RECOMMENDING STATE SUPERVISION OF CHARITABLE TRUSTS

I. INTRODUCTION TO THE PROBLEM

Recent investigations in New Hampshire and Massachusetts have indicated that state supervision of the administration of charitable trusts is needed to assure that the intent of the settlor is effectuated, and further that the cost of supervising will be more than counterbalanced by financial benefit accruing to the taxpaying public.[1] Two factors combine today to render the problem one of increasing importance in the United States. First, the increasingly heavy estate taxes levied upon non charitable devises and bequests[2] as contrasted to the favorable income tax exemptions for charitable gifts[3] may be expected to increase the number of charitable trusts created.[4] Second, the more liberal attitude of the courts toward charitable gifts should give grantors more confidence that their charitable gifts will be held valid.[5]

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1. Bushnell, "Report and Recommendations for Legislation" 30 Mass. L. Q. 22, 24 (1945); D'Amours, "The Control of Charitable Trusts By the Attorney General" address delivered at the Fortieth Annual Meeting of the National Association of Attorneys General (1946). Although no data is available for the other states, it is supposed that the number of charitable trusts in existence in the Midwest, the South, and the West is smaller than that in the New England states. D'Amours, Supra at 3. But the Vice-President of the Mercantile-Commerce Bank & Trust Co. of St. Louis finds that "Many charitable trusts and endowments . . . have been mismanaged, investments improperly made and funds dissipated contrary to the directions of the creator . . ." and concludes that the situation in the United States calls for an act similar to the English Charitable Trusts Act. Hennings, "The Road to Destiny" 67 Trust Companies 721, 722-723 (1938).
2. The rates today vary from $500 on a $10,000 estate to $6,000,000 on a $10,000,000 estate as compared with $100 and $3,116,000 respectively in 1932. Compare I.R.C. § 935 with 47 Stat. 243 (1932). In Indiana there is the additional tax saving resulting from the fact that the inheritance tax, which ranges from 1% to 20%, does not apply to that part of an estate given for charitable trust purposes. Ind. Stat. Ann. (Burns, Supp. 1945) § 6-2403(c).
3. I.R.C. § 23(o) permits unlimited deductions if the gifts exceed 90% of the taxpayer's net income.
4. Note, 47 Col. L. Rev. 659, 660 (1947).
5. "It is well established that legacies to the uses of charity are to be construed by the most liberal rules that each case will permit, and will not be declared void if they can by any possibility consistent with the law be held valid." In re Lowe's Estate, 70 N.E. 2d 187, 196 (Ind. App. 1946). And see 2 Bogert, "Trusts and Trustees" § 369 (1935).

Therefore an effective safeguard is now needed to give grantors confidence that their charitable gifts will be used for the charitable purposes directed, and not misapplied or wasted.[6]

It is commonly thought that a major portion of today's trust estates are administered by corporate trustees, and it has been asserted to follow that improvident investments, fraud, inactivity, and other mismanagement by trustees will occur so infrequently that a comprehensive system of supervision is not needed. The recent Indiana case of *State* v. *Union Trust Company*[7] provides an adequate answer. In an action by the State on relation of the Attorney General against a trust company for the purpose, inter alia, of enforcing the provisions of an alleged charitable trust, one of the grounds stated for demurrer was that the alleged failure to carry out the terms of the trust was res judicata by reason of a judgment of final settlement of the settlor's estate. The Indiana Appellate Court held that the demurrer had been improperly sustained below. The complaint alleged and the demurrer admitted that the judgment of final settlement of the settlor's estate was obtained by fraud, in that it had been falsely represented to the probate court that the trust purpose had already been caried out; consequently the judgment was subject to collateral attack.

Furthermore, it is not entirely clear that corporate trustees handle even a majority of the trust estates today. Exact data are not available on any large scale,[8] but some compilations have been made. For example, a survey made for Cook County, Illinois, showed that less than five percent of the etates probated are handled by corporate fiduciaries.[9] In other cities, an average of twenty to twenty-five percent of the estates of over twenty-five thousand dollars are administered by corporate fiduciaries.[10] Further, a cross sec-

6. D'Amours, supra n. 1 at 7; Ames, "Failure of the Tilden Trust" 5 Harv. L. Rev. 389 (1892).
7. 74 N.E. 2d 833 (Ind. App. 1947); cf. Hicks v. City of Providence, 43 R.I. 484, 113 Atl. 791 (1921) (breach of trust by non corporate trustee).
8. 3 Scott, "Law of Trusts" § 391 (1939); Bushnell, supra n. 1 at 34; D'Amours, supra n. 1 at 2.
9. Fisher, "Opportunities In Small Estates" 80 Trusts and Estates 453 (1945).
10. "Report of the New Business Panel" 75 Trusts and Estates 569 (1942).

tion of estates passing through probate courts in various parts of the country shows that the size of estates is decreasing,[11] which may possibly presage that corporate fiduciaries will be appointed in a smaller percentage of cases.

II. HISTORY AND PRESENT STATUS OF SUPERVISION

The need for supervision of the administration of charitable trusts has long been recognized in England. As early as 1601 it was thought necessary to establish a loose system of supervision to detect fraud, breaches of trust and negligence of charitable trustees.[12] The Statute of 1601[13] authorized the Lord Chancellor to award commissions to the bishop of every diocese to inquire into abuse of charitable trusts and to issue such binding orders as might be necessary to assure that the intent of the settlor would be carried out. Later investigation disclosed the inadequacy of that statute and resulted in the enactment of the more effective Charitable Trusts Act of 1853.[14] This Act established a permanent Board of Charity Commissioners consisting of three members, a secretary, and two inspectors, which was to investigate all charities in England and Wales and keep a separate account of each trust. All but certain excepted charitable trustees were to submit annual accounts. The Board was given authority to approve or modify proposed acts of trustees, to institute proceedings when necessary, and to give advice to trustees so requesting. The Board was required to be given notice of

11. Over one-half of the estates passing through probate in 1945 were of less than $5,000, over nine-tenths less than $25,000, and ". . . (I)n all probability they will be a great deal smaller from now on to the end of our lifetime" Stephenson, "Tomorrow's Smaller Estates" 80 Trusts and Estates 47 (1945).

12. The original concern was probably less connected with seeing the settler's intent carried out than to aid the government in providing for the poor. 4 Holdsworth, "History of English Law" 397-9 (1924).

13. 43 Eliz. c. 4 (1601). This statute has not been considered to be a part of the common law of the United States. Bd. of Com'rs. v. Rogers, 55 Ind. 297 (1876); Grimes' Ex'rs. v. Harmon, 35 Ind. 198 (1871), overruling City of Richmond v. State, 5 Ind. 334 (1854) and McCord v. Ochiltree, 8 Blackf. 15 (Ind. 1846); see also 2 Bogert, "Trusts and Trustees" § 322 (1935). The statute was repealed (except for its preamble) by the Mortmain and Charitable Uses Act of 1888, 51 & 52 Vict. c. 42.

14. 16 & 17 Vict. c. 137. The investigation lasted from 1818 to 1837, the report filling sixty volumes. 3 Scott, "Law of Trusts" §391 (1939).

all proceedings relating to trusts, and the case could not proceed without its approval. No order of a county or district court appointing or removing a trustee or approving proposed acts of trustees could be valid until confirmed by the Board. The general supervisory system thus established still exists substantially unaltered today.[15]

Effective regulation in the United States has lagged far behind that of England. Little supervision of trusts in general existed prior to 1930, and even today the only supervision generally provided is by the courts. Only a few of the state statutes today apply to charitable trustees.[16] The Indiana statute, typical of this class, requires every trustee of inter vivos and testamentary, charitable and private, trusts to submit annual accounts for approval by the circuit court.[17] Failure to report shall subject the trustee to a fine of not less than fifty dollars, and the court may order him to appear and show cause why he has not reported.[18]

Inherent weaknesses exist under statutes such as Indiana's.

First, if the trustee of an inter vivos trust fails to submit reports as required by the statute, the judge might never know of the trust's existence. The judge is precluded by the pressing duties of his office from investigating to determine the existence of charitable trusts which are not brought to his attention by some interested or public spirited person,[19] and no trained staff to which the task could be dele-

15. See 15 & 16 Geo. V. c. 27.

16. E.g., Ind. Stat. Ann. (Burns, 1933) §§ 7-714, 7-715; Mass. Acts 1930, c. 209 (supplemented by Mass. Acts 1931, c. 42); Nev. Laws 1941, c. 135, § 22; Vt. Acts 1937, no. 52, p. 85.

17. It has been held that a provision in a will that the trustee need not make annual reports does not invalidate the entire will but merely gives way to the statute. Ackerman v. Fichter, 179 Ind. 392, 101 N.E. 493 (1913).

18. Somewhat similar statutes in other states apply only to all testamentary trusts. Minn. Laws 1933, c. 259; Neb. Rev. Stat. (1943) § 30-1801. Still others provide merely that the trustee may account at any time or that the beneficiaries may petition for an accounting. Cal. Stat. 1931, c. XIX; Pa. Stat. Ann. (Purdon, 1930) tit. 20, § 838; Utah Code Ann. (1943) § 102-12-31.

19. The requirement of "indefiniteness" of the cestui que trust, essential to the establishment of a valid charitable trust, will usually prevent the cestui from providing the court the information needed. The public spirited citizen is often either nonexistent or does not himself know of the breach. Hicks v. City City of Providence, 43 R.I. 484, 113 Atl. 791 (1921); Town of South Kingstown v. Wakefield Trust Co., 47 R.I. 27, 134 Atl. 815 (1926); In re Mead's Estate, 227 Wis. 311, 277 N.W. 694 (1938).

gated is available.[20] The case of *Hicks* v. *City of Providence*[21] illustrates how trust funds may be misapplied for decades before the matter is brought to the attention of the court, and then only by the chance of an unrelated proceeding. The settlor in 1869 conveyed a lot and building to trustees for the purpose of providing a hall for free use for any religious, scientific, moral, or literary purpose. The property was never to be used as a store or dwelling. In 1903, the sole surviving trustee conveyed the property back to the settlor, reciting that the terms of the trust had been violated and that therefore the property reverted to the settlor in accordance with the provisions of the trust deed. The building was afterwards rented as a dwelling, the settlor collecting the rents. About 1920 the City condemned the property and the plaintiff claimed to be entitled to the proceeds through a series of deeds beginning with the settlor's heirs. The court found that there had been no breach of trust prior to 1903, applied the doctrine of *cy pres*, and decreed that the proceeds should go to a trustee to be appointed by the court.[22]

Second, even if an initial report is made pursuant to statute or the existence of the trust is otherwise brought to the judge's attention, failure to make subsequent reports may easily pass undetected.[23] The case of In re *Mead's Estate*[24] illustrates how easily such matters may be forgotten by the judge, and also provides a startling example of what then might happen. The settlor died in 1891, leaving a bequest

20. A poll taken of Indiana's county judges by correspondence indicates that most of them believe that their duties do not include such "investigatory" functions.

21. 43 R.I. 484, 113 Atl. 791 (1921).

22. For other examples, see Lewis v. Brubaker, 322 Mo. 52, 14 S.W.2d 982 (1929) (heirs of grantor sued to recover real estate on the ground that it had been used for other than the specified trust purpose about fifteen years before); Town of South Kingstown v. Wakefield Trust Co., 47 R.I. 27, 134 Atl. 815 (1926) (trustee, after having permitted the land to remain unused for about fifteen years brough suit for specific performance of contract to purchase); cf. Attorney General v. Old South Society, 13 Allen 474 (Mass. 1866) (attorney general brought ex rel. action after the trust funds had been misapplied over a period of forty-four years).

23. The poll of Indiana judges, supra n. 20, disclosed that only a very small number of the courts in Indiana have any system for ascertaining when the annual reports are due or delinquent. In a few of the counties, a check on the docket is used.

24. 227 Wis. 311, 277 N.W. 694 (1938), rehearing den., 227 Wis. 311, 279 N.W. 18.

of $20,000 in trust for a public library in Sheboygan. His will indicated the persons whom he desired to serve as trustees, but the court never made an appointment. The City was not informed of the trust until 1897. It then leased a building for use as a library until 1901, when a gift of $35,000 was made to the City for building a library. This library was built in 1902. The City did nothing with the trust fund. It was reported in 1934, by one of the persons indicated as trustees in the settlor's will, to have accumulated to $103,000. Finally, after that person's death in 1935, an heir of the settlor claimed the fund as unadministered assets of the settlor. It was held that the fund should be paid to trustees named by the court below and applied to the trust purpose specified by the settlor.[25]

Third, the continuing duty of examining reports as to the propriety of investments, payment of income, etc., is a ministerial or administrative, not a judicial function.[26] It is true, of course, that the courts can properly be called upon to determine in judicial proceedings whether alleged fraud, defalcation, or mismanagement has occurred,[27] but the ministerial duty of supervising is beyond the physical capabilities of a single judge and beyond the proper scope of his duties.[28]

Fourth, no system exists for coordinating the supervisory activities of the various county courts within the state. For example, there is an apparent conflict in the Indiana Act as to which circuit court is to approve the trustee's report—

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25. See 2 Bogert, "Trusts and Trustees" § 402 (1935).

26. Responses to the survey, supra n. 20, indicate that a majority of Indiana's judges are in accord. The statutes requiring the circuit or superior court judges to examine and approve trustees' reports is typical of the practice of dumping varied tasks into their crowded laps. See, e.g., Ind. Stat. Ann. (Burns, Supp. 1945) § 9-3102 (vesting the powers and duties of the juvenile court in the circuit court); Ind. Stat. Ann. (Burns, Supp. 1945) § 52-1118 (judge of the circuit court to appoint county board of public welfare members); Ind. Stat. Ann. (Burns, Supp. 1945) § 22-3203 (judge of the circuit court to appoint members of the governing board of county hospitals).

27. This function has reposed in the courts of equity for centuries, People v. Braucher, 258 Ill. 604, 101 N.E. 944 (1913); Hulet v. Crawfordsville Trust Co., 69 N.E.2d 823 (Ind. App. 1946); Ind. Stat. Ann. (Burns, Repl. 1943) § 56-629; Md. Laws 1931, c. 453, although some of the current statutes vest the supervisory power in the statutory probate courts. Conn. Acts 1925, c. 160, § 4; Neb. Rev. Stat. (1943) § 30-1801; Vt. Acts 1937, no. 52, p. 85; Wis. Stat. 1945, § 323.01.

28. Bushnell, supra n. 1 at 34.

the first section directs the trustee to report to the court in the county where the property is to be appropriated,[29] while the second section provides that the judge of the circuit court in the county where the trustee resides shall approve or disapprove the report.[30]

Fifth, the public interest in the proper administration of the trusts cannot ordinarily be protected as an incident to an action by the settlor or his heirs. It is generally held that neither the settlor nor his heirs have any standing in court to challenge the administration of a charitable trust.[31] Their challenge merely goes to the validity of the attempted charitable devise or bequest, since the property vests in them if the devise or bequest is void.[32] Likewise, the very nature of a charitable trust ordinarily precludes protection of the public interest through any suit by the cestui que trust.[33] It has even been held that one of a number of indefinite beneficiaries can not sue for enforcement.[34] Nor are such persons as financially interested social workers likely to be permitted to sue to enforce the settlor's intent.[35] Professor Scott's position that only the attorney general, a trustee or co-trustee, or a person with a special interest in the proceeds may bring such a suit is supported by the cases.[36]

Sixth, no public official, under the system of super-

29. Ind. Stat. Ann. (Burns, 1933) § 7-714.

30. Ind. Stat. Ann. (Burns, 1933) § 7-715. The statute apparently contemplates that the trustee shall reside in the county where the trust is being administered, but it does not so require. As a practical matter, the former section probably controls.

31. Webb v. Webb, 340 Ill. 407, 421, 172 N.E. 730, 736 (1930); American Red Cross v. Feltzner Post, 86 Ind. App. 709, 159 N.E. 771 (1928); Restatement, "Trusts" § 391, comment (e) (1935). Contra: McGee v. Vandeventer, 326 Ill. 425, 158 N.E. 127 (1927); Tate v. Woodward, 145 Ky. 613, 140 S.W. 1044 (1911).

32. Hulet v. Crawfordsville Trust Co., 69 N.E.2d 823 (Ind. App. 1946); Ackerman v. Fichter, 179 Ind. 392, 101 N.E. 493 (1913); Erskine v. Whitehead, 84 Ind. 357 (1882); Haines v. Allen, 78 Ind. 100 (1881).

33. See n. 19, supra.

34. Averill v. Lewis, 106 Conn. 582, 138 Atl. 815 (1927); cf. Burbank v. Burbank, 152 Mass. 254, 25 N.E. 427 (1890).

35. Barker v. Hauberg, 325 Ill. 538, 156 N.E. 806 (1927) (social worker's job dependent upon a particular application of the trust fund).

36. 3 Scott, loc. cit. supra n. 8. It is believed that the apparent exceptions can be classified as suits brought by persons having a special interest, e.g., City of Richmond v. State ex rel. Mendenhall, 5 Ind. 334 (1854) (permitting school trustee to sue for enforcement of a trust for the education of children of the town).

vision existing in most states today, is provided with any effective means of protecting the public's interest in the enforcement of charitable trusts.[37] It is generally supposed that the attorneys general of the various states are charged with the duty of seeing to their enforcement,[38] but even this rule is not universal.[39] And even where the attorney general is so charged, he is not ordinarily given sufficient power, personnel, or funds to enable him to perform this duty in any efficient or uniform manner.[40] These elements, combined with the fact that trustees ordinarily need not submit reports to the attorney general, render it likely that breaches of trust will occur without his knowledge.[41] Enforcement by the attorney general will therefore usually occur only if he is informed of the breach by some interested or public spirited citizen.[42]

Even in cases where matters concerning the trusts are actually litigated, there is frequently no one present to protect the interests of the state, unless the judge attempts the impossible task of acting as both judge and state's attorney. The attorney general, who is generally charged with the duty of protecting the state's interest in all litigation,[43] is not usually required by statute to be given notice.[44] Thus no one appears to protect the state's interest in cases involving contest of wills, petitions for instructions, petitions for application of the *cy pres* doctrine, petitions for settlement of

37. 3 Scott, loc. cit. supra n. 8.

38. McGee v. Vandeventer, 326 Ill. 425, 158 N.E. 127 (1927); Krauthoff v. Att'y. Gen., 240 Mass. 88, 132 N.E. 865 (1921); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278 (1928), cert. denied, 279 U.S. 839 (1929); Restatement, "Trusts" § 391, comment (a) (1935).

39. Hedin v. Westdala Lutheran Church, 59 Idaho 241, 250, 251, 81 P.2d 741, 745 (1938). In Indiana, it had never been decided until State v. Union Trust Co., supra n. 7, that the Attorney General was even a proper relator. It is still not entirely clear that he is under a duty to institute such actions, although such a duty might be inferred from Ind. Stat. Ann. (Burns, Supp. 1945) § 49-1924, which defines the duties of the Attorney General to include "(b) represent the state of Indiana in any matter involving the rights or interests of the state . . . for which provision is not otherwise made by law."

40. Bushnell, supra n. 1 at 22.

41. Id. at 24.

42. See n. 19 supra.

43. See, e.g., Ind. Stat. Ann. (Burns, Supp. 1945) § 49-1924, supra n. 39.

44. Bushnell, supra n. 1 at 28. Ind. Stat. Ann. (Burns, Supp. 1945) § 49-1937 would not appear to require notice to the attorney general except in actions against public officers.

estates, etc.[45] Each of these, as well as other actions, vitally affect the disposition of the settlor's money, it often being decided whether or not any of the proposed fund is to be used for the trust purpose directed by the settlor.[46]

III. RECOMMENDED REVISION

It would appear that the only method by which all of the weaknesses discussed can be remedied is to establish by statute a coordinated and unified system of state supervision. A statute, to be both effective and acceptable, must be sufficiently simple that no undue burden is placed upon the trustee who is properly administering his trust, but at the same time it must give the proper authorities sufficient power to enable them to deal with the dishonest, negligent, or lethargic trustee. The following statute is submitted as a tentative model for consideration by the Indiana Legislature. Much of the substance of this act can be found in the New Hampshire Act of 1943, which is set out in full in the Appendix.

AN ACT concerning charitable trusts.

Be it enacted by the General Assembly of the State of Indiana:

Section 1. Definitions. For purposes of this act, "charitable trusts" shall mean all trusts of a charitable nature as understood in the law of trusts, whether testamentary or *inter vivos*, except trusts for public institutions of higher learning and trusts administered by such institutions for the benefit of students thereof.[47]

Sec. 2. Direction to Establish a Register. The attorney general is directed to establish a Register of Charitable Trusts.[48]

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45. Bushnell, supra n. 1 at 28-31.

46. And frequently the attorney general is the only officer who could effectively protect the interests of the charity. See Bushnell, supra n. 1 at 28.

47. The N. H. Act was originally weak in that its application was limited to trusts administered by court-appointed trustees. N. H. Laws 1943, c. 181, §§ 13-b, 13-i. The scope of the Act was extended to include all testamentary trusts by N. H. Laws 1945, c. 92, but inter vivos trusts remain outside the scope of the Act. Amendments have been proposed to remedy this defect. Note, 47 Col. L. Rev. 659, 664 (1947).

48. The establishment of one central register is expected to permit sufficient specialization of personnel to promote efficiency and at the same time eliminate the problems of coordination discussed supra.

Sec. 3. Duties, Attorney General to Perform. Duties relating to the Register shall be performed by the attorney general,[49] who shall: (1) maintain a file of every charitable trust within the state;[50] (2) ascertain whether each charitable trust is being administered according to the intention of the settlor;[51] (3) bring actions necessary to secure the administration of each charitable trust in accordance with the intention of the settlor;[52] and (4) intervene and protect the interests of the State in any judicial proceeding where a charitable trust is brought into question or involved.[53]

Sec. 4. Reports by Trustees of Charitable Trusts. The trustee of every charitable trust shall submit to the attorney general annually upon March first, unless otherwise directed by the attorney general, a report including: (a) a list of all property held by the trust; (b) receipts and expenditures for the preceding year; (c) the names and addresses of beneficiaries; and (d) any other information which shall be required by the attorney general in the exercise of his powers under Sec. 6 of this act.[54]

Sec. 5. Penalty for Failure to Report. A trustee who does not submit the report required by Sec. 4 of this act shall be subject to a penalty of fifty dollars ($50.00) to be recovered in an action by the attorney general for the benefit of the trust. Failure to submit reports for two consecutive years shall constitute a breach of trust for which the trustee may be removed[55] and for which an action may be brought by the attorney general on the trustee's bond

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49. The physical location of the register might vary among the states, but it would seem that in most instances greater efficiency and fewer problems of coordination will result if it is established as a sub-division of the attorney general's office. Bushnell, supra n. 1 at 34.

50. Compare the English Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, § 52.

51. See N. H. Laws 1943, c. 181, § 18-e; Bushnell, supra n. 1 at 36.

52. This subsection is inserted for the purpose of clarifying the extent of the attorney general's duties in Indiana, discussed supra at n. 39. And see 16 & 17 Vict. c. 137, § 19.

53. Compare the English Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, § 36.

54. N. H .Laws 1945, c. 92; Bushnell, supra n. 1 at 35; 16 & 17 Vict. c. 137, §§ 10, 61.

55. N. H. Laws 1943, c. 181, § 13-i.

to recover for the trust any loss which can be attributed to the failure to report.[56]

Sec. 6. Powers of the Attorney General. The attorney general shall have power: (1) to issue subpœnas and subpœnas *duces tecum,* upon a statement or showing of general relevancy of the evidence sought to be produced, to assist in making the investigation directed in Sec. 3;[57] (2) to issue such rules and regulations as may be reasonable or necessary to secure reports, records, or other information relating to charitable trusts or for the supervision or enforcement of charitable trusts;[58] and (3) to make application to the court having jurisdiction over the charitable trust to require a trustee to give bond payable to the trust in an amount not less than the appraised value of the trust property, conditioned upon the faithful performance of his charitable trust duties.[59]

Sec. 7. Subpoena Enforcement Procedure. If a person fails to obey any subpœna authorized by Sec. 6(1) of this act which shall have been duly served at least fourteen (14) days before the date set for appearance therein, or refuses to testify when ordered to do so by the attorney general, the attorney general may institute proceedings to compel compliance in the manner directed by Indiana Acts 1947, chapter 365, Sec. 21.[60]

Sec. 8. Testimonial Privilege. A person shall not be excused from testifying or producing documentary evidence in an investigation or hearing by the attorney general upon

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56. "The criminal sanction is not effective because the financial risk is certain and can be set up in the production budget. Enforcement is sporadic and conviction is not burdensome. Civil liability is a more effective restraint. It compensates the very person the law seeks to protect and as a consequence juries favor recovery." Horack, "Cases and Materials on Legislation" 156 (1940). But cf. N. H. Laws 1943, c. 181, § 13-i; Ind. Stat. Ann. Burns, 1933) § 7-714.

57. N. H. Laws 1943, c. 181, § 13-e; Bushnell, supra n. 1 at 36.

58. N. H. Laws 1943, c. 181, § 13-c.

59. Trustees of an ordinary trust may, on application by the cestui que trust, be required by a court having jurisdiction to give a bond to secure the faithful performance of the trustees' duties. Thiebaud v. Dufour, 54 Ind. 320 (1946) (interpreting Ind. Stat. Ann. (Burns, Repl. 1943) §§ 56-624, 56-628). Cf. Tucker v. State, ex rel. Hart, 72 Ind. 242, 246 (1880); Hinds v. Hinds, 85 Ind. 312, 316-317 (1882). This subsection is intended to assure that the attorney general is a proper person to make the application where a charitable trust is involved.

60. Cf. N. H. Laws 1943, c. 181, § 13-g; Bushnell, supra n. 1 at 36.

the ground that the testimony might tend to incriminate him; but a person who claims his privilege against self-incrimination shall not be prosecuted or punished on account of any act or thing concerning which he shall have testified or produced documentary evidence by order of the attorney general.[61]

Sec. 9. Service of Pleadings and Motions on the Attorney General. In an adversary or ex parte judicial proceeding affecting a charitable trust where the attorney general is required or authorized to appear, defend, or be heard, he shall be served by mail at least 30 days before the date set for trial or hearing with a copy of the original and amended complaint, cross-complaint, petition or other writing by the person filing it. The attorney general then shall intervene if in his opinion the interests of the State so require, and the judge may, at any state of the proceeding, require that the attorney general be made a party if in his opinion the interests of the State so require. Whenever the attorney general has appeared in such proceeding, copies of all motions (except oral motions made at the trial or hearing), demurrers, pleadings and other writings filed therein shall be served upon the attorney general by mail by the filing party. A decision or judgement rendered without service upon the attorney general as required by this section shall be void, unenforceable, and subject to collateral attack.[62]

Sec. 10. Inspection of Register. The Register shall be open to reasonable public inspection for legitimate purposes.[63]

The enactment of a statute, however, will not of itself remedy the existing evils. The attorney general must, in addition, be allowed an adequate supply of funds in his budget to make it possible for him to carry out the purposes of the act—without such funds, his hands are tied.[64]

The lax supervisory system of today results in needless financial loss to the taxpaying public. New Hampshire was

61. N. H. Laws 1943, c. 181, § 13-h; but see Bushnell, supra n. 1 at 36 (expressly preserving the privilege and making no provision for the granting of immunity).

62. See Ind. Acts 1947, c. 196, § 1; English Charitable Trusts Act of 1853, 16 & 17 Vict. c. 137, § 36; Bushnell, supra n. 1 at 28-32, 35.

63. N. H. Laws 1943, c. 181, § 13-d.

64. Bushnell, supra n. 1 at 22; 3 Scott, loc. cit. supra n. 8.

the first state to recognize this fact and has led the way with an efficient and reasonably comprehensive system of administrative supervision. Their experiment has proven successful. If the public benefits from charitable trusts warrant the liberal tax deductions now allowed them, every state legislature must be made to realize that the time has come for a truly efficient system of supervision.

APPENDIX

New Hampshire Laws 1943, Chapter 181

AN ACT Establishing a Register of Public Trusts.

Be it enacted by the Senate and House of Representatives in General Court convened:

1. *Office of the Attorney General.* Amend chapter 24 of the Revised Laws by inserting after section 13 the following new subdivision:

Register of Public Trusts

13-a. Register Authorized. In addition to his common law and statutory powers the attorney general shall have authority to prepare and maintain a register of all public trusts hereftofore or hereafter established or active in the state.

13-b. Definition. The words "public trust" as used in this subdivision shall mean any fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it and subjecting the person by whom the property is held to equitable duties to deal with the property for charitable or community purposes; provided, however, that such trusts managed by persons not appointed by a court shall not be considered public trusts within the meaning of this subdivision.

13-c. Rules and Regulations. The attorney general shall make such rules and regulations as may be reasonable or necessary to secure records and other information for the operation of the register and for the supervision, investigation and enforcement of public trusts.

13-d. Inspection of Register. The register hereby established shall be open to inspection of any person at such reasonable times and for such legitimate purposes as the attorney general may determine, provided, however, that the attorney general may by regulation provide that any investi-

gation of public trusts made hereafter shall not be so open to public investigation.

13-e. Investigation. The attorney general may investigate at any time public trusts for the purpose of determining and ascertaining whether they are administered in accordance with law and with the terms and purposes thereof. For the purposes of such investigation the attorney general may require any person, agent, trustee, fiduciary, beneficiary, institution, association, corporation or political agency administering a trust or having an interest therein, or knowledge thereof, to appear at the state house at such time and place as the attorney general may designate then and there under oath to produce for the use of the attorney general any and all books, memoranda, papers of whatever kind, documents of title or other evidence of assets or liabilities which may be in the ownership or possession or control of such person, agent, trustee, fiduciary, beneficiary, institution, association, corporation, or political agency and to furnish such other available information relating to said trust as the attorney general may require.

13-f. Notice to Attend. Whenever the attorney general may require the attendance of any such person, agent, trustee, fiduciary, beneficiary, institution, association, corporation or political agency, as provided in the preceding section, he shall issue a notice setting the time and place when such attendance is required and shall cause the same to be delivered or sent by registered mail to such person, agent, trustee, fiduciary, beneficiary, institution, association, corporation or political agency at least fourteen days before the date fixed in the notice for such attendance.

13-g. Penalty. If any person, agent, trustee, fiduciary, beneficiary, institution, association, corporation or political agency receiving such notice, neglects to attend or to remain in attendance so long as may be necessary for the purposes for which notice was issued, or refuses to produce such books, memoranda, papers of whatever kind, documents of title or other evidence of assets or liabilities or to furnish such available information as may be required, he shall be liable to a penalty of one hundred dollars which shall be recovered by the attorney general in an action of debt for the use of the state.

13-h. Testimonial Privilege. No person shall be ex-

cused from testifying or from producing any book or paper in any investigation or inquiry by or upon any hearing before the attorney general, when ordered to do so by the attorney general, upon the ground that the testimony or evidence, book or document required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any act, transaction, matter or thing concerning which under oath, after claiming his privilege, he shall by order of the attorney general have testified or produced documentary evidence.

13-i. Reports by Trustees of Public Trusts. Any fiduciary holding property subject to equitable duties to deal with such property for charitable or community purposes, excepting fiduciaries not appointed by a court, shall annually, on or before July first, unless otherwise directed by the attorney general, make to him a written report for the last preceding fiscal year of such trust showing the property so held and administered, the receipts and expenditures in connection therewith, the names and addresses of the beneficiaries thereof and such other information as he may require; provided, that if such fiduciary is required by law or court order to file annually with the probate court an account or report containing the information herein required, the attorney general shall accept a copy thereof in lieu of the report herein required. Failure for two successive years to file such a report shall constitute a breach of trust and the attorney general shall take such action as may be appropriate to compel compliance herewith.

13-j. Information from Register of Probate. Each register of probate shall furnish such copies of papers and such information as to the records and files in his office relating to public trusts as the attorney general may require. Such register shall also permit an examination of the files and records in the probate office by representatives of the attorney general for the purpose of establishing and maintaining said register of public trusts. A refusal or neglect by the register of probate so to send such copies or refuse such information or to refuse access to the probate records relating to public trusts shall be a breach of his official bond.

13-k. Fees. The fees of a register of probate for copies of documents furnished at the request of the attorney gen-

eral shall be one dollar for each will, inventory or account not exceeding four full typewritten pages, eight by ten and one-half inches, and twenty-five cents for each page in excess thereof, and shall be paid by the attorney general.

13-l. Assistant Attorney General. The assistant attorney general shall perform such service in connection with the enforcement of the provisions of this subdivision as the attorney general may authorize or direct.

13-m. Clerks. The attorney general may employ and fix the compensation of such clerks as may be necessary to carry out the provisions of this subdivision.

13-n. Federal Assistance. The governor and council, upon the request and recommendation of the attorney general, are hereby authorized to cooperate with and enter into such agreements with the federal government or any agency thereof as they may deem advisable to secure funds or assistance for the purpose of carrying out the provisions of this subdivision.

2. Appropriation. The sum of seven thousand five hundred dollars for the fiscal year ending June 30, 1944, and the sum of two thousand five hundred dollars for the fiscal year ending June 30, 1945, are hereby appropriated for the purposes of this act, for the use of the attorney general's department, and the governor is hereby authorized to draw his warrant for said sums out of any money in the treasury not otherwise appropriated.

3. Takes Effect. This act shall take effect July 1, 1943. (Approved May 11, 1943.)