THE LAW RELATING TO THE REMOVAL OF TESTAMENTARY EXECUTORS AND TRUSTEES IN QUEBEC[1]

The subject of testamentary executors and trustees is bound up inextricably with the question of the family and of property rights and, as a consequence, is a vital issue to the majority of human beings. Succession is an institution which springs from the very nature of man and from the obligations which flow from the family relationship. While the state has denied succession only in Russia (the Soviet Civil Code reintroduced it five years later),[2] the American courts[3] have relied on the authority of Blackstone[4] to support the doctrine that succession is not a right but a privilege conferred by the state and that the power of the state with respect to it is unlimited; however, the American cases were dealing with matters of taxation and are not *res judicata* on the question whether or not succession is a privilege.

Despite freedom of willing, which has been incorporated into the law of the Province of Quebec,[5] the testator will generally bequeath his property to his immediate family (costly litigation is frequently the result of any departure from this practice). Therefore, the question of the administrative care meted to his family or relatives, when he is rendered powerless by death, and the length to which the law will go to protect such family or relatives from predatory or negligent acts of executors are questions of primary importance which must, of necessity, preoccupy the testator.

To choose a sagacious executor unerringly in every case is an impossibility : if an experienced man of high principles is appointed, undetected, premature senility may render such a man incapable and prodigal, and the younger man may prove equally untrue to his trust. In the last analysis it is on the law of his country that the testator must place his reliance.

---

[1] Based on the Notes of the Judgment of the Honourable Mr. Justice Surveyer in the case of *Davis* v. *Shaughnessy*, S.C.M. no. C–62130, June 30, 1930.

[2] Holman, *The Law of Succession in Soviet Jurisprudence, A Survey*, (1936) 21 Iowa L. Rev. 487.

[3] *State* v. *Hamlin*, 86 Me. 495, 30 Atl. 76 (1894); *In re Wilmerding's Estate*, 117 Cal. 781, 49 Pac. 181 (1897); *State* v. *Alston*, 94 Tenn. 674, 30 S.W. 750 (1895).

[4] 2 BL. COMM. c., 14.

[5] Quebec Act of 1774, 14 Geo. III, c. 83; C.S.L.C. (1861), c. 34.

THE CIVIL CODE RELATING TO TESTAMENTARY EXECUTORS

The law relating to testamentary executors is a law *sui generis* in the Province of Quebec. In France, the Code Napoléon only contains ten articles on this subject (articles 1025 to 1034); the Haitian Code has a similar number. The Louisiana Code has more articles than the Quebec Civil Code (old Code, articles 1651 to 1682, new Code, articles 1658 to 1689), but the Civil Code of Quebec goes far beyond any of the above mentioned codes in regard to the extent and duration of the executor's powers. A number of decisions, criticized by M. Billette,[6] have tried to assimilate Quebec law to the English law on the subject; but the only English author cited by the Codifiers is *Parsons* on *Wills* (pages 69 to 82, nos. 87 to 110). It appears as if the practice, which had developed in this country prior to the Code, has had more influence on the law than existing texts.

The testamentary executor was unknown in Roman law: while the testator, at times, charged a third party with the carrying out of a number of his wishes, for example, the supervision of the funeral arrangements, it was a special mandate and did not apply to the entire will. Our law is of French origin—it is in the country of the *coutûme* that this notion originated and developed, and was later encouraged by papal decrees.[7]

In their *Cours de Droit Civil Français*, MM. Colin and Capitant remark on this point: "The Romans, although keen realists, were unaware of our institution. It appeared in our old law, probably under the influence of the Church which always looked favourably on wills. Recognized as an institution by the thirteenth century (Beaumanoir, *Cout. de Beauvoisis*, ch. xii), it was developed by jurisprudence and incorporated in the Civil Code under articles 1025 to 1034. Although there are few provisions in the Civil Code on this subject, the institution has nevertheless grown and now tends to enter more into the established usage of the country, because it offers a practical and efficacious means whereby the testator can ensure the execution of his wishes".[8]

---

[6] DONATIONS ET TESTAMENTS (1933), p. 18.

[7] MIGNAULT, DROIT CIVIL CANADIEN, vol. IV, p. 440; PLANIOL ET RIPERT, TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS (1933), p. 721, n. 675; AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS (1919), vol. XI, p. 418, n. 711; BAUDRY-LACANTINERIE ET COLIN, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL (1905), vol. XI, pp. 303, 304, n. 2580.

[8] (1936), vol. III, p. 968, n. 1192.

And the Fifth Report of the Commissioners appointed to codify the Laws of Lower Canada in civil matters[9] depicts with great lucidity the development of this legalistic notion in the Province of Quebec: "The sixth and last section of this chapter, which is of considerable length, treats of testamentary executors. It would be somewhat shorter if it confined itself to the practice which obtained before the legislation of 1774 and 1801. Previously to these dates the limitation of the power of these persons was but seldom and slightly departed from. . . . Under our present system of law on the contrary, as regards authentic wills, as well as holograph wills and wills in the English form, the practice has been introduced to a greater or less extent of extending the duration of the office of executor and of attaching to it, independently of the heir or legatee or concurrently with him, either with or without substitution, very extensive powers for the administration or even alienation of the property, and also of fixing the manner in which the persons appointed to fill the office in the first place may be successively replaced. It cannot be doubted that this extension though it goes beyond the form of the act and although it has been applied to every kind of will, has become so habitual with us as to be considered at present as a portion of our law. And accordingly, the courts have given effect to this kind of disposition, except as regards what, as a matter of public order or jurisdiction, was not considered to be lawful."

Article 917 of the Quebec Civil Code makes provision for the removal of the testamentary executor for specified reasons. There is no corresponding article in the Code Napoléon, but the majority of the authors admit that the removal of the executor may be ordered by the court.[10]

Article 917 of the Quebec Civil Code reads as follows: "If, having accepted, a testamentary executor refuse or neglect to act, or dissipate or waste the property or otherwise exercise his functions in such a manner as would justify the dismissal of a tutor, or if he have become incapable of fulfilling the duties of his office, he may be removed by the court having jurisdiction." The Codifiers maintain that article 169 of the draft (article 917 of the Civil Code) is in conformity "with the actual law, although doubts have been entertained on the subject", and

[9] P. 187.

[10] BAUDRY-LACANTINERIE ET COLIN, *op. cit. supra*, pp. 352, 353, n. 2696; AUBRY ET RAU, *op. cit. supra*, pp. 431 to 433, n. 711; PLANIOL ET RIPERT, *op. cit. supra*, pp. 744, 745, n. 694; COLIN ET CAPITANT, *op. cit. supra*, p. 975, n. 1198; DEMOLOMBE, COURS DE CODE NAPOLÉON (1868), vol. xxii, pp. 86, 87, n. 107.

they have placed the following words above article 169;[11] "Additional article proposed in amendment to settle points in part doubtful." Unfortunately, in the official edition of the Code, article 917 is enlcosed in square brackets, indicating that it is new law.[12]

The Codifiers cite as authorities under this article:[13]

a) A passage in Nouveau Denizart to the effect that the heirs may ask that the seizin be taken from the testamentary executor when his conduct or capacity are questionable (it is impossible to determine if this is a matter of exclusion or removal, for, in the case cited the executor was not permitted to have the money or papers of the testator); (N. Den. vol. 8, par. 213.)

b) The case of *Mackintosh* v. *Dease* wherein judgment was rendered by Day, Smith and Mondelet, Justices, January the 13th, 1852, "That when an executor, whose powers have been extended by a testator, beyond a year and a day, has become insolvent, and is making away with the estate, the Court will interfere to deprive him of the control of the property and oust him from his office." (2 L.C.R. 71).

Testamentary executors are mandataries, but their mandate is *sui generis*. The mandate begins when the testator's life ends, but they are mandataries of the testator, not of the legatees, appointed in order that his last wishes may be carried out with greater certainty, precision and diligence.

Article 917 of the Civil Code, cited above, provides for the removal of the executor; it includes the grounds justifying the dismissal of a tutor (article 285 C.C.) and the executor may therefore be dismissed if his administration exhibits incapacity or dishonesty. His duties are enumerated in article 919, while his powers may be extended under article 921.

The Grounds for Removal of the Testamentary Executor

A. Insolvency.

The French authors are almost unanimously of the opinion that insolvency constitutes cause for removal : in this respect the removal of the mandatary is considered analogous.[14]

[11] *Fifth Report*, pp. 189, 375.
[12] *Chouinard* v. *Chouinard*, (1887) 13 Q.L.R. 275 at p. 283.
[13] N. D. *vbo Exécution testamentaire*, n. 213; *Mackintosh* v. *Dease* (1851) 2 L.C.R. 71.
[14] Baudry-Lacantinerie et Colin, *op. cit. supra*, p. 353, n. 2697; Aubry et Rau, Cours de droit civil français (1875), vol. vii, p. 447, n. 711.

But article 917 of the Quebec Civil Code, by its inclusion, under the cause of removal, of the exercise of functions in such a manner as would justify the dismissal of a tutor, prevents us from following the trend of French *doctrine*, since our courts have always refused to remove a tutor for insolvency.

In *Charbonneau* v. *Charbonneau*, Mr. Justice Taschereau declared that insolvency is not a motive of itself sufficient to justify dismissal from a tutorship.[15] Similarly, the Court of Appeal refused to dismiss a tutor where there was no proof of maladministration,[16] and the Court of Review decided likewise, especially where it was not established that the insolvency was the result of misconduct or incapacity.[17]

But it would appear that the Codifiers had definitely settled the law on this point in citing under article 917 the case of *Mackintosh* v. *Dease* which asserts that the court has power to remove an insolvent executor who had wasted a great part of the estate.

M. Mignault[18] upholds the view that poverty or even insolvency in the absence of proof of maladministration, incapacity or dishonesty cannot justify removal, and in *Lespérance* v. *Gingras*,[19] Mr. Justice Langelier says that if the insolvency of a testamentary executor is not alone and of itself a cause for removal, the court may and moreover should take such insolvency into account in appreciating acts displaying incapacity and dishonesty.

However, in 1924, in the case of *Ex parte Carrier*, Chief Justice Sir François Lemieux maintains, following the French authors, that insolvency is of itself a ground for dismissal; but he makes this statement merely in answer to the objections of the executor who had already resigned.[20]

B. The Grounds Must Be Serious.

It was maintained in *Gingras* v. *Brillon*[21] that the proof adduced of grounds for removal must be clear and unmistakable, if the court is to order dismissal from office a few months after the executors have entered upon their administration.

[15] *Charbonneau* v. *Charbonneau*, M.L.R., (1886) 2 S.C. 121.
[16] *MacFarlane* v. *Stimson*, M.L.R. (1891) 7 Q.B. 397.
[17] *St. Pierre* v. *Tucker* (1900) 18 S.C. 451.
[18] *Op. cit., supra*, p. 481.
[19] (1899) 15 S.C. 462.
[20] (1924) 62 S.C. 352.
[21] (1880) 3 L.N. 183.

By the judgment in *Robert* v. *Martin*[22] the executor was not removed from office but he was ordered to invest the estate funds within a certain time—a *bon père de famille* does not leave money in the bank at three per cent interest for a period of five years. The judgment in *Gendron* v. *St. Jacques*[23] is in conformity with the above holding. In *Contant* v. *Mercier*[24] the court ordered the executor to distribute the money as directed by the will.

In 1889 the Supreme Court declared that a lawsuit between the executor and the estate, especially where there existed other executors, does not suffice for dismissal. Although irregularities were shown in the administration, there was no incapacity or dishonesty (*Mitchell* v. *Mitchell*).[25]

The isolated act in *Devine* v. *Griffin*[26] declared to be negligence without bad faith was a loan by the executor. It was excused because the plaintiffs had been repaid and sufficient security had been offered to the minor; moreover, the executor had always acknowledged his responsibility.

In the matter of loans to legatees dismissal was not ordered where no proof was made that the funds of the estate could have been placed more advantageously if placed according to the testator's wishes (*Chouinard* v. *Chouinard*);[27] while in *Howard* v. *Yule*[28] unsecured loans by the executor to two of his sons and to other descendants of the heirs caused his dismissal (all of these persons might possibly not succeed, and at the time of the institution of the action one of the borrowers had already died penniless and others were without means). The executor's loan to himself was censured only on the ground that no interest was paid.

Failure to make an inventory and the fact that the domicile of the executor is in a foreign country are immaterial factors in an action for removal (*Myers* v. *Myers*);[29] lack of making an inventory is equally immaterial in the case where the testator had himself drawn up a statement of his affairs before his death and the heirs or legatees had never asked for an inventory during a period of forty years (*Howard* v. *Yule*).

[22] (1915) 48 S.C. 27.
[23] (1921) 27 R.L. n.s. 146.
[24] (1891) 20 R.L. 382.
[25] (1889) 16 S.C.R. 722.
[26] (1881) 25 L.C.J. 249.
[27] (1887) 13 Q.L.R. 275.
[28] (1881) 25 L.C.J. 229.
[29] (1912) 42 S.C. 415.

The executors were held to have proved their incapacity in failing to perform the duties entrusted to them by the testator, in the Court of Appeal (*French* v. *McGee*);[30] they delegated the entire administration to a stranger who paid the monies belonging to the estate into a bank in his own name, afterwards drawing them out, and the balance which the defendants had promised to pay to the plaintiffs had not been tendered to them.

And the Supreme Court dismissed an executrix who for her personal aggrandisement consented to a lease which was prejudicial to the estate and in addition, received bonuses without rendering an account of them (*Ross* v. *Ross.*)[31]

In *Seed* v. *Tait*,[32] Mr. Justice McCord discusses the meaning of the word "dishonesty" in the English version of article 285 of the civil code: "This word has to be taken in its legal sense of unfaithfulness to duty. The word in the French version is *'infidélité'*. The defendant's conduct in refusing the cooperation of the other executor, and in paying himself the charges already referred to . . . . are unfaithfulness to his trust."

The considered judgment of Mr. Justice Surveyer in the *Davis* and *Shaughnessy Case* dismissing an action praying for the removal of the two executors, Lord Shaughnessy and Mr. Reaper, was confirmed by the Court of Appeal and by the Privy Council,[33] the latter decision being delivered by Lord Blanesburgh on November 23, 1932. It had been urged that the Board should govern itself by the principles of Quebec law and not by those of English law where there was divergence, and their Lordships agreed that the question at issue was essentially one of Quebec law and that English law should only be resorted to as illustrative or for guidance where the matter in question had not been clearly provided for by the Quebec Code or where Quebec authorities were conflicting, non-existent or indecisive. But they further declared that no discussion was necessary as to the difference in outlook between the law of Quebec and of England: whether the testator's wishes or the interest of the beneficiaries and the estate was paramount. "In the present case the question is academic for the reason that, in their Lordships' judgment, the acts and omissions of the respondents unexplained and unexcused are sufficient to justify a discretionary order for removal, whichever be the

[30] (1886) M.L.R. 2 Q.B. 59.
[31] *Cass. Dig.* (1893), p. 306.
[32] (1883) 9 Q.L.R. 145, at p. 146.
[33] Nov. 25, 1932, Privy Council Appeal, no. 78 of 1931.

form in which the question is propounded."[34] However, they found that this conduct was palliated and excused by the very exceptional circumstances.

The Privy Council declared that they took a more serious view of the case than did any of the learned trial judges. The primary duty, their Lordships said, imposed on the respondents by the will to pay the testator's debts, was to proceed by immediate realization to provide the moneys necessary to realize on the Alcohol B shares, since these were non-voting shares with no influence on control (a proceeding which the testator himself had expressed his intention of taking). Their failure in this essential duty is described by their Lordships as neglect. The retention of the McNish debentures may be described as neglectful also, although somewhat less so, owing to the difficulty of their disposition on a large scale. As to the employment of the company's funds in three enterprises, there is nothing hazardous in the Investment Foundation or the Cadillac Coal, although the investments were ill-timed, but the venture of Jennison and Co. was a speculative transaction of the worst kind. With regard to the above complaints they were excused by the fact that Lady Davis appears to have shown wisdom after the event and the respondents' actions were all based on the mistaken belief that the interests of the company superseded those of the estate, and that they were carrying out what would have been the testator's policy had he been alive; and "while the Jennison venture remains unrelieved and unexcused, it was not a transaction which could in view of its singularity and of the comparatively limited amount involved of itself justify acceptance by their Lordships of the appellants' claim."[35]

In the adjustment of the claims of Lord Shaughnessy against the estate or the taking of concessions no judicial approval is possible of the acts of the respondents, but remembering the testator's "habitual generosity these may all be regarded as innocent mistakes".

The Law of Quebec Relating to Trusts

It is to be noted in the *Shaughnessy Case* that Lord Shaughnessy and Mr. Reaper were both executors as well as trustees, and as trustees they are governed by articles 981a

[34] *Ibid*, at p. 35.
[35] *Ibid*, at pp. 36, 37.

and following of the Civil Code, which are of statutory origin and of English inspiration.

Trustees for the purpose of their trust are seized as depositaries and administrators for the benefit of the legatees of the property conveyed to them in trust (981b C.C.).

Trustees dissipating or wasting the property of the trust or refusing or neglecting to carry out the provisions of the document creating the trust, or infringing their duties, may be removed by the Superior Court (981d C.C.).

When there are several trustees, the majority may act, unless it be otherwise provided in the document creating the trust (981f C.C.).

Mr. Justice Surveyer[36] remarks that "when persons are both executors and trustees as in this case, it may be hard to reconcile the latter article with the provisions of article 913 of the Civil Code, which says that if there be several joint testamentary executors with the same duties to perform, they have all equal powers and must act together, unless the testator has otherwise ordered. So that, while executors of equal powers must be unanimous, trustees may act when they are a majority.

"If it becomes necessary to find out when the parties appointed by Sir Mortimer Davis to carry out the provisions of his will must be treated as executors or may be treated as trustees, I should say that all the acts which are particularly the duties of the testamentary executors and which should be performed within the year and a day from the death of the testator, when the latter has not extended the powers of his executors, are acts of executorship for which unanimity is required, whilst all acts to be performed when the assets are realized, the succession duties and legacies paid, and shortly, when article 919 has been complied with are trustees' acts which may be performed by a majority.

"In this case, most of these acts will have to be performed by the Incorporated Company, and consequently articles 913 and 981f of the Civil Code will hardly have to be reconciled."

In *Brunet* v. *Brazier*[37] it was decided that a difference of opinion between one trustee and the remaining two even where the will exacted that they be unanimous in their opinion does not constitute ground for removal when no proof has been made that the interests of the estate were jeopardized as a result.

[36] Notes of Judgment in the case of *Davis* v. *Shaughnessy* at p. 15.
[37] (1898) 7 Q.B. 166.

The Court of Appeal stated in this case the acts which would constitute grounds for removal of the trustee, viz., if he had

a) dissipated or wasted the trust property;
b) refused or neglected to execute the provisions of the will; or
c) contravened his duties deliberately and in bad faith (article 981 d of the Civil Code).

Whether the inspiration for the law of trusts in the province of Quebec was the English law of trusts is a subject which has been keenly controverted. Since the Supreme Court in *Curran* v. *Davis*[38] took the affirmative view it would seem that in the future we shall hold that our law of trusts is inspired by English law on the subject. And we find Mr. Justice Mignault concurring in this view.[39]

There are no reports at Quebec in respect to the passing of the law 42–43 Victoria, ch. 29, entitled An Act Concerning Trusts, which was incorporated afterwards into the Civil Code as Chapter Fourth (A): "Of Trusts"; the only fact which we know is that Judge Wurtele, a member of the Legislature at the time, sponsored the bill.

But this law must have had its origin in some definite legal aspect, our Legislature must have had a point of departure. It is not the *fideicommissum* of Roman Law[40] nor yet the *fiducie* of French Law, concerning which Laurent says the usage has been lost.[41]

As to the foundation in France at the present time, M. Lepaulle[42] defines it as having merely an altruistic aspect, always implying the notion of *bienfaisance*—while trust has a much wider aspect.

The Law of England Relating to Trusts

This powerful legal institution is definitely peculiar to England in its origin (as we shall discuss later). It would be distinctly unreasonable to conclude that a chapter entitled "Of Trusts" should be incorporated into our Code and yet, without calling attention to the fact, have no relation to the English law of trusts. We are forced to conclude that our legislature

[38] [1933] S.C.R. 283 at p. 302.
[39] *A propos de fiducie*, (1934) *Rev. du Droit*, vol. xii, p. 73.
[40] [1933] S.C.R., at p. 295.
[41] Laurent, Principes de droit français (1876), vol. xiv, p. 444, n. 404.
[42] Traité théorique et pratique des trusts (1932) p. 55.

approved of trust as a legal mechanism necessary to social and economic life and thus included the concept of an English institution in our law.

In its embryonic history the English trust was a non-juridical institution known as the "use". It is generally conceded that it developed independently in England; most authorities now have discarded the theory that it originated in the Roman law *fideicommissum* or in the *Salman* of the Salic law—although it must be admitted that a somewhat similar concept did exist in the Salic law and that an extremely similar concept exists in the Mohammedan law of the present day.[43]

As a juridical institution with infinite ramifications in modern English civilization, we find the doctrine of trusts the natural outcome of ancient English elements.[44] The trust has even penetrated into public law as the theory of mandate since the Treaty of Versailles, but merely the idea of trust is used in this case.

M. Lepaulle in his illuminating exposition of the English trust fittingly describes it in the following words: "From the peace terms of the greatest of wars to the settlement of the most humble succession, from the most daring Wall Street combines to the protection of grandchildren, the Trust sees a variegated procession of human interests pass before it: dreams of peace, imperialism or commerce, endeavour for monopoly or to gain paradise, hatred or philanthropy, love of family or the wish to despoil it—all these take their place in the retinue."[45]

But we have not incorporated the English law of trusts in its entirety. Mr. Justice Bond in the Court of Appeal[46] says: "It is not, however, to be assumed that because the word trust (fiducie) is used, that the whole doctrine of trusts as known and administered in England has been bodily imported into the law of this Province." In the Supreme Court, Mr. Justice Rinfret[47] upholds this view also.

Under the English law in any question of the removal of a trustee the interest of the beneficiary is paramount. Their removal may be accomplished in the following ways :

[43] PLUCKNETT, HISTORY OF THE COMMON LAW, p. 371.
[44] JENKS, THE BOOK OF ENGLISH LAW (1928), p. 317 *et seq.*; *Stephen's* COMMENTARIES ON THE LAWS OF ENGLAND (1928), vol. 11, p. 31; MAITLAND, SELECTED ESSAYS (1936), p. 155 *et seq.*
[45] *Op. cit., supra*, p. 114.
[46] *Curran* v. *Davis*, (1932) 53 K.B. 231, at p. 236.
[47] [1933] S.C.R. at p. 302.

a). Under the power contained in the trust instrument;
b). Under a statutory power; or
c). By the Court.

The statutory jurisdiction of the Court as to the appointment of new trustees has in modern times been mainly derived from the Trustee Acts 1850, 1852 and 1893; by the Trustee Act, 1925, the law is consolidated and extended, and previous enactments are repealed.[48] Section 36 of the Act[49] enacts that one or more persons may be appointed to be a trustee or trustees in the place of the trustee who is deceased, remains out of the United Kingdom for more than twelve months, desires to be discharged, refuses, or is unfit or incapable or an infant. "Altogether, apart from its power under statutes, the Court has a jurisdiction to remove trustees and to appoint newcomers in their place, whenever it considers the interest of the beneficiaries required it."[50]

Mr. Justice Surveyer maintains in his Notes of Judgment:[51] "There is a great difference between our code and the English law on this subject. . . . For instance, it would be dangerous to apply to the Davis will the following rule which I find stated in Lewin on Trusts[52]—'4. The Jurisdiction of a Court of Equity to remove a trustee is ancillary to its principal duty, to see that the trusts are properly executed. And therefore, though charges of misconduct are not made out, or are greatly exaggerated the Court may, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, remove the trustee, as trustees exist for the benefit of those to whom the trust has given the trust estate; and in an administration action the Court will exercise the jurisdiction at any time when it deems it expedient so to do, and notwithstanding that the removal of the trustee has not been expressly asked for by the pleadings'."

Mr. Justice Surveyer proceeds to review the English, Canadian and American authorities.

All the leading English authors rely on the case of *Letterstedt* v. *Broers*,[53] wherein Lord Blackburn delivered the judgment: "In exercising so delicate a jurisdiction as that of removing

[48] LEWIN ON TRUSTS (14th edition, 1939), pp. 436, 437.
[49] (1925) 15–16 Geo. V, c. 19.
[50] KEETON, THE LAW OF TRUSTS (1934), p. 200.
[51] See note 36 *supra*, at p. 13.
[52] LEWIN ON TRUSTS (12th edition, 1911), p. 1088.
[53] (1884), 9 App. Cas., 371 at pp. 387, 389.

trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case. . . . It is quite true that friction or hostility between trustees is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate it is certainly not to be disregarded.

"Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties that have yet to be performed, their Lordships can come to no other conclusion than that it is necessary for the welfare of the beneficiaries that the Board should no longer be trustees."

It would appear that Mr. Underhill[54] goes rather far when he states that a trustee may be removed where he "from faults of temper or want of tact is in a permanent condition of hostility with his co-trustees and beneficiary". This statement relies on the case quoted above and on the case of *the Earl of Portsmouth* v. *Fellows*,[55] in which Sir John Leach says: "If a bill be filed by a *cestui que trust* for the purpose of removing a trustee, it is not scandalous or impertinent to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que trust*. . . . ; but it is impertinent and may be scandalous to state any circumstances as evidence of general malice or personal hostility. . . ."

In the case of *Ewing* v. *Orr Ewing*,[56] it is pointed out that "The Court of Sessions (Scotch) will not . . . . . interfere with the administration *extra curiam* except for some special cause shown. The English Courts, on the other hand, regard the mere exoneration of fiduciaries from the risks and responsibilities of an administration *extra curiam*, and the better security for the interests of beneficiaries afforded by judicial administration, as sufficient reason (generally) for its intervention . . . ."

In regard to bankruptcy, the rule is laid down that it is the duty of the Court to remove a bankrupt, who has trust

[54] ON TRUSTS (1926), pp. 385, 386.
[55] (1820) 5 Madd., 450.
[56] (1884–85) 10 App. Cas. 453 at p. 505.

money to receive or deal with, so that he cannot misappropriate it. There may be exceptions under special circumstances to that general rule.[57]

The Canadian law of trusts (not including the Quebec law on trusts) is the same as the English law with certain minor statutory differences. There is no text-book on the Canadian law of trusts; the leading English texts are used and the English cases followed.[58]

And concerning the American law of trusts Professor Austin Scott of the Harvard Law School says that formerly "The American Courts followed pretty closely the English precedents. But during the last fifty years there has developed a wider divergence between the English and American doctrines. . . .

"The English chancellors of the latter part of the seventeenth century and of the eighteenth century evolved a juridical concept of so broad and yet so flexible a character that it was adequate for the exigencies not only of their own time and place but of the American jurisprudence of the fourth decade of the twentieth century. It is when one examines the comments and illustrations in the Restatement[59] that he realizes how great the change has been, not in the principles themselves but in their application. . . .

"The development of the spendthrift trust is but one phase of a larger movement which has taken place in the United States. The American courts have laid increasing emphasis on the idea that the wishes of the settlor should be controlling in all matters relating to the trust . . . . curiously enough, the maxim *cujus est dare, ejus est disponere* is employed as a premise by judges in both countries. A man should be permitted to do as he likes with his own property. But which man? The settlor or the beneficiary? In England the courts take the view that the beneficiary should be permitted to dispose of his interest as he likes. In the United States the courts take the view that the settlor can dispose of his property as he likes."[60]

In conclusion, from an essentially practical as well as a juridical point of view, we should note a hiatus in the application of the law relating to the removal of the administrator in the

[57] *Re Barker's Trusts* (1875), 1 Ch. D., 43.

[58] K. G. Morden (1937), Can. Bar Review, vol. xv, pp. 23, 24; (1920) 18 O.W.N. 98, *Re Curran;* (1925), 36 O.W.N., 102, *Re McGannon;* [1928] 2 W.W.R., 697, *Re Somerset.*

[59] Restatement of the Law of Trusts, as Adopted and Promulgated by the American Law Institute at Washington, D.C., May 11th, 1935.

[60] *Fifty Years of Trusts,* (1936–37) Harvard Law Review, vol. 50, pp. 61 and 71.

province of Quebec. Frequently, when the estate is composed of immoveables, as apartment houses, homes and other buildings, these immoveables depreciate in value and the revenues dwindle. In many large cities on the continent such buildings are reclaimed at comparatively small cost, either by renovation or conversion to a new use; therefore, a supine attitude on the part of the administrator could be brought under lack of performance of his duties or incapacity and justify his dismissal.

CICELY MANLEY.

Montreal.