THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND

CHANTAL STEBBINGS

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THE PRIVATE TRUSTEE IN VICTORIAN ENGLAND

The trust was a popular device among the Victorian middle classes to preserve their private property for the benefit of their families. At the centre of this legal institution was the trustee, whose duty it was to manage the property as the original owner wished. In their task of managing the property, Victorian trustees found themselves in a society which was changing rapidly and extensively, a new commercial and dynamic society which had a profound effect on their ability to carry out their duties. This book explores the legal response to the challenges faced by trustees, and does so through the varied relationships which trustees necessarily experienced in the course of their administration.

A consideration of the legal dimension to trusteeship, this book sets the trustee in his legal, social and economic context. It will be of interest to legal historians, as well as nineteenth-century historians of Britain.

CHANTAL STEBBINGS is Reader in Modern Legal History at the University of Exeter.

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For Howard, Mark and Jennie

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FOREWORD

The English law of Trusts was invented by English barristers and developed by the courts to avoid feudal taxes and to protect property for the benefit of widows and infants. Settlements ensured that primogeniture preserved capital; settlement trustees enforced against eldest sons obligations to maintain widows, educate younger sons and provide financial inducements for the marriage of daughters. Eldest sons became squires, younger sons became clerics or administrators and daughters provided the next generation. The whole system of trusts depended on trust and on the incorruptibility of trustees. The Courts of Chancery, much abused for their delay and expense, nevertheless evolved a series of draconian rules designed to protect beneficiaries against exploitation. The two principal rules were that a trustee must not profit from his trust and must not put himself in a position in which his interest conflicts with his duty. While the Courts of Chancery supervised private trusts there was no corresponding check on public fiduciaries. Nepotism and corruption in public office were only gradually eliminated as Parliament reformed itself, and the Courts of King's Bench began to claim power to curb the excesses of maladministration by the weapons of judicial review and discovery. The heyday of trusts was the Victorian era when religion, philanthropy and male chauvinism all combined to frustrate Lizzie Eustace and produce Soames Forsyte. In this study of the private trustee in Victorian England, the author sets forth all the rules which still apply to trustees and all the ramifications of those rules on private and commercial morality. The rules have outlasted the settlements which they were designed to regulate. The basic principles of trust law are now applied to Members of Parliament, members of local authorities and other participants in public life by a variety of tribunals, auditors and ombudsmen. But the express private trust only survives as a relic of the past or

as a consequence of a death. One reason for the unpopularity of the trust is the incidence of taxes which can only be mitigated or avoided by manipulations which are too risky for trustees to undertake. An equally powerful reason is the divorce of income and profit. Under the traditional settlement, the beneficiary for the time being is entitled to income and some future, usually unborn, issue will ultimately claim the capital. Some land continues to produce an income for a life tenant, but both the life tenant and the remainderman are usually concerned to put an end to the trust in order to avoid the ravages of tax. Shares no longer produce an income. Companies prosper for their shareholders by an increase in the value of their shares, said to mirror an increase in the capital value of their assets, usually by a merger or takeover whose principal beneficiaries are directors who by a quirk of Company Law are not subject to the restrictions imposed by Equity on trustees. The laws which govern private trustees are of more than private or academic interest because they are the foundation of integrity in private and public life in this country. Dr Stebbings' lucid exposition of those laws is scholarly for the practitioner and thought-provoking for the general reader.

TEMPLEMAN

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ABBREVIATIONS

Law reports

AC	*Law Reports Appeal Cases* 1891–
Amb	*Ambler's Chancery Reports* (27 ER) 1737–84
App Cas	*Law Reports Appeal Cases* 1875–90
Atk	*Atkyns' Chancery Reports* (26 ER) 1736–55
Beav	*Beavan's Rolls Court Reports* (48–55 ER) 1838–66
Bli N S	*Bligh's House of Lords Reports, New Series* (4–6 ER) 1827–37
Bridg J	*Sir John Bridgman's Common Pleas Reports* (123 ER) 1613–21
Bro CC	*W. Brown's Chancery Reports* (28–9 ER) 1778–94
Bro PC	*J. Brown's Parliamentary Cases* (1–3 ER) 1702–1800
Ca t Finch	*Cases in Chancery tempore Finch* (23 ER) 1673–81
Ch	*Law Reports Chancery* 1891–
Ch D	*Law Reports Chancery Division* 1875–90
Coll	*Collyer's Chancery Cases tempore Bruce* VC (63 ER) 1844–5
Coop G	*G. Cooper's Chancery Reports tempore Eldon* (35 ER) 1815
Cox	*Cox's Chancery Reports* (29–30 ER) 1783–96
Cr & Ph	*Craig and Phillips' Chancery Reports* (41 ER) 1840–1
De G & J	*De Gex and Jones' Chancery Reports* (44–5 ER) 1857–9
De G & Sm	*De Gex and Smales' Chancery Reports* (63–4 ER) 1846–52
De G F & J	*De Gex, Fisher and Jones' Chancery Reports* (45 ER) 1860–2
De G J & S	*De Gex, Jones and Smith's Chancery Reports* (46 ER) 1862–6

De G M & G	*De Gex, Macnaghten and Gordon's Chancery Reports* (42–4 ER) 1851–7
Dick	*Dickens Chancery Reports* (21 ER) 1559–1798
Dow & Cl	*Dow and Clark's House of Lords Cases* (6 ER) 1827–32
Dr & Sm	*Drewry and Smale's Chancery Reports* (62 ER) 1860–5
Drew	*Drewry's Chancery Reports tempore Kindersley VC* (61–2 ER) 1852–9
Eden	*Eden's Chancery Reports* (28 ER) 1757–66
Giff	*Giffard's Chancery Reports* (65–6 ER) 1857–65
H & Tw	*Hall and Twell's Chancery Reports* (47 ER) 1849–50
Hare	*Hare's Chancery Reports* (66–8 ER) 1841–53
J & H	*Johnson and Hemming's Chancery Reports* (70 ER) 1860–2
Jac	*Jacob's Chancery Reports* (37 ER) 1821–2
Jac & W	*Jacob and Walker's Chancery Reports* (37 ER) 1819–21
Jo & Lat	*Jones and Latouche's Chancery Reports, Ireland* 1844–6
Keen	*Keen's Rolls Court Reports* (48 ER) 1836–8
LJ Ch	*Law Journal Reports, Chancery, New Series* 1831–46
LJ Exch	*Law Journal Reports, Exchequer, New Series* 1831–75
LR Ch App	*Law Reports Chancery Appeal Cases* 1865–75
LR Eq	*Law Reports Equity Cases* 1865–75
LR HL	*Law Reports English and Irish Appeals* 1866–75
LT	*Law Times Reports* 1859–1947
Mac & G	*Macnaghten and Gordon's Chancery Reports* (41–2 ER) 1848–51
Madd	*Maddock's Chancery Reports* (56 ER) 1815–22
Mod	*Modern Reports* (86–8 ER) 1669–1755
Moo PC	*Moore's Privy Council Cases* (12–15 ER) 1836–62
Mosely	*Mosely's Chancery Reports* (25 ER) 1726–31
My & Cr	*Mylne and Craig's Chancery Reports* (40–1 ER) 1835–41
My & K	*Mylne and Keen's Chancery Reports* (39–40 ER) 1832–5
P Wms	*Peere Williams' Chancery and King's Bench Cases* (24 ER) 1695–1735
QB	*Law Reports Queen's Bench* 1891–1901
Russ	*Russell's Chancery Reports* (38 ER) 1823–9

Russ & M	*Russell and Mylne's Chancery Reports* (39 ER) 1829–31
Salk	*Salkeld's King's Bench Reports* (91 ER) 1689–1712
Sel Cas t King	*Select Cases in Chancery tempore King* (25 ER) 1724–33
Sim	*Simons' Vice Chancellor's Reports* (57–60 ER) 1826–50
Sim & St	*Simons and Stuart's Vice Chancellor's Reports* (57 ER) 1822–6
Sm & Giff	*Smale and Giffard's Chancery Reports* (65 ER) 1852–7
Swans	*Swanton's Chancery Reports* (36 ER) 1818–19
Tam	*Tamlyn's Rolls Court Reports* (48 ER) 1829–30
TLR	*Times Law Reports* 1884–1952
Turn & R	*Turner and Russell's Chancery Reports* (37 ER) 1822–4
V & B	*Vesey and Beames Chancery Reports* (35 ER) 1812–14
Vern	*Vernon's Chancery Reports* (23 ER) 1680–1719
Ves & B	*Vesey and Beames' Chancery Reports* (35 ER) 1812–14
Ves Jun	*Vesey Junior's Chancery Reports* (30–4 ER) 1789–1817
Ves Sen	*Vesey Senior's Chancery Reports* (27–8 ER) 1747–56
WN	*Weekly Notes* 1866–1952
Y & C C C	*Younge and Collyer's Chancery Reports* (62–3 ER) 1841–3
Y & C Ex	*Younge and Collyer's Exchequer Reports* (160 ER) 1834–42

Source: Donald Raistrick, *Index to Legal Citations and Abbreviations*, 2nd edn (London, 1993). The relevant volume of the *English Reports* (ER) is also indicated.

Other abbreviations

DRO	Devon Record Office
Minutes of Evidence, 1895	'Minutes of Evidence taken before the Select Committee on Trusts Administration', *House of Commons Parliamentary Papers* (1895) xiii (403), C. 248
Parl. Deb.	*Parliamentary Debates*

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THE TRUSTEE

A simple creature Gaffer Jones,
A Court he never saw;
An income adequate he owns;
What should he know of Law?

He had a quiet stupid air,
And he was richly clad;
I thought if he's got cash to spare,
'Tis easy to be had.

A suit I heard was 'gainst him brought,
Which must expensive be.
'Expense!' he cried; 'Pooh pooh, 'tis nought;
I'm only a trustee.'

'But how is that? I pray you tell.'
He answered, 'Don't you see?
I'd got some property to sell –
Only as a trustee.

'Two purchasers they did apply,
Whilst, to prevent all bother,
When one hung back I by and by
Concluded with the other.

'The first from Chancery got a writ,
And served it straight on me;
But why am I to care a bit? –
I'm only a trustee.'

'You say in Chancery you are thrown;
Great the expense will be;
And since the fault has been your own,
The costs will fall on thee.'

Then did the simpleton reply,
''Tis true the first vendee
Has filed a bill – I can't tell why –
I'm only a trustee.'

‘You’re in a mess, my little man,
As sure as you’re alive,
Unless to hit upon a plan
For safety you contrive.’

‘You’re rather green, it may be seen,’
The silly man replied;
‘The purchase-money paid has been,
The fund I did divide;

‘And when I’d parted with it, Sir,
Another suit they brought;
Because, they said, I’d sold it for
Less money than I ought.

‘First, the original vendee
Had filed a bill to say,
His purchase-money paid would be,
Upon a certain day.

‘But as it happen’d, I’d been paid
By number two, and I
To him had the estate consign’d,
Passing the first one by;

‘And as I did not better know
With whom I ought to side,
I’ve let the money from me go –
The fund I did divide.

‘So the executors have brought
An action ’gainst me, too,
Yet I’ve proceeded as I thought
’Twere best for me to do.’

‘How many suits must you defend,
In numbers odd or even?’
Said he, ‘To say I can’t pretend:
I think, though, there are seven.

‘But then, you know, you’ll understand
It matters not to me;
For though no fund I’ve got in hand,
I still am a trustee.’

‘The cash is gone, the suit runs on,
Each day requires a fee!’
’Twas waste of argument, for still
He said, ‘I’ve not to pay a bill,
I’m only a trustee.’

Punch, 1848

1

CHALLENGES TO TRUSTEESHIP

When the concept of the trust was accepted and enforced by the Court of Chancery in the fifteenth century, Equitable theory and practical considerations placed the trustee at the very centre of the institution. The responsibility for the administration of the trust was placed in his hands; a task which, once accepted, he undertook with no remuneration, significant risk, and considerable effort. The jurisdiction of the Court of Chancery, and the acceptance of such a burden by the trustee himself, stemmed from the moral obligation attached to the transfer of the property to the latter. The creation of the trust and its effective management was both personally and legally a matter of conscience. The principal protagonists, namely the settlor, the trustee, the beneficiaries and the court, recognised it as such, a view understood and supported by the general public.

The undertaking of onerous duties possibly extending over many years for the benefit of one's family and friends was expected and accepted in early modern England. The ties of blood and friendship were strong. Family responsibility was essential in a society which was necessarily self-reliant, where fortunes, however modest, had to be preserved and passed down to later generations, and mortality was such that orphaned infants were not unusual and could only look to the prescience of their parents and the goodwill of their wider families. Moral duty, self-interest and practical necessity were conveniently united in the acceptance of the duties of trustee. In the relatively stable social structures prior to the industrial revolution, such attitudes were maintained. National wealth increased, but not so rapidly as to flood the country with surplus funds, and while the population increased, assets continued to be concentrated in relatively few hands. That prosperity was also sought and expressed largely in terms of land rather than in personal property or money. Land continued to be the foundation of political power, social status

and material wealth, and the preservation and transmission of land to subsequent generations within a family through the line of the eldest son, as well as ensuring the material support of family members, was a prime objective of the landowning classes. The many desirable qualities of the settlement of land had been fully appreciated and exploited.[1] Religious conviction was an equally potent force both socially and economically. In the eighteenth century, the institution of the trust appeared satisfactorily to address the demands of propertied individuals in the context of their society and economy, and the development of the law took place in that context.

In 1740 Lord Hardwicke LC expressed the original and traditional conception of the trust when he observed that, in general, his court looked upon it 'as honorary, and a burden upon the honour and conscience of the person intrusted, and not undertaken upon mercenary views'.[2] Trustees were to embrace the sacred duty of trusteeship with no receipt, or indeed thought, of financial reward. They were, furthermore, expected to undertake the burden personally, and were to devote themselves wholeheartedly to the well being and security of their beneficiaries. The beneficiaries were pre-eminent in Chancery's concern. Early Equity adopted a view of somewhat extreme paternalism, and perceived the beneficiary as a victim ripe for exploitation. The courts had to be supremely vigilant, for if trustees were given an inch, they would take a mile. Accordingly errant trustees had to be dealt with swiftly and severely to serve as an example to others. The voluntary nature of the trust was additional justification. The law neither encouraged nor permitted deviation from this ideal. Throughout the eighteenth and the early years of the nineteenth century the fundamental principles of Equity were settled and subsequently elaborated by Lord Hardwicke and then by Lord Eldon.[3] They laid the foundations of trusts jurisprudence in the Victorian period.

The dawn of the Victorian age saw the trust fully established in law and in English society and culture. It was familiar to and understood by the landed classes, who had employed it in the preservation

[1] See Lloyd Bonfield, *Marriage Settlements 1601–1740: The Adoption of the Strict Settlement* (Cambridge, 1983) ; M. R. Chesterman, 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in G. R. Rubin and David Sugarman (eds.), *Law, Economy and Society* (Professional Books, 1984), pp. 127–45.

[2] *Per* Lord Hardwicke LC in *Ayliffe* v. *Murray* (1740) 2 Atk 58 at 60.

[3] See W. S. Holdsworth, *Some Makers of English Law* (Cambridge, 1938).

of family estates and the provision for their families for over a hundred years. Its fundamental doctrines were largely settled and a considerable body of law had grown up around it. It was, furthermore, supported by an infrastructure, though still general in nature, of legal and other professional expertise. The Victorians embraced the trust with the same enthusiasm which they showed in all aspects of their lives. An intense curiosity about art, literature, history, science, medicine and the natural world was continued into the more prosaic sphere of government and social and legal institutions. Legal concepts and devices were addressed, examined, reformed, refined, developed and adopted, and, thus adapted, played their full part in the vibrant and dynamic society of Victorian England.

Since the trust was a purely private arrangement, with no requirements of registration and with significant fluctuations in the value of trust funds, it is impossible to state with accuracy how much property was held in trust in the nineteenth century. It was widely believed by contemporaries to be considerable, and to be increasing as the country became wealthier with more money available to be settled. In 1895 it was said that 'an enormous amount of personal property, as well as a great deal of land',[4] was held in trust, and some believed it was as much as one-tenth of the property in Great Britain.[5] One estimate was £1,000 million.[6] As a result Lord St Leonards could say that there were 'few social questions of more importance' than the trust relationship in Victorian England,[7] and as early as 1857 the trust could accurately be described as 'one of the most ordinary relations of life', and the positions of trustee and beneficiary as 'among the most common and the most necessary'.[8] Writing in the early years of the next century, Frederic Maitland observed that the trust 'seems to us almost essential to civilization'.[9] Where such numbers were concerned, trusteeship was a concept which formed an integral part of Victorian society and the issue of

[4] 'Report from the Select Committee on Trusts Administration', *House of Commons Parliamentary Papers* (1895) (248) xiii 403.

[5] 'Minutes of Evidence taken before the Select Committee on Trust Administration', *House of Commons Parliamentary Papers* (1895) xiii (403) q. 79, C. 248, hereafter cited as *Minutes of Evidence, 1895*.

[6] *Minutes of Evidence, 1895*, q. 593, *per* William Walters, solicitor.

[7] Lord St Leonards, *A Handy Book on Property Law* (2nd edn, Edinburgh and London, 1858), p. 159.

[8] *Parl. Deb.,* vol. 145, ser. 3, col. 673, May 21 1857 (HC).

[9] F. W. Maitland, *Equity* (2nd edn, Cambridge, 1949), p. 23.

trustees' powers, duties and liabilities was one of considerable legal and popular importance.

Being a relationship based on property, the trust was not one employed or enjoyed by the abject poor, but whereas in the eighteenth century it had been the province principally, though not exclusively, of the aristocracy and the landed classes, Victorian England saw its widespread adoption by the emerging middle class. This was a class with unprecedented power and influence in national life. These businessmen, bankers, lawyers, doctors, clergymen, civil servants and shopkeepers were, as a class, self-reliant, educated and commercially astute. An income of £1,000 a year put a man towards the top of the middle class, and many men were worth considerably more. They also had confidence, both in themselves and in the future of their country's political and economic standing. The complex family settlements of the landed estates of the aristocracy continued in their pattern of creation and renewal, but the principal innovation of the nineteenth century was the growth of the small – and not so small – family trust of personalty. Not only did this reflect the decline in the political, economic and social value of land and the increased tendency to express wealth in terms of money,[10] it also reflected the congenial nature of the trust in its fulfilment of the social, moral, religious and financial expectations of Victorian society. All sections of the middle classes, and some of the skilled working classes, employed the trust. Gentlemen, clerks in holy orders, butchers, printers, merchants and yeomen were typical of the range of middle-class settlors. In practice their creation reflected the most significant human rite of passage – marriage – and the most final – death – the former, moreover, implicitly embracing birth. Some individuals settled considerable amounts of property, others more modest fortunes, but it was clearly perceived as an accessible and flexible legal device which met – or at least had the potential to meet – the diverse needs of the new Victorian order.

Social structures in nineteenth-century England were unambiguously hierarchical and fixed, though movement could and did occur between the classes. Inherent in the psyche of the middle classes was the desire to rise through this hierarchy, and this was often expressed through the imitation and adoption of the habits and institutions

[10] See Tom Nicholas, 'Businessmen and Land Purchase in Late Nineteenth Century England', *Discussion Papers in Economic and Social History*, University of Oxford, No. 15, April 1997.

of the social classes above them.[11] In this context the adoption of the trust was unsurprising. The trust, however, was much more than a mark of social aspirations, for it provided a home for the new wealth which the middle classes produced. But central to its use was its traditional nature as a vehicle to support their wives and often numerous children, the family being the centre of Victorian life. There was no welfare state to speak of. Illness and epidemic made life itself uncertain, and the possibility of a parent left alone to raise infant children, or indeed infant children left as orphans, was very real. Children had to be supported and educated, since survival to adulthood brought exposure to a harsh world in which a living had to be sought and made. The liberal education essential to entry into the learned professions of medicine, the church and the law, and the support of young men while they were establishing themselves, was a considerable and long-term expense.[12] Towards the end of the century entry into the new professions, and the introduction of competitive entry to the traditional ones, increased the importance of a sound and relevant – and preferably public-school – education. Married women were entirely dependent on their husbands because they were, until the latter part of the century, incapable of holding property at Common Law. Widows, as indeed all single women of the middle class, had few opportunities to earn their own living for most of the nineteenth century. The trust addressed these issues and allowed the settlor to arrange his fortune in order to ensure that on his death his wife and children would not be left unprovided for, indeed that they would have a measure of that independence which was so highly valued as a measure of respectability in Victorian England. While the settlor desired their security above all else, he also wished his trustees to take financial decisions in unexpected circumstances to ensure his infant children were appropriately provided for in the social and economic context in which he himself had lived. Once a family had arrived in the middle class, it tended to want to stay there. As long as men in contemplation of their death wanted to consign their property to a trusted friend or relation to look after it for the benefit of their wives and children, and to regulate their enjoyment of it, there would be a need for the trust. In this sense trusts were regarded as a powerful and essential tool in family provision.

[11] See John Roach, *Social Reform in England 1780–1880* (London, 1978), pp. 153–73.
[12] See generally, W. J. Reader, *Professional Men* (London, 1966).

Even if the motive were the support of the family, the trust also satisfied the natural human desire to preserve and transmit family wealth to the next generation. The aims of Victorian settlors, and accordingly the powers they purported to give to their trustees, were, however, noticeably short-term in nature. The desire was not the preservation of a specific landed estate for future generations,[13] but rather the preservation and growth of a fund for the support of the next immediate generation or the support of dependants in the event of an early death. The danger in the nineteenth century was not that of taxation, for the rates were too low to make that a significant factor, but rather the natural decline in the value of property if it were not carefully attended to and placed, as well as the possibilities of dissipation by the current owners or appropriation by subsequent marriage. Accordingly, most trusts in Victorian England were trusts of a mixed fund, or of personalty, established for the benefit of persons in succession, generally the wife for life, remainder to the children of the marriage.

In its use in the family context, the trust concept reflected the common social, moral and religious values of the Victorian age. The prevailing culture was that of the family and the public good, of the responsibility of the individual and of thrift and self-reliance. The latter, embodied in the concept of self-help, was of profound significance in Victorian social attitudes. Self-help was 'the means by which the individual made his contribution to the community'.[14] That contribution was only partly material. The perception was that trusteeship, being a prime means of securing the place of a family within the social structure, was a moral duty owed directly to the family and to society. A husband's duty, in return for the complete rights he had over his wife, was to support her. A father's duty as head of the family was to provide for his children and more remote dependants. Socially the trust ensured the perpetuation of the status quo; it not only kept the settlor's dependants from destitution, it also enabled them to continue in the class in which they had lived and thereby preserved both individual position and the class itself.

[13] And indeed the Leases and Sales of Settled Estates Act 1856, 19 & 20 Vict. c. 120, the Settled Estates Act 1877, 40 & 41 Vict. c. 18, and the Settled Land Act 1882, 45 & 46 Vict. c. 38, recognised this in relation to settlements of land.

[14] See E. L. Woodward, '1851 and the Visibility of Progress' in Noel Annan *et al.*, *Ideas and Beliefs of the Victorians: An Historic Revaluation of the Victorian Age* (London, 1949), p. 59.

Any man – relatively rarely, it will be seen, woman – who took on trusteeship for a member of his family was thus playing – and was seen to be playing – his part in the preservation not only of the family interests but of the wider social order. This was done at great personal inconvenience, but as a contemporary writer observed, 'every trusted friend must be prepared to make sacrifices for friendship's sake'.[15] Trusteeship was an act of true affection and esteem, a demonstrable adherence to the social and moral codes, and as such it ensured the respect of the trustee's own social class. Moreover, since this ethos was reinforced and encouraged by the teaching of the Christian church, a man falling short of the expected moral code would have to answer ultimately to God.[16] In the context of the intense religious fervour in Victorian England, trusteeship was significant. It showed, no less, the moral standing of a man: to his family, his fellows, and to God.

As well as achieving its purpose in providing long-term financial support within a quasi-familial context for the middle classes, the trust strengthened the position of the class itself. It perpetuated that class through provision for subsequent generations, and furthermore the infrastructure of the trust in the Victorian period was itself middle class. It was to a large extent dependent on the lower branches of the legal profession and on the new professions of surveyor and accountant for its efficient administration. This supported and strengthened those same professions and, in turn, the class from which both sprang. The social and commercial interaction between settlors, trustees, beneficiaries and the supporting professions, with their shared values and outlook, reinforced the importance of the Victorian trust and facilitated its development.

Trusts in Victorian England were principally of three types. The first was the simplest, where a trustee held a capital sum on trust to pay the income to an adult beneficiary, often the widow, who largely managed her own affairs, and thereafter to distribute the capital to the adult children. This arrangement was straightforward and gave relatively little room for dissension. The principal issue in such trusts was that of investment. The second and most common form of trust was the family or mercantile trust. These trusts were much

[15] A. R. Rudall, *Duty of Trustees as to Investment of Trust Funds* (London, 1906), 'Introductory'.

[16] See W. J. Reader, *Life in Victorian England* (London, 1964).

more complex, often demanding a great deal of time and effort by the trustees, and requiring the exercise of discretion, for they necessitated the running of a business, or the supervision of the education and upbringing of infant children as well as the management of the trust fund. Trusts for widows and infant children, often portrayed as the archetypal Victorian trust, had a particular pathos and were often used to encourage the passage of trust law reform. The third was the traditional trust of landed property, which also required considerable effort from the trustee, though of a different nature, since land needed to be maintained through prudent investment and its value upheld.

Trusts were either testamentary or *inter vivos*. Though many wills did not contain any trusts, simply allocating absolute interests in property to beneficiaries who were *sui juris*, they were a useful vehicle for trusts. The most common testamentary trust was the gift of a fund, often the residue, to trustees on trust for the settlor's widow, remainder to the children, or again the gift of contingent pecuniary legacies to infant children. Trusts of businesses were testamentary in nature, the testator leaving his property and enterprise to his trustees, who were often friends in the same line of work. The trustees could be directed to carry on the business themselves until a child of the testator reached his majority,[17] or they might be directed to allow the widow to do so, though retaining ultimate control.[18] *Inter vivos* trusts, in the form of marriage settlements, typically comprised a capital sum of between £2,000 and £10,000 invested in, for example, consolidated bank annuities[19] held by trustees on trust to pay the income to either the husband or the wife for life, then to the survivor of them for life, then to hold the capital for the issue of the marriage in such shares as the husband or wife should have appointed. If no appointment were made, the property would be held on trust for the issue equally. Each child's share would vest on reaching the age of twenty-one if a son, or twenty-one or earlier marriage (usually with parental consent) if a daughter, though actual payment would be postponed until

[17] See for example Devon Record Office IRW C498 (1854), hereafter cited as DRO; DRO IRW H701 (1817).

[18] See for example DRO 4263 B/AB 28 (1898).

[19] Schedules of investments to marriage settlements yield valuable information as to the composition of individual trust funds. See for example DRO 1335 B/F18 (1883); DRO 337 add 3B/1/12/5 Box 5 (1893).

after the death of the surviving parent.[20] Such settlements ensured that the wife and children would be provided for, and also that the wife had some property for her separate use so as not to be wholly dependent on her husband.[21] Marriage settlements were long, complex and generally comprehensive instruments, containing detailed powers of appointment of trustees, indemnity, reimbursement of expenses, investment, maintenance, advancement and arbitration and, if the settlement was one of land, powers of arrangement, partition, sale, lease and exchange.[22] Sometimes the father of the bride settled property on her purely to ensure it remained to her separate use after her marriage and to guarantee her a measure of independence, and sometimes husbands made settlements on their wives in the later years of the marriage.

Victorian trustees found out about trusteeship, what it entailed, the problems associated with it, and its execution, largely through social intercourse within their class and through professional advice. Family papers and legal records confirm that trusteeship was a well-known concept. Indeed, so commonplace were family trusts in Victorian England that, paradoxically, they ceased to be the subject of widespread discussion or attention in contemporary fiction. The marriage settlement, observed a commentator in 1863, had become 'part of the regular established course of affairs to which every one submits in his turn'.[23] Other reading, however, gave the Victorians a general knowledge of trust matters. They were voracious readers. Newspapers of all persuasions, intellectual or popular, a host of general reviews and specialist journals to which the Victorian middle classes were so partial for both recreation and instruction were all readily available to middle-class readers.[24] Reflecting as they did contemporary life, trust matters inevitably played their part. This was necessarily small, since these reviews were catholic in their content, but the tone and substance of those articles which did appear clearly presupposed a general knowledge of trust administration.

[20] See for example DRO 337 add 3B /1/12/1 Box 25 (1804); DRO 337 add 3B /1/12/34 Box 26 (1821); DRO 3177 add 3/F3/1 (1835); DRO 5521 M/E7/4 (1880).

[21] See DRO 282 M/MS 6 (1846); DRO 1484 M/T13 (1817); Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Oxford, 1983), pp. 39–43.

[22] For a typical example of a marriage settlement of realty, see DRO 5521 M/E7/2 (1859).

[23] 'Marriage Settlements' (1863) 8 *Cornhill Magazine* 666.

[24] See Geoffrey Best, *Mid-Victorian Britain 1851–75* (London, 1979), pp. 245–9.

Trustees generally had access to technical information about many aspects of trust administration. *The Times*, though a general publication, and *The Economist*, as a respectable journal for businessmen and those in financial circles, discussed trusts and investment issues on a regular basis, and drew particularly dangerous issues to trustees' attention. The coverage of parliamentary matters in the former provided a convenient vehicle for the passage of any new and relevant legislation. This information, in the form of articles, correspondence and the reports of cases, provided current and practical information expressly for lay trustees. *The Times* also gave daily news on the prices of securities. In addition, a number of 'manuals' of trusteeship were published, directed to the lay trustee and written in clear and, as far as possible, non-technical language. Many trustees had relatively easy access to primary legislation, since libraries or literary clubs often held the *Statutes at Large*. Jurisprudence, however, was more problematic, in terms of both physical and intellectual access. It was contained in hundreds of volumes held in specialist libraries and was, in its substance, generally incomprehensible to anyone but a trained lawyer. While a general familiarity with trust matters was thus easily accessible, trustees had to rely heavily on their solicitor for the technical aspects of trusteeship and for assistance in understanding the relevant legislation, which was all too often obscure. The concept of the 'man of business', serving a family for successive generations and thus knowing its financial and personal affairs intimately, had a long tradition in both landed and commercial classes, and the continued use of such professional support in trust matters was to have a profound influence on trust administration.

The Victorian middle classes who adopted the trust were independent, with their own values and priorities, and the self-confidence to promote them. They also had the zeal to reform their familiar institutions to reflect those values. Though the Victorian trust was an essentially middle-class institution, it was not – and could not be – adopted as a fixed and unchanging concept. It was seen as a model, which would as far as possible be shaped and refined to suit the needs of the new users. The extent to which this was necessary, and subsequently undertaken, forms the subject of this book.

When Queen Victoria came to the throne in 1837, social and economic conditions of life had so altered, and were continuing to do so at an unprecedented rate, that the rights, obligations and powers

of trustees had to be re-evaluated. Early Equity had formulated its rules as to the administration of trusts by trustees and their relationship to the trust property and to the beneficiaries, in a narrow and essentially rigid socio-economic context, a context utterly different from that in which the early Victorian trustee found he had to function. The eighteenth-century judiciary had adjudicated on the basis of the conventional established notion of the trustee as a landed gentleman bound by honour to accept an office which was more a paternalistic social duty than a managerial one. Early Victorian society and the economy had become detached from its land base and transformed to an essentially urban, industrial structure. The Victorian age was one of invention, progress and expansion, of new balances and priorities, and it was already dominated by the mercantile ideal.[25] The growth of overseas and domestic trade, the development of manufacture and heavy industry, the immense advances in transport from road to rail, and the increased sophistication of financial services all interacted in their evolution, and transformed society and the economy in a context of new attitudes and outlooks. Money, shares, debentures and new forms of security came to dominate the sphere in which trustees had traditionally operated, giving them an unprecedented range of options and demanding an expertise far wider than the familiarity with the law of real property and estate management which had for over two hundred years been regarded as sufficient qualification for trusteeship. Better communications and postal services assisted trust administration by making access to skilled agents possible, but equally increased the volume and complexity of the work. No longer were the decisions to be taken by trustees ones they could legitimately base merely on their personal knowledge of the beneficiaries, their common sense and a notion of what they considered a proper course of action for property belonging to mute and in a sense dependent beneficiaries.

The changes were not only economic. The emergence of the new professional and commercial middle class reflected the new wealth of the country, and did so in a class which was confident, articulate and independent. It becomes clear that while the trust as an institution met the practical demands of Victorian society, and reflected its

[25] See generally M. J. Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700–1850* (Oxford, 1995).

underlying values, the Victorians themselves were not temperamentally suited to an unquestioning acceptance of the traditional concept of trusteeship. They certainly felt duty-bound to accept private trusts and many did so, to the extent that throughout the nineteenth century most men of a certain social and professional status either were trustees or had been asked to act as such. But to them trusteeship became equally a matter of business – the efficient management of property for the financial security of the beneficiaries – and, furthermore, one which encroached significantly on their own professional lives and their immediate family. The self-confidence of the Victorian commercial classes is also seen in the beneficiaries, who were less complaisant than their eighteenth-century predecessors. They were less passive, increasingly sophisticated and more active and interested in furthering their interests, which interests were almost always financial. They were more demanding, seeking greater flexibility to take advantage of commercial opportunities. The paternalism of Equity, therefore, reflected in that demanded of trustees, was not entirely to the taste of the Victorian beneficiary, and did not always suit the new Victorian trustee. Indeed, it was unclear how far the foundations of trusteeship in moral obligation could survive intensive commercialisation, the weakening of the social fabric caused by the growth in population, a nascent welfare state, widespread urbanisation, the growth of Empire and the increasing questioning of accepted Christian orthodoxies, characterised by the publication of Charles Darwin's *Origin of Species* in 1859.

The essential demands on trustees did not change: they remained the safety and productivity of the trust fund, and a sound knowledge of, and discretion in, family circumstances. The tensions and challenges lay in the changing conditions in which the former were to be achieved. Trusteeship and its field of operations were set to become increasingly complex, technical, dynamic and demanding. The trust concept was available to achieve the aims of Victorian settlors in theory, in practical terms it depended on the availability of experienced, willing and outward-looking trustees, for they formed the basis of the system. Trusteeship had always been demanding. Even a simple trust, and many were complicated, required considerable effort, often lasting over many years, with some beneficiaries being unborn when the trustees took office. Trustees had to exercise their own discretion in the administration of their trust.

In most trusts there were few difficult issues of discretion, but there was always something to be done. Even in a simple marriage settlement to hold property for the widow for life, remainder to the children, investments needed constant attention, advancements were requested, and matters of maintenance needed addressing. Trustees might have to give consents to marriages, grant leases, determine rents and even carry on the settlor's commercial enterprise. The last in particular was immensely demanding. All these required the exercise of a discretion, occasionally of a very personal nature.[26] Because the settlor had given the trustee that discretion, the court would not interfere with its exercise and it was left virtually unfettered. It remained to be seen whether the Victorian work ethic, notably strong, would prevail in this new burden of trusteeship.

And yet trusteeship was correctly perceived as utterly thankless. By 1898 the system was regarded as intolerable. 'What does a request to act as trustee really mean?' asked a lawyer in that year.

> It comes to this: 'Will you be so kind as to undertake the management of my affairs and my family's for an indefinite period – to bestow more pains and care upon them than I should myself, at the risk of being answerable – and no quarter given – for the slightest indiscretion, and to do all this for nothing?' Stated thus – and not over-stated – the coolness of the proposal becomes apparent: yet do settlors or testators ever realize this? Do they even manifest any gratitude? Not one in a hundred.[27]

Furthermore, issues of liability for simple mistakes or errors of judgment were ever present in a trustee's mind. The issue now was whether the changing social and economic conditions, and their legal consequences, would increase this burden, and if it did so, whether it would become so heavy that responsible and willing trustees would no longer come forward to accept the office, particularly if it continued to be in principle unremunerated. The issue of recruitment was not new; it had concerned the judges since the seventeenth century, but not until the Victorian period was there such a large potential change in the nature of trusteeship. Moreover, the demand was for trustees who were legally empowered to deal with trust property in a flexible way, responding to commercial

[26] *Minutes of Evidence, 1895,* qq. 335–343.

[27] See review of C. F. Beach's new book on administration of trusts in England and the USA in (1898) 55 *Law Quarterly Review* 323. See too Kekewich J in *Re Weall* (1889) 42 Ch D 674 at 677.

opportunities, employing specialised agents, and with liability for breaches of trust confined within realistic business limits. In the opinion of the manager of the trustee department of the Trustee and Executors Corporation, expressed to the Select Committee on Trust Administration in 1895, 'there are two wants in the public: one is a want for security and good administration, and the other a want . . . for relief from trusteeships'.[28] Efficient trust administration and the recruitment of trustees required certainty in trusts law. Uncertainty led to litigation, expense and deterrence. The essential question facing trust lawyers of this new age was the extent to which the law would go to guarantee the safety of the trust fund, and whether potential trustees were willing or able to follow. In the Victorian period, therefore, when England had been transformed from an essentially rural society and economy to the leading industrial and commercial power in the world, trusteeship faced its greatest challenge, a challenge which was, fundamentally, a legal one.

The elucidation and reform of the powers and duties of trustees was, in the first half of the nineteenth century, entirely judicial and essentially reactive. The Court of Chancery, which was the only tribunal to adjudicate on trust matters, had until 1813 consisted of only the Lord Chancellor assisted by the Master of the Rolls. Any development could not be systematic, let alone comprehensive, since it depended entirely on the litigation of a particular issue happening to take place. In this period the great reforming age of Equity jurisprudence had come to an end, and it was becoming as stifled and hidebound by technicality and precedent as the Common Law. It was not an atmosphere conducive to a judicial responsiveness to social change. Nevertheless its work increased enormously in the first years of the nineteenth century, and in 1813 Vice Chancellors were introduced to lessen the burden on the Lord Chancellor and Master of the Rolls, and to expedite the passage of litigation in the courts. The judiciary had to construe provisions in trust instruments, give rulings when instruments were silent, and resolve the numerous novel problems arising from the new commercial society.[29] As the courts drew the limits of the duties and powers of trustees, fine and subtle distinctions emerged, though always given a coherence by their firm foundation in the general principles of Equity. Indeed the many hundreds of cases coming before the courts on trust matters

[28] *Per* Herbert Boyce, *Minutes of Evidence, 1895*, q. 2336.

[29] New forms of investment for example. See *Re Clarke* (1881) 18 Ch D 160 at 163–4, *per* Bacon VC.

throughout the nineteenth century all afford examples and illustrations of the general doctrines of Equity. A great many applications to the court on trust matters were dealt with in chambers, where a single judge had the responsibility for making the order and applied his own view of the law on the merits of the case. Applications for advancements and for permission to carry on the business of a testator were common examples, and were 'illustrations of the exercise by the Court, justified by the practical necessity of the case, of jurisdiction going beyond the mere administration of trusts according to the terms of the instrument creating them'.[30] Though the exercise of Chancery jurisdiction in discretionary matters in chambers was not formally reported and so did not act as legal precedent, and although only the individual judge in question had full knowledge of the case before him, it was thought that there was a remarkable consistency of decision-making.[31] As a result of this practice, however, it was striking that some principles of Equity which modern lawyers regard as of fundamental importance to the law of trusts were only lightly supported by authority. They were, instead, 'engrained in the minds of practitioners without being formulated in reported cases'.[32]

As the personnel of the Court of Chancery changed, both judges and Masters, the chances of a wider outlook being brought to bear on the judicial conception of trusteeship became greater. Theoretically the judges had the scope to relate their adjudication to the changing social and economic context.[33] Equitable principles were broadly drawn and in legal theory there was room for manoeuvre, particularly since trusts of personalty were inherently more flexible than the traditional trusts of land. In the early years of the nineteenth century, however, there was a marked lack of flexibility and precedents were rigidly followed.[34] Any pliancy was rigidly constrained. In 1845 Lord Langdale, in affirming the rule prohibiting the remuneration of professional trustees, observed that

> in the administration of trusts, this Court will take care to promote, to the utmost extent of its jurisdiction, that which appears to be most for the benefit of the trust, and will take into consideration every circumstance

[30] *Per* Kekewich J in *Re Tollemache* [1903] 1 Ch 457 at 462.
[31] *Ibid*. at 459.
[32] *Per* Kekewich J in *Head* v. *Gould* [1898] 2 Ch 250 at 269.
[33] See Simon Gardner, *An Introduction to the Law of Trusts* (Oxford, 1990), pp. 31–6.
[34] See evidence of Lindley LJ in *Minutes of Evidence, 1895* at qq. 540–3.

tending in any way to promote that benefit. It will even deviate from its own general rules, if it finds circumstances warranting that deviation and that it may be safely allowed without breaking down the authority of the general rule.[35]

The notion of the trust as a 'sacred and private' institution,[36] in which government had no part to play, persisted throughout the century and the sanctity of the trust fund was still pre-eminent. By the end of Victoria's reign the judges were seen to adopt a degree of flexibility and to be less constrained by the conventional view of the position of trustee as expressed in the older precedents, though individual judges were still reluctant to adapt. Whether or not the judges felt able to adapt the general principles to take into account the immense changes around them, there is no question but that they were acutely aware of the tensions they faced. Kekewich J expressed the fundamental tension in 1889. 'Trustees', he said, 'deserve and receive the utmost consideration at the hands of the Court. They gratuitously undertake duties for the benefit of others, and as regards costs and otherwise they are entitled to generous treatment. But *cestuis que trust* also have their rights, their claim to consideration. The trust property is theirs, managed for their benefit.'[37]

The issue of liability was without doubt the principal trusts matter which exercised the judiciary and the legislature in the nineteenth century. It was an issue in practice preceded by breaches in investment, and succeeded by difficulties of recruitment and appointment of trustees. These two latter problems were of necessity to be addressed. The issue of delegation was of moderate importance, and those of remuneration, apportionment, maintenance and advancement were widely regarded as satisfactorily provided for and therefore minor. In the century before rates of income taxation were such as to encourage active mitigation, and when capital taxation was largely unknown, the modern intimate relationship between trusts and tax was a matter for the future.

From the middle of the nineteenth century, pressure of trusts practice forced the legislature – the principal organ of law reform – to become more proactive in the field of the law of trust administration. Legislative activity was at first primarily directed towards a

[35] *Per* Lord Langdale MR in *Bainbrigge* v. *Blair* (1845) 8 Beav 588 at 594–5.
[36] See Lord St Leonards in *Parl. Deb.*, vol. 145, ser. 3, col. 1553, 11 June 1857 (HL).
[37] *Re Weall* (1889) 42 Ch D 674 at 678.

reform of the personnel and procedures of the Court of Chancery,[38] and while initially reform of trust administration was piecemeal and slow, essentially reform of technical detail in response to particular practical problems, it gathered momentum. Certain clauses in trust deeds were becoming standard form and were widely known from their inclusion in books of precedents. There had been very few statutes of real importance relating to trustees in the eighteenth or early nineteenth centuries, but by the middle of the century there was a clear need for legislation in certain areas. The new Incorporated Law Society was responsible for bringing particular problems in the law to the notice of Parliament. In the House of Commons, members of the Bar who were professionally and personally involved with the administration of trusts were proactive in furthering new legislation. The President of the Incorporated Law Society, Mr John Hunter, suggested legislation, which ultimately took the form of the Trustee Act 1888, an Act of which Herbert Cozens-Hardy took charge in the Commons and which owed much to his energy and drive,[39] along with the Trust Investment Act 1889, and succeeded in passing them both. Such was the legislative activity in relation to trusts administration that the end of the century saw a demand for consolidating Acts to draw together in a clear and comprehensive form all the provisions relating to trustees to be found in over thirty separate Acts. This was achieved by the Trustee Act 1893. Such Acts were of immense assistance to lay trustees, who could more easily find the law applicable to their own case.

The impact of industrialisation made itself felt through the everyday business of trust administration. In both theory and practice the trustee was the pivotal point in the process. The interpersonal relationships which he necessarily experienced with the settlor, the beneficiaries, his co-trustees and any agents he might employ in his administration, reveal the nature of the challenges he faced and the extent of their resolution through legislative and judicial action. They show not only the legal dimension, but equally the pragmatic and human considerations which in practice had such a profound effect on the everyday management of trust affairs. His relationship

[38] See Lord Bowen, 'Progress in the Administration of Justice during the Victorian Period' in Committee of the Association of American Law Schools (ed.), *Select Essays in Anglo-American Legal History* (3 vols., Boston, 1970), vol. I, pp. 516–57.

[39] (1891) 90 *Law Times* 421.

with the law and legal institutions reveals the doctrinal forces, structures and limitations which constrained his actions. His operation within the commercial context of Victorian England reveals the specific challenges of a robust and complex industrial economy and the extent to which both legally and personally the trustee was equal to them. In thus concentrating on the trustee as the focal point rather than on the trust itself, Victorian trust administration, with all its tensions and problems, is looked at from the trustee's perspective. It sets the trustee in his legal, social and economic context, as well as the narrower context of his own particular trust. Equally, this approach reconstructs practical trust administration in Victorian England and places legal doctrine in its own contemporary context.

2

THE RELATIONSHIP WITH THE SETTLOR

Of all the relationships a trustee sustained in the course of his office, the first in point of time was that with the creator of the trust, the settlor. When an individual was asked to act as trustee, the transmutation to that office from a personal capacity occurred only once he had accepted it and the trust had been executed. The initial personal approach by the settlor to his prospective or potential trustees was the moment of conception, if not of birth, of the office of trusteeship in the context of a particular trust. It was, however, the fruit of an antecedent relationship with the settlor, of a nature, intensity, degree or duration which varied according to circumstance. It was a step of considerable significance to the future of the trust. Being an office of confidence, the choice of trustee was probably one of the most important decisions a settlor had to make. The decisions the trustee would have to make would be important and difficult ones – not only for the preservation of the trust fund, which was his prime and absolute duty, but also possibly for the actual entitlement of the beneficiaries and the exercise of numerous other personal discretions directly affecting their enjoyment of their entitlement. So for example he might have to exercise powers of maintenance, advancement, leasing, sale and exchange, and might even have to conduct a business for the trust. The administration of a trust was, therefore, highly personal and individualised and its success or failure depended to a very great extent on the character, ability, interest and commitment of the individual trustee.

The dynamics of the relationship between the settlor and his original and subsequent trustees affected the administration of the trust at a profound level, most importantly perhaps illustrating significant variations in the extent of control and influence exercised by either party. This in turn was revealing of popular attitudes to the creation of trusts and the position of trustees in the nineteenth

century. In a wider context, the nineteenth century was a formative period in the consideration and articulation of the qualities settlors desired in their trustees, and indeed those desirable in principle, and the recognition that there was a place for statutory provision of appointment powers. The increased commercialisation of the Victorian age both created and revealed serious tensions in the settlor–trustee relationship which, since in some cases they undermined the very viability of the trust, settlors, lawyers, and ultimately the legislature had to address.[1]

The law and practice of trustee selection and appointment inherited by the early Victorians had been formulated largely in the context of the trust of land, created by the wealthier middle classes, the gentry and the aristocracy to preserve the family estates and provide for the children of the family in an appropriate style. It existed to provide portions for the daughters, annuities for widows and other dependent relatives, and to allow an income to the sons of the family during their minorities and perhaps longer. Such trusts had called for particular qualities of management and administration, and the prevailing view was that they were best served by mature and paternalistic trustees who were reliable though not necessarily imaginative, who could be depended upon to preserve the trust estate, look after and support the settlor's dependants and curb any wayward tendencies of younger beneficiaries.

Such requirements had determined the nature of the trustees. Since a settlor looked for integrity, morality, status and an understanding of the family and its station in life, he would generally have known his trustees for many years, and in their turn they would have been intimately acquainted with his family. They would know the individual beneficiaries, their characters, their strengths and their weaknesses, as well as their aspirations. This would enable them to respond financially to their changing situations in an appropriate manner. It was well recognised, however, that neither ties of blood nor marriage guaranteed business acumen, and many settlors, particularly those of large landed estates, appreciated the necessity for trustees who were able and reliable in worldly as well as moral matters. They wanted trustees who were good judges of character, so as to be able to deal with any professional agents or

[1] See G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14 at 19–21 for an expression of similar concern after the Second World War.

with workers or tenants on the trust estates, and who were commercially astute in matters of sale or exchange of lands, of valuations and investments. Since, however, investment opportunities were strictly circumscribed and relatively unsophisticated in the eighteenth and early nineteenth centuries, they required a lesser degree of expertise. Extraordinary skills were in general neither sought nor needed; rather the desire was for common sense and competence in the conduct of everyday affairs. Where the management of a particular trust required some legal or other professional input, and possibly where there was an appreciation that a measure of distance and independence from the beneficiaries was desirable, settlors had long selected their attorney or land agent to act jointly with a more intimate trustee.[2] If the trust estate included a business enterprise or if the fund consisted of commercial securities, and mercantile skills were indispensable, there was always the option, if it became necessary, of employing commercially skilled agents such as bankers, attorneys and stockbrokers.[3] In essence, however, the business character of the relationship had yet to develop and it was still legally and morally honorary.

In such a context and in the absence of any real option,[4] the natural and traditional choice of trustee was a male relation of similar social and economic status, such as a brother or cousin, or a family friend,[5] who was known to be capable in the management of his own temporal affairs and who commanded the respect of the beneficiaries. Trust deeds of the latter part of the eighteenth century show that settlors commonly appointed a combination of family and friends, rarely more than three and normally two. Common phrases in trust deeds of the period are 'my good friends and brethren' and 'my trusty friends and kinsmen'. Trustees were of the same social class as the settlor, a gentleman appointing other gentlemen, a yeoman other yeomen. The friends who were appointed were usually in the same profession or trade. Clerks in Holy Orders, for example, always appointed other clerks to act as their trustees, surgeons often appointed other surgeons, merchants other merchants.

[2] See for example *Ayliffe* v. *Murray* (1740) 2 Atk 58; *Westley* v. *Clarke* (1759) 1 Eden 357; *Brice* v. *Stokes* (1805) 11 Ves Jun 319; *Burgess* v. *Wheate* (1757–9) 1 Eden 177 at 231 *per* Lord Mansfield CJ.

[3] See below, pp. 104–13.

[4] The Public Trustee, for example, was unknown, and trust corporations were rarely used.

[5] *Townley* v. *Sherborne* (1634) Bridg J 35 at 37.

The settlor–trustee relationship was thus characterised by some personal and emotional nexus which was generally regarded by all parties not merely as desirable, but as essential to the very viability of the institution.

The orthodox view that the ideal trustee was the honest, conscientious and intelligent individual, familiar with the history and affairs of the family, its status and aspirations, its personalities, personal conflicts and its property, continued to pervade the selection of trustees throughout the Victorian period. It was believed that only a sympathetic yet objective individual could exercise his discretion in relation to such delicate matters as the maintenance and advancement of the beneficiaries and to give that personal care the settlor desired. Accordingly, respected family members of maturity and status were the first to be approached. An analysis of nineteenth-century trust deeds, both testamentary and *inter vivos*, shows that at the beginning of the reign the preferred arrangement was still for a mixture of friends and family, or just of friends, an arrangement which continued to be favoured by the mid-Victorians. Towards the end of the reign the preferred number had fallen to two, and family members were appointed in preference to friends, possibly because of the rise in the appointment of professional trustees. Trustees were, furthermore, almost invariably male. Female trustees were occasionally appointed, generally where they were executrixes of the trusts of their husband's will. Even then, it was not uncommon for an express stipulation to be that they be subject to the 'advice, counsel and assent' of a male co-trustee.[6] There were legal difficulties surrounding the appointment of a woman as trustee until the Married Women's Property Act in 1882,[7] as the concurrence of her husband would be necessary in most trust transactions. Accordingly when an unmarried woman was appointed trustee, a daughter for example, she was expressly to hold the office only as long as she remained single.[8]

While the traditional ethos of the office prevailed, so did the traditional reasons for accepting it. Trusteeship was regarded as a moral

[6] See for example DRO IRW A4 (1816).

[7] Married Women's Property Act 1882, 45 & 46 Vict. c. 75. See too A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (2nd edn, London, 1914, reprinted 1940), pp. 371–98; Lee Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Oxford, 1983).

[8] See for example DRO 3162 B/MF 51 (1860).

duty, a debt of honour, owed to family and friends, and as such to be performed gratuitously and in this the popular perception was at one with the law, which had always regarded trusts as 'a burden upon the honour and conscience of the person intrusted'.[9] The prime motives were thus essentially sentimental: duty, loyalty, generosity and the maintenance of family ties or friendship with the settlor, though often against a backdrop of ignorance.[10] In one leading case in 1883 the trustee accepted the trust 'out of regard to his friend's family',[11] and in another in 1898 he accepted it out of kindness to the family to which he owed a debt of gratitude.[12] Many trustees found it difficult to refuse to act. For example, a man asked to accept the trusteeship of his sister's marriage settlement where there were family doubts as to the reliability of her intended husband would feel bound to accept. Pressures could be particularly intense where a testamentary trust was concerned. In practice a request to act as trustee often constituted the last wish of a lifelong friend or relative, and a refusal to accept would amount to deserting his widow, possibly with young children, at a distressing and difficult time. It was also understood by those accepting trusteeship that the time would undoubtedly come when they themselves would be seeking to appoint trustees. Social, moral and indeed emotional pressures were, therefore, considerable.

The extensive commercial developments of the nineteenth century, however, forced trusteeship into a new world, and imposed considerable strain on the traditional process of selecting and appointing trustees. In the eighteenth century, though trusteeship was described as an office 'attended with no small degree of trouble, and anxiety',[13] it was reasonably circumscribed, and its practical and legal burdens were still within acceptable limits. Furthermore, the number of trusts were relatively few and of those many were trusts of land within wealthy families who not only could afford legal assistance, but who by the nature of things had educated and responsible members of the family to call upon. The social infrastructure of the aristocracy ensured if not a plentiful, then certainly an adequate, supply of able and willing men to act as trustees.

[9] *Per* Lord Hardwicke LC in *Ayliffe* v. *Murray* (1740) 2 Atk 58 at 60.

[10] *The Economist,* 2 November 1878, p. 1284 (vol. 36).

[11] *Speight* v. *Gaunt* (1883) 9 App Cas 1 at 17.

[12] *Head* v. *Gould* [1898] 2 Ch 250.

[13] *Per* Lord Hardwicke LC in *Knight* v. *Earl of Plymouth* (1747) Dick 120 at 126.

While the legal burden, in the form of the trustees' duties and their liabilities, did not change in principle with industrialisation, the performance of those duties and the exercise of their discretions in a much wider and more sophisticated sphere in the nineteenth century transformed its scale. The law continued to concentrate heavily on the trustee's duties and liabilities rather than his rights. It was already established that he had to act exclusively in the interest of the trust, that he could not make any kind of profit from it, that the highest integrity was demanded of him in all his dealings, and that the standard of care was not just that of a reasonable man, but of a reasonable man of business. Furthermore if such standards were not met, then he was held personally liable for it. Wide investment opportunities and an overall increased specialisation and sophistication of financial matters, the awareness of settlors and beneficiaries of such opportunities and the growing number of occasions and ease when breaches of trust could occur, were primarily responsible for increasing the weight of the office. While legislative intervention could assist, it brought its own problems since there were more regulations for trustees to be aware of, to understand and to apply. The development was gradual, but by the close of the nineteenth century the work and worry sustained by ordinary, unpaid lay trustees was described as 'an almost intolerable burden'.[14] The courts, frequently seeing the results when trustees could not attain the legal standard of competence and care, were all too aware of this. Indeed Lord Cottenham LC once said that any man who accepted trusteeship a second time was only fit for a lunatic asylum.[15] This was equally well known in legal circles and among the professional advisers of settlors.

Although the social and moral duty to accept trusteeship remained – if anything it increased with the exacting moral and religious expectations of Victorian society – individuals became distinctly more reluctant to take on the office.[16] While some trustees were in ignorance of the full legal and practical extent of the burden imposed by the office,[17] the amount and complexity of the work

[14] *Per* Judge Chalmers in *Minutes of Evidence, 1895,* q. 2843.

[15] Reported in (1854) 23 *Law Times* 125.

[16] There is evidence that some settlors were only too well aware of the burden trusteeship would place on the shoulders of a friend or relative, and that for that reason they declined to ask them and thereby avoided creating sometimes very necessary trusts.

[17] *Buckeridge* v. *Glasse* (1841) Cr & Ph 126 at 128; *Booth* v. *Booth* (1838) 1 Beav 125.

and the risks involved were generally well known in those classes which employed the trust. The Victorian passion for reading was largely responsible: the frequent occasions on which cases of breach of trust came before the courts would be reported in *The Times* and frauds and incompetent administration received wide publicity; periodicals carried articles discussing the perils of trusteeship, and popular fiction evoked powerful and deterring images of the Court of Chancery in the public imagination.[18] Few people other than lawyers fully understood or appreciated what acting as a trustee involved, but if they did, or even if they had an imperfect knowledge of the burden, that sufficed to make them reluctant to accept. Many people were daunted by the considerable volume of work involved, seeing that the hours necessarily devoted to the administration of the trust would inevitably impinge on their own working lives. Certainly if the trust required the trustee to run a business, the burden in this respect would be immense. Some were not prepared to take on the emotional burden of trusteeship, knowing that they were in all likelihood laying themselves open to continued and considerable importunity by the family, often to commit breaches of trust, which they might find difficult to withstand and the legal consequences of which could be considerable.[19] Others were aware of their own limitations, and appreciated that an expertise beyond that which they possessed was becoming increasingly necessary to the execution of the office. Most, however, were willing enough in principle but were wary and simply unprepared to take the risk.

Finding a trustee, even in favourable conditions, was not easy. By the very nature of the institution settlors were often elderly, possibly with few contemporaries either surviving or able to take on trusteeship. If, as was not unusual in Victorian England, a settlor made his fortune in the colonies and returned to England after a number of years, he might have great difficulty in naming a suitable friend as trustee. It was not, furthermore, a matter of finding just one trustee.[20] A settlor personally appointing the original trustees was the most likely to succeed with the trustees of his choice, since at that point the bonds of blood, friendship or shared business enterprise were fresh in the minds of all the parties. He was also

[18] As in Charles Dickens' *Bleak House*, published in 1853.
[19] *Per* Lindley LJ in *Minutes of Evidence, 1895,* q. 456.
[20] See below, pp. 98–9.

more likely to succeed if he moved in wealthier middle-class circles, where social resources were more plentiful and suitable men were available to be approached. It happened, however, that those men found themselves so oversubscribed with requests to act as trustees that they frequently had to decline. Certainly any family member who happened to be either legally qualified or skilled in business matters was put under great pressure to act as a trustee for his relatives and friends. However, the potential liabilities which discouraged lay trustees in general discouraged such candidates even more, for they were not cloaked in any degree of ignorance and were far more aware of the difficulties involved in technical areas such as investment. As such they were not prepared to take the risks. As a judge observed in 1895, 'anybody who is in any position is continually worried and bothered to become a trustee'.[21] He himself had had to refuse four trusts in a single year because he simply did not have the time to take them on. As early as 1857 some, such as George Hadfield, Member of Parliament for Sheffield, and a practising solicitor for forty years, were refusing to accept trusts outside their own family circle.[22] 'The truth is', said Lord Halsbury, 'that you have frightened every responsible and respectable man out of being a trustee, as a rule; there is nobody will accept the office of trustee unless he is influenced by a very chivalrous spirit.'[23]

The difficulties experienced by small trusts of personalty where the family was of modest means were even more extreme. Appointment was always more problematic when the time came to appoint replacement trustees. This could happen immediately after the settlor's death, if the trustee refused to act; or a short time after death if he himself should die or if he retired; or many years after death, in the natural course of things. If one trustee died, then the trust property and the office vested in him passed by the *jus accrescendi* to his co-trustees since they held in joint tenancy,[24] but the plurality of trustees needed to be maintained. The problem was that the ties which had prompted the original offering and acceptance of the burden of trusteeship might have weakened through time, and anyway the focus of any loyalty or duty – the settlor – would generally

21 *Per* Judge Chalmers in *Minutes of Evidence, 1895,* q. 2820.
22 *Parl. Deb.,* vol. 145, ser. 3, col. 685, 21 May 1857 (HC).
23 *Minutes of Evidence, 1895,* q. 217.
24 *Warburton* v. *Sandys* (1845) 14 Sim 622.

no longer be there to exert moral pressure. When those ties were weaker, potential trustees were even less likely to accept the office. The poorer the families, the greater the difficulty. So in the growing number of relatively small private trusts of personalty where the settlor was of modest means, his family would not have either the social resources to call on a wide circle of educated friends or relatives, nor the financial resources to allow for the employment of a professional trustee. In such cases either no one could be found to act at all, or recourse had to be to trustees of limited ability. Furthermore, appointment was in itself an expense, and the transfer of trusteeship and the making up of a title to the new trustees could be costly. Not only did most trust deeds provide that fresh appointments should be made formally by deed attested, a deed was necessary to effect unequivocally the transfer of the title to the trust property to the newly constituted body of trustees and to ensure the joint tenancy. Deeds appointing new trustees were particularly expensive because of their length. They recited the original trust, a lengthy marriage settlement for example, under which the original power had arisen. They were also occasions on which many years of transactions – variations in the investments, deaths, bankruptcies and so on – could be gathered together in one instrument. Such deeds required extensive preparation, and the attendance of solicitors to take instruction of the trustees along with the considerable necessary correspondence between all the parties raised the cost significantly. A typical deed of appointment could run to some dozen pages and cost in the region of £30.[25] Even the simplest new appointment for a settlement of £5,000 would cost some 8 guineas, and the smaller the trust the greater the relative expense.[26] Indeed, considerations of cost might lead the remaining trustees, if they were sufficient in number, not to effect a replacement for a deceased colleague. The appointment of trustees was occasionally an insuperable problem and was often the cause of bitter internal tensions and disagreements.[27] Though it was thought by some that the difficulties involved in finding trustees were exaggerated, there was no doubt that by the end of the nineteenth century there were real recruitment problems. While it is true that virtually all private trusts were at that time administered

[25] See for example DRO 337 add 3B/1/12/22,23 Box 11 (1896).
[26] *Minutes of Evidence, 1895,* q. 644.
[27] See for example *Re Tempest* (1866) LR 1 Ch App 485.

by private persons who were often members of the family,[28] that was due to the absence of any real alternative, and trusteeship was taken on, if at all, only after profound hesitation and in a spirit of resigned sacrifice.

Remuneration for service as a trustee added little persuasive weight to the settlor's requests. The concept of trusteeship as an honorary office for which remuneration was not merely discouraged, but forbidden, was so firmly established in law and in popular culture that lay trustees neither expected remuneration nor, in general, sought it. In 1740 when Lord Hardwicke LC stated that trusteeship was a moral burden, he added that it should not be 'undertaken on mercenary views',[29] and 150 years later it was observed that in England private trustees were 'by a sort of custom of our society, expected to act for nothing'.[30] Lord St Leonards was of the view that remuneration was 'altogether repugnant to our habits and feelings'.[31] Not only was it felt that relations between gentlemen should not be tarnished by the exchange of money, it was believed that the relationship between settlor and trustee should be free and open, not constrained by the knowledge that every visit and letter would be charged for. That view was unequivocally supported by the law. By the seventeenth century the established rule was that trustees could claim only 'their costs and charges, and all just allowances', and nothing for their 'care and pains in managing the trust'.[32] This was maintained even in extreme cases of hardship,[33] but was not regarded as problematic since no trustee was obliged to accept the trust.[34] The fundamental prohibition on

[28] 'Report of Select Committee on Trusts Administration', *House of Commons Parliamentary Papers* (1895) (248) xiii 403 at 405.

[29] *Ayliffe* v. *Murray* (1740) 2 Atk 58 at 60.

[30] *Minutes of Evidence, 1895*, q. 101.

[31] Lord St Leonards, *A Handy Book on Property Law* (2nd edn, Edinburgh and London, 1858), p. 161.

[32] *How* v. *Godfrey* (1678) Ca t Finch 361; see too *Scattergood* v. *Harrison* (1729) Mosely 128.

[33] As in *Robinson* v. *Pett* (1734) 3 P Wms 249 where an executor-trustee unsuccessfully claimed payment for his great efforts in dealing with the testator's affairs, drawing up complex accounts and getting in difficult debts, all to the detriment of his own business. See too *Burden* v. *Burden* (1813) 1 Ves & B 170; *Brocksopp* v. *Barnes* (1820) 5 Madd 90.

[34] In exceptional cases, if the trustee applied before he accepted the trust and it was for the benefit of the beneficiaries, the court would order remuneration under its inherent jurisdiction: *Marshall* v. *Holloway* (1820) 2 Swans 432. See too *Re Freeman's Settlement Trusts* (1887) 37 Ch D 148; *Bainbrigge* v. *Blair* (1845) 8 Beav 588.

the remuneration of lay trustees remained strikingly constant and relatively unchallenged throughout the nineteenth century.[35] Even when the Select Committee on Trusts Administration heard evidence in 1895, when the recruitment problem was at its height, it was clear that remuneration was not a major issue. When asked whether a right to remuneration would ease the situation, witness after witness was adamant that it would not. On the contrary, lay trustees seemed to deplore the idea of remuneration. They felt that the type of person who took on trusteeship would do so irrespective of any remuneration he might be offered, and thought that a person who accepted the office because of the remuneration might well be undesirable anyway.[36] While the legal profession pressed for remuneration as the solution to the shortage of trustees,[37] other commentators occasionally did so but with an appreciation that such an innovation would be revolutionary in English law.[38] The hostility to trustee remuneration as a matter of course was, however, one of policy.[39] It was feared that remuneration as of right would lead to 'a class of professional trustees',[40] and would be a 'very dangerous innovation'.[41] In his address of 1891, the President of the Incorporated Law Society said that he thought 'it much to be deprecated that an office in which friends and relations are able to and do render assistance to each other in an unselfish way, should be degraded into an office of profit'.[42]

[35] Arguments to the contrary were rare. In debate in the House of Lords on second reading of the Fraudulent Trustees Bill in 1857, Lord St Leonards observed that if heavy responsibilities were to be imposed on trustees, then the legislature should allow them to be remunerated: *Parl. Deb.,* vol. 147, ser. 3, col. 551, 28 July 1857 (HL). The prohibition on trustee remuneration was retained in a draft bill of 1908 codifying the law of private trusts. It expressly retained the exception derived from *Cradock* v. *Piper* (1850) 1 Mac & G 664 and remuneration under charging clauses. See below, pp. 38–9 and 'Special Report from the Select Committee on Trusts' *House of Commons Parliamentary Papers* (1908) (245) x 1125, cl. 56.

[36] *Per* Lord Herschell in *Minutes of Evidence 1895*, qq. 85, 103.

[37] (1854) 23 *Law Times* 125; (1856) 26 *Law Times* 266.

[38] See T. Crisp Poole, 'Administration of Trusts by Joint Stock Companies' (1889) 5 *Law Quarterly Review* 395.

[39] See Lord St Leonards' speech in the House of Lords in 1857, *Parl. Deb.,* vol. 145, ser. 3, cols. 1551–7, 11 June 1857; see too evidence of John Adams, solicitor, in *Minutes of Evidence, 1895*, qq. 1829–30.

[40] *Per* Herbert Cozens-Hardy QC, MP in *Minutes of Evidence, 1895* at q. 1603; see too q. 1496.

[41] *Per* Mr Charles Morton, solicitor, in *Minutes of Evidence, 1895*, q. 1469.

[42] Read as evidence to Select Committee on Trusts Administration in 1895, see *Minutes of Evidence, 1895*, q. 585.

The legal reason was one of conflict of interest: if a trustee were able to make any kind of profit from his trust, he could administer the trust in his own interests rather than that of the beneficiaries. Such a conflict between his duty as a trustee and his personal interest would undermine the proper administration of the trust, and was accordingly strictly forbidden.[43] Theoretical integrity demanded that profit be widely construed to include remuneration for personal time and trouble which trustees might devote to the affairs of their trust. If a trustee were remunerated, not only could he charge for work which was not strictly necessary and thereby diminish the trust fund, he would also not be in any position to guard the beneficiaries against such abuse.[44] In practical terms too, it was difficult to determine the extent of any allowance, 'as one man's time may be more valuable than that of another'.[45]

Nevertheless, since Equitable theory allowed the settlor to lay down the rules which would guide his trustees in the administration of the trust – indeed encouraged it as an expression of his intention which Equity would enforce – it followed that if he wished to allow his trustees some allowance for the work they undertook in carrying out his wishes, he could 'give this satisfaction, if he pleases'.[46] The evidence suggests that he generally did so when he knew the trust might be particularly onerous.[47] This took the form of a specific legacy to the trustee for his trouble in executing the trust,[48] and it was an established, though certainly not universal, practice[49] throughout the eighteenth and nineteenth centuries.[50] In the wills creating trusts in the eighteenth century the size of the legacies varied. It could be a guinea to each trustee, £15, or 'five pounds apiece to buy each of them a piece of plate'.[51] Legacies to

[43] *Anon* (1707) 1 Salk 155; *Keech* v. *Sandford* (1726) Sel Cas t King 61; *Re Barber* (1886) 34 Ch D 77.

[44] This point was stressed by the judge in *New* v. *Jones* (1833) 1 H & Tw 632n.

[45] *Per* Lord Talbot LC in *Robinson* v. *Pett* (1734) 3 P Wms 249 at 251. This reasoning was approved by Lord Cottenham LC in *Moore* v. *Frowd* (1836) 3 My & Cr 45 at 50.

[46] *Per* Lord Hardwicke LC in *Ellison* v. *Airey* (1748) 1 Ves Sen 111 at 115.

[47] In *Duncan* v. *Watts* (1852) 16 Beav 204 the work was particularly onerous as the estate to be administered included estates in Jamaica.

[48] *Robinson* v. *Pett* (1734) 3 P Wms 249.

[49] *Ellison* v. *Airey* (1748) 1 Ves Sen 111 at 115. See too *Ayliffe* v. *Murray* (1740) 2 Atk 58.

[50] *Re Bedingfield* (1887) 57 LT 332.

[51] DRO 1484 M/T5 (1726).

trustees, if they occurred at all, were rarely expressed to be in the nature of remuneration. An exception in 1842 was a provision that the settlor's brother, who was one of two trustees, should receive '10% on the rental value of the [trust] estate as remuneration for his time in the execution of his office of Trusteeship'. The co-trustee, however, took nothing.[52] There was an increase in the provision of legacies to lay trustees at the close of the Victorian period, suggesting the growing burden on trustees was appreciated by settlors. The usual sum was in the region of £25. Express charging clauses for lay trustees were very rare, primarily because placing a value on their time was a matter of considerable difficulty. Indeed it was observed that the time of a non-professional trustee was 'considered to be of no value'.[53] Accordingly lay trustees of *inter vivos* trusts were almost invariably unpaid. The contemporaneous development of a number of exceptions as a result of practical demand or necessity served to make the broad and strict rule generally acceptable in an operational context.

A settlor's decision to allow his trustees a measure of remuneration for their efforts stemmed from his appreciation of their efforts. It was rarely conceived of as adequate remuneration for work undertaken, since that concept was essentially repugnant to the moral character of trusteeship and to the ties of family, friendship and shared social status which characterised the relationship and prompted acceptance. Remuneration in such a context would even have been insulting. The remuneration of these trustees did not aim to ensure the quality of the administration of the trust, but to mark the settlor's grateful recognition of their sacrifice on his behalf. There is little evidence that trusteeship was regularly refused on the basis of an absence of remuneration, though undoubtedly some payment would have sweetened the pill somewhat.[54] Even if a potential trustee were persuaded by the promise of such a legacy, depending as it did on the whim and bounty of the settlor, he could not rely on it. If a trustee did receive a legacy, it served as a tangible reminder of the moral obligation rather than to urge him to greater efforts in relation to the trust. In this way it had a negligible effect

[52] DRO 5521 M/W1/1 (1842).
[53] *Clarkson* v. *Robinson* [1900] 2 Ch 722 at 724.
[54] Though see the letter in (1804) 74 *Gentleman's Magazine* 1009–10 where two trustees apparently refused to accept a trust of £30,000 for a minor, for a legacy of £100 each.

on the trust administration, and only had a direct one if it induced a particularly able trustee to accept. As a single and usually relatively modest sum, its influence on the long-term management of the trust was equally slight.

In practice, settlors had to take what trustees they could get, and what they could get was not always ideal. The trustees in *The Trials of the Tredgolds* in 1864 are revealing of Victorian stereotypes: 'They were people remarkably unaccustomed to business affairs; and they were all of so advanced an age, that it was extremely unlikely they would ever survive to carry out the provisions of the trusts they were charged with.'[55] Ultimately only one of them survived, an elderly clergyman, 'who was profoundly ignorant of his duties; who never had been able to comprehend why he had been made trustee at all, though he felt it somehow as a compliment, like having his health proposed at the wedding breakfast'.[56]

The disinclination of lay trustees to accept trusts forced settlors to consider alternatives. This was in some ways a welcome development, since many legal advisers were aware that while relatives were attractive to settlors and might appear to suit, they did not always make good trustees. This was principally because they might lack a degree of independence and objectivity, and might succumb to often considerable pressure from the tenant for life to conduct the affairs of the trust in a particular way. It was said that Lord Romilly refused to appoint a relation on the basis that all breaches of trust were committed by relatives.[57] Similarly, there is evidence that the fact of friendship alone motivated settlors to approach potential trustees and that this created difficulties if indeed the trustee had only friendship to recommend him. While amiability and good nature might well motivate his appointment, they were the very qualities which might militate against strong and impartial trusteeship.

The growing awareness of the inability of trustees to administer their trusts without experience of financial affairs and significant business acumen encouraged settlors to consider appointing professional trustees outside their own circle of friends and relations. This practice was not new, for it had long been the case, as Anthony Trollope observed, that 'there is no form of belief stronger than

[55] 'The Trials of the Tredgolds' (1864) 10 *Temple Bar* 111.
[56] *Ibid.*
[57] *Minutes of Evidence, 1895,* qq. 51, 52, 300, 301.

that which the ordinary English gentleman has in the discretion and honesty of his own family lawyer',[58] but the last years of the Victorian period saw its significant increase. The older arrangement whereby friends or members of the family were appointed jointly with the settlor's trusted and confidential man of business continued,[59] but increasingly the professional trustees were men of the legal or associated professions.[60] The extent of professional trusteeship cannot accurately be ascertained, since while all trust deeds named the trustees, professional trustees were not always expressly described. Barristers, for example, were commonly termed 'gentlemen', leaving their profession to be deduced from their address. Solicitors, accountants and land agents, on the other hand, were generally described as such. The presence of accompanying provisions for remuneration, however, confirms that there was a marked increase in the last two decades of the nineteenth century. By the close of Victoria's reign it had almost become the rule. Solicitors were usually preferred, but occasionally accountants and auctioneers were appointed. The appointment of professional trustees was popular in the context of testamentary trusts set up by widows or single women, and suggests that they were particularly useful where women had no male relative to turn to. It was also a common and effective means of supplying replacement or additional trustees when a trust was becoming old and when family ties had weakened. It was also useful where a settlor wished to provide for someone – a mistress or an illegitimate child – of whom his family disapproved and for whom they would be unlikely to be prepared to act as trustee. Rarely, though, was a sole professional trustee appointed. In many ways this mixture of the personal and professional represented the ideal in trusteeship. A legal professional was there to guide the trustees through the minefield of the law of trust administration, to manage the trust efficiently and to undertake much of the onerous paperwork involved, while the personal touch and the knowledge of the family was provided by the lay co-trustees.

While in many ways a model arrangement, it was inherently limited by the question of expense. Professional trustees were not prepared to accept the trust without assured remuneration for their time and trouble. The settlor here clearly had to make a choice

[58] Anthony Trollope, *The Eustace Diamonds* (1873), Chapter 10.
[59] See for example *James* v. *Frearson* (1842) 1 Y & C C C 370.
[60] See *Willis* v. *Kibble* (1839) 1 Beav 559.

between efficient administration of the trust and a depletion through remuneration of the trust fund, and to decide on balance if this was his preferred route. Remuneration in such cases was a precondition, a necessity, and as such it challenged the fundamental underlying principle of trusteeship that it was an office of honour. The payment of remuneration and the absence of any personal tie between the professional trustee and the settlor reduced the relationship to one of business. It was that very point, however, which made solicitors approachable. The burden of trusteeship grew so great that settlors came to be reluctant to ask friends and family to take on the thankless task. Since solicitors invariably charged for their services, settlors felt no delicacy in applying to them.

The legacy was, if not encouraged, then tolerated by the law as the principal means of express remuneration because it was inherently limited. However much work was undertaken, the trustee could not be paid more than the sum specified.[61] This security was attractive in the face of a fear of abuse, but was not acceptable to professional trustees undertaking trust work as a business and in the face of unexpected or particularly onerous duties. While it remained the legitimate and undisputed method of recompensing lay trustees throughout the century, if that were desired, its use in a professional context was as a supplement to charging clauses for added security[62] in light of the obstacles and uncertainties in ensuring professional remuneration.[63]

It is clear that the impetus for the development of the practice of making express provision in trust instruments allowing trustees to charge for their time and trouble, and thereby introducing a necessary flexibility in the quantum of remuneration, lay with professional trustees. Indeed, the challenge posed to the orthodox view of trusteeship by the demand of professional trustees for remuneration created one of the major tensions in the relationship between trustees and the law in the nineteenth century. A legitimate construction of the older authorities laying down the prohibition of remuneration would have prohibited it only for personal time and trouble, thereby leaving the way open for solicitor-trustees to charge fees for their professional work, even if it was work done on behalf

[61] *Ellison* v. *Airey* (1748) 1 Ves Sen 111 at 115; *Re Bedingfield* (1887) 57 LT 332.
[62] *Re Bedingfield* (1887) 57 LT 332. For an earlier example see *Bainbrigge* v. *Blair* (1845) 8 Beav 588.
[63] See for example *Re Pitcairn* [1896] 2 Ch 199.

of the estate or trust. The courts, determined to maintain the rigour of the rule, fearful of abuse and mindful of a trustee's duty to protect the beneficiaries with vigilance and 'unbiassed judgement',[64] rejected the argument and applied the general principle strictly,[65] indeed ruthlessly. The law was laid down in a number of decisions in the middle years of the nineteenth century 'with precision and force'.[66] So when a trustee who was also a solicitor undertook legal business on behalf of the trust, he could be 'neither a sufferer nor a gainer', that is, he could recover out-of-pocket expenses but no more.[67] Though the rule might cause hardship to solicitor-trustees, it was justified for it existed for the safety of the public 'for the benefit of *cestuis que trust,* because it is thought unsafe to sanction any such allowance, and thereby tempt the solicitor to create unnecessary business for his own profit'.[68]

The attitude of the law to professional remuneration was essentially hostile. On general principles of law, the fundamental rule was that remuneration was forbidden for work which was connected with the trust; the work did not have to be either necessary or desirable, but it should be something a trustee as such would normally do or expect to do in the administration of a trust. Therein lay the danger of conflict and abuse; the charging for doing trust business. However, if the solicitor-trustee undertook work which was not the proper business of a trustee, the work, and therefore the opportunity for profit, would not arise directly from the office of trustee and no duty would attach to that activity to conduct it in the best interest of the beneficiaries. He would not, in such a case, have *qua* trustee employed himself as solicitor. He would be acting purely as

[64] *Per* Alderson B. in *Fraser* v. *Palmer* (1841) 4 Y & C Ex 515 at 517; and see Lord Cranworth LC in *Broughton* v. *Broughton* (1855) 5 De G M & G 160 at 164.

[65] See *Scattergood* v. *Harrison* (1729) Mosely 128 and *Sheriff* v. *Axe* (1827) 4 Russ 33, where a factor and a commission agent respectively were named executors and were not allowed to charge for business done for the estate.

[66] *New* v. *Jones* (1833) 1 H &Tw 632n, though the Irish case of *Willson* v. *Carmichael* (1830) 2 Dow & Cl 51 showed that the issue was recognised before that time; *Moore* v. *Frowd* (1836) 3 My & Cr 45; *Bainbrigge* v. *Blair* (1845) 8 Beav 588; *Todd* v. *Wilson* (1846) 9 Beav 486. The rule applied where a solicitor-trustee was a member of a firm of solicitors so as to disallow the profit costs of the firm and not just the solicitor-trustee, *Collins* v. *Carey* (1839) 2 Beav 128; *Christophers* v. *White* (1847) 10 Beav 523.

[67] In *Scattergood* v. *Harrison* (1729) Mosely 128 at 129, counsel observed that 'suppose an attorney is made executor, if he has occasion to carry on law-suits on the account of his testator, must he give up his fees?'

[68] *Per* Lord Langdale in *Stanes* v. *Parker* (1846) 9 Beav 385 at 389.

a solicitor, and not at all as trustee. Accordingly the two characters of trustee and solicitor would remain distinct, and there could be no conflict between duty and interest. If no conflict existed, there would be no reason for prohibiting remuneration for professional work done. It was on that basis that Lord Cottenham LC allowed the solicitor-trustee in *Cradock* v. *Piper* in 1850[69] to be remunerated in the absence of a charging clause. The work was clearly in his personal interest but it was 'no part of the business or employment of a trustee to assist other parties in suits relative to the trust property',[70] and accordingly not his proper business as trustee. As the work and the potential profit had not come from his office as trustee, a sufficiently close connection between the work of the solicitor and the office of trustee was absent, the two capacities did not merge and so no conflict could arise. As there was no reason why the no-remuneration rule should apply, it did not.[71] This reasoning was not new in 1850,[72] and clearly it allowed solicitor-trustees to charge professional fees even in the absence of a charging clause in certain instances. As a matter of policy, however, it was not taken further by the courts and indeed was later used negatively to limit the scope of professional charging clauses.

Since they could not be remunerated on general principles, the obvious solution was for professional trustees to demand express provision for their remuneration in the trust deed. This was allowed by the court on the basis that where the settlor expressly allowed a solicitor-trustee to charge professional fees he had shown 'that he would rather run the risk of abuse, by uniting the two characters, and pay the solicitor his costs, than lose his services as a trustee'.[73] The court more readily allowed professional remuneration where the charging clause was contained in an *inter vivos* deed, because it amounted to 'some special contract authorising him to

[69] *Cradock* v. *Piper* (1850) 1 Mac & G 664.

[70] *Ibid.*, at 679.

[71] The limitation to litigation costs was a subsequent and theoretically unsound development, *Lincoln* v. *Windsor* (1851) 9 Hare 158. In *Re Corsellis* (1886) 33 Ch D 160 at 165 Kay J understood that the limitation to costs in a suit had been introduced by *Lincoln* v. *Windsor*. See too counsel's argument in *Broughton* v. *Broughton* (1855) 5 De G M & G 160 at 162, and C. Stebbings, 'The Rule in *Cradock* v. *Piper* (1850): Exception or Principle?' (1998) 19 *Journal of Legal History* 189.

[72] *New* v. *Jones* (1833) 1 H &Tw 632n at 634 and *Moore* v. *Frowd* (1836) 3 My & Cr 45 at 50.

[73] *Christophers* v. *White* (1847) 10 Beav 523.

make the charge'.[74] The inclusion of an express charging clause was, furthermore, convenient for settlors, since if a professional trustee was to be appointed, he was generally the same person who took responsibility for the drafting of the deed itself. By the middle of the nineteenth century it was said that this was 'not unfrequently done',[75] and charging clauses for solicitor-trustees were common and standard form.[76]

It was quite clear that professional trustees would in general refuse to act unless they could recover their professional costs, but in practice their demands went further. Professional costs clearly covered by a charging clause included charges for matters they undertook strictly in their professional capacity, such as the drafting of deeds or conveyances and the giving of legal advice. It was appreciated by most settlors, or at least made clear to them by their advisers, that professional trustees could not be expected to devote their time to the management of trusts unless they were equally remunerated at professional rates for their non-professional work. This included matters they would quite properly undertake as solicitors in the administration of a trust, such as keeping accounts, attending at banks and auctions, attending meetings and writing letters in relation to the trust. Such tasks were not strictly professional, for a lay trustee would be expected to undertake them, but they were commonly and properly undertaken by solicitors. It suggests that increasingly solicitor-trustees were expected to participate fully in the administration of the trust as trustees, and not merely as quasi-agents. The emphasis thus turned to the analysis of the scope of professional charging clauses rather than their validity *per se*.

The authority of the no-remuneration rule was such that the term 'professional services' was strictly construed. The decision in 1860 that remuneration for non-professional work undertaken by professional trustees was not allowed raised an outcry from the solicitors' profession.[77] The court in *Harbin* v. *Darby (No 1)* held that the solicitor-executor in question could charge only for services he had rendered in the strict character of solicitor. All charges for work

[74] *Re Sherwood* (1840) 3 Beav 338 at 341, *per* Lord Langdale MR.
[75] *Bainbrigge* v. *Blair* (1845) 8 Beav 588 at 597.
[76] Counsel in *Douglas* v. *Archbutt* (1858) 2 De G & J 148 observed that 'the clause enabling a trustee to charge professional expenses is a well-known common form'. See too *Minutes of Evidence, 1895*, *per* Lord Herschell at q. 62.
[77] *Harbin* v. *Darby (No 1)* (1860) 28 Beav 325.

which might have been done by an executor in his lay capacity, such as attendance at the bank to make transfers, or attendance to pay legatees and creditors, could not be charged for. The distinction had to be made between work which properly belonged to the office of executor, and that which belonged to his character of solicitor. In response to that decision, a more comprehensive and carefully worded standard form charging clause was developed. It allowed professional trustees to receive their usual professional costs and charges for all business transacted by them, including all business of whatever kind not strictly professional, but which might have been performed, or would necessarily have been performed, in person by a trustee not being a solicitor. Variations included 'acts which a Trustee could have done personally',[78] 'not of a nature requiring the employment of . . . a professional person',[79] and 'in like manner as if he had not been a Trustee'.[80]

Such wording was widely adopted in the last quarter of the nineteenth century. Its judicial interpretation was clearly of considerable practical interest and importance. Each clause stood or fell on the construction of its individual wording. Some were successful in covering non-professional charges,[81] some not.[82] The tendency of the courts was always towards a strict construction, especially where the solicitor-trustee had also been left a legacy for his personal time and trouble.[83] The clearest words were necessary to allow a solicitor-trustee to charge for non-professional services, and where they were included the clause was effective in this respect. As Kay LJ observed, however, it was a form which 'no solicitor ought to put in its entirety into a will drawn by himself, unless the testator has expressly instructed him to insert those very words'.[84]

In the penultimate year of the reign, the standard form professional charging clause was given its final interpretation to cover just that non-professional business which was done in the course of the

[78] DRO 4552 Z/F1 (1893).
[79] DRO 4263 B/AB 28 (1897).
[80] DRO 1335B/F18 (1883).
[81] *Re Ames* (1883) 25 Ch D 72. It was later observed, however, that the charging clause in this case was 'a very special clause indeed': *Re Chalinder and Herington* [1907] 1 Ch 58 at 62.
[82] *Re Chapple* (1884) 27 Ch D 584.
[83] *Ibid*. See too *Re Fish* [1893] 2 Ch 413 and for an early illustration of the antipathy towards both giving a legacy and including a charging clause, see counsel's argument in *Bainbrigge* v. *Blair* (1845) 8 Beav 588 at 592.
[84] *Re Chapple* (1884) 27 Ch D 584 at 587.

business.[85] The standard provision allowed solicitor-trustees and other professional trustees to charge for business done in the administration of a trust whether it was 'in the ordinary course of his profession or business or not'.[86] These words were perceived as being at the heart of the issue, and were construed to refer to work which was in the course of his business, whether in its ordinary course or not. As a result a solicitor-trustee could only charge for work done in the course of the profession of solicitor, even if that work was neither usual nor strictly required. The final construction of professional charging clauses was therefore that he could charge for his strictly professional services and services properly undertaken in the course of his profession, and for non-professional services which could be undertaken by a lay trustee if the wording clearly and expressly permitted it.[87] In other words, he could charge for his time and trouble as a solicitor, but only exceptionally for his time and trouble as a trustee.[88] The authority of the no-remuneration rule and the essential nature of the office of trustee as honorary were therefore maintained, even in the face of the exploitation of the charging clause. Charging clauses were permitted because they were theoretically legitimate and met a practical demand, and because, essentially, the law had construed them in such a way as to introduce an inherent limitation in scope to prevent the abuses it had always feared.

Ultimately, therefore, practical necessity prevailed. An enforceable professional charging clause confirmed the relationship between the settlor and a professional trustee as one of business based on profit. This did nothing to improve the public image of solicitor-trustees. The maiden in 'Taken upon Trust' laments that she has 'a lawyer for our trustee, who is most unobliging, and expensive'.[89] There is evidence that it was a very fruitful line of business for solicitors. One practitioner in 1895 said that he was trustee to some twenty or thirty trusts, and another said he was trustee to forty-seven.[90] By the end of the Victorian period it was said that more

85 *Clarkson* v. *Robinson* [1900] 2 Ch 722.
86 DRO 4263 B/AB 28 (1899).
87 As in *Re Ames* (1883) 25 Ch D 72 and *Re Fish* [1893] 2 Ch 413.
88 *Re Chalinder and Herington* [1907] 1 Ch 58.
89 (1891) 100 *Punch* 161.
90 *Minutes of Evidence, 1895*, qq. 939,1019. If the solicitor was dishonest, an accumulation of trusts in this way could be extremely dangerous: see *Parl. Deb.*, vol. 148, ser. 4, col. 668, 30 June 1905 (HC).

than eight-tenths of the large estates in the country were in the hands of solicitor-trustees.[91] Some solicitors were very proactive in this respect, and it was said that when a testator approached a solicitor to have a will drafted without having previously decided on the trustee, the solicitor would often suggest himself, with, of course, the appropriate charging clause. The extent to which solicitors valued this work is clear from the debate surrounding the proposed appointment of a Public Trustee in the closing years of the nineteenth century.[92] One correspondent to *The Times* estimated that a London firm of solicitors would have trust business amounting to between £15 million and £20 million. Applying that over the whole country, he estimated trust business to be worth some £1,000,000,000 and that, he said, 'a very low estimate'.[93] Indeed, the proposal at the end of the century to introduce an official trustee was perceived as a professional, cultural and social issue, not a legal or commercial one.

Despite the increased popularity of professional trustees and the widespread use of expert agents, the personal nexus in the settlor–trustee relationship continued to be valued throughout the Victorian period. Indeed even in the professional context the family tie was retained, for it was not unusual to find that the solicitor-trustee was a member of the family. The reason was essentially one of control. The settlor's control over the property lay of course at the heart of the trust concept itself, in that the institution existed to give legal force to a settlor's wish to limit the enjoyment of his property in the future. The articulation, nature and extent of this control lay primarily in the express terms of the trust, in that the degrees of prescription or discretion were largely in the gift of the settlor. But in addition to this legal control there existed a moral control exerted through the persons of the trustees and depending for its extent on the nature of the personal quality of the relationship. The settlor, exercising his free choice as to trustees, approached individuals who would, as he saw it, administer the trust as he would wish. He desired trustees who would adopt his priorities and standards of morality as their guiding ethos. In that sense he conceived of the trust as a continuation of an element of his ownership and chose persons he felt he could trust to do what he would have done. If he

[91] *Parl. Deb.*, vol. 148, ser. 4, col. 687, 30 June 1905 (HC).
[92] See for example (1889) 88 *Law Times* 96, 307.
[93] *The Times*, 26 March 1895, p. 14, col. b.

succeeded in obtaining the consent of his preferred choice he had in effect ensured, as far as he could, the extension of his own personal control over the property he had placed in trust.

The extent to which the initial dynamics of the settlor–trustee relationship affected the way the trust was administered depended on the circumstances of each case. If the trust were *inter vivos* then the settlor's physical presence reinforced his moral control. If he was of a forceful character and a senior and respected member of the family, and if the trustees were irresolute, inexperienced or simply accommodating in nature, the settlor's influence could be considerable and could pervade the ongoing relationship with the trustees for many years. In testamentary trusts, the active personal relationship with the settlor clearly did not coincide with the administration of his trust and so the control was necessarily short-term in the form of the trustees' integrity and the force of the settlor's memory. The control generally took the form of undermining the independence of the trustees in the exercise of their discretions. Trustees could be psychologically coerced into exercising their discretions as the settlor would have wished, rather than as they themselves thought proper. In extreme cases the trustees could become the mere puppets of the settlor.

When the time came for the appointment of new trustees to replace the original ones, this control, however tenuous, was put in jeopardy. In the normal way of things, this event would take place some time after the testator's death, and any personal tie would have weakened with the passing of the years and new trustees would have little reason to be loyal to the unwritten values of the settlor, even if they were aware of what they were. Some settlors sought to prolong their moral control by specifying in the trust deed those persons who could make such fresh appointments. This was evident in marriage settlements, where the standard form was for the power of appointment of new trustees to be reserved to the husband or wife or the survivor, then to the surviving or continuing trustee.

The settlor's legal control over his trustees was more tangible and enduring. It was he who ultimately decided the degree of discretion his trust instrument would allow them. Those settlors who did not desire to dictate the future administration of the trust were content to give their trustees the widest discretion in the exercise of all their powers. Others who were less trusting took pains to leave as little room for flexibility as legally possible and the extent to which

they dictated and limited the trustees' sphere of discretion revealed the extent to which they were trying to impose their will on the administration of the trust. This was particularly striking in those testamentary trusts which comprised the settlor's business enterprise, where the future management of the business was provided for in astonishing detail and with considerable foresight.

The degree of prescription owed much to the legal advice a settlor received. Most settlors knew broadly what they wanted to achieve and expressed their wishes loosely. These were reduced to legal form and order by their legal advisers, who were almost invariably appointed to draft the trust instrument, who would tell them what was possible and what was not, and could encourage or discourage specific actions or directions. Solicitors advised on the basis of current practice, itself built on the accumulation of past practical and legal experiences, suggesting the clauses which were available and effective, whose scope was known and tested. To some extent too settlors needed to be told what to provide for, and not all express provisions of settlors came from their own desire, imagination and foresight. Since trust administration, like conveyancing, formed a large proportion of most solicitors' work, the degree of expertise in trust matters was high. The professional legal press was extensive in the nineteenth century, and the leading journals carried articles or reports on trust matters in most issues. Furthermore, there was an extensive resource of practitioners' texts and commentaries on trusts. The leading and most authoritative work of the period was 'Lewin on Trusts', the first edition appearing in the first year of Victoria's reign and being in its tenth edition in the last.[94] With books of forms and precedents from conveyancers such as Wolstenholme, the profession was well served with literature on trust administration.

Throughout the Victorian period solicitors generally used standard form clauses, and thus accurately reflected contemporary notions as to the position of settlors in relation to the trust property. The extent to which settlors thought of their property as having been alienated once put in trust is problematic. The emphasis on a personal relationship with the trustees, coupled with detailed and prescriptive trust deeds, suggested that they realised that legally the property was no longer theirs, and yet felt morally justified

[94] Thomas Lewin, *A Practical Treatise on the Law of Trusts and Trustees* (1st edn, London, 1837).

in trying to retain control by whatever means they could. Most trustees regarded the trust property as legally theirs, to administer for the benefit of the beneficiaries according to the wishes of the settlor expressed in his trust deed, but neither sought nor welcomed any further interference. In this sense practice reflected the legal principle that a trust was indeed the Equitable equivalent of the Common Law gift, and that once executed, the settlor parted with the ownership and lost all the privileges thereof. Even in marriage settlements, where settlor and beneficiary were often one and the same, the trustees consulted them in the latter rather than the former capacity. That there was a distance between the settlor and the trustees was established; the extent of the distance depended on the individual circumstances of each trust and the characters and values of each settlor and his trustees.

The settlor's ability to influence the administration of the trust through his personal relationship with his chosen trustees could be dashed just days after its execution. The law had always appreciated the onerous nature of trusteeship[95] and accordingly had always permitted trustees to disclaim.[96] If a person appointed trustee wished to refuse the trust, the most desirable course was for him to disclaim by deed poll, for this 'admits of no ambiguity',[97] and to do so as soon as practicable.[98] In practice most disclaimers were effected in this way.[99] The usual form was for the disclaiming trustee to state he was 'willing and desirous and hath determined to renounce and disclaim' the trust, and that the deed served 'to manifest his refusal to accept and Act in the Trusts'.[100] Once he had accepted the trust, however, the law discouraged retirement. While express powers, reflecting the everyday needs of trust administration and more realistic in their expectations, always provided for the retirement of

[95] *Conyngham* v. *Conyngham* (1750) 1 Ves Sen 522.

[96] The effect of a disclaimer by a trustee was comprehensively analysed by Lord Eldon in *Nicolson* v. *Wordsworth* (1818) 2 Swans 365. The disclaimer had to be made before acceptance of the trust, and the cost was borne by the trust: *Re Tryon* (1844) 7 Beav 496. Whether a trustee had accepted a trust was not always easy to establish: *Montford* v. *Cadogan* (1810) 17 Ves Jun 485. See too *Lowry* v. *Fulton* (1838) 9 Sim 104; *James* v. *Frearson* (1842) 1 Y & C C C 370.

[97] *Stacey* v. *Elph* (1833) 1 My & K 195 at 199.

[98] *Bence* v. *Gilpin* (1868) LJ 37 Exch 36; *Jago* v. *Jago* (1893) 68 LT 654.

[99] *Cafe* v. *Bent* (1845) 5 Hare 24. A disclaimer could be, and sometimes was, implied from conduct: *per* Sir John Leach MR in *Stacey* v. *Elph* (1833) 1 My & K 195 at 199.

[100] DRO 1179 B/WT 66 (1812). See too DRO 1044 B add 2/B7/4 (1875).

a trustee during the subsistence of the trust, anticipating illness or other pressures,[101] in the absence of such a power it was difficult, though possible.[102] The beneficiaries could join together to permit it,[103] and in the last resort the court could authorise it. Trustees could, under the provisions of the Trustee Relief Acts 1847 and 1849,[104] be relieved of the responsibility for the administration of a trust fund by paying it into court. These acts were primarily designed to assist trustees who had trust funds in their hands but were uncertain who should receive them. Retirement was not, however, straightforward and the law's attitude to it was one of reluctant agreement and then only if a good reason could be demonstrated.[105] Quite apart from any legal constraints, retirement was frequently morally difficult. When an established trustee realised the work was getting beyond him, for whatever reason, he often felt constrained in seeking to retire, knowing that appointing a replacement would be difficult, even if it was clearly to the trust's benefit to do so. Trustees, especially of marriage settlements, often remained in office for many years. Active trusteeships of some thirty years were not uncommon.[106] More usually, however, a group of trustees acted for some fifteen years, and when one died the others might continue for a short while and then seek to retire.[107]

The number of disclaimers and retirements increased with the complexity and volume of a trustee's work, as did the occasions on which it became necessary to remove acting trustees who were not capable of administering the trusts. Since neither feelings of friendship nor pecuniary remuneration guaranteed the ability of trustees, in the context of an increasingly onerous office the issue of removal became one of some moment. In practice, when it was clear that the trustee, for whatever reason, could no longer act effectively in the execution of the trust, he would generally seek to retire voluntarily. Certainly if the relationship between the trustee

[101] See *Camoys* v. *Best* (1854) 19 Beav 414.
[102] *Per* Sir John Romilly MR in *Forshaw* v. *Higginson* (1855) 20 Beav 485 at 487.
[103] See Sir John Leach MR in *Wilkinson* v. *Parry* (1828) 4 Russ 272 at 276.
[104] Trustee Relief Act 1847, 10 & 11 Vict. c. 96; Trustee Relief Act 1849, 12 & 13 Vict. c. 74.
[105] *Forshaw* v. *Higginson* (1855) 20 Beav 485; *Gardiner* v. *Downes* (1856) 22 Beav 395. See too *Adams* v. *Paynter* (1844) 1 Coll 530; *Coventry* v. *Coventry* (1837) 1 Keen 758.
[106] See for example DRO 337 add 3B 1/12/15 Box 33; DRO 282 M/MS 5 (1823).
[107] For example DRO 337 B/ add 501 (1828).

and the beneficiaries had collapsed, he should retire, and to refuse to do so would suggest either that the trustee was corrupt or that he was being deliberately obstructive. The trustee would be absolutely justified in remaining only when he was being urged to step down in order to be replaced with a more tractable trustee and thereby to facilitate a breach of trust.

By the early nineteenth century all professionally drawn trust deeds included an express authority to appoint new and additional trustees or to allow existing trustees to retire. These were drafted by conveyancers to meet practical demands and needs, were generally widely drafted and were found in standard form. They provided for the appointment of replacements where a trustee died, desired to be discharged, refused to act or was incapable of acting.[108] By the beginning of Victoria's reign such powers increasingly covered a trustee residing, or about to reside, abroad[109] for a minimum of six months or a year.[110] It has already been noted that in *inter vivos* trusts such as marriage settlements the express power was often reserved to the beneficiary, a feature which gave him a continued measure of control over the longer-term administration of the trust. Desirous of maintaining the personal nature of the settlor's trust, these powers were strictly construed by the courts and accordingly needed careful drafting. The general rule, for example, was that the original number of trustees should be adhered to, rather than increasing or decreasing them, because this was taken to be the presumed intention of the settlor in the absence of any contrary intention expressed in the instrument,[111] and so any increase had to be expressly provided for. Typically the power could be used 'in case it shall be deemed advisable to increase the number of trustees'.[112] A strict approach was particularly noticeable in relation to the common provision that the power to appoint was to be exercised by the 'surviving or continuing trustees', and there was extensive judicial debate as to what constituted, or rather did not constitute, a surviving or continuing trustee, particularly where a trustee wished to retire and appoint a trustee in his place. In some cases the court

[108] See DRO 337 B/ add 501 (1812); DRO 3162 B/MF 66 (1835); *Nicolson* v. *Wordsworth* (1818) 2 Swans 365 at 367; see too the express power in *Lord Camoys* v. *Best* (1854) 19 Beav 414.
[109] DRO 1457 M/F10 (1827).
[110] DRO 282 M/MS 6 (1846).
[111] *Meinertzhagen* v. *Davis* (1844) 1 Coll 335.
[112] DRO 337 add 3B/1/12/9 Pt 1 Box 8 (1845).

adopted a pragmatic approach, favouring where it could a 'convenient construction'.[113] In others, the court adopted a stricter and more legalistic approach, the judge on one occasion observing 'that in determining cases of this description, one is speculating and trying, by nice and refined distinctions, to discover the meaning of persons who never contemplated the case, inasmuch as the difficulty has arisen from a careless mode of filling up common forms. The Court, in so doing, is apt to impute to persons intentions and ideas which never entered their minds.'[114] The preferred view came to be that a retiring trustee was not a continuing trustee within the meaning of common form express powers of appointment.[115] Indeed to hold otherwise would have caused inconvenience, for the retiring trustee would have had to join in the appointment of a new trustee even if he were retiring due to mental incapacity or absence from the country. Later clauses addressed this potential difficulty expressly. It was in relation to express powers that the rules of law were developed. So residence abroad for twenty years was held to make a trustee incapable of acting,[116] though merely going out of the jurisdiction did not.[117] Incapacity meant personal incapacity, and this did not include a trustee who had been declared bankrupt even if he had absconded.[118] Some express powers specified that 'unfitness' was to include bankruptcy and insolvency.[119]

Express powers did not provide for the removal of trustees, or at least not directly. If a trustee had become incapable of acting in the trusts within the meaning the law gave to the term, express powers gave authority to replace him. It would be hoped that he would retire voluntarily, but if he did not, the only solution was recourse to the court for his involuntary removal under its ample inherent jurisdiction to execute the trust, preserve the trust property and ensure the welfare of the beneficiaries.[120] Being a matter 'so essentially

[113] *Re Hadley* (1851) 5 De G & Sm 67 at 72. See too *Cafe* v. *Bent* (1845) 5 Hare 24; *Emmet* v. *Clark* (1861) 3 Giff 32.
[114] *Stones* v. *Rowton* (1853) 17 Beav 308 at 313.
[115] Followed in *Travis* v. *Illingworth* (1865) 2 Dr & Sm 344; *Re Norris* (1884) 27 Ch D 333; *Re Coates to Parsons* (1886) 34 Ch D 370.
[116] *Mennard* v. *Welford* (1853) 1 Sm & Giff 426.
[117] *Re Harrison's Trusts* (1852) 22 LJ Ch 69; *Re The Moravian Society* (1858) 26 Beav 101.
[118] *Re Watts' Settlement* (1851) 9 Hare 106.
[119] DRO 5521 M/E7/4 (1880).
[120] *Courtenay* v. *Courtenay* (1846) 3 Jo & Lat 519; *Re Chetwynd's Settlement* [1902] 1 Ch 692.

dependent on details often of great nicety',[121] the procedure was not only unclear in its guiding principles, but also lengthy and inevitably expensive. It was known that the court would consider each case on its merits, and that any removal would be based on the welfare of the trust estate and the beneficiaries rather than any breach of trust by the trustee, though if a trustee were guilty of actual misconduct there could be no difficulty in removing him.[122] It was clear that mere hostility between the trustees and the beneficiaries was not regarded as sufficient reason for removing the trustees.[123]

The increased numbers of disclaimers, retirements and removals, a less than universal use of comprehensive express powers in this respect, against a background of the widespread reluctance of able individuals to act as trustees, led, in the context of a voluntary relationship, to a severe recruitment problem from the middle of the nineteenth century. Indeed all the problems of trusteeship became focused into this single issue, and by the closing years of the century it had become acute. The difficulties were exacerbated by the sheer scale of the problem; as the amount of wealth in the country increased, so did the number of trusts and so did, inevitably, the number of trustees who needed to be found. Some kind of legislative intervention was perceived as the only remedy, but it was not evident what the legislature could do. The increased burden of the office was the result of prevailing economic conditions, and while the law of trusts administration could be, and was, clarified through consolidating legislation, the clock could not be turned back in terms of the sophistication and complexity of Victorian commercial life. The legislature could, however, address the risks of the office which lay at the root of the reluctance to act as trustee. While trustees would have shouldered an increase in the volume of work, and possibly an increase in its complexity if they felt able, they were not prepared to attempt to do so while the law held them personally liable for even honest breaches of trust.[124] The legislature did address this as early as 1859 through the Law of Property and Trustees Relief Amendment Act,[125] but the relief it afforded was too limited to ease the recruitment problem.

[121] *Letterstedt* v. *Broers* (1884) 9 App Cas 371 at 387.
[122] *Letterstedt* v. *Broers* (1884) 9 App Cas 371.
[123] *Forster* v. *Davies* (1861) 4 De G F & J 133.
[124] See below, pp. 169–73.
[125] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35.

There was relatively little the legislature could do to ensure that inadequate persons did not become trustees. In other spheres the law did attempt to control the calibre of individuals in office by means of property qualifications, the size of a man's purse being regarded as a relatively sound indication of his moral worth. Such instances, however, concerned public offices which merited this kind of interference.[126] The law, and the public, perceived the trust as an essentially private arrangement between individuals, and accordingly saw there was a limit to the extent to which it could be prescriptive in relation to the selection and appointment of trustees. Its control was minimal. The only restriction it imposed on a settlor's choice of trustee was the purely formal one of legal capacity: anyone who was *sui juris* could be a trustee. Since anyone could be appointed trustee if they had the capacity to hold the property in question, this achieved no more than ensuring that the trustee would be legally capable of dealing with the property. It could not legislate for intelligence, objectivity or integrity. Neither, however, could the law entirely wash its hands of appointment issues and leave the matter to the free market. There were instances where a trust found itself with incapable trustees,[127] with too few or even none at all.[128] It was, after all, a maxim of Equity that no trust would fail for want of a trustee.[129]

One thing the legislature could do was to ease the appointment of new trustees, and to allow the appointment of additional ones. The court had always had the power under its inherent jurisdiction to appoint new or additional trustees, even going above the original number of trustees.[130] In 1801 the court approved the appointment of a new trustee to replace one who had released his office, and where there was no provision to deal with the situation,[131] while in 1847 it allowed a decree for the appointment of new trustees 'in the usual form' where all the trustees had died.[132] Where the court decreed that a new trustee was to be appointed, it referred the matter to the

[126] The General Commissioners of Income Tax, for example.
[127] *Sonley* v. *Clock Makers' Co.* (1780) 1 Bro CC 81.
[128] *Dodkin* v. *Brunt* (1868) LR 6 Eq 580; *Re Smirthwaite's Trusts* (1871) LR 11 Eq 251.
[129] The trusts, it was said, 'shall not be defeated', *Sonley* v. *Clock Makers' Co.* (1780) 1 Bro CC 81.
[130] *Birch* v. *Cropper* (1848) 2 De G & Sm 255; *Plenty* v. *West* (1853) 16 Beav 356 .
[131] *Buchanan* v. *Hamilton* (1801) 5 Ves Jun 722.
[132] *Ockleston* v. *Heap* (1847) 1 De G & Sm 640.

Master to choose a fit and proper person to fill the office.[133] It was in this context that the legislature first intervened directly in the matter of trustee appointments, passing the Trustee Act 1850[134] with the object, among others, of facilitating the appointment of new trustees by the court.

The Act gave the court for the first time[135] a general statutory power to appoint new trustees, providing

> that whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees.[136]

The assistance was essentially procedural. Applications could be made by petition in Chancery to the Lord Chancellor or the Master of the Rolls, and the object of the Act was to simplify and expedite the process and to reduce the costs of applying to the court in the traditional way by suit. The inherent jurisdiction of the court to appoint trustees was unaffected, though it came to be used only exceptionally since the statutory power was comprehensive.[137] The reform was necessary. *The Economist* reported a case where in 1847 the death of the surviving trustee necessitated an application to the court. There was no dispute, and no opposition to a chosen candidate, and yet it took three years to effect, and cost £337 which was nearly one-third of the three years' income.[138]

The power in the Trustee Act 1850 did not lay down the specific instances where it would be expedient for the court to appoint new trustees, it being deliberately widely worded so as to impose

[133] *Buchanan* v. *Hamilton* (1801) 5 Ves Jun 722; *AG* v. *Stephens* (1834) 3 My & K 347; *Ockleston* v. *Heap* (1847) 1 De G & Sm 640.

[134] 13 & 14 Vict. c. 60.

[135] See earlier statutory provisions: Conveyances and Transfers Amendment Act 11 Geo. IV & 1 Will. IV c. 60 (1830); Escheat and Forfeiture Amendment Act 4 & 5 Will. IV c. 23 (1834); Conveyances, Mortgagees Act 1 & 2 Vict. c. 69 (1838).

[136] 13 & 14 Vict c. 60, s. 32; see for example *Re Matthews* (1859) 26 Beav 463. The Trustees Act Extension Act 1852, 15 & 16 Vict. c. 55, s. 9 amended s. 32 by causing the words 'either in substitution for or in addition to any existing trustee or trustees' to be omitted and it expressly states that an order may be made 'whether there be any existing trustee or not at the time of making such order', thereby overcoming the difficulties in this respect which had become apparent.

[137] On occasion, however, the facts of the case were such as to require the exercise of the inherent jurisdiction: see *Dodkin* v. *Brunt* (1868) LR 6 Eq 580.

[138] *The Economist*, 21 June 1851, p. 670 (vol. 9).

no restraint on the court in this respect. This generality was largely preserved by its successors, though the Trustees Act Extension Act 1852 provided for the appointment of a new trustee in place of one convicted of a felony,[139] and the Trustee Act 1893 provided for the appointment of a new trustee by the court in place of one who was a bankrupt.[140] The law was accordingly developed through the decisions of the court. So, for example, it was held that the court could appoint a new trustee in place of one who had become incapable of acting through having gone abroad,[141] or through age and infirmity,[142] where all the trustees predeceased the testator[143] and where there were doubts as to the sufficiency or availability of other powers of appointment.[144] These were all very real problems in practical trust administration in a context of inherent difficulties in finding persons willing to act as trustees. The removal of the offending trustee was implicit in the provision,[145] though the removal would be effected under the court's inherent jurisdiction and not under the statutory power.[146] Indeed, although there was considerable judicial disagreement, the consensus was that the power could be exercised to remove a trustee only when a reappointment was also made.[147] Under this power the court was able to appoint additional trustees as well as replacement trustees,[148] and to reduce the number of trustees if it so wished.[149] The whole tenor of the provision was one of last resort. The private nature of the trust was reinforced through an express provision that the statutory power

[139] 15 & 16 Vict c. 55, s. 8.

[140] 56 & 57 Vict c. 53, s. 25. Express powers did not generally include conviction or bankruptcy as instances of incapability.

[141] *Re Bignold's Settlement Trusts* (1872) 7 LR Ch App 223.

[142] *Re Lemann's Trusts* (1883) 22 Ch D 633.

[143] *Re Smirthwaite's Trusts* (1871) LR 11 Eq 251.

[144] *Re Bignold's Settlement Trusts* (1872) 7 LR Ch App 223.

[145] See generally *Re Chetwynd's Settlement* [1902] 1 Ch 692. See too *Re Dewhirst's Trusts* (1886) 33 Ch D 416; *Re Gardiner's Trusts* (1886) 33 Ch D 590.

[146] A trustee could retire by direction of the court when the latter appointed a new trustee under its statutory power to do so: see *Re Moss' Trusts* (1888) 37 Ch D 513; *Re Chetwynd's Settlement* [1902] 1 Ch 692.

[147] See *Re Harford's Trusts* (1879) 13 Ch D 135; *Re Aston* (1883) 23 Ch D 217. Note that the court had a discretion to remove trustees under the bankruptcy legislation for the security of the trust fund: *Re Barker's Trusts* (1875) 1 Ch D 43; *Re Adams' Trust* (1879) 12 Ch D 634; but see Sir R.T. Kindersley VC in *Re Bridgman* (1860) 1 Dr & Sm 164 at 170.

[148] *Grant* v. *Grant* (1865) 34 LJ Ch 641; *Re Gregson's Trusts* (1886) 34 Ch D 209.

[149] *Re Fowler's Trusts* (1886) 55 LT 546; *Re Leslie's Hassop Estates* [1911] 1 Ch 611.

was to be exercised only at the request of the beneficiaries or the existing trustees, and the court even refused to exercise it if there were acting de facto trustees.[150] The court undoubtedly preferred to have individuals exercising the power of appointing trustees rather than having to do so itself.[151]

Where, however, the court had to make the appointment itself it faced the same difficulties as a private appointor in selecting suitable persons. The Trustee Act 1850 itself gave no guidance in this matter, though the court had to be satisfied by affidavit of the fitness of the new trustees[152] and of their willingness to act. In 1866 Turner LJ laid down the principles to aid the court in deciding whom to appoint as trustees.[153] Such a discretion, he said, should not be exercised arbitrarily, should defer to the express or implied wishes of the settlor in the instrument, should not be made to favour some beneficiaries and not others, and its effect on the execution of the trust should be considered.[154] While such guidelines did little more than reflect a common sense approach to the appointment of trustees, they were useful in that they narrowed the field by excluding certain categories of persons from potential trusteeship. So trustees residing outside the jurisdiction,[155] beneficiaries,[156] their spouses or solicitors[157] were all regarded as undesirable trustees. The court felt more comfortable applying such objective criteria, and was always reluctant to consider whether a particular individual was a fit and proper person, being respectable and trustworthy, to act as trustee. As Pearson J observed in 1884, 'the Court always declines to go into any question of that kind'.[158] When the court

[150] *Re Hadley* (1851) 5 De G & Sm 67.

[151] *Re Higginbottom* [1892] 3 Ch 132; and see too *Re Hodson's Settlement* (1851) 9 Hare 118; but see *Walsh* v. *Gladstone* (1844) 14 Sim 2. See generally *Re Gadd* (1883) 23 Ch D 134; *Re Norris* (1884) 27 Ch D 333.

[152] E. R. Daniell, *The Practice of the High Court of Chancery* (5th edn, 2 vols., London, 1871), vol. II, p. 1826.

[153] *Re Tempest* (1866) 1 LR Ch App 485 at 487.

[154] So the court could, exceptionally, appoint colonial trustees, *Re Simpson* [1897] 1 Ch 256.

[155] Though exceptionally such trustees could be appointed if it was for the benefit of the beneficiaries, see *Re Freeman's Settlement Trusts* (1887) 37 Ch D 148.

[156] *Re Clissold's Settlement* (1864) 10 LT 642; *Forster* v. *Abraham* (1874) LR 17 Eq 351.

[157] *Re Kemp's Settled Estates* (1883) 24 Ch D 485; *Re Earl of Stamford* [1896] 1 Ch 288 at 300; *Re Coode* (1913) 108 LT 94; *Re Spencer's Settled Estates* [1903] 1 Ch 75.

[158] *Re Norris* (1884) 27 Ch D 333 at 340.

did hold a particular appointment to be unsuitable, it was always at pains to stress that the objection was not a personal one.[159] In other contexts, however, the judges did make it clear that certain characteristics were desirable in a trustee. Kay J observed that a person who had a power to appoint new trustees had a duty to select 'honest and good persons who can be trusted with the very difficult, onerous, and often delicate duties which trustees have to perform'.[160] Stirling J felt that 'large experience', an acquaintance with the trust estate, and the support of the beneficiaries were desirable qualities.[161]

The legislature's second intervention in the matter of appointment addressed the difficulties surrounding the use of express powers. Although they were very common, they were not universally used, and it has been seen that they were occasionally inadequate.[162] Most express powers provided for death, refusal to act and the desire to retire. Not all provided for incapacity or for trustees who left to reside or visit abroad. Furthermore, since their wording and therefore construction differed, there was some uncertainty and frequent difficulty in making a valid appointment of new trustees. It was in order to address those difficulties and avoid the expense of recourse to the courts that the Trustees, Mortgagees, etc. Act 1860,[163] Lord Cranworth's Act, was passed. This 'most wholesome enactment'[164] introduced a statutory power of appointment into every trust instrument, in addition to any express power,[165] unless a contrary intention appeared. The power was one of many common and standard form powers introduced automatically into every trust instrument, as part of a wider policy to reduce the length – and therefore expense – of trust instruments.[166] The wording adopted by the statute was modelled on the express powers which had been

[159] *Re Kemp's Settled Estates* (1883) 24 Ch D 485 at 487; *Re Norris* (1884) 27 Ch D 333 at 336; *Re Tempest* (1866) 1 LR Ch App 485 at 488.
[160] *Re Skeats' Settlement* (1889) 42 Ch D 522 at 526.
[161] *Re Earl of Stamford* [1896] 1 Ch 288 at 300.
[162] *Re Wheeler and De Rochow* [1896] 1 Ch 315.
[163] Its full title was An Act to give to Trustees, Mortgagees, and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills, 23 & 24 Vict c. 145.
[164] *Per* Bacon VC in *Re Glenny and Hartley* (1884) 25 Ch D 611 at 616, and its successor in s. 31 Conveyancing and Law of Property Act 1881, 44 & 45 Vict c. 41, was described as 'a very useful provision', *per* Pearson J. in *Re Shafto's Trusts* (1885) 29 Ch D 247.
[165] *Re Wheeler and De Rochow* [1896] 1 Ch 315.
[166] The Act was not welcomed by solicitors, (1860) 35 *Law Times* 182–3; 342; 353–4.

common for over thirty years and which had been drafted by the conveyancers to meet the most usual needs. In its original form in 1860 the section provided that whenever a trustee should

> die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts . . . it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid.[167]

The Conveyancing and Law of Property Act 1881[168] enlarged the power[169] by expressly adding absence from the United Kingdom for more than twelve months, distinct from an incapacity to act, as an event which would allow the operation of the power.[170] A person exercising the statutory power had, like the settlor, complete freedom to appoint whomsoever he wished, and even if such an appointment was undesirable in the eyes of the court, it would not be overturned.[171] The Act of 1881 also included an express statutory power of retirement, recognising the difficulty which trustees had in the past faced in this respect, irrespective of the date of the settlement.[172] The power was not, however, unfettered because either the retiring trustee had to be replaced, or a sufficient number of trustees had to be left to administer the trust and had to have consented by deed. The Trustee Act 1893 left this power unaltered for retirement was still to be by deed and with consent, and reappointment was unnecessary if there were at least two trustees left.[173] Such restrictions were still widely thought to be too onerous, and

[167] Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145, s. 27.

[168] Conveyancing and Law of Property Act 1881, 44 & 45 Vict. c. 41.

[169] Thereby facilitating sales of land by trustees: see J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Oxford, 1992), p. 152.

[170] Conveyancing and Law of Property Act 1881, 44 & 45 Vict c. 41, s. 31(1); *Re Walker and Hughes' Contract* (1883) 24 Ch D 698. See too (1885) 79 *Law Times* 154.

[171] *Re Earl of Stamford* [1896] 1 Ch 288; *Re Coode* (1913) 108 LT 94; *Re Norris* (1884) 27 Ch D 333; and see too *O'Reilly* v. *Alderson* (1849) 8 Hare 101.

[172] Conveyancing and Law of Property Act 1881, 44 & 45 Vict. c. 41, s. 32.

[173] Trustee Act 1893, 56 & 57 Vict c. 53, s. 11(1).

there was a general feeling that trustees ought to be able to leave the office more easily.[174]

The death of a trustee raised no problems of title to the trust property, since as they held in joint tenancy the *jus accrescendi* operated. It might, however, be desirable to maintain the number of trustees, and accordingly the statutory power allowed for a new appointment on death. The problem which faced the court in relation to express powers[175] where the trustee nominated by the will died before the testator was expressly addressed by the Trustees, Mortgagees, etc. Act 1860 and appointment allowed in such a case.[176]

The provision for the appointment of new trustees where the old trustee was unfit to act or incapable of acting was of practical importance in the context of increasingly onerous duties. The Conveyancing and Law of Property Act 1881 allowed appointment where the trustee was unfit to act, but there was little authority on meaning of 'unfit'. It was held that a trustee who was declared bankrupt was unfit,[177] with little doubt where the bankruptcy showed a lack of integrity,[178] suggesting that 'unfit' meant moral rather than physical or mental unfitness. The latter were covered by the reference to the incapability of the trustee.[179] During the nineteenth century, in the context of express powers, the courts had to decide whether a trustee who went abroad was incapable of acting in the trust, and it was held that he was not, even if he travelled to countries such as Australia and China.[180] A trustee who was resident abroad, on the other hand, was held to be incapable of acting in the trust.[181] The provision in the 1881 Act specifying that a trustee could be appointed to replace one who had gone abroad for more than twelve months resolved a common problem, for it had always been difficult, when a trustee had gone abroad, to decide what period of absence constituted a

[174] See, for example, Lindley LJ in *Minutes of Evidence, 1895*, q. 480 and John Hunter, President of Incorporated Law Society, at qq. 1061–3.

[175] *Walsh* v. *Gladstone* (1844) 14 Sim 2; *Winter* v. *Rudge* (1847) 15 Sim 596; *Re Hadley* (1851) 5 De G & Sm 67.

[176] Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145, s. 28; Conveyancing and Law of Property Act 1881, 44 & 45 Vict c. 41, s. 31(6).

[177] *Re Hopkins* (1881) 19 Ch D 61 at 63.

[178] *Re Wheeler and De Rochow* [1896] 1 Ch 315.

[179] *Re Watts' Settlement* (1851) 9 Hare 106. See too *Re East* (1873) 8 LR Ch App 735.

[180] *Re Harrison's Trusts* (1852) 22 LJ Ch 69; *Withington* v. *Withington* (1848) 16 Sim 104.

[181] See *Mennard* v. *Welford* (1853) 1 Sm & G 426.

disability or unfitness to continue as trustee. The statute ensured every trust deed included a power of appointing trustees, and also obviated the need for lengthy express powers listing the various occasions on which the power could be exercised. All that was needed was a provision stating the donees of the power. From 1860, while many deeds did continue to recite the full power, others were much shorter and simply named the donees and occasionally added their own emphasis, extension or detail to the statutory provision.[182]

This piecemeal legislation did little to ease the problems of recruitment, and by the end of the century more radical solutions were being sought. While throughout the Victorian period private individuals were invariably chosen to act as trustees simply because there was no other option, necessity led to the contemplation of alternatives of a more public or official nature. By the closing years of Victoria's reign companies incorporated by registration were familiar organs of commercial and public life, and the use of the corporate form in trust administration had obvious advantages.[183] Initially these advantages stemmed purely from its legal form as an artificial entity; most obviously, perpetual succession immediately did away with the tiresome, expensive but generally unavoidable process necessary to maintain the plurality of trustees. Furthermore, trust companies would be readily available for appointment as trustees, and they would be competent. They would not succumb to the human risks and failings of illness, old age, sloth, overwork or absence. They would feel no moral pressures from the beneficiaries and since they would expect no gratitude, they would not be offended when thanks were not forthcoming. Nevertheless there was an innate resistance not only to such an impersonal expression of trusteeship, but also to the overt adoption of trust administration as a business. As Lord St Leonards observed extra-judicially in 1857 in relation to the South Sea Company's proposal to establish itself as a limited company for the purpose of administering trusts for profit, the office would become 'a mere trade'.[184]

More seriously, however, public confidence in trust companies had been severely shaken by the failure of the City of Glasgow Bank in 1878, and a widespread view was that such companies speculated

[182] *Re Wheeler and De Rochow* [1896] 1 Ch 315; DRO 1335 B/F25 (1879).
[183] For the prospectus of such a company, see *The Times*, 26 July 1886, p. 11, col. a.
[184] *Parl. Deb.*, vol. 147, ser. 3, col. 550, 28 July 1857 (HL). He explained the reasons for his dislike of trust companies in his *Handy Book on Property Law*, pp. 161–2.

with trust money, often with disastrous results. Accordingly the object of the Trust Companies Bill introduced in 1887 was to increase the security of appointing corporations to act as trustees. It made provision to safeguard the beneficiaries by requiring a subscribed capital of £100,000, of which £50,000 was to be put in court and invested in the name of the Paymaster General as security for the beneficiaries who would have a prior claim on the sum. The bill allowed companies to charge for their services even without express authorisation, though the charges had to be public, and the companies were to be under the same liability as private trustees. The bill also made provision for official inspection and audit.[185]

The bill was very warily received. Though the difficulties of recruitment were admitted, it was not surprising that the principal objection was that the bill appeared to allow trust companies to speculate with trust money. There was a general feeling that such companies should be well managed, secure and able, and that the proposed legislation did not ensure they would attain these standards. It was felt that companies should not be able to profit from trust business, that the conflict of the interests of the shareholders and that of the beneficiaries was too strong, that the proposed reserve was too small, and that the limited liability of the shareholders gave insufficient security. The success of trust companies in the United States, in South Africa, Canada and Australia made little impact. The matter dragged on throughout the late 1880s, unfortunately becoming entangled with proposals for a new official trustee. By 1890, Lord Herschell, though he particularly favoured the creation of an official trustee, said in the House that he could see no reason why a settlor should not be allowed to appoint a trust company as trustee if he so wished, and so no legal impediment should be put in his way.[186] Possibly the most controversial issue in the parliamentary debates was a Government amendment designed to limit the business of trust corporations entirely to trust business. This was strongly opposed both in Standing Committee and in the House, for it was thought that only by allowing a trust company to undertake other business could it build sufficient reserves to ensure the security of the beneficiaries. Though this was regarded by some as the thin end of the wedge in the context of company freedom,[187]

[185] *Parl. Deb.*, vol. 318, ser. 3, cols. 5–6, 26 July 1887 (HL).
[186] *Ibid.*, vol. 341, ser. 3, cols. 996–8, 24 February 1890 (HL).
[187] *Ibid.*, vol. 342, ser. 3, col. 969, 17 March 1890 (HL).

the House adopted the amendment and in so doing rendered the bill, according to Lord Herschell, 'absolutely worthless'.[188] Eventually it was withdrawn, having occupied parliamentary time for two years.[189]

Nevertheless the reformers had demonstrated the advantages of the corporate form in trust administration, and the continuing and pressing difficulties in recruiting private trustees led to the consideration of an official corporate trustee. The closing years of the nineteenth century were dominated by extensive discussion of a proposal to create a Public Trustee.[190] This was to be an official trustee with the status of a corporation sole, formed to undertake the administration of even small trusts and with the security that its liability would be secured by the Consolidated Fund. This issue underlay proceedings of the Select Committee on Trusts Administration of 1895 and it occupied a considerable amount of parliamentary time. The debates were parallel with those on trust companies, but it was generally appreciated that the two matters were distinct, and that the establishment of one would not have any effect on the other. It was clear, however, that the concept of an official corporate trustee would be particularly attractive in the context of the boom and subsequent crash of many commercial trust companies and the consequent public disquiet. Those reformers who were suspicious of official involvement in private matters and wary of delays and excessive bureaucracy preferred trust companies, while conservatives looked no further than the traditional private individual as the normal trustee, with the Court of Chancery stepping in where appropriate to administer trust funds through the Paymaster General, an option which reflected the enduring concern with the security of the trust fund.[191] A series of Public Trustee bills was introduced throughout the late 1880s and in reintroducing a measure in 1890, Lord Halsbury said he was moved by his serious misgivings with regard to giving powers to companies to act as trustees, a move which he thought was very dangerous, and yet with an appreciation of the

[188] *Ibid*., col. 972.

[189] For a history of the bills, see Howard Vincent's letter to the editor, *The Times*, 28 March 1891, p. 4, col. e; and for an excellent and comprehensive treatment of corporate trusteeship see D. R. Marsh, *Corporate Trustees* (London, 1952).

[190] See P. Polden, 'The Public Trustee in England 1906–1986: The Failure of an Experiment?' (1989) 10 *Journal of Legal History* 228.

[191] Under the provisions of the Trustee Relief Acts 1847, 10 & 11 Vict. c. 96 and 1849, 12 & 13 Vict. c. 74.

difficulties involved in finding suitable private trustees.[192] It was the most evident response to the difficulties which the changing nature of trusts administration elicited. As with trust companies it circumvented the frailties of human life, but it provided a more complete solution to the problems of recruitment, since the Public Trustee would be there for the very purpose – and the sole purpose – of disinterestedly administering trusts; it addressed the issue of the complexity of trust affairs, since he would have an expert staff; and as such it also addressed not only the issue of liability, but also the public anxiety about losses caused to trusts through fraud or incompetence; an expert and independent public officer would not commit breaches of trust. It would be less likely to be tractable and to succumb to the pressures of the beneficiaries, and so the breaches which commonly flowed from acceding to such requests would not occur. And, in any event, any liability which might arise would be covered by the Consolidated Fund. In short, it addressed nearly every problem then experienced in the administration of private trusts by private trustees and met almost every demand. In conjunction with the cynical public perception of the professional trustee as grasping, the Public Trustee was portrayed as kindly and benevolent. The orphans bullied by their mercenary and uncaring solicitor-trustee were assured by the Public Trustee: 'To-morrow, if your trustee again threatens you, and offers to retire, take him at his word. If I replace him, I will do all you wish – enter into mortgages, invest your capital to the best possible advantage, and make myself generally amiable.' 'But how shall we pay you for so much kindness?' asked the now overjoyed maiden. 'By a tariff fixed by the Government. It will be my duty to do my best for you, and I shall have no personal interest in running up costs like the common (or garden) kind of family Solicitor.'[193] The proposal to introduce a Public Trustee was generally welcomed as a boon to hard-pressed individuals who took trusteeship at considerable personal cost and as a positive move to raise the standards of practical trust administration. Howard Vincent, a driving force in the movement, praised it as being 'for the general welfare and for the especial benefit of the friendless and the helpless'.[194] It was thought settlors would accept the official as their trustee, particularly acting jointly with a private

[192] *Minutes of Evidence, 1895*, q. 254. See too qq. 224–7.
[193] (1891) 100 *Punch* 161.
[194] *The Times*, 28 March 1891, p. 4, col. f.

individual of their choice, for that went a long way to meeting the charge of 'officialism'.

The one requirement it did not meet, however, and which undermined its establishment in the Victorian period, was that of the personal dimension to trusteeship – the orthodox view that a trustee should be a private individual intimate with the affairs of the beneficiaries and their family, for only then could he exercise his discretions in a sensitive way. This very personal view of trusteeship was still held by many trustees and was exemplified by Young Jolyon, in *In Chancery,* who felt his position as Irene's trustee required him to act as her protector.[195] In this light a Public Trustee was inappropriate: it could not confer with beneficiaries, could not exercise the delicate discretions of maintenance and advancement, could not act without formal evidence, and could show none of that flexibility thought to be essential to the smooth administration of trusts in everyday life.[196] The Incorporated Law Society publicly opposed its creation on this basis[197] and on that of the ubiquitous 'officialism' with its consequent expense, delay and bureaucracy.[198] Underlying professional opposition, however, was a natural anxiety as to the impact of the new official on their livelihoods. Furthermore, the Public Trustee was not free, though private trusteeship, with its inherent lack of permanency, did give rise to regular expense. While the debate confirmed the underlying perception of the trust as a private arrangement within which any public official had no place, it did show the weakening of the traditional idea of trusteeship as invariably and necessarily personal, and an appreciation of the changing functions of trustees. Indeed, Jolyon was reminded by Soames Forsyte himself that his say in Irene's affairs was 'confined to paying out her income'.[199]

While the Public Trustee as such was not established until 1906,[200] having accordingly occupied parliamentary time for some twenty years, the debates of the early 1890s did yield immediate results in the form of the Judicial Trustees Act 1896.[201] The Lord

[195] John Galsworthy, *In Chancery* (1920), Chapter 13.
[196] Though this could be addressed by a joint appointment with a natural individual.
[197] See *The Times*, 16 October 1889, p. 8, cols. a–d.
[198] See R. Watson Evans, 'The Trustee Act 1888' (1890) 6 *Law Quarterly Review* 50; (1888) 85 *Law Times* 4; (1895) 98 *Law Times* 609.
[199] John Galsworthy, *In Chancery* (1920), Chapter 13.
[200] Public Trustee Act 1906, 6 Edw. VII c. 55.
[201] Judicial Trustees Act 1896, 59 & 60 Vict c. 35.

Chancellor, however, regarded it as an unsatisfactory alternative and some years later *The Times* described it as 'a feeble attempt' to achieve the objectives of the Public Trustee measures.[202] The Judicial Trustees Act was also the direct result of the Select Committee on Trust Administration which reported in 1895 and which, despite its title, concentrated almost entirely on the merits or otherwise of creating a Public Trustee. The Committee had been most impressed by the very successful system of judicial factors which operated in Scotland, whereby professional men such as solicitors and accountants were appointed trustees and remunerated for their trouble. The Act provided for the appointment by the court of a paid trustee, under the supervision of the court, to carry out a trust on the application of a beneficiary, a settlor, or indeed a trustee. In fact this was only one aspect of an Act which had wider significance,[203] but it was a direct attempt to address the selection problem which had been so clearly highlighted in the Select Committee Report. In this respect, however, and unexpectedly, the Act failed. Very few judicial trustees were appointed, and this was taken to be evidence of a profound dislike of 'officialism' in the field of trusts administration, as in all fields in Victorian England, a view forcibly expressed by the London Chamber of Commerce.[204] The Act was not a dead letter, 'but it has not quite answered expectations'. In short, it was 'something of a failure'.[205]

[202] *The Times*, 24 April 1905, p. 7, col. d.

[203] The provision giving relief to trustees for honest breaches of trust was of greater significance both in its own right, and in terms of addressing the difficulties experienced in selecting trustees: see below, pp. 188–91.

[204] See *Parl. Deb.*, vol. 148, ser. 4, col. 688, 30 June 1905 (HC).

[205] *The Times*, 24 April 1905, p. 7, col. d.

3

THE RELATIONSHIP WITH THE BENEFICIARIES

The relationship between the trustees and the settlor was the first in time, and, in its personal dimension, essentially transitory. Once the trustee had accepted the office and the trust was executed, the dominant relationship eclipsing all others became that with the beneficiaries. It was an enduring relationship of central importance, and was almost invariably the most difficult and challenging at every level. It was an ongoing relationship of varying degrees of intimacy, with inevitable tensions between the personal and the material. It was certainly more enduring, more complicated and much closer a relationship than a business one would be. Any relationship which attempted to integrate the personal and the business was by its very nature problematic. It was in many ways a quasi-parental relationship, with elements of affection, pride, respect and resentment, but one with important financial undertones, and sustained primarily by legal sanctions rather than by bonds of love, affection or that degree of moral responsibility found between close family members. Any such responsibility felt by the trustee was only indirectly for the beneficiaries themselves, having usually stemmed from his relationship with the settlor. So while trustees did act selflessly, shouldering a significant burden of effort and anxiety to fulfil obligations of conscience, they did not have the psychological and emotional support of the closest blood ties to ease the difficulties of the relationship.

The relationship between trustees and their beneficiaries lay at the heart of the trust arrangement. The relationship was the one recognised as special and enforced by Equity to the highest degree, since the dominant and primary object of Equity was to protect the interests of the beneficiaries. Indeed when Equity had first enforced trusts, it was by recognising the interest of the beneficiary and compelling the trustee to act in a manner consistent with that interest. This primacy of the beneficiary's interest was unequivocally

maintained in Equitable theory. All the duties imposed on trustees by the law existed to protect and maximise the trust fund for the beneficiaries, and all their powers were directed to the same end. Since Equity regarded the beneficiaries as the owners of the property, it imposed on trustees a legally enforceable duty to work exclusively for the benefit of the beneficiaries and from that fundamental premise stemmed the essential subjugation of the trustees to the beneficiaries. The orthodox Equitable view was that the trustee was the servant of the beneficiaries.

Formal control and title, however, lay equally unequivocally with the trustees as the legal owners of the fund able to deal with the trust property, even if Equity's direction of that formal control gave it the character of responsibility. Their legal duty was to administer the trust in accordance with its terms and with the principles of Equity, and their performance of that duty fulfilled their obligation towards the beneficiaries. The trustees thus had the immediate control of the trust fund, and certainly in the case of marriage settlements, the husband was perceived as having surrendered the control of his own property to trustees.[1] The settlor could, by the terms of the trust, endow the beneficiaries with a greater or lesser degree of control, particularly by use of powers of appointment, and indeed through agreement, the expression of the fundamental authority of the beneficiaries, they were powerful: they could reward trustees,[2] remove them, absolve them, allow them to retire[3] and ultimately bring their very existence to an end by dissolving the trust itself.[4] Furthermore, in the case of settled land the legislature gave the tenant for life considerable power to deal with the property, within certain limits, without having to obtain the consent of the trustees.[5] Nevertheless, in general the legal ownership of the property in the trustee often sat uneasily with the beneficiaries' perception of the property as theirs absolutely. In terms of the daily routine of trusts administration, however, control was determined not by law, but by knowledge, experience, personality and the possession of information.

[1] 'Marriage Settlements' (1863) 8 *Cornhill Magazine* 666.

[2] *Ayliffe* v. *Murray* (1740) 2 Atk 58; and see *Barrett* v. *Hartley* (1866) 2 LR Eq 789.

[3] See Sir John Leach MR in *Wilkinson* v. *Parry* (1828) 4 Russ 272 at 276.

[4] *Saunders* v. *Vautier* (1841) 4 Beav 115. See too M. R. Chesterman, 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in G. R. Rubin and David Sugarman (eds.), *Law, Economy and Society* (Professional Books, 1984), pp. 152–7.

[5] Settled Land Act 1882, 45 & 46 Vict. c. 38.

The degree of control exercised within each individual trust by the beneficiaries or the trustees depended on a number of factors. Apart from the legal position determined by the default law or the express or implied terms of the trust, the age, sex and character of the beneficiaries, the nature and quality of their relationship with the trustees and the characters and abilities of the trustees themselves were variable factors which directly affected the seat of actual control within a trust. Also relevant were the relationships between the settlor and the trustees and beneficiaries respectively. If the settlor had been particularly close to the trustees and was known to have valued them, and if the beneficiaries had respected the settlor, the relationship between trustees and beneficiaries would perhaps be more robust.

In the great majority of cases the relationship between trustees and the beneficiaries was one of probity and rectitude. The trustee undertook the office with the best interests of the beneficiaries as he saw them, was firm but not unreasonable, concerned but not gullible. He managed the trust fund so as to provide a sound income for the life tenant while not endangering the capital, and he was flexible and understanding in the various aspects of his management. He appreciated the inherent tension between his legal ownership and responsibilities, and the interests of the beneficiaries, but nevertheless stood firm in his responsibilities at the risk of compromising his friendship with the beneficiaries. In an ideal world the beneficiaries were satisfied with the administration of the trust by such trustees in accordance with the law. Certainly the law desired trustees who would ensure a relationship of this kind. Indeed, where the court appointed a trustee it would look favourably upon a particular appointment if a large majority of the beneficiaries supported it,[6] and a willingness to work gratuitously and harmoniously with the beneficiaries was regarded as a valuable quality in a trustee.[7] When tensions arose, as they often did, they were the result of the needs and demands of beneficiaries which either the trust deed did not provide for, or which depended on the trustee exercising his discretion in a particular way. Since the *raison d'être* of a trust was to provide financial benefit to the beneficiaries, it is clear that the very great majority of conflicts would concern the value

[6] *Re Higginbottom* [1892] 3 Ch 132 at 135; *Re Earl of Stamford* [1896] 1 Ch 288 at 300.

[7] *Re Ratcliff* [1898] 2 Ch 352 at 357.

of, or access to, the beneficiary's share in the trust fund. The evidence reveals that it was almost invariably the trustee's exercise of his powers of investment, maintenance and advancement which caused his relationship with the beneficiary to strain or even, in some instances, to collapse.

Such financial tensions were inherent in the usual nineteenth-century trust of personalty for persons in succession. The life tenant would usually be seeking the highest possible income from the trust fund, while the remainderman would want the capital to remain secure for his later enjoyment. To satisfy the demands of the life tenant would require a certain pattern of investment, a pattern which in terms of investment practice would in all likelihood undermine the security of the remainderman's interest.[8] As the duty to invest the trust fund, and the powers to do so, were vested in the trustee, he was directly subjected to the demands of the beneficiaries. In many cases common sense made trustees themselves desire the unequal treatment of the beneficiaries, as where for example the tenant for life was impecunious, and the remainderman wealthy. Or again, where the remaindermen were the children of the life tenant and to protect the capital at the expense of the income might be to the immediate financial detriment of the remaindermen. Since the trustee was bound by Equity to treat the beneficiaries equally, and any flexibility was forbidden, the resulting tensions were often considerable. The balancing of the competing interests of beneficiaries had always been integral to trust administration, but the Victorian period saw it brought into prominence by new conditions. Not only was there a growth in the number of small trusts of personalty for persons in succession, but a greater range of investment opportunities, and a public increasingly knowledgeable in such matters. These factors, combined with the beneficiaries' traditional dislike of equal treatment, made the maintenance of equality between them particularly difficult and more vulnerable to the dynamics of the trustee–beneficiary relationship.

Any imbalance in the relationship was accordingly particularly problematic in this context. Where some beneficiaries were articulate, demanding and strong-willed and others were weaker in character or status, an ineffective and irresolute trustee would in many instances favour the former at the expense of the latter. The evidence

[8] See below, p. 130.

shows that it was not unusual for trustees to be placed under considerable pressure by the beneficiaries to favour one as opposed to another. The beneficiary most able to exert such influence was generally the tenant for life, because by his very nature he was the most visible and active beneficiary, and as such frequently in a position to attempt to influence the trustee, and was also always acutely aware of the size of the income return. Beneficiaries in remainder were often infants, and usually the children of the tenant for life. Young beneficiaries of both sexes were rarely in a position to exert any moral control over the trustees.

To yield to such pressures, however, invited litigation. It would almost invariably put the trustee in breach of the duty imposed on him by Equity to act impartially and to treat the beneficiaries equally when administering the trust. This duty was imposed in accordance with the maxim 'Equality is Equity' and with the very foundation of Equitable jurisprudence in concepts of fairness and even-handedness. It was the essential underlying equity which applied in the absence of any contrary intention expressed by the settlor in the trust instrument, to which Equity would always give effect. The duty expressed in those terms was clearly of the widest application, suffusing every aspect of trusts administration, but its effect was particularly felt in the field of investment.[9] In one sense the existence of this legal duty, and Equity's determination to remain neutral, was of assistance to trustees in that it lessened the burden on them by taking the matter out of their discretion.

The maintenance of equality was not a passive exercise. It required the trustee to be continually vigilant and to take active steps. In testamentary gifts of residuary personalty to persons in succession, which were becoming increasingly common in the nineteenth century, the trustees' action to ensure equality was demanded immediately and so potentially involved them in some degree of disharmony from the outset. The issue arose because such dispositions by their nature gave no indication that the successive beneficiaries were to be differentiated in their enjoyment, other than in terms of time. Indeed, by their very terms the dispositions demanded a strictly balanced and impartial benefit.

[9] *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104 at 109 *per* Turner LJ; *Re Dick* [1891] 1 Ch 423 at 431 *per* Kay LJ. It was also relevant in the treatment of expenses and losses: *Cox* v. *Cox* (1869) LR 8 Eq 343 at 344–5.

Active intervention was not inevitable, since it could be that the status quo ensured equal treatment of the beneficiaries, the investments being of such a nature that they did not favour one beneficiary at the expense of another. In most cases, however, the residue included at least some property which by its very nature discriminated between the tenant for life and the remainderman, and as such was not suited to being settled in the ordinary sense. Equity was constrained to order the trustee to take active steps to restore the balance and maintain its theoretical integrity. It will be seen that the concept of the authorised investment was developed to achieve the desired balance,[10] but that concept presupposed a mechanism whereby the fund was placed in such a situation that the investment could be made. Accordingly, where the residue contained property of a wasting, hazardous or unauthorised nature, Equity ordered its conversion into authorised investments. At this point a life tenant might well demand that high-yielding investments be retained, and remaindermen demand their sale.

The rule of Equity as to conversion of such assets into something more permanent and capable of succession was long established and reflected eighteenth-century attitudes to landed estates. The authority for its application, and indeed for the broad principle demanding that beneficiaries be accorded equal and impartial treatment by their trustees, was the case of *Howe* v. *Earl of Dartmouth*[11] in 1802. The decision itself, however, reflected considerably earlier practice. It was argued in the course of the proceedings that the tenant for life was not entitled to the enjoyment of some annuities forming part of the residuary personal estate in specie, because 'there is a standing rule of the Court for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the 3%'.[12] The sale of assets which were depreciating in value and the reinvestment in securities which were inherently equal to the beneficiaries clearly reflected established Chancery practice even in the latter years of the eighteenth century. Counsel observed that an order to sell any property which gave the tenant for life any advantage over those entitled in remainder, where there was a bequest of residuary personalty to persons

[10] See below, pp. 130–45.

[11] *Howe* v. *Earl of Dartmouth* (1802) 7 Ves Jun 137. This was so despite its limited novelty and significance at the time it was decided.

[12] *Howe* v. *Earl of Dartmouth* (1802) 7 Ves Jun 137 at 141.

in succession, 'is to be found in every decree; and is so familiar, that no report of such a case is to be met with in print'.[13] In the case of a residuary gift, said Lord Eldon, the law was beyond dispute, and if personal property were given to persons in succession with no clear intention that it was to be enjoyed in specie, the court had to carry out the testator's intention, and could only do so by putting the property in such a state that it could be enjoyed equally.[14] Three per cent annuities were 'equal to all the parties interested'. Indeed, he said, he was 'astonished, when that was doubted'.[15]

The property which became subject to the rule in *Howe* v. *Earl of Dartmouth* was diverse. Chattels, copyrights and animals, for example, all had to be sold to benefit the remainderman, for otherwise it was likely that the tenant for life would take all the benefit of such property and leave nothing for the remainderman; conversely it was settled from the first that reversionary and future interests, producing no income, would benefit only the remainderman and were to be converted for the benefit of the tenant for life;[16] while unauthorised investments, which might well in practice have been of equal benefit to the parties, were deemed hazardous[17] and therefore discriminatory and were to be converted too. The rule was regarded as so well known that its rationale was not expressly stated until 1844, when Sir James Wigram made it clear that the law was not giving effect to an intention to convert, but to an intention that the beneficiaries were to enjoy the same property in succession, and where the property was perishable or reversionary that could only be achieved by conversion.[18] In this sense Equity subordinated the wishes of individual beneficiaries to the interests of the trust fund itself. As Kekewich J put it in 1907, 'there is a strong presumption that the testator does not intend the tenant for life to consume the fruit-bearing tree altogether, but only to have the fruit from the tree

[13] *Ibid*.
[14] *Ibid*. at 148.
[15] *Ibid*. at 149. For a clarification of the proceedings see L. A. Sheridan, 'Howe v. Lord Dartmouth Re-examined' [1952] *Conveyancer and Property Lawyer* 349.
[16] *Fearns* v. *Young* (1805) 9 Ves Jun 549; *Hinves* v. *Hinves* (1844) 3 Hare 609; see too Lord Gifford MR in *Dimes* v. *Scott* (1828) 4 Russ 195 at 200.
[17] *Macdonald* v. *Irvine* (1878) 8 Ch D 101.
[18] *Hinves* v. *Hinves* (1844) 3 Hare 609 at 611, and in *Cafe* v. *Bent* (1845) 5 Hare 24 at 35.

from year to year'.[19] The rule, observed Sir R. Malins VC in 1874, was one of common sense.[20]

Even if equality were deemed to be the intention of the settlor, many beneficiaries preferred the state of the fund at the time of death and so sought to contest it and to persuade their trustees against comprehensive conversion and reinvestment. Since the basis of the rule was the implied intention of the testator, it followed that it would be excluded if a contrary intention were expressed in the will.[21] In clear cases of contrary intention the rule did not apply and the beneficiaries could enjoy the property as the settlor left it, with all the hazards inherent in the property.[22] In many cases, however, the settlor's intention was much more difficult to discern, and where prima facie the rule applied, beneficiaries were not slow to challenge it. A challenge by the life tenant depended on the relative yield of the unconverted trust fund and that of a converted one. Any challenge to the trustee's right to effect the conversion also depended on the nature of the relationship between him and the beneficiaries, that between the beneficiaries themselves, and the extent of professional legal support which was available.

So opposed were many beneficiaries to conversion in cases where the settlor's intention was equivocal, that they looked to the slightest expression of contrary intention to avoid its application. Indeed much of the extensive nineteenth-century jurisprudence in this area was devoted to construing individual testamentary instruments to decide whether the rule applied or whether it was excluded by such an expression of contrary intention. Construction turned on single words, on the nuances of certain phrases, on the existence, nature or extent of any directions as to the enjoyment of the property by the

[19] *Re Bates* [1907] 1 Ch 22 at 28.
[20] *Tickner* v. *Old* (1874) LR 18 Eq 422 at 426.
[21] See Sir James Wigram VC in *Hinves* v. *Hinves* (1844) 3 Hare 609 at 611.
[22] The onus was on the party seeking to show that the rule did not apply – see the judgment of Thesiger LJ in *Macdonald* v. *Irvine* (1878) 8 Ch D 101. Examples of clear contrary intention were when the gift was specific: *Bethune* v. *Kennedy* (1835) 1 My & Cr 114, *Re Van Straubenzee* [1901] 2 Ch 779 at 782, *Re Beaufoy's Estate* (1852) 1 Sm & Giff 20; where there was a clear trust for sale: *Flux* v. *Best* (1874) 31 LT 645; where there was an *inter vivos* settlement: *Re Van Straubenzee* [1901] 2 Ch 779; where real property was concerned: *Howe* v. *Earl of Dartmouth* (1802) 7 Ves Jun 137 at 150, *Re Van Straubenzee* [1901] 2 Ch 779; and where there was a power to retain investments: *Re Bates* [1907] 1 Ch 22, and see *Re Pitcairn* [1896] 2 Ch 199.

beneficiaries or the management of the property by the trustees.[23] The whole scope of the will had to be examined,[24] minutely and critically,[25] to acertain the intention of the testator from the words of his instrument. There were, accordingly, as many reported cases as there were ambiguous wills executed, and general principles were difficult and somewhat unnecessary to attempt to discern. Reported cases were of some assistance in determining certain phrases or words which the court felt properly indicated an intention to exclude the rule, but the number of cases involved became unmanageable. These 'small indications of intention' which sufficed to exclude the rule made a rule which was 'unquestionably the law' exceedingly difficult to apply in practice.[26] Furthermore, the finesse of many of the distinctions was such that it suggested the rule was somewhat artificial and did not reflect the testator's true wishes. Sir James Wigram expressed the view that the courts in his time inclined against conversion in borderline cases.[27]

The extensive litigation challenging the application of the rule confirms that at least some of the parties to such trusts did not seek equality of treatment. The dislike of the rule is also seen in the increasing numbers of wills which expressly negated its application, primarily through express powers to retain investments, suggesting that equality of treatment may not have been, after all, the usual testator's underlying intention. An unequivocal exclusion of the rule[28] suggested not that settlors wanted the beneficiaries to be exposed to the risks of the investment market, but rather that the trustees should retain flexibility in investment matters so as to provide in the best way possible for the beneficiaries. It was a reaffirmation of the importance of trustees' discretion as much as anything else. While in theory this was an effective approach, in

[23] Sir John Romilly MR in *Morgan* v. *Morgan* (1851) 14 Beav 72 at 86. See for example *Cafe* v. *Bent* (1845) 5 Hare 24; *Pickering* v *Pickering* (1839) 2 Beav 31; *Goodenough* v. *Tremamondo* (1840) 2 Beav 512. See too *Harris* v. *Poyner* (1852) 1 Drew 174; *Marshall* v. *Bremner* (1854) 2 Sm & Giff 237; note that in that case Sir John Stuart VC said the rule applicable was that laid down by Sir John Leach VC in *Lord* v. *Godfrey* (1819) 4 Madd 455 at 459. See *Re Game* [1897] 1 Ch 881; *Alcock* v. *Sloper* (1833) 2 My & K 699; *Rowe* v. *Rowe* (1861) 29 Beav 276.

[24] *Tickner* v. *Old* (1874) LR 18 Eq 422.

[25] *Hinves* v. *Hinves* (1844) 3 Hare 609.

[26] See Sir John Romilly MR in *Morgan* v. *Morgan* (1851) 14 Beav 72 at 82.

[27] *Hinves* v. *Hinves* (1844) 3 Hare 609.

[28] As in the will of Lord Westbury, made in 1866: *Bethell* v. *Abraham* (1873) LR 17 Eq 24.

practice it removed the protection of Equity's imposition of equality from the trustees and exposed them to the demands of competing beneficiaries.

The existence of clear legal rules as to the imposition of conversion went a long way towards protecting trustees from demanding beneficiaries, but unless those rules were comprehensive, trustees were left open to manipulation and other beneficiaries with opposing interests were left unprotected. Since it was clearly impractical to convert the property on the day of death itself the court laid down, not without difficulty, that the conversion should take place as soon as it conveniently could. The courts allowed the trustees the traditional period of one year, the period accorded to executors for the administration of a deceased person's estate, to effect the necessary sale.[29] Even where there was a power to postpone sale, introduced by prudent testators who understood that it might not be possible for their trustees to dispose of their estate expeditiously, it was not to be exercised to benefit one beneficiary as against another. It was to benefit the estate generally 'without disarranging the equities between the successive takers'.[30] But the problem went further. Any property which was income producing would continue to yield according to its nature, and so the question arose as to its destination between date of death and date of actual conversion. The life tenant could persuade the trustees to delay conversion and claim the actual income if it was particularly high, to the detriment of the remainderman. In such instances the relationship between the life tenant and the trustee would be abused, and the remainderman would be left unprotected. Similarly, if the property in question were non-income producing, the situation would be reversed.

If the rule demanding the maintenance of parity between tenant for life and remainderman were to be taken to its logical conclusion, then there would have to be some equal allocation of the actual income prior to the conversion itself, when the very nature of the investments would ensure legal if not actual equality of treatment. This approach was justified by the maxim 'Equity looks on that as done which ought to be done', for it referred the point of conversion back to the time at which it was deemed to have taken place and allowed the courts to evolve rules by which this could be effected.

[29] *Sitwell* v. *Bernard* (1801) 6 Ves Jun 520.
[30] *Brown* v. *Gellatly* (1867) 2 LR Ch App 751 at 758 *per* Lord Cairns LJ.

These rules were the rules of apportionment, and were the principal development effected by the Victorian judiciary of the rule in *Howe* v. *Earl of Dartmouth*. It was never doubted that in principle the tenant for life was entitled to something before conversion, for 'all authority and daily experience'[31] were opposed to the notion that the tenant for life was entitled to nothing before conversion.[32] It would mean that the interest of a tenant for life would be affected by market considerations or the extent of the diligence of the trustees. The apportionment of interim income was judicially recognised in a case heard some three days before *Howe* v. *Earl of Dartmouth*, but was equally a reflection of established practice.[33]

Early decisions, however, left unresolved the precise entitlement of the tenant for life to income from various different types of property at various times after the testator's death. Where the investment was authorised, either by the will or by the court, it was of course not disputed that the tenant for life should receive the whole income from the date of death, for conversion and therefore apportionment was not relevant in such a case.[34] The tenant for life would receive the actual income from the date of death. It was the income from unauthorised investments prior to conversion which was uncertain. This was one issue in trusts administration which was of real contemporary practical importance, being of frequent occurrence and often involving considerable sums of money.[35] Its resolution occupied a significant amount of judicial time and energy in the Victorian period, and on more than one occasion the judges expressed regret that it had not been more expeditiously settled.[36] In 1805 Lord

[31] *Taylor* v. *Clark* (1841) 1 Hare 161 at 167 *per* Sir James Wigram. He observed that the court had gone so far as to hold that where it was directed that residue was to be employed in the purchase of land and the income was to be accumulated and added to the capital until a suitable purchase was found, and the rents of the land once purchased paid to the tenant for life, still the court allowed the tenant for life the income from the residue from the end of one year following the testator's death even before the land was purchased: *ibid*. at 168; *Sitwell* v. *Bernard* (1801) 6 Ves Jun 520.

[32] In *Stott* v. *Hollingworth* (1818) 3 Madd 161 at 165 counsel argued that 'the testator could not mean the tenant for life should starve for the first year after his death'.

[33] *Gibson* v. *Bott* (1802) 7 Ves Jun 89. See too *Sitwell* v. *Bernard* (1801) 6 Ves Jun 520 where it was clear the law was not fully formed.

[34] *Meyer* v. *Simonsen* (1852) 5 De G & Sm 723; *Brown* v. *Gellatly* (1867) 2 LR Ch App 751.

[35] See *Morgan* v. *Morgan* (1851) 14 Beav 72 at 92 *per* Sir John Romilly MR.

[36] See for example Sir James Wigram VC in *Taylor* v. *Clark* (1841) 1 Hare 161 at 175.

Eldon said, 'It is not very well settled, whether the tenant for life is entitled to the interest from the death, or from a year afterwards.'[37] The leading case, which led judicial development in this area in the Victorian period and came to be as significant as *Howe* itself, was *Dimes* v. *Scott*.[38]

In this case the residuary personalty left by the testator on trust to convert and to pay the income to his wife for life, remainder to another, included £2,000 in a fund of the East India Company, an unauthorised investment. From the date of death until the stock was sold, it yielded 10 per cent per annum, much more than the authorised investments would have yielded, and the trustees paid it in its entirety directly to the widow. Lord Gifford MR, struck by the 'strong language' used by Lord Eldon, held that the payments to the tenant for life were 'an improper application of the trust monies'.[39] He ordered the Master to make a valuation as at one year after the testator's death, and to ascertain how much 3 per cent annuities, the proper security for the investment of trust funds, that sum would have purchased at that point, and how much such an amount of 3 per cent annuities would have yielded to the time the investment was sold. The tenant for life could receive that sum and no more. So, as Lord Lyndhurst LC affirmed, during the first year after the testator's death, the tenant for life was not entitled to the whole income, but only to the dividends she would have received had the unauthorised investments been sold at the end of the year and properly invested.

The rules were technical, detailed and often uncertain and legal practitioners were unable to advise trustees or beneficiaries with confidence in a matter which was generally short-term in nature and requiring speedy resolution. Though the authorities were conflicting and no clear rule emerged, to the discomfiture of a number of judges,[40] on the whole it was the authority of *Dimes* v. *Scott* which

[37] *Fearns* v. *Young* (1805) 9 Ves Jun 549 at 553.

[38] *Dimes* v. *Scott* (1828) 4 Russ 195.

[39] *Ibid*. at 200.

[40] See for example the observations of Lord Langdale MR in *Douglas* v. *Congreve* (1836) 1 Keen 410 at 427: 'It is embarrassing to find the rule in cases of this nature so little settled. Lord Eldon seems to have considered the tenant for life entitled to the whole interest for the first year. Sir John Leach thought him entitled to no part of such interest. Lord Lyndhurst thought him entitled to such a sum by way of interest as would have accrued as dividends upon so much three per cents. as the residue would have purchased at the end of the year; and Sir Anthony Hart

came to prevail. The entitlement of the tenant for life during the first year after the testator's death was still, in 1841, a question 'of great difficulty'. At that date there were four possibilities, each supported by modern and high authority.[41] It was possible that he was entitled to no income at all, whatever the state of investment, until the end of the year from death; it was possible that he was entitled to the income accruing during the first year after death on authorised securities only;[42] it was possible that no distinction be drawn between authorised and unauthorised investments, and that the tenant for life could take all the income during the first year;[43] and finally it was possible that the tenant for life was not entitled to the actual income from unauthorised securities during the first year after death, but only to the dividends on so much 3 per cent stock as would have been produced during the year by the conversion of the property at the end of the year.[44] The last, of course, was the decision in *Dimes* v. *Scott*, and was that which ultimately found the most general acceptance.[45] In 1851 Sir John Romilly, addressing the issue, observed that 'the later authorities on this subject concur in this: that the legatee for life is to take something; but they are not, as it appears to me, reconcilable as to the extent of the interest which the legatee for life is to take, although the subject has been much agitated'.[46] He too followed *Dimes* v. *Scott*. He did so with little enthusiasm, but pragmatically on the basis that it was the 'least open to objection'. He expressed rather more enthusiasm for the decision in 1857,[47] observing that the rule laid down there 'is that

thought him entitled to the interest, from the death, of that part of the residue which at the testator's death was invested on the securities pointed out by his [will], but that the interest on such part of the residue as was not so invested was to be added to the capital.'

41 *Per* Sir James Wigram VC in *Taylor* v. *Clark* (1841) 1 Hare 161 at 170.

42 That was opinion of Sir Anthony Hart VC in *La Terriere* v. *Bulmer* (1827) 2 Sim 18, and supported by *Gibson* v. *Bott* (1802) 7 Ves Jun 89.

43 See *Angerstein* v. *Martin* (1823) Turn & R 232 and *Douglas* v. *Congreve* (1836) 1 Keen 410. Sir James Wigram VC in *Taylor* v. *Clark* (1841) 1 Hare 161 at 172 thought, however, that the distinction should be maintained and suggested that Lord Eldon may not have been aware of the unauthorised nature of some of the investments before him.

44 *Brown* v. *Gellatly* (1867) 2 LR Ch App 751 at 759.

45 See (1878) 65 *Law Times* 97.

46 *Morgan* v. *Morgan* (1851) 14 Beav 72 at 88–9.

47 *Holgate* v. *Jennings* (1857) 24 Beav 623. See too *Allhusen* v. *Whittell* (1867) LR 4 Eq 295 which imposed a duty on personal representatives to act impartially in the payment of the testator's debts and legacies as between the tenant for life and the remainderman interested in the residuary estate.

which presents the fewest difficulties and appears most consistent with commonsense, and with the meaning of a testator, who says the residue shall go to one for life and afterwards to another'.[48]

He never quite overcame his lingering reservations, however, for in 1860 he said it 'was . . . a very peculiar case, and carried the principle of *Howe* v. *Earl of Dartmouth* to a greater extent than any other case to be found in the books'.[49] Once it had been decided that the tenant for life would not take all the income in specie until conversion, but only a proportion, the issue of the date of valuation became one of some moment, since the capital had to be valued in order to calculate the percentage income. If the property were sold during the year, their value was the price obtained. If they were not sold within the year, the value was taken at the end of one year from death. But where there was a power to postpone sale, in practice regarded as particularly desirable, the traditional reasoning could not be maintained, for it was not possible to say that the property was to have been converted at any specific time. The only possible date for valuation was, therefore, the date of death.[50] The courts held that the tenant for life was entitled to 4 per cent, and this remained virtually static throughout the nineteenth century. The state of the economy was a material consideration in this, and in times of economic uncertainty the rate fluctuated.[51] The same problem of the tenant for life's actual entitlement arose where the asset to be converted was a reversionary or non-income producing asset. It was clear that a proportion of the proceeds of sale were to be paid to him in lieu of income, the rest going as capital, but the amount had to be determined. The principle underlying the calculations was settled as early as 1857,[52] and subsequently refined until the formula as laid down in the case of *Re Earl of Chesterfield's Trusts* in 1883[53] received general acceptance.[54] In practice, the rule

48 *Holgate* v. *Jennings* (1857) 24 Beav 623 at 627.
49 *Stroud* v. *Gwyer* (1860) 28 Beav 130 at 139.
50 *Brown* v. *Gellatly* (1867) 2 LR Ch App 751. See too *Re Chaytor* [1905] 1 Ch 233.
51 See below, pp. 128–9.
52 See for example *Wilkinson* v. *Duncan* (1857) 23 Beav 469.
53 *Re Earl of Chesterfield's Trusts* (1883) 24 Ch D 643.
54 The rule laid down in that case was that the sum should be ascertained 'which, put out at 4% per annum . . . and accumulating at compound interest calculated at that rate with yearly rests, and deducting income tax, would, with the accumulations of interest, have produced, at the respective dates of receipt, the amounts actually received; and that the aggregate of the sums so ascertained ought to be treated

as to apportionment was frequently expressly excluded in the trust instrument.[55]

The initial conversion of the trust fund would happen just once at the direction of the law or by the terms of the trust instrument, but it set the tone of the management of the trust fund for the future. Equality of treatment of beneficiaries, reflecting the determination of the law to protect the trust fund, was maintained in the continued administration of the trust through the idea of the authorised investment. Trustees could select only investments expressly allowed by the settlor in the trust instrument or, in the absence of such provision, the investments afforded trustee status by law. The factors which governed both the law and the settlor in their choice of authorised investments were primarily economic, since the investments were selected so as to ensure the trust fund was both secure and productive and that the competing classes of beneficiary were treated impartially and kept in balance.[56]

While this enforced constraint gave an operational framework to inexperienced trustees and provided all trustees with some support in the face of pressure from any one faction of the beneficiaries to purchase inappropriate investments, it raised the stakes somewhat, since any deviation from the regime amounted to a breach of trust. As Turner LJ observed in 1855, it was the trustee's 'bounden duty to have regard to the rights and interests of all parties concerned'.[57] And in 1861 Sir John Romilly MR commented that 'if, in a casual conversation, the *cestui que trust* happened to say to the trustee "I wish you would invest the trust money so as to get a higher rate of interest," that would not be sufficient to justify the trustee in committing a breach of trust, nor would it make the interest of the *cestui que trust* liable'.[58] Not only was the trustee allowed to invest only in authorised investments, and not to take any profit for himself, and always to be mindful of the need to treat beneficiaries

as principal and be applied accordingly, and the residue should be treated as income'. *Re Earl of Chesterfield's Trusts* (1883) 24 Ch D 643 at 653–4 *per* Chitty J. The judge applied the decision in *Beavan* v. *Beavan* (1869) 24 Ch D 649n, an unreported case appended as a note to the report of *Re Earl of Chesterfield's Trusts*.

[55] *Re Crowther* [1895] 2 Ch 56. There was a proposal in 1908 that the duty to convert and apportion be made statutory: 'Special Report from the Select Committee on Trusts', *House of Commons Parliamentary Papers* (1908) (245) x. 1125.

[56] See below, pp. 130–45.

[57] *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104 at 109.

[58] *Rehden* v. *Wesley* (1861) 29 Beav 213 at 215.

equally, he was also circumscribed in the degree of risk he was permitted to take. This further control, the second element of the two-pronged approach by the judiciary and the legislature to ensure the protection of the trust fund, was by means of the duty of care imposed on them by Equity. In this context, the law characterised the relationship between the trustee and the beneficiaries as that of a prudent businessman providing for someone for whom he felt morally bound to provide, and it demanded a significant degree of commercial knowledge and required an understanding of the economic context of its operation.[59] The trustee, caught between a restrictive code of permitted investments which frequently prevented him from investing for the real benefit of beneficiaries, and the generally reasonable demands of beneficiaries, all too often found himself in an intolerable position.

Trusts were created to provide beneficiaries with financial support. The extent of the support depended, of course, on the nature of the trust, the size of fund and the personal circumstances of the beneficiaries. In some cases the income from the trust was the sole, or principal, source of income, and so it was not surprising that beneficiaries were closely concerned with the state of the fund, either in its capital state or with respect to its yield. Despite the traditional conception of the trust which subordinated the personal wishes of the beneficiaries to the security of the trust estate itself, the attempt by the beneficiaries to control the investment policy of the trust was one of the most common abuses of the trustee–beneficiary relationship. The most usual pressure was for a tenant for life to urge the trustees to abandon a particular investment policy to adopt one of his own choosing which would, in general, give him a higher income.[60] In such cases the tenant for life saw his own need as greater, and more immediate, than that of the remainderman, and was encouraged to press for a change in policy by the greater inherent investment flexibility in trusts of personalty. The most common breaches of trust in this context were accordingly with regard to investments. Where the tenant for life was impecunious and wanted a higher return from the trust investments, the pressure he could exert on his trustees to invest in particular – and unauthorised – investments could be almost irresistible.

[59] See below, pp. 151–62.
[60] *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104.

Pressure naturally increased when the yield from authorised investments was low or when there was a general shortage of authorised trustee investments. Where in such cases the tenant for life saw prospectuses of undertakings making extravagant claims for secure returns, or even more so where he saw reasonable and careful men investing in securities widely accepted as being safe and yet yielding a better income than he was receiving, it was natural for him to feel frustrated and aggrieved with his trustees and to perceive them as his 'natural enemies'[61] if they did not cooperate. The pressure from beneficiaries could be considerable. A widowed mother, for example, requesting a higher income in order to keep her son at university, or to pay a premium for his entry to a profession, or to retain the enjoyment of certain little luxuries of life, was hard to withstand.[62] Only a strong-willed, independent and knowledgeable trustee could resist such pressures. Some trustees resigned rather than agree to countenance investments of which they disapproved, but many, anxious to be obliging and helpful, keen to avoid any coolness between themselves and the beneficiaries, or else simply not prepared to have their lives made a misery, succumbed. Their long-term moral duty to preserve equality between beneficiaries as the settlor would have wished and as the law required was forgotten in the face of such immediate pressures.[63] When in 1891 the court ruled that trustees were allowed to vary trust investments by virtue of the power in the Trust Investment Act 1889 even though their own instrument was silent on the matter of variation, Kay LJ regretfully observed that their decision would 'subject trustees to increased importunities from tenants for life'.[64] It is clear, however, that beneficiaries' demands were not always unreasonable. Some trustees could be so cautious, or so indolent, that they would invest only in the safest authorised – and undemanding – investment, which was utterly unexceptionable, except that it yielded the life tenant a low income. A life tenant in such a situation who could not as a result provide his children with the care and education he

[61] *Minutes of Evidence, 1895*, q. 303 *per* Lord Halsbury. See too q. 246. The same point was made by Mr Malins in the debate on the Fraudulent Trustees Act: *Parl. Deb.*, vol. 145, ser. 3, col. 683, 21 May 1857 (HC).

[62] An example from contemporary fiction is Lady Carbury, in Anthony Trollope, *The Way We Live Now* (1875).

[63] See A. R. Rudall, *Duty of Trustees as to Investment of Trust Funds* (London, 1906), p. 9.

[64] *Re Dick* [1891] 1 Ch 423 at 431.

desired – particularly when the children were probably the very remaindermen for whose ostensible benefit the trustee was pursuing his investment policy – was justified in his objections.[65]

The degree of influence a beneficiary exercised over his trustee in investment matters depended, as in the matter of conversion, on many factors, not least the extent to which the trust instrument itself gave power to the tenant for life to control the investment of the fund. In marriage settlements, notably, the tenant for life was often expressly empowered to direct his trustees in their investment or to give his consent. The reason was to act as a check on the trustees and so the consent had to be given before or at the time of the making of the investment, and not subsequently. In such cases, where the power to consent to investment was construed as being imperative, then trustees had to make the investment even if they disapproved of it. So where trustees had to invest at the direction of the tenant for life, and they refused to do so on the basis that the proposed investment would be to the detriment of the infant beneficiary in remainder, the court showed sympathy but directed them to make the investment.[66] This, of course, was in line with the prime object of the court which was to find and carry out the intention of the settlor, but it emphasised the tensions between the trustees endeavouring to treat beneficiaries equally and a trust instrument which restricted them in so doing. Though in this instance they took counsel's opinion, they were ultimately powerless. Where, on the other hand, the power of consent to investment was not imperative but discretionary, the tenant for life was not the sole judge of the propriety of the investment and the trustees' discretion was preserved. So where the trustees refused the request of a tenant for life to invest in a certain way because it would be to the detriment of the beneficiaries in remainder, the court refused to interfere with the trustees' exercise of their power.[67]

Many other factors were relevant. In marriage settlements, quite apart from any specific directions, the tenant for life was morally in a position of strength, since it was generally his own fortune which had been settled, and settled for his own benefit and that of his

[65] And he had the support of the court: see *Cockburn* v. *Peel* (1861) 3 De G F & J 170.

[66] *Beauclerk* v. *Ashburnham* (1845) 8 Beav 322. See too *Cadogan* v. *Earl of Essex* (1854) 2 Drew 227.

[67] *Lee* v. *Young* (1843) 2 Y & C C C 532.

spouse and infant children. Such tenants for life were among the most influential class of beneficiary. If they were able, articulate and strong-willed, and well informed as to the details of the settlement, and if the trustees were weak, eager to please and not commercially astute, a tenant for life would often be able to forward his own interests at the expense of the security of the capital. If the tenant for life were female, she was usually in a relatively weak position. Investment was a technical and complex matter of a commercial character, which certainly did not comply with the Victorian ideal of helpless and decorative womanhood. Many a female tenant for life who was fortunate enough to have a male relative would call on him to influence investment policy on her behalf and to advise her on investment matters. In such cases the husband, brother or cousin of a female life tenant could be a major force in investment decisions. This was not necessarily to the good. The husband of a female beneficiary might press for investment to his own ends, as for example urging investment in his own business.[68] There were, of course, exceptions. The evidence shows some highly able and commercially astute female beneficiaries urging their trustees to a particular investment plan with uncompromising firmness. Furthermore, the operation of trusts in the new mercantile middle class and the increasing confidence of that class produced beneficiaries who were in general more demanding and questioning than their eighteenth-century predecessors. This movement was encouraged by better educational provision and by the increased availability of information about trust matters through periodicals and popular culture.

Demanding, strong-willed and educated beneficiaries made formidable advocates of particular investment policies. The trustee's one and only response was, it was advised, *non possumus*. 'Never argue or reply to arguments, but barricade yourself behind your will or your deed and whilst profoundly regretting your inability to oblige, refuse to budge a foot.'[69] Whether a trustee found himself able to do this depended on his own character and ability. An honest, able, experienced and mature trustee who was respected as a man of integrity would generally be able to maintain his impartiality. A weak, inexperienced and young trustee would not be as robust and was more prone to manipulation. If a trustee were a remunerated

[68] DRO 337 add 3B/1/12/9 Pt 1 Box 8 (1884).
[69] A. Birrell, *The Duties and Liabilities of Trustees* (London, 1897), p. 23.

professional, the attitudes of the beneficiaries could be ambiguous. In some instances the solicitor-trustee was regarded as a servant to whom instructions should be given, it being his place to carry them out. In others, a solicitor-trustee's undoubted expertise and experience of the world of business and finance placed him in a recognised position of strength.

It was not only in matters of investment that the trustees could be approached to act in a certain way. In marriage settlements, other trusts for persons in succession and gifts to minors, the exercise by the trustee of powers of maintenance and advancement emerged as another area of some practical, if not legal, tension and contention. These were powers enabling the trustees to employ some or all of the income of an infant beneficiary's share in his maintenance or education, and to advance a proportion of the capital towards the advancement in life of any beneficiary. Neither the Select Committee on Trusts Administration of 1895, nor contemporary Victorian legal literature contains extensive discussion of the powers of maintenance and advancement. This suggests it was an area which was not perceived as problematic or controversial in any general legal sense, though it will be seen that there did exist a number of technical legal issues of some importance. It is not entirely surprising that these powers, despite their common use, should raise little comment in the Victorian period. As essentially domestic powers, it was not to be expected that increased commercialisation should significantly affect their nature or exercise. But it was this very domestic and intensely personal character which gave rise to problems in their exercise. They were first of all the prime example of discretions exercised within the trust relationship itself, requiring the minimum of interface with third parties or wider markets. They were therefore very much within the control of the trustee himself and as such open to attempted manipulation by the beneficiaries, their parents or others acting on their behalf. The only external factor was the court, but since such powers were comfortably in tune with the responsibilities which the Court of Chancery had assumed, there was little friction between its rules and the needs of settlors, trustees and beneficiaries.

Secondly, these powers were often exercised at the request of the parent of the infant beneficiary. The tension existed because it was in the exercise of these powers that the trustees most clearly adopted a quasi-parental role, and yet had to do so within an arrangement

which not only included the real parents of the beneficiaries in a different capacity, but could also materially affect them.

Thirdly, their domestic nature set them apart from the usual business considerations which dominated decisions of trust administration and demanded instead the exercise of sensitivity within an intimate knowledge of the family's circumstances. It required the human qualities of common sense, wisdom, sympathy and understanding. Objectivity was indeed necessary, but only as one quality of many essentially personal ones. In short, the exercise of the powers of maintenance and advancement demanded the personal nexus which lay at the heart of trustee appointment throughout most of the Victorian period. The tensions were potentially less when the trustees were family members or relatives who had known the life tenant and the family intimately for many years. It frequently happened in such cases that the life tenant and the trustees were in accord as to the exercise of the powers. Again, when professional trustees were appointed jointly with family trustees, the former often yielded to the inclination of the latter in such matters. When a professional trustee was acting alone, or acting with disinterested co-trustees, however, the tension could become acute. So as it became increasingly common to appoint professional trustees in order to address the growing complexity of trust administration, so the exercise of powers of maintenance and advancement – which in practice comprised a significant part of the business of trust administration – became the subject of general concern. This was particularly so when the creation of a corporate public trustee was debated, the impersonal nature of the office being thought to be quite unsuited to the exercise of these discretions. Only a private trustee, it was maintained, could effectively exercise such powers. In this sense those powers which were the most internalised of all those in a trustee's portfolio were, indirectly at least, affected by the changing nature of trusteeship in the nineteenth century.

Furthermore, with the growth and increased complexity of small family trusts of personalty throughout the late eighteenth and early nineteenth centuries, the child with a vested or presumptive share in property became more common. In most settlements, infant children were contingently entitled to the capital on attaining the age of twenty-one if male, or attaining twenty-one or marrying before then if female. The income of such shares was looked to by parents to provide for the children when they were unable to maintain them

either in absolute terms or according to their station in life, or by guardians if the parents should die. Apart from food, clothing and shelter, a child's principal need would be for education. For most of the nineteenth century, girls were in general educated at home, or perhaps at a private day school, but for boys education was regarded as being of the utmost importance. If possible, they were sent to a good boarding school, costing on average some £150 per annum and sometimes considerably more. Also, education at Oxford and Cambridge was a sizeable expense. It was a necessary investment, for a good education was indispensable to future professional and social success. A liberal education was still required for entry into the learned professions of medicine, the church and the law.[70] As a result, the financial position of infants within those arrangements came to be addressed by the courts in the Victorian period, as evidenced by a very considerable volume of litigation, in excess of that pertaining to most other areas of trust administration.

The Court of Chancery had long had concern for, and an extensive jurisdiction over, the care of infants and their property, and favoured provision for their maintenance. As Lord Redesdale observed in 1828, the court had jurisdiction 'with respect to the income of the property, to take care of it for the benefit of the children, to apply it for the benefit of the children, as far as it may be beneficial for them that it should be so applied, and to accumulate the surplus, if any surplus there should be'.[71] This inherent jurisdiction was 'unquestionable' and was based on the presumption that a settlor 'did not intend children to be left unprovided for . . . or not be educated properly'.[72] So far-reaching was this paternalistic jurisdiction that the court could allow maintenance where an infant's interest was absolute or contingent, could refuse to allow it even when the trustees had an express authority to do so, and to control its amount and application. Equally the trustees, even without recourse to the court, had the power to look to the trust income to support an infant beneficiary who was in need,[73] because the court itself would have done so. Settlors, however, were prescient, and most marriage settlements and settlements of personalty on infants contained express powers of maintenance. These generally

[70] See generally, W. J. Reader, *Professional Men* (London, 1966).
[71] *Wellesley* v. *Wellesley* (1828) 2 Bli NS 124 at 133–4.
[72] *Re Collins* (1886) 32 Ch D 229 at 232.
[73] *Nelson* v. *Duncombe* (1846) 9 Beav 211 at 230.

permitted the trustees to apply part or all of the income arising from the infant beneficiary's share of the fund towards his maintenance and education until he should attain the age of twenty-one years or, if a girl, be married before then, the capital then to be paid.[74] In normal marriage settlements of personalty, where the fund was settled on the parents for life and the children had a contingent interest in remainder in the fund, while the father was alive the provision of a power to maintain an infant beneficiary was not generally an issue. Where the surviving parents had died, and there was any doubt as to the exercise of this power, or where there was no express power, an application to the court was prudent.

In making orders for maintenance the court took notice of the duty imposed by law on the infant's father to maintain, support and educate his children,[75] and would in general not make an order allowing maintenance where the father was alive and able to do so himself, and would order an inquiry to assess his means. The only instance where the father's ability to maintain his children was not relevant was where the power was construed as a trust to maintain the child,[76] but this was a construction found in limited circumstances which the courts in the nineteenth century were reluctant to extend.[77] In such cases the trustees had to maintain the child out of the income yielded by his share in the trust property and accordingly the father was relieved of a significant personal financial burden.[78] Express provisions to maintain in the ordinary form were generally, however, construed as mere powers of maintenance.[79] In such cases the trustees had a discretion to apply part of the income, which otherwise would belong to the infants, for their maintenance and education, but the father would not be relieved from the burden of maintaining his child if he could.[80] The trustees had to be aware of this in the exercise of their powers. Furthermore, the court

[74] *Mucklow* v. *Fuller* (1821) Jac 198; *Hoste* v. *Pratt* (1798) 3 Ves Jun 730. See DRO 337 add 3B/1/12/9 Pt 1 Box 8 (1845); DRO 337 add 3B/1/12/13 Box 30 (1857).

[75] *Andrews* v. *Partington* (1790) 2 Cox 223; *Thompson* v. *Griffin* (1841) Cr & Ph 317; *Kekewich* v. *Langstaff* (1840) 11 Sim 291, 303, 305.

[76] *Meacher* v. *Young* (1834) 2 My & K 490. See too *Mundy* v. *Earl Howe* (1793) 4 Bro CC 223; *Stocken* v. *Stocken* (1833) 4 Sim 152; 2 M & K 489; *Ransome* v. *Burgess* (1866) LR 3 Eq 773.

[77] Jessel MR in *Wilson* v. *Turner* (1883) 22 Ch D 521 at 524. See too Sir R. T. Kindersley VC in *Ransome* v. *Burgess* (1866) LR 3 Eq 773 at 780.

[78] *Hoste* v. *Pratt* (1798) 3 Ves Jun 730 at 733 *per* Lord Loughborough LC.

[79] *Wilson* v. *Turner* (1883) 22 Ch D 521.

[80] *Thompson* v. *Griffin* (1841) Cr & Ph 317.

would not take into account the mother's fortune, however large it was,[81] since she was under no legal obligation to maintain the children. The court showed some flexibility however, and sometimes took other circumstances, such as the father's means, the size of the infant's fortune and the effect on the rest of the family, into account. While the trustees could not be compelled to exercise their power, the fact that they possessed it sufficed to lay them open in certain circumstances to parental and family pressures. In some instances an infant beneficiary could be entirely dependent on his interest in a trust fund and its release by his trustees for his sustenance. So where an infant beneficiary was abandoned by his father,[82] or the father was deemed an improper person to look after him,[83] the child's trustees could be ordered to apply some or all of the income from the child's property towards his maintenance and education. Indeed, if the infant beneficiary was in real need, and there was no other fund available, the trustees could exceptionally be ordered to maintain an infant out of capital,[84] but in some instances there were considerable difficulties in doing so.[85] The trustees could not, however, break in on the capital of their own accord;[86] if they did, even for the undoubted benefit of the infant beneficiary, they could not rely on the support of the court if the beneficiary demanded the sum again once his interest was vested.[87] Though the courts often considered distasteful the beneficiaries' insistence that they receive their full legacies, despite having enjoyed the sums spent on them, the courts were bound to find in their favour and allow an unscrupulous beneficiary to succeed.

Where the father clearly could not support the infant beneficiary, all those concerned with his welfare would be in agreement that the power should be exercised. Indeed, the trustee would need no persuasion. But the law reports reveal considerable litigation where trustees refused to exercise the power because in their view the

[81] *Per* Lord Langdale MR in *Douglas* v. *Andrews* (1849) 12 Beav 310 at 311, because she had no legal duty to maintain the child. See, however, Married Women's Property Act 1870, 33 & 34 Vict. c. 93, s. 14.

[82] *Ex p Swift* (1828) 1 Russ & M 575.

[83] *Wellesley* v. *Wellesley* (1828) 2 Bli NS 124.

[84] *Barlow* v. *Grant* (1684) 1 Vern 255; *Robison* v. *Killey* (1862) 30 Beav 520; *Ex p Green* (1820) 1 Jac & W 253; *Ex p Chambers* (1829) 1 Russ & M 577.

[85] Particularly with respect to an infant's real estate, and an infant could be left in real need: *Re Hamilton* (1885) 31 Ch D 291; *Ex p Swift* (1828) 1 Russ & M 575.

[86] *Walker* v. *Wetherell* (1801) 6 Ves Jun 473 at 474.

[87] *Lee* v. *Brown* (1798) 4 Ves Jun 362.

father could support the child out of his own financial resources. Trustees were under a duty to carry out their discretions bona fide, and only if they refused to do so would the court interfere,[88] for it was loath to interfere where the settlor had trusted. If the trustees exercised their discretion properly, whether their decision was to allow maintenance or not, the court would not interfere with it.[89] The prime consideration in the exercise of the power was to ensure the benefit of the child, it being a constant danger that any money paid by the trustees to the parents would be used for their benefit rather than that of the infant beneficiary.[90] Where its exercise was clearly for his benefit, the court was prepared to be forgiving and flexible if the trustees to some extent exceeded their powers. So where a trustee maintained four destitute infants without express authority to do so,[91] and where another continued paying maintenance without periodically reviewing the situation as he ought,[92] the court allowed the payments after having ensured the children did indeed benefit.

Whereas most trusts contained express powers of maintenance, some did not, and an application to the court was necessary. Accordingly, the power was made statutory as early as 1860, by Lord Cranworth's Act,[93] a statute whose parliamentary passage was unchallenged and uncontroversial. The power was a wide one, though not retrospective, and reflected usual practice by providing that where any property was held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before that time, the trustees could, at their sole discretion, apply the whole or any part of the income to which the infant might be entitled in respect of such property, towards his maintenance or education. The trustees could do this even if there was some other fund available to maintain the infant, or some other person bound by law to maintain him. The residue of the income was to be accumulated. The statutory power could be excluded by any expression of contrary intention, but otherwise was read into every trust instrument as either the sole

[88] *Gisborne* v. *Gisborne* (1877) 2 App Cas 300. See too *Re Lofthouse* (1885) 29 Ch D 921; *Re Wells* (1889) 43 Ch D 281.
[89] *Re Lofthouse* (1885) 29 Ch D 921.
[90] *Re Bryant* [1894] 1 Ch 324.
[91] *Prince* v. *Hine* (1859) 26 Beav 634.
[92] *Brown* v. *Smith* (1878) 10 Ch D 377.
[93] Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145, s. 26.

provision for maintenance, or in addition to any express provision. Expressions of contrary intention were various, including an express direction to accumulate the income of a beneficiary's share.[94] There was no doubt as to the power's nature as a mere discretion to maintain rather than a trust, and that any allowance was to be made out of income and not capital.

The statutory power of maintenance was enacted for reasons of practical convenience. It was primarily an attempt to reduce the costs of drawing up trust instruments by making them shorter, removing the need for express inclusion of a number of very common clauses, of which the power of maintenance of infants was one.[95] It was hoped that it would be more successful in achieving this than earlier Acts,[96] because rather than simply providing short forms of common clauses which could be adopted or not as the settlor chose, it provided that the powers should be 'incident to the estates of the persons interested'[97] so as to make it unnecessary to insert each power into every instrument. It thereby increased the security of infant beneficiaries, met the presumed intention of settlors and enabled trustees to maintain infant beneficiaries in the absence of express provision to do so without the expense and trouble of an application to the court. As such it was a valuable addition to trustees' powers. Beyond that, while the section was thought to have widened trustees' powers of maintenance, the nature and extent of that widening was not self-evident. The provision allowing maintenance even when there existed some other person bound by law to maintain the child appeared to widen the law, but it did no more than clarify it. Trustees were allowed to exercise their power of maintenance even when the father was legally bound to maintain the child, though they had to take this into account when exercising their discretion. Neither did it undermine the father's duty in this respect, for if he was able to support his child, the law bound him to do so.

The key issue in maintenance had always been, however, not the possession of the power itself, but whether there was any income available for maintenance. The fact that the trust property produced income was insufficient. That income had to belong to the infant

[94] *Re Alford* (1886) 32 Ch D 383.
[95] See Kekewich J in *Re Moody* [1895] 1 Ch 101 at 106.
[96] Conveyancing Act, 8 & 9 Vict. c. 119; Leases Act, 8 & 9 Vict. c. 124 (1845).
[97] Preamble to Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145.

in order to be applicable for his maintenance by the trustees so that it was indeed from his income that the sums for maintenance were taken and not somebody else's. In that respect the statutory power simply reflected existing and unsatisfactory law, and it was an area of technical complexity and uncertainty throughout the nineteenth century. Many trustees and settlors were unclear as to what they could legitimately do in the field of maintenance, and their legal advisers were often unable to advise them with certainty. And yet the need was urgent and practical when there existed infant beneficiaries who were entitled to property in the future, and yet were in immediate need. As a result litigation in this area was extensive, and there were frequent applications to the court for advice. A great deal of judicial time was expended analysing the varying gifts to infants and establishing whether or not they carried the intermediate income so as to leave money available for maintenance under the express or statutory power then in force. The possible permutations of interests were numerous, since gifts could be by will or by deed, vested or contingent, real or personal, specific or residuary.

If, on the construction of the instrument, the infant took an immediate vested interest in the fund, whatever the nature of that fund, then there was no doubt that in the absence of any express provision that it was to go elsewhere, he was entitled to the income and could be maintained out of it. The courts always leaned towards a construction which would give the infant beneficiary a vested interest. So where personalty was settled on children, and the course adopted was to vest the interests in them immediately, divesting their proportionate shares as others were born and divesting the shares of those who died under age or, if daughters, under age or before marriage, the share of each was vested, the income belonged to each child, and was available for maintenance. The difficulty lay with contingent gifts, where, for example, the interest was vested only in those sons who reached the age of twenty-one, or in those daughters who reached their majority or married before then. While the statutory power provided that it applied where an infant was entitled contingently on attaining his or her majority or on the occurrence of some event before that time (a provision, incidentally, which caused particular hardship where not unusually an infant was contingently entitled on attaining twenty-five or marrying before then), it would not apply if on the true construction of the settlement the income was payable to someone else during

infancy. To find otherwise would be to allow maintenance out of income belonging to someone other than the infant. The question was whether the income of the fund was to go with the capital when it vested or not. In the former case maintenance was possible, in the latter, not. By the close of the nineteenth century the courts had established certain rules, namely that a contingent bequest of residuary personalty carried the income, but a contingent devise of residuary realty did not; that a mixed gift of realty and personalty did, but that a general or specific legacy or devise in principle did not. The distinctions were subtle and the desire to enable the maintenance of infants became stifled by legal rules and the freedom and flexibility of earlier years was lost. The decisions were based on the construction of instruments and the arcane theory of property law. There was little overall logic or consistency to the decisions, and they often worked considerable hardship in practice. Difficulties of construction continued even after the power was re-enacted in wider words in 1881,[98] and it was an area of law which was in practice regarded as unsatisfactory and inaccessible to the parties to the trust.

The upholding of the Victorian social order, with its clearly delineated moral expectations and class structure, was central not only to the practical exercise by trustees of their powers of maintenance, but also to the judicial policy underlying it. The subordination of the power to the ability of the father to support his children reinforced the accepted role of the father in the Victorian family. He was the head of the family, whose duty it was to support and protect his wife and children. Equally, giving the trustees the power of maintenance reinforced the orthodox image of the trustee as the protector of the beneficiary. Furthermore, the power of maintenance had to be properly exercised for the benefit of the infant, but the meaning of benefit was determined by reference to the child's social position, which itself determined his legitimate expectations. As early as 1801 Sir William Grant MR had implied that he would have allowed maintenance out of capital if there had been 'expectations of fortune, which made it necessary to provide a suitable education',[99] and in 1813 he was seen to be reluctant to deny maintenance to a father simply because it appeared that he should have been able to maintain the children. The expense of maintaining three houses

[98] Conveyancing and Law of Property Act 1881, 44 & 45 Vict. c. 41, s. 43.
[99] *Walker* v. *Wetherell* (1801) 6 Ves Jun 473 at 474.

out of his substantial income exhausted it, and the judge thought that 'it would be a harsh thing for the Court to oblige the petitioner to put down his establishment in any part to educate his children, when they have large incomes of their own'.[100] The social dimension to judicial policy with the maintenance of people in the positions they were born to was repeatedly and unequivocally expressed. The court was thus pragmatic within the social and cultural context and the child's position in life determined the quantum of maintenance. The court would, for example, allow a significantly larger amount for maintenance than was strictly necessary in order to promote what it saw as the appropriate care of infants. Sir George Jessel MR recounted a case in his chambers where a young lady of large fortune who was ready to be introduced into society had no one to undertake the task since her parents were dead. He allowed a very considerable sum for maintenance to a lady of rank who was prepared to introduce the infant on those terms, deeming it 'a very desirable arrangement for the young lady'.[101] Putting this policy into its broader context, he observed that it was not realistic to expect people to take on the care of infants for the bare cost of so doing, and that the granting of realistic sums was for the wider good, especially with regard to girls, who needed the protection of their families who cared for their welfare and guarded them from 'the numerous temptations and dangers to which girls between the ages of sixteen and twenty-one are especially liable'.[102]

A trustee could supply an infant beneficiary's everyday needs such as food, clothing, education and general support through the exercise of the power of maintenance, but the terms of such powers did not cover financial needs of an extraordinary nature calling for an advancement of the trust capital. It was a common and long established practice throughout the nineteenth century for settlors to include express powers of advancement in any well-drawn instrument creating a trust of personalty. These express powers tended to adopt a standard form whereby the trustees were empowered to apply a proportion of the capital fund to 'the advancement and preferment in the world' of the beneficiary. A common power expressly allowed an advancement 'for putting out or establishing [the beneficiary] in or to any trade Business or Profession for [his]

[100] *Jervoise* v. *Silk* (1813) Coop G 52 at 53.
[101] *Brown* v. *Smith* (1878) 10 Ch D 377 at 381.
[102] *Ibid*. at 382.

benefit or preferment in the world'.[103] A more detailed version permitted an advancement to place the beneficiary 'in any profession business or employment or at the University or in any of the Inns of Court or in varying his situation calling or distinction in life . . . or otherwise for . . . his benefit or advancement in the world'.[104] Some were broad and provided for the beneficiary's 'advancement or preferment in the World or in Marriage',[105] others very specific, as a provision allowing an advancement to defray the expenses contingent on a son entering St Bartholomew's Hospital as a medical student.[106] Some powers were limited to sons only, but most permitted advancements to both male and female beneficiaries.

Legally the power was of significance because while it did not go so far as to breach the sanctity of the trust fund, it did constitute one of the rare instances where the trustees were empowered to interfere with the capital of the trust. They could, furthermore, do so whether the beneficiary's share was vested or contingent. As such it was potentially dangerous and was accordingly accompanied by a number of safeguards. Significantly, it was not given statutory form in the Victorian period, on the basis that a power with such potentially far-reaching consequences should in all cases be the result of the settlor's conscious decision, and so expressly included in the trust instrument, rather than the result of legal implication. Accordingly, other than ask the court to exercise its inherent jurisdiction,[107] trustees and beneficiaries had to rely on the efficiency of their legal advisers to ensure an express power was included in the trust instrument. It also was usual to limit the amount which could be advanced to half a beneficiary's actual or presumptive share in the trust fund. There was some contemporary disagreement as to this proportion, with some settlors imposing no upper limit,[108] some allowing up to one-third, but the great majority allowing only up to one-half. Being a fiduciary power, an absolute precondition of its

[103] DRO 337 add 3B/1/12/1 Box 25 (1804); DRO 146 B/add T47 (1810).
[104] DRO 329 8B/F2 (1842).
[105] DRO 337 add 3B/1/12/13 Box 30 (1857).
[106] DRO 3162 B/MF5 (1878).
[107] *Re Mary England* (1830) 1 Russ & M 499. See too *Clay* v. *Pennington* (1835) 7 Sim 370; (1837) 8 Sim 359.
[108] DRO 282 M/MS3 (1835).

exercise was that any advancement made had to be, in the opinion of the trustees exercising the power bona fide, for the benefit of the beneficiary, even indirectly,[109] and not for the benefit of anyone else.[110] The court was ever vigilant for any abuse of discretion. Further security was achieved through the careful selection and appointment of trustees of integrity and good sense.[111] In that sense the power of advancement was altogether different in character and potential impact from the power of maintenance.

As with the power of maintenance, the power of advancement was intended by settlors, and so used by trustees, to ensure the preservation and perpetuation of middle-class values and structures. Advancements were clearly included by settlors in order to secure the financial and social future of their beneficiaries, in a world in which ability alone was not enough to get on, and where establishment in any of the professions or in trade almost invariably required the expenditure of a capital sum. The purchase of a commission in the army, for example, cost between £450 and £1,200 depending on the regiment.[112] The global cost of a good legal training as a solicitor, including the premium, was in the region of a minimum of £1,000.[113] The premium alone for training as an architect or an engineer would be between £100 and £500.[114] Not only that, in many professions financial security was a long time coming, and parents typically had to support their children for the first few years of their professional life, to the extent of some £200 a year.[115] Indeed, in the army, it was accepted that an officer could not live on his pay. The power of maintenance was not available to an adult child, and the power of advancement had to serve. It was also widely used to assist with emigration. In one instance, the parents of a minor beneficiary requested the trustees of their marriage settlement to advance £300 for their son's passage to the USA to join his brother there in business, as there seemed to be 'no opening in England for a youngster, unless he is particularly clever, or has good interest,

[109] See *Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Re Price* (1887) 34 Ch D 603. See too *Simpson* v. *Brown* (1865) 11 LT 593.
[110] *Molyneux* v. *Fletcher and Clark* [1898] 1 QB 648.
[111] See above, pp. 22–4.
[112] See W. J. Reader, *Professional Men* (London, 1966), pp. 75–6.
[113] *Ibid.*, pp. 120–1.
[114] *Ibid.*, pp. 121–2.
[115] *Ibid.*, pp. 191 ff.

or plenty of money'.[116] Because such express powers concerned the capital of the trust, they tended to be narrowly construed.[117] The term 'advancement' was held to be one 'appropriate to an early period of life', and one which had as its object the establishment in life of the beneficiary.[118] Largely through applications for advice under Lord St Leonards' Act,[119] the courts systematically addressed the most common requests for the application of funds for the advancement of beneficiaries. The term came to acquire a settled legal meaning, and the purposes for which advancements were permitted reflected and reinforced the values of Victorian life. So the term clearly included the setting up of a beneficiary in business,[120] the purchase of a commission in the army,[121] the payment of a premium to a solicitor,[122] the payment to enter an Inn of Court,[123] emigration for reasons of health,[124] and the execution by a beneficiary of his own marriage settlement.[125] Conversely, the term did not cover payments to older beneficiaries with families,[126] the payment of living expenses,[127] payments for any preliminary education, nor, generally, for the payment of debts.[128] The term 'advancement' came as a result to be regarded as too restrictive, and the later years of the nineteenth century saw the usual addition of the words 'or otherwise for his benefit', a form which allowed a wider application of the trust fund. When the phrase was first judicially considered, having been in use for some years, it was held to cover the payment of debts.[129] The form was particularly useful where the testator had made no

[116] DRO 3162 B/MF 38 (1892). See too DRO 3162 B/MF 31 (1888).
[117] *Molyneux* v. *Fletcher and Clark* [1898] 1 QB 648.
[118] *Re Kershaw's Trusts* (1868) LR 6 Eq 322. See too *Taylor* v. *Taylor* (1875) LR 20 Eq 155, an example of successive purported advances made by a hopeful parent in trying circumstances.
[119] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35, s. 30.
[120] *Taylor* v. *Taylor* (1875) LR 20 Eq 155 at 159.
[121] *Lord Kircudbright* v. *Lady Kircudbright* (1802) 8 Ves Jun 51; *Boyd* v. *Boyd* (1867) LR 4 Eq 305. See too *Re Ward's Trusts* (1872) 7 LR Ch App 727.
[122] *Boyd* v. *Boyd* (1867) LR 4 Eq 305.
[123] *Taylor* v. *Taylor* (1875) LR 20 Eq 155.
[124] *Re Long's Settlement* (1868) 38 LJ Ch 125.
[125] *Roper-Curzon* v. *Roper-Curzon* (1871) LR 11 Eq 452.
[126] *Luard* v. *Pease* (1853) 22 LJ Ch 1069 at 1071.
[127] *Taylor* v. *Taylor* (1875) LR 20 Eq 155.
[128] *Ibid*. at 159. See too *Re Price* (1887) 34 Ch D 603. This was, however, not settled: see *Re Blockley* (1885) 29 Ch D 250.
[129] *Lowther* v. *Bentinck* (1874) LR 19 Eq 166.

provision for maintenance between majority and the vesting of the gift.[130]

Whatever the pressures individual beneficiaries or their relations might exert on their trustees to exercise their powers of investment, maintenance or advancement to their own best advantage, the relationship between them in general remained benign. The dynamics of the relationship were generally no more nor less turbulent than those found within most families in their resolution of financial and property matters. There were, however, occasions on which the relationship was destructive, when the trustee did not merely exercise his powers for the benefit of one or some beneficiaries at the expense of others, but exercised them instead for his own personal benefit. In his disregard of the interests of his beneficiaries he was, of course, fundamentally undermining the spirit and principle of the trust arrangement. Whether the trustee acted in a way contrary to the terms of his trust and the principles of Equity as a well-meaning response to the continual importuning by his beneficiaries, whether he did so as an act of fraud for his own personal profit, or whether his act or omission was the result of incompetence, honest ignorance or indolence, he was in breach of his trust. And, being in breach, he was open to a compensatory personal action by the beneficiaries which was limited only by the extent of the loss.[131] That right of action, placed by Equity in the hands of the beneficiary, but rigorously maintained and enforced by the law to the highest degree, epitomised the relationship of trustees with the law and had the most profound effect on trust administration in Victorian England.[132] The prime intended effect was to deter potential breaches of trust, but whether it did indeed inhibit trustee defalcations is open to question. What it perhaps did do, in the context of the trustee–beneficiary relationship, was to make beneficiaries more reckless in their urgings to commit breaches, on the basis that any loss could potentially be made good by the trustee personally with the support of the law weighted heavily in their favour.

Not all beneficiaries were so unscrupulous. While the law afforded trustees few defences to an action for breach of trust, in

[130] *Re Breeds' Will* (1875) 1 Ch D 226.
[131] See Sir John Romilly MR in *Norris* v. *Wright* (1851) 14 Beav 291 at 307.
[132] See below, pp. 169 ff.

practice the most effective was to show that the beneficiary had acquiesced in the breach – that he had consented prior to the breach, acquiesced once it had occurred, or released the trustee from liability. Since so many breaches were indeed made at the instigation of the beneficiaries themselves and were often the result of considered agreement between them and their trustees, this defence was both common and important. Throughout the Victorian period the court accepted the informed and independent consent of adult beneficiaries as a valid defence to an action for breach of trust, and numerous case reports confirm this.[133] It was not an easy defence to establish in practice. The law, ever vigilant to protect the beneficiary, laid down that mere knowledge was not enough to save the trustee, since then all he need do was to inform the beneficiary of his breach. Consent, observed Fry LJ in holding that a beneficiary did not give consent to an unauthorised mortgage when he did not know the nature of the investment, the amount of property on which it had been invested, or indeed any of the details of the investment, 'is not a mere formality. It is the judgment of a person who is interested . . . To show consent it is necessary that there should be knowledge of the nature of the investment which is offered.'[134] Consent had, furthermore, to be free,[135] and the court would look very carefully to ensure that the beneficiary had not been subjected to any undue influence by the trustee.[136] Where in 1859 two beneficiaries were induced by their uncle, who stood in loco parentis to them, to execute a release to the trustees, Knight Bruce LJ held they were not bound by it. The beneficiaries, he said, being without a solicitor and without a protector were 'ignorant of their rights and of business, and were helpless victims' of their uncle in his 'selfish and treacherous frauds'.[137] Since full knowledge on

[133] *Walker* v. *Symonds* (1818) 3 Swan 1. A beneficiary who was found to have instigated a breach of trust was liable to have his interest impounded to make good the loss at first under the Court of Chancery's inherent jurisdiction, and later under s. 6 Trustee Act 1888. See *Trafford* v. *Boehm* (1746) 3 Atk 440 at 444; *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104; *Chillingworth* v. *Chambers* [1896] 1 Ch 685.

[134] *Re Massingberd's Settlement* (1890) 63 LT 296 at 299.

[135] *Stevens* v. *Robertson* (1868) 18 LT 427 at 428.

[136] See *Wedderburn* v. *Wedderburn* (1838) 4 My & Cr 41, where a beneficiary executed a release three days after attaining his majority, without having had the time to examine the accounts fully, and the release was held to be ineffective. See too *Parker* v. *Bloxam* (1855) 20 Beav 295.

[137] *Lloyd* v. *Attwood* (1859) 3 De G & J 614 at 642, 641; see too *Bateman* v. *Davis* (1818) 3 Madd 98; *Farrant* v. *Blanchford* (1863) 1 De G J & S 107.

the part of the beneficiary was of the essence in raising the defences of acquiescence, consent and release, the issue of legal advice was of some moment. Where the beneficiary was assisted and advised by a solicitor independent of the trustees, the defence was more likely to be successful.[138]

[138] *Stanes* v. *Parker* (1846) 9 Beav 385; *Todd* v. *Wilson* (1846) 9 Beav 486.

4

THE RELATIONSHIP WITH CO-TRUSTEES AND AGENTS

The day to day management of a trust comprised the taking and implementation of policy decisions and attention to a quantity of administrative detail. Decisions as to both the making and the supervision of investments, as to payments of income for maintenance, advancements of capital and the preservation of the body of trustees, were all matters which had to be addressed and resolved. By the terms of the trust instrument and the law, this responsibility fell on the trustee. Not only was he the legal owner, and as such the person required to deal with the title to the property, he was bound by Equity to manage that property according to the terms of his trust. This considerable burden was not, however, one a single trustee generally had to bear alone.

The very great majority of nineteenth-century trusts, whether *inter vivos* or testamentary, appointed several trustees. There were no legal constraints on the numbers of trustees,[1] though in practice there was an upper limit of four where Government stock was to be held in trust, and the reasons for preferring a group of trustees were essentially threefold: continuity, security and the sharing of the burden of the administration. The holding of trust property by the trustees as joint tenants meant that the principle of survivorship applied, and as one died, the remaining trustees took by the *jus accrescendi*.[2] The larger the number of trustees and the range of ages they represented, the fewer the occasions on which, in the natural course of things, the diminution in number would require a formal transfer of the property and the trusteeship to a new and replenished group. Transfer would be needed only when the numbers fell uncomfortably low for the purposes of security or

[1] The Settled Land Act 1882, 45 & 46 Vict. c. 38, s. 39(1) provided that under the Act there should in practice be no fewer than two trustees.

[2] *Warburton* v. *Sandys* (1845) 14 Sim 622.

burden of work. The plurality of trustees was equally an important safety check for the protection of beneficiaries, since it ensured that the trustees could watch over each other and thereby reduce the opportunities and the inclination for an individual abuse of trust, whether it was maladministration or fraud. For these reasons, while it might be awkward to have too many trustees, it was undoubtedly regarded as dangerous to have just one. Certainly the court never committed a trust to the care of a single trustee;[3] it had to ensure that the beneficiaries were adequately protected, and fraud was simply too easy, and temptation too great, where there was a sole trustee. Though it was said that Sir John Wickens VC accepted trusteeship only if he were the sole trustee,[4] in practice sole trustees were very rarely appointed. In general, sole trustees were deliberately appointed only under a will, when the fund was small, and often when the testatrix was a widow or a spinster. Although the ideal number of trustees was three, to allow a majority where there was a difference of opinion,[5] most small to medium sized trusts of personalty in the nineteenth century appointed two trustees. That figure was regarded as the most practical; it was not so great that selection and appointment in a climate which regarded trusteeship warily was unrealistic; it allowed for mutual supervision; and it was a manageable number for informed consultation and the making of decisions. It meant that almost invariably a relationship experienced by a trustee was one with those with whom the law demanded that he work: his co-trustees. It has been seen that throughout the Victorian period the most commonly appointed trustees were family members and friends, though at the end of the period there was an increasing use of professional trustees, particularly solicitors.[6]

Despite a common purpose, namely the administration of the trust according to the terms of the trust instrument and the rules of Equity for the benefit of the beneficiaries, and Equity's expectation that co-trustees co-operate and consult with each other, the dynamics of this relationship differed considerably in each case.

[3] *Viscountess D'Adhemar* v. *Bertrand* (1865) 35 Beav 19 at 20 *per* Sir John Romilly MR; *Grant* v. *Grant* (1865) LJ Ch 641; *Re Martin* [1900] WN 129.

[4] Because then at least he could not be made liable for the acts or defaults of his colleagues: Montague Crackanthorpe, 'The Perils of Trustees' (1890) 57 *Contemporary Review* 855.

[5] Then to persuade the third dissenting trustee, since decisions had to be unanimous.

[6] See above, pp. 34–42.

This was according to the type of trustees involved, their individual personalities and abilities, as well as the circumstances of their appointment (the relationship to the settlor and the reasons for his selection). The relationship between co-trustees was often a very difficult one and it was prone to considerable tensions. The effect of this on the success or otherwise of the administration of the trust could be significant. The four original trustees in *The Trials of the Tredgolds* were 'divided in character . . . between trustees of inflexible nature, who were so impressed with the importance of their duties that they would consent to nothing, and trustees of an easy nature who thought lightly of their labours, and would consent to any thing'.[7] Where the trustees were of the usual family type, differences in age, character, experience, social position or status within the family were all factors which could lead to an imbalance in the administration.

In the ordinary way, practical trust administration all too often found a body of trustees which included the domineering, the able, the experienced, the ineffectual, the accommodating, the incompetent, and even the corrupt. While the joining together of several trustees deliberately to defraud the trust was rare, fraudulent breaches of trust could be perpetuated where there were a number of trustees. One dishonest trustee could, for example, forge the signatures of his honest co-trustees, or he could act as the driving force and manipulate or deceive his weaker, but innocent, co-trustees. Where, however, one trustee was not fraudulent but controlling, whether by age, status, force of personality or experience, his ascendancy could take the form of his wanting to impose his views as to a management decision on his colleagues. He could be so dominant within the group that he could force the retirement or removal of a colleague perceived as unsatisfactory. The one selected for ejection could be unacceptable in a number of ways: he could of course be incompetent, lazy or corrupt, but on the other hand he could be an honest man pressing for the proper conduct of trust matters. In most instances the co-trustees would exert moral pressure on the offending trustee to retire voluntarily, often with a considerable degree of success. Where he refused, they could attempt to use the statutory power given to the court to appoint new trustees,[8] since

[7] 'The Trials of the Tredgolds' (1864) 10 *Temple Bar* 111.
[8] Trustee Act 1850, 13 & 14 Vict. c. 60, s. 32.

it implicitly provided for the removal of existing offending trustees through the exercise of its inherent jurisdiction.[9] Since the statutory power could be exercised at the request of the existing trustees, they had in practice an element of control, albeit indirect, over the continuance in office of their colleagues.

Removal, in whatever form, would lead to replacement. In this, and in the appointment of additional trustees, the existing trustees could exercise significant influence over the nature and composition of the group. Indeed, they had considerable discretion to fashion a congenial group of trustees. It was natural for them to favour the appointment of persons they knew, who shared their own values, and who would be either co-operative or malleable, or again to look for someone who would be willing to take on a disproportionate amount of the work, or, ideally, who would be able to contribute to the trust administration in a constructive way by bringing new skills and experience to it. Only where the appointment was effected through the court, either through the exercise of its inherent jurisdiction or of its statutory power under the Trustee Act 1850,[10] would individual appointments receive any judicial scrutiny. Though the initiative would lie with the trustees to suggest suitable candidates, the court had to be satisfied of the fitness of the proposed trustee, and some categories were not favoured. The spouses or solicitors of existing trustees, for example, were not allowed.[11] This provided some safeguard against the more obvious weighting of the appointments towards the existing cohort of trustees. In the far more usual situation where new and additional trustees were appointed under an express power or the statutory form of that power,[12] existing trustees had more overt influence since appointment decisions inevitably did not receive judicial scrutiny. They gave a free and unrestricted power to appoint replacement trustees to the surviving or continuing trustees or trustee, or his executor or administrator, or to the last retiring trustee, as was in the circumstances appropriate. Trustees could, in this situation, incline an appointment to suit their own personal wishes, for the court would not upset it.[13]

[9] See above, p. 52.

[10] Trustee Act 1850, 13 & 14 Vict. c. 60.

[11] *Re Norris* (1884) 27 Ch D 333.

[12] Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145, s. 27.

[13] *Re Earl of Stamford* [1896] 1 Ch 288; *Re Norris* (1884) 27 Ch D 333; and see too *O'Reilly* v. *Alderson* (1849) 8 Hare 101.

Whatever the internal balance of the co-trustees' relationship, the law regarded them as equal in duty, power, responsibility, liability and control. It recognised neither a managing nor a sleeping trustee and demanded unanimity in their decision-making.[14] This unambiguously democratic character of trust administration suggested an almost quasi-corporate nature of the trustee body, underpinned by the trustees' holding of the trust property in joint tenancy, with its four unities of time, title, interest and possession. That unity of ownership was reflected in the unity of action and responsibility. Indeed, the first act of the original trustees of a new trust was to ensure that the trust property be placed under the joint control and care of all the trustees, by putting it in the bank or in investments in their joint names, and not be allowed to remain or to arrive in the hands of just one. In the same way the trustees were not to permit a disproportionate amount of the work to fall, voluntarily or otherwise, on the shoulders of just one, a temptation which was very great when one trustee showed himself to be particularly astute and experienced in commercial matters. Though unacceptable in legal theory, however, in practical terms a leader of a group of trustees was necessary. As in any joint enterprise, one person needed to be the driving and organisational force in order to ensure all trust matters were properly attended to. In practice this happened, particularly when one of the group was a professional trustee. Indeed such trustees were appointed for this very purpose, to understand the law and its application, to give expert advice, to effect any formal transactions, to address the extensive associated paperwork and generally to drive the administration on effectively and efficiently. The emphasis differed between trusts. In some cases a solicitor-trustee's office prevailed and he guided his co-trustees to a considerable extent and controlled the issues and the information divulged to them.[15] In others, his employment prevailed, and he preferred to take instruction from his co-trustees.[16] Even in this case, however, the responsibility remained in all the trustees. So all trustees had to play their part in the administration of the trust, and each had to ensure that that was the case. This duty of mutual supervision was one of particular importance. It involved the continued vigilance of each trustee, ensuring that their colleagues were acting properly in

[14] *Luke* v. *South Kensington Hotel Co* (1879) 11 Ch D 121.
[15] E.g. DRO 5521 M/E7/3 (1875).
[16] E.g. DRO 3459/F59 (1820).

the exercise of their duties and powers, and, indeed, that they were playing their part in the administration of the trust.

Although the law placed the responsibility for the administration of the trust entirely on the trustees themselves, this did not reflect the reality of trust administration. An entirely self-sufficient group of trustees, providing all the necessary skills and experience from within, even if one trustee was particularly able, was unrealistic. In practice, trustees were obliged to seek expert professional assistance in order to administer their trust to the standard they, the law, and the beneficiaries demanded. In some cases its use was necessary: attorneys, later solicitors, were needed to effect innumerable legal transactions within the administration of the trust, including sales and purchases of trust property, the appointment of new or replacement trustees, the taking of affidavits and the instruction of counsel. Indeed, eighteenth-century attorneys formed the basis of the new professions of the nineteenth century, for such men possessed far more than a knowledge of the law; they were shrewd in financial affairs and well versed in estate management.[17] Surveyors could give an accurate valuation of property for the purposes of investing in mortgages and brokers were necessary to the sale and purchase of stocks and shares. Nevertheless, the relationship between trustees and their agents in the eighteenth century was usually an unequal one, the social superiority of the trustee – and all that brought with it – leading him to place confidence in his own judgment rather than that of any employee.[18]

In other instances the use of an independent expert was not strictly necessary, but might be strongly desirable to ensure the trustees satisfied the demanding standards of their office. Trustees faced with an ever-expanding range of investments might not know which was best to achieve the necessary balance between their beneficiaries or simply might not appreciate the element of risk involved. The trust property in their care would increasingly consist of diverse and often new types of personal property, whose juridical

[17] See David Spring, *The English Landed Estate in the Nineteenth Century: Its Administration* (Baltimore, 1963), Chapter 3; W. J. Reader, *Professional Men* (London, 1966), p. 27; B. L. Anderson, 'Law, Finance and Economic Growth in England: Some Long-term Influences' in Barrie M. Ratcliffe (ed.), *Great Britain and her World 1750–1914* (Manchester, 1975), pp. 106–8.

[18] See G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14 at 16.

nature had not always been yet resolved,[19] but could also comprise the equally complex but better understood traditional interests in real property. They might not know how to set about finding these investments, or purchasing them. The advice of a professional skilled and experienced in financial matters, a banker or broker, would be necessary in such a situation.[20] A responsible and vigilant trustee would wish to keep accounts, since he was under a duty to provide beneficiaries with any information about the state of the trust fund they might request, and to do so properly would call for the services of an accountant – the last to emerge as an independent profession in the late nineteenth century. A trustee, bound to obtain the best price on the sale of trust property, might well feel that could only be achieved by the employment of a land agent to arrange all aspects of the publicity and sale by public auction or private agreement.

Not only was the commercial context of trusteeship increasing in complexity, the legal burden on trustees in the nineteenth century was immense. Any slip, any misjudgment, however honest and well meaning, brought with it the very real danger of a personal action for breach of trust, with few real defences.[21] Trustees naturally would seek to minimise the likelihood of any breach of trust, and this they could do by employing specialist agents to advise and warn. Underlying the desire of many trustees to appoint agents lay the issue of remuneration. The law was unmoving in its insistence that trustees act without remuneration.[22] As the work involved in administering even small trusts increased, so many trustees found their own livelihoods suffering as a result and they naturally sought ways to minimise both the financial and the personal burden of trusteeship. Since properly appointed agents could be remunerated, much of this burden could be shouldered by the trust fund itself. The expenses incurred in employing agents were legitimate 'costs, charges and expenses' under the standard form express

[19] See generally C. Stebbings, 'The Legal Nature of Shares in Landowning Joint Stock Companies in the Nineteenth Century' (1987) 8 *Journal of Legal History* 25–35; C. Stebbings, 'Statutory Mortgage Debentures and the Courts in the Nineteenth Century' (1987) 8 *Journal of Legal History* 37–44.

[20] In *Speight* v. *Gaunt* (1883) 9 App Cas 1 at 17 Lord Blackburn made the point that the fact that Gaunt had no special knowledge of investment furnished an additional reason why he should employ a stockbroker.

[21] See pp. 95–7, 187.

[22] See above, pp. 30–2.

reimbursement clauses included in all trust instruments. Furthermore, the professions themselves both sought and welcomed trust work. For them not only did it increase their business and therefore their fees, it also raised their profile and status at a time when they were establishing themselves alongside the traditional professions of the army, the church, medicine and the law. It was also the case that as trusteeship necessarily became more commercialised, and the use of agents grew in response, so their use stimulated its even greater specialisation and its even greater need for professional support.

Expert advice and assistance in a range of matters arising in trust administration was available to Victorian trustees, because the expanding economy and the increasing commercial sophistication of society led to the evolution and growth of a number of new professions to service and nurture it. To the ordinary lay trustee of the nineteenth century thrust into a world which might bewilder or overwhelm him, or which he had not the time or the inclination to embrace to the necessary degree, the existence and availability of specialists in those problematic areas of trust administration was very attractive. The growing practice of employing agents created yet another relationship in the sphere of trusteeship, and one which was markedly different from its eighteenth-century counterpart. The balance of the relationship changed and became more equal: trustees needed the professional expertise which only agents possessed. The necessary engagement of trustees with the new and dynamic Victorian society and economy gave rise to a consequent interaction with the emerging professions which both reflected and characterised it. This development required the law to examine the fundamental characteristic of the trust as a duty imposed on the trustees personally and to resolve the relationship between it and the use of agents. Within the relationship between the trustees and their agents, matters of scope of work and liability for the acts of those agents were major issues of considerable contemporary importance not only to the trustees and the agents themselves, but to the very viability of the trust in Victorian England.

This popular and well-founded desire to delegate, either to one of the group of trustees or to expert agents, evident in the early years of Victoria's reign, sat uneasily with Equity's essential conception of a trust as a personal duty imposed by the settlor on trustees specially selected by him for that purpose and voluntarily assumed by

all those trustees. The office of trustee, as its very name suggested, was one of personal confidence, and the moral obligation to which that gave rise embodied traditional Equity jurisprudence. In his leading work on powers, Lord St Leonards stated that 'if the power repose a personal trust and confidence in the donee of it, to exercise his own judgment and discretion, he cannot refer the power to the execution of another, for *delegatus non potest delegare*'.[23] Originally this conception of the trust and the office of trustee was strictly adhered to and resulted in the rigorous propounding of the prohibition on delegation, the view being taken that when trustees consciously accepted an office involving the management of property for the benefit of third parties, they could not 'shift their duty on other persons'.[24] Those 'other persons' included both strangers to the trust and the trustees themselves.

The law was clear that it could not allow unrestricted delegation. Had trustees been entirely free to delegate, it would have provided a welcome relief to trustees acting gratuitously, and would have gone a long way towards making up for the rigorous enforcement of the no-remuneration rules. It would also have ensured that the ministerial tasks of trusteeship were performed, and that the person who undertook the work was professionally remunerated for it. While this approach would have left the integrity of the legal theory undiminished, it would have undermined its spirit. It would not only have betrayed the confidence of the settlor who had chosen the trustee precisely because of the trust he placed in him personally, it would have weakened the position of the beneficiaries, who, although the work would have been well done, would have lost the benefit of a body of trustees making management decisions personally, gratuitously and therefore disinterestedly, on their behalf. Unlimited delegation would place the agent between the trustees and the beneficiaries, and would weaken the relationship and the lines of responsibility, or it would allow some trustees to abdicate their responsibilities in favour of one or some of their colleagues.

Prior to the Victorian period this principle had been kept more or less intact through the absence of pressure to do otherwise. Until the end of the eighteenth century, trusteeship involved the making of policy decisions which not only involved the exercise of a personal

[23] Edward Burtenshaw Sugden, *A Practical Treatise of Powers* (3rd edn, London, 1821), p. 175.

[24] *Per* Lord Langdale MR in *Turner* v. *Corney* (1841) 5 Beav 515 at 517.

discretion, the delegation of which was never contemplated, but which more importantly could be effected with the minimum of intermediaries. The trustees would for example have to take decisions on matters of maintenance and advancement, on the allocation of shares to discretionary beneficiaries, and these were essentially internal matters in that to carry them out did not require significant interaction with the outside world. Even in the area of investment, such interaction was kept to a minimum simply because the range of investments available to trustees was severely limited and trustees generally felt confident in making investment decisions themselves. In such circumstances any demand for a power to delegate ministerial acts was negligible. Since this state of affairs conveniently accorded with traditional Equitable principles, the law itself, never proactive at the best of times, was predictably quiescent.

That is not to say that the employment of an agent was never required. Since the majority of trusts prior to the nineteenth century involved land, and the formalities surrounding all transactions with land were notoriously complex and technical, there had been an early need to call upon the services of an attorney. This was not a question of convenience or even of common practice, but of necessity, even in the simplest trusts. Without some flexibility in the fundamental principle of Equity which disallowed delegation, the trustees would be incapable of carrying out their duty and the wishes of the settlor could not be fulfilled. This undeniable need had long been recognised, for in 1754 Lord Hardwicke LC had laid down the principles upon which delegation could be allowed,[25] principles which were later described as being based on 'reason and common sense'.[26] Trustees, he said, could 'act by other hands, either from necessity, or conformable to the common usage of mankind'.[27] Although the judge said there were two forms of necessity, 'legal' and 'moral', it is the latter which formed the basis of subsequent delegation law and practice. It meant where delegation was necessary 'from the usage of mankind', as where a banker was appointed to receive rents, or a steward was appointed. Nearly 130 years later Lord Hardwicke's phrase 'by necessity or conformably with the usages of mankind' was taken to mean where in the ordinary course

[25] *Ex p Belchier* (1754) Amb 218. See too *Bonithon* v. *Hockmore* (1685) 1 Vern 316; *Knight* v. *Earl of Plymouth* (1747) Dick 120.

[26] *Per* Bowen LJ in *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 763.

[27] *Ex p Belchier* (1754) Amb 218 at 219.

of business an agent was employed.[28] So there was established authority to the effect that where the appointment of an agent was customary and prudent in business circles it was permissible in law. This early authority to delegate was thereafter consistently confirmed by the courts[29] and was used as far as necessary and if a trust could afford it. By the time of the queen's accession in 1837 delegation was permitted to an attorney or solicitor for legal business,[30] to stockbrokers to sell stocks and shares,[31] to bankers to receive the fund when converted into cash and prior to reinvestment,[32] to accountants[33] for the drawing up of accounts, to rent collectors[34] and to auctioneers to sell land[35] because in these circumstances a businessman or 'provident owner'[36] would normally delegate.[37]

The law maintained its fundamental principles which in theory, being based on the real standard of the ordinary course of business, were consistent with the desires of settlors and trustees. The standard was stated in the leading case of *Speight* v. *Gaunt* which came before the courts in 1883,[38] where the judgments were so full and well considered that while the courts did no more than declare the law, they provided an invaluable exposition and explanation of the rules governing delegation and the consequent liability of trustees. Therein lay its importance and its status as one of the most significant decisions in trusts administration in the Victorian period.[39] Such was the importance of the case that the court was crowded when the Master of the Rolls delivered his judgment. Unfortunately, due to the poor acoustics of the new law courts, he was virtually inaudible.

[28] *Per* Jessel MR in *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 742, and *per* Bowen LJ at 763; see too Lord Cottenham LC in *Clough* v. *Bond* (1838) 3 My & Cr 490 at 497, where he says that necessity 'includes the regular course of business in administering the property'.

[29] See generally, *Re Weall* (1889) 42 Ch D 674 at 677.

[30] *Macnamara* v. *Jones* (1784) Dick 587 allowed the appointment of a solicitor by an executor to do business for him in the management of the testator's affairs.

[31] *Jones* v. *Powell* (1843) 6 Beav 488.

[32] *France* v. *Woods* (1829) Tam 172 approved the appointment of a banker by executor-trustees to assist them with the executorship.

[33] *Henderson* v. *M'Iver* (1818) 3 Madd 275; *Re Bennett* [1896] 1 Ch 778.

[34] *Wilkinson* v. *Wilkinson* (1825) 2 Sim & St 237; *Re Muffett* (1887) 3 TLR 605. See too *Knight* v. *Earl of Plymouth* (1747) Dick 120.

[35] *Edmonds* v. *Peake* (1843) 7 Beav 239.

[36] *Wilkinson* v. *Wilkinson* (1825) 2 Sim & St 237.

[37] See too *Bacon* v. *Bacon* (1800) 5 Ves Jun 331.

[38] *Speight* v. *Gaunt* (1883) 22 Ch D 727; 9 App Cas 1.

[39] *The Economist,* 1 December 1883, p. 1401 (vol. 41).

If its immediate impact was muted, its long-term significance was not. Gaunt, who was trustee of Speight's will, employed a broker to invest £15,000 of the trust fund in local corporation bonds, and when the broker absconded with the money, the beneficiaries sought to make Gaunt liable for the loss. Gaunt was ultimately held not to be liable by the Court of Appeal and the House of Lords,[40] on the basis that his appointment of the broker and his subsequent conduct had been that of any prudent man of business.[41] It was recognised, furthermore, that while delegation inevitably involved some element of risk,[42] it was a practical necessity in contemporary trust administration. A trustee could not, said Bowen LJ, do everything himself. He must 'to a certain extent make use of the arms, legs, eyes, and hands of other persons, and the limit within which it seems to me he is confined . . . is this – that a trustee may follow the ordinary course of business, provided he runs no needless risk in doing so'.[43]

As in all areas of trust administration, it was open to the settlor to provide for delegation and to lay down the perimeters of the power, thereby equipping his trustees, as he saw it, to manage the trust efficiently and well. In many cases he envisaged his trustees employing agents – often the same ones – to the same extent as he had during his lifetime. However, the notion that 'as it was an office that would of necessity be attended with great trouble, it cannot be imagined [the testator] meant they should do more than he did himself',[44] while readily accepted in the eighteenth century, did not find favour by the rigorous standards of the Victorian work ethic, a further reason why restraints on the power to delegate were never significantly lifted in the Victorian period. Express powers of delegation were occasionally included in nineteenth-century trust instruments. At first they took the form of an expression of individual settlors' wishes, tailored to their particular needs. Where, for example, trustees were to carry on a deceased settlor's business, an express clause might permit the appointment of an accountant to inspect the accounts, to assess the well being of the business and ascertain its profits.[45]

[40] *Speight* v. *Gaunt* (1883) 9 App Cas 1.
[41] Bacon VC had, at first instance, approved that standard but had held that the trustee's conduct did not meet it: *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 736.
[42] *Speight* v. *Gaunt* (1883) 9 App Cas 1 at 19, *per* Lord Blackburn.
[43] *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 763.
[44] *Knight* v. *Earl of Plymouth* (1747) Dick 120 at 124.
[45] E.g. DRO IRW H701 (1817).

Again, where the trust required any valuations to be made, the deed might permit the appointment of 'a competent appraiser',[46] and the appointment of receivers of rents and agents to manage parts of an estate were quite common.[47] While express delegation clauses of this kind were relatively rare, more oblique authority to delegate was found in the ubiquitous indemnity clause, which expressly referred to bankers, brokers, solicitors and other persons with whom trust money might have been deposited. During the Victorian period a dedicated power authorising trustees' appointment of agents became a more common clause inserted into trust deeds. By the closing years of the nineteenth century a standard form was in use whereby trustees were empowered to 'in their uncontrolled discretion instead of acting personally employ and pay a solicitor or any other person to transact any business or to do any act of whatever nature required to be done in the execution of the trusts . . . including the receipt and payment of money'.[48] Though there was some demand that it be made statutory,[49] it failed. The law did not feel ready to adopt the large powers of delegation found in standard form clauses, its caution stemming partly from a fear that it would encourage delegation to a degree which would harm the beneficiaries, and partly from its perception that its precondition to delegation was not unduly restrictive. In theory the requirement of necessity served the new industrial and commercial society adequately.

Certainly there were few difficulties involved in principle in employing the two most important agents in trust administration, surveyors and solicitors. Surveyors were widely employed throughout the nineteenth century, having an important role to play in the valuation of property for the purposes of investing on mortgage.[50] Their relationship with trustees was demanding, the duties imposed on the latter in selecting and instructing a surveyor in this context being the most closely regulated of all agency appointments. The trustees had to take pains to make a correct appointment. They had, first, to make the appointment themselves.[51] The usual practice was for their solicitor to draw up a list of possible valuers, and for

[46] DRO 5521 M/W1 /1 (1842).
[47] DRO 3162 B/MF 50 (1855).
[48] DRO 4263 B/AB 28 (1885). See too DRO 4552 Z/F1 (1893).
[49] *Minutes of Evidence, 1895,* q. 1424.
[50] See below, pp. 161–2.
[51] *Fry* v. *Tapson* (1884) 28 Ch D 268.

the trustees to make their choice, but they had to take a number of factors into account, the local knowledge of the valuer being just one.[52] While trustees might be tempted to rely on the valuation once they had appointed a competent valuer, the law expected more of them. They were required to use the information and form their own judgment.[53] Adhering to the valuation and adopting the legal limits of mortgage investment did not satisfy the duty of care. They still had to decide if the investment was prudent.[54] This was beyond many trustees, and in practice they generally accepted the figures at face value.[55]

The use of surveyors in this respect was recognised, and their status significantly enhanced, by the provision in the Trustee Act 1888 which entitled the trustees to rely on the advice of a valuer or surveyor not only as to the value of the property, but also as to the amount they could properly and safely advance within the maxima laid down by the Act.[56] This had the effect of lessening the responsibility of inquiry which had rested heavily on trustees, and if the valuer were properly appointed and instructed, and if the advice were given in accordance with the Act, they were justified in relying on it. The valuer's duty was to arrive at a valuation of the property, and also now to decide as to the proportion which he would, in his capacity as an expert, recommend to trustees to advance. Once protection from liability became dependent to a large extent on the report of a professional surveyor or valuer, then the position of those agents became all the more important, and this is reflected in increasing case law on the interpretation of that section.

The legal formalities surrounding the dealings with property, particularly real property, made the solicitor the most commonly used agent of all. Indeed, in the Victorian period, the usual arrangement was for the trust to be administered by a solicitor and his firm, subject to the direction and supervision of the trustees. Sometimes, however, a solicitor was appointed trustee and yet naturally took on the legal business of the trust. This blurring of functions caused particular problems in practice. Trustees were not allowed to

52 See *Budge* v. *Gummow* (1872) 7 LR Ch App 719.
53 See Lord Watson in *Learoyd* v. *Whiteley* (1887) 12 App Cas 727 at 734.
54 *Re Olive* (1886) 34 Ch D 70 at 73.
55 *Fry* v. *Tapson* (1884) 28 Ch D 268.
56 See below, pp. 161–2.

employ agents for pure convenience, to take on the burden of day to day administration of trust which any lay trustee was perfectly capable of undertaking in the normal way of things. This became problematic as the burden of trusteeship grew and it became more common to appoint solicitors as professional trustees. They would only act if they were remunerated. But since a solicitor should not be employed to do those things which a trustee could properly do himself, all charges had to be construed as charges for something in respect of which he was properly employed. There was accordingly a need to separate the trustee and agent functions of a solicitor-trustee for the purposes of remuneration. The law maintained its dislike of remuneration for the office of trustee, and not only did it allow payment only under an express charging clause, but it construed these restrictively so as to ensure solicitor-trustees were remunerated for their agency functions, in other words for their professional work, but not for their duties as trustees *per se*, being those functions which could be carried out by a lay trustee.[57]

Solicitors' accounts for work done in the administration of a trust reveal the nature and extent of professional legal involvement. A testamentary trust, where the functions of executor and trustee needed to be carried out, would, for example, entail the obtaining of probate, finding and reading associated deeds and documents, holding family conferences, checking share certificates, drawing up detailed lists of investments, valuing household goods, making copies of documents for the Inland Revenue, attending beneficiaries, and a great deal of correspondence with the parties, the tax authorities and the companies in which investments were held.[58] The total cost for the administration of such a will would be in the region of £50. Any kind of dispute in relation to the administration generated a huge amount of correspondence, all of which was charged for,[59] and which might also entail the expense of obtaining counsel's opinion. In the longer term the trust's solicitor kept the trustees informed as to the state of investments, as to the occasions on which decisions had to be made and generally seeking directions. Deeds appointing new trustees or releasing retiring ones would also, at intervals, need to be prepared, as well as the constant transactions involved with the investment of

[57] *Harbin* v. *Darby (No 1)* (1860) 28 Beav 325; *Re Chapple* (1884) 27 Ch D 584; but see *Re Fish* [1893] 2 Ch 413.
[58] DRO 1179 B/WT 64 (1878); DRO 337 add 3 B/2/46 Box 8 (1894).
[59] DRO 337 add 3 B/1/12/9 Pt 1 (Box 8) (1906).

the fund. This last was of particular importance in practice. James Forsyte said he had been engaged for fifty-four years 'in arranging mortgages [and] preserving investments at a dead level of high and safe interest'.[60]

While pragmatism and the need to ensure that the wishes of the settlor were carried out led the courts of Equity to allow delegation where necessary or usual, the integrity of the essentially personal nature of the trust was maintained by ensuring that trustees could not, through delegation, divest themselves of their duty towards their beneficiaries. The law allowed them only to delegate ministerial acts, not their discretions. While trustees could seek advice from experts, within the confines of the law, nothing would relieve them from taking essential management decisions themselves. It followed that the selection of the agent had to be their choice, and not that of the settlor,[61] the beneficiary,[62] or their solicitor,[63] as was the issue of the agent's remuneration.[64] Similarly, the distribution of funds to beneficiaries of discretionary trusts was not a matter that could be delegated, and neither could investment decisions.[65] These limits on the use of agents served to preserve the fiduciary character of trusteeship in the trustee personally, and confirmed the relationship with agents to be essentially a functional, business one. The law maintained this view throughout the nineteenth century, allowing the delegation of discretions only in exceptional circumstances.[66]

Just as the law permitted a measure of delegation by trustees to third party agents, so it allowed limited delegation to one of their

[60] John Galsworthy, *The Man of Property* (1906), Chapter 3.
[61] *Foster* v. *Elsley* (1881) 19 Ch D 518.
[62] *Robinson* v. *Harkin* [1896] 2 Ch 415; *Re Duke of Cleveland's Settled Estates* [1902] 2 Ch 350.
[63] *Fry* v. *Tapson* (1884) 28 Ch D 268.
[64] *Re Weall* (1889) 42 Ch D 674.
[65] *Roland* v. *Witherden* (1851) 3 Mac & G 568.
[66] The delegation of discretions could be allowed in exceptional circumstances, and with the expansion of the British Empire in the nineteenth century, the question of the management of trust property abroad became pressing. In *Stuart* v. *Norton* (1860) 14 Moo PC 17 at 33, Knight Bruce LJ stated, 'It is said that, according to the English law, a trustee cannot delegate discretion, cannot act by another in a matter of discretion; but even in the English law that general rule may be open to exception, and their Lordships are not at the present moment prepared to say, that a trustee in England under an English Will, may not effectually appoint an attorney to act in matters of discretion connected with the trust in a Colony or any Foreign country.'

own group. It was, for example, usual for one trustee to be used for a specific task to which he might, for whatever reason, be better suited than the rest of them,[67] and a degree of delegation was thus allowed. A common example of such internal delegation was the receipt of trust income by one trustee. This was generally for purely practical reasons, as where the trust property consisted of realty yielding rents, and it was convenient for one trustee, possibly living locally, to collect them on behalf of them all. Nevertheless, all trustees had to receive it, and to satisfy this requirement all the trustees would sign the receipt, even though only one had the money in his hands, a practice known as signing 'for conformity'. The signing of the receipt was necessary in order to give a valid discharge. If the money in the hands of the receiving trustee were somehow lost, the question arose as to the liability of the other trustees. Their formal acknowledgment of receipt made them prima facie liable for the loss of the money, but if they were able to demonstrate that they had in fact signed purely for conformity and had not received, then, for reasons of both legal theory and public policy, they escaped liability.[68] Indeed, making them liable in this situation, bearing in mind that in all likelihood they would have had no control over the defaulting trustee's appointment, would have constituted such a deterrent to accepting trusteeship that the law very early provided that liability was to be on the basis of fault.[69] Standard form clauses included in all trust deeds under Lord St Leonards' Act of 1859 purported to confirm it.[70] They were not, however, exonerated from the duty to supervise their receiving colleague. Once they had indeed signed the receipt, they were unequivocally put on notice that one trustee had received the money, and it was then their duty to ensure that that colleague put the money under the joint control of all the trustees. To leave the money in the hands of the receiver for an unreasonable period thereafter undoubtedly constituted fault. Lord St Leonards, in his *Handy Book on Property Law,*[71] stressed the dangers involved in not carefully supervising

[67] See *Langford* v. *Gascoigne* (1805) 11 Ves Jun 333; *Clough* v. *Bond* (1838) 3 My & Cr 490; *Cowell* v. *Gatcombe* (1859) 27 Beav 568.

[68] *Townley* v. *Sherborne* (1634) Bridg J 35.

[69] *Ibid.*

[70] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35, s. 31. See too Trustee Act 1893, 56 & 57 Vict. c. 53, s. 24.

[71] Lord St Leonards, *A Handy Book on Property Law* (2nd edn, Edinburgh and London, 1858), p. 166.

the receipt of trust money. So it was probably safe for a trustee to allow his co-trustee to receive the trust money, and to join only for conformity, but it still carried some dangers and it was regarded as safer to have the money paid to a trusted banker in the joint names of all the trustees. This was settled well before the beginning of the Victorian period.[72]

Again, however, delegation to co-trustees was circumscribed by the law. In practice, a particular difficulty was the prohibition on authorising one trustee to receive trust capital moneys on behalf of them all. The receipt of capital money, being the corpus of the trust and its receipt being a fiduciary act, was a different issue altogether, and the courts were not so lenient. One trustee could not be authorised to receive on behalf of them all. When payment of capital money was made by a purchaser, it had to be made to all the trustees, or paid into a bank account in their joint names. The judiciary maintained this view strictly. As late as 1884 a purchaser could insist that all the trustees attend the completion of a sale to receive the trust money, however inconvenient that might be, and despite the trustees all signing the receipt and providing written authority to the trustee to receive. Indeed, as Kay J observed in 1884, the very reason for the plurality of trustees was to ensure that the trust fund would not fall into the hands of just one of them, but be under their joint control.[73]

Equity's toleration of even a limited degree of delegation came at a price. Determined to maintain the personal and joint nature of trusteeship, and to safeguard beneficiaries from trustees who wanted to employ agents simply to lessen the burden of their office at the trust's expense, and possibly none too careful as to the agents they employed, or from trustees who wanted to take a passive role in the administration of the trust, the law imposed a strict regime of liability for the acts of their agents and their co-trustees. As Lord Langdale MR observed in 1841, if trustees did employ an agent, they remained 'subject to responsibility towards their *cestuis que trust*, for whom they have undertaken the duty'.[74] An effective means of protecting the beneficiary would have been to make the trustee vicariously liable for the acts of his agent, even if the agent had been properly appointed and the trustee was not

[72] *Brice* v. *Stokes* (1805) 11 Ves Jun 319.
[73] *Re Flower and Metropolitan Board of Works* (1884) 27 Ch D 592 at 596–7.
[74] *Turner* v. *Corney* (1841) 5 Beav 515 at 517.

at fault in any other way. There were, however, other considerations forcing the law to achieve a difficult balance, considerations which permeate the law relating to trustees throughout the Victorian period. It had to ensure that its rules were not so strict as to operate as a discouragement to potential trustees from accepting the office.[75] Such tensions were particularly felt when commercial considerations began to challenge the traditional conception of trusteeship as an act of kindness springing from a sense of moral duty.

In practical terms the issue of liability for losses caused by the default of the agent was the principal concern of both the law and trustees themselves in the matter of delegation.[76] Indeed, the scope of the necessity and propriety of the appointment of agents was refined within the context of liability because the two concepts were inextricably linked.[77] A trustee would be liable for the default of an improperly appointed agent, and for the defaults of a properly appointed agent if he, the trustee, had been at fault himself. In other words, public policy considerations prevailed, and led the law to reject vicarious liability, preferring instead liability based on the trustee's own fault. As Lord Hardwicke LC stated as early as 1747, 'if there is no *mala fides,* – nothing wilful in the conduct of the trustee, the Court will always favour him'.[78] He implied that unreasonable, unjustified or imprudent conduct might constitute fault, and that this could include such conduct in the appointment of the agent himself. The principal task of the courts in the nineteenth century with respect to powers of delegation was to work out and refine the limits of the responsibility laid down by the court in the eighteenth century through a growth in litigation commensurate with the escalation in the use of agents.

What was never suggested was that the proper appointment of an agent absolved the trustees from all liability for any losses which might ultimately result. To hold otherwise would have departed too fast and too far from the spirit of the no-delegation rule and its underlying Equitable principle. However, if a trustee properly appointed an agent, and then a loss arose through a *vis major* or

[75] See below, pp. 173–7.
[76] The earliest cases concerned this issue: see *Townley* v. *Sherborne* (1634) Bridg J 35; *Knight* v. *Earl of Plymouth* (1747) Dick 120.
[77] *Ex p Belchier* (1754) Amb 218.
[78] *Knight* v. *Earl of Plymouth* (1747) Dick 120 at 126.

a robbery for example, then he was not liable to make good that loss.[79] The implication was that he was not at fault in relation to the loss because it was entirely out of his control. Again, where trustees necessarily and properly appointed an auctioneer, and did all they could, including taking and acting on legal advice, to recover the trust funds from the agent, they were not liable when the agent defaulted. They had 'pursued that which was considered the most prudent and proper course', and they were held not to be liable for the loss.[80] Where executors properly appointed a solicitor to negotiate a compromise and he misappropriated the money they had paid into his hands, they were held not to be liable because they had done 'what any prudent man would think himself safe in doing', and had acted 'in the ordinary course of business then being transacted'.[81] Where the trustees had acted reasonably in the appointment of an agent,[82] for example where they lived at a considerable distance from the trust property,[83] or where the work involved was too onerous or unreasonably inconvenient,[84] they were not liable for any resulting loss. Where a trustee had acted with 'due diligence' in employing an agent to cut timber on the trust estate, which activity caused injury to a third party, he could be indemnified out of the trust estate when sued by the injured man.[85] In a number of cases the appointment of the agent in question by the testator or settlor during his lifetime, or on a recommendation in the will, strengthened the position of the trustee in making the appointment.[86] On the other hand, there was fault, and therefore liability, where an agent was appointed without authority, in other words where there was no express authorisation or where there was no necessity within the criteria laid down by Lord Hardwicke, and so in such cases the trustees were liable for any losses arising from the agent's default.[87] Though unauthorised appointment was usual in practice, cases relatively rarely came before the courts. The imprudent selection of an

[79] *Jones* v. *Lewis* (1750) 2 Ves Sen 241.
[80] *Per* Lord Langdale in *Edmonds* v. *Peake* (1843) 7 Beav 239 at 243.
[81] *Re Bird's Estate* (1873) 28 LT 658.
[82] *Rowth* v. *Howell* (1797) 3 Ves Jun 565.
[83] *France* v. *Woods* (1829) Tam 172 at 173.
[84] *Wilkinson* v. *Wilkinson* (1825) 2 Sim & St 237.
[85] *Benett* v. *Wyndham* (1862) 4 De G F & J 259.
[86] *Knight* v. *Earl of Plymouth* (1747) Dick 120; *Rowth* v. *Howell* (1797) 3 Ves Jun 565; *France* v. *Woods* (1829) Tam 172 at 176; *Re Bird's Estate* (1873) 28 LT 658.
[87] *Clough* v. *Bond* (1838) 3 My & Cr 490.

authorised agent was far more commonly seen.[88] The trustee was at fault if he did not appoint an agent who was properly qualified and able to undertake the task. Furthermore, the trustee was at fault if the agent acted beyond the proper scope of his business.

This was one of the most common instances of fault which rendered the trustee liable for the default of his agent. It was not, for example, within the scope of their employment for solicitors to appoint a valuer or advise as to whether or not to invest in the security in question.[89] But in this context the issue of considerable contemporary practical importance was the receipt of trust moneys by the trust's solicitor, a task which trustees were not permitted to delegate. Until 1881 the rule was that a purchaser could insist that the vendor be present at the completion of a sale to receive the purchase money himself. As this could be very inconvenient, it became the common practice for the vendor's solicitor to receive the money on production of the conveyance, a practice which was given statutory force by the Conveyancing and Law of Property Act 1881.[90] Once the legislature had thus accepted this practice was in the ordinary course of business, trustees for sale naturally asked if they could have the benefit of the provision. In 1883 the court said they could not, for only in the case of moral necessity could trustees delegate the receipt of trust moneys to an agent, and to do so otherwise had long been held to be a breach of trust for which trustees would be liable.[91] In so drawing a distinction between moral necessity and the ordinary course of business, where both had originally been taken to mean common business practice, the court took an uncompromising line in the maintenance of its fundamental prohibition of delegation. The judges vigorously defended their stand in this respect. 'It is said that the rule of the court operates harshly upon trustees', said Kay J in 1885.

> I dissent entirely from that proposition where trustees act in that kind of way. It seems to me that, unless trustees were liable under those circumstances, there would be no use in having trustees at all. The rule of the court would operate most harshly and wrongly upon persons beneficially

[88] *Re Weall* (1889) 42 Ch D 674; *Robinson* v. *Harkin* [1896] 2 Ch 415.
[89] *Fry* v. *Tapson* (1884) 28 Ch D 268.
[90] Conveyancing and Law of Property Act 1881, 44 & 45 Vict. c. 41, s. 56.
[91] *Ghost* v. *Waller* (1846) 9 Beav 497. See too *Bourdillon* v. *Roche* (1858) 27 LJ Ch 681; *Bostock* v. *Floyer* (1865) 35 Beav 603; *Viney* v. *Chaplin* (1858) 2 De G & J 468.

interested if trustees, under circumstances of that kind, were absolved because of the defalcations of the solicitor into whose hands they allowed trust money to go.[92]

The reason for imposing liability on the trustees was that while a solicitor would be properly employed to execute a conveyance, it was not part of his ordinary business to receive trust money and he could not be authorised to do so. Accordingly a purchaser could insist, for his own protection, that the trustees themselves receive the money personally, or that the money be paid directly into a joint account in the names of the trustees.[93] The ruling caused such practical difficulty that only five years later the Trustee Act 1888 was enacted in order to direct that the payment of purchase money could be made to a solicitor or banker, to act therefore as the trustees' agent to receive and give a discharge for any trust money.[94] This was a clear instance of a more liberal and pragmatic legislature seeking to mitigate the severity of the judicial approach.[95]

The relationship between the trustees and their agent did not, however, consist merely of the short-term professional interaction involved in his appointment. It was a long-term relationship characterised by a legal duty of supervision. The court would not condone a failure by trustees adequately to supervise the agents they had appointed. Such a failure constituted fault which would render the trustees liable for losses caused by the agents' defaults. The trustees could not simply rely on the integrity of the agent; they had actively to assure themselves that the agent was properly performing the tasks he had been properly allocated. Mere assurances were not enough.[96] The most common instance of a lack of supervision of agents was to leave trust property in the hands of their agents for an unreasonably long time.[97]

[92] *Re Dewar* (1885) 52 LT 489 at 492.

[93] *Re Bellamy and Metropolitan Board of Works* (1883) 24 Ch D 387. There could be exceptions to the rule, some 'extraordinary reason' for allowing the solicitor to receive the purchase money such as where a trustee lived abroad or in a case of 'moral necessity': see *Re Dewar* (1885) 52 LT 489 at 493, *per* Kay J.

[94] Trustee Act 1888, 51 & 52 Vict. c. 59, s. 2(1); Trustee Act 1893, 56 & 57 Vict. c. 53, s. 17.

[95] But of course the trustees would be liable if they allowed the money to remain in the hands of the agent for an unreasonable length of time.

[96] *Roland* v. *Witherden* (1851) 3 Mac & G 568; *Robinson* v. *Harkin* [1896] 2 Ch 415.

[97] *Moyle* v. *Moyle* (1831) 2 Russ & M 710; *Mathew* v. *Brise* (1845) 15 LJ Ch 39; *Wyman* v. *Paterson* [1900] AC 271.

Some judges, notably Lord Romilly, were far from tender in their treatment of trustees in this respect. He had a tendency to favour vicarious liability, holding the trustee liable whenever an agent defaulted and caused a loss to the estate, apparently irrespective of any fault on the part of the trustees, with a view to protecting the beneficiaries. But even in his cases, which have been considered as sitting uncomfortably with the trend of authority, it is possible to detect some element of fault on the part of the trustee. He held a trustee liable for the default of his solicitor, but observed that the trustee had not taken all possible precautions to ensure that the mortgage in question had in fact been made.[98] It was, furthermore, not in the ordinary course of business for the trustee to place money in the hands of a solicitor to invest it.[99] He held a trustee liable where he had trusted his solicitor unquestioningly, even though the appointment was a proper one and the solicitor of a good reputation,[100] a decision which *The Economist* criticised as 'most gross injustice'. 'The Trustee', it continued, 'might with as much justice be made liable for loss by an earthquake.'[101]

In just the same way, fault was a pre-requisite to trustees' liability for the defaults of their co-trustees. It had long been settled that a co-trustee was not liable for the acts and defaults of his co-trustees, and that only trustees who were at fault were liable for breach of trust.[102] It was all too easy, however, for a trustee to find himself at fault, and therefore liable, even if he considered himself as having played no active part in the principal breach. It has been seen that mere signing for conformity was not enough in itself to make a trustee liable, but that he would be regarded as at fault if he had failed to bring the property in question under joint control within a reasonable time without inquiry, an inactivity which would have permitted the breach to take place.[103]

[98] *Bostock* v. *Floyer* (1865) 35 Beav 603.

[99] As Lindley LJ pointed out in *Speight* v. *Gaunt* (1883) 22 Ch D 727.

[100] *Sutton* v. *Wilders* (1871) LR 12 Eq 373. See too *Hopgood* v. *Parkin* (1870) LR 11 Eq 74, but note that Lindley LJ questioned this decision in *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 761; (1870) 49 *Law Times* 24; *The Economist*, 30 April 1870, p. 535 (vol. 28).

[101] *The Economist*, 29 July 1871, p. 905 (vol. 29).

[102] *Townley* v. *Sherborne* (1633) Bridg J 35.

[103] *Lewis* v. *Nobbs* (1878) 8 Ch D 591. Lord Thurlow LC observed in 1790 that 'if a trustee will suffer a co-trustee to detain a sum of money belonging to the trust estate, they are both liable': *Keble* v. *Thompson* (1790) 3 Bro CC 112.

Similarly, he would be liable if he received the money himself and handed it to his co-trustee without subsequent inquiry, and again if he became aware a breach of trust had occurred, and did nothing to prevent or remedy it. These were all well-recognised heads of passive breach.[104] It was all too often 'that degree of negligence, which is frequently observed in very honourable men',[105] which gave rise to liability. In general no moral blame attached to them, but they should not have trusted their colleague so unquestioningly.

If a number of co-trustees were so held personally liable for a breach of trust, it was clear at the beginning of Victoria's reign[106] that their liability was not only joint but several too[107] and that a beneficiary could claim the whole loss from just one, some, or all the trustees. The concern of the beneficiaries was, of course, to recoup their losses, and to them internal questions of relative fault were unimportant. While the operation of the rule was favourable to the beneficiaries, it could be unduly severe on a trustee whose personal circumstances enabled him to make good the loss, and would naturally therefore be sued by the beneficiaries, leaving his poorer – but still liable – colleagues untouched. Accordingly, Equity took the view that among themselves the trustees were equally liable, and allowed the trustee who had paid more than his share to claim equal contribution from his co-trustees who were also liable.[108] In 1833 Sir John Leach MR stated that 'all parties to a breach of trust are equally liable; there is between them no primary liability'.[109] The force of this was clear where one trustee in practice took on much of the burden of the administration, and in the course of it committed a breach of trust, possibly an honest mistake, possibly an error of judgment. In such a case it would be wrong to deny that trustee the contribution of his colleagues, for 'the Effect would be a Premium to Trustees to be idle; as the most active would incur the Responsibility'.[110] The words of Sir William Grant MR in agreeing

[104] They were reiterated by Lord Westbury LC in *Wilkins* v. *Hogg* (1861) 31 LJ Ch 41.
[105] *Lord Shipbrook* v. *Lord Hinchinbrook* (1810) 16 Ves Jun 477.
[106] *Walker* v. *Symonds* (1818) 3 Swan 1 at 75, *per* Lord Eldon LC.
[107] *Fletcher* v. *Green* (1864) 33 Beav 426 at 430.
[108] *Ibid.*; *Birks* v. *Micklethwait* (1864) 33 Beav 409.
[109] *Wilson* v. *Moore* (1833) 1 My & K 126 at 146.
[110] *Per* Sir Samuel Romilly in argument in *Lingard* v. *Bromley* (1812) 1 V & B 114 at 116.

with this argument in 1812 were revealing. 'Nothing could be more mischievous', he said,

> than to hold, that Trustees may . . . avoid Responsibility by throwing the Burthen upon the Person, in whom they have reposed this blind Confidence. The Case is not, that they abstain merely from interfering; but they enter upon the Trust; make themselves Parties to every Proceeding; give the Sanction of their Names to each Transaction; and now say, they are to be considered as total Strangers; and all, that has been done, is to be taken as the Act only of their Co-trustee.[111]

Equal liability was thus imposed irrespective of any varying measure of culpability. Indeed when Sir John Leach's decision was affirmed, the Lord Chancellor remarked that though 'the moral impropriety, indeed, if any, is extremely slight', still there was equal liability.[112]

Discrepancies in degrees of fault were not, however, entirely ignored. They were addressed in special and very limited instances where the court relieved trustees from the obligation to contribute, and as such constituted some limitation of liability. This denial of the benefit of contribution to a culpable trustee ensured that he bore the entire loss himself and thus amounted to a complete indemnity to his co-trustees. A co-trustee would be granted such indemnity where the trustee committing the active breach was fraudulent or he had benefited personally. But the principal instance where indemnity was allowed was the common case where the trustee was also a solicitor and the co-trustee had left the management of the trust to him.[113] Central to this indemnity was the controlling influence of the solicitor-trustee on the other trustee. In one case in 1887,[114] where the trustees were a solicitor and the widowed tenant for life, the court allowed the latter indemnity on the ground that the solicitor did not communicate his intentions and actions sufficiently to the widow so as to enable her to exercise an independent judgment and to make the breach her act as well as his. She had trusted him in the making of investments, which he was being paid to do, and had been misled by him. Indemnity was, however, rare, and the

[111] *Lingard* v. *Bromley* (1812) 1 V & B 114 at 117.

[112] *Wilson* v. *Moore* (1834) 1 My & K 337 at 353.

[113] *Lockhart* v. *Reilly* (1857) 1 De G & J 464.

[114] *Re Partington* (1887) 57 LT 654. The mere fact that one trustee was a solicitor was not enough to compel him to indemnify his co-trustee: *Head* v. *Gould* [1898] 2 Ch 250 particularly at 265.

normal rule of contribution was generally maintained even where its operation was hard on individual trustees. In 1886, for example, Cotton LJ held that 'it would be laying down a wrong rule to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee'.[115]

In the face of the ease with which the law found them liable when their co-trustees or agents were in default, and the objective but fluid boundaries of prudent business practice, Victorian trustees naturally sought to protect themselves as far as they could from such personal liability. Even before some settlors included express delegation clauses in their trust instruments, nearly all had long included express indemnity clauses purporting to protect their trustees from the defaults of their co-trustees and their agents. The inclusion of indemnity clauses in trust instruments, to enable trustees seeking to escape liability for passive breaches where the trust property had not come into the hands of the trustee being charged and, if possible, for active breaches,[116] was common from the early years of the nineteenth century.[117]

An early example of 1807 provided that trustees

> shall be chargeable . . . only for such monies as they shall respectively actually receive by virtue of the Trusts hereby in them reposed notwithstanding his or their signing or giving any Receipt or Receipts for the sake of Conformity and any one or more of them shall not be answerable or accountable for the others or other of them but each and every of them only for his own Acts Receipts Neglects or Defaults respectively. And that they or any of them shall not be answerable or accountable for any Banker Broker or other person with whom or in whose Hands or Custody any part of the said Trust monies and premises shall or may be deposited for safe custody nor for the insufficiency or deficiency of any Security or Securities Stocks or Funds in or upon which the said Trust Monies and premises . . . shall be placed out or invested or for any Misfortune or Loss which may happen in the execution of the . . . trusts . . . except the same shall happen by or through their or his own wilful Misconduct Neglect or Default respectively.[118]

Later versions differed very little, all including the same essential elements. Unless the loss happened through his own wilful

[115] *Per* Cotton LJ in *Bahin* v. *Hughes* (1886) 31 Ch D 390 at 396.
[116] See for example *Brice* v. *Stokes* (1805) 11 Ves Jun 319.
[117] See for example *Todd* v. *Wilson* (1846) 9 Beav 486, where a will of 1836 contained 'the usual trustees' indemnity clause'; *Pride* v. *Fooks* (1840) 2 Beav 430.
[118] DRO 3459/F50 (1807).

default, the trustee was liable only for his own actual receipts, notwithstanding having signed the receipt for conformity. He was not liable for the acts, receipts or defaults of his colleagues and was not liable for the acts of his agent. Some indemnity clauses reduced this simply to a brief provision that trustees were not answerable for each other, nor for an agent, nor for any 'involuntary loss'.[119]

So common were these indemnity clauses that they found statutory expression as early as 1859, when section 31 of the Law of Property and Trustees Relief Amendment Act, Lord St Leonards' Act, provided that they should be read into every trust instrument.[120] Although most deeds continued to recite the full clause, by the end of the century the clause was often omitted altogether, or the deed included some further dispensation, for allowing a lesser investigation of title for example, 'in addition to the ordinary indemnity . . . by law given to trustees'.[121] Since the term 'wilful default' was defined as a 'want of ordinary prudence',[122] common form express clauses, and the statutory form, did no more than hold trustees liable for the acts of their co-trustees and agents only if they themselves had been at fault. Thus the Equitable standard of care which had been developed by the courts was unaffected. And doing no more than giving the existing law the authority of statute law,[123] it was of limited assistance to trustees and was regarded by professional men as being of negligible value.[124] It did little to assist the honest and unpractised trustee dominated by an experienced colleague. Cases abounded of elderly clergymen, widows or farmers asked by their co-trustee, an experienced businessman, to sign documents of transfer which then enabled him to misappropriate the property, and who then found the indemnity clause did not help them. In 1854[125] Sir John Romilly MR said of express clauses that they did not protect a trustee who did not do all he should to secure the trust fund and to prevent

[119] See for example DRO 3162 B/MF 50 (1855).
[120] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35, s. 31.
[121] See for example DRO 5521 M/E7/4 (1880); DRO 1335 B/F18 (1883).
[122] *Per* Lindley LJ in *Re Chapman* [1896] 2 Ch 763 at 776.
[123] *Per* Lord Selborne LC in *Re Brier* (1884) 26 Ch D 238 at 243.
[124] Sylvester Joseph Hunter, *The Act to Amend the Law of Property and to Relieve Trustees (22 & 23 Vict., c. 35): With Introductions and Practical Notes* (London, 1859), p. 95.
[125] *Dix* v. *Burford* (1854) 19 Beav 409.

his co-trustee receiving it, and he decided the same way in 1858.[126] With some exasperation he observed that

> This clause is constantly brought forward to sanction the misapplication of trust moneys; but until it is provided, by the instrument creating the trust, that the trustee shall be liable for no breach of trust, provided he does not obtain a personal advantage, I shall not consider the clause as giving a trustee the right or liberty of conniving at a breach of trust. Even if an instrument containing such an inconsistent clause were brought before me, I express no opinion on the result; but until it is, I cannot allow a trustee to say that it is not his business to act properly in the performance of his duty as trustee.[127]

Trustees could not as a rule escape their duty to supervise each other and to interfere and correct where necessary.[128] Only with very careful drafting could that effect be achieved. In 1861, an indemnity clause which was not in common form was held to be sufficiently widely and strongly worded to relieve the trustee from liability even from such passive breaches of trust.[129] The only new effect the statutory clause had, apart from ensuring that all trust instruments had the benefit of an express declaration of the law, was to put the onus on the beneficiary to prove the wilful default of the trustee in order to make him liable, rather than making the trustee demonstrate that his conduct had been proper in order to escape liability.[130] The positive benefits of indemnity clauses were limited to serving as an unambiguous declaration of the limits of trustees' liability in an area of law which was perceived as uncertain. Though increasing the expense, many settlors continued expressly to include the clause, knowing that it was highly valued by trustees as much needed, though possibly false, reassurance to them especially if they were taking on the office for the first time.

In allowing delegation at all the law undoubtedly relaxed the rigorous approach to trusteeship which legal theory demanded, and adopted a more realistic, pragmatic and tolerant approach, an approach which it would of necessity have had to implement when

[126] *Brumridge* v. *Brumridge* (1858) 27 Beav 5, an example of a standard form indemnity clause prior to the passing of Lord St Leonards' Act.

[127] *Brumridge* v. *Brumridge* (1858) 27 Beav 5 at 7.

[128] See Lord Cottenham LC in *Styles* v. *Guy* (1849) 1 Mac & G 422 at 435.

[129] *Wilkins* v. *Hogg* (1861) 31 LJ Ch 41.

[130] *Per* Lord Selborne in *Re Brier* (1884) 26 Ch D 238 at 243. Section 31 of the 1859 Act was replaced, in virtually unaltered language, by section 24 of the Trustee Act 1893, 56 & 57 Vict. c. 53.

increased commercial sophistication made delegation an everyday necessity for trustees. By adopting clear commercial criteria to measure the propriety of appointment, the law had the potential to keep in pace with the continued commercialisation of Victorian society and the consequent demands of those involved in practical trust administration. In the context of delegation, therefore, statute law and case law moved in the same direction to the same end. That the next century was to begin with a demand for far wider powers of delegation was due largely to the unrealistic attitude the courts had taken in their interpretation of the standard of care, not in relation to the appointment of agents, but rather in its demands in relation to their supervision and to the tasks the trustees delegated to them. In this the increasing distance from everyday commercial practice led to a general dissatisfaction with the rules as to delegation. Some trustees and their legal advisers wanted an even wider power to delegate, since there existed a number of instances where delegation was not allowed, and this was popularly perceived to be unreasonable. So while a trustee could employ an accountant to undertake the drawing up of complicated accounts if a prudent man would have done so, he could not appoint an accountant to undertake routine trust accounts.[131] It was also doubtful how far a trustee could employ an agent to collect rents of certain properties.[132] It was suggested that a general power to delegate would overcome such problems and go a long way to easing the difficulties experienced at the end of the nineteenth century in relation to the recruitment of trustees.[133] Nevertheless, that the judiciary and legislature perceived the fundamental premise as satisfactory is clear from a provision in a draft bill to codify the law relating to private trusts and trustees published in 1908. It proposed to make it a statutory duty not to delegate, allowing it only where there was express authorisation in the trust instrument or where a person of ordinary business prudence would do so in the management of his own affairs, as long as it was in the agent's ordinary scope of business.[134] The central issue, therefore, was the meaning the law ascribed to

[131] *New* v. *Jones* (1833) 1 H & Tw 632n; *Henderson* v. *M'Iver* (1818) 3 Madd 275.

[132] *Minutes of Evidence, 1895,* qq. 1416–1423.

[133] See evidence of Mr Morton, a Liverpool solicitor, in *Minutes of Evidence, 1895*, q. 1447.

[134] 'Report, Special Report and Second Special Report from the Select Committee on the Trusts Bill', *House of Commons Parliamentary Papers* (1908) (355) x. 1155, clause 27(1). The dissatisfaction of the minority expressed in the Select

'ordinary business prudence' and whether that adapted sufficiently to changing commercial practices.[135]

Committee on Trust Administration in 1895 yielded results in section 23(1) of the Trustee Act 1925, 15 Geo. V c. 19 which transmuted the law to a power to delegate with limits. Trustees could legitimately use agents at the expense of the trust for any ministerial task they wished without having to justify their appointment. In so doing it significantly widened the power of delegation.

[135] See below, pp. 151–9.

5

TRUSTEES IN THE COMMERCIAL CONTEXT

The essential nature of the trust as a private arrangement of property interests, conceived and developed to preserve, maximise and transmit wealth, inevitably required its trustees to operate in a commercial context. In some instances the commercial context was intensely practical, as in the common situation where the trust fund consisted of the settlor's business, which the trustees were directed to conduct after his death. In other cases the commercial context was less immediate, but not only did it determine the nature and extent of the demands of beneficiaries, it also determined in some cases their actual entitlement. So, for example, the current return on fixed interest securities and the yield of an unconverted trust fund would determine whether or not a life tenant would challenge a conversion,[1] and the rate of interest allowed under the rules of apportionment would be equally determined by the commercial context. The latter was broadly accepted at 4 per cent and remained so throughout most of the nineteenth century,[2] being perceived as a figure which represented financial solidity, security and wise investment. But when in the later years of the century the economy was in difficulties, the issue became one of some uncertainty and judicial disagreement, and the actual rate which a tenant for life received was allowed to fluctuate with the return from Consols. When in 1895 Kekewich J, typically pragmatic, adopted a lower rate of 3 per cent because he had looked to the rate the trustees could get on trust securities, he said it seemed to him to be 'bordering on an absurdity for judges . . . to say that interest is to be calculated at 4% when not only trustees, but ordinary prudent investors

[1] See above, pp. 68–77.
[2] See for example *Meyer* v. *Simonsen* (1852) 5 De G & Sm 723; *Brown* v. *Gellatly* (1867) 2 LR Ch App 751.

determined not to speculate, cannot obtain 3%'.[3] The state of the markets here directly affected a beneficiary's entitlement, but the extent to which the courts should take such economic considerations into consideration was problematic. While they were correct in seeking to ensure that the rate was realistic, in times of economic fluctuation this could result in rates varying in the short term, and this was an unsatisfactory basis for judicial policy.[4] In this, as in so many aspects of trust administration in a complex commercial society, such variations made it difficult to identify any clear rules which guided the courts, and it resulted in delays and uncertainty in daily practice and administration. Economic considerations also shaped other rules of trust administration, notably those in the sphere of investment. Furthermore, the standard of care expected of trustees in carrying out the duties of their office was set against commercial criteria, and the ultimate success or failure of the administration of a trust was determined by the extent of the yield and the security of the capital fund. With such a major commercial dimension to trust administration, much of the work of trustees took them out of an essentially private and domestic arrangement and required them not only to interact with wider market forces but to address their new vulnerability to the cycle of economic booms and depressions.[5]

The commercial dimension to trust administration was co-extensive with the existence and growth of the trust concept itself, but the Victorian period saw it emerge as a factor of considerable sophistication and real importance in the everyday management of trust affairs. This was of course partly the natural result of the increased complexity of the national economy, but those external developments provoked a much more profound change which gathered its own momentum. The new commercialisation of the English society and economy, begun in the late eighteenth century and reaching its zenith in the Victorian period, changed the character of the office of trustee. The trustee's function evolved from that of a paternalistic private individual managing the affairs of a trust as he would his own in a circumscribed sphere where he retained

[3] *Re Goodenough* [1895] 2 Ch 537 at 540.

[4] *Rowlls* v. *Bebb* [1900] 2 Ch 107. See too *Re Woods* [1904] 2 Ch 4 at 9 and *Re Chaytor* [1905] 1 Ch 233, where the rate was reduced in line with the reduced income derivable from trust securities.

[5] See generally S. B. Saul, *The Myth of the Great Depression 1873–1896* (London, 1969).

significant control and discretion to manage them as he thought best. The commercialisation of the context of trust administration, intensified by the widespread use of professional agents who despite their social advancement had retained an unmistakably commercial outlook, widened its sphere of operation and, as well as raising the expectations of beneficiaries, raised those of the law as to the extent and quality of trustees' engagement with the economic process. In short, the Victorian period saw the transformation of the trustee from amateur to professional, from layman to businessman.

In a society dominated by the mercantile ideal, where trust funds were so often depended upon for the economic and social survival of many beneficiaries, the demands of those beneficiaries were generally mercenary in character. Their requirements were for a high and steady income, for maintenance payments, for advancements, for particular sales to be made, but, above all these, for an investment policy which suited their individual needs. In the usual nineteenth-century trust of personalty for persons in succession these demands, and the tensions they created, are evident. The life tenant generally sought the highest possible income from the trust fund, while the remainderman wanted the capital to remain secure. To satisfy the life tenant would require a certain plan of investment, a plan which in terms of investment practice would in all likelihood undermine the security of the remainderman's interest. Investments which secured the capital, however, did not generally yield a satisfying income. Beneficiaries' demands as to investments were informed in the sense that reports and analyses as to the performance of investments were not limited to specialist journals such as *The Economist*. National newspapers contained daily reports of the money markets, correspondence on investment matters was common, local newspapers did not neglect the issue and the great number of monthly and weekly magazines contained regular articles on issues of economic interest. In this way not only were demands formed, but expectations were considerably raised.

Georgian notions of the sanctity of the trust fund, the protection of the beneficiaries and strict impartiality between them, as well as the economic conditions of the eighteenth century had, however, shaped the policy of the law towards trustee investments. Since those legal requirements could be achieved primarily through ensuring that investments possessed certain financial qualities, economic considerations dictated the policy of the law and required

direct interaction between the trustees and the financial markets for their implementation. The result was a narrow, exclusive policy, rendered inflexible by its underlying assumptions. As such it was to endure in its essentials throughout Victoria's reign, despite far-reaching changes in the commercial and financial climate of the country. The law, both judge-made and statutory, was slow to respond to changes in the economic situation. In implementing an investment policy in a dynamic commercial context, trustees thus found themselves caught between the high expectations of beneficiaries who saw the new investment opportunities of the Victorian age, the restrictive imperatives of the law and their own personal limitations. Most trustees had been appointed for their family connections, reliability and integrity rather than their commercial abilities, and they found themselves all too often insufficiently financially skilled to engage in the new markets, even within the constraints imposed by the law. The law, either because it recognised this or because it encouraged it, persisted with a restricted policy. The demands on and expectations of trustees in the nineteenth century in this respect were in many cases overwhelming, particularly in view of their underpinning by ferocious rules of personal liability.[6] They undoubtedly contributed in no small measure to the recruitment problems which characterised the century.[7]

The investment policy of the law was originally constructed and promulgated entirely by the judiciary. Eighteenth-century trustees, often uncertain as to what securities they could invest in, sought the court's advice for their own protection.[8] The Court of Chancery, with its long experience of investing the considerable moneys which came under its control, felt well qualified to rule on such matters, and, as Lord Eldon observed in 1802, on 'what the Court will decree it expects from trustees and executors'.[9] Since the underlying policy for court funds of this nature was to ensure the capital was secure, the investments favoured by the court were those Government securities and mortgages which furthered this object, and all unsecured, speculative or hazardous investments were distrusted and disliked. The experiences of the early eighteenth century had clearly

[6] See below, pp. 169–73.
[7] See above, pp. 25–31, 49.
[8] See G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14 at 23–4.
[9] *Howe* v. *Earl of Dartmouth* (1802) 7 Ves Jun 137 at 150.

reinforced the conservative and prudent tendency of the court in this respect. Many trustees had been infected with speculative fever at the time of the South Sea Bubble in the early eighteenth century and had been induced, along with a large proportion of the population, to invest in some of the bubble companies of the time. When the bubble burst, trust funds were lost and many beneficiaries were left either penniless or in straitened circumstances. The considerable funds in the custody and control of the Court of Chancery had suffered through similar investment by court officials, and the court's response was to regulate the permitted investment of its funds.[10] Government securities were adopted as the only security in which suitors' and other funds could be invested.[11] Since the court funds included, among others, trust funds, the policy naturally came to be adopted in relation to trustees' powers of investment. The court laid down these permitted investments in its Rules of Court, which accordingly constituted the first 'code' of trustee investments.[12]

Underlying this code was the requirement that while the trust property was never to lie unproductive, it was never to be exposed to hazard. The security of the trust fund was paramount. 'No man', stated the Master of the Rolls in 1801, 'is justified in putting the property, of which he is trustee, in jeopardy'.[13] The requirements of this policy resulted in early Victorian trustees finding themselves severely limited in their choice of investments. Investment on personal security was forbidden as nothing less than 'a species of gambling',[14] and investment in company shares was prohibited as inherently unsafe, depending as it did on the management skills of the directors.[15] Even the stock of the Bank of England and East India Stock were forbidden, because they did not really constitute a security at all, just a right to profits which were speculative,[16] and yet it was well known that they were safe investments. Mortgages of land were popularly regarded as good and safe investments, and

[10] See E. Heward, 'The Early History of the Court Funds Office' (1983) 4 *Journal of Legal History* 46.
[11] See 'Chancery Funds' (1867) 16 *Cornhill Magazine* 200.
[12] See too M. R. Chesterman, 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in G. R. Rubin and David Sugarman (eds.), *Law, Economy and Society* (Professional Books, 1984), pp. 157–64.
[13] *Pocock* v. *Reddington* (1801) 5 Ves Jun 794 at 799.
[14] *Per* Lord Commissioner Hotham in *Adye* v. *Feuilleteau* (1783) 1 Cox 24 at 26.
[15] See Lord Hardwicke LC in *Trafford* v. *Boehm* (1746) 3 Atk 440 at 444.
[16] *Howe* v. *Earl of Dartmouth* (1802) 7 Ves Jun 137 at 150.

as such should have appealed to the courts for adoption as a trustee investment, but throughout the eighteenth century judicial attitudes were not unequivocal as to their desirability or legality in this context. Lord Thurlow had disapproved of them in 1785,[17] but in 1801 Lord Alvanley had said that a trustee was properly executing his trust when he invested the property 'either in well secured real estates or upon Government securities'.[18] As late as 1855 Turner LJ said that he was 'not disposed to hold out any encouragement whatever to the notion that a trustee, in the absence of any power for that purpose, is entitled to lay out the trust fund upon mortgage'.[19]

Only Consols were unequivocally accepted. Consols, or 'the Funds', were the various stocks representing Government borrowing. Before the beginning of Victoria's reign these had been consolidated into a number of classes, the most commonly held being the Three per cent. Consolidated Annuities, 'the majestic Consols of Victorian England'.[20] Their advantages as a trustee security were clear: they were safe – the safest investment after land; they were cheap; they were easy; they were easily convertible into cash.[21] The courts adopted them enthusiastically, and investment in Consols was the prime trustee investment, not as a result of any law to that effect, but because it was the one adopted by the Rules of the Court of Chancery for the investment of funds under its control as a result of its convenience and security.[22]

The control of trustee investment by the judicial list of investment for court funds was not perceived as universally satisfactory. On the one hand it was felt that it gave the necessary degree of certainty and flexibility. The list was clear, amendment was possible through application to the court, and the judges had considerable experience of secure investment practice. Against that was a lack of openness and accessibility and the expense involved in making applications to the court. Experience had shown that such applications

[17] *Ex p Cathorpe* (1785) 1 Cox 182.
[18] *Pocock* v. *Reddington* (1801) 5 Ves Jun 794 at 800.
[19] *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104 at 108.
[20] W. J. Reader, *A House in the City* (London, 1979), p. 13.
[21] See H. Bellenden Ker, 'Minutes of Evidence before the Select Committee on Investments for the Savings of the Middle and Working Classes', *House of Commons Parliamentary Papers* (1850) (508) xix. 169, qq. 667, 704.
[22] See Lord Cranworth LJ in *Robinson* v. *Robinson* (1851) 1 De G M & G 247 at 255–6.

could use up to half a year's income of a small trust.[23] But the principal reason for dissatisfaction with the court list as the arbiter of permitted investment was the considerable popular, parliamentary and professional doubt that judges were indeed best equipped to assess the desirability of investments. This was part of a wider disquiet as to the suitability of the judiciary in commercial matters in general, particularly commercial practice, and of a frequently expressed demand that such matters be put to a jury. As one witness reminded the Select Committee on Trust Administration in 1895, 'judges grow old, and they are a class apart from the every-day life of commerce, and they forget, or do not know really, what is going on; changes now-a-days are rapid and great'.[24] Businessmen felt the same, and regarded judges as in general knowing little about investment issues,[25] while in Parliament it was said that the judges were 'extreme', indeed 'superstitious' in the extent to which they had restricted trustee investments.[26] Whether through ignorance or conservatism, it has been shown that in general the judges invested their considerable fortunes largely in Government securities. With few exceptions, they were as traditional in their personal investment habits as they were in their judicial pronouncements.[27] Throughout the nineteenth century, the court was inherently reluctant to look much beyond Consols as the preferred trustee investment.

By the early Victorian period, trustees had a measure of certainty in their investment practice, though it was a certainty born of restriction and bringing with it recognised dangers. There had, for example, been such a high demand for mortgages in the eighteenth century that the supply of land available for mortgage had been outstripped. They had, however, no flexibility. As trade and industry grew, trust funds seeking investment, and pressure on the very limited range of permitted securities, increased. Trustee investment became problematic. Prior to the Industrial Revolution the choice of investments open to any investor was in absolute terms very small, consisting primarily of land, Government securities, mortgages, personal loans and the stock of the great joint stock companies. The beginning of Victoria's reign saw a huge expansion of new

[23] See Mr F. Maclean, *Parl. Deb.,* vol. 334, ser. 3, col. 1492, 3 April 1889 (HC).
[24] *Minutes of Evidence, 1895*, q. 1428.
[25] *The Economist*, 29 November 1873, p. 1439 (vol. 31).
[26] Lord Salisbury in *Parl. Deb.,* vol. 326, ser. 3, col. 1327, June 7 1888 (HL).
[27] See Daniel Duman, *The Judicial Bench in England 1727–1875* (London, 1982), pp. 126–44.

types of investment, each type furthermore being well represented by a range of actual securities. The chartered trading companies, the joint stock banks, the public utilities and the improvements in transport, starting with road improvements funded by the turnpike trusts, the river navigations, the canals and ultimately the building of the railways from the 1840s, as well as England's expanding Empire, all provided unprecedented opportunities for the placement of capital and the collection of its yield. This expansion continued throughout the nineteenth century as the securities of private enterprise, at home and abroad, were increasingly available. Many of these securities frequently outperformed both mortgages and Consols and yet, since none was permitted by the Chancery list, the tensions between commercial reality and the prudence of the law were evident. The investment in question in the leading case of *Dimes* v. *Scott* in 1828,[28] for example, was a security of the East India Company which undeniably yielded far more than an authorised investment, and yet the executors were obliged to convert and reinvest in the 3 per cent stock, which was considered by the court as 'the fit and proper security'.[29] Throughout most of the nineteenth century, despite the transformation of investment conditions, the traditional permitted investments remained the sole securities on the court list. They were acceptable only in the sense that they were well known and understood by settlors, trustees, their advisers and the beneficiaries. In general too they were readily available, and they fulfilled what the law regarded as the prime duty of trustees, namely to provide the tenant for life with a steady income, while keeping the capital safe. In an age unfamiliar with the ravages of inflation and accordingly one in which trust funds retained their value and consistently yielded the income the settlor had originally contemplated, it was not thought pressing for statute to intervene.

It was in the settlement of new mercantile fortunes that conflict between permitted investments and public demand was particularly evident. Settlors with commercial knowledge and experience had been accustomed to investing their fortunes with total freedom to acquire the best possible return or long-term security, and they wanted any funds they settled to continue to perform as well as possible in the prevailing economic conditions. Most settlors achieved

[28] *Dimes* v. *Scott* (1828) 4 Russ 195.
[29] *Ibid*., at 207.

this by express provision, but in the absence of such clauses, or in the face of their strict construction by the courts, the law clearly lagged behind public expectations. Since many mercantile settlors appointed fellow businessmen among their trustees, such demands endured into the future. The frequent applications to the court to establish whether individual investments were permitted or not, or to invest more widely,[30] and a constant public demand for the widening of the range of permitted investments provoked the first statute addressing trustee investments in 1859. Lord St Leonards, a driving force behind the statutory reform of the law of trust administration, had in 1857 introduced a bill seeking to relieve trustees from liability for honest breaches of trust. This bill, which ultimately took the form of the Law of Property and Trustees Relief Amendment Act 1859,[31] originally made no provision for investment. It was not until the final stage of its passage through Parliament that the clause which became section 32 was proposed, the clause being introduced in Committee by George Hadfield, the Member for Sheffield who was both solicitor and of a merchant family,[32] only ten days before the Act received the royal assent. The section allowed a trustee, if he was not expressly prohibited from doing so by his trust instrument, to invest in real securities in any part of the United Kingdom,[33] in Bank of England or Ireland stock, and in East India stock. It was agreed to with no reported discussion, because, doing little more than reflecting current practice, it was relatively uncontroversial. It was, nevertheless, significant. Primarily it confirmed that the existence of only one undoubted trustee investment, Consols, was not only insufficient in view of the funds seeking investment, but was an unnecessary and damaging restriction. The removal of trust funds from profitable and secure but prohibited investments had in practice caused hardship, indeed ruin in some cases, and the section addressed that grievance. The enactment was also legislative confirmation of the legitimacy of mortgages of land as trustee investments. The principal significance, however, was that as the first statutory provision for the widening of trustees' powers of investment it indicated a move away from regulation by court list.

[30] *Minutes of Evidence, 1895,* qq. 838–41.
[31] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35.
[32] *Parl. Deb.,* vol. 155, ser. 3, col. 885, 3 August 1859.
[33] See Avner Offer, *Property and Politics 1870–1914: Landownership, Law, Ideology and Urban Development in England* (Cambridge, 1981), pp. 137–47.

The enactment revealed profound tensions between the judiciary and the legislature. While trustees, settlors and Parliament approved it, the judiciary regarded it with serious misgiving, even in this relatively mild form. Shortly after the Act was passed, the case of *Re The Colne Valley and Halstead Railway Bill*[34] was heard and the decision showed the judiciary being strikingly cautious in the matter of trustee investment.[35] The court was faced with an admittedly safe investment – the New East India 5 per cent Loan – and yet on the construction of the Act it felt serious doubt as to whether it was authorised by the new investment clause, primarily because it was not guaranteed by the Imperial Government. While there was some sound legal reason for refusing the application, it was not overwhelming, and reveals a clear conservative policy. Lord St Leonards himself, in his response to an extraordinary request by the Lord Chancellor, Lord Campbell, for his view on the matter, said that he wholly disapproved of the investment clause, entirely disclaimed being the author of it,[36] and implied that he intended to ensure its repeal.[37] He and the Lord Chancellor were in agreement that the reason why the clause was so objectionable was that it was 'in direct opposition to the principle of law which governs the relative rights of tenants for life and reversioners, and that it would lead to jobbing with trust funds'.[38] Taking it at its face value, the extent to which those dangers were real was doubtful. The security was widely accepted as safe and the dangers of jobbing were exaggerated. Despite the best efforts of Lord St Leonards to have the section repealed in the following year on the basis of its ambiguity, the House preferred to suggest that it be redrafted in unambiguous terms and refused to repeal it.[39] Indeed, it went further, and the Law of Property Act 1860 made it retrospective.[40] This deprived

[34] *Re The Colne Valley and Halstead Railway Bill* (1859) 29 LJ Ch 33. The case concerned an application to the court to invest in the New East India 5 per cent Loan, raised under the powers of the East India Loan Act 1859, 22 & 23 Vict. c. 39, a statute which received the royal assent on the same day as Lord St Leonards' Law of Property and Trustees Relief Amendment Act, 22 & 23 Vict. c. 35.

[35] See G. Keeton, *Modern Developments in the Law of Trusts* (Belfast, 1971), pp. 47–8.

[36] *Re The Colne Valley and Halstead Railway Bill* (1859) 29 LJ Ch 33 at 37.

[37] See Lord St Leonards' explanation of the scope of the section in *The Times*, 4 September 1860, p. 4, cols. e–f.

[38] *Re The Colne Valley and Halstead Railway Bill* (1859) 29 LJ Ch 33 at 37.

[39] *Parl. Deb.*, vol. 158, ser. 3, cols. 104–7, 25 April 1860 (HC).

[40] Law of Property Act 1860, 23 & 24 Vict. c. 38, s. 12.

settlors of older trusts of the opportunity of expressly prohibiting such wider investment, and as such was described by a future Attorney General as 'vicious in principle'.[41] If in so doing the Act appeared if not radical then progressive, it in fact betrayed an underlying conservatism by incorporating legislative recognition of the dual system of investment regulation. It gave the Lord Chancellor the power to make general orders as to permitted investments for both court funds and, on summary application by the parties, trust funds,[42] and trustees were allowed to invest on the securities included in such general orders,[43] thus giving them for the first time a more general power of investment. In pursuance of that, a general order of 1861 authorised investment in Bank Stock, East India Stock, Exchequer Bills, mortgages of freehold and copyhold land in England and Wales and certain Government securities. The whole episode did not reflect well on the regulation of trustee investments, and was widely regarded as unsettling and confusing to those whose business it was to invest trust funds or advise on their placement.[44]

Thereafter other Acts were passed, which extended trustee investments in an intermittent way and not, ultimately, to any significant extent. The process was slow, and one of utmost caution. The Trustees, Mortgagees, etc. Act 1860, just one year after Lord St Leonards' Act, only made express provision allowing trustees to invest in 'any of the Parliamentary stocks or public funds, or in government securities',[45] and to vary the investments for those of a like nature. It did not mention investment in real securities, since the Act of 1859 had given the power to invest in them. The Improvement of Land Act 1864 permitted trustees investing in real securities to invest in the charges authorised by that Act,[46] an Act of 1867 allowed them to invest in any stock the interest of which was guaranteed by Parliament,[47] an extension which was

[41] *Parl. Deb.*, vol. 158, ser. 3, col. 105, 25 April 1860 (HC).

[42] Law of Property Act 1860, 23 & 24 Vict. c. 38, s. 10.

[43] *Ibid.*, s. 11. See Rules of the Supreme Court November 1888, Order XXII r. 17, reproduced in Arthur L. Ellis, *The Trustee Act 1893: Including a Guide for Trustees to Investments* (London, 1894), pp. 22–3. Unfortunately in this instance the two lists, statutory and court, were not identical. Note that Order XXII r. 17 first appeared in the Rules in 1883, but did not extend current court practice.

[44] (1864) 39 *Law Times* 195 at 196.

[45] The Trustees, Mortgagees, etc. Act 1860, 23 & 24 Vict. c. 145, s. 25.

[46] Improvement of Land Act 1864, 27 & 28 Vict. c. 114, s. 60.

[47] Investment of Trust Funds Act 1867, 30 & 31 Vict. c. 132. This Act also clarified the meaning of East India Stock in the Act 22 & 23 Vict. c. 35.

regarded as safe, and one of 1871 allowed investment in stock issued by the Metropolitan Board of Works.[48] The Debenture Stock Act 1871 confirmed trustees' powers to invest in debenture stock where they already had the power to invest in the companies' mortgages and bonds.[49] This Act was regarded as important, and the change as a serious though welcome one in view of the increasing difficulty in finding debenture bonds to invest in due to an unforeseen widespread replacement with debenture stocks, and the security of the latter was regarded as 'practically perfect'.[50] Indeed, most settlements by then expressly allowed investment in debenture stocks. The complex Local Loans Act 1875 extended their powers in this respect,[51] and Lord Cairns' Settled Land Act 1882 allowed trustees to invest in railway debenture stock.[52] Lastly, the Trustee Act 1888 addressed an issue which had been doubted in the courts and provided that a power to invest in real securities authorised investment on a mortgage of a long term of years.[53]

This reform was, however, unsatisfactory in a number of ways. It resulted in a code which was piecemeal, scattered and often complex. Permitted investments were buried in a large number of Acts, not all bearing a title which indicated provision for trusts or trust investments and to which ordinary trustees had difficulties of access. The complexity of the regulations and their interaction was as a whole generally beyond lay trustees, and made their implementation in any coherent way a matter of considerable difficulty.[54] It was evident from extensive correspondence in *The Times* in the last quarter of the nineteenth century that the regulation of trustee investment had become so complex and confused that it was not, in general, clearly understood. The clarity and precision trustees both needed and demanded was thus largely denied to them. In its substance, too, the law failed to address the fundamental problems underlying the regulation of trustee investment. By the last twenty years of Victoria's reign, the difficulties which trustees had been experiencing since the accession had become acute. Trust funds

[48] Metropolitan Board of Works (Loans) Act 1871, 34 & 35 Vict. c. 47.
[49] Debenture Stock Act 1871, 34 Vict. c. 27.
[50] *The Economist*, 13 May 1871, p. 565; 20 May 1871, p. 597; 8 July, p. 810 (vol. 29).
[51] Local Loans Act 1875, 38 & 39 Vict. c. 83, s. 27.
[52] Settled Land Act 1882, 45 & 46 Vict. c. 38, s. 21.
[53] Trustee Act 1888, 51 & 52 Vict. c. 59, s. 9.
[54] See Herbert Cozens-Hardy, *Parl. Deb.*, vol. 334, ser. 3, col. 1483, 3 April 1889 (HC).

seeking investment were said in 1889 to be growing by 'millions a year',[55] and the traditional trustee investments were no longer readily available and, where available, were no longer so attractive. There were problems with most authorised investments:[56] Government securities had been largely paid off by the late 1880s and any still available had been appropriated by the Court of Chancery and the Savings Banks for their own purposes. Mortgages too were not as financially attractive in the later years of the nineteenth century as a result of the depression in the land market and the serious reduction in the value of landed property.[57] Investment in real securities, furthermore, brought other difficulties. Titles were often complex or uncertain and conveyancing was expensive.[58] The finding and arranging of mortgages was generally troublesome and slow. Not only that, it was not always possible to find a borrower who required the exact sum available for investment. Finally, the decline in the building of railways after the mid-1870s significantly reduced investment opportunities in that sector.

The yield from Consols had remained steady since the early years of the century at just over 3 per cent, and when that modest yield was reduced to 2½ per cent in 1888,[59] it was the last straw for some trustees and many beneficaries. It provoked an outcry on behalf of beneficiaries who depended on limited fixed incomes, were often by their nature persons who were incapable of earning their own living, and who suffered real hardship when the rate of interest was reduced. Consols were undoubtedly the safest investment, but safety came at too high a price. *Punch* expressed the general feeling:

> Consols? Bless me, I can't afford
> To live on one or two per cent!
> The workhouse then must give me board
> And lodging, free from rates and rent.[60]

The demand, expressed in the national and professional press and in Parliament, was for an even greater choice within a wider field

[55] *Ibid*. See too Fry L J in *Re Dick* [1891] 1 Ch 423 at 428.
[56] See *The Times*, 18 June 1884, p. 5, col. e.
[57] See generally S. B. Saul, *The Myth of the Great Depression 1873–1896* (London, 1969).
[58] See 'Report from the Select Committee on Investments for the Savings of the Middle and Working Classes', *House of Commons Parliamentary Papers* (1850) (508) xix. 169 p. iii.
[59] National Debt (Conversion) Act 1888, 51 Vict. c. 2.
[60] (1896) 110 *Punch* 78.

of permitted trustee investments[61] and in an accessible and understandable form. Trustees wanted wider authority to invest in the securities of British city corporations, of Indian, British and Irish railways and of metropolitan waterworks.[62] All these, it was argued, gave greater security than any mortgage and a higher income than Consols,[63] and any reasonable prudent man of business would invest in them. Stimulated by the considerable growth in investment of British capital in foreign enterprise from the 1870s,[64] the demand for investment in colonial securities intensified.

That there had to be some mechanism to allow for some extension of trustees' powers of investment and a degree of flexibility to respond to changing economic conditions in order to ensure that the trust fund continued to yield an adequate income to support the life tenant was widely accepted. Equally, however, this was not to be done at the expense of the capital, and there accordingly had to be sufficient control to ensure the security of the remainderman. This control was perceived as lying in the limitation of permitted investments, but any such regime would require a certain and complete code so that trustees would know clearly which investments they were permitted to use. The question was as to the nature of that mechanism as statutory or judicial, and how far it allowed for proper scrutiny of proposed new investments. Despite a consensus that trustees' powers of investment should be widened under the control and guidance of Parliament rather than the judges, the court was the first to respond. New Rules of November 1888 permitted limited investment in the stock of colonial governments guaranteed by the Imperial Government.[65] Colonial securities had not been accepted by the legislature as authorised investments despite considerable pressure from Lord Herschell, their champion in this respect,[66] and from trustees, beneficiaries and the colonies themselves. They were regarded as inherently dangerous because, being

[61] *The Economist*, 16 April 1887, p. 484 (vol. 45).
[62] *The Times*, 18 June 1884, p. 5, col. e.
[63] See *The Times*, 18 March 1878, p. 4, col. f.
[64] See P. L. Cottrell, *British Overseas Investment in the Nineteenth Century* (London, 1975).
[65] Rules of the Supreme Court 1888, Order XXII Rule 17.
[66] *Minutes of Evidence, 1895*, q. 168. They had been a permitted investment in the Liability of Trustees Bill introduced in 1888, but while the House of Lords approved it, the clause had been dropped when it appeared to endanger the passage of the bill in the House of Commons.

generally payable to bearer, they would have to come into the custody of a particular individual and the risk of fraud was clearly increased.[67] In practice solicitors advised trustees to lodge them in a reputable bank, to be withdrawn only on the signature of all the trustees, and this was popularly felt to constitute adequate safeguard against fraud.[68] Such securities were, however, viewed with considerable alarm in the context of the Victorian preoccupation with defalcations by trustees and were permitted only with express authority.[69]

Trustee investment was clearly, in the words of Herbert Cozens-Hardy, Opposition member for Norfolk North,[70] a matter which was 'ripe for legislation'.[71] He introduced the bill[72] which in due course became the Trust Investment Act 1889.[73] In terms of trustee investment as a whole, the Act was a major step forward. It repealed all existing statutory provisions relating to investment, consolidated existing powers and, to some degree, extended them. Traditional concerns as to the safety of the trust fund, and the fear that it was being compromised by extending the powers of investment,[74] permeated the debate at the bill's second reading.[75] This was so despite the fact that the proposed new investments were generally perceived as sound and safe, and reflected the underlying policy of the legislature, which was to ensure the security of the trust fund by selecting those securities which were under the control of Parliament. Indeed, as the member for Norwich observed, in proposing the wider code 'every precaution is taken that life beneficiaries shall not benefit at the expense of those who follow'.[76] In its final form the Trust Investment Act 1889 achieved its primary objective of tidying the

[67] *Minutes of Evidence, 1895*, qq. 304–5; 1541.

[68] *Ibid.*, qq. 355 and 867.

[69] *Ibid.*, q. 1595.

[70] Herbert Hardy Cozens-Hardy QC MP became a Chancery judge in 1899 and was Master of the Rolls from 1907 to 1918. See A. W. B. Simpson (ed.), *A Biographical Dictionary of the Common Law* (London, 1984), p. 134.

[71] Second reading, *Parl. Deb.*, vol. 334, ser. 3, col. 1484, 3 April 1889 (HC).

[72] First reading, *Parl. Deb.*, vol. 333, ser. 3, col. 127, 22 February 1889 (HC). See 'Trust Funds Investment Bill' (1889) 87 *Law Times* 49.

[73] Trust Investment Act 1889, 52 & 53 Vict. c. 32. See too Lindley LJ in *Re Dick* [1891] 1 Ch 423 at 427.

[74] Lord Herschell thought that the investment powers of trustees could not be extended with a view to increasing income without enlarging the risk to the capital: see *Minutes of Evidence, 1895*, q. 166.

[75] Second reading, *Parl. Deb.*, vol. 334, ser. 3, col. 1485, 3 April 1889 (HC).

[76] *Ibid.*, Mr S. Hoare, at col. 1501.

law and enlarging the range of permitted investments. In section 3 it laid down the range of securities in which trustees might legitimately invest without express authority.[77] It included all those previously sanctioned by Parliament, and included two entirely new categories. They were the stock of a leased railway or canal company, and the debenture or guaranteed or preference stock of a waterworks company. The new investments permitted by the Act were not speculative, but sought to include those which paid a higher rate of interest without compromising security.[78] The persistent reluctance of the House of Commons to allow investment in securities over which they did not have full control in the sense of not determining to what amount they should be issued or in securities that could not be brought within the jurisdiction of the British courts, proved too strong, and colonial securities were, yet again, excluded. This was an omission regretted by most trustees who did not doubt their intrinsic worth, and by commentators who appreciated that trustee investments had a significance beyond the individual for the domestic and foreign economies, but which was not rectified until economic, political and popular pressures forced the passing of the Colonial Stock Act 1900.[79] The code of investments laid

[77] Though it could not include any investments which might be allowed by the court list.

[78] Trust Investment Act 1889, 52 & 53 Vict. c. 32, s. 3. See A. R. Rudall, *Duty of Trustees as to Investment of Trust Funds* (London, 1906), pp. 18ff. The detailed discussion in Committee centred on Irish tramway and light railway securities and local government loans to ascertain their nature and quality: 'Report from the Select Committee on the Trust Funds Investment Bill', *House of Commons Parliamentary Papers* (1889) (200) xv. 499.

[79] Colonial Stock Act 1900, 63 & 64 Vict. c. 62. This was the last statutory enactment concerning trustees' powers of investment in the Victorian era. It allowed trustees to invest in any colonial stock registered in the UK in accordance with the Acts of the same name in 1877, 40 & 41 Vict. c. 59, and 1892, 55 & 56 Vict. c. 35. A measure of control was retained by the Treasury, who could prescribe further conditions, published in the *London Gazette*. Professor Keeton observed that these Acts indicated an increasing approval of investment in British colonial stocks generally, which has been attributed to the desire to enable trustees to assist in the development of the British Empire. See G. W. Keeton, *Modern Developments in the Law of Trusts* (Belfast, 1971), p. 49; G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14 at 29. See too 'Report of Trustee Securities Committee', *House of Commons Parliamentary Papers* (1928) (3107) xii. 497. The status of trustee investment was regarded as privileged and sought by many securities for the economic advantages it would bring. The colonies themselves felt they should not be excluded from this source of investment. See speech of Lord Herschell in *Parl. Deb.*, vol. 338, ser. 3, cols. 663–4, 18 July 1889 (HL) and his evidence in *Minutes of Evidence, 1895*,

down in 1889 remained virtually unaltered for the remainder of the Victorian period. The Trust Investment Act 1889 was passed with relatively little comment or notice, but was significant and welcome for its form as much as its substance. It also gave trustees the important power to vary investments,[80] and in the light of the Act's character as an enabling and enlarging instrument, this power was widely construed to apply to investments made under an express power as well as those made under the Act itself. The first consolidating Trustee Act, in 1893, whose object it was to ensure that the entire body of statutory law relating to trustees was to be found within a single Act rather than the existing thirty-three, accordingly gathered the provisions as to investment together.[81]

The Acts of 1889 and 1893 retained the concurrent jurisdiction of the courts to determine trustee investments, by providing that trustees could not only invest in the investments enumerated by the Act, but also in all investments for the time being authorised for the investment of cash under the control of the court.[82] It thus gave trustees an option of selecting investments from either list. Not only was such a list unnecessary in view of comprehensive statutory regulation, but it also perpetuated the old difficulties: the two lists might not be in agreement, and there was the continuing problem of accessibility. While most trustees could relatively easily locate an Act of Parliament, the Rules of the Supreme Court were not so easily accessible and were generally unknown to lay trustees. The evidence also suggests that settlors and trustees had more confidence in parliamentary regulation and relied considerably on its statutory expression in making investment decisions. This therefore sat uncomfortably with the avowed intention of the Act to tidy the law and gather the statutory provisions as far as possible into one legislative enactment. There was also the point that a statute could only be amended by Parliament, a public proceeding and likely, as such, to be brought to the notice of trustees and their legal advisers. The Rules of Court could be, and were, amended from time to time by the judges. It was thus the judges who retained an almost unlimited power of extending investments, largely outside public

q. 168. For Canada's demand see *The Economist*, 26 May 1900, p. 737; 23 June 1900, p. 875; 30 June 1900, p. 915; 22 December 1900, p. 1815 (vol. 58).

[80] *Re Dick* [1891] 1 Ch 423 at 426.

[81] Trustee Act 1893, 56 & 57 Vict. c. 53, s. 1.

[82] Trust Investment Act 1889, 52 & 53 Vict. c. 32, s. 3(o).

scrutiny. This system of dual codes was in its conception uncertain, and militated against the development of trustee securities on the basis of sound principle.[83] Indeed divergences between the two were experienced immediately, for while both sanctioned investment in railway stocks, the Act imposed more stringent requirements than the Rule.[84]

These uncertainties and limitations of the legislative and judicial codes of trustee investment led those involved in practical trust administration on a daily basis to seek elsewhere a wider and more imaginative list which included investments in commercial and industrial enterprise, investments which the law continued to regard as if not speculative, certainly hazardous,[85] and investment in municipal and colonial loans.[86] This could be achieved through the use of express investment clauses, and they were commonly inserted in trusts of personalty throughout the nineteenth century. The specific clause used depended on the knowledge of the settlor and of his legal advisers. Until the beginning of Victoria's reign they reflected contemporary judicial preferences rather than prevailing investment conditions. Settlors merely authorised those investments allowed by law, namely Consols and mortgages. Accordingly, express investment clauses of the eighteenth century generally permitted trustees to place the fund 'at interest on land security, or in some established Bank if land security cannot be had',[87] or 'in the purchase of a mortgage on Freehold Lands and Hereditaments in England or Wales or on Government securities'.[88] By the 1830s typical investment clauses provided for investment 'either in the parliamentary stocks or public funds of Great Britain or at interest upon Government or real Securities in England or Wales'.[89] Relatively rarely did they stray outside these traditional securities to allow investment

[83] By 1925 the general view was that Parliament, and only Parliament, acting through public general Acts, was the proper body to decide on trustee investments.

[84] See A. R. Rudall, *Duty of Trustees as to Investment of Trust Funds* (London, 1906), pp. 15ff.

[85] *Cock* v. *Goodfellow* (1722) 10 Mod 489. See too *Re Sharp* (1890) 45 Ch D 286.

[86] See *The Economist*, 16 April 1887, p. 484 (vol. 45).

[87] DRO 5521 M/W9 (1787).

[88] DRO 282 M/MS 4 (1798). See too *Webb* v. *Earl of Shaftesbury* (1802) 7 Ves Jun 480 at 481; *Allen* v. *Hancorn* (1775) 7 Bro PC 375, where counsel's words imply that such clauses were known as early as 1740; *Dimes* v. *Scott* (1828) 4 Russ 195; *Marshall* v. *Holloway* (1820) 2 Swans 432.

[89] DRO 282 M/MS 3 (1835); DRO 3162 B/MF 66 (1835).

in the railways, the public utilities or colonial enterprise. The reasons for a general conservatism among settlors were various. The permitted investments were, of course, undeniably safe. Indeed the term trustee investments continued to be synonymous in the public mind with safety, and at the end of the Victorian period were regarded as 'A class' in the investment lists sent to clients by member firms of the Stock Exchange.[90] Investment clauses were generally professionally drawn and naturally reflected those investments which were legally unexceptionable. The possibility of an application to the court for clarification or advice was to be avoided if at all possible. In some instances there was a clear reluctance, stemming either from a concern as to the burden of discretion placed on trustees, or from a lack of confidence in the trustees' financial acumen, to give them too wide a choice of investment possibilities. In a rapidly changing financial climate, furthermore, many securities had not had the opportunity to establish themselves. In these confirmatory rather than enabling investment clauses, one can see a shared desire on the part of law and settlor for a safe, if unexciting, security.

As, however, the range of available investments grew and became increasingly familiar to the public, as the pool of trust money seeking investment grew, as the commercial and financial expertise of at least some trustees and beneficiaries grew, and still the courts remained restrictive on the matter of trust investment, so express investment clauses, which addressed all these issues, became increasingly popular. They also widened in scope, and came almost invariably to extend the trustees' powers of investment beyond the list of those investments authorised first by the court, and then by statute. Exactly how they did so differed according to the preferences of the settlor and the knowledge of his legal adviser. Sometimes a list of specific permitted investments was included, sometimes just the class of permitted investment indicated. There is a noticeable trend, which becomes more pronounced in the second half of the Victorian period, for ever wider and more carefully drawn investment clauses, their detail often indicating areas of judicial uncertainty. For example, an investment clause of 1843 was careful to specify that trustees could invest in 'any freehold or copyhold manors, messuages, lands, tenements or hereditaments in England, of an estate of inheritance, or of any leasehold lands,

[90] See W. J. Reader, *A House in the City* (London, 1979), p. 110.

messuages or tenements in England, for any term of years (whereof not less than sixty years should be to come and unexpired at the time of such purchase)'.[91] Another clearly wished to allow investment in commercial companies, and succeeded in doing so by providing that the trustees could invest in the usual trustee investments and in the purchase of 'shares or stocks in or on the securities of any company or corporation, whether commercial, municipal, or otherwise, carrying on business or constituted for any purpose in Great Britain'.[92] Settlors became eager to allow their trustees the benefit of new commercial opportunities. Some allowed investment in shares 'in any Railroad or other company debentures or any other shares whatsoever or loans public or private bearing interest or producing yearly income'.[93] Furthermore, the industrial and commercial growth of Britain's colonies and the opportunities that created had not escaped the notice of investors, and it became common practice for settlors in the nineteenth century to allow investment in the 'Public stocks or funds or government securities of the UK or India or in any Colony or Dependency of the UK'.[94] Some settlors wished to allow investment on personal security, which the law did not allow. Such investment could only be authorised by a clear and express provision, a usual example being 'on any personal security . . . (whether bond covenant Promissory Note or otherwise)'.[95] A settlor could also provide for his trustees to invest in the family business.[96]

Even the simplest investment clause, however, would call for interpretation, and as such clauses became more elaborate so they increasingly came before the courts for construction.[97] Applications by originating summons were commonplace in the later years of the nineteenth century, the trustees or beneficiaries asking the court whether investment in a particular security was or was not permitted.[98] When construing express investment clauses, the courts

[91] *Lee* v. *Young* (1843) 2 Y & C C C 532.
[92] *Re Johnson* [1886] WN 72. See too *Re Walker* (1890) 62 LT 449; *Re Smith* [1896] 1 Ch 71.
[93] DRO 3162 B/MF 50 (1855).
[94] DRO 1335 B/F25 (1879).
[95] DRO 282 M/MS6 (1846); note that the indemnity clause in this instance gave a corresponding express protection.
[96] See for example DRO 4263 B/AB 28 (1897).
[97] For the relationship between the legislative and judicial codes, and express powers of investment, see *Ovey* v. *Ovey* [1900] 2 Ch 524. See too *Re Wedderburn's Trusts* (1878) 9 Ch D 112.
[98] *Minutes of Evidence, 1895*, q. 1649.

were consistently both strict and conservative in their approach throughout the Victorian period, for the protection of trustees and of beneficiaries.[99] This was particularly striking in relation to mortgages. Mortgages were regarded as stable and tangible investments on definite property, as opposed to investment on stocks and shares which were popularly perceived as 'the sport of directors and speculators'.[100] Another reason why they were widely used was because they were favoured by settlors' legal advisers. Most trusts were administered by solicitors under the supervision of the trustees, and solicitors being most familiar with land transactions, as well as having local knowledge of eligible properties and not inclined towards risk investments, naturally advised the trustees to invest in mortgages.[101] Such transactions, furthermore, carried useful fees. While statute had adopted mortgage securities in the broadest terms,[102] the court took the view that not all types of mortgage were sufficiently secure for the investment of trust funds.[103] Irish mortgages, for example, though permitted in law, were in practice excluded in most trust deeds and wills either expressly[104] or by omission.[105] Sub-mortgages were acceptable because the trustees got the legal estate, a covenant from the original mortgagor and the power of sale,[106] but second mortgages, where they did not, were regarded with more suspicion.[107] They were not approved because the security was not the land itself, but the right to become a mortgagee by paying off a previous incumbrance, and therefore did not carry the right to the title deeds. A similar disapproval was expressed as to equitable mortgages. While not forbidden, contributory mortgages, though first mortgages, were disapproved of on the basis that the

[99] See Simon Gardner, *An Introduction to the Law of Trusts* (Oxford,1990), pp. 31–6.
[100] *The Economist*, 7 August 1886, p. 981 (vol. 44).
[101] B. L. Anderson, 'Law, Finance and Economic Growth in England: Some Long-term Influences' in Barrie M. Ratcliffe (ed.), *Great Britain and her World 1750–1914* (Manchester, 1975), at pp. 107–8.
[102] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35, s. 32 allowed investment in 'real securities, in any part of the United Kingdom'.
[103] See *Minutes of Evidence, 1895*, qq. 691, 695.
[104] DRO 337 add 3B/1/12/13 Box 30 (1857).
[105] DRO 4263 B/AB 28 (1897).
[106] *Smethurst* v. *Hastings* (1885) 30 Ch D 490.
[107] *Norris* v. *Wright* (1851) 14 Beav 291 at 308; *Lockhart* v. *Reilly* (1857) 1 De G & J 464 at 476. See the other difficulties discussed by the Court of Appeal in *Chapman* v. *Browne* [1902] 1 Ch 785 which made second mortgages undesirable as trustee securities.

trustees did not retain sufficient control over the security for they could not, without the consent of the other mortgagees, realise the security. Certainly the common provision in investment clauses that investments had to be made in the names of the trustees and to remain under their control proved fatal to contributory mortgages as trustee investments.[108] Although it was a common transaction in the nineteenth century, trustees needed express authority to invest in such a mortgage. Some trust deeds did give trustees such a power,[109] often subject to the advice of counsel.[110]

In the face of a clear and unambiguous express power, however, the court had to give effect to its meaning, however wide it was. A perennial problem for the courts was the investment clause which allowed the trustees to invest as they thought fit, or similar words purporting to allow complete discretion in the trustees. Clauses of this kind had been well known since the eighteenth century.[111] Typically they provided that investment was permitted 'in such Funds or Security' as the trustees should advise,[112] 'out at interest at their discretion',[113] or 'in such manner as my . . . trustees shall think fit'.[114] They were, until the end of the nineteenth century, construed to allow a discretion within the trust investments approved by the court. Such a clause did not, for example, allow trustees to lend money on personal security.[115] To do so would require the clearest wording.[116] Neither did it allow investment in trade, for such investment was hazardous and not prudent.[117] Nor, in 1873, did the court allow the late Lord Westbury's trustees, to whom he had given the power to invest at their discretion, to invest in certain American securities of a commercial nature. Sir George Jessel MR held that as far as the court was concerned, if not in fact,

108 *Webb* v. *Jonas* (1888) 39 Ch D 660; *Re Dive* [1909] 1 Ch 328. See too *Re Massingberd's Settlement* (1890) 63 LT 296.
109 DRO 337 add 3 B/1/12/5 Box 5 (1893).
110 DRO 5521 M/E7/4 (1880).
111 In *Pocock* v. *Reddington* (1801) 5 Ves Jun 794 at 795 property was left to trustees 'upon trust to convert his effects into ready money, and place the same out at interest at their discretion'. See too *Langston* v. *Ollivant* (1807) G Coop 33.
112 DRO 3177 add B/F2/2 (1832).
113 DRO IRW S1038 (1845); DRO 5521 M/W10 (1846).
114 DRO 4263 B/AB 28 (1868).
115 *Pocock* v. *Reddington* (1801) 5 Ves Jun 794. See too *Styles* v. *Guy* (1849) 1 Mac & G 422.
116 As in *Re Laing's Settlement* [1899] 1 Ch 593.
117 *Cock* v. *Goodfellow* (1722) 10 Mod 489.

such investments were speculative.[118] This narrow interpretation was strongly criticised by the commercial press.[119] As late as 1882, where a testator had left his legatee to appoint her own trustees, who were to select their own investments, the court did not even consider it a matter of doubt that that discretion was only to select among those investments authorised by the law.[120] Not until the end of the century were such clauses, by then common, interpreted less restrictively. In 1896 Kekewich J took the view that the phrase 'as they should think fit' should be read as 'shall honestly think fit'.[121] He accordingly allowed the trustees to invest in debentures secured by floating charge, but could not prevent himself from observing that he supposed 'no very prudent man would invest money in the debentures, in the nature of a floating security, of a limited company. But it is familiar to us all that there is a class of men, who are prudent but not very cautious, who do invest money on such debentures and regard them as a good security.'[122] The caution expressed by a judge who had the reputation of being adaptable and open-minded is revealing.

It was abundantly clear that, where the trustees were given complete freedom to invest the trust funds at their discretion, there was no apparent protection for the beneficiaries. Indeed, even a restriction to the authorised investments of the court and statutory lists did not, and could not, guarantee the safety of the capital or the equal treatment of beneficiaries. There was an unavoidable degree of risk inherent in all investments, however ostensibly safe they might be. Furthermore, the lists or express clauses not only generally permitted types or classes of investment, requiring trustees to make their selection of particular investments to represent the permitted class, but also gave no indication of any preferred balance between the different investments. Trustees were not to be led into a false sense of security by the fact that an investment was authorised by the courts, by statute or by the trust instrument itself, because all the concept of the authorised investment did was to minimise the risks. This meant that the process of investment was necessarily not purely mechanical, and required not just an interaction of the

[118] *Bethell* v. *Abraham* (1873) LR 17 Eq 24.
[119] *The Economist*, 29 November 1873, p. 1439 (vol. 31).
[120] *Re Braithwaite* (1882) 21 Ch D 121.
[121] *Re Smith* [1896] 1 Ch 71 at 76.
[122] *Ibid*.

trustees with commercial institutions, but a far more demanding exercise of commercial judgment. In order to provide the essential further protection of the beneficiaries, the law imposed a duty of care on the trustees in exercising their power of investment. It put a standard against which their commercial judgment was to be measured.

Despite some older dicta to the contrary, a trustee was expected to attain a higher degree of care in the management of the trust for his beneficiaries than he would in the conduct of his own affairs. He had to show he was acting as a prudent businessman would act, which therefore made it necessary for him to be aware of the rules of business conduct of his day. The standard of care had been expressed from time to time during the nineteenth century, usually in relation to specific investments. In 1851 Lord Cranworth LJ had observed that in the case before him it should be considered whether the turnpike mortgages in question were still proper and eligible investments in view of the considerable social changes brought about by the formation of railways.[123] This had long been the case; the Law of Property and Trustees Relief Amendment Act 1859, the first statutory provision for wider investment powers, expressly provided that trustees could so invest provided that such investments were 'reasonable and proper'.[124] Sir John Romilly decided in 1862 that trustees given an express power to invest in the stocks, shares and securities of an incorporated company should 'make every necessary inquiry and satisfy themselves that it is really a solvent company'.[125] It was clear, therefore, that more was expected of trustees than merely investing in authorised investments. The issue in the nineteenth century, when commercial conditions were changing almost daily and had grown significantly in complexity, was the nature and the degree of this extra care and judgment.

That the law had long adopted commercial criteria in relation to the conduct of trustees was confirmed in relation to delegation. The early adoption of usual commercial practice as a standard for delegation was significant in itself, for it indicated an early judicial and popular recognition of the necessary interaction between

[123] *Robinson* v. *Robinson* (1851) 1 De G M & G 247 at 263.

[124] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35, s. 32.

[125] *Consterdine* v. *Consterdine* (1862) 31 Beav 330 at 333.

trusteeship and the business community, and the beginning of a more widespread perception of trusteeship as a commercial activity. When in 1883 the House of Lords approved the standard of care of the prudent man of business, acting for himself, for the propriety of the delegation of ministerial acts to expert agents,[126] it was expressing what had been called 'moral necessity' in the eighteenth century.[127] In *Speight* v. *Gaunt* the conduct expected of a prudent businessman acting on his own behalf, and the degree of commercial skill he would have possessed, were central to the decision. The issue was essentially whether such a person would have relied, as the trustee did, on a 'bought-note' which he was given by a broker whom he had employed to purchase some local corporation bonds. The trustee was sued by the beneficiaries when the broker misappropriated the purchase money which had been paid over to him on production of the 'bought-note', the argument being that he had shown 'a want of due and proper precaution': he should not have employed a broker to purchase such stock; he should not have allowed the money to remain in the broker's control; he should have paid the money direct to the corporation's bank; he should have taken active steps to ascertain the bonds had actually been purchased. The trustee argued in his defence that in all he had done he had acted in accordance with usual business practice.

While there was no dispute that the standard to adopt was the prudent businessman test, there was judicial disagreement as to whether on the facts the trustee had satisfied it or not. At first instance Bacon VC held he had not, and said that the rule of law in this respect was 'not only unquestionable, but . . . founded on absolute and distinct truth and justice, and to relax it in the slightest degree might give occasion to the committal of fraud'.[128] The trustee, however, succeeded on appeal, an outcome which led a Liverpool solicitor appearing before the Select Committee on Trusts Administration in 1895 to observe that 'trustees had to thank God that there was a Court of Appeal'.[129] Sir George Jessel MR, a highly respected judge in legal and commercial circles, agreed that the standard of care required of a trustee was that of 'an ordinary

[126] *Speight* v. *Gaunt* (1883) 9 App Cas 1.

[127] *Re Belchier* (1754) Amb 218. In *Mendes* v. *Guedalla* (1862) 2 J & H 259 at 277, the standard was described as that of a man of 'ordinary prudence'.

[128] *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 738.

[129] *Minutes of Evidence, 1895*, q. 1428.

prudent man of business' in the conduct of his own affairs, and no more.[130] Since the evidence established that it was in the ordinary course of business to employ a broker in such circumstances, and usual for an investor to pay him the money and for there to be an interval between the payment and the receipt of the security, the trustee was not liable. The crucial point was the interpretation of the 'bought-note'. Any ordinary man, looking at the document with care and vigilance, would have taken it to indicate that a purchase had been made in the ordinary course of business on the Stock Exchange and not directly from the corporations. The slight irregularities on the document might have alerted an expert, but not an ordinary prudent man of business, and so there was nothing to put the trustee on inquiry. It was therefore reasonable, as being in the ordinary course of business in the purchase of such securities on the Stock Exchange, to pay the broker personally prior to the receipt of the securities, and it was not reasonable to demand that the trustee make inquiries to ensure the broker had actually bought the securities and no one in the ordinary course of business would do so; he had to trust his broker. Lindley LJ said:

> I wish most emphatically to say that if trustees are justified by the ordinary course of business in employing agents, and they do employ agents in good repute and whose fitness they have no reason to doubt, and employ those agents to do that which is in the ordinary course of their business, I protest against the notion that the trustees guarantee the solvency or honesty of the agents employed. Such a doctrine would make it impossible for any man to have anything to do with a trust.[131]

The expression and scope of the general rule in relation to investment was found three years later in the leading case of *Re Whiteley*.[132] Under the usual power given to them to invest in 'real securities in England or Wales', the trustees invested in the mortgage of a freehold brickfield, on which the business of brickmaking was carried on, with all the plant and machinery. When the property proved insufficient for the sum advanced, the Court of Appeal held that the trustees were liable for the loss on the basis that they had not satisfied the legal standard of care. The court adopted the standard of care laid down in *Speight* v. *Gaunt* for the appointment

[130] *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 739.
[131] *Ibid*. at 762.
[132] *Re Whiteley* (1886) 33 Ch D 347.

of agents.[133] The court in *Re Whiteley,* however, was led to elaborate the test and raise the standard by the consciousness that the trustee was investing for the benefit of persons who were to enjoy the property at some future time, and not just for the benefit of the beneficiary in possession.[134] In that sense the trustee was not an ordinary investor, even a prudent one, investing for himself, with no thought for others in the future, and able to accept any risk inherent in any investment if he so chose. The point was, of course, that a businessman, however prudent, might well be prepared to take some risk in making his investments. The duty of the trustee was rather to 'take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide'.[135] The phrase 'morally bound', which added – or at least confirmed – the further dimension to the standard of care, would have been perfectly intelligible to contemporaries, importing as it did notions of Victorian morality. 'That', continued Lindley L J, 'is the kind of business the ordinary prudent man is supposed to be engaged in; and unless this is borne in mind the standard of a trustee's duty will be fixed too low; lower than it has ever yet been fixed, and lower certainly than the House of Lords or this Court endeavoured to fix it in *Speight* v. *Gaunt*.'[136] On this basis the trustees were liable. Though they had acted honestly and on the basis of specialist advice, they not taken such care as a 'reasonably cautious man' would take in providing for persons interested in the fund in succession.[137] They should have made further inquiries. They knew the security was a small piece of land of some ten acres, and that it included buildings, plant and machinery. They should therefore have inquired as to the proportion of the value which was accorded to the land and which to the business carried on there. If they had done so they would have discovered that the value of the land was relatively small, that of the buildings, plant and machinery relatively high, and that the real security depended for its value on the trade. They should have been aware, furthermore, that it would have been difficult to find anyone to undertake the business were it to become necessary to call in the money.

133 *Speight* v. *Gaunt* (1883) 9 App Cas 1. See above, pp. 108–9.
134 *Re Whiteley* (1886) 33 Ch D 347.
135 *Ibid*. at 355.
136 *Ibid*.
137 *Per* Cotton L J in *Re Whiteley* (1886) 33 Ch D 347 at 350.

When the decision was affirmed by the House of Lords in the following year,[138] Lord Halsbury LC did not entirely agree with the basis of the amendment of the test. Lindley LJ had drawn a distinction in the standard of care required of trustees where there were beneficiaries in succession, and those just with beneficiaries in possession, a distinction of which the Lord Chancellor disapproved. 'The question', he said, 'must be the due care of the capital sum. Whether that capital sum is one in which there is a life estate only, or absolutely to the use of the beneficiary, seems to me to bear no relation to the question of the due caution which a trustee is bound to exercise in respect of the investment of the trust fund.'[139]

The duty of care, placed so firmly in the commercial context by *Speight* v. *Gaunt* and *Re Whiteley,* depended on the economic and investment conditions pertaining at the time, and so varied as to both time and place. Private trustees had to assess the real commercial risks involved in taking all investment decisions, and that could involve them in making commercial and financial judgments of particular complexity. Simply to abide by the well-known popular maxims of investment, namely that high yield and good security were generally not found in the same investment, and that an investor should not put all his eggs in one basket, no longer sufficed. Trustees had to be far better informed than that and had to devote considerable time and attention to mastering matters of investment which were increasingly complex. In contemplating investment in railways, for example, a trustee would have to assess the rate of growth, comparing recent and past years, to exercise his judgment in deciding whether that improvement would continue and to assess the quality of the management of the preferred lines and, most important, to decide on the yield if the current rate of progress continued. He would have to consider and assess the prospects of the principal trades and industries which formed the freight traffic of the line and the possible effect of legislation or changes in commercial fortunes or practices. He should consider the prospects of passenger traffic, assess new residential developments along the line, and finally take into account wages and hours of labour which could have an impact on the viability and prospects of the railway.[140] Publications such as Cracroft's *A Trustee's Investment Guide*, as well

[138] *Learoyd* v. *Whiteley* (1887) 12 App Cas 727.
[139] *Ibid*. at 732.
[140] See Hartley Withers, 'How to Invest' (1897) 72 *Contemporary Review* 126–32.

as money articles in the financial and commercial press, were indispensable to trustees to enable them to attain the required standard of care.[141] Even Mr Cracroft, however, stressed the necessity of acting on legal advice in making important investment decisions. In the very formulation of the duty of care, however, there was flexibility, as the consideration of all circumstances which might affect the security of the investment was inherent in the thinking of the prudent businessman.

The judicial standard of care for trustees was a reaction to contemporary conditions and was therefore framed by it. The vulnerability of trustees to prevailing economic conditions, specifically the long depression in agriculture from the mid-1870s,[142] and the attitude of the courts to it, was vividly illustrated in the case of *Re Chapman* in 1896.[143] The trustees had failed to sell some authorised investments on mortgages of real estate and a decline in the value of land meant that the mortgages could only be realised at great loss to the trust. In holding that they were not liable for the loss, Lindley L J observed that the trustees had not considered whether to retain these mortgages or get rid of them, but that no one could have foreseen in 1881 that the value of land would decline as it had done. A trustee was liable for any loss caused by his wilful default, but he was not 'a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong'.[144] 'There is no rule of law', he continued,

> which compels the Court to hold that an honest trustee is liable to make good loss sustained by retaining an authorized security in a falling market, if he did so honestly and prudently, in the belief that it was the best course to take in the interest of all parties. Trustees acting honestly, with ordinary prudence and within the limits of their trust, are not liable for mere errors of judgement.[145]

The case showed an unusual appreciation by the judiciary of the effect of economic conditions on trustees and their impact on the

[141] See too Arthur L. Ellis, *The Trustee Act 1893: Including a Guide for Trustees to Investments* (London, 1894).

[142] See Graham Moffat *et al., Trusts Law: Text and Materials* (3rd edn, London, 1999), pp. 379–80; Peter Mathias, *The First Industrial Nation: An Economic History of Britain 1700–1914* (London, 1969), pp. 343–9;397–8; S. B. Saul, *The Myth of the Great Depression 1873–1896* (Macmillan Press Ltd, 1969).

[143] *Re Chapman* [1896] 2 Ch 763.

[144] *Ibid*. at 775.

[145] *Ibid*. at 776.

already difficult task of trusteeship, but one which was not surprising in view of Lindley L J's presence on the bench. He was always regarded as being experienced, understanding and knowledgeable not only of daily commercial life, but of wider economic issues. 'The case', he said,

> is an important one not only to the trustees of this particular will, but to trustees of mortgages generally. Owing to the great fall in the value of agricultural land trustees of mortgage securities have been placed in a position of great difficulty. To throw on the trustees the loss sustained by the fall in value of securities authorized by the trust, wilful default, which includes want of ordinary prudence on the part of the trustee, must be proved; but it is not proved in this case.[146]

Equally pragmatic and enlightened was Lopes L J, who agreed that the case was a most important one, and 'having regard to the gradual and persistent depression of the agricultural industry in this country, most intimately concerns the position of a large body of persons who have incurred the responsibility of trustees'.[147] Though the depression had fluctuated, it had been continuous from the later years of the 1870s, and in his view it would have been dangerous to have realised mortgages when such a course of action would have entailed heavy losses. 'It is very easy', he continued, 'to be wise after the event; but in order to exercise a fair judgment with regard to conduct of trustees at a particular time, we must place ourselves in the position they occupied at that time, and determine for ourselves what, having regard to the opinion prevalent at that time, would have been considered the prudent course for them to have adopted.'[148]

In theory a test founded on the conduct of the ordinary prudent man of business, though one making long-term provision for others, was practical, reasonable, realistic and inherently flexible. It had the potential to adapt to current commercial conditions. In practice, however, most people involved in trust administration found that the way it was interpreted by the courts was too demanding, because it was in practice and in perception applied in a way far removed from its pragmatic and realistic origins. Whereas the test had begun as a true reflection of everyday practice and common sense, the standard which came to be demanded by the court was

[146] *Ibid*.
[147] *Ibid*. at 777.
[148] *Ibid*. at 777–8.

far higher than the real standard observed by businessmen. It endowed the ordinary prudent businessman with an unrealistic degree of prudence and circumspection, as well as knowledge and financial acumen. 'In practice', observed a lawyer in 1897, 'a busy man in a large way of business prefers to run the risk of making a few bad debts, and having to put up in consequence with occasional loss than perpetually to hamper and pester himself with tiresome precautions.'[149] Such risks were anathema to the law, and the test became increasingly distorted by the judges as they failed to keep up with business practices. One solicitor observed in 1895 that when a trustee made investments, he 'must be treated as an expert in finance'. It was not enough, he said, for the trustee to admit that although he had been prudent in making the investment, he had no special financial expertise and had made a mistake. The court's response was felt to be that if he had not been a prudent financial expert, he must be liable for any losses arising from his mistake.[150] Expert commentators equally felt that the standard of care was too high,[151] at least for the typical contemporary amateur trustee, and indeed the legislature implicitly accepted this when in 1896 an Act was passed to enable the courts to relieve trustees who had committed honest and reasonable breaches of trust.[152] The ease with which a trustee was held liable for the default of his agent, even if that agent had been properly appointed, was particularly criticised in the commercial press as being unduly harsh. The degree of vigilance required went well beyond that which a reasonable person in his private business would exercise. Indeed, it was thought that even the most vigilant could not avoid liability.[153] In a leading article in *The Times* in 1895, the standard of care demanded of trustees by the law was described as 'a super-human standard of perfection', requiring a trustee who was 'a miracle of circumspection and prudence'.[154] In the Common Law it was the jury's task to decide if a man were behaving reasonably. In Chancery, on the other hand, not only did the task fall to the judge, of whose commercial acumen the public had never been convinced, it also created a precedent as

[149] A. Birrell, *The Duties and Liabilities of Trustees* (London, 1897), pp. 28–9.
[150] *Minutes of Evidence, 1895*, q. 650.
[151] F. H. Maugham, 'Excusable Breaches of Trust' (1898) 14 *Law Quarterly Review* 159; (1870) 48 *Law Times* 250.
[152] See below, pp. 188–91.
[153] *The Economist*, 29 July 1871, p. 905 (vol. 29).
[154] *The Times*, 18 March 1895, p. 9, col. e.

an enduring model of trustee behaviour.[155] It was thought that the absence of a jury in finding facts and in requiring direction as to the law had had a material effect on the development of the legal rules of trust administration. 'No jury', said a solicitor to a provincial meeting of the Incorporated Law Society, 'would have condemned trustees as Chancellors have done, and no Chancellor would have laid down to juries laws which Chancellors have unconsciously by degrees formulated and evolved, whilst under no obligation to express them in clear language to non-legally educated minds.'[156]

The concept of the authorised investment provided the first, and principal, safeguard for the beneficiary, while the ultimate safeguard was the prudent businessman test as laid down in *Speight* v. *Gaunt* in relation to delegation and applied to investment in *Re Whiteley*. Victorian commercial affairs were too complex to allow rules of conduct for prudent businessmen to be comprehensively articulated, but some elements were articulated by the courts and by the legislature and as such embodied yet another safeguard. The attention of the courts was particularly directed to mortgages in this respect, because they were a popular form of investment among trustees in the nineteenth century, particularly in country districts. Though they were regarded as sound in principle,[157] they were vulnerable to any depreciation in the value of land caused by general economic depression or local causes. In conjunction with a limited legal regime of trustee investment and pressure from beneficiaries to invest on mortgage, this led to an increase in the number of breaches of trust when too much was lent on mortgage in proportion to the land itself and the initial loan could not be repaid in full.[158] This lay at the heart of the security of such investments. In an attempt to ensure the competence of trustees in exercising their commercial judgment in this respect and in selecting only those mortgages which were likely to be safe, the law gave one aspect of the duty of care judicial, and then statutory, expression. The law, in short, laid down the caution of the prudent man.

It did so by reference to practice and experience.[159] The rule was well known at the beginning of Victoria's reign, when in response

[155] F. W. Maitland, *Equity* (2nd edn, Cambridge, 1949), p. 94.
[156] (1886) 80 *Law Times* 169.
[157] *Per* Kekewich J in *Re Somerset* [1894] 1 Ch 231 at 240.
[158] *Minutes of Evidence, 1895*, qq. 694, 698.
[159] See Stirling J in *Re Partington* (1887) 57 LT 654 at 657.

to counsel's argument that it was customary to lend on mortgage at two-thirds, and often at three-fourths, of the value of the property, the Master of the Rolls agreed that the former was 'within the rule of ordinary prudence' for freehold land, which was property of a permanent value, but not for house property.[160] Mortgages of houses, which became extremely popular, were always regarded as uncertain and problematic in this respect. Mortgages of newly built residential houses, many not quite finished and situated on new residential estates surrounding the larger cities, were readily available in the latter years of the nineteenth century,[161] since the building boom of that period brought together builders and developers seeking finance and trustees seeking investments. The result was not always propitious. In such cases, and in the equally problematic mortgages of properties employed in trade, the security of the mortgage was unpredictable and largely fortuitous and the property subject to depreciation. The courts accordingly came to adopt lending maxima of two-thirds for freehold agricultural property and one-half for freehold houses or buildings used in trade.[162] It was considered, in this case rightly, that such limits would be acceptable to a prudent businessman managing his own affairs. While trustees were permitted to rely on expert valuations, the duty of care ensured they could not unquestioningly accept them.[163] The laying down of rules as to value gave many trustees a false sense of security, and it was popularly supposed among trustees that they could always lend up to two-thirds on mortgage. The limits, however, were nothing more than 'the lowest margins which in ordinary circumstances a careful investor of trust funds ought to accept',[164] and the trustees still had to look at all the circumstances to decide if the investment was prudent at all, and to decide how much, within the limits, they should invest.[165] In doing so they were expected to be observant, to notice, for example, that houses were let to weekly tenants and to appreciate the financial consequences of that. They had to notice whether the property was properly finished, as in the making of

[160] *Stickney* v. *Sewell* (1835) 1 My & Cr 8 at 15.
[161] See for example *Blyth* v. *Fladgate* [1891] 1 Ch 337.
[162] See for example *Norris* v. *Wright* (1851) 14 Beav 291. See too the comments of Lord Watson in *Learoyd* v. *Whiteley* (1887) 12 App Cas 727 at 733–4.
[163] See pp. 110–11.
[164] *Learoyd* v. *Whiteley* (1887) 12 App Cas 727 at 734.
[165] See Kay LJ in *Re Olive* (1886) 34 Ch D 70 at 73. See too *Shaw* v. *Cates* [1909] 1 Ch 389 at 398.

access roads, paving and sewerage work. They were, in fact, expected to investigate all the circumstances of the transaction, including the nature and condition of the security itself, and the financial situation of the borrower, and then to exercise their own judgment on whether the investment was a prudent one to make.[166] The court demanded a not inconsiderable degree of commercial skill in this respect.

Limits on mortgage investment were given statutory force by the Trustee Act 1888,[167] though modified to allow trustees to lend two-thirds of the value on all property. This was in recognition not only of the fact that house property did not fluctuate any more than land in terms of value, but also that trustee securities were so limited that the legislature should ensure that landed securities were restricted no more than absolutely necessary. The same Act, in the spirit of the first statute to be enacted with the direct object of modifying the rules of Equity which, it was generally agreed, placed such a burden on trustees, included a clause affording trustees new protection when they invested on mortgage. It recognised that many trustees, though honest and acting on expert advice as a prudent businessman would, found themselves falling short of the demanding standards laid down by the courts in relation to the appointment of valuers.[168] The legislature, more pragmatic in its treatment of trustees, recognised that too much was being expected of them,[169] and in what was one of the most important provisions of the Act of 1888, allowed trustees to rely far more on the advice of the valuer and accordingly reduced the extent to which they had to form their own judgment on the matter of investing in mortgages. By section 4, when a trustee made a loan on mortgage which was proper in all respects other than the amount he had lent, then he would not be liable simply because the security was proved insufficient. The trustee, however, had to satisfy the court that he had acted on the report as to the value of the property prepared by someone he reasonably believed to be an able practical surveyor or valuer who was employed independently of the owner of the property,[170] that the amount of the loan did not exceed two-thirds of the value of the property, and that the valuer

166 See *Smethurst* v. *Hastings* (1885) 30 Ch D 490.
167 Trustee Act 1888, 51 & 52 Vict. c. 59, s. 4 (1).
168 See above, pp. 110–11.
169 *Re Solomon* [1912] 1 Ch 261 at 271.
170 See above, pp. 110–11.

or surveyor said in the report that the loan was an appropriate one in the circumstances. The Equitable test of business prudence still applied, however, so if the investment was by its nature speculative or hazardous, then the Act afforded no protection to the trustees. So where, for example, trustees invested in house property on a new residential estate, and the security ultimately proved insufficient, Stirling J held that the security was improper. 'The property', he observed, 'was situate in a new neighbourhood, and its future was uncertain. The mortgagor himself admitted that it was "under a cloud"; many of the houses were unlet, and there was a heavy ground rent payable; and . . . it was possible that the rents might be insufficient to keep down the accruing interest.'[171] The breach with which the trustees were charged was not one arising only from the proportion lent; it arose from the improper nature of the security, and section 4 did not, therefore, apply.

[171] *Blyth* v. *Fladgate* [1891] 1 Ch 337 at 354.

6

TRANSGRESSIONS BY TRUSTEES

The breadth of the trustees' powers in the administration of their trust, and the duties imposed on them, were such that transgressions were almost impossible to avoid. Anything that a trustee did which was not in accord with the provisions of his trust instrument or the rules of Equity constituted a breach of trust, as did any omission to do what he was meant to do. That some trustees in the nineteenth century were corrupt and defrauded their beneficiaries was undeniable. The number of deliberate and fraudulent transgressions by trustees was not known, though it was generally agreed that they were relatively few in the context of all breaches of trust.[1] The nature of the original relationship between the trustees and the beneficiaries within each individual trust to some extent determined the likelihood of fraud. Whether the beneficiaries were educated, wealthy, ignorant or poor, and whether the trustees were numerous, responsible, able, lay or professional were factors which determined the predisposition of a trust fund to be undermined by fraud. Educated and wealthy beneficiaries were not in practice the principal victims of fraud or indeed of incompetence. Not only were they more likely to have able and responsible trustees who knew their duty and performed it conscientiously, they also had the knowledge and education to ask questions of their trustees. If in doubt they had the social and family connections to seek informed advice, and the means to acquire expert legal advice if necessary. It was the poorer and less educated beneficiaries of smaller trusts, small tradesmen for example,[2] or the vulnerable such as widows,

[1] *Minutes of Evidence, 1895*, qq. 1368–71. There were convictions in twenty-two prosecutions for fraudulent breaches of trust between 1901 and 1904: Sir Robert Finlay, in response to a parliamentary question from Sir Howard Vincent, *Parl. Deb.*, vol. 142, ser. 4, col. 7, 1 March 1905 (HC).

[2] *Parl. Deb.*, vol. 147, ser. 3, col. 551, 28 July 1857 (HL).

who did not have these advantages and were easy prey for unscrupulous or careless trustees. Furthermore, the number of trustees of a trust was significant. Most fraudulent breaches occurred when the numbers had dwindled to one after a number of years, for then the trustee lost the restraining presence of his colleagues. If in those circumstances he found himself in personal pecuniary difficulties, then the opportunity for fraud presented itself since the property would be vested in him alone and there would be no one to control him. He could with relative impunity make the injudicious investment, dissipate the fund, use it in his own business or even borrow from it with an intention to repay it. Indeed a common breach of trust was for a trustee to place trust money in his own bank account, particularly if the money came in small amounts, or even simply awaiting an appropriate investment. It was then an easy step to withdraw from the account for his own needs, intending to replace the money when he could. Another common instance of breach was simple misappropriation of trust funds where investments were payable to bearer. While bearer investments were clearly imprudent, they were increasingly common in the nineteenth century, and accordingly there were greater opportunities for fraud. If a fraudulent sole trustee could arrange to continue paying the beneficiaries their interest, he could dissipate the capital of the trust fund with relative ease,[3] since beneficiaries were primarily concerned with income and would immediately be alerted if it was not forthcoming. There was no doubt that beneficiaries had to be particularly vigilant where their fund was in the hands of a sole trustee, and it was widely accepted that sole trusteeship was undesirable.

An issue which greatly exercised the minds of Victorian courts and legislators was that of fraudulent breaches committed by professional trustees. It has been seen that for a number of reasons the appointment of professional trustees was a growing practice.[4] By the very nature of such trustees, when breaches occurred they were unlikely to be the result of incompetence, indolence or ignorance, but rather of deliberate fraud.[5] In 1891 one correspondent wrote to the editor of *The Times* that in his opinion in four out

[3] Income was rarely misapplied; fraud was usually in relation to capital, which could be hidden from the beneficiaries by continuing to pay interest.

[4] See above, pp. 34–42.

[5] See for example *The Times,* 12 April 1856, p. 5, col. f.

of every five cases of breach of trust the defaulting parties were solicitors.[6] Where a solicitor was a sole trustee, the danger of fraud was compounded. The paying off of a mortgage, for example, as a matter that had to go through the hands of a solicitor, gave a dishonest solicitor-trustee the opportunity to defraud his beneficiaries. He would receive the money and could assure his co-trustees that he had found another investment for it. If they did not inquire, he could continue to pay the interest, and yet misappropriate the capital sum. Concern was particularly acute following the very public failures of certain banks where a number of shareholders were found to be trustees.[7] The sensational headlines, however, concealed more mundane fraud. It was said in evidence before the Select Committee on Trust Administration in 1895 that the proportion of solicitor-trustees who committed fraudulent breaches of trust was significant. Of the seventy-seven solicitors who were also Commissioners for Oaths and had the commission suspended between 1885 and 1894, fourteen were solicitor-trustees who had committed breaches of trust.[8] The Incorporated Law Society reported that between 1890 and 1905 there were sixty-one cases of misappropriation of trust funds, and the total amount of trust money misappropriated was £152,110.[9] The Discipline Committee of that Society, formed in 1888, ensured that solicitors who had committed a breach of trust were severely dealt with,[10] proceedings which would effectively ruin a man professionally. In 1890, in urging the creation of a Public Trustee, Kay LJ expressed the wish that legislators 'could have the benefit of the experience of a Judge of the Chancery Division for six months', since not a week passed without cases of fraudulent breach of trust committed by solicitor-trustees coming before him. In his view such breaches were

[6] *Ibid.*, 28 March 1891, p. 4, col. f.

[7] *Ibid.*, 13 October 1858, p. 9, col. e.

[8] *Minutes of Evidence, 1895*, q. 3, and see qq. 315–32, 1012. There were some 15,000 solicitors at that time, many of whom would be trustees of several trusts. It seems that Lord Romilly would never appoint either a family member or a solicitor as trustee, because he was of the opinion that all frauds were committed by one or other: see *ibid.*, q. 301.

[9] *Parl. Deb.*, vol. 148, ser. 4, cols. 375–6, 28 June 1905 (HC).

[10] *Minutes of Evidence, 1895*, qq. 636–41. In reply to a question in the House of Commons it was said that between 1890 and 1905 there were sixty-one cases of misappropriation of trust funds (to the value of over £150,000) reported to the Lord Chancellor by the Incorporated Law Society: *Parl. Deb.*, vol. 148, ser. 4, cols. 375–6, 28 June 1905 (HC).

very numerous and in the order of some hundreds of thousands of pounds.[11]

Fraudulent breaches by delinquent trustees were in the minority. The very great proportion of transgressions by trustees, even those which came before the courts for resolution, were innocent, involving no moral culpability. They were committed by lay trustees, and were the result of honest mistakes, genuine errors of judgment, weakness or an ignorance of the full requirements of the law.[12] As it became undeniably more difficult, especially in relation to smaller trusts, to find trustees of a sufficiently high calibre, so the problem of losses through such breaches increased.[13] Ironically, the principal reason for the difficulty in recruitment was the severity of the law relating to trustees' liability for breach of trust. Most breaches committed by honest trustees were breaches of omission such as a failure to convert the trust estate, a duty which, it has been seen, was implied by law and which nevertheless trustees were expected to fulfil, though a great many losses were the result of injudicious investments outside the authorised range.[14] The second most common breach was the carrying on of a testator's business for the benefit of his family, without express authority to do so. A large number of innocent breaches were the result of the trustees having failed to read and understand the trust instrument, or else, having read it and forgotten it. In a series of lectures delivered for the Council of Legal Education in 1897, Augustine Birrell QC described the 'real' trustee as

> Some farmer, it may be, who from a sense of cronyship has consented to act as a Trustee under the will of a neighbour with whom on market days he has often had a friendly glass. There he stands, ignorant for certain, pigheaded very likely, quarrelsome possibly, but honest, palpably honest and perspiring. He is charged with losses occasioned by his disregard of the strict language of a will he never understood, or for not having properly controlled the actions of his co-trustee, the principal attorney of his market town.[15]

Other honest breaches were the result of having conscientiously read the trust instrument and made every effort to understand it,

[11] *Re Glendinning* (1890) *The Times* 5 July 1890; see too *The Times*, 3 April 1891, p. 14, col. c.
[12] *Minutes of Evidence, 1895*, q. 2791.
[13] *Minutes of Evidence, 1895*, q. 265.
[14] See pp. 131–45.
[15] A. Birrell, *The Duties and Liabilities of Trustees* (London, 1897), pp. 16–17.

and having identified an obscurity or inconsistency in a provision. Concerned not to incur extra expense to the trust fund, and assured by the beneficiaries that the provision was clear, the trustee might arrive at his own interpretation of the clause and not seek the advice of the court. The only correct interpretation, however, was the one arrived at by the court, and if a trustee had relied on a contrary view formed either by himself or his legal adviser, he would have to answer for the consequences. Many transgressions were equally honest, but made at the urging of the beneficiary or members of the family where there was some pressing necessity which the family thought could be satisfied by an advancement, or a change in investments, or some act which was not strictly within the letter of the trust or the law.[16] Lord St Leonards believed that some nine-tenths of all breaches were of this kind.[17] It was usually the tenant for life who approached the trustee in this way, because by his very nature he was the most prominent and active beneficiary, and as such frequently in a position to attempt to influence the trustee, and was also always acutely aware of the size of the income return. Beneficiaries in remainder were often infants, and commonly the children of the tenant for life. The most common breaches of trust in this context were with regard to investments. Where the tenant for life was impecunious and wanted a higher return from the trust investments, the pressure he could exert on his trustees to invest in particular – and unauthorised – investments could be almost irresistible. In the very great majority of breaches, the trustees derived no personal advantage from the breach, and indeed often acted from the highest motives. It was also the case that the administration of trusts, then as now, would not have progressed as smoothly or efficiently without the occasional deliberate breach of trust, actions which would often have had the complete approbation of the settlor himself and were frequently even advised by the solicitor to the trust.[18] It was part of practical trust administration. A solicitor told the Select Committee on Trust Administration in 1895:

> I think everyone must admit that in a trust that lasts, say, 50 years there can be no mandatory direction in the original instrument which can possibly foresee and adapt itself to all the circumstances of that long period.

[16] See Lord Langdale MR in *Pride* v. *Fooks* (1840) 2 Beav 430 at 440.
[17] *Parl. Deb.*, vol. 145, ser. 3, col. 1552, 11 June 1857 (HL).
[18] See the evidence of Mr William Walters, solicitor, in *Minutes of Evidence, 1895*, q. 593; see too q. 1501.

Therefore private trustees must, and do daily, break their trust technically. They exercise discretions which they have no business to exercise very often, I admit, but they are bound to do it.[19]

Lord Lindley once went so far as to observe in argument that 'My old master the late Lord Justice Selwyn, used to say, "the main duty of a trustee is to commit *judicious* breaches of trust"',[20] and indeed he frequently stated his belief that the court ought to have the power to commit such breaches.[21] *The Times*, however, sharply warned trustees not to take him too seriously, for 'they may smart if they avail themselves of this latitudinarianism, even in insignificant matters'.[22]

It was undeniable, however, that while the great majority of trusts were properly administered, breaches of trust causing considerable losses and hardships to beneficiaries were very common.[23] Since, however, the total amount of property held on trust was unknown, it was difficult to assess the number of breaches and the amount of consequent loss with any real accuracy. Contemporaries certainly thought it a very serious problem, Lord Brougham understanding that one-twentieth of all trust funds were embezzled.[24] The number of fraudulent breaches was probably exaggerated in the public mind. Since cases of breach of trust were constantly before the courts, contemporary newspapers reported the more sensational examples,[25] and popular literature found breach of trust a fruitful source of inspiration. Publicised breaches were undoubtedly the tip of an iceberg, for many breaches were kept quiet, from a dislike of litigation, or, where the breach was committed by a member of the family, a reluctance to expose private corruption to the public gaze. Deeds of release occasionally expose an underlying breach, as when two trustees (a gentleman and a clerk in Holy Orders) had lent part of the trust fund to members of their families

[19] *Minutes of Evidence, 1895*, q. 1395.

[20] *Perrins* v. *Bellamy* [1899] 1 Ch 797 at 798. In *National Trustees Co of Australasia Ltd* v. *General Finance Co of Australasia* [1905] AC 373 at 376 he maintained that the words 'main duty' were a mistake, and amended them to 'great use'. He had first made the point in *Minutes of Evidence, 1895* when he had said there was 'an immense deal of good sense' in adopting this view: q. 457.

[21] *Minutes of Evidence, 1895*, qq. 459 and 532.

[22] *The Times*, 18 March 1895, p. 9, col. e.

[23] *Minutes of Evidence, 1895*, qq. 213, 394.

[24] *Parl. Deb.*, vol. 145, ser. 3, col. 1559, 11 June 1857 (HL).

[25] See for example *The Times*, 12 April 1856, p. 5, col. f.

on improper and inadequate security without the consent of the beneficiary.[26]

Whatever the reason underlying the breach, the law held transgressing trustees liable to replace any money lost.[27] This position reflected the paramount safety of the trust fund. The underlying purpose of the trustee's personal liability for breach was not to punish his default, but to compensate the trust estate for any loss it may have suffered, or indeed to account for any profit made. The aim was to put the beneficiaries in the state they would have been in if the breach had not happened.[28] In this light it was clear that the motive of the defaulting trustee was quite irrelevant. Whether the breach was honest or fraudulent, whether it was the result of a deliberate act or an omission,[29] whether the loss was caused by the dishonest act of a third party, whether the motive was the personal gain of the trustee or the assistance and comfort of the beneficiaries, and whether the trust was created for valuable consideration or not,[30] could not affect the issue of liability. So even where the trustees had themselves, out of motives of kindness and benevolence, created a trust out of their own property to provide for the family of a deceased friend they were held liable for a breach of trust.[31] The fundamental principle of Equity was that the trustee would be liable for any losses caused to the trust estate if that loss would not have occurred but for the breach.[32] Issues of remoteness and foreseeability were not regarded as relevant. As Lord Cottenham LC observed in relation to a personal representative, if the estate was invested in unauthorised investments, or put into the control of people who should not have it, then if there was a loss then he would be liable, 'however unexpected the result, however little likely to arise from the course adopted, and however free such conduct may have been from any improper motive'.[33] The attitude of the law reflected and reinforced the Victorian moral code, with its essentially rigid and clear conception of right and wrong.

[26] DRO 1044B add 2/B7/1 (1859).
[27] See Sir John Romilly MR in *Norris* v. *Wright* (1851) 14 Beav 291 at 307.
[28] *Dornford* v. *Dornford* (1806) 12 Ves Jun 127.
[29] *Grayburn* v. *Clarkson* (1868) 3 LR Ch App 605.
[30] *Smith* v. *French* (1741) 2 Atk 243.
[31] *Drosier* v. *Brereton* (1851) 15 Beav 221.
[32] *Grayburn* v. *Clarkson* (1868) 3 LR Ch App 605; see too *Devaynes* v. *Robinson* (1857) 24 Beav 86.
[33] *Clough* v. *Bond* (1838) 3 My & Cr 490 at 496.

Trustees were legally and morally bound to do their duty, and to relax the legal consequences of a breach of that duty would undermine accepted social mores and, as such, threaten the social order itself. A breach of trust was thus a legal breach seen in moral terms.

The determination of a trustee's measure of liability for the many and various breaches of trust was an issue which greatly exercised judicial minds in the nineteenth century, and yielded substantial and detailed case law.[34] The emerging rules were firmly based on the compensatory principle. The decisions ensured that the trust was put back into the position it would have been in had no breach occurred,[35] and so held the trustees liable for all the consequences which flowed from their breach,[36] a severe attitude towards trustees which was particularly harsh towards honest trustees and which was accordingly unpopular with both practitioners and their clients. So, for example, it was early settled that if a trustee was directed to make a specific investment, and failed to do so, he would have to purchase as much of that investment as the fund would have purchased at the proper time, even if the price of the investment had risen in the meantime.[37] Where a trustee retained investments he should have sold he was in breach, and the measure of liability was held to be the difference between the price obtained at sale, and the price the investment would have fetched if it had been sold at the proper time. In such a case liability could press hardly on trustees. In 1859[38] some trustees were directed to sell a freehold inn on the main road from Bristol to Exeter, as soon as convenient. They refused an offer of £900 in 1836, but the opening of the Bristol and Exeter Railway in 1843 resulted in a loss of traffic and custom, and led property prices to fall. The inn was still unsold in 1859, and the trustees were held liable for the difference between £900 and the proceeds of a present sale. They had been guilty of no more than a misjudgment, and yet found themselves liable to make good the whole of a substantial loss.

Civil liability could also bring with it penal consequences, even for the morally blameless. Although arrest and imprisonment for

[34] Particularly in relation to breaches concerning investment. See 'Liability of Trustees for Improper Investments' (1852) 16 *Jurist* 258–9.

[35] *Byrchall* v. *Bradford* (1822) 6 Madd 235.

[36] *Re Massingberd's Settlement* (1890) 63 LT 296.

[37] *Byrchall* v. *Bradford* (1822) 6 Madd 235. See too *Pride* v. *Fooks* (1840) 2 Beav 430.

[38] *Fry* v. *Fry* (1859) 27 Beav 144.

debt were abolished almost entirely by the Debtors Act 1869, the Act expressly excepted certain persons guilty of some misconduct, including a trustee who was in default of a court order to pay a sum in his possession or under his control, and he could be imprisoned for up to one year.[39] If, as was commonly the case, he had spent it, then he was liable to attachment.[40] The writ of attachment was, according to Sir George Jessel MR, a punitive procedure. A trustee who had disobeyed a court order was dishonest: 'He need not perhaps be called a thief in so many words, but he is a man who takes or keeps money belonging to other people, and he is to be punished as such.'[41] 'It is in that sense', continued the Master of the Rolls, 'vindictive, and intended to be so.'[42] Since the provision in the Debtors Act 1869 left the court with no discretion as to the issue of the writ, it could inflict severe hardship in cases involving no moral blame. Sir George Jessel MR, who was instrumental in passing an amending Act in 1878[43] to allow the court some discretion to deal with exceptional cases,[44] said he once had to order the imprisonment of a trustee who had committed an unintentional breach of trust, and was dying. The power to imprison was, however, regarded as an important and effective tool in the regulation of fraudulent trustees. Kay J made the order in 1883[45] against a trustee who had misappropriated trust money and mixed it with his own money, 'one of the most improper acts a trustee can possibly commit'.[46] In his view this was a case 'in which the punishment ought to be inflicted for the purpose of teaching this man that a dishonest act of this kind will not be passed over with impunity, even though he is unable to pay, and for the purpose of teaching other trustees the same lesson – a very salutary one in many cases'.[47]

Lord St Leonards' observation in 1857 that trustees received a 'hard measure of justice' from the courts of Equity[48] was entirely

[39] Debtors Act 1869, 32 & 33 Vict. c. 62, s. 4 (3). See *Minutes of Evidence, 1895*, q. 2093.

[40] But not if he had simply neglected to get the money in, *per* James LJ in *Ferguson* v. *Ferguson* (1875) 10 LR Ch App 661 at 662.

[41] *Marris* v. *Ingram* (1879) 13 Ch D 338 at 342.

[42] *Ibid*. at 343.

[43] Debtors Act 1878, 41 & 42 Vict. c. 54.

[44] *Marris* v. *Ingram* (1879) 13 Ch D 338 at 343.

[45] *Re Knowles* (1883) 52 LJ Ch 685.

[46] *Ibid*. at 686.

[47] *Ibid*. at 687.

[48] Lord St Leonards in *Parl. Deb.*, vol. 145, ser. 3, col. 1552, 11 June 1857 (HL).

justified and indeed became progressively more so until the last years of the Victorian period. The orthodox uncompromising attitude of the law was, however, and had always been, promoted with the object of ensuring the highest standards of behaviour by trustees, to emphasise that anything falling short in relation to the administration of trusts would not be tolerated and thereby to discourage breaches of trust.[49] Lord Hardwicke LC had observed, in relation to a trustee who had lent out money on an unsecured loan, that 'if this Defendant has acted fairly, it is a hard case, but the rules of this court must be observed; and it is better that one man should suffer an inconvenience, than that the general rule should be broken'.[50] Similarly Lord Eldon had thought that to show more leniency to trustees, to excuse honest breaches of trust where the trustees had no thought of benefiting themselves would 'be very dangerous . . . an encouragement to bad motives'.[51] Lord St Leonards said himself that the rules were 'calculated to alarm' trustees.[52] When it was argued in 1834 that the practical difficulties involved in severing the profits arising from a trustee's own money in a trade from those of the trust money he had misappropriated and invested in the same trade were such that he should be excused from accounting for the profits, Lord Brougham was outraged. In strong language he condemned the tendency of such a view 'to cripple the just power of this Court in by far the most wholesome, and indeed, necessary exercise of its functions, and the encouragement thus held out to fraud and breach of trust'.[53] Breaches were 'malversations', trustees perpetrating them 'contrivers of sordid injustice'. Breach of trust should be, and was, 'discouraged by intercepting its gains, and thus frustrating the intentions that caused it; punished by charging all losses on the wrongdoer, while no profit can ever accrue to him'.[54] Such forceful language was supported even in the later years of the nineteenth century, for forty years later

[49] See counsel's observation in *Pocock* v. *Reddington* (1801) 5 Ves Jun 794 at 797.

[50] *Ryder* v. *Bickerton* (1743) 3 Swans 90.

[51] *Caffrey* v. *Darby* (1801) 6 Ves Jun 488 at 495, 496. Originally the only leniency the court would allow, if leniency it was, was that it would occasionally allow a trustee to be relieved from liability if the breach was a technical one which the court would have authorised: *Lee* v. *Brown* (1798) 4 Ves Jun 362; *Brown* v. *Smith* (1878) 10 Ch D 377.

[52] Lord St Leonards, *A Handy Book on Property Law* (2nd edition, Edinburgh and London, 1858), p. 159.

[53] *Docker* v. *Somes* (1834) 2 My & K 655 at 667.

[54] *Ibid*. at 665; see too *Piety* v. *Stace* (1799) 4 Ves Jun 620 at 622, *per* Arden MR.

Lord Hatherley would not detract from such expressions which marked 'the decided course that the Court of Chancery will always take in keeping a trustee strictly in bounds with regard to dealing with the money committed to his trust'.[55] The strength of feeling and determination in the court was not to be underestimated. Furthermore it could be, and was, argued that this severity was acceptable because trusteeship was voluntary; no one had to accept the office, and so if he did he was bound to perform the duties inherent in it, and should be liable if he neglected to do so. The beneficiary, moreover, had the right to have the trust administered according to the terms of the trust instrument, the law and the principles of Equity, and if the trustee failed to do this, he had to make good the loss.

The imposition of liability in this way to protect the beneficiaries and to ensure the probity of trustees reflected the essential values and ideals of Victorian society. It found some sympathy with the judiciary, legislators and society because trustees, unlike other accounting persons, generally acted for women and children who were regarded as inherently weaker and presumably more easily duped, and therefore in need of robust protection.[56] Events such as the collapse of the City of Glasgow Bank in 1878 only served to increase public concern. As a result, the severity of the underlying principles of Equity with respect to trustees in breach continued throughout most of the Victorian period. In 1895 Lord Halsbury said he did not think the law as to liability should be relaxed, since such a step would only stimulate breaches of trust.[57]

There existed, however, an inherent and very real tension. It was accepted that the object of the law should be to recompense the trust for the loss it suffered through a breach. Moreover, no one doubted that fraudulent trustees should be harshly dealt with: a deliberate abuse of trust could not be tolerated and beneficiaries should certainly not be permitted to suffer losses because of it. But it was equally clear that a good supply of honest and able men willing to take on the office of trustee and perform a task of such importance to English life was absolutely necessary to the survival of the institution. Ironically, the judiciary itself had been the first to warn against the consequences of the harsh application of the

[55] *Per* Lord Hatherley in *Vyse* v. *Foster* (1874) 7 LR HL 318 at 337.
[56] See *Minutes of Evidence, 1895*, qq. 96, 99, 100.
[57] *Ibid*., q. 259.

law and the judges were, in the nineteenth century, proved right. In determining the nature and extent of the consequences of a breach for the trustees, the judges had always been aware of the need to arrive at a balance between being seen to be sufficiently severe with those who abused their trust and thereby injured their beneficiaries, and on the other hand not alienating potential holders of the office. As early as 1634 the Lord Keeper had asked for the assistance of all the judges

> whereby some course might be settled that parties trusted might not be too much punished, lest it should dishearten men to take any trust, which would be inconvenient on the one side; nor that too much liberty should be given to parties trusted, lest they should be emboldened to break the trust imposed on them, and so be as much prejudicial on the other side.[58]

Many judges who followed him were motivated by the same pragmatic public policy considerations. 'For as a trust is an office necessary in the concerns between man and man', observed Lord Hardwicke LC in 1747,

> and which, if faithfully discharged, is attended with no small degree of trouble, and anxiety, it is an act of great kindness in any one to accept it: to add hazard or risque to that trouble, and to subject a trustee to losses which he could not foresee, and consequently not prevent, would be a manifest hardship, and would be deterring every one from accepting so necessary an office.[59]

It was quite clear to him that if a trustee were to be held automatically liable for the defaults of his agent, 'no man in his senses would act'.[60] The court, he said, had 'laid down a rule with regard to the transactions of . . . trustees, so as not to strike a terror into mankind acting for the benefit of others, and not for their own'. The court had to encourage people to act as trustees, and not discourage them. The judiciary thereby showed an early appreciation of the burden of trusteeship. The need to secure a balance between security and pragmatism was reiterated by Lord Eldon in 1818 when he observed

[58] *Townley* v. *Sherborne* (1634) Bridg J 35 at 37. Note that in the eighteenth century Lord Thurlow was remarkable for the fact that 'he leant less hardly against trustees than any other Judge'. *Per* Lord Brougham LC in *Docker* v. *Somes* (1834) 2 My & K 655 at 673; and see Lord Langdale MR in *Ghost* v. *Waller* (1846) 9 Beav 497 at 499–500.

[59] *Knight* v. *Earl of Plymouth* (1747) Dick 120 at 126–7.

[60] *Ex p Belchier* (1754) Amb 218 at 219.

that it was important to secure the property of the beneficiary, but on the other hand it was important 'not to deter men from undertaking trusts, from the performance of which they seldom obtain either satisfaction or gratitude'.[61]

The application of the law to honest trustees who transgressed through ignorance or misjudgment and yet had done their very best in often difficult circumstances highlighted this tension and took it to its very limit. The difficulties in the recruitment of trustees in the nineteenth century were undeniable. The statutory provisions of 1850[62] and 1852[63] relating to appointment had only touched the surface of the problem and had not addressed its underlying causes. When the issue became critical in the closing years of the century, it was found that it was caused to a very great degree by the severity of the rules as to liability. Contemporary evidence makes it clear that the reluctance of honest and capable men to accept the office was compounded by the joint and several liability of trustees which meant a trustee could not even confidently leave business in the hands of his co-trustee or an agent. For trustees the issue of liability was at worst a menace, at best an ever-present anxiety. The fear of losing one's personal fortune through an inadvertent slip, momentary lapse of judgment, or honest mistake, loomed large in most potential and actual trustees' minds. The problem was essentially that many trustees found themselves liable for acts which any reasonable and prudent man would have done and which he could do very little to protect himself against. The problem lay, in short, with the law's harsh treatment of honest and reasonable trustees. Informed public opinion felt that the rules as to liability were so severe as indeed to 'strike terror into mankind generally, and honest men especially'.[64] The standard of conduct a trustee had to reach in order to escape liability was unrealistic. He had to be 'superhumanly vigilant and circumspect',[65] trusting no one. Agents and co-trustees, however well he might know them, however much confidence he and the settlor placed in them, were to be regarded as potential embezzlers. *The Times* observed that

[61] *Per* Lord Eldon in *Walker* v. *Symonds* (1818) 3 Swan 1 at 64. See too Sir John Leach MR in *France* v. *Woods* (1829) Tam 172 at 176.
[62] Trustee Act 1850, 13 & 14 Vict. c. 60.
[63] Trustees Act Extension Act 1852, 15 & 16 Vict. c. 55.
[64] *The Times*, 16 June 1890, p. 9, col. b.
[65] *Ibid.*

'English law treats those generous friends as if they were little more than malefactors.'[66]

Some Victorian judges professed to be concerned. Lindley LJ, who was the most vocal in urging a relaxation in the severity of the law, put the matter pithily when he observed that the court should not 'prevent people from becoming trustees by converting honest trustees into insurers of the moneys committed to their care'.[67] Extra-judicially he expressed the view that trustees had been 'very harshly dealt with by the Court of Chancery from time out of mind',[68] and he, like many of his colleagues on the bench, believed that in real terms too much was being demanded of trustees. In 1892 he expressed the difficult position in which some trustees found themselves. 'This', he said,

> is one of those cases in which the court has to deal with trustees placed in great difficulties by no fault of their own, and who have acted throughout, not only with scrupulous fidelity, but carefully and prudently to the best of their ability and with an anxious desire to act fairly and justly towards all their *cestuis que trust* . . . They have on all important occasions sought and acted upon legal advice, and with the approval of the father and mother of the infant plaintiffs. Their reward, I am sorry to say, is a harassing and expensive law-suit.[69]

Other judges expressed their discomfiture at holding some trustees liable. Sir John Romilly MR remarked that the case before him was 'very painful',[70] and Rigby LJ said that some orders he had had to make against trustees where the breach was inadvertent and involved no moral blame 'shocked one's conscience'.[71] Lord St Leonards observed that 'if trustees were to be expected to sacrifice their time and risk their property gratuitously, the law ought not to deal harshly with them'.[72] The addressing of these fundamental tensions in their social and legal context was the most significant and important issue in the law of trust administration in the nineteenth century. In 1898 Kekewich J said that it was a matter of 'vast importance, affecting, as it does, not only the two large classes to one

66 *Ibid.*
67 *Re Whiteley* (1886) 33 Ch D 347 at 357.
68 *Minutes of Evidence, 1895*, q. 422.
69 *Re Hurst* (1892) 67 LT 96 at 100.
70 *Drosier* v. *Brereton* (1851) 15 Beav 221 at 224.
71 *Perrins* v. *Bellamy* [1899] 1 Ch 797 at 801. See too *Re Hurst* (1890) 63 LT 665 at 669.
72 *Parl. Deb.*, vol. 147, ser. 3, col. 551, 28 July 1857 (HL).

or both of which most men belong, trustees and cestuis que trust, but also all members of the legal profession to which the position and duties of trustees are a source of constant anxiety'.[73]

Popular demand was for a clear distinction to be drawn between trustees who took trust money for their own advancement, and those who lost it in a genuine and earnest desire to help the beneficiaries. Solicitors, trustees and Parliament wanted, and appreciated the need for, a more liberal and realistic treatment of trustees. While there was some judicial inclination to this view, it was limited. Despite the judicial expressions of sympathy, the jurisprudence of the late Victorian period reveals an adherence to the compensatory principle, with relatively little mitigation of the severity of its application. Certainly the popular perception was that Parliament was being proactive in lessening the burden on trustees, while the harsh and restrictive application of the law was due to the judges. It was true that the judges found they were able, or willing, to express any concern they might feel for honest trustees in tangible ways only very occasionally. It was said even of Lindley LJ that in the Court of Appeal he would hold trustees 'answerable to the last farthing for conduct which, as a witness and a law reformer, he thinks not only excusable but proper'.[74] That judge said, however, that he went as far as he could and dared in *Speight* v. *Gaunt* in 1883,[75] bearing in mind the heavy presence of the House of Lords, when he applied the prudent businessman standard of care to the appointment of agents in a realistic way and refused to hold that trustees should 'guarantee the solvency or honesty' of their agents, on the basis that to do so would make it impossible for anyone to act as trustee.[76] He was very pleased when the court went his way, and was encouraged and relieved when the House of Lords upheld it,[77] for it was, he admitted, 'a little bit of a stretch'.[78] Sir George Jessel MR observed in that case that the court should 'not strain the law against [an honest trustee] to make him liable for doing that which he has done and which he believes is right in the execution of his duty', but

[73] *Head* v. *Gould* [1898] 2 Ch 250 at 267. See too Lopes LJ in *Re Whiteley* (1886) 33 Ch D 347 at 358.
[74] *The Times*, 18 March 1895, p. 9, col. f.
[75] *Speight* v. *Gaunt* (1883) 22 Ch D 727. He sat in the Court of Appeal with Jessel MR and Bowen LJ.
[76] *Ibid*. at 762.
[77] *Speight* v. *Gaunt* (1883) 9 App Cas 1.
[78] *Minutes of Evidence, 1895*, at q. 554.

rather to 'lean to [his] side'.[79] 'You are to endeavour', he continued, 'as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit.'[80] He was very critical of Bacon VC who had found against the trustee in the court below, observing caustically that 'you are not to exercise your ingenuity, which it appears to me the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability'.[81] To expect a trustee to be more cautious than an ordinary prudent man of business in the conduct of his own affairs, observed Lord Blackburn pragmatically, would be 'both unreasonable and inexpedient'.[82] Though some felt that the law had gone far enough in limiting the liability of trustees,[83] the judgment in *Speight* v. *Gaunt* was generally welcomed in principle. But the law perceived the ordinary prudent man of business conducting his own affairs in a rather different light from the ordinary prudent men of business themselves.[84] 'That is the law', observed one solicitor in 1895, 'but not the practice, I am afraid.'[85] It was felt by legal practitioners that the law demanded too much, indeed demanded that trustees be 'unreasonably, . . . supernaturally prudent'.[86] Recruitment inevitably suffered.

Some judges took heed and applied the standard of care generously. They refused to extend the categories of liability, and resisted the imposition of liability simply where there was loss, but no fault, in the sense of a technical breach of trust or a failure to satisfy the standard of care laid down in *Speight* v. *Gaunt*. Sir George Jessel MR had there observed that in his view it was

> the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons to fix him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man

79 *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 746.
80 *Ibid.*
81 *Ibid.*
82 *Speight* v. *Gaunt* (1883) 9 App Cas 1 at 20.
83 See Lord Herschell's evidence in *Minutes of Evidence, 1895*, qq. 152–3.
84 See above, pp. 157–9.
85 *Minutes of Evidence, 1895*, q. 762.
86 *Minutes of Evidence, 1895*, q. 1070. The witness was John Hunter, solicitor, and President of the Incorporated Law Society.

who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit. I think that is the view which has been taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation.[87]

The decision in *Re Chapman* in 1896[88] showed this more pragmatic and compassionate judicial attitude in this respect. It was there sought to make a trustee liable for a loss in the value of certain mortgage securities, which were authorised investments but had suffered from the depreciation in the value of land in Suffolk and Norfolk. The trustee was conscious of the depreciating market, but did not know what to do for the best – whether to retain the mortgages and hope the situation would improve, or to sell them for the best price possible. After consulting experienced farmers he decided, like most people in Norfolk, to retain the investments. In argument Lindley LJ said 'This is one of the most important cases that we have had before us for years. What is an honest trustee to do in such a case?'[89] Lopes LJ said that

a trustee who is honest and reasonably competent is not to be held responsible for a mere error in judgment when the question which he has to consider is whether a security of a class authorized, but depreciated in value, should be retained or realized, provided he acts with reasonable care, prudence, and circumspection. The liability of trustees should not, in my judgment, be extended.[90]

No one, including the trustee, could have foreseen what was going to happen. He was honest and he was competent. He had not been imprudent in his actions, had committed no breach in retaining the investments, and was not guilty of wilful default. Indeed, he had acted as any prudent man at that time would have acted, and as such was not held liable for the loss on the mortgages.

The courts were able to show some appreciation of the position of the honest trustee by manipulating the effects of the imposition of liability. They did this principally in the context of the rate of interest a defaulting trustee should pay on the sum which he was required to make good to the trust. The issue of interest came to be

[87] *Speight* v. *Gaunt* (1883) 22 Ch D 727 at 746.
[88] *Re Chapman* [1896] 2 Ch 763.
[89] *Ibid*. at 771.
[90] *Ibid*. at 778.

of considerable importance and difficulty, as a result not of the general principles themselves, but rather of their practical application to specific cases. The usual rate of interest throughout the nineteenth century was 4 per cent,[91] but the courts increased it to 5 per cent in special circumstances,[92] notably where the trustee's conduct had been fraudulent or unconscionable.[93] In order to achieve the difficult task of assessing the probity of the trustee's conduct for these purposes, the court looked carefully at all the circumstances of the case. If the court found that the breach was an honest one resulting from an error of judgment with no thought for personal advancement, it would charge the usual 4 per cent, and this had been the practice from the early years of the nineteenth century. In 1816,[94] for example, Sir Thomas Plumer VC observed that a distinction was taken, 'as in every moral point of view there ought to be, between negligence and corruption in executors'. As, amongst other things, the trust in the case before him was onerous, the property difficult to manage, and the executors had not made any personal advantage, there was no reason for charging them the higher rate of interest or compound interest. It was a case of mere negligence, and there were extenuating circumstances. Conversely, in another case the same judge imposed the higher rate on an executor who had sold out stock unnecessarily, retained large balances in his hands, and resisted paying debts, on the basis that it was a case of gross misconduct.[95]

In relating the rate of interest to the degree of probity, the courts were to an extent recognising the honest but defaulting trustee. It was limited in that it did not address the fundamental issue of liability, and it was an instance of treating dishonest trustees more severely rather than mitigating the severity of the law for honest ones. It followed that this view was not adopted in response to

[91] *AG* v. *Alford* (1855) 4 De G M & G 843, followed in *Burdick* v. *Garrick* (1870) 5 LR Ch App 233.
[92] *Knott* v. *Cottee* (1852) 16 Beav 77.
[93] *AG* v. *Alford* (1855) 4 De G M & G 843; *Jones* v. *Foxall* (1852) 15 Beav 388. Also where he had employed the money in trade and so was deemed to have gained more: *Docker* v. *Somes* (1834) 2 My & K 655; *Vyse* v. *Foster* (1874) 7 LR HL 318. Also where he had actually received more, and he had to account for what he had actually received: *Jones* v. *Foxall* (1852) 15 Beav 388; *Re Emmet's Estate* (1881) 17 Ch D 142.
[94] *Tebbs* v. *Carpenter* (1816) 1 Madd 290.
[95] *Crackelt* v. *Bethune* (1820) 1 Jac & W 586. See too *Docker* v. *Somes* (1834) 2 My & K 655.

any perceived harsh treatment of trustees or any anxieties as to recruitment, as it predates the period where such concerns were widespread. When such rulings were first made, some judges disapproved and were not convinced as to the validity of their foundation.[96] Lord Cranworth observed that he could not understand the reasoning behind it, and doubted whether it should be used as a tool to punish the defaulting trustee.[97] The orthodox view, underlying Equity's commitment to the compensatory principle, was that such decisions were not made with a view to punishing dishonest trustees, even though this might have been its effect. As Sir W. M. James LJ observed in 1872, the higher rate was imposed on the basis that a trustee either had, or ought to have, received more.[98] The imposition of the higher rate, like the decision to charge compound interest,[99] was, furthermore, entirely a matter for the discretion of the court,[100] and as such had little real impact on the underlying severity of the law as it applied to honest trustees.

Despite these modest judicial concessions, it remained the case at the end of the Victorian period that once a breach had been committed, any trustee who had contributed to it, however innocently, was personally liable for it. Breaches were, moreover, determined by reference to an objective standard of care which permitted breach without moral culpability. Lay trustees found this risk unacceptable, and recruitment suffered. Since the tacit judicial consensus was that the Equitable rules as to liability should not and could not be substantially relaxed, it was left to the legislature to effect the necessary reforms. The popular and professional concern for the impact of the law on honest trustees and its consequences for recruitment were repeatedly expressed in Parliament, and reform, albeit piecemeal, began as early as the middle years of the nineteenth century. The next fifty years saw a consistent legislative programme mitigating the severity of this judge-made law and protecting the honest trustee.

Prior to any relief of the innocent, however, came the punishment of the guilty. The Victorian legislature was generally more comfortable with concepts of punishment for dishonesty through

[96] *Raphael* v. *Boehm* (1805) 11 Ves Jun 92.
[97] *AG* v. *Alford* (1855) 4 De G M & G 843.
[98] *Per* Sir W. M. James LJ in *Vyse* v. *Foster* (1872) 8 LR Ch App 309 at 333.
[99] *Re Emmet's Estate* (1881) 17 Ch D 142.
[100] See Sir John Romilly's succinct exposition of the law in *Jones* v. *Foxall* (1852) 15 Beav 388 at 392–3.

the criminal law rather than relief for honesty through the civil law. It was consistent with notions of Victorian morality where above all else culpability should be punished for the rehabilitation of the offender and the example to his fellows. One view was that dishonest trustees should be punished by the criminal law, and honest ones should not be punished at all. Prompted by the frauds of the bankers Sir John Dean Paul and his partners, and of the directors of the Tipperary and British Banks,[101] the Attorney General introduced a bill in 1856 to make fraudulent breaches of trust a statutory crime, on the basis that it was a gross anomaly that the misappropriation of trust money by a trustee could not be regarded as larceny at Common Law since, being the legal owner, a trustee could not steal from himself, and the Equitable title was ignored. To regard such a trustee merely as a debtor and not as a thief was, he said, 'calamitous and . . . revolting to moral feeling'.[102] Furthermore, as a debt which could only be enforced through the Court of Chancery, it added insult to injury.

It was immediately evident that the principal concern was to ensure that honest and well-intentioned trustees, committing breaches possibly at the instigation of and for the benefit of the beneficiaries, were not then unwittingly subjected to criminal proceedings. There had to be stringent procedures in place to obviate the danger of a malicious, and public, prosecution by discontented or vindictive beneficiaries, and only the misappropriation of trust property for the trustee's own benefit with intent to defraud was to constitute a crime. There was nevertheless anxiety as to the effect on recruitment. It was thought that the mere possibility of criminal liability would make the acceptance of trusteeship much more dangerous, and in 1857 the difficulties in persuading respectable, able and prudent men to take on the office were already acute. Any inherent uncertainties in key terms, such as 'intent to defraud', could only further discourage respectable and sensitive men from taking the office. The Fraudulent Trustees Act 1857[103] ultimately made trustees or their agents who misappropriated trust property with

[101] W. Paterson (ed.), *Practical Statutes of the Session 1857* (London, 1857), p. 102.
[102] *Parl. Deb.*, vol. 145, ser. 3, col. 674, 21 May 1857 (HC).
[103] Fraudulent Trustees Act 1857, 20 & 21 Vict. c. 54. The Act of 1857 also included within its provisions offences by bankers, brokers and directors of joint stock companies. Directors were particularly severely dealt with. The law was later found in the Larceny Act 1861, 24 & 25 Vict. c. 96, s. 80 (trustees), ss. 75–6 (agents).

intent to defraud guilty of a misdemeanour,[104] punishable by a maximum of three years' penal servitude.[105] The reaction to the Act was mixed. Some thought the measure was too severe, in the light of the burden of trusteeship and the absence of remuneration, though most commentators advised trustees not to be alarmed for there was sufficient protection in the Act for honest trustees. The principal safeguards against malicious prosecutions were that a clear intent to defraud was necessary, and no beneficiary could begin any prosecution without the sanction of the Attorney General.[106] Some practitioners, however, thought the provision too weak in that it was restricted to express trusts constituted in writing. Accordingly a trustee of a parol trust who misappropriated trust money to his own use escaped punishment. One reason for this provision was that such a trustee might be placed 'in unfair peril' if he could be held criminally liable on the basis of oral evidence alone as to the nature of his trust duties.

The relief of honest trustees was regarded as of equal importance to the punishment of fraudulent trustees, and the debates served to highlight the demands for a more general statutory relief of honest trustees. Indeed the Fraudulent Trustees Bill and a Trustees Relief Bill introduced by Lord St Leonards were before Parliament at the same time. Certainly the two measures were regarded as complementary, and Lord St Leonards believed that if the former were enacted, and the latter not, then men would refuse to act as trustees.[107] His original bill, unambiguously entitled 'A Bill for the better protection of trustees, executors, and administrators, acting bona fide in the discharge of their office', addressed those instances which were regarded as epitomising the unduly severe treatment of honest trustees by the Courts of Chancery. He proposed that if a trustee committed an innocent act which was technically a breach of trust and upon which both a loss and a profit were made, he should be allowed to set the one off against the other. This was a reference to the case of *Dimes* v. *Scott* in 1828,[108] the result of which

[104] Fraudulent Trustees Act 1857, 20 & 21 Vict. c. 54, s. 1.

[105] *Ibid.*, s. 10. The period of penal servitude had been reduced from the original seven years. The court had the discretion to imprison for two years or impose a fine.

[106] *Ibid.*, s. 13. In 1901–4 there were twenty-two criminal prosecutions for fraudulent breaches of trust: *Parl. Deb.*, vol. 142, ser. 4, cols. 6–7.

[107] *Parl. Deb.*, vol. 147, ser. 3, col. 550, 28 July 1857 (HL).

[108] *Dimes* v. *Scott* (1828) 4 Russ 195. See above, pp. 74–7.

Lord St Leonards thought was unjust, where a trustee should have sold a particular investment and invested the proceeds in Consols, failed to do so, and, furthermore, paid the whole of the income of the original investment to the testator's widow. When the trustee did convert the investment, he was able to buy more Consols than he would have been able to buy had he converted at the proper time. Despite the fact that he had made no benefit for himself, and that there had not been any actual loss, the court compelled him to repay the sum he had overpaid to the tenant for life, some £1,000, without being allowed to take the benefit of some £900 profit made on the purchase of the Consols.

He also sought to address another hardship concerning conversion. As the law stood, where a trustee was directed to convert leaseholds, invest the proceeds in authorised investments and pay the income to the tenant for life, but instead allowed the tenant for life to take the whole of the income from the unconverted leaseholds, the trustee had to make up the excess of the rents above the yield of the authorised investments. This was so even if the remainderman had known of the overpayment, often made to his surviving parent, and had sued for it only after that parent's death. Moreover, the trustee in such a case was prevented by the law as it stood from proceeding against the tenant for life whom he had innocently overpaid, and the proposal was that he should be able to do so.

He addressed the very common instance of a trustee changing the trust investments at the urging of the tenant for life, and thereby committing a breach if the new investments were unauthorised. He proposed that if the trustee in such a case took the advice of a Queen's Counsel and gave notice of his intention to make the investment, he should be indemnified. Finally, he addressed the particular hardships arising from acts of omission, where a trustee was held liable for a failure to do something under a rule of Equity. He thought that beneficiaries should take more responsibility to protect an honest trustee, and that for a beneficiary to remain quiet and then take proceedings for an omission was unacceptable. He proposed protection against the liability of trustees to satisfy debts they had not sued for, even if they had omitted to sue because they believed they had no chance of recovery. These proposals had been lost in the passage of the bill through Parliament, partly because it had been introduced too late in the session, but mainly because it was perceived as giving trustees the impression that their duties

were purely nominal and not subject to any real responsibility. It ultimately became law in 1859 as the Law of Property and Trustees Relief Amendment Act,[109] but it fell far short of the original proposals. It contained only two provisions for the better protection of honest trustees: the first enabled trustees to apply to the Court of Chancery for advice on questions relating to the management of the trust, and the second was the inclusion in all trust instruments of a standard form indemnity clause purporting to relieve a trustee from liability for the wrongful act of his co-trustee.[110] A contemporary commentator felt that this was 'not sufficient for the fair protection of such a troublesome and thankless office as that of trustee',[111] and certainly insufficient protection for honest trustees.

Trustees had always been able to obtain protection from liability for breach of trust by seeking the advice of the Court of Chancery as to a proposed act. If the court gave its sanction, the trustee would receive protection from the consequences of that act. Indeed, the possibility of doing this was the main justification for the law's ostensibly harsh treatment of trustees, though some judges believed the courts had relied on this to an excessive degree.[112] Originally this procedure was prohibitively expensive and unwieldy, certainly where small trust funds were in question, but the procedure introduced by Lord St Leonards in 1859 was considerably cheaper and easier[113] and undoubtedly widened trustees' access to the court considerably. Any trustee could either present a petition to the court or apply by summons in chambers to obtain the court's advice on a question of law, or on the administration of the trust, and could do so at relatively small expense. The effect was to protect the trustee acting on such advice against any subsequent liability. The procedure came to be very commonly used, particularly in matters of investment and advancement, and was useful when a problem was anticipated. Although it was relatively inexpensive, however, it was not practical for trustees to seek such advice before every act and some expense – too much in the view of many solicitors – was

[109] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35.
[110] See above, pp. 124–5.
[111] W. Paterson (ed.), *Practical Statutes of the Session 1859* (London, 1859), p. 104.
[112] See Lindley LJ in *Minutes of Evidence, 1895*, q. 462, and at q. 422 where he said he thought 'the Chancery judges have ridden that to a degree which [he thought was] oppressive'.
[113] Law of Property and Trustees Relief Amendment Act 1859, 22 & 23 Vict. c. 35 s. 30; see too Law of Property Act 1860, 23 & 24 Vict. c. 38, s. 9.

undoubtedly incurred. The process was still, according to a solicitor in 1895, 'a little litigation . . . a suit in miniature',[114] and this in a context of the reputation of the Court of Chancery fixed in the public mind by the publication of *Bleak House* in 1853,[115] and a popular perception of Chancery suits 'being as difficult to get out of as a pair of wet leather breeches'.[116] Even respectable business journals such as *The Economist* pronounced on 'the grotesque and terrible enormities of the Court of Chancery' and described it as 'a reproach, a terror, and a scourge'.[117] In this context all parties generally sought to avoid the necessity of any application to the court, most trust funds being, in any event, unable to bear the cost.[118] Having said that, the new and cheaper procedure for seeking the court's advice did encourage some trustees to be over-cautious, and to seek advice even when the will or deed was clear.

The next major statutory intervention in matters of liability did not occur for nearly thirty years. The Trustee Act 1888 began life as the Liability of Trustees Bill,[119] introduced by Lord Herschell at the instance of the Incorporated Law Society and modelled on the Conveyancing and Law of Property Act 1881. Despite the by now general agreement as to the undue harshness of the rules of Equity on honest trustees, it did not propose any changes of principle, though its underlying policy was clearly to modify the rules of Equity to increase the protection afforded by the law to honest trustees, with its tacit admission that the legal burden placed on trustees in the administration of trusts was excessive. It put into legislative form a number of judicial decisions relating to loans and sales by trustees, but its most important new provision in terms of the protection of trustees was that which allowed them to plead the Statute of Limitations for the first time.[120] For most of the Victorian

[114] *Minutes of Evidence, 1895*, q. 649.

[115] For a literary analysis of *Bleak House* in the legal context, see K. Dolin, *Fiction and the Law* (Cambridge, 1999), Chapter 4.

[116] (1842) 2 *Punch* 176.

[117] *The Economist*, 21 June 1851, p. 669 (vol. 9).

[118] 'Report of Select Committee on Trust Administration', *House of Commons Parliamentary Papers* (1895) (248) xiii. 403 at 405. Lord Halsbury once observed that it was said 'that you never would send a fellow creature into chancery': *Minutes of Evidence, 1895*, q. 310.

[119] See (1888) 84 *Law Times* 385.

[120] Trustee Act 1888, 51 & 52 Vict. c. 59 s. 8. The defence was not available where there had been fraud. The rule received statutory expression in the Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66, s. 25(2).

period lapse of time as such was not a defence available to a trustee in an action for breach of trust.[121] At best it could serve as evidence of acquiescence.[122] As a result of intense pressure by the legal profession,[123] though it seems with little hope of success, the Act allowed trustees the benefit of the Statute of Limitations in all cases other than fraudulent breach of trust[124] or where the trustee had retained the trust money in his hands. It was added protection for the trustee who had committed a technical breach but no moral wrong,[125] though it proved to be difficult to construe and accordingly uncertain in scope. There was some powerful opposition. Lord Halsbury LC thought it went too far, and that trustees should not be encouraged to take their position and responsibilities lightly 'and put forward their own neglect of duty as a shield against liability'.[126] After all, he said, somewhat disingenuously, the acceptance of the office was entirely voluntary. Another provision gave some relief to trustees who had invested on a mortgage which was in all respects a proper investment, but for a smaller sum; they were to be liable only for the excess.[127] Yet another extended the remedies available to trustees who had committed a breach at the instigation of the beneficiary by allowing the court a discretion to impound all or part of the beneficiary's interest to indemnify the trustee.[128] It was held in 1894 that it was not enough for a breach to be made at the instigation, request or with the consent of the beneficiary, and that the beneficiary should know the facts which constituted the breach.[129]

Throughout the nineteenth century judges, legislators, lawyers, settlors and trustees had accepted that rules of Equity imposing

[121] *Re Cross* (1882) 20 Ch D 109.

[122] See Lord Erskine LC in *Morse* v. *Royal* (1806) 12 Ves Jun 355 at 374; *Bright* v. *Legerton* (1861) 2 De G F & J 606. See too *Life Association of Scotland* v. *Siddal* (1861) 3 De G F & J 58; *Rochefoucauld* v. *Boustead* [1897] 1 Ch 196.

[123] See for example the evidence of John Hunter in *Minutes of Evidence, 1895*, q. 1071.

[124] See *Thorne* v. *Heard* [1894] 1 Ch 599.

[125] See Kekewich J in *Re Timmis* [1902] 1 Ch 176 at 186. See too *Thorne* v. *Heard* [1894] 1 Ch 599 at 603; *Re Bowden* (1890) 45 Ch D 444; *Re Sale Hotel and Botanical Gardens Ltd* (1897) 77 LT 681 at 682.

[126] *Parl. Deb.*, vol. 323, ser. 3, col. 537, 8 March 1888 (HL).

[127] Trustee Act 1888, 51 & 52 Vict. c. 59, s. 5.

[128] *Ibid.*, s. 6. It seems that the language of the section was taken from the case of *Raby* v. *Ridehalgh* (1855) 7 De G M & G 104, *per* Davey LJ in argument in *Re Somerset* [1894] 1 Ch 231 at 262.

[129] *Re Somerset* [1894] 1 Ch 231. See too *Bolton* v. *Curre* [1895] 1 Ch 544.

personal liability on trustees were necessary, but were harsh and could work injustice in individual cases. There had been isolated attempts to mitigate the severity of the law, some judicial, most legislative, and all specific, but no general provision had been enacted to relieve honest trustees acting reasonably, because the essence of the problem was the Equitable standard of care, which the judiciary was unwilling or unable to address. Indeed, during the debate on Lord St Leonards' proposals, which went a long way towards relieving honest trustees in general, the Lord Chancellor said he thought it was impracticable to accept that a trustee had committed a breach of trust and yet to relieve him from responsibility for it. By the closing years of the century, however, the situation of trustees was popularly regarded as intolerable and the recruitment situation critical. It gave rise, as late as 1894, to a call for the appointment of a Select Committee[130] to inquire into the liability of trustees and whether the administration of trusts could be improved by legislation without extending it.[131] The terms of reference themselves implicitly accepted that the rules imposing liability could not be altered or made more flexible, a finding ultimately confirmed by the Committee's report: it discussed the creation of a Public Trustee who would be expert (thereby lessening the chances of breach and therefore the occasions on which the rules were invoked), available (thus addressing the problem of recruitment) and whose liability was underwritten by public funds (thus giving security to the beneficiaries). So though witnesses condemned the harshness of the rules in their application to honest trustees, the Committee effectively side-stepped the issue of liability altogether. Its positive recommendation, however, and one which was to bear fruit, was the proposal that the legislature should provide general relief from liability for honest trustees.[132]

It was proposed to include, in a bill creating the office of judicial trustee, a clause which excused and authorised certain breaches of trust. It provided that if it appeared that a trustee was or could be personally liable for a breach of trust, the court could relieve him from personal liability if it was found that he had 'acted honestly and reasonably, and ought fairly to be excused for the breach of trust

[130] *Parl. Deb.*, vol. 25, ser. 4, cols. 1095–6, 14 June 1894 (HC).
[131] *Parl. Deb.*, vol. 26, ser. 4, col. 515, 28 June 1894 (HC).
[132] 'Report from the Select Committee on Trust Administration', *House of Commons Parliamentary Papers* (1895) (248) xiii. 403 at 406. See *Re Stuart* [1897] 2 Ch 583.

and for omitting to obtain the directions of the court'. Although its importance was appreciated, it was subject to little discussion in Parliament, and found its way unaltered into the Judicial Trustees Act 1896.[133] Commentators were critical: Maitland took it to be evidence that the Court of Chancery had 'screwed up the standard of reasonableness to what many men would regard as an unreasonable height', and thought the better approach would have been for Parliament to lower it. All the section did, in effect, was to introduce a new, lower, standard of breaches of trust which could be excused.[134] The courts set about establishing the meaning and application of this wide provision. In 1898 Kekewich J allowed relief under the section where trustees sold some trust property having been incorrectly informed by a solicitor that they had the power to do so, and this breach of trust caused a loss to the beneficiaries.[135] He observed, however, that its interpretation was problematic. 'The difficulty', he said,

> arises from the fact that the Legislature in a few words, intended no doubt to be perfectly clear and expressive, has thought fit to interfere with well-established doctrines of the Court of Chancery and Chancery Division, which are to be found in numerous authorities and text-books, ancient and modern, accepted by the profession as expounding the law relating to trustees and their cestuis que trust. A large body of law is dealt with in a few words, which are apparently intended to introduce large alterations. The difficulty is to ascertain what those alterations are, and how they are to be applied.[136]

He thought the 'grit' of the section lay not in the word 'honestly', but in the words 'reasonably and ought fairly to be excused for the breach of trust', the latter suggesting the legislature envisaged a breach which was reasonable, but ought not to be excused. In his view, however, if a trustee acted reasonably, he should normally be excused. In this case, no reasonable man would have said they were wrong in selling the property if they had had the power to do so. Kekewich J finally addressed the last words of the section, which said that the trustee should also be excused for not seeking the directions of the court. He said that he could not see how a trustee

133 Judicial Trustees Act 1896, 59 & 60 Vict. c. 35, s. 3.

134 See F. W. Maitland, *Equity* (2nd edn, Cambridge, 1949), p. 99. See too F. H. Maugham, 'Excusable Breaches of Trust' (1898) 14 *Law Quarterly Review* 159.

135 *Perrins* v. *Bellamy* [1898] 2 Ch 521.

136 *Ibid.* at 526–7. See too Chitty LJ in *Re Grindey* [1898] 2 Ch 593 at 601.

could be excused the breach without also being excused from not seeking the court's advice, but, he continued, 'if I am at liberty to guess, I should suppose that these words were added by way of amendment, and crept into the statute without due regard being had to the meaning of the context'.[137] In affirming the decision in the Court of Appeal, Lindley MR, unsurprisingly, and in an equally sensible and informative account of the object of the section, said that in this case he had 'not the slightest doubt that it was a most judicious breach of trust – that is to say, looking at the interests of the reversioners as well as to the interest of the tenant for life; and there is not one trustee in a thousand, or one business man in a thousand, who would not have done likewise'.[138]

Although the courts were sympathetic to honest trustees, and stated their intention not to construe the section narrowly,[139] relief was by no means automatic. As Byrne J observed in 1901, the provision 'was never meant to be used as a sort of general indemnity clause for honest men who neglect their duty, and if it were so applied as to shake or weaken the clear rules of the Court in reference to the conduct of trust matters, it would, I believe, result in greater evils than those it was intended to remedy'.[140] He found that although the trustees had taken immense pains over the trust and were undoubtedly honest, they had not acted reasonably and so were not entitled to relief, though he did stress that while he could not be generous, the beneficiaries in this case could be, and should 'bear in mind that these gentlemen, whose honour and integrity is beyond suspicion, have acted gratuitously for a long series of years in a thankless office, and are deserving of great sympathy in the loss they have incurred through the rogueries of a man who seems to have had the confidence of other members of the family as well as the trustees'.[141] The case was reported at some length because, as the editor observed, it was a case of considerable importance to all trustees. It is useful because it shows the substantial amount of attention to detail, time and trouble that the court expected trustees to have demonstrated before granting relief under

[137] *Perrins* v. *Bellamy* [1898] 2 Ch 521 at 528–9.
[138] *Perrins* v. *Bellamy* [1899] 1 Ch 797 at 801.
[139] *Wynne* v. *Tempest* (1897) 13 TLR 360; *Re Kay* [1897] 2 Ch 518; *Chapman* v. *Browne* [1902] 1 Ch 785.
[140] *Williams* v. *Byron* (1901) 18 TLR 172 at 176.
[141] *Ibid.*

the Judicial Trustees Act. As soon as the section was enacted, the first of many cases came to appear before the court, and since there were few guiding principles and the relieving provision was so wide, the amount of litigation on the term 'reasonably' was prodigious. 'It is obvious', said Farwell J in 1900, 'that the exercise of such a jurisdiction is beset with great difficulty and requires great caution.'[142] It became clear that the section would not be construed narrowly, but that each case turned on its own circumstances.[143] In 1897, the trustee in question, though honest, had not acted reasonably in making a certain investment, judged by the standard of a businessman acting on his own account.[144]

The statutory provision allowing the court to grant relief to honest trustees who transgressed merely highlighted the fundamental problem in the law of trust administration. Indeed the whole body of case law determining the rules as to trustee liability illustrated more clearly than any other issue the place which the trustee occupied in the wider legal context. The rules themselves, and the legal response to a popular demand for their relaxation, epitomised the attitude of the law towards the office in Victorian England. It was, furthermore, from the legal response to transgressing trustees that all other aspects of trust administration derived their practical significance. Changing economic and social conditions in Victorian England undoubtedly had a significant impact on the office of trustee and on the everyday administration of trusts. It has been seen that the work of trustees rapidly became more demanding, to the extent that trustees either refused to take on the office, or took it on and then transgressed through ignorance of an increasingly specialised and complex field of operation, or through overwork in attempting to address it. The recruitment problem became severe, breaches were perceived as increasing, and yet the law was largely unyielding. It recognised, even to the extent of introducing an ostensibly realistic standard of care, that the rules of liability were too severe, but refused to mitigate them in any meaningful way. This reluctance was, moreover, in a context of the closest regulation of trustees. The motive force behind the administration of trusts was the legal obligation placed on the trustee to undertake that task. Every act in the management of the property was either required

[142] *Re Lord de Clifford's Estate* [1900] 2 Ch 707.
[143] *Re Turner* [1897] 1 Ch 536.
[144] *Ibid*. See too *Re Stuart* [1897] 2 Ch 583; *Re Dive* [1909] 1 Ch 328.

by the law or permitted by it. In other spheres of life, the law was one of many factors acting on an individual's behaviour, marking the outer boundaries perhaps, but in general encroaching relatively little. A trustee, on the other hand, was entirely controlled and circumscribed by the enabling or supervisory law. The relationship between a trustee and the law was both direct and intimate. It was an ever-present master, always vigilant, occasionally supportive, and never remote.

And yet the law of trust administration was no esoteric branch of law. It did not possess the arcane character of the law of real property, whose rules were understood and fully appreciated only by specialists in the field, and the relevance of whose finer points was the province of the very few. Chancery procedure, certainly, provided the element of technical complexity, but the rules of trust administration were firmly and unequivocally rooted in the daily practice of the management of property. The practical character of the law was largely due to the primacy of the settlor's wishes as expressed in his trust deed. So when the settlor provided his own regime under which his trust was to be administered, the law would enforce it. These express powers were a recognition not of the law's inherent flexibility in allowing the settlor to lay down the guiding rules of his trust, but rather of its acceptance that the intention of the settlor was pre-eminent. They also highlighted the perception of settlors and their advisers that the law was inadequate, inflexible or uncertain in particular areas. The express powers were a reflection of practice, of what settlors thought was sensible or necessary. Since a settlor could enumerate his particular requirements and give his trustees the necessary powers in the trust instrument itself, the initiative in creating new rules of trusts administration lay with the settlors and their professional advisers. Most trusts, whether *inter vivos* or testamentary, were professionally drafted by the settlor's legal adviser in his locality, and their provisions were conceived and suggested by the solicitor. Not only would these provisions be enforced by the law as the principal code to regulate the administration of the trust, as practices became common and accepted by the legal profession, they would often be adopted as standard form, developed and refined by the Court of Chancery, and then by statute implied in all trust deeds. This in most cases rendered the influence of the settlor slight, and gave the legal profession considerable influence over the content and form of the law of trust administration.

It also contributed significantly to its functional nature.[145] Its character was also due to the ubiquitous nature of the trust among the upper and middle classes which made up both the judiciary and the legislature, for in the Victorian period the trust was transformed from an institution of the nobility and gentry to one of the mercantile middle classes. Most judges and MPs were trustees, and many were beneficiaries under trusts, and as such had a direct experience of trust matters and a corresponding influence in the making of the rules of law.

Rules thus inspired and developed by practical necessity had the potential to reflect – and to do so relatively promptly and comprehensively – the changing conditions of the age, and to allow flexible appointment, easy retirement, free delegation, wide investment, realistic liability. It has been seen that statutory reform went some way to achieving this, primarily in the area of investment. But despite considerable legislative activity in the field of trust administration, reform – or rather the lack of it – was essentially judge-led. It is apparent that the judiciary's response to the challenges of the new order was relatively slow, unimaginative and conservative. The challenges of recruitment, professional remuneration, delegation, investment and liability were either not met by the judiciary at all, or else were met in a reluctant and inadequate manner. The major judicial development which had the potential to address the challenges in a realistic and constructive way, namely the standard of the ordinary prudent man of business, was not exploited.

The judges certainly articulated and elaborated the rules of trust administration, and any development was, quite properly, shaped by legal theory and constructed within the settled principles of Equity. However, it was this which, paradoxically, stifled the adaptation of the rules to the new order, because the judges' adherence to the orthodox conception of the trust was in essence complete. While the trust was a private arrangement based on property, the obligation on the trustee being one of conscience, Equity was always alert to ensure that the obligation was carried out and that the legal title to the property in the trustees was not abused. Where the settlor's provision was ambiguous or insufficient, or where he had failed altogether to appreciate the matters involved in the administration

[145] See for example Sir John Romilly MR in *Lord Camoys* v. *Best* (1854) 19 Beav 414 at 416.

of the trust, Equity's guiding ethos for trustees was one of total and unequivocal gratuitous service to the interests of the beneficiaries. On that basis the judges constructed a comprehensive default law, a regime which embodied Equity's expectations of trustees in the course of their administration. The default law made provision for the needs of trust administration, as perceived by the judges in seeking to achieve the orthodox aims of Equity, and accordingly laid down a code of 'suitable' investments and allowed 'proper' delegation to agents, as well as making it clear what was not permitted, as in remuneration, and furthermore laid down a standard which trustees had to meet in their office. Whereas in some matters Equity showed itself to be adaptable and accommodating, in matters of doctrine it was uncompromising. It would not undermine the fiduciary character of the office of trustee, and maintained it undiminished by an unbending prohibition on the making of any profit, whether earned or unearned, from the trust. The essential character of the office of trustee as an honorary obligation taken on for moral reasons, to which remuneration would be repugnant, was staunchly maintained. The law was equally determined to maintain the character of trusteeship as a personal office as far as practicable and did so by prohibiting the delegation of discretions and even limiting the delegation of ministerial acts. In this context it fought to maintain the joint nature of trusteeship through its control of liability. It was not prepared to allow a mistaken but honest trustee to bear the whole of a loss, when the other trustees were not actively involved in the breach simply because they were neglecting their own duty. To allow the latter relief in such a case would, in the words of Fry LJ, 'act as an opiate upon the consciences of the trustees; so that instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties. Such a doctrine would be against the policy of the Court in relation to trusts.'[146] The law upheld the sanctity of the trust fund as the very being of the trust, to be nurtured for its own preservation and for its yield. It insisted on an absolute adherence to its rules, and it was rigorous in dealing with transgressors. The law's objective

[146] *Bahin* v. *Hughes* (1886) 31 Ch D 390 at 398. See too Sir William Grant MR in *Lingard* v. *Bromley* (1812) 1 V & B 114 at 117.

in so doing was to ensure, to the utmost degree, the security of the trust fund for the equal benefit of the beneficiaries.

It was the inflexible adherence to the essential nature of the trust as a moral and fiduciary obligation, and an uncompromising support of its underlying policy in a practical and commercial context, which not only ultimately resulted in a failure to meet the challenges to trusteeship, but inevitably gave rise to serious tensions in the diverse relationships of which the office was comprised. The popular and professional demand was for a faster and more comprehensive adaptation to the changing context of trust administration, and an acceptance that while the trust concept suited Victorian needs, orthodox trusteeship did not. For most of the nineteenth century the rules of trust adminstration did not change. The system creaked and splintered, but did not collapse. This was largely due to a programme of steady legislative reform which went a long way towards a comprehensive and accessible code of trust administration law,[147] but which was piecemeal and limited in its reforming initiatives. Indeed, in its essential nature it largely reflected the conservative interpretation of the judiciary. More importantly perhaps for the survival of the system was the loss of the unique position which the trust had occupied for so long as the protector and custodian of long-term private property interests. The desire to retain landed estates in specie within particular families lessened; cash and securities became an increasingly important expression of wealth, but provision could be made for dependants through an increasing variety of means: savings banks and building societies, a growing welfare state, increased opportunities for women to work and legislative provision for the education of children. The reaction of trustees themselves to their changing context was equally significant. Even if the judiciary had been slow to adapt to the new conditions, trustees had not. The roots of trusteeship in moral obligation became weaker in the nineteenth century, despite Equity's determination that they should not, because contemporary conditions demanded it and recognised that it was no longer appropriate. At a practical level, trustees became aware that the administration of trusts was an activity requiring at the very least support from expert third parties, and in embracing that they lost a large measure of control by the end of the century.

[147] Culminating in the Trustee Act 1893, 56 & 57 Vict. c. 53.

Circumstances were such that it was beyond the capability of many amateur trustees to administer the trust successfully in the way the law and the beneficiaries required, and they came inevitably and not reluctantly to act under the direction of their professional adviser in decisions which really mattered to the fund, principally in the field of investment. No longer did trustees instruct their agents as mere functionaries to implement their decisions. As Anthony Trollope observed in *The Eustace Diamonds* in 1873, 'what his lawyer tells him to do, he does. What his lawyer tells him to sign, he signs. He buys and sells in obedience to the same direction, and feels perfectly comfortable in the possession of a guide who is responsible and all but divine.'[148] If the law did not permit wide delegation to experts, then the alternative was to appoint one as trustee. This brought with it a professional and more independent legal input into the drafting of the trust deed, resulted in the provision of a specific code of law tailored to the needs of the individual settlor, and weakened the personal nexus between settlor and trustee. In the last decade of Victoria's reign the change in this respect is clear. This alteration of personnel in itself marked the passing of the old order of trusteeship. When the trustee himself not only was, but needed to be, a professional man, the transformation from the independent landowner with complete mastery over his own family acres in his lifetime, and using the law as a servant to achieve a long-term control to retain the estate in specie in the future, to the manager of a trust fund which kept its identity but 'changed its dress', was largely achieved.[149] The typical trustee was no longer Sir Roger de Coverley, but rather Soames Forsyte.[150] After the end of the nineteenth century the orthodox 'honourable friend' would never again be the realistic model of trusteeship, because the demands imposed and skills required had become beyond anything which could reasonably be asked of a true friend, or indeed which he would be able to undertake. Through choice and necessity, trusteeship had become a matter of business, the management of a fund, of a portfolio of investments. The process would continue into the next century and trusteeship would become 'more akin to a contractual market-based

[148] Anthony Trollope, *The Eustace Diamonds* (1873), Chapter 10.

[149] F. W. Maitland, 'Trust and Corporation' in H. A. L. Fisher (ed.), *Collected Papers of Frederic William Maitland* (3 vols., Cambridge, 1911), vol. III, p. 351.

[150] See G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14 at 18–19.

relation'.[151] The cost of industrialisation and a conservative judiciary was a change in the nature of trusteeship from being a personal matter of confidence in a chosen person to a matter of experience, expertise and ability to pay. At its extreme, it had become a skilled occupation undertaken with a motive of profit. It was to be the task of the next century's judiciary to bring trusteeship into the modern commercial world.

[151] Graham Moffat *et al., Trusts Law: Text and Materials* (3rd edn, London, 1999), p. 331 and the authorities there cited. Graham Moffat traces similar processes in the modern context, pp. 328–445. See too B. L. Anderson, 'Law, Finance and Economic Growth in England: Some Long-term Influences' in Barrie M. Ratcliffe (ed.), *Great Britain and her World 1750–1914* (Manchester, 1975); M. R. Chesterman, 'Family Settlements on Trust: Landowners and the Rising Bourgeoisie' in G. R. Rubin and David Sugarman (eds.), *Law, Economy and Society* (Professional Books, 1984), pp. 124–67; G. W. Keeton, 'The Changing Conception of Trusteeship' (1950) 3 *Current Legal Problems* 14; Simon Gardner, *An Introduction to the Law of Trusts* (Oxford, 1990), pp. 113–27.

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