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UNIFORM TRUSTEES' POWERS ACT

CHARLES HOROWITZ*

*In August 1964 the Uniform Law Commission adopted the Uniform Trustees' Powers Act in response to a long felt need for legislative reform in the area of trustees' powers. The new act applies the "prudent man" concept to the entire field of trustees' powers, an approach proposed by Professor William F. Fratcher in an article published in 1962 entitled Trustees' Powers Legislation.** Charles Horowitz, Esq., Chairman of the Uniform Law Commission's Special Committee which was responsible for drafting the new act, discusses the basic approach of the act and the changes the act will effect in the traditional law of trusts.*

The trust as a method by which one may use an asset for the benefit of another¹ is a widely used and socially valuable device in the United States today. However, the traditional law of trusts, based on rules of interpretation crystallized two centuries ago,² has not proved adequate to the needs of those who presently seek to make maximum beneficial use of the device.

Since, in the absence of legislation, the powers of a trustee are derived exclusively from the instrument creating the trust,³ the law of trusts has developed primarily as a set of rules for determining the trustor's intention. However, the courts have not kept pace with changing social and economic conditions and consequent changes in trust usages and trustors' intentions in the development of rules of interpretation. Trusts in the 18th century were most commonly used to maintain family lands intact through the family settlement. The role

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** 37 N.Y.U.L. REV. 627 (1962).

¹ Compare RESTATEMENT (SECOND), TRUSTS §2 (1959). See 89 C.J.S. *Trusts* §§ 8-21 (1955). This act deals with a type of fiduciary relationship created by a voluntary act (RESTATEMENT (SECOND), TRUSTS § 17 (1959)) whether with or without consideration and whether the purpose is private or public as in the case of a spendthrift or charitable trust, 89 C.J.S. *Trusts* §§ 19 (*Public and Private Trusts*), 21 (1955). Not all fiduciary relationships are covered. Fiduciary relations existing between guardian and ward, principal and agent, attorney and client and other relationships voluntarily assumed but not in the forms of express trusts are excluded. Excluded are confidential relations such as those existing between members of a family, physician and patient, or priest and penitent. Such relationships do not contemplate general trust administration in the sense covered by this act. RESTATEMENT (SECOND), TRUSTS §§ 7-16, 16A, 16B, 16C (1959). For a discussion distinguishing "trustee" from other relationships, see 89 C.J.S. *Trusts* § 3 (1955).

² See Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 658 (1962). The trust concept as known in the United States today is derived from English Law. See MAILLAND, *EQUITY* 23 passim (2d ed. 1936); JENKS, *A SHORT HISTORY OF ENGLISH LAW* 95-101, 221-25 (3d ed. 1924).

³ RESTATEMENT (SECOND), TRUSTS § 186 (1959).

of the trustee in such a trust was essentially passive; his function was to preserve contingent remainders, to protect the eldest son during minority, and to raise portions for daughters and younger sons. Rights of management and possession of the property ordinarily belonged to the life tenant, not to the trustee. In view of the restricted nature of the trustee's functions, the courts' narrow interpretation of express powers and reluctance to find implied powers usually accorded with the trustor's actual intention.⁴

In the 20th century trusts have a more diversified use and trustees are called on to play a far more active role than in the 18th century. The modern trust is often created for investment and management of funds or property; the trustee has the right to possession of the corpus and active duties in its management. The trustee today is often hampered in effective and efficient administration of the trust by application of the old rules of strict construction of powers.

Although the nature of the trustee's role has drastically changed since the 18th century, his powers, read against this background of long established precedent, have on the whole been narrowly construed;⁵ this, notwithstanding the general rule that a trustee has all powers expressly conferred and necessarily implied, but not prohibited, to accomplish trust purposes.⁶ Thus, in the absence of express provisions a power of sale, whether express or implied, does not ordinarily include the power to sell on credit;⁷ the trustee cannot make permanent improvements even if the trust contains a power to repair;⁸ he has no power to exchange trust property without express authorization;⁹ the power to partition is rarely implied;¹⁰ there is no implied power to change the character or form of the trust estate except under unusual circumstances;¹¹ the power to encumber, mortgage or pledge a trust

⁴ Fratcher, *supra* note 2, at 658.

⁵ See, e.g., 90 C.J.S. *Trusts* § 246 n.33 (1955); *Stengel v. Royal Realty Corp.*, 179 Md. 204, 17 A.2d 127 (1941); *Prysi v. Prysi*, 3 Ohio Supp. 40 (1936); Fratcher, *supra* note 2, at 629, n.11.

⁶ RESTATEMENT (SECOND), TRUSTS § 186 (1959).

⁷ See Fratcher, *supra* note 2, at 632. *But cf.*, RESTATEMENT (SECOND), TRUSTS § 190(j) (1959) with reference to express power of sale. Nor is the power to sell implied. 90 C.J.S. *Trusts* § 287 (1955).

⁸ At common law, a trustee generally had the power to make repairs reasonably necessary to preserve the property, but could not make permanent improvements. See BOGERT, TRUSTS AND TRUSTEES § 601 (2d ed. 1960) [hereinafter cited as BOGERT]; 2 SCOTT, TRUSTS § 188.2 (2d ed. 1956) [hereinafter cited as 2 SCOTT]; 54 AM. JUR. TRUSTS § 359 (1945); 90 C.J.S. *Trusts* § 282 (1955).

⁹ See RESTATEMENT (SECOND), TRUSTS § 190(m) (1959); 2 SCOTT §§ 190.9, 190.9A; 54 AM. JUR. TRUSTS § 342 (1945); Fratcher, *supra* note 2, at 632-33.

¹⁰ See Fratcher, *supra* note 2, at 632.

¹¹ Generally, a trustee has, at common law, no implied power to change the char-

asset is ordinarily withheld,¹² especially for a term extending beyond the term of the trust;¹³ the trustee cannot make a lease extending beyond the period of the trust;¹⁴ he cannot grant an option involving the disposition of a trust asset;¹⁵ he cannot hold a security in the name of a nominee;¹⁶ he cannot borrow money;¹⁷ in some cases the trustee has no power to employ investment advisors;¹⁸ he cannot act on the recommendation of an agent without independent investigation;¹⁹ nor can the trustee delegate discretion.²⁰

Although in theory these protective rules have been predicated on the intent of the trustor, the trustor has been presumed to have the intent of an 18th century trustor. In practice today these rules are based on a distrust of the trustee—even express powers are limited by the rules of strict interpretation.²¹ If the trustor wishes to avoid these restrictions on the powers of the trustee, he is required to anticipate and expressly provide against them. Unless the draftsman is thoroughly familiar with the technical rules of law applicable, the trustor,

acter or form of the trust estate except where the welfare of the trust demands such a change. See 54 AM. JUR. *Trusts* §342 (1945).

¹² The common law generally withheld these powers, absent express or clearly implied authorization. See RESTATEMENT (SECOND), TRUSTS § 191 (1959); BOGERT §§ 751-55; 2 SCOTT § 191.1-4; 54 AM. JUR. *Trusts* §§ 476-80 (1945); 90 C.J.S. *Trusts* § 311 (Mortgage or Pledge) (1955); Fratcher, *supra* note 2, at 632.

¹³ See RESTATEMENT (SECOND), TRUSTS § 181 (1959). Cf. Fratcher, *supra* note 2, at 631.

¹⁴ See RESTATEMENT (SECOND), TRUSTS § 189(c) (1959); 54 AM. JUR. *Trusts* §§ 472-75 (1945); 90 C.J.S. *Trusts* § 319(b)(5)(b) (1955); cf. 2 SCOTT § 190.8.

¹⁵ The common law generally prohibits such a grant, even when the trustee has a power of sale. See RESTATEMENT (SECOND), TRUSTS § 190(k) (1959). See generally 2 SCOTT § 190.8; Fratcher, *supra* note 2, at 632; UNIFORM TRUST ADMINISTRATION ACT § 2(b). Citations herein make no distinction between the first and second tentative drafts of the now defunct *Uniform Trust Administration Act*. These drafts vary substantively only in the introductory paragraph of § 2 and in § 2(o) and § 2(i). The first tentative draft may be found in *National Conference of Commissioners on Uniform State Laws*, 1932 Handbook 242-48 and the second in 1933 Handbook 310-36.

¹⁶ Generally, express authorization for the exercise of this power is required at common law. See RESTATEMENT (SECOND), TRUSTS § 325(e) (1959). See also UNIFORM TRUST ADMINISTRATION ACT § 2(m); UNIFORM COMMERCIAL CODE § 8-403; UNIFORM TRUSTS ACT § 9; Fratcher, *supra* note 2, at 663.

¹⁷ The decisional law (in the absence of express power) generally so holds. See RESTATEMENT (SECOND), TRUSTS § 191 (2) (1959). Compare 90 C.J.S. *Trusts* § 279 (1955).

¹⁸ Decisional law is divided as to the power of a trustee to employ investment advisors. See 2 SCOTT § 188.3. Fratcher, *supra* note 2, at 639-41, concerning the rule against delegation of functions by the trustee. See generally RESTATEMENT (SECOND), TRUSTS § 225 (1959).

¹⁹ See RESTATEMENT (SECOND), TRUSTS § 171(h) (1959); 90 C.J.S. *Trusts* § 257 (1955).

²⁰ The common law limits rather strictly the power of a trustee to delegate the performance of a discretionary act. See RESTATEMENT (SECOND), TRUSTS §§ 171(d), (j), 188(c); BOGERT §§ 555, 557; 54 AM. JUR. *Trusts* §§ 309, 310, 329 (1945); 90 C.J.S. *Trusts* § 256 (1959). Cf. RESTATEMENT (SECOND), TRUSTS § 225 (1959). See Fratcher, *supra* note 2, at 640-41.

²¹ See note 5 *supra*.

trustee or third persons often find that the trustee does not possess adequate powers to fulfill trust purposes.

The restrictive rules as to the scope of the trustee's powers are buttressed by rules of strict accountability to the beneficiary²² and of third person responsibility. Under well established law a third person dealing with a trustee is put on notice as to the extent of the trustee's powers in the transaction involved. If the third person has actual or constructive notice that the trustee is violating his duties²³ or exceeding his powers,²⁴ the transaction may be void²⁵ or voidable²⁶ and the third person may be liable to the trustor for any damage caused.²⁷ As a result, third persons may justifiably be reluctant to deal with a trustee. Restrictions on trustees' powers combined with the fear of third persons may prevent effective trust administration. Although the trustee may seek judicial relief by way of instructions, augmentation of trust powers or removal of restrictions on their exercise,²⁸ these remedies often prove unavailing, costly, or impractical because of the delay involved.

Accordingly, much of traditional trust law needs to be reformed to meet the needs of those who seek to make maximum beneficial use of the trust device. That there is no necessity for maintaining the status quo in the field of trust powers may be seen in the many statutory revisions of trust powers that have been made in the past. In England a comprehensive statutory revision of trust powers, which

²² See RESTATEMENT (SECOND), TRUSTS §§ 174, 176-84, 186, 206, 223, 232 (1959); see generally 54 AM. JUR. *Trusts* § 338 (1945).

²³ See note 24 *infra*.

²⁴ At common law, third persons knowingly dealing with trustees are generally held to a duty of inquiry and are chargeable with constructive knowledge of a trustee's breach of duty which they might reasonably have discovered in the exercise of due care. See RESTATEMENT (SECOND), TRUSTS §§ 283-320 (1959); BOGERT, § 565; 54 AM. JUR. *Trusts* § 305 (1945); 90 C.J.S. *Trusts* § 246 n.56 (1955); Fratcher, *supra* note 2, at 644, 646, 662, 663; UNIFORM COMMERCIAL CODE § 8-403 (3).

²⁵ If trustee exceeds his powers, his acts may be a nullity. See 90 C.J.S. *Trusts* § 246 nn.53-54 (1955). As to such acts being merely voidable, see note 26 *infra*. Section 7 (see text accompanying notes 152-59 *infra*) changes the rule as to third persons acting in ignorance of trustee's lack of power. Powers would be limited on winding up of the trust because it would not be prudent to exercise powers to unnecessarily prolong the trust. RESTATEMENT (SECOND), TRUSTS §§ 344-47 (1959).

²⁶ *In re Chambers Estate*, 136 Ohio St. 202, 24 N.E.2d 601 (1939); *Wichita Royalty Co. v. City Nat'l Bank of Wichita Falls*, 109 F.2d 299 (5th Cir.), *cert. denied*, 310 U.S. 644 (1940).

²⁷ See RESTATEMENT (SECOND), TRUSTS § 326 (1959); Fratcher, *supra* note 2, at 646 n.117.

²⁸ Want of power would either prevent action by the trustee or require recourse to the courts for judicial augmentation of power. See UNIFORM TRUSTEES' POWERS ACT § 5, and text at note 142 *infra*. The decisional law allows such relief when, because of circumstances not known to the trustor when the trust was created and not anticipated by him, failure to do so would substantially defeat or impair the accomplishment of the purposes of the trusts. See RESTATEMENT (SECOND), TRUSTS § 167 (1959), Fratcher, *supra* note 2, at 654-56.

has been influential in the Dominions,²⁹ was enacted in 1925.³⁰ In the United States all fifty states and the District of Columbia have statutes which in one way or another affect the powers of a trustee.³¹

The Uniform Law Commission considered a proposed Uniform Trust Administration Act in 1932 and 1933,³² but could not agree upon either the First or Second Tentative Draft and abandoned the project until 1961.³³ The 1932 First Tentative Draft, which was mainly a list of powers, was adopted by Florida,³⁴ Oklahoma,³⁵ and Texas.³⁶

²⁹ Fratcher, *supra* note 2, at 627, n.4 cites: *E.g.*, ALTA. REV. STAT. c. 346 (1955); B.C. REV. STAT. c. 390 (1960); MAN. REV. STAT. c. 273 (1954); N.B. REV. STAT. c. 239 (1952); *Trustee Act*, 1925, 10 N.S.W. Stat. 1824-1937, p. 556 N.S. REV. STAT. c. 301 (1954); ONT. REV. STAT. c. 408 (1960); PR. ED. I. REV. STAT. c. 167 (1951); SASK. REV. STAT. c. 123 (1953). *Cf.* Trustees & Executors Acts, 1897 to 1924, 9 Queensland Pub. Acts 582 (1828-1936).

³⁰ 2 Trustee Act, 15 and 16 Geo. 5, c. 19 (1925); Settled Land Act, 15 and 16 Geo. 5, c. 18 (1925); Law of Property Act, 1925, 15 and 16 Geo. 5, c. 20; and the Trustee Investments Act, 1961, 9 and 10 Eliz. 2, c. 62. See generally Fratcher, *Fiduciary Administration in England*, 40 N.Y.U.L. REV. 12-99 (1965).

³¹ Fratcher, *supra* note 2, at 628, n.137 cites: ALA. CODE, tit. 47, §§ 154(1)-(10) (Supp. 1959); ALASKA COMP. LAWS ANN. §§ 22-8-1 to -12 (Supp. 1958); ARIZ. REV. STAT. ANN. §§ 44-2071 to -2080 (Supp. 1961); ARK. STAT. §§ 50-901 to -910 (Supp. 1961); CAL. CIV. CODE §§ 1154-65; CONN. GEN. STAT. ANN. §§ 45-101 to -109 (1960); DEL. CODE ANN. tit. 12, §§ 4501-10 (Supp. 1960); D.C. CODE ANN. §§ 21-214 to -224 (Supp. 1960); FLA. STAT. ANN. §§ 710.01-.10 (Supp. 1961); GA. CODE ANN. §§ 48-301 to -313 (Supp. 1961); HAWAII REV. LAWS §§ 338A-1 to -10 (Supp. 1960); IDAHO CODE ANN. §§ 68-801 to -810 (Supp. 1961); ILL. ANN. STAT. ch. 3, §§ 531-41 (Smith-Hurd 1961); IND. ANN. STAT. §§ 31-801 to -810 (Supp. 1961); IOWA CODE ANN. §§ 565A.1-.11 (Supp. 1961); KAN. GEN. STAT. ANN. §§ 38-901 to -911 (Supp. 1959); KY. REV. STAT. §§ 385.010-100 (1960); LA. REV. STAT. ANN. §§ 9:735-742 (Supp. 1961); ME. REV. STAT. ANN. ch. 158-A, §§ 1-10 (Supp. 1961); MD. ANN. CODE art. 16, §§ 213-22 (1957); MASS. GEN. LAWS ANN. ch. 201(A), §§ 1-11 (1958); MICH. STAT. ANN. §§ 27.3178 (241. 21)-(241. 31) (Supp. 1959); MINN. STAT. ANN. §§ 527.01-.11 (Supp. 1960); MISS. CODE ANN. §§ 672-101 to -113 (Supp. 1960); MO. REV. STAT. §§ 404.010-100 (1959); MONT. REV. CODE ANN. §§ 67-1801 to -1811 (Supp. 1961); NEB. REV. STAT. §§ 38-1001 to -1010, -1101 to -1105 (1960); NEV. REV. STAT. §§ 167.010-100 (1960); N.H. REV. STAT. ANN. §§ 463-A:1 to -A:10 (Supp. 1961); N.J. STAT. ANN. §§ 46:38-1 to -12 (Supp. 1961); N.M. STAT. ANN. §§ 48-20-1 to -10 (Supp. 1961); N.Y. PERS. PROP. LAW §§ 265-71; N.C. GEN. STAT. §§ 33-68 to -77 (Supp. 1961); N.C. CENT. CODE §§ 47-24-01 to -10 (1960); OHIO REV. CODE ANN. §§ 1339.31-.39 (Page 1962); OKLA. STAT. ANN. tit. 60, §§ 401-10 (Supp. 1961); ORE. REV. STAT. §§ 126.805-.880 (1961); PA. STAT. ANN. tit. 20 §§ 3601-11 (Supp. 1960); R.I. GEN. LAWS ANN. §§ 18-7-1 to -11 (Supp. 1961); S.D. CODE §§ 43.0701 (Supp. 1960); TENN. CODE ANN. §§ 35-801 to -810 (Supp. 1961); TEX. REV. CIV. STAT. ANN. art. 5923-101, §§ 1-10 (Supp. 1961); VT. STAT. ANN. tit. 14, §§ 3201-09 (1959); VA. CODE ANN. §§ 31-26 to -36 (Supp. 1960); WASH. REV. CODE §§ 21.24.010-900 (1961); W. VA. CODE ANN. §§ 36-7-1 to -11 (Supp. 1960); WIS. STAT. ANN. §§ 319.61-71 (1958); WYO. STAT. ANN. §§ 34-127 to -136 (1957); COLO. SESS. LAWS 1961, ch. 231; S.C. ACTS & RESOLUTIONS 1961, No. 330.

³² *National Conference of Commissioners on Uniform State Laws, 1932 Handbook* 242-48; 1933 *Handbook* 80-82, 310-36. The Second Tentative Draft was annotated with citations to the decisions of many jurisdictions.

³³ The committee appointed consisted of: Commissioners Howard Dresbach, Robert B. Harwood, Coleman Karesh (replacing R. Jasper Smith, deceased), A. Pratt Kessler, George H. Bowen, and the writer, as Chairman.

³⁴ FLA. STAT. ANN. ch. 691 (1944).

³⁵ OKLA. STAT. ANN. tit. 60, 175.1-.53 (1944).

³⁶ TEX. REV. CIV. STAT. ANN. art. 742b (1960); Boyles, *Texas Trust Act*, 6 TEXAS BAR. J. 149 (1943); Moorhead, *The Texas Trust Act*, 22 TEXAS L. REV. 123 (1944).

The Second Tentative Draft differed from the First in that the powers were to be given to the trustee only if the trust expressly granted "full statutory powers." Arkansas has a comprehensive trustees' powers statute, effective when incorporated by reference into the trust instrument;³⁷ Illinois,³⁸ Louisiana,³⁹ Pennsylvania,⁴⁰ Rhode Island,⁴¹ and Washington⁴² also have fairly comprehensive trustees' powers acts. On the whole, however, most states have only piecemeal legislation, directed at particular problems.⁴³

The most successful statutory revisions to date have been those dealing with investment powers of the trustee. Initially the courts adopted a conservative attitude in making rules as to proper investments. They drew somewhat mechanical distinctions among permissible investments in bonds, common and preferred stocks, real estate and personal property, mortgages and the like.⁴⁴ Gradually the decisional rules were subjected to statutory modifications,⁴⁵ many of which set out eligible trust investment lists.⁴⁶ These modifications, however, failed to take into account that times and economic conditions change, and that investments which seem proper at one time may prove unwise at a later date.⁴⁷ It became apparent that investment powers must be made more flexible in order to respond to prevailing economic conditions. To meet this problem, the legislatures of many states enacted the so-called "prudent man" rule,⁴⁸ which gives the trustee power to act where, in the exercise of prudence, he deems action necessary.

³⁷ ARK. ACTS 1961, No. 153; Bowen, *Powers of the Trustee of an Express Trust in Arkansas*, 2 ARK. L. REV. 153 (1948).

³⁸ ILL. ANN. STAT. ch. 148, § 35 (Smith-Hurd 1961).

³⁹ LA. REV. STAT. ANN. §§ 9:2111-.2128 (1951).

⁴⁰ PA. STAT. ANN. tit. 20, §§ 320.93-969 (1950).

⁴¹ R. I. GEN. LAWS ANN. § 18-4-2 (Supp. 1961).

⁴² WASH. REV. CODE §§ 30.99.010-.910 (1961).

⁴³ Fratcher, *supra* note 2, at 629.

⁴⁴ *Id.* at 634.

⁴⁵ *Id.* at 635.

⁴⁶ Fratcher sets out four categories of legislation as to types of investments: "(1) mandatory legal lists restricting trust investments to listed types of securities; (2) mandatory legal lists requiring a stipulated proportion of the trust property to be invested in listed types of securities but permitting the rest to be invested under the 'prudent man' rule; (3) permissive legal lists authorizing investment in listed types of securities and also expressly authorizing investment of all or any part of the trust property under the 'prudent man' rule, and (4) permissive legal lists authorizing investment in listed types of securities and, by implication, permitting investment of all or any part of the trust property under the 'prudent man' rule." Fratcher *supra* note 2, at 635 & nn.59-62.

⁴⁷ *In re Trusteeship Under Agreement with Charles H. Mayo*, 251 Minn. 91, 105 N.W.2d 900 (1960).

⁴⁸ The prudent man standard is based on the well known case of *Harvard College v. Amory*, 9 Pick. 446 (Mass. 1830). Since then, prudent man investment statutes have been widely adopted. See, e.g., WASH. REV. CODE §§ 30.24.010-.110 (1955). See 23 WASH. L. REV. 78 (1948).

Used alone⁴⁹ and in conjunction with eligible investment lists,⁵⁰ the prudent man rule adds resiliency and adaptability in trust administration and discourages reliance on mechanical guidelines. It permits a constant adjustment in investment powers to the needs of the trust over the years, avoiding both the problem of current power deficiencies and the problem that trust powers, adequate when granted, may later prove inadequate.

The success of the prudent man rule in the field of investment powers⁵¹ suggested the remedy for the problem of trustee powers in general. In *Trustees' Powers Legislation*, an article published in 1962,⁵² Professor William F. Fratcher proposed that trust powers be defined as those powers needed by the prudent man to perform trust purposes, rather than merely in terms of specifically described powers.⁵³ The Uniform Law Commission's Special Committee charged with drafting a uniform act dealing with trustees' powers adopted Professor Fratcher's theory.

The adoption of the prudent man concept in defining trustees' powers necessarily changes and liberalizes the doctrine of implied powers. Under existing law, powers may be implied if deemed by the court to be necessary to accomplish trust purposes;⁵⁴ under the prudent man rule, implied powers are those which the trustee in the exercise of prudence believes necessary. The trustee must determine whether he has the necessary power to act; if he makes such a determination in good faith and within the bounds of reasonable judgment, the courts should be precluded from substituting their judgment for that of the trustee.⁵⁵

As pointed out by Professor Fratcher,⁵⁶ applying the prudent man concept to the entire field of trustees' powers necessitates a re-examination of the traditional law of third person responsibility in dealing with trustees. Under the prudent man rule it would be necessary for third persons constantly to determine whether the trustee has or is exercising the powers which as a prudent trustee he should have or exercise. Obviously, the difficulty involved in making such a deter-

⁴⁹ See Fratcher, *supra* note 2, at 635.

⁵⁰ *Ibid.*

⁵¹ This success is evidenced by the wide adoption of the prudent man rule. The disadvantages of investment restrictions become apparent as times change. See, e.g., *In re Trusteeship Under Agreement with Charles H. Mayo*, 251 Minn. 91, 105 N.W.2d 900 (1960).

⁵² 37 N.Y.U.L. REV. 627 (1962).

⁵³ *Id.* at 660.

⁵⁴ See RESTATEMENT (SECOND), TRUSTS § 186 (1959).

⁵⁵ See RESTATEMENT (SECOND), TRUSTS § 187 (1959); *Occidental Life Ins. Co. v. Blume*, 65 Wash. Dec. 2d 622, 630, 399 P.2d 76 (1965).

⁵⁶ Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 644 (1962).

mination would stultify the effective exercise of trustees' powers. The Uniform Trustees' Powers Act therefore takes into account the necessity for protecting third parties.⁵⁷

Another problem dealt with by the new act concerns the tax consequences involved in the existence and exercise of trust powers.⁵⁸ Both federal and state laws have taxed or withheld tax exemptions, deductions or credits on the basis of the presence or absence of certain kinds of trust powers or their exercise.⁵⁹ The Special Committee in drafting the new act adopted the view that the trustor presumably intended to avoid adverse tax consequences in the exercise of trust powers, and that both he and the trust should be protected against such consequences. Thus, the Uniform Trustees' Powers Act adopted by the Uniform Law Commission in 1964 embodies the prudent man concept of trust powers, subject to fiduciary accountability,⁶⁰ takes into account the necessity for protecting third parties, and provides for protection of the trustor and the trustee against adverse tax consequences.

II.

Let us now turn to a consideration of the provisions of that act. Changes from traditional law will be briefly noted (but in light of the new basic approach of the act). The words "no change" indicate that apart from the new basic approach, no change in the traditional rule has been attempted.

Section 1. [*Definitions*] As used in this Act:

(1) "trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary, or both; "trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court, a liquidation trust, or a trust for the primary purpose of paying dividends, interests, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration;

⁵⁷ UNIFORM TRUSTEES' POWERS ACT § 7.

⁵⁸ *Id.* at § 3(b).

⁵⁹ See UNIFORM TRUSTEES' POWERS ACT § 3(b).

⁶⁰ Rules of fiduciary accountability are retained by the UNIFORM TRUSTEES' POWERS ACT § 3(b).

(2) "trustee" means an original, added, or successor trustee;

(3) "prudent man" means a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, diligence, discretion, and judgment would act in the management of their own affairs.

The kinds of "trusts" to which the act does not apply are illustrated in considerable detail. Thus, the act does not apply to resulting or constructive trusts;⁶¹ to business trusts which provide for certificates to be issued to the beneficiary;⁶² to investment trusts,⁶³ voting trusts,⁶⁴ security instruments,⁶⁵ trusts created by judgment or decree of a court,⁶⁶ liquidation trusts,⁶⁷ trust for the primary purpose of paying dividends, interest or interest coupons;⁶⁸ to salaries, wages, pensions or profits or employee benefits of any kind;⁶⁹ to nominees and escrows;⁷⁰ to bank deposit or savings and loan association deposit trusts;⁷¹ or generally to any other trust, the nature of which does not contemplate general trust administration.⁷² However, an instrument which is not a trust as defined in the act may incorporate by reference any part of the act by virtue of section 2 (b).

⁶¹ These are not necessarily voluntary manifestations of intent but remedies conferred by law to protect against wrongdoing. For a discussion, see RESTATEMENT, RESTITUTION § 160 (1937); 89 C.J.S. *Trusts* §§ 14 (*Resulting Trusts*), 15 (*Constructive Trusts*) (1955).

⁶² See *Morrissey v. Commissioner*, 296 U.S. 344 (1935), which contrasts ordinary trusts with business trusts. See generally, 12 C.J.S. *Business Trusts* § 1 (1938).

⁶³ For a discussion of investment trusts see RESTATEMENT (SECOND), TRUSTS § 227(n) (1959); 90 C.J.S. *Trusts* § 329 (1955); 9 C.J.S. *Banks and Banking* § 1061 (1938).

⁶⁴ See generally 18 C.J.S. *Corporations* § 552 (*Voting Trusts*) (1939).

⁶⁵ *E.g.*, deed of trust in the nature of a mortgage. See generally 59 C.J.S. *Mortgages* § 5 (1949).

⁶⁶ See generally 90 C.J.S. *Trusts* § 217(d) at 157 (1955).

⁶⁷ *E.g.*, assignment for benefit of creditors, see 6 C.J.S. *Assignment for Benefit of Creditors*, §11 (*Creation of Trust*) (1937), or liquidation trusts in corporate voluntary dissolution proceedings. *E.g.*, WASH. REV. CODE § 23.01.530 (1958).

⁶⁸ *Accord*, WASH. REV. CODE § 30.99.010 (1959).

⁶⁹ Fringe benefit trusts, including retirement trusts for self-employed individuals, are often created or conformed to obtain income tax benefits provided by INT. REV. CODE of 1954, §§ 401, 501. It is thought best to avoid possible disqualifying implied powers for income tax purposes.

⁷⁰ See generally 30 C.J.S. *Escrows* §§ 1-2 (1942); 66 C.J.S. *Nominee* (1950). Most states have statutory provisions covering trusts of this nature.

⁷¹ See, *e.g.*, WASH. REV. CODE § 30.20.035 (1950) (*Commercial Banks*); WASH. REV. CODE § 32.12.030 (1963) (*Mutual Savings Banks*); WASH. REV. CODE § 33.20.070 (1958) (*Savings and Loan Associations*).

⁷² A similar, although not identical, set of exceptions is set forth in WASH. REV. CODE § 30.99.010 (1959) and in WASH. REV. CODE § 30.30.010 (1955). The act does not apply to an executor or administrator (see RESTATEMENT (SECOND), TRUSTS § 6 (1959), not to passive trusts. See generally 89 C.J.S. *Trusts* § 17 (*Passive and Active Trusts*) (1955). *Cf.* definition in UNIFORM TRUST ADMINISTRATION ACT § 1; Fratcher, *supra* note 56, at 627-29.

The trusts to which the act does apply contemplate general trust administration. These are inter vivos and testamentary trusts, public and charitable trusts, and private trusts. The act treats trust powers as attached to the office rather than the person of the trustee.⁷³ Thus the powers will attach to the original, added or successor trustee.⁷⁴ However, the trustor may provide otherwise in the trust instrument pursuant to section 2(a).

A "prudent man" is defined in section 1(3) as "a trustee whose exercise of trust powers is reasonable and equitable in view of the interests of income or principal beneficiaries, or both, and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs."⁷⁵ This definition is in substance taken from the prudent man rule in the field of investment powers.⁷⁶ The act does not abridge the fiduciary duties imposed upon a prudent man in the exercise of conferred powers, for it imposes upon him the duty to exercise only those powers which he ought to exercise, considering what is reasonable and equitable in view of the interests of the beneficiary and in view of his position as a fiduciary. His duties as a fiduciary include the duty to administer the trust, to keep and render accounts, to furnish information to the beneficiary, to exercise reasonable care and skill, to take and keep control of the trust property, to preserve the trust property, to enforce claims held in trust, to defend actions involving the trust, to keep trust property separate, to exercise reasonable care in the making of bank deposits, to make trust property productive, to pay income to the beneficiary, to deal impartially with beneficiaries, to cooperate with co-trustees, to cooperate with a person holding power of control, and to be loyal to the interests of the beneficiaries by not profiting from his position as trustee except by way of reasonable compensation.⁷⁷

⁷³ Section 1 (2) of the act reads:
 "(2) 'Trustee' means an original, added or successor trustee;"

The court has power to appoint a successor trustee, or to increase or diminish the number of trustees. The trust may itself authorize the addition or diminution of trustees. 90 C.J.S. *Trusts* § 221 n.55 (1955). The older common law rule, and more modern variations, that discretionary authority cannot be exercised by court-appointed successors is superseded. Cf. Fratcher, *supra* note 56, at 627. The powers of the trustee, as described in the act, attach to the office of the trustee and are not personal. See RESTATEMENT (SECOND), TRUSTS § 196 (1959); BOGERT § 553; 54 AM. JUR. *Trusts* §§ 298, 303 (1945); 90 C.J.S. *Trusts* § 259 (1955); UNIFORM TRUSTS ACT § 10.

⁷⁴ UNIFORM TRUSTEES' POWERS ACT § 1 (2).

⁷⁵ See note 48 *supra*.

⁷⁶ See Fratcher, *supra* note 56, at 634, 636.

⁷⁷ For a discussion of the duties of a trustee, see generally RESTATEMENT (SECOND), TRUSTS §§ 174, 176-84, 186, 206, 223, 232 (1959); BOGERT §§ 584-91, 595-98; 54 AM. JUR. *Trusts* §§ 311, *passim*, 396-408, 453, 468, 469, 497-513 (1945); 90 C.J.S. *Trusts* §§ 247, 248, 250, 251, 270, 377 (1955).

The prudent man concept correlates the fiduciary duties of a trustee and the powers of a trustee utilized in the performance of those duties. The trustee has only those powers which he ought to have to perform fiduciary duties. He can exercise only those powers conferred which he ought to exercise in the performance of those duties. The mere existence of power is not enough to justify its exercise. It is only if power conferred ought to be exercised that a trustee is permitted to exercise power. This concept may not be too different from the traditional concept in which power is conferred but its exercise is restricted by the requirements of duty. Thus, a trustee given the power to sell under existing law is not necessarily excused for a violation of a trust duty simply because exercise of the power was authorized.⁷⁸ The prudent man concept therefore does not change the law in this respect. Suppose, however, that express powers conferred are inadequate and must be augmented to permit the trustee to perform an act which in his judgment should be performed to accomplish a trust purpose—for example, the lease of property for a period beyond the trust term.⁷⁹ Under the prudent man concept the trustee would have that power even though it was not expressly conferred. Under the present law,⁸⁰ however, it would be necessary to obtain judicial augmentation or permission in order to exercise this power.⁸¹

The powers described are *ipso facto* conferred on all trusts to which the act applies. This approach had been adopted by the First Draft of the Uniform Trustees' Powers Act of 1932. The Second Draft conferred power only where there was express incorporation by reference.⁸² The present act expressly provides, however, that the *ipso facto* rule applies in the absence of limitations in the trust instrument or under the act or except as is otherwise provided in a specifically described statute.⁸³

⁷⁸ *In re Durstan's Will*, 297 N.Y. 64, 74 N.E.2d 310 (1947).

⁷⁹ See generally RESTATEMENT (SECOND), TRUSTS § 189 (1959); 2 SCOTT § 189.1-7; 54 AM. JUR. TRUSTS § 471 (1945); 90 C.J.S. TRUSTS § 319 (1955); UNIFORM TRUST ADMINISTRATION ACT § 2(c); Fratcher, *supra* note 56, at 631.

⁸⁰ At common law, a trustee may not ordinarily make a lease extending beyond the period of the trust. RESTATEMENT (SECOND), TRUSTS § 189(c) (1959); See generally 54 AM. JUR. TRUSTS §§ 472-75 (1945); 90 C.J.S. TRUSTS § 319(b)(5)(b) (1955); 2 SCOTT § 190.8.

⁸¹ See note 28 *supra* and accompanying text.

⁸² See note 32 *supra*.

⁸³ Section 2(a) makes provision for possible statutory modification of the act. Thus a power conferred by the UNIFORM TRUSTEES' POWERS ACT may be excepted, limited or prohibited, or procedure for its exercise regulated by statute. Furthermore, there may be statutes that are not intended to be superseded. Obviously, as between the trustee and

Section 2. [*Powers of Trustee Conferred by Trust or by Law.*]

(a) The trustee has all powers conferred upon him by the provisions of this Act unless limited in the trust instrument [and except as is otherwise provided in . . .].

(b) An instrument which is not a trust under section 1(1) may incorporate any part of this Act by reference.

Section 2 of the act makes it quite clear that the trustor can still control the powers that he confers by express limitation in the trust instrument. He can, if he desires, provide that none of the powers in the act should be applicable to the trust or that the only powers applicable to the trust should be those which he expressly sets forth therein; or he can, if he wishes, adopt only certain powers in the act by reference or by express description. However, for the reasons hereinafter stated in the discussion of section 7 of the act (providing protection for third persons dealing with the trustee) it is believed that a provision excluding the operation of section 7 would be inoperative as violative of the basic purposes of the act. The remedy for breach of limitations or prohibitions on the exercise of power is against the trustee or third person with actual knowledge of such limitations or prohibitions. Accordingly, as between trustor and trustee, the act by its terms becomes a means by which a trustor can either accept the prudent man concept by saying nothing about it or he can adopt so much of the act as he believes would apply to his needs. Furthermore, as to trusts which are excluded from the operation of the statute,⁸⁴ the trustor may incorporate by reference any part of the act which fits his purpose. This practice might be especially desirable in the case of retirement or employee benefit trusts which are special continuing trusts and may need broad powers but, because of their peculiar nature and tax aspects, should be drafted with specific reference to specified powers.

Provision is made in the act for retention of existing statutes dealing with trust powers. An example would be if the legislature wished to retain specific controls over the exercise of a trust power requiring court order.

the beneficiary such statutory provisions are binding upon the trustee. They are likewise binding upon third persons dealing with the trustee notwithstanding the provisions of § 7 of the act, either because § 7 of the act does not apply to powers excepted from the operation of the act under § 2(a) or because third persons are conclusively charged with knowledge of the existence of such statutory provisions and, therefore, by the language of § 7, bound by such statutory provisions.

⁸⁴ See UNIFORM TRUSTEES' POWERS ACT § 1(1).

Section 3. [*Powers of Trustees Conferred by this Act*]

(a) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purpose of the trust including but not limited to the powers specified in subsection (c).

This is an introductory broad grant of power to perform every act which a prudent man would perform for purposes of the trust until final distribution. This broad grant of power means exactly what it says. It is to be applied even if the needed powers go beyond the present law as to the scope of trustees' powers where they are listed as express powers. To make certain that this is clearly understood, section 3(c) of the act describes twenty-six express powers, some of which, as will be seen in a later discussion, go beyond existing law in very important respects.

Section 3(b) In the exercise of his powers, including the powers granted by this Act, a trustee has a duty to act with due regard to his obligation as a fiduciary, including a duty not to exercise any power under this Act in such a way as to deprive the trust of an otherwise available tax exemption, deduction, or credit for tax purposes or deprive a donor of a trust asset of a tax exemption, deduction, or credit or operate to impose a tax upon a donor or other person as owner of any portion of the trust. "Tax" includes, but is not limited to, any federal, state or local income, gift, estate, or inheritance tax.

This section changes existing law. The relationship of section 3(b) to sections 3(a) and 3(c) should be understood. Section 3(b) proceeds upon the assumption that generally a trustor prefers to preserve all tax benefits, exemptions, deductions and credits possible in connection with the trust. The advantages of tax exempt status under the federal law are substantial. For example, there is no federal income tax liability except on "unrelated business taxable income" as contemplated by I.R.C. Section 511, et seq. Contributions to the trust are deductible by donors under I.R.C. Section 170. Bequests, legacies, devices, transfers or gifts to or for the use of the trust are deductible for federal estate and gift tax purposes under I.R.C. Sections 2055, 2106 and 2522. Exemption from tax also exists under the Federal Insurance Contributions Act (social security taxes) and under the Federal Unemployment Tax Act. I.R.C. Sections 3121(b)(8)(B) and 3306(c)(8). The act, in light of its purposes, does not, however, prohibit a trustee from exercising trust powers merely because tax

consequences, unless of a particular type described, will result from the exercise of power.

First, it is to be remembered that the act does not apply to trusts for the purpose of paying salaries, wages, pensions, profits or employee benefits. Accordingly, trusts for pension, profit-sharing or stock bonus purposes to which I.R.C. Section 401 applies, including self-employed individual retirement trusts, contributions to which are deductible under I.R.C. Section 404(a)(10) are not within the act.

A trust to which the act does apply may be, for example, a tax-exempt charitable trust within the meaning of I.R.C. Section 501(c)(3), a grantor trust within the meaning of I.R.C. Section 671-8, inclusive, or a marital deduction trust.⁸⁵ Under federal tax law if the trustee has or exercises statutorily prohibited powers for tax purposes, the otherwise available tax exemption, deduction or credit may thereby be lost. It is the purpose of section 3(b) to restrict the scope of the exercise of broad powers granted under sections 3(a) and 3(c) so that otherwise available, *i.e.* presently enjoyed, independently existing tax exemptions, deductions or credits available to the trust, will not be lost. Except to the extent so restrained, the prudent exercise of trust power is not prevented merely because other tax effects may follow. Thus, section 3(b) does not prevent the sale or purchase of a depreciable asset even though income tax liability may follow, nor does the section prevent the acquisition or disposition of tax exempt bonds; nor the transfer of funds from a bank, the bank accounts of which are subject to a state intangible tax, to a savings and loan association, the accounts in which are not so subject; *nor* the sale of an under-assessed old house in order to buy one fully assessed. In none of the examples given, would a trust, as a consequence of the action taken, lose any independently existing tax exempt status it might otherwise have (e.g., under I.R.C. Section 501(c)(3)) or lose its right to take any otherwise independently existing deduction or credit to which it might be entitled by virtue of its tax exempt status. However, if the trustee operated an existing tax exempt trust for the primary purpose of carrying on a trade or business, the trust would lose its exemption (I.R.C. Section 502) and such an operation would, therefore, be prohibited. Similarly, a trustee is precluded from engag-

⁸⁵ See discussion of administrative powers in marital deduction trusts as set forth in Reg. 20.2056 (b)-5 as reported 1 CCH FED. EST. & GIFT TAX REP. para 2091(3)-(4).

ing in a prohibited transaction as defined in I.R.C. Section 503 or 504 because such transactions would result in the loss of tax exempt status. On the other hand, if a trustee acquires an asset that imposes income tax liability upon the trust without destroying the otherwise existing tax exempt status of the trust (I.R.C. Section 511, et seq. relating to "unrelated business taxable income"), such an acquisition is not forbidden if otherwise prudent because it does not fall within any of the prohibitions set forth in Section 3(b).

A second category of powers, the exercise of which is prohibited, are those which would deprive a donor of the trust of an otherwise available tax exemption, deduction or credit and thus impose a tax upon a trustor or other person as if the trust did not exist. Thus, under federal law, I.R.C. Section 671 imposes such a tax on an "owner" or person treated as an owner (I.R.C. Section 678) if the grantor has power (I.R.C. Section 675) to (1) deal with the trust for less than an adequate and full consideration, (2) to borrow from the trust without adequate interest or security, (3) to borrow trust funds without repayment before the beginning of the next taxable year, or (4) if certain powers of administration are exercisable in a nonfiduciary capacity. The exercise of these powers is prohibited by section 3(b). The exercise of other powers permissible under the rule of prudence are not precluded because their exercise will not operate to impose income tax liability on a grantor or other person under I.R.C. Section 671 and thus deprive the trust, grantor or other person of an otherwise available tax exemption, deduction or credit.

Two somewhat guarded but nevertheless favorable tax rulings were made by the Director of the Tax Rulings Division of the Internal Revenue Service on July 30, 1964. In one ruling dealing with the charitable trust, the Director considered a possible conflict of section 3(c)(3)(9)(11) and (15) of the act with the existing provisions of I.R.C. Reg. 1.501(c)(3)-1(b)(i)(b) and (iii). He ruled that "the powers (under the act) would neither militate for or against exemption, a determination in each case depending upon the terms of the particular indenture involved. . . ." With reference to grantor trusts he ruled that "in view of the restrictions placed on the trustee in operating the trust by Section 3(b) of the act, it appears less likely that the trust will be operated in a manner which will cause the grantor to be treated as the owner of the trust under section 675 of the code and taxable on the income therefrom under section 671." It is to be noted that

section 3(b) applies not only to powers in relation to the federal tax statutes but to local tax statutes as well.⁸⁶

This construction of section 3(b), limiting its operation as above described, is reinforced by a consideration of well settled principles of statutory construction. Thus, it is to be presumed that the entire statute is intended to be effective; that a just and reasonable result is intended; and that a result feasible of execution is intended. If section 3(b) is construed more broadly than suggested, it would render largely nugatory the broad grant of power conferred by sections 3(a) and 3(c). It is not to be lightly assumed that powers liberally conferred by sections 3(a) and 3(c) to meet current and ever-changing necessities should at the same time be drastically curtailed by section 3(b) so as to virtually frustrate the remedy provided. Accordingly, section 3(b) should be construed in harmony with the basic purpose of the act and therefore free the trustee of artificial restraints on his powers without unnecessary impairment of favorable tax status enjoyed by a trust or its donor.

It is, of course, within the power of a trustor who wishes to proceed with the greatest caution to place an express limitation in the trust instrument as is permitted by section 2(a) of the act, which will withdraw from the permitted powers afforded the trustee any portion of section 3, including section 3(b). To do so, however, would be to impair the accomplishment of the beneficent purposes intended by the act.

Section 3(c). A trustee has the power, subject to subsections (a) and (b):

(1) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be

⁸⁶ There may be state statutes which are counterparts to certain federal statutes. See *e.g.*, Cal. (West's Ann. Cal. Codes, Revenue Taxation § 17788); N.Y. (Bk. 59, Pt. 2., McKinney's Cons. Laws of N.Y. § 365). It has been suggested by the Board of Managers of the Chicago Bar Association that the scope of the prohibition upon the exercise of trust powers as set forth in § 3(b) is too broad in dealing with all tax situations; and that the prohibition should be limited to three present problem areas, namely, to the exercise of powers that would "impose a tax upon the grantor or cause the disallowance of a marital or charitable deduction for tax purposes." For the reasons stated in the text it is submitted that the proposed limitation unnecessarily confines the benefits of § 3(b) and that if § 3(b) is construed in harmony with the basic purpose of the act, the necessity for the proposed limitations disappears.

Rev. Rul. 65-144, I.R.B. 1965-22 rules invalid a provision in a trust agreement providing in substance for the revocation of powers to whatever extent may be necessary to make the charitable remainder involved deductible for federal tax purposes. It is to be noted that § 3(b) of the UNIFORM TRUSTEES' POWERS ACT is a statutory prohibition upon the exercise of power and is not merely contained in a private instrument. Unless § 3(b) is constitutionally invalid, (it is submitted that it is not), the statute must be applied.

made; and the assets may be retained even though they include an asset in which the trustee is personally interested;

This subsection generally follows the common law rule⁸⁷ except with respect to an asset in which the trustee is personally interested.⁸⁸ Thus, the partner who is a trustee would be permitted to retain a trust asset notwithstanding his personal interest if it were otherwise prudent for him so to do.⁸⁹

Section 3(c)(2):

to receive additions to the assets of the trust;

No change.⁹⁰

Section 3(c)(3):

to continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

This section both clarifies and changes the common law rule.⁹¹ The powers are to be exercised if it is prudent to do so. The powers conferred by this section are often of great practical value. But for this section, court authority might or would have to be obtained to permit the exercise of the powers described.⁹²

⁸⁷ See generally BOGERT §§ 583, 592; 2 SCOTT § 175; 54 AM. JUR. *Trusts* §§ 338, 340, 341 (1945); 90 C.J.S. *Trusts* §§ 263, 264, 331 (1955); UNIFORM TRUST ADMINISTRATION ACT § 2(g). Trustees must exercise good faith, diligence and prudence in determining whether to convert or return the property as received. RESTATEMENT (SECOND), TRUSTS §§ 231, 240 (1959).

⁸⁸ Retention of such assets is generally approved where expressly or impliedly approved by the settlor. See, e.g., *In re Steele's Estate*, 337 Pa. 250, 103 A.2d 409 (1954). See generally 90 C.J.S. *Trusts* §§ 248(b) nn.34, 37, 38; 248(e) n.55; 249 (1955). Cf. RESTATEMENT (SECOND), TRUSTS §§ 230, 231 (1959). Trustees must act in good faith. RESTATEMENT (SECOND), TRUSTS § 170 (1959); 90 C.J.S. *Trusts* § 248(e) n.60 (1955); Fratcher, *supra* note 56, at 661. Court authority in self-dealing situations (§ 5(b)) is not required in § 3(a)(1), (4), (6), (18), (25) of the act. See § 7 of the act. The common law generally requires court authorization in such situations. RESTATEMENT (SECOND), TRUSTS § 170 (1959). See generally 2 SCOTT § 174.

⁸⁹ See note 88 *supra*.

⁹⁰ See generally 90 C.J.S. *Trusts* § 172 (1955). The subject matter on which the trust operates is a matter of the trustor's intent. Section 3(c)(2) in effect imposes the necessity of a specific contrary provision on the trustor if he wishes to exclude additions to the trust.

⁹¹ As a practical matter, prudence may require change in the form of organization of a business or enterprise. The power to accomplish this result is accordingly conferred. The common law recognizes this power only where expressly conferred by the trust instrument. See BOGERT §§ 571-79; 2 SCOTT § 188.5; 54 AM. JUR. *Trusts* §§ 345, 362 (1945); 90 C.J.S. *Trusts* § 272 (1955); Fratcher, *supra* note 56, at 636. Cf. RESTATEMENT (SECOND), TRUSTS § 188 (1959); BOGERT § 579 (proposing a model statute regarding continuation of a decedent's business). Conversion of a trust asset may be required in the exercise of prudence. The power to convert is accordingly conferred. See generally RESTATEMENT (SECOND), TRUSTS § 190 (1959); 54 AM. JUR. *Trusts* § 342 (1945).

⁹² See note 91 *supra*.

Section 3(c)(4):

to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

This changes the common law rule.⁹³ However, if prudence requires the exercise of this power it is available without the necessity of court approval.⁹⁴

Section 3(c)(5):

to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

Here the act does not attempt to change existing law. If the jurisdiction has adopted the prudent man rule either by decision or statute, that rule continues. If the statute contains a list of eligible investments⁹⁵ or a combination of the prudent man rule and listed investments, that too continues.⁹⁶

Section 3(c)(6):

to deposit trust funds in a bank, including a bank operated by the trustee;

The first clause of this subsection accords with the majority rule;⁹⁷

⁹³ Fratcher, *supra* note 56, at 642-43. This section applies whether the trustee has an undivided interest in the property as trustee for the same owner or another owner. Whether self-dealing is involved or not, power is conferred subject to requirements of prudence and fiduciary accountability. See § 3(b) of the act; RESTATEMENT (SECOND), TRUSTS § 205-06 (1959). *Cf.* § 3(a)(1) of the act.

⁹⁴ See note 93 *supra*; UNIFORM TRUSTEES' POWERS ACT § 3(a).

⁹⁵ Similar recourse to law outside the act will be found in §§ 3(a)(18), (22) of this act, under Principal and Income Acts or decisions. Investment statutes are summarized in Fratcher, *supra* note 56 at 635-37. See RESTATEMENT (SECOND), TRUSTS §§ 227, 228, 229, 230, 231 (1959). See also BOGERT, §§ 611-64; 54 AM. JUR. *Trusts* §§ 370-429 (1945); 90 C.J.S. *Trusts* §§ 320-37 (1955); UNIFORM TRUST ADMINISTRATION ACT § 2(1).

⁹⁶ This act does not affect local investment statutes (§ 3(c)(5)) nor the power to create reserves for depletion of mineral or timber properties to the extent regulated by laws other than those found in this act. Powers other than § 3(c)(5) have investment power aspects but are independent of investment powers regulated by statute. For a discussion of trustees' powers and legislation see Fratcher, *supra* note 56, at 627-29. See generally, 54 AM JUR. *Trusts* § 228, *passim*. (1945); 2 SCOTT § 186. See note 95 *supra*.

⁹⁷ There is decisional law to the contrary. Fratcher, *supra* note 56, at 634. However, the common law is generally in accord. 54 AM. JUR. *Trusts* § 367 (1945); 90 C.J.S. *Trusts* § 273 (1955).

A savings and loan association is not a "bank". *E.g.*, WASH. REV. CODE § 30.04.010. See 9 C.J.S. *Banks and Banking* § 1 (1938). 12 C.J.S. *Building and Loan Associations* § 3 (1938).

A deposit may constitute an investment in the shares of stock of a savings and loan association. See 41 C.J.S. *Husband and Wife* § 151 (1945). It may constitute a hybrid relationship of creditor-shareholder. See WASH. REV. CODE § 33.20.010. *State ex rel Wicks v. Puget Sound Sav. & Loan Ass'n*, 8 Wn. 2d 599, 113 P.2d 70 (1941); *Rummen v. The Home Sav. & Loan Ass'n*, 182 Wash. 539, 47 P.2d 845 (1935).

A deposit may be a form of investment in which case § 3(a)(5) applies. 54 AM. JUR. *Trusts* §§ 363-69 (1945); 90 C.J.S. *Trusts* § 273 (1955).

the second states the minority rule.⁹⁸ The power is to be exercised if to do so is prudent. A savings and loan association is not necessarily a bank within the meaning of this rule.⁹⁹ Since the depositor is deemed a shareholder, depositing funds in a savings and loan association may be an investment governed by the investment statutes.¹⁰⁰ The trustee acting prudently will ordinarily confine his deposits to the commercial department of the trustee bank providing the deposits are insured or secured.¹⁰¹

Section 3(c)(7) :

to acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee ;

The rules changed are the power to sell, whether for cash or on credit;¹⁰² to improve;¹⁰³ to partition;¹⁰⁴ to exchange;¹⁰⁵ to change the character or form of the trust estate;¹⁰⁶ and to encumber, mortgage or pledge¹⁰⁷ and to do so beyond the term of the trust.¹⁰⁸ The power to manage accords with existing law.¹⁰⁹

Section 3(c)(8) :

to make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings ;

This subsection changes the common law rule as to expenditures for more than ordinary routine repairs.¹¹⁰

⁹⁸ There is extensive authority that such a deposit is improper. See RESTATEMENT (SECOND), TRUSTS § 170(m) (1959); 54 AM. JUR. TRUSTS §§ 368, 369 (1954). Compare 90 C.J.S. TRUSTS § 273 (1955).

Washington permits such a deposit by a corporate trustee if the deposit is insured by the F.D.I.C. WASH. REV. CODE § 30.24.030.

⁹⁹ See note 97 *supra*.

¹⁰⁰ *Ibid*.

¹⁰¹ See note 98 *supra*.

¹⁰² See note 7 *supra*.

¹⁰³ See note 8 *supra*.

¹⁰⁴ See note 10 *supra*.

¹⁰⁵ See note 9 *supra*.

¹⁰⁶ See note 11 *supra*.

¹⁰⁷ See note 12 *supra*.

¹⁰⁸ See note 13 *supra*.

¹⁰⁹ See generally 2 SCOTT § 188.5; 54 AM. JUR. TRUSTS § 344 (1945); 90 C.J.S. TRUSTS §§ 268, 269 (1955).

¹¹⁰ At common law the trustee is ordinarily empowered to make only routine or ordinary repairs. See generally BOGERT §§ 600, 601, 803, 804; 2 SCOTT § 188.2; 90 C.J.S. TRUSTS § 282 (1955); Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627, 630 (1962).

Section 3(c)(9):

to subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration; No change.¹¹¹

Section 3(c)(10):

to enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the trust;

This subsection changes the rule with respect to making leases extending beyond the term of the trust¹¹² and broadens the powers with respect to entering into a lease with option to purchase.¹¹³

Section 3(c)(11):

to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

Such powers may be implied under the common law.¹¹⁴

Section 3(c)(12):

to grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

This subsection changes the common law rule that a general power of sale will not authorize a trustee to grant to a third person a future option to buy trust property.¹¹⁵

Section 3(c)(13):

to vote a security, in person or by general or limited proxy;

The common law rule forbade the delegation of discretion upon all

¹¹¹ See generally UNIFORM TRUST ADMINISTRATION ACT §§ 2(a), 2(d). A trustee may call on a court of equity for instructions. 90 C.J.S. *Trusts* § 261 (1955). While ordinarily it is improper for the trustee to make a gift of trust property, the propriety of dedicating trust property for streets or other public purposes is recognized where advantageous to the trust estate. See RESTATEMENT (SECOND), TRUSTS § 190(n) (1959).

¹¹² See note 14 *supra*.

¹¹³ At common law the trustee may enter into a lease with option to purchase if he has the power to lease or sell and the property could not otherwise be advantageously leased or sold. See RESTATEMENT (SECOND), TRUSTS § 190(k) (1959).

¹¹⁴ See generally 2 SCOTT § 1897. Cf. UNIFORM TRUST ADMINISTRATION ACT § 2(c) Concerning pooling or unitization agreements, see generally 58 C.J.S. *Mines and Minerals* § 213 (1948).

¹¹⁵ See RESTATEMENT (SECOND), TRUSTS § 190(k) (1959); 2 SCOTT § 190.8; UNIFORM TRUST ADMINISTRATION ACT § 2(b); Fratcher, *supra* note 110, at 632. See generally 90 C.J.S. *Trusts* § 251 (1955). For liability of trustee for failure to purchase, see RESTATEMENT (SECOND), TRUSTS §§ 170(k), 206(i), 211(g) (1959). Power to grant or take options is ordinarily not implied. 90 C.J.S. *Trusts* § 298 (1955); RESTATEMENT (SECOND), TRUSTS § 190(k) (1959).

questions of importance.¹¹⁶ Accordingly, this changes the common law rule, subject, of course, to fiduciary accountability.¹¹⁷

Section 3(c)(14) :

to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities ;

No change.¹¹⁸

Section 3(c)(15) :

to sell or exercise stock subscription or conversion rights ; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise ;

In so far as delegation of discretion is involved, this section does not change the common law rule.¹¹⁹

Section 3(c)(16) :

to hold a security in the name of a nominee or in other form without disclosure of the trust, so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held ;

This subsection changes existing law providing that a trustee must not keep securities in the name of a nominee.¹²⁰ The change is justified by considerations of convenience.¹²¹

Section 3(c)(17) :

to insure the assets of the trust against damage or loss, and the trustee against liability with respect to third persons ;

No change.¹²²

¹¹⁶ On questions of importance, the common law requires the trustee to exercise his personal judgment. RESTATEMENT (SECOND), TRUSTS §§ 193(a), (b) (1959) ; 2 SCOTT §§ 193.1-4. See generally UNIFORM TRUST ADMINISTRATION ACT § 2(j).

¹¹⁷ See UNIFORM TRUSTEES' POWERS ACT § 3(b).

¹¹⁸ Such powers would probably be implied at common law. See RESTATEMENT (SECOND), TRUSTS § 193 (1959) ; BOGERT § 604 ; UNIFORM TRUST ADMINISTRATION ACT § 2k.

¹¹⁹ Cf. § 3(c)(24) of the act. The common law is in accord in vesting trustees with such powers. See generally RESTATEMENT (SECOND), TRUSTS § 193(c)(d) (1959) ; 2 SCOTT § 193.4.

¹²⁰ In the absence of a statute, a trustee is under a duty to keep trust property earmarked in a manner that reveals the particular trust to which it is subject. See note 16 *supra* ; UNIFORM TRUST ADMINISTRATION ACT § 2(m).

¹²¹ Retention of liability for acts of nominee coupled with personal liability of the nominee for improper conduct help protect against abuse.

¹²² This provision accords with the common law view with reference to insuring assets of the trust. See generally BOGERT §§ 599, 803 ; 54 AM. JUR. *Trusts* § 358 (1945) ; Fratcher, *supra* note 110, at 630. Concerning insuring the trustee against liability, cf. RESTATEMENT (SECOND), TRUSTS § 244 (1959) ; 90 C.J.S. *Trusts* § 281 (1955).

It will be noted that this provision does not expressly include insurance against liability for the trustee's misconduct as between trustee and beneficiary.

Section 3(c)(18):

to borrow money to be repaid from trust assets or otherwise; to advance money for the protection of the trust, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

This subsection changes the common law rule in certain respects. At common law, in the absence of express power, the trustee cannot properly borrow money on the credit of the trust estate and charge the trust estate therefor.¹²³ Furthermore, at common law the trustee's right to reimbursement is severely limited.¹²⁴ Under the act, the trustee is entitled to indemnity out of the trust estate for expenses properly incurred by him in the administration of the trust and he is entitled to a lien to secure his indemnity. This is a permissible form of self-dealing.¹²⁵

Section 3(c)(19):

to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

No change.¹²⁶

¹²³ See note 17 *supra*.

¹²⁴ See generally RESTATEMENT (SECOND), TRUSTS § 245 (1959). For expenses properly incurred, the common law does recognize the trustee's lien on trust assets. See 54 AM. JUR. TRUSTS § 516 (1945); 90 C.J.S. TRUSTS § 285(c) (1955).

¹²⁵ See generally RESTATEMENT (SECOND), TRUSTS §§ 244(b), (c) and 345(h) (1959); 90 C.J.S. TRUSTS § 406 (1955).

The lien created is only as against the beneficiary and not as against third persons. The provision has the effect of insuring the repayment of the advance to the trustee rendered before any payment over to the beneficiary of trust assets. For a lien to be effective against a third person it would be necessary for the trustee to obtain a security instrument such as a mortgage and comply with the local filing or recording statutes. The power conferred is broad enough to permit a trustee's advance to be secured by a mortgage if prudent to do so.

¹²⁶ The common law is in accord, provided only that the prudent man standard be observed. See generally 2 SCOTT § 192; 54 AM. JUR. TRUSTS § 558 (1945); 90 C.J.S. TRUSTS § 277 (1955); UNIFORM TRUST ADMINISTRATION ACT § 3(i); Fratcher, *supra* note 110, at 634. For a discussion of claim settlement power see RESTATEMENT (SECOND), TRUSTS § 192 (1959); 2 SCOTT § 192; 90 C.J.S. TRUSTS § 266 (1955); Fratcher, *supra* note 110, at 634.

For a discussion of arbitration see RESTATEMENT (SECOND), TRUSTS § 192(b) (1959); 2 SCOTT § 192; 54 AM. JUR. TRUSTS § 562 (1945); 90 C.J.S. TRUSTS § 267 (1955); UNIFORM TRUST ADMINISTRATION ACT § 2(i); Fratcher, *supra* note 110, at 634.

For a discussion of release power see RESTATEMENT (SECOND), TRUSTS § 177(a) (1959); 2 SCOTT § 192; 90 C.J.S. TRUSTS § 286 (1955); Fratcher, *supra* note 110, at 634.

Section 3(c)(20) :

to pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, and protection of the trust ;

Although at common law the trustee is entitled to reasonable compensation for his services,¹²⁷ the compensation could not be fixed by the trustee himself.¹²⁸ This subsection changes that rule subject to fiduciary accountability. In other respects, the subsection makes no change.¹²⁹

Section 3(c)(21) :

to allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties ;

The statute makes no attempt to change either the decisional or statutory law of a particular jurisdiction. The common law applies in the absence of contrary statute.¹³⁰ The Uniform Income and Principal Act, if enacted in the jurisdiction involved, would be available as the governing law in the situations covered by this subsection.¹³¹

Section 3(c)(22) :

to pay any sum distributable to a beneficiary under legal disability, without liability to the trustee, by paying the sum to the beneficiary or by paying the sum for the use of the beneficiary either to a legal representative appointed by the court, or if none, to a relative ;

This subsection liberalizes existing decisional law requiring payment of the trust benefit directly to the beneficiary.¹³²

¹²⁷ The trustee's right to compensation is recognized at common law. See RESTATEMENT (SECOND), TRUSTS § 242 (1959) ; 54 AM. JUR. TRUSTS §§ 525, 526 (1945). See generally 90 C.J.S. TRUSTS §§ 248(b), (c) (1955). Statutes fixing the amount, or providing a procedure for fixing the amount, are not superseded.

With reference to reimbursement of the trustee for payment of taxes see BOGERT §§ 602, 807 ; 90 C.J.S. TRUSTS § 283 (1955).

With reference to expenses generally, see RESTATEMENT (SECOND), TRUSTS §§ 188, 242, 245 (1959) ; BOGERT §§ 603, 801-10 ; 2 SCOTT §§ 188-188.5 ; 54 AM. JUR. TRUSTS, §§ 239, 346, 355 (1945) ; 90 C.J.S. TRUSTS §§ 270, 277, 280, 284 (1955).

¹²⁸ See generally 90 C.J.S. TRUSTS § 396(a) (1955) ; RESTATEMENT (SECOND), TRUSTS § 242(b) (1959).

¹²⁹ See note 127 *supra*.

¹³⁰ See generally RESTATEMENT (SECOND), TRUSTS § 233 (1959) ; BOGERT §§ 809, 810 ; 90 C.J.S. TRUSTS § 355 (1955). See also RESTATEMENT (SECOND), TRUSTS §§ 233, 241 (1959).

¹³¹ UNIFORM TRUST ADMINISTRATION ACT § 2(n) ; FLA. STAT. ANN. tit. 39, § 691.03(14) (1941) ; REVISED UNIFORM PRINCIPAL AND INCOME ACT § 10.

¹³² See generally RESTATEMENT (SECOND), TRUSTS § 182 (1959) ; BOGERT § 814 ; 90 C.J.S. TRUSTS § 353(c) (1955) ; UNIFORM TRUST ADMINISTRATION ACT 2(o).

Section 3(c)(23):

to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

This changes existing law.¹³³

Section 3(c)(24):

to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

This subsection expands: (1) existing powers with respect to the employment of others, "even if they are associated with the trustee,"¹³⁴ (2) power to delegate discretion to agents,¹³⁵ (3) and power to act upon an agent's recommendations without independent investigation.¹³⁶ The trustee must still act prudently in these matters, but if it would be prudent to employ agents associated with the trustee, as for example in a trustee's law firm, real estate firm, investment advisory firm or bank, it is permissible to do so. If the trustee is absent or out of the country, delegation of discretion may be permitted.¹³⁷ If the trustee is some distance away from the site of a stockholders' meeting, making it expensive or inconvenient to attend in person, it might be prudent not to attend, and the trustee is excused from attending.¹³⁸ It is to be remembered, however, that under section 4 of the act the trustee may not transfer his office to another nor delegate the entire administration of the trust to a co-trustee or another.

Section 3(c)(25):

to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

No change.¹³⁹

¹³³ See generally 54 AM. JUR. *Trusts* §§ 481-84 (1945); 90 C.J.S. *Trusts* § 348 (1955); UNIFORM TRUST ADMINISTRATION ACT § 2(h); Fratcher, *supra* note 110, at 633. See UNIFORM TRUSTEES' POWERS ACT § 3(a) (7).

¹³⁴ Employing trustee's law firm for legal, accounting or investment services might be considered a form of self-dealing. The common law generally recognizes the trustee's power to employ legal counsel in appropriate cases. See 54 AM. JUR. *Trusts* § 361 (1945); BOGERT § 809; 2 SCOTT §§ 188.3, 188.4.

¹³⁵ See note 20 *supra*.

¹³⁶ See note 19 *supra*.

¹³⁷ In New South Wales, discretion may be delegated when prudent. Trustee Act, 1925 § 53.10 N.S.W. Stat. 1824-1937 pp. 609, 610 (1925) cited in Fratcher, *supra* note 110, at 661, n.162.

¹³⁸ See Fratcher, *supra* note 110, at 661.

¹³⁹ The common law is in accord. RESTATEMENT (SECOND), TRUSTS §§ 177, 178

Section 3(c)(26) :

to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee ;

No change.¹⁴⁰

Section 4. [*Trustee's Office Not Transferable.*]

The trustee shall not transfer his office to another or delegate the entire administration of the trust to a co-trustee or another.

No change.¹⁴¹

Section 5. [*Power of Court to Permit Deviation or to Approve Transactions Involving Conflict of Interest.*]

(a) This Act does not affect the power of a court of competent jurisdiction for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this Act.

In a formal sense, no change. The act is not intended to curtail the present powers of the court with reference to the modification or augmentation of trust powers. Existing decisional law makes judicial augmentation of powers a matter of difficulty.¹⁴² However, by virtue of section 3 of the act there will be little occasion to seek augmentation of trust powers because necessary trust powers exist if a trustee in the exercise of prudence requires such powers to fulfill trust purposes. With reference to the matter of removing a restriction upon the exercise of trust power, e.g., a prohibition against sale for a stipulated period of time, the law as to the powers of a court remains unaffected by the provisions of this act. If under existing law an express restriction should be removed, the court's power to order such removal would continue to exist. On the other hand, if under existing law the power cannot be exercised, the present act does not enlarge the court's powers. A question which might be posed is whether in view of sections 2 and 3 of the act (embodying the prudent man concept concerning the

(1959); BOGERT §§ 581, 582, 593, 594; 2 SCOTT § 188.4; 90 C.J.S. *Trusts* §§ 284, 359 (1955).

Concerning allocation of expenses of litigation, see RESTATEMENT (SECOND), TRUSTS § 233(g) (1959). Concerning actions involving the trustee in the performance of his trust duties see RESTATEMENT (SECOND), TRUSTS §§ 261, 262, (1959). Cf. RESTATEMENT (SECOND), TRUSTS §§ 244-49 (1959).

¹⁴⁰ This power is implicit in the other powers when a writing is required. Concerning contractual instruments, see 90 C.J.S. *Trusts* § 275 (1955); BOGERT § 556.

¹⁴¹ Decisional law is in accord. See RESTATEMENT (SECOND), TRUSTS § 171(c) (1959); 2 SCOTT § 171. See generally 90 C.J.S. *Trusts* §§ 225-35 (1955). Cf. Fratcher, *supra* note 110, at 639.

¹⁴² See notes 25, 28 *supra*.

existence of trust powers) a court's existing power to remove restrictions has been broadened. The act does not so provide. Section 2(a) of the act expressly permits a trustor to impose a limitation on the powers of a trustee. There is no requirement that the limitation be reasonable. Under present law, if a limitation would materially impair or defeat the purpose of the trust—which presumably the trustor does not intend—a court has power to remove the limitation. The mere fact that prudence requires the existence of such a power, however, would not be sufficient reason to warrant removal of a limitation in the absence of a showing that the prohibition or limitation would substantially impair or defeat the purposes of the trust. Accordingly, the statute in that respect makes no change in existing law. Notwithstanding this section, it is hoped that in the absence of clear intent to the contrary, the principle of liberality incorporated into the act concerning the existence and exercise of trust powers will serve to encourage a court to remove trust restriction when required by the rule of prudence. Liberality in the removal of restrictions would be especially encouraged if the act is made retroactive in operation, a possibility contemplated by section 8. Nothing in the act, of course, prevents an application to the court for instructions¹⁴³ or for declaratory judgment concerning the scope of trust powers.¹⁴⁴

(b) If the duty of the trustee and his individual interest or his interest as trustee of another trust, conflict in the exercise of a trust power, the power may be exercised only by court authorization (except as provided in section 3(c) (1), (4), (6), (18), and (24)) upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee.

The court can approve a transaction involving a conflict of interest which, but for the act, would be beyond the power of the trustee.¹⁴⁵ This subsection makes it clear, however, that if the power is exercised under section 3(c)(1), (4), (6), (18) and (24), that no application to the court is required, the matter being controlled by the rule of prudence.¹⁴⁶ It may still be desirable for a trustee to apply to the court

¹⁴³ See generally 90 C.J.S. *Trusts* § 261 (1955).

¹⁴⁴ See generally 2 ANDERSON, *ACTIONS FOR DECLARATORY JUDGMENTS* § 575 (2d ed. 1951).

¹⁴⁵ See generally 90 C.J.S. *Trusts* § 261 (1955); see notes 88, 93, 98, 125 and 134 *supra*.

¹⁴⁶ The power to enter into a transaction involving self-dealing may be expressly conferred by the trust. 90 C.J.S. *Trusts* § 248(e) (1955). The act expressly confers limited self-dealing powers.

in any of these situations if the question of prudence is in doubt. Personal profit or advantage to the trustees may be direct or indirect and the act specifically provides, in accordance with existing law,¹⁴⁷ that profit to an affiliated or subsidiary corporation is deemed personal profit to the corporate trustee.

Section 6. [*Powers Exercisable by Joint Trustees-Liability.*]

(a) Any power vested in 3 or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise; and a dissenting trustee is not liable for the consequences of an act in which he joins at the direction of the majority of the trustees, if he expressed his dissent in writing to any of his co-trustees at or before the time of the joinder.

This changes existing law. Trustees ordinarily must vote unanimously in the absence of a provision to the contrary.¹⁴⁸ Third persons sometimes require voting to be unanimous to remove any doubt about the validity of the transaction. This act, like the Uniform Trust Act, permits unanimous joinder without holding the dissenting trustee liable by permitting him to express his dissent in writing at or before the time of joinder.¹⁴⁹

(b) If 2 or more trustees are appointed to perform a trust, and if any of them is unable or refuses to accept the appointment, or, having accepted, ceases to be a trustee, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

No change.¹⁵⁰

(c) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust.

Section 3(b) of the act requires the trustee to act with due regard

¹⁴⁷ See *In re Ryan's Estate*, 186 Misc. 688, 57 N.Y.S. 2d 462 (1945).

¹⁴⁸ The common law, with certain exceptions, requires unanimity among trustees before they may act. RESTATEMENT (SECOND), TRUSTS § 194 (1959); BOGERT § 554; 2 SCOTT § 194; 54 AM. JUR. TRUSTS § 296 (1945); 90 C.J.S. TRUSTS § 258 (1955); Fratcher, *supra* note 110, at 637; UNIFORM TRUSTS ACT § 11.

Concerning a trustee's liability for actions of a co-trustee, see RESTATEMENT (SECOND), TRUSTS § 194 (1959); 54 AM. JUR. TRUSTS § 302 (1945). Language similar to that of § 6(a) appears in WASH. REV. CODE § 30.99.030 (1959).

¹⁴⁹ UNIFORM TRUSTS ACT § 11.

¹⁵⁰ Decisional law is in accord. RESTATEMENT (SECOND), TRUSTS § 195 (1959); 2 SCOTT § 195; 54 AM. JUR. TRUSTS §§ 297, 299 (1945).

to his obligation as a fiduciary. This subsection is a specific application of the overall fiduciary obligation of a cotrustee.¹⁵¹

Section 7. [*Third Persons Protected in Dealing with Trustee.*]

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, the existence of trust powers and their proper exercise by the trustee may be assumed without inquiry. The third person is not bound to inquire whether the trustee has power to act or is properly exercising the power; and a third person, without actual knowledge that the trustee is exceeding his powers or improperly exercising them, is fully protected in dealing with the trustee as if the trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the trustee.

This section makes important changes in existing decisional law.¹⁵² These changes are vital in order to make section 3 of the act workable. Without this section, third persons might never safely deal with a trustee for fear that he was exceeding his trust powers under the prudent man rule.¹⁵³ Accordingly, third persons are protected¹⁵⁴ and are not charged with knowledge of limitations on trustees' powers.¹⁵⁵ However, if a third person acts with actual knowledge that the trustee is exceeding his powers or improperly exercising them, he is not protected.¹⁵⁶ It is to be noted that constructive knowledge, as distinguished from actual knowledge, is not enough. Therefore, mere suspicion that limitations exist or knowledge of facts which, if pursued, would show that limitations exist do not deprive a third person of this protec-

¹⁵¹ See § 3(b) of the act. The trustee is so obligated as a matter of common law. RESTATEMENT (SECOND), TRUSTS § 184 (1959); 54 AM. JUR. TRUSTS § 341 (1945). See generally RESTATEMENT (SECOND), TRUSTS §§ 201, 205, 224 (1959); 2 SCOTT § 194; UNIFORM TRUSTS ACT § 11.

¹⁵² See Fratcher, *supra* note 110, at 662.

¹⁵³ Compare note 24 *supra*. The substance of section 7, in part at least, might in time be adopted decisionally. Thus it has been held that where a trustee, by terms of the trust, has power to transfer or encumber trust property, a third person dealing with him in good faith is not bound to ascertain whether the act of the trustee is justified unless the transaction, in view of the trust relation, is an unusual one. 54 AM. JUR. TRUSTS § 270 (1945). Section 7 follows, but on a broad front, the more limited precedent changing the common law set by the UNIFORM FIDUCIARIES ACT which protects third persons acting in good faith in certain types of dealings with the fiduciary. It should be noted that section 7 proceeds on the assumption that a trust in fact has been created. Thus, merely designating a grantee in a deed as "trustee" is insufficient to create a trust. *Hodgson v. Dorsey*, 230 Iowa 730, 298 N.W. 895 (1941); *Davidson v. Mantor*, 45 Wash. 660, 89 Pac. 167 (1907).

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

tion.¹⁵⁷ It is important, however, to make a distinction between trust powers conferred by the Uniform Trustees' Powers Act and statutory limitations and prohibitions upon the exercise of trust powers, which, under section 2(a) of the act, are excepted from its operation. A third person dealing with a trustee exercising a power, which, under section 2(a) of the act, is excepted from its operation, is conclusively charged with knowledge of the statutory limitation or prohibition and is, therefore, not protected unless the trustee acts in conformity with the statutory provision.¹⁵⁸ A more difficult question is whether a trustor purporting to act under section 2 may exclude the operation of section 7 and thereby restore a third person's duty of inquiry. Such an exclusion, if permitted, would mean that a third person dealing with a trustee would always have to inquire or examine the trust instrument to see if section 7 had been excluded. Such an obligation would impose the duty of inquiry even in cases where no limitation or prohibition had been imposed upon the exercise of trust powers. To impose such a duty of inquiry would prevent the operation of section 7 as intended and provided. Because the consequence of permitting a trustor to exclude the operation of section 7 would be to restore the duty of inquiry even in cases where clearly not intended, it is believed that an express exclusion should be ineffective. The remedy for breach is limited to the trustee and a third person with actual knowledge that the trustee is exceeding his powers or improperly exercising them. Therefore, more than ever, it is important that the trustee be carefully selected, bonded or otherwise a person of fiscal responsibility.

The rule that a third person is not bound to see to the proper application of trust assets paid or delivered to the trustee changes earlier decisional law to the contrary.¹⁵⁹

Section 8. [*Application of Act.*] Except as specifically provided in the trust, the provisions of this Act apply to any trust established [before or] after the effective date of this Act and to any trust asset acquired by the trustee [before or] after the effective date of this Act.

The act is clearly applicable to trusts established after the effective date of the act. The legislature may, however, by appropriate language,

¹⁵⁷ At common law, constructive knowledge was enough. See note 24 *supra*.

¹⁵⁸ Compare note 83 *supra*.

¹⁵⁹ See note 24 *supra*. Modernly, the common law imposes liability only if the third person had notice of the trustee's intent to misapply. RESTATEMENT (SECOND), TRUSTS § 321 (1959); *cf.* 54 AM. JUR. *Trusts* § 432 (1945). See also RESTATEMENT (SECOND), TRUSTS §§ 284-93, 296-303, 324 (1959).

make the act applicable to existing trusts. There is some question as to the constitutionality of a statute making such a provision, but the matter is debatable.¹⁶⁰

Section 9. [*Uniformity of Interpretation.*] This Act shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

This is a common provision in the Uniform Acts.¹⁶¹

Section 10. [*Short Title.*] This Act may be cited as the "Uniform Trustees' Powers Act."

The section is self-explanatory.

Section 11. [*Severability.*] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

Statutes containing a similar subsection have been held invalid in their entirety if a section of the act invalidated would substantially destroy the purpose of the act.¹⁶² Thus, if sections 3 or 7 of the act were held invalid, the substance of the act would be destroyed, because the two sections are interdependent. Similar examples might be cited with respect to other parts of the act. However, if section 6, for example, were held invalid, the substance of the act would not be defeated and section 11 would justify upholding the balance of the act.

Section 12. [*Repeal.*] The following acts are repealed:

- (1)
- (2)
- (3)

Many states have some statutes dealing with trust powers. To avoid

¹⁶⁰ WASH. REV. CODE § 30.99.010 (1959) limits the Washington Trust Act to express trusts executed after the effective date of the act. Cf. *In re Caswell's Will*, 197 Wis. 327, 222 N.W. 235 (1928), possibly overruled *sub silentio* by *In re Allis' Will*, 6 Wis. 2d 1, 94 N.W.2d 226 (1959). See also *Mechanics Nat'l Bank v. Brady*, 100 N.H. 469, 129 A.2d 857 (1957); *Fidelity Union Trust Co. v. Price*, 11 N.J. 90, 93 A.2d 321 (1952); *State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 166 N.E.2d 365 (1960); *Swanson v. Bates*, 202 Okla. 128, 211 P.2d 781 (1949); *In re Catherwood's Trust*, 405 Pa. 61, 173 A.2d 86 (1961); *Goodridge v. National Bank of Commerce*, 200 Va. 511, 106 S.E.2d 598 (1959); *Annot.*, 35 A.L.R.2d 991 (1954); see generally 1 Scorr § 1.11; 90 C.J.S. *Trusts* § 246 n.32 (1955).

¹⁶¹ Uniformity of interpretation is as important as uniformity in legislation in the field of trust law. This provision is, therefore, standard in uniform acts recommended for adoption by the Uniform Law Commission.

¹⁶² *E.g.*, *Pennsylvania R.R. v. Schwartz*, 391 Pa. 619, 139 A.2d 525 (1958).

the difficult problem of repeal by implication,¹⁶³ specific provision has been made for express repeal of those statutes which no longer would apply. An illustration would be statutes conferring express powers upon trustees¹⁶⁴ or limiting powers of trustees in specific situations.¹⁶⁵ It may still be desirable because of local considerations to retain specific express limitations upon the power of a trustee in those cases where limitations are a statutory expression of prudence.¹⁶⁶ Express provision is made for this in section 2(a) of the act.

CONCLUDING SUMMARY AND OBSERVATIONS

It will be noted that the Uniform Trustees' Powers Act seeks to: (1) remedy the problem of the trust with inadequately drafted powers;¹⁶⁷ (2) change the emphasis from the necessity for trustor restriction of powers to trustee self-regulation as is the case in the prudent man investment statutes;¹⁶⁸ (3) eliminate restrictions on the exercise of trust powers that experience indicates are not necessarily in the beneficiary's best interest,¹⁶⁹ including certain so-called self-dealing powers;¹⁷⁰ (4) protect against any unnecessary adverse tax consequences;¹⁷¹ (5) protect innocent third persons dealing with trustees;¹⁷² and (6) makes its provisions applicable to existing trusts if desired.¹⁷³ The act expressly permits a trustor to avoid or limit the act's operation.¹⁷⁴

The Uniform Trustees' Powers Act, unlike other trustees' powers acts,¹⁷⁵ is not merely a list of trustees' powers, but is a rather broad grant of power, the nature of which is clarified by detailed illustra-

¹⁶³ Repeals by implication are not favored. 50 AM. JUR. *Statutes* § 538 (1944); 82 C.J.S. *Statutes* § 291(c) (1953).

¹⁶⁴ For examples of these types of statutes see notes 34-42 *supra*.

¹⁶⁵ Typical are powers of trustees dealing with sales, mortgages, and leases and providing a procedure for exercising such powers. See, *e.g.*, MONT. REV. CODE §§ 86-114, 86-315 to -26 (1947).

¹⁶⁶ This would be true, for example, in statutes regulating investment powers of trustees.

¹⁶⁷ This could be accomplished by making the act applicable to existing trusts. See note 160 *supra*.

¹⁶⁸ See Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U.L. REV. 627 (1962).

¹⁶⁹ Self-dealing powers are illustrative. See § 5(b) of the act.

¹⁷⁰ See note 169 *supra*.

¹⁷¹ Act § 3(b).

¹⁷² Act § 7.

¹⁷³ Act § 8.

¹⁷⁴ Act § 2.

¹⁷⁵ See notes 34-36 *supra*. The Washington Trust Act (WASH. REV. CODE § 30.99.070 (1961)) lists the powers of a trustee, whereas the UNIFORM TRUSTEES' POWERS ACT treats described powers as illustrative of a broad grant of power measured by considerations of prudence.

tion.¹⁷⁶ The rule of fiduciary accountability is retained to prevent abuse.¹⁷⁷ It is believed that the prudent man rule, which has worked well in the field of investments, will work well in the field of other trust powers in the achievement of trust purpose with greater convenience and less expense. Wyoming¹⁷⁸ and Idaho¹⁷⁹ have led the way.

¹⁷⁶ Act § 3(c) (1)-(26).

¹⁷⁷ Act § 3(b).

¹⁷⁸ The UNIFORM TRUSTEES' POWERS ACT was enacted in Wyoming February 11, 1965. It is contained in WYO. STAT. ANN. §§ 4-36 to 4-45 (Supp. 1965) inclusive. Section 4-43 makes the act applicable "to any trust established before or after the effective date of this Act."

¹⁷⁹ The UNIFORM TRUSTEES' POWERS ACT was enacted in Idaho in 1965, and will be found in IDAHO CODE ANN. §§ 68-104 to 68-113 (Supp. 1965), inclusive. Section 68-111 makes the act applicable "to any trust established after the effective date of this Act."