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Trusts

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TRUSTS

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The significant developments in the law of trusts during the year have been in the field of legislation. The 1950 session of the Legislature passed three bills: Act 542[1] to exempt certain trust property from intangible taxes; Act 543[2] to exempt the income derived from the same class of property from income taxes; and Act 728[3] to prevent a trust from becoming executed so long as the trustee has active duties to perform.

Act 542[4] exempted from intangible taxes "intangible personal property belonging to any trust exempt from Federal income taxes under Section 165(a) of the Internal Revenue Code."

Act 543 amended Georgia Code Section 92-3105 by adding at the end thereof a new subsection, (k), which reads as follows: "(k) Trusts exempt from Federal income taxes under Section 165(a) of the Internal Revenue Code."

Since other states have passed similar acts relieving pension and profit sharing trusts from the burdens of income and intangible taxes, it is believed that Acts 542 and 543 will enable Georgia to compete with them on an equal basis for the pension and profit-sharing trust business.

Act 728 provides: "A trust shall be executory, and the legal estate shall remain in the trustee, whether or not the beneficiary or beneficiaries be sui juris and whether or not any remainder interest be created, so long as the trustee has any powers or duties in regard to the trust property such as to preserve or protect, to manage, to invest or reinvest, to collect income or proceeds, to sell or otherwise dispose of, to ascertain the objects or the beneficiaries, or to distribute income or principal."

Before the passage of Act 728, trusts could be created for the benefit of minors, persons non compos mentis and spendthrifts.[5] However, such a trust became executed as soon as the grounds for the trust ceased, and legal title automatically vested in the beneficiary. Any person interested could bring a proper proceeding in the superior court where the trustee resided to have the trust annulled. This meant that such a trust would be destroyed, without regard to whether or not the trustee had active duties to perform, as soon as the minor reached his majority, the person non compos mentis regained his sanity or the spendthrift reformed. It is evident that in many instances the interests of the beneficiary, from the viewpoint of the settlor, were not protected. Since the basis of the continuity of such a trust, under the old law, was the status or condition of

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1. Ga. Laws 1950, p. 74.
2. Ga. Laws 1950, p. 75.
3. Ga. Laws 1950, p. 310.
4. *Amending* Ga. Laws, Ex. Sess. 1937-1938, pp. 156, 161.
5. GA. CODE § 108-114 (1933).

the beneficiary, it followed that such a trust did not have that degree of permanency required for the adequate protection of the beneficiary. This fact became apparent when the case of the reformed spendthrift or the case of the person of unsound mind who had temporarily recovered was considered.

The act changes the basis of continuity of such a trust from the condition or the status of the beneficiary to the duties that the settlor has imposed on the trustee. So long as the trustee has active duties to perform, he retains legal title to the trust res and the trust remains executory. The intention of the settlor that the beneficiary shall continue to enjoy the income of the trust after his disability has been removed is given effect without the necessity of providing a contingent limitation over.

Before the act, a valid trust might be created for the benefit of a person sui juris, provided a situation was created in which it was legally necessary that legal title remain in the trustee in order to carry out the intention of the settlor as to that portion of the dispositive scheme which in and of itself did not offend the public policy that trusts should become executed as soon as possible.

Several illustrative cases will now be mentioned. A valid trust can be created for a person sui juris for life with a remainder in trust for a minor. Such a trust embraces both estates and the trustee is empowered to act for both the life tenant and the remainderman.[6] A valid executory trust can be created in favor of a person sui juris where there are contingent remainders or executory devises limited in favor of others.[7] A person might create out of his own property a valid trust estate for himself for life, provided the instrument also contains a valid remainder in trust.[8] However, a legal remainder is not sufficient to prevent the trust from becoming executed.[9]

The above decisions are also illustrative of the public policy that is set forth in the Code[10] that every person who is capable of handling his own property ought to be permitted to do so unless such property is the subject matter of a limitation over in favor of some person for whose benefit a valid trust may be created or where it is necessary that the trustee hold legal title for some purpose other than the mere management of the estate.

Does Act 728 establish a departure from a long established policy in this field and formulate a new one that is more in line with the development of trust law in other states? That seems to be the case.

Since the act does not purport to amend or repeal the code sections involved in the manner specified by the Constitution,[11] serious questions as to the scope and validity of the act may arise. If it was the legislative intent that the act cover the entire subject-matter of the code sections involved, then it may follow that they were entirely repealed by implication. Such a holding will result in the destruction of the special classes of trusts that

6. Sides v. Shewmaker, 188 Ga. 672, 4 S.E. 2d 829 (1939).
7. Sanders v. First National Bank of Atlanta, 189 Ga. 450, 6 S.E. 2d 294 (1939); McBride v. Bullard, 188 Ga. 354, 4 S.E. 2d 149 (1939).
8. Clark v. Baker, 186 Ga. 65, 196 S.E. 750 (1938).
9. DeVaughn v. Hays, 140 Ga. 208, 78 S.E. 844 (1912).
10. GA. CODE §§ 108-111, 108-112 (1933).
11. GA. CONST. Art. III, § 16, GA. CODE ANN. § 2-1916 (1948 Rev.).

were based on the status or the condition of the beneficiary and substitute therefor a type of trust unaffected by the character of the beneficiary. If the legislative intent was merely to repeal the provisions of the code sections which executed trusts set up thereunder, such trusts may be created as heretofore and their power to continue will be based on the duties imposed on the trustee rather than the status or condition of the beneficiary. It is believed that fewer problems would have been raised had the act merely amended the code sections involved, if such was the legislative intent. The evident purpose of the act was to remove certain peculiarities from the trust law of Georgia and thereby to make it conform more nearly to that of other states. Whether the purpose has been accomplished or not cannot be determined until the appellate courts have spoken.

There has been no unusual development in the case law of trusts within the year, but satisfactory progress has been made in defining, illustrating and clarifying established principles.

A Totten trust is valid in Georgia.[12] In *Guest v. Stone*[13] the difference between a Totten and a testamentary trust is pointed out. In the former there is an intent to create a present trust, subject to total or partial revocation by withdrawal of the deposit in the lifetime of the depositor-settlor; whereas in the latter the intent is to create a trust to become effective on the death of the depositor-settlor. In the former the intent may be proved by parol, in the latter it must be proved by an instrument executed with all the formalities of a will.

Hancock v. Hancock[14] discusses the differences between express and implied trusts and distinguishes between the two classes of implied trusts—resulting and constructive. The decision serves to clarify the concepts of resulting and constructive trusts and facilitates the application of long recognized principles to new factual situations. In *Price v. Price*[15] the characteristics of the resulting trust that arise when one person pays the purchase price of a piece of land, title to which is taken in the name of another, is discussed. Particular attention is paid to the principle that an oral promise by the grantee to hold in trust for another will not prevent or defeat a resulting trust where the law would, in the absence of such an agreement, imply a trust. The resulting trust arises out of the presumed intent of the person who pays the purchase price whereas the express trust comes into being by contract and the law requires this contract to be in writing. *Clements v. Hollingsworth*[16] should be studied in connection with *Hancock v. Hancock* and *Price v. Price* in order to get a clear picture of the distinction between the resulting and the constructive trust. *Estes v. Estes*[17] treats the problem where two parties jointly take title to a piece of land and one of the parties furnishes more than his share of the purchase price as a question of fact as to the extent of the resulting trust in favor of the payor.

12. Wilder v. Howard, 188 Ga. 426, 4 S.E. 2d 199 (1939).
13. 206 Ga. 239, 65 S.E. 2d 247 (1949).
14. 205 Ga. 684, 54 S.E. 2d 385 (1949).
15. 205 Ga. 623, 54 S.E. 2d 578 (1949).
16. 206 Ga. 255, 56 S.E. 2d 505 (1949).
17. 205 Ga. 814, 55 S.E. 2d 217 (1949).

Smith v. Merck[18] points out that loyalty of an agent to his principal is a primary obligation which, if violated by the agent in that he acquires an interest in the property antagonistic to his principal, constitutes him a trustee of the interest acquired for the benefit of his principal.

Chatfield v. Dennington[19] reiterates the ancient principle that when property is given for a particular charitable purpose the trustee cannot devote the goods to another purpose not within the scope of the original trust. In this connection it should be noted that this is not a case for the application of the doctrine of cy pres. There was no general intent to devote the goods to charity but merely an intent to devote them to furthering a particular purpose and if the particular purpose failed to have the corpus return to the settlor or his heir.

18. 206 Ga. 361, 57 S.E. 2d 326 (1950).
19. 206 Ga. 762, 58 S.E. 2d 842 (1950).