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THE PROPOSED UNIFORM TRUSTEES' ACCOUNTING ACT

GEORGE G. BOGERT†

I. THE PRESENT SITUATION

The English court of chancery long ago established a rule that the trust beneficiary is entitled to inspect trust documents and property, to have full information regarding trust business, and to procure the examination of a written account of the trust affairs by a chancellor.¹ The theory was that these advantages would come to the cestui que trust either because his trustee voluntarily gave him the information and court accounting, or because the beneficiary procured them for himself by application to the trustee or by bringing a suit in chancery. Neither the court nor any other representative of the state was charged with the duty of taking the initiative to procure for the beneficiary the information or the account. The individual beneficiary was supposed to be able to protect himself. The law did not set periodic times for accountings, nor did it prescribe the contents of accounts.

Some American states still maintain this system. Apparently, in twelve states,² neither statutes nor court rules require periodic accountings by trustees, fix the form or contents of accounts, or expressly confer jurisdiction on any court to demand or receive accounts. The beneficiary gets the information which he is energetic and shrewd

†This article is offered as a humble tribute to the character, personality, and high professional attainments of the late Chief Judge Pound.

¹In *re Tillott*, [1892] 1 Ch. 86; LEWIN, *TRUSTS* (13th ed.) 675-6. On accounts in the British Empire, see Chandler, *The Accounts of Executors and Trustees* (1908) 43 L. J. 611.

²*Florida*: *Singleton v. Knott*, 101 Fla. 1077, 133 So. 71 (1931); but a statute gives the county court authority to compel trustees for orphans and minors to account. *Illinois*: *Warner v. Mettler*, 260 Ill. 416, 103 N. E. 259 (1913). *Rhode Island*: *Freeman v. City of Providence*, 110 Atl. 644 (R. I. 1920). *Tennessee*: *Vaccaro v. Cicalla*, 89 Tenn. 63, 14 S. W. 43 (1890). This appears to be the situation in *Arkansas*, *Colorado*, *New Mexico*, *Oklahoma*, *Washington*, and *Wyoming*, although no cases have been found to that effect. In *Maryland*, there is no statute except regarding trusts to sell. MD. ANN. CODE (Bagby, 1924) art. 16, §§ 258, 259. In *Oregon*, the only statute seems to relate to annual reports by charitable trustees. ORE. CODE ANN. (1930) § 32-801.

enough to exact from the trustee or which the trustee thinks expedient or necessary to give him.

The writer has made some investigation of the contents of accounts voluntarily delivered to beneficiaries by professional trustees in this group of states. These reports seem generally to be presented annually, sometimes quarterly, and rarely at monthly intervals. They commonly consist of two statements, an income statement and an investment list. The income statement shows cash receipts and disbursements, both principal and income, with balances. The investment list gives a brief description of the bonds, stocks, mortgages, and other investments held at the date when the report is made.

Below and right are presented typical sample dummy accounts of this type, made up from actual statements:

LIST OF SECURITIES HELD BY NATIONAL TRUST COMPANY AS TRUSTEE
UNDER JANE DOE TRUST NO. LIV. 3456
January 10th, 1930.

Inv. 1236

\$2,000.00 Liggett & Myers Tobacco Co.—N. J.—G/B 7% Dtd 12-1-11 Due 10-1-44 Apr. Oct. 1

Inv. 1239

\$1,000.00 P. Lorillard Co.—N. J.—G/B 7% Dtd 12-1-11 Due 10-1-44 Apr. Oct. 1

Inv. 1234

\$2,000.00 Collateral Trust III No 3680 1st R. E. Mtge. Coll. Bds. Ser. A 5½%

Inv. 1189

100 Shares The New Jersey Zinc Co.—N. J.—Cap. Stk. P. V. \$25

Inv. 1110

100 Shares Eastman Kodak Co.—N. J.—Com. Stk. No P. V. Jan. Apr. Jul. Oct. 1

Inv. 1079

\$24,000.00 John and Mary Blank Re/L 6% Dtd. 10-7-28 Due 10-11-33 Apr. Oct. 11

Inv. 1092

\$10,000.00 Mary Brown et al Re/L 6% Dtd 10-13-27 Due 10-17-32 Apr. Oct. 17

Inv. 1345

\$2,000.00 Beach Drive Bldg Corp Re/L 6% Dtd 10-1-28 Due 10-1-38 Apr. Oct. 1

* * * * *

Summary

Bonds at par	\$16,422.50
Mortgages at par	62,000.00
Shares of Stock	231

It seems evident that these statements are not adequate to enable the beneficiary to discover dishonesty or incompetent administration. They do not show the names of the sellers of investments to the trust or of the buyers of investments from the trust. They do not disclose whether the trustee has been dealing with affiliates or subsidiaries or with other institutions with whom the trustee has a gentlemen's agreement regarding the purchase or sale of investments. They do not disclose information concerning the cost, book, or market values of the securities held at any time during the accounting period. It is well known that during the course of recent years, many beneficiaries have discovered too late that their trustees have been guilty of self-dealing, or of breaches of trust with regard to the holding or sale of trust investments. More detailed information on these points in the typical trust report would doubtless have warned many beneficiaries and enabled them to protect themselves before they were barred by acquiescence, court approval, or the lapse of time. It is believed that these voluntary statements, while perhaps fairly adequate to reveal the status of the elementary parts of administration in the hands of an honest, competent trustee, do not give sufficient information to warn a cestui que trust of disloyalty, bad judgment, or dishonesty.

In a second group of nine American states,³ the statutes merely provide that a voluntary or compulsory account of a trustee may be had in a named court (either the probate court or a court of general equity jurisdiction), without making it mandatory on the trustee to account at any particular time or to present any particular facts in the account. These statutes simply confer accounting jurisdiction on certain courts and do not differentiate this group of states materially from the first group described above, where it is assumed that the court of general equity jurisdiction will take the account.

A third list consists of twenty-three states which have acts obligating trustees to account periodically, in seventeen states⁴ annually, in

³See CAL. PROB. CODE (Deering, 1933) §§ 1121 and 1120, as amended by Laws 1933, p. 2495, § 14, vesting jurisdiction in the probate court, an act which has formed the model for similar legislation: ARIZONA REV. CODE ANN. (Struckmeyer, 1928) § 4083; IDAHO CODE ANN. (1932) § 15-1136; MONTANA REV. CODE ANN. (Choate, 1921) § 10352; NEV. COMP. LAWS (Hillyer, 1930) § 9816. Other provisions of this type are KAN. REV. STAT. ANN. (1923) § 20-1107; MISS. CONST. (1890) § 159; NEB. COMP. STAT. (Supp. 1933) § 30-1801 (except as to final accounts, which are compulsory); TEXAS ANN. CIV. STAT. (Vernon, 1925) art. 7135.

⁴GA. CODE ANN. (Michie, 1926) § 3777 (8); HAWAII REV. LAWS (1925) § 2475, as amended by Laws 1929, Act 169 (a few simple details stated); IOWA CODE (1931) § 12775; LA. GEN. STAT. (Dart, 1932) §§ 9820, 9821; MICH. COMP.

two states⁵ biennially, in one state⁶ triennially, and in three others⁷ at the end of the trust or other fixed time. These statutes do not settle in great detail the contents of the accounts but leave that matter to the discretion of the trustee or the court. These states do not think it essential to set forth certain fundamentals of accounts which are necessary to the beneficiary's protection.

A fourth class of jurisdictions, consisting of some of the older, more populous, and wealthier states, not only require by statute that trustees account annually,⁸ biennially,⁹ or triennially,¹⁰ but also, either by statute or court rules, set forth in considerable detail the schedules and items which such accounts must contain and the procedure in court with reference to examination and approval and disapproval.

The third and fourth classes of states have, therefore, departed from the common law *laissez faire* system and given the aid of the state to the trust beneficiary, at least to the extent of telling him and the court which information he and it should have at frequent intervals. These states have not generally,¹¹ however, required court or other officials to keep records for the purpose of seeing that trustees present accounts in due time or of jogging the memories of recalcitrant fiduciaries. The sanction behind these statutes, the stimulus to prompt and full compli-

LAWs (1929) § 15880; Minn. Laws 1933, c. 259; Mo. STAT. ANN. (Vernon, 1932) § 3148 (court-appointed trustees); N. H. PUB. LAWS (1925) c. 309, §§ 1, 18; N. C. CODE ANN. (Michie, 1931) §§ 51, 105; N. D. LAWS 1935, c. 250, § 16 (as to court-supervised trustees); S. C. CODE (Michie, 1932) § 9047 (court-appointed trustees); rules III, IV, VII, and VIII of the South Dakota Supreme Court (court-supervised trusts); UTAH REV. STAT. ANN. (1933) c. 102, art. 12, § 31; VT. PUB. LAWS (1934) § 3044; VA. CODE (Michie, 1930) § 5408; W. VA. CODE ANN. (Michie, 1932) § 44-4-1; WIS. STAT. (1933) § 323.01.

⁵KY. STAT. (Carroll, 1930) § 1065; OHIO GEN. CODE (Page, Supp. 1934) § 10506-34.

⁶ME. REV. STAT. (1930) c. 82, § 1.

⁷ALA. CODE ANN. (Michie, 1928) § 10443 (trustee must account on resignation or removal or completion of trust); IND. STAT. ANN. (Burns, 1926) § 13468 (trustees must account in equity on death of cestui or termination of trust); NEB. COMP. STAT. (Supp. 1933) § 30-1801 (final account).

⁸CONN. GEN. STAT. (1930) § 4973; Sup. Ct. D.C., Rule 69; MASS. GEN. LAWS (1932) c. 206, § 1; N. Y. Surr. Ct. Act, § 255.

⁹Del. Laws 1935, c. 232, amending DEL. REV. CODE (1915) § 3874.

¹⁰N. J. COMP. STAT. (Supp. 1924) tit. 146, § 114; PA. STAT. ANN. (Purdon, 1930) tit. 20, § 838.

¹¹In a few states officers of the court do seem to render some assistance. GA. CODE ANN. (Michie, 1926) § 4818 (ordinary to keep docket of returns); PA. STAT. ANN. (Purdon, 1930) tit. 17, § 1919 (prothonotaries to keep record book of accounts); VA. CODE (Michie, 1930) § 5401 (commissioner of accounts to keep record book); W. VA. CODE ANN. (Michie, 1932) § 44-3-1, § 44-4-1.

ance, is the power of the court to remove a trustee for misconduct or to reduce or withdraw his compensation.

Nearly all of these American statutes regarding trust accountings apply only to testamentary trusts. There are, however, a few jurisdictions in which living trusts are included expressly within the accounting statutes, or in which it seems that some living trusts may be so governed.¹² Whether this usual omission of inter vivos trusts is because they are much less numerous than trusts created by will, or because their creators are expected to provide in the trust instruments for adequate reports, or because of a desire to protect such trusts from publicity, or for other reasons, is not known to the writer.

The American situation is, thus, that in about two-fifths of the jurisdictions testamentary and living trust accounts are delivered to the beneficiary or presented to a court only when the trustee voluntarily accounts or is forced by the beneficiary to do so; whereas in the remaining three-fifths of the states periodic accounts are required by statute or rule to be delivered and filed by testamentary trustees, but not generally by non-testamentary trustees.

*Bank Examinations*¹³

An indirect check on the accuracy and honesty of professional trustees and their accounts, and on the soundness of their policies, is provided by states and the nation¹⁴ through the examination of the affairs of banks and trust companies. There are at least four sets of examining agencies, namely: (1) the office of the Comptroller of the Currency,

¹²Sup. Ct. D. C., Rule 69 (except those acting under authority of the probate branch); GA. CODE ANN. (Michie, 1926) § 3777 (8); KY. STAT. (Carroll, 1930) § 1065; Pa. Laws 1931, No. 349.

The Delaware statute is limited to trustees appointed by will or by the chancellor. DEL. REV. CODE (1915) § 3874.

In three states the accounting rules apply only to trustees of court-supervised trusts. Minn. Laws 1933, c. 259; N. D. Laws 1935, c. 250, § 16; S. D. COMP. LAWS (1929) § 1233B, and Sup. Ct. Rules in 46 S. D. x, xi.

In one state there seems to be no accounting statute applying to private trusts, but there is such an act regarding charitable trusts. ORE. CODE ANN. (1930) § 32-801.

¹³Much of the information given below is received from bank examining authorities by interview or correspondence, and from manuals and printed questionnaires prepared by the banking departments.

¹⁴Examinations are made by national bank examiners twice each year. In addition such banks are required to file annually a report under oath, on a form furnished by the examining authorities. The Comptroller of the Currency has a manual of information relating to the examination of national bank trust departments which is now in process of revision.

examining all national banks;¹⁵ (2) the several federal reserve banks, examining state banks which are members of the federal reserve system;¹⁶ (3) the Federal Deposit Insurance Corporation, examining state banks which are not members of the federal reserve system;¹⁷ and (4) state banking department authorities, examining state banks and trust companies and, in some states, by courtesy being permitted to examine the trust departments of national banks.¹⁸

The purpose of such examinations is in the main to discover dangers to the solvency of banking institutions, but the trust departments are also inspected with a view to discovering investment and accounting policies, the adequacy of the trust records kept, whether any self-dealing or dishonesty has crept into the fiduciary work, and whether the trust securities are actually on hand. These investigations of trust accounts are by sampling methods in the larger institutions, but are more complete in the case of smaller banks.

The federal examiner's report with respect to trust departments shows that he inquires into the number of fiduciary powers granted and being exercised by the particular bank; whether the trust department transacts any business which should be properly transacted in other departments; whether the state law requires a security deposit with state authorities, and if so whether this deposit has been made; whether the institution has a separate trust department with separate officials; whether it keeps a separate set of books and records of fiduciary activities which are adequate; whether the trust securities are kept separate and are earmarked; what are the principal officers and committees of the trust departments and their functions; whether the minutes record acceptance of all trusts; whether the written reports of all finished trusts are recorded; whether the opinion of competent counsel is obtained and filed in all important trust matters.

The federal report then gives a combined balance sheet as to assets and liabilities of all trusts being managed by the particular institution. It then takes up individual trusts, as distinguished from corporate trusts used as security in connection with loans. The following questions are to be answered by the examiner:

¹⁵12 U. S. C. A. (Banks and Banking) § 481 (1926).

¹⁶*Ibid.*, § 485.

¹⁷*Ibid.*, § 264.

¹⁸ILL. REV. STAT. ANN. (Smith-Hurd, 1933) c. 32, §§ 298-299 (annual examination by state auditor's department); N. Y. CONS. LAWS, c. 2 (BANKING LAW) § 39 (1920, 1935) (superintendent of banks to examine at least twice every fifteen months; have been examining trust departments for about one year only).

- "1) Number of individual trusts.
- "2) Are there on file: a) Original instruments creating each trust or properly authenticated copies thereof? b) Original or certified copies of inventories and appraisements? c) Proper releases or receipts for either partial or full distribution of trust assets?
- "3) Are reports of account properly filed with courts and/or others entitled thereto? Are copies of such reports on file?
- "4) Are all purchases and sales of trust investments and other matters of importance authorized or approved by the directors or a committee of same, specially designated for that purpose?
- "5) Describe the procedure in effect for periodically appraising and reviewing trust assets for the purpose of determining their current value and whether or not they should be retained.
- "6) Are all investments of trust funds made in strict accordance with state fiduciary laws, court orders or provisions of trust instruments? Comment on any unauthorized or illegal investments.
- "7) Where investment of trust funds are left to the discretion of the institution, in what class of securities are investments made?
- "8) Do trust investments include any loans to any directors, officers, or employees of the institutions? If so, list and comment.
- "9) Are trust funds invested in securities of concerns in which directors, officers, or employees are interested? If so, list and comment.
- "10) Has the trust department purchased for investment of trust funds any securities issued or guaranteed by an affiliated interest or in the distribution of which the bank or any affiliated interest has participated?
- "11) Has the trust department, in any case, purchased from any other department or affiliated interest any investments for trust funds? If so, give full explanation.
- "12) From what sources are trust investments purchased?
- "13) Do trust investments include any stock of the bank? If so, state amount, how acquired, and under what terms held.
- "14) Where the institution acts as co-fiduciary are all assets in its possession and is the accounting and management under its direction?
- "15) Are proper authorizations obtained from co-fiduciaries before important action is taken?
- "16) Are advances to trust estates improperly made from funds belonging to other estates? If so, give details.
- "17) Are proper records kept of all liabilities of the trusts to various creditors and of all trust assets pledged, or held elsewhere than in the trust department?
- "18) How often are audits or examinations of the trust department made by or for the directors? Are they complete?

"19) Has the institution given any guarantees or assurances of any nature in connection with its trust activities?"

"Stocks and Bonds

"1) Are negotiable assets safeguarded by being placed in the joint custody of at least two bonded officers or other employees designated by the directors?

"2) Upon whose order are securities released from the vault and is a permanent record maintained of all negotiable assets deposited or withdrawn from the vaults?

"3) Where stocks and bonds are considered valueless or without a ready market, is it the practice to list them on the asset record with a carrying value?

"4) How does the policy employed with reference to the amortization of accumulated premiums and discounts on bonds purchased affect the corpus of the trust?

"5) List or comment on stocks and bonds which are not registered in the name of the institution in its full fiduciary capacity which could be properly registered as such."

"Real Estate Mortgages

"1) Specify all mortgages (other than those received 'in kind') not accompanied by proper documentary evidence of title and priority of lien.

"2) Are written appraisals on file, showing the value of land and improvements separately?

"3) State whether such properties are inspected and revalued in writing by competent appraisers.

"3a) How often? When last done?

"4) What percentage of valuation is fixed as limit for mortgage loan?

"5) State cases where insurance coverage seems inadequate, giving pertinent details.

"6) State whether payments of taxes and assessments are verified at stated periods.

"7) Comment on mortgage loans in arrears of principal and/or interest, giving such detailed information as is considered advisable in the circumstances.

"8) Are payments on principal and/or interest properly indorsed on mortgage notes and participation certificates held?

"9) Are participation mortgages and certificates in proper form and is an adequate record of the latter maintained?"

"Real Estate

"1) Is real estate entered upon the asset records at a value? If so, is it carried at assessed, appraised or nominal values?

"2) Does the institution protect its beneficiaries and itself by providing for adequate fire and liability insurance? If not, is a

written request for not so doing secured from the proper interested persons?"

"Miscellaneous Assets"

"1) Are all miscellaneous assets properly entered on trust records immediately upon their receipt and not charged off until sale or distribution is made?"

"2) Are payments on account of principal and/or interest properly indorsed on notes?"

"Overdrafts and Advances"

"1) Were the reasons for granting, and circumstances surrounding each principal overdraft ascertained?"

"2) Give details in connection with unsecured principal or income overdrafts.

"3) List all income overdrafts of at least five months duration.

"4) List all habitual principal overdrafts, or any other large or unusual overdraft."

"Due from Banks (Individual and Corporate Trusts)"

"1) When trust funds are deposited in other banks are they placed therein as individual deposits in the name of the institution in its fiduciary capacity? If not, did you instruct?"

"2) How often are bank balances reconciled?"

"3) Are reconcilements made by someone other than the person who keeps the bank account? If not, are reconcilements checked by someone else?"

"4) Is a distinctive check used for disbursements of trust funds?"

"4a) Are checks effectively cancelled and properly filed?"

"5) If trust department cash is deposited in the commercial department, list and appraise the securities pledged. If security was insufficient or not approved was correction obtained?"

"6) Are trust funds deposited in other banks protected by deposit insurance?"

"7) Are available cash balances of trust funds promptly invested? Comment on any balances held for an unreasonable period without investment."

The separate questions regarding corporate trusts and the basis for the inquiry into them are not discussed here, because not relevant to the accounting question in the normal type of trust.

For the purpose of showing the scope of state examinations of trust departments, the writer obtained sample sheets from the New York Banking Department.¹⁹ These sheets show that a large part of the information required is the same as that described on the federal rec-

¹⁹Through the courtesy of Hon. C. Tracey Staggs, State Senator.

ord. The following questions seem to be peculiar to the New York questionnaire:

"1) Are there on file: a) Copies of tax reports. 1. Income. 2. Estate (inheritance). b) Abstract (history sheet) kept up to date. c) Proper court releases on termination of appointment.

"2) Are all assets listed with a carrying value?

"3) Is the review committee obtaining advisory services in connection with the investment list and are adequate means being taken to keep the list acceptable?

"4) Review recent sales and purchases, ascertaining from what source the transaction arose and test the prices. Are there any comments?

"5) Is a tickler kept for the purpose of controlling the receipt and disbursement of income?

"6) Are all accounts ticklerized for an annual review as to the sufficiency of income?

"7) Do all accounts carry principal and income sheets?

"8) Is all income remitted annually, except in trusts for the benefit of minors?

"9) Is a distinctive check used for the disbursement of trust funds?

"10) Are the minutes a full and complete record of pertinent trust activities and with each trust are the specific recommendations filed?

"11) What portion of mortgage participations was acquired from bank's own portfolio?

"12) What is the condition of the mortgages and mortgage participations sold to the trust department?

"13) What action is the institution taking to protect the interests of beneficiaries in delinquent mortgages or mortgage participations?

"14) Has the institution at any time paid dividends, interest, or any form of income out of the corporate funds, without having actually received such income? State particulars.

"15) Give comparative summary of trust department income and expenses."

To be filled out by the Institution under examination:

"1) Are the officers and committee members designated by the Board of Directors and are their duties prescribed by the Board of Directors?

"2) Is the acceptance of a fiduciary appointment the responsibility of the Board of Directors, Trust Committee, or officers?

"3) Are beneficiaries of trusts notified of extensions, defaults in interest payments, etc.?

"4) Are any suits or actions pending against the institution for damages resulting from its acts or omissions in a fiduciary capacity? State briefly each allegation and approximate amount involved.

"5) Are all assets properly placed under accounting control immediately upon receipt?

"6) Describe how purchases and sales of investments and other matters of importance are authorized or approved by the directors or a committee of same.

"7) Are investments made directly for definite trusts or are they bought and allocated later?

"8) What procedure is followed to insure prompt detection and investment of cash balances on hand?

"9) Are securities purchased or inventoried at a premium, amortized where required?

"10) Does the institution make it a practice to sell assets from one trust account to another trust account?

"11) Has the institution purchased for itself any securities, mortgages or other assets from any estate or trust? If so, give details, including cost to the trust and price paid on purchase.

"12) Are examinations made and if so, how often, to ascertain whether all investments for trusts are in strict accordance with State Fiduciary Laws, Court Orders and/or provisions of trust instruments? State exceptions.

"13) Describe the scope and procedure in connection with the control maintained of both personal and corporate securities.

"14) Describe the scope and frequency of accounts filed with courts and/or others entitled thereto.

"15) List those securities in trust assets of concerns in which officers, directors, or employees hold a controlling interest."

Obviously, the banking department making the investigation communicates its findings and recommendations to the officers of the institution and not to the beneficiaries of any trust. A check is subsequently made to see that the recommendations have been followed. Any violation of a criminal statute is reported to the appropriate prosecuting authority. It is only in case of the insolvency of the bank that the banking authority is permitted to take charge of the bank and carry out policies which it believes to be sound. Thus, the trust beneficiary does not acquire information through the bank examining authorities, but fiduciaries are doubtless stimulated by such authorities to segregate trust assets and to follow sound policies of fiduciary administration.

It is evident that the bank examiners obtain very much more information about trust administration by the bank as a whole than the individual beneficiary receives with regard to his particular trust through the usual annual statement and list of investments. Does not

the fact that the banking authorities regard this detailed and extensive information as requisite to enable them to perform their duties tend to prove that much of the same information would be useful to the trust beneficiaries? It may not be desirable to have the bank examining authorities furnish information to the trust beneficiaries, but would it not be reasonable for the states to require trustees to give at least the major part of this material to the cestuis que trust from time to time? The Uniform Trustees' Accounting Act is framed on the theory that there is some ground for answering these questions in the affirmative.

II. HISTORY OF THE PROPOSED UNIFORM TRUSTEES' ACCOUNTING ACT

In 1930, the Trust Division of the American Bankers' Association appointed a committee on Fiduciary Legislation. The hopes of the president of that division in appointing the committee are summarized in an article in the *Journal of the American Bankers' Association*,²⁰ entitled "Improving our Fiduciary Laws."

In the summer of 1930,²¹ the National Conference of Commissioners on Uniform State Laws learned of the movement sponsored by the Trust Division to forward trust legislation, and voted to appoint a committee to cooperate with the bankers and trust officers in this regard.

In a meeting at New York on December 30, 1930, the Trust Division Committee decided to undertake the drafting of three acts, namely, a statute regarding the implied powers of executors and trustees, an act relating to the intermediate and final accounting of fiduciaries, and a uniform descent and distribution statute. The second subject was committed to Mr. Leon M. Little, Vice President of the New England Trust Company, of Boston. It was stated at that time that one of the principal purposes of the trust men in obtaining a model accounting statute was to settle the exact effect of a court approval of an account, and to make it clear to what extent it relieved the trustee from liability for past acts.

The committee of the Conference on Uniform Laws proceeded to assist in the preparation of acts on the three topics indicated above and has submitted reports to the Conference annually from 1931 to 1935.²² The project for a Uniform Descent and Distribution Act was aban-

²⁰Gilbert T. Stephenson, *Improving Our Fiduciary Laws* (June, 1931) 23 *J. AM. BANKERS' ASS'N* 957.

²¹HANDBOOK, NAT. CONF. COMM'RS ON UN. STATE LAWS (1930) p. 115.

²²*Id.* (1931) p. 347; *id.* (1932) p. 242; *id.* (1933) p. 310; *id.* (1934) p. 230; *id.* (1935) p. 167.

done by the Conference in 1933. The act concerning the powers of trustees was changed by vote of the Conference into a statute intended to clarify and reform some parts of the law of trusts, and it now appears as the proposed Uniform Trusts Act, the proposed final draft of which will be presented to the Conference at its next meeting in Boston, in August. An accounting statute was drawn by the writer in 1932 and presented to the Conference for discussion in that year and in 1933, 1934, and 1935. It has had the benefit of criticism by many lawyers and trust officials. It is being offered for final adoption by the Conference at the Boston meeting next August.

The Trust Division of the Bankers' Association for some reason lost interest in the Accounting Act. Its committee collected information regarding the state laws governing accountings, but never drafted a statute for consideration. Some of its members have offered friendly criticism of the Conference drafts, but the attitude of the Division has, on the whole, been passive toward this particular proposed legislation.

III. TEXT OF THE PROPOSED FINAL DRAFT OF THE UNIFORM TRUSTEES' ACCOUNTING ACT (1936)

The following sections show the form of this proposed bill after the consideration of it by the Conference Committee at Washington, in May, 1936. While some changes will doubtless be made during the summer and at the Boston meeting, the act, if adopted, will probably be substantially as follows:

An Act Concerning Inventories and Intermediate and Final Accountings by Trustees and to Make Uniform the Law with Reference Thereto.

(Be it enacted, etc. . . .)

Section 1. (Definition of Terms.) As used in this Act:

A "testamentary trustee" means a trustee serving under a trust created by a will of a testator domiciled in this state at the time of his death whose will has been admitted to probate in this state, whether the trustee was appointed by the testator or by a court of other authority.

A "non-testamentary trustee" means a trustee serving under a trust created in this state otherwise than by a will, whether the trustee was appointed by the settlor or by a court or other authority.

The word "trustee" includes trustees, a corporate as well as a natural person, a successor or substitute trustee, and the successor in interest of a deceased sole trustee.

"Beneficiary" includes a beneficiary under the trust, a person who is entitled to the trust capital at the termination of the trust and surety on the bond of the trustee.

"Settlor" includes the creator of a testamentary as well as a non-testamentary trust.

This Act shall not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiaries, investment trusts, voting trusts, insurance trusts prior to the death of the insured, trusts in the nature of mortgages or pledges, trusts created by judgment or decree of a federal court or a state court other than the (probate court); liquidation trusts; or trusts for the sole purpose of paying dividends, interest or interest coupons, salaries, wages or pensions.

Section 2. (Testamentary Trust Inventory.) Within thirty days after it is the duty of the first qualifying testamentary trustee to take possession of the trust property, he shall file with the (probate court where the will was admitted to probate) an inventory under oath, showing by items all the trust property which shall have come to his possession or knowledge.

Section 3. (Intermediate Accountings.) Within thirty days after the expiration of the first year after the first qualifying testamentary trustee was under a duty to file his inventory as prescribed in Section 2, the testamentary trustee then in office shall file with the (probate court of the county where the will was admitted to probate) an intermediate account under oath covering such year and showing:

- (a) the period which the account covers;
- (b) the names and addresses of the living beneficiaries; which, if any, are legally incompetent; a description of any possible unborn or unascertained beneficiaries; the name of the surety or sureties on the trustee's bond with the amount of such bond;
- (c) in a separate schedule the trust principal on hand at the beginning of the accounting period and the then status of its investment; the investments received from the settlor and still held; additions to trust principal during the accounting period with the dates and sources of acquisition; investments collected, sold or charged off during the accounting period, with the consequent loss or gain and its disposition; investments made during the accounting period, with the date, source and cost of each; deductions from principal during the accounting period, with the date and purpose of each; and trust principal on hand at the end of the accounting period, how invested, and the estimated market value of each investment;
- (d) in a separate schedule the trust income on hand at the beginning of the accounting period, and in what form held; trust income received during the accounting period, when, and from what source; trust income paid out during the accounting period, when, to whom, and for what purpose; trust income on hand at the end of the accounting period, and how invested;
- (e) whether any seller of, or buyer from, the trustee, of trust property during the accounting period was at the time of such sale or purchase an affiliate, subsidiary, officer, employee or nominee

of the trustee, or had a contract or understanding with the trustee regarding the sale or purchase of trust investments;

(f) a statement of unpaid claims with the reason for failure to pay them, including a statement as to whether any estate or inheritance taxes have become due with regard to the trust property, and if due, whether paid;

(g) a brief summary of the account;

(h) such other facts as the court may by rule or court order require.

Within thirty days after the end of each yearly period thereafter during the life of the trust the testamentary trustee then in office shall file with the same court an intermediate account under oath showing corresponding facts regarding the current accounting period.

Section 4. (*Final Accounting.*) Within () days after the termination of every testamentary trust the trustee shall file with the (probate court of the county where the will was admitted to probate) a final account under oath, showing for the period since the filing of the last account the facts required by Section 3 regarding intermediate accountings and the distribution of the available trust property which the accountant proposes to make.

Section 5. (*Distribution Accounting.*) Within () days after the distribution of the trust property by the testamentary trustee he shall file in the office where the final account was filed a distribution account which shall contain a statement of the distribution of the trust property which he has made and the receipts of the distributees.

Section 6. (*Procedure on Intermediate Accountings.*) Every trustee who files an intermediate account in court shall within ten days after such filing deliver to each beneficiary a notice of such filing, and if there is to be no court hearing on the account a summary of the account with an offer to deliver the full account on demand, or if there is to be a court hearing on the account a copy of the account. Such delivery may be by (1) handing the notice or copy to the beneficiary personally, or to his guardian, or to his attorney of record; or (2) by mailing it in a sealed, postpaid envelope addressed to the beneficiary, or his guardian or attorney of record, at the last known address of the addressee. Any beneficiary may petition the court for a hearing on any intermediate account, and the holding of such a hearing shall be in the discretion of the court. In the case of the third intermediate accounting and every three years thereafter the trustee shall apply to the court for a hearing and approval of the account and shall give each beneficiary written notice of such application () days before the return day thereof, in the manner prescribed for the delivery of the copy of the account. The return day of the application for a hearing on an intermediate accounting shall be at least () days after the account was filed. The notice by the trustee of the application for a hearing on and approval of the account shall inform the beneficiaries of the amount of commissions or other compensa-

tion to be requested by the trustee on such hearing, and the amount of counsel fees which counsel for the trustee will then request the court to allow.

Section 7. (*Service of Papers in Final Accounting.*) At least () days before the return day of a final accounting the testamentary trustee shall deliver to each beneficiary a copy of the account and a notice of the time and place at which the account will be presented for approval, which date shall not be earlier than () days after the account was filed. Such delivery may be accomplished in the same manner as with regard to the service of papers on the intermediate accounting. The notice shall inform the beneficiaries of the amount of commissions or other compensation to be requested by the trustee on the application for approval of the account, and the amount of counsel fees which counsel for the trustee will then request the court to allow.

Section 8. (*Vouchers.*) When an intermediate or final account is presented for consideration in court the trustee shall produce in court vouchers for all expenditures of \$20 or more, made by the trustee during the accounting period. (The vouchers shall be returned to the trustee after the account is approved.)

Section 9. (*Representation.*) Any beneficiary who is an infant, of unsound mind or otherwise legally incompetent, and also possible unborn or unascertained beneficiaries may be represented by the court, or by competent living members of the class to which they do or would belong, or by a guardian *ad litem*, as the court deems best. If the residence of any beneficiary is unknown, or there is doubt as to the existence of one or more persons as beneficiaries, the court shall make such provision for service of notice and representation on the accounting as it believes proper.

Section 10. (*Court Approval or Disapproval.*) On the return day of an application for a hearing on and approval of an intermediate or final account the trustee shall file an affidavit proving the timely delivery to the beneficiaries of the documents required by the Act or by court order. The proceedings as to filing of objections, examination of the trustee and other witnesses, inspection of the trust property, adjournments, reference to a master or other representative of the court, amendment of the account, and similar matters, shall be in the discretion of the court. The court shall, as soon as practicable, act upon the account, and discharge the trustee if the account is an approved distribution account.

Section 11. (*Effect of Court Approval.*) The approval by the court of a testamentary trustee's account after due notice and service of papers shall relieve the trustee and his sureties from liability to all beneficiaries then known or in being, or who thereafter become known or in being, for all the trustee's acts and omissions which are fully and accurately described in the account, including the then investment of the trust funds, subject to the right of appeal. The account may be reopened by the court on motion of the trustee or a beneficiary, for amendment or revision, if it later

appears that the account is incorrect, either because of fraud or mistake. Court approvals or disapprovals of intermediate or final accounts shall be deemed final judgments in so far as the right of appeal is concerned. (No account shall be reopened because of mistake more than one year after its approval. No beneficiary may move for the reopening of an account because of fraud more than () days after he discovers the existence of the fraud.)

Section 12. (*Inventory by Non-Testamentary Trustee.*) Subject to the provisions of Section 14, within thirty days after it is the duty of the first qualifying trustee of a non-testamentary trust to take possession of the trust property, he shall file in the office of the (clerk of the) court in the county where the trust was created, a notice of his appointment as trustee, a copy of the instrument creating the trust if the trust was created by a writing, a list of the names, addresses, and dates of birth of the living beneficiaries, a description of any possible unborn or unascertained beneficiaries, and an inventory under oath of the trust property which shall have come to his possession or knowledge.

Section 13. (*Accountings by Non-Testamentary Trustees.*) Every non-testamentary trustee shall file intermediate, final and distribution accounts with the (clerk of the) court in the county where the trust was created, at the same intervals, under the same conditions, and with the same effect as herein provided with respect to the accountings of a testamentary trustee in the (probate) court.

Section 14. (*Duties of Court and Clerk.*) The clerks of the (probate and equity courts) shall severally keep records of all trust inventories and accounts filed with their respective courts and shall notify the respective judges of their courts of all failures by trustees to file accounts in accordance with this Act. Such courts shall, upon learning that a trustee subject to their respective jurisdictions has failed to perform any duty placed upon him by this Act, issue a citation or order to the trustee requiring him to perform such duty.

Section 15. (*Power of Settlor or Successors.*) The settlor of any trust affected by this Act may, by express written provision in the instrument creating the trust, relieve the trustee from any of the duties which would otherwise be placed upon him by this Act, or add duties to those imposed by this Act on trustees with regard to inventories and accountings. But no expression of intent by any settlor shall affect the jurisdiction of the courts of this State over inventories and accounts of trustees, in so far as such jurisdiction does not depend upon the provisions of this Act.

Section 16. (*Power of Beneficiary.*) Any beneficiary, if of full age and sound mind, may, if acting upon full information, by written instrument delivered to the trustee, excuse the trustee from performing any of the duties imposed on him by this Act or exempt the trustee from liability to such beneficiary for failure to perform any of the duties imposed upon such trustee by the terms of this Act.

Section 17. (*Accountability at Other Times.*) Nothing herein contained shall be construed to abridge the power of any court of competent jurisdiction to require testamentary or non-testamentary trustees to file an inventory, to account, to exhibit the trust property, or to give beneficiaries information or the privilege of inspection of trust records and papers, at times other than those herein prescribed; and nothing herein contained shall be construed to abridge the power of such court to excuse a trustee from performing any or all of the duties imposed on him by this Act. Nothing herein contained shall prevent the trustee from accounting voluntarily when it is reasonably necessary, even though he is not required to do so by this Act or by court order.

Section 18. (*Enforcement.*) Any beneficiary may apply to a court of competent jurisdiction for an order requiring the trustee to perform the duties imposed upon him by this Act.

Section 19. (*Forms of Accounts.*) The courts given jurisdiction over accountings by this Act may prescribe forms in which those accounts may be presented.

Section 20. (*Oaths.*) Whenever an oath or affirmation is required of a trustee under this Act it may be made in the case of a corporate trustee by an officer of such corporate trustee, and in the case of co-trustees acting jointly by any one of the co-trustees.

Section 21. (*Charitable Trusts.*) This Act shall apply to charitable trusts. Notices and accounts required to be delivered to beneficiaries of such trusts shall be delivered to the (Attorney General of the State and the State Department of Charities).

Section 22. (*Penalties for Violation of Act.*) When a trustee fails to perform any of the duties imposed upon him by this Act, he may be removed, or his compensation may be reduced or forfeited, or both, in the discretion of the court.

Section 23. (*Uniformity of Interpretation.*) This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Section 24. (*Short Title.*) This Act shall be cited as the Uniform Trustees' Accounting Act.

Section 25. (*Severability.*) If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 26. (*Repeal.*) All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Section 27. (*Time of Taking Effect.*) This Act shall take effect () and shall apply only to testamentary trusts created by wills executed after the effective date of the Act and to non-testamentary trusts created after the effective date of the Act.

IV. CRITICISMS OF THE ACT

The adverse criticisms²³ of the Uniform Trustees' Accounting Act, in so far as they have not been met by changes in the draft, are chiefly three, namely: (1) that there is no need for such a statute; (2) that the portion of it relating to living trusts is undesirable because of the publicity which it throws upon a highly secret and private transaction; and (3) that, assuming that the act brings some advantages to the beneficiaries, they cost more than they are worth, that is, the expense of furnishing the reports required would be extremely burdensome to *cestuis que trust*.

(1) First, taking up the question of *need* for the statute, it seems to the writer that much can be said for having a well prepared draft of a model act for the purposes of giving beneficiaries full information regarding the work being done for them and granting trustees periodic releases while the trust affairs are fresh in the minds of all.

The Trust Division Committee voted in 1930 that a model or uniform trustees' accounting act was desirable and should be prepared. The Uniform Law Conference undertook the project on this recommendation. What has happened between 1930 and 1936 which has caused trust officers to change their minds on this subject? Surely the situation as to the law and practice of trust accountings is the same now as then.

Nearly half of our states apparently have no statutes on the trust accounting topic. They render no aid to the beneficiary by obligating the trustee to account at regular and frequent intervals. They do not require accounts to be itemized in such a way as to bring out clearly the significance of the various transactions. They let the *cestui* get what he is strong and prudent enough to get, or what fortunately comes to him by grace of his trustee's conduct. Conceivably some of these states may wish to change from the *laissez faire* class to an attitude of greater concern for the welfare of beneficiaries. If so, it will be an assistance to their legislatures to have at hand a well-considered model draft which they can adopt in whole or in part.

Secondly, a use for this act may be found in the twenty-three states which require periodic court accountings but do not specify the details of such accounts, their procedure, or their effect. These states may wish to expand their statutory provisions and take one or more of the

²³See Stockton, *Proposed Uniform Trust Legislation*, Trust Bulletin, April, 1936. Other detailed criticisms have come from the Corporate Fiduciaries Association of Chicago, and from Professor M. I. Schnebly, University of Illinois Law School.

sections of the uniform act, when engaged in a general or special revision of the statute books.

Thirdly, the seven Eastern jurisdictions having large codes on the subject of accounting practice may obtain benefit from consultation with a model act when, from time to time, statutory revisions take place.

The information which a beneficiary needs in order to guard against dishonesty or negligence is substantially the same in every state. Climate, social conditions, historical background, and similar elements do not affect this subject. What is good accounting for a cestui in Florida would seem to be desirable for a beneficiary in Washington. Social customs and economic variations may make laws of descent and distribution unsuited to Maryland which are satisfactory to New Mexico, but it is not believed that this factor operates with regard to the law of trust accountings.

(2) Throughout the consideration of this act, the trust company officials have been emphatic in objecting to compulsory court accountings with relation to inter vivos or living trusts, on the theory that such trusts are established in order to obtain *privacy* for the management of property and that this secrecy should be respected.

In response to this suggestion it may be relevant to inquire whether the motives of settlors who desire privacy are legitimate. Why should the privacy of living trusts be so much more important than that of testamentary trusts? The law has quite generally required or permitted accounts in testamentary trusts to be presented in court and to be made a matter of public record. Why should there be any legitimate added delicacy about living trusts?

Insofar as living trusts are created to avoid the burdens of gift, inheritance, estate, income, or property taxes, it seems to the writer that the desire for privacy should not be heeded. A reasonable accounting statute will accomplish the main purpose of protecting cestuis and relieving trustees and also an incidental purpose of assisting the tax collecting authorities of state and nation. If the living trust legally assists in minimizing or avoiding taxation, there should be no reason to hide it. If it is of dubious legality or is certainly illegal, the reputable trustee should not accept it or assist in forwarding its purpose.

Furthermore, a conclusive answer to any objection on this ground seems to be that the act empowers a *settlor* to excuse a trustee from a duty to account and permits a settlor to vary the duties of the trustee under the act; that the act also permits the *court* to relieve the trustee of any trust from a duty to account under the act, and permits the court to change his duties for cause shown; and that it provides that

the *beneficiaries* of any trust may excuse their trustee from the duties imposed by the act. Surely, if there is any legitimate reason why a living trust should be kept in the dark, the court will sanction such secret management or the beneficiaries will give written consent to operation in this way. And whether there is good ground or poor reason, under the statute the settlors of all trusts subject to the act can by a simple clause remove the trust from the operation of the act. If living trust settlors and cestuis really are so anxious for privacy, they can get it under the act by very slight effort. The proposed act does not apply to trusts in existence when the act takes effect. It is prospective only.

Careless, inefficient, and dishonest administration is just as apt to occur in the case of living trusts as in the instance of testamentary trusts. Cestuis of living trusts are citizens entitled to the protection of the state to the same extent as beneficiaries of trusts created by will.

(3) Lastly, there is the argument of *expense*. To adopt the proposed act would, without doubt, impose upon trustees some new work, and in some states would mean a court proceeding where none now occurs. It would be an injudicious kindness to beneficiaries to make them pay for unnecessary bookkeeping and accounting by the trustee, and for needless court costs, guardians' fees, and similar items. Unless the benefits by way of added knowledge of trust affairs and increased opportunities to detect inefficiency, disloyalty, and dishonesty more than offset the increased cost, obviously the act should be relegated to the waste-basket.

It is believed, however, that this argument depends on exaggeration for any important effect. In the first place, all the facts which under the act must be stated in inventory or accounts can be found in the records which are now kept by all reputable professional trustees and which should be kept by all trustees. It will not be necessary to open any new ledgers or make new entries in them in order to comply with this statute. Secondly, the important new work devolving on trustees will be merely segregating and bringing out into the open items of information which are now known to the trustees and which appear in his books or correspondence. Nearly all professional trustees make annual or more frequent reports to their cestuis at the present time. The more important trusts are administered by professional trustees. Hence as to most trusts of significance the act will mean merely an elaboration of a statement already being made, instead of the preparation of an entirely new document. Printed schedules can quickly be prepared which will facilitate the preparation of the annual accounts.

Some of these schedules can be filled out, in the case of the ordinary trust, by the making of a negative entry to the effect that during the period there was no item of the type in question.

Insofar as the expense of a court proceeding for inspection and approval of the account is concerned, it should be noted that the 1936 form of the act requires annual accounts to be filed in court, but a court consideration of the account only every three years, unless a party asks the court for a more frequent consideration and the court grants the request. Normally, therefore, the trustee will go into court with his account for a hearing triennially. This is in accordance with the Massachusetts practice, and seems much more practical and economical than the compulsory annual court proceedings held in some states. This court proceeding, in the normal case, should be very simple. It should involve merely the filing of the account, the issuance and service of a citation to the cestuis, and an inspection of the account and examination of the trustee on the return day.

Not only will there be a benefit to the cestui from such compulsory periodic accountings, but the objecting trustees should consider the advantages to themselves which will come from having clear releases as to all past transactions which are fairly described in the account.

Furthermore, any cases of hardship because of the expense involved in the preparation of accounts or their presentation in court can readily be cared for under the express terms of the act. The beneficiary can, by agreement with the trustee and the execution of a written consent, or by the obtaining of a court order, amend or abolish the duties cast upon the trustee by the act. The settlor may, if he thinks the expense will be burdensome, limit the accounting duties to such as can be performed with smaller cost. The act is not rigid; on the contrary, there is great elasticity.