Title

From the negligible to the significant: The role of trustees in the geopolitics of the Middle East, the British Empire, and Europe

Text

Prof. Maitland saw the trust as "an 'institute' of great elasticity and generality; as elastic, as general as contract." That the State of Georgia (U.S.) was originally structured as a public charitable trust (1732/1733) is a dramatic example of the trust's elastic and protean nature. The jurisprudence that fosters this elasticity and generality is taken up in §8.15.95 of *Loring and Rounds: A Trustee's Handbook* (2024) (the "Handbook"), which section is reproduced in the appendix below. One Bermuda lawyer has echoed Maitland's sentiments: "Commercial lawyers are coming to realize what trust lawyers have always known, that the trust is incredibly flexible." See Randall Krebs, *Flexible friend*, 16(2) STEP J. 17 (Feb. 2008). "The future development of new and innovative uses of trusts in commercial applications is limited only by the imagination of the lawyers designing the commercial or tax structures." Id. But these lawyers will be standing on the shoulders of those who have gone before. Take the metropolis of Tel Aviv. In Palestine in the waning days of the Ottoman regime and on through the period of the British Mandate, which ended in 1948, Jews were forbidden by law from purchasing land. The English trust was one vehicle they employed to circumvent the proscription. Thus it should come as no surprise that "[t]he land at Kerem Jabali, which later became … [Tel Aviv's] …first neighborhood, was purchased and financed by a trust transaction." Kaplan, *Trusts & Estate Planning in Israel* 159–160 (2016). This was in 1909.

Despite the trust's elasticity and protean nature, its powers are not magical. There are some problems that cannot be solved, even by the employment of a trust. H.G. Wells was not so sure. In 1920, he had occasion to interview Lenin at his offices in the Kremlin. Wells came away with the view that as brutal and as incompetent as the Bolshevik regime was, it was preferable to whatever the counter-revolutionaries would be in a position to install. To constructively engage the Bolsheviks with their "invincible prejudice" against individual businessmen, the intermediary of a trust would have to be employed. This trust "should resemble in its general nature one of the big buying and controlling trusts that were so necessary and effectual in the European States during the Great War ….This indeed is the only way in which a capitalist State can hold commerce with a Communist State." Wells observed that "[t]he larger big business grows the more it approximates Collectivism." He feared that if his trust solution were not implemented there would be a "final collapse of all that remains of modern

civilization throughout what was formerly the Russian Empire." In his view, it was not beyond the realm of possibility that all modern civilization ultimately could tumble into the abyss as well. Was Wells employing the term "trust" metaphorically, as the U.S. Congress was to do later in the context of legislating its social security welfare scheme? See §9.9.3 of the Handbook. I do not think that he was. In any case, Wells' trust scheme, which was devoid of any jurisprudential specifics, was a geopolitical non-starter.

In 1990, essentially the entire economy of the former East Germany was assigned to a *Treuhandanstalt*, a German trust analog, whose purpose was to marshal salvageable enterprises, buff them up, and sell them to the public, discarding the unproductive. Its president was later murdered, possibly by former Stasi operatives. See 4-part docuseries *The Perfect Crime* (Netflix).

It was said that following the execution of Charles I of England (1600–1649), his lands, as well as those of Queen Henrietta Maria and Prince Charles, were vested with trustees and the profits from them used to pay off army arrears. The sales were "governed" by Parliament. One thing is for sure: This "trust" bore no resemblance to the trust that is the subject of the Handbook, all interests in said lands essentially having been merged by conquest and expropriation into the Commonwealth.

Cross reference. For more on the geopolitical limitations of the Anglo-American trust, see the postscript to Rounds, *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 Univ. Toledo L. Rev. 673, 700-703 (2011). The article was posted Aug. 3, 2011 (see below) in full on JDSUPRA: https://www.jdsupra.com/legalnews/proponents-of-extracting-slavery-reparat-78874/. In the postscript, not only is H.G. Wells's encounter with Vladimir Lenin recounted but also the unsuccessful efforts of certain private parties to employ the Anglo-American trust as a vehicle for shielding the Yukos Oil Company from the predations of Vladimir Putin.

Appendix

§8.15.95 Numerus Clausus: *The Trust Exception* [from *Loring and Rounds: A Trustee's Handbook* (2024)]

In civil law jurisdictions, such as Germany, the *Numerus Clausus* or "closed number" principle is a formal, *i.e.*, statutory, proscription against private individuals and courts creating new forms of real property and new forms of tangible personal property. Only the legislatures may effectively engage in such activity.[1466] The civil-

[1466]"The term numerus clausus is used in Germany alongside *Typenzwang* and *Typenfixierung* (both meaning "fixation of types" of property); the principle is considered a substantive limitation on the

law contractual right, however, is a property form not captured by the proscription. As for property rights incident to civil-law trust analogs, these interests are generally more contractual in character than equitable.[1467] Civil-law trust analogs are discussed generally in §8.12.1 of this handbook.

In common law jurisdictions, no such formal *numerus clausus* principle operates. It has been suggested, however, that in them a *numerus clausus* principle operates informally. In the case of estates in land, for example, "there are five general types of present possessory interests: the fee simple absolute, the defeasible fee simple, the fee tail, the life estate, and the lease … In practice, courts enforce the *numerus clausus* principle strictly (although not of course by name) in the context of estates of land."[1468] In any case, the contractual right and the equitable right incident to a true trust relationship are two property forms that have not been captured by the common law's informal *numerus clausus* proscription, assuming one exists. Instead, these two forms comprise a lightly-regulated *numerus apertus* (open number) property regime. That a trust is *numerus-clausus* exempt in large part accounts for its practical utility. "Trusts are famously fluid; they may be created on whim to serve a nearly unlimited array of purposes."[1469]

definition of property in the code. *See* §854 BGB (defining property)…." Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 n.6 (2000).

[1467]Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 Iowa L. Rev. 2275, 2277 (2015).

[1468]Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 13 (2000).

[1469]Jake Calvert, *A Response to Democracy and Trusts*, 43 ACTEC L.J. 319, 322 (Winter 2018).