

TRUSTS

BY WILLIAM C. TURPIN*

The most striking fact about the decisions with respect to trusts and trustees in Georgia during the year from June 1st 1955 through May 31st 1956, is that despite the growth in the number and importance of trusts created and in operation in Georgia, there were only three cases involving trusts decided by our supreme court during that time; and more remarkable still — no one of the three cases grew out of an express trust, but all three cases had to do with constructive trusts and nothing whatever bearing on, or growing out of, an express trust. It would be gratifying if it could be believed that this condition is the result of clarification and improvement of our trust law but unhappily, such is not the case and the need for a revision and codification of the law on trusts is just as great, or greater than it has ever been.

The first of the three cases under review is *Roach v. Roach, Jr.*¹ Basically, this was a divorce case and the only phase of it having to do with trust law, was a very practical and logical conclusion that since the petition does not allege definitely what property was sought to be subjected to the trust, a demurrer was properly sustained. The rest of this decision bears on fraudulent conveyances and is not material to this review.

Bateman v. Patterson,² decided by Mr. Justice Candler, deals with implied and constructive trusts. The facts, briefly, were that the plaintiff bought a certain cashiers check from a private banker who was a defendant, without knowledge of the insolvency of the defendant, but while the defendant knew his insolvent condition. The decision follows closely, the general law with respect to trusts ex maleficio and quite logically held that an implied or constructive trust arose by reason of the fraud of the defendant. The general subject will be discussed a little more fully after the three cases are reviewed.

Bennett v. Bennett,³ was a case in which the plaintiff sought to

*William C. Turpin; A.B., 1911, University of Georgia; LL.B., 1914. Mercer University; President, Macon Bar Association - 1929; President, Georgia Bar Association - 1937-38.

1. *Roach v. Roach, Jr.* 212 Ga. 40; 90 S.E.2d 423 (1955).

2. *Bateman v. Patterson*, 212 Ga. 284; 92 S.E.2d 8 (1956).

3. *Bennett v. Bennett*, 212 Ga. 128; 91 S.E.2d 29 (1956).

enforce by action for specific performance, a conveyance from the defendant. It was argued that the action was grounded on the failure of the defendant to carry out an agreement, but the court distinguished between such a failure and fraud which existed at the inception of the agreement and which accordingly vitiated all that was done thereafter.

It would seem that these three cases justify a brief summary of the law with respect to constructive trusts. The compilers of the Restatement of the Law felt that the very name was a misnomer and treated constructive trusts under Restitution. The learned authorities seem to agree with this theory, but for practical reasons consider constructive trusts together with all other forms of trusts, rather than under Restitution. In the *Bennett* case, Mr. Justice Mobley states the Georgia law extremely forcefully — "Trusts are implied where, from any fraud, one person obtains the title to property which rightly belongs to another."⁴ In *Jenkins v. Lane*,⁵ it is stated: "A trust is implied where, from any fraud, one person obtains title to property which rightfully belongs to another. An implied trust arises wherever a person acquires the legal title to land or other property by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose; and after having thus fraudulently obtained title, he retains, uses, and claims the property absolutely as his own, so that the whole transaction by means of which the ownership is obtained is in fact a scheme of actual deceit." Such an implied trust is sometimes termed a constructive trust or a trust *ex maleficio*. The essential ingredient which gives rise to a constructive trust is fraud." Mr. Scott, in his monumental work on trusts,⁶ very strongly holds that a constructive trust may arise in the absence of fraud. It seems to the reviewer that Judge Cardozo has defined the term more accurately than it has been defined elsewhere: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."⁷

Finally, it seems to this reviewer that the statement made by Mr. Justice Candler in the *Bateman* case *supra*, says all that is really to be said on the subject, and says it with beauty and with force — "Constructive (or implied) trusts are such as are raised by equity

4. See GA. CODE § 108-106 (1933).

5. 154 Ga. 454, 455, 115 S.E. 126, 127 (1922).

6. SCOTT ON TRUSTS § 462 (1939).

7. *Beatty v. Suggenheim*, 225 N.Y. 380, 122 N.E. 378 (1919).

in respect of property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds it."⁸ Trusts are children of equity. A court of law may entertain them; but when the case is complicated, especially when it has a flavor of fraud, equity will not banish them, and remit the parties to another forum. *Kupferman v. McGehee*.⁹ As against a trustee ex maleficio, the person injured is entitled to recover the property wrongfully obtained or, in equity, subject it and its income to such a trust; and if the trust property cannot be traced, the fact that an action might have been brought at law for damages or that the plaintiff may in his suit to establish the trust also seek a money judgment for the proceeds of the trust property, will not divest equity of jurisdiction. *Grant v. Hart*.¹⁰

LEGISLATION

There was no legislation dealing with trusts during the subject period.

8. *O'Neal v. O'Neal*, 176 Ga. 418 (2), 168 S.E. 262, 264 (1933); *Frick v. Taylor*, 94 Ga. 683, 21 S.E. 713 (1894); *Jenkins v. Lane*, 154 Ga. 454 (4), 115 S.E. 126 (1922).

9. 63 Ga. 250 (4) (1879).

10. 192 Ga. 153, 14 S.E.2d 860 (1941).