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Trust Investments in West Virginia

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The cases frequently hold that the promisor has by his actions waived his right, and that since he no longer has it, he can not later attempt to plead it. Others, though, speak more in terms of estoppel. But regardless of whether the language used is indicative of waiver or estoppel, the stimulus which compels enforcement of the agreement is the unfairness that would result to the promisee who reasonably relied upon a promise not to do an act in the future. It is only in cases in which unfairness would result that it would seem just to compel a fulfillment of the promise, and it is precisely in these cases that the doctrine of promissory estoppel would be applicable.

Conclusion. The courts in West Virginia, in arriving at their decision in cases where no actual consideration is present, but reliance has taken place, often do so on the basis of well-established "rules" of law or equity. In other cases, their decision is based solely upon the inequity of allowing the promisor to escape his promise after action has been induced. The doctrine of promissory estoppel is not mentioned by name, but its application in such cases would result in no different conclusion. The doctrine itself is not new, it is an entity, gathering into its sphere diversified rulings and tenets of the law. It may not be officially law in West Virginia, but its influence is both apparent and desirable, and its adoption inevitable.

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TRUST INVESTMENTS IN WEST VIRGINIA

Today, the problem of the proper investment of trust funds by fiduciaries arises with much more frequency than formerly. That it is becoming increasingly important is evidenced by the amount of recent legislation dealing with the question. The problem is troublesome both to legislatures and to courts in their attempts to formulate principles which will, as far as possible, not only keep intact the principal of the trust fund, and at the same time secure
the largest possible income for the beneficiaries but will also protect the fiduciary in his choice of investments.\(^1\)

It is clear that the primary duty of the trustee is to manage the fund in such manner as to produce income. If the fund is already of a productive nature, it will be his duty to maintain this productivity.\(^2\) Management of this type will, in most cases, involve investment by the trustee. If the trust instrument itself does not stipulate the type of investment, then the trustee must look for guidance either to the statutes, or to general equity principles.

The statutes and principles adopted in the different states are so divergent that there are comparatively few propositions on which all courts agree. There is, however, one principle of universal application, namely, that a trustee is under a duty to make such investments as a prudent man would make of his own property with a view to preserving the estate and securing a regular and desirable income.\(^3\) In a recent West Virginia case the court clearly stated that the care and prudence exacted by this rule was that of the investor, not the speculator, and that the diligence and sound judgment of a trustee in investing trust funds would be subjected to a searching inquiry by a court of equity.\(^4\)

Aside from this general rule, West Virginia cases dealing with the propriety of specific trust investments are few. In \textit{Davis v. Davis Trust Company}\(^5\) bonds held in trust were exchanged for preferred stock in a newly organized coal company, the success of which was problematical. The court said, "The authorities uniformly agree that except where expressly authorized by the creator of the trust or by statute, the general rule is that trust funds can not be invested in stocks of private corporations."\(^6\) But the court indicates that such investments would be permissible in some instances, as where the corporation has a long standing reputation of financial stability.\(^7\) In \textit{Davis v. See}\(^8\) the fiduciary obtained permission of the court to invest trust funds in promissory notes secured by a first lien on real estate. In fact, he obtained only a

\footnotesize{\begin{itemize}
\item \(^1\) Note (1936) 84 U. of PA. L. Rev. 640.
\item \(^2\) 3 BOGER, TRUSTS & TRUSTEES (1935) § 611.
\item \(^3\) 2 SCOTT, TRUSTS (1939) § 227; 3 BOGER, TRUSTS & TRUSTEES § 541; State \textit{ex rel.} Ballard \textit{v.} Thorne, 116 W. Va. 322, 324, 180 S. E. 764, 765 (1935); Key \textit{v.} Hughes \textit{Ex’rs}, 32 W. Va. 134, 139, 9 S. E. 77, 79 (1889).
\item \(^4\) Davis \textit{v.} Davis Trust Co., 106 W. Va. 228, 233, 145 S. E. 588, 590 (1928).
\item \(^5\) Ib id.
\item \(^6\) Id. at 322.
\item \(^8\) 119 W. Va. 490, 194 S. E. 271 (1937).
\end{itemize}}
second lien as security. It was held that he was liable to the beneficiary for any loss occasioned by his failure to comply with the court order. It would seem clear from this case that the West Virginia court is in accord with the generally accepted view that it is improper for a trustee to lend money on real estate unless secured by a first lien. 9

In large part, trust investment questions which are likely to arise in West Virginia are satisfactorily covered by statute. 10 A study of this legislation, however, reveals the possibility of difficulties which may arise. The statute provides that "Any . . . trustee, or other fiduciary whose duty it may be to loan or invest money intrusted to him as such, may, without any order of any court, invest the same or any part thereof in any of the following securities, and without liability for any loss . . ." 11 Note that this section permits the fiduciary to put the entire trust fund in one investment. He may put "all his eggs in one basket." This is in conflict with the generally recognized equity principle requiring diversification of trust investments. The reasonably skillful and diligent trustee will, instead of risking all in one venture, invest in a number of different securities, thereby affording some protection against loss. 12 It is suggested that the statute should be amended so that, except in the case of small estates where diversification would not be practicable, the trustee would be under a duty to diversify the investments. 13

Formerly, the statute permitted investment in mortgages or trust deeds up to eighty per cent of the assessed value of the realty. Assuming the assessor did his duty by assessing the realty at its true market value, as is required by law, 14 the margin of safety would have been inadequate, and this feature of the statute, under

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9 In re Estate of Cook, 20 Del. Ch. 123, 171 Atl. 730 (1934); In re Estate of Johnston, 198 Iowa 1372, 201 N. W. 72 (1924); Davis v. Woods, 273 Ky. 210, 115 S. W. (2d) 1043 (1938); King v. MacKellar, 109 N. Y. 215, 16 N. E. 201 (1888).
13 It could be argued that § 4 of the statute, which provides that the beneficiary may petition the circuit court to direct the trustee to sell and transfer any securities held by him and to invest the proceeds in other securities, would afford protection to the beneficiary in those cases where diversification is desirable. It would seem to be doubtful, however, whether this section would authorize the court to compel a sale of securities which the trustee was, by the statute, expressly authorized to buy.
14 W. Va. Code (Michie, 1937) c. 11, art. 3, § 1. It is probably safe to say that land is usually assessed at not more than sixty per cent of its true value.
On the other hand, one feature of this amendment seems to be an undesirable deviation from established principles. It provides that a trustee may without liability for loss caused by depreciation, keep the trust funds invested in the securities originally received by him, unless otherwise ordered by a court, or unless the trust instrument directs that a change be made. In the absence of such statutory provision authorities agree that it is the duty of a trustee to dispose of improper investments within a reasonable time after receiving them, unless otherwise provided by the instrument, and to invest the proceeds in proper securities. If, under this statute, the trustee insists on keeping the original securities, beneficiaries seasoned in business affairs would probably take advantage of the provision allowing a petition to the court for direction to the fiduciary as to change in investments. But in case the beneficiaries are minors or are lacking in business experience, it is not likely that this would be done. This is not desirable in view of the purpose for which trusts are generally created, and is not in harmony with the duties of fiduciaries as generally recognized.

The language of this statute is permissive and not mandatory. There would seem to be no reason why investments may not be made in securities not listed. If the trustee goes outside the statute for his investment the rule of ordinary prudence and diligence stated at the beginning of this note would be applied. On the other hand

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If this be true a loan of eighty per cent of the assessed value would be only forty-eight per cent of the market value, which would be a safe investment.

15 Gilbert v. Kolb, 85 Md. 627, 37 Atl. 423 (1897); Taft v. Smith, 186 Mass. 31, 70 N. E. 1031 (1904); Roach's Estate, 50 Ore. 179, 192, 92 Pac. 118 (1907); 3 Bogert, TRUSTS & TRUSTEES § 674.

16 W. VA. CODE (Michie, 1939 Supp.) c. 44, art. 6, § 2 (e).

17 Matter of Garvin, 256 N. Y. 518, 177 N. E. 24 (1931); Will of Leitsch, 185 Wis. 257, 201 N. W. 384, 37 A. L. R. 547 (1924); Babbit v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076 (1907).

18 W. VA. CODE (Michie, 1937) c. 44, art. 6, § 4.

it would seem that blind following of the letter of the statute should not be regarded as proper — even there the fiduciary should exercise some degree of care and prudence.20

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