cipal case on the theory that the bond that he signed was conditioned for the faithful performance of duties by the defendant justice, said bond in fact covering the misconduct for which the plaintiff sought damages. If the Ohio courts are reluctant to hold the surety to a greater extent of liability, by strict enforcement of the bond than that allegedly contemplated by the statute the defendant surety could still be held liable by the court's adoption of the view expressed in the notary public cases. If it were held that a commitment for contempt is a ministerial act, the bond on which suit was brought would cover such misconduct. However, if the courts would not deem such a position tenable, liability on the part of the surety could still be imposed on the assumption that the legislature intended the liability of the surety to be co-extensive with that of the justice of the peace. On this theory, a broader interpretation of the phrase "ministerial duties," as used in the statute, would have to be placed thereon than was made in the principal case. It is possible to construe the statute to cover all but proper judicial acts done within the justice's jurisdiction. If none of these positions is acceptable to the courts of Ohio, it would seem that the statute should be amended to afford adequate redress, when considered in the light of the legislature's obvious purpose in requiring such bond to be given as a prerequisite to the justice entering into the performance of his duties.

MARGARETTA BEYNON

TRUSTS

DEVIATION FROM THE TERMS OF A TRUST

Rufas A. Washburn, in his will, devised certain property to his executrix, in trust, providing that the property shall not be sold during the lifetime of his wife, Bessie Washburn, "but the first charge upon the income shall be a liberal provision for my said wife, during the balance of her natural life." By a subsequent item, the will provides that a sum shall be paid for the support of a blind granddaughter, this provision to continue as long as the wife shall live. "But the same shall only be paid out of the excess remaining after a comfortable maintenance for my said wife is provided." The residue of the estate was devised to a son and a daughter. Since the death of the testator, the property has fallen into disrepair to such an extent that the income has been greatly reduced. Necessary repairs and taxes will more than consume the income and there will be nothing left to supply "a liberal provision for my said wife." The wife, as executrix and trustee under the will, asks

for a construction permitting her to sell such part of the estate as may be necessary to pay the taxes, repair the remainder, and provide thereby a "comfortable maintenance" for herself. In a unanimous decision, the Court of Appeals for the Second District held that it had not the power to modify the provisions of a will to meet changed circumstances and needs of the beneficiary of a testamentary trust.[1] Although the court expressed a sincere sympathy for the widow, "and sought for some means to give her relief," they could find no authority which would permit of a construction to empower the executrix to sell a portion of the estate in the face of the express provision in the will not to sell.

The decision is clearly in accord with the present status of the law in Ohio. A well-reasoned decision, written by Judge Robinson and concurred in by four other judges of the Supreme Court, in 1921, established the rule that "the changed circumstances and needs of the beneficiary do not justify a court in modifying the provisions of a will to meet the changed circumstances and conditions. The theory that the testator, had he foreseen the changed circumstances and conditions, would have provided a different and larger income is an assumption merely and is no excuse for the usurpation by the court of the right to dispose of testator's property in a way different from that by him directed."[2] It is upon the authority of this Supreme Court ruling that the decision in the principal case is based.

The argument of the majority in the *Alter* case is based on the theory that if the court, a stranger to the motive which controlled the testator, is to assume to amend his will because such amendment would in their judgment provide a more beneficial result to the legatee, there is little purpose in retaining the wills statute, which confers upon every legally capable person the right to dispose of his property as he chooses. From the standpoint of the wills statute, the argument can scarcely be impeached. The court recognized, however, that in extreme cases in England, and in certain jurisdictions in America, courts have permitted a deviation from the terms of a will under the guise of doing what the court believed the testator would have done had he foreseen the situation, but denied that any such invasion into the rights of a testator had ever been made in Ohio, and failed to recognize any benefit to be derived from such invasion. It is to this last point that Chief Justice Marshall, in his dissenting opinion, takes exception, and presents a more liberal and, in the opinion of the writer, preferable view.

The argument of the former Chief Justice is based on the inherent jurisdiction of courts of equity over trusts. He pointed out that it is

[1] *Washburn* v. *Guild*, 25 Ohio Abs. 1 (1937).
[2] *Union Savings Bank & Trust Co.* v. *Alter*, 103 Ohio St. 188, 132 N.E. 834 (1921).

often necessary to deviate from the letter of the trust where it has become impossible or grossly inequitable to strictly follow it. The purpose of such relief is not to change entirely the purposes of the trust, but it is to carry into effect the spirit and general intent of the settlor. The Ohio courts have not hesitated to do this under their *cy pres* powers in the case of charitable trusts.[3]

Many courts in other jurisdictions have, in regard to private trusts, exercised a power somewhat similar to the *cy pres* power. A common expression of this power is found in an early Illinois case, where the court said: "Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency."[4] The examples are legion where courts have made similar statements in permitting or ordering a deviation.[5] All of these cases, however, except those based on statutes hereinafter discussed, have recognized that the deviation has been to preserve the trust, that the court's power in such a situation "depends not on expediency, but on exigency."[6] There must be something more than a mere advantage to be gained by the *cestui;* the trust itself must be in danger of destruction. This is particularly true where there is an express prohibition; but even if a sale has not been expressly forbidden, the courts will not grant a power of sale because such sale would secure a greater income and thus

[3] *McIntire's Admrs. and Zanesville Canal & Mfg. Co.* v. *City of Zanesville,* 17 Ohio St. 352 (1867); *City of Cincinnati* v. *McMicken,* 6 C.C. 188 (1892); *Carr* v. *Trustees of Lane Seminary,* 21 Ohio Abs. 107, 5 Ohio O. 272 (1935).

[4] *Curtiss* v. *Brown,* 29 Ill. 201, 229 (1862).

[5] *Pennington* v. *Metropolitan Museum of Art,* 65 N.J.Eq. 11, 55 Atl. 468 (1903); *In re Pulitzer's Estate,* 265 N.Y. 522, 249 N.Y.Supp. 87, 139 Misc. 575, 193 N.E. 302 (1931) court sanctioned sale of failing newspaper corporation, notwithstanding settlor's direction that there should be no sale; *Bibb* v. *Bibb,* 204 Ala. 541, 86 So. 376 (1920) no power of sale given, but sale granted where property depreciated and subject to tax liens; *Hewitt* v. *Beattie,* 106 Conn. 602, 138 Atl. 795 (1927) stone quarry could no longer be operated at a profit; *Hale* v. *Hale,* 146 Ill. 227, 33 N.E. 858, 20 L.R.A. 247 (1893) property unproductive and subject to heavy taxes and assessments, so that sale necessary to save investment; *Johns* v. *Montgomery,* 265 Ill. 21, 106 N.E. 497, Ann. Cases, 1916A, 996 (1914) land left for agriculture unproductive and could better be sold for building lots; *Cary* v. *Cary,* 309 Ill. 330, 141 N.E. 156 (1923) farming land better suited for subdivision purposes; *Suiter* v. *McWard,* 328 Ill. 462, 159 N.E. 799 (1928) land subject to mortgage and tax charges, sale of part necessary to save the rest; *Security-First Nat. Bank of Los Angeles* v. *Easter,* 136 C.A. 691, 29 Pac. (2d) 422 (1934); *Mayall* v. *Mayall,* 63 Minn. 511, 65 N.W. 942 (1896) property unproductive, sale necessary to avoid tax or mortgage sale; *Ruggles* v. *Tyson,* 104 Wis. 500, 79 N.W. 766, 48 L.R.A. 809 (1899) sale necessary to prevent tax sale; *Colonial Trust Co.* v. *Brown,* 105 Conn. 261, 135 Atl. 555 (1926); *Young* v. *Young,* 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963 (1931); *Mann* v. *Mann,* 122 Me. 468, 120 Atl. 541 (1923) statute permitted sale; Bogert, *Trusts and Trustees,* Vol. 3, Sec. 561.

[6] *Weakley* v. *Barrow,* 137 Tenn. 224, 192 S.W. 927 (1917).

a more beneficial result to the *cestui.*[7] In the principal case, although it will be much more beneficial for the *cestui* to sell part of the trust estate, it is also highly probable that the trust property itself may be lost through tax sale. The case does not show that any such sale was immediately threatened, but even if it had been the court would still have refused the relief sought. The alternative presented to the trustee—that of mortgaging the property—is itself a wasting of the estate which, through foreclosure, may very well result in a destruction of the trust. It is unfortunate that the intent of the settlor to provide adequately for his widow should be thwarted by such rigid adherence to the strict letter of the instrument creating the trust.

The chief strength of a court of equity lies in the discretionary power with which it is vested. Because of this power, equity is not bound by the strict formalism which fetters our courts of law. This freedom is clearly seen in the field of specific performance of contracts, where the equity court is not forced to construe literally the words of the parties to an agreement, but may look to the substance to find the actual intention of the parties.[8] And, since jurisdiction over trusts is inherently in the court of equity, this same power of discretion should be given the court in that class of cases. It must be remembered, however, that in the principal case, the Court of Appeals was bound by the Supreme Court's decision in the *Alter* case, and on the basis of that decision was denied the power to exercise such discretion. But, as has been pointed out, many courts have exercised this inherent power in their administration of trusts. Many other states have conferred it upon their courts by statute.[9] Under several of these statutes, the discretionary power of the

[7] *In re Tollemache,* (1903) 1 Ch. (Eng.) 457; *Johns* v. *Johns,* 172 Ill. 472, 50 N.E. 337 (1898); *Hackett's Ex'rs.* v. *Hackett's Devisees,* 180 Ky. 406, 202 S.W. 864 (1918) refused to deviate from terms to allow investment in realty instead of "in good and safe securities" in absence of showing that failure to invest in realty would result in loss of trust estate; *In re Davis,* 14 Allen (Mass.) 24 (1867); *Oliver* v. *Oliver,* 3 N.J.Eq. 368 (1835); *Stephens* v. *Collison,* 274 Ill. 389, 113 N.E. 691, Ann. Cases, 1918D, 559 (1916); *Russel* v. *Russel,* 109 Conn. 187, 145 Atl. 648 (1929); *Weakley* v. *Barrow, supra*; *Matter of Roe,* 6 N.Y.Supp. 464, 53 Hun. 433, affirmed in 119 N.Y. 509, 23 N.E. 1063 (1889); *Matter of Caswell,* 197 Wis. 327, 222 N.W. 235 (1928).

[8] *Rummington* v. *Kelley,* 7 Ohio (part 2) pp. 99, 102 (*dictum*), (1836); *Curtis* v. *The Factory Site Co.,* 12 Ohio App. 148, 31 C.C. (N.S.) 65, motion to dismiss petition in error sustained in 17 Ohio L.R. 392, 65 Bull. 15 (1919); *Woloveck* v. *Schueler,* 19 Ohio App. 210, 23 Ohio L.R. 262, error not prosecuted (1922).

[9] Ala. Code (1928) secs. 10438-10440; Conn. Gen. Stat. (1930) secs. 5925-5926; Ga. Civil Code (1926) secs. 3754-3762; Cahill's Ill. Rev. Stat. (1927) c. 22, sec. 50; Ind. Burns' Ann. St. (1933) secs. 56-621; Ky. Acts (1934) c. 128, sec. 4708-1; Me. R.S. (1930) c. 82, sec. 10; Md. Ann. Code (1924) art. 16, sec. 264; Mass. Gen. Laws (1921) c. 203, sec. 16; Mich. Comp. L. (1929) secs. 14397, 14398; Minn. Stat. (1927) sec. 8100; Public Stat. N.H. (1926) c. 309, sec. 13; N.J. 4 Comp. St. (1910) p. 4684, secs. 23-26; Cahill's Consol. L. N.Y. (1930) c. 51, sec 105; Oregon Code (1930) secs 6-801 to 6-816; Purdon's Pa. St. (1936) title 20, sec. 1561; R.I. Gen. Laws (1923) sec. 4406; Vt. Gen. L. (1921) c. 79, sec. 1; Va. Code (1930) sec. 5335 (1936) c. 217; Wis. St. (1931) sec. 231.21.

courts has been extended, permitting them to order a sale when there is not such an emergency as would be necessary to permit a sale in the absence of the statute. Such expressions as "when advisable," "when for the best interest," "when desirable," *etc.*, as found in these statutes, are all evidences of the expanding authority granted to our courts of equity.

It is indeed unfortunate, however, that such statutes should be necessary in order for equity to exercise a power with which, by its very nature, that branch of our jurisprudence is inherently endowed. In the case under discussion, the testator stipulated that his estate should not be sold during his wife's lifetime; but twice he expressed the desire that the income from the estate should be applied first to the providing of a comfortable maintenance for his wife. It would seem a permissible construction from these two facts that the dominant intention of the testator was to liberally provide for his widow. In fact, his very reason for prohibiting the sale undoubtedly was to assure that liberal provision for her. It seems also permissible to assume that had he foreseen the present situation, such a prohibition would never have been made. By granting the relief prayed for here, the Court of Appeals would have provided an entering wedge by which the Supreme Court could have modified its decision in the *Alter* case; it would have provided a basis upon which relief could be granted in such cases of apparent need. The jurisdiction of equity is an expanding one. Although its principles are based on precedent and not on the whim or consicence of the chancellor, it nevertheless is capable of adapting itself to the exigency as it arises. If in the exercise of its peculiar jurisdiction over trusts, equity is incapable of meeting such an exigency when it arises, but instead must rigidly adhere to the latter rather than to the spirit of the trust, there is little reason for equity's continuing that peculiar jurisdiction; it may as well be remanded to the law courts. As the law of Ohio now stands, however, manifested by the principal case and by the *Alter* case, our equity courts are met by such an incapacity. To remove that incapacity, and permit the court to exercise a mitigating jurisdiction seems to the writer to be the preferable course. Whether some liberal court will see fit to overrule this precedent by subsequent decision, or whether the legislature will do so by statute, is a question that only future decisions or legislation can answer.

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