

Trusts as Pension Pots: A Legal-Historical Perspective, c 1800 - 1925

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I. INTRODUCTION

Today, occupational pension trusts are ubiquitous: membership of an employer-sponsored scheme, coupled with reliance on the state pension, is the way in which most of us provide for our old age. Yet both occupational pension trusts and the state pension are relatively recent phenomena. Before the late nineteenth century few organised pension schemes existed, and some of those which did – such as the civil service scheme - operated largely on a discretionary, *ex gratia* basis.¹ Large-scale occupational schemes run by private employers developed slowly in the nineteenth century, and became common only in the early years of the twentieth, while the state pension was not introduced until 1908.²

This chapter explores the historical development of the trust as the default legal mechanism for holding and administering pension schemes. It has been suggested that a novel feature of the early twentieth century occupational schemes was their ‘use of the private trust as a legal vehicle for pensioning’, and that ‘[T]rust law had been developed for quite other purposes but, from being virtually unknown in large pension schemes in the nineteenth century, it became the most favoured vehicle in the twentieth.’³ Here it is argued that in fact the trust relationship underpinned various methods of pension provision during the nineteenth century. This is unsurprising, given the trust’s obvious utility in holding funds and facilitating the provision of concurrent benefits to groups of people. From a legal perspective, therefore, the widespread adoption of the trust in early twentieth century pension schemes was neither novel nor surprising. Rather, it was an obvious incremental step in pensions law and practice.

The chapter also discusses how the English courts conceptualised pensions during the nineteenth century. Ultimately, this seems to have been an exercise in interpretation, which depended on the terms of the instrument creating the relevant pension arrangements. If the terms suggested that pension payments were a discretionary matter for the employer, the courts treated them as *ex gratia*; if the terms gave employees an entitlement to pension payments, the courts would give effect to that entitlement. Thus, the law tracked and accommodated employers’ decisions as to whether and how to help their employees in old age.⁴

* I am grateful to Professor Charles Mitchell, David Pollard QC and Kathryn Purkis for their comments on this chapter.

¹ See M Raphael, *Pensions and Public Servants, A Study of the Origins of the British System* (Paris, Mouton & Co, 1964), 135, 148.

² L Hannah, *Inventing Retirement: The Development of Occupational Pensions in Britain* (Cambridge, Cambridge University Press, 1986) 15-16.

³ *ibid* 18-19.

⁴ In other jurisdictions, such as Canada, the idea of pension ‘rights’ developed later: see E Shilton, *Empty Promises: Why Workplace Pension Law Doesn’t Deliver Pensions* (Québec, McGill-Queen’s University Press, 1986) 15-16.

II. METHODS OF PENSION PROVISION IN THE NINETEENTH CENTURY

Historically, provision for old age was neither as systematic nor as comprehensive as it is now. During the nineteenth century, it was largely regarded as a matter of individual responsibility,⁵ and a variety of methods were adopted: some were individual, others were collective, and the type of provision often depended on one's class and occupation. Despite the patchwork of different types of assistance and provision, inevitably there were many who could not save for their old age at all, and so there was a close correlation between old age and poverty.⁶ The development and proliferation of occupational pension schemes towards the end of the nineteenth century was therefore of profound social significance.

The most obvious methods of individual provision were private savings and investment. These took different forms. An active share market did not develop until the late nineteenth century but in the meantime government bonds were perennially popular as they offered security of capital and interest rates of 4-5 per cent.⁷ During the eighteenth century, landowners and middle class investors had started to engage in the practice of lending against the security of mortgages over land,⁸ and commercial life insurance houses had developed in both England and Holland.⁹ The Victorian values of self-help and thrift led to a dramatic expansion in the life insurance business during the first half of the nineteenth century.¹⁰ Although the industry was unregulated and unstable for most of the century, it was nevertheless popular. From 1853 income tax relief was available on premiums for life insurance and deferred annuities,¹¹ which made them an attractive form of saving for old age, and after legislative reform in 1870 the market became safer for investors.¹²

As far as collective provision was concerned, the livery companies had a strong philanthropic tradition, which sometimes involved the payment of pensions. By 1880 approximately one third of their extensive income came from gifts and wills constituting trusts for benevolent or charitable purposes.¹³ It seems likely that by 1884, the companies had approximately 10,000 members. Membership entitled an individual to be received into the company's almshouses, to pensions and relief out of the trust funds which had been left to the company for that purpose, and to apply for general relief out of the company's corporate income.¹⁴ Workers also tended to contribute to

⁵ A Russell, *The Growth of Occupational Welfare in Britain* (Aldershot, Avebury, 1991) 24-5.

⁶ R Blackburn, *Banking on Death Or, Investing in Life: The History and Future of Pensions* (London, Verso, 2002) 47.

⁷ E Hutson, 'The Early Managed Fund Industry: Investment Trusts in 19th Century Britain', (2005) 14 *International Review of Financial Analysis* 439, 441-2; W Cornish et al, *Law and Society in England, 1750-1950*, 2nd edn (Oxford, Hart Publishing, 2019) 251.

⁸ Cornish (n 7) 130.

⁹ Blackburn (n 6) 39. See also Russell (n 5) 24-5.

¹⁰ Hannah (n 2) 5; M Zimmeck, 'Gladstone holds his own: the origins of Income Tax Relief for Life Insurance Policies', (1985) 58 *Bulletin of the Institute of Historical Research*, 167, 176.

¹¹ Income Tax Act 1853, s 54; Zimmeck (n 10).

¹² T Alborn, *Regulated Lives: Life Assurance and British Society, 1800-1914* (Toronto, University of Toronto Press 2009) 53-75; L. Hannah, 'Why Employer-Based Pension Plans? The Case of Britain', (1985) 45(2) *Journal of Economic History* 347, 349.

¹³ *City of London Livery Companies' Commission Report* (1884) (Cd. 4073) 13, 26-28.

¹⁴ *ibid* 22-24.

friendly societies and, later, trade unions.¹⁵ By the end of the nineteenth century approximately 50 per cent of adult males in the UK were members of friendly societies,¹⁶ but the contribution rates were higher than many unskilled workers could afford, and so – much like livery companies - the societies tended to operate for ‘an artisanal elite.’¹⁷ Some societies operated superannuation schemes towards the end of the century but there was a low take-up among members, perhaps because there were more immediate demands on working class saving, such as food, education and shelter, and because friendly societies supported their older members through the provision of sickness benefit anyway.¹⁸ Widows’ and orphans’ funds, which effectively facilitated the private provision of widows’ pensions, were also popular during this period.

Before the 1680s, it had been conventional for officers in the civil service, the armed forces¹⁹ and the professions who wished to retire to sell their office to their successors for a lump sum or an annuity.²⁰ In the late seventeenth century pension schemes were put in place for former members of the armed forces and private entities whose fortunes were closely associated with those of the British state, such as the Bank of England and the East India Company.²¹ In the early eighteenth century customs and excise officers benefited from the first civil service superannuation scheme.²² These early schemes were not always comprehensive,²³ and payments were usually discretionary. In the private sector, paternalistic employers would often look after their ageing employees by giving them easier jobs to do.²⁴ Sometimes they would make contributions to friendly societies on behalf of workers who were members.²⁵ Others exercised their discretion to reward long serving employees with an *ex gratia* pension.²⁶

There was little in the way of formal, organised pension provision in the private sector until much later in the nineteenth century. Utility companies were some of the first private sector employers to instigate formal pension schemes: eg, the Imperial Gas Light and Coke Company paid discretionary pensions during the 1830s²⁷ and introduced a superannuation scheme for its employees in 1842.²⁸

¹⁵ Hannah (n 2) 6.

¹⁶ J Macnicol, *The Politics of Retirement in Britain, 1878-1948* (Cambridge, Cambridge University Press, 1998) 115.

¹⁷ P Johnson, *Saving and Spending, The Working-Class Economy in Britain 1870-1939* (Clarendon Press, Oxford, 1985) 57-8; Macnicol (n 16) 115.

¹⁸ Macnicol (n 16) 117, 118; Johnson (n 17) 49, 83; D Weinbren, ‘The Good Samaritan, Friendly Societies and the Gift Economy’, (2006) 31 *Social History* 319, 328.

¹⁹ Anyone who left the armed forces with a disabling injury, as invalids or having completed an agreed term of service was entitled to a pension from the Royal Hospital Chelsea in London (established in 1678) or the Royal Hospital Kilmainham in Dublin (established in 1681). Officers could provide for their retirement by selling their commission, a practice which was eventually abolished by the Cardwell reforms in 1870-1871. I am grateful to Charles Mitchell for drawing these examples to my attention.

²⁰ P Thane, *Old Age in English History: Past Experience, Present Issues* (Oxford, Oxford University Press, 2000) 237; see also Raphael (n 1) 34-105.

²¹ Thane (n 20) 244

²² Raphael (n 1) 34-48.

²³ Eg the first comprehensive civil service scheme was only established a century later: Raphael (n 1) 132.

²⁴ Macnicol (n 16) 52.

²⁵ Hannah (n 2) 11.

²⁶ *ibid* 9.

²⁷ Thane (n 20) 244.

²⁸ Hannah (n 2) 12. This was extended to manual workers in 1870.

By the 1860s many railway companies had also established superannuation schemes.²⁹ Large-scale manufacturers, such as Colman's, Lever Bros, Cadbury and Rowntree followed suit at the turn of the twentieth century.³⁰ In 1900 there were approximately one million employees in formally constituted schemes across the public and private sectors, and by 1936 this number had more than doubled.³¹

The impetus for the proliferation of occupational pension schemes appears to have come from employers, particularly large ones.³² There were at least four reasons for this. The first was rooted in the quest for greater productivity and efficiency. There were hidden costs in *not* providing pensions and keeping on older employees as they became less productive.³³ Employers wished 'to be able without hardship, to get rid of employees when they are past efficiency and vigorous work',³⁴ and an employer-led pension scheme facilitated this goal. Pension schemes that operated on the basis of deferred remuneration which could be withheld (eg, whereby employers' contributions were not returned to leavers) also helped them to extract loyalty and longevity from younger workers who had specialist skills, or were in positions of financial responsibility, such as clerks in banks and railways.³⁵

The second reason was the need for employers to improve industrial relations. The Trade Union Act 1871 relaxed some of the constraints which had hitherto been imposed on trade unions³⁶ and the union movement grew in size and strength.³⁷ Some trade unions provided superannuation and other benefits to their members, albeit on a small scale and at a reasonably high cost.³⁸ Preventing the growth of trade unionism and encouraging employees to identify with corporate goals appears to have been a major factor in the development of some railway superannuation schemes in the 1890s.³⁹ Third, a new commitment to 'fair dealing in employment contracts' was apparent in the conduct of some of the large manufacturers,⁴⁰ such as Rowntree and Cadbury which were run by socially-minded Quaker families. Finally, in 1921 the government extended income tax relief to employer contributions to pension funds and pension fund investment income for pension schemes established on irrevocable trusts,⁴¹ which made occupational schemes much cheaper to run.

It is true to say that the idea of a 'pension trust' as we know it – in the form of an occupational pension scheme sponsored by the employer, embedded in the employment contract, governed by an express private trust instrument and rules, and overlaid by statutory regulation – only became

²⁹ Board of Trade, *Report of the Departmental Committee on Railway Superannuation Funds*, 1910 (Command 5349, 1910).

³⁰ Hannah (n 2) 18.

³¹ *ibid* 13; Hannah, 'Why Employer-Based Pension Plans?' (n 12) 350; Thane (n 20) 247.

³² Hannah, 'Why Employer-Based Pension Plans?' (n 12) 350-1; Thane (n 20) 244.

³³ A point made by Seebohm Rowntree: Russell (n 5), 28-9.

³⁴ Document entitled 'Statement of the Points we have Arrived at in Connection with the Proposed Pension Scheme', 6 May 1905, p2, Rowntree & Co Ltd Archive ('RCA'), R/DH/SR/10.

³⁵ Hannah (n 2) 24-5; Hannah, 'Why Employer-Based Pension Plans?' (n 12) 351-2.

³⁶ Cornish (n 7) 306; J Armour, 'Companies and Other Associations' in A Burrows (ed), *English Private Law* (Oxford, Oxford University Press, 2013) [3.99].

³⁷ Cornish (n 7) 309-10.

³⁸ Macnicol (n 16) 117.

³⁹ J. Melling, 'Welfare Capitalism and the Origins of Welfare States: British Industry, Workplace Welfare and Social Reform, c. 1870-1914' (1992) 17 *Social History* 453, 462-4.

⁴⁰ Hannah (n 2) 22.

⁴¹ Finance Act 1921, s 32(1).

common in the twentieth century. However, as the next section demonstrates, the trust relationship was far from absent in the pensions landscape before then.

III. THE TRUST AND PENSION PROVISION IN THE NINETEENTH CENTURY

(A) Collective provision by or on behalf of workers

(i) Livery companies - charitable trusts

During the eighteenth and nineteenth centuries, the livery companies offered financial support in old age to their members and the poor more generally. They did this either by acting as trustees of assets settled on them by donors for philanthropic purposes or by establishing pension trusts for their poorer members. In this way, their practices reflected those of their predecessors, the early modern craft guilds and differed from those of friendly societies, which operated a system of mutual insurance.⁴²

In some cases, livery companies acted as trustees of assets settled on them by donors for the benefit of their older members who had fallen on hard times. For example, in 1794 Samuel Whitbread (the brewer) gave to the Brewers Company land in Bedfordshire on trust 'as a perpetual Charitable provision for or towards the support and relief of decayed Master Brewers and their Widows,'⁴³ who were aged fifty and above and who as a result of losses in the brewing trade had 'come to decay or been reduced in circumstances' so as to require relief.⁴⁴ By a second indenture of the same date, he gave three houses in Whitecross Street to the Company upon trust to invest the rents after his death and apply them to make payments in support of poor freemen and their widows, 'particularly preferring such objects as shall be blind, lame, or afflicted with palsy, or very aged'.⁴⁵ The trustees had the power to collect the rents and profits from the land and houses, and after payment of tax and charges and payments to the livery company and its clerk, to invest the residue in public funds or government securities. The fund was to accumulate during Mr Whitbread's life but after his death the trustees held the residue for the purpose of making two half-yearly payments to one or two members of the class of objects, who were of good character and whom the Master and Court of Assistants (the Company's governing body) thought to be fit objects of support.

In other cases, livery companies would act as trustees of assets settled on them by donors for the benefit of poor and elderly members of the public. In 1813 John Baker transferred a number of annuities and government bonds to the Master and Wardens of the Company of Brewers upon trust to sell a sufficient part of them to purchase or build six cottages 'as an asylum for the dwelling and support of six poor widows or unmarried women of the age of fifty years or upwards' in Spitalfields.⁴⁶ The investment powers were similar: the trustees were to sell the stock and purchase the cottages or the land on which they were to be built, and to hold any surplus as an accumulating fund for the further support of the women. As trustee, the Company had a wide discretion as to who would benefit: to qualify, the women needed to have resided in the parish for five years, and be

⁴² P Wallis, 'Guilds and Mutual Protection in England', *Economic History Working Papers*, no 287, LSE, October 2018.

⁴³ Indenture of trust dated 26 March 1794, Samuel Whitbread's Charity Trust Deed and Minute Book ('Whitbread Indenture'), City of London Livery Company Archives ('CLLCA'), LCL/L/BF/G/129/MS05488, 1.

⁴⁴ *ibid* 7.

⁴⁵ Whitbread Indenture (n 43) 16.

⁴⁶ Indenture of trust dated 18 December 1813, John Baker's Charity, CLLCA, LCL/L/BF/G/018/MS18362.

‘of good life and conversation’, and they were to be ‘chosen elected and continued by and at the sole discretion of’ the Master, Wardens and Court of Assistants.

Occasionally, livery companies established their own trusts for the explicit purpose of providing pension benefits for their members: the trust established by the Master and Wardens of the Merchant Tailors Company on 6 July 1830⁴⁷ is an example. The indenture of trust records the resolution of the Master and Wardens to create a pension fund for ‘the benefit of such poor persons who are Members of the said Company or related to the Members thereof as the Court of Assistants of the said Company for the time being shall from time to time think proper to select’ To this end it paid £100 to four members of the Court of Assistants, who were to act as trustees. As in the case of the Whitbread and Baker trusts, the trustees were empowered to invest the fund in public stocks or at interest on government securities. The indenture records the expectation that some members of the company and others who were ‘willing to repose perfect confidence in the discretion of’ the Court of Assistants with respect to the disposition of the fund and its income and profits would contribute to the fund by way of donations and bequests. The fund was to be ‘under the absolute control’ of the Court of Assistants and the payment of pensions was entirely at their discretion.

As the clear primary intention of Messrs Whitbread and Baker appears to have been to relieve poverty, these are likely to have been valid charitable trusts, and they appear to have been treated as such.⁴⁸ And although not explicitly described as pension trusts, they are clearly directed at providing financial support to the aged poor. The way in which the Merchant Tailors indenture was drafted – with its emphasis on poor employees and their relations, and the inclusion of a 21-year limit on accumulations – suggests that it was also intended to be a valid charitable purpose trust.⁴⁹ There was, and is, no difficulty with the charitable status of employee poverty trusts *per se*.⁵⁰ However, exceptionally wide powers were reserved to the Company, as settlor, to direct how the trustees were to administer the fund, and to apply the fund for any other purposes they thought fit, other than expenditure on its own property, expenses or entertainment. Therefore, it is doubtful whether - by today’s standards, at least - its purposes could be said to have been exclusively charitable; if not, it would be void as a non-charitable purpose trust.⁵¹

None of the three trusts required contributions from the objects in exchange for the provision of benefits, and there was no sense in which the objects had any right to support: in all three cases the trustees had a broad discretion as to who would benefit, when and how. It is also notable that the investment powers of the trustees in all three trusts were narrowly drawn and extended only to investment in public funds or securities. This is consistent with the fact that at the beginning of the nineteenth century the investment powers of private trustees were tightly circumscribed by the Court of Chancery. The rule of thumb was not to put the trust property in jeopardy. For this reason, unless the trust instrument contained a clause expressly providing for wider investment powers, the only unequivocally accepted trust investments were government securities.⁵² It is unsurprising that self-styled charitable trustees adopted a similarly conservative investment policy.

⁴⁷ Deed of the Pension Fund of the Merchant Tailors Company, 6 July 1830, CLLCA, LCL/L/MD/G/043/MS34165.

⁴⁸ See: City of London Livery Companies’ Commission, *Report* (Command 4073, 1884) Vol V, 54, 55.

⁴⁹ Presumably in an effort to comply with the Accumulations Act 1800.

⁵⁰ *Dingle v Turner* [1972] AC 601; cf *AG v Charity Commission* [2012] WTLR 977 [57]-[59].

⁵¹ *Chichester Diocesan Fund v Simpson* [1944] AC 341.

⁵² C Stebbings, *The Private Trustee in Victorian England* (Cambridge, Cambridge University Press, 2001), 129-133.

(ii) Unincorporated associations and friendly societies – mutual insurance and private trusts

An additional method by which workers could provide collectively for a pension for themselves and, in case of their death, their dependants, was to establish funds through the legal mechanisms of unincorporated associations and friendly societies. These funds effectively operated as mutual insurance systems: in exchange for contributions members would receive sickness and funeral benefits and, occasionally, pension payments.

Originally, workers' funds were administered through unincorporated associations, which were managed by a committee of members, and whose assets were held by trustees. Subsequently, they were permitted to register themselves as friendly societies under a series of nineteenth century statutes, culminating in the Friendly Societies Act 1896. This made it a legal requirement that the assets be vested in trustees, in whose name any proceedings relating to those assets had to be brought. However, the Act also permitted them to sue and be sued in their own names, and at the turn of the twentieth century the courts appear to have treated friendly societies as having quasi-corporate status.⁵³ Friendly societies enjoyed state support in the form of tax exemptions,⁵⁴ and their membership was significantly larger than that of livery companies.

Although friendly societies mainly assisted their infirm elderly members through the provision of sickness benefit,⁵⁵ some also ran widows' and orphans' funds.⁵⁶ Members would contribute on the basis that after their death, the fund would pay out a lump sum and/or an annuity (effectively a widow's pension) to their wife and children. The extent to which employers were involved in these schemes varied: some had nothing to do with the scheme,⁵⁷ others made an initial capital contribution,⁵⁸ and some made regular contributions and were involved on an ongoing basis in matters to do with the fund.⁵⁹ Few friendly societies ran separate superannuation schemes,⁶⁰ but some better paid workers, such as railway employees, established friendly societies that did so.⁶¹ For example, the Great Western Railway Enginemen and Firemen's Mutual Assurance, Sick, and Superannuation Society was established in 1901⁶² to provide *inter alia* the payment of sick benefit to members, the payment of superannuation allowances to retired members, and the payment of

⁵³ Armour (n 36) [3.105].

⁵⁴ Johnson (n 17) 49.

⁵⁵ Macnicol (n 16) 116-119.

⁵⁶ Eg: The Trinity House Widows' and Orphans' Fund (established 1843) whose rules appear at London Metropolitan Archive ('LMA') CLC/526/MS30234 and MS30235; the Railway Unity Benevolent Fund for Widows and Orphans, whose rules may be found at PRO RAIL 1166/87; the Coal Meters' Benefit Society and Widows Aid Fund (established 1863), whose rules are at LMA CLC/B/052/MS10176; and the London Fire Brigade Widows' And Orphans' Friendly Society, whose rules appear at LMA ACC/1730-1.

⁵⁷ Eg the London Fire Brigade Fund.

⁵⁸ Eg the Trinity House Fund.

⁵⁹ Eg the Coal Meters' Benefit Society.

⁶⁰ Two notable exceptions were the Manchester Unity and the Ancient Order of Foresters, which had separate superannuation funds, but the uptake by members in each case was under one per cent: J Treble, 'The Attitudes of Friendly Societies Towards the Movement in Great Britain for State Pensions, 1878-1908' (1970) 15 *International Review of Social History* 266, 278-9.

⁶¹ Hannah (n 2) 14.

⁶² Rules of the Great Western Railway Enginemen and Firemen's Mutual Assurance Sick & Superannuation Society (1901), clause I, Public Records Office ('PRO') RAIL 1174/7.

allowances to widows and orphans of deceased members.⁶³ The objects were to be funded by members' contributions and donations, including contributions from the employer.⁶⁴

For present purposes, the important point is that the business of an unincorporated association or friendly society was carried out by a committee of its members, whilst its assets vested in trustees nominated under the institution's constitution to be held on behalf of the society and its members.⁶⁵ As a matter of law, the rights of the members *inter se* were governed by the constitution and the express or implied contractual arrangements between them.⁶⁶ Thus, the private trust facilitated the creation of a fund into which members' contributions were paid, and from which sickness and funeral benefit, widows' pensions and, occasionally, superannuation allowances could be paid.

(B) Collective provision involving employers

(i) British public sector schemes

The civil service superannuation scheme was one of the earliest and biggest employer-sponsored pension schemes in Britain: for most of its life, the scheme was non-contributory, and trusts law did not feature in its operation. In 1810 an Act conferred a power on the Treasury to pay superannuation allowances to civil servants generally.⁶⁷ To reduce public expenditure,⁶⁸ deductions were made from civil servants' salaries during a brief period between 1822⁶⁹ and 1824.⁷⁰ Thereafter, the scheme was non-contributory and funded entirely by the Treasury.

To make cost savings, the Superannuation Act 1834⁷¹ reduced the scales of superannuation allowances.⁷² It also reintroduced contributions by providing that the salaries of new officers entering the civil service after 1829 would be subject to an 'abatement' in respect of superannuations, the amount to be decided by the Treasury.⁷³ However, it made no provision for the establishment of a superannuation fund into which deductions from salaries were to be paid. Thus, the system implied that a percentage of civil servants' salaries was being held back by the Government and paid into a separate superannuation fund, when this was not the case.

In 1857 a Royal Commission reported on the operation of the system established by the 1834 Act.⁷⁴ The Commissioners rejected the suggestion that a superannuation fund should be established to which civil servants would have to contribute and for the administration of which the Treasury would have been directly responsible. Its reasons for this view included *inter alia* the fact that were the fund to run a surplus, difficult questions would arise as to 'the equitable appropriation of that

⁶³ *ibid* clause ii. The detailed provisions relating to the different benefits are set out in clause ix-xiii.

⁶⁴ *ibid* clause ii. There was also a separate superannuation fund for non-salaried servants of the company.

⁶⁵ See eg clauses 17-18 of the Rules of the Trinity House Fund, clauses viii, ix and xiii of the rules of the Coal Meters' Fund, clauses 5 and 19 of the London Fire Brigade Fund (n 56), and clauses xiv, xv and xxv of the rules of the Great Western Railway Enginemens and Firemen's Society (n 62).

⁶⁶ *Re Bucks Constabulary Widows and Orphans Fund Friendly Society (No 2)* [1979] 1 WLR 936 (Ch).

⁶⁷ 50 Geo 3 c 117, 21 June 1810; Thane (n 20) 239; Raphael (n 1) 132-135.

⁶⁸ Treasury Minute, dated 10 August 1821, Royal Mail Archive ('RMA'), Post 66/2.

⁶⁹ Contributions were introduced by 3 Geo 4 c 113, 5 August 1822; Raphael (n 1), 139.

⁷⁰ Contributions were abolished by 5 Geo 4 c 104, 24 June 1824; Raphael (n 1), 141-2.

⁷¹ 4 & 5 W 4 c 4, 24, 25 July 1834.

⁷² *ibid* s 9.

⁷³ *ibid* s 27.

⁷⁴ Board of Trade, *Report of Commissioners Appointed to Inquire into the Operation of the Superannuation Act (1857)* ('*Report into the Superannuation Act*'), RMA, Post 66/12.

surplus'.⁷⁵ The Commissioners recommended that the system of abatement be abolished, as it gave the misleading impression that a fund existed 'to which each Civil Servant has contributed, and in which he, therefore, may be supposed to possess a certain right of property.'⁷⁶ This was thought likely to produce a sense of hardship, and it also raised questions as to the sufficiency of the superannuation allowances paid by the Treasury as an equivalent for the deductions paid. The Commissioners' comments implicitly suggest that in their view a true contributory scheme would require the payment of employees' contributions into a separate fund, in which the employees would have some sort of property right, and which presumably would be held by the Treasury as trustee. However, following the Commissioners' recommendation that *no* such fund be established, the abatement system was abolished in 1857.⁷⁷

Two years later the Superannuation Act 1859 introduced a revamped non-contributory scheme and repealed some (but not all⁷⁸) of the 1834 Act. For the rest of the nineteenth century, the civil service scheme provided pensions to civil servants (but not their dependents) on a non-contributory and wholly discretionary basis. Under the 1859 Act it was unlawful for the Treasury to grant a superannuation allowance unless satisfied that the individual civil servant had served with diligence and fidelity.⁷⁹ Section 30 of the 1834 Act survived and expressly stipulated that nothing in the Act 'shall extend or be construed to extend to give any Person an absolute Right to Compensation for past Services, or to any Superannuation or Retiring Allowance ...' The courts held that although civil servants could rely on the expectation of an allowance with reasonable certainty, they did not have any contractual *right* to a pension: allowances under the scheme were discretionary gratuities, paid out of the bounty of the Crown.⁸⁰ They interpreted s 30 of the 1834 Act very strictly and refused to correct mistakes made by the Treasury in calculating superannuation allowances.⁸¹ As civil service pensions were discretionary and, if granted, wholly funded by the Treasury out of its own coffers, the scheme could function effectively without recourse to the legal mechanism of the trust.

When superannuation was extended to other public sector employees towards the end of the nineteenth century, some of the schemes were contributory, involved the establishment of a fund and implicitly recognised the trust as the legal mechanism which underpinned the administration of that fund. Moreover, the state (as employer) and the courts were prepared to treat these schemes as generating pension entitlements for employees rather than operating on an *ex gratia* basis. For example, as part of the professionalisation and centralisation of the county police forces, the Police Act 1890 introduced a nationwide contributory superannuation scheme for police officers.⁸² For the first time,⁸³ every police constable had a right to a pension (a maximum of two thirds of the weekly

⁷⁵ *ibid* xii.

⁷⁶ *ibid* xiv.

⁷⁷ Superannuation Act 1857.

⁷⁸ Superannuation Act 1859, s 19.

⁷⁹ *ibid* ss 9-10.

⁸⁰ *Considine v McInerney* [1916] 2 AC 162 (HL), 170 (Lord Buckmaster), 171 (Lord Loreburn), 174 (Lord Atkinson); *Nixon v Attorney General* [1931] AC 184 (HL). Nevertheless, once the pensioner had retired and was receiving a pension for past services, the pension constituted 'property' in the sense that it was assignable and could be seized by a bankrupt's creditors: *Wilcock v Terrell* (1878) 3 Ex D 323 (CA), 334 (Cotton LJ, citing *Wells v Foster* 8 M & W 149, 152; 151 ER 987); *Re Huggins* (1882) 21 Ch D 85 (CA).

⁸¹ *Cooper v The Queen* (1880) 14 Ch D 311 (Ch); *Yorke v The King* [1915] 1 KB 852 (KB).

⁸² Cornish (n 7) 594-5.

⁸³ *Garbutt v Durham Joint Committee* [1904] 2 KB 514 (CA), 523 (Collins MR).

wage) on the completion of 25 years' approved service.⁸⁴ Provision was also made for their widows and children in case of their death.⁸⁵ These generous terms encouraged police officers to remain in service.⁸⁶ Contributions were to be deducted from salary and carried to a pension fund,⁸⁷ which was to be established by every police force.⁸⁸ The Act provided that the pension funds of police forces should be kept separately, and that the treasurer of each force would act as the treasurer of its fund.⁸⁹ These funds were guaranteed by the police force, with any deficiencies to be met out of the general police fund.⁹⁰ The Act directed that at the end of each financial year the surplus of the annual income of each pension fund should be invested 'in such name as the police authority direct, and in any manner authorised by law for investments by trustees.'⁹¹

The contributory pension scheme established by the Poor Law Officers' Superannuation Act 1896 did not provide for the establishment of a separate superannuation fund: instead contributions were to be made to and pensions paid from the common fund of the union (out of which salaries were paid).⁹² Nevertheless, the courts appeared to take the view that the scheme conferred pension rights on Poor Law officers. In *Guardians of the Poor of Salford Union v Dewhurst*⁹³ the House of Lords had to consider whether it was possible for the employer to contract out of the Act in respect of certain officers. They concluded that the language of the Act precluded this. Section 2 provided that every officer and servant, on reaching the relevant retirement age or being no longer capable of performing his duties, 'shall be entitled ... to receive during life out of the common fund of the union, a superannuation allowance according to the scale laid down in this Act.' Viscount Cave LC interpreted this as a command to the public authority to provide pensions. Section 12 imposed an obligation on employees to contribute to the scheme, while s 10 stated that every superannuation allowance granted under the Act would be 'payable to or in trust for the officer or servant' and would not be assignable or chargeable with his debts or other liabilities. Both Lord Shaw and Lord Parmoor⁹⁴ set great store by s 10 as militating against the conclusion that the employer could contract out of the grant of the pension in the first place. Lord Shaw held that the obligation to contribute under s 12 had its 'practical correlative in the ticketing or earmarking of the funds so contributed in the common fund of the guardians', and that s 10 provided a clear declaration that pensions would be paid to or in trust for the officers.⁹⁵ This view is consistent with the idea that the earmarked contributions in the common fund were held on trust by the employer to provide pensions to officers.

Subsequently, the House of Lords confirmed that the Poor Law scheme generated an inalienable vested right to a pension.⁹⁶ This right was obviously subject to the satisfaction of conditions precedent set by the employment contract and/or the relevant statute or instrument establishing

⁸⁴ Police Act 1890, s 1.

⁸⁵ *ibid* s 2.

⁸⁶ H. Shpayer-Makov, 'The Making of a Police Labour Force' (1990) 24 *Journal of Social History* 109, 112-113.

⁸⁷ Police Act 1890, s 15.

⁸⁸ *ibid* s 16.

⁸⁹ *ibid* s 18(1) and (2).

⁹⁰ *ibid* s 19.

⁹¹ *ibid* s 18(3).

⁹² Poor Law Officers' Superannuation Act 1896, sections 2, 12 and 19.

⁹³ *Guardians of the Poor of Salford Union v Dewhurst* [1926] AC 619 (HL).

⁹⁴ *ibid* 635-6.

⁹⁵ *ibid* 627-8.

⁹⁶ *Gissing v Liverpool Corporation* [1935] Ch 1 (HL), 24 (Lord Hanworth MR).

the scheme. Members were entitled to draw down a pension on retirement only if they had completed the requisite number of years' service and contributed as required. Furthermore, both the police and Poor Law pensions could be forfeited in cases of fraud or grave misconduct,⁹⁷ and leavers were not automatically entitled to a refund of their own contributions if they left the scheme.⁹⁸ Thus, although by the end of the nineteenth century the idea of pension 'rights' was taking hold in relation to contributory schemes in the public sector,⁹⁹ such rights were not unqualified, nor were they universal.¹⁰⁰

(ii) The Bengal, Madras and Bombay Annuity Funds

By the late eighteenth century, the East India Company had become a significant land power in India, which exercised civil and military governmental functions in different regions, such as Bengal, Madras and Bombay,¹⁰¹ and by the early nineteenth century the Company had the power to grant pensions to its civil servants in England,¹⁰² as well as those servants overseas.¹⁰³ However, such pensions were discretionary,¹⁰⁴ and the Company's civil servants in India were not, and had not been previously, entitled to any allowances on retirement.¹⁰⁵

In the early 1800s some enterprising civil servants in Madras and Bombay organised collective benefit schemes for themselves, to which they persuaded the Company to contribute.¹⁰⁶ The Madras Civil Fund was established by deed poll in 1787 to provide subsistence to the widows and children of members who might die 'in circumstances of indigence and distress' and members who had fallen on hard times and were not provided for by the Company.¹⁰⁷ The civil servants contributed to the fund, and the Company also made an annual donation.¹⁰⁸ By deed poll dated 1 September 1800, the fund was augmented and its objects enlarged to include the purpose of providing annuities to civil servants who wished to retire. The Company also increased its contribution to the fund.¹⁰⁹ The Bombay Civil Service Fund developed in a similar way. In 1804, some Bombay civil servants set up an association to assist those who had to resign on the ground of ill-health or whose dependants might

⁹⁷ Police Act 1890, s 8; Poor Law Officers Superannuation Act 1896, s 7.

⁹⁸ See: Police Act 1890, s 20; and Poor Law Officers Superannuation Act 1896, s 8.

⁹⁹ Eg *Watts v Manchester Corporation* [1917] 1 KB 791 (CA), 793 (Lord Cozens-Hardy MR), 797 (AT Lawrence J) (Fire Brigade pension scheme).

¹⁰⁰ Other schemes still stipulated that pensions did not form part of the employment contract and were construed accordingly: eg *Admiralty Commissioners v SS Amerika* [1917] AC 38 (HL); *Baker v Dalgleish Steam Shipping Co Ltd* [1922] 1 KB 351 (CA).

¹⁰¹ M Moir, *A General Guide to the India Office Records* (London, The British Library, 1988), 15-18.

¹⁰² 53 Geo 3 c 153, 1813.

¹⁰³ *Gibson v East India Co* [1839] 5 Bing (NC) 262; 132 ER 1105 (military pensions).

¹⁰⁴ *ibid*.

¹⁰⁵ Despatch from the Court of Directors to the Governor of Madras, dated 31st December 1824, 859, India Office Records ('IOR'), E/4/930.

¹⁰⁶ Little in the way of fund documentation appears to have survived. What follows is taken largely from the Madras Civil Fund Deeds dated 1 July 1814 and 1 May 1818 and the Rules of the Civil Service Annuity Fund dated 1 May 1825, published 1838 (hereinafter 'Madras Civil Fund Deeds'), IOR/Tr.31.d, 1838, and the detailed description of the organisation of the Madras and Bengal funds which appears in *East India Co v Robertson* (1859) 12 Moo PC 400; 14 ER 963. The operation of the Bombay scheme is described in *Edwards v Warden* (1876) 1 App Cas 281 (HL).

¹⁰⁷ Preamble to the 1814 Deed, Madras Civil Fund Deeds (n 106) 1.

¹⁰⁸ *ibid* 2.

¹⁰⁹ *ibid* 4.

be left unprovided for after their death in service. The committee of managers of the association acted as trustees of the fund. The Company made donations to the fund and eventually the original scheme expanded its objects to provide annuities for those who wanted to retire.

Subsequently, the Madras civil servants wished to separate out the charity and annuity branches of their fund, and to increase the number of annuitants, and this was achieved by two further deed polls in 1814 and 1818.¹¹⁰ The 1814 deed¹¹¹ assigned the joint capital stock of the fund to trustees, five-eighths of which was to be held on trust for the charitable objects (i.e., provision for widows and children, etc) and three-eighths of which was to be held on trust to provide annuities for members. There were to be seven trustees, five of whom were to be elected annually from the body of civil servants, and two of whom were to hold office *ex officio*. A treasurer was appointed. Consistently with the narrow investment powers of trustees in the early eighteenth century, all monies belonging to the fund were to be invested in government securities or kept in the public Treasury.¹¹² It was envisaged that 23 annuities of £400 would be provided each year, and a capital sum was to be raised for this purpose through a combination of the three-eighths of capital from the previous funds, interest, and contributions from the members and the Company. Initially, membership of the fund was not compulsory for civil servants, although it became so in 1823.¹¹³ Those who were dismissed from the Company's service were entitled to a refund of their contributions, but those who voluntarily ceased to subscribe forfeited their subscriptions and all future rights and benefits to which they would otherwise have been entitled.

The early incarnations of the Madras and Bombay Funds look like pension funds run by unincorporated associations of civil servants for themselves, to which the Company donated on a regular basis. The Company was not a party to deeds establishing the Madras Fund, its contributions were gratuitous and it was not represented on the board of trustees,¹¹⁴ and there is no suggestion in the authorities¹¹⁵ that it was a party to the Bombay Fund deed either. However, this changed in 1824, when the Company received a request from its civil servants in Bengal to establish an annuity fund for them. The Company acceded to the proposal, and it took the opportunity to standardise the provision of retirement allowances across its civil service in all three regions.

In a Despatch to the Government of India¹¹⁶ ('the Despatch') the Company stated that it had resolved that an annuity fund be formed in Bengal to 'afford a reasonable expectation that at the end of twenty-five years from the date of appointment to the service, a civil servant ... would obtain the offer of an annuity.'¹¹⁷ The Despatch set out the proposed terms of the Bengal scheme. Membership was to be compulsory. The aim was to build up a capital sum which after 25 years would generate an income sufficient to pay up to nine annuities of £1,000 per year to be offered to civil servants on the basis of seniority. The fund was to be constituted out of contributions from the

¹¹⁰ *East India Co v Robertson* (n 106) 403.

¹¹¹ The general provisions of the 1814 deed are set out in *Madras Civil Fund Deeds* (n 106) pp 9-34, and the provisions of the Annuity Branch at pp 70-85. The 1818 deed provided for an increase in the number and value of the annuities and the contribution rate.

¹¹² Paras 56 and 57 of the 1814 and 1818 deeds, *Madras Civil Fund Deeds* (n 106).

¹¹³ See para 31 of the 1814 Deed, *Madras Civil Fund Deeds* (n 106) 21.

¹¹⁴ *Secretary of State for India v Underwood* (1869-70) LR 4 HL 580 (HL), 584 (Lord Hatherley).

¹¹⁵ *Boldero v East India Co* (1865) 11 HL Cas (Clark's) 405; 11 ER 1390.

¹¹⁶ The terms of the Despatch dated 8 December 1824 and the Bengal scheme rules attached to it are discussed in detail in *East India Co v Robertson* (n 106), 408 et seq, and discussed in *Boldero v East India Co* (n 115).

¹¹⁷ *East India Co v Robertson* (n 106) 410.

civil servants at a rate of four per cent on their salaries during their whole period of service, which were to be matched by an annual contribution from the Company. If by the time a subscriber was offered an annuity, his contributions had not amounted to half the capital value of the annuity, he was obligated to pay the difference.¹¹⁸ The calculations suggested that, together with accumulated interest, the contributions from members and the Company would produce a balance every year beyond what was necessary for securing the annuities. Quinquennial adjustments were to be made to the balance of the fund, whereby the Company would make good any shortfall and its contributions would be reduced by the value of any surplus. After 25 years a final adjustment was to be made, which would leave the Company contributing only the difference between the sum of the civil servants' contributions and the income of the fund, on the one hand, and the sum necessary to secure the regular payment of the annuities on the other.¹¹⁹ In this way, the Company was virtually guaranteeing the number of annuities per year, but its contribution was limited to the accomplishment of that object.¹²⁰ The fund was to be managed by a committee of nine civil servants, of whom four were ex officio, and a treasurer was to be appointed. The rules stated that 'all money and securities for money, belonging to the fund in India' were to be kept in the public treasury, 'subject to the direction and control of the trustees and managers of the fund.'¹²¹ The direction as to investment in public securities, which had featured in the earlier Madras Fund rules, was absent.

The Company sent the rules of the Bengal scheme to the Madras government¹²² and invited the Madras civil servants to change the rules of their funds to bring them into line with the Bengal scheme, so that they could benefit from the more generous terms that the Bengal scheme offered. The Madras civil servants agreed and the Madras Civil Service Annuity Fund was established on 1 May 1825. The rules were derived from the Bengal scheme, modified only to the extent necessary to deal with the existence of the earlier Madras funds and any extant obligations.¹²³ In the same year the Bombay Fund was also remodelled along similar lines. The provision for widows and children was to be given only to those who were not adequately provided for: every widow was to be entitled to a pension of £300 per year, but if she had other property her pension was to be reduced proportionately so that the income should not exceed £500 per year.

A series of mid-nineteenth century cases gives some insight into the courts' interpretation of the three funds after 1825. First, they regarded the fund as creating trusts for persons, of which both the members of the scheme and anyone else intended to benefit were *cestuis que trustent*. In *Edwards v Warden*¹²⁴ the daughter of a Bombay civil servant sought an order for an account on the basis that she and her late mother had been entitled to annuities from the date of her late father's death. The managers of the fund argued *inter alia* that they were not trustees for the widow and daughter but only for the association of civil servants which had been established when the fund was created. On this basis, they alleged that the daughter's claim was time-barred. The Court of Appeal accepted this argument. James LJ held that the case was indistinguishable from that of a mutual assurance society, and that there was no fiduciary relationship between such a body or its

¹¹⁸ *Boldero v East India Co* (n 106) 410 (Lord Westbury LC).

¹¹⁹ *ibid* 421 (Lord Westbury LC).

¹²⁰ *East India Co v Robertson* (n 106) 415 (Turner LJ).

¹²¹ *ibid* 419 (Turner LJ), quoting rule 21 of the Bengal Fund.

¹²² Despatch dated 31 December 1824 to the Governor of Madras (n 105) 859.

¹²³ *East India Co v Robertson* (n 106) 452-3 (Turner LJ). The Rules of the 1825 Madras Fund appear at Madras Civil Fund Deeds (n 106) 95-103.

¹²⁴ *Edwards v Warden* (n 106).

trustees and the grantee of an annuity.¹²⁵ Instead, under the contract among the members of the Fund, provision could be made for widows and children, but they were not themselves *cestuis que trustent*.¹²⁶ The House of Lords reversed the Court of Appeal's decision on this point. In reaching this conclusion, they had regard to the regulations of the Fund, which provided that the fund 'shall be applicable to the payment of all demands arising from' the first objects of the institution, which included provision for widows and children, and that every widow 'shall be entitled' to receive a pension not exceeding £300. The Court was satisfied that the whole property of the fund was vested in the committee of managers as trustees, not just for the association, but for widow and daughters as objects of the Fund.¹²⁷ As the relevant limitation period did not apply to a claim by a beneficiary against a trustee, the daughter's claim was not time-barred, although her late mother's delay in applying for an annuity counted against her, and the daughter's entitlement was reduced accordingly.

Second, the Company was also regarded as a beneficiary of the trusts on which the Funds were held. In *East India Co v Robertson*¹²⁸ Mr Robertson, a subscriber to the 1825 Madras Fund, claimed a refund of his contributions to the extent that they exceeded half the value of his annuity. The Privy Council rejected his claim that the rules of the Madras Fund or the rules of the Bengal Fund on which they were based provided for a refund of excess contributions. Nevertheless, it accepted the argument that he had become entitled to a refund through a course of dealing. The trustees had been granting refunds to new annuitants in Madras and Bombay since 1834, and in 1838 they amended the Madras fund rules to make this explicit. Initially, the Company received the accounts showing these refunds and learned about the publication of the 1838 rules without objection.¹²⁹ Subsequently, in 1850, it recommended that the Madras and Bombay Fund rules should be amended to abolish the practice of granting refunds. In 1853 the subscribers of the 1825 Madras Fund adopted new rules abolishing the grant of refunds.¹³⁰ Mr. Robertson made his claim to an annuity in 1852, i.e., before the new rules had been adopted.

Turner LJ held that because the Company was responsible for making good any shortfall between contributions and annuities, it had 'a direct and immediate interest in the application of the funds by the trustees. The trustees were responsible, not merely to the subscribers, but to the Company, for the due application of the fund.'¹³¹ It had a right to call for the accounts and check them. Therefore, there was no doubt that the Company had sanctioned the refunds which had been made. In his view, the Company stood 'in the position of the ultimate beneficiaries of the fund with which we have, in this case, to deal, subject to prior trusts for the benefit of the subscribers.'¹³² The practice of

¹²⁵ *Edwards v Warden* (1873-4) LR 9 Ch App 495 (CA), 505.

¹²⁶ *Edwards v Warden* (n 106) 292 (Lord Cairns LC).

¹²⁷ *ibid* 293 (Lord Cairns LC), 297 (Lord Chelmsford), 391 (Lord Hatherley).

¹²⁸ *East India Co v Robertson* (n 106).

¹²⁹ *ibid* 458, 463.

¹³⁰ *ibid* 439-444.

¹³¹ *ibid* 434-435, 458.

¹³² *ibid* 462. The modern view of the position of the employer is slightly different. The employer may benefit indirectly from the fund, such as where a surplus is held on resulting trust for it and the scheme members: *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399 (HL). And although scheme trustees do not owe fiduciary duties to the employer, provided they have regard to the primary purpose of the scheme they may also have regard to the employer's interests: *Keymed (Medical and Industrial Equipment) Ltd v Hillman* [2019] EWHC 485 (Ch), [119] (Marcus Smith J). See also *Re Merchant Navy Ratings Pension Fund* [2015] EWHC 488 (Ch), and C.

granting refunds was a breach of trust in which the Company concurred, and thus it was precluded by its conduct from disputing Mr Robertson's claim.¹³³

Although the Funds had now begun to look more like modern occupational pension trusts, there were still some differences. The Company was closely involved but it was not represented on the committee of trustees, nor was it involved in scheme administration or management. Furthermore, the extent to which the courts regarded the Funds as giving the civil servants enforceable rights against the Company is unclear. The Fund documents and regulations do not appear to have contained any stipulation that the payment of pensions was discretionary or dependent on good conduct.¹³⁴ The Despatch clearly indicates the Company's view that civil servants should have the reasonable expectation of a pension after 25 years' service. Yet judicial opinion differed as to whether the Company was contractually bound by the terms of the Bengal and 1825 Madras Funds. For example, in *Boldero v East India Co*¹³⁵ Mr Boldero sought to recover from the Company a refund of his excess contributions to the Bengal Fund. Unlike in Madras and Bombay, the trustees of the Bengal Fund had not engaged in the practice of granting refunds to subscribers. The Privy Council rejected Mr. Boldero's claim. Lords Westbury, Hanbury and Cranworth seemed to regard the Despatch as creating a contract between the directors of the Company and the subscribers,¹³⁶ although they rejected the argument that the fund documentation gave the subscribers any enforceable right to a refund. Lord Chelmsford took a different view. He noted that if the company had declined to donate to the fund, the subscribers would have had to have provided the entire cost of the annuities themselves. For this reason, the Despatch 'merely signified the directors' approval of the scheme and 'their willingness to promote it by a donation from their own funds.'¹³⁷

(iii) Railway superannuation funds

Railway superannuation schemes proliferated during the second half of the nineteenth century, and although the typical railway scheme had a statutory basis,¹³⁸ the language of trusteeship is apparent in the founding documents of some schemes and it is arguable that at least in some cases the trust relationship was relevant to their operation. In 1853 the London and North Western Railway Company ('LNWR') Superannuation Fund Association was established by deed poll.¹³⁹ The following year, the company promulgated a private act of parliament¹⁴⁰ by which it bound itself to observe the rules of the fund and carry out the scheme. In 1872 the London and Brighton South Coast Railway

Nugee, 'The Duties of Pension Scheme Trustees to the Employer – Revisited' (2015) 29 *Trust Law International* 59. I am very grateful to David Pollard QC for drawing this point to my attention.

¹³³ *ibid* 464-466.

¹³⁴ The Madras Fund documentation does not contain any stipulation. The Bengal and Bombay Fund rules were not available in the East India Company archives, but nothing in the authorities discussing those funds suggests that they contained such restrictions.

¹³⁵ *Boldero v The Directors of the East India Company* (n 115).

¹³⁶ *Ibid* 409, 411, 419 and 422. For a similar view, *Secretary of State for India v Underwood* (n 114), 584, 586 (Lord Hatherley, who dissented on the merits).

¹³⁷ *ibid* 434.

¹³⁸ See Hannah (n 2) 10. Railway companies and other companies who engaged in activities of a quasi-public nature were incorporated by statute. See *Armour* (n 36) [3.36].

¹³⁹ Extract from the Deed Poll Declaring the Constitution and Regulation of the Superannuation Fund Association of the London and Northwestern Railway Company, *Report into the Superannuation Act* (n 74), App IV, pp 33-34.

¹⁴⁰ The London and North-western Railway Act 1854 ('LNWR Act 1854'), ss 26-28, PA, 17 & 18 Vic., *Cap. cci*. The LNWR scheme rules appear in the Schedule to the Act.

Company ('LBSCR') was established, and in 1874 it was put on a statutory footing.¹⁴¹ Having obtained prior statutory authorisation, in 1882 and 1907 respectively the North Eastern Railway Company ('NER')¹⁴² and the Metropolitan Railway Company ('Metropolitan')¹⁴³ established their own funds. The operation of these four schemes is considered below.

All four schemes were contributory, and their purpose was to provide contributing members with *inter alia* a superannuation allowance, which could be drawn down upon retirement at a certain age: usually 60¹⁴⁴ or 65.¹⁴⁵ The employees contributed 2.5% of their annual salary¹⁴⁶ or a fixed weekly contribution¹⁴⁷ to the scheme by way of salary deduction, which the Company bound itself to match with an equivalent sum. To begin with, the LNWR, LBSCR and NER schemes were open only to salaried staff, but in 1899 the LBSCR extended its scheme to all classes of servants of the company.¹⁴⁸ The Metropolitan scheme was for waged staff only; since 1893 its staff had been subscribing to the Railway Clearing System Superannuation Fund, a contributory scheme which was open to salaried staff of any railway company. Each scheme was managed by a committee, on which both the company itself and the members of the scheme were represented, but the extent of employee representation varied. The company and members had equal representation on the LNWR and NER managing committees.¹⁴⁹ When the LBSCR was first established, the 'sole management and direction of the fund' was vested in the directors. This changed on revision of the scheme rules in 1899:¹⁵⁰ from then on the Pension Fund was 'to be administered by and be under the management control and regulation of a management committee', of whom only two were elected by the members.¹⁵¹ The company also had majority representation on the Metropolitan scheme committee.¹⁵²

Although the LNWR scheme began as an unincorporated association, while the NER and LBSCR funds were established by the company, all three schemes shared some of the features of the more sophisticated occupational pension schemes adopted by large employers in the early twentieth century. Importantly, the employer was not simply a discretionary donor: it was a party to the scheme and was statutorily bound to match the employees' contributions. It also took an active role in the management of the scheme through its presence on the committee. The schemes were generous to early leavers, and they also made provision for the grant of benefits to those retiring early through ill-health and for the refund of contributions and/or one-off payments to the dependants of a member who died in service. What is more, because ultimately the LNWR and

¹⁴¹ The London Brighton and South Coast Railway Act 1874 ('LBSCR Act 1874'), s 18, PA, 37 & 38 Vict, Ch. Liv. The fund regulations ('LBSCR Fund Regulations 1872') appear in the schedule to the Act.

¹⁴² The North Eastern Railway Company Act 1878 ('NER Act'), Parliamentary Archives ('PA'), 41 & V2 Vict, Ch. Ccv; The North Eastern Railway Superannuation Fund ('NER Fund Rules') (York, 1881), RCA, R/B6/21.

¹⁴³ The Metropolitan Railway (Pension Fund) Act 1907 ('the Metropolitan Act') and Scheme for the Management of the Pension Fund and Rules ('Metropolitan Scheme Rules'), Transport For London Archive ('TFLA'), LT 443/184.

¹⁴⁴ NER Fund Rules (n 142), clause 19; LBSCR Fund Regulations 1872 (n 141), clause 9.

¹⁴⁵ LNWR Scheme Rules (n 140), clause 8; Metropolitan Scheme Rules (n 143), clause 5.

¹⁴⁶ LNWR Scheme Rules (n 140), clauses 1 and 2; NER Fund Rules (n 142), clauses 6 and 10; LBSCR Fund Regulations 1872 (n 141), clauses 14-15.

¹⁴⁷ Metropolitan Scheme Rules (n 143), clause 6.

¹⁴⁸ The London Brighton and South Coast Railway (Pensions) Act 1899, recitals and ss 1-4.

¹⁴⁹ LNWR Scheme rules (n 140), clause 17; NER Fund Rules (n 142), clause 23.

¹⁵⁰ LBSCR Fund Regulations 1872 (n 141) clause 16.

¹⁵¹ LBSCR Act 1899, section 11.

¹⁵² Metropolitan Scheme Rules (n 143), clause 26.

LBSCR undertook to make good any deficiencies in their schemes,¹⁵³ these companies effectively gave their employees a guaranteed right to a pension contingent upon payment of their contributions.

The language of trusteeship is apparent in the fund documentation of all four schemes. The committee responsible for the establishment of the LNWR scheme requested the chairman and deputy chairman of the company for the time being and two other individuals to act as trustees for the fund.¹⁵⁴ The deed poll establishing the scheme stipulated that all monies constituting the fund of the association were to be 'accumulated at interest in the hands and under the trust of the Company' at the average rate of interest paid on the Company's bond, which was to be 'carried to the credit of the fund' on a half-yearly basis.¹⁵⁵ When the scheme was revised in 1907, the wording changed slightly: the funds were to be 'accumulated and invested in the hands and under the trust of the company'.¹⁵⁶ The NER scheme rules stated that 'the fund shall be invested on loan to the Company as trustees thereof, bearing interest at the rate of 4 per cent. per annum', and the interest was to be 'carried to the credit of the fund' on a half-yearly basis.¹⁵⁷ The original LBSCR scheme rules contained identical wording.¹⁵⁸ When the LBSCR rules were revised in 1899, the original fund was merged into a new Pension Fund for all classes of employees,¹⁵⁹ and the revised rules stated that from then on:

[A]ll moneys property and assets then belonging to or standing to the credit of the old fund shall be transferred to and thenceforth remain and be in the hands of the Company upon trust for the purposes of the Pension Fund ...¹⁶⁰

In addition to guaranteeing to make good any deficiency in the fund, the company also undertook to hold any surplus 'upon trust as part of the capital of the Pension Fund and such surplus ... shall carry interest as aforesaid.'¹⁶¹

The question arises as to the nature of these 'trust' arrangements involving the company: was the company really a trustee of the fund or did the committee invest the fund by lending it to the company so that the 'trust' was in fact a security device, such as a fixed or floating charge over profits or assets granted by the company?

It seems likely that each company would have had legal title to both its own and the members' contributions to the fund at the outset, as the latter were paid by way of deduction from salary. The directors of the LBSCR were responsible for the management and direction of its original fund, and so it must be the case that once the fund was established they simply retained legal title to the fund monies. The LNWR and NER funds were managed by committees, but as the rules stipulated from

¹⁵³ See LBSCR Act 1899, s 6; Memorandum dated April 24th 1906 of the London and North Western Railway Superannuation Fund Association, PRO RAIL 410/2052; and London and North Western Railway (Pension Fund) Act 1907 ('LNWR Act 1907'), ss 4 and 7.

¹⁵⁴ Minutes of Meeting, April 8th 1853, LNWR Superannuation Fund, Minutes of General Committee (No. 1), PRO, RAIL 1174/84, p1.

¹⁵⁵ LNWR Scheme Rules (n 140), clause 16.

¹⁵⁶ Schedule to the LNWR Act 1907, p 6.

¹⁵⁷ NER Fund Rules (n 142), clause 74; and clause 71 of the NER Fund Rules 1907, PRO, RAIL 526/1193

¹⁵⁸ LBSCR Fund Regulations 1872 (n 141), clause 18.

¹⁵⁹ LBSCR Act 1899, recitals and s 1.

¹⁶⁰ *ibid* s 4.

¹⁶¹ *ibid* s 6(2).

the outset that the funds were to be invested with the companies, it seems more likely that from the outset the companies themselves also retained legal title to the funds.

The language used by the managing committees of the LNWR and NER funds to describe the current balance of the fund is inconclusive. For example, the minutes of the managing committee of the LNWR fund variously refer to 'the Balance due from the Company to the Society',¹⁶² 'the Balance in the hands of the Company',¹⁶³ and 'the Balance belonging to the Association in the hands of the London and North Western Railway Company at interest'.¹⁶⁴ The NER fund's own statements of account refer to 'balance in hand, North Eastern Railway Company'.¹⁶⁵

The treatment of the three superannuation funds in the company accounts suggests that each fund was intended to be held separately from the company's other liabilities and assets. In the case of the LNWR and NER schemes, the company's contribution to the fund was recorded under general charges in the revenue account.¹⁶⁶ The value of the superannuation fund itself appeared as a separate liability in the general balance sheet, eg '[T]o Superannuation Fund',¹⁶⁷ or '[T]o Benevolent and Superannuation Funds',¹⁶⁸ which stood alongside other liabilities, such as the balance due to the capital and revenue accounts, outstanding dividend balances and interest, debenture interest accruing, debts owed to other companies, and other funds such as savings and provident funds and fire insurance funds. By the late 1890s the LBSCR had separate sections in its accounts to track debits and credits to its insurance funds.¹⁶⁹ However, there is no corresponding section for the superannuation fund in its accounts or those of the other companies. It may therefore be inferred that the superannuation funds were not used to discharge any of the companies' other liabilities or to pay dividends (the latter were paid out of the revenue account). Instead, they appear to have remained intact in the general balance sheets of the companies and increased year on year.

The abovementioned three companies' capital accounts include sections for capital raised by loans and debenture stock, but the figures are totalled and broken down by interest rate rather than by debtor, so it is unclear whether they included the value of the superannuation funds. There is no mention of a charge or repayment date nor any discernible pattern of repayment, any of which might be taken to support the existence of a loan secured by a charge. This is to be contrasted with the position under the Metropolitan scheme. The managing committee had the power to place the superannuation fund monies on deposit with the company, or to invest them elsewhere. If it chose to invest with the company, interest was payable at a rate of four per cent on the sums deposited, which were repayable within 14 days of a written demand and explicitly secured by a charge 'on the

¹⁶² See eg minutes dated February 7th 1856, LNWR Superannuation Fund, Minutes of General Committee (No. 1), PRO, RAIL 1174/84.

¹⁶³ Eg minutes dated April 9th 1857 and May 13th 1859, PRO, RAIL 1174/84.

¹⁶⁴ Eg minutes dated May 11th 1860, May 17th 1861 and May 16th 1862, PRO, RAIL 1174/84.

¹⁶⁵ Eg North Eastern Railway Superannuation Fund, Statement of Account and Balance Sheet, December 31st 1884, PRO, RAIL 526/1193.

¹⁶⁶ See the LNWR accounts for the half-year ending 30th June 1867 and subsequent years, London and North Western Railway Company Accounts 1862-1888, PRO, RAIL, 1110/270; and the NER accounts for the half-year ending 30th June 1882 and subsequent years: North Eastern Railway Company Accounts 1873-1882 and 1883-1893, PRO, RAIL, 1110/361. The LBSCR accounts do not record the company's contribution separately.

¹⁶⁷ Eg the LNWR and NER accounts (n 166).

¹⁶⁸ Eg the LBSCR accounts for the half-year ending 30th June 1872 and thereafter: LBSCR Accounts 1867-1876, and 1897-1906, PRO, RAIL 1110/287-288 and RAIL 1110/290.

¹⁶⁹ Eg the LBSCR accounts for the half-years ending 31st December 1898 and 30th June 1899 (n 169).

net profits of the company's undertaking next after any debt or money which the company owe or are liable to pay at the passing of the Act and any money for the time being borrowed by them'.¹⁷⁰

A committee appointed by the Board of Trade reported on the state of the railway superannuation funds in 1910.¹⁷¹ Its report confirmed that in railway schemes the fund assets were 'held in the hands of the companies, who generally allow 4 per cent. interest upon them', but in certain cases 'the money is, however, invested in debenture or other stock of the companies or in various trustee stocks.'¹⁷² The committee rejected a suggestion by a witness that the system of leaving the money in the hands of the companies was unsatisfactory.¹⁷³ It remarked that from the members' perspective, 'it has to be considered that their money is invested on a security which has priority to the company's debenture stock'.¹⁷⁴ The committee did not say precisely how the money was invested or what form the security took, but it concluded that the interest rate of four per cent would have been impossible to achieve through a purchase of debenture stock on the market. In its summary of the administration of the different railway schemes, the report noted that the company acted as the trustee of the LNWR fund,¹⁷⁵ and that the NER and LBSCR schemes had no trustees,¹⁷⁶ even though a later summary of the LBSCR scheme's financial position records that the company held the assets on trust for the purposes of the scheme.¹⁷⁷

It is possible that the phrase 'on loan to the Company as trustees thereof' in the NER and original LBSCR schemes was merely intended to indicate that the superannuation funds were to be invested in the company's debenture stock but this would appear to be inconsistent with the committee's remark that generally the funds were invested in securities which had priority over the company's debenture stock. Alternatively, the phrase might have been intended to create an effect similar to that which we now associate with an intentionally created *Quistclose* trust.¹⁷⁸ Of course, circumspection is required here: the period under consideration predates *Quistclose* by many decades, and the language of the original schemes does not indicate whether any trust that may have been created was intended to be a trust for persons or a trust for purposes. If these arrangements were sufficient to create a trust, then to the extent that the fund was not used in the payment of superannuation allowances, the company would have held it subject to a custodial duty and it would have been unavailable to the company's other creditors on insolvency. This is consistent with Hannah's suggestion that the railway schemes provided 'a segregated fund safe from creditors in the event of bankruptcy'.¹⁷⁹ Although the directors were responsible for the administration of the original LBSCR scheme, the fact that the NER scheme was managed by a committee from the start would have meant that any duties to which the company was subject were merely custodial.

Given the absence of the word 'loan' in both the LNWR scheme rules and the revised LBSCR scheme regulations and the express invocation of a trust for purposes in the latter, it seems more likely that

¹⁷⁰ Metropolitan Act 1907, s 7.

¹⁷¹ *Report on the Railway Superannuation Funds* (n 29).

¹⁷² *ibid* [37], [125]; see also Hannah (n 2) 11.

¹⁷³ *ibid* [126].

¹⁷⁴ *ibid* [127].

¹⁷⁵ *ibid* 43.

¹⁷⁶ *ibid* 46 and 44, respectively.

¹⁷⁷ *ibid* 60.

¹⁷⁸ *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 (HL).

¹⁷⁹ Hannah (n 2) 12.

in these cases the company did hold the fund monies as a trustee. There is no evidence whether such a trust would have been for the LNWR scheme members or its purposes. The revised LBSCR regulations explicitly state that the trust was intended to be a trust for purposes. It is unclear whether at that time the courts would have recognised the managing committee or the members as having standing to enforce any custodial duty to which the company was subject. However, in view of the courts' approach to the East India schemes, they might well have been prepared to do so.¹⁸⁰

By contrast, the statute establishing the Metropolitan scheme expressly envisaged that the managing committee, rather than the company, would act as trustees of the superannuation fund. They had the power to keep some of the pension fund uninvested in a bank account in their names.¹⁸¹ As to the remainder, the committee could place it on deposit with the Company. Alternatively, they could invest the monies in their own names as investment trustees in the Metropolitan Railway Provident Savings Bank or 'in such investments authorised by law as investments of money in the hands of trustees as they shall think fit or as the scheme may provide with power for the managing committee from time to time to vary or transpose such investments.'¹⁸² This more expansive investment strategy reflected the fact that trustees' investment powers were by then much wider than they had been at the start of the century. Due to company law reform in the mid-nineteenth century which introduced limited liability and made incorporation easier,¹⁸³ opportunities for private equity investment had increased. Investment in private securities had grown in popularity and by the late 1880s the yield from government bonds had dropped below three per cent.¹⁸⁴ In response to pressure from settlors and trustees, a series of statutes culminating in the Trust Investment Act 1889 gradually expanded the list of permitted 'safe' trust investments to include, eg, mortgages, real securities, government securities, stocks in railway and water companies with established minimum dividend rates, stocks in Indian railway companies and stock issued by municipal boroughs or water Commissioners.¹⁸⁵ However, the list was not unlimited. It did not extend to investments which the law still regarded as too risky, eg, in commercial and industrial enterprise or municipal or colonial loans: such investments were only possible if the trust contained an express investment clause permitting them.¹⁸⁶

IV. OCCUPATIONAL PENSION TRUSTS AT THE TURN OF THE TWENTIETH CENTURY

The trust became the preferred legal mechanism of private employers for establishing large occupational pension schemes in the first few years of the twentieth century, even though tax relief on employer contributions and investment income for pension trusts was only introduced in 1921.¹⁸⁷ Several reasons for the proliferation of pension trusts at this time have been put forward: the fact that such trusts could be administered by representatives from both the employer and the employees held an emotional appeal to those trying to improve industrial relations; trusts were

¹⁸⁰ On the courts' preparedness to treat pension trusts as consistent with the beneficiary principle today on the basis that they indirectly benefit the scheme members, see *Re Merchant Navy Ratings Pension Fund* (n 132) [214].

¹⁸¹ s 8.

¹⁸² *ibid.*

¹⁸³ Limited Liability Act 1855 (18 & 19 Vict c 133); Companies Acts 1862 and 1867.

¹⁸⁴ *Hutson* (n 7) 444; *Stebbings* (n 52) 140.

¹⁸⁵ For a discussion of these reforms see *Stebbings* (n 52) 136-144.

¹⁸⁶ *ibid* 145 et seq.

¹⁸⁷ Finance Act 1921, s 32(3)(a)-(d).

cheaper to establish than statutory funds (which required a private members' bill); and trusts offered employers flexibility as to the terms of the scheme.¹⁸⁸ The occupational pension trusts adopted by Lever Bros in 1905, and Rowntree and Cadbury in 1906, suggest that the choice of trust as legal form was driven by both practical and legal considerations, and that employers were cautious about the idea of granting pension rights to employees.

The Lever Bros scheme demonstrates the attraction of the trust as a legal mechanism to employers who wished to retain discretion over benefits and significant control over the operation of the scheme. It was a very generous non-contributory scheme.¹⁸⁹ Members who had completed at least 15 years of service and had reached retirement age¹⁹⁰ would receive a pension in the sum of one-sixtieth of their salary multiplied by their years of employment at retirement age, up to a maximum of £300 per year.¹⁹¹ After 45 years' service, this would have amounted to 75 per cent of an employee's salary. Benefits to those who had to retire early because of ill-health or injury, and to widows and children, were also provided.

Although the scheme was to be managed by trustees drawn from representatives of both the company and its employees,¹⁹² extensive powers were reserved by the company. It stated its intention to make such voluntary contributions as from time to time required to place the fund on a sound financial basis, but also expressly stipulated that it was under no obligation to continue contributions and reserved the freedom to terminate or alter them.¹⁹³ All benefits were gratuitous and did not vest any right or cause of action in any employee. They too could be altered, withheld or terminated by the company as it saw fit.¹⁹⁴ The scheme was quite moralistic in tone, expressly stating that the establishment of the fund was not to be regarded as relieving employees of their duty to provide for their own old age¹⁹⁵ and stipulating that 'intemperance or improper conduct' would disqualify them from benefiting from the scheme.¹⁹⁶

The company controlled the investment of the fund quite tightly. The first £1000 was to be placed on deposit with the company at interest. All other monies were to be invested in the names of trustees 'in such shares, securities or investments, and generally in such manner as the Company may from time to time direct in writing, but in the absence of such direction and so far as the same shall not extend, in Preference Shares of the Company.'¹⁹⁷ If the trustees wished to alter the benefits under the fund or make payments to employees or their dependants who otherwise would not be entitled to benefit, they needed the consent of the company in writing.¹⁹⁸ The company also reserved the power to amend the fund regulations with the Trustees' consent in writing, and to make new regulations.¹⁹⁹

¹⁸⁸ Hannah (n 2) 19; see also Shilton (n 4) 31-34.

¹⁸⁹ Trust Deed of the Employees' Benefit Fund of Lever Brothers Ltd, Port Sunlight (R/B6/19), clauses 3 and 6.

¹⁹⁰ *ibid* clause 9.

¹⁹¹ *ibid* clause 28.

¹⁹² *ibid* clause 22.

¹⁹³ *ibid* clause 5.

¹⁹⁴ *ibid* clause 7.

¹⁹⁵ *ibid* clause 4.

¹⁹⁶ *ibid* clause 12.

¹⁹⁷ *ibid* clause 20.

¹⁹⁸ *ibid* clause 28.

¹⁹⁹ *ibid* clause 29.

The trust was also attractive to the Rowntree and Cadbury families, who were Quakers and collaborated closely in establishing their schemes.²⁰⁰ They were paternalistic employers who were concerned to deal fairly with their employees at a time when good industrial relations were important not only because the unions were strong, but also in light of developing modern management techniques.²⁰¹ The Rowntree family's generosity is notable. When the Rowntree occupational pension scheme was first established, Joseph Rowntree made an initial personal donation of £10,000 to the fund and the company contributed a lump sum of £9,000 to ensure that existing older employees could draw pensions immediately.²⁰² The Rowntrees also felt that as their company would largely be responsible for the fortunes of the fund, it should guarantee the fund's solvency to ensure that the fixed pensions subscribed for by members could be paid.²⁰³ Later, in 1917 the company introduced and bore the entire cost of a widows' benefit scheme, which was the first of its kind.²⁰⁴ However, the Rowntrees also had an eye to commercial concerns: 'The commercial reason for the scheme is to facilitate the shelving of men who have ceased to be effective.'²⁰⁵ They thought they could achieve this by introducing a compulsory retirement age but ensuring that pension payments were high enough (about 66 per cent of the average wage on retirement after 45 years' service) to prevent a serious loss of income for employees.

In planning the Rowntree scheme, cost, control and flexibility were relevant factors. It was always intended that the scheme would be contributory but that membership would not be compulsory, and the company wished to retain some flexibility to withhold its contributions if for any reason it needed to, something that would not be possible if the company's contributions were fixed at a proportion of the employees' salaries.²⁰⁶ Four options were under consideration: the whole responsibility for the scheme could be handed over to an insurance company; the contributions could be transferred to a life insurance company that would guarantee a fixed rate of compound interest during the scheme but would not undertake any further responsibility; trustees could be appointed – partly by the directors and partly by the employees – who would be responsible for the management and investment of the fund; or a special limited company limited either by guarantee or shares could be incorporated.²⁰⁷

By the time Counsel was instructed to draft the Rowntree scheme in August 1905, the company seemed to have settled on a proposal to establish the scheme by trust.²⁰⁸ The positive reasons for this are not entirely clear, but there were good reasons for not adopting the insurance company options. It seems that the cost of handing over responsibility for the scheme to an insurance company would have been very high.²⁰⁹ Placing the fund with an insurance company at a fixed rate of interest would have enabled the trustees to withdraw money at any time on notice but the

²⁰⁰ Eg Notes of Interview with Mr Joseph Rowntree and Mr BS Rowntree, 3 July 1905, RCA, R/DH/SR/10.

²⁰¹ Hannah (n 2) 21; Thane (n 20) 243-4, 246.

²⁰² Draft speech for the Rowntree Pension Fund Golden Jubilee in 1956, RCA, R/B6/22.

²⁰³ Note read by Joseph Rowntree at Meeting of Trustees, 1 December 1911, RCA, R/B6/15.

²⁰⁴ Letter to employees setting out details of the widows' benefit scheme, RCA, R/DL/LP/4.

²⁰⁵ Notes of Interview with Mr BS Rowntree, Mr C Appleton and Mr WJ Fox at the Homestead, 17 July 1905, RCA, R/DH/SR/10 (emphasis in original).

²⁰⁶ Statement dated 6 May 1905 (n 34), 4-5.

²⁰⁷ Undated draft instructions to Counsel, RCA, R/DH/SR/10, 3.

²⁰⁸ Letter from Wragge & Co (solicitors to Cadbury) to Birdsall & Cross (solicitors to Rowntree), 11 July 1905 RCA, R/DH/SR/11.

²⁰⁹ Case for the Opinion of Counsel, 24 August 1905, RCA, R/B6/19. See also the letter from George King (actuary to the fund) to Rowntree's solicitors, 19 July 1905, RCA, R/DH/SR/11.

insurance company could have determined the arrangement as to future contributions,²¹⁰ which would have resulted in a loss of control and flexibility.

Rowntree also had three main legal concerns about the establishment of the scheme, on which it sought Counsel's advice.²¹¹ There was a question as to whether the scheme might require registration under the Shop Clubs Act 1902, which made it an offence for employers to require their workmen to join a shop club or thrift fund, unless it was registered as a friendly society.²¹² The difficulty was that if the scheme had to be registered in this way, the pensions payable would have been limited to a maximum of £50,²¹³ and Rowntree intended its pensions to be more generous than that. It also wished to know whether a trust would breach the rule against perpetuities and if testamentary gifts to the trust would be charitable gifts or otherwise legally valid. The advice received from Counsel²¹⁴ on these two points was that as the employees' contributions to the scheme were voluntary, there was no reason to think the scheme would require registration under the Shop Clubs Act, and there was no difficulty with the rule against perpetuities or the validity of testamentary gifts to the fund.²¹⁵

The third legal concern related to the application of the Truck Acts to the scheme. The truck system involved the payment of wages in kind rather than in cash.²¹⁶ This allowed unscrupulous employers to exploit employees by paying them partly in overvalued goods, such as groceries, or to grant wage advances in the form of tokens which could only be exchanged for items supplied by the company.²¹⁷ These practices were outlawed by the Truck Act 1831,²¹⁸ which rendered illegal and void any contract between a workman and his employer which imposed conditions regarding the place where, the manner in which, or the persons with whom any of the workman's wages should be spent.²¹⁹

Rowntree sought advice as to whether the fact that employee contributions would be effected through wage deductions would bring the scheme within the scope of s 2 of the Act. There was previous authority to the effect that where an employer deducted money from its workmen's monthly wages for a fund that was supposed to benefit them, but in fact retained the money itself, the arrangement offended the Truck Acts.²²⁰ Although dicta suggested that contributions to a sick or accident club or a pension fund were unlikely to fall within the scope of the legislation,²²¹ Rowntree's Counsel did not feel that the company could safely assume that its scheme would fall outside it, as

²¹⁰ Case for the Opinion of Counsel (n 209).

²¹¹ *ibid.*

²¹² Shop Clubs Act 1902, ss 1 and 2.

²¹³ Friendly Societies Act 1896, s 8(1)(b).

²¹⁴ Opinion of Mr Howard Wright, 5 September 1905, RCA, R/B6/19.

²¹⁵ See also the letter from Howard Wright, 11 December 1905, RCA, R/DH/SR/11.

²¹⁶ Cornish (n 7) 296.

²¹⁷ GW Hilton, 'The Truck Act of 1831', (1958) 10(3) *The Economic History Review* 470.

²¹⁸ Hilton (n 217). The provisions of the Act were subsequently amplified and clarified by amending statutes: see the Truck Acts of 1887 and 1896.

²¹⁹ Truck Act 1831, ss 2 and 9.

²²⁰ *Ex parte Cooper, In re Morris* (1884) 26 Ch D 693 (CA). Deductions applied by an employer at the direction of the workmen or to which they had tacitly assented were acceptable: *ibid* 699 (Cotton LJ); *Hewlett v Allen* [1894] AC 383 (HL), 390, 392 (Lord Herschell LC), 394 (Lord Watson).

²²¹ *Hewlett v Allen* (n 220) 396 (Lord Watson), 396-398 (Lord Shand).

the point was not directly covered by authority.²²² Cadbury's solicitors took a more robust approach. In their view, although the scheme might come within the letter of the legislation, there were only two risks: (i) that the workmen might seek to recover their contributions, which was unproblematic as the fact that they had consented to the deductions would preclude this, and in any event, it was proposed to allow employees to withdraw from the Rowntree and Cadbury schemes and receive a refund of their contributions; and (ii) that the employers would be prosecuted for penalties under the Truck Acts, but this seemed very unlikely.²²³

At a meeting between Rowntree, Cadbury and their respective Counsel in October 1905,²²⁴ Cadbury's Counsel endorsed the robust view taken by their solicitors on the basis that no attempt had ever been made to invalidate a pension fund under the Truck Acts. Rowntree's Counsel remained unconvinced on the legal point but thought the courts might take a pragmatic view. Both Counsel concluded that the use of a trust as the legal mechanism for the scheme would not improve the position, as the deductions would remain an arrangement between employer and employee. Nevertheless, in view of the advice from Cadbury's legal team Rowntree concluded that it was prepared to run the slight risk involved.²²⁵

The Rowntree and Cadbury schemes were launched in 1906.²²⁶ Both took the form of trusts and were to be managed by committees of trustees drawn from representatives of both the company and its employees.²²⁷ They were contributory schemes and much less moralistic in tone than that established by Lever Bros. Both expressly stated that, subject to the conditions set out in the rules, subscribers who had paid their contributions and continued in the employment of the company until they reached pension age would receive a pension.²²⁸ Pensions were also available for those who retired due to incapacity before retirement age (subject to a minimum period of service). In both cases membership of the scheme was optional,²²⁹ and the contributions of those who were dismissed from the company's employment, ceased to subscribe or died in service were to be refunded with interest.²³⁰ Pensions were forfeited if the subscriber became bankrupt,²³¹ disclosed company secrets or entered into a competing business without its consent.²³² Both schemes also offered flexibility to the employers and the trustees: for example, the Rowntree trustees had the power to enter into contracts with British insurance offices for the provision of pension benefits if they wished to do so, and both sets of trustees had the power to vary or amend the trusts with the consent of the company.²³³

²²² Opinion of Mr Howard Wright (n 214); Letter from Howard Wright to Rowntree, 20 September 1905, RCA, R/DH/SR/10.

²²³ Letter from Wragge & Co to Birdsall & Co, 12 October 1905, RCA, R/DH/SR/11.

²²⁴ Notes of Conference with Counsel at Mr Neison's Chambers, 18 October 1905, RCA, R/DH/SR/10.

²²⁵ Letter from Rowntree to Birdsall & Co, 18 October 1905, RCA, R/DH/SR/11.

²²⁶ Rowntree & Co Ltd Pension Fund, Trust Deed & Rules, 30 October 1906 ('Rowntree Deed'), RCA, R/B6/1; draft Trust Deed and Rules of Cadbury Scheme ('Cadbury Deed'), RCA, R/B6/19.

²²⁷ Schedule to Rowntree Deed (n 226), rule 22; Cadbury Deed (n 226), clause 19.

²²⁸ Schedule to Rowntree Deed (n 226), rule 2; Schedule to Cadbury Deed (n 226), rule 4.

²²⁹ Schedule to Rowntree Deed (n 226), rule 1; Cadbury Deed (n 226) clause 1.

²³⁰ Schedule to Rowntree Deed (n 226), rule 6; Schedule to Cadbury Deed (n 226), rule 7.

²³¹ Schedule to Rowntree Deed (n 226), rule 11; Schedule to Cadbury Deed (n 226), rule 16.

²³² Schedule to Rowntree Deed (n 226), rule 17; Schedule to Cadbury Deed (n 226), rule 19, which has the same effect but also stipulates for the refund of the subscriber's contributions plus interest in that scenario.

²³³ Rowntree Deed (n 226), clauses 9 and 16; Cadbury Deed (n 226), clause 16.

It is striking that the investment powers of the Rowntree and Cadbury trustees were much wider than those held by the managers of any other the other pension schemes discussed above. Both trust deeds included express investment clauses, but Rowntree seems to have taken a more cautious approach to investment than Cadbury. At least 75 per cent of the money available for investment by the Rowntree trustees was either to be invested in 'securities in which trustees are for the time being by law authorised to invest trust funds, or deposited with one or more British Insurance Offices certified by the actuary as solvent and proper for such deposit.'²³⁴ The other 25 per cent could be invested in the investments listed in the investment clause, which went beyond the list of permitted investments in the Trustee Act 1893 (and presumably also the courts' list). The Cadbury express investment clause²³⁵ permitted a more extensive range of investments, and the only caveat was that the proportion of the pension fund available for investment in *some* of the vehicles listed in the clause was to be capped at one third. The conferral of wide investment powers on separate trustees meant that in contrast with the early railway schemes, much greater diversification was possible and the fortunes of the schemes were therefore less closely linked to the company's success.

The main difference between the two schemes related to the company's contributions. Rowntree set its employee subscription level at a minimum percentage of wages which would produce a weekly pension of 15s for men at the age of 65 and 7/6 for women at the age of 55,²³⁶ and undertook to make such contributions as were necessary to keep the fund solvent.²³⁷ The subscriptions for Cadbury's employees ranged between 2.5 per cent and 5.4 per cent of wages, depending on age at the date of entry to the scheme,²³⁸ and the company undertook to match them. From the age of 60, each employee was to receive a pension equal to 1 per cent of the total wages in respect of which he had made contributions to the fund.²³⁹ In neither scheme did subscribers have any claim or right in respect of the pension fund save under the trust deed and rules,²⁴⁰ Cadbury reserved the right to reduce its contributions if a system of old age pensions was introduced,²⁴¹ and both schemes stipulated that the company's contributions were voluntary and could be suspended or withdrawn on six months' notice to the trustees.²⁴²

The Rowntree scheme expressly provided that if the company gave six months' notice of its intention to terminate its contributions, the actuary should thereafter make such reductions in 'the pensions ... to be paid to persons not in receipt of pensions ... at the termination of such notice as shall be necessary', and 'on the termination of such notice the Company shall carry to the credit of the Trustees such sum (if any), as shall be certified by the actuary to be necessary to render the Pension Fund a solvent Fund at the date of the termination of such notice.'²⁴³ Thus, Rowntree appears to have effectively guaranteed a pension to anyone who had reached retirement age within six months of it deciding to terminate its contributions. This suggests that although Rowntree

²³⁴ Rowntree Deed (n 226), clause 7.

²³⁵ Cadbury Deed (n 226), clause 9.

²³⁶ Schedule to Rowntree Deed (n 226), rules 3-5.

²³⁷ Rowntree Deed (n 226), clause 4.

²³⁸ Schedule to Cadbury Deed (n 226), rule 2.

²³⁹ *ibid* rule 4.

²⁴⁰ Schedule to Rowntree Deed (n 226), rule 20; Schedule to Cadbury Deed (n 226), rule 22.

²⁴¹ Cadbury Deed (n 226), clause 6.

²⁴² Rowntree Deed (n 226), clause 4; Cadbury Deed (n 226), clause 4.

²⁴³ Rowntree Deed (n 226) clause 4.

reserved the power to terminate the scheme, it came much closer to embracing the idea of pension 'rights' than Cadbury, which at best gave its subscribers a reasonable expectation of a pension.

V. CONCLUSION

Given the prevalence of the trust relationship in earlier pension arrangements, the adoption of the trust by early twentieth century employers as their instrument of choice for administering occupational pension schemes is best regarded as a small but logical step in pensions practice. Nevertheless, in combination, the drafting of sophisticated and detailed trust instruments, the transfer of pension funds to a separate board of trustees, and the expansion of trustees' investment powers were significant, as they offered flexibility, facilitated the balancing of employers' and employees' interests within the scheme and allowed for the diversification of investments for the benefit of scheme members.

It is also notable that the increased popularity of the trust *per se* did not signify a paradigm shift in the legal conceptualisation of pensions. As a legal mechanism, the trust was just as useful to employers like Lever Bros, who wished to offer non-contributory, discretionary, *ex gratia* pensions, as it was to employers like Rowntree, who were moving closer to the idea of pension rights. Ultimately, as the authorities relating to the East India funds and the British public sector schemes demonstrate, the extent of members' rights under any schemes depended upon the courts' interpretation of the legal instruments by which they were created.