

THE PRIVATE TRUSTEE
IN VICTORIAN ENGLAND

CHANTAL STEBBINGS



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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 personality. 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 settlers. 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 annuities¹⁹ 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 settlers 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.