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THE INDIANA TRUST CODE—APPLICATION TO PRE-EXISTING TRUSTS

T. BRYAN UNDERWOOD, JR.*

I. INTRODUCTION

In 1967, the Indiana General Assembly created a Trust Code Study Commission to survey the laws of Indiana bearing upon trusts and the administration of trusts charging the Commission to draft and recommend legislation that would “provide for standardized, unified and efficient creation, construction and administration of trusts.” Pursuant to this legislative mandate, the Commission was organized and four years later submitted its recommended Trust Code to the Indiana General Assembly. Passing the Indiana Senate and House of Representatives by unanimous vote, the Code was signed by the Governor on April 16, 1971, and become effective on September 2, 1971.

The Trust Code contains two general guidelines for the courts to follow in applying and interpreting its provisions. The terms of the trust instrument shall prevail unless clearly prohibited or restricted by the Code, and the courts may turn to the report of the Trust Code Study Commission for guidance.

This article will explore the extent to which the provisions of the Trust Code are to be applied to trusts created prior to its effective date, i.e., testamentary trusts of decedents dying prior thereto and inter vivos trusts entered into prior thereto. This will necessitate a consideration of the relevant language of the Trust Code,

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2. For a discussion of the Commission's work and the general format of its proposed final draft of the Trust Code, see Ard, A Proposed Trust Code for Indiana—An Effort at Reform, 45 NOTRE DAME LAW. 427 (1970). Mr. Ard served as Executive Secretary to the Trust Code Study Commission.
3. The Trust Code is found in IND. CODE §§ 30-4-1-1 through -6-13 (1971). Broad in its coverage, the Code is divided into six chapters (General Provisions; Creation of Trusts; Rights, Powers, Duties, Liabilities and Remedies of the Parties to a Trust; Rights of Third Parties; Administration of a Trust; Procedure).
4. IND. CODE § 30-4-1-3 (1971); see White, Indiana Trust Code: When the Trust and the Code Conflict, 47 IND. L.J. 481 (1972).
5. IND. CODE § 30-4-1-7 (1971).
the Commission's Comments, general constitutional limitations and judicial decisions, particularly those relating to the retrospective application of trust statutes.

II. STATUTORY LANGUAGE AND COMMISSION COMMENT

That the Commission and the Indiana legislature intended the Trust Code to have some retrospective effect is clear. The statute provides:

Except as provided elsewhere in this article, the rules of law contained in this article shall apply to all trusts created prior to the effective date of this act unless to do so would:

1. adversely affect a right given to any beneficiary;
2. give a right to any beneficiary which he was not intended to have when the trust was created;
3. impose a duty or liability on any person which was not intended to be imposed when the trust was created; or
4. relieve any person from any duty or liability imposed by the terms of the trust or under prior law.6

But the questions raised by the statute are numerous and troublesome. What is a "right"? When can it be said that a beneficiary has been "given a right"? Was a particular duty or liability "intended to be imposed" by a pre-existing trust instrument when the instrument is silent but general trust law in the past imposed such a duty or liability? Why only in subsection (4) is there a reference to "prior law"? Does "prior law" include both statutory and case law? If case law is included, what if there was no prior Indiana case law or statute covering the imposition of the particular duty or liability? Are we to read the statute so literally as to say that there can be no change in rights, duties or liabilities under pre-existing trusts whether imposed by the express terms of the instrument, the ascertainable intention of either the testator or settlor, or in the absence of either by trust law as heretofore defined by the legislature and courts? If so interpreted, the statute will have minimal, if any, retrospective application. If this were intended, then one could ask why any retrospective provisions at all?

The limiting language of the statute: "Except as provided otherwise in this article," has little significance in view of the fact that in only a very few sections of the Code is a pre-existing trust expressly excepted from the operation of those particular sections.7

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6. IND. CODE § 30-4-1-4 (1971).
7. See, e.g., IND. CODE § 30-4-3-7 (1971), which provides in part: "(a) Un-
The Commission Comment to this section is arguably less abstruse than the section. Nevertheless, its lack of specificity will still be disappointing to trustees and, ultimately, the Indiana courts when forced to choose between applying the prior Indiana trust law and the new Code:

This article will affect the remedies of the parties and the procedure not only for implementing the remedies but for administering the trusts in general as to trusts created prior to the effective date of this code. Under the present law, a statute will not be applied retrospectively unless the plain language of the statute indicates that it was intended to be. However, the article will not be applied retrospectively if vested rights or obligations will be affected or the retroactive operation would impose new liabilities. 8

Though the Comment fails to specify which individual Code sections are to be applied retrospectively, it does serve two valuable purposes. First, it makes clear the intention of the Commission that the Code be retrospectively applied to remedies, procedure and trust administration. Second, it indicates a general precept of the Commission that if at some point a retrospective application would affect vested rights or obligations or impose new liabilities, it should not be so applied. Though this precept is generally harmonious with Indiana judicial expression, 9 it, by itself, will not

less the terms of the trust provide otherwise, the trustee has a duty: . . . (4) if a corporate trustee, not to purchase for or retain in the trust its own or a parent or subsidiary corporation's stock, bonds or other capital securities: Provided, however, the trustee may retain such securities already held in trusts created prior to the effective date of this article.' Id. (emphasis added). See also Ind. Code § 30-4-5-20, -22 & -23 (1971) (Private Foundation Requirements).


9. Indiana courts have long followed the principle that unless the legislature clearly expresses an intent to the contrary, statutes will be applied prospectively and not retrospectively. See, e.g., Herrick v. Sayler, 245 F.2d 171 (7th Cir. 1957); Heekin Can Co. v. Porter, 221 Ind. 69, 46 N.E.2d 468 (1943); Chadwick v. City of Crawfordsville, 216 Ind. 399, 24 N.E.2d 937 (1940); Creighton v. Schafer, 117 Ind. App. 518, 72 N.E.2d 360 (1947).

As to remedial statutes, however, the Indiana courts have been willing to sanction retrospective application even though the statute does not by its terms provide for such retrospective application. See, e.g., Connecticut Mut. Life Ins. Co. v. Talbot, 113 Ind. 373, 378, 378, 14 N.E. 586, 589 (1887), where the court said:

This argument is supported upon the general proposition that statutes are to be construed and applied prospectively, unless a contrary intent is manifested in clear and unambiguous terms. This is undoubtedly the general rule, and it is sometimes held that, to work an exception, the intent favoring retrospective application must affirmatively appear in the words of the statute. The better rule of construc-
provide easy answers to the questions the statute raises. One does have the feeling, though, after reading the Code section, the Comment, and the cases cited therein that the Commission is simply saying to the Indiana courts: "Apply the Code retrospectively to the extent constitutionally permissible."

III. CONSTITUTIONAL RESTRANTS ON RETROSPECTIVE APPLICATION OF STATUTES

Assuming that the above interpretation of the Comment is reasonable, one is next tempted to review the variety of court decisions struggling with the question of what is a "vested right" to be protected under the due process clause of the fourteenth amendment to the Constitution of the United States, or under article 1, section 10 of the Constitution of the United States (denying the power to states to pass laws impairing the obligation of contracts), or under article 1, section 24 of the constitution of Indiana ("no ex post facto law, or law impairing the obligation of contracts, shall ever be passed"); then, by applying the rule discerned, designate the "rights" of trustees, beneficiaries and third parties created by pre-existing trusts and, thus, protected from the Code. But, it is submitted, such a review would be unproductive and, in fact, disheartening.

One commentator over forty years ago concluded that a "vested right" could not in fact be defined but only that a right could be characterized as "vested" when not subject to destruction and not "vested" when subject to destruction by retrospective legislation. In a subsequent article the same commentator suggested that though more definite rules are desirable to deal with this question, the ultimate issue is that of weighing the public interest against the reasonable expectations of the individuals concerned. In other words, simply consider the reasons for and against applying legislation retrospectively.

More recently, another writer after a thoughtful and thorough study of the approach of the United States Supreme Court to re-

See *In re* Smith, 115 Ind. App. 494, 60 N.E.2d 147 (1945).


Retrospective legislation found that the great variety of factual situations could not be reduced to a single denominator but that one factor appeared most often—the degree of reasonable reliance placed by the parties on the law as it existed at the time of the conduct to be affected by the retrospective statutes. He, too, stressed the importance of comparing the public interest served by the statute and the countervailing unfairness possibly created by its retrospective operation.\(^1\)

Though the Indiana courts, settlors, trustees, beneficiaries and others interested in pre-existing trusts may find scant benefit in a further consideration of the general judicial treatment of retrospective statutes, there are, nevertheless, a number of decisions specifically dealing with the retrospective applications of trust statutes that will be helpful.

IV. RETROSPECTIVE APPLICATION OF UNIFORM PRINCIPAL AND INCOME ACT

The decisions which, perhaps, best illustrate the judicial attitudes toward the retrospective application of trust statutes are those considering the legality of such an application of the Revised Uniform Principal and Income Act (1962).\(^1\)

Traditionally, in determining whether a trustee should allocate stock dividends to income or corpus, courts have adopted either the so-called Pennsylvania, Massachusetts, or Kentucky rules or some variation thereof.\(^1\)\(^4\) The Massachusetts rule simply regards all stock dividends as capital and thus allocable to corpus. The Pennsylvania rule looks to the time of the accumulation of the corporate earnings from which the stock dividend was paid and, then, allocates accordingly as between corpus and income. The Kentucky rule calls for just the opposite treatment from the Massachusetts rule—allocate a stock dividend to income regardless of whether it represents earnings before or during the time of the income beneficiary's interest.

The Uniform Act adopts the Massachusetts rule and provides for application of the Act to trusts in existence prior to the Act. In some states previously following a different rule of allocation, courts have been asked to decide the constitutionality of applying the allocation rules of the Act retrospectively.\(^1\)

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In 1949, in the case of *In re Crawford's Estate*, the Pennsylvania supreme court dealt with this question. First determining that it had possessed the power to adjudicate the right to "income" as between the life tenant and remaindermen at the time it previously adopted the so-called Pennsylvania rule, the court went on to hold that once "income" had been defined, the "income" as defined became a vested property interest within the protective provisions of the Pennsylvania constitution and the fourteenth amendment to the Constitution of the United States. Thus, the court reasoned, the legislature could not take away such "interest" from the life tenant.

The Wisconsin supreme court in what is now the leading case on the subject refused to follow the lead of the Pennsylvania court. In *In re Allis* the life beneficiary claimed entitlement to certain stock dividends on the basis of the court-adopted Pennsylvania rule followed in Wisconsin since 1911. She argued that she had a vested property right to the stock dividends which could not be taken away by the legislature without violating the due process clause of the fourteenth amendment to the Constitution of the United States. The remaindermen contended that under the terms of Wisconsin's Uniform Principal and Income Act the stock dividends were allocable to corpus. Citing the decision of the United States Supreme Court in *Tidal Oil Co. v. Flanagan*, the court pointed out that, had it decided to depart from the Pennsylvania rule, adopt the Massachusetts rule and apply the latter to pre-existing trusts, it could constitutionally have done so. The legislature, the court said, could similarly reverse the court's earlier decision. The court went on to find that testatrix in using the term "income" in her will creating the testamentary trust could not be said to have adopted the Pennsylvania rule; if any intention at all could be presumed it was that she intended that the allocation be made in accordance with the law as from time to time established:

17. *Crawford* was subsequently followed in *In re Pew*, 362 Pa. 468, 67 A.2d 129 (1949).
18. 6 Wis. 2d 1, 94 N.W.2d 226 (1959); see 72 Harv. L. Rev. 605 (1960). See also the discussion of *Allis* in King, *Uniform Principal and Income Act, § 5: Constitutionality of Its Retroactive Applications*, 1960 Wash. U.L.Q. 339.
19. 263 U.S. 444 (1928), holding that a decision of a state supreme court deciding against a party claiming a property or contract right under an earlier decision of the court and reversing such earlier decision did not deprive such party of property without due process of law contrary to the fourteenth amendment nor amount to an impairment of contract under the impairment of contracts clause of the Constitution of the United States.
by court decision or legislative action. The court concluded that the life beneficiary of a trust had no vested property right in the earnings of a corporation before the declaration of a dividend and, therefore, had no vested property right in the judicial rule governing the allocation of corporate stock dividends in effect at the date of the death of the testatrix.20

Following the Allis decision, the Pennsylvania supreme court was asked to review its holdings in Crawford and In re Pew's Estate.21 In In re Catherwood Trust22 the Pennsylvania court surprisingly overruled its holdings, finding there can be no vested property rights in a court-made rule of apportionment. The Catherwood opinion indicates that the court was influenced to some considerable extent by the difficulties trustees were experiencing in contending with two rules—applying the Pennsylvania rule to trusts created prior to a certain date and the Uniform Act with its Massachusetts rule to trusts created after that date.23

In the judicial decisions supporting the retrospective application of the Uniform Act the reliance principle is explicit in some and implicit in others. In other words, what right does a beneficiary have to assume that the relevant trust law of a state, whether legislative or judicial, will not be changed during the time the trust is undergoing administration? Is it not reasonable to conclude that if the beneficiaries or the settlor considered at all the possibilities of changes in the law governing the allocation of stock dividends, they assumed the law as changed from time to time would govern the trust relationship? If so, the beneficiaries are said to have no so-called "vested rights."24 The courts in this area show little interest in discussing what reliance a settlor may reasonably place on the continuation of the law in effect at the time the trust was created.

20. 6 Wis. 2d at 11-12 n.18, 94 N.W.2d at 232 n.18.
21. See notes 16 & 17 supra.
23. Unfortunately, the seemingly clear import of the holding in Catherwood that the Massachusetts rule in the Uniform Act was to be applied to all trusts was clouded two years later by the Supreme Court of Pennsylvania in In re Pew, 411 Pa. 96, 191 A.2d 399 (1963). There the court limited its Catherwood opinion to the apportionment of proceeds from the sale of stock and of extraordinary stock dividends pursuant to the Uniform Act, but approved the continuation of the long-standing Pennsylvania rule that small stock dividends of six per cent or less are payable to the income beneficiary.
V. RETROSPECTIVE APPLICATION OF STATUTES GOVERNING INVESTMENTS BY TRUSTEE

In a few cases where legislatures have amended statutes governing the permissible investments of trustees, the argument has been advanced that the creator of a trust intends that only those investments lawful under the law existing at the time the trust was established could be made thereafter. Thus, the argument continues, any later legislative attempt to broaden such investments by the adoption, for example, of the “prudent man” investment rule would be an impairment of contract or the taking away of vested rights contrary to the Constitution of the United States. These constitutional attacks have generally been rejected by the courts.

In Fidelity Union Trust Company v. Price,\textsuperscript{25} for example, a trustee sought a declaratory judgment as to the constitutionality and applicability of the New Jersey Prudent Man Investment Statute. The statute expanded the types of investments which a fiduciary lawfully could make provided such investments not therefo are deemed legal could not exceed forty per cent of the trust corpus and further provided the trust instrument did not specify otherwise. By its terms, the statute applied to trusts created prior to its enactment as well as to those created thereafter. In sustaining the constitutionality of applying the statute retrospectively, the court held that in the absence of a contrary intention in the trust or a court order, a New Jersey trustee may invest in such investments as are legal or permitted by statutes at the time the investments are made. As the rationale for this holding, the court went on to say:

Unless the trust instrument provides otherwise, it is presumed that the trustor intended that his trustee should have the power to make such investments of the corpus of the trust as the legislature might from time to time permit.\textsuperscript{26}

Here, again, we find a court looking back to the time of the creation of the trust to determine what was intended. Finding no contrary intention expressed in the instrument, the court is quite willing to presume the intention that the investments conform only to the law existing at the time they are made. Is not the court also saying, in effect, that such intention, once presumed, precludes as unreasonable any reliance by beneficiaries or settlors on the law as it was at the time of the trust's creation? Other jurisdictions have reached similar results.\textsuperscript{27}

\textsuperscript{25} 11 N.J. 90, 93 A.2d 321 (1952).
\textsuperscript{26} Id. at 99, 93 A.2d at 325.
\textsuperscript{27} See Mechanicks Nat'l Bank of Concord v. Brady, 100 N.H. 469, 129 A.2d
VI. RETROSPECTIVE APPLICATION OF STATUTES GOVERNING COMPENSATION OF TRUSTEES

When the statutory rate of compensation for trustees has been increased by legislative action, the question of whether a trustee of a pre-existing trust is entitled to the new increased compensation has often been raised. Generally, the courts have applied the compensation statute effective at the time compensation is to be awarded and not the statute in effect at the time the trust was created. The expressed theory of such cases is usually that a fiduciary's right to a definite rate of compensation is not "vested" at the time of the decedent's death or the creation of the trust or the commencement of fiduciary duties but becomes "vested" only when by court order the amount of compensation is determined. At that time, the court is to follow the compensation law then in effect.

Little mention is made of the intention of the settlor or reliance by the beneficiaries.

The Pennsylvania courts have, however, been reluctant to embrace the general rule in toto, finding under certain fact situations constitutional barriers in the fourteenth amendment to the Constitution of the United States. The Pennsylvania legislature, in 1945, repealed a portion of a 1917 act which had prohibited the same person from receiving commissions both as an executor and as a trustee. A corporate trustee of a testamentary trust created by the will of a decedent dying in 1930 was paid an executor's commission prior to the commencement of its duties as the testamentary trustee. The trustee, after the passage of the 1945 act, sought compensation for its services as a trustee since the inception of the trust contending that the 1945 act should be applied retrospectively. The Pennsylvania supreme court in the case of In re Williamson's Estate refused to apply the 1945 act retrospectively holding that in 1930 the corporate fiduciary accepted the trust and its executor's commission under the law as it then existed and that the rights, liabilities and expectancies of the life tenant and re-

857 (1957) (holding that the retrospective application of the Uniform Common Trust Fund Act to a testamentary charitable trust in existence prior to the Act was proper); Citizens National Bank v. Morgan, 94 N.H. 284, 51 A.2d 841 (1947) (approving the retrospective application of a statute empowering a court to permit a trustee on specific grounds to deviate from the terms of a trust on theory that substantive rights were not affected, but only trust administration); Goodridge v. National Bank of Commerce of Norfolk, 200 Va. 511, 106 S.E.2d 598 (1951) (upholding the retrospective application of 1956 prudent man statute to a 1940 trust).

30. 368 Pa. 343, 82 A.2d 49 (1951).
maindermen having thereby become fixed, an additional compensation pursuant to a retrospective application of the statute would violate the fourteenth amendment to the Constitution of the United States.

Williamson's Estate should, however, be limited to the particular factual situation therein considered. The executor-trustee had previously been paid a judicially approved full compensation under a repealed statute for its past services as an executor and future services as a trustee. The case should not stand as authority for a proposition that the compensation statute in effect at the time of the trust's creation establishes "vested rights."81

The Pennsylvania supreme court, in apparent recognition of this distinction, later expressly limited the application of Williamson's Estate. In the case of In re Ehret,82 the court retroactively applied a 1953 act to a 1913 testamentary trust. The 1953 act, by providing for interim commissions on principal to trustees, changed the case law in Pennsylvania which prior to that time had generally prohibited the payment of compensation to trustees before the termination of the trust. The court distinguished its prior decisions and held that in the absence of a controlling provision in the trust, there is no vested right in a beneficiary in the continuance of a judicially created rule forbidding interim commissions and permitted the payment of an interim commission.

VII. RETROSPECTIVE APPLICATION OF STATUTES GOVERNING SPENDTHRIFT TRUSTS

When legislatures have attempted to change in some way the


The interest of the trust beneficiary that would be affected by the award of a second principal commission is somewhat different from that which has been affected by the retroactive trustee compensation statutes held constitutional in other jurisdictions. The difference arises from the fact that the retroactive statutes in other jurisdictions were applied to services for which a court had not before determined the proper amount of compensation, while in the case of the executor-trustee seeking a second principal commission there has been a prior court determination of the value of all the fiduciary's services and an award of that full amount. Even where the application of new rates of compensation to established trusts has been held constitutional, courts have occasionally recognized this distinction. They have refused to apply the new rate to services for which compensation was granted in a past decree, usually on the theory that the awards were res judicata.

legal effect of protective provisions in pre-existing spendthrift trusts, the courts have reached different conclusions on the constitutionality of the retrospective application of such statutes.33

The General Assembly of Tennessee passed a statute in 1943 subjecting the interests of beneficiaries in spendthrift trusts to claims of the State of Tennessee whether or not the debt was created or the trust established prior to the effective date of the statute. The Tennessee supreme court in State v. Caldwell34 held that a state statute of 1832 supporting the validity of spendthrift trusts was a rule of property, not an exemption statute, and found that the beneficiaries of spendthrift trusts therefore had vested estates therein which could not be disturbed by later acts of the legislature. The court concluded that the 1943 statute was an invalid infringement of the rights of the beneficiaries as protected by the fourteenth amendment and article I, section 10, of the Constitution of the United States.35

The opposite result was reached in Bearley School v. Ward.36 In that case at the time a testamentary trust was created the beneficiary's interest was statutorily protected from claims of his creditors. Subsequently, the New York legislature amended the statute so as to subject a portion of trust income to execution by judgment creditors of the beneficiary. The argument advanced on behalf of the beneficiary was that as soon as the trust was created, the beneficiary became "entitled" to the entire income therefrom and the legislature could not constitutionally take away any part thereof. Taking the position that statutes affording protection to trust beneficiaries are statutes of exemption, the New York Court of Appeals held that to limit or lessen such exemption was not an unconstitutionual impairment of contract but, in fact, a strengthening of a contract, assuming that some sort of a "contract" existed. The court further found that there had been no taking of property without due process of law on the theory that there can be no vested right in statutory privileges and exemptions such as are inherent in statutes exempting property from levy and execution.37

34. 181 Tenn. 74, 178 S.W.2d 624 (1944).
35. See also In re Borsch, 362 Pa. 581, 67 A.2d 119 (1949), holding that a statute permitting a beneficiary of a pre-existing spendthrift trust to release or disclaim his interest in favor of a remainderman violated the constitutional property rights of the donor of the trust.
36. 201 N.Y. 558, 94 N.E. 1001 (1910).
37. See also Wilmington Trust Co. v. Carpenter, 39 Del. Ch. 314, 163 A.2d
VIII. RETROSPECTIVE APPLICATION OF STATUTES
Governing Court Supervision of Trusts

What is the effect of a state statute changing the procedure for the judicial supervision of trusts created prior to the effective date of the statute? A case arising in Oklahoma provides a strong answer.

In 1941 Oklahoma enacted a comprehensive Trust Act which, inter alia, provided:

The district court shall have original jurisdiction to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, duties, and liability of the trustee; the existence or nonexistence of facts affecting the administration of the trust estate; to require accounting by trustees; to surcharge trustees; and in its discretion to supervise the administration of trusts; and all actions hereunder are declared to be proceedings in rem.\(^8\)

The Act was made applicable to:

A. All agreements containing trust provisions entered into subsequent to the effective date hereof;

B. All wills made by testators who shall die subsequent to the effective date hereof;

C. All other wills and trust agreements and trust relations in so far as such terms do not impair the obligation of contract or deprive persons of property without due process of law under the Constitution of the State of Oklahoma or the United States of America.\(^9\)

In 1947, a beneficiary of a testamentary trust created by the will of a decedent dying in 1937 filed an action in the United States District Court, Eastern District of Oklahoma, seeking the removal of the trustee, an accounting by the trustee, a construction of the will and the fixing of definite sums to be paid to the beneficiary. The court sustained the motion of the trustee to dismiss the suit on the theory that the state district court of Muskogee County, Oklahoma, had exclusive jurisdiction of the subject matter thereof by

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\(^{578}\) (1960), aff'd, 39 Del. Ch. 528, 168 A.2d 306 (1961), noted in 18 Wash. & Lee L. Rev. 283 (1961), holding that a statute permitting a beneficiary of a spendthrift trust to assign a portion of his trust income to a charity was, when applied retrospectively, a reasonable modification of the spendthrift trust provisions. The court expressly held that the settlor had no property interest in the enforcement of spendthrift conditions.


the terms of the Oklahoma Trust Act. The Court of Appeals for
the Tenth Circuit affirmed the dismissal, holding that because sec-
tion 175.23 of the Act deprived no one of a substantive right but
simply provided new remedies, it could be applied constitutionally
to trusts created prior to the effective date of the Act. The court
explained that there can be no vested right in a method of pro-
cedure and that so long as the remedy provided by the legislature
is not unreasonable or arbitrary but substantial and efficient, due
process of law is not offended by the change in remedy. Here,
the court was not so concerned about intention and reliance but
only with the question of whether the statutory provisions con-
sidered were procedural or substantive.

IX. RETROSPECTIVE APPLICATION
OF STATUTES OF FRAUDS

Though not as directly related to trust administration, the
question of the constitutionality of the retrospective application of
statutes of frauds should be considered in view of the fact that the
Indiana Trust Code has added a requirement, new to Indiana law,
that trusts in personal property must be in writing to be enforce-
able:

A trust in either real or personal property is en-
forceable only if there is written evidence of its terms
bearing the signature of the settlor or his authorized
agent.

The Commission's reason for adding trusts in personal pro-
PERTY to the Indiana Statute of Frauds is well reflected in its Com-
ment:

The decision to require a trust in personal property
to be substantiated by written evidence is motivated by
the Commission's concern for the risk that manufactured
evidence might be used to enforce an oral trust. This
risk has been recognized in Indiana. It is believed that
the rules relating to trusts created by operation of law
provide a sufficient remedy to avoid injustice in most
oral trust cases.

But as is true throughout most of the Trust Code, the Com-

40. See note 38 supra.
41. Swanson v. Bates, 170 F.2d 648 (10th Cir. 1948); see also Swanson v.
42. 170 F.2d at 650-51.
43. Ind. Code § 30-4-2-1 (1971).
44. Commission Comment to Ind. Code § 30-4-2-1 (1971) (citation omitted).
mission failed to specify the effect this particular section is to have on pre-existing oral trusts in personal property. One can note that the section does not purport to make oral trusts in personal property void but merely unenforceable and from there argue that the section is remedial, not substantive, and intended by the Commission and legislature, therefore, to be applied retrospectively. Assuming that this section is intended to apply retrospectively, the question of the constitutionality of such application is a difficult one. Courts have differed sharply on the question.

In some cases, the statute of frauds being examined has been construed as remedial and, therefore, applicable to agreements entered into prior to the effective date of the statute. More commonly, however, courts have refused to afford retrospective effect to statutes of frauds on the theory that to do so would be an unconstitutional impairment of contract or deprivation of vested rights. This has been the result in a number of cases even where the statutes have contained remedial language, e.g., “no action shall be brought” or “parol evidence shall not be received” on the theory that to take away the remedy is to destroy the contract.

Indiana courts have, generally, interpreted the basic Indiana Statute of Frauds as not rendering oral contracts within its provisions void but merely unenforceable. If these holdings can be characterized as saying that the Indiana Statute of Frauds is remedial and not substantive, as noted earlier, it could be argued rather persuasively that the Commission and legislature likewise regarded the Trust Code Statute of Frauds as remedial and intended therefore, to be applied retrospectively. For the Indiana
courts to support such retrospective application, however, would require their taking a position contrary to that of the majority holdings in other jurisdictions.\textsuperscript{51}

\section*{X. Conclusion}

It is indeed regrettable that neither the Indiana legislature nor the Commission has provided to the courts and those concerned with the day-by-day administration of trusts understandable statutory language specifically stating which sections of the Code are intended to apply to pre-existing trusts.

Perhaps it would be unreasonable to expect the Commission and legislature to have resolved, in advance, all constitutional questions. But, at the least, they could have shown some additional foresight and responsibility and said in the Code what the Comment indicates was meant, namely, "The Trust Code is to apply to all pre-existing trusts to the extent constitutionally permissible." Though by according this interpretation to the statute, it is still not possible to anticipate, identify and resolve now every conceivable type of case which might present the retrospective question. The preceding discussion will, it is hoped, provide the courts with the basis for the development of rational guidelines for the resolution of such questions. It is suggested that a court first look to the terms of the instrument for any \textit{expressed} intention that the settlor or testator intended that the particular rule of law then in effect should always be applied even though the law should thereafter be changed. If such an expression is found, it would seem that, generally, the Code requires compliance with it.\textsuperscript{52}

Secondly, the court should recognize that the public interest of the State of Indiana will be served best by a uniform, orderly and consistent administration of trusts in accordance with the new Trust Code regardless of when such trusts came into existence.

Thirdly, in the absence of an expressed intention in the instrument calling for the application of prior law, the court should consider the relevant equities of the litigants resisting retrospective application of the Code to a particular set of facts \textit{vis-a-vis} the public interest. What reliance can litigants be said to have placed on the continuance of the law as it existed at the time of the trust's creation? What were their reasonable expectations? What "right" do they have to assume that the legal relationships existing between trustees, beneficiaries, third parties, etc., will never be changed throughout the duration of a trust that might last one hundred years or so?

\textsuperscript{51} See notes 47 & 48 supra.

\textsuperscript{52} See note 4 supra.
If these guidelines are applied, it is hoped that in most cases the Indiana courts will find constitutional objections to the retrospective application of the Trust Code to be insufficient to override the public interest just as have many other courts in trust situations. However, until the Indiana courts have evidenced their attitude toward retrospective application of the Trust Code, the cautious trustee of a pre-existing trust faced with a question of whether to utilize the new Trust Code or to rely on prior law may well decide to seek instructions from the court.53

53. Ind. Code § 30-4-3-18 (1971), provides in part: “If there is a reasonable doubt with respect to any matter relating to the administration of the trust, the trustee is entitled to be instructed by the court.”