Statute, the court decided that it was reversible error to refuse to allow appellant to testify in this case.[193]

IX. Probate and Trusts*

A. Executors and Administrators

During the survey period the Indiana Court of Appeals decided several cases concerning the administration of decedents' estates. In *Krick v. Farmers & Merchants Bank*[1] the appellant moved to set aside the compromise of an earlier contest of the decedent's will on the ground that he had no notice of the settlement and that the terms of the compromise were not reduced to writing.[2] After his motion was denied, the appellant waited over five years before filing an objection to the administrator's final report.

Though the administration of an estate is considered "one proceeding . . . in rem"[3] many Indiana courts treat collateral or

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[193]The *Jenkins* court felt that it was not the intent of the legislature in enacting the Dead Man's Statute to prevent testimony that could not affect a decedent's estate. 290 N.E.2d at 769.

*Bruce W. Claycombe, Mark T. McDermott, John R. Politan.

[1]279 N.E.2d 254 (Ind. Ct. App. 1972).

[2]Ind. Code § 29-1-9-1 (1971) provides that a will compromise is invalid if not reduced to writing. It should be noted that the appellant filed objections to the will compromise at three different times on the basis of this statute and his lack of actual notice. The first motion was denied by the trial court in September 1964, and no appeal was taken. The second motion was filed over three and one-half years later when the administrator filed his final report. This time the trial court realized its error in failing to comply with the statute and granted appellant partial relief. The administrator subsequently filed a supplemental final report showing that the corrections ordered by the court had been made. The appellant was not satisfied with this order of the court sustaining his objections and filed a Motion to Correct Errors in August of 1970, with substantially the same allegations of error. Denial of this third motion was the foundation for this appeal.

[3]*Id.* § 29-1-7-2 provides:

> The probate of a will and the administration of the estate shall be considered one proceeding for the purposes of jurisdiction, and said entire proceeding and the administration of a decedent's estate is a proceeding in rem.

ancilliary proceedings, such as will contests and creditors' claims, as separate civil actions. Although this practice has been held harmless error,[4] *Krick* exemplifies the confusion which results from this procedure. The distinction between independent civil actions and collateral proceedings arising at different stages in the administration of a decedent's estate is essential in determining when an appeal must be perfected. The court indicated that prior to the adoption of the Probate Code in 1953 the failure to perfect an appeal at the time of the final decision in a collateral action was fatal.[5] However, no cases had specifically dealt with this question since that time. Citing the pertinent sections of the 1953 Probate Code[6] and emphasizing the need for early and speedy administration of estates and finality of decisions, the court dismissed the appeal and concluded that the compromise of a will contest is an adversary proceeding in which the court finally determines the rights of the parties and that the failure to take a timely appeal from such final decision is fatal.[7]

In *Smith v. Carr*[8] the court of appeals reversed and remanded a lower court ruling which allowed the wife of the personal representative of the decedent's estate to recover on a claim against the estate for care and services rendered to the decedent. After the personal representative disallowed his wife's claim, a hearing was held without notice to the heirs and the trial court

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[4]State *ex rel.* Townsend v. Tipton Circuit Court, 242 Ind. 226, 177 N.E.2d 590 (1961).

[5]279 N.E.2d at 259, *citing* Goheen v. Stirlen, 193 Ind. 246, 139 N.E. 359 (1923). Prior to the adoption of the Probate Code in 1953, appeals had always been permitted from judgments in actions to contest the validity of a will or to resist the probate thereof. Allman v. Malsbury, 224 Ind. 177, 65 N.E.2d 106 (1946).

[6]

> In addition, our Probate Code provides that such an appeal of a will contest may be taken as appeals are taken in civil causes. IC 1971, 29-1-1-22 . . . provides:
>
> > . . . *Any person* considering himself *aggrieved by any decision of a court having probate jurisdiction* in proceedings under this code *may prosecute an appeal* to the court having jurisdiction of such appeal. Such appeals shall be taken as appeals are taken in civil causes . . . (emphasis supplied).

279 N.E.2d at 259.

[7]Allowing the parties to delay is expensive, frustrates the decedent's wishes, and dissipates estate assets. 279 N.E.2d at 260.

[8]280 N.E.2d 844 (Ind. Ct. App. 1972).

allowed the wife's claim which amounted to more than one-third of the value of the estate assets.[9] In reversing, the court reasoned that while Indiana Code section 29-1-14-17 speaks only of "a claim in favor of a *personal representative* against the estate he represents,"[10] the claim of the personal representative's wife and the entire transaction as a whole was so intertwined with the interests of the personal representative and the estate that an adversary hearing as contemplated by the statute would "best serve justice and the interests of all parties to this litigation."[11] Noting further that the administrator of an estate occupies a position of high responsibility,[12] the court feared that the lack of notice under the special circumstances of this case[13] could be construed as having a "tendency to deceive, which, regardless of intent, amounts to constructive fraud."[14]

Onward Corp. v. National City Bank[15] was a consolidation of

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[9]The heirs had filed objections to the personal representative's final report and claimed that IND. CODE § 29-1-14-17 (1971) should have been followed. These objections and the heirs' subsequent motion to correct errors were overruled and this appeal resulted. 280 N.E.2d at 845.

[10]IND. CODE § 29-1-14-17 (1971).

[11]280 N.E.2d at 847.

[12]

> The administrator of an estate occupies a position of the highest trust and confidence . . . . It is his duty to guard and protect the estate which he represents against those who may seek to diminish it by representing fraudulent, illegal, or unfounded claims for allowance; and, above all, the duties of his trust forbid him from doing any act or *entering into any arrangement whereby he will gain a personal advantage at the expense of the estate.*

Id. at 846, *quoting from* Gorham v. Gorham, 54 Ind. App. 408, 414, 103 N.E. 16, 18 (1913) (emphasis added).

[13]The court deemed the following factors to be quite relevant to its holding: the claim amounted to one-third of the total assets of the estate; the personal representative was a blood relative of the decedent; the decedent lived in the household of the personal representative for the last period of her life; the husband-wife relationship between the personal representative and claimant; the funds of the personal representative were used in providing, in part, the services for which his wife claimed payment; the wife deposited the claim in a joint checking account from which the personal representative could draw funds; the claim was typed, if not prepared, in the office of the attorney of the estate; and there had been prior "difficulty" in an Illinois estate involving the same decedent and heirs. 280 N.E.2d at 846.

[14]*Id. See* Budd v. Board of County Comm'rs, 216 Ind. 35, 22 N.E.2d 973 (1939); Keilman v. City of Hammond, 124 Ind. App. 392, 114 N.E.2d 813 (1953); Gish v. St. Joseph Loan Co., 66 Ind. App. 500, 113 N.E. 394 (1916).

[15]290 N.E.2d 797 (Ind. Ct. App. 1973).

separate wrongful death actions brought by the personal representative of two decedents' estates for the benefit of the death creditor beneficiaries. Liability was admitted by the appellant and the case was tried solely on the issues of damages. The trial court included in its damages award the personal representative's *total* costs and expenses of administering the entire estates. Appellant contended that the Indiana Wrongful Death Statute[16] allowed recovery only of expenses related directly to the wrongful death action.[17] Indicating that this case was one of first impression in Indiana, the court of appeals affirmed the trial court's application of the statute. Viewing the problem as basically a question of statutory interpretation, the court stated that Indiana statutory[18] and case[19] law mandates that words and phrases of statutes ordinarily be given their plain and usual meaning wherever pos-

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[16]IND. CODE § 34-1-1-2 (1971).

[17]Appellant based his objection on a variety of rationales: first, to allow recovery of the total costs would be an absurdity, not intended by the legislature, because it might result in a situation in which the death creditor beneficiaries would recover greater damages than a surviving spouse or dependent; second, since the statute limits recovery to pecuniary damages, only expenses incurred "as a direct result" of the wrongful death are recoverable; and third, since the expenses of administering the general estate are always incurred, regardless of the cause of death, it is unfair to make them recoverable in an action such as this. The appellant further proposed that the doctrines of strict construction and *ejusdem generis* would so limit the recovery. 290 N.E.2d at 799.

[18]The court referred to IND. CODE § 1-1-4-1 (1971), which states:

> The construction of all statutes of this state shall be by the following rules, unless such construction be plainly repugnant to the intent of the legislature or of the context of the same statute:
>
> First. Words and phrases shall be taken in their plain, or ordinary and usual, sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

290 N.E.2d at 799-800.

[19]

> We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the lawmaking power. It is a practice to be avoided and not followed. . . .

Id. at 800, *quoting from* Meade Electric Co. v. Hagsberg, 129 Ind. App. 631, 640, 159 N.E.2d 408, 413 (1959).

sible. Since the language of the statute was unambiguous and the contested provision was stated in the conjunctive,[20] the court reasoned that "the statute allows recovery of the costs incurred in *both* administering the general estate *and* prosecuting the wrongful death action."[21]

B. Trusts

Sendak v. Trustees of Purdue University[22] involved an action brought by the Trustees of Purdue University to alter the terms of a charitable trust by removing restrictive terms.[23] The terms, they alleged, frustrated the purpose of the trust which was to promote "education through the medium of making low cost loans available to students."[24] The trial court, after finding that the trustees had been unable to loan even the aggregate income of the fund because of the restrictive administrative provisions, ordered the restrictions removed and empowered the trustees to use the trust assets to make loans to students on substantially the same terms which the trustees established for loans made from the general unrestricted student loan funds. The trial court based its authority for the order on the *cy pres* doctrine.[25]

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[20]The exact language of the statute provides for recovery of the "necessary and reasonable costs and expenses of administering the estate *and* prosecuting or compromising the action . . . ." IND. CODE § 34-1-1-2 (1971) (emphasis added).

[21]290 N.E.2d at 800. The court stated that the *ejusdem generis* doctrine was inapplicable in a case in which the statutory language is clear. As for appellant's contention that recovery for total costs should not be allowed because any general estate will have to be administered whether the death of the decedent was due to a wrongful act or natural causes, the court pointed out that this same logic could be applied to funeral expenses, which will also be inevitably incurred regardless of the cause of death, and yet the statute clearly states that funeral expenses are recoverable by the death creditor beneficiaries. IND. CODE § 34-1-1-2 (1971).

[22]279 N.E.2d 840 (Ind. Ct. App. 1972).

[23]The restrictive conditions which were the subject of the action were:
a. a limitation on amounts of loans to $500.00 per student,
b. a limitation of loans to only those students in their third or more year of study and,
c. a requirement that loans be repaid within five years.
Id. at 842.

[24]*Id.*

[25]
If property is given in trust to be applied to a particular charitable purpose, and it becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more gen-

On appeal, the Attorney General contended that the trial court's application of the *cy pres* doctrine was erroneous since a provision of the settlor's will showed specifically that the "charitable purpose" of the trust was limited in accordance with the three restrictions the trustees sought to remove. The court of appeals upheld the trial court's finding that the charitable purpose of the trust was not limited by the specific restrictions but stated that the doctrine of *cy pres* was nevertheless inapplicable since that general purpose had not become impossible, impractical or illegal, even with the restrictions imposed. However, the court of appeals found that the removal of restrictions to allow the otherwise nearly dormant trust to accomplish its purpose was justifiable under the doctrine of equitable deviation.[26] Specifically, the court of appeals held that evidence of rising tuition, increased living expenses, greater numbers of students attending the university, and a greater need for financial assistance, coupled with other evidence which showed that continued application of the three restrictions in question would cause a further accumulation of assets in the trust with comparatively little aid to needy students, supported the result of the order of the trial court, despite incorrect application of *cy pres*.

In *Hauck v. Second National Bank*,[27] the court of appeals ruled that the trial court erred in admitting extrinsic evidence to permit an explanation of a minor contradiction between the terms of a trust agreement and a schedule of assets accompanying the instrument.[28] After a discussion of Lord Bacon's rule that a latent

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eral intention to devote the property to more charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

RESTATEMENT OF TRUSTS § 399, at 1208 (1935).

[26]

The court will direct or permit the trustee of a charitable trust to deviate from the term of a trust if it appears to the court that compliance is impossible or illegal, or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust.

2 RESTATEMENT (SECOND) OF TRUSTS § 381, at 273 (1959).

[27]286 N.E.2d 852 (Ind. Ct. App. 1972).

[28]This action was brought by the beneficiaries of the deceased, a life tenant of a testate trust established by her husband who died in 1934. Two years prior to the wife's death, she established a trust which directed the

ambiguity may be explained by extrinsic evidence but a patent ambiguity may not, the court applied the "four corners" doctrine and stated that the discrepancy between a phrase in the trust instrument[29] and the dates of acquisition of two stock certificates included in Exhibit A attached to the trust instrument was a "small shadow . . . [which was] blotted out by the white light of overwhelmingly expressed intent of the author of the Trust Agreement."[30] The apparent latent ambiguity could, therefore, be reconciled from a reasonable interpretation of the instrument without admission of extrinsic evidence. The ambiguity was deemed miniscule since Exhibit A included 137 stock certificates, only two of which did not comply with the description in the aforementioned phrase.

C. Wills

In *Pepka v. Branch*[31] the court of appeals was asked to decide whether or not a specific[32] bequest of a sole proprietorship was

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trustee to manage the assets of the life estate so as to pay her the income, and upon her death, to distribute the assets of the trust according to the terms of her husband's will. The basis of plaintiffs' complaint was that since Exhibit A of the wife's trust included property which had acquisition dates prior to the establishment of the husband's testate trust, Exhibit A necessarily included property owned in fee by the wife because of the phrase in the wife's trust instrument which declared that all the original property in the husband's trust had been disposed of and reinvested.

[29]The phrase in which the discrepancy was noted is as follows:

> WHEREAS, all of such property, real and personal, originally passing to me has been disposed of and the proceeds thereof invested and reinvested by me, a schedule of all said property as now existing being attached hereto marked "Exhibit A" . . . .

286 N.E.2d at 857.

[30]*Id.* at 863.

[31]294 N.E.2d 141 (Ind. Ct. App. 1973).

[32]The court pointed out that ademption applies only to specific legacies and not general or demonstrative legacies. *Id.* at 150. A specific legacy is a gift of a specific thing or of some particular portion of the testator's estate, which is so described by the testator's will as to distinguish it from other articles of the same general nature. If the specific bequest is no longer available, the specific legatee is not entitled to satisfaction from the general estate. 6 W. PAGE, WILLS § 48.3 (Bowe & Parker ed. 1962) [hereinafter cited as PAGE]. *See also* Grise v. Weiss, 213 Ind. 3, 11 N.E.2d 146 (1937); Jackson v. Lincoln Nat'l Bank & Trust Co., 147 Ind. App. 466, 469, 261 N.E.2d 899, 901 (1970); *In re* Estate of Brown, 145 Ind. App. 591, 603, 252 N.E.2d 142, 150 (1969).

A general legacy is one which may be satisfied out of the testator's

adeemed by the incorporation of the business. The testator's widow, recipient of a portion of the business under the specific bequest, brought the ademption action. Had ademption occurred, the widow would have taken the entire property under the residuary clause. The court held that incorporation did not so substantially change the bequest as to effect an ademption.[33]

The opinion was limited exclusively to ademption *by extinction* as opposed to other types of ademption.[34] The court recognized three different tests which are used in various jurisdictions to determine when ademption occurs. The first of these is the "ancient rule" which utilizes physical facts as evidence of the testator's intention to adeem.[35] In the past, Indiana has adhered to the ancient rule in which the testator's intent controls. This position was reaffirmed in *In re Brown's Estate.*[36]

A second test is the "modified rule." Under this test the complete, physical disappearance of a specific bequest constitutes an ademption regardless of the testator's intent. If, however, the subject matter still exists in an altered form, this test resorts to the testator's intent.[37]

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estate generally. *See* 6 PAGE § 48.2. A demonstrative legacy is one payable out of the estate generally, but which is charged (as against other legatees or devisees of general gifts) on certain specific property. 6 PAGE § 48.7. Consequently, neither demonstrative nor general legacies are rendered void by the nonexistence of specific property.

[33]294 N.E.2d at 149. The court relied in part on the fact that after incorporation there was no change in the business, its location, or employees. *Id.* at 156.

[34]Although the two larger categories of ademption may be broken down into subparts, ademption by extinction is generally contrasted with ademption by satisfaction. The former occurs when a specific legacy has become inoperative because of the withdrawal or disappearance of its subject matter from the testator's estate in his lifetime. 96 C.J.S. *Wills* § 1172 (1957). Ademption by satisfaction occurs when a gift is made by testator during his lifetime to a legatee, as satisfaction for the legacy. 6 PAGE § 54.21.

[35]The court in *Pepka* cited cases from the jurisdictions adhering to the ancient rule. *See In re* Packham's Estate, 232 Cal. App. 2d 847, 43 Cal. Rptr. 318 (1965); Kapiolani Maternity Hosp. v. Wodehouse, 33 Hawaii 846 (1936); Our Lady of Lourdes v. Vanator, 91 Idaho 407, 422 P.2d 74 (1967); Domzalski v. Domzalski, 303 Mich. 103, 5 N.W.2d 672 (1942); Donath v. Shaw, 132 N.J. Eq. 545, 29 A.2d 555 (1942); *In re* William's Will, 71 N.M. 39, 376 P.2d 3 (1962).

[36]145 Ind. App. 591, 252 N.E.2d 142 (1969).

[37]*See* Succession of Levy, 207 La. 1062, 22 So. 2d 650 (1945); Blaisdell v. Coe, 83 N.H. 167, 139 A. 758 (1927).

The third test used is referred to as the "form and substance" rule or the "modern rule." The focus is shifted from the intention of the testator to the actual existence or nonexistence of the specific subject matter of the bequest. If there has been only a formal change in the bequest, there is no ademption, but if the specific thing has changed in substance, the legacy is adeemed.[38] The form and substance rule, which gained popularity because of dissatisfaction with the confusion and uncertainty created by attempted ascertainment of the testator's intent, is now the majority rule.[39]

The court overruled Indiana's former adherence to the ancient rule and adopted the form and substance test as the rule in Indiana because it is more logical, less cumbersome, and easier to apply. In adopting the form and substance rule, it was necessary for the court to expressly overrule *In re Brown's Estate*[40] and all other Indiana cases inconsistent with the form and substance rule.[41]

A question of first impression for the Court of Appeals of Indiana arose in *Steele v. Chase*.[42] The testator executed a will which left his entire estate to his wife but provided that if his wife did not survive him by thirty days, the estate was to go half to his stepson and half to the testator's brothers. Subsequent to the execution of the will, the testator and his wife were divorced. The testator died without revoking his will or executing a new will. During the administration of the estate the administrator filed a petition for construction of the will and contended that the portions of the will relating to both the testator's wife and his stepson had been revoked by the divorce pursuant to Indiana Code section 29-1-5-8.[43] This statute provides that a divorce subsequent to the

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[38]294 N.E.2d at 152.

[39]The court noted this fact and listed several jurisdictions which adhere to the form and substance test: California, Connecticut, Delaware, Florida, Georgia, Illinois, Maryland, Massachusetts, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Tennessee, Vermont, and Virginia. For general discussion of the form and substance test, see Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEXAS TECH. L. REV. 195 (1971); Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741 (1961); Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953).

[40]145 Ind. App. 591, 252 N.E.2d 142 (1969).

[41]294 N.E.2d at 155.

[42]281 N.E.2d 137 (Ind. Ct. App. 1972).

[43]The statute provides:
If after making a will the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are thereby revoked.

making of a will automatically revokes all proivsions of the will in favor of the testator's spouse.

The operation of the statute as to the testator's wife was clear from the language of the statute. The issue in the case was whether or not the statute also operated to exclude the stepson. The administrator contended that the bequest to the stepson involved a condition precedent and that the contingent event had not occurred.

While Indiana had not passed on this question, other jurisdictions had. Decisions have gone both ways on the question but the majority view is that property prevented from passing to a former spouse because of revocation by divorce passes as if the spouse failed to survive the testator.[44] The court of appeals construed Indiana Code section 29-1-5-8 in this manner and stated that by doing so, the intent of the testator is satisfied and intestacy which is not favored by the law is avoided.

In the case *In re Estate of Darby*[45] the Court of Appeals of Indiana decided that the beneficiaries of certain trust funds set up by the testator's will were not entitled to the income from these trusts during the administration of the estate absent specific language to the contrary in the will. The testator created identical trusts for the benefit of her two grandnieces for life with the remainder to their respective children. These trusts were each to contain $500,000 and were to be funded first, in the event assets were insufficient to pay all bequests and legacies in full. The grandnieces were also the beneficiaries in trust of the residuary clause in the will. The administrator contended that the income during administration should be treated as part of the corpus of the estate and distributed according to the residuary clause. The

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> Annulment of the testator's marriage shall have the same effect as a divorce as hereinabove provided. With this exception, no written will, nor any part thereof, can be revoked by any change in the circumstances or condition of the testator.

IND. CODE § 29-1-5-8 (1971).

[44]UNIFORM PROBATE CODE § 2-508. The minority view is exemplified by *In re* Will of Lampshire, 57 Misc. 2d 332, 292 N.Y.S.2d 578 (1968), in which it was held that a bequest similar to the one to the stepson in *Steele* was "predicated on a condition set forth therein and limited thereby. The expressed contingency not having occurred, the result is intestacy." *Id.* at 334, 292 N.Y.S.2d at 580. Results conforming to the view of the Uniform Probate Code were reached in First Church of Christ, Scientist v. Watson, 286 Ala. 270, 239 So. 2d. 194 (1970); Volkmer v. Chase, 354 S.W.2d 611 (Tex. Civ. App. 1962); Peiffer v. Old Nat'l Bank & Union Trust Co., 166 Wash. 1, 6 P.2d 386 (1931).

[45]289 N.E.2d 542 (Ind. Ct. App. 1972).

trust beneficiaries contended that they were entitled to the income from the trusts as of the date of the decedent's death rather than as of the date the trusts were funded.

The court based its decision on Indiana Code section 29-1-17-7[46] which provides that *all* income received by the administrator during the administration shall be part of the corpus of the estate, unless the testator provides otherwise. There was no language in the will providing for distribution of the income during administration; therefore, the application of the statute was clear. The case law cited by the beneficiaries in support of their position was decided prior to the enactment of the Probate Code.[47] Adherence to the clear language of the statute promotes the uniformity which is the purpose of the Probate Code.[48]

X. PROPERTY*

A. Real Property

In *Erie-Haven, Inc. v. First Church of Christ*[1] the determinable easement was recognized in Indiana for the first time.[2] The

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[46]The statute provides:

> Unless the decedent's will provides otherwise, all income received by the personal representative during the administration of the estate shall constitute an asset of the estate the same as any other asset and the personal representative shall disburse, distribute, account for and administer said income as a part of the corpus of the estate.

IND. CODE § 29-1-17-7 (1971).

[47]*E.g.*, Alig v. Levey, 219 Ind. 618, 39 N.E.2d 137 (1942). One of the cases cited was decided after enactment of the Probate Code. *In re* Estate of Brown, 145 Ind. App. 591, 252 N.E.2d 142 (1969). This case, however, was held by the court not to support the position of the trust beneficiaries. 289 N.E.2d at 544.

[48]*See* IND. ANN. STAT. § 7-1107, Comments (1953). *See also* Rheinstein, *Some Observations on Wills Under the Indiana Probate Code of 1953*, 30 IND. L.J. 152, 161-63 (1955); Note, *Possession and Control of Estate Property During Administration: Indiana Probate Code Section 1301*, 29 IND. L.J. 251, 264-65 (1954).

*Robert T. Thopy.

[1]292 N.E.2d 837 (Ind. Ct. App. 1973).

[2]As with estates in land, an easement which will terminate automatically upon the happening of a particular event or contingency may be created.