labor organizations acts done in the "furtherance of . . . same purposes. . . ." It has found failure to act to be ratification and silence to be authorization.[20] The Board has not hesitated to hold the international body liable where its representative merely advised and guided the local in the management of the strike.[21] The international organization may thus be safe only if it disavows the strike, whereas its natural function is to assist the local.

The General Counsel has gone far beyond the Board in his attempts to hold the union responsible. He has already argued that the acts of pickets as well as of officers should be attributed to unions, even though the legislative history of Section 2(13) stands clearly opposed to the view that union members are per se agents of the union.[22] He has also tried to make unions liable by resorting to theories "reminiscent of the long discredited conspiracy and proximate cause doctrines. . . ."[23]

A more moderate legislative policy toward union responsibility would encourage the Board to reach a fair balance between protecting the non-striking employees and the employers from restraint and coercion without impeding proper union activities. Such a policy would direct the Board's attention toward enjoining the individual members, pickets, and officers actually participating in the coercive activities, and to look to the union as the responsible entity only when necessary to avoid violence.[24]

STANDARDS OF CARE FOR CORPORATE TRUSTEES

The growing judicial desire to impose a stricter duty of care on corporate trustees than that normally required of individual trustees was exemplified in a recent New Jersey decision.[1] The trust company fiduciary had advertised its special skill in trust administration and presumably was appointed trustee in reliance on such skill. In an accounting proceeding by the trustee, exceptions

mittee as an entity and against the offending individuals by name. Are the innocent members of the committee bound by the order, since they make up the entity?

[20] Sunset Line & Twine Co., 79 N.L.R.B. No. 207, Lab. Rel. Rep. 20–22 (Spec. Supp., Oct. 25, 1948).

[21] Ibid., at 23.

[22] Ibid., at 21. Senator Taft stated during the congressional debates: "The fact that a man was a member of a labor union in my opinion would be no evidence whatever to show that he was an agent." 93 Cong. Rec. 4435 (1947).

[23] Perry Norvell Co., 80 N.L.R.B. No. 47, 23 L.R.R.M. 1065 (1948).

[24] In his message vetoing the Taft-Hartly Act, President Truman stated in reference to the agency rule: ". . . it would expose unions to suits for acts of violence, wildcat strikes, and other actions, none of which were authorized or ratified by them. By employing elaborate legal doctrine, the bill applies a superficially similar test of responsibility for employers and unions—each would be responsible for the acts of his agents. But the power of an employer to control the acts of his subordinates is direct and final. This is radically different from the power of unions to control the acts of their members who are, after all, members of a free association." 93 Cong. Rec. 7455 (1947).

[1] Liberty Title and Trust Co. v. Plews, 60 A. 2d 630 (N.J. Eq., 1948).

were taken by the beneficiaries on grounds of indulgence in self-dealing, improper mortgage loans, and the retention of speculative stocks for an unreasonable length of time. The opinion, which declares that the trustee may be surcharged for these acts, appears to depart from the usual rule that a trustee is bound to exercise only such care and skill as a man of ordinary prudence would exercise in dealing with his own property.[2] Since the trust company ". . . represented itself as being possessed of greater knowledge and skill than the average man . . . ," the court held that "[t]he manner in which investments were handled must be viewed and assayed in the light of such superior skill and ability." *Liberty Title & Trust Co. v. Plews.*[3]

This recognition of a higher duty of care, however, is more nearly dictum than law since the acts of the fiduciary were clearly negligent even if judged by the usual investment rules. The trustee not only made loans from the trust fund at figures greater than sixty per cent of the appraised value of the mortgaged premises but on many of the mortgages no appraisals were secured at all and no attempt was made to secure credit reports on the individual borrowers. A higher standard of care was not required to impose liability for these acts.

But there is some suggestion that the court was actually applying the higher standard to several acts of the trustee. In imposing liability for the retention of certain speculative stocks Vice-Chancellor Haneman states: "This again exhibits a course of conduct not consistent with that degree of care, prudence and diligence required of this trustee."[4] For example, the stocks retained were investments in street railway companies which steadily declined in market value. Bankruptcy proceedings had been instituted against the railway company and still the trustee declined to sell. Implying that an individual trustee under similar circumstances might have been absolved, the court considered this conduct to be inconsistent with the standard required of "this trustee." But individual trustees have been surcharged for similar acts.[5] The importance of the present decision, therefore, lies in the fact that the court went out of its way to emphasize that corporate trustees should be held to greater care than individuals.

When stating the general rule of due care applicable to corporate and individual trustees alike, the courts have frequently indicated that if the trustee actually possesses greater skill and ability than the ordinary man, he should be held to the degree of skill and ability he actually has.[6] Application of this rule

[2] Rest., Trusts § 174 (1935). [3] 60 A. 2d 630, 642 (1948). [4] Ibid., at 648.

[5] Dickerson v. Camden Trust Co., 140 N.J. Eq. 34, 53 A. 2d 225 (1947); In re Cross, 115 N.J. Eq. 611, 172 Atl. 212 (1934).

[6] Braman v. Central Hanover Bank & Trust Co., 138 N.J. Eq. 165, 47 A. 2d 10 (1946); In re Sedgwick's Will, 74 Ohio App. 444, 59 N.E. 2d 616 (1944); In re Jones' Estate, 344 Pa. 100, 23 A. 2d 434 (1942); Tannenbaum v. Seacoast Trust Co. of Asbury Park, 16 N.J. Misc. 234, 250, 198 Atl. 855, 865 (1938); Barker v. First National Bank of Birmingham, 20 F. Supp. 185 (Ala., 1937); Gibson County v. Fourth and First National Bank, 20 Tenn. App. 168, 96 S.W. 2d 184 (1936); 3 Bogert, Trusts and Trustees § 541 (Supp., 1946); 2 Scott, Trusts § 227.2 (1939); Rest., Trusts § 174 (1935).

in the case of corporate fiduciaries would result in surcharge of the corporation in many cases where an individual trustee would be exonerated, since corporations generally possess better means of administering a trust than individuals. But instead of relying on this legal theory courts have emphasized that a different standard should be applied not because it is a corporation that is involved and not because the corporation actually possesses greater means of trust administration, but rather because the corporation represents to the public that it possesses such higher ability.[7] In other words, many judges feel that these organizations should be held to the representations they make. The Oklahoma Supreme Court, for instance, has taken special pains to point out the higher standard under circumstances where any individual trustee would have been surcharged.[8] "... [W]here a trust company holds itself out and advertises to the world that it has and possesses a higher degree of skill and ability than that possessed by an ordinary man, it should be held to that degree of skill and ability whether or not it actually possesses such skill and ability."[9]

Although there have been an increasing number of similar judicial expressions in the last two decades no substantial inroads have as yet been made on the traditional single standard of fiduciary duty. No case has been uncovered which unequivocally holds a trust company or a bank liable in a situation where the court expressly states it would not have held an individual trustee liable.[10] The

[7] "[M]uch more is to be expected from a corporate trustee than from an old-fashioned individual executor or trustee. Trust companies seek this character of business, claiming that they are specially qualified and financially responsible." In re Clark's Will, 136 N.Y. Misc. 881, 889, 242 N.Y. Supp. 210, 220 (1930), rev'd on other grounds 257 N.Y. 132, 177 N.E. 397 (1931). "When a professional trustee accepts a trust, after having emphasized in its printed circulars and advertisements its extraordinary attainments, it should be held impliedly to have promised the settlor that it would and could use its powers to the maximum." 3 Bogert, Trusts and Trustees § 541 (Supp., 1946). "It would seem also that where the trustee has secured his appointment as trustee by representing that he has a certain amount of skill, he may incur a liability if he fails to exercise the skill which he represented that he had." 2 Scott, Trusts § 227.2 (1939).

[8] Finley v. Exchange Trust Co., 183 Okla. 167, 80 P. 2d 296 (1938).

[9] Ibid., at 174, 303.

[10] A case which comes close to so holding is In re Church's Will, 221 Wis. 472, 266 N.W. 210 (1936). The assets of the trust estate were invested in bonds subject to redemption before maturity. The bonds were called and notice to that effect was inserted in a suitable newspaper. The employee of the trust company, whose duty it was to peruse notices, overlooked this particular paper and hence the defendant failed to present the bonds for redemption. Loss occurred when the mortgage trustee, after expending the redemption fund, was declared bankrupt. The court held the professional trustee liable on the theory that a trustee must exercise a high degree of fidelity, vigilance, and ability "especially ... when the trustee is a company organized for the purpose of caring for trust estates, which holds itself out as possessing a special skill in the performance of the duties of a trustee, and which makes a charge for its services which adequately compensates it for a high degree of fidelity and ability in the administration of a trust estate." Ibid., at 479, 215. The court emphasized that 2/3 of the other bondholders received the notice and collected their bonds. The court seems to be saying that where there is some doubt as to whether due care was taken, the fact that the trustee is a trust company may be the deciding factor which will impose liability.

Wisconsin court in *In re Allis*[11] first intimated that corporations representing themselves as specialists in trust administration should be held to the higher skill they profess. Although the trustee was absolved of liability for retaining certain stocks, the opinion is ambiguous. It is difficult to ascertain whether the court held the corporation to the higher standard, and found conformity therewith, or whether the court's remarks were merely suggestive and did not indicate the actual standard applied.

After the *Allis* case, recurring expressions of judicial approval of a higher standard for trust specialists appeared in the reports. In *Harris v. Citizens Bank & Trust Co.*[12] the court said in referring to the standard required of a fiduciary, ". . . more would be expected of the Guaranty Trust Company of New York than of a county bank at Churchville, which is but to say that negligence itself is an elastic term."[13] Some of the cases favoring the new concept of a double standard of liability expressly state that the corporate trustee would have been surcharged even under the ordinary prudent man rule,[14] or hold an individual co-trustee liable for the same act.[15] Thus, in spite of the many expressions indicating the existence of a double standard, the weight of authority remains that corporate and individual trustees are subject to a common rule of liability.[16] The great majority of courts have apparently ignored the problem

[11] "The performance of the duties of a trustee requires the exercise of a high degree of fidelity, vigilance, and ability. Especially is this true when the trustee is a company organized for the purpose of caring for trust estates, which holds itself out as possessing a special skill in the performance of the duties of a trustee, and which makes a charge for its services which adequately compensates it for a high degree of fidelity and ability in the administration of a trust estate." In re Allis' Estate, 191 Wis. 23, 29, 209 N.W. 945, 947 (1926).

[12] 172 Va. 111, 200 S.E. 652 (1939).

[13] Ibid., at 116, 657. Apparently the court is referring to the rule that a fiduciary should be required to exercise the skill he actually possesses. The trustee in this case had advised the beneficiaries that stocks held on margin should be sold immediately. The beneficiaries refused to approve the sale and losses occurred to the estate from the failure of the trustees to sell. Refusing to surcharge the trustees for the loss, the court relied on the elementary grounds of estoppel. The court's observation was therefore dictum since it clearly was irrelevant to the actual holding.

[14] Finley v. Exchange Trust Co., 183 Okla. 167, 80 P. 2d 296 (1938); In re Chamberlain's Estate, 9 N.J. Misc. 809, 156 Atl. 42 (1931); In re Clark's Will, 136 N.Y. Misc. 881, 242 N.Y. Supp. 210 (1930), rev'd on other grounds 257 N.Y. 132, 177 N.E. 397 (1931).

[15] Dickerson v. Camden Trust Co., 140 N.J. Eq. 34, 53 A. 2d 225 (1947); In re Cross, 115 N.J. Eq. 611, 172 Atl. 212 (1934).

[16] "Whether or not a corporate trustee is negligent is to be determined under the ordinary rule of duty of an individual trustee." In re Flint's Will, 240 App. Div. 217, 225, 269 N.Y. Supp. 470, 472 (1934), aff'd 266 N.Y. 607, 195 N.E. 221 (1935); "Banks, authorized by law to engage in a trust business, owe the same fidelity, and are subject to the same rules governing individual trustees when applicable on principle." First National Bank of Birmingham v. Basham, 238 Ala. 500, 191 So. 873 (1939); "Whether the trustee be a corporation or an individual the same rules must of necessity apply." Terre Haute Trust Co. v. Scott, 94 Ind. App. 461, 467, 181 N.E. 369, 373 (1932); In re City Bank Farmers Trust Company, 189 N.Y. Misc. 942, 68 N.Y.S. 2d 43 (1947); In re Weinz' Will, 65 N.Y.S. 2d 302 (Sup. Ct., 1946); Security Trust Co. v. Appleton, 303 Ky. 328, 197 S.W. 2d 70 (1946); Harris Trust and Savings Bank v. Wanner, 393 Ill. 598, 66 N.E. 2d 867 (1946); In re Vanderwater's Estate, 326 Ill. App. 81,

and applied the single standard of due care to corporate and individual trustees alike.[17]

Whether the courts should adopt the rule of a higher standard for corporate fiduciaries is a problem which may be clarified by reference to analogous situations in other fields of the law. A specialist in the medical profession is held to a higher degree of care than a general practitioner under ordinary tort rules of liability.[18] An agent who represents that he has special skill or knowledge is held to his representations.[19] Skilled workers who offer their services for hire are held to the standard of the skill they profess.[20] By their business solicitations trust companies represent that their knowledge and ability make their employment as fiduciaries more desirable than that of inexperienced individuals.[21] In fairness to settlors relying on this representation it seems reasonable to impose special liability on such corporations.

In addition to the argument that trust companies should be held to a higher standard of care because of their representations, there is further justification for the imposition of added liability on such corporate fiduciaries. Trust companies are often given special privileges such as permission to deposit trust

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61 N.E. 2d 392 (1945); In re Comstock's Will, 219 Minn. 325, 17 N.W. 2d 656 (1945); Commercial and Savings Bank of Winchester v. Burton, 183 Va. 133, 31 S.E. 2d 289 (1944); Hatfield v. First National Bank of Danville, 317 Ill. App. 169, 46 N.E. 2d 94 (1942); Pank v. Chicago Title and Trust Company, 314 Ill. App. 53, 40 N.E. 2d 787 (1942); In re Jones' Estate, 344 Pa. 100, 23 A. 2d 434 (1942); Central Hanover Bank and Trust Co. v. Brown, 177 N.Y. Misc. 421, 30 N.Y.S. 2d 85 (1941); Foster v. Ypsilanti Savings Bank, 299 Mich. 258, 300 N.W. 78 (1941); In re Musser's Estate, 341 Pa. 1, 17 A. 2d 411 (1941); In re Saeger's Estate, 340 Pa. 73, 16 A. 2d 19 (1940); In re Busby's Estate, 288 Ill. App. 500, 6 N.E. 2d 451 (1937); In re Baker's Estate, 249 App. Div. 265, 266, 292 N.Y. Supp. 122, 129 (1936); Matter of Union Trust Co., 219 N.Y. 514, 114 N.E. 1057 (1916); In re Peoples' Trust, 169 App. Div. 699, 155 N.Y. Supp. 639 (1915).

[17] See 39 Col. L. Rev. 1055 (1939), noting Harris v. Citizens Bank and Trust Co., 172 Va. 111, 200 S.E. 652 (1939).

[18] Coleman v. Wilson, 85 N.J.L. 203, 88 Atl. 1059 (1913); 59 A.L.R. 1071 (1929); 2 Beven, Negligence 1355 (1928); 3 Cooley, Torts § 473 (1932).

[19] Isham v. Post, 141 N.Y. 100, 35 N.E. 1084 (1894); Rest., Agency § 379, comments c, d (1933).

[20] "In all those employments where peculiar skill is requisite, if one offers his services, he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretensions are unfounded, he commits a species of fraud upon every man who employs him in reliance on his public profession." 3 Cooley, Torts § 472, at 335 (1932).

[21] Typical advertisements from recent issues of *Trusts and Estates:* "As trustee, executor, administrator—in every trust capacity—the Irving Trust Company offers the cumulative knowledge of years of experience. Seasoned specialists handle trust affairs prompty, efficiently, economically. As new needs arise, you may rely upon the Irving to find new ways of serving the public." Trusts and Estates 297 (Oct. 1948). "We originated and developed the Illinois form of Land Trust and have had the broadest experience in its use. Our unusual background and experience in all matters pertaining to Illinois real estate qualify us particularly to meet and solve unusual problems which so often arise. Our special facilities and resources are assurances of full cooperation." Ibid., at 279.

funds with themselves,[22] and exemption from giving bond;[23] hence it does not seem unreasonable to hold them to the higher level of performance.

The courts in the trust field have been slow in holding corporate fiduciaries to greater care than individuals despite the reasonableness of the view that a trustee should be required to conform to the representations he makes. Recent remarks in the cases seem to indicate, however, that this concept of added legal responsibility in the event of special representations may soon become an accepted doctrine of trust law.

BUYER'S LIABILITY AFTER REJECTING "ROLLING ACCEPTANCE FINAL" SHIPMENT

The plaintiff, Joseph Martinelli & Co., contracted to sell to the defendant, L. Gillarde Co., a carload of U.S. No. 1 cantaloupes, f.o.b. shipping point, on a rolling acceptance final basis. The melons were inspected at the point of shipment and were graded U.S. No. 1. On arrival the melons were again inspected by a federal inspector but were found to be infected with Cladosporium Rot, a defect which had been latent at the time of the first inspection. The defendant rejected the goods, and the plaintiff sued for the contract price less the amount received by it as a result of a sale of the goods by the carrier. Although the Circuit Court held that under the Perishable Agricultural Commodites Act[1] the buyer had no right to reject the shipment but could raise the defense of breach of warranty, on rehearing that court decided that the rejection of the goods constituted a waiver of the defense. The buyer accordingly was held liable for the contract price. *J. Martinelli & Co., Inc. v. Gillarde Co.*[2]

The defendant contended that the controversy should be adjudicated under the Uniform Sales Act since the P.A.C.A. was not intended to supersede that act[3] but only to provide additional remedies to the claimant.[4] Section 69 of the

[22] Hayward v. Plant, 98 Conn. 374, 119 Atl. 341 (1923); Trust Companies as Trustees and Depositaries, 23 Col. L. Rev. 465 (1923); 29 Mich. L. Rev. 125 (1930), noting In re Clark's Will, 136 N.Y. Misc. 881, 242 N.Y. Supp. 210, 220 (1930), rev'd on other grounds 257 N.Y. 132, 177 N.E. 397 (1931).

[23] Ala. Code Ann. (Michie, 1923) §§ 6391–96 (corporate trustee exempted from giving bond by depositing with state treasurer certain securities); Conn. Gen. Stat. (1930) § 3885 (no bond required of trust company in absence of court order). For other state statute citations see 1 Bogert, Trusts and Trustees § 151, n. 47, at 457.

[1] Perishable Agricultural Commodities Act of 1930, 46 Stat. 531 (1930), as amended, 7 U.S.C.A. §§ 499 et seq. (1939).

[2] 168 F. 2d 276 (C.C.A. 1st, 1948), rev'd on rehearing 169 F. 2d 60 (C.C.A. 1st, 1948), cert. den. 69 S. Ct. 237 (1948).

[3] The Perishable Agricultural Commodities Act was passed in 1930 to curb unfair and fraudulent practices prevalent in the marketing of perishable products. Dealers would often reject shipments or demand allowances in price on the basis of fabricated claims of unmerchantability. Because of the difficulties of proof and the expenses of long distance suits, sellers often took no action. Congress, by this act, set up the machinery to remedy these abuses. All dealers engaged in the trade were to be licensed by the federal authority, and this license was to be revoked if the dealer was found to have engaged in certain practices. A system of inspec-