DEVELOPMENTS IN CONTRACT LIABILITY
OF TRUSTS AND TRUSTEES

JOHN D. JOHNSTON, JR.

I

INTRODUCTION

THAT the utility of the trust device is attributable in great measure to its flexibility is hardly debatable. The trust's remarkable capacity for facilitating the accomplishment of a wide variety of human objectives amply justifies Maitland's characterization of it as "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence."1 Today, the trust is widely employed in this country for the effectuation of diverse purposes ranging from family settlements, where the beneficial enjoyment of wealth is divorced from the burdens of its management and the responsibility for its preservation, to speculative operations such as real estate development and oil exploration, where a sound organizational framework for the accumulation and investment of venture capital is required.2 Indeed, the importance of the trust as a medium for the employment and distribution of wealth is difficult to overestimate.

The significance of the trust is all the more remarkable when one recalls that its existence is attributable to the "more or less accidental circumstance that in England in the fifteenth century, and for four hundred years thereafter, there were separate courts of law and equity."3 The development of the modern trust from the feudal active use is by now a familiar narrative.4 Yet, it is well to be reminded from time to time of the adamant refusal of the English law courts to recognize either the trust estate as an entity apart from the trustee's own assets, or beneficial interests as enforceable against the trustee.

Of course, today the distinction between law and equity retains only a fraction of its former significance, and for many purposes the warring Coke and Ellesmere are merged in a single judge. Ironically, however, vestiges of the old dichotomy are

---

1. Maitland, Selected Essays 129 (1936).
2. For a listing of diverse business purposes for which trusts have been utilized see Annot., 156 A.L.R. 22, 80-82 (1945).
3. 1 Scott, Trusts § 1, at 5 (2d ed. 1956) [hereinafter Scott].
preserved in some aspects of trust law even today, through anachronistic perpetuations of the ancient legal antipathy which inevitably clash with the benign equitable foundations of modern trust law.

Third-party liabilities of trusts and trustees furnish a conspicuous example. With respect to contracts executed in the administration of a trust, nonrecognition of the trust entity often results in unfortunate consequences. This article will attempt an exposition of some of the difficulties presented by the traditional approach to contract liability, and a discussion of several statutory modifications that are currently in effect.

II
THE TRADITIONAL APPROACH

"It is familiar learning that a trustee is personally liable for those debts which he incurs in the course of the administration of the trust estate,"5 and that he is entitled to "appropriate from the assets of the trust such amount as is required to indemnify him" for the performance of authorized contracts.6 In addition, it is well established that a contract provision immunizing the trustee from personal liability is valid, and will restrict the promisee to such recovery as can be obtained from the trust assets.7

Perhaps the leading (and certainly the most frequently cited) American case on the subject of contract liability of trustees is Taylor v. Davis’ Adm’x.8 There, a former trustee of a land development trust was in possession of trust property. Since the trust estate was indebted to him, a lien was imposed in his favor upon this property.9 However, he agreed to transfer it to two successor trustees in consideration of the execution by them of a contract promising to repay the indebtedness of the trust to him out of “the moneys which shall come and remain in our hands as trustees... after first paying therefrom all taxes and current expenses of [the trust] ....”10 This agreement was signed “S.

5. Stone, A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee, 22 Colum. L. Rev. 527 (1922). The leading English case is Muir v. City of Glasgow Bank, 4 App. Cas. 337 (1879). American cases are in accord. See Restatement (Second), Trusts § 262 (1959) [hereinafter Restatement]; Bogert § 712 (1960); 3 Scott § 262.
6. Stone, supra note 5, at 527. English and American authorities are numerous. See Bogert § 718 (1960); 3 Scott §§ 244-46.
7. In re Robinson’s Settlement, [1912] 1 Ch. 717, 728-29, firmly established this doctrine in England. For American authorities see Bogert § 714 (1960); 3 Scott § 263.
8. 110 U.S. 330 (1884).
9. See Restatement § 244, comment c; 3 Scott § 244.1.
Staats Taylor, Edwin Parsons, Trustees of the Cairo City Property." When the promisee died some five and one-half years later, the contract was still unperformed. After his death, the successor trustees executed an identical contract in favor of his administratrix, confirming and renewing their obligation. Several years later, the administratrix brought an action at law against the two successor trustees, alleging that they had failed and refused to pay this contract claim even though large sums of money had come into their hands over and above the amounts necessary to pay taxes and current expenses of the trust.

It appeared that, at the time the contract with the plaintiff was executed and at the time her action was commenced, the defendants had "no money of the trust fund in their hands."11 The circuit court found, though, that at various times subsequent to the execution of the second contract, the defendants had had sufficient funds in hand to discharge the obligation. Finding that the defendants thus had wrongfully refused to pay the plaintiff, the lower court entered judgment in her favor against them personally. They brought a writ of error to the Supreme Court, contending that by the express terms of the contract their liability was limited to trust assets in their possession; hence, judgment against them individually was improper.

Their contention was rejected by the Supreme Court, in the following terms:

In this case the contract is the personal contract of the plaintiffs in error. Before it was made the trust estate and the plaintiffs in error, in their capacity of trustees, were already bound for the debt due to Davis [the decedent], and he had the right to keep possession of the trust estate until he was paid. It is clear, from the contract and the circumstances under which it was made, that Davis consented to yield possession of the trust property on condition that he received some security for his payment other than the mere liability of the trust estate. He therefore took the contract in suit, and yielded the possession of the trust estate without exacting payment of his demands.

We are of opinion, therefore, that the plaintiffs in error, having assumed a personal liability, the suit was well brought against them in a court of law, and that the court did not err in rendering judgment against them in their individual capacity.12

The Court's conclusion as to a contractual assumption of personal liability seems unsound. The contract clearly contemplated payment out of trust funds, and the validity of such a stipulation can scarcely be questioned. Moreover, since the promisee had full

11. Id. at 333.
12. Id. at 335-36, 337.
knowledge of the representative capacity of the promisors, there could be no contention that he contracted with the defendants as principals.

It should be noted that the Supreme Court concurred in the lower court's finding that the defendants had, from time to time, been in possession of sufficient trust funds to pay the plaintiff's claim. Therefore, the result of the case is sound. Even assuming that the trustees acted properly in making the contract, they breached it by their refusal, over a long period,\textsuperscript{13} to pay the plaintiff out of trust funds in their possession. For this wilful breach, they properly incurred personal liability. Had there been trust funds in their hands sufficient to discharge the contractual liability, the plaintiff could have brought a bill in equity against them in their representative capacity, requesting the chancellor to compel payment.\textsuperscript{14} Assuming that the contract was properly entered into on behalf of the trust, there can be no doubt that such relief would have been proper. Thus, it does not appear that the action at law was plaintiff's exclusive remedy; rather, it was her only practicable remedy.

The opinion of the Court by Mr. Justice Woods contains the following passage, which has been quoted numerous times in later cases:

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 an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. 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. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagement out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof.\textsuperscript{15}

\textsuperscript{13} More than twenty-two years elapsed between the execution of the original contract and the decision by the Supreme Court.

\textsuperscript{14} In the following cases, even though the trustee was held personally liable, the opinions indicate that an action could have been maintained against the "trust estate": Pan Am. Petroleum Corp. v. Gibbons, 168 F. Supp. 867 (D. Utah 1958); Allegheny Tank Car Co. v. Culbertson, 288 Fed. 406 (N.D. Tex. 1923); Bradner Smith & Co. v. Williams, 178 Ill. 420, 53 N.E. 358 (1899); Gnadt v. Moore, 297 S.W. 468 (Mo. Ct. App. 1927).

\textsuperscript{15} 110 U.S. at 334-35.
Because of this gratuitous statement, the *Taylor* case has frequently been cited in support of the general proposition that a trustee assumes personal liability whenever he contracts on behalf of the trust, unless the contract specifically limits the promisee’s recovery to the trust assets. Such a broad construction is not warranted by the facts or the actual holding in *Taylor* because these trustees could have been held personally liable even if the Court had found an express agreement that the plaintiff should look only to the trust assets for satisfaction. In this event, personal liability would be predicated on a tort theory: trustees are not permitted wrongfully to frustrate the promisee’s recovery by dissipating trust assets in their possession. This is the soundest justification for the holding in *Taylor*.

The *Taylor* opinion cites an earlier Supreme Court case, *Duvall v. Craig,* as supporting authority for its conclusion that the contract sued upon was a personal undertaking of the trustees. In that case, the defendant trustees conveyed trust property to the plaintiff with covenants of warranty, including a covenant against prior grants and encumbrances. This covenant was worded as follows: "Robert Johnson and Elijah Craig, trustees to the said John Craig, for themselves, their heirs, executors and administrators, do covenant . . . with [the plaintiff] . . . ." Below the signature of Robert Johnson and Elijah Craig appeared the words “Trustee for John Craig.”

The grantee brought an action in covenant against the grantors, alleging that a survey of the property conveyed had previously been assigned by one of the trustees and John Craig to a third party. This person had procured a patent executed by the Governor of Virginia, which conferred upon him a paramount title to the property. The defendant trustees demurred, contending that they could not be held liable in an action at law for an agreement executed by them as trustees. Their demurrer was sustained by the circuit court, but the Supreme Court reversed.

16. The trust having no assets, there could of course be no recovery on the contract. Nor, since the contract was authorized, could personal liability be imposed on the trustee for breach of warranty of authority to execute it. Where such conduct amounted to a breach of trust, the trustee was held personally liable to the promisees in *James Stewart & Co. v. National Shawmut Bank,* 69 F.2d 694 (1st Cir. 1934), cert. denied, 294 U.S. 722 (1935). Even if the misapplication of funds did not amount to a breach of trust, the promisee should still recover on a theory of tortious interference with contractual relations. See Prosser, *Torts* § 123 (3d ed. 1964).

17. See Restatement § 263(3); 3 Scott § 263.4.


19. Id. at 51.
The Court's opinion by Mr. Justice Story makes short shrift of the defendant's argument:

A trustee, merely as such, is, in general, only suable in equity. But if he chooses to bind himself by a personal covenant, he is liable at law, for a breach thereof, in the same manner as any other person, although he describe himself as covenanted as trustee; for, in such case, the covenant binds him personally, and the addition of the words "as trustee" is but matter of description, to show the character in which he acts, for his own protection, and in no degree affects the rights or remedies of the other party. The authorities are very elaborate on this subject. An agent or executor who covenants in his own name, and yet describes himself as agent or executor, is personally liable, for the obvious reason, that the one has no principal to bind, and the other substitutes himself for his principal.

The reasoning upon this point disposes, also, of the second made at the argument, viz., that the covenant being made by Robert Johnson and Elijah Craig, as trustees, no individual judgment can be rendered against them... for at law a judgment against a trustee in such special capacity is utterly unknown.20

The trustees may have been surprised to learn of their "choice" to bind themselves personally. The grantee was clearly on notice that they were conveying trust property in their representative capacity. The covenants, however, did expressly bind "themselves, their heirs, executors and administrators." Thus there is some foundation for the conclusion that they voluntarily incurred personal liability. It is simply not credible, though, that one who stands to receive no personal gain from a transaction would ordinarily assume personal liability for resultant losses.21 At the very least, it would seem that the promisee should have the burden of proving that personal liability was bargained for.

It is significant, however, that although the opinion in Duvall, as that in Taylor, suggests that the trustees voluntarily incurred personal liability, neither decision is dependent on such a finding. In both instances, the trustees knowingly and wrongfully prevented the promisee from receiving the object of his bargain; and in both cases there apparently were no trust funds available to recompense him.

The rule enunciated in these two Supreme Court cases has been followed in several analogous situations where the trustee was not authorized to enter into the contract,22 or executed it

20. Id. at 56-57.
21. Speaking generally, there might no doubt arise an inference (if not rebutted by other circumstances) that a person who derived no benefit himself, and who acted only for the benefit of others... would not intend thereby to expose himself to personal liability if it could be avoided. Muir v. City of Glasgow Bank, 4 App. Cas. 337, 368 (1879) (Lord Penzance).
negligently, or wrongfully refused to perform it, or defrauded the promisee. In addition, personal liability has been imposed upon liquidating trustees of businesses who contracted for goods or services knowing that the business assets were exhausted. In all of these situations, it would appear that the trustee's misconduct is sufficient ground for the imposition of personal liability. Of course, if the trustee represents that he has assumed personal liability, this representation is binding. Similarly, if the promisee is unaware of the existence of the trust, and believes himself to be dealing with a principal, personal liability is properly imposed on the trustee.

that, where the trustee executed an unauthorized note "as trustee," the holder is restricted to an action against the trustee individually. Had the note been authorized, though, the plaintiff would have been able to bring a creditor's bill in equity to recover out of trust assets.

In some cases the trustee who executed an unauthorized note as "trustee for X" has been held personally liable on the note. See, e.g., Marshall Field & Co. v. Himelstein, 253 Mich. 355, 235 N.W. 181 (1931); Multorpor Co. v. Reed, 122 Ore. 605, 260 Pac. 203 (1927).

23. In Horst v. Gaston, 217 Ala. 290, 116 So. 141 (1928), the trustee agreed to sell trust property to plaintiff, and procured court approval of the terms of sale. The trustee presented a written contract to the trustee containing the terms previously approved and a provision whereby the seller agreed to pay him a commission of five per cent of the purchase price. The trustee, unmindful of this insertion, executed the contract on behalf of the trust estate. Plaintiff sued the estate for his commission, but recovery was denied. The trustee's inadvertence or negligence "cannot be made the permissible basis of an allowance out of the trust estate. The issue as to whether such commission should be paid is a personal matter between [plaintiff and the trustee]..." Id. at 291, 116 So. at 142.

24. See, e.g., Rosenthal v. Schwartz, 214 Mass. 371, 101 N.E. 1070 (1913), where an administrator was held personally liable for a real estate commission where he contracted to sell real property belonging to the estate and defaulted on his obligation to convey.

25. See, e.g., Pfiff v. Berresheim, 405 Ill. 617, 92 N.E.2d 113 (1950). Plaintiff paid the trustee in full for two lots owned by a land development trust, but the trustee nevertheless conveyed them to a third party. Personal liability was imposed upon the trustee, as well as beneficiaries who knew and approved of the conveyance.

26. See, e.g., Gnadt v. Moore, 297 S.W. 468 (Mo. Ct. App. 1927). The opinion states that the plaintiff also had a remedy in equity against the trust estate. This remedy is not exclusive, however, and the action at law may be maintained against the trustee individually. Id. at 469. See also Bradner Smith & Co. v. Williams, 178 Ill. 420, 53 N.E. 358 (1899).

27. In Koken Iron Works v. Kinealy, 86 Mo. App. 199 (1900), the trustee of a business trust was held personally liable for rental payments where he had assured the landlord that, "as long as he... was... trustee, the rent would be paid promptly." Id. at 201.

28. See, e.g., Curtis v. Title Guar. & Trust Co., 3 Cal. App. 2d 612, 40 P.2d 562 (1935). This action was based on fraudulent representations by officers of the defendant corporation, which induced plaintiff to buy certain lots it owned. Defendant contended that it should not be held personally liable, since it was acting as
But what of the situation where the trustee enters into an authorized contract, and is guilty of no misconduct? If, in such a case, the promisee knows that the trustee is acting in a representative capacity, should not his recovery be out of (and limited to) trust assets? This would analogize trustee liability to that of agents and corporate officers who execute authorized contracts on behalf of their principals.29

The rule with respect to trustees is, however, otherwise: even in such situations as just described, the trustee still incurs personal liability.30 The reason for such a holding is, of course, suggested by the Taylor case. The trust is not a legally recognized entity, and since there is no "principal," there can be no "agent." The court of law is thus forced to reach a conclusion that is patently false: that the trustee is really acting as a principal in his own behalf.

trustee under an unrecorded deed of trust. This contention was rejected, and a judgment against the defendant corporation individually was affirmed upon this reasoning:

Where it [the defendant] has thus acted as, and in its contracts represented itself to be, the owner of the properties it should not be allowed to attempt to shift its responsibility by proving that it was not actually acting as owner but as trustee of an express trust under an unrecorded declaration of trust of which the purchaser had no notice.

Id. at 620, 40 P.2d at 565. Cf. Whalen v. Ruegamer, 123 App. Div. 585, 108 N.Y. Supp. 38 (2d Dep't 1908). This result is consistent with the agency doctrine that one who contracts with an agent for an undisclosed principal may hold the agent liable for performance. See Restatement (Second), Agency § 322 (1958).

29. With respect to contract liability of agents see Restatement (Second), Agency § 320, comment a (1958):

One who purports to contract on behalf of a designated person does not manifest by this that he is making a contract on his own account, and only where he so manifests does the agent become a party to a contract which he makes for the principal.

See also id. § 328.

Corporate officers are "agents, usually appointed and controlled by the board of directors." Ballantine, Corporations § 49 (rev. ed. 1946). "The officers of a corporation, whether it is close or publicly held, are in legal theory agents of the corporate entity." 2 O'Neal, Close Corporations § 8.05, at 93 (1958).

30. In Royal L. Brockob Constr. Co. v. Trust Co., 6 Ill. App. 2d 565, 128 N.E.2d 620 (1955), the promisee knew that the promisor was a fiduciary, but had no notice of the identity and extent of the trust estate, nor of the provisions of the trust instrument. The trustee was held personally liable. However, a number of cases have held that, where the promisee had actual or constructive notice of trust provisions denying personal liability of trustees for authorized contracts, his recovery should be limited to trust assets. E.g., James Stewart & Co. v. National Shawmut Bank, 75 F.2d 148 (1st Cir. 1935); East River Sav. Bank v. 245 Broadway Corp., 284 N.Y. 470, 31 N.E.2d 906 (1940); Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Wallace, 346 Pa. 532, 31 A.2d 71 (1943).

Scott says:

Such a provision in the trust instrument, however, does not of itself preclude the trustee from being personally liable . . . . But where the other party to the contract has notice of the provision, it may be considered with other facts in determining whether it was the understanding of the parties to the contract that the trustee should not be personally liable.

3 Scott § 263.2, at 2046.
At common law, this conclusion was inescapable. Since the trustee was regarded as the sole owner of trust property, no distinction was drawn between it and property owned by him individually. An action at law for the recovery of a contract claim would lie against the trustee individually, and execution could be levied against any of his assets. Thus, the trust res was liable to execution for the payment of his personal debts, as well as contract claims incurred on behalf of the cestui que trust. Similarly, judgment creditors whose claims arose out of the administration of the trust could levy execution against any property owned by the trustee.

For example, suppose $X$ is seized of three parcels of real estate—one owned by him outright, the second held as trustee for $Y$, and the third as trustee for $Z$. At common law, all three parcels would be liable to execution by $X$’s personal creditors, as well as creditors whose claims related to the administration of the trusts for $Y$ and $Z$. $Y$ and $Z$ could prevent $X$’s individual creditors from levying against the property held for their benefit by appealing to the Chancellor to restrain execution of the judgment against these assets. In this way, trust property was rendered immune
from execution for payment of the trustee's individual debts. But what of the creditor whose claim arose out of the administration of the trust for Y? With respect to this claim, it might seem that the parcel held in trust for Y, as well as X's individual property, should be liable to execution.

Equity procedure, however, did not permit any remedy so simple and direct. It was required that the creditor first exhaust the trustee's individual property before seeking recovery out of trust assets. In the event that he was unable to obtain full satisfaction of his judgment, he could bring a creditor's bill in equity against the trustee. If he could show that his judgment against the trustee was still unsatisfied after exhaustion of the trustee's individual property, and that the claim was of the type for which the trustee was entitled to indemnity against the trust assets, a court of equity would permit the creditor to attach the trustee's right of indemnity and obtain satisfaction out of the trust property. The creditor's recovery was completely dependent upon the trustee's right of indemnity, which could be defeated in a number of ways. For instance, if the contract were unauthorized, no right of indemnity would arise. Also, the trustee's right of indemnity was subject to setoffs asserted by the beneficiaries, arising out of the maladministration of the trust in any respect. These setoffs could reduce or nullify the trustee's right of indemnity; they would have an identical effect on the contract creditor's claim.

Thus, his recovery might be diminished or wiped out entirely by a setoff arising out of a completely unrelated transaction.

Although this last-mentioned aspect of equity procedure has been soundly criticized by an eminent authority, it is probably

---

A purchaser at a sheriff's sale succeeds to all the rights of the defendant [trustee] in the execution . . . . The defendant, in the execution, cannot deny the purchaser's right to stand in his shoes. Should the plaintiff [transferee of the purchaser at the execution sale], in this case, attempt to deprive the trustee of the possession of the premises, the remedy of the cestui que trust will be in a Court of Equity.

See also Stone, supra note 5, at 530: "When the judgment operates only to bind the trustee personally, equity will protect the trust property from levy and execution." In Kincaid v. Hensel, 185 Wash. 503, 55 P.2d 1050 (1936), the promisees had recovered judgment against the trustee for breach of a contract to convey trust property, and attempted to levy execution on trust assets. At the behest of the beneficiary, the Supreme Court of Washington set aside the execution, saying that "the trust property can be subjected to the obligation only by an equitable action in rem." Id. at 506, 55 P.2d at 1052.

33. See Restatement § 268; Bogert § 716 (1960); 3 Scott § 268.

34. See Restatement § 268, comments d and e; Bogert § 716 (1960); 3 Scott § 268.2. But this limitation is ineffective to the extent the trust estate has benefited from the contract. Restatement § 269, comment a; 3 Scott §§ 269, 269.1.

35. In such a case, the cestui que trust may continue to enjoy the full economic benefit of the trust property, including the benefit conferred upon it by the creditor of the trustee without the necessity of paying for it from
still followed in most American jurisdictions. In defense of this procedure, it has been said that it quite properly separates the question of the validity of the creditor’s claim from the question of who (as between the trustee and the trust estate) shall ultimately bear the burden of payment. On the former question, the financial interests of the trustee and beneficiaries are identical; on the latter, they are squarely in conflict. Further, it can be contended that the traditional procedure provides the most appropriate forum for the resolution of each issue. If he recovers judgment against the trustee personally, the creditor can obtain satisfaction out of the trustee’s assets. Having paid the judgment, the trustee may then obtain a determination of whether or not he is entitled to indemnity out of the trust estate. This determination is customarily rendered in an accounting by a court having supervisory jurisdiction over the trust. It is binding on the trustee and all beneficiaries properly before the court.

III

A CRITICISM OF THE TRADITIONAL VIEW

The traditional rationale just stated quite properly recognizes that any claim against a trustee arising out of the administration of the trust may present two separate issues, one of which places the trustee’s individual interests in conflict with his fiduciary duty. The traditional procedure is, however, vulnerable to attack from at least three quarters. First, in the case of clearly

the trust property or otherwise—the one authentic instance in the law where one may pay his debts with his losses.

Stone, supra note 5, at 529.

36. The rule against allowing persons dealing with trustees to proceed directly against the trust, is founded on public policy. The public interest requires that trustees shall incur the liability with the risk of its being disallowed, for cause, when they come to settle their accounts. This secures their good faith and keeps a salutary check upon their liberality in dealing with trust estates.


Furthermore, although not germane to the origin of the rule, it can be urged that original personal liability of the trustee on contracts is fairer to the beneficiaries than estate liability. If an action against him as trustee could be maintained at law and judgment satisfied out of the trust property, the cestui might be held to be concluded as to the propriety and fairness of the contract without an opportunity to be heard. The trustee, if he had made an injudicious contract, would be apt to keep silent as to his breach of trust and cover up the wrong. But if the original liability at law is on the trustee personally, the cestui is not bound as to the legality and wisdom of the contract by any settlement or litigation between trustee and the third person. The burden will be on the trustee, in his settlement with the cestui, to prove that the contract he made was within his powers and was fair in its terms, so that he may justify having applied trust property in satisfaction of his contract liability or may get reimbursement from the trust property for moneys of his own which he has spent on that account.

37. See Restatement § 220; Bogert §§ 956, 974 (1962); 2 Scott § 220.
authorized contracts, adherence to the traditional procedure places an unnecessary burden on a creditor where the trustee is insolvent or not amenable to service of process. Although the trust estate must bear the ultimate burden of the contract, the creditor nevertheless must pursue the trustee and exhaust all remedies against him before being permitted to bring a creditor’s bill. Second, having brought his creditor’s bill, he is subject to set-offs asserted by beneficiaries against the trustee, even though they arise out of transactions completely unrelated to the contract under which he claims.

In rebuttal, it can be argued that these are merely instances of inconvenience or loss to the creditor arising out of procedures instituted to protect beneficiaries against improper diminution of trust assets. As such, they reflect a value judgment that some degree of inconvenience to—and some risk of loss by—creditors is acceptable in order to protect beneficiaries against reduction of their beneficial interests by payment of unauthorized contract claims. This represents, perhaps, the ultimate argument in defense of the traditional procedure. But it is considerably weakened, if not altogether discredited, by consideration of our third point: the doctrine of exoneration. As Scott says:

Where the trustee incurs an obligation on behalf of the trust estate, it is frequently the individual obligation of the trustee; but if the obligation was properly incurred by him in the administration of the trust he is entitled to discharge it out of the trust property. He has, in other words, not merely a right of reimbursement where he has made payment out of his individual funds, but he has a right of exoneration, a power to use trust property in discharging the obligation.\(^38\)

\[
\ldots\ldots\]

If the trustee in the proper administration of the trust incurs an obligation to a third person, and he has discharged the obligation out of his individual property, he is entitled to reimbursement out of the trust estate. If he has not discharged the obligation out of his individual property, he is entitled to apply the trust property to the discharge of the obligation. In other words, he has not only a right of reimbursement, but a right of exoneration.\(^39\)

Dean (later Chief Justice) Stone pointed out that this so-called right of exoneration is actually a “power to apply the trust funds for payment of all expenses necessary or proper for the administration of the trust whether . . . [the trustee] be entitled to reimbursement or not.”\(^40\)

Bogert implies that the trustee’s exercise of his power to

---

38. 3 Scott § 244, at 1961. See also 3 Scott § 246.
39. 3 Scott § 268, at 2072.
40. Stone, supra note 5, at 534.
apply trust funds in this manner is dependent upon prior authorization by a court of equity.\textsuperscript{41} This is probably unsound;\textsuperscript{42} it is certainly contrary to trust administration practice.\textsuperscript{43} Trustees routinely discharge all obligations incurred on behalf of the trust out of trust funds, and for good reason. It is unrealistic to require a trustee to meet all trust obligations out of his individual funds, with reimbursement being postponed until judicially ordered in an interim or final accounting. Few trustees would have sufficient working capital to operate in this manner; even fewer would be willing to tie up their funds so unprofitably. It is equally unsound to compel the trustee to seek prior judicial authorization for each expenditure out of the trust estate. With respect to even a rel-

\textsuperscript{41} If a trustee is threatened with a judgment against himself personally, or with execution out of his personal property, he can bring a suit to prevent the judgment being obtained, or the execution enforced, and to compel the liability to fall on the trust property or the cestuis, or upon such other party as the court may consider the appropriate bearer of the burden. . . . This right is called the right to exoneration, that is, the right to have the court remove original liability from the trustee. Bogert § 718, at 486-87 (1960).

\textsuperscript{42} The only authority cited for Bogert's view of exoneration is Hobbs v. Wayet, 36 Ch. D. 256 (1887). There, a woman had purchased bank stock with her own funds, registering it in the joint names of herself and another. She predeceased the other tenant, and six years later the banking corporation failed. The liquidator levied an assessment against the estate of the surviving joint tenant, who had died in the meantime. His executor brought an action against the personal representative of the original purchaser, seeking indemnity out of her estate for the assessment. This relief was granted on the theory that the surviving tenant had accepted an interest (and consequent liability) in the stock at the request of the purchaser, and "'any one who requests another to incur a liability which would otherwise have fallen on himself is, in general, bound at law as well as in equity, to indemnify him.'" 36 Ch. D. at 258.

The court held that, on the facts of the case, the survivor's executor held the stock in trust for the purchaser's estate. Thus the case is authority for the conclusion that a trustee may bring an action to compel a beneficiary or third person to discharge a liability asserted against trust assets, and that such relief will be granted upon a proper showing. It is not authority for the proposition that a trustee must receive court approval before applying trust assets in his possession to the payment of trust indebtedness. Compare the comment of Lord Justice Stirling in Jennings v. Mather, [1902] 1 K.B. 1, 6 (C.A. 1901): "'[W]hen the legal title to trust property is vested in the trustee, he has a right to resort to that property, without the assistance of the Court, for the purpose of indemnity against liabilities properly incurred by him in the administration of the trust.'"

The American view is aptly stated as follows:

The trustee, therefore, who has incurred indebtedness in the proper management of the trust estate may apply the trust funds in payment of the indebtedness, and he may likewise do so by paying for the necessary goods and services even though he has assumed no personal obligation to pay for them. Every trustee's accounting, involving expenditures of trust funds for the proper expenses of the trust, is a recognition of this principle.

\textsuperscript{43} "The customary method of trustees of paying indebtedness incurred by them in the administration of the estate is to draw a check upon the trust bank account in favor of the creditor." Id. at 538.

Imaged with the Permission of N.Y.U. Law Review
tively small estate, the trustee may consummate dozens of trans-
actions each year. The delays incident to hearings on petitions for
authority to discharge each obligation out of trust funds would
hamstring the trustee, and the expense of such proceedings would
deplete trust assets.

Since it is the accepted practice for trustees to apply trust
assets to discharge contract obligations incurred on behalf of the
trust estate, it follows that the initial burden of all contracts,
whether technically "authorized" or not, is borne by the bene-
ficiaries. In this context, it becomes clear that the rule imposing
personal liability on trustees furnishes inadequate (if any) pro-
tection for beneficiaries. As a practical matter, their only effective
means of protection against unauthorized contracts are: (1)
through accounting procedures at reasonably frequent inter-
vals; and (2) a requirement that trustees post bond or its equiv-

44. The duty to keep records and to submit them to a court of equity for
approval is an elementary responsibility of all trustees. See Bogert §§ 962-63 (1962); 2 Scott § 172. Beneficiaries are entitled to informal accountings by the trustee at reasonable intervals, unless the trust instrument provides to the contrary; but the settlor cannot relive the trustee from submission to equity's supervisory jurisdic-
statement § 172, comment d.

Most jurisdictions have statutory provisions dealing with formal accountings.
It is not clear whether such enactments are intended to supersede the inherent
power of equity to require accountings, or merely to lay down formalized guide-
lines for trustees. The latter alternative seems more plausible, in the absence of a
clear legislative direction that the statutory regulations shall be exclusive. It has
been held, though, that a petition for an accounting prior to the time fixed by
statute is premature. Matter of Estate of Whitman, 22 Ill. 511 (1859). As will be
seen, complete judicial deference to statutory regulation is unwise—especially in
jurisdictions where the statutes in force do not purport to bind all trustees.

The range of variation in the statutory requirements for accountings is con-
siderable. The Uniform Trustees' Accounting Act provides for the filing of an inven-
tory within thirty days after the trustee takes possession of the trust estate, annual
intermediate accountings thereafter, a "final accounting" at the time of termination,
and a "distribution accounting" after the trust assets have been finally distributed.
Uniform Trustees' Accounting Act §§ 2, 3, 4, and 5 apply these requirements to tes-
tamentary trustees, and §§ 12 and 13 render them applicable to nontestamentary
trustees as well. Section 17 provides that these requirements shall not abridge the
judicial power to supervise trust administration, nor prevent a court from excusing
a trustee from performing any duty imposed by the act. Section 15 provides that
the settlor may relieve the trustee from any duty imposed by the act, without
affecting the jurisdiction of the court which "does not depend upon" the act. This
act is in effect in Kansas, Nevada, New Mexico, and the Virgin Islands.

By contrast, the statutes of at least ten states (Alaska, California, Illinois, Mon-
tana, New York, Rhode Island, Tennessee, Texas, Wisconsin, and Wyoming) appar-
ently do not require periodic intermediate accountings. In these jurisdictions,
accountings are ordered only upon request by a beneficiary or trustee.

The statutory requirements of the remaining jurisdictions fall between the ex-
tremes represented by the Uniform Trustees' Accounting Act and the accounting-
by-request procedure just indicated. Many states require periodic accountings only
of testamentary trustees, and in some the interval between required accountings is
as long as three years. See generally Bogert §§ 965-69 (1962).
alent in sufficient amount to afford protection against trustee insolvency pending the conclusion of such proceedings. 45

Finally, it might be argued that the traditional rules and procedures constitute some protection for beneficiaries by holding the trustee to a high standard of care and prudence in executing contracts on behalf of the trust. The unsoundness of this argument becomes apparent, however, upon a consideration of the ease with which knowledgeable trustees can avoid the personal liability rules altogether. As previously stated, it is well established that the trustee incurs no personal liability if the contract provides that the promisee shall look solely to the trust assets for performance. 46 A satisfactory rationale for this result has been elusive, though. Even if the promisee's agreement is treated as a renunciation of his cause of action against the trustee individually, how can it impose direct liability upon the trust estate? Some authorities have held that the effect of such an agreement is to transfer the trustee's right of indemnity to the promisee. 47 The promisee may then bring a bill in equity against the trustee in his representative capacity, and recover out of trust assets. 48

 Courts ordinarily engage in no “active” supervision of trustees; their jurisdiction must be invoked by the filing of an appropriate petition by an interested party. In the absence of a requirement for periodic intermediate accounting, it is thus possible for a trustee’s administration to continue from creation of the trust to termination without any formal accounting. This is an unwise and imprudent result, especially where the beneficiaries are under a disability. Clearly, accounting statutes in many states offer inadequate assurance that a trustee’s unauthorized or unlawful acts will be promptly discovered. See Bogert, The Proposed Uniform Trustees’ Accounting Act, 21 Cornell L.Q. 529, 548-50 (1936).

 It should be mentioned that national banks exercising fiduciary powers are required to keep records of fiduciary activities, and submit to inspection by the staff of the Comptroller of the Currency. 12 C.F.R. § 9.8(a) (1962).

 45. Bonding requirements are imposed by statute in most jurisdictions, with considerable disparity of treatment. Some statutes require bond of all trustees, others only of testamentary trustees, and a few impose this requirement only upon corporate trustees. A common provision exempts corporate trustees which meet certain capital and surplus requirements, or which have deposited securities with the state banking commissioner. See Bogert § 151 (1965).

 46. See note 7 supra.


 48. 3 Scott § 271 suggests two alternative justifications for this result: the “exemption” theory, under which the promisee can recover out of trust assets only
But the trustee's right of indemnity comes into existence only at the time he expends his own funds for the benefit of the trust. Where there has been no such expenditure, it would seem that the promisee really has no derivative claim at all. Even should this hurdle be surmounted (or ignored), the requirement for exhaustion of legal remedies must be dealt with. Can the trustee "waive" this requirement on behalf of the beneficiaries, for whose protection it was imposed? An additional difficulty is the question of whether the promisee's recovery can be offset by claims against the trustee arising out of unrelated transactions. As we have seen, the majority American rule permits such setoffs; but not, apparently, where the contract requires the promisee to look solely to the trust assets. Perhaps, on Stone's analysis, this result can be justified as a "transfer of the right of exoneration." But why, as a matter of policy, should the trustee be permitted simultaneously to relieve his own personal liability and to impose a greater liability upon the trust estate than it would normally incur, if the primary motivation of the personal liability rule is to protect beneficiaries?

Relatively few of the decisions concerning limitation of the trustee's contract liability have dealt with the substantive and procedural niceties of the promisee's recovery against the trust estate. Most of the cases are actions at law by the promisee against a trustee individually, and the courts are concerned with the question whether, in particular contracts, the trustee has effectively nullified his personal liability. The holdings indicate that, in the absence of a provision expressly limiting the promisee to recovery out of trust assets, the usual rule of personal liability will be imposed on the trustee. In a few cases, the fact that the contract was signed by the trustee "as trustee for" a named estate has been held sufficient indication of an agreement by the promisee to look only to trust assets. But this form of signature has also been held to be "mere descriptio personae," as has a signature "as trustee," without identification of the trust estate.

The doctrine of enforceability of disclaimer clauses actually to the extent the trustee is entitled to reimbursement; and the "direct claim" theory, under which the promisee's claim is not diminished by setoffs to the trustee's right of indemnity. Id. at 2093-94.

49. See text accompanying notes 33-34 supra.
50. See Restatement § 271, comment c; Bogert § 715 (1960).
51. See Restatement § 268; Bogert § 716 (1960); 3 Scott § 268. See also 3 Scott §§ 271A, 271A.1, unfortunately confusing indemnity with exoneration.
52. The natural supposition is that litigation arises most frequently not because the trustee has refused to pay the promisee out of trust assets, but rather because the trust funds are inadequate and the promisee can recover full satisfaction only from the trustee individually.
undermines the argument advanced to support personal liability in *Taylor v. Davis' Adm'x*. The reader will recall that the assertion "if the trustee is not bound, then no one is bound" was there made in support of the conclusion that agency concepts could not be utilized in deciding cases involving liability of trustees on contracts entered into in the course of administration. If this statement were true, contracts containing such disclaimers would be illusory and unenforceable by the promisee. As we have seen, though, this is not the case: the promisee *does* have a cause of action against the trustee in his representative capacity, and *can* recover out of trust assets. Thus, a more accurate statement would be that, even if the trustee is not bound individually, liability may nevertheless be imposed upon trust assets. It follows that yet another rationale supporting the traditional view of contract liability of trustees has proved fallacious.

Knowledgeable trustees can be expected to take full advantage of available techniques for limiting or nullifying personal liability on contracts executed in the administration of trusts. The traditional rule of personal liability thus is effective primarily as a snare for the unwary and a source of needless procedural

---


54. See, e.g., *Call v. Garland*, 124 Me. 27, 125 Atl. 225 (1924). The defendant, administratrix of her husband's estate, ordered the cutting of a gravestone and requested the promisee to "bill my husband's estate." She later signed a written agreement for the purchase of the stone as "Mrs. George H. Garland." The court held that by affixing her personal signature to the contract, she voluntarily incurred personal liability. This holding was later cited in support of a statement of law that a person acting . . . in a representative capacity . . . may be liable personally on any contract made by him unless the law (or a will) permits the credit of the estate to be pledged. This is true even though the contract is for the interest of and for the benefit of the estate.


In *Knipp v. Bagby*, 126 Md. 461, 95 Atl. 60 (1915), a trustee executed a mortgage on trust property as "Walter Knipp, trustee." After default and foreclosure, an action for deficiency judgment was brought against the trustee individually. The mortgagor testified that the defendant had told him that "other parties were interested with him in this property, but I did not go into that matter . . . ." Id. at 468, 95 Atl. at 62. In spite of this admission of knowledge that the mortgagor was acting in a representative capacity, and a deliberate choice not to make further investigation, the court held that the trustee was personally liable for the deficiency.

A contrary result was reached in *Boyle v. Rider*, 136 Md. 286, 110 Atl. 524 (1920), on policy grounds. There, trustees for creditors of an insolvent were permitted, with judicial approval, to complete the performance of a contract of the insolvent with the city of Baltimore for sewer construction. Their hope was to realize profits on the contract with which to pay claims of creditors. After completion, however, funds on hand were insufficient to pay even the plaintiff, who furnished materials or supplies to complete the sewer construction. He then sued the trustees individually. Although no express exculpatory clause was found in his contract with the trustees, the court implied such a provision from the "surrounding circumstances." The real basis for the holding, however, was the court's view that while it is true that . . . [the trustees] could have insisted upon an express
difficulty for contract creditors. These unfortunate effects are not, as we have seen, offset by any substantial protection for beneficiaries.

The trust estate functions as an economic unit or entity. Unfortunately, its recognition as a legal entity has been delayed by adherence to the traditional view in spite of its anachronistic character. Ironically, the same "historical accident" that permitted the development of the utility and flexibility of the trust device now serves to impede its development as a legal entity. As a result, trust law has been denied general participation in the development of principles of nonliability of agents and corporate officers acting within the scope of their authority. It has also lagged behind the trend toward general recognition of unincorporated associations as legal entities.

IV

STATUTORY MODIFICATIONS OF THE TRADITIONAL VIEW

Leading authorities agree that, with the general merger of law and equity in the United States, there is no real obstacle to legal recognition of trust estates. Such recognition has been accorded by legislation in a number of jurisdictions.

A. Business Trusts

Business trusts have been utilized in many jurisdictions to avoid disabilities or onerous restrictions placed on corporations. Agreement that they should not be personally liable for purchases honestly made in the progress of the work, it would not have occurred to many, if any, business men that there could be such liability, under the circumstances. If these trustees are to be held personally responsible, it will be difficult in the future to get responsible men to accept such positions, at the instance of creditors.

Id. at 297, 110 Atl. at 528-29. But see Bradner Smith & Co. v. Williams, 178 Ill. 420, 53 N.E. 358 (1899).

55. See note 29 supra.

56. The courts of law might conceivably have held that the contract of a trustee bound him as a trustee and that a judgment against him as a trustee could be collected by execution against the trust property. But it must be remembered that in the early days the courts of law took no cognizance of the trust and treated the trustee as complete owner of the property.


"In states in which the distinction between actions at law and suits in equity has been abolished, the procedural difficulties in permitting an action at law against a trustee in his representative capacity should not offer any difficulty." 3 Scott § 266, at 2069.

57. The development of the law of corporations was the overshadowing feature of legal history in this country in the last quarter of the nineteenth century. It was accompanied by unreasoning public hostility to corporations. . . . One of the most striking features of the recent decisions of the Courts is the evidence that business men are reverting to unincorporated associations to carry out their purposes. . . . These associations are organ-
Because of its similarity in function and operation to other forms of business association, the business trust has been recognized as a legal entity for some purposes. When the instrument or declaration of trust is duly recorded, some jurisdictions grant express authority to acquire an assumed name in which the trust can sue or be sued. Others go so far as to provide that the trustees of a qualified business trust shall incur no personal liability for any act, omission, or obligation arising out of the trust's activities. Thus the entrepreneurial trustee, a business owner-manager who has deliberately chosen the trust form as a means of evading some aspect of the jurisdiction's business regulatory scheme, may receive immunity from personal liability on contracts. But the conservatorial trustee, chosen by a settlor to manage assets for the objects of his bounty, incurs personal liability. This is not merely an anomalous result; it is precisely the opposite of one's normal expectation. The person who trades for his own benefit can reasonably expect to bear the burden of contract liabilities resulting from his transactions. On the other hand, he who deals solely on behalf of others, receiving no personal advantage from the transaction, would not ordinarily expect to incur liability for authorized transactions. Imposition of personal liability in the latter case, with immunity in the former, is a negation of the concept that those who stand to benefit from economic activity should also bear the liabilities usually associated with it.

No criticism of the policy equating business trusts with other forms of business organizations should be inferred from the foregoing discussion. Rather, it is intended to exemplify the unsystematic character of statutory modifications of the traditional rule of personal liability of trustees. It is appropriate now to consider other modifications, without pretense of exhaustive treatment of

----

Wrightington, Unincorporated Associations iii (1916).

58. E.g., Mass. Gen. Laws Ann. ch. 182, § 6 (1958). This statute does not relieve the trustee's personal liability on contracts; hence its effect may be characterized as procedural. Larson v. Sylvester, 282 Mass. 352, 185 N.E. 44 (1933). In Dolben v. Gleason, 292 Mass. 511, 198 N.E. 762 (1935), the court asserted that the statute "does not purport to make a trust a legal entity for the purpose of making contracts but merely permits its assets to be reached in an action at law to satisfy debts which its trustee has contracted." Id. at 515, 198 N.E. at 764. See also Ballentine v. Eaton, 297 Mass. 389, 8 N.E.2d 808 (1937).

59. E.g., Okla. Stat. Ann. tit. 60, § 174 (1963). In addition, it has been held that, where an unincorporated association is permitted to sue and be sued in its own name, its trustees are not personally liable for the performance of authorized contracts. See Hawthorne v. Austin Organ Co., 71 F.2d 945 (4th Cir. 1934). But where the association entity was not recognized, traditional liability was imposed on the trustees by analogy to the doctrine that an agent who contracts for a non-existent or incompetent principal incurs personal liability. Peeples v. Enoch's, 170 Miss. 472, 153 So. 796 (1934). See Restatement (Second), Agency § 326 (1958).
every relevant enactment. Several different statutes will be examined, with a discussion of the extent to which they actually alter the traditional doctrine of contract liability of trustees.

B. Alabama

In 1873, Alabama enacted a statute modifying the traditional rules in several respects. It is still in effect in substantially the same form, and provides as follows:

A trustee, or an executor, or an administrator, may render the estate in his hands to be administered liable for the payment for necessary service rendered to him, or for necessary repairs in and upon the estate, or for necessaries furnished to him, if he be or become insolvent without making payment, and has not charged the estate with, and obtained credit for such services, repairs, or necessaries.60

By permitting a direct action against the trust estate by one who has furnished services, repairs, or necessaries, the statute benefits the claimant in two situations: (1) if the trustee is insolvent, the statutory procedure facilitates recovery in one action at law, rather than the traditional action at law-creditor's bill practice;61 (2) the statutory claim is not subject to diminution from setoffs asserted by beneficiaries against the trustee, arising out of unrelated transactions.62 The prescribed means of procuring recovery under the statutory remedy is by action at law against the fiduciary or his successor, and beneficiaries apparently need not be joined.63

The statutory departure from traditional rules of contract liability is thus quite limited. It is applicable only to a narrow category of claims, and is apparently not intended to relieve the trustee's personal liability, but only to give the claimant an alternative method of recovering his claim. In fact, several jurisdictions permit direct access to trust assets by holders of comparable claims even in the absence of express legislative mandate.64

61. See text accompanying notes 33-34 supra.
62. An entire change of the character of the demand is produced [by the statute]. From a personal liability of the trustee, it is made a charge on the estate, burdening the rights and interests of the cestui que trusts [sic], without regard to the state of the trustee's accounts, or to the inquiry whether he could retain the estate for its payment. Askew v. Myrick, 54 Ala. 30, 32 (1875).
63. See Ala. Code tit. 58, § 40 (1960); Askew v. Myrick, supra note 62.
64. See, e.g., Austin v. Parker, 317 Ill. 348, 148 N.E. 19 (1925); New v. Nicoll, 73 N.Y. 127 (1878). In the former opinion, it is said that "where the estate would be required to pay the trustee if he paid the claim, and the latter is insolvent or non-resident . . . the estate can be directly held in a proceeding in chancery." 317 Ill. at 355, 147 N.E. at 22.
C. Connecticut

As early as 1902, Connecticut instituted a modification of the traditional approach to fiduciary contract liability.\textsuperscript{65} In its present form, the statute provides:

In any case in which any person has a legal claim against any executor, administrator, guardian or trustee, growing out of moneys paid or services rendered for the estate in the hands of such executor, administrator, guardian or trustee, and which should justly be paid out of such estate, a civil action may be brought by such claimant against such executor, administrator, guardian or trustee, while in office, or against the successor of any of them, if he has ceased to hold such office. If such claim is found to be a just one and one which ought to be equitably paid out of such estate, judgment may be rendered in favor of such claimant, to be paid wholly out of the estate so held by such executor, administrator, guardian or trustee; provided, that if there is not sufficient estate to satisfy such claim or claims in the hands of such executor, administrator, guardian or trustee, this section shall not be so construed as to prevent any claimant from pursuing his legal remedy against such executor, administrator, guardian or trustee, at his election, for the balance that may be due him, nor from electing to hold any such official liable to his personal responsibility for any debt contracted in the execution of such trust.\textsuperscript{66}

The statute contains several noteworthy features. Its coverage extends to executors, administrators, guardians, and trustees—virtually the entire spectrum of conservatorial fiduciaries. The statutory action, however, may be brought only on claims arising from "moneys paid or services rendered for the estate." This clearly excludes noncontract claims.\textsuperscript{67} In addition, the statute has been held inapplicable to certain contract claims asserted against fiduciaries.

In one case, Miller's Appeal,\textsuperscript{68} an administrator had compromised a will contest by executing an agreement to pay the caveator a cash sum, and to "care for" her for the rest of her natural life. The administrator's final accounting was approved by the probate court without provision for the care of the caveator, and she appealed to the superior court. The appeal was dismissed on the

\textsuperscript{65} Conn. Gen. Stat. § 739 (1902).
\textsuperscript{67} In Main v. Norman, 130 Conn. 600, 36 A.2d 256 (1944), the plaintiff attempted to utilize the statute to recover from a decedent's estate the value of sheep lost as a result of the administrator's alleged failure to keep a fence in proper repair. In affirming a directed verdict for the defendant, the Supreme Court of Errors asserted that, "if the neglect in this case were that of the administrator, he could be sued only in his individual capacity, with the right on his part, should he be called upon to make payment, to claim a credit in his accounting to the Probate Court." Id. at 601, 36 A.2d at 256.
ground that the appellant was not a creditor of the estate, and thus had no standing to appeal from the order of the probate court.\(^6\) In so holding, the superior court rejected the argument that the statute made her a creditor of the estate. It further refused to impose an equitable lien upon the estate assets to secure payment of the appellant's claim for support. No reason was given for either conclusion.

The caveator's claim obviously did not grow out of "moneys paid or services rendered for the estate," in a literal sense. If, however, the contract were authorized, then even by the traditional view ultimate liability would fall upon the solvent estate, not the administrator.\(^7\) Since all interested parties to the controversy were before the probate court, it was in a position to decide the authorization issue, and thereby determine whether or not the estate would be required to indemnify the administrator for support payments made to the caveator. Instead, the superior court decision forced her to proceed against the administrator individually. If she should obtain recovery from him, then he would be forced to pursue his claim for reimbursement against the estate. On the other hand, if her judgment should go unsatisfied she would then have to institute an action against the estate. Thus two additional actions might eventually be necessary to dispose of a matter that the probate court could have easily handled in the first instance. While the claim is being perfected through the slow and cumbersome traditional processes, the estate assets may have been distributed and may be beyond reach.\(^8\) If its interpretation of section 52-202 is correct, the \textit{Miller} case suggests that the statute should be amended to include all contract claims properly payable out of the fiduciary estate.

It has been held that judgments rendered in actions brought pursuant to the Connecticut statute must be satisfied solely out of estate property, without recourse to the fiduciary's personal

\(^6\) Conn. Gen. Stat. Rev. § 45-288 (1958) provides that "any person aggrieved by" the order of the probate court may appeal to the superior court. In Hartford Nat'l Bank & Trust Co. v. Malcolm-Smith, 129 Conn. 67, 69, 26 A.2d 234, 235 (1942), it was held that "no person can be aggrieved within the meaning of the statute unless he is interested in the estate, either as creditor, legatee, or heir-at-law, or in some pecuniary manner."

\(^7\) "If the contract obligation was properly incurred, the fiduciary might have reimbursement from the estate, through an allowance to him in his account." 20 Conn. Supp. at 181, 129 A.2d at 358. This is scant comfort for the administrator, since the result of the case was approval of the final accounting and distribution of the estate. See note 71 infra.

\(^8\) Creditors are sometimes permitted to reach estate assets in the hands of beneficiaries or legatees. See Wells-Stone Mercantile Co. v. Aultman, Miller & Co., 9 N.D. 520, 84 N.W. 375 (1900); Restatement § 279. However, the risk of scattering and dissipation of assets is obvious.
This holding may appear strained in view of the express statutory provision that the claimant may pursue his legal remedy against the fiduciary personally, where estate assets are insufficient to provide complete recovery. This would seem to authorize execution (the "legal remedy") out of personal assets of the fiduciary. The statute, however, has not been so construed. The reasoning has been that the statutory remedy is cumulative, not exclusive. Thus the common-law action against the fiduciary individually is neither merged into nor superseded by the statutory remedy.

Connecticut procedure apparently permits an action in the alternative against the fiduciary personally as well as in his representative capacity. This gives a court of law the opportunity to specify whether the plaintiff's recovery will be rendered out of the defendant's personal assets or the estate property. Thus, if his claim is of the sort described in the statute, the creditor can secure a complete adjudication in one action. Since it does not affect the trustee's individual liability, but merely authorizes a direct action against the trustee in his representative capacity, this statute may be characterized as procedural in nature. This conclusion is further fortified by the limitation of the statutory remedy to claims which "ought to be equitably paid out of such estate"—a clear indication that no liberalization of conditions justifying recovery against trust assets is intended.

It can be argued, however, that even the limited procedural changes wrought by the statute contain an element of danger. Since there is no provision for making beneficiaries parties to the statutory action, the trustee may be able to conceal a legitimate issue as to his authority to make the contract, resulting in an expenditure of trust assets for unauthorized claims. In rebuttal, it may be contended that the trial judge hearing the evidence will be solicitous of the interests of the beneficiaries. Also, since the statutory remedy is limited to cases where the plaintiff has paid money or performed services, the estate has presumably benefitted from the transaction. Of course, the beneficial interests


This statute does not change the nature of the obligation incurred by an executor or administrator in the performance of his duties; it merely affords the creditor a remedy by which, without injustice to the estate, the obligation owed him may be discharged immediately.

74. In American Sur. Co. v. McMullen, 129 Conn. 575, 30 A.2d 564 (1943), an action was brought against two co-executors, individually and in their representative capacities, to recover alleged misappropriations by one of them. Judgment was rendered against the wrongdoer, but in favor of the estate and the other co-executor who neither knew of nor benefitted from the wrongful acts.

75. In cases where the contract has conferred a benefit upon the estate, some
are exposed to no more risk of loss through unauthorized payments than they ordinarily bear anyway.

D. Georgia

Georgia abrogated the traditional rules of trust and trustee liability in 1856, with the enactment of a statute which is still in effect. The following provisions indicate its thrust:

Any person having a claim against any trust estate for services rendered to said estate, or for articles or property or money furnished for the use of said estate, or any claim for the payment of which a court of equity would render said estate liable, may collect and enforce the payment of such claim in a court of law.\(^{76}\)

If there is no trustee, or if he is a mere naked trustee and nonresident in the county, the cestui que trust shall be made the defendant, and the proceedings shall be, in all respects, the same as when the trustee is defendant.\(^{77}\)

The judgment thus rendered shall impose no personal liability on the trustee, or in any way render his property liable for the payment of the same; but said judgment shall only bind such trust estate, and execution shall issue accordingly.\(^{78}\)

All executions issued upon judgments rendered under the provisions of Section 108-501 to 108-505 shall specify in the body of the execution the property upon which the same is to be levied, and it shall be levied on no other property.\(^{79}\)

On its face, this statute appears to embody a more substantial alteration of the traditional approach to trust and trustee liability than the Connecticut statute.

For example, the statutory classification of claims is quite broad: where the Connecticut statute was limited to claims for money paid or services furnished to the estate,\(^{80}\) section 108-501 includes in addition to these categories "any claim for the payment of which a court of equity would render said estate liable." Although this clause could be subjected to a narrow interpretation under the canon of *ejusdem generis*, the Georgia Court of Appeals has held that the statute authorizes even tort actions against the trust estate.\(^{81}\)

A number of decisions indicate that this statute, like the Connecticut enactment, imposes no requirement that the claimant

\(^{80}\) See text accompanying note 66 supra.
join the beneficiaries as parties to the action. One case, *Clark v. Flannery & Co.*, held that minor beneficiaries were bound by a judgment against the trustee on several notes executed for the estate even though (1) the trustee had not defended the action; (2) it was alleged that he had applied the proceeds to his own use; (3) there were alleged setoffs or credits which could have been interposed against the creditor's claim; and (4) facts were alleged which tended to show that the trustee had colluded with the claimant to assure entry of the default judgment against the trust estate. The beneficiaries petitioned for an injunction to prevent execution of the default judgment on these averments, but a demurrer to their petition was sustained. The beneficiaries were thus relegated to their equitable claim for repayment against the trustee, who was their father, and allegedly insolvent.

This harsh result seems unwarranted. Unfortunately, the court ignored *Meyer v. Butt & Brother*, an earlier decision on point. There a beneficiary was permitted to show that the trustee conspired with the claimant to defraud her. The allegations were quite similar to those in *Clark v. Flannery & Co.*: that the trustee used proceeds of a note for his own purposes, then suffered a default judgment in an action brought against him in his representative capacity, and was insolvent at the time the beneficiary sought to enjoin execution of the default judgment against trust property. In granting relief to the beneficiary, the Georgia Supreme Court stated that

> generally, a trust-estate is bound by a judgment against the trustee. But we do not agree that this rule applies to a case where, by the very nature of the suit, it is [in] the interest of the trustee to have the judgment rendered. ... The interest of the trustee is with the plaintiff, and [it] is a perversion of the whole intent of the trust to permit his neglect, or his act to bind the trust property for his own benefit.

The apparent conflict between these two cases was resolved in favor of the *Meyer* case in *Snelling v. American Freehold Land Mortgage Co.* There a judgment creditor attempted to levy exe-

83. 99 Ga. 239, 25 S.E. 312 (1896).
84. Paragraph one of the court's syllabus states that "if the trustee was unfaithful to his trust in improperly allowing the judgment to be rendered, he and his sureties, if any, are liable to the beneficiaries thus injured." Id. at 239, 25 S.E. at 312.
85. 44 Ga. 468 (1871).
86. Id. at 471-72.
87. 107 Ga. 852, 33 S.E. 634 (1899).
cution on homestead property of the debtor. The debtor's wife sought to enjoin execution on behalf of herself and her children. The court held that the debtor, as head of the household, was trustee for his family and charged with a duty to protect their interests in the homestead. The creditor argued that, under the statute, the judgment against the debtor was binding on his family. The court rejected this argument and ordered the injunction, citing Meyer v. Butt & Brother. The opinion asserts that the debtor "had no power or authority to consent to a judgment which would have the effect of binding the trust estate to pay his individual debt." The result appears to be correct. If suffering the default judgment was a breach of the fiduciary duty to defend the action, then the claimant who participated in the breach should not be permitted to profit from it.

Section 108-505 appears to relieve the trustee from personal liability on contracts executed during the administration of the trust. In fact, an early decision held that, in an action pursuant to the statute, the trustee "is a mere nominal party, so far as personal interest in the suit is concerned, charged with the duty of defending the action, not on his own behalf, but on behalf of the cestuis que trust." It would seem reasonable to conclude that a judgment rendered in favor of the claimant does not subject the trustee to personal liability for any portion remaining unpaid after trust assets have been exhausted. But can he pursue his action at law against the trustee? This depends upon whether the statutory remedy is exclusive, or merely cumulative.

The first clue was provided in Faulk v. Smith. There the creditor received a judgment against the trustee individually, for an obligation incurred on behalf of the trust estate. Execution having been returned unsatisfied, the creditor brought an action at law against the trustee in his representative capacity, seeking to subject the trust assets to payment of his claim. The defendant interposed a defense of res judicata, contending that the claim against the trust estate could have been litigated in the action against the trustee individually. This argument was rejected with

88. Id. at 856, 33 S.E. at 635.
89. Absent allegations of fraud or collusion, however, the beneficiaries are bound by the judgment. See cases cited in note 82 supra; Wagnon v. Pease, 104 Ga. 417, 30 S.E. 895 (1898).
90. Restatement § 310; Bogert §§ 901, 904 (1962); 3 Scott § 310.
92. 168 Ga. 448, 148 S.E. 100 (1929).
93. The report contains no intimation as to why the creditor chose not to bring a bill in equity. Quaere: does the statutory action relieve the creditor from setoffs representing claims asserted by the beneficiaries against the trustee, arising out of unrelated transactions?
the assertion that "the original proceeding did not make the cestuis que trust parties, nor did the creditor proceed against the rem." Thus the first judgment was validly rendered against the trustee personally, and did not bar a later action against him in his representative capacity. The opinion implies that the statutory remedy is not exclusive. If it were, the holding would be the same, but for a different reason: the first action would then be a nullity, and the second suit the creditor's proper means of seeking recovery. There is, however, no such intimation in the opinion.

The question was squarely presented in the recent case of Oberdorfer v. Smith. The plaintiff sued the trustee individually to recover usurious interest charges on a loan the defendant made to her out of trust assets. The defendant demurred on the ground that the plaintiff's exclusive remedy was the statutory action for recovery out of trust assets. The trial court overruled the demurrer, and the court of appeals affirmed. Its point of departure was that the statutory action, being in derogation of the common law, should be strictly construed. From this premise, the court reached the conclusion that "this new method is merely cumulative of the common law, and it does not abolish the common law liability of the trustee personally either in tort or contract." That the statute is in derogation of the common law does not necessarily justify the conclusion that its remedy was intended to be cumulative; the purpose of the statute might well have been to abrogate the common law on this very point. Yet no attempt was made to ascertain the purpose of the enactment. The opinion relied upon an earlier court of appeals decision holding that, where a claimant had contracted with trustees to provide personal services, her complaint set forth a good cause of action

94. 168 Ga. at 450, 148 S.E. at 102.
98. There are indications that the statute was intended to effect a procedural change only; this tends to support the conclusion that it is cumulative rather than exclusive. For instance, § 108-501 is couched in permissive rather than mandatory terms: the claimant may collect his claim in a court of law. The effect of the statute was described in Moore, Jenkins & Co. v. Lampkin, 63 Ga. 748, 751-52 (1879), as follows: "An ordinary common law judgment cannot be enforced against . . . [trust] property. It requires equitable proceedings to reach the property or the income; but these equitable proceedings may be, at the option of the suitor, either in a court of equity or a court of law . . . . [E]specially may the proceedings be had at law when a perfect statutory remedy is furnished by the statute of 1855-6. . . ."

Also, the decision in Faulk v. Smith, 168 Ga. 448, 148 S.E. 100 (1929), implies that the statutory remedy is not exclusive. See text accompanying notes 92-94 supra.
against the trustees individually, but where the evidence tended to show that she had contracted with the trustees in their representative capacity, the personal judgment against the trustees would be reversed.\footnote{99} Since no authority was cited for the first proposition, and the statute was not mentioned in the opinion, the case would appear to be scant authority for the holding in \textit{Oberdorfer v. Smith}.\footnote{99. Pelotte v. Simmons, 41 Ga. App. 198, 152 S.E. 310 (1930).}

The \textit{Oberdorfer} opinion further relied upon the argument that, since section 108-506 requires the property subject to execution in the statutory action to be specified in the "body of the execution," and since it is possible for the trustee to conceal intangible trust property from the claimant, the statutory remedy presents opportunities for evasion of just debts. From this argument the court concluded that "obviously, then, of necessity, this statutory remedy is merely cumulative and in no wise did it abolish the common-law rule for obtaining redress."\footnote{100. 102 Ga. App. at 340, 116 S.E.2d at 311.} It is unclear whether the court felt that the legislature did not intend such a result, or whether the court was simply unwilling to permit it. In any event, the reasoning is specious. The trustee can as easily conceal his own intangible personalty from the sheriff seeking to levy execution on a judgment against him as he can hide the trust intangibles. He would have, if anything, a stronger motivation to conceal his own property. Since the possibility of concealment is present in every levy of execution, it furnishes no support for the conclusion reached in \textit{Oberdorfer v. Smith}.\footnote{101. Ga. Code Ann. § 108-501 (1960). Since the penalty for usury is forfeiture of interest (note 96 supra), no payment out of trust funds could be contemplated by the claimant.}

Furthermore, it was not necessary to decide this issue. The holding can be justified even if it be assumed that the statutory remedy is exclusive. Arguably, the statute is not even applicable to the facts of the case. The plaintiff furnished no money, property, or services to the trust estate; nor is a usury claim one "for the payment of which a court of equity would render said estate liable."\footnote{101} Since no action could be brought pursuant to the statute to collect such a claim, the plaintiff perforce is left to her common-law action against the trustee individually. The case thus offers no substantial impediment to a later holding that, with respect to claims of the sort enumerated in the statute, the statutory remedy is exclusive—at least in cases where the claimant knew or should have known that he was dealing with a trustee.

In spite of this restrictive judicial construction, the statute provides relief from one of the most cumbersome and vexatious
aspects of the traditional procedure. The creditor may receive satisfaction in one action at law, even though the trustee is insolvent. In addition, permitting the claimant to sue the trustee both individually and in his representative capacity obviates multiple actions (1) where the application of the statute is doubtful, and (2) where the plaintiff has a cause of action against both the trustee and the trust estate, but neither has sufficient assets to afford full recovery.

E. "Agency" Statutes

In 1865, the Field Commission unsuccessfully proposed the adoption by New York of the following statute:

A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust, and by this chapter, and none other. His acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal.102

Seven years later, California adopted this "enigmatic declaration,"103 which was later enacted by three additional Western states.104 This statute flatly contradicts the assertion that "a trustee is not an agent."105

But who is the principal? Obviously, there is no individual who fits the designation—not even the settlor of an inter vivos trust.106 On a functional level, however, what more is required of a "principal" than a source of instructions by which the scope of the agent's authority and powers can be measured, and an

102. Field & Bradford, The Civil Code of the State of New York § 1202, at 358 (1865). Scott says "the concept of property as a principal and as exercising control over the person entrusted with the property is most unorthodox. However, the purpose . . . is to enable a third person to reach the trust estate but not to impose a personal liability upon the beneficiaries." 3 Scott § 274, at 2113.

103. Cal. Civ. Code § 2267. Sections 2215-89 of the Civil Code consist of proposals of the Field Commission that were rejected by the legislature of New York. An eminent authority has said of the Field trust code that, "numerous as were its faults, it was at least conceived as an integrated and comprehensive scheme of trust law, with premises radical but certainly not irrational." Evans, Observations on the State, etc., of the California Laws of Uses and Trusts, 28 So. Cal. L. Rev. 111 (1955). The characterization of § 2267 as an "enigmatic declaration" is also Evans', Id. at 120.


105. See text accompanying note 15 supra. But cf. Scott, Liabilities Incurred in the Administration of Trusts, 28 Harv. L. Rev. 725, 741 (1915): "although the trustee is not an agent of the cestui que trust, he is in a sense an agent of the estate."

106. The settlor as such is not liable for the trustee's acts, nor has he any power to enforce the trust. Restatement § 200, comment b.
economic entity to respond to claims arising out of the agent's activities? Trust estates have a source of authority, the trust instrument as supplemented by rules of trust administration in effect in the jurisdiction; and they provide an aggregation of assets out of which properly incurred liabilities can be paid. Why, then, cannot the trust estate function as a "principal"? In equity, it has been so regarded for centuries; there is no longer any substantial impediment to legal recognition of the trust entity.\footnote{107}

Adoption of the agency concept has its drawbacks. For one thing, it may tend to create confusion with respect to settled rules of personal liability of beneficiaries for contracts of trustees. Although normally beneficiaries are immune from such liability, several cases have reached a contrary result on the ground that the beneficiary's control over the trustee rendered him in reality just an agent of the beneficiary, and therefore the latter is liable for the trustee's authorized acts.\footnote{108} Confusion of "agency" for purposes of holding the trust estate responsible for the trustee's authorized contracts with "agency" for purposes of holding the beneficiary personally liable could lead to most unfortunate results.\footnote{109} Thus the statute should be viewed as suggesting an agency analogy, rather than converting a trustee into an agent or literally imposing the rules of agency upon the trust relationship.

The principal problem presented by the statute, therefore, is how far the agency analogy should be applied in any given case. For instance, an agent for a disclosed principal incurs no personal liability for acts within the scope of his authority.\footnote{110} What of the trustee who executes an authorized contract on behalf of the trust estate?

Several California cases have considered the problem. In \textit{Hall v. Jameson},\footnote{111} a trustee executed a note secured by a mortgage on trust property, under authority granted by the trust instrument. He received no personal benefit from the transaction. His status as a trustee was explicitly set forth in the mortgage recitals, but the agreements and covenants of the mortgage were phrased in the first person singular. The California Supreme Court held that, despite the lack of personal benefit, the trustee was liable for the acts of the trust.

\begin{itemize}
\item \textbf{107.} See note 56 supra.
\item \textbf{108.} Restatement §§ 274-75; 3 Scott §§ 274-75.
\item In addition, a number of cases have held the beneficiaries of business trusts personally liable for contracts entered into by the trustee on a partnership analogy, because of the degree of "control" they possess over the trustee's activities. See Comment, Massachusetts Trusts, 37 Yale L.J. 1103, 1108-14 (1928).
\item \textbf{109.} Any modification tending to strengthen the possibility that beneficiaries may incur personal liability for the trustee's acts would weaken the utility of the trust device as a means of separating the benefits of property ownership from its managerial burdens.
\item \textbf{110.} See note 29 supra.
\item \textbf{111.} 151 Cal. 606, 91 Pac. 518 (1907).
\end{itemize}
Court held that the trustee was personally liable on the note. The effect of the statute was limited by the statement that it refers to the trust property alone. His [the trustee's] acts respecting that property, if authorized by the terms of the trust, bind the property. He is to that extent an agent for the property and for the interested parties.\textsuperscript{112}

Thus the statute was construed to be remedial, extending the claimant's remedies at law, rather than altering the substantive rules respecting a trustee's personal liability.\textsuperscript{113}

Some twenty years later, the same court decided \textit{Irvine v. MacGregor}.\textsuperscript{114} There, trustees of a business trust were assignees of an oil lease. The lessor sued the lessee and these assignees for royalties due under the lease, and obtained a judgment against the defendants. The liability of the trustees, however, was limited to the property of the trust estate. Defendant trustees appealed, urging that the lower court improperly imposed liability on the trust estate. It was their position that the lessor was only entitled to a judgment against them individually. This argument was rejected by the court, which cited the foregoing statute for the proposition that the authorized acts of the trustee bind the trust estate. Furthermore, added the opinion, the provision of the judgment restricting it to trust property was inserted for the protection of the trustees. (The court must have assumed that the trustees would ordinarily be personally liable, otherwise they would need no such protection.) Later California cases have consistently held that the statute does not alter traditional rules as to the trustee's personal liability.\textsuperscript{115}

This view has not prevailed in Montana, however. There, the agency statute has been interpreted to relieve the trustee from personal liability for authorized contracts.\textsuperscript{116} This result seems warranted by the terms of the statute,\textsuperscript{117} and has been

\textsuperscript{112} 151 Cal. at 612, 91 Pac. at 520. (Emphasis added.)

\textsuperscript{113} The result is changed by the Negotiable Instruments Law and the Uniform Commercial Code. See p. 521 infra and text accompanying note 164 infra.

\textsuperscript{114} 203 Cal. 583, 265 Pac. 218 (1928).

\textsuperscript{115} See Evans, supra note 103, at 120-21: "Arguably a trustee who signs in that capacity is relieved of personal liability, but the cases say not," citing Goldwater v. Oltman, 210 Cal. 408, 292 Pac. 624 (1930), and Zimmer Constr. Co. v. White, 8 Cal. App. 2d 672, 47 P.2d 1087 (1935). In Purdy v. Bank of America Nat'l Trust & Sav. Ass'n, 2 Cal. 2d 298, 40 P.2d 481 (1935), the California Supreme Court held that the statute creates a direct cause of action against the trust estate. This was considered a step toward elimination of the trustee's personal liability for authorized contracts by some commentators, but no California case has so held.

\textsuperscript{116} Tuttle v. Union Bank & Trust Co., 112 Mont. 568, 119 P.2d 884 (1941).

\textsuperscript{117} Its effect must be either that the trust estate is to be considered an entity chargeable as a principal for the acts of the trustee, its agent, or that the legal incidents of the trustee's authorized acts, so far as the parties are concerned, are the same as those which would attach to an agent's authorized transaction for his principal.
favorably received by at least one California commentator. But the agency statute presents other problems. For instance, how is the extent of the trustee's authority to contract determined? One California appellate court decision indicated that, "in the absence of express authorization either in the declaration of trust, or otherwise, he will be deemed to be personally liable for obligations which he incurs . . . ." This view may in part reflect a narrow interpretation of the statutory declaration that the trustee's authority is "such as is conferred . . . by the declaration of trust, and by this chapter, and none other." It seems unduly restrictive, especially in view of the doctrine of implied authorization to perform any act necessary to accomplish the trust purposes. A statement more closely attuned to this doctrine appears in another California opinion: "the trust relation being admitted, and the act being shown to have been reasonably necessary to protect and preserve the fund as in cases of ordinary agency . . . it may reasonably be inferred, in the absence of proof to the contrary, that the trustee acted within his authority." This latter approach was adopted by the Supreme Court of California in Purdy v. Bank of America Nat'l Trust & Sav. Ass'n.

No claim is made that the authority [to borrow] is expressly conferred by the language of the testamentary trust or by the provisions of the Code; but it is contended by the defendant that from the history of the operations of the trustees and from the facts produced on the trial, it is conclusively shown that the power to borrow money was necessarily incident to the power to manage and conduct the ranch in order to preserve the estate from appreciable loss.

Assuming that a claimant has a good statutory cause of action against the trust estate, must he join all beneficiaries as defendants or is service upon the trustee sufficient? It has been held that, where the trustee has the right to sue alone on behalf of the estate "it necessarily follows that he could be sued as a representative of the cestui que trust" without joinder of the

In either view . . . we must hold . . . that the trustee is not personally liable but that the remedy is an action against it as trustee, and that a judgment against it in that capacity is limited in its application to the trust estate.

Id. at 578, 119 P.2d at 888.
119. Duncan v. Dormer, 94 Cal. App. 218, 221, 270 Pac. 1003, 1004 (1928).
120. See Restatement § 186(b).
122. 2 Cal. 2d 298, 302, 40 P.2d 481, 482 (1935).
but this is a non sequitur: when the trustee is the plaintiff, there is no conflict of interest between him and the beneficiaries. Such a conflict may well exist where the trustee is defendant. In recognition of this possibility, the California decisions hold that joinder of beneficiaries is not necessary "so long as the trustee acts in good faith, and his own interests are not in conflict with those of the beneficiary." The test seems to be whether the trustee can reasonably be expected to represent the interests of the beneficiaries; if so, they need not be joined. But in any situation where the trustee's authority may be questioned, or the applicability of the statute is otherwise doubtful, the possibility of a conflict of interest indicates that the prudent course is to join the beneficiaries as parties to the action.

Suppose the claimant is unsure whether the contract was authorized or not, but desires to conclude the litigation in one action. May he bring an action in the alternative against the trustee in both his individual and representative capacities? The statute itself contains no apparent impediment to such a procedure.

In summary, the agency statute as judicially interpreted constitutes only a slight departure from the traditional view. In California, where individual liability of the trustee is preserved, its effect is procedural only: the claimant is permitted direct access to the trust fund. In doubtful cases he may join the trustee individually and in his representative capacity, but it may also be necessary to join the beneficiaries.

The Montana interpretation of this statute constitutes a breakthrough in the movement toward a trust entity theory which tends to equate the trustee with an agent or a corporate official. It is to be hoped that other jurisdictions with similar statutes will follow Montana's lead.

That the agency analogy represents a sound alternative to the traditional view is recognized by the draftsman of Revised Part Four of the Model Probate Code. He proposes that the

123. Merz v. Mehner, 57 Wash. 324, 327, 106 Pac. 1118, 1120 (1910).
125. Johnson v. Curley, supra note 124, recognized that an exception can be granted where "the beneficiaries are so numerous as to make it 'intolerably oppressive to require the plaintiff to bring them all into court.'" 83 Cal. App. at 633, 257 Pac. at 166.
personal liability of protectors of persons under disability\(^{127}\) be that of "an agent for a disclosed principal. A protector, or limited protector is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the trust unless he expressly agreed to be."\(^{128}\) This approach is precisely the converse of the traditional view.

\textbf{F. Uniform Trusts Act}

In 1937, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Trusts Act for the purpose, \textit{inter alia}, of doing away with "a few obsolete and unjust rules of trust law which have come about through unfortunate judicial decisions or are survivals of ancient property law."\(^{129}\) Section 12 of the Uniform Trusts Act was drafted in furtherance of this objective,\(^{130}\) and provides as follows:

\textbf{§ 12. Contracts of Trustee.—}1. Whenever a trustee shall make a contract which is within his powers as trustee, or a predecessor trustee shall have made such a contract, and a cause of action shall arise thereon, the party in whose favor the cause of action has accrued 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. In such an action the plaintiff need not prove that the trustee could have secured reimbursement from the trust fund if he had paid the plaintiff's claim.

2. No judgment shall be rendered in favor of the plaintiff in such action unless he proves that within thirty days after the beginning of such action, or within such other time as the court may fix, and more than thirty days prior to obtaining the judgment, he notified each of the beneficiaries known to the trustee who then had a present interest, or in the case of a charitable trust the

\(^{127}\) This proposal for revision of the Model Probate Code introduces interesting terminology: a person adjudged disabled (by reason of infancy, mental incompetence, senility, drug or alcohol addiction, imprisonment, unknown whereabouts, etc.) is designated a "curatel." A "protector" is one appointed by a court to manage the property and affairs of a curatel; a "limited protector" is a protector whose powers are limited by his letters of protectorship. Fratcher, First Tentative Draft of Revised Part IV, Model Probate Code §§ 401(g), 401(h) (1965).

\(^{128}\) Id. § 431.


\(^{130}\) See id. at 290:

At common law the court of law did not recognize the trustee as trustee as being a legal person. He could not be sued at law on a contract [in his representative capacity] . . . . It has been felt that this disability of the contract creditor, which is due to the ancient distinction between law and equity, should be removed, in the interest of facilitating collection of claims from trust estates. Section 12 of this act allows suit against the trustee as such at law if the contract was within the powers of the trustee to make, and if notice is given to the beneficiaries so that they can intervene in the rare case where they may object to collection from the trust estate.
[Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, of the existence and nature of the action. Such notice shall be given by mailing copies thereof in postpaid envelopes addressed to the parties to be notified at their last known addresses. The trustee shall furnish the plaintiff a list of the parties to be notified, and their addresses, within ten days after written demand therefor, and notification of the persons on such list shall constitute compliance with the duty placed on the plaintiff by this section. Any beneficiary, or in the case of charitable trusts the [Attorney-General] and any corporation which is a beneficiary or agency in the performance of such charitable trust, may intervene in such action and contest the right of the plaintiff to recover.

3. The plaintiff may also hold the trustee who made the contract personally liable on such contract, if the contract does not exclude such personal liability. The addition of the word "trustee" or the words "as trustee" after the signature of a trustee to a contract shall be deemed prima facie evidence of an intent to exclude the trustee from personal liability.

The Uniform Trusts Act is presently in effect in five states" and the Virgin Islands. Provisions based on section 12 are in force in at least two additional states, Louisiana and Texas.

The principal thrust of section 12 is to provide a direct action on authorized contracts against the trustee in his representative capacity, with execution of the resulting judgment levied against trust assets. The recovery may not be diminished by set-offs against the trustee's right of reimbursement, in accordance with the Stone thesis. Since the direct action is proper only where the contract is within the trustee's powers, an affirmative conclusion on the issue of authorization is apparently a jurisdictional requirement. But who will take issue on this point? It can be argued that the trustee's duty to defend requires him to raise the question; but if the trustee successfully maintains that the contract was unauthorized, he must assume personal liability on it. Thus, his fiduciary duty is clearly in conflict with his personal economic interest.

133. In 1938, Louisiana became the first state to enact the Uniform Trusts Act. In 1954, however, a new Trust Code was adopted there. La. Rev. Stat. Ann. § 9:2125 (1965), is the new provision concerning contract liability of trusts and trustees. See the discussion accompanying notes 140-41 infra.
135. See text accompanying note 40 supra.
The requirement of notification of the pendency of the action to all beneficiaries who have a "present" interest was probably conceived as a check on the trustee in such a situation. The reason advanced by the draftsmen for the imposition of this requirement was to permit beneficiaries to "intervene in the rare case where they may object to collection from the trust estate." Since the trustee's interest in contesting the validity of the promisee's claim coincides with that of the beneficiaries, he can reasonably be expected to provide adequate protection for their interests. The "rare case" is probably the one in which the trustee is only too willing to concede that the promisee's claim, if valid, is collectible out of trust assets.

The wisdom of the notice requirement is, however, open to question. Communication with all persons entitled to notification can be expensive and time-consuming. Since the cases in which notification would lead to intervention are "rare," and the court must conclude that the contract was authorized as a prerequisite to entering judgment against the trust estate anyway, it would seem that the net benefit to beneficiaries is small, and may be outweighed by the expense and inconvenience of notification. Louisiana has apparently so concluded. Its new Trust Code dispenses with the duty of notification, but does permit a beneficiary to intervene in the action "for the purpose of contesting the right of the plaintiff to recover." Presumably, a Louisiana noninterven-

137. It is not clear who is entitled to notification in the case of private trusts. The term "present interest" is not defined; it conceivably could be interpreted to mean vested rather than contingent, possessory rather than future—or, more broadly, all actual or potential beneficiaries known to the trustee.

In Cocke v. Duke University, 260 N.C. 1, 131 S.E.2d 909 (1963), it appeared that some 2,240 individuals or associations were actual or potential beneficiaries. The case arose on a petition for instructions by the trustees, and it was not required that all beneficiaries be before the court. Representation of each class of beneficiaries was held sufficient, under a statute similar to Fed. R. Civ. P. 23(a). Section 12 of the Uniform Trusts Act does not provide for representation where there are a large number of beneficiaries, however.

138. No reported case arising under § 12 has been found, although some twenty-eight years have elapsed since the Uniform Trusts Act was first adopted in Louisiana.

139. If notification expenses are taxed against the unsuccessful defendant as part of the costs of the action, then the trust estate would bear an unnecessary loss in those "not-rare" instances where the beneficiaries choose not to intervene. In addition, the Oklahoma version, Okla. Stat. Ann. tit. 60, § 175.18(B) (1963), provides for the appointment of a guardian ad litem for any minor or incompetent beneficiary. This is consistent with the policy of providing an adequate opportunity to intervene, but it considerably increases the cost of the action.

140. La. Rev. Stat. Ann. § 9:2123(B) (1965). The comment upon this section by the Louisiana State Law Institute indicates that the notification requirement was eliminated because no longer necessary. 3A La. Rev. Stat. Ann. 167 (1965). Refer-
ing beneficiary could raise the question of authorization at a subsequent accounting, and would not be bound by a finding of authorization in the action against the trustee. Of course, the beneficiary bears the risk of the trustee's insolvency between the time of the action and the time of the accounting; but, as we have previously seen, this risk is a normal incident of trust administration and can be effectively minimized by requirements for adequate bonds and reasonably frequent accountings.\textsuperscript{141}

Section 12 provides no answer to the question whether a beneficiary who fails to intervene in the action after receiving due notice will be permitted to contest the propriety of payment of the claim out of trust assets in subsequent judicial accountings. The statute is not, of course, intended as a substitute for judicial accountings. Beneficiaries could contend that the statutory right of intervention is permissive rather than mandatory, which indicates that it is not meant to be exclusive. In addition, since a beneficiary is not a "party" to the statutory proceeding, he is not bound by the judgment therein. Countervailing arguments can be made to the effect that, since the trustee is a party to the action in his representative capacity and the beneficiary is on notice of the pendency of the action, he is bound by any judgment entered against his representative.\textsuperscript{142} Also, if other beneficiaries intervene and unsuccessfully contend that the contract was authorized, a nonintervening beneficiary may be bound on the theory that the issue had been fully and fairly litigated in the action at law.\textsuperscript{143}

It should be noted that the statute does not elevate the trust estate to the status of a legally recognized entity; nor does it purport to provide general relief to the trustee from personal liability on authorized contracts. The first part of section 12(3) merely restates the traditional rule of personal liability, in the absence of a stipulation to the contrary. This statement is qualified, however,
to the point of nullification by the second sentence: the words "trustee" or "as trustee" after the promisor's signature are transformed from descriptio personae to prima facie evidence of an intention to exclude personal liability. How this provision effects the promisee's burden of proof is not specified. It is possible that an analogy may be drawn to the negotiable instrument cases wherein parol evidence is admitted to show that, at least between the immediate parties, the intention was to limit liability to the trust assets. But section 12, unlike the commercial statutes, apparently places the burden of going forward with evidence of personal liability on the promisee.

In summary, the principal contributions of the Uniform Trusts Act to the developing trust entity are (1) the "direct action" against the trustee in his representative capacity and (2) the exception to section 12(3) which, although "procedural" in form, enhances the prospect of relief from personal liability of trustees on authorized contracts.

G. The Commercial Statutes

Cases presenting the issue of imposition of personal liability on promissory notes executed by trustees have afforded numerous opportunities for application of the traditional view. Thus, if X signs a note "X, trustee" the word trustee is deemed mere descriptio personae and the action lies against X individually. One finds an occasional intimation that such a signature is sufficiently ambiguous to permit the introduction of parol evidence. If X can show that the payee agreed to limit his recovery to trust assets, no personal liability will be imposed on X. This result seems consistent with the view that the trustee may properly exclude personal liability by agreement with the promisee. But some opinions have concluded, from the presence of such phrases as "I promise to pay," a sufficient indication that the trustee intended to assume personal liability. Others have utilized agency theories, concluding that the situation is analogous to a contract entered into by an agent for an undisclosed or nonexistent principal.

144. See text accompanying note 130 supra.
145. Hall v. Jameson, 151 Cal. 605, 91 Pac. 518 (1907), so held in spite of the "agency" statute. See Knipp v. Bagby, 126 Md. 461, 95 Atl. 60 (1915); McDowall v. Reed, 28 S.C. 466, 6 S.E. 300 (1888).
146. See Mitchell v. Whitlock, 121 N.C. 165, 28 S.E. 292 (1897).
147. "This contract by its terms purports to make the defendant [trustee] personally liable thereon, and neither the context nor the circumstances proven are sufficient to change its effect in that particular." Hall v. Jameson, 151 Cal. 605, 609-10, 91 Pac. 518, 519 (1907). This same reasoning was employed in Duvall v. Craig, 15 U.S. (2 Wheat.) 45 (1817). See text accompanying note 20 supra.
Where the trust estate is clearly identified in the instrument, or the payee knows the trustee is acting in his representative capacity, this reasoning is inapplicable. In such cases, it would seem that a presumption of limited liability should be invoked, placing the burden on the promisee to show that personal liability was intended. Personal liability has nevertheless been imposed on the trustee in such cases.\(^{149}\) Apparently, the courts have concluded that the uniformity of result implicit in mechanical application of the traditional rules outweighs the harsh result occasioned by holding a trustee personally liable where he reasonably expected not to incur liability, but failed to protect himself with the proper form of exculpatory provision.\(^{150}\) Thus, one can generalize that, at common law, promissory notes are subject to the same rules as other types of contracts: the trustee is personally liable unless there is an express stipulation in the note to the contrary.\(^{151}\)

By the adoption of the Negotiable Instruments Law in 1896, the National Conference of Commissioners on Uniform State Laws instituted a significant change in the law with respect to trustee liability on negotiable instruments executed in a representative capacity. As approved by the Commissioners, Section 20 of the Negotiable Instruments Law provides:

Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

The effect of this proposal on liability of agents rendered it quite controversial. By negative implication, it indicates that an unauthorized agent is liable on the note. This changed the English and majority American view that the unauthorized agent was liable only for damages caused by breach of an implied warranty of authority to execute the note. Thus, if the principal was bankrupt at the time the note was signed, the payee would receive no recovery from the agent, because he suffered no damage from the


\(^{150}\) For an illustration of this result, see the Call case discussed in note 54 supra.

\(^{151}\) See Britton, Bills and Notes § 165 (2d ed. 1961).
breach of implied warranty. Under section 20, though, the unauthorized agent would be liable on the note itself.\textsuperscript{152} This represented an alteration of the draftsmen's original proposal,\textsuperscript{153} the soundness of which was debated by leading authorities of the time.\textsuperscript{154}

None of these experts took notice of the implication of the phraseology extending the effect of section 20 to all persons who execute negotiable instruments in a "representative capacity" with disclosure of their principal. Perhaps it was assumed that, since by the traditional view a trustee had no principal, section 20 would not apply to trustees. A number of cases have held, however, that where the trust is identified,\textsuperscript{155} the trustee incurs no personal liability on a negotiable instrument.\textsuperscript{156} Where the trust estate is not identified, though, the final clause of section 20 indicates that the trustee is personally liable.\textsuperscript{157} Several judicial

\textsuperscript{152} By implication only; but later so held, in New Ga. Nat'l Bank v. J. & G. Lippmann, 249 N.Y. 307, 164 N.E. 108 (1928), and many other cases. See Britton, supra note 151, § 166.

\textsuperscript{153} Section 20 was copied from Article 95 of the German Exchange Law. See McKeehan, The Negotiable Instruments Law, in Brannan, The Negotiable Instruments Law Annotated 472, 494 (3d ed. 1920).

The original draft proposal was:

Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument.

Crawford, Annotated Negotiable Instruments Law 28 n.(a) (2d ed. 1902).

\textsuperscript{154} See Ames, The Negotiable Instruments Law, 14 Harv. L. Rev. 241, 247 (1900), for a criticism of § 20, in the bankrupt principal situation. Brewster, A Defense of the Negotiable Instruments Law, 10 Yale L.J. 84, 90 (1901), argues that the result reached by § 20 is just. McKeehan tended to agree with Brewster, and saw practical advantages as well:

The rule will tend to increase negotiability, by assuring the holder that if the pretended principal cannot be reached because of lack of authority in the agent, a recovery may be had on the instrument itself against the agent. Then there is the additional advantage—which on reflection will appear to be of great importance—that the liability of the agent can be easily proved and the amount to be recovered ascertained by a more inspection of the instrument, whereas if the only recovery were for damages resulting from a breach of warranty, a complicated set of disputed facts would often go to the jury, from which it would be difficult even to approximate the damage.

\textsuperscript{155} Presumably, the proper form is "Y trust, by X, Trustee." The trust estate is the "principal." Matter of Estate of Winter, 133 N.J. Eq. 245, 251, 31 A.2d 769, 774 (Prerogative Ct. 1943). "Thus a trustee, administrator or other fiduciary, in their capacity as such, virtually become legal entities." Britton, supra note 151, at 494.

\textsuperscript{156} Cases are collected in Britton, supra note 151, at 495 n.5; 5 Uniform Laws Ann. pt.1, at 212 n.33 (1943).

\textsuperscript{157} The cases have so held. See Britton, supra note 151, at 495 n.6; 5 Uniform Laws Ann. pt.1, at 221 n.79 (1943).
tribunals have concluded, however, that this clause is intended to protect (1) holders in due course who have no knowledge of the principal on whose behalf the maker is acting and (2) the representative who has disclosed his principal. Accordingly, these cases hold that if the payee or holder knows that the maker acted in a representative capacity, his recovery on the instrument should be limited to the trust assets even though the trust estate is not therein identified. 158

As previously noted, the primary effects of section 20 were to broaden the remedy against agents on promissory notes, and to simplify the proof of the holder's cause of action. Since a trustee authorized to sign the instrument who discloses his "principal" is absolved from personal liability, the NIL actually restricts the traditional remedy against trustees. Although the NIL had been adopted in every state by 1924, no jurisdiction has amended its equivalent of section 20 so as to change this result.

This statute provides essentially the same result as the Montana interpretation of the "agency" statute. Substituting "order and common sense for fiction and refinement of reasoning," 159 it recognizes the trust estate as a legal entity. This approach has evidently found acceptance in mercantile and commercial circles, even though it does restrict the traditional remedy against the trustee individually.

The adoption of section 20 provides a striking anomaly in jurisdictions adhering to the traditional view of contract liability: suppose that a trustee properly enters into two contracts with another person, executing each "as trustee for Y." Suppose further that one contract is a negotiable instrument and the other is not. The trustee incurs no personal liability on the negotiable instrument, but by the majority view he does incur such liability on the other contract.

In recognition of this anomaly, and of the soundness of section 20, several states have extended its rationale to other types of contracts. For example, Pennsylvania provides that a trustee who executes an authorized written contract as trustee of a named trust shall incur no personal liability, and that execution of judgment in favor of the promisee is limited to trust property. 160 Although the extension of the entity concept beyond negotiable in-

158. Reconstruction Fin. Corp. v. Lucius, 320 Ill. App. 57, 49 N.E.2d 852 (1943); Huntington Fin. Co. v. Young, 105 W. Va. 405, 143 S.E. 102 (1928). In Megowan v. Peterson, 173 N.Y. 1, 5-6, 65 N.E. 735, 739 (1902), the court held that, "as between the original parties and those having notice of the facts relied upon as constituting a defense, the consideration and the conditions under which the note was delivered may be shown."


struments is commendable, confining the statutory change to written contracts seems questionable. Perhaps the legislature was concerned about the evidentiary problems inherent in proving oral contracts. Yet what of the agent who is permitted to testify that he disclosed his representative capacity to the promisee before entering into an oral contract? The evidentiary problem is the same, but the agent's testimony is admitted and, if believed, relieves him from personal liability.\textsuperscript{161} Perhaps the Pennsylvania statute will eventually be extended to include all contracts.

A Rhode Island statute provides that any authorized transaction entered into by a trustee in his representative capacity shall be binding on the trust estate and not upon the trustee personally.\textsuperscript{162} This is also a commendable extension of the NIL approach, in situations where judicial findings indicate that the transaction was authorized.\textsuperscript{163}

The NIL concept is retained by the Uniform Commercial Code, which provides:

(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.

(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.\textsuperscript{164}

"Representative" is defined to include agents, corporate officers, trustees, executors, administrators, and "any other person empowered to act for another."\textsuperscript{165} This clarifies, but does not change,

---

\textsuperscript{161} Restatement (Second), Agency § 284, comment c (1958).
\textsuperscript{163} R.I. Gen. Laws Ann. § 18-4-10 (1956) provides for special proceedings to be brought by the trustee, in which he can receive authority to sell, lease, subdivide, or borrow on the security of trust property. Section 18-4-14 refers to liabilities arising out of the exercise of powers thus authorized.
\textsuperscript{164} Uniform Commercial Code § 3-403. The Code is now in effect in more than thirty states.
\textsuperscript{165} Uniform Commercial Code § 1-201(35). By contrast, the Negotiable
the judicial interpretation of the looser NIL terminology. Another clarification is indicated by the exception in section 3-403(2)(b), which in effect provides for the introduction of parol evidence against the payee to show that an instrument was actually executed in a representative capacity in two situations where the maker would otherwise incur personal liability. Further, the Code expressly states that the unauthorized signer is liable on the instrument.

It is interesting to note that nowhere does section 3-403 specifically provide, as does NIL section 20, that the authorized representative who signs in a representative capacity is relieved from personal liability on the instrument. This omission has been duly pointed out, but was considered to be of no significance by an eminent authority on the ground that the rule as to non-liability of an authorized agent is "fairly implicit in the section, well settled, and made applicable by the section on supplementary general principles." The validity of these comments with respect to agents is unquestioned; but what of the authorized trustee? His exemption from personal liability is far from "well settled," and resort to "principles of law and equity" would seem to provide little support for the limited liability rule. That limited liability is "fairly implicit" is, however, indicated by the fact that if the traditional view were imposed, there would be no need for section 3-403, nor would the exception provided by section 3-403(2)(b) have any significance. Hence, the necessary conclusion

---

Instruments Law provides no definition of the phrase "person [who] signs ... in a representative capacity." However, Negotiable Instruments Law § 191 provides that, unless the context otherwise requires, "'person' includes a body of persons, whether incorporated or not." This furnishes some basis for the view that the word "person" as used in § 20 applies to fiduciaries such as trustees, executors, and administrators. See Britton, supra note 151, at 494.


167. Uniform Commercial Code § 3-404(1). This represents no change from the Negotiable Instruments Law, as judicially interpreted. See note 152 supra and accompanying text.


170. Uniform Commercial Code § 1-103 provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including ... the law relative to capacity to contract ... shall supplement its provisions." Comment 1 to this section affirms the "continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act."
seems to be that authorized trustees incur no personal liability.\textsuperscript{171}

It is difficult to overestimate the significance of these commercial statutes in the movement toward judicial recognition of the trust entity. At the present time, it appears much more likely that the traditional view will be modified to harmonize with the effect of these statutes than that they will be amended to restore the traditional view.

V

CONCLUSION

The foregoing discussion has indicated several criticisms of the traditional approach to contract liability of trusts and trustees, and has considered a variety of statutory modifications. Upon analysis, most are seen to have disadvantages and limitations, especially in view of what appears to be a persistent tendency on the part of the judiciary toward a somewhat restrictive interpretation. If, as the commentators say, a trend has developed favoring rejection of the traditional view and adoption of an entity theory,\textsuperscript{172} then its progress to date can be fairly characterized as fitful and irregular. The statutes of Alabama, Connecticut, and Georgia merely provide creditors with a means of direct access to the trust estate, without altering the traditional rule imposing individual liability on the trustee. The "agency" statute is broad enough to exclude personal liability, but only Montana has so construed it. The Uniform Trusts Act pays lip service to individual liability while cleverly subverting it through creation of a contrary presumption. Only the commercial statutes have completely repudiated the traditional view—perhaps unintentionally.

We have noted that anomalies are sometimes created by the enactment of statutes having a limited objective, such as alteration of the traditional view with respect to particular types of trusts or contracts. There is, of course, no rational justification for a rule of trustee liability on negotiable instruments different from that applicable to other contractual obligations, nor for a significant difference in result which is solely dependent upon whether a valid contract is in writing or parol. That trustees of business trusts may enjoy greater immunity from contract liability than conservatorial trustees is also indefensible.

But consensus regarding the most desirable conceptualistic alternative to the traditional view is not an immediate prospect.

\textsuperscript{171} This result corresponds closely to that attained by some probate statutes, and the Model Probate Code, with respect to claims against executors, administrators, and guardians which arose during the period of administration. See, e.g., Model Probate Code §§ 143, 136, 227 (Simes 1946).

\textsuperscript{172} E.g., 3 Scott § 271A.1; Midgett, Trustee Liability to Third Persons, 102 Trusts & Estates 157 (1963).
The agency approach might have proved more effective, had it not been for such unfortunate statements as that of Mr. Justice Woods in *Taylor v. Davis' Adm'x.*\(^{173}\) However, the commercial statutes have demonstrated that legal recognition of the trust entity can be accomplished through a well-drafted provision utilizing the agency analogy.

The corporate officer analogy may prove even more useful, since it offers a means of repudiating the traditional view while avoiding confusion with settled principles of beneficiary liability for the trustee's contracts.\(^{174}\) A statute embodying this analogy might include the following points: (1) a creditor who is in doubt about whether or not the contract was authorized may be permitted to bring an action in the alternative against the trustee in both his personal and representative capacity; (2) the determination of the capacity in which the trustee is liable would be rendered according to traditional agency principles; (3) if the trustee is adjudged liable in his representative capacity, the creditor's recovery would be limited to the trust assets unless the conduct of either the trustee or the beneficiaries justifies imposition of personal liability on them; (4) beneficiaries need not be made parties to the action, but may be permitted to intervene; (5) any judgment rendered in favor of the creditor is binding on all beneficiaries, except that nonintervening beneficiaries should not be precluded from litigating the question of the trustee's authority in a subsequent accounting proceeding.

Recognition, however belated, of the inefficiency and unfairness of the traditional procedure is prerequisite to any detailed consideration of the form of remedial legislation. It is hoped that this discussion can contribute to that recognition.


\(^{174}\) See text accompanying notes 108-09 supra.