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A PROPOSED TRUST CODE FOR INDIANA—
AN EFFORT AT REFORM

Anthony E. Ard*

I. Introduction

In an era when the most impassioned advocates argue for reform in human rights law, the arcane, intricate principles of the law of trusts seem likely to interest few and thrill none at all. Indeed, unless directed toward abuses in the probate system, discussion of reform in the rules of law applying to the disposition of family wealth could be deemed downright unseemly in some circles. Nonetheless, a group of very “establishment” lawyers, bankers, and legislators have been working on just that sort of reform in Indiana. Known as the Trust Code Study Commission, the group is codifying the laws applicable to express trusts, and its goal is the complete reorganization and restatement of that entire body of law.

Perhaps uncharacteristically, Indiana is not so late on the scene in undertaking a major codification of the law of trusts. In fact, only one state, Louisiana, has a statutory framework on this subject that can accurately be described as a “code.” This is not to suggest, however, that attempts to codify trust law are a wholly recent phenomenon. Indeed, the first attempt at codification dates back to the New York Revised Statutes of 1828. Borrowing from this initial effort, David D. Field included provisions on the law of trusts in his proposed code of New York substantive law. Although Field’s trust law proposals were rejected by the New York legislature and have been criticized as being “not well drafted” by Professor Scott, Field’s trust provisions have been adopted in modified form by a number of states.

* Research Director, Indiana Legislative Council. B.S., Indiana University (1963); J.D., Indiana University (1967). Mr. Ard served as the Trust Code Study Commission’s Executive Secretary.

1 This is unfortunate. Those with a real love for Anglo-American law should be encouraged by Professor Maitland’s statement:
If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea. 1 A. Scott, The Law of Trusts § 1 at 3 (3d ed. 1967).

2 The commission was created by the Indiana General Assembly in 1967. Ch. 120, § 1, [1967] Ind. Acts 222. Pursuant to the command of the legislature, the commission is composed of six lawyers, six bankers, four legislators, and a chairman (who is also a lawyer). The key duties imposed by the General Assembly on the commission are discussed in text accompanying notes 37-38 infra.


4 N.Y. Rev. Stat. pt. II, ch. I, tit. II, art. 2 §§ 45-72 (entitled “Of Uses and Trusts”); pt. II, ch. V, tit. I, art. 8 §§ 1-62 (entitled “Of the Powers, Duties and Obligations of Trustees and Assignees under this Title”) (1829). The sections pertaining to the responsibilities of a trustee were contained in an act passed by the Senate and Assembly and signed by Governor De Witt Clinton on December 4, 1827. The remaining sections did not become law until slightly more than one year later, on December 10, 1828. The current New York statutes governing the law of trusts are found in N.Y. Estates, Powers & Trust Law §§ 7-1.1 to 11-4.6 (McKinney 1967).


6 1 A. Scott, The Law of Trusts § 1.10, at 30 (3d ed. 1967). The states that have
Other states have chosen not to pattern their statutory trust law after the Field proposal, opting instead for legislation modeled after the older New York Revised Statutes.\(^7\) Still other states have chosen to free-lance, borrowing and blending a variety of sources with the thought of weaving the fabric of trust law most suitable for their individual needs. Of the states in this latter category, Louisiana, Oklahoma, and Texas have enacted the most sweeping trust law codifications.\(^8\) They are also the only states that have as yet adopted a comprehensive codification of both the substantive and procedural law of trusts. The statutory scheme in each of these states is primarily an amalgam of provisions taken from the Restatement of Trusts\(^9\) and the various uniform acts.\(^10\) In addition to these sources, Louisiana and Oklahoma utilized Erwin Griswold’s model spendthrift trust statute\(^11\) in drafting their spendthrift provisions.

The task of picking the most comprehensive trust code from among the legislative efforts of the three states is not difficult. Louisiana’s present trust code, which was enacted in 1964, is the product of two complete revisions\(^12\) and followed in Field’s footsteps are: California, Cal. Civ. §§ 852-71, 2215-83 (West 1954); Montana, Mont. Rev. Codes Ann. §§ 86-101 to -608 (1964); North Dakota, N.D. Cent. Code Ann. §§ 59-01-01 to -05-59 (1960); and South Dakota, S.D. Comp. Laws Ann. 55-1-1 to -3-22 (1967).

The states of Michigan, Minnesota, and Wisconsin followed this procedure. For compilations of their statutory frameworks see Mich. Stat. Ann. §§ 26.51-.77 (1957). Minn. Stat. Ann. §§ 501.01-.45 (1947); Wis. Stat. Ann. §§ 231.01-.35 (1957). It may be argued that in modeling their trust legislation after the New York Revised Statutes these states have chosen a less than splendid prototype. Professor Scott has observed that “[t]he provisions of the Revised Statutes of New York on uses and trusts have not worked well in many respects and have caused a good deal of litigation . . . .” 1 A. Scott, The Law of Trusts § 1.10, at 30 (3d ed. 1967).


10 Each of the states drew on material from the Uniform Trust Act and the Uniform Principal and Income Act. In addition, Oklahoma and Texas engrafted provisions derived from the Uniform Fiduciaries Act; Louisiana and Texas borrowed from the Uniform Trustees’ Accounting Act; Texas used the Uniform Common Trust Fund Act; and Louisiana has styled a portion of its revised code after provisions in the Uniform Testamentary Additions to Trust Act.


Most legislators viewed these provisions with alarm, thinking that such provisions would start something new by authorizing the creation of spendthrift trusts in [Texas]. Even after the legislators had learned that the Act would restrict powers already in existence instead of granting new powers, the typical (and understandable) reaction was: “That may be true, but my constituents won’t understand it; all they will understand is that I voted for a bill allowing a man to keep $10,000 per year from his creditors.” It soon became apparent that the inclusion of the spendthrift provisions would seriously hinder, if not prevent, the passage of the Act; consequently, these provisions were never submitted for formal legislative consideration. The result, of course, is that a trustor may continue to tie up ten thousand or ten million dollars in spendthrift trusts, and that the courts may continue to accord such trusts liberal treatment. Moorhead, The Texas Trust Act, 22 Texas L. Rev. 123, 146 (1944).

12 For brief discussions of the background of the present Louisiana code see Oppenheim,
stands as the most extensive body of statutory trust law to date. Louisiana's prominence in the codification of trust law is not unexplainable. As a general rule, statutory development in the trust area seems most comprehensive (and more general) in states where judicial development has been lacking. This would certainly be the case in Louisiana with its civil law foundations where the trust vehicle was not legally recognized until 1920.

On the other hand, it may be generally observed that statutory development seems least comprehensive (and most specific) in states favored with extensive judicial development. Statutes in these states are mainly remedial in nature. Massachusetts, birthplace of the prudent man rule, home of the famous Boston trustee, and center of sophisticated financial institutions, is the leading example of this class of development.

Introductory Comments in 3A LA. REV. STAT. xxxvi (1965); Report by the Louisiana State Law Institute to Accompany the Proposed Louisiana Trust Code in 3A LA. REV. STAT. xxxiii (1965).

13 A grasp of the extremely broad sweep of the Louisiana trust provisions may be achieved by considering the trust code's major subdivisions:

I. Preliminary Provisions
   II. Creation of the Trust
      A. General Provisions
      B. Form
      C. The Settlor
      D. The Trust Property
      E. The Trustee
      F. The Beneficiary
      G. Effective Date of Creation
      H. Term of the Trust
      I. Legitame in Trust
      J. [Not enacted]
      K. Life Insurance in Trust
      L. Class Trusts
      M. Trusts for Employees
      N. Additions to the Trust Property
      O. Trusts For Mixed, Private and Charitable Purposes

III. The Interest of the Beneficiary
      A. The Interest of the Income Beneficiary
      B. The Interest of the Principal Beneficiary
      C. Refusal
      D. Alienation by the Beneficiary

IV. Modification, Termination, Revocation, and Rescission of the Trust
      A. Modification and Termination of the Trust
      B. Revocation and Rescission of the Trust
      C. Formal Requirements

V. Duties and Powers of the Trustee
      A. General Dispositions
      B. Duties of the Trustee
      C. Powers of the Trustee
      D. Allocation to Income and Principal
      E. The Trustee's Bond

VI. Compensation and Indemnity of the Trustee
      A. Compensation of the Trustee
      B. Indemnity of the Trustee

VII. Liabilities of the Trustee

VIII. Remedies of the Beneficiary

IX. Actions

X. Designation of Attorney

XI. Validation


15 See Harvard College v. Amory, 26 Mass. 446 (1830). For an excellent treatment of this landmark decision, see Friedman, The Dynastic Trust, 73 YALE L.J. 547, 551-86 (1964).

16 For Massachusetts' statutory trust law scheme see MASS. ANN. LAWS ch. 203, §§ 1-42 (1969).
Indiana, as with most states, falls between the Louisiana and Massachusetts extremes of statutory development. The statutory trust law that does exist in Indiana is largely antiquated, with modernization appearing only by piecemeal additions and amendments. For example, Indiana has enacted the Uniform Fiduciaries Act, the Uniform Simplification of Fiduciary Transfers Act, a Trustees Accounting Act, a modified version of the Revised Uniform Principal and Income Act, and a statutory prudent man rule. In addition, references to "trusts" appear intermittently throughout the probate code, banking law, insurance law, statutes concerning real and personal property, and rules of civil procedure. There are, of course, other references to "trusts" to be found scattered about the statutes currently in force in Indiana. Anyone attempting to characterize those provisions as "miscellaneous" would do well to heed the admonition of Professor John S. Grimes: "One hesitates to use the term 'miscellaneous' in referring to trust statutes in Indiana for that phrase could be applied to most of the trust laws.

Judicial development here has been inconsistent and fragmented with large areas still unseasoned. From 1852, the year that Indiana's primary trust statutes were enacted, through the first quarter of the twentieth century the great majority of Indiana decisions expanded upon the effect of the Statute of Frauds on provisions of trusts in real estate. The depression era brought decisions on a beneficiary's right to recovery of trust deposits in banks and on allocation

17 See IND. STAT. ANN. §§ 56-601 to -631 (1962) and Professor John S. Grimes's caustic appraisal of Indiana's statutory trust law in J. GRIMES, A COURSE IN CHAOS (1965). The opening paragraph of the work sets the mood for Professor Grimes's extensive survey of the present status of Indiana statutory trust law:

The reader who expects an orderly discussion will be disappointed. The present chaotic situation in the Indiana Statutes leaves no opportunity for constructive thinking. If the reader finds himself unable to comprehend the law of trusts from this outline of the legislative law, he may congratulate himself that he is aware of the law as it stands today. J. GRIMES, A COURSE IN CHAOS 1 (1965).

19 Id. §§ 31-901 to -911 (1969).
20 Id. §§ 31-701 to -711 (1969).
21 Id. §§ 31-1101 to -1114 (Supp. 1969).
22 Id. § 31-507 (1969).
23 See id. §§ 6-101 to 8-218 (1953).
24 E.g., id. § 18-2709 (1964).
27 Id. § 2-202 (1967).
28 J. GRIMES, A COURSE IN CHAOS 3 (1965).
29 IND. REV. STAT. ch. 113, §§ 1-17 [sic; there are nineteen sections, two numbered seventeen] (1852). Those provisions have not been amended or repealed to date. See IND. STAT. ANN. §§ 56-601 to -619 (1961). Speaking of these statutes, Professor Grimes observed that:

The foundation of Indiana statutory trust law, such as it is, rests . . . on the Revised Statutes of 1852. There [sic] laws are not, however, truly trust legislation, but rather are real property law enactments tied in primarily to the Statute of Frauds. The extent to which they may gear into modern trust philosophies is questionable in some areas. J. GRIMES, A COURSE IN CHAOS 19 (1965).

30 E.g., Nesbitt v. Stevens, 161 Ind. 519, 69 N.E. 256 (1903); Ransdel v. Moore, 153 Ind. 393, 53 N.E. 767 (1899); Kintner v. Jones, 122 Ind. 148, 23 N.E. 701 (1890); Gaylord v. La Fayette, 115 Ind. 423, 17 N.E. 899 (1888); Koehler v. Koehler, 75 Ind. App. 510, 121 N.E. 450 (1919).
of receipts and expenses between income beneficiaries and remaindermen.32 From time to time cases have appeared dealing with the nature and extent of the trustee's liability,33 powers to revoke or modify,34 and the termination of a trust.35

Despite these and other judicial decisions dealing with (and contributing to) the thicket that is Indiana trust law, it can safely be asserted that a solid foundation of decisional trust law has not been established. Professor Grimes captured well the dilemma facing the Indiana attorney and his client compelled to cope with these inadequate bodies of law when he observed: "In Indiana, judge-made trust law is somewhat scanty. We do have, however, a kaleidoscope of unrelated statutes which makes the practice of trust law in Indiana something other than a thing of beauty and a joy forever."36

The 1967 Indiana General Assembly took the initial step required to bring about an overhaul of trust legislation in Indiana. At that time the Assembly passed a measure creating a commission directed to study the status of Indiana trust law.37 The commission was instructed to:

Prepare and recommend comprehensive legislation, in the form of bills for a code or acts, to provide for standardized, unified and efficient creation, construction and administration of trusts and all matters relating thereto, including the amendment or repeal of any inconsistent laws.38 The work of the commission formed by the General Assembly's mandate has advanced to the final stages. At this writing, the commission is reviewing the third proposed draft of its code and intends to publish its final draft this spring. It is not amiss to point out that the commission has not conceptualized the dimensions of its task as being wholly encapsulated within the General Assembly's imperative. Because the trust has become increasingly popular in Indiana as a device to avoid probate expenses and, generally, as a helpful tool in providing for the orderly disposition of family wealth, the Trust Code Study Commission viewed its role as not simply to reorganize and restate but also to modernize and supplement the law of trusts in Indiana.39 To this end, the commission has

32 See Powell v. Madison Safe Deposit & Trust Co., 208 Ind. 432, 196 N.E. 324 (1935) (adopting the Massachusetts rule). The importance of the Powell decision has been lessened by the adoption, in 1969, of a modified version of the Revised Uniform Principal and Income Act. See IND. STAT. ANN. §§ 31-1101 to -1114 (Supp. 1969). This legislation was a fruit of the Trust Code Study Commission's efforts. The Act's substantive provisions have been incorporated, in toto, in the proposed code. See INDIANA TRUST CODE STUDY COMMISSION, PROPOSED DRAFT OF INDIANA TRUST CODE §§ 5-101 to -112 (1970) [hereinafter cited as PROPOSED FINAL DRAFT].


36 J. GRIMES, A COURSE IN CHAOS 6 (1965).


39 The commission's study and proposals address themselves to the law of express trusts,
adopted a code format which it considers to have the requisite detail and comprehensive scope but is still sufficiently flexible to permit amendment when conditions require.

In pursuing the project, the commissioners were motivated by more than scholarly concern over the condition of Indiana's statutory and case law. Because the commission was primarily composed of individuals whose walks of life keep them in almost constant contact with trusts and trust problems, the commissioners were equally concerned with the practical, day-to-day problems caused by the inadequate condition of the law. In particular, they were concerned with the uncertainty distressing the judiciary regarding its role in the administration of trusts and its interpretation and application of Indiana trust law. Many of the other problems that the commission grappled with were derived from the varying approaches taken by the judiciary.

To ascertain the extent of this judicatory puzzlement, the commission resorted to the interpretation of data accumulated through empirical research. During the initial stages of the project the commission circulated a questionnaire among all of the circuit, superior, and probate court judges in the state. Fifty-eight judges replied that their courts handled trust matters. The results of the questionnaire confirmed the commission's previously undocumented opinion as to the extent of uncertainty in the judiciary.

Responding to the questionnaire, forty-eight judges said that they favored continuing court supervision of testamentary trusts, but only twenty-seven favored such supervision of inter vivos trusts. When asked whether all testamentary or inter vivos trusts are required to be docketed, however, forty-six judges replied that all testamentary trusts were to be docketed and twenty-one judges replied that docketing was mandatory for all inter vivos trusts. No judge who treated testamentary trusts differently from inter vivos trusts attempted to explain his rationale for the disparity in treatment. The logical explanation for this peculiar situation is that since most judges handle more probate than trusts matters, they consider the trustee of the testamentary trust as an extension of the executor of the will. Accordingly, they extend the same judicial safeguards to the beneficiaries of testamentary trusts that the devisees or legatees of the will enjoy. It would seem that beneficiaries of an inter vivos trust are not deemed by many judges to require that same protection merely because the inter vivos trust has no suitable analogue.

Other questions yielded even more curious results. For example, fifty-three judges said that they appoint successor trustees, but only thirty-nine said that either private or charitable. Trusts created by operation of law, such as resulting trusts and constructive trusts, were not treated. Among the other areas excluded from consideration were: business trusts, voting trusts, security instruments and creditor arrangements, prepaid funeral plans, trusts for the care and upkeep of cemeteries, nonprofit and charitable institutions, and agreements to furnish funeral expenses.

40 This is not to intimate that the commissioners only intended to perfect the state of Indiana trust law as it now exists. They were also concerned with shaping a body of law that would meet the frontier demands in the trust field. The land trust provisions that the commission adopted are but one manifestation of this concern. The land trust device is discussed in notes 98-141 infra and accompanying text.

41 For further evidence of the lack of unanimity among the judiciary over the necessity of docketing, see Cooper, Docketing, Closing the Docket and Termination, in 3 Trust Administration in Indiana 43 (1965); Judges Discuss Judicial Supervision of Trusts, 10 Res Gestae, Mar., 1966, at 11.
they ever remove a trustee. Only twenty-one judges said they could modify the dispositive provisions of an irrevocable trust, yet thirty-seven said that they would apply the "cy pres" doctrine. Fifty-four judges replied that they would permit a trustee to resign for good cause shown. Thirty-four would also permit the trustee to resign for his own convenience, but eighteen would permit him to resign only if, in addition to good cause shown, his resignation would not injure the beneficiaries. Forty-seven judges required court authority to sell trust real estate, forty-four required authority to sell trust personalty, and thirty-nine required court authority to make trust investments. The present statutory law requires a trustee to petition the court for authority to sell trust real estate, forty-four required authority to sell trust personalty, and thirty-nine required court authority to make trust investments. The present statutory law requires a trustee to petition the court for authority to sell trust real estate unless the terms of the trust provide otherwise. But there is no equivalent statutory requirement for sales of personal property or trust investments. Indeed, there would seem to be statutory provisions exactly to the contrary.

The state of uncertainty in the judiciary has a number of important and highly undesirable side effects. Obviously, without definiteness in the law it is extremely difficult for lawyers to furnish their clients with prompt and precise advice. Many attorneys find that their attempts to explain the mysteries of Indiana trust law to clients merely compound the confusion already generated by the complexities of estate planning. This situation is made more distressing, and occasionally more expensive for the client, when the draftsman prepares an extensive set of powers (which also confuses the client) and the court injects its presence to insure the fidelity and confidence of the trustee (sometimes at the client's expense).

Further, the inadequate condition of the law makes it particularly difficult for the individual trustee to perform his duties knowledgeably. This has two unfavorable implications. First, because of poorly performing individual trustees, doctrinal development at the appellate level could lead to the establishment of rules of law making market conditions unfavorable for corporate fiduciary competition. Second, an individual trustee's inept performance adversely affects the image of the trust device and thus injures the image of all trustees, including corporate fiduciaries. Thus, the commissioners' interest in the welfare of their own clients and customers, and in the preservation of market conditions favorable for fiduciary activity, accompanied their desire to formulate a sound body of law.

Beginning with the initial general discussions and continuing through the commission's examinations of several drafts of the code, certain ideas (themes

43 See Iles v. Martin, 69 Ind. 114, 116 (1879); Under an express trust with power to sell and convey, it is not necessary that the trustee should apply to a court to authorize the sale, nor to give bond unless required for the execution of the trust. . . . We do not think this case comes within the [purview of statutes cited in note 42 supra]. That act does not seem to affect express trusts, with a power in the trustee to sell and convey.
45 The vastness of the corporate trust industry — approximately $123 billion trust assets for the entire United States in 1968. Trust Department Assets, 108 Trust & Estates 1059 (1969) — contributed notably to the need for reform of Indiana trust law. The influence of the corporate fiduciary on the drafting of the proposed code is noticeable from the membership of the commission. See note 2, supra.
or principles, if you wish) persisted. These ideas were eventually integrated into the rules of law proposed in the code. They permeate the proposals and reflect rather accurately the philosophies of the commission members. Of course, not all the ideas of every commission member were incorporated. There were many battles fought and lost. The ideas that have been incorporated, however, do reflect a consensus of the members’ thinking.

One of these ideas is that the settlor has the right to establish the ground rules governing how the trustee is to administer the trust. His right to control the trustee’s conduct is exercised through the “terms of the trust.” The principle of the settlor’s right to regulate the trustee’s actions through the terms of the trust appears frequently throughout the code. Essentially, the language of the trust is the device by which a settlor can avoid the impact of a particular rule of law when that rule demands a result inappropriate to his plan. To insure that this result is reached, the code contains a section providing that if the terms of the trust and the rules of law in the code are in conflict, the terms of the trust control unless the code clearly prohibits the act which the terms of the trust purport to authorize.

Because of the importance of this innovation, an estate planner will naturally want to discuss a number of nontax considerations with his client, and possibly with the potential trustee, before beginning to draft the instruments. For example, he will want to discuss the trustee’s powers, the trustee’s duties (and

46 E.g., Proposed Final Draft § 3-201 (extent of trustee’s powers expressly made subject to the terms of trust); id. § 3-204 (providing that “[t]he trustee has a duty to administer the trust according to its terms,” and setting forth other duties binding on the trustee “[u]nless the terms of the trust provide otherwise”); id. § 3-205(a) (prohibiting the trustee from making self-dealing loans, sales, or purchases unless he is expressly authorized to enter into such transactions by the terms of the trust).

47 Id. § 1-104. That section provides:

The rules of law contained in this act shall be interpreted and applied to the terms of the trust so as to implement the intent of the settlor and the purposes of the trust. If the rules of law and the terms of the trust conflict, the terms of the trust shall control unless the rules of law clearly prohibit or restrict the act which the terms of the trust purport to authorize. [Comment: This section represents no change in the state of Indiana law. See Warner v. Keiser, 93 Ind. App. 547, 177 N.E. 369 (1931); McNew v. Vert, 43 Ind. App. 83, 86 N.E. 969 (1909).]

48 Section 3-201 of the proposed code gives the trustee the power to perform every act necessary or appropriate for the purposes of the trust. The section also contains a nonexclusive list of specific powers exercisable by the trustee. The exercise of any such power is expressly made subject to the terms of the trust. This section, with the author's comments added, provides:

Unless the terms of the trust provide otherwise:

(a) Subject to subsection (b) of this section, a trustee has the power to perform without court authorization, except as provided in Sec. 3-202(b) and 3-203(a), every act necessary or appropriate for the purposes of the trust including by way of illustration and not of limitation, the power: [Comment: this subsection makes no change in Indiana law. See Chase Nat’l Bank v. Citizens Gas Co., 113 F.2d 217 (7th Cir. 1940), rev’d on other grounds, 113 Ind. App. 418, 48 N.E.2d 1004 (1943).]

(1) to deal with the trust estate; to buy, sell or exchange and convey or transfer all property, real, personal or mixed and to invest and reinvest the trust estate; [Comment: this paragraph will replace several sections of statutory law prescribing procedures for the sale of trust real estate. See Ind. Stat. Ann. §§ 56-621 to -625 (1961). It should further eliminate the judiciary's present uncertainty regarding the trustee's need to secure court authority before selling personal property or making trust investments. See text accompanying notes 42-44 supra.]

(2) to manage real property in every way, including, among other things, the adjusting of boundaries; erecting, altering or demolishing buildings; dedicating streets, alleys or other public uses; subdividing; developing; obtaining vacation of plats;
granting of easements and rights of way; partitioning; entering into party wall agreements and obtaining insurance of the title to trust property; [Comment: This paragraph is intended to complement the provisions of the preceding paragraph. It should be interpreted as descriptive of the trustee’s power to manage real property, not as a limitation on his powers to deal with the property. The list of acts authorized by this paragraph is nonexclusive.]

(3) to grant options concerning disposition of trust property and to take options for acquisition of trust property, for a term either within or extending beyond the term of the trust; [Comment: The provision authorizing the trustee to grant an option or take an option for a term extending beyond the term of the trust is new to Indiana law.]

(4) to enter into a lease as lessor or lessee, with or without option [to] renew, for a term either within or extending beyond the term of the trust; [Comment: The Restatement (Second) of Trusts takes a different view: “If the trust is terminable at a fixed time ordinarily the trustee cannot properly make a lease which will extend beyond the period of the trust. . . . If the trust is not terminable at a fixed time, ordinarily the trustee cannot properly make a lease which will extend beyond the probable period of the trust.” Restatement (Second) of Trusts § 189, comment e at 414-15 (1959).]

This paragraph will overrule decisional law holding the duration of a lease entered into by a trustee which extended beyond the term of the trust to be unenforceable. See Richmond v. Davis, 103 Ind. 449, 3 N.E. 130 (1885). See also Chase Nat’l Bank v. Citizens Gas Co., 113 F.2d 217 (7th Cir. 1940).

(5) to continue in the operation or management of any business or other enterprise placed in trust; [Comment: This paragraph gives the trustee power to continue the operation of a business he receives in trust. The trustee may act as proprietor, partner, officer, or director. This subdivision is contrary to the general rule. See G. Bogert & G. Bogert, The Law of Trusts and Trustees § 571, at 163-71 (2d ed. 1960); 3 A. Scott, The Law of Trusts § 227.6, at 1816-17, § 230.4, at 1878-79 (3d ed. 1967). It is also contrary to existing Indiana decisional authority. See Tucker v. State ex rel. Hart, 72 Ind. 242 (1888). But see Robison v. Elston Bank & Trust Co., 113 Ind. App. 633, 48 N.E.2d 181 (1943) (permitting the trustee to participate in merger or reorganization of a bank when the terms of the trust allowed the trustee to retain the stock).]

(6) to borrow money, to be repaid from trust property or otherwise, and to encumber, mortgage, pledge or grant a security interest in trust property, in connection with the exercise of any power and for a term either within or extending beyond the term of the trust; [Comment: This paragraph endows the trustee with powers which, according to the weight of authority, he could exercise in the absence of a court order only if the terms of the trust or a statute permitted him to do so. See Restatement (Second) of Trusts § 191 (1959); G. Bogert & G. Bogert, The Law of Trusts and Trustees § 751, at 2-3 (2d ed. 1962); 3 A. Scott, The Law of Trusts §§ 191-191.3 (3d ed. 1967). This provision is new to Indiana.]

(7) to advance money for the benefit of the trust estate and for all expenses or losses sustained in the administration of the trust and to collect any money advanced without interest or with interest at no more than the lowest rate prevailing when advanced; [Comment: The commission included this power to enable a trustee to pay expenses that cannot be put off until the proceeds from the sale of trust property are received.]

(8) to prosecute or defend actions, claims or proceedings for the protection of trust property and of himself in the performance of his duties; [Comment: This rule comports with existing Indiana case law and the Restatement (Second) of Trusts. See Zaring v. Zaring, 219 Ind. 514, 39 N.E.2d 734 (1942); Restatement (Second) of Trusts § 188, comment b at 411 (1959).]

(9) to pay or contest any claim, to settle a claim by or against the trust by compromise or arbitration, and to release, totally or partially, any claim belonging to the trust; [Comment: The provision authorizing the trustee to compromise a claim due the trust estate overrules decisional law holding that the trustee can only take such action if authorized by the terms of the trust. See Hollingsworth v. Board of Com’rs, 22 Ind. App. 232, 53 N.E. 468 (1899). The provision enabling the trustee to release claims belonging to the trust is likewise new to Indiana. For an extensive discussion of decisional and statutory law in this area see Shaffer, Fiduciary Power to Compromise Claims, 41 N.Y.U.L. Rev. 328 (1966). Professor Shaffer is a member of the Trust Code Study Commission.]

(10) to insure the trust estate and himself individually and as trustee against damage or loss; [Comment: The duty of the trustee to secure the insurance necessary to protect the trust property against loss or diminution in value is currently covered by Indiana’s statutory prudent man rule. Ind. Stat. Ann. § 31-507 (1969). The
provision permitting the trustee to insure himself against liability is new to Indiana law. It is not intended to permit the trustee to insure himself against liability to the beneficiaries. Should the trustee desire to purchase such insurance, he must bear the cost, not the trust. See G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 599, at 551 (2d ed. 1960).]

(11) to pay taxes, assessments, and other expenses incurred in the acquisition, retention and maintenance of the trust property and in the administration of the trust; [Comment: The powers granted by this paragraph accord with those currently exercised by Indiana trustees under decisional law. E.g., Rothschild v. Weinhel, 191 Ind. 85, 151 N.E. 917 (1921). They are also in agreement with the Restatement (Second) rule. See Restatement (Second) of Trusts § 188 (1959).]

(12) to vote securities, in person or by a general or special proxy; to hold the securities in the name of a nominee, if the trustee is a corporate trustee; and to effect or approve, and deposit securities in connection with, any change in the form of the corporation including, among other things, dissolution, liquidation, reorganization, acquisition and merger; [Comment: The effect of this paragraph is to expand Indiana statutory law presently applicable to banks and trust companies to cover trustees generally. See Ind. Stat. Ann. §§ 18-508, 18-1213 (1964). This paragraph follows the Restatement (Second) rule regarding the trustee's powers with respect to shares of stock. See Restatement (Second) of Trusts § 193 (1959).]

(13) to employ persons, including, among others, attorneys, accountants, investment advisors or agents, to advise and assist the trustee in the performance of his duties; [Comment: This provision follows Restatement (Second) of Trusts § 188, comment c at 411 (1959). Existing Indiana case law not only permits a trustee to hire experts to advise him but further imposes a duty on him to do so. E.g., Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942).]

(14) to effect distribution of property in cash, in kind or partly in kind and partly in kind divided or undivided interests; and [Comment: This provision is adapted from a similar provision in the Uniform Trustees' Powers Act § 3(23).]

(15) to execute and deliver all instruments necessary or appropriate to accomplishing or facilitating the exercise of the trustee's powers. [Comment: This provision is also derived from the Uniform Trustees' Powers Act § 3(26).]

(b) In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for any trust heretofore or hereafter created, the trustee thereof shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, the trustee is authorized to acquire and retain every kind of property, real, personal or mixed, and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures and other corporate obligations, stocks, preferred or common, and real estate mortgages, which men of prudence, discretion and intelligence acquire or retain for their own account, and within the limitations of the foregoing standard, the trustee is authorized to retain property properly acquired, without limitation as to time and without regard to its suitability for original purpose. [Comment: This subsection has an identical counterpart in an Indiana statute currently in force: Ind. Stat. Ann. § 31-507 (1959). These identical provisions are embodiments of the famous "prudent man rule," set forth in the equally famous case of Harvard College v. Amory, 26 Mass. 446 (1830).]

49 The duties of the trustee are set forth in Proposed Final Draft § 3-204. With annotations added by the author, that section provides:

(a) The trustee has a duty to administer a trust according to its terms. [Comment: This is the trustee's primary duty. This subsection retains prior Indiana law. See Smith v. Taylor, 94 Ind. App. 194, 72 N.E. 651 (1904).]

(b) Unless the terms of the trust provide otherwise, the trustee also has a duty:

(1) subject to § 3-205, to administer the trust solely in the interest of the beneficiaries; [Comment: For the text and a summary of section 3-205, see note 50 infra. The duty imposed by this paragraph follows the Restatement (Second), and Indiana case law. See Restatement (Second) of Trusts § 170 (1959); Terre Haute Trust Co. v. Scott, 94 Ind. App. 461, 181 N.E. 369 (1932).]

(2) to treat multiple beneficiaries impartially; [Comment: This paragraph also follows the Restatement (Second). See Restatement (Second) of Trusts § 183 (1959).]

(3) to take possession of and maintain control over the trust property; [Comment: This provision is in accord with the Restatement (Second) view. Restatement (Second) of Trusts § 175 (1959).]

(4) to preserve the trust property; [Comment: Once again the Restatement
the circumstances under which the trustee might be authorized to deal with himself, the allocation of receipts and expenses between the income beneficiary,

(Second) rule is embraced. See Restatement (Second) of Trusts § 176 (1959). This paragraph imposes a duty on the trustee to preserve the existence of the trust fund or trust property and was drafted to overrule existing case law requiring the trustee to also preserve the identity of the trust fund. See State ex rel. Cavins v. Sanders, 62 Ind. 562 (1878).

(5) to make the trust property productive; [Comment: The Restatement (Second) position is embodied in this section. See Restatement (Second) of Trusts § 181 (1959); section 3-201(b) in note 48 supra.]

(6) to keep the trust property separate from his individual property and separate from or clearly identifiable from property subject to another trust; [Comment: The Restatement (Second) and Indiana rules are adopted in this paragraph. See Restatement (Second) of Trusts §§ 179 (1959); Gilbert v. Welsch, 75 Ind. 557 (1881).]

(7) to maintain clear and accurate accounts with respect to the trust estate; [Comment: See Restatement (Second) of Trusts §§ 172 (1959), which this paragraph follows. Under Indiana law a trustee has no duty to account for property that was never in his possession or under his control. Craig v. Citizens Trust Co., 217 Ind. 434, 26 N.E.2d 1006 (1940).]

(8) upon reasonable request, to give the beneficiary complete and accurate information concerning any matter related to the administration of the trust and permit the beneficiary or his agent to inspect the trust property, the trustee's accounts, and any other documents concerning the administration of the trust; [Comment: This provision is adapted from Restatement (Second) of Trusts § 173 (1959).]

(9) to take whatever steps are reasonable to prevent claims constituting part of the trust property; [Comment: This provision likewise follows the Restatement (Second) of Trusts. Restatement (Second) of Trusts § 177 (1959).]

(10) to defend actions involving the trust estate; [Comment: This paragraph is patterned after Restatement (Second) of Trusts § 178 (1959).]

(11) not to delegate to another person the authority to perform acts which the trustee can reasonably perform personally; [Comment: See Restatement (Second) of Trusts § 171 (1959), the source of this paragraph.]

(12) to supervise any person to whom authority has been delegated. [Comment: This duty attaches irrespective of whether the delegation was proper. See Restatement (Second) of Trusts §§ 225(2) (1959).]

50 Subject to the terms of the trust, self-dealing by the trustee in trust assets is banned by section 3-205.

(a) Unless the terms of the trust provide otherwise, the trustee has a duty:

(1) not to loan funds to himself or an affiliate; [Comment: This paragraph will overrule Caldwell v. Boyd, 109 Ind. 447, 9 N.E. 912 (1887) (permitting a loan by the trustee to his son because the loan was secured by a real estate mortgage).]

(2) not to purchase or participate in the purchase of trust property from the trust for his own or an affiliate's account; [Comment: This paragraph follows Restatement (Second) of Trusts § 170, comments b & c at 364-65 (1959). Under Indiana decisional law, the purchase of trust property by the trustee was not automatically void but could be voided by the beneficiary. Rice v. Cleghorn, 21 Ind. 80 (1863), will be overruled by this paragraph.]

(3) not to sell or participate in the sale of his own or an affiliate's property to the trust; or [Comment: This provision follows the Restatement (Second of Trusts § 170, comments b & i at 367-68 (1959).]

(4) if a corporate trustee, not to purchase for or retain in the trust its own or an affiliate's stock, bonds or other capital securities. [Comments: See Restatement (Second) of Trusts § 170, comment n at 370 (1959). This paragraph should not be interpreted to prevent a trustee bank from depositing funds in its savings department. Existing Indiana case law imposes a duty on the trustee not to do so and will be overruled by this paragraph. See Rottger v. First-Merchants Nat'l Bank, 98 Ind. App. 139, 184 N.E. 267 (1933).]

(b) If the terms of the trust permit the trustee to deal with a beneficiary for his own account, the trustee has a duty to deal fairly with and to disclose to the beneficiary all material facts related to the transaction which the trustee knows or should know; [Comment: This follows Restatement (Second) of Trusts § 170 (1959). Under existing decisional law, when the trustee deals directly with the beneficiary for his own account the beneficiary can avoid the transaction unless he has ratified it with full knowledge. Troyak v. Ens. 204 F.2d 336 (7th Cir. 1953); Schemmel v. Hill, 91 Ind. App. 373, 169 N.E. 678 (1930). Bad faith is presumed where the trustee acquires a conflicting interest without the beneficiary's knowledge or
and remainderman,\textsuperscript{51} a method of accounting,\textsuperscript{52} the method for selecting a suc-


(c) Unless the terms of the trust provide otherwise, the trustee may sell, exchange or participate in the sale or exchange of trust property from one trust to himself as trustee of another trust, provided the sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts and the trustee discloses to the beneficiaries of both trusts all material facts related to the sale or exchange which the trustee knows or should know. [\textit{Comment:} The commission found merit in permitting this procedure, particularly where a settlor establishes multiple trusts (possibly including a marital deduction trust). This follows \textit{RESTATEMENT (SECOND) OF TRUSTS} $\S$ 170, comment $r$ at 371-72 (1959).]

The trustee's duties regarding the allocation of receipts and expenditures between income beneficiaries and remaindermen are set forth in \textit{PROPOSED FINAL DRAFT} $\S$ 5-102:

(a) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(1) in accordance with the terms of the trust instrument, notwithstanding contrary provisions of this act;

(2) in the absence of any contrary terms of the trust instrument, in accordance with the provisions of this act; or

(3) if neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as of those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

(b) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to the provisions of this act. [\textit{Comment:} This section replaces IND. STAT. ANN. $\S$ 31-1102 (Supp. 1969). It is identical to the \textit{REVISED UNIFORM PRINCIPAL AND INCOME ACT} $\S$ 2 (1966). [\textit{See note 32 supra}.]]

\textit{PROPOSED FINAL DRAFT} $\S$ 5-201 deals with the trustee's duty to account and provides that:

(a) Unless the terms of the trust provide otherwise, the trustee shall deliver a written statement of accounts to each income beneficiary or his personal representative annually. The statement shall contain at least:

(1) all receipts and disbursements since the last statement; and

(2) all items of trust property held by the trustee on the date of the statement showing their inventory value. [\textit{Comment:} This subsection replaces IND. STAT. ANN. $\S\S$ 31-701, 31-711 (1969). It differs from the first statute by requiring that the annual statement be delivered to the personal representative of a minor income beneficiary. A personal representative is defined in \textit{PROPOSED FINAL DRAFT} $\S$ 1-103(7) as "an executor or administrator of a decedent's or absentee's estate, guardian of the person or estate, guardian ad litem or other court appointed representative, conservator, next friend, parent or custodian of a minor, or custodian of an incompetent." Subsection (a) differs from IND. STAT. ANN. $\S\S$ 31-711 (1969) only in that the current statute provides for a waiver of accounting by the beneficiary.]

(b) If property or money is willed or donated for benevolent public purposes, the trustee shall file a verified written statement annually with the court of the county in which such property or money is to be appropriated according to the purposes of the donors showing at least the items listed in section 5-202(a). [\textit{Comment:} This subsection replaces a portion of IND. STAT. ANN. $\S$ 31-712 (1969). The items that must be shown in the trustee's written statement filed under this subsection are: (1) the period covered by the account; (2) the total principal with which the trustee is chargeable according to the last preceding written statement of accounts or the original inventory if there is no preceding statement; (3) an itemized schedule of all principal cash and property received and disbursed, distributed, or otherwise disposed of during the period; (4) an itemized schedule of income received and disbursed, distributed, or otherwise disposed of during the period; (5) the balance of principal and income remaining at the close of the period, how invested, and both the inventory and current market values of all investments; (6) a statement that the trust has been administered according to its terms; (7) the names and addresses of all living beneficiaries and a statement identifying any beneficiary known to be under a legal disability; (8) a description of any possible unborn or unascertained beneficiary and his interest in the trust estate; and (9) the business addresses, if any, or the residence
The text of section 3-301 of the proposed trust code provides that:

(a) Unless the terms of the trust provide otherwise or unless to do so would frustrate, impair or defeat the purposes of the trust, a beneficiary, except as provided in subsection (b) of this section, relieves the trustee from liability for breach of trust as to that beneficiary's interest if he:

(1) consents to or acquiesces in the act or omission which constitutes a breach of trust;
(2) agrees to release or discharge the trustee from liability for breach of trust after the act or omission constituting the breach occurs;
(3) elects, under an option to affirm or reject a transaction entered into a breach of trust, to affirm the transaction; or
(4) participates in the act of the trustee which constitutes the breach of trust.

[Comment: Paragraphs (1) to (3) were patterned after Restatement (Second) of Trusts § 301 (1970). Paragraph (4) embodies Indiana decisional law. See Meier v. Union Trust Co., 93 Ind. App. 457, 176 N.E. 42 (1931).]

(b) The consent, acquiescence, agreement to release or discharge, affirmation, or participation by the beneficiary will not relieve the trustee from liability if:

(1) at the time it was given the beneficiary was under an incapacity;
(2) at the time it was given the beneficiary did not know of his rights or all of the material facts of which the trustee knew or should have known;
(3) it was induced by the trustee's improper conduct;
(4) the trustee had an adverse interest in the transaction and the transaction...
The second main idea that is integrated into the code is the preservation of privacy in the disposition of family wealth. The tendency of many courts to retain supervisory jurisdiction over testamentary trusts and the desire of some courts to assert supervision over inter vivos trusts were considered by the commission to pose both a threat to that desired privacy and an impediment to the trustee’s ability to carry out the terms of the trust — particularly when prompt action is required. Accordingly, the commission is considering a provision that would permit a court to acquire supervisory jurisdiction over a trust only where the settlor expressly provides in the terms of the trust for court supervision. This is not to say, however, that the commission lacked confidence in the court’s ability to deal competently with the trust administration problems brought before it. Quite the contrary. The commission is considering provisions that would broaden the court’s discretion in such areas as termination of

was not fair and reasonable; or

(5) the trustee pays or delivers a beneficiary’s interest to that beneficiary contrary to the terms of the trust with protective provisions. [Comment: The provisions of paragraphs (1) to (4) of this subsection are derived from the same sources as paragraphs (1) to (4) of subsection (a). See Meier v. Union Trust Co., 93 Ind. App. 457, 176 N.E. 42 (1931); Restatement (Second) of Trusts § 216-18 (1959). The commission added paragraph (5) to insure the implementation of protective provisions.]

55 Proposed Final Draft § 3-202 deals with the exercise of powers by multiple, successor, or surviving trustees. The exercise of these powers is expressly subject to the terms of the trust.

Unless the terms of the trust provide otherwise:

(a) Any power vested in two (2) trustees must be exercised by them jointly; any power vested in three (3) or more trustees must be exercised by a majority. [Comment: This provision differs from the rule espoused by the Restatement (Second): “If there are two or more trustees, action by all of them is necessary to the exercise of the powers conferred upon them as trustees. If one of them refused to concur in the exercise of a power, the others cannot exercise the power.” Restatement (Second) of Trusts § 194, comment a at 429 (1959). With respect to the power to vote corporate shares, the effect of this subsection is to make Indiana statute law, currently applicable only to banks or trust companies, cover trustees as well. See Ind. Stat. Ann. § 18-508 (1964).]

(b) If there are two (2) or more trustees and they are unable to exercise a power under subsection (a) of this section:

(1) if there is an immediate risk of irreparable damage to the trust property or the interest of any beneficiary before court approval could be obtained, any trustee may exercise the power and petition the court for approval after the power has been exercised; but

(2) if there is no immediate risk of irreparable damage to the trust property or the interest of any beneficiary, any trustee may petition the court for permission to exercise the power, but none may exercise the power prior to obtaining permission from the court. [Comment: Aside from the specific instance mentioned in paragraph (2) of this subsection, a trustee may petition the court for instructions under section 3-217(a): “If there is reasonable doubt with respect to any matter relating to the administration of the trust, the trustee is entitled to be instructed by the court.” Under the present banking law, when a majority of co-fiduciaries cannot agree or are equally divided on the question of voting stock, a court may direct the manner in which the shares are to be voted upon petition by a fiduciary or other interested party. See Ind. Stat. Ann. § 18-508(c)(2) (1964).]

56 The commission is aware of instances in which a court has asserted continuing supervisory jurisdiction over the trust in spite of the contrary wishes of all interested parties and at considerable expense. It is the judgment of the commission that the desire of families for privacy in the disposition of their wealth, coupled with the growing use of corporate fiduciaries, reduce the necessity for large-scale supervision by the courts.

57 Proposed Final Draft § 6-101 provides: “The court will have jurisdiction to supervise the administration of the trust only if the settlor expressly directs in the terms of the trust that the court is to have that jurisdiction.”
trusts, application of property donated in trust for charitable purposes, and removal of trustees.

Finally, some provisions (but mainly choices of phraseology) were tailored from time to time to reflect the commission’s awareness of the differences inherent in individual and corporate trustees and the moral suasions of rural, as opposed to urban, legislators. Also, great care has been exercised to make the language readable to the layman and to eliminate any real or illusory aura of favoritism toward corporate fiduciaries.

Just a word about the structure of the code before going on to some highlights. It will be divided into seven main articles. In outline form the articles and the major subparts of each article will be structured as follows:

Article 1—General Provisions

58 The court is given discretion to terminate a trust by PROPOSED FINAL DRAFT § 3-401(a):

(a) On petition by a trustee or beneficiary, the court may, in its discretion, terminate the trust:
(1) if the purpose of the trust has been fulfilled or has become illegal or impossible of fulfillment; or
(2) if, owing to circumstances not known to the settlor and not anticipated by him, the continuance of the trust would defeat or substantially impair the accomplishment of the purpose of the trust. [Comment: Paragraph (1) is patterned after PA. STAT. ANN. tit. 20 § 301.2(a) (1950). The legislative history of the Pennsylvania statute indicates that the provision was bred from a desire to assuage the plight of life tenants and remaindermen beleaguered by the ill-conceived provisions of “unproductive, inadequate, and oppressive trusts.” See Lefever, Termination of Trusts in Pennsylvania, 96 U. PA. L. REV. 305, 306 (1948). This paragraph follows RESTATEMENT (SECOND) OF TRUSTS § 335 (1959). The remainder of the subsection also follows the Restatement (Second).] The Restatement (Second) rule that all beneficiaries consent and not be under any incapacity before termination of the trust can be compelled was rejected, however. See RESTATEMENT (SECOND) OF TRUSTS §§ 337-38 (1959). When called upon to determine the extent of a court’s power to terminate a trust, Indiana courts have cited with approval language from Cuthbert v. Chauvet, 136 N.Y. 326, 328-29, 52 N.E. 1088, 1089 (1893), indicating that a change in circumstances is one of the few exceptions to the general rule forbidding a court to disturb or destroy the trust scheme: “Trusts which have become impossible of performance because of the existence of conditions not anticipated or foreseen when they were created, are [exceptions to the general rule of judicial nonintervention].” See Maley v. Citizens Nat’l Bank, 120 Ind. App. 642, 654, 92 N.E.2d 727, 733 (1950); Wilson v. Edmonds, 78 Ind. App. 501, 505, 136 N.E. 48, 49 (1922).

59 PROPOSED FINAL DRAFT § 3-404 provides that:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible, impracticable, or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to some charitable purpose which falls within the general charitable intention of the settlor. [Comment: This section follows RESTATEMENT (SECOND) OF TRUSTS § 399 (1959). The cy pres doctrine will be new to Indiana statutory law, but case law on the doctrine abounds. E.g., Quinn v. Peoples Trust & Sav. Co., 223 Ind. 317, 60 N.E.2d 281 (1945) (following the Restatement).]

60 PROPOSED FINAL DRAFT § 3-403 deals with the removal, resignation, and appointment of trustees. It provides in part:

(a) A trustee may be removed:
(1) by the court; or
(2) by the person, if any, who by the terms of the trust is authorized to remove the trustee.

(b) Upon petition by the trustee the court may, in its discretion, permit him to resign if his resignation will not be detrimental to the trust. [Comment: Subsections (a) and (b) follow RESTATEMENT (SECOND) OF TRUSTS §§ 107, 106 (1959) respectively. The remainder of this section, subsection (c) is set out and commented on in note 53 supra.]
II. Abolition of Oral Trusts

One of the first motions to be brought before the commission was one to "invalidate" oral (parol) trusts. Because at that juncture in their study the commission members were primarily concerned with establishing general areas of concentration, the motion failed. Later, after considerable discussion, the following language was adopted for inclusion in the proposed code: "A trust in either real or personal property is enforceable only if there is written evidence of its terms bearing the signature of either the settlor or the trustee or the legally authorized agent of either." This language will replace the existing Statute of Frauds provision applicable to trusts in Indiana: "No trust concerning lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney, thereto legally authorized in writing.

As is readily apparent, the effect of the existing statute is to require a writing for the enforcement of a trust in real property. The language of that...
section has not been judicially construed to forbid the enforcement of oral trusts in personal property. Indiana law reflects the position taken by the great majority of states.

By proposing, in section 2-101(a), that oral trusts in personal property be rendered unenforceable, the commission is advocating a major break with existing law. Why this innovation? The commission's decision to require a trust in personal property to be manifested in writing was motivated by its concern over the possible use of manufactured evidence to establish an oral trust. The threat that tainted testimony poses to the integrity of the trust device in the case of an oral trust is not illusory. Consider, for example, the facts presented in the Indiana Supreme Court case of Hinds v. McNair.

In that case judgment creditor Hinds sought to levy on stock held by McNair. McNair contended that he held the stock on an oral trust for his children and that the stock was therefore not subject to levy. The only evidence to support McNair's claim was his own testimony; neither the stock certificates nor the issuing corporation's records indicated that the stock had been placed in trust. Moreover, it was shown that in the course of a divorce proceeding initiated subsequent to the date the trust was created, ownership of the stock had been a matter of controversy between McNair and his wife. The dispute was resolved when McNair's wife transferred the stock to him. The settlement agreement did not show that the stock was held in trust.

The Indiana appellate court reversed a judgment for McNair, saying:

We recognize it to be the rule that an express trust in personal property may rest in parol, and we further agree that if the settlor of a trust constitutes himself the trustee thereof, it is not necessary that he should part with the possession of trust property which was formerly his and already in his possession. We are of the opinion however that such transactions cannot be had in secrecy and the fact of the declaration made known to no one. (Citations omitted.)

100, 67 N.E. 273 (1903). It is also enforceable as against a former trustee. Stringer v. Montgomery, 111 Ind. 489, 12 N.E.474 (1887). Parol evidence is admissible to prove that an oral trust has been executed. Moore v. Cottingham, 90 Ind. 239 (1883).

The existing statute's exception for trusts created "by implication of law" has been construed to apply to both resulting trusts and constructive trusts. See Westphal v. Heckman, 185 Ind. 38, 113 N.E. 299 (1916) (constructive trust); Catalini v. Catalini, 124 Ind. 54, 24 N.E. 375 (1890) (constructive trust); Baker v. Leathers, 3 Ind. 558 (1853) (resulting trust); Vonville v. Dexter, 118 Ind. App. 187, 77 N.E.2d 759 (1948) (resulting trust). Other judicially created exceptions include cases in which an oral trust in a fund was stretched to enforce a trust in real property purchased with the fund, Thomas v. Merry, 113 Ind. 83, 15 N.E. 244 (1888); Koehler v. Koehler, 75 Ind. App. 510, 121 N.E. 450 (1919); and decisions holding that an oral agreement supported by sufficient consideration is admissible to establish a trust in the proceeds from a sale of land if it can be shown that either (1) there is no nexus between the agreement and any trust in the land itself, or (2) that the agreement was entered into after the land had been sold. See Mills v. Thomas, 194 Ind. 648, 144 N.E. 412 (1924); State ex rel. Dair v. Roudebush, 114 Ind. 347, 16 N.E. 636 (1888); Mohn v. Mohn, 112 Ind. 285, 13 N.E. 859 (1887); Buntin v. Pritchett, 85 Ind. 247 (1862); Wills v. Ross, 77 Ind. 1 (1881).

65 E.g., Richards v. Wilson, 185 Ind. 335, 112 N.E. 780 (1916); Warner v. Keiser, 93 Ind. App. 547, 177 N.E. 369 (1931); Taber v. Zehner, 47 Ind. App. 165, 93 N.E. 1035 (1911).


67 235 Ind. 34, 129 N.E.2d 553 (1955).

McNair appealed the decision to the Indiana Supreme Court. The issue that faced the supreme court was whether, in the light of precedent permitting the enforcement of parol trusts in personalty "when the evidence is clear and unequivocal," McNair's uncontradicted (and unsupported) declaration of trust would suffice to defeat his creditor's claim. In upholding the decision of the trial court, the supreme court's majority opinion used language hinting that legislation to prevent the abuse of oral trusts in personal property was necessary:

Assuming [Hinds] made out a prima facie case, it is overcome as soon as opposing evidence is produced to explain or rebut it to the satisfaction of the triers of the facts. This is true even though the opposing evidence is oral, so long as it is properly admissible for consideration of the jury.

It is not for this court because it sees dangers of fraud, to legislate in this matter and say that a trust must be proved by a certain number of witnesses or that if the personal property involved exceeds the values [sic] of $500 a trust should be expressed in writing. The Legislature, where it feels that usual opportunities for fraud exist has enacted statutes requiring a writing. Personal property trusts have never been included in such legislation in this state, however desirable we may think it would be to have such transactions in writing.

The minority opinion probably expresses the commission's concern most vividly:

By holding that an oral trust may be established by the sole unsupported testimony of the settlor, given more than 21 years after the date on which the trust was allegedly formed, the majority opinion has opened wide the door to the unscrupulous for the perpetration of unlimited frauds.

The General Assembly's enactment of the commission's proposal to abolish parol trusts would, it may be observed, have the happy effect of answering the majority's plea for legislative leadership while at the same time allaying the minority's fear of wholesale fraud.

Although the abolition of parol trusts necessarily forecloses the establishment of an oral trust as a "remedy," it does not doom recovery by the plaintiff. First, though a signed writing will be required for trusts in personal property, courts examining the adequacy of the memorandum can be expected to proceed along the liberal lines of construction already developed for trusts in real property. Second, it is the judgment of the commission that the Indiana rules

69 This was the standard set forth in Richards v. Wilson, 185 Ind. 335, 368, 112 N.E. 780, 790 (1916). The requisite degree of proof has also been phrased as "clear and convincing which would be unequivocal and unmistakable to sustain the conclusion that a trust had been created," Costa v. Costa, 124 Ind. App. 128, 133-34, 115 N.E.2d 516, 518 (1953).

70 Hinds v. McNair, 235 Ind. 34, 54, 129 N.E.2d 553, 564 (1955). While the court did not give Hinds the recovery he sought, it did, at least, attempt to cushion the holding with rhetoric. In addition to the "until the legislature decides to move our hands are tied" argument quoted in the text, the court showed a philosophical bent in observing:

The only method yet devised by man to assure that justice is administered in the greatest number of cases, is for the courts to follow time tested principles and rules of the law and not shy away from them when confronted with what might seem "hard cases" to some. Id. at 55, 129 N.E.2d at 565.

71 Id. at 67, 129 N.E.2d at 570.

72 The form of the writing demanded by Proposed Final Draft § 2-101(a) is outlined in subsection (b) of that section:
relating to the imposition of constructive trusts have the potential for providing sufficient remedies to avoid injustice in most cases where oral trusts have been attempted.

The phrase "the potential for providing sufficient remedies" is used advisedly, since at present the precise identity of the requisites demanded by the Indiana judiciary to justify the imposition of a constructive trust is far from clear. The rudimentary ground rules involved are not difficult to apprehend, however. Indeed, one reading Indiana's constructive trust decisions will become well acquainted with the familiar rule that "fraud, either actual or constructive, is an essential ingredient of a constructive trust." "Actual fraud,"

Except as required in the applicable probate law for the execution of wills, no formal language is required to create a trust but its terms must be sufficiently definite so that the trust property, the identity of the trustee, the nature of the beneficiary, the nature of the beneficiary's interest and the purpose of the trust may be ascertained with reasonable certainty. [Comment: Subsection (b) retains existing case law holding that no formal, technical, or particular language is necessary to create a trust. E.g., Grant Trust & Sav. Co. v. Tucker, 49 Ind. App. 345, 96 N.E. 487 (1911). Existing statutory provisions demanding formality in the execution of a will creating a trust are exceptions to this rule. See IND. STAT. ANN. §§ 6-302 to -503 (1953).]

While the subsection imposes no formal requirements for the creation of a trust (aside from the wills exception), it does require that the terms of the trust be sufficiently definite that the terms can be ascertained with reasonable certainty. This view follows present Indiana case law. E.g., Baker v. Gordon, 130 Ind. App. 585, rehearing denied, 164 N.E.2d 650 (Ind. App. 1950); Beyer v. Beyer, 122 Ind. App. 649, 106 N.E.2d 247 (1952). In Baker, the appellate court set forth a list of items to be included in the writing that parallels subsection (b): "to create a trust it is not necessary to use any particular language or form of expression, but where the settlor, the trustee, the cestui que trust, the property involved, and the object to be obtained all appear with reasonable certainty from the writing, the requirements of the law are satisfied and an express trust is created which the courts will recognize." Baker v. Gordon, 130 Ind. App. 585, 596 (1960).

Parol is and will be admissible to clarify the terms of the trust and the circumstances surrounding the instrument's execution. See Hinds v. McNair, 235 Ind. 94, 129 N.E.2d 553 (1955); Lassiter v. Goldblatt Bros. Inc., 220 Ind. 215, 41 N.E.2d 803 (1942); Ross v. Thompson, 128 Ind. App. 89, 146 N.E.2d 259 (1957); McNew v. Vert, 43 Ind. App. 83, 86 N.E. 969 (1909). The Indiana appellate court in Lehman v. Pierce, 109 Ind. App. 497, 36 N.E.2d 952 (1941) elucidated the liberal standard governing the sufficiency of the demanded writing. "The writing or writings must give a correct picture of the oral trust actually agreed upon and contain the trust terms which were, in fact, fixed. But the writings are to be read in their setting, and the court may be aided by oral evidence as to the position, situation, circumstances, and surroundings of the parties at the time of the execution of the deed and the writings." *Id. at 502, 36 N.E.2d at 955.*

Regarding the admissibility of parol to clarify the description of the trust property, the *Lehman* court observed that: "if the description in a writing offered to meet the requirements of the statute of frauds is consistent, but incomplete, and its completion does not require the contradiction or alteration of that given, nor that a new description should be introduced, parol evidence may be received to complete the description and identify the property." *Id.* at 504-05, 36 N.E.2d at 956. But see *Christian v. Highlands*, 32 Ind. App. 104, 109, 69 N.E. 266, 268 (1903): "The trust must be expressed in the instrument, or by a reference therein to some other writing, so that the court which is called upon to enforce it as an express trust may ascertain, without resort to parol evidence, the character of the trust.

The Indiana Supreme Court has adopted the following definition of a constructive trust: A constructive trust is a fiction of equity, devised to the end that the equitable remedies available against a conventional fiduciary may be available under the same name and processes against one who through fraud or mistake or by any means or malfeasio acquires property of another. Brown v. Brown, 235 Ind. 563, 567-68, 135 N.E.2d 614, 616 (1956).

"The rule is firmly established in Indiana that fraud, actual or constructive, constitutes an essential ingredient of a constructive trust." *Id.* at 568, 135 N.E.2d at 616.
as that term is used in the Indiana decisions, corresponds to the common-law
tort of deceit:

Actual fraud has been defined by our courts to consist of deception
intentionally practiced to induce another to part with property or surrender
some legal right and accomplishing the end designed. Its essential elements
are false representations, scienter, deception and injury.\textsuperscript{76}(Citations omitted.)

So far so good. We have discovered that proof of fraud is necessary to
establish a constructive trust, that the fraud shown may be either actual or con-
structive, and that actual fraud is equivalent to the tort of deceit. What is left
to discover is the meaning of the term "constructive fraud" as it is used by the
Indiana judiciary.

Let us establish a point of reference. Section 44(1) of the \textit{Restatement
(Second) of Trusts} provides, in part, that:

\begin{enumerate}
\item Where the owner of an interest in land transfers it inter vivos to
another in trust for the transferor, but no memorandum properly evidencing
the intention to create a trust is signed, as required by the Statute of
Frauds, and the transferee refuses to perform the trust, the transferee holds
the interest upon a constructive trust for the transferor, if
\begin{enumerate}
\item the transfer was procured by fraud, duress, undue influence or
mistake, or
\item the transferee at the time of the transfer was in a confidential
relation to the transferor . . . .\textsuperscript{76}
\end{enumerate}
\end{enumerate}

Section 45(1) deals with the imposition of constructive trusts in favor of third
persons and sets forth standards similar to those found in section 44(1):

\begin{enumerate}
\item Where the owner of an interest in land transfers it inter vivos to an-
other in trust for a third person, but no memorandum properly evidencing
the intention to create a trust is signed, as required by the Statute of Frauds,
and the transferee refuses to perform the trust, the transferee holds the
interest upon a constructive trust for the third person, if, but only if,
\begin{enumerate}
\item the transferee by fraud, duress or undue influence prevented the
transferor from creating an enforceable interest in the third person, or
\item the transferee at the time of the transfer was in a confidential
relation to the transferor . . . .\textsuperscript{77}
\end{enumerate}
\end{enumerate}

We find in these excerpts five distinct instances in which, according to the
\textit{Restatement (Second)}, a constructive trust will be raised: fraud, duress, undue
influence, mistake, or the existence of a confidential relationship\textsuperscript{78} between
the transferee and the transferor at the time of transfer. "Fraud," is equivalent to
the Indiana category "actual fraud." The remaining four occurrences giving rise
to a constructive trust are, to use the Indiana judiciary's terminology, instances of "constructive fraud." The extent to which these four Restatement (Second) categories have been embraced by the Indiana judiciary is the subject of our inquiry.

Precisely what is meant by the Indiana courts when they talk of "constructive fraud" was discussed by the Indiana Supreme Court in the case of Brown v. Brown: 79

"Constructive fraud is fraud which arises by operation of law, from acts or (a) course of conduct which, if sanctioned by law, would, either in the particular case, or in common experience, secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud. Leader Publishing Co. et al. v. Grant Trust and Savings Co., Trustee (1914), 182 Ind. 651, 660, 180 N. E. 121." Ballard v. Drake's Estate (1937), 103 Ind. App. 143, 148, 5 N. E. 2d 671.

Constructive fraud has also been defined as "a breach of legal or equitable duty which, irrespective of the moral guilt of the fraudfeasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence or to injure public interests. Neither actual dishonesty nor intent to deceive is an essential element of constructive fraud." Daly v. Showers (1937), 104 Ind. App. 480, 486, 8 N. E. 2d 139.

Such acts or breach of duty may include mistake, undue influence, or duress. 3 Bogert Trusts Pt. 1, ch. 24, §474, p. 26; 3 Scott on Trusts, §462.2, p. 2317. 80

It is clear from the last paragraph quoted from the Brown opinion that three of the Restatement (Second)’s four types of constructive fraud have indeed been embraced by the Indiana courts. What of the fourth possibility, the existence of a confidential relationship between the transferee and the transferor at the time of transfer? For that matter, what about the pillar of the Restatement of Restitution’s very definition of a constructive trust, unjust enrichment? 81

On the first point it may be observed that the supreme court has not recognized that a confidential relationship within the meaning of Restatement (Second) of Trusts would suffice to bring a constructive trust into existence. The Brown decision is even more germane in considering the supreme court’s view on unjust enrichment as a variety of constructive fraud, and therefore as grounds for a constructive trust.

In Brown, the defendant had purchased land for his housekeeper, "Lucille Brown." The land was held in her name. Lucille Brown later conveyed the property to defendant. This deed contained the following provision: "Grantee gets only life lease and full possession during his natural lifetime and after his death her property so mentioned goes to her legal heirs." 82 Lucille Brown’s sole

80 Id. at 568, 135 N.E.2d at 616.
81 The Restatement of Restitution defines a constructive trust as follows: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." Restatement of Restitution § 160 (1937).
heir brought suit to have the title to the real estate quieted and the deed to defendant set aside. The trial court found that Lucille Brown's conveyance to defendant established a trust, making her the trustee and giving defendant a life estate and plaintiff a remainder in the property. The issue that confronted the court of appeals was whether the trial court's ruling was contrary to law. While conceding that the facts alleged were insufficient to establish a resulting trust, the appellate court found the facts sufficient to impose a constructive trust and affirmed.

The basis for the appellate court's imposition of a constructive trust was unjust enrichment:

A constructive trust is substantially an appropriate remedy against unjust enrichment. It is raised by equity in respect of property which has been acquired by fraud, or where, although acquired originally without fraud, it is against equity that it should be retained by the person holding it. . . .

. . . .

From the record herein it seems that reasonable men might readily conclude that, in recognition of the faithful services rendered to him over the years, and to provide her with security in the event she should survive him, appellee placed this property in her name. It also could be reasonably found that these parties did not intend that if, as happened, she predeceased appellee this property should go to her heirs and he be left penniless. Under such circumstances it seems to us it would be unjust and inequitable to permit the appellant to thus enrich herself.84

Following the affirmance, the appellant petitioned for rehearing, asserting that in holding "that fraud, either actual or constructive, is not an essential element of a constructive trust," the appellate court contravened an extensive accumulation of supreme court precedent. The court denied the petition, reiterating the view that unjust enrichment is a form of constructive fraud and gives rise to a constructive trust:

While it is true our courts have frequently stated that a constructive trust is based in fraud in [the cases discussed], the serious question is determining what constitutes constructive fraud. The authorities cited in our original opinion hold that courts of equity will impose a constructive trust to prevent a failure of justice or to prevent unjust enrichment. . . .

It seems to us there is constructive fraud where it would be an injustice to permit a party to unjustly enrich himself by retaining property under the circumstances which the trial court found to exist herein.85

The supreme court did not accept the appellate court's (and the Restatement of Restitution's) view that a court is justified in imposing a constructive trust to prevent "unjust enrichment."86 Reversing, the higher court observed that the facts alleged did not bring the case within the traditional constructive trust framework:

There is no fraud alleged in the case at bar, and a careful search of

84 Id. at 651.
86 See note 81 supra, for the pertinent Restatement language.
the record fails to reveal any evidence of fraud, either actual or constructive. There is no evidence here of any wilful acquisition by "Lucille Brown," or of any mistaken intention of appellee when he caused the title to such property to be placed in her name. Neither do we find any evidence of undue influence or duress, nor any breach of a legal or equitable duty tending to deceive anyone or to violate public or private confidence or to injure public interests. The mere fact that the grantee, "Lucille Brown," stated to her brother and others that she executed a deed to appellee so that he "would be taken care of as long as he lived"; that she had every-thing "fixed for Grant" and wanted him to have a home as long as he lived; and executed an invalid deed by which she attempted to accomplish this purpose, does not constitute fraud as will justify a court in declaring and enforcing a constructive trust.87

In Brown, by way of summary, the Indiana Supreme Court seems to give us three elements that do constitute constructive fraud: duress, undue influence, and mistake; and two that apparently will not: a confidential relationship within the meaning of Restatement (Second) of Trusts sections 44(1)(b) or 45(1)(b), and unjust enrichment as used by the Restatement of Restitution in defining a constructive trust, and as used by the appellate court in deciding Brown. This being so, it may come as a surprise to learn that in the case of Voelkel v. Tohulka,88 decided one year after Brown, the supreme court imposed a constructive trust saying:

Although it may be difficult to justify a constructive trust in all cases on the basis of fraud, still, if there is a breach of confidence coupled with an unjust enrichment which shocks the conscience if it is permitted to stand, it is then said to be a "constructive" fraud. To hold otherwise, it is said, is rewarding bad faith. 1 Scott, Trusts, §§55.1, p. 397; 54 Am. Jur., §231, p. 177; 37 Harvard Law Review, p. 653; Restatement, Restitution, §160, p. 640.89

At first blush, it would seem that this language conflicts somewhat with the constructive fraud rules established in Brown. In fact, however, the Voelkel definition does not at all contradict the rules established in Brown, and it is because of this anomaly that Indiana constructive fraud (trust) law is muddled at the moment and the need for clarification in view of proposed section 2-101(a) is so pressing.

To reconcile the decisions in a nutshell: Brown was a case involving an attempt to impose a trust in realty. The Statute of Frauds provision demanding a writing was not satisfied, and the defendant was forced to show either a resulting trust or a constructive trust, both implied trusts beyond the reach of the Statute of Frauds. As we know, he failed. Voelkel, on the other hand, was a case involving personal property, and no Statute of Frauds difficulty was encountered. It is submitted that the dichotomy between the real property—Statute of Frauds holding of Brown (where "constructive fraud" seems to have been

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88 236 Ind. 588, 141 N.E.2d 344 (1956).
89 Id. at 599, 141 N.E.2d at 349. Anyone desiring to trace the etymology of the Voelkel court's definition of constructive fraud is advised that the cited authorities will not be helpful.
defined to approximate undue influence, mistake, or duress) and the personal
property - no Statute of Frauds decision in *Voelkel* (with the court talking of
"constructive fraud" in terms of a breach of confidence and unjust enrich-
ment) is explainable in terms of a schism that has apparently developed in the
standards used by the Indiana courts in imposing constructive trusts in reality
and personalty.

The rationale for this seeming disparity probably has its genesis, one suspects,
in the belief that "fraud" need be shown to take a trust in real property "out-
side the Statute of Frauds." This very consideration seemed to be on the court's
mind in *Voelkel* when, just prior to announcing the definition of constructive
fraud quoted above, the court observed:

> Among law writers there has been a great deal of controversy as to
whether the constructive trust should be for the benefit of the intended
beneficiary, and thus in effect carrying out a testamentary disposition with-
out conforming to the Statute of Wills, or for the benefit of the heirs or
estate of the testator, and thus merely restore the status quo. . . .

> Here we are not concerned with that problem. Neither the Statute
of Wills nor the Statute of Frauds is involved. We have merely a promise
made at the time when the proposed trust res was an expectancy, which
later vested. To raise a constructive trust in this case will not violate or
run counter to either the Statute of Wills or Statute of Frauds.90

Had the trust property in *Voelkel* been realty, instead of personalty, the
court most certainly would have been unable to declare that the Statute of Frauds
was not involved. One may ponder whether the court's definition of constructive
fraud and, indeed, the actual outcome of the case, might not have been different
had the corpus in controversy consisted of real property. It seems likely that if
such were the case the *Voelkel* definition would not have differed from that
espoused in *Brown*.91

This is not to imply that the manifestation of the duality found in the
Indiana judiciary's treatment of constructive fraud in cases involving reality and
personalty is confined solely to the verbiage of *Voelkel*. The precedential value
accorded the 1919 appellate court case of *Koehler v. Koehler*92 furnishes us
with another example of the distinction made by the courts between constructive
trusts in real and personal property. The controversy in *Koehler* arose from an
agreement between a father and his sons. The father had promised his sons
that he would invest in land money they contributed, taking a life estate for
himself and his wife with the remainder to go over to the sons. Title to the
property was held in the father's name. After a considerable amount of money
had been contributed and invested, the father conveyed the property to third
parties, receiving no consideration for the conveyance. It was proved at trial
that, following the conveyance, the father and his wife remained in possession of
the property "and received all the rents and profits derived therefrom." The
sons brought suit alleging that their father held the money contributed by them
as trustee and seeking to have the deeds conveying the real estate to third parties
cancelled. Following a decision for the sons, the father appealed. The appellate

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90 Id. at 598-99, 141 N.E.2d at 349.
91 75 Ind. App. 510, 121 N.E. 450 (1919).
court affirmed, holding that the father held the funds contributed by the sons as constructive trustee. For our purposes Koehler is significant only in its imposition of a constructive trust in personal property. It is the manner in which Koehler has served as precedent that highlights the judiciary's failure to concoct equal standards to govern the imposition of constructive trusts in real and personal property.

In Callihan v. Bander, the plaintiff had entered into an oral contract with the defendant, Joe Bander. The agreement allegedly provided that the plaintiff was to receive a one-eighth interest in certain oil and gas leaseholds to be managed by Bander. Plaintiff brought suit, alleging a failure by Bander to comply with the terms of the oral agreement. Bander demurred to the complaint, and the trial court sustained the demurrer.

Appealing from the trial court's decision, the plaintiff set forth two grounds for recovery that are important to us here: (1) the oral agreement concerning the leaseholds involved personal property and was, accordingly, outside the scope of the Statute of Frauds; and (2) Bander held the property in trust for plaintiff. The appellate court disposed of the first point by holding that the leaseholds were real property, hence within the Statute of Frauds, and that the oral agreement was unenforceable. It is the court's disposition of the second argument that strikingly illustrates the dichotomy drawn by the judiciary between constructive trusts in realty and personalty:

If the averments of the complaint may be construed to allege a trust, it is a parol express trust concerning lands which is unenforceable under our statute, § 56-601, Burns' 1943 Replacement. Nor do the facts alleged show actual or constructive fraud. The most that can be said for the complaint herein is that it alleges a failure to carry out the provisions of the contract sued upon. This is not fraud. Westphal v. Heckman et al., 1916, 185 Ind. 88, 113 N.E. 299; Vance et al. v. Grow et al., 1934, 206 Ind. 614, 623, 190 N.E. 747.

The case of Koehler et al. v. Koehler et al., 1921, 75 Ind. App. 510, 121 N.E. 450, relied upon by appellant is clearly distinguishable from the facts herein. In that case this court, at page 526, pointed out the original trust was in personal property.

Given what appears from Brown, Voelkel, and Callihan to be two separate lines of thought by the Indiana judiciary regarding constructive trust standards in realty and personalty, with the personalty standard couched in the more liberal language of breach of confidence and unjust enrichment, it is extremely difficult to explain the Indiana appellate court's 1962 decision in Gorney v. Gorney. Gorney involved the conveyance of a remainder interest in real estate by a ward to parties with whom he had a relationship of a "very intimate and confidential character." The grantees promised to reconvey the property after executing a mortgage on the land. Despite demand by the ward, the grantees refused to reconvey. The ward brought suit; the defendants demurred; the

92 117 Ind. App. 467, 73 N.E.2d 360 (1947).
93 Id. at 471, 73 N.E.2d at 362.
demurrer was overruled; the defendants were held to be constructive trustees; and judgment was granted requiring that the property be reconveyed. Appealing from the trial court's overrule of the demurrer, the defendants asserted that the plaintiff's complaint failed to allege fraud and that fraud, either actual or constructive, is an essential element of a constructive trust.

In finding the requisite constructive fraud, the Gorney court emphasized the confidential relationship and used language milder than that employed by the supreme court in either Brown or Voelkel:

It is a settled rule in this state that the term "fraud" need not be used in the pleading if facts are alleged which show fraud. . . .

This court in the case of Huffman v. Huffman (1905), 35 Ind. App. 643, at page 645, 73 N.E. 1096, at page 1097, stated:

"For the purpose of working out justice, constructive trusts are raised by equity, when in fact there was no intention by the party charged as trustee to create such relation, and usually, indeed, when his intention was otherwise. The gist of every constructive trust is fraud, which may be founded upon misrepresentation and concealment, or arise from the use by one party of some influential or confidential relation which he sustained toward the owner of a legal title; thereby obtaining such title himself upon more advantageous terms than he could otherwise have done. And therefore one who obtains the legal title to property by arts or acts, or through circumvention or imposition, or by virtue of a confidential relation and influence arising from it, under such circumstances that he ought not, in good conscience, to hold and enjoy the beneficial interest therein, is converted into a trustee, and ordered to so execute the trust as to protect or indemnify the party defrauded and at the same time promote fair dealing and common honesty in the interest of society and the state," (citing cases).

Applying the above rule of law to the facts pleaded in the instant case, as set out above, we conclude that the appellee's pleading does state facts sufficient to constitute a cause of action and that the appellants' demurrer was properly overruled.65

Very clearly, the appellate court in Gorney, in deciding a case involving real estate and possessing the attendant Statute of Frauds complication, opted for a rule equivalent to that of the Restatement (Second) of Trusts sections 44(1)(b) and 45(1)(b). Those paragraphs, it will be recalled, fasten a constructive trust on the transferee of real property, in favor of the transferor or a third person, if the transferee refuses to perform and "the transferee at the time of the transfer was in a confidential relation to the transferor . . ." Gorney's liberality, unduplicated in any Indiana Supreme Court pronouncement, is wholly consistent with the lower court's tendency to follow the American Law Institute's positions when dealing with constructive trust situations. Remember that in Brown the lower court imposed a constructive trust founded upon unjust enrichment, the core of the definition of a constructive trust in the Restatement of Restitution.66 In Brown, the appellate court's maverick departure from supreme court precedent was cut short by a unanimous reversal.

The American Law Institute and the appellate court fared better in Gorney. On petition to transfer, an equally divided supreme court denied the petition.

96 For a discussion of Brown, see text accompanying notes 82-87 supra.
The reception given the lower court's holding was not a wholeheartedly warm one. Judge Jackson, in an opinion concurred in by Judge Achor, urged that the cause be reversed and remanded. In so arguing, he used language that calls to mind the traditional real property ("within the Statute") - personal property ("outside the Statute") dichotomy:

In order to comply with the statute [demanding that express trusts in real property be written], and to avoid the statute of frauds provision that contracts in real property be written it was necessary for plaintiff (appellee) to plead and prove the execution and delivery of a written contract. Parol evidence attempting to prove the existence of the oral contract would not afford a basis for a decree of specific performance, as it would be within the statute of frauds. 97

Where does Gorney leave us? An excellent question; let us review the decisions. We find that in Brown, a real property case, the supreme court reiterated the need for actual or constructive fraud — actual fraud meaning deceit and constructive fraud consisting, it appears, of duress, undue influence, or mistake. These requirements are substantially similar to sections 44(1)(a) and 45(1)(a) of the Restatement (Second). In Voelkel, the supreme court, dealing with a constructive trust in personal property, appeared to adopt what looks like a modified version of Restatement (Second) sections 44(1)(b) and 45(1)(b), demanding a breach of confidence (the Restatement (Second) would stop here) coupled with unjust enrichment that "shocks the conscience." Going even further, the appellate court in Gorney adopted a rule identical to that of sections 44(1)(b) and 45(1)(b), and did so in a case involving real property. It should be observed, lest Gorney be viewed as the ultimate breakthrough leaving Brown and Voelkel in its wake, that the supreme court's failure to review the case and the failure of any subsequent case to discuss or even cite Gorney raises at least the theoretical possibility that it may not be followed in the future.

The importance of appreciating these three divergent lines of case law becomes apparent when the effect of proposed section 2-101(a) is considered. Because that section would eliminate any differentiation between real and personal property from a Statute of Frauds standpoint, it is obvious that the split personality that has characterized Indiana's constructive trust decisions would no longer be tolerable, the reason for the split — the real property ("within the Statute") - personal property ("outside the Statute") distinction — having disappeared. Section 2-101(a) would force the judiciary to choose between the standards set forth in the Brown, Voelkel, and Gorney decisions. As has been pointed out, the Gorney holding is the most liberal and progressive of the three.

It is to be hoped that in making its selection the judiciary will bear in mind that the commission's decision to require a writing for trusts in personal property was founded on the belief that the constructive trust device furnishes an adequate remedy to prevent injustice. For this reason, it is desirable that elements necessary

to prove a constructive trust be as clear, easily attainable, and flexible as is possible. This type of development by the judiciary is necessary if subsection 2-201(a) is to become a dependable safeguard against the use of manufactured evidence to establish an oral trust, and not merely a booby trap for the unwary.

III. The Land Trust

Inspired by the Massachusetts business trust, created by the fertile wit of Cook County's realtors and corporate trustees, and sanctioned by a permissive Illinois judiciary, an enigmatic device known as the land trust has infiltrated into several states of late, Indiana included. The enigma that envelops the device centers on the respective rights and duties of the trustee and beneficiary. In the conventional trust, legal title vests in the trustee, equitable title in the beneficiary. In the typical land trust, however, both legal and equitable title vest in the trustee, while the beneficiary reserves the powers of management and control plus the right to rent or mortgage the land and receive the sale proceeds when the property is sold.

This adaptation of the shell game, which sees the trustee holding title to the property and the beneficiary holding every other incident of ownership, is brought about by the use of two separate instruments. The first is a deed in trust vesting the trustee with legal and equitable title to the realty. This instrument is recorded, giving constructive notice to the world that the trustee owns the land. The second instrument establishes the respective rights and duties of the trustee and beneficiary and is not recorded. Typically, the latter agreement provides that the trustee has power to convey only at the beneficiary's request or at the end of twenty years. In either event, the trustee is normally required to dispose of the realty within twenty years after the trust's creation. This provision is inserted to avoid the application of the Rule Against Perpetuities. Additionally, the unrecorded agreement endows the beneficiary with powers to manage, control, mortgage, rent, and sell the property. It also usually imposes some ministerial duties on the trustee.

The effect wrought by these machinations is, under Illinois law at least, that the beneficiary is able to convert what was originally an interest in realty into an interest in personal property. Before discussing the reasons explaining the necessity of and grounds for this conceptualization, let us first briefly examine the advantages that the land trust brings to owners of real property.

Two of the most desirable features common to the land trust are simplicity of transferability and privacy of ownership. Simplicity is achieved by centralizing

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100 McKillop, supra note 98, at 191; Note, supra note 99, at 109; Note, Land Trusts—Adaptability to Kansas Real Estate Practice, 14 U. KAN. L. REV. 97, 104 (1965).

101 The advantages commonly attributed to the land trust are detailed by the authors cited in note 98 supra.

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the power to convey the property in the trustee. This not only reduces the number of signatures to be gathered for conveyancing purposes in the case of multiple ownership, but also facilitates the transfer of property in case of the death, bankruptcy, or incompetency of one of the owners. The privacy afforded the beneficiary by the recordation of ownership in the trustee's name is considered desirable not only by those who want "to be left alone," but also by individuals wishing to use the trust to hold parcels of property without running the risk of driving up land prices should their identities (and motives) be uncovered. The feature is also, unhappily, attractive to slumlords anxious to be insulated from the complaints of their tenants. Other favorable incidents that may induce property owners to implement the land trust arrangement are ease in securing financing and the avoidance of dower rights, double probate proceedings on the death of a nonresident owner, and corporate taxation.

The importance of looking upon the beneficiary's interest in a land trust as personal property is not attributable, to the prevention of dower rights or to the ease with which the beneficiary may defeat attempts by his judgment creditors to levy on the land. These effects are a result of, not the causes for, the fiction. The need to find that a beneficiary's interest is personalty springs from the wording of the Statute of Uses.

As adopted by Indiana, the Statute provides that:

A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary.

Clearly, the plain language of the Statute presents a formidable roadblock to the exploitation of the land trust. In the pithy prose of one commentator: "[A] decision that would apply the Statute of Uses too strictly would sink the land trust plan without a trace." Still, the land trust is. And in Illinois, where it exists under a statute having the same effect, though phrased in the more quaint and much less lucid language of Henry VII's Parliament, the land trust not only exists; it flourishes. It is to the most interesting case of Illinois Judiciary ex rel. Land Trusts v. Statute of Uses that we now turn our attention.

The theories that brought about the demise of the Statute of Uses in our

102 Garrett, supra note 98, at 660; Note, supra note 99, at 106.
103 This feature would not apply to Indiana land trusts since dower rights have been abolished by statute. IND. STAT. ANN. § 6-211 (1953).
106 Garrett, supra note 98, at 668.
107 ILL. ANN. STATS. ch. 30 § 3 (Smith-Hurd 1969).
108 In the words of the Illinois Supreme Court:

The law of this State and the decisions of reviewing courts for more than 80 years have encouraged public reliance upon the real property concepts exemplified in the land trust now before us. Millions, and probably billions, of dollars have been and now are invested in similar trust arrangements and thousands of titles depend thereon for their validity. Chicago Fed. Sav. & Loan Ass'n v. Cacciatore, 25 Ill.2d 535, 547, 185 N.E.2d 670, 676 (1962).
fictional decision were best articulated in the 1939 case of Chicago Title & Trust Co. v. Mercantile Trust & Savings Co. The controversy in Mercantile centered on the relative rights of two banks to property held in a land trust. One bank was a judgment creditor of the sole beneficiary, the other held a mortgage on the property and served as trustee for the land trust. The first was seeking to enforce its judgment as a lien on the land, the latter to foreclose on the trust deed against the property. The actions were consolidated, and the trial court not only held that the judgment creditor did not have a superior lien on the land, but held that it had no lien against the property at all. The judgment creditor bank appealed.

As formulated by the appellate court, the appellant’s contention was that the beneficiary,

immediately upon the delivery of the deed in trust . . . to [the] trustee, by the operation of the Statute of Uses, became the legal owner of the real estate conveyed by said deed in trust, and consequently that appellant’s [subsequent] judgment against [the beneficiary]. . . attached as a lien on such real estate at the time of the rendition of said judgment and was therefore superior to the lien of appellee’s mortgage made [at a later date].

In holding the Statute of Uses inapplicable, the Mercantile court developed two separate theories: (1) the interest of the beneficiary was an interest in personal property (and since the Statute of Uses applies only to realty, it had no effect); and (2) the trust agreement’s specification that the trustee would convey at the beneficiary’s written request and sell any property remaining at the end of twenty years with the proceeds to go to the beneficiary constituted sufficient duties to make the trust “active” and thus remove it from the Statute of Uses.

In holding that the beneficiary’s interest was personalty and thus beyond the Statute of Uses, the Mercantile court stamped its imprimatur on two sub-theories, either of which would accomplish the desired end. The first we shall call the personalty by agreement theory, the second the doctrine of equitable conversion.

The personalty by agreement theory is not fully reasoned in the Illinois decisions. The theory springs from the Mercantile court’s keynote statement of the law governing the controversy:

The rule has been long and well established in this state that the form of deed of trust and trust agreement before us creates a valid and subsisting trust under which the interest of the beneficiary is personal property only and not real estate. It has been repeatedly held that an agreement creating an interest in the profits or proceeds of the sale of real estate creates no interest in or lien upon the land itself. Morrill v. Colehour, 82 Ill. 618; Roby v. Colehour, 135 Ill. 300, 25 N.E. 777; McDonald v. Dexter, 234 Ill. 517, 85 N.E. 209.

None of the three cases cited dealt with land trusts. Indeed the leading case of Morrill v. Colehour was decided fully fifteen years before the first land

110 Id. at 335, 20 N.E.2d at 994-95.
111 Id. at 336, 20 N.E.2d at 995.
trust is said to have been created. The three cases cited were partnership rather than land trust cases. The decisions involved agreements by the partners to create an interest in the profits realized from the purchase and sale of land by a trustee acting on their behalf. When the question arose whether the agreement created an interest in or lien on the land, the Morrill court set forth a rule of law that was followed in Roby and McDonald and has become one of the chief arguments used in declaring that a beneficiary's interest in a land trust is personalty.

Analyzing the transaction in Morrill, the court said:

The purchase was made for the purpose of sale and the acquisition of profits. It was not bought to hold as land, but simply as an article of commerce, and for speculation, and for that reason equity regards it as personal property among the partners. In such cases the intention of the parties stamp the character of the transaction. (Emphasis added.)

The utility of Morrill was not lost on land trust draftsmen when the land trust fiction came into being. In fact, the deed of trust in the very first land trust examined by the Illinois courts contained a recitation that

the interests of all beneficiaries, and all persons claiming under them, were declared to be personal property and to be in the proceeds from the disposition of the land; [and] that the intention was that the conveyance should vest in the trustee the entire legal and equitable title in fee.

The specification in that case was honored, as virtually all such stipulations commented on in the Illinois decisions have been.

The obvious criticism of the personalty by agreement theory is that Illinois courts have extracted partnership principles from their proper context in applying them to trusts. Under the common-law partnership principles that applied to Morrill, Roby, and McDonald, the courts will give effect to an agreement by the partners converting realty to personalty where the property was purchased for sale and profit. This partnership theory has obviously become engrafted onto trust theory. There would be no problem with this evolutionary process did not the terms "trust" and "partnership" imply two distinct legal concepts. That the Illinois courts appreciate this distinction is not readily discernible from their use of the pre-land trust era Morrill case as precedent:

112 Morrill was decided in 1876. The first land trust seems to have been created in 1891. See Garrett, supra note 98, at 657.
113 See note 115, infra.
114 Morrill v. Colehour, 82 Ill. 618, 626 (1876).
115 Jennings v. Kots, 299 Ill. 465, 467, 132 N.E. 625, 626 (1921). It is interesting to note that Florida, one of the three states that have enacted legislation legalizing the land trust, has included language in its statute permitting the parties to convert the corpus into personalty by express stipulation to that effect. The Florida statute, in pertinent part provides that:

In all cases where said recorded instrument, as hereinabove provided, contains a provision defining and declaring the interests of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this state. FLA. STAT. ANN. § 689.071 (4) (1969). For a non-Illinois case that emphasizes the intent of the parties in holding the beneficiary's interest personally, see Tutules v. Cranston, 204 Cal. App.2d 481, 22 Cal. Rptr. 427 (Dist. Ct. App. 1962).
The [land] trust here is an active trust, and [the beneficiary's] interest is personal property as distinguished from real estate by the terms of the recorded trust deed, the trust agreement itself, and by settled Illinois law. Seno v. Franke, 20 Ill.2d 70, 169 N.E. 2d 335; Chicago Title & Trust Co. v. Mercantile Bank, 300 Ill. App. 329, 20 N.E.2d 992; Morrill v. Colehour, 82 Ill. 618. 118 (Emphasis added.)

Indeed, it may be, though it sounds heretical to say so, that the aberration that the Illinois courts have carried forward as a "trust" is, between the beneficiaries, actually a joint venture or a common-law partnership in drag.

The doctrine of equitable conversion is the second subtheory employed by the Illinois court in holding the beneficiary's interest to be personalty. As applied in Mercantile and by a subsequent Illinois decision, 119 the doctrine holds that since the land must be converted into personalty (money) within twenty years from the date the trust is established, the form of the beneficiary's interest at the date the trust is formed is personalty, not realty.

The Illinois equitable conversion doctrine as applied to land trust cases has been indorsed by Professor Scott and the Restatement (Second) of Trusts. 120 Even ratification by such eminent authority has not stopped commentators from criticizing the theory, 121 nor has it stopped the judiciary from preventing or qualifying the application of the doctrine to land trusts and analogous agreements. For example, the doctrine of equitable conversion has been held not to apply when the agreement creating the trust fails to make the trustee's duty to sell by a certain date imperative, 122 or sets a definite termination date without giving the beneficiaries power to have the trustee sell out earlier. 123

The applicability of the doctrine of equitable conversion to Indiana land trusts is still an open question. It may be observed, however, that given the present state of Indiana case law, it appears unlikely that the doctrine would receive the adulation granted it in Illinois. The leading Indiana equitable conversion case is Comer v. Light. 124 In enunciating the Indiana rule of equitable conversion, the supreme court left little doubt that the doctrine could not be used to defeat the right of third parties:

The fiction of law, that under a simple direction to sell and divide the proceeds, conversion into money will be held in equity to have taken place at the date of the death of the testator, and that equity will treat that as done which is directed to be done, and it will be treated as that species of property into which it is directed to be converted, is grounded upon equitable considerations, and is interposed for the purpose of carrying out the intention of testators so far as that can be done within the rules of law, and generally for the purposes of equality, and doing equity between heirs or next of kin, where no other rights intervene, but it has never been understood that a testator can change realty to personalty, or

120 See 2 A. SCOTT, THE LAW OF TRUSTS § 131 at 1063-68 (3d ed. 1967); RESTA-
EMENT (SECOND) OF TRUSTS § 131 (1959).
121 See McKillop, supra note 98, at 188-93 Note; supra note 100 at 104.
123 See Wheless v. Wheless, 92 Tenn. 293, 21 S.W. 595 (1893).
124 175 Ind. 367, 93 N.E. 660, rehearing denied, 175 Ind. 378, 94 N.E. 325 (1911).
vice versa, by the mere declaration that it shall be one or the other, and an examination of the cases will disclose that the fiction of constructive conversion is grounded upon the proposition that, in the absence of intervening interests or rights, the testator’s intention, as it affects the beneficiary, shall control; but when the question as to possession before sale is one between the beneficiary and the trustee of a mere power of sale, the right of the beneficiary is superior; or if the rights of third persons attach or intervene before sale, the fiction is destroyed.\textsuperscript{125}

Based on this rule of law, it would not seem that an Indiana court would be as swift to permit a beneficiary’s judgment creditor to levy on the real estate in a land trust as the Illinois court was in Mercantile.

Should Indiana refuse to follow Illinois in applying the personalty by agreement theory and the doctrine of equitable conversion, one of the key advantages of the land trust scheme — the beneficiary’s ability to put the land out of a judgment creditor’s reach — would be destroyed.\textsuperscript{126} As we shall see shortly, the importance of this observation will be mooted if the legislation drafted by the Trust Code Study Commission to cope with land trusts is adopted.

The second major theory used in Mercantile to avoid the impairment or destruction of the land trust scheme by the Statute of Uses was to hold that the trustee’s two duties, to “make deeds for, or otherwise deal with the title to said real estate” and to sell any property remaining at the twenty-year termination date, were sufficient to make the trust active, thus preventing its execution by the Statute of Uses. Naturally, except in states where the courts apply the Statute of Uses to personalty,\textsuperscript{127} this theory will not become pertinent unless the personalty by agreement theory and the doctrine of equitable conversion have been rejected. The cases conflict on whether a direction to convey in the trust instrument suffices to make the trust active.\textsuperscript{128} The majority seem to favor the Mercantile view,\textsuperscript{129} in the land trust realm, however, two cases, one an Illinois decision, have held trusts passive when the only duty imposed on the trustee was to convey the property at the end of twenty years.\textsuperscript{130} It is interesting to note that an earlier Illinois decision held a trust “active” when the trustee’s sole duty

\textsuperscript{125} Comer v. Light, 175 Ind. 367, 373, 93 N.E. 660, 662 (1911). This view was reiterated by the supreme court in denying the petition for rehearing:

[As] between the testator and the specific beneficiary, and so long as no other rights attach or intervene, the rule of equitable conversion attaches, but when the rights of third persons intervene or attach, they must attach to the property as of that character that exists at the time, subject to being changed in form by the execution of power. That is the doctrine of our cases. If this were not so, the mere fiat of a testator could so change property as to put it wholly beyond the reach of deserving creditors and possibly heirs, and defeat all just expectations; while under the rule as we understand it, the established rules of law and the statutory provisions are operative as to descents, liens or general debts, and the just rights of all protected, but for the purpose of accomplishing equitable results, the rule of equitable conversion will be applied to carry out the intention of the testator where other rights have not intervened. \textit{Id.} at 379-80, 94 N.E. at 325-26.

\textsuperscript{126} Garrett, supra note 98 at 669: “It is of utmost importance in the administration of land trusts that judgments against the beneficiary not be liens against the property held in trust.”

\textsuperscript{127} E.g., Bellows v. Page, 88 N.H. 283, 188 A. 12 (1936). \textit{See} 1 \textsc{A. Scott}, \textsc{The Law of Trusts} § 70, at 664-66 (3d ed. 1967).

\textsuperscript{128} \textit{See} 1 \textsc{A. Scott}, \textsc{The Law of Trusts} § 69.1, at 659-60 & nn. 4-5 (3d ed. 1967).

\textsuperscript{129} \textit{Id.} at 660.

\textsuperscript{130} \textit{See} Janura v. Fenl, 261 Wis. 179, 52 N.W.2d 144 (1952); Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1950). \textit{See also} Note, supra note 100 and accompanying text.
was to reconvey property formerly held by a husband and wife as tenants in common to them as joint tenants.\(^{131}\) Under what scant Indiana case law is to be found discussing the extent of powers necessarily reposed in the trustee to make the trust active, it would seem that the lack of any discretionary latitude given the trustee in the conventional land trust situation would place the investment vehicle on thin decisional ice.\(^{132}\)

How well the land trust would fare in Indiana absent legislative protection is, as noted earlier, still an open question. It does seem, however, that given the Indiana Supreme Court's disinclination to adhere strictly to the intent of the parties as shown in *Comer v. Light*, and its refusal to apply the doctrine of equitable conversion to the detriment of third parties, as was also seen in *Comer*, judicial acceptance of the Illinois personalty theory is doubtful. The same may be said for the likelihood that Indiana courts would hold the conventional land trust active, given the skimpy powers traditionally granted the trustee.

These considerations were weighed by the commission in determining the niche or lack of same to be occupied by the land trust in the proposed code. Though there was considerable sentiment among the commission members to extend the Statute of Uses to personal property,\(^{133}\) there was also a feeling that the land trust ought have legal sanction in Indiana provided safeguards are installed to prevent a beneficiary from abusing the privacy the device affords.

Accordingly, the "Statute of Uses" formulated by the commission contains provisions that will statutorily sanction land trusts in Indiana. The "new Statute of Uses," found in that section 2-107 of the proposed code, provides that:

Subject to Sec. 2-201, if the trustee has neither a power nor a duty related to the administration of the trust, the title to the trust property will be treated as having vested directly in the beneficiary on the date of delivery to the trustee and the trust will be treated as though it were never in effect.\(^{134}\)

Section 2-201, the section carved out of the Statute of Uses, legalizes the land trust:

If the trust property consists only of real property and under the terms of the trust,

(a) the beneficiary has the power to manage the trust property, including the power to direct the trustee to sell the property; and

(b) the trustee may sell the trust property only on direction by the beneficiary or other person or may sell it after a period of time stipulated in the terms of the trust in the absence of a direction: then Sec. 2-107 shall not apply to defeat the trustee's title.\(^{135}\)

This commission views on the land trust's efficacy is set forth in the comments following section 2-201:

\(^{131}\) Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932).


\(^{133}\) The opposite end of the spectrum was also well represented, with some members favoring the abolition of the Statute of Uses altogether.

\(^{134}\) Proposed Final Draft § 2-107.

\(^{135}\) Id. § 2-201.
This section is intended to except from the operation of Sec. 2-107 "beneficiary-managed" trusts. This type of trust has also been known as a "land" trust. The commission neither approves nor disapproves of the use of this type of trust. It does, however, recognize its utility as a means of consolidating numerous parcels of land of which there may be several fractional interest owners and for subdividing a large parcel of land of which there may be several owners and for which there may be numerous buyers.\textsuperscript{136}

The commission also provided, in section 2-202, that the beneficiary may assign his interest in the land trust without going through the formalities required for conveyance of real property:

(a) If the terms of the trust give the trustee the power to sell the trust property upon direction by the beneficiary or other person or to sell it after a stipulated period of time in the absence of a direction as provided in Sec. 2-201 of this part, the beneficiary may treat his interest as personal property and may assign it to any person.

(b) The trustee will be bound by an assignment made under subsection (a) of this section only after he receives written notice of it.\textsuperscript{137}

In addition to the provisions necessary to make the land trust legally acceptable in Indiana, the commission included a section designed to prevent the often criticized misuse of privacy by anonymous land trust beneficiaries:

Any person may petition the court for disclosure of information concerning beneficiaries or the trust estate. The court may order the disclosure of all or any part of the information requested in the petition only after the petitioner has shown both a reasonable need for it and that the trustee has either refused or neglected to provide the information upon written request delivered to the trustee.\textsuperscript{138}

By including these provisions the commission has given vitality to a novel real estate device already in use within Indiana's borders. Legislation sanctioning the land trust has already been enacted in two states by express provisions\textsuperscript{139} and in a third by implication.\textsuperscript{140} Additionally, California has adopted the land trust by judicial decision.\textsuperscript{141} The enactment of the proposed land trust provisions promises to not only save Indiana beneficiaries, trustees, and third parties the expense involved in attempting to clarify the device's validity in the courts, but also, by virtue of the disclosure provision, to eliminate the land trust's most abused side effect.

IV. Trustee's Liability to Third Persons

Historically, the lot of a trustee hailed into court to answer a third party's

\textsuperscript{136} Id., Commission Comment at 56. The land trust provisions may also be looked upon as a recognition of the device's de facto existence in Indiana.

\textsuperscript{137} Id. § 2-202.

\textsuperscript{138} Id. § 4-104.


\textsuperscript{140} See N.Y. Est. Powers & Trusts Law § 7-1.4 (McKinney 1967): "An express trust may be created for any lawful purpose."

breach of contract or tort claim arising from the administration of the trust has not been especially enviable. Why this is so is shown in the Restatement (Second) of Trusts sections covering the trustee’s liability.\textsuperscript{142} Section 261 states the general rule covering the trustee’s liability: “The trustee is subject to personal liability to third persons on obligations incurred in the administration of the trust to the same extent that he would be liable if he held the property free of trust.”\textsuperscript{143}

What the Restatement (Second) quite clearly says is that agency principles, the doctrine of respondeat superior if you will, is not known in the law of trusts. We have it from the United States Supreme Court:

A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. . . . When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee.\textsuperscript{144}

Why can there be no agency relationship between the trustee and the trust? Because the trust cannot be a principal. Why cannot the trust be a principal? “Because never having been baptized with the water of life where-with the legislature blesses corporations, it is not a person.”\textsuperscript{145} What legal category is then left for the trustee? Under this logic the conclusion is inescapable that the trustee, even when carrying out the settlor’s express directives set forth in the terms of the trust, is merely a principal acting on his own behalf and is therefore personally liable on every obligation he incurs when administering the trust. This is the traditional view of the trustee’s liability and, of course, it is utter nonsense.\textsuperscript{146} Still, it is the prevailing view in most states, including

\textsuperscript{142} See Restatement Second of Trusts §§ 261-65 (1959).
\textsuperscript{143} Id. § 261. Personal liability of the trustee as used in this section means that “an action can be maintained against him as an individual and his individual property can be subjected by judicial proceedings to the satisfaction of a judgment . . . .” Id., comment a at 2. As is further explained in the Comment, the trustee is usually entitled to indemnity out of the trust estate if he incurred the liability in the proper course of administering the trust. See id. §§ 244-49 for provisions treating the trustee’s indemnification.

Still, as the Comment further points out, the general rule of the trustee’s personal liability applies whether or not the trustee is entitled to indemnification. Id., Comment b at 2.


\textsuperscript{145} Feezer, Trusts — Torts, 4 Ohio St. L.J. 289, 293 (1938). Professor Feezer added, “I have continued to speak of the trust as though it were something in spite of the cases which say it is not and shall continue so to speak of it.” Id. So have I and so shall I.

\textsuperscript{146} According to Dean (later Chief Justice) Stone, writing in 1922, the traditionalist view that “the trustee, and not the trust estate, is personally bound by law to contracts entered into in the course of administering the trust was “both [an] accepted and acceptable doctrine.” Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee, 22 Columbia L. Rev. 527, 530 (1922). Professor Johnston finds three shortcomings with the traditionalist theory: (1) When the contract is clearly authorized, the theory forces a creditor to exhaust all remedies against the trustee (who may be insolvent or not amenable to service of process) before he may bring a creditor’s bill against the trust estate (which would end up paying the charge anyway). (2) The creditor’s right to recovery is subject to setoffs by the beneficiaries against the trustee. It makes no difference that the setoffs arise from circumstances wholly unrelated to the transaction in question. (3) Because “knowledgeable trustees” are cognizant of the myriad ways of beating personal liability on the instrument, the traditional
That a mechanical application of the traditional theory causes courts to reach anomalous results is well portrayed in *Smith v. Rizzuto*, a 1937 Nebraska Supreme Court decision.

In *Rizzuto*, the testator died leaving all his property, including an apartment house, in trust. The will instructed the named trustee to sell the property and to invest the proceeds after paying the decedent’s debts. Three days after the testator’s death, plaintiff, a tenant in the apartment building, slipped on a patch of ice on the building’s porch, incurring personal injuries. She then brought an action for damages against the trustee named in decedent’s will. The trial court sustained the trustee’s general demurrer, and plaintiff appealed.

On appeal the trustee argued that not only could he not be made personally liable as trustee, but that he was not a trustee on the date the accident occurred. His latter argument hinged on the interpretation of a state statute requiring a trustee to post bond on appointment and providing that if the trustee failed or refused to do so within twenty days after receiving notice, he would be deemed to have declined the trust. Apparently the trustee never posted bond; but this did not daunt the court. The period set by statute for declining was twenty days, reasoned the court. The plaintiff was injured four days after the trust came into existence. Since the trustee had not declined the trust by the time the injury occurred, he was a trustee.

Having a trustee in its grasp, the court was swift to apply the traditional theory of tort liability. As enunciated by the traditional doctrine’s mouthpiece, the *Restatement of Trusts* section 264, the law was that: “The trustee is subject to personal liability to third persons for torts committed in the course of the administration of the trust to the same extent that he would be liable if he held the property free of trust.” The Comment to that section leaves no doubt that the section applies irrespective of the trustee’s fault.

The rule stated in this Section is applicable whether the trustee committed the tort intentionally or negligently or without fault, whether his conduct consisted in action or failure to act, and whether or not he was violating his duties as trustee in acting or failing to act.

After reciting these passages, the court merely observed: “We therefore conclude that the petition states a cause of action against the defendant.” The court then shifted to the issue of indemnification, holding that if the trustee’s liability “arises from the mere fact that the fee title to the trust property is in the trustee,” and if the trustee is without fault, the plaintiff’s maximum re-

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rule is hence primarily effective only as a “snare for the unwary.” See Johnston, *supra* note 144, at 493-500.


149 *Restatement of Trusts* § 264, comment a at 819 (1935). Both section 264 and comment a reappear verbatim in the *Restatement (Second) of Trusts*. 
covery against the trustee is limited to the extent the trustee can be indemnified by the trust.\footnote{150}

The irony of the decision is, of course, that the court was constrained to find a cause of action against an individual that likely did not even know he was a trustee at the time the plaintiff's injury occurred and arguably, tort aside, might have declined the task anyway. The court's talk of indemnification was doubtless of little solace. Though other courts have absolved trustees of liability when the sole ground for liability arise "from the mere fact that the fee title is in the trustee,"\footnote{151} Smith v. Rizzuto and the indomitable Restatement (Second) of Trusts section 264 still state the "traditional rule" regarding the trustee's liability for tort.

The traditional view "socks it to" the trustee in the field of contract law as well. Having no principal to bind, it is said, the trustee binds himself. The Restatement (Second), again representing the majority view, gives the trustee

\footnote{150}{For this proposition the Rizzuto court cited Restatement of Trusts § 265 (1935). That section provides that: "The trustee as holder of the title to the trust property is subject to personal liability to third persons, at least to the extent to which the trust estate is sufficient to indemnify him." The section carried the following caveat:

\textit{It is not intended to express any opinion on the question whether the trustee is personally liable as holder of the title to the trust property where the trust estate is insufficient to indemnify him, and where the trustee was in no way at fault in incurring the liability and was not responsible for the insufficiency of the estate to indemnify him. Id.}

If the caveat represented a split among the draftsmen, time has healed the division. The Rizzuto holding, that the extent of the trust's ability to indemnify the trustee should mark the upper limit of liability against the faultless trustee, is now embodied in Restatement (Second) of Trusts § 265 (1959).

\footnote{151}{This is not the rule followed in Illinois land trust cases. In Brazowski v. Chicago Title & Trust Co., 280 Ill. App. 293 (1935), for instance, plaintiff was injured when a dilapidated fence collapsed. The fence was on property held in a land trust in the name of defendant trustee. The plaintiff sued, charging that the trustee was personally liable, and recovered damages. The appellate court reversed, observing that since the defendant had neither possession nor control, no duty was owed to the plaintiff, hence no negligence was proved. This result—rationalized not from the standpoint that no tort was committed but from the standpoint that the trustee did not commit it—obviously does not square with the "new" traditional view found in Restatement (Second) of Trusts § 265 (1959). Brazowski can perhaps be best rationalized as another manifestation of the Illinois judiciary's penchant for shaping rules of law to nurture the needs of the land trust. Even so, Brazowski's departure from the traditional view has not been confined to Illinois. In a 1956 California case, Richman v. Green, 143 Cal. App. 2d 470, 299 P.2d 890 (Dist. Ct. App. 1956) the California court faced a similar situation in a non-land trust decision. Plaintiff in Richman received personal injuries when an elevator malfunctioned. The elevator was in a building held in Green's name. Green held record ownership as an accommodation to his illiterate father-in-law, Fishman, who had put up the cash for the building. The plaintiff sued for damages, joining Green and Fishman. The trial court dismissed the cause of action as to Green and entered judgment against Fishman. On appeal Fishman's sole contention was that the facts made out a resulting trust with Green as the trustee and that, following the traditional theory, Green, the trustee, was liable. The court of appeals rejected this argument citing Brazowski and observing that the traditional theory applies only to "torts committed in the administration of an active trust where the trustee actually controls the administration of the trust property." Id. at ----, 299 P.2d at 892. These courts clearly chose to ignore the approach of the Restatement (Second) of Trusts. They do not stand alone. See Pena v. Stewart, 78 Ariz. 272, 278 P.2d 892 (1955); Eisenbrey v. Pennsylvania Co., 141 Pa. 565, 21 A. 639 (1891); Fields v. 6125 Indiana Ave. Apt., Inc., 47 Ill. App. 2d 55, 196 N.E.2d 485 (1964); Gallagher & Speck v. Chicago Title & Trust Co., 238 Ill. App. 39 (1925). Holdings such as found in Brazowski, Green, and the cases cited above reject even the liberalized view found in the Restatement. Such holdings, now the exception, seem well on their way to remaking the rule.}
an "out" only if the agreement expressly provides that the trust, not the trustee personally, will be liable.

The "how much is enough" cases that have examined the adequacy of the trustee's disclosure present as fine a collection of hairsplitting decisions as is to be found in Anglo-American jurisprudence. The general rule is that if the trustee adds "trustee" or "as trustee" to his signature on the instrument, he will be personally liable. If he adds the admonition "as trustee but not individually," he will not be held liable. Whether the trustee ought be liable if he signs "X Trustee Estate of Y," or if the contract is executed in the name of a business conducted as a trust are questions on which the authorities diverge. If a court wishes to hold the trustee liable in these instances it has the traditional rule and familiar rhetoric to draw upon: "When a trustee contracts as such, unless he is bound, no one is bound for he has no principal. The trust-estate cannot promise . . ." Or the court can read the instrument and rationalize, as did Judge Cardozo, that: "[W]henever the form of the paper is such as fairly to indicate to the eye of common sense that the maker signs . . . in a representative capacity, he is relieved of personal liability if duly authorized."

The inconclusiveness of the standards to govern the trustee's disclaimer and the need for commercial expediency regarding the trust's obligations have bred statutes crafted to dissipate the signatory miasma. Foremost among the legislative efforts is the Uniform Commercial Code. Section 3-403 of the Code deals with the signature of an "authorized representative" on commercial paper and covers the liability of a trustee:

(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.


153 Roger Williams Nat'l Bank v. Groton Mfg. Co., 16 R.I. 504, 507, 17 A. 170, 171 (1889). This case has been superseded, and the rule liberalized by statute. See note 155 infra.


155 E.g., R.I. Gen. Laws Ann. § 9-2-9 (Supp. 1967). This section provides that if the trustee signs an instrument in his representative capacity, he may not be held personally liable. Unfortunately, this section has not been liberally interpreted. See 91065 Corp. v. Industrial Nat'l Bank, 94 R.I. 424, 181 A.2d 239 (1962), holding that the phrases "Trustees under 11th Clause of W," "Trustees of Will of X," "Trusts under Will of Y," and "Trustees under Indenture of Trust of Z dated Jan. 17, 1949," create a fact question of whether words were merely descriptio personae or indications that the trustees signed in their representative capacities. See also R.I. Gen. Laws Ann. § 18-4-14 (1957); Johnston, supra note 144, at 500-27.
(3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.\(^{156}\)

Though the Code does not expressly state that a trustee would not be personally liable if he fulfills the signature requirements, that conclusion is implicit in the provision.\(^{157}\)

As clear, concise, and widely adopted as it is, the U.C.C. answers only one of our questions concerning the trustee's liability to third parties. What of his liability on contracts and other nonnegotiable instruments and in tort?

The most cohesive and widely adopted network of provisions addressed to these points is found in sections 12 to 14 of the Uniform Trusts Act.\(^{158}\) Section 12 treats the trustee's contracts by providing in part that a third party with a mind to litigate "may sue the trustee in his representative capacity, and any judgment rendered in such action in favor of the plaintiff shall be collectible [by execution] out of the trust property." The section also contains a provision that requires the third party to notify the beneficiaries of the action within thirty days after it is commenced before he may satisfy himself out of the trust property.\(^{159}\) Subsection (3) goes far toward clearing up the "trustee," "as trustee," "who's on first," signature problem. It simply provides that unless the contract excludes personal liability on the part of the trustee, he will be held liable on the contract and that the inclusion of the designation "trustee" or "as trustee" constitutes "prima facie evidence of an intent to exclude the trustee from personal liability."

Section 13 and 14 treat the tort liability of the trustee and the trust estate. The trustee is given, in section 13, a right to exoneration or reimbursement for torts he or his agents commit in the course of administering the trust if

(1) the tort was a common incident of the kind of business activity in which the trustee was properly engaged for the trust, or (2) although the tort was not a common incident of such activity, if neither the trustee nor any officer or employer of the trustee was guilty of personal fault in incurring liability.

The trustee is also given the right to exoneration or reimbursement to the extent the fruits of his tort redound to the trust's benefit.

Section 14 permits suit against the trustee, in his representative capacity, and collection from the trust property if: (1) the tort was a common incident of the trust business; (2) neither the trustee nor his agents was guilty of "personal fault"; or (3) if the tort has enriched the trust corpus. Collection for

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156 This provision is the law in Indiana. IND. STAT. ANN. § 19-3-403 (1964).
157 See Johnston, supra note 144, at 525.
159 The notice requirement has been criticized as being a "small" aid to the beneficiary that "may be outweighed by the expense." Johnston, supra note 144, at 518. In support of the observation Professor Johnston points out that as of 1966, thirty-eight years had elapsed since the Act was initially absorbed into state law and no decisions under section 12 have been reported. Id. n.138.
categories (1) and (2) is limited only by the amount proved (and, presumably, the size of the trust estate); for class (3), collection is permitted only to the extent of the increase in the trust’s value. The section also provides that in suing the trustee in his representative capacity the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff’s claim and that the plaintiff does not sacrifice his cause of action against the trustee personally by proceeding against the trustee in his representative capacity. Notice to beneficiaries within thirty days after the action is brought is also required.

Not unappreciative of the historical underpinnings and contemporary importance of the traditional theory and the attempts of the National Conference of Commissioners on Uniform State Laws to capture it in modified form in the Uniform Trust Act, Indiana’s Trust Code Study Commission has, after spirited discussion and debate, adopted the following language to govern a trustee’s liability to third persons:

(a) Unless the terms of the contract or other non-negotiable obligation provide otherwise, the trustee is not personally liable on a contract or other non-negotiable obligation with a third person made by him in the administration of the trust.

(b) If a third person is entitled to compensation for injury suffered in the course of the administration of the trust and:

(1) if the injury is the result of the trustee’s personal act or omission as trustee, the trustee will be personally liable and the injured party will be entitled to satisfaction of his claim from the trustee’s individual property first and then, to the extent the claim is yet unsatisfied, from the trust estate.

(2) if the injury is the result of the act or omission of an agent of the trustee, and the agent was properly selected and supervised and there was no improper delegation of authority to the agent, the injured party will be entitled to satisfaction of his claim from the trust estate first and then, to the extent that the claim is yet unsatisfied, from the trustee’s individual property.

(3) if the injury is the result of the act or omission of the settlor or his agent, and not that of the trustee or his agent, the injured party will be entitled to satisfaction of his claim from the trust estate and not from the trustee’s individual property.\(^1\)

Subsection (a) sets forth the trustee’s liability on contracts, going further than either the traditional theory (“the trustee is a principal acting on his own behalf”) or the Uniform Trust Act. The section applies only to “contracts and non-negotiable instruments,” so there is no overlap between it and the pertinent U.C.C. provision covering negotiable instruments. Although several states have adopted the position that, absent a provision in the contract to the contrary, the trustee is not liable on the obligation, the same statutes also demand that the trustee’s capacity be disclosed in some manner.\(^2\)

The language of subsection (a) would have the salutary advantage of ridding Indiana trust law of the mischievous nuances engendered by formal signatory considerations. One imagines that after this provision is enacted the

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160 Proposed Final Draft § 3-208.
161 See note 155 supra.
Indiana judiciary will be pleased (and relieved) to be able to say with Cardozo:

Before the statute was adopted, all manner of subtle distinctions had to be drawn before one could say where liability would rest . . . . Many forms of signature indicating an intention to sign as [trustee] for a designated [trust] were held to charge the [trustee] personally . . . . Slight variations of form led to variant conclusions . . . . The refinement of distinction was mystifying even to the courts. It must have been more mystifying to business men in the quick transactions of the market.162

If the Indiana courts do join in this sentiment, and it is the commission's manifested belief that they will, real progress will undeniably have been made.

Subsection (b) establishes a system whereby third parties may assess the respective liabilities of the trustee and the trust for injuries sustained in the "course of administration of the trust." Whether the injuries are actually sustained in the course of administration of the trust is a fact question, dependant upon the peculiarities of each case. Restatement (Second) of Agency section 229 sets out criteria governing the "scope of employment" under agency law and may be useful analogy for a court called upon to decide whether a trustee or his agent's conduct is within the course of the administration of the trust.163

Paragraph (1) establishes the procedure to be followed by a third party seeking reimbursement for injuries caused by "the trustee's personal act or omission." If the injury was not caused by the trustee's personal act or omission but did arise out of the "administration of the trust," the trustee would not be personally liable to the third party. This is a marked departure from the Restatement (Second) of Trusts view exemplified by the Rizzuto case, which would impose liability on the trustee regardless of fault. Under the guidelines of this subsection, a successful claimant must first exhaust the trustee's individual property before he may levy against the trust estate.

Paragraph (2) sets out the rules governing the way in which a third party may recover for injuries caused by the trustee's agent. If the injury is caused by the acts of the trustee's authorized agent, and occurs in the course of ad-

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163 The Restatement (Second) of Agency § 229 (1958) provides:
(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
(a) whether or not the act is one commonly done by such servants;
(b) the time, place and purpose of the act;
(c) the previous relations between the master and the servant;
(d) the extent to which the business of the master is apportioned between different servants;
(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
(f) whether or not the master has reason to expect that such an act will be done;
(g) the similarity in quality of the act done to the act authorized;
(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
(i) the extent of departure from the normal method of accomplishing an authorized result; and
(j) whether or not the act is seriously criminal.
ministration of the trust, then as between the trustee and the trust, the injured party must first levy on the trust property. Again this departs from the traditional view, which would hold the trustee personally liable though permitting the trustee to reimburse or exonerate himself out of trust assets.

Paragraph (3) details one instance in which neither the trustee nor his agent have caused the third party's injury. In this case, only a right of recovery against the trust estate arises. The trustee and his agent are absolved from liability.

The philosophy underlying this subsection is readily apparent — the beneficiary is to be made whole for any injury he receives while the trust is being administered. The effect of these provisions is simply to assist the injured party in understanding from whose pocket recovery will come. If the trustee is at fault, he is primarily liable. If an agent causes the harm, he is, of course, liable; but as between the trustee and the trust, the trust is primarily liable. If neither the trustee nor his agent causes the injury, the trust estate is liable in full.

V. Conclusion

We have attempted to briefly explore the Trust Code Study Commission's efforts both from the standpoint of the factors in Indiana trust law that made the commission's work necessary and, in a more limited sense, the specific provisions crafted by the commission to resolve inconsistencies, fill voids, and fortify the law of trusts as it exists in Indiana. Anyone doubting the efficacy of a legislative response to the needs of Indiana's existing network of trust law is encouraged to reflect on the views Professor Williston offered forty years ago.

It has been the history of law in every other civilized country that after customary or common law has developed to a certain degree, or for a long period of years, and become unwieldy, a Code has followed. Most of the world today is living under Codes, and is tolerably well satisfied to do so; and when a Code has once been adopted, they never go back.

Whether it be in fifty or one hundred or two hundred years, my own belief is that we shall repeat the history of other countries; and if we are going to do so, it is highly desirable that we have something that will be a good Code.164

After several years of diligent effort the Trust Code Study Commission has arrived at the blend of renovation and innovation that it believes will give Indiana a "good Code" to govern the law of trusts. This spring, the commission will publish its report complete with comments on the new law and the extent to which existing Indiana trust law would be modified. The proposed code will be introduced in the 1971 session of the General Assembly. From that point it will be up to the people's elected representatives to determine the extent of reform in Indiana's trust law.