St. John's Law Review

Volume 5, December 1930, Number 1 Article 4

The Fiduciary of the Future

Murray L. Jacobs

Edmond Nathaniel Cahn

THE FIDUCIARY OF THE FUTURE

I

THE seventeenth century was quite sure of itself. The cultural and territorial conquests of the Renaissance had, by then, been largely consolidated, and a solid feeling of achieved importance ran through the veins of Spaniard, Frenchman, and Briton alike. It was an age of balanced and well-polished absolutisms, exemplified by le Roi Soleil, by Descartes, by Leibniz, Spinoza, the Stuarts, and decapitant Roundheads. Everyone was quite sure of his principles, quite immune from the poisonous virus of relativism. Far from being "sicklied o'er with the pale cast of thought," one relished gloatfully the intoxicating nectar of everlasting certitude. And if, in that charming century, you longed for the utmost pinnacle of rightness, the Pelion-on-Ossa of unimpeachable axioms, you could ask a passing London solicitor of what in the wide world he was surest. And he might very well reply—that *a corporation could not be a trustee.*[1]

If ever a doctrine rested on a firm theoretical rock, if ever a principle of law seemed destined immortally to endure, this was that principle, this that doctrine. The reasons assigned were as diverse as they were convincing; yet from each it followed as the night the day, that a corporation could not be seized to a use, could not be a trustee. An inspection of these reasons and their ultimate fate should prove a terrible object-lesson for those who yet believe that any proposition can long withstand the inexorable march of social utility.

The most ancient reason for disqualifying a corporation was a sort of corollary to the ecclesiastical officium of the Chancellor. The Chancellor was the legal advocate of men's souls, his court a forum of conscience. He subpœnæd their better natures to his presence, and issued his decree with the full sanction of absolute religion. A corpora-

[1] Fulmerston v. Steward (1554), Plowden, p. 103; Chudleigh's Case (1589–1595), 1 Co. Rep., f. 122a; Sanders on Uses (5th ed.), II, 27n; 1 Cruise, Digest, 340; Perry on Trusts, sec. 42. Is a pun between "soul" and "sole" involved? See 168 L. T. 299 (October 19, 1929).

tion being devoid of soul, how then could the Chancellor, supervisor of souls, call it to account? It could not even take an oath for the faithful performance of its trust. Clearly, a corporation could not be a trustee.[2]

If the first reason stressed the spiritual aspect of Chancery, the second emphasized its less pleasant concerns. The Chancellor enforces his decree by sending the disobedient to jail. Now, who can shackle a body corporate or imprison an impalpable creature of the law? Equitable remedies are commendably flexible, but they do not include the miraculous.[3]

The third reason assigned to forbid corporate trusteeship was the staid doctrine of *ultra vires:* "A corporation cannot be seized to a use, because their capacity is to a use certain; again, because they cannot execute an estate without doing wrong to their corporation or founder."[4] The soundness of this rationale strikes the eye: a corporation, being a mere creature of statute, has such powers only as the sovereign has seen fit to confer.[5] Though the rest of the general rule has long crumbled into dust, this facet remains intact. Trust functions are jealously reserved by legislatures to trust companies and are denied to other corporations;[6] and, in at least one state, even trust companies are disqualified from acting as executor, administrator, guardian or committee.[7] The question is one of local public policy.[8]

Still a fourth ground finds mention in Bacon: "chiefly because of the letter of this statute [of Uses][9] which, in any clause when it speaketh of the feoffee, resteth only upon the word, person, but when it speaketh of *cestuy que use,* it addeth person or body politic."[10] And so every consideration,

---

[2] Croft v. Howel (1578), Plowden, p. 538; Abbot of Bury v. Bokenham (1539), Dyer, f. 8b.

[3] Croft v. Howel, *supra* Note 2.

[4] Francis Bacon, Lord Verulam, Readings Upon the Statute of Uses, Discourse III, p. 57.

[5] Matter of Ciotto, 105 App. Div. 143, 93 N. Y. Supp. 970 (1905); Vidal v. Girard's Exs., 2 How. (1844), 127. See Am. Law Inst. Trusts Restatement (Tentative Draft No. 1), sec. 92.

[6] *E.g.,* Consolidated Laws of New York, Banking Law, secs. 185, 223.

[7] Public Laws of New Hampshire (1926), ch. 264. sec. 13.

[8] Woodbury's Appeal, 78 N. H. 50, 96 Atl. 299 (1915). The question of according banking privileges to trust companies has also been a source of considerable concern. See Jenkins v. Neff, 186 U. S. 230, 22 Sup. Ct. 905 (1901); Laws of New York (1893), ch. 696; (1892), ch. 689.

[9] 27 Hen. VIII, cap. 10 (1536).

[10] Readings Upon the Statute of Uses, *supra* Note 4.

whether spiritual or temporal, analytical or interpretative, led irresistibly to the conclusion that a corporation could not be seized to a use, could not be a trustee. Thus, the seventeenth century solicitor.

Now, the eighteenth century was wholeheartedly iconoclastic, if anything. Whatever its predecessor had set up, it upset with peculiar gusto. In law, as in politics and the gentler arts, the fetiches of the past were summarily guillotined. No doubt, the observer of that audacious epoch could readily appreciate the significant role of corporations in the drama of conquest and exploitation which occupied the British stage. The East India Company alone was enough to befriend Englishmen to the corporate device, while, across the Channel, French purses smarted poignantly of the Mississippi Bubble. So that there should have been no great amaze in London when milord Chancellor, out of a clear sky, declared that "nothing was clearer than that corporations might be trustees."[11] So much for souls, prisons, and the language of the statute.

The court of equity had no doubt queried: is it more valuable to the *cestui que trust* to rely upon the responsibility and continuity of the corporate trustee, or should he prefer the meager solace of believing that an unfaithful individual trustee is damned in soul and, sometimes, if caught within the jurisdiction, imprisoned in body? In other words, is it better to have the trust performed or to avenge oneself for its non-performance? This consideration was pregnant with more logic than a thousand scholastic syllogisms, and has universally prevailed. The trust company is the expression of a growing demand for affirmative results, as opposed to a quite human, but rather impractical, longing for retribution.

In the United States, as in England, this attitude has spread with unbelievable acceleration. A résumé of that growth follows. For the moment, it is enough to point out that the corporate trustee, forbidden by every rule of law and

[11] Attorney-General v. Landerfield, 9 Mod. 286 (1744). Holdsworth compares this decision to Daimler Co. v. Continental Tire & Rubber Co., 2 A. C. 307 (1916), where a British corporation was held a public enemy by reason of possessing an enemy charter. Holdsworth, A History of English Law, vol. IX, p. 52.

logic, came into being because men needed and wanted it. And what men need and want sufficiently, they will have, *ruat cœlum.*

II

The trust company is not only the youngest member of the banking family: for a long period after its birth, it enjoyed no independent existence, but must needs develop under the ægis of insurance, safe-deposit, and even canal-digging functions! But let us start at the beginning, so that this astonishing history may speak for itself. In as much as all early corporate ventures were instituted by special legislative fiat, the "Statutory Record of the Unconsolidated Laws of New York" will prove a worthy guide.

We find the first New York bank founded on March 21, 1791—the "Bank of New York."[12] Shortly thereafter, insurance companies are organized—"United Insurance Company in New York City,"[13] "Mutual Assurance Company of New York City,"[14] "New York Insurance Company."[15] By 1819, we have a savings bank—"The Bank for Savings, in New York City."[16]

But the eye must wearily traverse some 569 pages of the titles of unconsolidated laws before it rests, with a grateful, if somewhat befogged, glance, upon the first corporation whose name includes that familiar phrase — "trust company."[17] The initiator was the "New York Life Insurance and Trust Company," founded on March 9, 1830, some thirty-nine years after the first State bank. It will thus be seen that the nomenclature "trust company" is now exactly one hundred years old,—a mere infancy as financial institutions go.

---

[12] Laws of New York (1791), ch. 37; the Charter of Bank of New York drafted by Alexander Hamilton in 1784.

[13] Laws of New York (1798), ch. 41; (1805), ch. 10; (1813), ch. 86; (1816), ch. 80.

[14] Laws of New York (1798), ch. 46.

[15] Laws of New York (1798), ch. 71; (1800), ch. 84; (1808), ch. 33; (1818), ch. 95; (1838), ch. 130.

[16] Laws of New York (1819), ch. 62.

[17] Laws of New York (1830), ch. 75.

But the germs of corporate trusteeship had taken life a few years before the appearance of this definitive form. In 1818, the "Massachusetts Hospital Life Insurance Company of Boston, Massachusetts" was incorporated, upon a prospectus that stressed trust powers of a limited nature.[18] The company did a flourishing business, and eventually abandoned all attempts at writing life insurance. It is not to be supposed, however, that trust functions in general were exercised by this corporation. Its service was rather like that of an investment-trust, each beneficiary receiving a proportionate share of the entire income of the company.[19] This seems to have been the first example of the investment-trust device, and became sufficiently popular to warrant emulation by several contemporary corporations.[20]

The first explicit legislative grant of trust powers took place on April 16, 1822, the recipient being "The Farmers Fire Insurance and Loan Company," of New York, which was invested with full authority to act as trustee, under supervision of the Court of Chancery.[21]

In New Jersey, trust powers were soon bestowed upon "The Morris Canal and Banking Company of New Jersey."[22] These and other ventures of the sort gained an impetus from the interest incident to the incorporation of "The New York Life Insurance and Trust Company." A special committee of the Legislature, appointed to investigate the propriety of granting the petition of the incorporators, analyzed the advantages involved in corporate trusteeship, briefly as follows:

1. Fraud and incompetence of individual trustees.

2. The migratory character of the people of the United States, requiring trustees to look after property, and rendering individuals unsuitable for trust duties.

---

[18] Laws of Massachusetts (1817), ch. 180. See James G. Smith, Trust Companies in the United States, pp. 213 *et seq.* This volume is an invaluable collection of trust company history, practice and statistics.

[19] T. R. Jencks. Life Insurance in the United States, *Hunts Merchants' Magazine*, vol. 8 (February and March, 1843), pp. 109–131, 227–240.

[20] James G. Smith, *supra* Note 20 at 261.

[21] Laws of New York (1822), ch. 50. See Senate Journal of New York, 45th Session, 1822. pp. 1059–1060.

[22] Charter Laws of New Jersey (1824), pp. 158–171.

3. Complication of investment problems, due to rapidly changing property values.

4. Financial security and stability of corporate fiduciary.

5. Immortality of corporate fiduciary.[23]

The outcome was the incorporation of the first "trust company," *eo nomine*. In the first eight months of its existence, nearly one and a quarter million dollars were deposited with "The New York Life Insurance and Trust Company," in trust. These deposits seem to have been of the investment-trust category; but there were also (in 1833) court trusts aggregating $243,163.85, and two guardianships of infants in England with assets of $11,172.67.[24] The trust company in its modern sense had come—to stay.

But the growth, though impressively sure, was slow and gradual, jealously supervised by state banking authorities and legislative committees. Many petitions for incorporation were flatly denied.[25] As a result of this critical attitude, although New York could boast of a "free" banking law as early as 1838,[26] no blanket statute authorizing the exercise by corporations of trust functions was passed until 1883,[27] and none permitting the general incorporation of trust companies until two years later.[28] The trust company, offshoot of insurance, safe-deposit and other extraneous activities, is certainly the youngster of the financial family.

But, if ever a youngster lustily grew and developed and prospered, this is that youngster. One is constrained to minimize statistical illustration, for almost any mensural approach reveals the same startling expansion. For instance,

---

[23] Legislative Documents of the Senate and Assembly of New York, 53rd Session, 1830, vol. II, Doc. 84, pp. 3–7.

[24] Statement, New York Life Insurance & Trust Company.

[25] Documents of the Assembly of New York, 1833, vol. III, no. 209. Laws of New York (1834), ch. 250; Assembly Journal of New York, 1834, pp. 121–122. E. T. Perrine, The Story of the Trust Companies, pp. 37–46.

[26] Laws of New York (1838), ch. 260.

[27] Laws of New York (1885), ch. 425.

[28] Laws of New York (1887). ch. 546.

the following are the respective appointments of trust companies as executors during the last seven years:

1923..... 5,899	1927.....29,814
1924..... 7,878	1928.....44,375
1925.....12,926	1929.....60,036 [29]
1926.....19,128	

At the end of June, 1929, there were 1,734 national banks actively operating trust departments, an increase of 630, or fifty-seven per cent. in three years. There are now approximately 3,400 corporate trust organizations in the United States! [30]

The insurance-trust field is one in which the welding of two related, but entirely disparate, devices has led to astounding results. In 1927, $257,000,000 of life insurance was placed in trust with corporate fiduciaries; in 1928 an additional $700,000,000; and, in 1929, an additional $1,200,000,000! [31]

This is an outstanding example of a genuine social contribution by the trust company. The insurance trust is probably the most practical of all devices for the simple, efficient and economical administration of estates.[32] Aside from its advantages from the standpoint of inheritance taxation,[33] it combines all of the salutary features of life insurance with the solidity and flexibility of trust service. To this thesis, the figures above furnish sufficient commentary.

It is interesting to note the parallel which the development of corporate trusteeship in England bears to that in the United States. In England, too, the first corporate bodies to perform fiduciary services were not specialized trust companies, but rather the great life insurance companies. One

---

[29] Proceedings, Trust Company Division, American Bankers Association (1930), p. 3.

[30] Id., p. 3; see *Trust Companies Magazine*, vol. XLVIII, pp. 861, 869; vol. XLIX, pp. 450, 518; vol. L, pp. 199, 727, 801.

[31] Proceedings, *supra* Note 29 at 18–21. *Trust Companies Magazine*, vol. XLIX, pp. 641–644. These and the foregoing statistics are partial only, as not all of the trust companies have furnished reports of business transacted. Proceedings, *supra* Note 29 at 4.

[32] Matter of Haedrich, 134 Misc. 741, 236 N. Y. Supp. 395 (1929); *aff'd* on opinion below, 230 App. Div. 763 (N. Y. Law Journal, July 26, 1930); Matter of Hartman, 126 Misc. 862, 866, 215 N. Y. Supp. 802 (1926).

[33] Matter of Haedrich, *supra* Note 32. But see Laws of New York (1930), ch. 710, sec. 249 (r), 9.

of these has conducted a trust business for a full century, with present aggregate trust assets of £100,000,000.[34] It was not until 1908 that the Midland Bank created a subsidiary (Midland Bank Executor and Trustee Company, Ltd., Manchester, England) to enter this field. Its success has been quite remarkable, which may in part be attributed to the reasonableness of its fees. These are, roughly, one-half of one per cent. of the gross value of the estate and three-quarters of one per cent. of the net income, after deduction of taxes.[35] Other members of the "Big Five" have followed suit.[36]

III

Now, just what are the implications of this development? What does it seem to predict? We see throughout the land a large number of great administrative machines, grinding out, year by year, an increasing number of estates and trusts. These machines are not haphazard devices, temporarily adapted to trust service. They are especially designed and erected for that sole function. Their parts are endlessly readjusted, their methods everlastingly modified, better and ever better to fit the needs for which they were built. What

---

[34] P. D. Willcock, Fiduciary Service as Performed by the Trust Corporations in England. Proceedings, *supra* Note 29 at 116–117.

[35] *Ibid.* at 118. See Prentice-Hall, Trusts, Current Section, p. 9455, par. 10209.

[36] 168 L. T. 299 (October 19, 1929). Here the advantages of corporate trusteeship are outlined in much the same manner as by the New York legislative committee, *supra* Note 23. The fees prevalent in England are, approximatly:

Acceptance Fee

Value	Fee
£1,000	£10
5,000	25
10,000	43.75
20,000	81.25
50.000	137.50

Withdrawal Fee

Value	Executorships	Trusts
£1,000	.025	.01
5,000	.007	.005
10,000	.006	.0043
20,000	.0055	.0042
50,000	.0023	.0028

private artisan, skilled though he be, can turn out work so rapidly, so uniformly, so efficiently?

Let us compare what has lately occurred in a closely related field—that of bankruptcy, another situation in a man's history when the law takes his goods into its custody, administers and then distributes them. In January, 1929, after the irresponsibility, ineptitude, and, in many cases, flagrant dishonesty of individual receivers could no longer be tolerated, the Federal District Court for the Southern District of New York, following the experiment of other districts, selected a trust company to act as official receiver. A huge organization was set up to liquidate bankrupt estates, and experts and specialists were engaged to devote their entire time to this one pursuit. The results have been so gratifying that individual receivers are no longer within the realm of possibility.[37]

To carry the analogy still closer—England, in 1906, created the office of Public Trustee, a department of the state to which the administration of trusts could be committed. The success of this new departure has been extraordinary, for the Public Trustee is now administering more than 16,500 trusts of an approximate total value of £190,000,000. Two considerations have motivated Englishmen to avail themselves of this organization: first, the reasonableness of the statutory fees; and, second, the security offered by state support.[38]

It is noteworthy that the office of Public Trustee was created two years before any of the large English banks had entered the trust field. Had not the British trust companies been so tardy in inception, no such intervention by the government would have been necessary. A Public Trustee in this country, in the same sense as in Great Britain, would be quite supererogatory. The growth of trust company business in the United States demonstrates that the requisite organizations are already in existence and are functioning smoothly.

---

[37] *Trust Companies Magazine,* vol. XLIX, p. 304; Proceedings, *supra* Note 29 at 46.

[38] Proceedings, *supra* Note 29 at 117, 164 L. T. 195 (September 17, 1927); 161 L. T. 470 (June 12, 1926). Public Trustees Act (1896), 59 and 60 Vict., ch. 35 as amd. by 6 Edw. 7, ch. 55 (1906).

The reader has, no doubt, largely anticipated the point of the argument—that is, that the American trust companies should be made public trustees. In fine, the distribution of estates is so charged with a public interest that society may rightfully compel every testator and every settlor to select a fitting trust organization for this purpose. There seems no persuasive reason why next of kin or legatees are entitled to less honest, less efficient, less responsible liquidation of estates than creditors in bankruptcy. And, if it be objected that the intention of the testator is frustrated by such an enactment, the reply must be that his desires are rather enforced than thwarted by the thorough and expeditious administration of his estate. His money goes whither he willed it, not into the sloughs of inefficiency, ignorance, and slothful delay.

The above is not to be construed as a proposal that individual co-fiduciaries be precluded. In many situations the appointment of an individual co-executor or co-trustee is highly desirable, and confers a definite benefit upon the *cestuis que trustent.* Often the testator's attorney, by reason of his professional knowledge and experience and his personal contact with the members of the family, can invest the administration of the estate with a warm, human intimacy not otherwise obtainable. In other cases it may prove advisable to nominate a business partner, in order to capitalize his technical expertness. No derogation from this time-honored custom is here advocated. It is urged, however, that one executor (or one trustee) must be a corporation possessing financial responsibility and the machinery of fiduciary administration.

The proposed innovation would, strikingly enough, be in line with the ancient evolution of executorship into its present form. We have long abandoned the concept of the executor as *hæres testamentarius,* the instituted heir. Now the executor is a mere liquidator, the trustee a mere anchor to windward.[39] These functions should be referred to the fittest to perform them. The resulting practical benefits will outweigh the theoretical millstones, upper of which is the tes-

[39] Schouler, Wills, Executors and Administrators (6th ed.), vol. 3, secs 1492 *et seq.;* Domat, Le Droit Civil, secs. 3330–3332.

tator's arbitrary whim, and nether the longing of individuals for the emoluments of trusteeship.

One more analogy must be called upon to hush the reactionary protest. The proposed scheme is but a return, after many centuries, to the earliest method of administration. Far from being novel or radical, it may lay just claim to hoary antiquity in the chronicle of British law. Blackstone's account[40] is:

> "In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and, in such case it is said that, by the old law, the king was entitled to seize upon his goods, as the *parens patriæ,* and *general trustee of the kingdom.* This prerogative the king continued to exercise for some time by his own ministers of justice. * * * Afterwards, the crown, in favor of the church, invested the prelates with this branch of the prerogative: which was done, saith Perkins, because it was intended by the law that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods, therefore, of intestates were given to the ordinary by the crown; * * * in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And, as he had thus the disposition of intestate's effects, the probate of wills, of course, followed: for it was thought just and natural, that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby."

But

> "the popish clergy took to themselves the whole residue of the deceased's estate, after the *partes rationabiles,* or two-thirds, of the wife and children were

[40] Commentaries, II, 493–496.

> deducted; without paying even his lawful debts, or other charges thereon.[41] For which reason, it was enacted by the statute of Westminster 2, that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend: a use more truly pious than any requiem, or mass for his soul."

Eventually, by statute, the ordinaries were directed to appoint administrators, to be "the next and most lawful friend"[42] of the intestate. This was interpreted to mean his next of kin.[43] Thus was born the administrator of the pres-

As has been seen, in early England, the crown seized upon the goods of the deceased and administered them, as "general trustee of the kingdom." Here is surely ample precedent for the designation of carefully supervised administrative machines as general trustees of the citizenry. Blackstone, too, would agree that the preservation and protection of estates is a pious use.

Before passing on from this hypothesis, we might note one or two of its direct implications. In the first place, the standard of trust performance would be unquestionably raised, if only because chancellors subconsciously (and quite logically) require superior fidelity and thoroughness of a large financial institution to that of an individual businessman.[44] The latter is harassed by his own affairs, frequently inexperienced in the delicacies of trust accounting, and all too often perched 'twixt rival horns of some embarrassing legal dilemma. The former, on the contrary, is trained not to make mistakes, and is able to compensate the injured when it does. A trust department will inevitably be required to exceed the standard of care and judgment of the man in the

---

[41] *Cf.* Fleta, l. 2, ch. 57, sec. 10; Gloss of Pope Innocent IV, Decretales, l. 5, tit. 3, ch. 42.

[42] 31 Edw. III, ch. 11 (1358).

[43] Hensloe's case, 9 Rep. 39, Trin. 42 Eliz. Reg.

[44] Matter of Clark, 136 Misc. 881, N. Y. Supp. (1930). The concept of the restriction of specific functions affected with a public interest to exercise by supervised corporations is by no means novel. Witness commercial bankers, insurance companies, public utility corporations, etc. Under sec. 111 of the New York Decedent Estate Law, only trust companies or title guaranty corporations can be trustees on certain mortgages, if the same are to be acceptable as "legals." An obvious instance in most jurisdictions is the Public Administrator, a type of corporation sole.

street. It must devote more attention, more efficiency to the *cestui's* concerns than to its own.

In the second place, the trust company will be compelled to accept many small, even unprofitable trusts. The poor man also has his rights; he too is entitled to a quick and thorough administration. To the *cestui* of modest means, the proposed plan should prove a genuine boon. And to the trustee, it will not be over-burdensome, in view of the increased number of wealthy trusts receivable. *Ubi beneficium, ibi onus.* Moreover, it is clear that some reasonable means could be devised to simplify and cheapen the liquidation of small estates.

To recapitulate—the trust company is properly charged with a public service.[45] The process of administration would be rendered simpler, cheaper, safer for all if every estate were imperatively subjected to the same catalysis. Social utility requires an expedition of the process by which the dead hand enfeoffs the living.

MURRAY L. JACOBS,
EDMOND NATHANIEL CAHN.

New York City.

---

[45] That the thesis herein advanced reflects a factual trend, is attested by Surrogate Wingate of Kings County, New York, in a decision involving the right of executors to double commissions: "When it is realized that this fiduciary relationship is being more and more centered in an ever-diminishing number of large corporations, the consequent effects upon the future of the state and nation and the rights and fortunes of our citizens are worthy of the most careful study and critical analysis. These observations are in no way to be construed as a disparagement of the valuable contribution made by corporate fiduciaries in the administration of estates or the propriety of adequate recompense to them for services performed." The same decision recognizes the interest of the polity in an expeditious and inexpensive administration of decedents' estates: "Every testator relies upon the surrogate in the first instance, and the higher courts, if occasion requires, to see to it that his property, after his death, is made available, without improper diminution, for his family or named beneficiaries." Matter of Kings County Trust Company (Florence Fletcher Jackson, deceased), 84 N. Y. L. J. 376, October 21, 1930.