§8.37 The Origin of the English Trust

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> *The trust has had no such success with respect to another system of law—Islam. Legal historians have long recognized that the origins of the trust may actually be traceable to an Islamic legal construct, the waqf. However, whereas the trust has expanded its domain in the modern economy, the waqf has experienced a precipitous decline throughout the Islamic world. To some degree, this has been attributable to factors that point less to inefficiencies with respect to waqf legal doctrine itself than to consolidation of power by political movements intent on gaining control of private capital. To a large degree, however, it is ascribable to the legal doctrine associated with the waqf.*[1]

Introduction. The English trust is a unique legal device[2] whose origin has been the source of much debate among legal scholars.[3] There are three theories concerning the origin of the English trust:[4] the Roman,[5] Germanic,[6] and Islamic.[7] Until the nineteenth century, it was believed the trust was modeled on the Roman *fideicommissum*.[8] By the nineteenth century, the accepted theory was that the trust was modeled on the Salic law of the Salmannus.[9] The latest theory is that the trust is based on the Islamic example of the *waqf*.[10]

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[1]Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison with the Trust*, 32 Vand. J. Transnatl. L. 1191 (1999).

[2]Frederick W. Maitland, Equity: Also the Forms of Action at Common Law 23 (A. H. Chaytor & W. J. Whittaker eds. 1984) (stating that the trust "perhaps forms the most distinctive achievement of English lawyers….There is nothing quite like it in foreign law.").

[3]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1140 (1996).

[4]There is actually a fourth theory advanced by Frederick W. Maitland called the Romano-Germanic theory. Frederick Pollock & Frederick W. Maitland, The History of English Law 228–255 (2d ed. 1968) (theorizing that the use was modeled on both Roman and German law). However, this theory has received the same criticisms as the Roman and Germanic theories. Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1152 (1996).

[5]*See* 2 William Blackstone, Commentaries 328 (suggesting that the English use was modeled on the Roman *fideicommissum*).

[6]*See* Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443 (1899) (suggesting that the Salic Salmannus was the ancestor of the English use).

[7]George Makdisi, The Rise of Colleges 227–240 (1981) (suggesting that the English trust emerged from the Islamic law of the waqf).

[8]*See generally*§8.12.1 of this handbook (civil law alternatives to the trust).

[9]*See generally* Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443 (1899) (suggesting that the trust is based on the Salic Salmannus).

[10]Ann Van Wynen Thomas, *Note on the Origin of Uses and Trusts, Waqfs*, 3 S. L.J. 162, 163–166; Henry Cattan, *The Law of Waqf*, 1 Law in The Middle East 213–218 (Majid Khadduri

The English Use. Until the passage of the Statute of Uses in 1535, the English trust was known by its predecessor, the use.[11] The trust's antecedent, the use emerged in equity in order to circumvent to narrowness and rigidity of English common law restrictions on ownership and transfer of property.[12] The use "entailed the transfer of legal title (enfeoffment) to a person who was to hold the property (the feoffee to uses) for the benefit of another (the cestui que use)."[13] Through this device, feudal landowners could transfer property and circumvent the feudal incidents of tenancy (*e.g.*, ward, heriot, and escheat).[14] The use had other purposes as well. "Probably, as Maitland suggests, the first general employment of uses was in the thirteenth century, for conveying lands to the use of the Franciscan friars, who by the laws of their order could neither individually or as a community own property."[15]

Henry VII enacted the statute of uses to counteract the negative revenue effects of the employment of the use, by attributing ownership of the "legal title" to the *cestui que* use for taxation purposes.[16] Exceptions to the statute of uses, however, were recognized, such as "active trusts," in which the "feoffee to uses" retained certain incidents of ownership.[17] It is from these exceptions that the English trust emerged.[18]

The *fideicommissum* and the Roman theory. The *fideicommissum* was created in order to circumvent the strict regime of the *ius civile*.[19] Under the law of *ius civile*, certain classes of people, *e.g.*, infants and non-Romans, were prohibited from becoming beneficiaries of a legal testament.[20] A testator could nevertheless entrust his property to an intermediary person who was allowed to be an heir by law.[21] The testator would then instruct the intermediary third party to transfer the entrusted property to the intended beneficiary, who was not allowed to be an heir by law.[22] This informal testamentary trust was known as the *fideicommissum*, a legal device by which property was "entrusted" to one person (the *haeres* fiduciaries) for the benefit of another (the *fideicommissarius*).[23] The *fideicommissum* was eventually recognized and adopted by Roman law.[24]

The Roman theory traces the origins of the English use to the *fideicommissum* by pointing to

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& Herbert H. Liebesny eds., 1955); Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1232 (1988).

[11]*See generally*§8.15.1 of this handbook (statute of uses).

[12]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1143 (1996).

[13]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1143 (1996).

[14]Paul G. Haskell, Preface to the Law of Trusts 5 (1975); 1 Scott on Trusts §1.5.

[15]1 Scott & Ascher §1.4 (The First Period); 5 Scott & Ascher §37.1.2 (History of Charitable Trusts in England).

[16]1 Scott on Trusts §1.5.

[17]1 Scott on Trusts §1.5 (stating that the "feoffee to uses" had the right to take profits and hold seisin).

[18]Bogert, Trusts and Trustees §5.

[19]The *ius civile* was the law of the Roman Empire applicable to Roman citizens. Barry Nicholas, An Introduction to Roman Law 57–59 (1962).

[20]J. Inst. 2.23.1.

[21]J. Inst. 2.23.1.

[22]J. Inst. 2.23.1.

[23]David Johnston, The Roman Law of Trusts 1 (1988).

[24]Barry Nicholas, An Introduction to Roman Law 27–28 (1962).

the similarities between both institutions.[25] Both the use and the *fideicommissum* share a "common fiduciary nature: property is entrusted to one person for the benefit of another."[26] Both legal institutions "developed in independent jurisdictions, the trust in equity, outside the common law; the fideicommissum outside the Roman formulary system in a new official procedure."[27]

The Roman theory suggests that ecclesiastics introduced the *fideicommissum* into England as the use in order to circumvent the restrictions on the transfer of property imposed by the Mortmain Statute.[28] Further, proponents of the Roman theory theorize that because the law of the Church was founded on Roman law, logic dictates that the ecclesiastics would turn to Roman law for guidance.[29] Finally, the Roman theory's position was most recently revived by a letter Saint Jerome wrote in 393 A.D. condemning the ecclesiastics' usage of the *fideicommissum* to circumvent restrictions on the transfer of property to the clergy.[30]

The Roman theory has, however, been criticized by several scholars who point out that any similarities between the *fideicommissum* and the English use are merely superficial.[31] The fundamental criticism remains that the *fideicommissum* was a testamentary bequest, while the English use seldom arose by will.[32] Further, another critical difference is that for the *fideicommissum*, the beneficiary (the *fideicommissarius*) was considered the real owner of the transferred property, while for the English use, the third party intermediary (the feoffee to uses) held legal title to the transferred property.[33]

The Salmannus and the Germanic theory. The Salmannus was predominantly used to aid in the disposition of a transferor's property upon his death.[34] This institution dates back to the

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[25]2 William Blackstone, Commentaries 328 (suggesting that the Roman fideicommissum was the direct ancestor of the English use). *See generally* Bogert, Trusts and Trustees §2.

[26]David Johnston, The Roman Law of Trusts 1 (1988).

[27]David Johnston, The Roman Law of Trusts 1 (1988).The reader of this handbook may find amusing the first paragraph of the Roman Law of Trusts: Trusts did not exist in Roman law; nor do they exist in the civil systems which derive from it. They are rightly regarded as one of the hallmarks of legal systems of the common law family. Since this is the case, a book on the Roman law of trusts might well be expected to be short. David Johnston, The Roman Law of Trusts 1 (1988).

[28]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1143–1444 (1996). The Mortmain Statute of the late fourteenth century prohibited the clergy from receiving donations of land. Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139 at n.26.

[29]Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. at 1148–1149 (citing Brendan F. Brown, *The Ecclesiastical Origin of the Use*, 10 Notre Dame L. Rev. 357, 365–366 (1935)).

[30]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1143 (1996).

[31]Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. at 1149.

[32]Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. at 1149.

[33]Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. at 1149.

[34]J. L. Barton, *The Medieval Use*, 81 Law. Q. Rev. 562, 562 (1962).

fifth-century legal code of the German tribe of the Salian Franks, the Lex Salica.[35] The term *Salmannus* is derived from "sala," which means "to transfer."[36] The Salmannus entailed the transfer of the transferor's property during his lifetime to a Salmannus, a person trusted to transfer the property to a designated beneficiary upon the death of the original transferor.[37] Thus, the use of the Salmannus permitted the transferor to adopt or appoint an heir.[38] The Salmannus held the property "on account of or to the use of another" and was "bound to fulfill his trust."[39] The Salmannus is "the 'person through whom effect is given to a transfer,' and hence, the anglicized 'saleman.'"[40]

The Germanic theory on the origin of the English trust was propounded by Oliver Wendell Holmes and Frederick William Maitland.[41] Holmes and Maitland traced the origin of the English trust to the Salic Salmannus[42] and propounded that "the saleman became in England the better known feoffee to uses."[43] After the withdrawal of the Roman legions in the fifth century, Germanic tribes migrated to England, and the Salmannus was introduced with the Norman conquest of the eleventh century.[44] The Germanic theory that the Salmannus developed into the feoffee of uses is supported by "evidence of use of the salmannus in postmortem transfers of land in twelfth century England."[45] The theory further suggests that shortly after the Norman conquest, a series of cases emerged in England in which a transferor would convey his land to a third party "to the use" of another.[46]

Critics of the Germanic theory, like critics of the Roman theory, point to the superficiality of

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[35]John H. Wigmore, A Panorama of the World's Legal Systems 834–835 (1928). The Lex Salica was the earliest code of laws promulgated in the early sixth century. Wigmore, A Panorama of the World's Legal Systems.

[36]William S. Holdsworth, A History of English Law 410 (3d ed. 1945).

[37]Brendan F. Brown, *The Ecclesiastical Origin of the Use*, 10 Notre Dame L. Rev. 357 (1935). The Salmannus was a third party, distinct from the original transferor and designated beneficiary, who agreed to carry out the specific instructions of a transferor of property, either as an inter vivos transfer or as a postmortem transfer. Frederick Pollock & Frederick W. Maitland, The History of the English Law 226–259 (2d ed. 1968).

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

[39]Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1243 (1988) (quoting Holdsworth at 412).

[40]Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1243 (1988) (quoting Holdsworth at 411 & n.1).

[41]*See* Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 445 (1899). *See also* Frederick W. Maitland, *The Origin of Uses*, 8 Harv. L. Rev. 127 (1894). *See generally* Bogert, Trusts and Trustees §2.

[42]Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 445–446 (1899); Frederick W. Maitland, *The Origin of Uses*, 8 Harv. L. Rev. 127, 129 (1894).

[43]Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231 (1988) (citing to Oliver W. Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 446 (1899)).

[44]Brendan F. Brown, *The Ecclesiastical Origin of the Use*, 10 Notre Dame L. Rev. 357, 365 (1935).

[45]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1150 (1996) (citing to Brendan F. Brown, *The Ecclesiastical Origin of the Use*, 10 Notre Dame L. Rev. 357, 358 (1935)).

[46]Frederick Pollock & Frederick W. Maitland, The History of English Law 231 (2d ed. 1968).

the similarities between the Salic Salmannus and the English use.[47] Critics further suggest that there is no concrete evidence that the Salmannus was used by the Normans during the eleventh century.[48]

The Waqf and the Islamic theory. The Islamic *waqf* was created by Muslim jurists during the first three centuries of Islam.[49] This legal institution was, and still is, used as a charitable device.[50] The Islamic *waqf* (plural: *awqaf*) entails the "detention of the corpus from the ownership of any person and the gift of its income or usufruct either presently or in the future, to some charitable purpose."[51] Islamic *awqaf* are of two types: family endowments (*waqf ahli* or *dhurri*) [also known as family *awqaf*] and charitable endowments (*waqf khairi*) [also known as welfare *awqaf*].[52] A family endowment is created for the security and welfare of the near relatives of the one who contributes the subject property. Once the private objectives have been achieved, it converts to a charitable endowment. *Waqf* property always belongs to Allah; no human being may alienate the beneficial interest.

The *waqf* is created upon the declaration by the owner of the property (the *waqif*) that the income of the subject property (the property to be dedicated as waqf) is reserved for a specific

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[47]Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 216 (Majid Khadduri & Herbert H. Liebesny eds. 1955). The Salmannus merely adopted the role of a testamentary executor or of an intermediary for a conveyance, while the feoffee to uses adopted the role of a trustee. Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 216.

[48]J. L. Barton, *The Medieval Use*, 81 Law Q. Rev. 562 (1962).

[49]Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 205 (Majid Khadduri & Herbert H. Liebesny eds. 1955).

[50]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1154–1155 (1996). Avini has suggested the following: Although the ostensible purpose of the waqf was always charitable, the waqifs of awqaf also had many undeclared motives in creating a waqf. Because the waqf is the only form of perpetuity in Islamic law, it was bound to fulfill many other functions. Some of these secular uses included evasion of taxation, control over the excesses of heirs, accession of power over the masses by paying their religious leaders, and most prominently, immunity from government confiscation. There is also evidence that conquered peoples forced to convert to Islam used the *waqf* to circumvent the constraints of the Islamic law of inheritance. Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. at 1154–1155.

[51]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1152–1153 (1996) (quoting Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 203 (Majid Khadduri & Herbert H. Liebesny eds. 1955)). The ultimate purpose of the endowment must be pleasing to God and be in accordance with the laws of Islam. Heffening, *Waqf*, 8 Encyclopedia of Islam 1096 (1928).

[52]Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 213–218 (Majid Khadduri & Herbert H. Liebesny eds. 1955). The waqf ahli or dhurri (family endowment) entailed the dedication of property with an ultimate charitable purpose. Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1153 (1996). The owner of the property could reserve the income of the property for his children and descendants in perpetuity. Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139. Upon extinction of his descendants, the income would be transferred to the charitable purpose. Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139. On the other hand, the *waqf khairi* (the charitable endowment) entailed the immediate and irrevocable dedication of property to a charitable purpose. Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139.

purpose.[53] The *waqif* is responsible for appointing a trustee (*mutawalli*), designating beneficiaries (*mustahiqqun*), and providing for the manner of distribution of *waqf* income.[54] The *mutawalli* then administers the *waqf* according to the instructions of the *waqif*, under the supervision of the judge (*qadi*) within whose jurisdiction the *waqf* property is located.[55]

A *waqf* has custody of Jerusalem's Temple Mount, on which now sits the Dome of the Rock and Al-Aqsa Mosque:

> This is the holiest site in the world to Jews, where the deeply religious fear to tread lest they step on the Holy of Holies: Solomon's Temple and the Second Temple built by Herod the Great once stood on this site. The site is sacred to Muslims as well: Known in Arabic as the Haram al-Sharif, the Noble Sanctuary.[56]

Just as there is a "plausible" argument that the Gothic style was the result of "European encounters with Islamic architecture,"[57] so also there is a plausible argument that the trust was the result of European encounters with Islamic legal institutions. The Islamic theory traces the origin of the English use to the Islamic *waqf*.[58] Proponents of this theory advance that the *waqf* was introduced to England by Franciscan Friars returning from the thirteenth-century crusades.[59] Under the laws of their Order, the Friars were not allowed to own property because of their strict interpretation of religious poverty.[60] Because the Friars still needed property for their religious activities, they used the concept behind the *waqf* to circumvent the Order's vow of poverty.[61] Accordingly, benefactors would transfer property to a trustee "ad opus franciscanorum," *i.e.,* "for the use of the Franciscans."[62]

The Islamic theory on the origin of the English trust has received the least amount of criticism.[63] The *waqf* and the English use are almost identical institutions in purpose and structure.[64] Both have a settlor, a trustee, and a beneficiary, and both were used to circumvent

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[53]Heffening, *Waqf*, 8 Encyclopedia of Islam 1096. The *waqif* must clearly and unequivocally express his intentions to declare a property as waqf with the phrase, "it must neither be sold nor given away nor bequeathed."Heffening, *Waqf*, 8 Encyclopedia of Islam 1096.

[54]George Makdisi, The Rise of Colleges 35–36 (1981).

[55]Makdisi, The Rise of Colleges at 55.

[56]Hershel Shanks, *Biblical Destruction*, Wall St. J., July 18, 2007, at A14.

[57]Michael J. Lewis, *How Chartres Reached for the Divine*, Wall St. J, July 5–6, 2008, at W9 (noting that Philip Ball in his Universe of Stone "shows how Crusaders took home not only a knowledge of Islamic architecture's forms but also, in at least one case…and perhaps more, the architects themselves," the one recorded case being "a hapless prisoner named Lalys").

[58]Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1244 (1988).

[59]Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1244 (1988).

[60]M. D. Lambert, Franciscan Poverty 84 (1961).

[61]Marianne Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. Envtl. L. & Poly. 1, 5 (2001/2002).

[62]M. D. Lambert, Franciscan Poverty 84 (1961).

[63]Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of Waqf on the Development of the Trust in England*, 136 U. Pa. L. Rev. 1231, 1244 (1988).

[64]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1161 (1996).

restrictions of ownership and transfer of property.[65] The only significant difference between the *waqf* and the English use is that the *waqf* requires that the corpus of the trust be applied exclusively to a charitable purpose, whether immediately, as in the case of the charitable endowment, or as a reversion, as is the case of the family endowment.[66] As an aside, a charitable "reversion" under a family *waqf* regime is actually more analogous to an equitable charitable remainder than it is to an equitable reversion upon the imposition of a resulting trust.[67]

Conclusion. The exact institution from which the modern Anglo-American trust originated remains to date the source of much debate and speculation.[68] At a time when land was the principal form of wealth, the English use, the Roman *fideicommissum*, the Salic Salmannus, and the Islamic *waqf*, "all emerged as a result of positive-law deficiencies and restrictions concerning the ownership and devolution of property."[69]

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[65]Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139, 1161 (1996).

[66]Henry Cattan, *The Law of Waqf*, 1 Law in the Middle East 214 (Majid Khadduri & Herbert H. Liebesny eds. 1955).

[67]*See* the quotation introducing §4.1.1 of this handbook. *See also*§4.1.1.1 of this handbook (the resulting trust).

[68]Marianne Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. Envtl. L. & Poly. 1, 4–5 (2001/2002).

[69]Guerin-McManus, *Conservation Trust Funds*, 20 UCLA J. Envtl. L. & Poly. at 5 (quoting Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 Tul. L. Rev. 1139 (1996)).