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Trusts—Power of Trustee—Investment in Stock of Private Corporations

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The majority of the court in the instant case took the position that the statute creates a mere presumption despite the fact that the statute expressly states that proof of ownership shall be *prima facie* evidence of consent. The court also overlooked the fact that the other jurisdictions with similar statutes have construed them consistently as requiring cases like the instant one to go to the jury. It would appear, therefore, that the dissenting opinion of Judge Rutledge is more in line with established principles.

D. C.

TRUSTS—POWER OF TRUSTEE—INVESTMENT IN STOCK OF PRIVATE CORPORATIONS—[Missouri].—At the instance of the life beneficiary of a testamentary trust, the plaintiff trust company as trustee sought instructions with respect to permissible investment of the trust funds. The estate was invested almost wholly in railroad, public utility, industrial, and first mortgage real estate bonds. The annual income from them was less than 3% of their market value. The life beneficiary asked that about 20% of the estate be invested in such common and preferred stocks as the trustee might deem desirable investments. The pertinent clause of the will gave the trustee power to sell and to "invest the proceeds in such property or securities as in its judgment" would "yield a safe and regular income and to change investments and make new investments from time to time as it may deem necessary and proper." The lower court decreed that the trustee was authorized to invest "in corporate preferred and common stocks; provided, however, that it" should "exercise reasonable care in the selection of such stocks as" were "to be purchased." From this decree, the remainderman under the trust appealed. In the St. Louis Court of Appeals, this judgment was *affirmed. Toberman v. St. Louis Union Trust Co.*[1]

In another recent case the trustees of a charitable trust came into court asking instructions as to investment and approval of investments already made. The question was whether investments in the common and preferred stocks of private corporations were proper. The lower court decided that such investments were proper. In the Missouri Supreme Court, this judgment was *affirmed. Rand v. McKittrick.*[2]

That the trustee's loyalty is divided between life tenant and remainderman, between producing income and conserving capital, is clear. Stock is one of the most common forms of income-producing investment. However, authority is divided as to whether the trustee with general powers of investment may purchase stock.[3] The New York rule is that he has no such power.[4] On the other hand, by the Massachusetts rule, he has.[5] In many

1. (Mo. App. 1940) 140 S. W. (2d) 68. Another issue was whether the trustee might invest in a common trust fund. It was held that such was also a permissible investment.

2. (Mo. 1940) 142 S. W. (2d) 29. See Comment (1940) 9 U. Kan. City L. Rev. 44.

3. For a collection of cases pro and con see 2 Scott, *The Law of Trusts* (1939) sec. 227.11.

4. King v. Talbot (1869) 40 N. Y. 76.

5. Harvard College v. Amory (1830) 26 Mass. (9 Pick.) 446.

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states the trustee's power to invest is a matter of statute. These statutes may deny the trustee the power to invest in stock generally, or may set up categories in which investment is permissible. The effect given to them varies from mandatory to permissive. Under the mandatory, investment by the trustee outside the statute is a technical breach of trust. Under the permissive, the failure of the trustee to comply with its terms merely removes the presumption of due care.[6] The legislatures of some states are prevented from authorizing investment in private stocks by the state constitution.[7]

In Missouri the power of the trustee to invest in stocks remained undecided until recently. There was, however, a line of cases touching indirectly on that power.[8] While the power might have been inferred from some,[9] others seemed to indicate a contrary leaning.[10] Although several writers in the field concluded from this line of cases that Missouri would follow the New York rule,[11] the court in the *Rand* case selects certain of the line[12] as authority for its holding to the contrary.[13]

The *Rand* case established in Missouri the liberal, Massachusetts or Restatement rule,[14] that a trustee may invest in the stock of private corporations. However, the rule is not without its qualification. While stocks are a permissible form of investment, the trustee's choice of a particular stock may still render him liable, if that choice is improperly made. The *Rand* and *Toberman* cases throw little light on the degree of care required in making that choice. In neither case was the suit to hold the trustee liable for losses incurred from his investments in stock. Both were decided

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6. 49 Harv. L. R. 821; 2 Scott, *The Law of Trusts* (1940) sec. 277.13.

7. See Ala. Const. (1901) Art. IV, sec. 74; Colo. Const. (1876) Art. V, sec. 36; Mont. Const. (1889) Art. V, sec. 37; Wyo. Const. (1889) Art. III, sec. 38; Pa. Const. (1873) Art. III, sec. 22 likewise, but this was changed by amendment Nov. 7, 1933.

8. Gamble v. Gibson (1875) 59 Mo. 585; Taylor v. Hite (1875) 61 Mo. 142; Garesché v. Priest (1880) 9 Mo. App. 270, aff. 78 Mo. 126; Drake v. Crane (1895) 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653; Garesché v. Levering Inv. Co. (1898) 146 Mo. 436, 48 S. W. 653; Cornet v. Cornet (1916) 269 Mo. 298, 190 S. W. 333; Fairleigh v. Fidelity Nat'l Bank (1934) 335 Mo. 360, 73 S. W. (2d) 248; Covey v. Pierce (1935) 229 Mo. App. 424, 82 S. W. (2d) 592; Cameron Trust Co. v. Leibrandt (1935) 229 Mo. App. 450, 83 S. W. (2d) 234.

9. Drake v. Crane (1895) 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653; Garesché v. Levering Inv. Co. (1898) 146 Mo. 436, 48 S. W. 653.

10. Garesché v. Priest (1880) 9 Mo. App. 270, aff. 78 Mo. 126; Cornet v. Cornet (1916) 269 Mo. 298, 190 S. W. 333; Cameron Trust Co. v. Leibrandt (1935) 229 Mo. App. 450, 83 S. W. (2d) 234.

11. Grimm, Legal Investment for Trust Funds in Missouri (1929) 14 ST. LOUIS LAW REVIEW 277, 286, 287; Eaton & Cameron, Investment Authority of a Missouri Trustee (1937) 5 U. Kan. City L. Rev. 225, 238.

12. 142 S. W. (2d) 29, 32: "Other Missouri cases lend support to this theory. See Cornet v. Cornet, 269 Mo. 298, 190 S. W. 333; Drake v. Crane, 127 Mo. 85, 29 S. W. 990, 27 L. R. A. 653; Fairleigh v. Fidelity Nat. Bank & Trust Co. of Kansas City, 335 Mo. 360, 73 S. W. (2d) 248."

13. Rand v. McKittrick (Mo. 1940) 142 S. W. (2d) 29, 32.

14. Restatement, *Trusts* (1935) sec. 271 (1).

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virtually *in vacuo*, since they concerned almost ideally conservative stocks[15] and exemplary trustees.[16] The court, acting within the instant rule, has it still in its power to find the trustee liable for investing in any stocks which do not come up to these high standards. The question whether investment in stocks is improper *per se* has been answered in the negative. Beyond that, the law is undecided. The court may adopt a liberal attitude in determining whether specific stocks fall within the category established by the instant cases. Perhaps it may widen the category itself. On the other hand, it may confine the trustee strictly to that category of stocks so rhapsodically described in the *Toberman* case.

W. G. P.

15. The Toberman trustee wished to invest in "seasoned preferred and common stocks of companies with regular earnings and paying regular dividends, which may reasonably be expected to continue, and which stocks are of such kind and character that prudent men in the community are accustomed to purchase same when making investments of their savings with a view to their safety." Toberman v. St. Louis Union Trust (Mo. App. 1940) 140 S. W. (2d) 68, 70.

16. Of the trustee in the Rand case the court said: "We may say in passing that could the donator of the trust speak he would say to the trustees, 'Well done.'" Rand v. McKittrick (Mo. 1940) 142 S. W. (2d) 29, 32.

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