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THE COURT MOVES THE DEAD HAND
THE POWER OF A COURT OF EQUITY TO ALTER, VARY OR MODIFY THE EXPRESS TERMS OF A TRUST IN AN EMERGENCY

JOSEPH E. BRUNSWICK*

"The Moving Finger writes; and having writ
Moves on: nor all your Piety nor Wit
Shall lure it back to cancel half a Line,
Nor all your Tears wash out a Word of it."
—Rubaiyat of Omar Khayyam, Fitzgerald's translation.

HAD the poet been a chancellor, his verse could well be considered to be a court's expression, adopted to describe a general view regarding trusts which are created without a reservation of power to alter or change. But the poet was not a chancellor, and the chancellor, upon turning to his conscience, does not find himself bound in the iron-jawed vise of the trust instrument—he will permit change, and when the tears touch his conscience his decree will wash out the words which caused the tears.

The extent of the power of equity to alter or vary the terms of an express trust, which by its terms is irrevocable, and the elements of the situation which will cause the court to exercise this extraordinary power are problems of moment in periods of inflation as well as depression. Many a beneficiary of a rich trust finds his income seriously curtailed, his principal endangered; many a trustee is faced with a duty to perform trust functions without funds for the purpose and is at a loss as to what course to pursue with regard to his duty as trustee, not only to benefit the trust but also to avoid personal liability.

Thus, where, by a deed of trust or by a will, the settlor has stated in unequivocal terms what disposition is to be made of property, and in what form of investments it is to be held, the appearance of an emergency which

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will cause the destruction of the trust or render it inoperative may well tax the conscience of the chancellor and induce the exercise of the extraordinary powers of equity to authorize a change in administration.

The exercise of that extraordinary power will be viewed here through cases in which emergency conditions, not contemplated nor provided for by the settlor, arose and impelled the trustee to seek approval for a change or deviation from the terms of the trust. Only those cases of private trusts will be considered, however, which are entirely valid, enforceable, and in the course of administration. Accordingly, no further attention will be paid to those situations where the court will terminate or modify the trust either because the purpose has been achieved, or because of illegality, or because of impossibility of performance, or because of fraud or mistake; nor will consideration be given to the problem of termination of a trust upon application of the beneficiary. Also eliminated is all consideration of the cy-pres doctrine and its application to charitable trusts, except as they may be part and parcel of a private trust.

1 Restatement of the Law of Trusts, sec. 4, reads: "The phrase 'terms of the trust' means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings."

2 Ringrose v. Gleadall, 17 Cal. App. 664, 121 P. 407 (1911); Fox v. Fox, 250 Ill. 384, 95 N. E. 498 (1911); Bowditch v. Andrew, 8 Allen (Mass.) 339 (1864); Simmons v. Northwestern Trust Co., 136 Minn. 357, 162 N. W. 450 (1917).


5 Kilduffe et ux. v. Maitland, 30 W. N. C. (Pa.) 46 (1892).

6 Kerr v. Couper, 5 Del. Ch. 507 (1883).

7 There are many approaches to this problem and a number of causes for the application. The courts have not been uniform in their determination of the question. For a full discussion of the problem see: Austin W. Scott, "Control of Property by the Dead," 65 U. of Pa. L. Rev. 632 (1917); Alvin E. Evans, "Termination of Trusts," 37 Yale L. J. 1070 (1928); Edward W. Cleary, "Indistructible Testamentary Trusts," 43 Yale L. J. 393 (1934), and cases cited therein.

8 Nothing seems clearer in the law of trusts than the power to vary the terms of charitable trusts upon an application of the doctrine of cy pres.
The discussion here is confined primarily to testamentary trusts and inter-vivos trusts where the settlor is deceased, for the problem under consideration obviously does not arise where the settlor has retained a power of revocation or modification. When the settlor has created an irrevocable trust the same principles apply as in testamentary trusts, except that proof of the fact that the settlor would have provided for the alteration suggested had he foreseen the circumstances is simpler by reason of the testimony of the settlor.

The first general principle is that a trustee has those powers given to him by the trust deed or by the will and no others; he must comply strictly with the terms and may not deviate from them without incurring personal liability for breach of trust. Of course, if the powers are general the trustee has greater latitude in the exercise of them, but the instrument will set the limits whether broad or narrow. In certain cases where the trustee is uncertain as to the extent of his authority, he may apply to the court for interpretation, but the court may, and


By reason of statute 43 Elizabeth, c. 4 (1601), known as the Statute of Charitable Uses, many of the restrictions and technicalities necessary in private trusts are eliminated. See Vidal v. Girard's Executors, 2 How. (43 U. S.) 127, 11 L. Ed. 205 (1844).

10 For right to include power of revocation, see Bear v. Millikin Trust Co., 336 Ill. 366, 168 N. E. 349, 73 A. L. R. 173 (1929).

11 There seems to be no distinction made by the courts as to whether or not the settlor is alive if he has no power to change the trust and if he has not reserved the right he may not modify or alter it. Gulick v. Gulick, 39 N. J. Eq. 401 (1885); Dickerson's Appeal, 115 Pa. St. 198, 8 A. 64 (1887); Lawrence v. Lawrence, 181 Ill. 248, 54 N. E. 918 (1899).

12 See 3 Bogert on Trusts and Trustees (1935) 1733-56, secs. 551-553, and collection of cases there cited.


14 See footnote 12.

15 "Equity has jurisdiction over all matters relating to trust property, and in the execution and administration of the trust, in all cases of doubt as to their rights and liabilities and what their conduct should be, trustees are entitled to and should seek instruction and direction from the court," Laughlin v. Griswold, 169 Wis. 50, (Laughlin v. Wells Bldg. Co.) 171 N. W.
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will, in its discretion, refuse to hear him when it appears that interpretation is unnecessary,\textsuperscript{16} and it will not exercise the trustee's discretion for him.\textsuperscript{17} This matter of judicial interpretation is, however, no exception to the principle that the instrument determines the powers and duties, but is rather an extension of it.

Out of this broad general principle of the trustee's powers is carved a general exception that in a proper case the court of equity will authorize a trustee to vary or deviate from the terms of an express trust when an emergency arises.\textsuperscript{18} The Supreme Court of Illinois, in the early case of Curtiss v. Brown,\textsuperscript{19} gave a full, comprehensive, and understanding statement of the power and the reasons for it when it said:

Can it be said that the beneficiary of an estate which would bring in the market one hundred thousand dollars, should perish in the street from want or be sent to the poor-house for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of a court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency. . . . From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and . . . that power is vested in the court of chancery.

From these words of the court one might conclude at first blush that the problem is answered—the court of

\textsuperscript{16} Shurtleff v. Schoenleber, 106 Neb. 870, 184 N. W. 814 (1921).

\textsuperscript{17} McCarthy v. Tierney, 116 Conn. 588, 165 A. 807 (1933); In re Wander's Will, 252 N. Y. S. 813 (1931).

\textsuperscript{18} Restatement of the Law of Trusts, par. 167, and the cases cited throughout the following subject matter.

\textsuperscript{19} 29 Ill. 201 (1862). See also Pennington v. Metropolitan Museum of Art, 65 N. J. Eq. 11, 55 A. 468 (1903).
equity will authorize the trustee to vary the terms of an express trust in an emergency. This is true, but these questions then present themselves: Whence comes the power of the court? When does such an emergency situation exist? To what degree will the court authorize the trustee to deviate?

As to the power of the court to hear and determine applications from the trustee for leave to deviate from the express terms of the trust, or from the beneficiaries to compel the deviation, we find the statement: "The court's power to alter administrative terms of the trust and thus change the power of the trustee is doubtless an inherent power." In the reported cases and text material on this power there seems to be no distinct historical background or growth. It appears to be a doctrine which sprang up under equitable principles, and, once having come into being, it appears to have gone through little or no development, but to exist as it appears in the earliest cases where found. Some development may be seen in application of the doctrine to particular sets of facts, but the principle seems to have been constant. The exercise of the power by the court in authorizing such deviations is perhaps best explained by the statement:

The jurisdiction of a court of equity does not depend upon the mere accident whether the court has, in some previous case or at some distant period of time, granted relief under similar circumstances, but rather upon the necessities of mankind and the great principles of natural justice, which are recognized by the courts as a part of the law of the land, and which are applicable alike to all conditions of society, all ages and all people. . . . Where it is clear [that] the circumstances of the case in hand require an application of those principles, the fact that no precedent can be found in which relief has been granted under a similar state of facts is no reason for refusing it.

In three classes of cases courts of equity have consid-

21 Longwith v. Riggs, 123 Ill. 258, 14 N. E. 840 (1887).
22 Dodge v. Cole, 97 Ill. 338 (1881).
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erated that the facts show the type of emergency in which its power will be exercised: (1) where, by a construction of the instrument, it is found that the testator or settlor contemplated that the acts for which the trustee seeks authority were the real intent and were actually directed by the language used;\(^{23}\) (2) where a change from the express terms is necessary to carry out the intent of the testator or settlor;\(^{24}\) (3) where a deviation from the express terms of the trust becomes necessary to preserve the trust property and in addition to make possible the continued existence of the trust so that its purpose may be consummated.\(^{25}\)

The first two classes may appear to be so similar as to be identical but an analysis will show a striking difference. Strictly, the first class is not a deviation but an interpretation, the court finding that the apparent deviation decreed was exactly what the testator intended by the words he used.\(^{26}\) The second class is composed of those cases where the court finds the general intent, but also finds that the express terms prohibit its consummation by reason of some change in circumstance, and accordingly decrees authority to the trustee to deviate from those terms.\(^{27}\) From this comparison the difference is seen; the first class is not truly a deviation, but merely an apparent one.

The first class of cases is composed principally of those cases where a testator devises or bequeaths property in trust with the direction that the income be applied to the

\(^{23}\) This situation usually arises in will cases or in cases for the construction of a trust, and, as is explained in the following discussion and cases cited is not actually a deviation.

\(^{24}\) See cases cited following and Restatement of the Law of Trusts, sec. 167, and illustrations 6, 7, 8 and 9 there stated.

\(^{25}\) See cases cited following, and Restatement of the Law of Trusts, sec. 167, and illustrations 6, 7, 8 and 9 there stated.

\(^{26}\) The cases on this point are legion. For a collection from all jurisdictions see all the Decennial Digests of American Digest: Wills, key numbers 439 and 684 (6).

\(^{27}\) Restatement of the Law of Trusts, sec. 167.
support of one or more beneficiaries with a remainder over to others, or to the same beneficiaries after a period of years. Under these circumstances the court will generally find by reason of the words used, when the doctrine is applied, that the intent of the testator or settlor was to provide support to the named beneficiaries without regard to the remainder, and in the event the income is inadequate to provide suitable support or a minimum sum named, will make the payments a charge upon the principal fund.\textsuperscript{28}

In the case of \textit{Gluckman v. Roberson},\textsuperscript{29} the New Jersey court was asked to pass upon a will which devised property to trustees and provided a minimum payment of $40 a week out of income to the widow with a remainder to charity. In this typical case the court found that the primary intent of the testator was to support the widow and decreed that the payments should be a charge upon the principal, saying, "I construe the second paragraph to provide that the executors and trustees are authorized to pay the widow out of the corpus such sums as may be necessary. . . ."

In \textit{Wilce v. Van Anden},\textsuperscript{30} the court found that a will devising property to a trustee which was to be disposed of and used in raising a set fund "from which, together with the income thereof, they shall pay annuities" to certain beneficiaries, with a remainder to charity, was sufficient to charge the corpus with the annuity payments.\textsuperscript{31}

However, the court will often refuse to charge the principal with payments when it does not affirmatively appear from the instrument that the payments were the

\textsuperscript{28} Hedges v. Hopper, 118 N. J. Eq. 359, 179 A. 261 (1935); Rezzemini v. Brooks, 236 N. Y. 184, 140 N. E. 237 (1923).

\textsuperscript{29} 115 N. J. Eq. 522, 171 A. 674 (1934).

\textsuperscript{30} 248 Ill. 358, 94 N. E. 42 (1911).

\textsuperscript{31} It is interesting to note that in this case the gift over to charity was held void because of the uncertainty of the trust \textit{res} on the reasoning that since the annuities were charges upon the corpus of the estate there could be no certainty as to the amount which could be left.
primary intent and when it appears that one other than the recipient of the support is entitled to the residue\textsuperscript{32} or where the one entitled to support will take the residue contingent upon certain events.\textsuperscript{33} The court will not determine which party the testator intended to favor.\textsuperscript{34}

Thus, this first class of cases is not truly the granting of an authorization to deviate from the terms of a trust but amounts to a finding by the court that the testator intended to do what is ordered done. Nevertheless, these decisions give rise to the thought that the court may, in certain cases, in fact be varying the terms of the trust and be furnishing its own ideas of what the testator ought to have intended.\textsuperscript{35}

In the second class of cases, those in which a change from the express terms is necessary to carry out the intent of the testator or settlor, are found the cases in which the court unhesitatingly states that by virtue of its equity powers it is deviating from the trust.\textsuperscript{36} In both this class and the third class we find the courts saying that an emergency has arisen and it is the duty of the court to place itself in the position of the settlor and do what he would have done to carry out his primary intent\textsuperscript{37} in view of the unexpected circumstances.

\textsuperscript{32} Stephens v. Collison, 274 Ill. 389, 113 N. E. 691 (1916); Shaller v. Mississippi Valley Trust Co., 319 Mo. 128, 3 S. W. (2d) 726 (1928).
\textsuperscript{33} Olsen v. Youngerman, 136 Iowa 404, 113 N. W. 938 (1907).
\textsuperscript{34} This raises a very questionable argument in the mind of the court and it is usually unwilling to make this decision; see Stewart v. Hamilton, 151 Tenn. 396, 270 S. W. 79 (1925).
\textsuperscript{35} There is no more firmly established doctrine than that the court will not make a new will for the testator, but the suggestion is often raised that the courts do it in fact under the guise of interpretation. Willis v. Watson, 4 Scam. (5 Ill.) 64 (1842).
\textsuperscript{36} Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900); Weakley v. Barrow, 137 Tenn. 224, 192 S. W. 927 (1917), where the court said, "Courts of chancery under their inherent jurisdiction to administer and protect trust estates, and to direct the conversion of realty into personalty, and vice versa, have the power to modify the terms as to management of a trust imposed by the settlor, under this doctrine; that is, when, by reason of some exigency arising from unforeseen and unanticipated circumstances, the property held in trust will fail to answer the primary purposes of the trust, if the court's power is not brought into exercise."
\textsuperscript{37} Curtiss v. Brown, 29 Ill. 201 (1862).
The typical pattern in a case of the second class is where $S$ devises property to $T$ upon trust with the express direction that the income therefrom be devoted to the care and support of $B$, and in equally express terms directs that $T$ invest the funds in bonds $X$ and no others. In the course of years, bonds $X$ become a precarious investment, and default in payment of interest. $B$, the chief object of the settlor's bounty, becomes destitute, although the principal fund continues to exist in a somewhat diminished but adequate amount, which could produce income if invested in some other property. When this condition exists, the court will authorize the trustee to sell securities $X$ and reinvest in income-producing securities despite the clear mandate of the trust terms to hold securities $X$ on the theory that had the settlor been present to direct the investments he would have done so to continue to provide support for $B$. It must be noted that this power is one which the court will exercise only with the greatest caution, and not at the mere petition of the beneficiary, or when its exercise is merely advantageous to the beneficiary.

In a well-known Kentucky case, a testator left his business in trust with the provision that the income be paid to certain beneficiaries. Difficulty arose because the business was that of making whiskey barrels and the advent of the prohibition era destroyed the market. Under this set of circumstances, the court determined that the physical property, which was of considerable value, should be sold and the proceeds invested in income-producing property in order that the payments for support might still be continued.

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39 In re Tollemache, [1903] 1 Ch. 457, 955.
42 Stout v. Stout, 192 Ky. 504, 233 S. W. 1057 (1921).
Another case of the same general type was one decided by the New Jersey court in which the testator had left his interest in a jewelry business in trust with direction that the income be paid to certain named beneficiaries. Because of changing conditions in the industry it became apparent that the income would soon become inadequate for the trust purposes, and the court accordingly authorized a sale of the property and a reinvestment in other securities.43

However, the Illinois court which had often directed a change in trust administration44 when necessary to accomplish trust purposes, refused to permit deviation and sale of the corpus in a case where it appeared that such change was unnecessary for the fulfilment of the trust purpose, although it would have been profitable for the beneficiaries.45

The third class, where a deviation from the express terms of the trust is necessary for the preservation of the trust property, is the type of case in which it is simplest for the court to authorize a deviation. When it is apparent that investments held by the trustee are so precarious that reinvestment is essential to the continued existence of the trust, the court will authorize the trustee to sell and reinvest.

Examples of this situation are seen where farm land is heavily taxed because of expansion of cities,46 where business conveyed in trust becomes unprofitable,47 and where securities of one type or another, by reason of the condition of the business or property securing them, becomes a hazardous investment.48

44 Starting with Curtiss v. Brown, 29 Ill. 201 (1862), the Illinois court has been a leading jurisdiction in permitting deviations from the terms of an express trust in an emergency and has followed the doctrine in at least fourteen cases which are cited throughout this discussion. See footnote 72.
46 Hale v. Hale, 146 Ill. 227, 33 N. E. 858 (1893).
This third class is in a sense an extension of the second, and the two taken together as one give the true example of the type of case in which the court properly exercises its extraordinary power of authorizing a trustee to deviate from the express terms of his trust.

An example of this type is seen in an Illinois case where the testator left his farm in trust with the direction that the income be paid to certain beneficiaries and that it be used only as a farm for the period of the trust. Because of the growth of the nearby city which extended out to the farm, taxes were increased and special assessments levied so that there was grave danger that the property would be sold for taxes and the corpus of the estate thus destroyed. Faced with this situation, the court authorized a sale of part of the land, which was of great value, for the purpose of subdividing, in order to raise funds to save the balance.49

The degree to which the court will authorize deviation, exclusive of termination or advances, may be summed up by stating the various alterations or deviations which have been considered adequate to accomplish the purposes. These are: (1) granting of power to sell,50 (2) granting a power to lease,51 (3) granting a power to improve realty,52 (4) granting power to change invest-

49 Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914).
50 Stout v. Stout, 192 Ky. 504, 233 S. W. 1057 (1921); Price v. Long, 87 N. J. Eq. 578, 101 A. 195 (1917); Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914); Bibb v. Bibb, 204 Ala. 541, 86 So. 376 (1920), sale of land; Vickers v. Vickers, 189 Ky. 323, 225 S. W. 44 (1920), sale of land; Davis, Petitioner, 14 Allen (Mass.) 24 (1867), sale of residence; Upham v. Plankinton, 166 Wis. 271, 165 N. W. 18 (1917), sale of residence, now in business district; In re O'Donnell, 221 N. Y. 197, 116 N. E. 1001 (1917); Graney v. Connolly, 124 Me. 221, 126 A. 878 (1924), sale of unproductive lands. See also Mann v. Mann, 122 Me. 468, 120 A. 541 (1923).
51 Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900); Mayall v. Mayall, 63 Minn. 511, 65 N. W. 942 (1896).
52 In re Newman's Settled Estates, 9 Ch. App. 681 (1874). One of the most interesting cases on the general subject is Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555 (1926), where the court authorized the improving of and leasing for a term of years of valuable business property which actions were expressly prohibited by the will. The court mentions public policy as part of its reason, but basically the improvement of the trust controlled.
ments or make unauthorized investments. These powers practically run the whole gamut of activities in which a trustee could be engaged; so it appears that the court has ample power to protect a trust in any circumstance which might arise by the use of one or another type of deviation.

In recent years, since a trust deed in the nature of a mortgage has been frequently used in place of the common-law form of mortgage, courts have been presented with the problem of determining whether their broad equitable power to vary the terms of a trust may properly be applied in the foreclosure of a trust deed. It might be suggested that in case of a frozen real estate market the court should use its power to effect a liquidating arrangement for the benefit of the holders of bonds secured by the trust deed. This phase of the problem was presented in the case of Chicago Title and Trust Company v. Robin, where the Supreme Court of Illinois decided that a court of equity could not exercise its power, even in the face of an emergency, to compel the trustee to bid for the property at the foreclosure sale for the benefit of the bondholders. The court here treated the case as one where the relation between the parties was one of contract, and, thus, where the court could not make a new contract for the parties. If the court had regarded the case as one of ordinary trust, however, it would have had abundant authority in Illinois to support the view

53 In re London's Estate, 171 N. Y. S. 981 (1918); New Jersey National Bank & Trust Co. v. Lincoln Mortgage and Title Guaranty Co., 105 N. J. Eq. 557, 148 A. 713 (1930); In re New, [1901] 2 Ch. 534.

54 361 Ill. 261, 198 N. E. 4 (1935). Now stare decisis by reason of Chicago Title and Trust Co. v. Bamberg, 361 Ill. 291, 198 N. E. 10 (1935), which follows the decision on the main case. The case came to the Supreme Court on certificate of importance from the Appellate Court of the first district which had affirmed a decree of the Circuit Court of Cook County, which directed that the trustee under a trust deed conveying real estate to secure bonds bid in the property for the benefit of all bondholders in the event the price bid at the sale was inadequate or below a figure set by the court, and should hold the property for the benefit of said bondholders. See 13 CHICAGO-KENT REVIEW 160 and 355.
that equity could vary the terms of an express trust. And it is interesting to note that in other jurisdictions trust deeds have been treated as coming under the general principle of trusts, with the result that the court of equity will vary the terms of a trust to effect a conservation of the property for the beneficiaries.

Although the power of a court of equity to authorize deviation from the express terms of a trust in a proper case is well supported and established by sufficient authorities, three problems arise on which little or no authority is to be found: First, What is the liability of the trustee if he deviates from the express terms of a trust in an emergency without authority of the court? Second, What is the trustee’s liability if he complies strictly with the trust terms under circumstances which would properly move a court to authorize deviation and makes no application for that authorization? Third, What will the court’s response be to requested deviation when, because of conditions, the purchasing power of the trust income is wholly inadequate for the express trust purposes, but when the property is in no danger of de-

55 Curtiss v. Brown, 29 Ill. 201 (1862); Voris v. Sloan, 68 Ill. 588 (1873); Hale v. Hale, 146 Ill. 227, 33 N. E. 858 (1893); Longwith v. Riggs, 123 Ill. 258, 14 N. E. 840 (1887); Baldridge v. Coffey, 184 Ill. 73, 56 N. E. 411 (1900); Marsh v. Reed, 184 Ill. 263, 56 N. E. 306 (1900); Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523 (1898); Denegre v. Walker, 214 Ill. 113, 73 N. E. 409 (1905); Johnson v. Buck, 220 Ill. 226, 77 N. E. 163 (1906); Roberts v. Roberts, 259 Ill. 115, 102 N. E. 239 (1913); Packard v. Illinois Trust and Savings Bank, 261 Ill. 450, 104 N. E. 275 (1914); Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914); Cary v. Cary, 309 Ill. 330, 141 N. E. 156 (1923); Suiter v. McWard, 328 Ill. 462, 159 N. E. 799 (1928).


58 See Austin Wakeman Scott, “Deviation from the Terms of a Trust,” 44 Harv. L. Rev. 1025 (1931).
struction and is actually enhanced in value and the income in terms of dollars is unaffected.\textsuperscript{59}

It is clear that a trustee is liable for any loss which may occur because of his deviation which the court would not have authorized.\textsuperscript{60} As to his liability for a deviation which the court would have authorized on application but which has turned out ill, there is conflict of authority.\textsuperscript{61} Deviations which are profitable and which the court would have authorized, create no liability and they will be ratified by the court on application.\textsuperscript{62}

The most serious and doubtful branch of the problem lies in the situation where an emergency arises under which the court should properly authorize a deviation, but, because of the urgent nature of the emergency, the trustee does not have time to apply to the court for authority and, hence, in good faith deviates from his powers with a resulting loss to the estate. In this state of affairs, the court, acting upon a petition filed afterward, may well say that the facts at the time of the deviation were apparently sufficient to have induced it to exercise its powers, but that, since the deviation resulted disadvantageously to the trust, the court in its wise discretion would not, at the time of the filing of the petition, authorize it to be done nor ratify it after it has been done.\textsuperscript{63} On this doubtful point it is suggested that the better and more reasonable rule should be that if the deviation is made in good faith, in the face of an emergency, and was of such a nature that the court would

\textsuperscript{59} The writer has found no cases arising under this state of affairs but approaches the question with the suggestion that should the courts feel called upon to enlarge their view of allowing deviation from trusts, they will undoubtedly be called upon to consider petitions founded upon this type of emergency.

\textsuperscript{60} McCrory v. Beeler, 155 Md. 456, 142 A. 587 (1928); Estate of Sharpe, 2 Phila. 280 (1857).


\textsuperscript{62} Brown v. Hazelhurst, 54 Md. 26 (1880); Williams v. Smith, 10 R. I. 280 (1872).

\textsuperscript{63} Shirk v. Soper, 144 Md. 269, 124 A. 911 (1923).
have authorized it at the time of the deviation no liability should attach to the acts of the trustee, regardless of the financial result.\textsuperscript{64}

No less doubtful is the liability of a trustee for not seeking to deviate from the trust when it would be proper. It has been stated that even though a trustee carries out his duty to the letter in conforming to investments stipulated in the trust deed, he is, nevertheless, not relieved of the duty of watching carefully over the investments.\textsuperscript{65} In the light of this, may a trustee without liability sit complacently by and watch the trust corpus diminish and disappear merely because he is literally complying with investment restrictions even though a change in circumstances is destroying the value of the investments? Or is it his duty to apply to a court of competent jurisdiction for authority to deviate from the terms of that trust, to take such steps as are necessary to preserve the income or corpus?

A search of the authorities fails to reveal a satisfactory answer.\textsuperscript{66} The \textit{Restatement of the Law of Trusts} states that under circumstances of this nature it is the duty of the trustee to act within a reasonable time and in a reasonable manner.\textsuperscript{67} In addition, it has been held in a case brought to enforce liability upon the trustee for loss occasioned by failure to sell securities in a trust fund which were an exceedingly precarious investment that a cause of action had been stated.\textsuperscript{68} In a recent New York case involving the fiduciary duties of a guardian the court stated that the guardian would be liable for improper investments in hazardous securities although that

\textsuperscript{64} 1 Restatement of the Law of Trusts 424, sec. 167, comment on subsection (2), e, 5.
\textsuperscript{65} Jairus Ware Perry, A Treatise on the Law of Trusts and Trustees (3d ed.), I, 584, sec. 465.
\textsuperscript{66} Although there is some discussion in the secondary authorities, all of the writers seem to find only one case squarely in point. See footnote 68.
\textsuperscript{67} Restatement of the Law of Trusts, sec. 167, par. 3.
\textsuperscript{68} Johns v. Herbert, 2 App. D. C. 485 (1894).
class of securities was sanctioned by the statute as being proper for investment of trust funds. How far the courts of various jurisdictions will go in following this rule, if rule it be, is a matter of speculation, but it seems that if the courts adopt the Restatement in their opinions and make it the primary law by their adoption, at least some courts will adopt this section along with others.

What course the courts will follow in the face of circumstances which destroy the purchasing power of the trust income, is a question about which there can be nothing but speculation. Although such a situation may defeat the intent of the settlor and thus bring the problem within the second class of cases just discussed in that diminished purchasing power of income on fixed investments actually fails to provide adequate support for beneficiaries, it would seem that the courts will have to reach a stage of liberality unknown at the present time before they will decree a change under such circumstances. Statutes and policy governing trust investments at the present time should bind the court to refuse relief under such a state of affairs. The problem is one which may become important in the event of currency inflation. It is of particular interest as a scholastic query, because it might place the court in a dilemma, for if the case falls within one of the classes under which the court should grant relief because of the impairment of the trust purposes, it may at the same time be of such a nature as to find the courts bound by policy and statute.

In summation it may be said that "when, through an overabundance of caution, accompanied by a lack of foresight to provide for contingencies, the testator directs

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69 Delafield v. Barret, 270 N. Y. 43, 200 N. E. 67 (1936). As an indication of what the courts may do in this case, the court by way of dictum, citing other New York cases, held that mere statutory eligibility did not excuse loss. Of course, here the guardian had power to invest in any legal security. The type of case where the question is usually raised is one where the trustee is expressly directed to hold a certain, definite security.

70 For example, Ill. State Bar. Stats. 1935, Ch. 3, par. 144.
that his hand, though stilled by death, shall continue to conduct and control his property'" and when an emergency arises which threatens the trust, the court of equity, in the exercise of its equitable powers will decide that "had the donor of the trust foreseen the exigencies that have arisen since the trust declaration was made, a due regard for the interest of his beneficiaries would have compelled him to make a provision." However, on the three special questions, it can only be said that the answers remain a matter of doubt and speculation; but they are problems worthy of considerable thought on the part of persons who are, or may, find themselves in the situations suggested and who may be compelled to take them to reviewing courts as cases of first impression.

72 Johns v. Montgomery, 265 Ill. 21, 106 N. E. 497 (1914).