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Recent Case

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RECENT CASE

CHARITABLE TRUSTS — Adverse Holding of Trust Property — To Whom Notice of Hostile Holding Given. — In 1713 a one hundred acre tract of land was conveyed to certain members of the Presbyterian Church of James Island, as trustees, for the sole use and benefit of every Presbyterian minister chosen by the members of said church to be their pastor and for that purpose only. By the terms of this indenture, the members of the unincorporated society of Presbyterians furnished the consideration, selected the trustees and retained the power to appoint their successors. By Act adopted March 17, 1785, the plaintiff was duly incorporated. There was no record as to the use made of the tract of land prior to 1871. From 1871 to 1941, the property in question was leased by the church to various individuals and the rent used for general church purposes. In 1939 one acre was sold and the proceeds of the sale used to repair church property. In 1945, the land was subdivided. The existence of the indenture of 1713 prior to this time being unknown or disregarded, action was instituted to remove the cloud created by this instrument and the church was declared to be owner in fee simple of all property which it had not conveyed. In 1951 action was brought by plaintiff against defendant to enforce a contract, by the terms of which defendant was to purchase a portion of this land. The court below determined that plaintiff could convey a good title to the property, having acquired such good title by adverse possession, and issued a decree of specific performance. On appeal, HELD: Affirmed. The incorporated church, having dealt with the property conveyed under trust as if it owned said property in fee simple and having exercised exclusive, open, uninterrupted and hostile possession, had good and marketable title, whether it were regarded as a stranger or as a trustee under original indenture. *The Presbyterian Church of James Island v. W. F. Pendarvis,* 86 S.E. 2d 740 (S.C. 1955).

Trusts for the convenience and support of worship, or of ministers, have been held charitable. *Wilson v. Presbyterian Church of John's Island,* 2 Rich. Eq. 192 (S.C. 1846); *Jackson v. Phillips,* 96 Mass. (14 Allen) 539 (1867). Title by adverse possession may be acquired to lands held in trust. *Snyder v. Snover,* 56 N.J.L. 20, 27 Atl. 1013 (1893). As a general rule, title by adverse possession may be acquired by every class and description of persons, natural or artificial. *Ohio River R. Co. v. Johnson,* 50 W. Va. 499, 40 S.W. 406 (1897); *Memphis & L. R. R. Co. v. Organ,* 67 Ark. 84, 55

S.W. 952 (1899). No length of possession by a trustee as such will give him title as against the beneficiary, the possession of the trustee being considered the possession of the cestui que trust. *Howard's Adm'rs. v. Aiken,* 3 McCord 467 (S.C. 1826); *Huntley v. Huntley,* 43 N.C. 250 (1852); *Anderson v. Dunn,* 19 Ark. 650 (1858). But the trustee may repudiate existing relations and thenceforth hold adversely to the cestui que trust. *Hill v. Bailey,* 8 Mo. App. 85 (1879). The possession of the trustee does not become adverse until by some act he assumes to himself the ownership of the property. *Carter v. Feland,* 17 Mo. 383 (1853). The attitude of the trustee must be hostile and continuously so and there must be no mistake as to the character of his holding by either party. *Scott v. Haddock,* 11 Ga. 258 (1852); *Andrews v. Smithwick,* 20 Tex. 111 (1857); *McKim v. Glover,* 161 Mass. 418, 37 N.E. 443 (1894). In an express trust, as between beneficiary and trustee, the statute of limitations runs from the date when the beneficiary has actual or constructive notice of a repudiation of the trust by the trustee. *McDonald v. May's Ex'rs.,* 1 Rich. Eq. 91 (S.C. 1844); *Second Religious Soc. of Boxford v. Harriman,* 125 Mass. 321 (1878). If the trustee does an act which he intends and which is understood by his cestui que trust to be a discharge of his trust, from that time the statute begins to run. *Starke v. Starke,* 3 Rich. 438 (S.C. 1829); *Barr v. Luchenbill,* 351 Pa. 508, 41 A. 2d 627 (1945). The act must be a positive one, manifesting clear intention to terminate the trust and must be done by the trustee with the beneficiary's knowledge. *Coleman v. Davis,* 2 Strob. Eq. 334 (S.C. 1848); *Nesbitt v. Clark,* 187 S.C. 365, 197 S.E. 382 (1938).

In event of nonuser or misuser of property held under charitable trust, the remedy is by a proceeding in equity to enforce the trust and not forfeiture of the property to grantor or his heirs. *Sanderson v. White,* 35 Mass. (18 Pick.) 328 (1836); *Stanley v. Colt,* 72 U.S. (5 Wall.) 502 (1867). Before the statute of limitations can run, there must be someone in existence, by whom and a different person, against whom the claim may be enforced. *Brener v. Williams,* 210 Mass. 256, 96 N.E. 687 (1911). Potential gainers from the operation of a charity are not generally recognized as proper parties complainant in a suit for an accounting on a trust instrument. *Carroll v. City of Beaumont,* Tex. Civ. App. 1929, 18 S.W. 2d 813 (1929). But the courts have permitted private individuals whose interests were more or less certain and fixed for the time being to bring such suit alone. *Cannon v. Stephens,* 18 Del. Ch. 276, 159 Atl. 234 (1932). Ordinarily, it is the Attorney General alone who can bring

a suit to enjoin a breach of trust for charity. *Healy v. Loomis Institute,* 102 Conn. 410, 128 Atl. 774 (1925). The Attorney General of the state where the trust is to be enforced should bring the suit in the usual case making the trustees parties defendants. *Smith v. Thompson,* 266 Ill. App. 165 (1932); *Humphrey v. Board of I.O.O.F. Home of Goldsboro,* 203 N.C. 201, 165 S.E. 547 (1932). "The Attorney General shall enforce the due application of funds given or appropriated to public charities within the State, prevent breaches of trust in the administration thereof and, when necessary, prosecute corporations which fail to make to the General Assembly any report or return required by law." CODE OF LAWS OF SOUTH CAROLINA, 1952 § 1-240.

In the determination in the instant case that the incorporated church even if it were to be treated as a trustee of the property in question had acquired such property by adverse possession, the court has given no consideration to the person "against whom the claim could be enforced" and the notice which would appear to be required to be given such person before the statute of limitations might run in favor of the corporation claiming adverse possession. This would further appear to be the consideration given this matter by courts generally.

As to whom the claim could have been asserted against in this case, the ministers of the church were the designated beneficiaries and it would seem that such claim might be asserted against a minister who served the church at a particular time. However, it appears unlikely, due to the uncertainty of the time that ministers generally remain at any one church, that a minister of the church in question would have served the church for such a period of time as the statute *of limitations* might run against him. In this light it was stated by the court in the case of *Smith v. Board of Pensions of The Methodist Church, Inc., in Missouri,* 54 F. Supp. 224 (E.D. Mo. 1944), that where a fund is held in trust for the benefit of superannuated ministers the beneficiaries are constantly changing and this would help establish that no person can have a fixed interest in the fund or its income.

It would then appear that the Attorney General would be the proper person against whom the claim could be asserted, but in this connection it has been observed that aside from the indefinite nature of the cestuis of a charity against whom a claim of adverse possession of the trust property could be enforced, there is also the probability that breaches of trust may easily be unnoticed by the Attorney General or any interested party unless there is a record of all existing chari-

ties and periodic accountings are strictly enforced. See 2A BOGERT, TRUST & TRUSTEES § 402 (1953). Some states have apparently recognized the need for periodic checks on such charitable trusts and have enacted appropriate laws in regard thereto. By § 67-71, CODE OF LAWS OF SOUTH CAROLINA, 1952, enacted in 1953, trustees of charitable trusts in existence under the laws of the State of South Carolina are required to file a copy of the trust instrument with the Attorney General within sixty days after the creation of the trust, and Section 67-72 provides that an annual report shall be made by the trustees to the Attorney General, which shall include, among other things, a summary of the acts of the trustees in their capacity as such. However, Section 67-75, entitled "Exemptions", provides that the above sections shall not apply to trusts or trustees of churches and even though these sections would have had no application to the instant case, the problem posed remains unsolved.

The court further classified this case as being a case of "stale demand" — where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. There was, however, no "demand" in this case, it being one in which an individual refused to perform his contract with a subsequent suit being brought to compel performance, the result of which was the "testing of a title" and not a determination made of a "demand".

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