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ORIGINAL PAPER

Acfatmire and *De Terra Commendata* (Linguistic and Juridical Analyses)

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Abstract:
The Franks were divided into two large tribes, the Salian and the Ripuarian. Both of them compiled the laws - *Pacius Legis Salicae / Lex Salica* and *Lex Ribuaria / Lex Ripuaria.* Despite the existing belief that "the barbarian laws are not unadulterated Germanic custom" (Murray, 1983 : 117), they give us a glimpse of the early Germanic institutions rooted in the tribal past (Rivers, 1986 : 1-2). Some scholars (Holmes, Holdsworth, Frankel, Helmholz, etc.) suppose that *Pacius Legis Salicae* influenced the development of British law. They put special accent on the three-party ceremony of adoption - ***acfatmire*** - and its obvious impact on the formation of the common law *trust*.

The present paper discusses the juridical-linguistic peculiarities of the Salians' ***acfatmire*** and the Ripuarians' ***adfatimire*** as well as their similarity with the British entrusting relationships. Moreover, special attention is paid to Article 65c, which is differently numbered and entitled (***De terra co (n) demnata***, ***De terra commendata, De terra condempnata, De terra condamnata, De terra condemnata***) in several manuscripts of *Lex Salica*. The study of the existing data, manuscript materials and appropriate word-entries of the dictionaries reveals that the word ***commendata*** is a verbal realization of the concept of *entrustment*. Moreover, the transfer of ancestral land depicted in Article 65c is comparable with the earliest entrusting relationships that existed in the times of the Crusades. Accordingly, the research proposes the innovative attitude towards the origin of the common law ***trust*** via depicting the connection between the ***commendata*** and the trusted administration of property.

Keywords: *commendata, Lex Ripuaria, Lex Salica, the Franks, trust.*

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The General Introduction

Originally, the Franks were the confederation of the peoples, who spoke the Germanic language and who lived north and east of the nethermost part of the Rhine frontier of the Roman Empire. In the third century, the Franks took part in the barbarian raids on the Empire and the Roman Emperors led several campaigns against them. In the mid-fourth century, some of the Franks settled within the Empire. Later they appeared in several sources as the Romans' allies. The first historical source, which was actually written by a Frank, was *Pacius Legis Salicae* (James, 1988 : 6-7) or *Lex Salica*.

It is generally believed that *Lex Salica* is the most influential barbarian law. It is usually treated as an important Late Antique legal text, which was composed in Gaul, in Latin, shortly after the end of the Western Roman Empire (Palmer, 2018 : 271–272).

The researchers express different viewpoints regarding the date of the creation of *Lex Salica*. It is believed that the earliest version occurred in the middle of the 4th century (Dierkens & Périn, 2003 : 167). However, it seems more obvious that the oldest redaction - *Pacius Legis Salicae* i.e. the Pact (or Agreement) of the Salic law(s) comprised 65 legal titles and was created during the latter years of Clovis' reign (507-511). Two later Merovingian kings - Theuderic I (511-533) and Guntramn (561-592) - slightly modified the first redaction and the 65-title text received the additional laws in the 6th century. The first redaction was followed by the second (comprising 100 titles) and third redactions containing respectively 100 and 70 titles (Rivers, 1986 : 3).

"Lex Salica is preserved in about eight manuscripts, ranging in date from the latter half of the eighth century to the sixteenth century. The majority of them - about sixty – belong to the late Carolingian redaction" (Murray, 1983 :122). Some of them were recopied in the fifteenth and sixteenth centuries (Kremer & Schwab, 2018 : 241).

It is important that *Lex Salica* became the basis of the law of the Ripuarian Franks (*Lex Ribuaria*). The latter represents an updated version for the Frankish people in the Rhineland area (around Cologne), omitting all the statutes for the Roman people included in *Lex Salica*. King Dagobert was probably responsible for the composition of this ancient law whose origins date back to the first half of the seventh century. The *Lex* is preserved in 52 manuscripts, written between the ninth and eleventh centuries, as well as in the sixteenth century (Kremer & Schwab, 2018 : 241).

The Salic laws are characterized by the addition of several vernacular (Frankish) terms and phrases, which are interpolated within the Latin text as the Malberg glosses. They were intended to highlight and clarify the Latin text. However, only a few manuscripts contain these glosses (Rivers, 1986 : 6). Some of the words, owing to the mistranscription, are puzzles for the philological science (Pollock & Maitland, 2013 :7). Moreover, the glosses of *Lex Salica* of the early sixth century consist of the Germanic words that are hopelessly distorted (Keller, 1964 : 116). Additionally, the Frankish is corrupt – apparently because the scribes, who made copies of the laws, did not understand what they were reading (Rivers, 1986 : 6). "The recording of the unwritten laws was carried out with a substantial assistance of the Gallo-Roman jurists trained in the traditions of Roman law" (Gvelesiani, 2023 : 72).

Some scholars (Holmes, Holdsworth, Frankel, Helmholz, Zimmerman, etc.) suppose that *Pacius Legis Salicae* influenced the development of British law. They put special accents on the three-party ceremony of adoption - ***acfatmire*** - and its obvious impact on the formation of the common law ***trust***. The present paper discusses the juridical-linguistic peculiarities of the Salians' ***acfatmire*** and the Ripuarians' ***adfatimire,***

as well as their similarity with the British entrusting relationships. Moreover, special attention is paid to Article 65c, which is differently numbered and entitled (***De terra co (n) demnata***, ***De terra commendata, De terra condempnata, De terra condamnata, De terra condemnata***) in several manuscripts of *Lex Salica*. However, before starting the discussion, let us focus on the major peculiarities of the ***trust***.

The Common Law *Trust*

The ***trust*** as a legal institution originated in common law of the Middle Ages. It is characterized by a versatile, flexible nature and entails a three-party relationship, which consists of a donor/trustor/settler, a trustee and a beneficiary. A donor arranges with a trustee to divide a donee's interest between a trustee and a beneficiary (Langbein, 1995 : 632). The ***trust*** is characterized by bifurcation: a trustee holds a *legal title* to trust assets and a beneficiary has an *equitable* or *beneficial ownership*. This separation of legal and beneficial ownerships offers many advantages. Accordingly, the ***trust*** can be treated as a powerful tool for implementing a donor's freedom of disposition (Sitkoff, 2014 : 658).

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 assets belongs to a trustee, while an equitable right is owned by a beneficiary. Moreover, every valid ***trust*** meets three certainties – intention to form the ***trust*** is certain; identity of a trust property is defined; identity of a beneficiary is also defined (Tang, 2015 : 2).

Therefore, the ***trust*** consists of the following main elements:

- ***donor/settler/ trustor*** – a creator of the ***trust***;
- ***trustee*** – a legal entity or a physical person that holds a legal title to a ***trust property***;
- ***beneficiary*** – an equitable owner of a ***trust property***.

The scholars interested in the common law ***trust*** often raise the question of its origin. It is believed that the ***trust*** originated from the medieval ***use***, which had been connected with the Crusades of the 12th and 13th centuries (Sulçe, 2015 : 221). Before the Crusader knights (landowners) departed to the Holy Land, their majority entered into agreements with friends as well as relatives to care for their lands/estates while they were gone (Beijer, 2018 : 134-135). As a result, the ***use/use of land*** was created. It became a method of controlling an individual's property after his death and of ensuring that it could pass to somebody other than an heir. Another advantage of the ***use*** was that it could assist in the avoidance of payment of feudal incidents (Kerridge, 2011 : 432–471). Similarly to the ***trust***, the ***use*** was a three-party relationship consisting of three major elements:

- ***feoffor*** – a transferor;
- ***cestui que use*** – an owner of transferred assets;
- ***feoffee to use*** – a transferee that held transferred assets to the use of ***cestui que use***.

Some scholars connect the origin of the ***use*** with the legal institution ***Salman*** that dates back to *Lex Salica*. Holmes and Holdsworth expressed their influential opinions in this respect. Holdsworth considered that this was the true origin of the ***trust/use*** and was applied to grants of land in the early period after the Conquest. Holmes also traced the ***use*** to the Germanic ***Treuhand***, or ***Salman***, who was an executor in early times. Assets had been transferred to the ***Salman*** for certain purposes and he took a recognized position in administration of a deceased's personal property (Potter's, 1958 : 604-605). Moreover, the ***Salman*** permitted a transferor to adopt or appoint an heir (Rounds, 2015 :1376). Let us discusses the appropriate Articles from *Lex Salica*.

The Salians' *acfatmire* and the Ripuarians' *adfatimire*

The process denoted by the lexical unit ***acfatmire*** is presented in Article 46 of *Lex Salica*[2)], whose translation was made by Rivers in 1986:

"Concerning the transfer of property [that is, adoption of an heir, *acfatmire*]

1. This is to be observed [by anyone who wishes to transfer his property] so that the *thunginus* or the *centenarius* should call the court, and [the prospective transferors] must have a shield in the same court, and afterwards three men [as witnesses] must be asked three questions by this same court. Then let him [who wishes to transfer his property] summon a man [as a trustee] who is not related to him, and let [the transferor] throw a rod into his lap. And to him into whose lap he threw the rod, let [the transferor] say the words concerning his property for how much of it he wishes to give to him, or even if he wishes to give all or half of his property.
2. Afterwards he into whose lap [the transferor] threw the rod must live in [the transferor's] house and must receive three or more guests, and must have within his own power as much of the property as [the transferor] gave him. And, afterwards, he to whom that [property] is entrusted must do everything with witnesses present.
3. And afterwards [the transferor] must transfer his property either before the king or lawfully in court to him who he bestowed it upon, and let [the trustee] take the rod, and let him throw it into the lap of [the transferor's appointed] heirs in the same court before twelve months have elapsed, neither less nor more, but only as much as was [originally] entrusted to him.
4. And if anyone wishes to say anything against this [transferal], three witnesses must say under oath that they were at the court that the ***thunginus*** or ***centenarius*** convened, and how they saw that man, who wished to give his property, throw a rod into the lap of him who he had already selected. And they must identify him by name who threw his rod into the lap [of the other]; and thus he into whose lap he throw it and he who he proclaimed as his heir should be publicly identified" (Rivers, 1986 : 92-93).

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2) *"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.*

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 furtuna 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 furtuna ipsa aut ante regem aut in mallo publico legitimo hoc est in mallobergo ante teoda aut thunginum furtunam illam, quos heredes appellavit publice coram populo fistucam in laiso jactasset; hoc est novem testes ista omnia debent adfirmare" (Lex Salica, 1897).

In 1991 Drew presented another English version of Article 46:

"1. It should be done thus. The thunginus or hundredman should convene a court. In the court he should have a shield, and there three men should state the case three times. And afterward let a man appear who is not related to him [who wishes to transfer his property], and he [the transferer] should throw a stick (festuca) thus into his lap. And he should say to the man into whose lap he threw the stick how much he wishes to give him [the selected donee] — if he wishes to give him all or half of his property.

2. And afterward the man in whose lap the transferer threw the stick ought to stay in that one's house and receive there three or more guests and have in his control as much of the property as was given to him. And he to whom it was given should do all these things in the presence of assembled witnesses.

3. Afterward within twelve months he [the transferer] should in the presence of the king hand over his property to him whom he designated or who received the stick in legitimate court — neither more nor less than the amount he gave to him he named as heir and into whose lap he threw the stick.

4. And if anyone wishes to contest this, the three witnesses should declare under oath that they were present in the court that the thunginus or hundredman convened and that they saw in what manner that man, who wished to give his property, threw the stick into the lap of him whom he had chosen. And they should name by name the man who threw his property into someone else's lap, and they should likewise name him in whose lap it was thrown and publicly called heir.

5. And three other witnesses should state under oath that he in whose lap die stick was thrown remained there in die house of that one who had given him his property and that he assembled there three or more guests and fed them and these three or more guests offered thanks to him in accepting and ate porridge (pultes) at his table (beode) and the three were together as witnesses.

6. And three other witnesses should declare on oath all these things that it was in court in the presence of the king or in a legitimate public court that he who received the property in his lap — either in the presence of the king or in legitimate public court (called anttheoda or tkungino in the Malberg gloss) — he [who was giving the property] threw the stick into die lap of that one publicly in the presence of all and thus [threw] his property into the lap of the man whom he called heir. The nine witnesses should affirm all these things in their testimony" (Drew, 1991 : 110-111).

The study of Article 46 reveals that ***acfatmire*** can be treated as a three-party relationship, which consists of a transferor, a transferee and an heir. The process of transfer seems comparable with the process of entrustment, while a transferee is comparable with a trustee. This fact is clearly depicted in Rivers' translation that presents the lexical units ***trustee*** and ***to entrust***. Drew denotes a transferee with the lexical unit ***donee***, which can be treated as a trustee, because the terms ***donor*** and ***trustor*** are synonymous in the context of entrusting relationships. Moreover, the ritual very similar to ***acfatmire*** "was used down to modern times in England for the transfer of copyhold, a staff being handed to the steward of the manor as a first step conveying copyhold land to someone else; the surrender to the steward is expressed to be to the use of the purchaser or donee" (Wynen, 1949 : 163).

It is important that in contrast to *Lex Salica*, *Lex Ripuaria* denotes the process of adoption by the lexical unit ***adfatimire*** and presents it in the following way:

"If anyone has no children, neither sons nor daughters, let him have the right according to Ripuarian law in the presence of the king to adopt an heir of all his property: if he is a husband, his wife, or if she is a wife, her husband, or whoever, either related or not related. Or let him transfer property [*adfatimire*] through charters or let him hand over [his property when] witnesses are summoned. If a man and his wife transfer property [*adfatimus*], let the inheritance revert to the lawful heir who survives them after the death of both, except in so far as [the deceased husband] may have spent on alms or on his own needs" (Rivers, 1986 : 193).

Accordingly, when direct heirs did not exist, *Lex Ripuaria* allowed men and women to bequeath assets to their spouses through the process of adoption. However, the latter is not comparable with entrustment. Moreover, there are no trust-related terms in the above passage.

Towards the Question of *De Terra Commendata*

While dealing with *Lex Salica*, we paid attention to Article 65c, which is entitled ***De terra co(n)demnata***:

"LXVc.

De terra co (n) demnata

Si quiß alteri auift)am terram suam co(n)demnauerit et ei noluerit reddere, si eum admalluerit et conuinxerit, (pc denarios qui faciunt} solidos XV culpabilis iudicetur" (Lex Salica, 1953 : 235)

This article was translated by Rivers in the following way:

65c

"**Concerning entrusted land**

If anyone entrusts his ancestral land to another and he is unwilling to pay him [the tribute owed as payment for safekeeping his land], let him be held liable, if [the trustee] summons him to court and convicts him, for 600 denarii, which make fifteen solidi" (Rivers, 1986 p. 110).

It seems important that Rivers' translation is accompanied by the following explanation: "The text gives *condemnare* (to condemn), but *commendare* (to entrust) should be substituted" (Rivers, 1986 : 159). This explanation motivates us to focus on Article 65c, which is differently numbered (and even entitled) in several manuscripts of *Lex Salica*. Here are some examples:

"LXXI

De terra condemnata

Si quis aterra condemnata fuerita et ei fuerit adprobatum, MMD denariis qui faciunt solidos Lxn semis' culpabilis iudicetur" (Lex Salica, 1953 : 235)

"LXLIX

De terra condempnata

Si quis terram alienam condempnaverit et ei fuerit adprobatum, <MMD dinarius qui faciunt> solidos LXII semis culpabilis iudicetur" (Lex Salica, 1953 : 238).

"LXXI

De terra condemnata

Cl quis terram alienam condemnaverit & ei o fuerit adprobatum, bis mille quingentis denariis , qui faciunt solidos sexaginta duos cum dimidio, culpabilis judicetur" (Schilteri, 1728 : 93).

"LXXII
De terra commendata

I. Si quis alteri auicám terram fuam commendauerit, & ei noluerit reddere, fi eum admallauerit & conuinxerir, DC.denar. qui faciunt fol. x v . culpabilis iudicetur" (Wendelino, 1649 : 46.)

"De terra condempnata
(3 tit. 98 ; H tit. 72; Ef tii. 71.)

Si* quis terram alienam condempnaverit et ei fuerit adprobatum solidos LXII et semissem culpabilis judicetur.
* si quis alteri avicaui terram suam commendav. et ei noluerit reddere si eum admalluerit et convinx. DC den. q. f, sol. XV culp. judic. H." (Lex Salica, 1897 : 80)

"LXXI
De terra condamnata
Si quis terra condemnata fuerit et ei fuerat adprobatum" (Coumert, 2023 : 320).

"71
De terra condempnata
Si quis terram alienam condempnaverit et ei fuerit adprobatum, 2500 denarios qui faciunt solidos 62% culpabilis iudicetur (Lex Salica, 1850 : 80)

De terra commendata
Si quis alteri avicam terram suam commendaverit et ei noluerit reddere, si eum ammallaverit et convinxerit, 600 din arios qui faciunt solidos 15 culpabilis iudicetur" (Lex Salica, 1850 : 80)

The study of the above passages reveals the existence of four different spellings of the word-combination *De terra co(n)demnata*, namely: ***De terra commendata, De terra condempnata, De terra condamnata, De terra condemnata***. This fact may be stipulated by the usage of four verb-forms: ***commendare, condempnare, condamnare, condemnare***. However, the study of the data of the dictionaries (Latin-English Dictionary, Online Latin-English Dictionary, LatDict) prove only the existence of two Latin verbs - ***condemnare*** and ***commendare***.

The word ***commendare*** is polysemous and has the following meanings:
"1. commit
2. entrust, give in trust
3. point out, designate
4. recommend, commend to
Source: "Oxford Latin Dictionary", 1982" (https://www.latin-dictionary.net/search/latin/commendare)

The lexical unit ***condemnare*** is polysemous and means:
"1. (pass) sentence
2. blame, censure, impugn
3. condemn, doom, convict
4. find guilty

Source: "Oxford Latin Dictionary", 1982" (https://www.latin-dictionary.net/search/latin/commendare)

It is noteworthy that none of the meanings of the word ***condemnare*** presented in the above word-entry suits the context of Article 65c. Accordingly, River's opinion regarding substituting ***condemnare*** with ***commendare*** seems quite acceptable. Moreover, one of the above passages, namely, Article LXXI is entitled ***De terra condamnata***. However, the first sentence of the article consists of the word-combination ***quis terra condemnata***. The study of other passages reveals that the first sentence of every article repeats the verb used in the title. This fact enables us to suppose that the word ***condamnata*** may be treated as a mistake of the scribe, who wrote ***condamnata*** instead of ***condemnata***.

Finally, in case of the title ***De terra condempnata***, the word ***condempnata*** may be treated as a variant form of the lexical unit ***condemnata***. If we consider that *Lex Salica* is preserved in about eighty manuscripts created between the eighth and sixteenth centuries, than we may assume that the spellings of some words could change throughout the centuries and the manuscripts could depict those changes. Moreover, attention should be paid to the fact that the scribes, who made copies of *Lex Salica,* did not understand its content. Additionally, they might make mistakes while copying.

The Major Conclusions

Therefore, the present paper made an attempt to study the origin of the ***trust*** on the basis of the analysis of the Ripuarians' ***adfatimire*** as well as the Salian Franks' ***affatomie*** and ***De terra co(n)demnata***. Special attention was paid to their juridical and linguistic peculiarities, as well as the verbal realization of some concepts presented in the Salians' legal codes. The presented comparative analyses depicted the obvious similarity between the mechanisms of the Salian Franks' ***acfatmire*** and English ***use/trust***. Moreover, the parallel drawn between the rules of the entrustment of one's ancestral land (Article 65c of *Lex Salica*) and English ***trust*** revealed the same attitude towards the transfer of one's ownership.

Additionally, the linguistic analysis of the articles related to the ***affatomie*** and ***De terra co(n)demnata*** and their English translations depicted the existence of the trust-related words. The study of the existing data and appropriate word-entries of the dictionaries revealed that the word ***commendata*** was a verbal realization of the concept of *entrustment*. Moreover, the lexical unit ***condempnare*** presented in some manuscripts was treated as the variant form of ***condemnare***, while ***condamnare*** was considered as a mistake made by scribes. The existence of the variant forms may be explained by various dating of the manuscripts of *Lex Salica*, which were obviously created in different centuries.

Accordingly, the carried out research enables us to state that the common law ***trust*** may have the Germanic roots and the elements of *Lex Salica* could be gradually imported in Britain by the Normans after the Battle of Hastings.

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