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## Trusts - Illinois Land Trust - A Beneficial Interest is a "General Intangible" under U.C.C. Article 9

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### Recommended Citation

Mary Conrad, *Trusts - Illinois Land Trust - A Beneficial Interest is a "General Intangible" under U.C.C. Article 9*, 18 DePaul L. Rev. 875 (1969)

Available at: <https://via.library.depaul.edu/law-review/vol18/iss2/37>

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allowed. A beneficial drug such as tetracycline is likely to fall within this exception.

In summary, the lack of legislation does not appear to be a serious barrier to recovery by a future organ donor, as negligence and products liability have been particularly nonstatutory fields. A plaintiff's basic objectives would be to demonstrate proximate cause and to effectively refute the defense of assumption of risk. Since a future court could properly conclude that a kidney or skin transplant is a foreseeable result of damage to a donee's organ, the fact that the donor was an intervening third party should not operate to break the chain or proximate causality. The problem of overcoming the defense of assumption of risk would be more difficult. Although a strong argument can be made against the position that plaintiff assumed the risk, the court might choose not to accept it. Plaintiff should offer the alternative argument that he is entitled to the benefit of the rescue doctrine to which assumption of risk is no defense. Then, even if the court accepts defendant's assumption of risk argument, the result would turn on how broadly the court construes the time element in the rescue doctrine. If it finds that a transplant operation is a rescue of one in imminent peril, the plaintiff would recover. On the other hand, if the court finds that plaintiff did not assume the risk there would be recovery without the benefit of the rescue doctrine. Due to the merging of the rescue doctrine and the sudden emergency doctrine it is unlikely that organ donors will be able to rely upon that doctrine unless it becomes enlarged.

In an action against a manufacturer for breach of tort warranty or in strict liability for defective products there would be an additional barrier to recovery if the product which caused the injury to the donee was "unavoidably unsafe." On the other hand, the fact that a product could not, by the application of human skill, be made safe, might be no barrier to recovery in a jurisdiction where manufacturers of defective products are held absolutely liable. In light of insurance coverage and the trend of expanding tort liability some future organ donors may be expected to recover either upon a negligence, tort warranty, strict liability or absolute liability theory.

*Nancy Goldberg*

#### TRUSTS—ILLINOIS LAND TRUST—A BENEFICIAL INTEREST IS A "GENERAL INTANGIBLE" UNDER U.C.C. ARTICLE 9

On February 23, 1960, Jerome and Arlene Pascal contemporaneously executed both a deed in trust and a companion trust agreement naming the American National Bank as trustee, thereby placing their Highland Park home in an Illinois land trust. Four years thereafter, Arlene Pascal, as sole

beneficiary, pledged and assigned the beneficial interest of the aforesaid land trust as collateral for a loan received from Palos State Bank. Five months subsequent to this assignment, the plaintiff, Irving A. Levine, secured a judgment against the Pascals and immediately caused a writ of execution to issue to the sheriff. In conjunction with the issuance of this writ, the plaintiff also instituted a supplementary citation proceeding under Section 73(2)(e) of the Illinois Civil Practice Act,<sup>1</sup> the purpose of which was to discover any assets belonging to the Pascals which would be available to satisfy the judgment and which the sheriff most probably would be unable to locate and levy upon. In accordance with Rule 277 of the Illinois Supreme Court,<sup>2</sup> citations were directed and served upon the Pascals, the American National Bank, as trustee, and the Palos State Bank, as assignee. As a result of the citation proceeding, the lower court found that the Palos State Bank had failed to comply with the filing provisions of Article 9 of the Uniform Commercial Code (U.C.C.), and hence, held only an unperfected security interest in the beneficial interest of the aforesaid land trust. As such, this security interest was capable of being subordinated to that of a subsequent lien creditor. The lower court also held that the plaintiff was a subsequent lien creditor under Article 9 and therefore, was entitled to priority over Palos in determining the rights to the proceeds of a judicial sale of the Pascals' beneficial interest in the land trust. On appeal, the Illinois Appellate Court affirmed. A petition to the Illinois Supreme Court was denied. *Levine v. Pascal*, 94 Ill. App. 2d 43, 236 N.E.2d 425 (1968).

In order to more fully understand the significance and ramifications of the *Pascal* case, this note will initially attempt to focus upon the origin, characteristics, problems and some of the advantages of the Illinois land trust. An analysis of the rationale employed by the court in finding the provisions of Article 9 of the U.C.C. applicable to land trusts will then follow. It must be noted that because the land trust was the unique creation of Illinois<sup>3</sup> and because prior to 1963 Illinois was the only state to recognize it as a valid device, most, if not all, of the legal interpretation of land trusts originates in the Illinois courts.<sup>4</sup>

<sup>1</sup> ILL. REV. STAT. ch. 110 § 73(2)(e) (1967): "When assets or income of the judgment debtor not exempt from execution, a deduction order or garnishment are discovered, the court may, by appropriate order, judgment or decree: . . . (e) Compel any person cited to execute an assignment of any chose in action or a conveyance of title to real or personal property, in the same manner and to the same extent as a court of chancery could do in any proceeding by a judgment creditor to enforce payment of a judgment or in aid of execution."

<sup>2</sup> ILL. SUP. CT. R. 277.

<sup>3</sup> Garrett, *Land Trusts*, 1955 U. ILL. L.F. 655.

<sup>4</sup> Subsequent to January, 1963, Florida and Virginia enacted Land Trust Acts. FLA. STAT. ANN. § 689.071 (Supp. 1969); VA. CODE ANN. § 55-17.1 (Supp. 1968).

The use of this intriguing real estate device known as the Illinois land trust originated in Illinois during the nineteenth century as an outgrowth of the Massachusetts business trust,<sup>5</sup> although the first decision relating directly to it was not handed down until 1920.<sup>6</sup> Because the Illinois land trust avoids many anachronistic and cumbersome incidents of real estate ownership, the popularity of this device has multiplied in Illinois since its inception. However, the spread of land trusts outside of Illinois has been quite slow. Florida<sup>7</sup> and Virginia<sup>8</sup> are the only other states which have officially recognized the validity of the land trust; their acceptance of the land trust is statutory, however, whereas Illinois' acceptance is solely judicial.

A land trust consists of two basic instruments: a recorded deed in trust and an unrecorded trust agreement.<sup>9</sup> The deed in trust gives to the trustee full ownership of both the legal and equitable titles to the land.<sup>10</sup> The agreement between the settlor and the trustee circumscribes the trustee's powers by limiting them to only the power to convey upon the beneficiary's direction, the power to sell the property at the end of twenty years, and usually also

<sup>5</sup> In the Massachusetts business trust the investors agree to the creation of a group of governing trustees, vest the title of the property in them and also grant them control and management of the trust business. The interest of the beneficiaries are evidenced by transferable trust certificates. See, Annot. 156 A.L.R. 22 (1942); Ford, *Florida Land Trust Act*, 18 U. MIAAMI L. REV. 699 (1964).

<sup>6</sup> *Kerr v. Kotz*, 218 Ill. App. 654, 132 N.E. 625 (1920).

<sup>7</sup> FLA. STAT. ANN. § 689.071 (Supp. 1969): "Every conveyance, deed, mortgage, lease assignment or other instrument heretofore or hereafter made, hereinafter referred to as the recorded instrument, transferring any interest in real property in this state . . . to any person, corporation, bank, or trust company, . . . in this state, in which said recorded instrument said person, corporation, bank, or trust company is designated trustee, or, as trustee, without therein naming the beneficiaries of such trust, whether or not reference is made in said recorded instrument to any separate collateral, unrecorded declarations or agreements, shall be effective to vest and is hereby declared to have vested in such trustee full rights of ownership over said real property . . . , with full power and authority as granted and provided in said recorded instrument to deal in and with said property or interest therein or any part thereof: provided, said recorded instrument shall confer on the trustee the power and authority either to protect, conserve, and to sell, or to lease, or to encumber, or otherwise to manage and dispose of the real property described in said recorded instrument."

<sup>8</sup> VA. CODE ANN. § 55-17.1 (Supp. 1968): "No trust relating to real estate shall fail nor shall any use relating to real estate be defeated because no beneficiaries are specified by name in the recorded deed of conveyance to the trustee or because no duties are imposed upon the trustee. The power conferred by any such instrument on a trustee to sell, lease, encumber or otherwise dispose of property therein described shall be effective and no person dealing with such person shall be required to make further inquiry as to the right of such trustee to act nor shall he be required to inquire as to the disposition of any proceeds."

<sup>9</sup> CAPLAN, *LAND TRUSTS* 22-30 (2d ed. 1958); See also Garrett, *supra* note 3; Ford, *supra* note 6; Zinn, *Land Trusts—Adaptability to Kansas Real Estate Practice*, 14 U. KAN. L. REV. 97 (1965).

<sup>10</sup> *Id.* See *supra* note 3.

the power to perform some ministerial duties. The agreement further provides that the beneficiary retains the power to manage and control the property along with the right to receive the rental, mortgage and sale proceeds. By the terms of the agreement, the beneficial interest is to be personal property.<sup>11</sup> Thus, the trustee has record title to the real property, subject to the power of direction and control of the beneficiary, whose beneficial interest is held as personal property.

The Illinois land trust thus differs from the classic form of trust by reserving to the beneficiary virtually all of the incidents of ownership while placing in the trustee the legal and equitable title to the real estate.<sup>12</sup> Traditionally, the trustee has only legal ownership and the beneficiary has the equitable ownership of the trust property.<sup>13</sup> This deviation from traditional trust theory poses a major barrier to the total acceptance of the land trust.<sup>14</sup> A more important barrier to widespread acceptance of the land trust is the problem of its validity in view of the Statute of Uses. The Statute of Uses provides for the execution of the use or trust where one person is subject to the use of another.<sup>15</sup> Thus, by force of the Statute a passive land trust must be executed, thereby vesting full title in the beneficiary.<sup>16</sup> To avoid this execution in a land trust, the trustee must be endowed with sufficiently active duties so as not to be a mere receptacle of title. To dispose of this latter problem, the Illinois courts, displaying a liberal attitude, have held with near unanimity that either the duty to convey upon direction of the beneficiary<sup>17</sup> or the duty to sell at the end of twenty years,<sup>18</sup> or both, are sufficient to constitute an active trust. The typical land trust agreement often provides that the trustee will "make needs for, or otherwise deal with the title to said real estate."<sup>19</sup> These duties are also said to be active, and it is irrelevant that

<sup>11</sup> *Id.*

<sup>12</sup> See *supra* note 3.

<sup>13</sup> Turner, *Some Legal Aspects of Beneficial Interests Under Illinois Land Trusts*, 39 ILL. L. REV. 217 (1945); Zinn, *supra* note 9, at 101. See also 2 SCOTT, TRUSTS § 131 (3d ed. 1967).

<sup>14</sup> Zinn, *supra* note 9, at 101.

<sup>15</sup> 1 SCOTT, TRUSTS § 70 (3d ed. 1967). See ILL. REV. STAT. ch. 30 § 3 (1967).

<sup>16</sup> BOGART, TRUSTS AND TRUSTEES § 206 (1951).

<sup>17</sup> Crow v. Crow, 348 Ill. 241, 180 N.E. 877 (1932); Emery v. Emery, 325 Ill. 212, 156 N.E. 364 (1927); Masters v. Mayers, 246 Ill. 506, 92 N.E. 945 (1910); Kurzawski v. Malaga, 338 Ill. App. 182, 86 N.E.2d 398 (1949); Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, 300 Ill. App. 329, 20 N.E.2d 992 (1939).

<sup>18</sup> Breen v. Breen, 41 Ill. 206, 103 N.E.2d 625 (1952); Emery, *supra* note 17; Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, *supra* note 17. *But see* Masters v. Smythe, 342 Ill. App. 185, 95 N.E.2d 719 (1959); Janura v. Fencil, 261 Wis. 179, 52 N.W.2d 149 (1952).

<sup>19</sup> Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, *supra* note 17, at 992, 995.

they are merely ministerial, since the Statute will not execute an active trust.<sup>20</sup>

Some Illinois courts reach the same end through different reasoning, and expound the theory that although the land trust may be passive, the Statute of Uses will not execute the trust because the beneficial interest is considered personalty and the Illinois Statute of Uses does not apply to personal property.<sup>21</sup> This view is also shared by some treatise writers.<sup>22</sup>

Florida, when enacting its Land Trust Act, attempted to wholly avoid the problem of the Statute of Uses by imposing on the trustee more duties, namely, certain administrative duties consisting of "the duty to pay over all income and proceeds, to pay ad valorem taxes with funds from sources other than the trust and other ministerial duties."<sup>23</sup> Whether Florida agrees that the Statute of Uses does not apply to trusts of personalty is not clear, although it is suggested that Florida would adopt this theory since it is in keeping with the intent of the legislature, i.e., to make the beneficial interest of a land trust personalty.<sup>24</sup> In Virginia the problem of the possible execution of the land trust under the Statute of Uses was not serious. The Virginia Statute of Uses, as enacted,<sup>25</sup> did not apply to any instruments by which real property was conveyed by a settlor to a trustee. The Statute seems to apply only in a situation in which a property owner declares himself trustee for the benefit of another in a passive trust.<sup>26</sup>

As stated above, the beneficial interest of a land trust is personal property.<sup>27</sup> This legal proposition is based upon two theories: the doctrine of equitable conversion and the express stipulation in the trust agreement.

The doctrine of equitable conversion converts the interest of the beneficiary of a land trust to personalty: "[E]quitable conversion . . . [is] the change in the nature of property by which, for certain purposes, real

<sup>20</sup> See generally Ford, *supra* note 5, at 700; Zinn, *supra* note 9, at 101.

<sup>21</sup> Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank, *supra* note 17.

<sup>22</sup> 1 SCOTT, TRUSTS § 70 (3d ed. 1967). But see BOGART, TRUSTS AND TRUSTEES § 293 (1953).

<sup>23</sup> McKillop, *Illinois Land Trusts in Florida*, 13 FLA. L. REV. 173 (1960); Ford, *supra* note 5, at 702. See also FLA. STAT. ANN. 689.071(1) (Supp. 1969).

<sup>24</sup> *Id.*

<sup>25</sup> VA. CODE ANN. § 55-17.1 (Supp. 1968).

<sup>26</sup> Cowardin, *Land Trusts: Some Problems in Virginia*, 7 WM. & MARY L. REV. 371 (1966).

<sup>27</sup> Duncanson v. Lill, 322 Ill. 528, 153 N.E. 618 (1926); Chicago Federal Sav. & Loan Ass'n. v. Cacciatore, 25 Ill. 2d 535, 185 N.E.2d 670 (1962), *aff'g* 33 Ill. App. 2d 131, 178 N.E.2d 888; Seno v. Frank, 20 Ill. 2d 10, 169 N.E.2d 335 (1961); Cowardin, *supra* note 26, at 375, 376; VA. CODE ANN. § 55-17.1 (1968); FLA. STAT. ANN. § 689.071(4) (Supp. 1969): "(4) In all cases where said recorded instrument, . . . contains a provision defining and declaring the interests of beneficiaries thereunder to be personal property only, such provision shall be controlling for all purposes where such determination shall become an issue under the laws or in the courts of this state."

estate is considered as personalty."<sup>28</sup> Because a land trust agreement generally directs the trustee to sell after a lapse of twenty years, the beneficial interest of a land trust is immediately transferred into personalty under this doctrine. Professor Scott states: "The cases are numerous in which it is held that a mandatory direction to the trustees to sell the land which they hold in trust causes an equitable conversion, and that the interest of the beneficiary is treated not as real estate but as personal property."<sup>29</sup> Further: "There is equitable conversion where the trustee is directed to sell the land, even though it is not his duty to sell it immediately. It is sufficient that there is imposed upon him by the trust instrument an absolute duty to sell at some time."<sup>30</sup>

The Illinois courts have accomplished the characterization of the beneficial interest as personalty by use of the doctrine of equitable conversion<sup>31</sup> and by virtue of the express stipulation in the trust agreement.<sup>32</sup> On the other hand, Virginia's conception that the beneficial interest of a land trust is personalty lies solely in the doctrine of equitable conversion,<sup>33</sup> since the Virginia Supreme Court of Appeals has held that real property conveyed to a trustee with an unqualified direction to sell is immediately transformed into personalty.<sup>34</sup> Florida in its Land Trust Act specifically provides that the interests of the beneficiaries of the trust shall be personalty if the parties so designate in the agreement.<sup>35</sup>

As a consequence of the transformation of the beneficial interest into personalty, there are numerous inducements to employ this device. For example,

<sup>28</sup> *Richardson v. McCloskey*, 261 S.W. 801, 812 (Tex. 1924); *In Re Estate of Dodge*, 207 Iowa 374, 233 N.W. 106 (1929).

<sup>29</sup> *Duncanson v. Lill*, *supra* note 27. *See also Johnson v. Tracey*, 326 Mass. 628, 96 N.E.2d 157 (1951); *Sweesy v. Hoy*, 324 Ill. 319, 155 N.E. 323 (1927); *Union Guardian Trust Co. v. Nichols*, 311 Mich. 107, 18 N.W.2d 383 (1945); *Cowardin*, *supra* note 26, at 372-73.

<sup>30</sup> 2 SCOTT, TRUSTS § 131 (3d ed. 1967); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, *supra* note 17. *But see BOGART, TRUSTS AND TRUSTEES*, § 293 (2d ed. 1953).

<sup>31</sup> *Duncanson v. Lill*, *supra* note 27; *Breen v. Breen*, *supra* note 18; *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, *supra* note 17; *See also Ford*, *supra* note 5, at 701; *McKillop*, *supra* note 23, at 173, 186; *Oeltzen*, *The Illinois Land Trust and Nebraska Law*, 47 U. NEB. L. REV. 102 (1968).

<sup>32</sup> *Horney v. Hayes*, 11 Ill. 2d 178, 142 N.E.2d 94 (1957); *Aronson v. Olsen*, 348 Ill. 26, 180 N.E. 565 (1932); *Chicago N.S. & M.R.R. v. Chicago Title & Trust Co.*, 328 Ill. 610, 160 N.E. 266 (1928); *Chicago Land Clearance v. Darrow*, 12 Ill. 2d 365; 146 N.E.2d 32 (1957); *McKillop*, *supra* note 23 at 183, 193.

<sup>33</sup> *Cowardin*, *supra* note 26, at 370.

<sup>34</sup> *Seiter, Price, and Co. v. McClanachen*, 43 Va. 280 (1845).

<sup>35</sup> FLA. STAT. ANN. § 689.071(4) (Supp. 1969).

there are no dower rights in property held in a land trust;<sup>36</sup> ancillary probate proceedings in the state where the real estate is located are avoided if that land was in a land trust, since the beneficial interest in a land trust is probated in the state where the beneficiary is domicilled along with his other intangible personal property;<sup>37</sup> and judgments and lien against the beneficiary are not ipso facto liens against the property held by the trustee of a land trust.<sup>38</sup> It is interesting to note, however, that although the property in a land trust is considered personalty, no attempt has been made to require a beneficiary to include his interest on a personal property tax return.

Since the beneficial interest exists as personalty, and because widespread use of land trusts has resulted, it would be inconceivable and most illogical for a court not to recognize the applicability of the provisions of Article 9 of the U.C.C. to the beneficial interest of the land trust.<sup>39</sup> Although no mention of the land trust was made in the U.C.C. or its Official Comments when Illinois adopted the Code, Mr. W. B. Davenport, Editor of the Illinois' Official Comments, clearly placed the beneficial interest of a land trust in the U.C.C.'s category of "General Intangibles,"<sup>40</sup> in addition to goodwill, patents

<sup>36</sup> FLA. STAT. ANN. § 689.071(3) (Supp. 1969) provides that a purchaser from the trustee shall take property free of any claims arising out of dower or curtesy interest of the spouse of any beneficiary thereof. *Stathos v. LaSalle*, 62 Ill. App. 2d 398, 210 N.E.2d 828 (1965); *Clark v. Hason*, 320 Ill. 480 (1926); *See* VA. CODE ANN. § 55-17.1 (Supp. 1968).

<sup>37</sup> *Conley v. Peterson*, 25 Ill. 2d 271, 189 N.E.2d 288 (1962); *Oeltzen*, *supra* note 31, at 101; *See* ILL. REV. STAT. ch. 3 § 11 (1967); FLA. STAT. ANN. §§ 736.06, 734.31, 732.26 (Supp. 1969); VA. CODE ANN. § 64.55 (Supp. 1968).

<sup>38</sup> *Chicago Federal Sav. & Loan Ass'n. v. Cacciatore*, *supra* note 27; *Southwest Federal Sav. & Loan Ass'n. v. Cosmopolitan National Bank*, 23 Ill. App. 2d 174, 161 N.E.2d 697 (1959); *Marshall Sav. & Loan Association v. Chicago National Bank*, 56 Ill. App. 2d 372, 206 N.E.2d 117 (1965); *Chicago Title & Trust Co. v. Mercantile Trust & Sav. Bank*, *supra* note 17; *Regas v. Danigeles*, 54 Ill. App. 2d 271, 203 N.E.2d 730 (1964). *See* *Turner*, *supra* note 13.

<sup>39</sup> U.C.C. § 9-102(1)(a): "Except as otherwise provided in . . . Section 9-104 . . . this Article [9] applies so far as concerns any personal property and fixtures within the jurisdiction of this state . . . to any transaction . . . which is intended to create a security interest in personal property. . . ."

<sup>40</sup> Illinois adopted the U.C.C. on July 1, 1962. ILL. COMM. CODE COMMENTS, S.H.A. ch. 26 § 9-106 (1967), provides: "The definition of general intangibles is new. It is a residual definition covering all personal property not included in another classification.

Examples of general intangibles are goodwill, literary rights, a franchise, a patent, a trademark, a copyright, and a beneficial interest in a land trust.

Perhaps the most important of these . . . is the beneficial interest in a land trust. . . . since the code covers security interests in all kinds of personal property and no other classification is established for a beneficial interest in a land trust, it necessarily falls into the residual class of general intangibles. A gap existed in prior law as to the coverage of this type of collateral." *See* U.C.C. § 9-106: "'General Intangibles' means any personal property (including choses in action) other than goods, accounts, contract rights, chattel paper, documents and instruments."

and copyrights. In 1968, the Illinois Appellate Court in the *Pascal* case removed from any further speculation the question of whether Article 9 of the U.C.C. applies to the beneficial interest in a land trust, by judicially validating this logical corollary to the basic proposition that a land trust consists of personalty. In *Pascal*, when the beneficial interest of the land trust was assigned as collateral for a loan, a security interest in the land trust was created in favor of the assignee. To insure protection of this security interest in personal property from future creditors' claims, it is the law in 49 states<sup>41</sup> that the requirements specified in section 9-203 and section 9-302 of the U.C.C. be met. These sections provide respectively that a security agreement be executed and that an appropriate financing statement be filed with the Secretary of State. The purpose of the financing statement is to give notice to any future creditors of the beneficiary that a prior security interest exists in this particular beneficial interest of the land trust, and that any subsequent security interest in this same beneficial interest will be subordinate.

To the real estate lawyer Article 9 and its filing provisions are "something of a novelty."<sup>42</sup> Prior to the U.C.C., all chattel liens were recorded; under the U.C.C., however, chattel mortgages are replaced by security agreements which are perfected by the filing of a brief financing statement and not by recordation.<sup>43</sup>

At common law there is no requirement of filing or recordation in order to perfect a security interest in personal property when the secured party has possession of the collateral.<sup>44</sup> However, the U.C.C. deviates from this principle by allowing only certain collateral to be perfected by possession.<sup>45</sup> "General Intangibles" are expressly excluded from the category of collaterals to which possession in lieu of filing would constitute perfection.<sup>46</sup> The U.C.C. suggests that only collateral which is capable of physical possession can be perfected by the above common law method. "General Intangibles" by their very nature are incapable of physical possession because they have no physical existence.<sup>47</sup> As the beneficial interest of a land trust is both intangible

<sup>41</sup> Every state except Louisiana has adopted the Uniform Commercial Code.

<sup>42</sup> Kratovil, *The Uniform Commercial Code and The Real Estate Lawyer*, 18 DEPAUL L. REV. 101 (1968).

<sup>43</sup> *Id.*

<sup>44</sup> OFFICIAL TEXT WITH COMMENTS, U.C.C. § 9-305; RESTATEMENT, SECURITY § 1 (1941); See generally ILL. REV. STAT. ch. 95 § 1 (1961); Robbins, *The Pledge as an Illinois Security Device*, 31 CHI.-KENT L. REV. 90 (1953).

<sup>45</sup> U.C.C. § 9-305: "A security interest in letters of credit and advices of credit, . . . goods, instruments, negotiable documents or chattel paper may be perfected by the secured party's taking possession of the collateral. . . ."

<sup>46</sup> OFFICIAL TEXT WITH COMMENTS, U.C.C. § 9-305.

<sup>47</sup> See *supra* note 46.

personalty and a "General Intangible," it is excluded from perfection by possession and, therefore, can be perfected only by filing.

If the secured party fails to perfect his interest, as happened in *Pascal*, the priority of his security interest in the collateral may be defeated by a subsequent lien creditor or anyone else who qualifies under section 9-301 of the U.C.C. "An unperfected security interest is subordinate to the rights of . . . a person who becomes a lien creditor without knowledge of the security interest and before it is perfected."<sup>48</sup> A lien creditor under the U.C.C. means "a creditor who has acquired a lien on the property involved by attachment, levy or the like."<sup>49</sup> In *Pascal*, the judgment itself was not a lien upon the beneficial interest; the lien arose, however, by way of attachment in aid of the judgment. A writ of execution was placed in the hands of the sheriff; this action gave rise to the lien, under case law<sup>50</sup> and by statute.<sup>51</sup>

The recent case of *Century Pipe and Supply Company v. Empire Factors*<sup>52</sup> is said to hold that a person does not become a lien creditor until execution is levied upon the personal property. This is a misconception. *Century* recognizes that the placing of a writ of execution with the sheriff creates a lien from the time it is placed. Other statements in *Century* are concerned with the priority of liens. *Century* holds that if prompt action is not taken immediately to levy on the execution, another judgment creditor who places a subsequent execution with the sheriff and then actually levies may have priority as to the proceeds realized from the sale of the personal property. The first creditor did not lose his lien but only his priority.

One remaining requirement under section 9-301 is that the lien creditor must have no previous knowledge of the unperfected security interest. The burden of proving "no previous knowledge" is upon the party asserting the affirmative and the other party is not required to make plenary proof of a negative averment.<sup>53</sup>

<sup>48</sup> U.C.C. § 9-301(1)(b).

<sup>49</sup> U.C.C. § 9-301(3).

<sup>50</sup> *Watkins v. Dunbar*, 232 Ill. App. 1; *Grimes v. Rogers*, 263 Ill. App. 429; *Reardon v. Rock Island Plow*, 168 F. 654 (7th Cir.) *aff'd* 222 U.S. 354 (1909); *Century Pipe and Supply Co. v. Empire Factors*, 19 Ill. 2d 165, 153 N.E.2d 298 (1960).

<sup>51</sup> ILL. REV. STAT. ch. 77 § 9 (1967): "When execution binds personalty— . . . No execution shall bind the goods and chattels of the person against whom it is issued, until it is delivered to the sheriff or other proper officer to be executed; and for the better manifestation of the time, the sheriff or other officer shall, on receipt of such writ, indorse upon the back thereof the day of the month and year and hour when he received the same."

<sup>52</sup> *Century Pipe and Supply Co. v. Empire Factors*, *supra* note 50. For a more complete discussion of *Century*, see plaintiff's brief.

<sup>53</sup> *In Re Komfo Products Corp.*, 247 F. Supp. 229 (1965). *See also* *People v. Fusco*, 397 Ill. 468, 74 N.E.2d. 531 (1947); *In Re Estate of Sandusky*, 321 Ill. App. 1, 52 N.E.2d. 285 (1943).

*Pascal* also raises the question as to whether a writ of execution was the appropriate procedure to use in attaching the beneficial interest of the land trust. Execution was thought not to be attachable to the intangible rights and powers of the beneficiary of a land trust.<sup>54</sup> A creditor's bill was thought to be the sole way to reach the beneficiary's interest. *Chicago Federal Savings and Loan Association v. Cacciatore*<sup>55</sup> held that by the use of a creditor's bill a lien will attach to a beneficial interest of a land trust, but it did not state or imply that a creditor's bill was the sole method whereby a lien would attach. The court held that "all parties agree that it can be either by a creditor's . . . bill or other appropriate and timely proceedings."<sup>56</sup> Since a creditor's bill is not the exclusive remedy, and since there is no case law on what would be the "other appropriate and timely proceedings," the court in *Pascal*, by way of dicta, holds that a writ of execution on personal property appears to come within the meaning of *Cacciatore*. While there may be some question as to whether a party can attach a lien upon the beneficial interest of a land trust by means of a writ of execution, there is no doubt that he could do so when the writ is accompanied by a Supplementary Proceeding under Section 73(2)(e) of the Illinois Civil Practice Act (C.P.A.).<sup>57</sup> Perhaps this provision of the C.P.A. is what is meant by the statement in *Cacciatore* of "other appropriate and timely proceedings."

By applying the U.C.C. provisions of Article 9 to land trusts the court dramatically fortifies the position of this real estate trust device in the law. In addition to strengthening the land trusts, the court has also afforded the protection of the filing provisions of the U.C.C. to creditors of a beneficiary land trust. With this reaffirmation of the fiction that a land trust consists of personalty and with a state's ever constant need for increasing tax revenue, it would be interesting to observe what would happen to this personal property fiction if a state compels the inclusion of the beneficial interest of the land trust on personal tax returns, thereby creating a double tax on the property contained in the land trust—both real estate tax and personal property tax. It appears that such an event might discourage and impede the ever-increasing acceptance of this unique device.

*Mary Conrad*

#### PSALM OF A SECURED CREDITOR

The Code is my shepherd, (21.10)  
I shall not want.  
It maketh me to lie down in permissiveness.

<sup>54</sup> See, e.g., *Citizen's National Bank v. Grossman*, 21 Ill. App. 2d 573 (1959). See generally 18 I.L.P. § 8.

<sup>55</sup> *Supra* note 27.

<sup>56</sup> *Supra* note 27, at 544.

<sup>57</sup> ILL. REV. STAT. ch. 110 § 73(2) (1967).