



NORTH CAROLINA LAW REVIEW

Volume 45 | Number 4

Article 23

6-1-1967

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Recommended Citation

John G. Aldridge, *Trusts -- The North Carolina Fiduciary Powers Act and the Duty of Loyalty*, 45 N.C. L. REV. 1141 (1967).

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Trusts—The North Carolina Fiduciary Powers Act and the Duty of Loyalty

In 1965 the North Carolina General Assembly enacted the fiduciary powers act.¹ The act contains a list of thirty powers which are generally desirable in trust and estate management and which can be conveniently incorporated by reference into a trust instrument.² More important the draftsman is provided with a clear guide to powers available to the trustee which will eventually become well defined by case law. Use of the act will undoubtedly reduce the number of situations in which a trustee fails to act for fear of exceeding his authority and the necessity of applying to the court for instructions, often a time consuming and expensive process.³ Despite these conveniences the act has created a number of problems⁴ arising from the difficulty of striking a proper balance between the need for adequate powers in the trustee and adequate protection for the beneficiary. The purpose of this discussion is to analyze two of the North Carolina trustees' powers in light of tradi-

¹ N.C. GEN. STAT. §§ 32-25 to -27 (1966). For examples of similar legislation see ARK. STAT. ANN. §§ 58-114 to -116 (Supp. 1965) and TENN. CODE ANN. §§ 35-616 to -618 (Supp. 1966).

² The incorporation by reference type statute should be distinguished from a statute like the Uniform Trustee's Powers Act under which enumerated powers are automatically incorporated into all trust instruments unless specifically excluded. For a thorough analysis of the latter act see Horowitz, *Uniform Trustees' Powers Act*, 41 WASH. L. REV. 1 (1966) [hereinafter cited as Horowitz]. To the effect that the incorporation by reference type statute is inadequate to solve present day administrative problems see Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 659 (1962).

³ North Carolina is in accord with the well established rule that the courts will allow the trustee to deviate from the terms of the trust where due to circumstances not anticipated by the settlor compliance would defeat or substantially impair the purposes of the trust. RESTATEMENT (SECOND), TRUSTS § 167 (1959). *Accord*, *Trust Co. v. Johnston*, 269 N.C. 701, 153 S.E.2d 449 (1967); *Bank v. Broyhill*, 263 N.C. 189, 139 S.E.2d 214 (1964); *Cocke v. Duke Univ.*, 260 N.C. 1, 131 S.E.2d 909 (1963); *Blades v. Spitzer*, 252 N.C. 207, 113 S.E.2d 315 (1960).

⁴ N.C. GEN. STAT. § 32-26(b) (1966) creates an obvious problem which is beyond the scope of this discussion. Briefly, this section states that no power shall be exercised in such a manner as to deprive the trust or estate of an otherwise available tax exemption. First, it is not at all clear whether an exercise of power in violation of this provision would render the act of the trustee void or whether such exercise would constitute a breach of trust. More important it is not clear whether the Commissioner would honor this provision as a savings clause for federal estate tax purposes. See note 19 *infra* for a situation in which this becomes extremely important. For an analysis of a similar provision in the Uniform Trustees' Powers Act see Horowitz 13.

tional fiduciary principles of loyalty. Through this analysis the possible consequences of incorporation and the need for thoughtful draftsmanship will become apparent.

The requirement of loyalty of a trustee is derived from the most intense fiduciary relationship in our law.⁵ Basically this duty requires the trustee to subordinate his personal interests and act solely in the interest of the beneficiary.⁶ Whenever it appears that the trustee's personal interest may have been a factor, the courts have consistently fixed an extremely high and strict standard for his conduct.⁷ The duty of loyalty requires, however, more than mere subordination of personal interest since it is unrealistic to assume that opportunity for personal benefit will be consistently disregarded. Thus the law attempts to eliminate all possibilities of personal profit by preventing the trustee from occupying a position in which his interest could possibly conflict with that of the beneficiary.⁸ This requirement is not founded on a basic distrust of the trustee, but on the realistic premise that a man cannot possess total detachment from his own interests. The conflict may be so subtle that even the trustee is unaware of its effect on his judgment. Through the application of the rule of undivided loyalty the trustee has been prevented from buying trust property at his own sale,⁹ selling his individual property to himself as trustee,¹⁰ using the trust property for his own benefit,¹¹ depositing trust funds in its own banking department,¹² purchasing an adverse interest from a third party,¹³ and receiving a commission on a transaction in performance of the trust.¹⁴ North Carolina is in accord with the above principles¹⁵ and in addition has codified the rule against self-dealing in a

⁵ 2 SCOTT, TRUSTS § 170 (1956).

⁶ *Ibid.*; BOGERT, TRUSTS § 95 (4th ed. 1963).

⁷ See Scott, *The Trustee's Duty of Loyalty*, 49 HARV. L. REV. 521 (1936).

⁸ See note 6 *supra*.

⁹ 2 SCOTT, TRUSTS § 170.1 (1956).

¹⁰ *Id.* § 170.12.

¹¹ *Id.* § 170.17.

¹² *Id.* § 170.18.

¹³ *Id.* § 170.21.

¹⁴ *Id.* § 170.22.

¹⁵ See *Trust Co. v. Johnson*, 269 N.C. 701, 153 S.E.2d 449 (1967) where the court recognized "that one of the most fundamental duties of the trustee throughout the trust relationship is to maintain complete loyalty to the interests of his *cestui que trust*." *Id.* at 711. The court continued by stating that "[i]n this jurisdiction there have been few inroads on the rule regarding the duty of loyalty by the trustee to the interests of the *cestuis que trust*." *Id.* at 711. *Accord*, *Morehead v. Harris*, 262 N.C. 330, 137 S.E.2d

number of specific areas.¹⁶

A number of the powers set out in the North Carolina act are quite broad. These powers allow the trustee great leeway in the administration of the trust and permit him to occupy positions that are inconsistent with the fiduciary principles outlined above. Yet this fact does not in itself present a problem, for it is widely held that the undivided loyalty rule may be waived by the settlor and in certain circumstances by the beneficiary.¹⁷ As will be pointed out below, the incorporation of at least one power in the North Carolina act will result in such a waiver by the settlor.¹⁸ Since the draftsman can, however, refuse to incorporate a power if not in accord with the settlor's intent, and since even the broadest power may be desirable in certain situations, the new act can be utilized to its fullest extent with a minimum of problems through prudent and responsible draftsmanship. Yet despite the opportunity for selective incorporation, it should be recognized that as a practical matter the vast majority of trust instruments handled by corporate trustees in North Carolina incorporate the act *in toto*.¹⁹ This fact makes it necessary to determine whether the powers analyzed are appropriate in prac-

174 (1964); *Miller v. McLean*, 252 N.C. 171, 113 S.E.2d 359 (1960); *Trust Co. v. Barrett*, 328 N.C. 579, 78 S.E.2d 730 (1953); *Erickson v. Starling*, 233 N.C. 539, 64 S.E.2d 832 (1951); *Hatcher v. Williams*, 225 N.C. 112, 33 S.E.2d 617 (1945); *Williams v. Hooks*, 199 N.C. 489, 154 S.E. 828 (1930); *Carter v. Young*, 193 N.C. 678, 137 S.E. 875 (1927); *North Carolina R.R. v. Wilson*, 81 N.C. 223 (1879); *Freeman v. Cook*, 41 N.C. 373 (1849).

¹⁶ See N.C. GEN. STAT. §§ 36-26 to -30 (1966). The latter subsection which prevents a corporate trustee from purchasing its own stock should be kept in mind throughout the following discussion of the power of the corporate trustee to retain its own shares. Note that a number of these prohibitions cannot be waived by the settlor in the terms of the trust nor by the consent of the beneficiary. Purchase of its own stock by a corporate trustee is included in these non-waiver provisions. See N.C. GEN. STAT. §§ 36-40, 41 (1966). A court of competent jurisdiction may, however, relieve the trustee from these restrictions. N.C. GEN. STAT. § 36-42 (1966).

¹⁷ See BOGERT, TRUSTS § 95 (4th ed. 1963); 2 SCOTT, TRUSTS §§ 170, 170.9 (1956).

¹⁸ See note 30 *infra* and accompanying text.

¹⁹ This fact was determined by personal communication with trust officers of well known North Carolina corporate trustees. Note, however, that a power or powers may be excepted due to potential adverse tax consequences. For example, the trustee is given a very broad power in N.C. GEN. STAT. § 32-27(29) (1966) to determine what is principal and what is income of the trust. This broadness would seem to jeopardize the qualification of the property for the marital deduction and consequently a number of corporate fiduciaries urge the exclusion of this power. See Treas. Reg. § 20.2056(b)-5(f)(4) (1958).

tically all situations and whether it can realistically be said that the settlor intended the consequences which flow from such incorporation.

The first power that may be incorporated permits the trustee:

to retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.²⁰

The rule of undivided loyalty in respect to a retention power generally arises where the trust estate originally consists in part or in whole of the corporate trustee's own stock.²¹ Unless authorized to retain such stock by the trust instrument, retention by the corporate trustee is a breach of trust due to the potential conflict of interest between the trustee and the beneficiary.²² The possibility of an ac-

²⁰ N.C. GEN. STAT. § 32-27(1) (1966).

²¹ Only the consequences of the incorporation of this provision as to the duty of loyalty will be discussed.

It should be noted, however, that in addition to loyalty restrictions the trustee is required to exercise a certain standard of care and will be held liable despite the power to retain if this standard is not met. See 3 SCOTT, TRUSTS § 230.1 (1956). Apparently North Carolina has adopted the "prudent man rule" as to investments and would apply it to acts of retention authorized by the above power. See *Sheets v. Tobacco Co.*, 195 N.C. 149, 141 S.E. 355 (1928) where the court relied on the traditional statement that the trustee

is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to permanent disposition of their funds, considering the probable income as well as the safety of the capital to be invested. *Id.* at 152, 141 S.E. at 357, quoting from *Harvard College v. Amory*, 26 Mass. (9 Pick.) 446, 461 (1830).

For a review of early cases dealing with the investment power and the prudent man rule in North Carolina, see Comment, 14 N.C.L. REV. 160 (1936).

Although it is possible for the settlor to waive the requirement of reasonableness, it is doubtful that incorporation of this power would have such a result. The power gives the trustee broad discretion, but generally it is necessary to give "absolute" or "unlimited" discretion in order to waive this requirement. See RESTATEMENT (SECOND), TRUSTS § 187, comment j (1959). For a recent North Carolina case in which the prudent man rule was not applicable due to the grant of "sole" discretion to the trustee, see *Lichtenfels v. Bank*, 268 N.C. 467, 151 S.E.2d 78 (1966). In this case the court gave great weight to the fact that the power was expressly set out in the trust instrument. *Quaere* whether a power that is incorporated and thus made express should receive the same weight in light of the wholesale incorporation evident in North Carolina?

²² BOGERT, TRUSTS AND TRUSTEES § 543 (2d ed. 1960); 2 SCOTT, TRUSTS § 170.15 (1956). See generally Annot. 47 A.L.R.2d 187 (1956); Annot. 157

tual conflict in this situation is obvious since the corporation's officers may hesitate, consciously or unconsciously, to sell the shares where such a sale might depress the market value of the stock.²³ Also the sale of the corpus may compete with the desire of the officers to sell their own stock if there is a limited market.²⁴ This reluctance to sell may be compounded where the voting power represented by such shares is in the control of the corporate trustee.²⁵ It is well settled, however, that the retention of such shares may be authorized by the settlor,²⁶ and there is little doubt that the above power of retention, if incorporated, would serve as such an authorization.²⁷ Even though this power does not specifically mention shares of the corporate trustee, the majority of courts hold that such a general authorization to retain original investments is sufficient to cover this situation.²⁸ It is said that since the settlor was aware that he owned such shares, it is reasonable to infer that he intended the general authorization to cover them.²⁹ The validity of this rationale seems questionable unless there is evidence that the corporate trustee informed the settlor of the potential conflict of interest created by such a power. It seems highly doubtful that the

A.L.R. 1429 (1945); Annot. 134 A.L.R. 1324 (1941); Scott, *Retention of Its Own Shares by a Corporate Trustee*, 57 HARV. L. REV. 601 (1944).

²³ See 2 SCOTT, TRUSTS § 170.15 (1956).

²⁴ See Hallgring, *The Uniform Trustees' Powers Act and the Basic Principles of Fiduciary Responsibility*, 41 WASH. L. REV. 801, 813 (1966). [hereinafter cited as Hallgring].

²⁵ See 2 SCOTT, TRUSTS § 170.15 (1956).

²⁶ RESTATEMENT (SECOND), TRUSTS § 170, comment *n* (1959), 2 SCOTT, TRUSTS § 170.15 (1956).

²⁷ There has been very little litigation in North Carolina involving powers of retention. However, the court did evidence a liberal attitude toward such a power in *Young v. Hood*, 209 N.C. 801, 184 S.E. 823 (1936). The testator desired that certain bank stock be retained by the corporate trustee and authorized such retention by an express provision in the trust instrument. By a subsequent merger with this bank the corporate trustee held its own stock under the trust. Since the trust did not originally include the trustee's own stock, it cannot be said that by the express authorization the testator intended to waive the rule of undivided loyalty. The court held, however, that the trustee was not subject to surcharge despite the decline in value of the stock. Although the testator did desire the retention of the stock, this case does not seem to be particularly well reasoned from a duty of loyalty standpoint since the conflict of interest arose subsequent to the creation of the trust.

The liberality of this decision alone would seem to indicate that North Carolina will follow the majority in construing a general authorization to retain original property. See note 26 *supra* and accompanying text.

²⁸ See note 26 *supra*.

²⁹ 2 SCOTT, TRUSTS § 170.15 (1956).

typical settlor intends to waive the rule of undivided loyalty in the normal situation, yet this is precisely the result of such an incorporation.³⁰ Waiver of this rule should not, however, be understood as allowing self-dealing by the trustee. Technically the only consequence of such waiver is that the trustee is allowed to occupy a position in which there is a potential conflict of interest. But even though the trustee is prevented from acting in his own interest despite waiver, the practical affect of the waiver places the beneficiary in a precarious position. The rule of undivided loyalty becomes sterile to a large extent where the trustee is permitted to occupy a position of potential conflict because of the difficulty encountered in proving or even in detecting self-dealing. It would be an unusual case indeed if the trustee could not make an after-the-fact explanation consistent with the duty of loyalty.

Thus in a very real sense the incorporation of the above power of retention places the corporate trustee in a totally unrestrained position. It is true that the large and well known corporate trustee employs internal sanctions to combat this danger.³¹ Also there is no actual conflict in the usual case. Yet these facts do not justify incorporation of such a provision in all or even in the majority of trust instruments. Where the settlor desires that the corporate trustee hold its own stock,³² it is likely that he will be more aware of the potential consequences of such incorporation and will communicate his desire for retention directly to the corporate trustee. But can it be realistically assumed that in every trust handled by a corporate trustee in North Carolina, the settlor was aware of a potential conflict of interest yet intended that the stock be retained whether or

³⁰ See Annot. 47 A.L.R.2d 187, 268 (1956); 90 C.J.S. TRUSTS § 248(e) (1955); see generally Scott, *Retention of Its Own Shares by a Corporate Trustee*, 57 HARV. L. REV. 601 (1944).

³¹ For examples of suggested guidelines see Aartsen, *Statement of Policies on Conflict of Interest of Corporate Fiduciaries*, 103 TRUSTS & ESTATES 379 (1964). Note that Wachovia Bank & Trust Company has employed a safeguard through which the primary objections to a general authorization to retain are eliminated. Whenever it appears that Wachovia may have to hold its own stock in trust, it requests that a specific authorization to do so be placed in the trust instrument. This is done in spite of the incorporation of the general power to retain under the North Carolina Act. [This fact was determined by personal communication with a trust officer of the Wachovia Bank & Trust Company.]

³² For example, the settlor may desire to give the corporate trustee such a power where the corporate trustee is a close corporation. In this situation retention of the stock may be very desirable for control purposes and would act much the same as a stock transfer restriction.

not administration of the trust is affected by self-interest? The answer is obvious. Thus it would seem to be arguable that in the loyalty area an incorporated power should not be accorded the same weight as a power expressly set out in the trust instrument.

By incorporation into the trust instrument the trustee may also be given the power

to pay taxes, assessments, *compensation of the fiduciary*, and other expences incurred in the collection, care, administration, and protection of the trust or estate.³³

Under this section the trustee is given powers essential to the efficient administration of the trust estate. Clearly the prudent draftsman would be expected to incorporate such powers. Yet the reference made in this power to compensation is somewhat questionable in light of North Carolina law.

Under the English rule the trustee is not entitled to any compensation for his services unless such compensation is expressly set out in the trust instrument.³⁴ The early North Carolina rule was in accord with the English view.³⁵ Under the modern rule in this country both corporate and individual trustees are entitled to compensation whether or not it is provided for in the trust.³⁶ The majority of states, including North Carolina, have enacted statutes that fix standards under which the trustee is to be compensated.³⁷ Those states that have no statute apply the general rule that the trustee is

³³ N.C. GEN. STAT. § 32-27(9) (1966). [Emphasis added]. This power is substantially the same as that set out in the UNIFORM TRUSTEES' POWERS ACT § 3(c)(20). For a detailed analysis and criticism of this power under the Uniform Act see Hallgring 816.

³⁴ 3 SCOTT, TRUSTS § 242 (1956).

³⁵ See *Boyd v. Hawkins*, 17 N.C. 160 (1832), where the court rejected the argument that trustees were entitled to compensation above reimbursement for expenses. The court recognized that compensation could be expressly stated in the trust instrument, but such amount was to be taken only as evidence that the parties did not intend the services to be gratuitous. Such express provision for compensation was to be disregarded and a reasonable amount set by the court. In this case the court feared that the "trustee would take what he pleased of the estate . . . under the name of compensation, and every abuse would follow." *Id.* at 174.

³⁶ BOGERT, TRUSTS § 144 (4th ed. 1963); 3 SCOTT, TRUSTS § 242 (1956).

³⁷ See N.C. GEN. STAT. § 28-170 (1966), which provides, in part, that [e]xecutors, administrators, testamentary trustees, collectors or other personal representatives or fiduciaries shall be entitled to commissions *to be fixed in the discretion of the clerk* not to exceed five per cent upon the amount of receipts . . . and upon the expenditures made in accordance with the law. . . .

Ibid. [Emphasis added.]

to receive reasonable compensation as determined by the courts.³⁸ Yet despite the traditional judicial and legislative control over fiduciary compensation, a reasonable interpretation of the above power results in the conclusion that it authorizes the trustee to fix his own compensation.³⁹ The existence of a statutory scheme dealing with fiduciary compensation in North Carolina raises a question as to whether a trustee could, under the above power, set his compensation above the statutory maximum of five per cent. Even if he could not, the question remains whether compensation set by the trustee within the maximum is entitled to an initial presumption of validity.⁴⁰ Seemingly *Trust Co. v. Waddell*⁴¹ would require a negative answer to the latter question and perhaps to the former. The court stated in this case that "an executor has no right to fix and determine the compensation to be received by him."⁴² From this case it seems to be well settled in North Carolina that unless set by the settlor, the maximum compensation to be received by a fiduciary is fixed by the statute with the actual amount determined only by the clerk of court.⁴³ In light of this decision it is difficult to see what affect incorporation of the above power could have in North Carolina. In addition the power is inherently violative of the duty of loyalty. It is impossible to conceive of a more obvious case of conflict between the interest of the trustee and that of the beneficiary. It has been appropriately asked: "What trustee will not judge that his own skills are beyond compare, his energies inexhaustible, and his difficulties the most vexatious?"⁴⁴ Even a mere presumption of validity becomes undesirable in light of the obvious self interest and vague standards applied to determine compensation.⁴⁵ It should be

³⁸ 3 SCOTT, TRUSTS § 242 (1956).

³⁹ See Horowitz 23.

⁴⁰ See Hallgring 818 where it is suggested that such prima facie validity may be found by a court supervising the exercise of this power under the Uniform Trustees' Powers Act.

⁴¹ 237 N.C. 342, 75 S.E.2d 151 (1953).

⁴² *Id.* at 345, 75 S.E.2d at 153.

⁴³ Note that this statement is not meant to cover situations in which the settlor or testator set the trustee's compensation in the terms of the trust. In such a situation compensation exceeding the statutory maximum would be allowed. See *Trust Co. v. Waddell*, 237 N.C. 342, 75 S.E.2d 151 (1953).

⁴⁴ Hallgring 818.

⁴⁵ Under the North Carolina compensation statute the clerk is to consider "time, responsibility, trouble and skill involved in the management of the estate. . . ." N.C. GEN. STAT. § 28-170 (1966).

For factors generally considered in the absence of a statute see RESTATEMENT (SECOND), TRUSTS § 242, comment *b* (1959).

noted, however, that as a practical matter this problem exists only as to the individual trustee. The corporate trustee generally uses a schedule of compensation that is written into the trust instrument.⁴⁶ The percentages in such a schedule are set primarily by competition and are well below the statutory maximum. It is clear that even if the corporate trustee had the power to set its compensation above that allowed by the statute, it would probably not do so due to the competitive restraint. But the same is not true of the individual trustee who could reward himself handsomely. Again, the trustee would have little difficulty showing reasonableness on an after-the-fact inquiry. In the final analysis it seems, however, that the North Carolina compensation statute and the difficulties encountered as to the duty of loyalty would prevent the trustee from fixing his own compensation despite incorporation of this power. If this is correct, the power should be deleted from the fiduciary powers statute. If not, North Carolina has departed sharply from duty of loyalty principles and the considerations deemed decisive against such a power in the vast majority of states.

The propriety of these powers⁴⁷ should also be considered in

⁴⁶ For example, the basic schedule used by the Wachovia Bank & Trust Company for trustees is as follows:

Annual principal charge: (Based on current market value)

\$2.00 per \$1,000 for the first \$100,000

\$1.00 per \$1,000 for the next \$400,000

\$0.50 per \$1,000 for all over \$500,000

Annual income charge: (Based on income received)

5% or the first \$10,000

2½% of all over \$10,000

⁴⁷ Although the majority of the powers set out in the North Carolina Act are not overly broad and do not present fiduciary problems, there are at least two, other than those discussed above, that should be briefly mentioned. Both involve the duty of care.

N.C. GEN. STAT. § 32-27(4) (1966) allows the trustee to invest without diversification. This power is in conflict with the general rule that requires the trustee to spread investments so as to lessen the risk of loss. See 3 SCOTT, TRUSTS § 228 (1956). Thus the incorporation of this power would not seem desirable unless the settlor specifically intends to limit the field of investments.

N.C. GEN. STAT. § 32-27(24) (1966) enables the trustee to employ and compensate agents deemed necessary to advise or assist him and to do so without liability for any neglect provided the trustee selects and retains the agent with due care. It is not yet clear how far the trustee could go in delegating his duties to agents under this section. However, the power seems to be sufficiently broad to raise some question in light of the general rule that the trustee cannot delegate acts which he may reasonably be expected to perform. See 2 SCOTT, TRUSTS § 171 (1956). For a detailed analysis of the duty not to delegate and a criticism of a power similar to that in the North Carolina Act see Hallgring, 831.

light of the nature of the modern corporate trustee. The professional fiduciary is replacing the trusted family confidant as trustee in the modern business world. Despite a general realization that "the striving for profitability . . . should not obscure the traditional principles and ideals of trusteeship,"⁴⁸ the corporate trustee's relationship with the settlor and the beneficiary is becoming increasingly distant. The primary responsibility for maintaining the standard of loyalty clearly rests with the corporate trustee and most have set forth guidelines by which fiduciary principles are strengthened.⁴⁹ But it is also true that

those entrusted with the responsibility for establishing legal rules must recognize that the trustee's pursuit of profit necessarily casts him in a commercial, arms-length, and to some degree adversary, relationship to settlors and beneficiaries; that under contemporary conditions, the maintenance of high standards of fiduciary conduct requires vigilance.⁵⁰

The courts and legislatures in responding to the modern trustee's need for flexibility must not inadvertently lift fiduciary restrictions. The same conditions and considerations which demand a broadening of the trustee's power also demand a strict concept of fiduciary responsibility. Without the latter the entire concept of the trust device will fail. As one authority observed in speaking of an early financial era,

[M]ost of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as the holy writ, that a man cannot serve two masters. . . . No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle.⁵¹

This statement is equally applicable to the present trust era.

The problems discussed above are merely representative of those that may arise in the loyalty area. The majority of these problems can be eliminated by responsible and prudent draftsmanship and a general awareness on the part of the judiciary and legislature that such problems do exist. The broadness of these powers can be mitigated without placing undue restraint on the trustee by main-

⁴⁸ *Newsorama*, 103 TRUSTS & ESTATES 316 (1964).

⁴⁹ See note 31 *supra*.

⁵⁰ Hallgring 827.

⁵¹ Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 8-9 (1934).

taining high and clear standards under which they must be exercised. It is in the interest of the settlor, the trustee, and the beneficiary that a proper balance be maintained. Codification of such standards with special emphasis on the corporate trustee⁵² would aid in achieving such balance.⁵³

JOHN G. ALDRIDGE

Usury—Usury as Applied to Credit Transactions

In Biblical times¹ and at the early common law² the taking of any interest or compensation for the use of money, whether moderate or excessive, was considered usurious. Laws were later passed that allowed, but limited, the amount of interest a party could charge on a loan or forbearance of money.³ In 1821, the case of *Beete v. Bidgood*⁴ established the rule in England that a sale on credit was not a loan or forbearance of money and hence the laws against usury did not apply. This view was soon thereafter adopted in practically all the American courts.⁵ This doctrine allows a vendor to charge one price for a cash transaction and a higher price for the sale of the same goods on credit. The fact that the credit price

⁵² Due to the nature of the modern corporate trustee the need to set separate and higher standards is becoming greater. This need has been recognized to some extent by those authorities that require a higher degree of care for the corporate trustee. See RESTATEMENT (SECOND), TRUSTS § 174 (1959). Little attempt has been made, however, to set higher standards of loyalty due to the difficulty of framing such a standard. Thus day-to-day restraints are usually imposed by the corporate trustee itself. Yet despite this difficulty it seems that the loyalty concept merits more attention by law making bodies than it has received.

⁵³ As to the duty of care, both Tennessee and Arkansas have codified the "prudent man rule" as to investments and refer specifically to this standard in their powers acts. See ARK. STAT. ANN. § 58-302 (Supp. 1965); TENN. CODE ANN. § 35-320 (1955).

The Uniform Trustees' Powers Act in addition to adopting the prudent man rule in § 3(a), states in § 5(b) that if the duty of the trustee and his individual interests conflict in the exercise of a power, such power may be exercised only by authorization of the court. This restriction excludes, however, certain powers which are violative of fiduciary principles. For a criticism of these exclusions see Hallgring 812.

¹ Consolidated Police & Fireman's Pension Fund Comm'n v. Passiac, 23 N.J. 645, 652, 130 A.2d 377 (1957).

² Natonal Bank v. Mechanics' Nat'l Bank, 94 U.S. 437, 438 (1876).

³ An Act Against Usury, 1570, 13 Eliz. I, c. 8, § IX.

⁴ 7 Barn & Cress 453, 108 Eng. Rep. 792 (K.B. 1821).

⁵ *E.g.*, Hogg v. Ruffner, 66 U.S. (1 Black) 38 (1861); Carolina Industrial Bank v. Merriman, 260 N.C. 335, 132 S.E.2d 692 (1963).