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## FELLOWSHIP AND TRUST

In his consideration of the balance of liberty, equality and wealth through time, Maitland had effectively demolished one side of the famous nineteenth century dichotomy which was the basis of most thought on the evolution of societies. He had shown that not all civilizations had started in a world where individuals were embedded within the community, where contract was entirely subordinate to status, and where hierarchy and patriarchy were universal. Yet his magnificent achievement would be incomplete if he were to be unable to re-construct the other end of the famous supposed transformation. He needed to re-think the nature of the modern world as supposedly constituted by contract, individualism and absolute equality.

In the last few years of his life, Maitland sketched out a plan for how this re-thinking might be done. He died without implementing the scheme in detail. But we can see in his hints the way in which he finally reconciled those great contradictions which he had wrestled with in his youthful fellowship dissertation on liberty and equality, namely how Adam Smith's 'self love' and 'social love' could be harmonized, and how Tocqueville's problem of how to reconcile equality with liberty could be achieved. Maitland did this through an exploration of what he came to believe was the greatest of all English legal contributions to the world, the Trust. This was an institution born by accident, not from Roman law, but which became the third great principle of social organization in the world, standing on the same level as Status and Contract. It was the Trust and the trust which it engendered which provided the foundations for modern liberty, wealth and equality.

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Maitland asked himself what the link between political liberty, economic prosperity and the legal framework might be. Tocqueville had isolated parts of the solution. He had noted that there was a developing tendency in much of Europe for the central power to abolish all the intermediary bodies, that is to withdraw any franchises previously given to towns, local assemblies and parliaments. Any corporate group which derived its power from the State became a threat and was undermined. In the end one had the State and the Individual - with very little in between. There were very few ways in which individuals could associate without incurring the jealousy of the State. Since, among other things, religious and economic differentiation and development required the formation of sub-units - to worship, trade, manufacture - this tendency to eliminate the smaller grouping would finally abolish political, religious and economic liberty and also abolish progress towards wealth.<sup>1</sup>

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<sup>1</sup> Fukuyama, **Trust**, has recently endorsed this general view.

Tocqueville also saw that one country seemed to have developed along a different path. He laid a great stress in his work on America on the free associations which the Americans constantly set up. These associations were the essence of their religious, social and economic dynamism. Without them, wealth and liberty would again vanish. Thus Tocqueville had isolated the structural mechanism which linked social and legal forms through to religious and economic liberty. What he lacked was the training and deep knowledge of medieval European law to see what the 'point of departure' of this development was. He traced it back to England, as with other features, but was unable to pursue the matter further. It is from Maitland that we receive an answer.<sup>2</sup>

Maitland started his account of the development of the corporation based on Roman law with the universal need for some kind of group above the level of the individual. 'Every system of law that has attained a certain degree of maturity seems compelled by the ever-increasing complexity of human affairs to create persons who are not men, or rather (for this may be a truer statement) to recognize that such persons have come and are coming into existence, and to regulate their rights and duties.'<sup>3</sup> The essence of what has to be set up, the corporation or 'embodiment', he describes as follows. 'The core of the matter seems to be that for more or less numerous purposes some organized group of men is treated as an unit which has rights and duties other than the rights and duties of all or any of its members. What is true of this whole need not be true of the sum of its parts, and what is true of the sum of the parts need not be true of the whole. The corporation, for example, can own land and its land will not be owned by the sum of the corporators; and, on the other hand, if all the corporators are co-owners of a thing, then that thing is not owned by the corporation. This being so, lawyers from the thirteenth century onwards have been wont to attribute to the corporation a "personality" that is "fictitious" or "artificial".'<sup>4</sup> We are told that 'Sinibald Fieschi, who in 1243 became Pope Innocent IV was, it is said, the first to proclaim in so many words that the **universitas** is **persona ficta**.' [the association is a fictive person]<sup>5</sup>

The corporation thus has considerable power. The crucial question is where it derives this power from. In relation to English boroughs Maitland argued that 'Incorporation must be the outcome of royal charter...The king makes something. He constitutes and erects a body corporate and politic in deed,

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<sup>2</sup> For some of the background to his work, and particularly the relations with German jurisprudence and the work of Gierke, see Runciman, **Pluralism**, in particular chapters 3-5.

<sup>3</sup>Maitland, **History**, I, 486

<sup>4</sup>Maitland, **History**, I, 488

<sup>5</sup>Maitland, **Township**, 18

fact and name (in **re, facto et nomine**).<sup>6</sup> Maitland gave a fuller account of the development of corporation theory on the Italian model. Its sacred texts were the law of an unassociative people. Roman jurisprudence, starting with a strict severance of **ius publicum** from **ius privatum**, had found its highest development in "an absolutist public law and an individualistic private law." ... The theory of corporations which derives from this source may run (and this is perhaps its straightest course) into princely absolutism, or it may take a turn towards mere collectivism (which in this context is another name for individualism); but for the thought of the living group it can find no place; it is condemned to be "atomistic" and "mechanical".<sup>7</sup> He believed that 'If it be our task legally to construct and maintain comfortable homes wherein organic groups can live and enjoy whatever "liberty of association" the Prince will concede to them, a little, but only a little, can be done by means of the Romanist's co-ownership (**condominium, Miteigentum**) and the Romanist's partnership (**societas, Gesellschaft**). They are, so we are taught, intensely individualistic categories: even more individualistic than are the parallel categories of English law, for there is no "jointness" (**Gesammthandschaft**) in them.<sup>8</sup> This leads to what is known as the 'Concession Theory'. That is to say 'The corporation is, and must be, the creature of the State. Into its nostrils the State must breathe the breath of a fictitious life, for otherwise it would be no animated body but individualistic dust.'<sup>9</sup> Thus 'the corporation does not grow by nature; it must be made, by the act of parliament, or of the king, or of the pope...'<sup>10</sup> Basically, 'If the personality of the corporation is a legal fiction, it is the gift of the prince.'<sup>11</sup> He quoted a classic definition that 'a Corporation is a Franchise' and commented that 'a franchise is a portion of the State's powers in the hands of a subject.'<sup>12</sup>

The absolutist element in this State derivation is spelt out by Maitland with clarity, for 'what was understood to be the Roman doctrine of corporations was an apt lever for those forces which were

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<sup>6</sup>Maitland, **Township**, 18

<sup>7</sup>Maitland, **Political Thought**, xxviii

<sup>8</sup>Maitland, **Political Thought**, xxx

<sup>9</sup>Maitland, **Political Thought**, xxx

<sup>10</sup>Maitland, **History**, I, 490

<sup>11</sup> Maitland, **Collected Papers**, III, 310

<sup>12</sup> Maitland, **Political Theories**, xxxi

transforming the medieval nation into the modern State. The federalistic structure of medieval society is threatened. No longer can we see the body politic as **communitas communitatum**, a system of groups, each of which in its turn is a system of groups. All that stands between the State and the individual has but a derivative and precarious existence.<sup>13</sup> Thus, paradoxically, rather than strengthening the individual in relation to the State, the corporation became an indirect way of weakening the subject. France provided a very good example, as Montesquieu and Tocqueville had earlier realized. In France, I take it, we may see the pulverising, macadamising tendency in all its glory, working from century to century, reducing to impotence, and then to nullity, all that intervenes between Man and State...In this, as in some other instances, the work of the monarchy issues in the work of the revolutionary assemblies. It issues in the famous declaration of August 18, 1792: "A State that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the country." That was one of the mottoes of modern absolutism: the absolute State faced the absolute individual.<sup>14</sup> It is this view of the tendency to absolutism, and the way a Roman concept of corporations aided it, that explains remarks Maitland made in a letter to Henry Jackson in 1900. 'The subject of my meditation is the damnability of corporations. I rather think that they must be damned...' He ends the letter by looking forward to a great work. 'Then for the great treatise **De Damnabilitate Universitatis**.'<sup>15</sup>

If, then, it was not the Roman Law corporation that led towards the vibrant world of American associationalism, where did the key lie? Here, in the last ten years of his life, Maitland started to see the answer, and it was an accidental, unexpected and chance one. It lay in the development of a device that had no roots in Roman law, but was a bi-product of many forces, in particular the inadequacies of Roman law and the structural tensions in English society in the thirteenth century. He had considered the theory that the origin of the Trust was in Roman law, but by 1894 could write that 'I have long been persuaded that every attempt to discover the genesis of our **use** [the device that led into the Trust] in Roman law breaks down...'<sup>16</sup> In his lectures on Equity, given up to the year of his death, he told his audience that 'I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it. I believe that it was a natural outcome of ancient English elements.'<sup>17</sup> He expanded this remark later in the lectures, starting his assessment of the evidence as follows: 'Some have

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<sup>13</sup>Maitland, **Collected Papers**, III, 310

<sup>14</sup>Maitland, **Collected Papers**, III, 311

<sup>15</sup>Quoted in Fisher, **Life**, 124-5

<sup>16</sup> Maitland, **Collected Papers**, II, 403.

<sup>17</sup> Maitland, **Equity**, 6

thought that this new jurisprudence of uses was borrowed from the Roman law; that the English use or trust is historically connected with the **fidei commissum**. I do not myself believe in the connexion. One reason for this disbelief I will at once state because it leads on to an important point. From the first the Chancellors seem to have treated the rights of the **cestui que use** [the person or persons on whose behalf the trust is undertaken] as very analogous to an estate in land. They brought to bear upon it the rules of the English land law as regards such matters as descent and the like.<sup>18</sup>

Maitland believed he might discover something special and powerful. He had, among other things, thrown light on the question of how it was possible to move from status based societies to something other than pure, atomistic and individualistic contract. His excitement on discovering this key to the riddle of the peculiar nature of the modern world is palpable. In a letter to John Gray in 1902 he wrote of 'a matter of great historical importance - namely the extreme liberality of our law about charitable trusts...I think that continental law shows that this was a step that would not and could not be taken by men whose heads were full of Roman Law.'<sup>19</sup> The individual was acting like a king. **Practically** the private man who creates a charitable trust does something that is very like the creation of an artificial person, and does it without asking leave of the State.<sup>20</sup> The following year he also wrote to Gray that 'I am endeavouring to explain in a German journal how our law (or equity) of trusts enabled us to keep alive "unincorporated bodies" which elsewhere must have perished.'<sup>21</sup>

In the few years before his premature death he came to believe that the Trust was probably the most important of all English legal contributions. He wrote 'The idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder. If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.'<sup>22</sup> These words were echoed in a letter to John Gray in November 1903, 'Some one ought to explain our trust to the world at large, for I am inclined to think that the construction thereof is the greatest feat that men of our race have performed in the field of jurisprudence. Whether I shall be able

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<sup>18</sup> Maitland, **Equity**, 32

<sup>19</sup>Fisher, **Life**, 134

<sup>20</sup>Fisher, **Life**, 134

<sup>21</sup> **Letters**, ed. Fifoot, no.364; see also the letter of 15th November to the same.

<sup>22</sup>Maitland, **Collected Papers**, III, 272

to do this remains to be seen - but it ought to be done.<sup>23</sup> Increasingly ill, Maitland was unable to perform the task and died within three years. But he has given us glimpses of how he would have approached the subject and why he thought it so very important.<sup>24</sup>

Through a series of reported conversations with his German lawyer friends, Maitland brought home the fact that the trust was something unique to England and very important. The Trust, Maitland explained to his students in a series of lectures given up to the year of his death, 'perhaps forms the most distinctive achievement of English lawyers. It seems to us almost essential to civilization, and yet there is nothing quite like it in foreign law. Take up for instance the ... Civil Code of Germany; where is trust? Nowhere. This in the eyes of an English practitioner is a big hole. Foreigners don't see that there is any hole. "I can't understand your trust," said Gierke to me.<sup>25</sup> The enormity of the gap in Continental law is shown by another remark. Much of modern society, as many have argued, is based on Contract. Yet Maitland chides a German friend for not having anything equivalent to the Trust in their legal system and tells him that 'I have looked for the Trust, but I cannot find it; to omit the Trust is, I should have thought, almost as bad as to omit Contract.<sup>26</sup> The German friend was obviously nettled by such remarks and others such as 'Foreigners manage to live without trusts. They must.'<sup>27</sup> He replied "'Well, before you blame us, you might tell us what sort of thing is this wonderful Trust of yours.'<sup>28</sup> Maitland is more than happy to attempt this, and indeed published one of his longest analyses of trusts and corporations in German. He was keen to do so because he believed that 'Of all the exploits of Equity the largest and the

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<sup>23</sup>Fisher, **Life**, 147

<sup>24</sup> Maitland's hints were largely concealed. Thus even the normally perceptive John Burrow in his treatment of Maitland's work on 'the spirit of association' and the nature of the Trust can suggest that Maitland treated the subject as roughly equivalent to 'clubbability', the 'ethics of returning library books' (Burrow, 'Village Community', 280).

<sup>25</sup> Maitland, **Equity**, 23; Otto Gierke, part of whose work Maitland translated (in **Political Theories**) was one of the very greatest of modern legal theorists.

<sup>26</sup> Maitland, **Collected Papers**, III, 323

<sup>27</sup> Maitland, **Collected Papers**, III, 273

<sup>28</sup> Maitland, **Collected papers**, III, 323

most important is the invention and development of Trust.<sup>29</sup> Consequently 'Anyone who wishes to know England, even though he has no care for the detail of Private Law, should know a little of our Trust.<sup>30</sup> Nor was it just the concept of the Trust in itself that was so striking; many of the ideas which sprang out of it were equally remarkable. For example 'That idea of the trust-fund which is dressed up (invested) now as land and now as current coin, now as shares and now as debentures seems to me one of the most remarkable ideas developed by modern English jurisprudence.'<sup>31</sup>

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The idea of holding something in trust for someone else is a very old one and may have been found in a number of Germanic societies after the collapse of the Roman Empire. Certainly Maitland found that the idea of the use, **opus**, was widespread in Anglo-Saxon England, for example 'long before the Norman Conquest we may find a man saying that he conveys land to a bishop to the use of a church...'<sup>32</sup> Well before the revival of Roman law with its idea of a corporation created by a higher power, there was a widespread idea of an unincorporated body of people who held some asset on behalf of themselves or others. 'Probably as far back as we can trace in England any distinct theory of the corporation's personality or any assertion that this personality must needs have its origin in some act of sovereign power, we might trace also the existence of an unincorporated group to whose use land is held by feoffees.'<sup>33</sup> The germ of the idea, holding to the use of another in trust and the creation of a non-governmental body, was thus already present. Its formal institutionalization on a large scale, was to change the world, began, however, in the thirteenth century.

One minor contribution to this development may have been religious. Several times Maitland draws attention to the effect of the peculiar vows of poverty undertaken by the new Franciscan orders who came to England in the early thirteenth century. 'The law of their being forbade them to own anything... A remarkable plan was adopted.' This was that the benefactor would convey the property which they needed in order to survive 'to the borough community "to the use of" or "as an habitation for" the friars.'<sup>34</sup> The major contribution, however, came from another source.

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<sup>29</sup> Maitland, **Equity**, 23

<sup>30</sup> Maitland, **Collected Papers**, III, 322

<sup>31</sup> Maitland, **Collected Papers**, III, 277

<sup>32</sup> Maitland, **Collected Papers**, II, 404

<sup>33</sup> Maitland, **Collected Papers**, III, 283

<sup>34</sup> Maitland, **Collected Papers**, II, 407-8

Maitland pointed out that the institutionalized trust emerged out of a dilemma. The Englishman cannot leave his land by will. In the case of land every germ of testamentary power has been ruthlessly stamped out in the twelfth century. But the Englishman would like to leave his land by will. He would like to provide for the weal of his sinful soul, and he would like to provide for his daughters and younger sons. That is the root of the matter. But further, it is to be observed that the law is hard upon him at the hour of death, more especially if he is one of the great. If he leaves an heir of full age, there is a **relevium** to be paid to the lord. If he leaves an heir under age, the lord may take the profits of the land, perhaps for twenty years, and may sell the marriage of the heir. And then if there is no heir, the land falls back ("escheats") to the lord for good and all.<sup>35</sup> To get round the problem, the landowner conveys his land to some friends... 'They are to hold it "to his use (**a son oes**)". They will let him enjoy it while he lives, and he can tell them what they are to do with it after his death. I say that he conveys his land, not to a friend, but to some friends. This is a point of some importance. If there were a single owner, a single **feoffatus**, he might die, and then the lord would claim the ordinary rights of a lord...Enfeoff five or perhaps ten friends...("as joint tenants"). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing.<sup>36</sup> This idea came out of Anglo-French law, 'it is not in Roman books that Englishmen of the fourteenth century have discovered this device.'<sup>37</sup>

The desire of the landowners to avoid the strict implications of primogeniture and royal power would have failed if they had not coincided with the developing interest of one of the very strongest of royal officials, the Chancellor, to provide a new legal flexibility to supplement the Common Law, through the system of equity. The Chancellor began to hold himself out as willing to enforce these honourable understandings, these "uses, trusts or confidences" as they were called, to send to prison the trustee who would not keep faith. It is an exceedingly curious episode. The whole nation seems to enter into one large conspiracy to evade its own laws, to evade laws which it has not the courage to reform. The Chancellor, the judges, and the Parliament seem all to be in the conspiracy. And yet there is really no conspiracy: men are but living from hand to mouth, arguing from one case to the next case, and they do not see what is going to happen.<sup>38</sup> These trustees were not a perpetual corporation. They were not set up or "incorporated" by the State. Yet they had 'a jointness about them so that they could act as one

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<sup>35</sup>Maitland, **Collected Papers**, III, 335

<sup>36</sup>Maitland, **Collected Papers**, III, 335-6

<sup>37</sup>Maitland, **Collected Papers**, III, 337; for another version of this story, see Maitland, **Equity**, 26-7

<sup>38</sup>Maitland, **Collected Papers**, II, 492

body.' They were a 'fictitious person', recognized by the law, but nothing to do with the State.

The growth of this device proceeded apace, both nourishing and being protected by the growth of 'equity'.<sup>39</sup> The royal power as well as the lawyers turned a blind eye to this development, which seemed at first so innocuous. Like the custom of primogeniture, what had started as an upper class device spread through the large middling ranks of the population and began to widen its purposes in so doing. 'And then, if I may so speak, the "settlement" descended from above: descended from the landed aristocracy to the rising monied class, until at last it was quite uncommon for any man or woman of any considerable wealth to marry without a "marriage settlement."' <sup>40</sup> In due course 'the trust became one of the commonest institutes of English law. Almost every well-to-do man was a trustee...'<sup>41</sup>

When it became clear that the trust was developing into a major threat to royal power and finances, Henry VIII tried to crush it in the Statute of Uses (1535). But the horse had already bolted. Maitland summarizes a complex story in a few lines. 'Too late the king, the one person who had steadily been losing by the process, saw what had happened. Henry VIII put into the mouth of a reluctant Parliament a statute which did its best - a clumsy best it was - to undo the work. But past history was too strong even for that high and mighty prince. The statute was a miserable failure. A little trickery with words would circumvent it. The Chancellor, with the active connivance of the judges, was enabled to do what he had been doing in the past, to enforce the obligations known as trusts.'<sup>42</sup> The trust continued on its way. By the late sixteenth century an alternative set of methods to form meaningful, enduring, associations of citizens in pursuit of a common goal, for it was widening out from just passing property across the generations, had been developed. It was becoming particularly important for the setting up of charities and good works.

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Maitland drew attention to some of the structural benefits of this development, in particular as a supplement to the idea of corporations or **universitas**. 'The trust has given us a liberal substitute for a law about personified institutions.'<sup>43</sup> More generally he outlined the situation thus, describing the period roughly from 1500 to 1900. 'For the last four centuries Englishmen have been able to say, "Allow us our

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<sup>39</sup> The story is well told in Maitland, **Equity**, 1-6

<sup>40</sup> Maitland, **Collected Papers**, III, 354

<sup>41</sup> Maitland, **Collected Papers**, III, 354

<sup>42</sup> Maitland, **Collected Papers**, II, 493

<sup>43</sup> Maitland, **Collected Papers**, III, 279

Trusts, and the law and theory of corporations may indeed be important, but it will not prevent us from forming and maintaining permanent groups of the most various kinds: groups that, behind a screen of trustees, will live happily enough, even from century to century, glorying in their unincorporatedness. If Pope Innocent and Roman forces guard the front stairs, we shall walk up the back."<sup>44</sup> Whereas under Roman Law all could be threatened by the State, in England it was different: what for Roman lawyers was a 'question of life and death was often in England a question of mere convenience and expense, so wide was that blessed back stair. The trust deed might be long; the lawyer's bill might be longer; new trustees would be wanted from time to time; and now and again an awkward obstacle would require ingenious evasion; but the organized group could live and prosper, and be all the more autonomous because it fell under no solemn legal rubric.<sup>45</sup> The diversity and vagueness of what a trust could be helped it in its flourishing diversity. In dealing with charitable trusts one by one, our Courts have not been compelled to make any severe classification.<sup>46</sup> Whatever was useful and broadly 'charitable', in the words of mutual benefit to those involved (other than the trustees) and not illegal, could be pursued.

Thus the trust enabled the development of unincorporated bodies, protected from the prying eyes of the State or others. The **Genossenschaft** [Fellowship] 'has to live in a wicked world: a world full of thieves and rogues and other bad people. And apart from wickedness, there will be unfounded claims to be resisted: claims made by neighbours, claims made by the State. This sensitive being must have a hard, exterior shell. Now our Trust provides this hard, exterior shell for whatever lies within.<sup>47</sup> Thus '...we come upon what has to my mind been the chief merit of the Trust. It has served to protect the unincorporated **Genossenschaft** against the theories of inadequate and individualistic theories.<sup>48</sup> Yet there was something mysterious to foreigners about 'the most specifically English of all our legal institutes... the trust'. There was a kind of paradox; here was a non-body, or nobody, that was yet embodied. Maitland tried to explain the contradiction to his continental friends as follows. In the trust there is 'the device of building a wall of trustees' which 'enabled us to construct bodies which were not technically corporations and which yet would be sufficiently protected from the assaults of individualistic theory. The personality of such bodies - so I should put it - though explicitly denied by lawyers, was on the whole pretty well recognised in practice. That something of this sort happened you might learn from one simple fact. For some time past we have had upon our statute book the term "unincorporate

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<sup>44</sup>Maitland, **Political Thought**, xxix

<sup>45</sup>Maitland, **Political Thought**, xxxi

<sup>46</sup>Maitland, **Collected Papers**, III, 365

<sup>47</sup> Maitland, **Collected Papers**, III, 368

<sup>48</sup> Maitland, **Collected Papers**, III, 367

body."<sup>49</sup>

Maitland readily admitted that this was mysterious, even illogical, yet it worked. 'Some day the historian may have to tell you that the really fictitious fiction of English law was, not that its corporation was a person, but that its unincorporate body was no person, or (as you so suggestively say) was nobody.'<sup>50</sup> Yet this 'nobody' was much more than a mere partnership in pursuit of short-term profit. It was something different from what looked like equivalent devices under the revived Roman law: 'we may notice that an Englishman will miss a point in the history of political theory unless he knows that in a strictly legal context the Roman **societas**, the French **societe**, and the German **Gesellschaft** should be rendered by the English **partnership** and by no other word.'<sup>51</sup> A partnership for practical, money-making, ends did not create much mutual confidence, trust or commitment, but a trust did. 'It has often struck me that morally there is most personality where legally there is none. A man thinks of his club as a living being, honourable as well as honest, while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends.'<sup>52</sup>

The Trust was, as Maitland realized, something very peculiar, somehow bridging the gap between status and contract, between people and things. Although it forms people into powerful groups, 'It has all the generality, all the elasticity of Contract.'<sup>53</sup> 'It is an "institute" of great elasticity and generality; as elastic, as general as contract.'<sup>54</sup> In order to blend two contradictory principles, a sleight of hand had to be performed which puzzled continental lawyers and is difficult to explain. Probably once again referring to Gierke, Maitland wrote "I do not understand your trust," these words have been seen in a letter written by a very learned German historian familiar with law of all sorts and kinds. Where lies the difficulty? In the terms of a so-called "general jurisprudence" it seems to lie here:- A right which in ultimate analysis appears to be **ius in personam** (the benefit of an obligation) has been so treated that for practical purposes it has become equivalent to **ius in rem** and is habitually thought of as a kind of ownership, "equitable ownership." Or put it thus: If we are to arrange English law as German law is

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<sup>49</sup> Maitland, **Collected Papers**, III, 317

<sup>50</sup> Maitland, **Political Theories**, xxxiv

<sup>51</sup> Maitland, **Political Theories**, xxiii

<sup>52</sup> Maitland, **Collected Papers**, III, 383

<sup>53</sup> Maitland, **Collected Papers**, III, 322

<sup>54</sup> Maitland, **Equity**, 23

arranged in the new code we must present to our law of trust a dilemma: it must place itself under one of two rubrics; it must belong to the Law of Obligations or to the Law of Things.... It was made by men who had no Roman law as explained by medieval commentators in the innermost fibres of their minds.<sup>55</sup> Maitland explains roughly how the Chancellor somehow managed to muddle the two. 'We know what happened. No sooner had the Chancellor got to work than he seems bent on making these "equitable" rights as unlike mere **iura in personam** and as like **iura in rem** as he can possibly make them. The ideas that he employs for this purpose are not many; they are English; certainly they are not derived from any knowledge of Roman law with which we may think fit to equip him. On the one hand as regards what we might call the internal character of these rights, the analogies of the common law are to be strictly pursued.<sup>56</sup>

Maitland seems to have conceived the Trust as combining two principles. On the one hand, the way it was held, protected, entered into and enforced was according to voluntaristic, not contractual methods. 'No, there is no "obligatory" language: all is done under cover of "use"; a little later of "confidence" and "trust".<sup>57</sup> Or again he writes 'Let me repeat once more ... that use, trust or confidence originates in an agreement. As to the want of valuable consideration for the trustee's promise, it might, I think, fairly be said that even if there is no benefit to the promisor, the trustee, there is at all events detriment to the promisee, the trustor, since he parts with legal rights, with property and with possession.'<sup>58</sup> From this voluntaristic external viewpoint all that is created is a set of personal rights, between the trustor, trustee and person for whom the trust is made. It is quite clear that 'the trustee is the owner, the full owner of the thing, while the **cestui que trust** has no rights in the thing.' Yet this is not quite the whole story, for a personal relationship not of contract but of trust or obligation has been set up, not enforceable by law but by equity. 'The specific mark of the trust is I think that the trustee has rights, which rights he is bound to exercise for the benefit of the **cestui que trust** or for the accomplishment of some definite purpose.'<sup>59</sup> Thus, considered from one viewpoint we are talking about those interpersonal relations which belong to rights in persons. This is the essence of the trust. 'Men ought to fulfil their promises, their agreements; and they ought to be compelled to do so. That is the principle and surely it is a very simple one. You will say then that the Chancellor begins to enforce a personal right, a **jus in personam**, not a real right, a **jus in rem** - he begins to enforce a right which in truth is a contractual right, a right

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<sup>55</sup>Maitland, **Collected Papers**, III, 272-3

<sup>56</sup> Maitland, **Collected Papers**, III, 275

<sup>57</sup> Maitland, **Equity**, 31

<sup>58</sup> Maitland, **Equity**, 29

<sup>59</sup> Maitland, **Equity**, 47-8

created by a promise. Yes, that is so, and I think that much depends upon your seeing that it is so. The right of **cestui que use** or **cestui que trust** begins by being a right **in personam**. Gradually it begins to look somewhat like a right **in rem**. But it never has become this; no, not even in the present day.<sup>60</sup>

Yet while the frame is, so to speak, an enforcement of personal rights, the content is modelled on and filled with the highly sophisticated system of contractual land law which Maitland in his earlier works had shown to have developed in England by the thirteenth century and which spelt out rights against the whole world in 'things'. Thus Maitland explains that 'as regards estates and interests the common law of land is to be the model... The new class of rights is made to look as much like rights **in rem** (estates in land) as the Chancellor can make them look - that is in harmony with the real wish of the parties who are using the device... Thus we get a conversion of the use into an incorporeal thing - in which estates and interests exist - a sort of immaterialized piece of land. This is a perfectly legitimate process of "thing making" and one that is always going on.'<sup>61</sup> Thus the content of the trust, the 'use', came to have all that strange flexibility and multiplicity which was the great contribution to a new kind of property system developed under common law. In Maitland's words 'the use came to be conceived as a sort of metaphysical entity in which there might be estates very similar to those which could be created in land, estates in possession, remainder, reversion, estates descendible in this way or in that.'<sup>62</sup>

The result is a hybrid, which is neither straight status nor contract, neither pure rights in a person, nor rights in a thing. Such a system, Maitland believed, would not have emerged in Roman law, where the distinction between these two was very firm; 'the Trust could hardly have been evolved among a people who had clearly formulated the distinction between a right **in personam** and a right **in rem**, and had made that distinction one of the main outlines of their legal system.'<sup>63</sup> This is what mystified Maitland's continental colleagues, heirs of many centuries of Roman law. 'Jurists have long tried to make a dichotomy of Private Rights: they are either **in rem** or **in personam**. The types of these two classes are, of the former, **dominium**, ownership; of the latter the benefit of contract - a debt. Now under which head does trust - the right of **cestui que trust** - fall? Not easily under either. It seems to be a little of both. The foreigner asks - where do we place it in our code - under *Sachnrech* or under *Obligationenrecht*?<sup>64</sup> In fact it straddles both, bridging those great divides between Community and

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<sup>60</sup> Maitland, **Equity**, 29-30

<sup>61</sup> Maitland, **Equity**, 31

<sup>62</sup> Maitland, **Equity**, 33

<sup>63</sup> Maitland, **Collected Papers**, III, 325

<sup>64</sup> Maitland, **Equity**, 23

Association, Status and Contract, Mechanical and Organic solidarity which were supposed to divide the 'modern' world from the 'ancient'. If asked whether it is a system based on status or contract, one has to give a mixed answer. The best answer may be that in history, and probably in ultimate analysis, it is **jus in personam**; but that it is so treated (and this for many important purposes) that it is very like **jus in rem**. A right primarily good against **certa persona**, viz. the trustee, but so treated as to be almost equivalent to a right good against all - a **dominium**, ownership, which however exists only in equity. And this is so from a remote time.<sup>65</sup>

By bridging this gap, by uniting the great dichotomy, Maitland had implicitly refuted his predecessor Maine and subverted much of the classic sociology of the later nineteenth century. He had suggested that there was not just a binary opposition between two forms of civilization, and a movement from one to another. He showed that much of modern dynamism came through mixing the two principles, thereby creating a tolerable balance of inter-personal warmth and trust and commitment, with a reasonable amount of flexibility and voluntary association. Alluding to Maine's famous thesis, he was able to argue that the trust was indeed as important as that other great legal institution, the contract, and that modernity was based on it. The march of the progressive societies was, as we all know, from status to contract. And now? And now... there are many to tell us that the line of advance is no longer from status to contract, but through contract to something that contract cannot explain, and for which our best, if an inadequate, name is the personality of the organised group.<sup>66</sup> What was set up through the device of the trust was an entity which has been created by ordinary citizens and not by the State. In other words, a personal right had been turned into a property right. This was totally against the spirit of Roman Law. In truth and in deed we made corporations without troubling king or parliament though perhaps we said that we were doing nothing of the kind.<sup>67</sup>

### **The effect of trusts**

The effects of this revolutionary innovation of a new legal device, the Trust, were diverse. One was in contributing to political freedom. Here Maitland assumes the voice of a continental lawyer, who speaks as follows. "There is much in your history that we can envy, much in your free and easy formation of groups that we can admire. That great 'trust concept' of yours stood you in good stead when the days were evil: when your Hobbes, for example, was instituting an unsavoury comparison between corporations and ascarides [intestinal worms, thread worms], when your Archbishop Laud (an absolutist if ever there was one) brought Corporation Theory to smash a Puritan Trust, and two years afterwards his friend Bishop Montague was bold enough to call the king's attention to the shamelessly

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<sup>65</sup> Maitland, **Equity**, 23-4

<sup>66</sup> Maitland, **Collected Papers**, III, 315

<sup>67</sup> Maitland, **Collected Papers**, III, 283

unincorporate character of Lincoln's Inn . And your thoroughly un-Roman "trust concept" is interesting to us.<sup>68</sup>

Since much of Maitland's work was concerned with the relations between the individual and the State it is worth examining his various hints in a little more depth. One benefit of the trust was to help keep the judiciary independent. Lawyers were trained, and found their social and moral life sustained, by the Inns of Court.<sup>69</sup> If these had been appropriated by the Crown through incorporation, for example, the great struggle between Sir Edward Coke and the common lawyers and the Crown in the seventeenth century might have turned out differently. More generally, the constraints which the law put on the tendency for power to grow were dependent on the independence of the judiciary as Montesquieu and Tocqueville had noted. The fact that among the 'great and ancient, flourishing and wealthy groups' which were based on the Trust were the Inns of Court was significant.<sup>70</sup> This was by choice. 'Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it.'<sup>71</sup> They retained their independence.

Another important area was in the right to political associations. There were the various political clubs, essential to the balance of British politics. There were also numerous other political associations set up for particular purposes. Maitland only mentioned in passing 'those political societies which spring up in England whenever there is agitation: a "Tariff Reform Association" or a "Free Food League" or the like'.<sup>72</sup> But on several occasions he mentions Trade Unions as one of the fruits of the right of free association arising from the idea of the trust.<sup>73</sup> He brought out their importance by way of contrast with the Continent. He noted that many of his examples were taken from the eighteenth century, when

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<sup>68</sup>Maitland, **Political Thought**, xxxiii

<sup>69</sup> For an excellent and detailed account of how the Inns acted without incorporation and the various advantages of not being incorporated, see Baker, 'Inns of Court'. A number of the more general arguments in this chapter are also given depth by Professor Baker's analysis.

<sup>70</sup> Maitland, **Collected Papers**, III, 317

<sup>71</sup> Maitland, **Collected Papers**, III, 370-1

<sup>72</sup> Maitland, **Collected Papers**, III, 387

<sup>73</sup> For example, Maitland, **Collected Papers**, III, 400

Montesquieu and others were making a similar contrast. This was 'a time when, if I am not mistaken, corporation theory sat heavy upon mankind in other countries. And we had a theory in England too, and it was of a very orthodox pattern; but it did not crush the spirit of association. So much could be done behind a trust, and the beginnings might be so very humble.'<sup>74</sup> But the contrast did not end then. Maitland noted that during the French Revolution, despite all the talk of freedom, although business partnerships were maintained 'Recent writers have noticed it as a paradox that the State saw no harm in the selfish people who wanted dividends, while it had an intense dread of the comparatively unselfish people who would combine with some religious, charitable, literary, scientific, artistic purpose in view.' In France, even 'at the beginning of this twentieth century it was still a misdemeanour to belong to any unauthorised **association** having more than twenty members.'<sup>75</sup> The idea of a legal, unincorporated, association of free people pursuing political ends was essential to democracy.

Another effect Maitland noted was on one of Tocqueville's main themes, the de-centralization of power and the autonomy of local and regional bodies. He believed that the 'English county' was one example of an unincorporated, yet existing, body.<sup>76</sup> It was this which prevented it becoming merely a servant of the central government. So that 'if the English county never descended to the level of a governmental district, and if there was always a certain element of "self-government" in the strange system that Gneist described under that name, that was due in a large measure (so it seems to me) to the work of the Trust.'<sup>77</sup>

Perhaps deepest of all was an effect that spread outwards through all of political life. All power tends to corrupt, but it does so far less if the power is not looked on as the personal property of the powerful, but rather as a temporary force held 'in trust' for others. This, Maitland, suggests, is what the idea of the Trust and the trust it entailed performed. He explains that 'In the course of the eighteenth century it became a parliamentary commonplace that "all political power is a trust"; and this is now so common a commonplace that we seldom think over it. But it was useful.'<sup>78</sup> Above all it permeated the delicate relationship between the king and the people, enabling a new kind of constitutional monarchy to emerge. 'Possibly the Crown and the Public are reciprocally trustees for each other; possibly there is not much difference now-a-days between the Public, the State, and the Crown, for we have not appraised the full

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<sup>74</sup> Maitland, **Collected Papers**, III, 376

<sup>75</sup> Maitland, **Collected Papers**, III, 312-3

<sup>76</sup> Maitland, **Collected Papers**, III, 400

<sup>77</sup> Maitland, **Collected Papers**, III, 397

<sup>78</sup> Maitland, **Political Theories**, xxxvi

work of the Trust until we are quitting the province of jurisprudence to enter that of political or constitutional theory.'<sup>79</sup> This was an established fact by the later nineteenth century and Maitland briefly suggests how the application of the concept of trust had spread and influenced events in a somewhat disguised way in the aftermath to the confrontations between king and people of the seventeenth century. 'Applied to the kingly power it gently relaxed that royal chord in our polity which had been racked to the snapping point by Divine right and State religion. Much easier and much more English was it to make the king a trustee for his people than to call him officer, official, functionary, or even first magistrate. The suggestion of a duty, enforceable indeed, but rather as a matter of "good conscience" than as a matter of "strict law" was still possible; the supposition that God was the author of the trust was not excluded, and the idea of trust was extremely elastic.'<sup>80</sup>

Having established a concept of trust between monarchy and people by the eighteenth century, the idea found a further extension and application as a metaphor to hold together the largest Empire the world has ever known. Maitland explained that 'when new organs of local government are being developed, at first sporadically and afterwards by general laws, it is natural not only that any property they acquire, lands or money, should be thought of as "trust property," but that their governmental powers should be regarded as being held in trust. Those powers are, we say, "intrusted to them," or they are "intrusted with" those powers.'<sup>81</sup> A political example of how this worked was in relation to India. Maitland alludes to the way in which the delicate matter of the absorption of the East India Company was handled. 'When a Statute declared that the **Herrschaft** which the East India Company had acquired in India was held "in trust" for the Crown of Great Britain, that was no idle proposition but the settlement of a great dispute.'<sup>82</sup> He expands on this as follows: 'the English Trust...has played a famous part on the public, the world-wide, and world-historic stage. When by one title and another a ruler-ship over millions of men in the Indies had come to the hands of an English Fellowship, this corporation aggregate was (somewhat unwillingly) compelled by Acts of Parliament to hold this precious thing, this 'object of rights,' this rulership, upon trust for a so-called corporation sole, namely, the British Crown.'<sup>83</sup>

This was just part of that wider concept that all power was held in trust. The whole of the British

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<sup>79</sup> Maitland, **Political Theories**, xxxvi

<sup>80</sup> Maitland, **Political Theories**, xxxvi-vii

<sup>81</sup> Maitland, **Collected Papers**, III, 402

<sup>82</sup> Maitland, **Collected Papers**, III, 403

<sup>83</sup> Maitland, **Political Theories**, xxv

Empire came to be seen as held 'in trust' for the peoples themselves, until they were ready to take over. 'Open an English newspaper, and you will be unlucky if you do not see the word "trustee" applied to "the Crown" or to some high and mighty body. I have just made the experiment, and my lesson for today is, that as the Transvaal has not yet received a representative constitution, the Imperial parliament is "a trustee for the colony." There is metaphor here.<sup>84</sup> Maitland noted government ministers of his and earlier times saying that Victoria's government 'is a trustee for "the whole empire"'.<sup>85</sup> Perhaps this is part of the explanation for Tocqueville's question as to how such a small country as England could hold such a large Empire with such apparent lack of strain. The mechanism of the trust both gave the metropolitan government confidence and an easy conscience and allowed elastic forms of delegation of power without posing a direct clash between the centre and the periphery.

Equally important, as Maitland realized, were the effects of the possibility of having non-incorporated bodies in the field of religion. Maitland shows how the trust became a key defence of religious nonconformity and the sects. Any religious organization needs to form itself into some kind of permanent group. For instance, it needs a place of worship. Since such buildings had to be funded and maintained, how was this to happen? The State, associated with a Catholic or Anglican settlement was hardly likely to give them corporate status. What the Methodists, Baptists, Quakers and others did was to set up trusts. Groups of trustees ran their affairs and were recognized by the law. As Maitland pointed out, it is likely that without this legal loop-hole, the whole of nonconformity would have been crushed. Religious liberty and the trust were closely linked.

This is how Maitland himself puts the case. 'All that we English people mean by "religious liberty" has been intimately connected with the making of trusts. 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 preaching of their doctrines should not be unlawful.'<sup>86</sup> All that was required by the State was minimal. For '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 Staatskirchentum** [the Established Church] 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

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<sup>84</sup> Maitland, **Collected Papers**, III, 403

<sup>85</sup> Maitland, **Political Theories**, xxxvi, note 3

<sup>86</sup> Maitland, **Collected Papers**, III, 363

by trustees.<sup>87</sup> Maitland illustrated this with the case of the Wesleyans, whose chapels were set up as trusts. 'Now-a-days we see Wesleyan chapels in all our towns and in many of our villages. Generally every chapel has its separate set of trustees...'<sup>88</sup> Even large religious organizations could be tolerated in the form of trusts. 'Behind the screen of trustees and concealed from the direct scrutiny of legal theories, all manner of groups can flourish: ... a whole presbyterian system, or even the Church of Rome with the Pope at its head.'<sup>89</sup>

That England and later America were lands of toleration and sectarianism, exhibiting that mysterious relation between private and public which puzzled Tocqueville but which he saw as a central feature of America, is partly explained by the device of the Trust. The presence of the Trust explained why, if one searched through the voluminous records of Common Law, 'in the hope of discovering the organization of our churches and sects (other than the established church) you will find only a few widely scattered hints.'<sup>90</sup> It was equity and the trust that provided the infrastructure for the distinctive Protestant sectarianism of England and America. Maitland sums up the finding thus: 'If we speak the speech of daily life, we shall say that in this country for some time past a large amount of wealth has "belonged" to religious "bodies" other than the established church, and we should have thought our religious liberty shamefully imperfect had our law prevented this arrangement. But until very lately our "corporation concept" has not stood at the disposal of Nonconformity, and even now little use is made of it in this quarter: for our "trust concept" has been so serviceable.'<sup>91</sup>

Linked to religious freedom was economic liberty. In terms of economic development, a device was needed which would allow people to come together to co-operate in some venture of a new kind. This was the era when new insurance facilities were needed. It was a time when traders and manufacturers needed to form themselves into joint-stock arrangements and to issue shares. The law of trusts made all this possible, providing a 'wedge' which allowed in joint-stock arrangements and limited liability.<sup>92</sup> In all these cases the entity was recognized by the law, yet did not draw its strength directly from the Crown. It was a free association of individuals who had bound themselves together.

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<sup>87</sup>Maitland, **Collected Papers**, III, 364

<sup>88</sup>Maitland, **Collected Papers**, II, 366

<sup>89</sup> Maitland, **Political Theories**, xxix

<sup>90</sup>Maitland, **Collected Papers**, III, 369

<sup>91</sup>Maitland, **Political Theory**, xxix

<sup>92</sup> Maitland, **Collected Papers**, III, 389-92

Again, let us look at Maitland's account of some of the effects. Two examples Maitland describes in some detail may be given. He traces the history of the development of a late seventeenth century coffee house owned by Edward Lloyd, embodied in the mid-eighteenth century in a small trust fund and later, in 1811, a trust deed with eleven hundred signatures. Thus was developed the great insurance firm of Lloyds.<sup>93</sup> Maitland could easily have added numerous other examples of banks or mutual (or building) societies. But his second example was the London Stock Exchange. He describes how it grew from people meeting in an eighteenth-century coffee house into a group of trustees. By the later nineteenth century it was vast and wealthy. In 1877 some people recommended that after all these years as a trust it should be incorporated. 'And so the Stock Exchange was incorporated? Certainly not. In England you cannot incorporate people who do not want incorporation, and the members of the Stock Exchange did not want it.'<sup>94</sup> As for insurance companies, Maitland noted that a number of insurance companies, including the 'Sun' had been set up as unincorporated bodies by the early eighteenth century and had continued so until the time of Maitland's writing.<sup>95</sup>

One of the advantages of the fact that many of the pivotal economic institutions in England from the sixteenth century developed as trusts would have been appreciated by Adam Smith. New economic enterprises, for example long distance trade, or marine insurance, or making a new product, are risky. The individual needs protection, some limitation of liability, mutual assurance. Yet if the protection is given by the government, it very often takes the form of a monopoly. As Smith pointed out, this could easily turn out over time into something that would inhibit creative development. But it was of the essence of trusts that they were not state monopolies. If someone else wanted to set up a marine insurance company or a building society the trustees could not prevent them. It provided a protection for the members without inhibiting newcomers. It was thus the ideal situation for competition with protection, for uniting individuals in a way that did not inhibit other individuals. It is difficult to see how the wealth of industrial England could have been created without the trust concept.

The later development of trusts, from the second half of the nineteenth century, is more complex. On the one hand, some have argued that, particularly in America, they later became an impediment to economic growth by creating **de facto** monopolies.<sup>96</sup> On the other hand, Maitland was right to draw

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<sup>93</sup>Maitland, **Collected Papers**, III, 372

<sup>94</sup>Maitland, **Collected Papers**, III, 374

<sup>95</sup> Maitland, **Collected Papers**, III, 390

<sup>96</sup> For example Mancur Olson in various works, including in Wilson and Skinner (eds.), **Market and State**, 109-12

attention to the way in which the Trust also formed the foundation for dynamic growth in America. 'It is a big affair our Trust. This must be evident to anyone who knows - and who does not know? - that out in America the mightiest trading corporations that the world has ever seen are known by the name of "Trusts."<sup>97</sup> He was not sure why the Americans should have used the trust form, rather than the corporation, 'when they were engaged in constructing the greatest aggregations of capital that the world had yet seen', but he believed that it was because 'the American corporation has lived in greater fear of the State than the English corporation has felt for a long time past.'<sup>98</sup>

A third equally important area which Maitland touched on was in relation to social and intellectual liberties. He noted that a foreigner thinking of England would have noted 'you have been great makers of clubs.'<sup>99</sup> Many were of pivotal importance in political, legal and social life. For instance, 'every judge on the bench is a member of at least one club'.<sup>100</sup> Maitland took as an example the Jockey Club. 'I believe that in the eyes of a large number of my fellow-countrymen the most important and august tribunal in England is not the House of Lords but the Jockey Club; and in this case we might see "jurisdiction" - they would use that word - exercised by the **Verein** [club] over those who stand outside it. I must not aspire to tell this story. But the beginning of it seems to be that some gentlemen form a club, buy a race-course, the famous Newmarket Heath, which is conveyed to trustees for them, and then they can say who shall and who shall not be admitted to it.'<sup>101</sup> Newmarket Heath had been purchased by the Jockey club 'without asking the King's or the State's permission.'<sup>102</sup> He also referred to 'your clubs and those luxurious club-houses which we see in Pall Mall.'<sup>103</sup> But there were numerous others. Clubs were also closely related to intellectual activities, for example the Royal Society, British Academy and numerous working men's clubs were of enormous importance in furthering science and learning. He noted that 'many learned societies', including the one he had founded, the Selden Society,

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<sup>97</sup> Maitland, **Collected Papers**, III, 322

<sup>98</sup> Maitland, **Collected Papers**, III, 394

<sup>99</sup> Maitland, **Political Thought**, xxxiii

<sup>100</sup> Maitland, **Collected Papers**, III, 378

<sup>101</sup> Maitland, **Collected Papers**, III, 376

<sup>102</sup> Maitland, **Collected Papers**, III, 385

<sup>103</sup> Maitland, **Collected Papers**, III, 377

were run by trustees, as were key institutions such as the London Library.<sup>104</sup> While it struck Tocqueville that America was notable for its associations, it has struck many that one of the great peculiarities of England is its creativity in the field of inventing quasi-groups: its charitable, social, scientific and literary, 'clubs' and associations.

A final area which Maitland sees as important is what he calls 'social experimentation' and which we might roughly term innovation. He writes as follows:- 'First and last the trust has been a most powerful instrument of social experimentation. To name some well-known instances:- It (in effect) enabled the landowner to devise [leave] his land by will until at length the legislature had to give way, though not until a rebellion had been caused and crushed. It (in effect) enabled a married woman to have property that was all her own until at length the legislature had to give way. It (in effect) enabled men to form joint-stock companies with limited liability, until at length the legislature had to give way. The case of the married woman is specially instructive. We see a prolonged experiment. It is deemed a great success. And at last it becomes impossible to maintain (in effect) one law for the poor and another for the rich, since, at least in general estimation, the tried and well-known "separate use" has been working well. Then on the other hand let us observe how impossible it would have been for the most courageous Court of Common Law to make or to suffer any experimentation in this quarter.'<sup>105</sup> Thus the device of the trust affected not only individuals, but categories - married women, the poor (through boards of guardians, Poor Law funds and charity), the young and so on. The way it raised the status of married women by protecting their property particularly impressed Maitland.<sup>106</sup> In general it allowed a flexibility and vagueness which allowed change: 'let us observe that Englishmen in one generation after another have had open to them a field of social experimentation such as could not possibly have been theirs, had not the trustee met the law's imperious demand for a definite owner.'<sup>107</sup>

Of course this is not to say that continental style corporations were completely neglected. They were available as well. But as Maitland points out, the fact that an alternative mechanism also existed took the strain off the corporation route. If a group of people could get a better deal out of being incorporated, they might at a later point seek one - as Oxford and Cambridge did in the seventeenth century. But they had a choice and thus were not wholly dependent on royal whim. This was tremendously important. He singled out as one of the great achievements of the trust idea that it 'has given us a liberal supplement for

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<sup>104</sup> Maitland, **Collected Papers**, III, 388

<sup>105</sup> Maitland, **Collected Papers**, III, 278-9

<sup>106</sup> Maitland, **Collected Papers**, III, 356

<sup>107</sup> Maitland, **Collected Papers**, III, 283

a necessarily meagre law of corporations'.<sup>108</sup> In Germany, where Roman law had conquered in the sixteenth century, there had lingered on various earlier forms of associations which were different. Much of Maitland's interest in German historical law was in the academic attempts to revise these alternatives, in particular the research on **genossenschaft** which he thought was best translated as 'Fellowship', which 'with its slight flavour of an old England may be our least inadequate word'.<sup>109</sup> But while the Germans had to try to revive or re-invent such associations, they had become a rich and multifarious species in England by the seventeenth century.

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Summarizing Maitland's illuminating insight into the solution to Tocqueville's puzzle concerning the origins of associations, we can say that in England from about the thirteenth century there began to develop a society which had various essential constituents. It had a powerful Crown and a ruling group in parliament. The centre was strong - but it was limited in its power by two other levels. In the middle was a crowd of unincorporated bodies, to a certain extent 'nobodies', in Maitland's phrase, but nobodies which are the essence of what would now be called 'Civil Society'. The secret, anti-State, organizations (mafia, triads ) which have been the bane of most governments were not necessary. The rights of association, so important later for the trades union and the labour movement, allowed people to associate. They were encouraged to put their energies into open activity.

Thus through the widening development of the concept of the Trust, there also, indirectly, developed a world of trust and openness, which is the basis not only of capitalism but also for modern science.<sup>110</sup> Maitland points out that this is such a large feature of the development of English civilization that it has become invisible. 'Now we in England have lived for a long while in an atmosphere of "trust," and the effects that it has had upon us have become so much part of ourselves that we ourselves are not likely to detect them. The trustee...is well known to all of us, and he becomes a centre from which analogies radiate.'<sup>111</sup> The whole system is based on trust, both presuming a widespread level of trustability and, by that assumption, creating it. 'If I convey land to you as a trustee for me, or as a trustee for my wife and children, there is not merely what our law calls a trust, there really is trust placed by me in you; I do trust

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<sup>108</sup> Maitland, **Collected Papers**, III, 279

<sup>109</sup> Maitland, **Political Theories**, xxv

<sup>110</sup> For the necessity of trust in economic development, see Fukuyama, **Trust**; for science, Shapin, **Social History**

<sup>111</sup> Maitland, **Collected Papers** III, 402

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you, I do place confidence, faith, reliance in you.<sup>112</sup> In many civilizations such trust in unrelated individuals would not be easy. Nor would it be easy to find people who were prepared, for no obvious reward, to carry out such duties, for 'a very high degree not only of honesty but of diligence has been required of trustees'.<sup>113</sup> The whole wide concept of public and disinterested service for others and for the community is related to the development of the trust. It is indeed a peculiar development and, if we combine Tocqueville with Maitland, one of the keys to the making of the modern world.

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<sup>112</sup> Maitland, **Equity**, 44

<sup>113</sup> Maitland, **Collected Papers**, III, 352