St. John's Law Review

Volume 9
Number 1 *Volume 9, December 1934, Number 1*

Article 11

June 2014

Power of Trustees to Lease--Instructions

Leo F. Boland

While it may be granted that the Act does not violate the interstate commerce clause or the Fifth Amendment of the Constitution, its retroactive feature does seem to attempt to alter and amend executed contracts. Will the Supreme Court deem it advisable to take advantage of the separability clause and its prerogative of "separating the chaff from the wheat", thus cutting out the retroactive portion while preserving the valid sections of the Act?

While the highest court in the land enjoys a reputation of rare conservatism, it has been known in the past to perform astonishing feats of judicial reasoning in order to sustain legislation which has met with the Court's approval.

In the light of the known status of Mr. Justice Van Devanter and Chief Justice Hughes, who, it must always be remembered, wrote the opinions in the *Second Employers' Liability* cases and the *"Shreveport"* case, the liberal bloc of Benjamin Cardozo, Louis Brandeis, Harlan F. Stone and Owen J. Roberts should be able to influence the Supreme Court in holding the Railroad Retirement Act valid, if not in full, at least in part.

JOHN E. FREESE.

POWER OF TRUSTEES TO LEASE—INSTRUCTIONS.

A TRUSTEE, AFTER SECURING THE APPROVAL OF A LONG TERM LEASE BY THE SUPREME COURT UNDER SECTIONS 106 AND 107 OF THE REAL PROPERTY LAW,[1] HAS NO AUTHORITY TO MODIFY THE TERMS OF SAID LEASE, WITHOUT A LIKE APPROVAL BY THE COURT.[2]

THE COURTS WILL NOT DECIDE QUESTIONS OF BUSINESS JUDGMENT, BUT WILL LEAVE THEM TO THE TRUSTEE.

1. *Power to lease for term of trust estate.*

It has never been doubted that a trustee who is charged with the receipt and disposal of the income of real property necessarily

---

circumstances, is held invalid, the remainder of the Act or application of such provision to other persons or circumstances shall not be affected thereby."

[1] N. Y. REAL PROP. LAW §106. A trustee appointed to hold real property during the life of a beneficiary, and to pay or apply the rents, income and profits thereof to, or for, the use of such beneficiary, may execute and deliver a lease of such real property for a term not exceeding five years, without application to the court. The Supreme Court may, by order, on such terms and conditions as seem just and proper, in respect to rentals and renewals, authorize such a trustee to lease such real property for a term exceeding five years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate.

§107. Provides for notice to beneficiary and other persons interested where real property affected by a trust is conveyed, mortgaged or leased, and procedure thereon.

[2] City Bank Farmers Trust Co. v. Smith, 263 N. Y. 292, 189 N. E. 222 (1934), *aff'd* on reargument, 264 N. Y. 396, 191 N. E. 720 (1934).

has implied authority to lease the property, otherwise he could obtain no income from it.[3] This implied power extends only to leases which are reasonable. Such leases will bind the trust property only so long as the trust continues.[4] The mere fact that the term of the lease extends, or will extend, beyond the term of the trust does not render the lease totally void; it is only invalid to the extent of the excess.[5] But by Section 106 of the Real Property Law, a lease for five years or less will bind the trust property, if the trust should terminate before the expiration of the term of the lease.[6] A lease for a definite term of years is not violative of the statute.[7] A trustee has no implied power to lease on terms contrary to the ordinary or usual custom of the situs of the property.[8] If the trust consists of farmland, the trustee can grant ordinary farming leases; if of buildings in a city, he can grant the ordinary leases of such property.[9] If the lease is unreasonable a court of equity may interfere to protect the interests of the beneficiary, always having due regard for the rights of *bona fide* lessees.[10] In determining when a lease is reasonable the court considers the intent of the settlor, the nature of the property, the customs of the locality, the conditions of the estate and the probable period of the trust.[11]

2. Power to lease for term extending beyond duration of the trust.

In the absence of the consent of remaindermen,[12] expressed authority in the trust instrument,[13] or statute,[14] a trustee has no power

---

[3] *In re* Hubbell's Trust, 135 Iowa 637, 113 N. W. 512 (1907); Hedges v. Riker, 5 Johns. Ch. 163 (N. Y. 1821); Greason v. Keteltas, 17 N. Y. 491 (1858); Corse v. Corse, 144 N. Y. 569, 38 N. E. 630 (1895); Weir v. Barker, 104 App. Div. 112, 93 N. Y. Supp. 1150 (2d Dept. 1905); Frankford Trust Co. v. Schulte, Inc., 302 Pa. 421, 156 Atl. 746 (1931); O'TOOLE, LAW OF TRUSTS (1933) 85, §77; 2 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) §484; 1 TIFFANY, LANDLORD AND TENANT (1912) 205.

[4] Weir v. Barker, *supra;* Hubbell v. Hubbell, 172 Iowa 538, 154 N. W. 867 (1915); Matter of the City of New York (110th St.), 81 App. Div. 27, 81 N. Y. Supp. 32 (1st Dept. 1903), the court said at page 35 (Supp. 37): "While we reach the conclusion that the trustee had no power to lease beyond the term of the trust estate * * *, we are of the opinion that such leases are valid while such trust estate endures." Matter of Armory Board, 29 Misc. 174, 60 N. Y. Supp. 882 (1899).

[5] *Ibid.*

[6] Corse v. Corse, Weir v. Barker, both *supra* note 3.

[7] Frankford Trust Co. v. Schulte, Inc., *supra* note 3; see Barker v. Barker, 172 App. Div. 244, 158 N. Y. Supp. 413 (2d Dept. 1916).

[8] Newcomb v. Keteltas, 19 Barb. 608 (N. Y. 1855); Hedges v. Riker, *supra* note 3.

[9] Greason v. Keteltas, *supra* note 3.

[10] Matter of the City of New York, *supra* note 4; Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96 (1887).

[11] *In re* Hubbell's Trust, *supra* note 3.

[12] 1 TIFFANY, LANDLORD AND TENANT §22, at 212-213.

[13] O'TOOLE, *supra* note 3; Matter of the City of New York, *supra* note 4.

[14] Gomez v. Gomez, 147 N. Y. 195, 41 N. E. 420 (1895).

to lease the trust property so as to bind the interest of the remaindermen.

The courts have always recognized two distinct estates in trusts of real property; that of the remainderman and that of the trustee.[15] Obviously, if the trustee and the remaindermen join in the execution of the lease, it will be valid however long the term.[16] It would be to the advantage of the lessees to have the persons who are to take the property after the termination of the trust join in the execution of the lease. This is propably the most convenient and best means to insure the tenant of his term, if all remaindermen are of age and competent.

The settlor can, by express language, empower the trustee to lease for any period extending either during or after the trust estate, but the language granting such power must be clear and unequivocal.[17] It is only when the settlor uses such phrases as: "that the trustee shall have power to lease for any term he think proper," whether to extend beyond his estate or not, that he gives him express power to bind the remainder of reversion. "If he deem * * * it for the advantage of the said trust, to lease the said property for a term extending beyond the duration of the said trust" authorizes a lease for twenty-one years with the right to renewal for another twenty-one years.[18] The usual provision that he shall collect the rents and profits is not sufficient to give the trustee power to bind the property after the termination of his estate.[19] Power "to rent from year to year or any term of years" is not sufficient.[20] "To rent the same and receive the rents and profits" [21] and "to make leases" are likewise insufficient. An express power to lease given in general terms is insufficient.[22]

When the trustee is given power to lease in the trust instrument, it is to be complied with strictly.[23] A power to make leases "for twenty-one years from the making thereof" does not justify a lease for twenty-one years to begin in the future, or a lease for twenty-one years with right to renew for two similar terms.[24] And a power to lease "for the best rent attainable" does not authorize a lease for a lesser rent.[25] Where there is power to lease for a certain number of years, a lease for a shorter number is good, but a lease for a longer term than that prescribed is bad, as contrary to the power; [26]

[15] Losey v. Stanley, 147 N. Y. 560, 42 N. E. 8 (1895).
[16] 1 TIFFANY, *supra* note 12; Reynolds v. Browning, King, 217 App. Div. 443, 217 N. Y. Supp. 15 (1st Dept. 1926).
[17] Matter of the City of New York, *supra* note 4, at 33.
[18] Reynolds v. Browning, King, *supra* note 16.
[19] Matter of McCaffrey, 50 Hun 371, 3 N. Y. Supp. 96 (1888).
[20] Matter of the City of New York, *supra* note 4.
[21] Matter of Armory Board, *supra* note 4.
[22] *Ibid.*
[23] 2 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) §529.
[24] Griffen v. Ford, 1 Bosw. 123 (N. Y. 1857).
[25] *Ibid.*
[26] Sinclair v. Jackson, 8 Cow. 581 (N. Y. 1826).

such a lease may be sustained in equity for the proper number of years and only the excess is void.[27]

Sections 106 and 107 of the Real Property Law are the only statutes authorizing trustees to lease for terms which will extend beyond the termination of the trust.[28] Previous to the enactment of these sections a trustee had no power, without the consent of the remaindermen or authority in the trust instrument, to lease and bind the remaindermen.[29] Such a situation proved to be a hardship upon the trustee and the lessee, and a detriment to the trust estate. In previous years, as today, many cases arose where the circumstances of the trust property demanded long term leases, but the trustee had no power to execute them. The statute provides a means to remedy the defect in the law and to enlarge the powers of the trustee, at the same time allowing him to retain his common law powers.[30]

In *City Bank Farmers Trust Co.* v. *Smith*,[31] the complaint alleged that the plaintiff holds, as trustee, real property in the city of New York; it has leased the property, by securing the statutory approval of the Supreme Court, for a term of twenty years at a rental of twenty thousand dollars per annum. The tenant has not paid the full rent, and asserts it will be compelled to vacate the premises unless it can obtain a temporary reduction in the rent, for one year subject to the trust terminating before that time, from twenty to twelve thousand dollars per annum; and that plaintiff requested the consent of the life beneficiaries to a temporary reduction, but some of them refused. The complaint further alleges that doubt has arisen as "to the respective rights of the parties, and plaintiff is unable to proceed with the proper administration of the trust unless said doubt is resolved, said controversy determined, and the respective rights of the parties declared and the plaintiff instructed as to its legal duties and authority in the premises."

Upon the motion of one of the defendants in the Supreme Court of New York County the complaint was dismissed. The dismissal was affirmed by the Appellate Division, First Department, Justices Finch and Merrill dissenting.[32] The Court of Appeals in a decision written by Lehman, J., unanimously affirmed, and dismissed the complaint on two grounds:

FIRST. "A question between trustees and beneficiary as to wisdom of action where room for choice does not concern the 'rights and other legal relations' and forms no basis for a declaratory judgment." [33]

---

[27] *Supra* note 23.
[28] Matter of the City of New York, *supra* note 4.
[29] Gomez v. Gomez, *supra* note 14.
[30] Weir v. Barker, *supra* note 3.
[31] 263 N. Y. 292, 189 N. E. 222 (1934).
[32] 238 App. Div. 742, 265 N. Y. Supp. 654 (1st Dept. 1933).
[33] N. Y. CIVIL PRACTICE ACT §473. The Supreme Court shall have the power in any action or proceeding to declare rights and other legal relations

The trend of judicial opinion seems to disfavor the granting of declaratory judgments instructing trustees.[34] The courts have promulgated many rules restricting the right of trustees to secure instructions from the court.[35]

In recent years the courts have set up another rule; that they will not advise on purely business questions,[36] but will leave the duty on the trustee to decide whether, from the business standpoint, an act should or should not be performed. This is on the theory that the court can not possibly be placed in possession of all the facts which necessarily tend to decide the question.[37] This rule seems to be a limb of the general rule that courts will not advise as to the proper method of exercising a discretionary power invested solely in the trustee. It might be well to discuss herein the cases which have served to establish the "business" rule, so that we may discover how far the courts have gone.

---

on request for such declaration whether or not further relief is or could be claimed, and such declaration shall have the force of a final judgment.

RULES OF CIVIL PRACTICE, Rule 212. If, in the opinion of the court, the parties should be left to relief by existing forms of actions, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised.

[34] CARMODY'S NEW YORK PRACTICE §305, subd. 3: "The court must in the exercise of its discretion be on its guard lest it be called upon to make declarations where no controversy exists or is likely to exist, and the request for the declaration is found only in the fear of the plaintiff that a claim may possibly be asserted against him."

To the same effect see 1 LAWRENCE, EQUITY JURISPRUDENCE (1929) §495.

[35] See 2 LAWRENCE, EQUITY JURISPRUDENCE (1929) §900; *id.* §495; 2 PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) §476a, note a.

Declaratory judgments will not be granted:

1. Where no *bona fide* controversy exists.

2. Where no real need for it exists. A useful purpose must be served; not granted where question requires no action by trustee.

3. Where its only purpose is to determine a question already passed upon.

4. Where it would embarrass another tribunal before whom the question is properly pending.

5. Nor where another remedy is available, whether it be statutory or not.

6. To relieve the trustee of his discretionary powers.

7. Unless the trustee is honestly in doubt as to the law.

[36] *In re* Gallmar, 79 Misc. 592, 141 N. Y. Supp. 179 (1913); *In re* Hanna's Est., 119 Misc. 285, 196 N. Y. Supp. 160 (1922); Matter of Ebbet's Estate, 139 Misc. 250, 248 N. Y. Supp. 179 (1931); Matter of Pulitzer's Estate, 139 Misc. 575, 249 N. Y. Supp. 87 (1931); *In re* Weissman's Will, 140 Misc. 360, 250 N. Y. Supp. 500 (1931); *In re* Wander's Will, 141 Misc. 584, 252 N. Y. Supp. 813 (1931).

[37] *Ibid.*

In re Gallmar [38] was a case in which the executor sought the instruction of the court in regard to the disposal of a second mortgage in his hands. The surrogate refused to advise as the executor, and not the court, is the responsible officer of the estate. In the *Hanna* case the executors prayed for the approval by the court of certain of their acts in borrowing money and pledging securities of the estate. In denying the relief demanded the court said,[39]

> *"If the court attempted to direct executors in such duties, the court would become the executor, and would be foreclosed upon a final accounting to hear objections urged against the acts of the executors."*

In the same case the petitioner attempted to justify its entry into court by Section 215 of the Surrogate's Court Act.[40] The court, in this case, as in others,[41] strictly construed the statute and held that all matters other than the sale of the property were left to the executor or trustee.

In re Ebbet's Will,[42] the trustee applied for advice and direction of the court regarding their action or inaction in respect to voting a controlling number of shares of stock in the Brooklyn Baseball Club forming a part of the corpus of the estate. It was shown the seating facilities were greatly inadequate to accommodate the spectators. To avoid a loss it was proposed to mortage the real property. The court decided the trustee had the legal right to take the action proposed, but whether or not he should was a question of business judgment for the trustee to decide.

> "The question here presented is, therefore, a question not of law, but of business judgment in the conduct of the affairs of the corporations involved, which question is imposed upon and must be solved by the executor-trustee by reason of his assumption of the office.
>
> "The final decision in the matter must be made by the trustees and not by the court. They have the legal right to take the action proposed, the business advisability of which is not a question properly determinable by this court."

In the *Pulitzer* case [43] the question was whether the trustees had the legal right to sell the assets of a corporation, a majority of the

---

[38] *Supra* note 36.
[39] *Supra* note 36.
[40] This section allows executors and testamentary trustees to receive the advice and direction of the court as to the propriety, price, manner and time of sale of the trust property.
[41] *In re* Murray's Will, 128 Misc. 798, 220 N. Y. Supp. 395 (1921) and cases cited therein.
[42] *Supra* note 36.
[43] *Supra* note 36.

stock being owned by the trust estate and whether the surrogate had power to approve the sale. It was decided that the trustee had the right, but the court refused to lend its approval of the contract on the grounds that it had no power to interfere with the internal mechanism of the corporation and the other stockholders. In view of the cases it could as well have refused to approve because it was a question of business judgment resting solely on the trustee.

In re Weissman's Will,[44] the Guaranty Trust Co., accounting as executor, sought the advice of the court respecting the advisability of its abandoning certain real property of the estate. In declining the request for advice the court said:

> "In view of the familiar claims of corporate fiduciaries respecting their pre-eminent qualifications in the solution of such problems, the implied compliment to the business sagacity of the court is not inconsiderable.
>
> "The executor has the power to abandon worthless assets of the estate. Whether or not the property in question is of this description is for the executor, and not for the court to decide."

In re Wander's Will,[45] the trustee desired judicial approval of a plan to dispose of the business of the estate at a time prior to that directed in the will. The questions were: 1. Did he have the legal right? 2. Is the proposed sale desirable from a business standpoint? The court answered the first question in the affirmative and in refusing to answer the second, said:

> *"It is substantially impossible for the estate fiduciary, by mere written words or even testimony adduced upon the hearing to put the court into possession of all the facts pertinent to such a business decision.* Even were this possible, the court must of necessity remain ignorant of those more or less intangible facts and conditions ascertainable only from personal association with the subject-matter and persons involved, which inevitably play so large a part in reaching any business question."

In the above cases the trustees were attempting to overcome the possibilities of a surcharge upon a subsequent showing that the transaction in question should have been consummated differently. To accomplish this purpose they sought the approval of the court and tried to place the cumbersome duty of acting wisely, as shown by later events, upon the court.

---

[44] *Supra* note 36.

[45] *Supra* note 36.

If the complaint in *City Bank Farmers Trust* v. *Smith* [46] had not been dismissed the plaintiff would have proven the tenant was judgment proof and unable to pay the rent, that ultimately the estate would suffer if the rent was not reduced. The plaintiff would then be directed to reduce the rent. Such a direction was the basis for this suit. If it had been granted the plaintiff would thus be saved from a surcharge if the rent actually should not have been reduced. In such a situation the "business" rule would be involved. The court foresaw this and properly dismissed the complaint.

Taking a factual view of the case the court has found another set of facts to which the "business" rule applies. From a legal point of view the case shows that the Court of Appeals concurs with the lower courts in so exercising the judicial discretion that questions of business judgment will be decided by the trustee and not by the court.

SECOND. That the plaintiff could not get a declaratory judgment instructing him as to his rights because there was no doubt about the law in question.

The plaintiff won a reargument on the grounds that it had no opportunity to argue whether or not doubt did exist. On the reargument the court adhered to its prior opinion. In *City Bank Farmers Trust Co.* v. *Smith* [47] the court decided that a trustee, after securing the statutory approval of the Supreme Court for a long term lease, has no authority to modify the terms of said lease, without a like approval by the court.

The contention of the plaintiff was: In all trust property we find two distinct estates, that of the trustee and that of the remainderman. The statute gave the trustee a means of leasing to bind the remainder, at the same time, according to the decisions, allowing him to retain his common law powers. At common law he had complete control over his own estate, but none over the remainder. Therefore he can still control the trust estate and, in exercising this control, can modify an approved long term lease to continue until the termination of his estate. All of the cases cited by the plaintiff to substantiate his argument that the trustee retained his common law powers dealt with the first sentence of Section 106, none of them arose out of a lease approved by the court.

Weir v. *Barker* [48] was a suit to enforce a renewal option under a lease for five years with the right to renew for five years. The defense alleged the lease was absolutely void because it was for more than five years and the court's approval was lacking. The court held the lease was not void, but was valid for the term of the trust. The court said: [49]

---

[46] *Supra* note 2.
[47] 264 N. Y. 396, 191 N. E. 720 (1934).
[48] *Supra* note 3.
[49] *Supra* note 3, at 114.

> *"The statute did not assume to provide exclusive rules governing the conduct of the trustee* in the administration of the trust estate, *but left that matter to be controlled by the rules of the common law applicable thereto, except so far as the statute expressly or by implication dealt with the subject."*

In *Matter of the City of New York* (110th St.)[50] the question was the value, on condemnation proceedings, of a leasehold estate. The lease was for twenty years and its validity was attacked. The court held the lease was valid so long as the trust existed, and indemnified the tenant on the basis of the probable duration of the trust.

In *Frankford Trust Co.* v. *Schulte* [51] the court in construing a statute of Pennsylvania similar to our Section 106, Real Property Law, quoted extensively and with approval from *Weir* v. *Barker.*

The above cases held a trustee retains his common law authority to lease for a term to extend only to the termination of the trust. All of those cases were decided under the first sentence of Section 106. Now, for the first time, we have a case under the second sentence. Did it hold that a trustee retains all his common law powers? The answer is in the negative.

The court in the recent case [52] said: "The statute provides that if that (the 'best interest of the trust estate' dictates a long term lease) is shown to 'the satisfaction of the court,' it may authorize the trustee to lease such property for a term exceeding five years 'upon such terms and conditions as seem just and proper.' *The statute was not intended to restrict the power of the trustee* without the approval of the court *to enter into a lease for a term* exceeding five years *which would be valid so long as the trust continues.*" Again,[53] "In order to promote the best interest of the trust estate, a trustee may, at times, waive a breach of the provisions of the lease."

The court has said that the trustee has retained certain of his common law powers, *i. e.,* the right to lease for the duration of the trust, the right to waive a breach of an approved condition. Concerning his common law right to control the trust estate, as differentiated from the remainder, in relation to the modification, the court said the statute in clear language places the duty of being "satisfied" upon the court.

> *"The purpose of the statute would be frustrated if,* after the court had fixed the terms and conditions which are proper, *those terms and conditions might be changed in accordance*

---

[50] *Supra* note 4.
[51] *Supra* note 3.
[52] *Supra* note 2, at 398.
[53] *Ibid.*

with the discretion of the trustee during the duration of the trust estate." [54]

The underlying theory behind this and the previous decisions under this statute is, the trustee retains his common law powers, but in any case where a power is inconsistent with the statute, the courts will hold the common law right fails and the statute prevails. It has been asserted that, since this right was unknown to the common law, he has only those powers which the statute gives him. In view of the cases, this assertion seems to be erroneous. In future cases arising under this section as to whether or not the trustee retains a common law power, the answer will be found in the answer to the question: Is the retention of the common law right inconsistent with the statute?

Conclusion.

A trustee has implied authority to lease the trust property. A lease based on this implied power is valid only so long as the trust continues. The trustee can lease for a term to extend beyond the trust by consent of remaindermen, express authority or statute. Under the statute, a lease for a term of five years or less will bind the remainder if the trust should terminate before the expiration of the five years; or, the trustee can lease for a longer term by securing the approval of the court. After securing the approval of the court, he has no authority to modify the terms of the lease, without a like approval by the court, but courts will not advise and direct trustees as to business questions.

LEO F. BOLAND.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NUISANCE.

"A municipality being not only a public agency but also a quasi-private individual is therefore subject to the law. For its wrong to the public it may be prosecuted; for its torts against individuals it may in the proper case be sued in civil action for damages like a private corporation.[1]

To formulate a rule as to the liability of a municipal corporation for tort is impossible. This condition is not only due to the

---

[54] *Supra* note 3, at 399.

[1] 43 C. J. 920; Conrad v. Ithaca, 16 N. Y. 158 (1859); Healy v. New York, 3 Hun 708 (1857).