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THE ILLINOIS PRUDENT MAN INVESTMENT STATUTE.

William H. Dillon

The Illinois legislature, in 1945, amended Section 1 of an Act entitled "An Act concerning powers of trustees," and thereby adopted the Prudent Man Investment Rule for trustees. This amendatory Act, approved by the Governor on May 17, 1945, and effective July 1, 1945, reads as follows:

§ 1. In acquiring, investing, reinvesting, exchanging, retaining, selling and managing property for any trust here-tofore or hereafter created, the trustee thereof shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, the trustee is authorized to acquire and retain every kind of property real, personal or mixed, and every kind of investment, including specifically but without in any way limiting the generality of the fore-

* Member, Illinois Bar; A.B., DePaul University, LL.B., Loyola University; Vice-Chairman, American Bar Association Section of Real Property, Probate and Trust Law.
going, bonds, debentures and other corporate obligations, stocks, preferred or common, and real estate mortgages, which men of prudence, discretion and intelligence acquire or retain for their own account, and within the limitations of the foregoing standard, the trustee is authorized to retain property properly acquired, without limitation as to time and without regard to its suitability for original purchase.

§ 1a. Nothing contained in the foregoing section shall be construed as authorizing or requiring any departure from, or variation of, the express terms or limitations set forth in any will, agreement, court order or other instrument creating or defining the trustee's duties and powers, but the terms "legal investment" or "authorized investment" or words of similar import, as used in any such instrument, shall be taken to mean any investment which is permitted by the terms of Section 1 hereof.

§ 1b. Nothing contained in Section 1a of this Act shall be construed as restricting the power of a court of competent jurisdiction to permit a trustee to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale or management of trust property.

§ 1c. The word "trust," as used in the foregoing sections, means a trust created by will, deed, agreement, declaration, written instrument, or in any lawful manner. The word "trustee" means the trustee, or any successor trustee, of any such trust, whether appointed by the instrument creating the trust, by order of court, or otherwise.²

The new Act stems from the so-called Massachusetts Investment Rule for Trustees enunciated in 1830 in the famed case of Harvard College v. Amory.³ Predicated upon the concept that "Do what you will, the capital is at hazard," the statement of the rule made by the court therein was that:

All that can be required of a trustee to invest, is, that

³ 26 Mass. (9 Pick.) 446 (1830).
he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.\(^4\)

This rule has been uninterruptedly followed by the Massachusetts courts during the ensuing one hundred and fifteen years.\(^6\) The current Illinois statute, therefore, commences with a background of more than a century of judicial construction. The new legislation is not unique, however, for in addition to Illinois, the Prudent Man Rule is followed by statute in eight states,\(^6\) and has been made the rule by judicial decision in seven others.\(^7\)

There is naturally an abundance of judicial decision construing and applying the Prudent Man Rule in Massachusetts, but for reasons subsequently set forth it is not deemed necessary to re-

\(^{4}\) 26 Mass. (9 Pick.) 446 at 461.


\(^{6}\) The following jurisdictions, as well as Illinois, have enacted a model statute prepared by a committee of the American Bankers Association, Trust Division: California, Statutes, 1943, Ch. 811; Delaware, Laws 1943, Ch. 171. § 4401; Maine, Laws 1945, Ch. 80. § 17-A et seq.; Minnesota, Laws 1943, Ch. 635; Texas, Gen. Laws 1945, Ch. 77, § 46. Other jurisdictions have achieved similar results by various forms of statutory enactments: Connecticut, Gen. Stat. 1937, § 1289e; Michigan, Pub. Acts 1937, No. 177; New Hampshire, Rev. Laws 1942, p. 1551, § 17. It should be noted that the Minnesota and Michigan statutes refer to a "prudent trustee" standard rather than a "prudent man" standard.

view these cases. On the other hand, in order to determine the extent of change effected in the Illinois law by the new Act, it is important to examine its legislative and judicial antecedents. With this end in view, a review of the Illinois decisions and preceding statutory enactments seems proper.

I. EARLY ILLINOIS CASES

The earliest expression in Illinois concerning the investments which a trustee could properly make, in the absence of directions in the trust instrument, is to be found in Sholty v. Sholty,⁹ where the court said:

It is the duty of a trustee holding funds in trust, with no express or implied directions in the instrument creating the trust as to the management of the fund, to invest the same in good and safe securities ... There can be question that it was the clear duty of the appellant [trustee], ... upon receiving the trust fund, to loan the same on sufficient securities, at lawful interest, exercising the same care and diligence as in the transaction of like business for himself. ...¹⁰

The court did not specify what type of securities were "good and safe," but it is significant to note that they were to be interest-bearing. It also injected a standard of prudence into its decision by requiring a trustee to exercise "the same care and diligence as in the transaction of like business for himself."

Similar language was used by the court, in Butler v. Butler,¹¹ when it disapproved a trustee's purchase of lands and the opening of a coal mine thereon. Under the terms of the will there concerned, a specified sum was bequeathed to certain trustees, who were to "keep the same invested, in their discretion." Construing this provision, the court said that "it was the intention of the testator that the trustees should invest said money and keep it

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⁸ See note 5, ante, and also note 88, post.
⁹ 140 Ill. 81, 29 N. E. 1041 (1892).
¹⁰ 140 Ill. 81 at 87, 29 N. E. 1041 at 1043.
¹¹ 164 Ill. 171, 45 N. E. 426 (1896).
invested, as a fund, in interest-bearing securities that were readily convertible into money," and when the trustees "used the money in purchasing lands and in opening a coal mine thereon, and in mining operations, such acts were a perversion of the fund." The concept of ready convertibility introduced by the court does not aid in defining the type of "interest-bearing securities" which it had in mind.

In *White v. Sherman*, the court held a trustee's estate liable to the beneficiaries for losses to the trust fund incurred by depreciation in the value of railroad stocks purchased by the trustee. The trustee had purchased the stocks in his own individual name and the stock certificates were so issued. In addition, he had been speculating heavily in the same stock and had personally profited by collecting commissions on insurance premiums paid by him, concealing these facts from the beneficiaries. The court recognized that these actions constituted breaches of trust sufficient to warrant surcharges against the trustee. Nevertheless, the opinion included the following statement:

Where there are no express directions in the instrument creating the trust, and no statutory provisions, in relation to the character of the securities in which trust funds may be invested, a trustee cannot invest such funds in stocks, bonds or other securities of private business corporations. In England, trustees are required to invest trust funds in real estate securities, or in the public securities of the British government. In this country the same requirement, in regard to making investments in real estate securities or government securities, is generally recognized by the courts. At any rate, "all speculative risks are forbidden." . . . The rule is, that, in the investment of trust funds, the trustee must not only act in good faith and use sound discretion and reasonable vigilance, but, where he is appointed by a court . . . he must select such securities as the court will approve.

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12 168 Ill. 589, 48 N. E. 128 (1897).
13 168 Ill. 589 at 602, 48 N. E. 128 at 131.
These statements have been criticized as dicta, but they cannot be overlooked for they serve to indicate the attitude of the court, in 1899, on the subject of trust investments.

In a later case, that of \textit{Penn v. Fogler}, the court held that a trustee \textit{de son tort} had no power to invest trust funds in a banking partnership, and it permitted the complainants to follow the assets involved into the hands of the receiver of the bankrupt partnership. When so doing, the court said:

A trustee will not be protected from loss in investing trust funds, unless he invests in government or real estate securities, or other securities approved by the court, to which he is accountable. A trustee should not invest the money of others in his care in the stock or shares of any private corporation, nor has he any right to employ trust funds in a private business, and thereby subject them to the fluctuations of trade, even though such investment is approved of by his own judgment, and is made with honest intent. It is the duty of a trustee to make investments of trust funds in real estate securities or government securities, whether of the national or State government, or, if he is acting under the direction of a court, to select such securities as the court approves of.

These cases illustrate the state of the Illinois law on the subject prior to the enactment of the 1905 statute. The two earlier cases authorized investments in interest-bearing obligations sufficiently secured; the two later cases seem to add restrictions by specifying that such interest-bearing obligations should take the form of real-estate securities or government securities. Three of the four cases enunciated a rule of prudence in conjunction with the imposition of a limitation on investments. The only safe conclusion which a trustee could have drawn from these decisions,

\footnote{14 See Nylund, "Investments by Trustees," \textit{20 Chicago-Kent Law Review} 331 (1942), particularly p. 341.}

\footnote{15 182 Ill. 76, 55 N. E. 192 (1899).}

\footnote{16 182 Ill. 76 at 103, 55 N. E. 192 at 199.}
therefore, was to invest trust funds in government or real-estate securities. However, it is significant to note that in no one of these cases was the trustee given special direction concerning investments by the trust instrument, and in each of these cases it was either specifically stated or clearly implied that trustees might be authorized to invest trust funds in such manner as might be directed in the instrument creating the trust.\textsuperscript{17} If the trust instrument had granted the trustee broad discretionary power in making investments, there was nothing in these early cases to indicate that the trustee would have been governed other than by the rule of prudence.

II. THE ACT OF 1905

When the legislature passed the 1905 Act\textsuperscript{18} it resolved the confusion inherent in the judicial decisions to that time by specifying, with particularity, the investments which a trustee might make when not otherwise controlled by the trust instrument. As originally enacted, the statute read:

That investments of trust funds by trustees may, when not otherwise provided by the will, deed, decree, gift, grant or other instrument creating or fixing the respective trust, be in the bonds of the United States or of any of the states of the United States, or in first mortgages upon real estate in any state or in the bonds of any county, city or municipality in any state, or in the first mortgage bonds of any corporation of any state upon which no default in payment of interest shall have occurred, for a period of five years, but no trustee shall be authorized by this act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money and any trustee may continue to hold any investment received by him under the trust or any increase thereof.\textsuperscript{19}

\textsuperscript{17} This interpretation was actually enunciated in Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86 at 92, 95 N. E. 59 at 61 (1911).

\textsuperscript{18} Laws 1905, p. 1.

The act removed any doubt as to the propriety of investment in corporate bonds, although the legislature did engraft two limitations: (1) that no default in interest shall have occurred for a period of five years; and (2) that no funds should be invested in bonds in which cautious and intelligent persons would not invest their own money. The second of these limitations was not new for, as has already been seen, the Illinois Supreme Court had voiced a similar rule of prudence.

The 1905 Act, therefore, in substance was a reiteration of doctrines previously enunciated by the courts and merely codified these decisions. The Act permitted what the court had sanctioned, *viz:* investment in government bonds and real estate securities. During the period from 1905 to 1945, various amendments added other securities to the list enumerated in the original statute, but these amendments did not alter the two basic classifications although they did enlarge the classifications in the restricted sense that they elaborated upon the specific types of securities originally designated by the legislature. Even though amended from time to time, the 1905 Act retained throughout the requirement of prudence which appeared in the first enactment, to-wit: "no trustee shall be authorized by this Act to invest trust funds in any bonds in which cautious and intelligent persons do not invest their own money."21

An analysis of the decisions subsequent to the enactment of the statute is rendered difficult by the absence of cases precisely

20 Among such securities were bonds of the Home Owners' Loan Corporation (Laws 1933-4, First Sp. Sess., p. 45, §1), the Federal Farm Mortgage Corporation (Laws 1935, p. 3, §1), and the individual or consolidated bonds of the Federal Land Banks (Laws 1937, p. 1223, §1). Bonds or notes secured by mortgage or trust deed insured by the Federal Housing Administrator, or debentures issued by him, were included by Laws 1937, p. 1222, §1, as were the bonds, debentures or other obligations of a Federal Home Loan Bank, or of two or more such banks, whether issued jointly or jointly and severally. That same amendment added the insured shares of federally chartered savings and loan associations, provided such shares were insured by the Federal Savings and Loan Insurance Corporation. The first mortgage bonds of any corporation of any state qualifying under the terms of the Federal Securities Act of 1933, and the Securities Law of the State of Illinois, whether issued in whole or in part to refund any first mortgage bonds of such corporation eligible for investment under the statute at the time of refunding, were added by Laws 1935, pp. 3-4, §1.

involving investments, and by the mixture of improper activities generally appearing in those cases which seek to surcharge trustees. As recently observed by a noted authority on the subject,\textsuperscript{22} surcharges

\ldots arise most often out of situations which involve a mosaic of negligence or default; a supine failure to administer the trust, a failure to account, a breach of the duty of loyalty, an undue retention, an unwarranted delegation of the trust duties or, more likely, a combination of one or more of those deficiencies. It appears to be true that a surcharge almost never is founded upon the single ground that the trustee purchased a security which was not permitted to him \ldots Discussion of the danger of surcharge to the trustee is not likely to be clearly resolved at any early date. One of the chief reasons is that records of surcharge are obscure. The habitat of the surcharge is in the courts of first instance, and since records are not readily available of the many adjustments and settlements which take place in those courts, the statistics upon the incidence of surcharge in every day practice are spotty and unreliable.\textsuperscript{23}

Bearing in mind these facts, not too much in the way of enlightenment should be expected from the cases decided by our courts of review, and, in fact, not too much aid is given. To simplify a consideration of the decisions, the cases may be grouped in three broad classifications: (1) cases primarily concerned with the propriety of a trustee's investment, (2) cases primarily concerned with the propriety of a trustee's retention of securities, and (3) cases primarily concerned with a trustee's administration of the trust estate. This grouping is admittedly arbitrary, particularly because the issues are not usually well defined. However, the courts have frequently drawn distinctions on a similar basis, and such a treatment may assist in a proper evaluation of the cases.


\textsuperscript{23} Ibid., at p. 311.
The first significant decision subsequent to the 1905 Act was that of *Merchants Loan & Trust Company v. The Northern Trust Company.* The court was there confronted with the duty of construing portions of the will of the late Marshall Field relating to the trustees’ power to invest in real estate located in the State of Illinois and elsewhere in the United States and also to acquire a *pro rata* share of any increase of capital stock offered them by a corporation, shares of stock of which corporation were part of the assets delivered to the trustees at the time of the testator’s death. The court determined that the will granted the trustees discretion to make such investments, rejected the contention that the 1905 Act controlled the trustee in making investments, and held that the statute applied only to those cases where the trust instrument was either silent concerning investments or referred to the statute in that regard, so that, in this respect, the statute was permissive rather than mandatory. The court pointed out that investments other than those named in the statute might be authorized by a trust instrument, and said:

Where the will gives authority to the trustees to . . . invest and re-invest, in their discretion, the trustees may purchase such securities as a prudent and provident person would purchase as good and safe investments, and they are not restricted to the conditions and limitations imposed by law for the investment of trust funds.

The court was not required to decide, and did not decide, the effect of the statute in a situation where a trustee was given no special direction or discretion in the trust instrument with respect to investments, but it did make the following comment:

In the management and investment of trust property the will provides that the trustees shall have regard for the certainty of the income rather than the amount, and this is the general rule. The law does not give trustees the same freedom of choice in investments that may be exercised by prudent

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24 250 Ill. 86, 95 N. E. 59 (1911).
25 250 Ill. 86 at 93, 95 N. E. 59 at 61-2.
businessmen in their own affairs. It permits the trustee to assume no risks in his investment other than those that are inseparable from every species of property. "Absolute freedom from risk is impossible. The most stable forms of property may lose their value; lands may depreciate; even nations may become bankrupt. From these reasons which inhere in every kind of ownership the law does not pretend to save the beneficiary, but from the risk growing out of the uncertainty of speculative investments the law does protect him by making the trustee personally responsible for all trust funds invested by him in such a manner," unless upon the express direction in the instrument creating the trust or statutory permission. . . . The trustees must always and ever, in exercising their powers, act in the utmost good faith and with sound judgment and prudence.26

The quoted statement confuses the issue because although the court enunciates a standard of prudence, it implies that a trustee is bound by a higher degree of prudence than an ordinary individual. This implication was, however, explained by the court's comment on "speculative investments" which contains the key to the court's language. A man of prudence, discretion and intelligence may invest a portion of his funds in a speculative venture with the primary purpose of increasing his capital or of obtaining a high return on his investment. A trustee may not so speculate, but this does not mean that his activities are to be judged by a different standard of prudence than that exercised by men of prudence, discretion and intelligence in the management of their own affairs. The prohibition against speculation is an absolute limitation on a trustee's powers unless, as recognized by the court, such speculation is expressly directed in the trust instrument. It is to be noted that speculation is expressly prohibited in the Prudent Man Rule;27 and, in this respect, the decision announced the same rule as is contained in the new Act.28

26 250 Ill. 86 at 96, 95 N. E. 59 at 63.
27 "... not in regard to speculation but in regard to the permanent disposition of their funds..." See Harvard College v. Amory, 26 Mass. (9 Pick.) 446 at 461.
In the later case of *Illinois Trust & Savings Bank v. Tuley*, the court passed upon the propriety of a trustee's purchase of first mortgage bonds of the Chicago City Railway Company. The bonds had declined in value because of a general increase in prevailing interest rates. The court held that the investment complied with the statute, and was proper even if no statute had been in existence, and stated:

If the trustee acted in good faith and the investment was such as would have been made by cautious, prudent and intelligent business men with a view to securing a safe income, and further is in compliance with the statute of this State, then the trustee cannot be held responsible for consequences which could not have been foreseen at the time the investment was made.

This decision indicates a clear interpretation of the purpose of the 1905 Act in its application of a standard of prudence to investments within the prescribed limitations.

The trustee concerned in the case of *In re Estate of Sanders*, however, was surcharged for the cost of investments in bonds of a hotel corporation and of another building corporation. At the time of the purchase of the bonds, taxes were unpaid for one or more years, and subsequently taxes for later years were not paid. The trustee made no investigation of this fact nor of the fact that the income from the properties fell below the estimates made in the prospectus describing the bonds. It also appeared that the trustee had made a personal profit on the bond purchases. The court found that although the trustee was granted some discretion concerning his investments, the terms of the trust instrument limited him to securities of the "same kind and character as government bonds and first farm mortgages." The court further found that the trustee had failed to exercise the discretion required of him because "he invested in the Park Lane Corporation practically the entire trust fund" and in an enterprise which was

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29 226 Ill. App. 491 (1922).
30 226 Ill. App. 491 at 499. Italics added.
new and untried and whose success had not been established. The court recognized that an investment by a trustee in participating first mortgage bonds would be proper only "when authorized by the instrument creating the trust." The case merits additional note, however, because the court announced a prudent man standard in the following language:

When we take into consideration all of the many provisions of the trust deeds securing these bonds, we may have no hesitancy in holding that they are not such investments as the provisions of the will . . . authorized. Appellant was not investing his own money. He should only have taken such risks as a reasonably prudent man would have taken who was charged with the duty of investing money either for himself or for others. He knew it was of the utmost importance that the principal as well as the interest should be forthcoming at the appointed time.\textsuperscript{32}

A still further illustration of the application of a rule of prudence in investments made within the scope of the 1905 Act is contained in \textit{Campbell v. Albers}.\textsuperscript{33} The trustees there were surcharged for the purchase of bonds of a hotel corporation already in default for several years in its taxes, as well as for engaging in a transaction motivated by self-interest. The court commented on these acts by saying:

Section 1 of the act concerning the powers of trustees . . . which provides that investments of trust funds by trustees may be in first mortgage bonds of any corporation upon which no default in payment of interest shall have occurred for a period of five years, does not purport to sanction or permit such an investment where the bonds are otherwise unsafe, or to excuse the trustees from making a proper investigation as to the safety and propriety of such an investment.\textsuperscript{34}

\textsuperscript{32} 304 Ill. App. 57 at 67, 25 N. E. (2d) 923 at 928.
\textsuperscript{33} 313 Ill. App. 152, 39 N. E. (2d) 672 (1942).
\textsuperscript{34} 313 Ill. App. 152 at 165, 39 N. E. (2d) 672 at 679.
A study of the foregoing cases involving trustee investments during the period of the 1905 Act clearly reveals that the statute wrought no change in applicable legal principles. Although the decisions are not numerous, they do adequately illustrate the judicial interpretation of the statute.

B. PROPRIETY OF RETENTION

A segregation of the cases involving a trustee’s retention of securities is justified not only for the realistic reason that a different problem is presented, but also because the Illinois courts have generally recognized a distinction between retention and investment. Thus, in *Hatfield v. First National Bank of Danville*, the court refused to hold a trustee liable for alleged negligence in retaining and failing to sell shares of national bank stock received as part of the trust estate, despite the plaintiff’s contention that the stock was an improper investment, saying:

> Trustees must employ such diligence and prudence as men of discretion and intelligence in such matters employ in their own like affairs. In determining whether a trustee has acted prudently, courts must look at the facts as they existed unaided by subsequent events. The court, in determining liability of trustees, must distinguish between trustee’s investment of trust funds and making or failing to make prompt disposition of securities received from creator of trust. Ordinarily, trustees who act honestly and with ordinary prudence are not liable for mere errors of judgment. The court is not required to hold honest trustees liable for loss sustained by retaining an unauthorized security if the trustee acted honestly and prudently. A trustee receiving stock in testator’s estate under direction to continue the investment, will not, in the absence of negligence, fraud or other improper conduct, become liable for losses resulting from an honest mistake in judgment in the retention of stock in a declining market, before making sale thereof. A wisdom developed

after an event and having it and its consequences as its direct source, is a standard no man should be judged by.\textsuperscript{36}

A bill for accounting was filed in \textit{People v. Canton National Bank}\textsuperscript{37} against the receiver of a bank which had acted, prior to its closing, as trustee of a testamentary trust. The chief issue was the trustee's failure to sell shares of stock in its own bank which it had received as part of the trust estate. The defendant urged that under the terms of the 1905 Act, which provided in part that "any trustee or any and all successors in trust may continue to hold any investment received by him under the trust, or any increase thereof," the trustee was expressly authorized to continue to hold the stock received as part of the trust estate. The court overruled this contention, applying again a rule of prudence, and stated: "In our judgment the statute above referred to does not give trustees the power and authority to hold stock received with the trust estate for any particular length of time but only for such period as the facts and circumstances of each particular case may warrant."\textsuperscript{38} The court also pointed out that the retention of the stock placed the trustee in a position where it was difficult to be honest and faithful to its trust because of the personal interest of the bank.

The final account by the executor in the case of \textit{In re Estate of Busby}\textsuperscript{39} showed that none of the legacies and only certain of the claims against the estate had been paid, and that the estate was insolvent. The court found that the estate, at the time of decedent's death, consisted largely of securities of a speculative character held on about a one-third margin and propounded the following question:

The executor's good faith in the instant case is not questioned, but there is the question as to whether its opinions were prudently formed and its judgment warranted by the circumstances. Did the executor act as an ordinarily prudent and

\textsuperscript{36} 317 Ill. App. 169 at 177, 46 N. E. (2d) 94 at 98.
\textsuperscript{37} 288 Ill. App. 418, 6 N. E. (2d) 220 (1937).
\textsuperscript{38} 288 Ill. App. 418 at 428, 6 N. E. (2d) 220 at 224.
\textsuperscript{39} 288 Ill. App. 500, 6 N. E. (2d) 451 (1937).
cautious person who was the trustee of the money and property of others would have acted under similar circumstances.\textsuperscript{40}

If the court was drawing a distinction between a "prudent man" and a "prudent trustee," such a distinction was unnecessary, for the "prudent man" designated in the field of trust investments is an individual who does not speculate. This matter of speculation lies at the heart of the court's statement, for the court, in holding that the executor "had no right to continue decedent's speculation with the assets of the estate in the condition they were," remarked:

This is not a case where the securities were owned outright or held on a conservative margin, or where the estate was in a strong position and able to carry through an emergency. As has been heretofore stated, each case of this character must be decided on its own particular and distinctive facts. When the estate came into the hands of the executor, it consisted of a huge speculation. . . .\textsuperscript{41}

\textit{Pank v. Chicago Title & Trust Company}\textsuperscript{42} involved a co-trustee's liability for an exchange of shares of preferred stock for shares of common stock in the same corporation. The will had authorized the trustees to retain "any shares of capital stock in the . . . Fairbanks Morse & Co. . . . which I may own at the time of my death." Holding the trustee not liable, the court said:

The principle is well established that "The care and prudence to be exercised by trustees is that which ordinary men would exercise under like circumstances in connection with their own affairs." If a trustee has exercised the care and judgment of ordinarily prudent men in their own affairs he will not be chargeable for mere errors of judgment nor for accidental injuries and losses.\textsuperscript{43}

\textsuperscript{40} 288 Ill. App. 500 at 520, 6 N. E. (2d) 451 at 459.
\textsuperscript{41} 288 Ill. App. 500 at 522, 6 N. E. (2d) 451 at 460.
\textsuperscript{42} 314 Ill. App. 53, 40 N. E. (2d) 787 (1942).
\textsuperscript{43} 314 Ill. App. 53 at 65, 40 N. E. (2d) 787 at 791.
A frequently cited case is Christy v. Christy\textsuperscript{44} involving the action of an administrator in selling shares of stock in a ferry company, the ordinary market value of which was $250 per share, for $600 per share during a period when rival corporations were buying up the stock to gain control. The heirs attempted to surcharge the administrator on the ground that other persons had obtained as high as $1500 per share. The record showed that the administrator had sold his own stock at the same price as the stock of the estate, and that different prices were paid for the stock on the same day. In holding that the administrator was not liable, the court declared:

In the performance of his duties an administrator must act with the highest degree of fidelity and with the utmost good faith, but he is held to the exercise of only that degree of skill and diligence which an ordinarily prudent man bestows on his own similar private affairs. Nothing more can be required of him, and if his acts will stand the test of that rule he cannot be held liable for any loss that may be sustained by the estate of his intestate.\textsuperscript{45}

An early statement of a rule of prudence with respect to retention is to be found in Kaufman v. Loomis.\textsuperscript{46} In that case a bank, as co-trustee, held certain securities in trust for the payment of several loans guaranteed by the other co-trustee. The securities consisted of releases of a patent claim as well as for damages in a suit for infringement which had been successfully prosecuted and affirmed by the Circuit Court of Appeals for the United States. The cases were awaiting decision in the United States Supreme Court. Pending this decision, the defendants in these actions offered $11,000 for the releases, but the bank refused to sell for less than $15,000. The Supreme Court reversed the holdings of the lower courts and thereby the releases became worthless. The guarantor sought to avoid obligation on the notes on the ground

\textsuperscript{44} 225 Ill. 547, 80 N. E. 242 (1907).
\textsuperscript{45} 225 Ill. 547 at 552, 80 N. E. 242 at 243.
\textsuperscript{46} 110 Ill. 617 (1884).
that the bank had breached its trust in refusing to sell. The court held that no breach of trust had occurred, stating:

If, in good faith, as trustee, he exercised his honest judgment in so refusing, and acted, as he supposed, for the best interests of all concerned,—unless that judgment was grossly erroneous, with the lights he had,—he surely can not be charged with wronging any one by acting upon his judgment. The mere fact that it turned out afterwards that he was mistaken, does not charge him with a wrong done to any one.47

This decision evidences a reasonable conception of the problems of retention which confront a trustee.

C. PROPRIETY OF ADMINISTRATION

There are numerous Illinois cases dealing with a trustee's duties in the administration of the trust estate. The decisions appear to use the terms "administer" and "manage" interchangeably, and evidence a clear and consistent application of a rule of prudence during the periods both prior to and subsequent to the enactment of the 1905 Act.

Thus, in the early case of Christy v. McBride,48 an administrator employed an agent in another state to collect notes due the intestate. The agent collected the money, appropriated it to his own use, and later became insolvent. In holding the administrator not liable for this loss, the court said:

If an administrator has acted for the benefit of the estate, used proper diligence, and acted with ordinary care and circumspection in the discharge of his trust, he ought not to be held answerable for losses which could not have been foreseen, and which ordinary precaution may not guard against. The general principle which seems to run through all the authorities, as to his liability, recognize the doctrine, that if he acts honestly and prudently, though there be a loss to, or

47 110 Ill. 617 at 626.
48 2 Ill. 74 (1832).
diminution of, the testator’s estate or rights, he will not be liable. 49

Similarly, in *Rowan v. Kirkpatrick*, 50 the court stated that “an administrator who has acted in good faith in the collection of the debts due his intestate, and intended fully and fairly to discharge his duty in that respect, ought not, if his intentions have been directed by a reasonable judgment in the matter, to be charged with the loss of debts he has failed to collect.” Again, in *Clardy v. Smith*, 51 the court refused to charge a trustee who had allowed two secured notes for loans to become due and remain overdue. The trustee had collected the interest regularly, but the securities depreciated in value below the sums secured. Counsel agreed that the trustee was required to exercise the same care and prudence in the management of the estate which ordinary men would exercise in connection with their own affairs, and the court stated that “they are not chargeable for mere errors of judgment nor for accidental injuries or losses.” In *Waterman v. Alden*, 52 however, the court charged the trustee for failing to enforce collection of the notes of a debtor whom the trustee, while acting as an officer of a creditor bank, had been pressing for the collection of other debts. The court found that the notes might have been collected or secured by the use of ordinary business diligence and stated that the rule “undoubtedly is, that they must discharge the duties of their trust to the best of their skill and ability, with such care and diligence as men fit to be entrusted with such matters may fairly be expected to put forth in their own business of equal importance.” 53

In *Whitney v. Peddicord*, 54 the executors did not redeem land owned by the estate from a mortgage sale, because, at the time, the value of the land was only equal to the amount necessary to re-

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49 2 Ill. 74 at 78.
50 14 Ill. 1 (1852).
52 144 Ill. 90, 32 N. E. 972 (1893).
53 144 Ill. 90 at 100, 32 N. E. 972 at 973.
54 63 Ill. 249 (1872).
The mortgaged land subsequently increased in value. The court refused to hold the executors liable, saying: "We can not charge these executors with official delinquency merely because they failed correctly to forecast the future. They acted in this matter with reasonable wisdom and discretion, and nothing further can be required." The question was presented, in Wahl v. Schmidt, whether a tort judgment obtained by a third person for injuries received through the negligence of the employees managing a building owned by the trust estate was a judgment against the trustee personally or in his official capacity. The court held that the trustee should be allowed the loss in his account because the negligence of his servants did not indicate a failure on his part to act in "good faith and common prudence." Yaple v. Mahy involved the propriety of a payment by the administrator of a proportionate assessment levied against stockholders of a bank of which the estate owned shares of capital stock. The assessment was required to make up a deficiency found by the bank examiners in the assets of the bank, but the bank subsequently became insolvent. The court held this payment by the administrator to be proper, stating that the general principle running through all the authorities is that if a trustee acts "honestly and prudently, though there be a loss to, or diminution of, the testator's estate or rights, he will not be liable." Another case, that of Suffolk v. Leiter, contains a concise statement of the rule to be applied and the basic reasons therefor. That case arose on a bill seeking the removal of a trustee on a variety of claims of mismanagement and misconduct, which bill the court dismissed. It said:

The law requires that a trustee must act in good faith in the management of all matters relating to the trust, and employ such vigilance, sagacity and diligence as prudent men of intelligence ordinarily employ in their own affairs. A trustee who in an honest effort to serve his trust errs in his judgment

55 63 Ill. 249 at 250.
56 307 Ill. 331, 138 N. E. 604 (1923).
57 241 Ill. App. 446 (1926).
58 241 Ill. App. 446 at 451.
59 261 Ill. App. 82 (1931).
will not be condemned. If the rule were otherwise, it would not be possible to induce any person to act as trustee and assume the risk of losses which might result from mistakes of judgment.  

A recapitulation of the foregoing cases discloses (1) that it has always been the law in Illinois that where the instrument creating the trust granted broad investment powers to the trustee, or invested him with discretion in the matter of making investments, the trustee was governed in his investment activities by a rule substantially, if not exactly, the same as that stated in the new Prudent Man Investment Statute;  
(2) that if the trust instrument was silent as to a trustee’s powers of investment, or restricted him to “legal investments,” the trustee was limited in his choice of investments to those enumerated by the legislative list, or the judicial fiat before the list, but even in making a choice from this limited list, a trustee could not blindly select his investments, but was bound by a similar rule of prudence in choosing from the list; and (3) with respect to retaining investments the same rule of prudence was applied although there is some indication in this class of cases of a greater leniency. Similarly, courts of review in Illinois have uniformly applied the rule of prudence to all phases of a trustee’s activities connected with the administration of the trust estate.

60 261 Ill. App. 82 at 118.  
61 Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59 (1911); Illinois Trust & Savings Bank v. Tuley, 226 Ill. App. 491 (1922).  
62 Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59 (1911).  
63 Penn v. Fogler, 182 Ill. 76, 55 N. E. 192 (1899); White v. Sherman, 168 Ill. 89, 48 N. E. 128 (1897); Butler v. Butler, 164 Ill. 171, 45 N. E. 426 (1896); Sholty v. Sholty, 140 Ill. 81, 29 N. E. 1041 (1892).  
64 Campbell v. Albers, 313 Ill. App. 152, 39 N. E. (2d) 672 (1942).  
67 See cases discussed in notes 48 to 60, ante.
IIII. EFFECT OF THE NEW STATUTE

Having thus examined the prior judicial decisions and legislative enactments, a comparison of the new Act with the former law is in order. The question obviously raised is, "What change or effect does the new Act have on Illinois law?" By way of answer to this query, it must first be pointed out that the statute, broadly viewed, purports to cover the same three primary functions of trustees previously discussed, namely: (1) the propriety of making investments, (2) the retention of existing investments, and (3) the management of trust properties. Concerning each of these functions, the new Act declares a standard of prudence not dissimilar to that previously announced by the courts.68

To appreciate the effect of the statute on these functions of trustees, it is necessary to consider some varied general situations to which the statute may have application. For example, if a trust instrument enumerates particular investments which may be acquired or retained by a trustee, the new Act does not authorize the trustee to disregard such enumeration.69 On the contrary, he is bound by such a designation, as was the case under the former law.70 Similarly, if a trust instrument specifies particular classes of investments which a trustee is authorized to acquire or retain, his activities in acquiring or investing within these classes are governed by a rule of prudence no different than under the former law.71 A distinct advantage of the new Act to trustees in the management of discretionary trusts lies in its express recognition of "bonds, debentures and other corporate obligations, stocks, preferred or common, and real estate mortgages" as proper investments for the trust accounts if selected in accordance with the Prudent Man Rule.72 The great change effected by the new Act is not in any rule of law, but is in the opening up of a

68 Section 1 of the Act contains a virtually verbatim reiteration of the rule announced by Mr. Justice Putnam in Harvard College v. Amory, 26 Mass. (9 Pick.) 446.
70 See In re Estate of Sanders, 304 Ill. App. 57, 25 N. E. (2d) 923 (1940).
broad field of investments to those trusts heretofore restricted to so-called "legal investments." Prior to the adoption of the new Act, if the trust instrument was silent regarding investments, or specified "legal investments" or words of similar import, the trustee when making investments was restricted to the legal list. But now, the whole field of investments is open to the funds of such trusts, provided only that the trustee "shall exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital."

This enlargement of the scope of investments must be accompanied by a note of caution in instances where the trust instrument specifies "legal investments" or uses language of similar import. Generally, such words mean "legal" at the time the investment is made rather than the provision in force at some prior time. However, such phraseology must be examined and construed in the light of the entire trust instrument to ascertain that the language used does not restrict the trustee's investments to a "legal list" in force as of a particular time. If the instrument does accomplish such a restriction, it is the same as if such "legal list" were incorporated in the trust instrument, and the trustee would be bound thereby.

In thus extending the field of investments available to trustees, the new Act balances the conflicting interests of life beneficiaries and of remaindermen. Obviously, life beneficiaries are chiefly concerned with the income produced by the trust estate; the remaindermen are primarily interested in the safety of the principal. Any rule which results in special consideration being given either of these interests operates to the detriment of the

73 See notes 62-3, ante.
75 See cases cited in note 81, post.
other. Thus, the purchase of speculative investments to secure a high yield sacrifices the safety of the principal; and by the same token, an extreme concentration of trust funds in ultra-conservative investments may deprive the life beneficiaries of the income which the creator of the trust desired to provide for them. The new Act is designed to effect a fair compromise between these opposing interests, for a trustee is enjoined to consider "the probable income, as well as the probable safety of the capital to be invested."

This purpose of the Prudent Man Rule has been recognized by the courts of Massachusetts, and has been expounded in numerous cases. For example, in the case of *Dickinson, Appellant*, the court said:

... a trustee must, so far as is reasonably practicable, hold the balance even between the claims of the life-tenants and those of the remaindermen. The life-tenants desire a large income from the trust property, but they are only entitled to such an income as it can earn when invested in such securities as a prudent man, investing his own money, and having regard to the permanent disposition of the fund, would consider safe. A prudent man, possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking. A trustee, whose duty it is to keep the trust fund safely invested in productive property, ought not to hazard the safety of the property under any temptation to make extraordinary profits. Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust-funds in dividend-paying stocks and interest-bearing bonds of private corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stock and bonds as permanent investments."

76 152 Mass. 184, 25 N. E. 99 (1890).
77 152 Mass. 184 at 187, 25 N. E. 99 at 100.
In an earlier case, that of *Kinmonth v. Brigham*, the same court stated:

But although in this commonwealth there are no investments regarded as so absolutely secure as to make a choice of them obligatory upon trustees, and in all cases a considerable latitude is allowed, yet it has never been held that trustees for successive takers were at liberty to disregard the security of the capital, in order to increase the income. Nor, where property is of a wasting nature, is an investment in it consistent with their duty, in the absence of specific directions in the creation of the trust. They are equally bound to preserve the capital of the fund for the benefit of the remainderman, and to secure the usual rate of income upon safe investments for the tenant for life; and to use a sound discretion in reference to each of these objects. If there is no specific direction, and they are charged merely with the general duty to invest, they cannot postpone the yielding of income for the increase of the capital, nor select a wasting or hazardous investment for the sake of greater present profit. And the rule is the same in regard to property which comes to the trustee from the testator, not specifically bequeathed, as it is in regard to making new investments. If the investment is not such as this court would sustain them in making, it should not be allowed to continue, but should be converted.

While the rule of prudence contained in the new Act affords reasonable protection for remaindermen and life beneficiaries, it does further achieve an important benefit for the latter individuals, to-wit: the earning of a higher yield than is now possible by the purchase of "legals" under existing economic conditions. It is common knowledge that trustees today, with funds available for investment, are confronted with the lowest interest rates of all times. Accordingly, the returns to beneficiaries from restricted investments on legal lists are exceedingly low. The new Act, by

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78 87 Mass. 270 (1862).
79 87 Mass. 270 at 278.
increasing the scope of a trustee's investments, signifies to beneficiaries an answer to the dilemma of steadily decreasing yields in the face of constantly increasing demands for fiduciary investment outlets. The need for relief from this situation has been apparent for some years. The new Act points the way to a solution of the problem.

In addition to enlarging the scope of investments permitted trustees, with the attendant advantages outlined above, the new Act accomplishes certain formal changes of aid to those concerned with trust estates. These accomplishments can best be observed by a consideration of the provisions of the Act itself. Section 1 is undoubtedly the most important part of the statute as it embodies the statement of the Prudent Man Rule in substantially the same language as that used by Mr. Justice Putnam over one hundred and fifteen years ago. This section, therefore, crystallizes into a time-proven, definitive statement a rule of prudence which, although recognized by the Illinois courts, has not been always uniformly or clearly stated. The new Act resolves any confusion resulting from prior judicial decisions concerning a possible difference between a "prudent man" rule and a "prudent trustee" rule; the Illinois legislature has unequivocally adopted a "prudent man" rule. Section 1 further makes this same rule of prudence applicable to all phases of a trustee's activities, thereby removing any doubt concerning distinctions in the standard of care required for investment, retention or management. Finally, Section 1 expressly provides that the Act is applicable to "any trust heretofore or hereafter created." This provision permits a uniform treatment of all trusts not specifically controlled by the terms of the trust instrument. No doubt is entertained concerning the validity of this portion of the Act, and it is submitted that the Act would have been applicable to trusts created prior to its effective date even without an express provision. It is stated, in Scott on Trusts, that "where a statute specifies the types of investment which are legal for trustees the provisions which are in force at the time when the investment is made are controlling, rather than the provisions in force at the time when the trust
was created.” Although Illinois courts have not passed on this exact question, there are numerous authorities elsewhere sustaining this statement,\(^8\) and there would seem to be no reason why the Illinois courts should not follow this line of authority.

Section 1a accomplishes two objectives. First, it provides that the Act shall not be construed as authorizing or requiring any departure from the express terms or limitations set forth in the instrument creating or defining the trustee’s duties and powers; and second, it brings within the purview of the Act any instrument which defines the extent of a trustee’s authority to invest by the use of the terms “legal investment,” “authorized investment,” or similar phrases. Of course, as to trusts created prior to the effective date of the Act, if such phrase in the trust instrument is accompanied by language indicating an intention to restrict the trustee to investments legal at the time of the creation of the trust, then the result is the same as if the trustor had incorporated the then legal list in the trust instrument, and the trustee would have to follow such directions.\(^8\) Section 1b insures that the provisions of the Act will not be construed as an attempt to deprive a court of competent jurisdiction from permitting a trustee to deviate from the terms of the trust instrument. Courts of chancery in Illinois have frequently permitted trustees to deviate from the terms of the trust instrument to preserve trust estates from destruction.\(^8\) Section 1c defines the words “trust” and “trustee” in sufficiently broad terms to embrace all situations intended to be covered.

\(^8\) Scott on Trusts, Vol. 2, p. 1217.

\(^81\) Aydelott v. Breeding, 111 Ky. 847, 64 S. W. 916 (1901); Clarke v. Hayes, 75 Mass. 426 (1857); Reinhardt v. National State Bank, 130 N. J. Eq. 34, 20 A. (2d) 634 (1941); Reiner v. Fidelity Union Trust Co., 126 N. J. Eq. 78, 8 A. (2d) 175 (1939), reversed on other grounds 137 N. J. Eq. 377, 13 A. (2d) 201 (1940); City Bank Farmers Trust Co. v. Evans, 255 App. Div. 135, 5 N. Y. S. (2d) 406 (1938); Re Hamersley’s Estate, 152 Misc. 903, 274 N. Y. S. 303 (1934). See also Land Commissioners v. Kaskaskia Commons, 249 Ill. 578, 94 N. E. 970 (1911).

\(^82\) Merchants Loan & Trust Co. v. Northern Trust Co., 250 Ill. 86, 95 N. E. 59 (1911).

It is important to note that the new Act does not apply to investments for conservatorship and guardianship estates. The investments for such estates are still controlled by the sections of the Probate Act dealing therewith.\textsuperscript{84}

IV. INVESTMENTS PERMITTED UNDER THE NEW ACT

Any study of the new Act logically invites an inquiry relative to the investments which are permitted pursuant to the Prudent Man Rule which it pronounces. A sound interpretation of the statute precludes, in one sense, a reply to this question.

The Supreme Court of Massachusetts, in which state the rule has prevailed the longest, has determined each case coming before it on its own merits, applying the rule to the facts of the particular case.\textsuperscript{85} It has not permitted a decision concerning an investment in one case to be a precedent in another case.\textsuperscript{86} The Massachusetts court recognizes that an investment held to be improper in one case might, because of changing conditions, be proper at a later date and that an investment improper for one trust might at the same time be proper for another.\textsuperscript{87}

It is to be hoped that the Illinois courts will be careful to follow this practice of the Massachusetts courts, otherwise they will, over a period of years, create a new "legal list" by virtue of court decision rather than by legislative enactment. It may then become necessary to go back to the legislature to get a statutory legal list in order to get away from the judicial one. It should be the concern of lawyers and courts, and indeed of every one interested in trust administration in this state, to see that the

\textsuperscript{84} Ill. Rev. Stat. 1945, Ch. 3, §§ 412-5.
\textsuperscript{85} For example, in Taft v. Smith, 186 Mass. 31, 70 N. E. 1031 (1904), the court refused to hold a trustee liable for loss incurred on a purchase money second mortgage under the particular facts of the case, although it recognized generally that a trustee must not invest in second mortgages. See also Hunt v. Appellant, 141 Mass. 515, 6 N. E. 554 (1886).
\textsuperscript{86} Dickinson, Appellant, 152 Mass. 184, 25 N. E. 99 (1890), involved two successive purchases of Union Pacific Railroad Co. stock. The court approved the first purchase and disallowed the second.
\textsuperscript{87} This results from the flexible application given the rule in Massachusetts. See cases cited in notes 85-6, ante, and also see note 88.
Illinois courts do not take the position that because a certain character of investment has been approved or disapproved at one time and for a certain trust, that it thereby stands approved or disapproved for all time as to all trusts. In this light, it seems unnecessary to review the decisions, either from Massachusetts or the other states which have adopted the Prudent Man Rule, or to list investments which have been held to be proper or improper under that rule. To do so would serve no useful purpose, might mislead those who are acting as trustees, and would be doing the very thing here inveighed against.

By the same token, it is not believed that it is here necessary to endeavor to sketch or portray the "prudent man" described by the statute. This would be simply another way of trying to delineate within precise bounds the specific investments which are proper for a trustee. The moment the courts or the bar begin to analyze exact fact situations as a guide to similar fact situations, a step backwards will be taken toward the formulation of another legal list. The virtue of the new Act is its flexibility, its elasticity. Concerning such elasticity, the Massachusetts court, in Kimball v. Whitney, said:

Good faith and sound discretion, as these terms ought to be understood by reasonable men of good judgment, were thus made the standard by which the conduct of trustees is to be measured. That is a comprehensive principle. It is wide in its scope. It is not limited to a particular time or a special neighborhood. It is general and inclusive, so that while remaining itself fixed, it may continue to be a safe guide under new financial institutions and business customs, changed commercial methods and practices, altered monetary usages and investment combinations. It avoids the inflexibility of definite classification of securities, it disregards the optimism of the promoter, and eschews the exuberance of the speculator. It holds fast to common sense and depends on practical experi-

ence. It is susceptible of being adapted to whatever conditions may arise in the evolution of society and the progress of civilization. Although more liberal to investing trustees than the law of some states and countries, it has frequently been reaffirmed and never doubted in this jurisdiction.\(^9\)

The importance of judicial expressions elsewhere construing the Prudent Man Rule lies not in the type of investments approved or condemned by the courts, but in the reasons which moved the courts to approve or condemn. These reasons are grounded in a given trustee's failure to comply with one or more of the three elements involved in the rule—care, skill and caution. But, these are general statements which constitute little improvement over the language of the Prudent Man Rule. To a trustee imbued with the concept of a definite guide supposedly furnished by the legal list, and hence grasping for similarly specific assistance in the terms of the new Act, such phrases will prove of little help. The answer to this problem is a blunt one—the new Act is not designed as a crutch to bolster the confidence of uncertain trustees. As one author states, a trustee is under a duty to make such an investigation as a prudent man would make under the circumstances. He should take into consideration the past history of any security which he proposes to purchase and its future prospects. His conclusion as to the propriety of the investment will depend upon not merely the facts which he ascertains but the opinion which he forms. In reaching his conclusion he may take into consideration advice given to him by attorneys, bankers, brokers and others whom prudent men in the community regard as qualified to give advice. He is not justified, however, in relying wholly upon the advice of others, since it is his duty to exercise his own judgment in the light of the information and advice which he receives. In relying upon the advice of another, he should consider whether the person giving the advice is disinterested.\(^9\)

\(^9\) 233 Mass. 321 at 331, 123 N. E. 665 at 666.  
Moreover, certain valuable suggestions concerning the matters which should be considered by a trustee in selecting an investment are outlined in the Restatement of the Law of Trusts.\textsuperscript{2} They are: (1) the marketability of the particular investment; (2) the length of the term of the investment, that is the maturity date, callability, or redeemability, if any; (3) the probable duration of the trust; (4) the probable condition of the market with respect to the value of the particular investment at the termination of the trust, especially if at the termination of the trust the investment must be converted into money for distribution; (5) the probable condition of the market with respect to reinvestment at the maturity of the particular investment; (6) the aggregate value of the trust and the nature of the other investments, \textit{i.e.}, proper diversification; (7) the requirements of the beneficiary or beneficiaries, particularly with respect to the amount of the income; (8) the other assets of the beneficiaries including earning capacity; and (9) the effect of the investment in increasing or diminishing liability for taxes. The significance of these matters is obvious for they all relate to the two paramount considerations confronting a trustee in selecting trust investments, to-wit: the safety of the fund invested, and the amount and regularity of the income. The often unintended emphasis placed on safety in the application of the legal list rule has already been pointed out, but it should not be inferred that the new Act minimizes the necessity of preserving the capital of trust funds. The language of the Act refutes such a notion, and properly so, for safety is a matter of concern not only to the remaindermen but to the life tenants as well. If a trust fund is lost, the remaindermen lose their distributive shares, but the life tenants also lose their income. Therefore, a trustee must proceed with caution, and cannot become over-zealous in a desire to obtain a high income for the life tenants. If a testator wishes to grant to a trustee power to invest in speculative enterprises, he should clearly so provide in the trust instrument. It is no answer to this point to urge that testators are not generally familiar with the limitations of statutory and

judicial regulations on the subject, because it is equally logical to assume that testators are acquainted with these limitations and intend that the trustee shall consider "the probable income as well as the probable safety of their capital."

The investment field is a broad one and in this day and age is a constantly changing one. It is difficult, if not impossible, to lay down any hard and fast rule concerning the nature of the investigation a trustee should make before placing an investment. Rules applicable to one class of investments would not apply to another class. They might well vary as to particular investments within a given class. Rules applicable to a given investment today might, due to changing conditions, be inapplicable as to the same investment a year from now. Therein lies the reason for the flexibility of the Prudent Man Rule. The investigation which should be made concerning the worth and propriety of an investment is the investigation which a man of prudence, discretion and intelligence would make when investing his funds, not with a view to speculation, but with regard to the permanent disposition thereof, considering the probable income as well as the probable safety of the capital.

The foregoing principles, it is believed, outline a procedure undoubtedly followed in substance by most trustees. The new Act has created no original problems for experienced trustees. Established procedures have certainly been devised by trustees managing trust estates under the provisions of trust instruments granting them wide discretion in the scope of investments. They may now pursue similar policies with respect to all trusts, unless specifically directed otherwise in the trust instrument. Additional responsibilities have thus been given, but these burdens are accompanied by an opportunity to render more efficient service.

There need be no fear that the Act will result in lessening the legal responsibilities of trustees, or will exact a lower degree of diligence and care. On the contrary, it is believed that the effect of the Act is in the opposite direction, since it removes from trus-
tees any inclination to rely upon a legal list with its tendency to stultify judgment and initiative. The duties of the trustee must be performed by him with no less fidelity than hitherto required. He is expressly forbidden to speculate in any form with the assets of the trust. Although he may personally suffer loss from his management of the trust estate, he may never personally gain. The rules concerning undivided loyalty; against dealing individually with the trust estate; against intermingling trust assets with those of the trustee; and other like, familiar rules regarding trust administration are in no way relaxed.

V. CONCLUSIONS

Any conclusion concerning a new, untried legislative act must, of necessity, be conjectural. This article has attempted to show the effect and change produced by the new Prudent Man Statute on the fundamental Illinois law concerning trust investments. That Act is designed to make possible greater benefit for beneficiaries and, while it imposes added responsibilities on trustees, it does permit more efficient service. It is flexible enough to allow for adjustments required by changing economic conditions. Whether or not it will achieve the over-all objective intended depends, in large measure, upon the construction promulgated by the bar and judiciary of this state. While the difficulties with which trial judges will be confronted in cases arising under the Act cannot be minimized, there should be no doubt that the courts

93 The requirement of complete loyalty is implicit in all the Illinois cases and is a matter of uniform law throughout the United States. See cases cited in notes 95-98 inclusive.
95 Green v. Gawne, 382 Ill. 363, 47 N. E. (2d) 86 (1943); Hand v. Allen, 294 Ill. 35, 128 N. E. 305 (1920); White v. Sherman, 168 Ill. 589, 48 N. E. 128 (1897); Ward v. Armstrong, 84 Ill. 151 (1876); Mayr v. Hodge & Homer Co., 78 Ill. App. 556 (1898).
96 Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937 (1894); In re Estate of Sanders, 304 Ill. App. 57, 25 N. E. (2d) 923 (1940). See also cases cited in note 95, ante.
98 Hannah v. The People, 198 Ill. 77, 64 N. E. 776 (1902); Sholty v. Sholty, 140 Ill. 81, 29 N. E. 1041 (1892).
are competent to administer legislation which comes with a record of over a century of successful application elsewhere. No statute is any better than the courts which construe it or the agencies which enforce it. The Prudent Man Statute is no exception, but it is a progressive step in the right direction. The bar could well unite with the judiciary to insure a continuation of that progress.