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## Devolution of Interests in Trust Estates

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# THE SOUTH CAROLINA LAW QUARTERLY

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## REVIEW SECTION

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### DEVOLUTION OF INTERESTS IN TRUST ESTATES

COLEMAN KARESH \*

This article will be devoted to a discussion of the law in South Carolina covering the devolution on death of interests in trust estates—the interest of the beneficiary on the one hand, the title of the trustee on the other: in other words, what happens to the beneficiary's interest on his death, and what happens to the trustee's title on his. The law on the subject is fairly plain and elementary, and this dissertation may therefore be an essay on the obvious, but, perhaps, justified as an attempt to assemble and put all the parts into a single, if oversized, package.

The instrument which creates the trust may itself provide, within applicable legal limits, what shall happen to the beneficiary's interest when he dies. The beneficiary may have only a life estate, which will die with him. The interest may be defeated by his death before attaining a certain age, or before the happening, or absent the happening, of a certain contingency or event; and the instrument may direct where the interest shall then go.<sup>1</sup> With these instrument-directed dispositions we are not concerned.

If the interest of the beneficiary is turned into a legal one by reason of the operation of the Statute of Uses<sup>2</sup>, the problem of the fate of his interest ceases to be one of Trusts and finds no place in this discussion.

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1. See Restatement of Trusts, Sec. 142, comm. b.

2. Sec. 9038, S. C. Code of Laws 1942.

Nor are we here concerned fundamentally with cases where the beneficiary's interest never materializes, as where the interest has lapsed by reason of the beneficiary's death before the death of the settlor-testator. If there is no gift over, or accretion to the other members of a class to which he belonged, the gift will fail unless taken care of by a lapse statute.<sup>3</sup>

In the case of the trustee, the trust instrument may likewise provide what shall happen to the trustee's title upon his death.<sup>4</sup> Similarly, there is no involvement here with this aspect of the matter.

## I

### THE BENEFICIARY'S INTEREST

The problem of what happens to the beneficiary's interest upon his death is comparatively simple. Equitable interests adapt and mold themselves to legal interests, under the prin-

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3. Such as Sec. 8926, S. C. Code of Laws 1942, which provides: "If any child should die in the lifetime of the father or mother, leaving issue, any legacy of personalty or devise of real estate given in the last will of such father or mother shall go to such issue \* \* ." Presumably this applies to estates given in trust for children. Restatement of Trusts, Sec. 112, comm. f; 118 A. L. R. 559. In *Citizens & Southern Bank v. Cleveland*, 200 S. C. 373, 20 S. E. (2d) 811 (1942), there was a gift in trust of a yearly sum to testator's son during the widow's lifetime; the son predeceased the testator. The court, without reference to Sec. 8926, held that the gift did not pass to the son's child, on the ground that the gift was personal to the son and died with him.

What is virtually a lapse statute, at least in part, is Sec. 8874, S. C. Code of Laws 1942, which forbids one who is convicted of unlawfully killing another from participating in the slain person's estate, and provides: "Provided, further, that in case the offender is the parent of a child or children, who if such parent were dead, would inherit from the deceased, then, in that event, the said child or children shall immediately take the interest in the estate of the deceased, which the offending parent would have taken except for the provisions hereof." In *Razor v. Razor*, 173 S. C. 365, 175 S. E. 545 (1934), a father left property in trust for his children. He was killed by one of them, who was thereafter convicted of murder. The slayer was denied the right to take, but his children were let in by virtue of the proviso.

4. See Restatement of Trusts, Sec. 108, comm. f and g. *Roberts v. Lesley*, 8 Richardson's Equity 35 (1855); *Cone v. Cone*, 61 S. C. 512, 39 S. E. 478 (1901); 65 C. J. 575.

ciple that equity follows the law. An English case, *Hopkins v. Hopkins*,<sup>5</sup> puts the matter aptly:

"It is the maxim of this Court that trust estates, which are the creatures of equity, shall be governed by the same rules as legal estates, in order to preserve the uniform rule of property; and that the owner of the trust shall have the same power over the trust as he would have if he had the legal estate for the like extent or interest."

The principle is similarly expressed in the celebrated South Carolina case of *Heath v. Bishop*.<sup>6</sup>

"As a general rule \* \* it may be stated that the attributes with which the laws of this country have invested the institution of property attach alike to equitable as to legal estates. Under the maxim, that equity follows the law, the system of trusts has been molded into an almost perfect analogy and correspondence with legal estates. Equitable interests admit of the same modifications as to the quantity of right, duration, time, conditions and mode of enjoyment that appertain to estates at law."

#### *Death of the Beneficiary Intestate*

Upon the death of the beneficiary intestate, his interest will naturally devolve upon his heirs at law or his administrator, depending upon the nature of the property involved: *i.e.*, real or personal. Here again is pertinent *dictum* from *Heath v. Bishop*:<sup>7</sup>

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5. West t. Hardw. 606, 618 (1739). To the same effect is another English case, *Banks v. Sutton*, 2 P. Wm. 700, 713 (1732). These two cases are referred to in the footnotes at page 313 of *Scott's Cases on Trusts* (3d Ed.).

6. 4 Richardson's Equity 46, 55 Am. Dec. 654 (1851). This case is best known for its treatment of restraints on alienation. See, also, *Richardson v. Manning*, 12 Richardson's Equity 454, 483 (1866), where the interest involved was said to be "subject, being a trust, to the same rules of descent and conveyance which would apply to it if it was a legal estate." The interest was actually held to pass under a devise. See note 27 *infra*.

7. Note 6 *supra*.

"The same canons of descent apply to both systems. They are in the main subject to the same rules of succession. They may alike be held in severalty, in joint-tenancy, coparcenery and in common. They are devisable and assignable \* \* and they are both subject to the payment of debts."

The Restatement of Trusts<sup>8</sup> generalizes as follows:

"Upon the death intestate of the beneficiary of a trust, the devolution of his interest is governed by the same rules of descent and distribution as govern the descent and distribution of a corresponding legal interest."

That the interest of an intestate beneficiary descends to his heirs is implicit in two South Carolina statutes, original English statutes made of force in 1712.<sup>9</sup> The first of these (Sec. 9044) is captioned Trusts Shall be Assets in Hands of Heirs, and provides in part:

"If any cestui que trust shall die, leaving a trust in fee simple to descend to his heir, such trust shall be deemed and taken, and is hereby declared to be assets by descent \* \*."

The section then goes on to provide that such assets shall be subject to obligations of the ancestor beneficiary, and the succeeding section (Sec. 9045) provides that such obligations shall not be payable out of the heir's own estate.

There appear to be no cases in this state in which the question of the devolution of an intestate trust beneficiary's interest has been put directly in controversy, and it is to be assumed that the proposition that it descends or is distributed as does a legal interest is taken for granted.<sup>10</sup>

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8. Sec. 142. See Scott on Trusts, Sec. 142; Bogert on Trusts and Trustees, Sec. 189.

9. Secs. 9044, 9045, S. C. Code of Laws 1942; 2 Stat. 527.

10. *Cave v. Anderson*, 50 S. C. 293, 27 S. E. 693 (1897), holding that a Circuit Judge's charge stating the proposition as to descendibility was not misleading. *Cobb v. Brown*, Speers Equity 564 (1844), and *Richardson v. Cooley*, 20 S. C. 347 (1883), holding in each case that the share of a deceased beneficiary under a trust passed to his distributee, but that the action to recover should be maintained by the administrator. *Barrett v. Cochran*, 8 S. C. 48 (1875), holding that

The interest of a vendee under a contract of sale of real estate is an equitable interest, and in fact many of the cases say that the relationship between the vendor and the vendee is that of trustee and beneficiary,<sup>11</sup> although, objectively viewed, it cannot be said that a strict trust exists.<sup>12</sup> That the equitable interest of the vendee descends as does a legal interest is seen from these typical statements in two cases:

"The vendee is treated as the owner of the land and it is devisable and descendible as his real estate."<sup>13</sup>

"He (the vendee) may mortgage it, convey it to an-

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heir of deceased beneficiary succeeded to the latter's rights and, under facts, should be allowed to intervene in suit by trustee against third person.

The incident of descendibility is always collaterally and consequentially involved in those cases in which the issue is whether a deceased beneficiary had an estate for life or in fee. A finding that it was the latter would perforce result in a holding for the heirs of the intestate beneficiary, and such was the conclusion in *Bratton v. Massey*, 15 S. C. 227 (1880), and *Haynsworth v. Goodwin*, 35 S. C. 54, 14 S. E. 491 (1891).

An equitable estate in fee simple conditional can be created, and, according to the decision in *Withers v. Jenkins*, 14 S. C. 597, 608 (1880), "when thus existing in equity, is subject to all the rules of descent and otherwise, and is accompanied with most of the incidents and attributes applicable to such estates at law." The estate thus created is not devisable, and upon the death of the tenant in fee conditional it does not descend to heirs generally but *per formam doni*. In the case just cited and in *Burnett v. Burnett*, 17 S. C. 545 (1882), equitable estates in fee simple conditional were created. In the former the estates reverted to the grantor because the tenant died without leaving issue surviving; in the second the court struck down a devise by the tenant and awarded the property to her issue under the terms of the deed, saying, however, that it was doubtful whether there was a genuine trust and that, in any event, the duties of the trustees having ceased the property went directly to the issue.

11. See, for example, *Landrum v. Hatcher*, 11 Richardson's Law 54, 70 Am. Dec. 237 (1857); *Gregorie v. Bulow*, Richardson's Equity Cases 285 (1832); *Roddey v. Elam*, 12 Richardson's Equity Cases 343 (1866); *Peay v. Seigler*, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731 (1896); *Whitmire v. Boyd*, 53 S.C. 315, 31 S. E. 306 (1898); *Ridgeway v. Broadway*, 91 S. C. 544, 75 S. E. 132 (1912).

12. Restatement of Trusts, Sec. 13; *Whitmire v. Boyd*, note 11 *supra*, where the relationship is spoken of as practically that of mortgagor and mortgagee.

13. *Landrum v. Hatcher*, note 11 *supra*.

other, or devise it, and if he dies intestate, it descends to his heirs."<sup>14</sup>

In the first of the two cases from which quotation has just been made, a testator, after making his will, entered into a contract to buy land but died before legal title could be put into him. As the law then stood, after-acquired real property could not pass by will, and the court held that the equitable interest of the vendee passed as intestate property to his heirs, who could compel the executor to fulfil the contract by paying the purchase price.<sup>15</sup>

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14. *Ridgeway v. Broadway*, note 11 *supra*. For a similar statement, see *Roddey v. Elam*, note 11 *supra*. As to inheritability and descendibility of equitable estates generally, see 26 C. J. S. 1008.

Another type of descendible equitable interest is that existent where a borrower gives a deed absolute on its face intended as security. Equity, of course, treats this as a mortgage under the maxim "once a mortgage, always a mortgage." Despite the Act of 1791 (Sec. 8701, S. C. Code of Laws 1942), stripping real estate mortgages of their title-carrying attributes and providing that until foreclosure the mortgagor shall remain the owner of the land and the mortgagee shall have only a lien, it seems hardly open to doubt that when a borrower gives a deed absolute as security, the legal title passes to the grantee-mortgagee, and the grantor-mortgagor retains only the beneficial, or equitable, ownership. This is demonstrated by the fact that a *bona fide* purchaser for value of the property, without actual or constructive notice of the security nature of the transaction, acquires from the grantee a good title, cutting off the equity of redemption of the grantor-mortgagor. *Jones v. Hudson*, 23 S. C. 494 (1885). The grantee of a deed absolute intended as security, while he cannot be regarded as a strict trustee, certainly occupies a fiduciary or trust relationship. *Welborn v. Dixon*, 70 S. C. 108, 49 S. E. 232 (1904). Treating the ownership of the grantor-mortgagor as an equity, it follows that upon his death intestate the interest will pass to his heirs, and they may maintain an action to have the deed declared a mortgage and allowed to redeem. While there are no cases litigating the propriety of the heirs' maintenance of such an action, cases are to be found in which the heirs have brought such actions: *Buchanan v. Buchanan*, 38 S. C. 410, 17 S. E. 218 (1892); *Bristow v. Rosenberg*, 45 S. C. 614, 23 S. E. 957 (1895); *Francis v. Francis*, 78 S. C. 178, 58 S. E. 804 (1907); *Frady v. Ivester*, 118 S. C. 195, 110 S. E. 135 (1921).

15. There are at least three other cases in which a testator, after the execution of his will, entered into a contract to purchase real property and died before acquiring legal title. In each the court held that the equitable interest passed to the heirs, who could compel the executor to exonerate the property by payment of the purchase price. *Brown v. James*, 3 Strobhart's Equity 24 (1849); *Watson v. Child*, 9 Richardson's Equity 129 (1856); *Roberts v. Smith*, 21 S. C. 455 (1884).

What has been said up to this point has been with reference to express trusts, but the same logic applies to the interests of beneficiaries under resulting trusts, and the Restatement and other authorities<sup>16</sup> state this view. Consequently, the interest of the intestate beneficiary of a resulting trust passes to his heirs at law or personal representative. No South Carolina cases put the matter directly in issue, but of the many cases dealing with the typical resulting trust arising out of payment of the purchase money, some of them have presented assertions by heirs that their ancestor was entitled to a resulting trust by reason of the payment of the purchase money.<sup>17</sup> No objection was raised, or could be raised, that the trust interest so implied by law could not pass by succession to the heirs.

In the other most frequent type of resulting trust—where an express trust fails in whole or in part—the interest of the beneficiary of such a trust would be subject to the same rules of succession. Where the trust is created *inter vivos* and fails initially or subsequently, the settlor will take on a resulting trust, and if he thereafter dies intestate the interest will pass to his heirs or personal representative. If an express trust created by will is initially ineffectual, there will be a resulting trust (unless there is a gift over) in favor of the heirs or residuary takers as the case may be,<sup>18</sup> but here the heirs or residuary takers would be the original beneficiaries of the resulting trust and not successors to an equitable interest belonging to the decedent.

Another type of resulting trust in which the question may arise whether the beneficiary's interest will pass on intestacy

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16. Restatement of Trusts, Sec. 407 (2), comm. e; Scott on Trusts, Sec. 407; 26 C. J. S. 1008.

17. Minton v. Pickens, 24 S. C. 592 (1885); Odom v. Beverly 32 S. C. 107, 10 S. E. 835 (1889); Buchanan v. Buchanan, note 14 *supra*; Rogers v. Rogers, 52 S. C. 388, 29 S. E. 812 (1897); DeHihns v. Free, 70 S. C. 344, 49 S. E. 841 (1904); Miller v. Saxton, 75 S. C. 237, 55 S. E. 310 (1906); Bell v. Edwards, 78 S. C. 410, 59 S. E. 535 (1907).

18. Elliott v. Morris, Harper's Equity 281 (1824), trust not declared on face of will; Johnson v. Clarkson, 3 Richardson's Equity 305 (1851), trust imperfectly declared in will; Ford, Daingerfield, 8 Richardson's Equity 95 (1856), trust in favor of slaves void and in absence of heirs trust resulted to state by escheat; Brennan v. Winkler, 37 S. C. 457, 16 S. E. 190 (1892), attempted charitable trust invalid; City of Columbia v. Monteith, 139 S. C. 262, 137 S. E. 727 (1926), attempted charitable trust invalid.



to his heirs at law or personal representative is that which is impressed "where a person standing in a fiduciary relation uses fiduciary funds to purchase property and takes title in his own name." This classification, to be found in the South Carolina cases,<sup>19</sup> is taken from the grouping of resulting trusts set down by Perry, in his work on Trusts,<sup>20</sup> an old favorite of the South Carolina courts. The issue of the proper assertion by the heirs or administrator of such a beneficiary has not been brought to the fore in any South Carolina case, but it is implicitly recognized in at least one.<sup>21</sup>

On principle it would seem that where land or other property may be subjected to a constructive trust, the right to assert it would pass, on death of the person entitled, to his heirs or personal representative.<sup>22</sup>

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19. *Palmetto Lumber Co. v. Risley*, 25 S. C. 309 (1886); *Rogers v. Rogers*, note 17 *supra*; *Green v. Green*, 56 S. C. 193, 34 S. E. 249, 46 L. R. A. 525 (1899); *Phillips v. Yon*, 61 S. C. 426, 39 S. E. 618 (1901); *Walker v. Taylor*, 104 S. C. 1, 88 S. E. 300 (1915); *Sparks v. McCraw*, 112 S. C. 519, 100 S. E. 161 (1914); *Kirton v. Howard*, 137 S. C. 11, 184 S. E. 859 (1926); *Ex Parte Johnson*, 147 S. C. 259, 145 S. E. 113 (1928).

20. Sec. 138 (3d Ed.); Sec. 125 (7th Ed.). While this label is given to this factual situation, it is difficult to justify it as anything other than a constructive trust, since, even though he may be acting in good faith, a trustee violates his duty in investing trust funds in property and taking title in his own name. The Restatement of Trusts, Sec. 404, listing the various types of resulting trusts, does not so catalogue this situation. See the dissenting, and critical, opinion in *Green v. Green*, note 19 *supra*. See, also, *Dominick v. Rhodes*, 202 S. C. 19, 24 S. E. (2d) 168 (1943), where a father acting in good faith mingled his incompetent son's funds with his own, and the court termed it a constructive trust. In most cases it is immaterial whether the trust is called resulting or constructive, since the nature of the relief afforded to the beneficiary is substantially the same in either instance. Since the constructive trust is designed to prevent or undo fraud, which is its essence, it may be that the court, in characterizing a *bona fide* acquisition of property by a fiduciary in his own name with trust funds a resulting trust, is taking out the stigma that would be present if it were termed a constructive trust. Obviously, if the trustee acts in bad faith, it can be nothing but a constructive trust.

21. *Green v. Green*, note 19 *supra*.

22. *Scott on Trusts*, Sec. 462.5; *Bogert on Trusts and Trustees*, Sec. 472. See the dissenting opinion in *Green v. Green*, note 19 *supra*, in which the dissenting Justice treats the factual situation there as giving rise to a constructive trust, rather than resulting, and raises no point that the heirs of the alleged beneficiaries could not maintain the action.

A nice point may arise in these cases: if a trustee in bad faith breaches his trust by buying property in his own name with trust money,

*Death of the Beneficiary Testate*

Applying again the truism that equity follows the law, the consequence is that the beneficiary's interest, unless otherwise controlled by the terms of the trust instrument, may be transferred by will.<sup>23</sup> This, again, is merely saying that equitable interests generally are thus transferable,<sup>24</sup> and the quoted passages from *Heath v. Bishop*, *Landrum v. Hatcher*, and *Ridgeway v. Broadway*,<sup>25</sup> bear this out.

the beneficiary has a choice of remedies—sue for the money and ask for an equitable lien on the property so acquired, or sue for the property as a substitute for the money on the theory of a constructive trust. *Gulphill v. Isbell*, 1 Bailey's Law 230, 19 Am. Dec. 675 (1829); *Sollee v. Croft*, 7 Richardson's Equity 34 (1854); *Matthews v. Heyward*, 2 S. C. 239 (1870); *Richardson v. Day*, 20 S. C. 412 (1883); *Walker v. Taylor*, note 19 *supra*; Restatement of Restitution, Secs. 160, 161; *Scott on Trusts*, Sec. 463. If the beneficiary had obtained a decree declaring that he was the equitable owner of the real property so improperly acquired by his fiduciary, and the beneficiary thereafter died, his heirs or devisees would undoubtedly succeed to the interest. If he had not made such an election—to seek a constructive trust—and had died, would the right to have the trust impressed pass to his personal representative, who succeeded to the right to recover the misused money, or to the successors in interest of the real property? Logic points to the former. *Scott on Trusts*, Secs. 462.4, 462.5; but see *Bogert on Trusts and Trustees*, Sec. 472.

That the heirs or personal representative of an intestate who is the beneficial owner of property through a constructive trust should succeed to his interest is shown by analogy to the cases in which such successors have been allowed to maintain actions to set aside transfers obtained from their decedent by fraud or duress—rescission, like the constructive trust, being merely one of the methods to prevent unjust enrichment. See, at each end of the time range, *Rowland v. Sullivan*, 4 DeSaussure's Equity 518 (1814); *Page v. Lewis*, 209 S. C. 212, 39 S. E. (2d) 787 (1946).

There is a difference of opinion over whether, until there is an adjudication that a person is entitled to a constructive trust in property, he actually has an equitable interest. *Scott (Trusts, Sec. 462.5)* takes the view that there is an equitable interest from the outset—from the time of the transaction giving rise to it. *Bogert (Trusts and Trustees, Secs. 472, 186)* seems to believe that until there has been an adjudication the right is a mere chose in action, but that when there is such a decree it will establish the trust as of the time of the wrong.

23. Restatement of Trusts, Sec. 132, comm. b; *Scott on Trusts*, Secs. 132, 132.1; *Bogert on Trusts and Trustees*, Sec. 188; 68 C. J. 495. Historically, the devise of the use is one of the earliest trust functions, antedating the Statute of Uses (1535) and the Statute of Wills (1540).

24. 65 C. J. 539; 68 C. J. 496.

25. Notes 6, 7; 11, 13; 11, 14; *supra*.

In *Landrum v. Hatcher*, it will be recalled, the court decided that where a vendee, who became such after the making of his will, died before acquiring legal title, his equitable interest passed to his heirs as intestate property because of the then existing law that after-acquired real property could not pass by will. In reaching this conclusion, the court pointed out:

"The equitable interest therefore in question if it had been acquired before the will was made would have passed by the devise, but being acquired after and there being no republication passed to the heir."

If the testator had died after 1858, the equitable interest would have passed to the devisee and not to the heirs, since, in that year, legislation was enacted designed to permit after-acquired real property to pass under will.<sup>26</sup>

That the beneficiary's interest is the subject of testamentary transfer is evident in the statute<sup>27</sup> dealing with the mode of transfer of the interest:

"All grants and assignments of any trust or confidence shall be in writing, signed by the party granting or assigning the same, or by such last will or devise, or shall be utterly void and of none effect."

The *dicta* and near-*dicta* of the cases mentioned, and the indirect statutory recognition, are fortunately not the sole sources of the principle that beneficial interests can be transmitted by will. In *Schmidt v. Schmidt*,<sup>28</sup> the owner of land made a deed in trust for his children, but under such circumstances that in an action later brought by the father against his children, a decree was obtained that the transfer was merely in the nature of a mortgage or security. In this sequel case the court concluded that, since this was the nature of the transaction, or that at least that it was a trust for pay-

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26. Sec. 8910, S. C. Code of Laws 1942. In *Brown v. James*, note 15 *supra*, decided before the passage of the Act, the court remarked, as in *Landrum v. Hatcher*, note 11 *supra*, that a vendee who acquired his interest, but not the title, before making his will could devise the interest.

27. Sec. 9043, S. C. Code of Laws 1942. In *Richardson v. Manning*, note 6 *supra*, a gift in trust of income of real and personal property *pur autre vie* was held to pass to the executor of the will of the beneficiary, who died during the lifetime of the *cestui que vie*.

28. 7 Richardson's Equity 201 (1855).

ment of debts, the grantor was in equity the owner of the property, and that the equitable interest so retained by, or created for, him passed under his will. It was held:

"Equitable estates in land owned by a testator at the execution of the will, pass under its devises, though the testator afterwards acquire the legal title." (Chancellor's decree).

"After a conveyance for a mere particular purpose, as for the payment of debts, or the creation of a charge, the grantor, in contemplation of equity, remains seized of his original estate, and his equitable interest will pass by will."

The case of *Lindler v. Nicholson Bank & Trust Co.*<sup>29</sup> holds, inferentially, that the interest of a trust beneficiary under an express trust, and, directly, that the interest of a beneficiary under a resulting trust, can pass under the beneficiary's will. In that case the settlor conveyed to the named defendant property in trust to manage and rent for a period of five years and to pay the income to the settlor. The trust instrument further provided that if at the expiration of the period, the settlor could satisfy the trustee that he was capable of managing his affairs, the trustee should reconvey to the settlor; but that if the settlor could not satisfy the trustee of his ability to manage his affairs properly, the trust should continue for an additional five years under the same conditions, and at the expiration of the extended period the trustee should reconvey to the settlor. It was further provided that if the settlor should die "at any time before my said trustees reconvey said premises to me" without having wife or children, the trustee should sell the property and pay the proceeds to the settlor's father and mother in specified proportions. No reconveyance was ever made by the trustee to the settlor, and apparently the settlor was unable, or made no effort, to convince the trustee of his competence to handle his own interests. Six years after expiration of the ten-year period marked out by the trust instrument, the settlor made his will leaving all his property, with the exception of small legacies, to a cousin. The following year he died and the will was admitted to probate. This action was brought by

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29. 170 S. C. 373, 170 S. E. 429 (1933).

the heirs of the father, who had predeceased the settlor, to set aside a deed made by the trustee to the devisee cousin after the probating of the will. The plaintiffs' contention was that the father had acquired an interest under the trust deed which could not be frustrated by the settlor's will.

In its decision adverse to the plaintiffs the court held, in the first place, that the trust was active for a ten-year period, but became passive upon the period's expiration, and that the Statute of Uses put the legal title thereupon in the settlor. The court concluded that while a duty to *convey* would make the trust active—taking it out of the Statute of Uses—a duty to *reconvey* would not have that effect.<sup>30</sup> Further, and more relevantly, the court held:

"But had the Statute not executed the use, there can be no doubt that the donor was the sole beneficiary or *cestui que trust* after the termination of the second five-year period. The express trust having terminated, there was a resulting trust in favor of the original donor, and the original trustee held the legal title in trust for him. \* \*

"Since the original donor was the equitable owner of the trust property, he could have required the trustee to convey the property at any time he may have so desired. Being the equitable owner of the trust property, he had the right to dispose thereof by will, whether he held the legal title or not. \* \* He devised and bequeathed all his property and his estate of every kind whatsoever (with exception of the specific legacies) to the defendant (the cousin) \* \* absolutely and in fee simple. This was sufficient to transmit the property embraced in the trust deed to (the cousin) \* \* whether the testator had legal title to the property or not."

The Restatement of Trusts<sup>31</sup> summarizes the matter:

"The beneficiary of a resulting trust, like a beneficiary of an express trust, can transfer his interest by a testamentary disposition if, but only if, the requirements of the statute relating to wills are complied with."

30. The writer, with uncharacteristic restraint, refrains from commenting on the soundness or unsoundness of the distinction.

31. Sec. 407(1), *comm. d.*

If the beneficiary of a resulting trust may transmit his interest by will, there is no reason to suppose that the beneficiary of a constructive trust may not do likewise. Just as devisees may seek to rescind a conveyance obtained by fraud upon their testator,<sup>32</sup> so, apparently,—since the relief sought is substantially the same—may devisees seek to have a constructive trust imposed upon property obtained from the testator by fraud or under such other circumstances as would give rise to such a trust.<sup>33</sup>

### *Death of a Co-Beneficiary*

The interests of co-beneficiaries may arise originally under any of the recognized categories of trusts: express, resulting or constructive. Or they may arise upon the death of a single beneficiary through descent or testamentary gift to them. Trusts interests, to repeat the language of *Heath v. Bishop*,<sup>34</sup> "may be held in severalty, in joint-tenancy, coparcenary and in common."

Where beneficiaries own as tenants in common, it follows necessarily that on the death of one his interest will pass to his heirs or administrator if he dies intestate, to his devisees or executor if he dies testate, under the principles discussed in the two preceding sections.<sup>35</sup> Instances of co-beneficiaries are too commonplace to require citation of authority.

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32. *Bemis v. Waters*, 170 S. C. 432, 170 S. E. 475 (1933). The devisees here brought an action in tort against a grantee from their mother, the testatrix, alleging fraud in the procurement of the deed. The action was dismissed on the ground that the cause of action for the fraud itself which had been committed upon the grantor died with her, and that the Survival Act (Sec. 419, S. C. Code of Laws 1942) would not preserve it. The court suggested that a suit in equity to set aside the transfer would be appropriate.

33. *Bogert on Trusts and Trustees*, Sec. 472. In *All v. Prillaman*, 200 S. C. 279, 20 S. E. (2d) 741, 159 A. L. R. 981 (1942), the action was to impress a constructive trust upon property deeded to the defendant by his and the complainants' mother, the testatrix, as a result of an allegedly fraudulent promise. The conveyed land was specifically devised to the complainants. The suit was unsuccessful on the merits, and it was held that the testatrix, having irrevocably parted with the land, could not defeat the grant by her will. No point was made as to the legal availability of the relief to the complaining devisees.

34. Note 6 *supra*. To substantially the same effect: *Restatement of Trusts*, Sec. 113, comm. c; *Scott on Trusts*, Sec. 113; *Bogert on Trusts and Trustees*, Sec. 181.

35. See *Restatement of Trusts*, Sec. 143; *Scott on Trusts*, Sec. 143.

The proposition that equitable estates may be held in joint tenancy must, of course, be considered in the light of applicable joint tenancy statutes. The South Carolina statute<sup>37</sup> provides:

"Where any person shall be, at the time of his or her death, seized or possessed of any estate in joint tenancy, the same shall be adjudged to be severed by the death of the joint tenant, and shall be distributed as if the same were a tenancy in common."

Without critically analyzing the statute to determine whether the statute abolishes joint tenancies out and out, or merely eliminates the presumption of a joint tenancy, or preserves joint tenancies and only does away with the incident of survivorship,<sup>37</sup> it is reasonably certain that where there is a transfer *inter vivos* or by will to a transferee for the benefit of A and B—on the death of either, the heirs, devisees or personal representatives of the decedent will take a share as tenants in common with the survivor.<sup>38</sup>

Whether the statute will permit the owner of property to create a joint tenancy with the retention of the attribute of survivorship, as where there is a grant or devise to "A and B and to the survivor of them"; is a question that will merely be posed but not discussed here. Suffice it to say, if it is permissible in the creation of a legal estate, it is permissible in the case of a trust estate, and if there is a survivorship in the one case, there can be a survivorship in the other.

The same general observations may be indulged in with class gifts. The problem is not so much whether equitable interests are in a different category if the gift is a class gift,

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36. Sec. 8911, S. C. Code of Laws 1942.

37. The cases indicate that joint tenancies are not abolished as such, only the feature of survivorship. *Herbemont v. Thomas*, Cheves' Equity 21 (1839); *Ball v. Deas*, 2 Strobbart's Equity 24 (1848); *Telfair v. Howe*, 3 Richardson's Equity 235, 55 Am. Dec. 637 (1851). The first two of these cases hold that the statute applies only to vested interests: and where in a will there is simply a gift to A and B, without such intent-manifesting words as "in equal shares" or like terms indicating division into equal or other specified portions, and one of the donees dies before the testator, the survivor takes the entire estate. To the same effect is *Free v. Sandifer*, 131 S. C. 232, 126 S. E. 521 (1924).

38. For an instance of this in a trust estate, see *McMeekin v. Brummet*, 2 Hill's Equity 638 (1837).

but whether the gift is truly a class gift, and if so who the members of the class are, and as of what time the class is to be determined.<sup>39</sup> The death of a member of the class will produce no substitution of his heirs, devisees or personal representatives in his place but will result in an accretion to the remaining members of the class; and this should be true whether the interest affected is legal or equitable.<sup>40</sup>

### *Dower*

It is axiomatic that dower does not attach to equitable estates.<sup>41</sup> This is the rule at common law. In many states the rule has been changed by statute. No such reversing statute has been adopted in South Carolina. The cases hereafter discussed make it plain that there is adherence to the common law. The relevant significance of the stated rule is that dower does not attach to the estates of deceased trust beneficiaries. The Restatement<sup>42</sup> expresses the principle:

“Except as otherwise provided by statute, the widow of the beneficiary of a trust of land is not entitled to dower in his interest.”

Other authorities make the same statement,<sup>43</sup> and the South Carolina cases, hereafter treated, all point the same way.

In its relation to dower the formula that equity follows the law, and that the same consequences are visited upon equitable as upon legal estates, breaks down. This singular, and exceptional, circumstance stems from an early judicial concern for the integrity of titles acquired on the strength of

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39. For an exhaustive discussion of the local law of class gifts, see *Class Gifts in South Carolina*, by Philip Wilmeth, Year Book of the Selden Society, Vol. IX, Part 1, p. 16 (1947).

40. For an example of a class gift in trust, see *Buist v. Walton*, 104 S. C. 95, 88 S. E. 357 (1915), where all the members of the class which was to take on the life tenant's death predeceased the life tenant and the class interest was thereby destroyed.

41. *Tiffany on Real Property* (3d Ed.), Sec. 497; *Thompson on Real Property* (Perm. Ed.), Sec. 888; 28 C. J. S. 90.

42. *Restatement of Trusts*, Sec. 144.

43. *Tiffany on Real Property* (3d Ed.), Sec. 497; *Thompson on Real Property* (Perm. Ed.), Sec. 888; *Pomeroy's Equity Jurisprudence* (5th Ed.), Sec. 990 (a); *Scott on Trusts*, Sec. 144; *Bogert on Trusts and Trustees*, Sec. 186; 28 C. J. S. 94.



the accepted principle that dower did not attach to trust estates. It was a rule of property that the courts decided to respect.

"The difficulty in which the courts of equity have been involved, with respect to dower, I apprehend, originally arose thus: They had assumed as a principle in acting upon trusts to follow the law; and according to this principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts; and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower this principle, if pursued to the utmost, would affect title to a large proportion of the estates in the country; for that parties had been acting on the footing of dower, upon a contrary principle, and had supposed that by the creation of a trust the right of dower would be prevented from attaching. Many persons had purchased under the idea; and the country would have been thrown into the utmost confusion if courts of equity had followed their general rule with respect to trusts in case of dower."<sup>44</sup>

A South Carolina case<sup>45</sup> gives the same basis for the anomaly:

"It became very important that the English courts in perfecting such (trust) settlements, should attach to them every possible incident of legal estates. They, therefore, allowed curtesy in trust estates, and would also have allowed dower therein, but could not do it, because thereby too many estates would have been unsettled."

An early case dealing with a genuine equity of redemption under a mortgage given prior to 1791 (when the statute<sup>46</sup> declaring mortgages to create liens only was adopted) was

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44. Lord Chancellor Redesdale in the Irish case of *D'Arcy v. Blake*, 2 Sch. & Lef. 387 (1805), set out in *Scott's Cases on Trusts* (3d Ed.) 315. The same explanation is furnished in the comment to Sec. 144, *Restatement of Trusts*. See, also, *Scott on Trusts*, Sec. 144.

45. *Withers v. Jenkins*, note 10 *supra*. The quoted passage is from the Circuit Court decree, p. 601.

46. Sec. 8701, S. C. Code of Laws 1942.

resolved by assimilation to a trust estate. In *Verree v. Verree*,<sup>47</sup> a purchaser, while unmarried, bought land, assuming a pre-1791 mortgage. He thereafter married. Later he died, with the mortgage unpaid. The complainant, his widow, demanded dower, but the court held that the mortgage, given prior to the statute, passed the fee to the mortgagee, leaving in the mortgagor only an equity of redemption, which was all that the husband had acquired on his purchase; that, although the widow might redeem, she was not dowable in an estate of which her husband did not have legal seisin. The court said:

"It has been finally settled, by several concurrent decisions in equity, that the wife shall not be endowed of a trust estate of inheritance, or of an equity of redemption. \* \* The wife of a *cestui que use* was not dowable at common law; nor since the Statute of Uses is she dowable of a trust."

A trust interest being a species of equitable interest, it follows that cases dealing with other types of equitable interests, such as the interest of a vendee under contract of sale, furnish precedent and example for the trust interest. The vendor-vendee relationship is particularly an apt source of reference in the light of the recurring thesis that the vendor is a trustee and the vendee a beneficiary.<sup>48</sup>

There are at least three very definite cases in which dower has been denied to the widows of vendees of land who had not perfected their purchases by acquisition of the legal title. In *Secrest v. McKenna*,<sup>49</sup> a vendee under a contract of sale lost the property (upon which he had made considerable improvements) at a forced sale by the Commissioner in Equity to satisfy obligations, the interest being sold to the vendor. On the vendee's death his widow demanded dower. The demand was refused:

"Dower is a legal right, and can attach only on a legal seisin of the husband during the coverture. \* \* If (the vendee) had, at any time, during the coverture, a

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47. 2 Brevard's Law 211 (1807).

48. See notes 11 and 12 *supra* and text thereto.

49. 6 Richardson's Equity 72 (1853).

legal seizin, the plaintiff is entitled to a decree; if not, the defendant must be dismissed."

In *Bowman v. Bailey*,<sup>50</sup> the husband of the demandant widow was co-partner with another in a firm which owned land. The husband bought out the co-partner's interest but did not take a deed from him. The defendant purchased the land from the husband, taking a deed from both partners, under an arrangement that dispensed with the other partner's making a deed to the husband and then having the husband make a deed of a single interest to the purchaser. The deed carried no renunciation of dower. The widow's claim of dower was denied except as to the one-half interest her husband originally owned and retained. Although the husband had bought and paid for his co-partner's interest, the absence of legal seizin was considered fatal to the widow's claim.<sup>51</sup>

The case of *Morgan v. Smith*<sup>52</sup> reaches the same result as the two preceding cases. A vendee died before completing payment of the purchase price and before the acquisition of legal title. The balance was paid by his heirs or legal representatives after his death. The vendee had himself contracted to sell part of the land to another. After the vendee's death an action was brought by his purchaser to compel performance. The suit resulted in a deed to the purchaser, who thereafter conveyed the land to the defendant. The court denied dower to the original vendee's widow. Some stress was laid upon the fact that the vendee had not paid the entire purchase price before his death, but the broader ground upon which the court acted was, again, the husband's lack of legal seizin.

The cases so far detailed do not touch upon trust estates as such. The paucity of cases upon this precise point may be attributed to the early and readily accepted notion, treated as not open to controversy, that trust estates are not subject

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50. 20 S. C. 550 (1883).

51. It might be remarked, collaterally, that partnership real property is converted, in equity, into personal property to the extent that it may be needed for the satisfaction of partnership debts and the adjustment of partnership equities. Until these have been accomplished the widow of a deceased partner is not entitled to dower. Only so much of the real estate, or the balance of proceeds of sale, remaining after the payment of debts and the settlement of accounts is amenable to dower. *Bowman v. Bailey*, note 50 *supra*; *Schenk v. Lewis*, 125 S. C. 228, 118 S. E. 631 (1928).

52. 25 S. C. 337 (1886).

to dower. Two cases, however, make necessary mention of the proposition and may be considered ample and direct authority for the rule. In *Milledge v. Lamar*,<sup>53</sup> a grantor conveyed land to his natural son, to take effect upon the donor's death, but if the son should die without heirs of the body, then the property was to go to children of the donor's brothers. Afterwards the donor confirmed the deed by will. The contest was between the children of the donor's brothers and the widow of the grantee, who had died testate and without issue. The widow claimed under her husband's will. The court held that the limitation over to the brother's children was not too remote, and that the widow acquired no interest in the land under her husband's will. The case was then resolved into a consideration of the validity of the deed itself, an assault being made upon it as improperly attempting to create an estate *in futuro*, i.e., upon the donor's death. The contention was dismissed, the court sustaining the deed as a covenant to stand seised to uses. Here the question of dower arose in two aspects: (1) whether dower was available in an estate in fee simple conditional, where the tenant died without issue, (2) whether, if so, it was available under a covenant to stand seised. After deciding in favor of dower under the first aspect (a view open to criticism),<sup>54</sup> the court looked at the problem:

"But a more serious objection to the claim of dower exists. It is that a widow is not dowable of a trust estate; and that this was construed a deed to stand seised to uses by the court. There is no doubt that the decided cases have settled the point too long and too firmly to be shaken, that a widow is not dowable of a trust estate."

The court then concluded, however, that it would not construe such a covenant to stand seised to be one to all intents and purposes, and that it would be utilized only so far as necessary to sustain the purposes of the transfer; that there was no genuine trust; and that dower, therefore, should be allowed. As a hedge the court sustained the deed as a valid testamentary disposition by reason of incorporation into the confirmatory will of the grantor. While it is probably correct to say that dower is not defeated by the circumstance that a covenant to stand seised to uses, erecting an equitable interest

53. 4 DeSaussure's Equity 617 (1816).

54. See Restatement of Property, Sec. 54.

in the grantee, has been created, it is difficult to understand why the court did not declare that the Statute of Uses had executed the use, putting a legal estate in the grantee, thereby cutting out the impediment offered by the possible equitable character of the interest.

The second, and more important, case is *Spann v. Carson*.<sup>55</sup> The will out of which the suit arose disposed of the testator's residuary estate among his children. The share to a son, James, was given in trust "so that the portions or shares allotted to my son, James, shall not be subject to his disposal or liable for his debts." Similar trust provisions were inserted for the other children. The will further provided that if any child should die not leaving a child who should marry or reach twenty-one, his or her estate should go to named grandchildren. The beneficiary James died without issue, and his widow claimed dower. The issue was made by the court to depend upon whether the devised estate was legal or equitable. The lower court decided that the sole duty of the trustee being merely that of holding the legal title to protect the estate against the beneficiary's debts, that duty was not sufficient to make the trust an active one or otherwise keep the Statute of Uses from operating. The plain inference is that had the estate been equitable, dower would not have attached:

"Now it is not here contended that a widow is dowerable in a trust estate, for without a statute to that effect the authorities are unanimous in holding the opposite view."

Having thus concluded that the estate devised was a *legal* fee simple defeasible, it was adjudged that the widow was entitled to dower. The majority of the Supreme Court agreed with and affirmed the lower court decree for the reasons therein stated. In a separate opinion Justice Cothran concurred through a different line of reasoning, but with him, too, the pivotal issue was the character of the estate:

"There appears to be no contest over the proposition that if James C. Spann took under the will a legal, fee simple defeasible estate, the widow is entitled to dower in the land so held by him. It scarcely needs authority

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55. 123 S. C. 371, 116 S. E. 7 (1922).

for the well-established rule that a widow is not dowable of a trust estate."

An intermediate case reaching the same result is *Peay v. Peay*,<sup>56</sup> where the distinction between the two types of estates and their relation to dower are made manifest. There, a conveyance was to a trustee "in trust for the use of A. P., his heirs and assigns forever, and to permit the said A. P. to have and possess the same, and to enjoy the profits thereof, and in trust to convey the same to such person or persons as the said A. P. shall, by deed or will, or other writing under his hand, direct and appoint." It was held that the beneficiary had a qualified and terminable fee, that the Statute of Uses made the estate legal, and that the appointment never having been made, the fee became absolute and simple. The estate, being legal and not having terminated by appointment, was held to be subject to the widow's dower. The stress upon the legal character of the estate is, of course, reflective of the unexpressed tenet that dower is absent from an equitable estate.

As for dower in the interest of the husband under a resulting trust, no South Carolina cases seem to generate the issue. The authorities generally indicate that only to the extent that dower is available in the interest under an express trust is it available under a resulting trust.<sup>57</sup> Therefore, in those jurisdictions in which dower is held not to attach to the interest of the husband in an express trust, dower is likewise denied where the trust is resulting. The consequence, obviously, in South Carolina is that dower does not attach to interests under a resulting trust. Likewise, dower cannot attach where the interest is involved in a constructive trust.<sup>58</sup>

### *Curtesy*

The common law estate or tenancy by the curtesy is defined as "the estate to which a husband is entitled, upon the

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56. 2 Richardson's Equity 409 (1845).

57. Restatement of Trusts, Sec. 407(2), comm. e; 28 C. J. S. 95.

58. Scott on Trusts, Sec. 462.5; Bogert on Trusts and Trustees, Sec. 186. Scott takes the position that even in a jurisdiction which may permit dower to attach to equitable interests, the interest arising out of a constructive trust does not form such an estate as will permit dower. Bogert views the interest as a chose in action, to which obviously dower cannot attach.

death of his wife, in lands and tenements of which she was seized in fee simple or fee tail during coverture, provided they have lawful issue, born alive, which might have been capable of inheriting the estate. It is a freehold estate for the term of his natural life."<sup>59</sup> Unlike dower, it has remained in the ambit of the equity follows the law principle, and in jurisdictions in which curtesy has been allowed to persist, it will attach to the equitable estate of the deceased wife, provided the conditions for its creation otherwise exist.<sup>60</sup> For reasons not necessary to detail here, the courts held that, contrary to the situation presented by dower, titles would not be harmed or unsettled by permitting curtesy to cling to equitable estates, and the maxim was allowed to operate unhampered in this respect.

In a satisfyingly brief statute,<sup>61</sup> the Legislature, in 1883, decreed:

"That from and after the passage of this act the tenancy by the courtesy (*sic*) shall not exist in this State."

It is clear that since the passage of the statute, curtesy no longer exists as a concomitant of either legal or equitable estates. Some observations are in order, however, as to its status prior to that time. That curtesy existed in the abstract as to equitable estates is made clear by reference to *Verree v. Verree*,<sup>62</sup> which contrasts the denial of dower with the allowance of curtesy.

Whether the estate by curtesy existed at all after the enactment of the Statute of Descent and Distribution,<sup>63</sup> in 1791, was a matter of debate. In *Gray v. Givens*,<sup>64</sup> the court, without comment on the score, gave a surviving husband an election between curtesy and a distributive share as an heir

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59. *Withers v. Jenkins*, note 10 *supra*, quoting from Washburn on Real Property (....Ed.) 148.

60. Restatement of Trusts, Sec. 145; Scott on Trusts, Sec. 145; Bogert on Trusts and Trustees, Sec. 186; Tiffany on Real Property (3d Ed.), Sec. 558; 25 C. J. S. 50.

61. 18 Stat. 389, now codified as Sec. 8577, S. C. Code of Laws 1942. The code section is even briefer. The word used there is also "courtesy", a spelling rarely used, and seldom found in the South Carolina cases.

62. Note 47 *supra*.

63. 5 Stat. 162, now in amended form Secs. 8905, 8906, S. C. Code of Laws 1942.

64. 2 Hill's Equity 511 (1837).

at law in a legal fee simple estate. In *Wright v. Herron*,<sup>65</sup> a husband was allowed curtesy in the legal *fee conditional* estate of his wife. The matter was definitely settled as to fee simple estates by two decisions, *Gaffney v. Peeler*,<sup>66</sup> and *Frost v. Frost*,<sup>67</sup> both holding that curtesy did not exist in fee simple estates, an interpretation made necessary, according to the court, to give full and sensible effect to the Statute of Descent and Distribution. A distinction was drawn between the fee simple and the fee conditional, for the purposes of the case, in the fact that the statute then referred in express terms to the descent of estates owned in fee simple; and in that the decision in *Wright v. Herron*<sup>68</sup> and the intermediate decision in *Withers v. Jenkins*,<sup>69</sup> hereafter discussed, were limited to fees conditional, not affected by the statute.

In the case last mentioned the question arose whether a husband had an estate by curtesy in the *equitable fee conditional* estate of the wife, who had had a child which had predeceased her. The court admitted:

"We have already seen that there is no difference between legal and equitable estates as to their general incidents and qualities, and consequently it would seem, that when curtesy would attach to a legal estate, it should also attach to an equitable one of the same quantity and character."

The outcome of the case, however, was adverse to the husband, because there was not such seisin *in fact* as well as in deed as was necessary to support the estate (the wife never having been in possession nor having received the rents and profits from the trustee); and, further, because the whole tenor of the trust instrument displayed a purpose to exclude curtesy—an intent which, under the law, could and should be respected.<sup>70</sup>

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65. 5 Richardson's Equity 441 (1853); 6 Richardson's Equity 406 (1854).

66. 21 S. C. 55 (1883).

67. 21 S. C. 501 (1884).

68. Note 65 *supra*.

69. Note 10 *supra*.

70. Under the authority in this case, curtesy was allowed in a *legal fee conditional* estate in *Odom v. Beverly*, note 17 *supra*.



## II

## THE TRUSTEE'S TITLE

A maxim that has been accurately described by a South Carolina jurist<sup>71</sup> as "one of the 'mud-sills' of chancery" is that equity will not permit a trust to fail for want of a trustee. The Restatement's<sup>72</sup> generalization is:

"Except as otherwise provided by the terms of the trust, if a trust has been created the trust will not fail when the person designated as trustee ceases for any reason to be trustee."

Whatever the cause of the trustee's wanting, the trust will not fail on that account,<sup>73</sup> unless, indeed, the trust instrument should contain the unlikely provision, or be so construed, that the fate of the trust follows that of the trustee.<sup>74</sup> Trust powers may be created of so personal a character that only the trustee named by the settlor can execute them, and the trust may end for that reason. Even where there is a successor trustee appointed by the court, some of the duties imposed may be of such a nature as to be exercisable only by the

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71. Acting Associate Justice Grimball, in *Leaphart v. Harmon*, 186 S. C. 362, 195 S. E. 628 (1938).

72. Restatement of Trusts, Sec. 101.

73. Restatement of Trusts, Sec. 101, comm. a; Scott on Trusts, Sec. 101. *Shields v. Jolly*, 1 Richardson's Equity 99, 42 Am. Dec. 349 (1844), generally; *Dawson v. Dawson*, Rice's Equity 243 (1839), disclaimer; *Chaplin v. Givens*, Rice's Equity 132 (1839), disclaimer; *Cloud v. Calhoun*, 10 Richardson's Equity 358 (1858), disclaimer; *Withers v. Jenkins*, 6 S. C. 122 (1874), disclaimer; *Leaphart v. Harmon*, note 71 *supra*, disclaimer; *Ex Parte Trustees of Greenville Academies*, 7 Richardson's Equity 471 (1854), corporate and other incapacity; *Cooper v. Day*, 1 Richardson's Equity 26 (1844), removal; *Lewis v. Mew*, 1 Strobhart's Equity 180 (1846), removal; *Dickerson v. Smith*, 17 S. C. 289 (1881), removal; *Cathcart v. Jennings*, 137 S. C. 450, 137 S. E. 588 (1926), mental incapacity; Sec. 9046, S. C. Code of Laws 1942, resignation. There are undoubtedly many other cases involving change of trustee personnel; the action of the courts in thus effecting the change is indication enough of the proposition that elimination of the original trustee does not put an end to the trust.

In charitable trusts, aside from inherent power, the court is authorized to appoint successor trustees in the event of vacancies, or to name trustees where the trust instrument does not name any, even where the power conferred is discretionary and selective: Sec. 9045, S. C. Code of Laws 1942.

74. Restatement of Trusts, Sec. 101, comm. b; 65 C. J. 638.

named predecessor and to that extent the new trustee may be denied these powers.<sup>75</sup>

The equitable safeguard against collapse of the trust is especially apt and necessary when the trustee dies before the completion of his task; and the South Carolina cases are at pains to utilize the principle in this situation.<sup>76</sup> In *Reynolds v. Reynolds*,<sup>77</sup> it is said:

"The death of a trustee named in a deed does not destroy the trust. The court of equity will keep it alive as long as any duty as trustee shall remain."

The trustee may die, but the trust lives; and nothing is plainer than that on the trustee's death, the separation of legal and equitable interest survives. The beneficiary continues to have only an equitable interest, just as he had before. The legal interest is elsewhere.

Unless the trust instrument itself provides for a successor trustee, the logical and normal step to take is to apply to the court of equity for the appointment of a successor. The power of the court to grant the relief is unquestioned.<sup>78</sup> The process of filling the vacancy caused by death is simple and may be merely *ex parte* on petition, and this without regard to whether the trustee died testate or intestate.<sup>79</sup> The beneficiaries must make, or be made parties to, the application, but the presence of the holder of the legal title is not required. Presumably the reason for the permitted omission of the holder of that title is that at best he is not much more than

75. *Singleton v. Cuttino*, 105 S. C. 44, 89 S. E. 385 (1916).

76. *Mendenhall v. Mower*, 16 S. C. 303 (1881); *Sullivan v. Latimer*, 35 S. C. 422, 17 S. E. 701 (1891); *Reynolds v. Reynolds*, 61 S. C. 243, 39 S. E. 391 (1901); *Cone v. Cone*, note 4 *supra*; *Knight v. Jones*, 93 S. C. 376, 76 S. E. 978 (1912); *DuBose v. Kell*, 105 S. C. 89, 89 S. E. 555 (1916); *Highland Park Mfg. Co. v. Steele*, 232 Fed. 10 (C.C.A. 4, W.D.S.C.—1916). There are numerous other cases in which the court, in appointing successor trustees, makes no point of the maxim but obviously rests its action upon it.

77. Note 76 *supra*.

78. See the cases in notes 73 and 76 *supra*.

79. *Ex Parte Knust*, *Bailey's Equity* 489 (1831); *Gibbes v. R. R. Co.*, 13 S. C. 228 (1879); *Sullivan v. Latimer*, note 76 *supra*; *Cone v. Cone*, note 4 *supra*. To remove a trustee, other than supplanting the trustee who occupies through the death of his predecessor, or to effect a resignation, suit must be by bill (complaint), and the trustee to be removed must be made a party. *Ex Parte Tunno*, *Bailey's Equity* 395 (1831); *Wallace v. Foster*, 15 S. C. 214 (1880); *Cone v. Cone*, note 4 *supra*.

a repository of the title, upon whom the law has cast that title to keep it from being in abeyance or in a state of awkward suspension.<sup>80</sup> His presence is scarcely to be required if his consent to being stripped of the title is not needed, and his dissent would be, as it must, an ineffectual gesture.<sup>81</sup>

Upon the filling of the vacancy caused by death, the decree of appointment has the effect of transferring the title and powers of the deceased trustee to his appointed successor, without the necessity of a formal transfer by the displaced holder of the legal title or a transfer by an officer of the court.<sup>82</sup> Nor is the prior consent of the trustee to be substituted a requisite.<sup>83</sup>

In the period between the death of the trustee and the transference of title and powers, what of the powers of the interregnum holder of the title? The question of *who* acquires the legal title on death will be the chief burden of this discourse hereafter. In the meantime, it must be stated that the fact of title does not establish the fact of the existence of powers. A trust is founded upon personal confidence reposed in the one selected by the settlor to fill the office, and it would hardly be supposed that the settlor would rely upon the blind chance that the inheritor of the legal title might be as good as, or better than, the person he had himself selected for his individual qualities. That the holder of the title has some duties is reasonably clear, but his incapacity to administer the trust, at least in its affirmative aspects, is barely open to question. Yet here it must be admitted that there are curious, if unimportant, contradictions in the authorities.

Bogert<sup>84</sup> comments that, because the successor in title has not been selected by the settlor, he is not qualified to act and may be displaced, but he adds:

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80. *Dean v. Langford*, 9 Richardson's Equity 423 (1857); *Cone v. Cone*, note 4 *supra*.

81. *Gibbes v. R. R. Co.*, note 79 *supra*.

82. *Watson v. Pitts*, 2 McMullan's Law 298 (1842); *McNish v. Guerard*, 4 Strobhart's Equity 66 (1850); *Sullivan v. Latimer*, note 76 *supra*; *Kirton v. Howard*, note 19 *supra*; Sec. 9046, S. C. Code of Laws 1942. The applicability of this statute has been questioned as to the filling of vacancies caused other than through resignation: *Davant v. Guerard*, 1 Speers' Law 242 (1843).

83. *Kirton v. Howard*, note 19 *supra*.

84. Bogert on Trusts and Trustees, Sec. 529.

"Nevertheless, in the meantime the legal successor in title is trustee both in fact and in law. He is charged with the duty of executing the trust according to the terms of the trust instrument in precisely the same manner as his testator, intestate or ancestor was."

A seemingly different view or perhaps a difference in emphasis, is taken by Scott,<sup>85</sup> who makes the flat assertion that the interim trustee has no power to administer the trust. There is a coincident position in the Restatement.<sup>86</sup>

The language of the South Carolina cases, all admitting that the inheritor of the legal title may be displaced as a matter of course, is interesting. In *Ex Parte Knust*,<sup>87</sup> in speaking of an executrix who succeeded to her deceased husband's title, the court observed:

"In strictness, the office was not vacant in this instance, for the trust devolved on the executrix. Yet a trust must be regarded in some degree as a personal confidence, and the court will more readily transfer it, when it has devolved on a stranger to the *cestuy que trust*."

In *DuRant v. DuRant*,<sup>88</sup> where the trustee died intestate and his son succeeded to his title, the court, after calling attention to the devolution of the title, stated:

"Such being the case, the plaintiff was compelled by law to discharge any duty incident to the trust, and if at any time he failed to do so, the Court of Equity would compel him to do so. \* \* If at any time in the discharge of the duties of his office, it becomes necessary to obtain the directions of the court, it is competent for him to do so voluntarily, but if the exigencies of his trust require action on his part to protect or preserve the property confided to his keeping and he refuses or neglects to do so, the court, on a proper application, will enforce such action on his part."

Within the framework of the facts of the case, the quoted remarks are reasonably apropos, but it is doubtful that they

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85. Scott on Trust, Secs. 104, 105.

86. Restatement of Trusts, Sec. 104, comm. a; Sec. 105, comm. a. And accord: 54 Am. Jur. 91, 237.

87. Note 79 *supra*. There is similar language in *Gibbes v. R. R. Co.*, note 79 *supra*.

88. 36 S. C. 49, 14 S. E. 391 (1891).

could extend to cases where the trustee was given an appreciable amount of discretion, or clothed with a power of sale, or charged with the duty of management and investment.

There are, of course, cases where the mere passive retention of the title by the holder serves the purposes of the trust, as with the old trust for a married woman, and the trust to preserve contingent remainders. Here a duty is performed by inaction. And a case can be presented of a trust where there is merely a duty to convey the trust property to designated beneficiaries at a particular time. If the trustee has died in the meantime, his successor in title can, with all propriety, convey the trust property at the appointed time to the beneficiaries and thereby fulfil the functions of the trust. Or he may, with, and perhaps without, the consent of the beneficiaries, bring action, as holder of title, against third persons in wrongful possession;<sup>89</sup> and undoubtedly he may be joined as a party defendant in a suit involving the rights of the beneficiaries among themselves<sup>90</sup> or in a suit against third parties.<sup>91</sup> None of these courses of action can be objected to as an improper administration of the trust.

Finally, in *Cone v. Cone*,<sup>92</sup> it is said, concerning one who has succeeded to title on the trustee's death:

"It might be a grave question whether the heir at law in such case could be required to perform the duties of trustee."

To revert to the main theme—the course of the trustee's title: logically, the course of transmission of title on the trustee's death should be the same as if he were the holder of the legal title free of trust. In a sense, he is the *owner* of the property, subject to an equitable obligation to another. Without regard to the niceties of the *in personam* and *in rem* theories of trusts, the fact remains that, substantially, the trustee's legal title is his to do with as he chooses. The *equity* of the beneficiary is eliminated if the trustee transfers the

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89. *DuRant v. DuRant*, note 88 *supra*; *Delleney v. Winnsboro Granite Co.*, 72 S. C. 39, 51 S. E. 531 (1905).

90. *Huckabee v. Newton*, 23 S. C. 291 (1885).

91. *Moyle v. Campbell*, 131 S. C. 166, 127 S. E. 363 (1924); *Breeden v. Moore*, 82 S. C. 534, 64 S. E. 604 (1909); *Reynolds v. Reynolds*, note 76 *supra*.

92. Note 4 *supra*.

trust property pursuant to the terms of the trust, or if, in breach of trust, the trustee conveys to one who can qualify as a *bona fide* purchaser for value without notice; the equity is unaffected if the trustee, in violation of his duty, transfers to one who cannot so qualify. The course of transmission of his legal title on his death should be governed by the same principles: that it should go as if it were his property free of trust, but subject to the equity of the beneficiary. In the main these principles do control, and it is stated generally that on the death of the trustee his title passes as intestate or testate property, precisely as if he were not a trustee, the property passing, subject to the trust, to the personal representatives, heirs or devisees, as the case may be.<sup>93</sup> They, of course, are not *bona fide* purchasers for value without notice. South Carolina law has, however, some notable exceptions, as will be seen further on.

#### *Death of the Trustee Intestate*

*Personal Property.* The authorities, including those last noted, make it clear that on the death of the trustee intestate the title to personal property, subject of the trust, passes to his administrator. The appointment, of course, relates back to the time of death, and the administrator may be regarded as taking as of the earlier time. It may happen, however, that there is no administration on the deceased trustee's estate, and in such a case it would be hard to say just where the title was; but the question in all likelihood would become moot by the reclaiming of the property by the beneficiaries or by a substituted trustee. The trust property is, naturally, no part of the *assets* of the deceased trustee's estate: it is not subject to distribution among his distributees, nor is it available for the payment of his debts—this under the accepted proposition that property of a fiduciary passing on death to his representative reaches the latter's hands subject to interests and equities of the third persons for whom the fiduciary was acting, whether the fiduciary had title to the property or not.<sup>94</sup> Ob-

93. Restatement of Trusts, Sec. 104 (intestacy), Sec. 105 (testacy); Scott on Trusts, Secs. 104, 105; Bogert on Trusts and Trustees, Sec. 529; 65 C. J. 637.

94. 23 C. J. 1150; 21 Am. Jur. 483; *City Council v. Duncan*, 3 Brevard's Law 386 (1813), agent; *McIntyre v. McClenaghan*, 12 S. C. 185 (1879), agent. In both these cases the court speaks of the agent as

viously, too, the administrator can administer only his decedent's estate. It has already been pointed out that as successor in title he does not succeed to his predecessor's powers, nor is he subject to the original duties imposed in the creation of the trust.

There are, no doubt, many South Carolina cases in which there has been the fact of the trustee's dying intestate, followed by administration, but there appear to be none in which the question seems to have been debated. It is to be assumed that the underlying principle is taken for granted.<sup>95</sup> There are several cases involving executors of deceased trustees, where the principle is identical, and they will be noted hereafter.

Personal property held by one under a resulting or a constructive trust passes to the administrator of the intestate trustee, subject, of course, to the trust and recoverable by the persons beneficially entitled.<sup>96</sup>

*Real Property.* It has already been shown that, stated generally, real property held in trust passes to the heirs at law of the intestate trustee, subject to the trust.

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trustee, under the facts. *Gary v. Bank*, 26 S. C. 538, 2 S. E. 568, 4 Am. St. Rep. 733 (1886), guardian; *Bagwell v. Hinton*, 205 S. C. 377, 32 S. E. (2d) 147 (1944), guardian. It is, of course, accepted law that the administrator of a deceased administrator or executor does not represent the first estate, and the administrator *de bonis non* may recover from him the estate property in its original or converted form. *Villard v. Robert*, 1 Strobhart's Equity 393 (1847); *Rhame v. Lewis*, 13 Richardson's Equity 269 (1867).

A striking exception to the principle that the representative of a deceased representative has no power with respect to the first estate is the common law rule that the executor of a deceased executor represents, and becomes the executor of, the first estate—i.e., the estate of which his testator was executor—and that he can exercise all the powers of the first executor except those of a personal nature. *Reeves v. Tappan*, 21 S. C. 1 (1883). The rule was abolished by statute in 1880 (17 Stat. 363; Sec. 8956, S. C. Code of Laws 1942), and the proper representative of the first estate is the administrator *d. b. n. c. t. a.*

95. The statement is made in two lower court decrees, both affirmed, that on death of the trustee intestate the personal property passes to his personal representative. *Martin v. Price*, 2 Richardson's Equity 412, 424 (1846)—see the quoted language in the text to note 98 *infra*; *Withers v. Yeadon*, 1 Richardson's Equity 324, 327 (1845)—see the text to note 101 *infra*.

96. *Dominick v. Rhodes*, note 20 *supra*; *Duke v. Fulmer*, 5 Richardson's Equity 121 (1852).

In South Carolina, as elsewhere, the title of the intestate trustee goes by virtue of inheritance from the trustee, but there is a marked deviation in one respect: the title, instead of passing to the heirs at law of the deceased trustee under the Statute of Descent and Distribution, passes to the oldest son as common law heir. While this is the stock statement, the true meaning is that the title passes as at common law; and, if there is no son, then to daughters as coparceners, and so on, according to the common law canons of descent. So far as the legal title to trust estates is concerned, the Statute of Descent and Distribution, whose function it was to root out the inequities of the common law buttressed on the feudal system<sup>97</sup>—with its emphasis on the sex and age of the heir—has been denied operation.

The doctrine that the title to real property of an intestate trustee descends as at common law had its origin, in 1846, in the pronouncements of a single Chancellor, Johnston, in the case of *Martin v. Price*.<sup>98</sup> The case is built around a complicated set of facts, which, in substance, were these: A debtor conveyed property to an assignee for the benefit of his creditors. An undivided one-half was already under mortgage. The mortgage portion was sold at foreclosure and bought in by the assignee, who thereafter mortgaged it himself. He later died intestate, survived by his widow and minor sons and daughters. The mortgage which he had given was foreclosed, and the mortgaged interest was bought by the widow. She went into possession and occupied for more than ten years, asserting ownership of the whole. This action was brought by a creditor of the original assignor to reach the property, and the widow countered by alleging complete ownership in herself. The Chancellor writing the decree in the court below sustained the claim of the widow, among other reasons on the ground that, so far as the plaintiff was concerned, there had been what amounted to a disavowal and termination of the trust in a prior proceeding marshalling the assets of the deceased assignor, in which proceeding all creditors, including the plaintiff, were parties, and in which the property in dispute was not listed or treated as part of the assignor's estate. This open termination of the trust was held to be the starting point for adverse holding against the beneficiaries

97. *Edwards v. Barksdale*, 2 Hill's Equity 416 (1836).

98. Note 95 *supra*.



of the trust, and the plaintiff as one of them was barred by the lapse of time. The lower court decree, which was affirmed, stated: "The legal title of the real estate was in the heirs of Price (the assignee), of the personalty in Adger, his administrator."

In his concurring opinion Chancellor Johnston agreed to the result only on the basis of laches, but he differed as to the devolution of the title of the assignee-trustee, stating that it descended to the oldest son as at common law and not to the heirs at law under the statute. He also gave it as his opinion that the title having thus descended to the oldest son, his mother's holding could not be adverse to him, since he was a minor; but that even if all the heirs, under the statute, including the mother, succeeded to the title, her holding could not be adverse to her co-trustees. As a matter of fact, whether the trust descended to the heirs under the Statute of Descent and Distribution or went to the common law heir, the result would have been the same in either case; and the Chancellor, cutting short further exploration into the matter, observed: " \* \* I forbear to go into them, because too much time has already been consumed upon a point unnecessary to the case before us."

Chancellor Johnston's reasoning is worth setting out in some detail. It is based mainly upon the verbiage of the Statute of Descent and Distribution in its then and original form.<sup>99</sup> The preamble and enacting words of the statute were:

"WHEREAS: the Convention of this State, by the fifth section of the tenth article of the Constitution, passed the third day of June, in the year of our Lord one thousand seven hundred and ninety, did direct that the Legislature should, as soon as might be convenient, pass laws for the abolition of the rights of primogeniture, and for giving equitable distribution of the real estate of intestates: .

"I. *Be it therefore enacted, \* \** That the right of primogeniture be, and the same is hereby, abolished; and that when any person possessed of, interested in, or entitled to a real estate in his or her own right in fee simple, shall die without disposing thereof by will, the same shall be distributed in the following manner \* \* ."

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99. 5 Stat. 162 (1791).

With this language as his starting point, the Chancellor proceeded:

"Now my opinion is, that this has nothing to do with trust estates, but only concerns the distribution of those in which the intestate held the beneficiary interest in his own right.

"We must remember that the object of the Act is to distribute estates among those interested in them; but trusts are not created, that the property should be *distributed*, but that the *trusts may be executed*. The act provides only for the distribution of the intestate's own property; and would be violated not only in its spirit and intent but in its letter, if extended to estates not his own. If this were left doubtful, and resort were had to considerations of mere convenience, these would determine in favor of the descent at common law, and not under the statute. Trusts are often of long continuance; being clogged with limitations and remainders, sometimes determinable at distant periods. In the meantime, by the death of the trustees, and possibly of their issue, the trustees (taking the descent to be cast by the statute) would become so numerous and so widely dispersed, that it would amount almost to an impossibility, in many cases, to answer to their duty. On the other hand, the descent at common law presents a single person, easily traceable, and easy to be reached. The costs in the one case would be exorbitant, in the other comparatively inconsiderable.

"It is said, however, that the statute leaves no room for the descent at common law. That the right of primogeniture is expressly abolished, and that to hold that it may still exist, in any case is an infraction of the Act of Assembly; but the purposes for which this right was abolished, as well as the manner and connection in which it is done, manifest that this would be a very narrow and imperfect interpretation of the statute—the great purpose of which the solicitude of the convention bears evidence, was that property should be equalized by an organic law. \* \* But what would the distribution of trust estates accomplish towards the equalization of the property, or how would it accomplish the great purpose of the convention?

"If it be assumed that the right of primogeniture is unqualifiedly and absolutely abrogated in all cases on the one hand, it is just as certain,—and by the same mode of literal construction,—that the statute only provides for distributing the individual property of estates on the other; and, then, as this does not include trust property, we are brought to the absurd conclusion that the title to such property does not descend at all: not at common law, for that descent is abolished; nor under the statute, because that does not extend to it; a construction not to be entertained for a moment."

Thus, by reason of the utterances of a single concurring judge, which did not affect the result of the case in which they were made, there was initiated a doctrine which sharply departs from fundamental notions as to the devolution of the trustee's title. The reasons advanced as to the difficulties to be encountered in the administration of the trust because of the possibly numerous heirs taking the trustee's title, and themselves becoming trustees, are not very substantial, since even then there was no great delay or inconvenience in obtaining a substitute trustee upon simple *ex parte* application. No inquiry was even necessary, nor is it to-day, to ascertain over a period of years who the successive heirs and inheritors of title might be, if their presence in the proceeding to obtain a successor was, and is, not necessary. The *ex parte* practice had been approved in *Ex Parte Knust*,<sup>100</sup> fifteen years before, and that case was based upon apparently long-established English practice serving as precedent. It is singular that in the years between 1791, when the Statute of Descent and Distribution became law, and the opinion of Chancellor Johnston, in 1846, no case had spelled out the precise nature of the devolution of an intestate trustee's real estate. This circumstance is due, no doubt, to the fact that in most cases the death of the trustee must have been followed shortly by the appointment of a successor trustee by the court, and no problem on this score arose. Yet in the case of *Withers v. Yeadon*,<sup>101</sup> decided in 1845, in a decree passed in 1844 by the same Chancellor Johnston, and reaffirmed on appeal, it was

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100. Note 79 *supra*.

101. Note 95 *supra*.

said (concerning a deceased testate trustee and the imposition of the original trusts upon his successors in title):

"If the court can regard this power in the light of an obligatory trust, it can make no sort of difference whether the legal title of George Wagner, the trustee, be considered as having vested upon his death, as to the land, *in his heirs* (italics supplied) and as to the slaves in his personal representative, or to have passed under the will to his wife."

It will thus be seen that Chancellor Johnston entertained at this time, no notion that *heirs*, as distinguished from the common law heir, did not succeed to the trustee's title; and it cannot be said that in this case he was thinking of the common law heir, because the particular trustee was survived by a wife and several children, at least one of whom was a son.

The words in the original statute "when any person possessed of, interested in, or entitled unto a real estate, *in his or her own right* (italics supplied) \* \* "have disappeared from the statutes and the Code, and there appear now simply the words: "When any person shall die without disposing of the same by will, his estate, real and personal, shall be distributed in the following manner \* \* "102 The disappearance of the former words, and the substitution of the latter, took place in the General Statutes of 1882.<sup>103</sup> The reason and significance of their deletion is not clear, but a good case can be made for a contention that with the vanishing of the original words the reason for Chancellor Johnston's rule has ceased, and with it the rule itself; and that, therefore, the statute can be made to apply to all estates, whether held by the intestate in his own right or for another. But the cases since the change in the verbiage of the statute make no mention of this alteration, and it must be presumed that the doctrine remains inviolate.

The doctrine has been adverted to or applied in a number of cases since its birth. An early case, *Thompson v. Dulles*,<sup>104</sup>

102. Sec. 8906, S. C. Code of Laws 1942. Sec. 8905, taken from the original statute, provides simply: "The right of primogeniture is abolished."

103. Gen. Stat. (1882), Chap. LX, Sec. 1845.

104. 5 Richardson's Equity 370 (1853).

following on the heels of Chancellor Johnson's edict, presented the situation of an intestate trustee whose sole heir, a minor daughter, was compelled by the court to transfer the trust property to the intended beneficiaries, under the provisions of the Statute of Ann,<sup>105</sup> relating to compulsion of infant trustees to carry out trusts resting upon them. Nothing is said in this case of the principle of primogeniture, but both under the common law and under the Statute of Descent and Distribution, the daughter was the sole heir and successor to title. In *Gibbes v. R. R. Co.*,<sup>106</sup> a mortgage of lands was given to a trustee, "his heirs", etc. The mortgagee died and a substitute was appointed by the court. After the institution of foreclosure, the oldest son of the deceased mortgagee petitioned to be made a party, but his request was denied because of the prior appointment of a substitute. The case, on this point, could have been decided on the ground that the mortgagee's interest was a chattel interest which did not pass to the petitioner.

Most of the other cases dealing with the matter have to do with the necessity of the presence of the oldest son as trustee in suits affecting title to the trust property. *Huckabee v. Newton*<sup>107</sup> and *Reynolds v. Reynolds*<sup>108</sup> were actions for partition by beneficiaries in which the court held, in each, that the proceedings were defective for failure to make the oldest son, as trustee, a party. In *LeRoy v. City Council*,<sup>109</sup> a proceeding to sell land derived under a trust was deemed irregular because of the omission of the "heir-at-law" as a party. In *Moyle v. Campbell*,<sup>110</sup> an action to recover lands from a third party was dismissed because the oldest son of the deceased trustee was not a party, even though he was a non-resident. In *Breeding v. Moore*,<sup>111</sup> which was an action against a third party allegedly wrongfully in possession, the court held the

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105. 7 Ann c. 19; 2 Stat. 546; Sec. 9063, S. C. Code of Laws 1942.

106. Note 79 *supra*.

107. Note 90 *supra*.

108. Note 76 *supra*.

109. 20 S. C. 71 (1883).

110. Note 91 *supra*. The court does not suggest how the absent trustee, if he refuses to come in as a plaintiff, can be made a party. The Restatement of Trusts, Sec. 282 (3), states that where the trustee cannot be subjected to the jurisdiction of the court the beneficiary may proceed in equity against third parties.

111. Note 91 *supra*.

action properly maintained because the oldest son was joined in the action. In *DuRant v. DuRant*,<sup>112</sup> the court condemned the conduct of beneficiaries in using the name of the oldest son of the deceased trustee as plaintiff without consultation with him, but allowed the suit to go on because he had afterwards consented. In *Delleney v. Winnsboro Granite Co.*,<sup>113</sup> a suit against a third party was saved, against an assertion of the absence of the trustee, by the circumstance that among the complainants (who were beneficiaries of a trust) was the oldest son of the deceased trustee, although he was not denominated a trustee in the pleadings. In *Cone v. Cone*,<sup>114</sup> the general statement is made that the title of the intestate trustee descends to the common law heir, who can be displaced by *ex parte* proceeding. In *Kirkton v. Howard*,<sup>115</sup> the court, after stating the rule, held that a proceeding in a chain of title which had for its purpose the sale of trust property and the appointment of a substitute trustee to fill a vacancy caused by death of the trustee was regular because all the heirs of the deceased trustee were before the court.

An interesting question of merger was precipitated in the case of *Highland Park Mnfg. Co. v. Steele*<sup>116</sup> by the circumstance that the life beneficiary of the trust was the trustee's oldest son. The court had before it a deed of one John Steele conveying property to Joseph A. Steele "in trust \* \* to stand seized and possessed of the same for the use and benefit of my grandson \* \* John G. Steele, for and during the term of his natural life, and at his death to transfer and convey the same to such person or persons, as he, the said John G. Steele, may by will direct, or in default of such will and direction, to the heirs at law of the said John G. Steele." The trustee, father of John G. Steele, died intestate, survived by his widow, his son and five daughters. John G. Steele, after his father's death, undertook to convey the property in fee, and by successive conveyances it came to the manufacturing company. Following John G. Steele's death intestate, the plaintiffs, who were his widow and children, brought action to recover the property, claiming as beneficiaries un-

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112. Note 88 *supra*.

113. Note 89 *supra*.

114. Note 4 *supra*.

115. Note 19 *supra*.

116. Note 76 *supra*.

der the will of John Steele. The South Carolina Supreme Court had previously considered the same will in the case of *Steele v. Smith*,<sup>117</sup> and it had decided that John G. Steele had only a life interest; that the rule in Shelley's case did not apply because the life tenant's estate was legal and the remainder estate was equitable (the latter because of the duty to convey), the rule being inoperative where the estates were of different quality. Under the authority of that case, the Circuit Court of Appeals made the same decision in this case. At this point, however, it was argued that on the death of the trustee intestate, his oldest son, the life tenant, inherited the legal title, and, since he was both beneficiary and trustee by operation of law, there was a merger of the interests, giving him an absolute legal estate in fee, free of the trust. The court, while conceding that the trustee's title passed to the oldest son, the life beneficiary, held that no merger took place, since equity would prevent it where necessary to carry out the intent and to preserve the interests of the parties.

Accepting as settled law the major premise that the title of an intestate trustee of realty passes as at common law, what happens to the title if the trust is not express, but resulting or constructive? Actually, in all these cases, the trustee is not seized "in his own right", and in every one of them he holds a legal title impressed with an equitable obligation in favor of someone else. As a sheer abstraction, the same result should follow in each of these situations, but no case has ventured to place the implied trust on the same footing as the express trust, at least not so far as this problem is concerned, nor has any case touched upon the similarity or dissimilarity of the types of trusts in this respect. Of the numerous purchase-money resulting trust cases, there are several where the alleged trustee died intestate.<sup>118</sup> In none of them did the complainant hazard a suit against the common law heir alone. The safe course was pursued—suing, or setting up the claim against, all the heirs under the Statute of Descent and Distribution. Likewise, in suits to impress con-

117. 84 S. C. 464, 66 S. E. 200, 29 L.R.A. (N.S.) 939 (1909).

118. *Williams v. Hollingsworth*, 1 Strobhart's Equity 103, 47 Am. Dec. 527 (1846); *Odom v. Beverly*, note 17 *supra*; *Bell v. Edwards*, note 17 *supra*; *Hutto v. Hutto*, 187 S. C. 36, 196 S. E. 375 (1938). For a case involving a resulting trust arising from failure of the original trust: *Witt v. Carroll*, 37 S. C. 388, 16 S. E. 130 (1892).

structive trusts upon lands held by an intestate, the statutory heirs were the parties.<sup>119</sup>

It would be belaboring the point to argue the matter as it affects the synthetic trustee fashioned out of the vendor-vendee relationship. On the death intestate of the vendor-trustee, his estate descends, subject to the equity of the vendee; but it would not be erroneous to assert that none of the suits seeking specific performance against the successors in interest of the deceased vendor have limited the defendants to the oldest son or other common law heir. Such a course, it is hardly necessary to say, is not to be recommended.

It may be argued that it is logical to separate the two classes of trust—the express and the implied—and that there can be no difficulty, because of the clear distinction in their respective characters. But a case can be imagined where even under an express trust trouble may arise. A conveys land to B by deed absolute on its face but on a trust for C, separately declared in writing by B. The writing, which will satisfy the Statute of Frauds relating to the establishment of trusts,<sup>120</sup> is not recorded. Thereafter B dies intestate. He is survived by his widow, his sole heir under the Statute of Descent and Distribution. He has an uncle, his closest collateral kin, who is excluded by the widow under the statute.<sup>121</sup> At common law the widow is not an heir of the husband; but an uncle of the intestate is. The widow, who is believed to be the sole heir, sells the land to D. If the widow had title, D, if he can qualify as a *bona fide* purchaser for value without notice, will be protected against the unrecorded declaration of trust.<sup>122</sup> But if the common law heir takes, under the rule, the widow had no title to give: it was in the uncle. The Recording Act could not, it is submitted, protect against the unrecorded declaration of trust, because the wife was a stranger to the title. Nor could the equitable doctrine of *bona fide* purchaser help D, because that is built upon a legal title competing against a prior equity, and D had no legal title since the widow had none.

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119. *Richardson v. Day*, note 22 *supra*; *Dominick v. Rhodes*, note 20 *supra*.

120. Sec. 9041, S. C. Code of Laws 1942.

121. Sec. 8906, S. C. Code of Laws 1942, as amended by Acts 1945, p. 313.

122. Sec. 8875, S. C. Code of Laws 1942 (the general Recording Act).



There are instances, it is true, where one who receives what is supposed to be a legal title from another who does not really have it will be protected. On analysis, they will be seen, however, to arise in these cases: by adverse possession; or by operation of the Recording Acts (as where the grantee does not record his deed and the empty-handed grantor later conveys the same property to another); or by the operation of Acts having a similar design;<sup>123</sup> or the purchaser may be shielded by judicial determinations, as where one buys from an administrator whose letters are thereafter revoked,<sup>124</sup> or from a devisee, legatee or executor under a will which is thereafter set aside,<sup>125</sup> the purchaser finding safety in the first instance in the Probate Court's grant of administration, and in the second in Probate Court's admission of the will to probate; or the purchaser may be saved by the estoppel of the owner, as where, with personal property, there has been a clothing of another with the indicia of ownership.<sup>126</sup>

None of these curatives will work the salvation of the purchaser, D, in our hypothetical case; but if, perchance, any one of them, or some other beneficent doctrine, should do so, the stark fact remains that the purchaser did not initially get a title, for the reason, again, that the supposed heir was not the real one.

### *Death of the Trustee Testate*

*Personal Property.* The authorities previously mentioned<sup>127</sup> and the observations made concerning the administrator of the intestate trustee cover the case of the testate trustee.

123. Such as Sec. 7047, commonly called the Bailment Statute, protecting subsequent purchasers of bailees or other persons in possession of personal property—with some exceptions—from the undisclosed and unrecorded reservation of title in the owner. See Sec. 8945, S. C. Code of Laws 1942, protecting purchasers of a decedent's property where the decedent's will is not filed for probate within a year of death. A purchaser from a supposed heir will be protected against a devisee if he purchases before the probate of the will if such probate is not had within the year.

124. *Benson v. Rice*, 2 Nott & McCord's Law 577 (1820); *Foster v. Brown*, 1 Bailey's Law 221, 19 Am. Dec. 672 (1829); *Price v. Nesbitt*, 1 Hill's Equity 445 (1834).

125. *Weinberg v. Weinberg*, 208 S. C. 157, 37 S. E. (2d) 507 (1946).

126. *Russell Willis, Inc. v. Page*, 213 S. C. 156, 48 S. E. (2d) 627 (1948).

127. See note 93 *supra*.

On death, the title to all his personal estate, whether held in his own right or in trust, passes to his executor or other person qualifying to administer the estate. As in the case of the administrator, he cannot utilize the trust property as assets of his decedent's estate, either for the purpose of satisfying his testator's creditors or transferring it to legatees. Nor can he properly function as successor trustee, at least with respect to those acts that do not involve passivity or contemplate the mere formal transfer of the trust subject matter to the beneficiaries. In this connection, it is useful to repeat the language in *Ex Parte Knust*,<sup>128</sup> concerning the executrix of a deceased surviving co-trustee: "In strictness, the office was not vacant in this instance, for the trust devolved on the executrix."

In *Dean v. Langford*,<sup>129</sup> where an executrix, wife of a deceased trustee, asked to be relieved of the trust, the court declared:

"As the executrix of her husband she is merely a constructive, and not a technical trustee under the provisions of (the settlor's) will. She is only so far a trustee as that the legal title to the personalty may rest in her. \* \* She has the right to the aid of the court in being relieved from this relation."

Other cases, which incidentally involve the same situation, make it clear that the title of the testate trustee devolves upon the executor in the way mentioned.<sup>130</sup>

The same channel of transmission to the executor appears where the deceased trustee held personal property under a resulting or constructive trust.<sup>131</sup>

*Real Property.* When the trustee dies leaving a will, the real property which he held in trust will pass to his devisees, provided that the language of the will is sufficiently compre-

128. Note 79 *supra*; and the quoted text to note 87 *supra*.

129. Note 80 *supra*.

130. *Phaelan v. Perman*, 2 McCord's Equity 423 (1827); *McIntyre v. McClenaghan*, note 94 *supra*; *Bolling v. Stokes*, 7 S. C. 364 (1875).

131. *Wamburzee v. Kennedy*, 4 DeSaussure's Equity 474 (1814); *Towles v. Burton*, Richardson's Equity Cases 146, 24 Am. Dec. 409 (1832); *McDonald v. May*, 1 Richardson's Equity 91 (1844); *Sollee v. Croft*, note 22 *supra*; *Stuckey v. Truett*, 124 S. C. 122, 117 S. E. 1192 (1922)—see the concurring opinion.

hensive to embrace it. If he specifically devises it, the property will thus pass; and the same will happen if his entire estate is carried by a general disposition or if there is a general residue into which it can fall. If none of these dispositive features is present, or if the tenor of the will is such as to indicate an intention that the trust title shall not pass thereunder,<sup>132</sup> he will die intestate as to that property, with the title devolving upon the common law heir. At least the authorities as a whole assert that the devisee will take,<sup>133</sup> and, basically, the same logic that puts the title to personal property in the executor should put the title to real estate in the devisee. But here, it must be admitted, the South Carolina cases are not altogether clear and should be given scrutiny.

Under the principle that a trust cannot be delegated,<sup>134</sup> it is reasonably apparent that a trustee cannot, of his own motion, confer trust duties or power upon a nominee under his will. Such an act would amount to the trustee's appointment of his successor, an appointment not sanctioned by the settlor or by the court.<sup>135</sup> Of course, if the settlor has evinced an intention to permit his trustee to name the successor, the intention must be respected; but the cases have gone a long way from the old English rule that a transfer to a trustee, "his heirs, executors and assigns", gave, by virtue of the quoted words, the power to the trustee to designate his successor by will.<sup>136</sup> The rule has never found favor in the United States, and it would require language of clear import to find authority given to a trustee to select his successor by his will.

In *Withers v. Yeadon*,<sup>137</sup> a testator devised real and personal property to his son to apply the rents and income to the use of his family, with power to select by deed or will among the son's children. The trustee died, leaving a will, under

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132. See Scott on Trusts, Sec. 105.

133. See note 93 *supra*.

134. Restatement of Trusts, Sec. 171; Scott on Trusts, Secs. 171, 171.1; *Withers v. Yeadon*, note 95 *supra*; *Shannon v. Freeman*, 117 S. C. 480, 109 S. E. 406 (1921); *Black v. Erwin*, Harper's Law 410 (1824); *Glenn v. Walker*, 113 S. C. 1, 100 S. E. 706 (1919). The problem of delegation is usually presented during the life of the trustee, but *any* attempt to pass on the administration of the trust to one unauthorized is obviously an improper delegation.

135. Scott on Trusts, Sec. 105.

136. Scott on Trusts, Sec. 105.

137. Note 95 *supra*.

which he gave all his estate to his wife, with a direction to his executors, his wife and son, to carry out the trusts under his father's will. Construing the power as one in, or with a, trust, the lower court (Chancellor Johnston) held the power of selection to be non-delegable, and, the original trustee having failed to make the selection, the property went to the son's children equally. In discussing the devolution of the property on the trustee's death, the Chancellor entertained doubt as to whether the title to the real estate passed to the heirs or to the wife as devisee, but concluded that, in any event, whoever took would be bound by the trusts.<sup>138</sup> On appeal the court affirmed the decree, but stated that the legal title passed to the trustee's wife, as general devisee, subject to the trusts. The holding here is clear that a devisee, under a general disposition, takes the title, and not the heir, or heirs.

In *Dean v. Langford*,<sup>139</sup> from which quotation in part has already been made, the lower court decree, affirmed on appeal, contains this language concerning the executrix of the deceased trustee: "She is only so far a trustee as that the legal title to the personalty may rest in her as that of the realty (if any) devised to her husband in trust, would rest in his heirs." Since it does not appear that there was real estate in the trust, the statement as to that type of property is not determinative, although, perhaps, it does indicate a thinking opposed to the concept of the succession of the devisee to the title.

An element of considerable uncertainty is thrown into what is a rule of intrinsic simplicity by the decision in *Sullivan v. Latimer*.<sup>140</sup> This was an action for the recovery of land brought by a substituted trustee, who succeeded to the office by decree upon *ex parte* application. The property in dispute was devised in trust for the testator's daughter. The trustee regularly performed his duties until his death. He left a will giving all his property, real and personal, to his brothers. The executor brought action to sell the testator's property to meet debts and included the trust property in the proceeding. The trust property was sold as the absolute property of the testator to a purchaser, who according to the testimony, knew of the trust. Thereafter the purchaser

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138. The language is set out in the text to note 101 *supra*.

139. Note 80 *supra*; see the text to note 129 *supra*.

140. Note 76 *supra*.

died testate leaving the property to the defendants. An objection that the substitute trustee in this action was improperly appointed was dismissed;<sup>141</sup> but it was argued further that the defendants should have been made parties to the suit for appointment on the ground that they had derived title from their source, who in turn had acquired title under the sale of the interest of the devisees under the deceased trustee's will. The court held that the presence of the holders of the legal title was not necessary, and it then went on to say:

"M. A. Sullivan had the legal title as trustee. \* \* When he died, where did the legal title go? We incline to think that M. A. Sullivan, giving by his will all his property, real and personal, to his brothers \* \* did not intend to devise the *trust tract* as *his own absolute property*. It is not to be presumed that in the last most solemn act of his life, he meant to perpetrate a deliberate fraud upon his sister, by appropriating her land which he held as trustee. If not, the legal title must have descended to his heirs (*sic*). But if we must assume that he did so intend, that he undertook to devise the land absolutely to his brother, who must have had full knowledge of the trust in the will of their father \* \* such attempted devise was manifestly a flagrant disregard of the rights of the *cestui que trust*; and the subsequent proceedings to sell the land as the absolute property of M. A. Sullivan, without any notice whatever to the equitable owners, *was absolutely void*, carrying no title to Hewlet Sullivan, the purchaser, or those who claim through him."

No definitive principle emerges from this language, which seemingly makes the test of devolution dependent not upon the words of the will, but upon the hidden intent of the testator. The matter is further obscured by a later statement of the court that the purchaser at the judicial sale "became trustee by his purchase"—a result hardly possible unless the sale carried the title. If the sale carried the title, even as against the words of the court that it did not, then there must be a finding that the devise was a fraud; and if there was such a finding of fraud, it does not appear in the case, unless there is a subversion of the principle that criminal conduct or fraud will not be presumed. The virtue of the rule that

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141. See text to notes 79 and 82 *supra*.

the devisee will take by general devise is that it avoids the necessity of speculating as to the purity or impurity of the motives of the testate trustee. The reproach should be directed, instead, towards the devisee who, if he knows of the trust, ought not to keep the property. The court in this case, confronted with the plea of the Statute of Limitations, concluded that the purchaser, being a trustee, and having taken the land *cum onere*, could not avail himself of the Statute or claim adversely to his *cestui*; and that even if he were called a constructive trustee, the result would be the same, since the adverse acts were not brought home to the beneficiary. To reach this result, the original trustee (who cannot be presumed to have done a fraudulent act) must have passed the title to the devisee under the will: for, if it did not pass to the devisee, and if the purchaser at the judicial sale got no title whatsoever, the purchaser would be a stranger to the title, there would be no trust, and there could have been an adverse holding. All in all, this case cannot be regarded as weighty authority opposed to the general proposition that a testate trustee's title to real property passes to his devisee.

Where property is held on a resulting trust and the trustee dies testate, the devisee, if the language is comprehensive enough, takes subject to the trust,<sup>142</sup> and no case has been found suggesting that it goes to the common law or statutory heirs. The same is to be observed of constructive trusts.<sup>143</sup>

### *Death of a Co-Trustee*

From the nature of things, the title of co-trustees is joint,<sup>144</sup> and it has never been suggested that such trustees

142. *Brown v. Cave*, 23 S. C. 251 (1885); *Miller v. Cramer*, 48 S. C. 282, 26 S. E. 657 (1896).

143. *Stuckey v. Truett*, note 131 *supra*.

144. *Scott on Trusts*, Sec. 103; *Bogert on Trusts and Trustees*, Sec. 145; *Tiffany on Real Property* (3d Ed.), Sec. 283; 65 C. J. 636; 48 C. J. S. 919; 54 Am. Jur. 91; 130 Am. St. Rep. 508. It is to be noted that there is a requirement of unanimity for trust action: that is, all the living trustees must act in concert, and this without regard to whether the trust property is real or personal, unless the trust instrument confers the power to act upon less than the whole number. *Restatement of Trusts*, Sec. 194; *Scott on Trusts*, Sec. 194; *DeSaussure v. Lyons*, 9 S. C. 492 (1877). An exception seems to exist in the case of charitable trusts, and the general rule is that a majority of the trustees may act. *Restatement of Trusts*, Sec. 383; *Scott on Trusts*, Secs. 194, 383; *Ex Parte Trustees of Greenville Academies*, 7 Richardson's Equity

take undivided interests in the trust property; although it is conceivable that a settlor might declare an intention that the holding should be of that character. Where the co-trustees consist of corporations, or of a corporation and a natural person, the majority of cases, and the better opinion, seem to hold that they likewise hold as joint tenants;<sup>145</sup> but it has been held in South Carolina, in the case of *Telfair v. Howe*,<sup>146</sup> that a corporation cannot be a joint tenant, either with another corporation or with a natural person. The significance of this holding will appear hereafter.

The principal attribute of the joint estate is, of course, survivorship, and the question naturally arises whether, in the first place, there is survivorship if the joint estate is held by trustees as distinguished from persons holding in their own right, and, in the second place, whether the statute abolishing joint tenancies,<sup>147</sup> or their incident of survivorship, applies to the estate when held by co-trustees. As to the first phase of the question, there seems to be no serious assertion anywhere that the joint estate of trustees carries within itself the destruction of the feature of survivorship. As to the second phase—the impact of the statute—the rule is almost universally followed that statutes of this kind do not affect trust estates, and that the incident of survivorship is unimpaired.<sup>148</sup> Hence, when one of several trustees dies, even without expression to that effect by the settlor, the title is in the survivors, and so on, the title ultimately residing in the last surviving trustee.<sup>149</sup> Upon the death of the sole surviving

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471 (1854). See *State ex rel Daniel v. Strong*, 185 S. C. 27, 192 S. E. 671 (1937). The requirement of unanimity is not present with executors: as to personal property, the authority, for all practical purposes, is joint and several: *Rosborough v. McAliley*, 10 S. C. 235 (1878); *Chapman v. City Council*, 30 S. C. 549, 9 S. E. 591, 3 L.R.A. 311 (1888); *Smith v. Heyward*, 115 S. C. 145, 105 S. E. 275 (1920). As to the power to sell real estate, a majority of the executors who qualify may act, unless the testator's intention is that all must perform: Sec. 9054, S. C. Code of Laws 1942; *DeSaussure v. Lyons*, this note *supra*.

145. *Scott on Trusts*, Sec. 103; *Bogert on Trusts and Trustees*, Secs. 145, 530.

146. Note 37 *supra*.

147. Sec. 8911, S. C. Code of Laws 1942. See notes 36, 37, and 38 *supra*, and accompanying text.

148. *Restatement of Trusts*, Sec. 103, and comm. a; *Scott on Trusts*, Sec. 103; *Bogert on Trusts and Trustees*, Secs. 145, 530; 65 C. J. 636, 669; 54 Am. Jur. 92; 130 Am. St. Rep. 508.

149. See the authorities in note 148 *supra*.

trustee, the devolution of title is as if he had been the only trustee and is governed by principles previously discussed. The rule, apparently, is based on the presumed intention of the settlor: that having selected several persons, he would desire that, on the death of one or more, the remainder should have, and be able to utilize, the title.

The point seems not to have been seriously discussed in many South Carolina cases, and it may be assumed, from the courses that the cases have taken, that the principle of survivorship is intact. In *Ex Parte Knust*,<sup>150</sup> where there were two trustees of personal property and both of them died, it was held that the title ultimately passed to the executrix of the surviving trustee, a result which could follow only if the title went from the first to the second trustee upon the first's death. In *Andrews v. U. S. F. & G. Co.*,<sup>151</sup> the question arose quite directly. There, two co-guardians who had held a real estate mortgage as investment took title to the mortgaged property from the mortgagor in satisfaction of the debt secured. Although guardians are not, as a rule, strict trustees, in that they do not have title to the ward's property,<sup>152</sup> yet, in this case, since the deed ran directly to the guardians, they were treated as trustees meeting the requirement of title. Upon the death of one of the trustees, the title was held to pass to the survivor. The conclusion was bottomed upon the rule, as enunciated by Perry,<sup>153</sup> that the title of trustees is joint, the incident of survivorship is present, and that statutes affecting joint tenancies do not change the rule. Therefore, it was held that a deed by the surviving trustee would pass the entire estate, and not a mere one-half interest. A majority of the court, however, while conceding that the entire interest passed to the survivor, held that the sale made by the surviving trustee was beyond his powers and the defect bound the purchaser.

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150. Note 79 *supra*.

151. 154 S. C. 456, 153 S. E. 745 (1929).

152. Restatement of Trusts, Sec. 7; *Long v. Cason*, 4 Richardson's Equity 60 (1851); *Moore v. Hood*, 9 Richardson's Equity 311, 70 Am. Dec. 210 (1857); *McDuffie v. McIntyre*, 11 S. C. 551, 32 Am. Rep. 500 (1878); *Gary v. Bank*, note 94 *supra*; *Bagwell v. Hinton*, note 94 *supra*.

153. Perry on Trusts (5th Ed.), Vol. I, pp. 499, 500, restated in the 7th Ed., Sec. 343.



It has already been indicated that, under *Telfair v. Howe*,<sup>154</sup> a corporation cannot be a joint tenant, either with another corporation or with a natural person. In that case a testamentary gift, not in trust, was made to what appeared to be two corporations. One actually did not exist. It was held that the other donee took only one-half, and not the whole by way of accretion. The principal reason is thus stated:

"It is clear that, by the principles of the common law, none but natural persons can take in joint tenancy. A corporation cannot take this estate, either jointly with another corporation, or with a natural person. The reason assigned in the early writers is, that they hold in different capacities and in different rights."

The case quite correctly states the common law rule. Another reason advanced for the common law rule which is perhaps an amplification of the ground quoted, is that inherently *there must be survivorship* if a true joint tenancy is to exist; that, corporations having perpetual life, if there were corporation co-trustees, one could never survive the other; and if there were co-trustees consisting of a corporation and a natural person, death could occur only to the latter. This would be repugnant to the concepts of death and survivorship applicable to both joint tenants. The conclusion that is to be drawn from the case is that where a corporation is co-trustee with another corporation, or with a natural person, the taking is in halves; hence, in dealing with death as a fact, upon the death of the individual who is co-trustee with a corporation, the corporation does not succeed to the whole title. The title remains fractional, the original share residing in the corporate trustee, and the share of the natural person passing to his successors in title. Unless the corporate concepts then held are to be modified by the court in a proper case, the South Carolina law is that, unless the trust instrument expressly or by fair implication puts the whole title in the corporate trustee upon the personal trustee's death, the cleavage in interest remains, with all the complications that that division suggests. Perhaps today, with a watering down of the notion that corporations have eternal life and the substitution of the fact that they too are mortal—through

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154. Note 37 *supra*, and text to note 146 *supra*.

dissolution, charter forfeitures, consolidations, and the like<sup>155</sup>—the court may in time scrap the common law principle; but it has not done so yet. The prudent course at this time is to provide in the trust instrument for survivorship of both title and powers in such a case—a course, frankly, that is advisable even when all the trustees are natural persons.

Accompanying the passage of title to the surviving trustee (leaving aside the corporate trustee) is the transmission of powers, unless the intent is manifest that the whole number shall act.<sup>156</sup> Of course, if the power asserted by, or alleged to be in, the surviving trustee was one which the original trustees themselves never possessed, it hardly needs saying that the surviving trustee acquires no such power,<sup>157</sup> unless, improbably, the settlor conferred such a distinctive power upon the survivor. There are numerous cases in this state involving the continuance of powers in surviving executors. These cases draw upon trust principles and analogies to reach the conclusion that where powers are attached to the office and are not purely personal, they do not cease but will pass to the survivors.<sup>158</sup> Since these decisions formulate principles founded upon concepts in the law of trusts, they are, necessarily, formidable authority for the proposition that in trusts non-personal powers pass to surviving trustees.

Authority need not be cited to make the point that, *a fortiori*, the principle of survivorship—of title and powers—operates as effectively in the field of charitable trusts as it does in the realm of private trusts.

### *Dower*

It has already been seen that the wife of a deceased beneficiary of trust property is not entitled to dower, since the

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155. See *Citizens & Southern Nat. Bank v. Conner*, 195 S. C. 203, 11 S. E. (2d) 271, 131 A.L.R. 748 (1940), involving the trusteeship of an individual and a state bank, which was later converted into a national bank.

156. Restatement of Trusts, Sec. 195; Scott on Trusts, Sec. 195; Bogert on Trusts and Trustees, Sec. 530; 54 Am. Jur. 92, 235; 130 Am. St. Rep 508; *Andrews v. U. S. F. & G. Co.*, note 151 *supra*.

157. See *Andrews v. U. S. F. & G. Co.*, note 151 *supra*.

158. *Mallet v. Smith*, 6 Richardson's Equity 12, 60 Am. Dec. 107 (1853); *Smith v. Winn*, 27 S. C. 591, 4 S. E. 240 (1887); *Bredenburg v. Bardin*, 36 S. C. 197, 15 S. E. 372 (1891); *Dick v. Harby*, 48 S. C. 516, 26 S. E. 900 (1896). See also, Sec. 9054, S. C. Code of Laws 1942.

seisin of the husband must be *legal*, and an equitable estate will not do. But in order for dower to attach, the seisin—in addition to being legal—must be *beneficial*, for the husband's own use.<sup>159</sup> A bare legal title is not enough. Hence, the universal rule is that the widow of a deceased trustee is not dowerable of the trust estate.<sup>160</sup> And it is obvious that the widow cannot qualify as a *bona fide* purchaser for value without notice.<sup>161</sup> Whether the trust is created before marriage or after, the broad principle controls that the wife's right can attach to no higher or different quality of estate than her husband's.<sup>162</sup> Naturally, if a husband owned lands absolutely and free of trust, a subsequent declaration of trust by him would be ineffectual against the wife's right of dower, which had already attached, and only a renunciation or other effectual surrender of dower by the wife would free the trust thus created from that right.

The South Carolina cases without exception agree to the proposition that the wife of a deceased trustee is not dowerable.<sup>163</sup> They lay down the rule, too, that the principle covers the case of the resulting trust, and in the typical situation of the purchase-money resulting trust it is held that dower does not attach to the estate of the deceased husband who held the legal title for the benefit of the one whose funds were used in the purchase.<sup>164</sup> There is no reason to assume that the re-

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159. *Douglass v. Dickson*, 11 Richardson's Law 417 (1858); 28 C. J. S. 76; 17 Am. Jur. 670; Tiffany on Real Property (3d Ed.), Sec. 499.

160. Scott on Trusts, Sec. 289.1; Bogert on Trusts and Trustees, Sec. 146; Tiffany on Real Property (3d Ed.), Sec. 499; 28 C. J. S. 76, 93; 17 Am. Jur. 670.

161. Scott on Trusts, Sec. 289.1; 28 C. J. S. 93.

162. *Davidson v. Graves*, Bailey's Equity 268 (1831); *Brown v. Cave*, note 142 *supra*. The principle, of course, is not limited to trusts: it extends to other equities and liens existing before marriage and to those which exist, after marriage, at the time the husband acquires the property. The typical cases are those involving mortgages given before coverture and the purchase-money mortgage given during coverture.

163. *Plantt v. Payne*, 2 Bailey's Law 319 (1831); *Davidson v. Graves*, note 162 *supra*; *Thompson v. Perry*, 2 Hill's Equity 204, 29 Am. Dec. 68 (1835); *Whitmire v. Wright*, 22 S. C. 446, 53 Am. Rep. 725 (1884); *Brown v. Cave*, note 142 *supra*; *Pruitt v. Pruitt*, 57 S. C. 155, 35 S. E. 485 (1891).

164. 28 C. J. S. 96; *Thompson v. Perry*, note 163 *supra*; *McNish v. Pope*, 7 Richardson's Equity 186 (1855); *Brown v. Cave*, note 142 *supra*; *Pruitt v. Pruitt*, note 163 *supra*.

sult would be different if the land was impressed with a constructive trust.

Although the doctrine is clear, its applicability in a given case may be difficult to establish. In the usual situation, a settlor by deed or will transfers real property on trusts expressed in the trust instrument. No problem is here presented. But where the trust is not expressed, two questions arise: first, the effect of the Statute of Frauds relating to the establishment of trusts in real property,<sup>165</sup> and, second, its operation in relation to dower. If, absent elements conducive to a constructive trust, the trust is oral and the transferee sets up the statute, he keeps the property; and, concomitantly, his wife, on his death, can claim dower. If the husband, having acquired property on an oral trust, thereafter acknowledges the trust by a memorandum satisfying the statute, there can be no doubt that, so far as he is concerned, the trust can be enforced against him and his successors in title upon his death. But will the husband's memorandum, or his carrying out of the trust, bind the wife? If it does not (and we must assume that the trust is a genuine pre-existing one and not pretensive), there will be the paradoxical result that the wife's interest was not co-extensive with, but broader than, her husband's. The rule generally followed is that if the husband acquires lands in trust and he thereafter makes a signed memorandum acknowledging or declaring the trust, or if he carries out the trust, his acts are sufficient to bind him and his wife.<sup>166</sup>

The rule just mentioned, however, seems not to prevail in South Carolina. Three cases, at least, indicate departure from it. In *Davidson v. Graves*,<sup>167</sup> the court allowed a wife dower as against a contention that the conveyance to the husband had been made on undisclosed trusts. The nature of these trusts was never made clear to the court, which stated: "It would be very mischievous to allow such parol understandings to set aside the whole conveyance, and to defeat the just claim of the dower, under the absolute conveyance and a vested fee simple in her husband." No reference is made to the Statute of Frauds, nor does the case disclose any memorandum made

165. Sec. 9041, S. C. Code of Laws 1942.

166. Restatement of Trusts, Sec. 42 (b), and comm. g, ill. 4; Secs. 42, 43; Scott on Trusts, Sec. 42.3.

167. Note 162 *supra*.

by the husband, although he seems to have carried out the trusts in part by transfer. Under any view, the result here is clearly right if the trust could not be established at the outset.

In *Pruitt v. Pruitt*,<sup>163</sup> a widow's claim for dower was met by a defense that the deceased husband had acquired the land in trust for the defendant, who allegedly had furnished the purchase money. The conveyance had been made after marriage. The husband thereafter transferred the land to the defendant, his mother, by a deed on which the defendant did not renounce dower. An affidavit signed by the husband some years after his acquisition of title, which admitted his trust, and evidence of oral declarations made by him, were offered to support the trust. Both were held properly rejected:

"While in this State one who holds possession under a deed from the husband of the demandant in dower is not estopped to show that the seizin of the husband was as trustee and, therefore, his estate is not dowerable \* \* yet it is settled that such trust cannot be shown by the declarations of the husband; made after legal seizin, so as to effect the wife's dower. *Tibbets v. Langley*, 12 S. C., 465. The case last cited held that recitals in a mortgage deed by the husband after seizin are not admissible to affect the wife's dower in the mortgaged lands, she not being a party to such mortgage. This rests upon the ground that the favored right of dower, which attaches to the seizin of the husband during coverture, should not be impeached or defeated by subsequent acts or declarations of the husband; for the wife, as to dower, is not in privity with her husband after seizin, and to permit such declarations to defeat the wife's dower would open wide the opportunity to destroy the right. Such acts or declarations of the husband constitute no part of the *res gestae* or transaction under which the legal seizin was acquired."

Further evidence which was offered in the case to show payment of the purchase price by the alleged *cestui* was held not to be clear and convincing enough to raise the presumption of a resulting trust. The inference is plain that if there had been satisfactory evidence, sufficient to establish such a

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168. Note 163 *supra*.

trust, the wife's claim of dower would fail. In the establishment of a purchase-money resulting trust, given the facts showing payment, even the oral declarations of the alleged trustee would be admissible under the saving statutory provisions<sup>169</sup> which exclude implied trusts from the operation of the Statute of Frauds.

The authority of the last case is the basis for a similar decision in *Dowling v. DeWitt*.<sup>170</sup> The demandant's husband had acquired title under the will of his first wife. After his second marriage he conveyed the land to the predecessors of the defendants by a deed which presumably did not carry a renunciation of dower. At the time of this transfer the husband executed a declaration of trust admitting that the land had been acquired by his first wife on an oral trust. The writing, together with oral declarations, was rejected, the former as not binding on the wife, the latter as an invalid attempt to prove an express trust by parol.

These cases are discordant in that, as has been indicated, the wife's right of dower thus attaches to something her husband never had; and because they are out of line with the decisions which permit the holder of land subject to an oral trust to make the requisite memorandum to establish, as against his creditors, that he is not the real owner of the land.<sup>171</sup> If the memorandum actually reveals the truth—that the signer is not the real owner of the land—it should be as effective in the one case as in the other.

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169. Sec. 9042, S. C. Code of Laws 1942.

170. 96 S. C. 435, 81 S. E. 173 (1913).

171. *Price v. Brown*, 4 S. C. 144 (1872); *Ex Parte Trenholm*, 19 S. C. 126 (1882); *Finley v. Moore*, 55 S. C. 195, 33 S. E. 362 (1898); *U. S. F. & G. Co. v. Mills*, 146 Fed. (2d) 694 (C.C.A. 4, E. D. S. C.—1944).