IN-DEPTH ANALYSIS OF THE HISTORICAL TERMS RELATED TO THE COMMON LAW "TRUST"

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Abstract

"It is at least possible that the trust will in the 21st century join those other English inventions, such as football and the steam engine, which have swept the world"[1]*.The given optimistic definition of common law "trust" enables us to regard it as a unique legal instrument. However, its origin is the source of numerous debates of the scholars of the world. Scientific literature presents three theories concerning the origin of the "trust": Roman, Germanic and Islamic. Until the nineteenth century, it had been believed, that the trust had been modeled on the Roman legal institution "fideicommissum". However, by the nineteenth century, the given theory was replaced by the new assumption, which proposed, that the Salic "Salmannus" had been a predecessor of the "trust". The debates about the origin of this institution were fueled by the fact, that the English "use" (an initial form of the trust), the Roman "fideicommissum" and the Salic "Salmannus" had the same cause of emergence: they emerged as a "result of positive-law deficiencies and restrictions concerning the ownership and devolution of property"*[2] *during those times, when the land was the principle form of wealth. The given paper presents an attempt to highlight the existed theories about the origin of the "trust" and make new conclusions on the basis of in-depth terminological analysis. Synchronic and diachronic approaches initiate insights into the juridical and lingual developments.*

Keywords: *Fideicommissum, law, Salmannus, terminological analysis, trust.*

1. Introduction

The trust is usually treated as a "product" of equity, while "use" is considered as a forerunner of the trust. The latter was created in the 13th-14th centuries as a mode of the transference of property. The landholder/transferor of the property was denoted by the term "***feoffor***". He enfeoffed (transferred) "the legal estate in the land to a "***feoffee to use***" (the trustee) to hold it to the use of a "***cestui que use***" (the beneficiary). The right of the claimant was a right called a "use"[1]. The feoffees were almost always three in number. They held the land "in joint tenancy with right of survivorship. This arrangement made it very unlikely that the legal title would descend from a last surviving feoffee to that feoffee's heir and give the lord a potential wardship. It was very common for the feoffor to be the cestuy que use"[2].

It's worth mentioning, that in Common law jurisdiction ***feoffee to use*** was regarded as an absolute owner of the property (i.e. Common law did not recognize the interest of the ***cestui que use***). D. J. Seipp indicated in this respect: "Feoffees to uses had the full legal title to land, the right to sell or grant it, and the ability to sue and be sued in relation to the land… beneficiary or *cestuy que use* had no interest enforced by courts of common law and no remedy in courts of common law against feoffees who misbehaved"[3]. In 1535 the frequent employment of the "***use***" led to the enactment of the Statute of Uses, which tried to convert all equitable uses into legal estates by eliminating the ***feoffee to uses*** making the beneficiary the legal owner. Therefore, the ***feoffment to uses*** was regarded as a fiduciary relationship, which lay at the heart of the earliest attempts to divide the legal and beneficiary ownerships.

2. Content

There have been a lot of debates about the forerunners of the ***use***. Moreover, the question of its origin has raised controversy among many scholars. "It has been suggested that "Roman, Canon and Germanic laws (sources of the European *Ius-Commune* tradition) have provided elements of the law of [the English law of] trust"[4]. M. Lopio even indicated, that the English Chancellors "drew on a wealth of thirteenth- and fourteenth-century civil law authority in their development of the English trust… it was therefore not far-fetched to refer to these civil law institutions as being the "foundation" of the English trust"[5]. Till the 19th century it had been

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[1] Judith Bray, *A student's guide to Equity&Trusts*. (New York: Cambridge University Press, 2012), 7.

[2] David J. Seipp, "Trust and fiduciary duty in the early common law", *Boston University Law Review*, 91 (2011):2015, accessed November 22, 2015 http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SEIPP.pdf

[3] David J. Seipp, "Trust and fiduciary duty in the early common law", *Boston University Law Review*, 91 (2011):2016, accessed November 22, 2015 http://www.bu.edu/law/central/jd/organizations/journals/bulr/documents/SEIPP.pdf

[4] Tamar Frankel, "Towards universal fiduciary principles," accessed November 20, 2015 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009365

[5] *The Oxford Handbook of comparative law*, ed. M. Reimann et al. (Oxford University Press, 2008), 1088.

strongly believed, that the Roman law (the legal institution ***fideicomissum***) had stipulated the creation of the common law "trust". It had also been assumed, that "there was a momentary contact between Roman law – medieval, not classical, Roman law – and the development of the English *use*. Englishman became familiar with an employment of the word *usus* which would make it stand for something"[6] that just was not, though looked exceedingly like *dominium* – a full ownership. In the general sense "***usus***" meant "the act of using thing"[7]. As a personal servitude, it denoted "the right to use (ius utendi) another's property, without a right to the produce (fructis) of the thing"[8]. The classical Roman "***usus***" rejected the exploitation of the property for the personal benefit. It's significant, that the Latin terms "***usuarius***" and "***usuary***" denoted a trusted person (trustee) who had the right of ***usus*** on another person's thing. S. Herman even believed "that the clerical usus could have put the English onto the idea of "feoffment to uses", later trust, because of duties of loyalty and a division of enjoyment and administration"[9]. T. Frankel made more convincing statement via indicating, that the "***use***" dated from the 9th century "and was influenced by the doctrine of *utilitas ecclesiae*"[10].

The strong belief in the Roman origin of the "***trust***" radically changed at the end of the 19th century. Moreover, the Roman theory was criticized via relying on the fact, that similarities between the **"*fideicomissum***" and "***use***" were superficial, for instance, the "use" rarely arose by means of a will, while "*fideicomissum*" was a testamentary bequest. Moreover, "for the "*fideicomissum*" the beneficiary (the fideicommissarius) was considered the real owner of the transferred property, while for the English use, the third party intermediary (the feoffee to uses) held legal title to the transferred property"[11]. It was even mentioned, that the English word "***use"*** had not derived from the Latin "***usus"***. Its appearance was connected to the Latin phrase "***ad opus***", which occurred as early as Merovingian times in France and was transmitted to England in the 9th century.

Therefore, at the end of the 19th century the origin of the "***trust***" was vividly called into question. This process was especially stipulated by the fact, that US Supreme Court judge, Justice Oliver Wendell Holmes, expressed his extremely convincing view on the given subject. Holmes stated, that the English "***trust***", like the German "***Salman"/"Treuhand***", had sprung from Germanic roots and the feoffee to uses of the early English law corresponded "point by point to the Salman of the early German law"[12]. The same idea was accepted by the well-known scholars of different centuries: T. Frankel, A.V. Venedictov, English legal historian F. Maitland, German researches R. Helmholz and R. Zimmermann (the creators of the book "*Itinera Fiduciae: Trust and Treuhand in Historical Perspective*") and others.

T. Frankel indicated, that "Salic law influenced [the] development of the use" in England. Under the sixth-century Salic law, a trusted person (***Salman*** or ***Treuhand***) could become a trustee by receiving "property from a grantor on behalf of beneficiaries. Usually grantors held on to their property until death and the Salman transferred the grantor's property after the grantor's death"[13].

A.V. Venedictov also stated that the German "***Treuhand***" and the English "***trust****"* sprung from the similar root – the Old German law. Moreover, he strongly believed, that "the reception of the Roman law in Germany impeded the development of this institution and it did not spread as widely as in England"[14]. F. Maitland made more precise description of his conception via indicating to the origin of the institution of "***use***": "the use appeared in Germanic sources in the records of the early Franks and Lombards, which was then Gallicized to "*al os*" and "*ues*" and as such made its entry into the *Domesday Book* and the Laws of William the Conqueror. From the Germanic sources the phrase was transformed into the Anglo-Saxon books of the ninth-century and evolved into the English term of use"[15]. T. Zartaloudis added some important details to this viewpoint. He believed, that: "the early use had as its primary meaning "benefit" and is said to be derived from *ad opus* (*ad opus meum, tuum, seum* meaning on my behalf, or yours, or his) which in old French became *oes, os* or *ues* and which was arguably then fused with the term "use". *Ad opus et ad usum* were, in fact, often seen as interchangeable,

[6] Thanos Zartaloudis, "Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England", accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts

[7] Adolf Berger, *Encyclopedic Dictionary of Roman Law,* Volume 43, Part II, (Philadelphia: The American Philosophical Society, 1953), 754.

[8] Adolf Berger, *Encyclopedic Dictionary of Roman Law,* Volume 43, Part II, (Philadelphia: The American Philosophical Society, 1953), 755.

[9] C.H. van Rhee, "Trusts, Trust-like Concepts and Ius Commune", *European Review of Private Law*, 3 (2000): 458.

[10] Tamar Frankel, *Fiduciary law,* (Oxford University Press, 2011), 95.

[11] Charles E. Rounds, *Loring and Rounds: A Trustee's Handbook* (New York: Wolter Kluwer, 2012).

[12] C.H. van Rhee, "Trusts, Trust-like Concepts and Ius Commune", *European Review of Private Law*, 3 (2000): 459.

[13] Tamar Frankel, *Fiduciary law,* (Oxford University Press, 2011), 95.

[14] Tamar Zambakhidze, "Trust (Historical Review)," *Samartali 1,* (2000): 61.

[15] Thanos Zartaloudis, "Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England", accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts

written in the full formula of *ad opus et ad usum*"[16]. Domesday Book (1086) – a manuscript record of the "Great Survey" of English landholding – noted that the "lands said to have been held *ad usum* (to the use of) someone or other. These were probably lands put temporarily in the custody of others, such as when a landholder went off on a pilgrimage"[17].

During the investigation of the relationship between the "*trust*" and the "*Treuhand*"/"*Salman*"/"*Salmannus*", the greatest attention must be paid to the question of the origin and evolution of the latter.

The institution of "***Salman***" "dates back to the fifth-century legal code of the German tribe of the Salian Franks, the Lex Salica"[18]. O. W. Holmes stated in this respect: "In the Lex Salica – the law of Salian Franks - you find going back to the fifth century a very mysterious person, later named the Salmannus – the sale man – a third person who was called in to aid in completing the transfer of property in certain cases. The donor handed to him a symbolic staff which he in due season handed over in solemn form to the donee"[19].

Generally, the institution of "Salman"/"Salmannus "entailed the transfer of the transferor's property during his lifetime to a Salmannus, a person trusted to transfer the property to a designated beneficiary upon the death of the original transferor"[20]. The transaction could be done either *inter vivos* or *postmortem* i.e. after a transferor's death. It's a well-known fact, that the early Germanic law did not present testamentary transactions. Despite this fact, „***Treuhand mortis causa"*** could come into effect. In such cases a "special part of the estate, or even the entire estate, was transferred to a person or an institution in whom the transferor had confidence, under certain instructions about the final disposition of the property"[21]. Therefore, postmortem transactions authorized by the ***Salmannus*** replaced the process of inheritance. Moreover, "the use of the Salmannus permitted the transferor to adopt or appoint an heir"[22]. An adoption was named by the term "***affatomie***".

Chapter 46 of the Lex Salica gives a precise description of the process of "***affatomie*"**, which was divided into three major stages: initially, the adopter held the meeting *(mallus)*, where he "gave a stick *(festuca)* to a third person *(salmann)* (threw it into his lap). Simultaneously with the handover of the stick, the adopter expressed his wishes and handed over his property, or a part thereof, to the salmann. In the second stage, the salmann moved into the house of the adopter, that is, the property was transferred *(sessio triduana)*. He was required to stay in the house of the adopter for at least three days and receive at least three guests. The meeting certified such transfer of the property. In the closing stage, subsequently, but within twelve months, the salmann gave the stick to the heir at the meeting, in the presence of the king. As a result of the above procedure, the testator transferred his property to the adoptee"[23]. The given passage vividly reveals the details of the transaction, which considered the transference of the property to the salmann by the future testator via instructing him to pass it to third persons upon his death. Therefore, we can consider ***Salmannus*** as a person through whom an effect was given to a transfer and "hence, the anglicized 'saleman'"[24].

An in-depth study of the German law vividly depicts how the technique of "***affatomie***" gradually developed into the "***Vergabung von Todes Wegen****"* - "an inter-vivos transfer of a particular item of property in which the transferor reserved a life estate to himself"[25]. After the flow of time the scope of a transfer changed from a particular item of the ownership to a portion of an owner's entire property or the entire property itself. Moreover, "***Vergabung von Todes Wegen****"* started to consider the transference of the ownership after the owner's death. Therefore, the **Salman** had to deal with both *inter vivos* and *postmortem* transfers.

The scientific literature indicates to one more instance of the appearance of the concept of ***Salman***. In certain cases this person held the property for someone, who was temporarily away on a journey. G. P. Verbit indicated in this respect: "Someone going off on a journey might leave the property in

[16] Thanos Zartaloudis, "Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England", accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts

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[18] Charles E. Rounds, *Loring and Rounds: A Trustee's Handbook* (New York: Wolter Kluwer, 2012), 1350.

[19] *The essential Holmes selections from the letters, speeches, judicial opinions, and other writings of Oliver Wendell Holmes, Jr.*, ed. R. A. Posner, (The USA: The University of Chicago, 1992), 187.

[20] Charles E. Rounds, *Loring and Rounds: A Trustee's Handbook* (New York: Wolter Kluwer, 2012), 1182.

[21] Reinhard Zimmermann, "Heres fiduciarius?" *Itinera Fiduciae Trust and Treuhand in Historical Perspective,* ed. Richard Helmholz et al. (Berlin: Duncker&Humblot, 1998), 278.

[22] William S. Holdsworth, *A History of English Law* (3d ed. 1945), 410–411.

[23] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 92.

[24] Monica M. Gaudiosi, "The Influence of the Islamic Law of Waqf on the Development of the Trust in England" 136, *U. Pa. L. Rev.* (1988): 1231, 1243.

[25] Gilbert Paul Verbit, *The origins of the trust,* (the USA, 2002), 98.

the hands of a Salman to be turned over to a third party in the event that the donor did not return"[26].

The diachronic study of the German law indicates, that the German documentary evidence cannot "discover a document that actually uses the term Salman before 1108 CE"[27]. Moreover, there are two major considerations about the origin of the terminological unit ***"Salman"/"Salmannus".*** According to W. Holdsworth's "A history of English law", "*Salmannus*" derived from the word "*sala*," which means "*to transfer*"[28]. R. Zimmermann urgues, that this term is etymologically related to "*sale*"[29], while I. Sandor directly indicates, that *salmann* appeared around 1108, meaning a quasi independent agent[30]. Controversial ideas are also met during the examination of the utilization the word ***Salmann.*** I. Sandor states, that it "is not found in Anglo-Saxon law"[31]. G. P. Verbit supports I. Sandor's idea and indicates, that "the term Salman has never been identified in any document originating in England"[32].

During the study of the utilization of the word "***Salman***" the greatest attention must be paid to Avini's statement. According to his words: "evidence of the use of the *Salmannus* in post mortem transfers of land in twelfth-century England provides the basis for the proposition, that the *Salmannus* developed into the feofee to uses"[33]. W. Holmes has expressed almost the same idea. He indicated, that "the English use originated in the eleventh century when during the Norman Conquest elements of teutonic Salic law were arguably imported by the Conqueror. Brown has suggested that the theory could also rely on the migrations of Germanic tribes to England more generally during the fifth century"[34].

All the above mentioned enables us to make some in-depth analysis of the relationship between ***"Salman"/ "Treuhand"*** and ***"use"/"trust".***

On the one hand, W. Holmes' theory of Germanic origin of "trust" seems quite acceptable even nowadays. "… The word "trust" is itself like a chameleon, changing its colors to fit its environment. The same comment might easily have been made about *fiducia* in Italy or France, or even the *Treuhand* in Germany"[35]. Many scholars argue, that during the expression of the assumptions about Germanic origin of "trust", W. Holmes has never offered a theory how the concept of the ***Salman*** managed to cross the Channel. He only suggested, that during the Norman Conquest the elements of teutonic Salic law were imported by the Conqueror and the frequent contacts between various parts of England and the Frankish legal system certainly provided the opportunity for borrowing the legal ideas.

On the other hand, all the scholars agree, that Normans' conquest of 1066 transformed the English language forever. For more than three hundred years French was the language of power, aristocracy and royalty. Thousands of French lexical units entered the vocabulary of the English language. There was one very significant fact - after the Norman Conquest the French language was introduced to the English court. The court proceedings started operating with three languages: French, Latin and English. "Legal expressions in all three languages were therefore used simultaneously, and it is not surprising that both Latin and French have had a lasting influence on legal English"[36]. Therefore, one can suppose that after the withdrawal of the Roman legions in the fifth century, Germanic tribes migrated to England, and the ***Salmannus*** was introduced with the Norman conquest of the eleventh century.

3. Conclusions

The given paper presents an in-depth analysis of the historical terms related to the common law „trust" and „trust-like" institutions. It deals with an innovative approach towards the investigation of juridical institutions via simultaneous presentation and research of linguistic and legal data. Therefore, the terminological- juridical analysis of the relationship between ***"Salman"/"Treuhand"*** and ***"use"/"trust"*** enables us to single out the following outcomes:

The major peculiarities of the *"**Treuhand***" apparently correspond to the main features of the "***trust":*** "a person, *Salmannus*, is charged with administering property in the interest of another person or for a designated purpose. He does not

[26] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 104.
[27] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 109.
[28] William S. Holdsworth, *A History of English Law,* (3d ed. 1945), 410.
[29] Richard Helmholz and Reinhard Zimmerman, "Views of Trust and Treuhand: An Introduction", *Itinera Fiduciae Trust and Treuhand in Historical Perspective,* ed. Richard Helmholz et al. (Berlin: Duncker&Humblot, 1998), 40.
[30] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 95.
[31] Istvan Sándor, *A bizalmi vagyonkezelés és a trust,* (Budapest: hvgorac, 2014), 95.
[32] Gilbert Paul Verbit, *The origins of the trust,* (The USA, 2002), 104.
[33] Thanos Zartaloudis, „Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England," accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts
[34] Thanos Zartaloudis, „Theories of origin as to the progenitor of the trust: the invention of the uses and the Franciscan influence in England," accessed November 30, 2015. http://www.academia.edu/3568421/On_the_Origin_of_the_Uses_and_Trusts
[35] Reinhard Zimmermann, "Heres fiduciarius?" *Itinera Fiduciae Trust and Treuhand in Historical Perspective,* ed. Richard Helmholz et al. (Berlin: Duncker&Humblot, 1998), 278.
[36] Vanessa Sims, *English law and terminology*, (Lingua Juris, Auflage, 2010), 17.

administer the property for his personal interest. The relationship between the *Salmannus* and the beneficiary is of a fiduciary nature. Furthermore, the Treuhand serves many of the purposes of the trust"[37];

Similarly to the "***Trust***", the "***Salman***" relied on confidence;

The "***Salman***" could develop into the "***feofee to uses***" (a predecessor of "trust"), because both of them were often used for the transfer of land after a grantor's death. Moreover, in both cases grantors were entitled to use the land before their death;

The similarity of the English and German practices can be revealed via the discussion of the usage of their institutions. The "***Salman***" had different forms of usage. It was often used in cases of longer travels or for financial reasons: "Someone going off on a journey might leave the property in the hands of a *Salman* to be turned over to a third party in the event that the donor did not return or a *Salman* who was a freeman might function as owner of property for fiscal purposes, where the beneficial ownership was in a person who could not hold property"[38]. Resting the title to property in the name of ***Salman*** was especially useful during the periods of political unrest. Among these forms of the usage of the institution of "***Salman***", a special attention must be paid to the transference of the property to ***Salman*** during an owner's longer travels, because this mode of transference shows a particular resemblance with the forerunner of the common law ***"trust"*** - the institution of ***"use"/"use of land***" - which was connected with the land ownership during the times of the Crusades. When a landowner (knight) left England to fight in the Crusades, he needed an "acting administrator" for his estate. The administrator (usually, a close friend of a transferor) was obliged to run the ownership and pay feudal dues. After an owner's return all legal rights on the estate had to be transferred back to him;

The similarity of the English and German practices can also be revealed via the discussion of the historical rituals. D. T. Smith directly indicated, that according to the Salic law "the Salmannus was handed a symbolic staff by the donor, which he, in due course, and with due solemnity, handed to the done. A virtually identical ritual took place in England until modern times with respect to the transfer of copyhold, whereby a staff was handed to the steward of the manor as a first step in conveying copyhold land to another, the surrender to the steward being an expression to the use of the done or purchaser"[39];

During the discussion of the English and German practices one should take into consideration, that the "***trust"*** is proprietary in nature, while the modern "***Treuhand"*** is contractual. However, we have to rely on the assumption of old English scholars, who "characterized the trust as depositum, focusing on the contractual character of the trust"[40]. In this case we can approximate it to the concept of ***Treuhand.***

Therefore, all the above given data enable us to suppose, that the "trust" may have Germanic roots. However, the further investigations are needed for making the final conclusions.

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[38] Gilbert Paul Verbit, *The origins of the trust*, (the USA, 2002), 103.
[39] David T. Smith, "The Statute of Uses: A Look at its Historical Evolution and Demise", *Western Reserve Law Review 18* (1966): 40-63.
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