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Trusts—Lease of Trust Property Beyond Term Approved

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so, it would seem that it should make no difference whether the tax is to be levied directly or indirectly.

The rule in West Virginia now seems to be that no debt is created against the State within the meaning of the constitutional debt limitation, unless the State obligates itself to levy taxes to meet the obligation; with the exception that a fund established by a constitutional amendment may be pledged for the purposes specified therein, regardless of whether the fund is made up of taxes. The constitutional debt limitation is thus greatly narrowed from its probable original intention. The West Virginia interpretation may perhaps be regarded as a realistic interpretation of an unrealistic constitutional provision. However, another method of handling the debt limitation problems is suggested in *Boe v. Foss*, 77 N.W.2d 1, 7 (S.D. 1956): "If as some sincerely believe these organic debt limitations are unrealistic and are hampering progress, the appeal must be to the sovereign people. To amend the constitution is not a function of the courts."

R. M.

TRUSTS—LEASE OF TRUST PROPERTY BEYOND TERM APPROVED.—Petition by P, as trustee under the will of decedent and as guardian of the estate for an incompetent who held an interest in the particular property involved, to extend the lease on the premises for a term of fifty years beyond its expiration date. The existing ninety-nine year lease under the trust was given for an annual cash rental of \$8,000 net with no provision for the readjustment of the rental figure. Upon the death of the two beneficiaries of the trust, now aged 69 and 64, respectively, the corpus and all accumulated and unexpended income will be distributed to specified remaindermen. The rental under the new ninety-nine year lease would immediately be increased to \$16,000 per year, subject to adjustment in accordance with the fluctuations in the Wholesale Price Index. A lease for a shorter term would not bring a satisfactory rental income. A guardian ad litem, appointed to represent minor contingent remaindermen, objected to the proposed lease, emphasizing that the trust would terminate upon the death of two persons who had life expectancies of less than fifteen years. The district court authorized the extended lease agreement, and an appeal was taken by the guardian ad litem. *Held*, that the extension of the lease beyond the period of the trust is justified where because of changed conditions

caused by monetary devaluation, the beneficiaries are deprived of substantial income which the settlor intended them to have. Judgment affirmed. *In re Menzel's Will*, 77N.W. 2d 833 (Minn. 1956).

The court's decision was based on statutory authority, which grants power to the district court to authorize such a trustee to lease real property under trust for a term exceeding five years if it appears to the court that the lease is for the best interest of the trust estate. However, the court expressed the opinion that there is ample authority in case law for such a lease beyond the probable duration of the trust.

The problem presented in this case has bothered the courts of this country for a long while, and this confusion is reflected quite clearly in the conflicting and contradicting decisions of the various courts. The matter is still by no means resolved.

Admittedly, the general rule is quite well established that a trustee is not ordinarily justified in making a lease for a period longer than the duration of the trust. *Russell v. Russell*, 109 Conn. 187, 145 Atl. 648 (1929); *In re Caswell's Will*, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 (1928); *Sweeney v. Hagerstown Trust Co.*, 144 Md. 612, 125 Atl. 522 (1924); *Watland v. Good*, 189 Iowa 1174, 179 N.W. 613 (1920); *Marsh v. Reed*, 184 Ill. 263, 56 N.E. 306 (1900). It is in cases which present extraordinary circumstances, such as the principal case, that the trouble arises. The majority of courts have no difficulty in their application of the law: their rule is clear and straightforward. In these states the trustee cannot in any case grant a lease to bind the remaindermen without express authority from the trust instrument or from the court. *In re Beutel's Estate*, 347 Pa. 237, 32 A.2d 224 (1934); *Hastings v. Black*, 24 N.Y.S.2d 190 (Livingston County 1940); Annot., 13 L.R.A. (N.S.) 496 (1908); 2 SCOTT, TRUSTS § 189 (1956); 4 BOGERT, TRUSTS AND TRUSTEES § 789 (1948). Other cases hold that the trustee is justified in making a lease which extends only a short time beyond the probable duration of the trust. *North v. Augusta Real Estate Ass'n*, 130 Me. 254, 155 Atl. 36 (1931); *Crown Co. v. Cohn*, 88 Ore. 642, 172 Pac. 804 (1918). The other major line of cases allows the trustee to make leases beyond the probable duration of the trust where such leases are reasonably necessary to accomplish the purposes of the trust or to carry out the settlor's primary intention. *Smith v. Widmann Hotel Co.*, 74 S.D. 118, 49 N.W.2d 301 (1951); *Russell v. Russell*, 109 Conn. 187, 145 Atl. 648 (1929); *Upham v. Plankinton*, 152 Wis. 275, 140 N.W. 5, 48 L.R.A. (N.S.) 1004 (1913); *Marsh*

v. Reed, 184 Ill. 263, 56 N.E. 306 (1900); Annot., 61 A.L.R. 1368 (1929).

In between these major lines of cases there exist a great many variations of each. *Carter v. Boone County Trust Co.*, 338 Mo. 629, 92 S.W.2d 647 (1936); *Bank Farmers Trust Co. v. Smith*, 263 N.Y. 292, 189 N.E. 222, 264 N.Y. 396, 191 N.E. 217, 93 A.L.R. 598 (1934); *In re Caswell's Will*, 197 Wis. 327, 222 N.W. 235, 61 A.L.R. 1359 (1928).

A rule which would automatically invalidate a lease on the termination of the trust is an arbitrary rule not based on any requirements of justice as between the beneficiaries entitled to the income and those entitled to the principal. 2 SCOTT, TRUSTS § 189.2 (1956). It seems that the minority view, as expressed in the principal case, is the more satisfactory rule, although it is more difficult to apply considering the involved questions of fact that may arise, since modern business transactions require that property be leased for definite periods of reasonable length in order to secure a fair income. In cases where the necessity for the lease and the length of the lease is clearly reasonable, the trustee should be allowed to make leases extending beyond the termination of the trust, leaving the remaindermen to be protected in their interest by the test of reasonableness. Whether such reasonable necessity exists is in each case a question of fact. *Watland v. Good*, 189 Iowa 1174, 179 N.W. 613 (1920). In cases where the trustee may be in doubt, he should apply to the court for advice. *Russell v. Russell*, 109 Conn. 187, 145 Atl. 648 (1929); 4 BOGERT, TRUSTS AND TRUSTEES § 789 (1948). No West Virginia cases which treat the particular problem here involved were found. However, when and if the problem does arise, it is hoped that the court will adopt the modern and equitable view expressed in the principal case.

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