A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor's directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretions in administering the trust.
>
> The [trustee has the] duty to keep the beneficiaries informed and to account to them, directly or through court proceedings... A trustee who holds for successive beneficiaries owes a duty to them to administer the trust with impartial consideration for the interests of all the beneficiaries. He should not unnecessarily show a preference either for the current beneficiaries or for the remaindermen who may be or become entitled to principal at a future date. In making investments and sales, disposing of receipts, paying expenses, and making other decisions, the trustee should endeavor to act in such a way that a fair result is reached with regard to the interests of the current or income beneficiaries and those who take possession of their interests at a subsequent date.[xiii]

A second important characteristic of a trust is its asset protection features. Individual claims against a trustee cannot be satisfied from trust property. For example, if a trustee is sued for divorce, the assets the trustee holds as trustee are not marital assets. If a trustee commits a tort, her judgment creditor may not recover from the trust *res*, despite the fact that the trustee, as a trustee, technically holds legal title to trust assets. Moreover, with enforceable "spendthrift protections," trust assets may also be unavailable in satisfying a beneficiary's creditors.[xiv] Spendthrift protections are the most enviable characteristic of trusts.[xv] In most cases, unless the settlor has fraudulently conveyed assets to a trustee, the trust *res* is also immune from the claims of the settlor's creditors. In this sense, the assets in a trust are treated by law in ways similar to

corporate assets which are typically immune from personal claims framed against a shareholder or an officer, and yet the aim of a trust is not to further business interests, but rather to further private donative aims.

Trusts, despite their somewhat ignoble beginnings in England hundreds of years ago, are truly wonderful creatures in the commercial context as well as the private donative context.[xvi] Trusts have been called lawyers' greatest invention.[xvii] The primary function of trusts in the United States today is as a "revocable trust" designed as nothing more than a will substitute with the aims of reducing administrative costs and delays associated with the probate system. Secondarily, trusts are used to protect and preserve wealth for beneficiaries such as minors or individuals with disabilities or simply inexperienced with managing wealth without the assistance and oversight of a trustee. These aims are not deplorable, and, in fact, advance social good in large measure, while increasing the effectiveness of gratuitous transfers.

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The views and opinions expressed in this paper are those of Professor Simmons as an individual and do not reflect the opinions of the University of South Dakota, its School of Law, faculty, administrators, or employees.

ENDNOTES AND SOURCES

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* FREDERICK POLLOCK AND F. W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 228–39 (2nd ed. 1898). The *Bogert's on Trusts* treatise explains the other pre-English origins of the trust from civil law traditions:

> The generally accepted view is that uses were modeled after the *treuhand* or *salman* developed under Germanic Law... An earlier view was that the use was a development of the Roman *fidei-commissum.* Roman law prohibited giving property by will to certain persons, for example, to persons who were not Roman citizens. The Romans developed the custom of devising property to one capable of taking it, with a request that the devisee deliver the land to a desired devisee who was incompetent to take it directly. This was the creation of a *fidei-commissum.* The obligation of the devisee to the desired beneficiary in this relationship was not at first legally enforceable, but it later became so. This confidence was analogous in many ways to the English trust or use, but differed in that it arose by will only and was limited to one purpose.

AMY MORRIS HESS, GEORGE GLEASON BOGERT, AND GEORGE TAYLOR BOGERT, BOGERT'S TRUSTS AND TRUSTEES § 2 (2015).

† Brendan F. Brown, *Ecclesiastical Origin of the Use*, 10 NOTRE DAME L. REV. 353 (1935).

‡ BOGERT, *supra* endnote *, § 2.

§ CHARLES DICKENS, BLEAK HOUSE (1853).

** *See* Nash v. Duncan Park Comm'n, 848 N.W.2d 435, 443 (Mich. Ct. App. 2013) (describing the original Statute of Uses and Michigan's own version) (*vacated in part on other grounds*, Nash v. Duncan Park Comm'n, 862 N.W.2d 417 (Mich. 2015)). That court placed the 1535 Statute of Uses in a contemporary context:

> Feudal landowners employed a use "to relieve tenants of the burdens of feudal landholding, to enable religious orders to have the benefit of land, and to effect greater freedom in the conveyancing of real property." The use conveyed land to third parties who would hold the land for the benefit of others, such as religious orders.
>
> Henry VIII sought to confiscate monastic property and to otherwise enrich his treasury by abolishing the use. At his behest, the English Parliament in 1535 enacted the Statute of Uses, 1535, 27 Henry VIII, c 10 (England). "The Statute of Uses provided that where any person should thereafter be seised of land 'to the use, confidence or trust' of any other person, the latter person shall be seised and possessed of the land in the same estate as that person would otherwise have in use." The statute thereby "extinguished the interest of the person who otherwise would hold title subject to the use" and vested the legal property interest in the beneficiary.

Id. (internal citations omitted).

†† Pierre Lepaulle, *Civil Law Substitutes for Trusts*, 36 YALE L.J. 1126, 1126 (1927).

‡‡ John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

§§ *See* Restatement (Second) of Contracts § 304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."). A third party beneficiary contract simply "reflects the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person." *Id.* cmt. b.

*** *See, e.g.*, Restatement (Second) of Trusts § 2 (1959) ("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.").

††† *E.g.*, Restatement (Third) of Trusts § 2 cmt. a (Tentative Draft No. 1, April 5, 1996) (observing that modern laws "tacitly recognize the trust as a legal 'entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries."); Jeffrey A. Schoenblum, *The Hague Convention of Trusts: Much Ado About Very Little*, 3 J. INT'L TRUST & CORP. PLANNING 5, 14 (1994) (emphasizing that the Hague Convention of Trusts mandates "recognition of the trust as a distinct legal entity.").

‡‡‡ Equitable Trust Co. v. Milton Realty Co., 246 N.W. 500, 502 (Mich. 1933). "There must be a separation of the legal estate from the beneficial enjoyment [in a trust]." *Id.*

xii *E.g.*, In re Marriage of Petrie, 19 P.3d 443, 447 (Wash. Ct. App. 2001) (emphasizing: "A trustee owes the beneficiaries of the trust 'the highest degree of good faith, care, loyalty and integrity.'") "'This duty includes the responsibility to inform the beneficiaries fully of all facts that would aid them in protecting their interests.'" *Id.* (citation omitted).

xiii BOGERT, *supra* endnote *, § 541.

[xiv] Sligh v. First National Bank of Holmes Co., 704 So.2d 1020 (Miss. 1997); Restatement (Third) of Trusts § 58(1) (2003) (providing that "if the terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid."). The Restatement clarifies:

> The term "spendthrift trust" refers to a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries' interests... Spendthrift protection is not limited to beneficiaries who are legally incompetent or who, as a practical matter, lack the ability to manage their finances in a responsible manner...
>
> These rules apply to interests in principal as well as in income, and also to possessory interests under trusts.
>
> A number of states have enacted legislation codifying the law of spendthrift trusts. A few statutes contain significant departures from the rules stated here, such as by allowing restraints on income but not principal interests or otherwise limiting the extent of the protection allowed (e.g., to the beneficiary's support). Some statutes make all trusts spendthrift trusts unless the settlor provides otherwise, or restrain involuntary but not voluntary alienation with respect to all trusts.
>
> The rules of this Section have long been recognized under federal bankruptcy law. Current Bankruptcy Code § 541(c)(2) states that a "restriction on the transfer of a beneficial interest of a debtor in a trust that is enforceable under applicable nonbankruptcy law" is to be honored in bankruptcy. The rule of Subsection (1) of this Section ... has been codified in various state and federal statutes that provide spendthrift restraints or require or authorize their inclusion in pension trusts, most notably the provisions in the Employee Retirement Income Security Act.

Restatement (Third) of Trusts § 58 cmt. a (2003). The Employee Retirement Income Security Act (ERISA) referred to in the final sentence of this quoted text governed retirement accounts in the United States. Retirement accounts are an example of trusts in the commercial context. *See generally*, John Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997).

[xv] Spendthrift protections against a beneficiary's involuntary tort creditors are not without controversy. *See* Carla Spivack, *Democracy and Trusts*, (June 2, 2016), available at http://ssrn.com/abstract=2789128.

[xvi] *See* Langbein, *supra* endnote xiv, at 166 (noting that although "[t]he trust originated at the end of the Middle Ages as a means of transferring wealth within the family, and the trust remains our characteristic device for organizing intergenerational wealth transmission when the transferor has substantial assets or complex family affairs... well over 90% of the money held in trust in the United States is in commercial trusts as opposed to personal trusts.").

[xvii] Judith T. Younger, *Falling in Love*, 58 ST. LOUIS U. L.J. 767, 767 n. 6 (2014) (quoting Maitland who "extravagantly said, 'Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.'") (quoting FREDERICK W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (A. H. Chaytor & W. J. Whittaker eds., 2nd ed. 1936)).

TRANSLATION (attached)

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普通法上的赠与信托与衡平法

Thomas E. Simmons　　林斯韦译

致尊敬的西南政法大学法学院（中华人民共和国，重庆，渝北区，宝圣大道 301 号，401120）的一份论文与讲演。
2016 年 6 月 24 日

在所有衡平法的利用方式之中，规模最大且最为重要的莫过于信托的发明和发展。
Frederick W. Maitland（弗雷德里克 W. 梅特兰），衡平法：一堂讲座课（A. H. Chaytor & W. J.Whittaker 编，第 2 版，1936 年）

摘要

自中世纪的英国到现在，关于赠与信托言说的历史演变解释并且塑造了普通法上信托的基本要素。现今，普通法系上许多国家——乃至除了中国之外的许多民法法系的司法管辖区——都将信托置于私人赠与的背景之下，以用于保持和管理家庭财产，而非选择其他可行方式。这篇论文从功能主义的视角勾勒了普通法上赠与信托的基本要素，并阐明信托是如何成为一种无偿转让方式及其理由。

此份简短的论文呈现了英国普通法和衡平法上私人的，非商业化的赠与信托的历史渊源。此文亦勾画了信托法的最主要的特征，这些特征构成普通法系司法管辖区私人财产管理信托之流行的基础。

the popularity of trusts in private wealth management in common law jurisdictions.

Historical Origins

Although some antecedents to trusts can be identified in German and Roman law, the origin of trusts is typically traced to Medieval England. Owing to the residual influence of the successful French-Norman invasion of England in 1066 C.E. by William the Conqueror and his troops, French legal terminology described the relations of the parties to a trust (or "use" as a trust was then called, a corruption of the Latin "opus" meaning benefit): To create a trust in real property, a landowner (that is, a feoffor) transferred (or enfeoffed) land to a trustee-transferee (a feoffee to uses) for the benefit of a beneficiary (the cestui que use). Trusts soon became ubiquitous. By the time of the rule of Henry V (1413-1422 C.E.), the majority of the real property in England was held in trust.

What explains this popularity? Trusts allowed individuals to skirt legal barriers to accomplish their ends. A respected treatise on trusts puts it this way: "English jurists centuries ago suggested that the parents of the trust were fraud and fear and that the court of conscience was its nurse." One could even say that some of the motivations for the use of trusts were dishonorable. The American Revolution several centuries later was itself born in large measure out of objections to paying English taxes; the result was the birth of a country. The trust too was born out of the aim of tax evasion – or at least out of the aim of avoiding "feudal incidents."

历史渊源

尽管信托的某些来路能追溯到德国法和罗马法，但其渊源通常是被认为源于中世纪的英国。公元 1066 年征服者 William 和他的军队入侵英国，归功于此次法国诺曼人成功入侵的余威，法国的法律术语阐述了信托当事人间的关系（或者说在"使用"某项后来被称为信托的制度，拉丁语中"opus" ['əʊpəs] 的变体意为利益）：在不动产领域创造出了信托制度，土地所有人（换言之，即采邑授予者）为了受益人（有用益权人）的利益，将土地移转（换言之，即授予采邑）至信托受让人（换言之，即有用益权的采邑受封人）。信托制度很快成为普遍存在的事物。到了 Henry V 统治的时候（公元 1413 年——1422 年），英国绝大部分的不动产是以信托的方式被保管持有。

我们该如何看待该制度的流行？信托制度允许个体绕开法律的藩篱而实现其目的。一本令人尊敬的著述是这样表述这一问题的："几世纪以前英国的法学家提出欺骗和恐惧是信托制度的双亲，衡平法院则是他的保姆。"另一位论者甚至认为适用信托制度的某些目的是卑鄙无耻的。向英国付税的斗争很大程度上孕育于几世纪后的美国独立战争；而这一结果又导致了一个国家的诞生。信托制度也因作为一种逃税手段而应运而生——或者至少可以说是作为一种"反封建的"的手段而产生。

When William the Conqueror set about ruling the country he had overthrown, he recognized that the primary source of wealth and power was land. He therefore claimed it all for himself and rewarded and empowered his allies and supporters with use of vast tracts, conditional upon a continuing allegiance (political as well as financial) to his throne. William's trusted allies, in turn, divided the conditional use of their holdings to powerful men, and so on. At the lowest level of this feudal pyramid of wealth and fidelity, a lord would permit the cultivation of his lands in exchange for knight service. The lord was also entitled to relief (or taxes, essentially), upon certain events such as the marriage of a ward, the knighting of a son, or the devise of lands to the next generation of vassals. To avoid these inheritance-like taxes triggered by the transfer of use rights from father to son, ingenious lawyers created the trust. With a trust, the feudal incidents might be avoided because the beneficial use could pass without the need for a legal transfer overseen by the lord.

当征服者 William 为他所推翻的政权国家制定法律规则时，他恍然大悟道，土地是财富和权力最主要的来源。征服者 William 因此宣称，所有土地归他所有，继续效忠（既是政治上也是经济上的）他王权的军队和支持追随者将在此期间附条件地奖励或者赋予享有广袤土地的使用权。相应的，William 的近卫军又将他们所持有的附条件的土地使用权赋予其他强人，等等诸如此类分拨。土地领主处于财富和忠诚这一分封金字塔的最底层一级，他允许耕作自己的土地以此作为骑士义务的交换。土地领主还有权享有减免的权利（或者说，本质上就是税的减免），尤其在一些特定事件发生的时候，比如一位监护人结婚，授予儿子骑士爵位，或者是封臣的下一代继承人受让土地。为了避免土地使用权从老子转移至儿子所产生的遗产税，机智的律师创造出了信托制度，因诸如交税（译者注）之类的封建事件可以被规避，因为不需要领主的过问监督，用益权便能转移。

Initially, trusts were unenforceable in the English courts of law. Canon law prohibited priests from owning property as wealth ownership was inconsistent with a vow of poverty. If a priest came into wealth in the form of real property, he might convey legal title to a trustee, instructing the trustee to distribute the rents to the priest. If the trustee breached the trust agreement and used the property for himself, the priest might sue, asking the court to order the title to be re-conveyed to the priest. This kind of relief was typically denied. The law courts reasoned that if the trustee held legal title then the priest had no grounds

起先，英国法院不能强制执行信托。教会法禁止教士以财产所有权的方式拥有财产，这与教士安于清贫的誓言相违背。如果某位教士以不动产的方式接近财富，那么他可能会将法律权利赋予信托受托人，并指示受托人将租金分配给教士。如果受托人违反了信托协议并自己使用该财产，教士可以提起诉讼，要求法院判决将法律权利复归于教士。这类救济请求通常被法院所否决。法院详尽地论述到，如果受托人确享有法律权利，那么教士将没有理由针对如何使用该财产提起起诉。

to complain about how the property was used.

A second class of courts developed over a long period of English history based upon the authority of the King's chancellor to grant relief "in the King's conscience" when litigants were unsatisfied with the verdict of a court of law. These chancery courts (or "courts of equity") eventually came to compete with the courts of law. While initially, equity offered relief based on precepts of fairness which were less cumbersome than the inflexible writ system of the courts of law, equity eventually became as cumbersome and inefficient as the law courts. This strange bifurcation of courts: courts of law and courts of equity underscored both the development and arrangement of trusts. The courts of law would recognize legal title to a trust res in the trustee, but the courts of equity would enforce the fiduciary responsibilities of a trustee to her beneficiaries.

There were attempts to counter-act the spread of trusts. During Henry VIII's reign (1509-1547 C.E.), in an attempt to recapture the lost revenue that trusts were causing, the Statute of Uses (1535 C.E.) was passed by Parliament to invalidate "passive" trusts where the trustee had no real active duties to perform. The intent of the Statute of Uses was to convert, by legislative fiat, a bifurcated equitable title back to legal title. Ultimately, the attempts to defeat the common law trust were unsuccessful. "Passive" trusts have been largely superseded by trustees with active responsibilities to discharge. Today, the trust is widespread in common law countries:

当诉讼当事人对普通法院的裁判结果不满意时，可以向基于“国王良心”的国王大法官寻求救济，在英国历史的漫长时期里，第二类法院由此而发展。这些大法官法院（或者说是“衡平法院”）最终与普通法院成为竞争对手。起初，衡平法院凭借公平的概念使其不像有着不灵活令状体制的普通法院那般累赘繁复，但到了最后，衡平法院变得同普通法院一般不灵活和累赘繁复。出现了一奇怪的法院分歧：无论是普通法院和衡平法院都重视信托制度的发展和构造，但普通法院认为，信托财产的法律权利限于信托受托人，但衡平法院认为能为了受托人的受益人强制其履行受托责任。

历史上曾有阻止信托制度推行的尝试。在 Henry VIII 统治时期（公元 1509——1547 年），为了使因信托制度造成的流失收入重新征收，国会通过了《使用法》（公元 1535 年），旨在使得“消极”的信托关系，即那些信托受托者没有真正积极义务履行的无效。《使用法》被立法机关批准施行，旨在矫正分为两部分的衡平法上所有权复归为法律上所有权。最终，这一企图打败普通法信托的尝试被证明是不成功的。“消极”的信托关系被受托人的积极履行偿债义务而取代。时至今日，信托制度已广泛地传播至各普通法国家：

"Trusts have now pervaded all fields of social institutions in common law countries. They are like those extraordinary drugs curing at the same time toothache, sprained ankles, and baldness sold by peddlers on the Paris boulevards; they solve equally well family troubles, business difficulties, religious and charitable problems."

信托制度现已遍及普通法国家社会制度的各个领域。他们如同在巴黎林荫大道贩卖的特效药，同时能治疗牙疼、关节扭伤、脱发等毛病；同样的，他们也能很好地解决家庭纠纷，商务困难，宗教以及慈善团体带来的问题。

What explains the trust's continuing popularity? Before attempting to answer this question, a brief foray into trust theory is required.

如何解释信托制度接下来持续的流行？在试图回答这个问题之前，对信托理论进行简单的头脑风暴是必须的。

Three Theories

There are three primary theories or ways of thinking about trusts. Each theory standing alone is incomplete and fails to fully describe all of the characteristics of a trust, but each contributes to a complete understanding. The discussion which follows will articulate each theory, identify its strengths, and identify its shortcomings.

三种理论

有三种主要理论或者方式思考信托制度。每一种自洽的理论都是片面，也不能全面地描绘出信托制度的全部特征，但每种理论同时又对信托制度给出了完整的解释。接下来这一部分的讨论将仔细表述每一种理论，明确他的长处和短处。

The primary way of thinking about a trust is as a kind of agreement or contract. A trust agreement has two contracting parties: the settlor and the trustee. Indeed, trust instruments are often captioned "trust agreement" and read very much like an agreement between two parties: a grantor (or settlor) (the transferor of property) and a trustee (the feoffee to uses). For example, a trust instrument – let's call it the "Simmons Trust Agreement" – might read as follows:

一种最为主要的思考信托的方式是将其视为一种协议或者合同。信托协议有着相互联系的双方当事人：信托人与受托人。实际上，信托工具也经常被冠以"信托协议"的标题，读起来也非常像是双方当事人之间的协议：授予者（或者说信托人）（财产的出让方）和受托人（具有用益权的邑地受领人）。举个例子，信托工具——让我们将他称之为"Simmons 信托协议"——正如下所述：

"*This Trust Agreement dated 24/06/2016 is between Thomas E. Simmons, settlor, and Dr. Yuanyuan Bai, trustee. The grantor delivers to the trustee the sum of 10,000 RMB as the trust estate. The*

这一信托协议由信托人 Thomas E. Simmons 与白媛媛博士于 2016 年 6 月 24 日签署。授予人将共计 10000 元民币的信托财产交由受托人。受托人同意保有信托财产，并同意准守此项协议中的

trustee agrees to preserve the trust estate, to follow the terms of this agreement, and to make distributions for the benefit of Ethan Simmons, a minor child (the grantor's son) as beneficiary. The trustee will distribute 10 RMB to the beneficiary on the first day of each month. In addition, the trustee may distribute additional amounts to the beneficiary for the beneficiary's educational expenses as the trustee deems appropriate. Any funds remaining upon the beneficiary's 18th birthday shall be delivered to him and the trust shall then terminate."	条款约定，并为了受益人 Ethan Simmons，一位未成年人（授予人的儿子）的利益分配利益。受托人将在每月的第一天将分配10元人民币给受益人。除此之外，为了收益人的教育支出考虑，在受托人认为合适的时候，受托人也应分配额外的费用予以受益人。所有余下的资金应在受益人 18 岁生日那天转移至受益人，信托关系也应随之终止。
The theory of a trust as a contract is consistent with the "meeting of the minds" between the grantor and the trustee. The grantor can set the terms of the trust in any lawful manner so long as the trustee agrees to those terms. The grantor may identify additional or successive beneficiaries, may provide for the removal and replacement of the trustee, and endow the trustee with extensive powers over trust property (such as the power to invest, exchange, lease, encumber, etc.). Clearly, the agreement of a trust would qualify as an express third party beneficiary contract and the beneficiary would, under contract law, have the power to enforce the terms of the trust against a non-performing trustee even though the beneficiary was not originally a party to the agreement.	将信托关系视为合同的理论与授予人和受托人之间的"合意"一致。只要受托人同意，授予人便能以任一合法的方式将订立信托条款。授予人可以确定额外的或者接替的受益人，也能约定免除和替换受托人，还可以授予受托人就信托财产广泛的权力（比如投资，交换，出租，负债等等权力）。显而易见，信托协议能被作为体现第三方收益的信托，即便受益人并非协议原先的当事人，受益人也能基于合同法有权力要求不作为的受托人履行信托协议中的条款。
And yet a trust is not entirely analogous to a third party beneficiary contract. For one thing, the grantor – after entering into the agreement with the trustee – typically lacks standing to enforce the trust agreement. For another, a trustee is not even an essential requirement to a trust, it being often recited that a trust shall not	然而，信托制度并不能完全类比第三方利益合同。一方面，授予者——在与受托人进入协议之后——通常没有坚持实施信托协议。另一方面，对于信托制度而言，受托人甚至不是一必要条件，老话常说，信托关系并不会因受托人的缺乏而失败。信托法不仅仅是一协议的另一方面原因在于：受信义务是受托人

fail for want of a trustee. Another aspect of trust law that goes beyond a mere agreement is the fiduciary nature of the office of trustee; the trustee owing elevated duties of care and loyalty to the beneficiary of her trust.

的天性，受托人将其审慎而高尚的忠实义务归功于他信赖的受益人。

A second theory to explain trusts is the entity theory. Trusts, in many ways, are akin to corporations or other artificial legal persons. Indeed, trusts have many hallmarks of persons. Trusts can sue and be sued. Trusts can hire and fire consultants or employees. Trusts can buy and sell property. For the most part, trusts have their own tax identification number under U.S. law and file annual tax returns. Thus, in many ways, a trust is like a corporation with the trustee as its officers or board of directors. And yet the trustee of a trust holds legal title to trust assets, while in a corporation neither the board nor the officers have legal title to the firm's assets. The entity theory is therefore also inadequate to explain how a trust functions.

第二种解释信托的理论是实体理论。在许多方面，信托都与公司或者其他拟制法律实体很相像。事实上，信托制度上留下了许多“人”的印记。信托能提起诉讼或者被起诉。信托能雇佣或者解雇其顾问或者雇员。信托能买进或者卖出财产。大多数情况下，在美国法律、文件年度纳税申报单上，信托都有自己的税标示号。因此，在很多方面，信托更像一家公司，受托人可以视为他的高管或者董事会。但信托中的受托人对信托财产享有法律权利，然而在公司中，无论是董事会还是高管对公司的财产都没有法律权利。实体理论因此也无法充分地解释信托的功能。

A third theory which seeks to explain the workings of a trust focuses on the relation of the principal parties – trustee and beneficiary – to trust property (the “trust estate” or res). The property itself in a trust is bifurcated. One part of the property (the legal title) vests in the trustee as legal title holder; the other (beneficial title) vests in the beneficiary. A deed conveying property to a trust typically names the trustee as title holder. For example, a deed conveying Blackacre to the Simmons Trust described above would read:

第三种理论试图解释信托制度的运作机理，并将理论聚焦到主要当事人的关系上——受托人和受益人——就信托财产（“信托不动产”或者其他）。信托中财产本身也是花开两朵。一部分财产（法律权利）归属于法律权利持有人的受托人，另一部分（受益权利）归属于受益人。将某件财产运输给信托的行为通常象征着受托人为一权利享有人。举个例子，在一个信托关系中，将“黑地”运送给 Simmons 信托，通常会读到如下表述：

"*Thomas E. Simmons, grantor, hereby conveys Blackacre, in the province of Sichuan, PRC, along with all improvements and fixtures thereto to Dr. Yuanyuan Bai, as trustee of the Simmons Trust under a trust agreement dated 24/06/2016, grantee.*"

Thomas E. Simmons，受让人，在中国的四川省以此方式运送黑山，连同其所有的改善设备和固定设备运给白媛媛博士，Simmons 信托基于信托协议的受托人，签署于 2016/6/24，受让人。

Absent savings legislation, when a trustee resigns or is otherwise replaced by a successor trustee, new conveyance needs to be recorded to vest legal title in the new trustee (e.g., from Dr. Yuanyuan Bai as trustee, to the new trustee of the same trust). This cumbersome process is never necessary with realty held by a corporation. In a trust, the trustee holds legal title to trust property with all the attendant powers and authority, but the trustee holds title not for the trustee's own enjoyment or use. Instead, the beneficiary holds "equitable" title and – subject to the restrictions of the trust instrument and the discretion of the trustee – is permitted to enjoy the trust res. Thus, the property itself is bifurcated into legal title and beneficial (or equitable) title. The trustee owns, but may not enjoy, the res, while the beneficiary enjoys, but lacks any power to transfer, encumber, lease, or convey the res. The shortcoming of this third theory is that it cannot explain how a trust can act, and be acted upon, like an entity.

由于储蓄基金立法的缺位，当受托人辞去职务或者由其他继任的受托人替代时，一件新的运输需要被记录以赋予新的受托人法律权利（举例来说，从作为受托人的白媛媛博士到新的同一信托的受托人）。这么繁琐的手续从来不可能在公司中存在。在信托中，受托人对信托财产享有法律权利，并有着附随的权力和职权，但受托人享有权利并非为了自己的享乐或者使用。反而，受益人享有"衡平"法律权利——但要服从信托制度的限制和受托人的自由裁量权——被许可享受信托财产。因此，财产本身花开两朵地被划分为法律权利和受益权利（或者说是衡平权利）。受托人拥有，但并不享有信托财产，然而信托受益人享有，但他又缺乏出卖、负债、出租或者运输信托财产的权利。第三种理论的缺陷是不能解释信托怎能像实体那般运作和被运作。

Two Trust Characteristics

The fundamental characteristic of any trust and that which fuels the correct operation of a trust arrangement are the duties of a trustee to the beneficiary or beneficiaries of a trust. A leading common law trust treatise explains:

信托的两种特征

受托人对受益人的义务或是信托受益人的义务是任一信托的基本特征以及激起信托制度构建安排的正确措施。一本权威的普通法信托著述这样解释说明道：

"All trustees are subject to common law duties and equitable rules or principles which in some instances have been codified by statute. For example, the trustee must not personally profit from his administration of the trust. The trustee must continually demonstrate good faith in administering the trust and in dealing with beneficiaries.	所有的受托人均从属于普通法义务和衡平法规则或者原则，在某些情况下，法规已将其成文化。举个例子，受托人禁止在其管理的信托中牟利。受托人必须持续不断地证明其在管理信托财产和对待受益人上的善良意愿。
The trustee has the duty to collect and preserve the property made subject to the trust. The trustee is under a duty to segregate the trust assets and not to mingle them with his own assets or the assets of other trusts. A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust. Any attempt to take action contrary to the settlor's directions may be deemed to constitute a unilateral and invalid deviation from the trust terms even though the trustee is otherwise given broad discretions in administering the trust.	受托人有义务募集和保有受制于信托的财产。受托人有义务单独隔离信托财产，并使其不同自己的财产或者其他信托的财产相混淆。受托者最为基本的义务在于执行信托中条款表述的立遗嘱者或者托管财产者的指示。即便在管理信托财产方面，受托人被赋予额外的自由裁量权，但任何企图背离托管财产指令的行为都将被视为构成单边且无效的，与信托条款有所偏差的行为。
The [trustee has the] duty to keep the beneficiaries informed and to account to them, directly or through court proceedings... A trustee who holds for successive beneficiaries owes a duty to them to administer the trust with impartial consideration for the interests of all the beneficiaries. He should not unnecessarily show a preference either for the current beneficiaries or for the remaindermen who may be or become entitled to principal at a future date. In making investments and sales, disposing of receipts, paying expenses, and making other decisions, the trustee should endeavor to act in such a way that a fair result is reached with regard to the interests of the current or income	（受托人有）义务直接地或者通过法院程序，使受益人知情并对其述职负责……连续为几位受益人负责的受托人有义务以不偏不倚的关心对待所有受益人，为他们管理信托财产。他不应多余地展现对现在受益人或者余下将来可能被成为主要受益人的偏爱。在投资和买卖、处理收入、支付费用或者做其他决定时，受托人应考虑现在受益人、收入受益人以及那些在后来的日子里拥有利益者，而后，为了实现公平目标而努力奋斗。

beneficiaries and those who take possession of their interests at a subsequent date."

A second important characteristics of a trust is its asset protection features. Individual claims against a trustee cannot be satisfied from trust property. For example, if a trustee is sued for divorce, the assets the trustee holds as trustee are not marital assets. If a trustee commits a tort, her judgment creditor may not recover from the trust res, despite the fact that the trustee, as a trustee, technically holds legal title to trust assets. Moreover, with enforceable "spendthrift protections," trust assets may also be unavailable in satisfying a beneficiary's creditors. Spendthrift protections are the most enviable characteristic of trusts. In most cases, unless the settlor has fraudulently conveyed assets to a trustee, the trust res is also immune from the claims of the settlor's creditors. In this sense, the assets in a trust are treated by law in ways similar to corporate assets which are typically immune from personal claims framed against a shareholder or an officer, and yet the aim of a trust is not to further business interests, but rather to further private donative aims.

信托的第二个特征是资产保护的特性。个人针对受托人债务的诉请将不能从信托财产中得到满足。举个例子，如果某位受托人被起诉离婚，那么由受托人所持有的那部分受托财产并非婚姻共同财产。即便事实上受托人，作为一位受托人技术上对信托财产享有法律权利，但如果受托人侵犯他人权益，那么他的胜诉债权人将不能从信托财产中得到些许补偿。此外，随着"关于挥霍无度保护措施"的实施，信托财产亦不能使受益人的债权人得到受偿。关于挥霍无度的保护措施是最令人羡慕的信托特征。绝大多数情况下，除非财产授予人欺骗性地将财产转移至受托人，信托财产也依然对财产授予人的债权人"免疫"。在这个意义上，法律对待信托财产的方式更像公司财产，公司财产典型地对某个股东或者高管虚构的人身诉权而免疫，但与之不同的是，信托的目的并非是为了长远的商业利益，而是为了私人赠与目的。

Trusts, despite their somewhat ignoble beginnings in England hundreds of years ago, are truly wonderful creatures in the commercial context as well as the private donative context. Trusts have been called the greatest invention that lawyers have ever come up with. The primary function of trusts in the United States today is as a "revocable trust" designed as nothing more than a will substitute with the aims of reducing administrative costs and

尽管在数百年前的英国，信托制度的发迹多少有那么一丝不光彩，但在商业背景和私人赠与的背景之下，信托制度是一真正伟大的产物。信托被称作律师想出来的最好发明。在今日之美国，信托制度的首要作用在于用作"可撤销的信托"，即仅被设计为一遗嘱，从而替代了减少行政费用和降低遗嘱认证所带来的目的。其次，信托制度被用于保护和持有受益人的财产，受益人包括诸如未成年人、残疾人或者如果没有受托人

delays associated with the probate system. Secondarily, trusts are used to protect and preserve wealth for beneficiaries such as minors or individuals with disabilities or simply inexperienced with managing wealth without the assistance and oversight of a trustee. These aims are not deplorable, and, in fact, advance social good in large measure, while increasing the effectiveness of gratuitous transfers.	协助或者监督便简直没有经验管理财产的人。这些目的并非应受到谴责，事实上，很大程度上提高了社会福利，同时也提高了无偿转让的效率。