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Perpetual Trustees WA Ltd v A-G for Western Aust (1992) 8 WAR 441

[HIGH COURT OF AUSTRALIA.]

RIDDLE AND OTHERS . . . . . APPELLANTS;
APPLICANTS,

AND

RIDDLE AND ANOTHER . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1951, *Nov.* 14.

MELBOURNE, 1952, *March* 14.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Trusts and Trustees—Will—Unauthorized investments—Application to Court—Shares in joint stock companies—Expediency—Order—General or specific—Trustee Act 1925-1942 (*N.S.W.*) (*No.* 14 *of* 1925—*No.* 26 *of* 1942), *ss.* 14, 81.

Investments of trust funds by trustees are not finally limited to the securities authorized by s. 14 of the *Trustee Act* 1925-1942 (N.S.W.) or the trust instrument; under s. 81 of that Act, the Court may, if satisfied that it is expedient in the interest of the trust property as a whole so to do, authorize trustees to invest trust funds in shares in the capital of selected joint stock companies registered on the stock exchange, and to vary and transpose any such investments from time to time.

So *held* by *Dixon*, *Williams* and *Webb* JJ. (*Fullagar* and *Kitto* JJ. dissenting).

In re Strang, (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108, disapproved.

"Expediency" discussed.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.): *In re Riddle*, (1951) 68 W.N. (N.S.W.) 201, reversed.

APPEAL from the Supreme Court of New South Wales.

An application was made by way of originating summons under s. 81 of the *Trustee Act* 1925-1942 (N.S.W.) to the Supreme Court of New South Wales in its equitable jurisdiction, by John Goddard Riddle, Norman Robert McDowell and Enid Maud Cooper Warnock, the trustees of the will of Sir Ernest Cooper Riddle, deceased, for an order (i) that they be at liberty to postpone the conversion of a number of shares in certain public companies, and Commonwealth

Government stock; (ii) that they be authorized to retain those investments and to re-invest the proceeds of the conversion of any such investments or any other investments for the time being of the estate in shares in the capital of any of sixteen named companies, particulars of which were furnished by affidavits; (iii) that they be authorized to vary and transpose any such investments from time to time; and (iv) that they be granted such further or other order as to the judge seemed fit.

The summons was served upon Anthony Cooper Riddle and Cynthia Geraldine Riddle, both of whom were infants under the age of twenty-one years.

In a joint affidavit sworn on 5th April 1951 the trustees John Goddard Riddle and Norman Robert McDowell, solicitors, deposed to the following effect. The testator, Sir Ernest Cooper Riddle, died on 28th February 1939. His will, probate of which was granted to Perpetual Trustee Co. (Ltd.) on 28th June 1939, was in the following terms: "I give devise and bequeath all my property real and personal whatsoever and wheresoever situate unto my Trustee upon trust as to the income for my wife for her life and upon her death or should she predecease me upon trust as to the first half share of such income for my daughter Enid for her life and upon her death for her children until the youngest shall attain the age of 21 years and thereupon to divide the corpus of the said half share equally among such children then living and should my said daughter Enid die without leaving issue who attain the age of 21 years upon the same trusts as the other half share and as to the said other half share upon trust for my son John for his life and upon his death for his children until the youngest shall attain the age of 21 years and thereupon to divide the corpus of the said half share equally among such children then living and should my said son die without leaving issue who attain the age of 21 years upon the same trusts as the first one half share and finally in the event of the death of both my children without leaving issue I declare that the survivor of them may by will deal with my estate according to his or her absolute discretion." The testator died possessed of shares in seventeen joint stock companies, the total value of the shareholdings being £11,117 12s. 6d. The other assets in his estate, excluding certain assets which passed to his widow by survivorship on a joint tenancy basis, were valued at £2,709 7s. 2d., the principal item being life policies and bonuses to the value of £2,157 6s. 0d. The testator's liabilities at the date of his death were £303 7s. 6d. On 20th December 1939, upon an application made by the Perpetual Trustee Co. (Ltd.), the

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Court granted to that company liberty to postpone for a period of five years the conversion of the seventeen shareholdings, and authorized it to retain the shares or any of them for that period. The affidavit of the company's managing director, made in support of that application, contained the following statement: "It would be in the interests of all beneficiaries under the will of the abovenamed deceased that the Company should have a discretionary right to postpone the sale of such investments and retain the same for such period as the Company in its discretion shall think fit, and that in regard to such of the investments as the Company shall deem it advisable to sell that the Company should have a discretionary right to invest such of the moneys obtained from the sale of such investments in shares in leading industrial companies of the Commonwealth of Australia". Upon a further application made by the company the Court did, on 6th March 1945, order that the company was at liberty to postpone for a further period of five years the conversion of six of the shareholdings and authorized the company in its discretion to retain those shares or any of them for the same period. John Goddard Riddle deposed that of his marriage there was issue two children and no more, namely, Anthony Cooper Riddle, born 20th March 1941, and Cynthia Geraldine Riddle, born 13th September 1945. On 12th July 1944, Enid Maud Cooper Riddle, daughter of the testator, was married to John Alan Warnock. There was not any issue of that marriage. On 28th January 1948, the testator's widow, Lady Anne Riddle, the life tenant referred to in the will, died. By deed dated 31st August 1950, Perpetual Trustee Co. (Ltd.) retired from the trusts of the will and appointed John Goddard Riddle, Enid Maud Cooper Warnock and Norman Robert McDowell new trustees in its place and stead. At the date of that appointment and also at the date of the affidavit the assets in the estate consisted, apart from a small sum of money, of the six shareholdings which the company had been authorized to retain by the order of the Court of 6th March 1945; Commonwealth Government stock valued at £8,580; sundry pieces of presentation plate; and an interest in each of two estates of deceased persons. The deponents referred to the affidavit filed in connection with the application made to the Court in 1939 and said that factors at the date of this application were similar to those appertaining at the date of that application, and that it was still in the best interests of all beneficiaries that the trustees should have discretionary power to postpone the sale and conversion of such part of the estate as was invested in shares in public companies, and, further, they believed that it was to the advantage

of such beneficiaries that the trustees should have a discretionary power to invest moneys, in their opinion requiring investment, in shares in certain selected companies of the principal trading and industrial companies trading in Australia and with power to vary from time to time such investments. The deponents believed, further, that the inflationary trend experienced in Australia over recent years must receive further impetus from the record prices being paid for wool and last year's near record wheat harvest. With added money in their pockets the purchasing power of the people of Australia would increase at a greater rate than the production of goods available to be bought with that money. A number of the factors other than high export prices had contributed to that state of affairs. The inflow of money from abroad, seeking temporary or permanent investment in Australia, rising costs of imports and outlay on capital equipment which had not been acquired by savings out of income had all played their part in raising prices. Migrants were entering Australia at the rate of nearly 200,000 per year. Add to that the natural increase in our population and it would be seen that continuous expansion was required to give those people employment and homes and keep them fed, clothed and amused. The 100,000,000 dollar loan from the United States of America would enable the Commonwealth of Australia to purchase certain capital equipment without diverting its workers from the production of civilian goods. But as the Government's declared policy was to employ that fund principally on long-range developmental projects and for defence needs, it followed that there would be no perceptible or immediate improvement in production. It would require a deeper appreciation by unionists and others of the folly or restricted output before any material increase in output could be achieved. The impact of those economic factors on Australia's national economy was heightened by the war between the United Nations and Communist forces in Korea. As the threat to world peace became more serious the member nations of the United Nations would find it increasingly necessary to expedite their rearmament programmes. All over the western world factories were ceasing or diminishing production of civilian goods and producing in their stead war materials. In Australia employees in ever increasing numbers were being paid for defence work and their earnings were being applied to the limited civilian goods available. Considering the cumulative effect of all those aspects it was difficult to envisage an effective brake on the upward trend of prices. The deponents requested the Court to take notice of the increases in the basic wage which had been

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granted by the Arbitration Court since 1939 and in particular the judgment of that Court delivered on 12th October 1950, with the reasons for judgment of each of the justices who constituted the Court. In October 1929 the Court index number was 75.4. The "Needs" basic wage as applied to an unskilled male worker in Sydney was £3 15s. 0d. and the actual wage after adding loadings was £4 1s. 0d. The Court index number given under the Court's order of 12th October 1950 was 103.0 and in December 1950 the "Needs" basic wage as applied to an unskilled male worker in Sydney was £6 19s. 0d. and the actual basic wage after adding loadings was £8 5s. 0d. In the terms of the Court's statement the whole basic wage would be adjustable as from February 1951. If in 1939 a worker required a basic wage of £4 1s. 0d. to purchase his basic needs, and at present (5th April 1951) he required a basic wage of £6 19s. 0d. to purchase his basic needs, in each instance the needs being those determined by the Arbitration Court, it followed that the purchasing power of the Australian pound had decreased since 1939 at least in proportion to the amount by which the basic wage has increased and in respect of the goods considered by the Court in determining basic wage awards. The deponents believed that money invested in loans, whether to the Commonwealth or to other Governmental or semi-Governmental bodies or to private persons, was precluded from participating in the capital appreciation which accrued to moneys invested in reputable public companies whose policy and management enabled them to adjust their trading activities and to present and future economic circumstances. Expansion in our industries in Australia would necessitate such companies calling up fresh capital with consequent opportunities for owners of existing shares to participate in the increase in capital at par or near par values. Investments such as Commonwealth bonds or stock rarely rise in market value above face value plus accrued interest and at interest rates payable on issues in recent years would practically never do so. On the other hand such investments might fall in market value below face value plus accrued interest. In times of inflation the holder of bonds or stock faced inevitable loss resulting from decrease in the value of money; while in times of inflation he might face loss due to the fall in the market value of the bonds or stock. The special disadvantage which the holders of bonds or stock suffered in present times in comparison with other members of the community, who have investments in shares, could be such as to cause serious hardship. The deponents believed that in the case of the testator, the life tenants and remaindermen would suffer loss in value of

income and capital respectively if the orders asked for in the summons were not made. As an investment real property had its attractions. Bricks and mortar were very durable, but with pegged rents and increasing costs of maintenance and rates, property was not the investment it used to be. Apart from that, the purchase of even a small property these days called for the outlay of a considerable sum of money. First mortgages of freehold property were formerly regarded as a sound investment. In these times such an investment, if available, was in relation to the depreciation in value of money, subject to similar disadvantages to those attaching to Government bonds or stock. Furthermore, investment of money on mortgage today presented considerable practical difficulties. Whether due to extensive lending by banks, friendly and co-operative societies, insurance companies and Governmental or semi-Governmental authorities or to other causes, it was a matter of great difficulty to place money satisfactorily on mortgage at all. As trustees in other deceased estates and as attorneys for various clients and on their own account, the deponents either owned or so controlled shares in at least fifty public companies listed on the Sydney Stock Exchange, and for that reason they were familiar with stock exchange dealings in shares and had a reasonable working knowledge of the affairs of the principal companies in which they were so interested. They were of opinion that there were many companies of outstanding financial stability whose shares could be purchased on the open market and were listed on the Sydney Stock Exchange and the yield overall from dividends was at least equal to interest rates payable on Governmental loans and yet the prospect gain during inflationary times was assured. In conjunction with the estate's brokers, the deponents had made a careful survey of the public companies listed on the Sydney Stock Exchange whose shares would be suitable as trustee investments and as a result of such consultations they had selected sixteen public companies, particulars of which were set out. In determining whether such companies were suitable for the investment of trust funds they had considered the companies both collectively and individually. Considered collectively they were of opinion that their individual interests were sufficiently diversified so that circumstances which would be detrimental to one company would not adversely affect another. The assets and labour facilities of the company were spread over such a wide area that labour disputes and shortages or other local upsets would not affect adversely the companies as a whole. Considered individually the companies had reserves which were so substantial as to enable

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each company to weather periods of adversity, depression, strike or war, and even in such times of stress each company's shares would bear a high value relative to the purchasing power of the Australian pound at any given period. In addition, all those companies were likely to increase their dividend rates or their capital within the period of the investment contemplated by the trust, with consequent accretion to the capital already invested. Each of those companies carried on business and had a registered office in New South Wales and was listed on the Sydney Stock Exchange. The purchase of shares in those companies at current market value would give an overall interest yield equivalent to or better than Government loan interest. Finally, they believed that the powers conferred by the testator by his will made in 1930 were prejudicial to the interests of the beneficiaries by reason of the inflationary trend of money and that it was equitable and would be in the best interests of the beneficiaries for the present trustees to be empowered to employ the trust funds in investments which would increase in capital value.

A former Governor of the Commonwealth Bank of Australia, by affidavit dated 5th April 1951, deposed, *inter alia*, that from his knowledge of financial affairs gained as a banker and company director he was of opinion that the moneys at the date of the affidavit invested in shares in reputable companies such as the sixteen companies referred to by the trustees would continue to show a capital appreciation, at least for the next year or two. On the other hand moneys invested in mortgages, Commonwealth bonds or other Government securities could not show any such capital appreciation. The shares of those companies were in his opinion suitable for investment if trust funds. He was of that opinion because all those companies had adequate reserves to meet temporary set-backs and to withstand periods of economic adversity which this country, in common with other countries, might have to withstand. Over a period of say twenty years moneys invested in those companies should receive an adequate return by way of dividends and because of the sound nature of the companies the value of those shares would always remain high in relation to the purchasing power of money at any given time. In addition, it was reasonable to anticipate that many of those companies would expand their capital with consequent capital appreciation to the shareholders. After careful consideration he was of opinion that it was in the best interests of both the life tenants and the remainder-men of the estate that the trustees be empowered to retain the shares held by the estate unconverted for so long as they should

think fit and to invest and transpose investments in the shares of the other sixteen companies referred to above.

A member of a firm of stock and share brokers which for many years had carried on business in Sydney, by affidavit dated 5th April 1951, deposed, *inter alia*, that the companies referred to had been selected by him in consultation with the deponent trustees and in selecting a limited number of companies from the many public companies whose shares were suitable for trustee investments, they had given particular regard to the following requirements: (a) the companies must be listed on the Sydney Stock Exchange and must be ones which had been accepted by the trustees and, in particular, trustee companies, as being suitable for the investment of trust funds; (b) each individual company must have sufficient reserves to enable it to withstand long periods of financial stress such as would be occasioned by war, depression, low prices for exports of primary produce and prolonged industrial disturbances; (c) considered as a portfolio of shares the interest of the various companies, whose shares were included, must be sufficiently diversified so that the local upsets, such as strikes and shortages of material or adverse conditions applicable to a particular industry, for example, the present shortage of electricity, do not react on the activities of the other companies and thus the greatest security of income is achieved; (d) the record of the companies must be such that a prudent investor could confidently expect that they would make progress in the future which was in keeping with their past records of progress and that there would be both increased rates of dividends and capital expansion with consequent accretion of value to the shares; (e) the management of the companies must be sound; (f) the dividend yield must be equal to or better than interest on Government loans. In the deponent's opinion the portfolio selected met with those requirements and was eminently suited to the investment of trust funds. If money was invested in Commonwealth loan, then there was never appreciation in the value of the amount invested, but in times such as the last world-depression of 1930, Commonwealth stock depreciated. If moneys were invested in shares, the capital sum invested could appreciate and could depreciate. In inflationary times, if moneys were invested in companies of the type referred to above, it was almost impossible for the shares to do otherwise than appreciate in value. It was part of the deponent's business as a broker to consider the financial trend in Australia and he could say without hesitation that further inflation in Australia was inevitable so that if shares were wisely purchased at the then present time, there was

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not any doubt in his mind that the capital value of the shares in terms of pounds Australian would over a period appreciate in value substantially, thus keeping pace with inflation and expansion. It was the deponent's opinion, after long association with the testator, that were he alive at the date of the affidavit he would be the first to recognize that investments in securities authorized under the *Trustee Act* were damaging to his beneficiaries and would approve of the investment of his funds in good-class shares. In conclusion, the deponent was of opinion that the value of shares held in the suggested portfolio would always be high in relation to economic circumstances prevailing at any given time and that it would be in the best interests of all beneficiaries in the estate for power to be granted to the trustees to retain as investments any of the shares held by them at the then present time and with power to make and transpose investments in shares in the other public companies referred to.

Tables prepared for each of the years 1938 to 1950, inclusive showing the income which would have been derived from shares in the companies in which the trustees sought leave to invest, and a contrasting of that income with the income which would have been derived had the equivalent amount of capital been invested in Commonwealth bonds at $3\frac{3}{4}$ per cent showed, in summarized form, the total income from capital invested in shares 1938-1950 as £2,727 18s. 4d., and the total income from capital invested in $3\frac{3}{4}$ per cent bonds as £1,967 5s. 9d., the excess of income from shares over income from bonds being £760 12s. 7d. The market value of shares as at 21st January 1951 was shown as £10,546 15s. 5d., and the cost price of original and new issues or capital invested in bonds was shown as £5,472 2s. 5d., the capital increment on shares being £5,074 13s. 0d.

In an affidavit dated 9th April 1951 a director of seven public companies listed on the Sydney Stock Exchange deposed, *inter alia*, that a great deal of his time was engaged in advising his clients upon their respective financial matters and the trend of current finance both within the Commonwealth and overseas. Funds invested at the date of the affidavit in loans, whether it be to the Commonwealth Government or other governmental or semi-governmental authorities or to private persons, could not appreciate in value, and during a period of inflation the corpus of the estate so invested would diminish so far as purchasing power was concerned in the same ratio as inflation took place. At the time of the affidavit Government bonds or debentures or similar securities were paying a low rate of interest comparable to the

return to be obtained if the same funds were invested in good-class shares of the larger public companies. Furthermore, if moneys were invested in shares of that type of company, not only would the market value of the shares increase according to inflationary pressure, but further capital appreciation would occur where the companies concerned issued rights to further shares, which rights could be sold and the capital so obtained reinvested. Many of the larger companies, during the twelve to eighteen months preceding the date of his affidavit, had made bonus issues of shares without materially affecting the market value of the shares in question and at the same time the dividend rate had been maintained. Any trustees who were compelled to invest in authorized trustee securities were these days placed at a distinct disadvantage and material harm was done to the beneficiaries. Such beneficiaries as were dependent on income received very much less income per cent of capital invested where that capital was invested in trustee securities than if the capital were invested in shares of the type of the sixteen companies referred to by the trustees. The deponent was of opinion that those shares were particularly well suited for trustee investments. By investing in Commonwealth bonds or similar government securities remaindermen were materially penalized by the fact that their capital was prevented from expanding under inflationary conditions as would capital invested in shares. He was of opinion, also, that it would be in the best interests of all beneficiaries in the estate for power to be granted to the trustees to make investments within the portfolio of shares suggested by the trustees and with power to vary or transpose such investments from time to time as occasion should necessitate.

Roper C.J. in Eq. authorized the trustees in their discretion to postpone the conversion of the six shareholdings for a further period of ten years from the expiration of the period of five years provided by the Court's order of 6th March 1945, and to retain those investments for the further period of ten years, but his Honour refused to make an order conferring upon the trustees power to invest estate moneys in the shares of any of the sixteen selected companies (*In re Riddle* (1)).

From that decision the trustees appealed to the High Court.

N. H. Bowen, for the appellants. The *Trustee Act* 1925-1942 (N.S.W.) authorizes a trustee to invest in the securities set forth in s. 14 unless expressly forbidden by the trust instrument:

(1) (1951) 68 W.N. (N.S.W.) 201.

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s. 14 (1), (2). The powers conferred are " in addition to the powers conferred . . . by the instrument, if any, creating the trust " : s. 14 (12). Section 81 of the Act gives jurisdiction to the Equity Court to confer certain powers where neither the instrument nor the Act confers the power. It enables a settlor through his trustees to have an afterthought where some power is required, which he might have inserted if he had thought of it or if he had foreseen circumstances which had since occurred. In the head-note in *In re Mair* ; *Richards* v. *Doxat* (1) it is stated that s. 57 of the *Trustee Act* 1925 (15 Geo. 5, c. 19) (Imp.), which is the equivalent of s. 81 of the New South Wales Act, is deemed to be read into every will and settlement. The judgment in that case does not bear out the head-note, but at least it shows that any order made under s. 81 virtually becomes part of the trust instrument. The power of investment sought in this case is precisely within the wording of s. 81. The section refers expressly to " investment " and to the conferring of power " either generally or in any particular instance ". The only test is whether in the opinion of the Court it is " expedient " (*Lewin* on *Trusts*, 15th ed. (1950), p. 339). This means expedient from the point of view of the estate as a whole (*In re Craven's Estate* ; *Lloyds Bank Ltd.* v. *Cockburn* (*No.* 2) (2)). The power conferred by s. 81 is intended to be a wide power (*Re J. T. C. Mayne* (3)). It may be suggested that a wide power of investment such as is sought in this case is a matter for the legislature. It is submitted that under s. 81 the legislature has said it is a matter for the court. It may be highly undesirable that a general power be given by statute to invest in shares. Although most modern wills and settlements contain such a power, many may regard it desirable that such a power should be conferred only in cases which have been subjected to the scrutiny of the court and on terms laid down by the court. It may be suggested that, if the court granted such an order in this case it would have to grant it in many others. If the court, as is submitted, has power to make the order and is satisfied that it is expedient, it cannot be a legal ground of objection to say that it would also be expedient in other cases. According to *In re Strang* (4), before the Equity Court will apply s. 81 to confer a power of investment there must be shown some special advantage to be gained or some special disadvantage to be avoided. It is submitted that that is an unwarranted gloss upon the words of the section. A similar order to that now sought was made by *Williams*

(1) (1935) Ch. 562.
(2) (1937) Ch. 431.
(3) (1928) 28 S.R. (N.S.W.) 157 ; 45 W.N. 46.
(4) (1941) 41 S.R. (N.S.W.) 114 ; 58 W.N. 108.

J. (then *Williams* A.J. sitting in the equitable jurisdiction of the Supreme Court of New South Wales) in *Perpetual Trustee Co. (Ltd.)* v. *Kelly* (1).

P. J. Kenny, for the two infant respondents. The respondents support the appeal and adopt the argument addressed to the Court on behalf of the appellants. It was suggested that the appellants were in effect requesting the Court to act on a general proposition that shares in limited liability companies were a more desirable form of investment than the forms specified in the *Trustee Act* 1925-1942 (N.S.W.). It was unnecessary for the appellants to put their case so high. All that the appellants had to establish, and all that they sought to establish, was that it was expedient for this estate to invest in shares in a restricted range of limited liability companies. *Roper* C.J. in Eq. had based his refusal to make an order upon the absence of circumstances peculiar to this estate. That was the wrong test. It added the requirement of exclusiveness to that of expediency. There was not any justification in the section for that, and if that was the correct test it would be necessary in every case to inquire not only whether a proposed transaction was for the benefit of the particular estate, but also whether in the administration of any other estates a similar transaction would benefit those estates. If the court found that the proposed transaction would benefit the particular estate and was not of a type which would be beneficial to many other estates, it had power to make the order sought, but if it found that, because of prevailing conditions, the proposed transaction was of a type which would be beneficial to a large number of estates, it had not the power. That could not have been the intention of the legislature and accordingly exclusiveness was not an element in the test to be applied.

Cur. adv. vult.

March 14, 1952.

The following written judgments were delivered :—

DIXON J. This is an appeal from a decision of *Roper* C.J. in Eq. refusing to make an order under s. 81 of the *Trustee Act* 1925-1942 (N.S.W.) conferring upon the trustees of the estate power to invest in the shares of certain selected public companies.

His Honour refused the order upon the ground, based upon the decision in *In re Strang* (2), that the reasons relied upon for saying that such an investment of the funds of the estate was expedient

(1) (3rd June 1940) unreported.

(2) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

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were of equal application to every trust in which there was no power of investment outside the forms of security authorized by law for the investment of trust funds.

In the present case the trusts arise under a will conferring no express powers of investment, so that the trustees are confined to the description of investment authorized by s. 14 of the *Trustee Act*. The application under s. 81 was made by summons supported by affidavits making a strong case against the wisdom in prevailing conditions, from the point of view of the interests of the beneficiaries, of committing the assets of the estate, or a predominant proportion of them to such forms of investment. Section 81 appears to me clearly to extend to authorize the Court to make an order empowering the trustees to invest some or all of their trust funds in the manner desired.

It is a matter " in the management or administration of property vested in trustees ". Questions of investment are typically and traditionally matters arising in the administration of trust funds. The statutory condition is, of course, satisfied that the investment cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument or by law. The grounds upon which the application is based, if accepted, appear to me clearly to make a case of expediency. Expediency means expediency in the interests of the beneficiaries and the grounds assigned may be summed up by saying that if the trustees are confined to investments authorized by law the interests of the beneficiaries will be seriously threatened.

The summons seeks an order in general terms, terms no doubt too general to be approved, but s. 81 expressly authorizes the Court to confer the necessary power for the purpose upon the trustees generally. How generally is a matter of discretion.

Section 81 is a provision conferring very large and important powers upon the Court which depend upon the Court's opinion of what is expedient, a criterion of the widest and most flexible kind. The power necessarily carries with it responsibilities of equal extent. The responsibilities imposed involve business and financial considerations, but responsibilities of that description have always fallen on courts of administration.

I do not think that the powers given by s. 81 were intended to be restricted by any implications.

Various restrictions by interpretation or implication have been proposed. *In re Strang* (1) decided that it would not be proper for the Court to make a general order authorizing investment in the

(1) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

purchase of shares in joint stock companies to be selected at the discretion of the trustees or to make an order on grounds equally applicable to all trusts with powers of investment restricted to those authorized by law. This appears to imply some restraint upon the kind of order that may be made conferring the necessary power for the purpose generally. As I have said, the " propriety " of making a general order is a matter of discretion. But I cannot see why it should be legally wrong or in any sense improper to make an order sufficiently general to enable the trustees to act at their own discretion in selecting, out of a list of shares named in the order or out of a description of shares defined in the order, particular shares from time to time for investment or for sale. I respectfully disagree with the view that the fact that all other trust estates with the same lack of power are affected in the same manner takes the case outside the section or affords a reason for refusing to make an order. The section contemplates the conferring of a power of investment outside the investments allowed by s. 14 and, if it is " expedient " to do this for reasons applicable only to the particular estate or a limited class of estates, I am unable to see why it is less expedient because the reasons are of general application.

Nor am I able to assent to the view that s. 81 in its application to powers to invest is confined to cases where a specific investment is found to be expedient so that the basis of the order must be the particular investment, though the authority given by the order may be a general power.

When s. 81 (1) says that the Court may by order " confer upon the trustees, either *generally* or in any particular instance, the necessary power for the purpose " it is referring back to the various purposes mentioned earlier in the sub-section, namely, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction. A general power to enter upon any of these transactions must be a power authorizing them as a description of transaction, not as a specific identifiable contemplated transaction. The expression " any investment " is quite capable of meaning " any description of investment ", if indeed that is not its prima-facie meaning. Any other interpretation would involve an awkward and, I think, purposeless restriction of the provision to cases where, to obtain a general power, the trustees had to produce to the Court an inchoate identifiable particular transaction. The trustees having done that, the Court could then, according to the express terms of the section, confer the necessary power generally as opposed to conferring it in the particular instance.

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I think that s. 81 is not subject to any of the restrictions suggested and that, if the Court accepted the view of prevailing conditions affecting investments which the affidavits present, an order of some kind authorizing investment in shares should have been made. The order which the summons asks for is not sufficiently guarded and I would not regard the discretion of the Court as soundly exercised if approval was given to an order in such terms.

The foregoing reasons relate to the power of the Court. The manner in which the power is exercised depends on considerations of prudence and wisdom which are not likely to be overlooked by the Supreme Court in its equity jurisdiction. Since the affidavits were sworn so much development and change has taken place in the relevant conditions prevailing that I do not think that it would be desirable to deal finally here, upon the materials they contain, with the questions of fact and discretion that are involved. I would therefore allow the appeal and remit the suit for rehearing.

WILLIAMS J. This is an appeal from a refusal by the Supreme Court of New South Wales in its equitable jurisdiction (*Roper* C.J. in Eq.) to authorize the trustees of the estate of the late Sir Ernest Cooper Riddle deceased to invest part of the capital of his estate in the purchase of shares in certain public companies registered on the stock exchange. The testator died on 28th February 1939. He left a short will in the following terms:—"I give devise and bequeath all my property real and personal whatsoever and wheresoever situate unto my Trustee upon trust as to the income for my wife for her life and upon her death or should she predecease me upon trust as to the first half share of such income for my daughter Enid for her life and upon her death for her children until the youngest shall attain the age of 21 years and thereupon to divide the corpus of the said half share equally amongst such children then living and should my said daughter Enid die without leaving issue who attain the age of 21 years upon the same trusts as the other half share and as to the said other half share upon trust for my son John for his life and upon his death for his children until the youngest shall attain the age of 21 years and thereupon to divide the corpus of the said half share equally among such children then living and should my said son die without leaving issue who attain the age of 21 years upon the same trusts as the first one half share and finally in the event of the death of both my children without leaving issue I declare that the survivor of them may by will deal with my estate according to his or her absolute discretion".

It will be seen that the will contains no investment clause. At the date of death practically the whole estate of the testator was invested in shares in joint stock companies. There were seventeen such companies, the total value of the shareholdings being £11,117 12s. 6d. The other assets in the estate, excluding certain assets which passed to his widow by survivorship, were valued at £2,709 7s. 2d., the main items being life policies and bonuses totalling £2,157 6s. 0d. The testator's widow died on 28th June 1948. The testator had two children, a son and a daughter, who are still alive and are married. The son has two children. The daughter has no children. There is no express trust for conversion in the will. But the estate was left to life tenants and remaindermen and an implied trust arose under the rule commonly known as the rule in *Howe* v. *Lord Dartmouth* (1). On 20th December 1939 the Supreme Court authorized the trustees of the will to postpone the conversion of the seventeen shareholdings for five years and to retain the shares or any of them for this period. On 6th March 1945 the Supreme Court authorized the trustees to postpone the conversion of six of these shareholdings which were still unconverted for a further period of five years and to retain these shares or any of them for this period. The estate of the testator now consists of the six shareholdings which the trustees were authorized to retain by the order of 6th March 1945 and of Commonwealth Government Stock valued at £8,650. The present proceedings were commenced on 29th March 1951. They took the form of a summons under s. 81 of the *Trustee Act* 1925-1942 (N.S.W.). In the summons the trustees of the will asked (1) for an order authorizing them to postpone the conversion of and to retain the above six shareholdings and (2) for an order authorizing them to re-invest the proceeds of the conversion of any of these shares or any other investments for the time being of the estate in shares in the capital of a number of public companies registered on the stock exchange and authorizing them to vary and transpose any such investments from time to time.

The summons was heard by *Roper* C.J. in Eq., who authorized the trustees in their discretion to postpone the conversion of the six shareholdings already mentioned for a further period of ten years from the expiration of the period of five years provided by the order of 6th March 1945 and to retain these investments for the further period of ten years, but his Honour refused to make the second order. Hence this appeal. In the course of his judgment his Honour said that he felt no difficulty in authorizing the trustees

(1) (1802) 7 Ves. 137 [32 E.R. 56].

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" to postpone the sale of and in their discretion to retain as investments the particular shares now held by them ". He went on to say that the additional order sought was entirely different in its nature. " The question whether a trustee should be empowered to retain an investment which he holds but which is not authorized as such by the trust instrument or by law involves considerations essentially different from those arising when the question is whether the trustee should be permitted to invest money in his hands awaiting investment in investment not so authorized." With respect, I cannot see why the second order involves considerations essentially different from those governing the first order. Both depend upon the true construction of s. 81 of the *Trustee Act*. That section, as will be seen, gives the Court jurisdiction to empower trustees to make an investment and to authorize trustees to postpone the sale of trust property. I am quite unable to discover any direction in the section that the question whether trustees should be authorized to postpone the sale of trust property should be approached in a different manner from the question whether trustees should be empowered to make an investment.

With respect to the second order, his Honour appeared to be satisfied that these are inflationary times and the value of money is declining so that it is desirable that trustees should be authorized to invest at least some part of the trust funds either directly in tangible assets or in public companies possessing such assets. But he said that this was a difficulty in which all trustees not authorized to make such investments were placed. It was not a difficulty peculiar to the Riddle estate. The question really was whether, in the absence of any circumstances peculiar to this estate, the trustees should be empowered under s. 81 to invest trust money in the purchase of shares in certain companies whose shares had over a period of some twelve years shown a higher income return than would have been obtained from investment in the available trustee securities authorized by statute and also shown a reasonable capital enhancement over that period whilst such trustee securities showed none. His Honour thought that a general principle was to be extracted from the decision of the Full Supreme Court of New South Wales in *In re Strang* (1) and that principle was that the Court should not in purported exercise of its jurisdiction under s. 81 bring about the effect of a legislative amendment of s. 14. His Honour then quoted the following passage from the judgment of *Jordan* C.J. in that case (2) :—" In

(1) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

(2) (1941) 41 S.R. (N.S.W.), at pp. 118, 119; 58 W.N., at p. 111.

the present case, there is no evidence of anything special in the circumstances of the trust which calls for such an order as is now asked for; and if it were made on the material before us, I cannot see on what ground a similar order could be refused in any other estate in which the trustees chose to ask for it. In effect, the Court would be adding shares in limited liability companies . . . to the list of trustee securities. If this result is to be produced, it should be by an Act of the Legislature, not by a purported exercise by a Court of Equity of the enlarged powers of administration conferred by s. 81 ".

The first question is whether s. 81 authorizes the Court to make the second order. I have no doubt that it does. The important sub-sections are (1) and (2). They do not authorize the Court to make a direct order for the sale &c. of trust property. They authorize the Court to empower the trustees of the property so to do. The Court can therefore only make an effective order where the property is vested in trustees. The order must relate to the management or administration of the property so that the trusts or powers referred to must be administrative trusts or powers. The Court must be of opinion that in the management or administration of the property a sale &c. is expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust or by law; *In re Pratt's Will Trusts*; *Barrow* v. *McCarthy* (1); *Degan* v. *Lee* (2). Sub-section (1) provides that the Court may then by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions as the Court may think fit. Sub-section (2) widens, if it is possible so to do, the jurisdiction of the Court beyond that conferred by sub-s. (1). It provides that the provisions of sub-s. (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorize the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorization of the Court or the consent of the beneficiaries would be a breach of trust.

Section 81 therefore authorizes the Court to confer upon trustees the power to make any investment or investments which they are not empowered to make by the trust instrument or by law if the

(1) (1943) Ch. 326, at p. 332.

(2) (1939) 39 S.R. (N.S.W.) 234, 459; 56 W.N. 102.

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Court considers it expedient so to do. The section authorizes the Court to confer the power upon the trustees to make such an investment or investments either generally or in any particular instance. It authorizes the Court to make an order which will alter the trusts or powers including powers of investment conferred upon the trustees by the trust instrument or by law and extend such trusts or powers. If the Court considers it expedient that the trustees should be authorized to make an investment or investments outside those authorized by the trust instrument or by law, it can confer a general power on the trustees to make such an investment or investments on such terms and subject to such provisions and conditions as the Court may think fit. Accordingly, if the Court thinks it expedient that the trustees should be empowered to invest the trust property or any part thereof in certain shares, it can extend the powers of investment conferred on the trustees by the trust instrument or by law so as to authorize them to invest in such shares.

The section is couched in the widest possible terms. The sole question is whether it is expedient in the interest of the trust property as a whole that such an order should be made; *In re Craven's Estate*; *Lloyds Bank Ltd.* v. *Cockburn* (*No.* 2) (1). In *In re Strang* (2), referred to by *Roper* C.J. in Eq., a similar application to the present one came before the Full Supreme Court of New South Wales. In the course of his judgment *Jordan* C.J. said (3): "Section 81 is expressed in very general terms, and it would be unwise to run the risk of imposing fetters on a discretion which is intended to be large in its scope by attempting to lay down general conditions for the exercise of jurisdiction under the section". With this statement I completely agree. I also agree with his statement (4) that "it would not be proper for the Court to make a general order authorizing investment in the purchase of shares in joint stock companies to be selected at the discretion of the trustee". The Court must, I think, approve the investments in which trustees can be empowered to invest the trust property. He then said: "The next question is whether the evidence now before the Court would justify an order authorizing investment in shares of the particular companies named". He concluded that it would not for the reasons given in the passage cited by *Roper* C.J. in Eq.

(1) (1937) Ch., at p. 436.
(2) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.
(3) (1941) 41 S.R. (N.S.W.), at p. 115; 58 W.N., at p. 109.
(4) (1941) 41 S.R. (N.S.W.), at p. 117; 58 W.N., at p. 110.

The Chief Justice, in discussing the evidence required to prove that it would be expedient to authorize trustees to invest in shares, had said: "When authority is sought under s. 81 to make an investment of a type not authorized by the trust instrument or by the general law, it is in my opinion necessary that the Court should have before it evidence (1) that it is desirable to resort to the particular type of investment either to obtain some special advantage or to avoid some special disadvantage, and (2) that the particular investment proposed is eligible of its type (unless the type is such that the choice of particular instances may safely be left to the trustees' discretion)." (1). With respect I entirely disagree with the view that the evidence must prove that it is desirable to resort to the particular type of investment to obtain some special advantage or to avoid some special disadvantage. There is no such requirement in the section. The Court has only to be satisfied that it is expedient that the trustees should be authorized to make an investment or investments. The degree of proof that a proposed investment is expedient is no higher than the proof required that any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction is expedient. If the Court can only authorize an investment of a type not authorized by the trust instrument or by the general law where it is desirable to resort thereto to obtain some special advantage or avoid some special disadvantage, then the Court can only authorize trustees to make any sale &c. where there is evidence that the sale &c. will produce some special advantage or avoid some special disadvantage. Again with respect, I cannot agree with the view that the fact that if such an order as that now asked for were made in one estate it would be difficult to refuse a similar order in any other estate in which the trustees chose to ask for it provides a reason for refusing to make the order. The fact that what is expedient for one estate may also be expedient for a large number of other estates should not deprive them all of a beneficial order. There is nothing legislative in such an order whether it is proved to be expedient that it should be made in one estate or many estates. A propitious time might arrive for the sale of real estate which might induce the trustees of several estates to seek authority to sell the trust realty, but that would not be a reason for refusing an order to any of them. The section authorizes the Court in plain terms to extend the powers of investment of trustees beyond those authorized by the trust instrument or by law if it considers it expedient so to do. The ordinary natural

(1) (1941) 41 S.R. (N.S.W.), at p. 116; 58 W.N., at p. 109.

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grammatical meaning of "expedient" is "advantageous", "desirable", "suitable to the circumstances of the case". If the Court forms the opinion that it is desirable to extend the investment powers of trustees it can extend them. It can nominate the particular investments and authorize the trustees to invest in them just as it can nominate the particular trust asset or assets that may be sold &c. or the particular asset or assets that may be purchased or acquired and authorize the trustees to sell or purchase or acquire them.

In a recent case in England, *Municipal and General Securities Co. Ltd.* v. *Lloyds Bank Ltd.* (1), *Wynn-Parry* J. refused to make an order under s. 57 of the *Trustee Act* 1925 (15 Geo. 5, c. 19) (Imp.), which corresponds with s. 81 (1) of the New South Wales *Trustee Act* authorizing the trustees to sell stock issued or to be issued to the trust in lieu of shares previously held by the trust in certain transport, electricity and gas companies which were nationalized. The facts of that case were altogether different to the present facts. The trust was a different kind of trust. The English Act does not contain a sub-section similar to s. 81 (2) of the New South Wales Act. The real reason for refusing the order was the same as that in *In re Pratt's Will Trusts*; *Barrow* v. *McCarthy* (2), namely, that the trustees already had a power of sale under the trust instrument. His Lordship, however, made some remarks upon the meaning of s. 57 and said that the words "management or administration" at the beginning had a limiting effect upon the jurisdiction conferred upon the Court. The only limiting effect that these words have is, in my opinion, to limit the jurisdiction of the Court to administrative orders. The amount of stock that his Lordship was asked for leave to sell was small and the ground appears to have been that it would be inconvenient to hold the stock as part of the trust. He concluded that no real inconvenience had been proved. The case provides an example of the way in which the Court exercised its discretion on particular facts. It throws no light on the present problem.

The one and only test is the expediency of the act or thing which the Court is asked to authorize the trustees to do or abstain from doing. The Court has only to be of opinion that the trust property as a whole will in fact benefit from the making of the order. The trust property consists of the assets in which it is invested, and it must be expedient that the property should be invested in assets which, having regard to the existing and probable future economic conditions in Australia, are most likely to provide

(1) (1950) Ch. 212. (2) (1943) Ch. 326.

the best income for the life tenant and the best security for the capital. The principal enactment authorizing the investment of trust funds in New South Wales is s. 14 of the *Trustee Act*. This section, like all other sections authorizing the investment of trust funds, limits the investments to loans of money and these investments have the common characteristic that they bear a fixed rate of interest and the amount lent is repayable in full at maturity. With respect to such investments I venture to repeat a few remarks in an unreported judgment of my own in *Perpetual Trustee Co. Ltd.* v. *Kelly*, delivered in 1940, when I was an acting judge of the Supreme Court of New South Wales. A similar application to the present application was then before me and I made an order authorizing the trustees to invest approximately half the trust funds in the shares of certain public companies. "These investments were once supposed to provide the maximum degree of safety for the trust funds. They did not give an opportunity for substantial capital increment, although some increment could take place if government stocks could be purchased under par and held until redemption. Experience has shown, however, that this safety does not exist. The moratorium legislation has in many cases caused serious capital losses on mortgages and currency depreciation can in fact cause a capital loss by lowering the purchasing power of money. The price of tangible assets on the other hand can be increased to offset the depreciation in currency, so that the purchase of such assets can often provide a better security for trust funds than mere choses in action. . . . I think that experience has shown that it is advisable that some part of the trust funds should be invested in shares and that a reasonable balance should be maintained between investments in government stocks, mortgages and public companies. Most modern wills contain such an authority."

The passage of time lends point to these remarks. Who can doubt that capital invested in shares of leading industrial Australian companies has appreciated in amount or that the purchasing value of Australian currency has decreased in recent years, so that the owners of capital invested in shares are in a more favourable position today than the owners of capital lent at interest over these years. Section 81 authorizes the Court to step in whenever it is of opinion that sound practical business considerations make it expedient that trustees should have administrative powers in addition to or overriding the powers derived from the trust instrument or the general law. In *Re J. T. C. Mayne* (1) *Harvey* C.J. in

(1) (1928) 28 S.R. (N.S.W.) 157, at p. 161; 45 W.N. 46, at p. 47.

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Eq. said : " In my opinion, s. 81 is deliberately framed in the widest possible terms to enable the Court to do any administrative act in the administration of a trust. Sub-section (2) of that section says that these provisions are to be deemed to empower the Court to authorize the trustees to do or omit to do any act which if done or omitted would be a breach of trust." The Court is not infallible. Neither are economists. The Court can only do its best on the evidence before it, consisting either of its own judicial knowledge of current economic and financial conditions or knowledge derived from the evidence of experts. Section 81 recognizes that trust instruments and the general law may often prove inadequate to clothe trustees with the requisite powers to manage and administer trust estates over a period of years to the best advantage and authorizes the Court to supplement or override these powers so far as may be expedient.

The view that an order extending trustees' powers of investment so as to include types of investment not authorized by s. 14 of the *Trustee Act* is beyond the jurisdiction of the Court under s. 81 is quite untenable. Section 14 is a law which authorizes trustees to make certain investments. Section 81 is another law which says in the plainest terms that the Court may extend trustees' powers of investment. In exercising its jurisdiction under the section, the Court is not legislating. The Court is doing the very thing that s. 81 authorizes it to do. The section authorizes the Court to confer an authority upon a trustee involving an exercise of discretion. In *In re Thomas* ; *Thomas* v. *Thompson* (1) *Farwell* J. authorized the trustees either to partition freeholds and leaseholds on their own responsibility or to come again to the Court with full evidence to obtain the Court's approval to a particular partition. It is not correct to say that the Court would not be able to refuse an order whenever the trustees chose to ask for it. The Court would have to take into account the interests of the life tenants and remaindermen and it might be that the net income from trustee investments, with or without taking income tax into account, would be higher than the dividends from companies of which the Court would approve and the life tenants might oppose the order. The Court might not consider it to be expedient in the interests of the estate as a whole to make the order. It might consider that the order would benefit the remaindermen at the expense of the life tenants. Similar problems confront the Court in applications under other Acts—for instance, under the *Settled Estates Act* 1877 (40 & 41 Vict. c. 18) (Imp.) (in New South Wales

(1) (1930) 1 Ch. 194.

Part IV of the *Conveyancing and Law of Property Act* 1898) and *Settled Lands Act* 1925 (15 Geo. 5, c. 18) (Imp.), cf. *In re Mount Edgecumbe (Earl of)* (1); *In re Coffill's Settled Estate* (2).

In the present case the son and daughter, who are the life tenants, and two of the trustees, support the application. It is also supported by the guardian *ad litem* of the infants. The expediency of authorizing some spread of investment beyond the mere lending of money under the present and probable future economic and financial conditions in Australia is obvious. The estate is not a large one, so that frequent applications to the Court should be avoided. It is, in my opinion, expedient to authorize the appellants to invest some part of the estate in shares in public companies. The appellants seek authority to invest in sixteen public companies registered on the stock exchange. There is evidence that these are companies in which trust funds could be safely and profitably invested. If the affidavits were up to date this Court might be disposed to make an order itself authorizing the appellants or other the trustees for the time being of the estate to invest a certain proportion of the capital either in the retained shares or in shares in these companies or some of them. But the affidavits are no longer up to date, and many changes have occurred in the value of shares on the stock exchange in the interval. In these circumstances it would appear to be advisable to allow the appeal and remit the suit to the Supreme Court to decide the details of the order.

WEBB J. The problem here is not an ordinary one for the solution of which a court might give directions to the trustees after hearing evidence of matters peculiar to the estate in question: it is a national problem arising out of the decline in the purchasing power of money. As might be expected, this national problem is being dealt with at the highest political level, and it would be sheer speculation to forecast the result of legislative and other measures taken to prevent a further decline. Still it does not follow that if the Court grants this application it will indulge in speculation.

Really the Court is asked to avoid speculation by adopting the safe course of extending the scope of authorized investment so that the trustees may transfer from one form of investment to another, according to exigencies. This is the one way that the trustees can avoid the danger arising from the fluctuation of the purchasing power of money; and for that reason I cannot see

(1) (1950) Ch. 615.

(2) (1920) 20 S.R. (N.S.W.) 412; 37 W.N. 110.

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why it is not expedient to enable them to make such transfer. On the contrary, it seems to me to be imperative that the trustees should be authorized to do so, and that the Court has power to grant the authority. In so doing the Court would not, I think, delegate its statutory power to the trustees, as they would be authorized to invest only in shares selected by the Court after hearing evidence. The trustees would have no power to invest in other shares. They would have power to sell selected shares and invest the proceeds in other selected shares, or again in securities authorized by the legislature. In so doing they would not be exercising a general power given to the Court; but they might be exercising one given to them by the legislature. The trustees are required to act prudently on all occasions, and so it would be their duty to vary the investments of the trust moneys if the rise or fall of the purchasing power of money warranted the change, but always within the limits of the general authority given by the legislature and of the special authority given by the Court after hearing evidence.

Nothing turns, I think, on the shifting of the onus of proof as to prudent management that results when an authorized investment is attacked as imprudent. The legislature changed this onus when it ventured to authorize investment in certain classes of securities; and I am unable to see why it should be inexpedient for a court to do likewise when the purpose is to enable the estate to avoid loss and not to make profit. In my opinion the advantage of having the onus rest on the trustees does not outweigh the advantage of allowing them to keep the estate moneys always safely invested. Indeed, I think, it is of less weight. The shifting of the onus does not give the trustees any immunity; but the extension of the scope of investment might well save grave loss to the beneficiaries if inflation continues.

I would allow the appeal.

FULLAGAR J. In this case I find myself, after full consideration, in complete agreement with the judgment of *Jordan* C.J., in which *Nicholas* C.J. in Eq. and *Roper* J. concurred, in *In re Strang* (1). With great respect, I do not think that that judgment, properly understood, is fairly open to the criticism to which it has been subjected. I am not perfectly sure that I can usefully add anything to what *Jordan* C.J. said in that case, and what my brother *Kitto* has said in this case. Since, however, the matter is of considerable importance, and there is a difference of opinion, I propose to add a few observations.

(1) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

I agree with the learned Judge from whom this appeal comes that the approach of a court of equity to a question whether the retention of an investment for a period ought to be authorized must be, or at least ought to be, different from the approach to the question whether a more or less general or more or less limited authority should be given to invest trust moneys in shares of public companies. The difference between the two approaches comes very near to the heart of this case. When the former question arises, there is a particular concrete situation to be considered: the Court is not being asked to lay down or apply any new general policy with regard to the investment of trust funds. When the latter question arises, the Court *is* being asked to accept, and act upon, a general rule of policy that shares in public companies are a proper subject for the investment of trust funds. This statement is true, however the particular application may be framed, and however it may limit the class of shares in which authority to invest is sought. No comparable general rule of policy is involved in a mere application for authority to retain an existing investment for a limited time.

The next observation I would make is that s. 81 of the *Trustee Act* 1925-1942 (N.S.W.) should not be approached from the point of view of a common lawyer. That section is (as is its English prototype and other successors of that prototype, such as s. 57 of the Victorian *Trustee Acts* 1928-1947) directed to the equitable jurisdiction of the court to which it is addressed. Approached without a full realization of this, it immediately suggests that here is a new and beneficial jurisdiction conferred upon a court which had no such jurisdiction before. You must interpret this entirely novel jurisdiction liberally: you must "advance the remedy". If a literal construction yields a liberal result, you must interpret literally. So all you have to do is to see whether a proposed course is "expedient", that is, likely to be for the financial advantage of the trust fund, and, if you find it *is* "expedient" in that sense, give authority for the proposed course. The "may", in effect, becomes a "must".

But the truth is that the section was addressed to an existing position in equity, and that no question of jurisdiction arises under it in such a case as the present. The jurisdiction of equity is the jurisdiction which the great Chancellors, and the men who made equity, assumed and in fact exercised. At all times which can be regarded as material, equity *had* the jurisdiction which s. 81 purports to confer. It is true that very eminent judges, when they have been asked to sanction a departure from the terms of a

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trust, have used language which suggests that the question whether the application should be granted was a question of jurisdiction. But it could not be said with accuracy that there was "jurisdiction" to make the order sought in *Re New* (1), but no "jurisdiction" to make the order sought in *In re Tollemache* (2). For the order sought was of precisely the same nature in each case, though the application was granted in the one case and refused in the other. It appears from what is said by *Romer* L.J. in *In re New* (3) and by *Kekewich* J. in *In re Tollemache* (4) that the jurisdiction to sanction departures from a trust in a matter of investment was very extensively exercised. What *Romer* L.J. said was: "It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers". He added:—"Of course the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers". That last sentence indicates the general attitude of equity to such applications. *Kekewich* J. said (5):—"Generally speaking, the function and duty of the Court is to administer the trusts which are placed under its control, and not to exceed the limits of investment or application fixed" by the trust instrument or by law. He then proceeded to give a considerable variety of instances of the exercise of what he called the "extraordinary jurisdiction" of the Court.

The position before the statute, then, was that Courts of Equity had jurisdiction to sanction an investment not otherwise authorised, but exercised it only "with great caution". From the few reported cases it is difficult to extract any very clear principle, but the impression, derived mainly from the short judgment of *Vaughan Williams* L.J. in *In re Tollemache* (6), generally prevailed, I think, that "expediency" was not enough and that something in the nature of an "emergency" must be shown. It is, however, very difficult to find anything in the nature of an "emergency" in *Re New* (1): the opening words of the argument of Mr. *Haldane* K.C. (as he then was) seem to reveal the whole substance of the case and to show little, if anything, more than "expediency". Probably *Re New* (1) represented a short-lived tendency to a more liberal point of view in such cases, a view which the statute was designed to restore and perpetuate.

(1) (1901) 2 Ch. 534.
(2) (1903) 1 Ch. 457, 955.
(3) (1901) 2 Ch., at p. 545.
(4) (1903) 1 Ch., at pp. 459-462.
(5) (1903) 1 Ch., at p. 459.
(6) (1903) 1 Ch., at p. 956.

It is in the light of these considerations that the statute must be viewed. Equity had the jurisdiction, but generally refused to exercise it if no more than "expediency" were proved. No court of equity would construe the word "may" in such a statutory context as meaning "shall". The statute gives no new jurisdiction in the true sense. What, then, is its effect? It would, I think, be taking a quite logical view, if equity were to say:—"We did not think it wise to make such orders on the mere ground of expediency before, and we do not think it wise to make them now". But I do not think that any such view ought to be taken. It would fail to give effect to the real purpose and intent of the statute. The statute ought, in my opinion, to be regarded as a legislative direction to courts of equity that they are to regard expediency as prima facie affording sufficient ground for making an order of the kind described. There may be various reasons for not making the order even though it is "expedient". I have already indicated my view of the meaning of the word "expedient". It is based, of course, on the position existing in equity before the statute. I may add that, if I thought (as I do not) that the word "may" should be construed as "shall", I should attach a much wider meaning to the word "expedient" and regard it as including every consideration relevant to the propriety of making the order.

I would be quite prepared to give a wide scope to the statute. I would indeed have been quite prepared, even without it, to apply *Re New* (1) in any case in which I thought that the facts could fairly be regarded as analogous. But I am of opinion that the order was rightly refused in this case, as it was in *In re Strang* (2).

It is easy, I think, to exaggerate the abnormal character of the presently prevailing financial situation on which the application is based. In *In re Strang* (3) it was said that there had been and was a *constant* tendency for money to depreciate. I suppose there never was a time when a prudent investor of his own moneys would not have thought it a wise general policy to "spread" his investments. Some think that freehold land is the best of all forms of investment. Equity has generally frowned on the investment of trust moneys in business, and that is what the purchase of shares in a company generally means: a very large element in the security is the prosperity of the business. But, whatever may be thought of such considerations as these, there are two considerations which persuade me against the appellants in this case.

(1) (1901) 2 Ch. 534.
(2) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.
(3) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

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The Court cannot, in my opinion, under the statute give to a trustee a general authority to invest in shares or in some more or less stringently defined class or classes of shares. I entirely agree with *Kitto* J. as to the meaning and effect of the words " generally or in any particular case ". It can only authorize some *particular* investment or purchase or lease or transaction. And the Court is not in a position to assume, and, in my opinion, ought not to assume, a general advisory jurisdiction with regard to investments—to take upon itself to say that an investment in the A Company Ltd. is sound, whereas an investment in the B Company Ltd. is not.

But the decisive consideration to my mind is that to which I alluded at the beginning of this judgment. What *Roper* C.J. in Eq. was really asked to do was to lay down, and act upon, an entirely new rule of policy with regard to the investment of trust funds. The Court cannot act without laying down such a general rule of policy : the application in the present case is based wholly on considerations of general investment policy. To lay down such a rule of policy would not, of course, be to " legislate ", nor—equally of course—did *Jordan* C.J. suppose for a moment that it was. But the matter is a matter on which the will of the Parliament of New South Wales is expressed in s. 14 of the *Trustee Act*. It is not, to my mind, the proper function of a court of equity to say that an entirely new kind of security shall be a proper trustee investment—any more than it would have been its proper function to say that debentures of the Municipal Council of Sydney shall be a proper trustee investment. Such a matter is, in my opinion, a matter for Parliament. I am quite prepared to take a broad view of what courts can and should do in the exercise of equitable jurisdiction. But what the Court is asked to do here seems to me to lie outside the scope of the proper functions of a court. It may be, and I daresay it is, highly desirable that Parliament should amend s. 14 of the *Trustee Act* so as to authorize trustees to invest in the shares of certain companies. But I do not think that the courts should give such authority.

I should perhaps add specifically that I agree with what *Kitto* J. has said as to the effect of sub-s. (2) of s. 81 of the *Trustee Act*, which is not in the English section or the Victorian section.

I am of opinion that this appeal should be dismissed.

I must not be taken as assenting to the correctness of the assumption that this is a case in which an appeal to this Court lies as of right, although—no objection being taken, and the case being one in which special leave would probably, if necessary, have been granted—I have considered the appeal on its merits.

KITTO J. The trustees of the will of the late Sir Ernest Cooper Riddle, not having been given by the will authority to invest in shares, applied to *Roper* C.J. in Eq., for an order authorizing the investment of moneys of the estate in the shares of certain selected public companies, with power to vary and transpose investments so made from time to time. The application was refused, and the trustees appeal to this Court.

The application was made under s. 81 of the *Trustee Act*, 1925-1942 (N.S.W.). Similar applications in other estates, both in New South Wales and in Victoria, have met with varying receptions from different judges. It is safe to say that the weight of the practical considerations which in recent years have told in favour of the view that trustees should have power to invest in shares has been fully appreciated by the Courts. Those considerations have been urged in support of this appeal, both in the submissions of counsel and in affidavits sworn by persons experienced in financial matters. The reasoning relied upon may be sufficiently summarized in the following propositions:—(1) the inflationary trend which has been increasingly apparent in Australia for some years past is likely to continue at an accelerated rate; this means that the present purchasing power of money, its value in terms of real wealth, will decline; (2) while investment in any of the ordinary trustee securities, consisting as they do of a right to the repayment of a fixed sum of money at a future date with interest in the meantime, may be expected to ensure the safety of trust funds in terms of currency, it cannot provide any safeguard against loss of the purchasing power of money—indeed it ensures that trust funds will participate in any loss of purchasing power which money may suffer; (3) on the other hand, investment in shares on the stock exchange, if the companies are carefully selected and a reasonable spread of the invested fund over a range of companies conducting varied enterprises is observed, while probably producing at least as high an income, is likely to be more advantageous for capital in two respects: (a) the market value of the shares will probably advance more or less in proportion to the decline in the real value of money, and (b) the shares will probably produce capital increment as a result of new issues on advantageous terms; (4) therefore it is expedient that, with adequate safeguards, trustees should have some power to invest trust moneys in shares.

This reasoning may be very cogent in respect of a trust which has a long period of years to run, provided that when the time for distribution of corpus arrives the beneficiaries will be prepared to await a favourable time to sell, so that the short-term vagaries of

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the share market will not upset calculations. One can quite understand a settlor or testator, not inhibited by over-lively memories of 1929, being led by considerations such as these to decide to give his trustees a more or less extensive power to invest in shares; indeed such powers are to be found with increasing frequency in trust deeds and wills drawn up in recent years. One could also understand the legislature giving serious attention to an appeal supported by such reasoning for the inclusion of some carefully defined class of shares in the list of securities in which trustees are authorized by statute to invest trust funds. Moreover, if the reasoning were to carry sufficient conviction to the minds of the learned judges of the Supreme Court, it is not inconceivable that they might make shares of some description trustee investments under s. 14 (2) (g) of the *Trustee Act*, by authorizing them for the investment of cash under the control or subject to the order of the Court.

But the relevance of the considerations I have outlined is wholly and solely to the question whether the powers of trustees, either trustees in general or trustees of a particular deed or will, should include a power to invest trust funds in some or all classes of shares. That question, in my opinion, is entirely different from the question which confronts the Court when asked under s. 81 to authorize an investment in shares. Consider what is the effect of giving to a trustee a power to invest in shares. The effect is simply that if loss to the trust arises by reason of the making of any such investment the trustee has not to bear the onus of proving that the investment was prudent; the beneficiary who seeks to make him liable must prove that the investment was imprudent: *Lewin* on *Trusts*, 15th ed. (1950), p. 359. The grant of power leaves the trustee with the duty of governing himself, in relation to the manner in which the funds of the trust are invested from time to time, by the standard of care which would be observed by a prudent man who is minded to make an investment for the benefit of other people for whom he feels morally bound to provide (*In re Whiteley*; *Whiteley* v. *Learoyd* (1); *Learoyd* v. *Whiteley* (2)). The trustee therefore has the responsibility, if he buys shares, of watching the market and making any changes of investment which the proper standard of prudence may dictate. Thus a settlor or testator, when considering whether or not he should give a power to invest in shares, is not concerned to form a judgment as to whether, at any particular time, it will be expedient to exercise the power. The considerations that are relevant for him relate only to the

(1) (1886) 33 Ch. D. 347, at p. 355. (2) (1887) 12 App. Cas. 727.

wisdom of arming his trustees with the powers which future developments may or may not make it prudent for them to exercise. All judgments upon particular concrete questions arising in the management or administration of the trust property he necessarily leaves to the prudent decision of the trustees themselves. This is the very reverse of the position in which the Court finds itself on an application under s. 81 with respect to the making of investments. That section enables authority to be given for transactions which are not otherwise authorized, but which are sufficiently definite and particularized to enable the Court to pronounce them expedient; but it does not enable the Court to write into a trust instrument a power in the abstract, and leave it to the trustees to make their own judgment on the expediency of exercising it on particular occasions and in particular ways.

Such, at least, is my understanding of the section. The application of sub-s. (1) is conditional upon the opinion of the Court that "any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction" is expedient in the management or administration of trust property, but cannot be effected, by reason of the absence of any power for that purpose vested in the trustees. The Court, then, must have before it, on an application with respect to investment, a specific proposal for investment, upon the expediency of which it may form a judgment. If the condition be satisfied, the jurisdiction of the Court is to confer upon the trustees, "either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions . . . as the Court may think fit". It may be possible for the Court to be satisfied that it will be expedient to do a particular thing, within the wide descriptions contained in sub-s. (1), whenever a defined situation arises; and, if the Court is so satisfied, of course it may confer the necessary power for the purpose generally. But I am unable to see that this can ever be so with respect to investment. The expediency of an investment must be decided in the light of all the circumstances existing at the time it is to be made, and in my opinion it would be impossible to devise an order giving a general power of investing in shares, however carefully framed might be the terms, provisions and conditions inserted in the order, which would be free from the objection that it delegates to the trustees, to some extent at least, the function which the section commits to the Court, namely, the function of deciding whether the making of a given investment is expedient. Sub-section (2) is differently expressed, but produces

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the same result. Under it the question of expediency arises with respect to an alteration of the trusts or powers of the trustees; but the jurisdiction of the Court is confined to authorizing the trustees to do or abstain from doing an act or thing which would be a breach of trust if done or omitted without the authorization of the Court or the consent of the beneficiaries. It seems clear that what is referred to by the words "an alteration . . . of the trusts or powers conferred on the trustees" is not a general alteration, but is such an alteration as is involved in the authorization of the doing of or abstention from a particular act or thing. The section as a whole may be usefully contrasted with s. 83, and particularly with sub-s. (3) of that section. The contrast is between a jurisdiction to sanction what the Court judges for itself to be expedient, and a jurisdiction to confer on a trustee a power which will enable him to decide for himself whether an exercise of it will be expedient or not.

In the present case *Roper* C.J. in Eq. refused the application because he thought that the general principle to be extracted from the decision of the Full Court of the Supreme Court in *In re Strang* (1) was that the Court should not, in purported exercise of its jurisdiction under s. 81, bring about the effect of a legislative amendment of s. 14 of the *Trustee Act* which contains a list of authorized trustee securities. His Honour cited a passage from the judgment in that case (2) which I shall not repeat, but which expresses the view that, for the purposes of s. 81, expediency cannot be established by circumstances which exist with respect to trusts generally; it must be shown by proof of something special in the circumstances of the particular trust. With respect I am unable to see any justification for this view. When the Court is called upon to consider the expediency of a proposed transaction, it seems to me to be not only entitled but bound to take into its consideration all circumstances which bear upon the asserted expediency, whether they affect the particular trust specially or only affect it in common with other trusts; and if there are circumstances operating in the community generally which are relevant to the question of expediency, their relevance cannot disappear because of the inability of the trustees to point to special circumstances which also are relevant. In a word, expedient must mean expedient for any reason at all. The passage which his Honour cited goes on to say that if shares in companies or a group of companies are, in effect, to be added to the list of trustee securities, it should be done by the

(1) (1941) 41 S.R. (N.S.W.) 114; 58 W.N. 108.

(2) (1941) 41 S.R. (N.S.W.), at pp. 118, 119; 58 W.N., at p. 111.

legislature and not by a purported exercise of jurisdiction under s. 81. With this I agree, not for the reason that considerations common to trusts generally are irrelevant in deciding expediency under s. 81, but for the reason I have stated, namely, that on its true construction s. 81 does not confer jurisdiction on the Court to act the part of a legislature by giving powers in abstract terms, but relates to the sanctioning of concrete proposals only.

A construction of s. 81 as enabling the Court to confer a power and to leave it to the trustees to decide according to their own judgment whether it should be exercised or not, and, if it should be exercised when and in what manner it should be exercised, is to my mind irreconcilable with the apparent object, as well as with the words, of the section. The section is directed to the power of the Court to decide what ought to be done in the management or administration of trust property. It was enacted to deal with the situation explained in *In re Morrison*; *Morrison* v. *Morrison* (1); *In re New* (2), and *In re Tollemache* (3), namely, that the inherent power of the Court to authorize administrative acts of trustees which otherwise were unauthorized was applicable to " cases of emergency, not foreseen or provided for by the author of the trust, where the circumstances require that something should be done ", but was not available on proof merely that the proposed act would be beneficial or expedient. Section 81 widens the range of cases in which the Court may sanction proposed departures by trustees from the strict performance of their duty; but, in my opinion, it cannot fairly be construed as creating a jurisdiction totally different in kind, namely, a jurisdiction to insert into a trust instrument powers which the creator of the trust has withheld. The section would need to be very differently framed, it seems to me, in order to justify a construction which would give the Court a general power of reforming trust instruments by adding to them, regardless of the wishes of testators and settlors, every administrative power which seems to the Court to be an expedient power for the trustees to have. Yet the argument in support of this appeal cannot logically stop short of attributing that effect to the section.

In my opinion the appeal should be dismissed.

If, however, the appeal is to be allowed, I should be of opinion, for more reasons than one, that the matter ought to be remitted to the Supreme Court for decision. With regard to the existing evidence on the question of expediency, I say no more than that much of it is inadmissible, and the rest is out of date. If in this or

(1) (1901) 1 Ch. 701, at p. 707.
(2) (1901) 2 Ch. 534, at p. 545.
(3) (1903) 1 Ch. 457, 955.

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any other case a court is able to feel judicially satisfied of the expediency of conferring on trustees a power to invest in shares, I presume that attention will be given, not only to the selection of particular companies and to ensuring whatever spread of investments is thought desirable, but also to limiting the duration of the power, limiting the prices which may be paid for shares, specifying whether the power is to be personal to the trustees who applied for it, and imposing conditions as to report to and review by the Court. It is better that consideration of such matters in the first instance should be left to the Supreme Court.

Appeal allowed. Vary the order appealed from by including therein an order that the application that the appellants be authorized to invest moneys in shares and vary and transpose such investments do stand over generally and be restored to the list on seven days' notice; and remit the matter to the Supreme Court to be dealt with according to law consistently with the judgment of this Court.

Costs of all parties of the appeal as between solicitor and client out of the estate.

Solicitors for the appellants, *Manning, Riddle & Co.*
Solicitor for the respondents, *J. G. Palmer.*

J. B.