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A Note on Trust Powers after Termination

By Bernard D. Meltzer*

Mr. Harrison F. Durand, writing in 1945, observed that trust agreements typically do not make express provision with respect to trust powers during the winding-up period, *i.e.*, the period between the time fixed by an agreement for the termination of the trust and the time when the trust assets are ultimately distributed.[1] Lawyers in Chicago specializing in trusts and estates, as well as a few trust agreements that I have happened to examine, have indicated that Durand's observation remains largely true today. Some form books do, however, set forth clauses that would preserve the antecedent authority of trustees during the winding-up period.[2]

Although there have been general expressions of doubt regarding the validity of provisions expressly conferring broad trust powers for the period following "termination,"[3] it is difficult to see any substantive basis for that position.[4] It is true that there appears to be an obvious formal inconsistency in providing both that a trust shall terminate after the occurrence of a particular event and that the trust powers shall continue thereafter. But even this wholly formal inconsistency could be avoided by a provision expressly deferring "termination" if distribution of the trust assets were impracticable, *e.g.*, because of unresolved tax liabilities, litigation involving the validity of a pertinent will, or other factors that would make distribution impossible or imprudent. But such semantic refinements appear to be unnecessary. It should be sufficient that the settlor has clearly indicated the trust powers that are to operate during the winding-up period, since there is no apparent reason in this context for ignoring the general trust principle that the settlor's purposes should be respected. On the contrary, the case for observing that principle is strengthened by the difficulties, developed below, that result from the failure expressly to define trust powers for the winding-up period.

In the absence of such a definition, trustees frequently adopt rigid investment policies on the ground that they are compelled by law. It is true that trustees can defend such policies by pointing to black-letter doctrine that drastically limits their investment authority during winding-up periods.[5] But the application of such limitations is, in some contexts, incompatible with

* The author is pleased to acknowledge the helpful suggestions of his colleagues, Professors Allison Dunham, and Richard Epstein; and of Leo Herzel, Esq., and John Thomson, Esq., both of The Chicago Bar Association. They do not necessarily agree with all the views set forth herein.

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rational investment criteria and with purposes fairly attributable to particular settlors. Indeed, in some situations the consequences of applying the limiting doctrines would be so arbitrary and dysfunctional as to undermine the conclusion that such consequences are compelled by law.

The difficulties involved may be illustrated by the following situation, adapted from an actual case. H, by a revocable inter vivos trust, establishes both a marital trust for his wife ("W") and a residuary trust for the benefit of his grandchildren. The trust agreement grants W, who is also a co-trustee, a general power to appoint by will the assets in the marital trust. The principal of those trusts at their inception (and subsequently) consists primarily of marketable common stocks, such as IBM and GM; and the trustees prior to termination are granted the broadest investment authority over both trusts and are also given broad discretion to make distributions in cash or in kind. H dies, and his inter vivos trust becomes irrevocable. Thereafter, W by will appoints one-half of the marital trust property to the residuary trust, the beneficiaries of which are minors, and the other one-half to a dozen charities. W's will also provides that federal estate taxes and state inheritance taxes, resulting from the devolution of the appointed property and other property owned by W both in the United States and in foreign countries, shall be paid from the appointed property. W dies soon after H's death, and the marital trust has been "terminated" by an effective appointment made by means of a valid will. Any substantial distribution of the principal pursuant to the terms of the appointment would be imprudent, however, because of uncertainties regarding the amount of taxes to be paid from the appointed property. At least 36 months after W's death will be required to determine the amount of these tax liabilities, and both H's trust agreement and W's appointment are silent regarding the trustees' authority during the winding-up period. The question is: What are the investment powers of the trustees during the period between W's death (the terminating event) and the time when distribution pursuant to W's appointment would be prudent?

Lawyers have informally expressed quite different views on this question. One view, referred to here as "the limitist view," is that the marital trustees may continue to hold the common stocks, but that if they sell a common stock or if they receive funds from dividends or other sources, they must limit post-termination investments to short-term obligations or other cash equivalents.

The other view is considerably less restrictive of the trustees' authority and goes like this: The trustees are authorized to retain or to sell common stock and, in making new investments, are not restricted to short-term obligations or other cash equivalents. On the contrary, during the winding-up period they continue to have the broad investment and reinvestment authority conferred by the trust agreement. Naturally, that investment authority must be exercised in light of the interests of the putative distributees. And, since that group includes charities, some of which are presumably risk averse, the portfolio must be

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managed with a view to avoiding "excessive" risk in the portfolio as a whole.[6]

My submission is that the second construction, which would maintain the broad investment authority of the trustees during the winding-up period, is required by two interrelated considerations: (1) the purposes fairly attributable to the donee of the power of appointment;[7] and (2) the prerequisites for a rational investment program during the winding-up period.[8]

In considering the purposes fairly attributable to the donee of the power, the following elements of the situation are of critical importance; First, the trust agreement designated the same trustees for the marital and residuary trusts, respectively, and granted them broad investment authority with respect to the assets of both trusts. Second, the donee of the power of appointment, who was also a co-trustee, appointed one-half of the marital trust property to the trustees of the residuary trust, who, after distribution of the assets pursuant to the appointment, will have broad powers of investment with respect to the distributed assets. There is no basis for restricting those powers during the hiatus between the terminating event and the ultimate distribution. There is the same need, during that period, as in the periods immediately preceding and following it, for investment flexibility, for protection against inflation, for the authority to respond, as best one can, to the changing fortunes of particular companies and particular stock markets,[9] and to any changes in the needs of the ultimate beneficiaries. It seems indisputable that the donee of the power, had she considered the question of investment authority during the winding-up period, would not have narrowed the broad authority conferred by the trust agreement. There is no functional justification for any such restriction; and its duration would be wholly accidental, depending, as it would, on the time required to settle the amount of the liabilities falling on the trust assets. To impose this type of restriction during such a fortuitously determined period is unjustifiably to defeat purposes fairly attributable to the donee.[10]

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The foregoing argument obviously depends on the congruence of trustee authority under the terminated trust and under the trust to which a portion of its assets was appointed. That argument, accordingly, would not be directly applicable to the assets of the terminated trust which were appointed to the charities. Nevertheless, there are strong reasons for concluding that the latter portion should also be subject to the same broad investment authority during the winding-up period. The instrument of appointment does not expressly differentiate between the two shares of the appointed property during that period. Thus, it is fairly arguable that the powers applicable to the charitable portion are as great as those plainly applicable to the other portion. This argument might, as an abstract matter, be challenged as a bootstrap. Plainly, if under the governing instruments, there were sound arguments for restricting trust authority with respect to the charitable portion, one might, with equal logic, begin with that portion and then argue that investment limitations appropriate for that portion control the other portion. Even if this sequence of analysis were followed, it would not, in my view, support the limitist view in the situation under discussion. For, as demonstrated below, that view is arbitrary and dysfunctional, whether it is tested by the interests of the charities or those of the beneficiaries of the residuary trust.

Under the limitist view, the trustees are, it will be recalled, authorized to retain common stocks during the winding-up period. If, however, they sell such stocks and wish to reinvest the proceeds, they are limited to short-term obligations or other cash equivalents. Such a limitation is likely to distort decisions with respect to the sale or retention of common stocks. For example, let us assume that the trustees would sell stock in the A company if they were free to invest the proceeds of that sale in stock of the B company, or, indeed, in convertible bonds of the latter company. However, if reinvestment is limited to short-term obligations, the trustees might, at a time when the stock market is "depressed" or short-term yields relatively low, elect to hold the A company stock in order to avoid being restricted thereafter to short-term obligations during a winding-up period of substantial and indeterminate duration.

The limitist view distorts investment judgment not only with respect to particular sales, but also with respect to the portfolio as a whole. When the terminating event occurs, the ratio of common stocks to bonds and cash equivalents may be relatively high or low. Under the limitist approach, common stock holdings may be decreased but not increased, regardless of considerations that typically shape trustees' judgments regarding the appropriate ratio of common stockholdings. Such inflexibility plainly interferes with the formulation of sound investment policies. Furthermore, since the date of the terminating event frequently is unpredictable, as it was in the situation under consideration, this inflexible ceiling on common stock holdings becomes even more arbitrary.

Finally, as a functional matter, the retention of a common stock is, for purposes of trust administration, not

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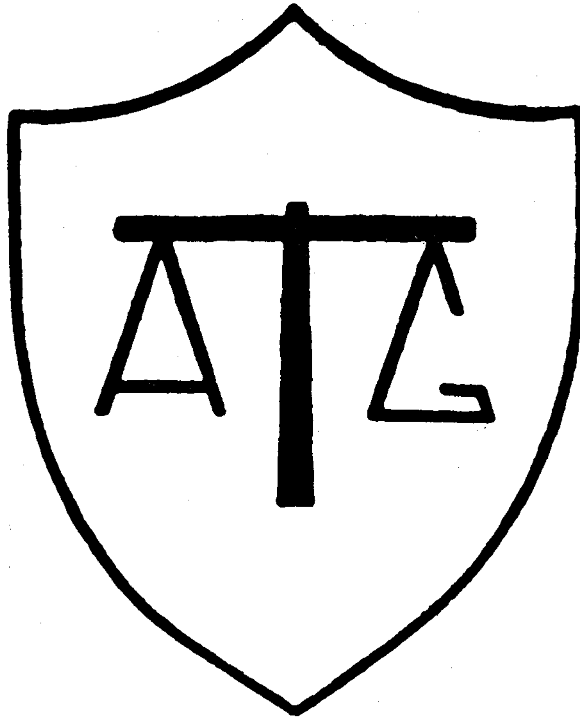

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essentially different from the purchase of the same stock, apart from transaction costs and tax considerations. Thus, for example, if as the limitists concede, the trust may retain a public utility stock held by the trust when the terminating event occurred, it is difficult to see why the trust may not purchase additional shares of that utility. The arbitrariness of such a proscription is underscored if we assume that the trustees wish to dispose of a common stock holding in order to reinvest the proceeds in a utility stock because it is deemed to have less risk with respect to yield or depreciation in market value, *i.e.*, because it is considered closer to a fixed obligation than the stock which it replaces.

The foregoing considerations make it plain that it is illogical and dysfunctional to interpret instruments, such as those postulated here, as granting trustees full authority to *retain* or *sell* common stocks during the winding-up period, while drastically curtailing their authority to *reinvest*. To be sure, that difficulty could be cured by interpreting the pertinent instruments as requiring the trustees, upon termination, to engage in an orderly sale of all common stocks and to reinvest the proceeds in short-term obligations. But that cure would be worse than the disease. It would, in the case at hand, involve an even greater frustration of the purposes fairly attributable to the donee of the power of appointment. Its rigidity would also be incompatible with reasonable efforts to protect against inflation during a winding-up period of indeterminate and probably substantial length. Finally, it would involve transaction and possible tax costs consequent upon the sale of securities and the purchase of the same or similar securities by the trustees of the residuary trust after the principal had been distributed to them. Accordingly, functional and operational considerations provide compelling support for the conclusion that the trustees under the instruments postulated here retain during the winding-up period their antecedent authority to acquire common stock.[11]

Lawyers who reject that conclusion do not question the force of the foregoing considerations but urge that the limitist view is required by the "law," which, unhappily, is not always logical and functional. Those lawyers suggest that the "law," which will be spelled out in a moment, makes the limitist view the right policy for a trustee concerned about the possibility of being surcharged if common stock acquired during the winding-up period declines in value prior to distribution of the trust assets. If, however, a trustee reinvests the proceeds of sales of common stock or other funds in short-term obligations, he is, the argument continues, not only conforming to the "law," but also is avoiding the risk of declines in money values, which are a more prolific source of discontent and litigation than the erosion of purchasing power by inflation. Hence, the "prudent trustee," or at least the trustee prudent about self-preservation, should avoid investments which, however reasonable, might be attacked on the ground that they exceeded his authority.

It is undeniable that the "law," at first blush, makes the limitists' fears

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plausible. Although the occurrence of the terminating event does not automatically divest a trustee of his authority and responsibility, and although he thereafter retains the powers and responsibilities appropriate for a complete winding-up, there is language in the cases[12] that indicates that a trustee's prior powers are curtailed during the winding-up period.

I have not attempted to collect all the relevant cases, but I have examined the cases most frequently cited in support of the limitist view. Those cases involved situations quite different from the one under discussion. First, and most important, in those cases, there was no impediment to immediate distribution of the trust assets, upon the occurrence of the terminating event.[13] Second, those cases generally involved real estate, a unique asset, which was not subject to a general power of sale and was to be distributed upon termination of the trust.[14] Plainly, those cases are a far cry from the trust under consideration, and their restrictive language should not control its administration; for the assets of this trust consist largely of marketable common stocks, distribution of which must be postponed for a substantial period despite the occurrence of the terminating event.

The Restatement (Second) of Trusts contains general language that also seems to support the limitist approach. Section 344, Comment f states:

> *Power to invest.* When the time for the termination of the trust has arrived, the power of the trustee to make investments ordinarily ceases. Where, however, the process of winding up the trust cannot be immediately accomplished, it may be reasonable for the trustee to make short-term investments in order to keep the trust property productive.
>
> Even though the time for the termination of the trust has not arrived, in making investments the trustee should take into consideration the length of time for which the trust is to continue. See §227, Comment o. Thus, if by the terms of the trust the trust is to terminate at a certain time, as for example on a specified date or when the beneficiary reaches a certain age, the trustee should not shortly before the time for termination of the trust make an investment which cannot readily be realized until some time after the termination of the trust.

An American Bar Association Committee relied on the first paragraph of that Comment as a basis for the limitist view set forth above.[15] But if that paragraph is read together with the second paragraph quoted above, there is serious doubt that the Restatement incorporates an inflexible rule limiting new investments during the winding-up period to short-term obligations. Such a rule would be inconsistent with the reference, in the second paragraph of Section 344, to Section 227, Comment o (p. 535), which lists a broad variety of factors to be considered in making "authorized investments." Furthermore, the latter comment, in dealing with investments in the period immediately before the terminating event, emphasizes the liquidity of such investments, rather than whether they will mature

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by the time fixed for termination. It is difficult to see why liquidity or marketability should not also be equally significant with respect to the legality of investments made after the terminating event when distribution must be postponed for an indeterminate but probably lengthy period. Finally, and most important, an automatic reliance on Comment f, quoted above, would ignore the need to consider the fair implication of the provisions of a trust agreement[16] and the settled and sound judicial tradition that stresses concern for context, needs and consequences in filling the gaps or resolving the ambiguities of a document.[17] In some circumstances the approach embodied in the first paragraph of Comment f to Section 344 would be wholly appropriate, *e.g.*, when cash is to be invested for a short and determinable period prior to distribution and when the trust agreement does not evince the purpose of permitting common-stock investments during that period. However, in other circumstances, such as those assumed in this note, compliance with the general language of the first paragraph of that comment would produce illogical, arbitrary and dysfunctional consequences, and would be incompatible with the purposes fairly attributable to the settlor.[18] Neither the Restatement nor the governing canons of construction may be fairly read as prescribing an approach that leads to such consequences.

It seems likely, however, that in most cases the adoption of the limitist approach would insulate trustees against liability; that approach, after all, is endorsed by passages in the Restatement and by other authorities. Nevertheless, there are situations that put those black-letter abstractions to a severe test. One such situation is the following: At the termination of a trust, a fair estimate of the minimum winding-up period is four years. During that time an institutional trustee limits the investment of cash flow to short-term obligations at interest rates that are relatively low, *i.e.*, below the dividend rate for seasoned utilities. The trustee's policy for the trust involved would have called for investment in common stocks if the trustee had express authority to make such investments.

Even under the foregoing circumstances, I do not mean to suggest that the limitist approach is the road to liability; for the trustee may point not only to the black-letter doctrine calling for the limitist approach but also to the convenience of standard procedures for administration during the winding-up period when the governing instrument fails to make any provision therefor. These considerations are likely to bring the trustee within the prudent-man standard. Nevertheless, in an extreme case it is not a wholly fanciful possibility that liability might result from the limitist approach and the concomitant renunciation by trustees of their investment discretion.[19] Such liability would involve an obviously ironic twist since the *raison d'etre* for the limitist approach is the desire to avoid liability.

Whatever difference there may be as to the risks of, or justifications for, relying on rules of thumb or on functional considerations during the winding-up period, there may be agreement on this point: A trust agreement or an instrument exercising a power

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of appointment should deal specifically with the powers of the trustees during the winding-up period, and especially so when that period may be of long or uncertain duration.

FOOTNOTES

1. *See* Durand, *Powers of Trustees Upon Termination of Trusts,* 45 COLUM. L. REV. 865, 866 n.2 (1945).

2. *See, e.g.,* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, *Suggested Will and Trust Forms For Lawyers* 5, Art. VI(k) (1970), which includes within the enumeration of the trustee's powers the power "[t]o make any distribution or division of the trust property in cash or in kind or both, and to continue to exercise any powers and discretion for a reasonable period after the termination of the trust, but only for so long as no rule of law relating to perpetuities would be violated."

3. *See* Durand, *supra* note 1, at 865 n.2.

4. In drafting provisions for the winding-up period, care must, of course, be taken to avoid violating rules against perpetuities. *See* note 2 *supra.*

5. *See* ABA COMMITTEE ON MODIFICATION AND TERMINATION OF TRUSTS, REPORT, 1 REAL PROPERTY, PROBATE & TRUST JOURNAL 514, 518-19 (1966), and authorities cited therein.

6. In the situation described in the text, possible legal difficulties with respect to the charities were avoided by securing their consents to the continued exercise of broad investment authority by the trustees. It should be observed, however, that approximately eight months were required to secure those consents, and that during that period there was considerable uncertainty regarding the scope of the trustees' authority.

7. When a trust confers a power of appointment, the appointed property is generally viewed as passing as part of the donor's estate, but an exception to this "relation back" doctrine may operate when the donee subjects the property to the payment of debts or charges. *See* RESTATEMENT OF PROPERTY, Introductory Note at 1811-12 (1940); In re Estate of Breault, 29 Ill.2d 165, 174, 193 N.E. 2d 824, 829 (1963). It is not clear whether an exception would operate with respect to the power under discussion here. But in the context of this discussion the point is a wholly formal one; for the donee of a general power may appoint in trust or subject to charges and conditions. *See* 1 SCOTT, TRUSTS §17.2 (3d ed. 1967). Hence, in determining the powers of the trustees during the winding-up period, it seems appropriate to consider the purposes fairly drawn from reading both the trust agreement and the testamentary exercise of the power granted by that agreement. Such a reading is contemplated by any reference to the "intention of the settlor" or the "intention of the donee" throughout this paper.

8. The arbitrariness of the limitist view is illustrated by applying it to trust funds acquired as a result of an issuer's calling its bonds or preferred stock, or liquidating its common stock after a sale of its assets. Prior to such action by the issuer, the trustees were, it is conceded, authorized to retain the securities and presumably did so on the basis of rational investment criteria. It is difficult to see why the fortuity of such extraordinary action by the issuer should require the trustees to invest the proceeds in short-term obligations, rather than in securities with the characteristics deemed appropriate prior to the call. Nevertheless, that arbitrary requirement is a corollary of the limitist view.

9. Serious questions have, of course, been raised as to whether professional trustees or other investment managers have special skills in picking individual stocks or predicting broad market movements. *See* J. LORIE & M. HAMILTON, THE STOCK MARKET: THEORIES AND EVIDENCE, ch.4, especially at pp. 96-97 and ch.5 (1973). Nevertheless, such doubts should be sharply separated from considerations bearing on the trustees' authority and should not be the unvoiced reason for adopting a mechanical investment policy rationalized on the basis of legal considerations.

10. *See generally* BOGERT, TRUSTS AND TRUSTEES, §§45, 682 (2nd ed. 1960); RESTATEMENT OF PROPERTY, Introductory Note at 1811-12 (1940).

11. Naturally, in exercising that authority the trustees should take account of the distinctive needs and interests of the ultimate distributees, including the charities.

12. *See, e.g.,* Breen v. Breen, 411 Ill. 206, 212, 103 N.E.2d 625, 628 (1952); Jackson v. Pillsbury, 380 Ill. 554, 578, 44 N.E.2d 537, 548 (1942); REPORT, supra note 5, at 518-19.

13. *See* McBride v. McBride, 262 Ky. 452, 464-65, 90 S.W.2d 736, 742 (1936); In Re Rothwell's Estate, 283 Mass. 563, 570-71, 186 N.E. 662, 665 (1933); *cf.* Jackson v. Pillsbury, 380 Ill. 554, 578-80, 44 N.E.2d 537, 548-49 (1942). The *Jackson* case, insofar as relevant here, was essentially concerned with the question of whether the trustee was required to distribute the proceeds. Nevertheless, without any explicit concern for context, that case has been cited as supporting the limitist view. *See* REPORT, *supra* note 5, at 519.

14. *See* McBride v. McBride, 262 Ky. 452, 455-56, 90 S.W.2d 736, 737-38 (1936); In Re Rothwell's Estate, 283 Mass. 563, 570-71, 186 N.E. 662, 665 (1933). Similarly, in *Rothwell's Estate,* the trustees, after selling assets in order to liquidate indebtedness, pursuant to the authorization of a judicial decree, could have distributed the trust assets. *See also* Matter of Miller, 257 N.Y. 349, 355-356, 178 N.E. 555, 556 (1931),

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recognizing greater trustee authority after termination with respect to sale of personal property, as distinguished from real property. *See* NOTE, Trusts: Termination of Trust: Power of Sale: Right to Collect Rents and Profits 39 CORNELL L. REV. 764, 766-67 (1954). It should be noted, however, that a dictum subscribing to the limitist approach is also found in Leith v. Mercantile Trust Company National Association, 423 S.W.2d 75, 87 (Mo. Ct. App. 1967), which did not involve a trust of real estate.

15. *See* REPORT, *supra* note 5, at 519 n.51.

16. *See generally* BOGERT, TRUSTS AND TRUSTEES, §1010, 681 (2d ed. 1960); Hallin v. Hallin, 2 Ill.App.2d 118, 123, 118 N.E.2d 612, 614 (1954).

17. *See generally* LLEWELLYN, *What Price Contract?—An Essay in Perspective,* 40 YALE L.J. 704, 746 n.86 (1931). The general rules of construction of contracts also apply to trusts. *See, e.g.,* Plast v. Metropolitan Trust Co., 401 Ill. 302, 313, 82 N.E.2d 155, 161 (1948).

18. *See* note 7 *supra.*

19. It is, of course, possible for a trustee to apply for judicial construction of the trust agreement. But when the interests of minors, or incompetents, or persons not ascertained are involved, one or more guardians ad litem and trustees for unborn or unascertainable persons would normally be appointed in such an action, usually at considerable expense. *See* REPORT, *supra* note 5, at 515. The expense and delays of such an action may frequently be avoided if trustees eschew wooden applications of general statements found in the cases and other authorities. Furthermore, the costs of such an application will not be payable out of the trust estate if the application was wholly unwarranted. *See* RESTATEMENT (SECOND) OF TRUSTS §259, Comment a (1959).

On the other hand, trustees might be surcharged for failure to apply to a court for permission to "deviate from the terms of the trust" because of changed circumstances. *See* RESTATEMENT (SECOND) OF TRUSTS §167 (1959); cf. Leith v. Mercantile Trust Company National Association, 423 S.D.2d 75 (Mo. Ct. App. 1967) in which the beneficiary challenged, albeit unsuccessfully, a trustee's policy after termination to convert units in a common trust fund into cash at the earliest possible time, urging that the trustee had failed to exercise any discretion. The court, in ruling in favor of the trustee, emphasized the beneficiary's failure to object to the trustee's contemplated action despite prior notice thereof. *Id.* at 88.

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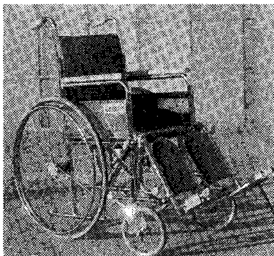

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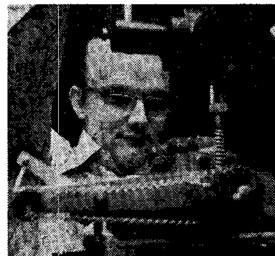

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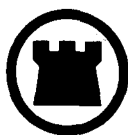

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