

INTERPRETATION OF THE ORIGIN OF “TRUST” ON THE BASIS OF THE IN-DEPTH TERMINOLOGICAL ANALYSIS

*Irina GVELESIANI**

Abstract

“Trust is an element that has been approached in the last decades by many disciplines and through many and varied means”. It is usually defined as a legal agreement under which a “settler” transfers property to a “trustee”, who has to exercise and manage it for the benefit of a “beneficiary” – an equitable and a beneficial owner of the property. Trust relationships become more and more popular in legal, commercial and non-commercial spheres of today’s life. Some researchers believe, that this legal institution originated in England at the end of the Middle Ages. However, certain studies indicate, that the initial “trust-like devices” existed even in the earlier times. Their existence stipulated the origination of the unique common law “trust” institution.

The given paper is dedicated to the interpretation of the origin of “trust” on the basis of the in-depth terminological analysis of the earliest “trust-like devices”. It makes an attempt to answer the question of its purely Roman roots. The parallel is drawn between the ancient and medieval institutions.

Key Words: *beneficiary, fiducia, trust, trust-like device.*

1. Introduction

It’s a well-known fact, that “trust” is a purely common law institution. However, some “trust-like” devices and “trustee-like” persons can be vividly seen in the Roman law. Some scholars even believe, that “there is a “common core” that unites”¹ English trust and the Roman institutions. William Blackstone indicated, that “trusts” were “in their original of a nature very similar, or rather exactly the same” as the fiduciary institutions of the Roman law, chiefly the *fideicommissum*². William Cruise stated the idea, which was widely accepted in the 18th century – the trust and the rules regulating it “have been borrowed by the ecclesiasticks [sic] from the fideicommissum of the civil law”³.

The given paper is dedicated to the interpretation of the origin of “trust” on the basis of the in-depth terminological analysis of the earliest “trust-like devices”. It makes an attempt to answer the question of its purely Roman roots. The parallel is drawn between the ancient and medieval institutions.

* Associate Professor, Ph.D., Ivane Javakhishvili Tbilisi State University.

¹ *The Oxford handbook of comparative law*, M. Reimann, R. Zimmermann, Oxford, Georgia, University Press, 2008, pp. 1089.

² *Trust and Treuhand in historical perspective*, edit. R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing House, Berlin, 1998, pp. 32.

³ W. Cruise, *An essay on uses*, Dublin, 1796, pp. 3.

2. Legal institutions of the Roman law

During the study of the Roman legal institutions a special attention must be paid to *mancipatio* – a juridical institution, which comprised *mancipating* the estate. Juridical literature describes the term *mancipatio* in the following way: “*Mancipatio* (from *manus* and *capio*) means, literally, to take in the hand, to take into one’s possession, or power”⁴. Generally, this Roman institution considered a ceremonial conveyance, which needed “the presence of the transferor and transferee, five witnesses (adult male Roman citizens), a pair of scales, a man to hold them, and an ingot of copper or bronze. The transferee grasped the object being transferred and said, “I assert that this thing is mine by Quiritarian [Roman] law; and let it have been bought by me with this piece of copper and these copper scales.” He then struck the scales with the ingot, which he handed to the transferor “by way of price”⁵. This ceremonial conveyance could originally be called “*mancipium* (from *manu capere* = to grasp with the hand, which was one of the decisive gestures performed during the act). *Mancipatio* was also applied for other purposes as, e.g., to make a donation, to constitute a dowry, to hand over a thing to another as a trustee *fiduciae causa*”⁶. It’s also worth mentioning, that during its further development *mancipatio* became a required oral procedure for making a classical will (“*testamentum per aes et libram*”). However, it disappeared in the Justinian’s law. Moreover, “mention of it in classical texts, accepted into Justinian’s codification, was omitted and substituted by the formless *Traditio*”⁷.

During the study of the Roman law a special attention must be paid to *mancipatio familiae*, which is described as “the oldest form of a testament made by *mancipatio* through which the testator transferred his property to a trustee (a friend) with an oral instruction (*nuncupatio*) as to how the trustee, who formally was a buyer of the estate, *familiae emptor*, had to distribute it after the testator’s death”⁸. Initially, *mancipatio familiae* “was not a *testamentum*, but a device for doing without one”⁹. It was especially useful in the cases of the contemplation of a testator’s death, when there was not a possibility of the creation of a will in the *comitia curiata* – “the earliest legislative assembly based upon the division of the people into *CURIAE*”¹⁰. However, this transaction “was inconvenient in cases where the testator managed to recover. Thus, the transfer of the full right was probably deemed to be postponed until the death of the testator”¹¹. Therefore, initially, the transaction considered by

⁴ W. L. Burdick, *The principals of Roman law and their relation to modern law* in *The lawbook Exchange, LTD.*, Clark, New Jersey, 2004.

⁵ Encyclopedia Britannica <http://www.britannica.com/Ebchecked/topic/361497/mancipatio>.

⁶ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II*, The American Philosophical Society, Philadelphia, 1953, p. 573.

⁷ Encyclopedia Britannica <http://www.britannica.com/Ebchecked/topic/361497/mancipatio>.

⁸ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II, The American Philosophical Society*, Philadelphia, 1953, p. 574.

⁹ *Trust and Treuhand in historical perspective*, R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing Hou, Berlin, 1998, p. 269.

¹⁰ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II, The American Philosophical Society*, Philadelphia, 1953, p. 298.

¹¹ *Trust and Treuhand in historical perspective*, R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing House, Berlin, 1998, p. 32.

mancipatio familiae “was not much like a will. It was oral, made only at the point of death, open, irrevocable, perhaps taking effect at once. But its character gradually changed. It became usual to write down the instructions, thus securing secrecy; they became enforceable, and variable...The familiae emptor was now a mere formality”¹². Therefore, the so-called “mancipatory will” or “testamentum per aes et libram” came into effect. The second century Roman law manual (the Institutions of Gaius) gives a more precise description of the proceedings of making such a will: “the testator, as in other mancipationes, takes five Roman citizens above puberty to witness and a scale-holder, and having previously written his will on tablets, formally mancipates his familia to someone”¹³. “This was a true will, not necessarily open, ambulatory, i.e. not operating in any way till the death, and capable, if not of revocation, of variation in any degree”¹⁴.

The third institution of the Roman law was “fideicommissum”, which was usually considered as “a gift under the Roman law of property stipulated by the donor to be transferred by the donee at a given time or upon a stated condition to a third person for his benefit and made between living persons in contemplation of death or by will”¹⁵. The term “Fideicommissum” originated from the “past part. of fideicommittere to bequeath in trust, fr. fidei (gen. of fides faith, trust) + committere to connect, entrust”¹⁶. “Fideicommissum” enabled a person to beg his/her heirs to transfer something to a third person. The begging could be done in a written form or orally via using simple words of request. In certain cases it could be intimated by a nod. An informal character of the creation of “fideicommissum” popularized this institution among the population. Its nature “rendered it available as a vehicle for conveying any kind of request from the testator to the *fiduciarius*, including therefore a request that the *fiduciarius* should transfer to a third party ... the share of the inheritance which he received either *ab intestato* or *ex testamento* from the deceased”¹⁷. Fideicommissum had a tripartite structure. It comprised: a testator, a fiduciarius and a fideicommissarius. A *fiduciarius* was the only owner of the transferred property, because the Roman law did not recognize a division of ownership into legal and equitable interests.

It's also worth mentioning, that initially, “fideicommissa were not recognized by the law, and the only entitlement the beneficiary had was a moral one which was not enforceable in the courts. That changed when the emperor Augustus introduced a jurisdiction charged with the enforcement of such trusts ... An institution which had

¹² W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, Cambridge University Press, 2007, p. 284.

¹³ M. Nowak, *Mancipatio and its life in late-Roman law in The Journal of Juristic Papyrology*, Vol. XLI, 2011.

¹⁴ W. W. Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, Cambridge University Press, 2007, p. 284.

¹⁵ Fideicommissum. Merriam-Webster online dictionary <http://www.merriam-webster.com/dictionary/fideicommissum>.

¹⁶ Fideicommissum. Merriam-Webster online dictionary <http://www.merriam-webster.com/dictionary/fideicommissum>.

¹⁷ R. Sohm, *The Institutes of Roman Law*, Gorgias Press, USA, 2002.

depended on *fides* and on *amicitia* came to depend on legal obligation”¹⁸. “Praetor fideicommissarius” had jurisdictions over fideicommissa.

The Roman law presented the institution “fiducia”, which “qualified a conveyance by providing what was to be done with the thing conveyed”¹⁹. The law distinguished two types of “fiducia”: “fiducia cum amico” and “fiducia cum creditore”. The former was not a testamentary disposition. It was regarded as an agreement concluded between fiduciant (settlor) and fiduciarius. “A *fiduciant* transferred his estate to the *fiduciarius* who was obliged to use it according to the terms of the agreement and subsequently to give it back to the fiduciant”²⁰. Technically, “amicus” was the owner. He was “able to exercise all the rights of an owner, for instance to vindicate the thing if it got out of his possession”²¹. “During the ancient times the *fiduciant*’s rights towards *fiduciarius* were not legally protected. They were protected by public opinion and moral”²². Terminological study of “fiducia cum amico” indicates that a fiduciary relationship was carried out by means of a friend (the Latin word “amicus” means a “friend”). Therefore, “*amicus*” played the major role in a safe custody, which ensured the management of the ownership of the Roman citizen, who travelled abroad.

In contrast to “fiducia cum amico”, “fiducia cum creditore” was “a kind of pledge. The debtor transferred the ownership of a thing given as a real security to the creditor through mancipatio or in iure cession. The latter assumed the obligation to transfer the thing to the debtor after the debt was paid”²³. P. Stec presented exact terms denoting participants of a transaction: “the fiduciant transferred ownership of chattles to the fiduciary on condition that he would transfer them back again when the debt was paid”²⁴. Initially, Roman law did not obligate the trustee to act according to the agreement and the settlor was not legally protected. However, the later Roman law gave some degree of protection to *fiduciant*. Moreover, during the following period of time “this type of *fiducia* was replaced by other instruments of security such as the *pignus* (pledge) and *hypotheka* (mortgage)”²⁵. The terminological study of “fiducia cum creditore” vividly indicates, that a fiduciary relationship was carried out by means of a creditor/with a creditor (cum creditore).

3. Analysis

¹⁸ *Trust and Treuhand in historical perspective*, R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing House, Berlin, 1998, p. 46.

¹⁹ *Trust and Treuhand in historical perspective*, edit. R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing House, Berlin, 1998, p. 46.

²⁰ P. Stec, *Fiducia in an emerging economy* in Modern studies in Property Law, Vol. 2, Oxford: Hart Publishing, 2003.

²¹ H. F. Jolowicz, B. Nicholas, *Historical Introduction to the Study of Roman Law*, Cambridge University Press, 1972.

²² I. Pukhan, *Roman Law*, Moscow, 1998.

²³ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II, The American Philosophical Society*, Philadelphia, 1953, pp. 472.

²⁴ P. Stec, *Fiducia in an emerging economy* in Modern studies in Property Law, Vol. 2, Oxford: Hart Publishing, 2003.

²⁵ P. Stec, *Fiducia in an emerging economy* in Modern studies in Property Law, Vol. 2, Oxford: Hart Publishing, 2003.

All the above mentioned enables us to analyze some institutions of Roman law in order to single out their similarity with the common law “trust”.

Firstly, a special attention must be paid to *mancipatio* – a juridical institution, which comprised a formal mancipating of the estate and included different types of transferences. Among them was handing over a thing to a certain person/a trustee. Before Justinian’s law *mancipatio* was regarded as a required oral procedure for making a classical will (“*testamentum per aes et libram*”). Supposedly, it was the first form of an entrustment, which comprised a transferor/trustor, a transferee/trustee, five witnesses and a beneficiary.

Another point of interest is “*mancipatio familiae*”, which was not a *testamentum*, but a device for doing without it. Similarly to the contemporary “trust”, “*mancipatio familiae*” could be analyzed as an example of a split ownership. However, “splitting” took place only in certain circumstances – in those cases, when the testator managed to recover after the transference of the property. Therefore, the transfer of the full right was possibly postponed until the death of a testator.

The third outstanding institution of Roman law was “*fideicommissum*”. Its major essence was “*fides*”. The term “*fideicommissum*” originated from “*fidei alicuius committere*”²⁶, while the lexical unit “*fides*” meant: “the confidence, truth, faith one has in another’s behavior, particularly with regard to the fulfillment of his liabilities”²⁷. *Fideicommissum* had a testamentary character and tripartite structure. It comprised: a testator, a *fiduciarius* and a *fideicommissarius*. The structure of “*fideicommissum*” seems quite close to the common law “trust”. However, the former considered only a *mortis causa* transaction – a testator’s request (addressed to his heir) regarding a certain performance for the benefit of the third person. It’s worth mentioning, that “*fideicommissum*” considered only domestic transactions, while common law “trust” entered juridical and economic spheres of different countries. The “trust” made distinction between legal and equitable interests, while “*fiduciarius*” can be regarded as the only owner of the property transferred via “*fideicommissum*”. Moreover, the relationship between the “trust” and “*fideicommissum*” is quite vividly seen from the following citation: “by *fideicommissa* we cheat the law”²⁸. Even nowadays, “trust” “cheats” the law, because it enables a trustee to distribute the property according to his/her wish. There are no taxes to be paid and no “obligatory shares” to be dealt with. A trustee acts freely.

The fourth institution of Roman law is “*fiducia*”. Its major essence is “trust” (*fiducia, fides*) and it seems akin to a “mancipatory will” (“*testamentum per aes et libram*”). However, from the contemporary point of view a “mancipatory will” is not a “*fiducia*”, “in the technical sense of the term, inasmuch as in a *fiducia* the duties of the formal owner are left to his “good faith”... whereas, on the other hand, the duties of the *familiae emtor* are accurately defined by the *nuncupatio* in such a manner as to

²⁶ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II, The American Philosophical Society*, Philadelphia, 1953, p. 470.

²⁷ A. Berger, *Encyclopedic Dictionary of Roman Law, Volume 43, Part II, The American Philosophical Society*, Philadelphia, 1953, p. 471.

²⁸ *Trust and Treuhand in historical perspective*, edit. R. Helmholz, R. Zimmermann, Duncker&Humblot Publishing House, Berlin, 1998, p. 46.

bind him rigorously to their performance”²⁹.

It's a well-known fact, that “fiducia” comprised fiducia cum amico” and “fiducia cum creditore”. The study of Roman “fiducia cum amico” revealed, that it was not remote from the practice of the medieval “trust”. It ensured the management of the ownership of persons, who travelled abroad. Similarly to the mechanism of “trust”, “fiducia cum amico” was based on friendship – a transferee was “amicus” (a friend acting as a “trustee”). The legal relationships between a transferor and a transferee ended after the return of the former, because an estate was given back to the transferor.

In contrast to “fiducia cum amico”, “fiducia cum creditore” was a kind of pledge used for securing a loan. Even the terminological study of “fiducia cum creditore” vividly reveals, that a fiduciary relationship was carried out by means of a creditor (“cum creditore” means “with a creditor”).

4. Conclusions

All the above mentioned enables us to conclude, that some Roman law institutions can be regarded as the early “trust-like devices”. Their structures reveal certain similarities with the common law “trust”. One of the closest devices is “fiducia cum amico”. However, we believe, that the greatest attention must be paid to “mancipatio familiae”, because similarly to the common law “trust”:

- it is not a will/testamentum, but a device to do without it;
- it can be analyzed (in certain cases) as an example of a split ownership;
- it considered the transference of a testator's property to a trustee (a friend) with an oral instruction (even nowadays American law recognizes oral trusts);
- it represents a part of the law of succession.

Therefore, these facts clearly indicate, that the Roman “mancipatio familiae” can be a possible predecessor of the Common law “trust”.

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