

**Comparative Studies
in Continental and Anglo-American Legal History**

**Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte**

Band 19

Itinera Fiduciae

**Trust and Treuhand
in Historical Perspective**

Edited by

**Richard Helmholz
Reinhard Zimmermann**



Duncker & Humblot · Berlin

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Herausgegeben von

Helmut Coing, Richard Helmholz, Knut Wolfgang Nörr
und Reinhard Zimmermann

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Preface

A person may hold property for a variety of purposes. The most common situation is that he wants to use and enjoy it for his own benefit. But he may also have agreed to administer the property either for the benefit of someone else or to further some particular purpose. Thus, in a broad and untechnical sense of the word, he may hold it “in trust”. This kind of arrangement has been resorted to for many different reasons, both legitimate and illegitimate. From very early on, European legal systems have been faced with the need to establish rules and, eventually, institutions to deal with the resulting legal problems. *Fiducia*, *fideicommissum*, *Treuhand*, foundation, executorship and, of course, the trust: they all provided, at some time or other and in some place or other, the legal framework that was required.

The present volume attempts to present a comparative historical analysis of these devices. It seeks to trace the paths of the idea of “holding for others” or of holding property in a fiduciary capacity: *itineraria fiducia*. The intellectual objectives pursued by the editors and contributors to this volume are set out in the Introduction (“Views of Trust and Treuhand”). We have met twice to discuss these objectives: once in November 1995 in Regensburg before we began the project and then in April 1997 in Halle when most of us had written their papers. Both meetings, and also the publication of this volume, were sponsored by the Gerda Henkel Stiftung. We are very grateful for this support. We would also like to express our sincere thanks to Knut Wolfgang Nörr for his encouragement, Paul Farlam for his editorial assistance, and Gabriele Schmitt, secretary at the Lehrstuhl in Regensburg, for her unfailing support and commitment.

February 1998

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Chicago

Reinhard Zimmermann
Regensburg

Summary of Contents

Views of Trust and <i>Treuhand</i> : An Introduction By <i>Richard Helmholz</i> and <i>Reinhard Zimmermann</i>	27
Trust and Trust-like Devices in Roman Law By <i>David Johnston</i>	45
Von den <i>piae causae</i> zu den Xenodochien Von <i>Harald Siems</i>	57
The Canonical Conception of the Trust By <i>Shael Herman</i>	85
Medieval Uses By <i>Joseph Biancalana</i>	111
Trusts in the English Ecclesiastical Courts 1300 - 1640 By <i>Richard Helmholz</i>	153
Trusts in England after the Statute of Uses: A View from the 16 th Century By <i>Neil Jones</i>	173
The Conceptual Basis of Trusts in the Later 17 th and Early 18 th Centuries By <i>Michael Macnair</i>	207
Formen der <i>Treuhand</i> im alten deutschen Recht Von <i>Karl Otto Scherner</i>	237
<i>Heres Fiduciarius?</i> Rise and Fall of the Testamentary Executor By <i>Reinhard Zimmermann</i>	267

Foundations in Continental Law since the 12 th Century: The Legal Person Concept and Trust-like Devices	
By <i>Robert Feenstra</i>	305
The Development of <i>Fiducia</i> in Italian and French Law from the 14 th Century to the End of the <i>Ancien Régime</i>	
By <i>Michele Graziadei</i>	327
<i>Philipp Knipschildt</i> und das Familienfideikommiß im Zeitalter des <i>Usus modernus</i>	
Von <i>Klaus Luig</i>	361
Treuhandtheorien in der deutschen Rechtswissenschaft des 19. Jahrhunderts – Zur Verwendung von historischen Rechtsinstituten in der Zivilrechtsdogmatik	
Von <i>Sibylle Hofer</i>	389
Kontinuität und Diskontinuität in der Treuhandforschung	
Von <i>Joachim Rückert</i>	417
German and American Law of Charity in the Early 19 th Century	
By <i>Andreas Richter</i>	427
The Evolution of Trust and <i>Treuhand</i> in the 20 th Century	
By <i>Stefan Grundmann</i>	469
Trusts and Civilian Categories (Problems Spurred by Italian Domestic Trusts)	
By <i>Maurizio Lupoi</i>	495
Scotland: The Evolution of the Trust in a Semi-Civilian System	
By <i>George Gretton</i>	507
List of Contributors	543

Table of Contents

Views of Trust and <i>Treuhand</i> : An Introduction	
By <i>Richard Helmholz</i> and <i>Reinhard Zimmermann</i>	27
I. Adoption of the Trust in Civil Law Countries	27
II. The Inquiry	30
III. Prior Scholarship	31
1. England	31
2. Germany	34
3. The Contemporary Situation	36
IV. The Problem of Definition	37
V. The Contributions	39
1. The Slow Emergence of the Concept of the Trust	40
2. Mining the Civilian Tradition	41
3. Circumventing Legal Restrictions	42
4. Trust Purposes	43
VI. A Final Word	44
 Trusts and Trust-like Devices in Roman Law	
By <i>David Johnston</i>	45
I. Introduction	45
II. Trust-like Devices	45
1. <i>Fideicommissum</i>	45
(a) Structure	47
(b) Content	47
(c) Duration	48
(d) Remedies and Third Parties	50
2. <i>Fiducia</i>	52
3. Usufruct and <i>usus</i>	53
III. Trustees	53
1. Executors and the <i>familiae emptor</i>	54
2. <i>Tutor</i>	54
IV. Conclusions	55

Von den *piae causae* zu den Xenodochien

Von <i>Harald Siems</i>	57
I. Einleitung	57
II. Das Nachwirken römischer Rechtstexte im Frühmittelalter	60
III. Die Briefe <i>Gregors des Großen</i>	70
IV. Merowingische Formulare und Testamente	73
V. Merowingische Konzilien, <i>Leges</i> und Kapitularien	78
VI. Zusammenfassung	82

The Canonical Conception of the Trust

By <i>Shael Herman</i>	85
I. Prelude: The Medieval Church's Dilemma	85
1. The Trust: A Solution to the Church's Dilemma	86
2. The Pope as Trustee; the Church as Primary Beneficiary of the Papal Trust ...	86
II. Possible Objections to the Proposed Canonical Trust Conception	87
III. Clerical Efforts to Legitimate Church Wealth	88
1. Apostolic <i>collegium</i>	89
2. The Metaphoric Hostelry: Use the World, But Do Not Use it Up	90
3. Clerical Innkeeper as <i>usuarius</i>	90
IV. Clerical <i>usus</i> , Feoffments <i>ad usus</i> , and the Franciscan Friars	92
1. Clerical <i>usus</i> and the Franciscan Friars	92
2. The Feoffment to Uses: A "Completely English Institution"	95
V. Influence of Roman Law upon the Concept of Trust	96
VI. Forms of Trusteeship in the Early Christian Church	98
1. Christian Custodians	98
2. Cemetery Custodian	98
3. Custodian of Holy Places	99
4. <i>Corpus Christianorum</i>	101
5. Bishops as Earthly Dwellers and Spiritual Guides to Life Everlasting	102
VII. Church Doctrines and Practices Assist Consolidation of Church Patrimony	102
1. Wills	102
2. Chantry Foundations	104
3. Monastic Finances and Feoffments to Uses	104
4. Feoffments to Uses Applied to Specific Spiritual Needs	106
VIII. Conclusion	109

Medieval Uses

By <i>Joseph Biancalana</i>	111
I. The Invention of Uses	113
1. Precursors	113
2. Origins	117
II. The Increased Employment of Uses	123
1. The Debtor Feoffor	124
(a) Pursuing the Heir	125
(b) Pursuing the Feoffees	126
2. Daughters	129
III. Uses and Wardship	131
1. Establishing a Baseline	132
2. Social Practice	133
3. The Cases: Seignorial Opportunism	137
IV. Uses and Chancery	141
1. In Search of a Forum	142
2. Uses at Common Law	145
3. Uses in Chancery	149

Trusts in the English Ecclesiastical Courts 1300 - 1640

By <i>Richard Helmholz</i>	153
I. Introduction	153
II. The Jurisdictional Setting	154
III. Uses and Land	155
1. The Rise of the Feoffment to Uses in England	155
2. The Ecclesiastical Courts and Enforcement	157
IV. Uses and Chattels	160
1. The Subject Matter	161
2. The Trustees	162
3. Objects of the Trusts	163
4. Remedies and Basis for Liability	165
V. Was the Trust Transplanted?	166
1. The Negative Side	167
2. The Positive Side	169
VI. Conclusion	171

Trusts in England after the Statute of Uses: A View from the 16th Century

By <i>Neil Jones</i>	173
I. Introduction	173
II. The Difficulty of Definition	174
III. Trust Property	177
1. The Operation of the Statute of Uses	178
2. Chattels Personal	179
3. Copyhold Land	180
4. Leases	180
5. Freehold Land	181
IV. The Purposes of Trusts	181
1. Evasion of the Royal Feudal Revenue	181
2. Charitable Trusts	183
3. Private Trusts for the Vulnerable	184
4. Trusts and Persecution	185
5. Trusts for Married Women	186
6. The Attendancy of Satisfied Terms	189
V. The Interest of the Beneficiary	190
1. The “Engrafting Principle”	190
2. Trust and Promise	192
3. Privity and the Doctrine of Notice	196
VI. Trusts in Context	199
1. Trusts and Conditions	199
2. Trusts and Bailment	202
VII. Conclusion	203

The Conceptual Basis of Trusts in the Later 17th and Early 18th Centuries

By <i>Michael Macnair</i>	207
I. Introductory	207
II. Explaining Equity, Explaining Trusts	208
1. Background	208
2. <i>Fideicommissum</i>	213
3. Usufruct	215
4. <i>Depositum</i>	216
II. Analytic Organisation of the Material	218
1. <i>Nottingham</i>	218
2. <i>Gilbert</i>	219
3. <i>Ballow</i>	220
4. Equity Cases Abridged	221

III. Trust as Property or Contract? Some Details	221
1. The Beneficiary's Rights	221
2. The Liabilities of Trustees	224
IV. The Importance of Trusts	229
1. Express Trusts are more Important in Concept than in Practice	229
2. Implied Trusts are Pervasive: Common Law Trusts	232
V. Conclusions	234

Formen der Treuhand im alten deutschen Recht

Von <i>Karl Otto Scherner</i>	237
I. Definitionsfragen, Forschungsschwerpunkte, Strategie	237
II. Die einzelnen Fallgruppen	239
1. Lehnrecht	239
(a) Die Veräußerung von Lehngut unter Umgehung der Heerschildordnung ..	241
(aa) Behalten zu treuer Hand	241
(bb) Treuleihe	241
(b) Umgehung der Lehnsunfähigkeit	242
(aa) Frauen	243
(bb) Minderjährige	245
(cc) Geistliche, Klöster, Ritterorden und Spitäler	245
(dd) Städte, Gemeinden und Stiftungen	247
(ee) Juden, Bürger und Bauern	247
(c) Überwindung der Unteilbarkeit des Lehens	248
(d) Erwerbssicherung	249
2. Früh- und hochmittelalterliches Stadt- und Landrecht	249
(a) Letztwillenstreuhand	250
(b) Einschaltung eines Treuhänders zur Überwindung der Erwerbsunfähig-	
keit im mittelalterlichen Stadtrecht	251
(aa) Geistliche, Klöster und Kirchen	252
(bb) Spitäler	252
(cc) Auswärtige	253
(dd) Juristische Personen	253
(ee) Eingesessene Nichtbürger	253
(ff) Juden	253
(gg) Frauen und Minderjährige	254
(c) Treuhänder im bäuerlichen Recht	254
(d) Einschaltung eines Mittelsmanns zur Erwerbssicherung	255

III. Auswertung	257
1. Die verschiedenen Funktionen der Treuhand	257
(a) Die Umgehungsfälle	257
(b) Die Erwerbssicherung	258
(c) Das zeitliche Auftreten der Gruppen	259
2. Definitionsfragen	259
3. Die Vorstellungen der Beteiligten: Treuhand als Institut des mittelalterlichen Rechts	260
IV. Ergebnis	262
V. Trust und Treuhand	262
1. Vergleich der Fallgruppen	262
(a) Übertragung eines Lehnsgutes durch den Lehnsmann	263
(b) Einsatz eines Treuhänders bei „unmöglichen“ Geschäften	263
(c) Letztwillenstreuhand	263
(d) Grunderwerb durch Kleriker	264
(e) Grunderwerb durch „Juristische Personen“	264
(f) Lehnsvormundschaft	265
2. Unmittelbare Beeinflussung und die gemeinsame mittelalterliche Welt	265
3. <i>Vestigia fiduciae?</i>	266
 <i>Heres fiduciarius? – Rise and Fall of the Testamentary Executor</i>	
By Reinhard Zimmermann	267
I. Introduction	267
II. Roman Law	268
1. Early and Classical Roman Law	268
2. Developments in Legal Practice and Surrogate Devices	271
3. Greek and Byzantine Law	273
III. Medieval Law	275
1. The “Nature” of Medieval Germanic Law	275
2. Succession in the Germanic Laws	277
3. The Influence of the Church	278
(a) Dispositions <i>ad pias causas</i>	278
(b) Executor <i>ultimae voluntatis</i>	280
4. The <i>executor</i> in the Learned Literature	282
IV. <i>Usus Modernus</i> in Germany and in the Netherlands	286
V. Austrian Law	289

VI. French Law	291
1. Medieval Customary Law	291
2. <i>Dumoulin, Pothier</i> and the <i>code civil</i>	294
VII. Developments in 19 th Century German Law	296
1. Bringing Clarity into an Obscure Institution?	296
2. The Long-term Administrator/Executor	299
VIII. English Common Law	301
Foundations in Continental Law since the 12 th Century: The Legal Person Concept and Trust-like Devices	
By <i>Robert Feenstra</i>	305
I. Different Foundation Concepts	306
II. Some Remarks on Developments before the 12 th Century	307
III. Medieval Romanists and Canonists	310
IV. Customary Law in the Middle Ages and Early Modern Times	318
V. Special Developments in the Dutch Provinces	319
VI. Foundations in the 18 th and 19 th Centuries	322
VII. Epilogue	325
The Development of <i>Fiducia</i> in Italian and French Law from the 14 th Century to the End of the <i>Ancien Régime</i>	
By <i>Michele Graziadei</i>	327
I. Introduction	327
II. Scope of Enquiry	328
III. The Place of the Roman Law of <i>fiducia</i> in the Age of the <i>ius commune</i>	331
IV. The Birth of the Doctrine of Testamentary <i>fiducia</i>	333
V. <i>Bartolus, Baldus</i> and the <i>consiliatores</i> on Testamentary <i>fiducia</i>	335
1. The Protection Granted to the Beneficiary of the Secret Testamentary Disposition According to <i>Bartolus</i>	335
2. Of Form and Substance: <i>Baldus</i> ' Approach to Testamentary <i>fiducia</i>	338
3. <i>Bartolus</i> ' and <i>Baldus</i> ' Legacy to the <i>consiliatores</i>	341
VI. Humanistic Scholarship and the Rediscovery of <i>fiducia</i> in the Ante-Justinianic Sources	343
VII. A Canon Law Detour: <i>fiducia</i> and the Canonical Prohibition of <i>confidentia beneficialis</i>	346

VIII. The 17 th Century Elaboration of the Doctrine of Testamentary <i>fiducia</i>	350
IX. Testamentary <i>fiducia</i> in the <i>Pays de droit écrit</i> of Southern France	353
X. Towards the Civil Codes	355
XI. Conclusions	356
 <i>Philipp Knipschildt</i> und das Familienfideikommiß im Zeitalter des <i>Usus modernus</i>	
Von <i>Klaus Luig</i>	361
I. Grundsätze	361
1. Begriff und Funktion des Familienfideikommissses	361
2. Parallelen zum englischen Recht	362
3. Der Sonderfall Deutschland	365
4. Die anderen europäischen Länder	368
II. <i>Philipp Knipschildt</i> und die wissenschaftliche Grundlegung des Familienfideikommisses in Deutschland	369
III. Analyse von <i>Knipschildts</i> Traktat	370
1. Ursprung, Bezeichnung und Definition des Familienfideikommissses	370
2. Einteilung und Arten	371
3. <i>Causa efficiens</i> : Mögliche Begründer und Stifter	371
4. Mögliche Begünstigte	372
5. Einem Familienfideikommiß zugängliche Güter	373
6. Art und Weise nebst Form der Errichtung	373
7. Zweck	375
8. Wirkung der Familienfideikommisse, und zwar erstens in bezug auf die zur Nachfolge berechtigten Personen	376
9. Methode und Form der Nachfolge (als Fortsetzung der ersten Wirkung)	377
10. Zweite Wirkung: Rechte des jeweiligen Inhabers	378
11. Dritte Wirkung: Beschränkungen des jeweiligen Inhabers, insbesondere das Veräußerungsverbot	379
12. Vierte Wirkung: Auf dem Familienfideikommiß ruhende Lasten	382
13. Rechte und Klagen des Anwärters	382
14. Beweis des Familienfideikommissses	384
15. Verwandte Erscheinungen (Primogenitur und Majorat)	384
16. Auflösung	385
IV. Schluß	387

Treuhandtheorien in der deutschen Rechtswissenschaft des 19. Jahrhunderts – Zur Verwendung von historischen Rechtsinstituten in der Zivilrechtsdogmatik

Von <i>Sibylle Hofer</i>	389
I. Die romanistische Seite	390
1. <i>Regelsbergers</i> Theoriebildung	390
(a) „Fiduziarische Geschäfte“	391
(b) <i>Regelsbergers</i> Vorbilder	394
(aa) ROHG 1872	395
(bb) <i>J. Kohler</i>	396
(cc) <i>Jhering</i>	398
2. Rechtsgeschichte und Dogmatik	399
(a) <i>Scheurl, Huschke</i>	400
(b) <i>Dernburg</i>	401
(c) <i>Regelsberger</i>	403
II. Die germanistische Seite	406
1. Rechtsgeschichte und Dogmatik	406
(a) <i>Schultze</i>	406
(b) <i>Beseler</i>	408
2. <i>Schultzes</i> Theoriebildung	410
(a) Der Gegensatz zwischen <i>fiducia</i> und Treuhand	411
(b) Die Verbindung zwischen <i>fiducia</i> und Treuhand	412
III. Ergebnisse	413
 Kontinuität und Diskontinuität in der Treuhandforschung	
Von <i>Joachim Rückert</i>	417
I. Die Problemzugriffe der deutschen Treuhandforschung	417
II. Das Beispiel <i>Alfred Schultze</i> (1901 und 1895): Begriffsbetonung im Dienst des Gegenwartsrechts	418
III. Das Beispiel <i>Franz Beyerle</i> (1932): ewige Grundformen als bleibende Substanz, aktuelle Lehre und Fingerzeig für die Zukunft	421
IV. Das Beispiel <i>Otto Stobbe</i> (1868): Fälle und Funktionen gestern und heute	422
V. Bilanz: Kontinuitätsfeststellung, Gleichheitsbehauptung und <i>ceteris paribus</i> . Die Methode vergleichender Funktionsanalyse in Rechtsvergleichung (<i>Hein Kötz</i> 1963) und Rechtsgeschichte	423

German and American Law of Charity in the Early 19th Century

By <i>Andreas Richter</i>	427
I. Introduction	427
II. Common European Roots of the Law of Charity	428
III. The German Development	429
1. The Medieval and Early Modern Period	429
2. The <i>Stüdel</i> Case	430
3. The Role of <i>Friedrich Carl von Savigny</i>	431
4. <i>Savigny's</i> Theory of Legal Personality	433
(a) Natural Persons (<i>natürliche Personen</i>)	434
(b) Legal Persons (<i>juristische Personen</i>)	434
5. The Foundation as a Legal Person	435
(a) Advantages of a Foundation with Legal Personality	435
(b) A Comparison with <i>Mühlenbruch</i>	436
(c) The Foundation as a Legal Institution (<i>Rechtsinstitut</i>)	438
6. The Memberless Foundation and the Corporation	439
(a) The Foundation – An Invisible Legal Person?	439
(b) The Impact of the German <i>Anstaltsstaat</i>	440
(c) <i>Savigny's</i> Treatment of the Sources	442
7. Private Associations, the Stock Corporation and the Private Foundation	443
(a) <i>Savigny's</i> Rejection of Freedom of Association	443
(b) “Privileges” of Private Foundations and the Business Corporation	444
IV. English Law of Charity	445
1. The Reformation	446
2. The Elizabethan Statute of Charitable Uses 1601	447
V. The American Development	448
1. The “Checkered Career” of the Charitable Trust	448
2. The Advantages of Incorporation	451
3. The Charitable Corporation as an Incorporated Trust	452
(a) Corporate Charters	452
(b) Membership and Trusteeship	454
(c) Trust Investment	455
4. The Law of Charity as a Branch of Private Law	456
(a) The Transformation of the Visitorial System	457
(b) The Distinction between Public and Private Corporations	459
(c) A Declaration of Philanthropic Independence	459
5. Constitutional Protection of Charities	460
VI. Conclusion	463

The Evolution of Trust and *Treuhand* in the 20th Century

By <i>Stefan Grundmann</i>	469
I. The Third Party Relationship as Starting Point	470
1. Characterization and Key Problems	470
2. Effects of the Anglo-American Trust against Third Parties	471
3. Lesser Effects of the <i>Treuhand</i> against Third Parties	471
(a) The Victory in Theory of a Purely Contractual Concept	471
(b) Some Traces of a Property Right Concept	473
4. Differences in Concept	477
II. The Fiduciary Relationship	478
1. The Crucial Importance of the Fiduciary Relationship and Key Problem Areas	478
2. The Distribution-of-Assets Question	481
3. The Decision-Making-Process Question	487
III. Trust, Corporation and the so-called <i>Quasitreuhand</i>	488
1. Trust v. Personality or Flexibility v. Registration?	489
2. Unity or Pluralism of Interests on the Side of the Settlor and Beneficiary	490
IV. Trust and <i>Treuhand</i> Irreconcilable?	492

Trusts and Civilian Categories (Problems Spurred by Italian Domestic Trusts)

By <i>Maurizio Lupoi</i>	495
I. “Domestic” Trusts	495
II. The Comparative Law Issue	497
III. Trust Instrument and Transfer of Assets to Trustees	498
1. From Agreement to Unilateral Disposition	498
2. The Unilaterality of the Conveyance	500
3. Trusts of Personality	501
4. The Creation of a Trust, from a Civilian Perspective	502
IV. Contracts, Gifts and Trusts	504

Scotland: The Evolution of the Trust in a Semi-Civilian System

By <i>George Gretton</i>	507
I. Introduction	507
1. Defining the Trust	507
2. The Influence of English Law	511
II. Origins	512
1. 19 th and 20 th Century Ideas as to Origins	512
2. The 17 th Century and Before	513

3. Pre-17 th Century Private Arrangements	513
4. <i>Fideicommissum</i> and Roman Law	517
5. The 17 th Century	518
6. Proof of Trust	522
III. History since the 17 th Century	522
1. Some Uses of the Trust	522
2. Proof of Trust	524
3. Immunity to Creditors	525
4. Powers	527
5. English Influence after 1700	528
6. Doing the <i>Watson</i> Wobble	533
7. Mortification, Charities, Public Trusts and Foundations	533
8. Constructive Trusts	537
9. <i>Frog's Creditors v. His Children</i>	538
10. Resulting Trusts and the Doctrine of the Radical Right	538
11. Executry	539
IV. Current Law	541
 List of Contributors	 543

Abbreviations

a.	= anno
A. 2d	= Atlantic Reporter, 2nd Series
ABGB	= Allgemeines Bürgerliches Gesetzbuch
A.C.	= Appeal Cases, Law Reports
AcP	= Archiv für die civilistische Praxis
APS	= Acts of the Parliaments of Scotland 1124 - 1707 (ed. Thomas Thomson, Cosmo Innes)
Add.	= Addendum
Add. Ms.	= Additional Manuscript
AktG	= Aktiengesetz
All E.R.	= All England Law Reports
Am. Dec.	= American Decisions
Art.	= Artikel
art.	= article
Atk.	= Atkyn's Reports, Chancery
B.	= Baron of the Exchequer
B. Mon.	= Kentucky Reports, Ben Monroe (Court of Appeals)
BGB	= Bürgerliches Gesetzbuch
BGBI	= Bundesgesetzblatt
BGH	= Bundesgerichtshof
BGHZ	= Entscheidungen des Bundesgerichtshofs für Zivilsachen
BIHR	= Borthwick Institute of Historical Research, York
BL	= British Library
BNB	= Bracton's Note Book
BW	= Burgerlijk Wetboek
Barb.	= Barbour's Reports (Supreme Court of New York)
BayGVBl	= Bayerisches Gesetz- und Verordnungsblatt
BayObLG	= Bayerisches Oberstes Landesgericht
Bod. Lib.	= Bodleian Library
Bro. C.C.	= W. Brown's Chancery Reports
Bro. P.C.	= J. Brown's Cases in Parliament
C	= Chancery
C 33	= Chancery Entry Books of Decrees and Orders
C 78	= Chancery and Supreme Court of Judicature, Chancery Division: Six Clerks' Office and successors: Decree Rolls
C.	= Justinian's Code
c.	= canon

C.B.	= Chief Baron
CCA	= Canterbury Cathedral Archive, Canterbury
C.C.Pa.	= Circuit Court of Appeals (Pennsylvania cases)
C.J.	= Chief Justice
COM	= EC Commission, Documents
CP	= Common Pleas
CP 25	= Common Pleas Feet of Fines
CP 40	= Court of Common Pleas De Banco Rolls
C. Th.	= Codex Theodosianus
CUL	= Cambridge University Library
cap.	= capitulum
Carth.	= Carthew's Reports, King's Bench
Ch.	= Law Reports, Chancery
Ch. Cas.	= Cases in Chancery
Ch.D.	= Law Reports, Chancery Division
Chan.	= Court of Chancery
Cl. & F.	= Clark and Finelly's House of Lords Report
Co. Rep.	= Sir Edward Coke's Reports
Col. LS MS.	= Columbia Law School, Manuscript
Columbia L.R.	= Columbia Law Review
Comb.	= Comberback's Reports, King's Bench
Cornell L.R.	= Cornell Law Review
D	= Dunlop's Series of the Court of Session Reports
D.	= Justinian's Digest
DJZ	= Deutsche Juristen-Zeitung
dec.	= decisio
E I	= Erster Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich
E.C.R.	= European Court Reports
EDR	= Ely Diocesan Office
E.R.	= English Reports
ed.	= edidit, editor
Eng. Judg.	= The Decisions of the English Judges during the Usurpation
Ex. Ch.	= Exchequer Chamber
Exch. AB.	= Act Book of the Court of Exchequer, York
F	= Fraser's Series of the Court of Session Reports; Federal Reporter
F. 2d	= Federal Reporter, 2nd Series
Fac. Coll.	= Faculty Collection (Court of Session)
Fed. Cas.	= Federal Cases
Fount.	= Fountainhall's Decisions, Court of Session
Free. Ch.	= Freeman's Reports, Chancery
Freem.	= Freeman's Reports, Chancery

Gai. Inst.	= Gaius's Institutes
Gilb. Rep.	= Gilbert's Reports, Chancery
H, Hil.	= Hilary
H.L.	= House of Lords
HLS MS.	= Harvard Law School, Manuscript
HRG	= Handwörterbuch zur deutschen Rechtsgeschichte
HansOLG	= Hanseatisches Oberlandesgericht
Hants. R.O.	= Hampshire Record Office, Winchester
Hard.	= Hardres' Reports, Exchequer
Harg.	= Hargrave (MS. collection)
Harl.	= Harleian (MS. collection)
Harvard L.R.	= Harvard Law Review
Hg.	= Herausgeber (editor)
Holt K.B.	= Sir John Holt's Reports, King's Bench
Iav.	= Iavolenus
Inst.	= Justinian's Institutes
Iul.	= Iulianus
JCP	= Juris Classeur Periodique
J.L.H.	= Journal of Legal History
JW	= Juristische Wochenschrift
JZ	= Juristenzeitung
JhJb	= Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts; zuvor: Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts
JUST	= Rolls of the Justices in Eyre in the Public Record Office
John & H.	= Johnson and Hemming's Reports, Chancery
K. & W. Dict.	= Kames' and Woodhouselee's Dictionary of Decisions (Court of Session)
KAO	= Kent Archives Office, Maidstone
K.B.	= King's Bench; Law Reports, King's Bench Division
KTS	= Zeitschrift für Konkurs-, Treuhand- und Schiedsgerichtswesen
Kames Sel. Dec.	= Kames' Select Decisions
Keb.	= Keble's Reports
Ky.	= Kentucky Reports (Court of Appeals)
L.C.	= Lord Chancellor
L.K.	= Lord Keeper
L.Q.R.	= Law Quarterly Review
L.R. Eq.	= Law Reports, Equity Cases
L.R. Ir.	= Law Reports, Ireland
L.T.	= Law Times
LZ	= Leipziger Zeitschrift
Lans.	= Lansdowne (MS. collection)

Ld. Raym.	= Lord Raymond's Reports, King's Bench and Common Pleas
Lev.	= Levinz's Reports, King's Bench and Common Pleas
Lib. Ass.	= Liber Assisarum
Lutw.	= Sir E. Lutwyche's Entries and Reports, Common Pleas
M	= Macpherson's Series of the Court of Session Reports
M, Mich.	= Michaelmas
M. & Cr.	= Mylne and Craig's Chancery Reports
M.R.	= Master of the Rolls
MS., Ms.	= Manuscript
MSS., Mss.	= Manuscripts
Marcell.	= Marcellus
March N.R.	= Reports, or New cases, collected by John March
Marci.	= Marcianus
Mass.	= Massachusetts Reports (Supreme Judicial Court of Massachusetts)
Mer.	= Merivale's Chancery Reports
Mod.	= Modern Reports in King's Bench
Moore K.B.	= Sir F. Moore's Reports, King's Bench
Mor.	= Morison's Dictionary of Decisions
N.E.	= North Eastern Reporter
N.H.	= New Hampshire Reports (Supreme Court)
NJW	= Neue Juristische Wochenschrift
N.S.W.L.R.	= New South Wales Law Reports
N.W. 2d	= North Western Reporter, 2nd Series
N.Y.S. 2d	= New York Supplement, 2nd Series
Nels.	= Nelson's Reports, Chancery
Nov.	= Justinian's Novels
Nov. Marc.	= Novellae Marciani
OLG	= Oberlandesgericht
P.	= Pacific Reporter
P, Pas.	= Easter
P. Wms.	= Peere Williams' Chancery Reports
Pat. App.	= Paton's House of Lords Appeal Cases
pl.	= plea
Plowd.	= Plowden's Reports
Pomp.	= Pomponius
Poph.	= Popham's Reports, King's Bench
PrALR	= Preußisches Allgemeines Landrecht
Pre. Ch.	= Precedents in Chancery
Quaest.	= Quaestio
R	= Rettie's Series of the Court of Session Reports
RGZ	= Entscheidungen des Reichsgerichts in Zivilsachen

RIDA	= Revue internationale des droits de l'antiquité
ROHG	= Reichsoberhandelsgericht
ROHGE	= Entscheidungen des Reichsoberlandesgerichts
RabelsZ	= Zeitschrift für ausländisches und internationales Privatrecht, begründet von Ernst Rabel
Rawl.	= Rawlinson (MS. collection)
Rob.	= Robertson's House of Lords Appeal Cases
Rz.	= Randziffer
S	= Shaw's Series of the Court of Session Reports
S. & M.	= P. Shaw and Maclean's House of Lords Appeal Cases
S.C.	= Court of Session Cases
SC	= senatus consultum
S.L.T.	= Scots Law Times
Salk.	= Salkeld's Reports, King's Bench
ser. lat.	= series latina
Sh. Ct.	= Sheriff Court
Show. K.B.	= Shower's Reports, King's Bench
Show. P.C.	= Shower's Cases in Parliament
So.	= Southern Reporter
Som. R.O.	= Somerset Record Office
St. Tr.	= State Trials
t.	= tomus
T, Trin.	= Trinity
T.R.	= Tijdschrift voor rechtsgeschiedenis
trans.	= translated by
Tulane L.R.	= Tulane L.R.
U.S.	= Reports of Cases in the Supreme Court of the United States of America
Ulp.	= Ulpianus
University of Chicago L.R.	= University of Chicago Law Review
V. & B.	= Vesey and Beames's Reports, Chancery
V.-C.	= Vice Chancellor
Va.	= Virginia Reports (Supreme Court)
Vent.	= Ventris' King's Bench Reports
Vern.	= Vernon's Reports, Chancery
Ves.	= Vesey's Reports, Chancery
Ves. Sen.	= Vesey Senior's Reports, Chancery
Vt.	= Vermont Reports (Supreme Court)
W. & S.	= Wilson and Shaw's House of Lords Reports
W.N.	= Weekly Notes (Law Reports)
WM	= Wertpapiermitteilungen
X	= Liber Extra (Corpus Juris Canonici)
Y.B.	= Yearbook

Yale L.J.	= Yale Law Journal
ZDR	= Zeitschrift für deutsches Recht und deutsche Rechtswissenschaft
ZEuP	= Zeitschrift für Europäisches Privatrecht
ZGB	= Zivilgesetzbuch
ZHR	= Zeitschrift für das gesamte Handels- und Wirtschaftsrecht
ZIP	= Zeitschrift für Wirtschaftsrecht
ZRG	= Zeitschrift für Rechtsgeschichte
ZSS (GA)	= Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)
ZSS (KA)	= Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Kanonistische Abteilung)
ZSS (RA)	= Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)

RICHARD HELMHOLZ and REINHARD ZIMMERMANN

Views of Trust and *Treuhand*: An Introduction

I. Adoption of the Trust in Civil Law Countries

“I do not understand your law of trusts” – so *Otto von Gierke* is said to have remarked about this characteristic English institution. His words were long remembered by the great English legal historian, *F. W. Maitland*, who quoted them more than once¹. According to this view – the traditional view and probably still the prevailing one – the trust is a distinctive institution of Anglo-American law². It is a special child of the English common law. Nothing like it occurred elsewhere.

In *Maitland's* hands, *Gierke's* puzzlement about the trust became an example, and eventually a symbol, of a wall of incomprehension that separated the English common law from the law of the Continent. Indeed trusts were only the most dramatic example of a quite fundamental divide. No matter the possible coincidence in origins of the Germanic *Salmann* and the English feoffee to uses, trusts were strange creatures to lawyers versed in the civil law. *Maitland* concluded that trusts always required substantial modification, as well as an extended period of adjustment, whenever they were taken over into a civilian legal regime.

Maitland would have been surprised to find that in recent times the trust has been adopted in many civil law countries, and apparently without fundamental difficulty. The perceived adaptability of this institution to meet so many different needs has caused it to burst the bounds of whatever geographical isolation it once

¹ *F. W. Maitland*, *The Unincorporate Body*, in: H. A. L. Fisher (ed.), *The Collected Papers of Frederic William Maitland*, vol. 3, 1911, p. 272. In *F. W. Maitland*, *Equity*, 1909, p. 23, the same remark is given as “‘I can’t understand your trust’, said *Gierke* to me”.

² *W. W. Buckland*, *Arnold D. McNair*, *Roman Law and Common Law: A Comparison in Outline*, 2nd ed. by *F. H. Lawson*, 1965, p. 177: “It has long been recognised that the trust is not derived from Roman law, nor has Roman law influenced its development to any extent”. The trust is described as a distinctive feature (“stiltypisches Institut”) of the English common law in: *Konrad Zweigert*, *Hein Kötz*, *Einführung in die Rechtsvergleichung*, 3rd ed., 1996, pp. 71, 186. It should be noted, however, that only two brief remarks have remained of what once (*Konrad Zweigert*, *Hein Kötz*, *Einführung in die Rechtsvergleichung*, 1st ed., 1971, pp. 328 ff.) constituted an entire chapter. Both the concept of “distinctive features” and the notion of “legal families” (that can be characterized with reference to their “distinctive features”) seem to be regarded as more problematic today than in the 1970s. For discussion, see *Hein Kötz*, *Abschied von der Rechtskreislehre?*, *ZEuP* 6 (1998) 493 ff.

suffered. Trusts have been taken up widely³. For the most part this has occurred by the familiar process of purposeful reception or transplantation. Civil law countries have sought to incorporate the English trust into their own legal systems.

Perhaps the most conspicuous means of adopting the English trust is the invitation contained in the Hague Convention on Private International Law in 1985⁴. The Convention declared that trusts created in accordance with its terms were to be recognized and protected by all signatory states⁵. Trust property was to be treated as a separate fund and "placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose"⁶. By January 1998, Italy and the Netherlands were the only civil law countries to have fully ratified the Convention⁷. It has received an enthusiastic welcome there, however⁸, and other countries have given it preliminary assent⁹.

³ For a review of the overall situation, current as of 1982, see: *Adair Dyer, Hans van Loon*, Report on Trusts and Analogous Institutions, in: *Conférence de La Haye de droit international privé, Actes et documents de la Quinzième session 8 au 20 octobre 1984*, vol. 2: Trust, 1985, pp. 26 ff. See generally: the contributions in J. Herbots, D. Philippe (eds.), *Le trust et la fiducie, implications pratiques*, 1997; *Antonio Gambaro*, Trust in Continental Europe, in: *Alfredo Mordechai Rabello* (ed.), *Aequitas and Equity*, 1997, pp. 777 ff.; *Donovan W. M. Waters*, The Institution of the Trust in Civil and Common Law, in: *Recueil des cours: Collected Courses of the Hague Academy of International Law*, vol. 252, 1995, pp. 113 ff.; W. A. Wilson (ed.), *Trusts and Trust-Like Devices*, 1981; *William F. Fratcher*, Trust, in: *International Encyclopedia of Comparative Law*, vol. VI, chapter 11, 1973, nn. 101 ff.; *Christian de Wulf*, The Trust and Corresponding Institutions in the Civil Law, 1965; *Kevin W. Ryan*, The Reception of the Trust in the Civil Law, 1959, pp. 264 ff.

⁴ Convention on the Law Applicable to Trusts and on their Recognition, 1985, Ch. I, art. 2, in: *Hague Conference on Private International Law, Collection of Conventions 1951 - 1988*, vol. XXX, pp. 315 ff. For the English and French versions, cf. also *RabelsZ* 50 (1986) 698 ff.; for the German version, see *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)* 1987, 55 ff. or *Heinrich Dörner*, in: *Staudinger, Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz, Einführungsgesetz zum Bürgerlichen Gesetzbuch/IPR*, 13. Aufl., 1995, Vorbem. zu Art. 25 f. EGBGB, n. 141.

⁵ *Loc. cit.*, Ch. III, art. 11.

⁶ *Loc. cit.*, Ch. I, art. 2.

⁷ Italy signed the Convention on 1 July 1985, ratified it on 21 February 1990, and it entered into force on 1 January 1992. For the Netherlands, the respective dates are: 1 July 1985 (signature), 28 November 1995 (ratification) and 1 February 1996 (entry into force). Information kindly supplied by the Bureau Permanent de la conférence de la Haye de droit international privé on 4 February 1998.

⁸ Particularly in Italy; see *Maurizio Lupoi*, *Trusts*, 1997; *Ilaria Beneventi* (ed.), *I trusts in Italia oggi*, 1996. For the Netherlands, where the Convention has only been in force since two years, see the contributions in *Frans Sonneveldt, Harrie L. van Mens* (eds.), *The Trust: Bridge or Abyss Between Common and Civil Law Jurisdictions?*, 1992; *D. J. Hayton, S.C.J.J. Kortmann et al.* (ed.), *Vertrouwd met de trust*, 1996; *Margaretha Elizabeth Koppenol-Laforce*, *Het Haags trustverdrag*, 1997.

⁹ So far, it has been signed by France (26 November 1991) and Luxembourg (1 July 1985); same source of information as in n. 7. Cf. also *Table of Signatures and Ratifications of the Hague Convention*, (1993) 42 *International and Comparative Law Quarterly* 650 ff. and (1994) 43 *International and Comparative Law Quarterly* 654.

The immediate results of the 1985 Convention do not tell the whole story. Other signs of a movement of opinion in the same direction are visible. For example, an International Working Group has been convened by the *Onderzoekcentrum Onderneming & Recht* at the University of Nijmegen to elaborate common principles of European trust law¹⁰. Moreover, some civilian systems have followed the Convention's lead even without fully ratifying the Hague Convention. Liechtenstein, for example, has received a form of the trust¹¹. So has Mexico¹². The Roman-Dutch law of South Africa has adopted the testamentary trust from English law, changing some of its features in the process¹³, and other regimes with "mixed systems" of law – Scotland¹⁴, and Québec¹⁵, for example – have taken the same step. Even

¹⁰ "Principles of European Trust Law" (unpublished MS.). See generally *Ugo Mattei*, *Comparative Law and Economics*, 1997, pp. 147 ff. including abundant references to other literature; *Michel Grimaldi*, *François Barrière*, *Trust and Fiducie*, in: *Towards a European Civil Code*, 2nd ed., 1998, pp. 567 ff.

¹¹ Art. 897 PRG, in: *Personen und Gesellschaftsrecht mit dem Gesetz über das Treuunternehmen*, 1986, p. 331. It reads: "Treuhand (Trustee oder Salmann) im Sinne dieses Gesetzes ist diejenige Einzelperson, Firma oder Verbandsperson, welcher ein anderer (der Treugeber) bewegliches oder unbewegliches Vermögen oder ein Recht (als Treugut), welcher Art auch immer, mit der Verpflichtung zuwendet, dieses als Treugut in eigenem Namen als selbständiger Rechtsträger zu Gunsten eines oder mehrerer Dritter (Begünstigter) mit Wirkung gegen jedermann zu verwalten oder zu verwenden". This provision was obviously inspired by the trust; but it attempts to place the institution within the conceptual framework of the civil law. Trustee and beneficiary are not both owners; there is merely an obligation to administer on behalf of the beneficiary. For a detailed doctrinal analysis, see *Harald Bösch*, *Die liechtensteinische Treuhänderschaft zwischen trust und Treuhand*, 1995, pp. 64 ff. and 246 ff.; *Klaus Biederermann*, *The Trust in Liechtenstein Law*, trans. *H. Gerald Crossland*, 1984, pp. 59 ff.

¹² *Roberto Molina Pasquel*, *The Mexican Fideicomiso: The Reception, Evolution and Present Status of the Common Law Trust in a Civil Law Country*, (1969) 8 *Columbia Journal of Transnational Law* 54 ff.; *Lupoi* (n. 8) 358 ff.

¹³ *Tony Honoré*, *Trust*, in: *Reinhard Zimmermann, Daniel Visser* (eds.), *Southern Cross: Civil Law and Common Law in South Africa*, 1996, pp. 849 ff. For comparison between South African and Scots trust law, see *Tony Honoré*, *Obstacles to the Reception of Trust Law?*, in: *Rabello* (n. 3) 793 ff. The standard work on South African trust law is *Tony Honoré, Edwin Cameron*, *Honoré's South African Law of Trusts*, 4th ed., 1992.

¹⁴ See the paper by *George Gretton* in the present volume; cf. also *idem*, *Trust and Patrimony*, in: *Scots Law into the 21st Century: Essays in Honour of W.A. Wilson*, 1996, pp. 182 ff. (discussing the various ways of conceptualizing the trust from a civilian point of view); *Daniela Krantz*, *Trusts im schottischen Recht*, 1997.

¹⁵ See the treatment of "fiducie" in arts. 1256 - 1298 of its new code civil, 1994. For comparative analysis, see *Lupoi* (n. 8) 362 f.; *Donovan W. M. Waters*, *Unification or Harmonization? Experience with the Trust Concept*, in: *Conflicts and Harmonization: Mélanges von Overbeck*, 1990, pp. 591 ff.; *Justin Thorens*, *Le trust de common law dans les systèmes de droit civil et l'arrêt Tucker de la Cour Supreme du Canada*, in: *Festschrift für Walter J. Habscheid*, 1989, pp. 325 ff.; *D. B. Walters*, *Analogues of the Trust and of its Constituents in French Law, approached from the Standpoint of Scots and English Law*, in: *Wilson* (n. 3) 124 ff. Louisiana is another interesting case in point; see *Joachim Zekoll*, *Zwischen den Welten – Das Privatrecht von Louisiana als europäisch-amerikanische Mischrechtsordnung*, in: *Reinhard Zimmermann* (ed.), *Amerikanische Rechtskultur und europäisches Privatrecht*, 1995, pp. 28 ff. on the reception of the trust in that state.