



ORIGINAL PAPER

New Insights into the Origin of the Trust

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Abstract:

Fiduciary duties have always included the “triad” – “loyalty, due care and good faith” (Atherton, Blodgett & Atherton, 2011 : 4) – accompanied with trust and reliance. Moreover, fiduciary relations similarly to the entrusting relationships have a long history of development. They existed in 1790 B.C. in the Code of Hammurabi (Zambakhidze, 2000 : 59). Their roots can also be found in Old and New Testaments, in the history of the Japanese societies, etc. Despite these facts, the *trust* (a manifestation of entrusting relationships) is usually treated as a “product” of equity, which presents a unique characteristic of common law – the duality of ownership. It is difficult to find historical roots of the *trust*. Accordingly, its origin raises controversy among the scholars.

The paper presents an innovative attitude towards the study of the origin of the *trust*. The major accent is put on the comparative analysis of the Salian Franks’ *affatomie* and the English *trust*, their juridical and linguistic peculiarities as well as the verbal realization of some concepts presented in the Salians’ legal code. The greatest attention is paid to the appropriate historical background, namely, migration of the Germanic tribes, interconnectedness of the Germanic peoples and their languages, linguistic and juridical contacts, etc. The results of the research reveal that the common law *trust* shares the major peculiarities of the Salian Franks’ *affatomie*. Moreover, the existing linguistic as well as juridical data point to the Germanic roots of the English entrusting relationships.

Keywords: *affatomie, common law, juridical-linguistic study, trust.*

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New Insights into the Origin of the Trust

The General Introduction

The early fiduciary principles may be found in the history of the Japanese and Greek societies. Moreover, the Code of Hammurabi (the most complete and perfect extant collection of Babylonian laws that developed during the reign of Hammurabi (1792–1750 BCE) (*Britannica*, 2022)) presented the rules of law governing a business conduct or fiduciary considerations, for the behavior of the employees entrusted with the assets (Atherton, Blodgett & Atherton, 2011 : 8). The ancient legal code – Greek Solomon’s laws (600 B.C.) – also included the rules for governing capital and guardianship. It gave a person an opportunity to choose a manager of his (her) property (Zambakhidze, 2000 : 59). Despite these facts, the *trust* – the manifestation of the entrusting relationships i.e. the fiduciary principles – is usually treated as a “product” of equity, which presents a unique characteristic of common law, namely, the duality of ownership.

This characteristic feature has made the *trust* widely acceptable not only in the United Kingdom, but in the USA. Moreover, during the last decades, the same feature popularized it in the non-common law jurisdictions. The rapid popularization was facilitated by another important factor, namely, the tendency of globalization, which has been reflected in the intensified juridical competition and interoperability of different European countries within the EU. All the above mentioned raised the interest towards the origin of the *trust*.

The paper presents an innovative attitude towards the study of the roots of this legal institution. The major accent is put on the comparative analysis of the Salian Franks’ *affatomie* and the English *trust*, their juridical and linguistic peculiarities as well as the verbal realization of some concepts presented in the Salians’ legal code. Moreover, the greatest attention is paid to the appropriate historical background, migration of the Germanic tribes, interconnectedness of the Germanic peoples and their languages, linguistic and juridical contacts, etc.

The Common Law *Trust* as a Juridical Institution

Initially, let us discuss the juridical mechanism of the *trust*. From the general viewpoint, this legal institution can be defined as the obligation enforceable in equity under which a trustee holds property that he or she is bound to administer for the benefit of a beneficiary or beneficiaries (*a private trust*), or for the advancement of certain purposes (*a purpose trust*). *Trusts* are established expressly by a settler in a trust deed or a testator in a will (*an express trust*) or by implication (*a resulting trust*). They may also be established by operation of law (*a constructive trust*) (*The philosophy of law: an encyclopedia*, 2004 : 870). The *trust* is characterized by a unique nature, namely, it entails a three-party relationship, in which a donor arranges with a trustee to divide a donee's interest between a trustee and a beneficiary (Langbein, 1995 : 632). As a result of such bifurcation of rights, a trustee is obliged to manage transferred assets, while a beneficiary enjoys benefits. Accordingly, a legal right on the assets belongs to a trustee, while an equitable right is owned by a beneficiary. Moreover, a valid *trust* usually meets three certainties – intention to create the *trust* is certain; identity of the trust assets is certain; identity of beneficiaries is perfectly defined (Tang, 2015 : 2).

Accordingly, the *trust* consists of three major elements:

- *A trustor/ donor/settlor/settler* – a person, who creates the *trust*;

- A *trustee* – a physical person or a legal entity, which holds a legal title to the *trust assets*;
- A *beneficiary* – a beneficial/equitable owner of the *trust assets*.

The Origin of the Trust

It is generally believed that the institution of the *trust* was preceded by the *feoffee to uses*, which originated in England in the Middle Ages, namely, at the times of the First Crusade. Before the Crusader knights departed to the Holy Land, many of them entered into agreements with relatives or friends to care for their lands while they were gone. The common problem that various Crusader knights faced was that, upon their return, those people to whom the knights had entrusted their property simply denied the existence of any form of trusteeship, arguing instead that the property was theirs. This was a thorn in the side for the Chancellor, an office tasked with acting as the conscience of the King and so the *trust* was created (Beijer, 2018 : 134-135).

There have been a lot of debates about the forerunners of this legal institution. Initially, “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” (Frankel, 2014 : 423). At the end of the 19th century, US Supreme Court judge, Justice Oliver Wendell Holmes, expressed his extremely convincing view on the given subject. He claimed 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” (Rhee, 2000 : 459). However, Holmes did not specify how the concept of the *Salman* had managed to cross the Channel. Before discussing the possibility of the “crossing”, let us focus on the comparative analysis of the Salian Franks’ *affatomie* and the English *trust*, their juridical as well as linguistic peculiarities.

The Salian Franks’ *Affatomie* and the English Trust – Comparative Analysis

It is generally believed that the legal institution *Salman/Salmannus* entailed a transfer of a transferor’s ownership during his (her) lifetime to the *Salmannus* – an individual trusted to transfer the ownership to a designated beneficiary upon a transferor’s death (Rounds, 2012 : 1182). It permitted a transferor to appoint or adopt a successor (Rounds, 2015 : 1376). Adoption was named by the word *affatomie*.

The process of the *affatomie* is well-presented in Chapter 46 of the Salian Franks’ legal code *Lex Salica*. It was the adoption of an heir by a childless person. Such an adoption was probably originally permitted only when there were no relatives in existence to whom the inheritance would pass by the ordinary rules of succession. Later it was allowed in all cases except when children were living. The subsequent birth of an heir rendered a transaction void (Goffin, 1901 : 16).

The *affatomie* was usually treated as a three-step process: initially, an assembly (mallus) was convened at which a donor or adopting party presented a wand (*festuca*) to [literally “throws the festuca into the lap of ”] a third party (the *Salman*). At the same time that a wand was delivered, a donor/adopter “should say to the man into whose lap he threw the stick how much he wished to give him [the selected donee] – if he wished to give him all or half his property.” The property had to be either a donor/adopter’s entire estate or an aliquot share thereof. It could not consist of a particular, individual piece of property. The second part of the ritual consisted of the *Salman*’s moving into a

New Insights into the Origin of the Trust

house of a donor/adopter “and there performing the ‘sessio triduana’,” which was a manifestation of “the vesting of the seisin”. The sessio triduana involved residing in the property for three days. The final step took place some time later, but within twelve months and consisted of the delivery by the *Salman* of the *festuca* to an heir in an assembly “in the presence of the king” following roughly the same ritual as in step one. The effect of this ritual was to give an adopted heir the same rights as a natural heir (Verbit, 2002 : 97).

Accordingly, it is obvious that Title 46 of *Lex Salica* presented the rules of transferring assets/ownership to an intermediary. This transfer implied the disposal of the assets in favor of the indicated persons, the so-called beneficiaries, after a transferor’s death. The similar rules of disposition of the property has been presented in common law (Tendan, 2021 : 28) since the Norman conquest. Even the common law *trust* seems to be formed in accordance to the legal institution *affatomie* presented in Title 46 of *Lex Salica*. Can we treat the Germanic institution *Salman* as a form of a proto-trust? Should we assume that the *Salman* – a third individual, who was handed the property – may be an equivalent to a modern-day settlor? How could the *Salman* reach the territory of the present-day United Kingdom? We suppose that the study of the historical movement of the Germanic tribes may shed light to these issues.

From the History of the Germanic Tribes

Let us discuss the movement of the Germanic tribes and their possible interinfluence. It is supposed that the Franks crossed the frontier together with other tribes. It was the agglomerate of the Germanic peoples (*The Laws of the Salian Franks*, 1991 : 3) i.e. the confederation of the Germanic-speaking border groups living along the lower reaches of the river Rhine. In the 3rd century, they were named as the *frank* – a new self-designation, whose etymology remains obscure even nowadays (Kerkhof, 2018: 33).

On the one hand, it is believed that the Franks were mentioned in the history in 240 A.D. (*Lex Salica*, 1880 : xii). They were settled as the Roman *deditici* on the Betuwe Island in 293 A.D. Around 340, emperor Constantius settled them on the sandy grounds of the present-day provinces of Brabant in the northern Belgium and southern Netherlands (Kerkhof, 2018 : 33).

On the other hand, it is believed that the first notes about the Salian Franks appeared in 358. They penetrated as far as Toxiandria, where they were subdued by Julian. The Salian Franks were allowed to stay in the country, which they occupied. However, they were required to supply Julian with the auxiliary troops (*Lex Salica*, 1880 : xii). By the collapse of the Western Roman Empire, the Franks had established themselves in the northern part of Gaul. There was the fusion of the older Gallo-Roman population and the new settlers. The Germanic influence seemed to be quite strong, because the law tended to remain customary and the formal education virtually disappeared. Supposedly, the Franks’ customary laws had existed in an unwritten form before the reign of Chlodwig/Clovis (*The Laws of the Salian Franks*, 1991 : 3). He was a successor of the first Salian King Childeric, whose name reached the present day.

Clovis unified the Franks – the Ripurians and the Salians. He eliminated the last vestiges of Roman rule in Gaul. The Germanic groups – the Alamanni, the Goths and the Thuringians – had to respect his power. When Clovis died in 511 (Robinson, 1993 : 201), he left the codification of the rules governing the Salian Franks’ behavior on the lands occupied by them. It is supposed that the oldest version of the written Salic law /

Pactus Legis Salicae / *Lex Salica* was issued between 507 and 511 (*The Laws of the Salian Franks*, 1991 : 52-53). Another written code, namely, *Lex Ribuarica* / *Lex Ripuarica* dates from around 630 (Sanmark, 2018 : 153). It was largely based on the *Liber Constitutionum* and *Lex Salica*. It represented an updated version for the Frankish people in the Rhineland area. It is supposed that King Dagobert was probably responsible for the creation of this law, which is preserved in 52 manuscripts (Benham, McHaffie & Vogt, 2018 : 241).

The Franks formed strong Frankish Realm, which included the Low Countries inhabited by the Franks and Ingvaemonic people on the coasts of Holland, Sealand and Flanders, by the Frisians (also Ingvaemonic) in the north and by the Saxons, who settled there in the 6th and 7th centuries. During the Carolingian sovereignty, the Frisians and the Saxons maintained their native languages, but the Ingvaemonic dialects at the western coastal regions were profoundly influenced by Old Low Franconian, the dialect of the Carolingians (Marynissen & Janssens, 2013 : 83-84). It is supposed that the local population spoke some variety of Celtic along the coasts of Flanders, Holland and Friesland. In the late 1st century B.C., the initial phase of germanicization of North Sea Celtic could have taken place. The second phase was supposedly brought by the migrating Saxons and the 'new Frisians' (Dijkstra & Koning, 2017 : 66). Later the Saxons hailed from the northern parts of modern Germany and landed in East Anglia. Britain was invaded by the Angles and the Jutes as well (Williams, 1975 : 55-56). In accordance to Bede's viewpoint, long ships carried the Frisians, the Jutes, the Saxons and the members of other tribes to Britain.

It is generally believed that the Jutes spoke the group of the Proto-Norse languages that would later morph into the Saxons' and the Angles' Ingvaemonic Germanic dialects. Moreover, it is claimed that the Angles' language was the unspecified Ingvaemonic Germanic dialect known as North Sea Germanic, while the Saxons spoke a variety of the Germanic dialects. The latter slightly differed from the Angles' language (Williams, 1975: 55-56). Gradually, the intensive contacts of the newcomers' languages with the local British Celtic stipulated the formation of Anglo-Saxon or Old English (Schrijver, 2016: 135).

The above data reveal that the British society was formed by merging of the Germanic tribes with the local population. The former had obvious contacts with the Franks and Ingvaemonic people before coming to Britain. Accordingly, it seems obvious that the *Salman* could reach the territory of the present-day United Kingdom by means of the migration and replacement of the Germanic tribes. However, the study of the linguistic peculiarities as well as the verbal realization of some concepts presented in the Salians' legal code may shed more light on this issue.

The Major Terminological Insights

After discussing the possibility of introduction of the *Affatomie* in Britain, let us discuss the linguistic peculiarities of *Lex Salica*.

It is generally believed that the Frankish law of the 6th-7th centuries was the early Frankish custom recorded in Latin. The latter did not often have equivalent words or concepts for the Frankish customs. This fact frequently caused problems for the judges and scribes. When the knowledge of classical Latin declined, the uncertainty of the scribes in transcribing the law increased. For explaining some Germanic lexical units, the Malberg glosses were added to some manuscripts. Accordingly, the original issue of Clovis that was later expanded by the capitularies issued by his descendants

New Insights into the Origin of the Trust

presumably existed in more or less barbarized versions (*The Laws of the Salian Franks*, 1991 : 52-53). Moreover, the Malberg glosses contained many old Frankish words (Pollock & Maitland, 2013 : 7).

Let us look through Title 46 of *Lex Salica*:

«1. Hoc convenit observare ut thunginus aut centenarius mallo indicant et scutum in illo mallo habere debent et tres homines tres causas demandare debent. Postea requirent hominem qui ei non perteneat et sic fistucam in laisum jactet. Et ipse in cui laisum fistucam jactavit, in casa ipsius manere debet. Et hospites tres vel amplius collegere debet et de facultatem quantum ei creditum est in potestatem suam habere debet. Et postea ipse cui isto creditum est, ista omnia cum testibus collectis agere debet. Postea aut ante rege aut in mallo illi cui fortuna sua depotavit reddere debet et accipiat fistucam in mallo ipso. Ante XII menses quos heredes appellavit in laisum jactet; nec minus nec ma jus nisi quantum ei creditum est.

2. Et si contra hoc aliquis aliquid dicere voluerit, debent tres testes jurati dicere quod ibi fuissent in mallo quem thunginus aut centenarius indixerit et quomodo vidissent hominem illum qui fortuna sua dare voluerit in laisum illius quem jam elegit fistucam jactare: debent denominare illo qui fortuna sua in laiso jactat et illo quem heredem appellit similiter nominent. Et alteri tres testes jurati dicere debent quod in casa illius qui fortuna sua donavit ille in cujus laisu fistuca jactata est ibidem mansisset et hospites tres vel amplius ibidem collegisset et in beodum pultis manducassent et testes collegissent et illi hospites ei de susceptione gratias egissent. Ista omnia illi alii testis jurato dicere debent et hoc quod in mallo ante regem vel legitimo mallo publico ille, qui accepit in laisum fortuna ipsa aut ante regem aut in mallo publico legitimo hoc est in mallobergo ante teoda aut thunginum fortunam illam, quos heredes appellavit publice coram populo fistucam in laiso jactasset; hoc est novem testes ista omnia debent adfirmare» (Lex salica 1897).

It seems that this Title does not consist of the words with *trust*-like stems. However, the study of *Lex Salica* reveals the existence of the passages consisting of some *trust*-related words, for instance:

"Qui **in truste dominica** (**antruscione dominico**) fuit, XLI. 3; sine **truste dominica** (**andruscio dominicus**) fuit," XLII. 1"
(Wiener, 1999 : 27).

"*Quod si post (per) truste inuenitur, medietate conpositione truste (trustis, trustes) adquirat*" (Lex Salica: the ten texts with the glosses and the Lex Emendata, 1880 : 417).

"*Pro itinere pacis iubemus ut **in truste** centenariae ponantur, per quorum fide atque sollicitudine pax praedicta seueritas. Ut centenariae latro licet prae esse caritatis indisrupta uinculum ut centenariae inter communes prouintias licentiam habeant latrones sequi uel uestigia adsignata minare aut **in truste** qua defecerat, sicut dictum est causa remaneat, ita ut continuo capitalem ei quern perdiderat reformare festinet, et latronem perquirat, quern sine (si **in**) **truste** peruenient, medietate sibi uindicet uel dilatura si fuerit de facultate latronis ei qui damno pertulerit sartiatur*" (Lex Salica: the ten texts with the glosses and the Lex Emendata, 1880 : 418).

“*Si quis colecto contubernio hominem ingenuo in domo suo adsalierit et ibi eum occiderit si in **truste dominica** fuit ille qui occisus est Malb. ambistaile hoc est LXXII M dinarios qui faciunt solidos MDCCC culpabilis judicetur*” (Lex Salica, 1897).

The above passages reveal the usage of the words *truste* and *in truste (dominica)*. The former may be considered as the term denoting the concept *trust*, while the latter may be the Latin word-combination that refers to a person, who is a member of a king’s retinue (Ayaz, 2017 : 25). However, some scholars propose to interpret it differently. In accordance to their viewpoints, *in truste dominica* can be translated as: *in their lord’s trust* (Whittaker, 2002 : 296) / *in the lord’s trust* (Goetz, Jarnut & Pohl, 2003: 31), *in the king’s trust*¹ or *in the service of the king* (Effros & Moreira, 2020 : 106). It is supposable that the best English version is *in the king’s trust*, because one of the meanings of the polysemantic word *lord* is a ruler i.e. a king. Therefore, the word-combination *in the lord’s trust* can be identified with the phrase *in the king’s trust*.

Accordingly, it is obvious that the word *truste*, which is presented in *Lex Salica* is semantically and structurally very similar to the lexical unit *trust* that has been presented in Middle English and Modern English. The study of Lewis’ *Middle English Dictionary* reveals that in the Middle Ages the word *truste* was a variant form of the lexical unit *trust*:

Trust “n. Also **truste, trost(e, troiste, trist(e, trest(e, treost...**” (*Middle English Dictionary*, 1997 : 1137).

Moreover, the word *truste* was attested in Geoffrey Chaucer’s *Troilus and Criseyde*: “*Troilus 1: 601: But lest thow deme I truste nat to the ...*” (Windeatt, 1984 : 123).

Accordingly, it is obvious that the *truste* with the meaning “trust” was presented in Middle English and in the Salian Franks’ law. The former appeared after the Norman Conquest, while the latter was written in the 6th -7th centuries. On the one hand, it seems probable that the lexical unit *truste/trust* could appear in Old English under the influence of the Ingvaenic dialects, namely, the Angles’ and the Saxons’ languages. On the other hand, it is supposable that the word *truste/trust* could appear in Middle English after the Norman Conquest, when the elements of *Lex Salica* were imported by the conqueror.

However, if we consider that there is no evidence of the existence of the *truste* or *trust* in Old English², we may assume that the Norman Conquest and its

¹ See: Drew K. F. (1991). *The Laws of the Salian Franks*. Philadelphia: University of Pennsylvania Press, p. 104; *Vengeance in Medieval Europe: A Reader*. (2009). Smail D. & Gibson K. (editors), Toronto: University of Toronto Press, p. 57; Pohl, W., Gantner, C., Grifoni, C., & Pollheimer-Mohaupt, M. (2018). *Transformations of Romanness: Early Medieval Regions and Identities*. Berlin, Boston: De Gruyter; Greenwood, T. (1836). *The First Book of the History of the Germans: Barbaric Period*, London: Longman, p. 668; Lex Salica: the Ten Texts with the Glosses and the Lex Emendata. (1880). Hessels, J. H. (editor). London: J. Murray, p. 527

² See the following dictionaries: Bosworth, J. (1882). *An Anglo-Saxon Dictionary, Based on the Manuscript Collections of the Late Joseph Bosworth: Part I: a-Fir*. Oxford: The Clarendon Press; Hall, J. R. C. (1916). *A Concise Anglo-Saxon Dictionary for the Use of Students*. New York: The Macmillan Company; Old English Core Vocabulary. Retrieved from Old English Core Vocabulary (st-andrews.ac.uk); Bosworth Toller’s Anglo-Saxon Dictionary Online. Retrieved from Bosworth-Toller Anglo-Saxon Dictionary online (bosworthtoller.com) .

New Insights into the Origin of the Trust

consequences might facilitate the transplantation of the entrusting relationships into the British soil.

The Major Conclusions

The paper makes an attempt to study the origin of the *trust* on the basis of the comparative analysis of the Salian Franks' *affatomie* and the common law *trust*, their juridical and linguistic peculiarities as well as the verbal realization of some concepts presented in the Salians' legal code *Lex Salica*. The study of the appropriate historical background (migration of the Germanic tribes, interconnectedness of the Germanic peoples and their languages, linguistic and juridical contacts, etc.) enables us to state that the common law *trust* may have the Germanic roots and the elements of *Lex Salica* could be imported in Britain after the Norman Conquest.

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Article Info

Received: March 22 2023

Accepted: March 29 2023

New Insights into the Origin of the Trust

How to cite this article:

Gvelesiani, I. (2023). New Insights into the Origin of the Trust. *Revista de Științe Politice. Revue des Sciences Politiques*, no. 77, pp. 144 – 153.