inspects the alternative pleading problem in so many words and therefore
doesn't decisively state the conclusion which tacitly results from the
decision tends to weaken the case as a final solution of that problem.
There is even a slight possibility that the case might be held to establish
a principle requiring an election of pleas rather than alternative pleading
but the wording of the decision would seem to indicate that the court
would have decided in favor of the alternative pleading theory had it
looked the problem squarely in the face. R.L.B.

TRUSTS

TRUSTS — THE OHIO TRUST INVESTMENT STATUTE

The problem of investment in these days of wars, economic de-
pressions, unemployment, and inflation are very real and very present.
The questions of relative security of principal, amount and permanence
of income are considered every day by all classes of investors. The invest-
ing public must be constantly alert to activities in all parts of the nation
and the world which affect the great securities markets. A great silver
shipment from India or China, or a change in the foreign policy of
some distant nation, may, and often does affect the trends of stock,
bond and commodity markets. The “blue chip” of today may be the
“dog on the market” of tomorrow. All these factors and many more
must be reckoned with by the usually careful but poorly informed in-
esting public. Difficult as the position of the ordinary prudent investor
may be, the position of a trustee, in placing the funds and property in his
care in such manner as to ensure the beneficiaries an adequate income
and at the same time safeguard the principal, is one infinitely more
difficult and precarious. In order to aid the trustee in this matter and
at the same time provide him with some protection, legislatures of many
states have enacted statutes governing types of investments and prescrib-
ing the outer limits as to conduct and discretion.¹

These statutes have been of two different types,² mandatory and
permissive. The mandatory statutes expressly limit the trustee in invest-
ing to the types of securities set out.³ Any deviation from this list con-
stitutes a breach of trust. The permissive statute⁴ is the more usual
treatment and also sets forth categories of permissible investments for a

² See former section Ohio g.c. 11214. And the present section 10506-41.
³ Legal Lists in Trust Investment, 49 Yale L.J. 891 (1940) sets out instances of
mandatory and permissive statutes, pages 895-900.
invest . . . but no other . . .”
⁵ “The trustees may invest . . .” The Ohio statute 10506-41 and the former
statute 11214 are also permissive in form.
trustee. The effect of these permissive statutes is to afford the trustee some measure of protection if he invests within the legal list, but if they go beyond these categories, then the securities must be judged on their own merits. It is submitted that the purpose of the legislatures when enacting these statutes was two-fold, to set a guide for and to afford some protection to the trustee, and not to act as an investment counselor.

The present Ohio statute is permissive in form as was the former statute. The permissive nature of the former provision was expressly recognized by the Ohio Supreme Court in Willis Adm'r v. Braucher, Guardian. In his opinion Spear, J., said: "It is perhaps enough to say of this statute that it is permissive." It provides for situations where the instrument constituting the trust does not otherwise provide. Undoubtedly it indicates a general policy: a policy of carefulness in the handling of trust funds; it points out a course free from risk, and affords a sure method by which the trustee may secure an affirmation of the legality of his investment in advance. The court in that case, expressly recognizing the difficulties of investing, refused to surcharge a trustee who invested in bank stock, so long as the trustee exercised his discretion in ascertaining the value of the stock, acting in honest belief and good faith, and upon the advice of business men of sound judgment who knew the market value of the stocks.

For cases involving a more strict approach in Ohio, an inferior Ohio Court has held that a trustee may not invest in stocks. An Ohio Appellate Court has stated that the purchase of stocks by a trustee is contrary to Section 11214, but in that case the purchase was also contrary to the terms of the will.

Until the recent case Home Savings and Loan Co. v. Strain et al, Trustees, it has been generally assumed on the authority of the Braucher case that the Ohio investment statute belonged in the permissive class. In the Strain case, the Supreme Court stated that the provisions of Ohio G.C. sec. 11214 were mandatory; that the authority of the testamentary trustee extends only to the categories of securities...
listed in the statute unless the will creating the trust confers greater powers on the trustee, or unless the trustee has received approval of the court to invest in non-legals. The Court answered the defendant's contention that the statute is permissive with a quotation from the final clause of the statute, "... or in such other securities as the court having control of the administration of the trust approves." and infers that this qualifies the "may invest" permissive phrase in the statute. It is submitted that this is simply not so; that this clause does not qualify the permissive nature of the statute, but is merely an additional means by which the trustee may obtain that degree of protection which the list itself affords. We must always return to the basic and fundamental purpose of this statute which was to afford some guides to the trustee, and if followed, some degree of protection.

The Court distinguished the Braucher case on the basis of discretion granted the trustee in the will. This is a valid though legalistic distinction. It is suggested that the true distinction is that even though the Court felt in the Braucher case that a trustee could purchase bank stock and not violate the standards of prudence and good faith, this could not be done in the speculative days of 1928. If this distinction be the true one, the Court recognized the tremendous changes in types and relative risks in investments which took place between 1904 and 1928. Thus it would follow that a purchase of bank stock by a trustee in the year 1928 could not come within the class of prudent trust investments, and the purchase would be a breach of trust in itself. In support of this theory the Court said: "The rule adopted in the majority of jurisdictions is that in the absence of express authority granted by the instrument creating the trust or authority conferred on the fiduciary by Court order or statute, a fiduciary has no power to invest the funds in the stock of a private corporation." It would seem that this is all that was necessary to decide the instant case and make it unnecessary for the Court to re-interpret the statute.

The statute as it now stands with the interpretation of the Supreme Court in the Strain case is mandatory, with investments outside the legal list permitted if the will permits or with court approval. If this interpretation prevails, will the trustee be protected by the mere fact that he stays within the legal list? It would seem that this should follow
and there are some dicta in Ohio cases which could be so interpreted. However, this has not been the interpretation placed on these statutes, although the courts are reluctant to surcharge the trustee if he has stayed within the legal list. The trustee must still exercise his own judgment and discretion and he is not absolved from the duty of exercising reasonable care. It is quite possible that many of the security categories listed would include permitted securities which if purchased by a trustee would constitute gross abuse of his discretion and a breach of trust. Also, the duty of determining whether a bond or mortgage is within any of the categories contemplated by the statute is still placed on the trustee.

In conclusion, it is submitted that the true interpretation should emphasize the permissive nature of the statute set out in the words “may invest;” that the purpose of the legislature, was to set a standard of permissible investments for trustees and did not intend to exclude all others; that the list set out provides a protection for the trustee and a presumption of reasonable diligence and good faith if he follows it; that the clause used by the Court in the Strain case in reaching the mandatory result is inserted for the purpose of extending this protection to non-legals approved by the court. Finally it is suggested that it is not wise public policy to have a mandatory trust investment statute in these days of questionable financing, both public and private, and that it would be better to permit a trustee to purchase a good security wherever found.

J.W.L.