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TRUSTS, TRUST-LIKE CONCEPTS AND IUS COMMUNE

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Introduction

The organisers of the Conference on trust and trust-like concepts have invited me to discuss a stimulating book edited by Richard Helmholz and Reinhard Zimmermann entitled *Itinera Fiducia: Trust and Treuhand in Historical Perspective* (Berlin-Duncker & Humblot, 1998).¹ They asked me to focus specifically on those parts of the book which deal with the possible links between the trust and European Private Law or *ius commune*. Consequently, the central question of this paper is whether or not the trust is a typical Anglo-American legal concept; can it be placed in the European *ius commune* tradition? Traditionally, this has been a central theme in academic writing. In their introductory essay to the book (p. 37), Helmholz and Zimmermann write that the question of whether a link can be established between the English trust and the traditions of the *ius commune* remains difficult to answer. They express the hope that the contributions to the book will be conducive to finding an answer, adding: 'At least it is the question we have sought to address'. This seems to imply that they are doubtful as to whether an answer has materialized in the papers. This question will also be addressed.

Trust: a Typical Anglo-American Concept?

A possible approach in answering the question of whether or not the trust is a typical Anglo-American concept is to try to uncover the historical roots of the trust. One question that should be asked is: from which sources did the Anglo-American trust evolve? If research into this area were to lead to the conclusion that the concept of trust developed solely from sources particular to the English legal tradition, I would not hesitate to claim that the trust is an authentic Anglo-American concept. However, this conclusion cannot be drawn.

It is unlikely that the exact sources of the trust will ever become known. Discussing a similar institution in Germanic law, the *Salman* or *Treuhand* (see below), Helmholz and Zimmermann (p. 35) argue that this is due to a lack of systematic treatment of the subject by jurists during the Middle Ages. The same may hold true for the Anglo-American trust and its precursors. It must be stressed, however, that it is likely that Roman, Canon and Germanic law (sources of the European *Ius-Commune* tradition) have provided elements of the law of trust. It may therefore be assumed that the trust is not as 'English' as some authors would like us to believe.²

I will discuss the possible contributions of Roman, Canon and Germanic law to the law of trusts

¹ References in this paper to authors and pages without any further information are to *Itinera Fiducia*.

² For examples of such authors, see Helmholz/Zimmermann, p. 27.

one by one. In so doing, I will draw upon the papers in the Helmholtz/Zimmermann book and add my own assessment of the contributors' findings.

Roman Law and the Trust

It has long been maintained that Roman law was of minor importance to the development of English law. The established view was that English law flourished in 'noble isolation' from the rest of Europe.³ In recent decades, however, various authors have attempted to demonstrate that Roman law was much more important to the development of Anglo-American law than was previously thought.⁴ As a result, many contemporary authors entertain the view that English law is not as foreign to continental law as was once believed.

The importance in England of Roman law becomes very obvious when we study the attempts by English authors to systematize English law. One of the first legal writers to do so is Bracton (13th century AD), who in his *De legibus et consuetudinibus Angliae* (ca. 1250) tried to present a comprehensive overview of the Common Law. William Blackstone (1723-1780) is an outstanding later example (see his *Commentaries on the Laws of England*, 1765-69). These authors were tempted to use Roman categories in systematizing English law, since the Common Law, being a product of case law, could not provide the tools for its own systematization. The result of their efforts was a description of indigenous English law based on Roman Law classification, often expressed by borrowed Roman Law terminology.

Such an approach is likely to trigger the reception of substantive rules from the system which was basically used for the purposes of classification and denotation: such a method of classification and use of terminology may give the impression that not only the representation of the subject matter has its origins in the system used for these purposes, but that the subject matter itself also derives from it. A good example in this respect are the efforts by the Kings of France from 1454 onwards to put French customary law into writing. The Kings were assisted by their lawyers, who had been trained in Roman law. As a result of this training, these lawyers often used Roman Law terminology to denote indigenous legal concepts. Seisin (*saisine*), for example, was represented as *possessio*.⁵ Although it may be presumed that, originally, a distinction was made between Roman *possessio* and *possessio* in written customary law, i.e. seisin, later generations of lawyers seem to have forgotten the distinction. They treated *possessio* in customary law more or less as if it were the Roman concept of *possessio*.

A similar development may have taken place in the case of English trust law. That is to say, in this area of the law we also find a concept foreign to Roman law denoted in Roman terminology. The use of Roman terminology and analogies with Roman Law can be explained by the fact that the medieval sources of the Common Law did not constitute a satisfactory basis for conceptualising the trust. The fact that the 'use', the forerunner of the trust, was referred to as *usus* may have been a result of this. The English 'use' was a legal instrument, by which

³ J.H. Baker, *An Introduction to English Legal History*, London 1979 (2nd ed.), p. 28.

⁴ See e.g. M. Reimann (ed.), *The Reception of Continental Ideas in the Common Law World (1820-1920)* (Comparative Studies in Continental and Anglo-American Legal History, vol. 13), Berlin 1993.

⁵ Ph. Godding, *Le droit privé dans les Pays-Bas méridionaux du 12e au 18e siècle*, Brussels 1987, p. 227.

property (often, but not always,⁶ land) was granted to one person to be held for the benefit of another.⁷ From the fourteenth century onwards, the ‘use’ became very popular, especially in the fifteenth century, when the Court of Chancery granted dissatisfied beneficiaries a remedy.

The Roman law term *usus* is found in the Law of the Twelve Tables (450 BC).⁸ There, it served as a requirement for acquisitive prescription. In classical Roman law (1-250 AD), *usus* referred to what in modern legal parlance is called a right *in rem*. This Roman *usus* denied the occupant the enjoyment of the (civil and natural) fruits of the object of the *usus*; he was only entitled to use the object.⁹ The *Corpus Iuris Civilis* (6th century A.D.) was only slightly more lenient in that it allowed the occupant to enjoy the fruits to a degree, that is for his personal benefit only.¹⁰

When the positions of the person enjoying *usus* in (later) Roman law and a ‘feoffee to uses’ (trustee) are compared, their positions show similarities. The term *usus*, combined with the fact that Roman *usus* shared some aspects with the English ‘use’, may suggest a relationship. According to some modern writers, however, the institutions lack common roots. Whether, indeed, this is correct should be assessed on the basis of possible Canon law influences on trust law. It seems that the development of the English legal concept of ‘use’ was inspired by ideas of the Church on poverty and how to deal with church property. The legal instruments that Canon law provided the Church with in order to continue its teachings on the spiritual dangers of wealth, while at the same time accumulating wealth, may, to a certain extent, have been influenced by the Roman *usus*.¹¹ This will be demonstrated when discussing the likelihood of Canon law influence on English trust law below.

In texts dealing with the ‘use’ and the trust, Roman terminology is found in addition to *usus*: *fiducia*, *ususfructus*, *fideicommissum* and *depositum*. Is it likely that these concepts influenced substantive trust law? To those looking for possible Roman roots of the trust *fiducia* may seem a very promising legal concept at first sight. After all, *fiducia* can be called a trust-like device in the sense that there was a division between title and interest in the thing governed by *fiducia*. In the case of *fiducia cum amico*, a ‘depositee’ held the title, whereas a ‘depositor’ retained his interest in reconveyance. Where *fiducia cum creditore* was concerned, the creditor was the titleholder, whereas the debtor retained his interest in reconveyance. It is not my intention to suggest, of course, that in the case of *fiducia* there was a divided title as known in modern trust law. After all, the depositor/debtor in case of *fiducia* only had access to an *actio in personam*. Nevertheless, the similarities are striking. As regards the similarities between the trust and *fiducia cum amico*, for example, it may be pointed out that use-like constructions were employed in England during the times of the Crusades, when people left their motherland on perilous expeditions to the Holy Land.¹² They placed their property in the hands of a third party,

⁶ R. Helmholz, p. 160.

⁷ Medieval uses are discussed by J. Biancalana, p. 111 ff.

⁸ M. Kaser, F.B.J. Wubbe, *Romeins Privaatrecht*, Zwolle 1971 (2nd ed), p. 97.

⁹ Kaser/Wubbe, p. 144.

¹⁰ See D 7.8.12.1-6, D 7.8.12-15.

¹¹ S. Herman, p. 85 ff.

¹² T.F.T. Plucknett, *A Concise History of the Common Law*, Boston 1956 (5th. ed.), p. 576 ff.

often a friend, to be held in trust in their absence. This friend also figured in Roman *fiducia cum amico*.

It is unlikely, however, that the Roman view on *fiducia* could have influenced English trust law; in any case, such influence could not have occurred before the nineteenth century, because the exact technicalities of *fiducia* only became known after Gaius' *Institutes* (ca. 160 A.D) were rediscovered at the beginning of that century. The *Corpus Iuris Civilis* offers very limited information on the subject, since references to *fiducia* were removed from the texts incorporated into the *Corpus*. For this reason, English lawyers from the period prior to the rediscovery of Gaius' *Institutes* could not have used *fiducia* in its technical sense of *fiducia cum amico* and *fiducia cum creditore*.

Better candidates than *fiducia* for being a source that influenced English trust law are *fideicommissum*, *usufructus* and *depositum*. *Fideicommissum* is a means of transferring property upon death. Instead of directly designating a legatee, a testator could entrust to the faith of a third party that property be conveyed to the person whom he would otherwise have designated as legatee.¹³ *Fideicommissum* shows many parallels to the concept of the trust. Firstly, trust terminology fits *fideicommissum* very well: one can consider the testator a 'settlor', the third party a 'trustee', and the person who eventually acquires the property a 'beneficiary'. Secondly, the position of the 'beneficiary' under the regime of *fideicommissum* is just like that of the beneficiary in modern trust law, proprietary in character (under Justinianic law, the beneficiary enjoyed protection in the form of an *actio in rem*).

In his contribution to the Helmholz/Zimmermann volume (p. 207 ff.) Michael Macnair offers examples of English writers who have used the term *fideicommissum* when explaining the English trust. They include Francis Bacon in his *Maxims of Law* (1630) and Lord Nottingham (Heneage Finch) in his *Prolegomena of Chancery and Equity* (17th century). According to Macnair, these authors are perhaps not saying outright that trust is a *fideicommissum*, but they come close to doing so. Their analogy with *fideicommissum* focuses on the proprietary character of the trust. However, it must be stressed that the analogy with trusts was not absolute: unlike the English trust, *fideicommissum* was primarily used in testamentary transactions.

In old trust literature we find another analogy: between trust and usufruct. Usufruct is a legal device whereby the owner only holds a 'bare' title to certain property, whereas the usufructuary has a right *in rem* to use and enjoy the fruits of this property. Trusts resemble usufruct in the sense that the trustee, like the owner in usufruct cases, holds a title to the property. This does not allow him to use the property for his own purposes or allows him to do so only to a very limited extent. In this respect he is a 'bare' titleholder like the owner of property to which a right of usufruct has been attached. It is the beneficiary who, like the usufructuary, enjoys the fruits of the property. One author (mentioned by Macnair) who used usufruct to explain trusts is Sir Jeffrey Gilbert in his eighteenth-century *Lex Praetoria*. According to Gilbert, trust, like usufruct, resulted in a separation of *dominium* from beneficial enjoyment.

As the *fideicommissum* analogy, the usufruct analogy is proprietary in nature. The usufruct analogy differs slightly from that of *fideicommissum* in that in cases of usufruct the relationship can be created either *inter vivos* or by will (as stated above, *fideicommissum* was reserved for transfers of property upon death).

¹³ D. Johnston, p. 45-46.

A final analogy is that between trust and deposit. Deposit is one of the *contractus re*, i.e. the real contracts, of Roman law. The depositor entrusts the property to a depositee, who is under a duty to keep the property without recompense until the depositor wishes it to be returned. Deposit resembles trust inasmuch as the depositee, like the trustee, does not hold the property for himself, but for the benefit of another.

In *A Treatise of Equity* (1737), Henry Ballow describes trust in terms of deposit. He writes: ‘We will now proceed to some particular kinds of agreements, which occur most usually in Chancery. And 1st, of a *Depositum* or Trust [...]’.¹⁴

The ‘*depositum* approach’ does not explain trust in proprietary terms. According to Macnair, ‘[t]he proprietary/*in rem* consequences of trust become merely another case of specific enforcement; a trust is a kind of contract; but it is perfectly general that equity allows contracts to have proprietary consequences’.¹⁵ To modern eyes, however, the essence of a trust must be found in its proprietary consequences and for this reason the concept of trust is difficult to reconcile with the contract of *depositum*.

At this point, the question arises as to whether the different ways of approaching trusts have had any lasting impact on how English lawyers view trusts, in particular because none of the above explanations of the trust seems to have survived.¹⁶ Should one agree with Macnair who argues that their main effect is that ‘the late seventeenth and early eighteenth-century trust concept’ may be placed ‘at less distance from the contractually based analyses of fiduciary relationships found in civilian literature [...]’? Or is there more to this issue? Did, for example, the fact that the trust was expressed in Roman terms result in a situation in which substantive rules of Roman law applied to this legal concept?

We do not find much evidence of this in the Helmholz/Zimmerman book. Such lack of evidence is surprising for various reasons. Firstly, the indebtedness of the trust to Roman law was not questioned until the end of the nineteenth century. *Fideicommissum* in particular was treated as a major source. Secondly, the development of the concept of trust was closely linked with the Court of Chancery. This Court has contributed considerably to the reception of Roman law ideas in England.

Although the book (and possibly the records) fails to provide a final answer to the question of whether there is a relationship between the trust and European *ius commune*, it refutes many of the old arguments against the influence of Roman law, more precisely *ius commune*, on trust law. The existence of a legal and an equitable owner in trust law, for example, has long been considered evidence that trust is a concept foreign to continental legal thought, which embraces the idea of unitary ownership. This argument, however, is not acceptable. Although dual ownership is not a Roman Law concept, the idea is not unknown in *ius commune*. In continental legal science, dual ownership is closely related to feudal law: *dominium directum* denoted the position of the Lord regarding his land, whereas his tenants (vassals) were granted *dominium*

¹⁴ Book II, c. 1, paragraph 1.

¹⁵ Macnair, p. 218.

¹⁶ Macnair, p. 235.

utile.¹⁷ This type of dual ownership continued to be part of the legal landscape well into the modern era. We even come across it in nineteenth and twentieth-century legal literature from the Dutch East Indies when the legal positions of European landowners and the indigenous occupants of their land are conceptualized.¹⁸

Canon Law and the Trust

The view that Canon law has been one of the sources of English trust law has been expressed for a long time. This is not surprising, since the claims to that effect are rather strong. Canon law used to be part of the ‘living law’ of all nations in medieval Western Europe. It was applied and enforced by a network of relatively modern ecclesiastical courts, known as ‘officialities’, which were established both in England and on the continent of Europe.¹⁹ Canon law played a significant role in everyday life, since the jurisdiction of the Church also included a great number of issues, which today fall within the jurisdiction of secular courts. As a result, ecclesiastical courts could play a significant role in the reception of the learned law.

Trust-like devices were popular in the Church, since they allowed this institution to accumulate the necessary means to discharge its tasks.²⁰ At the same time, these devices preempted the criticism that the Church was not practising its own teachings on the spiritual dangers of wealth. The wealth accumulated by the Church was not regarded as property owned by the Church itself. According to S. Herman, it was said to belong to God the Father as sovereign Lord, the Pope and his clerical lieutenants acting as His stewards. In trust terminology: God acted as ‘settlor’, while the Pope and his clerical lieutenants acted as trustees. Christ, the meek, the poor and the congregation were usually designated as ‘beneficiaries’. God, as the settlor, also figured as the ultimate beneficiary of creation.²¹ In this way, the wealth of the Church could be justified, since the Church simply acted as a depository of goods created for all. Church officials were charged with managing the goods entrusted to them as ‘trustees’ and with using them for the good of the community.

A Latin designation for a clerical figure acting as ‘trustee’ was *usuarius*. The term *usuarius* or *usuary* referred to a person who enjoyed *usus* as discussed above. Unlike *ususfructus*, which allowed the usufructuary to use the fruits and the revenue to his own advantage, classical Roman *usus* denied the exploitation of the estate for personal benefit. In a clerical context, such *usus* was, however, more flexible in that a *usuarius* could use the funds in his charge, provided he used them for charity. According to Herman, 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 en-

¹⁷ R. Feenstra, p. 305 ff.

¹⁸ C.H. van Rhee, *Particuliere landerijen in Nederlands-Indië en het zogenaamde erfpachtsrecht (1836-1912)*, in *Ars Aequi* 11 (1991), p. 973-983; *Idem*, *De rechten van de inheemse bevolking op de gronden der particuliere landerijen op Java vóór 1836*, in *Twaalf bijdragen tot de studie van de rechtsgeschiedenis van de negentiende eeuw*, Amsterdam 1993, p. 145-162.

¹⁹ R.C. van Caenegem, *History of European Civil Procedure*, in M. Cappelletti (red.), *International Encyclopedia of Comparative Law XVI (Civil Procedure, Chapter 2)*, Tübingen etc. 1973, p. 16.

²⁰ Information on this subject has mainly been derived from S. Herman, p. 85 ff.

²¹ S. Herman, p. 86.

joyment and administration.²² However, in order to establish whether this assumption is accurate, English church records, especially those of the ecclesiastical courts, must be studied in more detail. In addition to this, as is suggested by the Helmholz/Zimmermann book, it would be worthwhile to research continental ecclesiastical records in order to determine whether parallel developments resulted in trust-like institutions on the continent.

Germanic Law and the Trust

Until the end of the nineteenth century, it was assumed that the ‘use’ or trust had been derived from *fideicommissum*.²³ At the end of the nineteenth century, the Roman origin of the ‘use’ was called into question. This was the result of German scholarship which concentrated on a Germanic institution similar to that of the trust: the *Salman* or *Treuhand*. The *Salman* first appeared in thirteenth-century records.²⁴

The established theory on the origins of the trust was originally questioned in the United States during the nineteenth century. This is hardly surprising, since German academic writings were extremely popular in the New World.²⁵ The views of US Supreme Court judge, Justice Oliver Wendell Holmes, on the subject wielded much influence.²⁶ Holmes held that the English trust, like the German *Salman* or *Treuhand*, had sprung from Germanic roots. He concluded: ‘[t]he feoffee to uses of the early English law corresponds point by point to the *Salman* of the early German law’.²⁷ Holmes’ ideas were adopted by the great English legal historian Maitland and with that the presumed link between the trust and Roman law disappeared from the legal landscape.

The theory that the *Salman* (*Treuhand*) and the English ‘use’ are related, seems very plausible. The main features of the *Salman* or *Treuhand* correspond to the main features of the English ‘use’ and the English trust: a person, *Salmannus*, is charged with administering property in the interest of another person or for a designated purpose. He does not 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. Like the trust, the *Treuhand* makes it possible to accomplish objectives within the law that could otherwise not be accomplished (see Helmholz/Zimmermann, p. 42). However, it has proved impossible to demonstrate that trust and *Treuhand* are in effect related. Some modern authors entertain the view that the *Salmann* is not related to the ‘use’ or trust. They concur with Helmholz and Zimmermann, who claim that there are undeniable parallels between the English

²² S. Herman, p. 96.

²³ Helmholz/Zimmermann, p. 31.

²⁴ On the *Salman* or *Treuhand*, see K.O. Scherner (p. 237 ff.), S. Hofer (p. 389 ff.), J. Rückert (p. 417 ff.) and S. Grundmann (p. 469 ff.). Much of the information on *Salman/Treuhand* in this paper has been derived from the contributions of these authors to the Helmholz/Zimmermann volume.

²⁵ See e.g. M. Reimann, *Historische Schule und Common Law: die deutsche Rechtswissenschaft des 19. Jahrhunderts im amerikanischen Rechtsdenken* (Comparative studies in continental and Anglo-American legal history, vol. 14), Berlin-Duncker & Humblot 1993.

²⁶ Helmholz/Zimmermann, p. 32 ff.

²⁷ Quoted by Helmholz/Zimmermann, p. 33.

use/trust and the *Salman/Treuhand*. However, what needs to be established is whether the parallels resulted from common roots or were the result of similar social needs and analogous problems in both England and the German territories.²⁸

Although the question of whether the trust and the *Salman* are related has not as yet been answered, some arguments voiced in order to prove the difference in character between the trust and the *Salman*, have been definitely put to rest as a result of scholarly research. Although the modern *Treuhand* and trust differ in the sense that the first is contractual and the second proprietary in nature, this is a comparatively recent development only. As has been shown in the section on the trust and Roman law above, until fairly recently the specific character of the trust was a matter of debate among English legal authors. These scholars sometimes characterised the trust as *depositum*, focusing on the contractual character of the trust; at other occasions, the trust was characterized in proprietary terms. When given a contractual characterization, as some old English writers do, the concept of trust begins to approximate the concept of *Treuhand*.

A final remark about the *Treuhand* is that, as in the case of the trust, the origins of the *Treuhand* have yet to be uncovered. It is not clear whether the *Treuhand* hails from Germanic sources, from Roman sources or from both. In nineteenth-century Germany, the debate on this question was fuelled by the fact that there was both a Germanic and a Romanistic School of legal thought.²⁹ Each School tried to trace the roots of the *Salman*. As to be expected, the adherents of the Romanistic School thought the roots to be in Roman Law, whereas the adherents of the Germanistic School claimed to have found the Germanic origins of the *Salman*.

Trust and *Ius Commune*: an Assessment

On the basis of the above, several conclusions may be drawn. Firstly, it may be concluded that it is very likely that the origins of the trust cannot completely be traced. Whether these origins are Roman, Canonical or Germanic remains an unresolved question. A link between Romano-canonical *usus* -Roman *usus* in a Canonical guise- and the trust seems the most promising of all possible links. However, much research needs to be conducted of ecclesiastical records both on the continent and in England. Examining these records should be the primary aim of legal historians interested in the origins of the trust.

Secondly, the nineteenth-century shift from Roman law to indigenous law as the alleged origins of the trust did not change the position of the trust as a concept which may be placed in the *ius commune* tradition. Both the Germanic and Romano-canonical origins of the trust are of interest to scholars studying the question of whether trusts are part of a shared European tradition. As we know, *ius commune* comprised elements from both the Germanic and the Romano-canonical legal traditions.

And thirdly, it may be concluded that it is very unlikely that there has been an exact continental equivalent to the English 'use' or trust. The conclusion may be drawn that trust law cannot be viewed as an amalgam of concepts from the *Corpus Iuris*. This conclusion has also been drawn by Kenneth Reid (see his paper), who alleges that the modern trust is a relatively new concept, which cannot be explained solely by a contract/real right model. Nevertheless, we must continue to ask the question whether the uncovered similarities

²⁸ Helmholz/Zimmermann, p. 37.

²⁹ Helmholz/Zimmermann, p. 35.

amount to more than parallels reflecting similar social conditions. My answer to this question is that it is very likely that English trust law was influenced by ideas on the Continent. This is not too bold a statement paying regard to the influence of the ecclesiastical courts in England as well as to the fact that English civilians frequently used Roman and Canon law texts when describing trusts.