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NOTE ON THE ORIGIN OF USES AND TRUSTS—*WAQFS*

ANN VAN WYNEN THOMAS*

THAT trusts and uses arose in England to escape the many burdens attached to the holding of legal title of land under the English feudal system has never been in doubt. But the fog of time has blanketed in obscurity the origin of the legal devices which were used as a basis for the introduction of uses and trusts into English common law.

Early writers¹ on the subject put forth the theory that uses and trusts arose from the ancient Roman example of *fideicommissum* which permitted Romans to circumvent laws prohibiting certain persons from obtaining property by will by devising property to one capable of taking it with a request that he deliver it to a desired devisee who was incompetent to take directly. The obligation of the devisee to the desired beneficiary in this relationship was at first not legally enforceable but later became so. Although this confidence was in many ways analogous to the English trust or use, it must be pointed out that it arose by will only, while the English use in its earliest stage was seldom, if ever, the outcome of a will or testament.

More recent scholars² have held that trusts and uses were modelled after the German *Treuhand* or *Salmannus*. In the *Lex Salica*—the law of the Salian Franks—there arose in the fifth century a mysterious person named the *Salmannus*—a third person who was called in to aid in completing the transfer of property in certain cases, usually in matters pertaining to the appointing or adopting of an heir.

In upholding the theory that this *Salmannus* was the direct

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¹ BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* 7 (2nd Ed. 1942).

² Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127 (1894). Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899).

ancestor of the English feoffee to uses, it has been pointed out that under Salic law the donor handed the *Salmannus* a symbolic staff which he, in due season and with solemn form, handed over to the donee. This same ritual 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.

At a recent conference on the law of the Middle East,³ a novel contention was brought forth that both of these theories were incorrect, and that uses and trusts had been introduced into the English legal system by returning crusaders who had observed the operation of *waqfs* under Islamic law and had recognized in them an instrument of circumvention for feudal land owners.

The Mohammedan legal system is of a highly mechanical nature.⁴ It lacks the evolutionary outlook on life and works under the assumption that social phenomena, complex as they are, may be reduced to hard and fast rules to which the intricate and non-descript situations of real life must fit themselves as best they can. But Muslim law has one saving grace; early in its evolution it allowed for the "rottenness of the times" and recognized the fact that necessity breaks the law. As a result of this, and in view of the gulf between theory and practice, legal fictions were brought about to make things easier and to obtain extra-legal ends.

The spirit of legal fiction in Muslim law is to circumvent positive enactments of the Koran. For example, the Koran prescribes in minute detail the shares and portions in which property is to be distributed among heirs. To overcome these Koranic restrictions there arose under Muslim law a device known as *waqfs*, which combines the ideas of trust, family entail, and charitable foundation.

At the time of Muhammad (A.D. 570?-632), Northern Europe

³ Held at Lennox, Mass., September 20-24, 1948.

⁴ Schacht, *Islamic Law*, 4 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 345 (1937).

was at the doorstep of the Dark Ages, and Germanic law was still in its embryonic stage. Tribal law had recently come into contact with Roman law and began to feel the need for formulating its own customs. Therefore it was being reduced to written codes, the first of which was the *Lex Salica*.⁵ But Arabia, at this time, was the great commercial crossroad of the ancient world between Egypt, Assyria, and the Orient, and the law of the Middle East was by no means primitive. Thus contracts were not only known but were the basis of commercial existence. Although they received no external sanction, for there was no state authority on questions of commercial law, nevertheless they were enforced by merchants and traders among themselves as part of general business ethics. From the concept of contracts it was not a difficult transition to the theory of *waqfs* which were already firmly established in the second half of the first century of Islam (A.D. 670-750) as part of Muslim law.

Under early Islamic law there were two types of *waqfs*, the first being a trust established for the endowment of religious and charitable institutions, and the second intended to benefit a particular family or individual until failing of issue there is a gift over to a charity. The underlying object and legal justification of *waqfs* were of a religious complexion, namely the act of charity was implied by the final dedication of the property and thus favor was gained with Allah.

One of the great prophets of Islam, Al Bukhari (A.D. 804?-869) recites the following anecdote in one of his legal treatises:

"Ibn Omar relates that Omar, in the lifetime of the Messenger of God, made an alms of one of his properties called *Tsamgh*, which consisted of a palm grove. Omar said: 'O Messenger of God, I possess a property which is precious to me, and I would make alms with it.' The Prophet replied: 'Give it in alms, but provide that it shall never be sold nor given away nor divided among heirs, but the fruits of it shall be used.' So Omar made alms with the property, dedicating it to the use of the Holy War, the ransom of slaves, and the support of the poor, of

⁵ WIGMORE, PANORAMA OF THE WORLD'S LEGAL SYSTEMS 835 (1936).

guests, of travelers, and of kindred. It was provided that the trustee might not unlawfully draw therefrom a moderate subsistence either for himself or for a friend, but that he should not enrich himself."⁶ (*Al Bukhari*, Ch. XXII)

Waqfs were administered by trustees charged with the care, protection and distribution of the property according to the directions of the dedicator, and the trustee of *waqf* land was liable to account to a *Cadi* or judge. The Islamic concept of *waqfs* therefore involved a dedicator, an administrator, beneficiaries—both present and future—and a judge. Reversioners were nonextant under the Muslim theory, and under the original purist concept of *waqfs*, the trust must be perpetual and could not be limited in time.

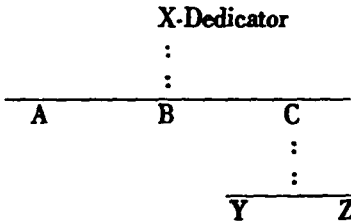
This characteristic of perpetuity was discovered to be injurious, for the *waqf* land could not be sold or leased, and its exploitation was thus hindered. A great deal of land was held in trust—over half the land in the heyday of the Ottoman Empire was *waqf* land—and to overcome the handicap of perpetuity, Islamic law created another fiction, namely the perpetually renewable annual lease on *waqf* property. Where the property attracts tenants, a lessee pays the trustee a certain sum of money on becoming the lessee, and agrees to pay nominal annual rent thereafter, in return for which his lease is guaranteed perpetually renewable. The interest of this lessee can be assigned or inherited. If the lessee should die without previously assigning his rights or without heirs, the property reverts to the trustee.

Another aspect of the law of *waqfs* relates to the conditions imposed by the dedicator. Many of the early *waqfs* were restricted to male descendants, or disintitiled female descendants upon marriage, or disintitiled any beneficiary on becoming indebted. Under strict Islamic law, it was held that such restrictive conditions on *waqf* land were valid and enforceable.

One of the characteristics of the early *waqf* was the method of the determination of beneficiaries. For example, a Muslim

⁶ *Id.*, 551.

created a *waqf* for himself, his children and descendants until failure of issue, with a gift over to charity. It was early established that if one of the dedicator's children died subsequent to his investment, his children did not inherit until all the first class beneficiaries were deceased. The remaining first class beneficiaries shared the proceeds of the interest of the dead first class beneficiary, *e. g.*:



C, one of the beneficiaries of a *waqf* established by X, dies; his children, Y and Z, do not inherit until A and B die, and until such time C's share is divided between A and B.

From this rough sketch of Muslim *waqfs*, it can be readily seen that, by the time of the great invasions of the Islamic world, the *waqf* concept of property conveyance was not only well established but compared favorably with modern English trusts. Therefore, it is not an idle contention to assume that the leaders of the Crusades against the Muhammadan world, which took place roughly between A.D. 1095 and A.D. 1250, noted every branch and aspect of social and commercial relations of the infidels whom they attempted to conquer, and brought back to Western Europe, and particularly to England, at least a rudimentary knowledge of trusts, which they proceeded to apply and develop according to their own needs.

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