TRUSTS

By J. WINSTON HUFF*

In view of what is said to be a rising incidence in the number of trusts created in the last ten years or so, it is surprising that a total of only four cases in that field were considered by the Georgia Appellate Courts last year. It is even more surprising that only one of these cases dealt with an express trust, while the other three were actions to declare implied trusts.

The case of *First National Bank of Atlanta v. Robinson*[1] involved an equitable petition for direction brought by an executor and trustee for judicial permission to enter into a lease. During his lifetime the testator made a lease covering certain property. His will referred to this fact and directed that the property be distributed in fee simple upon the death of the last surviving child or at the expiration of the lease, whichever was later. The will specifically provided that the executor and trustee should have the power to execute leases "for terms not extending beyond the several dates herein fixed for distribution . . ."

The trustee desired to execute a new lease which would begin at the expiration of the old one and extend beyond the distribution date set in the will. The superior court sustained general demurrers.

The Supreme Court, referring to the well established rule that the intent of the testator is controlling, pointed out that the will in plain terms gave permission only for the execution of leases whose terms would not extend beyond the dates of distribution set out in the will. The court said it could not disregard the testator's expressed direction, and affirmed.

There are those who sometimes carp at what they deem undue tardiness on the part of the legislative branch of government in remedying some of the strictures of decisional law. This stone could scarcely be cast at the Georgia Assembly in this particular instance, for before the Supreme Court's opinion in the *Robinson* case had been announced (February 24, 1953), the Legislature had passed and the Governor had approved (February 10, 1953) an Act[2] seemingly directed at this particular case.

This Act provides that upon application to the superior court, a guardian, administrator, executor or trustee may be authorized, if the Court deems it wise, to execute leases for terms beyond that of the administration or the trust, despite the "fact that the instrument creating

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1. 209 Ga. 582, 74 S.E.2d 875 (1953).
2. Ga. Laws 1953, p. 44.

the trust only authorizes leases for terms not extending beyond the duration of the trust." The Act requires notice to interested parties and the appointment of guardians to protect the interests of minor beneficiaries who have no guardians.

Since the general rule is that a will must be construed under the law as it existed at the time of the death of the testator,[3] one wonders whether this new Act will be of any benefit to the executor or trustee in the *Robinson* case.

The remaining three cases[4] reported were actions to have implied trusts declared, and the principal question for decision presented in each was whether the Statute of Limitations had run.

None of these cases represent any departure from established precedent, but they do demonstrate the exceptions, and exceptions to exceptions, with which the general rule as to the Statute of Limitations is sieved.

The *Toombs* case exhibits one of the exceptions to the axiom that the Statute of Limitations begins to run from the time of the accrual of the cause of action. Here, certain heirs brought suit to impress an implied trust upon and to set aside the sale of land by an administrator. The petition showed that the plaintiffs had from the time of the intestate's death been in actual, open and notorious possession of the property in question. The Supreme Court, relying on the rule that neither the Statute of Limitations nor latches will run against one in peaceable possession of property under a claim of ownership, held the action timely.

The *Brown* case shows us another exception. There, several co-heirs had entrusted the estate's property to one of their number, who then procured the appointment of an administrator and the sale to himself of the property without the knowledge of the others. The petition alleged that although the property had been sold several years previously, the plaintiffs had discovered this fact only six months before the suit was filed. They sought to impress a trust upon the property in the hands of the defendant. The Court averted to the rule[5] that in cases of fraud the Statute begins to run only from the time of its discovery where the fraud has deterred the plaintiff from his action, and also to the exception that the Statute will not thus be tolled where exercise of ordinary diligence by the plaintiff would have revealed the fraud. To this exception, however, there is another exception, and it was upon this sub-exception that the case was decided: Where a confidential relationship exists between the parties, failure of the defrauded party to use diligence to discover the facts will be excused where it appears that through this confidence he was lulled or

3. Gilmore v. Gilmore, 208 Ga. 846, 69 S.E.2d 753 (1952).
4. Toombs v. Hilliard, 209 Ga. 755, 75 S.E.2d 801 (1953); Brown v. Brown, 209 Ga. 620, 75 S.E.2d 13 (1953); Epps v. Epps, 209 Ga. 643, 75 S.E.2d 165 (1953).
5. GA. CODE § 3-807 (1933).

prevented from making the discovery. The plaintiffs here made the defendant their agent as to property of the estate and it was his duty to inform them of the sale. It was because of their trust and confidence in the defendant that they failed to discover his wrong-doing, and therefore the Statute of Limitations did not begin to run until they received actual knowledge. Furthermore, said the Court, all the heirs were co-tenants of the inherited property and there could be no adverse possession by the defendant against his co-tenants until actual ouster or exclusive possession after demand or notice of adverse holding, none of which occurred here.

The *Epps* case sets forth still another exception. Here, the plaintiff alleged that she purchased and paid for certain realty, but had the deed made to the defendant. Plaintiff and defendant both resided on the property for nearly twenty years thereafter. Shortly before the action was brought, the defendant informed plaintiff that she claimed the property as her own. Plaintiff brought suit for the declaration of an implied trust and for the recovery of property. The Supreme Court held that an implied trust had been created, and that the Statute of Limitations did not begin to run until defendant gave plaintiff notice of her adverse claim. Since the defendant's joint possession of the premises with plaintiff was alleged to be purely permissive, the Statute could not begin to run until the plaintiff by action or notice indicated that she claimed the property. This is consistent with the rule that as long as one is in possession of another's property and recognizes the other's equitable ownership, no lapse of time will bar the owner from asserting his title.[6]

The Supreme Court in both *Toombs* and *Epps* cases, after deciding the preliminary question as to when the statute begins to run, went further to consider the Statute of Limitations applicable. In each case, the Court held on the basis of numerous precedents that actions to impose implied trusts as to realty must be generally brought within seven years of the date the cause of action accrued.

Although this survey is not the place for any lengthy discussion of this rule, it is interesting to note its origin and apparent conflict with other cases. The seven year rule in such cases has no statutory basis,[7] but its origin apparently is the application by analogy of the seven year adverse possession statute.[8] Yet in a number of cases of implied trusts the Court has used Code section 3-709, which establishes a ten year statute in actions against trustees.[9] It is also strange that the Court has not used, by the same analogy, the four year prescriptive period[10] in cases involving implied trusts of personalty. It seems to be a question of characterization:

6. Salter v. Salter, 209 Ga. 90, 70 S.E.2d 453 (1952).
7. Eller v. McMillan, 174 Ga. 729, 163 S.E. 910 (1932).
8. Candler v. Clarke, 90 Ga. 550, 16 S.E. 645 (1892).
9. Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860 (1941); O'Neal v. O'Neal, 176 Ga. 418, 168 S.E. 262 (1932); Garner v. Lankford, 147 Ga. 235, 93 S.E. 411 (1917).
10. GA. CODE § 85-1706 (1933).

If the parties consider the action one for the recovery of realty, although the implied trust device is used for its recovery, the statute may well be declared to be seven years; on the other hand, if it is considered an action by a *cestui* against his trustee, it may result in the application of a ten year statute even though the identical facts are presented.

The Legislature this year was a bit busier with trust problems than before. Besides the Act already mentioned, it:

1. Exempted pension and profit sharing trusts from the rule against perpetuities;[11]

2. Made the deposit of funds in a chartered state or national bank or trust company a legal investment for fiduciaries, insurance companies, credit unions, municipal corporations and the like;[12]

3. Required all foreign trustees of Georgia realty to designate an agent for service (or by default have the Secretary of State appointed by operation of law), and establish venue for actions against foreign trustees in the county where the land lies;[13]

4. Provided the machinery for the conversion of a Georgia trust company into a state banking corporation;[14]

5. Changed the state income tax exemption for estates (now $1,000.00) and trusts (now $100.00);[15] and

6. Permitted creation of a trust to hold title to properties used or useful in furnishing utilities or other services as security for an obligation to furnish such utilities or services to other property.[16]

11. Ga. Laws 1953, p. 42.
12. Ga. Laws 1953, p. 108.
13. Ga. Laws 1953, p. 178.
14. Ga. Laws 1953, p. 240.
15. Ga. Laws 1953, p. 297.
16. Ga. Laws 1953, p. 496.