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 depressions, 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 investing 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 investing 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 prescribing 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 investing to the types of securities set out.[3] Any deviation from this list constitutes a breach of trust. The permissive statute[4] is the more usual treatment and also sets forth categories of permissible investments for a

[1] See former section OHIO G.C. 11214. And the present section 10506-41.

[2] *Legal Lists in Trust Investment,* 49 YALE L.J. 891 (1940) sets out instances of mandatory and permissive statutes, pages 895-900.

[3] See for example IND. STAT. ANN. (Burns, 1933 Code Book sec. 18-1204). "Shall invest . . . but no other . . . "

[4] "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.[5] 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[6] is permissive in form as was the former statute.[7] The permissive nature of the former provision was expressly recognized by the Ohio Supreme Court in *Willis Adm'r* v. *Braucher, Guardian*.[8] In his opinion Spear, J., said: "*It is perhaps enough to say of this statute that it is permissive.*[9] It provides for situations where the instrument constituting the trust does not otherwise provide. Undoubedly 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."[10] 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 truste 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.[11] 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.[12]

Until the recent case *Home Savings and Loan Co.* v. *Strain et al, Trustees*,[13] 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

[5] *In Re* Cook's Est., 20 Del. Ch. 123, 171 Atl. 730 (1934). Also see Wilmington Trust Co., *et al.* v. Worth *et al.*, 19 Del. Ch. 314, 167 Atl. 848 (1933). " . . . such statutes are said to create a 'protective haven' for the trustees." 49 YALE L.J. 891 at 898.

[6] OHIO G.C. sec. 10506-41. " . . . may invest them in the following;"

[7] Former OHIO G.C. sec. 11214. " . . . may invest . . . ."

[8] 79 Ohio St. 290, 87 N.E. 185, 55 L.R.A. (N.S.) 273 (1909). Also see 40 OHIO JURISPRUDENCE, TRUSTS, sec. 147 page 383, sec. 148 page 384 where the permissive nature of OHIO G.C. sec. 11214 is recognized.

[9] Italics added.

[10] Willis v. Braucher, *supra*, note 8.

[11] Guthrie v. Cincinnati Gas and Electric Co., 2 Ohio N.P. (N.S.) 117, 15 Ohio Dec. 23, citing King v. Talbot, 40 N.Y. 76 (1869).

[12] *In Re* Trusteeship of Couden, 9 Ohio App. 207 (1917).

[13] 130 Ohio St. 53, 3 Ohio Op. 104, 18 Ohio L. Abs. 60, 99 A.L.R. 903 (1935).

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."[14] 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."[15] 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,[16] 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

[14] OHIO G.C. sec. 11214.

[15] Home Savings and Loan Co. v. Strain *et al.*, Trustees, *supra*, note 13, at page 58.

[16] See SCOTT ON TRUSTS (1939) sec. 227. 13 n. 2. But note, the present statute, OHIO G.C. sec. 10506-41 has not been interpreted on this point. The new statute is considerably more extensive in scope and does not contain the phrase which the Court used to make the former statute mandatory. Many lower court opinions contain *dicta* to this effect. See, Shick v. Kroeger, 22 Ohio L. Abs. 389 (1936); Witmeyer v. Sheets, 24 Ohio L. Abs. 59, 64, 66 (1937).

and there are some dicta in Ohio cases which could be so interpreted.[17] 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.[18] The trustee must still exercise his own judgment and discretion and he is not absolved from the duty of exercising reasonable care.[19] 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.[20] 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.[21]

In conclusion, it is submitted that the true interpretation should emphasize the permissive nature of the statute set out in the words "may invest;"[22] 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 presumpion of reasonable diligence and good faith if he follows it; that the clause[23] 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.

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[17] *In Re* Trusteeship of Trischer, 46 Ohio App. 405, 15 Ohio L. Abs. 54, 39 Ohio L. Rep. 451, 188 N.E. 876 (1933). Willis v. Braucher, 79 Ohio St. 290, 298 " . . . it points out a course free course from risk and affords a certain sure method by which the trustee may secure an affirmation of the legality of his investment in advance."

[18] *Legal Lists in Trust Investment* (1940), 49 YALE L.J. 891, 895.

[19] Delafield v. Barrett *et al.*, 270 N.Y. 43, 200 N.E. 67, 103 A.L.R. 441 (1936). Also see, Matter of Jacobs, 152 Misc. 139, 273 N.Y.S. 279 "The effect of the statute is not to excuse the fiduciary in case of loss where he invests in securities of the permitted classes without proper investigation and the exercise of reasonable care . . . ." Also see, 2 SCOTT ON TRUSTS (1939) sec. 227, 12.

[20] Municipal bonds are in the permitted class in Ohio if the city has not defaulted on its obligations for more than one hundred and twenty days in the previous ten years. The bonds of American municipalities are at the present time notorious as a poor financial risk when considered as a class. An investment by a trustee in such obligations, completely fulfilling the terms of the statute could, even so, be a breach of duty.

[21] *Supra*, note 18.

[22] As a general proposition when a legislature uses the word "may," such use connotes discretion. If a mandatory interpretation is desired "shall" is used.

[23] *Supra*, note 14.