

EXONERATION CLAUSES IN TRUST INSTRUMENTS

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MORE than three quarters of a century ago the Autocrat of the Breakfast Table advised, "Put not your trust in money, but put your money in trust." Whether he is now generally read or not, millions of people have acted upon that or similar counsel. In 1929, according to a survey made by the American Bankers' Association, more than a thousand millionaires appointed in their wills trust companies as the executors and trustees of their estates. When we consider that a great part of the wealth of the nation passes through the hands of executors and trustees, that billions of dollars' worth of bond issues pass annually through the custody of trust companies, and that more and more the power of the dead hand is used in directing the fortunes of this country, we realize the magnitude of the business of modern trust companies.¹

With land, mortgages, stocks, and bonds rapidly depreciating in value the beneficiaries of these billions of trust funds are asking their trustees to account for losses. A number of such cases have already reached the highest courts,² and others are either now pend-

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1. The sixty-ninth annual report of the Comptroller of Currency concerning National Banks in the Trust Field states: "Substantial and steady progress marked the activities of national banks throughout the United States in the administration of trusts in 1931. The statistics for this function compiled as of June 30, 1931, revealed that 2,407 national banks had authority to exercise trust powers, with a combined capital of \$1,349,393,246 and banking resources of \$22,618,549,942, representing 35 per cent of the number, 80 per cent of the capital, and 82 per cent of the resources of all banks in the national banking system.

Trust departments had been established by 1,856 of these banks and 102,987 trusts were being administered with individual trust assets aggregating \$5,241,991,392. Seven hundred and eighty-two of these banks were also acting as trustees for bond and note issues aggregating \$10,719,846,426.

"The growing popularity with the American public of the corporate fiduciary in the settlement of estates and the administration of trusts is illustrated by the fact that compared with June 30, 1930, the survey revealed a net increase of 11,564, or 12.6 per cent more trusts under administration in 1931 than in 1930, while the individual trust assets under administration increased \$768,950,466, or 17 per cent over 1930." These increases, it should be noted, took place during a depression year.

2. *In re Clark's Will*, 257 N. Y. 132, 177 N. E. 397 (1931); *North Adams National Bank v. Curtis*, 180 N. E. 217 (Mass. 1932).

ing or in the more embryonic stage of legal consultation. In many of these recent cases the trust companies are relying upon safety devices, written into the trust agreements, which exonerate the trustee from all liability for losses except those incurred through gross neglect or wilful default. In addition to this general immunity clause, the trust agreements frequently contain special exemptions which negative every expressed duty, such as the duty to record a mortgage, to insure the trust fund, or to answer for the defaults of a co-trustee, an agent, or an employee.³

Several recently decided cases, among them *North Adams National Bank v. Curtis*,⁴ a Massachusetts case, and *In Re Clark's Will*,⁵ a New York case, have aroused considerable interest concerning the force and effectiveness of the usual immunity clause in trust agreements. The *Clark's Will* case has stimulated much comment, in legal journals⁶ as well as in popular magazines,⁷ to the effect that trust companies may by contract do everything but wilfully rob the beneficiary. The *North Adams National Bank* case has been construed as holding directly—and the language of the opinion possibly justifies it—that a trust company, acting under an exoneration clause, is liable only for its wilful defaults. These two recent cases which we shall consider presently, and other like cases which the depression will most assuredly bring before the courts, should make an investigation of the effectiveness of exoneration clauses of timely consideration. How far, then, may a trust company as trustee contract against its liabilities for losses incurred through negligent conduct, though acting in good faith?

It is a general rule of law that a trustee is held to that degree of care exercised by "an ordinary prudent man" in the management of his own business under similar circumstances.

"A trustee is bound to employ such diligence and such prudence in the care and management of the trust estate as, in general, prudent men of

3. *In re Knower's Estate*, 121 Misc. 208, 200 N. Y. Supp. 777 (Sur. Ct. 1923); *Bell v. Title, Trust, and Guarantee Co.*, 292 Pa. 228, 140 Atl. 900 (1928); *Indiana I. and I. R. Co. v. Swanell*, 157 Ill. 616, 41 N. E. 989 (1895).

4. See *supra* note 2.

5. *Ibid.*

6. Note (1930) 29 MICH. L. REV. 125; Note (1930) 30 COL. L. REV. 1166; "That any trustee, corporate or otherwise, could sit idly by and see a company in which it held securities retrograde to almost a position of bankruptcy, and do nothing with respect to the securities, and at the same time seek to escape liability for such negligence, is not to be thought of in a modern enlightened age, no matter how clear the good faith." N. Y. L. J., June 25, 1930, at 1637.

7. *Can Trust Companies Be Trusted?* FORUM, Oct. 1932.

discretion and intelligence in such matters employ in their own like affairs." ⁸

Any neglect or omission on the part of the trustee to measure up to the above standard of care is a breach of duty for which he is liable to the beneficiary for any losses incurred.⁹

Exoneration clauses in wills and trust contracts provide for immunity from losses in two general situations. In the first class the testator in his will or the settlor in the trust instrument directs the trustee to retain in the trust estate specific investments, exempting the trust company from liability for any losses which may occur from the retention of these securities, unless caused by its gross neglect or wilful default. In the second class the testator or the settlor turns over the assets of his estate to the trustee with power to invest and re-invest, providing that the trust company shall be liable only for losses caused by its gross neglect or wilful default.¹⁰

While the scope of this discussion is primarily to consider the second class, it may be well to recall briefly what the courts are doing in cases which come within the first classification. The courts generally recognize that the retention of speculative stocks, which have been purchased by the testator or the creator of the trust, is quite a different thing from the retention of such stocks purchased by

8. 77 A. L. R. 500 (1932); also, 26 R. C. L. 1280 and numerous cases there cited.

9. Merchants' Loan and Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59 (1911); Gibney v. Allen, 156 Mich. 301, 120 N. W. 811 (1909); Steward v. Traverse City State Bank, 187 Mich. 387, 153 N. W. 793 (1915); *In re* Union Trust Co., 219 N. Y. 514, 114 N. E. 1057 (1916); Moeller v. Poland, 80 Ohio St. 418, 89 N. E. 100 (1909); Newman v. Shreve, 229 Pa. 200, 78 Atl. 79 (1910); Cunningham v. Cunningham, 81 S. C. 506, 62 S. E. 845 (1908).

10. There is another group of cases in which the trustee is given full discretion in selecting the investments. In this class of cases it is well settled that the uncontrolled discretionary power does not render the trustee immune from losses caused by his imprudent or careless investments. *In re* Hall, 164 N. Y. 196, 58 N. E. 11 (1900); Carrier v. Carrier, 226 N. Y. 114, 123 N. E. 135 (1919); Gould v. Gould, 126 Misc. 54, 213 N. Y. Supp. 286 (Sup. Ct. 1925); Indiana Trust Co. v. Griffith, 176 Ind. 643, 95 N. E. 573 (1911); Holcomb v. Holcomb, 11 N. J. Eq. 281 (1857); Clark v. Garfield, 8 Allen 427 (Mass. 1864); Kimball v. Reding, 31 N. H. 352 (1855); *In re* Hart's Estate, 203 Pa. 480, 53 Atl. 364 (1902); Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381 (1909); Pinney v. Newton, 66 Conn. 141, 33 Atl. 591 (1895). On the other hand, it is generally held that, if the beneficiary voluntarily directs or requests the trustee to act, he is later estopped to collect damages for such action.—Villard v. Villard, 219 N. Y. 482, 114 N. E. 789 (1916); Michigan Home Missionary Society v. Corning, 164 Mich. 395, 129 N. W. 686 (1911); *In re* Fidelity and Deposit Co., 172 Mich. 600, 138 N. W. 205 (1912); Wieters v. Hart, 68 N. J. Eq. 796, 64 Atl. 1135 (1905); Furniss v. Zimmerman, 90 Misc. 138, 154 N. Y. Supp. 272 (Sup. Ct. 1915); *In re* Detre's Estate, 273 Pa. 346, 117 Atl. 54 (1922).

the trustee. One who is looking for the right opportunity to free himself from a declining market deserves more consideration than one who takes the bull by the horns. It is a well recognized fact that a careful investor will hold on to declining securities rather than take an actual loss, when he would not go into the market and invest in those securities. A vast majority of cases and jurisdictions, with few exceptions,¹¹ hold that an exonerating clause immunizes a trustee against losses incurred through retaining, at the request of the testator or the creator of the trust, the original assets of the estate. Among such jurisdictions are England,¹² Massachusetts,¹³ New York,¹⁴ Pennsylvania,¹⁵ Alabama,¹⁶ Rhode Island,¹⁷ Vermont,¹⁸ and New Jersey.¹⁹

"There is a great difference," states the New York Court of Appeals in *Jones v. Jones*,²⁰ "between an investment by the trustees of moneys forming a part of the estate, and the retention of securities purchased by the testator, and held by him at the time of his decease. In the one case the investment, whether wise or unwise, is the independent, uncontrollable act of the owner; and in the other it is the act of the trustees, whose discretion is limited and whose duties are prescribed; and each is to be subjected, therefore, to wholly different rules."

Or in the words of a comparatively early English opinion in *Marsden v. Kent*,²¹

"It would be very hard upon executors, who have been saddled with property of this speculative kind and have endeavored to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it is proved by the result, would have been the best course."

11. *Citizens' & Southern National Bank v. Clark*, 172 Ga. 625, 158 S. E. 297 (1931) held the trustee to the same rules of liability, whether dealing with the original assets of the estate or his own investments. See also Note (1930) 30 COL. L. REV. 1166.

12. *Marsden v. Kent*, 5 Ch. Div. 598 (1877); *Cocks v. Chapman*, [1896] 2 Ch. Div. 763.

13. *Anderson v. Bean*, 272 Mass. 432, 172 N. E. 647 (1930); *Old Colony Trust Co. v. Shaw*, 261 Mass. 158, 158 N. E. 530 (1927).

14. *In re Clark's Will*, *supra* note 2; *In re Winburn*, 140 Misc. 18, 249 N. Y. Supp. 758 (Sur. Ct. 1931); *Jones v. Jones*, 50 Hun 603, 2 N. Y. Supp. 844 (Sup. Ct. 1888); *In re Sherman*, 180 App. Div. 196, 167 N. Y. Supp. 682 (3d Dep't 1907).

15. *In re Brown's Estate*, 287 Pa. 499, 135 Atl. 112 (1926); *In re Taylor's Estate*, 277 Pa. 528, 121 Atl. 310 (1923).

16. *Foscue v. Lyon*, 55 Ala. 440 (1876).

17. *Peckham v. Newton*, 15 R. I. 321, 4 Atl. 758 (1886).

18. *Scoville v. Brock*, 81 Vt. 405, 70 Atl. 1014 (1908).

19. *McCully v. Lum*, 49 N. J. Eq. 552, 25 Atl. 705 (1892).

20. See note 14, *supra*.

21. *Supra* note 12, at 601.

The courts recognize that it is no easy matter to determine the right time to unload speculative securities on a declining or generally fluctuating market.

"We are to look at the facts as they exist," says the New York court in *Purdy v. Lynch*,²² "at the time of their occurrence, not aided or enlightened by those which subsequently take place, by reason of which the loss has occurred, for it is an obvious truth that a wisdom developed after an event and having it and its consequences as a source, is a standard no man should be judged by."

In Pennsylvania, where the courts hold the trustee to a very high degree of care and strictly construe against the trust company any statute or clause in the trust agreement which broadens the trustee's liberties or limits his liabilities, the Supreme Court in *In Re Taylor's Estate*,²³ quoting from an earlier opinion, said,

"The negligence imputed to this appellant did not arise from keeping the trust fund invested in the form in which it came into the hands of the trustee; there so strict a rule of liability does not apply as in the case of a loss in investments made after the trustee had actually received the money."

The same court in *In Re Brown's Estate*,²⁴ stated further,

"They (trustees) need not rush into a conversion of the securities left by the decedent and, under the whip of the law, sell them below what they might normally expect to receive for them, thus causing an estate to shrink out of all proportions to any possible benefit that might arise through a strict application of the rule."²⁵

We now come to a consideration of *In Re Clark's Will*, which has caused much comment, both lay and legal. The testator, Frederick H. Clark, turned over to the trustee, through his executor, 1248 shares of common stock of the Cuban American Sugar Company, valued at \$22 per share and 296 shares of Guantanamo Sugar Company, valued at \$12.50 per share. There was a provision in Mr. Clark's will which read as follows:

22. 145 N. Y. 462, 475, 40 N. E. 232, 236 (1895).

23. *Supra* note 15 at 528, 121 Atl. 313.

24. *Supra* note 15 at 502, 135 Atl. at 313.

25. In England where the trustee is held to a high degree of accountability *Cocks v. Chapman*, [1896] 2 Ch. Div. 763, held that where a will authorizes investments in mortgage on real estate and part of the testator's estate at his death consists of mortgages on farm land, there is no rule that his executors and trustees are under an absolute duty to call in the securities within twelve months from the testator's death even though some of the securities may be of a risky nature, as where, owing to an agricultural depression, they have apparently become insufficient to satisfy the mortgage debt.

"I hereby authorize and empower my executors and trustees to continue all the investments of money in the securities made by me and which shall come into their possession and control at my decease, without any personal liability for so doing. . . ."

On the arrival of the beneficiary at the age of thirty-five, when the trust was to be distributed, the Cuban shares had fallen in value to \$7 per share, and the Guantanamo to \$.50 per share. The order of the Appellate Division²⁶ sustaining the Surrogate in charging the trust company with the loss was reversed by the Court of Appeals,²⁷ which held that

"The testator had an absolute right to provide that his trustee should not be liable for losses accruing from the retention of the securities, although it may have been imprudent so to retain them."

Inasmuch as the court found that the trustee had acted with due care and without negligence and that the beneficiaries had given silent consent to the holding of these securities, it was not necessary for the court to rely on the exoneration clause to save the trustee from loss. "Even if the immunity from liability provided for by the testator does not cover the case," concludes the opinion, "we think that there was no fault and that it was error to so find." Considering this case on the facts as finally established by the Court of Appeals, it cannot be claimed, as some of the critics of this case have asserted,²⁸ that the immunity clause has become a cloak to all evil, except that of bad faith. This was a plain case of retaining certain securities at the direction of the executor, in which cases the courts have generally held that a trustee who follows, under an immunity clause, the direction of an executor is not liable for losses that may result.²⁹ The vast majority of opinions which give verbal approval, if not actual effect, to the exoneration clause are cases, it is believed, like *In Re Clark's Will* and other cases to which we have referred, where the trustee was following the specific directions of the executor in retaining the original investments of the estate.

Let us now consider the liability of a trustee who has the power to invest and reinvest at his discretion the assets of the estate, under an immunity clause which exonerates him from all liability except

26. 232 App. Div. 781, 249 N. Y. Supp. 923 (2d Dep't 1931).

27. *Supra* note 2, at 137, 177 N. E. at 398.

28. See *supra* note 6.

29. See notes 12-19, *supra*.

that incurred through "gross neglect or wilful default." Such an exculpating clause, if effective, greatly lessens the trustee's general responsibilities and liabilities for losses. Especially is this true under modern statutes which have expanded the liberties of the trustee in investing and depositing the assets of the estate.³⁰ Liberating statutes and contracts limiting liabilities open a wide gate through which negligent, if not dishonest, trustees may pass, unless the courts stand guard to protect their ancient wards, the beneficiaries.

At a time when careless investments become worthless securities, beneficiaries may well ask: May a trust company, through carelessness, permit a trust security materially to depreciate in value and escape liability through an immunity clause? May it, through carelessness, fail to collect the assets of the estate from the creator of the trust, the beneficiary, a co-trustee, or a debtor of the estate and escape liability under an exculpating clause? May a trust company in good faith, but not under a statute, deposit the funds in the commercial department of the bank and lose them and yet escape liability on the ground that it was not acting in bad faith? In short, may it commit all the sins of avarice that the human flesh is heir to and under a protective cloak escape persecution by kneeling at the altar of *bona fides*?

Exoneration clauses, though recently coming into general use by corporate fiduciaries, are not new. In the early part of the nineteenth century the English courts were denouncing their validity. In *Mucklow v. Fuller*,³¹ decided in 1821, Chancellor Eldon held that an indemnity clause, which provided that neither of two co-trustees should be liable for the neglect of the other, did not exonerate one of the trustees from a loss sustained by the other. To the same effect is *Dix v. Burford*.³² In this case one of two co-trustees had collected a mortgage, released the estate, and squandered the funds. The other co-trustee defended under an immunity clause, which provided that the co-trustees

"should not be chargeable, but only for their respective receipts, payments, acts, and wilful defaults."

But the Master of the Rolls in his opinion held,

30. ILL. REV. STAT (Smith-Hurd, 1929) c. 148, § 32.

The test of care in making the investment is that caution and care, which an intelligent person would use with his own money. For other statutes and decisions in various states see MCKINNEY, TRUST INVESTMENTS (1927).

31. Jac. 198, 37 Eng. Rep. 824 (1821).

32. 19 Beav. 409, 52 Eng. Rep. 408 (1854).

"The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the step necessary to secure the fund."³³

*Fenwick v. Greenwell*³⁴ concerned a marriage settlement in which a trust fund had been provided for the husband, wife, and children. The funds consisted of 5000-pound consols which were the personal property of the wife before the marriage. The trustees never received a conveyance from the wife whose husband dissipated the funds. In an action by the children against the trustees it was held that an indemnity clause, which provided that they should not be liable for any involuntary loss without their wilful default, afforded no immunity. *A fortiori*, a court should hold that an exonerating clause provides no protection to the trustee who fails to collect from a debtor of the estate, its executor, or the creator of the trust.

Turning again to English cases that have adjudicated the force of exonerating clauses in protecting the investments and deposits of the assets of the estate, we find among the early cases *Drosier v. Brereton*,³⁵ decided in 1851. In this case the trustees, acting in good faith, lent money secured by a mortgage on a house that fell into poor repair. Notwithstanding an immunity clause, which provided that the trustees should not be liable for any depreciation in value of the trust assets except through their wilful default, the court held them accountable for the loss. *A fortiori*, the court should reach the same conclusion, had the investments been in common stocks or even bonds. In *Rehden v. Wesley*³⁶ the trustees drew the assets of the estate out of the Union Bank of London and deposited them in their own names in another bank which immediately failed. Even though the will contained an indemnity clause against losses by a banker of moneys deposited for safe keeping, the Master of the Rolls held the trustees liable to the estate. The facts do not show that the bank had been designated as a depositary for trust funds. If that were the case, the trustee would be protected without an exonerating clause if he used due care in making the deposit.³⁷

The exonerating clause in *Knox v. MacKinnon*³⁸ provided that the trustee "shall not be liable for omissions, errors, or neglect of management." The trust deed further stipulated that the trustee should loan out the trust funds on such securities as they might

33. *Supra* note 32 at 413, 52 Eng. Rep. at 410. To the same effect are *Brice v. Stokes*, 11 Ves. 319, 32 Eng. Rep. 1111 (1805); *Sadler v. Hobbs*, 2 Bro. C. C. 114, 29 Eng. Rep. 66 (1786).

34. 10 Beav. 412, 50 Eng. Rep. 640 (1847).

35. 15 Beav. 221, 51 Eng. Rep. 521 (1851).

36. 29 Beav. 213, 54 Eng. Rep. 609 (1861).

37. *In re Kruger's Estate*, 141 Misc. 475, 252 N. Y. Supp. 688 (Sur. Ct. 1931).

38. 13 App. Cas. 753, 755 (1888).

think proper. The trustee in good faith, but not with that degree of care and diligence which a "man of ordinary prudence would have exercised in his own concern," conveyed the tenements of the estate to one of the beneficiaries and took back a mortgage on it and other property to secure 12,000 pounds of the purchase price. The beneficiary and his father-in-law were personally bound on the note. Ten years after the loan the beneficiary and his father-in-law were bankrupt and the security was practically worthless. This was not an unlawful loan under the terms of the trust but a plain case of not exercising "due care." The trustee took cover under the immunity clause, but the House of Lords in its opinion expressed by Lord Watson said,

"I see no reason to doubt that a clause conceived in these or similar terms, will afford a considerable measure of protection to trustees who have bona fide abstained from closely superintending the administration of the trust or have committed mere errors of judgment whilst acting with a single eye to the benefit of the trust. . . . But it is settled in the law of Scotland that such a clause is ineffectual to protect a trustee against the consequences of culpa lata, or gross negligence on his part, or of any conduct which is inconsistent with bona fides."

In connection with this declaration of the law by the House of Lords concerning negligence and exoneration clauses in trust agreements, it is interesting to note that the courts are prone to consider, as in this case, any action short of closely superintending the trust as gross neglect of duty.³⁹ While there are not a great number of English cases in the reports, those that have been decided, with few exceptions,⁴⁰ from *Mucklow v. Fuller*, down to the Trustees Act of 1925⁴¹ (which repealed the "honestly and reasonably" clause in the Judicial Trustees Act of 1896) have consistently held that good faith alone under an immunity clause will not absolve a trustee from

39. *Rae v. Meek*, 14 App. Cas. 558 (1889); *Stiles v. Guy*, 1 H. & Tw. 523, 47 Eng. Rep. 1517 (1849); *Paddon v. Richardson*, 7 DeG. M. & G. 563, 44 Eng. Rep. 219 (1855).

40. Though English courts materially reduce the force of the immunity clause, they are careful not to deny that it does afford some measure of protection. In *Wilkins v. Hogg*, 3 Giff. 116, 118, 66 Eng. Rep. 346 (1881). Vice-Chancellor Stuart in making reply to argument of counsel said: "The argument has proceeded on the assumption that the usual indemnity clause amounts to nothing; that it never receives a literal interpretation, but that the court will look generally at the conduct of the trustee, and, for any carelessness or any act that a prudent man ought not to have committed, will visit the trustee who has been guilty of such acts, whatever may be the language of the will. That is not the law of this court." See also *Bartlett v. Hodgson*, 1 T. R. 42, 99 Eng. Rep. 962 (1785).

41. 15 Geo. V. c. 19, § 61 (1925).

the sins of negligence in collecting, depositing, investing, and guarding the assets of the estate.⁴²

While the American courts have, for the most part, been more lenient with the trustee than have the English courts, they have manifestly evaded a direct application of exonerating clauses. Few cases, outside those where the trustee was retaining securities at the direction of the testator, have held that the immunity clause saved a negligent trustee from liability for losses.⁴³ In cases of this kind the American jurisdictions are prone to dodge the exoneration clause in one of three ways: first, to hold that the negligent act resulted in a clear breach of the trustee's duties so that the immunity clause does not apply; second, to hold that there was no negligence in the act done and, therefore, no liability; or third, to hold that the act done amounted to gross neglect or wilful default and, therefore, was not protected by the exoneration clause. This tendency to shift the ground so as to avoid an application of the exonerating clause is in part explanatory of the words of a recent writer⁴⁴ who says,

"There is surprisingly little authority on the interpretation of the usual provision in the ordinary trust that the trustee shall be liable only for a 'wilful default'."

This shifting of the ground permits the courts to reach the same conclusions they would have reached had the clause not been used and consequently negatives its protective value. Let us consider two New York cases, *In Re Garvin's Will*⁴⁵ and *In Re Jarvis's Estate*.⁴⁶ In the *Garvin* case the trustee was holding stocks that greatly depreciated in value, and in the *Jarvis* case the trustee was holding bonds which similarly depreciated. In the former case the trustee was not protected by an immunity clause, while he was in the latter. The courts, however, reached the same result in each case. In the *Garvin* case, in which there was no immunity clause, the court found the trustee "negligent" in holding common stock in a declining market and hence liable to the infant beneficiary. In the *Jarvis* case the court found the trustee "grossly negligent" in holding depreciating bonds and, therefore, not protected from liability to the beneficiary by the immunity clause. If anything, there

42. See *Nocton v. Lord Ashburton*, [1914] App. Cas. 982.

43. *Crabb v. Young*, 92 N. Y. 56 (1883); *In re Knower's Estate*, *supra* note 3.

44. Posner, *Liability of Corporate Trustees* (1928) 42 HARV. L. REV. 198, 243n.

45. 256 N. Y. 518, 177 N. E. 24 (1931).

46. 110 Misc. 5, 180 N. Y. Supp. 324 (Sur. Ct. 1920).

was greater negligence in the *Garvin* case than in the *Jarvis* case, for common stocks are, as a rule, considered more of a risk in a declining market than are bonds. All the court had to do in the *Jarvis* case was to shift from "negligence" to "gross negligence," and the trick was accomplished, the same result reached.

The same shifting may take place when the lower and the higher courts consider the same set of facts. For example, in *In Re Clark's Will*, the Surrogate and the Supreme Court of New York held that the retention of sugar stock in a declining market was a degree of negligence which was not protected by the immunity clause. The Court of Appeals, being of the opinion that the trustees were not liable, shifted in the other direction, holding that there was no negligence, therefore, no liability, and of course no necessity to consider the effect of the immunity clause. The lower courts held the trustees liable, the Court of Appeals reversed them, and neither found it necessary to rely upon the exoneration clause.

In *North Adams National Bank v. Curtis*,⁴⁷ the recent Massachusetts case previously referred to, the will provided,

"that in the event of any loss resulting to my estate through any act done or investment made in connection therewith in good faith by my said trustees hereunder, they shall not be held to any personal accountability or responsibility therefor."

The trial judge found as facts that the trustees acted in good faith and that they did not act imprudently or negligently. These findings of fact were not disturbed by the Supreme Court. Having established that the trustees acted in good faith and with due care in performing their duties, it followed that they were not liable for any losses, whether or not there was an exoneration clause. Any discussion of the clause would be clearly superfluous. While there are statements in the opinion of this case to the effect that the exoneration clause would protect the trustee, it is not a direct decision on that point.⁴⁸

In *Conover v. Guarantee Trust Company*⁴⁹ it seems that the trustee, either through bad judgment or ignorance of its duties, accepted securities which it was not empowered under the trust

47. *Supra* note 2.

48. The opinion in *North Adams National Bank* states: "The testator had the right to make the provision relating to the exemption of the trustee from personal liability," and supports it with the following cases: *Anderson v. Bean*; *Old Colony Trust Co. v. Shaw*, both *supra* note 13; *In re Clark's Will*, *supra* note 2. It should be noted, however, that in each of these cases, the testator directed his trustee to retain certain stocks or shares and that the rule is well settled that in such a case the exoneration clause is given full force.

49. 88 N. J. Eq. 450, 461, 102 Atl. 844, 848 (1917).

agreement to hold. The trust company acted under an immunity clause which held it free from liability for any mistake of judgment or discretion. The New Jersey court, however, shifted the act done from a question of poor judgment or discretion to a breach of the trust powers.

"It seems to me," states the court, "impossible to doubt that when a trustee transcends his powers by accepting securities for this trust of a nature or class which by the terms of the trust he is not authorized to accept, all inquiries touching his judgment, mistaken exercise of discretion, good faith and the value of the securities so accepted are necessarily excluded from consideration. . . . It accordingly seems impossible to construe an immunity clause as intending to exempt a trustee from liability for transcending his powers as clearly defined by the trust agreement."

When, as in this case, the court shifts the consequences of bad judgment or negligence over to a breach of duty, the protective power of the immunity clause is on uncertain ground. For, may not negligence, which results in failing to collect the assets of the estate, in selecting an unsafe depository, in buying bonds from the commercial department of the bank, or in any one of a number of unintentional wrongs that a trustee may do, become breaches of duties that are not protected by an immunity clause? While "trustees acting honestly with ordinary prudence and within the limits of their trust are not liable for mere errors of judgment,"⁵⁰ yet once the negligent act is interpreted as a breach of duty, good faith of the trustee cannot alter its liability.⁵¹

In *Tuttle v. Gilmore*⁵² the will provided that the trustee should not be liable except for his wilful and intentional breaches of the trust. On the advice of counsel the trustee accepted as securities second mortgages on real estate which he sold from the estate and

50. *In re Clark's Will*, *supra* note 2, at 137, 177 N. E. 398.

51. In *Nocton v. Lord Ashburton*, [1914] App. Cas. 932, 954, Lord Haldane reached the same conclusion as that in *Conover v. Guarantee Trust Co.*, *supra*, when he said: "When fraud is referred to in the wider sense in which the books are full of the expression, used in chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an *actual intent* to cheat must always be proved. A man may misconceive the extent of the obligation which a court of equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the court to have known. . . . The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them." (Italics supplied). Once the court has shifted the negligent or ignorant act to a breach of duty and constructive fraud, the plea of *bona fides* under an immunity clause is of little avail.

52. 36 N. J. Eq. 617 (1883).

which later proved to be worthless. The investment, however, was made in good faith and with no intention of personal gain. It was a plain case of negligence or ignorance. Nevertheless, the court in its opinion said,

"In my judgment, it is a wilful and intentional breach of trust within the meaning of this clause to knowingly do any act hazarding trust funds in violation of a duty imposed on the trustee. That this construction may leave but little force to the clause is no reason why it should not be adopted."

Here the New Jersey court interpreted, as it did in *Gilmore v. Tuttle*,⁵³ a negligent, careless, or ignorant act as an intentional and wilful breach of the trustee's powers. When the act done is translated into an intentional breach of duty, the way is clear to hold the trustee liable notwithstanding an immunity clause.

"Whatever may be the extent of the liability of a trustee justifying under this clause," states the opinion in *Digney v. Blanchard*,⁵⁴ "we do not construe it as affording him protection from a wilful and intentional breach of trust."⁵⁵

In this Massachusetts case the immunity clause provided that the trustee should be liable only for the result of his own gross negligence or bad faith, but the court translated the act, whether in bad faith or not, which was clearly beyond the trustee's powers, as a breach of trust and not under the protective veil of the immunity clause.

It is rather difficult to draw a fixed line between negligence in doing a thing the trustee is empowered to do, and negligence which results in doing a thing which the trustee should not do or in failing to do something he should do. A trustee is under a duty to collect and preserve the assets of the trust estate. Now if, as a result of negligence, he fails to collect part or all of the assets, or permits a security greatly to depreciate in value, has he committed a breach of his trust duties or is he, after all, only negligent? Is it not likely that a court will rely upon its discretion in deciding this question as it did in the cases of *Conover v. Guarantee Trust Company* and *Tuttle v. Gilmore*?

It would seem from the cases considered that the protective force of the exoneration clause is largely at the discretion of the courts. It may have some weight in the scale of justice but possibly not more than the English courts have given it, *i.e.*, to afford leniency

53. 32 N. J. Eq. 611 (1880).

54. 226 Mass. 335, 115 N. E. 424 (1917).

55. See *Mattocks v. Moulton*, 84 Maine 545, 24 Atl. 1004 (1892); *Adair v. Brimmer*, 74 N. Y. 539 (1878); *Tuttle v. Gilmore*, 36 N. J. Eq. 617 (1883).

toward an honest trustee who has not *closely superintended* the trust.

There is a class of cases, other than those where the trustee is directed to retain certain assets, in which the courts have been rather liberal in giving full effect to the exoneration clause. In this group the corporate trustee is acting as a depositary or a stakeholder of a security on which bonds are issued and sold to the public. *Green v. Title, Guarantee, and Trust Company*⁵⁶ is a fair illustration of this class. This suit was brought by holders of the bonds against the Title Company for its negligence in failing to include in the indenture of mortgage on which the bonds were issued certain properties of the mortgagor, for its carelessness in so drafting the mortgage instrument that it was subsequently declared void as to creditors, and for its negligence in failing to secure from the mortgagor a second instrument which would correct the defects in the first. The trust company in its release of the bonds to the plaintiff protected itself with an immunity clause which provided

"that the trustee shall not be answerable . . . for anything except its own gross negligence or wilful misconduct in the discharge of its duties. . . . The trustee is under no obligation to record or file their indentures in any office whatsoever or to procure any additional instrument or further assurances. . . ."

The court left the parties where the exemption clause in the contract had placed them, with the exception that it held that the trustee could not contract against its duty to record the mortgage. But since the mortgage was void, its recordation would not affect the rights of the parties. In *Browning v. Fidelity Trust Company*,⁵⁷ another case of this class, the trustees released bonds after it should have known that the mortgagor had defaulted in the payment of interest. The court held, however, that the trustee was not guilty of "gross negligence" and was, therefore, protected by the immunity clause which made it accountable only for bad faith. There are a few other cases⁵⁸ in which the courts have granted immunity to corporate trustees acting under exoneration clauses in the issuing of bonds secured by a mortgage held by the trust company.

It is submitted, however, that these cases are essentially and inherently different from the true *trustee-cestui que trust* relationship, for here both the mortgagor who places the security with the trust company and the purchasers of the bonds that are issued on

56. 223 App. Div. 12, 227 N. Y. Supp. 252 (1st Dep't 1928).

57. 250 Fed. 321 (C. C. A. 3d, 1918).

58. *Hunsberger v. The Trust Co.*, 218 N. Y. 742, 113 N. E. 1058 (1916); *Diggs v. The Fidelity & Deposit Co.*, 112 Md. 50, 75 Atl. 517 (1910).

those securities are dealing with the trust company at arm's length.⁵⁹ They are contracting parties. There is no *cestui que trust* in the true sense of the word. The parties all come into the relationship by contract, whereas in the true trustee relationship the beneficiary quite generally has little part in preparing the trust instrument. Through the centuries courts of equity have placed about the *cestui que trust* certain safeguards and about the trustee they have inscribed certain duties and responsibilities which are inherent in the relationship of trustee and beneficiary, and independent of the instrument creating the trust.

It would seem that, outside of those cases in which the testator or creator of the trust directs his trustee to retain certain securities exempting him from liability for so doing, and that class of cases where the trust company is acting as stakeholder and trustee for both mortgagor and bondholder,⁶⁰ there are few cases, if any, of the true *trustee-cestui que trust* relationship that have gone quite as far as New York has gone in *Crabb v. Young*⁶¹ and *In Re Knowler's Estate*.⁶² In each of these cases it was held that a careless trustee who had invested in insufficient securities was exempt from liability by an exoneration clause. While *Crabb v. Young* has received favorable reference⁶³ in later New York cases, it stands alone even in its own jurisdiction as an extreme application of the protective force of an exoneration clause. In *In Re Jarvis's Estate*, a New York case previously discussed, it was held that the exoneration clause

"gave no greater latitude to the executor and trustee than is given by the Code," which, continues the opinion, "means a common sense standard of prudence and proper diligence."

59. See Posner, *op. cit. supra* note 44, at 200 n. 7.

60. To this group should be added another type of trustee, *viz.*, corporate directors, whom the courts generally protect under the limited liability clauses written into the by-laws of the corporation. See *In re City Equitable Fire Insurance Co.*, [1924] Ch. 407. The problem here, however, is to determine just who are the beneficiaries. See Dodd, *For Whom Are Corporate Managers Trustees?* (1932) 45 HARV. L. REV. 1145. See also Berle, *For Whom Corporate Managers are Trustees* (1932) 45 HARV. L. REV. 1365.

Prof. Dodd, quotes Mr. Owen D. Young, executive officer of the General Electric Company, as saying that he is trustee for three classes of people, "one is the group of fifty odd thousand people who have put their capital in the Company, namely, its stockholders, another is a group of well toward one hundred thousand people who are putting their labor and their lives into the business of the Company. The third group is of consumers and the general public." Dodd, *supra* at 1154.

61. *Supra* note 43.

62. *Supra* note 43.

63. *In re Clark's Will*, *supra* note 2.

Again, the New York Surrogate Court in *In Re Clark's Will*⁶⁴ stated in its opinion that

"good faith of the trustee cannot alter its liability. Even in the face of authority to 'continue' to hold, vigilance and alert judgment will be required."⁶⁵

As corporate fiduciaries double and redouble their business by holding themselves out to the public as skilled and efficient executors and trustees, are they not fixing a standard of care higher than that of the ordinary individual trustee? An increased standard of care through representations of skill is not a new principle in the law of Torts. The large city surgeon is held to a higher degree of care than is the country doctor.

"The rule is that he [the doctor] must exercise that degree of care and skill ordinarily exercised by the profession in his own and in similar localities."⁶⁶

The same rule applies to lawyers, dentists, surgeons, chiropractors, and all men who hold themselves out as especially skilled in a particular field.

"By our law a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill contracts with his employer," states the New Hampshire court in *Leighton v. Sargent*,⁶⁷ "that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business."

Should not the colorful advertising on the part of trust companies, representing to the public that their officers are skilled specialists in the business of investing and protecting trust estates, cause the courts to regard any act that falls short of *closely superintending* the trust as gross negligence which an exoneration clause will not excuse? In other words, an act that is only "slight negligence" on the part of an ordinary individual trustee should be considered gross neglect when committed by a specialist in the field.

64. 136 Misc. 881, 888, 242 N. Y. Supp. 210, 219 (Sur. Ct. 1930).

65. See also *In re Channing's Estate*, 129 Misc. 393, 222 N. Y. Supp. 351 (Sur. Ct. 1927).

66. COOLEY ON TORTS (4th ed. 1932) § 473 note 99.

67. 27 N. H. 460, 469 (1853).

"It is not to be assumed," states the opinion in *Villard v. Villard*,⁶⁸ "that the trust company *with all its experience* was unwittingly and innocently deceived into accepting the stock in question." Further, "In trust relations these days," states the opinion of Surrogate Slater,⁶⁹ "when trust companies have entered the business, much more is expected from a corporate trustee than from the old-fashioned individual executor or trustee. Trust companies seek this character of business, claiming that they are especially qualified and financially responsible."

The Supreme Court of Pennsylvania in *In Re Linnards Estate*⁷⁰ suggests in its opinion that a stricter rule of law might be applied to corporate fiduciaries than to individual trustees.

"We have not overlooked appellant's argument," says the court, "so earnestly pressed, that owing to the special facilities possessed by such corporations a stricter rule of responsibility should be exacted from trust companies as fiduciaries than from the ordinary individual trustee."

Standards of care should be commensurate with skill proclaimed. A banker should not, any more than a lawyer or a doctor, gain business as a specialist and defend mistakes as a layman. Trust companies should not stand before the public as paragons of financial skill and before the bench as ordinary prudent citizens of Main Street.

The modern corporate fiduciary, holding billions of trust assets and serving as a trusted agent to pass the wealth of the nation from one generation to the next, is as much affected with a public interest, it would seem, as are telegraph companies, public utilities, and common carriers and should not, any more than these institutions, be permitted to limit its liabilities by contract. Important limitations on the power of common carriers to relieve themselves from liability for losses to persons or property through a want of ordinary care on their part or that of their servants are everywhere recognized.⁷¹ The same principle applies to telegraph companies exempting themselves from liability for losses from their own negligent acts;⁷² to contracts by masters exempting themselves from liability for negligence to their servants;⁷³ and in a majority of jurisdictions to a bailee for hire in contracts against his own negligence.⁷⁴ While

68. *Supra* note 10, at 502, 114 N. E. 794 (Italics supplied).

69. *In re Clark's Will*, *supra* note 64.

70. 148 Atl. 912 (Pa. 1930).

71. COOLEY, *op. cit. supra* note 66, § 494.

72. *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299 (1873). For collected cases from practically all jurisdictions see COOLEY, *op. cit. supra* note 66, at 458 n. 97.

73. *Blanton v. Dold*, 109 Mo. 64, 18 S. W. 1149 (1892).

74. *Inland Compress Co. v. Simmons*, 59 Okla. 287, 159 Pac. 262 (1916).

"the reasons which forbid such contracts," says Cooley,⁷⁵ "have special force in the business of carrying persons and goods, and of sending messages, they apply universally, and should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct."

That institutions and individuals may in their relation to other individuals and to the public occupy a position, the duties and liabilities of which are impervious to limitations by contract, is not a new principle in law. The liberty of contract is not unrestricted.⁷⁶ To give full force to the usual exoneration clause is to assert the contrary, although the facts warrant a rigid application of the principle that in certain instances there are inherent duties and liabilities beyond the reach of contract.

The trustee appointed by a testamentary instrument or by contract is clothed with certain inherent duties, one of the most fundamental of which is to preserve the trust estate with that degree of diligence and care which an "ordinary prudent man would give to his own like affairs." Strip from the trustee these inherent duties, let him by contract erase his losses and commit all the acts that ignorance, carelessness, or neglect will lead to, and the true *trustee-cestui que trust* relationship is gone. The beneficiary finds himself dealing not with a trustee but with a protected adversary whom he had no hand in selecting.

75. COOLEY, *op. cit. supra* note 66, § 496.

76. See Pound, *Liberty of Contract* (1909) 18 YALE L. J. 454.