Title

To parse or not to parse the Uniform Trust Code in jurisprudential isolation: What would Justinian and Coke have advised?

Text

Since time immemorial in the civil-law and common-law traditions, jurisprudential context has been key when it comes to statutory interpretation. As to the civil law, Michel de Montaigne (1533-1592) observed that the effort of Emperor Justinian (482-565) to legislate a body of statutory law that would address all of life's interactions was an act of futility: "…[But] never will it happen that even one of all the many thousands of cases which you have already isolated and codified will ever meet one future case to which it can be matched and compared so exactly that some detail or some other specific item does not require a specific judgement." Montaigne, *The Complete Essays*, III:13. France, Montaigne opined, would have been better served had the civil law been primarily principles-based rather than code-based.

As to the common-law, Edward Coke (1552-1634) observed that "To know what the common law was before the making of any statute is the very lock and key to set open the windows of the statute." E. Coke, 3 *Inst*. 308. *Cf*., letter, dated. Aug. 24, 1791, from James Wilson (1742-1798) to William Bingham: "To lay the Statute Laws before one, who knows Nothing of the Common Law, amounts frequently to much the same Thing as Laying every third or fourth Line of a Deed before one who has never seen the Residue of it." So too knowledge of the common law as enhanced by equity is the very lock and key to ascertaining the limitations of the Uniform Trust Code, merely a grab bag of statutory tweaks to equity's constellation of principles. The trust was invented by equity and to this day is overseen by the judiciary. Still, equity itself is a collection of appendices to the common law rather than a free-standing jurisprudential regime. In the words of Frederic William Maitland (1850-1906): "Equity without common law would be a castle in the air, an impossibility." Maitland, *Equity* (1909).

In "Choking on Statutes," the first chapter of his book *A Common Law for the Age of Statutes* (1982), Guido Calabresi asserts: "The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law." Perhaps. But the generic contract and the generic property right are still common law creatures, not statutory ones. So, also, is the donative transfer. And it is certainly the case that, notwithstanding the UTC, equity remains the "primary source" of the law of trusts. The UTC does not even presume to define what a trust is. Even the mechanics of breach-of-trust remediation are totally off the UTC's radar screen. *See, e.g*., https://www.jdsupra.com/legalnews/the-restatement-of-restitution-for-unju-53135/. The failure of courts to take into account the UTC's equitable context is now subverting the legitimate equitable property rights of real people. *See, e.g*., https://www.jdsupra.com/legalnews/the-trustees-general-duty-to-account-to-15480/ and https://www.jdsupra.com/legalnews/one-court-fails-to-consider-trustees-no-43194/.