

Trust and Corporation

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Grünhut's *Zeitschrift für das Privat- and Öffentliche Recht*, Bd. XXXII [1904].

Not very long ago, in the pages of this *Review*, Dr Redlich, whose book on English Local Government we in England are admiring, did me the honour of referring to some words that I had written concerning our English Corporations and our English Trusts.¹ I have obtained permission to say with his assistance a few more words upon the same matter, in the hope that I may thereby invite attention to a part of our English legal history which, so far as my knowledge goes, has not attracted all the notice that it deserves.

Perhaps I need hardly say that we on this side of the sea are profoundly grateful to those foreign explorers who have been at pains to investigate our insular arrangements. Looking at us from the outside, it has been possible for them to teach us much about ourselves. Still we cannot but know that it is not merely for the sake of England that English law, both ancient and modern, has been examined. Is it not true that England has played a conspicuous, if a passive, part in that development of historical jurisprudence which was one of the most remarkable scientific achievements of the nineteenth century? Over and over again it has happened that our island has been able to supply just that piece of evidence, just that link in the chain of proof, which the Germanist wanted but could not find at home. Should I go too far if I said that no Germanistic theory is beyond dispute until it has been tested upon our English material?

Now I know of nothing English that is likely to be more instructive to students of legal history, and in particular to those who are concerned with Germanic law, than that *Rechtsinstitut* of ours which Dr Redlich described in the following well chosen words: “das Rechtsinstitut des Trust, das ursprünglich für gewisse Bedürfnisse des englischen Grundeigenthumsrechtes entstanden, nach und nach zu einem allgemeinen Rechtsinstitute ausgebildet worden ist und auf allen Gebieten des Rechtslebens praktische Bedeutung und eine ausserordentlich verfeinerte juristische Aushildung erlangt hat.”²

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.” And this is only the Trust’s last exploit. Dr Redlich is right when he speaks of it as an “allgemeine Rechtsinstitut.” It has all the generality, all the elasticity of Contract. 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.

We may imagine an English lawyer who was unfamiliar with the outlines of foreign law taking up the new Civil Code of Germany. “This” he would say, “seems a very admirable piece of work, worthy in every way of the high reputation of German jurists. But surely it is not a complete statement of German private law. Surely there is a large gap in it. I have looked for the Trust, but I cannot find it; and to omit the Trust is, I should have thought, almost as bad as to omit Contract.” And then he would look at his book-shelves and would see stout volumes entitled “Law of Trusts,” and he would open his “Reports” and would see trust everywhere, and he would remember how he was a trustee and how almost every man that he knew was a trustee.

Is it too bold of me to guess the sort of answer that he would receive from some German friend who had not studied England? “Well, before you blame us, you might tell us what sort of thing is this wonderful Trust of yours. You might at least point out the place where the supposed omission occurs. See, here is our general scheme of Private Law. Are we to place this precious *Rechtsinstitut* under the title *Sachenrecht* or should it stand under *Recht der Schuldverhältnisse*, or, to use a term which may be more familiar, *Obligationenrecht*?”

To this elementary question I know of no reply which would be given at once and as a matter of course by every English lawyer. We are told in one of our old books that in the year 1348 a certain English

lawyer found himself face to face with the words *contra inhibitionem novi operis*, and therefore said, “en ceux parolx il n’y ad pas d’entendment.” I am not at all sure that some men very learned in our law would not be inclined to give a similar answer if they were required to bring our Trust under any one of those rubrics which divide the German Code.

“Des englische Recht,” says Dr Redlich, “kennt keine Unterscheidung von öffentlichem und privatem Recht.” In the sense in which he wrote that sentence it is, I think, very true. Now-a-days young men who are beginning to study our law are expected to read books in which there is talk about this distinction: the distinction between Private Law and Public Law. Perhaps I might say that we regard those terms as potential rubrics. We think, or many of us think, that if all our law were put into a Code that pair of terms might conveniently appear in very large letters. But they are not technical terms. If I saw in an English newspaper that Mr A. B. had written a book on “Public Law,” my first guess would be that he had been writing about International Law. If an English newspaper called Mr. C. D. a “publicist,” I should think that he wrote articles in newspapers and magazines about political questions.

In the same sense it might be said that English Law knows no distinction between *Sachenrecht* and *Obligationenrecht*. It is needless to say that in England as elsewhere there is a great difference between owning a hundred gold coins and being owed a hundred pounds, and of course one of the first lessons that any beginner must learn is the apprehension of this difference. And then he will read in more or less speculative books—books of “General Jurisprudence”—about *iura in rem* and *iura in personam*, and perhaps will be taught that if English law were put into a Code, this distinction would appear very prominently. But here again we have much rather potential rubrics than technical terms. The technical concepts which the English lawyer will have to operate, the tools of his trade (if I may so speak), are of a different kind.

I have said this because, so it seems to me, 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. I am aware that the question how far this distinction was grasped in medieval Germany has been debated by distinguished Germanists, and I would not even appear to be intervening between Dr Laband and Dr Heusler. Still I cannot doubt who it is that has said the words that will satisfy the

student of English legal history. In the thirteenth century Englishmen find a distinction between the *actio in rem* and the *actio in personam* in those Roman books which they regard as the representatives of enlightened jurisprudence. They try to put their own actions—and they have a large number of separate actions, each with its own name, each with its own procedure—under these cosmopolitan rubrics. And what is the result? Very soon the result is that which Dr Laband has admirably stated:

Die Klage characterisirt sich nach dem, was der Kläger fordert, wozu ihm der Richter verhelfen soll, nicht nach dem Grunde, aus welchem er es fordert... Dagegen vermisst man in den Quellen des Mittelalters eine Characterisirung der Klagen nach dem zu Grunde liegenden Rechtsverhältniss und insbesondere der Unterscheidung dinglicher und persönlicher Klagen. Der der römischen Bezeichnung *actio in rem* scheinbar entsprechende Ausdruck *clage up gut* [in England *real action*] hat gar keinen Zusammenhang mit der juristischen Natur des Rechts des Klägers, sondern er bezieht sich nur darauf, class das bezeichnete Gut vom Kläger in Anspruch genommen wird.³

To this very day we are incumbered with those terms “real property” and “personal property” which serve us as approximate equivalents for *Liegenschaft* and *Fahrrnis*. The reason is that in the Middle Age, and indeed until 1854, the claimant of a movable could only obtain a judgment which gave his adversary a choice between giving up that thing and paying its value. And so, said we, there is no *actio realis* for a horse or a book. Such things are not “realty”; they are not “real property.” Whether this use of words is creditable to English lawyers who are living in the twentieth century is not here the question; but it seems to me exceedingly instructive.

For my own part if a foreign friend asked me to tell him in one word whether the right of the English *Destinatär* (the person for whom property is held in trust) is *dinglich* or *obligatorisch*, I should be inclined to say: “No, I cannot do that. If I said *dinglich*, that would be untrue. If I said *obligatorisch*, I should suggest what is false. 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 *Eigenthum*.”

This, then, is the first point to which I would ask attention; and I do so because, so far as my knowledge goes, this point is hardly to be seen upon the surface of those books about English law that a foreign student is most

likely to read.⁴

I

Before going further I should like to transcribe some sentences from an essay in legal history which has interested me deeply: I mean “Die langobardische Treuhand und ihre Umbildung zur Testamentsvollstreckung” by Dr Alfred Schultze.⁵ I think that we may see what is at the root the same *Rechtsinstitut* taking two different shapes in different ages and different lands, and perhaps a German observer will find our Trust the easier after a short excursion into Lombardy.

To be brief, the Lombard cannot make a genuine testament. He therefore transfers the whole or some part of his property to a *Treuhänder*, who is to carry out his instructions. Such instructions may leave greater or less liberty of action to the *Treuhänder*. He may only have to transfer the things to some named person or some particular church, or, at the other extreme, he may have an unlimited choice among the various means by which the soul of a dead man can be benefited. And now we will listen to Dr Schultze:

Das Treuhandverhältnis wird regelmässig begründet durch Vertrag zwischen dem letztwillig Verfügenden und dem von ihm zum Treuhänder Erkorenen. Dieser Vertrag stellt sich da, wo dem Treuhänder eine unmittelbare Gewalt über körperliche Sachen zugewiesen wird, häufig schon durch seine äussere Erscheinung als dinglicher Vertrag dar. Jene Sachen werden ihm per cartam zu dem gewollten Zweck übertragen. Dabei ist ausdrücklich von “tradere res” die Rede.... Einzelne Urkunden des Regesto di Farfa aus dem II Jahrhundert sprechen von der Investitur, die der Schenker dem Treuhänder ertheilt hat. Der Schenker tradirt an den Treuhänder nicht blos das fragliche Grundstück, sondern auch, wie das nach einer langobardischen Rechtssitte bei Uebertragung dinglicher Rechte zu geschehen pflegt, seine eigene Erwerbssurkunde und diejenigen seiner Vorgänger, soweit sie sich in seinem Besitze befinden. Er wendet, wenn er ein Franke ist, die fränkischen Investitursymbole, festuca notate, Messer, Scholle, Zweig und Handschuh, an.⁶

That is what I should have expected, an English reader would say. The land is conveyed to the trustee. Of course he has *ein dingliches Recht*. He has *Eigenthum*. In the Middle Age he will be *feoffatus, vestitus et seisitus; feffé, vestu et seisi*. And naturally die Erwerbssurkunden,

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“the title deeds,” are handed over to him. But we must return to Dr Schultze’s exposition:

Der Treuhänder hat, wie soeben nachgewiesen ist, kraft Rechtsnachfolge ein eigenes dingliches Recht an den ihm zugewiesenen körperlichen Sachen. Welcher Art ist dieses Recht? Wir haben zunächst einige Urkunden herauszuheben die keinen Zweifel daran lassen, dass hier der Treuhänder volles Eigenthum hat und in der Nutzniessung und Verfügung weder dinglich noch obligatorisch beschränkt ist. Es sind sämtlich Fälle, in denen der Geber die Sachen im Interesse seines Seelenheils nach freier Bestimmung des Treuhänders verwendet wissen will, sodass der letztere die Rolle des Dispensators im eigentlichen Sinne hat.⁷

This, however, was not the common case. Generally what the Treuhänder has is not

die volle, freie Verfügungsmacht, sondern ein in bestimmten Schranken gebanntes Veräußerungsrecht. “Er nimmt hier im Verhältnis zu der oben geschilderten Rechtsstellung des Dispensators *optimo jure* eine Minderstellung ein. Aber worin besteht die Minderung? Es kann an dieser Stelle noch unerörtert bleiben, ob hier der Treuhänder obligatorisch beschränkt, dem Geber oder dessen Erben oder sonst jemandem kraft Privatrechts obligatorisch verpflichtet ist. Es handelt sich hier vielmehr um die Frage, ob sein Recht ein dinglich gemindertes ist. Diese Frage ist zu bejahen.”⁸

Dr Schultze then proceeds to expound the Treuhänder’s right as

“Eigenthum, aber Eigenthum unter auflösender Bedingung, resolutiv bedingtes Eigenthum.” “Die Bedingung wurde existent wenn das Vergabungsobject dem gesetzten Zweck entfremdet oder der Zweck aus irgend einem Grunde unerfüllbar wurde. Die Folge war, dass das Eigenthum auf Seiten des Treuhänders erlosch und ohne jede Rücktradition dem Geber oder seinen Erben anfiel, die nun mit der dinglichen Klage (Eigenthumsklage) das Gut wieder in ihren Besitz bringen konnten.”⁹

Now that is not true of the English trustee. His right is not “resolutiv bedingtes Eigenthum.” I cite it, however, because of what follows. And what follows is highly instructive to those who would study English

“equity”: indeed some of Dr Schultze’s sentences might have been written about the England of the fourteenth or the England of the twentieth century:

Die in der schwebenden Resolutivbedingung liegende dingliche Beschränkung des Eigenthums zu treuer Hand konnte gegen Dritterwerber Wirkung haben.... Diese Wirkung gegen Dritte setzte Offenkundigkeit (Publizität) jener dinglichen Beschränkung voraus, ein solches Mass von Offenkundigkeit, dass jeder Dritterwerber ohne Härte der Beschränkung unterworfen werden konnte, gleichgültig ob er im einzelnen Falle wirklich davon wusste oder nicht. Nun mögen auch die Langobarden in Bezug auf Grundstücke früher eine volkrechtliche Form der Rechtsveränderung gekannt haben, welche den Act selbst im Augenblick seiner Vornahme den Volksgenossen in genügendem Masse kundthat (Vornahme auf dem Grundstück, in mallo). In der hier interessirenden Zeit war aber bei weitem vorherrschend und wurde jedenfalls bei den ordentlichen Vergabungen auf den Todesfall, auch denjenigen zu treuer Hand, ausschliesslich angewendet die Form der *traditio cartae*.... Jede Rechtsveränderung die vermitteltst *traditio cartae* stattgefunden hatte, war damit erschöpfend beurkundet.... Wer ein Grundstück in derivativer Weise erwerben wollte, erlangte daher über das Recht seines Auktors dadurch sichere Auskunft, dass er sich die carta vorweisen liess, die seinerzeit für den Auktor von dessen Vorgänger ausgestellt worden war. Es wurde sogar schon frühe üblich diese carte zur dauernden Sicherung der Legitimation sich mit dem Grundstück zusammen übereignen zu lassen. Und—das war nur eine selbstverständliche Folgerung—nicht bloß die Erwerbsurkunde des Auktors, sondern auch die in dessen Hand befindlichen sämtlichen Erwerbsurkunden seiner Vorgänger.... Wer also von einem Treuhänder ein Grundstück erwerben wollte, erkannte sofort bei Prüfung der bis zu diesem herabreichenden Urkunden die Treuhänder-Eigenschaft des Gegenparts, die Bedingtheit seines Eigenthums. Kümmerte er sich aber der Rechtssitte zuwider nicht um die Erwerbsurkunden, so lag dann darin, dass die Bedingung, unvorhergesehen, auch gegen ihn ihre Wirksamkeit entfaltete, keine Härte, der ihm etwa daraus erwachsende Schade traf ihn nicht unverschuldet.¹⁰

But what have we here?—an Englishman might say—why, it is our “doctrine of constructive notice,” the keystone which holds together the

lofty edifice of trusts that we have raised. These Lombards, he would add, seem to have gone a little too far, and with a “resolutiv bedingtes Eigenthum” we have not to do. But of course the *Eigenthum* of a piece of land is conveyed *per traditionem cartae*. And of course every prudent buyer of land will expect to see *die Erwerbssurkunden* which are in his Auktor’s hand and to have them handed over to himself when the sale is completed. “Kümmerte er sich aber der Rechtsitte zuwider nicht um die Erwerbssurkunden,” then there is no hardship if he is treated as knowing all that he would have discovered had he behaved as reasonable men behave. He has “constructive notice” of it all. “Der ihm etwa daraus erwachsende Schade trifft ihn nicht unverschuldet.”

We must make one other excerpt before we leave Lombardy:

<bq>Indessen dies galt nur für Liegenschaften. Dem Fahrnisverkehr fehlten, ebenso wie in den übrigen germanischen Rechten, Vorkehrungen, die einem die Uebereignung beschränkenden Geding Publizität im Verhältnis zu Dritten verschafft hätten.... Gewiss war der letztwillige Treuhänder auch in Ansehung der Mobilien durch die Zweckbestimmung rechtlich gebunden. Gewiss war er dinglich gebunden und haste, wie an Grundstücken, nur resolutiv bedingtes Eigenthum.... Hatte er die Mobilien aber bereits an die falsche Adresse befördert, so konnten die Erben des Donators gegen die dritten Besitzer, selbst wenn sie beim Erwerb die Sachlage überschaut hatten, nichts ausrichten. Der Grund, weswegen bei Liegenschaften alle Dritten der Wirkung des Gedings unterworfen wurden, war hier nicht gegeben... Waren die dem Treuhänder anvertrauten Mobilien durch Veruntrennung aus seinem Besitz gelangt und daher mit der dinglichen Rückforderungsklage “Malo ordine possides” nicht erreichbar, so trat an die Stelle eine persönliche Schadenersatzklage.¹¹</b1>

That does not go quite far enough, the English critic might say. If it could be proved that *der dritte Besitzer* actually knew of the “trust,” it does not seem to me equitable that he should be able to disregard it. Also it does not seem to me clear that if the movables can no longer be pursued, the claim of the *Destinatär* must of necessity be a mere *persönliche Schadenersatzklage* against the *Trenhänder*. But it is most remarkable to see our cousins the Lombards in these very ancient days seizing a distinction that is very familiar to us. The doctrine of “constructive notice” is not to be extended from land to movables.¹²

II

We may now turn to the England of the fourteenth century, and in the first place I may be suffered to recall a few general traits of the English law of that time, which, though they may be well enough known, should be had in memory.

A deep and wide gulf lies between *Liegenschaft* and *Fahrnis*. It is deeper and wider in England than elsewhere. This is due in part to our rigorous primogeniture, and in part to the successful efforts of the Church to claim as her own an exclusive jurisdiction over the movables of a dead man, whether he has made a last will or whether he has died intestate. One offshoot of the ancient Germanic *Trenhandschaft* is already a well established and flourishing institute. The English last will is a will with executors. If there is no will or no executor, an "administrator" appointed by the bishop fills the vacant place. This will is no longer a *donatio post obitum* of the old kind, but under canonical influence has assumed a truly testamentary character. The process which makes the executor into the "personal representative" of the dead man, his representative as regards all but his *Liegenschaft*, is already far advanced. It is a process which in course of time makes the English executor not unlike a Roman *haeres*. In later days when the Trust, strictly so called, had been developed, these two institutes, which indeed had a common root, began to influence each other. We began to think of the executor as being for many purposes very like a trustee. However, the Trust, properly so called, makes its appearance on the legal stage at a time when the Englishman can already make a true testament of his movables, and at a time when the relationship between the executor and the legatees is a matter with which the secular courts have no concern.

As to dealings with movables *inter vivos*, we cannot say that there is any great need for a new *Rechtsinstitut*. It is true that in the fourteenth century this part of our law is not highly developed. Still it meets the main wants of a community that knows little of commerce. We will notice in passing that the current language is often using a term which, when used in another context, will indicate the germ of the true Trust: namely the term that in Latin is *ad opus*, and in French *al oes*. Often it is said that one man holds goods or receives money *ad opus alterius*. But the Common Law is gradually acquiring such categories as deposit, mandate and so forth, which will adequately meet these cases. This part of our law is young and it can grow.

On the other hand, the land law is highly developed, and at every

point it is stiffened by a complicated system of actions and writs (*brevia*). A wonderful scheme of “estates”—I know not whether that word can be translated—has been elaborated: “estates in fee simple, estates in fee tail, estates for life, estates in remainder, estates in reversion, etc.”; and each “estate” is protected by its corresponding writ (*breve*). The judges, even if they were less conservative than they are, would find it difficult to introduce a new figure into this crowded scene. In particular we may notice that a “*resolutiv bedingtes Eigenthum*,” which Dr Schultze finds in Lombardy, is very well known and is doing very hard work. All our *Pfandrecht* is governed by this concept. More work than it is doing it could hardly do.

Then in the second half of the fourteenth century we see a new Court struggling for existence. It is that Court of Chancery whose name is to be inseverably connected with the Trust. The old idea that when ordinary justice fails, there is a reserve of extraordinary justice which the king can exercise is bearing new fruit. In civil (*privatrechtliche*) causes men make their way to the king’s Chancellor begging him in piteous terms to intervene “for the love of God and in the way of charity.” It is not of any defect in the material law that they complain; but somehow or another they cannot get justice. They are poor and helpless; their adversaries are rich and powerful. Sheriffs are partial; jurors are corrupt. But, whatever may be the case with penal justice, it is by no means clear that in civil suits there can be any room for a formless, extraordinary jurisdiction. Complaints against interference with the ordinary course of law were becoming loud, when something was found for the Chancellor to do, and something that he could do with general approval. I think it might be said that if the Court of Chancery saved the Trust, the Trust saved the Court of Chancery.

And now we come to the origin of the Trust. 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.¹³ 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.

Once more recourse is had to the *Treuhänder*. 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; *relevium*, *custodia haeredis*, *maritagium haeredis*, *escaeta*, all would follow as a matter of course. But here the Germanic *Gesammthandschafft* comes to our help. Enfooff five or perhaps ten friends zu gesammter Hand (“as joint tenants”). When one of them dies there is no inheritance; there is merely accrescence. The lord can claim nothing. If the number of the *feoffati* is running low, then indeed it will be prudent to introduce some new ones, and this can be done by some transferring and retransferring. But, if a little care be taken about this matter, the lord’s chance of getting anything is very small

Here is a principle that has served us well in the past and is serving us well in the present. The “Gesammthandprinzip” enables us to erect (if I may so speak) a wall of trustees which will not be always in need of repair. Some of those “charitable” trusts of which I am to speak hereafter will start with numerous trustees, and many years may pass away before any new documents are necessary. Two may die, three may die; but there is no inheritance; there is merely accrescence; what was owned by ten men, is now owned by eight or by seven; that is all.¹⁴

In a land in which Roman law has long been seriously studied it would be needless, I should imagine, for me to say that it is not in Roman books that Englishmen of the fourteenth century have discovered this device; but it may be well to remark that any talk of *fides*, *fiducia*, *fideicommissum* is singularly absent from the earliest documents in which our new *Rechtsinstitut* appears. The same may be said of the English word “trust.” All is being done under the cover of *ad opus*. In Old French this becomes *al oes*, *al ues* or the like. In the degraded French of Stratford-atte-Bow we see many varieties of spelling. It is not unusual for learned persons to restore the Latin *p* and to write *oeps* or *eops*. Finally in English mouths (which do not easily pronounce a French *u*) this word becomes entangled with the French *use*. The English for “ad opus meum” is “to my use.”

It is always interesting, if we can, to detect the point at which a new

institute or new concept enters the field of law. Hitherto the early history of our “feoffments to uses” has been but too little explored: I fear that the credit of thoroughly exploring it is reserved for some French or German scholar. However, there can be little doubt that the new practice first makes its appearance in the highest and noblest circles of society. I will mention one early example. The “feoffor” in this case is John of Gaunt, son of a King of England and himself at one time titular King of Castile. Among the persons who are to profit by the trust is his son Henry who will be our King Henry IV.

On the 3rd of February, 1399, “old John of Gaunt, time-honoured Lancaster” makes his testament.¹⁵ Thereby he disposes of his movables and he appoints seventeen executors, among whom are two bishops and three earls. To this instrument he annexes a “Codicillus” (as he calls it) which begins thus:

Item, la ou jeo Johan filz du Roy d’Engleterre, Duc de Lancastre, ay purchacez et fait purchacer a mon eops diverges seigneuries, manoirs, terres, tenementz, rentz, services, possessions, reversions et advoesons des benefices de seint esglises, ove leur appurtenances. . . si ay je fait faite cest cedula annexee a cest mon testament, contenant ma darrein et entier volente touchant les suisdites seigneuries, manoirs, terres, tenementz, rentz, services, possessions, reversions, avoesons ove leur appurtenances.

He then says what is to be done with these lands. Thus for example:

Item je vueille que mon trescher Batchelor Monsieur Robert Nevyll, William Gascoigne, mes treschers esquier Thomas de Radecliff et William Keteryng, et mon trescher clerk Thomas de Longley, qi de ma ordonnance vent enfeffez en [le] manoir de Bernolswyk en [le] Counte d’Everwyk facent annuelement paler a mes executours....

To be brief, certain sums of money are to be paid to the executors, who will apply them for pious purposes, and

adonques soit estat fait du dit manoir a mon trezaimie filz aizne Henry duc de Hereford et a ses heirs de son corps; et par defaute d’issue du ditz Henry, la remeindre¹⁶ a mez droiz heirs.

Then at the end stand these words:

Item je vueille que toutz autres seigneuries, manoirs, terrez... ove leurs appurtenances, a mon eops purchasez et remaignantz uncore es mains des enfeffez par moi a ce ordennez, soient apres ma mort (si je ne face autre ordenance en ma vie) donnez a l'avantdit Thomas mon filz a avoir a lui et a ses heirs de son corps issantz; et par defaute d'issue de son corps, la remeindre a l'avantdit Johan son frere et a sez heirs de son corps issantz; et par defaute d'issue de dit Johan, la remeindre a la susdite Johanne leur seur et a ses heirs de son corps issantz, et par defaute d'issue de la cite Johanne, la remeindre a mez drois heirs qui serront heirs del heritage de Lancastre: veuillantz toutez voies que toutes icestes mes volentes ordenances et devys en ceste cedula compris, soient tout accomplez par ceulx q'en averont l'estat et poveir, et par l'avys ordenance et conseil de gentz de loy, en la plus sure manere que en se purra ordenner.

We see what the situation is. The Duke has transferred various lands to various parties of friends and dependents. When he feels that death is approaching, he declares what his wishes are, and they fall under two heads. He desires to increase the funds which his executors are to expend for the good of his soul, and he desires also to make some provision for his younger and (so it happens) illegitimate children.

Apparently the new fashion spread with great rapidity. We have not in print so many collections of wills as we ought to have; but in such as have been published the mention of land held to the testator's "use" begins to appear somewhat suddenly in the last years of the fourteenth century and thenceforward it is common. We are obliged to suppose that the practice had existed for some time before it found legal protection. But that time seems to have been short. Between 1396 and 1403 the Chancellor's intervention had been demanded.¹⁷

It would have been very difficult for the old Courts, "the Courts of Common Law," to give any aid. As already said, the system of our land law had become prematurely ossified. The introduction without Act of Parliament of a new *dingliches Recht*, some new modification of *Eigenthum*, would have been impossible. In our documents we see no attempt to meet the new case by an adaptation of the terms that are employed when there is to be a "resolutiv bedingtes *Eigenthum*."¹⁸ And on the other hand we see a remarkable absence of those phrases which are currently used when an *obligatorischer Vertrag* is being made. No

care is taken to exact from the *Treuhänder* a formal promise that the trust shall be observed. From the first men seem to feel that a contract binding the trustees to the author of the trust, binding the *feoffati* to the *feoffator*, is not what is wanted.

Moreover, it was probably felt, though perhaps but dimly felt, that if once the old Courts began to take notice of these arrangements a great question of policy would have to be faced. The minds of the magnates were in all probability much divided. They wanted to make wills. But they were "lords," and it was not to their advantage that their "tenants" should make wills. And then there was one person in England who had much to gain and little to lose by a total suppression of this novelty. That person was the King, for he was always "lord" and never "tenant."

An open debate about this matter would have made it evident that if landowners, and more especially the magnates, were to make wills, the King would have a fair claim for compensation. Even medieval Englishmen must have seen that if the King could not "live of his own," he must live by taxes. The State must have a revenue. Perhaps we may say, therefore, that the kindest

thing that the old Courts could do for the nascent Trust was to look the other way. Certain it is that from a very early time some of our great lawyers were deeply engaged in the new practice. We have seen a certain William Gascoigne as a *Treuhänder* for John of Gaunt. He was already a distinguished lawyer. He was going to be Chief Justice of England and will be known to all Shakespeare's readers. Thomas Littleton (ob. 1481) when he expounds the English land law in a very famous book will have hardly a word to say about "feoffments to uses"; but when he makes his own will he will say, "Also I wulle that the feoffees to myn use [of certain lands] make a sure estate unto Richard Lyttelton my sonne, and to the heirs of his bodie."

When we consider where the king's interest lay, it is somewhat surprising that the important step should be taken by his first minister, the Chancellor. It seems very possible, however, that the step was taken without any calculation of loss and gain.¹⁹ We may suppose a scandalous case. Certain persons have been guilty of a flagrant act of dishonesty, condemned by all decent people. Here is an opportunity for the intervention of a Court which has been taught that it is not to intervene where the old Courts of Common Law offer a remedy. And as with politics, so with jurisprudence.

I doubt whether in the first instance our Chancellor troubled his

head about the “juristic nature” of the new *Rechtsinstitut* or asked himself whether the new chapter of English law that he was beginning to write would fall under the title *Sachenrecht* or under the title *Obligationenrecht*. In some scandalous case he compelled the trustees to do what honesty required. Men often act first and think afterwards.

For some time we see hesitation at important points. For example, we hear a doubt whether the trust could be enforced against the heir of a sole trustee. As already said, efforts were generally made to prevent this question arising: to prevent the land coming to the hands of one man. So long as the wall was properly repaired, there would be no inheriting. But on the whole our new *Rechtsinstitut* seems soon to find the line of least resistance and to move irresistibly forward towards an appointed goal.

III

We are to speak of the rights of the *Destinatär*, or in our jargon *cestui que trust*.²⁰ Postponing the question against whom those rights will be valid, we may ask how those rights are treated within the sphere of their validity. And we soon see that within that sphere they are treated as *Eigenthum* or as some of those modalities of *Eigenthum* in which our medieval land law is so rich. The *Destinatär* has an “estate,” not in the land, but in “the use.” This may be “an estate in fee simple, an estate for life, an estate in remainder,” and so forth. We might say that “the use” is turned into an incorporeal thing, an incorporeal piece of land; and in this incorporeal thing you may have all those rights, those “estates,” which you could have in a real, tangible piece of land. And then in course of time movable goods and mere *Forderungen* are held in trust, and we get, as it were, a second edition of our whole *Vermögensrecht*: a second and in some respects an amended edition. About all such matters as inheritance and alienation, the Chancellor’s Equity, so we say, is to follow the Common Law.

Another point was settled at an early date. The earliest trust is in the first instance a trust for the author of the trust; he is not only the author of the trust but he is the *Destinatär*. But it is as *Destinatär* and not as contracting party that he obtains the Chancellor’s assistance. The notion of contract is not that with which the Chancellor works in these cases: perhaps because the old Courts profess to enforce contracts. It is the destinatory who has the action, and he may be a person who was unborn when the trust was created. This is of importance for, curiously

enough, after some vacillation our Courts of Common Law have adopted the rule that in the case of a “*pactum in favorem tertii*” the *tertius* has no action.

But a true ownership, a truly *dingliches Recht*, the destinatory cannot have. In the common case a full and free and unconditioned ownership has been given to the trustees. Were the Chancellor to attempt to give the destinatory a truly *dingliches Recht*, the new Court would not be supplementing the work of the old Courts, but undoing it.

This brings us to the vital question, “Against whom can the destinatory’s right be enforced”? We see it enforced against the original trustees. Then after a little while we see it enforced against the heir of a trustee who has inherited the land; and, to speak more generally, we see it enforced against all those who by succession on death fill the place of a trustee. But what of a person to whom in breach of trust the trustee conveys the land? Such a person, so far as the old Courts can see, acquires ownership: full and free ownership: nothing less. The question is whether, although he be owner, he can be compelled to hold the land in trust for the destinatory. We soon learn that all is to depend upon the state of his “conscience” at the time when he acquired the ownership. It is to be a question of “notice.” This we are told already in 1471. “If my trustee conveys the land to a third person who well knows that the trustee holds for my use, I shall have a remedy in the Chancery against both of them: as well against the buyer as against the trustee: for in conscience he buys my land.”²¹

That is a basis upon which a lofty structure is reared. The concept with which the Chancellor commences his operations is that of a guilty conscience. If any one knowing that the land is held upon trust for me obtains the ownership of it, he does what is unconscientious and must be treated as a trustee for me. In conscience the land is “*ma terre*.”

This being established, no lawyer will be surprised to hear that the words “if he knew” are after a while followed by the words “or ought to have known,” or that a certain degree of negligence is coordinated with fraud. By the side of “actual notice” is placed “constructive notice.”

And now we may refer once more to what Dr Schultze has said of the Lombards:

Nun mögen auch die Langobarden in Bezug auf Grundstücke früher eine volksrechtliche Form der Rechtsveränderung gekannt haben, welche den Act selbst im Augenblick seiner Vornahme den

Volksgenossen in genügender Masse kundthat. In der trier interessirenden Zeit war aber bei weitem vorherrschend und wurde jedenfalls bei den ordentlichen Vergabungen auf den Todesfall, auch denjenigen zu treuer Hand, ausschliesslich angewendet die Form der *traditio cartae*.²²

With some modifications, which it would be long to explain and which for our purpose are not very important, these words are true of the England in which the Trust was born and are yet truer of modern England. The buyer before he pays the price and obtains the land will investigate the seller's title. He will ask for and examine the Urkunden ("deeds") which prove that the seller is owner, and unless the contract is specially worded, the seller of land is under a very onerous duty of demonstrating his ownership. This Rechtssitte, as Dr Schultze calls it, enabled the Chancery to set up an external and objective standard of diligence for purchasers of land: namely the conduct of a prudent purchaser. The man who took a conveyance of land might be supposed to know (and he had "constructive notice") of all such rights of destinatories as would have come to his knowledge if he had acted as a prudent purchaser would in his own interest have acted. "Kümmerte er sich aber der Rechtssitte zuwider nicht um die Erwerbsurkunden...der ihm etwa daraus erwachsende Schade traf ihn nicht unverschuldet." Quite so. Such a purchaser himself became a trustee. We might say that he became a trustee *ex delicto vel quasi*. If not guilty of *dolus*, he was guilty of that sort of negligence which is equivalent to *dolus*. He had shut his eyes in order that he might not see.

A truly *dingliches Recht* the Chancellor could not create. The trustee is owner. It had to be admitted that if the purchaser who acquired ownership from the trustee was, not only ignorant, but excusably ignorant of the rights of the destinatory, then he must be left to enjoy the ownership that he had obtained. If he had acted as a prudent purchaser, as the reasonable man behaves, then "his conscience was unaffected" and the Chancellor's Equity had no hold upon him. But the Court of Chancery screwed up the standard of diligence ever higher and higher. The judges who sat in that Court were experts in the creation of trusts. We might say that they could smell a trust a long way off, and they were apt to attribute to every reasonable man their own keen scent. They were apt to attribute to him a constructive notice of all those facts which he would have discovered if he had followed up every trail that was suggested by those *Erwerbsurkunden* that he had seen or ought to have seen.

Of late years there has been some reaction in favour of purchasers. The standard, we are told, is not to be raised yet higher and perhaps it is being slightly lowered. Still it is very hard for any man to acquire land in England without acquiring “constructive notice” of every trust that affects that land. I might almost say that this never happens except when some trustee has committed the grave crime of forgery.

It remains to be observed that a strong line was drawn in this as in other respects between the *entgeltliche* and the *unentgeltliche Handlung*. A man who acquired the land from the trustee without giving “value” for it was bound by the trust, even if at the time of acquisition he had no notice of it. It would be “against conscience” for him to retain the gift after he knew that it had been made in breach of trust. It was only the “purchaser for value” who could disregard the claims of the destinatory.

Also we see it established that the creditors of the trustee cannot exact payment of their debts out of the property that he holds in trust. And on the other hand the creditors of the destinatory can regard that property as part of his wealth. If we suppose that there is bankruptcy on both sides, this property will be divided, not among the creditors of the trustee but among the creditors of the destinatory. This, it need hardly be said, is an important point.

To produce all these results took a long time. The *Billigkeitsrecht* of the new Court moved slowly forward from precedent to precedent: but always towards one goal: namely, the strengthening at every point of the right of the destinatory. In our present context it may, for example, be interesting to notice that at one time it was currently said that the right of the destinatory could not be enforced against a corporation which had acquired the land, for a corporation has no conscience, and conscience is the basis of the equitable jurisdiction. But this precious deduction from the foreign *Fiktionstheorie* was long ago ignored, and it is the commonest thing to see a corporation as *Treuhänder*.

But perhaps the evolution of this *Rechtsinstitut* may be best seen in another quarter. To a modern Englishman it would seem plainly unjust and indeed intolerable that, if a sole trustee died intestate and without an heir, the rights of the destinatory should perish. And on the other hand it might seem to him unnatural that if the destinatory, “the owner of this land died intestate and without an heir, the trustee should thenceforward hold the land for his own benefit. But the Court, working merely with the idea of good conscience, could not attain what we now regard as the right result. In the first case (trustee’s death) the land fell back (escheat)

to the King or to some other feudal lord. He did not claim any right through the trustee or through the creator of the trust, and equity had no hold upon him, for his conscience was clean.²³ In the second case (destinatory's death), the trust was at an end. The trustee was owner, and there was no more to be said. The King or the feudal lord was not a destinatory. In both respects, however, modern legislation has reversed these old rules.

Thus we come by the idea of an "equitable ownership" or "ownership in equity." Supposing that a man is in equity the owner ("tenant in fee simple") of a piece of land, it makes very little difference to him that he is not also "owner at law" and that, as we say, "the legal ownership is outstanding in trustees." The only serious danger that he is incurring is that this "legal ownership" may come to a person who acquires it *bona fide*, for value, and without actual or constructive notice of his rights. And that is an uncommon event. It is an event of which practical lawyers must often be thinking when they give advice or compose documents; but still it is an uncommon event. I believe that for the ordinary thought of Englishmen "equitable ownership" is just ownership pure and simple, though it is subject to a peculiar, technical and not very intelligible rule in favour of *bona fide* purchasers. A professor of law will tell his pupils that they must not think, or at any rate must not begin by thinking, in this manner. He may tell them that the destinatory's rights are in history and in ultimate analysis not *dinglich* but *obligatorisch*: that they are valid only against those who for some special reason are bound to respect them. But let the Herr Professor say what he likes, so many persons are bound to respect these rights that practically they are almost as valuable as if they were *dominium*.²⁴

This is not all. Let us suppose that the thing that is held upon trust passes into the hands of one against whom the trust cannot be enforced. This may happen with land; it may more easily happen in the case of movables, because (for the reason that Dr Schultze has given) the Court could not extend its doctrine of constructive notice to traffic in movables. Now can we do no more for our destinatory than give him a mere Schadenersatzklage against the dishonest trustee? That will not always be a very effectual remedy. Dishonest people are often impecunious, insolvent people.

The Court of Chancery managed to do something more for its darling. What it did I cannot well describe in abstract terms, but perhaps I may say that it converted the "trust fund" into an incorporeal thing,

capable of being “invested” in different ways. Observe that metaphor of “investment.” We conceive that the “trust fund” can change its dress, but maintain its identity. To-day it appears as a piece of land; tomorrow it may be some gold coins in a purse; then it will be a sum of Consols; then it will be shares in a Railway Company, and then Peruvian Bonds. When all is going well, changes of investment may often be made; the trustees have been given power to make them. All along the “trust fund” retains its identity. “*Pretium succedit in locum rei,*” we might say, “*et res succedit in locum pretii.*” But the same idea is applied even when all is not going well. Suppose that a trustee sells land meaning to misappropriate the price. The price is paid to him in the shape of a bank-note which is now in his pocket. That bank-note belongs “in equity” to the destinatories. He pays it away as the price of shares in a company; those shares belong “in equity” to the destinatories. He becomes bankrupt; those shares will not be part of the property that is divisible among his creditors; they will belong to the destinatories. And then, again, if the trustee mixes “trust money” with his own money, we are taught to say that, so long as this is possible, we must suppose him to be an honest man and to be spending, not other people’s money, but his own. This idea of a “trust fund” that can be traced from investment to investment does not always work very easily, and for my own part I think it does scanty justice to the claims of the trustee’s creditors. But it is an important part of our system. The Court of Chancery struggled hard to prevent its darling, the destinatory, from falling to the level of a mere creditor. And it should be understood that he may often have more than one remedy. He may be able both to pursue a piece of land and to attack the trustee who alienated it. It is not for others to say in what order he shall use his rights, so long as he has not got what he lost or an equivalent for it.

To complete the picture we must add that a very high degree not only of honesty but of diligence has been required of trustees. In common opinion it has been too high, and of late our legislature, without definitely lowering it, has given the courts a discretionary power of dealing mercifully with honest men who have made mistakes or acted unwisely. The honest man brought to ruin by the commission of “a technical breach of trust,” brought to ruin at the suit of his friend’s children, has in the past been only too common a figure in English life. On the other hand, it was not until lately that the dishonest trustee who misappropriated money or other movables could be treated as a criminal.

Naturally there was a difficulty here, for “at law” the trustee was owner, and a man cannot be guilty of stealing what he both owns and possesses. But for half a century we have known the criminal breach of trust, and, though we do not call it theft, it can be severely punished.

Altogether it is certainly not of inadequate protection that a foreign jurist would speak if he examined the position of our destinator. Rather I should suppose that he would say that this lucky being, the spoilt child of English jurisprudence, has been favoured at the expense of principles and distinctions that ought to have been held sacred. At any rate, those who would understand how our “unincorporate bodies” have lived and flourished behind a hedge of trustees should understand that the right of the destinator, though we must not call it a true *dominium rei*, is something far better than the mere benefit of a promise.

IV

To describe even in outline the various uses to which our Trust has been put would require many pages. As we all know, when once a *Rechtsinstitut* has been established, it does not perish or become atrophied merely because its original function becomes unnecessary. Trusts may be instituted because landowners want to make testaments but cannot make testaments. A statute gives them the power to make testaments; but by this time the trust has found other work to do and does not die. There is a long and very difficult story to be told about the action of Henry VIII. He was losing his feudal revenue and struck a blow which did a good deal of harm, and harm which we feel at the present day. But in such a survey as the present what he did looks like an ineffectual attempt to dam a mighty current. The stream sweeps onward, carrying some rubbish with it.

Soon the Trust became very busy. For a while its chief employment was “the family settlement.” Of “the family settlement” I must say no word, except this, that the trust thus entered the service of a wealthy and powerful class: the class of great landowners who could command the best legal advice and the highest technical skill. Whether we like the result or not, we must confess that skill of a very high order was applied to the construction of these “settlements” of great landed estates. Everything that foresight could do was done to define the duties of the trustees. Sometimes they would be, as in the early cases, the mere depositaries of a nude *dominium*, bound only to keep it until it was asked for. At other times they would have many and complex duties to perform and

wide discretionary powers. 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.” Trusts of money or of invested funds became as usual as trusts of land. It may be worthy of notice that this was, at least in part, the effect of an extreme degree of testamentary freedom. Our law had got rid of the *Pflichttheil* altogether, and trusts in favour of the children of the projected marriage were a sort of substitute for it. However, in this region, what we have here to notice is that the trust became one of the commonest institutes of English law. Almost every well-to-do man was a trustee; and though the usual trusts might fall under a few great headings, still all the details (which had to be punctually observed) were to be found in lengthy documents; and a large liberty of constructing unusual trusts was both conceded in law and exercised in fact. To classify trusts is like classifying contracts.

I am well aware that all this has its dark side, and I do not claim admiration for it. But it should not escape us that a very wide field was secured for what I may call social experimentation. Let me give one example. In 1882 a revolutionary change was made in our *eheliches Güterrecht*. But this was no leap in the dark. It had been preceded by a prolonged course of experimentation. Our law about this matter had become osseous at an early time, and, especially as regards *Fahrnis*, was extremely unfavourable to the wife. There was no *Gemeinschaft*. The bride’s movables became the husband’s; if the wife acquired, she acquired for her husband. Now *eheliches Güterrecht*, when once it has taken a definite shape, will not easily be altered. Legislators are not easily persuaded to touch so vital a point, and we cannot readily conceive that large changes can be gradually made by the practice of the courts. You cannot transfer ownership from the husband to the wife by slow degrees.

But here the Trust comes to our help. We are not now talking of ownership strictly so called. Some trustees are to be owners. We are only going to speak of their duties. What is to prevent us, if we use words enough, from binding them to pay the income of a fund into the very hands of the wife and to take her written receipt for it? But the wedge was in, and it could be driven home. It was a long process; but one successful experiment followed another. At length the time came when four well-tested words (“for her separate use”) would give a mar-

ried woman a *Vermögen* of which she was the complete mistress “in equity”; and if there was no other trustee appointed, her husband had to be trustee. Then, rightly or wrongly we came to the conclusion that all this experimentation had led to satisfactory results. Our law of husband and wife was revolutionized. But great as was the change, it was in fact little more than the extension to all marriages of rules which had long been applied to the marriages of the well-to-do.

But the 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* and *Stiftungen* of all sorts and kinds had been created by Englishmen.

Whether our law knows or ever has known what foreign lawyers would call a *selbstständige Anstalt* might be a vexed question among us, if we had—but we have not—any turn for juristic speculation. For some centuries we have kept among our technical notions that of a “corporation sole.” Applied in the first instance to the parson of a parish church (*rector ecclesiae parochialis*) we have since the Reformation applied it also to bishops and to certain other ecclesiastical dignitaries. We have endeavoured to apply it also—much to our own disadvantage, so I think,—to our King or to the Crown; and in modern times we have been told by Gesetz that we ought to apply it to a few officers of the central government, e.g., the Postmaster-general. It seems to me a most unhappy notion: an attempt at personification that has not succeeded. Upon examination, our “corporation sole” turns out to be either a natural man or a juristic abortion: a sort of hybrid between *Anstalt* and *Mensch*. Our medieval lawyers were staunch realists. They would attribute the ownership of land to a man or to a body of men, but they would not attribute it to anything so unsubstantial as a personified *ecclesia* or a personified *dignitas*. Rather they would say that when the rector of a parish church died there was an interval during which the *gleba ecclesiae* was *herrenlos*. The *Eigenthum*, they said, was “in nubilous,” or “in gremio legis”; it existed only “en abéance”; that is “in spe.” And I do not think that an English lawyer is entitled to say that this is not our orthodox theory at the present day. Practically the question is of no importance. For a long time past this part of our law has ceased to grow, and I hope that we are not destined to see any new “corporations sole.”

We have had no need to cultivate the idea of a *selbstständige Anstalt*, because with us the *unselbstständige Anstalt* has long been a highly

developed and flourishing *Rechtsinstitut*. I believe that the English term which most closely corresponds to the *Anstalt* or the *Stiftung* of German legal literature is “a charity.” It is very possible that our concept of “a charity” would not cover every *Anstalt* or *Stiftung* that is known to German lawyers: but it is and from a remote time has been enormously wide. For example, one of our courts had lately to decide that the mere encouragement of sport is not “charity.” The annual giving of a prize to be competed for in a yacht-race is not a “charitable” purpose. On the other hand, “the total suppression of vivisection” is a charitable purpose, though it implies the repeal of an Act of Parliament, and though the judge who decides this question may be fully persuaded that this so-called “charity” will do much more harm than good. English judges have carefully refrained from any exact definition of a “charity”; but perhaps we may say that any *Zweck* which any reasonable person could regard as directly beneficial to the public or to some large and indefinite class of men is a “charitable” purpose. Some exception should be made of trusts which would fly in the face of morality or religion; but judges who were themselves stout adherents of the State Church have had to uphold as “charitable,” trusts which involved the maintenance of Catholicism, Presbyterianism, Judaism.

To the enforcement of charitable trusts we came in a very natural way and at an early date. A trust for persons shades off, we might say, into a trust for a *Zweck*. We are not, it will be remembered, speaking of true ownership. Ownership supposes an owner. We cannot put ownership into an indefinite mass of men; and, according to our English ideas, we cannot put ownership into a *Zweck*. I should say that there are vast masses of *Zweckvermögen* in England, but the owner is always man or corporation. As regards the trust, however, transitions are easy. You may start with a trust for the education of my son and for his education in a particular manner. It is easy to pass from this by slow degrees to the education of the boys of the neighbourhood, though in the process of transition the definite destinatory may disappear and leave only a *Zweck* behind him.²⁵

At any rate, in 1601 there was already a vast mass of *Zweckvermögen* in the country; a very large number of *unselbstständige Stiftungen* had come into existence. A famous *Gesetz* of that year became the basis of our law of Charitable Trusts, and their creation was directly encouraged. There being no problem about personality to be solved, the courts for a long while showed every favour to the authors of “charitable”

trusts. In particular, it was settled that where there was a “charitable” Zweck there was to be no trouble about “perpetuity.” The exact import of this remark could not be explained in two or three words. But, as might be supposed, even the Englishman, when he is making a trust of the ordinary private kind, finds that the law sets some limits to his power of bestowing benefits upon a long series of unborn destinatories; and these limits are formulated in what we know as “the rule against perpetuities.” Well, it was settled that where there is “charity,” there can be no trouble about “perpetuity.”²⁶

It will occur to my readers that it must have been necessary for English lawyers to make or to find some juristic person in whom the benefit of the “charitable” trust would inhere and who would be the destinatory. But that is not true. It will be understood that in external litigation—e.g., if there were an adverse claim to a piece of land held by the trustees—the interests of the trust would be fully represented by the trustees. Then if it were necessary to take proceedings against the trustees to compel them to observe the trust, the Reichsanwalt (Attorney-General) would appear. We find it said long ago that it is for the King “ut parens patriae” to intervene for this purpose. But we have stopped far short of any theory which would make the State into the true destinatory (*cestui que trust*) of all charitable trusts. Catholics, Wesleyans, Jews would certainly be surprised if they were told that their cathedrals, chapels, synagogues were in any sense *Staatsvermögen*. We are not good at making juristic theories, but of the various concepts that seem to be offered to us by German books, it seems to me that *Zweckvermögen* is that which most nearly corresponds to our way of thinking about our “charities.”

That great abuses took place in this matter of charitable trusts is undeniable. Slowly we were convinced by sad experience that in the way of supervision something more was necessary than the mere administration of the law (technically of “equity”) at the instance of a *Staatsanwalt* who was casually set in motion by some person who happened to see that the trustees were not doing their duty. Since 1853 such supervision has been supplied by a central *Behörde* (the Charity Commissioners); but it is much rather supervision than control, and, so far from any check being placed on the creation of new *Stiftungen*, we in 1891 repealed a law which since 1736 had prevented men from giving land to “charity” by testament.²⁷

I understand that in the case of an *unselbstständige Stiftung* Ger-

man legal doctrine knows a *Treuhänder* or *Fiduziar*, who in many respects would resemble our trustee, and I think that I might bring to light an important point by quoting some words that I read in Dr Regelsberger's Pandekten:

Es hat ferner die Ansicht gute Gründe für sich, dass das Zweckvermögen dem Zugriff von Gläubigern des Fiduziars entrückt ist, deren Ansprüche nicht aus dem Zweckvermögen erwachsen sind, dass ferner im Konkurs des Fiduziars oder bei Verhängung einer Vermögensziehung für das Zweckvermögen ein Aussonderungsrecht in Anspruch genommen werden kann, da der Empfänger zwar Rechtsträger, aber nur im fremden Interesse ist.²⁸

Now in England these would not be probable opinions they would be obvious and elementary truths. The trustee's creditors have nothing whatever to do with the trust property. Our unselfständige Anstalt lives behind a wall that was erected in the interests of the richest and most powerful class of Englishmen: it is as safe as the duke and the millionaire.

But the wall will need repairs.

Das Rechtssubject, dem bei einer unselfständigen Gründung das Zweckvermögen zugewendet wird, ist (says Dr Regelsberger) in der Regel eine juristische Person, denn nur sie bietet einen dauernden Stützpunkt.²⁹

We have not found that to be true. Doubtless a corporation is, because of its permanence, a convenient trustee. But it is a matter of convenience. By means of the Germanic *Gesammthandschaft* and of a power given to the surviving trustees—or perhaps to some destinatories, or perhaps to other people (e.g., the catholic bishop of the diocese for the time being)—of appointing new trustees, a great deal of permanence can be obtained at a cost that is not serious if the property is of any considerable value. Extreme cases, such as that of a sole trustee who is wandering about in Central Africa with the ownership of some English land in his nomadic person, can be met by an order of the Court (“a vesting order”) taking the ownership out of him and putting it in some more accessible receptacle. We have spent a great deal of pains over this matter. I am far from saying that all our devices are elegant. On juristic

elegance we do not pride ourselves, but we know how to keep the roof weather-tight.

And here it should be observed that many reformers of our “charities” have deliberately preferred that “charitable trusts” should be confided, not to corporations, but to “natural persons.” It is said—and appeal is made to long experience—that men are more conscientious when they are doing acts in their own names than when they are using the name of a corporation. In consequence of this prevailing opinion, all sorts of expedients have been devised by Parliament for simplifying and cheapening those transitions of *Eigenthum* which are inevitable where mortal men are the *Stützpunkt* of an *unselbstständige Stiftung*. Some of these would shock a theorist. In the case of certain places of worship, we may see the *dominium* taken out of one set of men and put into another set of men by the mere vote of an assembly—an unincorporated congregation of Nonconformists.³⁰ Of course no rules of merely private law can explain this; but that does not trouble us.

This brings us to a point at which the Trust performed a signal service. 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.

By way of contrast I may be allowed to cite a few words written by Dr Hinschius:³¹

Das frühere Staatskirchentum konnte, als es in Folge der veränderten Verhältnisse neben der herrschenden Kirche noch einzelne andere Religionsgesellschaften zu dulden anfang, diese nicht als reine Privatvereine gelten lassen, da es die Religion als Staatssache ansah. Vielmehr musste es aus diesem Grunde zu dem Standpunkte gelangen, solche Genosserschaften in gewissem Umfange als Korporationen mit öffentlichen Rechten zu behandeln, sie aber andererseits weitgehenden staadichen Kontrollen und staatlichen Eingriffen zu unterwerfen.³²

But just what, according to Dr Hinschius, could not be done, was in England the easy and obvious thing to do. If in 1688 the choice had lain between conceding no toleration at all and forming corporations of Nonconformists, and even “Korporationen mit öffentlichen Rechten,” there

can be little doubt that “das herrschende Staatskirchentum” 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 Staatskirchentum 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.

Now I know very well that our way of dealing with all the churches, except that which is “by law established” (and in America and the great English colonies even that exception need not be made), looks grotesque to some of those who see it from the outside. They are surprised when they learn that such an “historic organism” as the Church of Rome, “einem Privatverein, einer Ballspielgesellschaft rechtlich gleichsteht.”³³ But when they have done laughing at us, the upshot of their complaint or their warning is, not that we have not made this historic organism comfortable enough, but that we have made it too comfortable.

I have spoken of our “charity” as an *Anstalt* or *Stiftung*; but, as might be expected in a land where men have been very free to create such “charitable trusts” as they pleased, *anstaltliche* and *genossenschaftliche* threads have been interwoven in every conceivable fashion. And this has been so from the very first. In dealing with charitable trusts one by one, our Courts have not been compelled to make any severe classification. *Anstalt* or *Genossenschaft* was not a dilemma which every trust had to face, though I suppose that what would be called an *anstaltliches Element* is implicit in our notion of a charity. This seems particularly noticeable in the ecclesiastical region. There is a piece of ground with a building on it which is used as a place of

worship. Who or what is it that in this instance stands behind the trustees? Shall we say *Anstalt* or shall we say *Verein*?

No general answer could be given. We must look at the "trust deed." We may find that as a matter of fact the trustees are little better than automata whose springs are controlled by the catholic bishop, or by the central council ("Conference") of the Wesleyans; or we may find that the trustees themselves have wide discretionary powers. A certain amount of *Zweck* there must be, for otherwise the trust would not be "charitable." But this demand is satisfied by the fact that the building is to be used for public worship. If, however, we raise the question who shall preach here, what shall he preach, who shall appoint, who shall dismiss him, then we are face to face with almost every conceivable type of organization from centralized and absolute monarchy to decentralized democracy and the autonomy of the independent congregation. To say nothing of the Catholics, it is well known that our Protestant Nonconformists have differed from each other much rather about Church government than about theological dogma: but all of them have found satisfaction for their various ideals of ecclesiastical polity under the shadow of our trusts.

V

This brings us to our "unincorporated bodies," and by way of a first example I should like to mention the Wesleyans. They have a very elaborate and a highly centralized constitution, the primary outlines of which are to be found in an *Urkunde* to which John Wesley set his seal in 1784. Thereby he declared the trusts upon which he was holding certain lands and buildings that had been conveyed to him in various parts of England. 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, but the trust deeds all follow one model, devised by a famous lawyer in 1832—the printed copy that lies before me fills more than forty pages—and these deeds institute a form of government so centralized that Rome might be proud of it, though the central organ is no pope, but a council.

But we must not dwell any longer on cases in which there is a "charitable trust," for, as already said, there is in these cases no pressing demand for a personal destinatory. We can, if we please, think of the charitable *Zweck* as filling the place that is filled by a person in the ordinary private trust. When, however, we leave behind us the province,

the wide province, of “charity,” then—so we might argue *a priori*—a question about personality must arise. There will here be no *Zweck* that is protected as being “beneficial to the public.” There will here be no intervention of a *Staatsanwalt* who represents the “*parens patriae*.” Must there not therefore be some destinatory who is either a natural or else a juristic person? Can we have a trust for a *Genossenschaft*, unless it is endowed with personality, or unless it is steadily regarded as being a mere collective name for certain natural persons? I believe that our answer should be that in theory we cannot, but that in practice we can. If then we ask how there can be this divergence between theory and practice, 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 attacks of inadequate and individualistic theories.

We should all agree that, if an *Anstalt* or a *Genossenschaft* is to live and thrive, it must be efficiently defended by law against external enemies. On the other hand, experience seems to show that it can live and thrive, although the only theories that lawyers hold about its internal affairs are inadequate. Let me dwell for a moment on both of these truths.

Our *Anstalt*, or our *Genossenschaft*, or whatever it may be, 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. If there is theft, the thief will be accused of stealing the goods of Mr A. B. and Mr C. D., and not one word will be said of the trust. If there is a dispute about a boundary, Mr A. B. and Mr C. D. will bring or defend the action. It is here to be remembered that during the age in which the Trust was taking shape all this external litigation went on before courts where nothing could be said about trusts. The judges in those courts, if I may so say, could only see the wall of trustees and could see nothing that lay beyond it. Thus in a conflict with an external foe no question about personality could arise. A great deal of ingenuity had been spent in bringing about this result.

But if there be this hard exterior shell, then there is no longer any pressing demand for juristic theory. Years may pass by, decades, even centuries, before jurisprudence is called upon to decide exactly what it is that lies within the shell. And if what lies within is some

Genossenschaft, it may slowly and silently change its shape many times before it is compelled to explain its constitution to a public tribunal. Disputes there will be; but the disputants will be very unwilling to call in the policeman. This unwillingness may reach its highest point in the case of religious bodies. Englishmen are a litigious race, and religious people have always plenty to quarrel about. Still they are very reluctant to seek the judgment seat of Gallio. As is well known, our "Law Reports," beginning in the day of Edward I, are a mountainous mass. Almost every side of English life is revealed in them. But if you search them through 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. And what is true of religious bodies, is hardly less true of many other *Vereine*, such as our "clubs." Even the "kampflustige Engländer," whom Ihering admired, would, as we say, think once, twice, thrice, before he appealed to a court of law against the decision of the committee or the general meeting. I say "appealed," and believe that this is the word that he would use, for the thought of a "jurisdiction" inherent in the *Genossenschaft* is strong in us, and I believe that it is at its strongest where there is no formal corporation. And so, the external wall being kept in good repair, our English legal *Dogmatik* may have no theory or a wholly inadequate and antiquated theory of what goes on behind. And to some of us that seems a desirable state of affairs. Shameful though it may be to say this, we fear the petrifying action of juristic theory.

And now may I name a few typical instances of "unincorporated bodies" that have lived behind the trustee wall?

I imagine a foreign tourist, with Bädiker in hand, visiting one of our "Inns of Court": let us say Lincoln's Inn.³⁴ He sees the chapel and the library and the dining-hall; he sees the external gates that are shut at night. It is in many respects much like such colleges as he may see at Oxford and Cambridge. On inquiry he hears of an ancient constitution that had taken shape before 1422, and we know not how much earlier. He learns that something in the way of legal education is being done by these Inns of Court, and that for this purpose a federal organ, a Council of Legal Education, has been established. He learns that no man can practice as an advocate in any of the higher courts who is not a member of one of the four Inns and who has not there received the degree of "barrister-at-law." He would learn that these Inns have been very free to dictate the terms upon which this degree is given. He would learn that

the Inn has in its hands a terrible, if rarely exercised, power of expelling (“disbarring”) a member for dishonourable or unprofessional conduct, of excluding him from the courts in which he has been making his living, of ruining him and disgracing him. He would learn that in such a case there might be an appeal to the judges of our High Court: but not to them as a public tribunal: to them as “visitors” and as constituting, we might say, a second instance of the domestic forum.

Well, he might say, apparently we have some curious hybrid—and we must expect such things in England—between an *Anstalt des öffentlichen Rechtes* and a *privilegierte Korporation*. Nothing of the sort, an English friend would reply; you have here a *Privatverein* which has not even juristic personality. It might—such at least our theory has been—dissolve itself tomorrow, and its members might divide the property that is held for them by trustees. And indeed there was until lately an Inn of a somewhat similar character, the ancient Inn of the “Serjeants at Law,” and, as there were to be no more serjeants, its members dissolved the *Verein* and divided their property. Many people thought that this dissolution of an ancient society was to be regretted; there was a little war in the newspapers about it; but as to the legal right we were told that there was no doubt.

It need hardly be said that the case of these Inns of Court is in a certain sense anomalous. Such powers as they wield could not be acquired at the present day by any *Privatverein*, and it would not be too much to say that we do not exactly know how or when those powers were acquired, for the beginning of these societies of lawyers was very humble and is very dark. But, before we leave them, let us remember that the English judges who received and repeated a great deal of the canonistic learning about corporations, *Fiktionstheorie*, *Concessionstheorie* and so forth, were to a man members of these *Körperschaften* and had never found that the want of juristic personality was a serious misfortune. Our lawyers were rich and influential people. They could easily have obtained incorporation had they desired it. They did not desire it.

But let us come to modern cases. To-day German ships and Austrian ships are carrying into all the seas the name of the keeper of a coffee-house, the name of Edward Lloyd. At the end of the seventeenth century he kept a coffee-house in the City of London, which was frequented by “underwriters” or marine insurers. Now from 1720 onwards these men had to do their business in the most purely individualistic

fashion. In order to protect two privileged corporations, which had lent money to the State, even a simple *Gesellschaft* among underwriters was forbidden. Every insurer had to act for himself and for himself only. We might not expect to see such individualistic units coalescing so as to form a compactly organized body—and this too not in the Middle Age but in the eighteenth century. However, these men had common interests: an interest in obtaining Information, an interest in exposing fraud and resisting fraudulent claims. There was a subscription; there was a small “trust fund”; the exclusive use of the “coffee house” was obtained. The *Verein* grew and grew. During the great wars of the Napoleonic age, “the Committee for regulating the affairs of Lloyd’s Coffee House” became a great power. But the organization was still very loose until 1811, when a trust deed was executed and bore more than eleven hundred signatures. I must not attempt to tell all that “Lloyd’s” has done for England. The story should be better known in Germany, because the hero of it, J. J. Angerstein, though he came to us from Russia, was of German parentage. But until 1871 Lloyd’s was an unincorporated *Verein* without the least trace (at least so we said) of juristic personality about it. And when incorporation came in 1871, the chief reason for the change was to be found in no ordinary event, but in the recovery from the bottom of the Zuyder Zee of a large mass of treasure which had been lying there since 1799, and which belonged—well, owing to the destruction of records by an accidental fire, no one could exactly say to whom it belonged. In the life of such a *Verein* “incorporation” appears as a mere event. We could not even compare it to the attainment of full age. Rather it is as if a “natural person” bought a type-writing machine or took lessons in stenography.³⁵

Even more instructive is the story of the London Stock Exchange.³⁶ Here also we see small beginnings. In the eighteenth century the men who deal in stocks frequent certain coffee-houses: in particular “Jonathan’s.” They begin to form a club. They pay the owner an annual sum to exclude those whom they have not elected into their society. In 1773 they moved to more commodious rooms. Those who used the rooms paid sixpence a day. In 1802 a costly site was bought, a costly building erected, and an elaborate constitution was formulated in a “deed of settlement.” There was a capital of £20,000 divided into 400 shares. Behind the trustees stood a body of “proprietors,” who had found the money; and behind the “proprietors” stood a much larger body of “members,” whose subscriptions formed the income that was divided among the

“proprietors.” And then there was building and always more building. In 1876 there was a new “deed of settlement”; in 1882 large changes were made in it; there was a capital of £240,000 divided into 20,000 shares.

Into details we must not enter. Suffice it that the organization is of a high type. It might, for example, strike one at first that the shares of the “proprietors” would, by the natural operation of private law, be often passing into the hands of people who were in no wise interested in the sort of business that is done on the Stock Exchange, and that thus the *genossenschaftliche* character of the constitution would be destroyed. But that danger could be obviated. There was nothing to prevent the original subscribers from agreeing that the shares could only be sold to members of the Stock Exchange, and that, if by inheritance a share came to other hands, it must be sold within a twelvemonth. Such regulations have not prevented the shares from being valuable.

In 1877 a Royal Commission was appointed to consider the Stock Exchange. It heard evidence; it issued a report; it made recommendations. A majority of its members recommended that the Stock Exchange should be incorporated by royal charter or Act of Parliament.

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. Something had been said about the submission of the “bye-laws” of the corporation to the approval of a central Behörde, the Board of Trade. That was the cloven hoof. *Ex pede diabolium*.³⁷

Now, unless we have regard to what an Englishman would call “mere technicalities,” it would not, I think, be easy to find anything that a corporation could do and that is not being done by this *nicht rechtsfähiger Verein*. It legislates profusely. Its representative among the Royal Commissioners did not scruple to speak of “legislation.” And then he told how it did justice and enforced a higher standard of morality than the law can reach. And a terrible justice it is. Expulsion brings with it disgrace and ruin, and minor punishments are inflicted. In current language the committee is said to “pronounce a sentence” of suspension for a year, or two years or five years.

The “quasi-judicial” power of the body over its members—*quasi* is one of the few Latin words that English lawyers really love—is made to look all the more judicial by the manner in which it is treated by our courts of law. A man who is expelled from one of our clubs,—or (to use

a delicate phrase) whose name is removed from the list of members—will sometimes complain to a public court. That court will insist on a strict observance of any procedure that is formulated in the written or printed “rules” of the club; but also there may be talk of “natural justice.” Thereby is meant an observance of those forms which should secure for every accused person a full and fair trial. In particular, a definite accusation should be definitely made, and the accused should have a sufficient opportunity of meeting it. Whatever the printed rules may say, it is not easy to be supposed that a man has placed his rights beyond that protection which should be afforded to all men by “natural justice.” Theoretically the “rules,” written or unwritten, may only be the terms of a contract, still the thought that this man is complaining that justice has been denied to him by those who were bound to do it, often finds practical expression. The dread of a *Vereinsheerrschaft* is hardly represented among us.

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 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. I fancy, however, that some men who have been excluded from this sacred heath (“warned off Newmarket Heath” is our phrase) would have much preferred the major excommunication of that “historic organism” the Church of Rome.

It will have been observed that I have been choosing examples from the eighteenth century: 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. All this tended to make our English jurisprudence disorderly, but also gave to it something of the character of an experimental science, and that I hope it will never lose.

But surely, it will be said, you must have some juristic theory about the constitution of the *Privatrein*: some theory, for example, about your clubs and those luxurious clubhouses which we see in Pall Mall.

Yes, we have, and it is a purely individualistic theory. This it must

necessarily be. As there is no “charity” in the case, the trust must be a trust for persons, and any attempt to make it a trust for unascertained persons (future members) would soon come into collision with that “rule against perpetuities” which keeps the *Familienfideicommiss* within moderate bounds. So really we have no tools to work with except such as are well known to all lawyers. Behind the wall of trustees we have *Miteigentum* and *Vertrag*. We say that “in equity” the original members were the only destinatories: they were *Miteigenthümer* with *Gesamthandschaft*; but at the same time they contracted to observe certain rules.

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.³⁸ (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. But every judge on the bench is a member of at least one club, and we know that, if a thousand tacit contracts have to be discovered, a tolerable result will be attained. We may remember that the State did not fall to pieces when philosophers and jurists declared that it was the outcome of contract.

There are some signs that in course of time we may be driven out of this theory. The State has begun to tax clubs as it taxes corporations.³⁹ When we have laid down as a very general principle that, when a man gains any property upon the death of another, he must pay something to the State, it becomes plain to us that the property of a club will escape this sort of taxation. It would be ridiculous, and indeed impossible, to hold that, whenever a member of a club dies, some taxable increment of wealth accrues to every one of his fellows. So the property of the “unincorporated body” is to be taxed as if it belonged to a corporation. This is a step forward. Strange operations with *Miteigentum* and *Vertrag* must, I should suppose, have been very familiar to German jurists in days when corporateness was not to be had upon easy terms. But what I am concerned to remark is that, owing to the hard exterior shell pro-

vided by a trust, the inadequacy of our theories was seldom brought to the light of day.

Every now and again a court of law may have a word to say about a club; but you will find nothing about club-property in our institutional treatises. And yet the value of those houses in London, their sites and their contents, is very great, and almost every English lawyer is interested, personally interested, in one of them.

A comparison between our unincorporated *Verein* and the *nichtrechtsfähiger Verein* of the new German code might be very instructive; but perhaps the first difference that would strike anyone who undertook the task would be this, that, whereas in the German case almost every conceivable question has been forestalled by scientific and controversial discussion, there is in the English case very little to be read. We have a few decisions, dotted about here and there; but they have to be read with caution, for each decision deals only with some one type of *Verein*, and the types are endless. I might perhaps say that no attempt has been made to provide answers for half the questions that have been raised, for example, by Dr Gierke. And yet let me repeat that our *Vereine ohne Rechtsfähigkeit* are very numerous, that some of them are already old, and that some of them are wealthy.⁴⁰

One of the points that is clear (and here we differ from the German code) is that our unincorporated *Verein* is not to be likened to a *Gesellschaft* (partnership): at all events this is not to be done when the *Verein* is a "club" of the common type.⁴¹ Parenthetically I may observe that for the present purpose the English for *Gesellschaft* is "Partnership" and the English for *Verein* is "Society." Now in the early days of clubs an attempt was made to treat the club as a *Gesellschaft*. The *Gesellschaft* was an old well-established institute, and an effort was made to bring the new creature under the old rubric. That effort has, however, been definitely abandoned and we are now taught, not only that the club is not a *Gesellschaft*, but that you cannot as a general rule argue from the one to the other. Since 1890 we have a statutory definition of a *Gesellschaft*: "Partnership is the relation which subsists between persons carrying on a business in common with a view of profit."⁴² A club would not fall within this definition.

The chief practical interest of this doctrine, that a club is not to be assimilated to a *Gesellschaft*, lies in the fact that the committee of an English club has no general power of contracting on behalf of the members within a sphere marked out by the affairs of the club. A true corpo-

rate liability could not be manufactured, and, as I shall remark below, our courts were setting their faces against any attempt to establish a limited liability. The supposition as regards the club is that the members pay their subscriptions in advance, and that the committee has ready money to meet all current expenses. On paper that is not satisfactory. I believe that cases must pretty frequently occur in which a tradesman who has supplied wine or books or other goods for the use of the club would have great difficulty in discovering the other contractor. We have no such rule (and here again we differ from the German code) as that the person who professes to act on behalf of an unincorporated *Verein* always personally liable;⁴³ and I think the tradesman could often be forced to admit that he had not given credit to any man, the truth being that he thought of the club as a person. I can only say that scandals, though not absolutely unknown,⁴⁴ have been very rare; that the members of the club would in all probability treat the case as if it were one of corporate liability; and that London tradesmen are willing enough to supply goods to clubs on a large scale. If there is to be extraordinary expenditure, if, for example, a new wing is to be added to the building, money to a large amount can often be borrowed at a very moderate rate of interest. We know a "mortgage without personal liability"; and that has been useful. Strictly speaking there is no debtor; but the creditor has various ways by which he can obtain payment: in particular he can sell the land.

Deliktsfähigkeit is an interesting and at the present time it is perhaps a burning point. A little while ago English lawyers would probably have denied that anything resembling corporate liability could be established in this quarter. Any liability beyond that of the man who does the unlawful act must be that of a principal for the acts of an agent, or of a master for the acts of a servant, and if there is any liability at all, it must be unlimited. But this is now very doubtful. Our highest court (the House of Lords) has lately held that a trade union is *deliktsfähig*: in other words, that the damage done by the organized action of this unincorporated *Verein* must be paid for out of the property held by its trustees. Now a trade union is an unincorporated *Verein* of a somewhat exceptional sort. It is the subject of special Statutes which have conferred upon it some, but not all, of those legal qualities which we associate with incorporation. Whether this decision, which made a great noise, is attributable to this exceptional element, or whether it is to be based upon a broader ground, is not absolutely plain. The trade unionists are dissatisfied about this and some other matters, and what the results of

their agitation will be I cannot say. The one thing that it is safe to predict is that in England *socialpolitische* will take precedence of *rechtswissenschaftliche* considerations. As to the broader question, now that a beginning has once been made, I believe that the situation could be well described in some words that I will borrow from Dr Gierke:

Vielleicht bildet sich ein Gewohnheitsrecht das die nicht rechtsfähigen Vereine in Ansehung der Haftung für widerrechtliche Schadenszufügung dem Körperschaftsrecht unterstellt.⁴⁵

The natural inclination of the members of an English club would, so I think, be to treat the case exactly as if it were a case of corporate liability. 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.

As to the *Deliktsfähigkeit* of corporations it may not be out of place to observe that by this time English corporations have had to pay for almost every kind of wrong that one man can do to another. Thus recently an incorporated company had to pay for having instituted criminal proceedings against a man “maliciously and without reasonable or probable cause.” In our theoretical moments we reconcile this with the *Fiktionstheorie* by saying that it is a case in which a master (*persona ficta*) pays for the act of his servant or a principal for the act of an agent, and, as our rule about the master’s liability is very wide, the explanation is not obviously insufficient. I am not sure that this may not help us to attain the desirable result in the case of the unincorporated *Verein*.

Our practical doctrine about the *Vermögen* of our clubs seems to me to be very much that which is stated by Dr Gierke in the following sentence, though (for the reason already given) we should have to omit a few words in which he refers to a *Gesellschaft*:⁴⁶

Das vereinsvermögen... gehört... denjeweiligen Mitgliedern; aber als Gesellschaftsvermögen [Vereinsvermögen] ist es ein für den Gesellschaftszweck [Vereinszweck] aus dem übrigen vermögen der Theilhaber ausgeschiedenes, den Gesellschaftern [Vereinsmitgliedern] zu ungesonderten Antheilen gemeinsames Sondervermögen, das sich einem Körperschaftsvermögen nähert.⁴⁷

And then in England the *Sonderung* of this *Vermögen* from all the other *Vermögen* of the Theilhaber can be all the plainer, because in legal analysis the owners of this *Vermögen* are not the *Vereinsmitglieder*, but the trustees. It is true that for practical purposes this *Eigenthum* of the trustees of a club may be hardly better than a *Scheineigenthum*, and the trustees themselves may be hardly better than puppets whose wires are pulled by the committee and the general meeting. And it is to be observed that in the case of this class of trusts the destinatories are peculiarly well protected, for, even if deeds were forged, no man could say that he had bought one of our club-houses or a catholic cathedral without suspecting the existence of a trust: *res ipsa loquitur*. Still the *nudum dominium* of the trustees serves as a sort of external mark which keeps all this *Vermögen* together as a *Sondervermögen*. And when we remember that some great jurists have found it possible to speak of the juristic person as puppet, a not unimportant analogy is established:

Der verein kann nicht nur unter Lebenden, sondern auch von Todeswegen erwerben. Denn es besteht kein Hinderniss die jeweiligen Mitglieder in ihrer gesellschaftlichen [vereinschaftlichen] Verbundenheit zu Erben einzusetzen oder mit einem Vermachtniss zu bedenken.⁴⁸

This is substantially true of our English law, though the words “zu Erben einzusetzen” do not fit into our system. A little care on the part of the testator is requisite in such cases in order that he may not be accused of having endeavoured to create a trust in favour of a long series of unascertained persons (future members) and of having come into collision with our “rule against perpetuities.” The less he says the better. Substantially the *Verein* is *vermächtnissfähig*. Dr Gierke’s next sentence also is true, though of course the first word is inappropriate:

[Landesgesetzliche] Einschränkungen des Rechtserwerbes juristischer Personen können auf nicht rechtsfähige Vereine nicht erstreckt werden.⁴⁹

Since our lawyers explained away a certain statute of Henry VIII, which will be mentioned below, our *nicht rechtsfähiger Verein* has stood outside the scope of those *Gesetze* which forbade corporations to acquire land (Statutes of Mortmain). And this was at one time a great advantage

that our niche rechtsfähiger *Verein* had over the *rechtsfähiger Verein*. The Jockey Club, for example, could acquire Newmarket Heath without asking the King's or the State's permission. Even at the present day certain of our *nicht rechtsfähige Vereine* would lose their power of holding an unlimited quantity of land if they registered themselves under the Companies Acts and so became corporations.⁵⁰

As regards *Processfähigkeit*, our doctrine regarded the capacity "to sue and be sued" as one of the essential attributes of the corporation. Indeed at times this capacity seems to have appeared as the specific *differentia* of the corporation, though the common seal also was an important mark. And with this doctrine we have not openly broken. It will be understood, however, that in a very large class of disputes the concerns of the *nicht rechtsfähiger Verein* would be completely represented by the trustees. Especially would this be the case in all litigation concerning *Liegenschaft*. Suppose a dispute with a neighbour about a servitude ("easement") or about a boundary, this can be brought into court and decided as if there were no trust in existence and no *Verein*. And so if the dispute is with some *Pächter* or *Miether* of land or houses that belong "in equity" to the *Verein*. There is a legal relationship between him and the trustees, but none between him and the *Verein*; and in general it will be impossible for him to give trouble by any talk about the constitution of the *Verein*. And then as regards internal controversies, the Court of Chancery developed a highly elastic doctrine about "representative suits." The beginning of this lies far away from the point that we are considering. It must suffice that in dealing with those complicated trusts that Englishmen are allowed to create, the court was driven to hold that a class of persons may be sufficiently represented in litigation by a member of that class. We became familiar with the plaintiff who was suing "on behalf of himself and all other legatees" or "all other cousins of the deceased" or "all other creditors." This practice came to the aid of the *Verein*. Our English tendency would be to argue that if in many cases a mere class (e.g., the testator's nephews) could be represented by a specimen, then *a fortiori* a *Verein* could be represented by its "officers." And we should do this without seeing that we were infringing the corporation's exclusive possession of *Processfähigkeit*.⁵¹

But with all its imperfections the position of the unincorporate *Verein* must be fairly comfortable. There is a simple test that we can apply. For the last forty years and more almost every *Verein* could have obtained the corporate quality had it wished to do this, and upon easy terms.

When we opened the door we opened it wide. Any seven or more persons associated together for any lawful purpose can make a corporation.⁵² No approval by any organ of the State is necessary, and there is no exceptional rule touching politische *socialpolitische oderreligiose Vereine*. Many societies of the most various kinds have taken advantage of this offer; but many have not. I will not speak of humble societies which are going to have no property or very little: only some chess-men perhaps. Nor will I speak of those political societies which spring up in England whenever there is agitation: a "Tariff Reform Association" or a "Free Food League" or the like. It was hardly to be expected that bodies which have a temporary aim, and which perhaps are not quite certain what that aim is going to be, would care to appear as corporations. But many other bodies which are not poor, which hope to exist for a long time, and which have a definite purpose have not accepted the offer. It is so, for example, with clubs of what I may call the London type: clubs which have houses in which their members can pass the day. And it is so with many learned societies. In a case which came under my own observation a society had been formed for printing and distributing among its members books illustrating the history of English law. The question was raised what to do with the copyright of these books, and it was proposed that the society should make itself into a corporation; but the council of the society—all of them lawyers, and some of them very distinguished lawyers— preferred the old plan: preferred trustees. As an instance of the big affairs which are carried on in the old way I may mention the London Library, with a large house in the middle of London and more than 200,000 books which its members can borrow.

Why all this should be so it would not be easy to say. It is not, I believe, a matter of expense, for expense is involved in the maintenance of the hedge of trustees, and the account of merely pecuniary profit and loss would often, so I fancy, show a balance in favour of incorporation. But apparently there is a widespread, though not very definite belief, that by placing itself under an incorporating *Gesetz*, 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*, 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 (we know little of Austria) 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."

Hitherto (except when the Stock Exchange was mentioned) I have been speaking of societies that do not divide gain among their members. I must not attempt to tell the story of the English *Aktiengesellschaft*. It has often been told in Germany and elsewhere. But there is just one point to which I would ask attention.

In 1862 Parliament placed corporate form and juristic personality within easy reach of "any seven or more persons associated together for any lawful purpose." I think we have cause to rejoice over the width of these words, for we in England are too much accustomed to half-measures, and this was no half-measure. But still we may represent it as an act of capitulation. The enemy was within the citadel.

In England before the end of the seventeenth century men were trying to make joint-stock companies with transferable shares or "actions" (for that was the word then employed), and this process had gone so far that in 1694 a certain John Houghton could issue in his newspaper a price list which included the "actions" of these unincorporated companies side by side with the stock of such chartered corporations as the Bank of England. We know something of the structure of these companies, but little of the manner in which their affairs were regarded by lawyers and courts of law. Then in 1720, as all know, the South Sea Bubble swelled and burst. A panic-stricken Parliament issued a law, which, even when we now read it, seems to scream at us from the statute book. Unquestionably for a time this hindered the formation of joint-stock companies. But to this day there are living among us some insurance companies, in particular "the Sun," which were living before 1720 and went on living in an unincorporate condition.⁵³ And then, later on when the great catastrophe was forgotten, lawyers began coldly to dissect the words of this terrible Act and to discover that after all it was not so terrible. For one thing, it threatened with punishment men who without lawful authority "presumed to act as a corporation." But how could this crime be committed? From saying that organization is corporateness English lawyers were precluded by a long history. They themselves were members of the Inns of Court. Really it did not seem clear that men

could “presume to act as a corporation” unless they said in so many words that they were incorporated, or unless they usurped that sacred symbol, the common seal. English law had been compelled to find the essence of real or spurious corporateness among comparatively superficial phenomena.

Even the more definite prohibitions in the Statute of 1720, such as that against “raising or pretending to raise a transferable stock,” were not, so the courts said, so stringent as they might seem to be at first sight. In its panic Parliament had spoken much of mischief to the public, and judges, whose conception of the mischievous was liable to change, were able to declare that where there was no mischievous tendency there was no offence. Before “the Bubble Act” was repealed in 1825 most of its teeth had been drawn.

But the *unbeschränkte Haftbarkeit* of partners was still maintained. That was a thoroughly practical matter which Englishmen could thoroughly understand. Indeed from the first half of the nineteenth century we have Acts of Parliament which strongly suggest that this is the very kernel of the whole matter. All else Parliament was by this time very willing to grant: for instance, active and passive *Processfähigkeit*, the capacity of suing and being sued as unit in the name of some secretary or treasurer. And this, I may remark in passing, tended still further to enlarge our notion of what can be done by “unincorporated companies.” It was the day of half-measures. In an interesting case an American court once decided that a certain English company was a corporation, though an Act of our Parliament had expressly said that it was not.

And if our legislature would not by any general measure grant full corporateness, our courts were equally earnest in maintaining the unlimited liability of the *Gesellschaftsmitglieder*.

But the wedge was introduced. If a man sells goods and says in so many words that he will hold no one personally liable for the price, but will look only to a certain subscribed fund, must we not hold him to his bargain? Our courts were very unwilling to believe that men had done anything so foolish; but they had to admit that personal liability could be excluded by sufficiently explicit words. The wedge was in. If the State had not given way, we should have had in England joint-stock companies, unincorporated, but contracting with limited liability. We know now-a-days that men are not deterred from making contracts by the word “limited.” We have no reason to suppose that they would have been deterred if that word were expanded into four or five lines printed

at the head of the company's letter-paper. It is needless to say that the directors of a company would have strong reasons for seeing that due notice of limited liability was given to every one who had contractual dealings with the company, for, if such notice were not given, they themselves would probably be the first sufferers.⁵⁴

In England the State capitulated gracefully in 1862. And at the same time it prohibited the formation of large unincorporated *Gesellschaften*. No *Verein* or *Gesellschaft* consisting of more than twenty persons was to be formed for the acquisition of gain unless it was registered and so became incorporate. We may say, however, that this prohibitory rule has become well-nigh a caput mortuum, and I doubt whether its existence is generally known, for no one desires to infringe it. If the making of gain be the society's object, the corporate form has proved itself to be so much more convenient than the unincorporate that a great deal of ingenuity has been spent in the formation of very small corporations in which the will of a single man is predominant ("one-man companies"). Indeed the simple *Gesellschaft* of English law, though we cannot call it a dying institution, has been rapidly losing ground.⁵⁵

In America it has been otherwise. As I understand, the unincorporate Aktiengesellschaft with its property reposing in trustees lived on beside the new trading corporations. I am told that any laws prohibiting men from forming large unincorporated partnerships would have been regarded as an unjustifiable interference with freedom of contract, and even that the validity of such a law might not always be beyond question. A large measure of limited liability was secured by carefully worded clauses. I take the following as an example from an American "trust deed":

The trustees shall have no power to bind the shareholders personally. In every written contract they may make, reference shall be made to this declaration of trust. The person or corporation contracting with the trustees shall look to the funds and property of the trust for the payment under such contract. . . and neither the trustees nor the shareholders, present or future, shall be personally liable therefor.

The larger the affairs in which the *Verein* or *Gesellschaft* is engaged, the more securely will such clauses work, for (to say nothing of legal requirements) big affairs will naturally take the shape of written documents. Then those events occurred which have inseparably con-

nected the two words “trust” and “corporation.” I am not qualified to state with any precision the reasons which induced American capitalists to avoid the corporate form when they were engaged in constructing the greatest aggregations of capital that the world had yet seen; but I believe that the American corporation has lived in greater fear of the State than the English corporation has felt for a long time past. A judgment dissolving a corporation at the suit of the *Staatsanwalt* as a penalty for offences that it has committed has been well-known in America. We have hardly heard of anything of the kind in England since the Revolution of 1688. The dissolution of the civic corporation of London for its offences in the days of Charles II served as a *reductio ad absurdum*. At any rate “trust” not “corporation” was the form that the financial and industrial magnates of America chose when they were fashioning their immense designs.

Since then there has been a change. Certain of the States (especially New Jersey) began to relax their corporation laws in order to attract the great combinations. A very modest percentage is worth collecting when the capital of the company is reckoned in millions. So now-a-days the American “trust” (in the sense in which economists and journalists use that term) is almost always if not quite always a corporation.

And so this old word, the “trust is” of the Salica, has acquired a new sense. Any sort of capitalistic combination is popularly called a “trust” if only it is powerful enough, and Englishmen believe that Germany is full of “trusts.”

VI

And now let me once more repeat that the connection between Trust and Corporation is very ancient. It is at least four centuries old. Henry VIII saw it. An Act of Parliament in which we may hear his majestic voice has these words in its preamble:⁵⁶

Where by reason of feoffments... made of trust of... lands to the use of... guilds, fraternities, comminalties, companies or brotherheads erected... by common assent of the people without any corporation... there groweth to the King. . . and other lords and subjects of the realm the same like losses and inconveniences... as in case where lands be aliened into mortmain.

We see what the mischief is. The hedge of trustees will be kept in such good repair that there will be no *escaeta*, no *relevium*, no *custodia*,

for behind will live a *Genossenschaft* keenly interested in the maintenance of the hedge, and a *Genossenschaft* which has made itself without asking the King's permission. Now no one, I think, can read this Act without seeing that it intends utterly to suppress this mischief.⁵⁷ Happily, however, the Act also set certain limits to trusts for obituary masses, and not long after Henry's death Protestant lawyers were able to say that the whole Act

was directed against "superstition." Perhaps the members of the Inns of Court were not quite impartial expositors of the King's intentions. But in a classical case it was argued that the Act could not mean what it apparently said, since almost every town in England—and by "town" was meant not *Stadt* but *Dorf*—had land held for it by trustees. Such a statement, it need hardly be said, is not to be taken literally. But the trust for a *Communalverband* or for certain purposes of a *Communalverband* is very ancient and has been very common: it is a "charity." There was a manor (*Rittergut*) near Cambridge which was devoted to paying the wages of the knights who represented the county of Cambridge in Parliament.⁵⁸

It is true that in this quarter the creation of trusts, though it was occasionally useful, could not directly repair the harm that was being done by that very sharp attack of the Concessionstheorie from which we suffered. All our *Communalverbände*, except the privileged boroughs, remained at a low stage of legal development. They even lost ground, for they underwent, as it were, a *capitis diminutio* when a privileged order of communicantes, namely the boroughs, was raised above them. The county of the thirteenth century (when in solemn records we find so bold a phrase as "die Grafschaft kommt und sags") was nearer to clear and unquestionable personality than was the county of the eighteenth century. But 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. That work taught us to think of the corporate quality which the King kept for sale as a technical advantage. A very useful advantage it might be, enabling men to do in a straightforward fashion what otherwise they could only do by clumsy methods; but still an advantage of a highly technical kind.

Much had been done behind the hedge of trustees in the way of constructing *Körper* ("bodies") which to the eye of the plain man looked

extremely like *Korporationen*, and no one was prepared to set definite limits to this process.

All this reacted upon our system of local government. Action and reaction between our *Vereine* and our *Communalverbände* was the easier, because we knew no formal severance of Public from Private Law. One of the marks of our *Korporation*, so soon as we have any doctrine about the matter, is its power of making "bye-laws" (or better "bylaws"); but, whatever meaning Englishmen may attach to that word now-a-days, its original meaning, so etymologists tell us, was not *Nebengesetz* but *Dorigesetz*.⁵⁹ And then there comes the age when the very name "corporation" has fallen into deep discredit, and stinks in the nostrils of all reformers. Gierke's account of the decadence of the German towns is in the main true of the English boroughs, though in the English case there is something to be added about parliamentary elections and the strife between Whig and Tory. And there is this also to be added that the Revolution of 1688 had sanctified the "privileges" of the boroughs. Had not an attack upon their "privileges," which were regarded as *wohlerworbene Rechte*, "vested rights," cost a King his crown? The municipal corporations were both corrupt and sacrosanct. And so all sorts of devices were adopted in order that local government might be carried on without the creation of any new corporations. Bodies of "commissioners" or of "trustees" were instituted by Gesetz, now in this place, and now in that, now for this purpose, and now for that; but good care was taken not to incorporate them. Such by this time had been the development of private trusts and charitable trusts, that English law had many principles ready to meet these "trusts of a public nature." But no great step forward could be taken until the borough corporations had been radically reformed and the connection between corporateness and privilege had been decisively severed.

A natural result of all this long history is a certain carelessness in the use of terms and phrases which may puzzle a foreign observer. I can well understand that he might be struck by the fact that whereas our borough is (or, to speak with great strictness, the mayor, aldermen, and burgesses are) a corporation, our county, after all our reforms, is still not a corporation, though the County Council is. But though our modern statutes establish some important distinctions between counties and boroughs, I very much doubt whether any practical consequences could be deduced from the difference that has just been mentioned, and I am sure that it does not correspond to any vital principle.

I must bring to an end this long and disorderly paper, and yet I have said very little of those *Communalverbände* which gave Dr Redlich occasion to refer to what I had written. I thought, however, that the one small service that I could do to those who for many purposes are better able to see us than we are to see ourselves was to point out that an unincorporated *Communalverband* is no isolated phenomenon which can be studied by itself, but is a member of a great genus, with which we have been familiar ever since the days when we began to borrow a theory of corporations from the canonists. The technical machinery which has made the existence of "unincorporated bodies" of many kinds possible and even comfortable deserves the attention of all who desire to study English life or any part of it. What the foreign observer should specially remember (if I may be bold enough to give advice) is that English law does not naturally fall into a number of independent pieces, one of which can be mastered while the others are ignored. It may be a clumsy whole; but it is a whole, and every part is closely connected with every other part. For example, it does not seem to me that a jurist is entitled to argue that the English county, being unincorporate, and having no juristic personality, can only be a "passive" *Verband*, until he has considered whether he would apply the same argument to, let us say, the Church of Rome (as seen by English law), the Wesleyan "Connexion," Lincoln's Inn, the London Stock Exchange, the London Library, the Jockey Club, and a Trade Union. Also it is to be remembered that the making of grand theories is not and never has been our strong point. The theory that lies upon the surface is sometimes a borrowed theory which has never penetrated far, while the really vital principles must be sought for in out-of-the-way places.

It would be easy therefore to attach too much importance to the fact that since 1889 we have had upon our statute-book the following words: "In this Act and in every Act passed after the commencement of this Act the expression 'person' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate."⁶⁰ I can imagine a country in which a proposal to enact such a clause would give rise to vigorous controversy; but I feel safe in saying that there was nothing of the sort in England. For some years past a similar statutory interpretation had been set upon the word "person" in various Acts of Parliament relating to local government.⁶¹ Some of our organs of local government, for example the "boards of health," had not been definitely incorporated, and it was, I suppose, to meet their case that the word "person"

was thus explained. It is not inconceivable that the above cited section of the Act of 1889 may do some work hereafter; but I have not heard of its having done any work as yet; and I fear that it cannot be treated as evidence that we are dissatisfied with such theories of personality as have descended to us in our classical books.

One more word may be allowed me. I think that a foreign jurist might find a very curious and instructive story to tell in what he would perhaps call the publicistic extension of our Trust *Begriff*. No one, I suppose, would deny that, at all events in the past, ideas whose native home was the system of Private Law have done hard work outside that sphere, though some would perhaps say that the time for this sort of thing has gone by. 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, "der zwar Rechtsträger aber nur in fremdem Interesse ist" is well known to all of us, and he becomes a centre from which analogies radiate. He is not, it will be remembered, a mandatory. It is not *Vertrag* that binds him to the *Destinatär*. He is not, it will be remembered, a guardian. The *Destinatär* may well be a fully competent person. Again, there may be no *Destinatär* at all, his place being filled by some "charitable" *Zweck*. We have here a very elastic form of thought into which all manner of materials can be brought. So 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. The fiduciary character of the *Rechtsträger* can in such a case be made apparent in legal proceedings, more or less analogous to those which are directed against other trustees. And, since practical questions will find an answer in the elaborate statutes which regulate the doings of these *Körper*, we have no great need to say whether the trust is for the State, or for the *Gemeinde*, or for a *Zweck*. Some theorists who would like to put our institutions into their categories, may regret that this is so; but so it is.

Not content, however, with permeating this region, the Trust presses forward until it is imposing itself upon all wielders of political power, upon all the organs of the body politic. 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 to-day 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. Those who speak thus would admit that the trust was not one which any court could enforce, and might say that it was only a “moral” trust. But I fancy that to a student of *Staatswissenschaft* legal metaphors should be of great interest, especially when they have become the commonplaces of political debate. Nor is it always easy to say where metaphor begins. 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. It is only the other day that American judges were saying that the United States acquired the sovereignty of Cuba upon trust for the Cubans.

But I have said enough and too much.⁶²

Notes

1. Ibid. Bd. xxx, S. 167.
2. [*Translation*: The legal institution known as the Trust, which originated out of certain requirements of the English land-law, has gradually developed into a general institution with a far-reaching and practical significance in all aspects of legal life; and, during this process, it has acquired, in a juridical sense, a remarkably refined and even a perfected form.]
3. Laband, *Die Vermögensrechtlichen Klagen*, S. 5–7 [Translation: The action possesses the distinctive characteristic that it is based, not on the cause of action asserted by the plaintiff, but on that which he demands in his claim, or, in other words, his objective; and in respect of this the judge can help him....In the medieval sources, on the contrary, there is absent any characterization, or classification, of actions in conformity with the legal relationships that lie at the basis of actions; and, more particularly, there is no distinction drawn between proprietary and personal actions, or, in other words, between actions *in rem* and *in personam*. The expression *clage up gut* [in England *real action*], which seems to correspond to the Roman term *actio in rem*, has no connection with the juridical nature of the plaintiff’s right: on the contrary, it has reference only to the subject-matter of

the plaintiff's claim.]

4. Heymann, in the sketch of English law that is included in the new edition of Holtzendorff's *Encyklopädie* has declined to place our Trust under "Des Sachenrecht" or under "Forderungsrecht." It seems to me that in this as in many other instances he has shown a true insight into the structure of our system.
5. Gierke's *Untersuchungen*, 1895.
6. Translation: The relationship of *Treuhand* is normally established by contract between the testator and the person whom he has chosen as *Treuhänder*. Where a direct control over corporeal things is conferred on the *Treuhänder*, this contract frequently assumes the outward form of a contract which has the effect of transferring title, or, in other words, a conveyance. The things in question are transferred to him *per cartam* for the purpose that has been willed by the testator. Accordingly, the transaction is expressly referred to as 'tradere res'.... Certain documents of the *Regesto di Farfa*, dating from the eleventh century, speak of the 'investiture' which the donor has conferred upon the *Treuhänder*. The donor transfers to the *Treuhänder* not only the land, but also, in accordance with Lombard custom in cases where proprietary rights, rights in rem, are conveyed, both the document of title by which he had himself acquired the property and also those of his predecessors in title, so far as he has those in his possession. If the donor is a Frank, he uses the Frankish symbols of investiture, namely, *festuca notata*, knife, sod, branch of a tree, and glove.]
7. [Translation: As has just been proved, the *Treuhänder* has, by virtue of the fact that he is the legal successor, his own proprietary right in the corporeal things that have been transferred to him. What is the nature of this right? In the first place, it may be observed that we have certain documents which, judging from their tenor, leave us in no doubt that the *Treuhänder* has full ownership and is not restricted, either by the proprietary or by the contractual rights of other persons, in the free enjoyment and the free alienation of the property. These are all cases in which the donor, for the good of his soul, wills that the things shall be at the free disposition of the *Treuhänder*, who, in the true sense of the term, is to play the role of a dispenser.]
8. [Translation: the full, free power of disposition, but a right of alienation that is strictly bound within certain definite limits. Here, in contrast with the legal position of the aforementioned *Treuhänder* who acts as a dispenser *optimo jure*, he occupies an inferior position.

But what is the nature of this inferiority? We may, in the present place, leave unanswered the question whether in these cases the *Treuhänder* is limited from the view-point of obligations, that is, whether he is bound, by the private law of contract and delict, to the donor or his heirs or any other persons. The sole question at the moment is whether his right is restricted from the view-point of the ownership of property; and this question must be answered in the affirmative.]

9. [Translation: ownership, but yet ownership subject to a condition subsequent, a condition the fulfilment of which extinguishes the ownership. The condition became operative when the subject-matter of the gift, the property, was alienated contrary to the expressed purpose of the gift or when for any reason that purpose became impossible of realization. The result, in such circumstances, was that the ownership of the *Treuhänder* was extinguished; and, without any re-transfer, the subject-matter of the gift became the property of the donor or of his heirs, who could at once bring an action in rem, the proprietary action, and thereby obtain once more the possession of the thing.]
10. [Translation: The limitation of the ownership *zu treuer Hand*, that is the ownership of a *Treuhänder*, by reason of the presence of a condition subsequent, could affect the title of third parties who acquired the property subject to that limitation.... This result presupposed the notoriety (publicity) of that limitation of the proprietary right, a publicity of such character that every third party acquiring the property could without hardship be subjected to the limitation whether or not, in the individual case, he actually knew of the limitation. In respect of land it is indeed possible that at an early time the Lombards knew a folk-law form of transfer of rights whereby the act of transfer became sufficiently known to the members of the folk-community at the very moment when the act itself took place, that is, when the transfer was effected on the land itself or in court, *in mallo*. In the period with which we are concerned, however, the form of transfer almost always employed was that of *traditio cartae*; and in any event that was the form used in most cases of gift mortis causa, including gift *zu treuer Hand*.... Every transfer of rights taking place by *traditio cartae* was, therefore, fully documented.... Whoever desired to acquire a piece of land by a derivative title obtained accordingly, reliable information in regard to the rights of his transferor by de-

manding the production of the *carta* which had been executed for such transferor by his predecessor in title. At an early time it became in fact the usage that the *carta*, as a permanent proof of the legality of the title, was transferred along with the land itself. It was only a natural consequence of this usage that, in addition to the title-deed of the transferor himself, all the title-deeds of his predecessors, so far as in fact he had these in his possession, were also handed over to his successor in title. Whoever, therefore, desired to acquire a piece of land from a *Treuhänder* knew at once, by an examination of the title-deeds, the limited nature of the *Treuhänder's* title as being one that was subject to a condition subsequent. In case, however, contrary to the customary procedure, the purchaser did not trouble about the documents of title there was no hardship in the fact, so far as he was concerned, that the condition, although actually unknown to him, nevertheless affected his own title to the land. The harm which resulted to him was not undeserved.]

11. [Translation: This, however, had validity only in the case of lands. In the case of transactions respecting chattels, as in other Germanic laws, there were no legal provisions that publicity would operate in such a way as to give effect, so far as third parties were concerned, to conditions restricting alienation.... It is true that the testamentary *Treuhänder* was legally bound by the purpose expressed in the will in respect of chattels not less than in the case of lands. Certain it is, indeed, that he was himself bound so far as his own proprietary right was concerned, and, as in the case of land, he held the chattels by a right of ownership that was subject to a condition subsequent.... Had he, however, transferred the chattels to the wrong persons, the heirs of the donor had no redress against such third parties, even when the latter had had notice of the conditional title of the *Treuhänder*. The reason which in the case of land subjected all third parties to the working of the condition was not present in the case of chattels. If the chattels entrusted to the *Treuhänder* reached the hands of third parties owing to a breach of the trust and were therefore not recoverable by the proprietary action 'Malo ordine possides,' then the beneficiaries could only bring a personal action for damages.]
12. I am aware that Schultze's construction of the right of the Lombard *Treuhänder* as "resolutiv bedingtes Eigentum" is open to dispute. See, for example, Caillemer, *Exécution Testamentaire* (Lyon, 1901), 351. A great deal of what M. Caillemer says about England in this

excellent book seems to be both new and true.

13. I do not wish to deny that there were other causes for trusts; but comparatively they were of little importance.
14. Our “joint ownership” is not a very strong form of *Gesammthandschaft*. One of several “joint owners” has a share that he can alienate inter vivos; but he has nothing to give by testament.
15. *Testamenta Eboracensia* (Surtees society), vol. I, p. 223. In the same volume (p. 113) an earlier example will be found, the will of William, Lord Latimer (13th April, 1381) see also the will of the Earl of Pembroke (5th May, 1372), and the will of the Earl of Arundel (4 March, 1392–1393) in J. Nichols, *Royal Wills* (1780), pp. 92, 120.
16. This is an *Anwartschaft*.
17. *Select Cases in Chancery* (Selden society), p. 69.
18. This is not quite true. A few attempts were made to attain the end by means of “conditions,” and Edward III himself made, so it seems, some attempt of this kind. But the mechanism of a “condition” would have been very awkward.
19. It may have been of decisive importance that at some critical moment the King himself wanted to leave some land by will. Edward III had tried ineffectually to do this. In 1417 King Henry V had a great mass of land in the hands of feoffees (including four bishops, a duke and three earls) and made a will in favour of his brothers. See Nichols. *Royal Wills*, 236.
20. At starting the phrase would be *cestui a qui oes le feffement fut fait*. This degenerates into *cestui que use*; and then *cestui que trust* is made.
21. Year Book, Trin. II Edw. IV, f. 8: “Si mon feoffee de trust etc. enfeoffa un autre, que conust bien que le feoffor rien ad forsque a mon use, subpoena girra vers ambideux scil. auxibien vers le feoffee come vers le feoffor... pur ceo que en conscience il purchase ma terre.
22. Translation: In respect of land it is indeed possible that at an early time the Lombards knew a folk-law form of transfer of rights whereby the act of transfer became sufficiently known to the members of the folkcommunity at the very moment when the act itself took place. In the period with which we are concerned, however, the form of transfer almost always employed was that of *traditio cartae*; and in any event that was the form used in most cases of gift *mortis causa*, including gift *zu treuer Hand*.
23. The law about this matter had become somewhat doubtful before

Parliament intervened.

24. Some writers even in theoretical discussion have allowed themselves to speak of the destinatory as “the real owner,” and of the trustee’s ownership as “nominal” and “fictitious.” See Salmond, *Jurisprudence*, p. 278. But I think it is better and safer to say with a great American teacher that “Equity could not create rights in rem if it would, and would not if it could.” See Langdell, *Harvard Law Review*, vol. I, p. 60.
25. In the oldest cases the Court of Chancery seems to enforce the “charitable” trust upon the complaint of anyone who is interested, without requiring the presence of any representatives of the State.
26. An Englishman might say that §2109 of the B.G.B. contains the German “rule against perpetuities” and that it is considerably more severe than is the English.
27. In some cases the land will have to be sold, but the “charity” will get the price.
28. *Pandekten*, S. 442 [Translation: There are good grounds in support of the view that the creditors of the Fiduziar cannot touch the Zweckvermögen unless their claims arise out of the Zweckvermögen itself; moreover, that in the event of the bankruptcy of the Fiduziar or of a sequestration, the Zweckvermögen can be dealt with on a special footing, because the person who rakes the property holds it in his own name, it is true, but only in the interests of third parties.]
29. *Pandekten*, S. 341 [Translation: In the case of a foundation unable to act without direction, the person to whom the Zweckvermögen is transferred is usually a legal person, a corporation; for only such a person furnishes a permanent basis for the foundation.]
30. Trustees Appointment Acts, 1850–69–90.
31. Marquardsen’s *Handbuch des Öffentlichen Rechts*, Bd. I, S. 367.
32. [Translation: As the earlier State-Church, or *Staatskirchentum*, began to tolerate certain other religious societies, owing to changed conditions it could not permit them to hold the legal position of private clubs, for the reason that it looked upon religion as a matter for the State. Accordingly, it adopted the attitude that these associations should be treated in certain respects as corporations of public law, with corresponding rights but, on the other hand, it subjected such associations to a far-reaching control and interference on the part of the State.]

33. Hinschius, op. cit. S. 222–224.
34. In Latin documents the word corresponding to our *inn* is *hospitium*.
35. F. Martin, *History of Lloyd's*, 1876.
36. C. Duguid, *Story of the Stock Exchange*, 1901.
37. London Stock Exchange Commission, *Parliamentary Papers* (1878), vol. XIX.
38. In a conceivable case the prospective right to an aliquot part of the property of a club that was going to be dissolved might be valuable to a member's creditors; but this would be a rare case, and I can find nothing written about it. Some clubs endeavour by their rules to extinguish the right of a bankrupt member.
39. *Customs and Inland Revenue Act*, 1885, s. 11.
40. I believe that all the decisions given by our Courts in any way affecting our clubs will be found in a small book: J. Wertheimer, *Law relating to Clubs*, ed. 3, by A. W. Chaster (1903).
41. It was otherwise with the unincorporated *Actiengesellschaft*, but that is almost a thing of the past. A few formed long ago may still be living in an unincorporated condition, e.g., the London Stock Exchange.
42. Partnership Act, 1890, 5. 1. For the meaning of these words, see F. Pollock, *Digest of the Law of Partnership*, ed. 6.
43. B.G.B. § 54.
44. See Wertheimer, op. cit. p 73.
45. Gierke, *Vereine ohne Rechtsfähigkeit*, zweite Auflage, S.20 [Translation: Possibly there is a customary law to the effect that clubs which do not as such possess legal capacity are to be placed in the category of corporations so far as liability for harm caused by illegal acts is concerned]
46. *Vereine ohne Rechtsfähigkeit*, S. 14.
47. [Translation: The property of a club belongs to the members for the time being, but, as partnership-property [club-property], it is separated from the rest of the property of the members as being property which serves the partnership's purpose [club's purpose]; it is a special or separate property which belongs to the partners [club-members] in undivided shares; and from this point of view it closely resembles the property of a corporation.]
48. Gierke, Op. Cit. S. 21. [Translation: The club can acquire property not only by transactions *inter vivos* but also by testate or intestate succession; for there is no legal objection to the appointment of the

- members for the time being, in their partnership [or club] capacity, as heirs, or to giving them a legacy.]
49. [Translation: The restrictions [laid down in the statutory law of the several German states] in respect to the acquisition of rights on the part of corporations cannot be extended to clubs which do not as such possess legal capacity.]
50. Companies Act, 1862, 5. 21.
51. Our law about this matter is now represented by Rules of the Supreme Court of Judicature, Order xvi, Rule 9.
52. Companies Act, 1862, S. 66.
53. F. B. Relton, *Fire Insurance Companies* (1893).
54. In England development along this line stopped at this point because wirtschaftliche Vereine became corporations under the Gesetz of 1862. English law had gone as far as the first, but not, I believe as far as the second of the two following sentences: "Es steht namentlich nichts im Wege, eine rechtsgeschäftliche Verpflichtung der Mitglieder so zu begründen, dass jedes Mitglied nur mit einem Theil seines Vermögens dass es insbesondere nur mit seinem Antheil am Vereinsvermögen haftet. Ist aber eine solche Abrede wirksam, so kann auch von vornherein durch die Satzung die Vertretungsmacht des Vorstandes dahin eingeschränkt werden, dass er die Mitglieder nur unter Beschränkung ihrer Haftung auf ihre Antheile verpflichten kann" (Gierke, *op. cit.* S. 39). Then as regards our clubs, there is, as already said, no presumption that the committee or the trustees can incur debts for which the members will be liable even to a limited degree.
55. A distinction which, roughly speaking, is similar to that drawn by B.G.B. §§ 21, 22 was drawn by our Act of 1862, S. 4: "No company, association or partnership consisting of more than twenty persons [ten persons, if the business is banking] shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered." I believe that in the space of forty years very few cases have arisen in which it was doubtful whether or not a *Verein* fell within these words.
56. Stat. 23 Hen. VIII, c. 10.
57. The trust is to be void unless it be one that must come to an end within twenty years.
58. Porter's Case (1592), I Coke's Reports, 16b, 24b, "For almost all

the lands belonging to the towns or boroughs not incorporate are conveyed to several inhabitants of the parish and their heirs, upon trust and confidence to employ the profits to such good uses, as defraying the tax of the town, repairing the highways... and no such uses (although they are common almost in every town) were ever made void by the statute of 23 H. 8.” Some of the earliest instances of “representative suits” that are known to me are cases of Elizabeth’s day in which a few members of a village or parish “on behalf of themselves and the others” complain against trustees.

59. Murray, *New English Dictionary*. It will be known to my readers that in English books “Statute” almost always means *Gesetz* (Statutum Regni) and rarely *Statut*. Only in the case of universities, colleges cathedral chapters and the like can we render *Statut* by “Statute.” In other cases we must say “by-laws,” “memorandum and articles of association” and so forth, varying the phrase according to the nature of the body of which we are speaking.

60. Interpretation Act, 1889, 5. 19.

61. Public Health Act, 1872, 5. 60.

62. It did not seem expedient to burden this slight sketch with many references to books; but the following are among the best treatises which deal with those matters of which I have spoken: Lewin, *Law of Trusts*, ed. 10 (1898); Tudor, *Law of Charities and Mortmain*, ed. 3 (1889); Lindley, *Law of Partnership*, ed. 6 (1893); Lindley, *Law of Companies*, ed. 6 (1902); Pollock, *Digest of the Law of Partnership*, ed. 6 (1895); Buckley, *Law and Practice under the Companies Act*, ed. 8 (1902); Palmer, *Company Law*, ed. 2 (1898); Wertheimer, *Law relating to Clubs*, ed. 3 (1903); Underhill, *Encyclopaedia of Forms*, vol. III (1903), pp. 728–814 (Clubs). As regards the early history of “uses” or trusts, an epoch was made by O. W. Holmes, “Early English Equity,” *Law Quarterly Review*, vol. I, p. 162.