# TRUSTS

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During this survey period the usual number of cases arose, all of which followed established principles. One involved individual liability of the trustee which while not of first impression in Georgia, is well worth calling to attention because of the principle stated. There were several amendments by the Legislature, including new sections, which are worthy of consideration here.

## IMPLIED TRUSTS

Cases involving implied trusts will continue to appear until it is learned that the agreement should be reduced to writing in clear and explicit terms.

In *Wells v. Wells*,[1] the son purchased land at auction and paid one-third of the purchase price as a down payment requesting that the deed be made in favor of his father, who, by agreement with his son, executed a note and deed to secure debt for the balance of the purchase price. The son and father each paid part of the balance until it was finally paid off and cancelled. The son died, and his administratrix sued the father, praying that the land be impressed with an implied trust in favor of his estate for the total of the amount paid by said son.

The defendant set up a verbal agreement to the effect that he was to hold the title as trustee for a child of his son and convey it to said child, upon his attaining the age of twenty-one years.

The court entered summary judgment, on the motion of plaintiff, impressing the land with a trust in favor of his estate, subject to payment of the amount contributed by his father. Payment of only part of the purchase price at time of purchase does not rebut the implied trust. The oral agreement to hold title as trustee for another will not defeat the trust implied, as an express trust cannot be made by parol agreement.

In *Lucas v. Bonner*,[2] the mother died intestate, leaving a husband and five children as her sole heirs at law. The five children executed

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1. 216 Ga. 384, 116 S.E.2d 586 (1960).
2. 216 Ga. 334, 116 S.E.2d 548 (1960).

a quitclaim deed as to their interest in favor of their father for a consideration of $10.00. The father died and the five children brought an action against his estate to impress the property with an implied trust, alleging in part that the quitclaim deed was delivered to the father upon his oral promise to leave them the property at his death. A general demurrer was sustained to the petition, and the court affirmed on the grounds that:

(a) No beneficial interest was retained by said children;
(b) There was a valuable consideration;
(c) Fraud in the procurement of the quitclaim deed is not alleged;
(d) From the nature of the transaction, it is not manifest that it was the intention of the parties that the father should have no beneficial interest in the property.

Therefore, plaintiff failed to establish an implied trust.

## INDIVIDUAL LIABILITY OF TRUSTEE

In *Oberdorfer v. Smith*,[3] the sole question raised was whether the trustee can be held liable individually on the contract which he has negotiated on behalf on the trust estate, where the contract was for the benefit of the estate.

Plaintiff sued the trustee individually, alleging usury, although setting forth that the contract was made with the defendant as trustee under a will. The defendant's general demurrer based on the fact that the petition showed that the acts were done in his fiduciary capacity while the suit was brought against him individually, was overruled.

The defendant contended that, while under the common law the trustee could be sued in his individual capacity, this was changed by GA. CODE ANN. §§108-502 and 505 (1959 Rev.), which provide a remedy for claims against trust estates. The court held, however that statutes in derogation of the common law must be strictly construed and that our code simply provided a new method, merely cumulative of the common law, and did not change the common law. The trustee was thus held liable in his individual capacity.

A distinction was drawn as to the liability of a trustee executing a negotiable instrument who is not liable in his individual capacity. The court pointed out that the Negotiable Instruments Law came from the law merchant, which was not a part of the common law.

3. 102 Ga. App. 336, 116 S.E.2d 308 (1960).

### MISAPPLICATION OF TRUST FUNDS

In *Gwinnett County v. Archer*,[4] a special attorney was employed in addition to the assistant county attorney to do the legal work necessary in establishing a county water system and in financing the same by the sale of bonds. Later an attorney was employed by the county to advise in reference to the validity of the bonds. No fees were agreed upon, but the county adopted a budget before selling the bonds and included in it some $128,000.00 for attorney's fees.

When the work had been completed, the county commissioners gave the special attorney $128,000.00 with authority to settle or make an agreement as to fees for the bond attorney and the assistant county attorney from said sum which he did, and retained the balance. This, with his previous compensation left him with $93,000.00 as fees for the job.

The county brought suit individually against the former three county commissioners who compromised the board at the time this arrangement was made and the special attorney for the recovery of $43,000.00 as excessive attorney's fees paid the special counsel, as his services were worth only $50,000.00. The gist and gravamen of the action is that the said three defendants as county commissioners were trustees of the fund raised by the sale of said bonds and that they abused their discretion and committed a breach of trust in the misapplication of trust funds in which the special attorney participated with full knowledge of the facts. The petition was dismissed on general demurrer by the trial court. The Supreme Court held that the petition set forth a cause of action on the theory that the commissioners paid an excessive fee to the special attorney and delegated to him authority to settle with the other attorneys for the county, so as to enable the special attorney to retain an exorbitant amount. It was the duty of the commissioners to fix a fee separately with each attorney it employed and could not delegate this authority.

The court pointed out that this is not a case where the commissioners and attorneys made a definite contract in good faith in advance of services.

### STATUTES

There are several amendments as follows:

(a) GA. CODE ANN. §92-3105 (1961 Rev.) was amended by adding a new subsection which exempts any real estate investment trust from state income tax to the extent the net income of such trust is exempt from federal income tax.[5]

4. 102 Ga. App. 813, 118 S.E.2d 97 (1960).
5. Ga. Laws 1961, p. 180.

(b) GA. CODE ANN. §108-601 (1959 Rev.) allowing the creation of said real estate trusts merely for the improvement of property, was amended to further provide that they may be created for the purpose of acquiring real estate. The amendment further allows the deed to provide any period of time which does not extend beyond any number of lives in being and twenty-one years thereafter. New sections were added as follows:

> (1) The deed creating such estate may further limit or expand the powers and authority with respect to investments, including the power to invest in property located outside the State of Georgia, and the deed may further provide that the trustee is authorized to repurchase or redeem any outstanding certificates of beneficial interest with funds from corpus or from income or from both.
> (2) The deed may provide that the trustee may conduct the affairs of such trust estate under a business or trade name, which may include the word "trust", but it may not include the words "trust company".
> (3) The deed must be filed by the trustee with the clerk of the superior court, and said clerk shall furnish two certified copies thereof, which shall be presented by the trustee to the Secretary of State, who shall attach his certificate and return it to the trustee. This shall be admissible as evidence showing the existence of the trust and its terms.
> (4) A return must be made upon the creation of the trust to the Secretary of State and annually thereafter, embracing the same information as required of corporations.[6]

(c) The limit of $150,000.00 was raised to $300,000.00 for investments by trustees in common trust funds of a trust institution, or such lesser amount, as may from time to time be prescribed for such investment in such funds by the Board of Governors of the Federal Reserve System or other competent federal authority, whichever amount shall be less.[7]

6. Ga. Laws 1961, p. 207.
7. Ga. Laws 1961, p. 220.