We Place Our Trust

Vincent Baldwin
TRUSTS and their administration have received the particular solicitude of chancellors ever since those “keepers of the king’s conscience” first began to leaven the common law with “the rules of equity and good conscience.” In those medieval times, the chancellor, who was invariably a cleric and usually a bishop, began gradually to develop a procedure which was adapted to deal effectively with fiduciary relationships. The ecclesiastical courts of that day had been accustomed to punish breaches of trust by spiritual censure, enforced penance, and excommunication. The procedure which the chancellors borrowed from them, in principle at least, is summary: The chancellor sends for the defendant to be examined concerning the charges of the petition or complaint (to do this authoritatively he devises and employs a new writ—the writ of subpoena wherein defendant is commanded to appear upon pain of forfeiting a sum of money, e.g. \textit{subpoena centum librarum}); the defendant appears and is examined upon oath and made to answer the complaint, sentence by sentence; and the chancellor decides both questions of fact and of law involved in the controversy.

Thus the chancellor came to enforce uses, trusts, and confidences. According to an ancient rhyme, the chancellor possessed full sway in these fields:

\begin{quote}
These three give place in court of conscience \\
Fraud, accident and breach of confidence.
\end{quote}

In so doing, he brings to his task certain maxims, some of which undoubtedly are borrowed from canon and civil law\(^1\) but which in the main are grounded in the “law of nature” and follow closely the rules of the common law.

The centuries roll on; the ecclesiastical character of the incumbents of the chancellery changes. Wolsey is the last great divine to fill it. Thereafter lawyers are in the ascendancy. In the reign of James I occurs that great quarrel between Lord Chancellor Ellesmere and Chief Justice Coke, as a result of which the pre-eminence of the Court of Chancery was upheld.

\footnote{Member of Illinois Bar; alumnus of Chicago-Kent College of Law.}

\footnote{Corpus Juris Canonici, Liber Sextus: \textit{Qui prior est tempore, potior est jure}.}
by the King. In order for the chancery to implement its maxims about trust and fraud, it must needs have power to prohibit the execution of judgments of the courts of law (whenever unconscionable) and to address its injunctions not to the judges but to the very party, to restrain him from taking action which would be inequitable. With the reign of Charles II, the era of equity jurisprudence may be said to be ushered in. In 1673, Sir Heneage Finch (afterward Earl of Nottingham) receives the Great Seal and distinguishes himself by being the first in that succession of illustrious magistrates by whom equity was refined into a system almost as determinate and positive and as emancipated from individual caprice and opinion as the common law itself. Equity was no longer meted out and "measured by the chancellor's foot." It had become a judicial science; as it was so perfectly expressed by Professor Maitland:

Equity had come not to destroy the law but to fulfill it. Every jot and tittle of the law was to be obeyed, but when all this had been done, something might yet be needful—something that equity would require.

That the trust device was able to survive the death-dealing effect of the Statute of Uses was testimonial proof of its essential vitality and utility. By the time of the Industrial Revolution, the law as to active trusts had become fairly well stated. The enormous increase and accumulation of intangible or capitalistic wealth created by the application of steam power to erstwhile home-spun methods of manufacture gave rise to new applications of the active trust. Trustees were called upon to perform more and more important duties, to assume managerial responsibilities, and to handle and discharge vicariously for settlors and cestuis large and burdensome business affairs. The juris-

---

2 1682 - Sir Francis North
1693 - Sir John Somers
1705 - Cowper
1713 - Harcourt
1725 - King
1733 - Talbot

1737 - Hardwicke
1757 - Northington
1766 - Camden
1778 - Thurlow
1793 - Loughborough
1801 - Eldon


4 "When any person shall be seized of lands, etc. to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life or years, or otherwise, shall from thenceforth stand and be seized and possessed of the land, etc. of and in the like estates as they have in the use, trust or confidence; and that the estate of the person so seized to uses shall be deemed to be in him or them that have the use, in such quality, manner, form and condition as they had before in the use." Statute of Uses, enacted by Parliament in 1535, 27th year of reign of Henry VIII.
diction of courts of equity over such trusts creating uses not executed by the Statute has grown apace with the expanded use of the device itself.

In modern economic society, the trust has become virtually the most important medium for the preservation and transmission of property from one generation to the next. According to the latest report of the Comptroller of the Currency of the United States, the 1913 national banks possessed of trust powers (of which 362 were reported as not exercising same) were administering, as of the close of the government's fiscal year ended June 30, 1937, trust estates with assets aggregating $9,656,397,140 in amount. To show the rapid increase, even in the past few years, of property held in trust, similar assets with the 1856 national banks operating trust departments at the end of the fiscal year 1930-1931 aggregated only $5,241,991,392 in amount.

As the desire and necessity grows for the protection and disposition of property to safeguard against the vicissitudes of a troubled and perplexed social order plus a tax-ridden economy, more and more property is being settled. No longer are settlements confined to the wealthy. In every walk of life, people are wondering how to pass on, or deal with, what little estate they may be possessed of so as to assure to the best possible advantage the future of their families. They are turning to the trust as a medium to accomplish this end. Thus there have sprung up such innovations of the trust device, inter alia, as the living trust, the family trust, the insurance trust, the spendthrift trust, the educational trust, the investment trust—all having their roots grounded in the older forms of land and testamentary trusts.

The ultimate success of any trust settlement must depend in the long run upon the honesty and capacity of the trustees whom the settlor appoints. The business of being a trustee today is not as simple as formerly. The trustee occupies a position of peculiar responsibility. His selection is usually made because of the trustor's confidence in his diligence, prudence, and abso-

5 See note 4.


8 For a discussion of this trend in England, see "On the Selection of Trustees and Personal Representatives," 176 Law Times 266-7 (Oct. 7, 1933).
lute fidelity, as well as in his ability to administer the trust so as to protect those who, through infancy or other cause, are not able to protect their own interests. Since it is difficult to find individuals possessed of the prerequisite virtues of able trusteeship or to be sure of their possession of such qualifications, settlors are frequently perplexed in designating their fiduciaries.

Financial institutions have not been slow to perceive the promising field offered by fiduciary business. Their right to engage therein was first procured in the early nineteenth century. The first trust company to be incorporated *eo nomine* in New York was the New York Life Insurance and Trust Company, founded on March 9, 1830, although a few years earlier the Farmers Fire Insurance and Loan Company of New York had been incorporated with a legislative grant of full power to act as trustee under the supervision of a Court of Chancery. It was not until 1883, however, that corporations in New York were given blanket authority to exercise trust functions and not until 1885 that permission was given generally to incorporate to do a trust business. Other states followed New York's example quite generally, but not without reservation, as for instance New Hampshire, where even today, on the grounds of public policy, trust companies are disqualified from acting as administrators or guardians and until quite recently even as executors.

That this development was a slow process may very likely have been due in part to the incompatibility of the doctrines of early equity jurisprudence anent trusts and trustees and their enforcement over an inanimate entity. A corporation, "being devoid of soul," could not very well have its "better nature subpoenaed." Another reason why this development was retarded, no doubt, was the adherence of English and of American colonial courts to the rule that fiduciaries were to have no allowance for personal services unless such compensation was provided for in

9 Laws of New York (1830), Ch. 75. 10 Laws of New York (1822), Ch. 50.
11 Laws of New York (1885), Ch. 425. 12 Laws of New York (1887), Ch. 546.
13 "Any trust company, etc. . . . may be appointed trustee or executor . . . but no corporation shall be appointed in any other fiduciary capacity. No trust company, etc. shall advertise or circularize the fact that it is authorized to act as executor. Nothing herein contained shall affect the rights of religious, charitable and eleemosynary corporations to act in fiduciary capacities." Pub. Laws of N. H. 1926, Ch. 264, § 13, as amended by act approved May 17, 1935.
14 See note 19 Va. L. Rev. 286.
the will or trust instrument. But the earliest cases in this country indicated a growing appreciation of principle that ubi beneficium, ibi onus, that "cheap trustees are poor trustees," and hence fiduciaries have come quite generally in the United States to be allowed compensation as a matter of right.

The public necessity for reliable and trustworthy fiduciaries has been duly recognized by the courts. Without such trustees, cestuis que trustent would have no real protection, and without protection there is no fundamental use for trusts and trustees.

The advantages of, and reasons for, corporate trusteeship were found by an early legislative commission of inquiry to be four-fold: (1) fraud and incompetence of individual trustees; (2) migratory character of people, rendering the individual unsuited for trust duties; (3) complication of investment problems due to rapidly changing property values; (4) financial security, stability, and immortality of the corporation.

Corporate fiduciaries have been prone to capitalize upon their inherent advantages by advertising their superior qualifications and their specialization in fiduciary work. What they have failed to make known clearly to the general public, however, in soliciting profitable trust business, is the fact that in their trust instruments or agreements are contained safety clauses which would exonerate them from all liability except that incurred through lata culpa, wilful default or bad faith.

The defensive efficacy of these common exculpatory clauses has been the subject of much current speculation in the pro-

15 Frederick Vierling, "Compensation of Executors," 10 St. L. L. Rev. 225, vindicating doubt as to whether this rule ever prevailed in the U.S.

16 "Gratuitous services are not to be expected in business relations. Disinterested benevolence is as rare as human gratitude. The law is formed, not on exceptional, but prevailing types. Hence, a policy of allowing compensation commensurate to the services and responsibility required is essential to secure the best results." Clark's Estate, 10 Fa. Dist. Rep. 378 at 379 (1901). See also In re Arkenburgh, 56 N. Y. S. 523 (1899); Granbery's Ex'r v. Granbery, 1 Va. 246 (1793).

17 In re Thurston, 145 A. 110 (N. J., 1929); Matter of Salomon's Ex'rs, 252 N. Y. 381, 169 N. E. 616 (1930); N. Y. Civil Practice Act (Clevenger) 1932, § 1548; Raines v. Raines's Ex'rs, 51 Ala. 237 (1874); In re Dunlap's Estate, 38 Ariz. 525, 2 P. (2d) 1045 (1931); W. Va. Code 1931, Ch. 44, Art 4, §§ 9-14; Tenn. Code (Williams 1932), § 8250; Mass. Gen. Laws 1932, Ch. 206, § 16; In re Smith's Estate, 18 Wash. 129, 51 P. 348 (1897).

18 In re Filardo, 221 Wis. 589, 267 N. W. 312 (1936); Richardson v. Union Mortgage Co., 210 Iowa 346, 228 N. W. 103 (1929).

fession, the topic of many articles of recent publication\(^2\) in the legal periodicals, and an outstanding issue of much litigation of late.\(^2\) The crux of the matter has been well put by Professor George G. Bogert in his admirable treatise, *The Law of Trusts and Trustees*. He writes:

It is quite common to find in trust instruments provisions that the trustee is to be held in the administration of the trust in question to a standard of skill and care lower than that normally fixed by equity. These clauses take various forms, sometimes limiting liability to cases of wilful default or gross negligence, and in other cases excluding liability in cases of mistakes and errors of judgment.

Such stipulations have been held valid; it being regarded as within the powers of the settlor “to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done.” . . .

The English and Scotch cases have sustained the ordinary limited immunity clauses, although giving them a somewhat strict construction, and somewhat reducing the effect which one might naturally think they would have.\(^2\)

Public opinion has become somewhat aroused by the exposure of the legal effect of such exoneration clauses. Trust companies have been accused of contriving by contract “to do everything but wilfully rob the beneficiary.”\(^2\) Moreover, the injustice or lack of ethics of permitting trust corporations to represent themselves to the public as “paragons of financial skill” and of delimiting their liability to that of an ordinary, prudent citizen of “Main Street” has been cogently pointed out by legal authors\(^2\) and touched upon by judicial obiter dictum.\(^2\)


\(^2\) But see Mucklow v. Fuller, Jac. 198, 37 Eng. Rep. 824 (1821); Knox v. Mackinnon, [1888] 13 A. C. 753, in which Lord Watson said, “But it is the settled law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of *culpa lata*, or gross negligence on his part, or of any conduct which is inconsistent with *bona fides*.”


\(^2\) The defendant herein not only generally restricted its liability to gross negligence but practically in every way and at every turn specifically limited
In general the measure of an individual trustee's duty and care in the handling of the broad affairs of a trust estate has been well settled and clearly defined by the authorities; it is that degree of diligence and skill which an ordinarily prudent man would bestow upon his own similar affairs. This leads to a query which is the cause of this writing: Will the professional fiduciary of the future be held to a stricter code of accountability than the individual trustee with no special training? There is growing evidence that this query ultimately may be answered in the affirmative. Let us examine some of the straws which show the wind to be in that direction.

In the Restatement of the Law of Trusts as adopted and promulgated by the American Law Institute and published in 1935, it is stated: "If a trustee has greater skill than that of a man of ordinary prudence, he is under a duty [to the beneficiary] to exercise such skill as he has." It is subsequently commented, however, that the requirements of care and skill may be relaxed or modified by the provisions of the trust instrument, although any such provision fixing a standard of care and skill lower than that which would otherwise be required of the trustee will be strictly construed.

In another topical section of the Restatement it is noted that the authorities do not justify the taking of any position on the question as to what extent a provision releasing a trustee from liability might be effective to shield a corporate trustee where the trust instrument has been drawn by an attorney regularly retained by the trustee or an attorney recommended by the trustee. It is well known that settlors will frequently, because of ignorance or inexperience, sign a printed form of agreement without realizing its significance upon their rights and without taking independent counsel, feeling that they can rely upon

and prescribed its duty, obligations and responsibilities. But the trustee should be made to live up to the responsibility which it represents to the public as having undertaken by the very advertisement of the designation 'trustee.' Hazzard v. Chase Nat. Bank, 287 N. Y. S. 541 at 571 (1936). "The remedy will come when buyers of corporate obligations prove to be more discriminating and when the presence of restrictive clauses will render the obligations unsalable or unattractive in the market." Lidgerwood v. Hale & Kilburn Corp., 47 F. 3d 318 at 321 (1930).

26 Christy v. Christy, 225 Ill. 547, 80 N. E. 242 (1907); Bell v. Scranton Trust Co., 261 Pa. 28, 103 A. 1019 (1918); Bogert, Trusts and Trustees, III, § 541, and authorities therein cited.


28 Restatement of the Law of Trusts, § 174, comment (d).

29 Restatement of the Law of Trusts, § 222, Caveat p. 634.
the reputation of the trust company to afford complete protection.

In 1936, the legislature of the state of New York added Section 125 to the Decedent Estate Law,\textsuperscript{30} in which section it is provided, in part, as follows:

The attempted grant to an executor or testamentary trustee or the successor of either, of any of the following enumerated powers or immunities shall be deemed contrary to public policy: The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence. . . . Any person interested in an estate or trust fund may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his interest in the estate or fund, any provision in any will to the contrary notwithstanding.

That the criterion of reasonableness may vary with the surrounding facts and circumstances is well recognized.\textsuperscript{31} What amounts to a reasonable display of care on the part of an individual—perhaps a farmer, mechanic, or small businessman—may be found by equity to be altogether inadequate in the case of a privileged trust company.

In two Wisconsin cases,\textsuperscript{32} that state's Supreme Court has recognized that a higher standard of accountability is due from trust companies. In the earlier case, a corporate testamentary trustee was surcharged with loss resulting from the purchase and retention of shares of the preferred stock of the old Chicago, Milwaukee & St. Paul Railway Company. In the later case, a trust company was surcharged where it failed to present in apt time bonds of the estate for payment after the publication of a "call" notice in local newspapers and loss resulted due to the subsequent insolvency of the paying agent. The opinion of the court in the former case contains this language which is in point:

The performance of the duties of a trustee require the exercise of a high degree of fidelity, vigilance and ability. Especially is this true when the trustee is a company organized for the purpose of caring for trust estates, which holds itself out as possessing a special skill in the performance of the duties of a trustee, and which makes a charge for its services which adequately compensates it for a high degree of fidelity and ability in the administration of a trust estate.\textsuperscript{33}

\textsuperscript{30} New York Laws 1936, Ch. 378.


\textsuperscript{32} In re Allis' Estate, 191 Wis. 23, 209 N. W. 945 (1926); In re Church's Will, 221 Wis. 472, 266 N. W. 210 (1930).

\textsuperscript{33} In re Allis' Estate, 191 Wis. 23, 209 N. W. 945 (1926).
The pertinent language of the later opinion is even stronger:

It would certainly seem that professional trustees, who obtain appointments as such because, by reason of their large volume of such business and consequently better facilities, they are considered better qualified for managing trust estates and investments than private individuals, and who function as such trustees largely for local estates . . . can reasonably be expected, in the exercise of ordinary care in respect to securities held by them in trust . . . to follow the status of such securities by carefully examining . . . newspapers of general circulation in that locality. 34

Much discussion has been evoked by the case of In re Clark’s Will, 35 where the court opined that a professional trustee or a trust company should be held to a stricter degree of care in the administration of a trust estate than could be expected of a private individual. While its judgment was affirmed by the intermediate appellate court without opinion, 36 the Court of Appeals did not seem to be particularly concerned about differences in standards between professional and nonprofessional trustees and decided that the trustee had merely made such a mistake in judgment as any testator risks when he relies on the exercise of discretion with respect to the disposal of his estate by a trustee. 37

The Supreme Court of Pennsylvania, in the case of In re Linnard’s Estate, 38 took cognizance of the argument that a trust company ought to be held to a stricter rule of responsibility but decided that the facts of the case did not warrant the application of any such rule, which, according to the Chief Justice, would be “an advance in the law.” 39 The statement of facts of that case shows that eight years after the approval of an executor’s final report and accounting and the closing of the estate in the probate court, the plaintiff’s petition for leave to file a bill of review to

34 In re Church’s Will, 221 Wis. 472, 266 N. W. 210 at 215 (1936).
36 250 N. Y. S. 781 (1931).
37 In re Clark’s Will, 257 N. Y. 132, 177 N. E. 397 (1931).
39 “We have not overlooked appellants’ argument, so earnestly pressed, that owing to the special facilities possessed by such corporations, ‘A stricter rule of responsibility should be exacted from trust companies as fiduciaries’ than from the ordinary individual trustee; but the record in the present case would not warrant consideration of any such advance in the law. Rulings which involve enlarged applications of established principles to new conditions, and when subsequently followed, give rise to what become known as new or advanced principles, should be made only in cases where the facts relied on plainly appear and clearly call for such rulings. As we have already indicated, this is not a case of that character.” In re Linnard’s Estate, 299 Pa. 92 at 93, 148 A. 912 at 914 (1930).
attack the account and surcharge the executor for retaining speculative securities was presented. The petition did not specify any errors of fact or law in the account, any new matter alleged to have arisen since its adjudication, nor the subsequent discovery of new evidence.

The much publicized decision of the Illinois Appellate Court in the case of In re Estate of Busby somewhat enlarged upon the measure of skill and diligence ordinarily required by trustees by its ruling that the executor in that case could only take such risks as would be taken by an ordinary prudent man "who is a trustee for the money of others." Presiding Justice John J. Sullivan, in the reported opinion of that case, stressed repeatedly the high qualifications of the fiduciary in question, using the following language:

It knew . . . that as a professional fiduciary holding itself out to be exceptionally skilled and qualified in matters of estate administration, it had no right to continue decedent's speculation with the assets of the estate in the condition they were.

A fortiori, the executor in this case, a professional fiduciary, was, in our opinion grossly negligent in permitting the total destruction of the assets of the estate herein.

The courts of appeal of the state of Washington have imposed rigorous liability on trustees. The Supreme Court of that state, in refusing to recognize an immunity clause in a trust deed, held as follows:

The implications which arise from the relations of the parties are as much a part of the deed as if they were written into it. . . . If this clause be given this effect . . . it would destroy the entire structure and character of the trust deed.

In the opinion of an eminent English jurist, Sir Ford North, deciding the case of National Trustees Company of Australasia

---

41 At p. 524.
42 At p. 531. Exonerating clause saves trustee against losses incurred through retaining at the request of the testator the original assets of the estate. Old Colony Trust Co. v. Shaw, 261 Mass. 158, 158 N. E. 530 (1927); In re Brown's Estate, 287 Pa. 499, 135 A. 112 (1926); Peckham v. Newton, 15 R. I. 321, 4 A. 758 (1888). But trustee is charged with the same rules of liability whether dealing with the original assets of the estate or its own investments. Citizens' & Southern Nat. Bank v. Clark, 172 Ga. 625, 158 S. E. 297 (1931).
43 Welch v. Northern Bank & Trust Co., 100 Wash. 349, 170 P. 1029 (1918); Stuhr v. Yakima Valley Bank & Trust Co., 149 Wash. 400, 271 P. 82 (1928).
44 State v. Comer, 176 Wash. 257, 28 P. (2d) 1027 (1934).
v. General Finance Company of Australasia, the more onerous position of a trust company is emphasized in the following language:

It is a very material circumstance that the appellants are a limited joint stock company, formed for the purpose of earning profits for their shareholders; part of their business is to act as trustees and executors; and they are paid for their services in so acting by a commission which the law of the Colony authorizes them to retain out of trust funds administered by them, in addition to their costs. . . . The position of a joint stock company which undertakes to perform for reward services it can only perform through its agents, and which has been misled by those agents to misapply a fund under its charge, is widely different from that of a private person acting as gratuitous trustee.

Another English case of more recent decision held a professional liquidator liable as a trustee to reimburse the estate for moneys that he had paid out in good faith to settle a contractual liability of the company in liquidation. He had defended his conduct by raising Section 30 of the Trustees Act of 1925, which would have made him liable only for loss occasioned by wilful default. The immunity afforded by Section 61 of the foregoing Act to trustees acting bona fide was also raised. Lord Lawrence, in holding the defendant liable, laid emphasis upon his professional character in this phraseology:

The appellant . . . is a chartered accountant carrying on business for his own profit; and in the course of such business and as part of it he undertakes to act as the liquidator of the company at a remuneration. If in so acting he incurs a loss by acting wrongly, although he may have acted honestly, I have come to the conclusion . . . that the Court would decline to hold either that he had acted reasonably or that he ought fairly to be excused for the breach of trust.

Legal grounds for attaching a heavier liability upon corporate trustees despite the protection of exoneration clauses and for the better protection of trust estate and cestuis que trustent might be propounded as follows:

1. Estoppel—By holding itself out as having superior capacity, greater skill and wider experience to discharge fiduciary responsibilities, the corporate trustee is estopped from disclaiming the burden of its representation.

46 In re Windsor Steam Coal Co. (1901), Ltd., [1929] 1 Ch. 151, 140 L. T. Rep. 80.
47 15 George V c. 19.
48 See 77 Sol. J. 611.
2. Public Policy—In view of the importance to the public welfare of the function of transmitting, by trust, mass wealth from one generation to another, it is in the public interest to surcharge professionals performing such function with stricter liability. The trust company, receiving as it does special privileges from the people, must be prepared to assume special responsibilities.

3. Negligence—Any negligence at all on the part of a trust company in the administration of the trust res might, depending upon the circumstances, be considered and construed as gross negligence.

4. Implied Duty—Duties might be implied from the trust instrument and its purposes which would be incompatible with and not "intended" to be covered by the exoneration clause and the general doctrine of ordinary vigilance.49

While the trust company is splendidly equipped to give specialized attention to the financial administration of trusts and to render such service with efficiency, there are certain drawbacks to such administration which settlors and their counsel must reckon with. Among these may be stated the following:

1. Expense—Corporate fiduciary fees are high and are apt to become higher;50 many trust officers openly admit that their services are too costly for estates with a corpus of less than $50,000 in amount; moreover, the basis for fee charges are being changed over from a percentage of annual income to a percentage of the corpus charged annually.

2. Impersonality—Being inanimate, it cannot exercise that personalized and human service so desired in family trusts; nor by the same token can it exercise the personal discretion so needed in the administration of many trusts.

3. Personnel—The trust company can act only through its agents, so that duties must necessarily be delegated, usually to subordinate officers and employees, none of whom have an assured tenure of employment; hence, the settlor or testator has no assurance that any particular person selected by him will continuously handle the affairs of the trust.

50 See S. A. Coykendall, Jr., "Trustees Insurance Protection Against Surcharge for Investment Loss," Law and Cont. Problems (Summer, 1938), 470 for discussion of insurance to curtail fiduciary expenses and relieve against all liability except for gross negligence and bad faith.
4. *Divided Loyalty*—Officials and employees of banks and trust companies owe their primary allegiance to the stockholders and not to the customer or his beneficiaries.

5. *Inflexibility*—Difficulties are always present in dealing with large corporations, especially those which are under the control or supervision of governmental bodies. Chief of these difficulties is the proverbial “red tape,” and not the least of them lies in the exercise of discretionary judgment and the making of urgent decisions with dispatch, especially when such matters pertain to the personal welfare of the beneficiaries.

6. *Commercialism*—The administration of a trust estate is and necessarily must be a profit-making endeavor with a bank or corporate fiduciary; should the business become unprofitable the corporate trustee is always tempted to resign and usually does; such a trustee is not bound by the impelling ties of friendship and honor to execute a trust regardless of the appearance of unforeseen difficulties and changed circumstances.

It is not with any thought of disparagement or criticism of organized trust companies and their vitally important function in modern society that the author has sought to trace a legal trend, obviously still inchoate, and to point out patent defects in corporate as against individual administration of trust estates. Like good St. Christopher, they have shouldered a burden which is becoming unexpectedly heavier, and they are carrying through with it. The reason why the writer has attempted to canvass the pros and cons of the matter is his conviction that there is needed in the public interest today a class of individual trustees and a system of personal or public trusteeship to complement corporate trusteeship. Such a class would and should be imbued with professional ideals; be possessed of prerequisite qualifications (if necessary, governed by statute); be required to provide and post fidelity bonds or sureties to guarantee the faithful discharge of their duties; and be required to make periodic accountings on standard forms and reports in prescribed manner subject to judicial or state departmental review. Not having the overhead of the corporate fiduciary, such professionals could afford to

---


52 See Uniform Trusts Act, Uniform Trustees' Accounting Act, and prefatory notes thereto.
undertake the administration of smaller estates at a more modest fee charge. To them, as well as to the trust company, the court might properly apply a rule of stricter accountability, of greater vigilance, higher care and closer diligence commensurate with their qualifications and privileges.

Individual fiduciaries of special standing have long been constituted by statute and custom in England and Scotland. They are known as "judicial trustees" in the former country and as "judicial factors" in the latter. By virtue of the Judicial Trustees Act which went into operation on May 1, 1897, this new class of trustees was called into existence. The provisions of this Act in brief are as follows: Judicial trustees are appointed by the court on application by or on behalf of the person intending to create a trust or by, or on behalf of, an ordinary trustee or beneficiary; any fit or proper person may be appointed, including an official of the court; general and special instructions in regard to the trust and its administration may be given by the court; an annual audit and report to and special investigations by the court on the administration of the estate are required of the judicial trustees; fees may be paid or allowed out of the trust property as the court of appointment shall sanction, or a flat fee or basis of remuneration may be assigned to cover all the work and personal outlay of the judicial trustee.

To supplement the work of private, professional, and corporate trustees in England there was established the office of Public Trustee, which has been functioning successfully since 1906. According to the enabling Act of Parliament, the office "shall be a corporation solely under that name with perpetual succession and an official seal. The State guarantees to make good to the beneficiary losses which an ordinary trustee would be liable to make good and this guarantee covers the acts and defaults of the public trustee officers." A big factor in the success of that office has been the reasonableness of its fees.

53 Lewin, Trusts (14th ed.), Ch. 15, p. 607 and footnotes.
54 Judicial Trustees Act (1896), 59 & 60 Vict. c. 35.
55 Lewin, Trusts, Ch. 15, p. 607 et seq.
56 Public Trustees Act (1896), 59 & 60 Vict. c. 35, as amended by 6 Edw. VII c. 55 (1906).
57 Ibid., § 1 (2).
58 Capital Fees:

10 s. per cent (per £100) for first £5,000
7 s. 6 d. per cent for next £20,000
3 s. 9 d. per cent for next £25,000
As in the administration of law itself, so in the administration of trusts, there can be no such thing as finality. In those fitting words of Lord Justice Bowen:

It changes, it must change, it ought to change with the broadening wants and requirements of a growing country and with the gradual illumination of the public conscience.

---

Income Fees:

1 s. 3 d. per cent for next £25,000
6 d. per cent for any excess over £75,000

In addition, there is a charge for managerial services. Pub. Tr. Order, 926 (S. R. & O. 1925 [No. 12681], p. 1631).


Acceptance Fee:

<table>
<thead>
<tr>
<th>Value</th>
<th>Transferred Trust</th>
<th>New Trust</th>
</tr>
</thead>
<tbody>
<tr>
<td>£1,000</td>
<td>£15</td>
<td>£10</td>
</tr>
<tr>
<td>£5,000</td>
<td>£35</td>
<td>£25</td>
</tr>
<tr>
<td>£10,000</td>
<td>£60</td>
<td>£43 15 s.</td>
</tr>
<tr>
<td>£50,000 and up</td>
<td>£185</td>
<td>£137 10 s.</td>
</tr>
</tbody>
</table>

Withdrawal Fee:

<table>
<thead>
<tr>
<th>Value</th>
<th>Executorship</th>
<th>New Trust</th>
</tr>
</thead>
<tbody>
<tr>
<td>£1,000</td>
<td>£1 10 s. per cent</td>
<td>£1 per cent</td>
</tr>
<tr>
<td>£5,000</td>
<td>14 s. per cent</td>
<td>10 s. per cent</td>
</tr>
<tr>
<td>£10,000</td>
<td>12 s. per cent</td>
<td>8 s. 9 d. per cent</td>
</tr>
<tr>
<td>£50,000</td>
<td>7 s. 5 d. per cent</td>
<td>5 s. 6 d. per cent</td>
</tr>
</tbody>
</table>