# FREDERIC WILLIAM MAITLAND – TRUST AND CORPORATION

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## I

Equity is a difficult subject. 'Equity' here denotes the Chancery courts' system of control of managerial and vulnerable relationships that grew up alongside the common law from the mid-14th century, and which shapes our law still, from contract and family law through to property, commercial and company law. Frederic William Maitland's late, great, sprawling, and challenging essay 'Trust and Corporation' of 1904 sums up his vision of the role and importance of Equity, and is one of the summits of his *oeuvre*.[1] It partners Maitland's well-known book *Equity*, the final record of his lectures on the subject, delivered at Cambridge for the last time a few months before his death in 1906 at the early age of fifty-six.[2] Although 'Trust and Corporation' is less widely read by lawyers than those elegant lectures, it is the more powerful and original contribution, full of memorable and arresting ideas, many of which have entered the cultural bloodstream of the law. Thus we learn that 'if the Court of Chancery saved the Trust, the Trust saved the Court of Chancery'.[3] 'Dishonest people are often impecunious, insolvent people'.[4] 'The Court of Chancery ... converted the "trust fund" into an incorporeal thing, capable of being "invested" in different ways ... the "trust fund" can change its dress, but maintain its identity'.[5] 'A very high degree not only of honesty but of diligence has been required of trustees .... The honest man brought to ruin by the commission of a "technical breach of trust",

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I thank Alexandra Braun for her help in preparing this article; one could hope for no surer guide into the world of comparative trusts.

1 Originally published in German as Frederic William Maitland, 'Trust und Korporation' (1905) 32 *Grünhut's Zeitschrift für das Privat- and Öffentliche Recht der Gegenwart* 1-76. The English original, completed in 1904, was posthumously published as 'Trust and Corporation' in Herbert A L Fisher (ed) *The Collected Papers of Frederic William Maitland, Volumes I-III* (Cambridge University Press, 1911) vol III, 321-404, available at <http://oll.libertyfund.org/titles/maitland-the-collected-papers-of-frederic-william-maitland-vol-3>.
Later editions offer useful translations of lengthy German and French passages in the original: H D Hazeltine, G Lapsley and P H Winfield (eds), *Maitland: Selected Essays* (Cambridge University Press, 1936) 141-222, available at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/maitland/trusts.pdf>; David Runciman and Magnus Ryan (eds), *Maitland: State, Trust and Corporation* (Cambridge University Press, 2003) 75-130. Some of the themes explored in the 1904 essay were rehearsed in a short lecture of circa 1903 entitled 'The Unincorporate Body', published in the *Collected Papers*, vol III, 271-84.
Runciman and Ryan's edition of 'Trust and Corporation' – henceforth *TC* – is the favoured version cited in this article, though I have sometimes departed from their translations, and substituted the 1911 Fisher *urtext* on occasion. The differences between the various editions are slight.

2 Frederic William Maitland, *Equity, also the Forms of Action at Common Law: Two Courses of Lectures* (A H Chator and W J Whittaker (eds), Cambridge University Press, 1909).

3 *TC*, 84.

4 Ibid 94.

5 Ibid 94.

brought to ruin at the suit of his friend's children, has in the past been only too common a figure of English life'.[6] 'To classify trusts is like classifying contracts'.[7] 'All that we English people mean by "religious liberty" has been intimately connected to the making of trusts'.[8] '... *quasi* is one of the few Latin words that English lawyers really love'.[9] 'Morally there is most personality where legally there is none'.[10] 'From saying that organisation is corporateness English lawyers were precluded by a long history'.[11] 'The Trust presses forward until it is imposing itself upon all wielders of political power, upon all the organs of the body politic'.[12] These are only samples: inspired observation and lapidary phrases come thick and fast across the text. As a literate, expressive lawyer Maitland had no peer in his day, save perhaps one contemporary across the ocean, namely Justice Oliver Wendell Holmes.

Yet Maitland's achievement in 'Trust and Corporation' goes beyond eloquence, for in this work he explains much difficult jurisprudence in a radically short compass, and suggests how the institutions of private associational law fits into a wider scape of political and social evolution. The essay is perhaps more familiar today to political theorists than to lawyers and jurisprudents, but it should be read by all. This article attempts to provide some equipment for the new reader to help understand Maitland's world. We begin with the person of the author.

## II

Frederic William Maitland, born May 1850, was the Downing Professor of the Laws of England at the University of Cambridge, serving in that post from 1888 until his death in December 1906.[13] His mother died when he was an infant, and his father and grandfather when he was a schoolboy. He highly valued his German governess, who gave him fluent command of the German language from a young age. Maitland boarded at Eton College, which he disliked, preferring mathematics and modern languages to the classical studies then forming the staple curriculum. Influenced by Henry Sidgwick and his peer group in the Cambridge Apostles, Maitland had worked on moral and political philosophy at Cambridge and had once hoped for a fellowship in philosophy at Oxford or Cambridge. An interest in the history of philosophy always hovered at the back of his mature empirical work. He commenced his academic career as Reader in Legal History at Cambridge in 1884, leaving behind a decade of work as a barrister specializing in conveyancing in London. During that decade in practice he had been swayed into the study of legal history by contact with Frederick Pollock (1845-1937) and Paul Vinogradoff (1854-1925), two formidable scholars, successively holders of the Corpus chair of jurisprudence in the University of Oxford, and both interested in the earliest English law as a prime example of Western feudal development. Under their influence Maitland began applying his energies to research on legal manuscipts in the Public Record Office concerning the origins of parliament

6 Ibid 95.
7 Ibid 97.
8 Ibid 102.
9 Ibid 109.
10 Ibid 114.
11 Ibid 119.
12 Ibid 127.
13 Herbert A L Fisher, *Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch* (Cambridge University Press, 1910); S F C Milsom, 'Maitland, Frederic William (1850–1906)' in H G C Matthew (ed), *Oxford Dictionary of National Biography* (Oxford University Press, 2004) (online edtn, May 2007, doi:10.1093/ref:odnb/34837).

and the common law. Maitland had already, whilst still in practice, published anonymously a paper in the *Westminster Review* in 1879 fiercely criticizing the distinctions of real property and personalty in English law, showing familiarity with Germanist and Romanist literatures and advocating root-and-branch statutory reform of the law.[14] These themes were to re-emerge in his later work; like the Pandectists whose work led to the passing of the German Civil Code in 1900, Maitland saw historical jurisprudence as the essential prelude to legal rationalisation.

Maitland's reputation rightly rests on his labours in medieval legal history, in which he achieved a vast amount in his relatively short life. Above all, Maitland opened up the early sources of English law, from Henry de Bracton's preparatory materials on the laws and customs of England[15] through to the voluminous year books and rolls of the early courts and parliament.[16] Many volumes of primary material were edited by Maitland with exemplary skill and then published handsomely by the Selden Society that he founded; and by this careful scholarship he established legal history as a scientific discipline in the common-law world – thus meeting the challenge he had set out in his inaugural Cambridge lecture, 'Why the History of English Law is Not Written'.[17] Thanks to Maitland, it now is.[18]

Secondly, and hardly less impressively, Maitland identifed and explored key questions concerning how the English had invented a new and fertile legal system that would come to define their own national life and then spread across the globe, contributing here two major monographic studies[19] and a rich bounty of closely researched historical articles, introductions and analyses.[20] For those daunted by the

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14 [Frederic William Maitland], 'The Law of Real Property' (1879) 122 (ns 56) *Westminster Review* 334-57, reprinted in *Collected Papers* (above n 1) vol I, 162-201. On the final page the young Maitland calls for a 'war of extermination … no compromise' in transforming England's unwieldy historical system of property law.

15 Frederic William Maitland (ed), *Bracton's Notebook: A Collection of Cases Decided in the King's Courts during the Reign of Henry III, annotated by a Lawyer of that Time, seemingly Henry of Bratton* (3 vols, Cambridge University Press, 1887); *Selected Passages from the Works of Bracton and Azo* (vol 8, Selden Society, 1895).

16 Frederic William Maitland (ed), *Memoranda de Parliamento: Records of the Parliament Holden at Westminster on the Twenty-eighth Day of February, in the Thirty-third Year of the Reign of King Edward the First, A. D. 1305* (XCVIII, Rolls Series, 1893); *Year Books of Edward II, Volumes I-V* (Selden Society, vol 17, 1903; vol 19, 1904; vol 20, 1905; vol 22, 1907); vol 24, 1910).

17 (Cambridge University Press, 1888).

18 The Selden Society, based in London and still active a century after Maitland in promoting legal history publication and scholarly meetings, now has branches spread across the world, and there are major conferences and journals devoted to legal history in the major common law jurisdictions. Interestingly the Queensland chapter of the Selden Society is now the most active of all the international branches.

19 *The History of English Law Before the Time of Edward I,* Volumes I-II (with Frederick Pollock) (Cambridge University Press, 1895; revised 2nd edtn, Cambridge University Press, 1898; reprinted with an introduction by S F C Milsom, Cambridge University Press, 1968); *Domesday Book and Beyond: Three Essays in the Early History of England* (Cambridge University Press, 1897; 2nd edtn, 1907; reprinted with an introduction by E Miller, Cambridge University Press, 1960; with a foreword by J C Holt, Cambridge University Press, 1987).

20 Most of the essays and articles are found in *The Collected Papers* (above n 1); significant omissions from these volumes include *Roman Canon Law in the Church of England; Six Essays* (Methuen & Co, 1898); *Township and Borough, The Ford Lectures for 1897* (Cambridge University Press, 1898); *English Law and the Renaissance* (Cambridge University Press, 1901); and the 'Introduction' to Otto Gierke's *Political Theories of the Middle Ages* (Cambridge University Press, 1900) vii-xlv. For a full publication list see Mark Philpott, 'Bibliography of the

power and complexity of his historical work, and looking for an entry point into his thought, his occasional lectures and essays on modern themes in the law may be more accessible.[21] Of these, perhaps 'Trust and Corporation' can serve as an ideal first introduction, for there Maitland shows most elegantly and intensely how the study of legal institutions through the twinned lens of history and philosophy can brightly illuminate the present. In the remainder of this article I will explain how 'Trust and Corporation' came to be written, then unfold its arguments about the law, and finally identify some of the wider implications concerning civil society. If by the end I have encouraged readers to go back to the original text, then my work here will have been successful.

## III

'Trust and Corporation' was composed over a twelve-month period in 1903-1904, a time of ill health for Maitland but also of extraordinary industry, as he was absorbed in preparing his scholarly editions of the Year Books of the early fourteenth century. 'Trust and Corporation' is a very different type of scholarship, being conceived as a purely reflective and comparative essay, to be published only in German, explaining the basics of English legal institutions in a form tailored for a foreign audience, and then giving rein to a degree of philosophical and political speculation quite atypical in Maitland's larger *oeuvre*. It was clearly an important – and difficult – piece for Maitland to execute, and his determined struggle to achieve it helps explain its extraordinary quality.

We know a good deal about the genesis of the article and the author's purposes from the contents of Maitland's published letters, especially those written to Josef Redlich (1869-1936), an Austrian constitutional scholar and statesman who Maitland knew and admired. It was Redlich who helped Maitland to conceive the work and bring it to fruition, and then translated it into German for publication in the Vienna-based *Journal of Contemporary Private and Public Law*.[22] This was a learned legal periodical founded and edited since 1874 by the commercial law scholar Carl Samuel Grünhut (1844-1929), who like Redlich taught at the University of Vienna. Grünhut's *Journal* was an influential forum comparable, for the *Deutscher Kulturkreis* or German intellectual world, to its slightly younger English peer, the *Law Quarterly Review* founded in 1884 and edited by Maitland's collaborator Sir Frederick Pollock;[23] yet for all its eminence the Viennese publication did not survive the Great War and the collapse of the pre-war order. Interestingly both Grünhut and Redlich came from the central European Jewish intelligentsia of the day, as did other significant scholars such as Paul Laband (1838-1913), the constitutional theorist and historian of commercial law based at Strassburg; Felix Liebermann (1851-1925) from Berlin, historian of Anglo-Saxon and Germanic laws; and Alfred von Halban Blumenstock (1865-1926), the Galician historian of the Salic and Papal laws. All of these scholars were overtly

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Writings of F W Maitland' in John Hudson (ed), *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, 89 *Proceedings of the British Academy* (Oxford University Press, 1996) 261-78.

21 For an example in public law, Maitland's *The Constitutional History of England* (Herbert A L Fisher (ed), Cambridge University Press, 1908, 2nd edtn, 1909, reprinted 1950 and 1961) springs to mind, and in private law, his *Equity, also the Forms of Action at Common Law* (above n 2), each originating as courses of lectures delivered at Cambridge and published after his death.

22 Maitland, 'Trust und Korporation', above n 1.

23 See Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004) 309-23.

influential in Maitland's own intellectual formation, though he avowed his greater debts to the scholarship of Otto Friedrich von Gierke (1841-1921), important parts of which Maitland translated into English,[24] and also Johann Friedrich von Schulte (1827-1914), whose compendium of Roman and Canon law seems to have been Maitland's main source of *ius commune* learning.[25]

The origins of the 1904 essay lie in Maitland sending apologies to Redlich in the summer of 1903 for declining to review his magisterial *English Local Government* in Grünhut's *Journal*. Maitland, who had recently met Redlich in Cambridge, had apparently been asked to rise to Redlich's defence against a fierce critic, the comparativist Julius Hatschek (1872-1926), a *völkisch* scholar who opposed liberal and universal jurisprudence from a nationalist German stance.[26] In this very local scholarly tiff lay a deeper controversy. Many central European scholars of the turn of the century, including luminaries such as Rudolf von Gneist (1816-1895) and Max Weber (1864-1920), avidly studied English law as an exemplar of modernity and liberal statecraft, and implicitly or explicitly presented English institutions as models for reform in Imperial Austria-Hungary and Germany, as these rapidly industrializing and urbanizing societies sought pathways to democratizing constitutionalism and away from authoritarian and military-aristocratic organisation. In this historical moment, English law served as an inspiration especially for German public lawyers,[27] in a manner analogous to the role of Roman classical scholarship as a template for private law rationalisation in the century preceding.[28] Some key tasks in this *fin de siècle* moment of constitutional reform were to define the personality of the state, develop limitations on state power, and define the juristic nature of civic, religious and business

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24 Otto von Gierke, *Political Theories of the Middle Ages* (Volume III of *The German Law of Associations* (1881), translated with an introduction by Frederic William Maitland, Cambridge University Press, 1900).

25 Richard H Helmholz, 'The Learned Laws in "Pollock and Maitland"' in Hudson (ed), *Centenary Essays,* above n 20, 145-69.
For general accounts of the influence of German scholars on Anglo-American jurisprudence see Mathias Reiman (ed), *The Reception of Continental Ideas in the Common Law World, 1820-1920* (Duncker and Humblot, 1993), notably essays by Michele Graziadei, 'Changing Images of the Law in XIX Century English Legal Thought (The Continental Impulse)', 115-63; and James Q Whitman, 'Early German Corporatism in America: Limits of the "Social" in the Land of Economics', 229-52; Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (Oxford University Press, 2004); David M Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2014). Patrick Wormald, in *The Making of English Law: King Alfred to the Twelfth Century, Volume I: Legislation and its Limits* (Wiley-Blackwell, 2001) 15-24, notes particularly how Continental scholars of early English law led the way for Maitland, and how this Anglo-German intellectual alliance was sundered by the Great War.

26 Hatschek's case is complicated: originally a Jew from the German-speaking community of the cosmopolitan city of Czernowitz in Bukovina, now Ukraine, he converted to Evangelical Protestantism, taught for many years at Göttingen, and was counted a leading member of the nationalist wing of the *Kathedersozialisten* (socialists of the chair) associated with Gustav Schmoller (1838-1917). Hatschek published widely on Islamic and English law as well as German public and private law.

27 See generally Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghan Books, 2001); Margaret Barbara Crosby, *The Making of a German Constitution: A Slow Revolution* (Berg, 2008).

28 James Q Whitman, *The Legacy of Roman Law in the German Romantic Era* (Princeton University Press, 1990); Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origins of the Civil Code* (Clarendon Press, 1989).

associations sitting alongside or under the sovereignty of the state; and Maitland's engagement with Continental scholars such as Redlich should be read as a part of this reform moment.[29]

Maitland wrote his apology to Redlich from Downing College, Cambridge on 26 July 1903, but then turned to a fresh matter, perhaps offered by way of compensation for declining the review:

> ... I have for some time past wished to say a word to a German audience about our 'trusts' and 'corporations', and since you have introduced my name in your treatment of this subject [ie in Redlich's own riposte to Hatschek] I will ask you whether you think that if I wrote some pages in English they could be turned into German for Grünhut's journal, and whether if this were done they would be read. Possibly, since you have taken up this matter in your polemic against Hatschek you might be inclined to carry kindness so far as to see that the translation was fairly correct. I know how complete is your mastery of English.
>
> But first tell me honestly and without flattery whether you think that there is any good in my suggestion.
>
> I think you will know from our talk in Downing – to which I look back with delight – the sort of thing I have to say. Is it worth saying and could it be profitably said in German?[30]

Redlich replied warmly and at length in a letter arriving early August:[31]

> ... your essay on Trust and Corporation, written for an audience of German jurists will be regarded as a real "événement" and will be most gratefully recepted as the most important recent contribution to that old and – as you know so well – to us so important scientific feud raging around persona ficta and "Genossenschaft" ["association" or "body politic"].

Redlich assured Maitland that he would be keen to translate the planned essay and promote it as a signal contribution to 'German Jurisprudence and German Political Science', offered by '*the* consummate master of our Science'. Amongst these and many other flowery compliments Redlich offered some more substantial encouragements:

> ... there is no juristic conception of English Law so much discussed now and yet so little known on the continent as the Trust! Since newspapers are almost daily talking about the immense *economic* powers – and shortcomings of the modern American Trusts, also the German jurists have become eager to learn the truth about the *legal* structure of trusts.

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29 The historical literatures on theories of sovereignty, legal personality and associational law, even confined to Maitland's period, are simply enormous; for some guides into these debates see Joshua Getzler, 'Law, History and the Social Sciences: Intellectual Traditions of Late 19th and Early 20th Century Europe' in Andrew Lewis and Michael Lobban (eds), *Law and History: Current Legal Issues, Volume VI* (Oxford University Press, 2003) 215-263, 227-42; Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge University Press, 2012); David Runciman, *Pluralism and the Personality of the State* (Cambridge University Press, 1997).

30 P N R Zutshi (ed), *The Letters of Frederic William Maitland Volume II* (Selden Society, 1995), no 263, 204.

31 *Letters*, ibid 207-8, n 6.

Redlich ended his letter by focussing Maitland's attention on the problem of '*Zweckvermögen*', difficult to translate but perhaps 'assets and powers held for a purpose'.

Maitland replied on 12 August[32] to thank Redlich most warmly for acting as muse and interpreter ('I blush all over') – though the seduction was not complete:

> But you also frighten me. You German jurists are such terrible fellows that the more I think of addressing you the less I like it. I hear one saying "Nichts neues!" [Nothing new!].

Maitland asked for six weeks' time, perhaps optimistically as he was then embroiled in a fierce bout of Year Book editing: 'By the end of September I will try to send you something unless before then sheer terror has led to suicide'. Alas, as the serious scholar knows too well, work inevitably spills beyond allotted time and energies, and in Maitland's case poor health in the autumn of 1903 imposed delays. He wrote apologetically to Redlich on 15 November[33] on the brink of travel to the Canary Islands to escape the Cambridge winter, to say that the essay was nearly done but needed some days in the library to perfect it:

> ... if I ever return to England I may put the last touches to it, but of course I discharge you from the duty of translating it .... The bright side of the affair is yours. You are escaping from a rashly undertaken task.

Maitland asked also for his sincere apologies to be proffered to Dr Grünhut, and further asked to be sent the works of Redlich's adversary Hatschek, implying that the latter's juristic ideas of the State as a non-person were so absurd that he himself must be a fictitious person. Early in 1904 Maitland wrote to Redlich again from his Grand Canary retreat,[34] having studied closely the Hatschek volumes that Redlich had loyally mailed out to him. Maitland could in the end see some point in Hatschek's characterisation of the English 'State' as a '*Passiv-Verband*', an entity without legal personality that could yet act through authorised and personalised public agents. Indeed, it may be argued that important organs of government – Cabinet, and Parliament itself – lack a juristic personality cognizable in court, yet have near-limitless powers to arm agents to act by law. But, for Maitland, this supposed conundrum was the product of an overwrought conceptualism derived from an English constitutional law that existed only on the pages of legal text books, ignorant of lived political experience. To flesh out Maitland's thought, any assembly of persons acting in concert begins to take on qualities of a 'court' in the sense of a deliberative college of decision-makers; and there are rules such as conventions governing what these assemblies can and cannot do: they are not lawless. Maitland added this note:

> I am just going to turn to that unlucky essay on Trusts. Whenever I think of the wretched thing I always hear a voice which says "Nichts neues". However it shall get itself done and then it can go into Profr. Grünhut's waste-paper-basket.

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32 *Letters*, ibid no 267, 207-8 (12 Aug 1903).
33 *Letters*, ibid no 270, 209-10 (15 Nov 1903).
34 *Letters*, ibid no 271, 210-11 (10 Jan 1904).

Ten days later Maitland wrote again to Redlich, this time going beyond banter to pose some serious scholarly questions, and asking for replies from his friend 'for the sake of that essay'.[35] Maitland wanted to find out how German or Austrian lawyers would analyse the property holding of a group banding together for a purpose but without incorporating. It might be an informal society or *Verein* rather than a business corporation or partnership. An example was the English club whose property – very valuable land on Pall Mall for example – was held by trustees. An even more legally obscure example would be one of the Inns of Court. Maitland continued:

> Can you, do you, find anything of this sort in Austria or Germany and, if so, what is the juristic category that you employ?
> Take a humble instance. A little society forms itself. It wants to hire a room where it will meet, for music or chess or conversation or what not.... [S]uppose that the arrangement is that Herr A.B. shall hire the room and be supplied by subscription with money to pay the rent, how do you construe the relationship between Herr A.B. and his fellows? Is it just contract. [sic]
> And then suppose that a richer society wants to *buy* a house. If A.B. buys it, will it be exposed to the attacks of his creditors?
> That is the point where our 'trust' is so different from mere Contract. A trustee's creditors have no claim whatever upon the trust property – no, not even in bankruptcy.
> I cannot help fancying that with you as with us a good many groups must live in an unincorporated state enjoying property which in law is owned by some member or some two or three – but I should very much like to know whether you have any legal machinery which meets this state of things, or whether a great deal is left to honour and good faith.

On 18 March Maitland wrote again from Grand Canary, having read Gierke's latest publication on 'Associations Without Legal Capacity', which he assured Redlich 'will enable me as soon as I am in England to finish off that wretched essay and send it to you'.[36] He affirmed to Redlich that he disliked Gierke's Concession theory of the corporation, requiring State chartering or registration to create artificial legal persons, preferring the Austrian Realist theory whereby 'so soon as you have what I may call a 'corporation de facto', juristic personality follows as a matter of course'. Maitland mused that the English partnership or *Gesellschaft* of German law assured to creditors legal recourse against the personal credit and assets of the members, adding –

> I believe that a tradesman who supplies goods to a club would often have great difficulty in finding a creditor who could be sued for the price. Our morals are better than our jurisprudence. Did not Tacitus say something of the kind?

So we can see how, alongside his inquiry into the juridical nature of trusts, the problems of group liability and the relations of State power to corporations had exercised Maitland's imagination for nearly a full year by the time his 1904 winter sojourn in Grand Canary was over. And the essay emerging from these puzzles had now taken form. On 30 April he wrote to Redlich, this time from Cambridge, 'I have got that wretched essay written'.[37] Maitland had the essay set up in type and printed to

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35 *Letters*, ibid no 273, 213-14 (20 Jan 1904).
36 *Letters*, ibid no 276, 215-16 (18 Mar 1904).
37 *Letters*, ibid no 280, 219-20 (30 Apr 1904).

make the text very clear for his translator, and he appealed to Redlich to make sure he had the passages from original German sources transcribed and spelt right. He conceded that he had not overtly taken on Hatschek's mystical theories of the State; 'However, my humble opinion about the 'passive' *Verband* will be evident enough to every one, though it lies between the lines'. He also asked Redlich for his candid criticisms and promised to act on them; indeed Maitland seemed to lack much confidence in the finished work and was still seeking 'the opinion of a friend or two' up to the very end. He added:

> Dr. Grünhut will understand that I am not publishing the essay in English – the print is only for your eyes and those of a few advising friends and the type will be 'broken up' when it has served its purpose. … Really I feel shameless in allowing you to turn translator of stuff that all your jurists will despise. Please consider whether you will not damage your hard-won reputation by standing god-father to my poor little baby. Wait until you see what a weakling it is!

Finally, on 5 June 1904, 'Trust and Corporation' was committed to the post;[38] and it seems the Redlich paid a second visit to Maitland that summer, cementing the friendship.[39] Maitland then fell ill again, but after some months' silence was impelled to write to his translator in early September in the wake of the great *Free Church of Scotland* case (*Bannatyne v Overtoun*).[40] Maitland wanted to footnote that case, involving conflict over the assets of a dividing church, in his new essay; he was especially struck by a letter to *The Times* suggesting the presence of 'a new *cestui que* trust: none other than "The great head of the church, Our Lord Jesus Christ"', mordantly commenting: 'This is a juristic construction with a vengeance!'.[41] Maitland ended up discussing *Bannatyne* in some later work, pointing out that ecclesiastical conflict was often as not a quarrel over governance rather than theology or ritual.[42] At any rate he seemed to be happy with the final results of his labours with Redlich and was gratified by the warm reception his published essay soon received, telling his Cambridge colleague William W Buckland in February 1905 that 'Learned Deutschers continue to send me cards'. He also agreed with Buckland on one small point of mistaken German pedantry: 'Yes, it does look ignorant to spell Corporation with a K', but defended his translator's honest striving for an authentic *Affekt*.[43] Maitland wrote occasionally to Redlich over the next half year, in warm personal tones from Cambridge and Madeira, acknowledging that his declining health had prevented them meeting. In March 1905 Maitland stated to Redlich his disbelief that unrest in Russia would foment revolution, and then returning to more introverted scholarly concerns, expressed a wry pleasure that the adversary Hatschek, in his new work *Englisches Staatsrecht* ('English Constitutional Law'), had praised Maitland's 'Trust und

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38 *Letters*, ibid no 285, 223 (5 Jun 1904).

39 *Letters*, ibid no 289, 225 (20 Jul 1904).

40 [1904] AC 515 (HL).

41 *Letters* (above n 30) no 294, 228 (8 Sep 1904). For analysis of the *Bannatyne* case and its background see Joshua Getzler, 'Faith, Trust, and Charity' in Andrew Burrows, David Johnston, and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford University Press, 2013) 559-74.

42 Frederic William Maitland, 'Moral Personality and Legal Personality' in *Collected Papers*, above n 1, 304–20, 319.

43 C H S Fifoot (ed), *The Letters of Frederic William Maitland, Volume I* (Selden Society, 1965), no 420, 330-31 (13 Feb 1905).

Korporation' and had officially registered his entire agreement with Maitland on every matter![44] This was to be Maitland's last extant letter to Redlich on this or any subject. A year later Maitland died in Grand Canary, on 20 December 1906, shortly after arriving to recover from the teaching term at Cambridge. It was a loss felt keenly across the scholarly world, with encomia coming from his many newly-won admirers in Germany, as well as those in Britain and America.[45]

Maitland's literary executor, the historian Herbert Fisher, decided to publish 'Trust and Corporation' in its original English version. Fisher was close to Maitland, who was his brother-in-law; he was a considerable scholar in his own right; and he likely would have appreciated Maitland's misgivings about reissuing a lengthy speculative essay originally addressed to a foreign audience and replete with Germanisms. But Fisher rightly assessed the essay worth recovering for an English audience, and it duly appeared in the third volume of Maitland's collected papers, put out by Cambridge University Press in 1911.[46] The Teutonic flavour of the original was left untouched, including lengthy untranslated portions quoted from contemporary German and Austrian jurists. For modern students it remains a forbidding read, but well worth the effort, especially since more modern editions usefully present the work with extra explanatory material and fresh translations of the key German passages.[47]

## IV

Maitland began his essay by acknowledging the great contribution of foreign scholars to the study of English law, bringing fresh perspectives of understanding to the English about their own law, but also finding evidence to explain Germanic laws, and more broadly cultivating the 'development of historical jurisprudence which was one of the most remarkable scientific achievements of the nineteenth century'.[48] And Dr Redlich had rightly identified the English trust as a 'general legal institution' that lay at the core of English law, and which had analogues in European law but no real twin, and was therefore of great comparative interest. Maitland noted that the trust had all the generality and elasticity of Contract, and moreover had done great deeds in the worlds of commerce, family and charity, and was now providing legal form for the great industrial and financial conglomerates of America. The trust concept had to be explained, but twice over: to show how it had come to be so in the Anglo world – and to explain why it was missing from the sophisticated Germanic legal world. It was only a partial answer to the latter question to point out that the trust could not easily be fitted within the German conceptual taxonomic categories of property on the one hand and debt or obligations on the other.[49] Maitland pointed out that the English too knew the juristic distinction between *iura in rem* and *iura in personam* – claims levied against a thing or against a person – yet they easily maintained trusts that seemed to claim in both directions simultaneously, without feeling that anything was amiss. The trust could live in the English system, it seems, because the English did not take seriously the great divide between ownership and obligation as explanatory categories of right or claim-right. Rather, as Laband had noticed, the English thought (like the classical Romans) in terms of whether an action to assert a claim was to be levied against person

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44 *Letters, vol II*, above n 30, no 312, 242-43 (12 Mar 1905).
45 Geoffrey E Elton, *F W Maitland* (Weidenfeld and Nicholson, 1985) 1-5.
46 *Collected Papers*, above n 1, 321-404.
47 See editions listed, above n 1.
48 *TC*, 75.
49 Ibid 76.

or thing. Not *iura* but *actio in rem* or *in personam*; the distinction of real and personal rights was effected at the remedial, adjectival stages, not the substantive or justificatory stages.[50] In effect, Maitland had here anticipated the analytical work of Hohfeld in the next decade, albeit in informal terms. And indeed Hohfeld's famous scheme of jural correlates was developed in the first instance to try to explain the trust to Americans in a fused system of law and equity and can be seen as an elaboration of Maitland's work.[51]

Maitland sums up his foray into analysis by answering his Germanist interrogators as follows: the right of a trust beneficiary, or *Destinatär* in its German equivalent, is properly neither *dinglich* [thing-like, real] or *obligatorisch* [obligational, personal]. In the manner of positivist linguistic philosophy, Maitland looked at how words were used in the relevant language community of lawyers rather than what the words might properly denote:

> In ultimate analysis the right may be *obligatorisch*; but for many practical purposes of great importance it has been treated as though it were *dinglich*, and indeed people habitually speak and think of it as a kind of *Eigentum* [possession or property].[52]

Maitland then moved from analysis to history, broaching the medieval *Treuhand* of Lombardic succession law as a possible precedent or parallel.[53] He quoted extensively from Alfred Schultze's work to demonstrate that a *Treuhand* involved a contract between a testator and trustee whereby property or title would be transferred from former to latter to be held for specified purposes, usually distribution to heirs according to a plan. Some trustees were dispensators, with full authority to bestow the property for the betterment of the testator's soul, for example through distribution to charity. Other trustees were more heavily circumscribed by conditions attached to the property, stipulating precise purposes to be pursued or beneficiaries to be endowed with the property. These conditions attached to the property itself as a kind of controlling easement (not to the person of the trustee), such that breach of the condition would give the donees or heirs a proprietary right to claim.[54] Such conditional property enforceable by beneficiaries was not how English law conceived the trust; for in the equitable trust the purposive obligation classically attaches to the person of the trustee, not the property.[55] But similarities in doctrinal design as well as function still remained between the Lombardic and English institutions. Schultze went on to show how the *Treuhänder's* conditioned grant, as recorded in the title deeds (or perhaps through notoriety of the terms of the transfer in the community), could run to bind third party assignees, who could be taken to know of such conditions when acquiring the property from the *Treuhänder* and were bound by those conditions, as if they had themselves accepted them. Knowledge was tantamount to assent, and as any reasonable person

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50 Ibid 77-8.

51 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (WW Cook (ed), Yale University Press, 1919), citing *TC* at p 25 and Maitland's *Equity* at many points.

52 *TC*, 78 (emphasis added).

53 For modern study of medieval civilian and common law antecedents of the trust, the essential work is Richard Helmholz and Reinhard Zimmermann (eds), *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Duncker and Humblot, 1998); and see also Maurizio Lupoi, 'Trust and Confidence' (2009) 125 *Law Quarterly Review* 253.

54 *TC*, 79-80.

55 Ibid 80.

would know of extant legal usage that all should accept such prior conditions, almost all buyers of conditioned property would be bound by the *Treuhand*; a web of mutual expectations meant that no one was punished by being so bound. Here the analogy to the English trust built on the doctrine of constructive notice was very great, save in one important respect. The Lombard *Treuhand* could embrace movables conveyed on a conditional grant, as well as land; but since possession alone rather than possession afforced with title deeds was the indicium of *Eigentum* in the case of movables, the doctrine of constructive notice could not apply. The Lombards went further and held that even with actual knowledge, a third party could take free of the *Treuhand.* These were lacunae in the web of enforcement that English law did not follow; a trust of movables could follow into the hands of third party takers with notice, though it was the case that constructive notice for movables was attenuated or absent.[56] To expand on Maitland, the reason why the English trust could embrace movables was that the conditional control of the trustee attached to the trustee's *right* to the property, as a power conditioning the exercise of the right;[57] it was not a servitude or real right attached to the property itself as symbolised by the title deeds. And this slight technical distinction, this juristic subtlety of the English lawyers, was the genetic mutation that allowed the English trust to go beyond the functions of *Treuhand* and ultimately transform both private and public law.

To illustrate this thesis, Maitland turned to an area he had mastered most thoroughly – the swiftly mutating English law of the 14th–15th centuries.

## V

The trust, Maitland argued, emerged because of a special distinction of early English law: the gulf between land and movable property.[58] This had two interlocking causes based on the law of succession. First came the paramountcy of primogeniture of land in the Ango-Norman system of fees, the rule that land was not disposable by will but must descend to the elder legitimate son. The royal courts, claiming a monopoly over the supervision of real estates and jurisdictions through the common-law writ system, permitted a complex system of entails and conditional fees to overlay the basic primogeniture rule, but that rule remained a constant anchor of the system. Balancing this rigidity, English canon law facilitated free testamentary disposition of movables, carrying over Anglo-Saxon custom. The church courts took a jealously-guarded and lucrative jurisdictional monopoly over the passing of movable wealth, enforcing wills by appointment of executors as representives of deceased testators on the model of the Roman heir. One consequence of this close imitation of the Roman law of heirship was the binding of the executor by *fideicommissum*-like duties of account and good conscience in the execution of the will. So entrenched did this legal institution of church-supervised succession become that the episcopal courts would appoint of their own motion an administrator to effect an intestate succession in cases where there was no will, or no will-designated executor. The church profited from this jurisdiction since charitable gifts *ad piam causam* to worthy objects (such as the church itself) became a feature of most wills.[59] There were some analogies in secular law: 'Often it is said that

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56 Ibid 81-2.

57 Ben McFarlane and Robert Stevens, 'The Nature of Equitable Property' (2010) 4 *Journal of Equity* 1; F H Lawson, 'Rights and other Relations in rem' in Ernst von Caemmerer et al (eds), *Festschrift für Martin Wolff* (Mohr, 1952) 103-22.

58 Compare text above n 14.

59 *TC*, 83.

one man holds goods or receives money *ad opus* [to another's use]'.[60] Maitland did not emphasise secular accounting institutions in the early centuries of common law, suggesting that contract, especially the real contracts of deposit and mandate borrowed from Roman law, could do much of the work.[61] Perhaps he underplayed factors such as the feudal control of guardianships which brought in important accounting duties, that later spread to commercial agency relationships. Whatever the division of labour, there was much work for the law to do in controlling managerial and custodial relationships, and a number of possible solutions emerged from the overlapping legal jurisdictions of the time.

Maitland then shows how the Chancery jurisdiction grew at just the time when there was pressure to allow a will-making device for land. Chancery jurisdiction begins with petitions to the Lord Chancellor to control abuse of legal process, as where jurors or witnesses might be intimidated and normal justice corrupted. Then land owners began to grant over to ('enfeoff') friends or family to hold their lands subject to instructions for postmortem distribution to close ones (including younger sons, daughters, widows, and perhaps mistresses and bastards), or perhaps to church institutions in evasion of mortmain prohibitions. There were high legal barriers to surmount in exercising such testamentary powers, but strong incentives to make the attempt, for grave financial penalties could apply if conventional primogeniture was observed. In effect these brought capital taxes or fines levied against the heir and payable to the superior lord, most obviously the Crown, in the form of reliefs, wardships, marriage imposts, and, in an ultimate case, complete confiscation under escheat where there was no legal-born heir. The solution lay in exploitation of common ownership to avoid a legal break in title. Transfer to joint tenants, maybe five or ten trusted friends and family members, would create a perpetual title immune to feudal impost, as the group would never die under the doctrine of accrescence; every drop-out would have their share automatically absorbed by the existing owners, and the numbers of joint tenants could regularly be topped up. And as fully legal owners, the 'feoffees to uses', the trustees, would have full powers to manage and transfer the lands according to the settlor's will.[62] Maitland observes that it was curious for the Lord Chancellor to step in and enforce these arrangements around 1400 as such enforcement would tend to cheat the king of revenue. Perhaps this anti-royal intervention could be justified '[i]n some scandalous case' where the Chancellor 'compelled the trustees to do what honesty required'.[63] But Maitland also guesses that this ad hoc enforcement was a type of policy evasion of painful issues that no-one was ready to confront – namely the balance between the property powers of the landlords on the one side and the state prerogatives of the king on the other, whose *dominium* comprised jointly lordship over lands and a Crown ruling over England. To give a telling example: King Edward III tried to make a testamentary trust of some of his lands to benefit a mistress, and the Parliament invalidated the will instruction, lest it might suggest that a king could gift the Crown itself and subvert primogeniture where it was needed most.[64] Pragmatism and obfuscation defeated principle, or as Maitland puts it: 'Men often act first and think afterwards'.[65]

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60 Ibid 83.
61 Ibid 83-4.
62 Ibid 84-7.
63 Ibid 89.
64 *Earl of Pembroke's Case* (1379) 3 Rot Parl 61, discussed in Oliver W Holmes Jr, 'Early English Equity' (1885) 1 LQR 61.
65 *TC*, 89.

We are then shown how, in one case-driven juristic experiment after another, the trust was augmented to bind wider and wider classes of persons: first the heir of a trustee, then assigns of a trustee, finally the helper of a trustee. Equity will seek out third parties blocking or perverting the due enforcement of trusts and bind them under the potent doctrine of constructive notice: if you know or ought to have known that the lands were not to be dealt with apart from the trust, then you are bound by the trust. Or as it is put in the Year Books:

> If my trustee conveys the land to a third person who well knows that the trustee holds to my use, I shall have remedy in the Chancery against both of them: as well against the buyer as against the trustee: for in conscience he buys my land.[66]

This is a crucial step: the errant trustee must pay to restore a breached trust if he can; a third party assignee must also return trust property or pay its equivalent. And the beneficiaries of trusts, the *cestuis que trust*, are now empowered to complain to the Chancellor and enforce their putative rights, bringing the widest evidence of trust breaches before a juryless court in order to achieve justice. Heirs and assigns of the beneficiary may soon enjoy these rights and powers; even unborn children under a settlement may have rights, and women too. In due course the Chancellor will supervise trusts and attendant managerial relationships even without the pleading of a breach, but more in his *parens patriae* jurisdiction to protect the vulnerable; and this brings into his court the enforcement of charities, especially after the Reformation and the reduction of ecclesiastical jurisdictions. The trust is quietly revolutionizing private law, and the common lawyers are themselves major participants in and users of the new binary system, even if legal intellectuals such as Thomas Littleton ignore the use or trust in their writings.[67]

There is still more radicalism inherent in the trust as we enter modern times. The wall of legal ownership of the trust will protect properties against thieves and trespassers in the normal way; but creditors of the trustees will discover on levying against assets that the wall of the trust will prevent them taking beneficial property – the function that we now call asset partitioning. To prevent the undue shutting out of bona fide creditors from access to trust assets, debt claims against the person of a beneficiary can be levied against all claims that the beneficiary himself may have under a trust – though since the trustee is not an agent, the trustee's personal assets outside the trust are insulated from the beneficiary's creditors, a neat inversion of the protection of the beneficiary from the trustee's creditors. The beneficiary's equitable assets, though constructed from a myriad of personal claims against trustees and assignees, are increasingly seen as property or estates, that may be charged, entailed and settled in turn. Trusts will now embrace movables easily, and also govern *inter vivos* relationships, providing a new accounting and co-owning vocabulary for partnerships and companies. Trusts will allow tracing of assets that 'belong' in Equity to the *cestuis* through different property forms and through mixed funds; it protects value inherent in rights to things as assets, not just the things themselves. There are enduring puzzles, such as whether the forfeiture or escheat of a beneficial estate can work under feudal law, whether perpetuity laws apply to beneficial interests, and whether the destruction of the trustee's legal estate by feudal law binds the Crown recovering the fee to respect beneficial interests under the trust. Such puzzles are ultimately resolved by legislation, but the fact that such puzzles arise is further

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66 Ibid 91, citing YB 11 Edw IV, fol 8 (1471).

67 Ibid 90-7.

evidence of the 'propertyisation' of the trust. If contract is the progenitor of a myriad of personal, subjective obligations from within the regular legal system, then the trust is a fertile progenitor of new property forms layered on top of the regular legal system.

## VI

For Maitland, crucial as these developments of the private trust for family and commercial interets may be, they are not the most fascinating part of the story, even though as matters of doctrine they are of the highest interest, needing sensitive exposition to be made understandable to foreign lawyers reared in Roman concepts, and indeed to native lawyers who repeat the mantras of Equity without full intellectual grasp. But of equal or even greater significance lies in the work of the trust in creating associational groups with effective personality, outside the state. Corporations sponsored or created by the state come late to England, argues Maitland, because the trust did so much useful work in organizing joint holding of property for a purpose. And trusts go beyond the bounds of family and commerce to supply the building blocks for religious and civic associations and even governmental organs at local and central level.

> [T]he liberty of action and experimentation that has been secured to us by the Trust is best seen in the freedom with which from a remote time until the present day *Anstalten* [institutions] and *Stiftungen* [foundations] of all sorts and kinds had been created by Englishmen.[68]

The fact that regular institutions of private law, provided by the courts of the Crown but without the control of executive and legislative goverment, do so much work in the public sphere is for Maitland a hidden but essential aspect of English statecraft. It explains the tolerant, pluralistic English form of government and the relative lack of interest in the personality and powers of the State as the guardian and guide of society. Implicitly Maitland is telling his overseas readers: England is not Prussia, and the trust helps to make this so.

To substantiate his claims, Maitland highlights the role of unincorporated associations such as clubs and religious societies, where persons unite in a network contract to pursue an agreed purpose, and then settle assets on trust with trustees to underpin the actions of the group. These associations are precursed by charities, or trusts for a public purpose; such trusts create the idea of *Zweckvermögen*, or funds or assets imprinted with a purpose, enforced by Crown officials.[69] The charitable trusts exist in vast numbers and over a wide field of education, philanthropy to the poor, maintenance of infrastructure and public goods, and sustenance of religious life. They are perpetual, and they pass irrevocably into the public sphere, though imprinted with the ideas of the private funders or settlors. By contrast, the unincorporated associations outside the categories of charity have their *Zweckvermögen* outside public control, and employ the state only to enforce the trust property stewardship that underpins the activities of the association.

Now we see why Maitland has been at such pains to explain how the English trust came into being and how it operates, for only thus can foreigners grasp how private associational law works in England.

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68 Ibid 97.

69 Ibid 98-9.

> [T]hose who would understand how our "unincorporate bodies" have lived and flourished behind a hedge of trustees should understand that the right of the destinatory [beneficiary], though we must not call it a true *dominium rei*, is something far better than the mere benefit of a promise.[70]

The most noble part of the story concerns religious life and association outside the post-1660 Anglican monopoly. Charitable trusts under the direct supervision of the Lord Chancellor and Attorney-General were made unavailable or hazardous for non-conformist or other non-Anglican confessions.[71] The great practical problem was how to gather lands and assets to found working religious congregations in such a hostile constitutional environment. It was one thing for the State to tolerate non-Anglican forms of congregational worship, perhaps in private chapels, in the sense of extending them a liberty to act without sanction. But it was another thing for the Anglican State to afford its active protection to alien and heretical religious forms, whether old Catholicism, the Non-conformist sects, or even further afield, Jewish, Moslem or deist communities. The answer lay in the trust.

> When the time for a little toleration had come, there was the Trust ready to provide all that was needed by the barely tolerated sects. All that they had to ask from the State was that the open teaching of their doctrines should not be unlawful. …
>
> If in 1688 the choice had lain between conceding no toleration at all and forming corporations of Nonconformists, and even "*Korporationen mit öffentlichen Rechten*" [corporations of public law], there can be little doubt that "*das herrschende Staatskirchenthum*" [the dominant State Church] would have left them untolerated for a long time to come, for in England, as elsewhere, incorporation meant privilege and exceptional favour. And, on the other hand, there were among the Nonconformists many who would have thought that even toleration was dearly purchased if their religious affairs were subjected to State control. But if the State could be persuaded to do the very minimum, to repeal a few persecuting laws, to say "You shall not be punished for not going to the parish church, and you shall not be punished for going to your meeting-house," that was all that was requisite. Trust would do the rest, and the State and *das Staatskirchenthum* could not be accused of any active participation in heresy and schism. Trust soon did the rest. I have been told that some of the earliest trust deeds of Nonconformist "meeting-houses" say what is to be done with the buildings if the Toleration Act be repealed. After a little hesitation, the courts enforced these trusts, and even held that they were "charitable."
>
> And now we have in England Jewish synagogues and Catholic cathedrals and the churches and chapels of countless sects. They are owned by natural persons. They are owned by trustees.[72]

Maitland was here a little too sanguine of the capacities of the pragmatic trust to afford a neutral solution to the issue of religious pluralism; there are many instances where the supposedly impartial enforcement of trust deeds supporting spiritual life

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70 Ibid 95-6.

71 Getzler, 'Faith', above n 41, 564-9; Gareth Jones, *History of the Law of Charity 1532–1827* (Cambridge University Press, 1969) 109–33.

72 *TC*, 102-3.

could lead the courts into fierce religious and communal controversies, forcing the judges to take sides between theologically opposed litigants fighting over control of their congregations. Maitland later recognised this when confronted with the disastrous *Bannatyne* case of 1904, in which a rump of the Free Church of Scotland was allowed to keep the church's property and expel the majority on the basis that the trust deed of the Church enshrined an antique theology that could not be reformed by majority vote. Maitland observed this litigation with biting irony:

> [I]t was a brilliant day in our legal annals when the affairs of the Free Church of Scotland were brought before the House of Lords, and the dead hand fell with a resounding slap upon the living body.[73]

Many such ecclesiastical quarrels of the late 19th and early 20th centuries ultimately had to be solved by the fiat of parliamentary legislation – by the very public path that Maitland deplored. But Maitland's basic historical point stood: that the private trust for long allowed for practical toleration and religious pluralism in England, decades or centuries before the Church Establishment and Parliament could possibly have granted a more overt toleration or equality of religious practice and association. Maitland saw the ultimate sophistication of the religious trust in Methodist ecclesiastical organisation, whereby every Wesleyan chapel in the land was founded on a lengthy deed drafted in 1832 of more than forty pages, that both standardised and centralised the governance of the entire denomination.[74]

## VII

The final case of the trust as an associational law went beyond religion, with its close association with charity law. Here Maitland came finally to 'what has to my mind been the chief merit of the Trust. It has served to protect the unincorporated *Genossenschaft* [association, society] against the attacks of inadequate and individualistic theories'.[75] Such associations as Pall Mall clubs, the Inns of Court, Lloyds of London, the London Stock Exchange, the Jockey Club, began informally as 'clubs' or societies of like-minded persons gathered together to pursue some purpose, some *Zweck* as Maitland communicated it to his German audience. As these clubs grew in power, sophistication and wealth, they chose to remain unincorporated, acting through trustees who held the assets and indeed ran the society according to the rules stated in the trust deed, which also served as a multipartite contract binding the members. But the members could not be said to be normal *cestuis que trust* or beneficiaries with an equitable interest whether vested or not in the society's assets, for enjoyment of the society's assets and activities might be made dependent on continued membership of that society and accession to its purposes. Thus the property was suspended in its functional ownership or control and made subject to the *Zweck*, the purpose of the association, for the foreseeable future or until the society transformed or dissolved itself.

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73 'Moral Personality and Legal Personality', in *Collected Papers,* above n 1, 304-22, at 319.

74 *TC*, 104. These organizational developments postdate the career of the Methodist founder John Wesley (1703-1791), who saw his religious movement as a radical wing of the Anglican communion. The split came after his death, hastened by the anti-establishmentarian stance of the American Methodists.

75 *TC*, 105.

Now the assets of an unincorporated association were fully legal property in the hands of the trustees, who could defend it from external threat and also attract credit and contract with outsiders where this helped the *Zweck* in hand. Any association debts so made would have to be levied against the persons of the trustees themselves, and then only if authority to contract such debts could be proved; the trustees would then recover against the association assets by way of indemnity. It was complicated, but it worked. As for the rights, powers and liabilities of the members, these were purely a creation of the internal association deeds; and Maitland observed that in the 'mountainous mass' of English litigation, in which 'almost every side of English life is revealed' there is precious little evidence of intra-associational litigation of a society's rules. The strong instinct within these organs is for self-regulation, by a 'jurisdiction' inherent in the *Genossenschaft* – a power to self-govern unregulated by State law, as fiercely guarded by these secular institutions as any religious community. The self-generated forms of internal governance are reproduced at other levels of associational life: unlike partners, agents or factors, the trustees were not mandated to contract on behalf of members; nor did the trustees 'represent' the association to the world in the manner of company directors, for there was no corporate legal person to represent; it was a '*nicht rechtsfähiger Verein*' [society without legal capacity].[76] But if not a corporate body, it was hard even to say that in the *nicht rechtsfähiger Verein* the trustees held property on trust for the members. At law the assets might belong to the trustees; but at equity those assets do not amount to beneficial property disposable by the membership. Maitland sums up the juristic peculiarities of associational property as follows:

> I do not think that the result is satisfactory. The "ownership in equity" that the member of the club has in land, buildings, furniture, books, etc. is of a very strange kind. (1) Practically it is inalienable. (2) Practically his creditors cannot touch it by execution. (3) Practically, if he is bankrupt, there is nothing for them. (4) It ceases if he does not pay his annual subscription. (5) It ceases if in accordance with the rules he is expelled. (6) His share—if of a share we may speak—is diminished whenever a new member is elected. (7) He cannot demand a partition. And (8) in order to explain all this, we have to suppose numerous tacit contracts which no one knows that he is making, for after every election there must be a fresh contract between the new member and all the old members.[77]

But if the asset-holding form of the *nicht rechtsfähiger Verein* was doctrinally ludicrous, the practical results were striking. England knew a private associational law where corporate forms could be woven out of co-ownership, contract and trust, without the State as the source of public order being called in to grant the concession of incorporation. Thus groups could attain agency, in the broad philosophical sense of a capacity to act rationally and legally as a unified entity, and also self-government, or the autonomous power to broker and settle internal conflict, building with the normal institutions of private law, using State enforcement only where necessary to maintain the building blocks of ownership, contract and trust. The associational urges of the citizenry could thus emerge beyond political State licence; the attainment of group identity and personality was not wholly in the gift of the State.

This is the pluralistic communal liberalism which Maitland sought to identify in 'Trust and Corporation'. It delivers the Holy Grail of political theory – how natural

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[76] Ibid 116.
[77] Ibid 111.

persons may create enforceable associations that guarantee cooperation and mutual help and do not become sources of coercion and oppression; and how persons can vest power in a central State that protects their interests, without their lives being depersonalised and regimented by the State they have created. Maitland hints at how precious the voluntary forms are felt to be when he reveals that his beloved Selden Society[78] takes associational, not corporate form, even though this raised a difficult question as to who owns the copyright of its publications: 'the council of the society – all of them lawyers, and some of them very distinguished lawyers – preferred the old plan: preferred trustees'.[79]

Maitland then stands back from all this detail and reflects on what it is all really about.

> But apparently there is a widespread, though not very definite belief, that by placing itself under an incorporating *Gesetz* [statute], however liberal and elastic that *Gesetz* may be, a *Verein* would forfeit some of its liberty, some of its autonomy, and would not be so completely the mistress of its own destiny as it is when it has asked nothing and obtained nothing from the State. This belief may wear out in course of time; but I feel sure that any attempt to drive our *Vereine* into corporateness, any *Registerzwang* [registration requirement], would excite opposition. And on the other hand a proposal to allow the courts of law openly to give the name of corporations to *Vereine* which have neither been chartered nor registered would not only arouse the complaint that an intolerable uncertainty was being introduced into the law … but also would awake the suspicion that the proposers had some secret aim in view: perhaps nothing worse than what we call "red-tape," but perhaps taxation and "spoliation".[80]

Maitland was not Panglossian; he could see the dark side of this system of group 'uncorporation':[81] How were such groupings to be taxed, to pay their debts efficiently, to be liable for wrongdoing? Injustices could be done. One solution was bespoke legislation that would treat the association as a legal person for certain regulatory incidents. Trade union regulation, a fraught subject in Maitland's day as in ours, was one such example where privileges and responsibilities had to be moulded by State power. But would such State control anywhere in the system in the end undermine the pluralistic benefits of unincorporated free associational forms?

Maitland concludes his essay with some pages of speculation about a fascinating reverse traffic, where the Trust does not merely insulate private association from State power, but insulates State power from the State itself. For the unincorporated trust form, securely established for religious, commercial and social groupings, could be applied to government itself. From local municipalities to national boards wielding vast budgets, trust form might be preferred to incorporation. One might finally describe the Crown and State as themselves, trusts – not the justiciable legal form, but the moral idea that the wielder of public power does so for the *Zweck* of public welfare. Elsewhere in his writings, Maitland indicates that he might prefer such a theory to the notion of the State or Crown as a corporate person; the better metaphor of the national

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78 See above n 18.
79 *TC*, 117.
80 Ibid 118.
81 Here I borrow the phrase of Larry E Ribstein, *The Rise of the Uncorporation* (Oxford University Press, 2010), anachronistic in respect to Maitland but capturing something of his theory.

community, with good medieval precedent, is that of a "body politic"; and the Crown and executive wield trust powers on behalf of that unincorporated meta-group. But this constitutional theory he develops elsewhere.[82]

## VIII

To conclude: in 'Trust and Corporation' Maitland advanced on three fronts. First, he began the work of explaining the English trust to jurists outside the common law tradition. Secondly, by describing the trust to outsiders he offered a new self-understanding of the trust for native English audiences, more acute than anything written before. In this, his 'Trust and Corporation' stands as an exemplary work of comparative law, demonstrating that one can hardly understand one's own juristic language and concepts unless one can explain them in a new idiom to a new audience. In our era of internationalized law, Maitland's comparative methods have left their mark across a wide swathe of imaginative trusts scholarship.[83] Thirdly, and finally, Maitland used the story of the trusts in its charitable, associational and public law extensions to produce a new theory of corporate life, and indeed began to sketch a new theory of associations and the state, which now appears as one of the high achievements of the New Liberalism of the Edwardian period, and which influences theorists of group action to this day.[84]

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82 See especially Frederic William Maitland's twinned essays, 'The Corporation Sole' (1900) 16 *Law Quarterly Review* 335, and 'The Crown as Corporation' (1901) 17 *Law Quarterly Review* 131, both reprinted in *Collected Papers,* above n 1, 210-43, 244-70; and *State, Trust and Corporation*, above n 1, 9-31, 32-51. For discussion see Joshua Getzler, 'Personality and Capacity: Lessons from Legal History' in Timothy Bonyhady (ed), *Finn's Law: An Australian Justice* (Federation Press 2016) (forthcoming).

83 Bernard Rudden, 'Things as Thing and Things as Wealth' (1994) 14 *Oxford Journal of Legal Studies* 81; John H Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625; George L Gretton, 'Trusts Without Equity' (2000) 49 *International and Comparative Law Quarterly* 599; Paul Matthews, 'From Obligation to Property, And Back Again? The Future of the Non-Charitable Purpose Trust' in David Hayton (ed), *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer, 2002) 203-41; Lionel D Smith, Michele Graziadei and Ugo Mattei (eds), *Commercial Trusts in European Private Law* (Cambridge University Press, 2005); Lionel D Smith, 'Trust and Patrimony' (2008) 38 *Revue générale de droit* 379; Alexandra Braun, 'The State of the Art of Comparative Research in the Area of Trusts' in Michele Graziadei and Lionel D Smith (eds), *Comparative Property Law: Global Perspectives* (Edward Elgar Publishing, 2017) (forthcoming). Maitland's place in the history of corporate theory is broached in David J Seipp, 'Formalism and Realism in Fifteenth-century English Law: Bodies Corporate and Bodies Natural' in Paul Brand and Joshua Getzler (eds), *Judges and Judging in the History of the Common Law and Civil Law* (Cambridge University Press 2012) 37-50; Ron Harris, 'The Transplantation of the Legal Discourse on Corporate Personality Theories' (2006) 63 *Washington & Lee Law Review* 1421.

84 Michael Freeden, *The New Liberalism: An Ideology of Social Reform* (Clarendon Press, 1978); Samuel J Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973); Roger Scruton and John Finnis, 'Corporate Persons' (1989) 63 *Proceedings of the Aristotelian Society* 239-74; Roger Scruton, 'Gierke and the corporate person', in *The Philosopher on Dover Beach* (Carcanet Press, 1990) 56-73; Alan Macfarlane, *F W Maitland and the Making of the Modern World: Visions from the West and East* (2002) at <http://www.alanmacfarlane.com/TEXTS/Maitland_final.pdf>, also published as *Making of the Modern World* (Palgrave, 2002) 1-135; John Finnis, 'Purposes, Public Acts, and

So we are lucky to have Maitland's great essay, recovered for the English world from publication in a now forgotten Viennese journal. To read it is to discover the foundations of the modern subjects of trusts and corporations, to understand the connections between common-law and civilian legal cultures, to see the deep and hidden inter-relationship of private and public law, and finally, to appreciate how much historical and comparative analysis can benefit the science of jurisprudence. Few essays in the law can hope to survive more than a century to enrich the debates of a later age. Maitland deserves this honour.

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Personification', in *Intention and Identity* (Oxford University Press, 2012) 82-91; Joshua Getzler, 'Plural Ownership, Funds, and the Aggregation of Wills' (2009) 10 *Theoretical Inquiries in Law* 241; Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011); McLean, *Searching for the State*, above n 29.